

Helm, Livesay & Worthington, Ltd.
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283-3970
(480) 345-9500
office@hlwaz.com
John D. Helm - AZ Bar # 002584
Sally Worthington - AZ Bar # 012424
Jeffrey L. Hrycko - AZ Bar # 023280
*Special Counsel for Maricopa County and
The Flood Control District of Maricopa County*

**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

**In The Matter Of The Navigability Of
The Gila River From The New Mexico
Border To The Confluence With The
Colorado River, Greenlee, Graham, Gila,
Pinal, Maricopa, And Yuma Counties,
Arizona**

No. 03-007-NAV

**Maricopa County and The Flood Control
District of Maricopa County's Response
to Proposed Findings of Fact and
Conclusions of Law Jointly Submitted
By the Salt River Project, Freeport
Minerals Corporation, The Gila River
Indian Community, and the San Carlos
Apache Tribe**

Maricopa County and the Flood Control District of Maricopa County (hereinafter County) submit this response to the proposed findings of fact and conclusions of law in opposition to a finding of navigability of the lower Gila by the Commission jointly submitted by four of the parties participating in the Arizona Navigable Streams Adjudication Commission (ANSAC) hearings on the Gila River. The four parties that filed jointly opposing a navigability finding are the Salt River Project, Freeport Minerals Corporation, the Gila River Indian Community and the San Carlos Apache Tribe and will be referenced herein as "SRP".

As directed by the Arizona Court of Appeals in the *Winkleman* decision, ANSAC now has the duty to “make its determination ‘in writing with sufficient documentation and detail to confirm the rationale and basis for the determination’” whether the Gila river or any segment thereof was navigable on the date of statehood. *State Ex Rel. Winkleman v. Navigable Stream Adjudication Commission*, 224 Ariz. 230, 237, 229 P 3rd 242 (App. 2010).

As previously stated in all of their submittals, the County urges ANSAC to find that the Gila River, from its confluence with the Salt River to its confluence with the Colorado River (hereinafter lower Gila), is navigable in its ordinary and natural condition in accord with the legal requirements set down in the applicable U.S. Supreme Court and Arizona decisions.

The County believes that the record before ANSAC contains more than the preponderance of evidence necessary to compel a finding that the Gila River was navigable below the confluence with the Salt River to its confluence with the Colorado.

The Findings of Fact Jointly Submitted by SRP Make Five Major Errors.

Upon review ANSAC will find that the very lengthy and sometimes confusing SRP proposed findings of fact make the following five major errors¹:

¹ Because of the lengthy nature of the joint filing, the double numbering and the limited time frame for this Response, only examples of the errors are cited after each category. The examples are not the sole error for a category, just intended to illustrate the problem to the Commission.

1. Many of the facts do not have citations to the record to back them up. The court in *Defenders* chastised the ANSAC and counsel for failing to support their findings. *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P3d. 722 (2001, App.)
2. Many of the facts which do have citations do not have correct citations to the portion of the record, or have a summary of the citation that severely misstates the actual testimony or evidence given.
3. Many of the experts called to testify gave opinions that were not within their scope of expertise, and their opinions on those areas outside of their areas of expertise, though inadmissible as evidence, are given the same deference in the SRP document as true expert testimony.
4. Testimony and evidence specific to a section of the Gila, usually the Upper Gila, is wrongly cited as proof of non-navigability conditions of the whole river or other segments thereof. Evidence for or against navigability of a segment should be correctly identified to the applicable segment of the river where found and held to be limited as proof of fact or law only within that segment unless a demonstration is made showing how the proof is applicable to another segment of the river. For example, rapids occurring in a segment of the upper Gila cannot be an obstruction to navigation in the lower Gila.
5. SRP relies on the findings of the 2009 ANSAC report as evidentiary proof of facts and law about the Gila. Assuming the same infirmities found by the *Winkleman* court with the Commissions' Salt determination, this reliance does

not meet the factual or legal requirements for a navigability determination. The report on the Gila cannot be used as an evidentiary basis to support a finding of fact or law by the Commission because errors such as failing to differentiate between natural and ordinary conditions of the river within segments or failing to consider the impact of diversions are corrected. Obviously this will be part of the purpose of any new Report the Commission issues.

The Conclusions of Law Jointly Submitted by SRP Do Not Follow the Correct Legal Tests.

ANSAC has the opportunity and the legal duty to follow the standards set out by federal courts in cases like *PPL Montana LLC vs. Montana*, 132 S.Ct. 1215, 182 L.Ed.2d 77 (2012) (*hereafter PPL*) and the Arizona Courts in *Winkleman* and *Defenders*, *supra*. The navigability of the Gila River has been the subject of court proceedings and other hearings for many years. It is imperative that ANSAC use the correct legal standards in its conclusions of law and fact. SRP's proposed conclusions of law misstate or ignore important legal tests in the applicable cases. For example they ignore a segmentation analysis of the river and conclude this is justified because they believe the whole is not navigable even though this is the very issue that the *PPL* court reversed the Montana Supreme Court for doing, see, *PPL supra* at 1226, 1229-1232; they provide no separate analysis of ordinary and natural characteristic of the river or its segments even though *Winkleman* demands it, see *Winkleman, supra* at 241.

