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5 **BEFORE THE ARIZONA NAVIGABLE STREAM**

6 **ADJUDICATION COMMISSION**

7 In re Determination of the Navigability of the) No. 03-007-NAV
Gila River in Maricopa County)
8) **GILA RIVER INDIAN**
9) **COMMUNITY'S RESPONSIVE**
10) **POST-HEARING MEMORANDUM**

11 The Gila River Indian Community respectfully submits its Responsive Post-Hearing
12 Memorandum regarding this Commission's determination of whether the reaches of the
13 Gila River, located within the boundaries of Maricopa and Pinal Counties, were navigable
14 within the meaning of A.R.S. § 37-1101 as interpreted by the Court of Appeals in
15 *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P.3d 722 (2001), as of February 14, 1912.

16 **OVERVIEW**

17 The standard by which the Arizona Navigable Stream Adjudication Commission is
18 to determine navigability is whether on February 14, 1912, "the watercourse, in its natural
19 and ordinary condition, either was used or was susceptible to being used for travel or trade
20 in any customary mode used on water." *Defenders of Wildlife*, 18 P.3d at 737.

21 The Commission has already conducted a number of hearings dealing with specific
22 reaches of the Gila River, as it flows through the various counties. The Commission will
23 conduct additional hearings concerning the reaches of the Gila River between the Maricopa
24 County border and the confluence with the Colorado River. Ultimately, the Commission

1 will decide if any of the reaches of the Gila River (whether long, or extremely short) meet
2 the criteria for a determination of navigability for purposes of title.

3 Whether a particular water course is navigable is not an all or nothing proposition.
4 A river may be navigable in some locations and non-navigable in other locations. The State
5 of Arizona has no claim to the bed and banks of the portions of the Gila River that were
6 non-navigable on February 14, 1912. *See Oklahoma v. Texas*, 258 U.S. 574, 585, 42 S. Ct.
7 406, 411, 66 L. Ed. 771 (1922) (“To attribute to the parties a purpose to impress this entire
8 stretch of the Arkansas with a navigable character, regardless of the actual conditions, is, in
9 our opinion, quite inadmissible.”); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S.
10 77, 86, 43 S. Ct. 60, 67 L. Ed. 140 (1922) (“We do not find it necessary to decide either of
11 these questions in view of the finding as a fact that the Arkansas is and was not navigable at
12 the place where the river bed lots, here in controversy, are.”); and *Northwest Steelheaders*
13 *Association, Inc. v. Simantel*, 199 Or. App. 471, 477, 112 P.3d 383, 385 (2005) (case
14 dealing with the navigability of the John Day River “in the disputed locations”).

15 A determination that the Gila River might have been navigable for two miles
16 upstream from its confluence with the Colorado River, or for a six hundred yard reach in a
17 narrow valley near New Mexico, has no bearing on the whether the Gila River was
18 navigable in the reaches that traverse through Pinal and Maricopa Counties.

19 Maricopa County bases the sum total of its evidence, that the Gila River was
20 navigable in predevelopment times, on Mr. Hjahlmanson’s report and testimony. Mr.
21 Hjahlmanson agreed that he did not provide any information on, nor render any opinion
22 about, whether the Middle Gila River--upstream from the confluence with the Salt River--
23 was navigable on, before, or after 1912. Transcript, Second Day, page 287. Having
24 presented no evidence that supports a claim that the Middle Gila River, in Maricopa and

1 Pinal Counties, was navigable, the proponents have failed to meet their burden of proof and
2 the Commission must determine that these reaches of the Gila River were not navigable in
3 1912.

4 The parties claiming that the Gila River was navigable on February 14, 1912, have the
5 burden of proof and must establish, by a preponderance of the evidence, that all the criteria for
6 navigability have been met. Failure to prove even a single element requires a determination
7 that the applicable reach of the Gila River was not navigable for purposes of title. The
8 proponents of navigability have failed to prove that *any* of the criteria have been met.

