

*Received
by
J. G. Miller
2-27-06*

Phoenix Corp. Ctr.
3003 N. Central Ave.
Suite 1200
P.O. Box 2199
Phoenix, Arizona
85001-2199

Telephone
602-604-2200

Facsimile
602-263-5333

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2
3
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6
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8
9
10
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25
26

Tom Galbraith, State Bar No. 002357
MEYER HENDRICKS PLLC
3003 North Central Avenue
Suite 1200
Phoenix, Arizona 85012-2915
(602) 604-2200

Attorneys for Attorneys for Buckeye Irrigation Company and Buckeye Water Conservation and Drainage District

**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In re Determination of Navigability of the Gila River) Case No. 03-007 NAV
)
) **RESPONSIVE POST-TRIAL MEMORANDUM**
) **FOR BUCKEYE IRRIGATION COMPANY AND**
) **BUCKEYE WATER CONSERVATION AND**
) **DRAINAGE DISTRICT**
)

1. **Introduction.** Again, overview. Without saying so, the PNs have virtually conceded that the Gila never was a highway of commerce. Unable to dispute reliable history, the PNs retreat to remote times in the land of "Could-Have-Been", where their wishful imaginings about the Gila's susceptibility to navigability will encounter a scantier historical record, and thus fewer possibilities for crushing contradictory evidence. Paradoxically, the PNs also fast forward past Valentine's Day, 1912, to the 21st Century in order to simultaneously claim that in 1870 the U.S. Supreme Court intended that private ownership of stream beds should revert to the state based upon future changes in boat technology and "commercial" recreational uses the Justices could not have imagined. Neither argument works. The Commission should find that the stretch of the Gila under consideration is not navigable.

1 **2. Burden of Proof and Ancient History.** The best evidence of navigability,
2 of course, is whether a water course was actually used as a highway of commerce. *United*
3 *States v. Oregon*, 295 U.S., 23 (1935). Unless our ancestors whimsically preferred to
4 trudge across burning deserts instead of cruising through them, the fact that the pioneers
5 did not use the Gila a highway of commerce proves that it was not susceptible of being
6 one. *Lykes Bros. Inc. v. Corps of Engineers*, 821 F.Supp. 1457, 1459 (M.D. Fla. 1993)
7 *affid.* 64 F.3d 630 (11th Cir. 1995). Unable to counter this logic and the dearth of
8 highway-of-commerce evidence, the PN's resort to fantasy. They push the date they claim
9 the Gila could have been used as a highway of commerce to a time before there was any
10 commerce. By invoking what is virtually pre-history, the PN's have made their claims
11 *much* harder to prove, because both due to primitive technology and faulty retention,
12 ancient information is inevitably unreliable. It is also subject to mythological distortion.
13 That is why fairy tales begin "Once upon a time, long, ago...."

14 As the predicate for their Could-Have-Been argument, the PN's ask the
15 Commission to believe that at some unspecified early date unnamed settlers made
16 diversions for agriculture in just the amount needed to reduce a navigable Gila to non-
17 navigability. The PN's claim is unsupported by either common sense or useful fact. The
18 notion that the earliest pioneers would have stopped in the desert to divert huge quantities
19 of water for local agriculture before they or any of their fellows had occasion to use the
20 Gila as a water highway to Yuma or the sea is inconsistent with the usual course of the
21 western migration as well as unsupported by historical evidence. The PN's conjectures¹
22 about average virgin Gila flows bring to mind the old saw about the accountant who
23 drowned in a stream that averaged 2 inches in depth. Averages comprised of dangerous

24
25 ¹ Tellingly, the Land Department refers to its Table 1, which contains almost no pre-statehood gauging information,
26 as "the best *available* hydrologic data" (emphasis ours) and claims with an equally telling lack of precision that
"USGS data should be increased by at least 16 to 41 percent". Land Department Opening Brief p. 11

1 flash floods and impassable trickles—both common in our Arizona—are not probative of
2 the question before the Commission. *Nothing the PNs have supplied shows that the*
3 *amounts and timing of early Gila diversions reduced the Gila's flows from consistent*
4 *volumes that could have permitted the sustained commerce necessary to support a*
5 *finding of navigability.* Implicitly, the PNs recognize this fatal defect. Their efforts to
6 overcome it lead PNs into a variety of embarrassments which SRP's briefs ably expose.
7 We confine ourselves to these highlights:

8 A. Remarkably, the PNs place heavy reliance on the experience of the Mormon
9 Battalion, which--as SRP demonstrates--actually proves non-navigability.
10 See SRP Response, pp.2-4.

11 B. The PNs engage in a whole cloth invention of pre-historic Apache Gila
12 River commercial boating. The only evidence about Native American uses
13 of the Gila is undisputed testimony from Mr. Gookin, an expert for the Gila
14 River Indian Community, corroborated by Dr. August's report that there is
15 no evidence of that American Indians ever used the Gila as a commerce
16 highway or made any other boating use of it. We attach as Appendix One
17 the actual report on which the Land Department bases its fanciful Apache
18 boating claim. At most, it says that Chiracahua Apaches are reported to
19 have used bull boats for "crossing streams". Contrary to the Department's
20 representation at page 15, the report does not say (1) that Apaches ever put
21 any boat in any part of the Gila; (2) that Apaches ever used bull boats for
22 commerce; or (3) that bull boats were necessary for "crossing streams" in
23 any but during unusual floods. That the Department must resort to such
24 distortion speaks volumes about the *bono fides* of its position.

