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35 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
36 **ADJUDICATION COMMISSION**

37 In re Determination of Navigability of the  
38 Gila River

39 No. 03-007-NAV

40 **RESPONSE TO PROPOSED**  
41 **FINDINGS OF FACT AND**  
42 **CONCLUSIONS OF LAW**  
43 **SUBMITTED BY DEFENDERS OF**  
44 **WILDLIFE, ET AL.**

45 Freeport Minerals Corporation ("Freeport"), the Salt River Project Agricultural  
46 Improvement and Power District and Salt River Valley Water Users' Association ("SRP"), the  
47 Gila River Indian Community ("Community"), and the San Carlos Apache Tribe ("Tribe")  
48 submit their response to the proposed findings of fact and conclusions of law filed by Defenders  
49 of Wildlife, et al. ("DOW"). On January 23, these parties submitted their own joint proposed  
50 findings and conclusions ("Joint Filing"). For the Commission's convenience, they submit this  
51 joint response in lieu of filing four separate, ten-page responses to DOW. They incorporate  
52 herein by reference the Joint Filing and their closing briefs and responsive closing briefs.

1 **Responses to DOW's Proposed Findings of Fact**

2 1. DOW FF#1-6: In its FF#1-6, DOW has accurately characterized the general nature  
3 of the Gila River Basin.

4 2. DOW FF#7: The SLD proposed a specific designation of segments on the Gila  
5 during Mr. Fuller's hearing testimony. Although all parties did not necessarily agree with those  
6 specific segments as presented by the SLD, any disagreement on that issue is immaterial because  
7 no portion of the Gila is navigable under the proper legal test.

8 3. DOW FF#8: Native inhabitants in the Gila River region were diverting and using  
9 water for irrigation for centuries prior to non-Native arrival. *See* Joint Filing FF#72, 84. Water  
10 "shortages" existed in the area at times of drought, which naturally occur throughout the region.  
11 Mr. Fuller testified that there were accounts from 1849 stating that the "whole stream" had been  
12 drawn off for irrigation at that time, *see* Tr. at 06/16/14:179 (Fuller), but no other evidence exists  
13 in the record to document those alleged accounts, and DOW has cited none. Even if Mr. Fuller's  
14 rendition of those accounts is correct, no evidence exists to show at what time of year those  
15 accounts occurred or to where on the Gila they were referring.

16 4. DOW FF#9: More significant diversions of the waters of the Gila began in the  
17 1880s. Whether a diversion of water for irrigation or other purposes is "severe" is a value  
18 judgment, not a statement of fact.

19 5. DOW FF#10: In its FF#10, DOW has accurately stated the number of irrigation  
20 diversions in the Safford and Duncan Valleys around 1900. The number of diversions is largely  
21 irrelevant to the issue of navigability. The more pertinent issue is the amount of water diverted.

22 6. DOW FF#11: In its FF#11, DOW has accurately summarized the statements in the  
23 report prepared by the SLD's consultants.

24 7. DOW FF#12: DOW's assertions regarding groundwater pumping along the Gila  
25 are vague as to time. To the extent that DOW FF#12 relates to the larger discussion relating to  
26 the 1800s, it is inaccurate. The record is clear that significant pumpage did not begin until well  
27 after statehood. *See, e.g.,* Burtell ¶ 63. For instance, in performing his stream flow

1 reconstruction, Mr. Burtell recognized that “[d]etermining the effects of well pumpage on  
2 streamflows can be complex,” and he therefore identified a time period before significant well  
3 pumping began, a period that extended into the early 1930s. Burtell ¶¶ 60-63. If DOW’s  
4 assertions about groundwater pumping are intended to relate to an earlier period, those assertions  
5 are inaccurate, *see* Burtell ¶¶ 60-63, and they are in no way supported by the page (5-14) of the  
6 SLD consultant’s report upon which DOW relies.

7 8. DOW FF#13-15: Historical descriptions of the Gila River do exist. *See* Joint  
8 Filing FF#64-283.

9 9. DOW FF#16: The credibility of the accounts of James Ohio Pattie has been  
10 subject to considerable skepticism by scholars and others. *See* Joint Filing ¶¶ 122-160.

11 10. DOW FF#17-18: Evidence in the record relating to the Kearny expedition is set  
12 forth in Joint Filing FF#191-194. Lieutenant Emory himself concluded that the Gila was “not  
13 navigable.” *See* Joint Filing ¶¶ 191, 194.

