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**received**

9/7/12



8 **BEFORE THE ARIZONA NAVIGABLE STREAM  
9 ADJUDICATION COMMISSION**

10 In re Determination of Navigability of  
11 the Gila River

No. 03-007-NAV (Gila)

12 **THE SAN CARLOS APACHE  
13 TRIBE'S MEMORANDUM  
14 REGARDING THE NAVIGABILITY  
15 OF THE GILA RIVER AT THE TIME  
16 OF STATEHOOD**

17 **Introduction:**

18 The San Carlos Apache Tribe ("Apache Tribe" or "Tribe") submits this Memorandum  
19 pursuant to the Commission's June 29, 2012, request for memoranda addressing the question  
20 of whether any of the pending watercourses were navigable on February 14, 1912, in  
21 accordance with the Court of Appeals' decision in *Arizona v. Arizona Navigable Stream  
Adjudication Commission*, 224 Ariz. 230, 229 P.3d 242 (2010).

22 **Discussion:**

23 There is strong evidence in the record for the Arizona Navigable Steam Adjudication  
24 Commission (the "Commission") to affirm its final determination that the Gila River, in its  
25 ordinary and natural condition, was not navigable on February 14, 1912. *See* ANSAC Report,  
26 Findings, and Determination Regarding the Navigability of the Gila River from the New  
27

1 Mexico Border to the Confluence of the Colorado River (January 27, 2009) (the "ANSAC  
2 2009 Report"), Exhibit E, Entries 1-28.

3  
4 The Commission solicited and received ample evidence proving that the Gila River  
5 was not navigable or susceptible to navigation up to and including the date of statehood,  
6 February 14, 1912. The ANSAC 2009 Report summarized the majority of this evidence, and  
7 referenced those documents and testimony that the Commission found most compelling.

8  
9 Those who claim the Gila River was navigable upon Statehood, have the burden of  
10 proof A.R.S. § 37-1128A. They have failed to do so. The record is devoid of such evidence.  
11 To the Contrary, the Apache Tribe urges the Commission to review the report by Dr. Douglas  
12 R. Littlefield, titled *Assessment of the Navigability of the Gila River Between the Mouth of the*  
13 *Salt River and the Confluence with the Colorado River Prior to and on the Date of Arizona's*  
14 *Statehood, February 14, 1912* ("Littlefield") (ANSAC 2009 Report at, Exhibit Item "EI" 12);  
15 a report by Jack L. August, Jr., Ph.D., titled *Expert Witness Report, the Lower Gila River: a*  
16 *Non-Navigable Stream on February 14, 1912* ("August") (EI 17); a report titled *Arizona*  
17 *Stream Navigability Study for the Gila River: Colorado River Confluence to the Town of*  
18 *Safford*, which was prepared by JE Fuller/Hydrology & Geomorphology, Inc. for the Arizona  
19 State Land Department in October 1994, revised September 1996, and updated in June 2003  
20 (the "Gila Study") (EI 2); and a report by Stanley A. Schumm, Ph.D., P.G. titled *Geomorphic*  
21 *Character of the Lower Gila River*, dated June 2004 (the "Schumm") (EI 6).<sup>1</sup>

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25 **A. The Gila River Was Not Susceptible to Navigability on February 14, 1912,**  
26 **nor Was It Ever Considered Navigable.**

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<sup>1</sup> These documents, and other evidence in the record are referred to in Part VII of the ANSAC 2009 Report at 21-22, "Evidence Received and Considered by the Commission."

