

1 Joe P. Sparks, 002383  
2 Julia M. Kolsrud, 029582  
3 **THE SPARKS LAW FIRM, P.C.**  
4 7503 First Street  
5 Scottsdale, Arizona 85251  
6 (480) 949-1339  
7 joesparks@sparkslawaz.com

8 *Attorney for the San Carlos Apache Tribe*

9  
10 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
11 **ADJUDICATION COMMISSION**

12 In re Determination of Navigability of  
13 the Gila River

No. 03-007-NAV (Gila)

**The San Carlos Apache Tribes'  
Response Brief Regarding the  
Navigability of the Gila River**

14 The San Carlos Apache Tribe ("Tribe") submits its Response Memorandum on the  
15 Navigability of the Gila River ("Gila" or "River") in its ordinary and natural condition on  
16 February 14, 1912, pursuant to the Court of Appeals' decision in *Arizona v. Arizona*  
17 *Navigable Stream Adjudication Commission*, 224 Ariz. 230, 229 p.3d 242 (2010). The  
18 Tribe's Closing Post Hearing Memorandum ("Post Hearing Memo") filed on November 14,  
19 2014 anticipates and addresses most of the arguments made by Proponents in their  
20 Memoranda filed on the same. The Tribe will not repeat those arguments, but rather  
21 incorporate its Post Hearing Memo here. Attached to this Response Memorandum are  
22 Appendix 1 which provides a matrix with the full citations for the Evidence Cited, and  
23 Appendix 2 which provides a matrix for the full citations for the "References Used".

24 In addition, the Tribe joins in the Closing Brief by the Salt River Project filed on  
25 January 23, 2015, and submits these additional points.  
26  
27

1           The Defenders of Wildlife (“DOW”), Arizona State Land Department (“ASLD”) and  
2 the Maricopa County Flood Control District (“Maricopa”)<sup>1</sup> filed Post-Hearing Memoranda<sup>2</sup>  
3 with the Arizona Navigable Stream Adjudication Commission (“ANSAC” or “Commission”),  
4 on November 14, 2014.

5           Proponents are persistently avoiding a thorough discussion of all the necessary  
6 requirements of the Federal test for Navigability in Proponents Memos. They misstate or  
7 avoid the Federal requirements and conclude that previous rulings of the Arizona Court of  
8 Appeals must control the Commission's decision here. The Arizona Court of Appeals  
9 decisions do not properly address the Federal requirements as set out in *The Daniel Ball*, 10  
10 Wall. 557, 563, 19 L.Ed. 999 (“Ball”), *United States v. Utah*, 283 U.S. 64, 76, 51 S.Ct. 438,  
11 75 L.Ed. 844 (“Utah”), and *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227, 1228,  
12 1233 (2012) (“PPL Montana”).

13           Upon careful review of the complete evidentiary Record, ANSAC will have enough  
14 information to apply the appropriate analysis for determining:

- 15           (1) whether **segmentation of the Gila River** is appropriate, and where those segments  
16 should be located as it adheres to the analysis set forth in PPL Montana. Relevant to  
17 the Court in PPL Montana included evidence of physical obstructions and the question  
18 of whether realistic commerce could have been conducted on the date of Arizona  
19 Statehood<sup>3</sup>;
- 20           (2) whether the entire Gila River or independent segments of the Gila River  
21 were navigable when evaluated in the Rivers:

22  
23  
24 <sup>1</sup> DOW, ASLD, and Maricopa will collectively be referred to as “Proponents” or “Proponents of  
navigability.”

25 <sup>2</sup> References to specific Memorandum shall be cited as [Party] Mem. at [page #]

26 <sup>3</sup> PPL Montana at 1220 (“Because commerce could not have occurred on segments nonnavigable at  
27 the time of statehood, there is no reason to deem those segments owned by the State under the equal-  
footing doctrine. Practical considerations also support segmentation. Physical conditions affecting  
navigability vary over the length of a river and provide a means to determine appropriate start points  
and end points for disputed segments.”)

1 a) **ordinary**<sup>4</sup>: virgin flow, absent man-made diversions, a volume of  
2 water which would be present before February 14, 1912; **and**  
3 b) **natural**<sup>5</sup>: the width, depth, location and obstructions of the river  
4 channel on the exact moment that Arizona became a state, this  
5 would be the natural River, as it was left by the most recent flood,  
6 which are common, natural, and been known to reshape the Rivers  
7 for centuries.

8 (3) **on the date of Arizona Statehood, February 14, 1912**<sup>6</sup>: this date  
9 controls the determination of the natural condition of the River,. That  
10 determination impacts other potential analysis, including an analysis of  
11 meaningfully similar boating and the question of susceptibility,

12 (4) **for the purpose of determining “whether the river forms by itself”**  
13 [i.e. a natural formation] or **“by connection with other water ways”**  
14 [natural formation] a **“highway of commerce**<sup>7</sup>, over which **trade and**  
15 **travel** are or may be conducted in the **customary modes for trade and**  
16 **travel on water**” on that date.<sup>8</sup> Evidence of modern day boating may be  
17 relevant but only if the River’s physical condition is not **materially**  
18 **different than at time of statehood**<sup>9</sup>.

19  
20 \_\_\_\_\_  
21 <sup>4</sup> Winkleman at 241-242.

22 <sup>5</sup> *Id.*

23 <sup>6</sup> PPL Montana at 1233-1234

24 <sup>7</sup> *Id.* at 1219-1221, 1233-1235; *see also* United States v. Appalachian Elec. Power Co., 311 U.S. 377  
25 at 408; United States v. State of Utah, 283 U.S. 64 at 76, 82-83, 51 S.Ct. 438.

