

**Navigable Stream Adjudication Commission  
State of Arizona  
ANSAC Meeting June 23, 2015, Oral Argument**

**2015-06-23 (09h04m15s).wav (Recording #1)**

Chairman            Let's begin this meeting of the Navigable Stream Adjudication Commission  
for the State of Arizona. The meeting is hereby called to order and  
Mr. Maynard can we have a roll call?

Maynard            Commissioner Allen?

Allen                Here.

Maynard            Commissioner Hannis.

Hannis              Present.

Maynard            Commissioner Horton.

Horton              Here.

Maynard            Chairman Noble.

Noble                Present.

Maynard            Okay. We have a quorum.

Chairman            Good. The first item of business on our agenda is the approval of the  
combined minutes from March 30, 2015 through April 3, 2015. Is there any  
discussion? Is there a motion to approve?

Horton              I so move.

Chairman            Jim? Mr. Horton moves, Mr. Hannis seconds. Any further discussion? All in  
favor say aye.

ALL                 Aye.

Chairman Chairman votes aye as well. Next item on the agenda is party presentations. We lawyers love those terms, party presentations. We are now going to get down and take off the gloves and we're going to argue this and we're going to hear from each of the parties who wishes to discuss the navigability of the Gila River. Would those who intend to argue in behalf of navigability, those parties let us know who plans to speak.

Slade Mr. Chairman, I do from the State.

Chairman Mr. Slade.

Helm John Helm for Maricopa County in the Flood Control District of Maricopa County.

Chairman Thank you Mr. Helm. Now Mr. Slade, oh go ahead.

Cardillo Joyce Cardillo on behalf of the defendant's party. Although I should know, I don't anticipate using anywhere close to 20 minutes, and I conceded the majority of my time to Mr. Slade.

? I'm in the same boat.

Chairman So my question then is, who's leading off? [laughter] Okay, if Mr. Slade is leading off, how are you going to determine how much of your time you gave to him?

? Mr. Chairman, I would suggest that the time beyond 20 minutes be taken from either Mr. Helms or Ms. Cardillo's time, if that works.

Chairman Okay. Do you plan to speak for 60 minutes?

? No, certainly not. I would bore myself to death. So, I plan on about 25 to 30 minutes.

Chairman Okay. It sounds like it will work out fine. Now who are we anticipating would like to argue this case against navigability?

Hood Sean Hood on behalf of Freeport.

Murphy Tom Murphy on behalf of Gila River Indian Community.

McGinnis Mark McGinnis for SRP.

Sparks Joe Sparks for the San Carlos Apache Tribe.

Chairman Okay, we just got past lunch - anyone else? So, we have four? Okay, then Mr. Slade are you ready to proceed, and have we moved the microphone for you?

Slade If you don't mind, I'll –

Chairman You can speak standing up. You can speak sitting down. We will hear you and listen to you in both places.

Slade I appreciate that. Do you have a timer?

? I do.

Slade Okay.

? Do you want us to give any kind of motion to let you know when you're getting close?

Slade I don't think I need that unless you need that.

Chairman As I understand it, he has 60 minutes.

Slade Mr. Chairman, if the commission is ready, I'm ready.

Chairman Please proceed.

Slade Good morning, Mr. Chairman, Commissioner Allen, Commissioner Hannis, Commissioner Horton, Mr. Breedlove, and Mr. Maynard. My name again is

Edwin Slade representing the Arizona State Land Department. I'm here with my co-counsel Laurie Hackle (sp?). The Gila is a navigable river in its ordinary and natural condition. The State is here because it has a duty to protect the public trust values and the public trust lands. Those lands include the bed and banks beneath navigable rivers. Rivers that were navigable in their natural and ordinary condition. I certainly recognize that when you cross the Gila on I-10 today you look at a dry river. I would encourage you as I summarize the law and the facts today to keep an open mind. Imagine a river in its natural and ordinary condition was much different than it is today. A river that supported steamboat use on the Lower Gila. Canoes and skiffs, traders, trappers, and travelers and a river as I might remind you that is still navigated today.

I'll first talk about the law. The law is the lands through which we view the evidence. It starts with the Daniel Ball test. I'm sure you've seen the Daniel Ball test. There are various parts to it which federal case law and some state law has articulated. It is a disjunctive test which means navigability can be proved by either actual use or susceptibility to use. Susceptibility meaning the possibility of use. There are two similar cases that you are aware of: *PPL v. Montana* and *ANSAC v. Winkleman*. The first, *ANSAC v. Winkleman* found two things. The ordinary word that is found the Daniel Ball test means the river absent drought or flow. It also found that the natural word that's found in the Daniel Ball test means the river without manmade diversions or dams. In the *Winkleman* case it was dealing with the Salt River. The Salt River it

found was in its natural condition in the early 1800s up until the 1860s when the swelling ditch was put in on the Salt. Of course, the Salt is a major tributary to the Gila so the natural condition of the Gila would similarly be the early 1800s to the about the 1860s.

In *PPL v. Montana*, U.S. Supreme Court case in 2012, the court found two things: first, a river should be segmented into non-navigable and navigable parts if there are, in fact, non-navigable parts. There are no non-navigable parts on the Gila River. *PPL* also addressed modern evidence of boating. It said modern evidence of boating is a valuable form of evidence to show susceptibility of the river to navigability if two things are present. Boats that are used today are meaningfully similar and the river is in a substantially similar condition. Both of those things are present for the Gila.

There is also a fair amount of other case law, and consistently the U.S. Supreme Court in all its cases, the Ninth Circuit which is controlling for this jurisdiction, and state courts have held that the test for navigability is broad and inclusive. What do I mean by that?

Number one, various types of boats can prove navigability. It all starts with the *Montello* which was a case in 1874 which has been cited by multiple Supreme Court cases since, and I'm going to read you the quote. "It would be a narrow rule to hold that in this country unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway." *U.S. v. Holt*, a 1926 Supreme Court case also cited the *Montello* and in that case the Mud Lake in Minnesota was found navigable by small

boat use by travelers. *In Economy Light and Power* 1921 U.S. Supreme Court case, the Des Plaines River in Illinois was navigable by the use of craft common to early fur trading days such as canoes. I could go on with more cases and I'll cite one more. *State of Alaska v. Aetna*, a Ninth Circuit case in 1989, the Lower Gulkana River found navigable where it was used by hunters and fishermen in 16 to 24 foot boats. Opponents navigability have attempted to show the test as narrow and only requiring big boats such as boats that could be used for mining or military. That is not the test.

The Highway of Commerce definition that you find in the Daniel Ball has also been interpreted broadly. In our own Arizona statutes it does not require the transport of goods. The transportation of people is enough.

Another area where the test is broad is that susceptibility can prove navigability, not just actual use. In fact, the U.S. Supreme Court in *U.S. v. Utah* in 1931 said susceptibility is "the crucial question. The extent of commerce is not the test." That is from the U.S. Supreme Court in 1931.

The capacity of rivers can be shown by physical characteristics and experimentation. John Fuller and his team have showed that and I'll go into that a little further later on when we talk about the evidence.

There is no requirement of up-stream travel. Although we do have up-stream travel on the Gila in segment eight from Yuma up to Gila City.

And lastly, the Supreme Court has consistently said that occasional obstacles do not defeat navigability such as rapids or sandbars or small portages. On the Gila, there is only one class through rapid, there are no

waterfalls, and there is no spot on the river that was consistently a difficult spot.

I'd like to discuss the evidence now that we talked about the law. Before you, you have a chart. I don't expect you to be able to read this. I will pull up some of the important points. This is a chart of all the historic boating accounts on the Gila River. The segments are at the top, segment one on the left to segment eight, the years of the accounts from earliest to the latest on the left side. As you can see, there are a substantial amount of accounts. I will not go through all of them for your benefit and mine, but I will highlight some of them. There are 32 newspaper accounts in all. You'll see red bars by some of the accounts. That notates a difficulty encounter. We tried to present it in a fair and honest way. Of the eight difficulties, three of the trips ended because of their difficulties. Thirty two accounts, three ended because of difficulties. The vast majority of the accounts were successful. I might add that some of these accounts talk about multiple accounts such as the John Day Brothers. We know, five trips, a future one oncoming. We list that as one account on here.

I'll start first with the historic accounts of steamboats in segment eight. But before I discuss that I'd like to talk about the back water of the Colorado. In 1999 Stantech put out a report, it said that the Colorado came up the Gila when the Colorado was at its low water point, point one miles. At its high water point on the Colorado it came up the Gila two and a half miles. Keep

that in mind when we look at the steamboat accounts and how far they came up.

The first chunk of steamboat accounts we have are of the steam boat Uncle Sam which in 1852 and 53 came up the Gila to get firewood and brought it back down. It was a 60 foot, 65 foot long boat, 16 feet wide, capacity of 40 tons. It ended up sinking on the Colorado in 1853. We also had the steamboat explorer that ran from 1854 to 1864, it transported fire wood from on the Gila down. This was the original boat that Lt. Ives used to explore the Colorado as far as he could. Eventually it was bought by George Johnson and used for firewood. It was also most likely the boat used to supply Gila City when the mine boom happened in 1858 and 1859. Gila City is at the present site of Dome (sp?), 20 miles upriver from the Colorado, 15 miles as the crow flies. In 1858 and 59 gold was found in Gila City, George Johnson the steamboat king of the Colorado was “suddenly over head and heels in business carrying men and provisions to the diggings. That comes from Mr. Lingenfelter’s book. That’s also supported by primary source newspaper accounts of the time. George Johnson was carrying provisions up the Gila to Gila City, 20 miles upriver. The ordinary high water of the Colorado is only two and a half months.

Here is a picture of the Explorer. We have – it’s on the cover of Steamboats on the Colorado by Richard Lingenfelter. If we blow it up, you can see it’s a stern wheeler and it was 54 feet long, 13 feet wide going at least 20 miles upriver.

We've also got the steamboat Aztec. This was a larger boat. 62 feet long, 21 feet wide with a 50 ton capacity. It made up river trips at least five miles for picnics and dancing on Sundays. One account says three times a day and it also made moonlight cruises.

We have the steamer Rhetta which took expeditions with children, 36 feet long, six feet wide. These accounts are supported by newspaper accounts of the time period. They are all in evidence. If you'd like more information, you can read our briefs.

We have the schooner McCord, getting firewood, up the Gila and bring it down.

I'd like to turn to other parts of the river. That was focusing on Segment 8. There was consistent use on all the river. If we look at some unnamed commercial trappers in 1890 and 91, they started out in Segment One which is the Duncan Valley area. They moved all the way down to Yuma. You'll notice there's a red hash in Segment 4, they had a difficulty – they encountered a flood. They lost their boat, they built a new one, and they kept moving. It was February, that's the high water season, they probably got caught in the canyon on a flood. That comes from the Tombstone Epitaph, 1891.

Another account, Amos and Evans in 1895, they went from Clifton to Sacaton, stopped by at the Salt, came back down the Salt and kept moving to Yuma on the Gila. They had no other difficulties reported other than a

portage in the San Carlos area. The newspaper reported that from Florence to Colorado “they will find navigation easy.”

There were other 49ers that used small boats on the Gila. One newspaper said this, and this is in the Lower Gila Report, there was an unsigned letter from a traveler at Camp Salvation and it reported in part that “expedience of lightening down teams by building small boats on the Gilas had been tried and succeeded and that many travelers had thus reached the Colorado River. That was an article from the New York Daily Tribune in 1850. We know one of those 49ers is the Howard family. The Howard family was the curious account of the wagon, they turned it into a boat, they moved down from, I believe Segment Six through Segment Eight, down to Yuma. They had a successful trip. They named their daughter who was born on the trip DeGila presumably because it was a successful trip. That’s an example of where we have a report that 49ers used the river but we don’t have all the 49ers. Again, these are just the recorded accounts that we have.

Of course, we have the Day brothers who came down the Verde, then the Salt, then the Gila to Yuma, trapping along the way. It was their fifth trip, they planned on doing it again. They were doing it in a boat.

And the last account I’ll mention is of January 1879. Hamilton Jordan and Halesworth traveled from Phoenix to Yuma. The newspaper said “they report the river perfectly practical for navigation.” They had one narrow spot around Gila Bend where there was some boulders and it got to about eight feet wide.

Other than that, they said the river would easily float a flat boat loaded with goods from Phoenix. That's from the Arizona Sentinel in 1879.

