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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In re Determination of Navigability of
the Gila River

No. 03-007-NAV

**RESPONSES TO THE ARIZONA
STATE LAND DEPARTMENT'S
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**

1 The Salt River Project Agricultural Improvement and Power District and Salt River
2 Valley Water Users' Association (collectively, "SRP"), Freeport Minerals Corporation
3 ("Freeport"), the Gila River Indian Community (the "Community"), and the San Carlos
4 Apache Tribe (the "Tribe") (collectively, "Parties") jointly submit their responses to the
5 Arizona State Land Department's ("SLD") Proposed Findings of Fact and Conclusions of
6 Law Regarding the Gila River ("SLD FF/CL"). In an effort to provide the Commission with
7 a more cohesive and less redundant set of responses, the Parties have coordinated to file
8 jointly. These Parties have limited this joint filing to the total number pages that would have
9 been filed if these Parties' prepared separate 10 page responses. *See* Commission Order,
10 December 23, 2014. These Parties also incorporate herein by reference their joint proposed
11 findings of fact and conclusions of law ("Joint Filing") and their closing and responsive
12 briefs.

13 RESPONSES TO SLD'S PROPOSED FINDINGS AND CONCLUSIONS

14 Responses to SLD's Proposed Findings of Fact

15 1. SLD ¶¶ 1-10: It is true that the State of Arizona failed to make any claim to title
16 to the bed of any Arizona stream until several decades after statehood. As the United States
17 Supreme Court recognized in *PPL Montana v. Montana*, 132 S. Ct. 1215, 1235 (2012),
18 longstanding reliance "in title upon the State's long failure to assert title is some evidence to
19 support the conclusion that the river segments were nonnavigable for purposes of the equal-
20 footing doctrine." This is certainly true with respect to landowners' reliance on title to the
21 beds of the Gila River and every other Arizona stream.

22 SLD is also correct to note that the *Winkelman* decision is limited to the Commission's
23 prior determination concerning the Lower Salt River. The Gila, however, is a different
24 circumstance. As addressed at length in Freeport's Responsive Post-Hearing Memorandum
25 Concerning the Non-Navigability of the Gila River ("Freeport's Responsive Memorandum")
26 (*see* Section I), in 2009 the Commission properly determined that the Gila was nonnavigable
27 based on evidence of the Gila's natural and ordinary condition. *See also* Joint Filing FF#117-

1 118.

2 2. SLD ¶¶ 11-21: The record reflects that, at least as it relates to navigability and
3 susceptibility, the Gila is not “among the major rivers of the United States...” As is reflected
4 through Freeport’s post-hearing memoranda and the Joint Filing, the Gila’s ordinary and
5 natural flows paled in comparison to other streams that have been deemed nonnavigable by
6 courts that include the United States Supreme Court. *See, e.g.*, Joint Filing FF#285-298 and
7 CL#32(j) and 33(c). The SLD also refers to the lower Gila as potentially “the most important
8 river in Arizona.” The SLD appears to be referring solely to drainage area and fails to make
9 any relevant connection to the issues to be determined in these proceedings. The Gila River
10 was never used as a highway of commerce, and was therefore never “important” for that
11 purpose. *See, e.g.*, Joint Filing CL#17.

12 3. SLD ¶¶ 22-33: Because no segment of the Gila was navigable or susceptible to
13 navigation in its ordinary and natural condition, there is no such need for segmentation. *See*
14 Joint Filing FF#71, CL#3, 15-17. Accordingly, while parties may have different views of the
15 relevant characteristics that are relevant to distinguishing various reaches of the Gila, any
16 disagreement on that issue is immaterial because no portion of the Gila is navigable under the
17 proper legal test. *Id.* Accordingly, the SLD’s paragraphs addressing characteristics related to
18 various portions of the Gila in its Segmentation section are largely immaterial for purposes of
19 this Commission’s deliberations.

20 The Gila does not uniformly maintain a single low flow channel when the stream is in
21 a braided condition. Instead, the river’s flow is often divided among multiple flowing
22 channels, thereby reducing the depth of each channel. *See* Joint Filing FF#323-346.

23 4. SLD ¶¶ 34-62: The problems with Mr. Hjalmarson’s approach to evaluating
24 flows and navigability are addressed at length in the Joint Filing. *See* FF#308-323 and 346.
25 With respect to the SLD’s mean, *i.e.* average, flow rates, it is clear in the record that high flow
26 events skew the average upwards, and that median flows are more representative of typical
27 flow. *See, e.g.*, Freeport’s Responsive Memorandum at p. 15.

1 5. SLD ¶¶ 63-69: The SLD is incorrect that the depths discussed and referenced in
2 these paragraphs are “sufficient to sustain boats using the River as a highway for commerce.”
3 Mr. Fuller employs an erroneous standard for navigability that is based on recreational
4 boating in modern recreational craft. Mr. Fuller’s view is that “[i]f it’s deep enough to float a
5 boat, it’s susceptible to navigation....” The “boat” that Mr. Fuller has in mind is a modern
6 recreational craft, not the watercraft that were “in customary use for trade and travel at the
7 time of statehood....” *PPL Montana*, 132 S. Ct. at 1234. Mr. Fuller relied upon his personal
8 recreational experience as well as modern recreational boating standards and testified that
9 “I’m using for the purposes of my testimony 6 inches as a minimum flow.” Mr. Fuller chose
10 that as his cut off because “at less than 6 inches, it becomes a little less fun to paddle.” *See*
11 *Freeport’s Responsive Memorandum* at Section II.A.

12 The evidence presented to the Commission demonstrates that modern recreational craft
13 are not equivalent to the types of craft commonly used for trade and travel at statehood.
14 Modern crafts are lighter, and therefore require less depth; and they are substantially more
15 durable, and therefore able to withstand greater impacts from rocks and other obstructions.
16 *Id.* Accordingly, evidence of modern recreational boating must not be considered. *PPL*
17 *Montana*, 132 S. Ct. at 1234.

18 The SLD cannot reconcile its claim that a small desert stream like the Gila was
19 navigable when the United States Supreme Court determined that San Juan River was
20 nonnavigable despite having depths between one and three feet “for 219 days” each year, and
21 for the other “146 days a depth of over three feet.” 1930 Special Master’s Report, Item No.
22 X016, Freeport 9, (“Special Master’s Report”) at pp. 167.

23 The SLD also mischaracterizes Mr. Burtell’s stream flow reconstructions. Mr.
24 Burtell’s reconstructed depths reflect the mean depth of the cross section under median flow
25 conditions. Burtell at Table 10. Mr. Burtell’s reconstructed flows and depth “are
26 overestimates or at least are at the highest level of what could reasonably have occurred based
27 on the data that I looked at.” Hence the use of “less than” symbols (“<”) in his Declaration,

1 which denote that the actual depths were less than the conservative calculations. *See*
2 Freeport's Responsive Memorandum at p. 17 n. 72. The SLD's assertion that the depth
3 reconstructions for the Gila near Bonita Creek are Mr. Burtell's lowest reconstructed depths is
4 simply inaccurate. Burtell at Table 10. These depths were insufficient to allow the Gila to be
5 used as a highway of commerce, which is reflected in the fact that the Gila never was used as
6 a highway for commerce, Joint Filing CL#17, and by United States Supreme Court precedent.
7 Joint Filing FF#285-298 and CL#32(j) and 33(c).

8 6. SLD ¶¶ 70-92: The SLD ignores the mountain of evidence that demonstrates
9 that braiding is a natural, reoccurring condition of the Gila River that results in multiple
10 flowing channels, resulting in a reduction of flow depth and obstructions to navigation. *See*,
11 *e.g.*, Joint Filing FF#299-346. The SLD's assertion that, even in a braided condition, "the
12 primary channel is without question a single thread channel overall," is inaccurate. *Id.* For
13 instance, field measurement records from the USGS demonstrate that the Upper Gila
14 frequently had multiple flowing channels through the Duncan Valley and the Safford Valley.
15 Aerial photographs confirm that the flow was divided among multiple flowing channels
16 through the Duncan and Safford Valleys. Joint Filing FF#331.

17 While it is true that some braided rivers can be used as a highway for commerce, "it
18 takes far more river flow than any of the experts or records suggest for the Gila River." Joint
19 Filing FF#343. "The braided planform that existed certainly at that time and the really low
20 flows would have made commercial navigation very impractical." *Id.*

21 It is also clear that the Gila's braided condition at statehood, and at other times during
22 its history, is a natural condition of the river, is not caused by man, but is instead driven by
23 natural factors such as flooding. Joint Filing FF#332-334. The evidence is clear that the
24 braiding that persisted throughout much of the Gila's reach at statehood was a natural
25 condition of the river. Joint Filing FF#299-346.

26 7. SLD ¶¶ 93-106: The SLD argues that the widening and braiding that occurred
27 as a result of the significant floods of the late 1800s and early 1900s were "not typical of the

1 long-term condition of the river.” As described above, this is incorrect. In prior phases of
2 these proceedings, the SLD recognized this cyclical component of the Gila’s natural
3 geomorphology. Joint Filing FF#305.

4 The Gila is typified by wide seasonal and annual variations in discharge rates, and by
5 significant periodic flooding. *See, e.g.*, Joint Filing FF#294. The SLD cannot escape the fact
6 that periodic flooding and related braiding are intrinsic to the Gila’s natural condition. *See,*
7 *e.g., id.*; Joint Filing FF#305 and 332.

8 It is certainly true that sporadic boating attempts that occurred during flooding or
9 periods of high water do not reflect the Gila in its ordinary condition and therefore are not
10 indicative of navigability or susceptibility to navigability under *The Daniel Ball* test. *See,*
11 *e.g., State v. ANSAC*, 224 Ariz. at 241.

12 8. SLD ¶¶ 107-136: The parties are in agreement that any Native American
13 diversions in the 1800s were minimal, and that the Gila remained in its ordinary and natural
14 condition at least until the 1860s. *See, e.g.*, SLD ¶¶ 107-111; Freeport’s Responsive
15 Memorandum at p. 21 n. 85. Meaningful diversions did not begin until the late 1860s on the
16 Salt and until the early 1870s along the Upper Gila. Freeport Response Memorandum at p.
17 25. Diversions were not significant enough to have a material impact on the flows of the
18 Upper Gila until the 1880s. *Id.*

19 The SLD is incorrect that the diversions that occurred starting in the late 1800s
20 materially altered the geomorphology of the Gila. The SLD’s argument is in fact directly at
21 odds with its own expert witness’s testimony. As Dr. Huckleberry testified on behalf of the
22 SLD in 2005, “in terms of the overall geometry of the floodplain, and particularly the flood
23 channels, it’s the floods that have the greatest impact.” Joint Filing FF#334.¹ Mr. Fuller also
24 recognized that, at various times, especially for extended periods following floods and during
25

26 ¹ Efforts to modify this testimony through subsequent submittals should be given little if any
27 weight. This is particularly where the SLD made the strategic choice to not produce Dr.
Huckleberry for live testimony, thereby precluding the parties from cross-examining Dr.
Huckleberry about his inconsistent testimony.

