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

11 **IN RE DETERMINATION OF THE**
12 **NAVIGABILITY OF THE SAN**
13 **PEDRO RIVER**

No. 03-004-NAV (San Pedro)

GILA RIVER INDIAN
COMMUNITY'S PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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16 Pursuant to the direction of the Arizona Navigable Stream Adjudication
17 Commission ("ANSAC" or "Commission") as outlined in the ANSAC
18 Information Bulletin (August 7, 2013), the Gila River Indian Community
19 submits its proposed findings of fact and conclusions of law. The Community
20 joins Salt River Project and Freeport-McMoRan Corporation's Proposed
21 Findings of Fact, specifically Findings of Fact Nos. 1-143, and submits the
22 following additional proposed findings of fact and conclusions of law:
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24

25 **FINDINGS OF FACT**

- 26 1. On October 18, 2006, the Commission issued its Report, Findings

1 and Determination Regarding the Navigability of the San Pedro River from the
2 Mexican Border to the Confluence with the Gila River (“Report”).

3 2. All findings of fact made in the Report are incorporated herein.

4
5 3. At the hearing conducted in this matter in Bisbee on June 7, 2013,
6 the Arizona Center for Law in the Public Interest presented the testimony of
7 Win Hjalmarson, P.E., who submitted a PowerPoint presentation entitled,
8 “Navigability of the Natural Channel of the San Pedro River, AZ, from Mexico
9 to Mouth [sic] at the Gila River at Winkleman, AZ” (“Hjalmarson Bisbee”).
10

11 4. Hjalmarson’s presentation included general information regarding
12 the San Pedro River, explanation of a hydraulic geometry model used to attempt
13 to calculate a flow rate for the San Pedro River, and application of the results of
14 his analysis to modern-day criteria for recreational stream flows.
15

16 5. Hjalmarson’s analysis incorrectly identified the standard for
17 navigability as the “navigability or non-navigability of the San Pedro River in
18 its “ordinary and natural condition” prior to the State of Arizona’s admission to
19 the United States on February 14, 1912.” [Hjalmarson Bisbee Slide #4]
20

21 6. Hjalmarson’s analysis also incorrectly assumed that the 2013
22 federal standard (presumably *PPL Montana, infra*) had been interpreted by the
23 Arizona Court of Appeals when it had not. [Hjalmarson Bisbee Slide #6]
24

25 7. While Hjalmarson noted the presence of human activity in the San
26

1 Pedro watershed going back for 300 years, none of that activity involved use of
2 the river for trade or commerce. [Hjalmarson Bisbee Slide #7, Bisbee Tr.¹ 178]

3 8. Hjalmarson indicated that the only watercraft that would be
4 suitable for the San Pedro River under his analysis would be canoes, kayaks and
5 possibly flat-bottomed rowboats, which he generally described as “very small,
6 very small watercraft.” [Bisbee Tr. 46]

7
8 9. Hjalmarson testified that the San Pedro River was susceptible to
9 navigation in its ordinary and natural condition because 80% of the time it had a
10 maximum depth of one foot. [Bisbee Tr. 46-47]

11
12 10. The chart Hjalmarson used to determine the required depth for a
13 watercraft [Hjalmarson Bisbee Slide #143] is for recreational watercraft.
14 [Bisbee Tr. 50]

15
16 11. Hjalmarson did not do any calculations of required depths for
17 commercial activities, such as transporting goods or people. [Bisbee Tr. 50]

18
19 12. Hjalmarson admitted that many factors can render a river non-
20 navigable, including braided channels, sandbars, or beaver dams. [Bisbee Tr.
21 51]

22
23 13. In addressing when the San Pedro River was in its ordinary and
24 natural condition, Hjalmarson testified that you have to “definitely go back
25

26 ¹ Citations to the transcript from the hearing held in Bisbee on June 7, 2013 are
as “Bisbee Tr.”

