

1 Michael C. Shiel, AZ Bar #006968
2 Office of the General Counsel
3 Salt River Pima-Maricopa Indian Community
4 10005 East Osborn Road
5 Scottsdale, Arizona 85256
6 Telephone: 480-362-7544
7 michael.shiel@srpmic-nsn.gov

8 Thane D. Somerville, AZ Bar #030870
9 Morisset, Schlosser, Jozwiak & Somerville
10 801 Second Avenue, Suite 1115
11 Seattle, WA 98104-1509
12 Telephone: 206-386-5200
13 t.somerville@msaj.com
14 Attorneys for Salt River Pima-Maricopa
15 Indian Community ("SRPMIC")

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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

IN THE MATTER OF THE NAVIGABILITY
OF THE SALT RIVER FROM THE
CONFLUENCE OF THE WHITE AND BLACK
RIVERS TO THE GILA RIVER
CONFLUENCE, MARICOPA COUNTY,
ARIZONA

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

SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY'S BRIEF
OPPOSING NAVIGABILITY

Pursuant to the Commission's order dated May 26, 2016, the Salt River Pima-Maricopa Indian Community (SRPMIC) submits the following brief in support of a determination that the Salt River was not navigable on February 14, 1912, the date of Arizona statehood. The Commission's prior determination in this proceeding that the entirety of the Salt River was not navigable on February 14, 1912 is supported by overwhelming evidence and remains correct. The proponents of navigability have failed to meet their burden of proving that the Salt River or any segment thereof was navigable-for-title purposes upon the date of Arizona statehood.

I. **The Commission's Prior Determination of Non-Navigability Was Thorough, Well-Reasoned, Supported by Substantial Evidence, and Remains Correct.**

On September 21, 2005, this Commission published its "Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila

1 River Confluence.” (“2005 Decision”). The 2005 Decision addressed the Lower Salt River.
2 On December 13, 2007, this Commission published its “Report, Findings and Determination
3 Regarding the Navigability of the Upper Salt River from the Confluence of the White and Black
4 Rivers to Granite Reef Dam.” (“2007 Decision”). The 2007 Decision addressed the Upper Salt
5 River. In the current remand proceeding before the Commission, the proceedings on the Upper
6 and Lower Salt River have been consolidated.

7 The 2005 Decision and 2007 Decision were each based on extensive evidence, expert
8 reports, public hearings, and testimony received by the Commission pursuant to public notice.
9 2005 Decision, pp. 1-3, 22-23; 2007 Decision, pp. 2-3, 17-19. In its 2005 Decision, after review
10 of the substantial amount of evidence presented, the Commission concluded:

11 Based upon all of the historical and scientific data and information, documents and
12 other evidence produced and considered by the Commission, the Commission finds
13 that the Lower Salt River between Granite Reef Dam and its confluence with the
14 Gila River is an erratic, unstable and undependable stream characterized by periodic
15 floods, sometimes extreme, followed by periods of drought when there is little or no
16 water in the riverbed. The Commission finds that in its ordinary and natural
17 condition even in the absence of Roosevelt Dam and reservoir the Lower Salt River
18 was a braided stream of 2 to 4 channels interspersed by sandbars and sand islands
19 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.

20 Accordingly, the Commissioner finds that the Lower Salt River from Granite Reef
21 Dam to its confluence with the Gila River was not used or susceptible of use for
22 commercial trade or travel as of February 14, 1912 and therefore was not navigable
23 as of that date nor was it susceptible to navigation.

24 2005 Decision, at pp. 45-46 (emphasis added). The Commission made a finding of non-
25 navigability with regard to the Upper Salt River in its 2007 Decision:

26 Based upon all of the historical and scientific data and information, documents
27 and other evidence produced and considered by the Commission, the Commission
28 finds that the Upper Salt River between the confluence of the White and Black
Rivers and Granite Reef Dam is erratic, unstable and unpredictable, characterized
by periodic floods, sometimes extreme, in its ordinary and natural condition.
Reach one of the Upper Salt River and reach two as it existed at statehood lie in
deep bedrock canyons and had rapids, waterfalls and other obstacles that
prevented it from being considered navigable or susceptible of navigability as a
highway for commerce. That portion of the Tonto Basin not inundated under
Roosevelt Lake *and reach three was a braided stream of two or more channels*
interspersed by sandbars and sand islands, which shifted with floods and high

1 flow of water, and as such, had a configuration that would be impossible to be
2 considered navigable or susceptible of navigability as of statehood. Accordingly,
3 the Commission finds that the Upper Salt River from its confluence with the
4 White and Black Rivers to Granite Reef Dam was not used or susceptible of use
as a highway for commerce over which trade and travel was or may be conducted
in the customary modes of trade and travel on water as of February 14, 1912.

5 2007 Decision, at pp. 64-65 (emphasis added).

6 In its 2005 Decision, the Commission relied on multiple lines of evidence supporting its
7 non-navigability finding. Regarding prehistoric use of the Salt River, the Commission found:

8 no evidence other than speculation that the Hohokam utilized the Salt River for
9 commerce or travel. There is no evidence of boating by the Hohokam. Their use of
the river was strictly to divert water from the river for use in irrigation.

10 2005 Decision, p. 25. See also 2007 Decision, p. 21 (finding “no evidence whatsoever of the
11 use of the Upper Salt River by prehistoric cultures for boating or travel on the water”).

12 Evaluating the “historic development of the Salt River Valley,” the Commission
13 described the exploration of the area by trappers and other “mountainmen” in the 1830s and
14 early 1840s who “did not use boats for travel on the rivers or streams in this area but traveled by
15 foot, horses or mules along the sides of the rivers or the streams.” 2005 Decision, p. 26. The
16 Commission also discussed pre-statehood development and settlement of areas near the Salt
17 River by Indian people, the United States military, miners, and farmers/settlers. 2005 Decision,
18 pp. 26-30; 2007 Decision, pp. 22-29. Despite the presence of individuals in the region who
19 clearly needed an efficient and reliable means of transportation for travel and trade, the
20 Commission found: “During the historical period from 1867 to Statehood, there is no record of
21 any sustained commerce, travel or fishing on the Lower Salt River. . . . All travel along the river
22 during this period was by wagons, horses, mules or on foot.” 2005 Decision, p. 30. See also
23 2007 Decision, p. 29 (“Up to statehood, all travel in this [Upper Salt River] area was by foot,
24 horseback, mule or wagon and later by automobiles as the road improved.”). Oral histories
25 regarding the Salt River prior to statehood provided further evidence that it was not used for
26 navigation, nor susceptible to such use. 2005 Decision, pp. 30-34; 2007 Decision, pp. 29-38.
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1 The Commission received and reviewed substantial historical evidence and expert
2 testimony regarding actual use of the river at and prior to statehood that strongly supported a
3 determination of non-navigability. 2005 Decision, pp. 30-34; 2007 Decision, pp. 29-38. The
4 Commission heard expert testimony that: “No contemporary observer thought that the Salt
5 River was navigable prior to and around 1912.” 2005 Decision, p. 32. Government survey
6 reports between 1868 and 1911 described the Salt River as separating into two to four channels
7 which constantly shifted and created sandbars. 2005 Decision, p. 32; see also 2007 Decision, p.
8 35. None of the federal or state land patents issued along the banks of the Salt River suggested
9 that the Salt River was navigable. 2005 Decision, pp. 32-33; 2007 Decision, p. 36. In addition,
10 “numerous descriptions by early settlers indicate that the river was an abraded stream having
11 anywhere from two to four flow channels and that in normal times the water was two to three
12 feet deep.” 2005 Decision, p. 33; see also 2007 Decision, p. 38. Regarding historical use of the
13 river prior to statehood, the Commission found “[t]here is no evidence of any commercial
14 transportation using the Salt River. Transportation in the Salt River Valley was carried out on
15 horseback, stage coach and wagon.” 2005 Decision, p. 34; 2007 Decision, p. 38.