25 C. The County's argument is contradicted by its own actions. The Flood
26 Control District knows perfectly well that the Gila was not navigable. That

1 is why in 1982 it acquired easements from private interests that own fee title
2 to its bed. Appendix Two, Exhibit A, contains an example of one such
3 easement, an attachment to a January 28, 2004 motion for summary
4 judgment filed by the lead defendant in *A Tumbling –T Ranches v. Paloma*
5 *Investment, L.P.*, Maricopa County Superior Court No. CV 1995-000253.
6 The Commission may judicially notice that litigation. *See e.g. Birt v. Birt*,
7 208 Ariz. 546, 96 P.3d 544 (App. 2004). It is the motivation for Maricopa
8 County Flood Control District's appearing in this case. The District wants
9 to escape liability in that litigation for its failure keep its promise to
10 maintain the river bottom easement it acquired from its owner, the Paloma
11 Ranch Investors. That is why it is asking this Commission to rule that the
12 river bottom is not privately owned. The Flood Control District's argument
13 is given the lie by it own previous action in acquiring river bottom
14 easements from private parties. The District should be barred by estoppel
15 from disavowing its own prior actions on which others have relied. *See e.g.*
16 *Employers Reinsurance Corp. v. GMAC Ins.*, 303 F. Supp.2d 1010 (D. Ariz.
17 2004).

18 D. Rather than fairly meet the substance of the expert opinions that well
19 regarded scholars have been offered against navigability, the Flood Control
20 District has engaged in tactics that defy polite description. Witness how the
21 District addresses the report of our witness, Professor August, the Director
22 of the Arizona Historical Foundation: After a poorly supported, ineffective
23 attempt to discredit Wheeler's report to Congress and the surveyors who
24 found the Gila not navigable, at page 20 of its opening brief the Flood
25 Control District says: "Throughout Dr. August's report, he misquotes and
26 mischaracterizes sources." The District purports to provide examples from

1 footnote 6, page 3 and pages 21 and 30 of Dr. August's report. We invite
2 the Commission to compare what Dr. August's report actually says and how
3 the District has characterized it.

4 This case is about land ownership. Since statehood, Buckeye Irrigation Company
5 and the Buckeye Water Conservation and Drainage District, the Flood Control District
6 and countless others have relied and acted in good faith on what is apparent to everyone:
7 the Gila is not a navigable river. The Flood Control District's ignoble attempt to renege
8 on a deal only hints the extent of the social and economic mischief that a ruling
9 upsetting longstanding understandings about the Gila's non-navigability would create.
10 Since neither adverse possession nor statutes of limitations run against the state, all
11 private land owners and those who contracted with them could face lawsuits from the
12 state to recover the value of any sand and gravel removed or other use made of the
13 riverbed, plus interest from the date of the activity. For most this would be ruinous.
14 What a high price to pay for believing in good faith--just as the Flood Control District
15 really does--that the Gila, which never has been used as a highway of commerce, was
16 nevertheless susceptible of being one at a time before any hard evidence of the volume
17 and consistency of its flows was available.

18 The PNs advocate a fundamentally unjust result when they ask the Commission
19 to deprive current landowners of their long held property based upon distorted
20 speculations about pre-history, unfounded assaults on reputable historians, and hydrologic
21 conjecture. The PNs have the burden of proof for a very good reason, and they have
22 failed utterly to discharge it.

23 **3. The PNs Ask the Commission to Violate the United States Constitution.**

24 The PNs also argue that, even if it was not a highway of commerce before, the Gila
25 became one when the owners of neoprene rafts and inflatable kayaks began guiding
26

1 customers on its scenic upper reaches². There was no recreational “adventure travel”
2 commerce for the pioneers. This industry is the invention of a more effete age³. As the
3 Commission is only too aware, the United States Supreme Court case that defined the
4 navigability test is *The Daniel Ball*, 77 U.S. 557, decided in 1870. We must suppose that
5 when the Court used the word “commerce” in the phrase “highway of commerce”, it
6 meant to use it as the phrase would have been understood at the time, based upon then
7 existing commercial practices and technology. Under *The Daniel Ball* navigability
8 determines property *ownership*. It is paradoxical that the PNs argue that dams and
9 diversions cannot transform a navigable stream into non-navigability while
10 simultaneously maintaining that the owners of fee land beneath non-navigable streams
11 must forfeit title to their land (without compensation) if somebody invents a new
12 technology or form of tourism that now makes it possible to make money from boating on
13 what had previously been a non-navigable stream. If, as PNs argue, the definition of
14 navigability changes with boating technology or recreational habit, then the invention of
15 air boats would have transferred vast expanses in the Everglades from private to state
16 ownership. Indeed, according to PNs the Everglades parcel that the Collier family
17 swapped with the federal government for part of the former site of Phoenix Indian School
18 actually belongs to Florida and the entire transaction must be voided.⁴ Similarly,
19 according to PNs, the invention of hover craft must result in the uncompensated transfer
20 of ownership from private interests to states in every stream bed over which these
21 technologically advanced boats can travel.

22
23 ² Since this has never happened on the Gila near Buckeye, the PNs “adventure tourism” argument does not directly
24 affect the Buckeye Irrigation Company or the Buckeye Water Conservation and Drainage District. Still, we cannot
25 resist comment.

