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

10 In re Determination of Navigability of the Verde River) No. 04-009-NAV
11)
12) **OPENING POST-HEARING**
13) **MEMORANDUM OF THE YAVAPAI-**
14) **APACHE NATION TO DETERMINE**
15) **WHETHER THE VERDE RIVER WAS**
16) **NAVIGABLE AT THE TIME OF**
17) **ARIZONA'S STATEHOOD**

18 The Yavapai-Apache Nation (the "Nation") submits its Opening Memorandum after the
19 Arizona Navigability Stream Adjudication Commission (the "Commission") hearing on January
20 18, 2006, to determine whether the Verde River is navigable under the equal footing doctrine.

21 The Verde River was not navigable prior to and at the time of Arizona's statehood on
22 February 14, 1912. The Nation therefore requests that the Commission determine that the entire
23 reach of the Verde River is non-navigable, including the reach of the Verde River running though
24 the lands held in trust for the Nation by the United States ("Reservation").

25 **A. Introduction**

26 The Yavapai-Apache Nation is a federally recognized Indian Tribe. The United States
27 holds several parcels in trust for the Nation in the Verde Valley from Clarkdale to and including
28 Camp Verde. These parcels are located within the aboriginal lands of the Nation, and were within
the original Reservation established by Executive Order of October 3, 1871.¹ That Reservation

¹That Order was "revoked and annulled" by Executive Order of U.S. Grant on April 23, 1875, when the members of the Nation were forcibly required to walk to the San Carlos Apache Reservation through a snow storm which resulted in the death of numerous people. The Yavapais and Apaches soon returned to the Verde Valley to find their camps, ditches and fields occupied by non-Indian settlers.

1 encompassed 10 miles on both sides of the river [Verde]...a distance...of about 45 miles.

2 The Verde River runs through multiple parcels of Camp Verde Military Reservation, a
3 U.S. Army military post (now Fort Verde State Historical Park), is located just north of Camp
4 Verde. The Verde River also ran through the Camp Verde Military Reservation which was
5 abandoned in 1891.²

6 There is no evidence that the Verde River was ever commercially navigated prior to or at
7 the time of Arizona's statehood. Navigation for commerce is required to satisfy the navigability
8 test under the equal footing doctrine. Almost all of the sparse evidence presented relates to
9 modern-day, private non-commercial recreational float trips downstream from Camp Verde,
10 starting at Beasley Flat,³ or Childs, Arizona,⁴ using either canoes, or inflatable kayaks and rafts,
11 with some of the float trips ending at Horseshoe Reservoir.⁵

12 Applying the federal test and criteria to determine navigability under the equal footing
13 doctrine, the Verde River was non-navigable at the time of Arizona's statehood, because there
14 was neither navigation for commerce on the Verde River prior to or at the time of Arizona's
15 statehood, nor was the Verde River susceptible to navigation for commerce at the time of
16 Arizona's statehood.

17 Occasional private non-commercial recreational float trips on the Verde River do not
18 demonstrate that the Verde was navigable for commerce under the equal footing doctrine.⁶ The
19 few recent guided recreational rafting trips on stretches of the Verde starting at Beasley Flat, or
20

21 ²ASLD Verde River Report (Revised June 2003), E-31 at 3-4.

22 ³Beasley Flat is approximately 10 miles downstream from Camp Verde.

23 ⁴Childs, Arizona, is 18 miles downstream from Beasley Flat, and approximately 30 miles
24 downstream from Camp Verde. *See* Table 7-4, ASLD Verde River Report, E-31 at 7-8.

25 ⁵Testimony of John Colby, Transcript of January 18, 2006, ANSAC Verde River hearing.
TR at 56.

26 ⁶The Nation is also submitting a separate brief as authorized by the Commission relating
27 to the federal meaning and requirement of commerce under the equal footing doctrine, which
28 concludes that private, non-commercial recreational float trips do not constitute commerce under
the equal footing doctrine. The Nation incorporates this separate brief as part of its briefing on
the navigability of the Verde River, the Upper Salt River, and the Gila River. *See*, also, Section B
herein.

1 Childs, for which fees are charged, do not establish that these reaches of the Verde River were
2 navigable for commerce at the time of Arizona's statehood under the equal footing doctrine. *See*
3 Section D herein.

4 The federal test and criteria to determine navigability under the equal footing doctrine are
5 reviewed in Section B herein. The federal test and criteria are then applied to the facts and
6 evidence in Sections C and D which establish that the Verde River was navigable for commerce
7 under the equal footing doctrine at the time of Arizona's statehood.

8 **B. The Federal Test to Determine Navigability Under the Equal**
9 **Footing Doctrine**

10 **1. Private Non-Commercial Recreational Float**
11 **Trips Do Not Satisfy the Commerce Requirement**
12 **of the Equal Footing Doctrine**

13 The federal test for navigability was first set forth in the case of *The Daniel Ball*, 77 U.S.
14 557, 563 (1870):

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

21 *The Daniel Ball* held that in order for a river to be determined to be navigable under the
22 Commerce Clause,⁷ and therefore subject to regulation by Congress under the Commerce Clause,
23 there must be a finding that a river is or may be used in its "ordinary condition," as a "highway for
24 commerce," over which "trade and travel are or may be conducted." A finding of some kind of
25 commercial navigation is therefore required to determine navigability in cases interpreting
26 Congress' power to regulate commerce⁸ under the Commerce Clause.

