

Supreme Court of the United States.
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT and Salt River Valley Water Users' Association, Petitioners,
v.

STATE OF ARIZONA, acting by and through Mark Winkleman, State Land Commissioner, and the Arizona State Land Department; Defenders of Wildlife; Donald Steuter; Jerry Van Gasse; Jim Vaaler; Arizona Navigable Stream Adjudication Commission; Arizona State University; City of Tempe; City of Phoenix; City of Mesa; Freeport McMoran Corporation; Maricopa County; Cemex Cement, Inc.; Gila River Indian Community; Home Builders Association of Central Arizona; and Maricopa County Flood Control District, Respondents.

No. 10-1392.

March 10, 2011.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals, Division One

Petition for a Writ of Certiorari

John B. Weldon, Jr., Mark A. McGinnis,^[FN*] Salmon, Lewis & Weldon, P.L.C., 2850 East Camelback Road, Suite 200, Phoenix, AZ 85016, (602) 801-9060, mam@slwplc.com, Attorneys for Petitioners.

FN* Counsel of Record

QUESTION PRESENTED

In 1902, Congress passed the Reclamation Act. *See* Act of June 17, 1902, c. 1093, 32 Stat. 388. Pursuant to that Act, the United States constructed various dams and diversion works on the Lower Salt River in the Territory of Arizona before Arizona became a state on February 14, 1912. Due to the presence of such dams and diversion works, the river was undeniably not “navigable” on February 14, 1912 (regardless of whether it ever was “navigable” before the United States undertook

such actions).

The Arizona Court of Appeals recently held that, when examining whether the Lower Salt River was navigable at statehood and thus whether the State acquired ownership of the streambed under the “equal footing” doctrine, the courts must ignore the effects of these pre-statehood actions by the United States. Petitioners assert that this decision conflicts with prior decisions of this Court and other state and federal courts and that, under those prior decisions, the effects of pre-statehood federal actions must be considered when determining whether a watercourse was navigable at the time of statehood.

The question before this Court on this Petition is, therefore:

Where the United States has, prior to statehood and pursuant to the 1902 Reclamation Act, undertaken to dam and divert substantially the entire annual flows of a river to provide water for federal Reclamation purposes, must a court applying the federal test of “navigability” for determining a new state’s “equal footing” title take into consideration the impacts of those federal actions on the condition of the river at statehood?

*III CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

The Salt River Project Agricultural Improvement and Power District (“District”) is an Arizona agricultural improvement district established pursuant to Title 48, Chapter 17, of the Arizona Revised Statutes. It is a political subdivision of the State of Arizona.

The Salt River Valley Water Users' Association (“Association”) is an Arizona territorial corporation. The Association has no parent corporation, and no publicly held company owns more than ten percent of its stock.

Pursuant to a 1917 agreement with the United States, the District and the Association operate the Salt River Federal Reclamation Project (“Project”) and are referred to herein collectively as “SRP” or “Petitioners.”

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*1 OPINIONS BELOW

The Arizona Navigable Stream Adjudication Commission (“ANSAC”) issued a Report, Findings and Determination Regarding the Navigability of the Salt River from Granite Reef Dam to the Gila River Confluence on September 21, 2005. That decision is referred to herein as the “ANSAC Decision” and is unreported but is reprinted, without exhibits, in the Appendix to this Petition (“App.”) at 53. The Maricopa County (Arizona) Superior Court issued a Ruling Minute Entry affirming the ANSAC Decision on August 3, 2007. That decision is referred to herein as the “Superior Court Decision” and is unreported but is reprinted at App. 43.

The April 27, 2010 opinion of the Arizona Court of Appeals, from which this Petition arises, is referred to herein as the “Appellate Decision,” is reported at 224 Ariz. 230, 229 P.3d 242, and is reprinted at App. 1. The Supreme Court of Arizona issued an order on February 9, 2011, denying various petitions for review of the Appellate Decision. That order is unreported but is reprinted at App. 122.

JURISDICTION

The Supreme Court of Arizona issued its order denying review on February 9, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a) because Section 37-1101(5) of the Arizona Revised Statutes, as interpreted and applied by the Arizona Court of *2 Appeals in the Appellate Decision, is contrary to established and controlling federal law.

STATUTES INVOLVED

The primary federal statute involved in this Petition is the 1902 Reclamation Act. *See* Act of June 17,

1902, c. 1093, 32 Stat. 388, *codified as amended at* [43 U.S.C. §§ 371 to 600e](#). Under that Act, the United States Secretary of the Interior is authorized to construct dams and reservoirs to store and divert water for federal Reclamation purposes. *Id.* § 4. That Act also empowers the Secretary to perform any and all functions “for the purpose of carrying out the provisions of [that] Act into full force and effect.” *Id.* § 10, *now codified at* [43 U.S.C. § 373](#); *see also* [43 U.S.C. §491](#). Pursuant to Supreme Court Rule 14(1)(f), the 1902 Reclamation Act is reprinted in its entirety at App. 124.

The Enabling Act passed by Congress in 1910, which authorized Arizona's statehood, specifically provided “[t]hat there be and are reserved to the United States, with full acquiescence of the state, all rights and powers for the carrying out of the [1902 Reclamation Act and any amendments thereto], to the same extent as if said state had remained a Territory.” Act of June 20, 1910, c. 310, § 20 (“Seventh”), 36 Stat. 557; *see also id.* § 28 (reserving to the United States “from the operation of any and all grants made or confirmed by this act to said proposed *3 state all land actually or prospectively valuable for the development of water power....”). Pursuant to Supreme Court Rule 14(1)(f), the Enabling Act is reprinted in its entirety at App. 131.

