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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN RE DETERMINATION OF)
THE NAVIGABILITY OF) **No. 03-007-NAV**
THE GILA RIVER) **PHELPS DODGE CORPORATION'S**
) **RESPONSIVE POST-HEARING**
) **MEMORANDUM**

Phelps Dodge Corporation (“Phelps Dodge”) submits this Responsive Post-Hearing Memorandum regarding the navigability of the Gila River in accordance with the briefing schedule established by the Commission following its November 16 and 17, 2005 hearings. In their opening post-hearing memoranda, Defenders of Wildlife (“Defenders”), Maricopa County (“County”), and the Arizona State Land Department (“ASLD”) (collectively, “Proponents”) argued that the Arizona Navigable Stream Adjudication Commission (the “Commission”) should find the Gila River navigable. However, neither the facts nor the law supports Proponents’ arguments. Proponents have failed to produce sufficient evidence for the Commission to find that the Gila River was actually used or was susceptible to use for navigation at the time of Arizona’s statehood. Lacking evidence of navigability, Proponents attempt to stretch Arizona’s navigability test beyond the reach of judicial precedent. In addition to the points made by Phelps Dodge in its Opening Post-Hearing Memorandum filed with the Commission on February 6, 2005, Phelps Dodge offers the following additional points and joins Buckeye Irrigation

Company, Buckeye Water Conservation and Drainage District, the Gila River Indian Community, Salt River Project (“SRP”), and the San Carlos Apache Tribe in requesting that the Commission find the Gila River non-navigable.

I. Proponents Have Fallen Far Short of Satisfying Their Burden of Proof.

Throughout their opening post-hearing memoranda, Proponents confuse the burden of proof they must satisfy . Proponents bear the burden of proving by a preponderance of the evidence that on February 14, 1912, the Gila River was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water. *See* A.R.S. § 37-1101(6); A.R.S. § 37-1128(A) (requiring that anything less than a preponderance of the evidence results in a determination that a watercourse is non-navigable); *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 363 n.10, 837 P.2d 158, 165 n.10 (App. 1991) (“The burden of proof rests on the party asserting navigability. . . .”). However, Proponents have not carried this burden of proof.

Proponents have presented no persuasive evidence that the Gila River was used or was susceptible to being used as a “highway for commerce” at any time. Proponents offer speculation and conjecture instead of evidence. *See e.g.*, County’s Br. at 21 (contending that “[i]t *seems likely* that early [flow] estimates were necessary because the river flow gauges *may* have been damaged by flooding; and therefore the gauge would not record anything after the flood event, *or alternatively*, the channel itself *may* [sic] moved away from the gauge”) (emphasis added); *id.* at 22-33 (stating that at certain places surveyors meandered both banks of the Gila, but it is *unclear* why they did so) (emphasis added). The Commission cannot base a navigability determination on such guesswork. *See In re Harber’s Estate*, 102 Ariz. 285, 294,

428 P.2d 662, 671 (1967) (“Mere suspicion, innuendo, insinuation and speculation are no substitute for evidence.”); *Cyprus Bagdad Copper Corp. v. Arizona Department of Revenue*, 196 Ariz. 5, 8, 992 P.2d 5, 8 (App. 1999) (“Mere speculation does not substitute for proof.”).

Despite asserting that “contemporaneous reports by observers cannot be relied upon as support for a finding of non-navigability,” Proponents almost exclusively rely upon a small number of anecdotal accounts discussed in JE Fuller’s Gila River report as evidence of the river’s navigability. See JE Fuller/Hydrology & Geomorphology, Inc., *Arizona Stream Navigability Study for the Gila River: Colorado River Confluence to the Town of Safford* (June 2003) (the “*Gila Report*”), at IV-1–21. However, these accounts are few in number.¹ Furthermore, as thoroughly discussed in SRP’s Opening Post-Hearing Memorandum, the anecdotal accounts are often inconsistent, unsubstantiated, and, in some cases, evidence of *failed* boating attempts. See SRP’s Opening Post-Hearing Memorandum, at 15-17.

Proponents’ reliance on largely unsubstantiated anecdotal accounts – many of them actually discussing failed boating attempts, false inferences, and erroneous conclusions demonstrates that there is insufficient probative evidence to show that the Gila River was a navigable stream as of February 14, 1912. Certainly, if Proponents had better evidence, they would have used it.