There is no place on the river that consistently was portaged where they consistently had difficulties. There were also logs that were floated down the river by raft initially, for the prison, and then by the river itself and a boom collected the logs for firewood to be used for generating electricity at the prison. That comes from the *Herald* in 1897.

Steamboat use, trappers, logging, travelers, accounts that say the river is navigable. There is substantial evidence that the Gila historically was navigated, and was historically susceptible for navigation.

Historic descriptions about depth also confirm the boating accounts. In 1857, a time period that was prior to dams and diversions, the U.S. Army came through Florence. Looking at the river around Florence, they reported that near and below Florence the river was 40 yards wide and an average of two feet deep. If you know anything about the river, you know that in Florence the Gila is in losing reach. Water is being put into the alluvial system. It's before the Salt River returns to the Gila. So the U.S. Army came to Florence, they said average of two feet deep at what is probably one of the more shallow spots on the entire river. Florence is in Segment Six.

We also have modern boating that confirms the river was navigable because it is still navigable today. You've heard testimony by John Farmer, excuse me, John Fuller, Don Farmer, and also John Colby who ran a commercial operation in the 90s on the Gila. You've also heard from John

Fuller evidence about meaningfully similar boats. He's the only expert to present substantial evidence that boats used today are meaningfully similar to boats used in historic times. He concluded based on his expertise, that today's canoes and other small boats can navigate the Gila presently and they are meaningfully similar to historic boats.

I'd like to show you some photos that are in the record. These were taken by John Fuller. You've got Segment One on the top left – that's in the Duncan Valley. That's a stretch from New Mexico to the Gila Box. In the top middle you have Segment Two which is from the 190 bridge, 191 bridge to the end of Gila Box near Bonita Creek Road. Segment Four is the San Carlos Canyon, Coolidge Dam to Highway 77. Segment Five in the lower left is San Carlos Dam to Ashurst Hayden Dam. Got a great Blue Herron taking off there it looks like. Segment Seven is below the Salt confluence to Dome. You could imagine that if you drove over the Gila, in its natural and ordinary condition today on I-10, you might see something like Segment Seven, the photo on the bottom right. That's where the effluent from the Salt comes back into the Gila.

Natural depth reconstructions also support the State's position that the Gila is navigable. You can find those in the State's brief, Exhibit A, to our opening brief.

I'd like to talk briefly about the various experts in this case.

Chairman Mr. Slade, before we go on, since you appear to be leaving the boating examples, during the 1850s and 1860s, do you know if there were any records kept in the Yuma area of persons who crossed the Colorado River at Yuma?

Slade Yes, Mr. Chairman, there are 49ers, I believe even the Howard family, that used their boat to ferry people across the Colorado and there are various 49ers and other people who used boats came to the Colorado and used those as ferries. Or do you mean physically crossing on foot?

Chairman I mean the number of people who crossed in any given year.

Slade I don't know the answer to that, but I can look that up and try to get back to you on rebuttal.

Chairman Thank you.

Slade There is one expert who stands alone as having the most experience and knowledge on the Gila River. And it's the State's expert, John Fuller. He's seen every segment on the grounds. That includes all of Segment One, Two, Four and Five. Most of Three and Six, and parts of Seven and Eight. He has boated every segment that still has permanent water. That includes boating all of Segments Two, Four and Five, most of One and parts of Three and Seven. He did not boat Six and Eight because they are in a very unnatural condition with little or no permanent water today. That's in stark contrast to opponent experts. And you have to wonder if this is a case about navigability why the deponent experts not go visit the river where it is still navigable today! Mr. Fuller has worked on the navigability studies since 1992 in various capacities; either as project manager or lead expert for the State. It was only

until this hearing that he was asked to opine on a navigability position. Previously, he had an unbiased, non-predetermined position presenting evidence and gathering the facts. In a show of his objectivity, he has advised the Land Department that only three rivers in Arizona are navigable. The Gila, the Salt and the Verde. He has advised that all other rivers should be disqualified for navigability. In other words, the State's position is not that all rivers that can float a boat or a canoe are navigable.

I'd like to address a few of opponent arguments that I suspect will be brought up. The first, that there's not continued use. You saw the evidence chart there is substantial actual use. But why might there not be even more use. Number one, the Gila was increasingly more diverted as time went on and western settlement came in. By 1899, the Upper Gila by the Duncan and Safford Valleys, had 45 diversions. The Lower Gila around that time had 220,000 acres in irrigating and 420 miles of ditches. Arizona made choices on how to use the Gila water. Choices that the State is not here to change today, but it impacted the natural condition of the water.

In addition, the railroads came in in the 1880s and they were a great transportation method, for things like mining, and even moving people across Arizona. But you have to remember the susceptibility of the river is "the crucial question that comes from U.S. Supreme Court. Opponents also tried to compare this river to other rivers that were found non-navigable. The U.S. Supreme Court has held consistently that each river must be viewed in its own

facts. Why have they done that? Because we don't know the circumstances of why a river was deemed non-navigable.

If you take the Rio Grande as an example, the Supreme Court held that the Rio Grande was non-navigable. But the evidence in that case presented to the Supreme Court was of logging, small amounts of logging, some rafts, and essentially that's it. There was not nearly the substantial amount of boating evidence that you have in our case.

And take a look at the John Day River by comparison. The John Day River was found navigable by the Oregon Court of Appeals. In that river there was a 10-mile stretch where steamboat use was used, the John Day One and then the John Day Two, only on that 10-mile stretch. The rest of the river probably had Native American canoe use. If you compare that to the Gila, we had steamboat stretch up river or steamboat use up river for 20 miles. We also had substantial boating on the entire river.

Given the law and the facts, the State has taken a reasonable and conservative position that is consistent with the law and the evidence. The question the Commission needs to ask itself is, is it more likely than not that the Gila River was navigable or susceptible to navigation in its natural and ordinary condition. And the answer is yes. There was substantial actual use. There was modern use. The actual use was done by various types of boats: steamboats, flatboats, canoes, skiffs, by trappers and traders, for commercial purposes. You even had accounts saying that the river was navigable by

people who just navigated it. The river is still boated today in many areas. By young people, by old people, by all of Arizonans. It is a treasure that we have.

I understand there may be some consequences or fears of consequences to finding a river like the Gila navigable. The State has never taken the position that water should be put back into the river should it be found navigable.

Arizona has made choices on how to use the Gila River for cotton farming and mining, but we are not here to change those choices.

To conclude, the use of the Gila River is a part of Arizona history, and it's a part of our future. It's something we can be proud of. Today's generations and future generations should be able to boat what's left of the wet river and access it. And where the river is dry it should be used consistently with the public trust values for the benefit of all Arizonans.

Mr. Chairman, Commission members, unless there are any further questions, that's all I have for you today.

Chairman Are there any questions?

? No, thank you.

Chairman Bill?

Bill Mr. Slade, you've taken the position that in its natural and ordinary position, that only apply to the timeframes in the 1800 and 1850, is that correct?

Slade About 1863 when the swelling ditch was put in on the Salt.

**9h38m12s and 9h40m06s (Recordings #2 and #3)**

Slade: Mr. Chairman and members of the Commission I don't have much to say. We've said most of what we want to say in voluminous memoranda and I know you've all read them with great interest and so, I don't want to take up your time with that. I'd just like to make a couple points. 1) I predate *PPL*. Segmentation has been the position of Maricopa County since this thing got under the get go.

We've always been concerned on this River, the Gila, with what I call a lower Gila which the State calls Segment 7 and 8. And regrettably I've been doing this stuff regarding navigable rivers since I graduated from law school too many years ago. And I probably ran into my first navigability case in about 1972, and that was when I was with the Department of Justice. And it has been, as far as I know, under federal law since the get go to look at rivers as segmented issues. Because otherwise it was the opinion of the Department, there wouldn't be a navigable river in the United States because at some point, even the Mississippi you can't boat when you get all the way up to the end of it. And if the non-navigable portion controls navigable portion, there won't be any navigable rivers. And so, segmentation is the reason you look at it at various slices. We have submitted that the slice you need to look at is in accordance with *PPL*, it's based on natural conditions it's the Salt River to the Colorado River. Those are both natural (9:40:06) spots along the Gila River that would need the *PPL* test for determination. Nobody in this matter has really taken issue with that. Nobody said whoa, that's a bad segment don't consider it. So, it is out position that that's a legitimate segment under *PPL* that you should look at. Having said that, we

also have the only...at least theoretical evidence done on that portion and that's the...Mr. Hjalmarson's testimony and reports. And those reports show basically a river that's 4 to 5 feet deep the entire way. There is no rapids, there's no water falls, there's no nothing, alright. You can get some braiding if you got a flood. But if you don't cut the water off the braiding will go away and we'll be back to a compound channel or a plain channel like a number of the experts recognized in this matter. You look to those floods that they had in the early or the late 1800s, the early 1900s that created the braiding issue that seems to be there. Although nobody, and I mean nobody has identified any spot on the lower Gila that was significantly braided. But having said that we've got these floods, well, they, they...there wasn't any water. By that time it's virtually all diverted and if it wasn't, it certainly was by 1910 when they closed Roosevelt and they took away the entire Salt River from the Gila. So, our point being that in its normal and natural condition as created by when Halmerson who nobody has contested. I mean they've said, well he didn't appear and testify at the last hearing; didn't have to because nobody put on any evidence that said he was wrong. In fact, it's been ten years since the first time we introduced his report and nobody has put on any evidence that he's wrong. You know, you can pick on it be...oh, we're using averages. Well, everybody in the expert division used averages, they used means, they used medians, Winn went far enough to use the 90 percentiles to show that it was going to be navigable virtually all year around. At any rate, we think that you have to treat at least the lower Gila as a separate issue from the other portions of the Gila and deal with 4 to 5 feet of water which floats any canoe, floats any flat

boat, even floats a steamboat if you believe those people who say it only takes 2½ foot of water to float a steamboat.

Second thing I'd like to just briefly state is federal law controls. If, if we go to using other issues that wouldn't be admissible in federal court, we're going to be back here again three years from now or whenever you issue these opinions. I probably won't be, but somebody will be making these same kinds of argument because this is an experience.... an experiment in Arizona. Nobody else has tried to do it this way where we have a commission and they determine what is navigable for all the state. Most of all of the determinations come from federal court cases that determine whether a river is navigable or not. And why you can listen and you were instructed by our state statutes to listen to every guy who showed up no matter how technical or not technical, you've got to weigh that against what's going to be navigable and what's going to be navigable is what the feds say is navigable. And so, my point is that you need to follow federal law closely. If you don't, we're going to be back here again because somebody up the line is going to say, well they didn't calculate what was ordinary or they didn't calculate what was natural and we're toast; I don't want to be toast. I've been doing this since we started in '85 and I'd like to end it before I end.

Chairman: Your toast is looking a little frosty.

(laughter)

Allen: I can't argue that with you. (laughter) There's been some writings done by some parties saying that the document that was produced by the then existing Commission in 2005 should just be kind of adopted by you guys and don't worry

about what's happened since then, alright. Well, the Minute Entry from the Superior Court of this State orders you to consider each one of these cases and that includes the Gila because the Gila was not the case the Minute Entry was originally entered in, in light of the *Winkleman* decision. So regardless of what people say, a court has ordered you to take and to consider *Winkleman* when you make your decision on whether it's navigable or not.

Finally, just one other caution and it goes back to this federal concept and that is, some people have cited a case called *Likes* that I believe is an 11<sup>th</sup> Circuit case. And if you follow the...the reason it was set forth was to...to make surveyors look like good evidence, alright. And we won't overdue the Supreme Court decision on that, so we're going to use like *Likes* which is 11<sup>th</sup> Circuit; now they kind of flip that on their ear. I always thought that the Supreme Court ran the railroad and the 11<sup>th</sup> Circuit didn't. But apparently some people don't think that. But at...but at any rate, if you look at the cases that *Likes* is based on, alright, the principal case was a case where a surveyor was in court testifying and in that case they said, yeah, you can consider his evidence because he was there as a testifying witness. He was not a surveyor from a 100 years ago showing up to...in somebody's report. He actually had gone in and testified about an area that he saw, that he was there, and he testified about a swamp, alright. But the point is...is he was a testifying witness he wasn't somebody who we were looking at just a piece of paper, alright. And the Supreme Court's cases mostly deal with piece of paper guys, and they say that they are not very significant in your considerations. That's all I have. I'd like to thank the Commission and the

Chairman for his patience with us over all this time. If you have any questions I'd take my best shot at answering them, otherwise I'll get out of here.

