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8 **BEFORE THE ARIZONA NAVIGABLE STREAM**

9 **ADJUDICATION COMMISSION**

10 In re Determination of Navigability of the
11 Gila River

) No. 03-007-NAV

) **OPENING POST-HEARING
MEMORANDUM OF THE SAN CARLOS
APACHE TRIBE TO DETERMINE
WHETHER THE GILA RIVER WAS
NAVIGABLE AT THE TIME OF
ARIZONA'S STATEHOOD**

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18 The Arizona Navigable Stream Adjudication Commission (the Commission) held a
19 hearing on November 16 and 17, 2005, in Phoenix, Arizona, to determine whether the Gila River
20 was navigable as of February 14, 1912, the date of Arizona's statehood, pursuant to the federal
21 test to determine "navigability for title" under the equal footing doctrine.

22 The San Carlos Apache Tribe ("Apache Tribe" or "Tribe"), submits its Opening
23 Memorandum, and respectfully requests that the Commission determine that the Gila River is
24 non-navigable for the reasons stated below.

25 **A. The Legal Test Under the Federal Test to Determine "Navigability for Title"
Under the Equal Footing Doctrine**

26 To determine "navigability for the title of the Gila River", the Commission should apply a
27 three part federal test: (1) "Those rivers must be regarded as public **navigable** rivers in law which
28 are **navigable in fact**. And they are **navigable in fact** when they are **used, as highways for**

1 commerce, over which trade and travel are or may be conducted in the customary modes of
2 trade and travel on waters.” [Emphasis added]. *The Daniel Ball*, 77 U.S. 557, 563 (1870)¹; (2)
3 It must have been navigable “in its natural and ordinary conditions”. *Oklahoma v. Texas*, 258
4 U.S. 574 (1922)² [Emphasis added]; and (3) at the time of Statehood.³

5 These criteria will be discussed in order below.

6 1. Navigable In Fact When Used As Highways For Trade and Travel

7 The federal test for navigability was first set forth in the case of *The Daniel Ball*, 77
8 U.S. 557, 563 (1870):

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

15 The *Daniel Ball* test requires that a river was used, or was “susceptible” of being used,
16 as a “highway for commerce,” because the *Daniel Ball* navigability test was developed based
17 upon the assertion of federal jurisdiction under the Commerce Clause of the U.S. Constitution,
18 Article I, § 8, to regulate interstate commerce.

19 In *The Montello*, 87 U.S. 430 (1874), another case testing Congress’ power to regulate
20 under the Commerce Clause, the U.S. Supreme Court further elaborated on the *Daniel Ball* test
21 to determine “navigability”:

22 ¹The Tribe will submit a separate brief on the requirement of “commerce” and its
23 meaning on February 27, 2006 pursuant to ANSAC Information Update, January 31, 2006.

24 ²While the evidence relating to the part of the river in the eastern half of the State is not
25 so conclusive against navigability as that relating to the western section, we think it establishes
26 that trade and travel neither do nor can move over that part of the river, in its natural
27 and ordinary condition....Its characteristics are such that its use for transportation has
28 been and must be exceptional, and confined to the irregular and short periods of
essential to establish navigability. [Emphasis added]. *Id.* at 591.

³*United States v. Holt State Bank*, 270 U.S. 49 (1926); *United States v. Utah*, 283 U.S. 64,
75, 83 (1931); *State of Oregon v. Riverfront Protection Association*, 672 F.2d 792, 795 (9th Cir.
1982); *Land Department v. O’Toole*, 154 Ariz. 43, 44, 739 P.2d 1360, 1361 (App. 1987) (“The
federal Equal Footing Doctrine grants each state property rights to the riverbeds of all its
waterways which were navigable on the date of statehood”); *Arizona Center for Law in the Public
Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158, 165 (App. 1991); and *Defenders of Wildlife v.
Hull*, 199 Ariz. 411, 18 P.3d 722 (App. 2001).

1 The capability of use by the public for purposes of transportation
2 and commerce affords the true criterion of the navigability of a
3 river, rather than the extent and manner of that use. **If it be**
4 **capable in its natural state of being used for commerce, no**
5 **matter in what mode the commerce may be conducted,** it is
6 navigable in fact, and becomes in law a public river or highway.
7 [Emphasis added].

8 *Id.* at 441.

9 The court in *The Montello*, quoting a Massachusetts Supreme Court opinion, *Rowe v.*
10 *The Granite Bridge Corporation*, 38 Mass. (21 Pickering at 344) 344, 347 (Mass. 1838),
11 stated that **“It is not...every small creek in which a fishing skiff or gunning canoe can be**
12 **made to float at high water which is deemed navigable,** but, in order to give it the character
13 of a navigable stream, **it must be generally and commonly useful to some purpose of trade**
14 **or agriculture.”** [Emphasis added]. *Id.* at 442. The *Montello* court further explained that
15 **“...the vital and essential point is whether the natural navigation** of the river is such that it
16 **affords a useful commerce.** If this be so the river is navigable in fact, although its navigation
17 may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-
18 bars.” [Emphasis added]. *Id.* at 443. Both *The Daniel Ball* and *The Montello* cases therefore
19 require a “highway for commerce,” or “useful commerce,” as part of the navigability test.