Error 1: The SRP Summary of Evidence and Proposed Statement of Facts Lack Citations.

Many of the paragraphs in the Summary of Evidence Submitted are not statements of fact or conclusions of law, nor do they cite to anything in the record that supports the statement made. The statements also do not describe what the Commission did to collect and document “reasonable available evidence.” Examples of these broad statements are in paragraphs 3 through 11, which purport to describe how the ANSAC did its work.

Some of the proposed findings of fact from SRP have no citations to support the statement. As a result those statements become just inadmissible conclusions of SRP. (See for example paragraphs 35, 222, 284 and 299). Paragraph 37 in the Determination of Navigability section states that the commission considered all evidence but doesn’t state what evidence it did rely on. To meet the *Winkelman* requirements and state statutes the Commission must be specific regarding the evidence it relies on. Ultimate conclusion are no longer acceptable unless the Commission tells us the specific facts it relies on to support the conclusion. See *Winkelman*, supra at 237, footnote 9.

Rather than rely on the opinion of the attorneys who prepared the SRP document ANSAC must review the testimony and decide for itself. An example of how opinion is used in this proposed finding is in paragraph 220(i) which states that “Dr. Jackson placed substantial reliance” on a particular statement regarding Gustavus Streitz. This claim is supported by a transcript reference to 11/17/05:200. A review of that transcript page discloses that Gustavus Streitz is not mention thereon nor is the terminology

“substantial reliance.” There is no way to know what level of reliance Dr. Jackson placed on something without a statement by him to that effect. The Court of Appeals did not appreciate such misstatements and opinions without any citations to support statements made when it reviewed the *Winkleman* record. See for example, *Winkleman* at 240. ANSAC must make its own estimates of the importance and reliability of the evidence, witnesses, and history, presented and cite the facts and law that support these estimates in its determinations.

Error 2: SRP Statements of Facts Often Have Erroneous Cites or Misrepresent the Evidence.

ANSAC must meet the *Winkleman* and *Defenders* standards and support their findings with the record. Adopting the SRP statements without examining the record would not meet this test. There are so many individual errors that only some, but not all, are included in this section in the interest of brevity simply to make the point that the Commission must check SRP’s legal and factual claims before relying on them.

The following citations for example appeared to be incorrect: TR cite to page 339 in paragraph 193 (Fuller never mentions Kearny or Emory, also only applicable to upper Gila); in Paragraph 197 the reference to TR 427 does not correctly state what is in that document; in Paragraph 200 the statement at TR 199 was that they would boat the Gila the next year, not the next day; in Paragraph 209 the citation is not about the Lower Gila; in Paragraph 224 the citation is to the small watercourse document and Gila is not a small watercourse. Also it deals only with steamboats and they are not the standard for boats in navigability case law.

Paragraph 232 refers to a USGS Annual Report that is post diversions and the description referenced covers many streams, not just the Gila. ; Paragraphs 237 and 271 cite transportation reports that are all post diversions of the river; Paragraph 311 is not correct. It references the Hjalmarson deposition at page 20 of deposition but there is no language on that page dealing with predictability which supports the statement they claim Mr. Hjalmarson made.

Because navigability is a historical inquiry the evidence and exhibits from the hearings include many kinds of written documents. SRP has submitted a list of books that were entered into evidence. The list may be correct, but ANSAC will have to decide for purpose of its findings how much weight they should be given. Such writings would be considered hearsay in a courtroom and so are not truly admissible evidence. (See for example paragraphs 45-53). ANSAC will also have to consider whether newspaper articles cited (see i.e. paragraph 54) are covering pre or post diversion flows, floods or other fact-specific situations and how much credibility to give to them, again because they are not truly admissible evidence. In either event, *Winkleman* requires the Commission to set out its reasoning on its decision to use or not to use such documents in its determinations

SRP devotes three pages of facts to discrediting in detail the Pattie book (see paragraphs 122 -144.) The County only cited Pattie's account of using his boat to trap beaver as part of its navigability argument on the lower Gila so it is not clear why the opponents are so concerned about the book. However, as the authors of all historical

books referenced are not available for questioning (similar to Dr. Lingenfelder) ANSAC may consider all the narratives and conclusions as hearsay and not true evidence proving or disproving any facts about the Gila River. However, the books and other documents are available for experts to rely on when researching the time period. If works from the past such as the Pattie accounts cannot be relied on as argued by SRP then ANSAC will have little to consider other than scientific reports such as that done by Hjalmar W. Hjalmarson, PE.