The Arizona courts applied a specific Arizona statutory definition in determining navigability, [Ariz. Rev. Stat. Ann. § 37-1101\(5\)](#), which provides: “Navigable” or “navigable watercourse” means a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

As prior Arizona courts have acknowledged, this Arizona statute is required to reflect and incorporate the “federal test” developed under federal common law. *See* [Defenders of Wildlife v. Hull](#), [199 Ariz. 411, 419, 18 P.3d 722, 730 \(App. 2001\)](#), *recon-*

sideration denied (May 8, 2001) (navigability standard is established by federal law); [Arizona Cntr. for Law in the Public Interest v. Hassell](#), [172 Ariz. 356, 362, 837 P.2d 158, 164 \(App. 1991\)](#), *review dismissed* (Oct. 6, 1992) (same).

STATEMENT OF THE CASE

This Petition arises from an opinion by Division One of the Court of Appeals of the State of Arizona, *4 which reversed and remanded an affirmance by the Maricopa County Superior Court of an administrative decision issued by ANSAC. *See* [Ariz. Rev. Stat. Ann. §§ 12-901 to -914](#). Petitioners seek this Court's review of an important question of federal law that was wrongly decided by the Arizona appellate court.

The Arizona court interpreted and applied the “federal test” of navigability in a manner that would require ANSAC and the lower courts to ignore any impacts on the river of pre-statehood actions taken by the United States pursuant to the 1902 Reclamation Act. That interpretation conflicts with prior decisions of this Court and other state and federal courts.

Because the Arizona courts and all parties agreed that the test of navigability is controlled by federal law, the federal question in this matter was raised at or before the outset of the present litigation. *See* [Hassell](#), [172 Ariz. at 362, 837 P.2d at 164](#). The entirety of the briefing and argument below dealt with application of the federal test. In addition, Petitioners consistently asserted that the key moment for determining navigability was the date of statehood and that the significant actions undertaken by the United States prior to that time should be considered. *See, e.g.*, Salt River Project's Answering Brief, at 5-6, 22, *State v. Arizona Navigable Stream Adjudication Comm'n*, Maricopa County Superior Court, Case No. LC2006-0004130-DT (November 30, 2006); Salt River Project's Answering Brief, *State v. Arizona Navigable Stream Adjudication Comm'n*, Arizona Court of Appeals, Case No. 1 CA-CV 07-0704 (December 21, *5 2007). The fed-

eral issue was properly and timely raised. *See* Supreme Court Rule 14(l)(g)(i).

A. Factual Background^[FN1]

FN1. The detailed ANSAC Decision sets forth the facts as determined by ANSAC, the state administrative agency tasked with gathering evidence and making factual determinations regarding the navigability of Arizona watercourses. App. 53. The Superior Court Decision recited and summarized several of those pertinent facts. App. 43.

The decision below involved the navigability of the “Lower Salt River” in central Arizona, i.e., the reach of the Salt River from Granite Reef Diversion Dam (northeast of Phoenix) to the confluence with the Gila River (southwest of Phoenix). This stretch of the river runs directly through the Salt River Valley (“Valley”), including the Phoenix metropolitan area, home to more than 3.5 million inhabitants. App. 57; *see also* Amicus Brief of Land Title Association of Arizona, at 6, *State v. Arizona Navigable Stream Adjudication Comm’n* (Arizona Court of Appeals, Case No. 1 CA-CV 07-0704) (May 29, 2008) (“LTAA Brief”).

The Lower Salt River has been essentially dry for the last century, since the United States’ completion of Roosevelt Dam in 1911. App. 58 (“By statehood in 1912, ... the Salt River was ephemeral in flow and was dry for portions of the year or flowed only due to reservoir releases upstream.”). Roosevelt Dam, the first storage dam constructed by the United States pursuant to the 1902 Reclamation Act, is located on *6 the Salt River, upstream from the reach at issue here. Granite Reef Diversion Dam, the upper boundary of what has been classified as the “Lower Salt River,” was constructed by the United States, with construction completed in 1908. App. 97, 225. Arizona became a state on February 14, 1912. The United States constructed additional Reclamation dams (Stewart Mountain Dam, Horse Mesa Dam, and Mormon Flat Dam) on the river between Roosevelt Dam and Granite Reef Di-

version Dam (all upstream of the reach in question) after statehood. App. 97.

1. The early Salt River

Even before the arrival of European settlers in the mid-1800s, “[t]he Salt River Valley was one of the most densely populated areas in the prehistoric southwest and contained the most extensive irrigation system in prehistoric North America.” App. 163-64. The native Hohokam developed an extensive irrigation system on the Salt River at an early date, but that system generally came into disuse around 1450 A.D. App. 91-92, 163-64. Additional diversions recommenced, at a reduced level, sometime thereafter, primarily by the Tohono O’odham and Pima Indians. App. 91.

From the beginning of time, the river was subject to alternating periods of floods and droughts. App. 109-10, 164. “Very high flood flows” existed during the Colonial Period (A.D. 650-900), washing out prehistoric flood gates and damaging canals. App. 164. *7 “Major floods, as well as lower-than-normal flows” continued through the Classic Period (A.D. 1100-1350). *Id.*

During the period between the arrival of the first non-native settlers and the completion of Roosevelt Dam in 1911, the river remained subject to alternating periods of devastating floods and prolonged droughts. Major floods hit the area in 1890 and 1891. “Severe” and “extreme” drought plagued the Valley from 1897 to 1904. Flooding returned again in 1905. App. 96, 175.

The only recorded opinions on navigability by the few individuals who actually tried to boat the river before statehood showed that the river was not suitable as a “highway for commerce.” Charles Hayden (father of late U.S. Senator Carl Hayden) and the other participants in a June 1873 trip to float logs down the Salt River to Tempe, the only known actual attempt to float logs on the river, “pronounce[d] the scheme a failure.” App. 98-99, 105-06, 177. Two engineers from the United States

Reclamation Service, who survived only a mile in a boat on the river in 1905, stated that “[t]hey found the Salt river a poor stream for navigation.” App. 184-85.

