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

12
13 In re Determination of Navigability of
14 the Salt River

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

**THE SAN CARLOS APACHE
TRIBE'S OPENING POST-HEARING
MEMORANDUM REGARDING THE
NAVIGABILITY OF THE SALT
RIVER AND NOTICE THAT THE
TRIBE JOINS IN THE OPENING
POST-HEARING MEMORANDA
FILED BY SRP, CEMEX, AND THE
CITIES OF PHOENIX, TEMPE, AND
MESA**

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23 The San Carlos Apache Tribe ("Tribe" or "Apache Tribe") submits its
24 Opening Post-Hearing Memorandum on the Navigability of the Salt River ("Salt or "Salt
25 River") in its ordinary and natural condition on February 14, 1912, pursuant the Arizona
26 Navigable Stream Adjudication Commission Scheduling Order dated May 26, 2016.

27 To conserve the effort of the Commission and the parties and to avoid duplication
28

1 of arguments the Tribe gives notice that it joins in the Opening Post-Hearing
2 Memorandum filed by the Salt River Project Agricultural Improvement and Power
3 District and Salt River Valley Water Users' Association (collectively, "SRP"), the
4 Opening Post-Hearing Memorandum filed by Cemex Cement, Incorporated ("CEMEX"),
5 and the Opening Post-Hearing Memorandum filed by the Cities of Phoenix, Tempe and
6 Mesa (collectively, "the Cities), and files this separate brief.

7 For reasons set forth below, the Tribe requests that the Arizona Navigable Stream
8 Adjudication Commission ("ANSAC" or "Commission") find that the Salt River was not
9 navigable or susceptible to navigation as of the date of Arizona statehood, February 14,
10 1912.

11 **I. Introduction**

12 During the past nineteen years and during the most recent evaluation of the Salt
13 River, the Commission has received thousands of pages of documents and transcripts of
14 testimony submitted as evidence on the question of navigability of the Salt River on the
15 date of Arizona statehood, February 14, 1912. ("Record").¹ The Commission must
16 carefully review all nineteen years of evidence and testimony in the Record to make its
17 final determination.

18 The Commission has exclusive jurisdiction to make the factual determination of
19 which, if any, of the Arizona watercourses were navigable on the date of statehood. *See*
20 A.R.S. §37-1123. The Commission is required to make the factual finding of
21 navigability or non-navigability for each watercourse "[b]ased only on evidence of
22 navigability or non-navigability" and the "preponderance of the evidence." A.R.S. § 37-
23 1123; A.R.S §37-1128(A).

24 The Commission has determined that it will examine the question of navigation on
25 a segment by segment basis as per the decision of the United States Supreme Court in
26 *PPL Montana LLC v. Montana*, 132 S. Ct. 1215 (2012). The *PPL Montana* ruling states

27 ¹ References to individual Evidence items in the Record for the Upper Salt will be cited as "Upper EI-
28 [#]"; Evidence Items for the Lower Salt Will be cited as "Lower EI-[#]" and Evidence Items in the
Record for the Consolidated River will be cited as "EI-C[#]"

1 that “[t]o determine title to a riverbed under the equal-footing doctrine, this Court
2 considers the river on a segment-by-segment basis to assess whether the segment of the
3 river, under the riverbed in dispute lies, is navigable or not.” *PPL Montana at 1220*
4 citing *United States v. Utah*, 283 U.S. 64, 76 (1931).

5 In August of 2014 Jon Fuller testified on behalf of the Arizona State Land
6 Department (“ASLD”) and proposed that the Commission consider the Salt River in six
7 segments.² The Commission is not bound to the State’s designation of segments on the
8 Salt River. In this brief, however, the Tribe, without agreeing that the State’s suggested
9 segmentation is physically appropriate, will generally refer to the Salt River by the
10 segments suggested by the State.

11 A careful review of all the evidence in the Record proves that the Salt River was
12 neither navigable in fact nor susceptible to navigation on the sate of statehood. This is
13 true for each of the segments as proposed by the State. The Tribe will primarily discuss
14 Segments 1 and 2 in this Brief (referred to as “Upper Salt”). As described by Mr. Fuller,
15 Segment 1 is located “from the confluence of the White and the Black River down to
16 Apache Falls, which is located a few hundred meters upstream of the U.S. 60 Bridge in
17 the Salt River Canyon.” Fuller TR 10/20/2015:54. Segment 2 is from “the U.S. 60
18 Bridge down to a rapid that's just below Quartzite Falls.” Fuller TR 10/20/2015:61. For
19 the Commission’s ease of reference, the Tribe will refer to the location of Segments 1 and
20 2 as described by Mr. Fuller, but reserves the right to object to any formal adoption of
21 Mr. Fuller’s segmentation by the Commission in the future. All of Segment 1 and much
22 of Segment 2 of the Upper Salt River are located on the San Carlos Apache Reservation.
23 The boundary of the White Mountain Apache Reservation is north of the Black River and
24 Salt River.

25 Pursuant to the Treaty with the Apache Nation of 1852, 10 Stat. 979³, a

26
27 ² References to all transcripts in the Record will be cited as “[speaker] TR [date:page]” for example Mr.
28 Fuller proposed that the Commission consider the Salt River in eight (8) segments on June 16, 2014 pg
124-166 this citations would be “Fuller TR 6/16/2014:124-166.”

³ EI-C056 ex. 25 *Treaty with the Apache July 1, 1852* 10 Stat. 979

1 reservation was established by Executive Order dated November 9, 1871⁴ and December
2 14, 1872.⁵ The Reservation was called the Fort Apache Reservation, Congress
3 partitioned the original reservation into the San Carlos Apache Reservation and the White
4 Mountain Reservation.⁶ The statute describes the White Mountain Apache Reservation
5 as the land lying north of the Black River and Salt River.

6 “[T]he burden of proof rests on the party asserting navigability . . . who must
7 prove navigability by a preponderance the evidence.” *State of Arizona v. Arizona*
8 *Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 238-239, 229 P.3d 242, 250
9 (Ariz. Ct. App. 2010). *See also* Arizona Revised Statutes § 37-1128(A) (requiring that a
10 claim of navigability be proven by a “preponderance of the evidence” and placing that
11 burden on the proponents of navigability). Federal Law also places the burden of proof
12 on the Proponents. In *North Dakota ex rel. Bd. of Univ. & Sch. Lands v. United States*,
13 972 F.2d 235, the Federal Court clearly placed the burden of proof on the proponents of
14 navigability.