In contrast to their treatment of the Pattie account, SRP liberally cites facts in a book by Edwin Corle that describes the Mormon Battalion expedition (see paragraphs 164 to 167) and Corle's opinion that the Mormon Battalion trip demonstrated that the Gila River was not practical for navigation. The account in the book indicates the Mormon Battalion members did complete their trip on the Gila River but some of their supplies did not make it. SRP's own witness, Dr. Littlefield admitted during cross examination that because the craft were not maneuverable they were unable to avoid sandbars. See Littlefield testimony at T.R. 08/18/14 page 1454.

Newspaper accounts are also treated differently in the SRP document depending on whether they support SRP's non-navigability theory. For example, the Howard family trip recounted in newspapers (see paragraphs 210 and 211) is discounted by SRP. But in paragraph 230 of SRP's statement (and in paragraph 22 of their conclusions of law) a newspaper account is suddenly presented as "historical evidence" of non-navigability because a Territorial delegate opined that for one third of the year it was a

“comparatively small river” and for “half or two-thirds of a year it is a larger river”. So, can ANSAC assume that it was navigable most of the year? How big is “larger”? Another newspaper article is cited by Dr. Littlefield in paragraph 231 as showing that only the Colorado was navigable and another in paragraph 235 stating that the Gila can be dry at some seasons. If the Commission determines not to rely on a newspaper account it should state its reason for discarding it. If the Commission intends to rely on newspaper account then should indicate the basis for such reliance. *Winkleman* requires this, supra at *Winkleman*, supra at 237 footnote 9.

ANSAC must make its own factual analysis because various reports are cited as evidence or discounted by SRP, depending on whether they support or dispute navigability. The SRP document refers to an article by Charles Pancoast (see paragraph 170) stating that the trip on the Gila was deemed dangerous but not saying why - water, heat, no food or Indian uprising? Another example of cherry picking from the publications in the record is found in the discussions in paragraphs 191 and 192 of the SRP findings, where the earlier descriptions of navigability up to the Pima Villages is ignored but later opinions that the Gila is not navigable are included. Maybe they were looking at different rivers, one that might have been diverted vs. one with all its water. Similarly, the fact that a boat capsizes and loses its cargo does not meet any court test to demonstrate non-navigability - in fact, if there is enough water for a boat to capsize then it is probably deep enough to be boatable and navigable, or pilot was such a bad sailor

he managed to turn a boat over that was sitting on the river bottom. (See paragraph 220(h) regarding Shibley trip from Phoenix to Gila Bend.

The authors of the SRP report repeatedly denigrate what they call anecdotal evidence, but most of the history of the river presented by all of the witnesses is "anecdotal" to a lesser or greater degree. See MERRIAM- WEBSTERS ONLINE DICTIONARY defining anecdotal as based on or consisting of reports or observations of usually unscientific observers. Due to the age of the river, the lack of video and living witnesses anecdotes are what is available. The Commission must remember that in reviewing such anecdotal evidence they must review within the time frame it is given. An observation about the river made at statehood describes a completely diverted river vs. one made 40 years earlier may be describing a river with more undiverted water. Not all evidence however is anecdotal. There is one witness and only one, Hjalmar W. Hjalmarson, P.E. who did a completely scientific method analysis of the river flow on the lower Gila, its' hydrology, and geomorphology to determine its navigability. (See Evidence Log X023) Hjalmarson drew a science and engineering based picture of the lower Gila river and applied the correct legal standards to determine ordinary and natural conditions. He then applied 3 accepted tests for boatability, one of which was developed to determine commercial boatability, to determine that the lower Gila was navigable See Hjalmarson Report Section 4, Navigability commencing on page 24, Evidence Log X023. No other party to the

proceedings attempted to do this same review, presented a study or a witness to rebut Hjalmarson's testimony.

SRP's document spends paragraphs 312 to 323(f), a total of four pages of findings of fact, tearing apart Hjalmarson's testimony. Yet none of the parties did any similar research or hired experts to rebut that testimony. Hjalmarson gave several depositions and testimony at different times and was able to back up his analysis with scientific process. No one else did on the lower Gila. This should be telling to the Commission since many of the opposition come well armed with hydrologists and geologists not to mention the legion of employees they have working in these fields. The SRP document, with nothing to rebut this testimony, instead misstates the record. See for example paragraph 292 which misstates Hjalmarson's testimony by adding "assumed" - this is writer's assumption, not Hjalmarson's. Paragraph 346 of SRP document finds that Hjalmarson's testimony is "not credible or persuasive" but they were apparently not able to find a hydrologist or other expert willing to say that, let alone why it was not credible or persuasive.

