96-002-015

SALT RIVER
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BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY OF THE SALT RIVER [From Granite Reef Dam to the Gila River Confluence]	Admin. Docket No. 94-1 STATE LAND DEPARTMENT'S RESPONSE TO SALT RIVER PROJECT'S MOTION TO DISMISS

The State Land Department ("LAND") responds to SALT RIVER PROJECT'S Motion to Dismiss as follows:

I. THIS COMMISSION HAS SUBJECT MATTER JURISDICTION TO HEAR AND DETERMINE THE NAVIGABILITY OF THE SALT RIVER

The interests of the beneficiaries of the Public Trust are important interests that require the same protections as private property interests. SALT RIVER PROJECT'S argument that "questions affecting titles to land, once decided, should no longer be considered open" must not be read to apply where neither the State of Arizona, as Trustee of the Public Trust, nor its predecessor in interest the United States,[1] as Trustee under the

[1] The land under navigable waters is an incident of sovereignty. The federal government holds such lands in trust for future states, to be granted to such states when they enter

Equal Footing Doctrine, have had an opportunity to litigate the ownership of the bed on behalf of the public beneficiaries. It is patently unfair to apply a judgment resulting from litigation between others who agree the Public Trust has no interest.

A. Common Law Principles of Collateral Estoppel Apply; LAND Is Not Barred from Arguing for Navigability Before the Commission

In response to SALT RIVER PROJECT's assertion that LAND is estopped by principles of res judicata from arguing that the Salt River was navigable as of Statehood, LAND relies on and incorporates herein by reference its Response to the Notices of Lack of Jurisdiction filed with the Commission on January 6, 1994.

B. Section 1(F)(2) Must Be Construed as Consistent with Common Law Principles of Res Judicata and Collateral Estoppel

With regard to the construction of Section 1(F)(2) argued for by SALT RIVER PROJECT, A.R.S. § 1-201 provides:

> The common law only so far as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people thereof, and not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, or established customs of the people of this state, is adopted and shall be the rule of decision in all courts of this state.

Principles of res judicata and collateral estoppel are not statutory, but have developed through case law to establish when repose is appropriate and when litigation is appropriate. These

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the Union and assume sovereignty on an "equal footing" with the established states. Montana v. United States, 450 U.S. 544, 551, 101 S. Ct. 1245, 1251, 67 L. Ed. 2d 493 (1981).

principles are common law principles that do no fall within any of the exceptions set out in A.R.S. § 1-201. It is a matter of essential fairness and good sense not to apply a judgment to someone who has not had a full opportunity to litigate or where the issue was not essential to the judgment rendered. See Chaney Building Co. v. City of Tucson, 148 Ariz. 571, 573, 576 P2d 28, 30 (1986).

Arizona case law holds that principles of res judicata and collateral estoppel apply with full force in Arizona unless a statute, by express language or necessary implication, abrogates the common law. S.H. Kress & Co. v. Superior Court, 66 Ariz. 67, 73, 182 P.2d 931, 935 (1947). Nothing in the Commission's enabling legislation expressly abrogates or necessarily implies that Section 1(F)(2) abrogates the common law principles of res judicata or collateral estoppel. Instead, Section 1(F)(2) appears to partially codify the law of res judicata. Cf. Tucson Gas & Electric Co. v. Schantz, 5 Ariz. App. 511, 515, 428 P.2d 686, 690 (1967) (a shareholder' common law right of inspection, which exists independently of statute, is not abrogated by statutory remedy). In this instance, the common law rule still applies and must be harmonized with Section 1(F)(2). The Court of Appeals has set out the proper way to construe Section 1(F)(2):

> Where a right exists at common law and a statute is enacted which could be construed as being consistent with the common law, then rules of statutory construction require [the decision maker] to indulge every intendment in favor of consistency with the common law. We are not to presume that the Legisla-

ture has repudiated the common law without a clear manifestation that such was its intent.

In re Estate of Thelen, 9 Ariz. App. 157, 160-61, 450 P.2d 123, 126-27 (1969).

The State, as Trustee, has the right to the benefit of principles of collateral estoppel that have been developed to give every litigant a fair opportunity to be heard where important rights are involved. Section 1(F)(2) does not abrogate that right.

C. "Navigability" for Purposes of Adjudicating Water Rights Is Different from "Navigability" for the Purpose of Determining Title to the Riverbed

A determination that the Salt River was navigable as of statehood for purposes of title, is not inconsistent with a determination that the Salt River was not navigable prior to statehood for purposes of determining water rights under prior appropriation. See Oregon by Division of State Lands v. Riverfront Protection Asso., 672 F.2d 792, 794 n.1 (9th Cir. 1982). The Commission's mission is to determine navigability for purposes of land title, not for purposes of determining water rights. Nonetheless, SALT RIVER PROJECT's discussion of the law of prior appropriation as it has developed in Arizona does provide several important insights into the jurisdiction of the Commission.

The first insight is that the Desert Land Act provided for the "bifurcation of the methods of acquiring land and water rights. Land rights were to be purchased or otherwise acquired from the Federal Government; water rights were to be regulated

under state and territorial appropriation systems." SALT RIVER PROJECT memorandum at 8. The importance of this insight is that it clearly demonstrates that we must look to federal law to construe a federal grant of land, but must look to state law to determine water rights. Thus, we apply federal law, i.e., the Equal Footing Doctrine, for the presumption that Arizona owns the beds of watercourses navigable as of statehood, but look to the state law of prior appropriation to determine how rights to use surface waters within Arizona are determined. Different law applies, different rights are involved.[2]

The second insight is that under the Desert Land Act, "the United States relinquished complete control of only nonnavigable waters; all navigable streams remained subject to Congress' plenary power over commerce." Id. The importance of this insight is that a determination of navigability for purposes of title to riverbeds differs from a determination of navigability for purposes of federal regulatory jurisdiction under the commerce clause. No interstate commerce requirement exists when

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[2] There is some confusion as to whether the Howell Code rejection of the doctrine of riparian water rights and the same provision in the Arizona Constitution, Article 17, Section 1, reject principles that apply to land ownership in or near watercourses. That issue was settled in State v. Gunther & Shirley Co., 5 Ariz. App. 77, 83, 423 P.2d 352, 358 (1967), which holds that ownership rights in land situated along or on (or riparian to) a watercourse are not affected by the rejection of riparian rights to water in that watercourse. See also State v. Bonelli Cattle Co., 107 Ariz. 465, 469, 489 P.2d 699, 503 (1971) (Lockwood, J., dissenting), Supp. op. 108 Ariz. 258, 495 P.2d 1312 (1972), rev'd, Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 38 L. Ed. 2d 526, 94 S. Ct. 517 (1973), overruled by Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977).

the issue is navigability for title. Oregon by Division of State Lands v. Riverfront Protection Asso., 672 F.2d at 794 n.1. Thus, although courts may look at the some of the same or similar evidence to determine navigability for both purposes, the fact that a court has made a determination that a river is nonnavigable for federal commerce clause purposes is not determinative in title cases. Nothing in either the Kibbey or Kent[3] Decrees shows specifically on what basis the determination of nonnavigability was made. A review of these decrees does show that they were water rights cases concerned only with the Desert Land Act requirements and the apportionment of the waters of the Salt River, a watercourse not required for interstate commerce purposes. The navigability determination relied on from these two Decrees is not sufficiently the same issue to preclude the Commission from determining navigablity for purposes of title.

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[3] Although the United States intervened in Hurley v. Abbott, it intervened in its capacity as guardian of Indian settlers to protect their water rights, see page 7 of the Kent Decree, not as the sovereign holding the beds of navigable rivers in trust under the Equal Footing Doctrine for Arizona at statehood. Furthermore, because control over Public Trust land is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of some international duty or public exigency. A court deciding a question of title to such land must begin with a strong presumption against conveyance by the United States and must not infer such a conveyance unless the intention was definitely declared or otherwise made by the appropriate federal authority. Montana v. United States, 450 U.S. 544, 552-557, 101 S. Ct. 1245, 1251-54, 67 L.Ed. 2d 493 (1981). Intervention by the United States on behalf of Indian settlers in a water rights case cannot affect the Pubic trust interest in the bed of the Salt River.

The United States was not a party to Wormser v. Salt River Valley Canal Co. (the Kibbey Decree).

II. CONCLUSION

Public policy considerations concerning state sovereignty and the rights of the public beneficiaries to use Public Trust lands have been important enough to withstand the deference with which courts treat Indian rights. See Montana v. United States. These same policy considerations are important enough for this Commission to continue its deliberations on the navigability of the Salt River irrespective of the numerous red herrings pulled from the history of Salt River litigation over other matters and between other litigants.

LAND respectfully requests that the Commission find that it has subject matter jurisdiction over the navigability of the Salt River and that LAND is not barred from advocating for navigability before the Commission.

RESPECTFULLY SUBMITTED this 21 day of January, 1994.

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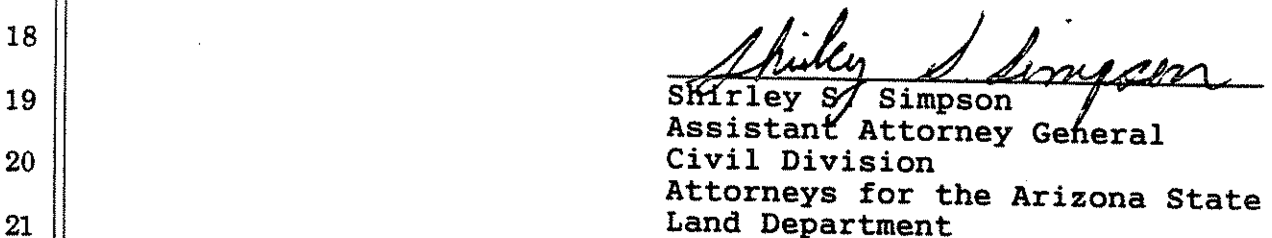

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BEFORE THE

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY OF THE SALT RIVER (From Granite Reef Dam to the Gila River Confluence)

SALT RIVER PROJECT'S REPLY TO STATE LAND DEPARTMENT'S RESPONSE TO MOTION TO DISMISS, JOINDER IN "DEMAND" FILED BY SCHLOSSER PARTIES, JOINDER IN AND REPLY IN SUPPORT OF CALMAT AND SRPMIC NOTICES, AND JOINDER IN FIRST AMERICAN TITLE'S MOTION TO EXCLUDE EVIDENCE

In this consolidated pleading, the Salt River Project[1] responds and replies to several papers that have been filed in these proceedings:

(1) On December 10, 1993, Ronald A. Schlosser, et al. (the "Schlosser Parties") filed a Demand that the Arizona Navigable Streambed Adjudication Commission Immediately Determine and Declare that the Salt River, from Granite Reef Dam to the Gila River Confluence, Was Non-Navigable as of the Date of Arizona Statehood. The Salt River Project has received no Responses to that "Demand" as of the date of this filing.

[1]As used in this pleading, the terms "Salt River Project" and the "Project" refer collectively to the Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District.

(2) On December 22, 1993, CalMat Co. ("CalMat") filed a Notice of Lack of Jurisdiction and Request for Termination of these Proceedings. On December 30, the Salt River Pima-Maricopa Indian Community ("SRPMIC") filed a similar Notice. The Arizona State Land Department ("Land Department") filed a Response to both Notices on January 10, 1994. The Arizona Center for Law in the Public Interest (the "Center") also filed a Response on January 9, 1994.

(3) On January 14, 1994, the Salt River Project filed and served in these proceedings a Motion to Dismiss based upon the lack of jurisdiction by the Commission to determine the navigability of this reach of the Salt River. The Land Department filed a Response to that Motion on January 21. The Salt River Project understands that oral argument on its Motion will be heard at the Commission's hearing on February 16, 1994.

(4) Also on January 14, First American Title Insurance Company ("First American") filed a Motion to Exclude Evidence of Ferries and Modern Day Boating. The Salt River Project has received no responses to that Motion as of the date of this filing.

In this pleading, the Salt River Project: (1) joins in the Schlosser Parties' "Demand"; (2) joins in CalMat's Notice and SRPMIC's Notice and replies in support of those Notices; (3) replies to the Land Department's Response to the Project's Motion to Dismiss; and (4) joins in First American's Motion to Exclude Evidence.[2]

The Salt River Project requests that the Commission find that it has no jurisdiction to determine the navigability of this reach of the Salt River. The navigability of this reach of the Salt River was determined by judicial actions long prior to the

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[2]The Commission's schedule for briefing these legal issues apparently has been or will be revised. At present, the Salt River Project is aware of no other responses filed to its Motion to Dismiss, Schlosser's Demand, CalMat's Notice, SRPMIC's Notice, or First American's Motion. By replying to the responses addressed in this pleading, the Project does not waive its right to reply to any other pleadings that might be filed within any time limits to be set by the Commission.

effective date of the act that established the Commission. Therefore, pursuant to Section 1(F)(2) of that act, the Commission lacks authority to address the matters at issue in these proceedings. The Salt River Project reiterates its request that the Commission immediately dismiss all proceedings relating to any determination of navigability or any public trust values associated with this reach of the Salt River.

Furthermore, the Project contends that, under the Arizona Rules of Evidence, neither evidence of ferries on the Salt River nor evidence of modern-day boating on the Salt River is relevant as to the navigability of the river as a "highway for commerce" on the date Arizona became a state. Although the Rules of Evidence do not necessarily apply in these proceedings, the Commission should take guidance from the reasoning set forth in those Rules. The Salt River Project requests that the Commission enter an order precluding the introduction of such evidence in these proceedings.

I. Salt River Project's Motion to Dismiss

In its Motion to Dismiss, the Salt River Project requests that the Commission dismiss all proceedings relating to any determination of navigability or any public trust values associated with this reach of the Salt River. The Commission has no authority to make a navigability determination for "reaches of watercourses where determinations have been made by judicial actions" prior to the effective date of the act that established the Commission. At least three Arizona court decisions have determined that this portion of the Salt River was not navigable on or before February 14, 1912. Therefore, the Commission should issue an order stating that this matter has been previously determined in a judicial action and should immediately dismiss all proceedings relating to this reach of the river.

A. Because the Issue Has Been Determined by Prior Judicial Determination(s), the Commission Has No Jurisdiction to Examine Navigability or Public Trust Values for this Reach of the Salt River.

The Commission was established by an act of the Arizona Legislature in 1992. See Ariz. Sess. Laws 1992, ch. 297 (hereinafter the "Commission Act"). The Commission Act provides the sole authority for any and all activities undertaken by the Commission; the Commission has no statutory authority apart from this act to conduct hearings or to make determinations of navigability.

Section 1 of the Commission Act provides that "[t]his act does not affect . . . [r]eaches of watercourses where determinations have been made by judicial actions before the effective date of this act." Commission Act, supra, § 1(F)(2). By including Section 1(F)(2) in the Commission's enabling legislation, the Legislature expressly limited the Commission's authority to address certain issues.

Section 1(F)(2) expressly states that the Commission Act "does not affect" reaches of watercourses for which determinations of navigability had been made prior to the effective date of the act. The Legislature was interested in fairness and efficiency in establishing the Commission. It was toward that goal that the Legislature withheld from the Commission the authority to re-examine reaches of watercourses for which the issue of navigability already had been determined by a court. Based upon the prior judicial determinations that the Salt River is not and was not navigable, the Commission should dismiss these proceedings.

As set forth in detail in the Project's Motion, at least three courts have determined that this reach of the Salt River is **not** navigable. Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co., D. Ariz. (April 13, 1977) (Cause No. CIV 72-376 PHX) ("SRPMIC"); Hurley v. Abbott, No. 4564, Third Judicial District, Territory of Arizona, County of Maricopa (March 1, 1910) (the "Kent Decree"); Wormser v. Salt River Valley Canal Co., No. 708, Second Judicial District, Territory of

1 Arizona, County of Maricopa (March 31, 1892) (the "Kibbey Decree"). The Kent Decree
2 and the Kibbey Decree were entered prior to February 14, 1912, the date Arizona
3 became a state. Both of these decisions, and the SRPMIC decision, determined that this
4 reach of the Salt River was **not** navigable. Because these prior judicial actions have
5 found the reach **not** to be navigable, the Commission has no authority to conduct these
6 proceedings to determine the navigability of this reach of the Salt River or to examine
7 any associated public trust values.

8 **B. The Determinative Legal Issue in this Dispute is Not the Application of Res Judicata, it is the Effect of Section 1(F)(2) of the Commission Act.**
9
10 In its Response, the Land Department misconstrues the legal argument set forth
11 by the Salt River Project in its Motion. The Land Department apparently believes that
12 the focus of the Project's argument is that the Land Department "is estopped by
13 principles of res judicata from arguing that the Salt River was navigable as of Statehood."
14 Land Department's Response, at 2. Although the Project acknowledges that the
15 SRPMIC decision might bar the State from asserting its ownership claims to land lying in
16 or near the river, see Motion to Dismiss, at 11-12, the crux of the Project's argument is
17 that the Commission lacks jurisdiction to address these issues with respect to this reach
18 of the river.

19 The Commission is a body of limited jurisdiction. The Commission has no power
20 other than that bestowed upon it by the Legislature in the Commission Act. Section
21 1(F)(2) of the Commission Act requires that the Commission has no authority to
22 examine "[r]eaches of watercourses where determinations have been made by judicial
23 actions before the effective date of this act." The only question for decision at this time
24 is whether, for purposes of Section 1(F)(2), a judicial "determination" of navigability or
25 nonnavigability has been made with respect to this portion of the Salt River.
26

The Commission owes its existence to the Legislature. In creating the Commission, the Legislature put certain limits on the Commission's jurisdiction and arguably could have imposed other restrictions on that jurisdiction. For example, the Legislature provided that the Commission has no authority to examine issues related to the State's ownership interest in the Colorado River. Commission Act, supra, § 1(F)(1). Similarly, the Legislature could have limited the Commission's authority to examining only watercourses with an average depth of at least three feet or only watercourses that flow freely for at least 180 days per year. Under either of these scenarios, the Legislature would not have precluded the State from asserting its "equal footing" claims relating to a watercourse with an average depth of two feet or one that flowed for only 160 days per year. The State would have been free to assert its claims for those watercourses in some forum other than the Commission proceedings.

The Legislature chose to limit the Commission's authority to examining only those watercourses for which judicial determinations of navigability had not been made prior to the date of the act. In doing so, the Legislature did not preclude the State from asserting its "equal footing" claims to watercourses for which such judicial determinations had been made. The State is free to assert such claims, but it must assert them in some forum other than the Commission proceedings.

In enacting Section 1(F)(2), the Legislature withheld from the Commission the authority to address issues for watercourses upon which judicial determinations had been previously made. Because this reach of the Salt River is just such a watercourse, the Commission has no statutory authority to act with respect to this reach of the river.

For purposes of ruling on the pending motions, the Commission need not determine whether a court can revisit these issues or whether the State or other interested parties (e.g., the Center) are precluded from asserting claims in a judicial action. In fact, it is unnecessary, and indeed inappropriate, for the Commission to decide

those issues at this time. Under the relevant legislation, the Commission is not the appropriate forum in which these issues may be addressed.

C. Section 1(F)(2) of the Commission Act is Not Merely a Codification of the Legal Rule of Res Judicata or Collateral Estoppel.

The Land Department also argues that Section 1(F)(2) of the Commission Act is nothing more than a legislative attempt to codify the legal doctrines of res judicata and collateral estoppel. The Land Department argues that Section 1(F)(2) should not be interpreted to abrogate these common law doctrines; in fact, the Land Department argues, Section 1(F)(2) actually codifies these principles. See Land Department's Response, at 3.

The Salt River Project agrees with the legal premise of the Land Department's argument, but contends that the argument goes too far. The Land Department is consistent with Arizona case law when it asserts that, absent clear legislative intent to the contrary, Section 1(F)(2) should not be interpreted to abrogate res judicata or collateral estoppel. See S.H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 P.2d 931 (1947); Tucson Gas & Elec. Co. v. Schantz, 5 Ariz. App. 511, 428 P.2d 686 (1967). Just because legislation does not abrogate a common law doctrine, however, does not mean that it is merely a codification of that doctrine.

Section 1(F)(2) can clearly be interpreted as consistent with res judicata and collateral estoppel without finding that it merely codifies those doctrines. Section 1(F)(2) deals solely with the Commission's jurisdiction to address a particular watercourse or reach thereof. Section 1(F)(2) does not limit the ability of party to assert claims with respect to a particular watercourse, it merely limits the forum in which those claims may be asserted. If the Land Department, the Center, or some other party desires to assert claims with respect to this reach of the Salt River, Section 1(F)(2) does not preclude them from bringing that action; it merely requires that they bring that claim in some

1 forum other than before the Commission. Section 1(F)(2) does not abrogate the State's
2 right to a "fair opportunity to be heard where important rights are involved," see Land
3 Department's Response, at 4; it merely directs the State to a forum other than the
4 Commission proceedings.

5 The legalistic arguments presented by the litigants on this issue present strong
6 evidence of a good reason why the Legislature included Section 1(F)(2) in the
7 Commission Act. As seen by these proceedings, prior judicial determinations with
8 respect to a particular reach of river are sure to complicate the determinations as to
9 navigability and public trust values. The Commissioners are laypersons who are "well-
10 informed on issues relating to rivers and streams in this state," A.R.S. § 37-1121(A); they
11 are not required, however, to be lawyers or judges. **The Legislature designed the
12 Commission to examine the factual information and to make well-reasoned decisions as
13 to navigability and public trust values, not to decipher formalistic legal arguments as to
14 the precise effect of prior judicial determinations.**

15 Because the determination of the navigability of this reach of the Salt River raises
16 important and complex legal issues arising from prior judicial determinations, the proper
17 forum for this determination is in a court of law. As required by Section 1(F)(2) of the
18 Commission Act, the Commission should find that prior judicial determination(s) have
19 been made with respect to the navigability of this reach of the river and should leave it
20 to the courts to determine the precise legal effect of those prior determination(s). The
21 Commission need not examine the res judicata effect of these determinations; it merely
22 needs to consider Section 1(F)(2) and to find that such determinations have been made,
23 thereby depriving it of jurisdiction to address this reach of the river.

24

25

26

D. The "Federal Test" that Determines Navigability for Purposes of Title is Not Necessarily Different from the Test for Determining Whether State Law Applies with Respect to the Appropriation of Water.

In its Response, the Land Department attempts to argue that the Kibbey and Kent Decrees do not come within the purview of a judicial "determination" under Section 1(F)(2) because the test for determining navigability for purposes of title is somehow different from the test of navigability applied in those decisions. Although the Land Department cites one federal case holding that the test of navigability for title is different from the test for navigability for determining the extent of Congress' power under the Commerce Clause of the United States Constitution, Oregon v. Riverfront Protection Ass'n, 672 F.2d 792 (9th Cir. 1982), the Land Department provides no support for its argument that the test of navigability for title is different from the test for navigability to determine whether state water law applies.

Even if these two tests are different, the Land Department has presented no evidence to show that the test used by the Kibbey and Kent courts was more narrow than the test used for purposes of title. For example, the test generally used for determining navigability for Commerce Clause purposes is quite broad, arguably broader than the test used for purposes of title. See generally Riverfront Protection Ass'n, 672 F.2d at 794 n.1. If the Kibbey and Kent courts used the Commerce Clause test (a broad test favoring navigability) to determine that the Salt River was not navigable, then Section 1(F)(2) still withholds the Commission's jurisdiction even if that test is different from the test of navigability for title.

In order for the Land Department's argument to have merit, the Kibbey and Kent courts need not only have used a **different** test from the one that the Commission must apply, the courts' test must have been **more narrow** than the Commission's test. The Land Department has produced no support for the proposition that the courts' test was different, let alone more narrow, than the test that the Commission would apply.

1 The Salt River Project's research has revealed no judicial precedent holding that
2 the test for determining navigability for purposes of title is any different from the test
3 applied by the Kibbey and Kent courts. Likewise, the Land Department apparently has
4 been unable to uncover any such cases or it would have cited them in its Response.
5 Therefore, the Land Department's contention that the Kibbey and Kent Decrees do not
6 satisfy the requirements of Section 1(F)(2) has no basis. Each of these courts
7 determined that the Salt River was **not** navigable. These determinations are sufficient to
8 invoke Section 1(F)(2)'s restriction on the Commission's authority to act.

9 **II. <u>"Demand" by the Schlosser Parties</u>**

10 In their "Demand," the Schlosser Parties make many of the same arguments set
11 forth in the Salt River Project's Motion. To the extent that the Schlosser Parties contend
12 that the navigability of this reach of the Salt River has been previously determined in a
13 judicial forum, the Salt River Project joins in that Demand. The Salt River Project also
14 hereby incorporates by reference the applicable arguments set forth above in regard to its
15 own Motion to Dismiss.

16 **III. <u>CalMat's and SRPMIC's Notices of Lack of Jurisdiction</u>**

17 Like the Demand by the Schlosser Parties, the CalMat and SRPMIC Notices set
18 forth some of the same arguments contained in the Salt River Project's Motion. These
19 Notices, however, are somewhat unique because they focus solely on the effect of the
20 1977 <u>SRPMIC</u> decision under Section 1(F)(2) of the Commission Act. The Salt River
21 Project has raised the issue of the <u>SRPMIC</u> decision in its Motion, and herein replies to
22 the arguments on this issue set forth in the Responses to CalMat's Notice and SPRMIC's
23 Notice filed by the Land Department and the Center.

24 Both the Land Department and the Center have attempted to focus the discussion
25 on the legal doctrine of res judicata. <u>See</u> Land Department's Response to CalMat, at 1;
26 Center's Response to CalMat, at 3. Although the <u>SRPMIC</u> decision certainly has res

1 judicata effect, see Motion to Dismiss, at 11-12, that is not the primary legal issue
2 involved in this dispute. The question put at issue by the Salt River Project's Motion, by
3 the Schlosser Parties' Demand, by CalMat's Notice, and by SPRMIC's Notice is whether
4 the Commission has jurisdiction to address the navigability of this reach of the Salt River
5 and any associated public trust values in light of the prior courts' conclusion that the Salt
6 River is not naviable. See Section I(B), (C), supra. The Land Department's extensive
7 discussion of the common law of res judicata and collateral estoppel is largely
8 superfluous.

9 The Land Department also argues that, even if the State is estopped from
10 asserting its ownership claims, the proceedings should continue because the Center and
11 other groups "have manifested a deep interest in the Commission's proceedings to date."
12 See Land Department's Response to CalMat, at 9-10. Because the issue is the
13 Commission's lack of authority, the "deep interest" of these groups should have no effect
14 on the decision on this matter. If Section 1(F)(2) requires the Commission to dismiss
15 these proceedings because it has no statutory authority to conduct them, these "deeply
16 interested" groups can pursue their claims in the appropriate forum. Section 1(F)(2)
17 does not prohibit any party from making its arguments; it merely prescribes the forum in
18 which those arguments can be made.

19 In its Response to CalMat's Notice, the Center accurately characterizes the legal
20 question at issue in this regard:

21 > Any decision by the Commission that it lacks jurisdiction would not resolve the navigability of the Salt. Such a decision would merely indicate that the
22 > Commission lacks authority to address the question. Thus, the relief sought by Calmat would not settle the navigability question at all, but
23 > rather would leave it unsettled until addressed in another forum.

24 Center's Response to CalMat Notice, at 5-6. Section 1(F)(2) of the Commission Act
25 merely restricts the forum in which these issues may be decided.
26

1 Although the Center's Response accurately portrays the issue, this portrayal
2 apparently is intended to imply that leaving the issue "unsettled until addressed in
3 another forum" would necessarily be a poor result. The Salt River Project contends that
4 this would not necessarily be a poor result on this issue. If the Commission does not
5 possess jurisdiction to address these issues with respect to the Salt River because of the
6 prior judicial determination(s) as set forth in Section 1(F)(2), any effort exerted by the
7 Commission and the parties in undertaking proceedings in this regard will be for naught.
8 **For the Commission to act beyond the scope of its authority would be much worse than**
9 **the Commission not acting at all.** If the Commission does not have statutory jurisdiction
10 to address these issues for the Salt River, the parties should not spend any more time
11 and resources on these proceedings that cannot possibly reach a sustainable final
12 resolution of the issues at hand.

13 **IV. First American's Motion to Exclude Evidence**

14 The Salt River Project also joins in First American's request that the Commission
15 exclude evidence of ferries and modern-day boating from these proceedings. Neither
16 evidence of trans-river ferries nor evidence of recreational boating in the 1980's and
17 1990's is probative on the issues in these proceedings. Therefore, the Commission should
18 not accept or review such evidence.

19 Although the Arizona Rules of Evidence do not necessarily apply in the
20 Commission's proceedings, the logic behind those Rules should be persuasive on the
21 Commission's decision on evidentiary issues. Rule 402 of those Rules provides that
22 "[e]vidence which is not relevant is not admissible." Ariz. R. Evid. 402. Under those
23 Rules, "[r]elevant evidence means evidence having any tendency to make the existence of
24 any fact that is of consequence to the determination of the action more probable or less
25 probable than it would be without the evidence." Ariz. R. Evid. 401.

26

1 The Commission's jurisdiction and the scope of these proceedings are limited by
2 the statutory provisions. The first task before the Commission is to determine whether
3 this reach of the Salt River was "navigable" as of February 14, 1912. Section 37-1101(6)
4 of the Arizona Revised Statutes defines "navigable" and "navigable watercourse." This
5 definition requires that, in order to be navigable, a watercourse must have been used, or
6 have been susceptible to being used, as a **"highway for commerce."** Id. Ferries are, by
7 nature, used to **cross** a river; not to travel along it. The use of a ferry to cross a river is
8 not a use of the river as a "highway for commerce."

9 Evidence of the use of ferries to cross the river does not make it more or less
10 probable that the river was also used as a "highway for commerce"--i.e. that other boats
11 were used to move people or goods along the length of the river rather than simply
12 across it. That a stream was capable of being crossed by boat at a given point does not
13 mean that it was susceptible for commercial navigation along its entire length or along a
14 substantial portion of its length. Therefore, evidence of the use of ferries is not relevant
15 on the issue of navigability. Ariz. R. Evid. 401, 402. Irrelevant evidence is inadmissible
16 in court. Ariz. R. Evid. 402. The Commission should adopt this evidentiary standard
17 and exclude such evidence from these proceedings.

18 Evidence of modern-day boating likewise is not determinative or relevant on the
19 navigability of the Salt River as of February 14, 1912. It is without question that the
20 issue of navigability must be determined as of the date of statehood. See A.R.S. § 37-
21 1101(6). Evidence of a 1990's kayak trip on the Salt River makes it no more or less
22 likely that the river was used or susceptible to being used as a "highway for commerce" in
23 1912. Therefore, this type of evidence is irrelevant, inadmissible, and should be excluded
24 by the Commission.

25 The Salt River Project agrees with First American that neither evidence of ferries
26 on the Salt River nor evidence of modern-day boating on the Salt River is relevant as to

the navigability of the Salt River as of February 14, 1912. Therefore, the Commission should enter an order precluding the introduction of such evidence in these proceedings.

V. Summary and Requested Action

The Salt River Project requests that the Commission find that a judicial determination previously has been made that the Salt River from Granite Reef Dam to the Gila River confluence was **not** navigable on or before February 14, 1912. Because this reach of the Salt River has been judicially determined to be nonnavigable, the Commission lacks statutory jurisdiction to now examine this issue. Therefore, the Project requests that the Commission issue an order stating that this matter has been previously determined in a judicial action and immediately dismissing all proceedings relating to a determination of navigability or any public trust values associated with this reach the Salt River.

Furthermore, the Salt River Project contends that neither evidence of ferries on the Salt River nor evidence of modern-day boating on the Salt River is relevant as to the navigability of the river as a "highway for commerce" on the date Arizona became a state. Therefore, the Project requests that the Commission enter an order precluding the introduction of such evidence in these proceedings.

RESPECTFULLY SUBMITTED this 7th day of February, 1994.

JENNINGS, STROUSS & SALMON, P.L.C.

By

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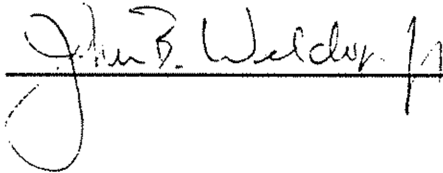
Attorneys for the Salt River Project

1 ORIGINAL AND FIVE COPIES filed
this 7th day of February, 1994,
2 with:

3 Rebecca Good, Secretary
Arizona Navigable Stream Adjudication Commission
4 1616 West Adams Street, Third Floor
Phoenix, AZ 85007
5

6 AND COPIES of the foregoing mailed this
7th day of February, 1994, to all parties
7 appearing on the Commission-approved mailing
list dated January 25, 1994.
8

9 

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SALT RIVER

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SNELL & WILMER

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION
TRANSCRIPT
1-19-94

Jennings — The Navigable Stream Adjudication Commission will come to order. We are missing two members. At least one of them may be on their way, but I understand we do have a quorum so we will take up the initial items on our agenda sent for today. The first item is the minutes of the December 8th meeting. And did you have an opportunity, members to review those.

Ramsbacher — Yes

Jennings — Both of the regular meeting and the executive session. Do I hear a motion to approve those minutes

Péwé — So moved

Ramsbacher — Seconded

Jennings — It has been moved and seconded. The minutes of the meeting of December 8th, 1993 be approved as written. All in favor say "aye".

All responded "aye"

Jennings Unanimously approved. The next item is an update on the - from the Land Department. Mr. Yount.

Yount Mr. Chairman, members of the commission, the Land Department has been rather active, as you probably are aware in the month and a half or so since the last meeting. On the 12th of December we had a public meeting that was aborted and rescheduled to the 21st. We underestimated the crowd that would be at the auditorium and we re-scheduled that meeting and had it down at the Civic Plaza and that meeting was conducted on the 21st. That was a general public meeting. The crowds were estimated somewhere between 700 and 450 finally came to the final meeting. We've also been out with citizens groups. We've met about six or seven times with different groups. I have a list of those if you're interested in seeing that list. We've also been briefing legislators along the way at various times. We've met with school boards, homeowners associations, newly formed task forces, we've also done some things with some of the realtors. Yesterday we briefed the democratic caucus in the Senate and we have a few more meetings on our agenda at this point. We have also filed a disclaimer on the Salt River that you

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are aware of. That disclaimer was filed on the 14th of December and essentially what that did was limit the state's interest to the existing bed of the Salt River. So that was another thing that we have done and with that I guess that would end my report unless you have any questions about the activities of the staff relating to this activity.

Jennings Are there any questions from the floor. Thank you, Mr. Yount. I'm going to go a little bit out of order, skipping the next issue, jurisdictional issue. With regard to the petition joint motion for delaying the February 14th hearing, as the chairman, and with my authority to handle procedural matters, I granted the motion by order on January 13, 1994 and vacated the hearing previously set for February 14th. I did not schedule a new date for that hearing. The motion asked that it be continued for a period of not less than 90 days. I thought that it would be best to - with all of the events that are transpiring in our legislature to see what comes out of that and then also if we do reschedule a meeting in the future, we would want to get one that is mutually acceptable, convenient to all members of the commission. So a new continued

hearing has not been set. It will be set at some future time, the date convenient to the members of the commission. Also the - although not listed here, the motion of Page Land and Cattle Company for extension of time to file statements of public trust values associated with the Salt River, a list of witnesses, summary of testimony, I summarily granted also. Probably, if new hearings are set for sometime this spring, new dates for filing of all of those - that information, list of witnesses, that sort of thing, will be granted - will be noticed, so that everyone will have an opportunity to either file, if you haven't already, or to supplement what you have already filed. So I granted that motion. I also issued notice, although, on a kind of a short basis, that we would hear oral argument today on the four notices or motions, objections, they have been styled in various ways, to the jurisdiction of this commission and asking that the commission - one of them styled a demand, motions, objections, notices and demands - whatever you want to call it. In the court we would refer to them all as motion type practice and we will hear oral argument on that later on. On all of those items later on in this hearing. I think that takes care

of most of the procedural areas. Let's skip on to, we got on here, notice of appearance.

Yount The purpose for that was so that you can discuss this stack of information that you have before you relative to the notice of appearance. It is, I assume, one of the procedural matters that is going to come before the commission. We can talk about the distribution and availability of those things. It's pretty obvious that there's a lot of paper here. The availability of them is such that they are available. We may have to charge you for these documents on a piece by piece basis and the cost may be fairly high. There is also a summary that has been prepared that we believe is up to date as of this morning. Is that correct. For those of you that just are interested in a listing of these things, that is available and that's at no charge. If you want all of the detailed information, we may have to charge you for that.

Simpson Mr. Chairman. Shirley Simpson appearing for the Land Department. I had an additional question about the appearances. When I reviewed them in the secretary's office, there are quite a few filed by pro per who it's unclear whether they

plan to attend and participate as a party or whether they merely want to come and make a statement. And so for those of us who are having to serve everyone who has made an appearance as a party we need to have clarified who we have to serve. So whatever the commission can do to take a look at those and clarify what the service list should be would be appreciated.

Jennings — Thank you, Shirley. We'll - we will take that up. The docket is as Mr. Yount indicates on the notices that have been filed and other papers here does run two, three, four, five pages, oh, many more than that I stopped when I got down to this. It runs at least eleven - fifteen pages. I think that we will have to consider that service. I - I'm especially interested and I think the commission itself might be interested in the item on the agenda listed as legislative action. Can we - I notice we have a copy of House Bill 2324. Could Mr. Yount or perhaps the Land Department, whoever knows anything about it, maybe could tell us about it.

Yount — Mr. Chairman, I'll try to answer that question. As far as we know, this is the cnly introduction

at this time. There was a hearing that was scheduled for nine o'clock this morning on this particular bill. It's our understanding that there will be amendments along the way or that there are a lot of proposed amendments. We have some people over there at the hearing right now and I suspect that there will be a lot of people coming over here after those hearings. And we should be able to give you an update as to what happened in the hearing this morning. That was before the Natural Resources Committee in the House.

Jennings Well, those of you who are not aware, among other things, House Bill 2324 repeals Title 37, Chapter 7 Laws 1992 Chapter 297 Section 1, which as I understand it, the repeal of the legislative basis for this commission, these hearings, and all that we have done so far. And I guess we'll just wait and see what our legislative masters decide to do with regard to the commission. Okey, well, the rest of the agenda is, other than the oral argument on the matters that have been filed that need to be ruled upon, are more or less procedural matters of notification and hearing which Ms. Simpson has already raised, I think probably we'll

try to get those out of the way first and we'll have a very short executive session to discuss the hearing and notification procedures and get advice from our attorney on that. I have to conceive that the weight of notifying everyone of you who has filed here, particularly the Land Department, could create a real problem in terms of just the weight of paper. And if we can do anything to solve it while still giving due process to everyone we will do so. So if that seems appropriate, inasmuch as this deals with the rules which the commission has adopted I think we need to get advice from, as to what notices should be sent out, what would comply with due process before we get into the actual hearing and oral arguments this morning. We will take a very short, if one of you gentlemen will move for an executive session on these we'll try to resolve them and we'll get back into the regular business in about fifteen minutes.

Péwé So move

Ramsbacher Second.

Jennings It's been moved and seconded that the commission go into executive session to consult with it's attorney regarding the due process and notification procedures and hearing. We will reconvene here in about fifteen minutes. All in favor say "aye".

(Break for Executive Session)

(missed about five minutes of tape)

Callahan notices of appearance to know who we have to serve with our motions which were filed last Friday. I'm curious now as to whether or not it's the intention to go forward with requiring us to file that an everyone who is on this list, either a "B" or a "C" or whether or not we are going to delay this notice process until there is an actual hearing date set for this proceeding.

Jennings Well, the, I think, Jim, that it will be taken care of in this and I - no, I don't think you have to send a copy of every thing that you file to everyone here on the list. The notice procedure that we will - that Rebecca will send out will ask everyone what exactly they want. Some people may

not even want the docket. All they want is a copy of the list.

Callahan Well, having had a little experience with the Gila River Adjudication, I think there may be a misperception that people won't want these materials and if they can get them without any onus placed upon them they will ask for them and we will be sending out thousands of pages.

Jennings Well,

Callahan As has been pointed out the rules require every party to be served and it's going to be a little bit difficult to do it in a ad hoc fashion here without following the rules. That's my concern. Is that when you set up the rules we're supposed to serve all parties and once they file a notice of appearance to become a party.

Jennings A party requesting notice of everything. In the adjudication though, I think, they - didn't they ____________

Callahan They did do a docket, but it's filed with every clerk with all the various counties in the

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Superior Court and it's a pretty significant process in terms of allowing people to have full access to the docket. Here, I think we're kind of making it up as we go along and you're also applying, that's a court proceeding and you have to follow the rules that have been adopted under the administrative procedure act. In this instance they were exempted, but they were exempted but they were at least adopted and filed with the Secretary of State. Now to try and change horses in the middle of the stream I think is going to be a little bit problematic. I just give that for your consideration because we were waiting to - that's why we did file a motion and we did not serve everyone that was previously listed because we want to know who all parties were so that we weren't giving preference. Only to those that had previously filed a document with the commission. I'll leave it at that.

Simpson Mr. Chairman, Shirley Simpson, again. I have to tell you that after I reviewed the list that Rebecca had prepared I actually served approximately fifty copies. I served everybody who indicated a "B" designation. They were appearing as a party. I did not serve those who

just indicated they wanted to come and testify, which are classified as a "C" person. The problem is that some of them didn't say anything and some of them filled out one part of the section and then checked the other section, so it's difficult to tell.

Jennings Yes, Mr. Carlock

Carlock Mr. Chairman, Reid Carlock for Roosevelt Water Conservation District and Page Land and Cattle Company. Anyone who is to be a serious participant in these proceedings has got to know what's going on. The only way to know that is to know what theories are being advanced, what motions are being made, what claims are being asserted, what opposition or agreement there is to everyone of those matters. The only way to know that is to be on the mailing list to receive everything that's filed. The clerk to the Commission should not, for instance, have to decide, well, how many people are going to be interested in this issue. That isn't a proper function. It's perfectly true that the service - copying and service of that kind of thing is a terribly burdensome thing. And I do think that a,

although I propose that those who indicate that they wish to be on the service list ought to receive everything. That it may be that a specially voluminous such as appendices to motions that list copies of other pleadings and that kind of thing or textbook kind of material, there could be some exception for that as long as what is served indicates with some precision and completeness the nature of the material which is not being served on everybody so that they can go get a copy of it.

Jennings Mr. Carlock, you've hit exactly on what I think our problem is in discussing it and really, I think the issue comes down, do we send actual copies of everything that is filed or that everything that individuals request that they receive copies of. We were hoping to cut down on having them copied by making it available to them at the Land office via the docket. They can go down, they can get the docket and what's been filed and then go down and look at it themselves. However, you're saying you don't think that would be adequate.

Carlock — I think it would not be, Mr. Chairman. The title on the papers that's filed is hardly ever all that descriptive. Motion to Dismiss, Motion to Reconsider, Motion to Strike, that doesn't - you get that and - everybody involved then has to make a trip to the Department to see what it is and the Department is hard put to it to accommodate all those people.

Jennings — A good point. Yes, ma'am.

Durazo — My name is Filomena Durazo. The paper that we received through the mail. I was called to help some people from a rest home that had some properties in here. They're there for illness. They didn't know how to fill it out. So I called in and they say they didn't have to send it on the fourteenth. So they did not send it in, but they would like to know what's going on because those people are in their 80's and their 70's and they're scared. They think their lands are going to take away from them and I would like to have copies so I could say to them. Well, this to me then I just tell them what's going on. Because they did not file. First they did not know how and first they could not afford a lawyer.

Jennings Well, if you're on the list

Durazo I signed myself up. So I

Jennings We'll see that you do get copies. Yes, sir.

Weldon Mr. Chairman, I'm John Weldon and I represent the Salt River Project. Your rules - Rule 1217.103 (C) provides that the commission can adopt a rule or order that would permit filing copies of papers on fewer than everybody that is a party to the proceeding. However, I think one of the difficulties that has occurred with this entire proceeding is the fact that the proceedings do affect everybody's property. The title to their property. I don't know whether you attended the public meeting over in the Civic Center or not, but you can see the degree of interest that your proceedings have engendered people along the Salt River. I think it's particularly important given that high degree of public interest that the parties that have actually filed notices of appearance have an opportunity to see the papers that are filed and see which motions may be of interest to them. They may want to come in and support something even though they don't file a

paper, they may want to support it through oral argument. I - from our view, I think it's important that the people that are affected have an opportunity to fully understand what this commission is doing and what the parties that are appearing before it are doing. So we would urge that service of papers be accomplished on everybody that has filed a notice of appearance, even though they may be just an individual that has not expressed a particular viewpoint on the navigability of the Salt River.

Jennings Mr. Braselton

Baron Would you turn on that microphone, it's hard to hear back here. We can't hear the questions and so on.

Braselton Is it this microphone

Baron There's no pickup on either of those. They need to be closer to the speaker.

Braselton Does it work now. I can't move it any closer, it's right up -

??	______
??	I don't know if I want to do that or not
Good	It's turned on
Braselton	Yeah, it sounds like it's on. Does that help at all?
??	______________________
Braselton	I don't know what you want to do. This is just recording on here, right. I'll try to just speak loud, Mr. Chairman and members of the commission. I just want to clarify one point. I don't disagree with anything that Mr. Weldon or Mr. Carlock have said, but I'm assuming that when we refer to parties, we're referring to only those people or entities that have checked box "B", if you will, on the notice of appearance and that those would be the ones that would be entitled to notice. Anybody who checked box "C" or did not check either box, are those the people or the entities, then, that you are proposing to send the card out to and ask them as to what type of notification they would like.

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Jennings Well, actually, I think what we were talking about was breaking down that category ____ box "B", but if this is the consensus that everyone who checked option "B" should get copies of whatever is filed, and that that's the way to accomplish the due process here I think that's what we are going to have to do.

Braselton John, is that what you were referring to?

Weldon Yeah, I would echo there

Jennings Okey, those that did not check it, are just interested, I suppose, would have an opportunity later to come in and file a notice of appearance and request that they receive copies of everything. That would be up to them.

Braselton Alright, thank you.

Simpson Mr. Chairman, I would still think it might be a good idea to send out, particularly to pro pers, who checked box "B" or who were unclear, but didn't put any other information on their notice of appearance to make sure that they understood that that meant they were going to be a

participant and they would be papered with every document that came through and they would have an opportunity then to withdraw that type of appearance and appear only to make statements. I would just like to get it clarified. It seemed to me that our form maybe was not as clear as it might have been in terms of what these things meant.

Jennings Well, I think we've already sent out the notice and those who checked box "B", we will assume that they want to get copies of everything. I have no objection if we want to send a notice out to those who checked "A" or no check at all, see if they now want to join the _________ here. The getting people off the mailing list, I always remember the suggestion of the chief justice of the Arizona Supreme Court that we could file some kind of a pleading such as a motion to get me off the mailing list. All of us who have been on a mailing list long after we are interested , or lost interest in what it is doing, and we would urge them to maybe do that. Perhaps down the road after, say, if we reach that stage conclude with, say, the Salt River, we would assume that the people who dealt with the Salt River, this docket

94 point one or dash one would maybe not be interested in docket 94-2, which would be one of the other rivers and we could follow the notice procedures there. But I think right now the consensus is that everyone who has checked box "B" will receive copies of all of the filings. Now what that means for individuals who have filed. They are going to have to get the docket and themselves determine who they must send copies of everything to, such as responses to the motions or notices that have been filed.

Sanders Mr. Chairman, I was notified by the Arizona State Land Department when I called them regarding this meeting today that the deadline would be extended based upon the February 14th decision of this commission. And that I did not have to send any documents in at that time. And they did not know when the delay date was. So by ruling the way you have, you have precluded those people with an opportunity to add their name to the list and check "B". Or have in essence forced them to seek legal counsel to do this for them.

Jennings Well, the deadline for filing a notice of appearance has long passed, but we have indicated

that we would be very liberal in allowing people to file and appear, for example, the granting of the motion of Page Land and Cattle to extend the time to file their proceedings. You should probably go ahead and file your notice of appearance and check box "B"

Sanders So you are saying the deadline, you would have exception to that deadline.

Jennings We would grant exception, we'll probably send out a new notice of anyone who wants to appear when we do set a new hearing on the actual taking of evidence, the hearing, of taking of evidence on the Salt River. But if you want to get everything else that's filed in the meantime you probably ought to go ahead and put in a notice.

Sanders Thank you.

Carlock Mr. Chairman, members of the commission, Reid Carlock, again. The chairman raised, made a point a minute ago that it might be that persons who wish to file things would need to come look at a docket sheet at the commission office in order to know who they needed to serve. That seems like a

fairly unfair and unnecessarily burdensome thing, Mr. Chairman. I think it could be more conveniently accomplished by a court - a commission prescribed service list, which could be changed from time to time as people requested, either to be off it or on it, but then things that needed to be served could be served simply by serving everybody on the commission prescribed service list and the certificate of service could just simply be that we mail to everybody on that list.

Jennings That's an excellent idea. Is there any thoughts on that? Okey. As Mr. Carlock points out merely typing the list of service could run longer than the document that you've done. Yes, we will get a list out taken from the docket of all those who have checked box "B". Can you do that, Rebecca. Yes, sir.

Weldon Mr. Chairman, I have one more comment here. I believe that the deadline for filing notices of appearance has not in fact run. The deadline runs thirty days prior to the date of the hearing. By continuing the hearing date

Jennings We've extended it automatically

Weldon Extended that notice so that I think people can continue to file their notices of appearance until you reschedule the hearing in the future. In the event you do.

Jennings That's right. That would solve the problem. What I meant was that the deadline had run January 14th had we gone ahead with the hearing on February 14th. And you are absolutely correct. So anyone can go ahead and file right now and there is no deadline as of now since we have not set a new hearing date. Thank you. I appreciate that comment that's very helpful. Yes, ma'am.

Durazo I was going to ask the lady that I was helping she did not know how have to file, so we just didn't send it in and need to get somebody to teach her how to file, because I don't understand it either. Maybe she can still send it in. She thinks if she doesn't file, later on she will have trouble with her land and she's very scared. So I'll look for somebody to help her to file because she's not comfortable for she did not send it in.

Jennings That would be very good if you could help her. There are other areas, legal aid and places like that that could perhaps provide some assistance on that.

Ching Mr. Chairman, can I ask Shirley a question?

Jennings Well, certainly. You two are from the same office. You ought to be able to talk to each other, I'd say

Ching Except we probably don't communicate.

Jennings Even though you sit on the opposite side of the office

Simpson Do we have to do this publicly.

Ching In light of Mr. Yount's statement earlier, that the commissioner has disclaimed any interest in land other than the present river bed. How has that decision been communicated to a lot of these people. If, you know, if their decision can be sent out coupled with, say, a map and then a lot of people will realize that they don't have to

participate in this proceeding because a lot of them have land that is not in the controversy.

Simpson I'm going to turn that question over to Mr. Yount, who I think is - knows the details.

Yount Mr. Chairman, Mr. Ching. The same mailing list that was mailed the original notices received a copy of the disclaimer, a letter and a set of maps. So that same mailing list should have received all of those things already.

Ching So all parties who asked to appear are those people who either checked "B" or "A", __________ they all received that information.

Yount They received the information about the disclaimer and a copy of the disclaimer and a set of maps. If they didn't, they are certainly available and we can get them to you as soon as we go across and get some, I guess.

Ching Is it possible for the Department to have some kind of a outreach program to actually help people if they tell you where is and you can go on the map and say you are outside the bed. Can you do

that? Because a lot of people can't read a map or can't read legal descriptions.

Yount — Mr. Chairman, Mr. Ching, I don't know whether that's appropriate for the advocate. You'll have to talk to the advocate about that.

Jennings — Certainly, if the State Land Department has disclaimed an interest in a piece of land and somebody who has received a notice is still uncertain as to whether they are within the zone of contingency, they can contact the State Land Department and through furnishing them information, either legal description or otherwise, I think they can find out whether the disclaimer disclaims interest in their land.

Yount — Mr. Chairman, we've done one other thing. We've - we now can provide for individual disclaimers to people who bring their legal descriptions and whatnot in, we can make a disclaimer if it in fact is outside the existing channel. We can look at the piece of property, make a determination, make an individual disclaimer that could then be filed in that way. We have provisions for doing that and people are welcome to come in and do that. So

that if they have a particular concern about a particular piece of land and they need to get more surety than the general disclaimer, we're prepared to do that right now as well. And they're welcome to come in anytime. They need to bring their legal descriptions in because that has to go on the disclaimer. And they have to be outside the existing bed, because we won't disclaim anything inside the bed.

Sliskovich — Mr. Chairman, my name's Thomas J. Sliskovich, a concerned property owner. I received the disclaimers. In fact I received three because of some partnerships, but there was no maps included in the disclaimers that were mailed to the three that I received. I have received, you know, obtained large maps when I attended the meeting on December the 19th, but you did not mail any maps out.

Jennings — Well sir, you take your legal description, legal documents, and contact the Land Department and as he indicated they will go over the maps with you to determine if your property is outside the area.

Sliskovich There's not a doubt in my mind that it's outside, but I'm still concerned because of the past history that my family and I have experienced in this great state, that I'm a native of. And there is not a doubt in my mind that the people that got this going in the first place is going to keep it going as long as they possibly can. No matter how this board or commission, you know, decides, if the legislature lets you decide. So I think anyone that's close to that river, if they want to make sure they keep their land like we've had it since the twenties, better stay concerned. Thank you.

Jennings Well, that, your issue there is above my pay grade. You'll have to take that up with the politicians, I think. Yes, sir.

Weldon Mr. Chairman, I'm John Weldon. I hate to keep jumping up and down, but I think there's been a dis-service done here by the filing of that disclaimer in the sense that this statute requires the commission to make a determination of navigability. Once that determination is made, then a determination of the ordinary high water

mark as of February 12 - February 14, 1912 must also be made. The statute provides that the current channel of the river is presumed to be that ordinary high water mark unless there is clear evidence presented to the contrary. This commission hasn't conducted any evidentiary hearings on where this river bed is or may have been. The public maps that were provided at the original public meeting had on those maps a line that allegedly depicted the high water mark as of February 14, 1912, which was substantially further from the river than the current bed. I think this commission and the State Land Department is misleading the people that may be adversely affected by this proceeding by virtue of the disclaimer. The State Land Department can no more disclaim an interest in the property that is subsequently determined to be within the state's ownership by virtue of this disclaimer any more than they could sell it for twenty five dollars an acre. So I think that the issue of the disclaimer has to be addressed by this commission and should not continue to mislead people, I think, with respect to the possible effect of that disclaimer.

Jennings Well, I think disclaimer was a governmental decision made by the - actually the governor as the chief executive of the state and through his agents, the State Land Department. The commission had nothing to do with the disclaimer. We don't even decide, as you are aware from the statute, what the bounds of the river would be. Our sole issue at this point would be navigability and then the public trust values that might be associated with navigability. The location and the land actually encompassed is the function, as I understand, of the State Land Department. I'm not sure if we are in a position to over rule what the governor and the State Land Department did, if we wanted to.

Weldon Well, the sanctioning of the disclaimer by this commission with some degree of authority or authenticity, I think skews the process in the sense the people who are going to be affected by your decisions are not going to be here and it obviously creates due process problems. I can't understand, frankly, how the State Land Department could have thought they could have issued that disclaimer without conducting, first, the hearing on navigability and then subsequently determining

what the ordinary high water mark was in 1912. Particularly since they published a map that showed the high water mark substantially different from where the current bed of the river is.

Jennings Well, it could be, but they didn't, the governor nor the Land Department really didn't consult the commission formally on that when they took that action. Yes, sir.

Schlosser Mr. Chairman, my name is Ron Schlosser and I'm - I received a notice yesterday that I'm item number four for oral argument and my question is, do you believe you'll get to those four brief arguments this morning. Or are we going to be getting into other issues.

Jennings I'm hoping to get to them. We're trying to clean up some things. I will just bring everyone up to date here, since I know you're all very interested in. House Bill 2324 apparently was passed by the Natural Resources Committee of the House. Twelve voting in favor and one absent. So its progressing.

Hoffman

Mr. Chairman, Bob Hoffman, members of the commission, I'm appearing on behalf of CalMat Companies. Relative to what Mr. Weldon was talking about, I think his point was that there is sufficient uncertainty as to the affect of the disclaimer that the people who are outside of the disclaimer are people who should be concerned in the proceedings here as to whether or not the river was navigable. And if this commission in it's process places too much emphasis on the disclaimer to discourage people who might, in fact, be affected by your determination of navigability because of the uncertainty of the disclaimer, then a dis-service is being made. So from your perspective I would urge you to not give people assurances that the disclaimer solves their problem because if in fact you determine the river to be navigable and the disclaimer then turned out to be not effective then you will have affected those people's titles that are out side the current bed. So that's, I think, what John's point was and I think it deserves re-emphasis because those people who are outside the current bed are potentially affected by a determination by this commission that the river was navigable.

Schaper Mr. Chairman, I'm John Schaper and I don't want to add to the confusion, but I feel obligated to do so because of the problem involving appearances. The commission has scheduled hearings for this morning on certain motions relating to jurisdiction. And other matters. We may have people who will appear next week who will be interested in those matters and who would want to respond or to join or to file additional motions addressing the same issues and my suggestion would be that the commission not undertake the resolution of these motions until it has reached a point where it knows that there will not be any further notices of appearance and the people will not be foreclosed in the future from participating in the disposition of the motions. One other procedural problem, I assume that by continuing the hearing the commission has, in effect, canceled the pre-hearing conference which had been scheduled for February 2nd. And that all of the timing of filing motions and taking procedural steps which were outlined at the last meeting of the commission have been put ahead until we reach the point where we are thirty days away from another hearing date.

Jennings Unfortunately, John, though granting, even, say, assuming you are making a motion to continue the hearing on these items, because of the way the rules are written, with the notices being filed up to thirty days prior to an actual evidentiary hearing, we may never get every body in who wants to hear or appear, or speak on it, or whatever it is, so I don't know quite how to -

Schaper Well, I don't have the answer. I'm just here to pose the problem, your honor, and part of the problem is that when these motions were filed, we did not have mailing lists. We just made them up as we went along and sent them to people that we happened to know would have some interest in what was going on and I'm sure what I sent probably went to people who didn't care whether they got it or not and they threw it away and what I didn't send is probably of interest to some people who were not on my mailing list.

Jennings Well, with a view towards - something happened __ the legislative end, I was trying to get the, at least these preliminary issues and at least the jurisdiction and our commission's legitimacy, you might say, at least out of the way before we got

into the - and determine whether it may be the motions are good and will be granted and then we don't have to worry about it at all, but I gather what you're suggesting, or is it that you want to make a motion to continue the hearings on these four motions and any other motions until some future time.

Schaper — Well, I'm prepared to argue the motion this morning, you know, I received a letter last week indicating that it would be heard and so I'm prepared to go ahead. It won't take me much time. I can do it in a few minutes, but I am concerned that there are other people out there who may not have yet appeared or who may not have received copies of the motion who are interested in it and would have a right to participate in the disposition of the motion and the presentation of a position with respect to it. If in order to bring it to a head, you want me to make a motion, I would move that the hearing on those four motions be continued to a subsequent date to be set by the commission.

Jennings — What do the commissioners think of that request by

Péwé	I think it has merit, but I was wondering if we could go ahead and hear what's before the commission now and maybe have a provision for taking care of additional people that might file in the future.
Ramsbacher	Yes, if we could do the four today and then, if necessary, continue. Do we need to make the -
Jennings	Unfortunately, the way this thing is set up, sort of a multi-party litigation, anyone who appears can make a motion, even if it's the same motion that was previously made by another party. I mean, we don't have a - as I see it anyway, you other lawyers will have to help us in this, but I don't see that there is any ruling on, obviously a ruling in favor of one of these motions as to navigability jurisdiction, that various thing, you know, would at least put the whole process to an end, but that the denial of one would not preclude some other party, whether he's appeared already or he's not appeared, from coming in and raising the same issue. That's one of the problems that I perceive. We could hear Mr. Hoffman's motion which is very thorough and well briefed and if, say, it were not granted, which I have no idea

what will happen, then someone else could make the same motion down the road. And obviously we could shorten the hearing and the oral argument time on it if no new issues have been raised, but I don't see any procedure for precluding someone from raising that issue again and again in these proceedings.

Hoffman Mr. Chairman, Bob Hoffman, again. I would oppose any continuance, I think, I mean, basically we take each legal proceeding, each proceeding before the commission as we find it. Provide notice to parties relative to it and if they are interested, have appeared, or had received notice at that time, they can appear and make argument, file a pleading with the commissioner, whatever. And so we served, at the time we filed this motion, everybody that we - that had been on any mailing list that we were aware of. We also made sure that the newspapers published the fact that it was - had been filed. I made everybody at the hearing on the 21st of December aware that it had been filed, so that I think anybody who has an interest in at least my motion and the motion of Mr. Wilks, I think, will have at least known about it and, you know, taken whatever action they needed to

take. In fact, two oppositions have been filed to the motion. So I think the issue is joined.

Jennings The commission has indicated a desire to go ahead and hear formal argument on it at this time, so

Schaper Mr. Chairman, Mr. Weldon whispered in my ear and I would withdraw the motion that I made, which is easy to do after it is denied.

Jennings Thank you. We'll hear one other gentleman that's been waiting and then we're going to go into oral arguments.

Duncan Okey. I'm Rick Duncan. And I've investigated this very detailed and what I found out is that this territory of Arizona had right even to claim the waters of this state. Because of the unique situation of our aridability that was granted to the territorial, not just to the state. And when they claimed it for irrigation, instead of navigability, and they had a choice one way or the other. They couldn't claim it for both. Our inland waters were claimed for irrigation. That's why we have an appropriation system such as we have right now. They could have claimed it either

way. They could have claimed it for irrigation or navigation. As a matter of fact, it's in the territorial statutes. Now, your Arizona constitution recognizes all of the decisions in the statutes. That's Article, let's see, Article 22 Section One. No rights, actions, suits, proceedings, contracts or claims or demands existing at the time of admission of this state into the union shall be affected by the change in form of government from territory to state. Now, the territory claimed our inland waters for irrigation. The Pyle report verifies this. The sundry act affirms it. The 1910 court decision affirms it and the desert act of 1902 definitely affirms it because the federal government gave money to create our dams to affirm our irrigation, not navigation.

Jennings Well, we'll take your comments and your thoughts into consideration along with that.

Duncan Well, okey, there's one more other thing here too, is that, in a case like this called the yahoo case, where land was sold by federal government, or state, and they wanted to rescind it. The court decision which still stands to this day, as

old as it is, 1810. If an act be done under law, a succeeding legislature cannot undo it. The past cannot be recalled by most absolute power. The deed is done. The thing is to recognize that. The stuff you are doing right now is actually in all intents and purposes, moot. It's already been claimed. No navigability. Period.

Jennings Did you file a

Duncan Yeah, I got a thing going with you guys. I just heard about this meeting just now and I came because I been talking to Mr. Killian and people in the legislature over there and tell them recognize what's already done. The idea of arguing this point now is a moot point. Because you can't, I mean even the Supreme Court says once you've made a decision, it's done. When they made the dams, all the ____ the river no longer served the public trust under appropriation rights. It stopped serving it. It was subject to disposal. It was disposed of. It was really that simple. I'll leave this with you, if you wish.

Jennings File it with the

Duncan I think you may already have a copy, but just in case.

Jennings Okey. Thank you very much. Mr. Hoffman. We will now take up the oral argument on the notice of lack of jurisdiction request for termination of the proceedings filed by Mr. Hoffman on behalf of CalMat a Delaware Corporation, CalMat Co. of Arizona, an Arizona Corporation and successor Arizona Sand and Rock, CalMat Properties Co., a California Corporation, CalMat Land and Allied Concrete and Materials. You have ten minutes, Mr. Hoffman.

Hoffman Thank you, Mr. Chairman, as a procedural matter at the outset, since Mr. Wilks motion closely parallels mine, I think it would be best to argue these together. I haven't talked to Mr. Wilks about it, but I think it would be best to have me and Mr. Wilks go first and have the response by the State Land Department and The Arizona Center for Law in the Public Interest and I would like to reserve about three minutes of my ten minutes for a rebuttal period. If that would satisfy the commissioners and the chairman.

Jennings We hadn't planned on rebuttal, but I think that your's and Mr. Wilks's motions do parallel each other and they were responded to by the State Land Department in the same pleading, so

Wilks I have no objection, Mr. Chairman. I, too, would like three minutes for rebuttal.

Jennings All right. Proceed, you have seven minutes, Mr.

Hoffman Thank you. I'll keep my watch here. If you think I'm going over, yell at me and I'll do the same.

Jennings I'll do that.

Hoffman First thing I'd like to talk about is the framework of the motion. The statutory framework that leads us to make the motion. As you know, laws 1992 Chapter 297 Section 1F sets forth certain exceptions to the process that you are going through. And that is that this process, this commission, is to have no affect on reaches of rivers where there has been a prior judicial determination. That is the sum and substance of the statute and it doesn't require that any person, or any particular entity be a party to

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that prior determination. All it requires is a prior judicial determination. It also doesn't require you tc look behind the prior judicial determination. To test the quality of that judicial determination. It doesn't say, the statute doesn't say, only good ones or only bad ones, are ones that you have to defer to. It simply says, if there was a prior judicial determination. So the issue you need to figure out with respect to our motion, is was there a prior judicial determination. You don't have to go behind the determination to find out whether it was good or bad. You don't have to go behind it to find out what evidence was in front of the court when it made its decision. You don't have to go behind it to find out what quality of representation was given in that proceeding. You simply have to know whether there was a prior judicial determination. I think

Jennings Sort of an in rem type of action.

Hoffman If it happened and it was a prior judicial determination within the meaning of that statute, then you should in fact defer and say you don't have jurisdiction. I think if you made those

inquiries, even with respect to the proceeding I'm talking about, you would find that there was a quality decision that was made with good legal representation on behalf of the people who decided that they would not - decided that the river wasn't navigable. And that the court made an appropriate decision. But you don't need to do that. Now the proceeding that we're talking about is a proceeding before Federal District Court. It was filed in 1972 and it was an action by the Salt River Pima-Maricopa Indian Community to kick people off their property and to receive damages for the use of their property. The property they were talking about was in this reach of the river, in the bed of the river. The first pleading that was filed by the State of Arizona and the State of Arizona was a defendant and the suit was against them and they were asking for millions of dollars of damages. The Salt River Pima-Maricopa Indian Community. The first pleading that was filed by the State of Arizona said that they had better right to be there. It said that the Indians didn't have a superior right and they weren't entitled to the damages that they were requesting. And attached to that pleading was a letter, as part of that pleading was a letter, to the federal

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government saying that, for the reasons, saying that the Indians didn't have title because the bed of the once navigable Salt River was reserved to the State of Arizona at the time of admission to the Union of the state under the so-called Equal Footing Doctrine. So they raised the issue in the law suit. And then at the end of the law suit in 1977, there was a judgement that was entered. That judgement said, based upon findings and facts and conclusions of law that are attached hereto, and those findings included a specific finding that the Salt River was not now and never has been a navigable river. It entered a judgement awarding damages and ejectment to the Salt River Pima-Maricopa Indian Community. It was an issue, it was decided by the judge. Now, there was a stipulation that formed the basis of the findings of fact and conclusions of law. That stipulation agreed among the parties that in fact it wasn't navigable. The State was a party to that stipulation. But the fact of the matter is that that found it's way into the judgement and the judgement was that the river was not now and never has been navigable. And in the memorandum supporting that judgement the court went through factual support for that finding and cited a

survey in the 1870s by Mr. Chilson, who surveyed the river. And when he surveyed the river, the requirements of surveyors was, if it's a navigable river you're to survey both sides of the river. Both banks. You're going to survey both banks. He didn't do that. He only surveyed one bank. And so the conclusion was necessarily necessary that he determined, because of his instructions that this was not a navigable river in 1877 when he did his survey. And that supported the judge's finding that the river was not and never has been navigable. Now, you have precedent for the relief that CalMat is requesting here. In June of this year, a petition was filed on the Agua Fria River. And I have attached that to my reply and in August of this year you made a finding as follows: Section 1F of the Act creating this commission provides this Act does not affect reaches of watercourses where determinations have been made by judicial actions before the effective date of this Act. And then you went on to find that the judgement of the Superior Court on the Agua Fria issue was a prior determination. If you look at that judgement, which I have also attached to my reply, you will see that that was also by stipulation. It was by agreement. So we have a

precise parallel here. There is no reason for you not to follow that parallel with respect to the Salt River and take the judicial determination that was made in 1977 by a Federal District Court judge with my clients as parties, the Salt River Pima-Maricopa Indian Community as a party and the State of Arizona as party and rule that that's a prior determination. If you do that and that's the ruling and this matter is dismissed because of lack of jurisdiction, I think most of these problems that have been raised by a lot of people may go away. And I'll reserve the rest of my time for

Jennings One question. You say that any judicial determination regardless of the issues involved, who was a party, or anything that determines non navigability would be binding on us.

Hoffman The statute does not say you look behind the judicial determination.

Jennings Do you think that a suit between two private parties over their land, what the boundary is, which happens to encroach on a river, whether navigable or not, where they are trying to set a

boundary line and they stipulate that the boundary line which is somewhere in a riverbed that the river at that point is not navigable and that is included in the judgement, that that's binding on the State of Arizona.

Hoffman — I don't think there would be a determination in that proceeding that the river was not navigable. Because it would be un-necessary for the dispute as between those two private property owners.

Jennings — Was the issue of navigability a central issue in the Salt River Project Pima-Maricopa Indian case.

Hoffman — Yes it was. Because the state could not have been ejected from the land if they claimed title pursuant to the Equal Footing Doctrine. If they title pursuant to the Equal Footing Doctrine the Indians couldn't kick them off that land, no matter what. And the reason is that the state's claim to land based upon the equal footing doctrine generally is greater than the Indians claim to land when a reservation is made by the Federal Government. Unless there is a specific reservation in that grant to the Indians of the river bed, a specific grant to the Indians, then

the presumption is, there was no intent of congress or the executive to pass title. And so in that instance, if there was no such specific reservation and there wasn't in the case of the Salt River Pima-Maricopa's, then the state would have a superior claim to title and would have had in that case and had, and so it became a necessary issue because in order to kick them out, the Indians had to prove that they had better title than the state.

Jennings One other quick question. Your motion seems to go to the entire reach of the Salt River from Granite Reef Dam to the confluence of the Gila. But yet your case and your precedent apparently only deals with a relatively small part of that reach.

Hoffman I understand that. I didn't select the reach that has been described in the report that you've given. I take it that the commission, when they selected the reach from Granite Reef to the Gila River felt that that reach was homogeneous and that there were, that there probably weren't distinguishing characteristics of the river as between the upper portions of that reach and the lower portions of that reach. So that the

selection of that reach, I think, determines the nature of the claim of prior determination here. I think, in fact, that's probably correct. There is no different characteristics relative to the navigability of the river as between the reach that was actually litigated in the Salt River Pima-Maricopa Indian case until perhaps the Gila River comes in. I'm not sure if it doesn't really go all the way down, but at least in that reach the characteristics are the same and

Jennings All the way down to the Colorado?

Hoffman To somewhere - somewhat close to the Colorado. But I don't - I'm not asking you to make that ruling. The only ruling I'm asking you to make is that there has been a determination - prior determination on this specific reach that is involved in 94-1. And that's the reach that was designated and done the study by CH2M Hill and their study report doesn't make any distinctions between the portion of the river that lies next to the Salt River Indian Community and the remaining portions and so I think there's a basis for you to decide that that determination applies to the entire reach.

Jennings Without any evidence as to the similarity of the - in other words, your legal authority and your basis of your motion is this decision.

Hoffman Yeah.

Jennings And that only covers a relatively small part of the reach.

Hoffman I think if someone were to say that it doesn't apply to this portion, they should have come forward with evidence that it didn't apply to the rest of this reach. I mean nobody has made the claim, nobody before you has opposed this motion and the report itself, the evidence in front of you, nobody has made the claim that the characteristics of the reach that was determined in the Salt River Pima-Maricopa case is not - are not the same as the characteristics of the remaining portions of the reach.

Jennings But then neither have you put on any evidence that the situation where you claim judicial precedent on is identical to that part of the river which you do not claim judicial precedent on.

Hoffman — Well, I think the evidence is in the record, however, Mr. Chairman, because of the report of CH2M Hill that you received and your designation of this as a reach. I assume that that was done with some basis, in fact, instead of me coming forward and providing extra support for that I think it's the burden of somebody who would claim that it's not the same to come forward and prove otherwise.

Jennings — Okey, then, your motion is that the entire reach that has been designated is non navigable based upon the judicial precedent and other matters

Hoffman — My motion goes to the entire reach and it is that there has been a prior determination relative on that reach.

Jennings — Okey. Thank you very much. Mr. Wilks.

Wilks — I'm Richard Wilks, Shea & Wilks for the Salt River Pima-Maricopa Indian Community. Mr. Chairman, with the small exception of Mr. Hoffman's discussion of the relative weight of reservation creation boundaries and Equal Footing Doctrine with which I disagree. I disagree with his

interpretation. I agree with everything else he had to say and I'm going to adopt it. I'm not going to repeat it. But our motions are similar. But I want to present to the commission the fact that this is - the decision that was made in 1977 was a real decision and the litigation that was filed by the Salt River Pima-Maricopa Indian Community in 1972 which lead to that judgement was a real case and it was really battled. The State of Arizona was no patsy then, _______ no patsy in this litigation. The result therefore came after a dispute and a dispute which towards the very end resulted in some agreements and final judgement. And it was a dispute not about esoteric ideas. Not about philosophical concepts. But about the ownership of land. Because the president of the United States on June 14, 1879 created a reservation for the Pima's and Maricopa's of Salt River and he described that reservation. I'm only going to read a small part of that description. It said at the beginning of the point where the range line between ranges four and five east crosses the Salt River, then up and along the middle of said river to a point where the easterly line of Camp McDowell Military Reservation, etc. Now when the Salt River Pima-Maricopa Indian

Community people read that they believed it. They believed it to be correct. Now the question became not whether that reservation, that line was correct, but where actually was that line. The middle of the river. Not whether it was the middle of the river, but where there were two channels, in which channel. And that issue was dealt with by the then Secretary of the Interior, Stuart Udall. There had been a considerable research Mr. Udall, then Secretary Udall, instructed the solicitor of the Interior Department to review the boundary, review the documents to make a recommendation to him and the solicitor did that and on January 17, 1969, Secretary Udall issued his order, his memorandum setting out that the middle of the river as in the Executive Order was in the southern channel of the river with the Salt River Indian Community lying north of it. Now that happened, they published it, people objected to it, the ordinary administrative course. The Salt River Community looked at all of those objections. It was at the same time a statute of limitations problem closing in on such disputes. And after requesting that the United States being an action to eject those who had trespassed on that land, the United States

having refused to do that, the community brought that action. It brought an action to get land. To have a determination by a Federal Court as to what land was in the reservation. And they had that determination. And they had it after, as I indicated earlier, significant litigation. The State of Arizona sent it's lawyers back to Washington, D.C. to interview the then former Secretary Udall. And many of his assistants to do depositions. A trial was held and a pre-trial stipulation was entered into and that stipulation, as Mr. Hoffman indicated to the commission said that the Salt River was not navigable, then nor had it ever been. And that was the basis of the state's case. Because the state was claiming it's right and what it had done was to claim some land within that area which was within the Salt River Reservation and use it as a borrow pit to take sand and gravel for the use of the State Highway Department in the building of roads and so on. They used that land under a license and permit from the United States government. Not from the Salt River Indian Community. So that if they had a right, it was only if the United States owned that land. The United States could only own that land in the river bed if there was no - if the

stream was not navigable. It was a clear line that they had to follow and they followed it. They knew what they were doing. And they lost. The court ruled against them. The court held that the Secretary was correct in determining the southern boundary was located in the south channel and that that was a proper determination properly made. The idea that somehow this judgement, which brought before the court the Salt River Indian Community and the State of Arizona on the very issue which this commission is now undertaking to deal with is not a prior determination and binding on this commission, makes no sense whatsoever. Thank you.

Jennings Ms. Simpson

Simpson Shirley Simpson, representing the State Land Department. Mr. Chairman, members of the commission.

Jennings You need to either speak louder or get closer to the mike, so

Simpson I will. I'll get louder. There's a very important principal at stake in this argument. And that principal is whether the people who have

the interest in the property that is going to be divested have been heard and have had an opportunity to litigate and protect that interest. That's what did not happen in the U.S. District Court case that is presented by CalMat and is relied upon by the Indian Community. I'm going to deal first with CalMat's argument about the statutory provision itself. That provision is a restatement or a reaffirmance of the common law of collateral estoppel and res judicata. Now the law on this is that this state under ARS Section 1201 adopts the common law unless it's repugnant to the situation. The law of res judicata and collateral estoppel is not repugnant to the situation in the State of Arizona. And the cases that I want to cite to you are these. S.H. Cress and Company versus Superior Court.

Jennings Are they contained in your memorandum?

Simpson No they're not, because this, I am really responding to the reply.

Jennings Could you furnish those citations so that they can be given to the commission to read. Go ahead.

Simpson I will. I'll give it to you here right now, too. It's 66 Arizona 67. You'll find it pinpointed at 73 and the stands for the proposition that the common law may be changed by statute, though it must be done expressly or by necessary implication. And by that it means that the intent of the legislature to change the common law has to be expressed by the legislature. Another case is Tucson Gas and Electric Company versus Shantz 5 Arizona APP 511 pinpointed at 515. That stands for the proposition. Its a fact that the statute partially codifies common law does not necessarily abolish the remainder of the common law rule. And most importantly is in re estate of Thalen 9 Arizona APP 157 at 160-61 which stands for this proposition. Where right exists at common law in this case the states right and interest in its public trust land. And a statute is enacted which could be construed as being consistent with the common law. Then the courts and this commission are required to favor consistency with the common law. The commission is not to presume that the legislature has repudiated the common law without a clear manifestation that such was its intent. I think that's the law that governs the situation with this provision in the 1992 Streambed Act.

Additionally, in response to CalMat's argument, if the commission were to construe Section F2 of the 1992 act as removing its jurisdiction and not giving the state an opportunity to protect the beneficiary's interest in public trust land. Then, even though the principals of collateral estoppel would not have that effect. Then that provision would have exactly the same effect that was found unconstitutional in the Center for Law. So I think you have to read this provision in connection with the Center for Law and in connection with these cases that I have cited to you. Now, with regard to the petition for the Agua Fria - on the Agua Fria. That precisely proves the point that I'm making here today. For collateral estoppel to apply, you need to have the issue actually litigated. In that case, through a summary judgement motion Maricopa brought that issue supported by facts and affidavits and a report before the court. The Land Department, not ADOT, but the Land Department, who is given the responsibility for managing public trust land was a party, they were represented by the attorney general, an investigation was made within the Land Department and by the attorney general's office to see if this - if the Agua Fria was navigable or

not. They determined that given the evidence before them they could stipulate that it was not a navigable river, and that's what happened there. The Land Department on the relation of the state, of the behalf of the state entered into a stipulation after an investigation and the issue was essential to the judgement. It's exactly opposite from the situation that we have here. Finally, let's get back to the basic principals of collateral estoppel. The case that is brought before you as estopping this commission from acting, really estopping the state from arguing that the Salt River was navigable was a case between the Indian Community and ADOT as a licensee or holder of rights of way from the federal government. Now, the Department of Transportation has never had, still does not have, any authority to deal with public trust land. So any action that took in that litigation was completely outside of its authority. Could not act. This precise case was brought before the Court of Appeals in CalMat versus ADOT, which is cited in my brief. And the court had before it the very argument that you have before you today and ruled against CalMat. So that case is directly on point and stands for this proposition.

Secondly, the Land Department was not a party to that suit. The Land Department even then had the management of all land which was not specifically in the authority of some other agency to manage. So it was the agency that had the responsibility to defend these interests. ADOT had absolutely no interest in defending this. It may have thrown it out as a defense, but it certainly didn't have any interest in litigating it because had that been true it's licenses and rights of way would have had no effect at all. Would have had to come to the State Land Department to get permission to be there. So it was the wrong party, had no interest in litigating the thing, there was no factual determination underlying this. It doesn't show up in any of the documents that were filed with CalMat. So there was no full opportunity to litigate. And finally, the judgement didn't run against the state. Don't you think you will find if you examine the judgement carefully in that case, that the tribe got a remedy against the state. And lastly, the determination was not essential to the judgement. This was not a quiet title action, which was how you determine who has the rights to the land. It was a trespass and ejectment action. The only way you can try title

and have it have the conclusive effect that you want is to have a quiet title action in which the real parties litigate that issue. Finally, they have facts for the wrong remedy. If you decide that the state is precluded certainly, the Center for Law is not precluded. They weren't a party to any of these suits and they have standing to bring this before the commission. And as was illustrated in the Hassell case, they also have standing to litigate before the Superior Court.

Jennings One question, Ms. Simpson, do you have any comment on the Hoffman's position or assertion that the judicial precedent which he claims which may or may not be valid, but that it extends to beyond the lands in which were discussed in that case.

Simpson Mr. Chairman, the judgement deals only with reservation lands. I think it can have no wider application for that under principals of res judicata.

Jennings We'll hear from Center for Law in the Public Interest.

Baron Mr. Chairman, members of the commission

Jennings Dave, you're going to have to speak louder or get closer to the microphone, too. We're having trouble with the audio today.

Baron And I was complaining, I was one of the complainers on that subject before. I want to just respond briefly to the interpretation of the statute given by Mr. Hoffman. The statute that says the commission has no jurisdiction whereas to reaches where determinations have been made by prior judicial actions. Mr. Hoffman suggested that any judicial determination, even one reached by stipulation between two parties would be sufficient for that and the chairman raised the question, well, does that even mean two private parties could stipulate away the state's - stipulate navigability so it's a ___________ jurisdiction. And the question didn't really get answered because in the example that the chairman gave, navigability wasn't an issue in the case. Although I guess that raises a question about the quality of this judgement, which I shall get to in a second. But suppose it was an issue. Suppose Mr. Smith and Mr. Jones have a dispute. Say Mr. Jones wants to float down the river over Mr. Smith's property. And they have a dispute over

whether Mr. Smith can do that and so they have a law suit and they stipulate one way or the other. Navigable or not navigable. Just between them. There may be some money exchanged, or something like that. Does that deprive this commission of jurisdiction because Mr. Smith and Mr. Jones stipulated that the river was not navigable and they got a judge to adopt that stipulation. I think the commission can adopt a reasonable interpretation of this provision. And the reasonable interpretation is that the commission's jurisdiction is limited where judicial determinations have been made in fact where the matter was presented to the judge, the judge heard the evidence and made a decision. As to the state's trust interests. And we didn't have that in this Salt River Pima case and I would urge the commissioners to look at the judge's decision. He doesn't say one word about navigability. He doesn't even say one word about public trust. His whole decision is based on the laws governing the creation of the reservation and the laws governing how the Secretary of the Interior can survey these lands and you know, whether he has the authority to change his survey. A fair reading of that decision shows he didn't consider navigability to

be an important issue in the case. Or even a relevant issue. All you have is his pro forma adoption of the stipulation between the parties which is something like thirty paragraphs long and there is one little mention of navigability. It doesn't say for what purpose. Salt River has never been navigable. Well not navigable for what purpose. You know there are lots of definitions of navigability in the law. It's navigability for public trust purposes. There's navigability for commerce purposes. There's navigability for all kinds of purposes. So to elevate this judicial decision to a determination of navigability is really going awfully far and the average person looking at this case would have no idea at the time it was pending that's what was involved. I should point out, too, that the materials produced by Mr. Hoffman don't show any formal judgement, final judgement, against the state on this issue. There is some money damages awarded against some of the individual parties but no formal judgement on this question. As to the issue of how far, even if you could say this was a determination of navigability, I strongly disagree with Mr. Hoffman's suggestion that somehow you can project it to the entire river. It wasn't involved in the

case. And whatever stipulations may have been made for purposes of that case can't possibly apply anywhere else. Now if you want to try to draw an inference from it, it's pretty hard because there wasn't any factual evidence before the court on navigability. But that goes to the weight of the evidence, it doesn't preclude you from hearing this matter. Finally, if you decide to, eventually, you don't have jurisdiction because of this decision, either as to the small stretch at issue or further, it's not going to resolve anything. All you're going to be saying is the same thing that you said with respect to the Agua Fria, which is, you don't have authority one way or the other. That's all the statute says. And that's not going to resolve anything. The purpose of this commission is to clarify the situation on these rivers to confirm whether they were or they weren't navigable. If they weren't, the state has no interest, if they were then the state does, but if you have no jurisdiction it's just going to leave the matter unsettled. And I don't think that's consistent with the purpose of the statute creating the commission.

Jennings Thank you. Can we have rebuttal now.

Weldon

Mr. Chairman, under your rules you adopted in November you were - there was a briefing schedule that was set forth and the Salt River Project believed it had until the end or nearly the end of this month to file an joinder to Mr. Hoffman's petition in response to this petition. It wasn't until yesterday that we found out that this case was going to be argued today. So we have not filed aa joinder but we would like to be heard on Mr. Hoffman and the Salt River Pima's motion on this issue.

Jennings

Well, we'll consider that you have joined in. If you desire to file something

Weldon

We have something we'd like to say, but since today is the opportunity to present argument on the motion.

Jennings

Okey

Simpson

Mr. Chairman, if I may speak to that. Mr. Weldon had in filed a motion and the State Land Department has not had an opportunity to respond to that ______ I think this argument should be postponed

Jennings Yeah, that's probably a good point.

Weldon No, I don't intend to argue the motion that we filed on behalf of the Salt River Project. What I do intend to address are some of the points that Ms. Simpson and Mr. Baron raised today with respect to these two motions.

Jennings I think it is more appropriate for the proponents to in their rebuttal to answer Ms. Simpson and we'll take your motion up later on if there is anything that you want to take on it.

Weldon Well, I want to file a joinder in this motion and I'm entitled to have an opportunity to argue our joinder, then at some point in the future. But, you've short circuited your procedures about joining in these motions and

Jennings We'll consider that you are joining and are all in favor of the motion. I assume the way it's filed.

Weldon But, that's not the points we would raise and our response today are different than the points we have raised in our motion ______________________ .

Jennings	Then that would be a different motion that you might want to file.
Weldon	No. We want to join with Mr. Hoffman's motion and address the issues that Ms. Simpson has raised.
Jennings	And raise other issues other than Mr. Hoffman and Mr. Wilks have raised.
Weldon	Well, it relates to this motion and the scope of the jurisdiction of this commission and whether the Salt River Pima judgement is in fact res judicata on this commission and whether res judicata is even an issue that is before you under the way the commission's been created by the legislature.
Jennings	Well, we'll consider it when you file something. But right now you're not really in - we'll consider that you joined or are asking for the same relief. But I'd like to hear, I think, rather the rebuttal from the two gentlemen. I think that the motion and its proponents are aptly represented by Mr. Hoffman and Mr. Wilks.

Weldon — That's fine, but I think you have effectively denied us an opportunity to appear before the commission on these two motions.

Jennings — You may a chance to file any motion that you want to, Mr. Weldon, at any time and we'll hear it.

Wilks — Mr. Chairman, I'm going to say something I didn't think a lawyer needed to say in a proceeding such as this. And I think that all lawyers in this room will understand. You file a law suit. You get an answer. And sometime down the line a judgement is made by some judge. And during the course of the law suit the plaintiff or the defendants recognize that everything they said in their answer or their complaint is insubstantial. And they change their position and they think that strategically or for some reason they're better off saying something else. And they come to a point in litigation where they stipulate and the rules of the court provide for that and so a judge at the end of the day sitting there after a trial doesn't have to decide every little thing or every big thing that's been raised in the course of litigation or that might have been raised. It is preposterous to believe if Mr. Baron believes it

that unless the judge says I have considered the issue of A and having considered it and heard evidence about it I decide this way on A that that isn't a binding judgement because he has accepted and incorporated the stipulations of the parties. Those stipulations have the same weight as if the issue itself had been tried. Without question. Now almost to the same level that we shouldn't be talking about is whether the attorney general of the State of Arizona has the authority under the statute that was enacted creating the Department of Transportation in 1973, cited by the assistant attorney general to stipulate whether it is in the best interest of the Department of Transportation. Here is a case in which the Department of Transportation was getting it's sand and gravel based on a permit - not from the State Land Department, the trustee, apparently the trustee, but from that party it thought owned the bed of the river - the United States. And it was in it's view then fighting to retain that right that it got by virtue of the permit and the license. And it did, it in a way, which was rational to do. And it stipulated that the bed of the river - that land, was owned in fee by the United States. It's another stipulation in that long line of thirty

paragraphs as Mr. Baron suggested. A perfectly rational thing to do and the authority was in the AG to do that. I've cited that authority from the statute adopted in 73 in the State Land - with the Department of Transportation. Thank you.

Jennings Mr. Hoffman

Hoffman Thank you, your honor. I join with what Mr. Wilks said. The state, the last time I heard was the state, it's not two different entities. The state is the state. The state was a party to that proceeding. The idea - the red herring that Mr. Baron has thrown out about two private parties is inapplicable. The state was a party. The state was there. It was determined. This collateral estoppel argument, with respect to the CalMat case has no application here. Mr. Wilks was not a party to the CalMat case that was filed in 1991 that decision that they rely on. And so even if CalMat were somehow precluded from raising the issue Mr. Wilks is perfectly capable of doing it. Mr. Weldon is perfectly capable of doing it. Both their clients are perfectly capable of doing it, because they weren't a party to the CalMat appeal. So that is another red herring. Now this red

herring about the stipulation. If you go back to my reply and attached to my reply is the amended order and judgement on the Agua Fria. Read that carefully. It says that the stipulation is approved. Secondly, that the State of Arizona and the State Land Department have no interest. The State, legal or equitable, by reason of the Equal Footing Doctrine and the lands of Maricopa County which constitute the beds, etc. etc. That pursuant to the Equal Footing Doctrine the State of Arizona has never had and does not now have and shall not hereafter claim an interest in the ____ legal or equitable in the lands described in the above paragraph two. That's a stipulation as a judge to be a disclaimer of the state's interest in the lands. It's a stipulation. Just like was entered in the case in 1977. A stipulation. They questioned without any evidence. They say, boy, that stipulation, they didn't know what they were doing. Well, I take it because it was signed by the state attorney general through his representative that they in fact did something and knew what they were doing when they filed the stipulation. That they were confident to represent the State of Arizona and it's interests. The presumption that Ms. Simpson would like to

have you apply is that they didn't know what they doing in 1977. That they had no idea of public trust interest. That they had no idea that there was a claim based on navigability. When a letter from her own office filed on the first day they filed an answer said we claim title to this property based upon the Equal Footing Doctrine and therefore you, the Salt River Pima-Maricopa Indian Community have no right to be here. So the argument has no weight whatsoever. I think you have to presume that the state attorney general's office and the State Department of Transportation knew what they were doing and knew what the state's interests were when they agreed to the stipulation. You don't have to presume that they were idiots. And they knew what they were doing and they did what they did and having entered that stipulation and having that judgement entered is a prior determination under even the most restrictive determination, or restrictive interpretation of the statute under which your jurisdiction is to be decided. Now, finally, with respect to Mr. Baron's point that it doesn't solve the problem if you granted the motion. I suspect that anything you do here with respect to Mr. Baron won't solve the problem. If you grant this

motion, I believe that Mr. Baron will be in the position of having to take your decision to the Court of Appeals and to the Supreme Court by a judicial review administrative action. If you don't grant it, I suppose I can do the same. It's a question if you think this is a balancing act. It's a question of which side of that issue you want to be on. It seems to me that the commission should be on the side of the issue that says that the State when they decided in 1977 that it was not navigable was right. That the judge was right in 1977. And that the courts and ______________ and other prior decisions that have been cited in other materials before the commission now knew what they were doing. That Mr. Chilson knew what he was doing when he in 1877 surveyed the river. I think the better side of that for the commission is to say, yes, they knew what they were doing. People in public positions, generally, are responsible. They knew what they were doing. They tried to do the best they could. And they did it and they made those determinations. You should follow those determinations. And let the people that are challenging those determinations take it to court and decide whether you were correct.

Jennings Mr. Hoffman, we like all other judges or quasi judicial will do our very best to make our decision. We're not intimidated by the threat of appeal or by either side or anything like that. We'll do our very best on it. Let me ask you a question.

Hoffman I certainly didn't mean to threaten you.

Jennings Do you think that the stipulation on the Agua Fria River which dealt with a specific reach and included legal descriptions, extends beyond the legal description contained in that judgement.

Hoffman I think in the case of the Agua Fria it extends to what the particulars are in that judgement. I think in this case because of what I explained before it extends to the reach that you yourselves have designated. I don't know of any characteristic of that river and based upon the report that is different from the characteristics at the Salt River Pima-Maricopa Indian Reservation. I think the Agua Fria may come in at that place between the two reaches, but I think you've already decided that wasn't navigable. I can't believe it's contribution at that point in

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the river would have an effect between the confluence of the Gila. I suppose Indian Bend Wash probably comes in just to the west of the area specifically at issue in the case. I can't imagine that that would have any effect. I think the reach was described by you.

Jennings Well, you've answered my question.

Hoffman I'll be happy to answer any other questions.

Jennings Do any of you have any questions to ask. All right, the next item, I think is objection to jurisdiction and motion to dismiss and terminate proceedings filed by Buckeye Irrigation and Water Conservation, - no, Buckeye Water Conservation and Drainage District.

