

ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
P.O. BOX 41835
TUCSON, ARIZONA 85717
(520) 529-1798

Joy E. Herr-Cardillo (State Bar #09718)

Attorneys for Defenders of Wildlife,
Donald Steuter, Jerry Van Gasse, and Jim
Vaaler

BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

In re Determination of Navigability of the Gila River))))	Case No. 03-007-NAV Response Memorandum regarding the Navigability of the Gila River
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Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler
(collectively, "Defenders") hereby submit their response memorandum regarding the
navigability of the Gila River.

**I. PPL Montana v. Montana Did Not Alter the Test for Navigability and,
Therefore, Has No Legal Effect on Arizona's Reported Decisions.**

The navigability opponents' attempt to persuade the Commission that the U.S.
Supreme Court case decided in 2012, *PPL Montana LLC v. Montana*, 132 S. Ct. 1215
(2012), broke new legal ground with regard to navigability for title is misguided at best.
In order to appreciate how little impact *PPL Montana* has on the proceedings before this
Commission, it is important to first understand the nature of the issues before the
Supreme Court in that case and how those issues were decided. The Montana case
involved three rivers which flow through the State of Montana—the Missouri River, the

Madison River, and the Clark Fork River. The State of Montana claimed title to the riverbeds of these three rivers under the equal footing doctrine. Based on these title claims, the State sought compensation from PPL Montana, LLC, (“PPL”) a power company, for its use of the riverbeds. PPL owns and operates hydroelectric facilities, ten of which are built upon the three rivers at issue. Five of those facilities are located along the Great Falls reach.

The facilities had existed on the riverbeds for years and the state had never sought compensation from the power company until 2003. The State first asserted the claim in the context of litigation brought by parents of schoolchildren against PPL in federal court. The issue was ultimately resolved in state court when, in 2010, the Montana Supreme Court held that the State held title to the riverbeds and awarded it \$41 million in past due rent for the period from 2000 to 2007. *PPL Montana, LLC v. State* 355 Mont. 402, 229 P. 3d 410 (2010).

The United States Supreme Court accepted review to consider whether, in holding the entire river navigable at the time of statehood, including the disputed segments where the facilities were located, the Montana Court had properly applied the rules of navigability for title under the equal-footing doctrine. In particular, the issue was whether the Montana Court had erred by refusing to make the navigability determination on a segment by segment basis. *PPL Montana*, 132 S. Ct. at 1229 (“The primary flaw in the reasoning of the Montana Supreme Court lies in its treatment of the question of river segments and overland portage.”) In reversing the Montana Court’s decision, the United States Supreme Court first reviewed the law regarding navigability for title under the

equal-footing doctrine. Notably, the Court did not make any changes to the existing law regarding the navigability for title test. Rather, the Court simply held that the Montana court has misapplied the law. *Id.* at 1229. (“The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded.”)

SRP, in its Opening Memorandum, accuses navigability proponents of “downplaying” the case by focusing on its actual holding regarding segmentation, which was the basis of the Court’s reversal, and claims, incorrectly, that navigability proponents in this case have advocated the Montana Court’s interpretation of the navigability for title test. SRP Opening Memorandum at 19. SRP seizes on the Court’s use of the word “liberal” in discussing the Montana court’s incorrect interpretation of the federal test regarding segmentation to suggest that in *PPL Montana* the Supreme Court altered the law to make the test more stringent or rigid. It did not. In fact every single one of the “restatements” enumerated by SRP to ostensibly support its claim that the Court “took the opportunity to...rein in the more ‘liberal’ and expansive constructions of that law proffered by some state courts and lower federal courts in recent years,” (SRP Opening memorandum at 20) have been either codified in Arizona’s statutes or acknowledged and applied by Arizona’s courts. In other words, *PPL Montana* did not impact existing Arizona case law regarding the test for navigability.