26 <sup>8</sup>“... rivers must be “navigable in fact,” meaning “they are used, or are susceptible of being used, ... as  
27 highways for commerce, over which trade and travel are or may be conducted in the customary  
28 modes of trade and travel on water.” *The Daniel Ball* at 563. This formulation has been used to  
29 determine questions of waterbed title under the equal-footing doctrine. *See Utah, 76, see also PPL*  
30 *Montana* at 1219.

31 <sup>9</sup> In order for present-day use to have a bearing on navigability at statehood, (1) the watercraft must  
32 be meaningfully similar to those in customary use for trade and travel at the time of statehood, and (2)  
33 the river's post statehood condition may not be materially different from its physical condition at  
34 statehood.. PPL Montana at 1221.

1 The Proponents have provided no evidence to ANSAC that meets all of the legal  
2 elements required by the Federal test of navigability. There is no credible evidence in the  
3 Record demonstrating that the River was used or susceptible of being used as a “highway of  
4 commerce.” Proponents have submitted no evidence to prove that the ordinary flow of the  
5 Gila River, in its natural state on the February 14, 1912, could have supported any type of  
6 boat or other watercraft used in commerce, trade or travel at the date of statehood. Finally,  
7 Proponents have completely ignored the least ambiguous element of the Federal test for  
8 navigability, that [t]he key moment for determination of title is the instant when statehood is  
9 created.” Winkleman at 242 (quoting Alaska v. United States, 213 F.3d 1092 (9th Cir.2000)  
10 at 197. The Proponents have failed to meet their burden and ANSAC must uphold its  
11 previous decision, that the Gila River is now and always has been a non-navigable River.<sup>10</sup>

12 **I. ANSAC MUST GIVE MEANING TO “ON THE DATE OF STATEHOOD”**

13 **A. ANSAC is not required to follow the Arizona Court of Appeals suggested**  
14 **timeframe when determining the Gila Rivers ordinary and natural condition**

15 The Arizona Court of Appeals clearly did *suggest* that by the early 1800’s “the River  
16 *could be considered* to be in its *natural* condition....” (emphasis added) Winkleman at 229.<sup>11</sup>  
17 Proponents argue that this timeframe is a binding requirement on ANSAC, when it is a simple  
18 “suggestion” that does not control how the Commission weights evidence or determines  
19 navigability. ASLD Mem. at 2, 4, and 5; Maricopa Mem. at 3, 15, 17, 20 and 28.

20 In fact, the only *requirement* made by the Court of Appeals was that the determination  
21 of navigability is the “instant statehood is created” and “ANSAC **must** consider whether the  
22 River would have been navigable in its ordinary and natural condition on February 14, 1912.”  
23 (emphasis added). Winkleman at 242 footnote 17.

24  
25 <sup>10</sup> Following the 2004-05 hearings, the Commission reviewed the evidentiary record and issued a  
26 report entitled, *Report, Findings and Determination Regarding the Navigability of the Gila River*  
27 *from the New Mexico Border to the Confluence with the Colorado River*, dated January 27, 2009  
28 (“ANSAC 2009 Report”).

<sup>11</sup> State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm’n, 224 Ariz. 230, 229  
P.3d 242, 254 (Ct. App. 2010) (“Winkleman”).

1 The "suggestion" by the Winkleman Court was based on what the Court called  
2 "uncontroverted evidence." Winkleman at 242. Since then, the evidentiary Record has been  
3 supplemented with voluminous amounts of documentary evidence, updated reports and  
4 studies, as well as new data and scientific analysis from experts in a variety of fields.

5 In addition to the supplementary evidence, since the Court of Appeals decision in  
6 2010, higher courts have made rulings that require Winkleman, and Proponents arguments, to  
7 finally give way to the U.S. Supreme Court decision in PPL Montana.

8 **B. Proponents' experts did not provide any new, or updated objective evidence to**  
9 **prove the navigability of the Gila River.**<sup>12</sup>

10 Proponents rely heavily on ASLD's one witness, Jon Fuller did not provide any expert  
11 testimony, and made no effort to testify objectively. ASLD 4, 9, 12, 13. Maricopa at 12, 15  
12 and 18. In fact, Mr. Fuller stated that his instructions were based upon, "the State filed an  
13 opinion that the river is navigable and I am here to support that objective." Jon Fuller stated  
14 that his testimony in 2014 was different than his testimony in 2005 since his role was now  
15 that of "an advocate for navigability" and not the "objective expert" he was in 2005<sup>13</sup>. Fuller  
16 TR 6/17/2014:357.

17 Fuller had testified for ASLD in the previous hearings in this matter, but he did nothing  
18 to update or amend his his previous Land Reports<sup>14</sup> and did not submit any new evidence  
19

20  
21  
22 <sup>12</sup> Donald D. Farmer testified on behalf of the ASLD on June 18, 2014. See Farmer TR  
23 6/16/2015:542-642. ("Farmer"); Jon Fuller testified on behalf of the ASLD on June 16-18, 2014 See  
24 Fuller TR 6/16/2014:8-267, 6/17/2014:273-535, 6/18/2014: 643-743.

25 <sup>13</sup> When asked if Mr. Fuller would consider his testimony in 2014 as more of an advocate than an  
26 objective expert, Mr. Fuller stated that he was there "advocating for navigability." Fuller TR  
27 6/17/2014:357.