Hjalmarson did not testify in 2014 because no other expert had contradicted his earlier testimony. He was present and available but not needed. ANSAC must disregard the analysis of attorneys advocating for non-navigability and make its own findings regarding the Hjalmarson testimony. Mr. Hjalmarson's credentials were never challenged. He is a recognized expert in his field. The citations in Paragraph 30 of the conclusions of law to the First Transcript cite are incorrect -the Hyra method is not

mentioned at either of pages cited. If ANSAC reads the transcript they will see that Hjalmarson used three methods in his navigability calculations, not one as the SRP drafters continue to state in error. The County can only assume that the SRP document drafters are intentionally misrepresenting the Hjalmarson testimony because it is so damaging to their non-navigability arguments. It is the only scientific attempt to quantify the hydraulics and hydrology of the lower Gila, to describe the water in the river to be used to determine the ordinary and natural condition.

The SRP document continues in paragraphs 328 to 345 to rehash testimony from non-experts, "unreliable" (their term) newspaper reports and other materials that purport to be facts showing that the Gila was "not for any significant period of time" a single channel (paragraph 345). Not only is this an incorrect summary of the many pieces of the record, but it contradicts the SRP's own experts who stated that prior to the 1890's the Gila was a single meandering channel. See Schumm Report dated June 2004 Conclusion 1, page 12.

Paragraph 41 claiming no evidence of river being capable to act as a corridor or conduit for the exchange of goods, commodities property or the transportation of persons in the SRP conclusions of law ignores the Hjalmarson evidence that was not contested or refuted and the evidence of early boating.

Paragraph 24 references historical photos of Gila in its ordinary and natural condition - amazing - no one has seen them. *Winkleman* determined that the river was in its natural and ordinary condition in the early 1800s. The County is not aware of one

photo of the Gila from the early 1800s showing the Gila river. We would have appreciated a record citation to those photos

Error 3: Testimony Was Presented By Many Witnesses That Were Not Qualified to Appear as Experts. The Commission Should Not Rely on that Testimony in its Findings or Decision.

Civil engineer T. Allen Gookin has experience in designing irrigation and other water conveyancing systems and has worked on Indian Community areas along the Gila. However, Mr. Gookin is not an expert in archaeology or history, or in the geomorphology of the whole river. His testimony in these areas should not be cited or relied on to establish facts (see i.e. paragraph 65). He is also not an expert in boats (paragraph 72), historical travel and trade (paragraphs 73, 74, 75 and 76) and pottery (77). In paragraph 94 he is cited for expertise as an economist and railroad historian.

Historian Dr. Littlefield's testified on surveyor work and other items but he had never been instructed by his client nor knew from his own work to do his research based on the proper legal standards in navigability cases. Dr. Jack August is also a historian but did no original research on the Gila River navigation history and did not apply the correct legal standards. SRPs document has many findings attributable to Dr. Littlefield (see for example paragraphs 99, 100, and 101) but ANSAC should not use the findings of fact in the SRP document that are based on his work because he does not use the correct legal standard. He admits he applied no standard to his work or conclusions. See Littlefield testimony, T.R. 08/18/14 at page1489.

One "expert" heavily relied on in the SRP proposed findings is Dr. Richard E. Lingenfelter, which is particularly troubling in this quasi-legal setting. Dr. Lingenfelter never testified in front of the Commission. (Paragraph 223) His testimony was by affidavit submitted by the opponents of navigability. Other parties were not able to cross-examine him and the County believes his opinions as to navigability should not be considered by ANSAC. They do not meet the standard of federal courts as evidence that may be relied on for a navigability determination. Clearly in a federal court such evidence would not be permitted. To consider it violates the Constitution's guarantee of due process and the right to confront a witness. How can the Commission judge his veracity or test the depth of his expert knowledge?

In paragraph 34 of the SRP document there is an attempt to somehow turn these affidavits into reliable evidence by having Mr. Burtell testify on them. This testimony is hearsay, not facts. Any statement of fact that refers to Lingenfelter's affidavit, such as paragraph 367 regarding rafting on the Gila, should be disregarded.

Paragraph 25 in the conclusions of law wrongly cites to Burtell evidence; Burtell is not a historian, he is a geologist. In that paragraph he imposes a commercial requirement done away with by Defenders (see *Defenders*, supra st 422) while admitting that there is evidence of historical trips on the upper Gila. Since navigation is enough per *PPL* (see *PPL*, supra at page 1229) does the admission of historical use mean the upper Gila was navigable?

Paragraph 6 of the conclusions of law makes a non-navigability determination for the river that rests on flood testimony that is only related to the upper Gila. This violates the *Winkleman* directive to use the ordinary condition. See *Winkleman*, supra at 241.

Jon Fuller reviewed reports of others (see paragraph 64) but admits when he can't verify a fact himself. His testimony is only cited in the SRP document when it fits the non-navigable theory pushed by SRP and others. In particular ANSAC must read the actual testimony of Mr. Fuller that is referenced in the proposed statements of fact in paragraphs 68, 69, 70, and 71. The testimony is misstated by SRP; it specifically describes the use of bull boats and wooden rafts on the lower Gila.

