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

15 In re Determination of Navigability of the
16 Gila River

No. 03-007-NAV

**RESPONSE TO PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
SUBMITTED BY MARICOPA
COUNTY AND FLOOD CONTROL
DISTRICT OF MARICOPA COUNTY**

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21 Freeport Minerals Corporation ("Freeport"), the Salt River Project Agricultural
22 Improvement and Power District and Salt River Valley Water Users' Association ("SRP"), the
23 Gila River Indian Community ("Community"), and the San Carlos Apache Tribe ("Tribe")
24 submit their response to the proposed findings of fact ("FF") and conclusions of law ("CL") filed
25 by Maricopa County and the Flood Control District of Maricopa County ("County"). On January
26 23, Freeport, SRP, the Community, and the Tribe submitted their own joint proposed findings and
27 conclusions ("Joint Filing"). For the Commission's convenience, these parties submit this ten-

1 page joint response in lieu of filing four separate, ten-page responses to the County. These parties
2 also incorporate herein by reference the Joint Filing and their respective closing briefs and
3 responsive closing briefs.

4 **RESPONSES TO COUNTY'S PROPOSED FINDINGS AND CONCLUSIONS**

5 The County's proposed findings and conclusions are not differentiated between findings
6 of fact and conclusions of law. Thus, these responses are likewise not specifically differentiated.

7 1. County ¶ A: If the portion of the Gila either upstream or downstream from the Salt
8 River confluence was navigable, that confluence might be an appropriate point for segmentation
9 pursuant to *PPL Montana*. Because neither portion of the Gila is or was navigable, however, no
10 need for such segmentation exists. *See* Joint Filing FF#71, CL#3, 15-17.

11 2. County ¶¶ 1-6: The U.S. Supreme Court's opinion in *PPL Montana* speaks for
12 itself on the issue of segmentation. *See also* Joint Filing CL#3, 15-17.

13 3. County ¶ 7: Mr. Fuller proposed a specific designation of segments during his
14 hearing testimony. Although all parties did not necessarily agree with those specific segments as
15 presented by Mr. Fuller, any disagreement on that issue is immaterial because no portion of the
16 Gila is navigable under the proper legal test. *See* Response to County ¶ A.

17 4. County ¶ 8: The County's statement that "there is evidence of successful boating
18 on the entire lower Gila during the 1800's" is overbroad. *See* Joint Filing FF#117-222.

19 5. County ¶ 9: The County's Paragraph 9 accurately reflects the general nature of
20 Mr. Fuller's testimony.

21 6. County ¶ 10: If the Commission reaches the issue of segmentation, substantial
22 evidence exists to distinguish between Segment 7 and Segment 8 at or near Dome. *See* Joint
23 Filing FF#195-197, 291, 365-366. Substantial evidence also exists demonstrating that neither
24 segment (nor any other segment of the Gila) was navigable in its ordinary and natural condition.

25 7. County ¶ 11: In its Paragraph 11, the County has accurately quoted and
26 summarized the report by the SLD's consultants. Mr. Hjalmarson's testimony discussed in that
27 paragraph does not support the County's assertions of the propositions for which it is cited,

1 however. *See* SRP's Responsive Closing Brief, at 11-15; Joint Filing FF#292, 308-323, 346.

2 8. County ¶¶ 12-15: In its Paragraphs 12-15, the County has accurately quoted and
3 summarized the report by the SLD's consultants.

4 9. County ¶ 16: The County cites no portion of the record in support of its Paragraph
5 16, and insufficient evidence exists to support such a finding. *See generally* Joint Filing.

6 10. County ¶ B: Proponents must prove navigability by a preponderance of the
7 evidence. *See* Joint Filing CL#2-3.

8 11. County ¶ 17: In its Paragraph 17, the County has accurately quoted A.R.S. § 37-
9 1128(A). The burden of proof in this proceeding is on the Proponents of navigability and is
10 addressed in Joint Filing CL#2-3.

11 12. County ¶ 18: Proponents have failed to satisfy their burden of proof. *See* Joint
12 Filing FF#346, CL#1-3, 29, 36-46.

13 13. County ¶ C: The standard for navigability for title purposes is ultimately an issue
14 of federal law. That federal test, and procedures to be used in applying that test, have been set
15 forth in the relevant Arizona statutes. *See* Joint Filing CL#1, 29, 36-46.