2. Construction of Roosevelt Dam and Granite Reef Diversion Dam by the United States

Marshall Trimble, Arizona's official State Historian, described the Lower Salt River and the Salt *8 River Valley as they existed in the period before statehood:

The Salt River Valley was an agricultural paradise. It was nestled at the heart of some 13,000 square miles of watershed. However, the Salt River, which meandered through the valley, was as fickle as a stud at a snortin' post. One year it'd run over its banks and flood all the way into the center of Phoenix; the next year would be so dry the cows were giving powdered milk.

In 1891, a flood spread the banks of the Salt River eight miles wide, washing out the railroad bridge at Tempe. Later in the decade, water was so scarce that folks were loading up their belongings and moving on to California. It was said a cactus wren wouldn't attempt to fly across the Salt River Valley without packin' a sack lunch. Those who stayed to await better days patrolled their irrigation ditches on horseback, armed with Winchesters. During the drought, brief but furious flash floods washed out dirt diversion dams, and farmers watched the precious water escape into the Gulf of California.

App. 162-63.

Much of the local community's energy during the decades prior to statehood was focused toward building a water storage project, so that the landowners could “take control of the unpredictable *9 waterway.” App. 95-98, 170.^[FN2] “For Valley residents, the [completion of Roosevelt Dam in 1911] was the culmination of years of work and planning. The temperamental Salt River had vexed farmers with alternative floods and droughts.” *Id.* In 1903, a group of local farmers pledged their land as collateral for a Government loan to build

Roosevelt Dam, which would control the river's erratic flow. That effort became the Salt River Federal Reclamation Project (“Project”). *Id.* In the March 1903 recommendation to the Secretary of the Interior from the Director of the U.S. Geological Survey (which resulted in the Secretary's order authorizing commencement of the Project), the USGS Director stated:

FN2. See also *Reichenberger v. Salt River Project Agric. Imp. & Power Dist*, 50 Ariz. 144, 146, 70 R2d 452, 453 (1937) (“In the last decade of the nineteenth century it was apparent that agriculture in the Salt River Valley had reached its limit, unless some method could be adopted for storing the flood waters of the Salt and Verde Rivers for use in time of shortage of the natural flow of those rivers.”).

This project is one of the most important and urgent in the United States, as the population needing the water is on the ground, and there is actual suffering and loss of property to the community for want of an adequate supply of water; and the conditions are such that early steps must be taken to perfect the organization contemplated in section 6 of the reclamation law relating to the maintenance and operation of the irrigation *10 works by the owners of the land irrigated thereby....

App. 236.

The Project was constructed by the United States Reclamation Service (now the Bureau of Reclamation). The lake behind Roosevelt Dam (Theodore Roosevelt Lake) began to fill in 1908, and construction on the dam was completed in 1911. App. 97, 224. The United States operated the Project for the first several years after construction was completed and to this day retains legal title to the Project facilities. App. 97, 128; *Ball v. James*, 451 U.S. 355, 358 (1981). The care, operation, and maintenance of the Project facilities were transferred to the Salt River Valley Water Users' Association (“Association”) in 1917. *Ball*, 451 U.S. at 358; see

also *Uhlmann v. Wren*, 97 Ariz. 366, 373, 401 P.2d 113, 119 (1965). The United States retained title to the dam and the bed of the Salt River above Granite Reef Diversion Dam. App. 96-97, 128-29, 224, 228.

Several things had to happen before the United States could build Roosevelt Dam. App. 95-98, 171. A local entity needed to be created to contract with the United States on behalf of the landowners. See App. 96, 128, 171. The Association became that entity. *Id.*; *Ball*, 451 U.S. at 358.

The United States also needed to obtain lumber to build the framework for the masonry dam. A sawmill was constructed in the Sierra Ancha Mountains, upstream from the dam site. App. 171. A road was constructed to cover the twenty-three miles from the *11 sawmill to the dam. App. 171-72. The historical record contains no mention of floating the timber downstream on the river. Rather, all of the timber was transported from the sawmill to the dam site using the lumber road. App. 172.

In addition, the United States had to get workers and supplies from Phoenix to the dam site. App. 172-74. No barges or other vessels were used to haul workers or supplies up the river. Instead, the Government constructed the Apache Trail, a remote, twisting route from Mesa to Roosevelt. *Id.* Construction of the road required the work of at least 200 men and involved a “3,700-foot-long crossing over Tonto Creek and the removal of rock and other material eighteen to twenty miles, primarily by hand.” *Id.* These difficulties made construction of the road extremely expensive. *Id.*

The United States also had to construct a diversion dam downstream from Roosevelt Dam, in order to divert the water to be stored at Roosevelt into the canal system that was to carry that water to end users in the Phoenix area. Prior to establishment of the Project, numerous private canals were operating to divert water from the Salt River in the Phoenix area. App. 59-61, 219-22. After passage of the 1902 Reclamation Act, the United States acquired the

water rights and assets of most of those canal companies. App. 96-98, 224. The Government then commenced construction of Granite Reef Diversion Dam, a 1,100-foot concrete dam, anchored in bedrock in the Salt River, that was designed to divert all of the *12 water in the river, thereby consolidating the diversions of stored water and the prior diversions of normal flow into one single diversion point. App. 97, 219-24. Construction of Granite Reef was completed in 1908. *Id.*

In the decade prior to Arizona's statehood, the United States constructed Roosevelt Dam and Granite Reef Diversion Dam on the Salt River upstream from Phoenix. These federal undertakings, done pursuant to the 1902 Reclamation Act, had the effect of storing and diverting essentially all the water that would have flowed in the Lower Salt River, so that such water could be used for agricultural irrigation and other federal Reclamation purposes within the Salt River Reservoir District in the Phoenix area.

