

SPLCO-0

30 October 1973

SUBJECT: Navigability of the Gila River between Painted Rock Dam and the Confluence with the Colorado River

FROM: Div Engr, Co Pac, ATTN: SPDCO-0

TO: HQDA (DAEN-CCZ-C)

1. In compliance with SPDCO-0 letter of 31 July 1973 to Bureau of Sport Fisheries and Wildlife, inclosed is our Report of Findings of Navigability for the Gila River between Painted Rock Dam and the confluence with the Colorado River in accordance with revised 33 CFR 209.260 in the Federal Register of 9 September 1972, pg. 18289-18292 (FR 1165-2-502). Also inclosed is the opinion of our District Counsel per Section 209.260(a)(2).

2. The subject reach of the Gila River lies entirely within the State of Arizona. Flow in this stretch is controlled by Painted Rock Dam. I am looking forward to your confirmation of our finding that this reach of the river is not a navigable waterway of the United States.

2 Incl
as

JOHN V. FOLEY
COL, CE
District Engineer

FOLEY
SPLDC

METALIO
SPLC

CF: Reading
MSR
Operations

CURRY
SPLC

YOUNG
SPLC

LAMB
SPLCO-0

FLANNERY
SPLCO-0
5644/nc

REPORT OF FINDINGS

Definition of Navigable Waters of the United States

1. Name of water body: Gila River, Painted Rock Dam to Colorado River (lower reach), State of Arizona.
2. Tributary to: Colorado River near Yuma, Arizona.
3. Physical characteristics:
 - a. Type: River
 - b. Length: 650 miles
Mouth to Painted Rock Dam - 126 miles
 - c. Approximate discharge volume:
Maximum - 20,700 cfs, 15 Feb 32 (Rough estimate 200,000 cfs 22 Jan 16)
Minimum - 0 (Dry part of most years)
Mean (1914-1938) - 904 cfs
Mean (1939-1971) - 29.7 cfs
(Flow regulated by Painted Rock Dam since 1959)
 - d. Fall per mile: Mouth to Painted Rock Dam - 3.2 ft/mi
 - e. Extent of tidal influence: None.
 - f. Range between ordinary high and ordinary low water: Negligible due to flood flow. Maximum high water 15 Feb 32 - 16.75 gage height.
 - g. Description of improvements to navigation not listed in paragraph 5 below: None.
4. Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce: The Gila River is very shallow in the reach between Painted Rock Dam and the confluence with the Colorado River. The nature of the streambed and the shallow gradient result in very sluggish flow over a wide area, with very little depth in places, and deep channelization others. Only rarely does this reach of the Gila carry water, as the upstream reservoirs divert almost all normal flow into upstream projects.

5. Authorized projects:

- a. Nature, condition and location of any improvement made under projects authorized by Congress: None.
- b. Description of projects authorized but not constructed: One authorized project has not been constructed. This is the Texas Hill to Gila Siphon levee project. The plans call for construction of a 750 foot wide floodway with 92 miles of levee, 44 miles on the right bank and 48 miles on the left bank. A low flow channel with unpaved invert and sides will be included, and its bottom width will vary from 300 feet to 490 feet. The capacity of this channel will be from 50,000 to 55,000 cfs. This project is temporarily delayed pending determination of a favorable benefit to cost ratio.
- c. List of known survey documents or reports describing the water body:
 1. Wheeler, Capt. G.M., United States Geographical Surveys West of the One Hundredth Meridian, Engineer Department, U.S. Army G.P.O. 1889.
 2. Emory, William H., Maj., Report on the United States & Mexican Boundary Survey, Senate Executive Document Number 108, 34th Congress 1st Session. A.O.P. Nicholson, Printer 1857.
 3. Corle, Edwin, The Gila, River of the Southwest, University of Nebraska Press, Lincoln, 2nd Printing, 1957.
 4. Calvin, Ross, Ph.D., Lieutenant Emory Reports: A Reprint of Lieutenant W.H. Emory's Notes of a Military Reconnaissance, The University of New Mexico Press, 1951.

