

1 Joe P. Sparks, 002383  
2 Julia Kolsrud, 029582  
3 **THE SPARKS LAW FIRM, P.C.**  
4 7503 First Street  
5 Scottsdale, Arizona 85251  
6 (480) 949-1339  
7 [joesparks@sparkslawaz.com](mailto:joesparks@sparkslawaz.com)  
8 [julia@sparkslawaz.com](mailto:julia@sparkslawaz.com)  
9 *Attorneys for the San Carlos Apache Tribe*

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

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In re Determination of Navigability of  
the Salt River

Nos.03-005 NAV and 04-008-NAV  
(Consolidated) (Salt River)

**THE SAN CARLOS APACHE  
TRIBE'S RESPONSE  
MEMORANDUM REGARDING THE  
NAVIGABILITY OF THE SALT  
RIVER**

The San Carlos Apache Tribe ("Tribe") files with the Arizona Navigable Stream Adjudication Commission ("ANSAC" OR "Commission") this Response Memorandum to the Opening Post-Hearing Memorandums of the Arizona State Land Department ("ASLD"), and the Arizona Center for Law in the Public Interest ("ACLPI"), on behalf of the Defenders of Wildlife ("Defenders") who argue in their Opening Memorandums that the Upper Salt River is navigable. ASLD 19-20; ACLPI at 1 (referred to collectively as "Proponents").

In addition, the Tribe has filed a Notice that it joins with the Proposed Findings of Fact and Conclusions of Law filed on or about August 17, 2016 in the above referenced matter, and file a short separate Findings of Fact and Conclusions of Law in support its

1 Response Memorandum. All references to the SRP's Proposed Findings of Fact will be  
2 cited herein as "SRP FF #[Page]. References to SRP's Proposed Conclusions of Law  
3 will be referenced here as "SRP COL #[Page]". References to the Tribe's Findings of  
4 Fact will be cited herein as "SCAT FF #[Page]". The Tribe's separate Conclusions of  
5 Law will be referenced as "SCAT COL #[Page]".

6 **There is No Reliable Evidence of Historical Navigation on the Upper Salt.**

7 To save time for the Commission and to avoid redundancy with other Parties the  
8 Tribe will focus almost exclusively on responding to the assertion by proponents that  
9 Segments 1 and 2 (Upper Salt River) of the Salt River were susceptible to navigation, on  
10 February 14, 1912. All of Segment 1<sup>1</sup> and a substantial part of Segment 2<sup>2</sup> are located  
11 within the San Carlos Apache Reservation. SCAT COL #1, #2.

12 There is no evidence citing a primary source that any person ever navigated the  
13 Upper Salt prior to the 1960's, and therefore the proponents must rely on the  
14 susceptibility of navigation of the river at Statehood to prove navigate. SCAT FF #47 -  
15 #55.

16  
17 **Proponents' Misplaced Reliance on Modern Day Recreational Boating to  
18 Show the River was Susceptible to Navigation is Flawed.**

19 The United States Supreme Court recognizes that evidence of present-day use of a  
20 river may be probative of its susceptibility of use at statehood. *PPL Montana, LLC v.*  
21 *Montana*, 132 S. Ct. 1215, 1233 (2012). However, the Court has laid out several  
22 requirements that must be met before present-day evidence is considered helpful in  
23 determining navigability:

24 **At a minimum**, therefore, the party seeking to use present-day evidence for title  
25 purposes must show: (1) the watercraft are meaningfully similar to those in  
26 customary use for trade and travel at the time of statehood; and (2) the river's post

27 <sup>1</sup> Segment 1 is located "from the confluence of the White and the Black River down to Apache Falls, which is  
28 located a few hundred meters upstream of the U.S. 60 Bridge in the Salt River Canyon." Fuller TR 10/20/2015:54

<sup>2</sup> Segment 2 is from "the U.S. 60 Bridge down to a rapid that's just below Quartzite Falls." Fuller TR 10/20/2015:61

1 Statehood condition is not materially different from its physical condition at  
2 statehood.

3 *PPL Montana* at 1233 (emphasis added).

4 In their Post-Hearing Opening Memorandum's Proponents of Navigation have  
5 relied almost exclusively on modern day recreational evidence to show that the Segment  
6 2 of the Upper Salt was susceptible to trade and travel in its ordinary and natural  
7 condition on the date of Arizona statehood, February 14, 1912; and Proponents assertion  
8 that Segment 1 has been ever been navigated.