15 Those who assert navigability in this matter (“Proponents”) have wholly failed to
16 meet their burden to prove navigability by a preponderance of the evidence.

17 **II. The Federal Test to Determine Navigability For Purposes of Title Under the**
18 **Equal Footing Doctrine Requires Realistic Commercial Navigation Under**
19 **Natural and Ordinary Conditions on February 14, 1912.**

20 “Whether a river is navigable is a federal question.” *United States v. Holt State*
21 *Bank*, 270 U.S. 49, 55-56, 46 S.Ct. 197 (1926). The federal test for navigability was set
22 forth in *The Daniel Ball*, 77 U.S. 557, 563 (1870):

23 Those rivers must be regarded as public navigable rivers in law which are
24 navigable in fact. And they are navigable in fact when they are used, or are
25 susceptible of being used, in their ordinary condition, as highways for
26 commerce, over which trade and travel are or may be conducted in the

25 ⁴ EI-C056 ex. 26 Executive Order signed by President Grant on November 9, 1871, establishing the
26 White Mountain Reservation

26 ⁵ EI-C056 ex. 27 Executive Order signed by President Grant on December 14, 1872 establishing the “San
27 Carlos Division” of the White Mountain Apache Reservation

27 ⁶ EI-C026 ex.28 Act of Congress of June 7, 1897, 30Stat. 64, dividing the White Mountain Reservation
28 into the Fort Apache and San Carlos Reservations

1 customary modes of trade and travel on water.

2 *Id.* at 563.

3 The *Daniel Ball* test requires that a river was used, or was “susceptible” of being
4 used, on the date of statehood, as a “highway for commerce”. *Id.* Thus, a river must
5 have been susceptible to navigation for a commercial purpose to meet the *Daniel Ball*
6 test.

7 The *Daniel Ball* test has been accepted as the federal standard to determine
8 “navigability for title” under the equal footing doctrine. Over the last 150 years the
9 Supreme Court has considered the issues of navigability and several important legal
10 principles have been well-established. First, the test to determine whether or not the Salt
11 River was navigable on February 14, 1912 is one of “navigability in fact.” *PPL Montana*,
12 132 S. Ct. at 1227. Thus the Commission must focus on whether the River was “really
13 navigable.” *Id.* (quoting *Shively v. Bowlby*, 152 U.S. 1, 31 (1894)).

14 Second, the United States Supreme Court determined that navigability depends on
15 whether “the stream in its ordinary and natural condition affords a channel for useful
16 commerce.” *United States v. Utah*, 283 U.S. 64, 76 (1931) (quoting *Holt State Bank*, 270
17 U.S. at 56). The requirements that a stream must be in its ordinary and natural condition
18 means that it is “not . . . every small creek in which a fishing skiff or gunning canoe can
19 be made to float at high water which is deemed navigable, but, in order to give it the
20 character of a navigable stream, it must be generally and commonly useful to some
21 purpose of trade” *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690,
22 698-99 (1898) (quoting the *Montello*, 20 Wall. 430, 442 (1874)). In *Rio Grande Dam*, the
23 Supreme Court concluded that that the river’s “use for any purposes of transportation has
24 been and is exceptional, and only in times of temporary high water.” *Id.* at 699. With
25 nothing more than a handful of instances of exceptional boating on the Rio Grande, the
26 Court concluded that “[o]bviously, the Rio Grande within the limits of New Mexico is
27 not a stream over which in its ordinary condition trade and travel can be conducted in the
28 customary modes of trade and travel on water.” *Id.* The Record contains only one tale of

1 anyone attempting to boat the Upper Salt River and it was during a time of heavy rainfall
2 on snowmelt (temporary high water).⁷ EI- C056 at 42; Fuller TR 5/19/2016:4910-4923.

3 In *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Supreme Court determined that
4 the Red River in Oklahoma was non-navigable under the equal footing doctrine, applying
5 the *Daniel Ball*, *Montello*, and the *Rio Grande Dam* federal cases and standards to
6 determine navigability. The *Oklahoma v. Texas* ruling is significant because the facts
7 regarding the flows of the Red River in that case are very similar to the conditions of
8 flows of the Upper Salt River at the time of statehood.

9 The *Oklahoma v. Texas* court made it clear from the outset that the evidence of
10 boating accounts on the Red River often emphasized “the exceptional conditions in times
11 of temporary high water and to disregard the ordinary conditions prevailing throughout
12 the greater part of the year. *Id.* at 587.

13 The Supreme Court then reviewed the evidence and stated:

14 The river has its source in the Staked Plains of northwestern Texas and
15 from there until it gets well into Oklahoma is within a region where the
16 rainfall is light, is confined to a relatively short period in each year and
17 quickly finds its way into the river. Because of this the river in the western
18 half of the State [Oklahoma] does not have a continuous or dependable
19 volume of water. It has a fall of three feet or more per mile and for long
20 intervals the greater part of its extensive bed is dry sand interspersed with
21 irregular ribbons of shallow water and occasional deeper pools. **Only for
22 short intervals, when the rainfall is running off, are the volume and
23 depth of the water such that even very small boats could be operated
24 therein.** During these rises the water is swift and turbulent and in rare
25 instances overflows the adjacent land. **The rises usually last from one to
26 seven days and in the aggregate seldom cover as much as forty days in
27 a year.**

28 *Id.* at 587 (emphasis added)..

The Court explained that in the stretch of the Red River located in the western half
of the state, the Red River gauge at Denison ranged between zero and 1 foot, and that

⁷ EI-056 *Charles Trumbull Hayden Pioneer Hayden*, Charles (1972) at 4.2

1 there were only 42 days during the year 1910 (Oklahoma was admitted as a state in 1907)
2 on which this gauge read 2 feet or over, and only 81 days on which it read 1 foot or over,
3 and that an examination of the river from a flat bottom bateau drawing 5 and ½ inches of
4 water when loaded was very difficult because of sand bars. The Supreme Court then
5 held, based on this evidence, that “[w]e regard it as obvious that in the western half of the
6 State the river is **not susceptible of being used in its natural and ordinary condition as**
7 **a highway for commerce**; and there is no evidence that in fact it ever was so used.” *Id.*
8 at 588 (emphasis added).