Schaper Mr. Chairman, just call it Buckeye as a all inclusive terminology and don't worry about the entities. Mr. Chairman, members of the commission, my name is John Schaper, I represent the Buckeye organizations. My motion has two basic parts to it. First and foremost, my position is that the legislation which created this commission is unconstitutional because it in

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effect attempts to create a judicial body in violation of the provisions of the constitution which require the separation of powers and the provisions of the constitution which vest judicial authority only in the courts which are authorized by the constitution. And the reason I take that position, your honor, is very simple. This body is an adjudication commission. It has no administrative function. It does nothing but determine rights and in essence the rights of the people of the state of Arizona in real property located within the bed of streams. Beyond that it has peripheral function such as determining public trust values, but when you get right down to it we're talking about the ownership of property and the function of this commission is to determine that. That is a judicial function. I've sat here and I've listened to people talk about res judicata and collateral estoppel and I've heard people talk about the impact of territorial laws and the confirmation of territorial laws in the Arizona Constitution. There are motions before the commission dealing with subjects like what effect does the constitutional approval of appropriative rights have? There are questions about the effect of the desert land act and other

federal statutes. There are all kinds of questions that have nothing to do with the fact finding function. These are purely judicial questions which are normally and properly determined by the courts. And for that reason and that reason alone, our position is that the legislature could not create this commission which in effect make it a court. That could have only been done by having the legislature undertake itself to establish the parameters and determine the criteria for determining navigability or by establishing a process for that to be done in the existing judicial system. Now I appreciate the fact that there is only one member of the commission who is a lawyer and I appreciate the fact that that creates some difficulty in evaluating all these arguments. I suspect that some of them never heard of res judicata and collateral estoppel until they were here today, or until they became involved in this process. But that is basically a part of the problem. We're dealing here with a judicial function and this commission cannot legitimately perform that. Now let me go beyond that for just a minute. If we assume that the commission is properly created and constituted and it exercises a quasi judicial

function which is appropriate under the constitution there is absolutely nothing in the statutes creating the commission which provides an adequate system for giving notice to people who are going to be affected by the determination's this commission makes. There is nothing. There is a provision in the statute to publish notice and notify people of proceedings if they requested to be heard. We found out how effective the statute was when the Land Department sent out all these notices to people using the assessors records and 700 or 1,000 of them showed up and overflowed a hall downtown in Phoenix. That was the first they knew about it. They didn't know that there had been a preliminary determination of the commission, that the Salt had possible characteristics of navigability. And to this day the commission has not sent anyone and the department has not sent anyone a notice saying this specific property is at risk because the state may claim it if this commission finds the river to be navigable. Now, we have a problem with the record which is before commission now because to the best of my knowledge the Land Department has not provided an affidavit or a memorandum or an explanation of how the notices

were determined. How they arrived at who would get notices. What process was sent out. How many notices came back undelivered or undeliverable. Even if we view the commissions rules as being the standard, we have no way of knowing if the rules were complied with because to the best of my knowledge the Land Department cannot tell this commission that every owner of every piece of land within the bed of the Salt River that they intend claim has, in fact, been given notice of these proceedings. And until that is done, I think the whole process under which this commission operates is flawed. The fact that someone may have a right to appeal after they hear that they've lost their property does not cure that problem and for that reason alone I think the commission should put a stop to what it's doing right now until this matter is clarified, until the authority of the commission is clarified and until due process requirements are satisfied. Thank you.

Jennings Mr. Schaper, thank you for your comments. You pretty well laid out a lot of the problems that have been with the commission from the very beginning

Schaper	I know, this has been discussed before, last summer and I know it's been a problem. Mr. Chairman, I'll apologize to the members of the commission for shouting at them but I wanted the people in the back of the room to hear me.
Jennings	We've been shouted at a lot recently.
Ramsbacher	Could I ask Mr. Schaper a question?
Jennings	Yes, certainly.
Ramsbacher	I have a lot of sympathy for some of the things - issues you have raised here. I guess you probably heard us discuss among ourselves over the times, too, but in my mind I believe the issue, I don't think this commission can decide whether we're constitutional or not. Is that, are you putting that before us, that you think we should decide that. Or just postpone some of the things that we're doing.
Schaper	Mr. Chair, Mr. Ramsbacher, it is my understanding as a lawyer and Mr. Ching might disagree with me that any administrative commission or adjudicative commission exercise in a quasi judicial function

can determine its own jurisdiction. There is a case that deals with that and I think it involved the Agricultural Employment Board or some such organization. So, yes, we feel the commission should make a determination as to whether or not it is properly constituted and has jurisdiction. Going beyond that I think there is still this problem hanging out there about notification and making sure that due process requirements are satisfied.

Jennings To help in the answer, certainly any judicial body or even quasi judicial body has, I think, the inherent power to determine subject matter jurisdiction, party jurisdiction, and that's what goes to your notice situation and we, perhaps not perfectly, but we have tried to make sure that the notification and due process is carried through. We may not have fully but at least we tried on that. You raised, however, a more basic issue that a body has the inherent authority to determine whether it is constitutional or not. I cannot imagine a superior court judge suddenly determining this court is not constitutional and illegal and I therefore disband it.

Schaper My imagination exceeds yours, your honor.

Jennings That is my problem with the basic jurisdictional issue. The legislature created us. They may de-create us very shortly, too. But I'm not sure that we have the inherent authority to over rule, in effect, the legislature. But we'll take that matter under consideration.

Schaper I understand that dilemma. It's a question which I have researched, your honor, and which I no definitive authority to cite one way or another. I feel an obligation to raise the issue at this point so that it is before the commission and is part of the record.

Jennings Certainly, and we agree that should be in the record. Mr. Helm, I believe, you filed a response on behalf of Maricopa County to Mr. Schaper's motion.

Helm Thank you, Mr. Chairman. John Helm on behalf of Maricopa County. As our response indicates, we disagree with the Irrigation District's position on this issue. I don't want to take a lot of time. I know it's been a long morning already. I

think we pretty adequately covered what we said in our response. Just let me note a couple of things. First, I find it curious at best, that the Irrigation District should be telling you that you can't be an adjudication body and then asking you to adjudicate yourselves out of existence. I find a conflict there and I don't find any support in any of the law that's been cited by the district that would support that conclusion. Something so basic I think should have been supported by some form of citation before this commission rules itself out of existence. Secondly, there are any number of examples that allow a commission such as yourself to be in existence. And I just like to briefly quote from corpus juris secundum 73 section 33 and in quoting this, keep in mind, what the - the job the legislature's done is to give this commission the job of determining certain facts as to navigability and from those facts you determine whether a river is navigable or not and in corpus juris and this is one of what us lawyers like to talk about as hornbooks or black letter law books. This is nothing unique or nothing magic. It says, so legislative acts granting to an administrative agency quasi judicial power are valid where the

legislature has laid down the policy, established the standards while leaving to the agency the determination of the facts to which the legislative body is to apply. Now, I think that's exactly what the enabling legislation for this committee does. It lays down the policy and it leaves to you the determination of the facts. And to that extent I would also submit to you that the district's argument regarding separation of powers is without merit and should be disregarded. Finally, with regard to to the complaint regarding the notice and the due process. I would also submit that that's without merit. I think the thing you have to keep in mind. It's not who gave the notice, it's not what kind of a notice, the question that the courts present to you is, was the notice meaningful. Did it give the people it was attempting to give notice to a chance to have an opportunity to come in and be heard. And I would submit to you that the notices that have been sent out and the processes followed, the use of the Maricopa County assessor's records, which are pretty reliable in that sense, while maybe not perfect, solve that problem. And I think in that context you got to understand that within this process it doesn't have to be noticed to each and

every person. It just has to be the best job you can do. And the courts have sanctioned the best jobs the commissions have done in these situations. And to that extend I would also submit to you therefore that the due process argument that is being made to you that you are not fulfilling your job is also without merit and we would suggest to the commission that the motion presented by the district should be denied. Thank you very much.

Jennings Thank you Mr. Helm.

Clark Mr. Chairman, just briefly, I'm Karen Clark for the State Land Department. We did file a brief response saying that we concurred in the response filed by Mr. Helm. The only reason I'm getting up to take any of your time is to say that the chairman is correct when he notes that saying that the commission can determine whether it has - what jurisdiction is has and whether it has jurisdiction is not the same thing as saying that the commission has the authority to determine that the statute creating it is unconstitutional. And there is a case on point. That case is Manning versus Reilly. M-A-N-N-I-N-G versus R-E-I-L-L-Y.

That is a zoning case, but it does clearly hold that an administrative agency cannot make a determination as to the constitutionality of the statute creating it.

Jennings What is the citation

Clark That cite is 2 Arizona Appeals 310408P second 414 1965. And other than that I didn't have anything further.

Jennings The last matter on the agenda on arguments is the Demand by Ronald A. Schlosser and others that the commission determine and declare the Salt River was not navigable as of the date of statehood. I would ask you due to the time because this issue has really been covered in the other. Do you have anything new or different your fellow lawyers have already argued.

Schlosser I think slightly different, Mr. Chairman. I think maybe the new test for navigability is whether or not all of the red herrings the lawyers have dumped in it today survive. Very briefly, I just got notice of the hearing yesterday, Mr. Chairman. And I really would like to narrow the focus of my

arguments to the Kent Decree. I do not believe that this commission need go a step beyond reviewing the Kent Decree and utilizing it, not to abandon yourself as a agency, but to make an affirmative determination that the Salt River was non navigable on the date of statehood. Both from a legal standpoint by taking official notice of Judge Kent's comments and also by taking official notice of the factual determinations made by Judge Kent. I'm going to read two brief quotes to you from Judge Kent. And you're all familiar, I'm sure with the 1910 decision and decree. First I want to point out that the United States of America was a party to that suit and I think it's fair to say that the Territory of Arizona was the predecessor and interest of the state that you're setting for today. At page three of the decision Judge Kent states, quote, Entering the valley from the northeast is the Salt River, a non navigable stream, end quote. And more importantly at page eight of the decision, I'll quote two sentences. Judge Kent states that the doctrine of riparian rights does not obtain in Arizona. The right of the owner of land to divert from a natural non navigable stream, the flow of water therein, and to apply the same to beneficial use upon such land

is and is always been recognized in this territory. End quote. We believe that your task as to the Salt River alone, Mr. Chairman, members of the commission, is very simple. I can tell you, we have had no response to our demand, request, or motion for a summary declaration except today the lady from the attorney general's filed or handed me something that I don't think has been filed with the commission. Although I doubt you're going to grant it summarily on that basis, but I wanted to put that into the record. What I want to point out to the three of you that the decision by Judge Kent in those comments I just read to you, they're not dictive, as others might argue. They're not excess verbiage, they're the underpinnings of the declaration of the 4800 water rights that were established in 1910. And a declaration of non navigability, as I understand it, was a precursor or a prerequisite to that finding. That's a different argument than I heard made here today about this Indian CalMat suit. And another argument is, I don't really care about CalMat or the Indians, I care about myself and my neighbors who are impacted and the Kent decree involved the entire stretch of the river as I read the supplements to it, from Granite Reef all the

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way to the confluence. And I want to make a point that I'm not standing here as a lawyer saying that well, if there's any type of judicial determination, by god, you're stuck with it. I think that may be true as a matter of law, from what Mr. Weldon and the fellow from Snell and Wilmer said, Mr. Hoffman. But I think you can look at the Kent Decree and you should read it. There's no doubt that the Kent Decree and all the work that went into it by government agencies, by 4800 people, by Mr. Hurley, who filed the suit and by Judge Kent and the masters, clearly that was the most exhaustive study and consideration ever again to the Salt River, both from a legal and factual standpoint. And if you think about it, when Judge Kent wrote those words, he was there. So were the 4800 parties in 1910. All they had to do is get off their horse and take a look and they could tell you if it was navigable or non navigable in 1910. They did not have to rely upon newspaper articles, testimonials. I read something that your family had rafted in the river back then. But Judge Kent did not have to speculate and did not have to rely on opinions of Kayak club in 1994. Almost done, Mr. Chairman.

Jennings — Let me ask you, how do you reconcile these statements in the Kent Decree with the statements contained in Judge Fidel's opinion in the recent case of Hassell versus the Arizona Law - Center for Law in the Public Interest.

Schlosser — Mr. Chairman, I read the Hassell opinion as being very well written by Judge Fidel. On the other hand, not as clear as we would all like to have seen it. Basically, I think what he was saying is, A, State you can't give things away. It violates the constitution. But more importantly, you haven't even determined whether or not you own that which you are trying give away and we need some sort of a factual determination. And that's what gave rise to this, I think, silly statute, but nevertheless, we'll live with it. It established your body. And I'm here to say, heck with all these constitutional arguments, you know, if we end up in the court house, that's where those should be made. I think that justice would be done if you guys would apply common sense. You're obviously people of good will. Look at the evidence and quickly declare it non navigability. That's our motion and I would ask because we only got the notice yesterday if any of you have any

inkling of not granting our demand for a determination based on the Kent Decree both as a matter of law and factually, that I can have an opportunity to come back and make a little more detailed presentation than today.

Jennings You didn't really answer my question. The, because Judge Fidel and that court both at the trial level and at the appellant level had the Kent Decree before it and while Judge Fidel states specifically he does not find that there is navigability, but he says that there is sufficient evidence in the record from which a fact finder perhaps could find navigability and thus, which then gets into the title area and then that's why he declares that the legislature couldn't do it the way that they were doing it, and some sort of implied he directs that some fact finding commission or body be established to actually determine it. I mean, I guess I'm inferring from that that the Court of Appeals didn't think that the Kent Decree solved the problem.

Schlosser I would, my thinking is, Mr. Jennings, that Judge Fidel did not address the issue of navigability or non navigability. I think he pointed out that

that was not really before him. He addressed the issues upon which he issued holdings and I don't know that those arguments were really made. I mean, you've made a determination that there is evidence that it possibly might be navigable. But that's easy. I mean, it's a river bed. Any river bed at one time may or may not have been navigable. So I don't - to answer you're your question, Mr. Chairman, the Court of Appeals never addressed that issue and I think that the Court was offended that the state and the governor at that time, who signed the bill that had been vetoed by Governor Babbitt would have the gall to give things away without doing at least a little bit of homework. I don't think that opinion in any way can be read to be interpreted to find that the Court of Appeals felt that the river was navigable or not navigable or to give you any sense of guidance in that regard.

Jennings Well, if the Court of Appeals had bought your argument and the Kent Decree, the state was not giving anything away.

Schlosser That's right, but the Court never addressed that issue. The Court never said bring us evidence of

earlier court decisions. Bring us evidence of fishing, rafting and what have you. The court, I think, just pointed that out indictive. That's not part of the decision made by the Court of Appeals. Thank you sir.

Jennings Thank you very much. Does the state want to respond briefly to that.

Weldon Did they file a response to this

Jennings Yes, they did.

Simpson I'm sorry. I'm filing it right now, your honor, and I, Mr. Chairman, and let me explain. Mr. Schlosser has put on the record that he just got it today and that's true. What I also want to say, is that I certainly offer to agree with him that he have an opportunity to reply and that we deal with this motion later. The reason the state is only responding today is despite the fact, that by our rules the State of Arizona is a party to this and the Land Department is the Department that is representing the state in this case and the attorney general represents the Land Department, no service was made on the State Land

Department. And I didn't find out about this particular demand until I read the docket that was provided by the secretary. Now that being said, I will file my response and my five copies with the commission. I certainly agree that Mr. Schlosser should be given additional opportunity to respond to that and I just want to make one point. The basis that Mr. Schlosser brings this motion before you is that you should take official notice of the Kent Decree and the case on point is Scottsdale Memorial Health System's, Inc. versus Clark 157 Arizona 461759P second 6071988 and it's cited in my response and it stands for this proposition. Where there is no preclusive affect to a judgement Arizona courts may not take judicial notice of the truth of a evidentiary record in another action tried in the same court. It is permissible to take notice that a judgement has been rendered. That a record exists and of the nature of its contents. It is not permissible to bind the party to the evidence in that record except where the party was joined in or privy to the action. So it takes us right back to the collateral estoppel arguments and as to the Kent Decree, the state nor any representative on behalf of the equal footing

interest, the public trust interest was a party to that decree.

Schlosser Mr. Chairman, may I have thirty seconds to respond to what she said.

Jennings Rebuttal. We have to allow a rebuttal.

Schlosser We filed the five with your commission whose office as I understand it is with the Land Department. I called the Land Department and asked if we were to serve any one else with initial pleadings. They told us, no we were not. That they monitor the things being filed with your commission in their building. And they've had no trouble responding to other motions. Also she mis-stated the basis of our request that you take official notice. We're not asking you to take judicial notice, because I don't think you can. You're not a court. But your own rules give you, I don't think it's mandatory, but give you leave to take official notice of the records of the Land Department, anything within your own expertise and certainly prior judicial determination. Thanks

Carlock May I say something. Mr. Chairman, will the response to the State Land Department that was referred to today be filed on the other - be served on the other parties?

Jennings It will be

Simpson Yes

Jennings We're going to adjourn the meeting now and there will be a meeting held on February 2nd. Previously it had been scheduled to have a pre-trial, or pre-hearing conference, I guess at that time. And at that time the commission will deliberate on the four motions that have been heard. If there are additional motions, I would say that because of the short hearing notice any of the parties who have filed a motion, or anyone else for that matter, including the Salt River Project, and want to either join in or oppose and file a paper relating to these four matters that we have heard can do so and do it prior to the February 2nd hearing, so that we can review them before we actually deliberate on those motions as I call them. Is there anything else from the commission? Okey, do I hear a motion to adjourn?

Hoffman Before you adjourn could I comment on the February 2nd hearing. Many of us are involved in a trial of the general stream adjudication that will take place over from January 31st through the February 2nd. So if you could either hold it before or after, it would be, you would have much better participation amongst a lot of the lawyers that are attending this proceeding because, for example, Mr. Carlock, Mr. Weldon and myself, others

Jennings How long will this hearing go?

Hoffman It's going to go for the entire week starting January 31st, starting at ten o'clock in the morning through 4:30 in the afternoon, so I suppose if we met early on one morning and got through by nine thirty it would be okey, but otherwise

Jennings How long, will it go all that week and then some

Hoffman It's planned for all of that week and possibly into the next week, but a lot of us don't think it's going to go too far into the next week.

Jennings We could set our February 2nd meeting over to the week of February 14th since we now have nothing scheduled for that week. The 14th is a Monday. What about the 16th? Wednesday.

Schaper Mr. Chairman, I had another motion and there's another matter. Does the commission intend to take up all the motions at this next hearing that we're discussing?

Jennings Well, I don't know that I can answer that. We're going to deliberate on the four that we've heard argument on. And I've indicated that anyone can file anything that they want with regard to those four. Now, you're not precluded from filing any other kind of motion you want, but I'm not sure we'll hear it on that day because I don't know that people will have a opportunity to respond to it.

Schaper That's all I'm concerned with because I intend to be in Porta __________

Callahan Just to follow up on Jack's there was a requirement that we file motions as of the date of the notice of appearance. And there was also -

there were also deadlines for responses and replies. Are those deadlines still in effect?

Jennings I don't think so. In view of what we've done about the setting the hearing off on the evidentiary matters. Okey, anything else.

Ramsbacher Are we talking now February the 16th.

Jennings Is that good for you, February the 16th?

Ramsbacher Fine with me.

Péwé Yes.

Jennings All right, we will - our next hearing then, meeting of the commission and it will be duly noticed publicly will be February 16th. We will vacate - I don't think we sent notice out for the February 2nd, so it will be February 16th.

Durazo What time?

Jennings Pardon

Durazo What time.

Jennings It will be ten o'clock in the morning. Same time as this one.

Durazo Here?

Jennings Well, I'm not sure where it will be. That kind of depends on where we can schedule it.

Ott It will be at the State Land auditorium.

Jennings Okey. They tell me the State Land auditorium at 1616

Ott Yes

Jennings Okey. Do I hear a motion to adjourn?

Ramsbacher So moved.

Péwé Second

Jennings All in favor say "aye".

All responded "aye"

Jennings Meeting then is adjourned.

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96-002-015
SALT RIVER
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ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION
(ANSAC)
1616 W. ADAMS STREET
PHOENIX, ARIZONA 85007

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THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION MEETINGS SCHEDULED FOR MARCH 9, 1994 AND APRIL 11TH THROUGH 15, 1994 HAVE BEEN CANCELLED.

YOU WILL BE NOTIFIED BY MAIL WHEN THESE MEETINGS HAVE BEEN RESCHEDULED.

Dated: March 4, 1994

Rec'd 12-22 1993
By: R [illegible] 11:35a
ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

Robert B. Hoffman, 004415
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Attorneys for Petitioners CalMat Co., CalMat Co. of Arizona, CalMat Properties Co., CalMat Land Co., and Allied Concrete & Materials Co.

96-002-015

SALT RIVER
016-026

BEFORE THE

ARIZONA NAVIGABLE STREAMBED ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY OF THE SALT RIVER [From Granite Reef Dam to the Gila River confluence]

Admin. Docket No. 94-1

NOTICE OF LACK OF JURISDICTION AND REQUEST FOR TERMINATION OF PROCEEDINGS

CalMat Co., a Delaware corporation, CalMat Co. of Arizona, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CalMat Properties Co., a California corporation, CalMat Land Co., a California corporation, and Allied Concrete & Materials Co. (collectively "Petitioners"), hereby give notice that prior to July 1, 1992, the reach of the Salt River from Granite Reef Dam to the Gila River confluence was determined to be not navigable by judicial action. Therefore, this Commission has no jurisdiction to make a finding in this docket and should terminate this proceeding. This should be done immediately and, in any event, no later than January 7, 1994, in order to remove unnecessary and illegal clouds on titles and to prevent the needless expenditure of public and private funds in the preparation for the noticed public hearing in this matter.

This notice and request is based upon the following:

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1. Petitioners each own or owned land in or near the current bed of the Salt River between the Granite Reef Dam and the confluence with the Gila River. Petitioners' title to this land has been clouded by this proceeding.

2. On July 17, 1972, the Salt River Pima-Maricopa Indian Community filed a complaint in United States District Court for the District of Arizona, entitled "Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Company, et al.," Action No. CIV 72-376 PHX (hereinafter the "Suit"). Defendants in the Suit included the State of Arizona, Allied Concrete & Materials Co., one of the Petitioners herein, and Arizona Sand & Rock Company, whose successor in interest is CalMat Co. of Arizona, also one of the Petitioners herein. A copy of the complaint is attached hereto as Exhibit A.

3. The Suit sought to eject the defendants from lands claimed to be a part of the Salt River Indian Reservation and sought over $13 million in damages for trespass.

4. The nature of the dispute in CIV 72-376 PHX can be determined by reference to the Pretrial Order and the Findings of Fact and Conclusions of Law in the case, copies of which are attached hereto as Exhibits B and C, respectively. Essentially, the dispute was over the location of the south boundary of the Salt River Indian Reservation. The Salt River has or had two channels as it passed along the south side of the Salt River Indian Reservation. Exhibit C at page 5. The south boundary of the Reservation as established by Executive Order dated June 14, 1879, was "up and along the middle of [the Salt River]." Exhibit B at page 5. The defendants contended that the boundary of the Reservation was the middle of the north channel as established by a 1962 survey and decided by the United States Bureau of Land Management. Exhibit C at pages 5-6. The Indian Community claimed the boundary to be an ambulatory line within the south channel. Exhibit C at pages 7-8. Thus, the area in dispute lay in between the two channels and included a portion of each.

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The State of Arizona claimed rights in the land in dispute by virtue of permits and licenses granted on and after 1942 from the Bureau of Land Management and a right-of-way also granted from the Bureau for Country Club Drive. Exhibit B at pages 8-9. A map clearly determining the area in dispute was attached as Exhibit A to the State of Arizona's "Motion for Summary Judgment" in Action No. CIV 72-376 PHX, a copy of which is attached hereto as Exhibit D. On Exhibit A to Exhibit D hereto, the area in dispute is delineated between the two dotted lines and the land claimed by the defendants is also delineated.

5. From the beginning of the Suit, it was recognized by the parties that title to the land from which the Indian Community sought to eject the defendants and sought damages for trespass was a critical issue. For example, in paragraph III of the Second Claim for Relief, the Indian Community alleged "Title to this land [at issue] is held by the United States as trustee for plaintiff." Exhibit A, page 6. Moreover, in its motion to dismiss the complaint, the State of Arizona recognized that the Indian Community was required to demonstrate a superior interest in the land at issue in order to succeed in its ejectment and trespass action and that therefore title to the land was a critical issue in the case. See Exhibit E hereto which is a copy of the State of Arizona's "Motion to Dismiss and Motion for Joinder of Necessary or Indispensable Parties," at pages 4-7. The State made this understanding clear by stating as follows:

> The Respondent [the State of Arizona] therefore contends that it would be virtually inconceivable that this action, allegedly brought in trespass but which could more accurately be characterized as a quiet title action in which Plaintiffs are seeking to obtain a determination as to the exact location of the boundary of their Executive Order Indian Reservation, could possibly proceed to judgment without first joining those departments and agencies of the United States Government which presently claim ownership of those disputed riparian lands . . .

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"Reply to Plaintiffs' Memorandum in Opposition to United States Attorney's Motion to Dismiss," filed in CIV 72-376 PHX, at pages 2-3 (emphasis added). A copy of the Reply is attached as Exhibit F.

6. The riparian lands at issue in the Suit as to which title was to be determined in CIV 72-376 PHX were lands in the bed of the Salt River in the reach between the Granite Reef Dam and the confluence of the Gila River. These lands lie within the subject area of the proceedings in this docket and are located within the approximate Ordinary High Water Mark Boundary as delineated in the maps attached to the Disclaimer dated December 14, 1993, by the State Land Commissioner, a copy of which is attached as Exhibit G hereto.

7. On April 13, 1977, final judgment was entered in Action No. CIV 72-376 PHX. A copy of the Judgment is attached as Exhibit H hereto. Incorporated by reference and made a part of the Judgment were Findings of Fact and Conclusions of Law. Exhibit H at page 1 (also enumerated "1439"). The judgment makes the following explicit statement:

> XXIII
>
> The Court finds all of the facts agreed to by the parties in the Pre-Trial Order.
>
> From the foregoing Findings of Fact the Court draws the following Conclusions of Law:

Exhibit H at "1454."

In the Pre-Trial Order the parties agreed and the Court ordered in relevant part as follows:

> 6. . . . Fee title to [the disputed] property is vested in the United States.
>
> * * * *
>
> 30. The Salt River is not now and never has been a navigable river.

Exhibit B at "1063" and "1068."

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These facts formed the basis of the Findings of Fact (Exhibit C) upon which the Conclusions of Law and Judgment (Exhibit H) were based.

8. At the beginning of the dispute and as a defense to the claim in the Suit, the State of Arizona had contended that the Salt River was navigable and that the State owned its bed. See paragraph IX of the State of Arizona's Answer to the Complaint in Action No. CIV 72-376 PHX, attached hereto as Exhibit I. Attachment A to Exhibit I hereto is a letter from the State of Arizona to the Bureau of Land Management. The letter documented the grounds the State of Arizona had for disputing the establishment of the Reservation boundary in the south channel of the Salt River. The letter states:

> 3. That the bed of the once navigable Salt River was reserved to the State of Arizona at the time of the Admission to the Union of the State under the so-called equal-footing doctrine. Scott v. Lattig, 227 U.S. 229, 33 S.Ct. 242, 57 L.Ed. 490 (1913).

Exhibit I at "160."

9. The issue of navigability was also discussed by the Judge in his "Memorandum in Support of the Judgment" in the Suit, a copy of which is attached as Exhibit J hereto. This explicit reference was made as a basis for the finding of fact that the Salt River was not navigable.

> . . . Chillson [a surveyor] did not determine the south boundary of the reservation either, although he was instructed to do so. He did meander one bank of the river, as this was in keeping with the survey rules of the time. (The Salt River was a non-navigable stream and the rules only required the surveyor to meander one bank).

Exhibit J at page 9.

10. It was necessary that the issue of navigability of the Salt River be decided as part of Action No. CIV 72-376 PHX. Under the equal footing doctrine, the State succeeds to title to beds of navigable streams even if there has been a prior reservation (such as to

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an Indian tribe) unless a "clear intention" is expressed to reserve the bed of such a stream. United States v. Holt State Bank, 270 U.S. 49, 58, 70 L.Ed. 465, 470 (1926).[1]

This principle was known and recognized in Arizona before the Suit was even filed. Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968) involved a boating accident in the Colorado River. The parties agreed that the accident occurred on the Arizona side of the Colorado River. The Tribe claimed that it owned the submerged lands and navigable waters where the accident occurred by virtue of executive orders issued before statehood. They argued that therefore the accident occurred within the reservation and outside the jurisdiction of the Arizona courts. The appellant claimed that the State owned the submerged lands by virtue of the navigability of the Colorado River at statehood and that therefore the accident occurred outside the reservation and within the jurisdiction of Arizona courts. The Supreme Court held that the State of Arizona held title to the submerged lands and navigable waters where the accident occurred based upon an analysis similar to that set forth in United States v. Holt State Bank, supra.[2]

If the Salt River had been navigable the State would have held title to the disputed lands notwithstanding the location of the south boundary of the reservation. The State would

---

[1] In the case of Indian reservations, such a "clear intention" has been found where the tribe in question clearly relied on fisheries for its livelihood and this reliance was part of the reservation language. See, Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 63 L.Ed. 138 (1918); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984); Muckelshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984). There is no evidence in any of the attached documents that the Salt River Pima-Maricopa Indian Community ever claims that the purpose of Hayes Executive Order establishing the reservation was to support their reliance on a fishery in the Salt River. In State of Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989), cert. denied, 495 U.S. 919 (1990), the Court could find no "specific intention" in the reservation language notwithstanding the fact that the Natives in fact relied on fisheries for their livelihood. Therefore, the Court held that the State of Alaska held title to the Gulkana River.

[2] The Court went on to hold that the Tribe nevertheless was sovereignly immune from suit and affirmed the judgment of the Superior Court dismissing the suit. Id. at 426.

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have been entitled to ejectment and the State, rather than the Tribe, would have been awarded damages for trespass.

11. The final judgment (Exhibit I) entered on April 13, 1977, in the Suit is a "final determination" by judicial action prior to July 1, 1992, within the meaning of Laws 1992, Ch. 297, § 1.F.2 which provides:

> F. This act does not affect:
>
> . . .
>
> 2. Reaches of watercourses where determinations have been made by judicial actions before the effective date of this act.

The effective date of Laws 1992, Ch. 297, was July 1, 1992. The land in dispute in CIV 72-376 PHX lays in the streambed of the Salt River in the reach of the river in this proceeding. This section of the Act deprives this Commission of jurisdiction to make navigability determinations where there has been a prior determination, such as occurred in the Suit.

12. "Determination" is not further defined in Laws 1992, Ch. 297. There is no standard definition of "determination" in other Arizona statutes or case law. Many other courts, however, have used definitions of "determined" in the context of statutes or procedures being examined in cases before them. These definitions may be instructive as to what the Arizona Legislature meant in the streambed legislation.

In Piccone v. United States, the Court of Claims said: "In ordinary usage, 'determination' refers to a final decision." Id.. 407 F.2d 866 at 873 (Ct. Cl. 1969). The Wisconsin Supreme Court reached a similar conclusion in stating that the term "determination" meant "final judgment" in an appeals statute. Thomas/Van Dyken Joint Venture v. Van Dyken, 279 N.W.2d 459, 463 (Wis. 1979). A New York court indicated that "determination" implies an ending or finality and is used frequently as an equivalent with judgment or decree. People v. Rubinstein, 20 Misc.2d 410, 193 N.Y.S.2d 117, 118 (1959).

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13. The State may argue that since they stipulated to the finding of non-navigability, the issue of navigability was not "determined." This argument flies in the face of the principles of interpretation of judgments.

Arizona courts have stated that that which is necessarily implied by a judgment is included therein. In Re Estate of Thompson, 1 Ariz. App. 18, 398 P.2d 926 (1965). Here, of course, the judgment is explicit with its finding of non-navigability. But even had it not been, the finding of non-navigability was necessary in order for judgment to be awarded to the Salt River Pima-Maricopa Indian Community.

Under the doctrine of res judicata, a judgment on the merits of a prior suit bars a second suit between the same parties not only upon facts actually litigated but also upon points which might have been litigated. See Gilbert v. Board of Medical Examiners of the State of Arizona, 155 Ariz. 169, 745 P.2d 607 (Ct. App. 1987). Here, if the findings had not explicitly ruled on the navigability issue, the navigability issue still would have been decided against the State because the State had the opportunity to litigate the issue in a suit where a determination of title was necessary to the result.

Judgment by confession or consent still carry res judicata effect. See Industrial Park Corp. v. U.S.I.F. Palo Verde Corp., 26 Ariz. App. 204, 547 P.2d 56 (1976). Here, even if the State had consented to the judgment with no reference to the navigability issue, res judicata would bar the State from raising any claim to title based upon navigability in any subsequent action with the Salt River Pima-Maricopa Indian Community.

If the State cannot relitigate the issue of navigability against its Indian citizens in a new case against the Salt River Pima-Maricopa Indian Community, why should the State be able to claim title based upon navigability against its other citizens who own property on the same reach of the river? Fairness dictates that the State should be bound equally to all of its citizens. The streambed statute recognized this moral obligation when it directed that the legislation would have no effect on determinations made prior to July 7, 1992.

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14. The Petitioners and the 6,000 other persons who have received notice of the potential claim of the State have had title to their property clouded and have suffered and are suffering untold, incalculable and irreparable damage during the pendency of this proceeding.

15. If this proceeding is not dismissed prior to January 7, 1994, the Petitioners and others who have received notice will be forced to spend considerable time and funds preparing for a hearing on February 10, 1994, which this Commission has no jurisdiction to conduct.

16. It was the legislature's intent in limiting the authority of this Commission where prior determinations had been made to save the Petitioners and the others who have received notice from the clouded titles and useless expense described above.

CONCLUSION

For the foregoing reasons, this Commission is without jurisdiction to determine the navigability of the reach of the Salt River between Granite Reef Dam and the confluence with the Gila River and it should dismiss this proceeding on or before January 7, 1994.

RESPECTFULLY SUBMITTED, this 22d day of December, 1993.

SNELL & WILMER

By Robert B. Hoffman

Robert B. Hoffman, 004415
One Arizona Center
Phoenix, Arizona 85004-0001
Attorneys for Petitioners CalMat Co., CalMat Co. of Arizona, CalMat Properties Co., CalMat Land Co., and Allied Concrete & Materials Co.

ORIGINAL AND FIVE COPIES
FILED this 22d day of
December, 1993, with:

Rebecca Good, Secretary
Arizona State Streambed Adjudication
Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

and COPY OF THE FOREGOING
mailed this 22d day
of December, 1993, to:

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The Honorable Fife Symington
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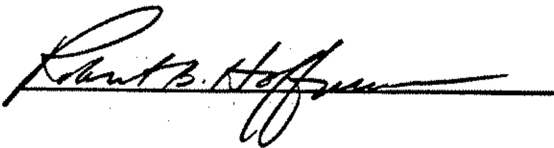

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Attorneys for Plaintiff

FILED
JUL 17 1972
W. J. [illegible], CLERK
UNITED STATES DISTRICT COURT
FOR [illegible] DISTRICT [illegible]
BY .... DEPUTY CLERK

(1)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Plaintiff,

vs.

ARIZONA SAND AND ROCK COMPANY, an Arizona corporation; JOHNSON & STEWART MATERIALS, INC., an Arizona corporation; MESA SAND AND ROCK, INC., an Arizona corporation; ALLIED CONCRETE & MATERIALS CO., an Arizona corporation; SALT RIVER VALLEY WATER USERS ASSOCIATION, AKA Salt River Project; ARIZONA STATE HIGHWAY COMMISSION comprised of Lou Davis, Rudy E. Campbell, Walter Surrett, Walter A. Nelson, and Len W. Mattice; MARICOPA COUNTY; JOHN L. MERRILL and Mrs. John L. Merrill, husband and wife; JOHN L. MERRILL, Administrator of the Estate of Ira L. Merrill, deceased; IRA KEITH MERRILL and Mrs. Ira Keith Merrill, husband and wife; GILBERT ALLEN MERRILL and Mrs. Gilbert Allen Merrill, husband and wife; JOHN DOE ICKES and SARAH ANN ICKES, husband and wife; ROY JOHNSON and Mrs. Roy Johnson, husband and wife; EARL C. JOHNSON and Mrs. Earl C. Johnson, husband and wife; JOHN CAMPO III, Executor of the Estate of LEROY JOHNSON, deceased; RICHARD G. KLEINDIENST, United States Attorney General; ROGERS C.B. MORTON, Secretary of the Department of the Interior; and WILLIAM SMITHERMAN, United States Attorney for the District of Arizona,

Defendants.

NO. CIV 72-376 PHX WEC

COMPLAINT

EXHIBIT A

FIRST CLAIM FOR RELIEF

The plaintiff asserts a claim for damages and ejectment and in support of this claim it alleges:

I

The plaintiff is an American Indian Tribe organized pursuant to the Indian Reorganization Act of June 18, 1934, 25 U.S.C.A. 461 et seq. The defendants ARIZONA SAND AND ROCK COMPANY, JOHNSON & STEWART MATERIALS, INC., MESA SAND AND ROCK, INC., and ALLIED CONCRETE & MATERIALS CO., are corporations that were organized under the laws of the State of Arizona. The defendant SALT RIVER VALLEY WATER USERS ASSOCIATION is a corporation that was organized under the laws of the Territory of Arizona. Defendant ARIZONA STATE HIGHWAY COMMISSION is an agency of the State of Arizona comprised of Lou Davis, Chairman, Rudy E. Campbell, Vice-chairman, Walter Surrett, Walter A. Nelson, and Len W. Mattice; MARICOPA COUNTY is a corporate subdivision of the State of Arizona. The defendants John L. Merrill and Mrs. John L. Merrill, his wife, Ira Keith Merrill and Mrs. Ira Keith Merrill, his wife, Roy Johnson and Mrs. Roy Johnson, his wife, Earl C. Johnson and Mrs. Earl C. Johnson, his wife, and John Campo III, are residents of Maricopa County, Arizona. The defendant John L. Merrill is also joined as the Administrator of the Estate of Ira L. Merrill, deceased, that was probated in the Maricopa County Superior Court, Cause No. P 73839 ; and John Campo, III, is joined as Executor of the Estate of Leroy Johnson, deceased, which is being probated in the Maricopa County Superior Court, Cause No. P 91997 . The defendants Gilbert Allen Merrill, Mrs. Gilbert Allen Merrill, John Doe Ickes and Sarah Ann Ickes are residents of California who caused an event to occur within this State which gave rise to plaintiff's claim for relief.

...

...

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II

This is a civil action in which the matter in controversy arises under the laws of the United States. The plaintiff being an Indian tribe with a governing body duly recognized by the Secretary of Interior, jurisdiction is conferred on this Court by 28 U.S.C.A. 1362.

III

The plaintiff occupies a reservation set aside for its exclusive use and enjoyment by an Executive Order issued on June 14, 1879, by President Rutherford B. Hayes. This land is situated entirely within Maricopa County, Arizona.

IV

The defendants named in paragraph I have trespassed upon the plaintiff's reservation and have damaged the plaintiff as specified below:

A. Since December 12, 1953, the defendants Johnson & Stewart Materials, Roy Johnson, Earl C. Johnson and the late Leroy Johnson have entered upon a portion of the northwest quarter of the northwest quarter of Section 9, Township 1 North, Range 5 East, G&SRB&M, which is entirely within plaintiff's reservation, and have extracted no less than 413,300 yards of sand and gravel of a value of not less than $8,266,000.

B. Since July 5, 1947, the defendants Mesa Sand and Rock, Inc., John L. Merrill, Gilbert Allen Merrill, Sarah Ann Ickes, Ira Keith Merrill and the late Ira L. Merrill have entered upon a portion of the southeast quarter of the northeast quarter, the northeast quarter of the southeast quarter, and the northwest quarter of the southeast quarter of Section 4, Township 1 North, Range 5 East, G&SRB&M, which is entirely within plaintiff's reservation, and have extracted no less than 225,600 yards of sand and gravel of a value of not less than $4,512,000.

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1 C. Since some time prior to 1966 the defendant Arizona
2 Sand and Rock Company has entered upon a portion of the northeast
3 quarter of Section 8, Township 1 North, Range 5 East, G&SRB&M,
4 which is entirely within plaintiff's reservation, and has extrac-
5 ted no less than 157,900 yards of sand and gravel of a value of
6 not less than $3,158,000.

7 D. Since 1959 the defendant Allied Concrete & Materials
8 Co. has entered upon a portion of the southwest quarter of the
9 northeast h a l f of Section 3, Township 1 North, Range 5 East,
10 G&SRB&M, which is entirely within plaintiff's reservation, and
11 has extracted no less than 207,200 yards of sand and gravel of a
12 value of not less than $4,154,400.

13 E. Since 1962 the defendant Salt River Valley Water
14 Users Association has entered upon a portion of the northwest
15 quarter of Section 3, Township 1 North, Range 5 East, G&SRB&M,
16 which is entirely within plaintiff's reservation, and used it as
17 a dumping ground, dumping upon it such refuse as trees, concrete
18 and dirt. To remedy this condition the plaintiff will be required
19 to remove ten feet of refuse over an area of ten acres at a cost
20 of $112,550.

21 F. The defendants Arizona Highway Commission and
22 Maricopa County have entered upon a portion of the northeast
23 quarter of the northwest quarter of Section 3, Township 1 North,
24 Range 5 East, G&SRB&M, which is entirely within plaintiff's
25 reservation, and have extracted no less than 63,300 yards of
26 sand and gravel of a value of not less than $1,266,000.

27 V

28 The appropriate relief to redress the wrongs caused by
29 these defendants to plaintiff is to award plaintiff money damages
30 in the amounts stated above and to issue an order ejecting these
31 trespassing defendants from plaintiff's reservation.

32

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PHOENIX, ARIZONA 85003

1 WHEREFORE plaintiff prays for the following relief:

2 1. For judgment against Johnson & Stewart Materials,
3 Roy Johnson, Earl C. Johnson, and John Campo III, Administrator of
4 the Estate of Leroy Johnson, deceased, for $8,266,000 and for an
5 order ejecting them from plaintiff's reservation;

6 2. For judgment against Mesa Sand and Rock, Inc., John L.
7 Merrill, Gilbert Allen Merrill, Sarah Ann Ickes, Ira Keith Merrill
8 and John L. Merrill, Administrator of the Estate of Ira L. Merrill,
9 deceased, for $4,512,000 and for an order ejecting them from plain-
10 tiff's reservation;

11 3. For judgment against Arizona Sand and Rock Company for
12 $3,158.000 and for an order ejecting it from plaintiff's reserva-
13 tion;

14 4. For judgment against Allied Concrete & Materials Co.
15 for $4,154,000 and for an order ejecting it from plaintiff's reser-
16 vation;

17 5. For judgment against Salt River Valley Water Users'
18 Association for $112,550 and for an order ejecting it from plain-
19 tiff's reservation;

20 6. For judgment against Arizona Highway Commission and
21 Maricopa County for $1,266,000 and for an order ejecting them from
22 plaintiff's reservation; and

23 7. For judgment against all the foregoing defendants for
24 plaintiff's costs and for such other relief as the Court deems
25 just.

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27

28 By [signature]

29

30 By [signature]

31 ATTORNEYS FOR PLAINTIFF

32

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PHOENIX, ARIZONA 85003

1 SECOND CLAIM FOR RELIEF

2 The plaintiff asserts an additional claim for relief
3 against the defendants Richard G. Kleindienst, Rogers C.B. Morton
4 and William C. Smitherman as follows:

5 I

6 The plaintiff is an Indian tribe organized pursuant to the
7 Indian Reorganization Act of June 18, 1934, 25 U.S.C.A. 461 et seq.
8 Richard G. Kleindienst is the Attorney General of the United
9 States. Rogers C.B. Morton is the Secretary of the Department of
10 the Interior. William C. Smitherman is United States Attorney for
11 the District of Arizona.

12 II

13 This claim for relief is an action in the nature of
14 mandamus to compel officers of the United States to perform a duty
15 owed to plaintiff. The jurisdiction is conferred on this Court
16 by 28 U.S.C.A. 1361.

17 III

18 The plaintiff occupies a reservation set aside for its
19 exclusive use and enjoyment by an Executive Order issued on June
20 14, 1879, by President Rutherford B. Hayes. Title to this land
21 is held by the United States as trustee for the plaintiff. The
22 nature of the trust relationship between the United States and
23 the plaintiff is such that the United States, acting through its
24 appropriate officers, is required to take all necessary and appro-
25 priate steps to redress damages caused by trespassers upon the
26 reservation and to obtain court orders ejecting such trespassers
27 from the reservation.

28 IV

29 The plaintiff has advised the defendants Rogers C.B.
30 Morton and Richard G. Kleindienst of the claims alleged in the
31 First Claim for Relief and has requested that they undertake
32

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1 appropriate litigation to obtain money damages and orders of
2 ejectment against the trespassers. Despite their knowledge of
3 these claims and their trust obligation to prosecute them they
4 arbitrarily and wrongfully refuse to do so.

5 WHEREFORE plaintiff prays for an order compelling the
6 defendants Richard G. Kleindienst, Rogers C.B. Morton and William
7 C. Smitherman to take immediate appropriate action to prosecute
8 before this Court the claims alleged in the First Claim for Relief.

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By [signature]

By [signature]

ATTORNEYS FOR PLAINTIFF

12/6/93

...the foregoing document is a full, true and correct copy of the original on file in my office and in my custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

By [signature] Deputy

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...TRUST BLDG.
...ADAMS STREET
...ARIZONA ...

FILED (146)

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CLERK U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA

DEPUTY CLERK

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff, vs. ARIZONA SAND & ROCK CO., an Arizona corporation, et al., Defendants.	NO. CIV-72-376-Phx.
JOHNSON & STEWART MATERIALS, INC., et al., Plaintiff, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior; et al., Defendants.	NO. CIV-73-579-Phx.
CITY OF MESA, an Arizona municipal corporation, Plaintiff, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior; et al., Defendants.	NO. CIV-73-769-Phx.
SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation; et al., Plaintiffs, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior; et al., Defendants.	NO. CIV-74-553-Phx.

STATE OF ARIZONA, ex rel., W. A. ORDWAY, Director of the Arizona Department of Transportation,

Plaintiff,

vs.

ROGERS C. B. MORTON, Secretary of the Department of the Interior; et al.,

Defendants.

NO. CIV-74-529-Phx.

CONSOLIDATED PRETRIAL ORDER

I.

These consolidated actions involve the south boundary of the Salt River Indian Reservation in Township 1 North, Range 5 East, Gila and Salt River Base and Meridian, north of Mesa, Arizona. As a result of a decision by the then Secretary of Interior on January 17, 1969, a plat of survey was prepared and filed on August 17, 1972, showing that boundary at a location which would result in the inclusion within the reservation of certain property to which other parties claim an interest. The individual actions are these:

NO. CIV-72-376. This is an action filed by the Indian Community against Arizona Sand and Rock Co., et al., for trespass, ejectment and damages for the removal of sand and gravel. The issue of the amount of damages, if any, has been severed and only the issue of liability is now before the Court. Of the defendants originally named in this action, only the following still remain: Johnson & Stewart Materials, Inc., Allied Concrete & Materials Co., Salt River Valley Water Users' Association, Arizona State Highway Commission (now the Arizona Department of Transportation), the County of Maricopa, Roy Johnson and Earl C. Johnson and their respective wives and the Executor of the Estate of Leroy Johnson, Deceased. Transamerica Title Insurance Company subsequently became a party defendant to this action on its motion to intervene upon the grounds that it has issued a policy of title

insurance upon property owned by Allied Concrete & Materials Co.

In this action the Indian Community seeks an order of ejectment against all defendants from the reservation as determined by the Secretarial memorandum of January 17, 1969, and damages for trespass against all defendants except Allied Concrete and Materials Company, Inc.

In the course of proceedings in this case the Court ruled that it would not consider a collateral attack by the defendants upon the decision of the Secretary of the Interior and this ruling resulted in the filing of the subsequent actions in which the following claims are asserted:

NO. CIV-73-579. This is an action instituted by Johnson & Stewart Materials, Inc., Roy Johnson and Earl C. Johnson and their respective wives, and the executor of the Estate of Leroy Johnson (hereinafter collectively referred to as "Johnson & Stewart") against the Secretary of Interior seeking to invalidate the decision of the Secretary and the 1972 Plat of Survey. The plaintiffs claim an interest in a portion of the disputed property by reason of unpatented mining claims and assert that the Secretarial memorandum of January 17, 1969 is unlawful, exceeds the Secretarial powers, violates due process and constitutes a taking of property interests without just compensation and due process.

NO. CIV-73-769. This is a similar action brought by the City of Mesa. It claims a fee simple interest in portions of the disputed property by reason of patents issued by the United States prior to the filing of the 1972 Plat of Survey.

NO. CIV-74-553. This is a similar action brought by the Salt River Valley Water Users' Association. The Association claims an interest in a portion of the disputed property pursuant to a contract entered into with the United States in 1917 by which said land, which previously had been withdrawn for

1 reclamation purposes, was conveyed to the Association, as Agent
2 of the United States, for use in connection with the operation of
3 the Salt River Project, a Federal reclamation project.

4 NO. CIV-74-529. This is an action brought by the State
5 of Arizona on behalf of the Director of the Arizona Department of
6 Transportation. The State of Arizona claims an interest in a
7 portion of the disputed property by reason of certain licenses
8 and permits for the removal of sand and gravel and rights of way
9 which were granted to the Department by the Bureau of Reclamation,
10 Department of Interior.

11 For convenience, the parties will some times hereinafter
12 be designated by referring to the plaintiff in No. CIV-72-376
13 as the "Indian Community", the defendants in the remaining docket
14 numbers as the "Secretary", and the remaining parties as the
15 "Land Claimants".

16 II.

17 The jurisdiction of this Court is invoked under Title 28
18 U.S.C. §1331 (Federal Question), §1361 (Action to Compel a Federal
19 Officer to Perform his Duty), §1362 (Indian Tribe as a Plaintiff),
20 §§2201-2202 (Declaratory Judgment) and Title 5 U.S.C. §§701-706
21 (Administrative Procedure Act).

22 To the extent this action might be regarded as an
23 action against the United States, the Land Claimants rely upon
24 the rationale of Ritter v. Morton, 513 F.2d 942 (9th Cir. ,1975);
25 Armstrong v. Udall, 435 F.2d 28 (9th Cir., 1970); Andros v. Rupp,
26 433 F.2d 70 (9th Cir., 1970).

27 III.

28 The following facts are admitted by the parties and
29 require no proof:

30 1. The Salt and the Verde Rivers converge at a point
31 approximately four miles northeast of what is now Granite Reef
32 Dam in Maricopa County, Arizona, to form the Salt River.

1 2. On October 22, 1868, there was filed with the
2 General Land Office of the United States of America a plat of
3 survey and subdivision of Township 1 North, Range 5 East of the
4 Gila and Salt River Base and Meridian in conformity with the field
5 notes of the survey thereof conducted by W. F. Ingalls and William
6 H. Pierce.

7 3. By Executive Order dated January 10, 1879, President
8 Rutherford B. Hayes set apart for the use of the Pima-Maricopa
9 Indians as an additional reservation a large parcel of land
10 within Maricopa County, Arizona, including what is now the greater
11 Phoenix area.

12 4. By Executive Order dated June 14, 1879, President
13 Rutherford B. Hayes cancelled his previous Executive Order dated
14 January 10, 1879, and set apart for the use of the Pima-Maricopa
15 Indians a substantially smaller tract of land described in part
16 as follows:

17 Beginning at the point where the range line between ranges four and five each crosses the
18 Salt River, thence up and along the middle of said river to a point where the easterly line
19 of Camp McDowell Miliary Reservation, if prolonged south, would strike said river, thence
20 northerly to the southeast corner of Camp McDowell Reservation; thence west along the
21 southern boundary line of said Camp McDowell reservation to the southwest corner thereof;
22 thence up and along the west boundary of said reservation until it intersects the
23 north boundary of the southern tier of sections in township three north, range six
24 east; thence west along the north boundary of the southern tier of sections in township
25 three north, ranges five and six east to the northwest corner of section thirty-one, town-
26 ship three north, range five east; thence south along the range line between ranges
27 four and five east to the place of beginning. [Emphasis added]
28

29 5. On December 27, 1887, L. D. Chillson was instructed
30 to survey the exterior boundaries of the Salt River Indian
31 Reservation and to subdivide the reservation into 40 acre allot-
32 ments. On July 11, 1888, there was filed with the General Land

1 Office a plat of survey in conformance with Chillson's field notes.
2 The surveyor meandered the north bank of Salt River as it flows
3 through Township 1 North, Range 5 East.

4 6. On July 2, 1902 the Secretary of the Interior, pur-
5 suant to Section 3 of the Reclamation Act (Title 43 U.S.C. §§416,
6 432 and 434), entered a Second Form of withdrawal order purporting
7 to withdraw the public lands in the Salt River Valley including
8 all of the land situated in Township 1 North, Range 5 East.
9 Thereafter, on June 29, 1940 and June 3, 1954, the Secretary
10 entered orders purporting to change from Second Form Withdrawal
11 to First Form Withdrawal the withdrawal of certain lands situated
12 within Section 3 of said township, more particularly described as
13 Lots 2, 3, 4 and the Southwest Quarter of the Northwest Quarter
14 of Section 3 in Township 1 North, Range 5 East, Gila and Salt
15 River Base and Meridian. The Salt River Valley Water Users'
16 Association claims an interest in this property pursuant to the
17 provisions of a contract between the Association and the United
18 States dated September 6, 1917. It is within this area that the
19 Bureau of Reclamation issued sand and gravel permits to the
20 Arizona Highway Department and Maricopa County. Fee title to
21 this property is vested in the United States.

22 7. On October 11, 1910, R. A. Farmer was instructed to
23 survey (1) the boundary and exterior lines embraced within the
24 Salt River Indian Reservation, and (2) to subdivide the Salt River
25 Indian Reservation. On March 29, 1913, there were filed with the
26 United States General Land Office in Washington, D. C. plats of
27 survey of Township 1 North, Range 5 East, Township 2 North,
28 Range 5 East, and Township 2 North, Range 6 East of the Gila and
29 Salt River Base and Meridian, Arizona, in conformance with R. A.
30 Farmer's field notes. On these plats there appears a dotted line
31 labeled "reservation boundary". A dispute exists between the
32 parties whether this line constitutes a part of the survey.

1 8. By Executive Order dated September 28, 1911, President William Howard Taft amended the Presidential Executive Order dated June 14, 1879, so as to permanently withdraw from settlement, entry, sale or other disposition all those tracts of land lying south of the Salt River in Sections 25, 26, 34 and 36, except the Southeast Quarter of the Southeast Quarter, Section 34, in Township 2 North, Range 5 East, of the Gila and Salt River Base and Meridian, for the use of the Pima and Maricopa Indians.

9. On September 30, 1924, the United States Surveyor General Charles M. Donahoe, filed with the United States General Land Office a supplemental plat of Section 35 of Township 2 North, Range 5 East, Gila and Salt River Base and Meridian in compliance with instructions contained in General Land Office letter "E" dated July 11, 1924. A supplemental plat relating to a portion of Section 12 of Township 1 North, Range 4 East was also filed at the same time by Surveyor General Donahoe.

10. Between 1892 and 1933 the United States issued patents covering various parcels of which, either directly or by mesne conveyances, the City of Mesa is now record owner. Such parcels are as follows:

> PARCEL NO. 1: The Southeast Quarter of the Southeast Quarter of Section 7, Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.
>
> PARCEL NO. 2: A strip or parcel of land 300 feet in width off the West side of the Northeast Quarter of the Northeast Quarter of Section 18, Township 1 North, Range 5 East, extending the entire length North and South of said Quarter Section.
>
> PARCEL NO. 3: The East Half of the Southwest Quarter of the Southeast Quarter of Section 7, and the East Half of the Northwest Quarter of the Northeast Quarter of Section 18, all in Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.
>
> PARCEL NO. 4: The West Half of the Southwest Quarter of the Southeast Quarter of Section 7, and the West Half of the Northwest Quarter of

the Northeast Quarter of Section 18, all in Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian.

PARCEL NO. 5: The Northwest Quarter of Section 18, Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian, EXCEPT the South one-half of the North one-half, and the North one-half of the South one-half of Lot 2 (which said Lot 2 is sometimes referred to as the Southwest Quarter of said Northwest Quarter) deeded to the United States of America in instruments recorded March 23, 1954, in Docket 1311, at Page 210.

PARCEL NO. 6: All of the Southeast Quarter of the Northwest Quarter of Section 3, Township 1 North, Range 5 East, of the Gila and Salt River Base and Meridian, EXCEPT the East 33 feet and the South 20 feet thereof.

11. Johnson & Stewart claims certain rights, titles, interests and licenses in the Northwest Quarter of the Northwest Quarter of Section 9, Township 1 North, Range 5 East pursuant to certain unpatented mining claims located originally in 1947 and again relocated in 1953 which have been worked, mined and maintained to the present time in compliance with all applicable federal and state laws.

12. Allied Concreté and Materials Company, Inc. holds record title originating with patents from the United States to the Southwest Quarter of the Northeast Quarter of Section 3, Township 1 North, Range 5 East, Gila and Salt River Base and Meridian.

13. Maricopa County, a political subdivision of the State of Arizona, has removed sand and gravel within Section 3 pursuant to permits issued by the Bureau of Reclamation which date from and after 1948.

14. The Arizona Department of Transportation has claimed certain rights to remove sand and gravel within Section 3, Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian, pursuant to permits and licenses issued by the United States Department of the Interior, Bureau of Reclamation, which date from and after 1942 and has been granted rights of way

covering portions of Country Club Drive by the Bureau of Reclamation.

15. In 1962, the Arizona State office of the Bureau of Land Management, at the request and expense of Arizona Sand and Rock Co. and the Indian Community, undertook to establish an agreed line for the south boundary of the reservation. In the course of this work, the surveyors reported the existence of two channels within the Salt River, one lying north of the other.

16. On October 26, 1962, the Arizona State Director of the Bureau of Land Management requested the Director of the Bureau of Land Management to decide whether the north or south channel constituted the boundary of the reservation. The State Director's report indicated that his position conflicted with that of the Bureau of Indian Affairs Superintendent at the Salt River Pima-Maricopa Reservation.

17. In response to the State Director's request, the Director of the Bureau of Land Management ruled on March 5, 1963, that the north channel constituted the reservation boundary in Township 1 North, Range 5 East, Gila and Salt River Base and Meridian.

18. A memorandum dated April 14, 1964 from the Associate Solicitor of Public Lands to the Assistant Secretary, Public Land Management, concluded that the evidence "preponderated" in favor of the north channel as the southern boundary of the reservation.

19. The Secretary of the Interior in 1968 requested the Solicitor of the Department of the Interior to review the Bureau of Land Management's 1963 opinion. The Solicitor is the chief legal officer of the Department of the Interior and has the responsibility for the legal affairs of both the Bureau of Land Management and the Bureau of Indian Affairs.

20. By memorandum dated January 17, 1969, to the Secretary of the Interior, the Solicitor of the United States

Department of the Interior, expressed the opinion that the boundary of the Salt River Indian Reservation lies within the south rather than the north channel of the Salt River.

21. By memorandum dated January 17, 1969 the former Secretary of the Interior, Stewart L. Udall, relying upon the Solicitor's 1969 memorandum, concluded that the south boundary of the Salt River Indian Reservation lies within the south channel of the Salt River in Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian and ordered the Bureau of Land Management to note the official records accordingly.

22. By memorandum dated November 17, 1971 to the Director of the Bureau of Land Management, Harrison Loesch, the then Assistant Secretary - Public Land Management, determined that the south boundary of the Salt River Indian Reservation in Section 3, of Township 1 North, Range 5 East should be accepted as being in the south channel as it existed during the 1965-66 flood.

23. On August 17, 1972, a plat of dependent resurvey and survey was filed with the United States Department of the Interior, Bureau of Land Management in Phoenix, Arizona, by Clark F. Gumm, Chief of the Division of Cadastral Survey of the United States Department of the Interior purporting to show thereon the south boundary of the Salt River Indian Reservation as an ambulatory line representing the middle of the Salt River.

24. The Federal Register in Volume 37, #175 for Friday, September 8, 1972, at page 18224, announced that interested parties were to be given the opportunity to protest the filing of the aforementioned 1972 plat of survey.

25. Protests were filed by all of the original parties to the above entitled and numbered consolidated action, excepting Maricopa County and the Secretary.

26. All of the aforementioned protests have been denied by the Department of Interior excepting the protest of the

Indian Community which was withdrawn upon condition that the other protests be denied. The parties were informed that such denial represented final administrative action by the Department of Interior.

27. The Land Claimants, other than Maricopa County, claim certain rights, titles, claims and other interests to lands lying north of the reservation boundary as set forth in the 1972 plat of survey.

28. A diversion dam (Granite Reef) was built below the confluence of the Salt and Verde Rivers in 1906-1908.

29. Storage dams were constructed on the Salt and Verde Rivers as follows:

SALT RIVER		STORAGE CAPACITY
Roosevelt Dam	1905 - 1911	1,381,580 acre feet
Horse Mesa	1924 - 1927	245,138 acre feet
Mormon Flat	1923 - 1925	57,852 acre feet
Stewart Mountain	1928 - 1930	69,765 acre feet
VERDE RIVER		STORAGE CAPACITY
Horseshoe	1944 - 1946	139,238 acre feet
Bartlett	1936 - 1939	178,477 acre feet

30. The Salt River is not now and never has been a navigable river.

IV.

The contested issue agreed upon between the Land Claimants and the Secretary is as follows:

With regard to Causes No. CIV-74-553, CIV-74-529 and CIV-73-579, whether the Secretary in connection with his 1969 memoranda and 1972 survey, acted in a manner which was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. No agreement has been reached as to other contested issues of fact and law in said actions.

No agreement has been reached as to the contested

issues of fact and law between the plaintiff Indian Community and the defendants in Cause No. CIV-72-376. No agreement has been reached as to the contested issues of fact and law between the plaintiff City of Mesa and the Secretary of the Interior in Cause No. CIV-73-769.

V.

The following additional issues of fact and law are deemed material:

A. By the Indian Community:

1. Whether the Salt River Project, the State of Arizona, and Maricopa County, have been mere licensees with respect to the lands withdrawn for reclamation purposes in Section 3, with the result that they lack standing to have the Secretary's Survey set aside.

2. Whether the Secretary's Survey of the southern boundary of the Salt River Indian Reservation was arbitrary, capricious, or beyond the scope of his authority, with the result that it should be set aside as being invalid.

3. If the Court orders that the Secretary's Survey of the southern boundary of the Salt River Indian Reservation is invalid, then the next issue will be whether the Court can proceed any further in the matter other perhaps than to remand the proceeding to the Secretary of the Interior.

4. If the Court finds the Secretary's Survey of the southern boundary of the Salt River Indian Reservation is invalid and thereupon retains jurisdiction to determine where the boundary should be relocated, then the remaining issue will be - where is the southern boundary of the Salt River Indian Reservation to be relocated.

B. By the Land Claimants jointly:

1. Whether the south boundary of the Salt River Indian Reservation was established prior to the Secretarial

Memorandum of January 17, 1969.

a. Whether the contemporaneous historical evidence surrounding the issuance of the Executive Order of June 14, 1879 indicate that it was the intent of the Order to establish the south boundary in the center of the north channel.

b. Whether the south boundary was platted and fixed by the Surveyor General's map dated July 12, 1879.

c. Whether the south boundary was established by the L. D. Chillson survey of 1888 and the official plat of record filed in the General Land Office.

d. Whether the south boundary was established by the R. A. Farmer survey of 1910 and the official plat of record filed in the General Land Office.

e. Whether the south boundary was fixed by interpretations and holdings of the Department of the Interior or its bureaus or divisions as being in the north channel.

f. Whether the United States as trustee and the Indian Community as beneficiary have acknowledged by their actions and transactions over a period of many years that the reservation did not extend south of the R. A. Farmer 1910 boundary line.

g. Whether the members of the plaintiff, Salt River Pima-Maricopa Indian Community, and the trustee of their reservation lands, for many years have taken no action or failed to register any objection to the establishment of mining claims, grants of patents or licenses within the property involved in this litigation.

h. Whether the members of the plaintiff Indian Community ever cultivated, inhabited or used or asserted any dominion or control over the so-called island located in Section 9 of Township 1 North, Range 5 East.

2. If the south boundary of the Salt River Indian

Reservation was not established prior to the Secretarial memorandum of January 17, 1969, was the 1969 memorandum of the Secretary and the 1972 survey pursuant thereto arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law?

a. Whether the Secretarial memorandum of January 17, 1969 created new boundaries for the reservation in violation of the provisions of Title 25 U.S.C. §398(d), Title 25 U.S.C. §211 and Title 43 U.S.C. §772 or clarified the original boundaries.

b. Whether the Secretary properly interpreted the Executive Order of June 14, 1879.

c. Whether due process of law was violated by the Secretary of the Interior when he refused to hold any hearings or take any evidence on the question of the disputed boundary and refused to recognize any protests other than those questioning the appropriate location of the boundary line within the south channel.

3. Assuming the Secretarial memorandum of January 17, 1969 was valid, whether the memorandum was followed and properly applied through the use of a "thalweg" as the "middle of the river" in the August 17, 1972 plat of survey.

4. Assuming the line shown on the 1972 plat of survey is not binding upon the Court, where is the "middle of the river" in compliance with the Executive Order of June 14, 1879 and is that line ambulatory?

a. The effect of the man-made changes within the bed of the Salt River upon the location of the south boundary.

b. Whether the south boundary should be an ambulatory line.

c. Whether the reference in the Executive Order to the "middle" of the river should be interpreted as referring to a medial line between the high banks, to the "thalweg",

1 to the "thread of the stream", or to some other measuring line.

2 d. At what level of water flow should the

3 "middle" of the river be measured?

4 e. Whether the "middle" of the river should

5 be determined with reference to the existance of the river bed

6 when dry.

7 f. Whether the evidence, geologic information

8 and photographs show a highly erratic river flow and that the

9 location of channels within the defined cut banks is constantly

10 subject to change.

11 g. Whether the Salt River in Township 1 North,

12 Range 5 East should be regarded as containing two "channels".

13 h. If so, whether at the present time, the

14 north channel of the Salt River in Township 1 North, Range 5

15 East is the main channel of the river.

16 i. Is it scientifically possible today to

17 determine a midline boundary, complying with the original Execu-

18 tive Order by using the high banks or cutbanks of the river?

19 j. Whether by reason of the doctrine of prior

20 appropriation such water which does occasionally flow in the

21 river bed is not available for use by the adjacent owners, includ-

22 ing any of the parties hereto, but must be permitted to continue

23 down stream for diversion by the Buckeye Irrigation District,

24 whose landowners have prior appropriative rights thereto.

25 k. Whether by reason of the foregoing circum-

26 stances access to the flow of water in the river bed is of no

27 value to any of the parties hereto.

28 l. Whether the common law rules respecting a

29 boundary lying between two parcels separated by a river are inap-

30 plicable to these actions.

31 m. Whether this Court may properly fix a period

32 of time when the flow of water in the Salt River became so

infrequent that the common law rules ceased to apply and the Court may fix a line, susceptible to survey on the ground, which will fix a permanent boundary to the reservation.

a. Whether the extensive man-made activities within the bed of the Salt River in the subject area starting from before the creation of the Indian Reservation in 1879, continuing through the present and anticipated in the future, have so artificially influenced and changed the flow and the course of the Salt River that the Court may properly and permanently fix the south boundary as a midline between the natural high banks (outside banks) of the Salt River.

5. Whether the Indian Community's claim for damages and ejectment is barred by statutes of limitation, laches, estoppel or immunity.

a. Whether the plaintiff Indian Community has standing to sue in trespass or ejectment without first establishing its possessory interest in the disputed land.

b. Whether if any portion of the reclamation withdrawn land in Section 3 is included within the reservation, the Salt River Valley Water Users' Association, the Department of Transportation and Maricopa County are immune from liability to the Indian Community because they have used the land pursuant to valid contracts and permits from the United States and in the case of the Association as agent of the United States.

C. By the Secretary:

1. The Secretary maintains that all he has thus far done is resolve an internal departmental dispute and has not affected any of the non-Indians alleged interests, that no federal question is present and that he has fulfilled the requirements of the Administrative Procedure Act.

2. The Executive Order of June 14, 1879, which established the present Salt River Pima-Maricopa Reservation

described the south boundary of the Salt River Pima-Maricopa Reservation by means of calls to natural objects. The Executive Order also preserved Indian interests lying south of the Salt River.

3. Calls to natural objects govern courses and distances run by a surveyor.

4. A meander line is not a boundary but merely describes the sinuosities of the banks of a stream and the amount of land to be conveyed.

5. The Bureau of Land Management is the agency within the Department of the Interior charged with administering the public lands of the United States. The Bureau of Land Management had an admitted self-interest in its 1963 opinion that the north channel of the Salt River constituted the boundary of the Salt River Pima-Maricopa Indian Reservation.

6. None of the non-Indian land claimants acquired any interest in lands between the north and south channels of the Salt River subsequent to, or in reliance upon, the Director of the Bureau of Land Management's May 3, 1963 opinion.

7. Neither the Bureau of Indian Affairs nor the Salt River Pima-Maricopa Tribe have ever assented to the Bureau of Land Management's view that the north channel of the Salt River is the southern boundary of the Salt River Indian Reservation.

8. Notwithstanding the rights asserted by the non-Indian land claimants, the United States has fee title to much of the land lying between the north and south channels of the Salt River.

9. The south boundary of the Salt River is an ambulatory line which changes with the non-avulsive changes in the main channel of the Salt River.

10. The 1972 survey was conducted in accordance

with the instructions by the Department of the Interior and accepted surveying practice.

11. A topographic map made in 1902-03 shows the Salt River running only in one channel--the south channel-- and a dotted line in the center of said channel indicates the reservation boundary.

12. None of the parties suing the Secretary have suffered a legal wrong because of agency action or have been adversely affected or aggrieved by agency action within the meaning of a relevant statute.

13. The Court's jurisdiction in the suits against the Secretary is limited to determining, on the basis of the administrative record before the Secretary, whether the Secretary acted in a manner which was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and, if so, to remanding the case to the Secretary for further proceedings.

D. By the City of Mesa, Transamerica Title Insurance Co. and Allied Concrete & Materials Co.:

1. Did the filing of the 1972 Plat of Survey constitute a decision by the Secretary of Interior regarding the proper location of the reservation boundary?

2. As against the claims of adjoining patentees from the United States and their successors in interest, did the Secretary of Interior have legal authority to decide the location of the boundary?

3. Did the filing of the 1972 Plat of Survey as a part of the public records of the Phoenix office of the Bureau of Land Management constitute a decision by the Secretary of Interior that all property lying to the north of the reservation boundary, as there delineated, was the property of the United States as trustee for the Indian Community?

4. Does the 1972 Plat of Survey as now filed with

the Bureau of Land Management constitute a cloud upon the titles of the City of Mesa and Allied Concrete & Materials Co.?

5. Was the filing of the 1972 Plat of Survey, including the boundary line shown thereon, within the legal powers of the Department of Interior irrespective of the nature and extent of the administrative procedures which preceded the filing of the plat?

E. By the Arizona State Highway Commission:

1. What is the appropriate scope of review of the decision of the former Secretary of the Interior, Stewart L. Udall?

2. What is the appropriate standard of review?

3. Are plaintiff Indian Community's claims for relief in trespass barred by the provisions of A.R.S. §12-542?

4. To what extent does prior construction of the June 14, 1879 Executive Order by the Bureau of Indian Affairs, the General Land Office (now the BLM) and the Bureau of Reclamation indicate a long-standing administrative interpretation of the location of the boundary within the bed of the Salt River?

5. Whether or not the plaintiff's action against the State of Arizona in the Federal District Court is barred by the Eleventh Amendment to the United States Constitution.

6. Whether or not there may be other indispensable parties having fee or lesser interests in real property lying within the bed of the Salt River within Township 1 North, Range 5 East, who may be adversely affected by any determination which this Court may make.

7. Whether or not the United States of America is an indispensable party to the present action under Rule 19 of the Federal Rules of Civil Procedure.

8. If the line to be established is a fixed rather than an ambulatory line, what date (or flow) should be utilized

1 for the purpose of establishing the rights of the parties to the
2 lands in question?

3 9. Should the entire matter be remanded to the
4 Department of the Interior in order to hold hearings, take testi-
5 mony, allow the introduction into evidence of exhibits, take
6 testimony and generally augment a woefully inadequate administra-
7 tive record.

8 F. By Johnson & Stewart Materials, Inc.:

9 Johnson & Stewart Materials, Inc. adopts the issues
10 of fact and law set forth above jointly by the Land Claimants
11 without additions thereto.

12 G. By Salt River Valley Water Users' Association and
13 Salt River Project Agricultural Improvement and Power District:

14 Salt River Valley Water Users' Association and the
15 Salt River Project Agricultural Improvement and Power District
16 adopts the issues of fact and law set forth above jointly by the
17 Land Claimants without additions thereto.

18 VI.

19 A list of exhibits is attached hereto and incorporated
20 herein by reference. The parties stipulate to the admission in
21 evidence of all exhibits previously marked for identification.
22 This stipulation is made solely in the interests of trial conven-
23 ience and does not preclude any party from challenging any exhibit
24 as being wholly irrelevant and immaterial to any of the issues in
25 this litigation or as being beyond the scope of review of the
26 Secretary's actions nor to challenge the weight to be given to any
27 of the contents thereof.

28 VII.

29 The Land Claimants intend to offer all of the following
30 depositions:

31 Deposition of Boyd S. Owens, dated March 28, 1974.
32 Deposition of the Honorable Stewart L. Udall, dated

October 22, 1974.

Deposition of Harrison Loesch, dated October 22, 1974.

Deposition of Edward Weinberg, dated October 21, 1974.

Deposition of Henry Taliafero, dated October 22, 1974.

Deposition of Clark Gumm, dated October 21 and October 22, 1974.

The Indian Community intends to offer the following depositions:

Deposition of James H. Jones, Jr., dated January 15, 1975, together with all depositions marked as exhibits herein.

The Secretary intends to offer the following depositions:

The Secretary believes that depositions are not relevant to the lawsuits in which he is a defendant since the only issue therein is the reasonableness of the decision made on the basis of the administrative record. In the event the Court permits the use of depositions herein, the Secretary reserves the right to use any of the depositions listed herein by the other parties.

VIII.

The Land Claimants intend to call the following witnesses at the trial:

1. Lawrence Hanline, Bureau of Indian Affairs
   124 West Thomas Road
   Phoenix, Arizona

2. James H. Jones, Jr.
   1536 East Mountain View Road
   Phoenix, Arizona

3. Clark Gumm
   Greater Washington, D.C. area, exact
   address unknown.

4. Stewart Udall
   6400 Goldsboro Road
   Bethesda, Maryland

5. Leonard Halpenny
   3938 Santa Barbara Avenue
   Tucson, Arizona

6. Dr. Troy L. Pewe
538 East Fairmont Drive
Tempe, Arizona

7. Paul Smith, Bureau of Indian Affairs
124 West Thomas
Phoenix, Arizona

8. Earl Johnson
1401 North Alma School Road
Mesa, Arizona

9. Everett Stewart
1401 North Alma School Road
Mesa, Arizona

10. Boyd Owens, Bureau of Land Management
Valley Center, 24th Floor
Phoenix, Arizona

11. Orson Phelps
827 East Seventh Street
Mesa, Arizona

12. Waldo Williams
502 North Alma School Road
Mesa, Arizona

13. Lewis Phelps
1014 West University Drive
Mesa, Arizona

14. Forrest Jennings, Location Section
Arizona Department of Transportation
206 South 17th Avenue
Phoenix, Arizona

15. Richard Pinkerton, Photogrammetry
Arizona Department of Transportation
206 South 17th Avenue
Phoenix, Arizona

16. Bryan Rockwell, Title Section
Arizona Department of Transportation
206 South 17th Avenue
Phoenix, Arizona

17. Richard K. Esser, Supervisor
Production Control, Right of Way Operations
Arizona Department of Transportation
206 South 17th Avenue
Phoenix, Arizona

18. A. J. Pfister, Deputy General Manager
Salt River Project
1521 Project Drive
Tempe, Arizona

19. Don Weesner, Chief Engineer
Salt River Valley Water Users' Association
1521 Project Drive
Tempe, Arizona

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20. Francis Smith, Secretary
Salt River Project
1521 Project Drive
Tempe, Arizona

21. Victor I. Corbell, former President of
Salt River Project
303 East Del Rio Drive
Tempe, Arizona

22. Ted Wilson, Supervisor
Hydrologic Records and Analysis
Salt River Valley Water Users' Association
1521 Project Drive
Tempe, Arizona

23. Jim Gardner, Supervisor
Cartographic Section of Drafting Department
Salt River Valley Water Users' Association
1521 Project Drive
Tempe, Arizona

24. John S. Schaper
215 East Lexington
Phoenix, Arizona 85012

25. Joe T. Fallini
Boise, Idaho area
exact address unknown

26. George Hedden, former Assistant Area Director of
Bureau of Indian Affairs
1902 East Dartmouth
Mesa, Arizona

27. Garnet Hayes
10000 East McDowell
Scottsdale, Arizona

28. Charles K. Luster
Director of Public Works
City of Mesa
55 North Center
Mesa, Arizona

29. Francis H. Lathrop
Deputy County Engineer
Maricopa County
3325 West Durango
Phoenix, Arizona

30. Joseph C. Alexander
Maricopa County Right of Way Agent
111 South Third Avenue
Phoenix, Arizona

31. Title Officer
Lawyers Title of Arizona
2200 North Central Avenue
Phoenix, Arizona

32. Title Officer
Transamerica Title Insurance Company
114 West Adams
Phoenix, Arizona

33. Title Officer
Dynacompa, Inc.
930 East Highland
Phoenix, Arizona

34. State witness re grade and location of North Country Club Drive

The Plaintiff Indian Community intends to call the following witnesses at the trial:

1. W. S. Gookin
4203 North Brown Avenue
Scottsdale, Arizona

2. G. Donald Voorhees
Bureau of Land Management
Washington, D. C.

The Secretary believes that the jurisdiction of the Court is limited to reviewing the administrative record upon which the 1969 decision and 1972 survey were made since the relief sought is a review of those administrative actions. However, if the Court is of the view that the introduction of other evidence is proper, the Secretary adopts the list of witnesses submitted by the tribe and in addition may call the following:

1. Boyd S. Owens, Bureau of Land Management
Valley Center, 24th Floor
Phoenix, Arizona

2. James H. Jones, Jr.
1536 East Mountain View Road
Phoenix, Arizona

3. Harrison Loesch
Counsel to the Committee on Interior and Insular Affairs
House of Representatives
Washington, D. C.

4. Edward Weinberg
1700 Pennsylvania Avenue, N.W.
Washington, D. C.

5. Henry B. Taliaferro, Jr.
815 Connecticut Avenue, N.W.
Washington, D. C.

6. Stewart L. Udall
6400 Goldsboro Road
Bethesda, Maryland

7. Clark Gumm
Address to be supplied

8. G. Don Vorhees
Bureau of Land Management
Department of the Interior
Washington, D. C.

IX.

The foregoing pretrial order has been approved by the parties to this action as evidenced by the signature of their counsel hereon, and the order is hereby entered and will govern the trial of this case. This order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

DATED this 17th day of March, 1976.

W. D. Murray
W. D. Murray, Senior U. S. District Court Judge

APPROVED AS TO FORM AND CONTENT:

MARKS & MARKS

By Philip J. Shea
Philip J. Shea
Attorneys for Plaintiff

SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

By Donald O. Fuller
Donald O. Fuller
Attorneys for Johnson & Stewart Materials, Inc., Johnson & Campo

PERRY & HEAD

By Dale A. Head
Dale A. Head
Attorneys for Allied Concrete & Materials

BRUCE E. BABBITT
The Attorney General

By Donald O. Loeb
Donald O. Loeb
Assistant Attorney General
Attorneys for Arizona State Highway Commission

1082

1 MOISE E. BERGER
The County Attorney
2
3 By [signature]
4 David Krom
Deputy County Attorney
5 Attorneys for Maricopa County
6 POWERS, BOUTELL, FANNIN & KURN
7
8 By [signature]
James Powers
9 Attorneys for City of Mesa and
Transamerica Title Insurance Co.
10
WILLIAM SMITHERMAN
11 United States Attorney
12
13 By [signature]
John F. Flynn
14 Assistant U. S. Attorney
Attorneys for Secretary of the Interior
15
JENNINGS, STROUSS & SALMON
16
17
By [signature]
18 Robert E. Hurley
Attorneys for Salt River Valley Water
19 Users' Association and Salt River
Project Agricultural Improvement and
20 Power District
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FILED (164)

AUG 1 3 1976

W. J. ..., CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY .... DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff, vs. ARIZONA SAND & ROCK CO., an Arizona corporation, et al., Defendants.	No. Cv-72-376-Phx.
JOHNSON & STEWART MATERIALS, INC., et al., Plaintiffs, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al., Defendants.	No. Cv-73-579-Phx.
CITY OF MESA, an Arizona a municipal corpdration, Plaintiff, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al., Defendants.	No. Cv-73-769-Phx.
SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation, et al., Plaintiffs, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al., Defendants.	No. Cv-74-553-Phx.

AUG 18 1976

EXHIBIT C

STATE OF ARIZONA, ex rel.,
W. A. ORDWAY, Director of the
Arizona Department of
Transportation,

Plaintiff,

vs.

ROGERS C. B. MORTON, Secretary
of the Department of the
Interior, et al.,

Defendants.

No. Cv-74-529-Phx.

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

These consolidated actions involve the south boundary of the Salt River Indian Reservation in Township 1 North, Range 5 East, Gila and Salt River Base and Meridian, north of Mesa, Arizona. As a result of a decision by the then Secretary of Interior on January 17, 1969, a plat of survey was prepared and filed on August 17,1972, showing that boundary at a location which would result in the inclusion within the reservation of certain property to which other parties claim an interest. The individual actions are these:

No. CIV-72-376. This is an action filed by the Indian Community against Arizona Sand and Rock Co., et al., for trespass, ejectment and damages for the removal of sand and gravel. The issue of the amount of damages, if any, has been severed and only the issue of liability is now before the Court. Of the defendants originally named in this action, only the following still remain: Johnson & Stewart Materials, Inc., Allied Concrete & Materials Co., Salt River Valley Water Users' Association, Arizona State Highway Commission (now the Arizona Department of Transportation), the County of Maricopa, Roy Johnson and Earl C. Johnson and their respective wives and the Executor of the Estate of Leroy Johnson, Deceased. Transamerica Title Insurance Company subsequently became a party defendant to this action on its motion to intervene upon the grounds that it has issued a policy of title insurance upon property owned by Allied Concrete & materials Co.

In this action the Indian Community seeks an order of ejectment against all defendants from the reservation as determined by the Secretarial memorandum of January 17, 1969, and damages for trespass against all defendants except Allied Concrete Materials Company, Inc.,

In the course of proceedings in this case the court ruled that it would not consider a collateral attack by the defendants upon the decision of the Secretary of the Interior and this ruling resulted in the filing of the subsequent actions in which the following claims are asserted:

No. CIV-73-579. This is an action instituted by Johnson & Stewart Materials, Inc., Roy Johnson and Earl C. Johnson and their respective wives, and the executor of the Estate of Leroy Johnson (hereinafter collectively referred to as "Johnson & Stewart") against the Secretary of Interior seeking to invalidate the decision of the Secretary and the 1972 Plat of Survey. The plaintiffs claim an interest in a portion of the disputed property by reason of unpatented mining claims and assert that the Secretarial memorandum of January 17, 1969 is unlawful, exceeds the Secretarial powers, violates due process and constitutes a taking of property interests without just compensation and due process.

No. CIV-73-769. This is a similar action brought by the City of Mesa. It claims a fee simple interest in portions of the disputed property by reason of patents issued by the United States prior to the filing of the 1972 Plat of Survey.

No. CIV-74-553. This is a similar action brought by the Salt River Valley Water Users' Association. The Association claims an interest in a portion of the disputed property pursuant to a contract entered into with the United States in 1917 by which said land, which previously had been withdrawn for reclamation purposes, was conveyed to the Association, as Agent of the United States, for use in connection with the operation of the Salt River Project, a Federal reclamation project.

No. CIV-74-529. This is an action brought by the State of Arizona on behalf of the Director of the Arizona Department of Transportation. The State of Arizona claims an interest in a portion of the disputed property by reason of certain licenses and permits for the removal of sand and gravel and rights of way which were granted to the Department by the Bureau of Reclamation, Department of Interior.

The above consolidated cases came on for trial before the court, sitting without a jury, on March 17, 18, 22, 23 and 31, 1976, the plaintiffs were represented by their respective counsel, and the defendants were represented by their respective counsel; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence, the parties rested and thereafter, within the time granted by the court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the court for its consideration and decision, and the court having considered all of the evidence and testimony submitted at the trial of the cause, and the briefs of counsel, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I

The Salt River Pima-Maricopa Indian Reservation was created by the Executive Order of President Rutherford B. Hayes, dated June 14, 1879. In issuing this order President Hayes acted pursuant to the authority of the Act of February 28, 1859).

II

The Reservation set aside by this Executive Order lies immediately east of what is now the City of Scottsdale and north of the City of Mesa. Its southern boundary is described in the Executive Order as being "* * up and along the middle of the [Salt] river * *". At issue in this proceeding is the location of the river boundary in Township 1 North, Range 2 East, Gila and Salt River Base

and Meridian.

III

The area comprising the Salt River Reservation had been surveyed in 1868 by W. F. Ingalls under contract with the General Land Office. Ingalls' field notes and the plats of his survey show the Salt River flowing in two distinct channels, generally about one-half mile apart, from a point in Section 25, T2N, R5E, and thence southwesterly about six miles to Section 7, T1N, R5E, where they reunite.

IV

The fact of these two channels was the source of uncertainty over a period of many years as to the location of the reservation boundary in T1N, R5E. This uncertainty was expressed by the Acting Commissioner of the General Land Office in a letter dated March 7, 1892, to the Commissioner of Indian Affairs, stating that entries were being made along the river and that his office did not know whether or not the island between the channels was within the reservation.

V

The location of the middle of the Salt River in Township 1 North, Range 5 East, has been complicated by extensive works of man. Beginning in about 1870 a series of irrigation canals, together with their headings and dams, diverted river waters from their natural channels. Since 1911, with the construction of Roosevelt Dam and Granite Reef Dam, only occasional flood waters have flowed through this Township.

VI

The Salt River Indians formally requested the Interior Department to resolve the uncertainty of the boundary in this Township by a Community Council resolution dated March 23, 1940. In his cover letter forwarding this resolution to his superiors, the Superintendent of the Pima-Maricopa Agency observed that non-Indians were removing sand and gravel from the river bed and were dumping refuse on it.

VII

In 1962, the Salt River Community and a principal sand and gravel claimant, Arizona Sand & Rock, sought to settle the boundary controversy by agreeing to an arbitrary midline through the disputed area which they proposed to have surveyed and then fixed by Act of Congress. The Phoenix office of the Bureau of Land Management undertook to fix this negotiated midline along the ground but it was instructed by its Washington Office that its function was only to fix true boundaries and not to participate in the settlement of disputes by fixing compromise lines.

VIII

The Phoenix office of the Bureau of Land Management sought to fix the boundary in the main channel of the River in this Township but, finding an uncertainty as to which of the channels was the principal one, referred the question to the Bureau Director in Washington. The letter of referral, sent by the Acting State Director of the BLM and dated October 26, 1962, included extensive historical material bearing on the channels of the River in this area and recommended a finding that the north channel was the main channel.

IX

The inquiry of the Phoenix District was answered in the memorandum of the Director of the Bureau of Land Management dated March 5, 1963. This memorandum reviewed the historical material and concluded that "The preponderance and weight of the evidence favors the recognition of the north channel of the Salt River as being the south boundary of the reservation." It also spoke candidly of the conflict between Indian and public land interests:

> This Bureau has a prime and direct interest in the determination of this boundary through a continuing public land interest in lands outside the reservation. In general terms, lands and resources north of this boundary inure to the benefit of the Indians while the land and resources south of this line are subject to laws and regulations pertaining to public lands.

This memorandum was approved by the Assistant Secretary, Public Land Management, on May 6, 1964.

X

The Secretary of the Interior determined that, in this and in several other matters, the Bureau of Land Management was making decisions affecting Indian lands without due regard for their interests. Accordingly he directed the Solicitor to review the matter.

XI

The Solicitor personally became familiar with all material in the file of this proceeding, and, by memorandum dated January 17, 1969, held that the record indicated that the boundary of the reservation in Township 1 North, Range 5 East, was in the south channel of the Salt River. It is clear on the face of this memorandum, together with the 24 exhibits attached to it, that the Solicitor's review of the matter was done thoroughly and intelligently.

XII

By memorandum dated January 17, 1969, the Secretary of the Interior advised the Director of the Bureau of Land Management that he had determined, on the basis of the Solicitor's opinion, that the southern boundary was in the south channel.

XIII

Following the change of administration in the Executive branch of the Government on January 20, 1969, the matter was assigned for reconsideration by the new Assistant Secretary for Public Land Management. After a study of the extensive administrative record which included aerial photographs, discussions with representatives of the Indians and private interests, and after flying over the area to make a personal inspection, this Assistant Secretary directed a memorandum to the Director of the Bureau of Land Management in which he, in effect, confirmed the Secretarial order of January 17, 1969, and in which he determined that the south boundary should be accepted as being in the south channel as it existed during the 1965-66 flood.

XIV

Pursuant to the determination that the boundary lies in the south channel, a survey was undertaken under the supervision of Clark Gumm, Chief of the Cadastral Survey. The plat of this survey, consisting of four pages, was accepted on August 17, 1972.

XV

Pursuant to the order of the Chief of the Cadastral Survey, the thalweg of the south channel, i.e. the line connecting its lowest points, rather than the midline between the opposite banks, was located by the surveyors as the boundary. The reason for fixing the thalweg was that that was midline of the last water that flowed through the channel and because of the difficulty of locating accurately the banks of the channel.

XVI

The Arizona State Director of the Bureau of Land Management caused notice to be given in the Federal Register on September 8, 1972, that the plat of survey would be filed on October 16, 1972, unless it was protested before that date, and that all protests would be acted upon before the plat was filed.

XVII

Protests were timely filed by all parties to this action except the Secretary. Normally, such protests would be considered by the Director of the Bureau of Land Management but, because of the Bureau's particular interest in these proceedings, the protests were referred to the Secretary's office.

XVIII

The protests of all the parties to this action, except only that of the Indian Community, were directed only to the Secretarial Order of January 17, 1969, and did not deal with the manner in which the survey was carried out. Particularly, they did not question the use of the thalweg to fix the middle of the south channel nor the description of the surveyed boundary as being ambulatory. By memorandum dated August 2, 1973, the Acting Deputy

Assistant Secretary advised the Director of the Bureau of Land Management that the protests of all the parties except that of the Indian Community were dismissed and that the Indian Community had submitted a withdrawal of its protest conditioned on the dismissal of the others. Accordingly the Director of the Bureau of Land Management was directed to file the plat of survey in the Arizona State Office.

XIX

The claims of the parties with respect to lands within the southern boundary of the reservation in Township 1 North, Range 5 East, as that boundary is defined in the plat of survey dated August 17, 1972, are as follows:

(a) The Salt River Valley Water User's Association claims a possessory interest in the north half of the northwest quarter, the northwest quarter of the northeast quarter, and the southwest quarter of the northwest quarter. These were purportedly withdrawn under the first form withdrawal orders issued pursuant to Section 3 of the Act of June 17, 1902, 43 U.S.C. 416, which authorizes withdrawals of public land for reclamation project purposes. The Association's claim to withdrawn lands is based on its contract with the United States dated September 6, 1917, by which the United States transferred to it the care, operation and maintenance of the project. There is no instrument or other record of transfer to the withdrawn lands in Section 3 to the Association.

(b) The State Highway Commission and Maricopa County have not in this proceeding claimed any interests in lands north of the surveyed boundary. However the Indian Community has claimed against them for sand and gravel removed from the withdrawn lands in Section 3. These removals of sand and gravel were made under color of authority of permits issued by the Secretary of the Interior pursuant to the Act of August 4, 1939, 43 U.S.C. 387.

(c) Allied Concrete and Materials Company, Inc. holds a deed to the southwest quarter of the northwest quarter of Section 3.

(d) Johnson & Stewart Materials, Roy Johnson, Earl C. Johnson and the late Leroy Johnson have removed sand and gravel under unpatented mining claims from the northwest quarter of the northwest quarter of Section 9.

(e) The City of Mesa holds record title to the south half southeast quarter, §7; the north half, northwest quarter, §18; the northwest quarter and the west 33' of the northeast quarter, northeast quarter of §18; and the southeast quarter, northeast quarter of §3.

