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**BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION**

IN THE MATTER OF THE NAVIGABILITY
OF THE GILA RIVER FROM THE NEW
MEXICO BORDER TO THE CONFLUENCE
WITH THE COLORADO RIVER, GREENLEE,
GRAHAM, GILA, PINAL, MARICOPA AND
YUMA COUNTIES, ARIZONA

No. 03-007-NAV

**ARIZONA STATE LAND
DEPARTMENT'S RESPONSIVE
CLOSING BRIEF REGARDING THE
GILA RIVER**

I. Introduction

The attempts of Opponents of Navigability (Salt River Project ("SRP"), Freeport Mineral's Corporation ("Freeport"), San Carlos Apache Tribe, and Gila River Indian Community) (hereinafter "Opponents") to discredit the navigability case by attacking particular portions of the evidence fail to overcome the comprehensive picture presented by the State that clearly demonstrates that the Gila River (the "River") was navigable in its ordinary and natural condition as of the date of statehood. In fact, portions of the River are navigable today and portions of the River that are now dry once supported a variety of commercial uses even as its flows were increasingly being diverted. Opponents' attempts to gloss over and mischaracterize this evidence should be rejected by ANSAC, and ANSAC should find that the River, in its ordinary and natural condition, was navigable or susceptible to navigation as of the date of statehood.

II. Opponents Mischaracterize *The Daniel Ball's Highway-for-Commerce Requirement.*

Evidence that a river was used, or was susceptible to being used as a highway for commerce is an essential component of *The Daniel Ball* test. *Arizona Ctr. for Law in the Pub.*

Interest v. Hassell, 172 Ariz. 356, 363, 837 P.2d 158, 165 (1991). *The Daniel Ball* test does not require actual commercial use or navigation of a river; all that is required is proof that the river in its ordinary and natural condition could have been used as a highway for commerce at the time of statehood. See *PPL Montana v. Montana*, 132 S.Ct. 1215, 1233 (2012) (hereinafter “PPL”) (affirming previous case law that susceptibility is sufficient); *United States v. Utah*, 283 U.S. 64, 82 (1931) (stating that the crucial question is the susceptibility of the river in its ordinary condition, not its actual use); *The Montello*, 87 U.S. (20 Wall.) 430, 441-442 (1874) (stating that the capability of use for transportation and commerce rather than the extent and manner of that use is an accurate indication of a river’s navigability); *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 422, 18 P.3d 722, 733 (App. 2001) (citing *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921) (“periodic navigability is enough, even if the river is not susceptible to navigation at all seasons of the year or all stages of the water.”)). A “highway for commerce,” is defined as “a corridor or conduit within which the exchange of goods, commodities or property or the transportation of persons may be conducted.” Arizona Revised Statutes (“A.R.S.”) § 37-1101(3). Neither federal nor state law narrowly construe “highway for commerce” within the meaning of the navigability-for-title test. See *Utah v. United States*, 403 U.S. 9, 11 (1971) (finding that the hauling of livestock by the animals’ owner and not by a carrier for the purpose of making money nevertheless demonstrated the lake’s navigability because “[t]he lake was used as a highway and that is the gist of the federal test”); see *Alaska v. United States*, 754 F.2d 851, 854 (9th Cir. 1985) (stating that the “central theme remains the movement of people or goods from point to point on the water”); see also *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 421-25, 18 P.3d 722, 732-36 (App. 2001) (stating that the federal test does not require travel or trade on the waterway to be commercial, sustained, successful or upstream).

A. The River Served As a Useful Channel for Commerce

The State has conclusively demonstrated the River’s practical utility for trade or travel; it showed that the River’s physical characteristics such as its depth, width, and channel could have supported navigation. Tr. 6/16/14, p. 61 (Fuller) (width is not a limiting factor if the river is deep enough); X020-79, PPT 156 – 188 (Rating Curves); Tr. 6/18/14, p. 687 (Fuller) (explaining width calculation); Tr. 6/16/14, p. 105 (Fuller) (outside of the bedrock canyons the River has a compound channel with a “single, low-flow meandering channel inserted in a wider braided channel network”) and Tr. 6/16/14, pp. 110, 202:13-18 (Fuller); see *Utah v. United States*, 403

U.S. at 12 (noting that the master's report relied on Great Salt Lake's depth in finding that the lake was physically capable of being navigated); *see also* Tr. 8/19/14, p. 1734:20-25, 1735:1 (Mussetter) (braided rivers can be navigable and this is consistent with Dr. Schumm's previous testimony).

Moreover, the River could support – and did in fact support – many of the types of commercial uses that occurred at statehood. *See* X004-20 (hunting and trapping); X019, p. 18 (travel); X004-12 (travel); X004-19 (travel); X019, p. 30 (hunting); X004-14 and X004-47 (travel); X025-116, p. 66 (travel); X019, p. 25 (transporting gold); X019, p. 13 (hunting and trapping); X006-9, p. 7 (travel); 012, p. 10 (travel); X004-18 (floating logs and transporting firewood); 004, p. IV-3 (ASLD Lower Gila Report); X019, pp. 17, 34 (transporting passengers); X019, p. 18 (transporting firewood); X004-15 (transporting firewood); X004-16 (transporting passengers); X004-12 (transporting passengers); X006-1 (transporting firewood); X020-79, PPT 117 (Nav. PowerPoint) (two accounts –heavily loaded vessel and transporting 12 oxen); Tr. 11/17/05, pp. 216-20 (Jackson)(survey), *see also* X020-80, PPT 6 (Boating PowerPoint) (typical trade and travel uses in 1912).

