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

11 In re Determination of Navigability of the Gila River ) Case No.  
12 )  
13 ) **POST-HEARING MEMORANDUM**  
14 )  
15 ) **FOR BUCKEYE IRRIGATION COMPANY AND**  
16 ) **BUCKEYE WATER CONSERVATION AND**  
17 ) **DRAINAGE DISTRICT**

18 **1. Introduction.** This is a broad brush stroke offering. We join in the able  
19 memorandum SRP presents, but add an overview. We will provide forest, not trees. Nor  
20 will we spend much ink on case analysis. By now, the Commission has been (pardon us)  
21 inundated with citations to navigable stream decisions.

22 **2. The Case Boils Down to Two Things—Burden of Proof and Terrain.** It is  
23 undisputed that the proponents of navigability (henceforth the “PN”) have the burden of  
24 proof. A.R.S. §37-1128(A). The nature of the terrain through which the Gila flows is also  
25 indisputable. It is searing desert.

26 If the Gila had been a viable “highway of commerce”, our forefathers would have  
found it preferable to traverse this hot, arid land from the deck of a steamboat, a barge, or  
even a raft. Instead of Safford-to-Yuma being an understandably disfavored route to the

1 California Promised Land, a “Great Gila Water Highway” would have been irresistibly  
2 inviting.

3 If the PNs were right, the history of the West would be very different. After  
4 following the Santa Fe Trail to its namesake, the pioneers would have floated down the  
5 Rio Grande to Las Cruces<sup>1</sup>, traversed Southern New Mexico, then embarked on the Gila  
6 at Safford for the journey to via Yuma to the Gulf of California, where they would have  
7 boarded ocean going ships for the short trip around Baja to California’s coastal cities. A  
8 Gila port, either Buckeye, Liberty, Avondale or Cashion, would have become the  
9 commercial hub of Central Arizona, and Phoenix would have been a backwater village,  
10 relegated to the role of supporting local farming.

11 **3. The PNs Have Not Offered “Highway of Commerce” Evidence.** Whether on  
12 land or water. America’s pioneer highways of commerce are the stuff of legend. Unlike  
13 the Mississippi, the Missouri or the Ohio, no song chronicles or praises the Mighty Gila.  
14 Imagine:

15 *I’m pushing on ere dawn’s a breaking*  
16 *Far across the wide Gila*  
17 *Oh Gila River, I love your daughter*  
18 *Away, you rolling river*

19 No such song. Nothing close. No song at all. No Disney television Show about Rip  
20 Roaring Mike Fink and his keel boat on the Gila. No traveler’s accounts of traversing the  
21 great Arizona desert on board a vessel.

22 Photography had been used to document Western life for more than a half century  
23  
24  
25

26 <sup>1</sup> The Rio Grand, with its higher average flow than the Gila, has already been adjudicated non-navigable. See Appendix B to SRP’s opening brief.

1 before statehood, but the PN's have not produced a single picture (or for that matter an  
2 etching or sketch) of any boat on the Gila, much less one engaged in commerce.<sup>2</sup> By  
3 contrast, a whole book, complete with photographs, is devoted to documenting  
4 steamboats on the Colorado. See Steamboats on the Colorado River, by Richard E.  
5 Lingenfelter (University of Arizona Press, 1978).

7 Nor have the PNs provided any physical evidence of the sort one would expect if  
8 the Gila really had put to commercial use. Where are the ruins of old riverside  
9 warehouses? The remnants of piers? What happened to the riverside communities that  
10 would have flourished if the Gila really had been abuzz with commerce?<sup>3</sup> The PNs  
11 present nothing. For a very good reason: such towns and structures never existed.

13 The same is true for paper evidence. The PNs do not favor the Commission with a  
14 single bill of lading. No lawsuit over damaged cargo or unpaid shipping bills. No  
15 evidence of shipping insurance or a claim. Nothing in English. Nothing in Spanish  
16 either. And surely if, as it would have, Gila commerce had included transportation of  
17 goods into and from the Gulf of California, there would be customs records kept by the  
18 government of Mexico as well as the United States.

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22 <sup>2</sup> Examples of books containing photographs of Maricopa county before statehood or directly discussing the Gila that are notable for their  
23 failure to include pictorial or other evidence of commercial boating on the Gila include: 1. Thomas Sheridan, *Arizona: A History* (Tucson:  
24 University of Arizona Press, 1996); 2. Bradford Luckingham, *Phoenix: The History of a Southwestern Metropolis* (Tucson: University of Arizona Press,  
25 2003); 3. Douglas Kupel, *Fuel for Growth: Water and Arizona's Urban Environment* (Tucson: University of Arizona Press, 1999); 4. Jack L. August, Jr., *Vision in the Desert: Carl Hayden and Hydropolitics in the American Southwest* (Ft. Worth: Texas Christian  
26 University Press, 1999); 5. Mark Reisner, *Cadillac Desert: The American West and its Disappearing Water* (New York: Viking, 1986); 6.  
William H. Goetzmann, *Exploration and Empire: The Explorer and the Scientist in the Winning of the American West* (New York: Norton,  
1966); 7. Edwin Corle, *The Gila: River of the Southwest* (New York: Rinehart, 1951); 8. Gregory McNamee, *Gila: The Life and Death of the  
American River* (New York: Orion, 1994).