26 ³ Figures 1 and 2 attached to the Land Department’s opening brief attempt only to establish stream flows necessary
to float kayaks, canoes, and, in one instance, inflatable rafts—not keel boats or others used historically for
commerce. They are, therefore, irrelevant.

⁴ An illegal sale of state land is void *ab initio* and must be rescinded even if the parcel has since been acquired by a
bono fide purchaser for value. *Schell v. White*, 80 Ariz. 156, 294 P.2d 385 (1956).

1 Laurie Hachtel
Shanti Roset
2 ATTORNEY GENERAL'S OFFICE
1275 W. Washington
3 Phoenix, AZ 85007
Attorneys for the State of Arizona
4
5 L. William Staudenmaier
Michael Kafka
6 RYLEY, CARLOCK & APPLEWHITE
One North Central Ave., Suite 1200
7 Phoenix, AZ 85004
Attorneys for Phelps Dodge Corporation
8
9 Joy Herr-Cardillo
ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST
10 2205 W. Speedway Blvd.
Tucson, AZ 85719
11 Attorneys for Defenders of Wildlife, et al.
12
13 Joe P. Sparks
John T. Ryley
SPARKS, TEHAN & RYLEY, P.C.
14 7503 First Street
Scottsdale, AZ 85251
15 Attorneys for San Carlos Apache Tribe, et al.
16
17 John Helm
Sally Worthington
HELM & KYLE
18 1619 E. Guadalupe, Suite One
Tempe, AZ 85283
19 Attorneys for Flood Control District of Maricopa County
20
21 Brad Woodford
Jeff Zimmerman
MOYES STOREY, LTD.
22 1850 N. Central Ave., Suite 1100
Phoenix, AZ 85004
23 Attorneys for Paloma Irrigation District
24
25 ///
26 ///

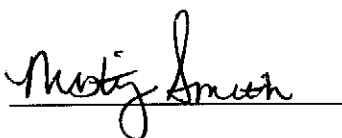
1 John B. Weldon, Jr.
Mark A. McGinnis
2 Rebecca C. Goldber
SALMON, LEWIS & WELDON, P.L.C.
3 2850 East Camelback Rd., Suite 200
Phoenix, AZ 85016
4 Attorneys for Salt River Project Agricultural Improvement and Power District
5 and Power District and Salt River Valley Water User's Association

6 Julie Lemmon
930 S. Mill Ave.
7 Tempe, AZ 85281
8 Attorney for Flood Control District of Maricopa County

9 John Hestand
Gila River Indian Community
10 5002 N. Maricopoa Rd.
Box 5090
11 Chandler, AZ 85226

12 Allen Gookin
13 4203 N. Brown Ave.
Scottsdale, AZ 85251
14

15 Paul Li
Robert S. Lynch Assoc.
16 340 E. Palm Ln., Suite 140
Phoenix, AZ 85004
17

18
19 

20 448410

21
22
23
24
25
26

Appendix One

June 2003 update

Arizona Stream Navigability Study
for the
Upper Gila River
Safford to the State Boundary
and
San Francisco River
Gila River Confluence to the State Boundary

Draft Final Report

Received
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gjm
ANSAC

Prepared for the
Arizona State Land Department



Date of Original Report: June 1997

Prepared by

SFC Engineering Company
In Association with
George V. Sabol Consulting Engineers, Inc.,
JE Fuller/ Hydrology & Geomorphology, Inc.,
and
SWCA, Inc. Environmental Consultants

Revised:

June 2003: JE Fuller/ Hydrology & Geomorphology, Inc.



6101 S Rural Rd.
Suite 110
Tempe, AZ 85283

Historic Indian Use

Two Native American groups, the Yavapai and the Apaches, used the study area in historic times. The Yavapai preceded the Apache and probably used the area until about 1700, when the Apaches moved into the area.

The Yavapai are a Yuman-speaking tribe who are thought to have numbered about 2,000 in the 1860s (Khera and Mariella 1983:Table 1). Prehistorically the Yuman speakers lived on the lower Colorado River, and began to spread east about A.D. 1100-1300 (Dobyns and Euler 1970; Pilles 1981:172-177; Rogers 1945:190), migrating into the Mogollon Highlands by the sixteenth century when they were probably observed north of the Gila River by the Coronado Expedition in 1540 (Winship 1896), and certainly seen in the Verde Valley by the Espejo Expedition in 1582 (Hammond and Rey 1966). Although the Yavapai practiced some limited agriculture, their subsistence was based on hunting wild game and gathering wild plants (Khera and Mariella 1983). Agave could be harvested year-round by moving to different elevations. The fruits of saguaro and other cactus were available in the summer. Piñon nuts, sweet acorns, walnuts, sunflower seeds, and grass seeds were gathered and stored for use in the winter. Each family group operated independently, but when resources were abundant, groups of families would camp together. Because the Yavapai were so mobile, they often lived in natural shelters of rock overhangs and more rarely built dome-shaped huts of brush or mud.

In 1540, the Coronado found a few people living in the vicinity of Chichilticale, a ruin at the northern edge of the Sonoran Desert. These people, who were probably Yavapai, were described as "the most barbarous yet seen. They live in separate cabins and not in settlements. They live by hunting" (Winship 1896:143).