The River also supported personal uses that demonstrate the River's availability for commercial navigation. *See PPL*, 132 S.Ct. at 1233 (citing with approval *United States Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940), for the proposition that “[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation”); X014-33 (recreation in a 3 ½ foot x 18 foot flat bottomed boat); X019, p. 16 (recreational travel); X004-17 (recreational travel); X004-15 (recreational travel but could use for commerce); 021, p. 11 (recreational travel); X020-79, PPT 107 (Nav. PowerPoint) (recreational travel); X004-62 (recreational travel); X019, p. 15 (recreational boating). Many additional uses could have been made on the River but for its continuously, and increasingly depleted condition and sparse settlement. Tr. 6/16/14, P. 90 (Fuller) (flows “significantly depleted”); X020-80, PPT 61-65 (Fuller Boating); X025-104 (AZ Census); X012-71, p. 436-37 (*Far Southwest*).

Moreover, unlike in *PPL*, here the State has produced evidence of actual use by trappers and others for trade and travel. *See PPL*, 132 S.Ct. at 1233 (explorers or trappers' use of the river to drag their boats in or alongside is insufficient for navigability). These actual uses of the River satisfy the highway for commerce component of the test.

B. It Is Not Necessary to Show That the River Was Used for Hauling Ore

Opponents' assumption that the River must have been available to haul mining products in order to be considered navigable under *The Daniel Ball* test is incorrect. It is not necessary for a river to be capable of carrying large vessels for it to be considered navigable. *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (“navigability does not depend on the particular mode in which such use is or may be had – whether by steamboats, sailing vessels or flatboats.”). Thus, it is immaterial that large vessels were not used on all parts of the River. Furthermore, there is no specific commodity or commercial use that must be employed in order for the River to be navigable.

III. The Evidence Shows (1) That the River Was Used as a Highway for Commerce and (2) That It Was Susceptible to Use as a Highway for Commerce

Opponents misconstrue the significance of boating under *The Daniel Ball* test. The “customary modes of trade and travel on water” requirement of *The Daniel Ball* test does not limit navigability to a particular mode of commerce, the type of craft that is used, or that could be used, or actual use. *United States v. Utah*, 283 U.S. at 76; *see United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 416 (1940) (“personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.”); *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (“navigability does not depend on the particular mode in which such use is or may be had – whether by steamboats, sailing vessels or flatboats.”); *The Montello*, 87 U.S. (20 Wall.) at 441-442 (“[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be conducted . . . [i]t would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.”); *North Dakota ex rel. Bd. of Univ. & Sch. Lands v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982), *rev'd on other grounds sub nom., Block v. North Dakota ex rel. Bd. of Univ. & State Lands*, 461 U.S. 273 (1983) (waterway need only support small boats such as canoes to be navigable). Here, the River was capable in its ordinary and natural condition of being used for the purposes of commerce and thus it is navigable in fact, and is therefore navigable as a matter of law. *Econ. Light & Power Co.*, 256 U.S. at 122-123.

Opponents also ignore or misstate the evidence presented on the use of the River, use that, as a realistic matter, did occur before and at the time of Arizona's statehood. Freeport argues that there are a mere four historic accounts of boating in Segments 1 through 3, and

argues that all of these trips were unsuccessful. Freeport Minerals Corporation's Opening Post Hearing Memorandum Concerning the Non-Navigability of the Gila River ("Freeport Brief") at 9. Freeport dismisses the first account of the military using rafts in 1869 to cross the river in Segment 3 because the raft crosses the River instead of travelling up and down it. Freeport Brief at 9; X004-19. This characterization misses the point. Presumably, the military while on an expedition did not willy nilly spend their valuable time constructing rafts that were unnecessary. Is it reasonable to assume that the River was too deep to cross easily for a substantial distance above and below where the military wanted to cross – a fact that would make it necessary to construct rafts. Moreover, contrary to Mr. Burtell's assertions, the River would need to be deeper than two feet to justify building rafts. Lastly, this account took place in March, which is generally past the time of peak seasonal flows. X004-19.

The second account Freeport dismisses is the account of the unnamed prospector in March and April 1886, who constructed a dugout canoe and traveled from Clifton to Riverside. Freeport dismisses this account in its entirety because the canoe "ultimately capsized." X004-12; Freeport Brief at 9. ASLD's boating experts indicated that it was not unusual for a small craft to capsize. Tr. 6/16/14, p. 209 – 210 (Fuller); Tr. 6/18/14, p. 574-576 (Farmer). Freeport's dismissal also disregards the fact that no other historic boater had difficulty in Segment 5 where the accident occurred, and that this same prospector had boated successfully through Segments 2 through 4. X004-12.

In April 1891, two men arrived in Yuma after having boated down the entire Gila River in Arizona. X004-20. They started their trip in New Mexico in approximately November 1890. X004-20. Although their boat capsized on the February floods, there is no indication where this incident took place. More importantly, when these boaters lost their boat, they simply built a new one and carried on. X004-20. Even SRP's expert, Dr. Littlefield, agreed that this trip was successful. Tr. 8/18/14, p. 1477-1478 (Littlefield). Again, Freeport would have the Commission dismiss this evidence in its entirety simply because these men encountered a momentary difficulty in their travels. Freeport Brief at 9.