14 11. DOW FF#19: DOW’s quote from Dr. Littlefield’s 2013 report is accurate, but  
15 incomplete. The journal entry by Henry Turner Smith referred to a point on the Gila  
16 approximately eighty miles west of Gila Bend. *See* Exhibit X02, at 95. Eighty miles west of Gila  
17 Bend is near Dome, in the area just east of Yuma. At that location, Mr. Smith noted that “[t]he  
18 Gila is assuming a much more river-like appearance,” implying that the Gila east of Dome did not  
19 have a “river-like appearance,” even in 1846. *See id.*

20 12. DOW FF#20: DOW cites Mr. Hjalmarson’s 2001 “Confidential Notes” [EI 25],  
21 wherein Mr. Hjalmarson offers second-hand information from a 1995 U.S. Corps of Engineers  
22 study. The Corps study is not in the record. Mr. Hjalmarson’s recitation of the Corps study is  
23 that, from 1846 to 1848, the Gila was 150 yards wide and had a depth of three to four feet at Gila  
24 Bend. *See* EI 25, at 47. Nothing in Mr. Hjalmarson’s report says whether those conditions  
25 existed on a specific day, but DOW’s FF#20 at least implies that those conditions existed  
26 throughout that entire three-year period. DOW also cites an illustration that appears on page 7 of  
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1 EI 25. Although Mr. Hjalmarson's report says that illustration shows the width of the river to be  
2 "about 300 feet," nothing the illustration shows that width.

3 13. DOW FF#21: In its FF#21, DOW again cites to the second-hand testimony of Mr.  
4 Fuller characterizing historical descriptions of the Gila, with no reference to the underlying  
5 source documents. Those descriptions are imprecise as to the time of year and the location on the  
6 river at which they occurred.

7 14. DOW FF#22: Mr. Fuller's testimony indicates a broad range of widths and depths,  
8 which is indicative of the erratic and volatile nature of the Gila flows, both over time and over the  
9 length of the river. Such volatility makes the river less navigable, not more navigable.

10 15. DOW FF#23: In its FF#23, DOW has cobbled together pieces of descriptions from  
11 different land surveyors, who were looking at different portions of the river in different years and  
12 at different times of the year. The descriptions further underscore the volatility of the flows in the  
13 Gila, even in the 1800s.

14 16. DOW FF#24: In its FF#24, DOW has accurately quoted from the transcript of the  
15 testimony by the SLD's witness. Mr. Fuller prefaced that testimony with the word "dominantly,"  
16 i.e., this is what he "dominantly" sees in the Gila River channel. Mr. Fuller's testimony again  
17 emphasizes the volatile and dynamic nature of the Gila, its flows, and its channel.

18 17. DOW FF#25: By 1912, flows in the Gila had been impacted by diversions and by  
19 Roosevelt Dam on the Salt River. No other large storage dams existed on the Gila or its  
20 tributaries by 1912, and Roosevelt Dam was only newly completed in 1911. DOW's assertions  
21 regarding impacts on river flows by groundwater withdrawals prior to 1912 are not supported by  
22 the portion of the record upon which it relies. *See* response to DOW FF#12.

23 18. DOW FF#26-27: As support for its FF#26, DOW cites the 2003 report by the  
24 SLD's consultant regarding the Lower Gila. The relevant sentence of that report (at page X-2),  
25 upon which DOW apparently relies, states: "By Statehood, an extensive series of irrigation  
26 diversions in combination with the construction of Salt River reservoirs had largely reduced flows  
27 in the Gila downstream of the Salt River confluence." The SLD's consultant's statement is

1 incorrect, at least to the extent it refers to "Salt River reservoirs," because only one reservoir on  
2 the Salt River (Roosevelt) was completed prior to statehood. Even if it is accurate, the  
3 consultant's statement is limited to the area downstream from the Gila/Salt confluence.

4 19. DOW FF#28: The portion (page VI-9) of the report of the SLD's consultant  
5 regarding the Lower Gila [EI 4] upon which DOW relies for its FF#28 does not support the  
6 contention that the "condition" of the Gila in 1912 was "substantially different from its natural,  
7 predevelopment condition." The portion (page 8) of the 2002 report by Mr. Hjalmarson [EI 23]  
8 that DOW also cites does refer to changes in "discharge" and "sediment characteristics" after  
9 1860, but that report deals only with the reach of the Gila between the Salt River confluence and  
10 the Colorado River confluence. Neither documents supports DOW's assertion regarding a  
11 change in condition "[t]hroughout the river's entire length in Arizona."

