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1 John B. Weldon, Jr., 003701  
2 Mark A. McGinnis, 013958  
3 R. Jeffrey Heilman, 029525  
4 **SALMON, LEWIS & WELDON, P.L.C.**  
5 2850 East Camelback Road, Suite 200  
6 Phoenix, Arizona 85016  
7 (602) 801-9060  
8 [jbw@slwplc.com](mailto:jbw@slwplc.com)  
9 [mam@slwplc.com](mailto:mam@slwplc.com)  
10 [rjh@slwplc.com](mailto:rjh@slwplc.com)

*Attorneys for Salt River Project Agricultural  
Improvement and Power District and Salt  
River Valley Water Users' Association*

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

13 In re Determination of Navigability of  
14 the Gila River

No. 03-007-NAV

15 **SALT RIVER PROJECT'S**  
16 **RESPONSIVE CLOSING BRIEF**

17 Pursuant to the Second Amended Order Clarifying Deadlines and Hearing Dates dated  
18 December 23, 2014, the Salt River Project Agricultural Improvement and Power District and  
19 Salt River Valley Water Users' Association (collectively, "SRP") submit their responsive  
20 closing brief regarding the Gila River ("Gila"). Based upon the evidence in the record and the  
21 appropriate legal test, the Commission should find that the Gila is not navigable.

22 SRP received briefs from three groups of parties contending that the Gila is navigable  
23 ("Proponents"): The Arizona State Land Department; the Defenders of Wildlife, et al.; and  
24 Maricopa County and the Flood Control District of Maricopa County.<sup>1</sup> SRP responds to those  
25 three briefs herein. In addition to SRP, three other parties filed briefs taking the position that  
26 the Gila is not navigable: Freeport Minerals Corporation, the Gila River Indian Community,

27 <sup>1</sup> See Arizona State Land Department's Closing Brief on the Navigability of the Gila River for State  
Title Purposes (November 14, 2014) ("SLD Brief"); Closing Memorandum Regarding the  
Navigability of the Gila River (November 14, 2014) ("DOW Brief"); Maricopa County and The  
Flood Control District of Maricopa County's Post-Hearing Closing Brief Regarding Navigability of  
the Gila River in "Natural and Ordinary" Condition on February 14, 1912 (November 14, 2014)  
("County Brief").

1 and the San Carlos Apache Tribe.<sup>2</sup> Because SRP generally agrees with the arguments  
2 presented in those three briefs, it does not address them in this response.

3 Many of the issues raised in Proponents' briefs already were addressed in SRP's  
4 November 14, 2014 brief, which was filed simultaneously with Proponents' briefs.<sup>3</sup> Rather  
5 than repeat the points made in SRP's Brief, this responsive brief incorporates that prior filing  
6 by reference and focuses primarily on those issues raised by Proponents that were not  
7 specifically discussed in SRP's Brief.

8 **I. No Arizona Court Has Yet Examined the Navigability of the Gila.**

9 In its brief, the County discusses the 2005 testimony to this Commission by Dr.  
10 Stanley Schumm. *See* County Brief, at 26-27. In that discussion, the County asserts that,  
11 with regard to the Lower Gila, "Dr. Schumm testified that he did not study the natural and  
12 ordinary conditions of the Gila River. . . . That is one of the principal reasons this case is  
13 again before this Commission." *Id.* at 27 (citations omitted). That assertion is patently false,  
14 for at least two reasons. First, Dr. Schumm's work did include a study of the Gila in the mid-  
15 1800s, a time when even the SLD admits the river was in its "ordinary and natural condition."  
16 *See* SLD Brief, at 4. Dr. Schumm's report and testimony presented the earliest possible data  
17 and evidence regarding the geomorphology of the Gila.<sup>4</sup> Among other things, Dr. Schumm  
18 reviewed and considered U.S. General Land Office plats from 1867, 1869, 1875, and 1883.  
19 *See id.* Figures 7, 8, 10, and 11.

20 Second, and perhaps more important, although an appeal to the Superior Court was  
21 taken from the Commission's 2009 Gila River decision ("2009 Decision"),<sup>5</sup> the court never

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22 <sup>2</sup> *See* Freeport Minerals Corporation's Opening Post-Hearing Memorandum Concerning the Non-  
23 Navigability of the Gila River (November 14, 2014) ("Freeport Brief"); Gila River Indian  
24 Community's Closing Brief (November 14, 2014) ("GRIC Brief"); The San Carlos Apache Tribe's  
25 "Opening" closing Post-Hearing Memorandum Regarding the Navigability of the Gila River  
(November 14, 2014) ("SCAT Brief").

26 <sup>3</sup> *See* Salt River Project's Closing Brief (November 14, 2014) ("SRP Brief").

27 <sup>4</sup> *See, e.g.,* Schumm, *Geomorphic Character of the Lower Gila River* 16 (June 2004) [EI 6].

<sup>5</sup> ANSAC, Report, Findings and Determination Regarding the Navigability of the Gila River from the  
New Mexico Border to the Confluence with the Gila River (January 27, 2009).

1 addressed the merits of that appeal. The Commission issued its 2009 Decision four years  
2 after its decision on the Lower Salt River and after oral argument was held on the Lower Salt  
3 River case in the Court of Appeals. *See* SRP Brief, at 1-2. No support exists for the County’s  
4 assertion that any judicial examination of this Commission’s 2009 Decision or Dr. Schumm’s  
5 2005 Gila River testimony was “one of the principal reasons this case is again before this  
6 Commission.” *See* County Brief, at 27.

7 The Gila River case was remanded to this Commission by stipulation of the parties, in  
8 order to give the Commission an opportunity to consider its decision and receive additional  
9 evidence, if necessary, in view of the opinion regarding the Lower Salt in *State v. Arizona*  
10 *Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010), and the  
11 United States’ Supreme Court’s subsequent decision in *PPL Montana, LLC v. Montana*, 132  
12 S. Ct. 1215 (2012). Contrary to the County’s assertion, it was not the result of any court’s  
13 substantive review of the Commission’s 2009 Decision on the Gila.<sup>6</sup>

14 The County also contends (again without appropriate citation to the record) that the  
15 Commission’s 2009 Decision “was based upon a mistaken legal premise, which ignored the  
16 legal requirement that the river be evaluated in its ordinary and natural condition.” County  
17 Brief, at 28. This contention is contrary to the plain language on the face of the 2009  
18 Decision itself. For instance, this Commission specifically found that the Gila “was not  
19 navigable or susceptible of navigability in 1860 and before, when white settlers first began to  
20 divert water for irrigation . . . .” 2009 Decision, at 79. Given that even the SLD contends that  
21 “[t]he River was in its ordinary and natural condition as of approximately 1860,” *see* SLD  
22 Brief, at 4, the County’s assertion that the 2009 Decision did not consider the Gila in its  
23 “ordinary and natural condition” is a complete fabrication that finds no support in the record.