27 In *The Montello*, 87 U.S. 430 (1874), the second case which involved the regulation of

28 ⁷Article I, § 8, of the U.S. Constitution, gives Congress the power "To regulate Commerce
with foreign Nations, and among the several States, and with the Indian Tribes."

⁸The word "commerce" is defined as "**an interchange of goods or commodities** esp. on a
large scale between different countries (foreign commerce) or between different parts of the same
country (domestic commerce)." *The Random House Dictionary of the English Language, Second
Edition, Unabridged, (1987) (emphasis added).*

1 navigation by Congress under the Commerce Clause, the U.S. Supreme Court further elaborated
2 on the *Daniel Ball* test to determine navigability which requires commercial navigation:

3 **The capability of use by the public for purposes of transportation**
4 **and commerce** affords the true criterion of the navigability of a river,
5 **rather than the extent and manner of that use. If it be capable in its**
6 **natural state of being used for commerce, no matter in what mode**
7 **the commerce may be conducted,** it is navigable in fact, and
8 becomes in law a public river or highway. [Emphasis added].

9 *Id.* at 441.

10 The Supreme Court in *The Montello*, quoting a Massachusetts Supreme Court opinion,
11 *Rowe v. The Granite Bridge Corporation*, 38 Mass. (21 Pickering at 344) 344, 347 (Mass.
12 1838), which stated that “**It is not...every small creek in which a fishing skiff or gunning**
13 **canoe can be made to float at high water which is deemed navigable,** but, in order to give it
14 the character of a navigable stream, **it must be generally and commonly useful to some**
15 **purpose of trade or agriculture.**” [Emphasis added]. *Id.* at 442. The Supreme Court here was
16 defining commerce in its traditional meaning as referring to navigation for the purposes of “trade
17 or agriculture.” The Supreme Court rejected the notion that a “fishing skiff” or “gunning canoe”
18 which can be made to float at “high water” would satisfy the commerce requirement.

19 *The Montello* court further explained that “**...the vital and essential point is whether the**
20 **natural navigation** of the river is such that it **affords a useful commerce.** If this be so the river
21 is navigable in fact, although its navigation may be encompassed with difficulties by reason of
22 natural barriers, such as rapids and sand-bars.” [Emphasis added]. *Id.* at 443.

23 All of the U.S. Supreme Court cases and lower federal court cases, including the Ninth
24 Circuit Court of Appeals, which have subsequently determined the criteria for the “navigability
25 for title” test under the equal footing doctrine, have applied the same commerce requirement
26 under the *Daniel Ball* and *The Montello* federal test to determine navigability under the
27 Commerce Clause.

28 Thus, in *Oklahoma v. Texas*, 258 U.S. 574 (1922), the first case decided by the Supreme
Court to determine navigability under the equal footing doctrine, the Supreme Court applied the
same *Daniel Ball* and *The Montello* commerce requirement of navigability under the Commerce
Clause, to determine that the Red River in Oklahoma was non-navigable under the equal footing

1 doctrine. Commercial navigation is therefore required under the equal footing doctrine to
2 determine “navigability for title.”

3 The Supreme Court in *Oklahoma, supra*, reviewed the conditions of the Red River in
4 Oklahoma in the eastern part of the state where the Red River receives additional waters from the
5 Washita and other tributaries and “has a practically continuous flow of varying volume, the
6 extreme variation between high and low water being about thirty feet.” *Id.* at 589. The Supreme
7 Court held that the Red River was non-navigable in this eastern reach of the river:

8 When the water rises it does so very rapidly and it falls in the same
9 way. The river bed has a fall of more than one foot to the mile and
10 consists of light sand which is easily washed about and is carried
11 down stream in great quantities at every rise of the water. At all times
12 there is an almost continuous succession of shifting and extensive
13 sand bars. Ordinarily the depth of water over the sand bars is from six
14 to eighteen inches and elsewhere from three to six feet. There is no
15 permanent or stable channel. Such as there is shifts irregularly from
16 one side of the bed to the other and not infrequently separates into two
17 or three parts. **Boats with a sufficient draft to be of any service can
18 ascend and descend only during periods of high water. These
19 periods are intermittent, or irregular and short duration, and
20 confined to a few months in the year.** [*Oklahoma* at p. 589].
[Emphasis added].

21 The Supreme Court observed that near the eastern Oklahoma boundary before railroads
22 were extended into that section, there had been boats of light draft carrying merchandise in that
23 vicinity of the Red River, but only in periods of high flows. The Supreme Court held that the
24 eastern reach of the Red River was non-navigable because commercial navigation only took place
25 during periods of high flows:

26 While the evidence relating to the part of the river in the eastern half
27 of the State is not so conclusive against navigability as that relating to
28 the western section, we think **it establishes that trade and travel
neither do nor can move over that part of the river, in its natural
and ordinary condition....Its characteristics are such that its use
for transportation has been and must be exceptional, and confined
to the irregular and short periods of temporary high water. A
greater capacity for practical and beneficial use in commerce is
essential to establish navigability.** [*Id.* at 591]. [Emphasis added].

29 Thus, *Oklahoma* held that there must be evidence of sustained and beneficial commercial
30 navigation under a river’s “ordinary” condition to satisfy the navigability for title test under the
31 equal footing doctrine, not just some occasional examples of commercial navigation during higher
32 flows.