16 14. County ¶ 19: *See* response to County ¶ C.

17 15. County ¶ 20: In its Paragraph 20, the County has accurately quoted A.R.S. § 37-
18 1105(5). *See also* Joint Filing CL#1-3, 29, 36-46.

19 16. County ¶ D: The standard for navigability for title purposes is set forth in A.R.S.
20 § 37-1105(5) and case law interpreting the federal test. In its Paragraph D, the County has stated
21 some, but not all, of the elements of that test. *See* Joint Filing CL#1-46.

22 17. County ¶ 21: "Ordinary and natural condition" is part, but not all, of the proper
23 legal standard for navigability for title purposes. *See* Joint Filing CL#1-46.

24 18. County ¶ 22: *See* response to County ¶ D.

25 19. County ¶ 23: In its Paragraph 23, the County has accurately quoted one selected
26 passage from the U.S. Supreme Court's decision in *The Montello*, 87 U.S. (20 Wall.) 430 (1874).

27 20. County ¶ 24: *See* response to County ¶ D.

1 21. County ¶ E: The “ordinary and natural condition” of the Gila is different at
2 different times. Substantial evidence was introduced on that issue during the 2003-2005 hearings
3 and especially during the 2014 hearing. That evidence is summarized in Joint Filing FF#326-346.
4 *See also* SRP’s Closing Brief, at 26-27.

5 22. County ¶¶ 25-30: The “ordinary and natural condition” of the Gila River is
6 different at different times. *See* Joint Filing FF#326-346; SRP’s Closing Brief, at 26-27; *see also*
7 response to County ¶ 31.

8 23. County ¶ 31: The County’s rendition of the witness testimony in its Paragraph 31
9 is overstated and largely inaccurate. A more complete and accurate statement of the record on
10 this issue is set forth in Joint Filing FF#299-345. *See also* SRP Closing Brief, at 26-27.

11 24. County ¶ 32: The County’s Paragraph 32 misstates the testimony by Dr. Mussetter
12 upon which it relies. Dr. Mussetter’s actual response to the question was that the return of the
13 river channel to its pre-flood condition after the floods in the 1890s and 1900s was affected by the
14 lack of flow but, to some extent, it did recover. *See* Tr. at 08/20/14:1819. Counsel for the
15 County, who was questioning Dr. Mussetter at the time, never bothered to follow up with Dr.
16 Mussetter and ask: (a) how much, if any, more quickly would the channel have returned to its
17 pre-flood condition if more flow had been present after the flood; (b) whether the channel
18 returned to its pre-flood condition prior to February 14, 1912; or (c) whether the channel would
19 have returned to its pre-flood condition prior to February 14, 1912 if more flow had been present.

20 25. County ¶ 33: The County’s quotation of a portion of one sentence from a report by
21 the U.S. Geological Survey that the Lower Gila had changed between the 1500s and 1923 is
22 neither surprising nor particularly relevant. The issue for the Commission is what the river would
23 have been like in its “ordinary and natural” condition on February 14, 1912.

24 26. County ¶ F: The County’s assertions of actual navigation on the Lower Gila are
25 not supported by the record. A more complete and accurate discussion of the evidence relating to
26 boating attempts on the Gila is found at Joint Filing FF#117-222. Navigation (as defined in the
27 applicable case law) was not actually occurring on the Gila at any time. *See id.*

1 27. County ¶¶ 34-35: In its Paragraphs 34 and 35, the County has accurately, but
2 selectively, quoted from the U.S. Supreme Court’s opinion in *PPL Montana*. For a more
3 complete and accurate discussion of the impact of that opinion on the Commission’s present task,
4 see Joint Filing FF#220(f) and CL#12-14, 33, 35.

5 28. County ¶ 36: The County’s assertion of the “probative” nature of modern-day
6 recreational boating on the issue of navigability is overstated. The U.S. Supreme Court in *PPL*
7 *Montana* specifically and in detail addressed the question of how and when modern-day
8 recreational boating can be considered as evidence of navigability at statehood. See Joint Filing
9 CL#13, 33, 35 & portions of *PPL Montana* cited therein; SRP Closing Brief, at 19-21, 29-30.

10 29. County ¶¶ 37-38: The historical accounts of the Gila in the record do not support a
11 finding that the Gila was susceptible to navigation. See also response to County ¶ F.