20 All of the U.S. Supreme Court cases and lower federal court cases, including the Ninth
21 Circuit Court of Appeals, applying and following the *Daniel Ball* and the *Montello* tests to
22 determine “navigability for title” under the equal footing doctrine, have required commercial
23 use in fact, or susceptibility for commercial use, at the time of statehood.

24 In *United States v. Oregon*, 295 U.S. 1 (1935), the Supreme Court held that three lakes
25 in Oregon were non-navigable because “The Special Master found that the boating which took
26 place in the area involved had no commercial aspects...” The Supreme Court in *Oregon*
27 squarely held that non-commercial private recreational boating for the purposes of trapping and
28 duck hunting in the spring and fall was insufficient to establish navigability for title purposes
29 (“The boats were all of light draft, those most in use being canvas canoes or homemade
30 rowboats drawing between one and six inches of water.”). *Id.* at 21.

31 The Supreme Court in *Oregon* held that these facts “...establish an absence of that
32 capacity for general and common usefulness for purposes of trade and commerce which is

1 essential to navigability,” and that “[a]t most the evidence shows such an occasional use of
2 boats, sporadic and ineffective, as has been observed on lakes, streams, or ponds large enough
3 to float a boat, but which nevertheless were held to lack navigable capacity,” citing *The*
4 *Montello, Rio Grande Dam*,⁴ and *Oklahoma v. Texas*⁵ cases as controlling federal law. *Id.* at
5 23.

6 Similarly, the Ninth Circuit Court of Appeals has ruled in several cases that commerce
7 is an essential requirement for the “navigability for title” test. For example, in *Ahtna*, the
8 lower 30 mile stretch of the Gulkana River in Alaska was at issue. The flow of the river in this
9 stretch was 3,600 to 4,800 c.f.s. from May to September, and an average of three feet deep.
10 Commercial recreational craft including aluminum powerboats and inflatable rafts were used
11 since the 1970's for guided fishing and sightseeing trips, and the Ninth Circuit observed “A
12 substantial industry of such **transportation for profit** emerged in the lower Gulkana, which
13 industry today employs 400 people.” [Emphasis added]. *Id.* at 1405. The court held in *Ahtna*
14 that “[u]nder the facts of this case, we think the present use of the lower Gulkana is
15 **commercial** and provides conclusive evidence of the lower Gulkana’s **susceptibility for**
16 **commercial use at statehood**. [Emphasis added]. *Id.* *Ahtna* held that commercial use is a
17 required element of the federal criteria to determine navigability under the equal footing
18 doctrine.

19 In *Adams v. The Montana Power Company*, 528 F.2d 437 (9th Cir. 1975), the Ninth
20 Circuit similarly held that commerce under the *Daniel Ball* test requires commercial activity
21 and commercial craft, and that non-commercial recreational boating use by fisherman, water
22 skiers, or pleasure boaters, cannot satisfy the commerce requirement under the *Daniel Ball* test.
23 The Ninth Circuit observed that for admiralty jurisdiction “[n]either **non-commercial fishing**
24 **nor pleasure boating nor water skiing constitutes commerce**.” [Emphasis added]. *Id.* at
25 438.

26 A finding of navigability under the equal footing doctrine therefore requires sustained
27

28 ⁴*United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690 (1899).

⁵*Oklahoma v. Texas*, 258 U.S. 574 (1922).

1 beneficial commercial use. Non-commercial recreational boating, such as, for example,
2 canoeing, rafting, or kayaking, for personal pleasure, cannot satisfy the commercial
3 navigability requirement under the *Daniel Ball* test.

4 **2. There Must Be Evidence of Commercial Navigability or Susceptibility**
5 **for Commercial Navigability Under “Natural and Ordinary**
6 **Conditions”**

6 In *United States v. Rio Grande Dam and Irrigation Company*, 174 U.S. 690 (1899),
7 another Commerce Clause case, the Supreme Court held that “...the mere fact that logs, poles
8 and rafts are floated down a stream occasionally and in times of high water does not make it a
9 navigable river,” citing and relying on *The Montello* case. *Id.* at 698. The court also stated
10 that “[its] use for any purposes of transportation has been and is exceptional, and only in times
11 of temporary high water. **The ordinary flow is insufficient.**” [Emphasis added]. *Id.* at 699.

12 Thus, under the federal test for navigability for title determinations under the equal
13 footing doctrine, commercial navigation is required, and it must take place during the
14 “ordinary flow” or “ordinary condition” of a river, and not just during times of “high flows.”