1 In *United States v. Oregon*, 295 U.S. 1, 22 (1935), the Supreme Court held that three lakes
2 in Oregon were non-navigable under the equal footing doctrine because “The Special Master
3 found that the boating which took place in the area involved had no commercial aspects...” The
4 Supreme Court in *Oregon* held that private non-commercial boating for the purposes of
5 recreational trapping and duck hunting in the spring and fall, could not satisfy the commerce
6 requirement to establish navigability under the equal footing doctrine:

7 Most of the evidence of boating related to the use of boats by trappers,
8 to which reference has already been made, and by duck hunters in the
9 spring and fall of the year. The boats were all of light draft, those
 most in use being canvas canoes or homemade rowboats drawing
 between one and six inches of water. [*Id.* at 21].

10 The Supreme Court in *Oregon* held that these facts “...establish an absence of that capacity
11 for general and common usefulness for purposes of trade and commerce which is essential to
12 navigability,” and that “At most the evidence shows such an occasional use of boats, sporadic and
13 ineffective, as has been observed on lakes, streams, or ponds large enough to float a boat, but
14 which nevertheless were held to lack navigable capacity,” citing *The Montello and Oklahoma v.*
15 *Texas* cases as controlling federal authority. *Id.*, at 23.

16 *United States v. Oregon, supra*, is the definitive case of the U.S. Supreme Court holding
17 that private non-commercial recreational boating does not satisfy the commerce requirement of
18 navigability under the equal footing doctrine.

19 In *Adams v. The Montana Power Company*, 528 F.2d 437 (9th Cir. 1975), the Ninth
20 Circuit Court of Appeals, held that commerce under the *Daniel Ball* test requires commercial
21 activity and commercial craft, and that non-commercial, private recreational boating by fisherman,
22 water skiers, or pleasure boaters, does not satisfy the commerce requirement under the *Daniel Ball*
23 test. The Ninth Circuit observed that “[n]either non-commercial fishing nor pleasure boating
24 nor water skiing constitutes commerce.” [Emphasis added]. *Id.* at 438.

25 The Ninth Circuit Court of Appeals ruled in *State of Alaska v. Ahtna*, 891 F.2d 1401 (9th
26 Cir. 1989), *cert. den.*, 495 U.S. 919 (1990), that under the facts of that case, commercial
27 recreational boating satisfied the commerce requirement under the equal footing doctrine.

28 In *Ahtna*, the lower 30 mile stretch of the Gulkana River in Alaska was at issue. The flow

1 of the river in this stretch was 3,600 to 4,800 c.f.s. from May to September, and an average of
2 three feet deep. Commercial recreational craft, including aluminum powerboats and inflatable
3 rafts, were used since the 1970's for guided fishing and sightseeing trips. The Ninth Circuit
4 observed, "**A substantial industry of such transportation for profit emerged in the lower
5 Gulkana, which industry today employs 400 people.**" [Emphasis added]. *Id.* at 1405.

6 The court held in *Ahtna* that "[u]nder the facts of this case, we think the present use of the
7 lower Gulkana is **commercial** and provides conclusive evidence of the lower Gulkana's
8 **susceptibility for commercial use at statehood.** [Emphasis added]. *Id.* at 1405. The court
9 further held, "To deny that this use of the River is commercial because it relates to the recreation
10 industry is to employ too narrow a view of commercial activity." *Id.* at 1405. *Ahtna* therefore
11 requires commercial activity where the transportation of passengers is for recreational purposes
12 only.

13 *Utah v. United States*, 403 U.S. 9 (1971), upheld the requirement of navigability for
14 commerce under the equal footing doctrine. The boating in *Utah* was for a commercial purpose,
15 since the ranchers had used nine different boats from time to time in the 1880's to haul cattle and
16 sheep across the Great Salt Lake from the mainland to one of the islands to support their
17 commercial ranching businesses. The Supreme Court held that the transportation of livestock for
18 their ranching businesses was sufficient to establish the navigability of the Great Salt Lake, even
19 though the hauling was done by the ranchers themselves:

20 The hauling apparently was done by the owners of the livestock, not
21 by a carrier for the purpose of making money. Hence it is suggested
22 that this was not the use of the lake as a navigable highway in the
23 customary sense of the word. **That is to say, the business of the
boats was ranching and not carrying water-borne freight.** We
think this is an irrelevant detail. The lake was used as a highway and
that is the gist of the federal test. [*Utah* at p. 11]. [Emphasis added].⁹

24 The adequacy of water available in the Great Salt Lake to support the transportation of
25 livestock was not in question. There was plenty of water.

27 ⁹The Supreme Court in *Utah*, in determining that the Great Salt Lake was navigable under
28 the equal footing doctrine, also relied on the fact that other boats in the 1880's had hauled ore,
salt, and cedar posts around the Great Salt Lake for commercial purposes.

1 Thus, in order to satisfy the commerce requirement of navigability under the equal footing
2 doctrine, there must be evidence of sustained beneficial commercial navigation. Private non-
3 commercial recreational rafting trips, such as those that recently and rarely occur on the Verde
4 River, do not establish that the Verde was navigable for commerce, and therefore, cannot establish
5 the navigability of the Verde River under the equal footing doctrine. The few guided
6 recreational float trips that may occasionally take place on the Verde River between Beasley Flat,
7 Childs, and Horseshoe Reservoir, in modern-day canoes, and inflatable rafts and kayaks, is
8 insufficient to prove that the Verde River was commercially navigable at the time of statehood
9 under the equal footing doctrine.¹⁰ See Sections C and D herein.