3. The Lower Salt River after completion of Roosevelt Dam in 1911

The erratic and flashy nature of the river changed with the completion of Roosevelt Dam upstream. One purpose of the United States constructing the dam was to capture the extreme flood flows and to store the water for use during the alternating periods of floods and droughts. App. 95-96, 194, 230; see *Reichenberger*, 50 Ariz. at 146, 70 P.2d at 453. Due in part to the completion of Roosevelt Dam in 1911, “[b]y statehood, except on rare occasions when runoff from the Salt River watershed exceeded the capacity of the Project water storage and diversion facilities, water users in the Valley appropriated all of the water in *13 the Salt River for diversion and use on Valley lands.” App. 195.

B. Proceedings Below

ANSAC is an administrative agency established pursuant to Title 38, Chapter 8 of the Arizona Revised Statutes. Members of the commission are

deemed “public officers” and are appointed by the Governor. *See* [Ariz. Rev. Stat. Ann. § 37-1121](#). They are required to “be well-informed on issues relating to rivers and streams in this state.” *Id.* Pursuant to an Arizona statute, ANSAC has jurisdiction to determine which, if any, Arizona watercourses were “navigable” on February 14, 1912. *See id.* [§ 37-1123\(G\)](#).

ANSAC solicited and received voluminous evidence with respect to the navigability of the Lower Salt River. Over 5,000 pages of documents were filed. ANSAC held a two-day hearing in Phoenix in April 2003, the transcript of which consists of 277 pages. App. 54, 87-88, 162. In September 2005, ANSAC issued its determination that the Lower Salt River was not “navigable.” App. 120-21.

The Arizona State Land Department (“ASLD”) filed a judicial appeal of the ANSAC Decision in the superior court. *See* App. 43. The parties before the superior court submitted lengthy briefs and detailed statements of facts. After conducting oral argument, Judge Carey S. Hyatt of the Maricopa County Superior Court issued a minute entry affirming the ANSAC *14 Decision that the Lower Salt River was non-navigable. *Id.* In that ruling, Judge Hyatt found:

ANSAC thoroughly traced, analyzed, and applied the controlling law in its decision. [Report pp. 4-17]. It spelled out and considered in painstaking detail the history of the Salt River Valley through which the Lower Salt traveled. [Report pp. 18-31]. It analyzed and weighed the expert testimony and evidence. [Report pp. 31-33, 38-41, 44]. It considered the personal and anecdotal testimony, along with historical newspaper accounts of the uses of the river. [Report, pp. 33-37].... There is nothing illegal, arbitrary, or capricious about the ANSAC decision, and it does not demonstrate an abuse of discretion.

App. 51-52.

Judge Hyatt ruled that: (1) ANSAC properly considered the river's condition, App. 46-48; (2) AN-

SAC considered and correctly interpreted the evidence concerning the river's physical characteristics and any indicia of navigability, App. 48-50; and (3) ANSAC correctly applied the law regarding the “highway for commerce” element of the federal test of navigability. App. 49-52. Judgment was subsequently entered consistent with Judge Hyatt's minute entry. *See id.*

The Defenders of Wildlife, et al. filed a notice of appeal of the Superior Court Decision in August 2007. App. 14 (¶ 12). The ASLD filed a similar notice shortly thereafter. *Id.*

***15** The Arizona Court of Appeals reversed the Superior Court Decision and remanded the case for further proceedings consistent with its opinion. App. 1. In reaching its conclusion, that court determined that “ANSAC did not evaluate the [Lower Salt] River's ordinary and natural condition in light of the numerous dams, canals, and other diversions other than Roosevelt Dam.” App. 21 (¶ 22). The court held that navigability should be determined as if the dams and diversions did not exist. *Id.* Recognizing that “[t]his is largely a question of first impression,” the court found that failing to take into account the impact of pre-statehood dams and diversions constituted legal error on the part of ANSAC, thereby supporting reversal of Judge Hyatt's affirmance of ANSAC's determination that the Lower Salt River was non-navigable. App. 22, 25-27 (¶¶ 23, 27-28).

SRP and others filed petitions for review to the Supreme Court of Arizona. App. 122. The State of Arizona filed a cross-petition. *See id.* On February 9, 2011, the Supreme Court of Arizona denied each of the petitions for review and the cross-petition. *Id.* SRP moved to stay issuance of the mandate by the Arizona appellate courts so that it could file this Petition, and that motion was granted. App. 37. The proceedings in the Arizona courts are thus stayed pending resolution of this Petition.

***16 REASONS FOR GRANTING THE PETITION**

Pursuant to Rule 10 of this Court, the Court should grant SRP's Petition for a Writ of Certiorari because the Arizona Court of Appeals' opinion regarding the proper standard for "navigability" is a decision on an important question of federal law - i.e., the proper analysis and application of the "federal test" of navigability and, specifically, the consideration of pre-statehood actions by the United States pursuant to the 1902 Reclamation Act and the effect of those actions on the river's navigability as of February 14, 1912. That federal question is one that should be settled by this Court. *See* Supreme Court Rule 10(c); Section I, *infra*. In addition, the Arizona Court of Appeals' decision on that important federal question conflicts with the relevant decisions of this Court (*see* Supreme Court Rule 10(c); Section II, *infra*) and with decisions of other state courts and United States Courts of Appeals. *See* Supreme Court Rule 10(b); Section III, *infra*.