6. Past or present interstate commerce:

- a. General types, extent, and period in time:
 1. Flow in the lower Gila occurs only rarely today, as most of the water from the upper watershed is diverted for agricultural purposes. The infrequent and irregular flows that occur are so shallow that even small boat traffic is impractical for any purpose with the possible exception of recreation. No organized recreational use is made of the infrequent flows.
 2. There is evidence that there was some waterborne traffic on the lower Gila, but it appears from available reports that this practice was not extensive or practical. It is a historical fact

that the first child born to American parents in Arizona, Gila Howard, was born on the Gila River on 21 October 1849. However, it should not be inferred from this fact that waterborne traffic was common. Edwin Corle, "The Gila River of the Southwest", University of Nebraska Press, Lincoln, P. 176, states: "He is probably the only child ever delivered on the river, for navigation of the Gila proved utterly impractical." Again, on P. 152-3, an account is given of the travel of the Mormon Battalion under Colonel Cooke in moving down the Gila. An attempt was made to float provisions down the river, which was described by Corle as "...his first mistake of the trip." After much frustration and effort, half the provisions were cached and moved by mule later. No account of any exploration was found in which river transportation was used. The military reconnaissance of Major William H. Emory, 1846-7, did not attempt to navigate the Gila. He did mention the possibility of navigation, thus: "The Gila, at certain stages, might be navigated up to the Pimos village, and possibly with small flat boats at all stages of water", (from Calvin, Ross, Ph.D., Lieutenant Emory Reports: A Reprint of Lieutenant W.H. Emory's Notes of a Military Reconnaissance, the University of New Mexico Press, Albuquerque, 1951, P. 150). However, the party did not attempt navigation, and the fact that later navigation did not develop indicates that he was mistaken in his opinion, as was the Colonel Cooke party. People who were familiar with the lower Gila never attempted waterborne commerce. No regular traffic of our type was conducted.

3. Historical references indicate that there was some commercial small boat traffic on the Salt River, an upstream tributary to the Gila. However, this was local traffic, and did not extend to the lower Gila.
 - b. Documentation: Documentation may be obtained from the sources outlined in Section 5c of this report.
7. Potential use for interstate commerce, if applicable:
 - a. If in natural conditions: The normally dry streambed, which carries very irregular discharges from Painted Rock Dam, at shallow depths, offers no opportunity for modern waterborne commerce.
 - b. If improved: Improvements, such as channelization, would not be adequate to establish a reliable avenue for commercial traffic, due to the irregularity of flow.
8. Nature of jurisdiction known to have been exercised by Federal agencies, if any: The Bureau of Reclamation constructed the Wellton-Mohawk Irrigation

and Drainage District which extends from Texas Hill to Gila Siphon along the lower Gila River. The purpose of this project is irrigation, using Colorado River water. The irrigated land lies along both banks of the lower Gila.

9. State or Federal court decisions relating to navigability of the water body, if any: No federal or state court decisions relating to the navigability of the lower Gila have been found.

10. Remarks:

- a. The Treaty of Guadalupe Hidalgo, dated 2 Feb 48, makes reference to navigation on the Gila. This reference was included in the Treaty, since, as the result of provisions in the Treaty, the Gila formed the boundary between the U.S. and Mexico. The Treaty did not refer to any navigation or commerce already established; in every instance the reference is to future navigation. The intent of the provisions regarding navigation refer to navigation which may be developed in the future. Articles VI and VII of the Treaty establish that both nations must agree before any construction be undertaken which may impede or facilitate navigation on the Gila. In Article VII, the Treaty states: "If, for the purpose of making the said rivers navigable, or maintaining them in a navigable state..." The wording of the Treaty indicates that the intent is to provide agreement to permit future navigation, if such navigation proves to be practical, rather than navigation then in practice. From the extent of the information believed available to the framers of the Treaty, it would not be known by those framers at the time whether or not navigation on the Gila was possible.
- b. No reference is found in any government document available to this office in which navigation was ever practiced. Expeditions in the lower Gila utilized land transportation, even tho it was regular practice at the time to utilize water when possible.

11. Finding of navigability and recommendation for determination: In the opinion of the District Counsel, the subject reach of the Gila River is found to not be a navigable waterway of the United States, as set forth in his opinion dated 26 October 1973. It is recommended that the Chief of Engineers concur in this determination.

