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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

**In re Determination of Navigability of
the Gila River**

No. 04-008 NAV

**STATE LAND DEPARTMENT'S
RESPONSE TO OTHER PARTIES POST-
HEARING MEMORANDA**

The Gila River (the "River") is one of the three largest rivers west of the Mississippi. Sylvester Mowry, "The Geography and Resources of Arizona and Sonora," *Journal of the American Geographical and Statistical Society*, 1 (March 1, 1859): 66 [LRA Box/File: 25/47]. Under the equal footing doctrine, the State of Arizona received title to the River's bedlands on February 14, 1912, because the River was a navigable waterway in its ordinary and natural condition.¹

I. Title to the Gila River's Bed Passed to the State of Arizona at Statehood Under the Equal Footing Doctrine.²

All parties agree that ANSAC must apply the *Daniel Ball* test to determine whether the River's bedlands passed to the State of Arizona in 1912.³ The parties, however, disagree on how to

¹ ASLD uses the same abbreviations that it used in its Opening Memorandum for this Response.

² GRIC incorrectly states that ANSAC's hearings, held on November 16 and 17, 2005, addressed the River only within Maricopa County. GRIC's Opening Memorandum ("OM") at 19. Rather, the hearings addressed the entire River. *See* Tr. 11/16/05 at 34 ("our next issue is . . . hearings on the evidence regarding the navigability or non-navigability of the Gila River.").

³ All parties, that is, except Buckeye Irrigation District, whose Opening Memorandum is irrelevant because it shows a fundamental misconception of the applicable law.

apply the test, which provides as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

The Daniel Ball, 77 U.S. 557, 563 (1870); *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 419, ¶ 17, 18 P.3d 722, 730, ¶ 17 (App. 2001). Although *Daniel Ball* involved a navigability determination under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, the case remains “the starting point” for determining navigability-for-title issues under the equal footing doctrine. *Defenders*, 199 Ariz. at 419, ¶ 17, n. 10, 18 P.3d at 730, ¶ 17, n. 10. In navigability-for-title cases, title to navigable riverbeds passes at statehood to the state in which the river flows. *United States v. Utah*, 283 U.S. 64, 75 (1931). All parties also agree that at Arizona’s statehood in 1912, the River was not in its ordinary and natural condition; its waters having been diverted for irrigation. The parties disagree, however, on how to apply the requirement that the River be considered in its ordinary and natural condition. In title cases, the equal footing doctrine operates to pass title to navigable bedlands at statehood. See *Defenders*, 199 Ariz. at 419, ¶ 17, 18 P.3d at 730, ¶ 17 (stating that the “federal standard that needs to be applied when determining the extent of watercourse bedlands a state takes by operation of the equal footing doctrine has remained virtually unchanged since the classic definition of navigability was provided by *The Daniel Ball*” (emphasis added)). Thus, title to watercourses that were navigable in their ordinary and natural condition passes on the date of statehood.

It is important not to confuse navigability-for-title concepts with those applicable to Commerce Clause cases. For purposes of Congress’s regulation of navigable waterways under the Commerce Clause, a waterway may be found navigable if it could be made so through artificial

aids. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407 (1940). Thus, a waterway that is not currently navigable but that could be made so with reasonable improvements could become subject to Congressional regulation; artificial conditions such as diversions that could be abated by due exercise of the public authority do not prevent a finding of navigability. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 118 (1921).⁴ This possibility does not exist in navigability-for-title cases where title must be determined once and for all as of the date of statehood. Thus, to determine whether the River could have been used as a highway for commerce, ANSAC must assess the River's pre-statehood ordinary and natural condition, disregarding all man-made obstructions and diversions.

II. The River Was Susceptible to Use as a Highway For Commerce in Its Natural and Ordinary Condition.

GRIC claims (OM at 34-35) that for the State to successfully argue that the River was susceptible to use as a highway for commerce; the State must prove that the reason that the River was not used in 1912 was due to the State's conditions of exploration and settlement, citing *United States v. Utah*, 283 U.S. at 81. The State incorporates by this reference its memorandum regarding highway-for-commerce requirements filed contemporaneously with this Response but nevertheless responds to GRIC's erroneous contentions. In *Utah*, the Court noted that historically the Green, Colorado, and San Juan Rivers had not been used as a means of trade or travel in Utah because of eastern Utah's pattern of development, which explained the lack of the rivers' actual use, but the

⁴SCAT incorrectly interprets the Commerce Clause cases as merely *permitting* a court to consider a river's pre-development conditions. See SCAT OM 16-17 ("[t]he Commerce Clause cases which [may] consider the navigability of rivers under pre-development virgin conditions to do not apply." However, the Commerce Clause cases do not *restrict* the inquiry to a river's pre-development, ordinary, condition but instead permit a court to consider artificial improvements that would make the waterway navigable for Congressional regulatory purposes. See *Appalachian*, 311 U.S. at 407 (stating that, in such cases, "[t]o appraise the evidence of navigability on the natural condition only of the waterway is erroneous"); see also *Oregon Div. of State Lands v. Riverfront Protection Assoc.*, 672 F.2d 792, 796 (9th Cir. 1982) (stating that "[b]ecause the parties stipulated that evidence from the late 1800s and early 1900s would be deemed evidence of the river's natural condition on February 14, 1859 [Oregon's date of statehood], only the question of whether the river was navigable in its ordinary, unimproved condition is at issue.").

Court did not make that circumstance a requirement for susceptibility arguments. *Id.* Even if such a provision—conditions of exploration and settlement—were a requirement, that requirement is satisfied, because the condition of settlement, and subsequent diversion of the waters pursuant to appropriation laws, is what changed the River and precluded most navigation on the Lower River by 1912. The Upper River is currently navigated. Even the coming of the railroads does not change this analysis. Dr. August testified (Tr. 11/16/05 at 207) that the railroads were a preferable mode of transportation at the time of statehood, particularly for mining districts, but “the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.” *Appalachian*, 311 U.S. at 409-10.

