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

10
11 In re Determination of Navigability of the } No. 03-007-NAV
12 Gila River }
13 } **SALT RIVER PROJECT'S**
14 } **RESPONSIVE POST-HEARING**
15 } **MEMORANDUM**

15 **I. Introduction**

16 The proponents of navigability¹ for the Gila River rely upon, among other things, a
17 book by Edwin Corle and accounts of the 1847 expedition by the Mormon Battalion along the
18 lower Gila.² As is true of many of Proponents' citations to the historical record, see Section
19 III(E), infra, their discussion of the Mormon Battalion voyage paints an unrealistically rosy
20 picture of the experience. In his book, Mr. Corle described the voyage as follows:

21
22 With all this happiness of environment, Colonel Cooke made his first
23 mistake of the trip. He took a look at the Gila River, which was at this point,
24 and would be today if there were any water in it, about four or five feet deep and
25 150 yards wide. He decided to construct a boat, to be made of two wagon beds
26 lashed together, and ballasted by two long cottonwood logs.

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26 ¹ The proponents of navigability ("Proponents") include the Arizona State Land Department ("SLD"),
Maricopa County ("County"), and the Defenders of Wildlife, et al. ("DOW").

27 ² See, e.g., State Land Department's Opening Post-Hearing Memorandum, at 16 (February 6, 2006)
("SLD Mem."); Jackson, "Lower Gila River Navigability," at 9 (November 16, 2005) (EI 21).

1 Lieutenant George Stoneman, whose self-shot thumbs had now healed,
2 was put in command of this first ship to attempt to run the Gila. The clumsy
3 craft was overloaded. Colonel Cook's thought was to lighten the burden of the
4 wagon train, and to utilize water power by letting the Gila pull his boat
5 downstream as if it were a raft. That plan would have worked on eastern rivers,
6 but not on the unpredictable Gila.

7 Lieutenant Stoneman became the first skipper on the Gila River—and he
8 regretted it. The improvised boat carried mostly meat and flour. At times the
9 craft caught on sand bars and spun crazily. Once it was half submerged and
10 Stoneman and his crew of three had to hustle the cargo ashore. Then the boat
11 was freed of the sand bar and they had to moor it and reload. Irksome was the
12 word for it. For in less than a mile it snagged on another sandbar and the same
13 tedious process had to be repeated. As this kind of thing became the routine of
14 the day, Stoneman decided he'd never get to the mouth of the Gila. So he
15 lightened his ship by making a cache of half the cargo and eventually guided,
16 pushed, and poled her to the lower end of the Gila, and beached her just in time
17 to prevent her from being sucked into the more mighty Colorado. Here he met
18 his commanding officer. Boating on the Gila, he reported to Colonel Cooke,
19 was definitely not to be recommended to Washington. Cooke, being a man of
20 adaptability, dropped the subject. And, without making an issue of it, he sent
21 four men and four mules back upstream to salvage the cached meat and flour.

22 The importance of the Mormon Battalion in southwestern history is
23 institutional rather than active. It brought the Mormon culture through the Gila
24 Valley to California, it proved that wheels could move west; and it instilled the
25 idea in some men's minds that where wagon wheels could go so might, some
26 future day, a railroad. It demonstrated that the Gila River was not practical for
27 navigation, and it added considerably to the knowledge of remote Arizona.
Because of the success of the expedition other wagons prepared to move west.
Americans were on the march.

Corle, The Gila: River of the Southwest, at 153-54 (1951) (EI 1).

This account of the Mormon Battalion's travels and travails along the lower Gila River helps establish several important points with respect to this proceeding:

1. This incident occurred in 1847, well prior to even the earliest non-Indian diversions of water from the river. See 1935 Globe Equity Decree (EI 1). Thus, this evidence substantially refutes Proponents' persistent arguments that, although the Gila River may not

1 be navigable today, it would have been navigable at statehood but for the upstream diversions
2 of water for irrigation and other purposes that occurred prior to that time.³ The condition of
3 the river as of 1847 was likely as close to being “[u]ntouched by man or by influences of
4 civilization; wild [or] untutored” as it ever got. See SLD Mem., at 10. Even at that time, the
5 river “was not practical for navigation.” Corle, supra, at 154.