I. THE ARIZONA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

Under the public trust doctrine, the sovereign owns land beneath "navigable" waters. *See Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 452-53 (1892), *aff'd*, 154 U.S. 225 (1894). The equal footing doctrine provides that new states enter the Union on an "equal footing" with the original 13 Colonies and *17 succeed to the United States' title to the beds of navigable waters within their boundaries, unless such lands have been otherwise conveyed or reserved by the United States prior to statehood. *See Alaska v. United States*, 545 U.S. 75, 79 (2005), *judgment entered*, 546 U.S. 413 (2006).

These two doctrines, taken together, mean that, unless the United States has otherwise reserved or conveyed the lands prior to statehood, each new state obtains title to lands beneath the waters within its boundaries that are "navigable" on its date of statehood. Courts have applied and interpreted these doctrines in more than one hundred published decisions issued since the mid-1800s. *See, e.g., Pol-*

lard's Lessee v. Hagan, 44 U.S. 212 (1845).

The crux of the analysis in many of these cases is the application and interpretation of the definition of "navigable." The most often cited definition is that set forth by this Court in *In re The Daniel Ball*, 77 U.S. 557 (1870). In that case, this Court stated:

Those rivers must be regarded as public navigable rivers which are navigable in fact. And they are navigable in fact when they are used, or are susceptible to being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 563. Application and interpretation of this definition is particularly important because it can *18 determine the ownership of many acres of valuable land. If a watercourse is "navigable," the State can claim ownership of all lands beneath its high water mark. If the watercourse is not "navigable," the lands beneath the high water mark are owned by the owner of the adjacent parcel (i.e., the adjoining landowner generally owns the land to the center of the watercourse).

Federal law applies to the determination of which watercourses are "navigable" for title purposes. *See Utah v. United States*, 403 U.S. 9, 10 (1971). This Court, and many others, have applied the *Daniel Ball* definition of "navigability" in more than one hundred cases. Those decisions have dealt with a variety of issues, such as whether physical impediments to navigation will defeat navigability (*see generally, e.g., Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921)), whether seasonal or periodic susceptibility to navigation is sufficient to satisfy the test (*see United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690 (1899)), and whether the landing of floatplanes on a remote Alaska lake constituted a "highway for commerce" within the *Daniel Ball* definition. *See Alaska v. United States*, 754 F.2d 851, 855 (9th Cir.), *cert. denied*, 474 U.S. 968 (1985).

None of those prior decisions has addressed the

specific issue at hand in this Petition, however. Although this Court and others have examined the powers and responsibilities of the United States while it holds lands in anticipation of the creation of future states, *see* Sections II and III, *infra*, no court has *19 analyzed how the impacts of pre-statehood actions by the United States (such as the construction of dams and diversion works pursuant to the 1902 Reclamation Act) should factor into the decision of whether a particular watercourse was “navigable” on the date of statehood.

This question of federal law is particularly important in the present case because the Arizona Court of Appeals applied an expansive version of the *Daniel Ball* definition of “navigable” (with the words “and natural” condition inserted, as some other courts have done) and used that “natural condition” element as grounds for ignoring the reality that all parties recognized existed with respect to the Lower Salt River on the date of Arizona's statehood: As of February 14, 1912, Roosevelt Dam and Granite Reef Diversion Dam had been completed. Those dams were capturing, storing, and diverting essentially the entire flow of the Salt River. The Lower Salt River was clearly not “used or susceptible to being used ... as a highway for commerce” on February 14, 1912, regardless of whether it was ever used or susceptible to such use at any prior date.

The Arizona Court of Appeals has vacated the ANSAC Decision and the Superior Court Decision and has ordered a remand to the superior court for proceedings consistent with the Appellate Decision. App. 35-36 (¶ 39). That remand, if allowed to occur, likely will result in an application of the federal test of navigability in a manner that requires the lower courts to ignore reality and the presence of Roosevelt *20 Dam and Granite Reef Diversion Dam on February 14, 1912, and to make their determinations based upon what they believe the river was or would have been like in its pristine “natural” state, absent any effects from such actions by the United States. Although Petitioners continue to believe that the river is not “navigable” even under

that overly expansive and liberal view of the federal test, they also deny that this is the proper test. The United States was the holder of any public trust interests in the Territory of Arizona before February 14, 1912. Consistent with prior decisions by this Court, the United States had the power to restrict or otherwise affect the inchoate public trust interests of the potential new state at that time or to convey lands that could be subject to that trust. *See* Section II, *infra*. On the Salt River, the United States exercised that power pursuant to the 1902 Reclamation Act.

Improper application of federal law by the Arizona courts on this issue could have devastating impacts on Arizona property owners. A determination that the Lower Salt River is “navigable” could have extensive ramifications with respect to current property ownership along the river, as well as property ownership along other watercourses. *See* LTAA Brief, *supra*, at 6. The Lower Salt River covers a distance of approximately thirty-seven miles, running through the Phoenix metropolitan area. *Id.* The Arizona Court of Appeals, in a 1987 opinion regarding navigability and the Salt River, noted that the State had claimed that “hundreds of millions, if not billions, of dollars' *21 worth of land in Arizona's most populous county are at issue.” [Land Dep't v. O'Toole](#), 154 Ariz. 43, 45, 739 P.2d 1360, 1362 (App. 1987).

Furthermore, five other cases are currently pending before the lower courts in Arizona relating to other watercourses (San Pedro, Santa Cruz, Upper Salt, Verde, and Gila Rivers) under this same statutory definition. *See*

www.azstreambeds.com/status_of_cases.asp. Those cases are stayed pending a final decision on the Lower Salt River case. *See id.* If the Appellate Decision is allowed to stand, the Arizona courts likely will proceed to apply a legal standard that conflicts with controlling federal law in reviewing ANSAC's decisions on the navigability of other watercourses.