XX

In determining that the boundary lies in the south channel of the river in Township 1 North, Range 5 East, the Secretary gave due consideration to the pertinent historical materials. Particularly:

(a) The Secretary gave due consideration to the historical record preceding the issuance of the Executive Order of June 14, 1879, and properly determined that it does not indicate whether the north or the south channel was intended as the boundary. A map dated March 4, 1879, shows that Captain A. R. Chaffee recommended a reservation with a south boundary in the south channel; an earlier map identified as being "traced in the Adjutant General's office, January 1879" shows a proposed reservation with a south boundary running north of the river; Major General McDowell, Commander of the Military Division of the Pacific, recommended a reservation with a south boundary being "along the middle of the Salt River"; Inspector J. H. Hammond, reporting on March 8, 1879, that the Pimas and Maricopas had settled on both sides of the river, recommended a reservation with the north bank of the Salt River as the south boundary. The Executive Order followed the recommendation of the acting Commissioner of Indian Affairs dated June 12, 1979, by stating the boundary to be "up and along the middle of the said river" without specifying one channel or the other.

(b) The Secretary gave due consideration to the Ingalls' survey of 1868 and properly concluded that it provided evidence, though limited and inconclusive, that the south channel was larger than the north. The Secretary noted that where section lines crossed channels the length of the section lines from bank to bank were an average of 4.83 chains across the south channel and 3.71 chains across the north channel. It was established at the trial that the perpendicular distances across the channels could be calculated at points

where the section lines crossed the channels on the basis of data provided in Ingalls' notes and the average width of the south channel so computed, was 301.19 feet and that of the north channel was 183.55 feet.

(c) The Secretary gave due consideration to the sketch plat of the reservation prepared in the Surveyor General's office in Tucson and dated July 12, 1879, and reasonably found it impersuasive. It is not a survey plat and there is no evidence that the person who drew it ever saw the Salt River.

(d) The Secretary gave due consideration to the surveys of Chillson in 1888 and Farmer in 1910 and reasonably concluded that they did not fix the boundary and that they provide no indication of which was the main channel. Both of these surveyors, having been retained to survey the reservation for agricultural allotment purposes, meandered only the north bank of the north channel which was the southern boundary of the reservation lands suitable for farming. Neither the plats of their survey nor their field notes indicate the relative sizes of the channels. There is a dotted line on the Farmer plat labelled "Reservation Boundary" which would lie approximately in the north channel if such channel had been defined on the plat. But this is not a survey line, no reference to it is made in the Farmer field notes, and it was most likely placed on the plat by someone other than Farmer merely to indicate that the boundary was south of the meander line.

(e) The Secretary gave due consideration to the letter of the Commissioner of Indian Affairs to the Commissioner of the General Land Office, dated August 1892, which refers to a plat which has not been identified, which the Indian Commissioner said "indicates that the principal portion or branch of the river runs south of the island, and that what is termed the north channel is a much narrower stream."

(f) The Secretary gave due regard to the topographical survey map of 1902-03 prepared by the United States Geological Survey which shows that the south channel was the main channel at that time.

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It in fact shows the historic south channel to be the only water-bearing channel. This map was revised in 1913 and at that time the south channel is still represented as it was in 1902-03.

XXI

It is not clear what aerial photography was considered as part of the administrative record. The aerial photography in evidence in this case confirms that the south channel is the main channel. Beginning with the earliest aerials of 1934, the principal channel coming into Township 1 North, Range 5 East, from Township 2 North, Range 5 East, is the historic south channel. At a point immediately north of the northeast quarter of section 3 in T1N, R5E, a new branch of the south channel veers to the west to the northwest corner of section 3 from whence it turns south and rejoins the historic south channel in the southwest quarter of Section 3. A second new branch of the south channel also makes a counterclockwise arc from the southwest of Section 3 across the south halves of Sections 4 and 5 and then rejoins the historic south channel in Section 8. It is undisputed that these two new branches are avulsive changes in the flow of water through the old south channel. Except for these avulations, the mainstream of the Salt River in this Township is the south channel as it was described in the Ingalls' plat of 1868 and the United States Geologic Survey plat of 1902-03.

XXII

The contention of the non-Indian land claimants that the Salt River in this Township has historically been a braided stream without discrete channels is not supported by evidence. The river ran in two well-defined channels in 1868 and in one well-defined channel in 1902-03. Since the interception of the river waters by upstream dams the works of man and wind erosion have done substantial damage but these changes do not affect the location of the boundary.

XXIII

The court finds all of the facts agreed to by the parties in the Pre-Trial Order.

From the foregoing Findings of Fact the court draws the following

CONCLUSIONS OF LAW

I

This court has jurisdiction of the consolidated cases under Title 28 U.S.C. 1331, 1361, 1362, 2201, 2202 and Title 5 U.S.C. 701-706.

II

The Congress has vested in the Secretary of the Interior the authority and the duty to survey the boundaries of Indian Reservations. Act of April 8, 1964, 13 Stat. 41, 25 U.S.C. §176.

III

A survey undertaken by the Secretary of the Interior within the scope of his statutory authority is accorded extra-ordinary deference by the judiciary.

IV.

Interior Department proceedings for the determination of instruction to surveyors, and the conduct of the survey on the ground, are executive functions with respect to which the Secretary is not required to give a hearing to affected persons or to make findings on the basis of a record.

V

A person who makes entry upon land which is near reserved land, the boundary of which has not been fixed by a survey, enters subject to the risk that his entry may later be determined to be within the reservation.

VI

The Secretary of the Interior has the legal authority and responsibility to review and to reverse any action taken with respect to a survey by the Director of the Bureau of Land Management.

VII

The fact finding procedures employed by the Department of the Interior to determine the boundary of the Salt River were adequate and the relevant facts were placed before, and considered by, the Secretary of the Interior.

VIII

The court can review the Secretary's survey of the south boundary of the Salt River Indian Reservation only to determine if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In reviewing the Secretary's decision, the court is limited to reviewing the administrative record.

IX

Boundaries of Indian reservations cannot be diminished except by Act of Congress. Act of March 3, 1927, 25 U.S.C. 398(d). Principles of estoppel and adverse possession cannot be invoked to deprive an Indian tribe of its land.

X

The Secretary of the Interior cannot be estopped from enforcing the public policy in favor of the protection of Indian rights.

XI

The land claimants all have standing to sue.

XII

Lands reserved for Indians are not part of the public domain and any patents, licenses, permits, or claims issued under, or made pursuant to, the public land laws are void <u>ab initio</u>.

XIII

The laws protecting Indians must be liberally construed for their benefit and protection.

XIV

Practical construction given to laws fairly susceptible of different constructions, by those charged with the duty of executing them, is entitled to great respect.

XV

The July 12, 1879 map entitled "Plat showing lands reserved for Pima and Maricopa Indians by Executive Order of June 14, 1879" is not an official plat since it does not reflect the findings of a duly authorized and approved survey of the land represented.

XVI

Neither the Chillson survey nor the Farmer resurvey attempted to locate the south boundary of the reservation, but merely meandered the north bank of the north channel of the Salt River. A meander line is not a boundary but merely determines the sinuosities of a river.

XVII

The south boundary of the Salt River Indian Reservation was not surveyed before 1972. The 1972 survey was an original survey of the boundary and not a resurvey conducted pursuant to 43 U.S.C. 772.

XVIII

When a stream has two or more channels the middle of the stream is synonymous with the thread of the stream or the middle of the main channel.

XIX

The branching out of a boundary stream into a new channel, circumventing a body of land rather than eroding through it, is an avulsion which does not result in a change in the boundary. The boundary rather remains fixed in the former channel. In consequence of this principle the counterclockwise arcing of the mainstream around the north and west of Section 3, and through the south halves of Sections 4 and 5, as shown in the aerial photographs, did not remove the boundary from the south channel from which the avulsive changes took place.

XX

The Secretary of Interior's determination that the south boundary of the Salt River Indian Reservation lies along the deepest points of the south channel was reasonable.

XXI

The plat of survey accepted in 1972 correctly fixes the south boundary of the Salt River Indian Reservation as established by the Executive Order of June 14, 1879.

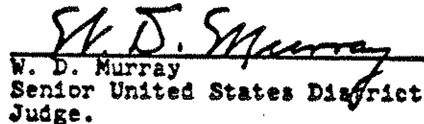
XXII

Since the Secretary of the Interior acted within the scope of his statutory authority and since the statute pursuant to which he acted is constitutional, the suits against the Secretary are in fact suits against the United States and must be dismissed on the grounds of sovereign immunity.

XXIII

The United States is not an indispensable party to the action brought by the Salt River Indian Community.

Done and dated this 16th day of August, 1976.



W. D. Murray
Senior United States District Judge.

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FILED

DEC 7 1973

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Highway Commission

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Plaintiff,

-v-

ARIZONA SAND AND ROCK COMPANY, an Arizona corporation, et al.,

Defendants.

No. CIV 72-376 PHX

MOTION FOR SUMMARY JUDGMENT
(Oral argument requested)

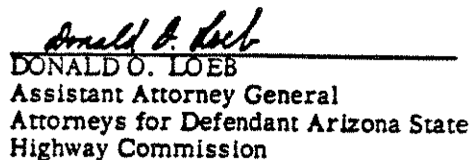
COMES NOW the Defendant Arizona State Highway Commission by and through its attorneys undersigned, pursuant to Rule 56 of the Federal Rules of Civil Procedure and respectfully moves this Court for an order granting a summary judgment against the Plaintiff and in favor of this Defendant on the grounds that there are no genuine issues as to any material facts and the Defendant Arizona State Highway Commission is therefore entitled to judgment as a matter of law. Defendant's Motion is based upon the ground that even if the Plaintiff is correct in its factual contention that the true boundary of the Plaintiff's Executive Order Indian Reservation lies along the line determined by the survey dated August 17, 1972, adopted by the Secretary of the Department of the Interior as the south boundary of the Plaintiff's Executive Order

1 Indian Reservation, Plaintiff's remedy, if any, is properly against the United
2 States of America before the Indian Claims Commission or in the alternative,
3 in an action in inverse eminent domain in the United States Court of Claims
4 for the taking of tribal lands without just compensation, and not against this
5 Defendant.

6 DATED this 3rd day of December, 1973.

7 GARY K. NELSON
8 The Attorney General

9



10 DONALD O. LOEB
11 Assistant Attorney General
Attorneys for Defendant Arizona State
12 Highway Commission

13 MEMORANDUM OF POINTS AND AUTHORITIES

14 The Plaintiff Indian Community was granted its reservation
15 pursuant to an Executive Order dated June 14, 1879, signed by President
16 Rutherford B. Hayes. In that Executive Order the south boundary of the
17 Plaintiff's reservation was defined as running "up and along the middle of the
18 Salt River".

19 Plaintiff now contends that the south boundary of its reserva-
20 tion lies along a line within the so-called south channel of the river established
21 by the survey dated August 17, 1972. (See dotted line on multi-colored map
22 attached hereto marked as Exhibit A and incorporated by reference herein.
23 Said map also shows the relative locations of the various properties held by
24 the Defendants in the present action.) The facts in this case, however, reveal
25 that portions of land within the bed of the Salt River lying north of this line
26 were treated as being lands within the public domain for a substantial period
27 of time following the date of the Presidential Executive Order.
28

1 Pursuant to Act of Congress dated May 20, 1862, Congress
2 approved the Federal Homestead Act which was entitled an Act "to secure
3 homestead to actual settlers on the public domain". Now 43 U.S.C. § 161, et
4 seq. The Homestead Act made available for settlement only "unappropriated
5 public lands". Rice v. United States, 348 F.Supp. 254, 257 (1972).
6 The affidavit of Brian Rockwell, attached hereto as Exhibit B,
7 an experienced title examiner with the Arizona Highway Department, Title
8 Section, reveals that the following patents were issued by the General Land
9 Office covering lands then assumed by the appropriate United States Governmen:
10 officials to be within the public domain: Homestead Certificate No. 160 issued
11 July 3, 1890; Homestead Certificate No. 935 issued June 25, 1892; Homestead
12 Certificate No. 1146 issued April 23, 1896; Desert Land Certificate No. 558
13 dated August 24, 1896 (issued under the Act of Congress of April 24, 1820
14 "An Act making further provisions for the sale of public lands"); Homestead
15 Certificate No. 981 issued February 14, 1900; Homestead Certificate No. 1108
16 issued October 23, 1901 and Patent No. 873498 issued July 21, 1922. None of
17 those conveyances has ever been canceled or declared invalid despite the fact
18 that each of the above grants encroaches upon lands now claimed to be a part
19 of Plaintiff's Executive Order Indian Reservation. These separate grants are
20 numbered and depicted in purple on the map attached hereto, marked as Exhibit
21 C and incorporated by reference herein.
22 There is no claim made here that the parties or their prede-
23 cessors in interest obtained these conveyances thru any fraud or other uncon-
24 scionable conduct. Nor do any of the patents, homestead certificates, recla-
25 mation withdrawals or use permits contain any reservations, conditions or
26 exceptions placing any of the Defendants on notice that these lands may form
27 a part of an Indian reservation.
28

1 In tracing the legal descriptions contained on the face of those
2 homestead certificates and land patents it may be demonstrated that each of
3 those conveyances relates to real property at least a portion of which lies north
4 of the survey line of August 17, 1972, now claimed to represent the south
5 boundary of the Plaintiff's Indian Reservation.

6 If these homestead applicants were attempting to gain title to
7 land which any Indians actually occupied at the time those applications were
8 made, those patent applications would have been denied since the lands would
9 not have been subject to entry. Interior Dept., Circular 3, Interior Dec. 371
10 (1884); Schumacher v. State of Washington, 33 Interior Dec. 454 (1905);
11 Ma-gee-see v. Johnson, 30 Interior Dec. 125 (1900). It is therefore respect-
12 fully submitted that the mere issuance of these conveyances constitutes a
13 recognition on the part of governmental officials within the various departments
14 and bureaus who issued those homestead certificates and land patents, etc.,
15 that those lands were not a part of the Plaintiff's Indian Reservation at the time
16 those conveyances were issued but that said lands constituted a part of the
17 public domain. It is of course hornbook law that Indian lands are not included
18 in the term "public lands" which are subject to sale or disposal under general
19 laws. Bennett County, South Dakota v. United States, 394 F.2d 8, 11 (8th
20 Cir., 1968).
21
In addition to the issuance of these land patents and home-
22 stead certificates, the General Land Office and various other agencies and
23 departments of the United States government, treated other lands within the
24 bed of the Salt River as it passes by the Plaintiff's Executive Order Indian
25 Reservation as being unreserved lands within the public domain and not as
26 Indian territory. As was discussed previously in this Defendant's Motion to
27 Dismiss and Motion for Joinder of Necessary or Indispensable Parties, the
28 Arizona Highway Department entered upon a portion of the lands in question

within the bed of the Salt River pursuant to express authority granted by the Secretary of the Interior under the provisions of 43 U.S.C. § 387. The three permits for removal of gravel, dated September 8, 1948, October 1, 1952 and January 14, 1972, respectively, copies of which are attached to that Motion, covered lands which had been previously withdrawn from the public domain by the United States Department of the Interior, pursuant to the provisions of what is now 43 U.S.C. § 416. It is clear that those lands could not simultaneously be "administered under the federal reclamation laws" yet at the same time be lands set aside to the Plaintiff Indian Community as a part of their Executive Order Indian Reservation under the jurisdiction of the Bureau of Indian Affairs. It is therefore respectfully submitted that even if we assume arguendo that the survey line of August 17, 1972, represents the south boundary of Plaintiff's reservation, the issuance of these conveyances constituted separate takings of real property from the Plaintiff Indian Community for which the Plaintiff may be entitled to just compensation in either an action in inverse eminent domain against the United States Government under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, or as an Indian Claim cognizable under 25 U.S.C. §§ 70(a)-(w). Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl., 1968).

It has long been held that fee title to Indian lands is vested in the federal government. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). In Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-544 (1832), the Court, speaking through Justice Marshall, made it clear that absolute legal title to the lands of Indian tribes was in the United States, subject only to the Indian right of occupancy.

The history of the relations between the federal government and the various Indian tribes is replete with instances where the government

has created, modified, altered and rearranged the boundaries of Indian reservations. It is equally clear that the United States Government has both the power and the authority to "extinguish" recognized title to Indian lands. 25 Univ. of Florida L.Rev. 308, 311 (1973), "Note, American Indian Land Claims-Land versus Money as a Remedy". Such extinguishment can be accomplished in a variety of ways: by treaty, conquest, purchase, occupancy, exercise of complete dominion adverse to the right of occupancy or otherwise Ibid. at 311.

With the passage of the Act of Congress dated August 13, 1946 (60 Stat. 1049) now found in 25 U.S.C. §§ 70(a)-(w) (1970), which created the Indian Claims Commission, tribes were given the right to sue the United States government in order to recover damages for the extinguishment of Indian title to land. Otoe & Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593, 131 F.Supp. 265 (1955). Even before the enactment of the Act creating the Indian Claims Commission, an Indian tribe which has been granted legal right to permanent occupancy of a sufficiently defined territory (i.e., recognized title) had the right to complain of damages arising under the Fifth Amendment for the taking of their land. Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1935). Once title in a tribe has been recognized by treaty or statute, any subsequent taking of that land may result in a liability of the United States government. Sac & Fox Tribe of Indians v. United States, 161 Ct.Cl. 189, 315 F.2d 896 (1963). The Indians therefore acquired compensable property interests when the Executive order creating their reservation was issued. 69 Yale Law Journal 628, 630-631 (1960), "Tribal Property Interests in Executive-Order Reservations; A Compensable Indian Right".

Wrongful transfer of tribal lands to third parties by the Secretary of the Department of the Interior may also constitute a violation or

1 breach of the trust responsibility owed by the United States to its Indian wards.
2 Seminole Nation v. United States, 316 U.S. 286, 62 S.Ct. 1049, 86 L.Ed. 1480
3 (1942); United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228
4 (1886).

5 The potential remedies now available under federal law may
6 even extend to the return of lands to the Tribe from whom such lands have
7 earlier been wrongfully taken. Such an order requiring the return of land to an
8 Indian tribe recently occurred in the controversial case of Pueblo de Taos v.
9 United States, 15 Indian Cl. Comm'n. 66 (1965). For centuries prior to 1906
10 the Taos Indians had continued to reside on lands lying within the so-called
11 Blue Lake area of New Mexico. In 1906, President Roosevelt set aside the
12 Blue Lake area as a forest reserve and thereby interrupted the Tribe's Indain
13 title and right of occupancy, although the Indians were given the exclusive use
14 of the Blue Lake area for a period of 12 years. In 1918 a permit was issued
15 allowing non-Indians to graze their cattle upon the disputed lands. Up until
16 the year 1950 the Indians were denied exclusive use of these lands and the
17 Forest Service continued to issue use permits to non-Indians covering the
18 disputed lands. In 1965 the Indian Claims Commission issued its opinion
19 finding title to 130,000 acres in the Taos Indians. It was not until 1970,
20 however, after extensive lobbying campaign had been conducted that Congress
21 passed Pub. L. No. 91-550 (Dec. 15, 1970) whereby the United States agreed
22 to hold 48,000 acres of the disputed lands in trust for the Taos Indians. Of
23 course, the return of Indian lands wrongfully taken by the United States govern-
24 ment is the exception rather than the rule.

25 Although there is abundant precedent indicating that Indian
26 tribes may under appropriate circumstances recover the monetary value of
27 lands wrongfully appropriated by the United States government, the author of
28

1 the above cited law review article (25 Univ. of Florida L. Rev. 308 at 325)
2 notes that " . . . many problems would result if Congress decided to transfer
3 privately held land to an Indian tribe in settlement of a claim. . . . ". And
4 " . . . if there were transfers of private lands the amount necessary to
5 compensate the present owners would be astronomical. . . . ". Ibid. It is
6 submitted that just such problems would occur if the Plaintiff Indian Community
7 were to be successful in their efforts to recover lands lying between the north
8 and south channels of the Salt River abutting their Reservation.

9 It is also obvious that the Plaintiff has an adequate remedy
10 available at law. Under the aforementioned statutes, it can obtain reimburse-
11 ment from the federal government for the alleged taking of reservation lands
12 resulting from the formal transfer of lands thought to be unreserved and open
13 to entry under the Public Land Laws but now claimed to lie within the boundarie
14 of Plaintiff's Executive Order Indian Reservation.

15 The law is also clear that the conveyance of Indian lands to
16 adverse holders constitutes a taking by the United States under the Fifth
17 Amendment to the United States Constitution. Creek Nation v. United States,
18 302 U.S. 602, 622, 58 S.Ct. 384, 82 L.Ed. 482 (1938). In the Creek Nation
19 case, supra, lands held by the Creeks were inadvertently set aside by the
20 United States for the use of other tribes due to an erroneous survey in 1872.
21 Here, as in the Creek case, supra, the act of the government in conveying
22 away the Plaintiff's interest in what it claims is a part of its reservation was
23 sufficient to terminate the interests of the Plaintiff Indian Community in the
24 lands in question (assuming the correctness of their contention for purposes
25 of argument). United States v. Cherokee Nation, 474 F.2d 628, 636 (U. S.
26 Ct. Cl., 1973).
27
28

These conveyances, though they may have resulted in a reduction in the total quantum of interests held by the Plaintiff Indian Community in the land lying within the boundaries of their reservation, did not necessarily change the boundaries of that reservation.

> "A reservation may be diminished in land size by sale of portions thereof to non-Indians without changing the reservation's boundaries." United States ex rel Condon v. Erickson, 478 F.2d 684, 688 (8th Cir., 1973).

And this principle of law is reinforced by the present definition of "Indian Country" which includes all land within an Indian reservation "notwithstanding the issuance of any patent". United States ex rel Condon v. Erickson, ibid at 688. Thus, in the present case, the conveyance by the government of lands now claimed to lie within the Plaintiff's Indian reservation is not necessarily inconsistent with its continued existence as a reservation. Ibid. See also City of New Town, North Dakota v. United States, 454 F.2d 121, 125 (1972).

CONCLUSION

Since the Defendant Arizona State Highway Commission obtained from officials within the United States Bureau of Reclamation, use permits expressly authorizing the State to enter upon a portion of the lands in question lying north of the survey line dated August 17, 1972, in order to remove sand and gravel, those officials must have treated the lands in question as being unreserved public lands open to entry and not lands forming part of Plaintiff's Executive Order Indian Reservation. Therefore, even if it be conceded that this survey line constitutes the south boundary of Plaintiff's Reservation, the issuance of these permits by officials within the United States

1 Government (along with the issuance of homestead certificates, land patents,
2 right of way grants, reclamation withdrawals, etc.) constituted separate
3 takings of Plaintiff's lands for which the Tribe may be entitled to compensation
4 in an appropriate proceeding filed against the United States of America, but
5 not in separate actions for damages against individual grantees innocent of
6 any wrongdoing.

7 Respectfully submitted,

8 GARY K. NELSON
The Attorney General

9

10

11 [signature] DONALD O. LOEB
Assistant Attorney General
12 Attorneys for Defendant Arizona State
Highway Commission

13

14

15

16 I hereby attest and certify on 12/6/73
that the foregoing document is a full, true and correct
17 copy of the original on file in my office and in my custody.

18 CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA
19 By [signature] Deputy

20

21

22

23

24

25

26

27

28

1 COPY of the foregoing Motion for Summary Judgment mailed/delievered this ________
2 day of December, 1973, to:

3 PHILIP J. SHEA
Marks & Marks
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Phoenix, Arizona 85003
5 Attorneys for Plaintiff

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26 Phoenix, Arizona 85012
Attorneys for Arizona Sand & Rock Co.
27

28

TOWNSHIP I NORTH, RANGE 5 EAST, OF THE GILA AND SALT RIVER MERIDIAN, ARIZONA

DEPENDENT RESURVEY AND SURVEY OF THE SOUTH BOUNDARY OF THE SALT RIVER INDIAN RESERVATION

A history of earlier surveys is contained in the field note record.

This plat, consisting of 4 sheets, represents a dependent resurvey of a portion of the north and west boundaries, a portion of the subdivisional lines and a portion of the subdivision of sections 4, 7 and 8, designed to restore the corners in their true original locations according to the best available evidence, and the retracement of a portion of the subdivisional lines, the survey of additional subdivisions in sections 4, 7 and 8 and the survey of the south boundary of the Salt River Indian Reservation, in Township 1 North, Range 5 East, Gila and Salt River Meridian, Arizona.

Except as indicated, the lottings and areas are as shown on the plats approved October [illegible] and March [illegible].

These surveys were executed by Boyd S. [illegible] and Paul G. [illegible], Cadastral Surveyors, from May 24, 1962 to May 11, 1972, under Special Instructions dated May 11, 1962, and Amended Supplemental Special Instructions dated March 9, 1972, for Group 372, Arizona.

The south boundary of the Salt River Indian Reservation, as shown, [illegible] an ambulatory line representing the middle of the Salt River.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D.C. August 17, 1972

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

Chief, Division of Cadastral Survey

1 **AFFIDAVIT**

2 STATE OF ARIZONA)
) ss.
3 County of Maricopa)

4

5 R. BRIAN ROCKWELL, having been first duly sworn upon his
6 oath, deposes and says:

7 1. That I am presently employed by the Arizona State Highway
8 Department in the capacity of Title Examiner II.

9 2. That prior to the date of my employment with the Arizona
10 Highway Department I worked for private title firms as a title examiner for
11 a period of four years.

12 3. That pursuant to a request for the Legal Division of the
13 Arizona Highway Department, I undertook an examination of the title to real
14 properties lying south of the north bank of the Salt River along the disputed
15 southern boundary of the Salt River Indian Reservation.

16 4. That my examination revealed that the following Homestead
17 Certificates, Desert Land Certificates and Land Patents were issued covering
18 real property lying south of what appears on the aerial photographs to be the
19 north bank of the Salt River within the bed of that River.

20 5. That in plotting the location of these grants it appears that
21 the following original instruments of conveyance from the United States
22 Government relate to lands lying north of the cadastral survey line recently
23 adopted by the Secretary of the Interior as constituting the southern boundary
24 of the Salt River Indian Reservation:

25 Homestead Certificate No. 160
26 issued July 3, 1890

27 Homestead Certificate No. 935
issued June 25, 1892

28

Homestead Certificate No. 1146
Issued April 23, 1896

Desert Land Certificate No. 558
dated August 24, 1896

Homestead Certificate No. 981
Issued Frbruary 14, 1900

Homestead Certificate No. 1108
Issued October 23, 1901

Patent No. 873498
Issued July 21, 1922

6. My examination also revealed the fact that permits for the removal of gravel issued by the Bureau of Reclamation to the State of Arizona dated September 8, 1948, October 1, 1952 and January 14, 1972 also relate to real property lying north of the aforementioned cadastral survey line.

R. Brian Rockwell
R. BRIAN ROCKWELL

SUBSCRIBED AND SWORN to before me this 7th day of September, 1973.

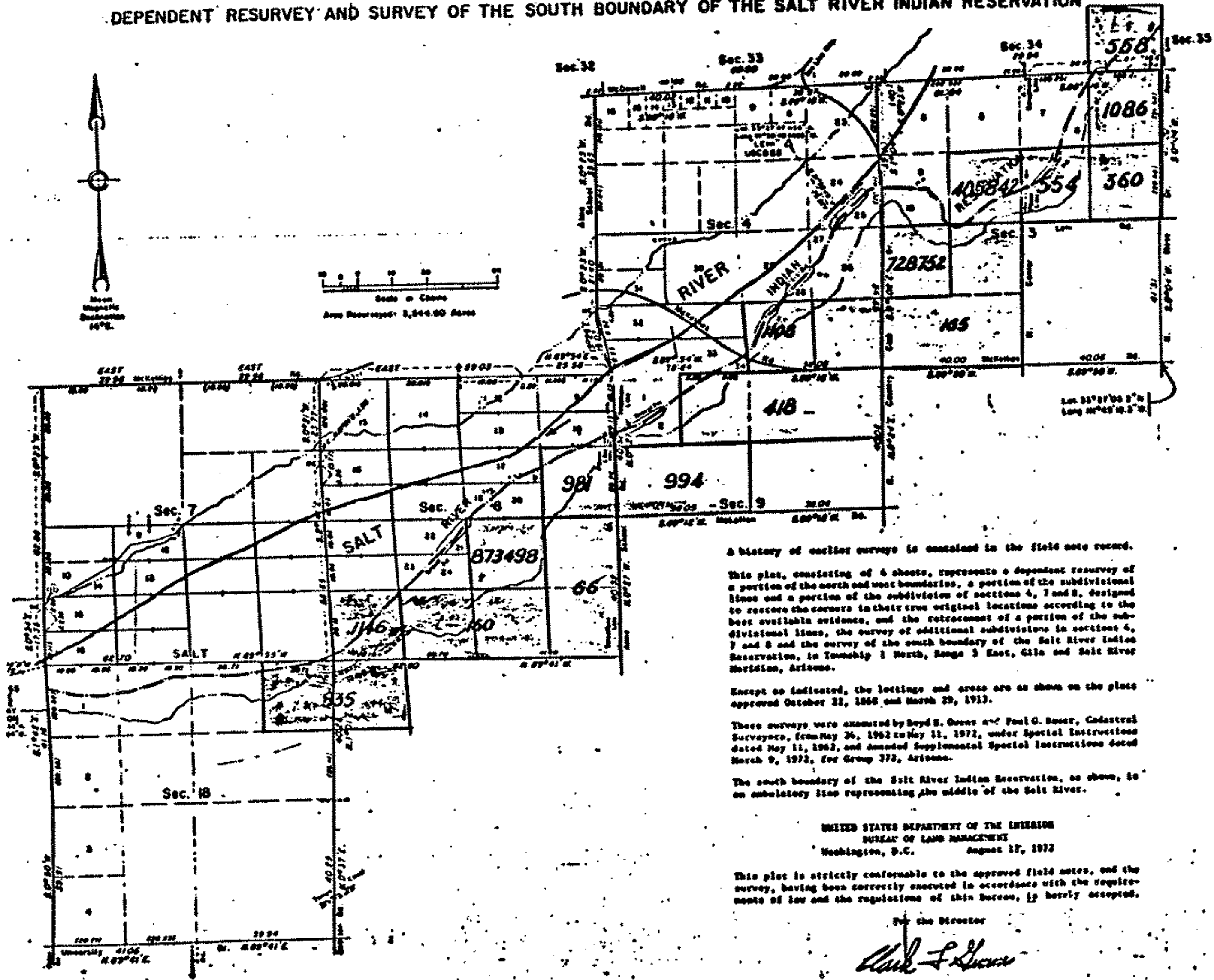
[signature]
Notary Public

My Commission Expires:

9-30-75

TOWNSHIP 1 NORTH, RANGE 5 EAST, OF THE GILA AND SALT RIVER MERIDIAN, ARIZONA

DEPENDENT RESURVEY AND SURVEY OF THE SOUTH BOUNDARY OF THE SALT RIVER INDIAN RESERVATION



A history of earlier surveys is contained in the field note record.

This plat, consisting of 4 sheets, represents a dependent resurvey of a portion of the north and west boundaries, a portion of the subdivisional lines and a portion of the subdivision of sections 4, 7 and 8, designed to restore the corners in their true original locations according to the best available evidence, and the retracement of a portion of the subdivisional lines, the survey of additional subdivisions in sections 4, 7 and 8 and the survey of the south boundary of the Salt River Indian Reservation, in Township 1 North, Range 5 East, Gila and Salt River Meridian, Arizona.

Except as indicated, the lottings and areas are as shown on the plats approved October 22, 1868 and March 29, 1913.

These surveys were executed by Boyd E. Owens and Paul G. Bauer, Cadastral Surveyors, from May 24, 1962 to May 11, 1972, under Special Instructions dated May 11, 1962, and Amended Supplemental Special Instructions dated March 9, 1972, for Group 372, Arizona.

The south boundary of the Salt River Indian Reservation, as shown, is an ambulatory line representing the middle of the Salt River.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D.C. August 17, 1972

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

[signature]

Chief, Division of Cadastral Survey

FILED

OCT 17 1972

W. A. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY [signature] DEPUTY CLERK

(24)

GARY K. NELSON
The Attorney General
ROBERT V. KERRICK, Assistant Attorney General
DONALD O. LOEB, Assistant Attorney General
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Telephone: 261-7291
Attorneys for Defendants Arizona State
Highway Commission, comprised of
Lew Davis, Rudy E. Campbell, Walter
Surret, Walter A. Nelson and Len A. Mattice

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff,	
-v-	No. CIV 72-376 PHX WEC
ARIZONA SAND AND ROCK COMPANY, et al., Defendants.	MOTION TO DISMISS AND MOTION FOR JOINDER OF NECESSARY OR INDISPENSABLE PARTIES (ORAL ARGUMENT REQUESTED)

COME NOW the Defendants, the Arizona State Highway Commission, comprised of Lew Davis, Rudy E. Campbell, Walter Surret, Walter A. Nelson and Len A. Mattice, by and through their attorneys, Gary K. Nelson, the Attorney General, and Robert V. Kerrick and Donald O. Loeb, Assistant Attorneys General, pursuant to Rules 12 (b)(1) and 12 (b)(7) of the Federal Rules of Civil Procedure, and respectfully move the Court for an order dismissing the Plaintiffs' Complaint or in the alternative for an order requiring joinder of necessary or indispensable parties on the following grounds.

1. The Plaintiff has failed to join certain indispensable parties as required by Rule 19 of the Federal Rules of Civil Procedure who include but are not limited to the following entities, agencies and officers: The United

States of America, the Department of the Interior and its sub-agencies, the United States Bureau of Reclamation and the United States Bureau of Land Management as well as the appropriate officers and agents thereof as is more fully set forth in the accompanying memorandum of points and authorities.

2. The District Court for the District of Arizona is without subject matter jurisdiction over the present controversy by reason of the fact that the matter in controversy does not arise under the Constitution, Laws or Treaties of the United States but instead arises under a Presidential Executive Order dated June 14, 1879.

Respectfully submitted this 17th day of October, 1972.

GARY K. NELSON
The Attorney General

Donald O. Loeb
DONALD O. LOEB
Assistant Attorney General
Attorneys for Defendant Arizona State Highway Commission

MEMORANDUM OF POINTS AND AUTHORITIES

I. Joinder of the United States Government, its officers and agents under Rule 19 of the Federal Rules of Civil Procedure.

In Paragraph III of its First Claim for Relief, the Plaintiff in its complaint alleges that the real property which forms the subject matter of the present controversy is that set aside to the Plaintiff pursuant to the Executive Order of President Rutherford B. Hayes, dated June 14, 1879. This Defendant respectfully submits that before the Plaintiff can properly attempt to attain any adjudication of its claims that this or any other Defendant has trespassed upon the Plaintiffs' Indian Reservation and has removed sand and gravel from por-

tions thereof, the Plaintiff must first establish that it has some right, title or possessory interest in the real property on which the alleged acts of trespass are said to have occurred.

The law is clear that a Plaintiff in an action based upon trespass to realty must prove either actual or constructive possession in himself at the time of the alleged trespass before he may bring such an action. West Virginia Pulp and Paper Co. v. Cohen, 153 F.2d 576 (4th Cir., 1946); Bennet v. Rewis, 212 Ga. 800, 96 S.E.2d 257 (1957). Where the plaintiff in a trespass action cannot prove actual occupancy, as is the case here, such a plaintiff must show title in himself. Daniels v. Coleman, 253 S.C. 218, 169 S.E.2d 593 (1969). Furthermore, the plaintiff in an action in trespass to realty must recover upon the strength of his own title and not upon the weakness of the defendant's title. Stottlemyer v. Kline, 259 A.2d 52 (Md., 1969).

Nowhere in its complaint does the Plaintiff Indian Community allege either actual or constructive possession of the real property which forms the subject matter of this action and from which the various Defendants are alleged to have removed sand and gravel without the consent of the Plaintiff. The only portion of the complaint in which the Plaintiff indicates any right, title or interest in the real property in question which would give it the requisite standing to bring the present law suit appears in paragraph IV of Plaintiff's First Claim of Relief wherein the Plaintiff alleges that "The defendants named in Paragraph I have trespassed upon the Plaintiff's reservation...."

The Plaintiff has not even attempted to set forth the physical dimensions or boundaries of its Indian Reservation in its Complaint although it is clear from the filing of the present action that the Plaintiffs are attempting to assert dominion, ownership and control over certain portions of real property which at the present time are not acknowledged to be within the

exterior boundaries of the Salt River Pima-Maricopa Indian Reservation by those agencies of the United States Government presently exercising control over this area of land.

The Defendant, Arizona Highway Commission, entered upon a portion of the land in question bordering the Salt River under the authority of three permits issued by the United States Department of Interior, Bureau of Reclamation, for the purpose of removing gravel and construction material. These permits, copies of which are attached hereto marked as Exhibits "A", "B" and "C" respectively, and incorporated by reference herein, were dated September 8, 1948, October 1, 1952 and January 14, 1972. The real property which forms the subject of these permits had been previously withdrawn from the public domain by the United States Department of the Interior pursuant to the provisions of what is now 43 U.S.C. § 416. These permits were then issued pursuant to authority granted to the Secretary of the Interior under the provisions of 43 U.S.C.A. § 387. Hence, it is clear that the real property in question cannot simultaneously be both land set aside to the Plaintiff Indian Community as an Executive Order Indian Reservation and land which at one time formed a part of the public domain but which has also been withdrawn from entry pursuant to the provisions of 43 U.S.C. § 416.

This Court cannot possibly grant a judgment in favor of the Plaintiffs and against any of the various Defendants, all of whom claim to have derived certain rights in and to the real property in question from the United States Government and its various agencies, without first holding that the Plaintiff was in either actual or constructive possession of the real property in question or was the owner in fee of this land. Such a determination in favor of the Plaintiff in this trespass action would be tantamount to a judicial decree quieting title in the Plaintiff Indian Community. Furthermore, such an

1 adjudication would effectively constitute a denial of any right, title or interest
2 in and to the real property in question so far as any agency of the United States
3 Government including the Department of the Interior is concerned.
4 Such a determination would in all probability render the
5 Department of the Interior and one or more agents liable to any and perhaps
6 all of the named Defendants for loss or damage sustained as a result of the
7 improper action of the Department of the Interior in issuing Use Permits
8 covering lands which were not owned by nor subject to the control of the
9 Department of the Interior.
10 It is therefore earnestly submitted that the Plaintiff should not
11 be permitted to circumvent the critical issue of title to the real property in
12 question by adopting the simple expedient of neglecting to name the United
13 States or any of its agencies, employees or officers as parties Defendants to
14 the present action. This contention is buttressed by the fact that the Plaintiffs
15 themselves have alleged in Paragraph III of their Second Claim for Relief that
16 "Title to this land is held by the United States as trustee for the plaintiff."
17 In his highly regarded treatise on Federal Practice, Professor
18 James William Moore states that in general, the United States is an indispen-
19 sable party in actions involving Indian lands because of its governmental
20 interest. Moore's Federal Practice, Vol. 3A ¶19.09[8]. This principle was
21 recently recognized in the case of Fontenelle v. Omaha Tribe of Nebraska,
22 430 F.2d 143 (8th Cir., 1970). This was an action brought by the plaintiff's
23 successors in interest to certain parcels of land which had been allotted to
24 individual members of the Omaha Tribe of Indians. The action was brought
25 against both the United States and the Omaha Tribe of Nebraska seeking to
26 quiet title to these lands and to establish the eastern boundary line of these
27 properties which the plaintiffs claimed extended to the present channel of the
28

Missouri River. Since the lands of the Omaha Tribe are held for the Tribe's perpetual occupancy by the United States as trustee, the Court held that the United States was an indispensable party to this action. Reasoning contained in the Fontenelle decision is equally applicable to the present controversy since the Plaintiff Indian Community has only a right of occupancy and use of the lands in question and the United States retains title to the real property in fee. Spaulding v. Chandler, 160 U.S. 394, 16 S.Ct. 360 (1896).

A similar conclusion was reached by the Court in First National Bank of Holdenville, Oklahoma v. Ickes, 60 F. Supp. 366 (D.C. 1945), wherein the Court held that the interest of the United States in restricted Indian Property may not be foreclosed by a judgment in proceedings in which the United States is not a party. The Court in that case stated that the interest of the United States in restricted Indian property is not distinct and severable from that of the Secretary of the Interior and no decree affecting that interest can be entered unless the United States is present as a party with an opportunity to be heard. See also, Nicodemus v. Washington Water Power Co., 264 F.2d 614 (C.A. 9th, 1959); Prairie Band of Potowamie Indians v. Puckee, 321 F.2d 767 (10th Cir., 1963).

Although the case of Schutten v. Shell Oil Co., 421 F.2d 869 (Ct.App. 5th Cir., 1970) does not relate to Indian Lands, certain principles enunciated therein are applicable to the present controversy. In that case certain persons claiming to be owners of certain lands brought an action in Federal Court seeking to evict an oil company and also for an accounting for oil,gas and other minerals allegedly removed from the land. The Fifth Circuit Court of Appeals held that the District Court had properly dismissed the action for failure to join the defendant-lessor which also claimed title to the land in question. The lessor could not be joined because its joinder would have

destroyed diversity of citizenship. More important, however, the Court went on to hold that the question of ownership of the land had to be adjudicated before the trespass issue could be reached and that the lessor had a definite interest in the issue. The Court stated that while the lessor might not be bound by a judgment rendered in its absence, it would have been prejudiced by a judgment adverse to the defendant oil company.

As in the present action, the Plaintiff in the Schutten case, supra, was not in possession of the land in question, although it claimed ownership thereof. The Court made the following comment with regard to the Plaintiff's action in trespass:

> " . . . It cannot be denied that appellants' action in trespass is based upon its claim of ownership of the land overlying the mineral deposits. This claim is directly opposed to the Levee Board's claim of ownership which is 'backed up' by its possession in fact. This question of actual ownership must necessarily be adjudicated before the trespass and accounting issues are reached. . . ."
> Schutten v. Shell Oil Co., 421 F.2d at p. 874.

The Defendant, Arizona Highway Commission, therefore, respectfully submits that the Department of the Interior and its sub-agencies, the Bureau of Reclamation and the Bureau of Land Management, as well as the appropriate officers and agents thereof, are at the very least necessary if not indispensable parties to the present action within the meaning of Rule 19(a) of the Federal Rules of Civil Procedure and must be joined before this Court can even attempt to determine whether or not the Plaintiff Indian Community has standing to bring its action in trespass.

It is therefore, respectfully submitted that the Court should take appropriate action to assure joinder of such officers and agents as necessary or indispensable parties under Rule 19, of the Federal Rules of Civil Procedure.

II. Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.

In Paragraph III of its First Claim for Relief, the Plaintiff asserts that this Court has jurisdiction to adjudicate the present controversy under the provisions of 28 U.S.C.A. § 1362. However, federal jurisdiction of a claim cannot be sustained under this statute or 28 U.S.C.A. § 1331 (The Federal Question Statute) on the bare allegation that it "arises under the Constitution, laws or treaties of the United States." A suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect (of federal law) upon the determination of which the result depends, and the Court will look beyond the naked allegations of the complaint to determine whether the asserted claim is controlled or conditioned by Federal Law. Prairie Band of Potowatomie Tribe of Indians v. Puckee, 321 F.2d 767 (10th Cir. 1963). 25 U.S.C.A. § 70(a), expressly establishes jurisdiction in the Indian Claims Commission to hear and determine any and all claims against the United States on behalf of any Indian Tribe in law or equity "arising under the Constitution, laws or treaties of the United States, and executive orders of the President." 25 U.S.C.A. § 70(a) relates, however, only to claims accruing before August 13, 1946. Claims arising thereafter fall within the jurisdiction of the United States Court of Claims, pursuant to 28 U.S.C.A. § 1505.

Although specific reference is made in both 25 U.S.C.A. § 70(a) and 28 U.S.C. § 1505 to "executive orders of the President", 28 U.S.C.A. § 1362, relied upon by the Plaintiff to establish jurisdiction in the United States

1 District Court for the District of Arizona, contains no reference whatsoever
2 to controversies arising under executive orders of the President.
3 Nor are the decisions cited by the Plaintiff in its Memorandum
4 in Opposition to Defendants Merrills and Mesa Sand & Rock's Motion to Dismiss
5 in point. Creek Indians National Council v. Sinclair Prairie Oil Co., 142 F.2d
6 842 (10th Cir., 1944) relates to an Indian allotment and involved construction
7 of certain treaties between the United States and the Creek Tribe. McCauley v.
8 Makah Indian Tribe, 28 F.2d 867 (9th Cir., 1942) involved the construction of
9 a treaty between the United States and an Indian tribe. Although the decision
10 in Skomomish Indian Tribe v. France, 269 F.2d 555 (9th Cir., 1959) was
11 concerned with the meaning of a Presidential Executive Order, the Court
12 there held that construction of that Executive Order was dependent upon and
13 drew into question of the construction of a treaty previously entered into
14 between the United States and the Indian Tribe.
15 It is therefore respectfully submitted that since the rights and
16 obligations of the parties to this action involve a construction of the Presidential
17 Executive Order dated June 14, 1879, and not of any statutory, Constitutional
18 or treaty provisions, this Court lacks subject matter jurisdiction of the present
19 controversy and Plaintiff's First Claim for Relief should be dismissed pursuant
20 to Rule 12(b)(1) of the Federal Rules of Civil Procedure. It is further sub-
21 mitted that 25 U.S.C. § 398(D) specifically states that any future changes in
22 the boundaries of Executive Order Indian Reservations shall be made by
23 Congress alone and that this Court, therefore, lacks subject matter jurisdic-
24 tion of the present controversy by reason thereof.
25 Respectfully submitted this 17th day of October, 1972.
26 GARY K. NELSON
The Attorney General
27 Donald O. Loeb
28 DONALD O. LOEB
Assistant Attorney General

I hereby attest and certify on 12/6/93 that the foregoing document is a full, true and correct copy of the original on file in my office and in my custody.
CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA
By ______ Deputy

1 Copy of the foregoing mailed this
2 17th day of October, 1972, to:

3 Royal D. Marks
4 Richard B. Wilks, and
Philip J. Shea, of
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7 Attorneys for Plaintiff

8 GOVE L. ALLEN
Standage & Allen
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10 Attorneys for Defendants Merrill

11 DARRELL F. SMITH
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13 Attorneys for Defendants:
Johnson & Stewart Materials, Inc.
14 Roy Johnson and Mrs. Roy Johnson
Earl C. Johnson and Mrs. Earl C. Johnson
15 John Campo III, Executor of the Estate of
Leroy Johnson, deceased

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21 Attorneys for Allied Concrete & Materials

and

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22 ROBERT E. HURLEY
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Attorney for Salt River Valley Water Users Association

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6 Attorneys for Arizona Sand and Rock Company

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8 Donald O. Loeb
DONALD O. LOEB
9 Assistant Attorney General

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Reg[illegible] Issue [illegible]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Salt River Project

Permit for Removal of Gravel

176r-444
This Permit was terminated
May 15th, 1967
A.K. Essen 6/12/72

P[illegible]
74 +
198

THIS AGREEMENT, made this 8th day of September 1948,
194[illegible], pursuant to the Act of June 17, 1902 (32 Stat. 388), and acts
amendatory thereof or supplementary thereto, between THE UNITED STATES
OF AMERICA, hereinafter styled the United States, represented by the
Contracting Officer executing this agreement, and ARIZONA HIGHWAY DEPARTMENT,
STATE OF ARIZONA, hereinafter styled the Contractor:

WHEREAS, in accordance with the authority vested in the
Secretary of the Interior by Section 23 of the Act of August 4, 1939
(53 Stat. 1187), the Contracting Officer is authorized to grant a
permit to the Contractor for the removal of gravel from the hereinafter
described vacant public land which is embraced in withdrawal under the
provisions of the Act of June 17, 1902 (32 Stat. 388);

NOW, THEREFORE, it is mutually agreed as follows:

1. In consideration of the obligations herein assumed by the
Contractor, the United States does hereby authorize and permit the
Contractor to enter upon the following described lands

The Southeast Quarter of the Northeast Quarter
([illegible]), Section Three (3), Township One (1) North,
Range Five (5) East, Gila and Salt River Meridian,
Maricopa County, Arizona,

for the purpose of removing gravel therefrom.

EXHIBIT A

2. The Contractor covenants and agrees that only gravel shall be removed from such locations on the herein described land as may be designated by the Contracting Officer, and that the excavation and stripping of the ground, the removal of gravel therefrom, and all other operations hereunder, shall at all times be subject to the control, direction and approval of the Contracting Officer.

3. The Contractor covenants and agrees to remove from the herein described land all garbage, trash and junk that heretofore has been dumped, which debris may be buried in an old pit located thereon; and that it will not dump or cause or permit to be dumped any garbage, trash or junk on any part of the herein described land. The Contractor further agrees:

(a) To post the herein described land immediately after the execution of this permit;

(b) To construct and maintain at its own expense a fence along the west boundary of said Quarter Section, and as much of the north and south boundaries as is required to eliminate the dumping of trash on these lands.

(b) (c) To maintain the entire area of said land in a healthful condition and presentable appearance.

4. This permit shall continue as long but in no event beyond 50 years from the date of this permit, as in the opinion of the Contracting Officer it is considered expedient and not detrimental to the public

[illegible] and may be terminated by either the Contracting Officer or the Contractor upon thirty (30) days' written notice. Within said thirty (30) days there shall be removed at the expense of the Contractor any structure or accessories placed on the land by the Contractor, except fences constructed by the Contractor; provided, that any structure or accessories, other than fences constructed by the Contractor, remaining on the land at the expiration of said thirty (30) days shall become and thereafter remain the property of the United States. The Contractor shall not remove any fences constructed by it upon the land herein described; upon the expiration of this permit, all such fences shall become and thereafter remain the property of the United States.

5. The Contractor shall not use the hereinabove described premises for any purpose other than the removal, processing and treating of gravel incident to using it for municipal purposes. The material removed hereunder shall be used for no purposes other than the construction and maintenance of public roads and streets serving and being within or in the immediate vicinity of the Salt River Project, Arizona, and the stripping of the ground and the removal of the materials shall at all times be under the control and subject to the approval of the Regional Director, Region III, Bureau of Reclamation.

6. The Contractor, for itself and for its representatives, agrees to hold harmless, and forever releases and discharges, the United States, its officers, agents and employees, from any and all damages or claims for damages either at law or in equity, which directly or indirectly may accrue or result from the operations under this contract.

7. This permit shall not be exclusive in character and the United States reserves the right to use, lease or permit the use of the land described herein or any part thereof for any purpose. It is understood by the Contractor that the land herein described may be used for purposes other than the removal of gravel, and the Contractor, having full knowledge of such contemplated uses, for itself and its representatives agrees to hold harmless and forever releases and discharges the United States, its officers, agents, attorneys and employees, from any and all damages or claims for damages either at law or in equity, which directly or indirectly may accrue or result from operations under this permit.

8. It is expressly understood and agreed that all rights granted to the Contractor hereunder shall be subject (a) to the right of any of the United States, its representatives, contractors, successors and assigns, to construct, operate and maintain without liability for damage to the works or equipment of the Contractor, canals, laterals, ditches, electrical transmission lines, telephone lines, and any other structures or works of any kind or nature constructed under the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto; and (b) to the right of the Salt River Valley Water Users' Association, under the supervision and control of the Contracting Officer, to remove boulders and gravel from any of the lands described herein during the term of this permit, provided that such operations by said Association shall not interfere with the Contractor's operations.

9. The Salt River Valley Water Users' Association, at all times during the term of this permit, shall have the right to inspect the lands herein

described and the Contractor's operations thereon; the Contractor shall promptly take such remedial action as said Association, at any time and from time to time, may, by written notice endorsed by the Contracting Officer, recommend for the protection of any lands, facilities, or works of the Salt River federal reclamation project.

10. No interest in this permit shall be transferred by the Contractor to any other party and any such transfer shall cause an automatic annulment of this permit so far as the United States is concerned; all rights of action, however, for breach of this agreement are reserved to the United States, as provided by Section 3737 of the Revised Statutes of the United States.

11. The Contractor shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and shall require an identical provision to be included in all subcontracts; Provided, however, That this clause does not refer to, extend to or cover the business or activities of the Contractor which are not related to or involved in the performance of this contract.

12. There is reserved to the United States all uranium, thorium, or any other materials which are or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same.

13. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

14. (a) Any notice, demand or request required or authorized by this contract to be given or made to or upon the United States shall be deemed properly given or made if delivered, or mailed postage prepaid, to Regional Director, Region III, Bureau of Reclamation, Boulder City, Nevada.

(b) Any notice, demand or request required or authorized by this contract to be given or made to or upon the Contractor shall be deemed properly given or made if delivered, or mailed postage prepaid, to

Arizona Highway Department, Phoenix, Arizona.

(c) The designation of the person to or upon whom any notice, demand or request is to be given or made, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this article for other notices.

15. The term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

IN WITNESS WHEREOF, the parties hereto have executed this instrument the date first shown above.

THE UNITED STATES OF AMERICA,

By (Sgd.) L. R. Douglass
Acting Regional Director, Region 3

ARIZONA HIGHWAY DEPARTMENT, STATE OF ARIZONA,
Contractor,

By [signature]
[illegible] STATE ENGINEER

ATTEST:
[signature]
Secretary
Arizona State Highway Commission

Regional Draft 9/3/[illegible]
Contract No. 14-06-300-21

ATTACHMENT NO 4A

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Salt River Project

Permit for Removal of Gravel

THIS AGREEMENT, made this 1st day of October, 19[illegible], pursuant to the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter styled the United States, represented by the Contracting Officer executing this agreement, and ARIZONA HIGHWAY DEPARTMENT, STATE OF ARIZONA, hereinafter styled the Contractor:

WHEREAS, in accordance with the authority vested in the Secretary of the Interior by Section 10 of the Act of August 4, 1939, (53 Stat. 1187), the Contracting Officer is authorized to grant a permit to the Contractor for the removal of gravel from the hereinafter described vacant public land which is embraced in withdrawal under the provisions of the Act of June 17, 1902 (32 Stat. 388);

NOW, THEREFORE, it is mutually agreed as follows:

1. In consideration of the obligations herein assumed by the Contractor, the United States does hereby authorize and permit the Contractor to enter upon the following described land:

Lot four (4), ([illegible]), Section Three (3), Township One (1) North, Range five (5) East, Gila and Salt River Meridian, Maricopa County, Arizona,

for the purpose of removing gravel therefrom.

EXHIBIT B

2. The Contractor covenants and agrees that only gravel shall be removed from such locations on the herein described land as may be designated by the Contracting Officer, and that the excavation and stripping of the ground, the removal of gravel therefrom, and all other operations hereunder, shall at all times be subject to the control, direction and approval of the Contracting Officer.

3. The Contractor covenants and agrees to remove from the herein described land all garbage, trash and junk that heretofore has been dumped, which debris may be buried in an old pit located thereon; and that it will not dump or cause or permit to be dumped any garbage, trash or junk on any part of the herein described land. The Contractor further agrees:

(a) To post the herein described land immediately after the execution of this permit;

(b) To construct and maintain at its own expense a standard fence along the west boundary of Lot 4 and so much of the north boundary as is required to eliminate the dumping of trash on these lands.

(c) To maintain the entire area of said land in a healthful condition and presentable appearance.

4. This permit shall continue so long but in no event beyond 50 years from the date of this permit, as in the opinion of the Contracting Officer it is considered expedient and not detrimental to the public

interest and may be terminated by either the Contracting Officer or the Contractor upon thirty (30) days' written notice. Within said thirty (30) days there shall be removed at the expense of the Contractor any structure or accessories placed on the land by the Contractor, except fences constructed by the Contractor; provided, that any structure or accessories, other than fences constructed by the Contractor, remaining on the land at the expiration of said thirty (30) days shall become and thereafter remain the property of the United States. The Contractor shall not remove any fences constructed by it upon the land herein described; upon the expiration of this permit, all such fences shall become and thereafter remain the property of the United States.

5. The Contractor shall not use the hereinabove described premises for any purpose other than the removal, processing and treating of gravel incident to using it for municipal purposes. The material removed hereunder shall be used for no purposes other than the construction and maintenance of public roads and streets serving and being within or in the immediate vicinity of the Salt River Project, Arizona, and the stripping of the ground and the removal of the materials shall at all times be under the control and subject to the approval of the Regional Director, Region III, Bureau of Reclamation.

6. The Contractor, for itself and for its representatives, agrees to hold harmless, and forever releases and discharges, the United States, its officers, agents and employees, from any and all damages or claims for damages either at law or in equity, which directly or indirectly may accrue or result from the operations under this contract.

7. This permit shall not be exclusive in character and the United States reserves the right to use, lease or permit the use of the land described herein or any part thereof for any purpose. It is understood by the Contractor that the land herein described may be used for purposes other than the removal of gravel, and the Contractor, having full knowledge of such contemplated uses, for itself and its representatives agrees to hold harmless and forever releases and discharges the United States, its officers, agents, attorneys and employees, from any and all damages or claims for damages either at law or in equity, which directly or indirectly may accrue or result from operations under this permit.

8. It is expressly understood and agreed that all rights granted to the Contractor hereunder shall be subject (a) to the right of way of the United States, its representatives, contractors, successors and assigns, to construct, operate and maintain without liability for damage to the works or equipment of the Contractor, canals, laterals, ditches, electrical transmission lines, telephone lines, and any other structures or works of any kind or nature constructed under the Act of Congress approved June 17, 1902, (32 Stat. 388), and acts amendatory thereof or supplementary thereto; and (b) to the right of the Salt River Valley Water Users' Association, under the supervision and control of the Contracting Officer, to remove boulders and gravel from any of the lands described herein during the term of this permit, provided that such operations by said Association shall not interfere with the Contractor's operations.

9. The Salt River Valley Water Users' Association, at all times during the term of this permit, shall have the right to inspect the lands herein

described and the Contractor's operations thereon; the Contractor shall promptly take such remedial action as said Association, at any time and from time to time, may, by written notice endorsed by the Contracting Officer, recommend for the protection of any lands, facilities, or works of the Salt River federal reclamation project.

10. No interest in this permit shall be transferred by the Contractor to any other party and any such transfer shall cause an automatic annulment of this permit so far as the United States is concerned; all rights of action, however, for breach of this agreement are reserved to the United States, as provided by Section 3737 of the Revised Statutes of the United States.

11. The Contractor shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and shall require an identical provision to be included in all subcontracts; Provided, however, That this clause does not refer to, extend to or cover the business or activities of the Contractor which are not related to or involved in the performance of this contract.

12. There is reserved to the United States all uranium, thorium, or any other materials which are or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same.

13. No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

14. (a) Any notice, demand or request required or authorized by this contract to be given or made to or upon the United States shall be deemed properly given or made if delivered, or mailed postage prepaid, to Regional Director, Region III, Bureau of Reclamation, Boulder City, Nevada.

(b) Any notice, demand or request required or authorized by this contract to be given or made to or upon the Contractor shall be deemed properly given or made if delivered, or mailed postage prepaid, to Arizona Highway Department, Phoenix, Arizona.

(c) The designation of the person to or upon whom any notice, demand or request is to be given or made, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this article for other notices.

15. The term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

IN WITNESS WHEREOF, the parties hereto have executed this instrument the date first shown above.

THE UNITED STATES OF AMERICA,
W. H. Taylor
By /s/ ~~[illegible]~~
Acting Regional Director, Region 3,
Bureau of Reclamation

ARIZONA HIGHWAY DEPARTMENT, STATE OF ARIZONA,
Contractor,

By /s/ R. D. Canfield
Deputy [illegible]

Contract No. 14-06-314-15

Attachment No. 6 — Copy 9 — ORIGINAL

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Permit to Remove Construction Materials

W 330 ft of the S 660 ft of Lot 3 Sec. 3, 1 N 6 E

1. In consideration of the obligations herein assumed by Arizona Highway Department, hereinafter styled "Permittee," and subject to the conditions set forth herein, the UNITED STATES OF AMERICA, hereinafter styled the "United States," represented by the Contracting Officer acting pursuant to the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, and particularly Section 10 of the Act of August 4, 1939 (53 Stat. 1187), as amended, hereby grants to Permittee a permit to remove approx. 50,000 cu. yds. or 75,000 tons from the lands described in Schedule A which lands are hereinafter styled "Permit Area."

2. The within permit shall become effective January 1, 1972, and shall expire on June 30, 1972, unless sooner terminated as herein provided. The United States or the Permittee may terminate the within permit at any time upon one months' written notice served upon the other party. In the event of a breach of any of the general conditions or special conditions hereof, the within permit may be terminated by the United States upon 30 days' written notice served upon the Permittee.

3. The rights granted to the Permittee hereunder shall be exercised only in accordance with the general conditions set forth in Schedule B attached hereto and the following special conditions:

(a) The materials removed hereunder shall not be used for any purpose other than the construction of Mesa Drive - Lindsay Road Section of Phoenix-Globe Highway, Project F-022-3-713.

(b) Permittee shall survey and maintain monuments at all corners of the permit area. The monuments shall be 4" x 4" wood posts, four feet above the ground. Each post shall be painted white and be marked to designate the corner of the permit area, and the name of the agency holding the permit.

(c) The permittee shall pay to the United States the rate of $0.10 per ton for select material and $0.05 per ton for pit run material removed from the permit area during the term of this permit.

(d) There will be no stockpiling of material.

(e) Excavation of materials will be to a minimum depth of 30 feet below the natural ground service.

(Paragraph 3 continued on reverse side.)

4. Permittee has read the contents of this permit including Schedules A and B and agrees to be bound by all the terms and conditions contained therein.

Dated this 14 day of February, 1972.

THE UNITED STATES OF AMERICA

By [signature]
Projects Manager, Phoenix Development Office, Bureau of Reclamation, Phoenix, Arizona

[signature]
Deputy State Engineer (12/23/7[illegible])
ARIZONA HIGHWAY DEPARTMENT
[illegible]
Phoenix, Arizona 85007

Contract No. 14-06-314-15

SCHEDULE A

LAND DESCRIPTION

The West 330 feet of the South 660 feet of Lot 3, Section 3, T. 1 N., R. 5 E., G&SRM, Arizona.

3. (f) Limits of permit area will be determined by personnel of Arizona Highway Department and Bureau of Reclamation prior to removal of material.

(g) Permittee shall sprinkle water on haul roads and pit area for dust control.

Contract No. 14-06-314-15

Schedule B
General Conditions

ORIGINAL

1. This permit shall not be exclusive in character and shall at all times be subject to easements or rights existing or of record in favor of the public or third persons and to the right of the United States to enter the above-described land for the purpose of removing or processing construction materials therefrom or thereon, and it is expressly understood and agreed that all rights granted to Permittee hereunder shall be subject to the right of the United States, its representatives, contractors, subcontractors, and assigns to construct, operate, and maintain without liability for Permittee's inability to remove or process any material as a result of such construction, operation, or maintenance of works of any kind or nature constructed under the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto. There is also excepted and reserved the right to prospect and carry on developments for oil, gas, coal, and other minerals on said lands under the Act of October 2, 1917 (40 Stat. 297), and the Act of February 25, 1920 (41 Stat. 437).

2. The Permittee shall not use the permit area for any purpose other than the removal of sand and gravel.

3. The stripping of the ground and the removal of the materials shall at all times be under the control and subject to the approval of the Contracting Officer.

4. The Permittee shall post warning notices around excavations and shall use such other safety measures as may be deemed necessary.

5. The Permittee will not dump or cause to be dumped any garbage, trash, or junk or any other material other than the material removed pursuant to this permit on any part of the permit area.

6. The Permittee shall prevent unauthorized removal of material from the permit area.

7. The Permittee insures that all materials shall be extracted in accordance with approved practices so as to preserve to the maximum extent all scenic, recreational, and other values of the land. At termination of operation, pit areas will be graded to blend with surrounding terrain and drainage reestablished; however, before complete restoration of premises is accomplished by Permittee, the Contracting Officer will be contacted as to type of disposition to be made of any stockpiled material.

8. The Permittee shall maintain the permit area in a condition of safety and presentable appearance. On or before the termination of this permit, Permittee shall return the permit area to a condition satisfactory to the Contracting Officer and shall remove at the expense of the Permittee, any structures, equipment, or accessories placed or installed in the permit area by the Permittee. Any such structures, equipment, or accessories remaining in the permit area after termination of the permit term or any extension thereof which may be granted by the Contracting Officer, shall become and thereafter remain the property of the United States or, at the option of the United States, may be removed by the United States at the cost and expense of the Permittee. Permittee shall promptly pay to the United States cost or expense of removal upon billing therefor.

9. No interest in this permit shall be transferred by the Permittee to any other party and any such transfer shall cause an automatic annulment of this permit so far as the United States is concerned: all rights of action, however, for breach of this agreement are reserved to the United States, as provided by Section 3737 of the Revised Statutes of the United States.

10. (a) During the performance of this contract, the Permittee hereinafter called "Contractor" agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Equal Opportunity clause.

(2) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

M.S. 4052

(5) The contractor will furnish all information and reports required by Executive Order No. 11245 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) The Contractor hereby agrees as follows:

(1) To comply with Title VI (Section 601) of the Civil Rights Act of July 2, 1964 (78 Stat. 241), which provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," and to be bound by the regulations of the Department of the Interior for the effectuation thereof, as set forth in 43 CFR 17.

(2) To obligate his subcontractors, subgrantees, transferees, successors in interest, or any other participants receiving Federal financial assistance hereunder, to comply with the requirements of this provision.

11. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

12. The Permittee warrants that no person or agency has been employed or retained to solicit or secure this permit upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the Permittee for the purpose of securing business. For breach or violation of this warranty, the United States shall have the right to annul this permit without liability or in its discretion to require the Permittee to pay, in addition to the contract price or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

13. (a) Any notice, demand, or request required or authorized by this permit to be given or made to or upon the United States shall be deemed properly given or made if delivered, or mailed postage prepaid, to the Contracting Officer at the address appearing below his signature.

(b) Any notice, demand, or request required or authorized by this permit to be given or made to or upon the Permittee shall be deemed properly given or made if delivered, or mailed postage prepaid, to the Permittee at the address appearing below Permittee's signature or below the signature of the person executing this permit on behalf of the Permittee.

(c) The designation of the person to or upon whom any notice, demand, or request is to be given or made, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this article for other notices.

Note: To enter permit area, permittee should contact the Phoenix Development Office for the key to the gate.

1 GARY K. NELSON
The Attorney General
2 ROBERT V. KERRICK, Assistant Attorney General
DONALD O. LOEB, Assistant Attorney General
3 206 South 17th Avenue
Phoenix, Arizona 85007
4 Phone Number: 261-7291
Attorneys for Defendants Arizona State
5 Highway Commission, comprised of
Lew Davis, Rudy E. Campbell, Walter
6 Surret, Walter A. Nelson and Len A. Mattice

OCT 3 1972

DEPUTY CLERK

19

7

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE DISTRICT OF ARIZONA

10 SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
11
Plaintiff,
12
-v-
13
ARIZONA SAND AND ROCK COMPANY, et al.,
14
15 Defendants.
16

No. CIV 72-376 PHX WEC

REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO UNITED STATES ATTORNEY'S MOTION TO DISMISS

17 In the Plaintiff's Memorandum dated September 20, 1972,
18 they assert that the annotation to 25 U.S.C.A. § 175 lists "countless cases"
19 in which that statute has been successfully invoked by Indian Tribal plaintiffs.
20 However, that particular annotation cites only three court decisions in all of
21 which, Tribal requests for representation by the United States Attorney
22 pursuant to 25 U.S.C.A. § 175 were summarily turned down.

23 This Respondent, therefore, respectfully submits that the
24 legal memoranda filed by the Plaintiff contain no authorities whatsoever
25 justifying its demand that the United States Attorney undertake representation
26 of the Plaintiff Indian Community in the present action.

27 This Respondent further contends that the Plaintiff has an
28 adequate remedy at law in that it is free to contract for the services of its

EXHIBIT F

1 own private attorneys under the provisions of 25 U.S.C.A. § 81. The
2 existence of such an adequate remedy at law, of course, precludes the
3 Plaintiff from invoking the provisions of 28 U.S.C. § 1361, the so called
4 Federal Mandamus Act.

5 It should also be pointed out that all of the alleged "depreda-
6 tions" said to have been committed by the various defendants named and
7 served in the present action, have occurred with the express sanction and
8 consent of various agencies of the United States Government, including the
9 Department of the Interior, the Bureau of Land Management and the Bureau
10 of Reclamation, all of which have for years purported to exercise dominion,
11 ownership and control over the real estate in question.

12 For example, the Respondent Arizona Highway Department
13 entered upon a portion of the lands in question under the authority of three
14 permits issued by the United States Department of Interior, Bureau of
15 Reclamation to remove gravel and construction material. These permits
16 were dated October 1, 1952, September 8, 1948 and January 14, 1972
17 respectively. The real property which forms the subject of these permits
18 had been previously withdrawn from the public domain by the Department of
19 the Interior pursuant to the provisions of what is now 43 U.S.C. § 416.
20 And these permits were then issued pursuant to authority granted to the
21 Secretary of the Interior under the provisions of 43 U.S.C. § 387.

22 This Respondent therefore contends that it would be virtually
23 inconceivable that this action, allegedly brought in trespass but which
24 could be more accurately characterized as a quiet title action in which the
25 Plaintiffs are seeking to obtain a determination as to the exact location of
26 the boundary of their Executive Order Indian Reservation, could possibly
27 proceed to judgment without first joining those departments and agencies
28 of the United States Government which presently claim ownership of these

disputed riparian lands. Of course once these agencies are properly joined in the present lawsuit, an inevitable conflict of interest similar to that described by the Ninth Circuit Court of Appeals in the Rincon Band of Mission Indians case cited in this Respondent's Memorandum of Law becomes quite apparent.

It is therefore respectfully submitted that this Court enter an order denying Plaintiff's request that the United States Attorney General be required to represent it in the action brought this Defendant.

RESPECTFULLY SUBMITTED this 29th day of September, 1972.

GARY K. NELSON
The Attorney General

By [signature]
DONALD O. LOEB
Assistant Attorney General
Attorneys for Defendant Arizona Highway Commission

Copy of the foregoing mailed this 29th day of September, 1972, to:

Royal D. Marks
Richard B. Wilks, and
Philip J. Shea, of
MARKS & MARKS
310 Title & Trust Bldg.
114 West Adams Street
Phoenix, Arizona 85003
Attorneys for Plaintiff

GOVE L. ALLEN
Standage & Allen
244 S. Horne Street
Mesa, Arizona 85204
Attorneys for Defendants Merrill

I hereby attest and certify on 12/6/93 that the foregoing document is a full, true and correct copy of the original on file in my office and in my custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA
By [signature] Deputy

DARRELL F. SMITH
Smith & Buckley
637 East Main Street
Mesa, Arizona 85204
Attorneys for Defendants:
Johnson & Stewart Materials, Inc.
Roy Johnson and Mrs. Roy Johnson
Earl C. Johnson and Mrs. Earl C. Johnson
John Campo III, Executor of the Estate of
Leroy Johnson, deceased

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and

GEORGE SORENSON, JR.
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Phoenix, Arizona 85003
Attorney for Salt River Valley Water Users Association

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Attorney for Maricopa County

WILLIAM SMITHERMAN, United States Attorney
Miss ALICE A WRIGHT, Assistant United States Attorney
5000 Federal Building
Phoenix, Arizona 85025
Attorneys for Federal Defendants

C. A. CARSON, III
Carson, Messinger, Elliott, Laughlin & Ragan
3550 N. Central, Suite 1400
Phoenix, Arizona 85012
Attorneys for Arizona Sand and Rock Company

When Recorded Mail To:
State Land Commissioner
1616 W. Adams
Phoenix, AZ 85007

STATE OF ARIZONA
STATE LAND DEPARTMENT

DISCLAIMER OF
OWNERSHIP INTEREST IN REAL PROPERTY

The State of Arizona hereby disclaims any claim of right, title or interest, based on the navigability of the Salt River as of February 14, 1912, to real property situated outside the presently existing left and right banks of the Salt River from Granite Reef Dam to the confluence with the Gila River as designated on the map attached hereto and incorporated herein. The approximate location of the existing banks of the Salt River in this reach is shown on the attached map and is based on the best information presently available to the State Land Department, which consists of recent aerial photographs of the bed and banks of the Salt River.

The State Land Commissioner, acting in accord with Section 37-1131(A), Arizona Revised Statutes, finds that no clear evidence exists to rebut the statutory presumption that any state ownership based on navigability is limited to the existing bed of the Salt River in the above reach.

DATED this 14th day of December, 1993.

STATE OF ARIZONA

By [signature]
M.J. Hassell
State Land Commissioner

STATE OF ARIZONA)
) s.s
COUNTY OF MARICOPA)

The foregoing Disclaimer was acknowledged before me, the undersigned Notary Public, this 14th day of December, 1993, by M.J. Hassell, State Land Commissioner, State of Arizona, for the purposes stated therein.

[signature]
Notary Public

Commission expires 09-05-95

Exempt from affidavit and Filing Fee pursuant to A.R.S. § 42-1614(A)(3).

NOTE: The map is too large and bulky to be included in this mailing. A copy of the map is available for review at the State Land Department and will be on display at the December 21 public meeting.

EXHIBIT G

SALT RIVER LAND MEETING RESCHEDULED

December 14, 1993

The State Land Department has rescheduled a public meeting to provide information and to answer questions about the Salt River navigability issue and the disclaimer which the State has made to lands outside the present channel of the Salt River, for Tuesday, December 21, at 7 p.m. at the Phoenix Civic Plaza, Yuma Room. The Yuma Room is located in Plaza South, entrance on 3rd Street, south of Washington.

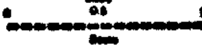
The December 9 public meeting had to be rescheduled due to overcrowding at the Maricopa County Auditorium.

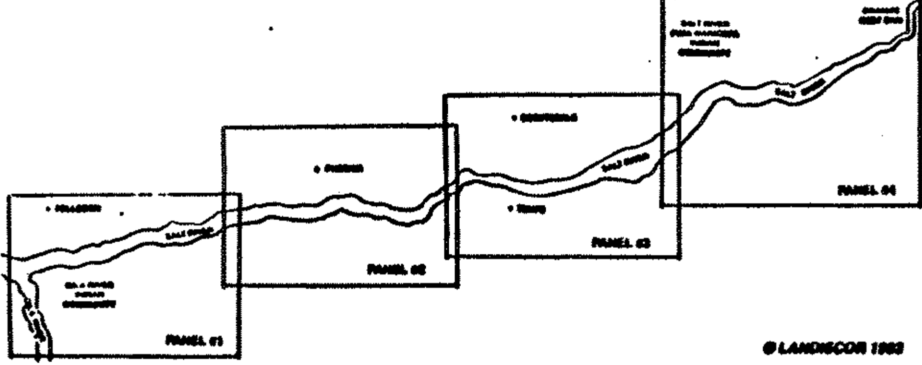
PANEL #1

Approximate Ordinary High Water Mark Boundary

Based on Existing Channel Condition in 1993,

Left Bank to Right Bank





2. That the ultimate boundary line established by the Department of the Interior, Bureau of Land Management's survey and plat of survey as accepted and approved on August 17, 1972 establishes the South boundary of the SALT RIVER PIMA-MARICOPA INDIAN RESERVATION in Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian, Maricopa County, State of Arizona as a fixed boundary line.

3. That the Defendants JOHNSON & STEWART MATERIALS, INC., EARL C. JOHNSON, EMMA JOHNSON, his wife, ROY JOHNSON, MRS. ROY JOHNSON, his wife, and JOHN CAMPO III, Executor of the Estate of LeROY JOHNSON claim certain interests in the Northwest quarter of the Northwest quarter of Section 9, Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian and that all property lying north of the boundary line as established by the August 17, 1972 survey lies within the reservation and said Defendants are hereby ordered to vacate the premises.

4. It is further ordered that the proper damages owing by these Defendants to the Plaintiff is $30,000.00 for the fair rental value of the Plaintiff's property and $36,000.00 for the fair market value of the sand, gravel, rock and aggregate material removed from the Plaintiff's property.

5. That pursuant to Rule 54 of the Rules of Civil Procedure, the Court finds there is no just reason for delay in entry of the Judgment and orders that this Judgment be entered forthwith.

6. It is further ordered that if the Defendants JOHNSON & STEWART MATERIALS, INC., EARL C. JOHNSON, EMMA JOHNSON, his wife, ROY JOHNSON, MRS ROY JOHNSON, his wife, and JOHN CAMPO III, Executor of the Estate of LeROY JOHNSON or any of the Defendants shall appeal this Judgment within the time allowed by law and post the necessary supercedeas bond

that no execution shall be issued pending the outcome of that appeal or the settlement of the appeal between the parties.

DONE IN OPEN COURT this 11th day of April, 1977.

Hon. W. D. Murray
Senior United States District Judge

I hereby attest and certify on 2/27/92 that the foregoing document is a full, true and correct copy of the original on file in my office and in my custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

By ______ Deputy

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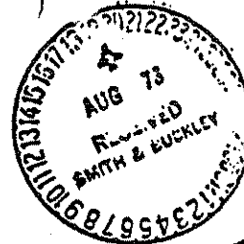

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff, vs. ARIZONA SAND & ROCK CO., an Arizona corporation, et al., Defendants.	No. Cv-72-376-Phx.
JOHNSON & STEWART MATERIALS, INC., et al., Plaintiffs, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al., Defendants.	No. Cv-73-579-Phx.
CITY OF MESA, an Arizona a municipal corporation, Plaintiff, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al., Defendants.	No. Cv-73-769-Phx.
SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation, et al., Plaintiffs, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al., Defendants.	No. Cv-74-553-Phx.

Exhibit "A"

STATE OF ARIZONA, ex rel., W. A. ORDWAY, Director of the Arizona Department of Transportation,

Plaintiff,

vs.

ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al.,

Defendants.

No. Cv-74-529-Phx.

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

These consolidated actions involve the south boundary of the Salt River Indian Reservation in Township 1 North, Range 5 East, Gila and Salt River Base and Meridian, north of Mesa, Arizona. As a result of a decision by the then Secretary of Interior on January 17, 1969, a plat of survey was prepared and filed on August 17,1972, showing that boundary at a location which would result in the inclusion within the reservation of certain property to which other parties claim an interest. The individual actions are these:

No. CIV-72-376. This is an action filed by the Indian Community against Arizona Sand and Rock Co., et al., for trespass, ejectment and damages for the removal of sand and gravel. The issue of the amount of damages, if any, has been severed and only the issue of liability is now before the Court. Of the defendants originally named in this action, only the following still remain: Johnson & Stewart Materials, Inc., Allied Concrete & Materials Co., Salt River Valley Water Users' Association, Arizona State Highway Commission (now the Arizona Department of Transportation), the County of Maricopa, Roy Johnson and Earl C. Johnson and their respective wives and the Executor of the Estate of Leroy Johnson, Deceased. Transamerica Title Insurance Company subsequently became a party defendant to this action on its motion to intervene upon the grounds that it has issued a policy of title insurance upon property owned by Allied Concrete & materials Co.

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In this action the Indian Community seeks an order of ejectment against all defendants from the reservation as determined by the Secretarial memorandum of January 17, 1969, and damages for trespass against all defendants except Allied Concrete Materials Company, Inc.,

In the course of proceedings in this case the court ruled that it would not consider a collateral attack by the defendants upon the decision of the Secretary of the Interior and this ruling resulted in the filing of the subsequent actions in which the following claims are asserted:

No. CIV-73-579. This is an action instituted by Johnson & Stewart Materials, Inc., Roy Johnson and Earl C. Johnson and their respective wives, and the executor of the Estate of Leroy Johnson (hereinafter collectively referred to as "Johnson & Stewart") against the Secretary of Interior seeking to invalidate the decision of the Secretary and the 1972 Plat of Survey. The plaintiffs claim an interest in a portion of the disputed property by reason of unpatented mining claims and assert that the Secretarial memorandum of January 17, 1969 is unlawful, exceeds the Secretarial powers, violates due process and constitutes a taking of property interests without just compensation and due process.

No. CIV-73-769. This is a similar action brought by the City of Mesa. It claims a fee simple interest in portions of the disputed property by reason of patents issued by the United States prior to the filing of the 1972 Plat of Survey.

No. CIV-74-553. This is a similar action brought by the Salt River Valley Water Users' Association. The Association claims an interest in a portion of the disputed property pursuant to a contract entered into with the United States in 1917 by which said land, which previously had been withdrawn for reclamation purposes, was conveyed to the Association, as Agent of the United States, for use in connection with the operation of the Salt River Project, a Federal reclamation project.

No. CIV-74-529. This is an action brought by the State of Arizona on behalf of the Director of the Arizona Department of Transportation. The State of Arizona claims an interest in a portion of the disputed property by reason of certain licenses and permits for the removal of sand and gravel and rights of way which were granted to the Department by the Bureau of Reclamation, Department of Interior.

The above consolidated cases came on for trial before the court, sitting without a jury, on March 17, 18, 22, 23 and 31, 1976, the plaintiffs were represented by their respective counsel, and the defendants were represented by their respective counsel; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence, the parties rested and thereafter, within the time granted by the court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the court for its consideration and decision, and the court having considered all of the evidence and testimony submitted at the trial of the cause, and the briefs of counsel, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I

The Salt River Pima-Maricopa Indian Reservation was created by the Executive Order of President Rutherford B. Hayes, dated June 14, 1879. In issuing this order President Hayes acted pursuant to the authority of the Act of February 28, 1859).

II

The Reservation set aside by this Executive Order lies immediately east of what is now the City of Scottsdale and north of the City of Mesa. Its southern boundary is described in the Executive Order as being "* * up and along the middle of the [Salt] river * *". At issue in this proceeding is the location of the river boundary in Township 1 North, Range 2 East, Gila and Salt River Base

and Meridian.

III

The area comprising the Salt River Reservation had been surveyed in 1868 by W. F. Ingalls under contract with the General Land Office. Ingalls' field notes and the plats of his survey show the Salt River flowing in two distinct channels, generally about one-half mile apart, from a point in Section 25, T2N, R5E, and thence southwesterly about six miles to Section 7, T1N, R5E, where they reunite.

IV

The fact of these two channels was the source of uncertainty over a period of many years as to the location of the reservation boundary in T1N, R5E. This uncertainty was expressed by the Acting Commissioner of the General Land Office in a letter dated March 7, 1892, to the Commissioner of Indian Affairs, stating that entries were being made along the river and that his office did not know whether or not the island between the channels was within the reservation.

V

The location of the middle of the Salt River in Township 1 North, Range 5 East, has been complicated by extensive works of man. Beginning in about 1870 a series of irrigation canals, together with their headings and dams, diverted river waters from their natural channels. Since 1911, with the construction of Roosevelt Dam and Granite Reef Dam, only occasional flood waters have flowed through this Township.

VI

The Salt River Indians formally requested the Interior Department to resolve the uncertainty of the boundary in this Township by a Community Council resolution dated March 23, 1940. In his cover letter forwarding this resolution to his superiors, the Superintendent of the Pima-Maricopa Agency observed that non-Indians were removing sand and gravel from the river bed and were dumping refuse on it.

VII

In 1962, the Salt River Community and a principal sand and gravel claimant, Arizona Sand & Rock, sought to settle the boundary controversy by agreeing to an arbitrary midline through the disputed area which they proposed to have surveyed and then fixed by Act of Congress. The Phoenix office of the Bureau of Land Management undertook to fix this negotiated midline along the ground but it was instructed by its Washington Office that its function was only to fix true boundaries and not to participate in the settlement of disputes by fixing compromise lines.

VIII

The Phoenix office of the Bureau of Land Management sought to fix the boundary in the main channel of the River in this Township but, finding an uncertainty as to which of the channels was the principal one, referred the question to the Bureau Director in Washington. The letter of referral, sent by the Acting State Director of the BLM and dated October 26, 1962, included extensive historical material bearing on the channels of the River in this area and recommended a finding that the north channel was the main channel.

IX

The inquiry of the Phoenix District was answered in the memorandum of the Director of the Bureau of Land Management dated March 5, 1963. This memorandum reviewed the historical material and concluded that "The preponderance and weight of the evidence favors the recognition of the north channel of the Salt River as being the south boundary of the reservation." It also spoke candidly of the conflict between Indian and public land interests:

> This Bureau has a prime and direct interest in the determination of this boundary through a continuing public land interest in lands outside the reservation. In general terms, lands and resources north of this boundary inure to the benefit of the Indians while the land and resources south of this line are subject to laws and regulations pertaining to public lands.

This memorandum was approved by the Assistant Secretary, Public Land Management, on May 6, 1964.

X

The Secretary of the Interior determined that, in this and in several other matters, the Bureau of Land Management was making decisions affecting Indian lands without due regard for their interests. Accordingly he directed the Solicitor to review the matter.

XI

The Solicitor personally became familiar with all material in the file of this proceeding, and, by memorandum dated January 17, 1969, held that the record indicated that the boundary of the reservation in Township 1 North, Range 5 East, was in the south channel of the Salt River. It is clear on the face of this memorandum, together with the 24 exhibits attached to it, that the Solicitor's review of the matter was done thoroughly and intelligently.

XII

By memorandum dated January 17, 1969, the Secretary of the Interior advised the Director of the Bureau of Land Management that he had determined, on the basis of the Solicitor's opinion, that the southern boundary was in the south channel.

XIII

Following the change of administration in the Executive branch of the Government on January 20, 1969, the matter was assigned for reconsideration by the new Assistant Secretary for Public Land Management. After a study of the extensive administrati ve record which included aerial photographs, discussions with representatives of the Indians and private interests, and after flying over the area to make a personal inspection, this Assistant Secretary directed a memorandum to the Director of the Bureau of Land Management in which he, in effect, confirmed the Secretarial order of January 17, 1969, and in which he determined that the south boundary should be accepted as being in the south channel as it existed during the 1965-66 flood.

XIV

Pursuant to the determination that the boundary lies in the south channel, a survey was undertaken under the supervision of Clark Gumm, Chief of the Cadastral Survey. The plat of this survey, consisting of four pages, was accepted on August 17, 1972.

XV

Pursuant to the order of the Chief of the Cadastral Survey, the thalweg of the south channel, i.e. the line connecting its lowest points, rather than the midline between the opposite banks, was located by the surveyors as the boundary. The reason for fixing the thalweg was that that was midline of the last water that flowed through the channel and because of the difficulty of locating accurately the banks of the channel.

XVI

The Arizona State Director of the Bureau of Land Management caused notice to be given in the Federal Register on September 8, 1972, that the plat of survey would be filed on October 16, 1972, unless it was protested before that date, and that all protests would be acted upon before the plat was filed.

XVII

Protests were timely filed by all parties to this action except the Secretary. Normally, such protests would be considered by the Director of the Bureau of Land Management but, because of the Bureau's particular interest in these proceedings, the protests were referred to the Secretary's office.

XVIII

The protests of all the parties to this action, except only that of the Indian Community, were directed only to the Secretarial Order of January 17, 1969, and did not deal with the manner in which the survey was carried out. Particularly, they did not question the use of the thalweg to fix the middle of the south channel nor the description of the surveyed boundary as being ambulatory. By memorandum dated August 2, 1973, the Acting Deputy

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Assistant Secretary advised the Director of the Bureau of Land Management that the protests of all the parties except that of the Indian Community were dismissed and that the Indian Community had submitted a withdrawal of its protest conditioned on the dismissal of the others. Accordingly the Director of the Bureau of Land Management was directed to file the plat of survey in the Arizona State Office.

XIX

The claims of the parties with respect to lands within the southern boundary of the reservation in Township 1 North, Range 5 East, as that boundary is defined in the plat of survey dated August 17, 1972, are as follows:

(a) The Salt River Valley Water User's Association claims a possessory interest in the north half of the northwest quarter, the northwest quarter of the northeast quarter, and the southwest quarter of the northwest quarter. These were purportedly withdrawn under the first form withdrawal orders issued pursuant to Section 3 of the Act of June 17, 1902, 43 U.S.C. 416, which authorizes withdrawals of public land for reclamation project purposes. The Association's claim to withdrawn lands is based on its contract with the United States dated September 6, 1917, by which the United States transferred to it the care, operation and maintenance of the project. There is no instrument or other record of transfer to the withdrawn lands in Section 3 to the Association.

(b) The State Highway Commission and Maricopa County have not in this proceeding claimed any interests in lands north of the surveyed boundary. However the Indian Community has claimed against them for sand and gravel removed from the withdrawn lands in Section 3. These removals of sand and gravel were made under color of authority of permits issued by the Secretary of the Interior pursuant to the Act of August 4, 1939, 43 U.S.C. 387.

(c) Allied Concrete and Materials Company, Inc. holds a deed to the southwest quarter of the northwest quarter of Section 3.

(d) Johnson & Stewart Materials, Roy Johnson, Earl C. Johnson and the late Leroy Johnson have removed sand and gravel under unpatented mining claims from the northwest quarter of the northwest quarter of Section 9.

(e). The City of Mesa holds record title to the south half southeast quarter, §7; the north half, northwest quarter, §18; the northwest quarter and the west 33' of the northeast quarter, northeast quarter of §18; and the southeast quarter, northeast quarter of §3.

XX

In determining that the boundary lies in the south channel of the river in Township 1 North, Range 5 East, the Secretary gave due consideration to the pertinent historical materials. Particularly:

(a) The Secretary gave due consideration to the historical record preceding the issuance of the Executive Order of June 14, 1879, and properly determined that it does not indicate whether the north or the south channel was intended as the boundary. A map dated March 4, 1879, shows that Captain A. R. Chaffee recommended a reservation with a south boundary in the south channel; an earlier map identified as being "traced in the Adjutant General's office, January 1879" shows a proposed reservation with a south boundary running north of the river; Major General McDowell, Commander of the Military Division of the Pacific, recommended a reservation with a south boundary being "along the middle of the Salt River"; Inspector J. H. Hammond, reporting on March 8, 1879, that the Pimas and Maricopas had settled on both sides of the river, recommended a reservation with the north bank of the Salt River as the south boundary. The Executive Order followed the recommendation of the acting Commissioner of Indian Affairs dated June 12, 1979, by stating the boundary to be "up and along the middle of the said river" without specifying one channel or the other.

(b) The Secretary gave due consideration to the Ingalls' survey of 1868 and properly concluded that it provided evidence, though limited and inconclusive, that the south channel was larger than the north. The Secretary noted that where section lines crossed channels the length of the section lines from bank to bank were an average of 4.83 chains across the south channel and 3.71 chains across the north channel. It was established at the trial that the perpendicular distances across the channels could be calculated at points

where the section lines crossed the channels on the basis of data provided in Ingalls' notes and the average width of the south channel so computed, was 301.19 feet and that of the north channel was 183.55 feet.

(c) The Secretary gave due consideration to the sketch plat of the reservation prepared in the Surveyor General's office in Tucson and dated July 12, 1879, and reasonably found it impersuasive. It is not a survey plat and there is no evidence that the person who drew it ever saw the Salt River.

(d) The Secretary gave due consideration to the surveys of Chillson in 1888 and Farmer in 1910 and reasonably concluded that they did not fix the boundary and that they provide no indication of which was the main channel. Both of these surveyors, having been retained to survey the reservation for agricultural allotment purposes, meandered only the north bank of the north channel which was the southern boundary of the reservation lands suitable for farming. Neither the plats of their survey nor their field notes indicate the relative sizes of the channels. There is a dotted line on the Farmer plat labelled "Reservation Boundary" which would lie approximately in the north channel if such channel had been defined on the plat. But this is not a survey line, no reference to it is made in the Farmer field notes, and it was most likely placed on the plat by someone other than Farmer merely to indicate that the boundary was south of the meander line.

(e) The Secretary gave due consideration to the letter of the Commissioner of Indian Affairs to the Commissioner of the General Land Office, dated August 1892, which refers to a plat which has not been identified, which the Indian Commissioner said "indicates that the principal portion or branch of the river runs south of the island, and that what is termed the north channel is a much narrower stream."

(f) The Secretary gave due regard to the topographical survey map of 1902-03 prepared by the United States Geological Survey which shows that the south channel was the main channel at that time.

It in fact shows the historic south channel to be the only water-bearing channel. This map was revised in 1913 and at that time the south channel is still represented as it was in 1902-03.

XXI

It is not clear what aerial photography was considered as part of the administrative record. The aerial photography in evidence in this case confirms that the south channel is the main channel. Beginning with the earliest aerials of 1934, the principal channel coming into Township 1 North, Range 5 East, from Township 2 North, Range 5 East, is the historic south channel. At a point immediately north of the northeast quarter of section 3 in T1N, R5E, a new branch of the south channel veers to the west to the northwest corner of section 3 from whence it turns south and rejoins the historic south channel in the southwest quarter of Section 3. A second new branch of the south channel also makes a counterclockwise arc from the south-west of Section 3 across the south halves of Sections 4 and 5 and then rejoins the historic south channel in Section 8. It is undisputed that these two new branches are avulsive changes in the flow of water through the old south channel. Except for these avulations, the mainstream of the Salt River in this Township is the south channel as it was described in the Ingalls' plat of 1868 and the United States Geologic Survey plat of 1902-03.

XXII

The contention of the non-Indian land claimants that the Salt River in this Township has historically been a braided stream without discrete channels is not supported by evidence. The river ran in two well-defined channels in 1868 and in one well-defined channel in 1902-03. Since the interception of the river waters by upstream dams the works of man and wind erosion have done substantial damage but these changes do not affect the location of the boundary.

XXIII

The court finds all of the facts agreed to by the parties in the Pre-Trial Order.

From the foregoing Findings of Fact the court draws the following

CONCLUSIONS OF LAW

I

This court has jurisdiction of the consolidated cases under Title 28 U.S.C. 1331, 1361, 1362, 2201, 2202 and Title 5 U.S.C. 701-706.

II

The Congress has vested in the Secretary of the Interior the authority and the duty to survey the boundaries of Indian Reservations. Act of April 8, 1964, 13 Stat. 41, 25 U.S.C. §176.