16 The Commission received evidence of sporadic, non-commercial, and often
17 unsuccessful boating efforts on the Salt River at or near the time of statehood. 2005 Decision,
18 pp. 34-38; 2007 Decision, pp. 38-44. After examining the few isolated accounts of boating
19 attempts between May 1873 and January 1915, the Commission concluded that “it seems clear
20 that there was no sustained operation of commercial boating or use of this river as a highway for
21 commerce.” 2005 Decision, at pp. 34-35. The Commission added: “From the testimony and
22 exhibits presented, we must conclude that at no time prior to and around statehood was the Salt
23 River used for actual commercial transportation in the ordinary and natural course of its flow.”
24 2005 Decision, at p. 36. The Commission similarly found that the Salt River in its ordinary and
25 natural condition was not susceptible to navigation; in fact, the Commission found the historical
26 record and the few accounts of boating attempts, often unsuccessful, to be “strong evidence that
27 this river is not navigable.” 2005 Decision, at p. 37.

1 Evidence of modern recreational boating on portions of the Upper Salt River did not
2 support a finding of navigability on the date of statehood, because “the technological advances
3 in the type of material, such as the rubber or neoprene rafts and even stronger material for
4 kayaks, which were not available in 1912, made these trips more possible and enjoyable from a
5 recreational standpoint after the 1950’s.” 2007 Decision, at p. 41. In addition, these modern
6 boating events are purely recreational, not for commercial purposes, and generally occur only
7 during times of year when water in the river is higher than average. *Id.* Also, such evidence
8 of recreational boating “to view the scenery and wildlife, enjoy the excitement of white water
9 rapid running and perhaps do some recreational fishing, in late winter and spring does not
10 satisfy the federal test for navigability or susceptibility of navigability.” 2007 Decision, p. 44.

11 The Commission also received and reviewed evidence, expert reports, and testimony
12 regarding the geology, geomorphology, and hydrology of the Salt River which supported its
13 determination of non-navigability. There were few stream gauges within the Lower Salt River
14 for the period before and around Statehood, so the Commission received no direct discharge
15 information from which average or mean flows could be accurately computed. At that time, the
16 navigability proponents asserted an *average* annual flow estimate of 1,445 cfs to 1,730 cfs for
17 the Lower Salt River, but the Commission highlighted the questionable nature of the flow
18 estimate and the limited usefulness of average flow data. 2005 Decision, at p. 38. Specifically,
19 the Commission noted that use of average flow data is problematic on the Salt River given the
20 erratic nature of the river and the occurrence of large flood flows that distort the average
21 upward. 2005 Decision, at p. 38; 2007 Decision, at p. 56. Even the questionable and upwardly
22 distorted average flow estimate put forward by navigability proponents at that time was far less
23 than the annual average for any other watercourse previously found navigable by a federal or
24 state court using the *Daniel Ball* test. 2005 Decision, at p. 39 (noting federal/ state courts found
25 watercourses navigable in whole or in part in only 4 out of 21 cases and the average annual
26 flows in the four navigable watercourses were 7,316 cfs, 6,930 cfs, 4,066 cfs, and 2,277 cfs). In
27 the latter case, the Miami River (average annual flow of 2,277 cfs) was found navigable only in
28 part and non-navigable in-part. Also, the Commission noted that “such a flow [in the Lower

1 Salt River] spread over a wide area in a braided stream of 2 to 4 flow channels interspersed by
2 shifting sand bars and small sand islands would be practically impossible to be considered
3 navigable or susceptible to navigation.” 2005 Decision, at p. 44. The Commission concluded
4 that: “Clearly the water flow in the Lower Salt River does not support a finding of navigability,
5 but in fact tends to support a finding of non-navigability.” 2005 Decision, at p. 39.

6 The geomorphological evidence reviewed by the Commission also refuted a finding of
7 navigability. 2005 Decision, at p. 40. The Commission relied on expert testimony that
8 described the Lower Salt River as a “braided river, and a pattern of bars, islands, and low water
9 channels changed through time.” 2005 Decision, at p. 41. Other experts agreed that the river
10 was a “braided river with sandbars and islands and multiple or compound channels which
11 shifted following each period of flood or high flow.” 2005 Decision, at p. 41; see also 2007
12 Decision, p. 57 (noting that “the Upper Salt River (between Stewart Mountain Dam and Granite
13 Reef Dam) was very similar to the Lower Salt River and is more spread out over the flood plain
14 it has a braided pattern with multiple channels and sand and gravel bars, which shift with
15 floods and high flows. . . . The river in this reach is dynamic and constantly changing and, thus,
16 not suitable for navigation.”). The Commission received no evidence that refuted these facts
17 regarding the geomorphological nature of the river, which clearly renders it non-navigable.
18 2005 Decision, at pp. 41-42; see also 2007 Decision, pp. 52-60.

19 Based on its review of all the evidence in the record at that time, the Commission found
20 that: “Clearly, the preponderance of the evidence supports a finding that the Lower Salt River
21 was not navigable on February 12, 1912 [sic] and further was not susceptible of navigability in
22 its ordinary and natural condition.” 2005 Decision, at p. 45. The Commission reached the
23 identical conclusion with respect to the Upper Salt River. 2007 Decision, at p. 64. All of the
24 evidence presented to the Commission in advance of the 2005 Decision and 2007 Decision
25 remains in the current record on remand. The Commission’s 2005 Decision and 2007 Decision
26 were each strongly supported by substantial evidence supporting non-navigability at that time.
27 The evidence presented to this Commission here on remand provides additional support to the
28 Commission’s prior non-navigable determination for the entirety of the Salt River.

1 In 2010, the Arizona Court of Appeals issued its opinion in *State v. Arizona Navigable*
2 *Stream Adjudication Comm'n*, 224 Ariz. 230 (App. 2010) relating to the Commission's 2005
3 decision that the Lower Salt River was not navigable. While not directly considering the
4 substantial weight of evidence favoring non-navigability, the Court of Appeals found that, with
5 respect to the Lower Salt River, the Commission had failed to consider diversions of water prior
6 to the construction of Roosevelt Dam and thus had failed to properly evaluate the Lower Salt
7 River in its "ordinary and natural condition." *Id.* at 241-242. The matter was remanded back to
8 this Commission for further proceedings. On remand, the Commission decided to take
9 supplemental evidence and render a new navigability determination with respect to the entirety
10 of the Salt River (Lower and Upper).

11 Here, on remand, the proponents of navigability have not presented sufficient evidence
12 (especially in light of the considerable supplemental evidence and analysis supporting non-
13 navigability) to carry their burden of proving navigability at statehood or to justify any change
14 in the Commission's prior determination of non-navigability. The Commission should again
15 find the Salt River, in its entirety, was not navigable as of the date of Arizona statehood.

16 II. **The U.S. Supreme Court Decision, *PPL Montana*, Further Supports the**
17 **Commission's 2005 Decision and Requires A Finding of Non-Navigability.**

18 On February 22, 2012, the United States Supreme Court issued a decision concerning
19 navigability-for-title in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), which further
20 supports the Commission's prior non-navigability determination and strongly refutes the
21 arguments and efforts made on remand by the proponents of navigability. In reversing the
22 Supreme Court of Montana's finding of navigability, the U.S. Supreme Court rejected the
23 Montana court's "very liberal" construction of the federal navigability-for-title test and its "very
24 broad" construction of the term "commerce." *PPL Montana v. State*, 355 Mont. 402, 446-47
25 (2010), *rev'd*, 132 S.Ct. 1215 (2012).

26 In *PPL Montana*, the U.S. Supreme Court reaffirmed that navigability-for-title is to be
27 determined as of the date of statehood and on a "segment by segment basis." 132 S. Ct. at
28 1227-29. The Court confirmed the navigability-for-title test relates to use or susceptibility to

1 use as a highway for commerce. 132 S.Ct. at 1233. *See also U.S. v. Holt Bank*, 270 U.S. 46,
2 55-56 (1926) (stating that navigability depends on whether the water in its natural and ordinary
3 condition “affords a channel for useful commerce.”). “Navigability must be assessed as of the
4 time of statehood, and it concerns the river’s usefulness for ‘trade and travel,’ rather than for
5 other purposes.” 132 S.Ct. at 1233. “Mere use by initial explorers or trappers who may have
6 dragged their boats in or alongside the river despite its non-navigability in order to avoid getting
7 lost, or to provide water for their horses or themselves, is not enough.” *Id.*; *see also United*
8 *States v. Oregon*, 295 U.S. 1 (1935) (lakes non-navigable where boating evidence did not
9 involve commercial aspect and was primarily limited to seasonal trapping and duck hunting).

