

1 Joe P. Sparks, 002383
2 **THE SPARKS LAW FIRM, P.C.**
3 7503 First Street
4 Scottsdale, Arizona 85251
5 (480) 949-1339
6 joesparks@sparkslawaz.com

7 *Attorney for the San Carlos Apache Tribe*

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SEP 13 2013
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11:50 a.m.

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

10 In re Determination of Navigability of
11 the San Pedro River

No. 03-004-NAV

12 **THE SAN CARLOS APACHE TRIBE**
13 **OPENING POST-HEARING**
14 **MEMORANDUM & NOTICE THAT**
15 **THE TRIBE JOINS IN THE SALT**
16 **RIVER PROJECT AGRICULTURAL**
17 **IMPROVEMENT AND POWER**
18 **DISTRICT AND SALT RIVER**
19 **VALLEY WATER USERS'**
20 **(collectively, "SRP")ASSOCIATION'S**
21 **OPENING POST-HEARING**
22 **MEMORANDUM**

23 The San Carlos Apache Tribe ("Tribe" or "Apache") submits its Opening Post-Hearing
24 Memorandum on the navigability of the San Pedro River ("San Pedro") in its ordinary and
25 natural condition as of February 14, 1912.

26 Concurrently with this opening Memorandum, the Tribe has submitted its Proposed
27 Findings of Fact and Conclusions of Law, which contain citations to evidence in the record
before the Commission. Rather than reiterate those citations, this Memorandum refers to the
appropriate proposed Apache Findings of Fact (" A FF#__") and Apache Conclusions of Law
("A CL#__").

1 The Tribe joins in the Opening Post-Hearing Memorandum Salt River Project
2 Agricultural Improvement and Power District and Salt River Valley Water Users' Association
3 (collectively, "SRP") Opening Post-Hearing Memorandum.

4 For the reasons set forth below and in the SRP Memorandum, the Tribe requests that
5 the Commission find the San Pedro non-navigable.

6
7 **I. EVIDENCE IN THE RECORD**

8 **A. Boating Attempts on the San Pedro**

9 There are no published accounts of boating on the San Pedro in watercraft
10 meaningfully similar to the watercraft used in the ordinary and usual course of trade and
11 travel in Arizona, at the time of statehood, February 14, 1912. *See* A FF#7. Proponents of
12 navigability fail to provide sufficient evidence of an identifiable segment of the San Pedro on
13 which they purport watercraft of any kind has floated.

14 **B. Boats Available at the Time of Statehood**

15 The handful of accounts of post-Statehood boating on the San Pedro do not include any
16 mention of whether those watercraft were of the type available at Statehood. *See* A FF#7, #9.

17 **C. Navigation and Navigability at the Time of Statehood**

18 In order to be deemed suitable for navigation, the San Pedro must have been navigable
19 at the time Arizona became a state on February 14, 1912. *See* A.R.S. § 37-1101(5).

20 The statute defines "navigable" or "navigable watercourse" as:

21 a watercourse that was in existence on February 14, 1912, and *at that time* was
22 used or was susceptible to being used, in its ordinary and natural condition, as a
23 highway for commerce, over which trade and travel were or could have been
24 conducted in the customary modes of trade and travel on water.

25 *See* A.R.S. § 37-1101(5) (emphasis added); *See* CL#3.

26 Mr. Hjalmarson, expert for the Arizona Center for Law in the Public Interest testified
27 that the San Pedro river was not a navigable river on February 14, 1912. *See* A FF#12.

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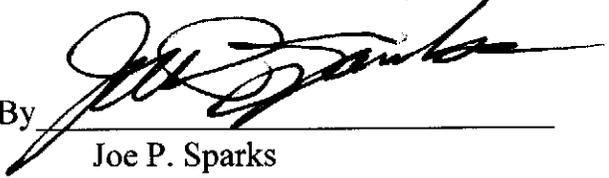
II. SUMMARY AND REQUESTED ACTION

There is no evidence in the record to show that any watercraft purporting to have traversed the San Pedro was of the type that either existed at the time of Arizona Statehood, was meaningfully similar to the watercraft that existed at the time of Arizona Statehood, or of the type that was regularly used in trade and travel at the time of Arizona Statehood. In order for recreational boating evidence to be relevant in determining the navigation or the susceptibility of navigation on the San Pedro, such evidence must show that the watercraft was of the type available at the time of Statehood, meaningfully similar to the watercraft available at the time of Statehood, and “meaningfully similar to those in customary use for trade and travel at the time of statehood.” *PPL Montana, LLC v Montana*, 132 S. Ct. 1215 (2012) at 1221.

