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BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

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

NO. 03-005 AND 04-008-NAV
(Consolidated)(Salt)

**CITIES OF PHOENIX,
TEMPE AND MESA POST-
HEARING OPENING
MEMORANDUM**

1 The Cities of Phoenix, Tempe and Mesa (“Cities”) hereby submit their Post-Hearing
2 Opening Memorandum (“Memorandum”) regarding the navigability of the Salt River. After a
3 review of the evidence, the application of the appropriate legal test, and for the reasons set
4 forth in this Memorandum, the Arizona Navigable Stream Adjudication Commission
5 (“ANSAC” or “Commission”) should find that the proponents of navigability have failed to
6 meet their burden of establishing that the Salt River is navigable in any of its segments by a
7 preponderance of the evidence.¹
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(Table of Contents Begins on Next Page)

24 ¹ The Cities join and incorporate by reference the Opening Memorandum filed by Salt River
25 Project (“SRP’s Opening Memorandum”) and the Opening Memorandum filed by Cemex Cement,
26 Inc. (“Cemex’s Opening Memorandum”). The Cities incorporate by reference the previous
27 memoranda regarding the Lower Salt River filed in 2003. The Cities also incorporate by reference the
Cities’ 2012 Memoranda filed at the request of ANSAC.

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF CONTENTSiii

I. SUMMARY OF ARGUMENT: THE STATE HAS NOT AND CANNOT MEET ITS BURDEN TO PROVE THAT THE LOWER SALT RIVER IN ITS NATURAL AND ORDINARY CONDITION WAS A “HIGHWAY FOR COMMERCE” AND “NAVIGABLE-IN-FACT” AT THE TIME OF ARIZONA’S STATEHOOD..... 1

A. The Salt River Has No History of Navigation or Boating in its Natural and Ordinary Condition. 1

B. The Burden of Proof is on the Parties Asserting Navigability. 5

C. Standard for Navigability. 5

II. THE EVIDENCE ESTABLISHES THAT NONE OF THE CIVILIZATIONS THAT HAVE LIVED IN AND EXPLORED THE LOWER SALT RIVER VALLEY CONSIDERED THE LOWER SALT RIVER USEFUL FOR COMMERCIAL TRADE AND TRAVEL 8

A. Historical Evidence is the Best Available Evidence to Determine Navigability. 8

B. The Hohokam Civilization Did Not Navigate the Salt River..... 9

C. The Spanish Explorers and other Europeans Did Not Navigate the Salt River or Consider it Useful for Navigation. 11

1. The Primary Purposes of Spanish Exploration were Ecclesiastical, Military and Exploitation of Resources. 11

2. Specific Exploration Accounts Demonstrate that the Salt River Was Not Viewed as Navigable by the Spanish Explorers..... 14

a) Alvar Nunez Cabeza de Vaca (1527-1534)..... 14

b) The Coronado Expedition (1540-1542)..... 14

c) Juan Bautista de Anza (1697 – 1737)..... 15

d) Father Eusebio Francisco Kino (“Padre on Horseback”)(1694 – 1701) 15

e) Father Juan Balthasar and Father Ignacio Keller (1737-1745)..... 16

f) Father Jacobo Sedelmayr (1737-1750)..... 17

g) Spanish Exploration from 1750-1800..... 17

3. The Spanish Explorers Did Not Consider the Salt River Navigable for Commerce and Travel. 18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

D.	The Pima, Maricopa, Apache and Other Indian Communities Did Not Use the Salt River for Commerce and Travel.....	19
E.	The Mountain Men and Fur Trappers Did Not Use the Salt River for Commerce and Travel.....	20
F.	The U.S. Military Did Not Use the Salt River for Commerce and Travel in the Mid-1800's.	22
G.	The Anglo Settlers and Early Arizona Governmental Officials Did Not Consider or Use the Salt River for Commerce and Travel in the Mid to Late 1800's.	24
H.	Representatives of Arizona, the United States and the Court System Have Consistently Recognized that the Lower Salt River Has Never Been Navigable.....	30
	1. The 1865 Memorial Asking Congress for an Appropriation.....	30
	2. Arizona Never Actually Sought Federal Funding for the Salt River Under the Rivers and Harbors Acts.	30
	3. The United States Did Not Recognize the Salt River as Navigable.....	31
	4. Surveys of the Salt River Area Demonstrate that the Salt River Was Not Navigable.....	31
	5. The Kibbey and Kent Decrees Recognized that the Salt River Was Non-Navigable.....	32
I.	The State's Isolated Boating Accounts Woefully Fail to Establish that the Salt River Was Navigable in its Natural and Ordinary Condition.....	33
III.	CONCLUSION.....	37

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Cases

Brewer-Elliott Oil & Gas Co. v. United States,
43 S. Ct. 60 (1922)5

Cox v. Stults Eagle Drug Co.,
42 Ariz. 1 21 P.2d 914 (1933)..... 25

Giragi v. Mooer,
48 Ariz. 33, 58 P.2d 1249 (1936)..... 25

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104 Ariz. 527, 456 P.2d 385 (1969)..... 25

Oklahoma v. Texas,
42 S. Ct 406 (1922) 6

Palicka v. Ruth Fisher School Dist. No. 90,
13 Ariz. App. 5, 473 P.2d 807 (App. 1970) 5

PPL Montana, LLC v. Montana,
132 S. Ct. 1215 (2012)passim

State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm'n,
224 Ariz. 230, 229 P.3d 242 (App. 2010).....passim

State of North Dakota ex rel. Bd. Of Univ. and Sch. Lands v. United States,
972 F.2d 235 (8th Cir. 1992)..... 28

State v. Cull,
32 Ariz. 532, 260 P. 1023 (1927)..... 25

The Daniel Ball,
77 U.S. 557 (1870) 6

Troutman v. Valley Nat. Bank of Arizona,
170 Ariz. 513, 826 P.2d 810 (App. 1992) 5

U.S. v. State of Oregon,
55 S. Ct. 610 (1935) 21

United States v. Utah,
51 S. Ct. 438 (1931) 1

Statutes

A.R.S. § 37-1128(A)..... 3, 5

A.R.S. §§ 37-1101(5)..... 3, 6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Other Authorities

31A CJS Evidence § 6325

1 **I. SUMMARY OF ARGUMENT: THE STATE HAS NOT AND CANNOT MEET**
2 **ITS BURDEN TO PROVE THAT THE LOWER SALT RIVER IN ITS**
3 **NATURAL AND ORDINARY CONDITION WAS A “HIGHWAY FOR**
4 **COMMERCE” AND “NAVIGABLE-IN-FACT” AT THE TIME OF**
5 **ARIZONA’S STATEHOOD.**

6 **A. The Salt River Has No History of Navigation or Boating in its Natural and**
7 **Ordinary Condition.**

8 In the most recent decision by the United States Supreme Court on the question of
9 navigability-for-title², the Court unanimously found that, in order for a river to be found to be
10 a “highway for commerce,” the river’s use for such a purpose must be a “commercial reality”
11 and that the river must be “navigable-in-fact.” *PPL Montana, LLC v. Montana*, 132 S. Ct.
12 1215, 1228, 1234 (2012). “Navigability must be assessed as of the time of statehood, and it
13 concerns the river's usefulness for ‘trade and travel,’ rather than for other purposes.” *PPL*
14 *Montana* at 1233, quoting *United States v. Utah*, 51 S. Ct. 438, 441 (1931).

15 At the outset, simple pragmatism forces recognition of a different reality in the case of
16 the Lower Salt River. Today, and since before the time of statehood, there is no serious
17 contention that the Lower Salt River has been or will be a “highway of commerce,”
18 “navigable-in-fact,” or useful for “trade and travel.” This reality is true regardless of the
19 outcome of these proceedings. Before Arizona became a state, the United States initiated one
20 of the great public works projects in history and constructed Roosevelt Dam, thereby
21 facilitating the development of the Salt River Valley. This project commenced at the urging
22 of Arizona territorial residents, who frustrated with the erratic and unpredictable shifting,
23 flooding and drought of the Salt River, needed a reliable water supply. *See* Jack August, *The*

24 ² The test for navigability-for-title is much narrower than navigability for other purposes. For
25 instance, navigability for admiralty jurisdiction also applies to water routes made navigable even if
26 not formerly so, or navigability for federal regulatory authority which also applies to water routes that
27 were once navigable, but are no longer as well as routes that may become navigable by reasonable
improvements. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1228 (2012).

1 *Lower Salt River: A Non-navigable Stream* [Lower Salt River 031] (“August 2003 Report”) at
2 1-3, 11-12, and 14-15. These residents sought to have what became Roosevelt Dam
3 constructed under the 1902 Reclamation Act. *Id.* at 11-12. Since the completion of the
4 Roosevelt Dam in 1911, the Lower Salt River is ordinarily a dry wash, with flows occurring
5 only when they cannot be contained by the series of dams that now exist east of the Phoenix
6 Metropolitan Area.

7 With over 4.5 million people dependent on the water supply provided by the Roosevelt
8 Dam system, there can be no serious contention that pre-diversion “natural and ordinary
9 conditions”—albeit still insufficient for commerce—will ever return to the Lower Salt River.
10 Thus, this case, at least with regard to the Lower Salt River, ultimately has nothing to do with
11 the Salt River’s usefulness for “trade and travel” as a “commercial reality,” whether at
12 statehood or otherwise, nor with preserving a “highway for commerce,” an essential purpose
13 of a navigability-for-title determination. Instead, it has everything to do with the State
14 attempting to take legal title to property over which it made no claim whatsoever for more
15 than 70 years. Meanwhile, over the intervening decades, the Cities and many others have
16 made substantial, irreversible, and critical public and private investments in lands that
17 neighbor or even contain the existing channel of the Salt River. These investments include
18 the Tempe Town Lake and the substantial private development surrounding it, the Rio Salado
19 Habitat Restoration Area (which includes a park open to the public along a 5-mile stretch of
20 the Lower Salt River), the Mesa Northwest Water Treatment Plant, the 3000-acre Phoenix
21 Sky Harbor International Airport (one of the ten busiest airports in the United States), and the
22 jointly owned 91st Avenue Wastewater Treatment Plant, which also provides the cooling
23 water for the Palo Verde Nuclear Generating Station.

24 In order to take title to this land, the State has the burden to establish by a
25 preponderance of the evidence that the Salt River, in its natural and ordinary condition, was
26

1 navigable for commercial purposes at Arizona’s statehood, using modes of travel customary
2 to that time. A.R.S. §§ 37-1101(5); 37-1128(A).