1 before 1850,” and possibly around 1820, but that the presence of cattle dates to
2 1697. [Bisbee Tr. 117-118]

3 14. There is an absence of data regarding the condition of the San
4 Pedro River in 1697. [Bisbee Tr. 118]

5
6 15. When asked whether there is any empirical way to determine the
7 condition of the San Pedro River in 1697, Hjalmarson gave an answer that was
8 fairly incomprehensible. [Bisbee Tr. 118-119]

9
10 16. When asked what to describe what the area would have looked like
11 before 1850, 1880 and more recent incisions, Hjalmarson gave an answer that
12 was likewise hard to follow. [Bisbee Tr. 145]

13
14 17. Hjalmarson used a smooth parabolic channel for his analysis.
15 [Bisbee Tr. 150]

16
17 18. There are several differences between a smooth parabolic channel
18 and a real life river channel. [Bisbee Tr. 151-154]

19
20 19. Hjalmarson conceded that the San Pedro River was not navigable
21 in fact and initially refused to answer questions regarding navigation in fact,
22 stating instead that “it has the potential to be navigated.” [Bisbee Tr. 172-173]

23
24 20. When Hjalmarson performed his calculations, he did not compute
25 a standard of error, which is a standard practice for a statistical calculation.
26 [Bisbee Tr. 186, 187-188]

1 21. Hjalmarson admitted that his analysis was giving his best guesses
2 about what the predevelopment conditions were based upon currently available
3 information. [Bisbee Tr. 190]

4 22. In determining navigability, Hjalmarson used two recreational
5 methods, which were not chosen on a scientific basis but supplied to him by his
6 attorney. [Bisbee Tr. 193]

7 23. When asked about the method he used from Jason M. Cortell and
8 Associates (1977) [Hjalmarson Slide #139], Hjalmarson seemed unfamiliar
9 with the method. [Bisbee Tr. 194]

10 24. When asked whether Cortell's method involved computation
11 followed by going out to the river and determining whether the action
12 conditions match the computations, Hjalmarson stated, "No."

13 25. Hjalmarson took his methodology from Cortell's *Recreation and*
14 *Instream Flow, Vol. 1, Flow Requirements, Analysis of Benefits, Legal and*
15 *Institutional Constraints*. [Hjalmarson Bisbee Slide #139]

16 26. Volume 1 of Cortell's work is *not* a methodology; Cortell's actual
17 research methodology is contained in Volume 2, *Recreation and Instream*
18 *Flow, Vol. 2, River Evaluation Manual*. [GRIC Submission 361]

19 27. Hjalmarson's claim that he followed Cortell's methodology, "word
20 for word," is not accurate. [Bisbee Tr. 196]

1 28. Cortell's *actual* river evaluation methodology requires field studies
2 following the preliminary analysis, including direct analysis of actual
3 conditions on the river. [GRIC Submission 363]
4

5 29. The "synthesis" portion of Cortell's actual methodology involves
6 analysis of data gathered during the field studies and correlation of the physical
7 measurements and observations with hydrological data. [GRIC Submission
8 363]
9

10 30. Hjalmarson did not follow the actual methodology outlined by
11 Cortell, but simply borrowed a chart from the first volume of Cortell's work.
12 [GRIC Submission 348]
13

14 31. Cortell identified optimum recreational flow levels for canoes and
15 kayaks as a depth of two to three feet, a width of 75 to 100 feet and a velocity
16 of 10 feet per second [GRIC Submission 350], substantially greater than any of
17 Hjalmarson's calculations.
18

19 32. Hjalmarson also seemed unfamiliar with the second method he
20 obtained from his attorney to determine navigability, *Methods of Assessing*
21 *Instream Flows for Recreation* (Hyra, 1978). [Bisbee Tr. 196-197]
22

23 33. Hjalmarson admitted that the methodology he used for his report
24 had not been peer reviewed and that no other study had employed the same
25 methodology. [Bisbee Tr. 197-198]
26

1 34. The only “methods” Hjalmarson applied were for determining
2 required flows for modern recreational watercraft.