15 In *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Supreme Court determined that the
16 Red River in Oklahoma was non-navigable under the equal footing doctrine, applying the
17 *Daniel Ball*, and *Montello* federal cases and standards to determine navigability. *Oklahoma v.*
18 *Texas* is a very significant case for navigability determinations in Arizona because the facts
19 reported in the case regarding the Red River are very similar to the conditions of most rivers in
20 Arizona, including the Gila River.

21 The Supreme Court in *Oklahoma* explained that in the stretch of the Red River in the
22 western half of the state, the Red River gauge at Denison ranged between zero and 1 foot, and
23 that there were only 42 days during the year 1910 (Oklahoma was admitted as a state in 1907)
24 on which this gauge read 2 feet or over, and only 81 days on which it read 1 foot or over, and
25 that an examination of the river from a flat bottom bateau drawing 5 and ½ inches of water
26 when loaded was very difficult because of sand bars. The Supreme Court then held, based on
27 this evidence that:

28 We regard it as obvious that in the western half of the State the river
 is not susceptible of being used in its natural and ordinary

1 **condition as a highway for commerce**; and there is no evidence
2 that in fact it ever was so used. [Emphasis added].

3 *Id.* at 588.

4 The Supreme Court then reviewed the conditions of the Red River in Oklahoma in the
5 eastern part of the state where the Red River receives additional waters from the Washita and
6 other tributaries and “has a practically continuous flow of varying volume, the extreme
7 variation between high and low water being about thirty feet.” *Id.* at 589. The Court held that
8 the Red River was non-navigable in the eastern stretch as well, based upon the following
9 evidence:

10 **At all times there is an almost continuous succession of shifting**
11 **and extensive sand bars.** Ordinarily the depth of water over the
12 sand bars is from six to eighteen inches and elsewhere from three to
13 six feet. **There is no permanent or stable channel.** Such as there
14 is shifts irregularly from one side of the bed to the other and not
 infrequently separates into two or three parts. **Boats with a**
 sufficient draft to be of any service can ascend and descend only
 during periods of high water. These periods are intermittent, or
 irregular and short duration, and confined to a few months in
 the year. [*Oklahoma* at p. 589]. [Emphasis added].

15 The Supreme Court also recognized that near the eastern Oklahoma boundary before
16 railroads were extended into that section, there had been boats of light draft carrying
17 merchandise in that vicinity of the Red River, but only in periods of high water and then with
18 some difficulty. The Supreme Court then held that the eastern stretch of the Red River was
19 non-navigable as well:

20 Thus, the commercial navigability of the Gila River must be determined under its
21 “natural and ordinary condition” at the time of statehood, and not during temporary periods of
22 high water flows.

23 While the criteria under the federal *Daniel Ball* test adopted under the Commerce Clause,⁶

24 _____
25 ⁶The Commerce Clause, Article I, Section 9 of the U.S. Constitution, provides in part
26 that Congress shall have the power “To regulate Commerce with foreign Nations, and among
27 the several States, and with the Indian tribes.” The holdings of the Supreme Court in *The*
28 *Daniel Ball*, 77 U.S. 557 (1870); *The Montello*, 87 U.S. 430 (1874); and *United States v. Rio*
 Grande Dam and Irrigation Company, 174 U.S. 690 (1899), were based on the constitutional
 power of Congress to regulate interstate commerce under the Commerce Clause. All of the
 U.S. Supreme Court “navigability for title” cases were decided thereafter, but adopted the
 Daniel Ball federal criteria in general to determine navigability under the equal footing
 doctrine, except that navigability of a river must also be determined at the time of statehood

1 in general apply to “navigability for title” determinations, the criteria are also different because of
2 the addition requirement under the “equal footing” doctrine be determined as of the date that a
3 state is admitted to the Union. This restriction in time does not apply to navigability
4 determinations made under the Commerce Clause exclusively to regulate interstate commerce.

5 3. Navigability at the Time of Statehood Under “Equal Footing”

6 a. Burden of Proof

7 The proponents of navigability have the burden of proof to establish that the Gila River is
8 navigable under the equal footing doctrine.⁷

9 “Equal footing” among states is not expressly stated in the United States Constitution. In
10 fact, efforts to expressly require equality were deleted in the draft Constitution by a vote of nine
11 (9) to two (2) states. *M. Farrand, The Records of the Federal Constitution of 1878* (New Haven;
12 rev. ed. (1937)), 454, 455.

13 The equal footing doctrine is based on the English common law that the English Crown
14 held sovereign title to all lands underlying navigable waters. The thirteen original states
15 succeeded to the title of such submerged lands within their boundaries, as the sovereign
16 successors to the English Crown, prior to the adoption of the U.S. Constitution. *See Martin v.*
17 *Waddells’ Lessee*, 41 U.S. 367 (1842). Subsequently admitted States entered the Union on an
18 “equal footing” with the original thirteen states under federal common law. Therefore, most
19 states are found to hold title to land under navigable waters within their boundaries at the time of
20 their entry into the Union. *See Pollard v. Hagan*, 44 U.S. 212 (1845).