3 In an attempt to meet its burden of proof, in proceedings stretching back now twenty
4 years, and most recently over the course of 23 days of testimony, the State has offered only a
5 handful of questionable accounts of small boats and canoes on the Salt River. Yet even the
6 State’s expert has admitted that it is not uncommon to have accounts of boating on non-
7 navigable rivers. *See* Tr. 5/19/2016 at 5137 (Fuller). The State has offered no evidence of any
8 sustained use of the Salt River for any commercial or transportation purpose. Its witness John
9 Fuller readily conceded in 1996 that there is no evidence that sustained trade and travel ever
10 occurred and that no profitable commercial enterprises for trade and travel were conducted on
11 the Lower Salt River. *See* JE Fuller/Hydrology & Geomorphology *Arizona Stream*
12 *Navigability Study for the Salt River: Granite Reef Dam to the Gila River Confluence*,
13 (September 1996) [Lower Salt Evidence 007] (“Fuller 1996 Report”) at v.³

14 The State also has presented various hydrologic estimations regarding the “average”
15 flow of the Salt River. As the Commission found in its original Lower Salt River Report,
16 “[c]omputing averages is not particularly meaningful since the average is skewed by the
17 heavy floods and periods of drought.” *Report, Findings and Determination Regarding the*
18 *Navigability of the Salt River from Granite Reef Dam to the Gila River Confluence, In the*
19 *Matter of the Navigability of the Salt River from Granite Reef Dam to the Gila River*
20 *Confluence*, Maricopa County, Arizona, No. 03-005-NAV, September 21, 2005 (“2005 Lower
21 Salt River Report”) at 38. In other words, an “average” creates a hypothetical flow condition
22 which may have never, in fact, occurred on the Lower Salt River. Even so, the mathematics
23

24
25 ³ Exhibits/Evidence from the Lower Salt Hearing before 2015 are referred to as “Lower Salt
26 River Evidence.”

1 of the State’s evidence from Jonathan Fuller was thoroughly discredited by other expert
2 testimony as described in detail in SRP’s Opening Memorandum.

3 Against the State’s evidence, and with no burden to do such, the Cities and other
4 proponents of a non-navigability finding have presented evidence of several civilizations—
5 Hohokam, Native American, Spanish/Mexican, and American—living in, traveling through,
6 and recording and/or observing the Lower Salt River area for some 2,000 years. There is no
7 evidence that any of these civilizations used the Lower Salt River for commercial
8 transportation or, in fact, for any sustained transportation of any kind. No records give any
9 indication that any of these varying civilizations seriously contemplated such a purpose, in
10 spite of a considerable need for transportation and trade in the area.

11 The historic evidence clearly establishes a picture of the Lower Salt River as a highly
12 erratic, unpredictable stream. The evidence shows that no one living in the Lower Salt River
13 Valley has ever concluded that the Salt River might be navigable. No one, that is, until the
14 beginning of these proceedings in the 1980s. At that time the State suddenly asserted, contrary
15 to the findings of the First Territorial Legislature in 1864, that the Salt River was navigable,
16 and that the State, not the political subdivisions and other persons whose names appear on the
17 legal titles and have invested heavily in public and private infrastructure in reliance on such
18 ownership, owned the land where the Salt River intermittently and erratically flowed 100
19 years ago. As the United States Supreme Court stated in *PPL Montana*, the State’s failure to
20 assert title until decades after statehood provides evidence of non-navigability-for-title
21 purposes. *See PPL Montana* at 1235. In the case of the Lower Salt River, this Commission
22 should place great weight on this significant evidence.

1 **B. The Burden of Proof is on the Parties Asserting Navigability.**

2 The burden of proof lies with the proponents of navigability, who must prove
3 navigability by a preponderance of the evidence. *State ex rel. Winkleman v. Arizona*
4 *Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 238-39, 229 P.3d 242, 250-51 (App.
5 2010); A.R.S. § 37-1128(A). The burden of proof never shifts. *See, e.g., Troutman v. Valley*
6 *Nat. Bank of Arizona*, 170 Ariz. 513, 517, 826 P.2d 810, 814 (App. 1992), *Palicka v. Ruth*
7 *Fisher School Dist. No. 90*, 13 Ariz. App. 5, 9, 473 P.2d 807, 811 (App. 1970). Thus, the
8 proponents of a non-navigability finding have no affirmative duty to provide any evidence
9 whatsoever; nonetheless, these parties submitted overwhelming evidence that the Salt River is
10 not, in fact, navigable.

11 **C. Standard for Navigability.**

12 Subsequent to the Arizona Court of Appeals decision in *Winkleman*, which remanded
13 ANSAC’s 2005 finding that the Salt River from Granite Reef Dam to the Gila River
14 Confluence was non-navigable at statehood, the United States Supreme Court issued its
15 opinion in *PPL Montana*. In this opinion, the Supreme Court clarified that “questions of
16 navigability for determining state riverbed title are governed by federal law.”⁴ *PPL Montana*
17 at 1227. “It is not for a State by courts or legislature, in dealing with the general subject of
18 beds or streams, to adopt a retroactive rule for determining navigability which ... would
19 enlarge what actually passed to the State, at the time of her admission, under the
20 constitutional rule of equality here invoked.” *PPL Montana* at 1235, quoting *Brewer-Elliott*
21 *Oil & Gas Co. v. United States*, 43 S. Ct. 60, 64 (1922).⁵

22

23 ⁴ Although state title is determined by *federal law* under the equal-footing doctrine, once title
24 is held to lie with a state, that state is free to pass *state law* for the use/disposition of the beds and
25 banks subject only to the public trust doctrine. *PPL Montana* at 1235.

26 ⁵ Based in part on the *PPL Montana* decision, which the United States Supreme Court issued
27 almost two years *after* the Arizona Court of Appeals issued the *Winkleman* decision, the Cities
contend that *Winkleman* incorrectly held that navigability-for-title requires a review of the “natural”

1 Under current federal law, “navigability is determined at the time of statehood, . . . ,
2 and based on the ‘natural and ordinary condition’ of the water, . . .”. *PPL Montana* at 1228,
3 quoting *Utah* at 441 (1931), and *Oklahoma v. Texas*, 42 S. Ct 406, 411 (1922).⁶ Arizona’s
4 statutory standard for navigability mirrors the current federal navigability-for-title test. See
5 A.R.S. § 37–1101(5).

6 The *Winkleman* Court held that “ordinary” means “usual, absent major flooding or
7 drought” and that “natural” means “without man-made dams, canals, or other diversions,” and
8 emphasized that ANSAC should apply both when determining what the watercourse would
9 have looked like on February 14, 1912. *Winkleman*, 224 Ariz. at 241-42, 229 P.3d at 253-54.
10 According to *Winkleman*, the best evidence of the Lower Salt River's natural condition is the
11 time period “after many of the Hohokam's diversions had ceased to affect the River, but
12 before the commencement of modern-era settlement and farming in the Salt River Valley.”
13 *Winkleman*, 224 Ariz. at 242, 229 P.3d at 254.

14 In addition to the specific holdings of *PPL Montana*, the U.S. Supreme Court discusses
15 principles regarding navigability and directs that “relevant evidence should be assessed in
16 light of the[se] principles.” *PPL Montana* at 1233. One such principle is the
17 acknowledgement that a State's long failure to assert title until many decades after statehood
18

19
20 condition of the Salt River at any point in time other than on the actual date of Statehood.
21 (“Navigability must be assessed as of the time of statehood, and it concerns the river's usefulness for
22 ‘trade and travel,’ rather than for other purposes.” *PPL Montana* at 1233, quoting *Utah* at 441). For
23 purposes of this Memorandum however, the Cities will follow the analysis in *Winkleman* as ANSAC
24 may be required to do so at this time.

25 ⁶ It is worth noting that the original formulation of the navigability-for-title test referenced
26 only “ordinary” conditions: “Those rivers must be regarded as public navigable rivers in law which
27 are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being
used, in their ordinary condition, as highways for commerce, over which trade and travel are or may
be conducted in the customary modes of trade and travel on water.” *The Daniel Ball*, 77 U.S. 557,
563 (1870).

1 provides some evidence to support the conclusion that a river is non-navigable for title. *PPL*
2 *Montana* at 1235.

3 The United States Supreme Court confirmed the long-standing principle that
4 “[n]avigability must be assessed at the time of statehood and it concerns the river’s usefulness
5 for trade and travel rather than for other purposes.” *PPL Montana* at 1233, quoting *Utah* at
6 441 (internal quotes omitted). Mere use by initial explorers or trappers, who may have
7 dragged their boats in or alongside the river in order to avoid getting lost, or to provide water
8 for their horses and themselves, does not itself demonstrate navigability. *PPL Montana* at
9 1233.

10 One of the holdings in *PPL Montana* is that, in most cases, portages are sufficient to
11 defeat a finding of navigability-for-title purposes because they require transportation over
12 land rather than over water. *PPL Montana* at 1231. The Court also noted that, while a river
13 need not be susceptible to navigation at every point during the year, “neither can that
14 susceptibility be so brief that it is not a commercial reality.” *PPL Montana* at 1234. *See also*
15 *Oklahoma* at 413 (watercourse not navigable because its use for transportation was “confined
16 to the irregular and short periods of temporary high water”).

17 Another holding is that a “party seeking to use present-day evidence for title purposes
18 must show: (1) the watercraft are meaningfully similar to those in customary use for trade and
19 travel at the time of statehood; and (2) the river's post statehood condition is not materially
20 different from its physical condition at statehood.” *PPL Montana* at 1233-34. The evidence
21 must show that the river could sustain the kinds of commercial use that, as a realistic matter,
22 might have occurred at the time of statehood and that such susceptibility to navigation cannot
23 be so brief that it is not a commercial reality. *Id.* Modern boats, which includes inflatable rafts
24 and lightweight canoes or kayaks, may be able to navigate waters much more shallow or with
25 rockier beds than boats customarily used for trade and travel at statehood. *Id.*

1 **II. THE EVIDENCE ESTABLISHES THAT NONE OF THE CIVILIZATIONS**
2 **THAT HAVE LIVED IN AND EXPLORED THE LOWER SALT RIVER**
3 **VALLEY CONSIDERED THE LOWER SALT RIVER USEFUL FOR**
4 **COMMERCIAL TRADE AND TRAVEL**

5 **A. Historical Evidence is the Best Available Evidence to Determine**
6 **Navigability.**

7 The Arizona Court of Appeals in *Winkleman* held that ANSAC erred in its previous
8 determination of non-navigability of the Lower Salt River because it failed to properly
9 consider the Lower Salt River in its “natural” condition. *Winkleman*, 224 Ariz. at 242, 229
10 P.3d at 254. Following the *Winkleman* logic, the Lower Salt River was in its “natural”
11 condition between the decline of the Hohokam civilization and modern diversions of the
12 Lower Salt River, which began in 1867 with the Swilling ditch.