3 35. The historical accounts of river conditions and navigation of the
4 San Pedro River are inconsistent with the “hydraulic geometry analysis”
5 Hjalmarson provided.
6

7 36. Because the historical accounts of river conditions and navigation
8 of the San Pedro River are not consistent with Hjalmarson’s hydraulic geometry
9 analysis, the Commission rejects Hjalmarson’s analysis.
10

11 37. Hjalmarson admitted that the physical condition of the San Pedro
12 River on February 14, 1912, was not navigable. [1 Phoenix Tr. 65²]
13

14 38. Hjalmarson’s methodology is hypothetical and not representative
15 of the actual conditions at any point on the San Pedro River at any time and
16 might not actually depict anything in real life. [1 Phoenix Tr. 103-104]
17

18 39. Hjalmarson was unable to identify any particular point on the San
19 Pedro River that is exactly the same as described in his hypothetical analysis. [1
20 Phoenix Tr. 104-105]
21

22 40. While Hjalmarson’s analysis only determined hypothetical depth
23 of the river, an ideal model for determining navigability or susceptibility to
24

25 ² Citations to the transcript from the hearing held in Phoenix on August 1, 2013
26 are as “1 Phoenix Tr.” and to the hearing in Phoenix on August 2, 2013 as “2
Phoenix Tr.”

1 navigation would consider factors such as flow rate, the slope of the river, the
2 shape of the river, the composition of the river bed, meanders, cienegas and
3 beaver dams. [2 Phoenix Tr. 90-92]

4
5 41. Because it does not consider several factors critical to determining
6 navigability, Hjalmarson's model is not a valid model for determining whether
7 a river was susceptible to navigation in its ordinary and natural condition.

8 **CONCLUSIONS OF LAW**

9
10 1. A watercourse is "navigable" if it "was in existence on February
11 14, 1912, and at that time was used or susceptible to being used, in its ordinary
12 and natural condition, as a highway for commerce over which trade and travel
13 were or could have been conducted in the customary modes of trade and travel
14 on water." A.R.S. § 37-1101(5).

15
16 2. The Commission is charged with receiving, reviewing and
17 considering all relevant historical or other evidence regarding the navigability
18 of non-navigability of Arizona's watercourses as of February 14, 1912. A.R.S.
19 § 37-1123(A).

20
21 3. Based upon evidence of navigability or non-navigability, the
22 Commission must determine which watercourses were navigable or non-
23 navigable as of February 14, 1912. A.R.S. §§ 37-1123(A)(1), (2).

24
25 4. The Commission's inquiry must include collecting and
26

1 documenting “all reasonably available evidence regarding the condition and
2 usage of a watercourse as of February 14, 1912.” A.R.S. § 37-1124(B).

3 5. “After the commission completes the public hearing with respect
4 to a watercourse, the commission shall again review all available evidence and
5 render its determination as to whether the particular watercourse was navigable
6 as of February 14, 1912. If the preponderance of the evidence establishes that
7 the watercourse was navigable, the commission shall issue its determination
8 confirming that the watercourse was navigable. If the preponderance of the
9 evidence fails to establish that the watercourse was navigable, the commission
10 shall issue its determination confirming that the watercourse was
11 nonnavigable.” A.R.S. § 37-1128(A).

12 6. The burden of proof of navigability rests on the party asserting
13 navigability, *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication*
14 *Comm’n*, 229 P.3d 242, 251 (Ariz.App. 2010) (citations omitted) (“*State v.*
15 *ANSAC*”), and to meet this burden the proponents of navigability must prove
16 navigability by a preponderance of the evidence. *Id.*

17 7. When a party has the burden of proof on any claim by a
18 preponderance of the evidence, it means that the fact finder must be persuaded
19 by evidence that the claim is more probably true than not. Ninth Circuit Model
20 Jury Instructions, 1.3 Burden of Proof—Preponderance of the Evidence.

1 8. Although ANSAC’s process is outlined in the *Arizona Revised*
2 *Statutes*, the determination of questions of navigability for determining state
3 title is governed by federal law. *PPL Montana, LLC v. Montana*, 132 S.Ct.
4 1215, 1227 (2012); *United States v. Oregon*, 295 U.S. 1, 14 (1935); *United*
5 *States v. Utah*, 283 U.S. 64, 75 (1931).

7 9. The standard for navigability expressed in the *Arizona Revised*
8 *Statutes* is a codification of the federal test of navigability first expressed by the
9 Supreme Court of the United States in *The Daniel Ball*, 77 U.S. (10 Wall.) 557,
10 563 (1870), “Those rivers must be regarded as public navigable rivers in law
11 which are navigable in fact when they are used, or are susceptible of being
12 used, in their ordinary condition, as highways for commerce, over which trade
13 and travel are or may be conducted in the customary modes of trade and travel
14 on water.”