21 The equal footing doctrine is not based upon the Commerce Clause. If a river is navigable
22 at the time of statehood, title to the “banks and beds” of navigable streams is usually found to
23 have vested in a state at the time it is admitted to the Union. Thereafter, questions of the state’s
24 title to the underlying lands are generally controlled by each state’s law, not federal common law.
25 *See Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), overruling *Bonelli Cattle Co.*
26 *v. Arizona*, 414 U.S. 313 (1973).

27 _____
28 under the equal footing doctrine.

⁷*See Hassell*, 156 Ariz. at 363, fn.10, and A.R.S. § 37-1128(A).

1 The federal government can under the Property Clause to the U.S. Constitution,⁸ however,
2 defeat a prospective state's title to land under navigable waters at the time it is admitted to the
3 Union, by a pre-statehood conveyance to a private party, or by a pre-statehood express reservation
4 of such land by Congress which clearly and expressly defeats a prospective state's title to such
5 land. *See Utah Division of State Lands v. United States*, 482 U.S. 193, 201 (1987).

6 The proponents of navigability have the burden of proof to establish that the Gila River is
7 navigable under the equal footing doctrine.

8 In *State of Oregon v. Riverfront Protection Association*, 672 F.2d 792, 795 (9th Cir. 1982),
9 the Ninth Circuit Court of Appeals noted that the federal criteria to determine navigability under
10 the Commerce Clause, substantially differs from the federal criteria to determine navigability
11 under the equal footing doctrine:

12 **Navigability for title to riverbeds differs in three important**
13 **respects from navigability for federal regulatory jurisdiction over**
14 **power plants under the Commerce Clause. The former must exist**
15 **at the time the State is admitted into the Union. Also, it must exist**
16 **in the river's ordinary condition**, see *United States v. Utah*, 283
17 U.S. 64, 75-76, 51 S. Ct. 438, 440-41, 75 L. Ed. 844 (1931); **it cannot**
18 **occur as a result of reasonable improvements.** This is not the case
19 in federal power plant licensing. See *United States v. Appalachian*
20 *Electric Power Co.*, 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243
21 (1940). [Emphasis added].

22 The Commerce Clause gives the federal government a "dominant servitude" to regulate
23 interstate navigable waters, even where states have already taken title to lands underlying such
24 navigable rivers under the equal footing doctrine. *See United States v. Cherokee Nation of*
25 *Oklahoma*, 480 U.S. 700 (1987).

26 In fact, in *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), the Supreme Court
27 described the plenary power of Congress to regulate its waters under the Commerce Clause, as
28 broadly described in *Appalachian Electric*, as not limited to control for navigation, and not
dependent on a river's "navigability," as follows:

Appalachian Power Co. indicates that congressional authority over
the waters of this Nation does not depend on a stream's

⁸The Property Clause to the U.S. Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...." U.S. Constitution, Art. IV, § 3, cl. 2.

1 “navigability.” **** The cases that discuss Congress’ paramount
2 authority to regulate waters used in interstate commerce are
3 consequently best understood when viewed in terms of more
4 traditional Commerce Clause analysis than by reference to
5 whether the stream in fact is capable of supporting navigation or
6 may be characterized as “navigable waters of the United States.”
7 [Emphasis added].

8 “Navigability for title” cases are therefore not governed by the plenary power of Congress
9 under the Commerce Clause to regulate interstate commerce, and must therefore be clearly
10 distinguished from Commerce Clause cases.

11 Under the equal footing doctrine, the navigability of a river must therefore be determined
12 based upon its existing condition at the time of statehood, and not based upon its condition under
13 pre-development virgin conditions prior to statehood, as argued by proponents.

14 In *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 418, 18 P.3d 722, 729 (2001), the court
15 warned that “A federal determination of ‘navigability’ may serve many different purposes, the
16 three most typical being: to confer admiralty jurisdiction, to define Congress’ reach under the
17 commerce power, and to grant title under the equal footing doctrine.”

18 The *Hull* court expressed its warning to differentiate these three different types of cases in
19 which a determination of navigability is required, as follows:

20 Because of the variant circumstances in which navigability is raised,
21 the cases interpreting navigability “cannot be ‘simply lumped into one
22 basket.’” **** **Indeed, when discussing navigability, any reliance
23 on judicial precedent should be predicated on a careful appraisal
24 of the purpose for which the concept of navigability is invoked.**
25 **** For the present purpose, navigability is being used to determine
26 the extent of land the State of Arizona received by virtue of the equal
27 footing doctrine. [18 P.3d at 729].

28 The *Hull* court was absolutely correct in distinguishing the “variant circumstances in
which navigability is raised,” and “the purpose for which the concept of navigability is invoked.”

b. Evidence

The “evidence” before the Commission regarding the navigability of the Gila River
covered the entire reach of the Gila River from the eastern border of Arizona to its confluence

1 with the Colorado River.⁹

2 The "ordinary condition" is best represented hydrologically by the median flow, not the
3 average flow of the Gila River. See testimony of Allen Gookin "You've got to look at the
4 median flows to get anything resembling a typical flow." TR 16:230.

