

1 Rodney B. Lewis, 003155
John T. Hestand, 005087
2 Timothy L. Pierson, 005081
James D. Hill, 015799
3 Ruth E. Koester, 005788
5002 N. Maricopa Road, Box 5090
4 Chandler, Arizona 85226
(520) 796-1344
5 Attorneys for the Gila River Indian Community

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6 **BEFORE THE ARIZONA NAVIGABLE STREAM**

7 **ADJUDICATION COMMISSION**

8 In re Determination of the Navigability of the) No. 03-005-NAV
Lower Salt River (from the Granite Reef Dam)
9 To the Confluence with the Gila River) **GILA RIVER INDIAN**
) **COMMUNITY'S OPENING**
10) **POST-HEARING MEMORANDUM**
)

11
12 The Gila River Indian Community respectfully submits its Opening Post-Hearing
13 Memorandum regarding this Commission's determination of whether the reach of the
14 Lower Salt River, from the Granite Reef Dam to the confluence with the Gila River, was
15 navigable, within the meaning of A.R.S. § 37-1101, as interpreted by the Court of Appeals
16 in *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P.3d 722 (2001), as of February 14,
17 1912.

18 **OVERVIEW**

19 Determination of whether a watercourse was navigable or non-navigable, on the day
20 Arizona received statehood, has significant implications on the ownership of land beneath
21 the watercourses in Arizona. If a watercourse was navigable on the date of statehood,
22 ownership of the bed transferred from the United States to the State of Arizona. If the
23 watercourse was not navigable, then ownership remained in the United States, which could
24 transfer that ownership to individuals.

1 After lying dormant for decades, the issue of the extent of the State of Arizona's
2 ownership rights in lands lying beneath watercourses raised its head in the mid-1980s. The
3 processes and procedures by which this determination is to be made have meandered
4 through the legislature and the appellate courts throughout the recent past, culminating in
5 *Defenders of Wildlife v. Hull*, 18 P.3d 722 (2001), and the most recent amendments to the
6 state statutes governing state claims to streambeds and determination of navigability.

7 The Arizona Navigable Stream Adjudication Commission is charged with the
8 responsibility of determining whether particular watercourses were navigable as of
9 February 14, 1912. See A.R.S. § 37-1128. The standard by which navigability is to be
10 determined is: "On February 14, 1912, the watercourse, in its natural and ordinary
11 condition, either was used or was susceptible to being used for travel or trade in any
12 customary mode used on water." *Defenders of Wildlife, supra*, 18 P.3d at 737. The
13 Commission has completed its public hearing as to the reach of the Lower Salt River
14 between the Granite Reef Dam and the confluence with the Gila River. Salt River Project
15 has admirably set out a detailed factual analysis demonstrating that the Lower Salt River
16 has never successfully been utilized as a highway of commerce. Rather than duplicate
17 SRP's efforts, the Community will focus its analysis on legal issues.

18 *Defenders of Wildlife v. Hull*

19 Before proceeding with an analysis of the legal and evidentiary issues specific to this
20 hearing, it is important to discuss what *Defenders of Wildlife* does and does not require from
21 the Commission. *Defenders of Wildlife* arose from a challenge that S.B. 1126 (dealing with
22 the standards for determining navigability) violated the public trust doctrine and the gift
23 clause of the Arizona Constitution. The gist of the Arizona Court of Appeal's decision was
24 that S.B. 1126 imposed evidentiary "presumptions and limitations [that] directly contradict the

1 Daniel Ball test's¹ intent that all relevant facts be considered." *Defenders of Wildlife, supra*,
2 18 P.3d at 736.

3 The Court of Appeals determined that S.B. 1126 established an excessive burden of
4 proof ("clear and convincing evidence"), set up presumptions that virtually required a
5 determination of non-navigability, and prohibited the consideration of certain types of
6 evidence. The net result was that, rather than utilizing the *Daniel Ball* test to make an
7 objective factual decision based upon all of the available evidence and legal standards, the
8 Legislature had mandated a determination of non-navigability, with the resulting loss of state
9 property that would have been protected under a proper review.