<sup>14</sup> ASLD Expert John Fuller relied on , *The Navigability of the Gila River from the Town of Safford to its Confluence with the Colorado River; Preliminary and Final Report and Study*, last updated and revised in June 2003 by J.E. Fuller/Hydrology and Geomorphology, Inc. (EI-2); as well *The Upper Gila River from the New Mexico Border to the Town of Safford; Preliminary and Final Report and Study*, last revised in 2003 by J.E. Fuller/Hydrology and Geomorphology, Inc. ("SLD/Upper") [EI 4].

1 aside from the “updates” referenced in his PowerPoint Presentations<sup>15</sup> during his testimony on  
2 June 16-18, 2014, and his “fieldwork” when he testified that he and several others had boated  
3 segments of the River and had taken pictures. Fuller TR 6/17/2014:381-382.

4 Fuller stated that the only new evidence he was providing was during his PowerPoint.  
5 He testified that it was based upon his reading of newspaper accounts and “other historical  
6 information as it came available,” which had been provided by ASLD. Fuller 6/17/2014:382.

7 Fuller did not use or interpret any new flow data or scientific evidence relating  
8 geomorphology in the period before 1912. *Id.*

9 ASLD refers to Jon Fuller’s testimony regarding the Gila’s “ordinary” and “natural”  
10 condition and relies on it almost entirely. ASLD Mem. at 11. Unfortunately, Mr. Fuller based  
11 his 2014 presentation on his own definitions of “ordinary and natural.” Fuller TR  
12 6/16/2015:19-20. In fact, Mr. Fuller defined both ordinary and natural as “prior to human  
13 disturbances.” *Id.* at 19. Mr. Fuller is not an attorney and his use of one definition to define  
14 both ordinary and natural is irrelevant. Additionally, Mr. Fuller’s testimony regarding those  
15 characteristics should be disregarded by the Commission, he not only testified as “an advocate  
16 for navigability” but he did so using his own legal conclusions. Finally, there is no support in  
17 Federal law of navigability for title to support this definition.

18 **C. Supplemental evidence in the Record controverts any showing of navigability that**  
19 **Proponents may have had in the past.**

20 Mr. Gookin took the Court of Appeals suggestion in Winkleman and studied the River  
21 around 1800. His analysis showed that the Court had “made a factual mistake” when it  
22 assumed that the River’s channel shape in the early 1800’s was the same as it had been  
23 throughout the Holocene geologic period (before the Hohokam), and that same channel shape  
24 was represented in 1912, i.e. the natural channel of a River shifts and the Court of Appeals  
25 was mistaken when it assumed that the Gila River has only one natural shape and that shape  
26

27 <sup>15</sup> PowerPoint Presentation, *Boating in Arizona* (“Fuller S1:[#]”) [CR-EX-20]; and *Gila River Navigability* (Fuller S2:[#]”) [CR-EX-20]

1 was identical during the Holocene geologic period, reappeared in the early 1800's and  
2 remained unmoved through February 14, 1912. Gookin TR 6/19/2014:850, 852.

3 Richard Burtell also considered the timeframe suggested by the Court of Appeals and  
4 his analysis concluded that the Commission should consider the natural condition of the  
5 Upper Gila River as of the date of Arizona statehood. Burtell TR at 6/20/2014:1224-1225.

6 The only expert that testified on behalf of Proponents in the supplemental hearings in  
7 2014 was Jon Fuller who had done no additional research regarding the flow data and  
8 geomorphology around the timeframe suggested by Winkleman.

9 Mr. Fullers only contribution was that he had looked through some historical articles  
10 provided to him by the State, and included them in his presentations because he had been  
11 hired as an advocate of navigability as it was defined in the States Argument rather than as  
12 unbiased expert intending to provide evidence and the States legal conclusion.

13 **D. The Courts have ruled that all requirements of the Federal tests and Arizona**  
14 **statute must be given meaning**

15 Proponents cite to Winkleman throughout their brief's but fail to address some of the  
16 underling concepts of the court's opinion, namely the requirement that "when possible, we  
17 interpret statutory language in a way that gives meaning to each word and clause, and avoids  
18 making any part of a statute superfluous, contradictory, void, or insignificant. Winkleman at  
19 241.<sup>16</sup>

20 Proponents failed to reconcile the requirements that require that this Gila River be  
21 evaluated in its ordinary and natural "at the time of statehood," which has been reiterated by  
22 the Arizona Court of Appeals and the U.S. Supreme Court in PPL Montana. Winkleman at  
23 242; PPL Montana at 1233.

24  
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26  
27 <sup>16</sup> Citing *Devenir Assocs. v. City of Phoenix*, 169 Ariz. 500, 503, 821 P.2d 161, 164 (1991); *Garza Rodriguez*, 164 Ariz. at 112, 791 P.2d at 638; *State v. Johnson*, 171 Ariz. 39, 42, 827 P.2d 1134, 1137 (App.1992).

1           The condition of the Gila River in the 1860's is clearly not the date of Statehood,  
2 February 14, 1912 and so directly opposite of what the Supreme Court has said navigability  
3 “turns on” – the date of statehood

## 4           **II. LEGAL CONCLUSIONS FROM NON-LAWYER, EXPERT WITNESSES**

5           Proponents argue that, in general, evidence and testimony by experts who did not  
6 testify that the Gila River was navigable should be ignored and their findings found irrelevant.  
7 Maricopa Mem. at 15, 19-21, 25, 27-28. The argument presented is that these experts did not  
8 apply the correct legal standards to determine the navigability of the Gila River *Id.*

### 9           **A. ANSAC must review the entire Record to make its navigability determination**

10           Maricopa contends that all testimony and evidence gathered by experts on behalf of the  
11 non-navigable parties be disregarded entirely by ANSAC, that the research and testimony of  
12 non-navigability did not conform to the legal standards in Winkleman. Maricopa Mem, at 15,  
13 17-22, 25, and 28.