1  
2 Federal surveys, investigational studies, findings and determinations, and an  
3 abundance of historical and archaeological evidence, was provided to the Commission, and  
4 further confirmed by experts who testified before the Commission on October 14, 2003;  
5 October 15, 2003; March 9, 2004; November 15, 2004; January 24, 2005; and November 16  
6 and 17, 2005. (T.R. at [date;page] refers to the Reporter's Transcripts). The overwhelming  
7 majority of this evidence led the Commission to conclude that the Upper Gila River was not  
8 susceptible to navigation on the date of Arizona's statehood, and has never been considered a  
9 navigable watercourse due to its historically erratic and unpredictable character. ANSAC  
10 2009 Report, at 87-88.  
11

12  
13 **1. Federal Reports and Findings Regarding the Flow Characteristics of the**  
14 **Gila River up to and on February 14, 1912, Demonstrate that the Gila River Was Never**  
15 **Navigable.**

16 Federal records from the U.S. Geographical Survey and the Reclamation Service  
17 beginning in the early 1870's, and continuing through February 14, 1912, reported a wealth of  
18 information concerning the characteristics of the Gila River. *See* Littlefield, at 89).  
19 Littlefield examined thousands of pages of documents produced by different agencies, using  
20 different methods, and having different interests, "all of which substantiated that the Gila  
21 River was never viewed as a reliable means of navigation prior to or at the time of Arizona  
22 Statehood in February of 1912." Littlefield, at 89. *See* August, at 16-17.  
23

24 The U.S. Geological Survey *Annual Reports* published at and around 1912, frequently  
25 included descriptions and observations of the Gila River. Over the course of several decades,  
26 well documented and historically consistent characterizations of the Gila River were  
27

1 solidified, and the Gila River became known as violent, unpredictable and unsusceptible to  
2 navigation. Published reports from the Department of Interior illustrate this consistency, *Part*  
3 *II of the Eleventh Annual Report of the U.S. Geological Survey* allocated an entire section for  
4 discussion of the Gila Basin, describing the rivers found within the basin as:  
5

6 most difficult and dangerous to examine and control . . . . In place of recurring  
7 annual floods of spring and early summer . . . these rivers show almost the  
8 reverse, being at that season at their very lowest stages - even dry - and rising in  
9 sudden floods at the beginning of and during the winter. These floods are of the  
10 most destructive and violent character, the rate at which the water rises and  
11 increases in amount is astonishingly rapid, although the volume is not great . . . .  
12 From this it will be recognized that the onset of such a flood is terrific. Coming  
without warning, it catches up logs, boulders [sic] in the bed, undermines the  
banks, and, tearing out trees and cutting sand-bars, is loaded with this mass of  
sand, gravel, and driftwood - most formidable weapons of destruction.<sup>2</sup>

13 The *Twelfth Annual Report of the U.S. Geological Survey* (1889-90) addressed the Gila  
14 River's dramatic changes in flow and massive torrents: "the floods of the Gila are usually  
15 short and violent . . . [T]hey often sweep out bridges, dams, and canal head works. . . . It is  
16 sometimes impassable for weeks and has the appearance in places as a sea of muddy water."<sup>3</sup>  
17

18 The *Sixteenth Annual Report of the U.S. Geological Survey* (1894-95) confirmed the previous  
19 reports characterization of the Gila River, noting that large water flow usually occurs  
20 "following the sudden storms or 'cloud-bursts' in the mountains . . . but these floods occur at  
21  
22

23 <sup>2</sup>*Eleventh Annual Report of the United States Geological Survey to the Secretary of the*  
24 *Interior, 1889-90, Part II-Irrigation* (Washington D.C.: U.S. Government Printing Office,  
1891), p. 58 (quoted in ANSAC 2009 Report, at 48-49; Accord Littlefield, at 92).

25  
26 <sup>3</sup>*Twelfth Annual Report of the United States Geological Survey to the Secretary of the*  
27 *Interior, 1890-91, Part II-Irrigation* (Washington, D.C.: U.S. Government Printing Office,  
1891), p. 292 (quoted in Littlefield, at 92, e.g. August, at 19; Gila Study, at IV-44).