9  
10 **The Tribe Agrees with Proponents That Segments 1 and 2 of the Salt River**  
11 **are Generally in Their Ordinary and Natural Condition.**

12 Evidence in the Record supports Proponents findings that Segments 1 and 2 of the  
13 Salt River ("Upper Salt") are generally in the same ordinary and natural condition as it  
14 they were on the date of Arizona statehood, February 14, 1912. ASLD at 7, 191; SRP FF  
15 #30; 800.

16 The Record shows that Segment 1 of the Salt River was not navigable at the time  
17 of Statehood and Proponents do not now assert that any portion of Segment 1 is  
18 navigable. ASLD at 17; Defenders at 29; SRP FF #22.

19 The fact that Segment 2 remains in its ordinary and natural condition today is not  
20 evidence that Segment 2 was navigable. The ordinary and natural condition of the Upper  
21 Salt is a River that is full of rapids, falls, boulders, sandbars and other impediments; the  
22 River is considered unpredictable, unreliable, and dangerous.

23 **The Physical Characteristics and the Extreme Variation in Flow of Segment 2**  
24 **of the Salt River Prove That Segment was Not Susceptible to Navigation at**  
25 **Statehood.**

26 Proponents assert that Segment 2 of the Salt River is in its ordinary and natural  
27 condition today and susceptible to navigation by modern recreational boats. ASLD at 19-  
28 20. Segment 2 includes Quartzite Falls and is a "whitewater" section of the River. SRP

1 FF #25. Segment 2 is made up of 45 rapids in just 33 miles, of which 19 are class III  
2 rapids, and at least 3 are class IV rapids. SRP FF #26. There are several falls in Segment  
3 2 including Apache Falls and Quartzite Falls. SRP FF #24, #26.

4 Mr. Fuller testified that Quartzite Falls in its natural condition, contributed to  
5 several deaths of boaters attempting to navigate the falls. SCAT FF #44; SRP FF #44.  
6 According to published guidebooks submitted into the Record by Proponents, while in its  
7 natural condition Quartzite Falls was a place where people had been killed, many had  
8 nearly drowned, “lots of boats damaged and gear lost,” and the consistent warning that  
9 boaters “[t]ake extreme caution when dealing with this problem.” SCAT FF #12. One  
10 guidebook plainly stated that “only the most experienced boatmen should consider  
11 running Quartzite Falls. Reading this water is both important and difficult. If you make  
12 this run you’re half lucky and half good... If you don’t, you’re dead.” SCAT FF #13.

13 The flow variations in the Upper Salt make the River unpredictable and unreliable,  
14 “annual flood stages could change any part of this river drastically. It is not dam  
15 regulated so be prepared for moved rocks, rapids, and other obstacles.... This river is not  
16 for the beginner or unprepared.” SCAT FF #14. The consistent underlying message of  
17 the guidebooks and manuals regarding this massive waterfall on the Upper Salt is that “to  
18 be safe, running this fall is not an option.” SCAT FF #15.

19  
20 **ASLD Experts Did Not Agree that Segment 2 of the Salt River Was**  
21 **Susceptible to Navigation by Historical Boats.**

22 ASLD claims that its boating experts all agreed that historical boats could have  
23 navigated Segment 2 of the Salt River on the date of Arizona Statehood in 1912. ASLD  
24 at 20-21. This claim is false. These experts included Mr. Dimock, Mr. Mickel, Mr. Tyler  
25 and Mr. Fuller all of whom testified before the Commission, and described the extreme  
26 conditions of Segment 2 prove that it was a non-navigable River that was not susceptible  
27 to commercial trade and travel in its ordinary and natural condition on the date of  
28 Arizona Statehood. SCAT FF #21-46.



1  
2 **ASLD Expert Mr. Brad Dimock Would Not Navigate Segment 2 in a**  
3 **Historical Boat.**