Chairman: Any questions for Mr. Allen? Thank you Mr. Allen. Thank you.

Allen Thank you.

Chairman: Ms. Cardillo without script. What are we going to do here?

Cardillo: I only have one point I want to make. I will be brief. I just wanted to clarify that although I wholeheartedly join with virtually everything that Mr. Slade presented to the Commission, I did want to know one point of departure and that is, any speculation about public trust values and what would happen in the next phase of this proceeding I think it's premature. The sole issue before the Commission today is whether the river was navigable in its ordinary and natural condition.

Chairman: Thank you very much.

Cardillo: Thank you.

Chairman: Does that conclude any argument by those who are proponents of navigability on the Gila River? If it does, then those parties in opposition to navigability, who is going to begin?

Hood: I think I'm up first Mr. Chairman.

Chairman: Mr. Hood, welcome to the microphone.

Hood: Thank you.

Someone speaking (I think I'm better now).

Chairman: And if someone wants to you can use the lectern if you prefer to stand. However, if you want to be seated we're just as comfortable with your being seated.

Hood: I believe (inaudible), thank you.

Someone speaking in background (I don't think the lectern will go that far. It's plugged into the wall).

Hood: George, will that pick me up, if I talk like this?

George: (Inaudible)

Hood: If not I'll just sit down, it's not a big deal. I don't want to...here we go, perfect, thank you both.

Chairman: Mr. Slade our apologies we should have thought about that earlier.

Slade: No problem.

Mark: You want more?

Hood: That's good. That's works for me. Thanks Mark.

Chairman: Remember Mr. Hood it's a lectern not a pulpit.

(Laughter)

Hood: I'm talking easy measured tones, very little hand waving and pointing, that's my plan anyway.

**(09h50m18s) (recording #4)**

Hood ....Gila River. My name is Sean Hood on behalf of Freeport Minerals. With me today are Shilpa Hunter-Patel who is Freeport senior water counsel, Mr. Burtell is here as well. You know Mr. Burtell well from all of the proceedings that we have been involved with. He's here for the time when Commissioner Allen zings with me something that I don't remember on a technical basis. Mr. Burtell will be here for that purpose. My focus which has been Freeport's focus in this proceeding is going to be on the Upper Gila River. We certainly agree with the other parties who contend that no segment of the Gila River is

navigable or was navigable in its ordinary and natural condition, but Freeport's focus in the case and my focus today will be primarily on the Upper Gila River. *PPL Montana*, if you're going to look anything leading up to your decision today, take another look at that case. When you read that case and it makes you wonder why are the proponents cases built so strongly on modern recreational boating. It's a good question to ask. This is something that the proponents on navigability namely, Ms. Herd-Cardillo's clients' focused on the San Pedro and the Santa Cruz. Look at all these people out there in canoes. They continue to rely, all of the proponents in this case, rely on modern recreational boating standards concerning modern recreational watercraft. Not the kinds of commercial vessels that were used for trade and travel at statehood.

Here's what the United States Supreme Court said about this in *PPL Montana*: "The Montana Supreme Court further erred as a matter of law in its reliance upon the evidence of present day primarily recreational use of the Madison River. Error is not inherent in a court's such consideration of such evidence, but the evidence must be confined to that which shows the river could sustain the kinds of commercial use that as a realistic matter might have occurred at the time of statehood. Navigability must be assessed as of the time of statehood and it concerns the river's usefulness for trade and travel rather than for other purposes." That's 132 Supreme Court at 1233. The proponents reliance on evidence of modern day recreational canoeing and kayaking in neoprene boats and kayaks made out of modern plastics that none

of us can pronounce very well, runs directly contrary to what the United States Supreme Court said in *PPL Montana*.

The proponents witnesses in this case we heard essentially from Mr. Fuller and Mr. Farmer. Okay, so the case here is rested not only on modern recreational craft and modern recreational boating, it rests on two recreational boating enthusiasts. And that is the perspective that they bring to these proceedings. Understandably so. Their avocation is recreational boating. They love it! They have a stake in this game and it does not relate to the Daniel Ball test, it does not relate to the Equal Footing Doctrine. They want to be able to continue boating the rivers that they boat today. They have a personal stake in the outcome for that reason.

Mr. Fuller described his navigability threshold as being six inches. He says he can boat recreationally in less, but he picked six inches as his cutoff because these are his words, "At less than six inches it becomes a little less fun to paddle." That is quote unquote. That's what we're dealing with from the proponents. We're not talking about commercial use, trade and travel for commercial uses at the time of statehood. We're talking about recreational boating in modern recreational craft.

When I discussed with Mr. Fuller his reasons for recommending to the State Land Department that they not take a position on the San Pedro to Santa Cruz, I asked him, is it because those streams today aren't as fit for modern recreational boating? And he admitted, yeah, that was a big part of the reason. He doesn't have a stake in those fights because he doesn't boat those rivers.

Because they are, they don't have places where he can still get his six inches of water. They certainly have that at statehood, they had that in their ordinary and natural condition. They don't have that now, and so the recreational enthusiast Mr. Fuller doesn't have the same concerns there.

Mr. Farmer we've all heard about, he calls himself an elfer, extreme low flow enthusiast, and he took a slightly different view towards navigability, he actually likes where Mr. Fuller said it's not as fun under six inches, Mr. Farmer likes boating in less than six inches. And so he says I have no hesitation to boat in less than six inches of water and I deem that to be navigable. That's his view of navigability.

There has never been a water course deemed navigable under Equal Footing Doctrine that meets those criteria. If there were, you would have heard about them long ago, I assure you.

Mr. Hjalmarson didn't testify this time around. He testified in 2005. The Commission already found his report to be not particularly incredible. I think you're going to hear a lot more about Mr. Hjalmarson from my other colleagues because Mr. Hjalmarson focused on the lower portion of the Gila River. He used the one foot standard for navigability straight out of the Hyra method. The Hyra method as we all know by now – San Pedro, Santa Cruz, Gila, we've heard about it on the Verde. I'm sure we're going to hear about it along the Salt. The Hyra method is a recreational boating criteria developed in 1978 by the United States Fish and Wildlife Service. It is a recreational

criteria built around modern recreational watercraft. Not the sort of commercial vessels used at statehood to conduct trade and travel.

The proponents' evidence falls into a couple of categories generally speaking. Sporadic historic attempts to boat the river. I'll talk about those as they relate to the Upper Gila in just a couple moments; and then there's obviously a lot of emphasis on this modern day boating, and you've got testimony from Mr. Fuller and he's got photos of him out there in his canoes and kayaks. The same with Mr. Farmer.

Modern recreational craft are not meaningfully similar to the commercial vessels used at statehood. And, the language that Mr. Slade relies upon and then I've already read, that evidence can only be relied upon, it only has any probative value if there's a tie between the modern recreational vessels being used and the commercial vessels used at statehood. They have not met that burden. Everybody who testified about the matter agreed: modern recreational watercraft are significantly more durable than the craft used at statehood. When you see some of the pictures of Mr. Fuller, in his watercraft and he's boating with his son before he starts walking with his son, and here he is on the Gila River and they are in their modern plastic boats, and he says the rapids were pretty bony but fun to try and pick your way through, they were scootching. Okay, that works great in today's modern recreational watercraft, when what you're interested in doing is going out and having a good time.

This is does not work in 1912 when you're trying to run a business and you're trying to conduct trade and travel in a commercial capacity. So, that's really the stark contrast between the case being presented by my colleagues on my right versus the position that we take that the Gila River was not navigable.

In addition to the durability factor, we can all imagine what would happen to a wooden boat going through these boulders in 1912. We all know what would happen. Wouldn't make it very far. And that bears itself out as we go through some of these accounts that we'll talk about.

We also know that the modern recreational craft are lighter than their closest counterparts were at statehood. Lighter means less draw. Archimedes Principle, we all heard testimony about that.

Fifteen years ago, we know that Mr. Fuller put out reports – he was commissioned by the Arizona Land State Department, but he wasn't an expert to take positions or opine as to navigability. I think I wrote down Mr. Slade said that at that phase his role was gathering the evidence and presenting the facts. A lot different than what he's done since then.

Here's what he had to say when he put out his reports 15 years ago. Mr. Fuller and his team acknowledged, acknowledged that modern craft are dissimilar from commercial vessels used at statehood. In the 1998 final report, Criteria for Assessing Characteristics of Navigability for Small Water Courses in Arizona, Mr. Fuller's report says, "Rivers were not generally used for recreational travel until the development of new materials such as

fiberglass and artificial rubber after World War II. Commercial recreational rafting did not start really until the 1930s,” the report goes on to say and it didn’t really start to take off until the 1970s coinciding quite nicely with the high-row method being introduced.

Mr. Fuller also acknowledged that the introduction of modern durable low draft recreational crafts were the primary driver behind this proliferation of recreational boating that happened in the 70s and continued into the 80s and 90s. This is a quote from the same report: “The development of durable small boats: plastic, fiberglass and other modern types of canoes and kayaks, inflatable boats for single paddlers and for groups all contributed to the rising popularity of river running in Arizona especially on rivers not previously considered boatable or boatable only very rarely because of low water.” We know why there are six examples of someone trying to boat the Upper Gila River back when it was in its ordinary and natural condition, and today in February and March, you might see a dozen people going down the Gila Box. It’s because of these boats. Mr. Fuller has a different take on it now. He’s got a dog in the race. And that’s the difference.

I want to talk about just a couple of the cases that the proponents and navigability rely on heavily. A couple minutes ago you heard Mr. Slade talk about *Northwest Steel Headers v. Samantell*, that’s the John Day River case. Any comparison that is attempted to be drawn between the Gila River and the John Day River stops in its tracks immediately. That is a massive river by comparison, it’s medium monthly flow exceeds a thousand cfs for over half a

year. It's not even on the same, not even in the same game much less same ballpark. Same is true of *Holt State Bank*, we hear that a lot from Mr. Helm. We heard I think Mr. Slade mentioned it today, *Holt State Bank* relates to the Mud River, I'm sorry, the Mud Lake, also very different from the Gila. The Gila River we're talking about six inches, a foot, two feet. Okay? The Court found that the Mud Lake in its ordinary and natural condition was three to six feet deep. Not the same, not the same type of water body at all. The other case that was cited quite regularly in the post-hearing briefing is the second of the Utah cases. It's *Utah vs. United States* from 1972. This wasn't the case concerning the Green and the Grand and the San Juan, this one concerned the Great Salt Lake, and they want to draw some sort of a comparison between Gila River and the Great Salt Lake. You can see the Great Salt Lake from space! The Court found that the Great Salt Lake was over 30 feet deep at the time of Utah statehood. Okay?

Again, we have not had the proponents come forth with one case that shows any river that is analogous in any meaningful way to the Gila River that has been deemed navigable. We have a host of them that have been deemed non-navigable that are all more significant than the Gila River: the San Juan is a great example. Much bigger river deemed non-navigable by the United States Supreme Court in the first *Utah* decision of 31. The Red River, the Rio Grande, the list goes on and on. It would be unprecedented, there would be no comparison drawn if the Gila were determined to be navigable, there would be no comparison to any other navigable strain that's ever been deemed

navigable. It would be unprecedented. I was going to spend a little time going over Mr. Burtell's stream-flow reconstruction. I even brought a poster board for that purpose, and it draws a nice contrast between the upper Gila River and the other water courses that were evaluated in the proponents main cases. I sense that I'm going to be going butting up against my time so I'm going to skip this part.

You've all seen this. This is Table 10 from Mr. Burtell's report. He reconstructed these flows. You can see that the mean depths 1.6, 1.7, these are all less than. When you're going back and reconsidering his reconstruction, remember why those are all less than values. There were several levels of conservatism built into this. Most notably in my view, Mr. Burtell did not account for return flows so the 30 to 40 percent of agricultural flows that were diverted in the Upper Gila, those would return to the river. Those are double counted because the return flows were measured at the gauge downstream, and Mr. Burtell added back all of the water, not just the 70 to 60 percent.