1 other wet cycles, the Gila has been a wide, unstable, braided watercourse with multiple and
2 shifting channels. Joint Filing FF#327 The SLD's efforts to correlate changes in the
3 streambed with man's activities in the late 1800s and early 1900s are unavailing, and they are
4 irreconcilable with the expert testimony presented to the Commission.

5 9. SLD ¶¶ 137-140: Historic descriptions of the Gila do not "generally confirm ...
6 that the Gila was navigable...." To the contrary, as described in great detail in the parties
7 post-hearing memoranda and the Joint Filing, the historical evidence reveals a shallow stream
8 with irregular flows that was neither used as a highway for commerce nor susceptible for such
9 use. *See generally* Joint Filing FF#64-378. The historical evidence does not "almost
10 exclusively describe the River with a single low-flow channel," Joint Filing FF#300-346, or
11 "a River from one to four feet deep." Joint Filing FF#205, 235, and 285.

12 10. SLD ¶¶ 141-159: The SLD concedes, as it must, that there is no archaeological
13 evidence of Native Americans using any kind of boat on the Gila. The SLD then goes on to
14 state, in direct contradiction, that Apaches boated the Upper Gila, that other Native Americans
15 used rafts on the Gila, and that the Gila was given the name "River of Rafts." The SLD
16 mischaracterizes the evidence before the Commission. There is no evidence that bullboats
17 were ever used on the Gila or that the River of Rafts was a reference to the Gila. *See, e.g.,*
18 Freeport's Responsive Memorandum at p. 3 n. 4. Moreover, the "River of Rafts" moniker
19 was a reference to the use of rafts to *cross* some river, not to the use of rafts to travel up or
20 down any river. *Id.*

21 The record is clear that Native Americans traveled on foot along the river, not using
22 boats on the river. If the Gila had been susceptible to use by Native Americans for
23 navigation, the historic record would reflect its use for navigation. Joint Filing FF#64-85.

24 11. SLD ¶¶ 160-179: The SLD argues that the dearth of historical use of the river
25 by trappers is because they were a close-mouthed lot, trapping was at the time illegal, and
26 there were tariffs, but that the Pattie narrative demonstrates that "at least one trapper found the
27 Gila suitable for boating...." The SLD's excuses for a lack of historical use by trappers do

1 not reconcile with the SLD's own proposed findings of fact, which include the truism that
2 "[b]y 1832 hundreds of trappers had trapped streams in Arizona." But they did not use the
3 Gila as a means of trade and travel, just like the explorers and missionaries and Native
4 Americans who preceded them did not use the Gila for any type of navigation. *See, e.g.*, Joint
5 Filing FF#64-93; Freeport's Responsive Memorandum at pp. 2-4. This is because the Gila
6 was not susceptible to navigation in its ordinary and natural condition.

7 The SLD's reliance on Pattie's narrative is misplaced for multiple reasons. *See* Joint
8 Filing FF#122-160. Multiple historians who have studied the narrative have warned that the
9 document is not historically accurate, as demonstrated by several demonstrable falsehoods
10 contained in the narrative. *Id.*; *see also* Tribe's Opening Memorandum at pp. 8-9 n. 13. For
11 example, readers have been cautioned that the Pattie Narrative lacks any "historical sense of
12 accuracy" and would never stand the test of "subsequent historical criticism." Joint Filing
13 FF#132-133; Tribe's Opening Memorandum at pp. 7-9.

14 Pattie's memoirs are clear that when his party constructed eight canoes, they had
15 already reached the Colorado River. Joint Filing FF#146-152. The only description of using
16 a canoe on the Gila was to go back and forth across the stream for purposes of setting beaver
17 traps without leaving a scent. Tr. at 06/20/14:1133-37 (Burtell).

18 The reality as that, as Mr. Fuller stated in his report for the SLD, "[t]hese early trappers
19 *traveled primarily on horseback or on foot* in the [Upper Gila River] area, *although there* [sic]
20 *records indicate that they built and used canoes and rafts when they reached the Colorado*
21 *River*" Joint Filing FF#161.

22 12. SLD ¶¶ 180-184: In these paragraphs, the SLD provides a partial description of
23 the experiences of Kearny, Emory, and Jones. It begs credulity to assert that the history
24 provided by these early observers in any way supports a finding of navigability. To the
25 contrary:

- 26 • Kearny's expedition reported the existence of rocks in the bed that, while
27 perhaps not an issue for modern durable canoes, posed an obstacle for the crafts
of Kearny's era: the Gila had "about 18 inches [of] water on the shoals . . . and

1 canoes might pass down it very readily and good sized boats, if it was not for
2 the round rocks in its bed.” Joint Filing FF#349. There is no record of
3 Kearny’s expedition using the Gila for transportation or shipping. Joint Filing
4 FF#193.

- 5 • Emory opined that the Gila was nonnavigable. Joint Filing FF#191. There is no
6 record of Emory using the Gila for transportation. Joint Filing FF#193.
- 7 • Jones’s boating attempt was a failure. The wagons “went aground on numerous
8 occasions,” and the participants were “forced to jettison a portion of the cargo.”
9 Joint Filing FF#220(b).

10 13. SLD ¶¶ 185-201: The SLD attempts to explain the absence of navigation of the
11 Gila by asserting that alternative means of transportation were more convenient and asserting
12 that shipping by wagons was more cost-efficient for the mines. This is false.

13 Dr. Richard E. Lingenfelter is a noted historian of the American West. As Mr. Fuller
14 recognized in one of his reports presented to the Commission, Dr. Lingenfelter is responsible
15 for one of the two seminal works on historic boating in Arizona, *Steamboats on the Colorado
16 River, 1852-1916*. Dr. Lingenfelter also recently completed a six-year study of the economic
17 history of metal mining in the American West, which included historical research concerning
18 major copper mines at Ajo and Clifton-Morenci in Arizona. Joint Filing FF#223-225.

19 As Dr. Lingenfelter recounts, mining operations throughout the nation and within the
20 Territory “were constantly looking for cheaper transportation, either by river or rail.” Joint
21 Filing FF#275. “Transportation costs, particularly shipping out copper matte and high-grade
22 ores, were very often the largest expenses of the mining operation, and frequently determined
23 whether profitable operations were possible.” Having the Colorado River, a navigable river,
24 close to a mine lead to cheaper transportation: “the cost of hauling the ore by wagon, a
25 roughly 300-mile round trip . . . was nearly half of the value of the ore....” Joint Filing
26 FF#276-77.

27 Dr. Lingenfelter explained that the mines “could cut shipping costs by two-thirds, and
profitably work a much larger amount of lower grade ore, but they found that even rafting
down the Gila, let alone running a steamer up it, was simply not possible most of the year.”
Dr. Lingenfelter ultimately concluded that “mining entrepreneurs would have eagerly

1 undertaken navigation of the Gila if it had been possible. The failure of anyone to do so was
2 not for [a] lack of demand, but for lack of sufficient water. *The Gila River was simply not*
3 *susceptible to commercial navigation.*” Joint Filing FF#28-79.

4 14. SLD ¶¶ 202-207: The SLD half-heartedly attempts to dismiss surveyors’
5 assessments that the Gila was not navigable as possibly being the product of differing
6 standards for navigability, or even fraud (an allusion that is entirely unsubstantiated).

7 The SLD has good reason to move off of the topic of surveys after just a few
8 paragraphs. As described at length in the parties’ post-hearing memoranda and in the Joint
9 Filing, several surveyors evaluated different portions of the Gila during this period, and in
10 each instance the surveyor’s meander lines indicate his assessment that the Gila was not
11 navigable. Joint Filing FF#98-107. These surveys are “a perspective of a historical party
12 who was specifically told to look for navigability at the time that he carried out his work and
13 these were professionals . . .” Joint Filing FF#102. The surveys are particularly relevant to
14 determining navigability in the Gila’s “ordinary and natural” condition because most of them
15 were performed at an early date. Joint Filing FF#103.

16 These surveys are entirely consistent with records of the other contemporaneous
17 observations of the Gila in its ordinary and natural condition. “[T]hese records illustrate that
18 ... the Gila River was considered *not* navigable by virtually every contemporaneous
19 observer.” Joint Filing FF#228.

20 15. SLD ¶¶ 208-228: These paragraphs appear to be designed to make excuses for
21 the lack of use of the Gila for navigation on the basis of population, Apache unrest, etc. As
22 has been addressed above, there were significant needs for use of the Gila as a highway for
23 commerce for hundreds if not thousands of years, yet it was never used for such a purpose.
24 Not by Native Americans, not by missionaries or explorers, not by trappers, and not by the
25 mines. The SLD’s excuses notwithstanding, the only plausible explanation for this history is
26 that the Gila was not susceptible to navigation, an explanation that finds unanimous support
27 from all of the contemporaneous assessments that the Gila was nonnavigable.

1 16. SLD ¶¶ 229-233: These paragraphs describe boats that were used on the
2 Colorado River, not on the Gila. This is consistent with the myriad of evidence demonstrating
3 that, while the Colorado was navigable, the Gila was not. For instance, travelers carrying
4 watercraft through the territory did not attempt to navigate the Gila, but instead travelled
5 overland along the Gila, until reaching the Colorado River. *See, e.g.*, Joint Filing FF#89; *see*
6 *also id.* #92, 93, 192, 203, 231, 252, 269, 277.

7 17. SLD ¶¶ 234-265: The SLD relies upon Mr. Fuller’s effort to correlate modern
8 canoes and kayaks – made from plastics and other modern materials – with the wooden
9 canoes available at statehood. Mr. Fuller contended that their draw is the same despite the
10 significant differences in materials. *See* Freeport Responsive Memorandum at pp. 9-12.

11 To the contrary, the Archimedes Principle establishes that the weight of a boat’s
12 materials dictates the boat’s draw. *Id.* Lighter materials result in a lower draw. Joint Filing
13 CL#35(d). Modern boating materials are lighter weight, *see, e.g.*, Joint Filing CL#35(d) and
14 Freeport Responsive Memorandum at pp. 9-12, which results in a lower draw.

15 The extremely low draws associated with modern recreational craft are highlighted in
16 the SLD’s paragraphs in this section. The SLD described Mr. Farmer’s testimony of having
17 boated the Gila over the past 20 years “using inflatable rubber rafts, inflatable cataracts,
18 canoes, plastic kayaks, and inflatable rubber kayaks.” SLD ¶ 264. The SLD goes on to
19 describe Mr. Farmer’s three recreational craft that he commonly uses to boat the low flows
20 associated with Arizona’s desert streams: “a 14-foot whitewater canoe with a draft of 1-1/2 to
21 2-1/2 inches”; “a 16-foot canoe with a draft of 1 inch with only himself in it and can float it in
22 25 cfs”; “and an 18-foot canoe that can take 1,300 lbs with a draw of 2-3/4 inches.”

23 Of course, none of these crafts were available at the time of statehood, and none were
24 among the crafts commonly used to conduct commerce at statehood; they are, instead,
25 “plastic, fiberglass and other modern types of canoes and kayaks, inflatable boats for single
26 paddlers and for groups [that] all contributed to the rising popularity of river running in
27 Arizona especially on rivers not previously considered boatable, or boatable only very rarely

1 because of low water.” Joint Filing CL#35 (quoting Mr. Fuller’s 1998 Final Report, *Criteria*
2 *for Assessing Characteristics of Navigability for Small Watercourses in Arizona* [X016,
3 Freeport 8, p. 32]).