OPINION AS TO THE NAVIGABILITY OF THE GILA RIVER
DOWNSTREAM FROM PAINTED ROCK DAMMOTO TO THE
CONFLUENCE OF THE GILA WITH THE COLORADO RIVER,
WITHIN THE STATE OF ARIZONA

FOR: CHIEF, OPERATIONS BRANCH

1. In accordance with your request, I have examined the data set forth in your draft of Report of Findings prepared under provisions of Title 33 CFR, Part 209 (FR Vol. 27, No. 176) and further, I have considered the provisions of Articles VI and VII of the Treaty of Guadalupe Hidalgo concluded between the United States of America and the United Mexican States on February 2, 1848, and I have also examined Article IV of the Gadsen Treaty between the United States of America and the Mexican Republic concluded on December 10, 1853.

2. Your Report of Findings and the aforesaid treaties do not disclose any facts or historical data tending to establish that the Gila River does, or ever did, support commerce downstream from Painted Rock Dam. The fact that logs, poles and rafts are floated down the stream occasionally and at times of high waters, does not make it a navigable river (United States v. Rio Grande Dam and Irrigation Company, 174 U.S. 690; 43 L. Ed. 1136).

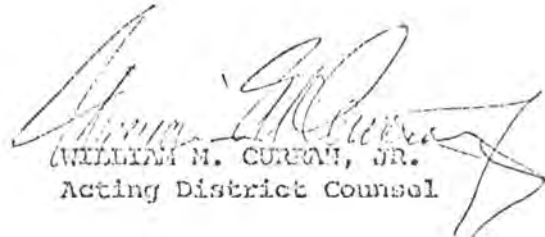
3. In Article VI of the Treaty of Guadalupe Hidalgo the provision relating to consideration of future construction of a road, canal or railway upon the Gila River seems to clearly indicate that the drafters of the treaty did not at that time consider the Gila River was then navigable, in that such future construction, if accomplished, would preclude any navigation. Further, the provisions in Article VII, that navigability of the Gila shall be free and common to vessels and citizens of both countries, does not in the opinion of the undersigned constitute a finding of navigability of the Gila River, but is merely a statement of the rights of the citizens of the two republics. This allusion to navigability of the Gila in Article VII was made at a time when the Gila was to be the international boundary between the two republics. The subsequent Gadsen Treaty made nugatory, Article VI and VII, in that this treaty (Gadsen) covered the purchase and cession of additional land southward of the Gila River and resulting in bringing the entire Gila River into the United States and the then territory of Arizona (Art. IV, Gadsen).

4. The ultimate and best test of navigability is a determination of fact by a Judicial Tribunal. The burden of establishing navigability rests upon he who asserts that proposition (Trotter v. North American Drudging Co., 245 F. 257, 157 C.C.A. 459). No State Court (Arizona) or Federal Court decisions have been found which have dealt with the question of navigability

of the Gila River. The fact that the Salt River, a tributary of the Gila, upstream of Painted Rock Dam has heretofore had some commercial small boat traffic is not indicative that the Gila, downstream from Painted Rock was also navigable.

5. Based on all of the foregoing, I conclude, and it is, therefore, my opinion that the Gila River downstream from Painted Rock Dam to the confluence of the Gila and Colorado Rivers is not a navigable water of the United States.

Dated 26 October, 1973


WILLIAM M. CURRAN, JR.
Acting District Counsel

SPDCO-0

31 July 1973

Mr. W. O. Nelson, Jr.
United States Department
Of The Interior
Fish and Wildlife Service
Bureau of Sport Fisheries and Wildlife
P. O. Box 1306
Albuquerque, New Mexico 87103

Dear Mr. Nelson:

In the absence of General Fink, I am responding to your recent letter concerning the question of navigability of the Gila River, Arizona.

In the past the Gila River has not been considered navigable waters of the United States for the purpose of the Army permit program. Accordingly, the Corps has not required permits for work such as recently constructed by the Wellton-Mohawk Irrigation District. As a result of your letter of May 10, 1973, however, the Los Angeles District has begun formal procedures to obtain an official determination on navigability. This determination is often a lengthy procedure and must be made by the Chief of Engineers.

If the river is determined to be navigable, the District Engineer will then decide if after-the-fact authorization of the completed work is required. In the interim, previous District policy with respect to the river will be continued.

The Los Angeles District Engineer will be pleased to inform you of the final disposition in this matter.

