

received

9/9/12



1 John B. Weldon, Jr., 003701
2 Mark A. McGinnis, 013958
3 Scott M. Deeny, 021049
4 **SALMON, LEWIS & WELDON, P.L.C.**
5 2850 East Camelback Road, Suite 200
6 Phoenix, Arizona 85016
7 (602) 801-9060
8 jbw@slwplc.com
9 mam@slwplc.com
10 smd@slwplc.com

11 *Attorneys for Salt River Project Agricultural*
12 *Improvement and Power District and Salt*
13 *River Valley Water Users' Association*

14 **BEFORE THE ARIZONA NAVIGABLE STREAM**
15 **ADJUDICATION COMMISSION**

16 In re Determination of Navigability of
17 the Lower Salt River, from Granite Reef
18 Dam to the Gila River Confluence

No. 03-005-NAV

19 **SALT RIVER PROJECT'S**
20 **MEMORANDUM REGARDING**
21 **WHETHER LOWER SALT RIVER**
22 **WAS NAVIGABLE IN ITS**
23 **"ORDINARY AND NATURAL**
24 **CONDITION"**

25 Pursuant to the Commission's order at its meeting held on June 29, 2012, the Salt
26 River Project Agricultural Improvement and Power District and Salt River Valley Water
27 Users' Association (collectively, "SRP") submit their memorandum regarding whether the
Lower Salt River ("Lower Salt") was navigable in its "ordinary and natural condition." See
State v. Arizona Navigable Stream Adjudication Comm'n, 224 Ariz. 230, 229 P.3d 242 (App.
2010) ("*State v. ANSAC*"). The Lower Salt was not navigable in its "ordinary and natural
condition," or in any other condition.

28 **I. The Proponents of Navigability Bear the Burden of Proving that the Lower Salt is**
29 **Navigable.**

30 In prior decisions, the Arizona courts have held the proponents of navigability bear the
31 burden of proving that a river is navigable. See *Arizona Ctr. for Law in the Public Interest v.*

1 *Hassell*, 172 Ariz. 356, 363 n.10, 837 P.2d 158, 165 n.10 (App. 1991); *Land Dep't v.*
2 *O'Toole*, 154 Ariz. 43, 46 n.2, 739 P.2d 1360, 1363 n.2 (App. 1987); *Defenders of Wildlife v.*
3 *Hull*, 199 Ariz. 411, 420, 18 P.2d 722, 731 (App. 2001). The Arizona statutes further support
4 this allocation of the burden. In order for the Commission to determine that a particular
5 watercourse is "navigable," the proponents of navigability must establish that fact by a
6 "preponderance of the evidence." See A.R.S. § 37-1128(A). If sufficient evidence is not
7 presented to show navigability for a particular watercourse, the Commission must find the
8 watercourse non-navigable. *Id.*

9 **II. The Court of Appeals' Decision Requires the Commission to Consider the Lower**
10 **Salt in Its "Ordinary and Natural Condition."**

11 At least for purposes of the present phase of this proceeding, the Arizona Court of
12 Appeals' decision in *State v. ANSAC* is controlling law that the Commission must follow.
13 224 Ariz. at 230, 229 P.3d at 242.¹ Relying in large part upon the dictionary definition of
14 "natural," the court found that the Lower Salt must be considered as if it were "untouched by
15 civilization." *Id.* at 241, 229 P.3d at 253. The court stated: "[W]e conclude that ANSAC
16 was required to determine what the River would have looked like on February 14, 1912, in is
17 ordinary (i.e., usual, absent major flooding or drought) and natural (i.e., without man-made
18 dams, canals, or other diversions) condition." *Id.* Although the court correctly determined
19 that ANSAC (in its September 2005 final report) had taken into consideration the impact of
20 Roosevelt Dam on the character of the Lower Salt, *id.* at 240, 229 P.3d at 253, the court found
21 insufficient evidence in the report to conclude that the Commission also had considered the
22 impact of other man-made dams and diversions. *Id.*

23 In addressing what constituted the "ordinary and natural condition" of the Lower Salt,
24 the Court of Appeals first started with the time "before the Hohokam people arrived many

25 _____
26 ¹ The Arizona Supreme Court has not yet addressed the "ordinary and natural" issue. The Court
27 denied discretionary review of the Court of Appeals' decision in *State v. ANSAC*, and the case was
remanded to the superior court and then to the Commission for further proceedings. 224 Ariz. at 245,
229 P.3d at 257.

1 centuries ago and developed canals and other diversions that actively diverted the River.”
2 *State v. ANSAC*, 224 Ariz. at 242, 229 P.3d at 254. Recognizing that “little if any historical
3 data exists from that period” and that the Lower Salt “largely returned to its natural state”
4 after the Hohokam disappeared, the court found that “the River could be considered to be in
5 its natural condition after many of the Hohokam’s diversions had ceased to affect the River,
6 but before the commencement of modern-era settlement and farming in the Salt River Valley.
7 . . .” *Id.*

8 Although the Court of Appeals determined that “evidence from that early period
9 should be considered by ANSAC as the best evidence of the River’s natural condition,” 224
10 Ariz. at 242, 229 P.3d at 254, the court also recognized that evidence from later (or earlier)
11 periods could have probative value. *Id.* at 243, 229 P.3d at 255. ANSAC has authority to
12 consider such evidence and to give it the appropriate weight. *Id.* The court rejected
13 arguments by the proponents of navigability that any evidence dated after the commencement
14 of man-made diversions should be thrown out and disregarded. “Even if evidence of the
15 River’s condition after man-made diversions is not dispositive, it may nonetheless be
16 informative and relevant.” *Id.*

17 **III. Evidence in the Record**

18 Over the course of more than a decade, the parties have submitted documents and
19 expert testimony regarding the Lower Salt to the Commission. A review of that evidence
20 shows that the Lower Salt was not navigable in its “ordinary and natural condition.”