15 10. The significance of navigability is that, under the equal-footing
16 doctrine, “the people of each State . . . hold the absolute right to all their
17 navigable waters and the soils under them.” *PPL Montana*, 132 S.Ct. at 1227
18 (citation omitted).

19 11. For state title under the equal-footing doctrine, navigability is
20 “determined at the time of statehood . . . and based on the natural and ordinary
21 condition of the water.” *Id.* at 1228 (citations omitted).

1 12. In *State v. ANSAC*, the Court of Appeals of Arizona addressed the
2 issue of what constitutes the “ordinary and natural condition” of a river for
3 purposes of determining navigability.

4 13. *State v. ANSAC* is erroneous for a number of reasons and must be
5 interpreted in light of *PPL Montana*.

6 14. The statement that the Commission may not begin with any
7 presumption *against* navigability, *State v. ANSAC*, 229 P.3d at 251, directly
8 contradicts the legal concept of the burden of proof, which has the practical
9 effect of creating a presumption in favor of the party without the burden. The
10 court’s citation to A.R.S. § 37-1121(B) on this issue is completely misplaced
11 because lack of bias is not the same as a legal presumption which operates
12 against the party with the burden of proof. Thus, in the absence of a *prima facie*
13 case of navigability, the Commission would necessarily have to find the San
14 Pedro River is non-navigable.

15 15. *State v. ANSAC* also held that the Commission misapplied the
16 “ordinary and natural condition standard” because it was unclear whether the
17 Commission considered the meaning of both “ordinary” and “natural” and
18 surmised that the Commission “effectively conflated these terms.” *Id.* at 253-4.

19 16. Instead of considering federal law on this federal issue, the court
20 applied Arizona law to the definition which appears at A.R.S. § 37-1101(5), to
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1 determine the Arizona legislature's intent. *Id.* at 252 (citations omitted).

2 17. In applying Arizona law to this federal standard, the court
3 concluded that "ANSAC was required to determine what the River would have
4 looked like on February 14, 1912, in its ordinary (i.e., usual, absent major
5 flooding or drought) and natural (i.e., without man-made dams, canals or other
6 diversions) condition." *Id.* at 253 (citations omitted).

7
8 18. In its analysis, however, *State v. ANSAC* failed to consider law
9 which clearly provides that it is to look at the physical condition of a river as of
10 the date of statehood.

11
12 19. This includes A.R.S. § 37-1124(B), which charges the Commission
13 with collecting and documenting all reasonably available evidence "regarding
14 the condition and usage of a watercourse as of February 14, 1912."

15
16 20. In discussing the relevance of evidence of modern day recreational
17 use of a stream in *PPL Montana*, the Supreme Court held that a proponent of
18 navigability must show that "the river's poststatehood condition is not
19 materially different from its physical condition at statehood." *PPL Montana*,
20 132 S.Ct. at 1233 (citation omitted).

21
22 21. The standard established in *State v. ANSAC* is vague and
23 unworkable because a river's ordinary and natural condition, as defined by the
24 court, could be based upon time periods encompassing or separated by
25
26

1 hundreds or thousands of years with conflicting results.

2 22. The Commission should presume that the river's physical
3 condition, as of the date of statehood, is the natural and ordinary condition of
4 the river for purposes of determining navigability.
5

6 23. In its physical condition as of the date of Arizona's statehood,
7 February 14, 1912, the San Pedro River was neither used nor susceptible to
8 being used, in its ordinary and natural condition, as a highway for commerce
9 over which trade and travel were or could have been conducted in the
10 customary modes of trade and travel on water.
11

12 24. In *PPL Montana*, the Supreme Court also rejected use of modern
13 day recreation as a basis for determining navigability as of the date of
14 statehood, holding that the Montana Supreme Court erred in relying upon
15 evidence of present-day, primarily recreational use. *PPL Montana*, 132 S.Ct. at
16 1233.
17

18 25. Instead, the court said that "evidence must be confined to that
19 which shows the river could sustain the kinds of commercial use that, as a
20 realistic matter, might have occurred at the time of statehood." *Id.* "Mere use"
21 by explorers or trappers is not enough. *Id.*
22

23 26. As with the issue involving the physical condition of the river at
24 the time of statehood, the Supreme Court was clear that use or susceptibility of
25
26

1 use as a highway of commerce is to be determined “at the time of statehood.”