9 The Supreme Court then reviewed the record to find evidence of the conditions of
10 the eastern segment of the Red River. Evidence showed that the Red River in the eastern
11 part of Oklahoma received additional waters from other streams and “has a practically
12 continuous flow of varying volume, the extreme variation between high and low water
13 being about thirty feet.” *Id.* at 589. Even with a continuous flow, the Court held that the
14 eastern segment of the Red River was non-navigable based upon the following evidence:

15
16 When the water rises it does so very rapidly and it falls in the same way.
17 The river bed has a fall of more than one foot to the mile and consists of
18 light sand which is easily washed about and is carried down stream in great
19 quantities at every rise of the water. At all times there is an almost
20 continuous succession of shifting and extensive sand bars. Ordinarily the
21 depth of water over the sand bars is from six to eighteen inches and
22 elsewhere from three to six feet. There is no permanent or stable channel.
23 Such as there is shifts irregularly from one side of the bed to the other and
24 not infrequently separates into two or three parts. **Boats with a sufficient**
25 **draft to be of any service can ascend and descend only during periods**
26 **of high water. These periods are intermittent, or irregular and short**
27 **duration, and confined to a few months in the year.**

28 *Id.* (emphasis added).

The Court also found that prior to the railroads extending into the eastern part of
the state, there was evidence of boats of light draft carrying merchandise in that vicinity
of the Red River, but only in periods of high water, and then with some difficulty.

While the evidence relating to the part of the river in the eastern half of the
State is not so conclusive against navigability as that relating to the western

1 section, we think **it establishes that trade and travel neither do nor can**
2 **move over that part of the river, in its natural and ordinary**
3 **condition....Its characteristics are such that its use for transportation has**
4 **been and must be exceptional, and confined to the irregular and short**
5 **periods of temporary high water. A greater capacity for practical and**
6 **beneficial use in commerce is essential to establish navigability.**

7 *Id.* at 591 (emphasis added).

8 Thus, the *Oklahoma v. Texas* case definitively established that commercial
9 navigation must take place during the ordinary condition or ordinary flow of a river, and
10 not just during times of “high flows” in order to satisfy the “navigability for title” test.

11 A river’s capacity must also “meet the needs of commerce as these may arise in
12 connection with the growth of the population, the multiplication of activities, and the
13 development of natural resources.” *United States v. State of Utah*, 283 U.S. 64, 83, 51 S.
14 Ct. 438, 444, 75 L. Ed. 844 (1931).

15 In *PPL Montana*, the Supreme Court held that non-commercial recreational
16 boating for the purposes of trapping and duck hunting in the spring and fall was
17 insufficient to establish navigability for title purposes. *PPL Montana* at 1233. The Court
18 stated that “[m]ere use by initial explorers or trappers, who may have dragged their boats
19 in or alongside the river despite its nonnavigability in order to avoid getting lost, or to
20 provide water for their horses and themselves, is not itself enough.” *Id.* (citing *United*
21 *States v. State of Oregon*, 295 U.S. 1, 20-21, 55 S. Ct. 610, 618, 79 L. Ed. 1267 (1935)).

22 The Supreme Court in *Oregon* found that evidence in the record that “trappers
23 appear to have waded or walked” through the river, dragging their boats rather than
24 floating them, had “no bearing on navigability” and that these facts “...establish an
25 absence of that capacity for general and common usefulness for purposes of trade and
26 commerce which is essential to navigability.” *Oregon* at 23. Furthermore, the Court
27 stated that “[a]t most the evidence shows such an occasional use of boats, sporadic and
28 ineffective, as has been observed on lakes, streams, or ponds large enough to float a boat,
but which nevertheless were held to lack navigable capacity,” *Id.* at 23 (citing *The*
Montello, *Oklahoma v. Texas*, and *Rio Grande Dam*, as controlling federal authority).

1 The Supreme Court recently emphasized the commercial use requirement in *PPL*
2 *Montana*, stating:

3 ... evidence must be confined to that which shows the river could sustain
4 the kinds of commercial use that, as a **realistic matter**, might have
5 occurred **at the time of statehood**. Navigability must be assessed as of the
6 time of statehood, and it concerns **the river's usefulness for 'trade and**
7 **travel,' rather than for other purposes.**

8 *PPL Montana* at 1233 (quoting *Utah*, 283 U.S., at 75–76, 51 S.Ct. 438) (emphasis
9 added).

10 In the *Utah* case the Court found that certain rivers were navigable because
11 their “susceptibility of use as a highway for commerce was not confined to exceptional
12 conditions or short periods of temporary high water, but that during at least nine months
13 of each year the river ordinarily was susceptible of such use as a ‘highway for
14 commerce.’” *Utah*, 283 U.S. at 87.

15 Thus, under the federal test for navigability there must have been or could have
16 been “useful” and “realistic” commerce during the “ordinary flow” or “ordinary
17 condition” of the river in its natural state, on the date of statehood and not just during
18 times of “high flows” or by “initial explorers or trappers” who may have traveled along a
19 nonnavigable river but not necessarily on the river and without evidence to the support
20 the contrary.

21 Similarly, the Ninth Circuit Court of Appeals has ruled in several cases that
22 commerce is an essential requirement for the “navigability for title” test. For example, in
23 *State of Alaska v. United States*, 754 F.2d 851 (9th Cir. 1985), the court took into account
24 transportation methods in use at the time of statehood and reaffirmed that commerce is an
25 essential requirement of the navigability test under the equal footing doctrine, by holding
26 that the use of floatplanes on an Alaskan lake did not make the lake navigable so as to
27 pass title to the bed of the lake to the State of Alaska. *Id.* at 854. The court held that
28 “...the crux of the test is still the requirement that the body of water be susceptible of use

1 as a highway or channel for commerce on water,” and that “...in this context, the lake is a
2 terminus or launching point for floatplanes, not ‘a *channel* for useful commerce.’” *Id.*

3 All of the U.S. Supreme Court cases and lower federal court cases, including the
4 Ninth Circuit Court of Appeals, have required “susceptibility for commercial use at
5 statehood.” *See State of Alaska v. Ahtma, Inc., et al.*, 891 F.2d 1401, 1405 (9th Cir.
6 1989). “[T]he vital and essential point is whether the natural navigation of the river is
7 such that it affords a channel for useful commerce.” *Arizona Law for the Public Interest*
8 *v. Hassell*, 172 Ariz. at 363, 837 P.2d at 165. “Segments that are nonnavigable at the
9 time of statehood are those over which commerce could not then occur.” *PPL Montana*,
10 132 S.Ct at 1230.

11 The Arizona Court of Appeals has held that the federal *Daniel Ball* standard
12 requires that the water course, in its natural and ordinary condition, either was used or
13 was susceptible of being used for travel or trade in any customary mode used on water.
14 *See Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426, 18 P.3d 722, 730 (Ariz. Ct. App.
15 2001).