Several other reasons he also didn't account for evapotranspiration losses so he added back in all of the water even though some of it would have been lost ET before the next gauge. He used the upper end of the USGS data. He didn't find a best fit curve that would have been significantly lower depths. He went with the high end of the data. He wanted to be very conservative. He knew he was going to get skewered on cross examination if he was aggressive. And then as we've all heard a lot of testimony about these are

reconstructions of depths at gauge locations. This is where they are going out to measure depth and those places that are chosen are not delimiting locations for navigability. They are not at the riffles. So, when you've got 1.7 feet mean depth in January, you're limiting location, your riffle that adjoins where that stick is being placed to measure, it's going to be significantly shallower than that.

The, for me, it may be the two most important pieces of evidence in this case are the Gila River was occupied for millennia by Native Americans. We don't have any evidence to suggest that they ever used the Gila River for boating in any way. They were river people; in fact, that's one of the names of the Pima's is River People. They lived by the river, they depended on the river, they kept these calendar sticks that chronicled all of the important parts of their lives. I hope Mr. Murphy will talk a little bit more about this. He knows a lot more than I do. But nowhere is there any evidence of any boating by those peoples or any other civilizations that resided along and relied upon the Gila River. That is incredible evidence. If they had had the opportunity to boat for their trading purposes with their neighboring civilizations and peoples, that's what they would have done. What we know is they ran up and down the river, and there was testimony from Mr. Gookin to that effect. That's because the river was not suitable for the purpose of boating for trade and travel.

The other evidence that is I think that may be tied for the most important in this case, particularly as it related to the Upper Gila River. We had vast

needs for a highway for commerce. We had all of the mines and all of the military, and I've got a lot of quotes that I was going to read, but I want to save time the best I can. It's in our papers. You've seen it. You've read it. You had time and again the mines and the military – it's chronicled by Dr. Lingenfelter. It's chronicled in the work by Mr. Burtell, crying out for a more efficient, more cost effective means of transportation, and they were simply not able to use the river for that purpose.

The railroad did come in, but not until decades after it was first called for. And I find it particularly interesting, you can't argue that the reason they didn't use the river is it's not where they needed the transportation, because when the railroad came in, it followed the river. The river was the corridor for transportation. It just couldn't be used for the transportation. They had to walk along it or they had to use wagons alongside it. That is compelling evidence.

I'll talk – switch gears now and talk about accounts of attempted boating, again focusing on the Upper. This is another table from Mr. Burtell's report. This is his Table 15. He chronicled four boating attempts; over the course of the proceedings, we've come up with three more, and so I'll talk about each of them.

The first, time to move over here George, or you are going to lose me.

Chairman Speak up.

? I'll speak up.

Hood The first of these is an 1860, oh, and I should mention, Mr. Slade talked about when ordinary and natural ceased to exist. He talked about 1863 give or take, and he's talking about the Swilling Ditch and the diversions that started on the Salt River. Those had zero impact on the Upper Gila River and Mr. Burtell's uncontradicted, uncontroverted testimony based on his analysis of the diversions that were occurring in the upper valleys, that it was well into the 1880s before he had any meaningful impacts to the river from man's impacts and influences. So here we are in 1869, we've got a raft, not up or down the river, this is merely a crossing, we lost sight of the cases that when you have a raft that's functionally a bridge, that's not really that indicative of when you have a river that is suitable for trade and travel. I'll note that in the State Land Department's post-hearing briefing, they tried to explain this, they tried to make more of it than there should be and they talked about March, it's after the February flows and so there must not have been that much water there and they still needed this river crossing. So that must mean we had a big raging river up there. Well, if you read the account itself, it's very clear that this river crossing was a direct reaction to heavy rains that occurring in March which is part of the wet period. "A good deal of rain this month. The Gila is pretty high."

Chairman Mr. Hood.

Hood Yes.

Chairman About how much more do you have?

Hood Where am I at on my time?

Chairman Well, you've pretty much used it up.

Hood Have I? Okay, let me wrap it up. I'll be brief.

Chairman Okay, you know, I hear that from every lawyer that stands in here. [laughter]

Hood Ms. Campbell said I get some of her time.

Chairman Oh, okay. [laughter]

Ms. Campbell Chuckling – you can have all of my time.

Hood I'll be very quick. I'll be very quick then. I appreciate it. Okay, we have an 1886 account, dug up canoe capsized. 1891, we got a hunting and trapping trip capsized. Flat bottom, we have two people, this is recreational, capsized. Three more accounts were uncovered during the course of the proceedings. Mr. Burtell testified about Mr. Buchanan, he accidentally was shot in the leg, they wanted to get him down the river for medical attention, they built a flat boat, couldn't go down the river. The river was too low and too many rapids is the quote and he was therefore carried by men. The other two accounts – these were not raised during the hearing but they've been cited to by the State Land Department. Mr. Duval used a two foot four inch boat in like, small boat – I can't even visualize what that looks like, but he was coming down and was floating in – let me read it because it's remarkable. "Travelers have all passed through Safford last Friday in a boat in the Union Canal." He's boating in a canal and I think we can all agree that's not going to tell us much about the susceptibility of the Gila River for trade and travel. "The boat is two feet and four inches long." He started his boat ride on the Gila at the mouth of Bear Creek in New Mexico and remained on the river...

Chairman Mr. Hood, did I understand you correctly? It was two feet four inches long?

Hood That's what it says. I can't even visualize it and if you think it's a typo and it's a very strange, a very strange account – first of all he's boating in canals. So it almost doesn't matter, but it does say, it ends by saying "we'll make the journey as far as Yuma in his little boat." I think if you'd make it as far as Yuma in that little boat, we would have heard about it. And that's a good segway to the last and I apologize for talking so fast.

Alan Mr. Hood.

Hood Yes, Mr. Alan.

Alan What year was that?

Hood Thank you. It was – it says October 1901. I think it was a 1901 account. Okay? So by that time, and the evidence is pretty clear, the upper valleys were irrigating at the time and so he's on an irrigation canal paddling around, that doesn't really have anything to do with this case. The other account that was raised in the briefing that was not addressed in Mr. Burtell's table, Carpenter and Todd, and it says "they launched a boat on the Gila River Sunday loaded with provisions, camping outfit and a small arsenal of guns, pistols and knives bound for San Carlos. We don't know if this was a successful trip. We don't know if they made it a hundred yards. We don't know if they got hung up on the first boulder guard. All we know is that they put their boat in the water and they were headed for San Carlos where they were going to apparently do some hunting and camping. A recreational trip. Again, not really particularly relevant to what we're doing here today. I read

Mr. Chairman loud and clear. I'm past my time. If anybody has any questions I'm happy to answer them otherwise I'll move along.

Chairman Ms. Campbell has lost about five minutes of her time.

Hood Okay, I appreciate it.

Campbell Ms. Campbell had no time to begin with Chairman.

Chairman We do have some questions.

Comm. Allen The timeframe that Mr. Slade has used was 1800 to 1860 or 1867.

Hood 63 I think is what he said earlier, but I may have misheard it.

Comm. Allen All right. How does that comport with the issues that we are talking about now with regard to recreational boats? Because at that particular point in time, there was substantially more water in the river.

Hood There was more water than there certainly is in certain places now. Could you take one of Mr. Fuller's plastic canoes and boat in certain places back in 1863? I'm sure you could. Could you conduct trade and travel? There's no evidence of that. And Mr. Fuller's boat wasn't available in 1863. That's the point.

Comm. Allen No, I understand that. You made the comment that mines needed river travel. When were the first mines actually established on the Gila? They could have used river travel and what would they have been sending ore deposits to?

Hood You hand mines developed in the 1850s when everybody would agree that Upper Gila was in its ordinary and natural condition and they continued operation throughout that whole period. They used wagon trains to send their ore eastbound. They certainly, if the Gila River had been susceptible, they

would have used it for that purpose. There were also mining districts and this is chronicled in our discussions of Lingenfelter's Affidavit, the Ajo mining district would have been a much shorter wagon trip to go north to the Gila and then use the Gila to get the ore or whatever else they were transporting down to Yuma where they were then transported out of Yuma. So, Ajo was sort of sending stuff by wagon train to Yuma. They certainly would have used the Gila if they could have. The mines on the Upper Gila would have also used the Gila to go up or down. I mean if they wanted to send it, if it was feasible to get it to Yuma and send ore to California, they probably would have done that. It certainly wasn't feasible for that. And I do, I had a lot of other things I was going to cover, I'm cognizant of my time, I do want to make mention the proponent sort of dismissed the whole mining thing as well. Maybe we can see that the Gila was not susceptible to transporting ore. Ore is heavy, maybe it couldn't do that. Well, I appreciate that concession and clearly that's the case, but they had a lot of other things to do. They had to bring in food for all the miners, they had to transport supplies in and out. They couldn't use the Gila River for any of those purposes. And those mining operations occurred; they were initiated prior to the meaningful diversions in the Upper Gila were all in the 1880s. It was well into the 1880s before you had a change in the natural condition of the Upper Gila.

Comm. Allen      So the mining companies in Ajo region came in at what point in time?

Hood              I would have to check to get an exact date. It's in the Lingenfelter Affidavit, Commissioner Alan. I can pull it for you on a break if you'd like.

Comm. Allen      Okay. Another question is, the processing that occurred of the ore that was extracted over around the New Mexico line or all east of the - there was no processing to my knowledge of ore west of that point was substantial distance. So, when you're thinking that it began in the 1850s?

Hood                Well, they were mining, they were extracting ore from the ore bodies beginning in the 1850s, in the Upper Gila. And where the processing took place I don't know.

Comm. Allen      It seems to me I believe it was east of there.

Hood                And all the more reason they would have loved to have a cheap mode of transport and they didn't have that via the Gila. They had to use wagon trains which was incredibly expensive that's chronicled through Lingenfelter.

Comm. Alan      I don't think that they would have gone up river in that particular case, if they could have, and there's a question about whether or not it was navigable at all above that point. So, just a thought.

Hood                Yeah, well, I agree there's a question about whether it was navigable above that point. I think if they could have gone upstream they would have. I think it's very clear that they could not.

Chairman         Mr. Hood, you may have heard my question to Mr. Slade regarding any data that you might be aware of with regards to crossings, angle crossings at Yuma of the Colorado River, are you aware of any such data in the 1850s and the 1860s?

Hood                I'm not Mr. Chairman.

Chairman            Thank you very much. Any other questions? Thank you Mr. Murphy, there's no need to get up unless you're going to use the restroom because we're taking a break. (End of recording)

**2015-06-23 10h28m46s (Recording #5)**

[background talking]

Chairman Mr. Murphy, we're still short one Commissioner so we will wait until he returns.

Murphy Okay.

[background talking]

**2015-06-23 10h31m31s (Recording #6)**

Hood: Mr. Chairman, I'm not coming back for more I promise.

Chairman: Mr. Murphy has never had this stoney stark look.

(laughter)

Hood: He has actually, he has. I apologize. The reason I'm back up here I wanted to correct one thing I said earlier. Commissioner Allen was asking me about some dates and we've got the dates actually in the Lingenfelter Affidavits so I want to be clear about those dates. The Ajo Mine, Mr. Chairman, was formed by the Arizona Mining and Trading Company and they began mining in June of 1855. That is paragraph 24 of Dr. Lingenfelter's Affidavit, which is in evidence as X, part of X008. The Clifton-Morenci Mine, which is the one you were asking me for dates and I think I said 1850s. That commenced mining in 1872 by the Detroit Copper Company. That was the one run by the Detroit boating captains, and they could not figure out a way to use the Gila. So I wanted to correct that date for you.

Chairman: Thank you very much.

Hood: And get in that last zinger.

(laughter)

Chairman: Weary in all your endless tongue. Please go ahead Mr. Murphy.