4 Mr. Fuller acknowledged that “durability has improved significantly” with the
5 introduction of modern materials, and that “you can bounce off things you couldn’t bounce
6 off before.” Joint Filing CL#35(d). The improvement in durability is indeed significant.
7 Joint Filing CL#35(d) and Freeport Responsive Memorandum at pp. 9-12.

8 The navigability proponents err further by essentially ignoring the craft that were
9 actually put to commercial use circa 1912 as described by Dr. Lingenfelter. Modern
10 recreational canoes and kayaks provide no basis for comparison to the commercial craft used
11 for trade and travel at statehood. *See, e.g.*, Joint Filing CL#35(d).

12 In sum, modern recreational canoes and kayaks require less water to float and are
13 much more durable, and they are therefore “able to navigate water much more shallow” and
14 “with rockier beds than the boats customarily used for trade and travel at statehood.” *PPL*
15 *Montana*, 132 S.Ct. at 1234. Modern canoes and kayaks made of Kevlar, Hypalon, fiberglass,
16 and other modern materials are not equivalent to the boats customarily used for trade and
17 travel at statehood, and Mr. Fuller’s evidence therefore may not be relied upon to support a
18 finding of navigability. *Id.*

19 18. SLD ¶¶ 266-281: These paragraphs consist of the SLD parroting Mr. Fuller’s
20 efforts to distinguish between “obstacles” and “obstructions” in support of his argument that
21 features such as beaver dams, sand bars, and rapids were “obstacles” that make the river more
22 “fun” and not “obstructions” that impede commercial travel. This approach again highlights
23 that the navigation proponents’ perspective is based upon modern recreational boating, not the
24 use of the Gila as a highway for commerce at statehood.

25 The SLD acknowledges that “[w]hether something is an obstacle to navigation
26 depends on many factors, including the type of boat, the boater’s experience, and the flow
27 rate.” SLD ¶ 266. This is important because, once again, the SLD and its witnesses approach

1 the issue of obstacles from the perspective of modern recreational boating. The types of boats
2 on which Messrs. Fuller and Farmer base their experience and their testimony are modern,
3 low draft, high durability craft designed for recreating in low flows, not the craft that were
4 commonly used to conduct commerce at the time of statehood.

5 For instance, while Messrs. Fuller and Farmer may find that sandbars are easily
6 avoided in their modern canoes, the historical record demonstrates clearly that sandbars posed
7 a significant obstacle to crafts commonly used to conduct commerce at the time of statehood.
8 The *Arno* fiasco is one example, described as follows by Dr. Lingenfelter:

9 Their failure to go farther up the Gila River, however, was not for lack of
10 demand or imagination. For Arizona's first gold rush in 1858 to the placers at
11 Gila City just twenty miles up the river prompted the formation of the Gila
12 Mining and Transportation Company in San Francisco. Hoping to navigate the
13 Gila, they sent down mining machinery and a small, disassembled "mail
steamer" from San Francisco on the schooner *Arno*. She arrived at the mouth of
the Colorado in March 1859, but promptly struck a sand bar, bilged and sank, "a
total loss in less than half an hour."² No one else attempted to put a steamer on
the Gila, and the rush petered out.

14 Lingenfelter [X008] at ¶ 19. As the *Arno* incident makes clear, sand bars can pose
15 serious impediments to use of a river as a highway of commerce. *See also Oklahoma v.*
16 *Texas*, 258 U.S. 574, 589 (1922) (determining that the Red River is not navigable and that
17 "[b]oats with a sufficient draft to be of any service can ascend and descend only during
18 periods of high water" as a result of the low depths of water over sand bars, which in some
19 places range "from 6 to 18 inches and elsewhere from 3 to 6 feet.").

20 The SLD also attempts to downplay the impediments that are posed by rapids,
21 asserting that only Class VI rapids can pose obstacles. This is simply impossible to reconcile
22 with either common sense or the historical record. History reflects that rapids have posed

24 ² Affidavit at ¶ 19. As the *Arno* incident makes clear, sand bars can pose serious
25 impediments to use of a river as a highway of commerce. *See also Oklahoma v. Texas*, 258
26 U.S. 574, 589 (1922) (determining that the Red River is not navigable and that "[b]oats with a
27 sufficient draft to be of any service can ascend and descend only during periods of high
water" as a result of the low depths of water over sand bars, which in some places range
"from 6 to 18 inches and elsewhere from 3 to 6 feet.").

1 serious impediments in connection with failed attempts to boat the Gila. For instance, in the
2 Upper Gila, Evans and Adams experienced problems due to “a continuous series of rough
3 rapids and falls for 81 miles.” At one point, Evans fell in the water and swam or was carried
4 by the current downstream. Evans called it “a torturous route.” The boat was damaged due to
5 the rapids, with “one end being entirely submerged,” and Adams had to “bail[] out the water
6 from the stern.” Joint Filing FF#180. Evans concluded that he “would not engage to make
7 the trip down (the Gila’s) hazardous waters again.” Joint Filing FF#181.

8 As another example, when 49ers traveling along the Gila had a need to transport one of
9 their wounded companions, they were unable to float the man down the river because the
10 river was too shallow and had “too many rapids.” Joint Filing FF#212.

11 The SLD does not address rocks directly (*i.e.* independent of the role that rocks play in
12 rapids), but the record is clear that rocks, too, posed meaningful impediments to use of the
13 Gila. For instance, Johnston reported that the Gila had “about 18 inches [of] water on the
14 shoals . . . and canoes might pass down it very readily and good sized boats, *if it was not for*
15 *the round rocks in its bed.*” Joint Filing FF#349. Messrs. Fuller and Farmer may contend
16 that they could easily boat through this stretch in a Kevlar canoe or a Hypalon kayak, but
17 Johnson, a contemporaneous observer, determined that the round rocks in the bed of the Gila
18 posed significant obstacles.

19 19. SLD ¶¶ 282-296: These paragraphs discuss the existence of fish in the Gila, and
20 are largely immaterial to the issues to be decided by this Commission. This discussion does
21 highlight, however, that, from prehistoric times through the 1800s leading up to statehood in
22 1912, the historic record is replete with evidence of the indigenous Native Americans as well
23 as explorers and settlers relying upon fish from the Gila as a food source. The Gila was a
24 central component of their lives, yet there is no evidence of prehistoric boating of any kind,
25 and the sporadic historic attempts to boat the Gila were largely unsuccessful and recreational
26 in nature, and often during periods of high water.

27 20. SLD ¶¶ 297-303: In these paragraphs, the SLD argues that beavers likely did

1 not build dams on the Gila and that, even if they did, beaver dams are “easily boated over or
2 removed.” While Messrs. Fuller and Farmer may enjoy overtopping beaver dams in their
3 durable modern recreational crafts, with respect to a commercial enterprise using commercial
4 craft at the time of statehood, “beaver dams would have forced considerable amounts of
5 portage in the natural state.” Joint Filing FF#358. Having described his personal
6 experiences encountering beaver dams, Dr. Mussetter testified that, if he had five days’ worth
7 of camping gear or 500 pounds of beaver pelts with him, he would have had to unload that
8 cargo from the canoe prior to carrying it around the beaver dam. Joint Filing FF#358.

9 21. SLD ¶¶ 304-335: These paragraphs purport to address the Duncan Valley
10 Segment, which is the SLD’s Segment 1 and Mr. Burtell’s Segment A. As throughout its
11 Proposed Findings of Fact and Conclusions of Law, the SLD builds its case on the faulty
12 premise that the ability to engage in recreation boating in modern recreational craft is the
13 measure of navigability under *The Daniel Ball* test. *See, e.g.*, SLD ¶¶ 320-335.

14 Segment 1 is devoid of any history of commercial navigation. Joint Filing FF#70;
15 Burtell at Table 15. Mr. Fuller admitted that steamboats could not have been used on the
16 Upper Gila in its ordinary and natural condition, and the only instances of attempted boating
17 prior to 1900 were either a ferry across the river, an unsuccessful attempt ending in a capsized
18 boat, Joint Filing FF#120, or a failed attempt to raft a man downstream to receive desperately
19 needed medical attention. Joint Filing FF#121. Sykes never boated the Upper Gila. If the
20 trip did in fact occur, the record demonstrates that Sykes did not float the Upper Gila. Joint
21 Filing FF#186-87.

22 The historic accounts of failed boating and stream conditions compiled in Mr. Burtell’s
23 Declaration are very consistent with Mr. Burtell’s conservative stream flow reconstructions.³
24 *Compare* Burtell at Table 1, Table 10, and Tables 15. These separate lines of evidence
25 provide ample explanation for the lack of historic boating, and the absence of commercial

26 ³ Referring to SLD ¶ 320, it is again necessary to clarify what Mr. Burtell’s reconstructed
27 flows represent. Mr. Burtell’s reconstructed depths reflect the mean depth of the cross section
under median flow conditions. Declaration at Table 10.

1 navigation at any time, in this segment – it was simply too shallow in its ordinary and natural
2 condition.

3 One outlier, impacted by well-documented extended precipitation, is an account by
4 Emory in 1846. The SLD quotes Kearny’s “party” for the notation that the Gila’s “cross
5 section here is about 70 feet by 4.” This account was made by Emory, whom expressly
6 opined that the Gila is was nonnavigable. *See* Joint Filing FF#191. As Mr. Burtell describes
7 in his Declaration,

8 on the day Emory’s of account (October 27th), there had been “some rain last
9 night, and it is now raining. A few days wet weather will use up the remainder
10 of our animals...” **This likely also explains the increased river depth Emory
observed.**

11 Referring to Mr. Burtell’s extremely conservative recreated flows below Bonita Creek, it is
12 clear that the account of depth is greatly inflated in response to significant precipitation. *See*
13 Burtell at Table 10. Emory’s estimated depth is also approximately 2-4 times greater than the
14 other historic accounts describing the depths of the Upper Gila. *See, generally,* Burtell at
15 Table 1; *e.g.* SLD ¶¶ 306, 307, 308, 310.

16 As Mr. Fuller noted in his SLD/Upper report and during the 2014 hearings, “[e]arly
17 descriptions of the upper Gila and San Francisco Rivers do not differ significantly from
18 contemporary descriptions of the river . . . Bartlett . . . believed that the Gila River was not
19 navigable except during irregular floods.” Joint Filing FF#106.

20 The SLD admits that “Segment 1 has a compound river channel ...” SLD ¶ 316. At
21 statehood, the natural condition of Segment 1 included a highly braided streambed. Braiding
22 is a natural condition of the Gila River; going back hundreds or even thousands of years, the
23 Gila has a long history of alternating between cycles of channel braiding followed by cycles
24 of single channel conditions. When significant portions of the Gila River developed braided
25 channels in the early 1900s, it was not the result of man, but of significant flooding that is an
26 intrinsic component of the river’s natural condition. Joint Filing FF#332-334 and CL#6.