¹ For example, in its opening post-hearing memorandum, Defenders refer to a picture of Governor Hunt crossing the Gila River on a ferry. See Defenders’ Opening Post-Hearing Memorandum, at 10. Although Barbara Tellman’s presentation included a large number of pictures of various boats in an apparent attempt to demonstrate the navigability of the Gila, when questioned by SRP she confirmed that despite an exhaustive search, only one of the pictures was actually taken on the Gila River – the one of Governor Hunt. (Tr. at 16:119-20.)

II. The Gila River Is Not and Has Never Been Susceptible to Use as a Highway for Commerce.

Not having probative evidence that the Gila River was ever used as a highway for commerce, Proponents misapply case law in a failed effort to show that the Gila was somehow susceptible to such use at the time Arizona was admitted into the Union.

A. An Analysis of Established Case Law Reveals that, To Have Been Susceptible to Use as a Highway for Commerce, Far More is Required than Bald Assertions of Susceptibility.

Proponents cite to *United States v. Utah*, 283 U.S. 64 (1931), in an ineffective attempt to substitute for the scarcity of evidence demonstrating the actual use of the Gila River as a highway for commerce. See Defenders' Br. at 7; ASLD's Br. at 15. However, this attempt fails because *Utah* does not stand for the proposition that, without more, an allegation of susceptibility is sufficient to support a determination of a river's suitability for navigation. Instead, *Utah* instructs, "where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway for commerce may still be satisfactorily proved." *Utah*, 283 U.S. at 83 (emphasis added). In the case of the Gila River, however, not only is there a dearth of evidence of its use as a highway for commerce, there has been no showing of conditions that would explain the infrequency of its use for such purposes. The evidence shows that *despite* the fact that people have lived near the Gila River for thousands of years, none of them conducted or could have conducted effective trade or transportation on the river.

Of significance is the fact that the regions through which the rivers under consideration in *Utah* flowed were "sparsely settled." See *id.* In the words of the Court, "the country in the vicinity of the streams ha[d] but few inhabitants[,] . . . the location of the rivers and the circumstances of the exploration and the settlement of the country through which they flowed

had made recourse to navigation a late adventure. . . .” *Id.* To the contrary, the evidence presented to the Commission demonstrates that by the time of Arizona’s statehood the area through which the Gila River flowed had already been populated for thousands of years. See *Gila Report*, at III-20; SFC Engineering Company, *Arizona Stream Navigability Study for the Upper Gila River and San Francisco River: Gila River Confluence to the State Boundary* (June 2003) (“*Upper Gila Report*”), at 2-18. Therefore, unlike in *Utah*, Arizona’s history and settlement played no part in the nonuse of the Gila as a highway for commerce. The logical inference to be drawn from this nonuse is that the Gila River was not susceptible to navigation.

B. Evidence of Opportunistic and Sporadic Modern Day Recreational Boating Does Not Demonstrate that the Gila River was Susceptible to Use as a Highway for Commerce at the Time of Arizona’s Statehood.

Proponents refer to evidence of opportunistic recreational rafting trips – most of which either failed or are unsubstantiated – in an attempt to show the Gila’s susceptibility to navigation. See *Defenders’ Br.* at 4; *County’s Br.* at 7; *ASLD’s Br.* at 15. However, case law instructs that, contrary to Proponents’ assertions, such evidence is not probative of navigability or susceptibility to navigability at statehood.

In *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F. Supp. 25 (N.D. Ga. 1972), the court considered whether evidence of contemporary use of the Chattahoochee River to float light pleasure craft constituted evidence of the river’s susceptibility to navigation. See *id.* at 30, 34. Finding the Chattahoochee non-navigable, the court stated “no meaningful argument can be made” that evidence of modern day use of a waterway for recreational purposes, which is “limited to very light sporting craft such as canoes, kayaks and rubber rafts, drawing no more than a few inches of water . . . [that] often scrape the rocky bed of the river,” demonstrates the

river's susceptibility for use for commercial navigation. *Id.* at 34. The court also stated the following regarding evidence of present day recreational boating in navigability cases:

While pleasure boating can sometimes indicate a river's susceptibility for commercial use, the type of craft and persons presently using, and enjoying, the river demonstrates that the river's main appeal lies in the frequent 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.