Finally, Freeport dismisses Adams and Evans' 1895 trip because their boat "capsized" downstream of San Carlos. Freeport Brief at 9. A careful reading of the article indicates that the men were lining their boat – Mr. Adams rode in the boat while Mr. Evans lowered the boat through the rapids. X014-33. At one point when the boat was out of sight, the rope broke.

X014-33. When Mr. Evans caught up with Mr. Adams and the boat, he discovered that the boat had sustained minor damage (it was repairable in a couple of hours) and had taken on some water (Mr. Adams was bailing it out). X014-33. Nowhere in the article does it indicate that the boat capsized. SRP apparently believes that this trip should be entirely discounted because their boat sustained some damage and the boaters encountered rapids. Salt River Project's Closing Brief ("SRP Brief") at 11. Even if this were true, the trip was successful and without incident in Segments 2-3 and 5-8. X014-33.

It is noticeable that Freeport and SRP both neglect to mention Mr. Duvall's uneventful trip on the Upper Gila in 1901 (X019, p. 18), and J.E. Carpenter and George W. Todd's hunting trip in Segment 3 in 1905 (X019, p. 30), both of which were apparently completely uneventful.

Further down on the River, SRP attempts to discredit the use of boats on the lower Gila by members of Colonel Cooke's command. SRP Brief at 8. Apparently, SRP's criticism is that the Commission previously decided that this use of the River should not count. Putting aside the implication that this Commission should not comply with its statutes and now reach its own conclusion, it is evident that significant additional information and testimony were entered into the record since that determination. It is incumbent on ANSAC to consider this new testimony and evidence. ASLD's expert admits that Colonel Cooke characterized this boating use as a failure, as did Mr. Fuller himself during the 2005 hearings. Tr. 6/16/14, pp. 192-193, 206-207. However, Mr. Fuller also indicated that he now characterizes the trip as a success after reviewing the additional information provided to the Commission. *Id.* The boats, people and, indeed, most of the cargo arrived in Yuma. *Id.* True, the boaters encountered small difficulties – they had to reconfigure their boats and loads, and they encountered sand bars. X020-79, PPT 102 (Fuller Nav.). Regardless, the Court has already found on numerous occasions that sand bars do not preclude a finding of navigability. *U.S. v. Utah*, 283 U.S. at 86; *Holt State Bank*, 270 U.S. at 57.

SRP also dismisses the evidence that the Howard family and other 49ers used the River. This is particularly perplexing given Opponents' stance on navigability – that there must be a need that travel on the river directly meets. There was clearly a need by the 49ers – travel from the Pima Villages to Yuma and then on to California – and many of them used the River to meet that need in a single year 1849, including the Howard family (X004-14 and X004-47), HMT Powell (X020-79, PPT 117, Tr. 6/16/14, p. 203), and the large party in a 16 foot by 5 ½ foot flatboat in October – November (X025-116, p. 66). Even Dr. Littlefield conceded that the

Howard family likely thought their trip was successful. Tr. 8/18/14, p. 1475-6 (Littlefield). Additionally, several historians who provided information to the Commission reported that numerous small boats were used to travel down the Gila. *See* 021, p. 10 (Jackson PowerPoint); 004, p. IV-3 (ASLD Lower Gila Report). Far from “scattered attempts to float boats,” these are solid evidence that people could and did use the Gila River for trade and travel.

SRP also dismisses both the Howard family trip and the “Yuma or Bust” trip because the trips indicated a difficulty with sand bars. SRP Brief at 10-11. Sand bars do not destroy navigability. *U.S. v. Utah*, 283 U.S. at 86, 57 S.Ct. at 445. SRP challenges the Sykes and McLean trip in the winter of 1890, from Phoenix to Yuma. SRP Brief at 11. Ms. Tellman did testify that this trip was quite unsuccessful, but a close reading of the actual trip account leads to the conclusion that the trip was ultimately successful once the party reached the less depleted flows of the Gila River. X004-62.

SRP challenges the log floating testimony by alleging that it is not clear how far up river the logs had come from. SRP Brief at 11-12. Although Mr. Fuller agreed on cross examination that it was possible that the logs came from one-half mile up the River, a closer examination of the facts indicates that while possible, it is not probable. The account originates in 1897. X004-18. In 1852 and 1853, the Steamboat *Uncle Sam* travelled “some distance” up the River in search of firewood. X004-15. There would be no need to travel “some distance” up the River if firewood was located within ½ mile of the confluence. Similarly, the Schooner *McCord* was engaged in transporting firewood on the River. X019, p. 18. There would be no need to send a schooner if firewood was less than a mile away.

SRP dismisses the remaining accounts as “low draft boats” used only for “downstream travel.” However, there is no case that limits title navigability to deep draft boats, nor upstream travel – if these were required for title navigability, the Court surely would have addressed it in its recent *PPL* decision.