For example, in paragraphs 1 and 3, SRP asserts that *PPL Montana* “[r]eaffirm[s]” and “[c]onfirm[s]” that the navigability test is applied as of the date of statehood. *Id.* This is hardly breaking news. The fact that navigability for title is determined as of the date of statehood was first recognized by the Arizona Court of Appeals in 1991 in

Arizona Ctr. For Law in the Public Interest v. Hassell, 172 Ariz. 356, 362-3, 837 P. 2d 158, 164-5 (App. 1991)(“Navigability is determined by reference to the ordinary and natural condition of the watercourse **at the time of the state's admission to the Union.**”)(emphasis added). It was reiterated in 2002 in *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426 ¶55,18 P.3d 722, 737 (2002)(“We hold that, to prove navigability of an Arizona watercourse under the federal standard for title purposes, one must merely demonstrate the following: **On February 14, 1912**, the watercourse, in its natural and ordinary condition, either was used or was susceptible to being used for travel or trade in any customary mode used on water.”)(emphasis added). And most recently, it was acknowledged by the Court of Appeals in *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 241, 229 P.3d 242, 253 (App. 2010)(“Applying these definitions, we conclude that ANSAC was required to determine what the River would have looked like **on February 14, 1912**, in its ordinary (i.e., usual, absent major flooding or drought) and natural (i.e., without man-made dams, canals, or other diversions) condition.”)(emphasis added). Finally, it should be noted that the date of statehood requirement is also codified in Arizona’s statutory definition of navigability. Ariz. Rev. Stat. §37-1101(5)(“‘Navigable’ or ‘navigable watercourse’ means a watercourse that was in existence **on February 14, 1912**, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.”)(emphasis added). In sum, the operable

date for determining navigability has never been an issue in Arizona (or elsewhere) and nothing in *PPL Montana* shed new light on that aspect of the navigability for title test.

Likewise, SRP's suggestion in paragraph 2 that the Court's reiteration of the "use or susceptible to use as a highway for commerce" standard is somehow intended to "rein in" applications of the test (SRP Opening Memorandum at p. 20) is simply puzzling, since that element of the test has likewise been present in every articulation of it in the major Arizona cases and in the Arizona statute. *See Hassell*, 172 Ariz. at 363, 837 P. 2d at 165 (rivers "are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.") (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)); *Defenders*, 199 Ariz. at 426 ¶55, 18 P.3d at 737 ("We hold that, to prove navigability of an Arizona watercourse under the federal standard for title purposes, one must merely demonstrate the following: On February 14, 1912, the watercourse, in its natural and ordinary condition, either **was used or was susceptible to being used for travel or trade in any customary mode used on water.**") (emphasis added); *Winkleman*, 224 Ariz. at 239, 229 P.3d at 251 ("This test required ANSAC to determine the characteristics of the River 'in its ordinary and natural condition' and whether, at the time of statehood, the River **was used or would have been susceptible to use as a highway for commerce** in that condition.") (emphasis added). *See also*. Ariz. Rev. Stat. §37-1101(5) ("'Navigable' or 'navigable watercourse' means a watercourse that was in existence on February 14, 1912, and at that time **was used or was susceptible to being used, in its ordinary and natural condition, as a highway**

for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.”(emphasis added).

Similarly, SRP’s reference to post-statehood use of the river (SRP Opening Memorandum at p. 20) suggests a change in the law despite the fact that the Court’s discussion of the relevance of evidence of modern boating did not depart from existing law. For example, in holding that the Montana court erred when it relied upon evidence of present day, primarily recreational, use of the Madison River, the Court was careful to note, “[e]rror is not inherent in a court's consideration of such evidence...” *PPL Montana*, 132 S. Ct. at 1233. Relying upon well-established case law, the Court explained:

Evidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use at the time of statehood. See *Appalachian Elec. Power Co.*, 311 U.S., at 416, 61 S. Ct. 291, 85 L. Ed. 243 (“[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation”); *Utah*, 283 U.S., at 82, 51 S. Ct. 438, 75 L. Ed. 844 (fact that actual use has “been more of a private nature than of a public, commercial sort . . . cannot be regarded as controlling”). Similarly, post statehood evidence, depending on its nature, may show susceptibility of use at the time of statehood. See *id.*, at 82-83, 51 S. Ct. 438, 75 L. Ed. 844 (“[E]xtensive and continued [historical] use for commercial purposes” may be the “most persuasive” form of evidence, but the “crucial question” is the potential for such use at the time of statehood, rather than “the mere manner or extent of actual use”).