Another transcript citation error is found in paragraph 91. In that paragraph SRP is discussion Fuller's testimony about a students masters thesis. One of the referenced pages, page 264 of the transcript on 06/16/14 does not mention the thesis.

Dr. Shumm's testimony as to navigability should not be considered because he did not use the ordinary and natural condition of the river in his analysis See T.R. 11/17/2005, 28:15-20, 31:4-32:11. Paragraphs 300 to 303 of the SRP document should be disregarded. Dr. Shumm passed away after the 2005 hearing and, contrary to Paragraph 325, Dr. Mussetter did not replicate any of Shumm's work on lower Gila. Dr. Mussetter testified that he flew over part of "Segment 7" but did nothing else on the lower Gila to study it, so ANSAC should not rely on his or Dr. Shumm's work as it is all based on the wrong standard (paragraphs 325 and 326). In a nutshell, Shumm used the

condition of the river at statehood instead of its natural and ordinary condition pre-diversions to make his conclusions. This is wrong under *Winkleman* See *Winkleman* supra at 241.

Error 4: Evidence and Testimony Specific to the Upper Gila or Another Specific Segment of the River Should Not be Used to Prove Non-Navigability of a Different Segment of the River.

The *PPL* decision, supra, is one of the reasons that additional hearings were held in 2014 to analyze the navigability of the Gila River. Therein the Supreme Court directs lower courts on how to describe and consider portions of rivers. Many of the findings of facts in the SRP document conflate sections of the river and make no attempt to correctly cite the record. The testimony of Mr. Burtell, for example, is specific to his studies on the Upper Gila but not applicable to the middle and lower Gila, sections that he did not study. The SRP proposed findings of fact neglects to make those important distinctions. For example, the Evans and Adams problem trip described in paragraphs 180, 182 and 220(g) did not show the non-navigability of the whole river. They gave up at Sacaton and then were able to successfully boat the lower Gila (paragraph 181). Paragraph 34(c) of the findings of fact applies to upper Gila only; same with 34(f), as there are no rapids on lower Gila identified by anyone.

Gookin's report was only on his work in the middle Gila, but the SRP statement of facts doesn't make that point, implying that it applies to whole river (see paragraph 285). SRP also cites State Land Department (SLD) reports on flow data which is only applicable to upper Gila but SRP omits that condition, so it reads as applicable to the

entire river (paragraphs 288, 289). The SLD report in paragraph 294 is not a correct cite (not page 8) and it is titled "upper". Again, ANSAC should check the statement of facts for generalizations trying to use upper or other segments to show navigability of the whole river.

More segment errors are found in paragraphs 295 to 298, citing Burtell testimony that is only applicable to upper Gila (see County Post-Hearing Closing Response paragraph 6, page 4, regarding Burtell not qualified to testify on lower Gila).

Additionally, there is a bad reference by SRP using SLD upper Gila testimony to make broad assumptions about river at paragraph 307.

Paragraphs 212 and 213 citing Burtell is not a segmented review per *PPL*; it is focused on upper Gila because there are no rapids on the lower Gila and is not applicable to whole river.

Burtell is again cited in paragraph 220(d) for record of high runoff but his tables are only for the upper Gila and not applicable to lower Gila. It should be remembered that the Salt River, the largest tributary of the Gila, meets it below where Burtell did his research thus its' impact on the flow of the Gila is not present in the Burtell work.

Whether Safford was in existence (see paragraph 153) has little to do with the navigability of the lower Gila.

Jon Fuller's statement about boats in referenced in paragraph 68 is not applicable to the lower Gila but used for an assumption regarding the whole river.

In the subsection title "Obstacles To Navigation" the SRP document makes the same error, attributing upper channel rocks to all of Gila (see paragraphs 347, 348, and 349), upper channel rapids to all of Gila (see paragraphs 350, 351, 352, 353, and 354), upper channel sandbars to lower Gila (paragraphs 355, 356, and 357) and upper channel beaver dams to lower Gila (paragraph 358). ANSAC will violate the Supreme Court's instructions in *PPL* if it does not correctly consider segments.

Dr. Huckleberry's study was on a portion of the middle Gila, while Bartell only looked at the upper Gila (See paragraphs 13, 14, 15, and 16.) Jon Fuller's reports included various portions of the Gila; therefore the Commission will need to examine the facts stated in the various proposed findings that cite Fuller to ensure that they are directed to the appropriate part of the river (i.e. paragraph 63, where Upper Gila finding is cited to apply to whole river, and paragraph 97 regarding Fort Goodwin, which was near Bylas in Graham County, not on the lower Gila) so transport of supplies at that location is inapplicable to the navigability of the rest of the river. SRP also makes the same mistake in paragraph 161 which applies only to the upper Gila.

