

MEMORANDUM FOR THE RECORD

SUBJECT: Traditional Navigable Water Determination for a 6.9-mile Reach of the Lower Gila River in Maricopa County, Arizona.

I. Summary

One 6.9-mile reach of the lower Gila River, from Powers Butte to Gillespie Dam, in Maricopa County, Arizona is determined to be a “traditional navigable water” or TNW. This determination is consistent with the Clean Water Act (CWA), U.S. Army Corps of Engineers’ regulations (including 33 CFR § 328.3), relevant case law, and existing guidance, including the 5 Jun 2007 joint U.S. Environmental Protection Agency and Department of the Army legal memorandum entitled *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (Rapanos Guidance), and *Appendix D of the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook* issued 5 Jun 2007.

II. Background

The Gila River drainage basin is one of Arizona’s largest watersheds, covering approximately 58,000 square miles, and extending from southwestern New Mexico to the Colorado River at Yuma, Arizona. The watershed covers practically the entire southern half of Arizona. The Gila River is one of the longest rivers in Arizona at approximately 654 miles in length, and runs in an area of high mountains and plateaus and flows westward towards the Colorado River along the Arizona-California state line. The majority of rivers in Arizona are tributary to the Gila River, including the Salt and Verde, Santa Cruz, San Pedro River, San Francisco, San Simon, Agua Fria, Centennial Wash, San Carlos River, Queen Creek, Hassayampa River, and Waterman Wash (Report of Findings, Los Angeles District, 30 Sep 2008).

Within the 6.9-mile study reach, the Gila River traverses through two Arizona Game and Fish Department (AGFD) owned and managed wildlife areas (i.e., Powers Butte Wildlife Area; and Arlington Wildlife Area). Several communities are located near the study reaches, including Buckeye and Arlington. This region is known for agriculture, and the Gila River traverses through thousands of acres of farmland in the Arlington and Buckeye Valleys before reaching Gillespie Dam, approximately 34 miles downstream from the confluence point of the Salt and Gila rivers near Phoenix (Report of Findings).

Construction of Gillespie Dam was completed in 1921 by Frank Alpine Gillespie as a part of Paloma Ranch, a farming operation he established in the early 1900s. Paloma Ranch consists of approximately 67,000 acres which Gillespie purchased from the railroad in the early 1900s (Report of Findings, Appendix B). Gillespie Dam was constructed to divert and deliver river surface water into the Gila Bend Canal for use by Paloma Ranch, deliver river surface water into the Enterprise Canal, and allow any

remaining Gila River water to continue downstream of the dam. As originally constructed, the dam, built of reinforced concrete, spanned the Gila River, a distance of approximately 1,700 feet, and until 1993 impounded the majority of surface flow coming downriver. In 1993, the dam was breached due to significant rainfall events in Arizona, and has remained in this condition. The majority of the dam remains across the river, with sections lying both east and west of the breached portion. The Gila River upstream of the breached dam remains impounded, and a large pond/small lake has remained on the upstream side of the dam despite the breached condition of the structure (Report of Findings, Appendix C). Additional impoundment of water is believed to be due to the presence of an earthen diversion dam located downstream of the dam constructed by the Paloma Irrigation and Drainage District (Report of Findings).

III. Evaluation of Los Angeles District Formal Report of Findings and Basis of TNW Determination

According to the Rapanos Guidance, the term TNW refers to those waters that are under the jurisdiction of the Corps, pursuant to 33 CFR § 328.3(a)(1), (i.e., “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”

As stated in *Appendix D* of the *U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook*: “When determining whether a water body qualifies as a “traditional navigable water” (i.e., an (a)(1) water), relevant considerations include whether a Corps District has determined that the water body is a navigable water of the United States pursuant to 33 CFR § 329.14, or the water body qualifies as a navigable water of the United States under any of the tests set forth in 33 CFR § 329, or a federal court has determined that the water body is navigable-in-fact under federal law for any purpose, or the water body is “navigable-in-fact” under the standards that have been used by the federal courts.”