16 “Statutory provisions must be considered in context of entire statute and
17 consideration must be given to all statute’s provisions so as to arrive at legislative intent
18 manifested by entire act.” *One Hundred Eighteen Members of Blue Sky Mobile Home*
19 *Owners Ass’n v. Murdock*, 140 Ariz. 417, 682 P.2d 422, 424 (Ariz. Ct. App. 1984).
20 When applying Arizona Statute A.R.S. 37-1128(A) , defining navigability, the
21 Commission must ensure that “no clause, sentence, or word is rendered superfluous, void,
22 contradictory or insignificant.” *State v. Superior Court for Maricopa County*, 113 Ariz.
23 248, 550 P.2d 626 (1976). *See dams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952); *City of*
24 *Phoenix v. Yates*, 69 Ariz. 68, 208 P.2d 1147 (1959).

25 The applicable Arizona Statutes are clear that “[i]f the preponderance of the
26 evidence fails to establish that the watercourse is navigable, the commission shall issue
27 its determination confirming that the watercourse in question is non-navigable”. A.R.S. §
28 37-1128(A).

1 ANSAC is required to follow the federal test for navigability and review the entire
2 Record to determine whether, by a preponderance of the evidence, the Salt River was
3 used, or was susceptible of being used, for realistic and useful commerce in a manner that
4 was customary at the time of Arizona statehood on February 14, 1912. Proponents have
5 failed to meet their burden. There is no credible evidence that the Upper Salt River was
6 ever successfully navigated for commerce prior to statehood. The sole reference is to a
7 tale recalled in Carl Hayden's book where Hayden relates a tale told to him by his father
8 which purports to have occurred more than 100 years earlier by a man who built a stout
9 boat on the White River, during a flood caused by heavy rainfall on melting snow, was
10 said to have floated from the White River to the Tempe area. There is no evidence that
11 any other boating attempt was made.

12 **III. Evidence in the Record Fails to Prove that the Salt River Was Navigable**
13 **Prior to or at the Time of Statehood**

14 Pursuant to A.R.S. § 37-1123, and other provisions of Title 37, Chapter 7, Arizona
15 Revised Statutes, the Commission has received, compiled, and reviewed all of the
16 evidence regarding the navigability and nonnavigability of the Salt River, including the
17 Upper Salt River which runs from the confluence of the White and Black Rivers to just
18 below Quartzite Falls. Evidence consisting of studies, reports, maps, newspapers and
19 historical accounts, pictures, film, and testimony were submitted and included in the
20 Record. Six witnesses testified during the two navigability hearings in 2004 and 2005
21 and ten witnesses testified over twenty-three days of hearings in 2014-2016. The Record
22 contains the transcripts from all twenty-five days of expert testimony, as well as the
23 entire Record of evidence starting in 1997. The burden of proof is on the proponents of
24 navigability and after having 19 years to submit evidence and testimony the Proponents
25 have failed to meet their burden.

26 **A. Historical Evidence**

27 Thousands of pages of historical evidence were submitted to ANSAC, including
28 reports, studies, testimony, and various accounts of mountain men, trappers, settler's

1 miners and pioneers who traveled or lived along the Salt River. A large percentage of the
2 historical evidence consists of historical newspaper articles and official reports from
3 government agencies. Additionally, Arizona has been reporting on its transportation
4 status since it was a territory continuing through modern day historical studies and reports
5 published by the Arizona Department of Transportation. Careful review of the entire
6 Record shows that there is no evidence to support the claim that the Salt River was
7 navigated or susceptible to navigation for realistic commercial trade or travel in its
8 ordinary and natural condition at the time of February 14, 1912, or anytime before.

9 While the Record fails to show that any segment of the Salt River was susceptible
10 to navigation, the Tribe herein will specifically address the question of navigability in
11 segments 1 and 2, also known as the Upper Salt River.

12 **1. Prehistoric Populations Never Navigated the Salt River and No**
13 **Evidence Suggested the Salt River was susceptible to Navigation**

14 Archeological evidence shows that the Upper Salt River has been populated on
15 and off by humans since ancient times. Scientists have discovered evidence from each of
16 these different civilizations; however none of their findings indicate that the Salt River
17 was ever used as a means of transportation by any prehistoric population. Proponents'
18 expert Mr. Jon Fuller stated that there was no evidence whatsoever of prehistoric Native
19 American boat use on the Salt River. Fuller 3/31/2016:4471.

20 Dr. Mark Newell, an anthropologist and archeologist who specializes in historic
21 river watercrafts, found nothing to suggest that any prehistoric civilization living along
22 the Salt River attempted to or ever did utilize the River for trade or travel. Newell
23 3/30/2016:4155-4174. According to Dr. Newell all cultures living along rivers like the
24 Salt River with access to "various types of soft woods" left evidence of some kind of boat
25 making, especially the basic dugout canoes which are the most common types of
26 watercraft made by prehistoric civilizations for use on water. Newell TR
27 3/30/2016:4192-4194. Dr. Newell was "shocked at the complete absence of information
28 of dugouts being used" on the Salt River and considers this to be a "very significant

1 factor” in his conclusion that the Salt River was never navigated in prehistoric times. *Id.*

2 Even if there was evidence of prehistoric River use, the Commission would have
3 to limit the influence of such evidence in making its determination of the navigability of
4 the River. In *PPL Montana* the Supreme Court made it clear that as a matter of law
5 “[n]avigability must be assessed at the time of statehood...” *PPL Montana*, 132 S. Ct. at
6 1233. See *Utah*, 283 U.S., at 75–76. Specifically, “[t]he evidence must be confined to
7 that which shows the river could sustain the kinds of commercial use that, as a realistic
8 matter, might have occurred at the time of statehood.” *Id.* While there is no evidence of
9 prehistoric populations utilizing the River for travel or trade, such evidence must be
10 weighed appropriately and cannot be determinative when considering navigability.

11 **2. Miners, Trappers, and Pioneers Never Navigated the Salt River**
12 **as a Method of Trade and Travel Because the Salt River was not**
13 **Susceptible to Navigation**

14 The Commission must review all of the evidence in the Record, including
15 evidence of pre-statehood miners, trappers, and pioneers who may have boated the Salt
16 River. However, the usefulness of this evidence is limited in scope and specific criteria
17 have been set out by the court.

18 Mere use by initial explorers or trappers, who may have dragged their boats
19 in or alongside the river despite its nonnavigability in order to avoid getting
20 lost, or to provide water for their horses and themselves, is not itself
21 enough. See *Oregon*, 295 U.S., at 20–21, 55 S.Ct. 610 (evidence that
22 “trappers appear to have waded or walked” through the river, dragging their
23 boats rather than floating them, had “no bearing on navigability”).