10 The U.S. Supreme Court rejected the Montana court’s liberal use of modern-day
11 recreational boating as evidence to prove navigability as of the date of statehood. 132 S.Ct. at
12 1233-34. Post statehood use of the river can be considered only if it is established that such use
13 involves the same river conditions and the same types of boats that existed at statehood. *Id.* at
14 1233. The party seeking to prove navigability must show that “the watercraft are meaningfully
15 similar to those in customary use for trade and travel at the time of statehood.” *Id.* “If modern
16 watercraft permit navigability where the historical watercraft would not, . . . then the evidence
17 of present-day use has limited or no bearing on navigability at statehood.” *Id.* at 1233-34.

18 The U.S. Supreme Court further confirmed and clarified that a river cannot be
19 navigable-for-title purposes if its susceptibility to navigation is “so brief that it is not a
20 commercial reality.” 132 S.Ct. at 1234. In addition, the Court emphasized that natural
21 obstructions, obstacles, and other impediments to navigation are highly relevant to the
22 navigability determination, especially if they require portage on land around the obstruction. *Id.*
23 at 1231. Finally, the Supreme Court found it relevant that the State of Montana had waited a
24 century after the first dams were built on the river without previously asserting state ownership.
25 “The reliance by PPL and its predecessors in title upon the State’s long failure to assert title is
26 some evidence to support the conclusion that the river segments were non-navigable for
27 purposes of the equal footing doctrine.” *Id.* at 1235. “It is not for a State by courts or
28 legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for

1 determining navigability which . . . would enlarge what actually passed to the State, at the time
2 of her admission . . .” *Id.* The Court’s decision in *PPL Montana* provides strong support for
3 the Commission’s 2005 and 2007 Decisions and requires a finding of non-navigability here.

4 **III. The Proponents of Navigability Have The Burden of Proving Each Segment**
5 **of the Salt River Was Navigable-In-Fact on the Date of Statehood.**

6 In *State of Arizona v. Ariz. Navigable Stream Adjudication Commission*, 224 Ariz. 230,
7 229 P.3d 242 (App. 2010), the Court of Appeals of Arizona confirmed that “the burden of proof
8 rests on the party asserting navigability.” 229 P.3d at 250. “Consequently, the burden of proof
9 lies with . . . the proponents of navigability, who must prove navigability by a preponderance of
10 the evidence.” 229 P.3d at 251. *See also* A.R.S. 37-1128 (requiring that a claim of navigability
11 be established by a preponderance of the evidence). Federal courts have also placed the burden
12 of proof on the proponents of navigability. *North Dakota ex rel. Bd. of Univ & Sch. Lands v.*
13 *United States*, 972 F.2d 235, 238 (8th Cir. 1992); *Mundy v. United States*, 22 Cl.Ct. 33, 34-35
14 (1990) (“Navigability is a question of fact, and the burden of proof is on the party asserting
15 navigability.”); *see also* 78 AM. JUR. 2d *Waters*, Sec. 133, at 480 (2002) (“the burden of proof
16 rests upon the party asserting navigability”).

17 As described by the Commission in its 2005 Decision:

18 The “preponderance of the evidence” standard is sometimes referred to as
19 requiring “fifty percent plus one” in favor of the party with the burden of proof.
20 One could imagine a set of scales. If the evidence on each side weighs exactly
21 evenly, the party without the burden of proof must prevail. In order for the party
22 with the burden to prevail, sufficient evidence must exist in order to tip the scales
23 (even slightly) in its favor [citations omitted].

24 2005 Decision, at p. 16. *See also* Black’s Law Dictionary (7th ed) at 1201 (“preponderance of
25 the evidence” means “the greater weight of the evidence”). Here, the evidence in favor of non-
26 navigability is overwhelming and the proponents have clearly failed to meet their burden.

27 Whether a river is navigable for title purposes is a question of federal law. *PPL*
28 *Montana*, 132 S. Ct. at 1227. Under the applicable federal navigability-for-title test, the
proponents of navigability here must prove, by a preponderance of the evidence, that the Salt
River (or each segment thereof) at the date of statehood: (1) was used or was susceptible of

1 being used, (2) as a highway of useful commerce, (3) in its natural and ordinary condition, and
2 (4) by the customary modes of trade and travel. *North Dakota*, 972 F.2d at 238, citing *United*
3 *States v. Holt State Bank*, 270 U.S. 49, 56 (1926). The proponents of navigability failed to meet
4 their burden of proving navigability by a preponderance of the evidence prior to the 2005
5 Decision and 2007 Decision. Nor have they met their burden of proof in this remanded
6 proceeding. The proponents have failed to establish that any segment of the Salt River was
7 navigable on the date of statehood. The Commission should again find that the Salt River was
8 not navigable in its entirety.

9 IV. **The Supplemental Evidence Provided to the Commission on Remand Does**
10 **Not Establish Navigability – That Evidence Supports Non-Navigability.**

11 On remand, the Commission received a substantial number of additional exhibits and
12 reports from both proponents and opponents of navigability and conducted twenty-three
13 additional days of hearings regarding the navigability of the Salt River. While the sheer amount
14 of evidentiary submissions and hearings were extensive, the substance of the evidence was
15 similar to what the Commission received in the prior proceedings leading up to the 2005 and
16 2007 Decisions. The supplemental evidence and testimony provides considerable additional
17 support for the correctness of the 2005 Decision and 2007 Decision as to the non-navigability of
18 the entirety of the Salt River including the reaches now referred to as Segments 5 and 6,
19 portions of which are located within the Salt River Pima-Maricopa Indian Reservation.

20 A. **There Remains No Evidence That the Salt River Was Navigable or Used for**
21 **Navigation By Native Americans During the Pre-Historic Period.**

22 Although Native Americans have inhabited lands near the Salt River for thousands of
23 years, there remains no evidence in the archaeological record that any of the prehistoric cultures
24 used the Salt River as a means for trade or travel. 2005 Decision, at pp. 24-25. The
25 Commission received evidence and testimony from Jack August Jr., Ph.D., regarding the lack of
26 any archaeological evidence of boating or navigation on the Lower Salt River by the Hohokam.
27 Exh. C040, pp. 3-6. Dr. August reports that although there is abundant evidence that the
28 Hohokam needed transportation for travel and trade and that they were experts in water

1 management in the Salt River, there is no evidence that they used the Lower Salt River for
2 navigation. *Id.* at 3-4. Dr. August adds that “no evidence exists that the Hohokam utilized the
3 Salt River for commerce or travel. Boating is not mentioned in any of the archaeological,
4 anthropological, or pre-Colombian historical research.” *Id.* at p. 6. Dr. Thomas Newell also
5 testified to the “complete absence of information of dugouts being used [by Native Americans
6 on the Salt River], especially in prehistoric times, which [to Dr. Newell] is a very significant
7 factor.” Tr. [3/30/16], at pp. 4193-4194 (Newell). Mr. Thomas Gookin also testified to the lack
8 of any evidence of boating on the Lower Salt River by the Hohokam or Pima people. Tr.
9 [11/19/15], at pp. 1463-1464 (Gookin).

10 The navigability proponents did not present any evidence of navigation or boating by
11 Native Americans or the Hohokam civilization in the pre-historic period. Regarding
12 archaeological evidence of pre-historic boating, Jonathan Fuller testified only that “there’s some
13 starting to find *some hints* in the archaeological record of *potentially* using boats on *some*
14 *canals.*” Tr. [10/20/2015], at pp. 154-55 (Fuller) (emphasis added). On cross-examination, Mr.
15 Fuller admitted the evidence of pre-historic boating on the Lower Salt River was “scant” and
16 “speculative.” Tr. [10/22/2015], at p. 695-700 (Fuller). Even that scant and speculative
17 evidence related to potential boat use on canals, not the river. *Id.* at p. 699. There is no actual
18 evidence that Native Americans used the Salt River for trade or travel in the pre-historic period.