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26 <sup>6</sup> *See, e.g.*, DOW Brief, at 14 (“After the Court of Appeals remanded the Lower Salt matter, the  
27 parties agreed that the stayed appeals should be remanded as well. Consequently, unlike the  
adjudication of the Lower Salt River, there is no specific instruction in this case as to what constitutes  
the ‘best evidence’ of the natural and ordinary condition of this river.”).

1 **II. Proponents Overstate the Evidence in Their Case.**

2 Throughout their briefs, Proponents consistently overstate the evidence they presented  
3 before and during the 2014 hearing. For instance, they exaggerate the number of times people  
4 in the 1800s and early 1900s tried to float boats on the Gila. The County states that “**many**  
5 people used the river to navigate while diversions were actually happening.” County Brief, at  
6 12 (emphasis added); *see also id.* at 29 (referring to “**multiple** historical records of successful  
7 navigation down the Gila River during the 1800s”) (emphasis added). The SLD refers to  
8 “[s]**ignificant numbers** of historical boating accounts” and asserts that, at least with respect  
9 to its Segment 7, the “[h]istorical documentation of the River’s use for trade and travel is  
10 **fairly robust.**” SLD Brief, at 11, 26 (emphasis added). DOW twice speaks of “**numerous**”  
11 accounts of boating on the Gila. DOW Brief, at 7, 19 (emphasis added).

12 The Commission heard nine days of hearing testimony in 2014 and has had an  
13 opportunity to review the record from the prior hearings. It can make its own determination  
14 of the relative frequency of boating attempts on the Gila. SRP submits, however, that the  
15 historical accounts of boating are not “numerous,” “significant,” or “fairly robust,” especially  
16 when one considers that the accounts of boating attempts in the record come after two  
17 decades of substantial efforts by historians and other experts to find documentation of such  
18 attempts. The accounts of boating attempts in the record must be viewed in the context of the  
19 fact that those research efforts covered at least seven decades of history (from the 1840s to the  
20 early 1900s) and that more than 10,000 people lived in the area of the Gila, even in the  
21 earliest of those decades. *See, e.g.,* SLD Brief, at 16; GRIC Brief, at 9-10.<sup>7</sup>

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23  
24 <sup>7</sup> As Mr. Fuller did in his hearing testimony, *see generally* SRP Brief, the SLD attempts to downplay  
25 the accounts of failed attempts to navigate the Gila during the 1800s, referring to the watercraft used  
26 in those attempts as “awkward” and “not particularly nimble.” *See* SLD Brief, at 26. Those  
27 watercraft were the ones chosen by the participants who were there at the time, however, and their  
decision about what type of watercraft might best be able to navigate the river should not be subject  
to second-guessing more than a century later. Furthermore, the availability of less awkward and more  
nimble watercraft using modern technology was rejected as evidence of navigability by the U.S.  
Supreme Court in *PPL Montana*. 132 S. Ct. at 1234.

1           Despite the plethora of adjectives used by Proponents to describe the accounts of  
2 boating attempts, it is beyond reasonable dispute that evidence of such attempts on the Gila is  
3 relatively sparse given the population, the long time period in question, and the significant  
4 efforts made by the parties and witnesses to locate such evidence.

5           In addition to their exaggeration of the relative number of accounts of boating attempts  
6 on the Gila, Proponents also take other liberties with the evidence in the record. For instance,  
7 the SLD states that “[t]he experts for the non-navigability proponents also agree the Gila had  
8 a single channel in its ordinary and natural condition.” SLD Brief, at 6 n.4. The extent of  
9 exaggeration in the SLD’s statement is shown by the excerpt from the transcript of the  
10 hearing testimony by Dr. Mussetter (SRP’s expert) that the SLD itself cites, for example,  
11 where he discusses anecdotal evidence “that **portions** of the Gila River in the mid-1800s did  
12 have a single-thread channel.” *Id.* (citing Tr. at 08/19/14:1699) (emphasis added).

13           DOW cites the diary of James Ohio Pattie as support for its assertion that Mr. Pattie  
14 “also described making eight dugout canoes and using them to carry furs from Safford to  
15 Yuma.” DOW Brief, at 8. Mr. Pattie’s diary and Mr. Fuller’s testimony regarding that diary  
16 and other related documents were addressed at length on cross-examination of Mr. Fuller and  
17 in SRP’s prior brief. *See* SRP Brief, at 6-7. DOW cites Mr. Fuller’s direct testimony on those  
18 issues but ignores that fact that, on cross-examination, Mr. Fuller conceded that the  
19 documents indicate that the canoes in question were used on the Colorado River, not the Gila.  
20 *See* Tr. at 06/16/14:327-28; SRP Brief, at 6. No credible evidence exists in the record to  
21 support a factual finding that Mr. Pattie ever used “eight dugout canoes” to “carry furs from  
22 Safford to Yuma” down the Gila River. *See id.*

23           DOW also points to “multiple” ferries that operated on the Gila for “many” years as  
24 evidence of navigability. *See* DOW Brief, at 10. Prior courts have discounted the value of  
25 ferry evidence, however:

26           The ferries on the Little Missouri River served the sole purpose of providing  
27 passage across the river. Although the ferries operated on the water, they were  
the functional equivalents of bridges. The existence of a bridge on a river may

1 establish that the bed of the river is covered at times by water too deep or too  
2 wide at any given point to be crossed by foot, by horse, or by automobile;  
3 however, it does not establish that the river is a channel for useful commerce.  
4 On the contrary, the existence of a bridge, or a ferry, establishes that the river is  
5 an obstruction to commerce which must be overcome. Clearly, those persons  
6 who used the ferries to cross the river would have had less difficulty making  
7 their trips had the river not existed.