1 such irregular intervals . . . . With the exception of the Colorado River . . . the streams of the  
2 territory are small, and usually intermittent."<sup>4</sup>

3  
4 The U.S. Geological Survey also published a series of research treatises known as  
5 Water Supply Papers ("WSP"). These studies chronicled the Gila River during the early  
6 1900's, and reported characteristics of the Gila River that mirror the *Annual Report*. There is  
7 further evidence that the Gila River was a consistently unreliable and unpredictable River,  
8 having never been susceptible to navigation, a River whose habit remained unchanged on  
9 February 14, 1912. See August, at 19 ("These studies further affirm the erratic,  
10 undependable, and unpredictable nature of the Gila River.").

12 WSP 289, describes the Gila River in 1910 as "torrential," and that while it was  
13 "[s]ometimes impassable for weeks," within months the riverbed would be completely "dry in  
14 some places. . ." *Surface Water Supply of the United States - Colorado River Basin*, U.S.  
15 Geological Study Survey WSP No. 289 (Washington D.C.: U.S. Government Printing Office,  
16 1912), at 200 (*As quoted in Littlefield*, at 92, *See also Gila Report*, at IV-14 ("The bed of the  
17 stream is composed of shifting sand and silt..."), *See generally August*, at 21.

19  
20 During the years just prior to 1912, there was massive flooding in Arizona, although  
21 this affected the Gila River, the result was a stream where navigation would have been  
22 impossible. See August, at 20. WSP 162 detailed the affects of the five floods that occurred  
23 on the Gila in 1905. See August, at 20. Published in 1906, WSP 162 stated:

24  
25  
26 <sup>4</sup> *Sixteenth Annual Report of the United States Geological Survey to the Secretary of the*  
27 *Interior, 1894-9, Part II-Irrigation* (Washington D.C.: U.S. Government Printing Office),  
p.505). *quoted in Gila Study*, at IV-45.

1 The total run-off for the five months is 2,957,400 acre-feet. To appreciate the  
2 magnitude of the run-off . . . it is necessary to remember that this stream is  
3 usually dry in this place about ten months of the year . . . . [The streambed] not  
4 only scours out during a flood and fills in after it, but [the channel] changes  
5 from one side of the bottom to the other . . . . This continual change of the river  
bed has made it exceedingly difficult to secure reliable estimates of the rate of  
flow, and some of the estimates may be largely an error.

6 *Destructive Floods in the United States in 1905, with Discussion of Flood Discharge and*  
7 *Frequency Index to Flood Literature* , U.S. Geological Survey WSP 162 (Washington D.C.  
8 Government Printing Office, 1906), at 200. *quoted in* Littlefield, at 94, August at, 21-22, *See,*  
9 ANSAC 2009 Report, at 51-52.

11 WSP 1049, provided compelling evidence of the Gila River's nonnavigability on  
12 February of 1912 reporting that "there was no flow at all." *Summary of Records of Surface*  
13 *Waters at Stations on Tributaries in Lower Colorado River Basin, 1880-1938*, U.S.  
14 Geological Survey WAP 1049 (Washington D.C.: U.S. Government Printing Office, 1947) at,  
15 230-237, *See* Littlefield, at 95, *See, e.g.,* August, at 21. Further, WSP 1049 provided an  
16 overall summary of the surface water records spanning 50 years, including the Gila River,  
17 stating that the Gila River had no flow and remained without flow until May 1912. *See*  
18 August, at 21. *accord* Littlefield, at 95-96.

21 Unpublished records were also available and relied upon by the Commission, and  
22 referenced in ANSAC 2009 Report. *See* ANSAC 2009 Report, at 49-51 (reasoning that the  
23 purpose of George M. Wheeler's unpublished draft *Progress Report Upon Geographical and*  
24 *geological Explorations and Surveys West of the 100th Meridian in 1872*, was to assess the  
25 topography of Arizona and how such conditions would affect future settlement in the west.  
26 Had there been the potential for navigability, Wheeler would have noted it in his report).  
27