6 2. The presence of numerous sandbars and other obstructions shoots another
7 gaping hole in the hypothetical analysis performed by Dr. Hjalmarson on behalf of the
8 County. Dr. Hjalmarson’s work assumed that the “natural” Gila River was a single
9 meandering, smooth, parabolic channel.⁴ This “pre-development” account of the river shows
10 that, at least in the lower portions in which this event occurred, it certainly was otherwise.

11 3. This account cast substantial additional doubt on the testimony of Dr. Jackson,
12 the Pennsylvania college professor who, in his presentation to this Commission, cited the
13 Mormon Battalion expedition as one of a few in which a group “successfully navigated the
14 Lower Gila River.”⁵

15 4. This event also addresses Proponents’ criticism of Dr. Littlefield’s report and
16 testimony, wherein Proponents criticized that evidence because Dr. Littlefield simply
17 recounted the reported opinions of contemporaneous observers and, according to Proponents,
18 thus did not properly apply the “ordinary and natural condition” component of the federal test
19 for navigability. These 1847 contemporaneous observers in the Mormon Battalion, who saw
20 and experienced the river prior to virtually any human intervention, came to the same
21 conclusion Dr. Littlefield did—i.e., the river was not susceptible to being used as a “highway

22 ³ See, e.g., Maricopa County’s Opening Post-Hearing Memorandum, at 6 (February 6, 2006) (“County
23 Mem.”); Defenders of Wildlife Opening Post-Hearing Memorandum, at 9-10 (February 6, 2006)
24 (“DOW Mem.”); SLD Mem., at 9-13.

25 ⁴ See Salt River Project’s Opening Post-Hearing Memorandum, at 19-24 (February 6, 2006) (“SRP
26 Mem.”).

27 ⁵ See Jackson, “Lower Gila River Navigability,” at 9 (November 16, 2005) (EI 21). At the hearing,
Dr. Jackson admitted that “Cooke himself, who was interested in getting to California to fight in the
Mexican War, did not consider it successful. But for our purposes, it was successfully navigated.”
Tr. at 17:208.

1 for commerce.” See, e.g., Corle, supra, at 153 (“Boating on the Gila, he reported to Colonel
2 Cooke, was definitely not to be recommended to Washington”).

3 The evidence regarding the Mormon Battalion could stand alone to support a finding of
4 non-navigability, but it need not do so. When viewed in the proper context and against the
5 correct burden of proof, all of the evidence submitted to the Commission weighs in favor of a
6 finding that the Gila River was not used or susceptible to being used as a “highway for
7 commerce” on February 14, 1912. SRP joins the Buckeye Irrigation District, Buckeye Water
8 Conservation District, the Gila River Indian Community, Phelps Dodge Corporation, and the
9 San Carlos Apache Tribe in requesting that the Commission find the river non-navigable.

10 **II. Proponents Misstate the Legal Standard of Navigability.**

11 As they have done with respect to watercourses previously before this Commission,
12 Proponents continue to substantially understate the rigor of the test for navigability under the
13 federal cases and the Arizona statutes.

14 In general, Proponents cite to prior court decisions that espouse platitudes about the
15 “equal footing” and “public trust” doctrines but do not address the “navigability” of any
16 specific river. Like the three published Arizona opinions, the public trust law is full of
17 decisions in which the courts have discussed the general scope of the legal doctrines without
18 ever getting to a factual determination of navigability.⁶ Although Proponents might take
19 comfort in some favorable statements made in passing in court *dicta*, no court has ever found
20 any river with the same general characteristics as the Gila River to be navigable. See SRP
21 Mem., Appendix B. Proponents cite to no such case, because there is none.