Id. (internal citations omitted).

Other cases have reached similar conclusions. For example, *Lykes Brothers, Inc., v. United States Army Corps of Engineers*, 821 F. Supp. 1457, 1463 (M.D. Fla. 1993), further illustrates that evidence of modern day recreational boating does not prove a river is susceptible to navigation. The *Lykes Brothers* court considered whether the operation of a "canoe trail" by the plaintiff constituted sufficient evidence of the creek's suitability for navigation. In finding the waterway at issue non-navigable, the court explained that adventure trips in small, shallow-draft canoes for recreational purposes do "not support a conclusion" that the creek had been used for commercial navigation. *Lykes Brothers*, 821 F. Supp. at 1464. Regarding the creek's susceptibility to navigation, the court stated the following: "The recreational activities of these noncommercial fishing excursions, boating in small John boats and canoe trips do not render [the creek] susceptible of being used as an artery of commerce." *Id.* See also *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) (holding that conducting boating trips on river in flat bottom boats with drafts of two to six inches does not constitute commerce and transportation sufficient to characterize watercourse as navigable). The above cited cases instruct that evidence of sporadic, present-day low-draft recreational boating on the Gila River – a stream generally

characterized by minimum flows and less frequent torrential peak flows – is not probative of its susceptibility to navigability as of February 14, 1912.

Proponents cite the Ninth Circuit’s holding in *Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989), in support of their argument regarding evidence of recreational boating to establish navigability. *See* Defenders’ Br. at 8; County’s Br. at 4; ASLD’s Br. at 15. However, in that case, the court was presented with sufficient evidence to establish that a “substantial industry” of guided sightseeing and fishing trips with watercraft existed on the Gulkana River, which industry employed approximately 400 people. *See Ahtna*, 891 F.2d at 1405. In addition, the parties stipulated that the Gulkana was either being used or susceptible to being used by powerboats 16 to 24 feet long by four to ten feet wide, capable of carrying loads of up to one ton. *See id.* at 1402. The parties also stipulated that “the watercraft customary for the River’s use at statehood included powered boats with a load capacity of approximately 1,000 pounds,” which watercraft “could have at least supported commercial activity of the type carried on today. . . .” *Id.* at 1405. Unlike in *Ahtna*, no evidence has been presented to the Commission that suggests the Gila River was of practical utility for any commercial purpose, let alone commercial activities of the magnitude of those conducted on the Gulkana. Furthermore, the Gulkana River’s hydraulic characteristics were far more impressive than the Gila’s. The *Ahtna* court stated that the river “displaces 3,600 to 4,800 cubic feet per second from May to September, decreasing to 200 to 300 cubic feet per second from November through April, when the River lies frozen [and, therefore, is not being navigated].” *Id.* at 1402.

In contrast, the upper Gila River’s long-term median (50%) flow rate varies from a mere 76 cubic feet per second to 174 cubic feet per second between the Arizona-New Mexico border

and its confluence with the Salt River.² See *Upper Gila Report*, at 4-4. The high end of this range is only reached far downstream at Safford Valley where the upper Gila River's median flow reaches 174 cubic feet per second. See *id.* However, according to United States Geological Survey gauge data, 99 percent of the time the average flow in this reach was only 29 cubic feet per second; one percent of the time its mean flow was 3,970 cubic feet per second. See *id.*, at 5-33. These figures demonstrate that on the vast majority of days, the upper Gila's flow is far too low for the river to be susceptible to any kind of navigation. Furthermore, during those rare instances when its flow rates arguably could support boating, the upper Gila is far too variable to be susceptible to navigation. In fact, the record shows that in the 1980s the Safford District Office of the Bureau of Land Management had in place a policy not to encourage floating the Gila River. See *id.*, 3-29. Among the stated reasons for this policy was that the "fluctuating water levels (flooding) make floating the[] river[] very hazardous." See *id.*

III. Evidence Presented by Drs. Schumm, Littlefield, and August Clearly Establishes that, in its Natural and Ordinary Condition, the Gila River Was Neither Navigable nor Susceptible to Navigation as of February 14, 1912.