If and to the extent the Lower Salt River ever was navigable, it is beyond reasonable dispute that such

watercourse was not “used or susceptible to being used ... as a highway for commerce” on the day Arizona became a state. Prior to that date, the United States had undertaken an active and comprehensive federal program to purchase the rights of the pre-existing private canal companies, construct Granite Reef Diversion Dam, and construct Roosevelt Dam, which was, at the time of its completion, the largest stone arch masonry dam in the world. *See* Statement of the Case, § A(2), *supra*. The Project was planned, designed, implemented, and financed under the 1902 Reclamation Act by the United States - the same sovereign entity that was the holder of any public trust interests for lands within the Territory of *22 Arizona and the same entity that this Court has determined has the power to sell or transfer lands beneath watercourses in furtherance of other federal interests. *See* Section II, *infra*.

In their response to various petitions for review to the Supreme Court of Arizona in this case, the Defenders of Wildlife, et al., some of the primary proponents of the argument that the Lower Salt River was “navigable,” affirmatively asserted:

The Lower Salt River is, and has been, the lifeblood of what is now the Phoenix Metropolitan Area, for more than 1000 years.... It is believed that the Salt River Valley has been inhabited for the past 1,000 years primarily because the Salt River had a “reliable flow.” ...

Given the arid topography of the region, the river has always been valued more as a source of water than as a conduit for travel. The practice of diverting water from the river extends back to prehistoric times. *Id.* More recently, modern irrigation ditches, canals, and other diversions have taken water from the mainstem of the Lower Salt River for various uses throughout the Valley.... These modern day diversions began in the 1860s and “[b]y 1912, numerous irrigation diversions upstream and within the Lower Salt River had significantly reduced the flow rates, and even caused the river to cease flowing in some reaches during some years.” ...

*23 Combined Response to ANSAC and SRP's Petitions for Review by Defenders of Wildlife, Donald Steuter, Jerry Van Gasse and Jim Vaaler, at 3, *State v. Arizona Navigable Stream Adjudication Comm'n*, Arizona Court of Appeals Division One, Case No. 1 CA-CV 07-0704 (July 30, 2010) (citations omitted).

Petitioners agree that the United States, working together with the Territory of Arizona and local citizens, made a conscious decision in the first decade of the 20th Century that the Salt River was worth more to the area for its water than for any potential for water-borne transportation or commerce (even assuming, for purposes of this argument, that such potential ever existed). The United States, acting pursuant to Congress' passage of the 1902 Reclamation Act, undertook the task of building Roosevelt Dam and Granite Reef Diversion Dam to harness the Lower Salt River and put its water to use in making it possible for people to live and thrive in the Phoenix area. *See Ramada Inns, Inc. v. Salt River Valley Water Users' Ass'n*, 111 Ariz. 65, 68, 523 P.2d 496, 499 (1974) (referring to the Salt River Project canal system as “indispensable for the maintenance of life and prosperity”); *see also* App. 236 (stating that the Project was “one of the most important and urgent in the United States”). In passing the 1910 legislation to authorize Arizona to become a state, Congress specifically provided that such statehood would not affect the United States' authority under the 1902 Reclamation Act. App. 137 (“Seventh”). It is now for this Court *24 to decide whether and how a court applying the federal test of “navigability” for title purposes should consider the effects of those pre-statehood federal actions.

II. THE ARIZONA COURT OF APPEALS' DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Although Petitioners' research has revealed no instance in which this Court has addressed the specific question of how pre-statehood dams and diver-

sions by the United States affect the determination of “navigability,” this Court has clearly stated that such determination must be made as of the date of statehood. In *Utah v. United States*, this Court stated:

The operation of the ‘equal footing’ principle has accorded newly admitted State[s] the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown. *Pollard's Lessee v. Hagan*, 3 How. 212, 222-223, 228-230, 11 L.Ed. 565. That means that Utah's claim to the original bed of the Great Salt Lake - whether now submerged or exposed - ultimately rests on whether the lake was navigable (*Martin v. Waddell*, 16 Pet. 367-410, 416-417, 10 L.Ed. 997) **at the time of Utah's admission.** *25 *Shively [sic] v. Bowlby*, 152 U.S. 1, 26-28, 14 S.Ct. 557-558, 38 L.Ed. 331. It was to that issue that we directed the Special Master, Hon. J. Cullen Ganey, to address himself. See *Utah v. United States*, 394 U.S. 89, 89 S.Ct. 761, 22 L.Ed.2d 99. In the present report the Special Master found that **at the time in question** the Great Salt Lake was navigable. We approve that finding.

403 U.S. at 10 (emphasis added); see also *id.* at 12 (focusing on the condition of the lake as of January 4, 1896, the day Utah became a state).

In addition, this Court has on several occasions examined the powers and limitations on the United States' actions with respect to watercourses and lands beneath them held by the Federal Government in anticipation of the establishment of future states. In each of those cases, this Court has held that, although there is a presumption against the defeat of a future state's title that is to be applied in interpreting pre-statehood federal intent and actions, the United States does have broad authority to take actions that affect the equal footing interests of future states.