5 There is no Historical Evidence of Commercial Navigation of the Gila Prior to or at the
6 Time of Statehood before the Commission.

7 At the November 16, 2005 hearing, Dennis Gilpin, testified on behalf of the Arizona State
8 Land Department regarding evidence of historical boating on the Gila River. He testified that
9 there were nine accounts of boating identified along the entire Gila River between 1846 and the
10 time of statehood, a period of 68 years. TR at 16:37. None can be described as beneficially
11 fulfilling any commercial purpose, most are exploratory and recreational in nature, and only a few
12 might be described as successful.

13 The first recorded attempt to boat the Gila River was by the Mormon Battalion in 1846 to
14 float some of their supplies down the Gila River starting at about 70 miles above the mouth of the
15 Gila River. The raft went aground and they were forced to leave their supplies. TR at 16:38. Mr.
16 Gilpin testified that "It was not a successful experience." TR at 16:38. There is an anecdotal
17 report next in 1849 that the Edward Howard party floated down the Gila River from Gila Bend to
18 Yuma. No other details are available. Then in 1850, there is an unsigned letter to the New York
19 Tribune reporting that some '49rs had successfully floated some supplies down the Gila River.
20 There are not any other contemporaneous reports documenting this practice, however, during this
21 period of time. There are then no other reports of any other boating on the Gila River for a period
22 of 17 years.

23 In 1867, there is then a report concerning the use of a ferry to cross the Gila River near
24 Maricopa Wells which was used 25 years, but it is unknown whether the ferry was used under

25
26 ⁹Two separate statutory reports were prepared on behalf of the Arizona State Land
27 Department, the "Arizona Stream Navigability Study for the Gila River: Colorado River
28 Hydrology & Geomorphology, referred to respectively herein as "ASLD Study 1," the lower Gila
River; and "ASLD Study 2," the upper Gila River, admitted as E-4 and E-2 (Evidence Log).

1 “ordinary conditions,” or only just during “high flows” of the Gila River to cross the river.

2 In *North Dakota v. United States*, 972 F.2d 235, 239 (8th Cir. 1992), the Eighth Circuit
3 Court of Appeals rejected evidence of the use of ferries to cross the Little Missouri River to
4 demonstrate navigability under the equal footing doctrine, holding that:

5 The ferries functioned much like bridges where funds were not
6 available to construct traditional bridges. **The ferries were used only
7 to provide transportation across the River; they were not used for
8 transportation up or down the River.**¹⁰ [Emphasis added].

9 There are no other reports of boating on the Gila River until the 1880's when there were a
10 handful of exploratory or recreational boating trips reported, the most famous being the William
11 “Buckey” O’Neill trip from Phoenix to Yuma in 1881, in a boat named “Yuma or Bust.” The
12 Phoenix Gazette reported that the three men had to wade in the water most of the time and push
13 the boat ahead of them. In 1881, two men, Cotton and Bingham, were reported to be planning to
14 take a boat trip to Yuma, but as Mr. Gilpin testified, “We really don’t know whether that was
15 successful or not.” TR 16:40.

16 There is then a report in 1895 in the *Arizona Sentinel* of two persons named Evans and
17 Adams who boated the Gila River in January and February of 1895 from Clifton to Sacaton, then
18 transported the boat overland on a train to Phoenix, and boated from there to Yuma. Evans
19 reported that “I would not engage to make the trip down [the Gila’s] hazardous waters again.”
20 ASLD Study 1 at p. IV-8, E-4. Their boat had to be lowered through rapids and boulders and was
21 damaged, and had to be repaired. Jon Fuller testified that this occurred just below San Carlos¹¹

22 ¹⁰While there are several other reports of ferries used to cross the Gila River prior to
23 statehood, they are not reviewed herein, because it is unknown if such ferry use only occurred
24 during “high flows,” or under “ordinary conditions.” TR 16:72. In addition, evidence of use
25 of ferries to cross a river functioning like a bridge does not satisfy the federal criteria to
26 establish navigability. *North Dakota v. United States*, 972 F.2d 235, 239 (8th Cir. 1992). In
27 1889, when there was an attempt for the first reported time to navigate a ferry down the Gila
28 River from the Maricopa Wells Fair to Gila Bend, the ferry hit a snag and broke in half. TR
16:40. There are no other reports of ferries being used for upstream or downstream
commercial use prior to statehood, although they were widely used on the Colorado River
prior to statehood in that stretch determined to be navigable in *Arizona v. California*, 283 U.S.
423 (1931).

¹¹San Carlos as described here is the old town of San Carlos located on the San Carlos
Apache Reservation next to the Gila River. San Carlos was totally inundated after Coolidge
Dam was completed in 1928, and was relocated next to the San Carlos River about ten miles
north of the Gila River.