10 **2. The Federal Test to Determine Navigability**
11 **Under the Equal Footing Doctrine Requires That**
12 **the Verde River Was Navigable at the Time of**
13 **Arizona's Statehood**

14 The navigability of a river, or its susceptibility to navigation, must be determined as of the
15 time that a state is admitted to the Union under the equal footing doctrine. See *United States v.*
16 *Holt State Bank*, 270 U.S. 49 (1926); *United States v. Utah*, 283 U.S. 64, 75 (1931);¹¹ *State of*
17 *Oregon v. Riverfront Protection Association*, 672 F.2d 792, 795 (9th Cir. 1982); *Land Department*
18 *v. O'Toole*, 154 Ariz. 43, 44, 739 P.2d 1360, 1361 (1987) ("The federal Equal Footing Doctrine
19 grants each state property rights to the riverbeds of all its waterways which were navigable on the
20 date of statehood."); *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 363,
21 837 P.2d 158, 165 (App. 1991); and *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426, 18 P.3d

22 ¹⁰The federal test under the equal footing doctrine is not "whatever floats your boat."
23 Evidence of modern-day recreational float trips using high-tech canoes, and inflatable kayaks or
24 rafts, is insufficient to establish commercial navigability at the time of statehood under the
"susceptibility" doctrine. *North Dakota v. United States*, 972 F.2d 235, 240 (8th Cir. 1992). See
Section D herein.

25 ¹¹The Supreme Court in *United States v. Utah*, 283 U.S. 64, 75 (1931), clearly held that
26 under the equal footing doctrine, a river must be navigable in fact, or susceptible to use as a
27 highway for commerce, on the date that a state is admitted to the Union: "In accordance with the
28 constitutional principle of the equality of the States, the title to the beds of rivers within Utah
passed to that State when it was admitted to the Union, **if the rivers were then navigable; and,**
if they were not then navigable, the title to the river beds remained in the United States."
[Emphasis added]. Also, see *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989),
"...the river must be navigable at the time of statehood..." [Emphasis added].

1 722, 737 (App. 2001).

2 In *State of Oregon v. Riverfront Protection Association*, 672 F.2d 792, 795 (9th Cir. 1982),
3 the Ninth Circuit Court of Appeals held that the federal criteria to determine navigability for title
4 under the equal footing doctrine differs from the criteria to determine navigability under the
5 Commerce Clause, because navigability under the equal footing doctrine must be determined at
6 the time of statehood:

7 **Navigability for title to riverbeds differs in three important**
8 **respects from navigability for federal regulatory jurisdiction over**
9 **power plants under the Commerce Clause. The former must exist**
10 **at the time the State is admitted into the Union. Also, it must exist**
11 **in the river's ordinary condition, see *United States v. Utah*, 283**
12 **U.S. 64, 75-76, 51 S. Ct. 438, 440-41, 75 L. Ed. 844 (1931); it cannot**
13 **occur as a result of reasonable improvements. This is not the case**
14 **in federal power plant licensing. See *United States v. Appalachian***
15 ***Electric Power Co.*, 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243**
16 **(1940). [Emphasis added].**

17 The federal criteria in cases determining navigability under the Commerce Clause,¹² such
18 as, *Economy Light & Power Company v. United States*, 256 U.S. 113 (1921); and *United States*
19 *Appalachian Electric Power & Co.*, 311 U.S. 377 (1940), is different than in cases under the equal
20 footing doctrine, because Congress has the plenary constitutional power under the Commerce
21 Clause to regulate interstate commerce, and determine navigability, based upon pre-development
22 virgin conditions, or to make a river navigable based upon man-made changes, even if such river
23 was never navigable. See *Economy Light & Power Company v. United States*, 256 U.S. 113
24 (1921); and *United States Appalachian Electric Power & Co.*, 311 U.S. 377 (1940).

25 Thus, under the equal footing doctrine, the navigability of the Verde River must be
26 determined based on its ordinary condition of the Verde River at the time of Arizona's statehood,
27 February 14, 1912. There must also be evidence that the Verde River was used, or could have
28 been used for commercial navigation at that time under the "susceptibility" doctrine.

The evidence regarding the navigability of the Verde River is examined below in light of
the proper federal test and criteria to determine the navigability of the Verde River under the equal
footing doctrine.

¹²Article I, Section 8, of the U.S. Constitution.

1 **C. The Historical Evidence Establishes That the Verde River Was**
2 **Non-Navigable at the Time of Statehood**

3 **1. Government Surveys of the Verde River Establish**
4 **That the Verde River Was Non-Navigable Prior**
5 **to and at the Time of Statehood**

6 Douglas R. Littlefield, Ph.D., filed an extensive report with the Commission regarding the
7 navigability of the Verde River, concluding after reviewing thousands of historical documents,
8 that this evidence demonstrates that the Verde River was non-navigable at the time of Arizona's
9 statehood.¹³ Dr. Littlefield also testified at the January 18, 2006, hearing that he found no
10 evidence that the Verde was navigable for commerce, or evidence that others thought it was
11 navigable at the time of Arizona's statehood.¹⁴

12 Dr. Littlefield both reported and testified that the pre-statehood U.S. Government surveys
13 conducted by the General Land Office,¹⁵ which primarily involved lands through which the Verde
14 River flowed upstream from Camp Verde in the Verde River Valley, never surveyed the meanders
15 of the Verde River because the government surveyors did not believe that the Verde River was a
16 navigable river.¹⁶ Government survey manuals specified that government surveyors were required

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19 ¹³See "Assessment of the Verde River's Navigability Prior To and On the Date of
20 Arizona's Statehood, February 14, 1912," Douglas R. Littlefield (Revised Report, July 7, 2005),
21 (E-32).