III

A survey undertaken by the Secretary of the Interior within the scope of his statutory authority is accorded extra-ordinary deference by the judiciary.

IV.

Interior Department proceedings for the determination of instruction to surveyors, and the conduct of the survey on the ground, are executive functions with respect to which the Secretary is not required to give a hearing to affected persons or to make findings on the basis of a record.

V

A person who makes entry upon land which is near reserved land, the boundary of which has not been fixed by a survey, enters subject to the risk that his entry may later be determined to be within the reservation.

VI

The Secretary of the Interior has the legal authority and responsibility to review and to reverse any action taken with respect to a survey by the Director of the Bureau of Land Management.

VII

The fact finding procedures employed by the Department of the Interior to determine the boundary of the Salt River were adequate and the relevant facts were placed before, and considered by, the Secretary of the Interior.

VIII

The court can review the Secretary's survey of the south boundary of the Salt River Indian Reservation only to determine if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In reviewing the Secretary's decision, the court is limited to reviewing the administrative record.

IX

Boundaries of Indian reservations cannot be diminished except by Act of Congress. Act of March 3, 1927, 25 U.S.C. 398(d). Principles of estoppel and adverse possession cannot be invoked to deprive an Indian tribe of its land.

X

The Secretary of the Interior cannot be estopped from enforcing the public policy in favor of the protection of Indian rights.

XI

The land claimants all have standing to sue.

XII

Lands reserved for Indians are not part of the public domain and any patents, licenses, permits, or claims issued under, or made pursuant to, the public land laws are void ab initio.

XIII

The laws protecting Indians must be liberally construed for their benefit and protection.

XIV

Practical construction given to laws fairly susceptible of different constructions, by those charged with the duty of executing them, is entitled to great respect.

XV

The July 12, 1879 map entitled "Plat showing lands reserved for Pima and Maricopa Indians by Executive Order of June 14, 1879" is not an official plat since it does not reflect the findings of a duly authorized and approved survey of the land represented.

XVI

Neither the Chillson survey nor the Farmer resurvey attempted to locate the south boundary of the reservation, but merely meandered the north bank of the north channel of the Salt River. A meander line is not a boundary but merely determines the sinuosities of a river.

XVII

The south boundary of the Salt River Indian Reservation was not surveyed before 1972. The 1972 survey was an original survey of the boundary and not a resurvey conducted pursuant to 43 U.S.C. 772.

XVIII

When a stream has two or more channels the middle of the stream is synonymous with the thread of the stream or the middle of the main channel.

XIX

The branching out of a boundary stream into a new channel, circumventing a body of land rather than eroding through it, is an avulsion which does not result in a change in the boundary. The boundary rather remains fixed in the former channel. In consequence of this principle the counterclockwise arcing of the mainstream around the north and west of Section 3, and through the south halves of Sections 4 and 5, as shown in the aerial photographs, did not remove the boundary from the south channel from which the avulsive changes took place.

XX

The Secretary of Interior's determination that the south boundary of the Salt River Indian Reservation lies along the deepest points of the south channel was reasonable.

XXI

The plat of survey accepted in 1972 correctly fixes the south boundary of the Salt River Indian Reservation as established by the Executive Order of June 14, 1879.

XXII

Since the Secretary of the Interior acted within the scope of his statutory authority and since the statute pursuant to which he acted is constitutional, the suits against the Secretary are in fact suits against the United States and must be dismissed on the grounds of sovereign immunity.

XXIII

The United States is not an indispensable party to the action brought by the Salt River Indian Community.

Done and dated this 16th day of August, 1976.

W. D. Murray
Senior United States District Judge.

DOL
#3725

FILED (29)

JAN 3 1973

[clerk's stamp, illegible] By [signature] Deputy Clerk

GARY K. NELSON
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ROBERT V. KERRICK, Assistant Attorney General
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff, -v- ARIZONA SAND AND ROCK COMPANY, an Arizona corporation, et al., Defendants.	No. CIV 72-376 PHX WEC ANSWER OF THE DEFENDANT ARIZONA STATE HIGHWAY COMMISSION

COMES NOW Defendant, Arizona State Highway Commission, by and through counsel undersigned, and for its answer to Plaintiff's Complaint filed herein, admits, denies and alleges as follows:

FIRST CLAIM FOR RELIEF

I

Defendant admits that the Arizona State Highway Commission is an agency of the State of Arizona comprised of Lew Davis, improperly named and served as Lou Davis, Chairman, Rudy E. Campbell, vice-chairman, Walter W. Surrett, Walter A. Nelson and Len W. Mattice; Defendant is without sufficient knowledge or information with which to form a belief as to the truth or falsity of the remaining allegations contained in paragraph I of Plaintiff's First Claim for Relief and therefore denies the same and places

Plaintiff on strict proof thereof.

II

Denies each and every, all and singular, the allegations contained in paragraph II of Plaintiff's complaint and alleges affirmatively that the controversy, if any, involves the construction of an Executive Order dated June 14, 1879 by President Rutherford B. Hayes, setting aside a certain portion of real property within the State of Arizona as Plaintiff's Indian Reservation.

III

Admits each and every allegation contained in paragraph III of Plaintiff's complaint.

IV

Defendant is without sufficient knowledge or information with which to form a belief as to the truth or falsity of the allegations contained in subparagraphs (a), (b), (c), (d), (e) of paragraph IV of Plaintiff's First Claim for Relief and therefore denies the same and places the Plaintiff on strict proof thereof; Defendant expressly denies the allegation contained in paragraph IV of Plaintiff's First Claim for Relief to the effect that this Defendant has trespassed upon the Plaintiff's Reservation and has allegedly damaged Plaintiff or entered upon any portion of Plaintiff's Indian Reservation for any purpose whatsoever, including the removal of sand and gravel.

V

Defendant denies each and every, all and singular, the allegations contained in paragraph V of Plaintiff's First Claim for Relief.

VI

As and for Defendant's first Affirmative Defense, Defendant alleges that Plaintiff's First Claim for Relief fails to state a claim upon

1 which relief may be granted.

2 VII

3 Plaintiff is not now, nor has it ever been in either actual
4 or constructive possession of the real property lying south of the north
5 channel of the Salt River in Maricopa County, Arizona, which forms the
6 subject of the present action and therefore is entirely without standing to
7 bring such action against Defendant.

8 VIII

9 That the real property upon which Defendant, its agents
10 and servants are alleged to have trespassed was originally part of the public
11 domain of the United States of America and has long ago been withdrawn
12 from the public domain by the United States Department of the Interior
13 pursuant to the express provisions of U.S.C.A. § 416.

14 IX

15 Defendant has entered upon those lands which are particu-
16 larly described in the Appendix A attached hereto pursuant to the express
17 authorization of officers and agents of the United States Department of
18 Interior pursuant to the provisions of 43 U.S.C.A. § 387 and other pertinent
19 Federal statutes and regulations.

20 X

21 That the Plaintiff's claim for relief is barred by the statute
22 of limitations.

23 XI

24 That the Plaintiff's claims for relief are barred by laches.

25 XII

26 That under Rule 19, Federal Rules of Civil Procedure, the
27 United States Government as the appropriate officers and/or agents thereof
28 are either necessary or indispensable parties to the present action.

1 XIII

2 That this Court is without subject matter jurisdiction of the
3 present controversy by reason of the fact that Plaintiff's cause of action does
4 not arise under the Constitution, laws or treaties of the United States but
5 instead arises under the Executive Order of President Rutherford B. Hayes
6 dated June 14, 1879, establishing Plaintiff's Indian Reservation.

7 XIV

8 That Plaintiff, in order to establish their First Claim for
9 Relief against Defendant, is attempting to unilaterally expand the area of
10 its Executive Order Indian Reservation in express violation of the specific
11 terms and provisions of 28 U.S C.A. § 398(d) whereby Congress unequiv-
12 ocally stated that any future changes in the boundaries of Executive Order
13 Indian Reservations shall be made by Congress alone.

14 XV

15 That Defendant entered upon the real property which forms
16 the subject matter of the present action under the express authority of three
17 separate permits issued by the United States Department of the Interior,
18 Bureau of Reclamation, authorizing the removal of gravel and construction
19 materials therefrom. That the real property to which these three permits
20 dated October 1, 1952, September 8, 1942 and January 14, 1972, respectively,
21 had been previously withdrawn from the public domain by the United States
22 Department of the Interior pursuant to the provisions of 43 U.S.C.A. § 416
23 and that said permits were issued pursuant to authority granted to the
24 Secretary of the Interior under the provisions of 43 U.S.C.A. § 387.

25 XVI

26 That at no time did this real property form any part of the
27 Plaintiff's Executive Order Indian Reservation. That neither the present
28 Secretary of the Interior nor any of his predecessors are authorized to

unilaterally re-establish the south boundary of the Salt River Pima-Maricopa Indian Community Executive Order Reservation, and that any attempt to do so in the absence of a formal judicial decree quieting title in the Plaintiff Indian Community or in the United States of America in trust for said Indian Community is void and of no force and effect.

XVII

That the filing of the Plaintiff's purported cause of action in trespass and ejectment is premature for the reason that there exists at the present time a controversy relating to the proper interpretation of the Presidential Executive Order dated June 14, 1879, which has never been satisfactorily resolved. That any other entries by Defendant upon the subject real property were all made with the express written consent and approval of duly authorized agents within the United States Department of the Interior and in accordance with law.

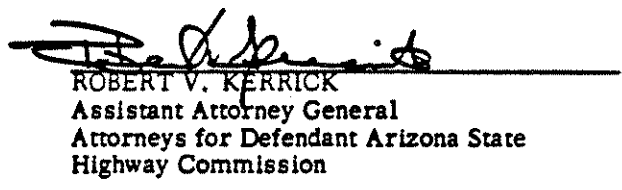
XVIII

That the order entered by Stewart L. Udall, former Secretary of the Interior, on January 17, 1969, whereby the Secretary purported to unilaterally relocate the south boundary of the Salt River Indian Reservation is erroneous, illegal, unlawful and constitutes arbitrary and capricious action and is an abuse of any discretion which may have been conferred by statute upon the Secretary. That in connection herewith, Defendant has attached hereto, marked as Exhibit "A" and incorporated by reference herein, a true and correct copy of a formal protest submitted by Defendant to the United States Department of the Interior, Bureau of Land Management, as well as the supplement thereto and that Defendant hereby incorporates by reference each and every argument set forth therein protesting the filing of the plat of survey prepared in accordance with the above described order by former Secretary of the Interior Stewart L. Udall.

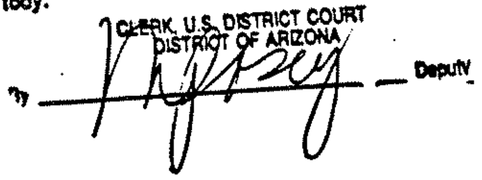
1 WHEREFORE, having fully answered Plaintiff's First Claim
2 for Relief, Defendant prays that Plaintiff take nothing thereby and that
3 Plaintiff's Complaint be dismissed and that Defendant recover its costs
4 incurred herein together with such other and further relief as the Court
5 may deem just and proper.

6 DATED this 3rd day of January, 1973.

7 GARY K. NELSON
The Attorney General



ROBERT V. KERRICK
Assistant Attorney General
Attorneys for Defendant Arizona State
Highway Commission



I hereby attest and certify on 12/6/93 that the foregoing document is a full, true and correct copy of the original on file in my office and in my custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

By ________________ Deputy

VERIFICATION

STATE OF ARIZONA)
) ss.
County of Maricopa)

ROBERT V. KERRICK, being first duly sworn, upon oath, deposes and says:

That he is one of the attorneys for the Defendant and is authorized to make this verification; that he has read the foregoing Answer and knows the contents thereof and knows them to be true, except those matters set forth on information and belief, and as to those matters he believes them to be true.

ROBERT V. KERRICK

SUBSCRIBED AND SWORN to before me this 3rd day of January, 1973.

Notary Public

My commission expires:
9-30-75

Copy of the foregoing Answer mailed
this 3rd day of January, 1973, to:

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October 13, 1972

State Director
Bureau of Land Management
Federal Building
Phoenix, Arizona

Re: Protest of the proposed filing Dependent Resurvey and Survey of the South Boundary of the Salt River Indian Reservation, dated August 17, 1972.

Dear Mr. Fallini:

Conforming with the Federal Register Volume 37, No. 175, page 18224, dated September 8, 1972, the State of Arizona by and through its Highway Commission hereby submits formal protest to the above proposed boundary change. This protest is based upon the grounds set forth herein as well as those additional grounds which the Arizona State Highway Department intends to set forth in an amended Notice of Protest to be filed within the thirty day period following the 16th day of October, 1972.

1. The plat of survey filed erroneously assumes that the phrase "up and along the middle of" the Salt River, contained in the Presidential Executive Order dated June 14, 1879, refers to the main channel and not the thread of the stream. The terms "middle of the river" and "thread of the stream" are synonomous and may be defined as the middle line between theshores when the water is at its natural stage at medium height and neither swollen by flood nor shrunken be drought. 11 CJS Boundaries § 33, pp. 578-579; Tiffany, Real Property (3rd Ed.) § 661, p. 705. The location of the thread of the stream and the location of the main channel relate to two different objectives.

EXHIBIT A

2. The Secretary of the Interior is without the authority or power to unilaterally redetermine by resurvey the proper location of the southern boundary of the Salt River Indian Reservation. Lakelands Inc. v. Chippewa & Flambeau Improvement Co., 237 Wis. 326, 295 N.W. 919. The Indians' right to the ownership of the disputed lands is to be decided under general rules of law governing quiet title actions, not by an ex parte determination of the Secretary of the Interior or his delegates. Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (1970). This rule of law is particularly applicable to the present controversy since a substantial period of time has elapsed since the establishment of this Indian Reservation by Executive Order in 1879 during which numerous third parties both private and governmental have acquired vested rights in and to the disputed riparian lands in question. (A list of some of such conflicting interests is attached hereto as Appendix A)

3. That the bed of the once navigable Salt River was reserved to the State of Arizona at the time of the admission to the Union of the State under the so called equal-footing doctrine. Scott v. Lattig, 227 U.S. 229, 33 S.Ct. 242, 57 L.Ed. 490 (1913).

4. That the notice appearing at page 18224 in Volume 37, No. 175 of the Federal Register was totally inadequate in that it failed to properly advise interested parties of any federal statutes or regulations pursuant to which the plat of survey was to be filed in the Office of the Bureau of Land Management on the 16th day of October, 1972.

5. That the filing of the resurvey and establishment of the South boundary of the Salt River Indian Reservation in accordance therewith, would constitute an illegal attempt to change the boundaries of an Executive Order Indian Reservation in violation of 25 U.S.C. § 398d and 25 U.S.C. § 211.

6. At no time since the establishment of the Salt River Indian Reservation by Presidential Executive Order have the members of that Tribe asserted or attempted to assert any dominion or control over the lands lying to the south of the north channel of the Salt River and therefore any attempt to relocate the south boundary of said Reservation ninety-three years after the date of its creation is barred by laches. Smith v. Town of Fowler, 33 P.2d 1034 (1959).

7. The Arizona Highway Department has not been granted access to many of the 24 Exhibits utilized and examined by the Field Solicitor in the formulation of his Opinion Memorandum M-36770 dated January 17, 1969, and therefore is without sufficient information to adequately frame its protest at this time.

8. The surveyors conducting the resurvey have ignored the historical background surrounding the various changes, both natural and manmade, which have occurred over the past ninety-three years and which have altered the course and flow of the Salt River.

9. Some of the changes in the flow of the Salt River and in the location of the channels underlying said river may well have occurred as a result of avulsion rather than by accretion. In order to make a proper determination of this important factual issue, an in depth hydrological study should be made by a competent riparian boundary expert or hydrologist before any permanent boundary line is established by survey or otherwise. Such a study should also include an inquiry into the questions of whether or not the island separating the north from the south channel of the Salt River was once a part of the mainland on one side or the other and the question of the date of formation of such island. City of Victoria v. Schott, 195 S.W. 681 (Texas 1895).

10. They survey is deficient in that it contains no evidence indicating that the south channel is either the deepest or the widest channel and hence it cannot be affirmatively stated that the south channel is in fact the "main" channel of the Salt River.

11. That if a determination is made that the boundary lies along the middle of the main channel of the Salt River rather than along the thread of the stream, the main channel is now the north channel rather than the south channel.

12. The purpose of the dependent resurvey and survey of the south boundary of the Indian Reservation should have been to determine the location of a line lying ". . . up and along the middle of the Salt River." However, since neither the Special Instructions dated May 11, 1962, nor the amended Supplemental Special Instructions dated March 9, 1972,

directed to those individuals performing the survey have been made available to the Arizona Highway Department, this protestant has no way of knowing what those performing the survey were told to accomplish.

Respectfully submitted,

GARY K. NELSON
The Attorney General

Donald O. Loeb

DONALD O. LOEB
Assistant Attorney General

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APPENDIX A

The areas affected by the proposed boundary change in which the State of Arizona has an interest are located at North Country Club Drive (SR 87) and the Salt River Bed in Section 3, Township 1 North, Range 5 East, Gila and Salt River Meridian, Maricopa County, Arizona, more particularly described as follows:

> Lots 2, 3 and 4 and South half Northwest quarter (S1/2 NW 1/4) of Section 3, Township 1 North, Range 5 East.

A search of the above described property shows the record owner is the United States of America (Bureau of Land Management) by virtue of the Treaty of Guadalupe-Hidalgo-1848. Subject to the Secretary of Interior's order, dated January 17, 1969, determines the south boundary of the south channel of the Salt River to be Reservation Boundary.

The above property is subject to the following encumbrances as shown on the records of the Bureau of Land Management, Phoenix, Arizona:

A. Rights as granted by the Secretary of the Interior to the Salt River Valley Water Users' Association under the provisions of the Act of June 17, 1902, (32 Stat. 388) as agreed upon in contract between the United States of America and the Salt River Valley Water Users' Association, dated September 6, 1917.

B. Withdrawals for reclamation purposes ordered by the Secretary of the Interior dated July 10, 1940, and June 30, 1954, to Bureau of Reclamation.

C. R/W Highway AR 01728, dated July 30, 1951, amended July 22, 1965, to Arizona Highway Department, through West half West Half Southwest quarter Northwest quarter (W 1/2 W 1/2 SW 1/4 NW 1/4), Section 3, Township 1 North, Range 5 East, Route 87. This is our drainage easement for pipe culverts under Country Club Drive. (SR 87)

D. R/W Highway AR 035991, dated August 16, 1966, to Arizona Highway Department, through Southwest quarter Northwest quarter (SW 1/4 NW 1/4) and Lot 4 (Northwest quarter Northwest quarter (NW 1/4 NW 1/4) in Section 3, Township 1 North, Range 5 East. This is the right of way for State Route 87.

E. R/W Highway AR 035714, dated February 14, 1968, to Arizona Highway Department, described as the South 40 feet of the South half Southwest quarter Northwest quarter (S 1/2 SW 1/4 NW 1/4). Note: Right of Way into the maintenance camp.

F. Maintenance Camp AR 032447 to Arizona Highway Department dated May 13, 1963, described as that portion of the South half Northwest quarter (S 1/2 NW 1/4) of Section 3 Township 1 North, Range 5 East, more particularly described as follows:

> Beginning at the West quarter corner of said Section 3; thence Easterly along the South line of the Northwest quarter (NW 1/4) of said Section 3, a distance of 111.83 feet; thence Northerly and parallel with the West line of said Section 3, a distance of 40 feet to THE TRUE POINT OF BEGINNING; thence continuing northerly and parallel with said West section line a distance of 240 feet; thence Easterly and parallel with said South line of the Northwest quarter (NW 1/4) a distance of 1000.00 feet; thence Southerly and perpendicular to the last described course a distance of 240 feet; thence Westerly 40 feet Northerly of and parallel with said South line of the Northwest quarter (NW 1/4) of Section 3, a distance of 1000.00 feet to THE TRUE POINT OF BEGINNING. 5.49 acres

Note: For some reason, the survey line has excluded the above camp, part of which would be included in the so called south channel.

The authority for this above Grant came from the Federal Aid Act implemented August 27, 1958, 72 Stat. 885 Title 23, U.S.C. § 317.

MATERIAL SITES

The State Highway Department over the years has had at least three (3) valid Material Pits in the affected area.

G. M.S. No. 1161: Legal description of this pit covered all of Lot 4 and Southwest quarter of Northwest quarter (SW 1/4 NW 1/4), Section 3, Township 1 North, Range 3 East, Gila and Salt River Meridian, Arizona, was approved October 1, 1952, under Contract No. 14-06-300-21 from Bureau of Reclamation and was later terminated by letter dated April 28, 1969 - termination to take effect on June 30, 1969.

H. M.S. No. 74 and 198: Legal description of this pit covered all of Lot 3, Northeast quarter Northwest quarter (NE 1/4 NW 1/4) Section 3, Township 1 North, Range 3 East, Gila and Salt River Meridian, Arizona, was approved September 8, 1948, under Contract No. 176a-444 from the Bureau of Reclamation, and was later terminated by letter dated March 30, 1967. Termination to take effect May 15, 1967.

I. M.S. No. 6083: Legal description of this pit covered the West 330 feet of the South 660 feet of Lot 3, Section 3, Township 1 North, Range 5 East; Gila and Salt River Meridian, Arizona, was approved January 1, 1972, and expired June 30, 1972, under Contract No. 14-06-314-15 from the Bureau of Reclamation.

J. The Secretary of the Interior, through Public Land Regulations, also has granted several patents in the affected area.

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Gary K. Nelson
The Attorney General
John T. Amey
Chief Counsel
Stanley Z. Goodfarb
Assistant Chief Counsel

November 15, 1972

State Director
Bureau of Land Management
Federal Building
Phoenix, Arizona 85025

Re: Protest by the Arizona State Highway Commission of the proposed filing of Dependent Resurvey and Survey of the South Boundary of the Salt River Indian Reservation, accepted August 17, 1972.

Dear Mr. Fallini:

The State of Arizona, by and through the Arizona Highway Commission hereby submits its Amended Notice of Protest against the Plat Survey of the South Boundary of the Salt River Indian Reservation accepted August 17, 1972. The Highway Commission filed its original Notice of Protest with the Bureau of Land Management in Phoenix, Arizona, on October 13, 1972.

Enclosed herewith are Exhibits 1, 2, and 3 consisting of three aerial photographs of the Salt River described as follows:

1. Aerial Mosaic Photographs (with overlay) of Salt River taken December 31, 1965.

2. Aerial Mosaic Photographs of Salt River taken December 31, 1965.

3. Aerial Mosaic Photographs of Salt River taken January 6, 1966.

It is respectfully submitted that careful visual study and analysis of the enclosed aerial photographs clearly demonstrates the obvious fact that during the period from 1965 through 1972, the main channel of the ambulatory Salt River has been and continues to be the North rather than the South Channel. It is further submitted that the enclosed photographic exhibits

EXHIBIT A

reveal the additional fact that the water at its lowest level clearly defines the thread of the Salt River as the North Channel.

The Arizona Highway Commission, by and through the office of the Attorney General of Arizona, hereby requests the opportunity to present oral argument along with the testimony of expert witnesses at any hearing or hearings which may be held in connection with the filing of the above described plat of survey.

The Commission is also in possession of a number of additional pertinent photographs and documentary evidence which it reserves the right to introduce into the record at any future administrative proceedings brought for the purpose of establishing the South Boundary of the Salt River Indian Reservation.

Respectfully submitted,

GARY K. NELSON
The Attorney General

Donald O. Loeb

DONALD O. LOEB
Assistant Attorney General

DOL:jn
Enclosures

FILED (165)

AUG 18 1976

UNITED STATES DISTRICT COURT CLERK
FOR THE DISTRICT OF ARIZONA
BY .... DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff, vs. ARIZONA SAND & ROCK CO., an Arizona corporation, et al., Defendants.	:	No. Cv-72-376-Phx.
JOHNSON & STEWART MATERIALS, INC., et al., Plaintiffs, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al., Defendants.	:	No. Cv-73-579-Phx.
CITY OF MESA, an Arizona a municipal corporation, Plaintiff, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al., Defendants.	:	No. Cv-73-769-Phx.
SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation, et al., Plaintiffs, vs. ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al., Defendants.	:	No. Cv-74-553-Phx.

AUG 18 1976

EXHIBIT J

STATE OF ARIZONA, ex rel., W. A. ORDWAY, Director of the Arizona Department of Transportation,

Plaintiff,

vs.

ROGERS C. B. MORTON, Secretary of the Department of the Interior, et al.,

Defendants.

No. Cv-74-529-Phx.

MEMORANDUM

On the question of standing to sue, the court has determined all the "land claimants" have standing.

A. The City of Mesa's standing is not contested but the others are.

B. Allied Concrete's standing is based on control of lands of patented status.

C. Johnson & Stewart (and the individual claimants) base their standing on mining claims.

D. Salt River Valley Water Users' Association and Salt River Project claims under 43 U.S.C. 416 and 43 U.S.C. 421.

Arguments of lack of standing to sue in part are defective in that they presume the ultimate issue (whether the lands in question belong to the Indians or was "public." Further argument of lack of standing is that their rights are merely contract rights.

E. State of Arizona & Maricopa County rely on permits issued by the Bureau of Land Management pursuant to 43 U.S.C. 387.

I. LEGAL DISCUSSION OF STANDING

A. The test.

The Administrative Procedure Act (5 USC §702) provides for the right of review in the following language.

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

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Although "legal interest" used to be given a very strict interpretation, the law of standing has been revamped by the Supreme Court in recent years. In companion 1970 cases, the Court established a two pronged test for standing to challenge agency action under the APA.[1/] (1) The agency action challenged must have caused the plaintiff "injury in fact." The injury then, must not be hypothetical; there must be current adversariness. One party which may have difficulty in arguing this point is Salt River Valley Water Users' Association; apparently, their contracts have not yet been cancelled. Nevertheless, rejecting standing on this ground would be anomolous because a verdict for the Indians would certainly mean cancellation of the contracts because they were void ab initio. (2) The second consideration is that the injury in question must be to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." For example, in environmental cases, the parties frequently seek protection under the EPA legislation which in fact was designed to protect environmental interests. Here the parties seek to protect their "property" interests which fall within the due process clause of the Constitution.

In two other recent Supreme Court cases [Sierra Club v. Morton, 405 U.S. 727 (1972) and United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). See also Cady v. Morton, 527 F.2d 786, 791 (9th Cir. 1975)], the court applied the above test to noneconomic injuries, requiring only that parties assert individualized harm.

Although the Indians and Secretary argue otherwise, I think it is easy for this court to envision sufficient harm to the land claimants by a verdict for the Indians, to entitle the claimants to standing. An attenuated line of causation from the agency action to

---

[1/] Data Processing Service v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970). See also American Horse Protection Ass'n, Inc. v. Frizzell, 403 F. Supp. 1206 (D. Nev. 1975). Data Processing the petitioners sought to protect their "competitive position." In Barton, tenant farmers were asserting property rights viz. the landowners, but were granted standing. Here a similar possessory right is being argued by some of the land claimants.

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the interest injured and protected is adequate. American Horse, n.1 supra.

B. Applying the Test to Particular Types of Interests

1. Mining Claims.

The general rule is that government officials can properly cancel entries, but they do not have an arbitrary and unlimited power to do so. 63 Am. Jur.2d, Public Lands, §64 at 535.

The Ninth Circuit has rendered some contradictory opinions on the status of mining claims as property interests worthy of due process rights. See United States v. Walker, 409 F.2d 477 (9th Cir. 1969); Adams v. Witner, 271 F.2d 29 (9th Cir. 1958) and U. S. v. Consolidated Mines & Smelting, 455 F.2d 432 (9th Cir. 1971); see also Wilbur v. U.S., 280 U.S. 306 (1930) and Best v. Humboldt Mining Co., 371 U.S. 334 (1963).

2. Cancellation of Leases, Licenses and Contracts.

This is the problem related to Arizona's, Maricopa County's and the SRV's standing. In discussing the erosion of the "privilege vs. rights" doctrine, Davis [Administrative Law Text, p. 184, §7.13 (1972)] states:

> Many licenses that were once regarded as privileges have become rights. The movement is strong and clear, although some traces of the privilege doctrine remain in state courts.

Davis goes on to note that occupational licenses have always been treated more favorably because they can obviously very easily affect economic interests.

Interests which may be merely possessory and based on contract or license cannot therefore be automatically excluded from due process protection. See e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Boddie v. Conn., 401 U.S. 371 (1971); and Johnson v. Lower Elwha Tribal Community, Etc., Wash., 484 F.2d 200 (9th Cir. 1973). In Sessions, Inc. v. Morton, 348 F. Supp. 694 (C.D. Calif. 1972) the plaintiff sought review of a decision by the Secretary of Interior terminating a lease on Indian lands. The court found judicial review under the Administrative Procedure Act (5 U.S.C. §702) was

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permitted despite the government's argument that the decision was discretionary and hence unreviewable. The reasoning employed in Sessions at 699 is applicable here (especially with regard to the alleged violations by the SRV of their contract):

> Here, extinguishment of the rights and obligations of the parties must abide a determination of facts showing a breach of the contractual terms of the lease. Such a function, judicial in scope, is not entrusted to the Secretary but rather is reserved to court action.
>
> To hold, as defendants urge, that the Secretary's decision is binding termination of the lease if supported by substantial evidence in the administrative record, would make one of the interested parties to the lease the final arbiter of the respective rights and obligations of the parties to the lease contract. Such a ruling would be an anathema to the concept of due process...

The Secretary and the Indians rely on cases which are distinguishable. For example, Bowman v. Udall, 243 F. Supp. 672 (D.D.C. 1965) aff'd sub nom., Hinton v. Udall, 364 F.2d 676 (D.C. Cir. 1966) and Mollohan v. Gray, 413 F.2d 349 (9th Cir. 1969) involved standing under the Taylor Grazing Act (43 U.S.C. 315 et seq.). That act (§315 b) specifically provides that permits granted under it shall not create a right in the land and authorizes the Secretary to cancel in his discretion. Furthermore, in Bowman, the court found the testimony on financial loss speculative and indicated that the only interests which were being threatened were subsurface rights, not the surface rights involved in grazing permits. In Sessions (at p. 699) the court also distinguished Mollohan by stating: although the court "appears to speak in terms of cancellation, analysis of the facts makes it clear that it was continued use (non-renewal) of part of the grazing allotment granted to plaintiff on an annual basis that concerned the Court." This latter factor is in keeping with the cases regarding due process and dismissal of teachers before their contracts have terminated as opposed to not renewing their contracts for the upcoming year. In the cases at issue here, it seems that "cancellation" rather than "nonrenewal" occurred, and therefore the parties are entitled to due process.

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II. A BRIEF REVIEW OF THE COURT'S ORDER ON THE SUMMARY JUDGMENT MOTIONS.

A. The Issues

The court's order on the summary judgment motions should be reviewed because it applies to many of the arguments now being raised with regard to the proposed findings and conclusions.

There were two motions which the court ruled on: 1) the motion by the Indians seeking to have the Secretary's decision declared discretionary and unreviewable and declaring the defendants liable for past and continuing trespass, and 2) the City of Mesa's motion (joined by the other land claimants) seeking to have the 1972 plat and underlying survey set aside. This latter motion was premised on the theory that the government issuance of patents to the plaintiffs exhausted the Secretary's authority over the land in question and statutes which prevent the creation or the enlargement or constriction of reservation boundaries without Congressional approval as well as those laws which preclude the execution of resurveys so executed as to impair the bona fide rights of any claimant, entryman, or owner.

B. The Court's Resolution of the Issues

1. Although Mesa had contended that a patent is the highest evidence of ownership and the jurisdiction of the land department ceases with the issuance of a patent (43 U.S.C. §1151), the court noted that 25 U.S.C. §176 and 43 U.S.C. §52 permits the Secretary to survey public and Indian lands. Since the court noted the determination of rightful ownership (public or private) was the ultimate issue of the case, it concluded that summary judgment was premature.

2. Furthermore, 43 U.S.C. §52 indicates that the survey of private land is permissible insofar as it is necessary to complete a survey of public lands. The court found two Supreme Court cases which suggested the Secretary has the right to initially determine for purposes of the survey what is public land, Kirwan v. Murphy, 189 U.S. 35 (1903) and Lane v. Darlington, 249 U.S. 331 (1919). In Kirwan, at 55, the court employed the following rationale:

"After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists he now has the legal title. If the Land Department decides in his favor, he is not injured If they give patents to the applicants for preemption, the courts can then in the appropriate proceeding determine who has the better title or right."

In Lane, at 333-34, the court emphasized that the government like a private landowner has the right to survey for its own purposes and if as a result of the survey adopted, patents are given to the land and conflicts develop, the courts can then decide who had better right or title. The language is particularly significant as it relates to rights derived under the APA and due process clause:

> ...This retracing of the Hancock line is not directed to the plaintiffs, but, as we have said, is an investigation by the United States on its own account. The plaintiffs gained no rights by the approval of the Sickler line: they lost none by the substitution of the Perrin line. These acts were neither adjudications nor agreements. The plaintiffs' rights were fixed before...

The court therefore denied the land claimants' motions in the case at bar, refusing to strike the plat and survey from the public record.

3. The court also noted that a patent is void ab initio if the land was not legally available for patent. Because the validity of the patents was a factual issue, the City of Mesa's contention that the Secretary lost jurisdiction over the land when the patents issued, was also insufficient to support a summary judgment.

4. The Indians' motion was also denied, for although the court recognized the cases which said that decisions of the land department regarding surveys were unassailable by the court, there was an exception to this general rule. Such decisions were challengeable "in direct proceedings." That exception applied to the case at bar because the land claimants have directly sued the Secretary of Interior.

III. BURDEN OF PROOF AND OTHER ISSUES NOT DECIDING THE MERITS OF THE BOUNDARY DISPUTE.

A. The Effect of Patents on the Burden of Proof

The land claimants relying on patents argue now as they

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did in their summary judgment motion that there is a very strong presumption of the validity of patents and that they can only be overturned if there is fraud or gross error. Mesa argues that there has been no evidence of fraud or gross error and the court should not give a presumption to the correctness of the 1972 plat and survey. "Gross error" may be evidenced when the Land Department grants patents to lands which had never been surveyed.

Despite the possibility of "gross error" classification, there are a number of cases which have dealt with the priority of patents over lands which have previously been conveyed or reserved. Lands which have been appropriated or reserved for a lawful purpose are not public and are impliedly excepted from subsequent laws, grants and disposals. Such patents have been held void ab initio because the Land Department does not have authority over the lands they are purporting to convey. See e.g., Northern Pac. Ry. Co. v. U.S., 227 U.S. (1913); U.S. v. Minnesota, 270 U.S. 181 (1926); Scott v. Carew, 196 U.S. 100 (1905); Burfenning v. Chicago, St. Paul, Min. & Ohio Ry. Co., 163 U.S. 321 (1896); Wilcox v. McConnel, 38 U.S. (13 Peters) 496 (1839); U. S. v. Conway, 175 U.S. 60 (1899); LaRoque v. U.S., 239 U.S. 62 (1915); U. S. v. Stewart, 121 F.2d 705 (9th Cir. 1971). The presumption of patent validity has not been employed in these cases. Northern Pac. at 366 dealt specifically with this issue:

> The Court of Appeals expressed the view that the rule that resolves doubts in favor of the patent issued by the United States does not apply in such case... Much can be said in support of that view. It must be borne in mind that the Indians had the primary right. The rights the Government has are derived through the cession from the Indians. If the Government may control the cession and control the survey and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effectual as fraud.

The presumption of patent validity cases then are inapplicable to our factual situation.

Another approach supporting this conclusion is to consider the cases which suggest that [illegible] survey, patents are ineffectual in conveying the land. A review of the factual

setting in this case reveals that although there were three official surveys of the area, the Ingalls' survey came before the reservation was even created and it did not even meander the Salt River, but merely contained a sketch of the river and some descriptions in the field notes. Chillson did not determine the south boundary of the reservation either, although he was instructed to do so. He did meander one bank of the river, as this was in keeping with survey rules at the time. (The Salt River was a nonnavigable stream and the rules only required the surveyor to meander one bank). The Executive Order's words "up and along the middle of the river" on their face are in conflict with a conclusion that Chillson surveyed the boundary of the Reservation. Farmer likewise meandered only one bank of the river, but someone apparently drew a dotted line up the middle of the river in his survey. The brief of the City of Mesa makes some argument to the effect that even though the field notes do not reflect that Farmer meandered both banks of the Salt River, Farmer probably estimated the middle of the river and that ought to be sufficient for our purposes. Somehow Farmer is supposed to have estimated the middle of the river by measuring the distance between the right bank and the waters edge. At any rate, suffice it to say that this court feels itself to be correct in finding that there had been no official survey of the southern boundary of the reservation until 1972. (Even the expert Vorhees conceded that point.) For support of the conclusion that patents are ineffective in conveying land which has not been surveyed see Horne v. Smith, 159 U.S. 40 (1895); Lee Wilson & Co. v. U.S., 245 U.S. 24 (1917); and Carroll v. U.S., 154 F. 425 (9th Cir. 1907). It is especially interesting to note the court's response to the equitable "reliance" argument propounded by the patent holders in Lee Wilson, supra at 32: "...if for the sake of the argument we assume the existence of the equitable considerations insisted upon, it is manifest that the prayer for their enforcement is in the nature of things beyond the sphere of judicial authority however much relief on the subject may be appropriately sought from the legislative department of the government."

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B. A Patent Revocation Proceeding is Nesessary

Although this argument has been raised time and again, the court has resolved this issue through an earlier order which indicated the Indians could sue on their own behalf and it was not necessary for the United States to join in their behalf.

C. Laches, Estoppel, Statute of Limitations, etc.

The land claimants now argue that the Indians are estopped from asserting their title to the land in question because they have "acquiesced" for so long in the assertion of titles etc. inconsistent with such ownership. Such acquiescence is in fact very debatable as the record reflects the apparent confusion over the boundary in the 1890's and in the 1940's till the present. Nevertheless, courts have rejected the application of laches to assertions of title by the government or Indians. (U.S. v. Minnesota, supra, Northern Pac. v. U.S., supra, and U.S. v. Stewart, supra.

IV. THE ADMINISTRATIVE PROCEDURE ACT AND DUE PROCESS

This section deals with the heart of the court's approach to the case, for it concerns the extent to which the court may and should review the Secretary's decision as to the interpretation of the Executive Order and the survey.

A. The Administrative Procedure Act does Not Apply to All Administrative Action.

The Indians and Secretary contend first and foremost that this court cannot review the Secretary's decisions regarding the land in question. To determine whether this is the case, it is necessary to look to the Administrative Procedure Act initially. 5 U.S.C. §701 provides that the APA shall apply to agency action "except to the extent that--(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

An examination of the statutes which could be contrued as authority for the survey (43 USC §2, 43 USC §52, and 26 USC §176) reveals that there is no specific indication of Congressional intent to exclude surveying activities of the Secretary of Interior from judicial review. Although cases demonstrate that the Secretary of

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Interior has many times argued that he is "above" the APA, courts have rejected the argument.

Proceeding to the second exemption to the APA, a more difficult question arises. Almost every agency action involves an element of discretion and perhaps that is why the courts have had such difficulty in dealing with this exception. See Jaffe, Judicial Control of Administrative Action, pp. 374-75 (1965); Ferry v. Udall, 336 F.2d 706, 711 (9th Cir. 1964). The leading case on the discretion exemption, and for that matter the Administrative Procedure Act in general, is Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). In that case the Secretary of Transportation was not authorized by two federal statutes to finance construction of highways through public parks if a "feasible and prudent" alternative route existed and if no such route was available to approve construction only if there had been "all possible planning to minimize harm" to the park. The Secretary had argued that his determination of highway routes (in this case through a park) was discretionary. The court, however, stated:

> ...[T]he Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception [citing authority]... The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

The court found "law to apply" in the form of the statutory limitations referred to above in routing a highway through a park.

This circuit has time and again attempted to resolve agency discretion's interaction with law. The most recent attempt was in Ness Inv. Corp. v. U.S. Dept of Agr. Forests, 512 F.2d 706 (9th Cir. 1975); Accord, Strickland v. Morton, 519 F.2d 467 (9th Cir. 1975). In Ness at 715, the court formulated the following test:

> Thus we face the following alternative propositions: Where consideration of the language, purpose and history of a statute indicate that action taken thereunder has been committed to agency discretion: (1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory regulatory or other legal

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> mandate or restrictions: (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making of an informed judgment by the agency.

Earlier formulations of the test were endeavoring to get at the same conceptual distinction. For example in Mollohan v. Gray, 413 F.2d 349, 351 (9th Cir. 1969), the court spoke in terms of mandatory discretion and permissive discretion in the following manner:

> With a mandatory type statute, administrative discretion is limited to deciding whether the statutory requirements have been met; if they are met, the Secretary must take certain action. With a permissive type statute, even where an applicant meets all of the statutory requirements, the Secretary still has discretion to refuse to act. Discretionary action under a permissive type statute is exempted from judicial review under the Administrative Procedure Act.

Applying these various tests to the facts of Salt River, leads to the conclusion that at least some aspects of the Secretary of Interior's actions are reviewable under the Administrative Procedure Act. In looking at those actions, it is important to distinguish between the 1969 decision interpreting the phrase "up and along the middle of the river" from the Executive Order and the actual survey and 1972 plat.

The land claimants maintain that the 1969 decision cannot be construed as falling within the definitions of surveys as used in the various statutes authorizing the Secretary to survey lands (e.g., 43 U.S.C. §2 and §52 and 25 U.S.C. §176). Here the Executive Order itself is the law to apply; interpreting a phrase like "up and along the middle of the river" is certainly in part a legal process which a court should be allowed to examine. Furthermore, Section 706 of Title 5 states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of terms of an agency action. I conclude then, that the 1969 decision interpreting the Executive Order is within the APA.

When the court concludes that the 1969 decision was in fact correct, then it must decide whether the survey itself falls within the discretionary exemption. The manner in which a line is laid on

the ground and the factors that enter into that decision call for a great deal more expertise than this court has. The land claimants complain that the actual survey itself had defects in that the thalweg line was run up the deepest part of the existing gravel pits and that could hardly have been the thalweg line back in 1879 when the reservation was created. Furthermore, they argue that the selection of the old south channel was a mistake because there is a different south channel now which has resulted from accretive rather than avulsive changes. Although there may well be a difference of opinion as to where the thalweg of the southern channel now lies, it is doubtful that this court is better equipped to determine that fact than the cadastral survey team.

One further point argued by the land claimants on this discretionary issue is that all of the Secretary's actions should be limited by the constitutional law--in particular the due process clause. Since there is no hearing provided, nor opportunity to submit evidence or even notice as to the 1969 decision, the parties are entitled to review. There was an opportunity to respond to the 1972 plat and survey because it was published in the Federal Register and notification was given that objections to it would be considered.

B. The Scope of Review

Assuming at least some of the Secretary's decision is reviewable, the following provisions of the Administrative Procedure Act (§706) applies:

> ...The reviewing court shall--
>
> (2) hold unlawful and set aside agency action findings, and conclusions found to be--
> (A) arbitrary capricious, an abuse of discretion, or other wise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

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(F) unwarranted by facts to the extent that the facts are subject to trial de novo by the reviewing court...

1. Subsection (C)

In Overton Park, the court indicated that the first question to be asked is whether the Secretary has properly construed his authority to act. In Salt River it seems to me that the Secretary was within his authority in making the particular series of decisions which he did. Each was consistent with his duty to survey reservation boundaries.

2. Subsection (A)

Perhaps the lowest common denominator of the scope of review is the arbitrary or capricious test.

> To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment... Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. [Id. at 416].

Using this test, it is impossible for the court to end up reversing the Secretary, for his opinion was obviously well thought out and considered a great deal if not all of the relevant evidence.

3. Subsection E

With regard to the substantial evidence test the Supreme Court has stated (Id. at 414) that it applies "only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself... or when the agency action is based on a public adjudicatory hearing." The action in question simply doesn't fall within either category and so the substantial evidence test does not apply.

4. Subsections B and D

Both of these subsections to §706 may be considered jointly for the purpose of this action. The law of course which is alleged to have been violated is the constitutional right to due process. Certainly there was nothing in the statutes here explicitly requiring a hearing, and the cases cited in the opinion on the summary

judgment motions make it doubtful that due process requirements are necessary before the government surveys land. See Lane v. Darlington, supra and Kirwan v. Murphy, supra. The surveys themselves had no legal affects on the claimants' rights until the courts resolved the conflict. This brings us to the last and most relevant type of review for the case at bar.

5. Subsection F

There are only two situations in which de novo review is required according to the Supreme Court. Overton Park, supra, and Camp v. Pitts, 411 U.S. 138 (1973). The first is "when the action is adjudicatory in nature and the agency fact finding procedures are inadequate. The second is "when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.

Both of these alternatives require a consideration of what is adjudicatory action. Davis, supra at 123-24 makes these generalizations. A rule making activity is generally designed to apply to a number of unnamed parties, it requires further proceedings to be enforced, and it ordinarily looks to the future. An adjudicatory action on the other hand applies to a smaller number of named parties, has immediate impact, and is retrospective (considers past action). The APA in 5 USC §553 provides for notice and an opportunity to submit evidence in the case of some rulemaking activities. 5 USC §554 indicates that where adjudicatory requirements are mandated by statute [see e.g., Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964) and U.S. v. Walker, 409 F.2d 477 (9th Cir. 1969), and especially Law Motor Freight Inc. v. CAB, 364 F.2d 139 (1st Cir. 1966)] notice and hearings may be required. Other cases discuss the meaninglessness of trying to categorize the agency action in question. Dusquesne Light Co. v. EPA, 481 F.2d 1 (3rd Cir. 1973) and Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973). The latter case at 501 suggests a very practical approach:

> ...[I]f the resulting administrative action, whether regarded as rulemaking or otherwise "is individual

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in impact and condemnatory in purpose" or "when the issue presented is one which possesses a great substantive importance, or one which is unusually complex or difficult to resolve on the basis of pleadings or argument," a hearing preceding any final administrative action is appropriate.

Certainly the criteria in the Appalachian Power case are satisfied in these Salt River circumstances. The issue is not so much, however, whether an opportunity for a hearing, etc. arises at the administrative level (if in fact that administrative decision is not binding) but rather that at some stage before final adjudication of rights the parties are afforded a right to submit evidence, etc.

I have concluded that (given the implication that some form of classification is necessary) the first requirement is not satisfied. This is not an adjudicatory action and I refer to the specific language of the court in Lane v. Darlington, referred to in the order on the motions for summary judgment. The court there specifically said that the survey was not an adjudication. At any rate, even if it were an adjudication, the fact finding procedures may have been adequate in that they involved efforts to submit evidence by disputing agencies (the BIA and the BLM) and much of the relevant evidence was considered.

The second provision for de novo review however, seems to fit our fact situation perfectly; issues that were not before the agency (Secretary) are now being raised in a proceeding to enforce nonadjudicatory agency action. As the court suggested in its opinion on the summary judgment motions, the surveys in and of themselves were not final--further court action was necessary to affect legal rights. Normally these proceedings would be for patent revocation brought by the United States. Here, however, it is in the form of a trespass and damage action initiated by the Indians. Certainly new issues were raised at trial than had been considered by the Secretary, although their relevance may be debatable. Other cases supporting de novo review here are U.S. v. Indpt. Bulk Transport Inc., 394 F.Supp. 1319 (S.D.

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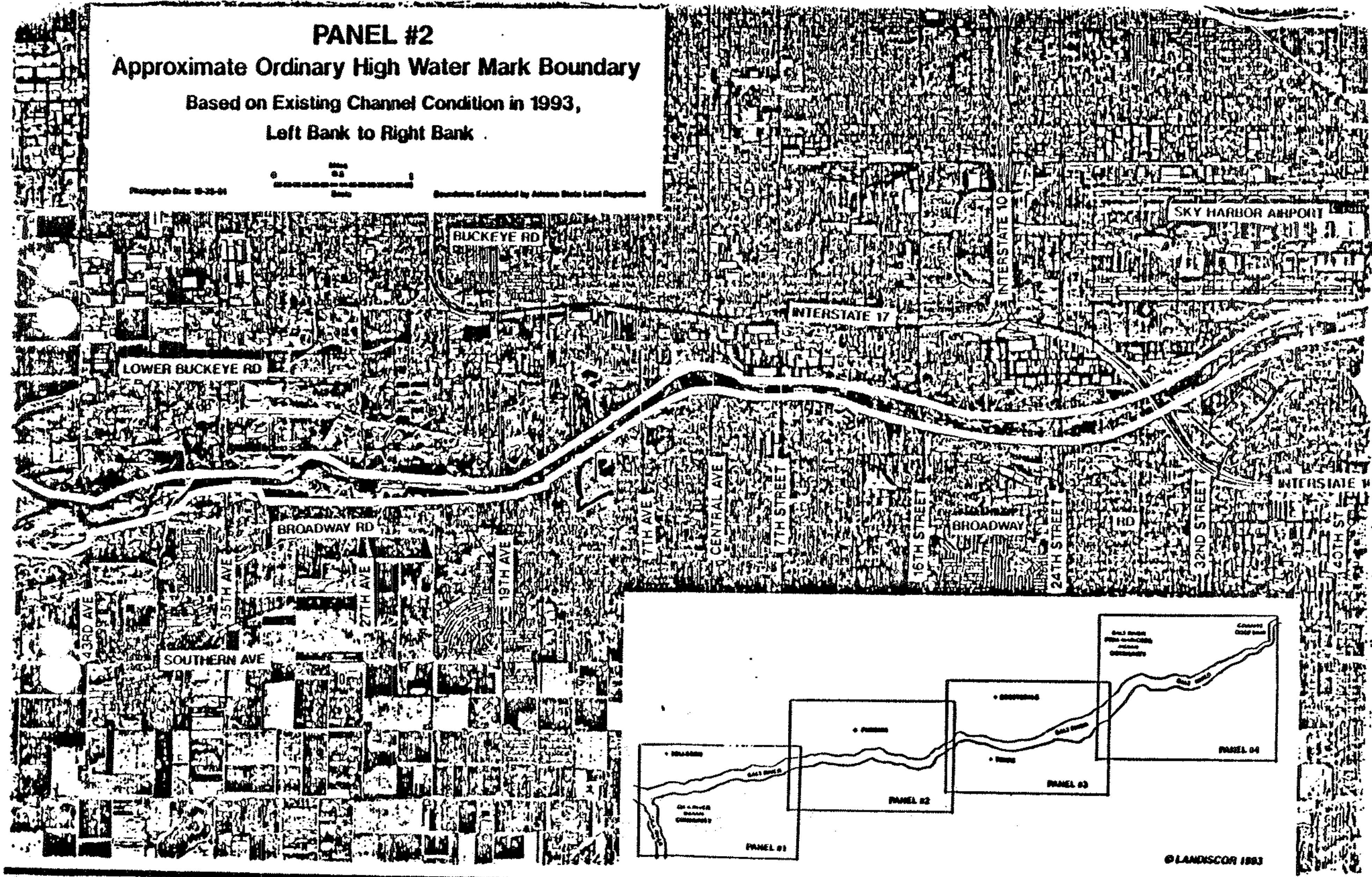
PANEL #2
Approximate Ordinary High Water Mark Boundary
Based on Existing Channel Condition in 1993,
Left Bank to Right Bank
BUCKEYE RD
SKY HARBOR AIRPORT
INTERSTATE 10
INTERSTATE 17
LOWER BUCKEYE RD
BROADWAY RD
7TH AVE
CENTRAL AVE
7TH STREET
16TH STREET
BROADWAY
24TH STREET
RD
32ND STREET
INTERSTATE 1
40TH ST
43RD AVE
35TH AVE
27TH AVE
19TH AVE
SOUTHERN AVE
PANEL #1
PANEL #2
PANEL #3
PANEL #4
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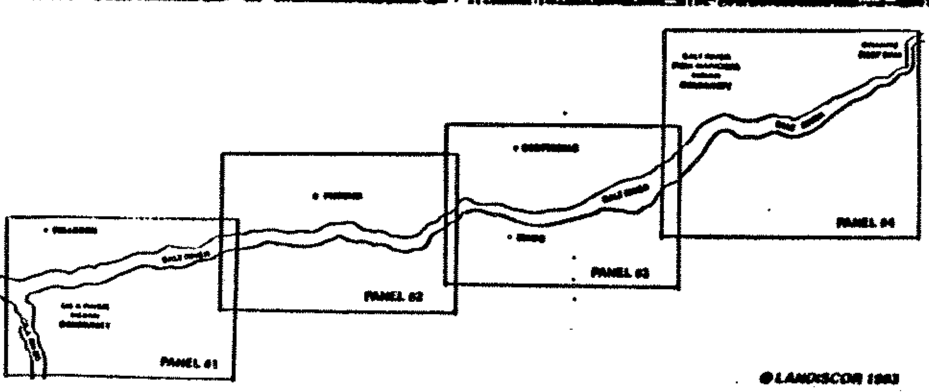
PANEL #3

Approximate Ordinary High Water Mark Boundary

Based on Existing Channel Condition in 1993,
Left Bank to Right Bank

Boundary Established by Arizona State Land Department

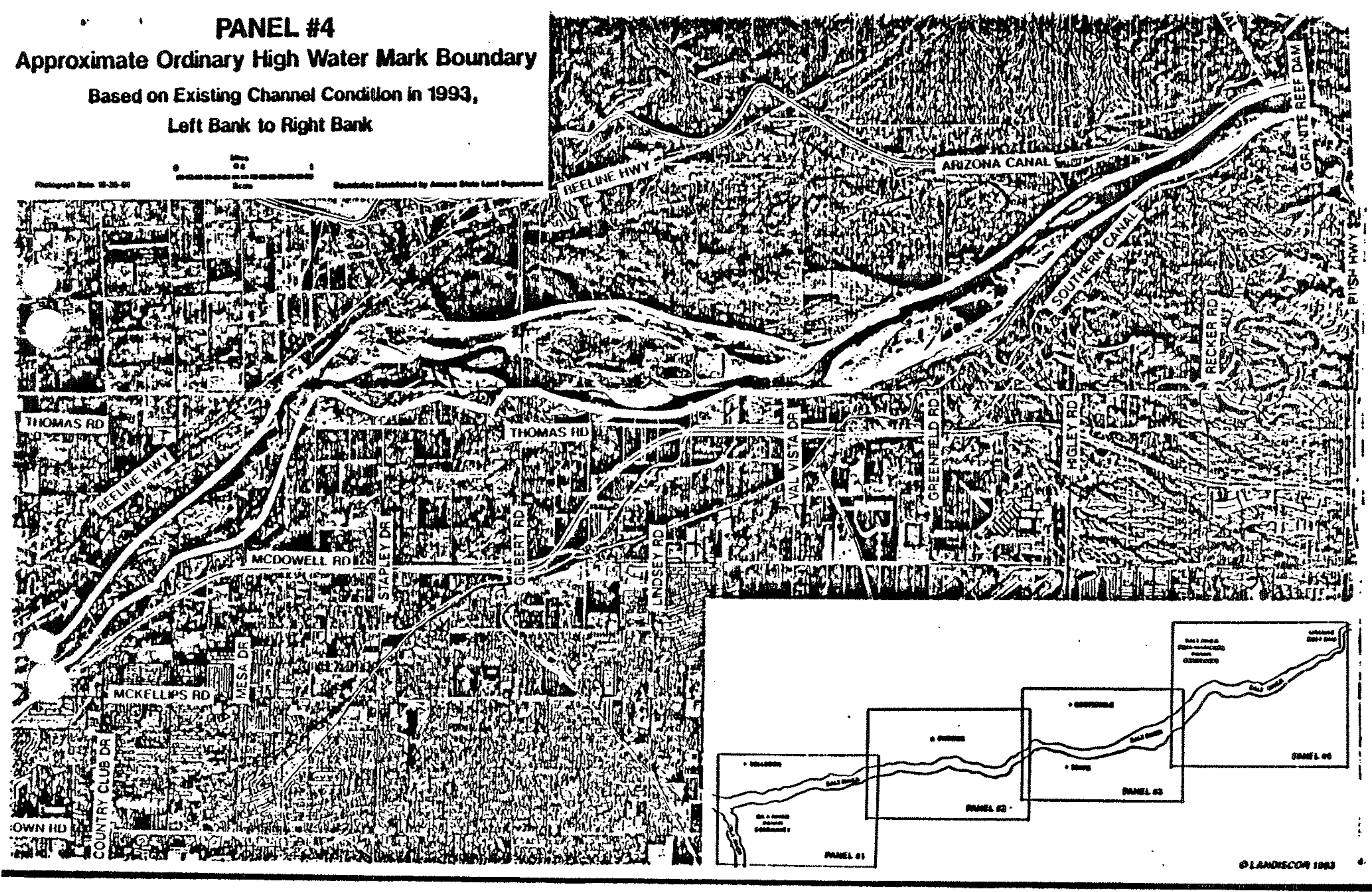
MCDOWELL RD
48TH ST
WASHINGTON ST
56TH
MCKELLIPS RD
CURRY RD
202 LOOP
BROWN RD
RIO SALADO PKWY
HOHOKAM EXPY
UNIVERSITY DR
PRIEST DR
MILL AVE
RURAL RD
MCCLINTOCK DR
PRICE RD
UNIVERSITY DR
DOBSON RD
ALMA SCHOOL RD
INTERSTATE 10
40TH ST



PANEL #4

Approximate Ordinary High Water Mark Boundary

Based on Existing Channel Condition in 1993, Left Bank to Right Bank



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FILED

APR 13 1977

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY [signature] DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Plaintiff, vs. ARIZONA SAND & ROCK CO., an Arizona corporation; et al., Defendants.	NO. CIV. 72-376 PHX WDM JUDGMENT

The Court having tried this matter without a jury on March 17, 18, 22, and 31, 1976, the Plaintiffs and Defendants were represented by their respective counsel. The Court on August 16, 1976 made findings of fact and conclusions of law which are marked Exhibit "A" attached hereto and incorporated into this Judgment by reference. Based upon the foregoing findings of fact and conclusions of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the determination by the Secretary of the Interior on January 17, 1969 that the South boundary of the SALT RIVER PIMA-MARICOPA INDIAN RESERVATION in Township 1 North, Range 5 East of the Gila and Salt River Base and Meridian, Maricopa County, State of Arizona is located in the South channel, was a proper determination and within the scope of his authority and power.

96-002-015

SALT RIVER
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ex rel. M.J. Hassell as the State
Land Commissioner

BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY OF THE SALT RIVER [From Granite Reef Dam to the Gila River Confluence]	Admin. Docket No. 94-1 STATE LAND DEPARTMENT'S RESPONSE TO NOTICE OF LACK OF JURISDICTION AND REQUEST FOR TERMINATION OF PROCEEDINGS

The State Land Department ("LAND") responds to the Notices of Lack of Jurisdiction[1] as follows:

The gravamen of both Notices is that the doctrine of res judicata prevents the State of Arizona from relitigating the navigability of the Salt River because the State was a party to prior litigation in which the State had full opportunity to litigate the issue of navigability of the Salt River, and establishment of non-navigability was essential to the prior judgment. The

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[1] Two Notices have been filed, one by CalMat Co., CalMat Co. of Arizona and Allied Concrete & Materials Co., and one by the Salt River Pima-Maricopa Indian Community. Although by rule LAND is a party to every Commission proceeding, A.A.C. R12-17-101(4), and is represented by the Attorney General, neither LAND nor its counsel were served as required, A.A.C. R12-17-103(C), with these Notices. Nonetheless LAND will respond to both Notices through this Response.

relief requested is termination of the proceeding. First, the doctrine of res judicata[2] does not apply; LAND is not collaterally estopped from advocating navigability of the Salt River before the Commission. Second, even if LAND were estopped, the public beneficiaries of the trust are not estopped; termination of the proceeding is the wrong remedy. LAND requests that the Notices (petitions) be denied.

A. IT IS NECESSARY TO CLARIFY PETITIONERS' VERSION OF THE PRIOR PROCEEDINGS IN THE UNITED STATES DISTRICT COURT

In response to the Petitioners' recitation of the proceedings in the United States District Court lawsuits as evidenced by the Exhibits attached to the Notice, LAND directs the Commission's attention to the following clarifications:

1. The named defendant in Cause No. CIV 72-376 was the Arizona State Highway Commission[3] comprised of Lou Davis, Rudy E. Campbell, Walter Surrett, Walter A. Nelson and Len W. Mattice. See Exhibit A to the Notice. The named plaintiff in CIV-74-529-Phx was the State of Arizona ex rel. W.A. Ordway, Director of the Arizona

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[2] Res judicata, concerns a judgment on the merits in a prior suit involving the same parties or their privies; it bars a second suit based on the same cause of action. Chaney Building Co. v. City of Tucson, 148 Ariz. 571, 573, 576 P.2d 28, 30 (1986). The prior consolidated lawsuits involved causes of action in trespass and ejectment. The Commission's hearing is an administrative proceeding limited to determining navigability and public trust values. The causes of action are not the same. The doctrine of res judicata does not apply.

[3] The Arizona Department of Transportation ("Transportation") was created in 1973 (during the course of these consolidated lawsuits) and replaced the Arizona Highway Commission, which was terminated by Transportation's enabling legislation. See 1973 Ariz. Sess. L. (1st Reg. Sess) ch. 146.

Department of Transportation. See Findings of Fact and Conclusions of Law, p.4,[4] attached and made a part of the Judgment (Exhibit H to Notice).

2. The issues essential to the final Judgment in these Consolidated cases were 1) whether the location of the Reservation Boundary was within the scope and authority of the Secretary of Interior to determine and 2) whether a survey and plat approved in 1972 established the south boundary of the reservation as a fixed boundary line. See Findings of Fact and Conclusions of Law attached and made a part of the Judgment (Exhibit H to Notice).

B. LAND IS NOT ESTOPPED FROM ADVOCATING THE NAVIGABILITY OF THE SALT RIVER

The elements required to establish collateral estoppel or issue preclusion against a party in a new and different proceeding have been succinctly stated in Chaney Building Co. v. City of Tucson:

> Collateral estoppel or issue preclusion is applicable when the issue or fact to be litigated was actually litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it, provided such issue or fact was essential to the prior judgment.

148 Ariz. 571, 573, 576 P.2d 28, 30 (1986).

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[4] "No. CIV-74-529. This is an action brought by the State of Arizona on behalf of the Director of the Arizona Department of Transportation. The State of Arizona claims an interest in a portion of the disputed property by reason of certain licenses and permits for the removal of sand and gravel and rights of way which were granted to the Department by the Bureau of Reclamation, Department of Interior." (Emphasis supplied.)

In deciding whether LAND is barred from advocating on behalf of the navigability of the Salt River before the Commission, "we must look both to the degree of identity of the parties and to the degree of identity of the issues in the two actions." Industrial Park Corp. v. U.S.I.F. Palo Verde Corp, 26 Ariz. App. 204, 206, 547 P.2d 56, 58 (1976).

1. LAND, the State Agency Delegated Public Trust Land Management Authority, Is Not a Party Estopped by Transportation's Ultra Vires Admissions in Prior Litigation

With regard to the degree of identity of the parties, Petitioners disingenuously name the party in the first lawsuit as the "State of Arizona." Petitioners' exhibits plainly show that the party was the State on the relationship of the Director of Transportation. Transportation and the office of Director were created by 1973 legislation. See 1973 Ariz. Sess. L. (1st Reg. Sess.) ch. 146. A review of Transportation's powers discloses no statutory power delegated to it or to its Director to dispose of or to deal in any way with State public trust land. "[A]dministrative officers and agencies have no common law or inherent powers. . . The powers and duties of an administrative agency are to be measured by the statute creating them." Kendall v. Malcolm, 98 Ariz. 329, 334, 404 P.2d 414, 417 (1965); accord Cochise County v. Kirschner, 171 Ariz. 258, 261, 830 P.2d 470, 473 (App. 1992)

(citations omitted) (an agency has no powers other than those the legislature has delegated to it).[5]

A recent case is dispositive. In CalMat of Ariz. v. State ex rel. Miller, the Court of Appeals held:

> Generally, equitable estoppel does not apply to the state in matters affecting sovereign immunity, and this is especially true if the claim of estoppel is based upon an ultra vires or illegal act of a government official. However, this rule is not absolute. Estoppel may apply against the state only when the public interest will not be unduly damaged or when it application will not affect the exercise of governmental powers or make binding the unauthorized acts of the government. Given the substance of our holding in Hassell, we believe that this case must be remanded for a new trial at which the state shall be permitted to assert any ownership interest in this property. Binding the state by estoppel to a position asserted in another lawsuit, after that position has been declared unconstitutional, would unduly damage the public interest. Since Hassell determined that the state held the land of all navigable water courses within its boundaries as of February 14, 1912, when Arizona achieved statehood, the state must be allowed to put on evidence as to whether any of the condemned property in this case falls within the boundaries of any navigable watercourse. To agree that the state is estopped from presenting this evidence on remand would be inconsistent with our holding in Hassell that quit claims of riverbed land are unconstitutional and that the state cannot waive its right to hold such lands in the public trust. Therefore the state has the duty to assert, and must assert, this ownership interest in this and any future condemnation litigation involving riverbed land.

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[5] Long before the legislature enacted the 1992 Ownership of Streambeds Act, codified at A.R.S. § 37-1101 to -1156, LAND was authorized to "have charge and control of all lands owned by the state . . . except lands under the specific use and control of state institutions." A.R.S. § 37-102(B). Moreover, LAND was authorized to both "prosecute and defend all actions and proceedings to protect the interest of the state in lands within the state." Id. subsection (C). It should also be noted that the Attorney General on his own has no authority to sue or defend interests in State land managed by LAND. Arizona State Land Department v. McFate, 87 Ariz. 139, 144-48, 348 P.2d 912, 915-18 (1960).

172 Ariz. 300, 311, 836 P.2d 1010, 1021 (App. 1992), vacated in part, but aff'd in pertinent part, 148 Ariz. Adv. Rep. 3, 859 P.2d 1323 (1993). The ultra vires actions of officers of Transportation and its lawyer in stipulating that Salt River was not navigable cannot bind the State.[6]

2. CALMAT Is Estopped from Litigating Whether the State Is Estopped from Advocating Navigability of the Salt River

Petitioner CalMat of Arizona ("CALMAT") is itself estopped from raising the issue that the State is barred by principles of res judicata or collateral estoppel. CALMAT bases its argument before the Commission on the same prior case on which it based identical arguments before the Court of Appeals. In its brief in CalMat of Ariz. v. State ex rel Miller, 172 Ariz. at 311, 836 P.2d at 1021, CALMAT argued:

> A copy of the Pretrial Order and subsequent Findings of Fact and Conclusion [sic] of Law in District Court No. CIV 72-376 were attached to Calmat's Motion in Limine (I.R.A. 101). Both Calmat's predecessor and [sic] interest, Arizona Sand & Rock Co., and the State were parties

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[6] Petitioners rely on Section F(2) of the 1992 Ariz. Sess. L. (2d Reg. Sess.) ch. 297, which provides: "This act does not affect: 2) Reaches of watercourses where determinations have been made by judicial actions before the effective date of this act." This provision is a reference to res judicata and collateral estoppel. It cannot be enough that there has been a determination made in prior litigation to which the State was not a party or where the issue was not litigated. To interpret Section F(2) to permit a 1977 Judgment to estop LAND from asserting navigability of the Salt River under the factual circumstances underlying the stipulation relied on in that case, would be to make Section F(2) as unconstitutional and violative of the public trust doctrine as the statutes found wanting in Center for Law v. Hassell. The Commission should not so interpret Section F(2), but should recognize that it is a reference to principles of res judicata and collateral estoppel and not more.

> to and bound by the admissions made and judgment entered in that action.

See Cross Appellants Answering Brief, pp. 27-29, attached hereto as Exhibit 1. Neither the Court of Appeals nor the Supreme Court was impressed with CALMAT's position, fully argued and essential to the decision of the Court of Appeals. The rule in Arizona is:

> [T]he determination of an issue may also be conclusive in a subsequent action when . . . it is raised by a party not involved in the prior action so long as it is asserted defensively[7] against a party who was involved in that prior action. Thus, [a non-litigant in the first action] can defensively assert against [a litigant in the first action] any issues actually litigated and determined, and essential to the judgment, in the first action.

King v. Superior Court, 138 Ariz. 147, 151, 673 P.2d 787, 791 (1983) (citation omitted). CALMAT had its opportunity to litigate the effect of the Judgment in CIV 72-376 and lost; it is estopped from relitigating the issue. LAND requests that the Commission find that CalMat of Arizona is estopped from raising the stipulation regarding the Salt River's navigability entered in Cause No. CIV-72-376 in the United States District Court, to estop LAND from advocating for navigability before the Commission.

3. Whether the Salt River Was Navigable at Statehood Was Not Essential to the Prior Judgment in the United States District Court

Additionally, the issue of whether the Salt River was navigable at statehood was not essential to the Court's ruling in Cause No. CIV 72-376. In King v. Superior Court the court held:

---

[7] Under certain circumstances it may also be used offensively. See Wetzel v. Arizona State Real Estate Dep't, 151 Ariz. 330, 727 P.2d 825 (App. 1986), cert. denied 482 U.S. 914, 107 S. Ct. 3186 (1987).

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> [P]reclusion exists only when an issue was actually litigated and determined in the prior suit. If an issue was neither essential nor necessary to the prior judgment, such preclusion is inappropriate. The Restatement (Second) of Judgments states the general rule as follows:
>
> > "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

138 Ariz. 147, 150, 673 P.2d 787, 790 (1983) (citations omitted). A review of the Judgment and Findings of Fact and Conclusions of Law in Cause No. CIV 72-326, Exhibit H to the Notice, will conclusively demonstrate that, although all parties stipulated that the Salt River was not navigable at statehood, that issue was not litigated, determined or essential to the ruling on the case. See argument A(2) and FN 4, supra. See, e.g. King v. Superior Court, 138 Ariz. at 151-52, 673 P.2d at 791-92.

4. Transportation Had No Incentive to Protect Public Trust Land Ownership

One further principle is essential in order for LAND to be estopped before the Commission: the incentive of the "State" in the prior litigation must be sufficient for the "State" to obtain a full and fair adjudication of the issue in that action. As indicated in footnote 4, supra, Transportation had an interest in the subject property only because of certain licenses and permits for the removal of sand and gravel, and because of rights-of-way that were granted to Transportation by the Bureau of Reclamation. Thus, Transportation had no incentive to press for the navigability of the Salt River. Although a determination of navigability and State

ownership would have countered the Indian Community's possessory rights to land in the bed, it also would have undermined Transportation's licenses and rights-of-way granted by the federal government, with no guarantee that LAND would issue similar licenses or rights-of-way to Transportation to use public trust land for sand and gravel extraction. The requisite identity of interest to apply collateral estoppel against LAND before the Commission is missing.

C. **TERMINATION OF THE PROCEEDING IS THE WRONG REMEDY**

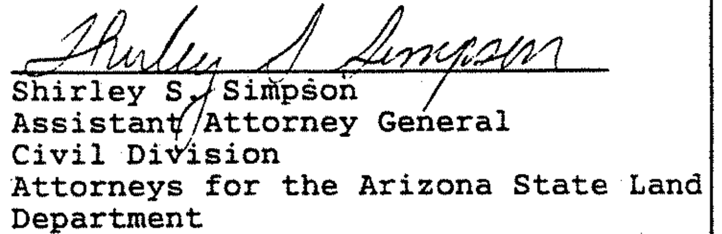
Finally, assuming for purposes of argument only that LAND is estopped, this proceeding should not terminate. A.R.S. § 37-1121(B) provides "[p]rivate citizens, clubs, organizations, corporations, partnerships, unincorporated associations, municipal corporations and public entities" may appear and take part in the navigability hearings. Both the Center for Law in the Public Interest and the Arizona Paddler's Club have manifested deep interest in the Commission's proceedings to date. Arizona Center for Law in the Public Interest has already sued to protect the public's interest in the beds of navigable rivers within Arizona. If LAND is estopped from its statutory advocacy role, principles of collateral estoppel cannot be applied to the Center for Law, the Arizona Paddlers Club, or any other like-minded person or entity who would take up the cause before the Commission. If the State, as Trustee of the Public Trust on behalf of the beneficiaries has abrogated its trust duties, the beneficiaries cannot be estopped from litigating in their own behalf.

CONCLUSION

The petitioners have failed to demonstrate that LAND is estopped from advocating for the navigability of the Salt River. The petitions for termination of the above-captioned proceeding should be denied.

RESPECTFULLY SUBMITTED this 9 day of January, 1994.

GRANT WOODS
Attorney General



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FOREGOING FILED this 6 day of
January, 1994, with

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EXHIBIT A

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

CALMAT OF ARIZONA, an Arizona corporation, Plaintiff-Appellant, Cross-Appellee, vs. STATE OF ARIZONA, ex rel. CHARLES L. MILLER, Director of Transportation, Defendant-Appellee, Cross-Appellant.	1 CA-CV 89-602 (Maricopa County Superior Court No.s C-555355 & CV 87-17569 (Consolidated))

APPELLANT'S REPLY BRIEF AND CROSS APPELLEE'S ANSWERING BRIEF

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Appellant/Cross Appellee

ANSWERING BRIEF ON CROSS APPEAL

STATEMENT OF THE CASE

Although not technically inaccurate, the State's summary of the procedural background of this case (which is included in its Statement of Facts) is misleading in that it omits a number of crucial facts. In October 1985 the State filed a condemnation action (C 557965) in an attempt to acquire the legal right to occupy the property at issue in this case. The Verified Complaint the State filed in that action affirmatively alleged Calmat owns the subject property in fee. (Complaint at IV and Exhibit D; App at 4.) Calmat admitted that fact in its Answer. (Answer at IV; App at 5.) The State obtained immediate possession of Calmat's land under those pleadings but took no further action to prosecute the action. The State's action was ultimately dismissed for lack of prosecution in November 1986. (App at 1.)

Calmat filed its inverse condemnation action (CV 87-17569 on July 6, 1987. (I.R.A. 1.) On September 11, 1987 Calmat served a standard set of requests for admission and nonuniform interrogatories which, among other things, asked the State to identify the witnesses and exhibits it intended to use at trial. (I.R.A. 4.) In response the State identified a single real estate appraiser but stated he had not yet formed an opinion of value. The State also included the somewhat cryptic statement: "questions of ownership of riverbed property have not been resolved." (App. at 6.)

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Those interrogatory responses were given on October 16, 1987. (I.R.A. 5.) The State took no further action in this case until after Calmat filed its original motion to set and certificate of readiness in March 1988. At that time, the State filed a controverting certificate which again referenced the riverbed issue. (I.R.A. 59.) The State never supplemented its interrogatory responses, nor did it actually deny Calmat owns the land in question. Instead, it simply noted that the "State Land Department in 1985 stated an intention to claim ownership over the beds of navigable streams in the State." The State did not and, to this day, has not stated it has ever claimed an interest in the subject property.

Calmat's original motion to set was denied because, due to a clerical error, its list of witnesses and exhibits was not properly filed. Calmat filed a new list of witnesses and exhibits on May 16, 1988. (I.R.A. 12.) The State filed its list on June 6, 1988 and Calmat's second motion to set and certificate of readiness was filed on June 9, 1988. (I.R.A. 16 & 17.) Again the State failed to supplement its interrogatory responses to identify expert witnesses or the opinions they would offer at trial.

In late August 1988, with just over one month left before the trial date then set, the State attempted to begin discovery by taking the depositions of Calmat's expert witnesses. That dispute resulted in a motion to compel which was heard on September 14, 1988. At that hearing Calmat explained

that when the State's witnesses were deposed they each stated they had not completed their final opinions. The State had therefore agreed, on the record at those depositions, that it would inform Calmat of any changes in its expert's opinions and provide an opportunity for redeposition. The trial court granted the State's motion to compel, but also ordered the State to provide those final opinions by supplementing its interrogatory responses by Friday, September 16, 1988. (App at 7.)

The State actually delivered its supplemental responses on Saturday, September 17, 1988. (I.R.A. 100.) It is those answers, filed over a year after the requests were served and only one month before trial, that the State now cites as its pretrial disclosure of Mr. Halpenny's proposed expert testimony. Calmat moved in limine to exclude Mr. Halpenny's testimony arguing both that the State had failed to disclose his proposed testimony in a timely manner and that the State was estopped from claiming ownership of the Salt River riverbed. (I.R.A. 101.) The court granted Calmat's motion, on both grounds, by minute entry dated October 7, 1988. (App at 8.)

The trial was continued until February 23, 1989 at the State's request. However, the State did not ask the trial court to reconsider the riverbed issue at that time. The State did raise the riverbed issue in its motion for new trial, but although the trial court granted that motion on the valuation date issue, it reaffirmed its ruling on the riverbed issue.

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STATEMENT OF FACTS

The Facts Relevant to Calmat's Response to the State's Cross Appeal are contained in the Statement of the Case.

Issue Presented

1. Did the Trial Court Abuse its Discretion in Excluding Evidence of the Riverbed Issue?

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion In Excluding Evidence of the Riverbed Issue.

The trial court properly prohibited the State's eleventh hour attempt to claim ownership of the Salt River riverbed in this case. The State failed to raise the issue or disclose its intention to present evidence to support such a claim in discovery. The State has not and cannot argue the trial court abused its discretion in refusing to allow the State to introduce Mr. Halpenny's testimony at trial. *Selby v. Savard*, 134 Ariz. 222, 227, 655 P.2d 342, 347 (1982).

Rule 26(e) of the Arizona Rules of Civil Procedure deals with the supplementation of discovery responses.

> A party is under a duty <u>seasonably</u> to supplement the response with respect to any question directly addressed to . . . . (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify and the substance of the person's testimony.

Ariz. R. Civ. P. 26(e)(1) (Emphasis added). The State Bar Committee Notes to the 1983 Amendment to that rule emphasize

that a party cannot wait until the eve of trial to disclose its expert witnesses and their opinions:

> A party has an affirmative duty to disclose information which is the subject of this rule in a timely fashion. The primary duty is to supplement discovery responses concerning (B) and (C) seasonably after receiving the information . . . . . That duty may not be fulfilled by waiting until the last minute (e.g. 31 days before trial) to make the required disclosures. Similarly, in those courts [where filing a list of witnesses and exhibits is a requisite to filing a motion to set] discovery responses concerning (B) and (C) should be seasonably supplemented, and information should not be withheld until the filing of the list of witnesses and exhibits required to be filed prior to the motion to set and certificate of readiness.

(Emphasis added).

The State did not even attempt to comply with this rule. Although it filed two separate lists of witnesses and exhibits, it never revealed that it intended to have Mr. Halpenny offer both expert opinion and factual testimony concerning the navigability and the boundaries of the Salt River as it existed in 1912. This failure was not simply inadvertence. On March 23, 1988 Calmat filed a response to the controverting certificate the State filed in connection with Calmat's first Motion to Set and Certificate of Readiness. (I.R.A. 60.) That pleading, filed some three months before the State's List of Witnesses and Exhibits specifically noted that the State had "not supplemented its interrogatory responses to identify any witnesses or exhibits it expects to offer on [the

riverbed issue]." (I.R.A. 60 at 2 (emphasis in original).) Despite the fact that Calmat explicitly reminded the State of its obligations under Rule 26(e), the State did nothing to supplement its discovery responses or reveal that Mr. Halpenny would testify on the riverbed issue.

As the trial court recognized, this last minute identification was no trivial matter that could be cured through a deposition. The State attempts to minimize the riverbed issue and pretend the equal footing doctrine, through which the State now contends it may someday claim ownership of the Salt River riverbed, can be explained in a few short paragraphs and established through a single witness. This Court may take judicial notice (as could the trial court) of the court files in *Maricopa County* v. *State of Arizona, et al.*, C 569870, and *Arizona Center For Law In The Public Interest, et al.* v. *Hassell, et al.*, CV 87-20506, which were consolidated before Judge Hendrix and are now on appeal as 1 CA-CV 89-134. Ariz. R. Evid. 201. The memoranda of law submitted on the equal footing doctrine in those cases consumed hundreds of pages. The parties took tens of depositions attempting to establish the necessary factual predicates and anticipated calling at least twenty or thirty witnesses on those issues if the case were tried.

Calmat did not take that discovery or list those witnesses in this case because the State never revealed it intended to call a witness to attempt to establish it owned the Salt

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River riverbed under the equal footing doctrine. The trial court recognized that fact and correctly excluded that evidence at trial. The State has not and cannot argue that evidentiary ruling was a clear abuse of discretion. *Selby v. Savard,* 134 Ariz. 222, 227, 655 P.2d 342 (1982) (trial court's exclusion or admission of evidence will not be disturbed on appeal unless a clear abuse of discretion appears and prejudice results.) There is thus no basis on which to reverse the trial court's ruling.

II. <u>The State Cannot Be Allowed To Ignore Its Own Judicial Admissions</u>.

The State does not assert and never has asserted it owns the subject property, which it now alleges is located in the Salt River riverbed. Instead, the State notes *Arizona Center for Law in the Public Interest* v. *Hassell,* No. 1 CA CV 89-134, is on appeal. The trial court in *Hassell* upheld the constitutionality of a statute allowing the State to issue quit claim deeds to claimants along areas within the banks of navigable rivers The State now argues that if that case is reversed on appeal the State Land Department <u>might</u> be able to claim an interest in the subject property.

The State does not and cannot argue that the trial court erred in excluding its evidence concerning the so-called "equal footing" doctrine. Instead, the State implies that the trial court's ruling in this case was based entirely on the trial court decision in *Hassell* and should be reversed if

that decision is overturned on appeal. The State thus seeks to ignore the fact that it is the appellee in the *Hassell* case. More importantly, regardless of the constitutionality of the statute at issue in *Hassell*, the State's Answer filed in that case is clear and unambiguous with regard to any ownership of the Salt River riverbed:

> [The State admits] that the "Equal Footing" doctrine would vest title to beds of all bodies of navigable waters in the State. Deny that the defendants [including the State of Arizona] made claims to lands [including lands in the Salt River riverbed] plaintiff has acquired or which it is attempting to acquire.
>
> * * *
>
> deny that defendants have asserted claims [to, among other things, property lying in the Salt River riverbed]. Further deny that defendants have clouded any title to lands plaintiff has acquired or any other land.

(State's Answer in C 569870 at ¶¶ 3-4).

The trial court in the *Hassell* case ultimately granted the State's Motion for Summary Judgment which essentially argued the State did not own the Salt River riverbed. As the *Hassell* Court explained:

> It is undisputed that under the Equal Footing Doctrine, the State owns the beds of the rivers that were navigable at Statehood. It is not known if any rivers, other than the Colorado, were navigable at Statehood. It has never been established whether or not the Verde, Gila and Salt Rivers were navigable at Statehood. In Yavapai County Cause No. 45245, the State ultimately concluded that its claim that the Verde River was navigable at Statehood was weak. The State of Arizona has entered into

> a stipulation with the City of Tempe and the Maricopa Flood Control District that under the Equal Footing Doctrine, it has no ownership interest in the Agua Fria River, New River of Skunk Creek. In CIV 72-376 of the District Court of Arizona, a stipulation was entered into which stated that the Salt River is not now and never has been a navigable river.

(Minute Entry dated 7/12/88 at 27-28; emphasis added).

A copy of the Pretrial Order and subsequent Findings of Fact and Conclusion of Law in District Court No. CIV 72-376 were attached to Calmat's Motion in Limine (I.R.A. 101). Both Calmat's predecessor and interest, Arizona Sand & Rock Co., and the State were parties to and bound by the admissions made and judgment entered in that action. In the trial court below the State attempted to justify ignoring these judicial statements, final judgments and the pleadings by arguing it is not subject to the doctrine of latches and estoppel.

The Trial Court correctly recognized that latches, estoppel and other equitable defenses do run against the State. *Mohave County v. Mohave - Kingman Estates*, 120 Ariz. 417, 586 P.2d 978 (1978); *Sumid v. City of Prescott*, 27 Ariz. 111, 230 P. 1103 (1924). The Supreme Court has unequivocally held that the State can be bound by latches and estoppel even when it exercises its governmental authority. *Freightways, Inc. v. Arizona Corp Comm'n.*, 129 Ariz. 245, 248, 630 P.2d 541, 544 (1981). In *Freightways*, latches and estoppel were held to have run against the Corporation Commission because of its repeated approval of the certificate in question. The

Court held that "a void certificate can ripen into a valid certificate due to the passage of time."

In each of the cited cases the State stipulated, agreed or formally denied having any claims or interest in the Salt River riverbed. In the District Court case, for example, the State obtained the goals it desired by stipulating with, among others, Calmat's predecessor in interest, that the Salt River was not and never had been a navigable river. That stipulation was incorporated into both the District Court's pretrial order and its Findings of Fact and Conclusions of Law. It must, therefore, be enforced. *Chaney Building Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986); *May v. Sexton*, 68 Ariz. 358, 206 P.2d 573 (1949) (Adoption by Appellants of testimony of respondent and reliance upon such testimony constituted an admission that such testimony was true).

In *Chaney* the Supreme Court addressed the application of collateral estoppel to a stipulated dismissal. The Court explained that based on the facts presented in *Chaney* the doctrine did not apply because the parties had not indicated an intent to establish certain facts. The Court also explained that if the parties had intended the dismissal "to be binding as to certain factual issues, and their intention was reflected in the dismissal, we would enforce the intent of the parties and collateral estoppel would apply."

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The State cannot argue it did not have a full and fair opportunity to litigate the Salt River riverbed issue. The issue before the trial court was not simply Judge Hendrix's ruling in the *Hassell* litigation. Having used the condemnation statutes to obtain possession of Calmat's property in 1985, the State waited almost three years before attempting to transform this case into a quiet title action. In so doing the State sought to ignore the history of this case, its pleadings in the *Hassell* litigation as well as its stipulation (and the subsequent order) in the District Court case. No litigant is entitled to shift its position from case to case in this fashion. There was no abuse of discretion here. The trial court properly excluded Mr. Halpenny's testimony and the State's last minute attempt to raise the riverbed issue at trial. The State's motion for a new trial on the riverbed issue should therefore be denied.

Conclusion

The Trial Court did not abuse its discretion in excluding evidence concerning the navigability of the Salt River in 1912. The State did not disclose its intention to rely on such evidence and, instead, attempted to raise new issues on the eve of trial. More importantly, the State cannot be allowed to ignore its own judicial admissions, stipulations and the collateral estoppel effect of prior rulings which conclusively establish that the State has no ownership interest in the Salt River riverbed. Regardless of the outcome of the

Hassell appeal, there is no basis for a new trial in the I-10 case.

RESPECTFULLY submitted this 27 day of April, 1990.

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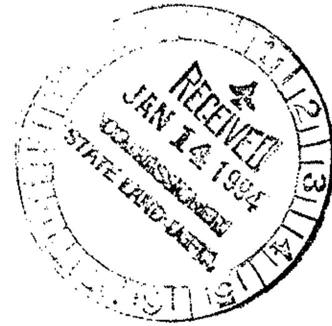

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BEFORE THE

ARIZONA NAVIGABLE STREAMBED ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY OF THE SALT RIVER [From Granite Reef Dam to the Gila River confluence]

Admin. Docket No. 94-1

REPLY OF CALMAT TO RESPONSES OF STATE LAND DEPARTMENT AND ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST TO CALMAT'S NOTICE OF LACK OF JURISDICTION

CalMat Co., a Delaware corporation, CalMat Co. of Arizona, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CalMat Properties Co., a California corporation, CalMat Land Co., a California corporation, and Allied Concrete & Materials Co. (collectively "CalMat") reply to the responses of the State Land Department and the Arizona Center for the Law in the Public Interest to CalMat's Notice of Lack of Jurisdiction.

1. The only issue to be decided by the Commission is whether there has been a prior determination pursuant to Chapter 297, § 1.F.2, Laws of 1992.

The Salt River Pima-Maricopa Indian Community's ("Community") Reply shows why the State would be estopped from claiming the bed of this reach of the Salt River in any

subsequent litigation over title thereto.[1] It is, however, unnecessary of the Commission to resolve this issue in order to dismiss this proceeding. This Commission need only to decide the issue of whether there has been a prior judicial determination on the navigability issue for this reach of the river. If such a determination has occurred, this proceeding is over, because the Commission has no jurisdiction.

It matters not whether the state would be collaterally estopped in a subsequent judicial action or whether the judgment would be res judicata against the state. All that is required is that there have been a prior judicial determination. Non-parties to that prior determination could raise the issue. In fact, the Streambed Adjudication Act ("Act"), Laws 1992, Ch. 297 § 1.F.2, does not even require the state to have been a party to that prior determination, only that a prior determination have been made. The fact that the state was a party along with the Community, CalMat's predessor and Allied Concrete & Material adds weight to the position that there has been a prior determination, but even if the state had not been a party, the judgment in CIV 72-376 PHX would have qualified as a prior determination under the Act.

2. Whether or not there has been a prior determination within the meaning of the Act was not decided in *CalMat of Arizona v. State, ex rel Miller*, 172 Ariz. 300, 836 P.2d 1010 (App. 1992), *vacated in part, aff'd in part*, 148 Ariz. Adv. Rep. 3, 859 P.2d 1323 (1993) (the "CalMat case").

At issue in the CalMat case was whether the trial court properly excluded evidence of a claim of navigability in a condemnation case. The Streambed Adjudication Act had not even been enacted into law when the original trial occurred. There was no argument in the CalMat case concerning the Act and no argument about whether CIV 72-376 PHX constituted a prior "determination" within the meaning of that Act. Therefore, there was no decision on that issue. Under the principles of res judicata and collateral estoppel

[1] CalMat adopts the Community's brief and will not burden the Commission with repetition here.

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mistakenly relied on by the State Land Department, the CalMat case cannot preclude CalMat from making that argument here. The State's argument falls even further on its face in the case of the Community. The Community was not even a party to the CalMat case and would be permitted to argue that CIV 72-376 PHX is a prior determination no matter what was at issue in the CalMat case.

3. The Commission's action on CalMat's petition regarding the Agua Fria River is precedent for dismissal of this proceeding.

In June of 1993, CalMat filed a petition for determination of non-navigability before this Commission. The Petition (Exhibit A hereto) sought a determination that there had been a prior determination of non-navigability regarding the Agua Fria River and based thereon sought confirmation that the Commission had no jurisdiction over the Agua Fria River. Based upon the Petition, the Commission made this finding in its August 3, 1993 meeting:

> The following motion was made:
>
> Section 1F of the Act creating this Commission provides: This Act does not affect reaches of watercourses where determinations have been made by judicial actions before the effective date of this Act.
>
> The Commission finds that the judgment contained in No. 93-2, No. C-569870 in the Superior Court of Maricopa County, dated November 20, 1986 is a judicial determination before the effective date of this Act.
>
> Therefore, the Commission determines that it has no jurisdiction over the navigability of the reach of the watercourses as contained in the judgment in No. 93-2.
>
> Motion passed.

Minutes of the August 3, 1993 Commission meeting (Exhibit B hereto).

This is precisely the type of relief sought in the instant Notice and Request.

The parallels between the Agua Fria River and the Salt River do not stop with the type relief sought. Both the State Land Department and the Center for Law in the Public

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Interest base a large part of their argument on the fact that the judgment in CIV 72-376 PHX was based upon a stipulation and that there was no actual trial of the issue. In the case of the Agua Fria River, this Commission, however, has already recognized that a judgment based upon a stipulation constitutes a prior determination. Attached hereto as Exhibit C is a copy of the Amended Judgment which formed the basis of CalMat's Petition in the Agua Fria and the Commission's August 3, 1993 Decision. A review of the Amended Judgment shows that it was based upon a stipulation and that no actual trial took place:

> That the stipulation is approved.
>
> . . .
>
> 4. That the Stipulation is adjudged to be a disclaimer of the state's interest.

Amended Order and Judgment in Maricopa County Superior Court Action No. C-569870 (Exhibit C).

The stipulation in CIV 72-376 PHX was entered after five years of litigation and should have no less weight than the stipulation in the Agua Fria case which was reached in less a year. Each stipulation formed the basis of a judgment which determined that the respective rivers were not navigable at statehood. The Commission recognized judgment in the Agua Fria case as a prior determination depriving it of jurisdiction. There is no rational distinction between the stipulated Agua Fria judgment and the stipulated Salt judgment. The judgment in CIV 72-376 PHX should be accorded the same respect and the Commission should recognize its lack of jurisdiction over this reach of the Salt River.

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1 RESPECTFULLY SUBMITTED, this 14th day of January, 1994.

2 SNELL & WILMER

3

4 By [signature]

5 Robert B. Hoffman, 004415
One Arizona Center
Phoenix, Arizona 85004-0001

6 Attorneys for Petitioners CalMat Co., CalMat Co. of Arizona, CalMat Properties Co., CalMat Land

7 Co., and Allied Concrete & Materials Co.

8 ORIGINAL AND FIVE COPIES
FILED this 14th day of

9 January, 1994, with:

10 Rebecca Good, Secretary
Arizona State Streambed Adjudication

11 Commission
1616 West Adams Street, 3rd Floor

12 Phoenix, Arizona 85007

13 and COPY OF THE FOREGOING
mailed this 14th day

14 of January, 1994, to:

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22 Arizona House of Representatives
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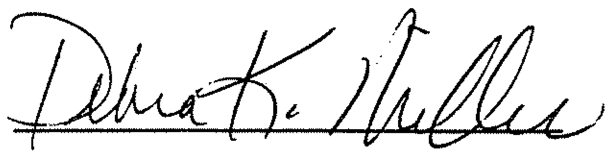
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STATE OF ARIZONA

NAVIGABLE STREAM ADJUDICATION COMMISSION

In the Matter of CALMAT CO. OF ARIZONA, an Arizona Corporation, Petitioner.	PETITION FOR DETERMINATION OF NON-NAVIGABILITY

CalMat Co. of Arizona ("CalMat") hereby petitions the Arizona Navigable Stream Adjudication Commission ("the Commission") for a determination that, in a prior judicial action, a certain reach of the Agua Fria river was determined not to have been navigable as of statehood.