Murphy: I don't know if the suggestion is that I didn't look toney starkish because mine had so much gray in it before I cut it off but, I just want to make a few points for the Commission with regard to the navigability of the Gila River; I'm Tom Murphy on behalf of the Gila River Indian Community. The first is that navigability for title is a federal issue, and I find it interesting that today we're hearing that from advocates in favor of navigability given some of the testimony and the argument that the Commission has previously heard. I think it is clear that questions of navigability are determined and governed by federal law. And I think the way to look at Arizona's state statutes is that, while Arizona has developed a procedure for making navigability determinations, the standard or the substance to be applied through that procedure is a matter of federal law and is a federal standard. And while these proceedings were prompted by the decision of the Court of Appeals in *State v. ANSAC*, the Commission must and has properly considered the impact of *PPL Montana*, a Supreme Court case in 2012. And the Commission should consider that *PPL Montana* was the first navigability for title case decided by the Supreme Court in several decades. *PPL Montana* in part, casts some questions on the prior decisions of the Arizona Appellate Courts in both *Winkleman* and *Defenders of Wildlife v. Hall*. And in considering the admissibility of modern day recreational use of a river in *PPL Montana*, the court said that such evidence may be considered to the extent it informs the

historical determination of whether the river segment was susceptible of use for commerce at the time of statehood. Important in that...in that articulation is the Supreme Court saying to the extent it informs the historical determination, which is what this Commission is making. The Court said that such evidence may be considered if it could be shown that a river's post statehood condition is not materially different from its physical condition at statehood. The Supreme Court in that sentence did not say ordinary and natural condition at statehood, it said physical condition at statehood and that means something. This is all...also recognized in the state statutes where the role of the State Land Department is described. Their charge is that after collecting and documenting all reasonably available evidence regarding the condition and usage of a water course as of February 14, 1912, they are to transmit that evidence to the Commission. Any inconsistencies between *PPL Montana*, and the state court cases because this a federal standard if relates to the substance of that federal standard, have to be resolved in favor of the Supreme Court cases. As Mr. Hood noted to, *PPL Montana* knows that navigability concerns the river usefulness for trade and travel rather than for other purposes; modern recreational use is not sufficient. And *PPL Montana* consistently identifies commercial uses of rivers as the lopus (?) of the navigability inquiry.

The next point that I would like to make is that hypothetical susceptibility determination should be rejected. *PPL Montana* suggests that ordinarily a navigability determination must be historically and presently meaningful, that

is some trader commerce took place on a river at the time of statehood establishes a pattern that should be recognized at the time of the present day navigability determination. The point and purpose of this Rule is to prohibit interference with a highway for commerce. The Proponents primarily make their case under the Supreme Court decision in the *United States v. Utah*. But as the court explained in that case, that standard is appropriate where conditions of settlement explain the non-use of a river. Some of the rivers the court looked at in that case had never been the subject of exploration or development. In contrast, the Gila River has been the subject of exploration and development for thousands of years. So it is clear with regard to *Utah* is that, that is a standard that you apply if you do not have any historic record, not in the absence of navigation. Let's talk about the need for navigation of the Gila River and efforts of...and navigation in the past. As *Utah* said, the most persuasive evidence of navigability of a river is the actual use of a river for commercial navigation. I think what the Court said in that case was extensive and continued to use for commercial purposes. The best explanation for the lack of navigation in the Gila River is that it was and is non-navigable. Lack of population is not a credible explanation. The middle Gila for example, was one of the most densely populated areas in the southwest in prehistoric times with between 20,000 and 150,000 people. Another explanation given is that there were no transportation routes on the river. I found this one somewhat ironic because I think Mr. Fuller's slide 67 said, the river was not conducive to carrying major tonnage. In other words,

the Gila River, the lack of navigation, the Gila River is explained by the fact that it is not capable of sustaining commercial navigation. The boating...the idea of a boating accounts or that boating was not newsworthy is likewise, without merit. The newspaper accounts that you've heard clearly highlight the unusual nature of the navigation attempts, some of which were kind of humorous. If you assume the number of 32, and to be honest I couldn't see the chart that Mr. Slade put up from across the room, but even if you assume that there were 32 attempts at navigation of the Gila River, and you assume that it's over a period of 100 years, although we know the time period covered could be longer than that, that's roughly one attempt every three years for the entire river. And when you further divide that out by the segments of the Gila River, you get into something that just mathematically, very fractional in terms of the attempts at navigation. And that would be assuming that all of those attempts were successful. We also know that extensive farming and trading occurred among the Pima in the mid-1800s when the Gila was, according to the proponents, in its ordinary and natural condition. The Pima were major market players at that particular time trading in grains and fruit among the people who were passing through. But their capacity and the market and such that they were able to store grains and other goods that they sold and if there was a need for navigation, it certainly existed at that time period. And there was a lot of commercial activity at that time period. What you don't see are any accounts of boating during this particular time period, there is none. And the only accounts of Native American boating that Mr.

Fuller provided to the Commission, some of them were on other rivers, some of them I think there was the Tone or \_\_\_\_\_ creation story, which is not clearly established to be on the Gila River, but there was no analysis or consideration of this particular time period when there was a large amount of commerce, a great need to navigate the river, but no navigation or boating took place. The newspaper accounts were problematic when you view those in the context of how much coverage and the type of coverage you would expect if the Gila River was being navigated. I think the phrase is, few in number, fraught with difficulty and sometimes unique; for example, the boat with the wheels on it. Mr. Fuller's view was particularly concerning because at one point, I asked him about the success of some of these efforts at navigation where the newspaper article related to an attempt that was forthcoming to navigate the Gila River. And his comment was, well there is no evidence that it wasn't successful. That is not evidence of successful navigation of the Gila River. And in fact, that almost reverses the burden of proof to put the burden on the opponents of navigation to disprove that these trips occurred when the only evidence in the record is that a trip began or started at a particular point.

Finally, the stream flow reconstructions do not support a finding that navigability. The Proponents seem to insist on a perfect unbraided channel, unchanged by flooding or with no flooding, the maximum amount of water in a perfect condition. And even then the depths are not deep enough for commercial use. Even if the river is considered with the reconstructive flows,

the river channel was often and is often braided in its natural and ordinary condition. Our position would be that flooding is an ordinary condition. It happens at periodic intervals and the experts have testified to you that the effects of this flooding on the river channel take decades to recover and that was not opinion that was qualified in terms of then and now. I think that was pretty much the across the board opinion. The modern recreational standard, again which was rejected in *PPL Montana* and nourished by the Proponents identified 2.5 feet or more as optimum for recreational canoeing on a river.

Another difficulty with using these standards is there is no way to field test these standards with regard to the conditions as they existed at the time that Arizona became a state. Finally I would note that...that the recreational use of the river was specifically rejected in *United States v. Utah*, this is neither *Utah 1* or *Utah 2* but maybe *Utah 1.5* which was the 1960 case involving the navigability of the San Juan River, the portion that hadn't been considered back in the 30s. In that case, the District Court rejected the use of the river by river runners for recreational purposes, found that the river was not navigable, that was upheld by the 10th Circuit and the United States Supreme Court denied Cert. Review in that particular case. The community urges the Commission find that the Gila River is not navigable in its ordinary and natural condition as of the date of statehood. Thank you.

Chairman: Is that in all segments?

Murphy: We contend that the failure of burden of proof by the proponents would be in all segments.

Chairman: Are there any questions for Mr. Murphy, before you go, I think Mr. Allen may have a question.

Allen: Yes. The comment that you made just previously regarding the decades to recover after flooding in terms of going from braiding back to a single channel, that's not precisely what the USGS found in the Sanford Valley. Their comment was in the paper that the professional paper they put out that, the change from braiding back to a single channel takes very, very little time. So, I have a little problem with...with the issue of decades specifically since the...the water flow in the river continue to go down, down, down, down down, as more of it was extracted and, if you have the original natural and ordinary flow, then in all likelihood decades to recover would not have been the case.

Murphy: And Mr. Chairman, Commissioner Allen, I would suggest maybe looking at the flyover of Segment 6 and I think that may provide some explanation.

Allen: I don't think that tells you anything because it...its current conditions and we're not talking about current conditions, we're talking about between 1800 and 1863 or 1867, whatever the date was.

Murphy: I would just say I think there may be a disagreement between the experts on that particular point. But one reason I mentioned the flyover of Segment 6 is that, for that particular date of the flyover, there was a bit of water on the river.

Chairman: Any other questions?

Allen: How long had the water been in the river at that point and time?

Murphy: I...I think based upon the date of the flyover, there was a period, I think it was July early August of 2006 and so, I think that there was a...there was several days of flow in the river. But I think that the flyover was done on the tail end of it that.

Allen: Well, my point is that it takes continuous flow not periodic flow and that's basically where I'm going.

Chairman: Any other questions for Mr. Murphy? Mr. Murphy thank you. Are you yielding that balance of your time to your friend Mr. Hood?

Murphy: I am.

Hood: I think I'm still in arrears.

Murphy: I thought it was going to be yielded to me but Sean used it up in beginning.

McGinnis: Mark McGinnis for SRP. I had wanted to talk a little bit about some things that came up in the opening arguments and then have four points to make. And hopefully I'll get done without using the rest of Miss Campbell's time. In similar to what Mr. Hood did, I'm going to focus primarily on Segment 7 and 8, the part downstream from the Salt.

Chairman: Great. Let's just stop right here. Do you have any information as to how many annual crossings there were on the Gila River in the 1850s and 60s?

McGinnis: I do not have any...I don't think there is any evidence in the record. I don't think there is any evidence in the record. Obviously the evidence in the record is...there are a lot of people going down the Gila trail from the 49ers and the early 1850s, but I don't think there's any evidence that I know of.

Chairman: I recently read a report that said, in 1850, 1856, there were 50,000 crossings of the Colorado River at Yuma.

McGinnis: Most of...

Chairman: ...in a year.

McGinnis: ...most of them I think were going to the gold fields in California and not to go to the dunes in El Centro but I...there were a lot of people going from the things I seen (inaudible).

Chairman: We get those on weekends.

McGinnis: I understand, yeah. But I will focus on Segment 7 and 8 primarily. SRP stated position all the segments are not navigable. We think that is fully covered in the several trees we killed and the papers we gave you. So, I'm not going to deal with that. I would like to start though when where Mr. Slade started this morning. And he said to you, I don't think I wrote a note of it but he said, imagine a river different than it is today and he talked about steamboats, and he talked about skiffs and, he talked about a river that's pretty navigable in what he talked about. And as I was listening, if I hadn't been through the hearing I would have been changing my vacation plans this summer to go to the lovely river port of Tachinta(sp) because that was the kind of river port he was describing. I've been to Tachinta, it's a great place, it's not a river port, it's not a...never been a river port according to the evidence. But I think the imagination that Mr. Slade showed this morning is indicative of what we see in the plaintiff's case. There is in the proponents case. There is some evidence, they put on a lot of evidence but it doesn't

paint the picture they are trying to paint. And for example, Mr. Slade talked about the boating on Segment 8 and I think that SRP would agree that, Segment 8 is the one portion that streaming down by Yuma, where there is the most evidence of boating historically. Whether it is in the Colorado River back water or a little bit farther up, I think the evidence is unclear but, that's the place where we've seen the most evidence of boating of any of the Segments. And he said well, look at our papers and that's all dealt with in there, look at our briefs. So let's look at his briefs, his legal briefs that is. The proposed findings and fact of conclusions of law that the State Land Department submitted has a section on Segment 8 starting on page 62. And it talks about some of the steamboat evidence that was put in the record. And you have to recall this is the State's best rendition of the evidence. This is what the State wants you to believe the evidence is, okay. So with that in mind, paragraph 520 of the proposed findings says for example, the logs were once rafted down the Gila to Yuma for use at the prison. One time, that is one newspaper article from Los Angeles, doesn't say what time of year it is, doesn't say how far it was, says it happened one time, one newspaper article. Paragraph 522 says, steamboats on the Gila likely ran up as far as where Dome is today. So even in the states putting the best face on the evidence, they say steamboats on the river likely ran up to where Dome is today, citing Mr. Fuller or their own expert. Paragraph 523, they talk about George Johnson, it was a quote he gave you here today that when gold was discovered in Gila City, Mr. Johnson found himself over head-in-heels in business

carrying men and provisions to the diggings. Now, of course, the source they cite doesn't say whether Mr. Johnson was busy taking people up from the Gulf of Colorado...Gulf of California to Yuma and a little bit of business up the Gila or whether he was going from Yuma all the way up to Gila City. Again, nothing that establishes a regular commerce in that area.

Paragraph 528, similarly in their Proposed Findings, talks about the steamboat Uncle Sam. They say, apparently regularly traveled some distance up the Gila. Again, this is the State's best face on the evidence, and the best they can say is, the Uncle Same apparently "regularly traveled some distance"...some distance up the Gila. There's...there's....if you go through that whole section there they talk about these relatively sporadic reports of some steamboat traffic, some other boat traffic, up some distance the river, sometime in the year, some years, some distance. And that's the best evidence of any historical boating on the whole Gila River. So you need to think about it, think about that when you're thinking about the rest of the river. Mr. Helm talked some this morning about Halmerson. I recall...I recall cross-examining Mr. Hjalmarson late one night at the La Quinta Inn during the 2005 hearing or whatever. He said, why didn't anybody put on evidence this time to rebut Mr. Hjalmarson? Well, if you've read the report that this Commission did in 2009, this Commission pretty much took care of Mr. Hjalmarson from what I can tell. There were credibility issues, it says that they actually say his testimony was not credible. There were numerous methodological problems. None of those methodology issues he had were cured by the subsequent

decision on the Salt River and *Winkleman*. There was no need for any further rebuttal from Mr. Hjalmarson. There might have been a need for some resurrection of Mr. Hjalmarson, some rehabilitation, but he sat here for the whole hearing and never opened his mouth. So, let's talk about the four things that I wanted to talk about before we got...before I heard what was on this morning.