~~Some time between the Coronado Expedition of 1540 and about 1700, the Yavapai were largely~~ displaced by the Apache, who were the principal group to use the Gila and San Francisco rivers in historic times. The Apache and Navajo speak mutually intelligible dialects of a single language, Southern Athapaskan. Southern Athapaskan speakers are believed to have split from the main group of Athapaskan speakers in the western subarctic regions of Canada about 1,000

years ago. Drifting south, the Southern Athapaskans probably entered the Southwest between about A.D. 1540 and 1582. Gunnerson (1956, 1974) notes that when the Coronado Expedition passed through the Southwest in 1540, they did not report seeing any groups of people that can be identified as the Apache. Once the Coronado Expedition reached the Great Plains, however, they came across a groups of people who lived in conical skin tepees, used dogs as beasts of burden, and hunted the buffalo. Coronado's Pueblo Indian guides reported that these people, who Gunnerson believes to have been Apaches, arrived in the area about 15 years before. In 1582, the Espejo Expedition reported Querechos near Acoma Pueblo in New Mexico, and this group of people is often interpreted as Apaches, perhaps the ancestors of the modern Navajo (Gunnerson 1956, 1974).

Once in the Southwest, the Southern Athapaskans split into seven groups, known since the late nineteenth century as the Kiowa-Apache, Lipan Apache, Jicarilla Apache, Mescalero Apache, Navajo, Western Apache, and Chiricahua Apache. These names are relatively recent, however. The term Apache was first used by Don Juan de Oñate in 1598 (Opler 1983:385). Apaches are said to have been allied with Acoma Pueblo during Oñate's siege of Acoma in 1598 (Di Peso 1956:33-35). Fray Alonso de Benavides mentioned the Apaches de Gila (probably ancestors of the Chiricahua Apache) in the 1620s (Benavides 1945:82, 84-85). In 1697, Captain Juan Manje observed Apaches de Gila at the junction of the Gila and San Pedro (Di Peso 1956:33-35; Manje 1954).

By the mid-nineteenth century, the San Francisco River was an informal dividing line between the Western Apache and the Chiricahua Apache. The Western Apache lived primarily by hunting wild animals and gathering wild plants, although practiced some agriculture (Basso 1983). Their winter camps were in the Salt, Black, and Gila River valleys; their summer camps were along streams in the mountains, where they practiced irrigated agriculture. The Western Apache lived in wickiups brush-covered wickiups. They comprised five divisions, the Northern Tonto, Southern Tonto, Cibecue, San Carlos, and White Mountain Apaches.

The Chiricahua Apaches lived almost exclusively by hunting wild animals (especially deer, more rarely antelope, and often small game) and gathering wild plants (especially agave). The

Chiricahua practiced only limited agriculture and even that probably dates to historic times. Dwellings were primarily brush-covered wickiups. Opler (1983:414) reports that the Chiricahua manufactured bull boats (hide-covered, wooden-frame boats) for crossing streams. Geronimo divided the Chiricahua Apaches into four groups (Barrett 1970); Opler (1983) recognizes three: the Eastern Chiricahuas (the Chihennes group described by Geronimo); the Central Chiricahuas (including Geronimo's own group, the Bedonkohe, and Cochise's band, the Choconens); and the Southern Chiricahuas (the Nednais of Mexico). Geronimo said that he was born in 1829 at the headwaters of the Gila, in Arizona. Since the headwaters of the Gila are in New Mexico, the exact location of Geronimo's birthplace is a matter of debate. Debo (1976) believes that it was at the junction of the San Francisco and the Gila.

In addition to hunting, gathering, and agriculture, a substantial portion of Apachean subsistence in historic times was based on raiding and warfare. Throughout the Spanish and Mexican periods (see below) the Apaches were considered a threat to neighboring Indian and European settlements. In 1862, the United States established a chain of forts in Arizona to control the Apaches, initiating nearly 25 years of warfare that ended with Geronimo's final surrender in 1886.

Spanish Period

Spanish exploration of the Southwest was originally prompted by the stories of Cibola heard by Cabeza de Vaca during his 1528-1536 trek from Florida to Mexico. Sometime near the end of April, 1536, Cabeza de Vaca, and three companions--the only survivors of 300 men who had debarked on the coast of Florida eight years before--arrived in Sinaloa, having walked across the Gulf Coast and through the American Southwest.

In 1539, Fray Marcos de Niza and Estevan (a black who had accompanied Cabeza de Vaca) set out from Culiacan to investigate the stories of Cibola. Estevan went as far as Zuni, where he was killed, and when Fray Marcos (who was traveling some distance behind Estevan) heard of Estevan's death, he retreated to New Spain, spreading tales of the wealth of Cibola. These stories

Appendix Two

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MEYER HENDRICKS, P.L.L.C.
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MICHAEL K. JEANES, CLERK
E. NELSON, DEPUTY CLERK

1 MESCH, CLARK & ROTHSCHILD, P.C.
259 North Meyer Avenue
2 Tucson, Arizona 85701
Phone: (520) 624-8886
3 Fax: (520) 798-1037

4 By: J. Emery Barker, #1151
Scott H. Gan, #6568
5 43002-286/dkh
6 Attorneys for Defendants, PILP, et al.

7 SUPERIOR COURT, STATE OF ARIZONA

8 MARICOPA COUNTY

9 A TUMBLING-T RANCHES, an
10 Arizona general partnership, et al.,

11 Plaintiff,

12 -vs-

13 PALOMA INVESTMENT L.P., a limited
partnership, et al.,

14 Defendants.

NO. CV 1995-000253 (consolidated)