Although Proponents bear the entire burden to prove by a preponderance of evidence that the Gila River was navigable or susceptible to navigation as of February 14, 1912, Dr. Stanley A. Schumm, Dr. Douglas R. Littlefield, and Dr. Jack L. August, Jr. provided unimpeachable evidence demonstrating that the Gila River was clearly not navigable or susceptible to navigation at that time. Proponents' criticisms of these experts' reports are based on faulty reasoning and flawed evidence and, therefore, should be rejected.

² The *Upper Gila Report* states that median (50%) flow rate is probably a better indicator of a river's susceptibility to navigation than mean discharge rates. *Upper Gila Report*, Exec. Sum., at 8.

A. Proponents' Unfounded Criticism of Dr. Schumm's Report is Entirely without Merit and Should be Disregarded.

Proponents' unfounded position is that because dams and irrigation diversions have affected the flow of the Gila River since before the turn of the century, Dr. Schumm's report lacks evidentiary value. *See* Defenders' Br. at 11; County's Br. at 22. No party is disputing that human actions have affected the Gila River's flow. However, the fact that dams and diversions have historically existed on the river in no way affects the validity of Dr. Schumm's conclusions. If anything, their existence supports his findings because, *despite* these controls and diversions of water from the river, flood events on the Gila "radically transformed" its geomorphology. *See* Stanley A. Schumm, Ph.D., P.G., *Geomorphic Character of the Lower Gila River* (June 2004), at 10. Contrary to the County's assertion that "[m]ovement of the river does not prove anything with respect to navigability," County's Br. at 21, the United States Supreme Court has considered such evidence in its navigability determinations. *See United States v. Oregon*, 295 U.S. 1, 23 (1935) (finding lack of defined banks to be indicia of water body's non-navigability); *Oklahoma v. Texas*, 258 U.S. 574, 587-88 (1922) (considering as evidence of non-navigability an excerpt from a 1910 Army Corps of Engineers Report stating that bank caving "causes a continual shifting of the river bed, which moves from one side of the valley to the other").

ASLD's own witness, Gary Huckleberry, reached a similar conclusion to Dr. Schumm regarding the geomorphology of the upper Gila:

[T]here were a series of larger floods around the turn of the century – particularly 1905, 1906, and 1916 – on the upper Gila River seem to result in some considerable channel changes. . . . *So the large floods obviously had an impact on the channel.* The flood channel particularly was widened and my estimate is in 1912 we had pretty much a wide, braided flood channel.

(Tr. at 16:57.) *See Upper Gila Report*, Exec. Sum., at 6 ("The reach of the Gila River located downstream of the Gila Box widened significantly around the time of statehood *in response to*

large floods, and changed from a narrower, tree-lined river to a wide braided floodplain.”). As for the lower portion of the Gila River, Mr. Huckleberry stated that a series of channel changes resulted from a series of flood events occurring in the late part of the nineteenth century and the early part of the twentieth century. (Tr. at 16:59.) As a result of these floods, as of February 14, 1912, the lower reaches of the Gila River were characterized by a wide, braided flood channel. (Tr. at 16:59.) Mr. Huckleberry concluded that “the Gila River has a dynamic flood plain that changes in response to changing flood regime. The period 1905 to 1916 . . . was the wettest period in at least three centuries. . . . Increased large flood frequency leads to generally wide, braided flood channel along most of the alluvial reaches of this channel.” (Tr. 16:59-60.) Mr. Huckleberry opined “that in terms of channel changes in the floodplain, the floods have much greater impact on the morphology of that channel than the diversions do.” (Tr. at 16:95.) John Fuller generally confirmed Mr. Huckleberry’s conclusions in his testimony that “flood impacts are significant to this river. It does change the shape and location of the low-flow channel as well as the flood channel.” (Tr. at 16:61.) Based on the opinions of these witnesses, it is clear that flood events have had far more influence on the Gila River’s geomorphology than dams and irrigation diversions.