8 *North Dakota v. United States*, 770 F. Supp. 506, 511 (D.N.D. 1991), *aff'd*, 972 F.2d 235 (8th  
9 Cir. 1992).<sup>8</sup>

10 Many of Proponents' arguments about actual navigation are based upon speculation  
11 and supposition, not fact. For instance, the SLD contends that, because some of the  
12 conflicting evidence regarding Mr. Pattie shows that his party might have used a canoe to  
13 cross the river and set traps in order to avoid leaving a scent that would discourage beavers,  
14 "it is entirely logical and probable that other, undocumented trappers did the same thing."  
15 SLD Brief, at 12. Thus, the SLD is speculating that, even though exhaustive research has  
16 revealed no evidence that any other trappers used boats on the river for any purpose, it is  
17 "entirely logical and probable" that they did. That is speculation by counsel; it is not  
18 evidence.

19 Similarly, the SLD points to an 1880 photograph showing a covered wagon crossing  
20 the river near Calva and suggests that such photograph supports a finding of navigability. *See*  
21 SLD Brief, at 19. The SLD's argument is based upon speculation that the persons in the  
22 photograph would have crossed the river at the shallowest possible location and not  
23 necessarily the narrowest location. *Id.* The 1880 photograph is evidence only of the location  
24 at which it was taken on the date on which it was taken. The SLD cannot, by implication and  
25 speculation, credibly use this photograph to show that the Gila was navigable at other places  
26 at other times. If anything, that photograph shows that the river was not navigable where and

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26 <sup>8</sup> *See also, e.g., United States v. Crow, Pope & Land Enters., Inc.*, 340 F. Supp. 25, 35 (N.D. Ga.  
27 1972), *appeal dismissed*, 474 F.2d 200 (5th Cir. 1973) ("the existence of ferries is no more an  
example of commercial use than the presence of a bridge or railroad trestle whose primary purpose is  
to avoid the river rather than to employ it as a means for trade or transportation").

1 when it was taken and that a cow could walk across the Gila without getting more than its  
2 hooves wet.

3 Proponents bear the burden of proof and cannot meet that burden based upon  
4 speculation and supposition. *See* SRP Brief, at 18-19. They need facts, and they do not have  
5 enough facts to support a finding that the Gila was or could have been used as a “highway for  
6 commerce,” in its “ordinary and natural condition” or otherwise.

7 **III. Proponents Continue to Rely upon the “Liberal” Interpretation of the Federal**  
8 **Test that the U.S. Supreme Court Rejected in *PPL Montana*.**

9 In an effort to stretch the limited evidence of actual navigation or susceptibility over  
10 the frame of the legal test of navigability, Proponents continue to argue that the test is  
11 extremely liberal. The SLD asserts that “[t]he United States Supreme Court has liberally  
12 construed what is sufficient for the highway of commerce component of the *Daniel Ball* test.”  
13 SLD Brief, at 10. The SLD refers to three Supreme Court decisions in that paragraph of its  
14 brief, none of which supports its position.

15 The SLD first cites *Utah v. United States*, 403 U.S. 9 (1971), *cited in* SLD Brief, at 10.  
16 In that case, boats had been used on the Great Salt Lake to haul livestock in a ranching  
17 business, and other evidence indicated that boats were used to transport salt, passengers,  
18 freight, ore, and cedar posts. 403 U.S. at 11. That evidence is substantively different from  
19 the evidence introduced by Proponents in this case regarding the Gila, especially as it relates  
20 to the “commercial” aspect of the travel.

21 The SLD also relies upon *Alaska v. United States*, 754 F.2d 851 (9th Cir.), *cert. denied*,  
22 474 U.S. 968 (1985), stating that the “central theme remains the movement of people or goods  
23 from point to point on the water.” *See* SLD Brief, at 10. The Ninth Circuit in that case  
24 focused on the phrase “‘customary modes of trade and travel on water,’ taking into account  
25 transportation methods in use at the time of statehood.” *Alaska*, 754 P.2d at 854. That  
26 opinion does not help the SLD because the SLD has not shown that the Gila was used or  
27 susceptible to being used for navigation in the “customary modes of trade and travel on

1 water” using the “transportation methods in use at the time of statehood.” *See generally* SRP  
2 Brief; *see also* Note 7, *supra*.

3 The SLD also continues to cite to the Eighth Circuit’s opinion in *North Dakota v.*  
4 *Andrus*, 671 F.2d 271 (8th Cir. 1982), *rev’d on other grounds sub nom. Block v. North*  
5 *Dakota*, 461 U.S. 273 (1983). *See* SLD Brief, at 10. Despite noting that the opinion upon  
6 which it relies was reversed by the U.S. Supreme Court, the SLD ignores the fact that such  
7 reversal makes the Eighth Circuit opinion a nullity.

8 The *North Dakota* case involved the navigability of the Little Missouri River. *See*  
9 *North Dakota v. Andrus*, 506 F. Supp. 619 (D.N.D. 1981). That dispute began in 1981 as a  
10 case between the United States and the State of North Dakota. *Id.* The United States,  
11 throughout the first phases of that litigation, consistently contended that the Federal Quiet  
12 Title Act (“QTA”) applied and that, under the QTA, North Dakota had waited too long to  
13 bring its “public trust” title claim. *See North Dakota v. Andrus*, 671 F.2d at 273. In 1983, the  
14 U.S. Supreme Court agreed with the United States that North Dakota’s “public trust” title  
15 claims were subject to the statute of limitations under the QTA and, therefore, North Dakota  
16 had waited too long to bring those claims. *See Block v. North Dakota*, 461 U.S. at 273.  
17 Following that decision, North Dakota led a successful initiative to amend the QTA and  
18 relieve itself from the effects of the statute of limitations. *See North Dakota v. United States*,  
19 972 F.2d at 237 n.2.

20 After the QTA was amended, North Dakota filed a second lawsuit in the same court to  
21 assert its same claims to streambed lands against the United States. This time, however, the  
22 United States hired experts, submitted evidence, and vigorously presented its factual case  
23 regarding navigability. *North Dakota v. United States*, 770 F. Supp. at 506. When presented  
24 with a more complete evidentiary record, the same federal district court that had in 1981  
25 found the river navigable at statehood held in 1991 that “North Dakota ha[d] failed to prove  
26 by a preponderance of the evidence that the Little Missouri River was a navigable river when  
27

1 North Dakota was admitted to the union and became a state in 1899.” *Id.* at 513. The Eighth  
2 Circuit Court of Appeals affirmed in 1992. *North Dakota v. United States*, 972 F.2d at 240.