To determine whether the 6.9-mile study reach is a TNW, in accordance with 33 CFR § 328.3(a)(1), a case-specific analysis to evaluate whether the study reach is navigable-in-fact, including consideration of potential susceptibility to interstate and foreign commerce, was undertaken by Los Angeles District Regulatory Division personnel. A formal Report of Findings was forwarded from the Los Angeles District Engineer to the South Pacific Division Engineer for final TNW determination on 30 Sep 2008, in accordance with the 24 Sep 2008 directive issued by the Assistant Secretary of the Army (Civil Works)[ASA(CW)], subject: Traditional Navigable Water Determinations Under the Clean Water Act.

The ASA(CW) directive requires every formal Report of Findings to be based substantially on applicable portions of the format described in paragraph (c) of 33 CFR § 329.14, as follows:

(1) Name of waterbody: 6.9-mile reach of the lower Gila River from Powers Butte to Gillespie Dam, in Maricopa County, Arizona.

(2) Tributary to: Colorado River.

(3) Physical characteristics:

(i) Type: River.

(ii) Length: 6.9-miles.

(iii) Approximately discharge volumes: Daily maximum, daily minimum, and mean annual flows (cfs) are summarized in the Report of Findings from USGS gage stations located in the Gila River above diversions at Gillespie Dam and upstream in the Gila River at Estrella Parkway. From Oct 2006 to Sep 2007, the daily maximum flow at Gillespie Dam was 424 cfs, the daily minimum flow was 41 cfs, and the mean annual flow was 109 cfs. From Oct 1992 to Sep 2007, the daily maximum flow at Estrella Parkway was 9300 cfs, the daily minimum flow was 1.4 cfs, and the mean annual flow was 728.1 cfs. Due to regular, ongoing upstream discharges of treated effluent and irrigation return flows, the study reach supports significant discharge year-round. This flow regime comprises the “ordinary condition”.

(iv) Fall per mile: 3.0 foot per mile within the study reach.

(v) Extent of tidal influence: None.

(vi) Range between ordinary high and ordinary low water: Data not available.

(vii) Description of improvements to navigation not listed in (5) below:
No improvements for navigation within the study reach.

(4) Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce: Gillespie Dam, located at the downstream end of the study reach. The dam was completed in 1921 to divert water for irrigation purposes. In 1993, the dam was breached (100 ft wide) due to high rainfall events and never repaired.

(5) Authorized projects:

(i) Nature, condition and location of any improvements made under projects authorized by Congress: None within the study reach.

(ii) Description of projects authorized but not constructed: None within the study reach.

(iii) List of known survey documents or reports describing the waterbody: Report of Findings prepared by the Los Angeles District provides a comprehensive list

studies and documents prepared by the U.S. Army Corps of Engineers, the Arizona State Land Department, and Arizona Geological Survey. These documents were reviewed and are referenced in their formal Report of Findings.

(6) Past or present interstate commerce:

(i) General types, extent, and period in time: The Gila River has an extensive history of human activity, including turn-of-the-century territorial Arizonans who navigated and traveled the Gila River with various types of watercraft. Successful navigation dating back to the 1800s has been documented as occurring on the lower Gila River, from the Salt River confluence near Phoenix to Yuma on the Colorado River (Report of Findings, Appendix G). Recent river usage includes a commercial canoe tour offered by the Arizona Game & Fish (AGFD) in Mar 2004 from Arlington to Gillespie Dam, and regular use by hunters and anglers navigating the study reach using inflatable kayaks and other similar watercraft to hunt and fish year round. Both the upstream Powers Butte Wildlife Area and the downstream Arlington Wildlife Area provide public access for wildlife-oriented recreation, including waterfowl and upland gamebird (mourning and white-winged doves, Gambel's quail) hunting and fishing (AGFD source, www.azgfd.gov, 9 Oct 2008).