First of all, I was interested in Commissioner Allen's question because that's one of the things that I'm going to talk about. And that is if the illegal effect of the impact of floods on the ordinary and natural condition of the Gila, all of the evidence we had the nine days or ten days where we went through this time, a lot of it was cumulative of what was there before. But the one issue that I found to be more fully examined this time than we did last time, was this thing about the dynamic nature of the river. Back in the 2003 report, that's kind of where this...there was some of it back then. In the 2003 report, Mr. Fuller and Mr. Huckleberry, who was the author of this section of the State and Land Department report said, the Gila River is a classic example of a dry land river that seldom seeks equilibrium form. He says these dry land rivers, I'm paraphrasing here, are inherently more unstable and more prone to changes in channel configuration. The Gila River responds to secular climatic variability with radical changes in channel configuration, and periods of increased large flood frequency correlate with unstable braided channel conditions. That's what Mr. Fuller said last time when as Mr. Slade characterized this morning, he was acting as an unbiased objective reporter of

fact. Dr. Musser(sp) dealt with that issue this time along with several of the other experts and there is some language from Dr. Musser that we proponents, page 16 of our open brief, it's page 1679 of the transcript from October 19, 2014. He talked about it in little more common terms, a little more plain language than what was in the prior report. He said, big flood comes along, blows the river out, you get a wide braided condition, you tear up the banks, shift the sand bars around and so on. In and over the next period of time, the flood recedes and the river kind of settles down. And it's been described as sort of recovering back towards a more stable and less dynamic system. And then another flood comes along and you start the whole process over again. That's I think, the inherent nature of at least Segments 7 and 8, and really the whole river that's important in this case. The Gila River is really sort of a living being that changes over time, and it's not just one thing in any segment. There was some testimony that the proponents of navigability like to talk about that there were some times in the mid-1860s where you had a relatively more stable and a straight chain. They want to talk about that. The problem is, is there is also evidence in the record that by statehood you didn't have a stable and a straight channel. And the other important evidence is, is those kinds of changes happen forever. Mr.Gukin(sp) talked about it in his 2014 report, Mr. Fuller even talked about it in the June...on the June 17 transcript and Dr. Musser obviously talked about it too and those are talked about in our brief. The river went back and forth over time. You get a big flood, river gets braided, some period of time later it starts to recover, but then you have

another big flood. So what the proponents want to say is, well the river would've recovered if you hadn't shut off the water by creating dams upstream. Well it might have recovered for a while, but the evidence is, sooner or later there would have been another big flood. Those dams upstream, the same facilities that slowed the water from coming down in normal times, also captured that flood flow that's what they are there for. So, in addition to slowing down the recovery, they also slowed down the big floods that would happen again. So if you want to imagine a river, the Gila River, you have to imagine a river that goes in and out, more flows, less flows, sand bars, and then no sand bars, it's not one thing over time. I believe it was Commissioner Allen asked Mr. Slade earlier about what the year was that the ordinary and natural condition, and I think that's kind of a trick question. Because I don't think there is a year where the river was in its ordinary and natural condition that is indicative of the rest of the time. The Gila River based on the evidence, it's a full length feature film not an 1863 snap...snapshot. And that's important in the navigability determination because it's changing all the time. Okay? There might be a smooth straight channel today and you go out and invest your money to start your business, and even if you are using Mr. Fuller's Kevlar or propylene or whatever that thing is, kayak and you can get it down there well, tomorrow there might be a flood, or next week there might be a flood. And its those...those changes in condition are part of what make it not a reliable source as a highway for commerce. We would agree with the parties that say that the flows during a

flood are not part of the ordinary and natural condition under the test. I mean the actual flow on the day of the flood happening, if you can float a boat on it or if it makes you not be able to float a boat on it that day, I would agree that's not ordinary. It might be natural but it's not ordinary. But what's important is a legal matter here and the test is, that day of the flood or the month of the flood or however long the flood lasted, has long lasting impacts on the river and on the navigability of the river. And Commissioner Allen whether it's decades or years, I don't think that we know the answer to that question because it's different every time. And that's what I got out of the evidence. If it's five years to go back to normal, maybe it is in certain circumstances, but what if there is a flood and year four, well let me start the clock again. And that's what I see on the evidence and again, at the nine days we suffered through; maybe that's a draw of (inaudible)...the nine days we went through the additional hearings, that's the big thing I got out of it was that the changing nature of the river became even more clear in this last hearing.

Second point, evidence of actual use. That's covered in the brief pretty well, all the briefs pretty well. There is some evidence that at some times, some people have tried to put boats on some portions of the river and sometimes been successful and some not. Not a lot of evidence but every piece of paper that any of us could find, I think, is in the record. Is that enough to show actual navigation, actual use of a highway for commerce? I don't think so. Is it enough to show that somebody could have started a

business and carried it on based upon the limited information we have? I don't think that meets the test.

Third point, lot of talk about susceptibility. We would agree that the test talks about actual use for commerce or susceptibility for use of commerce. One of the things that proponents continue to forget however, is the discussion of susceptibility. The most detailed discussion of susceptibility that I've seen by the U.S. Court is in the *United States v. Utah* case from 1931. And there is an important passage in that case where they talk about when susceptibility really matters, okay. And they say a river can be navigable even though it wasn't actually used. If it was susceptible to use and the lack of navigation can be explained by one of two things; either the location of the rivers and the circumstances of the exploration settlement of the country to which they flowed made recourse to navigation a late adventure, that's one; so how did the area develop? Or two, commercial utilization on a large scale awaits future demands. Both of those are kind of the same but they're basically saying, if there is a reason it wasn't navigated then we are going to look at susceptibility even more because of the lack of navi...actual navigation is not as important because it's explained. Mr...and there might be more than those two but they're the same general idea and those are the two they listed there.

Mr. Fuller spent a lot of his testimony trying to explain why there wasn't more evidence of navigation on the Gila. I frankly didn't find any those very persuasive and I'll leave to you based on the evidence to make your own decision. But I think what's been said a little bit this morning, the important

thing is to think about all of the need for navigation on the Gila, there were a lot of people here. There are a lot of people here prehistorically, Hohokam were here, the Pima's were here. They went up and down river, they ran up and down the river, there was a need for navigation. The two...the two factors listed in that *Utah* case about what's explainable, how you can explain lack actual use, and when you should really look at susceptibility, neither of those are the case here. There was a lot of talk in both the Gila hearing and in subsequently I think in the Verde hearing about the presence of roads along the river. And the proponents kind of played that down saying the presence of road along the river doesn't mean its navigable. It's not navigable, there's roads along the Mississippi. Well the presence of roads along the river are important...is important because it shows the need for navigation. So if you have a road along the river and little or no evidence of navigation on the river, it certainly supports the conclusion that, well somebody had a reason to go up and down that stretch and they didn't do it by boat and that's the key important thing.

Fourth point, there has been a lot of discussion - some during the hearing and a little bit in the brief, not as much this morning about what's the meaning of commerce for highway of commerce, and lawyers could argue about that until the cows come home and we probably will. Questions about whether the business, the commerce has to be profitable. Well, how do you figure out what's profitable or not? Somebody makes a living, is that profitable? Is recreation itself enough? Is recreation that's paid for, somebody pays

somebody to recreate, is that enough? And the one I find the most interesting thing is, is it trade and travel or trade or travel, okay. By the way, our statute says trade and travel and that's what's...what's you're direction but I agree that there are cases that makes things wrong. But I think all these questions when you are thinking about the questions of what's commerce, when you think about the purpose of the public trust doctrine and equal footing doctrine, the purpose of these two doctrines was to retain in the State the ownership of the beds to the river so that people can shut them off and stop commerce. People couldn't charge the... couldn't be the troll under river under bridge charging the toll. Okay? It's to maintain commerce and to allow commerce to be carried on without private infringement. What commerce was ever or ever could have been carried on in the Gila? What commerce are we protecting by giving the State or have saying the State's always owned all lands along the Gila that people have fought, they own privately for decades? There really isn't any. I mean really when you look at the evidence, really you can talk about the little stretch down there with the steamboats, however long that was, but after that there is no significant evidence of commerce straight along the river ever, ever. Going back...you want to talk about 1863, you want to talk before that and with the changing nature of the river, there is really not evidence that you could have carried on any sort of commercial enterprise in 1500, in 1600, in 1700. And unless the Commission has questions, I think everything has been said that needs to be said.

Chairman: Do the Commissioners have any questions for Mr. McGinnis?

Male: No sir.

Chairman: You Mr. Allen.

Allen: No.

Chairman: Mr. McGinnis if the report I read was correct and say in 1850, 50,000 people crossed the Colorado with the confluence with the Gila, would that suggest to you any need for travel in the area?

McGinnis: Certainly. I mean and I think that's...even though that facts I don't think is in the record, I mean I think there is enough evidence in the record that there was certainly in that 1850 period a need for traveling and gold is a very strong draw to people and there were a lot of people going across and there were people going across for other reasons. If you're right, if that evidence is right and there were 50,000 people who crossed the Gila...crossed the Colorado, based upon the limited evidence we've seen trying to boat the Gila toward the Colorado, it means 49,990 some of them went over land, over land to get to the...to get to Colorado.

Chairman: Thank you.

McGinnis: Thank you.

Chairman: Good after...good...we're not afternoon yet, good morning.

Sparks: Good morning Mr. Chairman and members of the Commission. I'm glad it still is morning and I'm glad I'm here to talk with you. We've tried the, I'm Joe Sparks on behalf of the San Carlos Apache Tribe, with me is attorney, Julie Colsrud of our office. And the group opposing navigability, we've tried to consolidate our efforts as best we could to lighten the load, which is

enormous in terms of volumes of paper that this Commission has been presented with over the years, and over the last series of hearings. I wanted to talk with you just a bit about first of all, the legal test and there's been a number of comments about them...one of the pieces of the legal test however, is the condition of the river on the date of statehood and that is easily ignored and hard to deal with. But it is a critical part of the test. It clearly is still part of the federal test and it's part of the state statutory test. There is nobody that suggests that the Gila River on the date of statehood was actually navigable. None of the evidence indicates that whatsoever. Another part of it I want to deal with is, what is evidence, and I'm married to a historian and in about eight weeks that will have...we will have been married 49 years. She is clear on what is historical evidence and anecdotal...anecdote, I can't even say that, I'm from Missouri. That anecdotal...dote...rumors (laughter)...there you go I can say that one, is in evidence. In other words, what is a primary source of evidence for historian and what would the Commission should...the Commission consider to be primary evidence in terms of what is persuasive to the Commission. In terms of the law, you are clearly the finders of fact. It is your exclusive province to evaluate the evidence and decide how to...how to give it weight, how to give it credibility and, and what is persuasive. That's your prerogative and it's not that of the courts. Applying the test, the federal test is your test, and that is applying the facts to the law. We tried to...even though the, the second and third hand kind of narratives and newspaper reports are not primary evidence. Nevertheless, the parties have endeavored

to give you every piece of evidence that ever said anything about the Gila River in this case and therefore, it is up to you to sort it out. I'm going to make some suggestions about sorting it out though and based on what we, on behalf of the Apache Tribe, I presented to this Commission. For one thing, we think it's important to look at what the State itself has said and before the State, the Territory of Arizona, told the Secretary of Interior of the United States, was the condition of...the condition of Arizona over the years and so, we presented you with the Territorial Governors' Reports beginning in 1878 through 1907 and all of the Governors' reports of the territory, they spoke...the Governors spoke specifically of how Arizona could become a major commercial and agricultural and mining state if it had the appropriate kinds of infrastructure for getting goods and things about. And that was...the Governors talked about the fact that we could get goods up the...part way up the Colorado River from the Gulf...Sea of Cortez or Gulf of California. But once they...we got up to somewhere around the junction of the Colorado and Gila, then from then on, we had to use wagon roads and horses and walk. Now they...the Governors were trying to put things in the best light possible. They're also lobbying the federal government for kinds of federal support for projects out here. But none of them ever suggested that as have happened in Europe for hundreds of years, and it had happened in the east of the United States for several hundred years, that the government should invest in even reconfiguring rivers to bring out transportation, waterway canals as the head occurred in the east coast and along the major rivers in the east where

sometimes they were not susceptible themselves in navigation. But if you took the water out and took it along a contour above the river you could transport goods and services and people in heavy commercial quantities, no suggestion in all the government reports. But we do think that those government reports should be given eye-level of credibility to you...by you.