Id. This is entirely consistent with the Arizona court’s holding in *Defenders*, which struck down the statutory presumption that a river was non-navigable if “any boating or fishing was for recreational and not commercial purposes.” 199 Ariz. at 423, ¶41, 18 P. 3d at 734 (“evidence of the river's capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or

travel.”)(quoting *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (N.Y. 1998)). Further, as the Arizona Court of Appeals recognized in *Winkleman*, “[e]ven if evidence of the River's condition after man-made diversions is not dispositive, it may nonetheless be informative and relevant.” 224 Ariz. at 243, ¶31, 229 P. 3d at 255.

The fifth “clarification” cited by SRP is a single phrase, with virtually no explanation or discussion by the Court, about seasonal flows. SRP Opening Memorandum at 21. Moreover, the Court’s statement quoted by SRP was hardly groundbreaking, particularly in the context that it was offered. In acknowledging that “the Montana court was correct that a river need not be susceptible of navigation at every point during the year,” the Court was not, at that time, passing on the sufficiency of the river’s flow. Rather, it offered its observation as part of its criticism that the Montana court had apparently ignored “meaningful evidence that the river's conditions had changed since statehood in ways that made present-day navigation of the river easier in all seasons than it was at the relevant time.” *PPL Montana*, 132 S. Ct. at 1234. Thus, there is nothing in the Court’s holding in *PPL Montana* that disturbs the well-established law that a river may be found navigable even if it not navigable every month of the year. *See, e.g. Defenders*, 199 Ariz. at 422, 18 P. 3d at 733, (“periodic navigability is enough, even if the river is not susceptible to navigation at all seasons of the year or all stages of the water”) citing *Economy Light Co. v. United States*, 256 U.S. 113, 122 (1921).

Moreover, SRP’s attempt to cite *PPL Montana* as a basis for finding the entire Gila River non-navigable based on so-called “obstructions” in the river misreads the central holding of the case. SRP Opening Memorandum p. 21 (“The *PPL Montana*

opinion makes clear, however, that natural obstructions to navigation that would require portages can and often do make **the river nonnavigable.**”(emphasis added). The fact that some segments in a river are non-navigable does not render the entire river non-navigable. Indeed the import of the Court’s holding supports the exact opposite result. For example, as the *PPL Montana* Court pointed out, in 1913 the Supreme Court held that “the Colorado River was navigable for its first roughly 4-mile stretch, nonnavigable for the next roughly 36-mile stretch, and navigable for its remaining 149 miles.” 132 S.Ct. 1229 (citing *United States v. Utah*, 283 U.S. 64, 73-74 (1931)). Similarly, the *PPL Montana* Court relied upon a 1922 decision involving the Arkansas River. *Id.* (citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 85 (1922)). As the *PPL Montana* Court noted, in that case, the Supreme Court “found the segment of river along the reservation to be nonnavigable even though a segment of the river that began further downstream was navigable.” *Id.* at 1229. Thus, the holding in *PPL Montana*, was limited to the potentially non-navigable segments upon which the facilities were located. In remanding the case back to the Montana Court, the Supreme Court recognized that “the ultimate decision as to this and the other disputed river stretches is to be determined, in the first instance, by the Montana courts.” *Id.* at 1233. The Court noted that “[e]ven if the law might find some nonnavigable segments so minimal that they merit treatment as part of a longer, navigable reach for purposes of title under the equal footing doctrine, it is doubtful that any of the segments in this case would meet that standard, and one--the Great Falls reach--certainly would not.” *Id.* at 1230.