19 **B. Evidence Regarding Boating Attempts on the Salt River, or the Lack Thereof, Prior**
20 **to Statehood Supports A Finding of Non-Navigability.**

21 Extensive and continued historical use of a river for commercial purposes is the most
22 persuasive form of evidence regarding its susceptibility for navigation. *PPL Montana*, 132
23 S.Ct. at 1233, *citing United States v. Utah*, 283 U.S. 64, 82-83 (1931). As in the previous
24 proceedings, the Commission received accounts of sporadic, non-commercial, often
25 unsuccessful boating efforts on the Salt River between the 1860s and 1912. Tr. [10/23/15], at p.
26 787 (Fuller) (discussing 22 accounts of boating on Salt River in 46 year period between 1873
27 and 1919). These sporadic attempts are insufficient to show that the Salt River was actually
28 used or susceptible of use as a highway for commerce. Most and perhaps all of these boating

1 accounts were previously considered by the Commission when it determined the Salt River to
2 be non-navigable. Tr. [11/19/15], at p. 1467 (Gookin). Pro-navigability witness Mr. Fuller
3 conceded that he found no evidence of any regular commercial enterprise on the Salt River at or
4 prior to statehood. Tr. [10/23/15], at p. 790 (Fuller). Mr. Fuller further conceded there was no
5 evidence of people regularly navigating the Salt River for the commercial transportation of
6 food, crops, building materials, minerals, or people at or prior to statehood. Tr. [10/23/15], at
7 pp. 826-827 (Fuller).

8 Given the significant need for reliable means of transportation for trade and travel by
9 inhabitants including Native Americans, explorers, trappers, settlers, and the United States
10 military, the minimal record of boating attempts on the Salt River and the infrequent (and often
11 unreliable) accounts strongly support a finding that the Salt River was neither actually used nor
12 susceptible of use as a highway for commerce. See Exh. C023 (Expert Report of Jack August,
13 Jr., Ph.D.); Exh. C040 (updated August report). If the Salt River was navigable at statehood, it
14 is both logical and probable that the region's inhabitants would have navigated it. *Id.* The best
15 explanation for the lack of boating accounts or other reports of navigation, commercial or
16 otherwise, is that the Salt River was in fact not navigable and was not considered as susceptible
17 to navigation at or prior to statehood. *Id.*

18 In its 2005 Decision, the Commission correctly found that "there was no sustained
19 operation of commercial boating or use of this river as a highway for commerce." 2005
20 Decision, p. 34-35. The evidence presented in this proceeding is more similar to cases such as
21 *United States v. Oregon*, 295 U.S. 1, 21 (1935), where lakes were found non-navigable because
22 the only boating which took place in the area involved no commercial aspects and was of such a
23 character as to be no indication of navigability. Boating evidence in the *Oregon* case was
24 primarily limited to seasonal trapping and duck hunting. In *Harrison v. Fite*, 148 F. 781, 784
25 (8th Cir. 1906), the Court found that "mere depth of water, without profitable utility, will not
26 render a watercourse navigable in the legal sense . . . nor will the fact that it is sufficient for
27 pleasure boating or to enable hunters or fishermen to float their skiffs or canoes"). *See also*
28 *Monroe v. State*, 175 P.2d 759, 761 (Utah 1946) (no evidence that lake was used for

1 transportation of goods or that “it is likely ever to develop as a valuable means of public
2 commercial transportation”); *Proctor v. Sim*, 236 P. 114, 116 (Wash. 1925) (principal use of
3 non-navigable lake included recreational boating, fishing, swimming, and skating). The need
4 for a showing of significant commercial activity to support navigability (i.e., to make such use a
5 “commercial reality”) was re-affirmed by the Supreme Court in *PPL Montana*. Even if the few
6 questionable accounts of boating after 1860 (averaging approximately one boating attempt
7 every two years during the relevant period) can be taken as reliable evidence, they are not
8 sufficient to establish any segment of the Salt River as navigable-for-title. Most and perhaps all
9 of these same boating accounts were presented by navigability proponents in the remand
10 proceeding regarding the Gila River, which again concluded with a finding of non-navigability
11 by this Commission after presentations of evidence and argument on June 23, 2015.

12 The lack of actual boating accounts at any time prior to statehood is striking in light of
13 the substantial need for reliable transportation for trade and travel at and prior to statehood.
14 Exh. C023 (August); C040 (August); Tr. at [1/26/16], pp. 1864-2001 (August). As described
15 above, there is no evidence of indigenous use of the Salt River for navigation. Instead, they
16 traveled along the river by foot. Despite the importance of transportation to exploration, there is
17 no evidence of any Spanish explorers in the region navigating the Salt River. Tr. at [1/26/16],
18 pp. 1900-1908 (August). This is despite extensive documentation of other aspects and
19 characteristics of the Salt River and surrounding area. *Id.* at pp. 1900-1903. Instead, the
20 Spanish explorers traveled in the Salt River Valley by foot and horseback. *Id.* at p. 1905. Fur
21 traders, trappers and so-called “mountainmen” came to the Salt River Valley in the 1820s.
22 There is no record that these people used the Salt River for navigation. Instead, they traveled
23 along the river with horses and mules. *Id.* at pp. 1925-1933. The United States military came to
24 the Salt River Valley in the mid-1800s and established forts on the Verde River. *Id.* at pp.
25 1933-1945. Although travel and transportation was a significant concern and need for the
26 military in terms of moving supplies and people, the record shows that the military did not use
27 the Salt River for navigation purposes. *Id.* There is no evidence that the military even
28 considered using the Salt River for navigation during the period prior to statehood. *Id.* at p.

1 1945. Instead, at considerable difficulty and expense, they built roads for transportation
2 purposes. *Id.* at pp. 1943-1944. Nor did the settlers, homesteaders, or miners use the river for
3 navigation purposes at or prior to statehood despite a significant need for reliable transportation
4 and the difficulty and burdens associated with moving goods, supplies, and people overland. *Id.*
5 at pp. 1949-1961. Unlike other cities located near navigable waterways, none of the developing
6 cities along the Salt River invested in developing harbors, ports, or docks to accommodate
7 commercial navigation. *Id.* at p. 1994. Nor did the State of Arizona, during that period, make
8 any requests for federal appropriations or make any designations that suggested the Salt River
9 was navigable. *Id.* at pp. 1979-1989.

10 In sum, despite significant need for a reliable source of commercial transportation in the
11 Salt River Valley throughout the seventy-five year period prior to statehood, there is simply no
12 evidence that the Salt River was used for navigation for commercial purposes or as a highway
13 for commerce. *Id.* at pp. 1960-1961 (concluding that Salt River was not a highway of
14 commerce in its natural condition prior to 1867); *id.*, at 1999 (concluding that Lower Salt River
15 was not navigable in its ordinary and natural condition as a highway for commerce prior to
16 statehood); Exh. C023; C040. To the contrary, all transportation in the region was over land.
17 The Salt River was not navigable, nor susceptible to navigation.

18 C. The Historical Record Regarding Contemporaneous Views, Statements, and
19 Opinions of the Navigability of the Salt River Support Non-Navigability.

20 The Commission received supplemental evidence from Douglas R. Littlefield, Ph.D.
21 regarding the non-navigability of the Salt River. The Commission favorably relied on Dr.
22 Littlefield's report and testimony in its 2005 Decision and 2007 Decision. In this remanded
23 proceeding, Dr. Littlefield expanded his already extensive research to provide a comprehensive
24 historical record of whether the Salt River was considered navigable at the date of statehood.
25 Exh. C001. The historical materials show overwhelmingly that the Salt River was not thought
26 to be navigable by contemporary observers at or prior to statehood.

1 Dr. Littlefield confirmed again that not one survey of the Salt River stated or indicated
2 that it was navigable. Exh. C001, pp. 16-54. Regarding the survey evidence, Dr. Littlefield
3 concluded at Exh. C001, p. 54:

4 Federal government surveyors were specifically charged with the task of
5 identifying navigable streams as part of their surveying duties, and the manuals
6 and instructions under which they carried out their work were very precise about
7 how navigable bodies of water were to be distinguished from non-navigable ones.
8 As part of the U.S. Government's surveying efforts, the area along the Salt River
9 was surveyed and resurveyed many times. Significantly, while those surveys
10 were done in varying seasons, in different years, and by several individuals, all of
11 the descriptions and plats that resulted from this work consistently portrayed the
12 Salt River as a non-navigable stream.

13 In his testimony, Dr. Littlefield offered his opinion as a professional historian with decades of
14 experience dealing with federal surveys that the historical evidence regarding the federal
15 surveys was "overwhelmingly persuasive" evidence in support of a non-navigability
16 determination. Tr. at [2/25/16], pp. 3324-3326 (Littlefield). The surveys and supporting files
17 "indicate overwhelmingly that from the perspective of the surveyors, the river was not
18 navigable when they did their surveying work." *Id.* at 3326.