Findings of non-navigability in paragraphs 106 and 107 broadly reference as applying to the whole Gila River testimony that is particular to the upper Gila. Whipple didn't think there were any obstructions by nature that imposed a serious obstacle to the construction of a way to communicate on the river, so arguably it was usable for travel. (See Tr. 3-14, State Report on upper Gila.) Dr. Huckleberry's analysis in paragraph 304 of the SRP document also suffers from generalization of all segments

of the river and is also missing the analysis in paragraph 305(f) regarding how the low flow channel returns to the river creating the navigable condition.

Conclusion of law paragraph 8 references the Gookin testimony regarding floods at statehood and is contradicted by experts who testified that the river would have returned to a single meandering channel but for the many diversions. Conclusions of law paragraphs 9 and 10 have the same problem with the testimony of Dr. Mussetter: he was not qualified to testify about the whole river (see paragraph 11); he did not study lower Gila (paragraphs 15 and 16) and was therefore not qualified to opine on it. Dr. Mussetter just read Dr. Shumm's material. Shumm used the wrong standard, not the ordinary and natural character of the river, as defined by *Winkleman*. Conclusion of law paragraph 4 makes a statement about navigability that does not cite to any authority and fails to properly analyze as directed by *Winkleman*, supra at 241, which finds that floods are not ordinary and natural and the Commission must evaluate those terms separately.

Error 5: The 2009 ANSAC Report Does Not Meet the Test of *Winkleman*.

In several sections of the proposed findings of fact the SRP drafters relied on and cite to the ANSAC 2009 Report. It is understandable why the proponents of navigability like this document, as it minimizes much of the evidence of actual uses of the Gila River and its potential for navigation. *Winkleman* has rejected the report for its failure to assess natural and ordinary characterizations of the river separately and for failing to deal with the massive diversions of flow that had taken place by statehood. See *Winkleman*,

supra at 240- 241. Further it argues a need for a commercial intent for boating. *Defenders of Wildlife, supra*, made it clear that commercial use is not required. Therefore citing the 2009 report is a gross error in any proposed findings of fact or conclusions of law and would leave the new findings open to attack again (see paragraph 117 to 119, also citation in paragraph 173 that '49ers trying to use the river were generally unsuccessful).The portion of the 2009 ANSAC report cited in paragraph 66 does not meet the standards for *Winkleman* because it did not consider the impact of diversions on the ordinary and natural conditions. The ANSAC 2009 Report also does not include the actual evidence or statements of law relied on by the Commission, just the name of a report or witness that appeared (see paragraph 12).

The earlier studies done on the Gila were either for the whole river, or done in segments that did not meet the requirements of the *PPL* case.

**SRP Conclusions of Law do not Correctly State the Laws Regarding Navigability;
The SRP "Facts" Are Often Conclusions of Law.**

Use of Other Land-Based Transportation:

Proving that a river was not navigable because people used other land-based transportation does not meet the *Defenders of Wildlife* standards. *Defenders, supra* at 242. SRP has attempted to do that in numerous "facts" (see paragraph 86, also in 237, 243, 244, 248, 254,272, 277, 280 and 281 in reference to the Arizona Department of Transportation plans). The ADOT plan states that there was agreement that more roads were needs, but there is absolutely no statement to the Gila River or the navigability of

the river, so the citation is irrelevant. The County documented 21 trips on the river in Exhibit C of County's Post-Hearing Closing Response Brief.

Many other facts are simply irrelevant, i.e. paragraph 255 regarding needing transportation, and the entire section regarding "requests for railroads" cited in paragraphs 256 to 267. The citation in paragraph 269 is totally false as [X021:103 on page 139] says nothing about navigable rivers.

Use of Surveys and Land Patents

The General Land Office surveys are cited in paragraphs 101 and 102 as evidence of non-navigability but using surveys as a "navigability test" directly controverts the case law (See *State of Oklahoma v. State of Texas*, 258 U.S. 574, 585 (1922) Paragraph 03(d) also has a bad citation; it should be to page 1316 and the complete list of surveys Dr Littlefield relied on is in Ex. A to County Post Hearing Response.

Federal Patents are similarly given great significance in the SRP conclusions. This is an unwarranted legal conclusion. (See i.e. paragraphs 108-110). The County discussed the applicability of federal patents in Section 10, pages 4-5 of its Post-Hearing Response and in earlier briefs and Dr. Littlefield consistently admitted that he was not following the U.S. Supreme Court cases regarding federal patents. Such patents do not convey land under navigable waters. (See *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926), *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427, 443 P.2d 421, 423 (1968) and discussion in County's Post-Hearing Response, *supra*. State patents are all

dated after statehood and would therefore be granted after the complete diversion of the river and thus do not reflect the ordinary and natural condition of the river.