21 **A. Historical evidence**

22 **1. The prehistoric Salt River**

23 Even before the arrival of European settlers in the mid-1800s, “[t]he Salt River Valley
24 was one of the most densely populated areas in the prehistoric southwest and contained the
25 most extensive irrigation system in prehistoric North America.”² Despite the presence of

26 ² JE Fuller/Hydrogeology & Geomorphology, Inc., *Arizona Stream Navigability Study for the Salt*
27 *River: Granite Reef Dam to the Gila River Confluence 2-1* (Sept. 1996) [EI 7] (“Fuller”). “EI”
refers to evidence items already in the record before the Commission in this matter.

1 between 80,000 and 200,000 residents in the area in prehistoric times, no evidence has been
2 submitted to show that any of those individuals ever used or even tried to use the Lower Salt
3 as a “highway for commerce.” *Id.* From the beginning of time, the river was subject to
4 alternating periods of floods and droughts. *See* Tr. at 7:26 (Fuller); *see also* Fuller, *supra*, at
5 2-8.³ “Very high flood flows” existed during the Colonial Period (A.D. 650-900), washing
6 out prehistoric flood gates and damaging canals. *See* Fuller, *supra*, at 2-10. “Major floods, as
7 well as lower-than-normal flows” continued through the Classic Period (A.D. 1100-1350). *Id.*
8 at 2-12. No evidence suggests that any of the early inhabitants tried to float, or succeeded in
9 floating, boats on the river. *See id.* at 2-13, 2-17; Tr. at 7:26-27 (Fuller).

10 Due to the early habitation of the Salt River Valley and the use of water for irrigation
11 even during prehistoric times, this evidence that is more than 1,000 years old arguably does
12 not strictly constitute evidence of the Lower Salt’s “natural” condition under the Court of
13 Appeals’ definition. *See State v. ANSAC*, 224 Ariz. at 242, 229 P.3d at 254. This evidence is,
14 however, “informative and relevant.” *Id.* at 243, 229 P.3d at 255. It shows that the Lower
15 Salt was not navigable.

16 2. Early exploration of the Salt River Valley

17 Under the Court of Appeals’ standard, evidence of the time when early explorers
18 ventured into the Salt River Valley, beginning in the 1860s, is perhaps “the best evidence of
19 the River’s natural condition.” *State v. ANSAC*, 224 Ariz. at 242, 229 P.3d at 254. Despite
20 submission of extensive documentation from this period, no evidence has been presented that
21 any of these early explorers ever used the Lower Salt as a means of transportation or
22 commerce. *See* Fuller, *supra*, at 3-1, 3-6, 3-9 to -10, 3-24; Tr. at 7:24, 7:29-33 (Fuller).
23 Overland transportation always has been the primary method of trade and travel in the vicinity
24 of the river. Explorers, trappers, and soldiers are reported to have traveled on foot or by
25 horseback along the river in the mid-1800s, but no evidence shows that any of those
26 individuals ever traveled (or thought they could travel) by boat up or down the river. *Id.*

27

³ “Tr. at [date: page]” refers to the Reporter’s Transcript of the April 7-8, 2003 hearing.

1 Francisco Vasquez de Coronado is reported to have used rafts on the Salt River, but the
2 evidence shows that Coronado used the rafts only to cross the river (not to travel up or down
3 it), and the evidence also suggests that Coronado's use of the river was actually to the east
4 (upstream) of the reach of the river currently at issue or even on some other river. *See Fuller,*
5 *supra*, at 3-6, 3-9; Tr. at 7:29-30 (Fuller). Trappers such as James Ohio Pattie and Ewing
6 Young are reported to have traveled along the river, but all indications are that their travels
7 were by foot or on horseback, not in boats or canoes. *See Fuller, supra*, at 3-10; Tr. at 7:33
8 (Fuller). In 1849, Lt. Beckwith traveled from present-day New Mexico to the Lower
9 Colorado River, and a portion of his route included the Salt River. Again, however, the
10 evidence shows that his travels along the river were by foot or on horseback, not in a boat or a
11 canoe. *See Fuller, supra*, at 3-10; Tr. at 7:33 (Fuller). The travels of each of these individuals
12 took them along the Lower Salt, at a time prior to significant man-made dams or diversions.
13 If the river had been navigable, it surely would have been easier for them to travel by boat
14 rather than by foot or on horseback.

15 **3. Federal land surveys and patents**

16 Another group of individuals who were present in the area at a relatively early date,
17 beginning in 1868, were the federal land surveyors who were responsible for conducting the
18 rectangular survey in the new territory. Historian Dr. Douglas Littlefield testified that each of
19 these surveyors was under specific instructions to distinguish between navigable and non-
20 navigable streams.⁴ None of these Government representatives ever once indicated that the
21 Lower Salt was navigable. *See Littlefield, supra*, at 27-50. "Significantly, while those
22 surveys were done at varying times of the year, in different years, and by several individuals,
23 all of the descriptions and plats that resulted from this work consistently portrayed the Salt
24 River as being a non-navigable stream." *Id.* at 51.

25
26
27 ⁴ *See D. Littlefield, Assessment of the Salt River's Navigability Prior to and On the Date of Arizona's Statehood* 11-27 (December 5, 1996) [EI 16]; Tr. at 7:167-71, 175-77 (Littlefield).