22 ¹⁴See Transcript of the January 18, 2006 hearing, at pp. 65-99 (TR65-99).

23 ¹⁵The U.S. Government had the General Land Office (today, the Bureau of Land
24 Management) conduct surveys to map public lands for orderly claim by American settlers, for
25 homesteading, and to also record the characteristics of these lands which required the survey of
26 the meander of navigable bodies of water.

27 ¹⁶This is not conclusive evidence that the Verde River was non-navigable at the time of
28 statehood, but such evidence is admissible, relevant, and highly probative of the fact that the
29 Verde River was non-navigable, because these contemporary observers of the Verde River were
30 required to survey the meander the Verde River, if they believed it was navigable. See *Oklahoma*
31 *v. Texas*, 258 U.S. 574, 585 (1922); and *Gauthier v. Morrison*, 232 U.S. 452, 458 (1914), holding
32 that a government surveyor did not have the legal authority to conclusively classify the nature of
33 public lands, but was required to note and report its character as it appeared to him "as a means of
34 enlarging the sources of information upon that subject otherwise available." As Dr. Littlefield has
35 reviewed all of these government surveys, the cumulative effect of this historical evidence is very
36 persuasive.

1 to do survey meanders of navigable bodies of water.¹⁷

2 Dr. Littlefield testified:

3 There were eight surveyors total who did the surveys along the Verde
4 River. **Not one of these surveyors, though, who surveyed the area**
5 **indicated that he thought that the stream [Verde River] was**
6 **navigable.** That's not to say that there weren't some meanders that
7 were done, but they were done, in my understanding of the survey
record, on the basis of the 1864 or the 1890 instructions, either to
outline routes of internal communication or bodies of water that were
over three chains in width but were not navigable. [Emphasis added].
[TR at p. 70].

8 Dr. Littlefield reports, for example, that several different government surveys were
9 conducted in the area near present-day Camp Verde, which included a portion of Camp Verde
10 Military Reservation, and other areas northeast of Camp Verde which had settlements in the
11 Verde Valley.¹⁸ None of these surveys in the 1880's by C. Burton Foster did not include the
12 meanders of Verde River in any of these areas. E-32 at p. 60-62.

13 Dr. Littlefield concludes in his report:

14 As part of the U.S. Government's surveying efforts, the areas along
15 parts of the Verde River were surveyed and resurveyed many times
16 before 1912. **Significantly, while those surveys were done at**
17 **varying times of year, in different years, and by at least eight**
18 **individuals, all of the descriptions and plats that resulted from**
19 **this work consistently portrayed the Verde River as being a non-**
20 **navigable stream.** [Emphasis added]. [TR at 73].

21 The government surveys by these contemporary observers of the Verde River prior to and
22 at the time of statehood, are persuasive evidence that the Verde River which runs through these
23 lands being surveyed, and the nearby Reservation, were non-navigable in fact.¹⁹

24 ¹⁷Dr. Littlefield reports that "surveyors were given precise instructions for measuring the
25 sinuosities of navigable bodies of water, including rivers, streams, lakes, ponds, or bayous.
26 Between the meander corner posts, the edges of the banks were to be measured going downstream
27 by recording degree bearings. The details of this meander surveying were to be recorded in the
28 surveyor's field book as a separate set of records from the surveys of township, range, and section
lines." E-32 at p. 39.

¹⁸E-32 at 60-65.

¹⁹While Dr. Littlefield reports that a Daniel Drummond surveyed the meanders in Camp
Verde Military Reservation between 1892 and 1893, it is clear that this was done only because the
1890 government survey manual required for the first time for government surveys of non-
navigable bodies of water over three chains wide. Drummond noted in his field notes that the
Verde River was more than three chains wide, i.e., "Since the flood [1891] the banks of the river

1 **2. The Federal Patents That Were Issued**
2 **Overlaying the Verde River Establish That the**
3 **Verde River Was Non-Navigable Prior to and at**
4 **the Time of Statehood**

5 Dr. Littlefield also reported and testified that none of the 120 federal patents issued to
6 private parties to lands overlaying the Verde River ever identified the Verde River as a navigable
7 stream, or reserved the bed and banks of the Verde River for the State of Arizona:

8 There were over 120 federal patents that touched the Verde River and
9 in every single case of those 120 patents, there's not any reference to
10 any of the portion of the bed of the river [Verde River] having been
11 withheld due to considerations of navigability. [TR at 71].

12 Dr. Littlefield also reports that after reviewing these 120 federal patent files, there was
13 nothing in these files to ever suggest that the Verde River "was navigable or that settlers used the
14 stream for transportation."²⁰

15 Dr. Littlefield also reported and testified that there were also 50 land patents that were
16 applied for under the Desert Land Act of 1877,²¹ on or adjacent to the Verde River, in which the
17 persons claiming such arid desert lands had to prove a water supply for irrigation from water
18 obtained by prior appropriation from a non-navigable stream,²² and that they cited the Verde River
19 as their source for such water.²³ Dr. Littlefield states:

20 The logical conclusion from these applications is that the Verde River
21 (as the source of irrigation water for these lands) must have been
22 considered non-navigable by the applicants as well as by the
23 administrators of the U.S. General Land Office. [TR at 103].

24 All of these U.S. government officials also considered the Verde River to be non-
25 navigable, where they either issued patents to public lands overlaying the Verde River, or issued

26 [Verde River] average a width of nearly 20 chains." E-32 at 64. Jon Fuller testified that a chain
27 was equal to 66 feet. TR at 83.

28 ²⁰E-32 at 93.

²¹19 Stat. 377 (1877).

²²See *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 164
(1935), interpreting the Desert Land Act of 1877: "What we hold is that following the act of 1877
if not before, all non-navigable waters then a part of the public domain became *publici juris*,
subject to the plenary control of the designated states..."

²³E-32 at 102-103.

1 patents under the Desert Land Act of 1877.

2 This evidence regarding the U.S. government surveyors and officials, who as
3 contemporary observers considered that the Verde River was non-navigable prior to or at the time
4 of Arizona's statehood, provides persuasive cumulative historical evidence that the Verde River
5 was in fact non-navigable at the time of Arizona's statehood.

6 **3. Other Federal and Historical Documents Also**
7 **Establish That the Verde River Was Non-**
8 **Navigable Prior to and at the Time of Statehood**

8 Dr. Littlefield's historical report on the Verde River also reviews many other historical
9 documents, and photographs, which provides additional cumulative evidence that the Verde River
10 was non-navigable at the time of statehood.²⁴

11 For example, the U.S. Geological Survey "Water Supply Papers" indicated that there was a
12 widely fluctuating flow of the Verde River, which at certain times of the year had a flow of less
13 than 100 cfs, while at other times during flooding had flows exceeding 100,000 cfs.²⁵

14 In another example, U.S. Geological Water Supply Paper No. 329 described low flows and
15 shifting channels of the Verde River in 1912, at two different gaging stations on the Verde River
16 at Camp McDowell and Camp Childs:

17 At the first two stations [Camp McDowell and Camp Childs], the
18 channel was recorded as being mostly of sand and clay, and of a
19 shifting nature. **** Nevertheless, indicating the river's shallow
20 nature, even at the Camp Child's measuring station some of the
21 measurements had to be taken by wading across the stream (as they
22 also had been at the other stations at times). [E-32 at 118].

22 ²⁴See E-32 at pp. 112-162.

23 ²⁵E-32 at 116, citing U.S. Geological Survey Water Supply Paper No. 66 (Washington
24 D.C.:U.S. Government Printing Office, 1902). In 1891, there was a large flood that "caused a
25 considerable amount of change in flood-channel position and morphology." E-31 at 5-12. Phil
26 Pearthree testified that in the alluvial reaches of the Verde River (this includes the Reservation),
27 "the position of the low-flow channel changes after every flood." TR at 24. Mr. Pearthree also
28 testified that "the low-flow channels will change position during large floods---or after large
floods because they're basically reworked and they reestablish after the floods." TR at 27. This
was one of the factors that the U.S. Supreme Court cited in *Oklahoma v. Texas*, 258 U.S. 574
(1922), as to why it determined that the Red River was non-navigable. The Supreme Court's
description of the Red River as a flashy desert river prone to flooding, and changing channels,
closely describes the nature of the Verde River, and other desert rivers in Arizona. "The bed of
stream is composed of sand and is constantly shifting" referring to the Verde River. (TR p. 76,
lines 21-22).

1 The pre-statehood photographs of the Verde River provide clear visual documentation that
2 the Verde River was non-navigable at the time of statehood. For example, they show that the
3 Verde River in the Verde River Valley²⁶ in its ordinary condition as being shallow, and that the
4 Verde River could be forded by wagons except during times of floods.²⁷

5 **4. There Is No Evidence That the Verde River Was**
6 **Ever Commercially Navigated Prior to or at the**
7 **Time of Statehood**

8 The historical boating evidence also establishes that the Verde River was non-navigable
9 under the equal footing doctrine prior to and at the time of statehood. There are not any reported
10 historical accounts of commercial navigation on the Verde River prior to or at the time of
11 statehood. In addition, the few anecdotal accounts of boating on the Verde River prior to or at the
12 time of statehood, consist of only of a handful of private recreational float trips down the Verde
13 River, or boating by the U.S. Army to cross the Verde River at times of high flows when it could
14 not be forded.

15 For example, an early photograph at the Fort Verde Historical Park shows a collapsible
16 boat on the Verde River taken sometime between 1884-1888, the caption of which states that “[i]t
17 seems likely that this is the collapsable [sic] boat requested by the Post commander [Camp Verde
18 Military Reservation] to aid in getting messages and couriers across the river when it was high or
19 in flood.”²⁸ Dr. Littlefield comments about this boating evidence:

20 **Importantly, this suggests that the boat was not used year round (there**
21 **were fords available for crossing the river at most times), but that**
22 **during flood season (usually January to March), the boat was used to**
23 **get across the river. In other words, the boat was used as a way to**

24 ²⁶The Verde River Valley is defined for purposes herein as the reach of the Verde River
25 from Cottonwood to Camp Verde where non-Indian farming began in 1865 near Camp Verde.
26 ASLD Verde River Report (E-31 at 3-15). The ASLD Verde River Report (E-31) describes the
27 middle Verde reach as starting at Clarkdale and extending all the way to Childs, Arizona (E-31 at
28 iii).