SCAT erroneously claims (OM at 4-5) that to demonstrate navigability for title purposes, a proponent must show “sustained beneficial” commercial use, but no such requirement exists. *See Defenders*, 199 Ariz. at 421, 18 P.3d at 732 (stating that “the federal test has been interpreted to neither require both trade and travel together nor that the travel or trade be commercial”). SCAT’s cited authorities are unpersuasive. In *United States v. Oregon*, 295 U.S. 1 (1935), the Court merely pointed out that small boats drawing one to six inches of water were insufficient to demonstrate a capacity for general and common usefulness for purposes of trade or travel. *Id.* at 21. Similarly, in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), the Ninth Circuit discussed the transportation for profit involved in boating on the Gulkana River but, again, did not require such proof. Indeed, the *Ahtna* court permitted actual current commercial use to demonstrate susceptibility for use as a highway for commerce at statehood: “[w]e think the present use of the lower Gulkana is commercial and provides conclusive evidence of the lower Gulkana’s susceptibility for commercial use at statehood.” *Ahtna*, 891 F.2d at 1405. Under this test, the Upper River and parts of the Lower River are clearly navigable. The last case that SCAT cites—*Adams v. Montana Power Co.*, 528

F.2d 437 (9th Cir. 1975)—is an admiralty case and is inapplicable to this navigability-for-title case. “[W]hen discussing navigability, any reliance on judicial precedent should be predicated on a careful appraisal of the purpose of which the concept of navigability is invoked.” *Defenders*, 199 Ariz. at 419, 18 P.3d at 730.

SRP leads its Opening Memorandum with a statement from John R. Bartlett’s account of his visit to the area in 1850 to 1853. SRP OM at 1. SRP’s use of Bartlett’s statement is misleading, because it implies that Bartlett thought that the whole River was generally not navigable. However, Bartlett was actually talking about the Upper River when he made his non-navigability comment; *he concluded that the Lower River could be navigated*. See ASLD Upper River at 3-14. In any event, Bartlett was incorrect about the Upper River because it is currently navigated (*see* ASLD OM at 20 - 23), and parts of the Lower River are also navigated (ASLD OM at 20 - 22). SRP’s example of the German POWs’ attempted escape from their Papago Park prison is simply irrelevant; by 1944 there was obviously very little water in the Lower River and the year 1944 has no legal significance to these proceedings.

The authorities SRP relies on (OM at 17 - 19) do not preclude a finding of navigability based on the River’s susceptibility for use as a highway for commerce. The State has clearly met its burden of proof that the River was susceptible for use as a highway for commerce. See *Utah v. United States*, 403 U.S. 9, 11-12 (1971) (finding that farmers boating their livestock to an island in the Great Salt Lake from time to time, along with evidence of other sporadic use of the Lake, provided adequate proof of use as a highway for commerce); *Puget Sound Power & Light Co. v. F.E.R.C.*, 644 F.2d 785, 789-90 (9th Cir. 1981) (finding navigability based mainly on river transportation of moderately sized timber supplies); *Oregon v. Riverfront Protective Assoc.*, 672 F.2d at 795 (finding that historic long-term log floating, even with natural obstructions in the river,

was sufficient to find navigability); *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (N.Y. 1998) (recreational use is sufficient to satisfy the traditional navigability test to show whether a river has practical utility for trade or travel). Recent navigability-for-title decisions reflect a more liberal view of the federal title test. *See Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, Richard M. Frank, University of California, Davis Law Review, Vol. 16:579, 592, (1983); E.I. 1.

III. Federal Surveyors' Opinions on Non-Navigability, Even If They Could be Discerned, Are Irrelevant.

Much has been made in these proceedings of the nineteenth century federal surveyors' failure to note in their surveys that the River was navigable. *See* SRP OM at 5; PD OM at 4 - 8, 18-19; SCAT OM at 13, n. 13. SRP's expert, Dr. Littlefield, finds this highly significant and places great weight on the surveyors' supposed belief that the Lower River was non-navigable. *See generally* Littlefield, Tr. 11/16/05 at 127 - 150. However, it is impossible to know what the surveyors actually believed, and in any event their beliefs are irrelevant.

Dr. Littlefield reached his hypothesis about the surveyors' beliefs based upon surveying instruction manuals and surveyors' actions taken in apparent compliance with the instructions. Although the manuals' requirements changed from time to time for non-navigable waterways, the instructions to meander both sides of a navigable waterway did not change. Thus, the instructions made a crucial distinction between "navigable" and "non-navigable" waterways, but neither the instructions nor the underlying statute (U.S.C. § 43-931) defined "navigable." Contrary to his final opinion, Dr. Littlefield testified that surveyors' navigability decisions were discretionary with each surveyor (Tr. 11/17/05 at 58), that the surveyors were just using their own opinions (Tr. 11/16/05 at 154), and that navigability was in the eye of the beholder. Littlefield Depo at 40. On cross-examination at the hearing, he was asked for his own definition of "navigability" and he responded:

“[T]hat would be the Daniel Ball case, which I didn’t bring any documents precisely related to Daniel Ball, or whether it would be under any other type of precise definition or just a general commonsense definition.” Tr. 11/16/05 at 150. Although Dr. Littlefield could not have known what “navigable” meant to the surveyors; he still defended his opinion by claiming that he had looked at many documents and “what I found was that pretty much under any reasonable standard of assessment by parties who were on the scene at the time, the river was not reliable as a progressive means of transportation.” *Id.* The State is not aware of any definition of “navigability” that requires a showing of a “progressive means of transportation.” Some of the surveying instructions required the meandering of one bank of non-navigable streams that were “natural arteries of internal communication.” Again, although Dr. Littlefield had no specific understanding of what this meant (Tr. 11/17/05 at 58), he later claimed that it meant “something that people followed a path along, such as the Gila Road.” Tr. 11/17/05 at 132. But Dr. Littlefield previously admitted that such a stream could satisfy the *Daniel Ball* test. Depo at 89-90. Undaunted by his lack of understanding of critical terms and admitting that federal surveyors lacked authority to make legal determinations of navigability (Tr. 11/17/05 at 68), Dr. Littlefield nevertheless stuck to his hypothesis that the surveyors’ actions demonstrated their belief that the Lower River was non-navigable.⁵ Tr. 11/16/06 at 150; Littlefield, 11/03/05 at 1. However, considering the context in which the federal surveyors were in the field, it is more likely that they considered the term “navigable” in federal terms, that is related to interstate - or at least federally-navigable - waterways, and waterways that would provide a way to transport goods to the Nation’s interior. They were surely not concerned with the dispositive issue in this case, that is, who owned the riverbed. According to George M. Wheeler, who the U.S. Geological Survey had sent to the west in 1872:

⁵Dr. Littlefield either overlooked or ignored the fact that the surveyors sometimes used boats to conduct their surveys on the River. *See e.g.* Jackson, Tr. 11/17/05 at 217.