This Court's most recent pronouncement on the issue of pre-statehood federal action and a state's equal footing title came in 2005 in its opinion in *Alaska v. United States*, 545 U.S. at 75. That case

was one of several disputes between the State of Alaska and the United States regarding title to submerged lands within the State's boundaries. This Court found that the Alaska Statehood Act expressed *26 congressional intent to retain submerged lands lying under the waters of Glacier Bay as part of the Glacier Bay National Monument, which later became Glacier Bay National Park. *Id.* at 103-04. The Court stated: “The Federal Government can overcome the presumption and defeat a future State's title to submerged lands by setting them aside before statehood in a way that shows an intent to retain title.” *Id.* at 79. Thus, pre-statehood actions by the United States, acting pursuant to a specific congressional act, served to defeat Alaska's equal footing title to submerged lands, even though the waters (in that case) clearly would have been “navigable” in their “ordinary and natural condition.” See *id.*

Similarly, in 2001, this Court held that the pre-statehood actions by Congress to set aside lands in Idaho for the Coeur d'Alene Indian Tribe defeated Idaho's equal footing title to lands underlying portions of Lake Coeur d'Alene and the St. Joe River. *Idaho v. United States*, 533 U.S. 262, 277-78 (2001). “Congress has the power before statehood to convey land beneath navigable waters, and to reserve such land for the United States.” *Id.* at 272. Although the courts must begin such analysis with a presumption against finding federal intent to defeat the future state's title, the United States has broad pre-statehood authority over such land if it elects to exercise it. *Id.*; see also *United States v. Alaska*, 521 U.S. 1, *reh'g denied*, 521 U.S. 1144 (1997) (“Although the United States has the power to divest a future State of its equal footing title to submerged lands, we do not ‘lightly infer’ such *27 action.”) (quoting *Utah, Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987)).

This line of cases had its primary origin in *Shively v. Bowlby*, 152 U.S. 1 (1894). Although acknowledging prior decisions regarding the presence of the public trust and equal footing doctrines, this

Court in *Shively* was the first to address the question of pre-statehood federal actions and their effect on equal footing title at the time of statehood. Rejecting dicta from prior opinions regarding the impact of pre-statehood federal actions, this Court stated: “Notwithstanding the dicta contained in some prior opinions of this court, already quoted, to the effect that congress has no power to grant any land below high-water mark of navigable waters in a territory of the United States, it is evident that this is not strictly true.” *Id.* at 47. After discussing early decisions regarding Mexican land grants and pre-statehood federal patents, the Court continued:

By the constitution, as is now settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have [sic] the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition....

We cannot doubt, therefore, that congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it *28 becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations or among the several states, or to carry out other public purposes appropriate for the objects for which the United States holds the territory.

Id. at 48 (citations omitted).

Before 1912, when Arizona was a territory, the United States, as the only government, had “the entire dominion and sovereignty, national and municipal, federal and state” over the area. *Shively*, 152 U.S. at 48. During that time, Congress passed the 1902 Reclamation Act, and the United States proceeded to construct Roosevelt Dam and Granite Reef Diversion Dam to carry out the “public purposes appropriate to the objects for which the United States [held] the territory.” *See id.* According to this Court's prior decisions (and contrary to

the holding by the Arizona Court of Appeals in the Appellate Decision), the pre-statehood federal actions were well within the power and authority of the United States, and the determination of “navigability” under the federal test must take into account any effects of those actions on the condition of the river on February 14, 1912. The 1910 Enabling Act expressly required “full acquiescence” by the future state to the United States' authority under the 1902 Reclamation Act. App. 137.

In several cases decided between *Shively* (1894) and *Utah, Div. of State Lands* (1987), this Court *29 examined whether the United States intended to defeat a state's equal footing title with respect to its pre-statehood actions, regardless of whether such actions be reservation for itself or conveyance to a third party. *E.g.*, *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922); *Oklahoma v. Texas*, 258 U.S. 574 (1922), *modification denied*, 260 U.S. 711 (1923). In some of those decisions, the Court found that no such intent existed. *E.g.*, *Montana v. United States*, 450 U.S. 544, 553-57, *reh'g denied*, 452 U.S. 911 (1981); *United States v. Holt State Bank*, 270 U.S. 49 (1926). Each of those opinions, however, repeated the principle of law that, although a presumption exists against the defeat of a future state's title, the United States has broad authority over territorial lands and can take action to defeat the future state's equal footing title if it elects to do so for another federal purpose. *E.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 633, *reh'g denied*, 398 U.S. 945 (1970) (“Indeed, it seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands.... Rather, the question is whether the United States intended to convey title to the river bed to petitioners.”).

The Appellate Decision in the present case, which mandates ignoring the impacts of pre-statehood actions taken by the United States pursuant to the 1902 Reclamation Act, conflicts with both the holding and the rationale set forth by this Court in these cases. The key time for determining navigability

under the public trust and equal footing doctrines is *30 the date of statehood. The United States is the holder of any public trust interests in the lands in territories of future new states prior to statehood. During that period, the United States has broad powers as the holder of those lands, and actions taken by the United States prior to statehood must be considered in determining navigability at the time the state enters the Union.

III. THE ARIZONA COURT OF APPEALS' DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS AND UNITED STATES COURTS OF APPEALS.

While some disputes regarding the authority of the United States to convey or otherwise deal with lands beneath watercourses prior to statehood have reached this Court for decision, other federal and state courts also have addressed the question of how the date of statehood requirement applies under the federal test of navigability. The Appellate Decision in this case is at odds with those prior opinions.

Acknowledging that the precise question of how to deal with pre-statehood dams and diversions was an issue of first impression, the Arizona Court of Appeals interpreted the federal test in a manner that essentially negated the date of statehood element. App. 25-29 (¶¶ 27-30). The court stated that “ANSAC was required to determine what the River would have looked like on February 14, 1912, in its ordinary *31 (i.e., usual, absent major flooding or drought) and natural (i.e., without man-made dams, canals, or other diversions) condition.” App. 25-26 (¶ 28). This interpretation, as a practical matter, focuses upon the “natural” condition of the watercourse and ignores the date of statehood. Arguably, the “natural” condition of the watercourse on February 14, 1912, is no different from the “natural” condition in 1700, 1850, or 2011. What the Arizona court effectively required was that ANSAC and the lower Arizona courts assess the Lower Salt River in its “natural condition” and ignore any consideration

of February 14, 1912, and any consideration of the impacts of pre-statehood actions by the United States to dam and divert water from the river under the 1902 Reclamation Act.