3 The SLD’s reliance on the 1982 Eighth Circuit opinion is inappropriate and unhelpful  
4 to it. Because the 1981 decision was made by a court acting outside its authority under the  
5 QTA (as subsequently found by the U.S. Supreme Court in 1983), neither the 1981 nor the  
6 1982 decision has any force or effect as a matter of law. In fact, in the second round of  
7 litigation starting after the QTA was amended, North Dakota argued that the 1981 decision  
8 was entitled to great weight as “law of the case,” but the court of appeals rejected that  
9 argument: “In view of our holding that the trial court was without jurisdiction to inquire into  
10 the merits of North Dakota’s complaint, however, we need not belabor this point. **Entered in**  
11 **the absence of jurisdiction, the entire judgment must be reversed.**” *North Dakota v.*  
12 *Block*, 789 F.2d 1308, 1314 (8th Cir. 1986) (emphasis added); *see also North Dakota v.*  
13 *United States*, 770 F. Supp. at 508 n.6; *North Dakota v. United States*, 972 F.2d at 237 n.3.

14 The controlling authority on the “liberal interpretation” argument is, of course, the U.S.  
15 Supreme Court’s recent decision in *PPL Montana*. As discussed in detail in SRP’s prior  
16 brief, the U.S. Supreme Court in *PPL Montana* rejected the Montana Supreme Court’s  
17 “liberal interpretation” of the federal test, including the “commerce” requirement. *See* SRP  
18 Brief, at 19-21. Among other things, the U.S. Supreme Court concluded: “By contrast,  
19 segments which were nonnavigable at the time of statehood are those over which commerce  
20 could not then occur.” *PPL Montana*, 132 S. Ct. at 1227-28. The U.S. Supreme Court  
21 continued: “While the Montana court was correct that a river need not be susceptible to  
22 navigation at every point during the year, neither can that susceptibility be so brief that it is  
23 not a commercial reality.” *Id.* at 1223-24.

24 **IV. Proponents Largely Ignore an Important Element of the “Susceptibility”**  
25 **Component of the Federal Test for Navigability.**

26 Despite the exaggerated language they use to describe the number of actual attempts of  
27 boating on the Gila, *see* Section II, *supra*, Proponents rely heavily on the “susceptibility”

1 component of the test, arguing that, even if the Gila was not actually navigated in its  
2 “ordinary and natural condition,” it was susceptible to navigation if anyone had really tried.  
3 The SLD, for instance, quotes a portion of a passage from the U.S. Supreme Court’s decision  
4 in *United States v. Utah*, 283 U.S. 64, 82 (1931), as support for its “susceptibility” argument.  
5 *See* SLD Brief, at 3.

6 DOW puts forth a more complete quotation from the *United States v. Utah* opinion, but  
7 then proceeds to largely ignore in the remainder of its brief the important language that it  
8 quotes. As DOW acknowledges, the *United States v. Utah* Court stated:

9 . . . Utah . . . is not to be denied title to the beds of such of its rivers as were  
10 navigable in fact at the time of the admission of the state **either because the**  
11 **location of the rivers and the circumstances of the exploration and**  
12 **settlement of the country through which they flowed made recourse to**  
13 **navigation a late adventure or because commercial utilization on a large**  
14 **scale awaits future demands.** The question remains one of fact as to the  
15 capacity of the rivers in their ordinary condition to meet the needs of commerce  
16 as they may arise in connection with the growth of the population, the  
multiplication of activities, and the development of natural resources. And this  
capacity may be shown by physical characteristics and experimentation as well  
as by the uses in which the stream have been put.

17 283 U.S. at 83, *quoted in* DOW Brief, at 18 (emphasis added).

18 DOW then proceeds with no analysis of whether the “location” of the Gila or the  
19 “circumstances of the exploration and settlement” of central Arizona “made recourse to  
20 navigation a late adventure” or that “commercial utilization on a large scale awaits future  
21 demands.” *See* DOW Brief. None of the other Proponents has satisfied its burden of showing  
22 that the Gila was “susceptible” to navigation and that its “location” or the “circumstances of  
23 the exploration and settlement” of the region “made recourse to navigation a late adventure”  
24 or that “commercial utilization on a large scale awaits future demands.” In fact, the evidence  
25 is just the opposite. People inhabited central Arizona for centuries prior to statehood. *See*  
26 SRP Brief, at 2-5 and evidence cited therein. Thousands of residents were present in the mid-  
27 1800s. *See* SLD Brief, at 16; GRIC Brief, at 9-10. Trade and travel through the desert was

1 extremely difficult, and a navigable watercourse from eastern Arizona, through Florence,  
2 Sacaton, and the Phoenix area, and all the way to Yuma and the seaport in the Gulf of  
3 California would have been invaluable. *See generally, e.g.,* Mr. Burtell’s report and  
4 testimony. No need existed for “commercial utilization” to “await future demands” because  
5 such demand already existed in the 1800s. *See id.* Notwithstanding significant efforts by Mr.  
6 Fuller and others to explain the relative lack of boating attempts despite all of these incentives  
7 to develop waterborne trade and travel, Proponents have been unable to do so. *See, e.g.,* SRP  
8 Brief, at 4-9 and evidence cited therein.

9 As the U.S. Supreme Court noted in *United States v. Utah*: “The evidence of the  
10 actual use of streams, and especially the extensive and continued use for commercial purposes  
11 may be most persuasive, but, **where conditions of exploration and settlement explain the**  
12 **infrequency or limited nature of such use**, the susceptibility to use as a highway of  
13 commerce may still be satisfactorily proved.” 283 U.S. at 82 (emphasis added). Proponents  
14 have failed to prove that “conditions of exploration and settlement” explain the lack of use of  
15 the Gila as a highway for commerce.

16 **V. Mr. Hjalmarson’s Testimony is No More Persuasive Now than It Was in 2005.**

17 The County places great reliance on the 2005 testimony of Mr. Hjalmarson, referring  
18 to that testimony as the “best available evidence.” County Brief, at 6; *see also id.* at 3-9.  
19 That reliance is misplaced, for at least three reasons.