[o]ne of the urgent wants felt in the promotion of our mining industry is that of increased and cheapened *inland transportation*. River transportation upon our western coast is, to a great extent, a failure, as beyond the Columbia and Colorado Rivers, that furnish somewhat irregular avenues of *connection with the interior*, no streams of considerable magnitude exist (emphasis added).⁶

The interpretation of federal surveyors' beliefs: that "navigable" referred to interstate rather than intrastate streams, is consistent with a leading surveying authority's definition of "navigable stream." Frank Clark notes in his surveying and boundaries treatise that "[t]he United States Supreme Court has defined the term 'navigable stream' in a most satisfactory way." *See* Clark on Surveying and Boundaries, 3rd ed., Frank Emerson Clark, Bobbs-Merrill Co., Inc., Indianapolis, Ind., 1959, Section 576 (citing *The Montello*, 87 U.S. 430, 443 (1874), which found that the term means interstate but not intrastate waterways); *see also United States v. Utah*, 283 U.S. at 75 (stating that navigable waters of the United States are those that are navigable in interstate or foreign Commerce). In the nineteenth century, the federal government was looking for ways to transport mined goods out of the west, and the River does not provide a means of transporting goods to the interior.⁷ Contrary to SRP's interpretation, the term "navigable" as used in the federal surveying instructions was irrelevant for navigability-for-title issues.

None of the opponents of navigability has cited persuasive authority that surveyors' opinions are important for ANSAC to consider in its determination. SCAT cites *Oklahoma v. Texas*, 258 U.S. 574 (1921) (OM at 13, n. 13) for the proposition that surveyors' actions in not meandering a river, while not conclusive or presumptive evidence of non-navigability, are highly

⁶ George M. Wheeler, Report on Exploration of the Public Domain in Nevada and Arizona, Ex Doc. 65, 42 Cong. 2 Sess. (Washington, D.C.: U.S. Government Printing Office, 1872), 17-20, 53 [LRA Box/File 8/18] (emphasis added).

⁷ The surveyor Martineau's survey in T8S R21W (near Kinter, Dome) provides an illustration: Martineau meandered the River in 1890. Dr. Littlefield interpreted Martineau's meandering as reflecting Martineau's belief that the River was non-navigable. Littlefield, Tr. 11/17/05 at 105-07. However, Martineau noted that the water was twelve to fifteen feet deep in that location. *Id.* Thus, although the River was not important for federal purposes, it could have been navigable for title purposes in that reach.

relevant. That case actually found the opposite. The Court stated that the action of surveying officers in meandering a river had “little significance . . . [because] those officers were not clothed with power to settle questions of navigability.” *Oklahoma v. Texas*, 258 U.S. at 585. PD cites *Lykes Bros. Inc. v. United States Army Corps of Engineers*, 64 F.3d 630, 635-36 (11th Cir. 1995) and *Harrison v. Fite*, 148 F. 781, 784 (8th Cir. 1906) (OM at 8) for the proposition that government surveyors’ actions are to be considered as evidence of navigability or unnavigability. However, *Lykes* which was decided under the Rivers and Harbors Act, provided that surveyors’ actions are merely probative, not determinative, and may be considered in light of all the evidence. 64 F.3d at 635-36. *Harrison* is equally unpersuasive. The court stated that evidence of surveyors’ actions was not conclusive on the question of navigability, because “[t]he surveyors are invested with no power to foreclose inquiry into the true character of the water.” *Harrison v. Fite*, 148 F. at 784.

Dr. Littlefield’s testimony provides no basis upon which to discern the nineteenth century federal surveyors’ beliefs on whether the River was navigable for title purposes, and surveyors’ beliefs on the issue are irrelevant.

IV. Federal Patents and State Land Grants That Do Not Reserve Bedlands Do Not Demonstrate Non-Navigability.

Both PD (OM at 8 - 10) and SRP (OM at 6, 19) assert that the failure of federal and state land patents to reserve land representing the River bed shows that federal and state officials regarded the River as non-navigable and that this fact is somehow significant. The State disagrees. Federal authorities in all likelihood believed that the River was not navigable only for federal purposes under a Commerce Clause analysis (*see* discussion above), and it is well known that the State did not assert its interest in Arizona’s bedlands until the 1980s. *Defenders*, 199 Ariz at 415, 18 P.3d at 726. Moreover, both governments were more interested in irrigation than in navigation in the nineteenth and early twentieth centuries. *See* ASLD OM at 4 - 6, 23 - 24.

None of the authorities that the opponents of navigability have cited requires a different conclusion. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922) dealt with the boundaries of an Indian reservation. In *Brewer-Elliott*, the only reason the Court inferred that the Congressional grant extended to the main channel of the river was because Congress already knew that the river was not navigable, 260 U.S. at 87. The Court expressly did not address the question whether it would have been outside Congress's authority to make the grant if the river was navigable. In *United States v. Oregon*, 295 U.S. 1, 23 (1935), the Supreme Court noted that the Secretary of the Interior had described Lake Malheur as "nonnavigable . . . [as] little more than a swamp or marsh," and the Oregon Supreme Court had also described the Lake as non-navigable. But the United States Supreme Court stated in *Economy Light & Power*, 256 U.S. 113 (1921) that a state Supreme Court ruling of non-navigability was not *res judicata* on the issue because the United States had not been a party to the earlier case and because the district court in that case had more evidence before it upon which to determine navigability. *Id.* at 123. In these proceedings, no governmental pronouncements on the River's navigability or non-navigability exists, much less by federal and state high officials. The patents that SRP mentions and that PD lists were presumably issued by low-level government employees in the performance of their day-by-day duties. Neither the personnel who prepared the patents nor the patents themselves included a reasoned evaluation of the River's navigability. Moreover, by the time of almost all of the patents that PD lists, only one of which was in the nineteenth century, the Lower River had been diverted and would have appeared non-navigable to a casual observer. More important, in navigability-for-title cases, each waterway must have its own particularized assessment to determine navigability under the *Daniel Ball* test. *Defenders*, 199 Ariz. at 418, ¶ 12, 18 P.3d at 729, ¶ 12. In *Oregon Div. Of State Lands*,