29 ²⁷E-32 at 152, Figure 67, 1887 photograph of the Verde River near the confluence of Oak
30 Creek, showing the Verde River to be a clearly shallow sandy and gravel beds (See TR p. 76,
31 lines 21-22). Also, see Figures 68-71 showing the Verde River in the Verde Valley area to be
32 shallow and fordable.

33 ²⁸E-32 at 155, Figure 70.

1 avoid, rather than use, the Verde River. [E-32 at 155.]²⁹

2 The historical and boating analysis contained in the ASLD Verde River Report (Revised
3 June, 2003), establishes that the Verde River was seldom ever used for any kind of boating prior
4 to or at the time of statehood, and that “No evidence of sustained commercial boating industries
5 was found for the Verde River as of 1912, though isolated cases of commercial use were found.”³⁰
6 In reviewing the ASLD Verde River Report, however, there are not any reported accounts of
7 commercial navigation on the Verde River prior to or at the time of Arizona’s statehood.³¹

8 Mr. Fuller also testified that “We found no evidence in the archaeological record of any
9 use of boats on the Verde River.” TR at 10. There is also an absence of any evidence in the
10 record that the Yavapai or Apache Indians (now members of the Yavapai-Apache Nation) who
11 had settled in the Verde Valley before any settlers arrived, ever boated the Verde River at anytime
12 in the 1800's or prior to statehood.

13 Besides the Fort Verde report of a U.S. Army collapsible boat used to ferry couriers across
14 the Verde River sometime between 1884 and 1888 during high flows, the next documented
15 boating event is not until 1903, when it was reported that two persons would occasionally float a
16 boat down the Verde River downstream from Camp Verde for the purposes of duck hunting and
17 fishing. TR at 13-14. The next reported boating on the Verde River is not until 1931, when two

18 _____
19 ²⁹Jon Fuller testified that the U.S. Army kept a collapsible Army-issue boat at Fort Verde
20 located at the downstream end of the Verde Valley and that the boat was used according to fort
21 historians to cross the Verde River at times of high water to communicate messages across the
22 Verde River. TR at 13. Boating to cross the Verde River at times of high water by the Army for
23 this purpose does not establish evidence of navigability under the equal footing doctrine. *See*
State of North Dakota v. United States, 972 F.2d 235, 239 (8th Cir. 1992), rejecting use of ferries
to cross rivers as evidence of navigability. Also, *see* ASLD Verde River Report, E-31 at 3-20,
describing that the use of this collapsible Army boat was to take couriers across the Verde River
during times of high water.

24 ³⁰E-31 at p. v, and 9-3.

25 ³¹None are described in Chapter Three, “History of the Verde River,” or Chapter Eight,
26 “Boating on the Verde River,” E-31. In Chapter Four, “Oral History,” Jim Bykrit and Bob
27 Munson, who have written extensively on the history of the Verde River, both stated that in their
28 research they have found no accounts that the Verde River was ever navigated for a commercial
purpose prior to statehood. E-31 at 4-2. *See* Appendix D of the ASLD Verde River Report, E-31
at D-1-D-11, “Oral History Summaries.” Mr. Bykrit, Environmental Sciences Professor, NAU,
said that “he has not heard or does not know of the Verde ever being navigable for commercial
purposes.” E-31 at D-8. Mr. Munson, Park Manager, Fort Verde Historical Park, said that
“nobody used the river [Verde] for commercial purposes either prior to or following the territorial
period.” E-31 at D-10.

1 persons floated a boat down the Verde River on a trapping expedition, starting at Clarkdale, and
2 ending up close to the confluence of the Upper Salt River. TR at 14.

3 Mr. Perkins, who owns the Perkins Ranch about 45 miles upstream from Camp Verde,
4 Arizona, in a letter to ANSAC which was written when he was 68 years old, states:

5 I never heard my father or old timers speak of seeing or knowing of
6 any navigable boats. In the past 25 years, I have seen a few small
7 rubber rafts, rubber tubes, canoes, and kayaks. However, they need to
8 get out every few hundred yards, and pull them over the shallow
9 rapids. The river in many places is only a few inches deep.³²

10 The pre-statehood historical boating evidence regarding the Verde River is therefore
11 almost non-existent. It fails to establish that the Verde River was ever commercially navigated
12 prior to or at the time of statehood under the equal footing doctrine.

13 **5. The Hydrology of the Verde River Demonstrates**
14 **That the Verde River Was Non-Navigable at the**
15 **Time of Statehood**

16 Mr. Fuller testified about the hydrology of the Verde River, and also prepared Chapter 7,
17 "Hydrology of the Verde River," of the ASLD Verde River Report (E-31). Table 11(b) in Chapter
18 7, entitled "Verde River: at Camp Verde," describes the flow rates of the Verde River at Camp
19 Verde from 1912 through 1920, as measured by a U.S.G.S. gaging station located there. These
20 reported flow rates are therefore most representative of the flow rates of the Verde River at the
21 time of statehood at Camp Verde, which is the downstream end of the Verde where the
22 cumulative flows are the highest.³³ The ASLD Verde River Report states that "The hydrology of
23 the three Verde River reaches has remained substantially unchanged since statehood, except for
24 the reach downstream of Horseshoe and Bartlett Reservoirs." E-31 at 7-11.

25 Table 11(b) also shows that the depth of the Verde River at a flow rate of 189 cfs is .8 feet,

26 ³²See letter from Mr. Perkins dated December 2, 1996, to ANSAC, E-5.