19 Dr. Littlefield reviewed more than 200 land patents issued by the United States and
20 others issued by the State of Arizona that touched or overlay the Salt River, as well as their
21 supporting patent files, and in no instance did the United States or Arizona, in granting such
22 patent, state or suggest that the Salt River was navigable. Exh. C001, pp. 55-117. In no case
23 was land within the bed or banks of the Salt River withheld from the patent. In fact, in some
24 cases, the "patentee expressly either acknowledged that he or she was getting part of the bed of
25 the river, or in a few cases they actually indicated that they wanted the bed of the river for
26 gravel or sand" Tr. at [2/25/16], pp. 3336-3337 (Littlefield). Dr. Littlefield also offered
27 evidence on 41 patents issued on the Lower Salt River under the Desert Land Act, which
28 required irrigation of lands patented under that Act to come from a non-navigable stream. Thus,
each of these patents contains the statement of the land applicant and the patenting government
official that the Salt River was deemed non-navigable. *Id.* at pp. 3339-3341. Upon his
comprehensive review of the patent files, Dr. Littlefield concluded:

1 In conclusion, the federal government granted to private individuals over two
2 hundred twenty-five separate patents that touched or overlay the lower Salt River.
3 In not one case did any of these patents or the supporting patent files indicate that
4 acreage was being withheld due to possible ownership of the bed of the Salt River
5 by the state of Arizona. In each case where patents were applied for, several
6 parties expressed implicit opinions on the navigability of the Salt River through
7 the request for, and award of, lands through which the river flowed. These
8 included the patentee, his witnesses, and officials of the U.S. General Land
9 Office. It is significant that cumulatively, literally hundreds of people made
10 judgments concerning the Salt River's navigability in this manner – opinions
11 spread chronologically over many years, throughout different seasons, and over a
12 large geographic area.

13 Just as important, however, was how Arizona officials perceived the Salt. The in-
14 lieu grant in the Salt River bed awarded to the State of Arizona directly did not
15 give any indication that Arizona authorities believed the state was receiving lands
16 it already owned due to the presence of the bed of the river. Furthermore, the
17 patents issued by the state to private parties for land through which the river ran
18 provided another perspective. If the state believed it owned the bed and banks of
19 the river, it certainly would have considered the stream's navigability in disposing
20 of those lands. Collectively, therefore, federal patents, Congressional grants to
21 Arizona, and state patents strongly suggest that both federal and state officials, as
22 well as multitudes of private individuals, did not perceive the Salt River to be
23 navigable

24 Dr. Littlefield also reviewed and testified on numerous government reports, documents,
25 and photographs which all support a view of non-navigability. Exh. C001, pp. 117-167.

26 Upon his review of multitudes of historical government documents that describe the Salt River
27 at many points in time before and near Arizona statehood in 1912, Dr. Littlefield reported at
28 Exh. C001, pp. 166-167:

The records of the three federal agencies whose responsibilities were most closely
associated with water resource development in the West (the Reclamation
Service, the Geological Survey, and the Department of Agriculture) all
consistently illustrated that none of the officials in those agencies considered the
Salt River to be navigable on a reliable basis. Reports by those agencies – both
published and unpublished – routinely characterized the stream as varying
dramatically in flow, from a mere trickle to wild floods. The accounts also
described a river whose channel frequently changed, whose course was blocked
by many dams and diversion works, and whose water supplies were fully diverted
to supply farming needs. Moreover, the U.S. Government documents observed
that even when water materialized in the Salt River's channel it frequently
disappeared a short distance downstream. For all of those reasons, no
contemporaneous observer considered the Salt River navigable on a regular and
reliable basis.

1
2 Dr. Littlefield also comprehensively reviewed newspaper articles during the period prior
3 to statehood and found that “despite countless articles detailing nearly every aspect of the Salt
4 River, there is no indication in the press reports that the stream was useful for transportation or
5 that it could have been employed in that manner.” Exh. C001, at p. 207. Given “the booster
6 qualities inherent in late nineteenth and early twentieth century American West newspapers,”
7 the lack of any discussion or promotion of the Salt River for navigation or commercial purposes
8 in those newspapers is ‘doubly significant’ as evidence of non-navigability.” *Id.* Dr. Littlefield
9 also testified that when dams were proposed on the Salt River, no person or entity complained
10 about potential impacts to navigation, nor was there any documented consideration of using the
11 Salt River to transport supplies for the dam construction. Tr. [2/26/16] at pp. 3406-3409
12 (Littlefield); *see also* Exh. C001, at pp. 202-203. He also cites a statement of the 1865 Arizona
13 Territorial Legislature that “the Colorado River is the only navigable water in this Territory,”
14 which is additional evidence of the State’s own view of navigability at the time. Exh.C001, at
15 p. 212. Examples of court documents and decrees at or prior to statehood were also presented in
16 which parties and courts at that time declared the Salt River to be a non-navigable or
17 unnavigable stream. Tr. [10/23/15], at pp. 872, 881 (Fuller); Tr. [3/10/16], at pp. 3567-3568
18 (Littlefield).

19 Dr. Littlefield summarized his review of the historical record as follows: “From this
20 wealth of information, covering a huge array of documentary sources, only one conclusion can
21 be reached: The Salt River was not navigable on or before February 14, 1912, in its ordinary
22 and natural condition.” Exh. C001, at p. 250 (emphasis added). The historic accounts and
23 assessments of non-navigability reported on by Dr. Littlefield were further supported by the
24 testimony and reports of Rich Burtell (regarding Upper Salt River) and Dr. Jack August, Jr.
25 (regarding Lower Salt River). The navigability proponents have presented no evidence to rebut
26 or contradict the comprehensive and contemporaneous historical evidence presented by Dr.
27 Littlefield, Mr. Burtell, or Dr. August. In fact, their primary witness Mr. Fuller repeatedly
28 admitted that he simply discounted this vast array of historical evidence in favor of his own

1 speculative account of how the river could have been used at or prior to statehood. Tr.
2 [10/23/15], at pp. 865-896 (Fuller). The Commission however cannot ignore the historical
3 record. The persuasive historical evidence overwhelmingly supports a finding of non-
4 navigability along the entirety of the Salt River. The Salt River was not actually used for
5 navigation at or prior to statehood in its natural and ordinary condition, nor was it susceptible to
6 navigation.

7 D. Evidence Regarding the Geology, Geomorphology, and Hydrology of the Salt
8 River Strongly Support A Finding of Non-Navigability.

9 “All reports from the [pre-statehood] era indicate that the Salt River was an extremely
10 erratic and undependable river characterized by periodic floods followed by longer periods of
11 drought.” 2005 Decision, at pp. 42-43; 2007 Decision, at p. 64. Prior to its 2005 Decision, the
12 Commission received evidence describing the Lower Salt River in its ordinary and natural
13 course as being located in a wide, flat, alluvial plain except for the Tempe narrows with two to
14 four flow channels interspersed by sandbars and small sand islands which would shift with each
15 period of high flow or flood preventing there being a single channel which could be navigated
16 as a highway for commerce.” 2005 Decision, at p. 44. Even accepting the questionable average
17 flow data of up to 1730 cfs put forward by the navigability proponents at that time, “such a flow
18 spread over a wide area in a braided stream of 2 to 4 flow channels interspersed by shifting sand
19 bars and sand islands would be practically impossible to be considered as navigable or
20 susceptible to navigation.” 2005 Decision, at p. 44 (emphasis added). The Commission made
21 identical findings with respect to the lower reaches of the Upper Salt River. 2007 Decision, at
22 pp. 64-65. The evidence received in the remand proceeding continues to strongly support the
23 Commission’s prior non-navigable determination with regard to the entirety of the Salt River.

24 There is no dispute that the Salt River in its natural and ordinary condition is “erratic,
25 unstable and unpredictable, characterized by periodic floods, sometimes extreme, in its ordinary
26 and natural condition.” 2005 Decision, pp. 42-43. This undisputed fact has a number of
27 relevant implications. First, large flood flows significantly limit the usefulness of average
28 annual flow data on the Salt River, because these large flood events upwardly distort the

1 average. 2007 Decision, pp. 55-56. Second, these large flood events cause significant changes
2 in channel position and character, especially in the downstream reaches. 2005 Decision, p. 41;
3 2007 Decision, pp. 57-59. Third, the erratic and unstable nature of the Salt River, with potential
4 for violent floods would generally discourage its use as a “highway for commerce” and
5 discourage investment in navigation, instead favoring use of land routes. This is especially true
6 in years prior to statehood, which saw thirteen recorded floods with flows exceeding 20,000 cfs
7 between 1888 and 1910 and four flood events of 199,500 to 351,514 cfs. 2007 Decision, p. 56.