672 F.2d at 796, the court reversed the district's finding of non-navigability, thereby defeating federal patentees' successors-in-interest title to the bedlands. (The patents at issue in *Riverfront* must not have contained reservations for the McKenzie's riverbed, but the court nevertheless found the river navigable.) Even Congressional indications of navigability are not necessarily persuasive in title cases. In *Oklahoma v. Texas*, 258 U.S. 574 (1921), Oklahoma asserted title to the Red River's bed and argued that because Congress had permitted bridges to be constructed over the River and had required that the bridges not interfere with navigation, Congress must have considered the River navigable. The Court rejected this argument, finding that the non-interference provision was merely "precautionary and not intended as an affirmation of navigable capacity." *Id.* at 585-86. SRP also cites (OM at 19) *Washington Water Power Co. v. F.E.R.C.*, 775 F.2d 305, 332 (D.C. Cir. 1985); *Lykes Bros. Inc. v. United States Army Corps of Engineers*, 821 F. Supp. 1457, 1460 (M.D. Fla. 1993); and *Koch v. Department of Transportation*, 47 F.3d 1015, 1019 (10th Cir. 1995) for authority that courts should consider the government's treatment of a watercourse as non-navigable in their analysis of navigability. However, none of these authorities is persuasive. *Washington Water* involved a determination of whether the Spokane River was navigable under the Federal Power Act, not for title purposes. The issue in *Lykes* was whether a certain creek was a navigable water of the United States under the Rivers & Harbors Act of 1899, a very different question from whether a river is navigable for title purposes. And *Koch* is simply irrelevant to any issue raised in these proceedings. In fact, the *Koch* court acknowledged that the issue of whether the land passes to the state or passes under a patent are analytically distinct. 47 F.3d at 1019, n. 3. Thus, in navigability-for-title cases, incidental use of the word "navigable" in other contexts is not persuasive, and ANSAC should disregard the opponents' arguments.

V. The River's Hydrology and Geomorphology Demonstrate That the River Was Susceptible to Use as a Highway for Commerce.

A. The River's Ordinary and Natural Hydrology Demonstrates That the River Was Susceptible to Use as a Highway for Commerce.

The opponents of navigability continue to argue, incorrectly, that the River's ordinary and natural condition was either usually dry or at flood stage and subject to unpredictable periods of flow (GRIC OM at 24; SRP OM at 8, 9, 18; PD OM at 14, 19, 21) and that the River never included sufficient flow to support a highway for commerce (SRP at 8-9). Such contentions are unfounded. How, for example, could the Pima Maricopas have sustained their lifeways, which depended on irrigation, if the River had been normally either dry or flooded? The River, in its ordinary and natural condition, had reliable, non-flood, perennial flow. *See* ASLD OM at 2, 10-11. Long-term USGS stream gauging records over the past 100 years also demonstrate that runoff was perennial, significant, and reliable. ASLD Upper Gila at 5-15 to 5-45, 5-48, Tables 7 to 23; ASLD Lower Gila at VI-4 to VI-9, IV-39, App. E. This was the River's condition until Anglo settlers diverted the water.⁸ ASLD Upper Gila at 5-8 to 5-14; ASLD Lower Gila at VI-9. Nevertheless, even after such diversions the USGS stream gauge data show that boatable conditions continue to exist at least eighty percent of the time in the upper watershed, despite numerous diversions. ASLD Upper Gila, Table 21, at 5-33; Table 17 at 5-30. In the lower watershed, Win Hjalmarson's compelling scientific analysis demonstrates that natural flow rates were sufficient to support navigation. Hjalmarson Report at 6. The USGS gauge data also demonstrate that floods occur less than one percent of the time. ASLD Upper Gila at 5-33, Table 21. The floods are therefore irrelevant in assessing the River's ordinary condition. The same USGS data also indicate that flow is predictably and reliably within a narrowly defined (and boatable) range eighty percent of the time. *See* ASLD

⁸ Dr. Hjalmarson testified that the Indians' diversions for irrigation would have made only a "small difference" to his calculations. Tr. 11/17/05 at 300.

OM, Fig. 1; ASLD Upper Gila at 5-33, Table 21, Table 17 at 5-30. Moreover, historical records of swimming (August, Tr. 11/16/05 at 165), boating (ASLD Upper Gila at 3-27 to 3-29, Ch. 6; ASLD Lower Gila at Ch. IV; Jackson, Tr. 11/17/05 at 220), and the presence of large fish, some weighing up to 100 pounds (Weedman, Tr. 11/16/05 at 210-211; GRIC OM at 11) clearly demonstrate that the River, in its ordinary and natural condition, had reliable, significant, and perennial flows. “Large fish require deep pools of permanent water.” Weedman, Tr. 11/16/05 at 218.

Opponents’ criticisms regarding differences between average and median flow rates (SCAT OM at 10, SRP OM at 9) misstate the record. For example, SRP’s claim that “SLD’s reports rely primarily on average annual flow data” is false. ASLD’s report contains twelve tables describing flow conditions, and only one of the tables reports average annual flow data. ASLD Upper Gila, Ch. 5; Fuller, Tr. 11/16/05 at 63. Moreover, SRP’s and GRIC’s own witnesses rely on average annual flow data in their reports and testimony. SRP OM, App. B; Schumm, Tr. 11/17/05 at 26, 38; Gookin 11/1/2000 Report at 2-25, 2-30. The ASLD and Hjalmarson reports present minimum (base) flow rates in addition to median flow rates. Fuller, Tr. 11/16/05 at 63; ASLD Upper Gila, Ch. 5; Hjalmarson Report at 13-14.

B. The United States Geological Survey’s Annual Reports Are Irrelevant to Demonstrate the River’s Ordinary and Natural Flow Conditions.

PD’s reliance on the U.S. Geological Survey’s Annual Reports from 1888-90 and 1890-91 is misplaced. PD OM at 18 - 20. The reports’ purpose was to assess water sources for irrigating large areas of the Southwestern United States to promote settlement that would benefit the nation. Water Supply Paper (“WSP”) No. 162 notes that the River “drains 71,140 square miles, 40 per cent of which has an elevation of less than 3,000 and is largely agricultural land if supplied with water.” The Tenth Annual Report states in its general background section: “Irrigated, this land would be worth not less than \$30 an acre, adding \$2,880,000 to the wealth of the nation.” To promote

irrigation, it was also important to find reservoir sites. *See* The Eleventh Annual Report, 1889-90. The federal government's concern was not with navigation but with settlement supported by irrigated agriculture. All of the River's waters were dedicated to this endeavor, which began immediately after the United States obtained the land in 1848 thereby altering the River's ordinary condition. The Geological Survey's WSPs from after the turn of the twentieth century (*see* PD OM at 20 - 21) reflect this change to the River's ordinary condition. Moreover, most of the selected papers show the River's condition at Dome, near the River's confluence with the Colorado River, where upstream diversions would have shown the most deleterious effect on the River's natural flow.