Opponents outright ignore the evidence of steamboats in Segment 8 of the River. SRP dismisses the evidence by stating that Mr. Fuller could not identify the location of Dome. Mr. Fuller indicated on cross examination that he was not *exactly* sure where Gila City was located and he did not know off the top of his head how many miles upriver Dome was located from the confluence (Tr. 6/17/14, p. 410 (Fuller)), but the previous day he testified that Dome was approximately 20 miles upstream of the confluence with the Colorado (Tr. 6/16/14, p. 157

(Fuller). Further, SRP asserted that Dr. Littlefield did not recall seeing a primary source stating that steamboats traveled up to Dome. SRP Brief at 12. Dr. Littlefield admitted to missing many primary sources showing boating on the River. Tr. 8/18/14, p. 1483-1484 (Littlefield). Similarly, Freeport relies on Dr. Lingenfelter's affidavit to support their dismissal of the evidence of steamboat use on the River. Freeport Brief at 20-22. The State's evidence included several primary accounts of steamboats running up the River, including some references from Dr. Lingenfelter's own book. X028, pp. 31, 33 (Lingenfelter, *Steamboats on the Colorado*); X004-15 (*Arizona Sentinel*, 1/25/1879); X004-33 (Muther, *Paddle-wheelers*); X006-1 (Robertson, *Yuma*); X019, pp. 17, 34 (Maricopa Supp.); X004-21 (*Tombstone Epitaph*); X019, p. 18 (Maricopa Supp.); X004-16 (*Arizona Sentinel*).

While Opponents attempt to chip away at the evidence presented, they have not identified a single issue that significantly impacted navigability for all or even most trips on the River. Opponents cannot point to a rapid or waterfall on the River that entirely stops navigation. See *PPL Montana*, 132 S.Ct. at 1232 (no one disputed overland portage was necessary on the Great Falls Reach). They cannot point to a single place on the River where all or even most trips had difficulty. The Opponents' most common complaint seems to be sand bars on the River. As previously set forth, sand bars are not an obstacle to navigation, but rather are merely a "small difficulty," and in any event are not a complete bar to navigation requiring an overland portage. *U.S. v. Utah*, 283 U.S. at 86, 57 S.Ct. at 445. Opponents' fixation on them is irrelevant.

Large flatboats were used both for downstream travel and as ferries on the River, primarily in Segments 6 through 8. See X014-33 (3 ½ foot x 18 foot flatboat – Segments 2-8); X004-14 and X004-47 (boat made of wagon – Segments 6-8); X004-15 (could use for commerce – Segments 7-8); X006-9, p. 7 (boat made of two wagons and logs – Segments 6-8); X004-53 (Dome ferry); 004, p. IV-7 (16 foot x 18 foot ferry); 004, p. IV-8 (ferry large enough to carry a six-horse team); 004, p. IV-13 (two ferries 20 feet x 6 feet). Moreover, the ferries' existence demonstrates that the River could and did float large boats; thus, the River was not only used as a highway for commerce, but also susceptible to being used as a highway for commerce. Above the Pima Villages in Segment 6, there are fewer recorded boating accounts, but trade and travel in flatboats and canoes certainly occurred. For example, in January and February 1895, W.A. ("Amos") Adams and J.W. Evans successfully brought the above-mentioned 3 ½ foot by 18 foot flat bottomed boat from Clifton to Yuma, skipping only a small portion of Segment 6 in order to

facilitate a side trip to Phoenix. X014-33. The purpose of this trip was apparently recreational, but a boat that size was certainly capable of carrying substantial commerce. *See PPL*, 132 S.Ct. at 1233 (citing with approval *Appalachian Elec. Power Co.*, 311 U.S. at 416, for the proposition that “[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.”).

A. Low Draft Boats Are Sufficient to Demonstrate Navigability

In *PPL*, the Court dismissed the Montana Supreme Court’s reliance on modern day recreational use of the river, not – as Opponents are asserting here – because that recreational use was primarily in small low draft boats (“lightweight canoes and kayaks”), but because there was insufficient evidence in the current record to show: (1) that the watercraft used today were meaningfully similar to those used at the time of statehood; and (2) that the river was not easier to navigate today than it was at the time of statehood. *PPL*, 132 S.Ct. at 1233-4. The Court questioned whether modern recreational fishing boats, including inflatable rafts and lightweight canoes or kayaks were better able to navigate shallow or rocky waters than boats used at statehood, and remanded the case to find out the answer to that question. *PPL*, 132 S.Ct. at 1234. Here, both of those questions have been satisfied. Mr. Fuller and Mr. Farmer both testified that historic and modern boats were meaningfully similar to those in use at the time of statehood in terms of shape, depth of water required to float, and weight. Tr. 6/16/14, pp. 43-49, 85-89 (Fuller); Tr. 6/18/14, pp. 548-551, 585, 596-597, 635 (Farmer). While Mr. Farmer and Mr. Fuller testified that historic boats were less durable than modern boats, they believed that the expectations of historic boaters compensated for the differences in durability. *Id.* Historic boaters anticipated that repairs to their boats would be a necessary and/or expected part of their trip. *Id.*, *see* X004-45 (Christmas 1911 photo of Colorado River boaters repairing hold in boat); Tr. 6/16/14, pp. 86-87 (Fuller); X004-20. Although Mr. Burtell and Mr. Gookin both testified that modern boats were more durable than historic boats, their testimony was not credible due to their lack of experience with boats and boating. Tr. 6/19/14, p. 836 (Gookin) (“The only time I’ve been in a canoe was on the Rivers of America in Disneyland”); Tr. 6/20/14, p. 1190-1194 (Burtell) (river boating experience limited to a handful of trips). Mr. Fuller testified that the higher flows that would have been available both at statehood and in the River’s ordinary and natural condition made the River more navigable, not less. Tr. 6/16/14, p. 90 (Fuller). No other expert testified differently.