13 The *Winkleman* Court stated that evidence from the period prior to modern diversions
14 from the Lower Salt River “should be considered by ANSAC as the best evidence of the
15 River’s natural condition.” *Id.* During the hearing, the parties generally agreed that the Salt
16 River was in its natural condition from the period between 1450 and 1867. For this 417 year
17 period, no historic evidence exists that civilizations that lived and traveled through what is
18 now Central Arizona used the Lower Salt River for navigation, boating or floating objects as a
19 highway of commerce, nor did they describe the River as useful for such purposes. *See* Tr.
20 1/27/16 at 2209 and 2213 (August). In addition, no one from that period observed or
21 determined that the Lower Salt River was susceptible for navigation. *See* Tr. 1/27/16 at 2210-
22 11 and 2213 (August). Sources contemporaneous with that period provide the best evidence
23 of the natural condition of the Salt River. As set forth in detail below, numerous civilizations
24 lived, worked and traveled in and around the Salt River from the period of the decline of the
25 Hohokam civilization until 1867. The vast information from that period demonstrates the Salt
26 River was not navigable in its natural and ordinary condition.

1 **B. The Hohokam Civilization Did Not Navigate the Salt River.**

2 The Hohokam inhabited the Salt River Valley from around two thousand years ago
3 until approximately 1450. *See* Jack August, *History of Lower Salt River Prior to February 14,*
4 *1912* (Updated January 20, 2016) (“August Report”) at 3-5. At the peak of their civilization
5 (from 110-1200 AD), the Hohokam had a population ranging from 80,000 to 150,000 in the
6 Salt River Valley. *Id.* at 4-5; Tr. 1/26/16 at 1881 (August). “At the peak of Hohokam culture,
7 the Salt River Valley was one of the most densely populated areas in the southwest[.]” 2005
8 Lower Salt River Report at 25. No evidence exists that the Hohokam Indians ever navigated
9 the Salt River as a highway of commerce. *See* Tr. 1/26/16 at 1885-86, 1889-90 (August); Tr.
10 5/18/2016 at 4857 (Fuller).

11 The Hohokam were extremely resourceful and used many methods to control and use
12 water. *See* August Report at 4. Such methods included developing canal systems, terracing,
13 check dams, rock piles, and linear and grid borders. *Id.* Although the Hohokam were experts
14 in water management, no boating or navigation of the Salt or Gila Rivers is mentioned in any
15 of the archaeology, anthropological, or pre-Columbian historical research of the period. *Id.* at
16 4-6, 57.

17 The Hohokam civilization was based on a mastery of canal irrigation, and the
18 Hohokam and their predecessors traveled long distances along the Salt River by foot or horse,
19 but not by boat. *Id.* at 3. Travel was a defining and central experience of Native American life
20 during this period. *Id.*; Tr. 1/26/16 at 1884 (August). The Hohokam traveled for a variety of
21 reasons including for trade, commerce, foodstuffs, spiritual activities and other reasons. *See*
22 Tr. 1/26/16 at 1884 (August).

23 The Hohokam traveled along the Salt River and in most directions including to the
24 West Coast. *Id.* at 1882, 1884-1885 (August). The Hohokam traveled by foot along the route
25 of the Salt River and Gila River to Yuma, Arizona and the West Coast but did not utilize the
26 Lower Salt River or Gila River other than as a guide/trail. *Id.* at 1882-83, 1885 (August);

1 Arizona Department of Transportation, *Arizona Transportation History*, Final Report 660,
2 December, 2011[C040] (“AZ Transportation History”) at 7-8.

3 Instead of traveling overland, the Hohokam would have traveled to California more
4 simply, efficiently and quickly if the Salt and Gila Rivers were boatable. *See* Tr. 1/26/16 at
5 1885 (August). If the Salt River had been susceptible to boating, the Hohokam would have
6 floated down to the Gila River and to the mouth of the Colorado River and traded more
7 robustly with other peoples. *Id.* at 1890-91 (August); August Report at 3-4. Archaeological
8 evidence of boating and the supplies the Hohokam carried would have been prevalent. *See* Tr.
9 1/26/16 at 1884-90 (August). Despite the large amount of archeological information, there has
10 been no evidence of the use of balsa rafts or other boats by the Hohokam on the Salt River or
11 evidence of oars or other implements of boating in the region of the Salt River or Gila River.
12 *See* Tr. 1/26/16 at 1886, 1889-90 (August). In contrast, archaeological evidence does exist on
13 the use of balsa boats along the Colorado River during the Hohokam period. *Id.* at 1888-89
14 (August); Tr. 3/31/16 at 4471 (Newell).

15 The Hohokam needed transportation for trade and travel, but no evidence exists that
16 they navigated the Salt or Gila Rivers for such purposes or at all. *See* August Report at 4;
17 Arizona Transportation Report at 7. The Hohokam traded small items such as pottery, arts,
18 shells, stones, minerals, bells, figurines and organic goods like herbs, animal hides and
19 feathers, which they could have easily transported in a small boat if there was a navigable
20 waterway. *See* August Report at 3; Tr. 1/26/16 at 1885 (August). They also carried out raids
21 on neighboring peoples, sometimes returning with captives. *See* August Report at 3-4;
22 Arizona Transportation Report at 7. The need for travel by boat existed, but there is no
23
24
25
26
27

1 evidence of such use in the archeology or other information from that period.⁷ *See* Tr. 1/26/16
2 at 1885-86, 1889-90 (August); 2005 Lower Salt River Report at 25.

3 The Hohokam had access to and traded with other Native Americans that may have
4 used boats on the Colorado River. *See* Archaeology Southwest, *Hohokam Irrigation and*
5 *Agriculture on the Western Margin of Pueblo Grande: Archaeology for the PHX Sky Train*
6 *Project*, May, 2015 [C0-28; SLD Item 313] (“Sky Train Archaeological Report”) at 112; Tr.
7 1/26/16 at 1889 (August). However, there is no archaeological evidence that the Hohokam
8 ever traveled the Salt River or any other rivers using any type of boats. *See* Tr. 1/26/16 at
9 1885-86, 1889-90 (August). *See* 2005 Lower Salt River Report at 25. The complete lack of
10 archaeological evidence of the use by the Hohokam of dugout canoes, used by other
11 aboriginal populations, “is extremely significant” and indicates that the Salt River was not
12 navigable or susceptible for navigation when the Hohokam occupied the Salt River area. *See*
13 Tr. 3/30/16 at 4194-95, 4249 (Newell); Tr. 3/31/16 at 4472-73 (Newell) .

14 **C. The Spanish Explorers and other Europeans Did Not Navigate the Salt**
15 **River or Consider it Useful for Navigation.**

16 **1. *The Primary Purposes of Spanish Exploration were Ecclesiastical,***
17 ***Military and Exploitation of Resources.***

18 The earliest European occupants of Arizona included Spanish priests, soldiers and
19 civilian explorers of the sixteenth, seventeenth and eighteenth centuries. *See* August Report at
20 6. There were three primary purposes for Spanish exploration: (1) ecclesiastical, (2) military
21 and (3) bullion and natural resources. *See* Tr. 1/26/16 at 1894 (August).

22 ⁷ In the Sky Train Archaeological Report, there is a discussion of a feature on one of the
23 Hohokam canal systems that humorously was originally referred to as possibly an area for parking
24 and loading of rafts. *See* Sky Train Archaeological Report at 112; *See* Tr. 1/26/16 at 1886-87
25 (August). However, the Sky Train Archeological Report while discussing possible alternatives
26 regarding this feature makes no conclusion regarding the use of this feature, which was not located in
27 the Salt River, but in a canal off the Salt River. *See* Sky Train Archaeological Report at 109-113; Tr.
1/26/16 at 1887-88 (August).

1 The Spanish controlled what is now Arizona from 1540 until 1821, and during those
2 nearly three centuries, traveled widely across the area. *See* AZ Transportation History at 9.
3 Spanish control ended when Mexico gained independence from Spain after the Mexican
4 revolution. Mexican influence over Central and Southern Arizona ended in 1848 and 1853,
5 when Mexico, under the Treaty of Guadalupe Hidalgo and Gadsden Purchase, ceded the land
6 that is now Central and Southern Arizona to the United States. *See* Tr. 1/26/16 at 1894
7 (August).

8 The Spanish goal of converting people to Catholicism also had a pragmatic purpose to
9 assimilate people into the Spanish culture and to make them tax-paying citizens to the King of
10 Spain. *Id.* at 1895 (August). Mission building was at the foundation of this ecclesiastical
11 purpose. *Id.* at 1895-96 (August). A navigable stream would further this ecclesiastical purpose
12 because it would encourage a mission and settlement. *Id.* at 1895 (August).

13 When available, a navigable stream, such as the Colorado River, served the role of
14 transportation in the location of and between missions to move people and food from one
15 mission to another. *Id.* at 1907 and 1920 (August). The Spanish would have used the Salt
16 River to fulfill their purpose of trying to populate the area, exploit natural resources and
17 convert people to Catholicism for the crown if it was navigable. *Id.* at 1906 (August).

18 The Catholic Church's ecclesiastical explorers, the Jesuits, were very educated. *Id.* at
19 1898 (August).⁸ They reported to their bishop and kept detailed official records of their
20 exploration. *Id.* (August). They were founded to revitalize the Church after the Reformation,
21 and many of them were the equivalent of Ph.D.s in math, cartography, or linguistics. *Id.* at
22

23 ⁸ The Jesuits were pulled out of the Spanish Empire in 1767, and thereafter, the Franciscan
24 order of the Catholic Church came into Arizona. *See* Tr. 1/26/16 at 1915 (August); August Report at
25 18-19. However, the Spanish mission system was pretty much gone by 1842, after the Mexican
26 revolution, and just before the land which is now Arizona was ceded to the United States by Mexico.
See Tr. 1/26/16 at 1915 (August).

1 1898-99 (August). They would go so far as to learn the language of those they were trying to
2 convert. *Id.* at 1899 (August).