20 First, counsel for the County has spent substantial time in these proceedings on cross-  
21 examination reading long passages from court opinions into the record and questioning  
22 whether a particular expert has considered those passages in rendering his or her opinion.  
23 *See, e.g.,* County Brief, at 13-28. The 2014 hearing was specifically intended to take  
24 evidence regarding issues raised by *State v. ANSAC* (2010) and *PPL Montana* (2012). *See,*  
25 *e.g.,* Agenda for June 16, 2014 Hearing. The County now relies almost exclusively on reports  
26 and testimony presented by Mr. Hjalmarson in 2005, long before the issuance of either of  
27 those court decisions. *See* County Brief, at 3-9 (relying upon testimony from November 17,

1 2005). Mr. Hjalmarson was present for most or all of the nine days of hearing in 2014, but  
2 the County never called him to testify during that hearing, and he submitted no written  
3 supplement to his report. *See generally* Tr.<sup>9</sup> Thus, there is nothing in the record to show that  
4 Mr. Hjalmarson considered either of those two court decisions in rendering his opinions and,  
5 in fact, he could not have considered those court decisions because they were issued **several**  
6 **years after** he submitted his reports and testified. Furthermore, there is not even anything in  
7 the record to show that Mr. Hjalmarson still holds those same opinions in light of *State v.*  
8 *ANSAC* and *PPL Montana*. The County argues that experts should be precluded from  
9 testifying unless their opinions are based upon the proper legal standards. *See* County Brief,  
10 at 19. Because he presented his only reports and testimony years before *State v. ANSAC* and  
11 *PPL Montana* were decided, Mr. Hjalmarson does not satisfy the County’s own standard.

12         Second, the Commission heard Mr. Hjalmarson’s live testimony in 2005, considered  
13 that testimony, and largely rejected his opinions. In its 2009 Decision, for instance, the  
14 Commission noted that Mr. Hjalmarson’s opinions were based upon averages and “averages  
15 do not have a great deal of meaning as it would a very rare day to have that exact amount of  
16 water flowing and the extremes show the unpredictability and undependability of the flow in  
17 the river.” 2009 Decision, at 73. Furthermore, Mr. Hjalmarson’s opinions relied upon the  
18 assumption that “the typical natural channel, like the natural channel of the Gila River, is  
19 approximately parabolic in shape.” *Id.* The Commission found that “[t]his is a singularly  
20 unusual conclusion in view of the testimony of so many parties as to the braided condition of  
21 the river and the sand islands, sand bars and other obstacles reported by others.” *Id.*

22         The Commission also found that Mr. Hjalmarson’s flow numbers were taken from  
23 U.S. Geological Survey reports on the Salt River Indian Reservation on the Salt River and the  
24 Gila River Indian Reservation on the Gila. *See* 2009 Decision, at 74. The Commission

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25  
26 <sup>9</sup> It is particularly ironic that the County complains about its lack of an opportunity to cross-examine  
27 Dr. Lingenfelter on his affidavit, when its own witness also chose not to take the stand during the  
2014 hearing even though he sat in the hearing room throughout the proceeding. *See* County Brief, at  
20.

1 determined that Mr. Hjalmarson took those two numbers and then “put[] them down river to  
2 the junction of the Gila and Salt Rivers.” *Id.* The Commission determined: “These figures  
3 do not agree with the figures obtained from the gauging stations and other evidence in the  
4 State Land Department’s report. Also, it does not give adequate consideration, if any, to the  
5 infiltration on the middle and lower reaches of the Gila River.” *Id.*

6 After considering the entirety of Mr. Hjalmarson’s report and testimony on the Gila,  
7 the Commission concluded:

8 In his testimony, Mr. Hjalmarson admitted that this was the only  
9 navigability study that he had ever performed. (TR, Nov. 17, 2005, p. 312) He  
10 stated that in making his report and preparing for his testimony, he made certain  
11 assumptions as to what he thought the river should have looked like in 1860 and  
12 then applied various empirical tests to it to see if his assumption was correct.  
13 He also admitted that if the assumptions and the tests did not conform to actual  
14 conditions as reported by observers on the river, there could be a problem with  
15 his conclusions. (TR, Nov. 17, 2005, pp. 301-302) **While his report was  
16 impressive, its credibility was not high.**

17 2009 Decision, at 76 (emphasis added).

18 Third, Mr. Hjalmarson’s 2002 report and 2005 testimony were inconsistent with a prior  
19 version of his report in the record. Exhibit EI 25 is an unedited 2001 draft of his report.<sup>10</sup> In  
20 that 2001 version of his report, Mr. Hjalmarson expressed opinions that were contrary to what  
21 he said on direct examination by the County’s counsel in the 2005 hearing and also contrary  
22 to the position that the County is still taking in this matter.<sup>11</sup> For instance, Mr. Hjalmarson

23 <sup>10</sup> Hjalmarson, “Confidential Notes: The Ability to Navigate the Gila River Under Natural  
24 Conditions, Below the Confluence with the Salt River to the Mouth at Yuma, Arizona” (July 2001)  
25 [EI 25] (“2001 Hjalmarson Draft”).

26 <sup>11</sup> See also 2009 Decision, at 74-75 (“This document [EI 25] was apparently a first draft of his official  
27 assessment and contained a number of statements in conflict with and which were left out of his  
official report”); see also Deposition of Hjalmar Hjalmarson, at 20, *A-Tumbling-T v. Paloma  
Investment 44* (January 16, 2003) [EI 24] (referring to his 2001 draft: “These are – what I did in the  
production of the report and because of the way I – because of my history of commonly producing  
reports from the work I do, the way I go about doing the job is I put things together as if it’s going to  
be published.”); see also *id.* at 21-22 (clarifying that the report generated from his 2001 draft was the  
one filed with this Commission in 2002).

1 repeatedly referred to the multiple channels and braiding of the Lower Gila, both in its  
2 predevelopment condition and under current conditions:

3 1. “Two of the sites where [sic] selected because they were braided channels that  
4 represented the worst-case condition for navigability. It is unknown if the braided conditions  
5 were representative of natural conditions.” 2001 Hjalmarson Draft, at 35.

6 2. “Following very large floods[,] the channel may have become destabilized and  
7 reaches may have developed multiple channels of braids. Braided channels divide and  
8 combine.” *Id.*

9 3. “There may have been channel braiding in places along the Gila River as  
10 suggested by the oldest available USGS topographic maps. There was also at least one  
11 historic account of multiple channels.” *Id.*

12 4. “Following a very large flood, the channel may more than double in width (at  
13 the expense of flood-plain areas), straighten, and modify to a braided pattern. Most silt and  
14 fine sand may be washed from the bed material, and coarse-sand to gravel sizes would be  
15 added by destruction and reworking of flood-plain deposits. This braided channel condition  
16 would be unstable.” *Id.* at 41.