22 DOW again relies upon the overruled and outdated decision in North Dakota v.
23 Andrus, 671 F.2d 271 (8th Cir. 1982), rev’d, Block v. North Dakota, 461 U.S. 273 (1983).

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26 ⁶ See, e.g., Land Dep’t v. O’Toole, 154 Ariz. 43, 739 P.2d 1360 (App. 1987); Arizona Ctr. for Law in
27 the Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (App. 1991), review dismissed (Oct. 6,
1982); Defenders of Wildlife v. Hull, 199 Ariz. 411, 18 P.3d 722 (App. 2001), reconsideration denied
(May 8, 2001).

1 DOW Mem., at 7.⁷ As SRP has repeatedly pointed out but DOW has consistently ignored,
2 that decision was subsequently thrown out by the United States Supreme Court. North Dakota
3 v. Andrus, 461 U.S. at 273. After that Supreme Court decision, the issues were retried. In the
4 second case, the same federal district court that had in 1981 found the river navigable at
5 statehood held in 1991 that “North Dakota ha[d] failed to prove by a preponderance of the
6 evidence that the Little Missouri River was a navigable river when North Dakota was
7 admitted to the union and became a state in 1899.” North Dakota v. United States, 770 F.
8 Supp. 506, 513 (D.N.D. 1991). The Eighth Circuit Court of Appeals affirmed in 1992. North
9 Dakota v. United States, 972 F.2d at 240. The 1982 decision upon which DOW relies has no
10 remaining legal import.⁸

11 DOW also relies upon the case of Alaska v. United States for the proposition that “a
12 river may be deemed navigable if it is susceptible to transporting goods or people by any
13 conveyance, not merely those in use at the time of statehood.” DOW Mem., at 7 (citing
14 Alaska v. United States, 662 F. Supp. 455, 465 (D. Alaska 1986), aff’d, Alaska v. Ahtna, 891
15 F.2d 1401 (9th Cir. 1989)). In fact, the courts’ conclusions in those cases were specifically
16 premised upon certain factual stipulations between those parties that are not present here:

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18 Our conclusion that the present commercial use of the lower Gulkana
19 provides conclusive evidence of its susceptibility follows from the facts

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20 ⁷ DOW also cites Oregon v. Riverfront Protection Ass’n, 672 F.2d 792 (9th Cir. 1982), for the
21 proposition that a watercourse can be determined navigable “despite occasional impediments such as
22 sand or gravel bars, and despite the fact that it is only navigable a few months out of the year.” DOW
23 Mem., at 7. The record is clear, however, that the Mackenzie River at issue in that case supported the
24 transportation of “[t]housands of logs and millions of board feet of timber,” 672 F.2d at 795, and had
25 an annual mean flow rate of approximately 4,000 cfs. See SRP Mem., Appendix B. Those
26 characteristics bear no relation to those of the Gila River, during any time period.

27 ⁸ In addition, because the 1981 and 1982 decisions were made by courts acting outside their authority
under the Federal Quiet Title Act (as subsequently found by the Supreme Court in 1983), those
decisions have no force or effect as a matter of law. See North Dakota v. Block, 789 F.2d 1308, 1314
(8th Cir. 1986) (“In view of our holding that the trial court was without jurisdiction to inquire into the
merits of North Dakota’s complaint, however, we need not belabor this point. Entered in the absence
of jurisdiction, the entire judgment must be reversed.”).

1 stipulated to by the parties. The parties stipulated that the River's physical
2 characteristics have remained unchanged since statehood. They also agreed that
3 the watercraft customary for the River's use at statehood included powered
4 boats with a load capacity of approximately 1,000 lbs. We note that the rafts
5 employed today in the guided and fishing industry have a maximum load
6 capacity of 2,000 lbs. We therefore think that the watercraft customary at
7 statehood could have at least supported commercial activity of the type carried
8 on today, with minor modifications due to the more limited load capacity and
9 rudimentary technology. We therefore conclude that the lower Gulkana was
10 susceptible for use as a highway for commerce at statehood.

