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## PRESENTATION TO ARIZONA STREAM AND NAVIGABILITY COMMISSION

The purpose of this address is to discuss the navigability of the Salt River and the resulting ownership of the riverbed lands in the reach immediately upstream of its junction with the Gila River. This reach forms the northerly boundary of the west end of the Gila River Indian Reservation. There are four points we would like to make.

First, this Commission lacks jurisdiction to determine the navigability and resulting ownership in the above-mentioned reach.

Second, ownership of a portion of the riverbed had already passed to the Pima-Maricopa's of the Gila River Indian Reservation before February 14, 1912.

Third, the Salt River in that reach, was not, as of the date of Statehood, a navigable stream because it was dry or nearly dry.

Fourth, the Salt River was not, as of the date of Statehood, a navigable stream, because the Gila River no longer provided a navigable connection to the Colorado River.

The first point is as to the Commission's jurisdiction. In the aforementioned reach, the ownership of the riverbed affects the ownership of the Gila River Indian Reservation. Unless Congress specifically provides for state jurisdiction on a certain matter, the Federal Government retains jurisdiction on all matters relating to the Gila River Indian Reservation and other Indian reservations. To our knowledge, no such exemption exists.

The second point concerns the ownership. Irrespective of whether the riverbed was navigable, there is no doubt that this land was held by the Pima-Maricopa

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Confederation prior to the advent of American sovereignty in 1848. This fact was already recognized by the United States Indian Claims Commission in Docket 228. After that time, the Federal Government recognized the Pima-Maricopa ownership of that land when it, on June 14, 1879, reserved for the Gila River Indian Reservation land that began four miles east of the Salt River's junction with the Gila River, and "thence down and along the middle of said Salt River to the mouth of the Gila River."<sup>1</sup> When the State came into existence in 1912, the Federal Government only retained title to the southern portion of the bed of the Salt River as Trustee for the Pima-Maricopa Indians of the Gila River Indian Reservation. It did not have the ability to convey that title to the State of Arizona whether or not the River was navigable. The above legal description does not limit the ownership to half the riverbed, rather in accordance with applicable survey law, it provided ownership to the thread of the main channel. This channel had accreted to the river by 1912 where the boundary remains today.

The third point is that the Salt River was not navigable as of the date of statehood. Even before Roosevelt Dam was closed in 1910, numerous canals had been built, which had effectively rendered the river as a non-navigable stream. Diversions began on the Salt River dating back to 1869. Wet periods allowed development in excess of what the unregulated river could supply.<sup>2</sup> In 1883, the first major step towards creating a non-navigable situation occurred. This was the construction of Arizona Dam. Arizona Dam was located approximately where Granite Reef Dam is located today and diverted the

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<sup>1</sup> Executive Order June 14, 1879. I Kappler 806

<sup>2</sup> Forbes, R. H., *Irrigation and Agricultural Practice in Arizona* 1911, 11.

entirety of the Salt and Verde Rivers during times of low flow. This created a dry section below its diversion.<sup>3</sup>

Now, the geology of this region is such that the river regained flow at a location approximately where Mill Bridge stands today. The reason that the river gained flow is the same reason that Mill Bridge exists where it does today. Bedrock is near to the surface. This bedrock forced the underflow of the river to emerge. Shortly downstream from this re-emergence, exists another major diversion dam, Joint Head Dam. This diverted what flow remerged at the narrows of the Mill Avenue Crossing. We know that Joint Head Dam diverted all of the low flow both due to contemporaneous statements<sup>4</sup> and because it was the inability to get water that lead to the so-called Kibbey Decree that allocated many of the water rights in the Salt River Valley. At that point, the river was again dry during most times of the year. As Engineer W. H. Code stated in 1900, "The river-bed is again dry below the dam of the Maricopa and Salt Canals..."<sup>5</sup>

Down towards the west end, groundwater began to reemerge from the irrigation seepage that occurred upstream. The Maricopas had built a canal called the "Indian Canal". The Indian Canal had a capacity of 37 cubic feet per second.<sup>6</sup> This canal was built prior to statehood and is referenced in the so-called Haggard Decree as having been in existence as of 1903. This canal, coupled with the massive capacity of numerous canals upstream, would have and did dry the river through this reach during normal low-flow conditions. Some flow did reemerge. Farmers were ready to address that circumstance. Many small canals were built, including the Leon Canal, the Peninsula

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<sup>3</sup> Agricultural Experiment Bulletin #44, 153.