2 *Id.*

3 27. “Evidence of present-day use may be considered to the extent it
4 informs the historical determination whether the river segment was susceptible
5 of use for commercial navigation at the time of statehood.” *Id.*

7 28. In undertaking this analysis, “it must be determined whether trade
8 and travel could have been conducted in the customary modes of trade and
9 travel on water over the relevant river segment in its natural and ordinary
10 condition.” *Id.* (citation omitted).

12 29. The only historical uses of the San Pedro River which appear in the
13 record are “mere use” by trappers and explorers on a few occasions.

15 30. The San Pedro River was not used for navigation prior to
16 Arizona’s statehood, February 14, 1912.

18 31. The San Pedro River was not susceptible to use for navigation in
19 its ordinary and natural condition at the time of Arizona’s statehood, February
20 14, 1912.

22 32. The only methodology proffered by proponents of navigability for
23 determining whether the San Pedro River was susceptible to navigation in its
24 natural and ordinary condition were two studies for determining suitability for
25 modern-day recreation—*Methods of Assessing Instream Flows for Recreation*
26

1 (Hyra, 1978) and *Recreation and Instream Flow, Vol. 1, Flow Requirements,*
2 *Analysis of Benefits, Legal and Institutional Constraints* (Jason M. Cortell &
3 Assoc., Inc., 1977).

4
5 33. The proponents' method and analysis fails to meet the
6 requirements of *PPL Montana* because the proffered methods are exclusively
7 for determining present-day recreational use with modern watercraft and there
8 was no testimony or evidence that the results of applying those methods would
9 apply to the customary modes of trade and travel on water as of the date of
10 statehood.
11

12
13 34. While not directly applicable to the admissibility of testimony in
14 public hearings, the federal case law on the admissibility of scientific evidence
15 may be helpful as a standard for evaluating the scientific testimony proffered by
16 the proponents of navigability in this matter because the applicable cases
17 address the evaluation of scientific evidence.
18

19 35. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579
20 (1993), the Supreme Court of the United States established standards for the
21 admissibility of scientific evidence in federal courts under the Federal Rules of
22 Evidence.
23

24 36. In *Daubert*, the Supreme Court stated that when faced with a
25 proffer of expert scientific testimony, a trial judge must conduct a "preliminary
26

1 assessment of whether the reasoning or methodology underlying the testimony
2 is scientifically valid and whether that reasoning or methodology properly can
3 be applied to the facts in issue.” 509 U.S. at 592-3.

4
5 37. This includes: (a) whether the theory or technique can be and has
6 been tested, (b) whether the theory or technique has been subjected to peer
7 review and publication; (c) consideration of the known or potential rate of error;
8 and (d) whether the method used has general acceptance in the scientific
9 community. *Id.* at 593-4.

11 38. The testimony and evidence proffered by the proponents of
12 navigability meets *none* of the standards for expert scientific evidence and the
13 testimony and evidence provided by Mr. Hjalmarson should be rejected in its
14 entirety.

16 39. The proponents of navigability have failed to meet their burden of
17 proof.

19 40. The Commission applied the correct legal standard in its prior
20 proceedings.

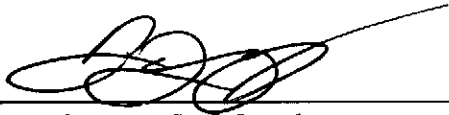
22 41. The Commission reaffirms the conclusions it made in its Report,
23 Findings and Determination Regarding the Navigability of the San Pedro River
24 from the Mexican Border to the Confluence with the Gila River on October 18,
25 2006.
26

1 42. Should *State v. ANSAC* require the application of a different legal
2 standard, in light of *PPL Montana*, the Commission concludes that the San
3 Pedro River was not used or susceptible to being used, in its ordinary and
4 natural condition, as a highway for commerce over which trade and travel were
5 or could have been conducted in the customary modes of trade and travel on
6 water.
7

8 43. Because the San Pedro River is nonnavigable in its entirety, there
9 is no reason for the Commission to perform a segmentation analysis under *PPL*
10 *Montana*.
11

12 DATED this 27th day of September 2013.
13

14 GILA RIVER INDIAN COMMUNITY

15 By 
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17 Thomas L. Murphy
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