11 891 F.2d at 1405. The Alaska case, which was decided based upon stipulations relating to a
12 factual situation entirely different from that of the Gila River, is not persuasive authority to
13 support Proponents' contention that the Gila River was or could have been a "highway for
14 commerce" in 1912.

15 **III. Proponents Have Failed to Carry Their Burden of Proof on the Evidence.**

16 Proponents have the burden of proof. See A.R.S. § 37-1128(A). In order to achieve
17 their desired finding of navigability, they must show, by a preponderance of the evidence, that
18 the Gila River was used or susceptible to being used as a "highway for commerce" on
19 February 14, 1912. See SRP Mem., at 3. Faced with this burden, Proponents have resorted to
20 overstating the extent of their evidence and using every possible means to discredit the
21 evidence to the contrary. Despite their best efforts, they have failed.

22 **A. The County's attacks on Dr. Littlefield miss their mark.**

23 Although those who favor a finding of non-navigability could have prevailed merely by
24 showing that Proponents have failed to carry their burden of proof and did not necessarily
25 need to submit evidence of non-navigability, they did so anyway. Those parties presented,
26 among other things, direct live testimony by Drs. Littlefield, August, and Schumm.
27 Proponents' arguments fail to rebut this evidence.

The County, for example, goes to great lengths to attack the testimony of Dr.
Littlefield, likely because it knows the extent to which such testimony lessens the likelihood

1 of a finding of navigability. See County Mem., at 9-18.⁹ Dr. Littlefield's report was never
2 intended or portrayed to be the conclusive determining factor with respect to navigability.
3 That report is what it purports to be—a thorough analysis of historical evidence regarding
4 contemporaneous observations of whether the river was navigable. Dr. Littlefield did not
5 attempt to opine, and did not say he was attempting to opine, about the nuances of the
6 hundreds of federal and state court decisions regarding the “equal footing” and “public trust”
7 doctrines. Unlike Dr. Jackson, Dr. Littlefield limited his opinions to his actual field of
8 expertise.

9 Even the County must recognize the extent to which it has stretched its criticism of Dr.
10 Littlefield's work, ending up with section headings such as “Dr. Littlefield's interpretation of
11 the GLO survey notes is not unambiguously supported by the evidence.” See id. at 10. As
12 with any testimony, a certain amount of Dr. Littlefield's opinions are based upon application
13 of his professional judgment resulting from his extensive education and training and more
14 than twenty-five years of experience in the field. Furthermore, because Proponents bear the
15 burden of proof, any ambiguity must be construed against them, not against Dr. Littlefield or
16 SRP. See A.R.S. § 37-1128(A).

17 Unable to find significant fault in Dr. Littlefield's report, the County nibbles at the
18 edges. The County, for instance, quibbles over the extent to which Dr. Littlefield can be
19 certain that a given surveyor was using a new or old version of the survey manual. See id.
20 Although some amount of uncertainty likely does exist with respect to surveys conducted soon
21 after a new version of the manual was issued given the relative lack of speed of east-west
22 communication during the late 1800s, it is patently reasonable to assume that, if a survey was
23 conducted more than a few weeks after the new manual was issued, the surveyor likely was

24 ⁹ The County's position as a vehement proponent of navigability is curious, especially when one
25 considers that the County apparently has paid large amounts of public money to purchase land and
26 acquire rights-of-way and easements in the bed of the river. See Gila River, Maricopa County
27 Interests (Deeds and Easements) (EI 1). If the County actually believes the river is “navigable,” it
should not have needed to waste those public funds to acquire such interests from the private property
owners. See Ariz. Const. art. 9, § 7.

1 using the new manual. The County's nit-picking with respect to survey manual dates does
2 nothing to lessen the persuasiveness of Dr. Littlefield's report and testimony.

3 The County also takes issue with Dr. Littlefield's testimony regarding the state and
4 federal land patents, contending that they are irrelevant "because the homesteaders did not
5 care whether the river was navigable." Id. at 14. The County's contentions lack merit, for at
6 least two reasons. First, logic suggests that the homesteaders should have cared and did care
7 about whether the river was navigable. If the river was navigable, the State would have a
8 potential claim to title to lands below the ordinary high water marks, thereby reducing the
9 amount of land the homesteader would obtain. The County is incorrect to assume that each
10 and every homesteader and patent officer was entirely ignorant of the law.

11 Second, if the County is correct that "the homesteaders did not care about whether the
12 river was navigable," that assumption means that the homesteaders' statements should carry
13 more weight, not less. If the homesteaders were not aware of the legal ramifications of
14 navigability and how it could affect their property interests, they had less incentive to fabricate
15 information regarding navigability and, thus, their statements should be given more credibility
16 by this Commission.

17 The County also attempts to find fault with Dr. Littlefield's testimony regarding the
18 Desert Land Act, arguing that he was wrong to state that such act required that irrigation water
19 come from a non-navigable stream. Id. at 15. Even the County admits, however, that the
20 United States Supreme Court has interpreted that law to prohibit the use of water from a
21 navigable stream if such use would affect the river's navigability. See id. Even if the County
22 is correct in its view of the case law, it is difficult to imagine how the thousands of acres along
23 the Gila River that were acquired pursuant to the Desert Land Act could have been irrigated
24 with water from the Gila without affecting its navigability. As Proponents argue in this very
25 proceeding, the diversion of water from a river adversely affects its potential navigability.
26 Therefore, even the County's own interpretation of the Desert Land Act supports Dr.
27 Littlefield's conclusion on that issue.

1 The County strains its own credibility when it contends that Dr. Littlefield's
2 "interpretation of history regarding the navigability of rivers should be carefully scrutinized"
3 because, before producing his initial report on the Gila River several years ago, he "had
4 worked on only one other navigability case, had published no books or magazine articles on
5 the subject, had not taken classes on the subject, or taught any classes on the subject." Id. at
6 16. Dr. Littlefield's professional education and experience speak for themselves and are not
7 subject to being assailed by the County. Dr. Littlefield earned a Ph.D. in American history
8 from UCLA in 1987, where his emphasis was on the history of land and water issues in the
9 American West.¹⁰ He has been actively involved in those same matters since that time and
10 has studied navigability issues for a wide variety of rivers in Arizona, California, and Idaho.
11 See Littlefield, supra, at 212-16.

12 The County's criticisms of Dr. Littlefield's background are particularly ironic when
13 one considers the history "expert" the County put on to testify. Dr. Jackson, an associate
14 history professor at a small college in Pennsylvania, has absolutely no prior experience on
15 navigability issues.¹¹ His relevant experience is paltry at best and in no way compares to Dr.
16 Littlefield's extensive work with land and water issues in the West.

17 **B. Dr. August's work is also persuasive evidence of non-navigability.**

18 The County also attempts to attack, to a somewhat lesser degree, the historical work of
19 Dr. Jack August. Among other things, the County accuses Dr. August of misquoting a
20 statement from George Wheeler and taking it out of context. See County Mem., at 19. Even
21 taking the entire quote provided by the County, however, what Mr. Wheeler said supports Dr.
22 August's statement. Even the County must admit that "Wheeler did not speak highly of water
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25 ¹⁰ See Littlefield, Assessment of the Navigability of the Gila River Between the Mouth of the Salt
26 River and the Confluence with the Colorado River Prior to and on the Date of Arizona's Statehood,
February 14, 1912, at 212 (November 3, 2005) (EI 12).

27 ¹¹ See Deposition of Donald C. Jackson, A-Tumbling-T v. Paloma Investment 13 (January 15, 2003)
(EI 22).

1 transportation in the West.” Id. at 20. That is the essence of Dr. August’s testimony on that
2 point.

3 As it did with Dr. Littlefield, the County tries to nit-pick Dr. August’s report, in a
4 desperate attempt to discredit his powerful report and testimony. Such efforts are to no avail,
5 however. When one stacks up the professional credentials and thorough research conducted
6 by Drs. Littlefield and August against the eighteen-page Power Point presentation produced
7 by the County’s historian (Dr. Jackson), the answer is clear. Even if the County did not have
8 the burden of proof (which it does), the historical evidence would weigh clearly in favor of
9 non-navigability.

10 **C. Dr. Schumm’s report and testimony support a finding of non-navigability.**

11 The County is less critical of Dr. Schumm’s report, correctly referring to it as
12 “scholarly work.” County Mem., at 22. The only complaint the County has about Dr.
13 Schumm’s report is that he did not consider the channel in a pre-development condition. See
14 id.

15 No party appears to dispute that the river changed as diversions and other human
16 activities occurred. The river also changed (and continues to change) over time due to natural
17 causes, such as the 1905-06 floods. Dr. Schumm’s report and testimony present the earliest
18 possible data and evidence regarding the geomorphology of the Gila River. Based upon his
19 work, Dr. Schumm concluded that the river was not navigable at statehood.¹² No other party,
20 including Proponents, presented credible geomorphic evidence to the contrary. In fact, Dr.
21 Huckleberry, the State’s own expert, agreed with Dr. Schumm that the river had been braided
22 through most of its existence, with evidence of braiding existing as far back as 798-899 A.D.¹³
23 The testimony of geomorphologists Drs. Schumm and Huckleberry effectively refutes the

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26 ¹² See Schumm, Geomorphic Character of the Lower Gila River 16 (June 2004) (EI 6).

27 ¹³ See Fuller, Arizona Stream Navigability Study for the Gila River: Colorado River Confluence to the Town of Safford III-23 (June 2003) (EI 4).

1 opinion of Dr. Hjalmarson and supports a finding that the braided Gila River was and is non-
2 navigable.

3 **D. Mr. Hjalmarson's testimony does not comport with reality.**

4 SRP discussed the flaws in Mr. Hjalmarson's testimony at length in its opening
5 memorandum and will not repeat those criticisms in the same depth in this response. See SRP
6 Mem., at 19-24. SRP does not suggest that Mr. Hjalmarson was not well-intentioned or
7 truthful. He attempted to do what was asked of him. He did the best he could and, when that
8 was not enough, he revised his opinions to more closely reflect the desired result. See id.

9 The problem with Mr. Hjalmarson's testimony is that it does not comport with the way
10 the Gila River was known to exist at and prior to statehood. The river was, at least in many
11 stretches, not a single meandering, smooth, parabolic channel. It did not actually exist in the
12 form required for Mr. Hjalmarson's assumptions to work. See id. Instead, as the
13 geomorphologists agree, the river was in large part a braided and multiple channel. See
14 Section III(C), supra. The failure of his key assumption substantially negates the credibility
15 and persuasiveness of Dr. Hjalmarson's testimony.

16
17 **E. No credible evidence exists in the record to support a finding that the Gila
was ever actually used as a "highway for commerce."**

18 In an attempt to meet their burden of proof, Proponents stretch the evidence of actual
19 navigation on the river. Examples of specific instances of such exaggerations and
20 mischaracterizations are discussed below:

21 1. The State refers to a 1846 notation in Henry Smith Turner's journal that the
22 river was "quite deep enough to float a steamboat." See SLD Mem., at 3. What is important
23 about this notation, however, is that it specifically refers to the stretch of the river "about
24 eighty miles west of Gila Bend," which corresponds roughly to the Dome Valley area just east
25 of Yuma, where this Commission has previously determined the river is affected by the
26 backwaters of the Colorado River. See generally Phelps Dodge Corporation's Opening
27 Memorandum Following the Hearings of November 16 & 17, 2005, at 23 (February 6, 2006).

1 Thus, Mr. Turner's notation is consistent with prior anecdotal accounts of steamboats from the
2 Colorado River running a short distance up the bed of the Gila in the Colorado's backwaters.
3 Furthermore, even at this extremely western point of the Gila River, Mr. Turner notes that
4 "[t]he Gila is assuming a much more river-like appearance," thus strongly implying that the
5 river did not look like a river further upstream. See Littlefield, supra, at 107.

6 2. The State quotes a selected portion of the 1848 Treaty of Guadalupe Hidalgo
7 and argues that this excerpt means that "the River was navigable when the United States
8 acquired it from Mexico." SLD Mem., at 4. As Drs. Littlefield and August both testified,
9 however, the proper import of this treaty language was simply to provide for cooperation
10 between the United States and Mexico if the river turned out to be navigable. See Tr. at
11 16:200-01 (August), 17:348-49 (Littlefield) Although the treaty language appears to have left
12 open the possibility that the river might be navigable, by no means does it conclusively
13 establish that it was navigable.

14 3. The State refers to several historical accounts that a particular person had to
15 swim to cross the river. See, e.g., SLD Mem., at 5. None of these accounts supports a finding
16 of navigability. Even today, it might be necessary to swim to cross the river during floods or
17 periods of unusually high water, if one is brave (or foolish) enough to do so. Likewise, it has
18 been shown that the Gila is and was an unpredictable and variable watercourse. Therefore, a
19 pool in one location could require swimming to traverse it while another location, perhaps not
20 too far upstream or downstream, could be crossed on foot. That some people on some
21 particular days swam across the river does not make it a "highway for commerce."

22 4. The State cites to Dr. August's testimony, among other things, to support its
23 statement that "[b]efore Anglo settlement of Arizona, the [Gila] River was perennial, with
24 reliable flows sufficient for shallow draft boating throughout the year." SLD Mem., at 10-11.
25 Dr. August's testimony does not support that statement and, in fact, contradicts it. What Dr.
26 August actually said was: "The more common pattern, according to Dr. Meyer, was for the
27 water to sink quickly into the sandy bed and within a short distance, disappear from human

1 sight.” Tr. at 16:163-64. A river that has “disappear[ed] from human sight” is not one that
2 has “reliable flows sufficient for shallow draft boating throughout the year” and is not one that
3 is susceptible to use as a “highway for commerce.”

4 5. The State notes the existence of ferries at certain locations along the river during
5 certain years. See SLD Mem., at 13. The State then leaps to the conclusion that, if there are
6 ferries, the river must have a single natural channel. Id. It is true that ferries are not often
7 located in a reach of a river having multiple or braided channels. It is also true, however, that
8 the fact that a single-channeled portion of the river exists sufficient for a ferry to cross does
9 not mean that the entire length of the river consists of a single channel and is not braided. The
10 Commission will recall this situation with respect to the Hayden Ferry on the Lower Salt
11 River, which was located at a particular point in the river where bedrock created a pinch point
12 and a single channel, even though much of the remainder of the river upstream and
13 downstream was braided.¹⁴

14 6. With respect to early diversions of water for irrigation, the State contends that
15 the diversions were much higher than those listed in the 1935 Globe Equity Decree because
16 “only some of the rights established in prior decrees were adjudicated in the [Globe Equity]
17 Decree.” SLD Mem., at 13 n.17. In fact, as recently determined by the Arizona Supreme
18 Court, it is clear that all rights to divert water from the Gila River between a point ten miles
19 east of the Arizona/New Mexico state line and another point just upstream from the
20 confluence of the Gila and the Salt were adjudicated in the 1935 Decree. See generally In re
21 General Adjudication of All Rights to Use Water in the Gila River System and Source, 2006
22 WESTLAW 14848 (Feb. 9, 2006). The State’s contention that the amount of water for which
23 rights were decreed in Globe Equity is somehow indicative of the amount of water that

24 ¹⁴ The State cites Mr. Hjalmarson’s “confidential notes” to support its argument. See Hjalmarson,
25 “Confidential Notes: The Ability to Navigate the Gila River Under Natural Conditions, Below the
26 Confluence with the Salt River to the Mouth at Yuma, Arizona” (July 2001) (EI 25). In many other
27 places in that same set of “confidential notes,” however, Mr. Hjalmarson recognizes that the Gila
River was braided in many reaches. See SRP Mem., at 22-23.