8 In the prior Salt River proceedings culminating in the 2005 Decision and 2007 Decision,
9 Dr. Stanley A. Schumm filed an expert report with the Commission that supported the position
10 of non-navigability. He found that the steep gradients of the Upper Salt River, ranging from 17
11 feet per mile to 31 feet per mile, precluded any finding of navigability. 2007 Decision, at pp.
12 57-59. Dr. Schumm cited a letter from Captain John A. Mellon, who had over 40 years of
13 experience on the Colorado River, which stated: “I have come to the conclusion that any river
14 that has over 4 feet fall to the mile cannot compete with a railroad for freight or passengers.”
15 2007 Decision, at pp. 58-59. This is a notable contemporaneous opinion of river navigability
16 with available watercraft at or near the time of Arizona statehood. Dr. Schumm concluded that:
17 “If at 4 feet per mile, commercial navigation is inhibited, certainly at 17 to 31 feet per mile, the
18 gradients measured on the Upper Salt River, navigation would be impossible.” 2007 Decision,
19 at pp. 58-59. Although less steep than the Upper Salt River, the gradient of the Lower Salt River
20 between Granite Reef Dam and the Gila confluence is approximately 9.3 feet/mile, which is still
21 considerably steeper (more than double) than the 4 feet per mile deemed practical for
22 commercial navigation using watercraft available at statehood. Exh. C024, p. 34 (Mussetter).

23 With regard to the lower reaches of the Upper Salt River, Dr. Schumm testified to the
24 Commission that:

25 Well, if the braided pattern has multiple channels and sand bars and gravel bars,
26 during any flood the position of the gravel bar could shift and be eroded away.
27 The pattern of the bed changes its characteristics, not in the sense of not being
28 braided but the position of the channels and the position of the bars and the
character of the bars could change.

1 2007 Decision, at p. 58. Dr. Schumm also testified that:

2 The large floods prior to statehood would have created a wide-braided channel
3 probably occupying the entire valley floor, as occurred along the Gila, Verde
4 (Schumm, 2004), and lower Salt Rivers (Schumm, 2003). The canyon reaches of
5 the upper Salt River, including the now submerged reaches (Roosevelt Dam to
6 Stewart Mountain Dam) are very steep and rapids are frequent. These conditions
7 make navigation impossible.

8 Braided rivers are wide, shallow, and steep, a condition not conducive to
9 navigation. The marked changes of valley width cause dramatic alterations of
10 water depth and velocity, which would make navigation hazardous. The
11 numerous rapids (Table 1) clearly prevent navigation, and the bedrock that
12 controls the Verde and Salt Rivers at their confluence prevents navigation
13 upstream on both rivers (Figure 8).

14 2007 Decision, at p. 58. See also 2005 Decision, at p. 40-42 (describing Lower Salt River in its
15 ordinary and natural condition as “definitely not navigable” due to its multiple channels,
16 changing conditions, sandbars, and sand islands).

17 On remand, Robert A. Mussetter, Ph.D., PE, submitted a Declaration re Navigability of
18 the Upper and Lower Salt River. Exh. C024. Dr. Mussetter reviewed the prior work of Dr.
19 Schumm and also “made an independent assessment of the navigability of the Upper and Lower
20 Salt River.” Exh. C024, p. 1. Dr. Mussetter agreed with Dr. Schumm’s work and conclusions.
21 Exh. C024, p. 4. Dr. Mussetter concluded that no reach or segment of the Salt River could be
22 considered navigable or susceptible to navigation in its ordinary and natural condition. Exh.
23 C024, p. 5; Tr. [1/28/16], at p. 2488 (Mussetter) (explaining that depths are too shallow, the
24 river too variable, and too much instability in the channels to consider the river navigable or
25 susceptible to navigation as a highway for commerce under ordinary and natural conditions).

26 Dr. Mussetter also made specific observations with respect to the downstream reach of
27 the Upper Salt River, referred to by the navigability proponents as Segment 5 here:

28 Similar to the Gila River, a series of large floods occurred during the period
between the late 1880s and 1912 that likely scoured away much of the riparian
vegetation, caused extensive bank erosion and channel widening, and maintained
a wide, braided, multi-channel planform, a condition that would have made
navigation impossible, or at the very least impractical, during significant portions
of the year when flows in the river were low.

1 Exh. C024, p. 4. Regarding the Lower Salt River (referred to as Segment 6), Dr. Mussetter
2 states:

3 Contrary to previous testimony before the ANSAC on behalf of the State of
4 Arizona that the Gila and Verde Rivers were boatable using small, modern,
5 shallow-draft watercraft, and the anticipated similar testimony with regard to the
6 Lower Salt River, the highly-unpredictable hydrology, the braided nature of the
7 high-flow channel, and small size and dynamic nature of the low-flow channel,
8 including the tendency to shift laterally by thousands of feet during a single flood
9 event, strongly suggest that use of the Lower Salt River as a highway for
10 commerce in customary modes of trade and travel on water would have been
11 impractical.

12 Exh. C024, p. 5. Pro navigability witness Jonathan Fuller agreed that the conditions in the
13 Lower Salt River [Segment 6] in its ordinary and natural condition are very similar in character
14 to the upper portions of the Gila River, which was found on remand to be non-navigable by
15 this Commission on June 23, 2015. Tr. [10/23/15], at p. 857-859 (Fuller). Mr. Fuller testified
16 that the geomorphology and shape of channel in those river reaches would be very similar, and
17 that there might even be more flow and more depth of water below the Gila confluence than in
18 the Lower Salt. *Id.* at 859. In addition, numerous errors and flaws in methodology were
19 discovered in Mr. Fuller's assessments of the depth and flow of the Salt River in its ordinary
20 and natural condition. See, e.g., Tr. [11/17/15], at pp. 999-1067 (Fuller); Tr. [11/18/15], at pp.
21 1436-1443 (Gookin); Tr. [11/19/15], at pp. 1452-1462 (Gookin); Tr. [1/28/16], at pp. 2394-
22 2416, 2449-2488 (Mussetter). There is simply no basis in this record to find the Salt River
23 navigable. The overwhelming weight of evidence requires a finding of non-navigability.

24 E. Navigability Proponents Rely Primarily on Modern Recreational Boating
25 Evidence, Which Is Insufficient to Establish Navigability In Light of the
26 Substantial Historical and Scientific Evidence Supporting Non-Navigability.

27 The U.S. Supreme Court's recent decision in *PPL Montana* reaffirms that the
28 determination of navigability is to be assessed at the time of statehood and that evidence of
modern recreational boating is not sufficient evidence to meet the burden of proof in
establishing navigability. In this case, opponents of navigability have presented comprehensive
and overwhelming evidence from a variety of historical and scientific sources that conditions in
the Salt River at and near the time of statehood were not conducive to navigation, that no

1 contemporaneous observer at or near the time of statehood considered the Salt River to be
2 navigable, and that the inhabitants of the region did not in fact use the Salt River for navigation
3 or as a highway for commerce.

4 Evidence that persons currently float parts of the Upper Salt River for recreation,
5 primarily in boats made of materials not available in 1912, is not sufficient to overcome the vast
6 weight of historical and scientific evidence opposing navigability. This is especially true in
7 downstream reaches of the Upper Salt River [Segment 5] and the entirety of the Lower Salt
8 River [Segment 6] , which have been subject to significant flow regulation since the
9 development of upstream dams. For Segment 5 [and 6], navigability proponents cannot show
10 that “the river’s poststatehood [modern] condition is not materially different from its physical
11 condition at statehood.” *PPL Montana*, 132 S.Ct. at 1233. In Segments 5 and 6, the modern
12 dam-regulated Salt River is materially different than its unregulated condition at statehood. In
13 addition, the need for improvement of the river for modern recreational use counsels against a
14 navigability finding. *North Carolina v. Alcoa Power Generating, Inc.*, 2015 WL 2131089, at *5
15 (E.D. N.C., May 6, 2015).