Opponents, particularly Freeport, argue strenuously that the mines required transportation, and that if the River was not regularly used to transport ore or other minerals, the River is therefore non-navigable. Their argument is primarily based on *PPL*'s statement, "[E]vidence must be confined to that which shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood." *PPL*, 132 S.Ct. at 1233. The *PPL* court further clarified that commercial use concerns the river's usefulness for "trade and travel," rather than for other purposes." *Id.* (citing *United States v. Utah*, 283 U.S. at 75-76); see *Utah v. United States*, 403 U.S. at 11 (details of the types of commerce are largely irrelevant as long as river was used as a highway for commerce); *The Montello*, 87 U.S. 430, 441 (1874) ("[T]rue test of navigability of a stream does not depend upon the mode by which commerce is, or may be, conducted . . ."). The case law, even *PPL*, does not require that the River be appropriate for use for every type of commercial transport that exists or may exist within the state, nor even for the dominant type of commercial transport. Here, the State has presented evidence that all segments of the River supported commercial use and travel in flatboats and canoes. Moreover, the State presented information that steamboats were used to transport miners and mining equipment in Segment 8. This evidence satisfies the requirement under the test.

In fact, numerous cases have been decided based on the use of small, low-draft boats. See *The Montello*, 20 Wall. at 441 (finding fur trade which utilized canoes evidence of a navigation on a channel for useful commerce); *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 117, 41 S. Ct. 409, 410, 65 L. Ed. 847 (1921) (finding actual use where Desplaines River was used by the kinds of craft common to early fur-trading days, including canoes); *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1403, 891 F.2d 1401, 1403 (9th Cir. 1989) (finding lower Gulkana navigable where actual use at statehood was by hunters and fishermen using 16 to 24 ft boats); see also *Nw. Steelheaders Ass'n, Inc. v. Simantel*, 112 P.3d 383, 389-90 (2005) (finding John Day River navigable and stating "qualifying travel and trade is not limited to large-scale commercial or multiple passenger vessels of the sort typically engaged in modern commerce [o]ther courts have also recognized the relevance of the historic role of small boats to transport goods in volumes that might seem insignificant by modern standards."). The Opponents' argument requires ANSAC to wholly disregard the evidence of boats that actually used the River, from 1846 with Colonel Cooke of the Mormon Battalion to 1901 when Charles

Duvall boated down the Gila to Yuma. X006-9, p. 7; X019, p. 18. These boats included steamboats up to 65 feet long, both large and small flatboats, and canoes – each type used for trade and travel purposes. The use of these boats demonstrates that historic boats were appropriate and useful on the River.

B. Indian Non-use of the River Does Not Preclude Navigability

Opponents devote substantial portions of their briefs to the uncontested fact that there is no evidence in the record that Indian people along the River used boats. Opponents then urge the Commission to conclude from this fact that the River was not susceptible to navigation. *See* Freeport Brief at 6-8; SRP brief at 2-5; The San Carlos Apache Tribes’ “Opening” Closing Post-Hearing Memorandum Regarding the Navigability of the Gila River at 5-7. Their conclusion contradicts the other evidence, which clearly shows that low-draft boats could have been and are easily used on the River.

Taking into consideration the evidence as a whole it is clear that there must be some other explanation for the lack of Indian boating evidence – either Indians did use boats but the physical evidence did not survive (X020-80, PPT 60 (Fuller Boating); Tr. 6/16/14, p. 49 (Fuller)), or there were cultural prohibitions against the use of boats (*See* X016-9, p. 25-6 (Utah Special Master) (“It seems likely that use must have been made of the Rivers by these Indians, though no trace of boats or canoes used by them has been found. The present day Indians, the Navajos and the Utes, probably owing to old superstitions and legends, have not navigated these Rivers in boats and do not now navigate them except to cross at fords”), or some other unknown reason. In any case, the fact that there is no evidence of Indian use of the River does not equate to non-navigability of the River.

IV. Opponents of Navigability Overstate the Holdings of the *PPL Montana* Case and Ignore Relevant Case Law

A. *PPL* Does Not Impose New Requirements for Determining Navigability

The United States Supreme Court decision in *PPL v. Montana*, focused on segmentation and overland portage. *Id.* at 1229. The Court rejected the Montana Supreme Court’s approach to determining navigability-for-title by clarifying that rivers must be analyzed on a segment-by-segment basis to determine navigability-for-title under the equal footing doctrine. Additionally, the Court addressed the use of present day, primarily recreational boating evidence in determining navigability. 132 S. Ct. at 1233. The *PPL* Court’s holdings were solely based on its

review of the evidence in the record. *Id.* at 1232. The *PPL* Court did not address the ordinary and natural element of *The Daniel Ball* test. The Court reiterated the necessary components of the navigability for title test, including the requirement that rivers be in their ordinary and natural condition. *Id.* at 1228. Although the *PPL* Court's holdings are applicable to ANSAC's determination, a large part of Opponents' reliance on the case is actually dicta – the evidentiary record in that case not applicable to the River – and the River's navigability must be determined on its own facts.

The *PPL* Court acknowledged the susceptibility element of *The Daniel Ball* test. 132 S.Ct. at 1233. The United States Supreme Court did not restrict the availability of the susceptibility argument to the circumstances pertaining to Utah in the nineteenth century. Rather, the Court gave an expansive – not restrictive – interpretation of *The Daniel Ball* navigability-for-title test in light of Utah's special circumstances. *United States v. Utah*, 283 U.S. at 81-82. The *Utah* case addressed the navigability of some of Utah's rivers. Utah became a state in 1869, about twenty years after the United States acquired the land from Mexico. *United States v. Utah*, 283 U.S. at 81-82. American settlement and many of the reported navigation incidents thus occurred after statehood, and the federal government argued that those incidents should not count for navigability-for-title purposes. *United States v. Utah*, 283 U.S. at 82. The Court disagreed, stating that the “crucial question” was whether the rivers were susceptible to commercial use in their ordinary condition, and that the Court was less concerned with “the mere manner or extent of actual use.” *United States v. Utah*, 283 U.S. at 82.