10 The Court noted that "a 'preponderance' of the evidence appears to be the standard
11 used by the courts" in determining navigability. *Defenders of Wildlife, supra*, 18 P.3d at 731.
12 Based on this guidance, the Arizona Legislature amended A.R.S. § 37-1128(A) to require that:
13 "If the preponderance of the evidence establishes that the watercourse was navigable, the
14 commission shall issue its determination confirming that the watercourse was navigable. If
15 the preponderance of the evidence fails to establish that the watercourse was navigable, the
16 commission shall issue its determination confirming that the watercourse was nonnavigable."

17 The amended A.R.S. § 37-1128(A) eliminated the specific restrictions on introduction
18 of evidence and eliminated all presumptions from the determination process, requiring the
19 Commission to "review all available evidence" before rendering its decision. The Court of
20 Appeals, quite correctly, objected to any process that interfered with a navigability decision
21 that was based upon all available evidence and a rational real-world determination of
22 navigability. S.B. 1126 had taken away the Commission's independent discretion to weigh

23
24 ¹ *The Daniel Ball*, 77 U.S. 557, 19 L. Ed. 999, 10 Wall. 557 (1870), is the United States Supreme Court
decision that first enunciated the standards to be used in determining whether a watercourse was navigable,
for purposes of federal admiralty jurisdiction, and has become the touchstone for determining navigability for
purpose of title.

1 the facts and make a reasoned decision. The amended statutes, in keeping with the Court of
2 Appeals' directives, requires the Commission to consider all of the evidence and make its own
3 decision based upon its analysis of that evidence. There is nothing in the *Defenders of*
4 *Wildlife* decision that prohibits the Commission from considering any factors that would make
5 the navigability of the Salt River in this reach, on February 14, 1912 more or less likely. All
6 that has been eliminated is the requirement that the Commission make its decision on any
7 basis other than the weight of the evidence.

8 THE EQUAL FOOTING DOCTRINE

9 The equal footing doctrine guarantees newly admitted states the same rights that were
10 enjoyed by the original thirteen states and the other previously-admitted states. *See Pollard's*
11 *Lessee v. Hagan*, 44 U.S. 212, 3 How. 212, 11 L. Ed. 565 (1845); and *Utah v. United States*,
12 482 U.S. 193, 107 S. Ct. 2318, 96 L. Ed. 2d 162 (1987). "The equal footing doctrine ensures
13 that each state shares 'those attributes essential to its equality in dignity and power with other
14 states.'" *Nevada v. Walkins*, 914 F.2d 1545 (9th Cir. 1990).

15 The original thirteen states entered the Union owning the land underneath their
16 navigable waterways. Unless it had a different use for territorial land beneath navigable
17 waters, the United States held the lands for the eventual benefit of the new state and
18 transferred title on the day of statehood. *Idaho v. United States*, 533 U.S. 262, 121 S. Ct.
19 2135, 150 L. Ed. 2d 326 (2001). At statehood, all of the remaining federally-owned lands
20 (public lands and federal reservations) were retained by the United States, including the land
21 beneath non-navigable waters. *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev.
22 1996).

23 NAVIGABILITY

24 The equal protection clause gives the impetus to the Commission's determination of

1 whether a particular watercourse was navigable or not on February 14, 1912. If the
2 watercourse was navigable, and the bed of the watercourse had not already been given to
3 another, or reserved by the United States for its own uses, then the lands underneath the
4 watercourse are the property of the State of Arizona. If the watercourse was not navigable,
5 then ownership of the bed remained with the United States, which could dispose of the bed as
6 it deemed appropriate.

7 As with many legal issues, the definition of navigability is simple, until you have to
8 actually apply it. Because *The Daniel Ball* was the genesis of the American doctrine of
9 navigability, it is the starting place for any contemporary analysis of navigability. There are
10 two basic definitions that arise out of *The Daniel Ball*:

- 11 • “Those rivers must be regarded as public navigable rivers in law which are
12 navigable in fact.”
- 13 • “And they are navigable in fact when they are used, or are susceptible of being
14 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.”

15 77 U.S. at 563.