1 when they went through the canyon there, and “actually, I think, broke the front half of their boat
2 off and had to line the boat through.” TR 16:74. See Evan and Adams report describing the boat
3 wreck near San Carlos, ASLD Study 2, E-2 at p. 3-28. Mr. Gilpin describes all of the reported
4 boating trips in the 1880's as “recreational attempts at boating the Gila River.” TR16:39.

5 Mr. Gilpin testified that in 1889 there was a ferry boat launched far below the Apache
6 Reservation at the Maricopa Wells Fair that was boated down to Gila Bend to be used as a ferry
7 there, but “that it hit a snag and broke in half.” TR16:40.

8 There are only a handful of other anecdotal reports of boating attempts between 1889 and
9 the time of statehood. In 1905, there are three reported unsuccessful attempts to boat the Gila
10 River. ASLD Study 1 at IV-13 (E-4), and one boat actually capsized and lost its cargo. The last
11 reported boat trip is in 1909 when a canoe trip was taken by Stanley Sykes down the Gila River,
12 but it is unknown what time of year the trip was taken, or what the condition of the Gila River
13 was then. TR16:77.

14 There is also no evidence that any Native American Indians from either the San Carlos
15 Apache Tribe or Gila River Indian Community ever used the Gila River prior to statehood for any
16 kind of boating or canoeing, even though the Gila River runs through the San Carlos Apache
17 Reservation and Gila River Indian Reservation. TR16:47; 16:67; and 16:247. There is also no
18 evidence that any trappers boated the Gila River in the 1880's. TR16:69.

19 Thus, the sparse anecdotal boating evidence on the Gila River reviewed above does not
20 establish that there was any successful commercial boating on the Gila River prior to or at the
21 time of Arizona's statehood. In addition, almost all of the exploratory or recreational boating
22 trips reported were unsuccessful. It is also unknown whether these boating trips were taken under
23 “ordinary conditions,” or just during “high flows.”

24 There are only two reported boating trips on the Gila River that could have passed through
25 the San Carlos Apache Reservation prior to statehood. The 1895 Evans and Adams trip where
26 their boat broke in half in the rapids and boulders just below San Carlos, and the 1905 Stanley
27 Sykes canoe trip, reviewed above. This historic boating evidence is therefore woefully inadequate
28 to prove by a preponderance of the evidence, that the Gila River was commercially navigable

1 under the equal footing doctrine, on any reach of the Gila River, especially the stretch running
2 through the San Carlos Apache Reservation, prior to or at the time of statehood.

3 Douglas R. Littlefield, Ph.D., an expert and highly credible historian submitted an
4 extensive report dated November 3, 2005 (E-12)¹² on the question of the navigability of the Gila
5 River prior to and at the time of Arizona's statehood. He also testified at the hearing. Dr.
6 Littlefield examined thousands of historical documents relating to the navigability of the Gila
7 River prior to and at the time of Arizona's statehood, including federal government surveys and
8 field notes, federal government homestead patents, and historical government records describing
9 the Gila River prior to Arizona's statehood. His report and testimony reflects the fact that the
10 Gila River was always considered and treated by various federal government officials performing
11 their duties, as a non-navigable river, at all times prior to and at the time of Arizona's statehood,
12 as witnessed in the federal government surveys, plats, and field notes;¹³ the federal government
13 land patents to individuals that touched or overlaid the Gila River; and in the federal
14 government historical reports and records.

15 Dr. Littlefield concludes in his report:

16 **From this wealth of information, covering a huge array of**
17 **documentary sources, only one conclusion can be reached. The**
18 **Gila River was not navigable or susceptible to navigation on or**
19 **before February 14, 1912. [E12 at 136].**

20 Dr. Littlefield's exhaustive historical research strongly corroborates the historical boating
21 evidence that the Gila River was non-navigable prior to and at the time of Arizona's statehood.¹⁴

22 ¹²Dr. Littlefield's report is entitled, "Assessment of the Navigability of the Gila River
23 Between the Mouth of the Salt River and the Confluence With the Colorado River Prior To and
24 On the Date of Arizona's Statehood, February 14, 1912," dated November 3, 2005.

25 ¹³The lack of the meandering of the Gila River by U.S. government surveyors while not
26 conclusive or presumptive evidence of the non-navigability of the Gila River, nevertheless, is
27 highly relevant probative evidence of the fact of the non-navigability of the Gila River, since
28 these federal surveyors were required as part of their duties to meander navigable rivers. See
Oklahoma v. State of Texas, 258 U.S. 574, 585 (1922), fn.2, citing *Gauthier v. Morrison*, 232
U.S. 452 (1914).