**PILP DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT RE:
FCD'S "NAVIGABILITY" OR
"EQUAL FOOTING" DEFENSE
TO THE INDEMNITY
AGREEMENT**

(Honorable Michael J. O'Melia)

16 *Prefatory Note.*

17 Prudential Insurance Company of America ("Prudential"), Paloma Ranch Joint Venture
18 ("PRJV") and Paloma Investment Limited Partnership ("PILP") (collectively the "PILP"
19 defendants) are the indemnitees of an indemnity agreement from the Flood Control District of
20 Maricopa County ("FCD") which agrees to hold them harmless from the claims of the A
21 Tumbling T plaintiffs. In the first phase trial of the Declaratory Judgment action (CV97-07081)
22 the Hon. John Foreman held that the indemnity agreement was valid, ran with the land and
23 would serve to indemnify these defendants from the A Tumbling T claims, provided that the
24 PILP defendants could prove that the "cleared channel" constructed by the FCD was a
25 proximate cause of the failure of Gillespie Dam. The FCD claims that the consideration for the
26 indemnity agreement fails in the face of the claims that the Gila River may be navigable.

ATTORNEYS AT LAW
259 N. Meyer Ave.
Tucson, AZ 85701-1090

1 There have previously been cross-motions for summary judgment filed about this issue by the
2 PILP defendants and the FCD and they were both denied. The PILP defendants believe that this
3 Court should reconsider this motion since a new argument is raised in this motion.

4 **Facts.** (All prior facts from the prior motions are incorporated by reference as required by Rule
5 5(g)(D), *A.R.C.P.*; copies of those filings are furnished to the Court separately for ease of
6 reference).

7 PRJV owned Paloma Ranch in 1982. Included in the purchase of the 67,000 acre ranch
8 was Gillespie Dam and a 26.8 acre parcel (the "easement" parcel) immediately upstream of the
9 face of the dam. (FCD SOF 7/28/00 #3; PILP SOF 8/14/00 #2) FCD desired an easement
10 across the easement parcel in order to construct a "cleared corridor" channeling a portion of the
11 Gila River. (FCD SOF 7/28/00 #3; PILP SOF 8/14/00 #3) PRJV agreed to grant FCD an
12 easement across the easement parcel on the condition that the FCD agree to indemnify PRJV
13 against any loss. (FCD SOF 7/28/00 #4; PILP SOF 8/14/00 #4) The FCD agreed to the
14 indemnity, the document was signed and recorded. (Exhibit A) FCD entered upon the
15 easement parcel and constructed the "cleared corridor." PRJV was dissolved and Prudential
16 succeeded to the PRJV interest. Ultimately PILP ended up owning Paloma Ranch, Gillespie
17 Dam and the easement parcel. In 1991 the FCD bought the easement parcel from PILP and a
18 deed was recorded. (FCD SOF 7/28/00 ## 7, 8; PILP SOF 8/14/00 ## 7, 8)

19 ***FCD's Argument.***

20 FCD argues that the Gila River is "navigable," that thus the bed of the river (the location
21 of the easement parcel) is public property of the State of Arizona, and thus PRJV did not really
22 own the easement parcel back in 1982 and hence there was no consideration for the indemnity
23 agreement.

24 The PILP defendants argue that (1) there has been no final binding ruling that the Gila
25 River at the reach which includes Gillespie Dam and the easement parcel is navigable, (2) that
26 PILP's experts claim the river is non-navigable and that PRJV, et al. did own the easement

1 parcel, (3) that the law is clear that a later discovered impediment does not vitiate the
2 consideration for a prior indemnity agreement, thus (4) the indemnity agreement is valid based
3 on the consideration which the parties agreed upon at the time of execution of the agreement.
4 In short, the law is quite clear that the consideration for the indemnity agreement does not fail
5 retroactively!

6 **Argument.**

7 **1. The Indemnity Consideration.**

8 An indemnity contract is an agreement whereby one party (the indemnitor) agrees to
9 make good any harm resulting to another party (the indemnitee). *INA Ins. Co. of North America*
10 *v. Valley Forge Ins. Co.*, 150 Ariz. 248, 252, 722 P.2d 975, 979 (App. 1986). Indemnification
11 by contractual means is examined in the traditional manner as any other contract. *Id.*; *Seaboard*
12 *Air Line Railroad Co. v. Richmond-Petersburg Turnpike Authority*, 202 Va. 1029, 1033, 121
13 S.E.2d 499, 503 (1961). Therefore, a contract for indemnity must be supported by consideration
14 to be enforceable.

15 Consideration may take the form of a benefit to the promisor or a detriment to the
16 promisee. *USLife Title Co. of Ariz. v. Gutkin*, 152 Ariz. 349, 354, 732 P.2d 579, 584 (App.
17 1986). Courts will not generally question the adequacy of consideration supporting a contract.
18 *Sun World Corp. v. City of Phoenix*, 166 Ariz. 39, 42, 800 P.2d 26, 29 (App. 1990). It is more
19 important that the consideration be the result of a bargain, and that the parties are motivated to
20 enter the contract by the agreed-upon consideration. *Demasse v. ITT Corp.*, 194 Ariz. 500, 507,
21 984 P.2d 1138, 1145 (1999).