3 The Spanish explorers would gain information of the area that they were exploring by
4 speaking to the people that were native to the area and documenting this information in their
5 official reports. *See* Tr. 1/27/16 at 2202 (August). Based on these conversations, if explorers
6 thought there was a navigable river in the region, they would have searched for it. *See* Tr.
7 1/26/16 at 1907 (August).

8 On every expedition, there was a Jesuit diarist/historian/scribe, who would document
9 what happened on their exploration. *Id.* at 1899-1900 (August). These diarists/historians/
10 scribes were detailed in their reports on everything they saw, such as “flora, fauna, rivers,
11 mountains, deserts, new animals.” *See* Tr. 1/27/16 at 2021 (August). They would have noted
12 “if a river was significant enough to float boats down it or move people.” *Id.* at 2120-21,
13 2202-03 (August). The educated clergy were particularly known for their cartography skills.
14 *See* Tr. 1/26/16 at 1917 (August). Father Eusebio Kino visited the Salt River Valley in 1698
15 and mapped the Salt River. *Id.* at 1911 (August). He also prepared a map in 1701 of the Salt
16 River region, including the Salt River Valley. *Id.* at 1911-12 (August).

17 The Spanish military typically traveled with the priests in the exploration of Arizona
18 and the Southwest. If a mission were established, the military would typically set up a
19 military post or presidio adjacent to or near such Spanish mission. *Id.* at 1914 and 1921
20 (August). The military also traveled with a separate record-keeper and diarist. *Id.* at 1912
21 (August). Thus, there would be two parallel descriptions of the same exploration. *Id.* at 1912
22 (August). However, no description of the Salt River being navigable by the military or
23 ecclesiastical explorers exists.

1 2. ***Specific Exploration Accounts Demonstrate that the Salt River Was***
2 ***Not Viewed as Navigable by the Spanish Explorers.***

3 a) ***Alvar Nunez Cabeza de Vaca (1527-1534)***

4 Alvar Nunez Cabeza de Vaca traveled the Southwest for some eight years. *See* August
5 Report at 9. He was the first European to traverse what is now Arizona. *Id.* While he did not
6 specifically go through the Lower Salt River Valley, he would have been looking for a
7 navigable river during his travels. *See* Tr. 1/26/16 at 1907 (August). As part of his
8 exploration, he conversed with the native people and used local guides to reconnoiter the area.
9 *Id.* If through these conversations and reconnaissance, Cabeza de Vaca thought a navigable
10 river existed to the west of their route, he would have searched for it to use for transportation
and commerce. *Id.* at 1907 (August); Tr. 1/27/16 at 2202-03 (August).

11 In 1537, Cabeza de Vaca wrote an account of his exploration that did not promote or
12 suggest the possibility of navigating rivers for exploration of the Southwest. *See* August
13 Report at 9-10. He also reported his findings of the exploration to the Viceroy, who was the
14 extension of the King in the New World, who reported directly to the King of Spain. *See*
15 August Report at 9-10; Tr. 1/26/16 at 1897-98 (August).

16 b) ***The Coronado Expedition (1540-1542)***

17 The Coronado Expedition took place from 1540 to 1542. *See* August Report at 10. The
18 Coronado Expedition's purpose in part was to uncover secrets of the area, and the diarist of
19 the Coronado Expedition noted crossing what is now known as the Salt River. *See* August
20 Report at 10. In 1539, directly in response to Cabeza de Vaca's briefings to the Viceroy,
21 Spanish explorer Marcos de Niza led an advance party for the Coronado Expedition through
22 parts of Arizona. *Id.* While Marcos de Niza, and later the Coronado Expedition, did not cross
23 into the Lower Salt River area, they did travel the Salt River above modern-day Granite Reef
24 dam, into the White Mountains, and into northern New Mexico. *See* August Report at 10.

25 During the Coronado Expedition, the Spanish explorers sent Zuni tribe members on a
26

1 sortie down the Salt River to the Gila River. *See* Tr. 1/27/16 at 2171 (August). The Zuni then
2 returned to the main party of Spanish explorers. *Id.* at 2171-72 (August). The accounts from
3 this sortie did not describe a river that could be used for travel or commerce. *Id.* (August). The
4 accounts only noted that they saw the rivers and traversed the area. *Id.* at 2172 (August).

5 c) ***Juan Bautista de Anza (1697 – 1737)***

6 Sargent Juan Bautista de Anza (the elder) made a reconnaissance trip of Central
7 Arizona and the Salt River Valley in 1697. *See* Tr. 1/26/16 at 1910-11 (August); August
8 Report at 12. He made written observations of his trip such as the “ruins on the north side of
9 the ‘irregular’ river” but did not describe the Salt River as navigable. *See* August Report at
10 12; Tr. 1/26/16 at 1910 (August). On his 1697 trip, de Anza did not boat or navigate the Salt
11 River. *See* Tr. 1/26/16 at 1910 (August); August Report at 12. Instead, he followed the Salt
12 River on land. *See* Tr. 1/26/16 at 1911 (August). He also did not describe the Salt River as
13 being suitable for navigation, a fact he would have noted in his official reports if he believed
14 the river was navigable. *Id.* at 1910 (August); August Report at 12.

15 On January 7, 1737, Juan Bautista de Anza (the elder) also made a written report on
16 the discovery of silver in Arizona but did not indicate that the Salt River was suitable for
17 navigation, which would have been considered significant in the Bishop and King’s
18 determination of whether to establish a mission and/or presidio along the Salt River. *See*
19 August Report at 14-15.

20 d) ***Father Eusebio Francisco Kino (“Padre on Horseback”)(1694 –***
21 ***1701)***

22 Father Kino made a number of journeys to the Gila River between 1694 and 1701. *Id.*
23 at 12 (August). He also observed the Salt River from the top of the Estrella Mountains. *See*
24 Tr. 1/26/16 at 1911 (August); August Report at 14. Father Kino described his observations
25 from his trips to the Gila River and Salt River area in official reports. *See* Tr. 1/26/16 at 1911
26 (August); August Report at 14. He also drafted a couple of maps of the Salt River that

1 included the Salt River Valley. *See* Tr. 1/26/16 at 1911-12 (August); *see* August Report at 13-
2 14. His first map showed the Salt River flowing south to the Gila River. *See* August Report at
3 13. By this time, cartography played a significant role in Spanish exploration of North
4 America, and Father Kino gained an international reputation for his cartographic skills. *Id.*

5 Juan Mateo Manje, a Spanish military officer, usually accompanied Father Kino on
6 these expeditions and made his own separate observations of the trips. *See* Tr. 1/26/16 at
7 1912-13 (August); August Report at 12. There was a notable absence of a description of a
8 river susceptible to navigation of any kind in Manje’s or Kino’s reports. *See* Tr. 1/26/16 at
9 1912-13 (August); August Report at 12. The existence of a navigable river would have been
10 prominently featured in Kino’s and Manje’s reports to the Spanish government or the Church.
11 *See* August Report at 12. Kino describes the Salt River as possibly being useful for irrigation
12 water or for men and animals but does not describe a river susceptible for transportation or
13 commerce. *See* Tr. 1/26/16 at 1912 (August); August Report at 12, 14. Manje stated that the
14 “Salado [Salt] River runs from east to west and to the south of . . . the Verde River . . . and
15 they merge” and further described the Lower Salt River and the Gila River as “more properly,
16 arroyos.” *See* August Report at 14.

17 e) ***Father Juan Balthasar and Father Ignacio Keller (1737-1745)***

18 Father Juan Balthasar made an official visit to the Sonora missions in 1744 and
19 prepared a report to the Father Provincial in Mexico that was critical of the lack of support for
20 the southern portion of Pimeria, which included modern day Arizona. *Id.* at 15. A June 19,
21 1745, report from the Bishop of Durango to the King of Spain supported a recommendation to
22 establish new missions on the Gila, Colorado and Azul (what is now known as the Salt)
23 Rivers and urged the construction of a presidio for their defense. *Id.* “If the Gila and Salt
24 would have been suitable for navigation, such a fact would have been included in the reports
25 and would have been considered a significant benefit to further exploration and missionary
26

1 activity, providing incentive, and perhaps a military route, to overcome any dangers posed by
2 the Apaches.” *Id.* If the Salt River had been navigable, the Salt River Valley may have looked
3 more like parts of Southern Arizona or even California. *Id.* Missions would have been built
4 alongside a navigable Salt River, establishing a better route for trade and travel between Santa
5 Fe, New Mexico and California using the Salt River and Gila River to Yuma, Arizona. *Id.*
6 However, no mission or presidio was ever established on the Salt River. *See* Tr. 1/26/16 at
7 1912-23 (August).

8 Father Ignacio Keller, the missionary at Suamca, located in what is now Southern
9 Arizona, reached the Salt River in 1737. *See* August Report at 15. He never mentioned that
10 the Salt River was suitable for navigation, but did note that the Salt River was suitable for
11 irrigation and for water for humans and animals. *See* Tr. 1/26/16 at 1922-23. (August).

12 f) ***Father Jacobo Sedelmayr (1737-1750)***

13 Father Ignacio Keller was succeeded as an explorer by Father Jacobo Sedelmayr. *See*
14 August Report at 15. During the period 1737-1750, Sedelmayr made several trips north in
15 which he touched the Gila, Salt and Colorado Rivers, as well as the Bill Williams Big Fork.
16 *Id.* at 16. In 1744, Father Sedelmayr traveled by horseback north from the Casa Grande ruins
17 to the Salt River, then down the Salt River (which he called Rio de la Asuncion) to its
18 confluence with the Gila River and down the Gila River all of the way to the Colorado River.
19 *Id.* at 16-17; Tr. 1/26/16 at 1922-23 (August). Sedelmayr rode his horse along the banks of the
20 Lower Salt River, but did not use its waters for transportation. *See* August Report at 16.