24 *PPL Montana*, 132 S. Ct. at 1233.

25 Not only must the historical accounts of people using the river contain evidence of
26 sustainable floatation, “but the evidence must be confined to that which shows the river
27 could sustain the kinds of commercial use that, **as a realistic matter**, might have
28 occurred at the time of statehood.” *Id.* ([emphasis added]). See *Utah*, 283 U.S., at 75–
76, 51 S.Ct. 438. The *Utah* Court qualified the commerce requirement as well, stating

1 that “the vital and essential point is whether the natural navigation of the river is such that
2 it affords a channel of **useful commerce.**” *Utah* at 86-87 (emphasis added). “The mere
3 fact that logs, poles, and rafts are floated down a stream occasionally and in times of high
4 water does not make it a navigable river.” *Rio Grande Dam*, 174 U.S. at 698.

5 During the 2005 Salt River hearings Dr. Dennis Gilpin, an expert in history and
6 archeology, testified on behalf of Proponents and presented his historical research and
7 determinations to the Commission.

8 There are hundreds of historical newspaper articles in the Record that pertain to
9 the Salt River prior to statehood. The majority of articles submitted by the Proponents
10 were from Dr. Gilpin’s research. After review of the Record, Dr. Gilpin stated that the
11 newspaper accounts of people floating on the Salt River “only constitute a sample of
12 what was occurring... But it does appear that it was a relatively rare occurrence, rare
13 enough that when it did happen it was a newsworthy event.” Gilpin TR 10/20/2005: 15.
14 “In most of these situations it was being reported on because it was a newsworthy event.”
15 *Id.*

16 Dr. Gilpin determined that it was “clear that from many of these accounts that
17 people themselves regarded their trip down the Salt as an experimental sort of thing.”
18 Gilpin TR 10/20/2005: 16. In 2007, after reviewing the evidence and considering Dr.
19 Gilpin’s report and testimony, ANSAC concluded that the historical accounts provided in
20 the Record were inadequate to support a finding of navigation⁸. ANSAC at 29.

21 Dr. Gilpin did not submit any papers and was not called to testify during the 2014-
22 2016 hearings. In fact, the Proponents of navigability did not call one expert historian,
23 archeologist or ethnographer to testify about the historical boating accounts on the River.
24 Proponents did nothing to deal with the inadequacies of the previous evidence. Instead,
25 Proponents relied on their expert hydrologist, Jon Fuller, who made it clear that he is “not
26 a professional historian.” Fuller TR 10/22/2015:711. In reality, the only formal education

27 ⁸ Arizona Navigable Stream Adjudication Commission *Report, Findings and Determination Regarding*
28 *the Navigability of the Upper Salt River from the confluence of the White and Black Rivers to Granite*
Reef Dam (2007)

1 Mr. Fuller has in the area of history are the “three or four classes in that subject” that he
2 took as an undergraduate student. Fuller TR 10/23/2016: 963. However, when asked
3 what qualified him to testify as a historian Mr. Fuller explained that in his opinion
4 “geology is history” and because he is as registered geologist in Arizona he qualifies
5 himself as an expert in historical research and ethnography. *Id.* Additionally, his work
6 with Dr. Gilpin gave Fuller confidence that he could accurately interpret Dr. Gilpin’s
7 1997 findings for the Commission in his 2015-2016 testimony.

8 During the 2015-2016 hearings Mr. Fuller admitted that there were very few
9 changes or additions to the historical accounts summarized by Dr. Gilpin in Section 3 of
10 the 1997 Arizona State Land Department’s Upper Salt River Navigability Study.⁹
11 (“Upper Salt 1997”). The 2003 update of that same report included no new research or
12 information and no additional historical accounts of people boating the River.¹⁰ Fuller
13 TR 10/20/2005:26-27.

14 From 1997 to 2016 the only additional historical research that was done regarding
15 historical boating accounts was that found by Mr. Fuller using a keyword search on a
16 website called Chronicallyingamerica.com.¹¹ Fuller 10/22/2015:724,729. These new
17 accounts included a report on attempts to boat the Salt during floods and high-water,
18 reports of boats being built which did not give any details as to whether the boats were
19 floated on any Arizona river or whether floating the boats was even completed, and
20 articles that do not state what river the account is referring to, where, when or who
21 purported to have navigated the river and whether the trip was a success, failure or even
22 took place. Fuller 5/19/2016: 4986-4987. The Record shows that the vast majority of the
23 historical accounts included in Mr. Fuller’s 2015-2016 testimony were researched and
24 presented by Dr. Gilpin in 2005. After reviewing these accounts the first time, ANSAC
25 found them to be inadequate to show that the Upper Salt was ever susceptible to

26 ⁹ Fuller, et al., *Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the Confluence*
27 *of the White and Black Rivers* (March 1997) [Upper Salt EI- 004]

28 ¹⁰ Fuller, et al., *Revised Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the*
Confluence of the White and Black Rivers [Upper Salt EI-027]

¹¹ EI-C0364 at 204-208

1 navigation. The Proponents have offered no additional expert testimony to deal with
2 these inadequacies.

3 Dr. Jack August, an expert in hydro politics and southwest history, testified before
4 the Commission and submitted two reports in 2015 and 2016.¹² In *his Revised Expert*
5 *Report* updated January 20, 2016 (“August 2016”), Dr. August determined that:

6 [t]he mountain men did not stay in Arizona long enough to transform its
7 economy or ecology. Nor did they use the Salt River as a highway of
8 transportation, trade, or commerce. Whether they exported their pelts
9 through New Mexico or California, they moved through Arizona on foot or
10 horseback. This was not simply a matter of preference. Their horses were
11 frequently stolen by the Apache and other local tribes, so travel by boat –
12 using the same rivers they trapped for pelts – would have been preferable.

13 August 2016 at 24.

14 None of the expert historians who testified found evidence to suggest that the Salt
15 River was ever used or susceptible of being used as a means for trade or travel at or
16 around the time of Arizona statehood. Proponents did not have an expert historian
17 research or testify about the historical research that was re-submitted by Proponents. The
18 Proponents have failed to submit any evidence to controvert the Commission’s originally
19 finding that these historical accounts do not show that the Upper Salt was navigable
20 before, during or after February 14, 1912.