C. SRP's List of Selected Rivers is Irrelevant to Demonstrate the Natural Flow of the Gila River.

SRP attaches a list of rivers to its Opening Memorandum in an attempt to compare the River with other selected rivers. SRP OM at 9-10, App. B. However, comparisons to other rivers is inappropriate and not determinative. *See Defenders*, 199 Ariz. at 418, 18 P.3d at 729 (citing *Hassell* which requires a particularized assessment of each watercourse); *Appalachian*, 311 U.S. at 404 (stating that there is no "formula which fits every type of stream under all circumstances and at all times"); *Puget Sound Power & Light*, 644 F.2d at 790 (stating that a court must take due account of the changes and complexities of a river when determining the sufficiency of evidence to prove navigability).

D. The River's Ordinary and Natural Geomorphology Demonstrates That the River Was Susceptible to Use as a Highway for Commerce.

The opponents' criticisms of Dr. Hjalmarson's methodologies and results are without substance. GRIC OM at 26, SRP at 19-24. GRIC asserts (OM at 26) that Dr. Osterkamp would not approve of his equations being applied to the River, but the record belies this contention. Dr.

Hjalmarson testified that he discussed the matter with Dr. Osterkamp and that Dr. Osterkamp then provided the particular equation for Dr. Hjalmarson's use. Hjalmarson, Tr. 11/17/05 at 295. Dr. Hjalmarson's results are based on scholarly, peer-reviewed published, scientific methodologies using unbiased data that are published by the federal government. Hjalmarson, Tr. 11/17/05 at 236; Hjalmarson Report at 9, 12, 16-23. Additionally, Hjalmarson verified his results (Tr. 11/17/05 at 309-10, 328) using alternative methods which showed that his results were internally consistent and complemented historical observations and measurements.

The opponents of navigability also claim that the River was braided and therefore not susceptible to use as a highway for commerce. SRP OM at 11-12, 22 - 24; GRIC OM at 25 - 27. This premise is false. Whether the River was braided or subject to channel change during floods is irrelevant to a general navigability decision. SRP's own geomorphologist, Stanley Schumm, testified that braided rivers can be navigated (Tr. 11/17/05 at 11, 12, 27) and offered numerous slides showing navigation on braided rivers (Tr. 11/17/05 at 11-12). Dr. Schumm also testified that alluvial rivers that change course during floods can be navigated (Tr. 11/17/05 at 25) and that portions of the River could be boated (Tr. 11/17/05 at 19).⁹ Further, Dr. Schumm "agree[d] with everything Dr. Huckleberry and Dr. [sic] Fuller said about this river." Tr. 11/17/05 at 17. Dr. Huckleberry testified that the Lower River had a braided *flood* channel and a single *low-flow* channel on which boating would have occurred. Tr. 11/16/05 at 58-61, 99. The Upper River's low flow channel has a single channel, pool and riffle pattern, not a braided channel. ASLD Upper Gila at 4-7. Whether a river, braided or not, can be navigated is a function of its depth, slope, and

⁹ Dr. Schumm expressed no opinion, either in his report or at the hearing, on the Upper Gila River. Schumm Report at 1; Tr. 11/17/05 at 19, 27. His opinion that the River is not navigable therefore applies only to the Lower River. Moreover, he did not base his opinion on the federal test for navigability. Schumm, Tr. 11/17/05 at 28, 31. Rather, his opinions are based primarily on cursory observations from a brief helicopter tour and inspection of post-statehood maps and aerial photographs that were made and taken well after the River's natural flow had been diverted. Schumm, Tr. 11/17/05 at 21, 31, 37.

velocity. If the water is deep enough and the current is not too swift; the river can be boated. The only evidence submitted to ANSAC regarding estimated or natural flow depth, channel slope, and velocity was by the State and Dr. Hjalmarson. ASLD Upper Gila at 5-43, Table 23; ASLD Lower Gila at App. F; Hjalmarson Report at 16 - 23. These reports document and conclude that boating was possible for the vast majority of the time when the River was in its ordinary and natural condition. ASLD Upper Gila at 5-43, Table 23, 6-6; ASLD Lower Gila at X-1-2; Hjalmarson Report at 6. GRIC hypothesizes (OM at 25) that braiding would divide a river's available flow from an otherwise navigable single channel but offers no scientific analysis to support this assertion. In fact, reducing the flow depths computed by Dr. Hjalmarson by half or even one-third would still provide a sufficient depth to meet federal navigability criteria for low-draft boats. *See* Hjalmarson Report at 6 (depth of 4.8 feet); ASLD Upper Gila at 6-2, Table 1. Even after major floods such as Arizona experienced in 1891 and 1905, the River's low-flow channel would reestablish itself. Huckleberry, Tr. 11/16/05 at 60, 99. GRIC misrepresents (OM at 26) Mr. Fuller's testimony regarding diversions lessening the intensity of flood impacts. What Mr. Fuller actually said was that the USGS records underestimate natural flow rates because diversions have reduced the amount of streamflow reaching the gauge sites relative to the ordinary and natural streamflow. Fuller, Tr. 11/16/05 at 89-90.

Finally, Dr. Schumm's and Dr. Huckleberry's testimony regarding the River's "braided" character does not conflict with Dr. Hjalmarson's assumption of a single parabolic channel, because Dr. Schumm and Dr. Huckleberry analyzed the River in its non-natural, post-statehood condition. Schumm, Tr. 11/17/05 at 26, 28, 30, 31; Huckleberry, Tr. 11/16/05 at 86-87. Both Drs. Schumm and Huckleberry acknowledge the presence of a single low flow channel within the braided flood channel. Huckleberry, 11/16/05 at 58-60; Schumm, Tr. 11/17/05 at 14. By 1912, upstream

irrigation diversions, including Roosevelt Dam on the Salt River, had deleteriously affected the channel's geomorphology. Huckleberry, Tr. 11/16/05 at 88. Dr. Hjalmarson's analysis relates to the River's natural channel that existed before diversion of the ordinary and natural flow. Hjalmarson Report at 5. GRIC's dismissal (OM at 24) of Hjalmarson's scientific analysis as "speculative mishmash . . . completely at odds with historic reality" is completely unfounded.