16 The concept of navigability is used in a variety of different legal settings. Navigability
17 of watercourses is critical to the determination of state title to riverbeds. Navigability is a
18 precondition for the United States of America to have admiralty jurisdiction over shipping.
19 Navigability has serious implications on federal power under the Commerce Clause.
20 Navigability is an important issue under miscellaneous statutory schemes such as the Rivers
21 and Harbors Act and the Federal Power Authority Act. It is not surprising that the
22 “definition” of navigability can vary, depending on the purpose for which it is being
23 determined. The *Defenders of Wildlife* court suggested caution when analyzing navigability
24 cases:

1 Because of the various circumstances in which navigability is raised the cases
2 interpreting navigability “cannot be ‘simply lumped into one basket.’” *Boone*
3 *v. United States*, 944 F.2d 1489, 1499 (9th Cir. 1991 (quoting *Kaiser Aetna v.*
4 *United States*, 444 U.S. 164, 170, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)); *see*
5 *also* Glenn J. MacGrady, *The Navigability Concept in Civil and Common Law*,
6 3 Fla. St. U.L. Rev. 511, 515 (1975). Indeed, when discussing navigability,
7 any reliance on judicial precedent should be predicated on a careful appraisal
8 of the purpose for which the concept of navigability is invoked. *See id.* For
9 the present purpose, navigability is being used to determine the extent of land
10 the State of Arizona received by virtue of the equal footing doctrine.

11 18 P.3d at 729-730. The *Defenders of Wildlife* court explained that federal, not state law,
12 governs in this area:

13 “The standard of navigability for equal footing claims is established by federal
14 law.” [Citations omitted.] Indeed, the assessment of navigability for the
15 purpose of determining title to land under watercourses at the time of statehood
16 is a matter of federal rather than state law.

17 18 P.3d at 730.

18 “The question whether a watercourse is navigable is one of fact. The burden rests on
19 the party asserting navigability unless the court takes judicial notice of the status of the
20 watercourse.” *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837
21 P.2d 158 (App. 1991). *See State of North Dakota ex rel. Board of University and Schools*,
22 770 F. Supp. 506 (D. N.D. 1991); *Mundy v. United States*, 22 Cl. Ct. 33 (Cl. Ct. 1990).

23 In *United States v. Appalachian Electric Power Company*, 311 U.S. 377, 404, 61 S.
24 Ct. 291, 85 L. Ed. 245 (1940), the United States Supreme Court emphasized that each
determination of navigability was case specific: “Both the standards and the ultimate
conclusion involve questions of law inseparable from the particular facts to which they are
applied.” The Court explained that there is no “formula which fits every type of stream under
all circumstances and at all times.”

The test of navigability, against which this Commission must measure the evidence,
has four distinct elements—each of which must be present before a watercourse can be held

1 navigable for purposes of title. The watercourse:

- 2 • in its natural and ordinary condition
- 3 • either was used or was susceptible to being used for travel or trade
- 4 • in any customary mode used on water
- 5 • on February 14, 1912.

6 Ordinary and Natural Condition

7 Navigability, for title purposes, must be measured against the ordinary and natural
8 condition of the watercourse. What does “ordinary and natural condition” encompass?
9 While *Appalachian Electric Power Company* was a federal power navigability case, it
10 provided a simple definition: “‘Natural or ordinary conditions’ refers to the volume of water,
11 the gradients and the regularity of the flow.” *Supra*, 311 U.S. at 407. In *State of Oklahoma v.*
12 *State of Texas*, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922), the United States Supreme
13 Court discussed physical characteristics that went into determining the ordinary and natural
14 condition. These included: the continuous or dependable volume of water; the amount of and
15 timing of rain; how often was the river bed dry, the water level shallow or the water level
16 swift and turbulent; whether there was a permanent or stable channel; the amount of water
17 provided by tributaries and the timing of that water’s arrival; whether there was an extreme
18 variation between high and low flow; the gradient of the river; and the extent and stability of
19 natural barriers such as sand bars. *See also United States v. Crow, Pope & Land Enterprises,*
20 *Inc.* 340 F. Supp. 25, 35 (D. Ga. 1972) (the natural and ordinary condition of the river, *i.e.*,
21 volume of water, gradient, and regularity of flow). *State of Alaska v. United States*, 662 F.
22 Supp. 455, 463 (D. Alaska 1987), discussed “natural and ordinary condition” “ in terms of
23 location and general physical characteristics such as water volume, gradients, geology and
24 general weather and water level conditions.”