1 SRP also has submitted extensive evidence regarding the federal and state land patents
2 issued along the Lower Salt, including the expert testimony of Dr. Littlefield and others. The
3 Federal Government granted over 225 separate patents that touch or overlay the river to
4 private individuals. *See* Littlefield, *supra*, at 113; Tr. at 7:171-75 (Littlefield). In not one
5 case did any of those patents (or the supporting patent files) indicate that acreage was being
6 withheld because the Lower Salt was navigable. *See* Littlefield, *supra*, at 113; Tr. at 7:172
7 (Littlefield). Likewise, none of the patents issued by the State of Arizona to private parties
8 reserved lands because the river was navigable or otherwise indicated that the river might be a
9 “highway for commerce.” *See* Littlefield, *supra*, at 113-14; Tr. at 7:173 (Littlefield).

10 **4. The Lower Salt from the 1870s to 1911**

11 Water diversion and irrigation in the Valley began in earnest after the 1870s.
12 According the Court of Appeals’ opinion, even if evidence from the period between the 1870s
13 and statehood (1912) is not dispositive, “it may nonetheless be informative and relevant.”
14 *State v. ANSAC*, 224 Ariz. at 243, 229 P.3d at 255.

15 **a. Water storage efforts**

16 For instance, evidence of the local community’s efforts to build a water storage project
17 on the Salt River is relevant on the issue of whether the river was navigable in its “ordinary
18 and natural condition” and supports the finding that the Lower Salt was not navigable, even in
19 that condition. Among the things that had to happen just after the turn of the century before
20 the United States Government would build Roosevelt Dam (located several miles upstream
21 from the upper end of the Lower Salt) was that the Government needed to obtain lumber to
22 build the framework for the masonry dam. A sawmill was constructed in the Sierra Ancha
23 Mountains, upstream from the dam site.⁵ At this time, neither Roosevelt Dam nor any other
24 storage dams on the Salt River had been constructed, and both the sawmill and the Roosevelt
25 Dam site were miles upstream from the early water diversions from the river. Thus, although

26 ⁵ *See* K. Smith, *The Magnificent Experiment: Building the Salt River Reclamation Project, 1890-1917*, at 72-73 (1986) [EI 24]; *see also* E. Zarbin, *Roosevelt Dam: A History to 1911*, at 89 (1984) [EI 24].

1 the segment of the river at issue still was in its “natural” condition at the time, the
2 Government built a road to cover the twenty-three miles from the sawmill to the dam site.
3 See Smith, *supra*, at 73; Zarbin, *supra*, at 75. The historical record contains no mention of
4 floating the timber downstream on the river. Rather, all of the timber was transported from
5 the sawmill to the dam site using the lumber road. See Smith, *supra*, at 73; Zarbin, *supra*, at
6 75. If the river had been navigable in this “natural” condition, it would have been a relatively
7 easy task to float the logs down from the sawmill to the dam site.

8 Similarly, the Government had to figure out a way to get workers and supplies from
9 Phoenix to the Roosevelt Dam site. See Zarbin, *supra*, at 76; Smith, *supra*, at 75. Again, this
10 was before the construction of Roosevelt Dam or any of the other storage dams and required
11 transport over the area upstream from Phoenix, where no significant early water diversions
12 existed. Despite this fact, no evidence exists regarding the floating of barges or other vessels
13 up the Lower Salt to haul workers or supplies. Instead, the Government constructed the
14 Apache Trail, a remote, twisting route from Mesa to Roosevelt, at great hardship and expense.
15 See Tr. at 7:124-26 (August), 7:234 (Roberts); Zarbin, *supra*, at 76; Smith, *supra*, at 75.

16 **b. Early attempts to boat the Salt River**

17 That the Federal Government never attempted to use the river to transport workers or
18 materials from Phoenix to the Roosevelt Dam site during construction is not surprising when
19 one considers the record of those few persons who actually did attempt to navigate the river.
20 During the period prior to the completion of Roosevelt Dam in 1911, the Lower Salt remained
21 subject to alternating periods of floods and droughts. Major floods hit the area in 1890 and
22 1891. “Severe” and “extreme” drought plagued the Valley from 1897 to 1904. Flooding
23 returned again in 1905. See Fuller, *supra*, at 3-8; Tr. at 7:32-33 (Fuller), 7:109-12 (August).

24 The recorded opinions on navigability by persons who attempted to float boats on the
25 river show that the river was not suitable as a “highway for commerce.” For example,
26 Charles Hayden (father of late U.S. Senator Carl Hayden) and the other participants in a June
27 1873 trip to float logs down the Salt River to Tempe, the only known actual attempt to float

1 logs on the river, “pronounce[d] the scheme a failure.” Tr. at 7:114, 125 (August). This 1873
2 attempt was made at a time before any storage dams and was entirely upstream from any
3 significant then-existing irrigation diversions from the river. It was, however, deemed “a
4 failure” by Mr. Hayden. *Id.* This evidence is, at a minimum, highly “informative and
5 relevant,” *State v. ANSAC*, 224 Ariz. at 243, 229 Ariz. at 255, and it supports a finding that
6 the Lower Salt was not navigable.

