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10 **BEFORE THE ARIZONA NAVIGABLE STREAM**
11 **ADJUDICATION COMMISSION**

12 IN THE MATTER OF THE
13 NAVIGABILITY OF THE GILA
14 RIVER FROM THE NEW MEXICO
15 BORDER TO THE CONFLUENCE
16 WITH THE COLORADO RIVER,
17 GREENLEE, GRAHAM, GILA, PINAL,
18 MARICOPA AND YUMA COUNTIES,
19 ARIZONA

No. 03-007-NAV (Gila)

**GILA RIVER INDIAN COMMUNITY'S
RESPONSIVE CLOSING BRIEF**

20 Pursuant to the Second Amended Order Clarifying Deadlines and Hearing
21 Dates, dated December 23, 2014, the Gila River Indian Community hereby submits its
22 responsive closing brief. The Community generally joins in the closing arguments
23 made by the Salt River Project, Freeport Minerals Corporation and the San Carlos
24 Apache Tribe.

25 **I. NAVIGABILITY IS A MATTER OF FEDERAL LAW AND PPL**
26 **MONTANA V. MONTANA (2012) IS THE LAW.**

The proponents of navigability continue to downplay the effect of *PPL Montana* on the law of navigability for title. ASLD, for example, cites *PPL Montana* initially for the proposition that a river may need to be segmented, ignoring critical

1 parts of the case dealing with the purpose of navigability and how the determination
2 of navigability is to be made. It is incorrect to state that “[a] determination of
3 navigability is based fundamentally on *The Daniel Ball* test, and the subsequent
4 rulings by Arizona and federal courts, and the codification of *The Daniel Ball* test in
5 the Arizona Revised Statutes,” [ASLD Closing Brief at 2] Navigability for title is a
6 federal law issue and, while Arizona has *procedures* for determining navigability, the
7 *standard* to be applied is a federal standard.

9 There also appears to be some disagreement between the proponents on when
10 the Gila River was in its natural and ordinary condition. ASLD claims that the Gila
11 River was in its ordinary and natural condition as of approximately 1860. [ASLD
12 Closing Brief at 4] Defenders of Wildlife, on the other hand, argues that “any
13 observations or reported experiences on the river from approximately 1840 forward
14 do not reflect the Gila River in its ordinary and natural condition.” [ACLPI Closing
15 Brief at 15] This disagreement highlights a conceptual problem with how the Court of
16 Appeals articulated the “ordinary and natural” standard in *State ex rel. Winkleman v.*
17 *Ariz. Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 229 P.3d 242 (App.
18 2010).

21 **II. THE PROPONENTS OF NAVIGABILITY FAIL TO MEET
22 THEIR BURDEN OF PROOF AS TO THE NAVIGABILITY OF
23 SEGMENT 6 (ASHURST-HAYDEN DAM TO THE SALT RIVER
24 CONFLUENCE).**

25 Despite a near lack of evidence, ASLD, in approximately two pages of
26 analysis, concludes that Segment 6 of the Gila River, often referred to as the Middle

1 Gila River, is navigable. In support of its contention that Segment 6 had a “median
2 natural depth” of 1.5 to 2.0 feet, ASLD cites to “Exhibit A.” Exhibit A is Table 1,
3 attached to ASLD’s Closing Brief. The first footnote to the table states that “[t]hese
4 are just theoretical depths and should be used in conjunction with historical and
5 modern accounts of the river.” The Community is not certain what this means, and is
6 unclear where the figure of 1.5 to 2.0 feet is derived from, given ASLD’s admission
7 that it “did not calculate a median flow rate at Olberg.” Likewise, ASLD’s Exhibit A
8 does not include the corrected numbers from Gookin’s supplemental information
9 [X029], which were available prior to the close of evidence in this matter.
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12 Apparently overlooked by ASLD, in his supplemental information concerning
13 the navigability of the Gila River, Mr. Gookin corrected the mistake in his use of
14 0.020 for Manning’s “n,” and arrived at a depth below Kelvin of 0.57 and above the
15 confluence of 0.76 for the median flow. [X029] Other than noting that Mr. Gookin
16 made an error in his initial calculations, ASLD makes no substantive analysis of Mr.
17 Gookin’s research or methodology. Mr. Gookin’s figures are consistent with the lack
18 of boating on the Gila River, with historical descriptions of the Gila River, and with
19 the Commission’s prior description of the Gila River as “an erratic, unreliable,
20 unstable and unpredictable watercourse.” [2009 Gila Report at 79] ASLD’s
21 “theoretical depths” are not consistent with either historical or modern accounts of the
22 river.
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25 ASLD relies on what it labels “significant records” of historical boating, which
26 apparently means occasional newspaper accounts. First, they rely on an article from

1 the *Tombstone Epitaph* which is reprinted from the *Yuma Times* noting that “two
2 men” accomplished the “dangerous feat of navigating the Gila river from source to
3 mouth.” [X020-20] The names of the men are not provided and there are no specific
4 descriptions of any places along the river, although the article does state that their
5 initial boat was destroyed. The statement from Granger [X025-110], regarding
6 Stanley Sykes canoeing the length of the Gila River in 1909, is contrary to other
7 evidence regarding the condition of the Gila River in 1909 and, although included in a
8 compilation (*Arizona's Names*), no footnote or source is provided. The account from
9 Evans [X014-33] does not state that they actually reached Sacaton traveling on the
10 Gila River; only that the boat was hauled from Sacaton to Tempe. Other
11 inconsistencies in newspaper accounts were addressed at length in Mr. Fuller’s cross-
12 examination. The newspaper accounts of attempted boat travel on the Gila River are
13 lacking, equivocal and often inconsistent.