1 *States v. State of Oregon*, 295 U.S. 1, 22, 55 S. Ct. 610, 79 L. Ed. 1267 (1935), the United
2 States Supreme Court found a lake non-navigable where “[o]nly four motorboats appear to
3 ever have been used, and then only to a limited extent, when conditions were favorable.” The
4 Supreme Court wrote: “At most, the evidence shows such an occasional use of boats,
5 sporadic and ineffective, as has been observed on lakes, streams, or ponds big enough to float
6 a boat, but which nevertheless were held to lack navigable capacity.” *Id.* The Court found
7 that use of light draft boats “most in use being canvas canoes or homemade rowboats, drawing
8 between one and six inches of water” [295 U.S. at 21] did not establish navigability—noting
9 that the “record is replete with evidence showing that many difficulties were customarily
10 encountered in the use of boats.” 295 U.S. at 22.

11 *Hagan v. Delaware Anglers’ & Gunners’ Club* 655 A.2d 292, 293 (Del. 1995),
12 explains factors to be considered in determining navigability, including “the manner and
13 extent of actual use of the waterway; and the ease or difficulty of navigation, including, but
14 not limited to, the existence of any serious impediments to navigation.”

15 In *Puget Sound Power & Light Company v. Federal Energy Regulatory Commission*,
16 644 F.2d 785, 787 (1981), the Ninth Circuit Court of Appeals wrote:

17 If the waterway is merely capable of exceptional transportation during periods
18 of high water, it is not navigable. “The mere fact that logs, poles, and rafts are
19 floated down a stream occasionally and in times of high water does not make it
a navigable river.” *United States v. Rio Grande Dam & Irrigation Co.* 174 U.S.
690, 698, 19 S. Ct. 770, 773, 43 L. Ed. 1136 (1899).

20 In *U.S. v. Crow, Pope & Land Enterprises, Inc.*, 340 F. Supp. 25, 29 (1972), the
21 District Court explained:

22 The mere fact that a river will occasionally float logs, poles and rafts
23 downstream in times of high water does not make the river navigable. *United*
24 *States v. Rio Grande Dam & Irrig. Co.*, *supra*, and [i] is not however, as Chief
Justice Shaw said (*Rowe v. [Granite] Bridge Co.*, 21 Pick., 344), “every small
creek in which a fishing skiff or gunning canoe can be made to float at high
water, which is deemed navigable, but, in order to give it the character of a

1 navigable stream, it must be generally and commonly useful to some purpose
2 of trade or agriculture.”

3 In *State of North Dakota ex rel. Board of University and Schools, supra*, the court
4 found that isolated tie drives (conducted with difficulty at times of high water) and isolated
5 use of the river by Indians in the 1700s did not prove that the river was used as a “highway for
6 useful commerce.” In *United States v. Utah*, 283 U.S. 64, 86-88, 51 S. Ct. 438, 75 L. Ed. 844
7 (1931), the United States Supreme Court explained:

8 The use of that portion of the river for transportation boats has been
9 exceptional and necessarily on high water, was found impractical, and was
10 abandoned. The rafting of logs or freight has been attended with difficulties
precluding utility. There was no practical susceptibility to use as a highway
of trade or travel.

11 Evidence of successful use of the Lower Salt River as a highway of commerce is
12 lacking. The Community specifically agrees with the analysis of J E Fuller/Hydrology &
13 Geomorphology, Inc. that “[d]espite the presence of between 80,000 and 200,000 residents in
14 the area in prehistoric times, no evidence exists that any of those individuals ever used or even
15 tried to use the Lower Salt River as a ‘highway for commerce.’”²

16 Euro-American settlers might try and fail to navigate the Lower Salt River, and, in the
17 process, have their boats destroyed, need to be rescued, or die. The Pima knew better. The
18 Pima Indians and their ancestors, the HoHoKam, have lived and farmed in the area of the Gila
19 and Salt Rivers for over two thousand years. The Pima name for themselves is Akmiel
20 O’Odham—the River People. If the Lower Salt River was navigable, the Pimas would have
21 navigated it. Instead, they recognized that rather than being a “highway for commerce,” the
22 Lower Salt River was an artery (being the lifeblood of water) through the desert and to their
23 fields and mesquite orchards. The Pimas were farmers, not boaters, for a reason—the Lower

24

² Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to Gila River Confluence 2-1 (Sept. 1996) (EI 7).

1 Salt River could sustain crops, but not boats.

2 Clearly, the parties advocating navigability also found no evidence of a Pima or
3 Maricopa Indian (or any other Indian for that matter) using the Lower Salt River to travel or
4 conduct commerce. Courts commonly consider Indian aboriginal travel on watercourses as
5 evidence of navigability. There can be no stronger evidence that the Lower Salt River was not
6 susceptible of navigation than the fact that the people who lived with and depended upon the
7 River for over twenty centuries never navigated it.