21 g) ***Spanish Exploration from 1750-1800***

22 In 1774, Juan Bautista de Anza (the younger son of the elder Anza who crossed the
23 region in 1697), led a series of expeditions through the Gila Valley, south of the Salt River
24 Valley, for the purpose of finding a land route between California and Sonora. *Id.* at 17. In
25 1775-76, Anza led a colonizing expedition from Tucson to San Francisco. *Id.* Father Pedro
26

1 Font kept detailed records of this expedition, which traversed central Arizona via the Santa
2 Cruz River to the Gila River, then down to its confluence with the Colorado River. *Id.* at 17-
3 18. Father Font observed that in the fall of 1775, the Gila River was intermittent and erratic,
4 and in most reaches dry. *Id.* at 18. Father Pedro Font did not mention any interest or attempts
5 to use the Gila River or any other river in Central Arizona for navigation. *Id.*

6 In 1776, the Spanish moved the mission of Tubac north to Tucson. *Id.* In 1780, the
7 Spanish also located a new mission by the lower Colorado River, near present day Yuma,
8 Arizona. *Id.* However, even though the Salt River flowed into the Gila River and the Gila
9 River down to Yuma, the Salt River was not considered relevant for transportation or
10 commerce during the Anza expeditions that focused on developing transportation routes in the
11 area. *Id.*

12 **3. *The Spanish Explorers Did Not Consider the Salt River Navigable for***
13 ***Commerce and Travel.***

14 Based on the foregoing Jesuit explorations, the Salt River was not considered for use
15 and was not used for transportation or commerce during the time-period from 1540 to 1821.
16 *Id.* at 6-20. The Colorado River was the only Arizona river that was considered navigable by
17 the Jesuit explorers. *Id.* at 17. The Gila and Salt Rivers were only worthwhile as a clear path
18 for overland travel with a source of water significant enough for watering horses and men but
19 not for navigation. *Id.*; *see also* Arizona Transportation History at 7 (Many of the native trails
20 along the rivers and washes used by the Hohokams and other Native Americans of that earlier
21 era were then later used by “the Spaniards, Mexicans, and Americans.”).

22 The Spanish were familiar with boat construction and exploration by boat, and
23 intentionally followed rivers on foot or horseback in their travels throughout what is now
24 Arizona, including visiting the Salt and Verde Rivers. *See* August Report at 11-13; Tr. 10/22/
25 2015 at 709-10 (Fuller). Location of a river susceptible to navigation would have been a
26 critical find and certainly noted for the officials in Santa Fe, Mexico and Spain. *See* Tr.

1 1/26/16 at 1912-13 (August); August Report at 12. The Spanish explorers failed to mention
2 any instances of navigation on the Salt River in any of their detailed exploration accounts. *See*
3 Tr. 10/22/2015 at 711 (Fuller). As noted above, Spanish explorers would have considered the
4 discovery of a river susceptible to navigation of vital importance and would most certainly
5 have documented it.

6 The purpose of Spanish exploration was to find suitable places to establish missions
7 and locate natural resources for exporting. *See* August Report at 19. While mineral deposits
8 were known to the Spanish, without a transportation route there was no way to exploit those
9 resources. *Id.* at 19-20. If the Spanish explorers had considered the Salt River navigable for
10 trade and travel, the Spanish would have established missions along the Salt River. *Id.* at 15.
11 However, without reliable methods of transportation, especially a direct route to or from
12 Yuma on the Gila and Salt Rivers, missions could not be supplied. *Id.* at 20.

13 While the Apaches represented a deterrent to Central Arizona exploration, the
14 existence of a navigable river would have resulted in the same type of military presence and
15 presidio construction that occurred in Tucson and Tubac, pushing back the Apache in favor of
16 colonization and commerce. *Id.* Those opportunities did not exist because the Gila and Salt
17 Rivers did not provide an opportunity for travel or commerce. *Id.*

18 **D. The Pima, Maricopa, Apache and Other Indian Communities Did Not Use**
19 **the Salt River for Commerce and Travel.**

20 The Pimas were established in the Lower Salt River Valley by 1699. *See* T.A.J.
21 Gookin, *Navigability of the Salt River*, July 27, 2015 [CO22](“ Gookin Report”) at 14.
22 Thereafter, the Maricopas entered the area, formed a confederation with the Pimas, and
23 primarily settled in the area around the confluence of the Salt and Gila Rivers. *Id.* While the
24 Pima-Maricopas engaged in trade, they chose to travel by foot rather than use the Salt River
25 for travel. *Id.* at 15. Significantly, the Spanish explorers visited the Pimas, but despite the
26 explorers’ detailed accounts of their explorations and engagement with the Native Americans,

1 none of the Spanish explorers ever reported that the Pimas used boats or canoes. *Id.* at 16: *see*
2 *also* Tr. 10/22/2015 at 711 (Fuller). In direct contrast, the Spanish explorers reported on the
3 Native American boating on the Colorado River based on the explorers' discussions with the
4 Native Americans in the area. *See* Gookin Report at 16.

5 The State's witness, Jonathon Fuller, also repeatedly conceded that he had not found
6 any definitive evidence of boating on the Upper or Lower Salt River by any of the native
7 populations. *See* Tr. 11/17/2015 at 1175, 1178 (Fuller), Tr. 10/22/2015 at 710 (Fuller), and Tr.
8 10/20/2015 at 169. If the Salt River had been susceptible to boating, the Pimas and Maricopas
9 would have floated down the Salt River and Gila River to the mouth of the Colorado River for
10 purposes of trade. *See* Gookin Report at 15 and Tr. 11/19/2015 at 1463-64 (Gookin).

11 **E. The Mountain Men and Fur Trappers Did Not Use the Salt River for**
12 **Commerce and Travel.**

13 The first mountain men to arrive in Arizona were Sylvester Pattie and his son James.
14 *See* August Report at 20. In late December 1825 or early January 1826, they crossed the
15 Arizona-New Mexico Border and traveled along the Gila River to its confluence with the Salt
16 River. *Id.* These and other fur trappers traveled up and down the Salt River on multiple
17 occasions. *Id.* at 23. In 1831, Ewing Young led a trapping expedition to the Salt River. *Id.* The
18 expedition followed his previous route via the Zuni Pueblo, continued to the Salt River and
19 thereafter followed the Salt River, setting traps as they progressed. *Id.* Members of the
20 expedition maintained diary accounts chronicling their days of trapping on the Salt River, but
21 there is no mention in those accounts of the use of the river by boat. *Id.* at 23-24.

22 The fur trappers were familiar with boats and the use of boats for trapping beaver in
23 other areas of the United States. *See* Tr. 1/26/16 at 1928-29 (August). Some were experienced
24 boatmen, yet they did not use boats to trap beaver throughout the Salt River. *Id.* at 1928-29
25 (August). The trappers did not use boats for travel along the Lower Salt River or other
26 streams, like the Gila and Verde Rivers, and instead traveled by horses, mules, wagon or foot

1 alongside the rivers. *Id.* at 1929 (August); August Report at 21, 24. The United States
2 Supreme Court has rejected trapping as credible evidence of navigability in *U.S. v. State of*
3 *Oregon*, 55 S. Ct. 610, 618 (1935) (“The state places much reliance on the large amount of
4 testimony relating to the trapping of fur-bearing animals, principally muskrats, in the
5 contested area. . . . Most of this evidence has no bearing on navigability, for, with a few
6 exceptions, the trappers appear to have waded or walked.”)

7 The fur trappers exported their pelts to northern New Mexico or California by moving
8 through Arizona on foot or horseback. *See* August Report at 24. If the Salt River had been
9 boatable, the trappers would have used it for travel to get to the Colorado River and then to
10 California. *See* Tr. 1/26/16 at 1931 (August). However, the fur trappers only traveled
11 overland. *Id.* at 1928 (August). At that time, travel by boat on a navigable river was a faster
12 and cheaper method of travel than travel by roads. *See* Tr. 11/29/15 at 1515 (Gookin).⁹

13 During the time of the fur trappers, boats, if useable on the Salt River, would have
14 been preferable to horses and mules because the Apache and other local Indian communities
15 repeatedly stole such animals. *See* Tr. 1/26/16 at 1929 (August). However, even with the
16 specific records and accounts of fur trappers Miguel Robidoux, James Pattie and Ewing
17 Young, no statement or notation exists in any accounts by these and other fur trappers during
18 this time that they ever used the Lower Salt River for navigation. *Id.* at 1929 and 1931
19 (August).

20
21 ⁹ Travel overland included the cost of building roads and removing obstacles and building
22 bridges to get wagons and stagecoaches through an area. *See* Tr. 11/19/15 at 1518 (Gookin). Travel
23 by wagon/stagecoach was rough. As described by William Gookin: “Further, a person, I think, would
24 rather ride a boat rather than a stagecoach ride. . . . you were normally packed three across, and the
25 front – the people on the front bench were so close to the people on the bench behind them, you had
26 to interweave your knees to have room for your legs. The dust was supposed to be unbelievable.
27 And you were stuck in that position. They ran 24 hours a day, and you had to sleep sitting upright. . . .
And because of the springs in the stagecoaches, motion sickness was a very common phenomena.”
Id. at 1524-25 (Gookin).

1 The fur trade in the Southwest, and as practiced on the Salt River, declined
2 precipitously after 1833. *See* August Report at 23. By the mid to late 1830's, the beaver trade
3 waned, in part because of the Panic of 1837 and because silk hats then replaced beaver hats as
4 the desired fashion in eastern urban areas and Europe. *See* Tr. 1/26/16 at 1932 (August);
5 August Report at 24. By the time of the Civil War [1861-1865], the beaver trapping industry
6 is hardly spoken about in historical accounts. *See* Tr. 1/26/16 at 1933 (August).

7 **F. The U.S. Military Did Not Use the Salt River for Commerce and Travel in**
8 **the Mid-1800's.**

9 The majority of Arizona became a part of the United States in 1848 upon the
10 conclusion of the Mexican War. *See* August Report at 25. It did not become a state, however,
11 until 1912, being the last state admitted of the contiguous forty-eight states. Arizona, in spite
12 of its significant natural resources, was inhibited in its development by a lack of
13 transportation. *Id.* at 25-26.

14 It is interesting and revealing to contrast the development of the Salt River with that of
15 the Colorado River. The navigability provided by the Colorado River allowed for penetration
16 into the interior of the Southwest by the 1860s. *Id.* at 26-27. From the Colorado River, the
17 interior of Arizona was supplied entirely upon pack animals and freight wagons, which made
18 the difficult journey hundreds of miles across the desert. *Id.* at 27, 42.

19 The U.S. military began arriving in Arizona in 1846. *See* Tr. 1/26/16 at 1933 (August).
20 The lack of transportation in what is now the interior of Arizona was a key concern of the
21 United States military. *See* August Report at 26-28; Tr. 1/26/16 at 1937-39 (August). The
22 discovery of a navigable river would have been a valuable natural resource; it would have
23 been extraordinary. *See* Tr. 1/27/16 at 2202; 2203 (August). Even if a river was not capable
24 for large-scale transport, a navigable river would have been note-worthy to the military. *See*
25 Tr. 1/27/16 at 2203-04 (August); Tr. 1/26/16 at 1936-37 (August). It also would have been
26 recorded and reported. *See* Tr. 1/27/16 at 2204-05 (August).