¹⁴The oral histories contained in ASLD Study 1 also strongly corroborate the fact that
there was not any navigation on the Gila River prior to statehood. For example, see 1993
Statement of Daniel Colvin, from Eden, Arizona, located not far upstream from the San Carlos
Apache Reservation, "As a boy [prior to statehood], I saw no commercial use of the Gila River
between San Jose and Sunnyside." ASLD Study 1 at V-3 (E-4). Also, Mr. Colvin states, "In my

1 In addition, another well known expert historian, Jack L. August, Ph.D.,¹⁵ submitted an
2 expert witness report, also concluding that the Gila River was non-navigable prior to and at the
3 time of Arizona's statehood. His report reviews many of the historical federal government reports
4 which all treated the Gila River as non-navigable at anytime prior to or at the time of statehood.
5 His report also documents the fact based on federal government reports that the Gila River was
6 often subject to massive flooding, and at other times dry in many of its reaches. See E-17 at pp.
7 19-21, for example, citing *The Twelfth Annual Report of the U.S. Geological Survey*, published in
8 1891. In his report, Dr. August concludes:

9 **The overwhelming evidence suggests that since modern settlement**
10 **began in Arizona in the mid-nineteenth century, the Gila River**
11 **was a non-navigable stream. The documentary evidence, daunting**
12 **in its size and scope—from unpublished and published sources,**
13 **federal, state, and territorial records, diaries, newspapers, journals, and**
14 **a variety of other archival sources—is irrefutable. [E17 at pp. 34-35].**
15 **[Emphasis added].**

16 Dr. August testified at the hearing that in his opinion, all of these historical reports
17 demonstrate that the Gila River was non-navigable from the border of New Mexico to its
18 confluence with the Colorado River prior to and at the time of statehood. TR16:175.

19 Thus, all of the historical evidence overwhelmingly demonstrates that the Gila River was
20 in fact non-navigable prior to or at the time of Arizona's statehood.

21 The evidence shows that the hydrological and geomorphic conditions of the Gila River at
22 the time of Statehood precluded commercial navigation. Most of the expert witnesses that
23 testified at the hearing concurred that at the time of Arizona's statehood, the Gila River was non-
24 navigable. Thus, even Hjalmar Hjalmarson, a hydrologist retained by Maricopa County, and a
25 proponent of the navigability of the Gila River, admitted in his testimony that the Gila River was
26 non-navigable at the time of Arizona's statehood. For example, Mr. Hjalmarson was asked
27 whether he had an opinion as to whether the Gila River, at the junction of the Gila River and the

28 90 years of living in Eden, I have seen a lot of things, but the use of the Gila River for navigation
was not one of them.”

¹⁵Dr. August is the Executive Director of the Arizona Historical Foundation, Hayden
Library, Arizona State University. His report is entitled “The Lower Gila River: A Non-
Navigable Stream on February 14, 1912” (E-17).

1 Salt River, was navigable at the time of Arizona's statehood. Mr. Hjalmarson responded:

2 No—okay, I think there were some pools and stuff in there so you
3 might be able to go around a little pond, **but no, not navigable in the**
4 **context of what we're talking about.** [TR17:327]. [Emphasis
5 added].

6 The Gila River was clearly non-navigable at the time of statehood. The Anglo-American
7 farmers who arrived in the mid-1880s, built canals along the Gila River and diverted all of the
8 water from the Gila River for farming purposes. Mr. Hjalmarson testified in his deposition taken
9 January 26, 2003, that because of these canals and diversions, the Gila River was dry in the
10 reaches downstream from these diversions:

11 After about 1860, Anglo diversion started occurring throughout the
12 Gila River waters. **So all the flow that you experience in the Gila**
13 **after about 1860 reflects the effects of these many diversions,**
14 **Verde, Salt, Gila, so forth. And, yes, so I would expect, under**
15 **those conditions, to have the Gila dry.** And, in fact, in my report I
16 show examples for 1905 where, because of diversions, the Gila, you
17 know, goes dry, it was quite common after those diversions occurred.
18 [E-24 at p. 70.]

19 Dr. August also testified that the Gila River had been over-appropriated by the time of
20 Arizona's statehood,¹⁶ by Anglo-American farmers who had arrived in the mid-1800s, and started
21 to divert the Gila River for irrigation purposes.¹⁷ Also, *see* Dr. August's expert witness report, E-

18 ¹⁶See TR16:162, and 16:194-195.