In *Utah*, the pattern of Euro-American settlement explained the limited, infrequent use of the rivers around the time of statehood, but the Court did not limit other States' susceptibility examinations to the conditions that existed in Utah. Moreover, the Court rejected the argument that consideration of future commerce was too speculative, stating as follows: “Rather, it is true that as the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored.” *United States v. Utah*, 283 U.S. at 83. This statement represents an expansive, not restrictive, view of navigability when a State's title is at issue.

In a later case, the Court repeated that the relevant inquiry is whether the waterway once had the capacity to carry useful commerce, even if it no longer had that capacity because of changed circumstances. *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 118 (1921). *The Daniel Ball* test is flexible and is “apt to uncover variations and refinements which require

further elaboration.” *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940). Moreover, *The Daniel Ball* test is only “the starting point” in determining navigability-for-title issues. *Defenders*, 199 Ariz. at 419 n.10, 18 P.3d at 730 n.10. It is appropriate and proper for ANSAC to examine Arizona’s special circumstances in determining whether the River was navigable at the time of statehood.

The special circumstances surrounding the River at statehood include that starting in the 1860s, the River’s flow was greatly diverted (Tr. 6/16/14, p. 90 (Fuller)); railroads crossed Arizona prior to statehood and the territorial officials often had a stake in railroad companies (X012-71, p. 458-463; 476 (Far Southwest); X012-71, pp. 440-41 (Far Southwest); 002, p. 3-25 (ASLD Upper Gila Report)); Arizona’s population was small and mostly not located on the major rivers (X020-80, PPT 61-65 (Fuller Boating); X025-104 (AZ Census); X012-71, p. 436-37 (*Far Southwest*)); and other transportation options existed (X020-80, PPT 65-66 (Fuller Boating)). See *Appalachian Elec. Power Co.*, 311 U.S. at 405-406 (stating that navigability for title purposes is not affected by nonuse over an extended period, changed conditions, or the existence of other forms of transportation); *United States v. Utah*, 283 U.S. at 82 (stating that where conditions of exploration and settlement explain the infrequency or limited nature of commercial use, the susceptibility to use as highway for commerce may be still satisfactorily proved). By 1912, the River’s reliable, perennial flows had been diverted for irrigation and dammed. This fact is merely one circumstance that *The Daniel Ball* test is flexible enough to accommodate. See *United States v. Utah*, 283 U.S. 64, 81-82 (1931) (discussing reasons why little evidence of actual navigation may exist, such as the fact that the region had not been settled).

Navigability-for-title is not a “one size fits all” test. It is a question of fact with respect to each individual river. See *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 363 n.10, 837 P.2d 158, 165 n.10 (1991). *The Daniel Ball* test is sufficiently flexible to take into consideration that the River’s waters have traditionally been used for irrigation. See *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940) (stating that there is no “formula which fits every type of stream under all circumstances and at all times” and that “[o]ur past decisions have taken due account of the changes and complexities in the circumstances of a river”). In fact, it is not only appropriate, but absolutely necessary that ANSAC examine this special circumstance and others in determining whether the River was navigable at statehood.

Opponents heavily rely on *PPL*, but ironically they blatantly disregard the Court's holdings in its last pronouncement on title navigability prior to *PPL: Utah v. United States*, 403 U.S. 9 (1971). In construing the phrase "highway for commerce," the United States Supreme Court rejected the contention that proof that a few owners of small boats who had used their boats to shuttle supplies and cattle to their ranching operations on islands in the Great Salt Lake was insufficient to establish that the lake was a highway for commerce. *Utah v. United States*, 403 U.S. at 11-12. The Court found it an "irrelevant detail" that the cattle were transported for ranching purposes and not as water-borne freight. *Id.* The Court further stated as follows:

The hauling apparently was done by the owners of the livestock, not by a carrier for the purpose of making money. Hence it is suggested that this was not use of the lake as a navigable highway in the customary sense of the word We think that is an irrelevant detail. The lake was used as a highway and that is the gist of the federal test.

Id. at 11. The "vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." *United States v. Utah*, 283 U.S. 64, 86 (1931). The *PPL* Court's decision did not overrule or change in any way the Court's prior pronouncement on the highway for commerce element of *The Daniel Ball* test. The State's evidence of actual navigation such as ferry use and boating trips satisfies this element of the navigability for title test.

B. The River's Usefulness Was Not So Brief That It Was Not A Commercial Reality

Freeport wholly misstates *PPL* when it discusses the concept of "commercial reality." Freeport Brief at 3. *PPL* uses that phrase in conjunction with its discussion of how much of the year a river must be susceptible to navigation. *PPL*, 132 S.Ct. at 1234 ("While the Montana court was correct that a river need not be susceptible of navigation at every point during the year, neither can that susceptibility be so brief that it is not a commercial reality.") In this case, Mr. Fuller opined, and no other expert disagreed, that the River would have been more navigable with the additional water that was present in its ordinary and natural condition. Mr. Fuller opined that all segments were navigable by canoes at least 90% of the time (329 days per year). See X020-79, PPT 158, 162, 170, 175, 180, 184, and 189. Mr. Fuller opined that navigability for flatboats varied, from 40% of the time (146 days per year) in Segment 1 to over 90% of the time in Segments 5 through 8. X020-79, PPT. See X020-79, PPT 158, 162, 170, 175, 180, 184, and

189. In addition, Mr. Fuller opined that Segment 8 was navigable by steamboats approximately 50% of the time. X020-79, PPT 189. No expert opined that these percentages were incorrect.