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16 As Gookin noted, there seems to be little disagreement that there is no history
17 of commercial navigation on the Gila River, despite substantial need. [X009 at 62]
18 For a time period of over a hundred years, the proponents of navigability can produce
19 only a handful of instances where boating was attempted on the Gila River and an
20 even smaller percentage that were arguably successful using the most liberal criteria
21 for success. The most compelling evidence regarding the historical attempts to
22 navigate the Gila River was Mr. Fuller’s statement, in an attempt to justify his
23 position that not knowing whether a trip was completed constituted evidence of
24 success, that “[i]t’s certainly not unsuccessful.” [GRIC Closing Brief at 13-14; Tr.
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1 Vol. II at 496] This statement is an example of reversing the burden of proof, as it
2 requires the opponents of navigability to prove that the trips were not successful, even
3 in the absence of evidence of success.

4 During his testimony, Mr. Fuller was questioned about newspaper accounts of
5 boating on the Gila River that were unsuccessful, unclear or just plain wrong. These
6 included the newspaper article on the Cotton and Bingham trip, which only indicated
7 that they were leaving the next day [Tr. Vol. II at 495], a newspaper article which
8 indicated that during a trip one person had to walk along the bank of the river because
9 only one person could stay in the boat due to lack of water [Tr. Vol. II at 498], and a
10 newspaper article with a question inquiring about navigating the Gila and Santa Cruz
11 Rivers to Tucson [Tr. Vol. II at 500]. It was clear from Mr. Fuller's presentation that
12 factors influencing whether a trip would be considered successful or unsuccessful
13 were not necessarily considered.

14 Mr. Fuller was also questioned extensively about the "prehistoric" accounts of
15 boating in his presentations. For example, he referenced the Tohono O'odham
16 "creation account," in which Montezuma prepared for the great flood by building a
17 canoe. [Tr. Vol. II at 482] However, there was no indication of where or when the
18 story took place and the Mr. Fuller stated that his basic point was "[t]hey knew what a
19 canoe was." [Tr. Vol. II at 483] However, in making that assumption, he failed to
20 account for the translation into English. Mr. Fuller admitted that early descriptions of
21 the Middle Gila River were inconsistent and, at times, described the river as
22 completely dry. As to de Anza's account in 1775, Mr. Fuller admitted that the
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1 descriptions of the Gila River as “dry” and “halfway up legs” were inconsistent and
2 “sound like a contradiction.” [Tr. Vol. II at 486] Mr. Fuller also vaguely recalled a
3 member of de Anza’s party described the Gila River as “so sandy that in some places
4 the water would sink into the sand and come out at other places.” [Tr. Vol. II at 487]
5 Mr. Fuller admitted to other descriptions of the Middle Gila River as dry in 1849 and
6 1869, well before pumping in the upper valley. [Tr. Vol. II at 489] None of these early
7 descriptions included boating.
8

9 Mr. Fuller admitted that the standard for navigability should involve
10 “repeatability” of travel on the river; that is, “people should be able to do it over and
11 over.” [Tr. Vol. 11 at 503] However, in all of the accounts reviewed by Mr. Fuller, the
12 *only* individual he could identify who actually repeated their travel on the Gila River
13 after the first time was James Ohio Pattie. [Tr. Vol. II at 504] He could not recall any
14 others who repeated a boating trip on the Gila River.
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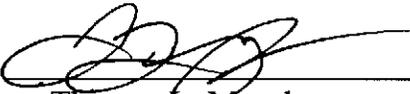
16 While ASLD notes that Mr. Gookin testified that Segment 6 was navigable by
17 canoe in its ordinary and natural condition [Tr. Vol. IV at 857], it failed to provide the
18 actual context for the testimony. When asked about Segment 6 in its ordinary and
19 natural condition, Mr. Gookin stated that he did not believe it was dry most of the
20 year, but that “there were nonboatable flows by my criteria. I do think it was deep
21 enough to float your three-quarter inch canoe, for example,” a reference to prior
22 testimony by Mr. Fuller. [Tr. Vol. IV at 813]
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CONCLUSION

The Commission should affirm its finding from 2009.

DATED this 23rd day of January, 2015.

GILA RIVER INDIAN COMMUNITY

By 
Thomas L. Murphy

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