14           First the final rules of evidence do not apply to this proceeding and even if they did  
15 the flaw in this argument can be easily demonstrated in the following example. *See* . A.R.S.  
16 § 37-1101 (a)(3). Dr Douglas Littlefield is a professional historian who testified on behalf of  
17 SRP as an expert witness. Dr. Littlefield maintained that he had no opinion on the ordinary  
18 and natural condition of the Gila River, or the overall navigability of the River based on any  
19 legal standard. Littlefield TR 8/18/2014:1489-1496, 8/19/2014:1583.

20           Dr. Littlefield testified that he was providing ANSAC with historical evidence,  
21 describing the Gila in all conditions, to help ANSAC make those factual legal determinations  
22 and ultimately support ANSAC’s Final Determination. Maricopa argues that “Dr. Littlefield  
23 failed to apply the proper legal standards to the alleged evidence he gathered, thus, his  
24 conclusions are unsupported and should not be relied on by the Commission.” Maricopa  
25 Mem. at 22.

26           However, he did not testify on legal standards, he simply testified about his analysis of  
27 historical evidence. Dr. Littlefield submitted a report with his testimony which states “the



1 Gila River was a very erratic stream. When it carried water, it was violent, prone to channel  
2 changes, wild inundations, and dangerous currents, while at other times it was either bone dry  
3 or extremely shallow.” Littlefield Report at 144.

4           Whatever Dr. Littlefield’s opinion may be on the navigability of the Gila River, it has  
5 no bearing on the truthfulness and relevancy of his evidence he testified about. The  
6 descriptions published about the River prior to Statehood. ANSAC evaluates the credibility of  
7 witnesses and the evidence regardless of how Maricopa interprets Winkleman.

8           In fact it is exactly this type of historical evidence that PPL Montana round to be of  
9 great importance to the legal analysis of navigability. PPL Montana at 1233.

10           In PPL Justice Kennedy made it clear that the determination of navigability relies  
11 heavily on the exact types of historical documents entered into evidence by Littlefield. PPL  
12 referenced historical accounts throughout the opinion, including multiple editions of the  
13 letters and journals of Lewis and Clark, historical newspaper articles, obscure government  
14 reports and encyclopedias, to show non-navigability of certain segments of the River around  
15 the time of Montana’s statehood. *Id.* at 1220-1221, 1223-1225, 1227, 1231-1232.

16           The Court in PPL cited to historical evidence when it discussed how evidence should  
17 be assessed in determining whether a river is navigable. In its opinion, PPL did not mention  
18 the use of any one expert's ultimate conclusion or opinion. *Id.* Not only were historical  
19 publications considered important, but many of them were researched by the Justices  
20 themselves and were used in their assessment of a river's navigability. *Id.* at 1220-1221.

21           The Proponents are wrong when they argue that ANSAC may only consider evidence  
22 gathered by those who did their research with the intention of conforming to the “legal  
23 standards” as interpreted by the Proponents. Often times those “legal standards” were loosely  
24 defined by those who testified on behalf of Proponents. See Fuller TR 6/16/2014:19-21.

25           ANSAC must evaluate the testimony of witnesses and assess all of the evidence in the  
26 Record independent of the party that submitted it, to determine what helps the Commission  
27 make its navigability determination.

1 **B. Overland Travel is relevant evidence and not contrary to the federal test**

2 Proponents are incorrect when they argue that evidence of overland travel is contrary  
3 to the federal test of navigability and therefore irrelevant to the Commission. Maricopa  
4 Memo at 16 (citing Defenders of Wildlife, 199 Ariz. 411, 424-424, 18 P.3d 722, 736 (Ct.  
5 App. 2001). On the contrary, the U.S. Supreme Court has been clear, that overland portage  
6 and travel is considered “relevant evidence” and “may defeat navigability for title  
7 purposes...” PPL Montana, at 1220.

8 In PPL Montana the Court determined that [“t]he primary flaw in the reasoning of the  
9 Montana Supreme Court lies in its treatment of the question of river segments and overland  
10 portage.... Even if portage were to take travelers only one day, its significance is the same: it  
11 demonstrates the need to bypass the river segment, all because that part of the river is  
12 nonnavigable.” Id. at 1231, 1229.

13 Overland travel was considered important to the Supreme Court in PPL Montana, and  
14 therefore ANSAC must pay careful attention to the evidence in the Record that illustrates how  
15 and why the people in Arizona never used the Gila River as a means for travel by watercraft.

16 The Tribe, submitted a report prepared in cooperation with the Arizona Department of  
17 Transportation, United States Department of Transportation and the Federal Highway  
18 Administration entitled Arizona Transportation History (“ADOT Report”) [CR-EX010:2].

19 The ADOT Report includes a “timeline of transportation-related development” in  
20 Arizona and provides perspective for its report by including “transportation-related  
21 developments from the rest of the nation and the world.” ADOT Report at Technical Report  
22 Documentation Page.

23 Around the 1850’s railroads and steamboats were the “dominate means of commercial  
24 transportation” throughout the United States. Id. at 144. In Arizona the ferry took travelers  
25 across the Colorado River at Yuma, but it was “stagecoaches that carried passengers from  
26 town to town across the Territory.” Id. at 121.

27

1 According to the Arizona Department of Transportation, as of 1863, “[e]veryone in the  
2 new territory agreed that Arizona’s most pressing need was for wagon roads. Freight and  
3 passengers had been able to reach Arizona by boat since 1852, when steamboat service was  
4 established on the lower Colorado River. But travel inland from the river still required a  
5 difficult and time-consuming journey by horse or stagecoach, open made worse by the poor  
6 conditions of the few existing road.” Id. at 14.

