



statehood or at any time. Lacking evidence of navigability, the Department and Defenders attempt to stretch Arizona's navigability test beyond the reach of judicial precedent and, with Defenders' "water as commerce" argument, past the point of common sense.

Accordingly, Phelps Dodge joins in the reasoning and conclusions of SRP's Responsive Post-Hearing Memorandum, with the following points offered as additional support for a request that the Commission determine the Lower Salt River is not navigable.

**I. The Lower Salt River Never Was "Susceptible" to Navigation**

A river is navigable if at the time of statehood it actually "was used or was susceptible to being used, in its ordinary and natural condition" for "trade and travel on water." See A.R.S. § 37-1101(5). Because there is no any evidence that the Lower Salt River actually was navigated as of February 14, 1912, the Department and Defenders ask the Commission to assume the river was susceptible to navigation. However, neither the facts nor the law supports the Department's and Defenders' bootstrapped conclusions. The Lower Salt River never was even susceptible to navigation.

The Department and Defenders ask the Commission to assume that trade and travel could have been sustained on the Lower Salt River before dams and irrigation diversions were established decades prior to statehood. See Department's Opening Memo. at 7; Defenders' Opening Memo at 14. Phelps Dodge agrees with SRP that the Commission does not need to guess what "ordinary and natural" means, or what the Lower Salt River's "ordinary and natural condition" may have been in order to make its navigability determination. First, speculation about the river's "ordinary and natural condition" deviates from both the language of the navigability statute and the purpose of the equal footing doctrine. Arizona's navigability statute specifies "February 14, 1912" as the exact date when the Lower Salt River's potential for trade

and travel on water must be evident. See A.R.S. § 37-1101(5). Defenders wants the Commission to consider the condition of the Lower Salt River only before 1870. See Defenders' Opening Memo. at 11, 14. The Department refers to "indelible navigability" and tries to convince the Commission that even changes in the Lower Salt River's flow before statehood are not relevant. See Department's Opening Memo. at 4-5 (citing State v. Bonelli Cattle Co., 107 Ariz. 465, 468, 489 P.2d 699, 702 (1971) (finding that dams built on the Colorado River after statehood do not affect its navigability). The Commission cannot and should not deviate from the February 14, 1912 timeframe. The equal footing doctrine resolves claims to land title, title which transferred, if at all, only on February 14, 1912, and not earlier.

More importantly, the Department and Defenders offer no evidence to show that the Lower Salt River was susceptible to navigation decades before statehood. Although they ask the Commission to picture the Lower Salt River as wider, deeper, and more evenly flowing than it ever has been, their evidence consists of inappropriate inferences from statistics and silence. For example, both the Department and Defenders list a series of estimated or "reconstructed" streamflow averages, apparently to show the volume of water in the Lower Salt River beginning around 1889. See Department's Opening Memo. at 12-13; Defenders' Opening Memo. at 15. Defenders is so eager for a bright-line rule that it argues that a river could be determined susceptible to navigation if it had "an annual flow rate of 1,000" cubic-feet-per-second at any time. See Defenders' Opening Memo. at 15, n.8. Even if navigability could be determined according to such bright-line rules, the evidence before this Commission is that the Lower Salt River is and always has been a wildly variable stream. See SRP Opening Memo. at 14-18 (highlighting and summarizing evidence); see also April 7, 2003 Transcript at 194-99 (testimony of Stanley Schumm). Statistical averages fail to show the violent floods and braided channels

that characterized the Lower Salt River well before irrigators and dam-builders began the practices that were established before Arizona's statehood. See April 7, 2003 Transcript at 196-97 (testimony of Stanley Schumm). Furthermore, the Commission has received testimony from the State Land Department's own expert cautioning against relying upon streamflow averages to estimate the Lower Salt River's volume. See April 7, 2003 Transcript, at 62-64 (testimony of Jon Fuller). Annual averages do not reflect the river's extreme fluctuations from reach to reach and season to season, and therefore do not demonstrate that trade and travel could have been conducted on the Lower Salt River even before the dams and irrigation diversions established prior to statehood were in place.

The Department also makes inappropriate inferences regarding the regularity of the Lower Salt River's streamflow. It claims that the river must have flowed year-round because early explorers did not report that it ran dry. See Department's Opening Memo. at 13 (citing State Land Department Report at 7-10). However, it is impossible to tell from the evidence before the Commission how much time each explorer spent along the Lower Salt River or for what purpose he explored it. See State Land Department Report, at 3-14 through 3-15). The Commission does not have enough information about each of those sources to assume that they all had the opportunity to observe the Lower Salt River chronically running dry, or that they all had reason to comment on such a phenomenon if they did observe it. Therefore, the Commission should not infer anything about the condition of the Lower Salt River from the silence of historical sources.