8 While it is correct that a watercourse can be considered navigable, even if it has never
9 been navigated, so long as navigation could have been conducted, this exception to actual use
10 has no applicability to the Lower Salt River in 1912. It is one thing to argue that a small,
11 isolated watercourse is susceptible of navigation, even though it has never actually been used.
12 Perhaps no one had any incentive to try. However, in 1912, the Lower Salt River was not a
13 small isolated watercourse. By 1912, thousands of Euro-American settlers had supplanted
14 the Pima and Maricopa Indians. The Euro-American settlers had the incentive to use a
15 navigable waterway. The Euro-American settlers tried to use the Lower Salt River for
16 navigation, and, after trying and failing, the settlers recognized that the Lower Salt River's
17 uses did not include navigation. In *United States v. Holt State Bank, supra*, the United States
18 Supreme Court noted that scarcity of navigation in an isolated area did not necessarily
19 indicate that the watercourse was not navigable. The Court explained: "True, the navigation
20 was limited, but this was because trade and travel in that vicinity were limited." 270 U.S. at
21 57. Trade and travel were not limited in the area of the Lower Salt River in 1912.

22 To be a highway of commerce, and to be navigable, it is necessary that there be a
23 regular, predictable ability to actually travel on the waterway. The instances of "navigation"
24 presented before this Commission are reminiscent of the people who go over Niagara Falls in

1 a barrel. The person manages to get from one place to another, but it hardly constitutes a
2 useful highway. As explained by the Ninth Circuit in *State of Alaska v. United States*, 754
3 F.2d 851, 854 (1985), navigation “necessarily involves the utilization of the waterway as a
4 path between two points.” “[T]he crux of the test is still the requirement that the body of water
5 be susceptible of use as a highway or channel for commerce on water.” *Id.* “[T]he central
6 theme remains movement of people or goods from point to point on the water.” *Id.* In 1912,
7 there was no actual or possible movement of people or goods from point to point on the water
8 of the Lower Salt River.

9 **In The Customary Modes Of Trade And Travel On Water**

10 The third prerequisite to a finding of navigability for title is that the travel on the
11 highway of commerce, in its ordinary and natural condition, be in the customary modes of
12 trade and travel on the water; i.e. “transportation methods in use at the time of statehood.”
13 *State of Alaska v. United States*, 754 F.2d 851, 854 (9th Cir. 1985). The Community does not
14 dispute that the vehicles used by the Euro-American settlers in their attempts at navigation in
15 the late 1800s and early 1900s were customary modes of trade and travel on the water, they
16 just were not successful. The failed attempts conclusively established that travel and trade
17 could not be conducted through the customary modes on the Lower Salt River in 1912.

18 **On February 14, 1912**

19 Among the most significant differences between the various navigability tests are the
20 temporal requirements. Navigability for purposes of admiralty jurisdiction is based on current
21 conditions, since the government is seeking to enforce matters that directly affect navigation
22 contemporaneously or in the near future. Navigability for purposes of Commerce Clause
23 jurisdiction is based on the past, basically if it was every navigable, it remains navigable and
24 the United States can exercise its control of interstate commerce. Navigability for purposes of

1 Rivers and Harbors and Power is concerned with the present and the future: is it navigable
2 now or can it be altered to make it navigable.

3 Navigability for title “must exist at the time the State is admitted into the Union.”
4 *State of Oregon v. Riverfront Protection Association*, 62 F.2d 792, 794 (9th Cir. 1982). “We
5 must bear in mind that the issue is one of potential commercial use and hence navigability at
6 the time of statehood, not in the present day.” *State of Alaska v. United States*, 662 F. Supp.
7 455 (1987). “Under the Equal Footing Doctrine, title to the beds of those rivers which were
8 navigable at the time of statehood passes to the state upon admission to the union. Title to the
9 beds of rivers that were not navigable at the time of statehood remains in the United States.
10 *State of North Dakota ex rel. Board of University and Schools*, 770 F. Supp. 506, 507 (1991).

11 In reviewing the navigability for title decision involving some shallow lakes in Oregon, the
12 United States Supreme Court examined the evidence and wrote: “The conclusion must be that
13 at the time of admission to statehood, the bodies of water within the meander line were
14 shallow... .” *United States v. State of Oregon*, 295 U.S. 1, 16, 55 S. Ct. 610, 55 S. Ct. 610.