7 The roads in Arizona were no better than those already in existence throughout the  
8 United States. The nation’s roads “generally consisted of a path worn in the dirt by constant  
9 use. Rough and dusty in dry weather, highways became muddy and often impassable under  
10 wet conditions.” Id. at 109.

11 The roads already in existence throughout the United States were so bad that,  
12 “whenever possible, travelers and freighters avoided highways altogether in favor of trains or  
13 boats.” Id. Had there been any possibility of traversing the Territory by water rather than  
14 overland, Arizonians would surely have opted for such an alternative. The first Territorial  
15 wagon road in Arizona cost \$10,000 to build and connected Phoenix to Globe, in 1877. Id. at  
16 145.

17 **C. Floods and Droughts are relevant in determining the natural and ordinary**  
18 **condition of a River at statehood**

19 Proponents argue that the Commission should disregard any evidence that suggests the  
20 Gila River’s ordinary and natural condition was affected by floods or droughts because to do  
21 so would not comply with the Court of Appeals decision in Winkleman. Maricopa Memo at  
22 17, citing Winkleman at 241. ASLD Mem. at 4. The Winkleman Court was concerned with  
23 “major flooding or drought.” Id.

24 The Record shows that floods were not uncommon or out of the ordinary on the Gila  
25 River. In fact, floods were common place, but unpredictable. “About every fifth year in  
26 primitive times the Gila River failed in midwinter, the flow diminishing day by day until at  
27 length the last drop that could not gain shelter beneath the sands was licked up by the eye

1 thirsty sun.” Gookin Report at Chpt 2 pg 18-19. “The Gila River has had a pattern of  
2 unpredictable heavy flooding and torrential conditions proceeded by periods of very low flow  
3 and relatively dry conditions.” Huckleberry TR 9/16/2005: 56. “The historical record  
4 illustrates that the Gila River was erratic, subject to unpredictable flooding, prone to channel  
5 changes, and blocked by natural obstacles such as rock outcroppings and sandbars.”  
6 Littlefield Report at 2.

7  
8 The floods on the Gila may not be predictable as to when, but the floods themselves  
9 are considerably large, every time. Floods in Arizona “are very rapid, very violent, come  
10 without warning, and carry a tremendous amount of debris with them. In short, floods are  
11 dangerous to watercraft.” Gookin Report at Chpt 2 pg 16. When the Gila River floods, “it  
12 catches up logs and boulders [sic] in the bed, undermines the banks, and tearing out trees and  
13 cutting sand-bars is loaded with this mass of sand, gravel, and driftwood - most formidable  
14 weapons for destructions...” Id. 17.

15  
16 There is little doubt that flood data isn’t useful for determining the ordinary flow of  
17 water down a river, but the flood itself is “an ordinary event that happens in rivers all the time  
18 and affects geomorphology.” Gookin TR 6/19/2014:784. Floods are imperative to  
19 determining the natural channel of the River because it is a flood that “changes the natural  
20 channel to a new natural channel.” Gookin TR 6/19/2014:969. Large flood events on the  
21 Gila River “didn’t just have an affect on the low flow channel. They had effect on the entire  
22 channel, obviously, broadening that entire channel probably without question, moving the  
23 location of the low flow channel.” Burtell TR 6/20/2014: 1210

24  
25 The reason the Gila River in the 1800’s was not representative of the Rivers natural  
26 condition in 1912 is because the routine flooding of the River, shifts the River. Between  
27 1800and 1912 the natural and ordinary condition of the River would have changed as often as  
the River flooded. See TR 6/19/2014:969.

ANSAC must recognizes that a Rivers natural channel is reestablished by ordinary  
events like flooding. Therefore ANSAC must take into consideration the flood that would

1 have most heavily influenced the natural and ordinary condition of the River at the time of  
2 Arizona's statehood on February 12, 1914.

3 Evidence in the Record shows that the ordinary and natural condition of the River in  
4 1912 would have been the result a flood that changed the channel in 1905. It wasn't until  
5 1916 that a similar flood would shift the channel of the River again. So the relevant period  
6 for the Commission in determining the ordinary and natural condition of the River would be  
7 the River as it was from 1905-1916. Gookin TR 6/19/2014:792-793.

8 **D. The Federal Test requires ANSAC to consider evidence of Commercial Trade and**  
9 **Travel**

10 Proponents have argued that a River does not need to show evidence of both trade and  
11 travel to be navigable. Maricopa Memo at 16 ("the federal test has been interpreted to neither  
12 require both trade and travel together nor that trade or travel be commercial." quoting  
13 Defenders at 732.)

14 The United States Supreme Court felt differently and took an opportunity to re-  
15 emphasize the language of "trade and travel" when it said:

16 [T]he evidence must be confined to that which shows the river could  
17 sustain the kinds of **commercial use** that, as a realistic matter, might have  
18 occurred at the time of statehood. Navigability must be assessed as of the  
19 time of statehood, and it concerns the river's usefulness for '**trade and**  
20 **travel,**' rather than for other purposes.

21 PPL Montana at 1232-1233 (citing Utah at 75-76).

22 Evidence of present-day use may be considered to the extent it informs  
23 the historical determination whether the river segment was susceptible of  
24 use for commercial navigation at the time of statehood. For the  
25 susceptibility analysis, it must be determined whether trade and travel  
26 could have been conducted "in the customary modes of trade and travel  
27

1 on water,” over the relevant river segment “in [its] natural and ordinary  
2 condition.”