<sup>3</sup> Even if the buildings were gone, there would be deeds to shipping companies and those old time surveys showing the warehouses and docks on  
wonderful brown, cracking paper.

1 Nor do the PNs offer any of the political evidence that Gila river commerce would  
2 have generated. They present no record of debate in the territorial legislature about  
3 taxation on Gila transportation of bullion or concentrates from Arizona's mines or from  
4 produce sent down the Gila, or the importation of finished goods up the river to Central  
5 Arizona. They offer no evidence of laws regulating Gila commerce, nor any request for  
6 funds to dredge the Gila after a flood. The PNs advance no evidence of any protests that  
7 the proposed Roosevelt Dam would have provoked among the boatmen and shippers who  
8 made their livings from plying the Gila—because no such people existed. If they had  
9 existed, would commercial river ports, such as Safford, Florence, Buckeye, or Yuma,  
10 quietly accepted economic curtailment when Roosevelt Dam was announced or when  
11 Bernie Gillespie's predecessors built their earthen dams at the narrows between the  
12 Buckeye Hills and the Gila Bend Mountains? Of course, not. Nor have the PNs given  
13 the Commission evidence of a single instance, through newspaper article or otherwise, of  
14 any instance in which anyone commented upon the impact of either draught or flood upon  
15 Gila River commerce.

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19 To put it mildly, the PNs have failed to carry their burden of proof.

20  
21 **4. Either What the PNs Have Shown is Irrelevant, or the PNs Propose a Radical**

22 **Change of Law.** The PNs present evidence of only fourteen circumstances in 63 years  
23 when human beings wetted floating objects in the Gila. See Appendix A to SRP's  
24 opening brief. In many of those, the PN's evidence, most of which is shaky, includes  
25 stories of boats that run aground or otherwise encounter obstacles unfavorable to  
26

1 sustained commerce.

2           The PNs present no evidence whatsoever to preclude the overwhelming likelihood  
3 that each of their boat floating instances occurred during a brief, uncommon flood. This  
4 deficiency is glaring. Commission members may remember one occasion years ago when  
5 it snowed on South Mountain. The newspaper had a photograph of a small snow man  
6 children had built there. Needless to say, this event did not transform South Mountain  
7 into a commercially viable ski resort. Nor would catching a bass on the Gila during a  
8 spring flood be evidence that it supported a commercial fishing industry.  
9  
10

11           On the Mississippi, they did not write “New Orleans or Bust” on the sides of their  
12 steamboats, because there was no question that the river flows were consistently  
13 sufficient to satisfy an essential prerequisite for commerce—an absence of a significant  
14 risk of “busting.” The PNs offer no evidence of any commercial purpose for Bucky  
15 O’Neil’s lark, nor any suggestion why—in an age of pioneer entrepreneurs—our  
16 forefathers would have refused to exploit the Gila’s potential to be a “highway of  
17 commerce” if, indeed, it had any potential to be one. Unless they can demonstrate that  
18 human nature was different before statehood, the PNs inability to prove that the Gila  
19 River was used as a highway of commerce is also proof that it did not have the potential  
20 to be used as one.  
21  
22

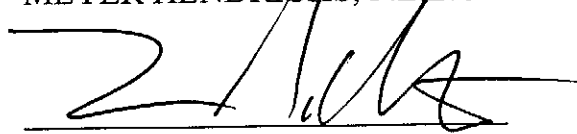
23           Uniformly, stronger evidence of boating use than the PNs have offered has been  
24 held to be insufficient to support a finding of navigability. *See e.g. North Dakota v.*  
25 *United States*, 770 F. Supp. 506, 511(D.N.D 1991) *affd.* 972 F2d (8<sup>th</sup> Cir. 1992)  
26

1 (Ferryboats); *George v. Beavark, Inc.*, 402 F.2d 977 (8<sup>th</sup> Cir. 1968) (Flat Boats); compare  
2 *United States v. Appalachian Electric Power Company*, 312 U.S. 712, 61 S.Ct. 548  
3 (1940) (17 keel boats carrying lumber and tobacco “with fair regularity” are evidence of  
4 Navigability). If, as the PN’s implicitly argue, the only test is whether sufficient water was  
5 ever in the Gila to float a boat, then every flood plain in the state is “navigable”, and the  
6 consequences for people who think they own property that is (or used to be) in a flood  
7 plain will be dramatic indeed.  
8

9  
10 5. **Conclusion.** This is not a close case. The PN’s have failed dismally to prove that  
11 the Gila is a navigable river.

12  
13 Dates this 6<sup>th</sup> day of February, 2006

14  
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22 ORIGINAL AND SIX COPIES of the foregoing  
23 hand-delivered for filing this 6<sup>th</sup> day of February, 2006 to:

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