CalMat is the record title holder of certain real property in and along the bed of the Agua Fria River in Maricopa County. By a memo dated January 11, 1993 from John D. Helm and Sally Worthington, the Commission was advised that in the case of *State of Arizona v. Maricopa County*, certain portions of the Agua Fria River were determined not to have been navigable at statehood. Specifically, in the Amended Order and Judgment in *State of Arizona v. Maricopa*

EXHIBIT A

County, a copy of which is attached hereto, the State disclaimed all interest in

> "lands in Maricopa County which constitute the beds (from mean high water mark to mean high water mark) of the tributaries to the Agua Fria River, including Skunk Creek and New River, and the Agua Fria River from Waddell Dam south to the South line of the North half of Sections 22 and 23, Township 1 North Range 1 West, Gila and Salt River Base and Meridian."

Based upon that Order and Judgment, the Commission, on January 19, 1993, removed the Agua Fria River from its priority list of watercourses to be studied initially by the Commission.

Section 1(F)(2) of the act which established this Commission (the "Act") provides that the Act does not affect "reaches of water courses where determinations have been made by judicial actions before the effective date of this act." CalMat's property is within those lands in which the State has disclaimed an interest in *State of Arizona v. Maricopa County.*

Unlike the beds of other watercourses whose navigability status at the time of statehood has yet to be determined by the Commission, the ownership of the bed of that reach of the Agua Fria River described above has already been determined. Once determined in the context of a judicial proceeding, that result is binding and conclusive upon all other property owners (and, in this case, claimants, such as the State of Arizona) similarly situated.

1 *El Paso Natural Gas Co. v. State*, 123 Ariz. 219, 599 P.2d
2 125, *cert. denied*, 445 U.S. 938 (1979). Consequently,
3 CalMat's title is not being clouded by the undetermined
4 navigability status of that reach of the Agua Fria River,
5 but by the Commission's failure to formally recognize that
6 the navigability status of that reach of the Agua Fria River
7 has already been determined.

8 Based on the foregoing, CalMat requests that the
9 Commission issue a determination (i) that the above
10 described reach of the Agua Fria river was determined to
11 have been non-navigable as of the time of statehood in *State*
12 *of Arizona v. Maricopa County*, a judicial action occurring
13 before the effective date of the Act, and (ii) that the
14 State of Arizona has abandoned all right, title and interest
15 in those portions of the Agua Fria River described above.

16 Dated this 1 day of June, 1993.

17

18 Mark F. Reardon
1801 E. University
19 Phoenix, AZ 85034
Attorney for CalMat Co. of Arizona

20 ORIGINAL and five (5) copies
mailed this 1 day of June,
21 1993 to:

22 Secretary of the Arizona Navigable
Stream Adjudication Commission
23 Arizona State Land Department
1616 West Adams Street
24 Phoenix, Arizona 85007

25

26 c:legal\sucam.pet

27

28

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION (ANSAC)

MINUTES - AUGUST 3, 1993

An Arizona Navigable Stream Adjudication Commission meeting was convened on Thursday, August 3, 1993 at 10:00 A.M., Room 219, 1688 West Adams, Phoenix, Arizona.

Present at the meeting were the following Commission members:

Curtis A. Jennings	Chairperson
Dr. Troy L. Péwé	Member
Margaret S. Petersen	Member
Harold Ramsbacher	Member

The Arizona Navigable Stream Adjudication Commission was represented by Anthony B. Ching, Attorney General's Office.

The Land Department was represented by Shirley Simpson, Attorney General's Office.

The minutes of the June 10, 1993 meeting were approved.

Clyde Anderson of the Land Department gave a progress report on the Gila River Navigability Study. The literature search is 50% complete. The historical material review is 30% complete. The resource review is being completed at the same time as the resource search. The archaeology review is expected by the end of August from the contractor. The hydrologic and hydraulic material review is 50% complete. Ownership identification is approximately 60% complete. Land use information has been identified and is under review and approximately 10% complete at this time. The preliminary report will be prepared in the next two months. The outline for that report will be done in the next two weeks. The project should be completed by September 30th. The Department will be holding public meetings for informational purposes the end of August.

Steve Walker, CH2M Hill gave a progress report on the Salt, Verde, Hassayampa, and San Pedro Navigability Studies. The literature search is completed. The literature review for historical and archaeological is 95% completed.The literature review for environmental is 75% complete. The completion date is set for September 22, 1993.

The Commission recessed for an Executive Session at 10:20 a.m. and re-convened at 11:20 a.m.

The Letter regarding the Gila River Navigability Study from Julie M. Lemmons, Flood Control District of Maricopa County was moved be heard next. Ms. Lemmon requested the Commission for a motion to prioritize the Gila and give it second priority after the Salt, which was given first priority. After a discussion between Ms. Lemmon and Mr. Jennings, Mr. Jennings stated that if the Commission so decides, due consideration to her particular area of interest as the next priority will be given.

EXHIBIT B

93-2 Petition for Determination of Non-Navigability
CalMat Properties and CalMat Company of Arizona

Mark Reardon represented CalMat. Mr. Reardon requested the Commission to take notice that there was a prior judicial determination on the Agua Fria River. Mr. Jennings commented that the Act does not effect reaches or watercourses where determinations have been made by judicial actions before the effective date of this Act, which CalMat's determination was. A discussion on this matter was held by Mr. Reardon, Ms. Simpson, Mr. David Baron, Arizona Center for the Law in the Public Interest, Timothy Flood, Friends of Arizona Rivers and James Braselton, attorney. Mr. Reardon stated he wants this action to clear the title to their property.

The following motion was made:

Section 1F of the Act creating this Commission provides: This Act does not affect reaches of watercourses where determinations have been made by judicial actions before the effective date of this Act.

The Commission finds that the judgement contained in No. 93-2, No. C-569870 in the Superior Court of Maricopa County, dated November 20, 1986 is a judicial determination before the effective date of this Act.

Therefore, the Commission determines that it has no jurisdiction over the navigability of the reach of the watercourse as contained in the judgement in No. 93-2.

Motion passed.

It was suggested that in the future an executive session be scheduled at a time that would not inconvenience the public. Mr. Jennings stated that Executive Sessions should be called when needed.

The next meeting will be held at 10:00 a.m. on September 22, 1993.

Mr. Jennings discussed the Agenda for the next meeting. He requested further information on public trust values that might be presented for general education of the commission considering the question of title for navigability purposes.

Dorothy Riddle, Central Arizona Paddlers Club requested that future meeting requesting public trust values be scheduled during the evening hours.

Mr. Braselton brought to the Commission's attention the rules and regulations that the Land Department has adopted. Ms. Simpson will send a copy to the Commission members.

The Arizona Navigable Stream Adjudication Commission meeting was adjourned at 12:05 p.m.

87 009895

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA MOD JUDG (MJ)

STATE OF ARIZONA, STATE LAND DEPARTMENT and ROBERT K. LANE, Commissioner of the State Land Department, et al.,

Plaintiffs,

v.

MARICOPA COUNTY, a political subdivision,

Defendant.

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY, a political subdivision and municipal corporation,

Defendant-Intervenor.

CITY OF TEMPE, a municipal corporation,

Defendent-Intervenor.

NO. C-569870

AMENDED ORDER AND JUDGMENT

(Assigned to the Honorable Thomas O'Toole, Division 41)

RECORDED IN OFFICIAL RECORDS OF MARICOPA COUNTY, ARIZONA
JAN 07 1987 -4 00
KEITH POLETIS, County Recorder
FEE N/C PGS 3 R.N.

Good cause appearing, IT IS ORDERED AND ADJUDGED:

1. That the stipulation is approved.

2. That the State of Arizona and Arizona Land Department have no interest or estate, legal or equitable, by reason of the Equal Footing Doctrine, in lands in Maricopa County which constitute the beds (from mean high water mark to mean high water mark) of the tributaries to the Agua Fria River, including Skunk Creek and New River, and the Agua Fria River from Waddell Dam south to the South line of the North half of Sections 22 and 23, Township 1 North, Range 1 West, Gila and Salt River Base and Meridian, for the reason that these reaches of rivers and tributaries were not navigable at the time of statehood.

Law Offices of
Larry J. Richmond, P.C.
Suite 100

EXHIBIT C

3. That pursuant to the Equal Footing Doctrine, the State of Arizona and the Arizona Land Department has never had, does not now have and shall not hereafter claim an interest or estate, legal or equitable in the lands described above in paragraph two.

4. That the Stipulation is adjudged to be a disclaimer of the State's interest in the lands described in paragraph two, above, pursuant to A.R.S. Sec. 12-1103 (C), and such disclaimer shall be limited to any real property which the State might have claimed pursuant to the Equal Footing Doctrine.

5. That the hearing on Maricopa County Flood Control District's Motion for Partial Summary Judgment is vacated.

6. That, there being no just reason for delay, the entry of this final judgment is expressly directed pursuant to Arizona Rules of Civil Procedure, Rule 54(b).

DATED this 20th day of November, 1986.

Tom O'Toole

THOMAS O'TOOLE
Judge of the Superior Court

COPY of the foregoing delivered
this 19TH day of November, 1986, to:

The Honorable Thomas O'Toole
Judge of the Superior Court
9D Central Court Building
201 West Jefferson Street
Phoenix, Arizona 85003

COPY of the foregoing mailed
this 19TH day of November, 1986, to:

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Maricopa County Attorney's Office
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Attorneys for the Salt River
5 Pima-Maricopa Indian Community

Rec'd 12-30-93
By: R Yorel
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

96-002-015

SALT RIVER
029

6
7 BEFORE THE
8 ARIZONA NAVIGABLE STREAMBED ADJUDICATION COMMISSION
9

10 IN THE MATTER OF THE NAVIGABILITY OF THE SALT RIVER [From Granite Reef Dam 11 to the Gila River confluence] 12	Admin. Docket No. 94-1 NOTICE OF LACK OF JURISDICTION AND REQUEST FOR TERMINATION OF PROCEEDINGS

13 The Salt River Pima-Maricopa Indian Community, a federally
14 recognized Indian tribe, hereby gives notice that in a final
15 judgment in a case entitled "Salt River Pima-Maricopa Indian
16 Community v. Arizona Sand & Rock Company, et al.", No. CIV 72-
17 376-PHX, entered on April 13, 1977, the Salt River was determined
18 to be a non-navigable stream. Among the parties to that action
19 were the Salt River Pima-Maricopa Indian Community and the State
20 of Arizona. That judgment is res judicata as to all of the
21 parties to it. These proceedings ought to be terminated as to
22 any part of the Salt River running through land held by or for
23 the benefit of the Salt River Pima-Maricopa Indian Community.
24 Copies of the judgment and ancillary documents in the above-cited
25 action have been filed as exhibits to the CalMat Co., et al.,
26 Notice and Request.
27 . . .
28

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The Salt River Pima-Maricopa Indian Community reserves any claims or defenses it has by virtue of the Executive Order establishing the Salt River Pima-Maricopa Indian Community's reservation or for any other reason.

RESPECTFULLY SUBMITTED this 30th day of December, 1993.

SHEA & WILKS

By:
Richard B. Wilks, Attorneys for the Salt River Pima-Maricopa Indian Community

ORIGINAL and five (5) copies filed this 30th day of December, 1993, with:

Rebecca Good, Secretary
Arizona State Streambed
Adjudication Commission
1616 W. Adams St., 3rd Floor
Phoenix, AZ 85007

and COPY of the foregoing mailed this 30th day of December, 1993, to:

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Attorneys for Salt River Pima-Maricopa
Indian Community

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96-002-015
SALT RIVER
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BEFORE THE

ARIZONA NAVIGABLE STREAMBED ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY OF THE SALT RIVER [From Granite reef Dam to the Gila River confluence]	Admin. Docket No. 94-1 SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY'S REPLY TO STATE LAND DEPARTMENT'S RESPONSE (Response of the State of Arizona by Grant Woods, Attorney General)

The Salt River Pima-Maricopa Indian Community replies to the State of Arizona's Response to its Notice of Lack of Jurisdiction as follows:

1. <u>The State is bound by the general principles of collateral estoppel and issue preclusion to the determination in the U.S. District Court, District of Arizona cases numbers CIV-72-376-PHX and CIV-74-529-PHX (Consolidated Cases).</u>

The Salt River Pima-Maricopa Indian Community in cause number CIV-72-376 brought an action against various defendants including the Arizona State Highway Commission for trespass and ejectment as well as damages for the removal of sand and gravel. Cause number CIV 74-529 was an action brought by the State of

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Arizona against the Secretary of the Interior asserting the State's rights to interests in real property by reason of certain licenses and permits for the removal of sand and gravel and rights-of-way. The cases involved questions of boundaries and surveys, Indian land and Secretarial responsibility and authority. But at the end of the day, the issue was whether certain land was held in trust for the Salt River Pima-Maricopa Indian Community or not. The Community asserted that the southern boundary of the reservation was at the midpoint of the southern channel of the Salt River and not at some more northerly point. The complaint made a claim for damages against the various alledged trespassers for unauthorized use of the land and as to the State of Arizona acting through the Arizona State Highway Commission for the removal of sand and gravel. All of this land was in the streambed of the Salt River. If the State of Arizona owned the land by virtue of the application of the equal footings doctrine, then the Salt River Pima-Maricopa Indian's claim would have been denied. The claim was sustained. All of the parties to the litigation including the State of Arizona recognized that the land in question belonged either to the United States under the general administration of the Bureau of Land Management or beneficially to the Salt River Pima-Maricopa Indian Community under the trusteeship of the United States. Indeed, the claim of the State of Arizona both in its defense to the Salt River Pima-Maricopa Indian Community claim against it and to its complaint against the United States rested upon its assertion that its rights were derivative from the

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1 United States through permits and licenses received from the
2 United States.

3 If this Commission proceeds to hearing and determination of
4 the navigability of the Salt River and determines that the Salt
5 River was indeed navigable at the time of statehood, no
6 additional litigation will be necessary to determine that the bed
7 of the river is the property of the State. So that this
8 proceeding before this Commission deals with the ownership of
9 land just as the proceeding in the United States District Court
10 for the District of Arizona brought by the Salt River Pima-
11 Maricopa Indian Community and the State of Arizona dealt with the
12 ownership of land.

13 The District Court cases were consolidated for trial. The
14 Consolidated Cases were filed in 1972. The judgment of the
15 District Court was entered on April 11, 1977. During the course
16 of that period of litigation the parties filed complaints and
17 answers, motions, memorandum and responses. They litigated the
18 issues. On March 17, 1976, they entered into a Consolidated
19 Pretrial Order which was executed not only by the parties through
20 their counsel, but by the United States District Court Judge.
21 That Pretrial Order, as was the practice, described the claims of
22 the parties, the facts as to which they were in agreement, the
23 factual issues about which they were in dispute, and other issues
24 of facts and law which were material. The twenty-six page
25 Pretrial Order which consisted of a stipulation of the parties
26 and an order of the Court revealed clearly the position of the
27 State of Arizona. In paragraph II on page 4, it was noted
28

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"The State of Arizona claims an interest in a portion of the disputed property by reason of certain licenses and permits for the removal of sand and gravel and rights-of-way which were granted to the department by the Bureau of Reclamation, Department of Interior."

Among the undisputed facts which "require no proof" in paragraph 6 on page 6, it was stated

". . . the Bureau of Reclamation issued sand and gravel permits to the Arizona Highway Department and Maricopa County. Fee title to this property is vested in the United States."

Additionally, it was agreed in paragraph 14 on page 8 that

"The Arizona Department of Transportation has claimed certain rights to remove sand and gravel . . . which date from and after 1942 and has been granted right-of-way covering portions of Country Club Drive by the Bureau of Reclamation."

Additionally, it was agreed that

"The Salt River is not now and never has been a navigable stream."

An "additional issue of fact and law" set out in paragraph 5b on page 16 raised the question of whether

". . . the Department of Transportation . . . are immune from liability to the Indian community because they used the land pursuant to valid contracts and permits from the United States . . . ."

The State of Arizona (Arizona Department of Transportation) raised the issue of

"whether or not there may be other indispensable parties having fee or lesser interests in real property lying within the bed of the Salt River within Township 1 North, Range 5 East, who may be adversely effected by any determination which this Court may make." (Emphasis supplied)

Four years into the litigation of these disputes in Federal District Court the parties laid out all of the issues. The list

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of issues set out above clearly demonstrates that the over over arching question was the right of the State to the use of the bed of the Salt River. That is the claim facing this commission. It is a claim which cannot now be relitigated. In (b) of its Findings of Fact dated August 16, 1976 supporting its judgment of April 11, 1977, the Court determined that

> ". . . the Indian Community has claimed against them (the State) for sand and gravel removed from the withdrawn lands in section 3. These removals of sand and gravel were made under color of authority of permits issued by the Secretary of the Interior . . . ."

Additionally,

> "The Court finds all of the facts agreed to by the parties in the Pretrial Order."

The final judgment entered in the Consolidated Cases incorporated by reference the findings of fact and conclusions of law. Any determination by this Commission that the Salt River is navigable would fly in the face of the clear determination by the Court in the Consolidated Cases and is barred under general principles of collateral estoppel and issue preclusion. For here the issues were actually litigated in a previous suit, a final judgment was entered and the State had a full opportunity to litigate the issue and did litigate it. The issue in the Consolidated Cases, the ownership of the bed of the Salt River, is the same issue as is now before this Commission. There the issue was resolved by virtue of the analysis of the boundary of the Salt River Indian Community and here it would be resolved on the basis of navigability.

. . .

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2. <u>The Department of Transportation had full authority to litigate the issues in the Consolidated Cases and to enter into all necessary stipulations</u>.

The State, acting through the Department of Transportation, was sued by the Salt River Pima-Maricopa Indian Community for trespass and damages. The State acting through the Department sued the United States to validate its claim to certain land in the streambed of the Salt River by virtue of permits and licenses issued to it by the United States. The streambed property which was the subject matter of the Consolidated Cases was used by the State acting through the Department of Transportation as sources of sand and gravel for the construction of highways and roads. Customarily, such sources of sand and gravel, commonly called borrow pits, were made available to contractors building highways and roads under contract with the State acting through the Department of Transportation. The construction of roads and highways and the awarding of contracts for such construction is central to the powers of the Transportation Board. Section 28-106, Ch. 146, 1973 Ariz. Sess. L. (1st Reg. Sess). The Director of the Department of Transportation had among specific obligations the obligation to

> "Exercise such other powers and duties as are necessary to fully carry out the policies, activities and duties of the Department." (Sec. 28-108 12, Ch. 146, 1973 Ariz. Sess. L.)

The same act provided for the obligations of the Attorney General in regard to the Department of Transportation

. . .

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"The Attorney General shall be the legal advisor of the Department and shall give legal services as the Department requires. He shall prosecute and defend in the name of the State all actions necessary to carry out the provisions of this title." (Sec. 28-109, Ch. 146, 1973 Ariz. Sess. L.)

Thus, the Department of Transportation in all regards had authority to protect the interests of the Department as the Director understood them and the Attorney General had the obligation under law to provide legal services as directed by the Department. Those legal services are provided "in the name of the State." The Attorney General represented the Department of Transportation in the Consolidated Cases and in the course of that litigation stipulated that the Salt River was non-navigable and that fee title to the streambed was vested in the United States.

3. The State Land Department had no exclusive authority over streambed property at the time of the Judgment in the Consolidated Cases.

The predecessor to A.R.S. § 37-1101 was enacted in 1987. Before that what was understood to be trust lands were enumerated in § 24 of the Enabling Act and in Article 10, Sec. 1 of the Constitution. At the time of the Consolidated Cases Judgment in 1977, there was no Arizona statute providing for the adjudication of the question of navigability of streams. The issue arose in the Consolidated Cases as the result of the claim by the Salt River Pima-Maricopa Indian Community that its boundary extended to the southern channel of the Salt River. That claim directly attacked the State of Arizona's claim of right to sand and gravel

1 resources by virtue of federally-issued permits and licenses. If
2 the Community's claim prevailed, the permits and licenses issued
3 to the State would be void. If the Community's claim did not
4 prevail and the bed of the Salt River remained in the ownership
5 of the United States, then the State's permits and licenses would
6 be valid. Thus, the issue was raised, litigated and a Judgment
7 entered on the stipulation of all the parties that the Salt River
8 was not navigable and that the United States owned the fee
9 interest in the streambed. Perhaps the State of Arizona should
10 have determined before 1985 a method by which navigability of
11 streams within the State could be adjudicated. It did not do so
12 and in the ordinary course of litigation before the Federal
13 courts a decision was made that the Salt River was non-navigable
14 and that the boundary of the Salt River Pima-Maricopa Indian
15 Community extended south to the middle of the south channel of
16 that River.

17 4. Miscellaneous State arguments.

18 The case of CalMat of Arizona v. State ex rel. Miller, cited
19 by the State is not relevant to the issues raised by the
20 Community. There CalMat's claim was that the State having failed
21 to raise the issue of navigability and streambed ownership at the
22 proper time during the course of a condemnation litigation it was
23 equitably estopped from raising it at the last moment. The court
24 held that the State could not be bound by the doctrine of
25 equitable estoppel if significant interests of the State were at
26 stake. This, of course, is not applicable in regard to
27 collateral estoppel as the State admits in its footnote 6. The
28

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State was a party to the Consolidated Cases and subject to the Judgment in those cases. Therefore, Sec. f(2) of the 1992 Ariz. Sess. L. (2nd Reg. Sess.) Ch. 297 applies. The prior adjudication takes the issue of navigability out of the hands of the Commission.

It should be further noted that Arizona Center v. Hassell, 172 Az. 356, 837 P.2d 158 (1992) relied on in CalMat, supra, does not support the State's position, There the court held the State's prior stream adjudication statute to be in violation of the Arizona Constitution's gift clause of Art. IX, Sec. 7. Here in the course of contested litigation the Attorney General stipulates to the status of the Salt River and the ownership of the streambed in an effort to win the lawsuits. There was not gift and the litigation decision of the attorney General cannot now be reviewed.

The State asserts that even if the State were estopped the proceeding should not terminate because beneficiaries of the trust would have a right to take action. Of course, A.R.S. § 37-1121(B) deals only with the standing of such beneficiaries in navigability hearings. If there was no such hearing there would be no such standing. Additionally, the State's argument assumes that the Salt River was navigable at the time of statehood. If the Judgment in the Consolidated Cases determined that issue, which it did, then the adjudication proceeding adopted by the State Legislature in 1992 would have no effect in regard to the Community and its interest in the streambed of the Salt River. The citizens' standing provision would then have no effect.

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5. Conclusion.

The question of navigability of the Salt River within the Salt River Pima-Maricopa Indian Community was adjudicated and determined by the United States District Court for the District of Arizona in the Consolidated Cases. The State was a party to that litigation and under the doctrine of collateral estoppel and issue preclusion cannot again raise the issue. State law does not support the State's assertion that the stipulation and the Pretrial Order which was incorporated into the Findings of Fact and the Judgment in the Consolidated Cases was ultra vires. The Department of Transportation at the time of the Consolidated Cases Judgment had the authority to direct the Attorney General to fully defend it and its interest and the Attorney General did so. The State lost in the Consolidated Cases. It cannot now come back through another proceeding on its own statute and effectively reverse a Judgment nearly 20 years old. The question of navigability of the Salt River within the Salt River Pima-Maricopa Indian Community is adjudicated and for all times settled.

RESPECTFULLY SUBMITTED this 11th day of January, 1994.

SHEA & WILKS

By ____________________
Richard B. Wilks, attorneys for
the Salt River Pima-Maricopa
Indian Community

. . .

. . .

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ORIGINAL and five copies
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96-002-015

SALT RIVER
031

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JAN 11 1994

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BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY OF THE SALT RIVER [From Granite Reef Dam to the Gila River Confluence]	)	ADMIN. DOCKET NO. 94-1 RESPONSE TO CALMAT'S "NOTICE OF LACK OF JURISDICTION AND REQUEST FOR TERMINATION OF PROCEEDINGS"

The Arizona Center for Law in the Public Interest (Center) requests permission to file the following response to Calmat's "Notice of Lack of Jurisdiction and Request for Termination of Proceedings" (hereinafter, Motion). Filing of a response at this time is justified because the Center did not receive a copy of Calmat's Motion until December 30, 1993, and because the Motion and attachments are quite lengthy.

RESPONSE

Calmat raises an argument that has already been rejected by the Arizona Court of Appeals. In Calmat of Arizona v. State, 836 P.2d 1010 (App. 1992), Calmat argued that the non-navigability of the Salt had been judicially determined in Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock (hereinafter, Salt River Pima) - the very case Calmat relies on here. Calmat further argued

that Salt-River Pima precluded the state from arguing the navigability of the Salt in subsequent cases.[1] The Court of Appeals rejected these arguments, holding that the state was not only free to assert the navigability of the Salt, **but had a duty to do so** under the public trust doctrine.

The Court of Appeals' decision was well justified. The navigability of the Salt was simply not at issue in Salt River Pima. The issue in that case was whether the Interior Department acted improperly in redrawing the south boundary of a portion of the Salt River-Pima reservation. The trial judge based his decision on the various federal laws governing creation of the reservation, not on the navigability or non-navigability of the Salt. No evidence on navigability was offered by any of the parties. The State Highway Commission claimed an interest in the disputed land not on the basis of navigability, but on the basis of licenses and permits from the Bureau of Reclamation.[2]

Calmat's argument is primarily based on a one sentence statement, buried in 30 paragraphs of stipulations among the

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[1]Appellant's Reply Brief and Cross Appellee's Answering Brief in Calmat of Arizona v. State at 27-29.

[2]Calmat asserts that the Highway Commission raised the navigability issue in its initial Answer to the Complaint in the case. But the Answer itself says nothing about navigability. A letter attached to the Answer contains an isolated statement that the bed of the once-navigable Salt was reserved to the state at Admission, but the letter did not explain if or why this assertion was relevant to the boundary issue. Not once during the subsequent course of the case did the Highway Commission argue that its interests were based on the navigability of the Salt. Instead, it relied exclusively on its permits and licenses from the Bureau of Reclamation.

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parties, to the effect that the Salt was never a navigable river. The fact that the trial judge as a pro forma matter adopted the parties' stipulations hardly elevates the case into a judicial determination of non-navigability. The judge made no determination as to navigability at all. He heard no evidence or argument on the matter, and did not even discuss it in his decision. A fair reading of his decision shows that he simply did not treat it as a material issue in the case.

Calmat incorrectly asserts that the stipulation in Salt River Pima somehow binds "the state" in all subsequent proceedings. In reality, the stipulation was entered into solely on behalf of the Highway Commission, not the state as sovereign in its public trust capacity. The state land commissioner, who is the state officer charged with the management and control of state lands, was not a party, and has never stipulated to the non-navigability of the Salt. A.R.S. § 37-102(B)&(C). Moreover, under Arizona Center for Law v. Hassell, 837 p.2d 158 (App. 1992), no state agency has the power to stipulate away public trust lands without a detailed, particularized inquiry of a type that plainly did not occur in Salt River Pima.

Calmat is also incorrect in asserting that the legal doctrine of res judicata bars the state from asserting navigability of the Salt. There are two versions of this doctrine: claim preclusion, and issue preclusion. Under claim preclusion, a judgment in a prior suit involving the same parties bars a second suit based on the same claim. Here, the neither the parties nor the claims are

the same as in Salt River Pima. As already noted, the State Land Commissioner, who is now pursuing the state's trust claims, was not a party to Salt River Pima.[3] Most other parties involved in the current proceeding were not parties in the Salt River Pima case either. Moreover, the claims are not the same at all. The issue in Salt River Pima was whether the redrawing of a portion of the reservation boundary improperly interfered with the Highway Commission's federal permits and licenses. The court did not discuss navigability and didn't have to in order to resolve the case. In contrast, the issue here is whether the entire stretch of the Salt from Granite Reef Dam was navigable at statehood.

Issue preclusion applies only where the issue in question (here, navigability of the Salt) was actually litigated and determined in the first action. The Arizona Supreme Court has explicitly ruled that an issue resolved by stipulation - as was the navigability issue in Salt River Pima - does not meet this test. Chaney Building Co. v. City of Tucson, 148 Ariz. 571, 573 (1985). Thus, even if the parties were the same, the stipulation of non-navigability in Salt River Pima could have no preclusive effect. Moreover, there can be no issue (or claim) preclusion unless there

---

[3]The mere fact that another state agency was a party does not give the first judgment preclusive effect on the entire state government. According to the Restatement of Judgments: "If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action." Restatement, Second of Judgments, 1981 § 36, comment f.

was a final judgment with respect to the relevant matter. Id. Here, the materials supplied by Calmat do not show that a final judgment was entered against the Highway Commission.

In addition, issue preclusion applies only where determination of the issue was "essential" to the prior judgment. Chaney, 148 Ariz. at 573. As noted above, the Salt River Pima court did not have to determine navigability to decide the narrow question presented there. But even if it did, the case addressed only a small segment of the river. There was certainly no need to decide on the navigability of the entire reach from Granite Reef Dam to the Gila. Thus, even if the judgment could have some preclusive effect on the navigability issue, it would be strictly limited to the small segment of river involved in that suit.

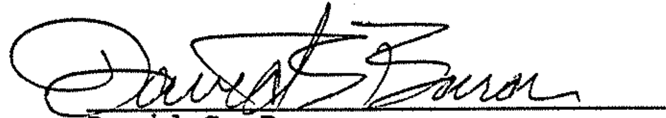
Application of issue preclusion here would also be grossly unfair to the Center and others who are beneficiaries of the trust, but were not parties to Salt River Pima. Under basic principles of due process, parties not involved in a prior suit cannot be bound by stipulations and issue determinations in the prior suit. Thus, even if Salt River Pima had some preclusive effect, it would not bind the Center or others who were not parties. It would be particularly unfair to bar the Center from seeking a navigability determination now on the basis of an irrelevant stipulation by a state agency in a case where there was no full or fair opportunity to litigate the issue. See, e.g., In re American Continental, 794 F. Supp. 1424, 1454-55 (D.Ariz. 1992).

Finally, the Center notes that any decision by the Commission

that it lacks jurisdiction would not resolve the navigability of the Salt. Such a decision would merely indicate that the Commission lacks authority to address the question. Thus, the relief sought by Calmat would not settle the navigability question at all, but rather would leave it unsettled until addressed in another forum.

For all of the foregoing reasons, Calmat's motion should be denied.

DATED this 10 day of January, 1994.



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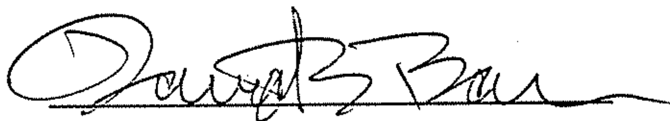

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96-002-015

SALT RIVER
032

BEFORE THE

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY OF THE SALT RIVER (From Granite Reef Dam to the Gila River Confluence)

MOTION TO DISMISS

Pursuant to A.A.C. R12-17-107(C), the Salt River Project[1] hereby requests that the Arizona Navigable Stream Adjudication Commission (the "Commission") find that it has no jurisdiction to determine the navigability of the Salt River from Granite Reef Dam to the Gila River confluence. The navigability of this reach of the Salt River was determined by judicial actions long prior to the effective date of the act that established the Commission. Therefore, pursuant to Section 1(F) of that act, the Commission lacks authority to address the matters at issue in these proceedings. Furthermore, the legal doctrine of res judicata also bars the State of Arizona from asserting any ownership claims to lands lying in or near the bed of the Salt River. The Salt River Project requests that the Commission immediately dismiss all pending and future proceedings relating to any determination of navigability or any public trust values associated with this

[1]As used in this Motion, the terms "Salt River Project" and the "Project" refer collectively to the Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District.

stretch of the Salt River. This Motion is supported by the attached Memorandum of Law.

MEMORANDUM OF LAW

The Salt River Project requests that the Commission dismiss all pending and future proceedings relating to any determination of navigability or any public trust values associated with that stretch of the Salt River from Granite Reef Dam to the Gila River confluence. The Commission has no authority to make a navigability determination for "reaches of watercourses where determinations have been made by judicial actions" prior to the effective date of the act that established the Commission. At least three Arizona court decisions, two of which were decided before statehood, have determined that this portion of the Salt River was not navigable. Therefore, the Commission should issue an Order stating that this matter has been previously determined in a judicial action and should immediately dismiss all proceedings relating to this reach of the river.

These proceedings involve important issues relating to the security of title for numerous Arizonans who own land along the Salt River. The United States Supreme Court, on many occasions, has stated that certainty of title is among the most important of legal issues:

> "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. . . [W]here courts vacillate and overrule their own decisions . . . affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. . . ."

Nevada v. United States, 463 U.S. 110, 130 n.12 (1983) (quoting Minnesota Co. v. National Co., 3 Wall. 332, 18 L. Ed. 42 (1865)). Abraham Lincoln recognized the importance of this issue long ago when he "described with scorn those who sat in the basements of courthouses combing property records to upset established titles." Arizona

v. California, 460 U.S. 605, 620 & n.10 (1983) (citing E. Kempf, Abraham Lincoln's Philosophy of Common Sense, Part 1, at 346 (1865)).

The Commission should adopt Mr. Lincoln's "philosophy of common sense" and dismiss these proceedings. The nonnavigability of this reach of the Salt River has been "determined" by courts on several occasions and has remained unquestioned for more than 100 years; no substantive issue remains within the Commission's limited jurisdiction to address. Based upon the prior judicial "determinations" of nonnavigability and the res judicata effect of the 1977 SRPMIC decision, the Commission must dismiss these proceedings immediately.

I. The Commission Has No Jurisdiction to Examine Navigability or Public Trust Values on Reaches of Watercourses for Which a Court Already Has Made Such a Determination.

The Commission was established by an act of the Arizona Legislature in 1992. See Ariz. Sess. Laws 1992, ch. 297 (hereinafter the "Commission Act"). This enactment, which was effective on July 1, 1992, has been codified in part at A.R.S. §§ 37-1101 to -1156. The Commission Act provides the sole authority for any and all activities undertaken by the Commission; the Commission has no statutory authority apart from this act to conduct hearings or to make determinations of navigability.

Section 1 of the Commission Act has not been codified into the Arizona Revised Statutes. This section, entitled "Purpose and Intent," sets forth the general purposes behind the act. In addition to the general purpose statement, however, this section also contains an important limitation on the Commission's authority under the act. Section 1(F) provides as follows:

> F. This act does not affect:
>
> 1. This state's title, or claims relating, to the bed of the Colorado River.
>
> 2. Reaches of watercourses where determinations have been made by judicial actions before the effective date of this act.

1 3. Any existing public right to use the watercourses of this state as otherwise provided by law.

2

3 Commission Act, supra, § 1(F).

4 By including Section 1(F) in the Commission's enabling legislation, the Legislature
5 expressly limited the Commission's authority to address certain issues. The Legislature
6 passed the Commission Act to avoid expensive and time-consuming litigation over the
7 navigability of certain streams:

8 . . . A review of the experience of other states having similar claims indicated that, in the absence of legislation, protracted, difficult, expensive
9 and disruptive fact-finding processes and litigation may be needed to resolve the claims. . . . The purpose of this act is to establish an
10 administrative procedure for the necessary fact-finding efforts and the determination of the extent of this state's ownership of the beds of
11 watercourses located in this state. . . .

12 Id. § 1(D), (E).

13 In including this language, the Legislature recognized that a determination of
14 navigability could properly be made in a court of law. The Legislature also recognized,
15 however, that making this determination for many streams or portions thereof in the
16 state could impose a significant burden and delay on the judicial system and on individual
17 litigants. Therefore, the Legislature established the Commission to provide an efficient
18 and "systematic" forum to resolve the important issues for the streams that have not
19 already been addressed judicially. Id. § 1(C), (F).

20 Section 1(F) expressly states that the Commission Act "does not affect" portions of
21 streams for which a determination of navigability had been made prior to the effective
22 date of the act. The Legislature was interested in fairness and efficiency in establishing
23 the Commission. It was toward that goal that the Legislature withheld from the
24 Commission the authority to re-examine reaches of streams for which the issue of
25 navigability already had been determined by a court.

26

1 In prohibiting the Commission from revisiting issues that have previously been
2 determined by a court of law, the Arizona Legislature was acting consistently with long-
3 established legal principles of title. American courts have long held that "questions
4 affecting titles to land, once decided, should no longer be considered open." Arizona v.
5 California, 460 U.S. at 620. Our courts and the Legislature have agreed with Abraham
6 Lincoln and have recognized the importance of the security of title. Id. at 620 n.10
7 (citing E. Kempf, supra). Based upon the prior judicial determinations that the Salt
8 River is not and was not navigable, the Commission should dismiss these proceedings.
9
10 II. At Least Three Courts Previously Have Determined that the Salt River Was Not Navigable On or Before February 14, 1912.
11 The Commission has no authority to examine navigability for "[r]eaches of
12 watercourses where determinations have been made by judicial action prior to" July 1,
13 1992. Id. The portion of the Salt River that is the subject of this action is just such a
14 reach of a watercourse. At least three courts have determined that this portion of the
15 Salt River is **not** navigable. Salt River Pima-Maricopa Indian Community v. Arizona
16 Sand & Rock Co., D. Ariz. (April 13, 1977) (Cause No. CIV 72-376 PHX) ("SRPMIC");
17 Hurley v. Abbott, No. 4564, Third Judicial District, Territory of Arizona, County of
18 Maricopa (March 1, 1910) (the "Kent Decree"); Wormser v. Salt River Valley Canal Co.,
19 No. 708, Second Judicial District, Territory of Arizona, County of Maricopa (March 31,
20 1892) (the "Kibbey Decree").[2] The Kent Decree and the Kibbey Decree were entered
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23
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26

[2]Copies of the Kibbey and Kent Decrees are attached to this Motion. The Salt River Project understands that the Commission already has been provided with the relevant documents from the SRPMIC decision.

prior to February 14, 1912, the date Arizona became a state. Both of these decisions, and the SRPMIC decision,[3] determined the navigability of this portion of the Salt River.

A. The Kibbey Decree in 1892 Held that the Salt River was Not Navigable.

The first decision regarding the navigability of the Lower Salt River was issued by Judge Joseph H. Kibbey of the Territorial District Court in the 1892 "Kibbey Decree." That case was a suit instituted by downstream water users and canal companies against upstream appropriators. See generally Kibbey Decree, supra, at 1-5. The court characterized the plaintiffs' complaint as follows: "[The plaintiffs] filed their complaint in this court against the Arizona canal company, alleging that the Salt River is a natural **unnavigable** stream rising in the mountains in the eastern part of the territory and running thence in a westerly direction to its junction with the Gila River in Maricopa County." Id. at 4-5.

When addressing the issue of what law to apply in the case, Judge Kibbey first reviewed the 1864 codification of the laws of the Territory of Arizona, commonly known as the "Howell Code." Id. at 21. The Howell Code adopted the system of prior appropriation of water rights and rejected the riparian system that was common in the eastern United States. Id.

In addition to examining the territorial laws, however, Judge Kibbey also analyzed the relevant federal law on the subject. Id. at 24. In particular, the Judge relied upon the Desert Land Act of 1877. Act of March 3, 1877, 19 Stat. 377 ("An Act to Provide for the Sale of Desert Lands in Certain States and Territories"). The Desert Land Act provides, in pertinent part:

[3] Logic requires that, if this portion of the Salt River was not navigable in 1892 and 1910, it also was not navigable on February 14, 1912. The Salt River Project knows of no fact or event that could have occurred between March 10, 1910, and February 14, 1912, that could have changed the status of the Salt River from a nonnavigable river into a navigable river.

> ...[T]he right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon a bona fide appropriation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and **not navigable**, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.

Id. (emphasis added).

Judge Kibbey reasoned that the territorial laws could grant a person the right to appropriate water, but that such right of appropriation was subject to some restrictions imposed by federal law:

> ... [T]he Territory of Arizona is only a temporary government erected by the national government. We possess none of the attributes of sovereignty --those all inhere in the United States. ... We can look alone, then, to the legislation of Congress and to our own legislation within the limits prescribed by our own organic act, to ascertain the rights that may be acquired to divert and use water.

Kibbey Decree, supra, at 37. After deciding that territorial appropriation law applied because the Salt River was not navigable, Judge Kibbey went on to apply such law to decide the dispute.

B. The Determination of Nonnavigability Was Necessary to the Decision in the 1892 Kibbey Decree.

Based upon the law as it existed in 1892, a finding of nonnavigability was necessary for Judge Kibbey's decision in the case. Given the historical setting in which Judge Kibbey entered his decree, his determination might have been different had he found the Lower Salt River to be navigable.

Prior to 1866, water in the western states and territories "generally was fixed and regulated by local rules and customs." California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154 (1935). Most states and territories in the arid West (including Arizona) adopted the prior appropriation system, which was much different

1 from the riparian system in place in the Eastern states. See, e.g., Howell Code, supra.
2 The Federal Government silently acquiesced in this practice until 1866, when it formally
3 confirmed rights recognized by local customs and laws. Act of July 26, 1866, ch. 262, 14
4 Stat. 251.

5 In 1877, Congress passed additional legislation to promote development in the
6 West. Desert Land Act, supra. This act provided for a bifurcation of the methods of
7 acquiring land and water rights. Land rights were to be purchased or otherwise acquired
8 from the Federal Government; water rights were to be regulated under state and
9 territorial appropriation systems. California v. United States, 438 U.S. 645, 658 (1978);
10 State v. Dority, 55 N.M. 12, 18, 225 P.2d 1007, 1013 (1950), appeal dismissed, 341 U.S.
11 924 (1951). Therefore, the Desert Land Act granted the states the power to regulate the
12 appropriation and use of water from most rivers and streams.

13 Under the Desert Land Act, the state's right to regulate water matters were
14 subject only to two limitations:

15 First, in the absence of any specific authority from Congress, that a state
16 could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow, so far, at least, as might be necessary for the beneficial use of the government property;
17 and, second, that **its power was limited by that of the general government
18 to secure the uninterrupted navigability of all navigable streams within the limits of the United States.**

19 California Oregon Power Co., 295 U.S. at 159 (emphasis added); see also, e.g., California
20 v. United States, 438 U.S. at 663. Therefore, in passing the Desert Land Act, the United
21 States relinquished complete control of only nonnavigable waters; all navigable streams
22 remained subject to Congress' plenary power over commerce. U.S. Const. art. 1, § 8.

23 When the Kibbey Decree was decided in 1892, the United States retained control
24 over all navigable streams. See generally Federal Power Comm'n v. Oregon, 349 U.S.
25 435, 454 n.2 (1955) ("If this were a navigable stream, the authority of the United States
26 in the water power would be complete without reference to state law."); United States v.

Fallbrook Pub. Util. Dist., 165 F. Supp. 806, 837 (S.D. Cal. 1958). Although it is now somewhat uncertain exactly what law Judge Kibbey would have applied had he found this portion of the Salt River to be navigable, it is possible that a quite different body of law would have developed had he determined that the Salt River was subject to the navigation servitude of the United States. Judge Kibbey found that, because the Salt River was not navigable, the territorial law of prior appropriation applied.[4] As such, his finding of nonnavigability was necessary to his decision in the case.

C. The Kent Decree in 1910 Held that the Salt River Was Not Navigable.

The Kibbey Decree set forth the rights to water from the Salt River as between the various canal companies that were parties to that action. Kibbey Decree, supra, at 74. Judge Kibbey did not "attempt to define the rights of individual irrigators." Id. Events subsequent to the issuance of the Kibbey Decree, including the pending development of the Salt River Federal Reclamation Project, made it necessary that rights be established as between individual appropriators and not just between the canal companies. The determination of these rights was set forth in 1910 in the Kent Decree, supra.

In determining the rights of individual appropriators, Judge Kent relied heavily upon the legal rules set forth in the Kibbey Decree. Id. at 5-6. Judge Kent did not specifically examine the issue of whether the territorial prior appropriation law applied

[4] At this time, it is somewhat uncertain as to what law would have applied if the Salt River had been found to be navigable in 1892. If the river was navigable, it would have been subject to the federal power to protect navigation. For example, Congress passed an act in 1890 that prohibited "[t]he creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters. . . ." Act of September 19, 1890, 26 Stat. 454, § 10. This particular act would not have applied, however, to the dams subsequently constructed on the Salt River because they were "affirmatively authorized by federal law." Although it is possible that Judge Kibbey might have applied federal common law and reached a similar result in the case as to the relative rights of the parties, any determination at this time of what law he would have applied if the river was found to be navigable would be pure speculation.

because that issue had been decided by Judge Kibbey. Judge Kent found that the relevant portion of the Salt River was "a non-navigable stream," and, therefore, applied territorial law. Id. at 3.

The legal determination of nonnavigability was important to the determination of rights in the Kent Decree, as it was in the Kibbey decision. If Judge Kent would have found the Lower Salt River to be navigable, he might have applied something other than territorial prior appropriation law. See Section II(B), supra.

D. The SRPMIC Decision Also Found that the Salt River Was Not Navigable.

A more recent court also addressed the navigability of this reach of the Salt River. In 1972, the Salt River Pima-Maricopa Indian Community filed an action in federal court to eject certain defendants from lands claimed to be part of the Salt River Indian Reservation. A portion of the lands in dispute were situated within the banks of the Salt River below Granite Reef Dam.

The State of Arizona, which was a defendant in this action, argued that it held title to the disputed lands because the river was navigable and the State owned its bed. In its final judgment, the court held that title to the lands was vested in the United States, not the State of Arizona. The court based its finding upon its conclusion of law that "[t]he Salt River is not now [1977] and **never has been a navigable river.**" Judgment, SRPMIC, at "1063" and "1068" (April 13, 1977) (emphasis added).

Because the SRPMIC litigation involved title as between the United States and the State of Arizona, the issue of navigability as of February 14, 1912, was central to the court's decision. The legal question in the dispute was identical to the question that the Commission now is proposing to revisit. As in the Kibbey Decree and the Kent Decree, the SRPMIC court made a judicial "determination" that the Lower Salt River is not and was not navigable.

III. The Commission Has No Jurisdiction to Examine the Navigability or Public Trust Values of the Salt River from Granite Reef Dam to the Gila River Confluence.

The Commission's jurisdiction is limited by Section 1(F) of the 1992 Commission Act. As such, the Commission has no authority to examine or make determinations of navigability regarding "[r]eaches of watercourses where determinations have been made by judicial actions before" July 1, 1992. Commission Act, supra, § 1(F).

The 1892 Kibbey Decree, the 1910 Kent Decree, and the 1977 SRPMIC decision determined that this stretch of the Salt River was **not** navigable. Based upon the law as it existed in 1892 and 1910, the determination of nonnavigability was necessary to the court's decision in the Kibbey and Kent Decrees. The navigability issue also was necessary to the SRPMIC decision. Because these prior judicial actions have found the stream **not** to be navigable, the Commission has no authority to conduct these proceedings to determine the navigability of the Salt River from Granite Reef Dam to the Gila River confluence or to examine public trust values associated with this stretch of the river.

IV. The SRPMIC Decision is Res Judicata as to the State of Arizona.

In addition to being a judicial "determination" of nonnavigability under Section 1(F) of the Commission Act, the SRPMIC decision also acts as a bar against the State under the legal doctrine of res judicata. Under this legal rule, when a court has entered a final judgment on the merits of a case,

> [i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Nevada v. United States, 463 U.S. at 129-30 (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1877)). If a subsequent action involves the same cause of action between the same parties, the parties are precluded from asserting the claim in the subsequent

lawsuit. See Gilbert v. Board of Medical Examiners, 155 Ariz. 169, 745 P.2d 607 (App. 1987). The doctrine also precludes the parties or their privies from subsequently asserting a claim that they could have asserted in the first action, even if they did not assert that claim in the first action. Id.

Because the State of Arizona, acting through the Arizona State Highway Commission and represented by the Attorney General, was a party to the SRPMIC litigation, the court's final judgment in that case is entitled to res judicata effect against the State. The State asserted its claims to title based upon the navigability of the Salt River in that litigation. Because that case determined that the Lower Salt River was not navigable, the State is now precluded from asserting any ownership claims to land lying in or near the river. Res judicata can apply to government entities as well as private parties. See generally Arizona v. California, 460 U.S. at 617, 626.

The SRPMIC case was an action to quiet title in certain disputed lands lying in or near the bed of the Salt River. If the State is not now precluded from reopening the navigability issue, each of the issues decided in that suit might also be subject to review. See id. at 625 (". . . the urge to relitigate, once loosened will not be easily cabined."). Such a result would adversely affect the certainty of title associated with this completed judicial action.

V. Summary and Requested Action.

The Salt River Project requests that the Commission adopt the "philosophy of common sense" and refrain from disturbing long-established titles to lands near the Salt River. The Commission should find that a judicial determination previously has been made that the Salt River from Granite Reef Dam to the Gila River confluence was not navigable at or before February 14, 1912. Both the Kibbey and Kent Decrees clearly made this determination, and such determination was essential to their holdings at the time. Likewise, the SRPMIC court found this reach of the river not to be navigable.

1 Because this reach of the Salt River has been judicially determined to be
2 nonnavigable, the Commission lacks statutory jurisdiction to now examine this issue.
3 Furthermore, the 1977 SRPMIC decision precludes the State from asserting its ownership
4 claims based upon navigability. Therefore, the Salt River Project requests that the
5 Commission issue an Order stating that this matter has been previously determined in a
6 judicial action. The Commission should immediately dismiss all pending and future
7 proceedings relating to a determination of navigability or any public trust values
8 associated with this reach the Salt River.

9 RESPECTFULLY SUBMITTED this 14th day of January, 1994.

10 JENNINGS, STROUSS & SALMON, P.L.C.

11

12 By [signature: John B. Weldon Jr.]

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17 Original filed this 14th day of
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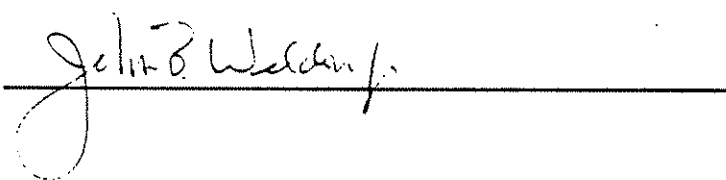
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IN THE DISTRICT COURT

of the

Second Judicial District

Of the Territory of Arizona,

in and for the County of Maricopa.

M. WORMSER, et al, Plaintiffs, vs. THE SALT RIVER VALLEY CANAL CO., et al, Defendants.	)	No. 708.

DECISION

Joseph H. Kibbey, Judge

March 31, 1892

HISTORICAL RESEARCH & ARCHIVES
SALT RIVER PROJECT
Phoenix, Arizona
1977

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M. WORMSER, et al, Plaintiffs, vs. THE SALT RIVER VALLEY CANAL CO., et al, Defendants.	)	No. 708

This is a suit instituted for the purpose of enjoining certain parties to it from the diversion of water from the Salt River in derogation of the rights of plaintiffs. Historically the facts out of which the present litigation has grown are briefly as follows:

The Salt River enters the County of Maricopa from the east, and after flowing some distance through a mountainous country, at a point about a mile below its confluence with the Verde, its valley broadens rapidly into a level alluvial plain, the soil of which when supplied with sufficient water is extremely fertile. The climate in the valley is extremely arid, the average annual rainfall not exceeding seven and a half inches, most of which is precipitated in the winter months. No crop of any agricultural product can be produced in the valley without the artificial application of water to the land. The water-shed of Salt River is extensive, and the river is consequently subjected to very great variations in the volume of water which it carries. During the winter months of December, January, February, and until the middle of May, there is a large volume flowing in the river, more than adequate for the irrigation of all the lands in the valley. The Salt River valley spoken of, is that part of the valley of Salt River extending from the mouth of the Verde river westerly to the Agua Fria.

In 1867, attracted by the fertile plain and the then superabundance of water in the Salt River, and by the demand for hay, grain and other agricultural products necessary to supply the neighboring military posts, Jack Swilling and some of his associates began the construction of a ditch for the diversion of the water of the Salt River for the purpose of irrigating fields for the cultivation of those products. This ditch, then known as the Swilling ditch, and very frequently so designated at the trial of this cause, was taken out on the north side of the river, heading about four miles east of the present site of Phoenix. The Swilling ditch is now claimed by various mesne conveyances by the Salt River valley and the Maricopa Canal companies, corporations, parties to this suit, and as incident to their ownership of the ditch they claim a right to divert certain definite quantities of the water of Salt River.

In the year 1870, certain other persons attracted by the natural advantages of the location, began the construction of a ditch for the diversion of the water of Salt River for the purpose of irrigation, beginning at a point on the south side of the river about seven miles above the point whence the Swilling makes its diversion. This ditch was constructed and has been maintained until now, and is and has been operated as a community ditch, the water diverted by it being chiefly claimed by shareholders who are also the owners of land irrigated by the waters of the ditch. The shareholders are unincorporated, but their association is known by the name of the "Tempe Irrigating canal," and its affairs are managed after the manner of those of a corporation. The owners of the shares of this ditch are the plaintiffs in this action.

Some time after the construction of the original Swilling ditch, it was extended and a branch was taken from it at a point about three miles below its divergence from the river, and constructed northwardly, and became known as the "Maricopa canal."

In 1874 and '75 the construction of a ditch on the south side of the river emerging therefrom about a mile above the head of the Salt River valley canal, and about six and a half miles below the head of the Tempe canal, was begun, and since that time has been constructed, repaired and probably enlarged, which ditch has become known as the San Francisco canal and is, with its alleged incidental rights to divert water from Salt River, claimed by M. Wormser, who is also a plaintiff in this case.

In 1877, the construction of another ditch for the diversion of water for irrigation was begun on the south side of the river, emerging at a point about five miles above the head (the point of diversion) of the Tempe canal, which ditch is now known as the "Utah Canal," and is so designated in the pleadings in this case. The Utah canal was constructed and is now maintained and operated by the owners of and occupants of lands which are irrigated by water conveyed by it, who have associated themselves together and entrust the actual administration of their affairs to officers after the manner of a corporation. The several interests of the associates are evidenced by certificates reciting the ownership of definite shares, which certificates are transferable. The associate owners of the Utah canal are parties defendant to this suit.

In 1878, the construction of another ditch was begun on the north side of the river, emerging therefrom at a point about two miles and a half above the head of the Swilling canal, by a corporation known as the Grand canal company, which company is a party to this suit.

In 1879, there was begun by the Mesa canal company, a corporation, the construction of a ditch upon the south side of the river emerging therefrom about two miles and a half above the head of the Utah canal, being above the head of all the canals or ditches before mentioned. This last ditch is known and designated in the proceedings in this case as the "Mesa Canal", and the Mesa canal company is made a party to this suit.

In 1882, certain persons posted a written notice on the north bank of the Salt River at a point a short distance below its confluence with the Verde, of their intention to divert 50,000 inches (miner's measurement) of water from Salt River at that point, for the purpose of irrigation, and a copy of this notice was filed in the recorder's office of Maricopa county. Any rights that may have been acquired or initiated by the posting of that notice, were conveyed to the Arizona canal company, a defendant in this case.

In 1883, the Arizona canal company, a corporation duly organized under the laws of this territory, began the construction of and with reasonable diligence prosecuted work until the completion of its canal, beginning the diversion of water at the point where the notice before mentioned was posted, and claiming the right thereunder to divert the water. The head of this canal (its point of divergence from the river) is above that of all the other canals or ditches in

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the suit instituted by him should be consolidated and tried with this, and his rights determined in the consolidated suits.

The earlier efforts of the settlers under these older ditches toward cultivation was confined to the production of hay and grain, and a few garden vegetables, the cultivation of which was confined to that period of the year when the water in the river was very abundant. As the settlement became older and its population increased, a more extended cultivation began to be undertaken. Instead of confining themselves to hay and grain, as above mentioned, the ranchers gradually began the planting of alfalfa, fruits and vines which required water during the entire year. Under the conditions as they originally existed, and as is usual in such cases, there were many usurpations and concessions of rights to the diversion of water, unnoticed at the time, or if noticed, tacitly and without objection acquiesced in because of the then abundance of water. As the population increased and with it the more extended form of cultivation, a deficiency in water began to be noticed. While the river during the months in which hay and grain and the ordinary agricultural crops are being grown had in it a vast volume of water, this volume diminished with the advance of the season, from thousands of cubic feet per second to about, at a minimum of, three hundred cubic feet per second, and as both the increase of population and the different products to which the land was cultivated increased, the demand for water in the summer months when the supply is the least, aggravated by an unnecessary and very considerable waste of water, exceeded the supply. This deficiency of supply made at once the question of priority of the right to appropriate water, important, and that question is the subject matter of this suit.

On the 7th day of February, 1887, the Salt River Valley canal company, a corporation; the Maricopa canal company, a corporation; M. Wormser, alleging himself to be the owner of the San Francisco ditch; the Mesa canal company, a corporation; and C. T. Hayden, M. Wormser and forty-nine others alleging themselves to be the owners of the Tempe irrigating canal and constituent members of the Tempe Irrigating Co., and Henry C. Rogers and forty-five others alleging themselves to be owners of the Utah canal and the constituent members of the Utah canal company, and the Grand canal company, a corporation, filed their complaint in this court against the Arizona canal company, alleging that the Salt

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River is a natural unnavigable stream rising in the mountains in the eastern part of the territory and running thence in a westerly direction to its junction with the Gila river in Maricopa county. That the said river during its course in its natural channel flows in and through a tract of country situated in Maricopa county known and called the "Salt River valley," and that the river at and before the times hereafter mentioned flowed through land that belonged to the domain of the United States. The Salt River valley begins at a point about twenty miles east of the city of Phoenix, and continues on both sides of the river to its junction with the Gila river, and includes in its area 150,000 acres of land fit for cultivation and the production of crops, when irrigated. That the climate of the valley is dry and arid, and the said lands are only capable of cultivation when irrigated, and without irrigation they are unfit for cultivation and will not produce any crops. That through the dry season of the year the volume of water in that river is reduced to a very great extent, so that at times during the dry season the amount of water flowing in the river does not exceed 13,000 inches of water. (A "miner's inch" as used in these proceedings is a unit of measurement of water, and while varying in different states and territories on the coast, here is held to be an amount equal to the fortieth part of a cubic foot flow per second.)

That during the year 1867 a number of persons owning and possessing lands in the valley, desiring to cultivate the same, associated themselves together under the name of the "Swilling Irrigating Canal Company," and did locate, appropriate and claim for the purpose aforesaid, 12,000 inches of water of said river; and constructed at great expense a dam over and across the river, and two ditches commencing on the north bank of the river in the vicinity of each other, at points about five miles southeast of Phoenix, running thence in a northwesterly direction over and across lands then being a part of the public domain, each of which ditches were capable of carrying 6,000 inches of water, for the irrigation and cultivation of such lands. That afterwards, in 1875, the Salt River Valley canal company by divers mesne conveyances succeeded to all and every right, title and interest of the said association the Swilling Irrigating Canal company, in the lower or westerly of the two aforesaid ditches and to the water and water-rights appropriated by said ditch, and the plaintiff, the Salt

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River Valley canal company, has since that time been, and is now, the lawful owner and in the possession of that ditch, and to all the rights appurtenant thereto. That the Salt River Valley canal company was incorporated by the owners of the lands theretofore irrigated by means of that ditch, and was organized for the purpose of and has been continuously at all times engaged and employed in carrying and conducting the water of said river in and by that ditch to the land for which said ditch was designed and intended to irrigate, and which has been irrigated by it, and the stockholders of the said Salt River Valley canal company have at all times been and are now owners of the land irrigated by means of the water conveyed by the said ditch, and assert a claim to 6,000 inches of water.

That in the year 1875, the plaintiff, the Maricopa canal company, by divers mesne conveyances succeeded to all the rights of the Swilling irrigating canal company in the upper or easterly of the two aforesaid ditches, and to all the rights appurtenant thereto, and since that time has been and is now the lawful owner, entitled to have and enjoy all the rights and privileges of the Swilling Irrigating canal company in and to the waters of the river carried and used in and by the upper or easterly of the two ditches aforesaid. That the Maricopa canal company was incorporated by the owners of the lands theretofore irrigated by the waters conveyed through said upper or easterly of said ditches, and was organized for the purpose and has at all times been engaged and employed in carrying and conveying the water for the purpose of irrigating said land; and its stockholders are the owners of the lands irrigated by waters conveyed through the ditch. That for the purpose of protecting themselves against damage by freshets the said two corporations the Salt River valley canal company and the Maricopa canal company have combined the heads of their ditches and take the water used by each of them from one point on river.

That on or about the sixth day of December, 1870, the grantors and predecessors in interest of the plaintiffs, C. T. Hayden and others, alleging themselves to be constituent members of the Tempe irrigating canal company being then the owners or occupants of certain lands in the Salt River valley and intending to cultivate the same, associated themselves together by the name of the Tempe irrigating canal company, and located and appropriated of the waters of said river 11,000 inches, and did thereupon proceed to

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and did construct at great expense, a dam across the river and an irrigating ditch commencing at the south bank of the river at a point about sixteen miles east of the city of Phoenix and running thence in a southwesterly direction over and across lands then being a part of the public domain, said ditch being capable of carrying said 11,000 inches of water, and they thereafter did continuously appropriate, use and employ said 11,000 inches of water for the irrigation of lands so owned and possessed by them. That the plaintiffs now composing the said association the Tempe irrigating canal company have succeeded by divers mesne convenances to all the rights of the original claimants of said 11,000 inches of water diverted and carried by said Tempe canal, and of the lands irrigated thereby.

That in 1877, the grantors, in interest of the plaintiff, Henry C. Rogers, and others constituting the Utah canal company, formed and associated themselves together by that name and took up, located and claimed of the waters of the Salt River, 2,500 inches of water, and proceeded to and did construct at great expense, a dam over and across the river, and a ditch commencing on the south bank of Salt River at a point about twenty miles east of Phoenix, and running thence in a southwesterly direction across land then being a part of the public domain, the ditch being capable of carrying said 2,500 inches, and that the persons composing said association thereafter by means of said ditch did continuously appropriate, use and employ 2,500 inches of water for the cultivation of the land owned and actually cultivated by them. That the plaintiffs last named now constitute the Utah canal company, and have succeeded by divers mesne conveyances to all and every the rights of the original locators and claimants of the said 2,500 inches used by means of the ditch of the Utah canal company, and the land irrigated thereby, and have so continuously used the said water.

That about the middle of December, 1870, divers persons the grantors and predecessors in interest of the plaintiff, M. Wormser, being the owners and possessed of land in Salt River valley, desiring to cultivate the same, appropriated 4,500 inches of water and constructed at great expense a dam across the river, and an irrigating ditch known as the San Francisco ditch commencing on the south bank of the river at a point about nine miles east of Phoenix, and running thence in a southwesterly direction across land then being a part of the public domain, the ditch being capable

of carrying the 4,500 inches of water so appropriated, and such persons did thereafter by means of that ditch continuously use and employ 4,500 inches of water in the cultivation of said lands. The plaintiff, M. Wormser, heretofore and more than five years before the commencement of this suit, by divers mesne conveyances succeeded to all the rights of the owners of said San Francisco ditch, and is now the owner and possessor of the same and has been continuously using the same.

That during the month of July 1870, divers persons being the owners and possessors of land in the Salt River valley, desiring to cultivate the same appropriated 1,500 inches of water of said river and constructed at great expense a dam across the river, and an irrigating ditch called and known as the Griffin ditch, commencing on the north bank of Salt River at a point about a mile and a half south of the city of Phoenix, and running thence in a northwesterly direction across land then being a part of the public domain and capable of carrying 1,500 inches of water, and the persons so mentioned by means of that ditch continuously diverted and appropriated and used said 1,500 inches of water for the cultivation of the land owned and possessed by them. The plaintiff, M. Wormser, thereafter and more than five years before the commencement of this suit, by divers mesne conveyances succeeded to all the rights of said persons, and continues now to be the owner of the same.

That on or about the 24th day of June, 1878, divers persons being the owners and possessors of land in the Salt River valley and desiring to cultivate the same, formed and caused to be created a corporation known as the Grand canal company, and thereupon the said company appropriated 10,000 inches of the water of said river, and thereafter constructed at great expense a dam across the river, and an irrigating canal commencing at a point about twelve miles east of the city of Phoenix, running thence in a northwesterly direction and through and across land then being a part of the public domain, capable of carrying 10,000 inches of water, and used the waters of said river in and about the cultivation of the lands of the persons forming such corporation and owning its capital stock, and for their use and benefit, using the said 10,000 inches of water.

That on or about the second day of March, 1878, divers persons being the owners and possessors of land in Salt River valley and desiring to cultivate the same, organized the Mesa canal company and appropriated 10,000 inches of the water of said river for the purpose of the irrigation

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of said lands, and constructed at great expense a dam across the river, and an irrigating ditch commencing on the south bank of the river at a point about twenty-five miles east of Phoenix, and running thence in a southwesterly direction over and across the land then being a part of the public domain, capable of carrying 10,000 inches of water, and by means of that ditch did thereafter appropriate, use and employ for the purpose of cultivation of said lands of the persons forming the corporation and owning its capital stock, said 10,000 inches of water.

The plaintiffs further allege that the aggregate quantity of water which they had appropriated and used for the purposes aforementioned, is 62,500 inches of water, and that they and their predecessors in interest have expended in and about the construction of the several dams and ditches mentioned, a sum aggregating $350,000 and upwards. They further allege that the then present season was dry and that the quantity of water in the river was then insufficient to supply the plaintiffs with the several quantities to which they were then entitled. And the plaintiffs allege that at the then present time a great portion of the crops in the valley had been planted and that the water was required for their irrigation, and that but for the wrongful acts of the defendants hereinafter alleged, all the water flowing in the natural channel of the river would have flowed down and through their several ditches, and then would have been able to secure whatever water there was in the river, and that by a judicious and economical use of it preserved portions of their crops planted as aforesaid. The plaintiffs further allege that on or about the 1st day of January, 1887, being long subsequent to the appropriation and use by them and their grantors of the several quantities of water hereinbefore mentioned, the Arizona canal company, defendant in violation of the plaintiff's rights entered upon the river at a point above any of the dams and ditches of plaintiffs and about twenty-eight miles east of the city of Phoenix, and by means of a dam constructed by it across the river, there, capable of holding all of the waters flowing in the river, and by means of a canal commencing at the dam and running thence northwesterly, of a size sufficient to carry all the waters flowing in the river during a dry season at a time when the water is needed by the plaintiffs, diverted and turned out of the river a large quantity of the water of the river, and by such diversion prevented the water from reaching the ditches of the plaintiffs, and had diminished the quantity of water to such an extent that the

plaintiffs and each of them was prevented from procuring a sufficient supply of water for their crops aforesaid, whereby such crops are now suffering and are in immediate danger of actual destruction.

That without the use of the water naturally flowing in the river the plaintiffs cannot receive and take the amounts of water to which they are severally entitled and of which they are actually in need, and that the continued diversion of the waters by the defendants as aforesaid would prevent the cultivation of the lands under the ditches of plaintiffs, and work irreparable damage to them. That the defendant, the Arizona Canal company, threatens to continue its diversion of said water and threatens to divert all the water flowing in the river and thereby to deprive the plaintiffs of procuring any water from the river. The plaintiffs further allege that the defendant does not divert any water for any useful or beneficial purpose. That of the water so diverted, and carried away by the defendant, a small quantity not exceeding 1,000 inches is being sold and being disposed of by defendant for the purpose of irrigation, and that the remaining portion of the water so diverted by the defendant is carried away and allowed to run to waste and wholly lost, and is not thereafter restored to the river. Wherefore the plaintiffs pray that pending the action the defendant be enjoined from in any way or by any means interfering with or obstructing the present flow of water in the river or the waters to flow therein at any times hereafter, whereby the plaintiffs or any of them shall be impeded in their right to the use thereof. That defendant may be ordered to remove from the river its dam and any other obstructions placed in the river by it whereby the flow of the water in the river is impeded or obstructed, and that it be required at all times to permit the water of the river to so flow in its natural channel that the plaintiffs and each of them can receive the several quantities of water to which they allege themselves in this complaint to be entitled.

This complaint was sworn to by the president of the Salt River Valley canal company, the president of the Maricopa canal company, the president of the Mesa canal company, the president of the Grand canal company, and by M. Wormser, Winchester Miller and E. R. Jones, constituent members of the San Francisco, Tempe, and Utah canal companies. The complaint was presented on the 4th day of February, 1887, to J. W. Crenshaw, the then court commissioner of this court,

who ordered that the defendant show cause on or before the 14th day of February, 1887, why an injunction pendente lite should not be granted, and further ordered that upon the plaintiffs giving an undertaking in the sum of $10,000, the defendant in the meantime be restrained from in any manner interfering with or obstructing the flow of water in the river and suffer all the water therein flowing to flow through its natural channel.

On the 17th of December, 1888, an amended complaint was filed by those plaintiffs in the original complaint who constituted the Tempe Irrigation canal company and the Utah canal company, making the Salt River valley canal company, the Maricopa canal company, the Grand canal company, the Arizona canal company and the Mesa canal company, defendants. This complaint, after alleging the manner in which they acquired their right to divert and to appropriate the water from the Salt River alleges that during the year 1867, divers persons owning and possessing lands in Salt River valley, associated themselves together under the name of the Swilling Irrigating canal company, and located, appropriated and claimed for the purpose of irrigating lands, 1,500 inches of water of the river, and constructed a dam across the river, and thereafter constructed two certain ditches over and across the lands which they desired to irrigate, each capable of carrying 750 inches, and that the said Swilling Irrigating canal company and the persons composing the same became thereafter entitled to and continued to appropriate, use and employ 750 inches of water and no more. And that during the year 1875 the defendant, the Salt River valley canal company, by divers mesne conveyances succeeded to all and every the right, title and interest of the said association, the Swilling Irrigating canal company, and of the persons composing the same, in the lower or westerly of the two aforementioned ditches. And that during the year 1875, the Maricopa canal company, defendant by divers mesne conveyances succeeded to all and every the right, title and interest of the Swilling Irrigation canal company, in and to the upper or easterly of the two aforesaid ditches, and since that time has been and is now the lawful owner and possessor of all and every rights, privileges, and franchises of the Swilling irrigation canal company, in and to said upper or eastern ditch. And that while said Salt River valley canal company and the Maricopa canal company have been using said water, they have for certain purposes connected the heads of their two ditches, and for some time heretofore the two ditches have been and now are taken out

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at one head at one point on the river. That hereafter the defendants, the Maricopa canal company and the Salt River valley canal company in violation of the rights of the plaintiffs have diverted from the river quantities of water in excess of the rights that the plaintiffs had to divert, depriving the plaintiffs of water to which they were entitled. That the defendants, the Maricopa canal company and the Salt River valley canal company threaten to continue to claim, assert and exercise their alleged right each to take out of the river 6,000 inches by means of the canal of the defendant, the Arizona canal company, and that the Arizona canal company permits and consents to it, and threatens to continue to permit, and consent to the use of its canal by each of the aforementioned defendants for the purpose of diverting such excessive quantities of the water from the river for the use and benefit of the aforementioned defendants at a point upon said river above the place where the plaintiffs take their water from said river, when in fact the places where each of the said defendants, the Salt River valley canal company and the Maricopa canal company, originally took the water from the river into their ditches at the time the plaintiffs first acquired their rights to the quantities of water herein alleged, were below the place on the river where the plaintiffs then took and now take their water. That such proposed diversion through and by means of the Arizona canal will diminish the quantity of the water in the river out of which plaintiffs may obtain the supply to which they allege themselves to be entitled.

And plaintiffs further allege that the Grand canal company on or about the 24th of June, 1878, did without right and in violation of the rights of the plaintiffs, take up, locate, appropriate, and claim, 10,000 inches of the water of the Salt River, and constructed a dam across the river, and an irrigating ditch commencing at a point about twelve miles east of Phoenix, and running thence in a northwesterly direction over and across the land being a part of the public domain, capable of carrying 10,000 inches of water, and by means of such ditch and dam thereafter diverted 10,000 inches of water, thereby diminishing the quantity of water in the river so that plaintiffs could not supply themselves.

That the point at the river where the Grand canal company first took out the water into its ditch is below the point in the river where the head of the ditch of the Tempe irrigating canal company originally was taken out and now is situated, and below that of the Utah canal company, and is above the point on said river where the head of the San

Francisco ditch was originally taken out and is now situated. That the said defendant has, subsequent to the appropriation of the plaintiffs above set forth, diverted the water and threatens to continue to do so, by means of the Arizona canal company's canal.

That the Mesa canal company has made appropriation of the water of Salt River long subsequent to the appropriation made by the plaintiffs, and that its point of diversion is above the place where the plaintiffs take the water into their respective ditches. That the quantity of water that the Mesa canal company claims and asserts the right to divert, is 10,000 inches, and that when that defendant made its appropriation of water the plaintiffs were in the peaceful and undisturbed possession of their right to use and employ the waters of the river which they had theretofore appropriated.

That the defendant, the Mesa canal company, wrongfully prevents the waters of the river flowing down the ditches of the plaintiffs and threatens to continue to do so. That such diversion lessens and diminishes the quantity of water flowing in the river so such an extent that the plaintiffs cannot obtain the supply to which they are entitled by their prior appropriation.

Plaintiffs further allege that long subsequent to the appropriation by them, their grantors and predecessors in interest, namely on or about the 1st of January, 1887, the Arizona canal company, without right and in violation of the rights of the plaintiff to use the waters of the Salt River at a point about 28 miles east of Phoenix by means of a dam across the river and a canal commencing at said dam capable of carrying all the waters flowing in the river during the dry or rainless seasons, diverted and turned out of the river a large quantity of waters flowing therein, thereby preventing the water from flowing to or reaching the ditches of the plaintiffs, and thereby lessens the quantity of water in the river to such an extent that the plaintiffs are prevented from receiving in their ditches or any of them, a sufficient quantity of water for the purposes to which they allege themselves to be entitled to use it. That without the use of all the water now flowing in the river the plaintiffs cannot take or receive therefrom the several quantities thereof to which they are entitled and of which they have actual need.

That the defendant, the Arizona canal company does not divert the said water for any useful or beneficial purpose. That of the said waters so diverted and carried away by the

Arizona canal company, a small quantity not exceeding a thousand inches is sold and disposed of by that company for the purpose of irrigation, and that the remaining portion of the water except what is being carried through the canal as before-mentioned, is allowed to run to waste and be wholly lost, and no part thereof is ever restored to the river.

That the defendant is insolvent and unable to respond in damages.

Plaintiffs further allege that the aggregate quantity of the water of the river which they have appropriated and used is 20,000 inches of water. That they have expended large sums of money in and about the construction of their several dams and ditches.

Plaintiffs further allege that during the dry and rainless season of the year the quantity of water in the river is greatly diminished; that the entire amount thereof is insufficient to supply the plaintiffs with the quantities to which they are entitled after first making an allowance therefrom of the quantity of 750 inches due each of the defendants, the Maricopa and the Salt River valley canal companies.

The plaintiffs further allege that the defendants, the Salt River valley canal company, the Maricopa canal company and the Grand canal company, have since the filing of the original complaint, by means of a transfer of a certain share of the stock of those companies to divers persons acting in concert with the Arizona canal company in order to aid that company in its efforts to wrongfully continue its alleged appropriation of the waters of the river against the rights of the plaintiffs, combined with the Arizona canal company to injure the plaintiffs and prevent the plaintiffs from proceeding with this action. That the persons who have received the said transfers of stock of the above companies respectively, are now holding control of the management of the said respective companies, and subordinating the claims and rights and interests thereof in such a manner as to seriously impair the rights of the plaintiffs by collusively permitting the said transfers of the stocks to the said Arizona canal company in order to enable it to secure an undue and wrongful advantage over the plaintiff, and to control the diversion of the water of the river; in violation of the rights of the plaintiffs.

This complaint is sworn to by Winchester Miller, one of the plaintiffs, and by M. Wormser and others.

On the 28th of January, 1889, a third amended complaint was filed, wherein an addition to the allegations of the foregoing complaint, the amendment consisted in the substitution of the Utah canal company as a party defendant instead of a party plaintiff; and on the 11th of June, 1889, by a still further amendment, the Highland land and water company, a corporation, was made a defendant. It is alleged that the Highland land and water company was a corporation, and that in January 1889, it diverted waters of Salt River by means of its canal, beginning at a point on the river about twenty-seven miles east of Phoenix, and above the point of diversion by the plaintiff, whereby they deprived the plaintiffs of the ability to divert to the uses to which they were entitled, as before alleged.

On the 14th of July, 1890, an amended complaint was filed wherein the alleged owner of the San Francisco ditch and the alleged owner and constituent members of the Tempe canal company were plaintiffs and the Salt River valley canal company, the Maricopa canal company, the Grand canal company, and Arizona canal company, and Mesa canal company, the Highland land and water company and the constituent members of the Utah canal company were defendants. In addition to the allegations made in the original complaint, it is alleged in this amended complaint that the defendants, the Salt River valley canal company, and the Maricopa canal company, and the Grand canal company, original plaintiffs, have since the filing of the original complaint by means of the transfer of certain shares of stock of those companies to divers persons acting, and designing and intending, to aid in concert with the Arizona canal company, and to aid that company in its effort to wrongfully maintain its alleged appropriation and use of water against the rights of plaintiffs, combined with the Arizona canal company to injure the plaintiffs and to prevent plaintiffs from proceeding with its suit and obtaining the relief sought.

That the persons who received the said transfers of stock above mentioned, are now holding control of the same and subordinating the claim and rights and interests of those companies so as to seriously impair the rights of the plaintiffs. That the above named companies have collusively permitted and acquiesced in such transfer of stock to the Arizona canal company in order to enable that company to secure and enjoy a wrongful advantage over the plaintiffs and to control the diversion of the water of the river in violation of the rights of the plaintiffs. It is also

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alleged in the amended complaint that in January, 1889, the Highland land and water company, a corporation, entered upon the said river above and east of the dams and ditches of the plaintiffs at a point about twenty-seven miles east of Phoenix, and there by means of a dam which it constructed across the river and a canal beginning at said point and running thence in a southwesterly direction, capable of carrying 6,000 inches of water, diverted and turned out of the river a large quantity of water, and has by such diversion prevented the water from flowing through or reaching the ditches of the plaintiffs, thereby diminishing the quantity to which they were entitled, and the crops and orchards and the vineyards planted by the plaintiffs have become thereby endangered. To the last amended complaint the Arizona canal company, the Grand canal company, the Maricopa canal company and the Salt River valley canal company filed their several answers; first, demurring to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action against them or either of them.

Second. That the several defendants have each of them separately been severally and in the peaceable and adverse, open and notorious and actual possession and use and enjoyment of the waters and of the rights and franchises described and referred to in the amended complaint, and every part thereof, under color of title for more than three years next preceding the commencement of the action and before the filing of the amended complaint.

Third. Alleging that the cause of action set out in the amended complaint had not accrued within two years before the commencement of the action or the filing of the complaint.

Fourth. That neither the plaintiffs nor their grantors or predecessors have been in the possession of the franchises or rights they claim, wherein five years next preceding the commencement of the action and filing of the amended complaint.

Fifth. Denying specifically the allegations of the plaintiffs that they had in 1870, or at any time, appropriated any water of Salt River in a quantity exceeding 300 inches, except that sometime in the year 1871, certain persons constructed a small temporary dam across Salt River, and a very small irrigating ditch in the vicinity of the place where it is alleged plaintiffs predecessors constructed a dam and ditch in the complaint described. That by means of that dam and ditch, water was taken out of the

river during said year after the construction of the said dam and ditch, in sufficient quantities to irrigate small patches of summer crops covering not to exceed a small number of acres of land. That thereafter and sometime about the year 1871, the said ditch was from time to time enlarged and increased in its capacity to some extent, but the total amount of water diverted therefor did not at any time exceed 300 inches of water, miner's measurement, until the year 1873. That thereafter and up to the month of January, 1877, the ditch was enlarged from time to time to enable it to carry water for irrigating purposes to such an extent that on or about that date the ditch was capable of carrying about a thousand inches of water in addition to the water carried for mechanical purposes, as hereinafter mentioned. That sometime in the year 1873, one of the plaintiffs, Charles T. Hayden, having constructed a flouring mill on the ditch with a water wheel whereby the same was intended to be driven, by some arrangement the details whereof are unknown to the defendants, enlarged the ditch and increased its carrying capacity sufficient to enable it to carry about 1,500 inches of water in addition to the said quantity it was capable of carrying before that. And that thereafter from time to time while said mill was running, the ditch was used to carry about not exceeding 1,000 inches of water, miner's measurement, for irrigating purposes, and not exceeding 1,500 inches of water for said mechanical purpose of driving said water wheel.

That all of said water which was diverted and used to run the mill except such part as was lost by evaporation and seepage was by means of a tail race below the mill immediately after passing through and over the water wheel of said mill, permitted to flow and did flow back into the river at a point above the dam and head of the canal of the defendants, the Salt River valley canal company and the Maricopa canal company, and the same and every part thereof except what was lost by evaporation and seepage flowed to said dam and ditches of said defendants and was available to them and each of them for the purposes of irrigation. That thereafter from time to time said ditch was enlarged in capacity. That up to the year 1883, it was not capable of and did not carry for any purpose, more than 3,000 inches of water, miner's measurement. That not more than 1,500 inches of said water was at any time diverted for the purpose of being used by any person or persons, by means of the ditch and dam for any purpose except the driving of the

mill. That thereafter from time to time the ditch was enlarged to such an extent that in January, 1886, it was capable of carrying about 3,500 inches of water calculating said 3,500 inches of water by miner's measurement, diverted by means thereof for the propulsion of the mill.

That no more than 2,000 inches of water was used for any other purpose than the driving of said mill, and that the proper irrigation of the lands could and ought to have been had with the use of at least twenty-five per cent less than the quantity the ditch was capable of carrying, after deducting from its total capacity the 1,500 inches it carried for the propulsion of the mill.

And further answering, those defendants deny that the predecessors in interest of the plaintiff, M. Wormser, appropriated 5,000 inches, or any other quantity of the water of Salt River in December, 1870, or at any other time, or that he or they ever applied 5,000 inches to the irrigation of any lands, or that he ever acquired by any conveyance the interest of any person who had any such right to appropriate water, but allege that sometime in the year 1872, some person or persons to the defendants unknown constructed a small irrigation ditch at or near the place where the alleged San Francisco ditch is alleged to have been excavated, but it was not capable of carrying more than fifty inches of water. That thereafter that ditch or some other one constructed near by the place where that one had been made, was from time to time enlarged to some extent, but that up to and in the year 1877 and '78 it was capable of carrying not more than one hundred and fifty inches of water. That thereafter the said ditch was enlarged from time to time until in 1883 it was capable of carrying not more than 200 inches of water. That the ditch was again enlarged from time to time to some extent, but that up to the present time it has not been nor is it now, capable of carrying more than 400 inches of water.

The answer further denies that the water of the river in dry and rainless seasons is ever diminished to a quantity not exceeding 13,000 miner's inches. They further allege that the amount of water appropriated by the Swilling irrigation canal company was, instead of 1,500 inches, 12,000 inches, and the two ditches constructed by the Swilling canal company were each capable of carrying 6,000 inches instead of 750 inches as alleged in the complaint, and that the whole amount thereof was and has been continuously used

in good faith in the irrigation of lands by the owners of lands under those ditches, and asserts their right to divert the same.

It is further averred that on or about the 24th day of June, 1878, divers persons being then the owners and possessors of land in Salt River valley and desirous of irrigating the same and requiring water for that purpose, formed and caused to be created the Grand canal company, and thereupon appropriated 10,000 inches of water of the river for that purpose, and proceeded to and did construct a dam over and across Salt River, and an irrigating ditch commencing at a point about twelve miles east of the city of Phoenix and running thence in a northwesterly direction over and across the lands then being a part of the public domain, the ditch being capable of carrying 10,000 inches of water and that thereafter they applied the said 10,000 inches of water for the purpose of the irrigation of those lands. And they make a similar allegation as to the Arizona canal company, and deny that since the filing of the original complaint that by means of any transfer of stock in any of the companies to any person or persons whatsoever that they sought to act in concert or in collusion whereby the rights of the plaintiffs should anywise be injured, or to prevent the plaintiffs or any of them from proceeding with their action.

The answers of the other defendants raise substantially the same issues, asserting in themselves the rights to divert and appropriate water of the river in the order suggested in the original complaint.

During the pendency of this action the court has attempted as best it could be means of commissioners appointed for that purpose, to control the distribution of water among the various claimants in accordance with the rights of the consumers as nearly as that could be ascertained on preliminary hearings, and the waters of the Salt River are now being distributed under the supervision of such a commissioner.

The final trial of this cause was begun in March, 1890, the evidence being adduced before a commissioner appointed for that purpose, and before whom about 3,000 pages of evidence were taken and reported to the court. The continuation of the trial was begun before the court in July, 1890, and continued until its conclusion in August of that year. The amount of evidence taken in the case is very voluminous, consisting of 6,000 pages of typewritten matter. Counsel

desiring to argue the case and their engagements and the business of the court being such that it could not be heard then, the further trial of the case was continued till February 1891, at which time the cause was fully and ably argued, the argument occupying 15 days.

This resume of the origin and progress of this case as brief as the multiplicity of the issue involved would permit, suggests at once its importance. From the time of the construction of the first ditch in 1867 until now, there has been expended in the construction, operation and maintenance of irrigating ditches in the Salt River valley a sum exceeding a million of dollars. The population of the valley has grown from 200 or 300 to 10,000 people. Its products from being simply barley and hay, now range through all the long list of grain, fruits and vines, to the production of which the soil and climate are peculiarly adapted. From a valueless desert, lands have been reclaimed, aggregating millions of dollars in value. The city of Phoenix itself began its existance since the Swilling ditch was constructed. Without water the Salt River valley would still be a desert uninhabited save by the jack rabbit, coyote, and the rattlesnake, and devoid of vegetation except the sage brush and the cactus. Water is just as essential to the maintenance of the population now there, and the production of the means of its subsistance, as the air itself.

Before proceeding to the finding of facts I shall to some extent discuss the law as I have found it and believe it to be, relevent to the issues of the cause to illustrate the import of the facts the finding of which will follow.

That part of Arizona in which the Salt River valley is situated, from the time of the Spanish conquest until the establishment of the republic of Mexico was under the dominion of Spain, and thence until 1847 under the dominion of the republic of Mexico, and was subject, of course, during those periods, to the laws of Spain and the republic of Mexico, respectively.

It might be interesting and instructing to study the laws and customs which prevailed under those governments concerning the appropriation and use of water, but it would here be out of place to discuss or even cite them, further than to state that the common law doctrine of rights of riparian proprietors did not there prevail, because, as disclosed by the evidence in this case, no rights whatsoever

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were acquired until at least twenty years after the acquisition of that territory by the United States under the treaty of Guadalupe Hidalgo.

In 1848, and from that time to 1863, that part of the territory of Arizona within which is the Salt River valley was a part of the territory of New Mexico, and there were expressly enacted by that territory laws governing the appropriation and use of water for irrigation. In 1863 a part of the then territory of New Mexico was erected into a temporary government by the name of the territory of Arizona, and the laws of New Mexico were by the act of congress establishing the territory of Arizona, made applicable to that territory. In 1864, the first legislative assembly of the territory convened and enacted the code of laws commonly known and cited as the Howell code. By article 22 of an act of that legislature, known and designated as the "bill of rights," it was provided that "all streams, lakes, and ponds of water capable of being used for the purposes of navigation or irrigation are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private use except under such equitable regulations and restrictions as the legislature shall provide for that purpose." This act went into force on the first day of January, 1865.

This provision has been incorporated in the successive revisions of our code, and is still a part of our statutory law. At the same session of the legislature and by a law taking effect at the same time, an act governing acequias and irrigating canals was adopted. The first section of that act provides that "all rivers, creeks and streams of running water in the territory of Arizona are hereby declared to be public and applicable to the purposes of irrigation and mining," as afterwards provided. Section 2 saves all vested rights. Section 3 provides that "all inhabitants of this territory who own or possess arable or irrigable lands shall have the right to construct public or private acequias and obtain the necessary water for the same from any convenient river, creek, or stream of running water." Section 4 provides for the assessment of damages resulting from the construction of ditches across private property of individuals. Section 5 provides that no inhabitant of this territory shall have the right to erect any dam, or build a mill, or place any machinery, or open any sluice, or make any dyke, except such as are used for mining purposes or the reduction of metals, as provided for in section six and

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and seven of the act that may impede or obstruct the irrigation of any lands or fields, as the right to irrigate the fields and arable lands shall be prefereable to all others; and the justices of the respective precincts shall hear and determine in a summary manner, and cause the removal of the same by order directed to a constable of the precinct or sheriff of the county who shall proceed to execute the same without delay.

By section 7 it is provided that when any ditch or acequia shall be taken out for agricultural purposes, the person or persons so taking out such ditch or acequia shall have the exclusive right to the water, or so much thereof as shall be necessary for the said purposes, and if at any time the water so required shall be taken for mining operations, the person or persons owning said water shall be entitled to damages to be assessed in the manner provided in section six of this chapter. Section 8 prohibits the construction or maintenance of by-paths and foot-paths across cultivated fields. Section 9 provides that all owners and proprietors of arable and irrigable land bordering on, or irrigable by, any public acequia, shall labor on such public acequia, whether such owners or proprietors cultivate the land or not. Section 10 provides that persons interested in a public acequia, whether owners or lessees of land, shall labor thereon in proportion to the amount of land owned or held by them, which may be irrigated by the ditch. Section 11 provides that animals shall be herded to prevent trespass upon cultivated fields. Section 12 provides that in case a community desire to construct an acequia and the persons desiring to construct the same are the owners or proprietors of the land upon which they design constructing the acequia, no one shall be bound to pay damages for the land taken. Section 13 provides for the election of overseers of public acequias. Section 14 prescribes the manner of the election of overseers. Section 15 provides for the payment for services of the overseers. Section 16 prescribes the duty of the overseers, which, among others, is enumerated his duty to distribute and apportion the water in proportion to the quantity to which each one is entitled according to the land cultivated by him; and that in making such apportionment he shall take into consideration the nature of the seed sown or planted, and the crops and plants cultivated.

Section 17 provides that "during years when a scarcity of water shall exist, owners of fields shall have precedence

of the water for irrigation, according to the dates of their respective titles or their occupation of their lands, either by themselves or their grantors. The oldest titles shall have the precedence always." Section 18 provides for the contribution of labor by irrigators, to the maintenance of the acequia. Section 19 prescribes penalties for malfeasance or nonfeasance of the overseer in discharging his duties, and provides for his removal in certain events. Section 20 provides for the filling of a vacancy occasioned by the removal of an overseer. Section 21 imposes a penalty upon the owner or proprietor of land irrigated by an acequia for neglect or refusal to furnish the number of laborers required by the overseer for the maintenance and repair of the acequia. Section 22 prescribes the penalties against any person who shall in any manner interfere with, impede or obstruct any such acequia, or use the water from it without the consent of the overseer. Section 23 provides that the fines and forfeitures recovered under the provisions of the act shall be applied by the overseers to the improvement, excavation and repair of the acequia, and for the construction of bridges at points where they may be crossed by public streets or roads. Section 24 provides for the appeal from judgment of conviction under any of the provisions of the act.

Section 25 is, "The regulation of acequias" which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona, shall remain as they were made and used, up to this day, and the provisions of this chapter shall be enforced and observed from the day of its publication." Section 26 provides that plants and trees growing on the banks of any acequia shall belong to the owners of the land through which the acequia runs. Section 27 provides that any person owning lands which may include a spring or stream of running water, or owning lands upon a river where there is not population sufficient to form a public acequia, may construct a private acequia for his own uses, subject to his own regulations, provided he does not interfere with the rights of others.

In the year 1866, the national congress enacted a law for the disposal of its lands containing valuable minerals, and among the provisions of that act, with some subsequent slight verbal changes not affecting the substance or meaning, is the following:

(Section 2339, revised statutes of the United States.)

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"Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed: but whenever any person, in the construction of a ditch or canal injures or damages the possession of any settler upon the public land, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Section 2340 provides that all patents granted or preemption or homestead allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section." This provision of the act of congress has been held by the supreme courts of the United States and of some of the states not only to confirm rights that have been initiated or had vested prior to the passage of the act, but that it was continuous in its operation and was the license of the government to persons to thereafter appropriate water on the public domain for agricultural, mining, manufacturing or other purposes.

98 United States 453.
13 Oregon 596.

On the 3rd of March 1877, there went into effect an act of congress providing that any citizen of the United States, or any who had declared his intention to become such, upon the payment of twenty-five cents per acre may file a declaration with the registerand receiver of the land district in which any desert land is situated, of his intent to reclaim a tract of land not exceeding one section, by conducting water thereon within the period of three years thereafter. It provides that the right to the use of the water by the person so conducting the same on or to any tract of desert land of 640 acres "shall depend upon bona fide prior appropriation: and such rights shall not exceed the amount of water actually appropriated, and necessarily used for the purposes of irrigation and

reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights."