Case law also contradicts Dr. Littlefield's erroneous legal conclusions in paragraphs 111 and 112, cited in regard to the Desert Land Act and use of water from non-navigable streams. This test was rejected in *Defender of Wildlife*, 199 Ariz. 411, 423, 18 P3d 722, (App 2001) Dr. Littlefield and the SRP documents also misstate the legal ability of the State to sell property under navigable streams and Dr. Littlefield is honest in saying that "presumably the state would have considered navigability in disposing of lands" in paragraph 113. Dr. Littlefield applied no standard for navigability and for "ordinary" as separate from "natural" in regard to the condition of the river. The statements from Dr. Littlefield cited in paragraphs 113 to 116 regarding patents should not be included in the ANSAC findings of fact and conclusions of law.

Boating

The SRP findings dismiss the use of ferry boats as proof of navigation, as if going across the river is less navigation than going up or down the river (see paragraph 174). It is evidence of water deep enough to float a decent-sized boat (paragraph 179) that exists for some distance in both directions on the river at the ferries location. If the depth did not exist for some distance around where the ferry service existed people would simply go up or down river to the closest shallow portion of the river and cross without having to pay for the ferry. In paragraph 218 SRP describes ferries as the equivalent of a bridge without acknowledging that they indicate enough water to

support a big boat many days of the year. ANSAC needs to make its own findings regarding ferries.

The SRP document equates “pulling boats alongside the river” with walking around short obstacles (see paragraph 220(f)). ANSAC’s duty is to look at river segments in their ordinary and natural state as per *Winkleman*, read the Supreme Court decisions regarding obstacles in a river and how you determine if they prohibit navigation and then specifically identify any obstacles that prohibit navigation if the existence of obstacles is the reason the Commission determines a segment of the river to be not navigable, On the lower Gila SRP has not specifically identified any obstacle that would prohibit navigation..

Paragraph 34 of the proposed findings of fact cite to no case law that says you can’t rely on a skilled boater for a determination of navigability.

Paragraph 35 again uses the word “unpersuasive”, but in the finding of fact ANSAC must state why it is or is not persuaded by boating evidence. Paragraph 35(d)(i) references Dr. Lingenfelter’s affidavit, which was only for steamboats and was only applied to the upper Gila, not the whole river (See Section 6, page 4 of County’s Post-Hearing Closing Response Brief..

Canoes can establish navigability (see i.e. *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785, 788-89 (9th Cir. 1981).

Paragraph 35 is very long for a conclusion of law, and in reality it is just a summary of facts that are chosen to support non-navigability.

Also 35(d)(vi) regarding durability of boats is irrelevant to the lower Gila as there are no reports of the canoes or flat bottom boats on lower Gila being damaged or sunk (stuck, yes) by rock, rapids or sandbars.

Paragraph 35(d)(vii) uses term "equivalent" which is not a correct legal term. The question is susceptibility and measuring the river against the old boats. There is no evidence that old boats could not have navigated the old lower Gila when it was in its' ordinary and natural condition.

Paragraph 13(d) of the conclusions of law also uses the wrong term. *PPL*, supra at 1233 only requires that watercraft are "meaningfully similar", not exactly the same types of boats.

Paragraph 364 of the proposed statement of facts relies on anecdotal evidence that no steamboats could have used upper Gila in ordinary and natural condition but gives no citation in support.

Paragraphs 373, 374 and 375 show the kinds of boats in established use around statehood. That's all that is needed to establish navigation if there are no serious impediments to navigation, and there were not on the lower Gila. Therefore Paragraphs 377 and 378 are irrelevant.

Commerce Not Required

In paragraph 221 the term “highway for commerce” is used, which is not the correct legal standard. The term used by the court in *Utah v. U.S.*, 409 U.S. 9, 91 S.Ct. 1773, 29 L.Ed. 279 (1971) is just a highway.

There is no case law that uses ore transportation to define navigability, so the conclusions in paragraphs 225-228, also paragraph 19 of conclusions of law, drawn from a review of mining activity should have no weight in the Commission’s analysis of the legal status of navigability. Dr. Lingenfelter was not a witness and only knows steamboats, and both Lingenfelter and Gookin's work was on only the upper Gila not all of river (see paragraph 21 of the conclusions of law).

The proposed SRP findings mistakenly look for evidence of trade, which is not needed, and at the use of other forms of travel (see County Post-Hearing Response page 4, paragraph 7). The use of other transportation not on the river is not determinative of susceptibility to navigation. See also paragraph 18 of the conclusions of law, which wrongly suggests a commerce requirement in *PPL* or other cases. The evidence of over 20 trips on the river proves navigability.

Paragraph 12 of the conclusions of law misstates the *PPL* decision with dicta not the holding. *PPL* says don’t need commerce, just navigation and did not overrule *Utah v. U.S.*, *supra*.

Paragraph 27 of the conclusions is in error; there is no commerce requirement.

most part their observation take place after large diversions of the river were taking place.

Conclusion of law paragraph 43 uses the term “theoretically possible” when writing about the act of navigation on the lower Gila. There is sufficient evidence that this segment of the river was actually navigated.