Based on the testimony of their own witnesses, the Proponents’ attempts to discredit Dr. Schumm obviously fail. Given the significant effect flood events have had on the geomorphology of the Gila River, it was unnecessary for Dr. Schumm to perform an analysis to determine the condition of the river prior to the construction of dams and diversion works. The County hired Hjalmar Hjalmarson in an attempt to determine the predevelopment physical characteristics of the Gila River. However, as ably pointed out by SRP in its Opening Post-Hearing Memorandum, Mr. Hjalmarson’s report is severely flawed because it incorrectly

assumes that, prior to the construction of dams and diversion works, the Gila River was a single meandering, smooth, parabolic channel. *See* SRP's Opening Post-Hearing Memorandum, at 19-24. As discussed above, both Dr. Schumm and Mr. Huckleberry opined that the Gila was unstable and had a braided flood channel.

Furthermore, Mr. Hjalmarson's report is based on estimated mean annual flow data. *See e.g.*, Hjalmar W. Hjalmarson, P.E., *Navigability along the Channel of the Gila River* (October 25, 2002) ("*Hjalmarson Report*"), at 15 (explaining flow duration curve represents distribution of river's average natural flow). As Mr. Fuller testified, however, the Gila is "a desert river so floods tend to skew the averages." (Tr. at 16:63.) In fact, "about 70% of the time the flow is less than the mean annual flow." *Hjalmarson Report*, at 16. The *Hjalmarson Report's* gross oversimplification of the Gila's geomorphology and reliance on average flow data casts significant doubt on the validity of Mr. Hjalmarson's conclusions regarding the Gila's navigability.

B. Proponents' Unfounded Criticism of the Research Done by Drs. Littlefield and August is Entirely without Merit and Should be Disregarded.

First, Proponents assert that Dr. Littlefield's opinions fail to apply the correct legal standard. *See* Defenders' Br. at 11; County's Br. at 16-17. Proponents misunderstand the respective roles of the witnesses and the Commission in these proceedings. It is not Dr. Littlefield's (or, for that matter, any other witness's) role to apply a legal standard of navigability to his research. His function was to gather and present historical evidence to the Commission, and that is what he did. Findings of fact and conclusions of law are for the Commission to make, not the parties or their witnesses. *See Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F.2d 554, 559 (D.C. Cir. 1938) (instructing that courts and commissions are to reach legal decisions based on the facts presented). The Commission will consider the facts

surrounding the Gila River and apply the law to those facts to make a determination of navigability. Accordingly, exactly what legal standard Dr. Littlefield may or may not have used is without import.

Second, Proponents attempt to chip away at Dr. Littlefield's report by casting doubt on whether government surveyors used the correct manual when conducting some of their surveys. Although the surveyors did not always make specific references to the survey manual they used, no evidence has been proffered to show that any of these surveyors either ignored the correct manual or used an incorrect manual. Although the County alleges that one surveyor "ignored" the instructions to meander the Gila River at a certain point, County's Br. at 12, the fact that the surveyor chose not to meander the river merely demonstrates that he thought the Gila was not a "well-defined natural arter[y] of communication" as required by the survey manual under which he was operating. *See Littlefield Report*, at 18. No matter what manual a surveyor was using, he would have been required to meander both sides of a navigable river. The fact that surveyors chose not to do so is probative evidence that they did not consider the Gila River navigable, as is the absence of information regarding navigability in the surveyors' field notes and on their plats. The only reasonable inference that can be drawn is that the men who surveyed the region around the time of Arizona's statehood did not believe that the Gila River was a navigable waterway. The County's assertions to the contrary, based solely on speculation, do not constitute evidence sufficient to meet the Proponents' burden of proof.

Understanding the strength of this evidence, the County sets forth a conspiracy theory in an apparent attempt to discredit a government surveyor. *See County's Br. at 13*. In its Opening Post-Hearing Memorandum, the County relies on a single master's thesis, which, according to the County, claims that surveyor Ridgley C. Powers and the Surveyor General for Arizona,

among others, “created a land speculation scheme in the Gila Valley below Buckeye.” *Id.* From this statement the County concludes that the alleged scheme “created a strong financial motive for Powers to find the Gila non-navigable.” *Id.* However, the County neither provides evidence to support its contentions nor explains a connection between the alleged land scheme and the navigable status of the Gila River.