Although the evidence in this proceeding does not support a finding that there are any obstacles on the Gila River sufficient to defeat a finding of navigability even within a limited reach—certainly nothing that would require a portage longer than a few minutes-- if such obstacles did exist, they would not be a legitimate basis for finding the entire river non-navigable, as SRP suggests.

II. Because the Gila River Was and is Navigable, People Navigated it Both Before and Shortly After Statehood, and Continue to Navigate it Today.

Navigability opponents are fond of quipping that if the Gila River was susceptible to navigation then people would have navigated it. *See, e.g.* SRP Opening Memorandum at 27. Of course, when proponents then respond with evidence of navigation that ranges from predevelopment times, before statehood, shortly after statehood, and even during modern times, suddenly the opponents claim that none of these examples of actual navigation qualify as evidence of “navigability.” Since the 1990s, navigability opponents have attempted to minimize the evidence of navigation of Arizona’s rivers by grafting all sorts of conditions upon what qualifies as evidence of navigability. Initially, these conditions were codified in Arizona’s ANSAC statutes, until the Arizona Court of Appeals struck them down in *Defenders*. Yet, despite the court’s admonition that they were contrary to the *Daniel Ball* test, navigability opponents continue to trot them out during every adjudication. Ironically, as these proceedings have dragged on over the years, more and more incidents of historical navigation have come to light. Yet, whenever opponents are presented with a new piece of evidence, they scramble to

minimize it often using the same discredited arguments to claim that actual navigation of the river doesn't prove it was navigable.

Thus, it is no surprise that once again we are hearing from navigability opponents that historic accounts of boating on the Gila River don't establish navigability because the trips were "unsuccessful," they were not sufficiently commercial, or they were not a sustained commercial enterprise. *See, e.g.* SRP Opening Memorandum at 22-24; Freeport Opening Memorandum at p. 9; GRIC Opening Memorandum at pp. 13-14; San Carlos Opening Memorandum at pp. 10-11. Likewise when confronted with evidence of boat travel on the river, they imply that if a trip did not involve "trade" or was recreational it is somehow less probative. *See, e.g.* SRP Opening Memorandum at 22; Freeport Opening Memorandum at p. 21. Boat travel is discounted if it occurred during "high water." Freeport Opening Memorandum at p. 21. The use of boats to cross the river rather than travel upstream or downstream is dismissed. *Id.* at 9. The use of other modes of transportation are cited as evidence that the river was nonnavigable. SRP Opening Memorandum at 5, Freeport Opening Memorandum at p. 10-13; San Carlos Opening Memorandum at p. 15. And finally, the extensive amount of evidence regarding modern boating on the river is dismissed as irrelevant because, according to opponents (and contrary to the evidence before the Commission), modern boats make navigation easier. SRP Opening Memorandum at 29-30; Freeport Opening Memorandum at pp. 23-27.

Of course, as the Arizona Court of Appeals made clear in *Defenders*, none of these conditions created and imposed by navigability opponents is actually a requirement of the

Daniel Ball test. As noted above, the previous statute struck down in *Defenders* mandated a presumption of non-navigability if any of the following applied: (1) there had been previous findings of non-navigability; (2) the watercourse flowed only in direct response to precipitation; (3) no profitable commercial enterprise was conducted; (4) no sustained trade and travel occurred both upstream and downstream in the watercourse; (5) vessels customarily used for commerce in 1912, such as keelboats, steamboats or powered barges, were not used on the watercourse; (6) diversions were made from the watercourse for various purposes that would have been inconsistent with or impediments to navigation; (7) any boating or fishing was for recreational and not commercial purposes; (8) any flotation of logs or other material that occurred or was possible on the watercourse was not and could not have been regularly conducted for commercial purposes; (9) there were structures constructed in or across the watercourse that would have been inconsistent with or impediments to navigation; (10) transportation in proximity to the watercourse was customarily accomplished by methods other than by boat; or (11) the United States did not regulate the watercourse under the Rivers and Harbors Act of 1899. *See* Ariz. Rev. Stat. §37-1128(B)-(D)(1994)(repealed). The 1994 Act also barred consideration of the following evidence in finding whether a watercourse was navigable: (1) previously appropriated water as being within the ordinary and natural condition of a watercourse; (2) the use of ferries to cross a watercourse; (3) fishing from the banks; or (4) uses of the watercourse under flood conditions. *See* Ariz. Rev. Stat. §37-1128(E)(1994)(repealed). The court in *Defenders* painstakingly went

through each of these “presumptions” and rejected all of them as contrary to the *Daniel Ball* test. See 199 Ariz. at 420-426, ¶¶20-56, 18 P. 3d at 731-737.