7 **c. Ferries crossing the River**

8 One or more ferries operated to cross the river at some times of some years. Hayden’s
9 Ferry, a cable ferry which operated near present-day Mill Avenue in Tempe, is the best
10 known of those ferries. The ferry was not used year-round on the river, but rather “was used
11 only when high water impeded fording the river.” Fuller, *supra*, at 3-7; Tr. at 7:31 (Fuller).
12 Jon Fuller, the State Land Department’s (“SLD”) consultant, correctly concluded that “[m]ost
13 of the ferries operated on the Salt River were short-lived, expedient ventures, that were
14 mentioned in the papers only when they first went into service.” Fuller, *supra*, at 3-26; Tr. at
15 7:38 (Fuller), 7:113 (August).

16 Evidence of ferry use does not support a finding that the Lower Salt was navigable in
17 its “ordinary and natural condition.” The location of Hayden’s Ferry was not coincidental.
18 Geomorphologist Dr. Stanley Schumm and others testified regarding the “Tempe
19 constriction,” an outcropping of bedrock in the river near the former location of the ferry.⁶
20 The constriction forces groundwater to the surface and also narrows the width of the channel.
21 These two factors combined to make the Hayden’s Ferry site a good location to **cross** the
22 river. *See* Tr. at 7:198-99 (Schumm). This “natural” feature was present before and after the
23 onset of water diversions from the river.

24 The physical features that appear at the Tempe constriction did not (and do not) cover
25 any significant length of the river. To the contrary, the braided nature of the channel is

26 _____
27 ⁶ *See* Tr. at 7:198-99 (Schumm); Schumm, *Geomorphic Character of the Salt River* (March 2003) [EI
26]; Tr. at 7:14 (Fuller).

1 present just upstream and downstream from the Tempe constriction.⁷ The physical nature of
2 the Hayden's Ferry location was relatively unique among other locations on the river. See Tr.
3 at 7:198-99 (Schumm).

4 **B. Climate, hydrology, and geomorphology of the Lower Salt**

5 The other evidence in the record relates primarily to the climate, hydrology, and
6 geology of the river and the surrounding area. The climate evidence indicates that the desert
7 climate provided for brief, violent periods of precipitation and runoff, rather than the type of
8 weather that would produce a particularly large or regularly flowing stream. See Fuller,
9 *supra*, at 5-4, 7-3; Tr. at 7:62 (Fuller). The hydrologic evidence, which is limited in extent,
10 shows that the river was erratic and never included sufficient flows to support a "highway for
11 commerce." See Fuller, *supra*, at 5-4, 7-1, 7-6, 7-14, 7-17 (Table 26); Tr. at 7:15, 7:62, 7:68
12 (Fuller). The geomorphologic evidence shows that the Lower Salt had a braided channel
13 configuration, with numerous snags and sandbars that constituted "natural" impediments to
14 navigation.⁸

15 The climate, hydrology, and geology evidence are particularly supportive of a finding
16 that the river was not navigable in its "ordinary and natural condition." Although the man-
17 made diversions eventually reduced water flows in some parts of the river, no evidence shows
18 that those diversions altered the climate of the region or made the river channel more or less
19 braided. The river was particularly erratic and unpredictable in its "ordinary and natural
20 condition."

21 Precipitation in the Salt River Valley and the adjoining watersheds occurs primarily
22 during the summer "monsoons" and during larger winter storms. See Fuller, *supra*, at 5-4; see
23

24 ⁷ See Slides presented by Dr. Schumm at April 7, 2003 hearing [EI 51]; Fuller, *supra*, at 3-7 ("Several
25 times floods washed out the cable supports on the north side of the river and took the ferry
26 downstream. Hayden had only to send a team of horses downstream to haul the boat back because it
would only float a few miles before landing on a sandbar.").

27 ⁸ See Schumm, *supra*, at 2-4; Tr. at 7:194-200 (Schumm), 8:7 (Bowers); W. Graf, *The Gila and Salt
Rivers in Central Arizona: A Geographic Field Guide* 117 (1988) [EI 23]; P. Ruff, *A History of the
Salt River Channel in the Vicinity of Tempe, Arizona, 1868-1969*, at 3, 8-10 (1971) [EI 23].

1 also *id.* at 7-3; Tr. at 6:62 (Fuller). This weather pattern is reflected in the data relating to the
2 monthly average flows of the river. The SLD's consultant estimated monthly average flows
3 at the confluence of the Salt and Verde Rivers (near the upper end of the reach at issue in this
4 proceeding). See Fuller, *supra*, at 7-17. That data showed a variation in monthly average
5 flows from 3,420 cubic-feet per second ("cfs") in March to 501 cfs in June. *Id.* These
6 variable flows reflect the erratic nature of the river, even on a monthly average basis.

7 The hydrologic evidence relating to the time period in question is limited. There were
8 little or no stream gauge records available for this reach of the river at or before statehood,
9 and no flow duration statistics were available to reflect flow conditions. *Id.* at 5-4, 7-1, 7-6;
10 Tr. at 7:15, 7:62 (Fuller). Due to this almost complete lack of any real data, what the SLD's
11 consultant did was to add Upper Salt River and Verde River data from above the relevant
12 stretch of the river and arrive at an estimate of flows on the Lower Salt. See Fuller, *supra*, at
13 7-17 (Table 20); Tr. at 7:15, 7:68 (Fuller).

14 The testimony shows that knowing the average annual flow of a river is of dubious
15 value in determining whether that river is or was "navigable." As the SLD's consultant
16 admitted, "average annual flow rates are skewed due to high flood flow volumes relative to
17 'typical' flow rates." Fuller, *supra*, at 5-5. Due to the prevalence of huge floods, the
18 "average" flow rate is biased substantially upward. See Tr. at 7:63-64 (Fuller). For example,
19 the evidence shows that a flow of 199,500 cubic-feet per second ("cfs") occurred during a
20 flood on November 27, 1905. See Fuller, *supra*, at 7-21. If that flood had lasted for only two
21 days, an average daily flow for all of the other 363 days in the year of only 353.8 cfs would
22 have resulted in an average annual flow of 1,445 cfs. The erratic and variable nature of the
23 river flows existed in the river's "ordinary and natural condition."