12 20. DOW FF#29: A discussion of the evidence relating to boating attempts on the Gila  
13 is found at Joint Filing FF#117-222.

14 21. DOW FF#30: There is no sound evidentiary basis to support the contention that  
15 steamboats may have run as far as Gila City/Dome. *See* Joint Filing FF#365-366; Freeport's  
16 Responsive Memorandum, at 20-21. None of the articles to which Mr. Fuller and the SLD cite  
17 provides any support for the notion that steamboats ever traveled as far as Dome. Freeport's  
18 Responsive Memorandum, at 20-21. The only evidence before the Commission demonstrates  
19 that the furthest steamboats ever traveled was 5 or 6 miles upstream from the confluence, and  
20 only for recreational purposes during periods of high water. Lingenfelter ¶¶ 16, 18, and 31. Dr.  
21 Littlefield testified that he had never seen a primary source documenting steamboat travel to  
22 Dome. *See* Joint Filing FF#365-366. No other evidence exists of steamboat use that far upstream  
23 on the Gila.

24 22. DOW FF#31: In its FF#31, DOW cites to the second-hand testimony of Mr. Fuller  
25 characterizing historical accounts of boating on the Gila, with no reference to the underlying  
26 source documents. Even Mr. Fuller's testimony was that bullboats were used to "cross" the river,  
27

1 see Tr. at 06/16/14:189, and no evidence exists to confirm that these small boats were ever used  
2 on the Gila, as opposed to some other watercourse. *See id.*

3 23. DOW FF#32: The credibility of the accounts of James Ohio Pattie has been  
4 subject to considerable skepticism by scholars and others. *See* Joint Filing FF#122-160. In its  
5 FF#32, DOW states that Pattie described making eight dugout canoes and using them to carry  
6 furs from Safford to Yuma. DOW cites Mr. Fuller's testimony on direct examination. Mr.  
7 Fuller, however, neither could provide a reference to where in the Narrative James O. Pattie  
8 claimed to have navigated the Gila, nor could he provide the Commission with the citations used  
9 by the SLD. *See* Joint Filing FF#150. Furthermore, Pattie's memoirs are clear that, when his  
10 party constructed eight canoes, they already had reached the Colorado. Joint Filing FF#152-157.

11 24. DOW FF#33: The failed attempt by certain members of the Mormon Battalion to  
12 float wagons down the Gila River in 1846 is addressed in Joint Filing FF#164-167. Col. Cooke,  
13 who participated in the effort, pronounced the scheme a failure. *See* Joint Filing FF#167.

14 25. DOW FF#34: The Howard party trip is addressed in Joint Filing FF#168-171.

15 26. DOW FF#35: In its FF#35, DOW cites to the second-hand testimony of Mr. Fuller  
16 characterizing a purported historical account of boating on the Gila, with no reference to the  
17 underlying source documents.

18 27. DOW FF#36: DOW's assertion that there are "several" reports of people boating  
19 from Phoenix to Yuma in the late 1800s is overstated. DOW recites only a few such accounts in  
20 its proposed findings, over the course of a half-century or so. No evidence exists in the record to  
21 show that any produce was ever actually transported on the Gila River.

22 28. DOW FF#37: In its FF#37, DOW asserts that, in 1881, "two men named Cotton  
23 and Bingham also traveled by boat from Phoenix to Yuma." DOW again cites only to Mr.  
24 Fuller's second-hand testimony of these accounts, with no reference to any underlying source  
25 documents. DOW also neglects to note that it is unclear whether this trip actually even occurred  
26 because the newspaper article was written the day before the trip. *See* Joint Filing FF#175.

27 29. DOW FF#38: A more complete discussion of Buckey O'Neill's "Yuma or Bust"

1 expedition is set forth at Joint Filing FF#176-178.

2 30. DOW FF#39: The Sykes trip down the Gila is addressed at Joint Filing FF#186-  
3 190. Ms. Tellman, testifying on behalf of the SLD in the 2005 hearing, testified that the trip was  
4 “quite unsuccessful.” *See* Joint Filing FF#189.