16 Nor can proponents meet the second prerequisite identified by the Court in *PPL*
17 *Montana* that “the watercraft are meaningfully similar to those in customary use for trade and
18 travel at the time of statehood.” *PPL Montana*, 132 S. Ct. at 1233. As this Commission
19 previously recognized in 2007, the technological advances in the type of material, such as the
20 rubber or neoprene rafts and even stronger material for kayaks, were not available in 1912. 2007
21 Decision, at p. 41. In general, rivers were not used for recreational travel until after the advent
22 of new materials that facilitated such activities. Tr. [11/19/15], at p. 1500. Thus, use of the Salt
23 River for recreational boating is a relatively modern phenomenon made possible by the
24 development of boat-making materials that were not available at or prior to statehood as well as
25 increased discretionary income of the region’s inhabitants for recreational pursuits.

26 On remand, the Commission received evidence and heard testimony from Mark Newell,
27 Ph.D., who prepared a report entitled “Synopsis of Historic Watercraft Operating in
28

1 Southwestern States and The Salt River, Arizona.” See Exh. C044, Part 5. Dr. Newell
2 investigated the types of watercraft that were used, or available for use, for the transportation of
3 goods and people in the southwestern United States at and before the date of Arizona statehood.
4 Exh. C044, Part 5, p. 4. He investigated whether such historic watercraft were used on the Salt
5 River in its ordinary and natural condition prior to statehood. *Id.* He also examined whether the
6 types of watercraft currently used on some reaches of the Salt River are meaningfully similar to
7 the watercraft used or available for use in 1912 and earlier, for purposes of transporting goods
8 or people on water. *Id.* Dr. Newell found no evidence that watercraft available at or prior to
9 statehood were used on the Salt River for commercial transportation or trade at or prior to
10 statehood. Tr. [3/30/16], at p. 4246 (Newell). In addition, Dr. Newell expressed his opinion
11 that the type of modern recreational craft used on some portions of the Salt River today are not
12 meaningfully similar to the types of historic watercraft available at the time of statehood. *Id.* at
13 p. 4232-4234. He noted that unlike historic watercraft in existence at statehood, a “modern day
14 kayak or plastic canoe is specifically designed to withstand the kinds of impacts on cataracts
15 and rapids which it can negotiate.” *Id.* at p. 4234; Exh. C044, Part 5, p. 22.

16 “If modern watercraft permit navigability where the historical watercraft would not, or if
17 the river has changed in ways that substantially improve its navigability, then the evidence of
18 present-day use has little or no bearing on navigability at statehood.” *PPL Montana*, 132 S. Ct.
19 at 1233-34. That is the case here – the evidence of modern recreational boating should be given
20 little or no weight. It is inconclusive and speculative at best. Any relevance of recreational
21 boating is also limited because the concept of “recreational” boating for relaxation, adventure,
22 or excitement was not present at the time of statehood, but is a more modern phenomenon.
23 Relevance of recreational boating is also limited because the criteria and conditions that support
24 such boating are different than the criteria and conditions that would support use of the river as
25 a highway for commerce. Tr. [11/19/15], at p. 1531 (Gookin) (analogizing that the criteria used
26 for building a roller coaster is not the same as that used when building a highway).

1 Even if the Commission provides the evidence of modern recreational boating some
2 weight, that evidence still pales in comparison to the substantial historical and scientific
3 evidence supporting a non-navigability determination, including the River's actual condition at
4 statehood and how the Salt River was actually used and thought of by contemporaneous
5 observers and inhabitants. The navigability proponents case that the Salt River was susceptible
6 of navigation at and prior to statehood in its natural and ordinary condition is speculative at best.
7 The overwhelming weight of the evidence favors a determination of non-navigability.

8 F. Arizona Did Not Assert Any Claim of Navigability For More Than Seventy
9 Years After Statehood, Which Is Also Evidence In Favor of Non-Navigability.

10 In *PPL Montana*, the Supreme Court found that the State of Montana's "long failure to
11 assert title [via navigability] is some evidence to support the conclusion that the river segments
12 were non-navigable for purposes of the equal footing doctrine." *PPL Montana*, 132 S.Ct. at
13 1235. Similarly here, as the Commission previously noted:

14 Until 1985, most Arizona residents assumed that all rivers and watercourses in
15 Arizona, except for the Colorado River, were nonnavigable and accordingly there
16 was no problem with the title to the beds and banks of any rivers, streams or other
17 watercourses. However, in 1985 Arizona officials upset this long-standing
18 assumption and took action to claim title to the bed of the Salt River.

19 2005 Decision, at p. 10. The lack of action by the State to assert title for a period of seventy-
20 three years is further evidence that the Salt River was not navigable at the time of statehood.
21 For example, in 1976, the State of Arizona entered a stipulation in litigation that the Salt River,
22 and specifically the portion of the Lower Salt River within the boundary of the Salt River Indian
23 Reservation, was not navigable. Tr., [10/23/15], at pp. 891-893 (Fuller). In addition, on remand
24 in this case, historical evidence was presented by Dr. Littlefield regarding contemporaneous
25 actions by the State of Arizona and its officials at and near the time of statehood confirming the
26 State's contemporaneous view that the Salt River was not navigable. "It is not for a State by
27 courts or legislature, in dealing with the general subject of beds or streams, to adopt a
28 retroactive rule for determining navigability which . . . would enlarge what actually passed to
the State, at the time of her admission . . ." *PPL Montana*, 132 S. Ct. at 1235. That is exactly

1 what the State has attempted to do in this proceeding. The Commission should find, as it did
2 previously, that the Salt River was not navigable at the time of statehood.

3 V. **Any Determination of Whether the Salt River Was Navigable At Statehood**
4 **Can Have No Effect on Title to Portions of Riverbed Lying Within the Salt**
5 **River Indian Reservation.**

6 The Commission should find, as it did previously, that the Salt River was not navigable
7 as of February 14, 1912. The evidence strongly supports a finding of non-navigability for the
8 entirety of the Salt River, and especially the portions of the River labeled here as Segments 5
9 and 6, portions of which are located within the Salt River Indian Reservation. However, in an
10 abundance of caution, SRPMIC notes that any determination of navigability made in this
11 proceeding cannot and will not provide Arizona with any right, claim, or interest to the bed of
12 that portion of the Salt River that lies within the boundaries of the Salt River Indian
13 Reservation. Any determination of navigability made by this Commission is relevant only to
14 those portions of water courses that had not been previously reserved or set aside by the United
15 States prior to statehood. The Salt River Indian Reservation was reserved and set aside for the
16 exclusive use and occupation of SRPMIC in 1879, thirty-three years before Arizona achieved
17 statehood. Any title that the State might have acquired in 1912 by way of the equal footing
18 doctrine could not include riverbeds within Indian lands previously set aside by the United
19 States.

20 The U.S. Supreme Court has made clear that a determination of navigability, standing
21 alone, will not affect title to Indian lands set aside prior to statehood. If the Federal Government
22 has set aside lands prior to statehood in a way that shows intent to retain title, a determination of
23 navigability is not dispositive. *Alaska v. United States*, 545 U.S. 75 (2005). "Creation of an
24 Indian reservation [containing the bed of navigable waters] is an appropriate public purpose
25 justifying defeat of state title to submerged lands." *Idaho v. United States*, 533 U.S. 252, 276 n.
26 6 (2001). In addition, in Article 20, Part 4 of the Arizona Constitution, the State of Arizona
27 affirmatively disclaimed ownership of any portion of the bed of the Salt River located within the
28 Salt River Indian Reservation on the date of statehood. Finally, given the fee title ownership

1 interest that the United States holds in Indian reservation lands, the United States is an
2 indispensable party to any determination involving title to Indian lands. *United States v. City of*
3 *Tacoma*, 332 F.3d 574, 579-80 (9th Cir. 2003).

4 If the Commission determines, as it should, that the Salt River was not navigable as of
5 February 14, 1912, these unique issues of federal Indian law will have no relevance. The
6 State's belated claim to title will simply fail on the Commission's findings. However, if the
7 Commission makes a determination in favor of navigability for Segments 5 or 6 of the Salt
8 River, the Commission's determination will simply have no application or effect within Indian
9 lands that were reserved and set aside by the United States prior to Arizona statehood, such as
10 those portions of the riverbed lying within the Salt River Indian Reservation.