By an act of the legislative assembly of the territory of Arizona, approved February 19th, 1877, all the laws of the territory then in force were directed to be recompiled, which was done; and the compilation is known and cited as the "Compiled laws of 1877" among which are the section of Bill of Rights and the various provisions governing the constructions of private and public acequias, and the appropriation and use of water for irrigation, that we have above quoted from the Howell Code. The same laws have been carried forward into the revision of 1887. In 1887, the acequia law was not re-enacted, but not having been repealed, it is still in force, and the editors of the revision of 1887 have incorporated in that revision:

Sections 3199-3226 R. W. 1887 Arizona.

In 1887, the legislative assembly enacted a law providing that the common law doctrine of riparian rights shall not obtain or be of any force or effect in this territory:

Sections 3198 R. S. 1887, Arizona.

CUSTOM AS A SOURCE OF WATER-RIGHTS.

There has during the argument of this case been much reference to customs prevailing in this territory and in the Pacific slope states and territories as a guide to determine the rights of parties to the appropriation of water. I am of the opinion that we cannot refer to customs, because we have covering the subject, express statutory law. There is no evidence in this case of any customs prevailing, and if the court may revert to its judicial knowledge of what customs have prevailed, resorting to whatsoever means it may to ascertain them, the court would have to say that there are as many customs

prevailing as there are persons who have enunciated them. In short, there has been no custom; there has on the contrary been an entire want of uniformity of practice among appropriators, and no two attorneys in this case who have agreed upon what has been the custom. There has until recently been no two canal companies or associations who have concurred in their practice of either appropriation, distribution, or application of water. It may be noted here that there seems to have prevailed a practice of posting a notice of intention to appropriate water, this notice being posted at the point whence they expected to divert it from the river, and thereafter to record that notice in the recorder's office. This practice has been imported from California where by express statutory provision a person who seeks to appropriate water may initiate a right by posting such a notice, but it is there further provided that such posting must be followed within sixty days by actual work of construction of means of diversion. This practice has prevailed to such an extent in the Salt River valley that notices of intention to appropriate many times more water than ever did flow down the Salt River, have been given; and so in the Gila River valley. It has been an impression quite commonly prevailing, that by posting such a notice some rights were acquired. Yet in the argument of this case none of counsel refer to it as a source of right, or a means of initiating one.

I am unable to understand how such a notice can vest in the person who posted it, any right whatsoever. On the contrary, it does not, and the most that can be said of it is, that it is a mere expression of intention, and may serve to limit the person who thereafter appropriates the water, to the amount of water which it was his declared intention to appropriate. So far as I am able to determine after a careful and continuous study of this subject for more than three years among those among whom it would be supposed customs would prevail if any existed, or from the evidence in this case, that any customs exist in this territory relative to the appropriation and use of water. Until after the organization of the Territory the use of water for irrigation was almost unknown here. There is no evidence that there was any use of it in Salt River Valley prior to that time. Our Bill of Rights says, that the water can only be

appropriated under regulations prescribed by legislature, and at the same session of the legislature that body did prescribe regulations for the appropriation of this water for the purpose of irrigation, and to those statutes we must resort to determine the rights of those who seek to appropriate water for that purpose.

With all due respect to the very able opinion of Judge Silent in the case of Kelsey vs. McAteer before him in the District Court, and the opinion of our own Supreme Court in the case of Clough against Wing, I cannot accede to the doctrine that any of the rights of the appropriators of water in this Territory may have their origin in any local customs or the decisions of the courts: they are statutory, purely and simply. Even if there had prevailed any customs, they must yield to the express statutory enactments.

87 U. S. 684.

And a careful review of the cases elsewhere, of which there are at least one hundred and fifty in California alone, discloses that there as well as elsewhere, the right does not rest in custom. It was there held that the right was by the implied license of the state and national government--that upon public lands the riparian proprietor was the national government, and that as between mere possessors of public lands the old maxim, "Qui prior est in tempore, potior est in jure," controlled and defined their rights as among themselves--that the first possessor could not avail himself of the riparian rights of the true owner against subsequent occupants of the public domain.

It is true that in most of the cases something is said about custom of the country and about local conditions making the old rules inapplicable, but I think that as a source of right to appropriate water mere custom cannot be referred to. Custom might in some cases regulate the use of it; the right to appropriate it in this Territory at least, emanates clearly from congressional and legislative grant. The conditions existing on this coast making impracticable the strict application of rules of right prevalent elsewhere may have been and no doubt did suggest the legislation on the subject to which we refer for the right to appropriate water.

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RIPARIAN RIGHTS.

The diversion of water and its proper application to the irrigation of lands necessarily results in an entire consumption of the water so applied, so that the amount of water taken from a natural water-course for irrigation, to the extent, diminishes the quantity left in the stream. In the Salt River Valley where there has been at least an attempted appropriation of the entire amount of water flowing in Salt River, there is an entire consumption of the water of that stream. Naturally there occurs to the mind of anyone whose knowledge of the rules governing the rights of property has been derived from the study of the common law of England as it exists there and in the United States, in considering the subject of appropriation of water for irrigation, the question of the effect of the common law doctrine of riparian rights, and whether that doctrine exists in Arizona.

The United States at the time of the cession by the Republic of Mexico, to it of the territory which now constitutes the Territory of Arizona, became possessed of all the rights of a proprietor of the lands the title to which had not been theretofore vested in private ownership by grant from the Mexican or Spanish governments, and as incident thereto acquired those rights relative to water in streams running over its land which are denominated "riparian rights" at Common Law, notwithstanding the non-prevalence of that doctrine in that particular territory prior to such cession. The first legislature of the territory enacted (1864) the law concerning public and private acequias which we have heretofore recited, which law was and is utterly inconsistent with the assertion by a riparian proprietor of his "Common Law rights" to have the water run as it was wont to run, undiminished in quantity and undeteriorated in quality. From the time of the enactment of that law to the time of the act of Congress of 1866, the United States was the only proprietor of the lands in the Salt River Valley. There is no evidence of any private ownership, and as a matter of fact the United States had not granted to any individual any part of the lands in the Salt River Valley of which it was the primary owner. By the act of Congress of 1866, the United States being then the riparian proprietor of all the lands in Salt River Valley, expressly acknowledged the right of occupants and owners of land on the streams

of the territory to appropriate water, inter alia, for the purpose of irrigation, and thereby acquiesced in the implied abrogation of the Common Law doctrine of riparian rights; for the use of water for irrigation does diminish the quantity of water in the stream whence it is taken even to its entire and exclusive consumption by another than a riparian owner. The difficulties attending the use by a riparian proprietor of the water of Salt River render the right under the rules of the Common Law valueless. Under the homestead, the pre-emption and the timber culture laws providing for the acquisition of public lands by citizens, only a quarter section could be acquired. Under the Desert Land Act, 640 acres could be acquired. The surface of the water of Salt River at ordinary stages is at least twenty feet below the surface of the lands not subject to annual inundation through which it flows, and as the river itself has a fall of only eight or ten feet to the mile, it is impossible for any such owner to divert the water to his own land unless he should begin his diversion at the river at a point more than two miles above his own boundary, necessarily thereby trespassing upon the rights of some other riparian owner. There is not an owner of land in the Salt River Valley, whether that land be bordering upon or be crossed by Salt River or not, who can irrigate his land without constructing a greater part of his works therefor on the lands of others. It cannot be maintained that the doctrine of riparian rights gives the right to trespass upon the rights of others. To apply the doctrine of riparian rights would at once render valueless every foot of arable land in the Salt River Valley. During the entire progress of this case, it was conceded, practically, by all the counsel, that the Common Law doctrine of riparian rights had no place in the policy of our law, and to it no one has referred for any right he claims; nor has any person directly or indirectly asserted that the doctrine of the right of prior appropriation of water for the purposes of irrigation has been in derogation of any rights that he might have as a riparian proprietor, except in the one instance of C. T. Hayden, to which we will hereafter refer.

Mr. Pomeroy, in his work on riparian rights, deprecates an attempt to inject into American institutions practices or customs in derogation of common law; but as

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the conditions which give rise to the common law are entirely different from those existing here which give rise to the doctrine of exclusive appropriation of water for irrigation, mining, or manufacturing purposes, the rule and practice themselves must necessarily differ. It has been said by courts in repeated cases, that the conditions in an arid country like that of Arizona where the artificial application of water to the soil is necessary to make it productive are so radically different from those in a humid country, like England, where arose the common law doctrine, and where instead of the artificial application of water to the soil to make it productive, there is required a constant effort to remove from it a superabundance of water, that it would not be strange that we should require different rules and different regulations governing the rights of persons to water running in the streams, than those prevailing in England: and if there is anything anomalous in the doctrines of our local law it is an anomaly arising from conditions over which we have no control. It is unnecessary for us here to note or discuss those cases arising chiefly in California, Nevada and Oregon, which maintain the existence of the common law rule. The result there has not been happy, and we fortunately are relieved of any effort to reconcile the rights of riparian owners with those of irrigators or other appropriators of water. The conditions which gave rise to the celebrated case of Lux vs. Haggin in 69th California, do not and cannot exist in the Salt River Valley--had Arizona in 1866 or in 1877 been a state and had a constitution like that of California, we might now have been confronted with this difficulty. It has been distinctly enunciated by our Supreme Court that the common law doctrine of riparian rights does not exist in this Territory.

Clough vs. Wing, 17th Pac. Rep. 453.

In California the doctrine of riparian rights is held to obtain:

Lux vs. Haggin, 69th Cal.

In Colorado it is as positively denied application there:

Coffin vs. Ditch Co., 6th Colo. 443.
Hammond vs. Rose, 11th Colo. 524.

In Nevada, the Common Law doctrine of riparian rights prevails. And for an able and elaborate decision of that question and as well the power of territorial

legislatures relative to these rights, see the leading case of "Vansickle vs. Haines, 7th Nev. 249.

The common law doctrine prevails in Oregon:

Weiss vs. Oregon &c Co., 13th Ore., 496.

As I have before said, we have been relieved of the difficult task of reconciling this apparent conflict, by the abrogation of the doctrine necessarily implied from congressional legislation, supplementing our local legislation.

THE APPROPRIATION OF WATER.

As appropriation of water consists of the actual diversion of it from its natural course and its application to a useful purpose, as irrigation, mining, or manufacturing. Until there has been this actual diversion and application of the water, there can be no valid right of appropriation. The extent of the right of appropriation depends upon and is limited by the intention of the person making the appropriation. So, although intent is not a necessary element of appropriation, yet it is important to be taken into consideration in determining the extent of the right of appropriation. Water may be taken and used one single season for a purpose which may be accomplished during that season, and the appropriation would have been simply for that season, and its extent would be limited by the expiration of that season. In other words, the purpose having been accomplished for which the water was appropriated, the right of appropriation ceases. It has been decided by a number of courts, that water may be appropriated for the irrigation of a crop the maturing of which requires only a portion of a year, and that the water thereafter running in the stream from whence it was taken, may be subject to appropriation by other persons for other purposes, at a time different from that at which it was used by the original appropriator.

Smith vs. O'Harra, 43 Calif., 371.
Barnes vs. Sabron, 10 Nevada, 217.
Edgar vs. Stevenson (Calif.), 11th Pac. Rep. 704.

And so, if of two persons on a stream of water carrying a volume sufficient only for the irrigation of a hundred acres of land, one may have made a valid appropriation for the cultivation from year to year of one hundred

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acres of barley, which matures and is harvested by the middle of May, while another and different person upon another and different piece of land may use the water in that stream at a period of time in each year beginning with the middle of May and ending with the time for replanting barley. We have, then, two appropriations, and so long as the appropriators continue the same use for which they appropriated, there cannot be any conflict of right. But assuming that the first settler appropriated all of the water and for a number of years has used it for the irrigation of barley, which as we have said, matures and is harvested by the middle of May, and that during the remainder of the year water is allowed to flow down the stream unused and is wasted, and that later a settler comes, and seeing the unused water running down the stream to waste during a part of each year, appropriates it and begins the use of it after the middle of May in each year for the cultivation of crops that may be grown during that period. Then if the first settler should conclude even after a series of years of cropping during only a portion of each year, to attempt the cultivation of a crop that requires irrigation for the entire year, there would be, as between himself and the subsequent settler, a conflict of claims to the use of water, and this conflict can only be determined by ascertaining as a matter of fact for what purpose the first settler did appropriate the water, and, consequently the extent of his right of appropriation. The earlier settlers in this valley confined their efforts to the cultivation of crops during only a portion of the year--that portion, which under the natural conditions existing here, the water was the most plentiful. By the middle of May more than nineteen-twentieths of the land which was under actual cultivation, did not need irrigation because the crop that was grown upon it was harvested. There ran down the river after that date in each year and until a succeeding crop for the next year had been planted a large quantity of water which was permitted to flow upon its way to the sea unused and unappropriated. But as time went on, new settlers came in and began the cultivation finding the products they had theretofore raised were less profitable, or that the cultivation of different and other products was more profitable, and from time to time gradually adopted a culture that required for its successful prosecution, irrigation for the entire year.

We think that it might be safely assumed that when a man enters upon a piece of government land and has conformed to the requirements imposed by the national government as conditions to the acquisition of the title to that land, makes improvements upon it and finally becomes the owner of it, that he intended from the time of the initiation of such proceedings to make that land produce all that it could to his profit; that if he discovered that it was adapted to a more profitable production though requiring more extended cultivation and irrigation he would have the right to avail himself of those possibilities. But he could not do this unless he had the water for such new culture, at a time he had not theretofore used it, and we are again reverted to the extent of the appropriation. It is a question of fact to be determined as any other question of fact is. If, as a matter of fact, the settlement upon the land was with an intention to appropriate water simply for the raising of hay and grain, the settler could not by virtue of that appropriation use it for any other purpose, as against subsequent appropriators. The question is one of great practical difficulty. As before noted, the first cultivation in the valley was to grain. Subsequent settlers finding the water flowing down the river unappropriated and being wasted after the harvesting of the grain crops, settled upon lands, reclaimed them and planted therein alfalfa, and orchards and vineyards. So long as the earlier settler continued the use of the water as he had theretofore, so long there was no dispute as to the right to use the water, for there was an abundance for both, but as the earlier settler in the pursuance of his right, if such right he had, planted his field which he had formerly cultivated only to barley, to alfalfa and trees, the supply of water was insufficient.

Public policy requires that this question should be determined in such a way as shall conduce to the greatest good of the greatest number, or that the question of the appropriation, use, and distribution of water shall be determined in such a manner as to encourage the highest development of the lands and increase their products to the greatest extent. It may be that the earlier settler intended only to plant barley. It may be that if he did change the cultivation of his land to a culture that required water for the greater period of the year, that

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he was induced to do so by the example of the newer settler, and that had it not been for the newer settler the older settler would not have attempted the new culture. It is desirable that the new culture be encouraged. But to say that while that is desirable, and that while the water was wasting at a definite period of the year no one could appropriate it for the purpose of a cultivation resulting in a greater public benefit than that which had theretofore followed unless the new settler made his appropriation subject to the right of the earlier settler and made possible, by the exercise of the earlier settler of his right, his deprivation of water necessary for this culture, and the consequent loss of immense labor is, to say, practically, that there shall not be an advancement in the methods of cultivation and improvement in the character of the products of the valley. Yet, as we have just noted, the first settler may be presumed to have taken his land and appropriated the water for the irrigation thereof, with a view and intent then formed, to make that land produce the most profitably that it can. There would seem to me to be but one solution of the difficulty--the difficulty arising from want of specific evidence as to the actual intent of the first appropriator other than that which may be afforded by his use of the water, and that is to presume that the first proprietor of land intended to and in fact did acquire the right to appropriate water for any culture of his land that inured best to his benefit and profit.

As before stated, having determined the extent of appropriation, by which we mean the determination of the purpose for which the appropriation was made, we determine the superiority of right of several appropriations by determining the question of fact: Who first appropriated? As we have said, appropriation of water consists in the actual diversion of it from its natural course and its application to a beneficial use, and that that appropriator's rights are superior to those of others in the order of time in which their several appropriations were made, the first in time being superior. To determine the question of the time when an appropriation is made, we are not confined to the point of time at which an actual application of the water was made in the accomplishment of the purpose for which it was appropriated, but we may go back to a time when the first efforts were made

to make an appropriation that were followed with reasonable diligence and resulted in the actual appropriation, and that point of time will be deemed the time of the actual appropriation, by relation back thereto. In the case before us, large works were undertaken occupying years in their completion before the water could be actually appropriated. But if the construction of these works was prosecuted with reasonable diligence to completion, the right to appropriate water, if the right existed at all, dates from the beginning of the work. So it may have happened that persons may have made appropriations intermediate to the time of the beginning and completion of such works, yet their appropriation must be deemed subsequent to the appropriation accomplished by the former. The question of what constitutes reasonable diligence is not one of peculiar difficulty; the natural conditions and the difficulties of the work must be taken into consideration: and it is not the policy of the law to presume abandonments.

THE RELATION OF CANAL COMPANIES TO CONSUMERS.

Among the parties to this case are a number of corporations organized under the laws of this Territory, which claim the right to divert water from Salt River. The law of the Territory under which they were organized is not one especially providing for the creation of irrigating companies, but is a general incorporation law. These irrigating companies so incorporated have simply by virtue of their incorporation, the rights generally incident to corporations. Some of them were organized as disclosed by their constating instruments, for the purpose of constructing ditches, diverting the water from the river and selling it for consumption in irrigation to the occupants of land lying under the lines of their respective canals.

The question has arisen in this case, as to the right of a corporation to thus appropriate the water; whether it can make a valid appropriation of water, and whether it can appropriate water for sale. The water in the streams in Arizona is public, subject to be appropriated "for a beneficial use." It seems to me that this means the actual use of the water in irrigation,

mining, milling and domestic uses; that that is what is meant by "useful purposes," and that water cannot be appropriated for sale. Indeed, it seems to me that in this Territory there is no private property in water. It is public property subject to the uses that we have before defined. If in that use it is entirely consumed, it does not matter, for consumption is not an incident to ownership of water any more than the consumption of the amount of air that we breathe into the lungs and vitiate and destroy as air, thereby makes the air our property. We have a right to use it, and if the use results in its destruction or vitiation, the right is none the less nor greater. It then becomes important to consider what rights, if any, corporations which have constructed at large expense these irrigating canals, have. It is a familiar principle governing dealings among men, that whatever one may do himself he may do by another, as by an agent. There is not doubt that a community may by joining together and contributing labor or money, or both, to the construction of a ditch of sufficient capacity to divert and carry water necessary for the irrigation of their lands, accomplish the result more cheaply, better, with less waste and more promptly, than if each attempted by a separate ditch to divert and appropriate the water which he himself needed, and it seems to me that there can be no doubt of the right of a community or an association of valid appropriators to thus combine. It is but a step further and in the same direction to say that this community can select or appoint an agency to construct their works and do the actual work of diversion and delivery of water for their use; and there is nothing in the law of this territory that prevents a corporation from sustaining just this relation to the water appropriators. Many of these corporations claim the absolute right of appropriation; and their business affairs are conducted on the theory that they as corporations are the owners of the water. There are many cases reported in the books wherein the courts refer to a sale of water by corporations as a business, seemingly thereby to recognize the right of a corporation to acquire by diversion a property in water. My attention has not been called, however to a case that expressly decides that either an individual or a corporation can acquire such a right. In applying the rules laid down in California by her courts, a distinction which is often

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lost sight of should be observed. California is a state, sovereign in all matters not expressly of national concern, and may regulate and define the tenure upon which property may be held within its territory. It may declare or abrogate the Common Law doctrine of riparian rights. It may declare ownership in water running in the streams and water-courses of the state in others than riparian proprietors, and may allow such ownership for purposes other than that of immediate beneficial use. It may delcare the diversion of water for sale to be for a beneficial use; and the constitution of that state taking effect January 1, 1880, Art. 14, Sec. 1, prescribes:

"Art. 14, Sec. 1. The use of all water now appropriated or that may hereafter be appropriated for sale, rental or distribution; is hereby declared to be a public use." * * *

(And we may add here, passim, that the same article provides that such use shall be subject to the regulation, and control of the state.) On the other hand, the Territory of Arizona is only a temporary government erected by the national government. We possess none of the attributes of sovereignty--those all inhere in the United States. The legislative power conferred by Congress upon this territory to legislate upon all rightful subjects of legislation, does not vest the territory with sovereignty, any more than does the charter of the city of Phoenix by conferring upon its Common Council certain legislative power--as of taxation--make the city of Phoenix a sovereignty. Indeed the political status of our territory to the United States government is almost if not quite strictly analogous to that of a subordinate municipal corporation to the sovereignty that creates it. We can look alone, then, to the legislation of Congress and to our own legislation within the limits prescribed by our own organic act, to ascertain the rights that may be acquired to divert and use water. We cannot go further than Congress has expressly and impliedly authorized it, for the doctrine of appropriation of water is in derogation of the common law rights of the United States as proprietor, and of the rights of its grantees. Reference to the acts of Congress, the one of 1866 and of 1877, (the Desert Land

Act), * will disclose the purposes for which Congress has authorized an appropriation of water. The act of 1866 defines those uses to be mining, agricultural, manufacturing, or other purposes. I do not think that a sale of water is a use of water, any more than a sale of wheat or any other commodity is a use of it; and that that was the intent of Congress we derive from its subsequent legislation of 1877 wherein it is provided that the water * * *
"shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes." But whether the act of 1866 authorized an appropriation of water for sale it is hardly necessary here to determine, for it is not claimed by any party to this suit that it acquired or initiated any right to divert water for sale, prior to the act of 1877. ** The act of our wwn legislature, providing for the appropriation of water which was in effect at the time of the adoption of the act of 1866, recognized the appropriation of water for mining, agricultural and mechanical purposes, and suggests no others, and that law is a "local law" which by the act of 1866 is made a measure of the right of appropriation. It would seem to me under this state of our law, even prior to the act of Congress of 1877, that neither a corporation nor an individual can by the construction of a canal and of a dam, no matter how elaborate or expensive, become the owners of an amount of water equal to the capacity of its or his canal, nor become vested with a right to divert any greater quantity of water than may be necessary to supply its or his needs as an irrigator, miner or manufacturer, and as a

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* The provisions of the act of Congress of March 3, 1891, amendatory of the desert land act of 1877 are elsewhere noted.

** The professed purpose of the organization of the Salt River Valley and the Maricopa Canal Companies as disclosed by their constating instruments and their practice relative to distribution of water will be noted in the finding of facts which is to follow. These were the only corporations in the Salt River Valley organized for the purpose of diversion of water prior to the act of Congress of 1877 known as the desert land act.

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quasi-agent to supply them sufficient for their needs, irrigators, miners or manufacturers. To say otherwise is to say that they may divert water and refuse to deliver it to those who may have use for it. If they are the owners of it they may store and impound it, or waste it and discharge it upon the desert, to the advantage of nobody. To say that they are the owners of it is to say that they have the right to control it, and they are at once a monopoly which it seems to me to be against the public policy to permit to be created. So, in my opinion, a canal company whether it be a mere association of persons who may or may not be land owners, or may consist indifferently of both, whether it be a corporation or whether it be an individual, cannot become the owner of water. The total amount of water that a canal company, as well as either an individual or an association of land owners may divert from a stream in this territory, is the amount they devote immediately and not mediately to a useful purpose. In other words, the amount of water needed by those to whom water can be supplied through such canal and to whom such water is actually supplied and no more.

The Constitution of Colorado provides:

"Art. XVI. Sec. 5. The water of every natural stream not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." A comparison of this language with that employed in the Desert Land Act, while there appears a difference in phraseology, discloses no difference in substance. The language of the Desert Land Act is. * * * "and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."
"See act of Congress entitled "An Act to Provide for the Sale of Desert Lands in certain States and Territories," approved March 3, 1877.)

U. S. Stat. 2d Sess. 44th Cong. p. 377.

Sec. 8. Art. 14 of the Colorado statutes provides that the general assembly of the state shall provide * * *

to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations. Certain of the statutes of that state contain provisions for the regulation of the purchase and sale of water.

In the case of Wheeler vs. Northern & Co., 10th Colo. 582, the Supreme Court of that state discusses at some length the power of a corporation to acquire property in water. After noticing the provisions of the Constitution, and thereafter the statutes which seem to recognize such a right, Helm, C. J., speaking for the Court, says: "But giving these rights all due significance, I cannot consent to the proposition that the carrier becomes a proprietor of the water diverted."

QUANTITY OF WATER THAT MAY BE APPROPRIATED.

The quantity of water to which a person may be entitled for irrigation is necessarily an indefinite quantity. Definite quantities of water have been spoken of throughout the proceedings in this case; the Tempe Canal Company, for instance, claiming 11,000 inches of water, etc. An inch of water is a definite quantity of water, as before stated, and is a unit of measurement in this valley. The law is, that water may be appropriated for a useful purpose, and a valid appropriation is necessarily limited to the accomplishment of that purpose, and there can be no definite appropriation of any amount of water over and above that which the necessity requires. The amount of water necessary for irrigation even on the same identical piece of land and for the same crop, may not be constant. It varies with the season, varies with the rain-fall, varies with the temperature, varies with the manner of cultivation.

The amount of water necessary for irrigation in this valley varies between very wide extremes, being affected by the character of the soil, which varies greatly, by its location, by the length of time during which it has been irrigated and cultivated, by the character of the crop, by the method of its irrigation, by temperature, by amount of rain-fall, and by the prevalence of the winds. It cannot be determined in advance what amount of land an inch of water will irrigate. If an inch of water

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is too small for a given quantity of land and the appropriator is limited to that amount, though he may have a valid right of appropriation of an amount sufficient for the irrigation of the land, he is deprived of his right; and on the other hand, if an inch of water is too much for the irrigation of the given extent of land, then the amount taken by an appropriator who takes an inch for such land exceeds that to which he is entitled, and others are deprived of its use. While it is to be desired to limit to the smallest possible quantity the amount of water that may be used by the land owners in this valley consistent with the proper cultivation of the soil, yet, as I have before said, the conditions are so varied that it cannot be done by fixing any definite quantity in advance of its use. The best that can be said is, that the extent of a man's appropriation must be measured by the necessity as it exists at the time it is attempted to be measured. It is in evidence in this case that there are lands which produce a full crop of alfalfa throughout the year with the use of not more than one inch of water to ten acres. It is also in evidence, as to other lands planted to alfalfa, that it requires for the production of a full crop on them, the use of half an inch to the acre. To fix a definite quantity to which the respective owners of lands might be entitled, we must resort to an average of the requirements of all the lands; so in the cases we just mentioned, taking them for the purpose of illustration an average between half an inch per acre and the tenth of an inch per acre would be three-tenths of an inch per acre, and in that event he whose land was irrigated with one-tenth of an inch per acre would have two-tenths of an inch per acre too much water, while the alfalfa on the land requiring one-half an inch per acre, if limited to the average found, would for the lack of water be destroyed. An average is never right, except accidentally; it is always too much or too little for any particular case.

PRO-RATING AND OTHER AGREEMENTS.

It appears from the evidence in this case that the owners of lands under a number of the canals, have entered into contracts with the corporations who claimed

to be owners of those canals, for the delivery of water to them for the purposes of irrigation. These contracts in general terms, between the Arizona Canal Company, the Grand Canal Company, the Maricopa Canal Company, the Salt River Valley Canal Company, and the Highland Land and Water Company, are similar. It is provided in those contracts that in the event of an insufficiency of the water in the river to supply all who may need it, those companies may respectively distribute the water among their customers, pro rata. This presents a question somewhat novel in this Territory, and one of very considerable importance. Its importance is suggested by what has elsewhere been said, that the right of a canal or ditch company or owner to divert water is dependent upon the needs of those whom it supplies who have a valid right of appropriation. It is always the policy of the law to declare that principle governing the dealings among men, which shall conduce to the greatest public good and as will best accomplish the result contemplated by the law makers--the observance of the public good being really the purpose of the law makers. The law of this Territory is, as before stated, that he who is first in point of time in the matter of the appropriation of water for the purpose of irrigation, is first in right to take that water. These pro-rating agreements render this provision of law practically nugatory, for it places all who are under these canals upon an equality so far as priority is concerned. There is no limit to the extent of land to which these canal companies may agree to furnish water, and therefore he who was first in the valley and took from Salt River the first water that was applied to the cultivation of the soil, may by these agreements be required to submit to a distribution of the water among the owners of such an extent of land that the water applicable thereto will not produce a crop. The carrying out of these agreements, then, may result in the deprivation of some who are entitled to water sufficient for the cultivation of their crops, and in the attempt to irrigate so considerable an extent of land none of them may be properly irrigated and thereby crops may be lost. This is a direct public injury and, as I think is hereafter shown, directly contravenes the policy of Congress as found outlined in its acts relative to that subject, and of our own local legislation, and the courts should not give countenance to that which so results. I shall discuss later, when

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considering the question whether a right to appropriate water for irrigation is appurtenant to the land for which the water was actually first appropriated, the policy of the national government in authorizing the appropriation of water. If I am correct in the conclusion reached (hereafter discussed), that the right to appropriate water for irrigation is appurtenant to the lands for which the water was originally appropriated (of course subject to forfeiture by abandonment), the same policy that forbids a segregation of the right of appropriation from the land, equally prohibits a diminution by agreement of the right to appropriate the quantity of water an appropriator has the right to take for the proper irrigation of his land--otherwise he might do indirectly that which he cannot do directly.

If he may by means of these pro-rating agreements consent to a diminution of his right to any extent, however slight, I see no reason why it may not be continued to an absolute destruction of the right itself. We are then confronted with the question: If these contracts be against the policy of the law and therefore invalid, what is the situation of these companies who are the real as well as the nominal parties in this proceeding? If what I have said as to the right of appropriation being simply a right to take and apply water to a useful purpose be true, then the right of a canal company to divert water from the river depends upon the right of those who have acquired a right of appropriation and who by agreement or otherwise have the right to have the water diverted through and carried by that canal for the purpose of irrigation, and if any agreement between such consumers and the canal companies is invalid because of being against public policy, we have presented for our consideration this further question as to the right of the consumer to water at all whether they have abandoned their right to the use of water, or whether their agreement with the company is simply invalid to the extent that it violates, if it does violate, the public policy outlined in the course of Congressional legislation, and that in that event they are entitled to the use of the water just in that order of time and priority as if the agreements had not been made. It appears that those persons who are now the owners of the lands originally irrigated by water taken by and carried through the Swilling Ditch, have entered into these agreements with

some one or more of these corporations. They have accepted from such corporations what purports on its face to be a grant of the right to the use of the water of the corporation. Have they then abandoned the right which had inured to the owners of these lands under that old ditch? And when I speak of the Swilling, I do so merely for illustration, for the same question applies to nearly all if not all of the canals in the valley. If there has been an abandonment by this acceptance by the land owners of the grant to the use of water, then the priority that the owners of these lands which were first irrigated had, has been lost.

The law does not favor abandonments or forfeitures. It can hardly be said, considering the evidence in the case, that these persons intended to abandon their rights, nor has there been an abandonment through laches, for the evidence discloses that there has been a continuous use by these persons of the water formerly appropriated by them or their grantors. Nor would a declaration of a forfeiture or abandonment now by the courts subserve that policy which we have conceived to be the one that prompted our congressional legislation.

I am then, of the opinion that these agreements to pro rate are void because in violation of our express statutory provision that he who is first in point of time, shall be first in right supplemented by the act of Congress of 1866, and of the express provisions of the act of Congress known as the Desert Land Act, and the amendments thereto of 1891, and of the policy of the government there outlined.

In Colorado the Supreme Court announced a doctrine relative to agreements among appropriators to pro rate apparently in conflict with the conclusion to which I have come:

Schilling v. Rominger, 4th Colo., 100.

In that case, however, which was decided in 1878, the particular agreement which was under consideration was made and had been acted upon before the enactment of the Desert Land Act. In that state there is a statute providing for a pro rating among consumers in certain cases, and the question came up again in the case of:

Farmer's Highline & Co. vs. Southworth, 21 Pac. Rep., 1028.

Each of the three justices delivered an opinion. The case is instructive and emphasises the difficulty of

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the question. Justice Hayt declined to give an opinion upon that particular question, stating that it would be time enough to do so when it was properly presented by the pleadings. Justice Elliott very vigorously assails the constitutionality of the statute, and among other things, says:

"A single illustration will suffice to show the disasterous consequences which would ensue if the pro rating statute should be made the rule for the distribution of water for irrigation, instead of the rule of priority:

"An irrigating ditch is constructed, the first and only one taking water from a small and natural stream. The first year, five consumers applied for and received, each, one hundred inches of water for the irrigation of their lands. The next year, the ditch being enlarged, five more apply and receive the like quantity. The third year, five more, and so on successively until thirty or forty consumers are located under the ditch. Perhaps the first five might be required to pro rate with each other in times of scarcity and their appropriation being practically equal in point of time. But under the statute the first five would also be compelled to pro rate with all subsequent consumers until the amount of water that each would receive would become so infinitesimally small as to be of no practical value, and would eventually be entirely wasted before it could be applied. It requires volume or head of water to irrigate successfully. Under circumstances like these, what mockery to pretend that the pro rating statute is a reasonable regulation provided for the distribution of water for the early settlers and prior appropriators who bought and improved their lands and expended their money, relying upon the doctrine that priority of appropriation shall give the better right as between those using water for the same purpose.

"It may be said that the foregoing illustration is founded upon an extreme and unusual case; but extreme cases are often necessary to test the correctness of a general rule."

Chief Justice Helm, on the contrary, maintains the constitutionality of the statute upon the grounds, first, that it would be wholly impractical to apply the rule of prior right among a large number of consumers, and second, the view that that statute be unconstitutional, rendered

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other legislation delusive; that other provisions beside the pro-rating section must fall.

The second reason assigned by Chief Justice Helm does not concern us, because the result he anticipates is one dependent upon their statute, and would be inapplicable here. I cannot concede that his first reason is valid--that it is difficult to ascertain facts upon which rights are predicated is not a reason why a court should refuse to administer justice. In a dispute between two the question of priority is ordinarily easily ascertained, and the Court will restrain an infringement by one upon the rights of the other. Why the Court should decline so to do when the right of the first is infringed by twenty or by five thousand persons I cannot understand. The mere difficulty of ascertaining the fact cannot and ought not to change the rule of law.

The distinction between the Colorado case and the one at bar, in that that was based upon a statute compelling pro rating, and this involves the right to effect the same by voluntary agreement of the parties affected, is noted; but I, as stated before, am of the opinion that parties cannot by their agreements thwart the whole scheme of Congress devised for the reclamation and cultivation of the desert lands.

While the relations existing between the several corporations and their customers cannot in this proceeding be directly adjudicated and the judgment of the Court cannot bind those customers, nevertheless, as I have before said, the determination of the right of these corporations to divert water must depend upon the right of their customers to have water supplied to them--hence the consideration of the validity of these contracts.

It might be suggested that there is a limit to the extent of lands for which canal companies might contract to deliver water; that the canal companies themselves have fixed a limit; the Tempe, for instance claiming a right to divert 11,000 inches of water, the Salt River Valley Canal Company 6,000 inches, the Maricopa 6,000, the San Francisco 4,500, the Grand 10,000, the Utah 2,500, the Mesa 6,000, the Highland 6,000 and the Arizona 50,000--this makes an aggregate of 96,000 inches. It may be argued that none of them would attempt to contract to deliver water in excess of their carrying capacity. But this statement of their claim shows a capacity seven or eight times as great as the volume of water in the river

at its lowest stages. So the limit to which they should be confined is already passed--were it not this suit would not be pending.

There is another provision of some of these contracts, which has been the subject of much discussion among counsel in this case, that requires the attention of the Court. The contract into which some of the purchasers entered with certain incorporated companies, parties to this proceeding, for what have been termed "water rights," provides that neither the selling of water to the purchaser nor the fact that the purchaser uses water out of the canal, or that the water sold by the canal company shall be used to irrigate any particular tract of land, shall give any right to the purchaser or to the owner of the land to the continuance of the supply, or give to the purchaser any claim to the use of water for any other time or times than that mentioned in the contract, nor shall such use be construed into a custom or usage or precedent for the use of water for any other year or time than that mentioned in the contract, nor shall such use be construed into a custom or usage or precedent for the use of water for any other year or time than that mentioned in the contract; and it is further provided in those contracts that the purchaser waives any and all right or claim which he may have by virtue of any statute, custom or law, of the use of water from the canal after the expiration of the period of time limited by the contract.

It is argued by the plaintiffs that the provisions of this contract constitute an express waiver by the purchaser, of any right of appropriation of water which he may theretofore have had. It will be noted that the waiver is a waiver of any right which the purchaser may have by virtue of any statute, custom or law to the use of water from that particular canal after the expiration of the period of time limited by the contract.

Counsel for the defendants very ingeniously and plausibly argue that this does not constitute a waiver or abandonment by the purchaser of any right he may have acquired before entering into the contract to appropriate water from the river, but that it only defines his rights as against the canal company. It seems improbable that owners of land the cultivation of which depends upon the use of water, should voluntarily abandon a right, once acquired, of appropriation of water--there is nothing in the evidence indicating that there was any consideration

for an abandonment. On the contrary it appears that the owners of these lands continued the use of water for their cultivation and made improvements, and planted trees and vines for the enjoyment and maintenance of which the right to use water for a time extending far beyond the period limited by the contract is necessary. By their acts, by their conduct, they evinced anything but a purpose to abandon a right, the possession of which was so essential.

In the case of South Boulder vs. Marfell, reported in 25th Pacific Reporter, at page 504, the Supreme Court of Colorado, in discussing the rights of a consumer who had entered into an agreement with a canal company, in which agreement there was a provision that upon the failure of the consumer to pay a certain annual rent or delivery charge, he should forfeit and relinquish all rights and claims whatsoever, both against the company and in and to the use of water from the ditch of the company. It appeared that the consumer had refused to pay the water rental, and litigation arose. Chief Justice Helm, speaking for the Court, says:

"Whether appellees could by contract forever relinquish rights relating to the water conferred upon them by the Constitution and statutes, we need not determine. The instrument itself in our judgment does not indicate any such intent. It contains no declaration that upon a failure to accept the annual proposition and make the annual contract the consumer abandons all right to obtain in any manner water from the carrier's canal. In the absence of an express declaration or clear implication to the effect that such omission or failure should produce a forfeiture of constitutional and statutory rights collaterally provided for in the agreement, such collateral rights would in any event, unquestionably remain. The simple and obvious meaning of the provision is, that the rights and claims intended to be forfeited are those mentioned by the instrument itself."

The canal company is but a carrier, and I know of no principle of law in the absence of statutory provisions that compels it to carry against its consent or will.

That one has a valid prior right of appropriation of water from Salt River, in itself gives him no right to have that water conveyed to him through the works constructed by another whether that other be an individual or a corporation. He can only do that by and with the

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consent of the carrier. Nor is there, it seems to me, any reason why the carrier may not limit the period of time during which he or it will consent to carry the water that another has appropriated. But however that may be, it is only necessary to decide for the purpose of this case, that these agreements do not operate to deprive the consumer of his right of appropriation.

As has been before said, the right of a canal owner, whether a corporation or not, to divert water, depends upon the fact that there are persons, the owners or occupants of land having the right of appropriation of water for their irrigation, whom they supply with the water for that purpose. If, then, a canal company have agreements with its customers or any of them limiting the time during which it will carry water to such of those who have a valid right of appropriation, it would after the expiration of that time have no right to divert the water to which such persons are entitled.

RIGHT TO APPROPRIATE WATER APPURTENANT TO THE LAND.

It appears from the evidence that some of the canals, the owners of which are parties to this proceeding, were constructed by associations of individuals without any attempt at corporate organization. The associations have a nominal capital stock, and certificates of the ownership of that stock were issued to persons who were the constituent members of the organizations, and by the practice of the association there was incident to the ownership of each of these certificates or shares of the stock, the right to the use of a proportionate part of the water diverted by and conducted through the association's ditch. In the first place not all of the shares were issued, but have from time to time been issued, so that the whole amount of the capital stock is now outstanding. These shares were transferable much as shares of the capital stock of a corporation are, by assignment and transfer thereof on the books of the association. Most, if not all of the shares of this association have in that manner changed hands, and persons now the owners of such shares by such transfers, claim as incident to their ownership, certain rights to the use of water. It is urged by some of the defendants in this case that the right to use water

is a right lying in grant, and that it cannot be transferred by parol, but that it must be done by deed, and that the attempt to pass such rights by assignment of the shares of the stock in the manner adopted, results in an abandonment by the original appropriator of his appropriation of the water, and that the grantee or transferee of the stock becomes simply an appropriator himself, his right to take it dating from a time subsequent to the time such share was transferred to him. Of these associations the Tempe Canal is one. If this be the true construction of the law, then from the evidence it would appear that the rights of most of those who claim the right to the use of water diverted by and conducted through the Tempe Canal, would be subsequent to that of those who obtained the right to use the water diverted by and through canals and ditches constructed long since the Tempe Canal. It is and must continue to be until finally determined, a question of very great interest and importance to the citizens of the Territory, whether a right to divert and use water for the irrigation of land is an appurtenant to that land, or whether the right can be a distinct right to take water, independent of any ownership or occupation of any land whatsoever; and a solution of that question affords us the means of the determination and definition of the rights of such shareholders. If what we have said before relative to the appropriation of water in this Territory be true, it follows, I think, that a man cannot be the owner of a right to appropriate water from a river in this Territory, unless he has for it some beneficial use. It is in evidence in this case that there are owners of the capital stock of some of these associations, who have not any lands and who have never used any water whatsoever for the irrigation of land, or for any other purpose, but have from year to year and from time to time let out, leased, or attempted to lease their right to the use of water to some other persons who were the owners or occupants of land.

It further appears that some of the owners of shares to which by the practice of the company there were incident the right to use water from the canal while they have been the owners of land for ten years or more capable of being irrigated by the water taken from that canal, have not cultivated the same or applied water to it nor permitted any one else to use the same or apply water to it, but have leased their alleged right to use water to others to

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take and use the water diverted and conveyed by the canal. There is one specific instance wherein it appeared that a man entered a section of government land under the provisions of the Desert Land Act, reclaimed the same by means of his right to the use of the water, derived from his ownership of certain shares in the capital stock of the canal association, who has never since cultivated that land or any part of it, or permitted any one else to do so, but has allowed or attempted to allow others to use the water to the permanent right to which, in his proof required under the Desert Land Law to entitle him to a conveyance of the land, he adduced evidence.

There is now a scarcity of water; were there not, this suit would not be pending. What can be the right of this man who claims to be the grantee of the government, of land under the provisions of the law which required that he should have the right to the permanent use of the water for its cultivation, as between himself and those whom he has permitted to use that water? There is not enough for both. Either the lesees of this right who have used the water and thereby made productive lands in the valley, or the lessor who has not used the water, is the owner of the right to such use--and this is an important question, which sooner or later must be determined. While some of the owners of lands claiming the right to use the water for the irrigation thereof, are parties to this suit, there are other parties to this suit, viz: the corporations, who have constructed, operated and maintained the canals, who are not the owners of land. Nevertheless, under our view of the law, it is the individual ownership of the land and the right to use water therefor, to which we must look to determine the rights of the parties to this proceeding. If one of these corporations or associations, having constructed, maintained and operated a canal, does not apply the water to some beneficial use and has no customers who do apply the water that they divert, to some beneficial use, it has no right to divert the water at all. Permanence of ownership of land, and, under the conditions in this country, of right to appropriate water necessary to cultivate it, are necessary to the best development and highest degree of production of that land, and a course of dealing between individuals themselves or between individuals and corporations, whereby the right to the use of water is abridged and made less than permanent, is directly injurious to

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the general good, and consequently against public policy. While one who has the right to divert and use the water may abandon that right, or may forego the use of the water for a time without abandonment, yet there cannot, it seems to me, be a course of dealing between persons who claim a right to the diversion of water whereby such use of water may be a mere matter of barter and sale.

The greater portion of the cases that have been decided by the various courts of the Pacific Coast states and territories, involve questions concerning the rights to the use of water for mining purposes. The doctrine of the right of appropriation of water and principles governing its use was first announced in cases involving the right to such use of water, and to those cases the courts have latterly looked for the principles that should obtain in the determination of the rights to the use of water for irrigation. This, I think, has led to some confusion, because the analogy between the use of water for mining and its use for irrigation is not complete. In using water for mining, the use is strictly a mechanical one; it is needed for no other purpose than that its mechanical power shall be applied to the separation of gold from the earth that contains it. Hydraulic mining is a California invention and the tremendous mechanical effects produced by the use of water in mining under that system has excited the admiration, and almost the wonder of engineers. But in no sense is its use for that purpose similar to its use for irrigation. The water is not consumed in the process of mining. It is true that the water was often lost because of the fact that it had been used in mining, and that it was often so deteriorated that it was unfitted for any other use, but this was merely incident to its use as a mechanical power; and not necessarily incident. It is a use as distinctly mechanical as if it had been used for the propulsion of machinery. The force of the water by its direct impact of the particles of earth containing the precious metals, separates the earth from the minerals. The fact that there might not have been intervening between the water itself and the object of the mechanical operation any machinery or mechanical appliance, makes no difference. Upon the other hand, water for irrigation is not in any sense a mechanical use. The element of force or power does not concern the irrigator of land, except to the mere extent that it serves to convey the

water to him; that is, by the force of gravity, water will deliver itself from a source higher in elevation than the point at which its use is desired, to that point. No amount of rain would help the miner in his operations except indirectly by storing for his use a source of power. On the other hand, rainfall renders the use of water unnecessary, temporarily, to the irrigator. The requirements of mining, just as of the miller, demand a constant, uniform and definite supply of water. The requirements of the irrigator varies both in time and quantity. If a miner or a miller has acquired the right by grant, license, prescription or otherwise to the use of water for a given mechanical purpose, he has acquired the right to a definite quantity of water that is commensurable. And again the analogy fails when we come to consider whether the use to which water may be put may be changed, or whether the locus of its use shall remain as at first. In mining, the use of water cannot be confined for any considerable length of time to a particular locality, because as the process of mining proceeds, the earth is exhausted of its minerals and the water must be used elsewhere--and hence it was the policy of the government that it should be so used, because mining operations could not be carried on otherwise.

As each cubic yard of gravel containing mineral is subjected to the mechanical process of hydraulic mining, the purpose of that process has been served and the mechanical power of the water is applied to the next cubic yard of earth, and so on until the entire field has been subjected to the process, and the use of water to that particular purpose in that particular locality has ceased to be beneficial; while with irrigation, the application of water to any particular square yard of earth does not render unnecessary the future application of water to it; in fact the application must be continuous. So that in considering the cases, we must not lose sight of this distinction between the use of water for mining, which is a mechanical use of the water or a use of water for its mechanical power, which is accomplished by one application to any locality, and the use for irrigation which is continuous from year to year. It is, no doubt, a failure to note these distinctions that has led to the belief by some that the use of water for irrigation may be changed from place to place at the will of the appropriator.

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It has been the policy of the general government during all that period of time covered by the events that we are discussing, to induce the rapid settlement upon and development of public lands, and to that end it has proposed to bona fide settlers, liberal terms, upon compliance with which they can obtain title. The Desert Land Act, for instance, provided prior to its recent amendment (and that is the law under which title to most of the lands in this valley was acquired), that a citizen of the United States might settle upon and acquire the title to 640 acres of land upon the condition that he would reclaim it from its desert character by the application to it of water. The price of the land was fixed at a dollar and a quarter an acre, and express license was given by the act to appropriate any waters of the public streams for the purpose of reclamation and cultivation.

The desire of the general government to have these lands settled upon and thereafter cultivated to the highest degree attainable, is what prompted it to this liberality in its terms. To say that the water so appropriated for the reclamation and cultivation of that land is not appurtenant to it, is to make possible a direct fraud upon the government and the defeat of its evident purpose. To illustrate, we may assume a case. Suppose that in a stream in the Territory there is a volume of water flowing sufficient to irrigate 640 acres of land and no more. A, locates 640 acres of land under the Desert Land Act, and diverts this water and appropriates it for the reclamation of that 640 acres. He then in due course prescribed by the statute, makes proof of his reclamation and appropriation of the water and pays his dollar and a quarter an acre and obtains from the government the title. The government expects of him thereafter, and has the right to expect of him, no less than that he shall diligently and in good husband-like manner cultivate that land. If however, he has the right to segregate from that land his water right, we may further suppose that B settles upon the same stream upon another 640 acres, and purchases of A his right to appropriate water and he, (B) may then in the same manner as did A, acquire a title from the government. And so we may repeat the process until we have an indefinite quantity of land the title to which has been acquired from the government in direct violence of the intention of the government--for upon our hypothesis there is not sufficient water

to irrigate more than 640 acres. It is a direct fraud upon the government and a direct perversion of its bounty which could not have been intended.

So, in my opinion, when one under the Desert Land Act has appropriated water for the relcamation and cultivation of desert land, he cannot segregate it, as it is appurtenant to the land. And what is said here of lands acquired under the Desert Land Act applies equally to land acquired under any of the provisions for the sale of public lands. The United States government did not propose to sell its land to private owners for speculative purposes--on the other hand, stringent regulations have been prescribed to prevent mere speculators from acquiring the title. The whole purpose has been to induce bona fide settlers who will cultivate the lands, to take them up. What a perversion of such intent if he who took up a timber claim, for instance, and should, after fairly starting the growth of timber, the very object the government had in view in giving him the land, be permitted to segregate from that land the right so generously given him to appropriate water, and make of it a subject of barter, sale and speculation--and by such segregation destroy that the existence of which was a condition to his title.

And in strict consonance with the view expressed that our territorial and national legislation contemplates permanency of right to use water upon land reclaimed is the amendment of March 3, 1891. That act was approved after the trial of this case, but it makes no change in the law as I understand it so far as the right of appropriation and use of water is concerned. It requires that at the time of filing the declaration required by the desert land act of an intention to reclaim desert land the declarant shall also file a map of the land which shall exhibit a plan showing the mode of contemplated irrigation, which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source whence the water is to be obtained:

26 U. S. St. 1096. ch 561 Sec. 4.

Can it be imagined that any plan for irrigation contemplating or disclosing a right to the use of water temporarily would be accepted by the government under this provision? Or a right less than a permanent one? It

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cannot be conceived that the "reclamation" meant by that act, and by the desert land act of which it is amendatory, is a mere temporary one. And if the right is severable from the land is not the right, at the will of the land owner, merely temporary--if the right is segregated does not the land relapse into its desert character? If by some casualty, as a flood, his lands were destroyed or rendered useless for agriculture it is possible that he might settle upon another piece of land and apply his original appropriation of water to it, but by any voluntary act of his own, we do not think he can effect the segregation.

It is true that one who has acquired land and the right to appropriate water for its cultivation, may abandon that right and by his own neglect, laches, or expressed intention, forfeit it, but in so doing he exhibits a want of good faith toward the government by whose bounty he obtained title, and he should not be permitted to designate the beneficiary, by granting to some particular person not the grantee of the land itself, such right--if he has lost his right to appropriate, the common stock of water for public use is increased to that extent and can only inure to the next comer, who may appropriate anew, dating his appropriation from the date he actually makes it--a pretended grantee cannot "tack," if that term can be so applied to the process, his pretended grantor's right to his own.

I have come to the conclusion, then, that the right of appropriation of water for the cultivation of land becomes permanently appurtenant to that land, for without it the land is worthless; without the land the appropriation could not have been made.

It would follow, then, from what I have said as to appurtenance of the right to appropriate water to the land for which the appropriation was made, that a conveyance of lands under the Tempe Canal operates as a transfer with it of the water-right appurtenant to it, whether there be a transfer of the stock representing that right or not--the transfer of the stock being merely a convenient mode of making known to the Canal Company the fact of the purchase of land and the right to the use of water therefor. I am of the opinion that the transfer of stock cannot operate per se to transfer the water right. And so it must be said of those corporations whose stock is supposed to represent water-rights.

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For the purposes of this suit it is not necessary here to decide what is the status of any shareholder who may have neglected to himself use the water the right to which is evidenced by his ownership of shares in the canal. If he shall have leased or attempted to lease his right to another and permit that other to assert by reason of such lease a right to the use of water, the right of that other is subordinate in point of time to that of any appropriator who made his appropriation prior to the time of the attempted lease. In other words such lessee's rights, if he has any at all (as against others than the alleged lessor), are those of an independent appropriator dating from the time of his first actual use of the water. He cannot acquire any priority against others by virtue of any transfer or lease from the owner of the shares, or by his consent. The owner of such shares, unless he himself be the owner or occupant of land upon which he uses the water, or of a mill which is propelled by the water, has not by reason of his ownership of stock, any right of appropriation, and of course he can transfer none. And when an owner of stock who is also the owner of land for the irrigation of which the water, the right to which is evidenced by his certificates of stock, was appropriated, and who has leased the same and failed and neglected to cultivate his own land for a long period time, seeks to obtain water, the question of his abandonment will arise. In the meantime he cannot claim for himself; and the rights of his lessee are subordinate to others in point of time, in the order of first actual use.

And as a necessary conclusion it must be decided that the owners of shares who have not a beneficial use for the water, have no right to divert it.

PRIORITY OF APPROPRIATION AMONG CONSUMERS UNDER THE SAME CANAL.

It has been frequently decided by the courts of last resort in most of the states and territories on the Pacific Slope, that the time to which is to be referred the vesting of a right of appropriation of water is not necessarily that time at which an actual diversion and appropriation of the water to the contemplated use, is made; it may

antedate that time. It is to be referred, in this Territory, to the time when the appropriator begins the construction of the means of diversion of the water and its conveyance to the point of use, if he shall have thereafter prosecuted the work of such construction, with reasonable diligence to completion, and made an actual application of the water to the contemplated use. What constitutes reasonable diligence, has upon particular facts, been the subject of frequent judicial decision. From these decisions it may be deduced that in determining what constitutes reasonable diligence in such cases, there must be taken into consideration the difficulties inherent in the natural conditions attending the enterprise, the magnitude of the work, the difficulty of obtaining labor, and material, etc. Mere want of pecuniary ability will not warrant delay, nor, it has been decided in one case, illness of the projector of the enterprise. So long as we have to determine only the rights of successive appropriators who have each provided his own means of diversion and conveyance of water, the rules are of each application.

The actual application of water to the contemplated purpose and its diversion from the original stream are two element that must concur to constitute a valid appropriation. It is not necessary, however, that each of those concurrent acts should be performed by the same person: One may divert and another may make the application of water so diverted, and their combined acts would constitute a valid appropriation. And so, if a number should combine who are the owners of land, desiring to appropriate water for its irrigation, may agree with another, either an individual or a corporation, that that other shall provide the means of the actual diversion of the water, and thereafter their application of it to the purposes of irrigation would constitute a valid appropriation; but the right of appropriation is vested in those who make the actual application of the water to the useful purpose.

As has been before suggested, most of the consumers of water in the Salt River Valley obtain their water from ditches and canals constructed by others than themselves. The act of diversion, however, as we have said, and the application of it to the purposes of irrigation, constitute a valid appropriation. As, however, between those who take from the same canal or ditch, it has been suggested

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that those in whom is vested the right to appropriate water in the aggregate equal to the capacity of the canal, are equal in point of priority, and further than that they are all prior as appropriators to any one who may have appropriated by means of some other ditch and canal, even though such other ditch and canal may have been begun and completed before the completion of the first after, but that actual appropriation may have been made under such other canal before some of the appropriations under the first if the Grand Canal through which the former take, was first commenced, and work thereon prosecuted with reasonable diligence to completion.
It is argued that where, for instance, a corporation undertakes the construction of a canal of a capacity sufficient to carry water for the irrigation of say a hundred thousand acres of land, that a reasonable time shall be allowed from the initiation of the enterprise in which to complete it, and that all who take water by means of that canal may date their appropriations from the time of the commencement of the canal. From what has been said before, this doctrine cannot prevail. The right to appropriate has its origin, as we have before said, in our express statutory provisions upon that subject, and they all contemplate that he who is first in point of time, shall be first in right. It can be readily seen by assuming a case, how unjust any other rule would be. Let it be supposed that a large canal enterprise is undertaken. A canal is surveyed and its construction undertaken of sufficient capacity to irrigate a hundred thousand acres of land, and to divert from a natural water-course for that purpose the entire quantity of water flowing in that course. It can be easily supposed that the projectors of a canal might impose such terms either as to the use of water or the cost of its delivery as to deter the owners or occupants of land from taking water from that source. It is, then, obviously unjust that the public should be delayed by the want of agreement between a canal company and its proposed customers, and as equally unjust to say that the public should wait until such disagreement shall have been adjusted. The true rule, it seems to me, should be, that when a canal enterprise is undertaken, that those who being the occupants or owners of land have, relying upon their agreements then contemplated with the canal company or owner have gone about the relcamation of their lands

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and the preparation of them for irrigation by that means, should be deemed to be appropriators of water dating their appropriation from the commencement of such canal provided that it shall have been completed with reasonable diligence. All others should be postponed as between themselves and appropriators by other means of diversion just in the order of the actual time of their application of the water. There can be no doubt, it seems to me, from a consideration of the evidence in this case, that the San Francisco Canal, the Tempe Canal, the Salt River Canal, the Maricopa Canal, the Utah Canal and the Mesa Canal have been enlarged so that their capacity to divert water has been from time to time increased; and I am of the opinion that the order of the priority of the consumers of those several canals, should take precedence in the order in which they actually completed their appropriation by the actual application of the water to the irrigation of the soil. The Tempe Canal did not divert in 1870, 11,000 inches of water, nor did it do so for a very considerable length of time after that date; nor did the Salt River Valley or the Maricopa Canals for a long time after the commencement of their construction, divert such an amount of water. But each and all of them have gradually increased the capacity to meet the increased demand of new irrigators. And it may be said of the Arizona Canal and the Highland Canal, that while they are now of the capacity originally designed, that nevertheless their appropriation cannot be measured by that capacity. Their right of diversion must be measured by the rights of those who have valid rights of appropriation of the water of Salt River, who have also, by agreement or otherwise, a right to divert the water through the Arizona and the Highland Canals.

Reviewing the entire doctrine of the right of appropriation of water, taking into consideration the fact that the water is public property subject to the use of the public, I cannot accede to the proposition that any canal company can by the beginning of the construction of a canal of large capacity, acquire the right to divert a quantity of water equal to the capacity of its canal, independent of the rights of actual appropriators. It must be admitted that if the Arizona Canal or the Highland Land and Water Company have no customers who have need for water and a right of appropriation of water, that neither of those companies

could divert any water at all. And it cannot, it seems to me, be said that either of those canal companies or any canal company or association, has a right to divert water as against one who has actually appropriated water by the concurrence of the acts of diversion and application to the purposes of irrigation, even though such company may not then have customers whose needs require an amount of water equal to the capacity of such canal.

It has been before said that it is my opinion that pro rating agreements are void; and yet, where a number have actually appropriated at one and the same time, their rights are equal. If they should have attempted to appropriate more water than was left for appropriation, they have perpetrated somewhere a fraud upon the government. As between them, however, nothing remains for the Court to do but to compel them to pro rate. As long as there is water enough for all, no difficulty arises.

USE OF WATER FOR MILLING.

Charles T. Hayden is the owner of a flouring mill in Tempe, the water for the propulsion of which has since 1874 been obtained from Salt River by means of the Tempe Canal, being diverted in the first instance by the Tempe Canal, and thence conducted to the mill through what is known as the Kirkland and McKinney Ditch, whence, after propelling the mill, it is discharged into the river. He claims that the defendants have by the diversion of the water above him, deprived him of the water which he had appropriated for the propulsion of his mill, and the use of which he had enjoyed before the construction of the Arizona Canal and the Cross-Cut Canal.

As before stated, Hayden instituted a suit subsequent to the commencement of this, seeking an injunction against certain of the defendants in this case to restrain them from diverting the water from his mill. A plea, in abatement, that this suit was pending was filed, and it was urged that the plea in abatement should be sustained and the Hayden's separate suit be dismissed. Practically it would make no difference whether the plea should be sustained or overruled, for Hayden's right must be determined. If I am right in the statement elsewhere made that the constituent members of the Tempe Irrigating Canal Company, of whom Hayden is one, are here not as individuals

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seeking the enforcement of their several rights, but that they are here as co-owners of a canal asserting the right to divert by means of that canal a definite quantity of water from Salt River, then the pendency of this suit will not sustain a plea in abatement to Hayden's individual suit. If the contrary be true, then the plea should be sustained. But in that event Hayden's rights remain a part of the subject matter of this suit. The only question on the plea, of any importance, that could arise, is one of costs--that can be settled on a motion to tax.

Upon the evidence in the case, the court now finds against the defendants in the suit of Hayden vs. the Arizona Canal, et al, on the plea in abatement.

The evidence discloses that until 1888 the water to supply irrigators under the Salt River Valley, the Maricopa and the Grand Canals was diverted from the river at a point below the point whence the Tempe Canal makes its diversion. That since that time the Cross-Cut Canal has been constructed, so that water may be and has been diverted through the Arizona Canal at a point above the head of the Tempe Canal into the Cross-Cut and thence to the Salt River Valley, the Maricopa and the Grand Canals. Prior to the construction of the Cross-Cut Canal, the water necessary for the needs of irrigators under the Salt River Valley and the Maricopa Canals was diverted from the river at a point below that at which the water used in the propulsion of Hayden's mill was returned to the river, and their diversion by the means theretofore used could not in the nature of things interfere with the use of water for the mill.

The point whence the diversion by the Tempe Canal was made is above the point where the Grand Canal, prior to the construction of the Cross-Cut, made its diversion--the head of the Grand Canal, however, is above the point at which the water used by Hayden's mill is returned to the river.

It is urged by counsel for defendants that under our statutes the right to appropriate water for irrigation is preferred to its use for mechanical purposes, and Sec. 3203 R. S. 1887 (a re-enactment of Howell Code p. 501) is cited, wherein it is declared that "the right to irrigate the fields and arable lands shall be preferable to all others," and that therefore the right of an appropriator of water for mechanical purposes must yield to that of an irrigator

even though the appropriation by the irrigator be subsequent in point of time to that of him who uses water for mechanical purposes.

The question is a new one, it seems, as counsel have not cited any decisions involving the exact question.

In California there was a statute (1852) giving the right of action to any one who had settled upon public lands for the purpose of grazing or cultivation against trespassers, but provided that "if the lands so occupied and possessed contain mines of any of the precious metals, the possession or claim of the person occupying the same for the purposes aforesaid shall not preclude the working of such mines by any person or persons desiring to do so, as freely and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes." This act distinctly gave to miners the preference over agriculturalists on the public lands in the state. Disputes between miners and agriculturalists upon public lands frequently arose, and this act became the subject of judicial consideration.

Stokes vs. Barrett & Co., 5 Cal., 37
McClintock vs. Bryden, 5 Calif. 97.
Martin vs. Browner, 11 Calif. 13.
5th Cal., 308.
6th Cal., 45.
15th Cal., 100.
16th Calif., 153.
23rd Calif., 452.

The court in those cases seemed to place the preferred right of the miner as much upon the policy of the national government in reserving mineral lands from occupation and sale as upon their own local statute. The mere possessor of government public lands would individually acquire no right thereto--could not maintain an action for ejectment or for trespass, ordinarily. However, certain rights are given to such possessors in most of the western states and territories, as the right of possession and undisturbed enjoyment as against all but the United States; and it is being the early policy of California to encourage mining, deeming it paramount to every other industry, the legislature withheld these possessory rights in favor of the miner. But it was distinctly held in that state that miners could not invade

the possession of a private owner of land, whether such owner was an agriculturalist or not. It was only where neither the miner nor the agriculturalist had title to the soil that this preference was given to the miner.

The act of Congress of 1866 confirms rights to the use of water for mining, agricultural, manufacturing or other purposes that shall have vested and are recognized by the local customs, laws and decisions of the Courts. This act, as I have aforesaid, vitalized the acts of our legislature, embodied in the Howell Code, the use of water for milling was made distinctly subordinate to its use for agriculture--so that he who made an appropriation of water after 1864, and before the Desert Land Act of 1877, made it subject to the preferred use of irrigators.

But whether the use by Hayden of the water of Salt River in the manner in which it is used does interfere with the use of it for irrigation, need now I think, be decided, for I am of the opinion that the act of 1877, the Desert Land Act, gave the right to appropriate water not theretofore appropriated, for milling purposes as well as for irrigation. The grant is there distinctly given for the appropriation of water for irrigation, mining and manufacturing. I do not think any preference was intended to be implied from the order in which the uses are named--wherever a preference is intended it is expressed.

So from 1877, at least, Charles T. Hayden has been a valid appropriator of water for the propulsion of his mill.

It is urged in the argument that Mr. Hayden has lost his priority by reason of the transfers of his stock at various times.

The history of the ownership of the shares claimed by Mr. Hayden need not be followed--that he has continuously used the water is sufficient evidence that his appropriation has been continuous and uninterrupted, and that there was no actual abandonment--that there may have been an intermediate grantee of the mill and of the appurtenant water-right does not alter the matter. It does appear that the mill and the shares of stock were at one time--and during the pendency of this suit--conveyed and assigned to one J. A. Ford; but it also appears that Ford was really but a trustee, and that conveyance and transfer cannot operate to defeat Mr. Hayden's rights.

REASONABLE USE OF WATER.

Incident to the right of the inhabitants of this Territory to appropriate water for irrigation or other uses, is the restriction that such use, including the means and manner of diversion, distribution and application, shall be reasonable.

That the means of diversion shall be reasonably adapted to the purpose, to the end that the water that is made free to the public shall not be diminished beyond the quantity sufficient to supply the actual needs of the appropriator. That the methods of application of the water to the purposes for which it is appropriated shall be of a character to insure as small a consumption of water as is reasonably consistent with the accomplishment of that purpose.

No man has a right to waste a drop of water--any excess of water that he diverts and wastes by carelessness, negligence or ignorance of economic methods of cultivation or irrigation, or failure to adopt them, he unlawfully diverts.

It appears in the evidence in this case that large quantities of water is allowed to flow in the various canals and ditches to supply stock with water. This necessarily involves a great waste of water--at a small estimate I should think the evidence discloses an amount of water wasted thus sufficient, if properly applied to irrigation, to make productive 10,000 acres of land. The amount of water actually consumed by the stock is insignificant--the loss is that due to evaporation and seepage in its long passage through the various canals and the miles of subsidiary ditches. This, it seems to me, to be an unreasonable use of water. I do not mean to deny the right to the use of water for stock, for it has always been a recognized use, like that for domestic purposes. But it cannot, I think, be diverted from its original course for that purpose. It has always been the law that stock and the public could drink from a water course--but not to impede its flow or materially diminish its quantity for that purpose. Instead, I consider the law to be, of bringing the water diverted from a natural water course a long distance by means necessarily involving an enormous proportionate waste, to water stock, the stock must be taken to the natural water course to drink, or otherwise provided for.

If the water be in the ditches on a man's ranch in the course of application directly to irrigation, it might be permitted to allow stock to drink of it--but it is an unreasonable use of it to permit water to be in the ditches for that purpose alone.

Another matter for our consideration in this connection, is the right of the appropriator of water to the exclusive possession, maintenance, operation and use of the conduit, as he has prepared it, for the diversion of the water; whether or not, having constructed such a conduit, he thereby has the right to have the water flow in the river to that conduit and thence to the point where he desires to use it, or whether his right is limited to the actual delivery of water to his lands, with or without increased expense to himself, whether it be by means therefor provided by himself or by means provided by someone else. To illustrate: If those who operate the Highland Canal should divert from the river the water to which the consumers under the Tempe, the Mesa, the Utah and the San Francisco are entitled, and yet should that company deliver the water so diverted through its own canal to and upon the lands of those under the other canals named, in the quantities to which they are entitled to it, would those who constructed and since have operated and maintained the Tempe Canal, the Utah Canal, the Mesa Canal and the San Francisco Canal, have any just cause of complaint? Or have the owners of those last mentioned canals a vested right not only to the use of the water for the purpose of irrigation, but also to have it conveyed by means of their own conduits?

Following out to their sequence the propositions I have advanced as to the ownership of water and the right of appropriation, I am of the opinion that the entire right of the appropriator for irrigation is limited to the delivery of water, sufficient for the purpose, upon his land at a point whence he can use it for irrigation, and that so long as such water is so delivered he may be indifferent to any acts of diversion or obstruction of the flow of water in the natural water course, and has no just cause of complaint therefor. He might be compelled to adopt a more expensive means of delivery of the water to his lands if the means that he has already adopted are such as would result in a loss of water; for, as we have repeatedly affirmed, the water is public property; it is a common stock to which all may go, and no man has

any right by faulty construction of his conduits, or by their deficient construction, or by a desire to appropriate more than his share of the water, to diminish that common stock of the water to any greater extent than his necessities require.

This brings us to the question whether or not it is the duty of a prior appropriator to make use of such new means as may result in the more economical conveyance of water than those which he had theretofore provided for himself. Whether or not it would be his duty, if, for instance, he was an irrigator under the Tempe Canal, to construct a new conduit from the Highland Canal to his lands and thereby conduct his water at a considerable saving of the common stock of water, assuming, of course, that the Highland Canal is capable of carrying in addition to that which it is already under obligation to carry, the quantity sufficient for his use.

The variety of means adopted for the diversion of water, vary under different conditions. The person who first appropriates usually finds in the natural water course a volume of water in excess of that which he himself needs, and to divert the comparatively small proportion of the whole volume which he may need, would be inexpensive and easy of accomplishment. It is usually unnecessary for the first appropriator to construct a dam, or that he should excavate a ditch to the bottom of the water course whence he diverts his water, because of the superabundance in the natural water course, enough for his purpose may be diverted by less expensive means. As, however, others seek, subsequently, to appropriate a portion of the same stream above the point of diversion by the first, a diminution of the quantity of the water going down to the first appropriator, results in such a reduction of the volume of water that the means adopted by the first appropriator will not enable him to continue his diversion, and he must in order to get the water, either construct a dam so as to divert the water, or, excavate his ditch deeper so as to reach and divert the water from the diminished quantity flowing in the natural water course. This would, of course, entail an additional expense upon the first appropriator. To illustrate the question, let us suppose that upon a water course there is an average flow of water of four feet in depth: That the construction by the first appropriator of a ditch, the bottom of which is two feet below the surface of the

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water, enables him thereby to divert all the water that he needs. Suppose that thereafter another appropriator constructs above the point of diversion by the first, a ditch which appropriates two feet in depth of the water, and diminishes it so in volume that instead of flowing by the point of diversion by the first, four feet in depth, it now flows only two feet in depth. Still the quantity there flowing is sufficient to supply the needs of the first appropriator. It will be seen that the first appropriator cannot by the means he then had, divert his amount of water, and there is necessarily entailed upon him an expense of either further excavation of the ditch or the erection of a dam in order to raise the surface of the water to a point at which it can be diverted into his ditch; and this additional expense is entailed by the act of the subsequent appropriator. It is not a question, as I have put it, of a deficiency in the supply of water, but it is merely a question of the right of a subsequent appropriator to diminish the volume of water flowing, to such an extent that it cannot be diverted by a prior appropriator by the means he then had. We think that it certainly cannot be said that the first appropriator has the right to have the water flow in such a way that by his first means of diversion he can still continue his appropriation of the water. The whole policy of the law is, that all of the waters in the streams in this Territory should be used for mining, agriculture, and milling, and that there shall be no appropriation by any one in a manner that shall prohibit subsequent appropriation by others, unless that subsequent appropriation leaves an insufficient quantity of water. The difficulty, however, on this subject, may be illustrated by the case, for instance, of the Tempe Irrigating Canal. It is in evidence in this case that a considerable quantity of the water of the river even at its lowest stages, escapes below the dam of the Tempe Canal. It is contended by appropriators above, that inasmuch as they have permitted a sufficient quantity to go down to the dam, that it is the fault of the Tempe Canal if by means of its dam or by means of a dam not calculated for the purpose, it fails to capture and divert this quantity of water. It is the duty of the Tempe Canal if there is a quantity of water left unappropriated by those who attempted to appropriate above, sufficient for their use, to erect a dam sufficient to stop and divert the water, no matter at what expense. Or

have the owners of that canal the right to have the water of Salt River flow down the river in a volume equal to that necessary for their actual use plus the amount wasted through their dam? The evidence discloses that the construction of a dam sufficient to prevent the escape of any water below it, at any point along the Salt River, involves a vast expenditure of money so great that it might practically be prohibitory.

The late Professor Pomeroy in his work on riparian rights seems to announce the doctrine that an appropriator of water has a right to the natural flow of water at the head of his ditch:

Pomeroy Rip. Rights, Sec. 60.

A careful examination of the authorities he cites in support of his proposition will disclose that they do not warrant his deduction. The statement by Mr. Pomeroy is indefinite. If he means that if an appropriator is entitled to 100 inches of water, that there must be left by subsequent appropriators 100 inches for his use, we accede to his proposition. If, however, he means that if an appropriator is entitled to 100 inches, subsequent appropriators must leave a volume of water in the water-course sufficient under the conditions existing at the time of his appropriation to enable him to take his 100 inches by his then existing means of diversion, even if that volume be 10,000 inches, we cannot accede to it. We cannot consent to a doctrine that involves in its practical application a possible waste of ninety-nine per cent of the water to which the public is entitled.

I have been unable, after diligent search, to find any adjudicated cases, the consideration of which would assist in the solution of this question. The cases cited by Prof. Pomeroy, as I have before said, do not in my opinion sustain the doctrine announced by him. The first case that he cites is the Lower King's River &c. Company vs. the King's River &c. Company, 60th California, 408. The facts in that case disclose that the injury complained of there was an attempted appropriation by one situated along the water course above the complainants, and the Court simply says: "Granting that the plaintiff does not own the corpus of the water until it shall enter its ditch, yet the right to have it flow into the ditch appertains to the ditch." This it was not necessary to

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decide in the case, as the suit was an action for the diversion of water, and there was an application for a change of venue by the defendant upon the ground that the suit was one in personam and therefore transitory, and not one relating to real estate. And all necessary to decide was that the right to appropriate water was appurtenant to the land; and that is all it did decide. The next case that he cites is, Parks Canal & M. Co. vs. Hoyt, 57 California, 44. That was an action by one ditch appropriator against another for a diversion of water and the deprivation by him of its use. The suit was in the nature of assumpsit. The Court held that the right that an appropriator may have in water in the natural course above the point where he actually diverts it, is not personal property and is not subject to the particular kind of a suit there brought. It was unnecessary to decide and the Court did not decide, that the appropriator was entitled to have the water flow in its natural and accustomed course to the land of the appropriator's ditch. The next case that he cites is the case of Reynolds against Hosmer, 51 California, 205. In that case that question did not arise, and was not decided. The next case that he cites is in the 29th California, page 200. That was an action restraining defendants from erecting a dam across Bear River whereby as alleged the water of the river would be set back from a wheel of the plaintiffs' flouring mill. This was the question that was involved in that case, and is the one decided, and we think it is not analogous to the announcement in the text. The next case that he cites is in 23 California, 281. That was an action to recover damages and for an injunction to restrain defendants who were the owners of a saw mill upon a stream the waters of which the plaintiffs claimed by a prior appropriation, for mining purposes, from interfering with the regular flow of the water of the plaintiff's ditch, and from throwing saw-dust and other refuse into the water and thereby deteriorating it for the purpose for which the plaintiffs had appropriated it. This is not the question announced in the text in support of which the case is cited. The next case that the author cites is the case of Barnes against Sabron, 10th Nevada, 217. The Court in that case says: "It logically follows from the legal principles we have announced, that the plaintiff, as the first appropriator of the waters of Currant Creek, has the right

to insist that the water flowing therein shall, during the irrigating season, be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use. To this extent his rights go, but no farther, for in subordination to such rights the defendants, in the order and to the extent of their original appropriation and use had the unquestionable right to appropriate the remainder of the water running in said stream."

I do not think these cases warrant the announcement in as broad terms as those used by that author, that the party who has perfected an appropriation has the right to have the water flow in its natural manner to the head of his ditch; indeed, it seems to me that the last case cited (10th Nev.) expressly limits it.

In a recent case in Colorado---

Mack vs. Jackson, 13 Pac. Rep. 542,

which was an action upon an injunction bond, the Supreme Court approved a charge given by the lower court to the jury which was as follows:

"In passing upon the question of damages * * * you may consider whether or not the plaintiff might have obtained water through another ditch readily and at slight expense, and if he could have obtained sufficient water through some other source to have prevented the injury, he is not, it seems to me, entitled to recover a greater sum than it would have reasonably required for him to have expended in procuring the water from some other source * * *."

Applying this rule, although I have no hesitancy in saying that it is a novel application of it, to the question we are considering it suggests the solution.

If a subsequent appropriator should by his diversion reprive a prior appropriator of his ability to divert the water he needs, yet should he supply or offer to supply such prior appropriator an amount of water at a place and in quantity and time commensurate with the first's right of appropriation at a cost not exceeding that attendant upon the manner of diversion theretofore employed by the first, such prior appropriator has no just cause for complaint.

So if the Arizona Canal Company and the Highland Canal Company (and I name these because they are those diverting water at points above all the irrigators in the valley) should supply or offer to supply in good faith water to irrigators on either side of the river

under canals making their diversion below those points, and at no greater cost than theretofore attending their appropriation, such irrigators should be required to accept it.

This would result directly in a saving of water--a saving under the actual conditions existing in the Salt River Valley as disclosed by the evidence, sufficient to properly irrigate several thousand acres of land. No injury is done to those former irrigators and a public good is accomplished.

I appreciate the difficulties attending a practical application of this rule, but I am confident that its application is just and equitable; that it would result beneficially to every legitimate interest in the valley.

To say that every appropriator of water in the Salt River Valley may be supplied to the full extent of his just right, at no increased cost to him, even though it by means not of his own providing and thereby affecting a great saving of water, compels the conclusion that it ought to be done.

It is possible that the application of this rule might result in the abandonment of some of the earlier canals and ditches--but that this is an evil cannot be conceded.

In the argument of this case both orally and upon brief it is urged that canal companies have a status relative to water that is distinct and that insures to - it the right to divert water.

It is unnecessary again to repeat that unless the canal company has customers it cannot divert water--and that a canal company may be deprived of its customers by the construction of new and better conduits for water is not an incident peculiar to canal companies; a railroad may be paralleled and its business by cheaper facilities offered by a newer railroad diminished or destroyed. No one is hardy enough to argue that this could not and ought not to be done; that a railroad company may not be subject to competition.

It further appears that there are other considerable causes of waste in the valley due to improper methods of irrigation as well as cultivation--that the duty of water, that is, its capacity to irrigate properly a given extent of land, can by the adoption of improved methods of cultivation and irrigation in Salt River Valley be very materially increased; and it is the duty of every

irrigator to adopt and practice the best practical system of cultivation and irrigation; if we will not do so voluntarily, then some system of control of the distribution of water should be devised to enforce its adoption.

I am of the opinion that this control can only be properly exercised by some one who himself experienced in the matter of irrigation is appointed to supervise the diversion of water from the river--not to limit any one's rights but to see that each receives that justly due him and no more.

The adoption of these precautions against waste of water will, I think, demonstrate that there is enough water in the valley for all.

The parties to this suit, as is disclosed by their pleadings, proceeded upon the theory that an association of individuals and a corporation, and as well as an individual, might become to divert from a natural water course a definite quantity of water, and that this depended not upon the fact that the constituent members of an association or corporation had for the water a beneficial use and applied it to that use, but that the right to divert depended upon the amount that they had actually been accustomed to divert. The evidence in the case before the Commissioner, and at the trial before the Court, proceeded upon this theory. There is, accordingly, an omission to make that particular proof of the rights of individual appropriators, upon which, as we have before said, the right of diversion necessarily depends. In the consideration of the evidence, the Court in this case, will have to indulge in some presumptions because of the absence of that testimony. I think it is fair to presume, for the purposes of this case, that when there has been proof that any particular piece of land was reclaimed and cultivated, that it was done so by the owner or legal possessor, that that particular piece of land has since then, been in ownership or legal possession, and that the right to appropriate water for its cultivation, being appurtenant to it, has been continuous from the time of its first cultivation.

It appears in the evidence that many of the earlier cultivators of the soil in the valley were, in the language of the witnesses, mere "squatters" upon the public domain. However that may be, for the purposes of this suit they

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may be deemed to have had at least a possessory interest in the land and a consequent right to appropriate water. It will be impossible as well as unfair to attempt in this proceeding to define the rights of individual appropriators, because they are not parties, except in the case of M. Wormser and Charles T. Hayden, and their rights can only be defined as against the corporations and associations, the parties hereto. The Tempe Irrigating Canal Company, while its constituent members are parties here, yet they, I conceive, are not appearing here in their individual capacity, but in their joint capacity, representing the association known as the "Tempe Irrigating Canal Company." So that the attempt will not be made to define the right of the individual appropriators under the Tempe Irrigating Canal Company, except so far, as we have before said, it may be necessary to determine the rights of the association itself to divert water. There cannot be an adjudication of their several rights.

As was said in the case of Clough vs. Wing, by the Supreme Court of this Territory, the association itself or corporation, might neglect to either prosecute or defend its rights in which are involved those of its customers or constituent members, because of a disinclination upon their part to engage in expensive litigation, or because of collusion for the accomplishment of purposes adverse to the interests of such customers. Those consumers may have certain rights as against those corporations and as among themselves which we have not here discussed. It is not the purpose in this case to lay down rules that will hereafter govern this Court in the determination of the rights of those consumers as against the corporations and associations from whom they may derive their water supply. It might be that a Court could in a direct proceeding between a consumer and a canal company, hold that the canal company was acting as a quasi public agent, and therefore amenable to the orders and judgements of the courts to secure to the consumers reasonable regulations for the distribution and cost of distribution of water to them, and as well to protect these corporations and associations in their rights, but that is not necessary here to decide.

It would be futile in this case to attempt to define the rights of individual irrigators--it would not operate as an adjudication of their rights.

Accordingly I shall find as matters of fact the quantity of land for which water was from time to time appropriated under the various canals as the only means under the pleadings and evidence in this case to measure the right of the several canal companies to divert water.

This particular litigation should end at some time, and while the Court might retain the case for the purpose of making the individual irrigators parties to it, the same result can be accomplished so readily by the voluntary action of the parties themselves that I shall not do so.

Of course under my views of the law the decree cannot determine the ultimate rights of the parties; conditions may not, and it is hard to conceive that they will, remain as they are now--and any change in the relation of the parties among themselves, or of those who while not parties are directly concerned, must render the decree to that extent at least nugatory.

In the case at bar only the right to divert water in the immediate present can be determined upon the facts disclosed by the evidence--what the future rights of the parties may be, depending as they do upon their conduct and their agreements, upon a vast number of conditions varying constantly, cannot even be surmised, much less adjudicated.

In conclusion I wish here to express my thanks to all of counsel engaged in this case for their uniform courtesy displayed throughout and for their assistance in determining the questions present.

There has been exhibited by all a desire to assist in proper determination of the disputes existing between the parties to this action and a settlement of their respective rights.

FINDING OF FACTS.

The subjoined finding of facts will be confined to a determination from the evidence of the amount of land from time to time brought under cultivation and supplied by the several canals and ditches. The quarter section (160 acres) is for convenience used as the unit of measurement. The right of a canal or ditch company to divert water from a public stream being solely dependent upon the amount actually applied to useful purpose, the finding will be confined to that determination alone.

And it should be here understood that these findings are for the determination of the rights of the several canal companies and not for the determination of the rights of individuals who may be customers of such canal companies. The court cannot undertake in this case to settle the rights of individual consumers.

From the evidence I find the several amounts of water which the parties of this suit were in each year entitled to divert from Salt River by means of their several canals and dams to be the amounts necessary under proper methods of irrigation and cultivation to irrigate the quantity of land shown in the following table:

1889		
Amt.	Inc.	
117		
123½		
139		
31		
48½		
55		
82		
350	16-3/4	
1100		

The figures in the foregoing table in the columns headed "Inc" denote the <u>time</u> and <u>extent</u> of the several appropriations.

There will be a decree declaring the rights of the several parties in their order as shown by this finding as of July 14, 1890, and an injunction against the parties severally restraining their acts in violation of prior rights.

The commissioner heretofore appointed will be continued with powers as now confered upon him until the District Court in and for Maricopa County shall order otherwise.

Counsel will prepare the form of the decretal order.

I find as a matter of law that
C. T. Hayden's appropriation
for his mill dates from 1877.

Joseph H. Kibbey
Judge
March 31, 1892

Filed April 2nd 1892 at
2:30 O'clock P.M.
C. H. Knapp
Clerk

Note: See Arizona Daily Gazette, April 3, 1892, page 5, for chart of allocations of water to the various canals and for specific years. Also comment on Kibbey decision and statement by Judge Kibbey.

(State Archives)

Year	CANALS.																			
	Tempe........		Salt River....		Maricopa......		Wormser.......		Grand.........		Utah..........		Mesa..........		Arizona.......		Highland......		Hayden Mill...	
	Amt	In	Amt	In	Amt	In	Amt	In	Amt	In	Amt	In	Amt	In	Amt	In	Amt	In	Amt	In
1868			12	12½	1	1														
1869			22	9½	6	5														
1870			31½	9½	14½	8½														
1871	5	5	48	16½	24½	10	8	8												
1872	49	44	8½	33½	28½	4	8													
1873	57	12	90½	9	29	½	12	4												
1874	57		90½		31	2	12												*1100	
1875	57		90½		32	1	12												1100	
1876	57		92½	2	36	4	12												1100	
1877	57		95½	3	41	5	22	10			7	7							1100	1100
1878	67	10	102	6½	53	12	22		2	2	24	14	23	23					1100	
1879	70		104	2	65½	12½	22		15	13	24		30	7					1100	
1880	70		109		84½	19	24	2	17½	2½	24		35	5					1100	
1881	72	2	116½	7½	102	17½	24		18½	1	24		43	8					1100	
1882	90	18	117½	1	117½	15½	27	3	33½	5	26	2	50	7					1100	
1883	90		118½	1	124½	7	28	1	43½	20	38	12	59	9					1100	
1884	95	5	119½	1	128½	4	28		45½	2	38		62	3					1100	
1885	98	3	120½	1	133	4½	28		46½	1	38		73	11	43½	43½			1100	
1886	105	7	121½	1	135	2	29	1	47½	1	38		75	2	105½	61½			1100	
1887	113	8	122½	1	137	2	31	2	47½		40	2	82	7	192½	87½			1100	
1888	8	117	123½	1	139	2	31		48½	1	55	15	82		333½	140½			1100	
1889	4	117	123½		239		31		48½		55		82		350	16½			1100	

*Note the appropriation by C. T. Hayden for the propulsion of his mill is here measured in inches, the inch used as the unit being one fortieth part of a cubic foot flow of water per second.

(This chart was found on page 5 of the April 3, 1892, issue of the Arizona Daily Gazette and appears to belong to the Kibbey Decision. P.G. Weimann)

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE TERRITORY OF ARIZONA, IN AND
FOR THE COUNTY OF MARICOPA.

PATRICK T. HURLEY, *Plaintiff,* THE UNITED STATES OF AMERICA, *Intervenor,* Against CHARLES F. ABBOTT and Four Thousand Eight Hundred Others, *Defendants.*	**ORIGINAL** **No. 4564** **DECREE**

Before CHIEF JUSTICE KENT,
Sitting as DISTRICT JUDGE.

Decision and Decree

Filed March 10, 1910
at 9:35 A.M.
Elias F. Dunleavy, Clerk
By E. S. Curtis, Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE TERRITORY OF ARIZONA, IN AND
FOR THE COUNTY OF MARICOPA

PATRICK T. HURLEY,
Plaintiff,
THE UNITED STATES OF AMERICA,
Intervenor,
Against
CHARLES F. ABBOTT and Four Thousand Eight Hundred Others,
Defendants.

No. 4564
DECREE

This cause having come on regularly to be heard upon the complaint of the Plaintiff, the Petition in Intervention and Cross Complaint of the United States of America, and upon the Pleas and Answers of various defendants herein, and upon the default of certain defendants in appearing and answering; the Plaintiff appearing herein by Messrs. Joseph H. Kibbey, and Roy S. Goodrich, his attorneys, The United States of America by Mr. J. L. B. Alexander, United States Attorney for the Territory of Arizona, and various defendants by Messrs. Anderson & Anderson, C. F. Ainsworth, Thomas Armstrong, Jr., A. C. Baker, Walter Bennett, Alexander Buck, Lysander Cassidy, Chalmers & Wilkinson, Christy & Lewis, E. S. Clark, Frank Cox, J. W. Crenshaw, J. K. Doolittle, E. B. Goodwin, P. H. Hayes, J. M. Jamison, W. J. Kingsbury, J. H. Langston, A. D. Leyhe, Reese M. Ling, Frank H. Lyman, B. E. Marks, O'Neill & McKean, J. C. Phillips, Thomas J. Prescott, C. H. Rutherford, G. W. Silverthorn, and Charles Woolf, their attorneys, and the Court having heard the evidence and the proofs, and having duly considered the same and being fully advised in the premises and having filed its decision in writing herein, with accompanying tables,

IT IS ORDERED, ADJUDGED AND DECREED, That the various parties hereto, and their successors in interest be, and they hereby are, entitled to divert or to have diverted from the water flowing in the Salt River to and upon the land owned or possessed by them as their interest may appear, for beneficial use upon such land, such amount of water as may be necessary and proper for the economical and successful irrigation and cultivation of such land, in area and extent, and in duration, and according to the relative rights in priority of appropriation, and in the amount, manner and form as shown, set forth and determined in the following decision herein of this date, and the tables annexed thereto, which decision and accompanying tables are hereby made a part of, and are to be considered as incorporated in, this Decree and to which reference is hereby made for exact and particular description and provision,

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That Frank P. Trott, be and he hereby is appointed Commissioner of this Court to execute and to carry out the provisions of the decision and decree herein, with the powers and duties as in said decision more fully set forth,

subject at all times to the control and supervision of the Court, and the said Commissioner shall be paid as compensation for his services by the owners of the land, through the canal agencies serving them, the amount and in the manner as in said decision specified.

The Plaintiff and the United States of America, intervenor, shall each recover as against the defendants their costs to be taxed.

The Court retains jurisdiction of the cause and of the issues embraced herein and, upon good cause shown, may from time to time modify, enlarge, or abrogate any portion or feature of this decree, or of the decision and tables filed herewith as a part hereof, by order or supplemental judgment or decree to be entered at the foot hereof.

This Decree, and the Provisions of the Decision herein, shall become effective on and after April 1st, A. D. 1910.

Dated, Phoenix, March 1, 1910.

EDWARD KENT,
Judge.

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE TERRITORY OF ARIZONA, IN AND
FOR THE COUNTY OF MARICOPA

PATRICK T. HURLEY, *Plaintiff,* THE UNITED STATES OF AMERICA, *Intervenor,* Against CHARLES F. ABBOTT and Four Thousand Eight Hundred Others, *Defendants.*	**DECISION**

The Salt River Valley, so-called, is an alluvial plain, nearly level, lying in the central portion of the Territory of Arizona, the soil of which, when supplied with sufficient water, is extremely fertile. Its approximate length from east to west as far as the Agua Fria river is thirty-five miles; its average width fifteen miles. The climate is arid with but a slight rainfall, and artificial application of water to the land is necessary in order for the successful growth of agricultural products. Entering the valley from the northeast is the Salt river, a non-navigable stream. Into the Salt river and just before its entrance into the valley, flows the Verde river; the Salt river, after such conflux, empties into the Gila river in the southwestern part of the valley. In the valley are located the city of Phoenix and the towns of Tempe, Mesa, Lehi, Scottsdale, Peoria, Glendale and Alhambra; and these places and the farming country lying east of the Agua Fria river tributary to them are irrigated by water diverted from the Salt river by means of canals. The river is subject to very great variations in the amount of water flowing in it; from time to time there is a large volume of water in the river, more than adequate for the irrigation of all the land hitherto attempted to be cultivated: for the greater part of the year the supply is inadequate for such cultivation.

The land shows evidence of cultivation in prehistoric times by irrigation from the same source as at present. Cultivation in recent times began about the year 1869. From the cultivation of a few hundred acres in 1869, the area of such cultivation in the valley has increased until at the present time there are approximately 151,000 acres attempted to be cultivated from water diverted from the Salt river at various points of diversion on the river at or above the "Joint Head" hereinafter described. Although all the water flowing in the Salt river is, in the lower stages of the water in the river, diverted by canals which have their heads at such points in the river, nevertheless additional land lying to the westward, not covered by the ditches aforesaid, is irrigated by means of ditches which have their heads in the river below the Joint Head. This is made possible by the peculiar conditions which obtain in the river whereby, though dry above, water rises in the channel of the river below, forming a new source of supply independent of that diverted above. Such additional land and the relative rights of such land or the owners thereof to water for irrigation purposes are not included within the issues of this suit.

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The canals serving the land embraced in this suit lying to the north of the river are the Salt River Valley Canal, the Maricopa, the Grand, and the Arizona; those serving land embraced in this suit lying to the south of the river are the Tempe, the Broadway, the San Francisco, the Utah, the Mesa, the Highland, and the Consolidated. A general map showing the river, the land in question, and the means of diversion thereto of the water supply, is attached hereto, marked Map No. I.

Of the canals on the north side, the canal now known as the Salt River Valley Canal is the oldest of those now in service; it was commenced in the year 1867 and was originally known as the Swilling ditch. Its head was at a point about five miles east of the present site of the city of Phoenix. The slope of the land on the north side of the river being generally to the southwest, this canal in general serves the land lying to the south and west of its course—approximately 19,000 acres.

Some time after the construction of the original Swilling ditch, it was extended and a branch was taken from it at a point about two miles below its divergence from the river, and constructed to the north and west, and became known as the Maricopa canal, serving in general land lying between it and the Salt River Valley canal, approximately 18,000 acres; the head of this canal in the river is the same as that of the Salt River Valley canal, and is known as the "Joint Head."