27 Contrary to the SLD’s argument, the Gila River does not uniformly maintain a single

1 low flow channel when the stream is in a braided condition. For instance, field measurement
2 records from the USGS demonstrate that the Upper Gila frequently had multiple flowing
3 channels through the Duncan Valley and the Safford Valley. This remained true even
4 decades after the flooding and braiding took place, during a time when the river was in the
5 process of transitioning back to a single meandering channel. Joint Filing FF#331. Aerial
6 photographs from 1935 and 1937 also show that the river remained divided among multiple
7 flowing channels through the Duncan Valley and the Safford Valley. Joint Filing FF#331.

8 It is notable that the SLD essentially ignores the fact that the Gila was not used as a
9 highway for commerce despite the well-documented existence of several significant needs for
10 commercial navigation throughout various times when the Gila (including this segment) was
11 in its ordinary and natural condition. This is perhaps the most compelling proof that the Gila
12 (including this segment) was not susceptible to use as a highway of commerce, because if it
13 had been susceptible, it would have been used to meet these needs. *See generally* Freeport's
14 Opening Memorandum at Sections III.B. and III.C and Freeport's Responsive Memorandum
15 at Section IV; *see also* Joint Filing FF#271-283 and CL#40-42.

16 A discussion of the evidence relating to boating attempts on the Gila is found at Joint
17 Filing FF#117-222.

18 22. SLD ¶¶ 336-365: The foregoing discussion of SLD ¶¶ 304-335 is incorporated
19 herein, as much of it is applicable in response to SLD ¶¶ 336-365.

20 The SLD references Mr. Burtell's compilation of an account from Territorial Governor
21 Safford about swimming across portions of the Gila, but the SLD omits both Territorial
22 Governor Safford's explanation that "at an ordinary stage of the water, there is not the least
23 difficulty in passing with a cavalry company through this canon," and Mr. Burtell's
24 accompanying analysis that the account "*indicates river is typically shallow but becomes*
25 *deeper during the monsoon when he travelled down it.*" Burtell at Table 1. As elsewhere, the
26 SLD puts far too much reliance on instances of flood and high water.

27 The other historic accounts of river conditions of the Gila Box reach (SLD's Segment

1 I and Mr. Burtell's Segment B) describe a river that has similar discharge to its tributary, the
2 San Francisco, that is shallow enough to be easily crossed, and that, typical of desert streams
3 in the region, exhibits widely variable flows based on season. Burtell at Table 1.

4 The historic accounts of failed boating and stream conditions compiled in Mr. Burtell's
5 Declaration are very consistent with Mr. Burtell's conservative stream flow reconstructions.⁴
6 *Compare* Burtell at Table 1, Table 10, and Tables 15. These separate lines of evidence
7 provide ample explanation for the lack of historic boating, and the absence of commercial
8 navigation at any time; the Gila was simply too shallow in its ordinary and natural condition.

9 Like the rest of the Gila, there is no evidence of Native Americans ever boating the
10 Upper Gila, including Segment 2. Unsupported insinuations notwithstanding, there is no
11 evidence that the Apache bull boats involved the Upper Gila, or any other portion of the Gila,
12 for that matter. *See* Freeport's Responsive Memorandum at p. 17 n. 73.

13 Again, the SLD devotes a significant portion of this section to the use of modern
14 recreational crafts for recreational purposes only. *See, e.g.*, SLD ¶¶ 356-365. Even
15 recreational boating tends to be seasonal. *See, e.g.*, SLD ¶ 356 (describing "a short" rafting
16 season that is extended by low water boaters). The SLD relies on inflatables and other
17 modern recreational craft, including plastic canoes and kayaks and rubber rafts. *See, e.g.*,
18 SLD ¶¶ 356-365. As Mr. Fuller recognized in one of his reports for the SLD, these sorts of
19 "plastic, fiberglass and other modern types of canoes and kayaks, inflatable boats for single
20 paddlers and for groups [] all contributed to the rising popularity of river running in Arizona
21 especially on rivers not previously considered boatable, or boatable only very rarely because
22 of low water." Joint Filing CL#35. Such is the case in Segment 2, which is now boatable
23 seasonally for recreational purposes thanks to the proliferation of modern inflatables and
24 plastic, durable, low draft crafts, which are "able to navigate water much more shallow" and
25 "with rockier beds than the boats customarily used for trade and travel at statehood." *PPL*

26 ⁴ Referring to SLD ¶ 348, it is again necessary to clarify what Mr. Burtell's reconstructed
27 flows represent. Mr. Burtell's reconstructed depths reflect the mean depth of the cross section
under median flow conditions. Declaration at Table 10.

1 *Montana*, 132 S.Ct. at 1234. To this day, Segment 2 has neither been used as a highway for
2 commerce nor susceptible to use as a highway for commerce.

3 It is notable that the SLD essentially ignores the fact that the Gila was not used as a
4 highway for commerce despite the well-documented existence of several significant needs for
5 commercial navigation throughout various times when the Gila (including this segment) was
6 in its ordinary and natural condition. This is perhaps the most compelling proof that the Gila
7 (including this segment) was not susceptible to use as a highway of commerce, because if it
8 had been susceptible, it would have been used to meet these needs. *See generally* Freeport's
9 Opening Memorandum at Sections III.B. and III.C and Freeport's Responsive Memorandum
10 at Section IV; *see also* Joint Filing FF#271-283 and CL#40-42.

11 23. SLD ¶¶ 366-386: The foregoing discussions of SLD ¶¶ 304-335 and SLD ¶¶
12 336-365 are incorporated herein, as much of these discussions is applicable in response to
13 SLD ¶¶ 366-386. These paragraphs relate to the Safford Valley Segment, which is the SLD's
14 Segment 3 and Mr. Burtell's Segment C.

15 Segment 3 is devoid of any history of commercial navigation. Joint Filing FF#70;
16 Burtell at Table 15. Mr. Fuller admitted that steamboats could not have been used on the
17 Upper Gila in its ordinary and natural condition, and the only instances of attempted boating
18 prior to 1900 were either a ferry across the river, an unsuccessful attempt ending in a capsized
19 boat, Joint Filing FF#120, or a failed attempt to raft a man downstream to receive desperately
20 needed medical attention. Joint Filing FF#121. Sykes never boated the Upper Gila. If the
21 trip did in fact occur, the record demonstrates that Sykes did not float the Upper Gila. Joint
22 Filing FF#186-87.

23 The historic accounts of failed boating and stream conditions compiled in Mr. Burtell's
24 Declaration are very consistent with Mr. Burtell's conservative stream flow reconstructions.⁵
25 *Compare* Burtell at Table 1, Table 10, and Tables 15. These separate lines of evidence

26 ⁵ Referring to SLD ¶ 379, it is again necessary to clarify what Mr. Burtell's reconstructed
27 flows represent. Mr. Burtell's reconstructed depths reflect the mean depth of the cross section
under median flow conditions. Declaration at Table 10.

1 provide ample explanation for the lack of historic boating, and the absence of commercial
2 navigation at any time; the Gila was simply too shallow in its ordinary and natural condition.

3 Like the Duncan Valley (Segment 1 / Segment A), the Safford Valley had a highly
4 braided streambed at statehood. Braiding is a natural condition of the Gila River; going back
5 hundreds or even thousands of years, the Gila has a long history of alternating between cycles
6 of channel braiding followed by cycles of single channel conditions. When significant
7 portions of the Gila River developed braided channels in the early 1900s, it was not the result
8 of man, but of significant flooding that is an intrinsic component of the river's natural
9 condition. Joint Filing FF#332-334 and CL#6.

10 Contrary to the SLD's argument, the Gila River does not uniformly maintain a single
11 low flow channel when the stream is in a braided condition. For instance, field measurement
12 records from the USGS demonstrate that the Upper Gila frequently had multiple flowing
13 channels through the Duncan Valley and the Safford Valley. This remained true even
14 decades after the flooding and braiding took place, during a time when the river was in the
15 process of transitioning back to a single meandering channel. Joint Filing FF#331. Aerial
16 photographs from 1935 and 1937 also show that the river remained divided among multiple
17 flowing channels through the Duncan Valley and the Safford Valley. Joint Filing FF#331.
18 The braiding in the Safford Valley depicted in the photographs is particularly significant.
19 Joint Filing FF#331.

20 It is notable that the SLD essentially ignores the fact that the Gila was not used as a
21 highway for commerce despite the well-documented existence of several significant needs for
22 commercial navigation throughout various times when the Gila (including this segment) was
23 in its ordinary and natural condition. This is perhaps the most compelling proof that the Gila
24 (including this segment) was not susceptible to use as a highway of commerce, because if it
25 had been susceptible, it would have been used to meet these needs. *See generally* Freeport's
26 Opening Memorandum at Sections III.B. and III.C and Freeport's Responsive Memorandum
27 at Section IV; *see also* Joint Filing FF#271-283 and CL#40-42.

1 24. SLD ¶¶ 387-403: These paragraphs relate to SLD’s Segment 4, which begins at
2 Coolidge Dam. The foregoing discussions of SLD ¶¶ 304-335, SLD ¶¶ 336-365, and SLD ¶¶
3 366-386 are incorporated herein, as much of these discussions is applicable in response to
4 SLD ¶¶ 387-403.

5 Although all parties did not necessarily agree with those specific segments as presented
6 by the SLD, any disagreement on that issue is immaterial because no portion of the Gila is
7 navigable under the proper legal test.

8 As with Segments 1-3 / A-C described above, Segment 4 is typified by shallow depths,
9 a complete absence of commercial navigation, and an extremely limited, and unsuccessful,
10 history of attempts to boat the segment prior to the advent of modern recreational boating.
11 *See, e.g.*, Burtell at Tables 1, 10, and 15.

12 The SLD again misplaces reliance on the adventurous – and “torturous” – trip of
13 Adams and Evans. As described above, this was a recreational escapade in which Evans and
14 Adams experienced problems due to “a continuous series of rough rapids and falls for 81
15 miles.” At one point, Evans fell in the water and swam or was carried by the current
16 downstream. Evans called it “a torturous route.” The boat was damaged due to the rapids,
17 with “one end being entirely submerged,” and Adams had to “bail[] out the water from the
18 stern.” Joint Filing FF#180 (quoting SLD/Upper, at 3-28). Evans concluded that he “would
19 not engage to make the trip down (the Gila’s) hazardous waters again.” Joint Filing FF#181.

20 Notably, Evans and Adams capsized in Segment 4. *See, e.g.*, Burtell at Table 15.

21 The SLD erroneously states that Mr. Burtell’s reconstructed depth for Segment 4 is “a
22 median of 2.7 feet.” Mr. Burtell’s reconstructed mean cross-sectional depths at Coolidge dam
23 range from less than 1.8 feet to less than 2 feet under median flow conditions.⁶ The 2.7 feet
24 appears to have been calculated by Mr. Fuller as the depth under average flows, *i.e.* mean
25 flow conditions skewed upwards by large flood events. The actual reconstructed flows and

26 ⁶ Referring to SLD ¶ 392, it is again necessary to clarify what Mr. Burtell’s reconstructed
27 flows represent. Mr. Burtell’s reconstructed depths reflect the mean depth of the cross section
under median flow conditions. Declaration at Table 10.