In summary, the River's ordinary and natural flow conditions and its natural geomorphology - that is before large-scale irrigation diversions depleted the River's waters - establish that the River was susceptible for use as a highway for commerce.

VI. The Incidents of Actual Boating Demonstrate that the River was Susceptible to Use as a Highway for Commerce.

The opponents of navigability generally claim the historical incidents of boating are insignificant and insufficient to demonstrate the River's navigability. GRIC OM at 36 - 38; SCAT OM at 11 - 12; PD OM at 16; SRP OM at 6 - 8, 15 - 17, App. A. SRP claims (OM at 6) that the evidence shows a calamitous record, and GRIC even refers to (OM at 35) an occasional death. These parties also complain the evidence is only anecdotal, not subject to verification, and is often taken from newspaper articles which might contain some puffery or boosterism. PD OM at 15 - 16, SRP OM at 6 - 7. All of these assertions lack merit. Neither early explorers such as the trappers nor the Forty-niners left much of a paper record of their activities, but the available historical record does show navigation on the Lower River despite its diminishing ability to support it throughout the nineteenth and early twentieth centuries. As the Ninth Circuit has stated: "Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence." *Puget Sound & Power & Light*, 644 F.2d at 789 (citing *Appalachian*, 311 U.S. at 416). The Upper River is still navigated.

No one has demonstrated that the newspaper accounts are inaccurate or unfounded. Much boat use was not reported to the newspapers, because boating was routine. Tellman, Tr. 11/16/05 at

116-117. Dr. Jackson testified (Tr. 11/17/05 at 210) that it is necessary to evaluate and assess newspaper evidence, and after doing so, he found it apparent that the Mormon Battalion and the Howard-Pancoast journeys actually took place.¹⁰ The Adams-Evans trip also occurred: Adams' letter to the Phoenix newspapers regarding Adams' and Evans' trip in 1895 from Phoenix to Yuma described the sights that the men saw along the way and is persuasive evidence that they actually "made this journey" and that "the river is susceptible for navigation, in fact, along its full length in 1895." Jackson, 11/17/05 at 212-214. The comment, "I would never make that journey again" refers to the Box Canyon (on the Upper River) portion of the 1895 trip and not to the Lower River. Jackson, Tr. 11/17/05 at 214-215.

Some opponents of navigability complain (SCAT OM at 12, GRIC OM at 36 - 38) that there is little or no evidence of Native American navigation, but these parties cite no authority requiring such proof. SRP points out (OM at 15) that the 1846 Kearney expedition and the 1847 Mormon Battalion traveled on land and not on the River. The Stephen Kearney expedition originated in Missouri and made its way down the Santa Fe Trail, setting up a military government in New Mexico.¹¹ The expedition would not have carried boats all the way from Missouri. Similarly, the 1847 Mormon Battalion originated in Iowa; its members would not have brought boats for potential use along the way. In the reported incident, the members of the party who made a boat from two wagons successfully reached Yuma. ASLD OM at 16.

The opponents of navigability have various other unfounded complaints. SRP states (App. A, ¶ 2) that no information exists to show at what time of year the 1849 Howard trip took place and

¹⁰SRP registers (OM at 15 - 17) many complaints about Dr. Jackson's testimony, particularly that Dr. Jackson did not submit a report and his Power Point presentation contained references to court decisions and he is not a lawyer. SRP's expert, Dr. Littlefield, is also not a lawyer, but he nevertheless offered his interpretation of the *Daniel Ball* decision as part of the basis for his opinion that the River is not and never has been navigable. Tr. 11/16/05 at 150. The fact that Dr. Littlefield produced two, largely duplicative, reports does not make his testimony more credible than Dr. Jackson's.

¹¹See <http://angam.ang.univie.ac.at/roads02/santafe/kearny.html>

that it could have taken place during a flood. However, the article states that the party constructed a boat. It is unlikely that they could construct a boat so quickly in order to take advantage of the flood; it is more likely that they already had the boat. And, contrary to SRP's assertion (App. A, ¶ 3), it was common for Forty-niners to build small boats and thus lighten their wagons. See ASLD OM at 16, ¶ (f). SCAT incorrectly asserts (OM 12) that no evidence exists that the trappers boated the River in the 1880s. See ASLD's OM 15-16. Trapping on the River continued until the beaver skin market back east declined in the late nineteenth century. Weedman, Tr. 11/16/05 at 212. Although there was no followup report on the 1881 Cotton and Bingham trip (SRP App. A, ¶ 5), the newspaper article shows that travel was considered and that there was a boat. Jackson, Tr. 11/17/05 at 210-11. Several opponents (SRP OM at 16, GRIC OM at 38, SCAT OM at 11) point out that members of the "Yuma or Bust" party of 1881 had to wade in the water for part of their way down the River. However, occasional difficulties do not render non-navigable an otherwise navigable river (*United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *United States v. Utah*, 283 U.S. at 76), and places of portage have always been considered part of a navigable waterway (see *The Montello*, 87 U.S. at 440 (finding that a short portage between two rivers formed part of the Fox River's highway for commerce for federal navigability purposes). The trip's account demonstrates, at least, that there was a not-insignificant amount of water in the River. Jackson, Tr. 11/17/05 at 211. SRP also mischaracterizes (OM at 16 - 17) Dr. Jackson's testimony regarding the 1893 Streitz incident: Dr. Jackson did not opine that the River was navigable merely because Gustavus Streitz, a county surveyor, crossed the River in a skiff. Instead, Dr. Jackson testified that the skiff belonged to a rancher, Dougherty, who used the boat as part of his general ranch equipment. Tr. 11/17/05 at 219. Dr. Jackson correctly equated this use with farmers' general use of boats in *Utah v. United States*: "This is evidence; here we have that a rancher along the Gila River has a skiff. And then a

surveyor makes use of it.” *Id.* It is simply erroneous and misleading for SRP to state that Dr. Jackson relied solely on Streitz’s crossing the River in a skiff one time as the basis for his opinion that the River was navigable.