22 Valid consideration may also be provided by the forbearance of a valid legal claim.
23 *Mustang Equip., Inc. v. Welch*, 115 Ariz. 206, 209, 564 P.2d 895, 898 (1977). A party's
24 promise to forbear may be expressly stated in the contract or "may be inferred from the fact of
25 forbearance and the circumstances under which it was exercised." *Reid-Strutt, Inc. v. Wagner*,
26 671 P.2d 724, 727 (Or. App. 1983). In *Reid-Strutt*, the court found valid consideration in the

ATTORNEYS AT LAW
259 N. Mey. Ave.
Tucson, AZ 85701-1090

1 plaintiff's forbearance from enforcing his rights to an easement. *Id.*

2 Forbearance of a legal right that proves to be invalid still is valid consideration if (a) the
3 claim is disputed, or (b) the forbearing party has a good faith belief in the validity of the claim.
4 Restatement (Second) of Contracts, § 74(1). The policy behind the compromise of disputed
5 claims is the reduction in the overall amount of litigation. *Id.* at Comment (a). The bargain is
6 to be judged as it appeared to the parties at the time of its making. *Id.* at Comment (b).
7 Furthermore, the Restatement (Second) of Contracts, § 74(2) provides:

8 The execution of a written instrument surrendering a claim or defense by one who
9 is under no duty to execute it is consideration if the execution of the written
10 instrument is bargained for even though he is not asserting the claim or defense
and believes that no valid claim or defense exists.

11 Thus, for example, a party who agrees to sign a quitclaim deed for property even though
12 he possesses no interest in that property has provided consideration to support an agreement.
13 *USLife*, 152 Ariz. at 354, 732 P.2d at 584. The execution of a quitclaim provides the promisor
14 with the benefit of relief from the prospect of a future lawsuit concerning title of a property.
15 *Id.* Therefore, it is possible for a party to provide valid consideration for an agreement
16 involving property even if that party has no legal interest in that property.

17 In the matter *sub judice*, PRJV and FCD believed that PRJV owned the easement parcel.
18 Testimony in the first trial by the PRJV manager, Kvalheim, was clear that PRJV would only
19 agree to allow the FCD to enter on the property and construct the cleared corridor if FCD gave
20 it an indemnity. The FCD gave three such indemnity agreements to private parties, including
21 PRJV.

22 In addition, the contract was then fully executed on the PRJV side, the FCD availed itself
23 of the easement to enter the property and constructed the cleared corridor. Entry on the property
24 was fully performed and all the value that the FCD sought was gained. The FCD now wants to
25 "renege" on its indemnity and claim that the agreement may be vitiated *ab initio* should the
26 ANSAC Commission determine that PRJV did not own the streambed at the time of the

1 agreement. The law generally is that lack or want of consideration cannot be asserted as to an
2 executed contract. 17A Am Jur 2d, Contracts, Sec. 670, 677

3 The consideration was the forbearance by PRJV which allowed the FCD to enter on the
4 property and accomplish its work. That is an adequate consideration under Arizona law.

5 **2. The Navigability Issue.**

6 Counsel refers this Court to the arguments of the State of Arizona that the issue of
7 "navigability" has been reserved by the Legislature to the Arizona Navigable Stream
8 Adjudication Commission as a matter of first impression and that under the legislation that the
9 courts are barred from deciding whether any given river in Arizona was navigable under the
10 "equal footing" doctrine at the time of statehood, until that Commission has completed its
11 deliberations. Thus, if this Court disagrees with the PILP defendant's legal analysis of contract
12 law, and decides that it does matter whether or not the Gila River, at the point of the easement
13 parcel, is later determined to have been navigable, then that issue will have to await a final
14 decision until ANSAC completes its deliberations and a final decision is made by that body.

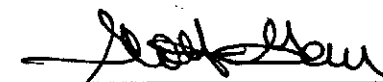
15 **Conclusion.**

16 The PILP defendants believe that the contract law is clear that the later issue of the actual
17 ownership of the streambed is immaterial to the question of the **consideration** for the indemnity
18 agreement. The forbearance by PRJV and the performance of the "bargained for" entry on the
19 property constituted sufficient consideration for the indemnity agreement and this Court should
20 grant summary judgment in favor of the PILP defendants and against the FCD on the basis that
21 whether the Gila is later determined to be navigable or non-navigable is immaterial to the issue
22 of the consideration for the indemnity agreement

23 DATED this 28 day of January 2004.

MESCH, CLARK & ROTHSCHILD, P.C.

24 By



J. Emery Barker
Scott H. Gan

Attorneys for Defendants, PILP

ATTORNEYS AT LAW
259 N. Meade Ave.
Tucson, AZ 85701-1090

- 1 Copy of the foregoing delivered
- 2 January 28, 2004 to:
- 3 The Honorable Michael O'Melia
- 4 Maricopa County Superior Court
201 W. Jefferson
Phoenix, AZ 85003-2243
- 5 Copy of the foregoing mailed
- 6 January 28, 2004 to:
- 7 John D. Helm
- 8 Roberta S. Livesay
Helm & Kyle
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283
- 9 Michael J. Frazelle
- 10 Swenson, Storer, Andrews & Frazelle
2901 N. Central Avenue, Suite 1500
Phoenix, Arizona 85012
- 11 Julie M. Lemmon
930 S. Mill Avenue
Tempe, AZ 85281-5605
- 12 Burton J. Kinerk
Kinerk, Beal, Schmidt & Dyer
5225 E. Williams Circle, Suite 6000W
Tucson, AZ 85711
- 13 Reed W. King
Attorney at Law
P.O. Box 34401
Phoenix, AZ 85067
- 14 Terry Goddard, Attorney General
- 15 Judith C. Darknell, Assistant Attorney General
- 16 Arizona Attorney General
1275 W. Washington
Phoenix, AZ 85007
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EXHIBIT A