15 In order to be navigable for the purpose of passing title to the streambed to the state,
16 the watercourse had to be a highway of commerce that was used or capable of being used for
17 trade and travel, in its ordinary and natural condition—on the day the state was admitted into
18 the Union. For purposes of navigability for title, it does not matter that a watercourse may
19 have been navigable 50 years earlier, and it does not matter that it might again be navigable
20 50 years in the future. In the case at hand, the Lower Salt River had to be navigable on
21 February 14, 1912. If it was not, then title to the streambed did not pass to the State of
22 Arizona. Evidence of past navigability is only useful in a navigability for title case to the
23 extent that it establishes that having been navigable in the past, the watercourse remained
24 navigable on the day of statehood.

1 The United States owned the property in question, the beds of watercourses. The
2 United States made the rules about whether or not it would give any of the beds of the
3 watercourses to the states. The rule the United States made was that the watercourse had to be
4 navigable on the day the state was admitted into the Union. This is not a requirement that can
5 be waived or ignored. As has been established earlier in this memorandum, the term
6 “ordinary and natural condition” deals with physical matters such as regularity of extremely
7 high and low flows, the volume of typical flows, and existing barriers to navigation. These
8 physical matters are the ones that existed on February 14, 1912, not conditions that might
9 have existed in 1850 or 1200.

10 **NEITHER THE UNITED STATES OF AMERICA NOR THE ARIZONA COURTS**
11 **TREATED THE LOWER SALT RIVER AS NAVIGABLE**

12 *United States v. State of Oregon*, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935),
13 was a navigability for title case in which the United States was seeking to quiet title to the bed
14 of several lakes in a bird reserve, over the objection of the State of Oregon, which claimed
15 that the lakes were navigable. At 295 U.S. 23, the Court wrote: “It is not without significance
16 that the disputed area has been treated as nonnavigable both by the Secretary of the Interior
17 and the Oregon courts.” In *State of Utah By and Through Division of State Lands v. United*
18 *States*, 624 F. Supp. 622 (1983), in a navigability for title case involving a lake bed, the
19 District Court for Utah noted that documents from the USGS mentioned the 1889 withdrawal
20 specifically including the lake in question. The Court wrote at 624 F. Supp 626: “Because
21 these documents reflect the involved agency’s contemporaneous interpretation of the scope of
22 the withdrawal, they are entitled to deference.” In *Amite Gravel & Sand Co. v. Roseland*
23 *Gravel Co.*, 87 So. 718 (La. 1921) the Court noted “that the United States government has not
24 considered or treated the river as navigable there or for some distance towards its mouth, for it

1 has authorized the construction thereon of a number of stationary bridges... .”

2 Its actions demonstrate unequivocally that, as of February 14, 1912, the United States
3 did not consider the Lower Salt River to be navigable. Pursuant to the 1902 Reclamation Act,
4 the United States of America, using federal money, constructed Roosevelt Dam. Roosevelt
5 Dam is on the Salt River, upstream from the stretch between Granite Reef Dam and the
6 confluence with the Gila River. Roosevelt Dam started storing water in 1910 and was
7 completed in 1911, before statehood. Roosevelt Dam, on February 14, 1912, was storing the
8 water of the Salt River thereby preventing its natural flow. No storage or release decisions
9 were made with regard to whether they helped or hindered navigability. Water was stored
10 when it was not needed for agriculture and it was released when it was needed for agriculture.

11 Even if the Lower Salt River had been navigable in 1909, that navigability would have
12 ceased by 1910 and was undeniably destroyed by 1912. The United States has the power and
13 authority to destroy the navigability of any river that it owns and controls, before granting
14 statehood to a state. If the United States changed a river from navigable to non-navigable,
15 prior to statehood, on the day of statehood, the state received a non-navigable stream and no
16 title to the streambed.

17 There can be no reasonable dispute that, following the completion of Roosevelt Dam;
18 the ordinary and natural condition of the Lower Salt River was completely and totally unfit as
19 a highway for commerce, using any mode of transportation.