PD argues that ANSAC should disregard the State’s Lower Gila Report (at X-2) concerning steamboat use on the River because the waters in the River near its confluence with the Colorado mix with the Colorado’s waters.¹² However, because the Colorado River is navigable, to the extent that its waters mix with the Gila River’s waters, ANSAC also should find the River navigable. Furthermore, the evidence demonstrates that the River’s navigability extends beyond any backwater effect from the Colorado; steamships plied the River from the confluence to Dome. Fuller, Tr. 11/16/05 at 65; Littlefield, Tr. 11/17/05 at 157-58; Hjalmarson, Tr. 11/17/05 at 328-29.

Finally, contrary to the opponents’ assertions (SCAT OM at 11, SRP OM at 8), it is not necessary for boats to travel up and down a waterway for that waterway to be found navigable. These parties claim that ferry use is not indicative of navigability. This is not the case. Arizona Revised Statutes § 37-1101(3) provides that a highway for commerce means “a corridor or conduit within which the exchange of goods, commodities or property or *the transportation of persons may be conducted*” (emphasis added). The statute does not require transportation to be up and down a waterway. Ferries transported persons for many years on the River. ASLD OM at 18-19. Those ferries were not “obstructions to commerce” as SRP characterizes it. *See* SRP OM at 8, citing *North Dakota v. United States*, 770 F.Supp. 506, 509 (D.N.D. 1991). In any event, the United States Supreme Court has approved ferry use to show navigability. The Court found the Great Salt Lake navigable based largely on evidence that ranchers transported their cattle and sheep across the Lake by ferry boat to and from an island. *Utah v. United States*, 403 U.S. at 11-12; *see also The*

¹²Gila Backwater Analysis, Colorado River Boundary Study, Project No. A8-0052, Stantec Consulting, Inc., February 11, 1999. E.I. 1.

Montello, 87 U.S. at 441 (stating that the true test of the navigability of a stream does not depend on the mode by which commerce is or may be conducted.). The Ninth Circuit upheld a finding of navigability based in part on the use of small ferries that were used to carry passengers across the river. *City of Centralia v. F.E.R.C.*, 851 F.2d 278, 283 (9th Cir. 1988). Ferry use on the River was extensive and essential to the communities that the ferries served. See ASLD OM at 18 - 19. For example, when the 1905 flood disrupted railroad service, ferries were in unprecedented demand and a brisk competition developed for freight and passenger transportation. ASLD Lower Gila at IV-12 to IV-13. At a minimum, the presence of ferries—large boats that transported people and goods across the River—are evidence of commercial traffic on the River. They also show that the River was ordinarily too deep and wide to ford by wagons or cars and that a heavily loaded boat could regularly cross the River. They therefore demonstrate that the River was susceptible to boating by heavily laden commercial boats. Ferries on the Gila and the Salt were an absolute necessity for communication during several months every year. See ASLD Report on Lower Salt River at 3-25. Why would ferries operate at multiple locations over many years - some continuously for twenty-five years - if the River had been normally dry?

The evidence demonstrates that, although the Lower River has not seen commercial navigation for many years, the River was once navigable. See *Defenders*, 199 Ariz. at 426, 18 P.3d at 737 (stating that each application of the *Daniel Ball* test is apt to uncover variations and refinements which require further elaboration); *Appalachian*, 311 U.S. at 409-10 (stating that absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense); *United States v. Utah*, 283 U.S. at 82 (stating that the question of susceptibility in the ordinary condition of the river, rather than of the mere manner or extent of actual use, is the crucial question). Today's

courts are merging the federal law navigability-for-title test and the state law ‘pleasure boat’ test and the beds of virtually all bodies of water suitable for any sort of boating use eventually will be deemed to have been owned by the state at statehood. *Defenders*, 199 Ariz. at 418, n. 8, ¶ 14, 18 P.3d at 729, n. 8, ¶ 14 (citing Beck, *Water and Water Rights*, Section 30.01(d)(3)(C)).

VII. ANSAC Lacks Jurisdiction to Consider GRIC’s Claims to Bedland Ownership, and GRIC’s Claim to the River’s Bedlands Lacks Substantive Merit.

GRIC requests ANSAC to determine that GRIC owns the portion of the River’s bed that runs through the GRIC reservation. OM at 1 - 16; 39. However, ANSAC lacks jurisdiction to make such a determination, and GRIC fails to show the requisite federal intent to transfer the bedlands to GRIC.

A. ANSAC Lacks Jurisdiction to Determine Ownership, Title, and Control of Riverbeds and Submerged Lands.

GRIC requests (OM at 39) that ANSAC determine that GRIC “has exclusive beneficial ownership of and control over the submerged lands within or adjacent to the Gila River Indian Reservation” and that the State of Arizona did not receive title to those lands. ANSAC lacks power to make such a determination.

An administrative agency has only the powers, duties, and jurisdiction, that the Legislature has given it. *See Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, 80 P.3d 765, 767 (2003). The Legislature established ANSAC’s powers, duties, and jurisdiction in A.R.S. § 37-1123. That statute limits ANSAC’s powers to determining the single issue of navigability, that is, which Arizona watercourses were not navigable and which watercourses were navigable as of February 14, 1912. *Id.* at (A)(1) and (2). ANSAC therefore lacks jurisdiction to comply with GRIC’s request that it determine ownership of and control over the submerged lands within GRIC’s reservation and that the State of Arizona did not receive title to those bedlands.

- B. The 1872 and 1882 Executive Orders that Created the Reservation Fail to Make Any Express Reference to any “Riverbeds” and/or “Submerged Lands” and Therefore Fail to Reserve Such Lands for the Community.”

GRIC claims that the United States specifically and expressly reserved the bedlands beneath the Gila and Salt Rivers for GRIC’s beneficial ownership, referencing certain Acts of Congress and Executive Orders. OM at 12-15. However, GRIC fails to demonstrate where the United States made those express reservations.

Congress generally holds the lands under navigable waterways in trust for future states. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997). Congress may, however, dispose of such lands to carry out federal purposes. *Montana v. United States*, 450 U.S. 544, 551 (1981). Congress’s disposals of the lands during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain. *Holt State Bank*, 270 U.S. at 55. Although a presumption exists against such disposals (*United States v. Alaska*, 521 U.S. 1, 34 (1997)), the Federal Government can overcome the presumption and defeat a future State’s title to submerged lands by setting them aside before statehood in a way that shows the intent to retain title. *Alaska v. United States*, ___ U.S. ___, 125 S. Ct. 2137, 2144 (2005). Congress must demonstrate its intention “*in clear and especial words unless the claim confirmed in terms embraces the land under the waters of the stream.*” *Montana*, 450 U.S. at 552 (emphasis added).