1 depths calculated by Mr. Burtell are consistent with the complete absence of any commercial
2 navigation and an extremely limited history of attempts to boat this segment for any purpose.

3 The SLD relies heavily on the existence of modern day recreational boating in dam
4 regulated flows that are more consistent than the flows were in the river's ordinary and
5 natural condition. The SLD's reliance on modern recreational boating, supported through
6 unnatural, regulated flows, is at odds with *PPL Montana*, 132 S.Ct. at 1234 (evidence of
7 dissimilar modern crafts must not be considered), and *State v. ANSAC*, 224 Ariz. at 241 (the
8 river must be considered in its "natural" condition), among other authorities.

9 It is notable that the SLD essentially ignores the fact that the Gila was not used as a
10 highway for commerce despite the well-documented existence of several significant needs for
11 commercial navigation throughout various times when the Gila (including this segment) was
12 in its ordinary and natural condition. This is perhaps the most compelling proof that the Gila
13 (including this segment) was not susceptible to use as a highway of commerce, because if it
14 had been susceptible, it would have been used to meet these needs. *See generally* Freeport's
15 Opening Memorandum at Sections III.B. and III.C and Freeport's Responsive Memorandum
16 at Section IV; *see also* Joint Filing FF#271-283 and CL#40-42.

17 25. SLD ¶¶ 404-427: The SLD again erroneously contends that the Gila was given
18 the name "River of Rafts." During the 2014 hearing, Mr. Fuller had to concede that there is
19 no evidence that the River of Rafts was a reference to the Gila. *See, e.g.*, Freeport's
20 Responsive Memorandum at p. 3 n. 4. Moreover, Mr. Fuller also conceded the "River of
21 Rafts" moniker was a reference to the use of rafts to *cross* some river – again, we do not know
22 which one – not to the use of rafts to travel up or down any river, the Gila or otherwise. *Id.*
23 The only evidence addressed by the SLD of actual Native American use of the Gila involved
24 irrigation uses of the river, not use of the river as a highway of commerce or for boating of
25 any kind. SLD ¶¶ 406-07.

26 The SLD errs in relying on the Johnston account. Eighteen inches of water is
27 insufficient to support commercial navigation, and the relevant aspect of the account is that

1 rocks created impassable obstruction to canoes and good-sized boats. Joint Filing FF#349.
2 There is no record of Johnston or any member of Kearny's expedition using the Gila for
3 transportation or shipping. Joint Filing FF#193.

4 The SLD also relies upon an account from Emory, who would later go on to express
5 unequivocally his opinion that the Gila was nonnavigable. Emory opined that the Gila was
6 nonnavigable. Joint Filing FF#191. There is no record of Emory using the Gila for
7 transportation or shipping. Joint Filing FF#193.

8 The SLD acknowledges that Segment 5 at times exhibited a braided channel. Braiding
9 is a natural, reoccurring condition of the Gila River that results in multiple flowing channels,
10 resulting in a reduction of flow depth and obstructions to navigation. Joint Filing FF#299-346.
11 The SLD concedes further that even the low-flow channel is at times braided. SLD ¶ 413.
12 This is consistent with field measurements and aerial photography demonstrating that portions
13 of the Gila frequently had multiple flowing channels. Joint Filing FF#331.

14 While it is true that some braided rivers can be used as a highway for commerce, "it
15 takes far more river flow than any of the experts or records suggest for the Gila River." Joint
16 Filing FF#343. Concerning the Gila, "[t]he braided planform that existed certainly at that
17 time and the really low flows would have made commercial navigation very impractical." *Id.*

18 The SLD devotes the rest of its paragraphs in this section to discussing "occasional
19 recreational use by canoes and kayaks" and other "small draft boats." SLD ¶¶ 419-427.
20 Segment 5, like Segment 4, is downstream of Coolidge Dam, and the SLD therefore places its
21 reliance on the existence of modern day recreational boating in dam regulated flows that are
22 more consistent than the flows were in the river's ordinary and natural condition. The SLD's
23 reliance on modern recreational boating, supported through unnatural, regulated flows, is at
24 odds with *PPL Montana*, 132 S.Ct. at 1234 (evidence of modern recreational boating in
25 dissimilar crafts must not be considered), and *State v. ANSAC*, 224 Ariz. at 241 (the river
26 must be considered in its "natural" condition), among other authorities.

27 It is notable that the SLD essentially ignores the fact that the Gila was not used as a

1 highway for commerce despite the well-documented existence of several significant needs for
2 commercial navigation throughout various times when the Gila (including this segment) was
3 in its ordinary and natural condition. This is perhaps the most compelling proof that the Gila
4 (including this segment) was not susceptible to use as a highway of commerce, because if it
5 had been susceptible, it would have been used to meet these needs. *See generally* Freeport’s
6 Opening Memorandum at Sections III.B. and III.C and Freeport’s Responsive Memorandum
7 at Section IV; *see also* Joint Filing FF#271-283 and CL#40-42.

8 26. SLD ¶ 428: The SLD proposed a specific designation of segments on the Gila
9 River during Mr. Fuller’s hearing testimony. Although all parties did not necessarily agree
10 with those specific segments as presented by the SLD, any disagreement on that issue is
11 immaterial because no portion of the Gila is navigable under the proper legal test.

12 27. SLD ¶¶ 429-435: During his 2014 hearing testimony, Mr. Fuller admitted that
13 his previous report (Small Watercourses [X016-FMI_X008]) stated that early Spanish
14 explorers navigated the Colorado River, but that “[t]he Spaniards are not known to have used
15 boats on other Arizona rivers as their exploration inland was on horseback and on foot”
16 despite exploring the Gila, Santa Cruz, and San Pedro Rivers. *See* Joint Filing FF#203. Mr.
17 Fuller testified that he was not aware of any evidence that the early Spanish explorers
18 navigated any other Arizona river besides the Colorado River. *See id.*

19 28. SLD ¶¶ 436-437: Emory was part of the Kearny expedition in 1846. Evidence
20 in the record relating to the Kearny expedition is set forth in Joint Filing FF#191-194. As the
21 SLD itself acknowledges in its Paragraph 436, Lieutenant Emory himself concluded that the
22 Gila River was “not navigable.” *See* Joint Filing ¶¶ 191, 194.

23 29. SLD ¶ 438-439: Prior to issuing its 2009 decision, the Commission received
24 evidence concerning sporadic historic attempts to float the Gila and found that the “incidents
25 of boating or attempted boating were for recreational purposes and none of them, except the
26 very earliest, during the Mexican-American War and the passage of the Forty-Niners had any
27 commercial intent at all.” *See* Joint Filing FF#117. The Commission found that “[t]here are

1 reports that some . . . Forty-Niners attempted to float boats or rafts down the Gila to Yuma,
2 but generally they were unsuccessful.” See Joint Filing FF#173; see also Joint Filing FF#172.
3 In its Paragraph 439, the SLD states that “[o]ther groups of forty-niners also used the River as
4 an alternative to wagon travel.” See SLD ¶ 439 (citing X006-9, pp. 3-4). The document upon
5 which the SLD relies (X006-9) contains two references to “immigrants” on pages 3 and 4.
6 The first reference, at the bottom of page 3, quotes an October 1849 account by James Collier,
7 who states: “Some of the immigrants in our party are going down the river on a raft I suppose
8 they will beat us to the Colorado [by] some days.” That account has no information about
9 who those “immigrants” were, whether they actually undertook their attempt, or whether they
10 ever made it any appreciable distance on the river. The second reference, at the top of page 4
11 of X006-9, is a December 1849 account by Robert Eccleston, who states that his group found
12 a wagon close to the river and that he assumed that the person who owned the wagon had
13 “taken to water.” Like the Collier passage, the short excerpt from Mr. Eccleston has
14 information about who the owner of the wagon was, whether they actually attempted to float
15 on the river, or whether they ever made it any distance on the water.

16 30. SLD ¶ 440: The descriptions of the river to which the SLD refers in its
17 Paragraph 440 contain no information as to who made those observations or what time of year
18 they were made.

19 31. SLD ¶ 441: In its Paragraph 441, the SLD relies upon a newspaper article by an
20 unnamed author repeating information from an unnamed source. A more reliable source of
21 information comes from John R. Bartlett of the United States Army Corps of Topographical
22 Engineers, who was in the area about the same time as the newspaper article upon which the
23 SLD relies. See Joint Filing FF#104. Mr. Bartlett worked on surveying the boundary
24 between the United States and Mexico from 1850 to 1853. *Id.* Mr. Bartlett’s account of the
25 Gila tracks the information in the newspaper article to some extent but is different in certain
26 significant aspects. In one report, Mr. Bartlett stated: “It is doubtful whether [the Gila] can
27 ever be navigated, except at its floods, and these are by no means regular. At such times [i.e.,

1 during irregular floods,] flat-bottomed boats might pass to the mouth of the Salinas [Salt
2 River], near the Pima villages.” See Joint Filing FF#105; see also response to SLD ¶ 436.

3 32. SLD ¶¶ 442-443: The flows in some reaches of the Gila River in the early
4 1900s were different from what they would have been absent human influences such as
5 diversions of water. Periods of flood and drought have occurred on the river throughout the
6 course of time.

7 33. SLD ¶ 444: Native inhabitants in the Gila River region were diverting and
8 using water for irrigation for centuries prior to non-Native arrival and continued to do so
9 thereafter. See Joint Filing FF#72, 84. Although Native American inhabitants of the region
10 made use of water from the Gila for irrigation, they did not use the river for navigation during
11 recorded history. *Id.*

12 34. SLD ¶ 445: The 1910 photograph that appears as Figure 32 in Dr. Littlefield’s
13 2013 report (X002 at 108) shows multiple braided channels.

14 35. SLD ¶¶ 446-449: In its Paragraphs 446-449, the SLD has accurately
15 summarized the opinions of its own witness, Mr. Fuller. Those opinions are disputed in
16 several respects, including the nature of the Gila River channel in Segment 6. See generally
17 Joint Filing FF#284-361.

18 36. SLD ¶ 450: Issues associated with estimated depth of the river are discussed in
19 Joint Filing FF#295-298 and 308-317.

20 37. SLD ¶¶ 451-453: For a discussion of Mr. Gookin’s analysis, see Gila River
21 Indian Community’s Responsive Closing Brief (January 23, 2015).