19 ¹⁷There were many irrigation canals constructed in the Duncan/Virden and Safford
20 valleys upstream from the San Carlos Apache Reservation in the mid to latter part of the 1800's
21 that diverted all of the water of the Gila River under "ordinary conditions" for irrigation and
22 farming. In ASLD Study 1 (E-4), it is reported that a gaging station was established at the San
23 Carlos/Coolidge Dam site by the U.S. Geological Survey in 1899, and that the average
24 monthly flow of the Gila River at this location prior to statehood was 272 cfs. E-4 at p VI-5.
25 It is also reported that the maximum estimated flow of the Gila River was 150,000 cfs which
26 occurred on November 28, 1905. The median flow is not reported. The "natural and ordinary
27 flow" is therefore badly distorted by the average which include such heavy floods in the Gila
28 River. The median flow would better represent the "ordinary condition" of the Gila River for
purposes of the equal footing doctrine, which would be much lower than the average monthly
flow reported. The average monthly flow would also have been much lower at the time of
statehood, due to the enormous diversions for lands upstream from the Apache Reservation
from none prior to 1872 to over 40,000 acres by 1912. *See* Globe Equity No. 59 Decree,
Article V. The ASLD Study 2, E-4 at p. 5-33, Table 22, reports that the long-term median
flow statistics for the Upper Gila River from Safford to New Mexico is between 66 cfs and 174
cfs, but that the Gila River is a losing river in the Safford valley because of the large irrigation
diversions there. E-4 at p. 5-34. The "ordinary" or median flow of the Gila River through the
San Carlos Apache Reservation at the time of statehood was therefore not capable of supporting
any commercial navigation.

1 17, at pp. 21-26, which documents the fact that the waters of the Gila River had been over-
2 appropriated by the time of statehood.¹⁸

3 In the Gila River Indian Community's "Presentation to Arizona Stream and Navigability
4 Commission,"¹⁹, Mr. Gookin reports that even under virgin conditions, the Gila River was non-by
5 navigable,²⁰ and that by the time of Arizona's statehood, the Gila River was clearly non-
6 navigable:

7 **Starting shortly after the American Civil War, irrigation**
8 **development began up and down the Gila River.** In 1886, the
9 Florence Canal was built and its diversion caused the river to dry up in
10 certain locations. [E-5 at p. 4]. [Emphasis added].

11 Stanley A. Schumm, Ph.D, also provided his expert opinion that the geomorphology of the
12 Gila River in 1912 was not conducive to navigability at the time of statehood because the Gila
13 River had developed into a wide-braided river at this time due to flooding in past years. TR
14 17:17-20, and 17-23. Dr. Schumm concludes in his report that:

15 The large, long-duration floods, especially those of 1905 and 1906
16 converted the relatively stable lower Gila River into a braided channel
17 that was wide and shallow and unsuitable for navigation. [E-6 at p.
18 16].

19 The proponents of navigability must prove by a preponderance of the evidence that the
20 Gila River was navigable at the time of statehood under the equal footing, despite the fact that
21 there were man-made changes to the Gila River that diverted all of the water of the Gila River for
22 farming by the time of statehood, which rendered the Gila River clearly non-navigable at that
23 time. The Commerce Clause cases which many consider the navigability of rivers under pre-

24 ¹⁸For example, see R.H. Forbes, *Irrigation and Agricultural Practice in Arizona*,
25 University of Arizona Agricultural Experiment Station, (Washington D.C.: Government
26 Printing Office, 1911), at pp. 32, 46-48, cited in Dr. August's report (E-17 at pp. 25-26),
27 describing the Gila River in 1911 as "a comparatively small and irregular stream, due to its
28 arid watershed and uncertain rainfall, although occasionally it carries enormous floods. Since
the appropriation of its upstream waters for irrigation its lower courses (from the confluence of
the Salt to the Colorado) are often dry for months in succession....It may be stated summarily
that the fluctuations in water supply become more and more extreme from the source to the
mouth of the Gila River."

¹⁹E-5, prepared by Allen Gookin, a hydrologist for the Gila River Indian Community,
dated November 15, 2005.

²⁰Mr. Gookin reports that "In all my studies, I have never seen any indication that the
Pima Maricopas used canoes for transport of goods anywhere in their area." E-5 at p. 3.

1 development virgin conditions do not apply. See Section A(1) herein.

2 The evidence is overwhelming that the Gila River was non-navigable at the time of
3 Arizona's statehood on February 14, 1912. The Gila River was not susceptible to commercial
4 navigation prior to or at the time of Statehood.

5 **C. Conclusion**

6 The Gila River was commercially non-navigable in its "ordinary condition" at the time of
7 Arizona's statehood on February 14, 1912, under the equal footing doctrine.

8 All of the historical documentary evidence demonstrates that the Gila River was
9 commercially non-navigable prior to and at the time of Arizona's statehood. .

10 There is no credible evidence that the Gila River was "susceptible" to commercial
11 navigation at the time of Arizona's statehood, or at anytime prior to Arizona's statehood.

12 Recent periodic use of non-commercial recreational boating or rare commercial
13 recreational boating on short stretches of the Gila River at high flows do not satisfy the
14 "commerce" requirement under the equal footing doctrine.

15 There is not any evidence to show that the stretch of the Gila River running through the
16 San Carlos Apache Reservation was navigable at the time of Arizona's statehood.

17 The Apache Tribe therefore requests that the Commission determine for all of the above
18 reasons that the Gila River from the Arizona-New Mexico border, to its confluence with the
19 Colorado River, is non-navigable under the equal footing doctrine.

20 DATED this 6th day of February, 2006.

21 **SPARKS, TEHAN & RYLEY, P.C.**

22
23 By 

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