The County also contends that reliance on surveys as evidence of non-navigability is “unfounded.” *Id.* at 19. However, this assertion conflicts with established federal case law. For example, in *Lykes Brothers* the Eleventh Circuit made clear that the action of surveyors is probative evidence of a watercourse’s non-navigability. *See Lykes Brothers*, 821 F. Supp. at 635-36 (holding that given the instructions under which the surveyor operated in 1871, “his meandering of only one bank of [the c]reek is probative of whether [the] creek was navigable in 1871”). *See also Harrison v. Fite*, 148 F. 781, 784 (8th Cir. 1906) (“The action of the government surveyors in meandering a body of water or in surveying its bed is to be considered as evidence upon the question of its navigability or unnavigability at that time. . .”).

Third, the County claims that Dr. Littlefield’s statements regarding the existence of roads along the Gila River are “contrary to the Federal test for navigability.” County’s Br. at 13-14. The Ninth Circuit, however, does not agree. In *Muckleshoot Indian Tribe v. Federal Energy Regulatory Commission*, 993 F.2d 1428 (9th Cir. 1993), the court found probative FERC’s conclusion that the “roads and railroads, rather than the Cedar River, appear to have served as the primary means of transport for the logs.” *Id.* at 1431. *See also Washington Water*, 775 F.2d at 327 (noting that logs are brought to mills by railroad or truck, not by boat). *See also id.* at 328 (reasoning that if the watercourse under consideration were truly useful as a highway for

commerce, there would be evidence of its use “for such purposes, especially in the earlier days of settlement before the development of other means of transportation”).

Fourth, the County contends that land patent files are irrelevant because the homesteaders did not care whether or not the Gila was a navigable river. On what the County is basing this assertion is unclear. Regardless, it is counterintuitive given the fact that, were the Gila ever determined to be navigable, these homesteaders would likely lose title to that portion of their lands lying below the river’s ordinary high water mark. The County also seeks to diminish the importance of the fact that the state did not lay claim to any of these patented lands. See County’s Br. at 14-15. Regardless of the state’s priorities of the day, it is rather unlikely that a sovereign power would forego title to lands to which it believed it had the legal right. If “the issue of navigability was not foremost on the minds of the settlers and politicians,” *id.* at 15, it was because they understood that the Gila was not navigable. Rather than wasting valuable resources trying to improve navigation on a stream that could not be made navigable, contemporaries built railroads and roads on which to travel and engage in commerce. Furthermore, contrary to the County’s assertion, politicians of the day did not overlook the Gila River’s navigability. The evidence shows that at least as early as 1865 the legislature was aware of the concept of navigability. See *Littlefield Report*, at 110 (noting that in 1865 the Arizona Territorial Legislature passed a *Memorial Asking Congress for an Appropriation to Improve the Navigation of the Colorado River* in which it declared that “the Colorado River is the only navigable water in this Territory[.]”

Fifth, the County questions why Dr. Littlefield disregarded evidence of use of the steamboat *Explorer* in his report. See County Br. at 17-18. Dr. Littlefield correctly discounted this evidence because that particular vessel floated on the Colorado River and a small portion of

the lower Gila influenced by the backwater effects of the Colorado. As discussed at the August 8 and 9, 2005 hearings in Mohave and La Paz Counties, the transition from the backwaters of the Colorado River to the confluence with its tributaries (such as the Gila River) is unrelated to the Commission's work and has no bearing on the Commission's determination of the navigability of the Gila River as of February 14, 1912. *See Gollatte v. Harrell*, 731 F. Supp. 453, 457 (S.D. Ala. 1989) (refusing to consider backwater effects of river on adjacent creek when making determination as to creek's navigability). Therefore, given the irrelevance of the *Explorer* to a determination of the navigability of the Gila River and the focus of Dr. Littlefield's report, it would have made little sense for Dr. Littlefield to discuss the *Explorer*.³

Finally, as with Dr. Schumm, Proponents employ their "reliance on post-diversion observations" argument in an attempt to bring into question the veracity of Dr. Littlefield's and Dr. August's reports. County's Br. at 9, 18. However, this effort also falls well short of its mark. As the D.C. Circuit reasoned in *Washington Water*, "[i]f the river were . . . useful [for navigation], it would have been used for such purposes, especially in the earlier days of settlement before the development of other means of transportation"). *Washington Water*, 775 F.2d at 327. As discussed above, there is no probative evidence of historical use in the record to establish the Gila's utility for commerce either before or after surface water diversions occurred.