22 38. SLD ¶ 454: In its Paragraph 454, the SLD relies solely upon the transcript of
23 the testimony by its own witness, Mr. Fuller. In that testimony (Tr. at 06/16/14:166), Mr.
24 Fuller states: “There’s limited information in the archaeological records about Native
25 American use of Native American boating.” He continues: “Evidence of using wooden rafts
26 on the lower Gila in Segments 7 and 8, possibly on the middle Gila, according to
27 archaeologists.” Mr. Fuller provided no support for his statements, and the SLD provides

1 none in its Paragraph 454. In his written reports to the Commission, Mr. Fuller and his co-
2 authors repeatedly stated that “[a]rchaological research has not documented any use of the
3 river for commercial trade and travel or any regular flotation of logs” on the river. *See* Joint
4 Filing FF#60; *see also id.* FF#63. In its 2009 decision, this Commission found that “[t]here is
5 no evidence in [the] archeological Record that would indicate that any of the prehistoric
6 cultures located in the study areas along the Gila River used the Gila River a means of
7 transportation by boat or other watercraft and there has been no documented use of the river
8 for commercial trade and travel or for result flotation of logs. All travel along the Gila River
9 during this period was by foot.” Joint Filing FF#67. When asked during his 2014 testimony
10 to expand on his statement about the “limited information” in the archaeological records
11 about Native American use of boats, Mr. Fuller admitted that he could not recall any evidence
12 of the use of the Gila by indigenous peoples for trade or commerce. Joint Filing FF#68-69.

13 39. SLD ¶ 455: The Howard account of an 1849 attempt to float down the Gila is
14 discussed at Joint Filing FF#168-171. The SLD’s assertion in its Paragraph 455 that
15 “[n]either account records any difficulty with the trip” is belied by the account of statements
16 by Charles Edward Pancoast, who indicated that “[t]he Crew told us afterwards that they
17 found the River shallow and full of Bars, and the Current very rapid; they frequently found
18 themselves aground and had much difficulty in getting off.” *See* Joint Filing FF#170.

19 40. SLD ¶ 456: The flatboat float down the Gila in 1849 described by the SLD in
20 its Paragraph 456 is likely the same Howard family trip recounted in its Paragraph 455. No
21 evidence exists in the record to show that these were two separate trips.

22 41. SLD ¶ 457: The Gully and Richardson attempt to float the Gila is addressed at
23 Joint Filing FF#201.

24 42. SLD ¶ 458: The 1846 or 1847 effort to float the Gila by the Mormon Battalion
25 and Captain Philip St. George Cooke is discussed at Joint Filing FF#164-167. Col. Cooke
26 described his failed attempt as follows: “The experiment signally failed, owing to the
27 shallowness of the water on the bars; the river was very low. In consequence of the difficulty

1 of approaching the river, orders mistaken &c., the flour only was saved from the loading, and
2 the pontoons were floated empty to the crossing of the Rio Colorado, where they were used as
3 a ferry boat.” *See* Joint Filing FF#167.

4 43. SLD ¶ 459: The SLD report on the Lower Gila was presented to the
5 Commission during the 2003-2005 hearings. In its 2009 decision, the Commission observed
6 that “[t]here are reports that some . . . Forty-Niners attempted to float boats or rafts down the
7 Gila to Yuma, but generally they were unsuccessful.” *See* Joint Filing FF#173.

8 44. SLD ¶ 460: In its Paragraph 460, the SLD cites only to the transcript of the
9 testimony by its witness, Mr. Fuller, and his Power Point. The Power Point slide (X020-79, at
10 Slide 117) makes a passing reference to “McCroskey, 1989,” but the SLD does not cite to
11 “McCroskey” in its Paragraph 460, and no such document appears to be in the record. Based
12 upon the limited information supplied by Mr. Fuller and the SLD, it is not possible to
13 determine whether the purported 1849 attempt to float the Gila was a planned attempt, an
14 actual attempt, or whether it was successful or unsuccessful.

15 45. SLD ¶ 461: A discussion of the accounts of actual attempts to float the Gila is
16 set forth in Joint Filing FF#117-222.

17 46. SLD ¶ 462: Transporting passengers and cargo over the Gila River using a
18 suspended cable and cage does not support a finding that the river itself was ever used or
19 susceptible to being used as a highway for commerce.

20 47. SLD ¶ 463: Ferries operated at certain locations on the Gila during parts of
21 some years. The records of ferries provide evidence that ferries were used only to cross the
22 river, as opposed to travel upstream and downstream. *See* Joint Filing FF#215. All of the
23 ferries were used to traverse the river, serving as the functional equivalent of a bridge. *See*
24 Joint Filing FF#218. The use of ferries to cross the river does not demonstrate that navigation
25 along the stream occurred or could have occurred.

26 48. SLD ¶ 464: Like other segments of the Gila River, Segment 6 is rarely, if ever,
27 boated.

1 49. SLD ¶ 465: *See* response to SLD ¶ 463.

2 50. SLD ¶¶ 466-468: Various historical descriptions of the Gila River do exist.
3 Those descriptions are often conflicting, in part due to differences in location, year, and time
4 of year. With respect to the SLD's assertions in its Paragraph 468, the journal entry by Henry
5 Turner Smith of the Kearny party referred to a point on the Gila approximately eighty miles
6 west of Gila Bend. *See* Exhibit X002, at 95. Eighty miles west of Gila Bend is near Dome, in
7 the area just east of Yuma. At that location, Mr. Smith noted that "[t]he Gila is assuming a
8 much more river-like appearance," implying that the Gila east of Dome did not have a "river-
9 like appearance," even in 1846. *See id.*

10 51. SLD ¶ 469: *See* response to SLD ¶ 9. In addition, the accounts discussed in
11 SLD ¶¶ 477-478 refer to sufficient water for irrigation but make no mention of navigation.
12 Due to a variety of issues (including timing of flows, depth, and the presence of natural
13 obstructions), a sufficient quantity of water for irrigation does not necessarily equate to a
14 sufficient quantity for navigation.

15 52. SLD ¶¶ 470-482: *See* response to SLD ¶¶ 466-468.

16 53. SLD ¶¶ 483-485: The numerous substantive and methodological flaws in Mr.
17 Hjalmarson's analysis are set forth in Joint Filing FF#308-323, in SRP's Responsive Closing
18 Brief (pages 11-15), and in this Commission's 2009 decision (pages 74-76).

19 54. SLD ¶¶ 486-487: In its Paragraphs 486 and 487, the SLD has accurately
20 summarized the opinions of its own witness, Mr. Fuller. Those opinions are disputed in
21 several respects, including the nature of the Gila River channel in Segments 7 and 8. *See*
22 *generally* Joint Filing. *See also* response to SLD ¶¶ 483-485 with respect to Mr.
23 Hjalmarson's analysis.

24 55. SLD ¶ 488: Because insufficient evidence exists to demonstrate that any of the
25 eight SLD segments is navigable, the navigability determination of the Gila River does not
26 require segmentation. In its ordinary and natural condition, none of the river was navigable at
27 the time of statehood.

1 56. SLD ¶ 489: The flows in some reaches of the Gila River as of February 14,
2 1912, were different from what they would have been absent human influences such as
3 diversions and dams. Whether the river itself was in a “natural” condition as of that date is a
4 more complex question. The “ordinary and natural condition” of the Gila River is different
5 at different times. Substantial evidence was introduced on that issue during the 2003-2005
6 hearings and especially during the 2014 hearing. That evidence is summarized in Joint Filing
7 FF#326-346. *See also* SRP’s Closing Brief, at 26-27.

8 57. SLD ¶¶ 490-493: *See* response to SLD ¶¶ 486-487.

9 58. SLD ¶ 494: The document submitted by Ms. Tellman upon which the SLD
10 relies for its Paragraph 494 (EI 16, at 33) says only that “[p]rehistoric peoples used boats to
11 cross and travel along the lower Colorado and lower Gila rivers.” That document does not
12 indicate whether such use was in the SLD’s Segment 7, Segment 8, or only in the area near
13 the Colorado River confluence. Ms. Tellman’s document cites to no authority for her
14 statement. *See also* response to SLD ¶ 454.

15 59. SLD ¶¶ 495-496: *See* response to SLD ¶¶ 438-439.

16 60. SLD ¶ 497: The account of an 1879 attempt to float the Gila by Hamilton,
17 Jordan, and Halesworth is discussed at Joint Filing FF#198.

18 61. SLD ¶ 498: The 1881 newspaper article relating to Cotton and Bingham is
19 discussed at Joint Filing FF#175. It is unclear whether this trip actually occurred because the
20 newspaper article (the only record of this supposed trip) was written the day before the trip.
21 The record contains no subsequent information concerning whether the trip actually occurred.

22 62. SLD ¶ 499: The “Yuma or Bust” expedition is discussed at Joint Filing
23 FF#176-178. With regard to that event, Mr. Fuller acknowledged that they had “[a] good deal
24 of trouble getting through some sandbars” and were seen “pushing their boat.” *See* Joint
25 Filing FF#178. The SLD, in its Paragraph 499, speculates that the craft “was not particularly
26 nimble,” but nothing in the record supports that speculation.

27 63. SLD ¶ 500: The Burke and Davis account is discussed at Joint Filing FF#199.

1 During his 2014 hearing testimony, Mr. Fuller acknowledged that the boaters damaged or lost
2 their boat at the Needle's Eye Wilderness Area and were forced to build another boat. *See*
3 Joint Filing FF#199.

4 64. SLD ¶ 501: The Day brothers' trip is discussed at Joint Filing FF#200.

5 65. SLD ¶¶ 502-503: The account of Stanley Sykes is discussed at Joint Filing
6 FF#186-190. Some uncertainty exists in the documents regarding whether that trip occurred
7 in the 1890s or after 1900. *See id.* During the 2005 hearing, Ms. Tellman testified that the
8 Sykes trip was "quite unsuccessful." *See* Joint Filing FF#189.

9 66. SLD ¶ 504: The presence of a boat used to cross the river does not demonstrate
10 that navigation along the stream occurred or could have occurred.

11 67. SLD ¶ 505: The SLD's assertion in its Paragraph 505 that no boaters in
12 Segment 7 except Sykes and McLean had "difficulty" is exaggerated and unsupported in the
13 record. For example, the "Yuma or Bust" expedition discussed in SLD ¶ 499 and Joint Filing
14 FF#176-178 reportedly went from Phoenix toward Gila Bend and encountered substantial
15 "difficulty." The participants in that expedition were found, only twelve miles from Phoenix,
16 all wading in mud and water up to their knees and pulling the boat. *See* Joint Filing FF#177.
17 The *Arizona Gazette* reported that "the boat reached Gila Bend and 'busted.' . . . [The crew]
18 endured great hardships, being compelled to wade in the water the greater portion of the time
19 and push the craft ahead of them." *See id.*

20 68. SLD ¶ 506: *See* response to SLD ¶¶ 483-485.

21 69. SLD ¶¶ 507-509: Like other segments of the Gila River, Segment 7 is rarely, if
22 ever, boated.

23 70. SLD ¶ 510: In its Paragraph 510, the SLD has accurately summarized the
24 opinions of its own witness, Mr. Fuller. Those opinions are disputed in several respects,
25 including the nature of the Gila River channel in Segment 8. *See generally* Joint Filing.

26 71. SLD ¶¶ 511-512: Various historical descriptions of the Gila River do exist.
27 Those descriptions are often conflicting, in part due to differences in location, year, and time

1 of year.

2 72. SLD ¶¶ 513-514: *See* response to SLD ¶ 510.

3 73. SLD ¶ 515: In its Paragraph 515, the SLD states that “the experts agree,” but
4 that paragraph cites to no witness other than Mr. Hjalmarson. The numerous substantive and
5 methodological flaws in Mr. Hjalmarson’s analysis are set forth in Joint Filing FF#308-323,
6 in SRP’s Responsive Closing Brief (pages 11-15), and in this Commission’s 2009 decision
7 (pages 74-76).