People have lived near the Lower Salt River for thousands of years, and yet the Department and Defenders are unable to show that any of these nearby residents conducted or could have conducted their trade or transportation on the river itself. By focusing exclusively on

misleading statistical measures and the silence of historical accounts on a single, narrow point, the Department and Defenders ignore the actual history of the River. Ultimately, the Department and Defenders have not shown that the Lower Salt River was even susceptible to navigation at any point in time, much less that it was actually used in navigation.

**II. Defenders' "Water Is Commerce" Shows Their Willingness to Stretch the Law.**

Defenders' Opening Post-Hearing Memorandum concludes with a novel argument that the Lower Salt River may be determined navigable because water itself is an article of commerce carried by the river. See Defenders' Opening Memo. at 19-21. Defenders' theory is disconnected from over 100 years of judicial precedent addressing navigability under the equal footing doctrine. Phelps Dodge agrees with SRP that this is an illogical and unsupportable basis for a navigability determination. While the Commission should reject Defenders' argument, the fact that Defenders made such an argument is telling. If the actual test for navigability were satisfied, Defenders would have no need to invent an entirely new navigability theory.

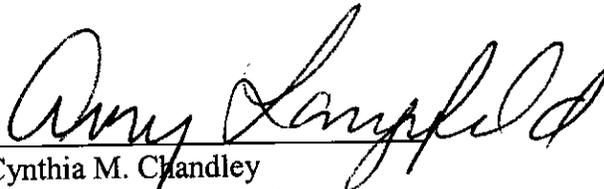
**III. Conclusion**

Defenders and the Department have failed to show by a preponderance of the evidence that the Lower Salt River was navigable. Phelps Dodge asks the Commission to determine the Lower Salt River non-navigable.

...  
...  
...  
...

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of August, 2003.

RYLEY CARLOCK & APPLEWHITE

By 

Cynthia M. Chandley  
L. William Staudenmaier  
Amy K. Langenfeld  
One North Central Avenue, Suite 1200  
Phoenix, Arizona 85004-4417  
Attorneys for Phelps Dodge Corporation

Original and seven copies HAND DELIVERED  
this 11<sup>th</sup> day of August, 2003, to

Arizona Navigable Stream Adjudication Commission  
1700 West Washington  
Room 304  
Phoenix, Arizona 85007

AND one copy MAILED  
this 11<sup>th</sup> day of August, 2003, to

Curtis A. Jennings, Esq.  
Jennings, Haug & Cunningham  
2800 North Central Avenue  
Suite 1800  
Phoenix, Arizona 85004-1049

Laurie A. Hachtel  
Tom Shedden  
Arizona Attorney General's Office  
1275 West Washington Street  
Phoenix, Arizona 85007-2997

Vera Kornylak  
Joy E. Herr-Cardillo  
Timothy M. Hogan  
Arizona Center for Law in the Public Interest  
18 East Ochoa Street  
Tucson, Arizona 85701

Sally Worthington  
John Helm  
Helm & Kyle, Ltd.  
1619 East Guadalupe  
Suite No. 1  
Tempe, Arizona 85283

Sandy Bahr  
202 East McDowell Road  
Suite 277  
Phoenix, Arizona 85004

Julie Lemmon  
930 South Mill Avenue  
Tempe, Arizona 85281

Michael Dendy  
Lewis and Roca  
40 North Central Avenue  
Phoenix, Arizona 85004

M. Byron Lewis  
John B. Weldon, Jr.  
Mark A. McGinnis  
Salmon, Lewis & Weldon, P.L.C.  
2850 East Camelback Road  
Suite 200  
Phoenix, Arizona 85016

Charlotte Benson  
P.O. Box 5002  
Tempe, Arizona 85280

Charles Cahoy  
P.O. Box 1466  
Mesa, Arizona 85211-1466

Jim Callahan  
200 West Washington  
Suite 1300  
Phoenix, Arizona 85003

John Hestand  
5002 North Maricopa Road  
Chandler, Arizona 85226-5177

Michael J. Pearce  
Fennemore Craig  
3003 North Central Avenue  
Suite 2600  
Phoenix, Arizona 85012-2913

James T. Braselton  
Marical Weeks McIntyre & Friedlander PA  
2901 North Central Avenue  
Suite 200  
Phoenix, Arizona 85012-2705

Steve Wene  
Moyes Storey PA  
3003 North Central Avenue  
Suite 1250  
Phoenix Arizona 85012

*Sandra L. Epperson*