5 31. DOW FF#40: In its FF#40, DOW again cites to the second-hand testimony of Mr.  
6 Fuller characterizing purported historical accounts of boating on the Gila, with no reference to the  
7 underlying source documents.

8 32. DOW FF#41: In its FF#41, DOW relies solely upon the second-hand testimony of  
9 Mr. Fuller characterizing the trip of G.W. Evans and Amos Adams in 1895, with no reference to  
10 the underlying source documents. That trip was reported in two newspaper articles. *See* Joint  
11 Filing FF#180. The two articles detail the difficulties the pair experienced. *See id.* Mr. Fuller’s  
12 testimony regarding that trip is incomplete. A more complete and accurate discussion of that trip  
13 appears at Joint Filing FF#180-183.

14 33. DOW FF#42-44: In its FF#42-44, DOW cites to the second-hand testimony of  
15 Mr. Fuller characterizing purported historical accounts of boating on the Gila, with no reference  
16 to the specific reach of the Gila or to the underlying source documents.

17 34. DOW FF#45: Ferries operated at certain locations on the Gila during parts of some  
18 years. The records of ferries provide evidence that ferries were used only to cross the river, as  
19 opposed to travel upstream and downstream. *See* Joint Filing FF#215. All of the ferries were  
20 used to traverse the river, serving as the functional equivalent of a bridge. *See* Joint Filing  
21 FF#218. The use of ferries to cross the river does not demonstrate that navigation along the  
22 stream occurred or could have occurred.

23 35. DOW FF#46-49: In its FF#46-50, DOW accurately summarizes the information  
24 from the report prepared by the SLD’s consultant regarding ferries. *See also* response to DOW  
25 FF#45.

26 36. DOW FF#50: In its FF#50, DOW accurately quotes from the transcript of the  
27 testimony by Mr. Fuller. Numerous flaws exist in Mr. Fuller’s conclusions based upon the

1 evidence in the record. *See* Joint Filing; responses to other paragraphs, *supra*.

2 37. DOW FF#51: DOW's FF#51 is not a proposed finding of fact, it is a proposed  
3 conclusion of law. The U.S. Supreme Court in *PPL Montana* specifically and in detail addressed  
4 the question of how and when modern-day recreational boating can be considered as evidence of  
5 navigability at statehood. *See* Joint Filing CL#13, 33, 35 & portions of *PPL Montana* cited  
6 therein; SRP Closing Brief, at 19-21, 29-30.

7 38. DOW FF#52: In its FF#52, DOW relies solely upon the testimony by Mr. Fuller.  
8 Mr. Fuller's testimony as it relates to modern-day recreational boating is addressed at Joint Filing  
9 CL#13, 33, 35, and in SRP's Closing Brief at pages 19-21, 29-30.

10 39. DOW FF#53: In its FF#53, DOW relies solely upon the Power Point by Mr.  
11 Fuller. Mr. Fuller's testimony as it relates to modern-day recreational boating is addressed at  
12 Joint Filing CL#13, 33, 35, and in SRP's Closing Brief at pages 19-21, 29-30.

13 40. DOW FF#54-57: *See* response to DOW FF#52.

14 41. DOW FF#58: Evidence of modern-day recreational boating on the Gila is not  
15 sufficient to support a finding of navigability. *See* Joint Filing CL#13, 33, 35 & portions of *PPL*  
16 *Montana* cited therein; SRP Closing Brief, at 19-21, 29-30.

17 42. DOW FF#59: *See* response to DOW FF#28.

18 43. DOW FF#60: In its FF#60, DOW relies upon two documents for its assertion that,  
19 "[b]efore Anglo settlement of Arizona, the river was perennial with reliable flows sufficient for  
20 shallow draft boating throughout the year." DOW first cites Table 23 at page 5-43 of the report  
21 on the Upper Gila by the SLD's consultant [EI 2]. That table, however, has entries only for the  
22 Upper Gila (Virden, NM; Clifton, AZ; Safford Valley, AZ; Safford, AZ; and Clifton, AZ), and  
23 the earliest date it mentions is 1910—hardly a time "before Anglo settlement of Arizona." DOW  
24 also cites page 6 of Mr. Hjalmarson's 2002 report [EI 23]. That page from Mr. Hjalmarson's  
25 report likewise contains nothing that supports DOW's FF#60.

26 44. DOW FF#61-62: In its FF#61-62, DOW has accurately summarized the testimony  
27 by the SLD's consultant. That testimony is not supported by the evidence in the record.