11 VI. **Conclusion – The Salt River Was Not Navigable at Arizona Statehood.**

12 SRPMIC respectfully requests that the Commission determine, based on the substantial
13 evidence in the record, that the Salt River in its entirety, and specifically Segments 5 and 6, was
14 neither navigable nor susceptible to navigation in its natural and ordinary condition at the date
15 of Arizona statehood.

16 Respectfully submitted this 18th day of July, 2016

17 MORISSET, SCHLOSSER, JOZWIAK SRPMIC OFFICE OF THE GENERAL COUNSEL
& SOMERVILLE, APC

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19 

20 Thane D. Somerville, AZ Bar #030870
21 801 Second Avenue, Suite 1115
22 Seattle, WA 98104-1509
23 t.somerville@msaj.com
24 Tel: 206-386-5200
25 Attorneys for Salt River Pima-Maricopa
26 Indian Community

20 

21 Michael C. Shiel, AZ Bar #006968
22 Office of the General Counsel
23 Salt River Pima-Maricopa Indian Community
24 10005 East Osborn Road
25 Scottsdale, Arizona 85256
26 Telephone: 480-362-7544
27 michael.shiel@srpmic-nsn.gov

1 **CERTIFICATE OF SERVICE**

2 A PDF copy of the foregoing was filed via e-mail on this 18th day of July, 2016 with the
3 original and six copies mailed this same day to:

4 George Mehnert, Email: nav.streams@ansac.az.gov
5 Arizona Navigable Stream Adjudication Commission
1700 West Washington, Room B-54
Phoenix, AZ 85007

6 A PDF copy of the foregoing was e-mailed this 18th day of July, 2016 to:

7 Matthew Rojas, Email: matthew.rojas@ssd.com
8 Squire Patton Boggs (US) LLP
1 E. Washington St., Suite 2700
9 Phoenix, AZ 85004
Attorneys for ANSAC

10 John B. Weldon, Jr., Email: jbw@slwplc.com
11 Mark A. McGinnis, Email: mam@slwplc.com
12 R. Jeff Heilman, Email: rjh@slwplc.com
13 Salmon, Lewis & Weldon, Plc
2850 E. Camelback Rd., Ste 200
14 Phoenix, AZ 85016-4316
*Attorneys for the Salt River Project Agricultural Improvement
15 And Power District and Salt River Valley Water User's Association*

16 Cynthia M. Chandley, Email: cchandley@swlaw.com
17 L. William Staudenmaier, Email: wstaudenmaier@swlaw.com
18 Snell & Wilmer
400 East Van Buren
19 Phoenix, AZ 85004-2022
Attorneys for Freeport-McMoRan Copper & Gold, Inc.

20 Sean Hood, Email: shood@fclaw.com
21 Fennemore Craig, P.C.
2394 E. Camelback, Suite 600
22 Phoenix, AZ 85016-3429
Attorneys for Freeport-McMoRan Copper & Gold, Inc.

23 Laurie Hachtel, Email: laurie.hachtel@azag.gov
24 Edwin Slade, Email: Edwin.slade@azag.gov
Attorney General's Office
25 1275 West Washington Street
26 Phoenix, AZ 85007-2297
Attorneys for State of Arizona

1 Joy E. Herr-Cardillo, Email: jherrcardillo@aclpi.org
2 Timothy M. Hogan, Email: thogan@aclpi.org
3 Arizona Center For Law In The Public Interest
4 P.O. Box 41835
5 Tucson, AZ 85717

6 Joe P. Sparks, Email: joesparks@sparkslawaz.com
7 Julia Kolsrud, Email: Julia@sparkslawaz.com
8 The Sparks Law Firm
9 7503 First Street
10 Scottsdale, AZ 85251-4201
11 *Attorneys for San Carols Apache Tribe, et al*

12 Sally Worthington, Email: Worthington.sally@hlwaz.com
13 John Helm, Email: helm.john@hlwaz.com
14 Helm, Livesay & Worthington, Ltd.
15 1619 E. Guadalupe, Ste 1
16 Tempe, AZ 85283
17 *Attorneys for Maricopa County*

18 Steven L. Wene, Email: swene@lawms.com
19 Moyes Sellers & Sims
20 1850 N. Central Ave., Ste 1100
21 Phoenix, AZ 85004

22 Cynthia S. Campbell, Email: Cynthia.campbell@phoenix.gov
23 Law Department
24 City Of Phoenix
25 200 W. Washington Street, Ste 1300
26 Phoenix, AZ 85003-1611
27 *Attorneys for City of Phoenix*

28 William H. Anger, Email: wha@engelmanberger.com
Engelman Berger, P.C.
3636 N. Central Avenue, Ste 700
Phoenix, AZ 85012
Attorneys for City of Mesa

Charles L. Cahoy, Email: chuck_cahoy@tempe.gov
Assistant City Attorney
City Attorney's Office
CITY OF TEMPE
21E. Sixth St, Ste 201
Tempe, AZ 85280
Attorneys for City of Tempe

1 Michael J. Pearce, Email: mpearce@mpwaterlaw.com
2 Maguire & Pearce, LLC
3 2999 N. 44th Street, Ste 630
4 Phoenix, AZ 85018-0001
*Attorneys for Chamber of Commerce
And Home Builders' Association*

5 Carla A Consoli, Email: cconsoli@lrrc.com
6 Lewis Roca Rothgerber LLP
7 201 E. Washington, St., Suite 1200
8 Phoenix, AZ 85004-2595
Attorneys for Cemex

9 James T. Braselton, Email: jbraselton@dickinsonwright.com
10 Mariscal, Weeks, McIntyre & Friedlander, P.A
11 2901 N. Central Ave, Ste 200
12 Phoenix, AZ 85012-2705
Attorneys for Various Title Companies

13 Julie Lemmon, Email: jmlemmon@att.net
14 1095 W. Rio Salado Pkwy, Ste 102
15 Tempe, AZ 85281-2603
*Attorney for Flood Control District
Of Maricopa County*

16 Thomas L. Murphy, Email: Thomas.murphy@gric.nsn.us
17 Linus Everling, Email: Linus.Everling@gric.nsn.us
18 Gila River Indian Community Law Office
19 Post Office Box 97
20 Sacaton, AZ 85147
Attorney for Gila River Indian Community

21 Sandy Bahr, Email: sandy.bahr@sierraclub.org
22 202 E. McDowell Rd, Ste 277
23 Phoenix, AZ 85004
Sierra Club

24 Susan B. Montgomery, Email: smontgomery@milawaz.com
25 Robyn L. Interpreter, Email: rinterpreter@milawaz.com
26 MONTGOMERY & INTERPRETER, PLC
27 4835 E. Cactus Rd., Ste. 210
28 Scottsdale, AZ 85254

Brown & Brown Law Offices
David A. Brown, Email: david@b-b-law.com
128 E. Commercial, PO Box 1890
St Johns, Arizona 85936

1 Dr. Carole Coe Klopatek, Email: cklopatek@ftmcdowell.org
2 P.O. Box 17779
3 Fountain Hills, AZ 85269-7179
4 *Director of Government Relations*
5 *Fort McDowell Yavapai Nation*

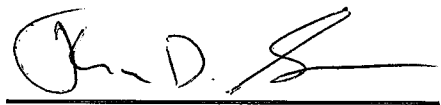
6 Mr. Thomas Moriarty,
7 P.O. Box 17779
8 Fountain Hills, AZ 85269-7779
9 *Arizona Attorney of Record*
10 *Acting General Counsel*
11 *Fort McDowell Yavapai Nation*

12 Ms. Arlinda F. Locklear, Esq., Email: alocklearesq@verizon.net
13 4113 Jenifer Street, NW,
14 Washington, D.C. 20015
15 *D.C. Attorney of Record*
16 *Fort McDowell Yavapai Nation*

17 Michael F. McNulty, Email: michael.mcnulty@pcao.pima.gov
18 Deputy County Attorney
19 Pima County Attorney's Office
20 32 N. Stone Ave., Suite 2100
21 Tucson, Arizona 85701

22 Mark Horvath, Email: mhorvath@ftmcdowell.org
23 Representing the Fort McDowell Yavapai Nation
24 Horvath Law Office, P.C., L.L.O.
25 1505 East Los Arboles Drive
26 Tempe, Arizona 85284
27 402.699.1652

Executed this 18th day of July, 2016



Thane D. Somerville
Morisset, Schlosser, Jozwiak & Somerville
Attorneys for SRPMIC