GRIC incorrectly asserts (OM at 6) that the 1872 and 1882 Executive Orders contain clear expressions of federal intent to withdraw certain riverbeds from the public domain and reserve such lands for the Pima and Maricopa Indians. To the contrary, the 1872 Executive Order fails to make any mention of the “riverbed” or any other submerged lands. That Executive Order provides that the Reservation included the following land:

All the land in said Territory bounded and described as follows, viz: Beginning at the northwest corner of the old Gila Reservation; thence by a direct line running northwesterly *until it strikes Salt River* 4 miles east from the intersection of said river with the Gila River; *thence down and long the middle of said Salt River to the mouth of the Gila River; then up and along the middle of said Gila River* to its intersection with the northwesterly boundary line of the old Gila Reservation; thence northwesterly along said last-described boundary line to the point of beginning (emphasis added).

This language does not use the words “riverbed” or “submerged” lands, or provide any basis to construe a grant to the middle of the River as an express grant to GRIC of any of the River’s bedlands. GRIC also quotes from the 1882 Executive Order, which only states that the boundary line ran “thence north along the Gila River meridian to the middle of the Gila River; thence with the boundary of the present reservation along and up the middle of the Gila River to a point where the said boundary leaves the said river.” GRIC OM at 6. Again, this passage fails to make any reference to a “riverbed” or any “submerged lands.” As GRIC admits, (OM at 5) “[T]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance”. *Montana*, 450 U.S. at 554.

Neither the 1872 Executive Order nor the 1882 Executive Order reserves the bed to GRIC because the Orders’ language “in no way expressly referred to the riverbed nor was an intention to convey the riverbed expressed in clear and especial words or definitely declared or otherwise made very plain.” *Id.* (internal citations omitted). Without using the words “riverbed” or “submerged land,” or any other terms that could be interpreted to reference such lands, the Executive Orders cannot be said to grant those lands to GRIC.

In short, GRIC cannot direct ANSAC to any Executive Order or any other granting document that expressly uses the terms “riverbed” or “submerged lands” (or that uses any other unambiguous language) and, therefore, GRIC cannot demonstrate that the United States intended to

reserve such riverbeds and submerged lands for the reservation and thereby overcome the presumption that the bedlands passed to the State of Arizona at statehood.

C. The Aboriginal Rights of the Community and/or any Individual Allottees to Riverbeds and Submerged Lands Were Extinguished by the Indian Claims Commission Proceedings.

GRIC claims (OM at 2, 10 - 12) that it has aboriginal rights to the River's bedlands, but GRIC's aboriginal rights to land within its reservation have already been adjudicated.¹³ On August 8, 1951, the Gila River Pima-County Indian Community filed a claim against the United States with the Indian Claims Commission (the "Commission") for compensation for the taking of lands in south-central Arizona. *Gila River Pima-Maricopa Indian Community v. United States*, Docket 228, 24 Ind. Cl. Comm. 301, 335 (1970). The Commission's Finding 23 specifically described the "Boundaries of Pima-Maricopa Land," and in *Pima-Maricopa Indian Community v. United States*, Docket 228, 27 Ind. Cl. Comm. 11, 11 (1972), the Commission determined that GRIC had "exclusively used and occupied in Indian fashion the lands" lying within Finding 23's description. These proceedings set GRIC's reservation boundaries (with no specific or express grant of riverbed and/or submerged lands), extinguished all of GRIC's rights to land as of 1883, and awarded GRIC approximately \$5.5 million in compensation. The United States Court of Claims affirmed the Commission's decisions. *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386, 1394 (Ct. Cl. 1974); *Gila River Pima-Maricopa Indian v. United States*, 2 Ct. Cl. 12 (1982) (affirming award of approximately \$5.5 million dollar compensation).

Thus, GRIC's rights to any lands within the boundaries of its reservation have already been determined. The Commission intended that these proceedings constitute a final determination by stating that "[t]he intention of the Government to assert dominion over the subject land does

¹³ GRIC's water rights were adjudicated in *United States v. Gila Valley Irrigation Dist., et al.*, Globe Equity Decree No. 59 (June 29, 1935). (See ASLD's OM at 13, n. 16).

become manifest at the enlargement by Executive order of the Gila River Reservation in 1883” because there was “an apparent attempt to make a final settlement of the Pima claims to land, and unequivocal exercise of dominion over the public domain thereafter.” *Pima-Maricopa Indian Community v. United States*, Docket 228, 27 Ind. Cl. Comm. at 15. GRIC has no claim of aboriginal title to riverbeds or submerged lands because any such aboriginal title was extinguished in 1883.

In sum, pursuant to A.R.S. § 37-1123(A)(1) and (2), ANSAC lacks jurisdiction to determine any issues beyond the navigability or non-navigability of Arizona’s waterways as of February 14, 1912. Even if ANSAC had jurisdiction, GRIC has failed to overcome the presumption that Arizona took title to the bedlands at statehood and because GRIC’s rights to land within its reservation have already been adjudicated.

VIII. Conclusion.

For all of the reasons described above and those stated in the State’s Opening Memorandum, the State has carried its burden of proof that the Gila River was navigable within the meaning of the *Daniel Ball* test as interpreted by the applicable case law as of February 14, 1912. A.R.S. § 37-1128(A). ANSAC should declare it so.

DATED: February 27, 2006.

TERRY GODDARD



Laurie A. Hachtel
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BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

In re Determination of Navigability of
the Gila River

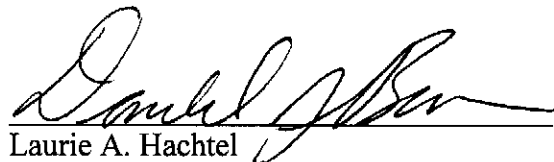
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THE ARIZONA STATE LAND
DEPARTMENT'S REQUEST TO
EXCEED PAGE LIMITATION

The Arizona State Land Department (ASLD) hereby requests permission pursuant to Arizona Navigable Stream Adjudication Commission (ANSAC) Rule 12-17-108(B) to exceed the fifteen (15) page limitation in their Reply Memorandum. The ASLD requires additional pages in order to effectively address the numerous and complex issues raised by five parties in their Opening Memoranda. The ASLD notes that other parties have exceeded the page limitation without ANSAC's permission.

DATED: February 27, 2006.

TERRY GODDARD



Laurie A. Hachtel
Donald J. Baier
Assistant Attorneys General

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