24 SRP and others also submitted evidence regarding the geomorphology of the Lower
25 Salt. Geomorphology, the shape of the land underneath and adjoining the river, was largely
26 the same in the river's "ordinary and natural condition" as it was thereafter. See generally,
27 *e.g.*, Schumm, *supra*. Dr. Stanley Schumm testified regarding the braided nature of the

1 Lower Salt, containing numerous islands and sandbars. *See* Schumm, *supra*, at 2; Tr. at
2 7:194-200 (Schumm). The Lower Salt “was a braided river, and the pattern of bars, islands,
3 and low-water channels changed through time.” Schumm, *supra*, at 3; *see also* Tr. at 8:7
4 (Bowers). It “was a wide, sandy-gravelly channel,” and “the low-water channels shifted
5 within the main channel and often more than one low-water channel was present.” Schumm,
6 *supra*, at 3. Dr. Schumm concluded that “[t]his wide and shallow Salt River channel, that
7 contained numerous bars and islands, would not be favorable for navigation.” *Id.* at 4.

8 Dr. Schumm’s testimony regarding the geomorphology of the river continues to stand
9 unrefuted in the record. That testimony was supported by the other relevant geomorphologic
10 evidence. For example, referring to the area near old Jointhead Dam, former Arizona State
11 University geomorphologist Dr. William L. Graf stated in a 1988 report: “The channel
12 pattern here is braided.” Graf, *supra*, at 117. In another report, Dr. Paul F. Ruff, then an
13 Associate Professor of Engineering at ASU, described the river as having two distinct
14 channels. *See* Ruff, *supra*, at 8-10. Braided channels, such as those found on the river, are
15 not conducive to navigation. *Id.* at 3. Those braided channels were part of the river’s
16 “ordinary and natural condition.”

17 **IV. The Lower Salt Was Not Navigable in Its “Ordinary and Natural Condition.”**

18 In the 2003 proceedings in this matter, the Commission held that the Lower Salt was
19 not navigable. The Court of Appeals questioned whether the Commission’s decision was
20 made in consideration of the river’s “ordinary and natural condition.” *State v. ANSAC*, 224
21 Ariz. at 230, 229 P.3d at 2342. Although the Commission on appeal repeatedly informed the
22 court that it had considered the Lower Salt in its “ordinary and natural condition,” the court
23 remanded the case to the Commission to ensure that was done. Upon reviewing the evidence
24 and specifically considering the “ordinary and natural condition” of the river, the Commission
25 should again find it non-navigable.

26 ...

27 ...

1 “[A] river is navigable in law when it is navigable in fact.” *Muckleshoot Indian Tribe*
2 *v. FERC*, 993 F.2d 1428, 1431 (9th Cir. 1993). Thus, the Commission must consider all of
3 the evidence in the record before it. SRP submits that, when the Commission reviews the
4 evidence submitted, and considers the totality of that evidence, it must again determine that
5 the Lower Salt never has been used as a “highway for commerce” and was not, in its
6 “ordinary and natural condition” (or in any other condition), susceptible to being used as a
7 highway for commerce.

8 **A. The Lower Salt has never been used as a “highway for commerce.”**

9 A watercourse can meet the test for “navigability” under the Arizona statute and the
10 case law if it satisfies either of two elements: (1) If it was actually used as a “highway for
11 commerce,” or (2) if it, in its “ordinary and natural condition” at the time of statehood, was
12 “susceptible to being used” as a “highway for commerce.” *See* A.R.S. § 37-1101(5).⁹

13 The Lower Salt has never been actually used as a “highway for commerce.” Despite
14 speculation that the HoHoKam might have floated balsa rafts on their canals in prehistoric
15 times, no evidence exists that they ever used any type of boat on the river itself. *See* Section
16 III(A)(1), *supra*. Likewise, no evidence exists that the early explorers or soldiers in the Salt
17 River Valley, who traveled through the area on several occasions, ever used the Lower Salt,
18 for “commerce” or otherwise. *See* Section III(A)(2), *supra*. No credible evidence exists in
19 the record that any successful “tie drive” or any other effort to float logs or timber down the
20 river was ever conducted. *See* Section III(A)(4), *supra*.

21 The only other evidence in the record of the use of boats on the Lower Salt relates to
22 the ferries, which were, for the most part, “short-lived, expedient ventures.” *See* Fuller,
23 *supra*, at 3-26. Even Hayden’s Ferry, which is by far the best known and likely the longest-
24 lasting ferry on the river, “was used only when high water impeded fording the river.” *Id.* at
25

26 ⁹ “For state title purposes under the equal-footing doctrine, navigability is determined at the time of
27 statehood . . . and based on the ‘natural and ordinary condition’ of the water.” *PPL Montana LLC v.*
Montana, 132 S. Ct. 1215, 1228 (2012).