LI 162897 513

291673

EASEMENT (ES)

FLOOD CONTROL EASEMENT

PALOMA RANCH JOINT VENTURE, a Joint Venture (Partnership), pursuant to the Joint Venture Agreement dated October 1, 1979 (comprised of John B. Anderson and The Prudential Insurance Company of America, a New Jersey corporation, as co-venturers), herein called the Grantor, for and in consideration of the sum of TEN (\$10.00) DOLLARS and other valuable consideration paid by the FLOOD CONTROL DISTRICT OF MARICOPA COUNTY, a municipal corporation and political subdivision of the State of Arizona, herein called the Grantee, the receipt of which is hereby acknowledged, does hereby grant and convey unto the Grantee, its permitted successors and permitted assigns, a non-exclusive right-of-way easement ONE THOUSAND (1,000) feet in width, in, upon, over, under and across the lands hereinafter described, to clear, erect, construct, reconstruct, replace, repair, maintain and use a flood control channel and other flood control improvement works at such locations and elevations, upon, along, over and under the hereinafter described Right of Way as Grantee may now or hereafter deem necessary from time to time, together with the right of ingress thereto and egress therefrom, to and along said Right of Way, and subject to existing easements, rights of way and licenses.

The lands through and across which this Right of Way Easement is granted are situated in the County of Maricopa, State of Arizona, and are more particularly described in Exhibit "A" attached hereto and incorporated herein by this reference, herein called the Right of Way.

EXCEPTING THEREFROM any and all rights and interests in the Gillespie Dam and Gillespie Canal (also known as the Gila Bend Canal), the water transported therein, and all hereditaments, easements, and other rights and interests belonging or appurtenant to said Dam and Canal; and all water and water rights of every kind and nature; and

EXCEPTING FURTHER THEREFROM any and all rights and interest in the Federal rights of way, more particularly described by the United States Department of the Interior, Bureau of Land Management as Phoenix Serial Number 07642 and Phoenix Serial Number 086674.

RESERVING UNTO THE GRANTOR the absolute and exclusive right, without liability to Grantee, to construct, install, repair, replace, inspect and maintain canals, ditches and other watercourses, underground and surface pipelines, and all other equipment, fixtures and improvements on, over, under and across said Right of Way; and

RESERVING FURTHER UNTO THE GRANTOR, the absolute and exclusive right, without liability to Grantee, to store, impound, pump, release or discharge waters of the Gila River or waters from other sources in, over, under, upon or across said Right of Way; and

RESERVING FURTHER UNTO THE GRANTOR, the absolute and exclusive right, without liability to Grantee, to cultivate, use and occupy said Right of Way for any purpose whatsoever consistent with the rights and privileges granted herein; and

RESERVING FURTHER UNTO THE GRANTOR, the absolute and exclusive right, without liability to Grantee, to drill, excavate and remove oil, gas, minerals and aggregate materials from said Right of Way.

It is hereby agreed that subject to the foregoing exceptions and reservations the Easement herein granted shall be for the non-exclusive use of Grantee, its permitted successors and permitted assigns. The granting of this Easement shall not be construed to exclude Grantor, its successors and assigns, its lessees or any other person or entities claiming under Grantor, from using the land for the Right of Way as a right of way or for any other purposes not inconsistent with the grant of this Right of Way to Grantee, nor shall the grant of this Right of Way be construed to preclude Grantor from granting rights of way, easements or licenses over, under, upon and across the land of the Right of Way to any other persons or entities at any time in the future.

It is further agreed that Grantee shall not hinder, interfere with, or otherwise affect or damage Grantor's use, operation or maintenance of the Gillespie Canal or Gillespie Dam or any other existing or future improvements thereof, in any manner whatsoever.

Grantor may, but shall not be obligated to modify, repair, retain, improve, restore or alter Gillespie Dam or Gillespie Canal or any other existing or future improvements thereof.

Except for the intentional acts or omissions of Grantor, Grantor shall not be liable for any fine, suit, proceeding, claim, demand, action, loss, damage or injury (including death) of any kind or nature to any person or property arising from any use, nonuse, repair, disrepair, maintenance, condition or occupancy of the Right of Way by Grantee or any of Grantee's agents, employees, licensees, invitees or contractors, or caused by or arising from any act or omission of Grantee or Grantor as landowner, or any of Grantee's agents, employees, licensees, invitees or contractors or from any accident on the Right of Way arising from or connected with Grantee's use, nonuse, repair, disrepair, maintenance, condition or occupancy of the Right of Way or the use, nonuse, repair, disrepair, maintenance, condition or occupancy thereof by agents, employees, licensees, invitees or contractors of Grantee; and Grantee further agrees hereby to indemnify and hold Grantor entirely free and harmless from any and all liability for any fine, suit, proceeding, claim, demand, action, loss, damage or injury (including death) to persons or property, and from all costs and expenses arising therefrom including, without limitation, any attorneys' fees and court costs incurred by Grantor in defending against any such liability.