3 *Id.* at 1233

4 Proponents argue that Gila had sufficient depth to be used as a highway of commerce  
5 over the course of the River. ASLD Mem. at 8. Proponents also continue to ignore the  
6 voluminous amount of evidence and testimony, all of which clearly shows that had there been  
7 a **realistic means** of conducting commerce on the Gila River, the people of Arizona would  
8 have utilized it. *See generally* the Territorial Governors Reports *infra*.

9 The record contains 16 pre-statehood reports written annually to the Secretary of the  
10 Interior by the Governor or Acting Governor of Arizona (“GR” cited as “GR Year at pg”).

11 In 1878 J.C. Fremont, Governor of the Territory of Arizona, reported that Arizona had  
12 “remained shut up and barred out of progress by its inaccessibility.” GR 1878 at 1. Fremont  
13 described the inadequacies of the “desert roads” which were the only means of travel in  
14 Arizona at the time, and he blames the lack of transportation for isolating Arizona, keeping  
15 Arizona “shut off from immigration” and precluding Arizona from “the development which  
16 its great resources would otherwise have commanded.” *Id.*

17 These early reports tell of Arizona’s potential to have trade commerce was being  
18 hindered by the lack of travel options; in fact Fremont called Arizona “the natural gateway of  
19 commerce and travel between the States east of the Mississippi, and California and the Pacific  
20 Ocean.” *Id.* at 7. The Territorial Governor further elaborated on the potential of Arizona’s  
21 commercial prosperity:

22 [F]ronting on Mexico it is in position to profit by any developments which  
23 may result from the awakening interest of merchants and manufacturers in  
24 the Trade of that country... This is the commerce which is to develop  
25 Arizona, and a railroad connection with the seaport of Guaymas is a  
26 necessity to it. Any aid that the Congress could be induced to give these  
27 railroad enterprises would be repaid manifold to the country in increased

1 revenue from increased commercial activity and the opening of new  
2 branches of trade....”

3 *Id.* at 7.

4 In 1907 F.M. Irish commented on Commerce and Travel in Arizona, blaming  
5 Arizona’s extremely stunted economic growth on the lack of transportation alternatives,  
6 specific blame went to the inability to navigate the rivers in Arizona

7 The rivers of Arizona are not suited to navigation. Light-draught  
8 steamers can usually ascend the Colorado as far as Yuma, but little or no  
9 traffic is carried on by these means. The Commerce in the Territory is  
10 carried on by the railways. There are about two thousand miles of  
11 railroads in Arizona.... These roads connect Arizona with the ports of the  
12 Gulf of Mexico and markets of the Mississippi Valley on one hand, and  
13 with Pacific Coast cities on the other.

14 Supplemental Volume, Arizona Irish, F.M. NY (1907) at 23-24.

15 Some of the mining towns are not yet reached by the railroads, and freight  
16 must be hauled to them in wagons. These wagons are large and heavy,  
17 and are drawn by from six to twenty horses or mules. This method is  
18 slow and expensive. Without railroads, Arizona could have made very  
19 little progress toward her present prosperous condition.

20 *Id.*

21 As of 1877 the mines on the Upper Gila River still utilized overland mail routes to get  
22 merchandise from Clifton to Silver City, a distance of 120 miles, via ox and mule  
23 transportation.

24 **Conclusion**

25 Proponents have failed to meet the burden of proof that the Gila River was navigable at  
26 Statehood.

1 DATED this 23rd day of January, 2015:  
2

3 THE SPARKS LAW FIRM, P.C.  
4

5  
6  
7 By 

8 Joe P. Sparks  
9 Julia M. Kolsrud  
10 7503 First Street  
11 Scottsdale, Arizona 85251  
12 *Attorney for the San Carlos Apache Tribe*

13 ORIGINAL AND SIX COPIES of the foregoing  
14 mailed for filing this 23 day of January, 2015 to:

15 Arizona Navigable Stream Adjudication Commission  
16 1700 West Washington, Room B-54  
17 Phoenix, AZ 85007

18 Fred E. Breedlove III  
19 Squire Sanders (US) LLP  
20 1 East Washington Street, Suite 2700  
21 Phoenix, AZ 85004-2556  
22 *Attorney for the Arizona Navigable Stream Adjudication Commission*

23 COPIES of the foregoing sent by  
24 U.S. mail this 26 day of January, 2015 to:

25 Laurie A. Hachtel  
26 Joy Hernbrode  
27 Attorney General's Office  
1275 West Washington Street  
Phoenix, AZ 85007-2997  
*Attorneys for State of Arizona*

Timothy M. Hogan  
Arizona Center for Law in the Public Interest



1 2205 E. Speedway Blvd.  
2 Tucson, AZ 85719  
3 *Attorneys for Defenders of Wildlife, et al.*

4 John B. Weldon, Jr.  
5 Mark A. McGinnis  
6 Scott M. Deeny  
7 Salmon, Lewis & Weldon, P.L.C.  
8 2850 East Camelback Road, Suite 200  
9 Phoenix, Arizona 85016  
10 *Attorneys for Salt River Project Agricultural Improvement  
11 and Power District and Salt River Valley Water Users' Association*

12 Sally Worthington  
13 John Helm  
14 Helm, Livesay, & Worthington, Ltd.  
15 1619 E. Guadalupe, Suite 1  
16 Tempe, AZ 85283  
17 *Attorneys for Maricopa County*