4 ASLD expert Mr. Dimock may be the most qualified expert to determine whether  
5 a historical boat could have navigated Segment 2 of the Upper Salt River successfully in  
6 1912. Mr. Dimock is the only expert who has firsthand experience with constructing and  
7 navigating a historical recreation of a boat that was meaningfully similar to those that  
8 existed around the time of Arizona statehood. SCAT FF #21; SRP FF #678. Mr.  
9 Dimock stated that he would not put a wooden boat on the Upper Salt and specifically  
10 would not put his historic replica on Segment 2 of the Salt River. SCAT FF#23. Mr.  
11 Dimock made his determination regarding historical boats and their use on Segment 2  
12 partially based on his own experiences boating Segment 2. ASLD at 21; SRP FF #678.  
13 Mr. Dimock testified that he has only boated Segment 2 in polyethylene plastic, post  
14 1970's era kayaks, and "modern, 1970's-vintage inflatable rafts." SCAT FF #24. Mr.  
15 Dimock stated that he has only boated Segment 2 of the River during spring runoff, in  
16 high water and has never attempted to navigate Segment 2 in a wooden boat of any kind.  
17 SCAT FF #24, #25 and #32. Mr. Dimock said he has no idea what Segment 2 looked  
18 like the rest of the year prior to Quartzite falls being destroyed and could not speculate on  
19 what the River looked like now during median flows. SCAT FF #26. At no point did  
20 Mr. Dimock suggest that historical boats could navigate Segment 2 as the ASLD claims.  
21 ASLD at 12 and 23; SCAT FF #32.

22 ASLD asserts that Mr. Dimock testified that "canoes, kayaks, and rowboats that  
23 were available at Statehood and the modern versions of those boats are meaningfully  
24 similar to the historical versions." ASLD at 11. In reality Mr. Dimock described  
25 significant differences between modern day vs. historical canoes, kayaks, and rowboats.  
26 SCAT FF #27.

27 Mr. Dimock explained that modern kayaks are built out of better materials not the  
28 'gummy rubber' or 'canvas' that made up the kayaks in 1912. SCAT FF #28.

1 Mr. Dimock testified that historical wooden canoes were being used in other rivers  
2 with “flat water and small riffles,” not on river conditions like those found in Segment 2.  
3 SCAT FF #31. Segment 2 is not flat with small riffles; Segment 2 is characterized by  
4 large rapids and falls, steep slopes and multiple impediments to navigation. SCAT FF  
5 #31.

6 Regarding rowboats in 1912, Mr. Dimock testified that most rowboats were home-  
7 built, “and home-built boats you never know what they're going to be; a bunch of planks  
8 with a couple of sides nailed on.... You don't know what they were; something somebody  
9 whacked together.” SCAT FF #29. When asked about the expertise of a home-made  
10 boat builder in 1912 he stated that “you get someone who is a half-decent craftsman and  
11 they can make a box that floats and they call it a boat and off they go. Some of the  
12 contraptions people were running on rivers were just comical...” SCAT FF #30.

13  
14 **ASLD Expert Mr. Alex Mickel Described Historical Boats That Would Not**  
15 **be Navigable on Segment 2 of the Salt River.**

16 ASLD’s other boating expert Mr. Alex Mickel did not testify that historical boats  
17 could navigate Segment 2 of the Salt River as ASLD claims. ASLD 20-21. In fact Mr.  
18 Mickel testified that a person attempting to navigate Segment 2 with a historical boat in  
19 1912 “would **damage it regularly** and have to repair it... you would have to **rebuild**  
20 **boats** sometime on those historic trips, at least from the accounts that I’ve read.” SCAT  
21 FF #33 (emphasis added). Mickel explained that when a historical boat was in need of  
22 repair it would cause at least one overnight delay. SCAT FF #34. Mr. Mickel did not  
23 speculate on the time it would take to rebuild a boat after severe damage caused by  
24 navigating Segment 2 however, it would presumably take longer than an overnight repair.  
25 SCAT FF #34.

26 Unlike Mr. Dimock, Mr. Mickel has never built a historic replica of a boat, nor has  
27 he boated any part of the Salt River in a historical replica of any kind. In fact Mr. Mickel  
28 has never been in a wooden boat on Segment 2 and when asked if he would take a

1 wooden boat on that particular Segment Mr. Mickel admitted that there were at least 4 or  
2 5 rapids on Segment 2 that would have him concerned. SCAT FF #36.

3 Mr. Mickel testified that before Quartzite Falls was blasted, he was forced to  
4 portage that Segment, describing the laborious process of portaging his gear, people and  
5 his raft around the Falls. SRP FF #611. Mr. Mickel stated that there were at least 3 or 4  
6 rapids in Segment 2 that he would line or portage, especially “if you had a strong  
7 motivation not to flip over your canoe.” SCAT FF #40; SRP FF #29.