If 90% of the time is too brief for Freeport to consider a river's navigation a "commercial reality" it is difficult to imagine any river that could be deemed navigable. *See Defenders*, 199 Ariz. at 422, 18 P.3d at 733 (citing *Econ. Light & Power.*, 256 U.S. at 122 (periodic navigability is sufficient even if the river is not susceptible to navigation at all seasons of the year or at all stages of water); *United States v. Utah*, 283 U.S. at 87 (finding that portions of the Green, Colorado, and San Juan rivers were navigable because they were useable as a highway for commerce during at least nine months of the year); *United States v. Holt State Bank*, 270 U.S. at 57 (Mud Lake navigable despite occasional "seasons of great drought" during which navigation was difficult); *Alaska v. Athna*, 891 F.2d at 1402 (Gulkana River navigable even though frozen six months of the year); *Oregon v. Riverfront Prot. Ass'n*, 672 F.2d at 795 (McKenzie River navigable based on seasonal log drives for seventeen years that occurred primarily during three months of the year).

C. Modern Recreational Boating Demonstrates the River Was Susceptible of Use for Commercial Navigation at Statehood

ANSAC should consider modern, recreational boating on the River as evidence of the River's navigability. *See* X020-79, PPT 191-193. First, the State clearly demonstrated that modern boats are substantially similar to canoes and shallow draft boats used at statehood. Tr. 6/16/14, pp. 43-49, 85-89 (Fuller); Tr. 6/18/14, pp. 548-551, 585, 596-597, 635 (Farmer). Although modern boats may be more durable than boats used at statehood, the State provided evidence that the boats used at statehood had similar requirements and handling as boats today. *Id.*; *cf. PPL v. Montana*, 132 S.Ct. at 1234 (Montana did not provide evidence of types of modern day recreational boats; Court questioned whether such modern boats could navigate shallow, rockier rivers more easily than historical boats). Secondly, the State has shown that the River's current flows are substantially depleted; thus, the River is not more navigable, but in fact less navigable.

Again, the crucial question is not the extent of commercial activity that occurred, but rather, whether commercial activity *could have been* conducted on the River. *See, e.g., Utah v. United States*, 403 U.S. 9, 11 (1971) (finding the Great Salt Lake navigable for title purposes although most traffic on the Lake occurred in the 1880s before Utah achieved statehood in 1896;

nine boats used from time to time to haul cattle and sheep by owners sufficient, although not extensive evidence); *Appalachian*, 311 U.S. at 409 (stating that a navigability determination is not affected by an absence of use over long periods of time due to changed conditions); *Econ. Light & Power*, 256 U.S. at 117-118 (affirming a finding of navigability in spite of events such as drainage, forest clearance, diminished rainfall, canal construction, and various dams, that caused the water level to be lower than formerly and in spite of no actual, current navigation); *Puget Sound Power & Light Co. v. F.E.R.C.*, 644 F.2d 785, 788 (9th Cir. 1981) (finding the White River in Oregon navigable based on the river's historic use before construction of a hydroelectric project that diverted a substantial portion of the river's flow). If the River's dependable flows were not substantially diverted by the time of statehood, the River's channel, depth, and flows could have been utilized for trade and travel. Modern, recreational use on the River shows that the River was susceptible to commercial use at statehood. *PPL v. Montana*, 132 S.Ct. at 1233. The State met the requirements for modern day boating under *PPL v. Montana*, 132 S.Ct. at 1233-1234, by proving that present day canoes are meaningfully similar to those used for trade and travel at statehood, and that the River's post-statehood, depleted condition is significantly different than its ordinary and natural condition, its navigability was not improved by the diversions and impoundments.

D. State ex rel. Winkleman v. ANSAC's Holdings Apply to ANSAC's Determination

1. ANSAC's Prior Determination Is Not Controlling

Opponents urge ANSAC to wholesale adopt its prior determination on the River. Opponents' reliance on the Commission's prior determination in this matter is puzzling. ANSAC's prior determination in the River adjudication in many ways mirrored its determination on the Lower Salt River which was the subject of *State ex rel. Winkleman v. ANSAC*, 224 Ariz. 230, 229 P.3d 242 (App. 2010). The *Winkleman* Court found that ANSAC misapplied the pertinent test for determining navigability, and vacated the Superior Court's affirmation of ANSAC's determination. *Winkleman*, 224 Ariz. 230, 234, 242, 229 P.3d 242, 246, 254 ("ANSAC itself has made contradictory findings as to the ultimate question of fact . . . albeit most recently while applying the incorrect standard for determination.").

Moreover, Opponents seem to be in fact suggesting that ANSAC disregard all the evidence submitted since the 2009 determination, contrary to ANSAC's statutory directive to

“review and consider all relevant historical and other evidence.” A.R.S. § 37-1123(A) and (D) (“[t]he commission shall consider the information that those persons and entities [state land department, department of water resources, game and fish department, state parks board, and other interested persons and public and private entitle] have compiled regarding the navigability of watercourses.”).