20 Additionally, the Arizona Territorial Courts specifically determined that the Salt River
21 was non-navigable before statehood. On March 1, 1910, well before statehood, the District
22 Court of the Territory of Arizona, entered its decision in *Hurley v. Abbott (the Kent Decree)*.
23 The *Kent Decree* quantified the water rights of farmers in the Salt River Valley who had taken
24 title to their property under the Desert Land Act. Many, if not most of the parties to the Kent

1 Decree diverted their water from the stretch of the Lower Salt River between Granite Reef
2 Dam and the confluence with the Gila River. The *Kent Decree* found at page 3: “Entering the
3 valley from the northeast is the Salt river, a non-navigable stream.” At page 8 of his *Decree*,
4 Judge Kent wrote: “The right of the owner of land to divert from a natural non-navigable
5 stream the flow of the water therein and to apply the same to the beneficial use upon such land
6 is and always has been recognized in this Territory. Such diversion and use is termed an
7 appropriation of water.”

8 The decision that the Salt River was not navigable was a necessary jurisdictional
9 component to the *Kent Decree*. Congress adopted the Desert Land Act in 1877. At section 21
10 it provides:

11 It shall be lawful ... to file a declaration ... to reclaim a tract of desert
12 land not exceeding one-half section, by conducting water upon the
13 same.... Provided, however, That the right to the use of the water ...
14 shall depend upon bona fide prior appropriation; ... and all ... water of
15 all lakes, rivers, and other sources of water supply upon the public
16 lands *and not navigable*, shall remain and be held free for the
17 appropriation and use of the public for irrigation, mining and
18 manufacturing purposes subject to existing uses. [Emphasis added.]

19 Judge Kent could not have quantified the water rights of many of the parties to *Hurley*
20 *v. Abbott* if the waters of the Lower Salt River had been navigable. The United States owned
21 virtually all of the land and water in the Territory of Arizona. It could and did choose to split
22 the land and the water up. The United States kept the desert lands in the public domain rather
23 than giving them to Arizona. The United States gave Arizona the beds beneath navigable
24 waters. On the other hand the United States kept the navigable waters and allowed the State
ownership of the non-navigable waters.

25 NEITHER THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION
26 NOR THE STATE OF ARIZONA HAVE ANY JURISDICTION OVER THE BED AND
27 BANKS OF PORTION OF THE LOWER SALT RIVER BETWEEN GRANITE REEF

GILA RIVER INDIAN COMMUNITY


Rodney B. Lewis
Attorney for the Gila River Indian Community

ORIGINAL AND TEN COPIES of the foregoing
hand-delivered the 9th day of June, 2003, to:

Arizona Navigable Stream Adjudication Commission
1700 West Washington
Phoenix, AZ 85007

AND A COPY of the foregoing mailed the
10th day of June, 2003, to:

Sally Worthington
Maricopa County
Helm & Kyle, Ltd
1619 E. Guadalupe, #1
Tempe, AZ 85283

Deborah Abele
Papago Salado Assoc.
1300 N. College
Tempe, AZ 85281

Eran Mahrer
Pinnacle West Capital Corp.
400 N. 5th Street
Phoenix, AZ 85007

Allen Gookin
Gila River Indian Community
4203 N. Brown Ave.
Scottsdale, AZ 85259

Diane McCarthy
Westmarc, City of Avondale,
Phoenix International Raceway
4949 W. Indian School Road
Phoenix, Arizona 85031

Vera Kornylak
Defenders of Wildlife, Jerry Van Gasse,
Jim Vaaler, Donald Steuter

1 18 E. Ochoa St.
Tucson, AZ 85701-1915

2 Sandy Bahr
3 Sierra Club
4 202 E. McDowell Road
5 Suite 277
6 Phoenix, AZ 85004

7 Scott Higginson
8 Four Square Group
9 RWCD
10 One North Central Ave.
11 Suite 1200
12 Phoenix, AZ 85004

13 Lyn White
14 Cynthia Chandley
15 Bill Staudenmaier
16 Phelps Dodge
17 1 North Central, Suite 1200
18 Phoenix, AZ 85004

19 Mike Rice
20 Cheryl Doyle
21 V. Ottozawa Chaioprov
22 State Land, ASCD
23 1616 W. Adams
24 Phoenix, AZ 85007

John Helm
Maricopa County
1227 E. Balboa
Tempe, AZ 85282

Doug Littlefield
Salt River Project
6207 Snake Road
Oakland, CA 94611

Douglas K. Martin
Kerry Ugalde
Arizona Mine Inspector
1800 W. Washington, # 400
Phoenix, AZ 85007