18 Sandy Bahr  
19 202 E. McDowell Road, Ste. 277  
20 Phoenix, AZ 85004  
21 *Sierra Club*

22 Carla Consoli  
23 Lewis & Roca  
24 40 N. Central Avenue  
25 Phoenix, AZ 85004  
26 *Attorneys for Cemex*

27 L. William Staudenmaier  
28 Snell & Wilmer LLP  
29 One Arizona Center  
30 400 E. Van Buren  
31 Phoenix, AZ 85004-2202  
32 *Attorneys for Freeport Minerals Corporation*

33 Sean Hood  
34 Fennemore Craig, P.C.  
35 2394 E. Camelback Road, Suite 600  
36 Phoenix, AZ 85016-3429  
37 *Attorneys for Freeport Minerals Corporation*

1 Charles Cahoy  
2 Assistant City Attorney  
3 City of Tempe  
4 21 E. Sixth Street  
5 Tempe, AZ 85280  
6 *Attorney for City of Tempe*

7 Cynthia Campbell  
8 Law Department  
9 City of Phoenix  
10 200 W. Washington, Suite 1300  
11 Phoenix, AZ 85003  
12 *Attorney for City of Phoenix*

13 William H. Anger  
14 Engelman Berger, P.C.  
15 3636 N. Central Avenue, Suite 700  
16 Phoenix, AZ 85012  
17 *Attorneys for City of Mesa*

18 Thomas L. Murphy  
19 Gila River Indian Community Law Office  
20 Post Office Box 97  
21 Sacaton, AZ 85147  
22 *Attorney for Gila River Indian Community*

23 Michael J. Pearce  
24 Maguire & Pearce LLC  
25 2999 N. 44th Street, Suite 630  
26 Phoenix, AZ 85018-0001  
27 *Attorneys for Chamber of Commerce and  
Home Builders' Association*

28 James T. Braselton  
29 Mariscal Weeks McIntyre & Friedlander PA  
30 2901 N. Central Avenue, Suite 200  
31 Phoenix, AZ 85012-2705  
32 *Attorneys for Various Title Companies*

33 Steven L. Wene  
34 Moyes Sellers & Sims  
35 1850 N. Central Avenue, Suite 1100  
36 Phoenix, AZ 85004-4527

1 *Attorneys for Arizona State University*

2 David A. Brown  
3 Brown & Brown Law Offices  
4 128 E. Commercial, P.O. Box 1890  
5 St. Johns, AZ 85936

6 Susan B. Montgomery  
7 Robyn L. Interpreter  
8 Montgomery & Interpreter, P.C.  
9 4835 E. Cactus Road, Suite 210  
10 Scottsdale, AZ 85254

11 Joy E. Herr-Cardillo  
12 Arizona Center for Law in the Public Interest  
13 P.O. Box 41835  
14 Tucson, AZ 85717

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**APPENDIX 1**  
**Evidence Cited**

<b>Evidence Item NO.</b>	<b>DATE</b>	<b>DESCRIPTION</b>	<b>SCAT short cite for Closing Memorandum and Response Memorandum</b>	<b>SCAT short cite in Joint Filings of Fact and Conclusions of Law</b>
EI 2	June 2003	Fuller, et al., <i>Arizona Stream Navigability Study for the Upper Gila River, Safford to the State Boundary, and San Francisco River, Gila River Confluence to the State Boundary</i>	Fuller Upper Gila Report	SLD/Upper
EI 4	June 2003	Fuller, et al., <i>Arizona Stream Navigability Study for the Gila River: Colorado River Confluence to the Town of Safford</i>	Fuller Lower Gila Report	SLD/Lower
EI 6	June 2004	Schumm, <i>Geomorphic Character of the Lower Gila River</i>	Schumm	Schumm
EI 12	November 3, 2005	Littlefield, <i>Assessment of the Navigability of the Gila River Between the Mouth of the Salt River and the Confluence with the Colorado River Prior to and on the Date of Arizona's Statehood, February 14, 1912</i>	Littlefield 2005	Littlefield 2005
EI 15	November 16, 2005	Gookin, <i>Presentation to Arizona Stream and Navigability Commission</i>	Gookin 2005	Gookin 2005

EI 16	November 6, 1995	Tellman, Tellman evidence	Tellman evidence	Tellman evidence
EI 21	November 16, 2005	Jackson, <i>Lower Gila River Navigability</i>	Jackson	Jackson
EI 23	October 25, 2002	Hjalmarson, <i>Navigability Along the Natural Channel of the Gila River</i>	Hjalmarson 2002	Hjalmarson 2002
EI 23	November 16, 2005	Hjalmarson, Power Point Presentation entitled "Navigability Along the Natural Channel of the Gila River, AZ"	Hjalmarson 2005 PP	Hjalmarson 2005 PP
EI 24	January 16, 2003	Deposition of Hjalmar Hjalmarson, <i>A-Tumbling-T v. Paloma Investment</i>	Hjalmarson Depo.	Hjalmarson Depo.
EI 25	July 2001	Hjalmarson, <i>Confidential Notes: The Ability to Navigate the Gila River Under Natural Conditions, Below the Confluence with the Salt River to the Mouth at Yuma, Arizona</i>	Hjalmarson 2001	Hjalmarson 2001
EI 28	April 2003	<i>Information Regarding Navigability of Selected U.S. Watercourses</i>	Watercourse Information	Watercourse Information