Most importantly, as directed by the *Winkleman* Court, ANSAC must begin its determination of the navigability of the River without any “presumption against navigability.” *Winkleman*, 224 Ariz. at 239, 229 P.3d at 251. “Instead, ANSAC’s approach and analysis must be wholly impartial and objective, while utilizing the proper legal test.” 224 Ariz. at 239, 229 P.3d at 251.

2. Floods Are Not Part of the River’s Ordinary and Natural Condition

Opponents argue that floods are part of the ordinary and natural condition of the River and, thus, the resulting flood impacts should be necessarily considered part of the River’s ordinary and natural condition. SRP Brief at 15, 26. Although floods may naturally occur on rivers, focusing on their effects alone essentially discounts analysis of the River’s ordinary condition. *See Winkleman*, 224 Ariz. 241-242, 229 P.3d 253, 254. ANSAC must consider both in its determination of the River’s navigability. *Id.* Floods are rare on the River and are far from the River’s “ordinary” condition. Tr. 6/16/14, pp. 28, 42, 112, 207, 216, 218 (Fuller).

Regardless, this argument is to some extent moot. Dr. Gary Huckleberry, an acknowledged expert on the River whose work is cited by the Opponents’ experts, stated in his affidavit that while the effects of major floods on the flood plain may last for long periods of time, in a relatively short period of time the low flow channel where boating would occur will reappear. X035-129(2)(e). Opponents continue to try and confuse the issue by insisting on discussing the flood channel where boating does not occur.

Moreover, periodic floods occurred on the Gila River, as they do on any river, before 1860 and thereafter. After the floods recede, the low flow channel reforms, the flood channel may change, and where sufficient water remains, the River continues to be navigable.

V. Credibility of Expert Witnesses

The State joins in Maricopa County and The Flood Control District of Maricopa County’s analysis of the expert witnesses’ testimony presented in this case. Although other technical experts in this case may be competent hydrologists or geomorphologists, they lack the

experience necessary to properly evaluate a title navigability case, and thus, their testimony should be afforded less weight than that of Mr. Fuller.

SRP asserts that Mr. Fuller's work double checking his navigability analyses by boating the River was frivolous. SRP Brief at 29 (“[h]e even went so far as to extend his consulting work into a series of recreational canoe trips not long prior to the June 2014 hearing.”). Mr. Fuller, in fact, performed a comprehensive analysis of whether the Gila River was navigable in its ordinary and natural condition at statehood, the only expert to do so. Mr. Fuller first performed a scientific analysis of the river to determine if it met navigability requirements based on hydrologic and geomorphologic conditions. Most of the other expert's analysis stopped essentially at this point. Mr. Fuller went further – he researched and reviewed historic accounts of the River and historic photographs to see if they supported his scientific conclusions. Finally, he went out and looked at the River itself to see if his conclusions were correct. He was the only expert in this case to have gone out and boated the River.

Opponents rely on several lines of evidence to support their conclusions but that should be afforded minimal weight by the Commission. Dr. Littlefield failed to review the evidence in the record before coming to his conclusions, evidence that directly related to his field of study. Tr. 8/18/14, p. 1483-1484. Mr. Gookin's testimony regarding the depth of the River was not even supported by other experts on the same side – his flawed selection of Mannings “n” values (even after the correction submitted to the Commission) leads to significant errors in his testimony. See Tr. 8/19/14, pp. 1743-1745 (Mussetter); X032-123 (Mussetter, *Sediment Erosion*). In addition, Mr. Gookin's understanding of the requirements for boating is based on his limited experience with boats and boating. Tr. 6/19/14, p. 836 (Gookin) (“The only time I've been in a canoe was on the Rivers of America in Disneyland”). Dr. Mussetter has not done any work in Arizona on the Gila River outside of this case, and his superficial analysis of the characteristics of the River reflects that. Tr. 8/19/14, pp. 1708-9 (Mussetter). Although Dr. Mussetter's firm put together depth profiles for the Gila in New Mexico, he did not do so for Arizona. See X035-130 (MEI, *Geomorphology*). Mr. Burtell's conclusions should be discounted by the Commission because he bases his opinion on navigability on a requirement that there be a depth of three feet. Tr. 6/20/14, pp. 1179-1182 (Burtell). Mr. Burtell did not base his three feet requirement on the navigability characteristics of any historic boat. *Id.* The evidence before the Commission is that canoes can navigate in 2 inches of water, and that

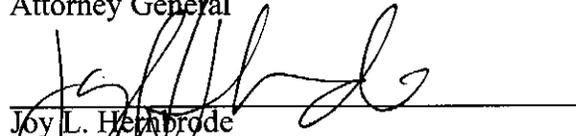
flatboats require slightly more. See X020-80, PPT 76, 116 – 117, Tr. 6/16/14, pp. 38-39, 42 (Fuller). An average depth of 6 inches is required to make boating practical. Tr. 6/16/14, p. 42 (Fuller). Steamboats at the time of statehood could operate in 19 inches of water. X020-80, PPT 17 (Fuller Boating). Opponents presented no evidence of any boat available at statehood in Arizona that would have required 3 or even 2 feet of depth.

VI. Conclusion

For the foregoing reasons, the Commission should find all segments of the Gila River navigable in their ordinary and natural conditions as of the date of statehood.

DATED: January 23, 2015.

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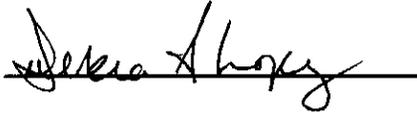
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