8 74. SLD ¶ 516: *See* response to SLD ¶ 510.

9 75. SLD ¶ 517: There is evidence in the record of sporadic and limited steamboat
10 use on the extreme lower end of Segment 8, near the Colorado River confluence. *See* Joint
11 Filing FF#364. The SLD has no sound evidentiary basis to support its contention that
12 steamboats may have run as far as Gila City / Dome. *See* Joint Filing FF#365; *see also id.*
13 FF#366; *see also* Freeport’s Responsive Memorandum at pp. 20-21. As was addressed
14 during the hearing, none of the articles that Mr. Fuller and the SLD cite to provide any
15 support for the notion that steamboats ever traveled as far as Dome. Freeport’s Responsive
16 Memorandum at pp. 20-21. As described by Dr. Lingenfelter, and contrary to the SLD’s
17 unsupported assertions, the only evidence before the Commission demonstrates that the
18 furthest steamboats ever traveled was 5 or 6 miles upstream of confluence, and only for
19 recreational purposes during periods of high water. Lingenfelter at ¶¶ 16, 18, and 31.
20 Consistent with Dr. Lingenfelter’s historical research, Dr. Littlefield testified during the 2014
21 hearing that he had never seen a primary source documenting this assertion. *See* Joint Filing
22 FF#365; *see also id.* FF#366. With respect to log floating on Segment 8, *see* Joint Filing
23 FF#195-197, Mr. Fuller admitted that he did not know how far the logs were floated, and he
24 acknowledged that it could have been as short as half a mile. *See* Joint Filing FF#196. Mr.
25 Fuller stated that a single 1897 newspaper article was the only documented instance of
26 floating logs on the Gila. *See* Joint Filing FF#197.

27 76. SLD ¶ 518: The SLD’s Paragraph 518 is a verbatim repeat of its Paragraph

1 500. The Burke and Davis account is discussed at Joint Filing FF#199.

2 77. SLD ¶ 519: The SLD's assertion in its Paragraph 519 that only two of the
3 travelers on Segment 8 encountered "difficulties" is perhaps not surprising when one
4 considers that those two groups were among the few who even attempted to float the Gila in
5 Segment 8, other than those who used the river in the extreme lower end of Segment 8 near
6 the Colorado River confluence.

7 78. SLD ¶ 520: See response to SLD ¶ 517.

8 79. SLD ¶ 521: In its Paragraph 521, the SLD has accurately summarized the
9 opinions of its own witness, Mr. Fuller. Those opinions are disputed in several respects,
10 including the nature of the Gila River channel in Segment 8. See generally Joint Filing.

11 80. SLD ¶¶ 522-534: See response to SLD ¶ 517.

12 81. SLD ¶ 535: Exhibit X019 is not independently paginated, so it is difficult to
13 determine which portion of that document the SLD intends to cite when it refers to "p. 15."
14 To the extent that document refers to the "Gila Laguna," however, it does not necessarily
15 indicate boating on any portion of the Gila River. "Laguna" is a Spanish word for "lagoon,"
16 which means "a small sound, channel, or pond near or communicating with a larger body of
17 water." See *Merriam-Webster's Collegiate Dictionary* 697 (11th ed. 2005). Thus, a reference
18 to boating on the "Gila Laguna" would relate to boating on a body of water separate from, but
19 perhaps connected to, the Gila River.

20 82. SLD ¶¶ 536-537: Dr. Lingenfelter's affidavit (X008) is addressed in Joint
21 Filing FF#223-227. Dr. Lingenfelter concluded: "In over fifty years of researching and
22 writing on Western American history, I found no historical evidence of any commercial
23 navigation on the Gila River more than a short distance above its junction with the Colorado,
24 despite a continued demand from developing mines for cheaper transportation." See Joint
25 Filing FF#227.

26 83. SLD ¶ 538: Ferries operated at certain locations on the Gila during parts of
27 some years. The records of ferries provide evidence that ferries were used only to cross the

1 river, as opposed to travel upstream and downstream. *See* Joint Filing FF#215. All of the
2 ferries were used to traverse the river, serving as the functional equivalent of a bridge. *See*
3 Joint Filing FF#218. The use of ferries to cross the river does not demonstrate that navigation
4 along the stream occurred or could have occurred.

5 84. SLD ¶ 539: The numerous substantive and methodological flaws in Mr.
6 Hjalmarson's analysis are set forth in Joint Filing FF#308-323, in SRP's Responsive Closing
7 Brief (pages 11-15), and in this Commission's 2009 Decision (pages 74-76).

8 85. SLD ¶ 540: Like other segments of the Gila River, Segment 8 is rarely, if ever,
9 boated.

10 **Responses to SLD's Proposed Conclusions of Law**

11 1. SLD ¶ 541: In its Paragraph 541, the SLD accurately notes that the State of
12 Arizona first began asserting ownership claims to the beds of watercourses under the public
13 trust and equal footing doctrines in Arizona in 1985. For all the years prior to 1985, neither
14 the Territory of Arizona (before 1912) nor the State of Arizona (after 1912) made any
15 assertion for any watercourse other than the Colorado River. In fact, in 1865, in its second
16 session, the Arizona Territorial Legislature passed a memorial specifically stating that "the
17 Colorado River is the only navigable water in this Territory." *See* Littlefield, "Revised and
18 Updated Report: Assessment of the Navigability of the Gila River Between the Mouth of the
19 Salt River and the Confluence of the Colorado River Prior to and on the Date of Arizona's
20 statehood, February 14, 1912," at 98-99 (November 12, 2013) [X002]. The 1865 memorial
21 by the Territorial Legislature is cited in full in footnote 97 of Dr. Littlefield's report.

22 2. SLD ¶¶ 542-546: In its Paragraphs 542-546, the SLD has accurately stated the
23 general law relating to the public trust doctrine, the equal footing doctrine, and ownership of
24 beds beneath navigable watercourses. A summary of that body of law also appears on pages
25 9-12 of this Commission's 2009 decision. Exceptions to these general legal doctrines do
26 exist, including but not limited to instances where the Federal Government has granted or
27 otherwise reserved those watercourses prior to statehood. SRP Closing Brief, at 30 n.19.

1 3. SLD ¶ 547: The standard for navigability for title purposes is ultimately an
2 issue of federal law. That federal test, and procedures to be used in applying that test, have
3 been set forth in the relevant Arizona statutes. *See* Joint Filing CL#1, 29, 36-46.

4 4. SLD ¶ 548: *See* response to SLD ¶¶ 542-546.

5 5. SLD ¶¶ 549-551: The standard for navigability for title purposes is set forth in
6 A.R.S. § 37-1105(5) and case law interpreting the federal test. In its Paragraphs 549-551, the
7 SLD has stated some, but not all, of the elements of that test. *See* Joint Filing CL#1-46.

8 6. SLD ¶ 552: *See* response to SLD ¶ 541.

9 7. SLD ¶¶ 553-559: The SLD’s statement of the procedural history of navigability
10 litigation in Arizona since 1985 in its Paragraphs 553-559 is generally accurate but
11 incomplete. The best statement of the court’s decision in the prior appellate cases is set forth
12 in those opinions themselves. A summary of the history of the Arizona navigability litigation
13 also appears on pages 12-15 of this Commission’s 2009 decision.

14 8. SLD ¶ 560: The SLD’s assertion in its Paragraph 560 that the 1994 legislation
15 “made it almost impossible for an Arizona watercourse to be determined navigable” is
16 exaggerated and not supported by the case law upon which the SLD relies. *See also* response
17 to SLD ¶¶ 553-559.

18 9. SLD ¶¶ 561-563: *See* response to SLD ¶¶ 553-559.

19 10. SLD ¶ 564: This Commission already has ruled on whether the Gila River, in
20 its “ordinary and natural condition,” was used or susceptible to being used as a highway for
21 commerce on February 14, 1912. *See* Joint Filing FF#66-67, 90, 117-119, 173, 321, 324,
22 346, CL#8-12.

23 11. SLD ¶¶ 565-569: The SLD’s statement of the procedural history of navigability
24 litigation in Arizona since 2009 in its Paragraphs 565-569 is generally accurate but
25 incomplete. The best statement of the court’s decision in the prior appellate cases is set forth
26 in those opinions themselves and in related court filings, such as the parties’ stipulation to
27 remand the cases after issuance of the *Winkleman* and *PPL Montana* opinions.

1 12. SLD ¶¶ 570-572: For a more complete discussion of the task before this
2 Commission, *see* Joint Filing CL#1.

3 13. SLD ¶ 573: The Commission’s determination of whether the Gila River was
4 navigable under the federal test is a fact-based analysis. “[A] river is navigable in law when it
5 is navigable in fact.” *Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1431 (9th Cir.
6 1993); *see also* Joint Filing CL#1. The SLD’s reliance upon *United States v. Utah*, 283 U.S.
7 64, 87 (1931), for the SLD’s assertion in its Paragraph 573 that “[c]omparisons with other
8 rivers do not aid in a contention of navigability or nonnavigability” is misplaced, however.
9 The portion of the *United States v. Utah* opinion upon which the SLD relies is not a general
10 prohibition on courts considering how prior courts have treated other watercourses. Rather,
11 that discussion by the U.S. Supreme Court compared the particular facts for other
12 watercourses (Rio Grande, Red River, and Arkansas River) with the particular facts for the
13 watercourses in question in that case (Green River, Colorado River, and San Juan River). 283
14 U.S. at 87, 51 S. Ct. at 445. The Court distinguished the holdings in those other cases on their
15 facts, but did not hold that comparisons with other rivers were not helpful or should not be
16 considered. In fact, in performing such a factual comparison itself, the Court effectively held
17 just the opposite—i.e., that courts can and should consider findings in prior cases (and the
18 particular facts of those cases) in making a determination of navigability.

19 14. SLD ¶¶ 574-577: The SLD’s summary of the federal test of navigability and
20 the relevant Arizona statutes in its Paragraphs 547-577 is generally accurate but incomplete.
21 The standard for navigability for title purposes is set forth in A.R.S. § 37-1105(5) and case
22 law interpreting the federal test. In its Paragraphs 574-577, the SLD has stated some, but not
23 all, of the elements of that test. *See* Joint Filing CL#1-46.

24 15. SLD ¶¶ 578-583: In its Paragraph 578, the SLD has accurately quoted A.R.S. §
25 37-1128(A). As the SLD admits in its Paragraph 579, the burden of proof in this proceeding
26 is on the Proponents of navigability. The burden of proof is addressed on pages 17-19 of this
27 Commission’s 2009 decision. *See also* Joint Filing CL#2-3; SRP Closing Brief, at 18-19.

1 16. SLD ¶¶ 584-588: The U.S. Supreme Court’s opinion in *PPL Montana* speaks
2 for itself on the issue of segmentation. *See also* Joint Filing CL#3, 15-17. Because
3 insufficient evidence exists to demonstrate that any of the eight SLD segments is navigable,
4 the navigability determination of the Gila River does not require segmentation. In its ordinary
5 and natural condition, none of the river was navigable at the time of statehood.