Another item that we submitted on behalf of the Tribe were the Arizona and Federal Reports on transportation, and the one that we presented to you it would...which was Exhibit XO10-2 and 10-...yes 10-2. I apologize because not only am I vertically challenged but I'm visually challenged as well and so, I can see over this pulpit...lectern but not much of me shows on your side, that's the good news. But in any event, in the transportation report, Arizona reviewed and Arizona and the U.S. Department of Transportation Highway Department, we reviewed the transportation history of the whole state and the territory. And it indicated that at times when steamboats and trains were the better way and preferred way of transportation of goods and services of people around the country, basically we had none here except when trains finally arrived and were put across the state first up through Holbrook and across that direction and later pieces of as Mr. Hood showed you, pieces of the railroad came into Arizona and they came into Arizona primarily through the area to serve the mines. And I wanted to indicate that in terms of the railroad that came in from New Mexico it came in from New Mexico, followed the Gila River to the town of Globe through the San Carlos Reservation. Another spur of a railroad came from Clifton down to that railroad and all of those were

primarily to serve the mines. And so when the railroads and waterways were very, very important to the state, the waterways is a source of transportation simply were not part of the Arizona requests, the Arizona experience or the Arizona effort where those kinds of efforts had been successful for hundreds of years in Europe and hundred...and several hundred years in the east.

The other part that I want to mention to you is the observers of the military. Probably all of you know that we have been awash in our career on behalf of the Apache Tribes and military records cited by us, against us, among us and all kinds of ways. But one of the things that we have done has been awash in those military records. And the military records, what we've found over the experience of time is that they simply told what they saw. They're professional soldiers, they were in a position, they had to make their reports, they had to do it in writing, the people who did it were literate, frequently college educated and one of the early reports, right after the Treaty of Guadalupe Hidalgo. I think I was the only one who was there at that treaty signing. But, but I remember it pretty well. Kearny and Turner and Griffin and Emory all came into the Arizona Terr...was then in New Mexico and Arizona Territory in 1846. And in...they were all in the same party all during the same period of time. Kearny was a military man, he wrote the Kearny Code for the New Mexico Territory which he included Arizona, which included water law. And it is not to say water law that Mr. Hood would have written but on the other hand, he ran out of ink shortly and so, it would have been a longer document if he had more ink I guess. But in any event, they

came into Arizona and what they were doing is exploring at that time the border between Arizona and United States and Mexico, was the Gila River, the center of the Gila River. And they came along the north side of the Gila River and down the Gila River and under the treaty they both...both New Mexico...both Mexico and United States would have had access to the river under the treaty. And all the way down the river of...and that period of time from October their trip when they entered what is now Arizona at the upper areas of the Gila River to the San Pedro from October to around November 7, you know from the patterns of the testimony of the experts and your own experience that, that is the tail end of the monsoon season and they did experience extremes on the river. They experienced times when there was dust 12 inches deep on their mules, there was times when they had to leave the river and some of their livestock perished for lack of water. There were stretches in the river when there was no water. There were stretches in the river when it was high, which they reflected on their experience having seen dark clouds over the mountains two days earlier. What they saw was extremes. They saw dry river, they saw flooding rivers, they saw areas that were inaccessible including areas that were...where they had to leave the river completely and go over the mountain to get down to the area near the San Pedro junction with the Gila. That was because it was impassible in any way. None of those members of that ca...of that party, each making separate reports from separate experiences and professions, indicated that the Gila had any potential whatsoever of navigation and they were u...accustomed to

evaluating these kinds of things, they did that for the military and for the United States Government. The government wanted to know, can you navigate this river? What's the chance of building a canal to take freight boats on there? What's that kind of thing? And none of that happened there. So I think the...that, that kind of report is significant in what it doesn't say also it's significant because it talks of the extremes of the Gila. I think the other part of the evidence that is clear over the myriads of pieces is that the Gila is one of extremes. And if you look at the way the valley is structured, the Gila Valley is structured from the upper reaches of the Gila Mountains clear to the...conjunction with the Colorado that you can see the geologic evolution, the fluvial morphology of that river has sorted itself out since the last 17,000 years and certainly for the last 11 or 12,000 years in a way that shows the extremes are alive and are continuing to make a difference in the way that the...that of the river is structured at least a moment in time. Now I want to also speak of the times now for the San Carlos. Oh, one other part of the...the Arizona...the state of railroad plan which was in 2011; it showed that it reviewed the entire history which is XO31-114. It talked about the development of the railroads in Arizona, why it was necessary and where...where and when they went and came. And basically what it did was as railroads came in and made areas of Arizona accessible for commerce, commerce from mining, commerce for settling, commerce for agriculture, which were the primary elements of commerce in the area. And Arizona transportation plan also spoke of the fact that railroads were necessary

because although hundreds and hundreds of people came across the Colorado River and Yuma, once they got here they had to take a wagon, walk or ride a horse, that there were no other ways of getting about. So that development of the rail system was going to be essential and has been essential in the development of Arizona. I think that's another state report that you can count on and give high levels of credibility. It was in each one of these reports we're neutral in nature, they were just reports. They were just taking the facts and reporting them in a summary form. Now what else matters here? I think one other general category of evidence is the way a channel forms in different kinds of sediments, different kinds of rock, different kinds of pebbles, in other words, the way a river grades itself. And part of the way a river grades itself into those kinds of sediments, fine settlements like...sediments like clay, silts, sands, gravel, particulate size, cobbles, boulders is telling and also a part of the dynamics of the river. I've studied the rivers now for 54 years in Arizona. Four of them are water quality of all the rivers in Arizona. Five of them or four more for the Arizona versus California which invent...which was New Mexico and Arizona and on the Gila and the Colorado River. And then from 69 until now, you know where I've been. And in all that time what we...what we've learned is that the dynamics of the various grades of the river, in other words, the slope of the river in any particular area is very important and the way the river sorts itself out and normalizes so to speak, in area...at times of lower, lower flows is a dynamic activity. Well, one of the experts suggested to you that an area such as Segment 3 – I want to speak to you now about

Segments 3 and 4 because they are on the San Carlos Reservation – but in Segment 3 you could predictably provide a uniform parabolic channel in times of low flow and those, that predictability was based on some formula, and you look at the formulas, you’ll see that it’s a highway department formula used to develop the approaches to bridge and bridges and culverts and pass-overs and pass throughs. Well a local application such as the development – the heads of the bridges, the turnways and the bridges and the abutments of the bridges the type of channel and the constituents of the type that particulate matters – the particle size and the gradient of the river is very important there and the way they engineered that stretch of river, and passover of the river, is by taking the formula and trying to predict under most circumstances how will that work. Well, that’s fine maybe for a hundred yards, maybe 50 yards or shorter, and that is something that has been at some level of reliability in protecting the bridges and overpasses from washouts. But it’s not the way to predict, and it’s not the nature of the river to uniformly heal itself or render itself into a uniform parabolic channel for 40 miles. For instance, the 40 miles through the San Carlos Reservation where the gradient is so low on the river that you can take, it’s very difficult to take out an irrigation canal by gravity. And that alluvial valley is low, slow and grades itself. The pictures that you saw from one instance was a picture looking up stream from the Kalva Gauge which is located on the railroad bridge near the highway from Safford to Globe through the San Carlos Reservation. It’s on the San Carlos Reservation. The picture was looking upstream and what you saw was a

shallow braided channel. What you saw there, if you're driving that road regularly is that's rarely that much water, but whatever you can see it, that's the way it looks. Now, the uniform parabolic channel plus the analysis of the depth of the channel is something that several people talked about. Mr. Fuller talked about it, Mr. Burtell, Mr. Gukin. Burtell and Gukin both told you that when they estimated the depth of the water in the channel they did so where? At the Kalva Gauge. And that's the same place Mr. Fuller did it. They overestimated, in other words, they erred on the side of depth. Namely, they over stated the depth of the river in that, at the Kalva Gauge. But, and Mr. Fuller testified that when you narrow the river, I talked with him about jetties on the Mississippi and dams and areas like that, and where were the gauges on the Gila were placed. They were placed at a narrow area. Either narrow because of geology or narrow because in this case, a railroad bridge abutment narrows the river to that channel. That channel stated, overstates the depth of that location, and it also doesn't speak to the normality of that other river at all. Now, I bored you with the fact that my granddad was a commercial duck hunter on the Missouri and Call River near Kansas City, and he talked about averages in a way that's been helpful to me and boring to you. He said, if you shoot 10 inches to the right of a duck and miss and 10 inches to the left of a duck and miss, the average does not make a duck dinner. And that's the test that we're using here. We're trying to make a duck dinner out of averages. Now, the averages and median flows of the river are very helpful in trying to decide how big of a helmet you need, how big of a bridge

abutment you need to protect, or the approach to a river crossing, what it's really not very good in doing is what's the river look like every day, and if the river doesn't look like the average every day you can't eat duck every day on the average or even the mediums. So, what we know however from those, or what the extremes are, and unlike some I think the extremes are part of what is ordinary and natural in the Gila River. It's part of the ordinary and natural condition of all rivers because we have a very short view of time. We might want to avoid the extremes. But, then I want to go to the specifics...

Chairman About how much more time do you have Mr. Sparks?

Sparks Three minutes.

**2015-06-23 11h30m13s (Recording #7)**

Sparks Specifics of segment Three and segment Four. First of all, none of the purported or planned trips in my opinion should be considered evidence by this Commission. What somebody plans to do, is reported to plan to do, is not something that should be considered evidence by the Commission. Also, reports of unnamed parties doing anything I don't think is a very reliable piece of evidence. And, now going to segments three, there are a couple of reports that somebody got in a flat boat that they made and tried to go through segment three and one of them stopped at the San Carlos encampment of the Army, the Headquarters of the Army at San Carlos. Now, that one was referred to by Mr. Slade I believe as, I don't know, my catch word is Amos and Andy but I don't think that was the right word. I think it was the, sorry, my eyes are failing me, it's the 1895 report XO14-33. It talked about the fact

that they were, they made a boat, they stopped at San Carlos and then proceeded on down the Gila. What they didn't say is what happened when they stopped at San Carlos and what happened after they attempted to proceed down. What happened was when they were at San Carlos the people at the, the Army people told them that they should not try to go down the canyon of the Gila below San Carlos, that no one had ever done it before. That's what the report says. It said that the river drops 10 to a 100 - in other words 10 feet for every 100 horizontal feet, and then it goes on to say that the people reported that in their effort to go down the river, they lowered the boat by rope, they tried to push it off of the rocks, they tried to get it around boulders, and it got loose from them and it was destroyed. And many miles downstream they found the wreckage of the boat that they tried to use piled up against the boulders and rocks. Now going down the river under the federal test should not be one of those tests that you use when you're learning to fly a glider that anything that successfully lands on the ground after you take off and you can walk away with was a successful landing. That was not a successful voyage and there's not a single report of a successful transfer down Segment Four through the Colorado - uh through the Gila Canyon. Now, I want to speak to the reports by Mr. Fuller and others who voted from below Coolidge Dam.

Chairman Mr. Sparks, are you going to use some of Ms. Campbell's time?

Sparks I'll wrap it up.

Chairman Okay.

Sparks                   And that is after Coolidge Dam was built, after that the flows were regulated flows and although there is not always water to release, when the water is released it's a predictable level and makes a river possibly that was not susceptible to being run before. Because the same dry river that was above the canyon at times when it was dry above the canyon, it would be dry in the canyon. And therefore, what Coolidge Dam may have made navigable by modern recreational expert voters under regulated flows would not be the case under the normal conditions. I believe they have no substantial material evidence that the Gila in Segment Three or Four or any other part for that matter were navigable at statehood or at any time prior to statehood.

Chairman                Thank you. Are there any questions for Mr. Sparks? Hearing none, thank you very much Mr. Sparks.