The much more limited showing required by the *Daniel Ball* test was recently reiterated by the Oregon Court of Appeals in *Northwest Steelheaders Ass'n v. Simantel* 199 Ore. App. 471; 112 P.3d 383 (2005)(cited with approval in *Winkleman*):

First, with respect to “actual use,” it is not necessary that the historic use made of the river have been either widespread or commercially profitable. “The extent of * * * commerce is not the test.” . . . For example, the Court's most recent application of the *The Daniel Ball* test upheld a determination of the navigability of Utah's Great Salt Lake based on evidence that the Court described as “sufficient” but “not extensive.”

Id. at 389 (quoting *Utah v. United States*, 403 U.S. 9, 11 (1971)). Further, as the Oregon court observed, “qualifying travel and trade is not limited to large-scale commercial or multiple passenger vessels of the sort typically engaged in modern commerce.” *Id.* at 390. Navigation by small boats has often been recognized as evidence of navigability. *Block v. North Dakota*, 461 U.S. 273(1983) (“Canoe travel at the time of North Dakota's statehood represented a viable means of transporting persons and goods.”); *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65 (W.D. Wash 1981), *aff'd*, 717 F.2d 1251 (9th Cir 1983)(declaring navigability on the basis that “Indians navigated the river with their fishing boats and canoes”).

As Defenders pointed out in their Opening Memorandum, in the case of the Gila River, there is ample evidence of actual navigation both prior to statehood and after, even though when much of that boating occurred, the river was already no longer in its natural condition. The record contains numerous accounts of boating on the Gila River in the

1800s and even into the early 1900s using a variety of vessels that range from wagons strapped to logs, wooden flat boats, skiffs, rafts, and, in the case of the Lower Gila, even steamboats. The river was used to haul goods, carry passengers, explore the territory, transport military goods and personnel, fish, trap beaver and otter, hunt and conduct government surveys. Thus, it was not only “susceptible” to being used as a highway for commerce, it was actually used as one both before and shortly after statehood. Moreover, as the evidence regarding modern boating demonstrates, even in its current depleted state, the Gila River continues to be used as a highway for commerce today.

In its effort to refute this overwhelming evidence, SRP takes particular aim at the State Land Department’s expert witness Mr. Jon Fuller. SRP attempts to impeach Mr. Fuller’s testimony about historic evidence of boating as well as his own personal experience boating the Gila River by deriding his testimony and ascribing to him a fictitious “nobody died” standard of navigability. SRP Opening Memorandum at 24. Yet the attempt to skewer Mr. Fuller only reveals the fundamental flaw in SRP’s own understanding of the *Daniel Ball* test.

Under *Daniel Ball*, “[t]hose rivers must be regarded as public navigable rivers in law **which are navigable in fact.**” *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). Further, they are “navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *Id.* In other words, if—when the river is in its ordinary and natural condition—you can travel on it in a boat, the river is navigable in fact. And if it is navigable in fact, it follows that it is

navigable in law. Mr. Fuller’s articulation of the *Daniel Ball* test is completely consistent with the case law.