8 **ASLD Expert Mr. Tyler Williams Described Historical Boats That Would**  
9 **Not be Navigable on Segment 2 of the Salt River.**

10 Mr. Tyler Williams, another boating expert for ASLD, did not say that Segment 2  
11 of the Salt River could be navigated by historical boats as ASLD asserts. ASLD at 20-21.  
12 In fact Mr. Williams stated that his knowledge of historic flat boats was based on Mr.  
13 Dimocks recreation and experience with the Edith, which Mr. Dimock testified would not  
14 navigate Segment 2. SCAT FF #38. Mr. Williams also testified that he did not know if a  
15 historical flat boat could navigate some of the falls in Segment 2 and his experiences  
16 regarding those falls was “very limited.” SCAT FF #38. At no point did Mr. Williams  
17 state that he knew of or seen evidence of anyone ever navigating Segment2 in a wooden  
18 boat of any kind.

19  
20 **ASLD Expert Mr. Jon Fuller Has No Evidence to Support His Opinion**  
21 **That Historical Boats Could Navigate Segment 2.**

22 ASLD expert Mr. Jon Fuller testified that a flat boat could get down Segment 2  
23 about 50% of the time; however Mr. Fuller has never attempted to navigate a flat boat on  
24 Segment 2 and there is no evidence that anyone has ever successfully navigated a flatboat  
25 on Segment 2. SCAT FF #55; SRP FF #31 and #34. While Mr. Fuller is aware that there  
26 are several Salt River guidebooks and manuals describing Segment 2 as a non-navigable  
27 river, dangerous at high flows, with many rapids, and falls, he maintains his position that  
28 the Segment is boatable. SCAT FF #41. Mr. Fuller explained that he made this

1 determination “one time in summer time [when he] stopped and looked and stared” at the  
2 portion of Segment 2 that the guidebooks say is dangerous or unboatable and determined  
3 that the guides were wrong. SCAT FF #41. Mr. Fuller then drove further down the road  
4 and again “stared” and determined that he could boat that unidentified portion of  
5 Segment 2 and therefore the guidebooks were again, incorrect. SCAT FF #42. This ‘stop  
6 and stare’ evaluation of the River is not reliable and only serves to confuse the  
7 Commission as they weight Mr. Fullers testimony with the Proponents submission of  
8 these river guidebooks and manuals which the Proponents rely on, almost exclusively, in  
9 their Opening Memoranda to show Segment 2 was susceptible to navigation at the time  
10 of Arizona Statehood. ASLD at 23.

11 ASLD claims that its boating experts determined that Segment 2 of the Upper Salt  
12 was susceptible to navigation by historical watercraft has no basis in reality, a review of  
13 the ANSAC Transcript from October 21, 2015 and Evidence Item No. C018 – 149 will  
14 make that clear to the Commission.

15 Finally, The Tribe requests that the Commission, when considering Mr. Fuller’s  
16 testimony and opinions, weigh its consideration of differing types of testimony according  
17 to the character of the testimony – giving greater weight to Mr. Fuller’s expert testimony  
18 from his perspective as a hydrologist and geomorphologist, and giving nominal weight (if  
19 any) to Mr. Fuller’s lay opinion testimony which he characterizes as being based on his  
20 recreational boating experience and various other perspectives. SCAT FF #56-59.

21  
22 **Proponents Evidence of Modern Recreational Boating Does Not Satisfy the**  
23 **Susceptibility Test Established by the U.S. Supreme Court.**

24 The Proponents of navigability have a represented a flawed interpretation of what  
25 is required to prove a river’s susceptibility for navigation using modern day post-  
26 statehood evidence. ASLD at 9; SCAT COL #3, #5. ASLD correctly restates part of *the*  
27 *PPL Montana* discussion of post-statehood boating which requires “(1) the watercraft are  
28 meaningfully similar to those in customary use for trade and travel at the time of



1 statehood; and (2) the river's post-statehood condition is not materially different from its  
2 physical condition at statehood.” ASLD at 9 quoting *PPL Montana* at 1233. ASLD  
3 failed to point out and discuss the importance of the first part of that sentence, which  
4 clearly states that those 2 required elements are the *minimum* requirements. *PPL*  
5 *Montana* at 1233.

6 Proponents claim that the “the evidence meets **both parts** of the *PPL Montana*  
7 test for showing the susceptibility of the River for navigation by post-statehood evidence.  
8 ASLD at 11 (emphasis added). This interpretation of the requirements for useful post-  
9 statehood evidence is simply incorrect. In fact the Court has reiterated time and time  
10 again that “the “crucial question” is the potential for [commercial] use at the time of  
11 statehood...” *PPL Montana* at 1233. The Commission must review all of the post-  
12 statehood evidence in the record,

13 but the evidence must be confined to that which shows the river could  
14 sustain the kinds of commercial use that, as a realistic matter, might have  
15 occurred at the time of statehood. Navigability must be assessed as of the  
16 time of statehood, and it concerns the river's usefulness for “‘trade and  
17 travel,’ ” rather than for other purposes.