1 3-7. Furthermore, although the Commission should consider the facts in the record relating to
2 the use of ferries on the river, that evidence is not, in this instance, sufficient to support a
3 finding that the Lower Salt was actually used as a “highway for commerce.”¹⁰ Hayden’s
4 Ferry, like the ferries at issue in the *North Dakota* case involving the Little Missouri River,
5 was a **cable ferry** “attached to cables strung across the river from two relatively high points,
6 towers, or posts.” Compare Fuller, *supra*, at 3-7, with *North Dakota v. United States*, 972
7 F.2d 235, 239 (8th Cir. 1992). With respect to the probative value of ferry evidence, the
8 federal district court in *North Dakota*, applying the *Daniel Ball* test, stated:

9 The ferries on the Little Missouri River served the sole purpose of
10 providing passage across the river. Although the ferries operated on the water,
11 they were the functional equivalents of bridges. The existence of a bridge on a
12 river may establish that the bed of the river is covered at times by water too
13 deep or too wide at any given point to be crossed by foot, by horse, or by
14 automobile; however, it does not establish that the river is a channel for useful
15 commerce. On the contrary, the existence of a bridge, or a ferry, establishes
that the river is an obstruction to commerce which must be overcome. Clearly,
those persons who used the ferries to cross the river would have had less
difficulty making their trips had the river not existed.

16 *North Dakota*, 770 F. Supp. 506, 511 (D.N.D. 1991), *aff’d*, 972 F.2d 235 (8th Cir. 1992).¹¹

17 The federal courts’ logic is equally applicable with respect to ferries on the Lower Salt.
18 The ferries “served the sole purpose of providing passage across the river.” *Id.* They were
19 the “functional equivalents of bridges.” *Id.* They were “short-lived, expedient ventures” that
20 were used only in times of high water. See Fuller, *supra*, at 3-7, 3-26. The ferries are proof
21 that “the Salt River served as a barrier rather than a corridor for transportation.” Tr. at 7:113
22 (August). The people who used the ferries would have had an easier trip if the river had not

23
24 ¹⁰ See Tr. at 7:72 (Fuller) (“Q. The river, for purposes of those main transportation routes, as you
25 have talked about in your report, really was an impediment that needed to be crossed by the ferry? A.
It would be an obstacle, yes.”).

26 ¹¹ See also *United States v. Crow, Pope & Land Ents., Inc.*, 340 F. Supp. 25, 35 (N.D. Ga. 1972) (“the
27 existence of ferries is no more an example of commercial use than the presence of a bridge or railroad
trestle whose primary purpose is to avoid the river rather than to employ it as a means for trade or
transportation”).

1 existed. The ferries are not persuasive evidence the Lower Salt was ever actually used, in its
2 “ordinary and natural condition” or otherwise, as a “highway for commerce.”

3 **B. The Lower Salt was not, in its “ordinary and natural condition,”**
4 **susceptible to being used” as a “highway for commerce.”**

5 Because the evidence shows that the Lower Salt was never actually used as a “highway
6 for commerce,” the only way it can be considered navigable is if it was “susceptible” to such
7 use. No evidence exists in the record to show that the Lower Salt, in its “ordinary and natural
8 condition” or in any other condition, was capable of acting as “a corridor or conduit within
9 which the exchange of goods, commodities or property or the transportation of persons may
10 be conducted.” A.R.S § 37-1101(3) (defining “highway for commerce”).

11 Although the Lower Salt existed in close proximity to much of the exploration and
12 settlement in early Arizona, it was never used for any type of trade or transportation.¹² In
13 order for the Commission to determine that the Lower Salt was “susceptible to being used . . .
14 as a highway for commerce,” it must find that the prehistoric inhabitants, the early explorers,
15 the soldiers at Fort McDowell, and thousands of citizens who resided in the area prior to
16 statehood simply failed to comprehend the potential usefulness of the river as an avenue for
17 navigation. No evidence exists to support such a finding.

18 To the contrary, all of the evidence in the record shows that the Lower Salt was not, in
19 its “ordinary and natural condition,” “susceptible to being used” for navigation. From the
20 beginning of time, the river was subject to alternating periods of devastating floods and
21 prolonged droughts. See Sections III(A)(1), (4) and III(B), *supra*.¹³ The Lower Salt was

23 ¹² “Navigability must be assessed as of the time of statehood, and it concerns the river’s usefulness
24 for ‘trade and travel,’ rather than for other purposes.” *PPL Montana*, 132 S. Ct. at 1233. “Mere use
25 by initial explorers or trappers who may have dragged their boats in or alongside the river despite its
26 nonnavigability in order to avoid getting lost, or to provide water for their horses or themselves, is not
27 enough.” *Id.*

¹³ “While the Montana court was correct that a river need not be susceptible of navigation at every
point during the year, neither can that susceptibility be so brief that it is not a commercial reality.”
PPL Montana, 132 S. Ct. at 1234.

1 always a braided channel, with a “pattern of bars, islands, and low-flow water channels” that
2 moved over time. *See* Section III(B), *supra*.

3 It might be theoretically possible that, on one or more occasions in particular years, it
4 would have been feasible for a person to boat or float logs down some portion of the river.
5 Occasional use in exceptional times does not, however, support a finding of navigability.
6 “The mere fact that a river will occasionally float logs, poles, and rafts downstream in times
7 of high water does not make the river navigable.” *Crow, Pope & Land Ents.*, 340 F. Supp. at
8 32 (citing *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690 (1899)). “The waterway
9 must be susceptible for use as a channel of useful commerce and not merely capable of
10 exceptional transportation during periods of high water.” *Id.* (citing *Brewer-Elliott Oil & Gas*
11 *Co. v. United States*, 260 U.S. 77 (1922)).¹⁴

12 **V. In Addressing Whether the Lower Salt Was Navigable, the Courts Must**
13 **Consider the Significant Federal Involvement in Damming and Diverting the Salt**
14 **River Before Statehood.**

15 As discussed above, SRP acknowledges that the Court of Appeals’ holding regarding
16 the “ordinary and natural condition” of the river likely is binding authority on the
17 Commission at this stage of the proceedings. *See* Section II, *supra*. The Arizona Supreme
18 Court has not yet addressed the test of navigability for any watercourse in the state, however,
19 so the ruling by the Court of Appeals remains subject to review by the Supreme Court
20 following the conclusion of these proceedings on remand.