And the conclusions of law paragraphs 1 and 43 to 46 that the Gila was not navigated do not address the legal test of susceptibility.


Conclusion of law paragraph 14 makes the puzzling statement that navigability has both liberal and conservative interpretations. County’s counsel is unaware of any case law that makes that classification and no citation is given. It seems most important to cite to a factual record, not a changing scale.

Conclusion

Contrary to the proposed conclusions of law put forth by the SRP document, the County believes that the facts in the record show evidence of navigability and susceptibility to navigation on the lower Gila. ANSAC should enter findings of fact and conclusions of law that correctly reflect the evidence.

Respectfully Submitted this 6th day of February 2015.

Helm, Livesay & Worthington, Ltd.



John D. Helm
Sally Worthington
Jeffrey L. Hrycko

1619 E. Guadalupe, Suite One
Tempe, AZ 85283-3970
*Special County for Maricopa County and
Flood Control District of Maricopa County*

ORIGINAL and **SIX** copies of the foregoing **MAILED** for filing
this 6th day of February 2015, to:

George Mehnert, Executive Director
Arizona Navigable Stream Adjudication Commission
1700 W. Washington, Room B-54
Phoenix, AZ 85007

ONE COPY mailed via **First-Class U.S. Mail** on
this 6th day of February 2015 to:

Fred Breedlove
Squire Sanders (US) LLP
1 East Washington St, Ste 2700
Phoenix, AZ 85004
Attorneys for ANSAC

John B. Weldon, Jr.
Mark A. McGinnis
Salmon, Lewis & Weldon, Plc
2850 E. Camelback Rd., Ste 200
Phoenix, AZ 85016-4316
*Attorneys for the Salt River Project Agricultural Improvement
And Power District and Salt River Valley Water User's Association*
Cynthia M. Chandley
L. William Staudenmaier
Snell & Wilmer
400 East Van Buren
Phoenix, AZ 85004-2022
Attorneys for Freeport Minerals Corp.

Sean Hood
Fennemore Craig, P.C.
2394 E. Camelback, Ste 600
Phoenix, AZ 85016-3429
Attorneys for Freeport Minerals Corp.

Paul Katz
Laurie Hachtel
Joy Hernbrode
Attorney General's Office
1275 West Washington Street
Phoenix, AZ 85007-2297
Attorneys for State of Arizona

Joy E. Herr-Cardillo
Timothy M. Hogan
Arizona Center For Law In The Public Interest
2205 E. Speedway Blvd.
Tucson, AZ 85719
Attorneys for Defenders of Wildlife, et al

Joe P. Sparks
The Sparks Law Firm
7503 First Street
Scottsdale, AZ 85251-4201
Attorneys for San Carols Apache Tribe, et al

Steven L. Wene
Moyes Sellers & Sims
1850 N. Central Ave., Ste 1100
Phoenix, AZ 85004

Cynthia S. Campbell
Law Department
City Of Phoenix
200 W. Washington Street, Ste 1300
Phoenix, AZ 85003-1611
Attorneys for City of Phoenix

William H. Anger
Engelman Berger, P.C.
3636 N. Central Avenue, Ste 700
Phoenix, AZ 85012
Attorneys for City of Mesa

Charles L. Cahoy
Assistant City Attorney
City Attorney's Office
CITY OF TEMPE

21E. Sixth St, Ste 201
Tempe, AZ 85280
Attorneys for City of Tempe

Michael J. Pearce
Maguire & Pearce, LLC
2999 N. 44th Street, Ste 630
Phoenix, AZ 85018-0001
*Attorneys for Chamber of Commerce
And Home Builders' Association*

Carla Consoli
Lewis & Roca
40 N. Central Ave
Phoenix, AZ 85004
Attorneys for Cemex

James T. Braselton
Mariscal, Weeks, McIntyre & Friedlander, P.A
2901 N. Central Ave, Ste 200
Phoenix, AZ 85012-2705
Attorneys for Various Title Companies

Thomas L. Murphy
Linus Everling
Gila River Indian Community Law Office
Post Office Box 97
Sacaton, AZ 85147
Attorney for Gila River Indian Community

Sandy Bahr
202 E. McDowell Rd, Ste 277
Phoenix, AZ 85004
Sierra Club

David A. Brown
Brown & Brown Law Offices
128 E. Commercial, PO Box 1890
St Johns, AZ 85936

Susan B. Montgomery
Robyn L. Interpreter
Montgomery & Interpreter, PLC

4835 E. Cactus Rd., Ste. 210
Scottsdale, AZ 85254

Michael F. McNulty
Deputy County Attorney
Pima County Attorney's Office
32 N. Stone Ave., Suite 2100
Tucson, AZ 85701

Wayne Peck
Deputy County Attorney
Maricopa County Attorney's Office
Civil Services Division
222 N. Central Ave., Ste 1100
Phoenix, AZ 85004-2206
*General Counsel Flood Control District of
Maricopa County*

By: