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3-23-06
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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In re Determination of Navigability of
The Verde River

No. 04-009 NAV

**STATE LAND DEPARTMENT'S
OPENING POST-HEARING
MEMORANDUM**

I. The Verde River's Historical Background.

The Verde River (the "River") is a perennial stream with its headwaters in Chino Valley in north-central Arizona, flowing generally southeast through the rugged terrain of central Arizona, and emptying into the Salt River east of the Phoenix metropolitan area. The River drains a total of 6,188 square miles at the Salt River confluence.¹ ASLD Verde at 2-2 – 2-11. Human occupation of the River dates back to the Paleo-Indian Period (8,000 - 12,000 B.C.) and continues through the Archaic, Formative, Classic and Historic periods. See generally ASLD Verde, Chapter 2. The River provided water for irrigation and has been a communication and trade route among various cultures since prehistoric times. ASLD Verde at 2-11. In sum, the archaeological evidence indicates that the Verde River has provided accessible, permanent water to the Verde Valley area since prehistoric times. ASLD Verde at 2-9 – 2-11, 2-14.

Spanish exploration of central Arizona began in the sixteenth century. In 1716, Padre

¹Arizona State Land Department's *Arizona Stream Navigability Study for the Verde River: Salt River Confluence to Sullivan Lake* (rev. June 2003 by JE Fuller/Hydrology & Geomorphology, Inc.) (Evidence Item ["E.I."] No. 7) ("ASLD Verde").

Luís Velarde wrote that the major rivers of the region were the Gila and the Colorado but also mentioned “two others, called the Salado and the Verde River, the first because it was salty, and the latter perhaps because it runs among greenish shapes or rocks.” ASLD Verde at 3-8. The early Spanish explorers of the Verde River provided only cursory descriptions of the River. However, according to Bartlett, in speaking of the general vicinity of the mines, explorer Antonio de Espejo said, “The general aspect of the land where the mines are located is good; there are rivers, marshes, wood, and also—on the riverbanks—great quantities of Castile grapes, walnut trees, flax, mulberries (*morales*), maguey plants, and prickly pears.” ASLD Verde at 3-11. Diego Perez de Luxan, who accompanied Espejo, wrote that on May 8, 1583, “we found a large and copious river which flowed from north to south, which we called El Río de los Reyes.” Hammond and Rey’s [1966] translation of this account describes the El Río de los Reyes a[s] “a large river, carrying a great volume of water.... Close to it was a marsh into which flowed a stream of water.” Bartlett believes that this “River of Kings” was the Verde River. *Id.*

Marcos Farfán’s expedition passed through the region in November 1598 and, as reconstructed by Bartlett, described Beaver Creek as “a river of fair width and much water, with good pasture and a cottonwood grove,” then crossed Oak Creek (“another river, wider than the first”), and finally crossed the Verde River (“another river, much larger, which flowed from the north”). Farfán also said that “there was a great abundance of water in the rivers and springs mentioned above. ASLD Verde at 3-11.

Anglo fur trappers came to the Verde River in the early 1820s and through the 1840s.² Jonathan E. Fuller, P.E., R.G., P.H., CFM, Tr. at 11. In 1826, trappers James Ohio Pattie, Ewing

² ANSAC held its public hearing on the Verde River on January 18, 2006. Some testimony on the Verde River was also taken at the public hearing on November 16, 2005. The relevant portions of the November 16 hearing transcript are attached as Exhibit A to the January 16 transcript. References to testimony elicited at the hearing are designated by witness, “Tr.,” page number.

Young, and others traveled up the Salt River, trapping beaver along the way. ASLD Verde at 3-8. At the Verde River, Young went up the Verde River and followed it up to its headwaters, then returned to the Salt River. *Id.* In 1829, Young returned with 40 other trappers (including Kit Carson), traveling up the Verde River to the Chino Valley. *Id.* John Wolfskil, George Yount, and Pauline Weaver trapped the Verde River in 1829 and 1830. ASLD Verde at 3-9.

In 1863, gold was discovered on the Hassayampa River and Lynx Creek, a tributary of the Verde River. *Id.* In 1865, New Mexico Volunteers from Fort Wipple established an unofficial garrison on the middle Verde River, which was officially designated as Camp Lincoln and later (1868) renamed Camp Verde. *Id.*

Civilian settlement of the middle Verde River Valley began in 1865. A circa 1884 account provides: “The Verde River is one of the largest northern branches of the Salt River, its upper branches rising at different points to the east, north, and northwest, from Prescott. It becomes a fine river of eighty feet in width about fifty miles northeast from Prescott, and thence runs a southerly course to its junction with the Salt River, near Camp McDowell. Its whole course is about one hundred and fifty miles.” ASLD Verde, Table 3-1, *Chronology of Historical Events in the Verde River Valley*. Another 1884 account describes the Verde’s waters as “clear and limpid,” the river “as large as the Gila,” “well stocked with fish,” and “capable of irrigating vast stretches of land.” *Id.* Jessie Belle Shelley moved to the middle Verde Valley in 1879 and described the Verde River as following in a definite course with grass covered banks. ASLD Verde at 3-14. Dr. Edgar A. Mearns, a surgeon at Fort Verde and an accomplished naturalist, stated that in the 1880s the Verde River “was deep, flowed slowly, and was impeded by many beaver dams.” ASLD Verde at 3-14. Dr. Ralph F. Palmer arrived in Camp Verde in 1902 and described the Verde River as 50 feet wide, no more than waist deep with banks two to three feet

high and a “steep by gravelly slope to the sand wash below.” ASLD Verde at 3-15.

Farming on the middle Verde River, near Camp Verde, began in 1865 just after the establishment of the garrison. According to Margaret Goddard, the principal irrigation ditches in the middle Verde River and their dates of establishment were the Eamon or Diamond Ditch (1865), the Wood Ditch (1868), the Cottonwood Ditch (1869), the O.K. or Middle Verde Ditch (1873), and the Hickey Ditch (1874). ASLD Verde at 3-15. By 1880, most of the arable land in the middle Verde Valley was under cultivation. ASLD Verde at 3-15. Patrick Hamilton stated that in 1884, 3000 acres along the Verde River were being farmed and that a canal under construction would bring another 1000 acres under production. ASLD Verde at 3-15.

The historical record of the Verde River provides a clear, consistent picture of river conditions as of the time of Arizona statehood. The Verde’s perennial flow was sufficient to supply irrigation for thousands of acres of farmland, to supply water and power for local residents, and to support native fish and aquatic mammal populations and lush riparian habitat. Not a single account describes a dry riverbed or insufficient water supply. As described in Section III, B below, the historical condition was sufficient to support boating, much as same as the river continues to do today.

II. Title to the Beds of Navigable Watercourses in Arizona Automatically Passed to the State at Statehood Pursuant to the Public Trust and Equal Footing Doctrines.

Under the equal footing doctrine, each new state enters the Union “with all of the powers of sovereignty and jurisdiction which pertain to the original states, and . . . such powers may not be constitutionally diminished.” *Coyle v. Smith*, 221 U.S. 559, 572-73 (1911); *Pollard’s Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845). One attribute of sovereignty enjoyed by the original thirteen states was their succession to the British Crown’s sovereign interest in the beds

of navigable waters under the common law of England, which interest was subject to the public right (*jus publicum*) of navigation and commerce. *Martin v. Waddell's Lessee*, 41 U.S. 367, 413-14 (1842); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997). Protection of the public's right of access to public waters by sovereign bed ownership is known as the public trust doctrine. To assure that each new state receives the bedlands of navigable waterways pursuant to this public trust doctrine, the federal government, as sovereign, holds title to the beds and banks of navigable waters in territorial lands in trust for future states. *Coeur d'Alene*, 521 U.S. at 284. The federal government may convey such bedlands in pursuing national interests, but any conveyance must be explicit. *See id.* at 283-84.

Although in England only tidelands were considered navigable, in the United States the public trust interest extends to inland navigable waterways, in keeping with the trust's fundamental purpose of preventing private interests from interfering with the use of navigable waters for transportation. *Packer v. Bird*, 137 U.S. 661, 667 (1891); *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 436 (1892). Thus, when each state enters the Union, the new state receives title to the beds of navigable waterways within its boundaries (except in a few cases where the United States either did not acquire title or had conveyed title to such lands). *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977) (citing *Pollard's Lessee*, 44 U.S. (3 How.) 212); *see also Defenders of Wildlife v. Hull*, 199 Ariz. 411, 415-416, 18 P.3d 722, 726-727 (App. 2001). Navigability is the key to determining a state's title to watercourses. Because title was acquired from the federal government, navigability for title purposes is determined by federal law. *Defenders*, 199 Ariz. at 419, 18 P.3d at 730; *Arizona Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 362, 837 P.2d 158, 164 (App. 1991). ANSAC's determination is thus governed by the federal test of navigability, which is derived from the

United States Supreme Court's decision in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). That test provides as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, *or are susceptible of being used*, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 563 (emphasis added); *see also Defenders*, 199 Ariz. at 420, 18 P.3d at 731 (stating that the *Daniel Ball* test is correctly paraphrased in A.R.S. § 37-1101 (5)). The test is a flexible one that is "apt to uncover variations and refinements which require further elaboration." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940). How the *Daniel Ball* test is to be applied in Arizona's unique geographical context is the source of much contention.

The *Daniel Ball* test is applied to determine navigability in title, admiralty and maritime, and commerce clause cases. *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979); *Defenders*, 199 Ariz. at 418-19, 18 P.3d at 729-30. Under the commerce clause, once a river is determined to be navigable, it is considered navigable in law forever whether or not it remains navigable in fact. *Appalachian*, 311 U.S. at 408 (citing *Economy Light & Power v. United States*, 256 U.S. 113 (1921)). The Ninth Circuit has held that the commerce clause test applies to riverbed title cases. *City of Centralia v. F.E.R.C.*, 851 F.2d 278, 281 (9th Cir. 1988). Thus, the concept of "indelible navigability" applies to navigability-for-title cases. *See* David M. Guinn, *An Analysis of Navigable Waters of the United States*, 18 Baylor L. Rev. 599, 564-565 (1966) (opining that a state should not lose title to a riverbed even if the river is presently nonnavigable, as long as river was navigable at some point in the past). Moreover, the State's title to the beds of all navigable streams within its borders may not be defeated merely because the bed was channeled, artificially controlled, dammed, or its waters diverted. *State v. Bonelli Cattle Co.*,

107 Ariz. 465, 468, 489 P.2d 699, 702 (1971), *rev.'d on other gr., Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), *rev'd, Oregon ex rel State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

III. The Verde River Was Navigable In Its Ordinary and Natural Condition; The Verde River Was Used or Was Capable of Being Used As a Highway for Commerce.

A. To Determine the Verde River's Navigability, ANSAC Must Determine the River's Ordinary and Natural Condition.

Although the Verde River was actually used for navigation (*see* § III(B)(1) below), the *Daniel Ball* test does not require actual commercial use or navigation to prove navigability for title purposes; all that the test requires is proof that a river in its ordinary and natural condition could have been used as a highway for commerce at the time of statehood. *United States v. Holt Bank*, 270 U.S. 49, 56 (1926); *United States v. Utah*, 283 U.S. 64, 82-83 (1931); *The Montello*, 87 U.S. (20 Wall.) 430, 441-442 (1874). Such proof permits a finding of navigability for remote watercourses that were capable of being used for trade or travel but were not so used because of lack of demand for such uses or for some other reason. *See United States v. Utah*, 283 U.S. at 82 (stating that the arid, western states would be disadvantaged if navigability could be established only by actual use).

"Ordinary" means "[r]egular; usual; normal; common; often recurring; according to established order; settled; customary; reasonable; not characterized by peculiar or unusual circumstances" Black's Law Dictionary, 758 (6th ed.1991); *cf. Holt State Bank*, 270 U.S. at 57 (stating that drought conditions on the Mud River were "exceptional" and not "the usual conditions"). Ordinary conditions necessarily exclude floods and other extraordinary high water events, but include the average or normal reach of high water each year. "Natural" means "[u]ntouched by man or by influences of civilization; wild, untutored, and is the opposite of the

word 'artificial.'" Black's Law Dictionary, 712 (6th ed. 1991). Dams or diversions that cause low flow or a dry bed in the River are man-made obstructions (*see Black's* at 712) and are therefore not natural parts of the River. *See Bonelli*, 107 Ariz. at 468, 489 P.2d at 702 (stating that "a watercourse [does not] lose its character as such because all the water has been diverted therefrom, no matter for how long a period . . . nor by reason of the fact that the water has all been dammed at a places far up the stream," *citing Smith v. City of Los Angeles*, 153 P.2d 69 (1944)); *Econ. Light & Power Co.*, 256 U.S. at 118 (stating that artificial obstructions that may be reduced by public authority do not preclude a finding of navigability if, assuming the obstruction is reduced, the waterway would be navigable in its natural and ordinary condition). To determine whether a watercourse could support navigation, tiers of fact examine evidence of the watercourse's physical characteristics, that is the river's "volume of water, the gradients and the regularity of flow." *Appalachian*, 311 U.S. at 407-13. In undertaking such inquiries, courts are not limited to examining the watercourse's physical condition at statehood, but they may look back at the watercourse's historic physical condition. *United States v. Oregon*, 295 U.S. 1, 15-18 (1935).

Thus, to determine whether the Verde River could have been used as a highway for commerce, ANSAC must assess the River's pre-statehood ordinary and natural condition, disregarding all man-made obstructions and diversions.

1. *Hydrology.*

The Verde River was and is a naturally perennial river (ASLD Verde Report at 7-1, 3, 5, 8, 26; Philip Pearthree, Arizona Geological Survey, Tr. at 28:18), despite numerous irrigation diversions (ASLD Verde Report at 7-4, 6, 7, 11, 22, Table 7-16; Fuller Tr. at 10:12-17, 29:8) and two major water supply reservoirs (Horseshoe & Bartlett) (ASLD Verde Report at 7-6, 8, 11,

25). Systematic hydrologic measurements made by the U.S. Geological Survey and others that extend back well before Arizona Statehood provide an undisputable record of reliable, perennial flow throughout the year. ASLD Verde, Tables 7-1 to 7-7. The hydrologic data were reported as median (50%), monthly average minimum, monthly average maximum, and flow duration records. ASLD Verde, Table 7-5; Fuller Tr. at 31:2-5; Fuller PowerPoint (E.I. 38) Slides 17-22. Archaeological records of irrigation extending back more than 1,000 years (Fuller Tr. at 10), tree-ring studies (Fuller Tr. at 29) and historical descriptions of the River (Fuller Tr. at 13) that include not just reliable flow, but also healthy fish, beaver, and otter populations (Fuller Tr. at 11), paint a consistent picture that supports the long-term stream gauge information.

The best available hydrologic data, and the only Verde River data submitted into the record for consideration by ANSAC, are summarized in Table 1 *See* Appendix A. The data demonstrate that not only was the Verde River perennial, but also that the ordinary and natural flow condition was neither drought nor flood. In fact, long-term flow records demonstrate that, while large flash floods can occur on the Verde River, flood conditions that might inhibit boating occur less than one percent of the time. Fuller, Tr. at 31, Fuller PowerPoint at Slides 18-21. Therefore, descriptions of flood hazards and flood conditions are irrelevant for determining navigability in the “ordinary and natural” condition of the River.

The existing hydrologic condition of the Verde River, as well as the River’s condition in 1912, is substantively different from the River’s natural, pre-development condition. In 1914, 25 diversions along the entire Verde River diverted more than 121 cubic feet per second (“cfs”) for more than 5,000 acres of farm land between Perkinsville and the Salt River. ASLD Verde at 7-22. Diversions lowered measured stream flow and depleted stream resources. *Id.* By 1980, about 30 irrigation diversions existed in the upper and middle Verde, providing water for about

7,800 acres. *Id.* Near Cottonwood and Camp Verde, these diversions took more than half of the ordinary flow of the Verde River, and all or portions of the flow from several tributaries. *Id.* Consequently, the data in Table 1 derived from USGS records do not account for the volume of runoff diverted for irrigation, and thus underestimate the natural low flow rates by as much as 121 cfs. *See* Appendix A, Table 1.

2. *Geomorphology.*

The Verde River flows through a series of bedrock canyons and intervening alluvial valleys. ASLD Verde, Chapter 5; Pearthree Tr. at 17-20. Bedrock canyons occur upstream of Clarkdale and between Beasley Flat and the Fort McDowell Indian Community. Wider, alluvial valley reaches extend from Clarkdale to Beasley Flat downstream of Camp Verde, and across the Fort McDowell Indian Community to just upstream of the Salt River confluence. Pearthree Tr. at 17 – 19. With respect to navigability, the primary difference between the bedrock canyons and alluvial valleys is flow removal by irrigation diversions in the alluvial valleys and the presence of man-made obstructions such as fences and diversion dams. The low flow channel is similar regardless of whether it is in a bedrock canyon or an alluvial reach. Pearthree Tr. at 22, 27. Rating curves indicate similar flow depth, width, and velocity at ordinary flow rates in the bedrock canyon and alluvial reaches. ASLD Verde, Tables 7-8 to 7-13. The dominant low flow channel at ordinary flow rates has a single channel, and a pool and riffle pattern. Pearthree Tr. at 20-21.

In summary, the hydrology of the Verde River has not substantially changed since 1912. Flow rates, channel conditions, stream geomorphology, ground water conditions, and river uses are similar to conditions at statehood. At statehood, the Verde River was used for boating, fishing, trapping, irrigation and water supply. With the possible exception of trapping, these uses

continue on the Verde River today. The USGS gage records indicate that the Verde River was and is a perennial river and that the ordinary and natural flow condition was neither drought nor flood.

B. The Verde River Was and Is Navigated.

In evaluating a river's navigability, federal courts have adopted a liberal construction of the *Daniel Ball* test that allows the consideration of evidence of the watercourse's historic navigability, even though the watercourse may not be currently navigable. 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); *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 117-18 (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); *Defenders*, 199 Ariz. at 423, 18 P.3d at 734 (noting that the "ordinary modes of trade or travel" of the *Daniel Ball* test are not restricted to those in existence at the time of statehood).

The United States Supreme Court also adopted a liberal test for determining what is a highway for commerce. In *Utah v. United States*, the Court found that nine boats which ranchers used occasionally to haul their livestock from the mainland to one of the islands or vice-versa was sufficient evidence to show that the Great Salt Lake was used as a highway for commerce,

concluding that “[t]he Lake was used as a highway and that is the gist of the federal test.” 403 U.S. at 11. A watercourse is a highway for commerce if it was utilized as a path between two points. *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”). In addition, a river may be deemed navigable despite occasional impediments such as sand or gravel bars, and despite the fact that it is navigable a few months out of the year. *See e.g., State of Oregon v. Riverfront Protective Ass’n*, 672 F.2d 792, 795 (9th Cir. 1982).

It is not necessary that a river actually have been used for commerce so long as the river was capable of commercial use. *United States v. Utah*, 283 U.S. at 82. Incidents of modern boating can demonstrate historic navigability. *See Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (finding that present recreational guided fishing and sightseeing trips are “commercial activity” under the *Daniel Ball* test and can prove a river’s susceptibility for commercial use at the time of statehood); *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (1998) (holding that evidence of a river’s capacity for recreative use is in line with the traditional test of navigability).

(1) *The River Was Navigated Historically.*

Despite a very sparse population in the Verde Valley and no local news source around the time of Statehood, there are seven recorded accounts of boating during the historical period. ASLD Verde at 3-20 to 3-21, 8-2 to 8-4. All of the accounts describe successful boating trips and none report problems with navigability.

a. Fort Verde personnel and civilians kept boats to reach the other side of the river during periods of seasonal high flow. A photograph shows two men on the Verde in a collapsible U.S. Army boat about 1887. ASLD Verde at 3-20.

b. At least two newspaper accounts describe soldiers boating down the Verde River from Ft. McDowell to Phoenix. ASLD Verde at 3-20. They are as follows:

i. *Arizona Gazette*, February 14, 1883: “The Salt River is a navigable stream and should be included in the river and harbor appropriation. North Willcox and Dr. G.E. Andrews, U.S.A., of McDowell, landed at Barnum’s Pier, on the Salt River Valley Canal, at three o’clock yesterday afternoon, direct from McDowell, having accomplished the voyage from that point to this port, in a canvas skiff. The running time proper was eighteen hours.”

ii. *Phoenix Herald*, December 12, 1888: “... While coming down to Phoenix with Capt. Hatfield in a canoe and shooting as they came, they were about to lift their boat over the Mesa dam, when the major attempted to remove his gun from the boat, and in doing so it was discharged, killing him almost instantly.”

c. Article in *Mesa Free Press* of 1890 or 1891 describes how A.J. Chandler had logs or sawn timber from the Fort McDowell floated down the Verde River and then used in the head gates of the Consolidated Canal. ASLD Verde at 3-20.

d. Boats or rafts were used to transport rock for building a dam near Perkinsville in June 1899. ASLD Verde at 8-3.

e. In 1903, Dr. Ralph Palmer and Joe Crain, boated 16 miles along the Verde River while duck hunting. ASLD Verde at 3-21.

f. Prior to Statehood, boats were used for recreational purposes. ASLD Verde at 8-3.

(2) *Modern Boating.*

Modern boating occurs over the entire length of the Verde River (Fuller Tr. at 34, 37), although some reaches are more popular boating areas than others. The Arizona State Parks Department lists the Verde River from Perkinsville to the Salt River as a boatable stream. (ASLD Verde at 8-4 – 8-5). Commercial boating is common on the Verde River. *See generally* Fuller Tr. at 40; John Colby Tr. at 55 – 63. John Colby owns a rafting company that operates commercial tours on the Verde River. His tours include the following: the stretch from Childs to Horseshoe Reservoir, and from Bartlett reservoir to the forest boundary through the Fort McDowell community and down through the Salt River. Colby Tr. at 55 – 56. His commercial trips have included single-day trips on the lower section of the River with as many as one-hundred fifty commercial guests. Colby Tr. at 55 - 56. The trips on the upper Verde are for up to seven days and with up to twelve commercial guests with water levels ranging from about 32 cfs to up to 3500 cfs as measured at the Camp Verde gauge. Colby Tr. at 56: 7-13. Boats used on the Verde include inflatable rafts, “catarafts,” canoes and inflatable kayaks. Colby Tr. at 57: 18-23. The boats carry not only the guests, but also the camping gear and food to be used by the group. *See Ahtna*, 891 F.2d at 1403 (guided trips on inflatable rafts carrying five passengers and guide held to support determination of navigability); *Defenders*, 199 Ariz. at 424, 18 P.3d at 735 (“guided fishing and sightseeing trips, although merely recreational, are ‘transportation for profit’ and can be considered commercial activity under the *Daniel Ball* test.”). The Town of Camp Verde sponsors an annual boat race on the Verde River (Fuller Tr. at 28, 36) and boating by environmental regulatory agencies (David Weedman, Tr. Ex. A at 219) also occurs on the Verde River.

With respect to private boating, the U.S. Forest Service recently began tracking boating on the Verde River downstream of Beasley Flat through a voluntary registration program. From January 2001 to March 2005, the USFS recorded 728 boating trips by 863 individuals (Fuller Tr. at 37), not including the boaters who chose not to participate in the registration program. This boating occurred during every month of the year, during some of the most prolonged drought known in Arizona, and occurred at flow rates as low as 30 cfs (ASLD Verde, Table 8-4) and as high as 40,000 cfs (Jim Slingluff Tr. at 127). The USFS records demonstrate the Verde's broad appeal -- boaters from as far away as Connecticut and Montana paddled the River. The types of boats reported by the USFS included canoes, kayaks, and rafts. ASLD Verde, Table 8-4; Fuller Tr. at 37. Mr. Colby testified that he has been personally boating the Verde since 1985, including from the Beasley Flat access point, which is just down stream from Camp Verde, through Childs, through Sheep Bridge and all the way down to Horseshoe Reservoir at the far end of the Verde River. Colby Tr. at 55. Mr. Fuller testified that he boats the Verde River six to ten times per year in flows as low 65 cfs at Camp Verde. Jim Slingluff, an experienced boater and guide on the Verde River, testified that he had boated the entire Verde, as well as in all months of the year and in flows as low as 40 cfs and as high as 6,000 cfs (Slingluff Tr. at 105, 127). Books and articles have been written on and describing boating on the Verde, including that authored by Mr. Slingluff (*Verde River Recreational Guide*, E.I. 9) and Arizona State Parks (*Arizona Rivers and Streams Guide*). ASLD Verde at 8-4 – 8-5; Fuller Tr. 36. Mr. Slingluff also testified that the Verde would be boated even more frequently than it currently is if it was more accessible. (Slingluff Tr. at 123).

Figures 1, 2, and 3 show the flow duration data for Verde River provided in the ASLD Verde Report plotted relative to the boating criteria for the River Fuller PowerPoint Slides E.I.

38. These figures demonstrate that boatable conditions exist 99 percent of the time. Figures 4, 5, and 6 show the variability of the average monthly, average minimum monthly, and average maximum monthly flow rate relative to known boating levels, and demonstrate that boatable conditions exist during every month of the year. Fuller PowerPoint Slides E.I. 38.

The historical record indicates that boating occurred on the Verde River as of the time of Arizona Statehood. The modern record confirms that the river is readily boated during the ordinary and natural condition of the river. US Forest Service records document that hundreds of boaters use the river each year, and that boaters from all over the United States visit and boat the river. Clearly there can be no dispute that the Verde River is susceptible to navigation.

III. Conclusion.

The evidence demonstrates that the Verde River is navigable. The Verde River has provided accessible, permanent water to semi-arid Arizona since the region was first inhabited. Since statehood, the Verde River was used for boating, fishing, trapping, irrigation and water supply. With the possible exception of trapping, these uses continue today. Further, modern, recreational year-round boating by individuals and seasonal boating by commercial outfitters, despite numerous irrigation diversions and two major water supply reservoirs, also demonstrates that the Verde is navigable.

The *Daniel Ball* test for determining title to the beds of navigable rivers is sufficiently flexible to take into account the vast differences that exist among the Nation's regions. In determining the River's navigability, the unique circumstances of Arizona's settlement, statehood, development, industry, and its climatic, geologic, and hydrologic conditions warrant different considerations than navigability determinations of other States' watercourses. The Verde is navigable under the under the *Daniel Ball* test, and ANSAC should declare it so.

DATED: March 21, 2006.

TERRY GODDARD

A handwritten signature in black ink, appearing to read "Donald J. Baier", written over a horizontal line.

Donald J. Baier
Laurie A. Hachtel
Assistant Attorney General

ORIGINAL and SEVEN COPIES
of the foregoing sent by U.S. mail
this 21st day of March, 2006

Arizona Navigable Stream Adjudication Commission
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Phoenix, AZ 85007

And COPY sent by U.S. mail this
21st day of March, 2006 to:

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2800 North Central Avenue, Suite #1800
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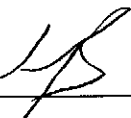
COPY of the foregoing sent by U.S. mail
this 21st day of March, 2006 to the following
persons who indicated they were a party and
appeared at the public hearing:

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By:  _____

APPENDIX A

Table 1. Streamflow Data for the Gila River, Arizona.										
Location	Description	USGS Gage	Gage Period	D.A. (mi ²)	Average Annual Flow (cfs)	Median Flow 50% (cfs)	High Flow 10% (cfs)	Base Flow 90% (cfs)	Major Tributaries Above Location	Citation
Verde River near Paulden	10 miles downstream of Sullivan Lake	09503700	1963-2006	2507	42	25	22	31		ASLD Report Table 7-4 ASLD Report Table 7-5
Verde River near Clarkdale	4 miles upstream of Clarkdale	09504000	1915-2006	3503	192	85	70	236	Granite Creek Sycamore Creek	"
Camp Verde	1 mile north of Camp Verde		1913-1920							"
Verde River near Camp Verde	9 miles southeast of Camp Verde	09506000	1934-2006	5010	439	189	84	837	Oak Creek Beaver Creek West Clear Creek	"
Camp Verde	18 miles southeast of Camp Verde		1911-1917							"
Above Horseshoe Reservoir	9 miles upstream Horseshoe Dam	09508500	1945-2006	5859	559	238	120	917	Fossil Creek East Verde River Wet Bottom Creek	"
McDowell	1 mile upstream of Salt River Confluence		1888-1950	6000	781	968	-	-	Sycamore Creek	"