For the reasons set forth here and in those set forth in the SRP Memorandum, the Tribe requests the Commission find that (1) the evidence suggesting instances of boating on the San Pedro, is insufficient to prove by a preponderance of the evidence that the San Pedro was navigable in fact, in its ordinary and natural conditions when Arizona became a state on February 14, 2012; and (2) evidence in the record is insufficient to show by a preponderance, that the San Pedro was a navigable river when Arizona became a state on February 14, 1912.

DATED this 13th day of September, 2013.

THE SPARKS LAW FIRM, P.C.

By 

Joe P. Sparks
7503 First Street
Scottsdale, Arizona 85251
Attorney for the San Carlos Apache Tribe

1 ORIGINAL AND SIX COPIES of the foregoing
2 hand-delivered for filing this 13th day of September,
3 2013 to:

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

7 AND COPY, with CD containing electronic Word
8 version of same, mailed this 13th day of September,
9 2013 to:

10 Fred E. Breedlove III
11 Squire Sanders (US) LLP
12 1 East Washington Street, Suite 2700
13 Phoenix, AZ 85004-2556
14 *Attorney for the Commission*

15 AND COPY mailed this 13th day of September,
16 2013 to:

17 Laurie A. Hachtel
18 Joy Hernbrode
19 Attorney General's Office
20 1275 West Washington Street
21 Phoenix, AZ 85007-2997
22 *Attorneys for State of Arizona*

23 Joy E. Herr-Cardillo
24 Timothy M. Hogan
25 Arizona Center for Law in the Interest
26 2205 E. Speedway Blvd.
27 Tucson, AZ 85719
Attorneys for Defenders of Wildlife, et al.

28 John B. Weldon, Jr.
29 Mark A. McGinnis
30 Scott M. Deeny
31 Salmon, Lewis & Weldon, P.L.C.
32 2850 East Camelback Road, Suite 200
33 Phoenix, Arizona 85016
34 *Attorneys for Salt River Project Agricultural
35 Improvement and Power District and Salt*

1 *River Valley Water Users' Association*

2 Sally Worthington

3 John Helm

4 Helm, Livesay, & Worthington, Ltd.

5 1619 E. Guadalupe #1

6 Tempe, AZ 85283

7 *Attorneys for Maricopa County*

8 Joe Sparks

9 The Sparks Law Firm

10 7503 First Street

11 Scottsdale, AZ 85251-4201

12 *Attorneys for the San Carlos Apache*

13 *Tribe, et al.*

14 Sandy Bahr

15 202 E. McDowell Road, Ste. 277

16 Phoenix, AZ 85004

17 *Sierra Club*

18 Carla Consoli

19 Lewis & Roca

20 40 N. Central Avenue

21 Phoenix, AZ 85004

22 *Attorneys for Cemex*

23 L. William Staudenmaier

24 Snell & Wilmer LLP

25 One Arizona Center

26 400 E. Van Buren

27 Phoenix, AZ 85004-2202

Attorneys for Freeport-McMoRan

Copper & Gold, Inc.

Sean Hood

Fennemore Craig, P.C.

2394 E. Camelback Road, Suite 600

Phoenix, AZ 85016-3429

Attorneys for Freeport-McMoRan

Copper & Gold, Inc.

27

1 Charles Cahoy
2 Assistant City Attorney
3 City of Tempe
4 21 E. Sixth Street
5 Tempe, AZ 85280
6 *Attorney for City of Tempe*

7 Cynthia Campbell
8 Law Department
9 City of Phoenix
10 200 W. Washington, Suite 1300
11 Phoenix, AZ 85003
12 *Attorney for City of Phoenix*

13 William H. Anger
14 Engelman Berger, P.C.
15 3636 N. Central Avenue, Suite 700
16 Phoenix, AZ 85012
17 *Attorneys for City of Mesa*

18 Thomas L. Murphy
19 Gila River Indian Community Law Office
20 Post Office Box 97
21 Sacaton, AZ 85147
22 *Attorney for Gila River Indian Community*

23 Michael J. Pearce
24 Maguire & Pearce LLC
25 2999 N. 44th Street, Suite 630
26 Phoenix, AZ 85018-0001
27 *Attorneys for Chamber of Commerce and
Home Builders' Association*

28 James T. Braselton
29 Mariscal Weeks McIntyre & Friedlander PA
30 2901 N. Central Avenue, Suite 200
31 Phoenix, AZ 85012-2705
32 *Attorneys for Various Title Companies*

33 Steve Wene
34 Moyes Sellers & Sims
35 1850 N. Central Avenue, Suite 1100
36 Phoenix, AZ 85004-4527

1 *Attorneys for Arizona State University*

2 David A. Brown
3 Brown & Brown Law Offices
4 128 E. Commercial, P.O. Box 1890
5 St. Johns, AZ 85936

6 Susan B. Montgomery
7 Robyn L. Interpreter
8 Montgomery & Interpreter, P.C.
9 4835 E. Cactus Road, Suite 210
10 Scottsdale, AZ 85254

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