1 Indeed, U.S. military records from that time regarding the Arizona Territory document
2 the types of transport that were available and also discuss the challenges of overland
3 transport. *See* Tr. 1/26/16 at 1990-1991 (August). At that time, overland transportation was
4 hard “[b]ecause of the topography, the geography, mountains, forest, desert, [and] the lack of
5 machinery to really construct and grade roads.” *Id.* at 1943 (August). There are no records
6 that the U.S. military ever used, or considered, the Salt River as a potential for transportation.
7 *Id.* at 1945 (August). The Salt River is never referenced as “navigable.” *Id.* at 1990 (August).
8 There are records considering transportation alternatives, but the navigability of the Salt River
9 is not included in such reports. *Id.* at 1945 (August).

10 Early U.S. military incursions into the territory went north and south of the Salt River
11 Valley, avoiding the area completely. *See* August Report at 27-33. The Salt River Valley was
12 bypassed, even though the military used guides familiar with the area, who would have
13 known of navigable rivers, if such rivers had been available. *Id.* at 27-30.

14 As the military began establishing outposts in Arizona, numbering over twenty, the
15 need for transport of material, supplies, and men became more important. *See* Tr. 1/26/16 at
16 1938; 1941 (August); *see also* Gookin Report at 47. The military established outposts along
17 rivers, including Fort McDowell in 1865, near the confluence of the Salt and the Verde
18 Rivers. *See* 2005 Lower Salt River Report at 27; Tr. 1/26/16 at 1941 (August). In spite of Fort
19 McDowell’s proximity to the Salt River, there are no records of the U.S. military having used
20 the Salt River for transportation to move up and/or down the River, even though the military
21 regularly kept records of modes of travel available for their use. *See* Tr. 1/26/16 at 1945; 1990
22 (August).

23 In 1878, a Hand-Book to Arizona identified forty-one military routes across Arizona.
24 *See* August Report at 40. None of these routes were rivers. *Id.* at 39. Transport continued to
25 be limited to wagons, transporting supplies from the Colorado River. *See* August Report at
26

1 42. A navigable river would have been important for efficient military operations to serve the
2 needs to move men, ammunitions and animals from one point to another. *See* Tr. 1/26/16 at
3 1938. If the Salt River had been navigable, it would have been useful to move men,
4 munitions and animals from Fort Verde (now Camp Verde) down to Fort McDowell and Fort
5 Yuma. *Id.* at 1939. However, the Salt River was not useful for those transportation purposes.
6 *Id.* at 1942-45.

7 **G. The Anglo Settlers and Early Arizona Governmental Officials Did Not**
8 **Consider or Use the Salt River for Commerce and Travel in the Mid to**
9 **Late 1800's.**

10 As settlers began to arrive in the late 1860s, and Arizona was organized into a territory,
11 transportation was a key concern:

12 Everyone in the new territory agreed that Arizona's most pressing need was for
13 wagon roads. Freight and passengers had been able to reach Arizona by boat
14 since 1852, when steamboat service was established on the lower Colorado
15 River. But travel inland from the river still required a difficult and time-
16 consuming journey by horse or stagecoach, one made worse by the poor
17 condition of the few existing roads.

18 AZ Transportation History at 14.

19 Early territorial government officials noted the urgent need for transportation. In spite
20 of that need, there was no consideration of the Salt as a potential transportation route, and in
21 some instances, there were clear declarations by early observers that the Salt River was not
22 navigable. For example, the first Territorial Legislature in 1864 resolved that the Colorado
23 River was the only navigable river in the State. *See* August Report at 36-37. Arizona's first
24 territorial governor, John Goodwin, stated in a speech to the first Territorial Legislature:

25 In conclusion, gentlemen, I congratulate you on the brilliant promise for the future
26 of Arizona. Nature has indeed been lavish of the gifts which make a populous and
27 wealthy State; and for every blessing withheld there is ample compensation. **It is true that we have one navigable river only, but that is the Colorado of the West. It has been navigated for five hundred miles, and its capacity for improvement has never been tested. The arable land of the Territory is not extensive when compared with its whole area, but the fertile and well watered valleys of the Gila, the Salado, and the Verde, have once, and will again support a large population.** The climate of northern and central Arizona is

1 In spite of significant mineral wealth, development of that wealth lagged in Central
2 Arizona. *See* August Report at 26. That delay was due, at least in part, to a lack of
3 transportation and a lack of navigable rivers. *Id.*

4 It was only upon the availability of transportation—in the form of the arrival of a
5 railroad—that Arizona began to develop. *Id.* at 43; *see also* AZ Transportation History at 20.
6 It allowed for mining and transportation of agricultural demands beyond only local markets.
7 *See* August Report at 43. Another Territorial Governor’s Report, this one from 1879, also
8 noted this advancement. *See* SCAT Documents, *Report of the Governor of Arizona, 1879*,
9 Item 2 [C010] at 3.

10 In this assessment and report, in contrast to the report issued only the year before, the
11 Governor reported, “It gives me pleasure to report this year’s advance. The South Pacific
12 Railway has entered the Territory, bringing its result of population and enterprise. . . . Mining
13 has been so stimulated that its steadily increasing yield of bullion commands the capital to
14 continue development.” *Id.*

15 When Anglo settlers began to arrive in the Salt River Valley around 1867, they saw the
16 potential for irrigation from the Salt River. *See* Tr. 1/26/16 at 1945; 1949 (August). Irrigation
17 by American settlers began in 1867 when Jack Swilling rehabilitated a Hohokam aqueduct
18 and began irrigating acreage near what would become Phoenix. *See* 2005 Lower Salt River
19 Report at 27. But the settlers also had transportation needs such as obtaining supplies and
20 getting their products to market. *See* Tr. 1/26/16 at 1949-50 (August).

21 The military presence at Fort McDowell provided an early local market for settler
22 farmers. The Salt River, had it been navigable, would have provided a direct route from the
23 irrigated acres around Swilling ditch and the Fort, but the river was not used to transport
24 goods upstream. *Id.* at 1952 (August). Instead, the settlers went to the great expense and
25 difficulty of building a road. *Id.* at 1953 (August). This was before significant diversions from
26

1 the Salt River began. *Id.* at 1954-55 (August). Settlers would have used the river instead of
2 building and using a road, if it had been possible. *Id.* at 1955 (August).

3 Transportation for early settlers was a challenge. *Id.* at 1960 (August). Lack of
4 transportation impeded commerce; people were limited to the local market. *Id.* at 1960
5 (August). In spite of this need, there is no evidence in the records presented to the
6 Commission that the Salt River was used in any commercially real sense for trade and travel.
7 Nor is there any indication in the record that there was ever a debate or discussion among the
8 early settlers as to whether the Salt River should be used for irrigation versus preserving it for
9 transportation, in spite of these competing needs. Consideration of the Salt River for
10 transportation or commerce simply did not occur.

11 Among the earliest settlers of the Salt River Valley was Charles Trumbull Hayden, or
12 CT Hayden, as he was also known. CT Hayden settled in and founded what is now Tempe,
13 relocating his business enterprises from Tucson to Tempe in the early 1870s. *See* Berelov and
14 Jones, *The Story of Charles Trumbull Hayden*, [C018, SLD Item 13] (“Hayden Story”) at 3-4.
15 Hayden was a “visionary” and “a great businessman,” and his original business was
16 freighting—that is, the transport of goods. *Id.* at 1-3; Bert M. Fireman, *Charles Trumbull*
17 *Hayden*, *The Smoke Signal* [C044, SLD Ex 3] (“Smoke Signal Hayden”) at 194; Tr. 1/26/16
18 at 1972 (August). He was an expert in transportation for his day. *See* Tr. 1/26/16 at 1966
19 (August).

20 When Hayden settled along the banks of the Lower Salt River in what is now Tempe,
21 he was looking for new ventures. *Id.* at 1966 (August). He continued his overland freighting
22 business. *See* Hayden Story at 5; Tr. 1/26/16 at 1976-77 (August). He used the power of the
23 river to start a flour mill and he started a ferry to take people across the river at times of the
24 year when the river was not fordable. *See* Tr. 1/26/16 at 1966-1967 (August). In 1873, he tried
25 to use the river to float logs down and start a lumber mill, but Hayden and those who
26

1 participated called the venture a failure and abandoned it. *See* Arizona Citizen Article, June
2 14, 1873 [C002, SLD Item 1]; Smoke Signal Hayden at 202; Tr. 1/26/16 at 1971 (August);
3 *see also* Weekly Arizona Miner Article, June 28, 1873. [C002, SLD Item 6]. This astute
4 businessman was obviously aware of the need for transportation of goods and was searching
5 for ways to profit from the Salt River. *See* Tr. 1/26/16 at 1972 (August). If he could have used
6 the Salt River to transport goods up or down the river for profit, he would have; instead, he
7 advocated for the construction of roads and railroads. *Id.* at 1972 (August); *see also*
8 Archaeological Consulting Services, Ltd., *Hayden Flour Mill*, Vol. I [SLD C018, SLD Ex 15]
9 at 48.

10 One newspaper account reflects a trip up the Lower Salt River from Hayden’s Ferry to
11 a landing on the Swilling canal some 4 miles down the Salt River in 1873. *See* Weekly
12 Arizona Miner Article, May 3, 1873 [C002, SLD Item 5]. There is evidence that CT Hayden
13 was involved in this effort, since during his boyhood in Connecticut he had seen the potential
14 of using flatboats to haul goods. *See* Smoke Signal Hayden at 202-04. However, there is no
15 record that indicates this venture was ever repeated or even attempted again, *See* Tr. 1/26/16
16 at 1973 (August), and this one known effort has been described as “unique.” *See* Smoke
17 Signal Hayden at 204. In spite of CT Hayden’s intimate knowledge of the Salt River, his
18 extensive records, and his quest to make profitable businesses around the Salt River, there is
19 no record that indicates that CT Hayden ever believed the Salt River could be navigable but
20 for his ill-fated log floating effort. *See* Tr. 1/26/16 at 1977-78 (August).

21 Including CT Hayden’s ferry, at least half a dozen ferries were used on the Salt River
22 during the early Territorial period.¹¹ *See* 2005 Lower Salt River Report at 36. Ferries are part
23

24 ¹¹ Ferries used for transportation across a river, and not up or down a river, “functioned much
25 like bridges” and do not show susceptibility of the river for commercial use. *State of North Dakota ex*
26 *rel. Bd. Of Univ. and Sch. Lands v. United States*, 972 F.2d 235, 239 (8th Cir. 1992).