1 otherwise would have flowed down the river on a regular basis is likewise meritless,
2 especially when one considers that many of the rights listed in that decree remain unsatisfied
3 in some or most years. See id.

4 7. The State takes another quantum leap, when it argues that (a) Apaches are
5 known to have lived near the Gila River and (b) Chiricahua Apaches are know to have used
6 crude boats on other rivers, so therefore (c) some Apaches must have used boats on the Gila
7 River. See SLD Mem., at 15. Notwithstanding the State's ethnocentric and erroneous view of
8 assuming all Apaches are alike, it is also true that there is no evidence in the record that any
9 Apaches (Chiricahua or otherwise) or any other Native Americans ever used boats on the Gila
10 River.

11 Despite their best efforts to fortify the available evidence, Proponents have not satisfied
12 their burden of proof to show that the Gila River is or was navigable.

13
14 **IV. The Commission Should Not Consider Evidence Introduced After Completion of
the Hearings.**

15 Proponents attempt to introduce evidence through their post-hearing memoranda that
16 was not included in the record in the hearings before the Commission. The Commission's
17 rules provide for the closing of evidence on a particular watercourse at the conclusion of the
18 hearing. See A.A.C. R12-17-108.01. The Chairman closed the taking of evidence at the
19 conclusion of the November 15 hearing, and no additional evidence may be submitted after
20 that time. The parties had several years to locate and submit evidence on the Gila River, and
21 it is patently unfair for one or more parties to attempt to circumvent this Commission's rules
22 by attaching or referring to additional documents in their post-hearing memoranda. The
23 failure to introduce the items as evidence precludes the other parties from having an
24 opportunity to cross-examine or present witnesses to refute any shortcomings in the
25 documents.

26 The following documents do not appear in the index of evidence prepared by the
27 Commission and were not introduced as evidence at or before the hearings:

1 1. Goode P. Davis, Jr., Man and Wildlife in Arizona: The American Exploration
2 Period 1824-1865 (2d. ed. 1986). This document is cited by the County on page 8 of its
3 opening post-hearing memorandum. Although Mr. Weedman made a passing reference to this
4 book in his testimony, no party introduced it as evidence. SRP does not object to Mr.
5 Weedman's testimony, but does object to the additional reference to the book itself in the
6 County's memorandum.

7 2. Linda Sue Pelen, Land Laws, Water Monopoly, and Lewis Wolfley in Gila
8 Bend, Arizona (M.A. thesis, Arizona State University, 1997). The County cites this document
9 on page 13 of its memorandum. It was neither referred at the hearing nor introduced as
10 evidence before the Commission.

11 3. "Arizona Department of Water Resources' Briefing Report on HSR
12 Investigations of Globe Equity No. 59 Rights," In re General Adjudication of Gila River
13 System and Source (April 1993). This document is cited as evidence on page 5 of the State's
14 memorandum, but was neither referred to nor introduced as evidence at the hearing.

15 4. George McNamee, Gila: Birth and Death of an American River. The County
16 cites and quotes from this book on page 22 of its memorandum. The book is not part of the
17 record in this case.

18 5. The State's "Figure 1" was not introduced in evidence and is not part of the
19 record in this proceeding.

20 SRP respectfully requests that the Commission disregard these belated evidentiary
21 submissions. SRP further requests that any references to these documents be formally stricken
22 from the record, for purposes of preserving the integrity of the record in this matter for any
23 appeal. See A.A.C. R12-17-107(C).

24 **V. Summary and Requested Action**

25 No credible evidence in the record supports a finding that the Gila River is, was at
26 statehood, or ever has been used or susceptible to being used as a "highway for commerce."
27 The Commission should find the river "non-navigable."

1 DATED this 27th day of February, 2006.

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12 Arizona Navigable Stream Adjudication Commission
13 1700 West Washington, Suite 304
14 Phoenix, AZ 85007

15 AND COPY mailed this 27th day of February, 2006 to:

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