21 SRP contends that the Lower Salt was not navigable, in its “ordinary and natural
22 condition” or in any other condition. In making the arguments presented in this
23 memorandum, however, SRP does not waive its right to contend before the courts reviewing
24 the Commission’s decision that the extensive federal involvement in pre-statehood activities
25 on the Salt River created special circumstances that should be considered in applying the
26 navigability test with respect to this river.

26 ¹⁴ *See also United States v. Harrell*, 926 F.2d 1036, 1040 (11th Cir. 1991) (“susceptibility of use as a
27 highway for commerce should not be confined to ‘exceptional conditions or short periods of
temporary high water’”) (quoting *United States v. Utah*, 283 U.S. 64, 87 (1931)).

1 The Arizona courts must apply the federal test of navigability in consideration of pre-
2 statehood actions by the United States pursuant to the 1902 Reclamation Act¹⁵ and the effect
3 of those actions on the river as of February 14, 1912. Under the Reclamation Act, the United
4 States Secretary of the Interior is authorized to construct dams and reservoirs to store and
5 divert water for federal Reclamation purposes. *Id.* § 4. That Act also empowers the Secretary
6 to perform any and all functions “for the purpose of carrying out the provisions of [that] Act
7 into full force and effect.” *Id.* § 10, now codified at 43 U.S.C. § 373; see also 43 U.S.C. §
8 491. Furthermore, the Enabling Act passed by Congress in 1910, which authorized
9 Arizona’s statehood, specifically provided “[t]hat there be and are reserved to the United
10 States, with full acquiescence of the state, all rights and powers for the carrying out of the
11 [1902 Reclamation Act and any amendments thereto], to the same extent as if said state had
12 remained a Territory.”¹⁶ The people of Arizona accepted this authorization when they
13 adopted the Arizona State Constitution. See *Ariz. Const.* art. 10, §§ 6, 8.

14 Federal law applies to the determination of which watercourses are “navigable” for
15 title purposes. See *Utah v. United States*, 403 U.S. 9, 10 (1971). The courts have examined
16 the federal test of “navigability” in more than one hundred cases. Those decisions have dealt
17 with a variety of issues, but none of those prior decisions has analyzed how the impacts of
18 pre-statehood actions by the United States (such as the construction of dams and diversion
19 works pursuant to the 1902 Reclamation Act) should factor into the decision of whether a
20 particular watercourse was “navigable” on the date of statehood. Depending on what the
21 Commission and the courts decide about whether the Lower Salt was navigable in its
22 “ordinary and natural condition,” that issue might need to be addressed in the appellate review
23 of the Commission’s decision in this matter.

24
25 ¹⁵ See Act of June 17, 1902, c. 1093, 32 Stat. 388, codified as amended at 43 U.S.C. §§ 371 to 600e.

26 ¹⁶ Act of June 20, 1910, c. 310, § 20 (“Seventh”), 36 Stat. 557 (“Enabling Act”); see also *id.* § 28
27 (reserving to the United States “from the operation of any and all grants made or confirmed by this
act to said proposed state all land actually or prospectively valuable for the development of water
power . . .”).

1 For title purposes, the determination of navigability must be made as of the date of
2 statehood. See A.R.S. § 37-1101(5); *Utah v United States*, 403 U.S. 9, 10 (1971). As of
3 February 14, 1912, Roosevelt Dam and Granite Reef Diversion Dam had been completed.
4 Those dams were capturing, storing, and diverting water from the Salt River. The Lower Salt
5 was clearly not “used or susceptible to being used . . . as a highway for commerce” on
6 February 14, 1912, regardless of whether it was ever used or susceptible to such use in any
7 condition at any prior date. The United States was the holder of any public trust interests in
8 the Territory of Arizona before February 14, 1912. Consistent with prior decisions by the
9 U.S. Supreme Court and others, see discussion, *infra*, the United States had the power to
10 restrict or otherwise affect the inchoate public trust interests of the potential new state at that
11 time or to convey lands that could be subject to that trust. On the Salt River, the United States
12 exercised that power pursuant to the 1902 Reclamation Act.

13 The courts have on several occasions examined the powers and limitations on the
14 United States’ actions with respect to watercourses and lands beneath them held by the
15 Federal Government in anticipation of the establishment of future states. In each of those
16 cases, the courts have held that, although there is a presumption against the defeat of a future
17 state’s title that is to be applied in interpreting pre-statehood federal intent and actions, the
18 United States does have broad authority to take actions that affect the equal footing interests
19 of future states. See, e.g., *Alaska v. United States*, 545 U.S. 75, 79 (2005), judgment entered,
20 546 U.S. 413 (2006); *Idaho v. United States*, 533 U.S. 262, 277-78 (2001); *United States v.*
21 *Alaska*, 521 U.S. 1, *reh’g denied*, 521 U.S. 1144 (1997); *Shively v. Bowlby*, 152 U.S. 1, 48
22 (1894).