Grantee shall not suffer or permit to be enforced against Grantor or against the property, or any part thereof, any mechanics', materialmen's, contractor's or subcontractor's liens arising from or any claim for damages arising out of the work of Grantee, its employees, agents, business invitees, contractors or subcontractors in connection with any clearing, excavation, construction, repair, restoration, replacement or improvement to take place on or about the property subject to the Right of Way

created hereby; and Grantee shall pay or cause to be paid all of said liens, claims or demands and shall indemnify and hold Grantor and the property free and harmless from all liability for any and all such liens, claims and demands, together with all attorneys' fees and all costs and expenses in connection therewith.

Grantee shall not assign all or any part of its rights or interest in this Easement to any person, corporation, association, partnership, joint venture, political subdivision, local, state or federal agency, board or commission, or any other public or private entity or organization, except that (i) Grantee may, in the event of a merger, consolidation or reorganization of Grantee with or by another municipal corporation and political subdivision of the State of Arizona, assign all (but not a part) of its rights and interest in this Easement to such successor; and (ii) in conjunction with the flood control purposes of this Easement, as specified herein, Grantee may enter into contracts with or grant licenses to third persons or entities, so long as Grantee shall remain liable for all of Grantee's obligations provided for in this Easement. Any attempted assignment by Grantee not specifically permitted herein shall be void and confer no rights or interest upon any third person or entity.

This Easement shall be of full force and effect, and shall not be deemed to be abandoned in any respect, until Grantor or its successors and assigns has received, from Grantee or its permitted successors or permitted assigns, a resolution and fully-executed, recordable instrument terminating all rights, interests and obligations contained herein, and then all rights and interest herein granted shall cease and revert to Grantor or its successors or assigns.

As consideration for the granting of this Easement, the Grantee represents and agrees that it shall clear and maintain a 1000-foot wide corridor through the floodplain of the Salt/Gila River from 91st Avenue to Gillespie Dam, and that this so-called Salt/Gila Flood Control Project shall be designed to reduce obstructions to the flow of water during times of flooding.

The provisions hereof shall be binding upon the parties hereto and their respective heirs, executors, administrators, permitted successors and permitted assigns.

IN WITNESS WHEREOF, PALOMA RANCH JOINT VENTURE has caused its name to be signed this 1st day of September, 1982.

PALOMA RANCH JOINT VENTURE,
a Joint Venture (Partnership)

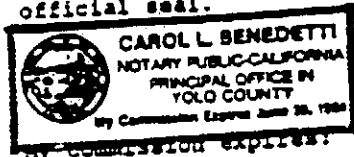
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a New Jersey
corporation

By Robert A. Wait
Its Vice President

STATE OF CALIFORNIA)
) ss.
County of Yolo)

On this the 30th day of August, 1982,
before me the undersigned Notary Public, personally appeared
JOHN B. ANDERSON, known to me or satisfactorily proven to be the
person whose name is subscribed to the within instrument, and
acknowledged that he executed the same for the purpose therein
contained.

IN WITNESS WHEREOF I have hereunto set my hand and
official seal.



Carol L. Benedetti
Notary Public

My Commission Expires:
June 26 1984

RECOMMENDED FOR APPROVAL:

Richard J. McNamara
Property Acquisition Manager
(Richard J. McNamara)

John E. Burke
Chief of Land Management
(John E. Burke)

D. E. Sagramoso, P.E.
Chief Engineer and General
Manager, Flood Control Dis-
trict of Maricopa County
(D. E. Sagramoso, P.E.)

DATE: 9-3-82

APPROVED:
BOARD OF DIRECTORS OF FLOOD
CONTROL DISTRICT OF MARICOPA
COUNTY

Richard J. McNamara
Chairman of the Board
ATTEST:

Cherie Pennington
Clerk of the Board

DATE: 9-7-82

DT 16289 518

STATE OF ARIZONA }
County of Maricopa }

I hereby certify that the within instrument was filed and recorded at request of

Flow Control Dept
SEP 15 1982 - 2

in District 16289

on case 518-518

Witness my hand and official seal this day and year aforesaid.

Bill Jany

County Recorder

By *[Signature]*
Deputy Recorder

n/c

SALT-GILA CLEARING PROJECT

SECTION 28-2S, 5W

PALOMA RANCH JOINT VENTURE

401-61-17

That portion of the NW $\frac{1}{4}$ NE $\frac{1}{4}$; S $\frac{1}{2}$ NE $\frac{1}{4}$ of section 28-2S, R5W, G & SRB & M, Maricopa County, Arizona, lying within the following described property in the Gila River bed: Said property lies between the North section line and Gillespie Dam and lies between the two lines described as follows: Beginning on the North line of said section at a point 295' Easterly of the NE corner of the NW $\frac{1}{4}$ NE $\frac{1}{4}$; thence Southerly to the North line of said S $\frac{1}{2}$ NE $\frac{1}{4}$ at a point 325' Easterly of the SE corner of said NW $\frac{1}{4}$ NE $\frac{1}{4}$; thence continuing along said line to Gillespie Dam. Also beginning on the North line of said section at a point 710' Westerly of the NE corner of said NW $\frac{1}{4}$ NE $\frac{1}{4}$; thence Southerly to the North line of said S $\frac{1}{2}$ NE $\frac{1}{4}$ at a point 685' West of the SE corner of said NW $\frac{1}{4}$ NE $\frac{1}{4}$; thence continuing along said line to Gillespie Dam. Containing 26.80 acres more or less.

FCD
Proved
<input checked="" type="checkbox"/>
11
<i>[Signature]</i>
6/17/82
Approved
<i>[Signature]</i>
6/17/82

6/17/82; Exhibit A