1 The notes and unpublished progress reports prepared for the Geological Survey by  
2 E.C. Murphy, further demonstrate the nonnavigability of the Gila River in February of 1912.  
3 See August, at 21, See ANSAC 2009 Report, at 49-50. The Report, *Water Power Utilization*  
4 *in Arizona* (April 15, 1915) ("Murphy") was the result of an investigation into hydroelectric  
5 power sites in Arizona. See Littlefield, at 96-97. See ANSAC 2009 Report, at 50-51. The  
6 Murphy study was necessary to comply with the 1910 Enabling Act, which would allow  
7 Arizona to take steps to join the Union. See Littlefield, at 96. Murphy reported that the Gila  
8 River "a very small run-off at the mouth except during very wet periods." Murphy, at Part II,  
9 p. 3, quoted in Littlefield, at 97. The Murphy Report described the flow of the Gila River:

12 In all these valleys there is no surface flow at certain places during the low  
13 water period of dry years. Though the surface flow may be at one place there  
14 may be several second feet at some distance below due to seepage from  
15 irrigated lands, or a reduction in cross section of the underground water channel.

16 Murphy, at Part II, p. 3, quoted in August, at 23, Littlefield, at 97, See Generally ANSAC  
17 2009 Report, at 51.

18 Murphy reported that the Gila River had an overall lack of water supply, regardless of  
19 reports of date-specific measurements of high flow. It noted that while the unpredictable  
20 violent floods increased the water flow, the floods made the Gila River nonnavigable. It  
21 described the River during high flow as:

23 a broad, sandy, changing channel . . . . dry for a month or longer each year at  
24 Florence, and below the Gila Bend it is dry all the time except during large and  
25 long continued floods . . . .As previously stated there may be several years in  
26 succession if very small run-off. During these years only ground water is  
27 available for some of this land. . . . when a flood comes it damages or destroys  
the head works and little if any of the flood water is utilized.

Murphy, at Part II, pp. 9-10, quoted in Littlefield, at 97-98, accord August, at 93.

1           The Bureau of Reclamation in its *First Annual Report of the Reclamation Service*,  
2 published in 1903, also reported on the Gila River. It also characterizing the river as erratic  
3 and unpredictable. This report is more evidence of the Gila River was not susceptible to  
4 navigation in its ordinary and natural state, which remained unchanged in February of 1912:  
5

6           The sources from which water may be obtained for reclamation of arid lands of  
7 Arizona are, taken as a whole, the most erratic or irregular in the entire country.  
8 There are comparatively few rivers which flow throughout the year. Most  
9 tributaries of the Gila River, beginning in the mountains as perennial streams,  
lose their waters in the broad open valleys.

10 *First Annual Report of Reclamation Service from June 17 to December 1, 1902* (Washington  
11 D.C.: U.S. Government Printing Office, 1903), at 75, *quoted in August*, at 24.

12           The U.S. Reclamation Service continued to catalogue both published and unpublished  
13 records which painted a vivid picture of the Gila River as unpredictable and unsuitable for  
14 commercial navigation. *See generally* ANSAC 2009 Report, at 52. While many of the  
15 unpublished documents dealt with proposed dam construction along the Gila River, none of  
16 them indicated that the river was a commercially navigable, or reported that there ever had  
17 been any reference to historical navigation; a finding that would have had major implications  
18 for both the State and Federal Government. *See Littlefield*, at 99-100 (arguing that the reports  
19 indicated a historical reference to the Gila River, and had the river ever been susceptible to  
20 navigation, it certainly would have been included in the reports).  
21

22           A plethora of other evidence in the record, listed in the ANSAC 2009 Report,  
23 including a multitude of reports, observations, investigations, personal and public accounts,  
24 and the references to thousands of pieces of published and unpublished information, make it  
25 clear that on February 14, 1912, the Gila River was in the same condition as it had been  
26  
27



1 reported consistently for decades. (See ANSAC 2009 Report, at 21-25 ("Evidence Received  
2 and Considered by the Commission), See *Id.*, at Exhibit E (Evidence Log), See generally *Id.*,  
3 at 38-54 ("Section D. Conditions Around Statehood: Observations and Opinions of Pioneers  
4 Who Lived and Traveled in the [near the Gila River] Area"), See generally August, at 34-36  
5 (described the "daunting size and scope" of "irrefutable" evidence all of which supported the  
6 conclusion "that the Gila was not navigable" during, on or after statehood, and noted there is  
7 "no indication the federal or state administrators found the Gila Navigable.")  
8  
9