18 *PPL Montana* at 1233 (quoting *Utah*, at 75-76.)

19 While in its ordinary and natural condition, Segment 2 is not a navigable. There  
20 has never been any commercial navigation of Segment 2 as described in *PPL Montana*.  
21 The modern recreational post 1960 whitewater rafting which is a niche sport that came  
22 into being only after technological advances had been made to boats does not meet the  
23 requirements of *PPL Montana* to make Segment 2 navigable. SCAT FF #10-11. All of  
24 the experts have described boats that would not be capable of successfully navigating  
25 Segment 2 and the guidebook which Proponents rely on heavily in their Memoranda all  
26 describe a River that is not boatable by anyone except for experienced whitewater rafting  
27 boatmen using watercraft constructed of modern high impact and highly durable  
28

1 materials.

2 The Record shows that neither Segments 1 or 2 of the Upper Salt were in the  
3 condition required by *PPL Montana* to show the River was susceptible to navigation.  
4 COL #5. Additionally, *PPL Montana* made it clear that a “liberal” interpretation of what  
5 qualified as susceptibility evidence is inadequate, and clarified that the “use for realistic  
6 commerce” was still the most important element of determining navigability. SCAT  
7 COL #3 - #4.

8 **Conclusion**

9 The Commission made a determination in December of 2007 that the Upper Salt  
10 River was not navigable. Nothing in the supplemental Record has changed regarding  
11 Segment 1 and 2, nothing has been added, and aside from Jon Fuller’s personal opinion  
12 after staring at the River, there is nothing to suggest that the Upper Salt was susceptible  
13 to navigation on the date of Arizona Statehood February 14, 1912. After reviewing the  
14 entire Record ANSAC should reaffirm its original determination that Segments 1 and 2  
15 of the Salt River were not susceptible to navigation in their ordinary and natural  
16 condition, for the purposes of realistic commercial trade and travel, on February 14,  
17 1912.

18  
19 DATED this 17<sup>th</sup> day of August, 2016.

20  
21 **THE SPARKS LAW FIRM, P.C.**

22  
23 By \_\_\_\_\_



24 Joe P. Sparks

25 Julia Kolsrud

26 7503 First Street

27 Scottsdale, Arizona 85251

28 *Attorney for the San Carlos Apache Tribe*

1 ORIGINAL AND SIX COPIES with a CD of the foregoing  
2 mailed for filing this 17<sup>th</sup> day of August 2016 to:

3 Arizona Navigable Stream Adjudication Commission  
4 1700 West Washington, Room B-54  
5 Phoenix, AZ 85007

6 AND COPY of the forgoing  
7 mailed for filing this 17<sup>th</sup> day of August 2016 to:

8 Matthew L. Rojas  
9 Squire Sanders (US) LLP  
10 1 East Washington Street, Suite 2700  
11 Phoenix, AZ 85004-2556  
12 *Attorney for the Arizona Navigable Stream Adjudication Commission*

13 Laurie Hachtel  
14 Edwin Slade  
15 Attorney General's Office  
16 1275 West Washington Street  
17 Phoenix, AZ 85007-2297  
18 *Attorneys for the State of Arizona*

19 AND COPY of the forgoing electronically sent  
20 this 17<sup>th</sup> day of August 2016 to the following:

21 Arizona Navigable Stream Adjudication Commission  
22 1700 West Washington, Room B-54  
23 Phoenix, AZ 85007  
24 Nav.Streams@ansac.az.gov

25 Matthew L. Rojas  
26 Squire Sanders (US) LLP  
27 1 East Washington Street, Suite 2700  
28 Phoenix, AZ 85004-2556  
*Attorney for the Arizona Navigable Stream Adjudication Commission*

John B. Weldon, Jr.  
Mark A. McGinnis  
Salmon, Lewis & Weldon, Plc  
2850 E. Camelback Rd., Ste 200  
Phoenix, AZ 85016-4316

1 *Attorneys for the Salt River Project Agricultural Improvement*  
2 *And Power District and Salt River Valley Water User's Association*