12 30. County ¶ 39: The County’s reliance upon the accounts of James Ohio Pattie is
13 misplaced. See Joint Filing ¶¶ 122-160. The credibility of the Pattie accounts has been subject to
14 considerable skepticism by scholars and others. *Id.* Those accounts are not persuasive evidence
15 to show that the Gila was actually navigated or susceptible to navigation in its ordinary and
16 natural condition on February 14, 1912. See *id.*

17 31. County ¶¶ 40-41: Evidence in the record relating to the Kearny expedition is set
18 forth in Joint Filing FF#191-194. See also generally response to County ¶¶ 37-38.

19 32. County ¶ 42: See response to County ¶¶ 40-41. Lieutenant Emory himself
20 concluded that the Gila was “not navigable.” See Joint Filing ¶¶ 191, 194.

21 33. County ¶ 43: The portion of Dr. Littlefield’s 2005 report [Evidence Item 12] that
22 the County cites in its Paragraph 43 in no way supports the County’s broad assertion in that
23 paragraph. The cited page (120) discusses an attempt to use a steam wheeler on the Lower Gila
24 and states that the person making the attempted determined that “the boat as unable to navigate
25 the Gila on a regular basis.” See EI 12, at 120. That page also mentions, in passing, the failed
26 “Yuma or Bust” expedition. *Id.* It does not support the County’s assertion that that, before 1913,
27 there were “several types of boats” in use on the Gila, “all of which were susceptible to

1 commercial use.” Likewise, the County also stretches its citation of the papers submitted by Ms.
2 Tellman at the prior hearing [Evidence Item 16]. The cited page (31) of Ms. Tellman’s
3 submission contains a table addressing boats that were “available” in 1913. *See* Evidence Item
4 16, at 30 (discussing Table 3.2 on page 31). Of the list of nine types of boats that the County
5 asserts were “in use in Arizona on the Gila River” before 1913, Ms. Tellman’s table mentions the
6 Gila only with respect to four of those categories. *Id.* at 31. Four of the other categories refer to
7 “[m]any rivers, canals, [and] lakes,” but do not mention the Gila. *Id.* With regard to steamboats,
8 Ms. Tellman’s table lists only the Colorado River. *Id.* For two of the nine categories, Ms.
9 Tellman’s table refers only to travel across the river, not up or down it. *Id.*

10 34. County ¶ 44: The assertions in the County’s Paragraph 44 lack any evidentiary
11 support. For its assertions in that paragraph, the County cites “*Id.*, at IV-3.” The documents cited
12 in the prior paragraph, to which the *Id.* might refer, are both consecutively numbered throughout,
13 and no page “IV-3” appears in either document. Neither the Tellman report nor Dr. Littlefield’s
14 2005 report supports the County’s assertion or mentions any document stating that the Gila
15 “probably” could be used to transport logs or that the river was nine feet deep for any distance
16 upstream from its mouth during any period.

17 35. County ¶ 45: Dr. Littlefield’s 2005 report, on page 120 cited the County, refers to
18 an account of attempts to use a steam wheeler on the Gila “occasionally.” *See* EI 12, at 120.
19 That same account says that, in 1864, the boat became “unmanageable.” *Id.* Neither Dr.
20 Littlefield’s report, nor the account he cites on page 120, says how far up the river steam wheeler
21 use was ever attempted. *See id.* There is no sound evidentiary basis to support the contention
22 that steamboats may have run as far as Gila City/Dome. *See* Joint Filing FF#365-366; *see also*
23 Freeport’s Responsive Memorandum, at 20-21. None of the articles to which Mr. Fuller and the
24 SLD cite provides any support for the notion that steamboats ever traveled as far as Dome.
25 Freeport’s Responsive Memorandum, at 20-21. The only evidence before the Commission
26 demonstrates that the furthest steamboats ever traveled was 5 or 6 miles upstream of confluence,
27 and only for recreational purposes during periods of high water. *See* Lingenfelter ¶¶ 16, 18, and

1 31. Dr. Littlefield testified during the 2014 hearing that he had never seen a primary source
2 documenting this assertion. *See* Joint Filing FF#365-366.