In 1878 construction was begun of the Grand canal, which had its head on the river at a point about three miles above the Joint Head, serving land lying between it and the Salt River Valley canal, approximately 17,000 acres. After the great flood of the year 1891, the head of the Grand canal was discontinued and the Grand canal thereafter received its water from the Arizona canal by means of a cross-cut therefrom.

In 1883 the construction of the Arizona canal was begun. The head of this canal was above that of all the other canals in the valley at a point some twenty-eight miles east of the city of Phoenix. The Arizona canal is the most northerly of all the canals and serves land lying between it and the Maricopa canal, and also some land on the north side of the river east of the Grand, Maricopa, and Salt River Valley canals, in all approximately 38,000 acres.

Water is also diverted from the river by means of the Arizona canal and conveyed through the cross-cut to the Maricopa and Salt River Valley canals, thus adding to the supply of the two latter canals over and above that taken by them from the river at the Joint Head.

On the south side of the river the first canal constructed was the Tempe irrigating canal, begun in the year 1870, its head being at a point on the south side of the river about nine miles above the Joint Head. This canal serves the land lying under it and its various branches, approximately 24,400 acres.

A small ditch called the Broadway was taken out about 1870, with its head originally about four miles west of the Joint Head. The head, however, was abandoned about twelve years ago, and since then the land for which the canal was originally built, approximately 450 acres, has been served partly by an extension of the original Broadway ditch, receiving a part of the water through the Tempe canal (which water for more than the year last past, however, has been carried by the San Francisco canal), and partly through the Marmonier or French ditch, which latter ditch has its head below the Joint Head.

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About that time a canal known as the San Francisco canal was also constructed, with a head about a mile and one-half above the Joint Head, serving land under it similarly situated, approximately 4,000 acres. An independent head for this canal has long since been discontinued and it receives its water through the Tempe canal.

In 1877 the Utah canal was constructed, with a head about five miles above the head of the Tempe canal, and it, together with the extension thereof afterwards built, serves land under it, approximately 11,200 acres.

In 1878 the construction of the Mesa canal was begun, which had a head in the river about two and one-half miles above the head of the Utah canal, and it serves land under it, approximately 16,400 acres.

In 1888 the construction of the Highland canal was begun, with a head about three miles above the head of the Mesa canal, and it serves land lying under it similarly situated, approximately 425 acres.

In 1891 the construction of the Consolidated canal was begun, with a head about three miles above the head of the Utah. It serves land under it approximately 2,300 acres.

In the year 1874 C. T. Hayden, a shareholder in the Tempe Canal Company, erected a flour mill at Tempe on the banks of the Tempe canal, and by an arrangement with the other shareholders of the Tempe Canal Company, had supplied to him through that canal water sufficient to operate his mill, being a maximum amount of water equal to a flow of 1,100 miners' inches. Since that date this mill has been continuously so served.

In the year 1887 a suit was begun in this Court entitled M. Wormser and others against the Salt River Valley Canal Company and others. It was a suit instituted for the purpose of enjoining certain parties to it, owners of the canal systems, from the diversion of the water from the Salt river in derogation of the rights of the plantiffs. The purpose of such suit and the reasons for it, historically applicable to this present suit, are set forth in the following extract from the opinion of Judge Kibbey rendered therein in the year 1892:

"The earlier efforts of the settlers under these older ditches toward cultivation was confined to the production of hay and grain, and a few garden vegetables, the cultivation of which was confined to that period of the year when the water in the river was very abundant. As the settlement became older and its population increased, a more extended cultivation began to be undertaken. Instead of confining themselves to hay and grain, as above mentioned, the ranchers gradually began the planting and cultivation of alfalfa, fruits and vines, which required water during the entire year. Under the conditions as they originally existed, and as is usual in such cases, there were many usurpations and concessions of rights to the diversion of water, unnoticed at the time, or, if noticed, tacitly and without objection acquiesced in because of the then abundance of water. As the population increased and with it the more extended form of cultivation, a deficiency in water began to be noticed. While the river during the months in which hay and grain and the ordinary agricultural crops are being grown had in it a vast volume of water, this volume diminished with the advance of the season, from thousands of cubic feet per second to about, at a minimum of, three hundred cubic feet per second, and as both the increase of population and the different products to which the land was cultivated increased, the demand for water in the summer months, when the supply is the least, aggravated by an unnecessary and very considerable waste of water, exceeded the supply. This deficiency of supply made at once the question of priority of right to ap-

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propriate water, important, and that question is the subject matter of this suit."

In that case Judge Kibbey, after setting forth at length the facts in the case, in an exhaustive and able opinion covering the questions of law that arose therein, held that, as the parties to the suit, as was disclosed by their pleadings, had proceeded on the theory that an association of individuals or a corporation may become entitled to divert from a natural water course a definite quantity of water, and that this right depended, not on the fact that the constituent members of an association or corporation had for the water a beneficial use, and applied it to that use, but that the right and title to divert depended on the amount that they had been actually accustomed to divert, there was an omission to make that particular proof of the rights of individual appropriators upon which the right of diversion necessarily depended; and that under the pleadings and evidence in the case no attempt could be made to define the rights of individual appropriators, since an attempt to define in such suit the rights of individual irrigators would not operate as an adjudication thereof. The findings of fact in the case were therefore confined to a determination of the amount of land from time to time brought under cultivation and supplied by the various canals and ditches, and a table was prepared showing the number of quarter sections of land brought into cultivation under the various canals from time to time from the year 1868 to and including the year 1889, the determination in the case being expressly confined to the rights of the several owners of the canals and not to a determination of the rights of individual customers of such canal companies. The Court decreed that the amount of water which the various canal companies were entitled in each year to divert from the Salt river by means of their several canals and dams, was the amounts necessary under proper methods of irrigation to cultivate and irrigate the number of quarter sections set forth in such table, but did not find the amount of water actually necessary for such cultivation.

Whatever may have been the legal effect of the decree entered in the Wormser suit, there was no effective attempt to enforce it or to distribute water according to its terms. Even prior to its rendition an agreement was entered into by the various canal companies whereby the parcels of land as found by such decree to be entitled to water lying under the Tempe and San Francisco canals should receive water for their irrigation to be diverted from the river by the Tempe canal according to the dates of the reclamation thereof, and in the amount of sixty-four miners' inches to the quarter section measured at the head of the canal. The balance of the normal flow of water in the river at its various stages was divided among the various canal companies in accordance with the terms of the agreement entered into by them independent of the various dates of reclamation of the land lying under the canals as such dates were found in the Wormser decree. Since such agreement the water in the river at its various stages up to 60,000 miners' inches has been distributed theoretically under the provisions of this decree, but practically and actually under the agreement entered into by the canal companies as just stated.

To this agreement and to this distribution of the water protest has been made from time to time since the rendition of the Wormser decree, by individual land owners not content with the action of the canal company serving them with water in that regard, and various suits have been instituted from time to time in this Court to test the validity of such distribution of the water under such arrangement, none of which suits have ever come to final judgment, and one of which, at least, is still pending awaiting the determination of this proceeding.

In the year 1903 the United States Government, acting by the authority of Congress under what is known as the reclamation act, commenced the construction of an impounding dam, known as the Roosevelt dam, upon the Salt river just below the conflux of Tonto creek with the Salt river, at a point about seventy-five miles east of the city of Phoenix, for the purpose of storing the waters of the Salt river in a reservoir at that point. This dam, now rapidly approaching its completion, will be approximately 280 feet in height above bedrock, will create a reservoir lake of some twenty-five miles in length and an average of more than one mile in width, and will impound approximately 1,300,000 acre feet of water. The height of the dam is already sufficient to impound at present a large body of water, and its completion is expected within the next few months. The object of the dam and the purpose of the Government in its erection is to store in the reservoir the surplus water in the Salt river over and above the amount of the normal flow of the river appropriated and used. The Government also finished the construction in the year 1908 of a permanent diversion dam across the Salt river known as the Granite Reef dam at a point about twenty-five miles east of Phoenix, three miles below the conflux of the Verde river, from which dam water is now being diverted into the Arizona canal for the use of the land lying on the north side of the river, and which now diverts a large portion and which is capable of diverting all of the water necessary for the land on the south side of the river.

An association of land owners known as the Salt River Valley Water Users Association was formed, comprising nearly all the owners of the land lying on the north side of the river embraced in this suit, capable of irrigation, and the owners of a majority of all the land lying on the south side of the river. The owners of a large majority of the land lying under the Tempe and San Francisco canals, however, have not joined the association. By contracts between the Government and the members of the water users association, the latter will be entitled to receive for their land their proportionate share of the surplus water that may be stored by the Government in its impounding reservoir. Those not in the association will have no contractual rights with the Government with respect to the water thus impounded.

In the year 1905 this suit was instituted by the plaintiff, P. T. Hurley, he claiming to be an early appropriator of water, and asking to have his title quieted to the use of an amount of water suffcient to cultivate the land owned by him. He made as defendants in the suit a large number of other individual land owners in the valley. After the commencement of the suit, the United States, having acquired the possession and ownership of the canals on the north side of the river, and being interested in its capacity as guardian of a number of Indian settlers on the reservations situated in the valley, by leave of Court first obtained, intervened as a party in the suit and filed its answer and cross complaint, and sought and obtained process to make party defendants to its cross complaint all land owners in the district in the valley irrigated by the canals above mentioned, and prayed for a judgment establishing the rights of each individual defendant and each parcel of land to the water in the river, and the establishment of the various dates of appropriation of water by each individual land owner. These various individual land owners, some four thousand eight hundred in all, were served with process in the suit, and evidence has been taken before the Court respecting the duty of water and the dates of reclamation of the various parcels of land in the irrigable district in the valley in question from the year 1869 to and including the year 1909, the testimony being taken intermittently during a period of two and one-half years. The case is now before the Court for adjudication.

The purpose of this suit is to obtain a judicial determination and definition of the rights of the various parcels of land and the owners thereof under the various canals above mentioned in and to the use of the water flowing in the Salt and Verde rivers. For a complete and effective adjudication of such rights it is necessary not only to determine the date of appropriation of the water to each parcel of land, but also the amount of the water appropriated and the relative right of each parcel to the other.

The doctrine of riparian rights does not obtain in Arizona. The right of the owner of land to divert from a natural non-navigable stream the flow of the water therein and to apply the same to beneficial use upon such land, is and always has been recognized in this Territory. Such diversion and use is termed an appropriation of water. Whatever may be the steps necessary to take to initiate such a right or to evidence the intent to initiate it, the appropriation itself only becomes complete and vested when the water is actually diverted from the stream and placed to a beneficial use upon the land. The right given by such an appropriation is strictly not a right to the water itself, but a right to the use of the water. Its application to a beneficial use upon the land is as necessary in order to complete the right as is the diversion therof from the stream. An appropriation of water, therefore, for the purpose of the irrigation of a parcel of land may not be established and completed by means merely of a declaration of intention or by the posting of notices of appropriation, nor may it be made by a canal owner or by a canal company as such alone, independent of its ownership of the land; but as application to a beneficial use upon the land is necessary to complete the appropriation, it follows that such appropriator must be an owner of land or have a possessory right thereto. Furthermore, since the land to which the water is to be applied is a necessary integral part of the appropriation and a factor by which the amount of the water appropriated for use is measured, it follows that when the water is no longer applied to the land for which it was diverted, the right of appropriation of such water for such land ceases. The right of appropriation further depends upon a supply of water that is unappropriated. It follows, therefore, that the first in time of appropriation is the first in right to appropriate, since water previously appropriated by another is no longer available for a subsequent appropriator. The extent of the appropriation is limited by the beneficial use to which the water can be applied. The actual amount of water that may be appropriated for irrigation, therefore, is the amount that the land owner can and does actually use in the necessary and economical irrigation of his land for cultivation. This much and no more may he have; and this much he may only have when there is sufficient water available to supply first those prior in date of appropriation. The fundamental principle in the doctrine of appropriation of the normal flow of water in a stream for irrigation is its application by the land owner to the land for a beneficial use. The right to appropriate is a right that belongs to the land owner, but the water appropriated is appropriated for the land, and when so appropriated its use belongs to the land and not to the appropriator. The method of diversion from the river and the means of carriage of the water to the land is immaterial in the establishment or maintenance of the right; it may be done by the individual appropriator or by an association of individual appropriators, or by a canal company, or by any person or corporation; and the means of carriage or the point of diversion from the river may be changed from time to time to suit altered conditions without impairing the right of appropriation already made, provided prior rights of others are not interfered with. There being in this Territory no private property in water, but water being a public property subject to the uses before defined, in so diverting and carrying the water such person, association or corporation acts

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merely as the agent of the appropriator and acquires no right of appropriation to the water itself, and no rights as against the appropriation made to the land, except a right to proper compensation for such diversion and carriage.

Applying these general principles to the case in hand, it follows that the dates of the reclamation of the land and its first cultivation by the means of water diverted to the land by the land owner, must determine the date of the appropriation in each instance; that each appropriator in turn and prior to the one next succeeding him is entitled to have diverted and applied on his land a quantity of water sufficient for the economical cultivation thereof and no more, until the supply available shall have been exhausted, provided the use of such water on his land shall have been reasonably continuous.

The various dates of the application of water to the land, the amount of water necessary for the economical cultivation thereof, the duration of such cultivation, and the supply of water available, are therefore interstitial facts affecting all questions arising in the case.

A great amount of testimony has been taken as to the dates of application of water to the various subdivisions of land lying under the canals, and the results obtained have been checked in such ways as were possible. The results showing the years in which each piece of land was brought into cultivation have been tabulated, and it is believed are as accurate as is practicably possible in a history which covers so great a period of time and so great an acreage. In each instance where a land owner has brought into cultivation in a given year a portion only of a section or subdivision of a section of land owned by him, but with the intention of speedily reclaiming the balance, and he or his successors in interest subsequently and within a reasonable time have brought the balance of such land into cultivation by irrigation, and such cultivation has been kept up, I have under the doctrine of relation fixed as the date of the appropriation for the whole tract the date of the first cultivation of the part.

Testimony has also in each instance been given as to the duration of cultivation. While in the main correct and accurate, it is my belief that in a number of instances the facts as to the duration and extent of the cultivation of the land have been exaggerated. So far as possible the testimony given has been compared with other reliable data and in a few of such instances the testimony given has been disregarded as undoubted error.

The amount of water flowing in the river varies greatly in each month in the year, in each year, and in a given month in each year. No accurate or probable estimate of the amount of water that will be available either by the month or by the year can be predicted. A table compiled from the records that have been kept by the water commissioner for the past fourteen years, showing the monthly average and the annual precipitation of rain and the daily average amount of water by months and by years that has been received by the canals from the river, is hereby made a part of this decision and filed herewith, and designated as Table No. I.

By the "normal flow of the river," as that expression is used in this decision, is meant the flow of water in the river at its varying stages available for appropriation. The maximum normal flow is the total amount to be diverted from the river for the cultivation of all the parcels of land to which water has been appropriated. By "flood water" is meant water flowing in the river over and above the maximum normal flow. By "surplus water" is meant the flow of the river, both normal and flood, not needed or used. By "stored water" is meant the water impounded in the Roosevelt reservoir.

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The actual maximum normal flow is the total amount to which the land is entitled, as shown by the table hereinafter referred to, plus the estimated loss in carriage, and amounts in all to approximately 58,000 miners' inches. The total practicable carrying capacity of all the various canals is roughly 87,000 miners' inches. The practical carrying capacity of the Tempe canal, through which is diverted the water supplying the parcels of land generally not in the water users' association, and therefore not to be entitled by contractual relations with the Government to the benefits of the stored water, is roughly 16,000 miners' inches.

The amount of water necessary for proper and economical irrigation and cultivation of a given amount of land is perhaps the most difficult of satisfactory solution of all the numerous questions arising in the case. The views expressed by the various witnesses are widely divergent. Theoretically for many years last past, under the agreement as to diversion, the land entitled to water under the Tempe and San Francisco canals has been supplied therewith upon a basis of 64 miners' inches constant flow to each quarter section, measured at the head of the Tempe canal. In reality the land has not had any such fixed quantity nor its equivalent. At times it has had more, at times less. For the greater part of the time more land in the valley has been attempted to be cultivated than the water available would supply. Under the distributing agreement before referred to, land older in cultivation and prior in right shared with later land the supply of water available during the low stages of the river, and each had diverted for large portions of many years less than the equivalent of the 64 miners' inches. No record extending over any appreciable period of time has ever been kept as to the effect of a given amount of water on a given amount of land, nor has the amount of water required for a given amount of land been determined by any series of experiments with any constant or varying quantity of water. The character of the soil differs in different parts of the valley, some land requiring more water by reason of its character than other land of a different soil. These differences in soil are not in land lying in defined boundaries and thus perhaps susceptible of differentiation, but are found all over the valley in such position and placement as to make it impracticable to segregate them. The amount of water necessary successfully and economically to cultivate a given product, such as alfalfa, is greater than that necessary for another, such as grain; and so through a long list of various products. These products are likewise scattered throughout the valley and are not embraced each within its own separate confines. The duty of water, by which expression I mean the amount of water necessary for the successful and economical cultivation of the land, in reality, therefore, differs with the different crops and with the different soils to be found in the valley under the conditions as they exist. But one standard, however, can be taken, since the variations as to crops and soil cannot practically be followed by a varying standard as to the duty of water dependent upon such variations of crop and soil; nor can the matter of the amount required be left to the judgment and demand of the individual land owner dependent upon the crop he may plant. To avoid confusion and to promote a certainty of division and distribution of the water, the standard to be taken must be determined by the Court, and must be such as will apply to all land and all crops, and which, while it will permit by economical use of sufficient water for the cultivation of the land in great part at least to the crop requiring the most water, will still be not too much for the land owner who intends to cultivate a portion of his land to the crop requiring a less amount of water. Such a standard, while perhaps not permitting of a precise conformity with existing conditions, can for the present at least experimentally be tried, and hereafter changed as it may be found

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to be inadequate or too great. I believe that 48 miners' inches constant flow to the quarter section of land, measured and delivered at the land, is sufficient under ordinary conditions for the proper, economical and successful irrigation of the average product as grown in the district. I therefore fix upon and determine such to be the duty of water for the purposes of this case, subject, however, to an increase or decrease of such standard upon application to the Court in this suit hereafter as conditions may require and develop after due trial of such amount as such standard.

When practicable, measurement of the water to be delivered should be made at the entrance of the lateral to each quarter section. When such measurement cannot be so made, and until so made, the measurement shall be made at or near the point of diversion of the water from the river, except as hereinafter provided. When the water is not measured at the land, there must be added to the 48 miners' inches constant flow found to be the amount necessary for the cultivation of a quarter section of land, an amount necessary to cover the loss from evaporation and seepage from the point of diversion from the river to the land. Like the duty of water, this estimated loss by evaporation and seepage has not been determined in this valley by any series of experiments or otherwise. In fixing upon an amount to be added to supply such loss by evaporation and seepage, I am guided by the testimony as to the use of water in the valley in the past, by expert testimony, and by testimony as to experiments made elsewhere. Taking into consideration the average flow in the canal, the different seasons of the year, the wasteful ordinary open earth channel now in use, the extent of the area exposed to evaporation and the greater loss by seepage in the laterals, and the fact that the loss also applies to the water to be added, it is believed that one per centum added for each mile of carriage from the point of diversion from the river at the head of the canal to the termination of such canal in its main course, will approximately supply the loss by evaporation and seepage in the volume of the water so delivered for general distribution. Until the further order of the Court, and until such amount which is hereby fixed upon shall be found to be inadequate or too great, to the water to be diverted to each canal for use upon the land under it entitled thereto when measured at the head of the canal, there shall be added for loss by evaporation and seepage one per centum of the amount of water diverted for each mile of such canal length in its main course.

The main course of a canal as here used is defined to be its course from its head to the point where the canal ceases to be a main canal and becomes in effect a distributing lateral.

The water for the land on the north side of the river is supplied through the Arizona canal and the Joint Head, and the land so supplied forms one system. The length of the Arizona canal in its main course is 36 miles, and this is also approximately the length in main course of the canals of the Grand, the Maricopa, and the Salt, measured from the head of the Arizona canal. To ascertain the amount of water to be delivered for this system, therefore, when measured at the head of the Arizona canal, there shall be added one per cent of such amount for each mile of such length of canal, to-wit, 36 per cent. The length of the Maricopa and Salt River Valley canals from the Joint Head to the end of their main course is 6 miles. For water diverted at the Joint Head there shall be added one per cent for each mile of such carriage, to-wit, 6 per cent.

On the south side of the river the land lying under the various canals is served by the canals independent of each other. The land, therefore, does not form one general system, but there are several systems, each under separate canals. The Utah, the Mesa, the Consolidated and the Highland

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canals no longer maintain independent heads. The water for these canals is diverted from the river at the Granite Reef dam. The water for these canals, to which the land lying under them is entitled, is to be measured at the Granite Reef dam until a system of measuring at the land is adopted. The amount to be added to the water diverted and measured to these canals for loss is therefore to be determined by the distance from the Granite Reef dam to the end of the main canal of each of these systems. This distance is found to be for these canals as follows:

The Utah, 15 miles. Amount to be added, 15 per cent.

The Mesa, 14 miles. Amount to be added, 14 per cent.

The Consolidated, 21 miles. Amount to be added, 21 per cent.

The Highland, 7 miles. Amount to be added, 7 per cent.

The Tempe canal maintains an independent head and diverts a portion of the water it carries through such head. The water so diverted is to be measured under present conditions at the present place of measurement, to-wit, a point about three hundred yards below its present head gates. To the water so diverted and measured the amount to be added for loss in subsequent carriage is to be determined by the distance from such place of measurement to the end of the main canal. This distance is hereby fixed upon as 11 miles, and the amount is, therefore, 11 per cent. A portion of the water for the Tempe canal, by a determination of Court heretofore had, has been diverted in the past at the Consolidated Head (and recently at the Granite Reef dam) and carried to the Tempe canal through the Tempe cross-cut from the Consolidated canal. So long as this method of diversion and carriage is maintained the portion of the water for the Tempe canal so diverted and carried shall be measured in such cross-cut at the place of measurement heretofore maintained, to-wit, a point about one-third mile above its junction with the Tempe canal. The amount to be added to such water for loss in subsequent carriage is to be determined by the distance from such measuring station to the end of the main canal. This distance is hereby fixed upon as 11 miles, and the amount is, therefore, 11 per cent.

The Broadway and San Francisco canals receive their water from the Tempe canal. The amount of water these canals are entitled to receive for the land lying under them is to be measured at the point of delivery to the San Francisco canal just below the Hayden mill. The amount to be added for loss to such water in subsequent carriage is to be determined by the distance from such point of measurement to the end of each of their main canals, respectively. Such distance is found to be, for the San Francisco canal, 8 miles; for the Broadway canal, 10 miles, and the amount is therefore 8 per cent and 10 per cent, respectively.

One of the essentials to the establishment of a continuing right to the use of water is a reasonably constant use. The evidence in the case shows that with respect to a large body of the land in question cultivation by irrigation has been continuous year by year from the various dates of the first reclamation of the several parcels down either to the present time or to a time sufficiently near to the present as will permit of a determination with reasonable certainty as to the intention of the land owner with respect to a continuing cultivation. In many other instances the evidence shows that though such cultivation may not have been carried on in each and every year, the cultivation has been reasonably constant to such time, and there has been no intent to discontinue definitely such cultivation. No distinction as to right of present use of the normal flow, except that of priority, is perceived between such various parcels of land. They are entitled

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according to their relative dates of reclamation, and by years, to the use of the normal flow of the water in the river to the extent necessary for their economical cultivation. They form a distinct class preferred in their rights to the use of such water over and above the other parcels of land in the suit. For the purposes of this suit they may be designated as land in class A. A description of these parcels of land listed by years of date of appropriation appears in tabulated form in the tables designated 2 and 3 hereto attached, being tables for the land on the North Side and South Side respectively; they include all land now being cultivated or upon which cultivation was continued to as late a date as during the year of 1903. Where land has been cultivated in the past, but such cultivation discontinued prior to the new date of appropriation under which it appears in the table, the dates of such prior cultivation will be found in the table under the column entitled "Remarks." This column also gives the last date of cultivation, so far as the proof before the Court shows, when such cultivation, though not to the year 1909, is later than the year of 1902.

The evidence shows that with respect to a large amount of land, water in the past was applied thereto and the land cultivated in some instances for one or two years and in other instances for a longer period of time, in some instances constantly, in others intermittently, but in all such instances cultivation of the land had entirely ceased for a number of years, and in every instance more than five years, prior to the beginning of the taking of testimony in this suit. A large portion of the land with this history was first brought into cultivation on the north side of the river shortly after the completion of the Arizona canal, and on the south side shortly after the completion of the Highland and Consolidated canals; some land with a similar history is also found under the older canals. Generally speaking, the cultivation of such land was begun during times of plenty and discontinued during times of scarcity of the flow in the river. The hope of a sufficient continuous supply of water was followed by the realization of the fact of insufficient supply. A financial loss was the certain result of an attempt to cultivate with insufficient uncertain supply of water for irrigation, and one by one, the supply of water failing to equal the necessary demand, cultivation of these parcels of land was discontinued. The failure of these land owners to continue after such appropriation to make a reasonably constant diversion and application of water so appropriated to their land came about, not of their wish to discontinue cultivation nor because there was not at certain seasons of the year plenty of water available for such cultivation, but because no certainty of supply could be counted upon at times when such supply was essential. Such appropriation of water by these land owners as was made was, speaking broadly, an appropriation, not of the flow of the river in its lower stages, for such flow had already been appropriated by others, but of the flow in the higher stages of the water in the river over and above the flow necessary for the cultivation of the land in class A, unavailable in the past to such land owners for practical and efficient continued use because of the lack of storage facilities, but now shortly to be available by means of the impounding dam constructed by the Government. Such parcels of land to which water has hitherto been applied for the purpose of cultivation, but upon which the use of water was definitely discontinued before the year 1903, and has not been since resumed, may be designated as land in class B, and appear in the descriptive lists of such parcels showing the duration of cultivation, hereto attached, marked 4 and 5, embracing the land on the North Side and South Side respectively. These parcels of land in class B having discontinued in the past use of the water to which otherwise they might now be entitled by reason of the appropriation made for them, no new appropriation of later date having

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been made by a new and continued use of water upon the land, have no right that can now be established to the normal flow of water in the river appropriated by the land in class A. Their attempted appropriation, however, of the surplus water, discontinued because of lack hitherto of storage facilities, gives them equitably a preferential right over the land in class C (hereinafter described) in a right of application to the Government for stored water, where the owners of such land in class B are members of the water users' association, and by reason thereof may enter into contractual relations with the Government with respect thereto.

The third class of land is that which may be known as land in class C. It is such land as is situated within the irrigable district lying under the canals above mentioned, or their possible extensions, not included in classes A or B, upon which no cultivation has been had or as to which no appropriation or attempt at appropriation of the flow in the river at or above the Joint Head, has been made in the past. They are not entitled to the establishment of any right of appropriation in this suit.

The land in these three classes may be found upon the map hereto attached, marked Map No. 2, in colors as thereon designated.

By agreement entered into between the United States and the Water Users Association, the members of the latter, whether owners of land in classes A, B or C, are to be entitled to the benefits of the stored water in the Roosevelt reservoir, in such extent of acreage as the project shall serve. These benefits are to be formally obtained by those entitled thereto after the completion of the dam and upon the formal opening thereafter by the Government of this reclamation project, by contractual obligations then to be entered into by the members of the Water Users' Association with the Government. The stored water is to be distributed to those who shall have the right thereto, proportionally according to the acreage of the land, and irrespective of any priority of irrigation or cultivation of such land. Under the decision herein the owners of land in class A and in class B, because of the cultivation in the past of their land, and the facts as found, have a preferential right over the owners of land in class C to apply for and obtain from the Government a right to their proportionate share of the stored water needed by them. This preferential right to the owners of land in classes A and B is not a right to the water itself, nor does it give to those applying for and obtaining such right a priority in use or in extent of use to the stored water over owners of land in class C who may also apply and receive a similar right to the water. The preference given is merely and only that of a right to make application and have listed as sharers in the stored water the land in classes A and B before the owners of land in class C, whose land, if listed, will be listed subject to such prior right of application. Such priority of application, in order to be effective, must be availed of and be asserted both as to the owners of land in class A and the owners of land in class B within a reasonable time in order that certainty as to existing rights of all the land in the valley, as well to the surplus and stored as to the normal supply of water, may be speedily and definitely ascertained and determined. Such reasonable time is hereby fixed as one year from the formal opening by the United States Government of this reclamation project. Within such time all the owners of the land in classes A and B, in order to avail themselves of such prior right, must apply therefor to the United States Government or its reclamation officials in charge of this project, under such rules and regulations governing such application as shall be promulgated by such officials; and on and after such date all the parcels of land in classes A and B for which application for such stored water shall not have been made, or which for good cause shall not have had such appli-

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cation therefor granted, shall cease to have any such preferential right of application over and above the land in class C.

Attached hereto and made a part of this decision are a number of tables, the contents and purposes of which are as follows:

Table 6 is a table showing the acreage of land in classes A and B by townships and sections, followed by summaries thereof.

Table 7 is a table showing the acreage of land in class A on the North Side by townships and years of first cultivation under present appropriation.

Table 8 is a table similar to table 7, but for the South Side land.

Table 9 is a table showing the amount of the acreage of land in class A brought into cultivation year by year from 1869 to 1909, inclusive. In this table the first column shows the year of first cultivation, the second column the total acreage to such date and the increase in cultivation in that year, the third column similarly the acreage on the North Side, the fourth on the South Side, and the remaining columns such acreage under each of the various canals on the South Side.

Table 10 is a table showing the amount of water upon the basis established as the duty of water herein to which the parcels of land in class A lying on the North Side of the river, and the parcels of land in such class lying on the South Side of the river, and such parcels in such class under each of the canals lying on the South Side of the river, are entitled at the various stages of the river up to 45,325 miners' inches, the maximum amount necessary under such standard for the total acreage thereof. Such water in the river at its various stages of flow will be diverted for distribution to this land according to this table, subject to such graduation and interpolation thereof by the Commissioner as may be necessary, in the varying increase of the water, to give the various parcels of land entitled to the increase their proportionate share thereof. When the flow in the river equals the maximum amount necessary for the irrigation of the total acreage of the land in class A, plus the loss for carriage, all such land, of course, can be supplied. When the flow in the river is less than the maximum amount, the amount available shall be distributed to the various canals for those parcels of land first entitled thereto according to their relative dates of priority by years as shown in the table. All flood and stored water shall be shared by those entitled to it, and who can avail of it, irrespective of dates of priority.

The amount of water in the river available for distribution is to be computed by taking the daily flow in the Verde river and adding thereto the amount of the daily flow in the Salt river. The daily flow in the Salt river shall not be impounded by the Government, by means of the Roosevelt dam, in the reservoir, except when the total intake in such reservoir, including the estimated loss thereto by seepage and evaporation between such intake and the conflux with the Verde river, added to the flow of the Verde river shall exceed the amount called for in table 10, plus the amount to be added thereto for loss by evaporation and seepage in the canals, unless at the request or with the assent of the users of such water whose land is entitled thereto; and no water user entitled thereto shall be deprived against his consent of his proportionate share of the normal flow of the river by reason of such impounding dam. The Government, in times of flood water, shall not by impounding water in the reservoir lessen the proportionate share of such flood water of any individual land owner not a member of the water users' association, and against his consent, nor shall it lessen the proportionate share of the Tempe and San Francisco canals, or of either of

them, to such flood water available to such canals, so as to deprive such canals of such proportion of such flood water desired when the land lying under such canals is in need of such water or any portion thereof, and can avail of it, and when such canal company shall notify the Commissioner of its desire to divert such water or any portion thereof. The various parcels of land in the valley in cultivation are entitled to share equally, according to acreage, in the use of the flood water available; the proportionate share in the flood water of the Tempe and San Francisco canals is therefore to be measured by their relative acreage under cultivation, since the share of the land under the other canals, listed in the association, in the flood water in the Salt river can now be stored for them in the Roosevelt reservoir. The acreage under the Tempe canal is found to be approximately 16 per cent of the total acreage in cultivation. The acreage under the San Francisco canal is found to be approximately 3 per cent of the total acreage in cultivation. The amount of flood water to which the Tempe and San Francisco canals shall be entitled to receive, as above stated, is, therefore, 16 per cent and 3 per cent, respectively, of the total amount of flood water available.

The officials of the United States Government in charge of the reclamation project, the reservoir, and the impounding and diversion dams hereinbefore mentioned, shall be at all times under the direction and control of the Court with respect to the impounding, diversion and distribution of the flow of the water in the river, and they shall make such reports, daily and otherwise, of existing conditions as shall reasonably be required by the Commissioner and as shall show the amount of the flow into the reservoir and in the river, and shall cause to be diverted into the various canals or otherwise such amount or proportion of the water as the Commissioner shall direct.

Frank P. Trott, Esq., long the efficient Water Commissioner of this Court, is hereby selected and designated as the Water Commissioner to execute and carry out the provisions of the decree herein. In the exercise of such duty the Commissioner is authorized to enter upon the reservoir and the impounding and diversion dams constructed by the Government, and their gates and appliances, and also upon the canals herein mentioned, their dams, gates, laterals, and other structures and appliances whenever necessary to ascertain existing conditions, or to control, supervise, or regulate the proper delivery, carriage, or distribution of the water to be diverted by the canals under the decision and decree herein, and is authorized to establish such measuring boxes, and to make such rules and regulations as may be expedient and proper to ensure the delivery, carriage, and distribution of the water in accordance with the rights of the persons entitled thereto, as found by the decision and decree herein. The managements of the various canals shall cause to be made to the Commissioner, daily or otherwise as he shall direct, such reports and information as shall show the amount of water in their various canals, and shall cause such measurements of such amounts to be made at such places as the Commissioner shall direct, as may be necessary to obtain such information, and shall make such changes in the measurement, carriage and distribution of the water as the Commissioner shall direct. The Commissioner shall report from time to time to the Court as directed, as to his action, and shall apply to the Judge of the Court for such further or specific directions as to his powers or duties whenever such directions shall be necessary or proper for the effective carrying out of the provisions of the decree herein. At any time any party to this suit, or any canal company acting as the carrier of the water distributed, may apply to the Court or the Judge thereof for an interpretation, modification, enlargement, or annulment of any order, direction, or action of the Commissioner in the carrying out of the provisions of the decree. The Commissioner shall receive for his services a salary in the sum of Three Thousand Dollars

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($3,000.00) per annum, to be paid monthly on the first of each and every month on behalf of the parcels of land entitled to the regular flow of the river, by the owners of the canals, the carriers of such water to such land, or their successors in interest, and proportionately to the acreage served, as follows:

From the United States for the land on the North Side of the river	.608	thereof, to-wit	$152.00
From the Tempe canal for land served by it	.161	thereof, to-wit	40.25
From the San Francisco canal	.027	thereof, to-wit	6.75
From the Broadway canal	.003	thereof, to-wit	.75
From the Utah canal	.074	thereof, to-wit	18.50
From the Mesa canal	.109	thereof, to-wit	27.25
From the Highland canal	.003	thereof, to-wit	.75
From the Consolidated canal	.015	thereof, to-wit	3.75
Total	1.000		$250.00

The Commissioner shall keep an account of the necessary expenditures made by him in the proper exercise of his duty, and shall make a report of the same to the Court from time to time, and such expenditures, when allowed and approved by the Court, shall be paid by the various canal companies in the same relative proportion as the salary of the commissioner is paid by them.

Until the further order of the Court or the Judge thereof, the Commissioner, in the execution of the decision and decree herein, shall not see to the actual application of the water to the various parcels of land entitled to it. He shall from day to day ascertain the amount of water available for distribution and the land entitled to it, according to the right thereto of the various parcels in the order of their priority as shown by table 10, and shall order and supervise the diversion to the various canals supplying such parcels of land, at such points in the river, and in such manner as shall most economically subserve, and as shall be expedient, the various amounts to which such parcels of land are entitled to have diverted at the various stages of the water available, as shown in the table. The actual application of the water to the various parcels of land entitled thereto shall be made by the management of the various canals in such manner and under such reasonable rules and regulations as to rotation and delivery as they shall establish, subject always, however, to the control and regulation of the Court. The Commissioner shall also, when necessary, similarly supervise and direct the diversion and distribution to the Tempe, San Francisco and Broadway canals of the flood water to which they are entitled.

All users of water and the agency by which such water is diverted and delivered for use, are restricted in the diversion, carriage, and use of the water to methods reasonably adapted to its conservation to the end that the water made free of use to the public shall not be wasted. The methods of application of the water to the purpose for which it is appropriated shall be of such a character as to insure as small a consumption of water as is reasonably consistent with the accomplishment of such purpose. Under the present method of diversion, distribution, and use of the water, there is in some instances an unnecessary loss of water. Whenever and wherever practicable, the Commissioner is directed to decrease such loss by causing more economical methods or means of diversion, carriage, distribution, and use to be adopted.

Whenever, for the economical conservation, diversion, or distribution of the water, it shall be desirable and expedient that the water to be delivered

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to any canal system for distribution to the land under it entitled thereto, be carried thereto from the point of diversion in the river for such delivery by another canal, or by a number of other canals, such canal or canals, upon a written order by the Commissioner, shall carry such water in its or their canals and deliver the same to the canal entitled to receive it for distribution, subject, however, to a payment by such latter canal of such proper charges for such diversion and carriage as may be agreed upon, or as shall be determined by the Court or Judge, but no such order upon any such canal company for such carriage shall be made by the Commissioner without the signed approval thereon of the Judge.

The Hayden mill has established a right to the use of water for power purposes only, dating from the year 1874, in a maximum amount of eleven hundred (1,100) miners' inches. The method of diversion and carriage of the water shall be such as will enable the mill, when the supply is sufficient, to make use of such water as it is entitled to.

For more than forty years the Indians living on the reservation on the north side of the river, known as the Salt River Reservation, in township two north, range five east, have had delivered to them from the river for the cultivation of their land 500 miners' inches of water, irrespective of the amount of water in the river, whether scarce or plenty, and such water has been measured and delivered to them for the last twenty years before the segregation and division of any water to other water users. This land has acquired a prior right over and above all others to this amount of 500 inches. The amount of land to which this water has been applied is about 2,500 acres. This amount of water is insufficient properly to cultivate this amount of land. The evidence shows that for the cultivation thereof at least 700 miners' inches is necessary. Strictly, the additional 200 inches necessary could be decreed to these lands only after others prior in right had received the water to which they are entitled. In consideration, however, of the fact that the 500 inches to which the land at low stages is entitled is not increased, even when at the higher stages of the river the land by its acreage and early date of reclamation might be entitled to more than such 500 inches, and in order to avoid the practical difficulty of a method of distribution which would combine a definite fixed quantity at all stages with a varying quantity given according to priority, by consent of all parties in the suit, 700 miners' inches of water is to be given the Indians for use upon these lands at all stages in the river, and prior to the distribution and diversion of the remaining water in the river, such water to be measured at the lateral ditch or ditches to such land at their point of diversion from the Arizona canal. Certain other parcels of land in this reservation not embraced in the area above mentioned, have also been put in cultivation from time to time by these Indians, but these parcels are not included in the area for which the 700 inches are appropriated, but form a part of the land in class B entitled only to the right to obtain water appertaining to the land in that class, and are found in the tabulated statement of such land.

For many years last past a number of Indians living on land within the Camp McDowell Indian Reservation, situated along the Verde river above its conflux with Salt river, have cultivated such land by means of water diverted from the Verde river. The extent of such cultivation is approximately 1,300 acres. The maximum amount of water to which this land is entitled is 390 miners' inches constant flow. As a matter of fact, for some years last past, because of the insufficient means of diversion of the water from the river, and for other causes, these Indians have not been able to divert from the river the amount of water necessary for the proper irrigation of the land. It is the expressed purpose and intention of the Government

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within the next year to remove these Indians from this reservation to the Salt River Reservation, and to have them settle upon land within that reservation to be irrigated by means of the proportionate share in the stored water in the Roosevelt reservoir, to which such land, as land in class B or class C may acquire the right to share. In the expectation of this change of domicile and discontinuance of use of water as at present made from the Verde river by these Indians, and until the further order of the Court upon application with respect thereto in this suit, if hereafter necessary, the present diversion and use of water upon the said land in the Camp McDowell reservation by these Indians may be maintained.

Evidence has been given in the suit with respect to the cultivation of land on the south side of the river in sections 25, 26, 27, 28, 29 and 35, township 1 north, range 2 east, and 30 acres in section 30, township 1 north, range 3 east. The facts show that the cultivation of these various parcels of land was either by independent ditches from the river not embraced in this suit or by waste water. There is no such evidence of appropriation of water to these parcels of land as will permit of an establishment of their right to water diverted from the river in the canals that have their heads at or above the Joint Head, to which the issues in this suit are confined. This land, as likewise other land in the western portion of the valley not embraced in this suit, has had, and may still be entitled to have, for its source of supply the water rising in the river below the Joint Head, which supply is not within the issues here. These parcels of land, however, while not, under the testimony, entitled to a decree establishing their proportionate right of water under class A, or their right to a preferred application under class B, where they have been or shall be listed in the water users' association and become thereby privileged to enter into contractual relations with the Government with respect to the stored water, are entitled to the rights appertaining to land in class C.

Water has been applied for a number of years upon several tracts of land otherwise uncultivated for rows of ornamental and shade trees growing thereon. Such an appropriation is a valid one. The evidence shows that under ordinary conditions of planting, water sufficient for five acres of land is sufficient for one mile of such rows of trees. In determining the amount of water to be delivered to such trees, such standard of measurement has been taken.

Proof has been given in this case and the fact established of an appropriation of water to the land described as southeast quarter of section 23, township 1 north, range 3 east, by means of a subterranean flow of water, independent of the water in the river, through a ditch leading from the source of such supply in section 20, township 1 north, range 4 east. The issues in this case being confined to the right to the use of the flow in the Salt river, no decree herein as to the right of this land to an appropriation of this independent subterranean flow can be given.

In addition to the owners of the parcels of land situated in the Salt River valley under these canals, there have been made parties defendant to this suit owners of parcels of land lying in the Verde valley, along the Verde river and irrigated by water from it, some fifty miles above its conflux with the Salt river. The demurrers and pleas to the jurisdiction interposed by these defendants have been overruled. No testimony, however, as to the exact extent of cultivation of the land in the Verde valley owned by these defendants or the dates of the reclamation of the various parcels of such land and the application of water thereto has been given. It is not possible, therefore, in this decree to establish the rights of such land owners and such land to the use of the water in the Verde river in relation to the

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rights to such water of the land in the Salt River valley. From the general testimony in respect to the cultivation in the Verde valley, it seems that such cultivation, though in actual point of time and relative date of priority, in some instances later than that of land in the Salt River valley, is not of sufficient area and acreage at the present time to interfere seriously with the prior rights, if any, of the land in the Salt River valley. Such being the case, it does not seem desirable to delay the promulgation of the decree herein to await such testimony, nor at the present time under existing conditions does there seem to be a necessity for a determination of such relative priorities, if any, of rights between the two widely separated areas of land. The owners of the land in the Verde valley are party defendants to this suit, and it is conceived that if hereafter conditions shall arise by increased cultivation or otherwise, which shall make it necessary for a determination of the rights of the land in the Verde valley to the water in the Verde river as against the rights of the land to which water is by the decree herein shown to be entitled, the necessary steps for such determination can hereafter be taken, and such rights and their relation to those hereby decreed may be established by a supplemental decree hereafter to be entered in this suit.

Evidence has been given of the existence of a number of pumping plants by means of which the supply of water from the river to which the land is entitled in times of scarcity is supplemented by an underground supply thus made available. In other instances water so pumped is the only means of supply. As there is no evidence that the water so pumped materially lessens the flow in the river, such rights as the land and the owners of such plants may have in the water so pumped will not be interfered with by this decree, but as the establishment of such rights, if any, is not within the issues herein, no finding will be made with respect thereto.

At the date of this decision the Highland canal has been definitely discontinued as a carrying canal, its place as such carrier having been taken by the Eastern canal, serving the land heretofore served by the Highland.

The unit of measurement of a miners' inch, as the expression is used herein, is defined to be one-fortieth part of one cubic foot of water flowing per second of time.

The standard of a given number of miners' inches constant flow as the duty of water is taken because of the familiarity therewith of the water users in the valley, and because I know of no other well-known adaptable standard of measurement. In practical and economical use of water for irrigation and cultivation, however, no parcel of land is given a constant flow, but the water for a number of parcels is given to each in rotation, thus giving a larger, a more serviceable and a more economical head of water.

The various tables and maps attached hereto have been prepared under my direction by the Water Commissioner, Frank P. Trott, Esq., who in many ways has been of material assistance to me in the preparation of this decision.

The decision and decree in this case, from the nature thereof, is of necessity a continuing one. The Court retains jurisdiction of the case and of the issues embraced therein. From time to time, as conditions may require an enlargement or modification of the decision and decree, application for such modification or enlargement may be made to the Court, and if granted, the same shall be entered at the foot of the decree herein.

In order to afford an opportunity to make such changes and such preparation as may be necessary to carry out and conform to the provisions of this decision and decree, the same shall not be effective as of this date, but the same shall be effective on and after April 1st, 1910.

Dated, Phoenix, March 1, 1910.

EDWARD KENT,
Judge.

TABLE No. 1

A table showing the monthly average precipitation in Phoenix for fourteen years (from 1896 to 1909, inclusive) and the monthly daily average amount of water in miners' inches that was received from Salt River by the canals of Salt River Valley for the same periods of time.

MONTHS	Precipitation	Tempe, San Francisco and Broadway	Mesa and Consolidated	Utah	Mesa, Consolidated and Utah	Highland	Arizona and appropriators	Joint Head	Total, less 500 for Indians	Total on the South Side	Total on the North Side
January	0.98	6,531	3,576	1,860	5,436	109	8,458	3,017	23,551	12,076	11,475
February	0.83	7,372	5,025	2,950	7,975	189	11,185	4,243	30,964	15,536	15,428
March	0.54	8,779	5,380	3,508	8,888	265	12,917	4,407	35,256	17,932	17,324
April	0.44	7,866	5,546	3,095	8,641	192	15,107	4,769	36,575	16,699	19,876
May	0.04	6,634	4,445	2,275	6,720	88	9,911	3,603	26,956	13,442	13,514
June	0.09	4,963	2,164	1,539	3,703	....	6,308	2,523	17,497	8,666	8,831
July	1.25	4,708	2,577	1,700	4,277	62	7,741	2,662	19,450	9,047	10,403
August	1.10	7,539	4,477	2,756	7,233	86	14,934	4,311	34,103	14,858	19,245
September	0.96	6,640	3,995	2,234	6,229	52	11,559	3,579	28,059	12,921	15,138
October	0.35	5,699	2,645	2,046	4,691	48	8,056	2,678	21,172	10,438	10,734
November	0.83	6,186	2,933	2,362	5,295	59	10,925	2,780	25,245	11,540	13,705
December	0.74	6,216	2,832	1,951	4,783	16	8,116	2,607	21,738	11,015	10,723
Average	0.68	6,594	3,800	2,356	6,156	97	10,435	3,432	26,714	12,847	13,867

TABLE No. 1 A

A table showing the annual precipitation in Phoenix for fourteen years (from 1896 to 1909, inclusive) and the annual daily average amount of water in miners' inches that was received from Salt River by the canals of Salt River Valley for the same periods of time.

YEAR	Precipitation	Tempe, San Francisco and Broadway	Mesa and Consolidated	Utah	Mesa, Consolidated and Utah	Highland	Arizona and appropriators	Joint Head	Total, less 500 for Indians	Total on the South Side	Total on the North Side
1896	10.48	7,318	4,715	3,106	7,821	201	14,927	3,557	33,824	15,340	18,484
1897	9.87	7,100	5,625	2,680	8,305	428	12,272	4,881	32,986	15,833	17,153
1898	5.95	7,065	4,386	2,322	6,708	178	11,486	3,491	28,928	13,951	14,977
1899	5.19	6,050	2,481	1,968	4,449	43	8,958	2,800	22,300	10,542	11,758
1900	5.39	4,237	1,462	1,240	2,702	14	5,848	1,855	14,656	6,953	7,703
1901	4.87	6,580	3,871	2,695	6,566	175	12,411	2,559	28,291	13,321	14,970
1902	6.87	4,471	1,787	1,507	3,294	81	7,413	1,442	16,651	7,796	8,855
1903	6.61	5,441	2,419	2,110	4,529	33	10,094	1,723	21,820	10,003	11,817
1904	5.57	4,476	1,830	1,319	3,149	3	7,647	1,482	16,757	7,628	9,129
1905	19.73	6,498	4,035	2,040	6,075	33	7,109	3,035	22,750	12,606	10,144
1906	8.55	9,092	5,000	2,726	7,726	177	6,783	5,971	29,749	16,995	12,754
1907	8.17	7,881	5,125	2,883	8,008	....	10,291	5,895	32,075	15,889	16,186
1908	10.68	7,827	5,159	2,815	7,974	....	13,691	5,626	35,118	15,801	19,317
1909	6.17	8,286	5,297	3,579	8,876	45	17,154	3,727	38,088	17,207	20,881
Average	8.15	6,594	3,800	2,356	6,156	97	10,435	3,432	26,714	12,847	13,867

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TABLE No. 2

A descriptive list of Class A land on north side of Salt River.

DESCRIPTION	Sec.	Township	Acres	Remarks
Indian Land—				
SE ¼	20	2 N R 5 E	160	
S ½ of N ½	21		160	
S ½ of	21		320	
SW ¼	22		160	
W ½ of	27		320	
N ½ of	28		320	
N ½ of NE ¼	29		80	
E 13 a. of SE ¼ of SE ¼	29		13	
NE ¼	31		160	
S ½ of	31		320	
N ½ of	32		320	
Total acreage of the Indian land			2333	
Year 1869—				
N ½ of NW ¼	3	1 N R 3 E	80	
E ½ of	4		320	
SW ¼ of	4		160	
S ½ of	8		320	
E ½	9		320	
NW ¼	9		160	
S 120 a. of SW ¼	9		120	
E ½ of	10		320	
N ½ of NW ¼	10		160	
SW ¼	10		80	
All of	11		640	
60 a. in SW cor. of NW ¼	12		60	
S ½ of NW ¼	14		80	
NE ¼	17		160	
70 a. N of River in SE ¼	17		70	
NE ¼	33	2 N R 3 E	160	
Total			3210	
Year 1870—				
SE ¼	1	1 N R 2 E	160	
E ½ of NE ¼	13		80	
SW ¼	14		160	
SW ¼	5	1 N R 3 E	160	
SE ¼	7		160	
E ½ of SW ¼ and SW ¼ of SW ¼	7		120	
15 a. in NW cor. of NE ¼	16		15	
NW ¼	17		160	
NE ¼	18		160	
N ½ of SE ¼	18		80	
N ½ of NW ¼ and SE ¼ of NW ¼	18		120	
N ½ of SW ¼	18		80	
Total			1455	
Year 1871—				
S 50 a. of SW ¼	11	1 N R 2 E	50	
E ½	12		320	
NW ¼	12		160	
SE ¼ except 40 a. in River	13		120	
NE ¼ of NW ¼ and NE ¼ of NW ¼ of NW ¼	13		50	
SW ¼	13		160	
N 100 a. of NE ¼	14		100	

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1871—(Continued)—				
SE ¼	14	1 N R 2 E	160	
NW ¼	14		160	
SE ¼ except 30 a. in NE corner	2	1 N R 3 E	130	
130 a. S of S. R. V. Canal in SW ¼	2		130	
NW ¼	4		160	
E ½	5		320	
NW ¼	5		160	
E ½	6		320	
80 a. N of Grand Ave in NW ¼	6		80	
5 a. S of Grand Ave. in NW ¼ of NW ¼	6		5	
20 a. S of Grand Ave. in SE ¼ of NW ¼	6		20	
20 a. in E part of N. Capitol Addition	6		20	
N ½	7		320	
NW ¼	16		160	
30 a. N of River in SW ¼	16		30	
SW ¼	34	2 N R 3 E	160	
Total			3295	
Year 1872—				
S 70 a. of NE ¼	11	1 N R 2 E	70	
SW ¼	12		160	
SE ¼	16		160	
SE ¼	17		160	
NE ¼	20		160	
E ½ of NE ¼	3	1 N R 3 E	80	
SE ¼	31	2 N R 3 E	160	
E ½	32		320	
NW ¼	32		160	
E ½ of SW ¼ and NW ¼ of SW ¼	32		120	
S ½	33		320	
Total			1870	
Year 1873—				
E 60 a. N of River in NE ¼	25	1 N R 1 E	60	
E ½ of NW ¼	20	1 N R 2 E	80	
N ½	8	1 N R 3 E	320	
Total			460	
Year 1874—				
SE ¼	11	1 N R 2 E	160	
S 100 a. of NE ¼	16		100	
SW ¼ except 15 a. rough	17	1 N R 3 E	145	
Total			405	
Year 1875—				
60 a. S of Maricopa Canal in SE ¼	34	2 N R 3 E	60	
Total			60	
Year 1876—				
W ½ of SE ¼	2	1 N R 2 E	80	
SW ¼	2		160	
SW ¼	9		160	
NE ¼	10		160	
N 120 a. of NW ¼	10		120	
NW ¼	11		160	
SW ¼ except 10 a. rough	15		150	

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TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1876—(Continued)—				
NW ¼ except 10 a. in SW cor.	17	1 N R 2 E	150	
N ½ of SE ¼	20		80	
NW ¼	22		160	
NE ¼	14	1 N R 3 E	160	
N ½ of SE ¼	14		80	
N ½ of SW ¼	14		80	
Total			1700	
Year 1877—				
NE ¼	1	1 N R 2 E	160	
N ½	2		320	
NE ¼	9		160	
W ½	16		320	
NE ¼	18		160	
SE ¼	29	2 N R 3 E	160	
N ½	31		320	
SW ¼	31		160	
Total			1760	
Year 1878—				
SW ¼	1	1 N R 2 E	160	
All of	3		640	
NE ¼	4		160	
All of	6		640	
N 110 a. of SW ¼	11		110	
NW ¼	18		160	
NW ¼ of NE ¼	22		40	
Lots 1, 2, 7 and 8, Montezuma Place, in SE ¼ of SW ¼	3	1 N R 3 E	30	
NW ¼ of SW ¼	8		40	
NW ¼ except 60 a. in SW Cor.	12		100	
NE ¼ of NW ¼	14		40	
N ½ of NE ¼	15		80	
NE ¼ except 15 a. in NW cor.	16		145	
E ½	25	2 N R 2 E	320	
SW ¼	25		160	
S ½	26		320	
S ½	35		320	
SW ¼ of SW ¼	29	2 N R 3 E	40	
S ½ of SE ¼	30		80	
SW ¼	30		160	
NW ¼	33		160	
Total			3905	
Year 1879—				
NW ¼	1	1 N R 2 E	160	
NW ¼	4		160	
NE ¼	7		160	
N ½	8		320	
NW ¼	9		160	
30 a. N of Maricopa Canal in NE cor. of SE ¼	2	1 N R 3 E	30	
NW ¼	2		160	
30 a. N of S. R. V. Canal in SW ¼	2		30	
50 a. N of River in SW ¼	13		50	
S ½	27	2 N R 2 E	320	
SE ¼	34		160	
SE ¼	36		160	
SE ¼ except 10 a. in NW cor.	19	2 N R 3 E	150	

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TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1897—(Continued)—				(Erratum, obviously should read 1879)
S ½	20	2 N R 3 E	320	
25 a. in SW cor. of SE ¼	27		25	
E ½	28		320	
NW ¼ except 50 a. in SW cor.	28		110	
SW ¼	28		160	
N ½	29		320	
NE ¼	30		160	
Total			3435	
Year 1880—				
All of	1	1 N R 1 E	640	
All of	12		640	
NE ¼	13		160	
S ½ of NE ¼	2	1 N R 2 E	80	
S ½	4		320	
W ½	7		320	
SW ¼	8		160	
SW ¼	17		160	
W ½ of NW ¼	20		80	
60 a. N of River in N ½ of NE ¼	21		60	
120 a. N of River in NW ¼	21		120	
SW ¼	1	1 N R 3 E	160	
45 a. in SW cor. of NW ¼	1		45	
NW ¼ of NW ¼	14		40	
SW ¼	22	2 N R 1 E	160	
S ½ of NE ¼	26		80	
SE ¼	26		160	
W ½	26		320	
All of	35		640	
All of	36		640	
20 a. S of Grand Canal in NW ¼	26	2 N R 2 E	20	
S ½ of	28		320	
SE ¼	29		160	
55 a. S of Grand Canal in NW ¼	29		55	
SW ¼	29		160	
E ½ of	32		320	
NW ¼	32		160	
E ½	33		320	
NE ¼	34		160	
N ½	35		320	
W ½	36		320	
140 a. S of Grand Canal in SW ¼	19	2 N R 3 E	140	
SW ¼ except 10 a. in NE cor.	21		150	
SW ¼ except 30 a. in NE cor.	27		130	
NW ¼	30		160	
NE ¼ except 15 a. in NE cor.	34		145	
Total			8025	
Year 1881—				
E ½	11	1 N R 1 E	320	
NW ¼	11		160	
SW ¼ except S ½ of SW ¼ of SW ¼	11		140	
NE ¼	5	1 N R 2 E	160	
SW ¼	5		160	
NE ¼	12	1 N R 3 E	160	
N 120 a. of SE ¼	12		120	
S ½ of NE ¼	25	2 N R 1 E	80	
SE ¼	25		160	
NW ¼ except 50 a. in NE Cor.	25		110	

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TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
SW ¼	25	2 N R 1 E	160	
All of	28		640	
All of	33		640	
E ½ of	34		320	
NW ¼	34		160	
SW ¼	34		160	
All of	31	2 N R 2 E	640	
NW ¼	33		160	
W ½ of	34		320	
NE ¼	36		160	
SW ¼ of NW ¼ except 5 a. in NE cor.	27	2 N R 3 E	35	
Total			4965	
Year 1882—				
E ½ of NE ¼	2	1 N R 1 E	80	
W ½ of NE ¼	2		80	82-04
SE ¼	2		160	
W ½ of	2		320	82-04
All of	3		640	
N ½ of	10		320	
SE ¼	5	1 N R 2 E	160	
NW ¼	5		160	
NW ¼ of SW ¼	7	1 N R 3 E	40	
90 a. S of Grand Canal in SE ¼	14	2 N R 1 E	90	
100 a. S of Grand Canal in NW ¼	14		100	
SW ¼	14		160	
All of	15		640	
E ½ of	20		320	
SW ¼	20		160	
E ½ of	21		320	
W ½ of	21		320	82-04
E ½ of	22		320	
NW ¼	22		160	
NE ¼	23		160	
SW ¼	23		160	
SE ¼ except 40 a. in NE cor.	24		120	
SW ¼	24		160	
N ½ of NE ¼	25		80	
50 a. in NE cor. of NW ¼	25		50	
All of	27		640	
E ½ of	29		320	
SW ¼	29		160	
E ½ of	32		320	
S ½ of NE ¼	30	2 N R 2 E	80	
SE ¼	30		160	
NW ¼ except 15 a. in NE cor.	30		145	
SW ¼	30		160	
SW ¼	32		160	
SW ¼	33		160	
NW ¼	34	2 N R 3 E	160	
Total			7745	
Year 1883—				
N ½ of NE ¼	9	1 N R 1 E	80	
S ½ of NE ¼	9		80	83-05
SE ¼	9		160	
NE ¼	19	1 N R 2 E	160	
SW ¼	12	1 N R 3 E	160	

000379

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1883—(Continued)—				
NE ¼ of NW ¼	15	1 N R 3 E	40	
NW ¼ of NW ¼	15		40	
SW ¼ of NW ¼	15		40	
NW ¼ of SW ¼	15		40	
5 a. in NW cor. of SW ¼ of SW ¼	15		5	
SE ¼	23	2 N R 1 E	160	
NW ¼	23		160	
N ½ of NE ¼	26		80	
50 a. in SW cor. of NW ¼	28	2 N R 3 E	50	
Total			1255	
Year 1884—				
N ½	5	1 N R 1 E	320	
E ½	6		320	
W ½	6		320	84-04
NE ¼	14		160	
SE ¼	18	1 N R 2 E	160	
SE ¼ except 15 a. in NW cor. of SW ¼	3	1 N R 3 E	145	
25 a. in NE cor. of SW ¼	3		25	
40 a. S of Grand Canal in NW ¼	20	2 N R 3 E	40	
Total			1490	
Year 1885—				
N 90 a. of NE ¼	11	1 N R 2 E	90	
N 60 a. of NE ¼	16		60	
S ½ of SE ¼	18	2 N R 1 E	80	
SW ¼	31		160	
N ½ of N ½ of SE ¼	30	2 N R 3 E	40	
SW ¼ except 20 a. in NE cor.	35		140	
Total			570	
Year 1886—				
S ½	7	1 N R 1 E	320	
N ½ of SE ¼	19	1 N R 2 E	80	
E ½ of SE ¼	9	2 N R 1 E	80	
SW ¼ of SE ¼	9		40	
S ½	16		320	
95 a. on E side of NE ¼	19		95	
SE ¼ except 20 a. on W side	19		140	
SE ¼	31		160	
All of	21	2 N R 2 E	640	
40 a. S of Grand Canal in NE ¼	26		40	
SW ¼ of SE ¼	16	2 N R 3 E	40	
NE ¼	17		160	
N 60 a. of SE ¼	17		60	
E ½ of SW ¼	17		80	
NE ¼ except 20 a. in SW cor.	20		140	
W 20 a. N of Grand Canal in SW ¼ of NW ¼	20		20	
45 a. S of Grand Canal in W ½ of SE ¼	21		45	
NW ¼ of SW ¼	29		40	
Total			2500	
Year 1887—				
20 a. in SE ¼ of NW ¼ and W ½ of NW ¼	13	1 N R 3 E	100	
S ½ of NE ¼	15		80	
N ½ of SE ¼	15		80	
NW ¼	15	2 N R 2 E	160	
SW ¼	19		160	

000380

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1887—(Continued)—				
S ½ of NW ¼	23	2 N R 2 E	80	
N ½ of SW ¼	23		80	
S 30 a. of SE ¼ of NW ¼	17	2 N R 3 E	30	
S ½ of NW ¼	25		80	
S ½ of N ½ of SE ¼	30		40	
10 a. for Trees	29	2 N R 4 E	10	
NE ¼ of NE ¼	25	3 N R 1 E	40	
S ½ of NE ¼	25		80	
E ½ of SE ¼	25		80	
W ½ of SE ¼	25		80	87-05
E ½ of SW ¼	25		80	
50 a. N of Grand Ave. in E ½ of SE ¼	36		50	
N ½ of NW ¼ of NE ¼	30	3 N R 2 E	20	
S 10 a. of SE ¼ of NE ¼	30		10	
E ½ of NE ¼ of SE ¼ & S ½ of SE ¼ except 5 a. in NW cor.	30		95	
E ½	34		320	
NE ¼ of NE ¼	36		40	
E ½ of SE ¼	36		80	
NE ¼ of NE ¼	31	3 N R 3 E	40	
NW ¼	31		160	87-03
Total			2075	
Year 1888—				
N ½ of SE ¼ except 10 a. in SE cor.	10	1 N R 2 E	70	
S ½ of SE ¼	10		80	
SW ¼	10		160	
E ½	15		320	
NW ¼	15		160	
SE ¼ of SE ¼ of SW ¼	6	1 N R 3 E	10	
SE ¼ of NW ¼ of SE ¼	7	1 N R 4 E	10	
40 a. N of River in E ½ of SW ¼	7		40	
50 a. N of River in W ½ of SW ¼	7		50	88-03
W ½ of NE ¼	4	2 N R 2 E	80	
W 30 a. of SW ¼ of SE ¼	4		30	
W ½	4		320	
N ½	5		320	
W ½ of SW ¼	5		80	
E ½	6		320	
80 a. N of Grand Ave. in NW ¼	6		80	
20 a. S of Grand Ave. in SE ¼ of NW ¼	6		20	
SW ¼	6		160	
NW ¼ of NW ¼	8		40	
E ½	9		320	
NW ¼ of NW ¼ of NW ¼	9		10	
N ½ of SW ¼	9		80	
NW ¼ of NE ¼	10		40	
E 60 a. of S ½ of NW ¼	10		60	
NW ¼ of NE ¼	11		40	
W ½ of NW ¼ of NW ¼	13		20	
N ½ of NW ¼ of NE ¼	14		20	
SW ¼	14		160	
NW ¼ of NW ¼ and NW ¼ of NE ¼ of NW ¼	23		50	
W ½ of NW ¼	6	2 N R 3 E	80	
W ½ of SW ¼	6		80	
SE ¼ of SE ¼	35		40	
5 a. in NE cor. of SW ¼ of SE ¼	35		5	
S ½ of NE ¼	36		80	
S ½ of NW ¼	36		80	

000381

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1888—(Continued)—				
S ½	23	2 N R 4 E	320	
E ½ of SE ¼ and NW ¼ of SE ¼	27		120	
NE ¼ of NE ¼ of SW ¼ of SE ¼	27		5	
W ½	34	3 N R 2 E	320	
Total			4280	
Year 1889—				
N ½ of SE ¼	10	1 N R 1 E	80	
N ½ of SW ¼	10		80	
50 a. N of River in NE ¼	23	1 N R 2 E	50	
NE ¼ of NW ¼ and NW ¼ of NW ¼	23		60	
10 a. in NE cor. of SE ¼ of SE ¼ and 30 a. N of River in S ½ of SE ¼	14	1 N R 3 E	40	
N ½ of NE ¼ & W ½ of SW ¼ of NE ¼	1	2 N R 1 E	100	
SE ¼	1		160	
NE ¼ of SE ¼	2		40	
NE ¼ of NE ¼	11		40	
S ½ of NE ¼	11		80	
NE ¼ of NE ¼	13		40	
SW ¼ of NE ¼	13		40	
NE ¼ of NE ¼	14		40	
W ½ of NE ¼	2	2 N R 2 E	80	
SE ¼ of SE ¼	2		40	
W ½ of SE ¼	2		80	
W ½ of NW ¼	2		80	
W ½ of SW ¼	2		80	
E ½	3		320	
SW ¼	3		160	
W ½ of NE ¼	7		80	
NW ¼	7		160	
NE ¼ of NE ¼ of SW ¼	7		10	
SE ¼ of SW ¼	7		40	
SW ¼ of NW ¼ of SW ¼	7		10	
S ½ of NE ¼ of SE ¼	8		20	
10 a. N of Grand Ave. in NW cor. of SE ¼	8		10	
W ½ of NW ¼	11		80	
All of	16		640	
E 100 a. of NE ¼	17		100	
SE ¼	17		160	
SW ¼ of NW ¼	17		40	
N ½	20		320	
W ½ of SW ¼	20		80	
N ½ of NE ¼	22		80	
NW ¼ of SW ¼	22		40	
5 a. for Trees in Alhambra	26		5	
NE ¼ except 20 a. on N side	27		140	
35 a. S of Grand Canal in NW ¼	27		35	
W ½ of NW ¼	19	2 N R 3 E	80	
N ½ of NW ¼ of SE ¼	36		20	
SW ¼ of SE ¼	36		40	
N ½ of SW ¼	36		80	
50 a. S of Ariz. Canal in NE ¼	28	2 N R 4 E	50	
W 55 a. in N ½ of SE ¼	28		55	
30 a. S of Ariz. Canal in SE ¼ of NW ¼	28		30	
15 a. in NE cor. of SW ¼	28		15	
NE ¼ of SE ¼	30		40	
SE ¼ of SE ¼	30		40	
NE ¼ except 10 a. rough	22	3 N R 1 E	150	
NE ¼ of SE ¼	22		40	
80 a. S of Grand Ave. in SE ¼	22		80	

000382

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1889—(Continued)—				
5 a. for trees in NW ¼ of NW ¼	26	3 N R 1 E	5	Peoria
5 a. for trees in NE ¼ of NE ¼	27		5	Peoria
SE ¼ of NE ¼	27		40	
SW ¼ of SW ¼	7	3 N R 2 E	40	
S 60 a. of E ½ of SE ¼	31		60	
NW ¼ of SE ¼	31		40	
N ½ of SW ¼	31		80	
NW ¼ of SW ¼ of SW ¼	31		10	
NE ¼	32		160	
SE ¼	33		160	
S 40 a. of SW ¼	33		40	
E ½ of NW ¼	35		80	
W ½ of SW ¼	36		80	
Total			5260	
Year 1890—				
S 40 a. of NW ¼	10	1 N R 2 E	40	
S ½ of SW ¼ of SE ¼	12	1 N R 3 E	20	
E ½ of NE ¼	2	1 N R 4 E	80	
10 a. in NW cor. of NE ¼ of NE ¼	6		10	
NW ¼ of NE ¼	6		40	
W ½ of SW ¼	6		80	
S ½ of SE ¼	2	2 N R 1 E	80	
E ½ of NE ¼	7	2 N R 2 E	80	
N ½ of SE ¼	10		80	
E ½ of NW ¼ of NW ¼	13		20	
S ½ of SE ¼	14		80	
E ½ of SE ¼	15		80	
NW ¼	28		160	
N 60 a. of W ½ of SW ¼	4	2 N R 3 E	60	
S ½ of SE ¼	15		80	
SW ¼ of SW ¼	15		40	
NE ¼ of NE ¼ and S ½ of NE ¼	22		120	90-04
NW ¼ of NE ¼	22		40	
NE ¼ of SE ¼	22		40	
NW ¼ of SE ¼ and S ½ of SE ¼	22		120	90-05
NW ¼ of NW ¼	22		40	
E ½ of SE ¼	27		80	
15 a. in NE cor. of SW ¼ of SE ¼	27		15	
NE ¼ of SW ¼	29		40	
SE ¼ of SW ¼	29		40	
5 a. in SW cor. of NE ¼ of SE ¼	19	2 N R 4 E	5	
S ½ of SE ¼ except 5 a. in NE cor.	19		75	
SW ¼	22	3 N R 1 E	160	
5 a. in SE cor. of NE ¼	26		5	
50 a. S of Ariz. Canal in E ½ of SE ¼	25	3 N R 2 E	50	
S 60 a. of E ½ of SE ¼ and S ½ of SW ¼ of SE ¼	32		80	90-04
N ½ of NE ¼ of SE ¼ and N 60 a. of W ½ of SE ¼	32		80	90-03
NE ¼	35		160	
W ½ of NW ¼	36		80	
N ½ of NE ¼	18	1 N R 1 W	80	
Total			2340	
Year 1981—				
SE ¼ of NW ¼	15	1 N R 3 E	40	
N ½ of SE ¼	14	2 N R 2 E	80	

000383

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1891—(Continued)—				
SE ¼	19	2 N R 2 E	160	
N ½ of SE ¼ of NE ¼	35	2 N R 3 E	20	
NE ¼ of NE ¼	36		40	
SE ¼ of SE ¼	36		40	
S ½ of SE ¼ of SW ¼ and SW ¼ of SW ¼	36		60	
SW ¼	26	3 N R 1 E	160	
SE ¼ of SE ¼	27		40	
E ½ of SE ¼	35	3 N R 2 E	80	
SE ¼ of NE ¼ and W ½ of NE ¼	31	3 N R 3 E	120	
NE ¼ of NW ¼ of SW ¼ and W ½ of W ½ of SW ¼	32		50	
Total			890	
Year 1892—				
N ½ of SE ¼	13	1 N R 1 E	80	
W ½ of SW ¼ of SE ¼	13		20	
E ½ of NW ¼ and NW ¼ of NW ¼	13		120	
NE ¼	1	1 N R 3 E	160	
NE ¼ except 10 a. in SE cor.	2		150	
E ½ of NE ¼ of SE ¼	11	2 N R 1 E	20	
S ½ of SE ¼	11		80	
E ½	12		320	
N 60 a. of W ½ of NW ¼	12		60	
NE ¼ of SW ¼	12		40	
NW ¼	32		160	
SW ¼	32		160	
NW ¼ of SW ¼ and W ½ of SW ¼ of SW ¼	12	2 N R 2 E	60	
NW ¼ of NE ¼ of NW ¼ and NW ¼ of NW ¼	14		60	
E ½ of SW ¼ and SW ¼ of SW ¼	17		120	
NE ¼ of NE ¼	18		40	
SE ¼ of NE ¼	18		40	92-04
W ½ of NE ¼	18		80	92-04
E 60 a. of N ½ of SE ¼	18		60	
SE ¼ of SE ¼	18		40	
S ½ of SW ¼ of NW ¼ of SE ¼	18		5	
NE ¼	19		160	
N ½ of NE ¼	30		80	
15 a. in NE cor. of NW ¼	30		15	
W ½ of NW ¼	23	2 N R 3 E	80	
100 a. N of Maricopa Canal in SE ¼	34		100	
S ½ of NE ¼	24	2 N R 4 E	80	
N ½ of N ½ of SE ¼	24		40	
S ½ of NW ¼	14	3 N R 1 E	80	
N ½ of SW ¼	14		80	
50 a. in E part of N ½ of NW ¼ and SE ¼ of NW ¼	22		90	
S 30 a. of NW ¼ of NE ¼ and N 10 a. of SW ¼ of NE ¼	27		40	
N 25 a. of SE ¼ of NE ¼	36		25	
SW ¼ of NE ¼	36		40	
80 a. strip running SW through center of SW ¼	30	3 N R 2 E	80	
W ½	32		320	
Total			3185	
Year 1893—				
SW ¼ of NE ¼	6	1 N R 4 E	40	

000384

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1893—(Continued)—				
100 a. S of Grand Canal in NW ¼	7	1 N R 4 E	100	
SE ¼ of SE ¼	16	2 N R 3 E	40	
NW ¼ of SE ¼	16		40	
W 30 a. of NW ¼ of NW ¼	27		30	
E ½ of NW ¼	35		80	
NW ¼ of NE ¼	36		40	
NE ¼ of SE ¼ & S ½ of NW ¼ of SE ¼	36		60	
S ½ of N ½ of NW ¼	36		40	
NW ¼ of SE ¼	30	2 N R 4 E	40	
W ½ of NW ¼ of NE ¼	36		20	
W ½ of NW ¼ of SE ¼	36		20	
NW ¼	36		160	
N ½ of SW ¼	36		80	
SW ¼ of SW ¼	36		40	
N ½ of SW ¼	36	3 N R 1 E	80	
N 60 a. of E ½ of NE ¼ & W ½ of NE ¼	31	3 N R 2 E	140	
S ½ of NW ¼	31		80	
Total			1130	
Year 1894—				
50 a. N of Grand Canal in W part of NW ¼	1	1 N R 3 E	50	
W ½ of NE ¼	3		80	
S ½ of NW ¼	3		80	
Blk. 5, Montezuma Place, in SW ¼	8		10	
W ½ of NW ¼	6	1 N R 4 E	80	94-04
N ½ of NE ¼ of SW ¼	15	2 N R 3 E	20	
N ½ of SE ¼ of NE ¼ of SW ¼	15		5	
NW ¼ of SW ¼	15		40	
NE ¼ of NE ¼ of NE ¼	23		10	
NW ¼ of SE ¼ of NW ¼	23		10	
NW ¼ except 10 a. in SE cor.	24	2 N R 3 E	150	
N 60 a. of E ½ of SW ¼	34	3 N R 1 E	60	
N ½ of NW ¼ & E 30 a. of S ½ of NW ¼	35		110	
N ½ of SW ¼	20	3 N R 2 E	80	
W ½ of NW ¼	35		80	
30 a. in SW cor. of SW ¼	33	3 N R 3 E	30	
Total			895	
Year 1895—				
S 60 a. of NE ¼	14	1 N R 2 E	60	
NW ¼ of SE ¼	2	2 N R 1 E	40	
N 25 a. of SE ¼ of NW ¼	16		25	
NE ¼	24		160	
S ½ of SE ¼ of NW ¼	5	2 N R 3 E	20	
E ½ of SW ¼	5		80	
S 60 a. of W ½ of SW ¼	5		60	
10 a. for trees along Central Avenue	5		10	
All of	18		640	
NW ¼ of NE ¼ of NE ¼, S ½ of NE ¼ of NE ¼ and SE ¼ of NE ¼	23		70	95-05
NE ¼ of SE ¼ and S ½ of SE ¼	23		120	
SW ¼	23		160	
NW ¼ of NE ¼ of SW ¼	24		10	
NW ¼ of NW ¼ of SW ¼ and S ½ of NW ¼ of SW ¼	24		30	
5 a. in NW cor. of SW ¼ of SW ¼	24		5	
SE ¼ of NW ¼	27		40	
35 a. S of Ariz. Canal in S ½ of SE ¼	22	2 N R 4 E	35	

000385

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1895—(Continued)—				
E ½ of NE ¼	35	3 N R 1 E	80	
S ½ of SE ¼ of SW ¼	35		20	
W 15 a. of N ½ of SW ¼ of NW ¼	36		15	
SW ¼ of SW ¼ of SW ¼	30	3 N R 3 E	10	
Total			1690	
Year 1896—				
NE ¼	4	2 N R 1 E	160	
SE ¼ of NW ¼	13		40	
S ½ of NE ¼	7	2 N R 3 E	80	
SW ¼ of NE ¼ of SW ¼	15		10	
S ½ of NW ¼	26	2 N R 4 E	80	
10 a. for trees in NW ¼ of NW ¼	26		10	Scottsdale
NE ¼ of NW ¼ of SW ¼	32		10	Cemetery
NE ¼ of SW ¼	31	3 N R 3 E	40	96-04
SW ¼ of SW ¼	31		40	96-04
Total			470	
Year 1897—				
SE ¼	7	1 N R 2 E	160	80-87, 97-09
SE ¼	9		160	73-74-76-80, 97-09
N 15 a. of W ½ of NW ¼ of NE ¼	8	2 N R 3 E	15	
S ½ of S ½ of NW ¼ of NE ¼	8		10	
NE ¼ except 30 a. in NE ¼	16		130	
NW ¼ of NE ¼ of NW ¼ and NW ¼ of NW ¼	16		50	
S ½ of NW ¼	16		80	
W ½ of SE ¼ of SW ¼	16		20	
W ½ of SW ¼	16		80	
25 a. in SW cor. of SE ¼	35		25	
SE ¼ of SW ¼	19	2 N R 4 E	40	
NE ½ of NW ¼ of NE ¼	26		10	
N ½ of SW ¼ of SE ¼	30		20	
NE ¼ of NE ¼ of NE ¼	36	3 N R 1 E	10	
Total			810	
Year 1898—				
SW ¼ of NW ¼	18	2 N R 2 E	40	
S ½ of SW ¼ of SW ¼	4	2 N R 3 E	20	
W ½ of SE ¼ of SW ¼	15		20	
30 a. in central part of SW ¼ of NE ¼	23		30	98-04
N ½ of SE ¼ of SW ¼	36		20	
W ½ of SE ¼	35	3 N R 2 E	80	
W ½ of SE ¼ of SW ¼ of SW ¼	30	3 N R 3 E	5	
Total			215	
Year 1899—				
E ½ of NE ¼	22	1 N R 2 E	80	
80 a. N of river in SW ¼ of SE ¼	22		30	
SW ¼ of SE ¼ of NW ¼	23	2 N R 3 E	10	
E ½ of NE ¼ of NE ¼	35		20	
NE ¼ of NW ¼	26	3 N R 1 E	40	
W ½ of SE ¼ of SW ¼	7	3 N R 2 E	20	
Total			200	

000386

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1900—				
NW ¼ of NE ¼	8	1 N R 1 E	40	
E ½ of SE ¼ of SW ¼	8	2 N R 3 E	20	
15 a. in W part of SW ¼ of SW ¼	10		15	
N ½ of NW ¼ of SE ¼	23		20	00-04
NE ¼ of NE ¼ of NE ¼	25		10	
E ½ of SW ¼ of SW ¼	19	2 N R 4 E	20	
10 a. in SW cor. of SW ¼	20		10	
SW ¼	30		160	
SE ¼ of SE ¼ except 5 a. in SE Cor.	31		35	
SW ¼ of NW ¼	26	3 N R 1 E	40	
Total			370	
Year 1901—				
N ½ of SW ¼	18	1 N R 2 E	80	
50 a. N of river in E part of NE ¼	21		50	
N 60 a. of E ½ of NW ¼	8	2 N R 3 E	60	
SE ¼ of SE ¼ of NW ¼	8		10	
W ½ of SE ¼ of NW ¼	15		20	
E ½ of SE ¼	21		80	
10 a. in NE cor. of NE ¼ of SE ¼	28	2 N R 4 E	10	
SE ¼	28	3 N R 2 E	160	91-92, 01-09
NE ¼ of SW ¼	28		40	89-90, 01-0[illegible]
W ½ of NW ¼ of NE ¼	36		20	
Total			530	
Year 1902—				
E ½ of SW ¼	13	1 N R 1 E	80	
NW ¼ of SW ¼	13		40	
70 a. in N ½ of SE ¼	16	1 N R 3 E	70	
30 a. S of Ariz. Canal in SE ¼	4	2 N R 3 E	30	
E ½ of NW ¼	19		80	
W ½ of NW ¼ of NW ¼	21		20	
NE ¼ of SE ¼	35		40	
E ½ of SE ¼ of NE ¼	36	3 N R 2 E	20	
Total			380	
Year 1903—				
5 a. in SE cor. of SE ¼ of NW ¼	10	1 N R 3 E	5	
15 a. N of river in S ½ of SW ¼	14		15	
E ½ of NE ¼	24	2 N R 2 E	80	
SE ¼	24		160	
E ½ of SE ¼ of SE ¼	6	2 N R 3 E	20	
Total			280	
Year 1904—				
NE ¼	16	2 N R 1 E	160	90-94-04-07
S ½ of SW ¼	15	2 N R 2 E	80	91-95-04-09
NW ¼	19		160	
W ½ of NE ¼ of SE ¼	16	2 N R 3 E	20	
N ½ of NE ¼ of NW ¼ and SE ¼ of NE ¼ of SW ¼	16		30	
SE ¼ of SE ¼ of SW ¼	16		10	
NW ¼ of NE ¼ of NE ¼ and NE ¼ of NW ¼ of NE ¼	26		20	86-87-04-09
S ½ of NW ¼ of NE ¼	27		20	

000387

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1904—(Continued)—				
15 a. in SE cor. of NE ¼ of SE ¼	28	2 N R 4 E	15	04-05
N ½ of NW ¼	14	3 N R 1 E	80	
Total			595	
Year 1905—				
S ½ of NW ¼ of NE ¼ and N ½ of SW ¼ of NE ¼	13	1 N R 3 E	40	
S ½ of NW ¼ of NE ¼	26	2 N R 3 E	20	
W ½ of NW ¼	26		80	
N ½ of NW ¼ of SW ¼	26		20	
S ½ of SW ¼	14	3 N R 1 E	80	
W ½ of SW ¼ of SW ¼	20	3 N R 2 E	20	
SE ¼ of SW ¼	36		40	
Total			300	
Year 1906—				
SE ¼	4	1 N R 1 E	160	
40 a. bet. Grand & Aprs. Canals in NE ¼	24		70	
NW ¼ of SW ¼				
S ½ of SW ¼ of NE ¼	13	1 N R 2 E	20	
SE ¼	1	1 N R 3 E	160	
65 a. in NE part of NW ¼	1		65	
SW ¼ of SW ¼ of SW ¼	1	2 N R 1 E	10	92-99
S ½ of NE ¼ of NE ¼ & NW ¼ of NE ¼	15	2 N R 2 E	60	92-93
SW ¼ of SE ¼	18		40	92-97
40 a. bet. Grand and Aprs. Canals in NE ¼	26		40	
SE ¼ of SW ¼	4	2 N R 3 E	40	
E ½ of SW ¼ of NW ¼	15		20	
NW ¼ of NW ¼ of SE ¼	21		10	
E ½ of SE ¼	31	3 N R 3 E	80	
Total			775	
Year 1907—				
All of	16	1 N R 1 E	640	84-85
N ½ of NE ¼ of NE ¼	17		20	84-87
E ½ of NE ¼ of SE ¼	17		20	
W ½ of NW ¼	17		80	
S ½ of SW ¼ of SW ¼	21		20	
NE ¼ of NE ¼	17	1 N R 2 E	40	72-74, 90-91
E ½ of NW ¼	6	1 N R 4 E	80	94-01
NW ¼ of NW ¼ of SW ¼	1	2 N R 1 E	10	
25 a. in SE cor. of SW ¼	8		25	
W ½ of NE ¼ of SE ¼	11		20	92-00
SW ¼ of NW ¼	16		40	
N ½ of SE ¼	18		80	
NW ¼	20		160	
NW ¼	29		160	
W ½ of NE ¼	31		80	
NW ¼	8	2 N R 2 E	160	89-00
NW ¼ of NE ¼ of SW ¼ and S ½ of NE ¼ of SW ¼	7		80	89-97
E 10 a. N of Grand Ave. in NW ¼ of SE ¼	8		10	89-97
NE ¼ of NW ¼ of NW ¼ and S ½ of NW ¼ of NW ¼	9		30	88-01
NE ¼ of NW ¼ and S ½ of NW ¼	9		120	88-99
S ½ of SW ¼	9		80	88-96
E ½ of NE ¼	13		80	93-98

000388

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1907—(Continued)—				
N ½ of SW ¼	15	2 N R 2 E	80	92-97
N 15 a. of W ½ of NW ¼ of SE ¼	18		15	
40 a. bet. Grand and Aprs. Canals in W ½ of NW ¼	25		40	
60 a. S of Grand Canal in S ½ of NW ¼	25		60	86-90
50 a. S of Grand Ave. and N of Grand Canal in W ½ of NW ¼	26		50	
NE ¼ of NW ¼	27		40	
W ½ of NE ¼	5	2 N R 3 E	80	
W ½ of SE ¼	5		80	
N 60 a. of E ½ of NW ¼	5		60	
E ½ of NE ¼ of SW ¼	8		20	92-93
5 a. in SW cor. of SE ¼ of NW ¼ and 5 a. in SE cor. of SW ¼ of NW ¼	14		10	
SW ¼ of SW ¼ of NW ¼	15		10	
SE ¼ of NE ¼ of NE ¼	16		10	
SW ¼ of NE ¼ of SW ¼	16		10	97-98
10 a. N of Grand Canal in SE ¼	19		10	
20 a. N of Grand Canal in SW ¼	19		20	
N ½ of NE ¼ of NW ¼	20		20	
E 10 a. N of Grand Can. in SW ¼ of NW ¼	20		10	
N ½ of NE ¼ of NW ¼	27		20	
S ½ of NW ¼ of SE ¼ and N ½ of SW ¼ of SE ¼	24	2 N R 4 E	40	92-99
S ½ of NE ¼ of NE ¼	36	3 N R 1 E	20	
25 a. N of Grand Ave. in NW part of SE ¼	36		25	
W ½ of SE ¼	36	3 N R 2 E	80	87-93
E ½ of NW ¼	36		80	
W ½ of SE ¼	31	3 N R 3 E	80	
SE ¼ of SW ¼	31		40	
E ½ of SW ¼ and 30 a. in E ½ of W ½ of SW ¼	32		110	
SE ¼ of SE ¼	32		40	
E ½ of E ½	1	1 N R 1 W	160	
NW ¼ of NW ¼	1		40	
S ½ of NE ¼	13		80	
SE ¼	13		160	
N ½ of NE ¼	24		80	
Total			3665	
Year 1908—				
NE ¼ of NE ¼ and S ½ of NE ¼	8	1 N R 1 E	120	83-88
NW ¼ of SW ¼ of NW ¼	13		10	
All of	18		640	86-96
N ½ of NE ¼ of NE ¼	20		20	
NW ¼ of NE ¼ and S ½ of NE ¼	17	1 N R 2 E	120	72-74, 90-91
SE ¼ of SW ¼	18		40	01-02
SW ¼ of SW ¼	19		40	86-02
SE ¼ of SE ¼ of NE ¼	2	1 N R 3 E	10	
NE ¼ of SW ¼ of SW ¼	3		10	
E ½ of SW ¼ of NE ¼	1	2 N R 1 E	20	89-97
N ½ of NW ¼ of NW ¼	3		20	93-94
E ½ of SE ¼	10		80	86-91
NW ¼ of NE ¼	11		40	00-01
NW ¼ of SW ¼	13		40	92-96
E ½ of NE ¼ of NE ¼	18		20	
NW ¼ of SE ¼ of SW ¼ and S ½ of SE ¼ of SW ¼	18		30	94-02
30 a. N of Grand Canal in SE ¼	24		30	98-99

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TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1908—(Continued)—				
E ½ of	30	2 N R 1 E	320	84-93
E ½ of NW ¼	2	2 N R 2 E	80	89-99
E ½ of SW ¼	2		80	89-00
E ½ of NE ¼	4		80	88-02
W 25 a. of SE ¼ of SE ¼	4		25	88-02
SE ¼	5		160	88-99
E ½ of SW ¼	5		80	88-99
SE ¼	7		160	89-97
SE ¼ of SE ¼	8		40	89-99
20 a. S of Grand Ave. in NW ¼ of SE ¼	8		20	89-99
SW ¼ of SE ¼	8		40	89-99
S 10 a. S of Grand Ave. in S ½ of NW ¼	8		10	89-99
SW ¼	8		160	89-99
NE ¼ of NE ¼	10		40	99-01
SE ¼ of NE ¼	10		40	88-92
N ½ of SW ¼ of NE ¼	10		20	88-92
N ½ of NW ¼ and W ½ of SW ¼ of NW ¼	10		100	88-00
SW ¼	10		160	88-92
E ½ of	12		320	88-92
NW ¼	12		160	88-90
E ½ of SW ¼ of SW ¼	12		20	92-00
SW ¼ of NW ¼	13		40	90-93
NE ¼ of NE ¼ and S ½ of NW ¼ of NE ¼	14		60	88-00
S ½ of NE ¼	14		80	92-98
S ½ of NW ¼	14		80	92-98
W 60 a. of NE ¼	17		60	89-97
E ½ of NW ¼ and E ½ of NW ¼ of NW ¼	17		100	89-97
NW ¼ of SW ¼	17		40	92-97
NE ¼ of SW ¼	18		40	92-01
E ½ of SW ¼	20		80	89-02
W 60 a. of NW ¼	24		60	96-98
W 60 a. of SW ¼	24		60	96-98
NW ¼ of NE ¼	26		40	89-93
NE ¼ of NE ¼ of NW ¼	26		10	
20 a. in NW cor. of NW ¼	4	2 N R 3 E	20	
E ½ of NW ¼	6		80	88-92
E ½ of SW ¼	6		80	88-92
NE ¼ of NE ¼	7		40	96-97
S 10 a. of NE ¼ of NE ¼ and S ½ of NE ¼	8		90	92-93
W ½ of W ½ of SE ¼	8		40	92-93
SW ¼ of SE ¼ of NW ¼	8		10	92-93
N ½ of NW ¼ of NW ¼	8		20	92-93
SW ¼ of SE ¼ of SW ¼	8		10	92-93
SE ¼	9		160	92-93-94-96
S ½ of SE ¼ of NE ¼ of SW ¼ and E ½ of SE ¼ of SW ¼	15		25	98-00
E ½ of NE ¼ of SE ¼	16		20	
S 100 a. of SE ¼	17		100	86-96
N ½ of NE ¼ of NW ¼	17		20	
S ½ of N ½ of SW ¼ of NW ¼ and SE ¼ of SW ¼ of NW ¼	17		20	
SW ¼ of SW ¼	17		40	86-96
S ½ of NW ¼ of SE ¼	23		20	00-02
E ½ of SE ¼ of NW ¼	23		20	
E 30 a. of SE ¼ of SE ¼	25		30	90-95
S ½ of NE ¼ of NE ¼	26		20	86-87
5 a. in SW cor. of SE ¼ of NW ¼ and 5 a. in NW cor. of NE ¼ of SW ¼	26		10	

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1908—(Continued)—				
E ½ of SE ¼ of NE ¼	27	2 N R 3 E	20	00-02
N ½ of N ½ of NW ¼	36		40	93-00
10 a. in NW cor. of SE ¼ of SE ¼	22	2 N R 4 E	10	
NE ¼ of NE ¼	24		40	91-92
NW ¼ of NE ¼	24		40	92-96
S ½ of NE ¼	27		80	91-92
S ½ of SW ¼ of SE ¼	30		20	97-98
SE ¼ of SW ¼	36		40	93-00
SE ¼	12	3 N R 1 E	160	
SE ¼ of NE ¼	15		40	90-91
E ¼ of SE ¼ & S ¼ of SW ¼ of SE ¼	15	3 N R 1 E	100	88-98
N 60 a. of W ½ of SE ¼	15		60	90-91
SW ¼ of NW ¼	22		40	92-97
SW ¼ of SW ¼	23		40	
NW ¼ of NE ¼	25		40	87-88
NE ¼ of SE ¼	33		40	
S 15 a. of E ½ of NW ¼ of NW ¼	33		15	92-00
15 a. in center of SW ¼	33		15	92-95
NW ¼ of NE ¼	36		40	90-91
N 120 a. of NE ¼ except N ½ of NW ¼	30	3 N R 2 E	100	87-93
SE ¼ of SE ¼ of NE ¼	31		10	95-98
W ½ of NE ¼ of NW ¼	31		20	95-98
S 15 a. of NE ¼ of SW ¼ and N 10 a. of SE ¼ of SW ¼	33		25	89-98
SW ¼	35		160	91-02
W ½ of SE ¼ of NE ¼	36		20	91-02
NE ¼ of SW ¼	36		40	87-93
All S of Ariz. Canal in SW ¼ except W 15 a. of S ½ of SW ¼ of SW ¼	30	3 N R 3 E	50	92-94
E ½	12	1 N R 1 W	320	90-93
S ½ of NE ¼	24		80	
Total			6735	
Year 1909—				
SE ¼	5	1 N R 1 E	160	85-89
N 50 a. of SE ¼	8		50	86-87
N 25 a. of NW ¼ of NE ¼	17		25	84-87
SE ¼	8	1 N R 2 E	160	78-99
N 60 a. of W ½ of NE ¼	13		60	70-89
SE ¼ of SW ¼	19		40	
NE ¼ of SW ¼	15	1 N R 3 E	40	95-00
SE ¼ of NE ¼	2	2 N R 1 E	40	92-95
S ½ of NW ¼ of NW ¼	3		20	93-94
N ½ of SE ¼	4		80	96-02
NW ¼ of NW ¼ of NW ¼	4		10	99-00
NE ½ of NE ¼ of NE ¼	5		10	90-93
E ½ of NW ¼	12		80	92-00
S ½ of SW ¼	12		80	92-02
SE ¼ of NE ¼ and W ½ of NE ¼	14		120	82-02
70 a. N of Grand Canal in SE ¼	14		70	82-02
60 a. N of Grand Canal in NW ¼	14		60	82-02
NE ¼ of SW ¼ and NE ¼ of SE ¼ of SW ¼	18		50	
45 a. strip N and S thru W ½ of NE ¼	19		45	86-90
20 a. on W side of SE ¼	19		20	
E ½ of E ½ of SW ¼	19		40	
E ½ of NE ¼	31		80	
N ½	1	2 N R 2 E	320	92-94, 00-01
E ½ of NE ¼	2		80	89-99

000391

TABLE No. 2—(Continued)

DESCRIPTION	Sec.	Township	Acres	Remarks
Year 1909—(Continued)—				
NE ¼ of SE ¼	2	2 N R 2 E	40	89-99
E 60 a. of N ½ of SE ¼, E 15 a. of SE ¼ of SE ¼ and E 10 a. of SW ¼ of SE ¼	4		85	88-02
20 a. S of Grand Ave. in NW ¼ of NW ¼	6		20	92-01
SW ¼ of NW ¼	6		40	92-01
S ½ of SE ¼	10		80	89-90, 00-01
E ½ of NW ¼	11		80	89-98
SW ¼ of NE ¼	11		40	88-01
SE ¼ of SE ¼ and W ½ of SE ¼	11		120	88-91
N ½ of SW ¼	11		80	88-97
E ½ of SW ¼	12		80	88-90
N ½ of N ½ of NE ¼ of NE ¼	15		10	92-96
W ½ of SE ¼ except 40 a. in central part	15		40	93-96
SE ¼ of SW ¼ and W ½ of SW ¼	18		120	92-01
N ½ of SE ¼	20		80	89-02
20 a. in SW cor. of NE ¼	22		20	89-95
80 a. N of Grand Ave. in SE ¼	22		80	89-95
65 a. N of Grand Ave. in NW ¼	22		65	89-95
40 a. S of Grand Ave. in NW ¼	22		40	89-95
N ½ of SW ¼ of SW ¼	22		20	89-95
NE ¼	23		160	87-92
SE ¼	23		160	87-95
SE ¼ of NE ¼ of NW ¼ and W ½ of NE ¼ of NW ¼	26		30	88-92
W ½ of SE ¼ of SE ¼ and W ½ of SE ¼	6	2 N R 3 E	100	92-93
N 30 a. of W ½ of E ½ of SW ¼	8		30	
SW ¼ of SW ¼ of NW ¼	17		10	
NW ¼ of SW ¼	17		40	
E ½ of NE ¼	19		80	95-99
SE ¼ of SE ¼ of NW ¼	21		10	91-93
SE ¼ of SW ¼	24		40	00-01
NW ¼ of NW ¼ of NE ¼	26		10	86-87
SE ¼ of NE ¼ of NW ¼	27		10	
SW ¼ of SW ¼	32		40	72-95
S 60 a. of E ½ of SE ¼ and S ½ of SW ¼ of SE ¼	24	2 N R 4 E	80	92-93
SW ¼ of SW ¼ of NE ¼	26	3 N R 1 E	10	
SE ¼ of SW ¼	27		40	91-97
S ½ of SW ¼ of SW ¼	35		20	
10 a. S of Grand Ave. in NW cor. of SE ¼	36		10	90-91
10 a. N of Grand Ave. in SE cor. of NW ¼	36		10	
All S of Arizona Canal in	27	3 N R 2 E	320	87-88
SE ¼ of SW ¼ and W ½ of SW ¼	28		120	89-90
N 25 a. of NE ¼ of SW ¼	33		25	89-98
N 60 a. of W ½ of SW ¼	33		60	89-98
S ½ of N ½ of SE ¼ of SW ¼	33		10	89-98
Total			4305	
Total acreage of Northside Class A land			91,813	

000392

TABLE No. 3.