The County cites *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785 (9th Cir. 1981), for the prospect that "use of canoes by Indians was relevant to the navigability determination of the White River in Washington before the river was substantially diverted." County's Br. at 5 (citing *Puget Sound*, 644 F.2d at 788-89). That the Ninth Circuit made this statement is not in dispute. The dilemma for Proponents, however, is

³ The purpose of the *Littlefield Report* was to analyze historical evidence regarding contemporaneous observations of whether the Gila River itself was a navigable waterway. *See Littlefield Report*, at 1.

that there is no evidence in the record to establish that Native Americans ever used the Gila River for trade or travel. The only evidence cited by Proponents is a reference in the *Upper Gila Report* that Chiricahua Apache Tribe manufactured bull boats for *crossing* streams. See *Upper Gila Report*, at 3-5. However, when questioned by SRP, ASLD's historical archeologist, Dennis Gilpin, admitted that there was no evidence that the Tribe specifically used these bull boats on the Gila. (Tr. at 16:67.) Furthermore, even if the Chiricahua Apaches had used bull boats on the Gila River, the fact that they would have been using them to *cross* the river is not evidence of the Gila's navigability.⁴

IV. The Commission Should Decline Proponents' Invitation to Liberalize the Navigability Test to the Point of Absurdity.

As a result of the lack of evidence demonstrating that at the time of Arizona's statehood the Gila River was either of practical usefulness for commerce or was susceptible to being used as a highway over which useful trade or travel could be conducted, Proponents urge the Commission to liberalize the *Daniel Ball* test and consider case law that has no relevance to a determination of the Gila's navigability. See Defenders' Br. at 11; ASLD's Br. at 24.

For example, the County suggests that the Gila River could somehow be made navigable by means of the construction of artificial aids. See County's Br. at 5-6. The County quotes *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407 (1940), for the proposition that "[a] waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken." County Br. at 5. Based on this statement, the County instructs

⁴ For the same reason, Proponents' reliance on evidence that the Spanish named the Gila "Rio De Las Balsas" (River of Rafts) "either because the explorers were forced to cross the River on rafts or because the Indians used wicker baskets to cross the River" is equally unconvincing. ASLD's Br. at 15. Furthermore, Mr. Gilpin testified that the members of the Coronado expedition might have actually constructed the rafts to get across the Salt River. (Tr. at 16:68.)

the Commission that it “must consider evidence . . . whether artificial aids would be required to make the [Gila] river suitable for commercial navigation.” *Id.* at 5-6. However, the D.C. Circuit analyzed *Appalachian’s* holding in *Washington Water Power Co. v. Federal Energy Regulatory Commission*, 775 F.2d 305 (D.C. Cir. 1985), and clarified that when a river is evaluated as susceptible to being made navigable, a court must strike “a balance between cost and need at a time when the improvement would be useful.” *Id.* at 331 (quoting *Appalachian*, 311 U.S. at 407-08). Given the Gila River’s physical characteristics, it is implausible that any kind of balance could be struck in favor of artificially improving the river in an attempt to make it somehow navigable. Doing so would require a project of massive scale, dredging and channeling virtually the entire length of the river to eliminate the constantly shifting braided channels that prevail throughout its course.

As another example, Proponents rely on *Oregon v. Riverfront Protection Association*, 672 F.2d 792 (9th Cir. 1982), to assert that the Commission may deem the Gila River navigable “despite occasional impediments . . . and despite the fact that it is only navigable a few months out of the year.” Defenders’ Br. at 7. However, an analysis of *Riverfront’s* facts reveals that in that case, the court considered transportation of “thousands of logs and millions of board feet of timber” down the McKenzie River to be probative evidence of the river’s navigability. *Id.* at 795. The *Riverfront* court further found persuasive the fact that log drives on the McKenzie were neither occasional nor confined to periods of high water. *See id.* Finally, the Ninth Circuit considered important the fact that the log drives in question were held over a period of 17 years. *See id.* Such evidence of regular and sustained use of the Gila River as a highway of commerce simply does not exist.