CODWIN/sj
(SPDCO-0)

Sincerely yours,

BAER
(SPDCO)

EVERETT B. LOVE
Colonel, CE
Acting Division Engineer

HUTCHISON
(SPLDD-C)

CF: SPLCO
↳ Col Hutchison

LOVE
(SPLDD-N)



UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE
POST OFFICE BOX 1306
ALBUQUERQUE, NEW MEXICO 87103

RB

July 18, 1973

Division Engineer
U.S. Army Engineer Division,
South Pacific
630 Sansome Street, Room 1216
San Francisco, California 94111

Dear Sir:

We refer to our May 2, 1973, teletype to the District Engineer, Corps of Engineers, Los Angeles, California, requesting that he take immediate action on an apparent illegal channel construction operation on the Gila River within the Wellton-Mohawk Irrigation District, Wellton, Arizona. In response to our teletype this office received a telegram dated May 3, 1973, from Robert E. Land, Chief, Construction Operations Division, Corps of Engineers, Los Angeles District, which stated that preliminary investigation of the Gila River from Growler, Arizona, to Dome, Arizona, indicated that this portion of the river had not been determined to be navigable waters of the United States. A letter to the District Engineer from this office, dated May 10, 1973, suggested that further investigations by the Corps could lead to a determination that the Gila River is considered a navigable water. It requested that the Irrigation District be made aware of the fact that its work may be illegal and asked that we be advised on what action the Corps' office had taken. We have received no reply to our May 10 letter. The activities of the Wellton-Mohawk Irrigation District have proceeded to completion, apparently without further effort by the District Engineer to comply with our request. Copies of the above-referenced correspondence are attached.

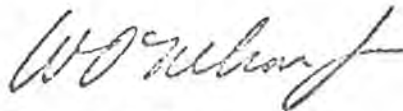
Investigations by the Arizona Game and Fish Department and this Bureau indicate that the Gila River is historically navigable. Article 7 of the Treaty of Guadalupe Hidalgo (9 U.S. Stat. 922), dated February 2, 1848, defines the Gila River as well as the Rio Grande as navigable and stipulates that these waterways will be open for unrestricted commerce between Mexico and the United States. This Treaty is presently recognized and included within Title 1 of the Arizona Statutes. The Corps of Engineers' general

definition of navigable waters of the United States as published in the Federal Register, September 9, 1972, states, "Navigable Waters of the United States are those waters which are presently, or have been in the past, or may be in the future, susceptible for use for purposes of interstate or foreign commerce. A determination of navigability once made applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity." In light of this definition, and other rules published by the Corps of Engineers in the Federal Register of the same date, as well as those included in the Federal Register on May 10, 1973, it would appear that there is no question of navigability of the Gila River.

We request that you make an early determination regarding navigability of the Gila River. If you make a determination that the river is considered a navigable water, we request that you advise Wellton-Mohawk Irrigation District that a permit was required to conduct the above referenced activities and that the District is in violation of Federal Law. We further request that, under these circumstances, the Corps of Engineers require the Wellton-Mohawk Irrigation District to restore the Gila River habitat to its preconstruction condition in accordance with stipulations to be set forth by the Arizona Game and Fish Department and the Bureau of Sport Fisheries and Wildlife.

We request that you advise us of your determination regarding navigability of the Gila River and of any subsequent actions taken.

Sincerely yours,



Regional Director

Enclosures 3

cc:

Director, Arizona Game and Fish Department, Phoenix, Arizona
Field Supervisor, BSFW, Div. of River Basin Studies, Phoenix, Arizona

May 10, 1973

AIRMAIL

District Engineer
Corps of Engineers, U. S. Army
P. O. Box 2711
Los Angeles, California 90053

Dear Sir:

The Western Union telegram of May 3, 1973, to William M. White, Acting Regional Director, from your Construction Operations Division stated "preliminary investigation indicates the Gila River from Growler, Arizona, to Dome, Arizona, has not been determined to navigable waters of the United States by this office."

The Gila River historically was one of the major navigable streams in Arizona. It is therefore possible that, upon further investigation, findings could lead to a determination in which the river would be classified as navigable. Until such time as a final determination has been made as to whether the Gila River is classified as navigable waters we respectfully request that the Wellton-Mohawk Irrigation District be made aware of the possibility that a Department of the Army permit may be required and that to continue the unpermitted activities may constitute a violation of Federal law.