23 The United States, working together with the Territory of Arizona and local citizens,
24 made a conscious decision in the first decade of the 20th Century that the Salt River was
25 worth more to the area for its water than for any potential for water-borne transportation or
26 commerce (even assuming, for purposes of this argument, that potential ever existed). Acting
27 pursuant to Congress’ passage of the 1902 Reclamation Act, the Federal Government

1 undertook the task of building Roosevelt Dam and Granite Reef Diversion Dam to harness the
2 river and put its water to use in making it possible for people to live and thrive in the Phoenix
3 area. *See Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n*, 111 Ariz. 65, 68, 523
4 P.2d 496, 499 (1974) (referring to the Salt River Project canal system as “indispensable for
5 the maintenance of life and prosperity.”). In passing the 1910 legislation to authorize Arizona
6 to become a state, Congress specifically provided that such statehood would not affect the
7 United States’ authority under the 1902 Reclamation Act. *See Enabling Act, supra*.

8 Before 1912, when Arizona was a territory, the United States, as the only government,
9 had “the entire dominion and sovereignty, national and municipal, federal and state” over the
10 area. *Shively*, 152 U.S. at 48. During that time, Congress passed the 1902 Reclamation Act,
11 and the United States proceeded to construct Roosevelt Dam and Granite Reef Diversion Dam
12 to carry out the “public purposes appropriate to the objects for which the United States [held]
13 the territory.” *See id.* According to the established case law, the pre-statehood federal actions
14 were well within the power and authority of the United States, and the determination of
15 “navigability” under the federal test must take into account any effects of those actions on the
16 condition of the river on February 14, 1912. The 1910 Enabling Act expressly required “full
17 acquiescence” by the future state to the United States’ authority under the 1902 Reclamation
18 Act. Thus, although SRP contends that the Lower Salt was not navigable in its “ordinary and
19 natural condition,” SRP does not concede that “ordinary and natural condition” constitutes the
20 proper legal test for this particular river, due to the extensive Federal involvement with the
21 river prior to statehood.

22 **VI. Summary and Requested Action**

23 The proponents of navigability bear the burden of proof. The evidence in the record
24 does not support a finding that the Lower Salt ever was actually used as a “highway for
25 commerce.” The record likewise does not support a finding that the Lower Salt, in its
26 “ordinary and natural condition” was susceptible to being used as a highway for commerce.
27 The Commission should find the Lower Salt “non-navigable.”

1 DATED this 7th day of September, 2012.

2 SALMON, LEWIS & WELDON, P.L.C.

3 By Mark A. McGinnis

4 John B. Weldon, Jr.

5 Mark A. McGinnis

6 Scott M. Deeny

7 2850 East Camelback Road, Suite 200

8 Phoenix, Arizona 85016

9 Attorneys for SRP

10 ORIGINAL AND SIX COPIES of the foregoing
11 hand-delivered for filing this 7th day of September,
12 2012 to:

13 Arizona Navigable Stream Adjudication Commission
14 1700 West Washington, Room B-54
15 Phoenix, AZ 85007

16 AND COPY mailed this 7th day of September, 2012 to:

17 Fred E. Breedlove III
18 Squire Sanders & Dempsey LLP
19 1 East Washington Street, Suite 2700
20 Phoenix, AZ 85004-2556
21 *Attorney for the Commission*

22 Laurie A. Hachtel
23 Attorney General's Office
24 1275 West Washington Street
25 Phoenix, AZ 85007-2997
26 *Attorneys for State of Arizona*

27 Joy E. Herr-Cardillo
Timothy M. Hogan
Arizona Center for Law in the Public Interest
2205 E. Speedway Blvd.
Tucson, AZ 85719
Attorneys for Defenders of Wildlife, et al.

...

- 1 Sally Worthington
2 John Helm
3 Helm & Kyle, Ltd.
4 1619 E. Guadalupe #1
5 Tempe, AZ 85283
6 *Attorneys for Maricopa County*
- 7 Sandy Bahr
8 202 E. McDowell Road, Ste. 277
9 Phoenix, AZ 85004
10 *Sierra Club*
- 11 Julie M. Lemmon
12 1095 W. Rio Salado Parkway, Suite #102
13 Tempe, AZ 85281
14 *Attorney for Flood Control District*
15 *of Maricopa County*
- 16 Carla Consoli
17 Lewis and Roca
18 40 N. Central Avenue
19 Phoenix, AZ 85004
20 *Attorneys for Cemex*
- 21 L. William Staudenmaier
22 Snell & Wilmer LLP
23 One Arizona Center
24 400 E. Van Buren
25 Phoenix, AZ 85004-2202
26 *Attorneys for Freeport-McMoRan Corporation*
- 27 Charles Cahoy
28 P.O. Box 5002
29 Tempe, AZ 85280
30 *Attorney for City of Tempe*
- 31 William Taebel
32 P.O. Box 1466
33 Mesa, AZ 85211-1466
34 *Attorney for City of Mesa*
- 35 ...
- 36
- 37

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

Cynthia Campbell
200 W. Washington, Suite 1300
Phoenix, AZ 85003
Attorney for City of Phoenix

Thomas L. Murphy
Gila River Indian Community Law Office
Post Office Box 97
Sacaton, AZ 85147
Attorney for Gila River Indian Community

Michael J. Pearce
Maguire & Pearce LLC
2999 N. 44th Street, Suite 630
Phoenix, AZ 85018-0001
*Attorneys for Chamber of Commerce and
Home Builders' Association*

James T. Braselton
Mariscal Weeks McIntyre & Friedlander PA
2901 N. Central Avenue, Suite 200
Phoenix, AZ 85012-2705
Attorneys for Various Title Companies

Steve Wene
Moyes Sellers & Associates
1850 N. Central Avenue, Suite 1100
Phoenix, AZ 85004-4527
Attorneys for Arizona State University