1 of a road transportation system, not a part of riverine transportation. *See* Tr. 3/30/16 at 4229
2 (Newell). The presence of a number of ferries is an indication that the river they cross is
3 surrounded by a network of roads, which indicates that the river is probably not being used
4 for trade and transportation. *Id.* at 4229 (Newell).

5 CT Hayden’s son, Carl Hayden, grew up on the banks of the Salt River, assisting with
6 his father’s enterprises. *See* August Report at 53-54. Carl became a long-serving member of
7 Congress from the newly admitted State of Arizona. *See* Smoke Signal Hayden at 194. As the
8 son of an early Salt River Valley settler, he was acquainted with and communicated with a
9 number of Salt River Valley residents from the 1860s. *See* Tr. 1/27/16 at 2195-96 (August).
10 Many of these 1860s Salt River Valley residents had visited the Hayden home when Carl was
11 a young boy. *See* Smoke Signal Hayden at 194. During his entire career, he collected
12 information about the pioneers of Arizona. *See* Smoke Signal Hayden at 194.

13 It was Senator Carl Hayden’s opinion, based on his own personal experiences, as well
14 as early court cases, that the Salt River was not navigable. *See* Tr. 1/26/16 at 1985 (August).
15 Senator Hayden, as well as his father, considered the Salt River “erratic” and “unreliable.” *Id.*
16 at 1978 (August); 1/27/16 at 2104, 2108 (August).

17 As the Commission found in its 2005 Report, prior to the construction of Roosevelt
18 Dam, “[t]he river is erratic, unpredictable, often flashy with lots of water in it, and at other
19 times it’s virtually dry. It doesn’t have a steady flow; its flow is highly variable.” *See* 2005
20 Lower Salt River Report at 28.

21 As is well documented in the records before the Commission, the construction of
22 Roosevelt Dam prior to statehood captured the flood waters as well as the ordinary flows of
23 the Salt River. *Id.* at 34. Since that time, the Lower Salt River has flowed only as necessary to
24 release waters from behind the dams during times of heavy precipitation.

1 **H. Representatives of Arizona, the United States and the Court System Have**
2 **Consistently Recognized that the Lower Salt River Has Never Been**
3 **Navigable.**

4 **1. The 1865 Memorial Asking Congress for an Appropriation.**

5 The Arizona Territorial Legislature in 1865 recognized and determined that the Salt
6 River was not navigable. In that year, which preceded many of the diversions on the Salt
7 River system, the Legislature declared that “the Colorado River is the only navigable water in
8 this Territory.” *See* Tr. 1/26/16 at 1980 (August); Tr. 3/10/16 at 3566 (Littlefield); Douglas R.
9 Littlefield, *Declaration of the Non-Navigability of the Salt River at and prior to Arizona’s*
10 *Statehood on February 14, 1912* [CO20] (“Littlefield Declaration”) at 14. The Legislature
11 made this statement to the United States Congress while seeking to secure funding to clear
12 obstructions in the Colorado River, where commercial trade and travel was already well
13 established. *See* Tr. 3/10/2016 at 3566 (Littlefield).

14 **2. Arizona Never Actually Sought Federal Funding for the Salt River**
15 **Under the Rivers and Harbors Acts.**

16 The Rivers and Harbors Acts are a series of pieces of legislation and appropriations,
17 commencing in 1824, which listed many rivers in the United States as navigable and therefore
18 eligible for federal funds to construct improvements. The Salt River was not identified in any
19 of these Acts prior to Statehood. *See* Tr. 1/26/16 at 1981 (August); Kupel/Endebrock Report
20 at 22. As reflected in the “tongue in cheek” article in the Arizona Gazette from February 14,
21 1883, Arizonans were aware of the availability of federal funds for navigable rivers. *See* Tr.
22 1/26/16 at 1981-1984 (August); *See* Arizona Gazette, 2/14/1883 [C018, SLD Item 248].
23 However, the Territory of Arizona never requested River and Harbor funding for the Salt
24 River. *See* Tr. 1/26/16 at 1980, 1984-85 (August). Funding was requested only for the

1 Colorado River. *Id.* at 1884 (August).¹²

2 **3. *The United States Did Not Recognize the Salt River as Navigable.***

3 Over two hundred federal patents were issued by the United States for lands that
4 overlay or touch the Lower Salt River. None withheld any acreage. Yet the clear practice at
5 the time these patents were issued was to account for land underlying navigable waters. *See*
6 Littlefield Declaration at 9-12; August 2003 Report at 8. Similarly, the U.S. General Land
7 Office accepted forty-one federal Desert Land Act patents which included the Lower Salt
8 River. *See* Littlefield Declaration at 10. The issuance and acceptance of patents demonstrate
9 that federal officials perceived the Lower Salt River was not navigable. *See* Littlefield
10 Declaration at 8-12; August 2003 Report at 10.

11 In 1894, the Army Corps of Engineers also determined that the Salt River was “not
12 navigable” in response to an inquiry as to whether the construction of dams would impede
13 navigability. Douglas E. Kupel Historian and Ellen G. Endebrock, P.E. Hydrologist,
14 Historical and Scientific Evidence Concerning Navigability of the Lower Salt River April
15 2003 (“Kupel/Endebrock Report”), [Lower Salt EI 029] at 15. A few years later in 1898, the
16 Bureau of the Census published a statistical atlas of the United States. Only the Colorado
17 River was designated as navigable. *See* Kupel/Endebrock Report at 22.

18 **4. *Surveys of the Salt River Area Demonstrate that the Salt River Was Not***
19 ***Navigable.***

20 Numerous federal land surveyors conducted surveys and resurveys on the lands which
21 included the Lower Salt River. These surveyors had specific instructions, which evolved and

22 _____
23 ¹² In contrast, the actions of the territorial and county governments in attempting to obtain
24 approval for funding and construction of bridges across the Lower Salt River further showed that the
25 local governments and residents prior to statehood considered the Lower Salt River to be non-
26 navigable. *See* Kupel/Endebrock Report at 5-7. The construction of a bridge directly related to the
27 navigability of a stream because such a bridges could impede river travel. *Id.*

1 grew increasingly precise over time, regarding the appropriate methods of surveying and
2 distinguishing between navigable and non-navigable streams. *See* Littlefield Declaration at 5-
3 8; August 2003 Report at 7. None of the resulting surveys, which were conducted at varying
4 times of the year, in different years, and by multiple individuals, portray the Salt River as
5 navigable. *See* Littlefield Declaration at 5-8; August 2003 Report at 7. Rather, they all
6 consistently portrayed the Salt River as a non-navigable stream. *Id.*

7
8 **5. *The Kibbey and Kent Decrees Recognized that the Salt River Was Non-Navigable.***

9 Two pre-statehood Arizona court decisions demonstrate that the Salt River was not
10 navigable. The Kibbey Decree resulted from a lawsuit filed by downstream appropriators and
11 canal companies against upstream appropriators. *Wormser v. Salt River Valley Canal Co.*, No.
12 708, Second Judicial District, Territory of Arizona, County of Maricopa (March 31, 1892)
13 (the “Kibbey Decree”). The *Wormser* Plaintiffs specifically alleged that the Salt River was a
14 “natural innavigable stream.” *See* Complaint *Wormser v. Hayden* at ¶ 2 [Lower Salt River
15 Evidence 012, part 2 at 218]. Judge Kibbey analyzed both state and federal water rights law
16 and held that territorial appropriation law applied. Kibbey Decree at 31. Later, in 1910 (after a
17 proceeding lasting five years), Judge Edward Kent, in a decision establishing the rights for
18 thousands of claimants to appropriate water from the Salt River, stated in part: “[e]ntering the
19 Valley from the northeast is the Salt River, a non-navigable stream.” *Hurley v. Abbot*, No.
20 4564, Third Judicial District, Territory of Arizona, County of Maricopa (March 1, 1920) (the
21 “Kent Decree”) at 3.

22 Both the Kibbey and Kent Decrees clearly reflect the mindset of the Salt River Valley
23 residents prior to statehood – that the Salt River was not navigable. In fact, in over twenty
24 judicial proceedings stretching from 1890 through 1914, none even mention navigation as a
25 potential use of the Salt River. *See* Kupel/Endebrock Report at 3-4. The complete absence of
26 such evidence or dispute over these findings contradicts any arguments regarding

1 susceptibility, or that the Salt River could have ever been used in a commercially real sense
2 for trade or travel.

3 **I. The State’s Isolated Boating Accounts Woefully Fail to Establish that the**
4 **Salt River Was Navigable in its Natural and Ordinary Condition.**

5 To counter the records of early settlers which clearly demonstrate their belief that the
6 Salt River was not useful for navigation, the State depends heavily upon newspaper
7 accounting of various boats appearing on the Salt River.¹³ In its final presentation of
8 evidence, the State reviewed 31 such accounts. It deems all but 6 of those accounts to be
9 “successful” and thus asserts that the Salt River, in its natural and ordinary condition, was
10 navigable. *See Fuller, Salt River Navigability - Rebuttal*, May, 2016 [C053, SLD Item 385] at
11 51.

12 Among the “successful” accounts of boating asserted by the State, the newspaper
13 articles use the following language:

- 14 • “Bold navigator;” “first account of successful travel.” *See* C018; SLD Item
15 128.
- 16 • “Daring adventurers;” “exciting and interesting;” “were wrecked losing
17 provisions;” “very severe struggle;” “very nearly perishing.” *See* C018; SLD
18 Items 133; 135.
- 19 • “Adventurous passage;” “trials of engineering party;” “adventures and
20 difficulties;” “overturned;” “ribs [of boat] were found to be smashed.” *See*
21 C018; SLD Item 76.
- 22 • “Struck the snag;” “cut in two.” *See* C0-18; SLD Item 247.
- 23 • “Capsized.” *See* C018; SLD Item 203.
- 24 • “[T]he Major attempted to remove his gun from the boat, and in doing so, it was
25 discharged, killing him almost instantly.” *See* C028, SLD Item 323.

26
27 ¹³ *See* Cemex’s Opening Memorandum for a detailed discussion of the flaws in the State’s
reliance on various boating accounts.

- 1 • “[W]ere building a boat . . . which they intended to navigate.” *See* C053; SLD Item 383.¹⁴
- 2 • “A sudden rise in the river . . . carried away the boat.” *See* C053; SLD Item 384.