Please advise this office of action taken in this matter.

Sincerely yours,

W. M. White

Regional Director

cc:

Director, Arizona Game and Fish Department, Phoenix, Arizona
U.S. Attorney, Central District of California, Los Angeles, Calif.
State Director, BLM, Arizona State Office, Phoenix, Arizona
Regional Director, BR, Lower Colorado Region, Boulder City, Nevada
Project Manager, Yuma Projects Office, BR, Yuma, Arizona
Special Assistant to Dist. Engineer, CE, Phoenix, Arizona
Field Supervisor, BSW, Div. of River Basin Studies, Phoenix, Ariz.

OFFICE OF AGENCY BUREAU OF SPORT FISHERIES AND WILDLIFE DIVISION OF RIVER BASIN STUDIES ALBUQUERQUE, NEW MEXICO	PRECEDENCE ACTION: INFO:	SECURITY CLASSIFICATION
ROUTING CLASSIFICATION	DATE PREPARED 5-2-73	TYPE OF MESSAGE <input type="checkbox"/> SINGLE <input type="checkbox"/> BOOK <input type="checkbox"/> MULTIPLE-ADDRESS
FOR INFORMATION CALL Don C. Dobel		PHONE NUMBER 843-3597
SPACE FOR USE OF COMMUNICATION UNIT		

MESSAGE TO BE TRANSMITTED (Use double spacing and all capital letters)

T E L E T Y P E

DISTRICT ENGINEER
 CORPS OF ENGINEERS, U.S. ARMY
 LOS ANGELES DISTRICT
 P.O. BOX 2711
 LOS ANGELES, CA 90053

RETEL CALL BY PERSONNEL BSFV PHOENIX, ARIZ. FIELD OFFICE TO JOE BENSON
 YOUR STAFF 1:45 p.m. APRIL 27, 1973, RE APPARENT ILLEGAL CHANNEL
 CONSTRUCTION OPERATION OBSERVED ON APRIL 24, 1973.

PROJECT LOCATED ON GILA RIVER WITHIN WELLTON-MOHAWK IRRIGATION DIST.
 PROJECT EXTENDS WITHIN GILA RIVER CHANNEL FROM MOHAWK MTS. NEAR TOWN
 OF GROWLER TO DOME VALLEY SEVERAL MILES DOWNSTREAM FROM WELLTON.

DEVELOPER, WELLTON-MOHAWK IRRIGATION DIST. ACCOMPLISHING CHANNEL
 CONSTRUCTION WITH CATERPILLAR DOZERS. UNAUTHORIZED DOZING AND BURNING
 DETRIMENTAL TO WILDLIFE HABITAT WHICH IS PRIMARILY RIPARIAN VEGETATION,
 AND ENVIRONMENTAL QUALITY OF PROJECT AREA.

WE UNDERSTAND DEPT OF ARMY PERMIT NOT ISSUED FOR PROJECT. IF PERMIT
 REQUIRED, CONTINUATION OF UNPERMITTED ACTIVITIES CONSTITUTES VIOLATION

SECURITY CLASSIFICATION

PAGE NO.	NO. OF PGS.
1	2

EGRAPHIC MESSAGE

NAME OF AGENCY USDI BUREAU OF SPORT FISHERIES AND WILDLIFE DIVISION OF RIVER BASIN STUDIES ALBUQUERQUE, NEW MEXICO	PRECEDENCE ACTION: INFO:	SECURITY CLASSIFICATION
ACCOUNTING CLASSIFICATION	DATE PREPARED 5-2-73	TYPE OF MESSAGE <input type="checkbox"/> SINGLE <input type="checkbox"/> BOOK <input type="checkbox"/> MULTIPLE-ADDRESS
FOR INFORMATION CALL	PHONE NUMBER	
AME	THIS SPACE FOR USE OF COMMUNICATION UNIT	

MESSAGE TO BE TRANSMITTED (Use double spacing and all capital letters)

TO:

FEDERAL LAW AND IMMEDIATE ACTION WARRANTED BY RESPONSIBLE AGENCIES.