9 I. February 14, 1912

10 Maricopa County and the Flood Control District of Maricopa County claim that the
11 criteria of navigability in its natural and ordinary condition on February 14, 1912, “does not
12 mean that the determination is based on the physical condition of the river . . . on that date,
13 but only that the determination is made as of that date.” Maricopa County is badly
14 mistaken. Maricopa County cites to *United States v. Utah*, 283 U.S. 64, 82, 51 S. Ct. 438,
15 75 L. Ed. 844 (1931), in support of its false contention. The Supreme Court’s opinion in
16 *United States v. Utah* belies Maricopa County’s claim. The Court discussed various
17 historic information that was considered in the determination of navigability. 283 U.S. at
18 82. Some of the evidence involved activities before 1896 and some of the evidence
19 involved activities shortly after 1896. However, *United States v. Utah* did not discuss the
20 possibility that the determination of navigability for title could be made based on the natural
21 and ordinary condition of the river at any date other than the very day that the state enters
22 the Union. Indeed, the Supreme Court wrote: “The master has made his findings as to
23 navigability as of January 4, 1896, the date of the admission of Utah to the Union. The
24

1 master finds that *at that time* the following streams in question were navigable waters of
2 Utah.” 283 U.S. at 73, 51 S. Ct. at 440 (emphasis added).

3 *North Dakota, ex rel. Board of University and School Lands v. United States*, 972
4 F.2d 235, 238 (8th Cir. 1992) (*North Dakota II*) explained that “the State had the burden of
5 proving by a preponderance of the evidence that the Little Missouri River, was navigable at
6 the time of statehood.” *See also Alaska v. Ahtna, Inc.* 891 F.2d 1401, 1404 (9th Cir. 1989)
7 (“the river must be navigable at the time of statehood”).

8 Mr. Hjalmar Hjalmarson readily admitted that he did not base his opinion that the
9 Gila River was navigable on the natural and ordinary conditions that existed on February
10 14, 1912. He based his opinion on conditions at some unspecified date in the past. Mr.
11 Hjalmarson stated: “What I did was reconstructed what the natural flow was, which
12 occurred roughly 1860 to maybe 1760.” Transcript, Second Day, pages 303 and 304. Mr.
13 Hjalmarson had no data as to what precipitation conditions existed during this hundred year
14 period. In the absence of precipitation data, Mr. Hjalmarson’s “reconstruction” is nothing
15 more than self serving double talk. Mr. Hjalmarson’s opinion did not even consider the
16 effect of the two floods shortly before statehood that resulted in a badly braided river, with
17 multiple channels, that precluded the possibility of navigation on February 14, 1912.

18 Maricopa County failed to present *any* evidence that the natural and ordinary
19 condition of the Gila River would have allowed even the possibility of navigability on
20 February 14, 1912, without regard to whether human activities were factored out.
21 Therefore, proponents failed to meet their burden of proof.

22 II. Natural And Ordinary Condition

23 A waterway is not navigable for purposes of title, unless, in its natural and ordinary
24 condition, it was used, or susceptible of being used as a highway of commerce, on the day

1 of statehood. A water way is not navigable at law unless it is navigable in fact. “[I]n order
2 to be navigable-in-fact, a river must provide practical utility to the public as a means of
3 transportation. ...[O]f paramount concern is the capacity of the river for transport, whether
4 for trade or travel.” *Adirondack League Club, Inc. v. Sierra Club*, 92 N.Y.2d 591, 603, 706
5 N.E.2d 1192, 1195 (1998). If the waterway cannot be used to transport people or items, it
6 is not navigable. In determining whether a river was susceptible as a highway of
7 commerce, courts examine the physical characteristics of the waterway.

8 In *Oklahoma v. Texas*, 258 U.S. at 589 and 594, 42 S. Ct. at 412 and 414, the United
9 States Supreme Court discussed the factors to be examined in determining whether a reach
10 of a river was navigable on the date of statehood. These factors included:

- 11 • Was there a continuous or predictable flow?
- 12 • Was there extreme variation between high and low water?
- 13 • Was the geologic composition of the riverbed susceptible to shifting and
14 extensive sand bars?
- 15 • Was there a permanent or stable channel?
- 16 • Were any periods of flow (high enough to allow a boat to float, but not so
17 high as to flood out the boat) intermittent, irregular, and of short duration?
- 18 • Was there a relatively level riverbed over which the water was well
19 distributed?