3 In addition, the State includes in the “successes” at least two articles intended to be
4 jokes, or at least, “tongue-in-cheek.” *See* Tr. 1/26/16 at 1982 (August). In one, the article
5 begins with the seemingly noteworthy statement, “The Salt River is a navigable stream and
6 should be included in the river and harbor appropriation bill.” The light-hearted and
7 exaggerated tone of the remainder of the article, however, which includes references to “jolly
8 mariners” making their way to the local “port,” strongly indicates that the statement that the
9 Salt River is a navigable river is meant as a joking exaggeration which all locals would have
10 understood to be amusing, thus setting the tone for the remainder of the article. *See* Arizona
11 Gazette, 2/14/1883 [C018, SLD Item 248]; Tr. 1/26/16 at 1982 (August).

12 Another incident among the State’s “successes” is recounted in three articles,
13 obviously ridiculing a local man who was building a boat for use on the Salt and Gila Rivers.
14 The first article references something on the river that may make “eyes bug out” and that
15 might be a “new manner of war vessel” for use in the ongoing Russo-Japanese war. *See*
16 Arizona Republican, 3/24/1905 [C0-18; Item 81]. After noting the launching “in the presence
17 of a vast crowd of two or three,” the article concludes that on its trip to Yuma, the craft was
18 likely to “prove to be a submarine [i.e., sink] before it leaves American waters.” *See* Arizona
19

20
21 ¹⁴ During Mr. Fuller’s rebuttal presentation, Mr. Fuller added what he described as a new
22 “successful” boating account for trapping purposes on the Lower Salt River. *See* Arizona State Land
23 Department, Presentation to ANSAC: Salt River Navigability – Rebuttal (May 2016) [C053, SLD
24 Item 385] at 45. The source cited for this account was an article from the Arizona Republican dated
25 February 11, 1894 [C053, SLD Item 383]. However, the article describes a couple of brothers
26 building a boat intending to travel on the Salt and Gila River. There is no statement regarding whether
27 the brothers ever actually traveled by boat on either the Salt or Gila Rivers. This account is not
evidence of a successful trip, or that such trip actually occurred because there is no follow-up
account.

1 Republican, 3/24/1905 [C0-18; Item 81]. In a follow up article, the newspaper noted that its
2 “marine reporters” stated that the craft was near the “Buckeye coast.” *See* Arizona
3 Republican, 3/29/1905 [C018; SLD Item 201]. In the final report, the first-hand account of the
4 matter states that “we was capsized.” The boat was saved “but we lost a most all.” *See*
5 Arizona Republican, 4/3/1905 [C0-18; Item 203].

6 The State also relies heavily on one newspaper account of J.K. Day and his brother in
7 1892. *See* The Arizona Sentinel 4/2/1892 [SLD, C002, Item 8]. In this article, the brothers
8 supposedly traveled by boat from Camp Verde to Yuma, trapping beaver and otter. It is also
9 mentioned that the trip had been made 4 times prior, and in fact, the State’s 25 “successful”
10 incidents of boating includes these 5 as separate incidents. The account, however, provides no
11 details of what conditions were faced or difficulties encountered or even the dates and year of
12 each of the incidents boldly asserted by the Day Brothers. According to the article in the
13 Arizona Sentinel, the Day brothers traveled 800 miles down the Verde River to the Salt River
14 and to the Gila River to Yuma (an actual distance of less than 400 miles). It also provides that
15 it apparently took approximately eight months for them to make the journey, having started
16 the trip in September and arriving in Yuma in April (less than 2 miles per day).

17 The proponents of navigability present the article as evidence of five separate trips by
18 the Day brothers for trapping, although there is no other evidence of commercial activity. Yet,
19 the article does not explicitly say that the Day brothers traveled the entire trip on one or all of
20 the rivers mentioned in the article. Another oddity about this account is that these alleged
21 beaver trapping expeditions occurred four or five decades after the collapse of the market for
22 beaver pelts. *See* Tr. 1/26/16 at 1932 (August); 1/27/16 at 2176 (August). It also does not say
23 how frequently or for how long they had to portage their small boat. Portage can defeat
24 navigability on some or all of a watercourse. *PPL Montana* at 1231 (“Even if portage were to
25
26
27

1 take travelers only one day, its significance is the same: it demonstrates the need to bypass the
2 river segment, all because that part of the river is nonnavigable.”).

3 The article appears two columns away from another “news” article in the same edition
4 of the Arizona Sentinel describing the benefits of “German syrup” for use in treating a “cold
5 on the lungs.” See The Arizona Sentinel April 2, 1892 [SLD, C002, Item 8]. It was not
6 uncommon for newspapers of the day to publish human interest or novelty articles for
7 entertainment value. See Tr. 1/27/16 at 2126; 2137; 2197-98 (August). When compared to the
8 nearly 300 years of official reports and records of governmental bodies, individual accounts
9 and evidence of the non-navigability of the Salt River, a one paragraph article hardly proves
10 navigability by a preponderance of the evidence.

11 Even if, however, one accepts the State’s assertion of 25 “successful” occurrences of
12 boating, 20% of which are the 5 trips allegedly taken by the Day brothers, the average number
13 of boating accounts is almost one every other year during the period from 1867, when Anglo
14 settlers first arrived, to statehood in 1912. These 25 accounts are all that the State has
15 uncovered, in spite of searching for such information for at least three decades.

16 The State’s expert witness admits that it is not uncommon to have accounts of boating
17 on non-navigable rivers. See Tr. 5/19/2016 at 5137 (Fuller). The U.S. Supreme Court has
18 noted that a river’s susceptibility to navigation cannot “be so brief that it is not a commercial
19 reality.” *PPL Montana* at 1234. It is clear that these reports are “outliers” and do not establish
20 that the Lower Salt River was navigable. See Tr. 1/27/2016 at 2106 (August). These 25
21 accounts certainly do not overcome the evidence of various civilizations spanning over 2,000
22 years that had need for transportation in Arizona and the Salt River Valley and yet left no
23 records that anyone in these civilizations used or considered the Salt River for commercial
24 navigation.

1 **III. CONCLUSION**

2 The Cities assert that the most persuasive evidence of the fact that the Salt River was
3 not navigable at Arizona’s statehood in its natural and ordinary condition is the 2,000-year
4 history of people living in, traveling through, and recording observations of the river. All of
5 these persons had need for transportation.

6 The Hohokam were masterful water engineers who built a complex system of
7 irrigation canals around the Salt River, yet there is no archaeological evidence that this
8 advanced civilization ever used the river for transportation, a lack of evidence at least one
9 expert called “extremely significant.”

10 The Spanish padres and explorers were seeking ways to solidify, exploit and
11 evangelize their New World empire. They were great record keepers and cartographers, and
12 were expected to inform their superiors of significant discoveries. A navigable river would
13 certainly have been noteworthy, and it would have been reported. Spanish records of the area
14 contain no accounts describing the Salt River as navigable.

15 In the mid-1800s, Native Americans, Mexicans, fur trappers, and miners lived in and
16 moved through the area. There are no records or accounts of any of these groups using the
17 Salt River for transportation.

18 The American military also arrived in the mid-1800s. A navigable river would have
19 been a useful resource; it would have been “extraordinary.” Although the military kept
20 records and accounts of transportation in the Arizona Territory, there is no mention of the Salt
21 River as useful for or considered for transportation.

22 Early Anglo settlers quickly identified the need for transportation to and through
23 Arizona. It was identified as the main factor holding Arizona back economically. Once the
24 railroad arrived, the economy almost immediately expanded. None of these early settlers,
25 entrepreneurs, and government officials ever recorded an opinion that the Salt River was
26

1 navigable. In fact, the First Territorial Legislature specifically declared that the Colorado
2 River was the only navigable river in Territory.

3 At the dawn of the Hohokam civilization, during the entirety of the Spanish Empire,
4 throughout control by Mexico, at the arrival of the U.S Military, and upon the arrival of
5 Anglo settlers, the Lower Salt River was in its natural and ordinary condition. The only use
6 any of these people found for this erratic and unpredictable river was as a source of drinking
7 water, as a path to follow on foot or horseback, and as a source of irrigation for the
8 surrounding desert. In spite of the proponents of navigability searching for nearly three
9 decades, there are no accounts of any of these persons even considering the Salt River as a
10 navigable stream that would be useful for commerce or travel.


11 To counter this 2,000-year history, the proponents of navigability have only offered:
12 1) 25 allegedly “successful” accounts of boating provided by various newspaper articles, a
13 number of which are obviously jokes or exaggerations and all of which occurred after the
14 river was being substantially diverted by the Arizona settlers post-1867 with the construction
15 of the Swilling Ditch; 2) hydrologic “estimations” of the “average” flows of the Salt River,
16 the methodology of which has been discredited by other experts; and 3) numerous accounts of
17 modern boating which involve boats made of materials never dreamed of by early Arizonans
18 and one account of a “recreated” boat allegedly of the era floating downstream of Roosevelt
19 Dam, which is hardly indicative of the erratic and unpredictable Salt River in its “ordinary
20 condition.”

21 Based on this paucity of evidence, ANSAC should find that the proponents of
22 navigability have failed to demonstrate by a preponderance of the evidence that any segments
23 of the Salt River were navigable in their natural and ordinary condition at statehood. The
24 Cities and other proponents of non-navigability on the other hand, despite having no burden
25 to do such, have provided ample evidence demonstrating that the Salt River was neither used
26

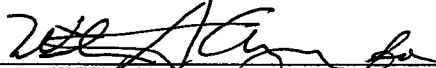
1 nor susceptible for use as a "highway of commerce," "navigable-in-fact," or useful for "trade
2 and travel." Based on the evidence, ANSAC should determine that all segments of the Salt
3 River were non-navigable as of February 14, 1912.

4 RESPECTFULLY SUBMITTED this 18th day of July, 2016.

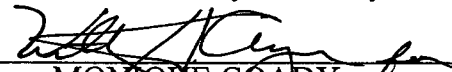
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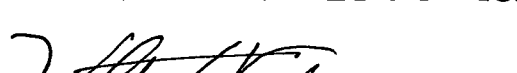
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ORIGINAL and SIX COPIES of the foregoing
Hand-delivered for filing and COPY emailed
this 18th day of July, 2016:

Arizona Navigable Stream Adjudication Commission
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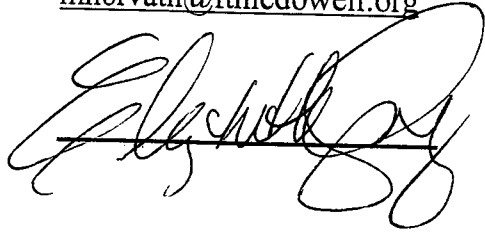
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