BSFW RECOMMENDS CE TAKE FOLLOWING ACTIONS:

1. VISIT SITE SOON AS POSSIBLE TO VERIFY BSFW FINDINGS;
2. ISSUE CEASE AND DESIST ORDER IF WORK FOUND ILLEGAL.
3. INFORM DEVELOPER OF NECESSITY OF OBTAINING DEPT OF ARMY PERMIT AND
4. ADVISE THIS OFFICE AND U.S. ATTORNEY, CENTRAL DIST. OF CALIF. LOS ANGELES, CA, WITHIN 7 DAYS OF THIS TT IF ACTIVITY IS LEGAL OR IF CEASE AND DESIST ORDER HAS BEEN ISSUED.

William R. D. G.
Acting Regional Director
BSFW, Reg. 2.

cc:
Director, Ariz. Game and Fish Dept., Phoenix, Ariz.
U.S. Attorney, Cent. Dist. of Calif., Los Angeles, Calif.
State Director, BLM, Ariz. State Office, Phoenix, Ariz.
Regional Director, BR, Lower Colo. Reg., Boulder City, Nev.
Project Manager, Yuma Projects Office, BR, Yuma, Ariz.
Special Asst. to Dist. Engineer, CE, Phoenix, Ariz.
Field Supervisor, BSFW, Div. RBS, Phoenix, Ariz.

SECURITY CLASSIFICATION

RBS

WESTERN UNION CALLED THE FOLLOWING TELEGRAM AT 2:50 p.m.

William M. White, Acting Regional Director
Bureau of Sport Fisheries and Wildlife
P. O. Box 1306
Albuquerque, New Mexico

Preliminary investigation indicates the Gila River from Growler, Arizona to Dome, Arizona, has not been determined to navigable waters of the United States by this office.

ROBERT E. LAND
for R. P. Young
Chief, Construction Operations Division
Fax tcb

DISPOSITION FORM

For use of this form, see AR 340-15; the proponent agency is The Adjutant General's Office.

REFERENCE OR OFFICE SYMBOL

SUBJECT

SPLCO-0

Determination of Navigability of the Gila River

XXR THRU: C, Constr-Opns Div FROM C, Operations Branch DATE 15 Oct 1973 CMT 1
TO: C, Off of Counsel FLANNERY/abr/5644
FL

1. We have received a copy of the Treaty of Guadalupe Hidalgo, as requested in our Memo dated 10 Sep 73. However, we have not been able to determine whether or not the Treaty establishes the navigability of the river. Article VII of the Treaty states "the navigation of the Gila and the Bravo below said boundary shall be free and common to the vessels and citizens of both countries." Later, the same article states "if, for the purpose of making the said rivers navigable...". We are not able to determine if the phrase "making the said rivers navigable," implies that the river was not navigable at the time the treaty was signed.

2. We are requesting a legal determination concerning the navigability of the Gila based on the Treaty of Guadalupe Hidalgo. We wish to have this determination in time to forward a report of navigability to SPD on 19 October 1973. This problem is receiving attention at SPD and OCE.

Robert E. Lusk
ROBERT E. LUSK
Chief, Operations Branch

C, Op Div

Acting District Counsel

26 Oct 1973
CURRAN/sc/5390

Opinion of the undersigned as to non-navigability of the Gila River is inclosed as requested.

Incl
As

William M. Curran, Jr.
WILLIAM M. CURRAN, JR.
Acting District Counsel



DEPARTMENT OF THE ARMY
LOS ANGELES DISTRICT, CORPS OF ENGINEERS
P. O. BOX 2711
LOS ANGELES, CALIFORNIA 90053

Flannery/5643/nc

SPLCO-0

10 September 1973

MEMORANDUM THRU: ~~Actg Ch, Construction Operations Division~~ *M*
FOR: Chief, Office of Counsel

SUBJECT: Determination of Navigability of the Gila River

1. Attached is a copy of a letter from the Bureau of Sport Fisheries and Wildlife, dated 18 July 1973, inquiring about the status of the navigability of the Gila River. We have no knowledge of the Treaty of Guadalupe Hidalgo (9 U.S. Stat. 922), which is referenced in the attachment. We request a copy of this Treaty, as well as an opinion of the effect of the Treaty on the status of the Gila River as a navigable water of the United States. This action is preliminary to our planned report of navigability on the Gila River, under authority of ER 1165-2-302.

1 Attech
as

Robert E. Land
ROBERT E. LAND
Chief, Operations Branch

W.E.
BOYLE

Furnished 9/15/73

MOR