3 Susan B. Montgomery  
4 Robyn L. Interpreter  
5 Montgomery & Interpreter, PLC  
6 3301 E. Thunderbird Road  
7 Phoenix, AZ 85032  
8 *Attorneys for Yavapai-Apache Nation*

9 L. William Staudenmaier  
10 Cynthia Chandley  
11 Snell & Wilmer  
12 400 East Van Buren  
13 Phoenix, AZ 85004-2022  
14 *Attorneys for Freeport Minerals Corporation*

15 Laurie Hachtel  
16 Edwin Slade  
17 Attorney General's Office  
18 1275 West Washington Street  
19 Phoenix, AZ 85007-2297  
20 *Attorneys for the State of Arizona*

21 Sean Hood  
22 Fennemore, Craig, P.C.  
23 2394 E. Camelback Rd, Ste 600  
24 Phoenix, AZ, 85016-3429  
25 *Attorneys for Freeport Minerals Corporation*

26 Mark Horvath Law Office, P.C.  
27 1505 E. Los Arboles Drive  
28 Tempe, AZ 85284

Ms. Arlinda Locklear, Esq.  
4113 Jenifer St., N.W.  
Washington, D.C. 20015

Joy E. Herr-Cardillo  
Timothy M. Hogan  
Arizona Center for Law In The Public Interest  
P.O. Box 41835



1 Tucson, AZ 85717  
2 Attorneys for Defenders of Wildlife, et al

3 Joe P. Sparks  
4 Julia Kolsrud  
5 The Sparks Law Firm  
6 7503 First Street  
7 Scottsdale, AZ 85251-4201  
8 *Attorneys for San Carols Apache Tribe, et al*

9 John Helm  
10 Sally Worthington  
11 Helm, Livesay & Worthington, Ltd.  
12 1619 E. Guadalupe, Ste 1  
13 Tempe, AZ 85283  
14 *Attorneys for Maricopa County*

15 Steven L. Wene  
16 Moyes Sellers & Sims  
17 1850 N. Central Ave., Ste 1100  
18 Phoenix, AZ 85004

19 Cynthia S. Campbell  
20 Law Department  
21 City Of Phoenix  
22 200 W. Washington Street, Ste 1300  
23 Phoenix, AZ 85003-1611  
24 *Attorneys for City of Phoenix*

25 Dr. Carole Coe Klopatek  
26 P.O. Box 17779  
27 Fountain Hills, AZ 85269-7179

28 Diandra Day Benally  
P.O. Box 17779  
Fountain Hills, AZ 85269-7179

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

1 Charles L. Cahoy  
Assistant City Attorney  
2 City Attorney's Office  
3 CITY OF TEMPE  
21E. Sixth St, Ste 201  
4 Tempe, AZ 85280  
5 *Attorneys for City of Tempe*

6 Michael J. Pearce  
Maguire & Pearce, LLC  
7 2999 N. 44th Street, Ste 630  
8 Phoenix, AZ 85018-0001  
9 *Attorneys for Chamber of Commerce  
And Home Builders' Association*

10 Michael F. McNulty  
11 Pima County Attorney's Office  
12 32 N. Stone Ave Suite 2100  
13 Tucson, Arizona 85701

14 Carla A Consoli  
Lewis Roca Rothgerber Christie LLP  
15 201 E. Washington, St., Suite 1200  
16 *Attorneys for Cemex*

17 James T. Braselton  
Dickinson Write  
18 1850 N. Central Ave., Ste. 1400  
19 Phoenix, AZ 85004  
20 *Attorneys for Various Title Companies*

21 David A. Brown  
Brown & Brown  
22 128 E. Commercial St.  
23 PO Box 1890  
24 St Johns, AZ 85936

25 Julie Lemmon  
1095 W. Rio Salado Pkwy, Ste 102  
26 Tempe, AZ 85281-2603  
27 *Attorney for Flood Control District  
Of Maricopa County*  
28

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2  
3  
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18  
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25  
26  
27  
28

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

Sandy Bahr  
514 W. Roosevelt  
Phoenix, AZ 85004  
*Sierra Club*

Thane D. Somerville  
Morisset, Schlosser, Jozwiak & Somerville  
801 Second Avenue, Suite 1115  
Seattle, WA 98104-1509  
Salt River Pima-Maricopa Indian Community  
(SRPMIC)

Michael C. Shiel  
Office of the General Counsel  
Salt River Pima-Maricopa Indian Community (SRPMIC)  
10005 East Osborn Rd.  
Scottsdale, Arizona 85256

By  \_\_\_\_\_