21 **3. Military Expeditions Show That the Salt River was Never** 22 **Navigated by the Military or Considered Susceptible for** 23 **Navigation**

24 U.S. Military expeditions traveling through the Arizona Territory on their way to
25 California would pass through as quickly as possible and few, if any, stayed in the
26 Territory. August 2016 at 27. The Commander of the Army of the West, General
27 Stephen Watts Kearny, led the first military group through Arizona. Concerned about the
28 unmapped desert ahead of his dragoons, Kearny brought former mountain man, Kit
Carson, to be their guide.

Carson, more than once, had crossed the same withered terrain over which

¹² EI-C023 *History of the Lower Salt River prior to February 14, 1912* August, Jack (2015); and
EI-C040 *Updated History of the Lower Salt River* August, Jack (2016)

1 Kearny's dragoons would be soon passing. Carson knew the land, water
2 courses, and the disposition of the Indian along the route. He could tell
3 Kearny which stretches were suitable for wagons and rolling artillery
4 pieces. Most importantly, he knew the best places to ford the creeks and
5 rivers.... He had trapped the river many times prior to the Mexican War
6 and he knew its canyons, braided reaches, and uneven flows.....The Salt
7 River clearly could not serve as a possible waterway to move this
8 contingent of military men to their ultimate destination, California. Thus
9 they headed south and west—avoiding the Upper Salt—and struck the Gila
10 River and then followed its course on foot, horseback and mule through
11 challenging canyons and land that was barren and arid.

12 *Id.* at 28-29.

13 **4. The Territorial Government Reports on Arizona Transportation**
14 **Show that The Territory was Desperate for Trade and Travel**
15 **Alternatives and Navigating the Salt River Was Not an Option**

16 “Navigability must be assessed as of the time of statehood, and it concerns the
17 river's usefulness for ‘trade and travel,’ rather than for other purposes.” *PPL Montana*,
18 132 S. Ct. at 1233. Politicians considered the Territory “a wasteland, a desert, an Indian-
19 infested obstacle between Santa Fe and San Diego, utterly lacking in a reliable
20 transportation route, especially one as ideal as river navigation.” August 2016 at 27.
21 Beginning in 1878 the U.S. Secretary of Interior requested the Governor of the Arizona
22 Territory to write an annual “statement of the actual conditions” of the Territory
23 “together with any suggestions” that may help the Territory prosper and grow.

24 The record contains 16 pre-statehood reports written annually to the Secretary of
25 the Interior by the Governor or Acting Governor of the Territory of Arizona.¹³ (cited as
26 “GR [Year] at [pg]”).

27 In 1878 J.C. Fremont, Governor of the Territory of Arizona, reported that Arizona
28 had “remained shut up and barred out of progress by its inaccessibility.” GR 1878 at 1.
Fremont described the inadequacies of the “desert roads” which were the only means of
travel in Arizona at the time, and he blames the lack of transportation for isolating
Arizona, keeping Arizona “shut off from immigration” and precluding Arizona from “the

¹³ EI-C010 ex. 1-16 *Arizona Territorial Governor Reports*

1 development which its great resources would otherwise have commanded.” *Id.*

2 This early report tells of Arizona’s potential for successful trade and travel. The
3 Territory was described by Fremont as the country’s “natural gateway of commerce and
4 travel between the States east of the Mississippi, and California and the Pacific Ocean.”

5 *Id.* at 7. He went on to give the following explanation regarding Arizona:

6 [F]ronting on Mexico it is in position to profit by any developments which
7 may result from the awakening interest of merchants and manufacturers in
8 the Trade of that country... This is the commerce which is to develop
9 Arizona, and a railroad connection with the seaport of Guaymas is a
10 necessity to it. Any aid that the Congress could be induced to give these
11 railroad enterprises would be repaid manifold to the country in increased
12 revenue from increased commercial activity and the opening of new
branches of trade, especially from the rich products of Mexico, and in great
addition to the common wealth by bringing into use that which now
remains locked up in the mines of this country.

13 *Id.*

14 By 1881 railroads were creeping into the Territory and those communities near
15 railway stations were beginning to prosper and grow in ways that were impossible
16 without the opportunity to trade and travel.

17 [t]he subject of north and south railroads is of paramount interest to the
18 people of Arizona, and one upon which their prosperity to a great degree
19 absolutely rests. . . . [T]he chief desire of the people is that they brought
20 into competition by roads constructed north and south. The physical
formation of the country is such that the present transportation facilities and
interchange of home products is barred.

21 GR 1890 at 10.

22 Prior to statehood the Arizona Territory was stifled commercially and it was
23 almost entirely due to the lack of any transportation options other than overland. “Until
24 the completion of the Atlantic and Pacific Railroad all the freight for the Territory comes
25 of the Southern route, and from thence is carried by mule teams to the northern portion of
26 Arizona.” GR 1881 at 24.

27 The Territorial Report from 1881 included a section entitled “Facilities for Travel
28

1 and Transportation” which described the parties could travel to and throughout Arizona.
2 GR 1881 at 24. Parties were told that travel to Arizona was best by railroad, once in the
3 Territory travel inland from any of the rail stops to “all points of the Territory” was done
4 by stage lines running from principal towns to mining camps. *Id.*

5 **5. Modern Government Reports on Arizona Transportation**
6 **History Show That the Salt River Was Not Navigable or**
7 **Considered Susceptible to Navigation**

8 The Tribe submitted a report which was prepared in cooperation with the Arizona
9 Department of Transportation, United States Department of Transportation and the
10 Federal Highway Administration entitled *Arizona Transportation History* (“ADOT
11 Report”).¹⁴ The ADOT Report includes a “timeline of transportation-related
12 development” in Arizona and broadens its results by including “transportation-related
13 developments from the rest of the nation and the world.” ADOT Report at Technical
14 Report Documentation Page.

15 Around the 1850’s railroads and steamboats were the “dominate means of
16 commercial transportation” throughout the United States. *Id.* at 144. In Arizona the ferry
17 took travelers across the Colorado River at Yuma, but it was “stagecoaches that carried
18 passengers from town to town across the Territory.” *Id.* at 121. According to the
19 Arizona Department of Transportation, as of 1863,

20 [e]veryone in the new territory agreed that Arizona’s most pressing need
21 was for wagon roads. Freight and passengers had been able to reach
22 Arizona by boat since 1852, when steamboat service was established on the
23 lower Colorado River. But travel inland from the [Colorado] river still
24 **required a difficult and time-consuming journey by horse or**
25 **stagecoach, often made worse by the poor conditions of the few existing**
26 **roads.**

27 *Id.* at 14 (emphasis added).