10 Evidence in the record shows an overwhelming agreement among experts and laymen  
11 alike, that Gila River was an undependable and unpredictable watercourse, that over time  
12 flooded intermittently and infrequently during the decades leading up to and including  
13 February 14, 1912, which made the Gila River wholly unsusceptible to navigation.  
14

15 **B. The Geomorphology, Geology and Hydrology of the Gila River in its Ordinary and  
16 Natural State was Not Susceptible to Navigation on February 14, 1912.**

17 Evidence in the record shows that the geology, geomorphology and hydrology of the  
18 Gila River in its natural and ordinary state, was never susceptible to navigation and remained  
19 nonnavigation, on the day of statehood, February 14, 1912. See generally ANSAC 2009  
20 Report, at 62-80 (Part VII, Section G (Geology, Geomorphology and Hydrology of the Gila  
21 River).  
22

23 Most notably, for the purposes of proving the Gila River was not navigable on the day  
24 of Arizona statehood, the Commission should look to: a report titled the *Preliminary and  
25 Final Report and study prepared by the Arizona State Land Department, Geological Survey  
26 and SWCA Environmental Consultants updated and revised through June of 2003*, by J.E.  
27

1 Fuller/Hydrology and Geomorphology, Inc. on *the navigability of the Gila River from the*  
2 *town of Safford* ("Gila II Study")(EI 4); A presentation on behalf of the Gila River Indian  
3 Reservation by Alan Gookin (EI 5); The Schumm Report (EI 6); The Littlefield Report (E12);  
4 as well as other studies, presentations and testimony cited in the ANSAC 2009 Report on  
5 pp.21-22 and Exhibit E EI's 1-28. Also included in the record are the transcripts from experts  
6 testifying before the Commission on October 14, 2003; October 15, 2003; March 9, 2004;  
7 November 15, 2004; January 24, 2005; and November 16 and 17, 2005. ([Witness T.R.] at  
8 [year:page] refers to the Reporter's Transcripts).

11 Major flooding in the 1890's and early 20th century continued to re-define the  
12 boundaries of the Upper Gila River, evidence in record shows that on February 14, 1912, the  
13 Gila River "was pretty much a wide, braided flood channel." Huckleberry, at T.R. Nov  
14 2005:55.<sup>5</sup> After 5 major floods in 1905, the Upper Gila, became "a wide braided channel  
15 with several branching channels. Channel boundaries mapped during this period include the  
16 entire scoured channel formed after the large floods of 1905, 1914-1915 and 1916." Gila II  
17 Study, at VII-8.

19 The Gila River floods caused "a great deal of channel and bank cutting and  
20 transformed the Gila River into a wide, braided channel with very little depth when it did  
21 flow. Different observers at different times of year, under different stream flow conditions,  
22

23  
24  
25  
26 <sup>5</sup> The Commission relied heavily on the testimony of Dr. Gary Huckleberry, of the Arizona  
27 Geological Study, a witness for the Arizona State Land Department, when determining the  
Gila Rivers navigability on the date of statehood. His testimony to the Commission is found  
multiple times throughout the ANSAC 2009 Report

1 would describe the river in a totally different manner." ANSAC 2009 Report, at 68. *See*  
2 *generally* Gila II Study, at VII 8-9. .

3  
4 Evidence in the record shows that on the date of statehood, February 14, 1912, the Gila  
5 River was unpredictable and unreliable, with drastically different channel configurations on  
6 each reach of the river, none of which being susceptible to navigation :

7  
8 "the Gila River is a classic example of a dryland river that seldom seeks  
9 an equilibrium form. [Graf, 1988; Knight, 1984; Stevens and others, 1975].  
10 Unlike Rivers in humid regions that have more stable channels adjusted for  
11 more continuous stream flow with less variance in discharge, the dryland rivers  
12 are inherently more unstable and more prone to changes in channel  
13 configuration. In such unstable fluvial systems, channel configuration depends  
14 much on the history of previous flood events. Periods of high flood frequency  
15 are likely to correlate with periods of increased channel instability .... [T]he  
16 premise of this study is that the Gila River responds to secular climate  
17 variability by radical changes in channel configuration and that periods of  
18 increased large flood frequency correlate with unstable, braided channel  
19 conditions.