17 5. “Navigation during low flows was limited where the low-water channels may  
18 have been braided. Flow appears to divide into two or more channels in these areas and there  
19 may not have been much depth for rafts and small boats during long-dry periods when base  
20 runoff was low. Where low water was in a single channel all of the low water was confined  
21 to the channel and flow depths, the major limiting parameter for navigation on the Gila River,  
22 were greatest where low water was in three channels the low water was distributed and more  
23 total flow was needed to produce the needed depths.” *Id.* at 50.

24 6. “Navigability of the Gila River below Gillespie Damsite was limited by areas  
25 with multiple (braided) channels because flow was divided among two or more channels.” *Id.*  
26 at 66.

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1 Given these inconsistencies, it is not surprising that the Commission found Mr. Hjalmarson's  
2 2005 hearing testimony not particularly credible. *See* 2009 Decision, at 76.<sup>12</sup>

3 It has long been recognized in Arizona law that the tribunal before which a witness  
4 presents live testimony has the best opportunity to judge that witness' credibility. As the  
5 Arizona Supreme Court stated in 1947: "There are some things which the opinions of this  
6 court have laid down and which have been the law for a long time which we follow.  
7 Principally that is true as to the recognition of the opinion of the trial court which had the  
8 privilege of observing the demeanor of the witnesses and getting the facts first hand."  
9 *Robinson v. Merchants Packing Co.*, 66 Ariz. 22, 29, 182 P.2d 97, 101 (1947). A subsequent  
10 tribunal "must give due regard to the trial court's opportunity to judge the credibility of the  
11 witnesses." *Double AA Builders, Ltd. v. Grand State Constr., L.L.C.*, 210 Ariz. 503, 511, 114  
12 P.3d 835, 843 (App. 2005), *review denied* (Mar. 14, 2006); *see also, e.g., Vong v. Anue*, 235  
13 Ariz. 116, 119, 328 P.3d 1057, 1060 (App. 2014), *review denied* (Nov. 6, 2014) ("the trial  
14 court, having seen and heard the witnesses and the evidence, is in a better position to  
15 determine credibility and weight than the appellate court").

16 Because the County chose not to have Mr. Hjalmarson submit a supplemental report or  
17 testify during the nine days of the 2014 hearing (despite his persistent presence at that  
18 hearing), the only tribunal with an opportunity to judge Mr. Hjalmarson's credibility was the  
19 Commission as it was constituted when he testified in 2005. Based upon his written reports  
20 and live testimony at that time, the Commission found his testimony not particularly credible  
21 and largely rejected it in its 2009 Decision. That finding, coupled with the fact that the  
22 County put nothing in the 2014 record showing that Mr. Hjalmarson even still holds the  
23 opinions he expressed in 2005 in view of the subsequent court decisions in *State v. ANSAC*  
24 and *PPL Montana*, means that Mr. Hjalmarson's submissions are of little value in the  
25 Commission's current deliberations.

26  
27 <sup>12</sup> This unedited 2001 version of Mr. Hjalmarson's report is one of the same documents upon which  
DOW now relies. *See* DOW Brief, at 5-6.

1 **VI. The County's Efforts to Discount the Experts Other Than Mr. Hjalmarson are**  
2 **Not Well Founded in Fact or Law.**

3 The County contends that Mr. Hjalmarson is the only credible expert with respect to  
4 the Gila and that the testimony by all of the witnesses presented by SRP, Freeport, and GRIC  
5 should be summarily rejected on various grounds. *See* County Brief, at 3, 6, 13-28. The  
6 County is wrong with respect to Mr. Hjalmarson. *See* Section V, *supra*. The County is also  
7 wrong with respect to the other witnesses.

8 The County begins its rambling criticism of the other parties' experts by citing Arizona  
9 Rule of Evidence 702 and stating that such rule "governs the admissibility of expert opinion  
10 testimony." County Brief, at 14. In addition to the substantive flaws in the County's  
11 argument addressed below, that argument also fails as a matter of law. The Arizona statute  
12 that governs the Commission's hearings specifically provides: "The commission shall  
13 conduct its proceedings informally without adherence to judicial rules of procedure or  
14 evidence." A.R.S. § 37-1122(A)(3). The *Defenders of Wildlife v. Hull* decision, upon which  
15 Proponents are so willing to rely, provides that, in making determinations of navigability, "all  
16 evidence should be examined during navigability determinations and no relevant facts should  
17 be excluded." 199 Ariz. 411, 425, 18 P.2d 722, (App. 2001), *reconsideration denied* (May 8,  
18 2001). The idea that this Commission should exclude or ignore evidence presented by  
19 qualified experts is entirely contrary to the Commission's governing statutes and the appellate  
20 court's interpretation of those statutes.<sup>13</sup>

21 Furthermore, even where they apply, Rule 702 and *Daubert* largely reflect a trial  
22 judge's "gatekeeper" duties with regard to evidence that goes to a jury. Here, as in a civil trial  
23 to a judge instead of a jury, the Commission acts both as the "gatekeeper" and the finder of  
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25 \_\_\_\_\_  
26 <sup>13</sup> The case law developed in *Daubert* and subsequent decisions is a judicial interpretation of Arizona  
27 and Federal Rule of Evidence 702 and is thus similarly inapplicable to proceedings before the  
Commission. *See* County Brief, at 13 (citing *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579  
(1993)).

1 fact. Thus, even if Rule 702 otherwise applied (which it does not), the policy considerations  
2 behind Rule 702 and *Daubert* are substantially less compelling in this context.