Sparks                   I did have an anecdote and that is that the Spanish maps showed the copper deposits at Clifton on the maps as a copper mine Apaches and the Mexican maps did the same and the early American maps did also. So the Apaches were mining copper early on. They just didn't have a good organizational structure for marketing.

Chairman                Thank you. Mr. Slade?

Slade                    Mr. Chairman, can I have five minutes to collect my notes and take \_\_\_\_\_(inaudible).

Chairman                You certainly may.

Slade                    Thank you.

Chairman                We'll take a five minute break. It is anticipated that following Mr. Slade....

**INSERT 2015-06-23 11h43m23s (Recording #8)**

Slade                    Mr. Chairman, members of the Commission, I just made some notes from the various comments of those opposing that I feel compelled to talk to you a little bit about. First of all, regarding Mr. Hood's statement. Mr. Hood states that Winn Halmerson only used one methodology to hire a methodology to establish the navigability of the lower Gila. That is flat not true. And he said it writing and he said he said it here today. If you want to look at Mr. Hjalmarson's report page 24, Mr. Hjalmarson starts right off saying navigability along the Gila River is evaluated. Using natural hydraulics, hydraulics \_\_\_\_\_(inaudible) of the natural \_\_\_\_\_(inaudible) in the study reach. Three methods of assessing in-stream flows are used. So he didn't use one, he used three. And one of the ones that he used was a commercial determination for travel up and down the river and under all three methodologies that Mr. Hjalmarson found the river in the Lower Gila to be navigable. Talk about recreational boats. We are not here arguing on recreational boats on the Lower Gila. I mean I've seen it a lot, I even went down it in a flood. And I haven't seen a lot of recreational boating taking places out there. Our point is that what we demonstrated with Mr. Hjalmarson's work is that when you take the old boats, the boats that were in existence, that boats that we have all identified, the canoes, the flat bottom boats, what have you, the river as it was in those days was four to six feet deep and more than sufficient to carry any of those smaller

boats even sufficient to take a paddle wheeler. So, in terms of our stuff, we're talking about all wooden boats. We're not talking about recreation, we're talking about old and we've proved that old float, the lower Gila and can be traveled and were traveled and so we feel from that perspective this recreational stuff doesn't apply to the Lower Gila. We've talked about the San Juan River and those cases and everything, Mr. Hjalmarson work clearly establishes that the Gila River was deeper than the San Juan. So these comparisons are not justified. The one thing that I would say with respect to that is you got to put it in the context of who's doing the talking. Mr. Hood is talking about the Upper three segments of the river. Well, you can't use evidence of what's happening up on the upper three levels of the Gila River to declare the Lower Gila not navigable unless you can show that it's applicable also to the Lower Gila. I think that's what *Winkleman* requires you to do now. I mean it's changed to the extent that you got to tell us why you determine something was or was not navigable. Mr. Allen, you made several times asked questions about the timeframe and that's also right there in *Winkleman* on page 242. They lay out the timeframe for ordinary and natural. I believe it was Mr. Murphy who talked about prehistoric Indian cultures and thing like that. Yes, they were there. We don't argue about that, but *Winkleman* told you the timeframe to consider and it does not include the arguments regarding the prehistoric Indians and the 150,000 of them that lived in and around the Phoenix area. You're stuck with *Winkleman*, right or wrong.

Chairman

And what was that timeframe?

Helm

Oh, the timeframe? Ah, consequently, of the river, could be considered to be in its natural condition after many of the Hohokam's diversions had ceased to effect the river but before the commencement of modern era settlement. The farming in the Salt River Valley when some of the Hohokam's diversions were returned to use and other manmade diversions and obstructions began to effect the river. Evidence from early period should be considered by ANSAC as the best evidence of the river's natural condition. They don't give you a specification, but they say after the Hohokams and before people started building the Roosevelt dams of the world or their canals and that sort of stuff. So I don't necessarily disagree that it's the early 1800s to the mid-1800s. It may be even a little bit in the late 1700s for that matter.

We've also heard several arguments here from counsel regarding basically suggesting that you shouldn't pay any attention to *Winkleman* and you shouldn't pay any attention to defenders. And they have made arguments that suggest you want to look at a river contrary to what our state court of appeals has told that you should do – that we want you to consider flooding as part of the natural and ordinary course. Well you can do that and I appreciate your desire to keep me employed but I don't think the court of appeals is going to be fascinated if you make flooding part of the natural and ordinary course of the river. It's natural, there's no question about that but it sure **is/isn't** **(inaudible)** ordinary. Mr. McGinnis talked about Dr. Mussiter (sp?). The plain simple fact is Dr. Mussiter did no studies on the Lower Gila. He has managed to fly over part of Segment Seven in an airplane or a helicopter, I

forget which one it was. That's his only connection with the Lower Gila, so I suggest to you he is not qualified as an expert to render any opinions on the Lower Gila.

Chairman Mr. Helm, about how much more time do you have, that you'll need?

Helm I'm rolling, maybe two pages left.

Chairman We had a five minute limit on rebuttal. You're outside that.

Helm Okay. I don't know how much time, I'm just trying to get it done like Mr. Sparks did and then some of the other gentlemen. The big flood argument that we're going to have braiding and everything like that. The USGS is the answer to that. That's a non-interested party that indicates that rivers recover pretty quickly from those events and you get a boating channels. Mr. Fuller has also testified that, you know, after the flood the boating channel immediately starts recreated. There's lots of evidence to that. I don't think it's many, many years unless you cut off all the water to it. Some people talked about the trade and travel requirements. To me, under *PPL* it's not trade and travel, it's navigation. They say it's navigation and if you navigate it that's what *PPL* says that's good enough. And we've seen a number of navigation, \_\_\_\_\_(inaudible) set out so I think *PPL* directs where that ought to go. The other thing is that I can't emphasize enough, Mr. Sparks talks about three and four, Segments Three and Four, when you're deciding the evidence you got to apply the evidence to the Section that they are talking about. If you've got an expert who's God's gift to the Upper Gila that doesn't mean he's God's gift to the Lower Gila. And in a lot of cases

that's exactly what happened. I mean they are using information from the Upper – that's above Salt, the largest contributory to all of the water coming into the Gila and attempting to transpose that down on the Lower Gila and that shouldn't work. That's it.

Chairman Thank you Mr. Helm. Mr. Slade, we look forward to hearing the final word from you.

Slade The final word comes from this Commission Mr. Chairman, that's for sure.

Helm That isn't even true of the \_\_\_\_\_ (inaudible)

[laughter]

Slade I stand corrected. You're right. I want to start off by talking about this photo. You were passed a copy of this. You weren't told how many cfs were in this photo. 22 cfs. If you look at Mr. Burtell's chart that Mr. Hood put up. The lowest median cfs that he had in Segment Two was 158. This is a completely unnatural river and yet it's still boating. You see rocks. Imagine five times as much water and then think about the river. That's the legal test. You heard opponents talk about modern recreational use. You didn't hear me talk about modern recreational use that much. We talked about actual use, and actual documented evidence of people going down the river and saying it's navigable for commercial purposes. Mr. Fuller is continually misquoting that six inches is his navigability test. If six inches was the test, we'd be here for the blue, for the black, for the San Pedro, for the Agua Fria, we're not here for that. Six inches is not his test. He's had a reasonable and conservative test, and that's left the three rivers navigable.

I want to address Mr. Chairman, your contention of the parties that were crossing the Colorado. If we pull up the historical chart, we in fact do have an account that says and I read it previously, many 49ers were lightening their loads as they came across down the Gila. But remember they were coming in wagons for the most part. From New Mexico, taking the southern route, crossing Oklahoma or Texas. As they came across the new wagons were they going to make a boat and leave their horses and their wagons? Or were they going to lighten their loads and use the boats which the account said they did. We don't have all the accounts. We don't know how many did it. But we have one account that said 49ers were doing it and it's plural. We also have the Howard family which is evidence, actual evidence of it being done. And they were coming in a wagon, they moved it to a boat, got creative, but that were the times we were looking at. They weren't coming across Texas and Oklahoma with a boat ready at hand.

The John Day might have more flow but it's a wider river. It was not deeper than the Gila, if you look at the evidence. So the contention that finding the Gila or any of the other two rivers navigable would be a far cry from the law is not the right contention. It's consistent with the law. Consistent with the John Day. Consistent with other rivers that have been found navigable.

If we talk about the Clifton Mine, 1872, the mine took off. Where were they going with their ore? They were going to Kansas City. First up to Colorado, to Denver, and then over the Kansas City. That's where it was

being processed. You can't take the Gila through the Gila wilderness and into New Mexico and get to Kansas City. There was no processing going west. Then the railroads come in 1800s. Eight years after the mine starts. And then we start seeing more traffic headed out to San Francisco.

Mr. Sparks talked about the dugout canoe and mentioned there was no successful boating in three or four. Well, that was a prospector in 1886 - his boat flipped. He got back in the boat and he came all the way down to Yuma. It was a successful account from where he started, which I believe was Segment One, all the way down to Segment Eight. If you've ever boated and you haven't flipped at any point then you're a lucky man, but if you're a realistic person thinking about boating you know accidents happen on any river at any time. It's the nature of boating. John Fuller's testified to it. Don Farmer has testified to it. That's what you have happen with a dugout canoe. You heard Mr. Hood talk about that the depths are the shallowest. Mr. Burtell who came up with these reconstructions never went out to the river to look at the depths. So who are you going to believe? Mr. Fuller who's been to every part of the river or Mr. Burtell who was not. You heard some talk about braiding. The State submitted an affidavit by Gary Huckleberry who wrote his Ph.D. thesis on the Gila River. Gary Huckleberry said the river returns quickly after a flow. And certainly would have or rather he said it would be highly probable it would have returned to a single channel by statehood. It's in the evidence. Gary Huckleberry.

The back water, the evidence couldn't be more clear. Stantec put out a report, two and half miles maximum. You heard steamboat use up to the 20 mile mark. That evidence couldn't be more clear. I won't bore you about reading it, but page 31 of *Steamboats on the Colorado*, that's where they are talking specifically about providing material and provisions to Gila City for the mining parties at Gila City. Consistently through 58 and 59. You also heard about the logging and it was dismissed as just an instant. Well, let's read what that account says. It's in evidence as X004 excuse me, as X00418.

For instance, formerly, they were bringing wood down the Gila River on a raft. Nugent put a boom across the river, threw the wood in it and when it came down on a swift current had it dragged up and corded off. Many cut cords of the wood are used to run the prison electric lights. They were floating wood down the river on a consist basis to power the prison down at Yuma.

You didn't hear a lot discussion about actual boating accounts from the other side. That's because we had a lot, a lot were successful and the other side doesn't want to talk about it. I encourage you to take a look at State's brief. I didn't go through all of them today – there are too many, but they are all in our briefs.

I also have to disagree with Mr. Sparks respectfully about the Army accounts. There are accounts from the Army saying that the river could be navigated up 35 miles. Up-river from the Colorado when it's at nine feet deep. There are accounts from the Army that I talked about with Florence.

They differ. Yes the river changed over its time, but the question is was it navigable at times? Was it susceptible to navigation? U.S. Supreme Court has said that it need not be navigable at all seasons of the year at all stages of water. I should mention that the dug-out canoe account, he actually said it was smooth sailing after he tipped over and got back on.

The last thing I'll mention is the Public Trust Doctrine. The Public Trust Doctrine is for the State of Arizona to have land beneath navigable waterways for the use of all of Arizonans whether it's dry now or whether it's wet now. It's a state's right issue; it's also a public land's issue. That's all I have Mr. Chairman.

Chairman Thank you very much Mr. Slade. Is there anyone else who wishes to make any comment to the Commission today? This is the opportunity for the public to comment. Gentlemen, do we want to go into executive session?

? We're going to move....

Chairman We're going to move to go into executive session.

? Correct.

Chairman Okay.

? I move that we go into executive session with the purpose of obtaining legal advice related to the decision that we're being asked to make today.

? Second.

Chairman It's been moved to seconded that we go into executive session to obtain legal advice. Any further discussion? --- Hearing none, all in favor say "aye."

? Voices say "aye."

Chairman            Any opposed? --- We will be in executive session. It's a difficult for us to say how long that will last. We do not intend to take a lunch break. As a Commission at this time, we do have another room for the Commission to meet in while we are in our .....

**END OF RECORDINGS**