James Griffith
James F. Polise

- 1 Polise Pietzson
William & Nolan
- 2 2702 N. Third St., #3000
Phoenix, AZ 85004
- 3
- 4 Walter W. Meeh
Arizona Utility Investors Association
2100 N. Central Ave, Suite 210
- 5 Phoenix, AZ 85004
- 6 Shannon Wilhelmsen
City of Tempe
7 31 E. 5th Street
8 Tempe, AZ 85281
- 9 Roe Arnett
East Valley Partnership
550 W. Baseline
- 10 #102-102
Mesa, AZ 85210
- 11 Julie Lemmon
12 Flood Control District
Of Maricopa County
- 13 930 S. Mill Ave.
Tempe, AZ 85281
- 14 Doug Kupol
15 Ellen Endebrock
Jim Callahan
- 16 City of Phoenix
200 W. Washington
- 17 Phoenix, AZ 85003
- 18 Robert Sejkorn
Arizona State Parks
- 19 1300 W. Washington
Phoenix, AZ 85007
- 20 Richard G. Perreault
21 Flood Control District
Of Maricopa County
- 22 2801 W. Durango
Phoenix, AZ 85009
- 23 Michael Dendy
24 Lemex
Lewis and Roca

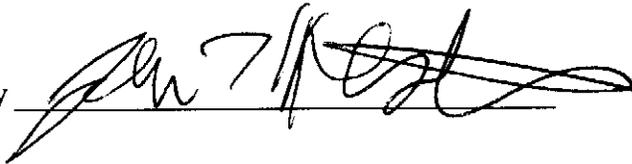
- 1 40 N. Central Ave.
Phoenix, AZ 85004
- 2
- 3 Claudia Walters
Keno Hawker
City of Mesa
- 4 20 E. Main St., Suite 750
Mesa, AZ 85201
- 5
- 6 Rusty Bowers
Arizona Rock Products Assoc.
916 W. Adams
- 7 Phoenix, AZ 85007
- 8
- 9 Jim Danninor
MVWCDD
P. O. Box 70
Salome, AZ 85348
- 10
- 11 Jon Fuller
JEF / H & G
6101 S. Rural, #110
- 12 Tempe, AZ 85283
- 13
- 14 Diane Flaan
Land Arizona Finance Group
1550 N. Central Ave.
Phoenix, AZ 85025
- 15
- 16 Bill Werner
Arizona Game & Fish Dept
2221 W. Greenway Road
- 17 Phoenix, AZ 85053
- 18
- 19 Charlotte Benson
City of Tempe
P.O. Box 5002
Tempe, AZ 85280
- 20
- 21 Mark McGinnis
Salt River Project
Salmon, Lewis & Weldon, P.L.C.
- 22 2850 E. Camelback Road, Site 200
Phoenix, AZ 85016
- 23
- 24 Win Higal macson
FCDMC

- 1 275 Hereford
Camp Verde, AZ 86322
- 2
- 3 Ronald K. Miller
Fort McDowell Sand & Gravel
P.O. Box 17150
- 4 Scottsdale, AZ 85269
- 5 Charles Cuhoy
City of Mesa
- 6 Mesa City Attorney's Office
P.O. Box 1466
- 7 Mesa, AZ 85211-1466
- 8 Kathy Stevens
817 W. Watson Dr.
- 9 Tempe, AZ 85283
- 10 Dave Nichols
TRW
- 11 11202 E. Germann Road
Queen Creek, AZ 85242
- 12
- 13 Roy Pierpoint
30125 W. Pierpoint Road
Arlington, AZ 85322
- 14
- 15 Lori L. Pace
6727 N. 26th Ave.
Phoenix, AZ 85017
- 16
- 17 Jeannette Fish
Maricopa County Farm Bureau
4001 E. Broadway, #B-9
- 18 Phoenix, AZ 85040
- 19 Wayne Stamp
Frank Vallie
- 20 Mesa Materials
3410 N. Higley Road
- 21 Mesa, AZ 85215
- 22 Eric Kamienski
City of Tempe
- 23 P.O. Box 5002
Tempe, AZ 85042
- 24

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Stan Schumm
Salt River Project
1308 Rollingwood
Fort Collin, CO 85025-1946

By

A handwritten signature in black ink, appearing to read 'Stan Schumm', is written over a horizontal line. The signature is somewhat stylized and cursive.