3 More important, however, the County's contentions regarding why the experts'  
4 testimony should be disregarded lack substantive basis. With respect to Dr. Littlefield, for  
5 instance, the County mostly regurgitates the same arguments that this Commission rejected  
6 last time.<sup>14</sup> In its 2009 Decision, this Commission found Dr. Littlefield credible and  
7 considered his report and testimony in reaching its conclusions. *See* 2009 Decision, at 45-46;  
8 *see also* SRP Brief, at 7-8. The Commission recognized Dr. Littlefield as "an acknowledged  
9 expert on the history of the American West, in particular water rights and water-related  
10 issues." 2009 Decision, at 45. Specifically with regard to the information relating to federal  
11 land surveys that Dr. Littlefield presented, the Commission found: "While the surveyors'  
12 opinions as shown by their action and reports are not determinative on the issue of  
13 navigability, their actions and opinions are probative and support the position that the  
14 watercourses were not navigable. *Lykes Bros., Inc. v. United States Army Corps of Engineers*,  
15 64 F.3d 630 (11<sup>th</sup> Cir. 1995). . . ."<sup>15</sup>

16 After the Gila River case was remanded to the Commission, Dr. Littlefield made a  
17 substantial effort to update his report in view of additional evidence (primarily historical  
18 newspaper articles) that was available and to take special consideration of the courts' opinions  
19 in *State v. ANSAC* and *PPL Montana*.<sup>16</sup> The County now criticizes Dr. Littlefield for, among  
20 other things, "just . . . reporting what he found." *See* County Brief, at 22. It is difficult to  
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22 <sup>14</sup> SRP also disagrees with the County's criticisms of the testimony by Mr. Gookin, Mr. Burtell, and  
23 Dr. Lingenfelter, for reasons similar to those discussed herein with regard to Dr. Littlefield and Dr.  
24 Mussetter. SRP will leave issues with respect to those witnesses to be addressed by the parties who  
presented them. In general, SRP contends that the County's arguments regarding experts on pages  
13-28 of its brief are wholly without merit.

25 <sup>15</sup> The Commission also cited *Denison v. Stock*, 997 F.2d 1356, 1364-65, *reh'g denied*, 7 F.3d 242  
26 (11th Cir. 1993). *See* 2009 Decision, at 46 n.12.

27 <sup>16</sup> *See* Littlefield, "Revised and Updated Report: Assessment of the Navigability of the Gila River  
Between the Mouth of the Salt River and the Confluence with the Colorado River Prior to and on the  
Date of Arizona's Statehood, February 14, 1912," at 1 (November 12, 2013) [X002].

1 ascertain how a party can criticize a witness for “just reporting what he found,” as opposed to  
2 exaggerating, distorting, and fabricating facts and opinions. Dr. Littlefield’s testimony should  
3 not be discounted on the grounds that he performed exhaustive and relevant historical  
4 research and “reported what he found.”

5 The County also characterizes Dr. Littlefield’s testimony as contrary to the *State v.*  
6 *ANSAC* opinion because, in addition to relying upon historical evidence from 1860 or before,  
7 he also cited and discussed evidence from periods after the 1860s. *See* County Brief, at 22.  
8 The County’s argument ignores the express statements on that issue from the same court  
9 decision on which it relies, however. In *State v. ANSAC*, the Court of Appeals rejected this  
10 same argument by the County and specifically found that the Commission was correct to  
11 consider post-1860 evidence regarding the Lower Salt: “We will not fault ANSAC for  
12 considering all relevant evidence presented to it because that is the task with which ANSAC  
13 is charged.” 234 Ariz. at 243, 229 P.3d at 255. “Even if evidence of the River’s condition  
14 after man-made diversions is not dispositive, it may nonetheless be informative and relevant.”  
15 *Id.* “Assuming the evidence has indicia of reliability, the determination of the relevance and  
16 weight to be afforded the evidence is generally for ANSAC to make.” *Id.* The County’s  
17 recycled arguments about post-1860 evidence already have been rejected by the appellate  
18 court.

19 The County also criticizes Dr. Littlefield for considering the U.S. Supreme Court’s  
20 decision in *PPL Montana* in addition to the Arizona Court of Appeals’ opinion in *State v.*  
21 *ANSAC*. *See* County Brief, at 23. The County argues that Dr. Littlefield erred in  
22 “[c]oncluding that the federal test for navigability required that the actual use of the river  
23 being considered must have commercial transport as a component to qualify the use as  
24 supporting a navigability determination.” *Id.* If and to the extent that was a component of Dr.  
25 Littlefield’s testimony, that statement is entirely consistent with the U.S. Supreme Court’s  
26 decision in *PPL Montana*. *PPL Montana* was issued after *State v. ANSAC* and, thus, the  
27

1 Arizona Court of Appeals in *State v. ANSAC* did not have the benefit of considering it. *See*  
2 *generally* SRP Brief, at 19-21.

3 The County also attacks Dr. Littlefield’s opinion that the federal land surveyor notes  
4 and opinions should be given more weight than any other fact. *See* County Brief, at 24. As  
5 discussed above, and as this Commission and federal courts already have found, such notes  
6 and opinions are “probative” on the issue of navigability. *See* Note 15, *supra*, and  
7 accompanying text. That Dr. Littlefield, a Ph.D. historian with decades of experience on  
8 water and river issues in the American West, believes that this evidence is more probative  
9 than other evidence is a proper subject of expert opinion. The Commission can either agree  
10 or disagree with the relative weight of the survey information as compared to the other  
11 evidence in the record, but Dr. Littlefield’s opinion as to that relative weight is properly  
12 admitted and considered.

13 The County levels similar criticisms toward the report and testimony presented by Dr.  
14 Mussetter. *See* County Brief, at 25-28. Although Dr. Mussetter did not testify during the  
15 2005 hearings, his colleague (Dr. Schumm) did. In its 2009 Decision, this Commission stated  
16 that it was “impressed by the report, testimony and exhibits furnished by” Dr. Schumm. 2009  
17 Decision, at 70. Dr. Mussetter’s 2014 testimony was no less credible or impressive. The  
18 County complains that Dr. Mussetter did not do significant field work in the preparation of his  
19 report, but that was neither the purpose nor the focus of his testimony. *See* County Brief, at  
20 26. The purpose of Mussetter’s testimony was to talk about the Gila in its “ordinary and  
21 natural condition,” which, as Proponents strenuously argue, no longer exists.

22 Dr. Mussetter is well qualified to provide testimony as to the “ordinary and natural  
23 condition” of the Gila. *See* Mussetter Resume [X018]. His testimony should assist the  
24 Commission in making its determination of whether the Gila was navigable in such condition.  
25 For many of the same reasons that the County’s criticisms of Dr. Littlefield’s testimony lack  
26 merit, those same criticisms fail to carry any weight with regard to Dr. Mussetter.

27 . . .