6 17. SLD ¶¶ 589-591: *See* response to SLD ¶¶ 565-569.

7 18. SLD ¶ 592: In its Paragraph 592, the SLD misstates the holding of the Ninth
8 Circuit Court of Appeals in *Oregon v. Riverfront Protection Ass’n*, 672 F.2d 792 (9th Cir.
9 1982). The SLD asserts that, in that opinion, the Ninth Circuit “held that it is appropriate to
10 use a date range for evidence that corresponds to a period when a river is in its ordinary,
11 unimproved condition.” *See* SLD ¶ 592 (citing *Oregon v. Riverfront Protection Ass’n*, 672
12 F.2d at 795). No such “holding” appears in that 1982 Ninth Circuit opinion. In fact, on the
13 page of the opinion upon which the SLD relies, the Ninth Circuit states that “the parties
14 stipulated that evidence from the late 1800’s and early 1900’s would be deemed evidence of
15 the river’s natural condition” on the date of Oregon’s statehood. A stipulation by parties in a
16 case is not a “holding” by a court, and that stipulation has no effect as precedent on the parties
17 in any other case.

18 19. SLD ¶ 593: In its Paragraph 593, the SLD cites to a superior court case number
19 and a page but no specific document or date. The SLD’s incomplete citation does not support
20 its assertion in its Paragraph 593 and it does not allow the other parties an opportunity to
21 properly respond to the assertion. Following issuance of the opinions in *Winkleman* and *PPL*
22 *Montana*, the parties stipulated to a remand of the Gila River and certain other watercourses
23 to the Commission so that the Commission could consider its findings and conclusions on
24 those watercourses in view of both of those court opinions.

25 20. SLD ¶ 594: The flows in some reaches of the Gila River as of February 14,
26 1912, were different from what they would have been absent human influences such as
27 diversions and dams. Whether the river itself was in a “natural” condition as of that date is a

1 more complex question. The “ordinary and natural condition” of the Gila River is different
2 at different times. Substantial evidence was introduced on that issue during the 2003-2005
3 hearings and especially during the 2014 hearing. That evidence is summarized in Joint Filing
4 FF#326-346. *See also* SRP’s Closing Brief, at 26-27.

5 21. SLD ¶¶ 595-598: The SLD’s summary of A.R.S. § 37-1123(A) and the court
6 decisions discussed in its Paragraphs 595-598 is generally correct but incomplete. In making
7 the Commission’s determinations, “all evidence should be examined during navigability
8 determinations and no relevant facts should be excluded.” *Defenders of Wildlife v. Hull*, 199
9 Ariz. 411, 425, 18 P.2d 722, 736 (App. 2001). “[A] river is navigable in law when it is
10 navigable in fact.” *Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1431 (9th Cir. 1993).
11 Thus, the Commission must consider all of the evidence in the record before it. In its
12 *Winkleman* decision, the Court of Appeals specifically found that the Commission was correct
13 to consider post-1860 evidence regarding the Lower Salt: “We will not fault ANSAC for
14 considering all relevant evidence presented to it because that is the task with which ANSAC
15 is charged.” 234 Ariz. at 243, 229 P.3d at 255. “Even if evidence of the River’s condition
16 after man-made diversions is not dispositive, it may nonetheless be informative and relevant.”
17 *Id.* “Assuming the evidence has indicia of reliability, the determination of the relevance and
18 weight to be afforded the evidence is generally for ANSAC to make.” *Id.* When the
19 Commission reviews the evidence, it should determine that the Gila never has been used or
20 susceptible to being used as a “highway for commerce.”

21 22. SLD ¶¶ 599-600: The SLD’s discussion of the test for navigability and the
22 *United States v. Utah* decision its Paragraphs 599-600 is generally accurate, but its analysis is
23 flawed and incomplete. As the SLD acknowledges, under *United States v. Utah*, a
24 watercourse that was not actually navigated but was susceptible to navigation can be found
25 navigable if the lack of navigation was “either because the location of the rivers and the
26 circumstances of the exploration and settlement of the country through which they flowed
27 made recourse to navigation a late adventure or because commercial utilization on a large

1 scale awaits future demands.” *Id.* at 83. The *United States v. Utah* Court continued: “The
2 question remains one of fact as to the capacity of the rivers in their ordinary condition to meet
3 the needs of commerce as they may arise in connection with the growth of the population, the
4 multiplication of activities, and the development of natural resources. And this capacity may
5 be shown by physical characteristics and experimentation as well as by the uses in which the
6 stream have been put.” *Id.* With respect to the Gila River, the SLD and the other Proponents
7 have failed to show that the lack of navigation on the river can be explained by the river’s
8 location or by “the circumstances of the exploration and settlement of the country through
9 which” it flows. None of the evidence supports a finding in favor of Proponents on that issue.
10 The evidence in the record regarding the Gila River shows neither actual use nor
11 susceptibility to use as a highway for commerce. *See generally* Joint Filing.

12 23. SLD ¶ 601: The SLD and the other Proponents of navigability have submitted
13 insufficient evidence to support a finding that the Gila River, in its “ordinary and natural
14 condition,” was actually used or susceptible to being used as a “highway for commerce.”
15 Based upon all of the historical and scientific data and information, documents, and other
16 evidence produced and considered by the Commission, the Commission should find that the
17 Gila River, in its ordinary and natural condition, was not used or susceptible to being used as
18 a highway for commerce as of February 14, 1912 and therefore was not navigable as defined
19 in A.R.S. § 37-1101(5). *See* Joint Filing CL#1-46.

20 24. SLD ¶¶ 602-612: The standard for navigability for title purposes is set forth in
21 A.R.S. § 37-1105(5) and case law interpreting the federal test, including the U.S. Supreme
22 Court’s most recent navigability opinion in *PPL Montana*. *See* Joint Filing; SRP Briefs. SLD
23 places mistaken reliance on the navigability analysis from *The Montello*, 20 Wall. 430, 22
24 L.Ed. 391, ASLD ignores the U.S. Supreme Court’s criticism of the Montana Supreme Court
25 which had also relied on *Montello*. *PPL Montana*, 132 S. Ct. at 1231-1232. The navigability
26 assessment in *The Montello* was to determine Federal regulatory jurisdiction, which relies on
27 a “doctrinally distinct” inquiry that should not be applied to cases requiring an assessment of

1 navigability-for-title purposes. The Court stated “[t]he reasoning and the inquiry of *The*
2 *Montello* does not control the outcome where the quite different concerns of the riverbed title
3 context apply.” *Id.* at 1232. The ‘actual use’ test in *The Montello* is misapplied by SLD for
4 determining title.

5 25. SLD ¶ 613: The SLD’s assertions of actual navigation on the Gila River are not
6 supported by the record. A more complete and accurate discussion of the evidence relating to
7 boating attempts on the Gila is found at Joint Filing FF#117-222. Navigation (as defined in
8 the applicable case law) was not actually occurring on the Gila, in its “ordinary and natural
9 condition” or otherwise. *See id.*

10 26. SLD ¶¶ 614-615: The SLD and the other Proponents of navigability have
11 submitted insufficient evidence to support a finding that the Gila River, in its “ordinary and
12 natural condition,” was susceptible to use as a “highway for commerce.” Based upon all of
13 the historical and scientific data and information, documents, and other evidence produced
14 and considered by the Commission, the Commission should find that the Gila River, in its
15 ordinary and natural condition, was not used or susceptible to being used as a highway for
16 commerce as of February 14, 1912 and therefore was not navigable as defined in A.R.S. § 37-
17 1101(5). *See* Joint Filing CL#1-46.

18 27. SLD ¶¶ 616-617: *See* response to SLD ¶¶ 599-600.

19 28. SLD ¶ 618: *See* responses to SLD ¶¶ 599-600, 613, and 614-615.

20 29. SLD ¶ 619: *See* response to SLD ¶¶ 599-600 and 614-615. It is also important
21 to note that *FPL Energy Maine Hydro LLC v. FERC*, 287 F.2d 1151 (D.C. Cir. 2002), upon
22 which the SLD relies in its Paragraph 619, is a Federal Power Act case, not a navigability for
23 title case. As the SLD itself acknowledges in its Paragraphs 550-551, Federal Power Act
24 decisions are of limited value in navigability for title cases.

25 30. SLD ¶ 620: The U.S. Supreme Court in *PPL Montana* specifically and in detail
26 addressed the question of how and when modern-day recreational boating can be considered
27 as evidence of navigability at statehood. *See* Joint Filing CL#13, 33, 35 & portions of *PPL*

1 *Montana* cited therein; SRP Closing Brief, at 19-21, 29-30.

2 31. SLD ¶ 621: The SLD and the other Proponents of navigability have submitted
3 insufficient evidence to support a finding that the Gila River, in its “ordinary and natural
4 condition,” was actually used or susceptible to being used as a “highway for commerce.”
5 Based upon all of the historical and scientific data and information, documents, and other
6 evidence produced and considered by the Commission, the Commission should find that the
7 Gila River, in its ordinary and natural condition, was not used or susceptible to being used as
8 a highway for commerce as of February 14, 1912 and therefore was not navigable as defined
9 in A.R.S. § 37-1101(5). *See* Joint Filing CL#1-46.

10 32. SLD ¶¶ 622-626: *See* response to SLD ¶ 620.

11 33. SLD ¶¶ 627-628: *See* response to SLD ¶ 621.

12 34. SLD ¶¶ 629-634: Natural impediments to navigation, which the Proponents and
13 their witnesses largely ignored, are a factor to be considered in determining navigability. *See*
14 *United States v. Utah*, 283 U.S. 64, 85 (1931); *PPL Montana*, 132 S. Ct. at 1231; Joint Filing
15 FF#356, CL#14.

16 35. SLD ¶ 635: The SLD and the other Proponents of navigability have submitted
17 insufficient evidence to support a finding that the Gila River, in its “ordinary and natural
18 condition,” was used or susceptible to being used as a “highway for commerce.” Based upon
19 all of the historical and scientific data and information, documents, and other evidence
20 produced and considered by the Commission, the Commission should find that the Gila River,
21 in its ordinary and natural condition, was not used or susceptible to being used as a highway
22 for commerce as of February 14, 1912 and therefore was not navigable as defined in A.R.S. §
23 37-1101(5). *See* Joint Filing CL#1-46.

1
2 RESPECTFULLY SUBMITTED this 6th day of February, 2015.
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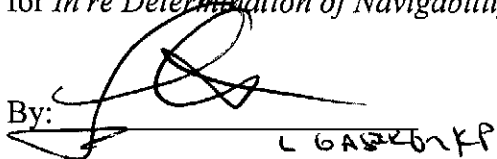
MAILING CERTIFICATE

ORIGINAL AND SIX COPIES of the foregoing
sent via U.S. mail for filing this 6th day of February, 2015 to:

Arizona Navigable Stream Adjudication Commission
1700 West Washington, Room B-54
Phoenix, AZ 85007

COPY sent via e-mail this 6th day of February, 2015 to each
party on the mailing list (see <http://www.ansac.az.gov/parties.asp>)
for *In re Determination of Navigability of the Gila River*

By:


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