18 The Commission needs to examine whether the “stream or body of water is permanent in
19 character, and . . . is of sufficient size and so situated and condition that it may be used for
20 purposes common to the public.” *Board of Trustees of the Internal Improvement Trust
21 Fund v. Florida Public Utilities Company*, 599 So. 2d 1356 (Fla. 1992).

22 Navigability does not require “the absence of *occasional* difficulties in navigation.”
23 *United States v. Utah*, 283 U.S. at 76, 51 S. Ct. at 441. Indeed, the “use of the river need
24 not be without difficulty, extensive, or long and continuous.” *Oregon v. Riverfront*

1 *Protective Association*, 672 F.2d 792 (9th Cir. 1982). “[N]avigability . . . is not destroyed
2 because the watercourse is interrupted by *occasional* natural obstructions or portages.”
3 *Economy Light & Power Company v. United States*, 256 U.S. 113, 122, 41 S. Ct. 409, 412,
4 651 L. Ed. 84 (1921) (emphasis added). See also *Adirondack*, 706 N.E.2d at 1197.

5 If a reach of a river has an occasional sand bar or rock outcropping, navigability
6 would not be destroyed. If a party had to portage for two miles out of a seventy mile reach
7 of the river, navigability would not be destroyed. However, where natural obstructions are
8 the norm, rather than the exception, the river is not navigable in its natural and ordinary
9 condition. The question is whether the condition(s) “constitute a serious obstacle to
10 navigation.” *United States v. Utah*, 283 U.S. at 84, 51 S. Ct. at 444. Do the ordinary and
11 natural conditions cause “difficulties precluding utility”? *United States v. Brewer-Elliott Oil*
12 *& Gas Co.*, 249 F. 609, 623 (D. Ok. 1918).

13 Occasional obstacles do not preclude navigability so long as “the natural navigation
14 of the river is such that it affords a channel for useful commerce.” *The Montello*, 87 U.S.
15 430, 443, 20 Wall. 430, 443, 22 L. Ed. 39 (1874). In determining the navigability of a
16 particular reach of the McKenzie River, the Ninth Circuit observed that “notwithstanding
17 such difficulties, thousands of logs and millions of board feet of timber were driven down
18 the river.” *Oregon v. Riverfront Protection Association*, 672 F.2d 795. Likewise, in *The*
19 *Montello*, notwithstanding occasional difficulties “commerce was successfully carried on.”
20 87 U.S. at 442.

21 Rivers with shifting, braided, or multiple channels are not susceptible to navigation.
22 In determining that reaches of the Arkansas River in Oklahoma were not navigable, as of
23 the date of statehood, the *Oklahoma v. Texas* Court observed: “There is no permanent or
24 stable channel. Such as there is shifts irregularly from one side of the bed to the other and

1 not infrequently separates into two or three parts.” 258 U.S. at 589, 42 S. Ct. at 412. *See*
2 *also North Dakota II.*

3 The evidence is clear that the Gila River was not, in its natural and ordinary
4 condition, susceptible of navigability. The proof is in the pudding, or the lack thereof. No
5 navigation took place. The river was an obstacle course of difficulties. The Gila River was
6 extremely flashy, ranging from no flow to massive floods, even before the arrival of Euro-
7 Americans. Expert witnesses can compute “average flows” and proclaim that boats could
8 float on that average amount of water. Unfortunately, nature does not deal in averages. If a
9 river flows at 10 cfs for 364 days and 102, 210 cfs for one day, its average would be 290
10 cfs. While a boat might be able to navigate on 290 cfs, it still could not have navigated on
11 any day of the year.

12 In an effort to support his allegation that the Gila River would have had a sufficient
13 flow to allow navigation--at some unknown time centuries before 1912--Mr. Hjalmarson
14 creates numbers that he claims represent the width of the riverbed in the Gila River below
15 the confluence with the Salt River. He manipulates the data. First, he assumes that the
16 width of the water surface was the same as the width of the riverbed.

17 Surveyors were charged with determining the width of the riverbed and made, at
18 most, anecdotal reference to the width of the water in the channel. It is impossible to
19 determine how much water flows through a riverbed on a specific day by examining the
20 riverbed. The riverbed is normally representative of the flood stage. On a non-flood day,
21 the width of the water passing through the riverbed would be considerably more narrow
22 than the bed length. Indeed it is likely, on a number of days, that a riverbed that was 600
23 feet wide might have only a foot of water width. Mr. Hjalmarson listed numerous
24 documented widths of the Gila River (approximately 10%) between 1,000 feet and 2,453

1 feet. However, in computing his answer, he arbitrarily threw out all the widths greater than
2 1,000 feet so that his graph curves would match his desired answer. It is unacceptable for
3 an engineer to exclude 10% of the known data in order to create a graph to support a
4 dimensional analysis conclusion that could not be derived if all of the data were used.

5 The formula for dimensional analysis is $cfs = \text{width} \times \text{velocity} \times \text{depth}$. By way of
6 an example, if the riverbed was 2453 feet wide with a base flow of 290 cfs at a very low
7 velocity of 2 feet per second, then the depth of the river would be 0.7 inches. Clearly no
8 navigation can take place in water that is less than an inch deep. If an engineer is allowed
9 to create his own data, exclude any data that would conflict with predetermined outcomes,
10 fail to apply proper procedures, and fail to calibrate his computations, it should not be
11 surprising that he would be able to produce an answer that supports the conclusion that he is
12 supposed to reach.

13 The Gila River had a braided channel that completely precluded navigation on
14 February 14, 1912. No human activities caused the braided river. The braided river was
15 caused by two floods immediately preceding statehood (1891 and 1905). Human activity
16 did not cause those floods. Those floods would have occurred even if no Euro-American
17 had ever set foot in Arizona. Those floods created the natural and ordinary condition of the
18 Gila River in 1912.

19 Mr. Hjalmarson admitted that both floods changed the Gila River. Transcript,
20 Second Day, page 303. Mr. Hjalmarson's own sources verify that the braiding caused by
21 these types of floods takes decades or even centuries to "heal" (assuming, of course, that
22 there are no future floods that intervene in the "healing process"). See USGS Professional
23 Paper 1288 and Ecology Magazine October 1996, both authored by Mr. Osterkamp, Mr.
24 Hjalmarson's primary source. The other experts agreed with Mr. Hjalmarson that the 1891

1 and 1905 floods would have drastically changed the bed of the Gila River. Between the
2 dates of these two floods and statehood, there was no time for the Gila River to “heal” and
3 create the perfect parabolic channel that Mr. Hjalmarson fantasized about in his testimony.

4 The Commission can take judicial notice that the Gila River and the Salt River,
5 above its confluence with the Gila River, have flooded on numerous occasions between
6 1912 and today. The Gila River never “wanted” to have a perfect parabolic channel. The
7 Gila River has been subject to patterns of no flow, low flow, high flow, and floods since
8 time immemorial. This natural and ordinary interrelationship between precipitation and
9 geology existed before the Euro-Americans arrived, existed in 1912, and continues to exist
10 today. Humans cannot make it rain or snow, and they cannot prevent rain and snow.

11 The Gila River was not navigable in its natural and ordinary condition in 1912,
12 without regard to any human activity. The Gila River was not navigable in its natural and
13 ordinary condition on some abstract, undefined date in the past, without regard to human
14 activity. The Gila River is not navigable in its natural and ordinary condition in 2006,
15 without regard to human activity.

16 III. Used Or Susceptible To Being Used

17 Before the Gila River could be held to have been navigable for purposes of title, it
18 had to actually be used as a highway of commerce for trade or travel, or have been
19 susceptible of actual use. A reach of a river must actually, in reality, in the real world, be
20 capable of being used as a highway of commerce before it can be considered navigable.
21 Abstract theories, which ignore actual history and are based on manipulation of various
22 unrelated engineering programs, have no value in a determination of navigability. The *fact*
23 is that there was no navigation before or on February 14, 1912.

1 A determination of navigability cannot be based on “exceptional circumstances”
2 that are neither common nor predictable. *United States v. Oregon*, 295 U.S. 1, 19, 55 S. Ct.
3 610, 79 L. Ed. 167 (1935). A determination of navigability cannot be based on
4 “exceptional conditions or short periods of temporary high water.” *United States v. Utah*
5 283 U.S. 87, 51 S. Ct. 445. An “occasional use of boats, sporadic and ineffective” does
6 not establish navigability. *United States v. Oregon*, 295 U.S. at 23, 55 S. Ct. at 619. “An
7 isolated and exceptional example of a person using the river for a few miles” does not
8 constitute proof of navigability. *United States v. Crow, Pope & Land Enterprises, Inc.* 340
9 F. Supp. 25, 35 (D. Ga. 1972). *See also Northwest Steelheaders Association, Inc. v.*
10 *Simantel*, 199 Or. App. at 477, 112 P.3d at 385.

11 An examination of the record demonstrates that the pitiful attempts at navigation on
12 the Gila River “did not rise to the level of ‘occasional’ usage, rather [they] were unique and
13 isolated venture(s).” *North Dakota II*, 972 F.2d at 239. Navigability cannot be based on
14 whether parties *attempted* to use the river as a highway of commerce 8 times or 80 times or
15 800 times. Navigability must be based on *successful* navigation: the useful and practical
16 movement of people or goods, successfully, from one intended point to a different intended
17 point. When a group intends to go to “Yuma or Bust,” it is not a successful navigation if
18 they float for a couple of miles before their boat breaks apart.

19 A determination of navigability is not conditioned on the use of boats. Using a
20 reach of a river to transport logs or shingles can suffice if the use is not exceptional.
21 However, failed attempts to use a reach of a river to transport logs does not constitute
22 navigability. An attempt to float logs down the Little Missouri River, from 1880 through
23 1883, did not constitute navigation. As noted by the *Bismarck Tribune* in May of 1883,
24 “He [E. H. Bly] has been three years getting those ties down the river and he is tie-rd of the

1 business as a matter of course.” *North Dakota ex rel. Board of University and School*
2 *Lands v. United States*, 770 F. Supp. 506, 510 (D. N.D. 1991) (*North Dakota I*). Mr. Bly
3 only succeeded in getting some of the railroad ties down the reach of the river because the
4 stream was very high and still booming. Mr. Bly’s tie drive “resulted disastrously from a
5 financial standpoint.” *Id.* The United States Supreme Court has explained that:

6 It is not, however, as Chief Justice Shaw said, [21 Pickering 344] ‘every small
7 creek in which a fishing skiff or gunning canoe can be made to float at high
8 water which is deemed navigable, but, in order to give it the character of a
navigable stream, it must be generally and commonly useful to some purpose of
trade or agriculture.’

9 *The Montello*, 87 U.S. at 442.

10 A river can be susceptible to use as a highway of commerce in the absence of actual
11 use. However, there has to be a compelling reason to justify the lack of actual navigation.

12 Such reasons include:

- 13 • there were no humans in the area to use the river
- 14 • the humans in the area had no incentive to use the river as a highway of trade
or commerce

15 The proponents of navigability are fond of the saying: The absence of evidence is
16 not evidence of absence. This glib generalization can only apply in a setting where there
17 was no reason for someone to gather evidence. As noted in the Opening Memorandum, the
18 absence of early Spanish reports documenting Pima and Maricopa settlements on the Salt
19 River is not evidence that the Pima and Maricopa Indians were not living there. Instead,
20 these reports simply reflect where the Spanish explorers went and what they saw. Since
21 they did not go upstream on the Salt River, they could not have seen the Pima and Maricopa
22 Villages to report on.

23 This generalization is worthless when discussing the use of boats and other
24 floatation devices on the Gila River on and prior to 1912. There were a lot of people

1 present. They had a motive to use the Gila River to transport people and goods, if only
2 such use had been possible. The few miserable attempts at using boats on the Gila River
3 were unmitigated disasters that garnered a great deal of press.

4 It is inane to argue that boating was so common that it was never referenced in any
5 newspaper, flyer, diary, or other contemporaneous document. Automobiles are ubiquitous
6 in our society. Newspapers do report when an automobile suffers the same type of disaster
7 as the alleged incidents of boating occurring before 1912. However, other evidence that
8 cars exist and are common is found throughout our culture. If boating was so common in
9 1912, where are the ads for the sale of boats, boating equipment or boating attire? Where
10 are the ads for rental of boats as pleasure craft or business craft? Where are the ads for
11 tickets on boats transporting people around or the ads seeking freight to be transported?
12 Where are the society columns discussing Mr. and Mrs. Fancypants' recent Saturday
13 afternoon boating excursion with the Mayor and the lead opera singer? The absence of
14 references to navigation, other than documentation of abysmal disasters is deafening.

15 While not actually finding the limited boating of various Indian tribes to be viable
16 evidence of navigability, some courts have noted that river use by Indians, as a highway of
17 commerce, can be probative evidence as to navigability. See *North Dakota I*, *North Dakota*
18 *II*, and *Northwest Steelheaders Association, Inc.* If a river was susceptible of navigation,
19 the indigenous people who lived with the river since time immemorial would have used the
20 river for trade and travel. The Pima-Maricopa Confederation was a unified government
21 between two tribes for purposes of mutual protection, trade, and maintenance of culture.
22 The Pima and Maricopa Indians engaged in extensive trade with other Indians, the Spanish,
23 and the Mexicans long before the arrival of the Euro-Americans. If the Gila River was
24 susceptible of use as a highway for trade and travel, the Akimel O'odham (the River

1 People) would have used it. The Pima and Maricopa Indians know that neither they, nor
2 their ancestors the Huhugam, used the Gila or Salt Rivers as highways of trade and travel.
3 The fact that the River People did not use the Gila River as a highway of commerce is
4 definitive evidence that the Gila River was not navigable before the arrival of Euro-
5 Americans--and is certainly more compelling than expert reports that ignore data and
6 history and manipulate formula in order to reach a predetermined conclusion.

7 IV. For Travel Or Trade

8 A water course must be a highway of commerce for trade or travel, to be navigable.
9 The river reach must have practical usefulness and utility as a means of transporting people
10 or goods from one specified location to a different specified location. *See Adirondack*
11 *League Club, Inc. v. Sierra Club; Alaska v. Ahtna Inc.; California Oregon Power Co. v.*
12 *Beaver Portland Cement Co.; The Montello; and United States v. Brewer-Elliott.*

13 The water course must provide a "reliable means of transportation." *North Dakota*
14 *I*, 720 F. Supp at 52. A river reach must provide a "viable means of transporting persons
15 and goods." *Northwest Steelheaders*, 112 P.3d at 390. In *Oklahoma v. Texas*, 258 U.S. at
16 591, 42 S. Ct. at 413, finding the Arkansas River non-navigable, the Supreme Court noted:

17 Its [the river reach] characteristics are such that its use for transportation has
18 been and must be exceptional, and confined to the irregular and short periods
19 of temporary high water. A greater capacity for *practical and beneficial use*
20 *in commerce* is essential to establish navigability. [Emphasis added.]

21 The proponents of navigability have not provided any evidence that supports their
22 claim that the Gila River was susceptible to being a reliable, viable, practical, and beneficial
23 highway of commerce for travel or trade. Attempted use of a waterway as a highway of
24 commerce that is a financial disaster does not establish navigability. *North Dakota I*. "A

1 theoretical navigability or one that is temporary, precarious, and unprofitable, is not
2 sufficient.” *United States v. Brewer-Elliott Oil & Gas Co.*, 49 F. at 612.

3 The need for reliable, practical usability of a highway of commerce is obvious. If
4 people can not safely and regularly get from where they are to where they want to go, using
5 the water course, it is not navigable in fact. If a party cannot get goods shipped in a timely
6 manner, in a usable condition, the water course is not navigable. The proponents of
7 navigability list nine examples of navigation on the Gila River--only two of which took
8 place after the 1905 flood that braided the Gila River’s bed. None of the trips were
9 successful. It is silly to claim that a capsized boat with a lost cargo represents successful
10 navigation. The proponents claim that Sykes experienced a successful navigation in 1909.
11 Unfortunately Mr. Skyes disagreed and felt that his experience was unsuccessful.

12 There have been fifteen attempts by people to navigate the reach of the Niagara
13 River from immediately upstream of the Falls to a location immediately downstream from
14 the Falls. The mode of transportation was a barrel. Five of the attempts to travel using this
15 reach of the Niagara were “successful,” at least to the extent that the person in the barrel
16 survived the trip. Niagara Falls has been successfully used as a means of transporting
17 people from one location to another more often than the Gila River has been. By the
18 proponents’ logic, Niagara Falls is a navigable water way.

19 In determining navigability, it is necessary to recognize the difference “between a
20 trade-route and a point of interest.” *Mountain Properties, Inc. v. Tyler Hill Reality Corp.*
21 767 A.2d 1096, 1100 (Pa. 2001). Noncommercial fishing, pleasure boating, and water
22 skiing do not establish navigability. *Adams v. Montana Power Company*, 528 F.2d 437,
23 429 (9th Cir. 1975). Even commercial recreation is problematic as evidence of
24 navigability, now or as of the date of statehood.

1 While pleasure boating can sometimes indicate a river's susceptibility for
2 commercial use, the type of craft and persons presently using, and enjoying,
3 the river demonstrates that the river's main appeal lies in the frequent
4 excitement one encounters in "running the rapids", observing the "white
water", and having short interims of "good water" upon which to relax. It
would be an affront to the public's intelligence to classify the river *presently*
suitable for any kind of commercial navigation.

5 *United States v. Crow, Pope & Land Enterprises*, 340 F. Supp. at 34.

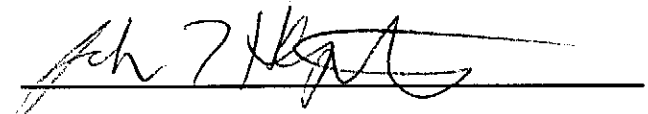
6 In *Adirondack League Club, Inc.*, the Court observed that "because of the
7 unpredictability of water flow the South River provides no commercial value for such
8 ventures." 706 N.E.2d at 1197. In this case, the only truly reliable commercial recreational
9 boating appears to be in the reach of the Gila River between Coolidge Dam and the
10 Ashurst-Hayden Diversion Dam. This actually makes sense. The San Carlos Reservoir is
11 an irrigation water storage dam. It makes regular releases of water during the summer
12 months. A proprietor of a boating company could check with the San Carlos Indian
13 Irrigation Project to determine what its scheduled releases will be and then set the
14 recreational trips around that schedule. However, this predictability did not exist in the
15 natural and ordinary condition.

16 CONCLUSION

17 The proponents of navigability have failed to establish any of the criteria that must
18 be met before a reach of the Gila River can be determined to have been navigable on
19 February 14, 1912. The Community requests that the Commission issue its determination
20 that the reaches of the Gila River in Pinal and Maricopa Counties were not navigable as of
21 the date of statehood.

22 RESPECTFULLY SUBMITTED this 27th day of February, 2006.

23 GILA RIVER INDIAN COMMUNITY

24 
15

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2 Attorney for the Gila River Indian Community

3 ORIGINAL AND SEVEN COPIES of the foregoing
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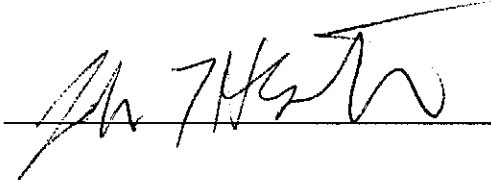
29 Bill Staudemaier
30 Ryley, Carlock and Applewhite
31 1 North Central Ave. 1200
32 Phoenix, AZ 85004
33 For Phelps Dodge

34 Mike Kafka
35 Ryley, Carlock and Applewhite
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13 For Buckeye Irrigation Co & Buckeye
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- 14 Joe P. Sparks
15 7503 First Street
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16 For San Carlos Apache Tribe, etc.
- 17 John Ryley
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- 19 Brad Woodford
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- 22 Jeff Zimmerman
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3
4 Paul Li
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5 Phoenix, AZ 85042

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7 By  _____

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