20 Gila II Study, at VII 8-P quoted in ANSAC 2009 Study, at 69

21  
22 Evidence in the record shows that on the date of statehood, February 14, 1912, each  
23 reach of the Gila River was dynamic, dramatically changing to accommodate for the extreme  
24 fluctuations of water flow due to the flooding of the 1890's and early 20th century.

25  
26 Huckleberry, at T.R. Nov 2005: 56. Evidence in the record shows that the Gila River on  
27 February 14, 1912 was not susceptible to navigation due to the constant shifting of the river in  
wet or dry times:

So the pattern that we have on the Gila is an increase in large flood  
frequency and magnitude [which] tends to favor wide, braided conditions;  
whereas periods of few floods a, relatively dry conditions, we tend to see a  
condition where [the river] tends to be a narrow, single, low-flow channel. The  
volume of discharge associated with floods on the Gila could never be  
anticipated, and "floods change the morphology of the channel, that's a dynamic

1 channel and - - because flood frequency will change through time in  
2 relationship to climate - - climate variability."

3 Huckleberry, at T.R. Nov 2005: 56.

4 Evidence in the record made clear by Dr. Huckleberry and Dr. Schumm that "the  
5 natural major floods of the 1890's and early 1900's changed the riverbed completely so that by  
6 1912, it was a braided stream with sand islands and sandbars and other obstructions and that it  
7 alternated between no flow at all, in part through infiltrations, and large floods... it was not  
8 susceptible to navigation in 1860 or before...but even if it had been the great floods of the  
9 1890's and really 1900's so changed the character of the river that it was clearly not navigable  
10 or susceptible of navigability on the day of statehood... it was not ever navigable in fact...It is  
11 a typical dry land or desert river." *See Generally* ANSAC 2009 Report at 67-69 (referencing  
12 Gila II Study to argue that there is no "so-called" ordinary an ). *See Id.*, at 77-78 (quoting  
13 testimony of John Fuller, who testified that there were small portions of the Gila River that  
14 may have been navigable, but ANSAC determined that the "preponderance of the evidence"  
15 in the record showed the Gila River was never used for Navigation. TR, Nov 16, 2005, pp.  
16 120-122). *See Id.*, at 70 (in giving weight to Dr, Stanley Schumm, " (E-6). *See* ANSAC  
17 2009 Report, at 70-72 (construing the Schumm, at 12-16 and 19-20). *See Id.*, at 71-72  
18 (quoting Schumm, at 10, 12, and 16).

19 Evidence in the record, includes Exhibit B the "Evidence log" of the ANSAC 2009  
20 Report, with special consideration given to specific studies, presentation and testimony  
21 referenced to throughout the ANSAC 2009 Report. The evidence in the record proves that the  
22  
23  
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1 geology, geomorphology and hydrology of the Gila River made it not navigable or susceptible  
2 to navigation on February 14, 1912.

3  
4 In support of this memorandum, the Tribe incorporates by reference, The San Carlos  
5 Apache Memorandum Regarding the Record as to Segmentation and its Notice that It joins in  
6 Salt River Projects Memorandum Regarding the Effect of the Supreme Court's Opinion in  
7 *PPL Montana v. Montana*. Dated June 8, 2012.

8  
9 **Conclusion**

10 The ANSAC 2009 Report referred to evidence already in the record when it made the  
11 ultimate determination that the Gila River was not navigable before after or on the date of  
12 statehood, February 14, 1912.

13  
14 Respectfully submitted this 7th day of September 2012.

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16  
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