3 36. County ¶ 46: Insufficient evidence exists in the record to support a finding that, in
4 its “ordinary and natural condition,” the Gila was ever susceptible to steamboat traffic for any
5 more than a few miles up the river in the Colorado River backwater. *See* Joint Filing FF#271,
6 363-367. The County relies, in part, on 2005 testimony by Dr. Donald Jackson. Dr. Jackson’s
7 testimony is addressed in Joint Filing FF#219-221.

8 37. County ¶ 47: The County cites no evidence as support for its assertion in its
9 Paragraph 47.

10 38. County ¶¶ 48-49: *See* response to County ¶ 36; *see also* Joint Filing CL#35; SRP
11 Closing Brief, at 22-26, 29-30.

12 39. County ¶ 50: The County’s rendition of historical boating accounts in the table in
13 its Paragraph 50 is overstated and not supported by the record. For a more accurate statement of
14 the boating accounts based on the record, *see* Joint Filing ¶¶ 117-222.

15 40. County ¶ 51: *See* response to County ¶ D.

16 41. County ¶ 52: In *Utah v. United States*, 403 U.S. 9 (1971), boats had been used on
17 the Great Salt Lake to haul livestock in a ranching business, and other evidence indicated that
18 boats were used to transport salt, passengers, freight, ore, and cedar posts. 403 U.S. at 11. That
19 evidence is substantively different from the evidence introduced by Proponents in this case
20 regarding the Gila, especially as it relates to the “commercial” aspect of the travel. *See also* SRP
21 Responsive Brief, at 7.

22 42. County ¶ 53: Evidence of historical use of the river, where it exists, should be
23 considered in determining navigability. With respect to the Gila, however, insufficient evidence
24 exists to support such a finding. *See generally* Joint Filing; Briefs.

25 43. County ¶¶ 54-56: In its Paragraphs 54 through 56, the County includes its
26 interpretation of selected snippets from various prior court opinions regarding navigability.
27 Those decisions, like other prior decisions on navigability, were based upon the totality of the

1 evidence presented. With respect to the Gila, Proponents have not presented sufficient evidence
2 to support their contentions. *See* Joint Filing; Briefs.

3 44. County ¶ G: A watercourse can be deemed navigable if it was susceptible to being
4 used, in its ordinary and natural condition, as highway for commerce on the date of statehood.

5 45. County ¶ 57: The County in its Paragraph 57 leaves out an important element of
6 the “susceptibility” prong of the federal test. Under the prior case law, including *United States v.*
7 *Utah*, 283 U.S. 64 (1931), a watercourse that was not actually navigated but was susceptible to
8 navigation can be found navigable if the lack of navigation was “either because the location of the
9 rivers and the circumstances of the exploration and settlement of the country through which they
10 flowed made recourse to navigation a late adventure or because commercial utilization on a large
11 scale awaits future demands.” *Id.* at 83. “The question remains one of fact as to the capacity of
12 the rivers in their ordinary condition to meet the needs of commerce as they may arise in
13 connection with the growth of the population, the multiplication of activities, and the
14 development of natural resources. And this capacity may be shown by physical characteristics
15 and experimentation as well as by the uses in which the stream have been put.” *Id.* Proponents
16 have failed to show that the lack of navigation on the Gila can be explained by the river’s location
17 or by “the circumstances of the exploration and settlement of the country through which” it flows.
18 None of the evidence, including Mr. Hjalmarson’s testimony, supports a finding in favor of
19 Proponents on that issue.

20 46. County ¶ 58: *See* response to County ¶¶ 54-56.

21 47. County ¶ 59: Evidence from the period when then river was in its “ordinary and
22 natural condition” is relevant to the question of navigability. With respect to the Gila, such
23 evidence, when considered with the other evidence in the record, does not support a finding of
24 navigability.

25 48. County ¶ 60: The Commission heard Mr. Hjalmarson’s testimony and reviewed
26 his reports when he testified in 2005. *See* Joint Filing FF#292, 308-323, 346; *see also* SRP
27 Responsive Closing Brief, at 11-15. The Commission found Mr. Hjalmarson’s testimony not

1 particularly credible. *See* 2009 Decision, at 76 (its “credibility was not high”). Mr. Hjalmarson
2 did not testify or submit any written report for the 2014 hearings. *See* Joint Filing FF#292. His
3 reports and testimony from ten years ago do not support a finding by this Commission that any
4 segment of the Gila was navigable.