Proponents also cite *United States v. Utah*, 283 U.S. 64 (1931), for the proposition that “the mere presence of occasional difficulties in navigation does not render non-navigable an otherwise navigable river.” County Br. at 3. However, unlike the Green and Grand Rivers at issue in *Utah*, the Gila River has never been “an otherwise navigable river.” The flow characteristics of the rivers at issue in *Utah* differ significantly from those of the Gila. For example, the *Utah* Court relied on findings by the special master, which indicated that the rivers had a depth of at least three feet over 300 days per year. *See Utah*, 283 U.S. at 78-79. The Gila River, however, does not boast such impressive hydraulic characteristics. *See Upper Gila Report*, at 5-43 (chart of upper Gila River’s flow characteristics).

The *Utah* Court was also persuaded by the special master’s finding that “motor boats of proper construction, power and draft can navigate upstream [on the Green and Grand Rivers] without trouble. . . .” *Utah*, 283 U.S. at 85. The Court quoted with approval the special master’s determination that, as to each of the rivers under consideration, “its susceptibility to use as a highway for commerce was not confined to exceptional conditions or short periods of temporary high water, but that during at least nine months of each year the river ordinarily was susceptible of such use as a highway for commerce.” *Id.* at 87. Unlike in *Utah*, no facts have been presented to the Commission to support a determination that as of February 14, 1912, the conditions of the Gila River were such that “motorboats of proper construction, power and draft” could navigate upstream, or that the river otherwise was susceptible to being used as a highway for commerce. *Id.* at 85.

As noted by the County, the fundamental question is whether the watercourse at issue is *capable* of being used as a channel for *useful* commerce. *See* County Br. at 3-4 (quoting *The Montello*, 87 U.S. (20 Wall.) 430, 441-43 (1874)). Where commercial use or susceptibility of

use is “sporadic and ineffective,” the watercourse is not navigable. *See United States v. Oregon*, 295 U.S. 1, 23 (1935). Proponents urge that when determining the navigability of a watercourse, its width, depth, amount, and regularity of flow must be considered. *See County’s Br.* at 24; *ASLD’s Br.* at 10. However, when the Gila River’s physical characteristics are considered, it is clear that it has never been capable of supporting commerce of a substantial and permanent character and, therefore, neither *Riverfront* nor *Utah* supports a determination of navigability. *See Leovy v. United States*, 177 U.S. 621, 632 (1900) (“It is a safe inference . . . that the term ‘navigable waters of the United States,’ has reference to commerce of a substantial and permanent character to be conducted thereon.”).

The Eighth Circuit Court of Appeals warned against attempts at liberalizing the test for determining the navigability of a watercourse in the absence of a record of past historical use. *See George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) (refusing to liberalize test for navigability and stating “we are wary of unnecessary extension of any rule on navigability, particularly when it could well lead to absurdity”). The Supreme Court of Louisiana perhaps expressed it best almost 150 years ago when it discussed the absurdity that would result from an overly liberal concept of what constitutes commerce:

[I]t suffices to say . . . that [the Act of Congress giving Louisiana title to the beds and banks of navigable watercourses] was never intended to apply to streams only capable of an imperfect navigation in time of floods and very high water. . . . Were the mere fact that a steamboat or flatboat had been a short distance up a stream or bayou in high water a sufficient ground for declaring it a navigable stream, every slight depression of the soil on the banks of the Mississippi would then become a navigable stream. . . .

Boykin v. Shaffer, 13 La. App. 129, 131 (1858).

The Commission should decline Proponents’ invitation to stretch the navigability test beyond the reach of judicial precedent and past the point of common sense, and instead apply the

appropriate test as set forth in *The Daniel Ball* and its progeny. See Phelps Dodge's Brief Regarding the Meaning and Necessity of "Commerce" When Determining the Navigability of a Watercourse being filed concurrently with this Responsive Post-Hearing Memorandum.

V. Conclusion

As the United States Supreme Court expounded in *United States v. Utah*, "[e]ach determination as to navigability must stand on its own facts." *Utah*, 283 U.S. at 87. An examination of the facts regarding the navigability of the Gila River reveals that Proponents have failed to prove by a preponderance of the evidence that the Gila River was navigable at the time of Arizona's statehood or at *any* time. Accordingly, Phelps Dodge respectfully asks the Commission to determine the Gila River non-navigable as of February 14, 1912.

RESPECTFULLY SUBMITTED this 27th day of February, 2006.

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A handwritten signature in cursive script, appearing to read "John Hestand", is written over a horizontal line.