<sup>4</sup> United States Department of Agriculture, Bulletin 104, 86.

<sup>5</sup> Hodges, Paul V. Notes on the Discharge of Gila River at Buckeye Heading. December 16, 1941, 5.

<sup>6</sup> See Calculations Attached.

Canal, the Lambeye Canal, and the Meridian Canal.<sup>7</sup> The Maricopas had also built their canal and it took most of the water that was available and when it couldn't, the Saint Johns Canal diverted almost all of what remained. We know that before the Indian canal was built, on June 15, 1896, the flow passing the St. John's Canal immediately upstream from the border of the Gila River Indian Reservation only allowed 24 cubic feet per second to pass.<sup>8</sup> The subsequent construction of the Indian Canal would have permitted the Maricopa's to take 37 of that 24 cfs available.

The diversions from all these canals would have occurred most of the year. Farmers had learned to take all the water they could whenever they could because they didn't know when they would get it again. This attitude persisted past 1912.<sup>9</sup>

The Salt River merged with the Gila River and became the Gila River. At this point, significant underflow and some surface flow joined the Gila. The Gila River, below its confluence with the Salt, picked up underflow from the Aqua Fria and provided some water for the Buckeye Irrigation District down below the Gila River's junction with the Aqua Fria.

Data are not available to conclusively prove whether or not some return flow emerged on the reach immediately adjacent to the Gila River Indian Reservation. However, soil maps from the Bureau of Soils show that as of 1900, water tables were nearest to the surface downstream from the Gila-Salt confluence.<sup>10</sup> This would have been the primary area of reemergence of water. In 1910, the world's largest cyclopean, masonry, rubble dam had been built, Roosevelt Dam. The gates were shut in February of

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<sup>7</sup> United States Geological Survey, *Underground waters of Salt River Valley, Arizona* 1905, 152.

<sup>8</sup> United States Geological Survey, *21<sup>st</sup> Annual Report* 1901, 382.

<sup>9</sup> Marr, James C. *The Use and Duty of Water in the Salt River Valleys* May 1920, 69.

<sup>10</sup> Means, Thomas, *Soil Survey in Salt River Valley, Arizona* 1900, 316.

1910. This was two years before statehood. We know, from that point forward, that water was only released to meet demands for the crops that were now served by recently expanded 2000 cubic foot per second capacity of the newly-completed Granite Reef Diversion structure. USGS records show us that during the summer, fall, and winter months, the flows of the Verde River were small and could easily have been diverted by Granite Reef. The situation downstream would have been more limited since less water could have made it downstream.

But, even if small amounts of water did pass the Reservation, it is unlikely that it constituted a navigable river. The United States Geological Survey's description of the confluence area of the Gila River explains the nature of reemergent flow.

Water occurs near the surface over a large part of the lowlands, the western third of the reservation. Bogs and sloughs are a frequent occurrence. At the edge of one of these sloughs, ... large springs were noted boiling up from the sands below.<sup>11</sup>

A fourth element of navigability relates to the law that applies. For an Indian Reservation, it is not State Law that governs, but Federal Law. The United States Supreme Court determined that federal law requires that:

A river is a navigable water of the United States when it forms, by itself or by its connection with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.<sup>12</sup>

The fact that a river may be navigable intrastate is not relevant. The United States Supreme Court also said:

If such river is only navigable between points in the same state and does not connect with a stream or lake bearing commerce between different

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<sup>11</sup> Hodges, Paul V., Report on Gila River showing periods of low flow above Buckeye Heading and sources of flow 1939, 8.

<sup>12</sup> Clark, Frank Emerson, A treatise on the law of surveying and boundaries 1959, 612.

states, it is not a navigable river of the United States, but of the State where located.<sup>13</sup>

By the time of statehood, the Gila River below Gillespie Dam was an ephemeral wash that rarely flowed water down to Yuma. In addition to the difficulty of trying to navigate a river full of diversion dams, the Gila River is shown by the USGS in its records that begin in 1922, as being dry for months at a time below Gillespie Dam. It was also dry near Sentinel Arizona in June 1914 and for six months in 1914 at Dome near the Gila's mouth.

The Salt River is the Gila River Indian Reservation's northern boundary. This ownership extends to the thread of the Northern channel of Salt River as it existed in 1910. The Pima-Maricopas retain their ownership of these lands as they have since time immemorial.

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<sup>13</sup> Ibid.