5 49. County ¶¶ 61-70: The numerous substantive and methodological flaws in Mr.
6 Hjalmarson’s analysis are set forth in Joint Filing FF#308-323, in SRP’s Responsive Closing
7 Brief (pages 11-15), and in this Commission’s 2009 decision (pages 74-76).

8 50. County ¶ 71: *See* responses to County ¶¶ 31-32.

9 51. County ¶ 72: Although the flow of the river during a flood is not part of its
10 “ordinary” condition, the resulting impacts from floods (which can last for many years or
11 decades) are part of its “ordinary and natural” condition. *See* Joint Filing FF#305-306, 323, 326,
12 327-330, 334-339; SRP Closing Brief, at 26-27.

13 52. County ¶ H: The Gila was not navigable in its ordinary and natural condition. *See*
14 *generally* Joint Filing.

15 53. County ¶¶ 73-77: *See* response to County ¶¶ 61-70.

16 54. County ¶ 78: *See* response to County ¶¶ 25-30.

17 55. County ¶ 79: *See* response to County ¶¶ 61-70.

18 56. County ¶ I: Natural impediments to navigation, which Proponents and their
19 witnesses largely ignore, are a factor to be considered in determining navigability. *See United*
20 *States v. Utah*, 283 U.S. 64, 85 (1931); *PPL Montana*, 132 S. Ct. at 1231; Joint Filing FF#356,
21 CL#14.

22 57. County ¶ 80: In its Paragraph 80, the County has accurately quoted one excerpt
23 from the Arizona Court of Appeals opinion in *Defenders of Wildlife v. Hull*. That excerpt
24 specifically refers to (and is limited to) “artificial” obstructions to navigation.

25 58. County ¶¶ 81-82: The courts in *Defenders of Wildlife v. Hull* and *United States v.*
26 *Utah* stated that “occasional” difficulties did not necessarily render a watercourse non-navigable.
27 The U.S. Supreme Court, in its most recent navigability decision (*PPL Montana*) held, among

1 other things, that navigability requires that susceptibility to navigation on the watercourse must be
2 consistent with “commercial reality.” *See* Joint Filing CL#12-14.

3 59. County ¶ J: The opinions and statements of U.S. government land surveyors,
4 especially those who were in the area performing the rectangular survey at a relatively early date,
5 are persuasive evidence on a river’s characteristics and whether it was navigable.

6 60. County ¶ 83: The County’s reliance upon *Oklahoma v. Texas*, 258 U.S. 574
7 (1922), is misplaced. That decision did discuss survey information as it relates to navigability. In
8 that case, however, the Court found that the fact that a surveyor did meander a watercourse did
9 not necessarily mean it was navigable—i.e., there was not a strict “legal inference” from that fact.
10 *See Oklahoma v. Texas*, 258 U.S. at 585. More recent federal court decisions have addressed the
11 question more precisely at issue with respect to the Gila: Is the fact that the surveyors generally
12 did not meander the Gila evidence that it was not navigable? In *Lykes Bros. v. U.S. Army Corps*
13 *of Engineers*, 64 F.3d 630 (11th Cir. 1995), the Eleventh Circuit Court of Appeals found that the
14 fact that the surveyor did not meander a particular creek was “probative” on the issue of
15 navigability. *Id.* at 635-36. The Eleventh Circuit stated: “Although we recognize that surveyors
16 do not settle questions of navigability, the surveyor’s actions are probative.” *Id.* at 636.

17 61. County ¶ 84: The government surveys on the Gila took place at different times.
18 Some of those surveys were done before any substantial diversions or other man-made impacts on
19 the watercourse, and others were later. *See* Joint Filing FF#103; *see also* X002 (Littlefield 2013
20 report). The survey dates ranged from the 1860s through statehood. *See* Joint Filing FF#103(d).

21 62. County ¶ K and ¶¶ 85-86: The fact that the United States and the State granted
22 patents for land lying within the bed of the Gila is relevant evidence of the river’s lack of
23 navigability. *See* Joint Filing FF#110. “All evidence should be examined during navigability
24 determinations and no relevant facts should be excluded.” *Defenders of Wildlife v. Hull*, 199
25 Ariz. 411, 425, 18 P.2d 722, 736 (App. 2001).

26 63. County ¶ 87: *See* response to County ¶ 84.
27

1 DATED this 6th day of February, 2015.

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