A descriptive list of Class A land on south side of Salt River.

BROADWAY CANAL.

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1870—				
S ½ of NE ¼	25	1 N R 2 E	80	
N 140 a. of NE ¼	30	1 N R 3 E	140	
NW ¼ except 15 a. in NW cor.	30		145	
Total			365	
Year 1883—				
S ½ of N ½ of NE ¼	25	1 N R 2 E	40	
Total			40	
Year 1896—				
N ½ of N ½ of NE ¼	25	1 N R 2 E	40	
Total			40	
Year 1905—				
S 20 a. of NE ¼	30	1 N R 3 E	20	
Total			20	
Total acreage under Broadway Canal			465	

SAN FRANCISCO CANAL.

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1873—				
70 a. S of river in SE ¼	19	1 N R 3 E	70	
20 a. S of river in NE ¼	20		20	
SE ¼	20		160	
130 a. S of river in SW ¼	20		130	
SE ¼	21		160	
10 a. S of river in NW ¼	21		10	
SW ¼	21		160	
S 90 a. of the SE ¼	22		90	
S 110 a. of the SW ¼	22		110	
75 a. S of river in SW ¼	23		75	
N ½ of	27		320	
N ½ of	28		320	
Total			1625	
Year 1875—				
N ½ of	29	1 N R 3 E	320	
Total			320	
Year 1878—				
SE ¼	24	1 N R 3 E	160	
S 150 a. of SW ¼	24		150	
N 145 a. of SE ¼	27		145	

000393

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1878—(Continued)—				
N 150 a. of the SW ¼	27	1 N R 3 E	150	
SE ¼	28		160	
Total			765	
Year 1879—				
70 a. S of river in NE ¼	24	1 N R 3 E	70	
25 a. S of river in NW ¼	24		25	
Total			95	
Year 1880—				
W ½ of NW ¼	19	1 N R 4 E	80	
Total			80	
Year 1883—				
NW ¼ except 5 a. rough land	25	1 N R 3 E	155	
70 a. N of Canal in SW ¼	25		70	
S ½ of NW ¼ of NE ¼ and S ½ of NE ¼	26		100	
N 125 a. of the SE ¼	26		125	
S 150 a. of the NW ¼	26		150	
N 140 a. of the SW ¼	26		140	
Total			740	
Year 1887—				
95 a. W of Canal in NE¼	25	1 N R 3 E	95	
Total			95	
Year 1903—				
SE ¼	29	1 N R 3 E	160	
40 a. in northern part of NE ¼	32		40	
Total			200	
Year 1904—				
N ½ of SW ¼	28	1 N R 3 E	80	
E 30 a. of SW¼	29		30	
Total			110	
Total acreage under San Francisco Canal			4030	

TEMPE CANAL.

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1871—				
110 a. S of river in SE ¼	8	1 N R 5 E	110	
60 a. S of river in SW ¼	8		60	
60 a. S of Wallace ditch in SW ¼	9		60	
80 a. N and W of Tempe Canal in NE ¼	17		80	
NW ¼	17		160	
60 a. N and W of Tempe Canal in SW ¼	17		60	
110 a. S of river in NE ¼	18		110	
20 a. S of river in NW ¼	18		20	
SW ¼	18		160	
Total			820	

000394

TABLE No. 3—(Continued—

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1872—				
140 a. S of river in SE ¼	13	1 N R 4 E	140	
70 a. S of river in SW ¼	13		70	
145 a. S of river in SE ¼	14		145	
110 a. S of river in SW ¼	14		110	
25 a. N of Hayden ditch in SE ¼	15		25	
SW ¼ of SE ¼	15		40	
20 a. S of river in NW ¼	15		20	
50 a. in NW part of SW ¼	15		50	
S ½ of SW ¼	15		80	
SE ¼	17		160	
125 a. S of river in SW ¼	17		125	
N ½ of NE ¼	20		80	
N ½ of NW ¼	20		80	
NE ¼	21		160	
NE ¼	22		160	
SE ¼ except 15 a. in SE cor.	22		145	
NW ¼	22		160	
SW ¼ except 15 a. in SE cor.	22		145	
W ½ of	23		320	
NE ¼	24		160	
N ½ of SE ¼	24		80	
S ½ of	26		320	
W ½ of	27		320	
SE ¼	28		160	
W ½ of	28		320	
SE ¼	29		160	
NE ¼	33		160	
N ½ of	34		320	
N ½ of	35		320	
50 a. in NW cor. of NE ¼	19	1 N R 5 E	50	
NW ¼	19		160	
85 a. W of Tempe Canal in SW ¼	19		85	
Total			4830	
Year 1873—				
SW ¼	24	1 N R 4 E	160	
SE ¼ except 10 a. in SE cor.	18	1 N R 5 E	150	
Total			310	
Year 1875—				
20 a. S of river in NE ¼	16	1 N R 4 E	20	
SE ¼	16		160	
SW ¼	25		160	
SE ¼	34		160	
Total			500	
Year 1876—				
SW ¼	16	1 N R 4 E	160	
SE ¼	20		160	
NE ¼	23		160	
S ½ of SE ¼	24		80	
S ½ of NW ¼	24		80	
NE ¼	27		160	
SW ¼	35		160	
Total			960	

000395

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1877—				
10 a E of San Francisco Canal in NE cor of NE ¼	19	1 N R 4 E	10	
SE ¼	23		160	
E ½ of	25		320	
NW ¼	25		160	
N ½	26		320	
SE ¼	27		160	
S ½ of NE ¼	28		80	
All of	11	1 S R 4 E	640	
Total			1850	
Year 1878—				
SW ¼	20	1 N R 4 E	160	
E ½ of SE ¼ of SW ¼	21		20	
NE ¼ except 40 a. in NW cor	29		120	
NW ¼ except 10 a. in SW cor	33		150	
SW ¼	34		160	
SE ¼	35		160	
N ½ of NW ¼ of NE ¼	36		20	
NW ¼	36		160	
W ½ of SW ¼	36		80	
Total			1030	
Year 1879—				
15 a. S of river in NW ¼	16	1 N R 4 E	15	
N ½ of	2	1 S R 4 E	320	
NE ¼	14		160	
W ½ of	14		320	
Total			815	
Year 1880—				
NE ¼ of NE ¼ except 10 a. in NE cor	19	1 N R 4 E	30	
NW ¼ of NE ¼ except 10 a. in NW cor	19		30	
Total			60	
Year 1881—				
N ½ of NW ¼	24	1 N R 4 E	80	
70 a. in W part of NW ¼	29		70	
SW ¼	29		160	
100 a. N of Tempe Canal in SE ¼	33		100	
W ½ of NW ¼	1	1 S R 4 E	80	
NE ¼	3		160	
80 a. E of Tempe Canal in NW ¼	3		80	
40 a. in NE cor. of SW ¼	3		40	
E ½	15		320	
Total			1090	
Year 1883—				
N ½ of NE ¼ and SW ¼ of NE ¼	30	1 N R 4 E	120	
NW ¼	30		160	
NE ¼	22	1 S R 4 E	160	
Total			440	
Year 1884—				
SW ¼	19	1 N R 4 E	160	
N ½ of SE ¼	21		80	

000396

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1884—(Continued)—				
N ½ of SW ¼	21	1 N R 4 E	80	
20 a. in SW cor. of SE ¼	30	1 N R 5 E	20	
100 a. W of Tempe Canal in NW ¼	30		100	
SW ¼ except 5 a. in NE cor.	30		155	
S ½	2	1 S R 4 E	320	
120 a. E of Kyrene ditch in NW ¼	22		120	
Total			1035	
Year 1885—				
NW ¼	31	1 N R 5 E	160	
All of	23	1 S R 4 E	640	
Total			800	
Year 1886—				
45 a. N of Tempe Canal in SW ¼	31	1 N R 5 E	45	
E ½ of	1	1 S R 4 E	320	
E ½ of NW ¼	1		80	
SW ¼	1		160	
SE ¼ except 5 a. in SW cor.	3		155	
Total			760	
Year 1887—				
65 a. E of S. F. Canal in NE ¼	25	1 N R 3 E	65	
SE ¼	25		160	
90 a. S of S. F. Canal in SW ¼	25		90	
15 a. in SE cor. of SE ¼	22	1 N R 4 E	15	
15 a. in SE cor. of SW ¼	22		15	
120 a. N of Tempe Canal in NE ¼	32		120	
120 a. N of Tempe Canal in NW ¼	32		120	
SE ¼	36		160	
E ½ of SW ¼	36		80	
20 a. in SW cor of SW ¼	31	1 N R 5 E	20	
E ½ of NE ¼	10	1 S R 4 E	80	
E ½ of SE ¼	10		80	
All of	24		640	
All of	26		640	
Total			2285	
Year 1888—				
SE ¼ of NE ¼	30	1 N R 4 E	40	
S ½	30		320	
N ½ of NE ¼	31		80	
N ½ of NW ¼	31		80	
10 a. in NE cor. of SW ¼	33		10	
NE ¼ except N ½ of NW ¼	36		140	
All of	13	1 S R 4 E	640	
SE ¼	22		160	
NW ¼	25		160	
SW ¼ except 10 a. in SE cor.	25		150	
NE ¼	27		160	
Total			1940	
Year 1889—				
N ½ of	35	1 N R 3 E	320	
NE ¼	34	1 S R 4 E	160	
Total			480	

000397

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1890—				
35 a. S of S. F. Canal in SE ¼	26	1 N R 3 E	35	
20 a. S of S. F. Canal in SW ¼	26		20	
Cementery in NE ¼ of NW ¼	29	1 N R 4 E	15	
W ½ of NE ¼	10	1 S R 4 E	80	
W ½ of SE ¼	10		80	
All of	12		640	
SE ¼	14		160	
NE ¼ except 60 a. in SE cor.	25		100	
SE ¼	27		160	
Total			1290	
Year 1891—				
15 a. S of S. F. Canal in SE ½	27	1 N R 3 E	15	
10 a. S of S. F. Canal in SW ¼	27		10	
N ½ of	34		320	
SE ¼	19	1 N R 4 E	160	
S ½ of NE ¼	31		80	
S ½ of NW ¼	31		80	
SW ¼	27	1 S R 4 E	160	
SE ¼	34		160	
SW ¼	35		160	
Total			1145	
Year 1892—				
NE ¼	36	1 N R 3 E	160	
NW ¼ except 20 a. in SE cor.	36		140	
Total			300	
Year 1895—				
130 a. N of Tempe Canal in SE ¼	35	1 N R 3 E	130	
110 a. N of Tempe Canal in SW ¼	35		110	
Total			240	
Year 1896—				
110 a. N of Tempe Canal in SE ¼	34	1 N R 3 E	110	
110 a. N of Tempe Canal in SW ¼	34		110	
SW ¼	34	1 S R 4 E	160	
Total			380	
Year 1897—				
SE ¼	33	1 S R 4 E	160	
Total			160	
Year 1906—				
NW ¼	21	1 N R 4 E	160	
W ½ of SE ¼ of SW ¼	21		20	
SW ¼ of SW ¼	21		40	
Total			220	
Year 1907—				
W ½ of SE ¼	28	1 S R 4 E	80	
130 a. E of railroad in SW ¼	28		130	
110 a. in NE ¼	32		110	

000398

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1907—(Continued)—				
SE ¼	32	1 S R 4 E	160	
NW ¼	33		160	
Total			640	
Total acreage under Tempe Canal			24,380	

UTAH CANAL.

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1871—				
50 a. N of Wallace ditch in SW ¼	9	1 N R 5 E	50	
Total			50	
Year 1877—				
NE ¼	2	1 N R 5 E	160	
SE ¼ except 40 a. in SE cor.	2		120	
W ½	2		320	
100 a. S of river in NE ¼	3		100	
SE ¼	3		160	
110 a. S of river in SW ¼	3		110	
NE ¼	10		160	
40 a. N of Utah Canal in SE ¼	10		40	
NW ¼	10		160	
70 a. N of Utah Canal in SW ¼	10		70	
NW ¼ except 40 a. in SE cor.	11		120	
20 a. in NW cor. of NE ¼	11		20	
Total			1540	
Year 1878—				
35 a. in NW cor. of NE ¼	1	1 N R 5 E	35	
N ½ of NW ¼	1		80	
S ½ of NW ¼ except 20 a. in SE cor.	1		60	
20 a. in NW cor. of SW ¼	1		20	
Indian Reservation south of river in	35 & 36	2 N R 5 E	1115	
Total			1310	
Year 1879—				
W 55 a. of SW ¼	33	1 N R 5 E	55	
Total			55	
Year 1880—				
40 a. E of Tempe Canal in NE part of NE ¼	9	1 N R 5 E	40	
Total			40	
Year 1882—				
SW ¼	20	1 N R 5 E	160	
NW ¼	29		160	
Total			320	

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1884—				
S ½	32	1 N R 5 E	320	
Total			320	
Year 1885—				
40 a. in SE cor. of SE ¼	4	1 N R 5 E	40	
90 a. W of Tempe Canal in NE ¼	9		90	
100 a. S of river in NW ¼	9		100	
SE ¼	19		160	
NW ¼	20		160	
NE ¼	31		160	
SW ¼ of SE ¼	31		40	
Total			750	
Year 1886—				
NE ¼	30	1 N R 5 E	160	
SE ¼ except 20 a. in SW cor.	30		140	
60 a. E of Tempe Canal in NW ¼	30		60	
5 a. in NE cor. of SW ¼	30		5	
Total			365	
Year 1887—				
NE ¼ except 50 a. in NW cor.	19	1 N R 5 E	110	
75 a. E of Tempe Canal in SW ¼	19		75	
SE ¼ of SE ¼	31		40	
95 a. E of Tempe Canal in SW ¼	31		95	
N ½ of	5	1 S R 5 E	320	
Total			640	
Year 1888—				
W ½ of NW ¼	3	1 S R 5 E	80	
W ½	4		320	
S ½	5		320	
N ½	6		320	
All of	7		640	
All of	8		640	
NE ¼	17		160	
SE ¼ except 15 a. in SE cor.	17		145	
W ½	17		320	
NE ¼	18		160	
SE ¼ except 20 a. in SE cor.	18		140	
W ½	18		320	
Total			3565	
Year 1889—				
S ½ of	6	1 S R 5 E	320	
Total			320	
Year 1890—				
15 a. in SE cor. of NE ¼	8	1 N R 5 E	15	
N ½ of SE ¼	31		80	
SE ¼	4	1 S R 5 E	160	
Total			255	

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1892—				
NE ¼	4	1 S R 5 E	160	
NE ¼ except 50 a. in eastern part	16		110	
NW ¼	16		160	
Total			430	
Year 1893—				
W ½ of SW ¼	3	1 S R 5 E	80	
NE ¼	9		160	
SE ¼ except 35 a. in SE cor.	9		125	
W ½	9		320	
Total			685	
Year 1894—				
20 a. in NW cor. of SE ¼	16	1 S R 5 E	20	
N 100 a. of SW ¼	16		100	
Total			120	
Year 1898—				
25 a. in SE part of NE ¼	9	1 N R 5 E	25	
10 a. in SE cor. of SE ¼	34	2 N R 5 E	10	
Total			35	
Year 1900—				
65 a. E of Tempe Canal in N ½ of SE ¼	9	1 N R 5 E	65	
Total			65	
Year 1905—				
NE ¼ except 50 a. in eastern part	19	1 S R 5 E	110	
NW ¼	19		160	
Total			270	
Year 1909—				
80 a. S of river in SW ¼	30	2 N R 6 E	80	
Total			80	
Total acreage under Utah Canal			11,165	

MESA CANAL.

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1878—				
SW ¼	14	1 N R 5 E	160	
120 a. S of Mesa Canal in SE ¼	15		120	
S ½	21		320	
All of	22		640	
N ½	27		320	
SW ¼	27		160	
NE ¼	28		160	

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1878—(Continued)—				
NE ¼ except 20 a. in SE cor.	31	2 N R 6 E	140	
NW ¼ except 10 a. in NW cor.	31		150	
SW ¼ except 5 a. in SE cor.	31		155	
Total			2325	
Year 1879—				
80 a. E of Mesa Canal in NW ¼	14	1 N R 5 E	80	
NE ¼	21		160	
W ½	23		320	
NW ¼	25		160	
E ½	33		320	
E 105 a. of SW ¼	33		105	
All of	34		640	
Total			1785	
Year 1880—				
S 60 a. of NE ¼	14	1 N R 5 E	60	
SE ¼	14		160	
20 a. in SE cor. of SW ¼	15		20	
E ½	20		320	
NW ¼	21		160	
NW ¼ of SE ¼ and S ½ of SE ¼	24		120	
S ½ of NW ¼ of NW ¼	24		20	
E ½ of SW ¼	24		80	
E ½	26		320	
SW ¼	26		160	
SE ¼	27		160	
SE ¼	28		160	
W ½	28		320	
NW ¼	33		160	
Total			2220	
Year 1881—				
S ½ of SW ¼ except 20 a. in SE cor.	15	1 N R 5 E	60	
SW ¼	25		160	
NW ¼	26		160	
N ½ of NE ¼	29		80	
SE ¼	29		160	
Total			620	
Year 1882—				
15 a. in SW cor. of SW ¼	13	1 N R 5 E	15	
SW ¼	16		160	
SE ¼	17		160	
NW ¼ of NE ¼	25		40	
NW ¼	35		160	
Total			535	
Year 1883—				
SE ¼	16	1 N R 5 E	160	
S ½ of NE ¼	29		80	
N ½	32		320	
NE ¼	35		160	
Total			720	

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1884—				
SW ¼	29	1 N R 5 E	160	
SW ¼	35		160	
Total			320	
Year 1885—				
NE ¼	23	1 N R 5 E	160	
W ½ of SW ¼	24		80	
NE ¼ of NE ¼	25		40	
Total			280	
Year 1886—				
NE ¼ except 40 a. in NE cor.	24	1 N R 5 E	120	
S ½ of NE ¼	25		80	
W ½ of SE ¼	25		80	
Total			280	
Year 1887—				
S 145 a. of NE ¼	16	1 N R 5 E	145	
NW ¼	16		160	
SE ¼	23		160	
E ½	3	1 S R 5 E	320	
Total			785	
Year 1888—				
E ½ of SE ¼	25	1 N R 5 E	80	
NW ¼	36		160	
E ½ of NW ¼	3	1 S R 5 E	80	
Total			320	
Year 1889—				
S 70 a. W of canal in SW ¼	11	1 N R 5 E	70	
NE ¼	36		160	
NW ¼ of SE ¼	36		40	
W ½ of NE ¼	30	1 N R 6 E	80	
SE ¼	30		160	
NW ¼	30		160	
All of	31		640	
NE ¼	12	1 S R 5 E	160	
Total			1470	
Year 1890—				
SW ¼	36	1 N R 5 E	160	
S ½	6	1 S R 6 E	320	
Total			480	
Year 1891—				
N ½ of SW ¼	15	1 N R 5 E	80	
W ½ of NE ¼	1	1 S R 5 E	80	
10 a. in NW cor. of SE ¼	1		10	
W ½	1		320	
Total			490	
Year 1892—				
80 a. W of Mesa Canal in NW ¼	14	1 N R 5 E	80	

000403

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1892—(Continued)—				
SE ¼	35	1 N R 5 E	160	
SW ¼ of SE ¼	36		40	
20 a. in SW cor. of SE ¼	19	1 N R 6 E	20	
15 a. in SW cor. of NW ¼	19		15	
SW ¼ except 20 a. in NE cor	19		140	
SW ¼	30		160	
S ½	2	1 S R 5 E	320	
E ½ of SW ¼	3		80	
NE ¼ of SE ¼	10		40	
N ½	11		320	
NW ¼	12		160	
NE ¼ of NE ¼	6	1 S R 6 E	40	
N ½ of SW ¼	7		80	
Total			1655	
Year 1893—				
S 60 a. of the SE ¼	10	1 N R 5 E	60	
Cemetery in SE ¼ of SW ¼	10		20	
40 a. N of Mesa Canal in SE ¼	15		40	
E ½ of NW ¼	24		80	
N ½ of NW ¼ of NW ¼	24		20	
SW ¼ of NW ¼	24		40	
Total			260	
Year 1894—				
15 a. in NE cor. of NE ¼	1	1 N R 5 E	15	
Total			15	
Year 1896—				
W ½ of NW ¼	2	1 S R 5 E	80	
Total			80	
Year 1897—				
S ½ of SW ¼ except 15 a. in SW cor	13	1 N R 5 E	65	
NE ¼ of SE ¼	24		40	
Total			105	
Year 1898—				
NE ¼ except 20 a. in NW cor	15	1 N R 5 E	140	
NW ¼ except 10 a. in NE cor	15		150	
40 a. in NW part of NW ¼	32	1 N R 6 E	40	
Total			330	
Year 1900—				
30 a. in SW cor. of SW ¼	29	1 N R 6 E	30	
S ½ of NE ¼	10	1 S R 5 E	80	
NW ¼	10		160	
Total			270	
Year 1905—				
NE ¼	2	1 S R 5 E	160	
W ½ of SE ¼	10		80	
S ½	11		320	

000404

TABLE No. 3—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1905—(Continued—)				
NW ¼ of NE ¼	7	1 S R 6 E	40	
NW ¼	7		160	
Total			760	
Year 1906—				
N ½ of NE ¼ of SE ¼	12	1 S R 5 E	20	
Total			20	
Year 1907—				
E ½ of SE ¼ of SW ¼	17	1 N R 5 E	20	
N ½ of SW ¼ and SE ¼ of SW ¼	10	1 S R 5 E	120	97-00
SW ¼ of SW ¼	10		40	
Total			180	
Year 1908—				
50 aS of canal in N ½ of NE ¼	14	1 N R 5 E	50	
W ½ of SE ¼ of SW ¼ and E ½ of SW ¼ of SW ¼	17		40	
N ½ of NE ¼	10	1 S R 5 E	80	92-94
Total			170	
Total acreage under Mesa Canal			16,475	

CONSOLDATED CANAL.

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1892—				
All of	21	1 S R 5 E	640	
SW ¼	27		160	
E ½	28		320	
SW ¼	28		160	
Total			1280	
Year 1893—				
W ½ of	10	2 S R 5 E	320	
W ½	15		320	
Total			640	
Year 1897—				
NE ¼	33	1 S R 5 E	160	
NE ¼ of NW ¼ and S ½ of NW ¼	33		120	
Total			280	
Year 1907—				
N 90 a. of SW ¼	15	1 S R 5 E	90	
10 a. in SW cor of SW ¼	15		10	
10 a. in NW cor. of NW ¼	23		10	
Total			110	

000405

TABLE No. 3—(Continued)—

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1908—				
20 a. W of canal in NE ¼	27	2 S R 5 E	20	
Total			20	
Total acreage under Consolidated Canal			2330	

HIGHLAND CANAL.

DESCRIPTION.	Sec.	Township.	Acres.	Remarks.
Year 1892—				
SE ¼	12	1 N R 5 E	160	
E ½ of SW ¼	12		80	
Total			240	
Year 1901—				
NE ¼	12	1 N R 5 E	160	
Total			160	
Year 1905—				
25 a. in SW ¼ of NW ¼	7	1 N R 6 E	25	
Total			25	
Total acreage under Highland Canal			425	

Summary of Class A land on the Southside under the following named canals:

Broadway Canal	465	acres
San Francisco Canal	4,030	"
Tempe Canal	24,380	"
Utah Canal	11,165	"
Mesa Canal	16,475	"
Consolidated Canal	2,330	"
Highland Canal	425	"
Total	59,270	acres

TABLE No. 4.

A descriptive list of Class B land on North Side of Salt River.

DESCRIPTION.	Sec.	Township.	Acres.	Years cultivated.
NE ¼ and W ½	4	1 N R 1 E	480	83-89
S 30 a. of N ½ of SE ¼	8		30	86-87
NW ¼	9		160	83-85
SW ¼	9		160	84-85
SW ¼ of SW ¼	10		40	89-02
NE ¼ of SW ¼ of NW ¼ and S ½ of SW ¼ of NW ¼	13		30	92-00
S 60 a. of E ½ of NE ¼ and S 55 a. of W ½ of NE ¼	17		115	84-87
E ½ of NW ¼	17		80	84-87
SE ¼ of NE ¼ of SE ¼	10	1 N R 2 E	10	88-90
NW ¼	19		160	90-91
NE ¼ of SW ¼	19		40	88-92
SW ¼	20		160	80-85
125 a. N of river in NW ¼	30		125	72-99
S ½ of SW ¼ of SW ¼	3	1 N R 3 E	20	76-85
55 a. S of Grand Ave. in W ½ of NW ¼	6		55	71-88
SW ¼ except 20 a. in E part of NE ¼ and 10 a. in SE cor.	6		130	71-88
N 40 a. of SW ¼	9		40	69-89
S ½ of NW ¼ except 5 a. in SE cor.	10		75	69-94
NE ¼ of NW ¼	13		40	87-91
S ½ of SE ¼	18		80	70-98
SW ¼ of NW ¼	18		40	70-98
E ½ of SE ¼	2	1 N R 4 E	80	90-95
Indian Reservation—				
200 a. unlocated in	12	1 N R 5 E	200	
200 a. unlocated in	4		200	
400 a. unlocated in	5		400	
200 a. unlocated in	6		200	
200 a. unlocated in	7		200	
SE ¼ of NE ¼	1	2 N R 1 E	40	89-97
NW ¼	1		160	89-90
SW ¼ except 10 a. in NW cor. and 10 a. in SW cor.	1		140	92-99
SW ¼ of NE ¼	2		40	00-01
S 40 a. of SE ¼	3		40	95-96 CR
SW ¼ of SW ¼	3		40	93-94 CR
60 a. in E ½ of NW ¼	4		60	98-99 CR
50 a. in W part of NW ¼	4		50	99-00 CR
75 a. in E part of SW ¼	4		75	99-00 CR
E ½ of E ½ of NE ¼	8		40	96-98 CR
W ½ of E ½ of NE ¼	8		40	98-99 CR
NW ¼ of SE ¼	9		40	86-87
NE ¼	10		160	92-93 CR
NW ¼ of SE ¼	11		40	92-02
130 a. in SW ¼	11		130	92-93 CR
S ½ of SW ¼ of NW ¼	12		20	92-00
NW ¼ of SW ¼	12		40	92-02
SE ¼ of NE ¼	13		40	89-98
NW ¼ of NE ¼	13		40	89-98
SE ¼	13		160	92-96
NE ¼ of NW ¼ and W ½ of NW ¼	13		120	96-99
NE ¼ of SW ¼ and S ½ of SW ¼	13		120	92-96
10 a. in SW cor. of NE ¼ of SE ¼	24		10	98-99
NE ¼ of NW ¼	24		40	91-92 CR
S 20 a. of the NW ¼	24		20	82-84
E ½ of NW ¼	30		80	84-93
NW ¼	31		160	86-91
W ½ of NW ¼ of SE ¼	4	2 N R 2 E	20	88-02

000407

TABLE No. 4—(Continued)

DESCRIPTION.	Sec.	Township.	Acres.	Years cultivated.
N ½ of NW ¼ of SW ¼, SE ¼ of NW ¼ of SW ¼ and SW ¼ of SW ¼	7	2 N R 2 E	70	89-97
E ½ of NE ¼	8		80	91-01
W ½ of NE ¼	8		80	89-99
N ½ of NE ¼ of SE ¼	8		20	89-99
60 a. N of Grand Ave. in E ½ of NW ¼	8		60	89-99
N 50 a. S of Grand Ave. in S ½ of NW ¼	8		50	89-99
S ½ of SW ¼ of NE ¼	10		20	88-92
E ½ of NE ¼	11		80	88-01
NE ¼ of SE ¼	11		40	88-91
S ½ of SW ¼	11		80	88-97
W ½ of NE ¼	13		80	89-90
SE ¼	13		160	89-90
E ½ of NW ¼	13		80	90-93
SW ¼	13		160	89-90
S ½ of N ½ of NE ¼ of NE ¼	15		10	92-96
S ½ of NE ¼	15		80	97-02 CR
W ½ of NW ¼ of NW ¼	17		20	87-97
E ½ of NW ¼ and NW ¼ of NW ¼	18		120	92-01
S ½ of SE ¼	20		80	89-02
S ½ of NE ¼ except 20 a. in SW cor.	22		60	89-95
80 a. S of Grand Ave. in SE ¼	22		80	89-95
15 a. N of Grand Ave. in NW ¼ of NW ¼	22		15	89-98
W 40 a. S of Grand Ave. in W ½ of NW ¼	22		40	89-98
E ½ of SW ¼ and S ½ of SW ¼ of SW ¼	22		100	89-95
NE ¼ of NE ¼ of NW ¼ and S ½ of NE ¼ of NW ¼	23		30	88-91
S ½ of SW ¼	23		80	87-91
NE ¼ of NE ¼	26		40	89-93
25 a. N of Grand Canal in SE ¼ of NW ¼	26		25	89-93
20 a. N of Grand Ave. in NW ¼ of NW ¼	26		20	89-95
20 a. N of Appropriators Canal in NE ¼	27		20	89-95
All N of Grand Canal in NW ¼ except 40 a. S of Appropriators Canal in E ½	27		85	89-99
NE ¼	28		160	90-00
150 a. N of Grand Canal in NE ¼	29		150	92-02
NE ¼ of NW ¼	29		40	92-02
NE ¼	6	2 N R 3 E	160	88-92
NE ¼ of SE ¼	6		40	88-92
NW ¼ of NE ¼	7		40	96-97
SE ¼	7		160	89-92
E 45a. of N 60 a. of NE ¼	8		45	92-93
E 120 a. of SE ¼	8		120	92-93-99
S 60 a. of W ½ of NW ¼	8		60	92-93
W ½ of SW ¼	8		80	92-93
NW ¼ of NW ¼ of NW ¼	9		10	92-93
S ½ of SE ¼ of SW ¼	13		20	99-02
W ½ of NE ¼	19		80	95-99
20 a. S of Grand Canal in SW cor. of NE ¼	20		20	86-90
NE ¼	21		160	91-93
25 a. N of Grand Canal in E part of NW ¼ of SE ¼	21		25	91-93
E 60 a. of N ½ of NW ¼	21		60	91-93
SE ¼ of NW ¼ except 10 a. in SE cor.	21		30	91-93
SW ¼ of NW ¼ except 5 a. in SW cor.	21		35	91-93
E ½ of NW ¼ and SW ¼ of NW ¼	22		120	90-02
SW ¼	22		160	90-02
20 a. in E part of NW ¼ of NE ¼	23		20	98-02
E ½ of NE ¼ except 10 a. in the NE cor.	25		70	00-02
SW ¼ of NE ¼	25		40	00-02
N ½ of NW ¼ of SW ¼	25		20	95-96
NE ¼ of NE ¼ of NE ¼	26		10	86-87

000408

TABLE No. 4—(Continued)—

DESCRIPTION.	Sec.	Township.	Acres.	Years cultivated.
S ½ of NE ¼	26	2 N R 3 E	80	86-87
SE ¼	26		160	86-88
E ½ of NW ¼ except 5 a. in SW cor.	26		75	86-87
E ½ of SW ¼ except 5 a. in NW cor.	26		75	86-87
S 60 a. of W ½ of SW ¼	26		60	86-87
NE ¼ of NE ¼	27		40	88-95
N ½ of NW ¼ of NE ¼	27		20	88-95
W 60 a. of S ½ of NE ¼	27		60	88-95
NW ¼ of SE ¼	27		40	88-95
W ½ of NE ¼ of NE ¼ and E ½ of E ½ of NW ¼ of NE ¼	35		30	99-00
S ½ of SE ¼ of NE ¼	35		20	91-92
W 30 a. of NW ¼ of NE ¼ and SW ¼ of NE ¼	35		70	97-98
W 30 a. of SE ¼ of SE ¼ and W ½ of SE ¼	12	2 N R 4 E	110	91-95
SE ¼ of SW ¼	12		40	91-95
15 a. in SE ¼ of NW ¼	19		15	98-99
SW ¼ of SW ¼ of SW ¼	19		10	95-96 CR
NE ¼ of NW ¼ of NE ¼	23		10	95-96 CR
SW ¼ of NW ¼	24		40	97-98 CR
W ½ of SW ¼	24		80	96-97 CR
E ½ of SW ¼ of NE ¼	26		20	96-98
E ½ of NW ¼ of SE ¼	26		20	96-97
30 a. in NW ¼ of NW ¼	26		30	94-95 CR
E ½ of NW ¼ of SW ¼	26		20	96-97
N ½ of NE ¼	27		80	91-92 CR
SW ¼ of SE ¼ except 5 a. in NE cor.	27		35	96-98
N ½ of NW ¼ of SW ¼	27		20	92-94
N ½ of SW ¼	29		80	98-99
N ½ of	30		320	94-97
NW ¼ of NW ¼ of SW ¼	32		10	96-97 CR
SW ¼ of NW ¼ of SW ¼	32		10	93-96 CR
NE ¼	34		160	93-94 CR
W ½ of SE ¼	34		80	93-94 CR
E ½ of NW ¼ of NE ¼ and SW ¼ of NE ¼	36		60	93-99
S ½ of	28	2 N R 5 E	320	Indian Reservation.
W 67 a. of S ½ of NE ¼	29		67	Indian Reservation.
S ½ of SE ¼	29		80	Indian Reservation.
120 a. in W ½ of	29		120	Indian Reservation.
S ½ of	32		320	Indian Reservation.
70 a. S of Arizona Canal in SW ¼	1	3 N R 1 E	70	92-99
10 a. in SE cor. of NE ¼	2		10	93-95 CR
N ½ of SE ¼	2		80	90-98 CR
NW ¼ of NW ¼	2		40	94-95 CR
10 a. in SE cor. of SW ¼	2		10	90-91 CR
20 a. in SE ¼ of SE ¼	16		20	94-97 CR
20 a. N of Grand Ave. in NW ¼ of SE ¼	22		20	89-96
NW ¼	24		160	94-97 CR
30 a. in SE cor. of NW ¼	25		30	95-96 CR
SW ¼ of SW ¼ of SW ¼	25		10	96-98 CR
E ½ of NE ¼ except 5 a. in SE cor.	26		75	94-97 CR
SE ¼	26		160	96-97 CR
NW ¼ of NW ¼ except 5 a. for trees	26		35	89-90
NE ¼ of NE ¼ except 5 a. for trees	27		35	89-90
S ½ of N ½ of SW ¼ of NE ¼ and N ½ of S ½ of SW ¼ of NE ¼	27		20	92-00
N 10 a. of NE ¼ of SE ¼	27		10	99-00
NW ¼ of NW ¼ of NW ¼	27		10	98-99 CR
NE ¼ of NW ¼	34		40	98-99 CR
NE ¼ of NW ¼ of NW ¼	34		10	90-99 CR

000409

TABLE No. 4—(Continued)—

DESCRIPTION.	Sec.	Township.	Acres.	Years cultivated.
S 15 a. of SE ¼ of NE ¼	36	3 N R 1 E	15	92-00 CR
S 70 a. W of railroad in SE ¼	36		70	90-91
NE ¼ of NW ¼	36		40	90-91
E ½	20	3 N R 2 E	320	90-92
50 a. S of Arizona Canal in W ½ of SE ¼	25		50	90-92
45 a. S of Arizona Canal in SW ¼	25		45	90-92
All of	29		640	87-90 SW ¼ to 98
N ½ of S ½ of SE ¼ of NE ¼ and S ½ of SW ¼ of NE ¼	30		30	87-93
W 60 a. of N ½ of SE ¼	30		60	87-93
5 a. in NW cor. of SW ¼ of SE ¼	30		5	87-93
NE ¼ of NE ¼ of NW ¼	30		10	98-99
SW ¼ of SE ¼ of NE ¼	31		10	95-98 CR
N ½ of NE ¼ of SE ¼	31		20	95-98 CR
SW ¼ of SE ¼	31		40	95-98
E ½ of NE ¼ of NW ¼	31		20	95-98
NW ¼ of NW ¼	31		40	95-98
SE ¼ of SW ¼	31		40	91-96 CR
SW ¼ of SW ¼ except 10 a. in NW cor.	31		30	91-96
N ½	33		320	89-95
NW ¼ of SW ¼	31	3 N R 3 E	40	90-93
Total acreage of Class B land on the North Side			14,792	

N. B. —"C. R." means canal company's records showing cultivation in the years specified.

000410

TABLE No. 5.

A descriptive list of Class B land on South Side of Salt River.

SAN FRANCISCO CANAL.

DESCRIPTION.	Sec.	Township.	Acres.	Years cultivated.
130 a. S of river in SE ¼	23	1 N R 3 E	130	73-98
Total			130	

Since 1898 this land has been irrigated by water from a subterranean ditch having its head in SE ¼ of Sec. 20, T. 1 N., R. 4 E.

TEMPE CANAL.

DESCRIPTION.	Sec.	Township.	Acres.	Years cultivated.
40 a. S of river in S ½	18	1 N R 4 E	40	82-02
N 60 a. of E ½ of NW ¼	19		60	82-02
N ½ of NE ¼	28		80	77-88
10 a. E of Kyrene ditch in the SE cor. of NW ¼	15	1 S R 4 E	10	92-95
10 a. E of Kyrene ditch in the NE cor. of SW ¼	15		10	92-95
SW ¼	22		160	89-94
15 a. in NW cor. of SE ¼	25		15	96-98
NW ¼	27		160	89-92
50 a. in eastern part of NE ¼	28		50	91-93
E ½ of SE ¼	28		80	91-93
S ½ of NW ¼	34		80	96-97
NE ¼ except 20 a. in SE cor	35		140	89-00
NW ¼	35		160	89-00
Total			1040	

UTAH CANAL.

DESCRIPTION	Sec.	Township.	Acres.	Years cultivated.
20 a. in NW cor. of NE ¼	20	1 S R 5 E	20	89-90
20 a. in SE cor. of SE ¼	20		20	89-90
NE ¼ of NW ¼	20		40	90-92
NW ¼ of NW ¼ except 10 a. in NW cor	20		30	89-90
S ½ of NW ¼ except 10 a. in SE cor	20		70	89-90
20 a. in NW cor. of SW ¼	20		20	89-90
Total			200	

MESA CANAL.

DESCRIPTION	Sec.	Township.	Acres.	Years cultivated.
40 a. in SW cor. of NW ¼	13	1 N R 5 E	40	97-00
N ½ of SW ¼	13		80	97-99
30 a. E of Tempe Canal in N ½ of SW ¼	17		30	87-91
10 a. in SW cor. of SW ¼	17		10	87-91
E ½ of SE ¼	36		80	89-02

000411

TABLE No. 5—(Continued)

DESCRIPTION	Sec.	Township.	Acres.	Years cultivated.
35 a. in NW cor. of SE ¼	31	2 N R 6 E	35	89-98
40 a. in NW cor. of NW ¼	32		40	87-00
SE ¼ except 10 a. in NW cor	1	1 S R 5 E	150	95-98
SE ¼ of NE ¼	6	1 S R 6 E	40	92-96
S ½ of SW ¼	7		80	92-98
Total			585	

CONSOLIDATED CANAL.

DESCRIPTION	Sec.	Township.	Acres.	Years cultivated.
100 a. unlocated in SW ¼	12	1 S R 5 E	100	93 94
NW ¼	13		160	96-97
E ½ of NW ¼	15		80	92-00
W ½ of NW ¼	15		80	92-95
W 60 a. of S ½ of SE ¼	15		60	97-98
E ½ of	22		320	92-00
W ½ of W ½	22		160	92-00
NE ¼	26		160	90-99
W ½	26		320	90-99
E ½	27		320	92-97
W ½ of NW ¼	27		80	92-97
NW ¼	28		160	92-98
S ½ of NW ¼	31		80	93-97
S ½ of	31		320	93-97
S ½ of	32		320	93-97
N ½ of NW ¼	34		80	97-01
All of	9	2 S R 5 E	640	95-98
W ½ of NE ¼	10		80	95-01
SE ¼	10		160	95-01
E ½ except 15 a. in SE ¼	15		305	93-01
Total			3985	

HIGHLAND CANAL.

DESCRIPTION	Sec.	Township.	Acres.	Years cultivated.
Unlocated 30 a. in E ½ of SW ¼	1	1 N R 5 E	30	95-00
N ½ of SE ¼ of NE ¼	11		20	99-00
W ½ of SW ¼	12		80	92-98
NE ¼	13		160	93-01
30 a. in SW cor. of SE ¼	13		30	90-91
NW ¼ except 40 a. in SW cor	13		120	93-95
15 a. W of canal in S part of SE ¼	7	1 N R 6 E	15	95-96
20 a. in NW cor. of SW ¼	7		20	93-95
NE ¼ except 5 a. in NE cor	18		155	95-96
NW ¼	18		160	95-00
E ½ of SW ¼	18		80	92-93
W ½ of SW ¼	18		80	97-98
NE ¼	19		160	95-99
SE ¼ except 20 a. in SW cor	19		140	95-99
NW ¼ except 15 a. in SW cor	19		145	95-99
20 a. in W part of NE ¼	20		20	92-02
E ½ of NW ¼	20		80	92-02
W ½ of NW ¼	20		80	92-96

000412

TABLE No. 5—(Continued)

DESCRIPTION	Sec.	Township.	Acres.	Years cultivated.
E ½ of SW ¼	20	1 N R 6 E	80	96-97
70 a. W of canal in NW ¼	28		70	91-99
E ½ of NE ¼	30		80	89-96
N ½ of NE ¼	32		80	89-92
S ½ of NE ¼	32		80	89-99
SE ¼	32		160	89-02
NW ¼ of SE ¼	33		40	90-99
W ½ of	33		320	89-99
20 a. W of canal in SW ¼ of SW ¼	28	2 N R 6 E	20	90-95
60 a. in S ½ of SE ¼	29		60	90-95
20 a. in SE cor. of SW ¼	29		20	90-95
95 a. W of canal in NE ¼	32		95	90-95
90 a. E of Consolidated in NW ¼	32		90	90-95
40 a. N of Highland in SW ¼	32		40	90-95
N ½ of SE ¼ of SE ¼	24	1 S R 5 E	20	95-96
Unlocated 60 a. in NW ¼	25		60	90-96
W ½	4	1 S R 6 E	320	89-99
NE ¼ of NE ¼	5		40	99-02
SE ¼	5		160	89-99
W 100 a. in NW ¼	5		100	93-99
10 a. in E part of SW ¼	5		10	90-96
All of	8		640	89-99
S 35 a. of NE ¼ of NE ¼ and N 15 a. of SE ¼ of SE ¼	9		50	99-00
Unlocated 30 a. in NE ¼	16		30	90-93
Unlocated 10 a. in SE ¼	16		10	90-93
W ½	16		320	90-93
All of	17		640	89-99
All of	18		640	89-99
All of	20		640	89-99
40 a. W of canal in SW ¼	21		40	89-96
NW ¼	29		160	89-99
SW ¼	29		160	90-92
E ½ of	30		320	89-99
NW ¼	30		160	90-92
E ½ of	31		320	89-99
NW ¼	31		160	89-99
SW ¼	31		160	89-92
Unlocated 40 a. in SE ¼	1	2 S R 5 E	40	90-96
N ½ of NW ¼	1		80	92-94
Unlocated 60 a. in SW ¼	6	2 S R 6 E	60	90-96
Total			8150	

Summary of Class "B" land on the South Side that has been irrigated by means of the following named canals:

Canal	Acres	
San Francisco canal	130	acres
Tempe canal	1,045	"
Utah canal	200	"
Mesa canal	585	"
Consolidated canal	3,985	"
Highland canal	8,150	"
Total	14,095	acres

000413

TABLE No. 6.

A table showing acreage of Class A and Class B land by Townships and Sections.

T. 1 N., R. 1 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	640	640		640	640				
2	640	640		640	640				
3	640	640		640	640				
4	640	160	480	640	160	480			
5	480	480		480	480				
6	640	640		640	640				
7	320	320		320	320				
8	240	210	30	240	210	30			
9	640	320	320	640	320	320			
10	520	480	40	520	480	40			
11	620	620		620	620				
12	640	640		640	640				
13	540	510	30	540	510	30			
14	160	160		160	160				
16	640	640		640	640				
17	340	145	195	340	145	195			
18	640	640		640	640				
20	20	20		20	20				
21	20	20		20	20				
24	70	70		70	70				
25	60	60		60	60				
Total	9,150	8,055	1,095	9,150	8,055	1,095			

T. 1 N., R. 2 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	640	640		640	640				
2	640	640		640	640				
3	640	640		640	640				
4	640	640		640	640				
5	640	640		640	640				
6	640	640		640	640				
7	640	640		640	640				
8	640	640		640	640				
9	640	640		640	640				
10	640	630	10	640	630	10			
11	640	640		640	640				
12	640	640		640	640				
13	490	490		490	490				
14	640	640		640	640				
15	630	630		630	630				
16	640	640		640	640				
17	630	630		630	630				
18	600	600		600	600				
19	520	320	200	520	320	200			
20	560	400	160	560	400	160			
21	230	230		230	230				
22	310	310		310	310				

000414

TABLE No. 6—(Continued)

T. 1 N., R. 2 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
23	110	110		110	110				
25	160	160					160	160	
30	125		125			125			
Total	13,325	12,830	495	13,165	12,670	495	160	160	

T. 1 N., R. 3 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	640	640		640	640				
2	640	640		640	640				
3	600	580	20	600	580	20			
4	640	640		640	640				
5	640	640		640	640				
6	640	455	185	640	455	185			
7	640	640		640	640				
8	640	640		640	640				
9	640	600	40	640	600	40			
10	640	565	75	640	565	75			
11	640	640		640	640				
12	620	620		620	620				
13	230	190	40	230	190	40			
14	535	535		535	535				
15	485	485		485	485				
16	420	420		420	420				
17	535	535		535	535				
18	560	440	120	560	440	120			
19	70	70					70	70	
20	310	310					310	310	
21	330	330					330	330	
22	200	200					200	200	
23	205	75	130				205	75	130
24	405	405					405	405	
25	635	635					635	635	
26	570	570					570	570	
27	640	640					640	640	
28	560	560					560	560	
29	510	510					510	510	
30	305	305					305	305	
32	40	40					40	40	
34	540	540					540	540	
35	560	560					560	560	
36	300	300					300	300	
Total	16,565	15,955	610	10,385	9,905	480	6.180	6,050	130

000415

TABLE No. 6—T. 1 N., R. 4. E.—(Continued)

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
2	160	80	80	160	80	80			
6	330	330		330	330				
7	200	200		200	200				
12	200		200	200		200			
13	210	210					210	210	
14	255	255					255	255	
15	215	215					215	215	
16	355	355					355	355	
17	285	285					285	285	
18	40		40				40		40
19	530	470	60				530	470	60
20	480	480					480	480	
21	560	560					560	560	
22	640	640					640	640	
23	640	640					640	640	
24	640	640					640	640	
25	640	640					640	640	
26	640	640					640	640	
27	640	640					640	640	
28	640	560	80				640	560	80
29	525	525					525	525	
30	640	640					640	640	
31	320	320					320	320	
32	240	240					240	240	
33	420	420					420	420	
34	640	640					640	640	
35	640	640					640	640	
36	640	640					640	640	
Total	12,365	11,905	460	890	610	280	11,475	11,295	180

T. 1 N., R. 5 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	240	210	30				240	210	30
2	600	600					600	600	
3	370	370					370	370	
4	240	40	200	200		200	40	40	
5	400		400	400		400			
6	200		200	200		200			
7	200		200	200		200			
8	185	185					185	185	
9	430	430					430	430	
10	510	510					510	510	
11	230	210	20				230	210	20
12	480	400	80				480	400	80
13	510	80	430				510	80	430
14	590	590					590	590	
15	610	610					610	610	
16	625	625					625	625	
17	560	520	40				560	520	40
18	440	440					440	440	

000416

TABLE No. 6—T. 1. N., R. 5 E.—(Continued)

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
19	640	640					640	640	
20	640	640					640	640	
21	640	640					640	640	
22	640	640					640	640	
23	640	640					640	640	
24	640	640					640	640	
25	640	640					640	640	
26	640	640					640	640	
27	640	640					640	640	
28	640	640					640	640	
29	640	640					640	640	
30	640	640					640	640	
31	640	640					640	640	
32	640	640					640	640	
33	640	640					640	640	
34	640	640					640	640	
35	640	640					640	640	
36	640	560	80				640	560	80
Total	18,900	17,220	1,680	1,000		1,000	17,900	17,220	680

T. 1. N., R. 6 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
7	60	25	35				60	25	35
17									
18	475		475				475		475
19	620	175	445				620	175	445
20	260		260				260		260
28	70		70				70		70
29	30	30					30	30	
30	640	560	80				640	560	80
31	640	640					640	640	
32	360	40	320				360	40	320
33	360		360				360		360
Total	3,515	1,470	2,045				3,515	1,470	2,045

T. 2 N., R. 1. E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	640	300	340	640	300	340			
2	240	200	40	240	200	40			
3	120	40	80	120	40	80			
4	435	250	185	435	250	185			
5	10	10		10	10				
8	105	25	80	105	25	80			
9	160	120	40	160	120	40			

000417

TABLE No. 6—T. 2. N., R. 1 E.—(Continued)

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
10	240	80	160	240	80	160			
11	450	280	170	450	280	170			
12	640	580	60	640	580	60			
13	640	160	480	640	160	480			
14	640	640		640	640				
15	640	640		640	640				
16	545	545		545	545				
17									
18	260	260		260	260				
19	340	340		340	340				
20	640	640		640	640				
21	640	640		640	640				
22	640	640		640	640				
23	640	640		640	640				
24	540	470	70	540	470	70			
25	640	640		640	640				
26	640	640		640	640				
27	640	640		640	640				
28	640	640		640	640				
29	640	640		640	640				
30	400	320	80	400	320	80			
31	640	480	160	640	480	160			
32	640	640		640	640				
33	640	640		640	640				
34	640	640		640	640				
35	640	640		640	640				
36	640	640		640	640				
Total	16,645	14,700	1,945	16,645	14,700	1,945			

T. 2 N., R. 2 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	320	320		320	320				
2	640	640		640	640				
3	640	640		640	640				
4	640	620	20	640	620	20			
5	640	640		640	640				
6	640	640		640	640				
7	640	570	70	640	570	70			
8	640	350	290	640	350	290			
9	640	640		640	640				
10	640	620	20	640	620	20			
11	640	440	200	640	440	200			
12	640	640		640	640				
13	640	160	480	640	160	480			
14	620	620		620	620				
15	600	510	90	600	510	90			
16	640	640		640	640				
17	640	620	20	640	620	20			
18	640	520	120	640	520	120			
19	640	640		640	640				
20	640	560	80	640	560	80			
21	640	640		640	640				

000418

TABLE No. 6—T. 2 N., R. 2 E.—(Continued)

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
22	640	345	295	640	345	295			
23	640	530	110	640	530	110			
24	360	360		360	360				
25	580	580		580	580				
26	640	555	85	640	555	85			
27	640	535	105	640	535	105			
28	640	480	160	640	480	160			
29	565	375	190	565	375	190			
30	640	640		640	640				
31	640	640		640	640				
32	640	640		640	640				
33	640	640		640	640				
34	640	640		640	640				
35	640	640		640	640				
36	640	640		640	640				
Total	22,245	19,910	2,335	22,245	19,910	2,335			

T. 2 N., R 3 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
4	170	170		170	170				
5	390	390		390	390				
6	640	440	200	640	440	200			
7	320	120	200	320	120	200			
8	640	335	305	640	335	305			
9	170	160	10	170	160	10			
10	15	15		15	15				
13	20		20	20		20			
14	10	10		10	10				
15	290	290		290	290				
16	580	580		580	580				
17	560	560		560	560				
18	640	640		640	640				
19	640	560	80	640	560	80			
20	570	550	20	570	550	20			
21	625	315	310	625	315	310			
22	640	360	280	640	360	280			
23	570	550	20	570	550	20			
24	235	235		235	235				
25	250	120	130	250	120	130			
26	640	180	460	640	180	460			
27	585	425	160	585	425	160			
28	640	640		640	640				
29	640	640		640	640				
30	640	640		640	640				
31	640	640		640	640				
32	640	640		640	640				
33	640	640		640	640				
34	625	625		625	625				
35	490	370	120	490	370	120			
36	640	640		640	640				
Total	14,795	12,480	2,315	14,795	12,480	2,315			

000419

TABLE No. 6—(Continued)—T. 2 N., R 4 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
12	150		150	150		150			
19	165	140	25	165	140	25			
20	10	10		10	10				
22	45	45		45	45				
23	330	320	10	330	320	10			
24	440	320	120	440	320	120			
25									
26	190	100	90	190	100	90			
27	340	205	135	340	205	135			
28	175	175		175	175				
29	90	10	80	90	10	80			
30	640	320	320	640	320	320			
31	35	35		35	35				
32	30	10	20	30	10	20			
34	240		240	240		240			
36	420	360	60	420	360	60			
Total	3,300	2,050	1,250	3,300	2,050	1,250			

T. 2 N., R. 5 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
20	160	160		160	160				
21	480	480		480	480				
22	160	160		160	160				
25									
26									
27	320	320		320	320				
28	640	320	320	640	320	320			
29	360	93	267	360	93	267			
31	480	480		480	480				
32	640	320	320	640	320	320			
34	10	10					10	10	
35 & 36	1,115	1,115					1,115	1,115	
Total	4,365	3,458	907	3,240	2,333	907	1,125	1,125	

T. 2 N., R. 6 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
28	20		20				20		20
29	80		80				80		80
30	30	30					30	30	
31	480	445	35				480	445	35
32	265		265				265		265
Total	875	475	400				875	475	400

000420

TABLE No. 6—(Continued)—R. 3 N., R. 1 E.

Sections	Acreage. Total	Acreage. Class A	Acreage. Class B	North Side Acreage. Total	North Side Acreage. Class A	North Side Acreage. Class B	South Side Acreage. Total	South Side Acreage. Class A	South Side Acreage. Class B
1	70		70	70		70			
2	140		140	140		140			
12	160	160		160	160				
14	320	320		320	320				
15	200	200		200	200				
16	20		20	20		20			
22	580	560	20	580	560	20			
23	40	40		40	40				
24	160		160	160		160			
25	440	400	40	440	400	40			
26	530	260	270	530	260	270			
27	240	165	75	240	165	75			
33	70	70		70	70				
34	110	60	50	110	60	50			
35	230	230		230	230				
36	450	325	125	450	325	125			
Total	3,760	2,790	970	3,760	2,790	970			

T. 3 N., R. 2 E.

Sections	Acreage. Total	Acreage. Class A	Acreage. Class B	North Side Acreage. Total	North Side Acreage. Class A	North Side Acreage. Class B	South Side Acreage. Total	South Side Acreage. Class A	South Side Acreage. Class B
7	60	60		60	60				
20	420	100	320	420	100	320			
25	145	50	95	145	50	95			
27	320	320		320	320				
28	320	320		320	320				
29	640		640	640		640			
30	410	305	105	410	305	105			
31	640	440	200	640	440	200			
32	640	640		640	640				
33	640	320	320	640	320	320			
34	640	640		640	640				
35	640	640		640	640				
36	580	580		580	580				
Total	6,095	4,415	1,680	6,095	4,415	1,680			

T. 3 N., R. 3 E.

Sections	Acreage. Total	Acreage. Class A	Acreage. Class B	North Side Acreage. Total	North Side Acreage. Class A	North Side Acreage. Class B	South Side Acreage. Total	South Side Acreage. Class A	South Side Acreage. Class B
30	65	65		65	65				
31	640	600	40	640	600	40			
32	200	200		200	200				
33	30	30		30	30				
Total	935	895	40	935	895	40			

000421

TABLE No. 6—(Continued)—T. 1 N., R. 1 W.

Sections	Acreage.			North Side Acreage.			South Side Acreage.		
	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	200	200		200	200				
12	320	320		320	320				
13	320	320		320	320				
24	160	160		160	160				
Total	1,000	1,000		1,000	1,000				

T. 1 S., R. 4 E.

Sections	Acreage.			North Side Acreage.			South Side Acreage.		
	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	640	640					640	640	
2	640	640					640	640	
3	435	435					435	435	
10	320	320					320	320	
11	640	640					640	640	
12	640	640					640	640	
13	640	640					640	640	
14	640	640					640	640	
15	340	320	20				340	320	20
22	600	440	160				600	440	160
23	640	640					640	640	
24	640	640					640	640	
25	425	410	15				425	410	15
26	640	640					640	640	
27	640	480	160				640	480	160
28	340	210	130				340	210	130
32	270	270					270	270	
33	320	320					320	320	
34	560	480	80				560	480	80
35	460	160	300				460	160	300
Total	10,470	9,605	865				10,470	9,605	865

T. 1 S., R. 5 E.

Sections	Acreage.			North Side Acreage.			South Side Acreage.		
	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	560	410	150				560	410	150
2	560	560					560	560	
3	640	640					640	640	
4	640	640					640	640	
5	640	640					640	640	
6	640	640					640	640	
7	640	640					640	640	
8	640	640					640	640	
9	605	605					605	605	
10	600	600					600	600	
11	640	640					640	640	
12	440	340	100				440	340	100

000422

TABLE No. 6—T. 1 S., R. 5 E.—(Continued)

Sections	Acreage.			North Side Acreage.			South Side Acreage.		
	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
13	160		160				160		160
15	320	100	220				320	100	220
16	390	390					390	390	
17	625	625					625	625	
18	620	620					620	620	
19	270	270					270	270	
20	200		200				200		200
21	640	640					640	640	
22	480		480				480		480
23	10	10					10	10	
24	20		20				20		20
25	60		60				60		60
26	480		480				480		480
27	560	160	400				560	160	400
28	640	480	160				640	480	160
31	400		400				400		400
32	320		320				320		320
33	280	280					280	280	
34	80		80				80		80
Total	13,800	10,570	3,230				13,800	10,570	3,230

T. 1 S., R. 6 E.

Sections	Acreage.			North Side Acreage.			South Side Acreage.		
	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
4	320		320				320		320
5	310		310				310		310
6	400	360	40				400	360	40
7	360	280	80				360	280	80
8	640		640				640		640
9	50		50				50		50
16	360		360				360		360
17	640		640				640		640
18	640		640				640		640
20	640		640				640		640
21	40		40				40		40
29	320		320				320		320
30	480		480				480		480
31	640		640				640		640
Total	5,840	640	5,200				5,840	640	5,200

T. 2 S., R. 5 E.

Sections	Acreage.			North Side Acreage.			South Side Acreage.		
	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
1	120		120				120		120
9	640		640				640		640

TABLE No. 6—T. 2 S., R. 5 E.—(Continued)

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
10	560	320	240				560	320	240
15	625	320	305				625	320	305
27	20	20					20	20	
Total	1,965	660	1,305				1,965	660	1,305

T. 2 S., R. 6 E.

	Acreage.			North Side Acreage.			South Side Acreage.		
Sections	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
6	60		60				60		60
Total	60		60				60		60

Summary of Class A land, showing the total acreage, the total acreage on the North Side and the total acreage on the South Side.

	ACREAGE.		
TOWNSHIPS.	Total	North Side	South Side
1 N R 1 E	8,055	8,055	
1 N R 2 E	12,830	12,670	160
1 N R 3 E	15,955	9,905	6,050
1 N R 4 E	11,905	610	11,295
1 N R 5 E	17,220		17,220
1 N R 6 E	1,470		1,470
2 N R 1 E	14,700	14,700	
2 N R 2 E	19,910	19,910	
2 N R 3 E	12,480	12,480	
2 N R 4 E	2,050	2,050	
2 N R 5 E	3,458	2,333	1,125
2 N R 6 E	475		475
3 N R 1 E	2,790	2,790	
3 N R 2 E	4,415	4,415	
3 N R 3 E	895	895	
1 N R 1 W	1,000	1,000	
1 S R 4 E	9,605		9,605
1 S R 5 E	10,570		10,570
1 S R 6 E	640		640
2 S R 5 E	660		660
2 S R 6 E			
Total	151,083	91,813	59,270

000424

TABLE No. 6—(Continued)

Summary of Class B land, showing the total acreage, the total acreage on the North Side and the total acreage on the South Side.

December 31, 1909.	ACREAGE.		
TOWNSHIPS.	Total	North Side	South Side
1 N R 1 E	1,095	1,095	
1 N R 2 E	495	495	
1 N R 3 E	610	480	130
1 N R 4 E	460	280	180
1 N R 5 E	1,680	1,000	680
1 N R 6 E	2,045		2,045
2 N R 1 E	1,945	1,945	
2 N R 2 E	2,335	2,335	
2 N R 3 E	2,315	2,315	
2 N R 4 E	1,250	1,250	
2 N R 5 E	907	907	
2 N R 6 E	400		400
3 N R 1 E	970	970	
3 N R 2 E	1,680	1,680	
3 N R 3 E	40	40	
1 N R 1 W			
1 S R 4 E	865		865
1 S R 5 E	3,230		3,230
1 S R 6 E	5,200		5,200
2 S R 5 E	1,305		1,305
2 S R 6 E	60		60
Total	28,887	14,792	14,095

Table of summaries of Class A and B land by Townships and Sections.

December 31, 1909	Cultivation Total Acreage of			North Side Acreage			South Side Acreage		
TOWNSHIPS	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
T 1 N R 1 E	9,150	8,055	1,095	9,150	8,055	1,095			
T 1 N R 2 E	13,325	12,830	495	13,165	12,670	495	160	160	
T 1 N R 3 E	16,565	15,955	610	10,385	9,905	480	6,180	6,050	130
T 1 N R 4 E	12,365	11,905	460	890	610	280	11,475	11,295	180
T 1 N R 5 E	18,900	17,220	1,680	1,000		1,000	17,900	17,220	680
T 1 N R 6 E	3,515	1,470	2,045				3,515	1,470	2,045
T 2 N R 1 E	16,645	14,700	1,945	16,645	14,700	1,945			
T 2 N R 2 E	22,245	19,910	2,335	22,245	19,910	2,335			
T 2 N R 3 E	14,795	12,480	2,315	14,795	12,480	2,315			
T 2 N R 4 E	3,300	2,050	1,250	3,300	2,050	1,250			
T 2 N R 5 E	4,365	3,458	907	3,240	2,333	907	1,125	1,125	
T 2 N R 6 E	875	475	400				875	475	400
T 3 N R 1 E	3,760	2,790	970	3,760	2,790	970			
T 3 N R 2 E	6,095	4,415	1,680	6,095	4,415	1,680			
T 3 N R 3 E	935	895	40	935	895	40			
T 1 N R 1 W	1,000	1,000		1,000	1,000				
T 1 S R 4 E	10,470	9,605	865				10,470	9,605	865
T 1 S R 5 E	13,800	10,570	3,230				13,800	10,570	3,230
T 1 S R 6 E	5,840	640	5,200				5,840	640	5,200
T 2 S R 5 E	1,965	660	1,305				1,965	660	1,305
T 2 S R 6 E	60		60				60		60
Total	179,970	151,083	28,887	106,605	91,813	14,792	73,365	59,270	14,095

000425

TABLE No. 6—(Continued)

Summary of Class B land, showing the total acreage, the total acreage on the North Side and the total acreage on the South Side.

December 31, 1909.	ACREAGE.		
TOWNSHIPS.	Total	North Side	South Side
1 N R 1 E	1,095	1,095	....
1 N R 2 E	495	495	....
1 N R 3 E	610	480	130
1 N R 4 E	460	280	180
1 N R 5 E	1,680	1,000	680
1 N R 6 E	2,045	....	2,045
2 N R 1 E	1,945	1,945	....
2 N R 2 E	2,335	2,335	....
2 N R 3 E	2,315	2,315	....
2 N R 4 E	1,250	1,250	....
2 N R 5 E	907	907	....
2 N R 6 E	400	....	400
3 N R 1 E	970	970	....
3 N R 2 E	1,680	1,680	....
3 N R 3 E	40	40	....
1 N R 1 W	....	....	....
1 S R 4 E	865	....	865
1 S R 5 E	3,230	....	3,230
1 S R 6 E	5,200	....	5,200
2 S R 5 E	1,305	....	1,305
2 S R 6 E	60	....	60
Total	28,887	14,792	14,095

Table of summaries of Class A and B land by Townships and Sections.

December 31, 1909	Cultivation Total Acreage of			North Side Acreage			South Side Acreage		
TOWNSHIPS	Total	Class A	Class B	Total	Class A	Class B	Total	Class A	Class B
T 1 N R 1 E	9,150	8,055	1,095	9,150	8,055	1,095	....	....	....
T 1 N R 2 E	13,325	12,830	495	13 165	12,670	495	160	160	....
T 1 N R 3 E	16,565	15,955	610	10,385	9,905	480	6,180	6,050	130
T 1 N R 4 E	12,365	11,905	460	890	610	280	11,475	11,295	180
T 1 N R 5 E	18,900	17,220	1,680	1,000	....	1,000	17,900	17,220	680
T 1 N R 6 E	3,515	1,470	2,045	....	....	....	3,515	1,470	2,045
T 2 N R 1 E	16,645	14,700	1,945	16,645	14,700	1,945	....	....	....
T 2 N R 2 E	22,245	19,910	2,335	22,245	19,910	2,335	....	....	....
T 2 N R 3 E	14,795	12,480	2,315	14,795	12,480	2,315	....	....	....
T 2 N R 4 E	3,300	2,050	1,250	3,300	2.050	1,250	....	....	....
T 2 N R 5 E	4,365	3,458	907	3,240	2,333	907	1,125	1,125	....
T 2 N R 6 E	875	475	400	....	....	....	875	475	400
T 3 N R 1 E	3,760	2,790	970	3,760	2,790	970	....	....	....
T 3 N R 2 E	6,095	4,415	1,680	6.095	4,415	1,680	....	....	....
T 3 N R 3 E	935	895	40	935	895	40	....	....	....
T 1 N R 1 W	1,000	1,000	....	1,000	1,000	....	....	....	....
T 1 S R 4 E	10,470	9,605	865	....	....	....	10,470	9,605	865
T 1 S R 5 E	13,800	10,570	3,230	....	....	....	13,800	10,570	3,230
T 1 S R 6 E	5.840	640	5,200	....	....	....	5,840	640	5,200
T 2 S R 5 E	1,965	660	1,305	....	....	....	1,965	660	1,305
T 2 S R 6 E	60	....	60	....	....	....	60	....	60
Total	179,970	151,083	28,887	106,605	91,813	14,792	73,365	59,270	14,095

000426

TABLE No. 7.

A table showing the acreage of the North Side Class A land by Townships and years.

YEARS	T 1 N R 1 E	T 1 N R 2 E	T 1 N R 3 E	T 1 N R 4 E	T 2 N R 1 E	T 2 N R 2 E	T 2 N R 3 E	T 2 N R 4 E	T 2 N R 5 E	T 3 N R 1 E	T 3 N R 2 E	T 3 N R 3 E	T 1 N R 1 W	Totals
Indian									2333					2333
1869			3050				160							3210
1870		400	1055											1455
1871		1280	1855				160							3295
1872		710	80				1080							1870
1873	60	80	320											460
1874		260	145											405
1875							60							60
1876		1380	320											1700
1877		1120					640							1760
1878		1910	435			1120	440							3905
1879		960	270			640	1565							3435
1880	1440	1300	245		2000	2315	725							8025
1881	620	320	280		2430	1280	35							4965
1882	1600	320	40		4760	865	160							7745
1883	320	160	325		400		50							1255
1884	1120	160	170				40							1490
1885		150			240		180							570
1886	320	80			835	680	585							2500
1887			260			480	150	10		410	565	200		2075
1888		790	10	100		2250	365	445			320			4280
1889	160	110	40		540	2890	220	230		320	750			5260
1890		40	20	210	80	500	715	80		165	450		80	2340
1891			40			240	160			200	80	170		890
1892	220		310		840	760	180	120		355	400			3185
1893				140			330	360		80	220			1130
1894			220	80			235			170	160	30		895
1895		60			225		1245	35		115		10		1690
1896					200		90	100				80		470
1897		320					410	70		10				810
1898						40	90				80	5		215
1899		110					30			40	20			200
1900	40						65	225		40				370
1901		130					170	10			220			530
1902	120		70				170				20			380
1903			20			240	20							280
1904					160	240	100	15		80				595
1905			40				120			80	60			300
1906	230	20	225		10	140	70					80		775
1907	780	40		80	575	795	360	40		45	160	270	620	3665
1908	790	200	20		600	2545	935	230		590	375	50	400	6735
1909	235	260	40		805	1890	370	80		90	535			4305
Total	8055	12,670	9905	610	14,700	19,910	12,480	2050	2333	2790	4415	895	1000	91,813

TABLE No. 8.

A table showing the acreage of the South Side Class A land by Township and years.

YEARS	T 1 N R 2 E.	T 1 N R 3 E.	T 1 N R 4 E.	T 1 N R 5 E.	T 1 N R 6 E.	T 2 N R 5 E.	T 2 N R 6 E.	T 1 S R 4 E.	T 1 S R 5 E.	T 1 S R 6 E.	T 2 S R 5 E.	Totals
1870	80	285										365
1871				870								870
1872			4535	295								4830
1873		1625	160	150								1935
1874												
1875		320	500									820
1876			960									960
1877			1210	1540				640				3390
1878		765	1030	2075		1115	445					5430
1879		95	15	1840				800				2750
1880			140	2260								2400
1881			410	620				680				1710
1882				855								855
1883	40	740	280	720				160				1940
1884			320	915				440				1675
1885				1190				640				1830
1886				690				715				1405
1887		410	510	805				1440	640			3805
1888			670	240				1270	3645			5825
1889		320		270	1040			160	480			2270
1890		55	15	255				1220	160	320		2025
1891		345	820	80				480	410			1635
1892		300		520	335				2630	120		3905
1893				260					685		640	1585
1894				15					120			135
1895		240										240
1896	40	220						160	80			500
1897				105				160	280			545
1898				815	40	10						865
1899												
1900				65	30				240			335
1901				160								160
1902												
1903		200										200
1904		110										110
1905		20					25		830	200		1075
1906			220						20			240
1907				20				640	270			930
1908				90					80		20	190
1909							80					30
Total	160	6050	11,295	17,220	1445	1125	500	9605	10,570	640	660	59,270

000428

TABLE No. 9.

A table of the acreage of Class A land, showing the year of first cultivation, the acreage for that year and the total acreage year by year up to and including the year 1909.

YEARS.	Total acreage	Total on North Side	Total on South Side	Broadway Canal	San Francisco Canal	Tempe Canal	Utah Canal	Mesa Canal	Consolidated Canal	Highland Canal
Indian	2,333	2,333								
	2,333	2,333								
1869	3,210	3,210								
	5,543	5,543								
1870	1,820	1,455	365	365						
	7,363	6,998	365	365						
1871	4,165	3,295	870			820	50			
	11,528	10,293	1,235	365		820	50			
1872	6,700	1,870	4,830			4,830				
	18,228	12,163	6,065	365		5,650	50			
1873	2,395	460	1,935		1,625	310				
	20,623	12,623	8,000	365	1,625	5,960	50			
1874	405	405								
	21,028	13,028	8,000	365	1,625	5,960	50			
1875	880	60	820		320	500				
	21.908	13,088	8,820	365	1,945	6,460	50			
1876	2,600	1,700	960			960				
	24,568	14,788	9,780	365	1,945	7,420	50			
1877	5,150	1,760	3,390			1,850	1,540			
	29,718	16,548	13,170	365	1,945	9,270	1,590			
1878	9,335	3,905	5,430		765	1,030	1,310	2,325		
	39,053	20,453	18,600	365	2,710	10,300	2.900	2,325		
1879	6,185	3,435	2,750		95	815	55	1,785		
	45,238	23,888	21,350	365	2,805	11,115	2,955	4,110		
1880	10,425	8.025	2,400		80	60	40	2,220		
	55,663	31,913	23,750	365	2,885	11,175	2,995	6,330		
1881	6,675	4.965	1,710			1,090		620		
	62,338	36,878	25 460	365	2,885	12,265	2,995	6,950		
1882	8,600	7,745	855				320	535		
	70,938	44,623	26,315	365	2,885	12,265	3,315	7,485		
1883	3,195	1,255	1,940	40	740	440		720		
	74,133	45,878	28,255	405	3,625	12,705	3,315	8,205		
1884	3,165	1,490	1,675			1,035	320	320		
	77,298	47,368	29,930	405	3,625	13,740	3,635	8,525		
1885	2,400	570	1,830			800	750	280		
	79,698	47,938	31,760	405	3,625	14,540	4,385	8,805		
1886	3,905	2,500	1,405			760	365	280		
	83,603	50,438	33,165	405	3,625	15,300	4,750	9,085		
1887	5,880	2,075	3,805		95	2,285	640	785		
	89 483	52,513	36,970	405	3,720	17,585	5,390	9,870		
1888	10,105	4,280	5,825			1,940	3,565	320		
	99,588	56,793	42,795	405	3,720	19,525	8,955	10,190		
1889	7,530	5,260	2,270			480	320	1,470		
	107,118	62,053	45,065	405	3,720	20,005	9,275	11,660		
1890	4,365	2,340	2,025			1,290	255	480		
	111,483	64.393	47,090	405	3,720	21,295	9,530	12,140		

TABLE No. 9—(Continued)

YEARS.	Total acreage...	Total on North Side...	Total on South Side...	Broadway Canal..........	San Francisco Canal..........	Tempe Canal...	Utah Canal.....	Mesa Canal.....	Consolidated Canal..........	Highland Canal..........
1891	111,483 2,525	64,393 890	47,090 1,635	405	3,720	21,295 1,145	9,530	12,140 490		
1892	114,008 7,090	65,283 3,185	48,725 3,905	405	3,720	22,440 300	9,530 430	12,630 1,655	 1,280	 240
1893	121,098 2,715	68,468 1,130	52,630 1,585	405	3,720	22,740	9,900 685	14,285 260	1,280 640	240
1894	123,813 1,030	69,598 895	54,215 135	405	3,720	22,740	10,645 120	14,545 15	1,920	240
1895	124,843 1,930	70,493 1,690	54,350 240	405	3,720	22,740 240	10,765	14,560	1,920	240
1896	126,773 970	72,183 470	54,590 500	405 40	3,720	22,980 380	10,765	14,560 80	1,920	240
1897	127,743 1,355	72,653 810	55,090 545	445	3,720	23,360 160	10,765	14,640 105	1,920 280	240
1898	129,098 580	73,463 215	55,635 365	445	3,720	23,520	10,765 35	14,745 330	2,200	240
1899	129,678 200	73,678 200	56,000	445	3,720	23,520	10,800	15,075	2,200	240
1900	129,878 705	73,878 370	56,000 335	445	3,720	23,520	10,800 65	15,075 270	2,200	240
1901	130,583 690	74,248 530	56,335 160	445	3,720	23,520	10,865	15,345	2,200	240 160
1902	131,273 380	74,778 380	56,495	445	3,720	23,520	10,865	15,345	2,200	400
1903	131,653 480	75,158 280	56,495 200	445	3,720 200	23,520	10,865	15,345	2,200	400
1904	132,133 705	75,438 595	56,695 110	445	3,920 110	23,520	10,865	15,345	2,200	400
1905	132,838 1,375	76,033 300	56,805 1,075	445 20	4,030	23,520	10,865 270	15,345 760	2,200	400 25
1906	134,213 1,015	76,333 775	57,880 240	465	4,030	23,520 220	11,135	16,105 20	2,200	425
1907	135,228 4,595	77,108 3,665	58,120 930	465	4,030	23,740 640	11,135	16,125 180	2,200 110	425
1908	139,823 6,925	80,773 6,735	59,050 190	465	4,030	24,380	11,135	16,305 170	2,310. 20	425
1909	146,748 4,335	87,508 4,305	59,240 30	465	4,030	24,380	11,135 30	16,475	2,330	425
Total acreage	151,083	91.813	59,270	465	4,030	24,380	11,165	16,475	2,330	425

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TABLE No. 10.

A table of acres and miners' inches for Class A land, showing the total acreage year by year and water for the same at 48 miners' inches per quarter section or one miners' inch for every three and one-third acres.

YEARS	Total acreage and miners' inches	Total on North Side	Total on South Side	Broadway Canal	San Francisco Canal	Tempe Canal	Utah Canal	Mesa Canal	Consolidated Canal	Highland Canal
	2,333	2,333	...	...	...	...	...	...	...	...
Indian	700	700	...	...	...	...	...	...	...	...
	5,543	5,543	...	...	...	...	...	...	...	...
1869	1,663	1,663	...	...	...	...	...	...	...	...
	7,363	6,998	365	365	...	...	...	...	...	...
1870	2,209	2,099	110	110	...	...	...	...	...	...
	11,528	10,293	1,235	365	...	820	50	...	...	...
1871	3,459	3,088	371	110	...	240	15	...	...	...
	18,228	12,163	6,065	365	...	5,650	50	...	...	...
1872	5,469	3,649	1,820	110	...	1,695	15	...	...	...
	20,623	12,623	8,000	365	1,625	5,960	50	...	...	...
1873	6,187	3,787	2,400	110	487	1,788	15	...	...	...
	21,028	13,028	8,000	365	1.625	5,960	50	...	...	...
1874	6,308	3,908	2,400	110	487	1,788	15	...	...	...
	21,908	13,088	8,820	365	1,945	6,460	50	...	...	...
1875	6,572	3,926	2,646	110	583	1,938	15	...	...	...
	24,568	14.788	9,780	365	1,945	7,420	50	...	...	...
1876	7,370	4,436	2,934	110	583	2,226	15	...	...	...
	29,718	16,548	13,170	365	1,945	9,270	1,590	...	...	...
1877	8,915	4.964	3,951	110	583	2,781	477	...	...	...
	39,053	20,453	18,600	365	2,710	10,300	2,900	2,325	...	...
1878	11,716	6,136	5,580	110	813	3,090	870	697	...	...
	45,238	23 888	21,350	365	2,805	11,115	2,955	4,110	...	...
1879	13,571	7,166	6,405	110	842	3,334	886	1,233	...	...
	55,663	31,913	23,750	365	2,885	11,175	2,995	6,330	...	...
1880	16,699	9,574	7,125	110	866	3,352	898	1,899	...	...
	62,338	36,878	25,460	365	2,885	12,265	2,995	6,950	...	...
1881	18,701	11 063	7,638	110	866	3,679	898	2,085	...	...
	70,938	44,623	26,315	365	2,885	12,265	3,315	7,485	...	...
1882	21,282	13,387	7,895	110	866	3.679	995	2.245	...	...
	74,133	45,878	28,255	405	3,625	12,705	3,315	8,205	...	...
1883	22,240	13,763	8,477	122	1,087	3,812	995	2,461	...	...
	77.298	47,368	29,930	405	3,625	13,740	3,635	8,525	...	...
1884	23,189	14,210	8,979	122	1,087	4,122	1,091	2,557	...	...
	79,698	47,938	31,760	405	3 625	14,540	4,385	8,805	...	...
1885	23,909	14,381	9,528	122	1,087	4,362	1,316	2,641	...	...
	83,603	50,438	33,165	405	3,625	15,300	4,750	9,085	...	...
1886	25.081	15,131	9,950	122	1,087	4,590	1,425	2,726	...	...
	89,483	52,513	36,970	405	3,720	17,585	5,390	9,870	...	...
1887	26,845	15,754	11,091	122	1.116	5,275	1,617	2,961	...	...
	99,588	56,793	42,795	405	3,720	19,525	8,955	10,190	...	...
1888	29,877	17,038	12,839	122	1,116	5,857	2,687	3,057	...	...
	167.118	62,053	45.065	405	3.720	20,005	9,275	11,660	...	...
1889	32,136	18,616	13,520	122	1.116	6,002	2,782	3.498	...	...
	111,483	64,393	47,090	405	3.720	21,295	9,530	12,140	...	...
1890	33,445	19,318	14,127	122	1.116	6.388	2.859	3,642	...	...

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TABLE No. 10—(Continued)

YEARS	Total acreage and miners' inches	Total on North Side	Total on South Side	Broadway Canal	San Francisco Canal	Tempe Canal	Utah Canal	Mesa Canal	Consolidated Canal	Highland Canal
	114,008	65,283	48,725	405	3,720	22,440	9,530	12,630	....	....
1891	34,203	19,585	14,618	122	1,116	6,732	2,859	3,789	....	....
	121,098	68,468	52,630	405	3,720	22,740	9,960	14,285	1,280	240
1892	36,329	20,540	15,789	122	1,116	6,822	2,988	4,285	384	72
	123,813	69,598	54,215	405	3,720	22,740	10,645	14,545	1,920	240
1893	37,144	20,879	16,265	122	1,116	6,822	3,193	4,364	576	72
	124,843	70,493	54,350	405	3,720	22,740	10,765	14,560	1,920	240
1894	37,453	21,148	16,305	122	1,116	6,822	3,229	4,368	576	72
	126,773	72,183	54,590	405	3,720	22,980	10,765	14,560	1,920	240
1895	38,032	21,655	16,377	122	1,116	6,894	3,229	4,368	576	72
	127,743	72,653	55,090	445	3,720	23,360	10,765	14,640	1,920	240
1896	38,323	21,796	16,527	134	1,116	7,008	3,229	4,392	576	72
	129,098	73,463	55,635	445	3,720	23,520	10,765	14,745	2,200	240
1897	38,730	22,039	16,691	134	1,116	7,056	3,229	4,424	660	72
	129,678	73 678	56,000	445	3,720	23,520	10,800	15,075	2,200	240
1898	38,903	22,103	16,800	134	1,116	7,056	3,240	4,522	660	72
	129,878	73,878	56,000	445	3,720	23,520	10,800	15,075	2,200	240
1899	38,963	22,163	16,800	134	1,116	7,056	3,240	4,522	660	72
	130,583	74,248	56,335	445	3,720	23,520	10,865	15,345	2,200	240
1900	39,175	22,274	16,901	134	1,116	7.056	3,260	4,603	660	72
	131,273	74,778	56,495	445	3,720	23,520	10,865	15,345	2,200	400
1901	39,382	22,433	16,949	134	1,116	7,056	3.260	4,603	660	120
	131,653	75,158	56,495	445	3,720	23,520	10,865	15,345	2,200	400
1902	39,496	22,547	16,949	134	1,116	7,056	3,260	4,603	660	120
	132,133	75,438	56,695	445	3,920	23,520	10,865	15,345	2,200	400
1903	39,640	22,631	17,009	134	1,176	7,056	3,260	4,603	660	120
	132,838	76,033	56,805	445	4,030	23,520	10,865	15,345	2,200	400
1904	39,852	22,810	17,042	134	1,209	7.056	3,240	4,603	660	120
	134,213	76,333	57,880	465	4,030	23,520	11,135	16,105	2,200	425
1905	40,264	22,900	17,364	140	1,209	7,056	3,340	4,832	660	127
	135,228	77,108	58,120	465	4,030	23,740	11,135	16,125	2,200	425
1906	40,568	23,132	17,436	140	1,209	7,122	3,340	4,838	660	127
	139,823	80,773	59,050	465	4,030	24,380	11,135	16,305	2,310	425
1907	41,947	24,232	17,715	140	1,209	7,314	3,340	4,892	693	127
	146,748	87,508	59,240	465	4,030	24,380	11,135	16,475	2,330	425
1908	44,024	26,252	17,772	140	1,209	7,314	3,340	4,943	699	127
	151,083	91,813	59,270	465	4,030	24,380	11,165	16,475	2,330	425
1909	45,325	27,544	17,781	140	1,209	7,314	3.349	4,943	699	127

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

PATRICK T. HURLEY
Plaintiff,
THE UNITED STATES OF AMERICA,
Intervenor
Against
CHARLES F. ABBOTT and Four Thousand Eight Hundred Others,
Defendants.

No. 4564

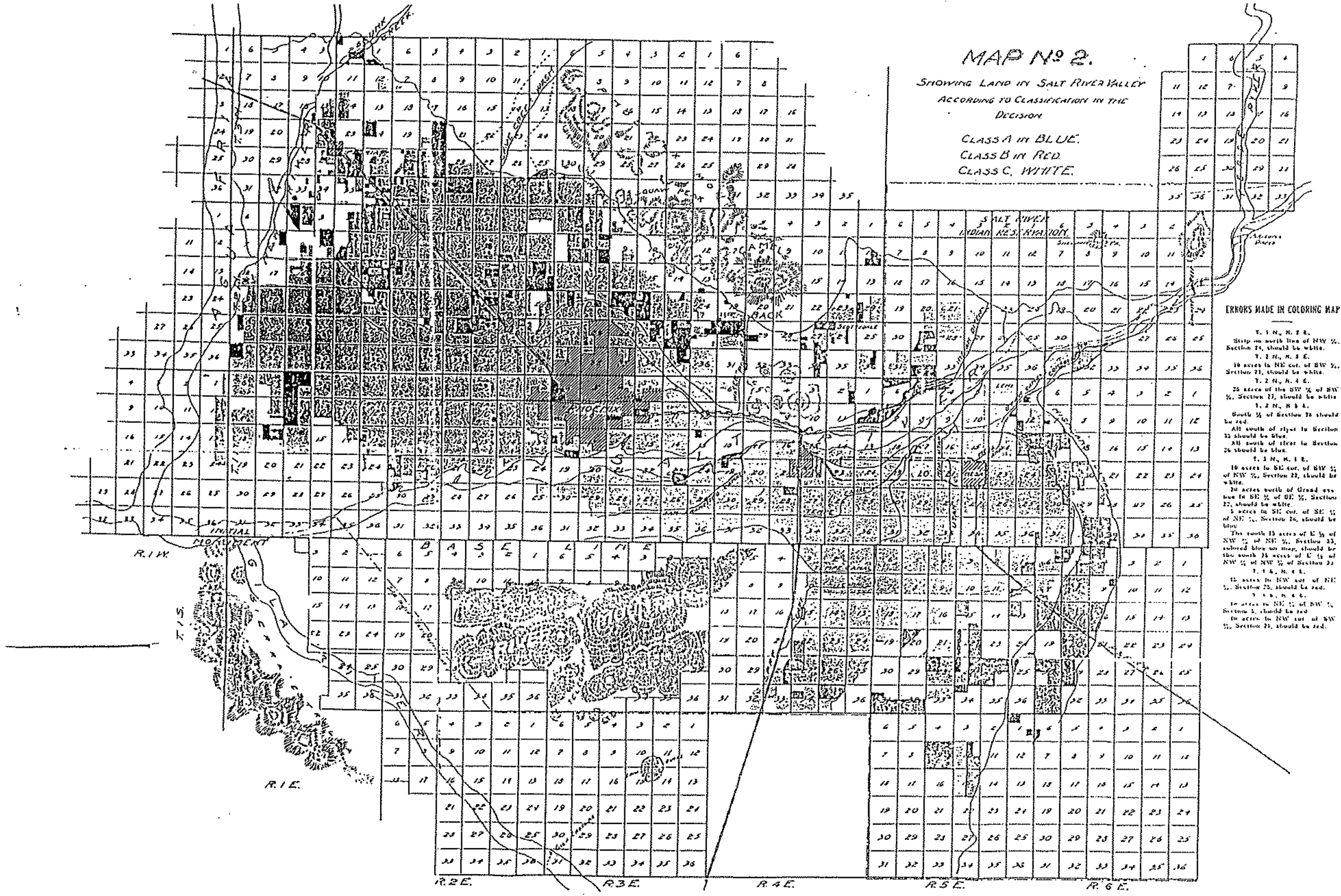
STATE OF ARIZONA }
County of Maricopa } ss.

I, WALTER S. WILSON, Clerk of the Superior Court of Maricopa County, State of Arizona, hereby certify the foregoing to be a true and complete copy of the ORIGINAL DECREE, filed March 10, 1910, in the District Court of the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa, as the same remains of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court of Maricopa County, State of Arizona, this 11th day of October, 1954.

(SEAL)

WALTER S. WILSON
WALTER S. WILSON, Clerk of the Superior Court,
Maricopa County, Arizona


MAP No 2.
SHOWING LAND IN SALT RIVER VALLEY
ACCORDING TO CLASSIFICATION IN THE
DECISION
CLASS A IN BLUE.
CLASS B IN RED.
CLASS C. WHITE.
SALT RIVER
INDIAN RES. RVATION.
PHOENIX
CAMEL BACK
INITIAL MONUMENT
BASE LINE
GILA
R. 1 W.
R. 1 E.
R. 2 E.
R. 3 E.
R. 4 E.
R. 5 E.
R. 6 E.
T. 1 S.
ERRORS MADE IN COLORING MAP

MAP No. 1.

SKETCH OF THE

ROOSEVELT RESERVOIR

AND THE

SALT RIVER VALLEY

SHOWING THE

PRESENT CANAL SYSTEMS.

JAN. 1, 1910.