SRP’s claim that Mr. Fuller adopted some sort of “nobody died” standard to determine navigability is simply incorrect. That testimony related to Mr. Fuller’s opinion regarding what qualified as a “successful” trip. Notably, there is nothing in *Daniel Ball* or its progeny that requires that every trip by every boater on a river be an unqualified success in order for a river to be a highway for commerce. That is a “requirement” that navigability opponents dreamed up—and they offer no legal authority to support it. The simple fact is that Mr. Fuller accurately applied the *Daniel Ball* test to both the historic evidence of boating on the Gila (which involved boats that were customary at the time of statehood) and his own recent experience boating the river (using a modern boat that was comparable to boats available at the time of statehood) to conclude that the Gila River was a navigable watercourse.

III. The Fact that Federal Surveyors Did Not Meander the Gila River is Irrelevant.

Navigability opponents also make much of the fact that the Gila River was not meandered. SRP Opening Memorandum at pp. 7, 28; Freeport Opening Memorandum at p. 15; San Carlos Opening Memorandum at pp. 13-15. Courts have consistently held that meanders have no bearing on the issue of navigability. *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922) (Surveying officers “were not clothed with the power to settle questions of navigability.”); *Railroad Co. v. Shurmeir*, 74 U.S. 272, 286 (1868) (“Express decision of the Supreme Court of the State was, that the river, in this case, and not the meander-


line, is the west boundary of the lot, and in that conclusion of the State court we entirely concur.”); *Micellis v. Andrus*, 61 Or. 7, 88-89 (1912)(“[N]avigability in law can never exist independent of navigability in fact, and the fitness of a river in its original condition for the transportation...can never be settled by fiat or by meandering the banks of the stream.”). Thus, that the Gila River was not meandered is irrelevant to this Commission’s determination regarding the river’s navigability.

IV. Conclusion.

There is ample relevant, persuasive evidence demonstrating that the Gila River meets the Arizona and federal standards of navigability. In summary, the evidence demonstrating navigability includes information regarding the substantial flow of the river in its ordinary and natural condition as well as historic and recent incidents of boating. When the objective evidence submitted is evaluated in light of the appropriate standard, it is clear that at the time of statehood the Gila River, in its ordinary and natural condition, was susceptible for use as a highway for commerce, over which trade and travel could be conducted in the customary modes of trade and travel from the New Mexico/Arizona boarder to the confluence with the Colorado River.

Respectfully submitted this 23rd day of January 2015

ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
P.O. Box 41835
Tucson, Arizona 85717


Joy E. Herr-Cardillo
Timothy M. Hogan

ORIGINAL AND SEVEN COPIES of the foregoing
Mailed for filing this 23rd day of January 2015 to:

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

COPY of the foregoing mailed this 23rd day of
January 2015, to:

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

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

John B. Weldon, Jr.
Mark A. McGinnis
Salmon, Lewis & Weldon, Plc
2850 E. Camelback Rd., Ste 200
Phoenix, AZ 85016-4316
*Attorneys for the Salt River Project
Agricultural Improvement
And Power District and Salt River Valley
Water User's Association*

Cynthia M. Chandley
L. William Staudenmaier
Snell & Wilmer
400 East Van Buren
Phoenix, AZ 85004-2022
*Attorneys for Freeport-McMoRan
Copper & Gold, Inc.*

Sean Hood
Fennemore Craig, P.C.
2394 E. Camelback, Suite 600
Phoenix, AZ 85016-3429
*Attorneys for Freeport-McMoRan
Copper & Gold, Inc.*

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

Sally Worthington
John Helm
Helm, Livesay & Worthington, Ltd.
1619 E. Guadalupe, Ste 1
Tempe, AZ 85283
*Attorneys for Maricopa County Flood
Control District*

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

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

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

Charles L. Cahoy
Assistant City Attorney
CITY OF TEMPE
21E. Sixth St, Ste 201
Tempe, AZ 85280
Attorneys for City of Tempe

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

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

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

Julie Lemmon
1095 W. Rio Salado Pkwy, Ste 102
Tempe, AZ 85281-2603
*Attorney for Flood Control District
of Maricopa County*

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

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

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

Susan B. Montgomery
Robyn L. Interpreter
Montgomery & Interpreter, PLC
4835 E. Cactus Rd., Ste. 210
Scottsdale, AZ 85254

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