X002	November 12, 2013	Littlefield, <i>Revised and Updated Report: Assessment of the Navigability of the Gila River Between the Mouth of the Salt River and the Confluence with the Colorado River Prior to and On the Date of Arizona's Statehood</i>	Littlefield Report	Littlefield 2013
X003	January 8, 2014	Mussetter, <i>Declaration Regarding Navigability of the Gila River Between the Arizona-New Mexico State Line and the Confluence with the Gila River</i>	Mussetter Declaration	Mussetter
X004	1930	Hannum, <i>A Quaker Forty-Niner: The Adventures of Charles Edward Pancoast on the American Frontier</i>	None	None
X008	May 2014	Burtell, <i>Declaration of Rich Burtell on the Non-Navigability of the Upper Gila River at and Prior to Statehood</i>	Burtell Declaration	Burtell
X008	May 16, 2014	Affidavit of Richard E. Lingenfelter and curriculum vitae attached thereto	Lingenfelter	Lingenfelter
X009	May 19, 2014	Gookin, <i>Report on the Navigability of the Gila River Prepared for the Gila River Indian Community</i>	Gookin Report	Gookin 2014

X013	June 16, 2014	Fuller, <i>Presentation to ANSAC: Gila River Navigability</i>	Fuller S2:[#]	Fuller/Gila
X016	September 1998	Fuller, et al., <i>Criteria for Assessing Characteristics of Navigability for Small Watercourses in Arizona</i>	Small Watercourses	Small Watercourses
X018	June 16, 2014	Littlefield, <i>Assessment of the Gila River's Navigability on February 14, 1912</i> (Powerpoint presentation)	Littlefield Slide [#]	Littlefield Presentation
X020	June 16, 2014	Fuller, <i>Boating in Arizona ca. 1912</i>	Fuller S1:[#]	Fuller/Boating
X026	August 19, 2014	Mussetter, <i>Gila River Navigability</i> (Powerpoint presentation)	Mussetter Slide [#]	Mussetter Presentation
X037	Various	Fuller Photos	None	None
X010:2	December 2011	United States Department of Transportation; Federal Highway Administration and Arizona Department of Transportation <i>Arizona Transportation History</i>	ADOT Report	ADOT Report
X031:114	2011	Arizona Department of Transportation 2011 Report <i>Arizona State Rail Plan</i>	ADOT Plan	ADOT Plan
X021:93-108	Various from 1878 - 1907	16 Pre-Statehood Governors Reports to the Secretary of Interior	GR [year] at [page]	GR [year] at [page]

X 006		<i>The Personal Narrative of James O. Pattie of Kentucky</i> , was submitted by the Maricopa County Flood Control District on January 28, 2014.	Proponents Narrative	Proponents Narrative
X036:120		Appendices from the First Edition of the James O. Pattie Narrative, printed in 1831	Pattie Appendices	Pattie Appendices
X036:121		'Editors Preface' and 'Introduction' by Timothy Flint, from the 1 <sup>st</sup> Edition of the James O. Pattie Narrative published in 1831	Flint	Flint
X036:122		'Preface' to the 3 <sup>rd</sup> Edition of the James O. Pattie Narrative, by Reuben Gold Thwaites (1905)	Thwaites	Thwaites
X036:123		'Publishers Preface' and 'Historical Introduction' to the 4 <sup>th</sup> Edition, of the James O. Pattie Narrative, edited by Milo Milton Quaife, Secretary and Editor of the Burton Historical Collection	Milo	Milo
X036:124		'Editors Preface' to the 6 <sup>th</sup> Edition of the James O. Pattie Narrative, by William M. Goetzmann (1962)	Goetzmann	Goetzmann
X036:125		'Introduction' to the 7 <sup>th</sup> Edition of the James O. Pattie Narrative by James Batman (1988)	Batman	Batman
X036:126		<i>Appendix E: James Ohio Pattie's Vaccination Story from the Series Francisco or Mission Dolores</i> , by Zephyrin Engeldardt. Francis Herald Press, Chicago (1924)	Zephyrin	Zephyrin



X036:127	1886	Table of Contents, and Chapter III, <i>Etheadnia and Herrera – Finance – The Solis Revolt 1826-1830</i> ; and Chapter VI <i>Overland – Smith and Pattie – Foreigners 1826-1830</i> from Volume 3 of Hubert Howe Bancroft's 7 volume series, <i>History of California</i> (1886).	Bancroft	Bancroft
EI 14	1993	Dr. Gary Huckleberry report, <i>Historical Geomorphology of the Gila River</i> , dated 1993 – entered into evidence	Huckleberry	Huckleberry
X010:1	1907	<i>Supplementary Volume, Arizona</i> , by F.M. Irish. The Macmillan Company. New York (1907)	Irish	Irish
EI 17	November 16, 2005	<i>Expert Witness Report</i> , entitled <i>The Lower Gila River: A Non-Navigable Stream on February 14, 1912</i> by Jack L. August was submitted November 16, 2005	August	August
X039:129	2014	<i>History of Safford A Few Facts about the Establishment of the City of Safford</i>	History of Safford	History of Safford
	2009	<i>O Report, Findings and Determination Regarding the Navigability of the Gila River from the New Mexico Border to the Confluence with the Colorado River</i> dated January 27, 2009	ANSAC 2009 Report	ANSAC 2009 Report

**APPENDIX 2**  
**References Used**

<b>Reference/Description</b>	<b>SCAT short cite for Closing Memorandum and Response Memorandum</b>	<b>SCAT short cite in Joint Filings of Fact and Conclusions of Law</b>
Quoting Transcripts	“[speaker] TR [date:page]”	“Tr. at [date]:[page] (Witness)”
Evidence in connection with the 2004-05 Hearings	“CR-EI-[ANSAC’s assigned Evidence Item #]”	“EI[#]”
Evidence in connection with the 2014 Hearings	CR-EX-[ANSAC’s assigned Evidence Item #]”	“EX[#]”