28 The roads in Arizona were not an ideal way for people to travel, and throughout
the rest of the country states utilized their navigable rivers in order to avoid similar roads
within their territories. The nation’s roads “generally consisted of a path worn in the dirt

¹⁴ EI-C010 Part 22

1 by constant use. Rough and dusty in dry weather, highways became muddy and often
2 impassable under wet conditions.” *Id.* at 109. The roads already in existence throughout
3 the United States were so bad that, “whenever possible, travelers and freighters avoided
4 highways altogether in favor of trains or boats.” *Id.* Had there been any possibility of
5 traversing the Territory by water rather than overland, Arizonians would surely have
6 opted for such an alternative. The first Territorial wagon road in Arizona cost \$10,000 to
7 build and connected Phoenix to Globe, in 1877. *Id.* at 145.

8 “The historical record of this period indicates that there was a significant need for
9 transportation in Central Arizona. In spite of this need, there is no record the military or
10 explorers of the era used, or considering using, the Salt River for navigation.” August
11 2016 at 23.

12 **B. Hydrology and Geomorphology**

13 The hydrology, the geomorphology and the recorded flow records of the Salt
14 River show that the Salt has always been a river of extremes. Torrential and
15 unpredictable floods have been interspersed with periods of low or no flows for
16 thousands of years. The Upper Salt River is confined within shear walled canyons and
17 flows over bedrock, rapids and waterfalls at very steep gradients. In the Lower Salt River
18 the floods have scoured and redistributed the materials which have made the bed and
19 banks of the River into braided channels and shifting sandbars since at least the late
20 prehistoric period. Those forces have resulted in a river with wide, shallow, and braided
21 channels which were not deep enough, wide enough and did not contain water of
22 sufficient, reliable and predictable volume to support navigation.

23 These river conditions are consistent with the Evidence that the Salt River was
24 never used, from prehistoric times to the date of statehood, for navigation as a highway
25 for commerce, trade or travel. In spite of a need for transportation to support travel,
26 mining, the military, mail, and other purposes which were regularly conducted on rivers
27 in other parts of the United States, the early non-Indian immigrants and government
28 officials in Arizona never proposed that the Salt River was adequate or had potential to

1 serve such purposes.

2 The evidence shows that there are geomorphic obstacles on both ends of these
3 Segments of the Upper Salt, narrow bedrock channels on the Upper Salt dominated by
4 periods of low flows which were too extreme and unreliable to support navigation, and
5 the flood flows which impede navigation, are all evidenced in the Record and support the
6 determination that the Upper Salt River was not navigable at statehood.

7 **1. Gradient has always been an impediment to Navigation on the**
8 **Salt River**

9 Evidence in the Record proves that the gradient of Segments 1 and 2 made
10 navigation in the Upper Salt River impossible around the time of Arizona statehood,
11 February 14, 1912.

12 Dr. Schumm testified about the Upper Salt River, stating that “at 14.7 miles, the
13 river drops 17 feet per mile. At 20.8 miles, the river drops 16 feet per mile, and then
14 finally at 30.1 feet [miles], the river drops 31 feet per mile. We’re dealing with a
15 relatively steep portion of the channel with numerous rapids.” - Shumm TR 10/20/2005:
16 87-88. In his 2005 report to the Commission Dr. Schumm concluded that:

17 Obviously, the numerous rapids and bedrock impacts on the river prevent
18 navigation, but even more important are the very steep gradients ranging
19 from 17 to 31 ft/mile . . . If at 4 feet per mile, commercial navigation is
20 inhibited, certainly 17 to 31 per mile, the gradients measured on the Upper
21 Salt River, navigation would be impossible.

22 Schumm at 12.¹⁵

23 The U.S. Forest Service is responsible for issuing permits to present day
24 recreational boaters on much of the Salt River. In its 1998 *Evaluation of Navigability at*
25 *the time of Statehood, Salt River* the United States Forest Service determined that
26 “[d]uring its rush through 48 miles of the Salt River Canyon, it drops over 1,100 feet, for
27 an average of approximately 23 feet per mile. One three-mile stretch of river drops an

28 ¹⁵Upper EI-028 *Geomorphic Character of the Upper Salt River*, Schumm, Stanley (2005) (“Schumm”)

1 average of 31 feet per mile!” Forest Service at 2-3¹⁶.

2 Mr. Burtell submitted his Declaration to the Commission (“Burtell”)¹⁷ and
3 testified on behalf of Freeport Minerals Corporation. agreed with the other experts that
4 that Segment 1 is not and never was navigable. Burtell TR 2/23/2016:2756. Burtell also
5 explained that the reason for dividing Segments 1 and 2 in the Upper Salt was because
6 Segment 2 is much more accessible to modern boaters and therefore there is more
7 information in the Record on that particular segment of the Upper Salt:

8 One of the main difference between Segment 1 and Segment 2 is the
9 access top each Segment. It wasn’t unreasonable for the State to divide that
10 portion of the Upper Salt into two segments because I would like to point
11 out that there doesn't seem to be a huge difference between Segments 1 and
12 2 at least with respect to the gradient of the river: About 24 or 25 feet per
13 mile; very steep; lots of rapids, on the order of Classes II through IV;
14 bedrock canyons. So Segments 1 and 2 are perhaps not as different as
15 maybe some would think, at least in my opinion. But obviously Segment 1
16 doesn’t have the access that Segment 2 does from a boating perspective and
17 so I think it’s unreasonable to break those out that way [Fuller] did.

18 Burtell TR 2/23/2016:2765.

19 **2. Bedrock and Sandbars Have always been Impediments to**
20 **Navigation on the Salt River**

21 Mr. Fuller summarized the character of the Upper Salt as follows: “[m]ost of the
22 Upper Salt River is formed within deep bedrock canyon. Bedrock along the channel
23 margins in these canyons precludes significant movement of the river channel or other
24 channel changes Bedrock outcrops in the channel created waterfalls, rapids and

25
26 ¹⁶ Upper EI-008 *Evaluation of Navigability at the time of Statehood, Salt River (Roosevelt Dam Upstream*
27 *to the Eastern Boundary of the Tonto National Forrest)* published by the United States Department of
28 Agriculture, the Forest Service (1998)

¹⁷ EI-C021 Part 1 *Declaration of Rich Burtell on the Non-Navigability of the Upper Salt River (Case Nos.*
03-005-NAV and 04-008 NAV (Consolidated)) (July 2015)

1 narrow canyons.”¹⁸ Fuller 2003 at 4-15.