(ii) Documentation if necessary: Report of Findings, Appendix G, Historical Overview/River Chronology from the *Gila River Navigability Study, Draft Final Report*, Revised 1996.

(7) Potential use for interstate commerce, if applicable:

(i) If in natural condition: In its current, natural condition it is possible for small watercraft to navigate the Gila River within the 6.9-mile study reach, without portage for at least 5-months out of the year (Jan to May) and year-round with reasonable portages, depending on the flow and type of craft used (Report of Findings).

(ii) If improved: The study reach has been navigated over its entire 6.9-mile length by shallow-draft vessels for commercial purposes in the past, but in-stream or in-channel navigability improvements are unlikely in the foreseeable future given the undeveloped nature of the surroundings and insufficient demand for waterborne concessions. Most current river usage is related to recreation and research (Report of Findings). However, recreational navigation of the study reach would likely increase if recreational access and associated recreational facilities at the 2 existing state-owned wildlife areas were improved. The study reach is relatively close to several US and interstate (I-10) highways, which would make access by interstate travelers and recreational users easier.

(8) Nature of jurisdiction known to have been exercised by Federal agencies if any: The Corps of Engineers has exercised Section 404 of the Clean Water Act jurisdiction over the entire 6.9-mile study reach up to the ordinary high water mark or to the limits of adjacent wetlands.

(9) State or Federal court decisions relating to navigability of the waterbody, if any: None known.

(10) Remarks: There are two AGFD Wildlife Areas within the study reach (i.e., Powers Butte Wildlife Area and Arlington Wildlife Area), which provide the general public accessibility to the Gila River for various wildlife-oriented recreation (Report of Findings, Appendix J). AGFD personnel conduct their marsh bird surveys by accessing the Gila River at Powers Butte, Arlington Wildlife Area, and Gillespie Dam (Report of Findings, Appendix K). These locations are also accessible and used by the general public for accessing the Gila River.

(11) Finding of navigability (with date) and recommendation for determination:

The Los Angeles District Formal Report of Findings dated 30 Sep 2008 recommended that the 6.9-mile study reach of the lower Gila River be designated a “traditional navigable water” in accordance with 33 CFR § 328.3(a)(1).

The Report of Findings show that the lower Gila River within the 6.9-mile study reach is navigable-in-fact by shallow-draft vessels; that it has been navigable in the past for commercial purposes; that the presence of recreational and research craft indicates that the waterway is capable of bearing some forms of commerce; and is easily accessible by the public.

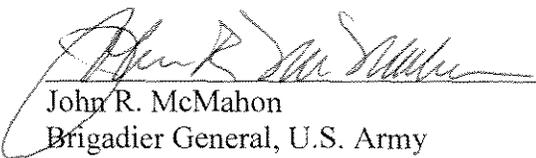
IV. Determination

Historic and modern day boating for transportation, recreation, research and educational purposes; numerous public access points along and outside of the 6.9-mile study reach; and river flow characteristics indicate the 6.9-mile study reach of the lower Gila River was historically navigable and provides evidence of the susceptibility for the study reach to be used for commercial navigation. Collectively, the above discussed factors demonstrate that the study reach is navigable-in-fact and thus a TNW. Therefore, I hereby determine the 6.9-mile study reach of the lower Gila River identified herein is subject to the jurisdiction of Section 404 of the Clean Water Act, pursuant to 33 CFR Part 328.3(a)(1).

V. Disclaimer

This determination focuses narrowly and exclusively on the TNW status of the 6.9-mile study reach of the lower Gila River in Maricopa County, Arizona under the Clean Water Act. This determination does not consider, and shall in no way be construed as precluding any consideration of, (1) any and all other applicable bases for asserting Clean Water Act jurisdiction over the 6.9-mile study reach, or (2) any and all applicable bases for asserting Clean Water Act jurisdiction outside the 6.9-mile study reach.

17 OCT 2008
Date



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