1 **Responses to DOW's Proposed Conclusions of Law**

2 1. DOW CL#1-4: In its CL#1-4, DOW has accurately quoted selected portions of the  
3 Arizona Court of Appeals' opinion in *Winkleman*.

4 2. DOW CL#5: In its CL#5, DOW has accurately summarized the procedural history  
5 of the Gila River case following the Court of Appeals' decision regarding the Lower Salt River in  
6 *Winkleman*.

7 3. DOW CL#6: DOW's description of the process for determining navigability in its  
8 CL#6 is generally accurate.

9 4. DOW CL#7: The flows in some reaches of the Gila as of February 14, 1912, were  
10 different from what they would have been absent human influences. Whether the river itself was  
11 in a "natural" condition as of that date is a more complex question. The "ordinary and natural  
12 condition" of the Gila is different at different times. Substantial evidence was introduced on that  
13 issue during the 2003-2005 hearings and especially during the 2014 hearing. That evidence is  
14 summarized in Joint Filing FF#326-346. *See also* SRP's Closing Brief, at 26-27.

15 5. DOW CL#8: *See* response to DOW FF#8.

16 6. DOW CL#9: In its CL#9, DOW has accurately quoted from the U.S. Supreme  
17 Court opinion in *United States v. Utah*, 283 U.S. 64 (1931). A watercourse can be deemed  
18 navigable if it was susceptible to being used, in its ordinary and natural condition, as highway for  
19 commerce on the date of statehood.

20 7. DOW CL#10: In its CL#10, DOW has accurately quoted from the Arizona  
21 Revised Statutes. Commerce is a critical element of the federal test. *See* Joint Filing CL#13, 33,  
22 35 & portions of *PPL Montana* cited therein; SRP Closing Brief, at 19-21.

23 8. DOW CL#11-12: The term "highway for commerce" is not misleading. It is  
24 defined in the Arizona statutes, and it means a "highway" for "commerce." *See* A.R.S. § 37-  
25 1101(5); *see also* Joint Filing CL#13, 33, 35 & portions of *PPL Montana* cited therein; SRP  
26 Closing Brief, at 19-21. The Arizona Court of Appeals in *Defenders of Wildlife v. Hull* did not  
27

1 have the benefit of the U.S. Supreme Court's subsequent guidance in *PPL Montana*. See also  
2 Briefs.

3 9. DOW CL#13-14: DOW in its CL#13-14 leaves out an important element of the  
4 "susceptibility" prong of the federal test. Under the prior case law, including *United States v.*  
5 *Utah*, 283 U.S. 64 (1931), a watercourse that was not actually navigated but was susceptible to  
6 navigation can be found navigable if the lack of navigation was "either because the location of the  
7 rivers and the circumstances of the exploration and settlement of the country through which they  
8 flowed made recourse to navigation a late adventure or because commercial utilization on a large  
9 scale awaits future demands." *Id.* at 83. "The question remains one of fact as to the capacity of  
10 the rivers in their ordinary condition to meet the needs of commerce as they may arise in  
11 connection with the growth of the population, the multiplication of activities, and the  
12 development of natural resources. And this capacity may be shown by physical characteristics  
13 and experimentation as well as by the uses in which the stream have been put." *Id.* Proponents  
14 have failed to show that the lack of navigation on the Gila can be explained by the river's location  
15 or by "the circumstances of the exploration and settlement of the country through which" it flows.  
16 None of the evidence supports a finding in favor of Proponents on that issue.

17 10. DOW CL#15: See responses to DOW FF#29-50.

18 11. DOW CL#16: See responses to DOW FF#51-58.

19 12. DOW CL#17: See responses to DOW FF#59-62.

20 13. DOW CL#18-20: The SLD proposed a specific designation of segments on the  
21 Gila during Mr. Fuller's hearing testimony. Although all parties did not necessarily agree with  
22 those specific segments as presented by the SLD, any disagreement on that issue is immaterial  
23 because no portion of the Gila is navigable under the proper legal test.

24 14. DOW CL#21: Because insufficient evidence exists to demonstrate that any of the  
25 eight SLD segments is navigable, the navigability determination of the Gila does not require  
26 segmentation. In its ordinary and natural condition, none of the river was navigable at the time of  
27 statehood.

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DATED this 6th day of February, 2015.

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