2 The Upper Salt has a braided pattern “that has multiple channels and sand bars and
3 gravel bars” that can shift and erode away. Schuum TR 10/20/2005:96-97 “The pattern
4 of the bed changes its characteristics not in the sense of not being braided but the position
5 of the channels and the position of the bars and the character of the bars could change.”
6 *id.*

7 In his 2015 Declaration¹⁹ (“Mussetter 2015”), Dr. Robert Mussetter described how
8 the bedrock in the Upper Salt was a dangerous impediment to navigation:

9 As is the case at many locations along the Upper Salt River, the bedrock
10 can cause sharp breaks in the longitudinal profile that create waterfalls and
11 rapids that can make navigation very challenging and dangerous, and in
12 some cases, impossible. Coarse-grained sediment and debris delivered from
13 the tributaries and side canyons often creates alluvial fans and bars that
14 constrict the river, forming rapids that also severely limit navigability.

15 Mussetter 2015 at 8.

16 **3. Rapids have always been an impediment to Navigation on the
17 Salt River**

18 The rapids that persist through the Upper Salt River have always been
19 impediments to navigation. The expert testimony and evidence in the Record all prove
20 that the bedrock outcroppings that make up the bed of the Upper Salt result in dangerous
21 rapids that would have destroyed any boat available in 1912. The United States Forest
22 Service is responsible for issuing permits and has classified many rapids in the Upper Salt
23 River. Proponents’ expert disagreed with the classifications used by the U.S. Forest
24 Service determinations, especially the rapid classifications to be 2-3 classes higher than
25 his own classifications.

26 Fuller explained that the differences between his rapid classifications, which

27 ¹⁸ *Geomorphology of the Upper Salt River. Report Prepared for SFC Engineering Company and Arizona
28 State Land Department.* Fuller, J.E. (2003) at 4-15

¹⁹ EI-C024 Mussetter, Robert *Declaration, Navigability of the Upper and Lower Salt River.* (August 2015)

1 tended to be lower than the U.S. Forest Service by as much as 3 ratings, was due to the
2 fact the U.S. Forest Service was not classifying rapids to protect people running the river,
3 but instead classified rapids with a bias towards making a river appear being non-
4 navigable. Fuller TR 10/23/2015: 951. There is no evidence in the Record and Mr.
5 Fuller presented no evidence during his testimony to support that claim.

6 Mr. Fuller also accused the Forest Service of exaggerating its descriptions of
7 rapids and falls in their publications warning people of the dangers of navigating the
8 Upper Salt would have been in 1912. Fuller TR 10/23/2015: 951-952. Fuller took it
9 upon himself to classify several rapids and based his conclusions on “the information that
10 we’ve had available from aerial photographs; maps; talking to boaters who have either
11 boated or talked to other boaters who have, which is a bit of a sensitive subject; or people
12 who have hiked along the river who are boaters and made their estimates. So there’s
13 somewhat uncertainty . . .” Fuller TR 10/20/2016 at 56. Not only are Mr. Fuller’s
14 methods of classification based on the opinions of present day recreational hikers.

15 Mr. Fuller testified that Quartzite Falls should be classified as a rolling rapid that
16 doesn’t impeded navigability while at the same time admitting that multiple people have
17 been killed at Quartzite Falls and portage was the only route around the falls before it was
18 partially destroyed in 1994. Fuller TR 5/19/2016: 4919 and 5129. After the Commission
19 reviews this evidence it will be clear that Mr. Fuller’s methods of rapid classification are
20 not reliable or useful to the Commission to determine the navigability of the Salt at the
21 time of statehood.

22 The Record does prove that the rapids in the Upper Salt made navigation
23 impossible. Dr Stanley Schumm testified that, “for the 60 miles above Roosevelt Dam
24 Spillway, which is river mile one, there’s a rapid on average every 3.3 miles . . .” –
25 Shumm TR 10/20/2005: 87-88. The Forest Service determined that in 1912 the Upper
26 Salt had multiple rapids, many of which “would have been extremely dangerous to
27 someone attempting to sustain downstream trade or travel.” Forest Service at 4.
28 Furthermore at least 12 rapids of those rapids could have “easily destroyed any boat

1 available in 1912.” *Id.*

2 No water craft capable of being used for sustained trade and/or travel at the
3 time of statehood could have gone upstream through the Salt River Canyon.
4 The cliffs at water’s edge, the swift current and numerous rapids would
5 have even precluded pulling an empty watercraft back upstream. Even
6 now, no watercraft has ever gone up the 48 miles of this section of the
7 river.

8 *Id.* at 5

9 Referring to the maps in his Declaration²⁰ Mr. Burtell summarized his findings on
10 rapids in Segments 1 and 2 stating “I think the take-home message, from my perspective,
11 on the rapids, particularly in Segments 1 and 2, is there's a high frequency of rapids,
12 certainly Class II rapids, but plenty of Class IIIs and IVs...” Burtell TR 2/23/2016:2820.
13 These types of impediments to navigation prove that the Salt Rive River in Segments 1
14 and 2 was not navigable on February 14, 1912.

15 All of the Evidence shows that Segments 1, and 2 of the Upper Salt River contain
16 “numerous rapids that would have made navigation impossible, or at the very least
17 extremely dangerous, with the watercraft that were in customary use at and prior to the
18 date of Arizona statehood on February 1912.” (Mussetter 2015 at 4).²¹

19 **IV. Conclusion: The Salt River is Neither Navigable in Fact or Susceptible to**
20 **Navigation at any time prior to or on February 14, 1912**

21 The Proponents of navigability must show by a preponderance of the evidence that
22 the River was navigable on the date of Arizona statehood, in a manner that would support
23 useful and realistic commerce or travel in boats available and commonly used at that
24 time. Proponents have failed to meet this burden. No evidence exists of Segment 1 being
25 navigable, and all parties have agreed that it is a non-navigable river in that segment.
26 Nothing exists in the Record to show that that prior to or at the time of statehood,
27 Segment 2 was ever successfully navigated for purposes of trade or travel and the

28 ²⁰ EI-C021 Part 1 *Declaration of Rich Burtell on the Non-Navigability of the Upper Salt River (Case Nos. 03-005-NAV and 04-008 NAV (Consolidated))* (July 2015)

²¹ EI-C024 Mussetter, Robert *Declaration, Navigability of the Upper and Lower Salt River.* (August 2015)

1 hydrology and geomorphology of that segment prove it was not susceptible to navigation.
2 Failure to meet their burden means that the Commission must find that the Salt River was
3 not navigable or susceptible to navigation on the date of Arizona statehood, February 14,
4 1912.

5
6 DATED this 18th of July, 2016

7
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