The Arizona court's focus on the “natural” condition of the watercourse and its stated intent to ignore any consideration of the actual condition on the date of statehood are directly contrary to published decisions from a variety of state and federal courts. In those decisions, those courts have definitively found that the determination of navigability must be made as of the date of statehood.

For example, in *Parks v. Cooper*, the Supreme Court of South Dakota correctly stated the federal test as applying to the actual condition of the river on the day of statehood:

... Under the federal test, the question is whether the water body was “navigable in fact” **at the time the state entered the *32 Union**. Thus, the waterway must have been susceptible to being used as an “avenue of commerce” in its ordinary condition **at the time of statehood**. *Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2d 279 (1971); *Hughes v. Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967); *The Daniel Ball*, 77 U.S. (10 Wall 557) 19 L.Ed.2d 999.

2004 S.D. 27, 676 N.W.2d 823 (2004) (emphasis added). The legal standard applied by the Appellate Decision in the present case is contrary to the recent statement of the same federal test by the highest court of the State of South Dakota, which rightly focused on “the time the state entered the Union.”

In *United States v. Champlin Refining Co.*, 156 F.2d 769 (10th Cir. 1946), *aff'd*, 331 U.S. 788, *reh'g denied*, 331 U.S. 869 (1947), the Tenth Circuit Court of Appeals stated:

In accordance with the constitutional principle of the equality of states, the title to the beds of rivers within a state passes to such state upon its admission into the union, if the rivers are **then** navigable. If they are not **then** navigable, the title to the river

beds, if a part of the public domain, remains in the United States. The question of navigability is determinative and is a Federal question.

Id. at 773 (emphasis added); *see also, e.g., Bingenheimer v. Diamond Iron Mining Co.*, 237 Minn. 332, 54 N.W.2d 912 (1952) (“States organized in the public *33 domain, as was Minnesota, became vested upon admission to the Union with title to the beds of all waters **then** navigable and not previously granted by the United States....”) (emphasis added).

Other courts have been even more emphatic in their findings that the federal test of navigability must be applied as of the date of statehood. Many of these cases have arisen in Alaska because Alaska, like Arizona, was a relative latecomer to statehood. In a case involving the Gulkana River, for instance, the federal district court in Alaska stated that “the requirement that title navigability be determined at the time of statehood means only that when making a title navigability determination, the *Daniel Ball* test is to be applied to the physical dimensions and physical configuration existing at the time of statehood.” *Alaska v. United States*, 662 F. Supp. 455, 463 (D. Alaska 1987), *aff’d*, 891 F.2d 1401 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990); *see also Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) (“[t]he river must be navigable at the time of statehood”); *Northwest Steelheaders Ass’n, Inc. v. Simantel*, 199 Or. App. 471, 112 P.2d 383, *review denied*, 339 Or. 407, 122 P.3d 65 (2005), *cert. denied*, 547 U.S. 1003 (2006) (“The test is applied to the condition of the river at the time of statehood.”) (citing *United States v. Utah*, 283 U.S. 64, 75 (1931), and *Alaska v. Ahtna, Inc.*, 891 F.2d at 1404); *Stewart v. United States*, 639 F. Supp. 2d 1190, 1195-96 (D. Or. 2009).

*34 The Ninth Circuit Court of Appeals, in another Alaska case regarding the Kukpowrak River, put it even more succinctly:

Alaska next argues that, because the United States is presumed to hold the beds of navigable waters in

trust for the states to take title at statehood, it also must hold reserved lands *after* statehood in a similar trust. Consequently, the State argues, the title to the beds of navigable rivers within the reserved lands must pass to the state whenever, *after* statehood, the purpose that caused the lands to be reserved *at* statehood is no longer served. The State offers, and we have found, no authority for such a proposition. **The key moment for the determination of title is the instant when statehood is created.** The governing doctrine is that new States “enter the Union on an ‘equal footing’ with the original 13 States [and] hold title to land under navigable waters within their boundaries *upon entry into the Union.*”

Alaska v. United States, 213 F.3d 1092, 1097 (9th Cir. 2000) (quoting *Utah, Div. of State Lands*, 482 U.S. at 196) (italics in original, holding added).

Lower courts also have examined the questions relating to lands beneath watercourses that were conveyed or reserved by a prior sovereign (most often, the United States) before statehood. *Cf.* Section II, *supra* (addressing similar cases decided by this Court). In *City of Los Angeles v. Venice Peninsula Properties*, for example, a California appellate court found that *35 lands that had been subject to a prior Mexican land grant and later patented by the United States before statehood were not subject to the public trust. 253 Cal. Rptr. 331, 335 (App. 1988), *reh’g denied* (March 2, 1989). That California court stated: “Our reading of the cases leads us to conclude that the public trust easement only exists over lands to which California acquired title by virtue of its sovereignty upon admission to the Union.” *Id.*

As in the other cases cited above, the decision under the public trust and equal footing doctrines rightly focuses upon the date of statehood, not some hypothetical prior condition of the watercourse as determined in the Appellate Decision below in the present case. *See also James v. Alaska*, 950 P.2d 1130 (Alaska 1997) (examining pre-statehood withdrawals of lands for national forests and stating

that, although there is a strong presumption against defeating the State's title, "there is nothing in the Constitution to prevent the Federal Government from defeating a State's title to land under navigable waters by its own reservation for a particular use").

The Arizona Court of Appeals ignored the basic element of the "federal" test that the determination of "navigability" must be made as of the date of statehood. As discussed above, that decision on an important question of federal law conflicts with prior holdings by numerous state and federal courts.

***36 CONCLUSION**

An important federal issue exists with respect to the United States' actions under the 1902 Reclamation Act and the impacts of those actions on a state's equal footing title as of the date of statehood. For the reasons set forth herein, Petitioners request that the Court grant their Petition for a Writ of Certiorari.

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