1 The County closes this portion of its brief with a discussion of testimony presented by  
2 Dr. Mussetter on re-direct examination. *See* County’s Brief, at 28. The County’s criticism of  
3 this testimony is without merit. The primary importance of Dr. Mussetter’s testimony on re-  
4 direct was to show that, in hearings leading up to the 2009 Decision, all of the witnesses  
5 (including Mr. Fuller and Mr. Hjalmarson, and Dr. Huckleberry) acknowledged that,  
6 throughout recorded history and earlier, the channel of the Gila would periodically be blown  
7 out by large floods. *See* Tr. at 08/20/14:1868-81; *see also* SRP Brief, at 26-27. As Dr.  
8 Huckleberry described it: “The Gila River is a classic example of a dryland river that seldom  
9 seeks an equilibrium form. . . . [T]he Gila River responds to secular climatic variability by  
10 radical changes in channel configuration . . . , [and] periods of increased, large flood  
11 frequency correlate with unstable, braided channel conditions.” *See* SRP Brief, at 15 and  
12 evidence cited therein. All of the experts testified to that point in the prior hearings, and that  
13 is what the Commission found in its 2009 Decision. *See generally* Tr. at 08/20/14:1868-81.  
14 That the County and other Proponents have now changed their position in order to further  
15 their arguments for navigability does not alter these indisputable geologic and geomorphic  
16 facts that have existed for centuries.

17 **VII. Summary and Requested Action**

18 The Commission was right in 2009, when it considered all the evidence and  
19 determined that the Gila was not navigable. Even after nine more days of hearing and  
20 thousands of pages of more evidence, the record does not support a finding that the Gila ever  
21 was used or susceptible to being used as a “highway for commerce,” in its “ordinary and  
22 natural condition” or otherwise. The Commission should find the river non-navigable.

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DATED this 23rd day of January, 2015.

SALMON, LEWIS & WELDON, P.L.C.

By Mark A. McGinnis

John B. Weldon, Jr.

Mark A. McGinnis

R. Jeffrey Heilman

2850 East Camelback Road, Suite 200

Phoenix, Arizona 85016

Attorneys for SRP

1 ORIGINAL AND SIX COPIES of the foregoing  
2 mailed for filing this 23rd day of January,  
2015 to:

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

5 AND COPY mailed this 23rd day of January, 2015 to:

6 Fred Breedlove  
7 Squire Sanders (US) LLP  
8 1 East Washington St., Ste. 2700  
Phoenix, AZ 85004  
*Attorneys for ANSAC*

9 Cynthia M. Chandley  
10 L. William Staudenmaier  
11 Snell & Wilmer  
12 400 East Van Buren  
Phoenix, AZ 85004-2022  
*Attorneys for Freeport-McMoRan Copper & Gold, Inc.*

13 Sean Hood  
14 Fennemore Craig, P.C.  
2394 E. Camelback, Suite 600  
Phoenix, AZ 85016-3429  
*Attorneys for Freeport-McMoRan Copper & Gold, Inc.*

16 Laurie Hachtel  
17 Joy Hernbrode  
18 Attorney General's Office  
1275 West Washington Street  
Phoenix, AZ 85007-2297  
*Attorneys for State of Arizona*

20 Joy E. Herr-Cardillo  
Arizona Center For Law In The Public Interest  
P.O. Box 41835  
Tucson, AZ 85717  
*Attorneys for Defenders of Wildlife, et al*

23 Joe P. Sparks  
The Sparks Law Firm  
7503 First Street  
Scottsdale, AZ 85251-4201  
*Attorneys for San Carols Apache Tribe, et al*

26 ...

27 ...

1 Sally Worthington  
2 John Helm  
3 Helm, Livesay & Worthington, Ltd.  
4 1619 E. Guadalupe, Ste. 1  
5 Tempe, AZ 85283  
6 *Attorneys for Maricopa County*

7 Steven L. Wene  
8 Moyes Sellers & Hendricks  
9 1850 N. Central Ave., Ste. 1100  
10 Phoenix, AZ 85004

11 Cynthia S. Campbell  
12 Law Department  
13 City Of Phoenix  
14 200 W. Washington Street, Ste. 1300  
15 Phoenix, AZ 85003-1611  
16 *Attorneys for City of Phoenix*

17 William H. Anger  
18 Engelman Berger, P.C.  
19 3636 N. Central Avenue, Ste. 700  
20 Phoenix, AZ 85012  
21 *Attorneys for City of Mesa*

22 Charles L. Cahoy  
23 Assistant City Attorney  
24 City Attorney's Office  
25 CITY OF TEMPE  
26 21E. Sixth Street, Ste. 201  
27 Tempe, AZ 85280  
*Attorneys for City of Tempe*

18 Michael J. Pearce  
19 Maguire & Pearce, LLC  
20 2999 N. 44th Street, Ste. 630  
21 Phoenix, AZ 85018-0001  
22 *Attorneys for Chamber of Commerce  
23 And Home Builders' Association*

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

25 James T. Braselton  
26 Mariscal, Weeks, McIntyre & Friedlander, P.A.  
27 2901 N. Central Ave, Ste. 200  
Phoenix, AZ 85012-2705  
*Attorneys for Various Title Companies*

1 Julie Lemmon  
2 1095 W. Rio Salado Pkwy, Ste. 102  
3 Tempe, AZ 85281-2603  
4 *Attorney for Flood Control District  
5 Of Maricopa County*

6 Thomas L. Murphy  
7 Linus Everling  
8 Gila River Indian Community Law Office  
9 Post Office Box 97  
10 Sacaton, AZ 85147  
11 *Attorney for Gila River Indian Community*

12 Sandy Bahr  
13 202 E. McDowell Rd, Ste. 277  
14 Phoenix, AZ 85004  
15 *Sierra Club*

16 David A. Brown  
17 Brown & Brown Law Offices  
18 128 E. Commercial, PO Box 1890  
19 St Johns, Arizona 85936

20 Susan B. Montgomery  
21 Robyn L. Interpreter  
22 Montgomery & Interpreter, PLC  
23 4835 E. Cactus Rd., Ste. 210  
24 Scottsdale, AZ 85254

25 Michael F. McNulty  
26 Deputy County Attorney  
27 Pima County Attorney's Office  
32 N. Stone Ave., Suite 2100  
Tucson, Arizona 85701

  
James Jacob Bush