27 ³³E-31 at 7-18. Mr. Fuller testified that this Camp Verde U.S.G.S. gaging station is
28 located downstream from Beaver Creek which the downstream end of the Verde Valley.
(Upstream flows would be lower). TR at 44. Also, as Mr. Fuller testified, gaging stations are
located where the geomorphologic condition of a river concentrates the flow. TR at 48. This
gaging station would therefore over-estimate the flow of the Verde River at other areas along the
river, especially through the Reservation parcels upstream, which is an alluvial reach of the river,
and where the low-flow channel of the river changes after flooding and has pool and riffle
sequences. See testimony of Mr. Pearthree. TR at 22-27. See "Geomorphic Character of the
Verde River," Stanley A. Schumm, dated December 2004, stating that within the Verde River
Valley, "the channel is braided." E-30 at 2.

1 or 9.6 inches; the width of the Verde River at 189 cfs is reported at 125 feet; and the velocity at
2 189 cfs is reported to be 1.7 feet per second.³⁴ 9.6 inches of water is barely enough to support the
3 occasional modern-day recreational canoeing, kayaking, or rafting, according to federal
4 government criteria developed by the U.S. Department of the Interior.³⁵ The reported velocity of
5 only 1.7 feet per second at 189 cfs, however, is not enough to support such modern-day
6 recreational boating ³⁶

7 A median flow rate of 189 cfs is therefore clearly insufficient to support commercial
8 navigation. 50% of the time, the flows of the Verde are below the median of 189 cfs. The exhibit
9 submitted by the Salt River Project, entitled "Information Regarding Navigability of Selected U.S.
10 Watercourses,"³⁷ which is a compilation of the annual mean flow rate for rivers determined to be
11 either navigable or non-navigable, shows that no rivers have been determined to be navigable with
12 an annual mean flow less than 4,066 cfs. For example, the Red River in Oklahoma/Texas with a
13 annual mean flow rate of 9,363 cfs was found to be non-navigable in *Oklahoma v. Texas*, 258
14 U.S. 574 (1922); while in *State of Oregon v. Riverfront Protection Association*, 672 F.2d 792 (9th
15 Cir. 1982), the McKenzie River with an annual mean flow of 4,066 was found to be navigable.
16 Also, *see*, for example, *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), where the
17 Gulkana River which was determined to be navigable, had a flow rate of 3,600 to 4,800 cfs, and
18 an average depth of three feet.

19 The hydrology and geomorphology of the Verde River demonstrates that the Verde River
20 would not support commercial navigation at the time of statehood. This is corroborated by the
21 lack of any evidence that there was any commercial navigation at that time.

22 **D. Evidence of Modern-Day Recreational Float Trips on the Verde River**
23 **Does Not Establish Commercial Navigability of the Verde River at the**
24 **Time of Arizona's Statehood Under the Equal Footing Doctrine**

25 ³⁴Table 11(b), E-31 at 7-18.

26 ³⁵*See* Tables 8.1 and 8.2 at 8-1 and 8-2, ASLD Verde River Report, E-31. Table 8-1
27 developed for modern day recreational boating shows that the minimum required stream depth
for recreational canoeing or kayaking is .5 feet, and 1 foot for rafting or tubing.

28 ³⁶*See* Table 8-2 which was developed for recreational boating which indicates that
recreational canoes, kayaks, and rafts, require a minimum velocity of 5 feet per second.

³⁷E-22.

1 Nearly all of the evidence admitted at the hearing regarding boating on the Verde River
2 relates to modern-day recreational float trips, using canoes, and high-tech inflatable kayaks and
3 rafts. The vast majority of this kind of modern-day recreational boating on the Verde River is
4 private and non-commercial, which starts at Beasley Flat (about 10 miles downstream from Camp
5 Verde), or Childs (about 30 miles downstream from Camp Verde), and then proceeds downstream
6 to Childs, or, for example, Horseshoe Reservoir.

7 Jim Slinguff testified that he has taken private non-commercial recreational boat trips
8 with family members down the Verde River, primarily in the reach of the Verde River
9 downstream from Beasley Flat, or Childs, Arizona.³⁸ This is not the Verde River above Camp
10 Verde. He testified that he has never charged any fees when acting as a guide.³⁹ David
11 Weedman, a biologist with the Arizona Fish and Game Department, testified that he has canoed
12 from Childs to an area called Sheep Bridge just above Horseshoe Reservoir, 11 or 12 times, and
13 from Beasley Flat to Childs twice, conducting fishery surveys.⁴⁰ Mr. Weedman testified that he
14 has never canoed the Verde River upstream from Beasley Flat through the Camp Verde or
15 Verde River valleys.⁴¹ Jon Fuller testified that the U.S. Forest Service reported in the reach
16 starting from Beasley Flat downstream to Horseshoe Reservoir that it recorded 728 boats from
17 January 2001 to March 2005.⁴² The 40.5 mile reach of the Verde River starting at Beasley Flat
18 and then downstream from there is regulated under the Wild and Scenic Rivers Act (P.L. 90-
19 542). Most of the private float trips take place in this reach of the Verde River.

20 There was evidence of one or two guided recreational float trips recently using canoes, and
21 inflatable kayaks, or rafts, on the reach of the Verde River from Childs downstream to Horseshoe
22
23
24

25 ³⁸E-31 at 101-131.

26 ³⁹TR at 120.

27 ⁴⁰TR, Exhibit "A," at 212 and 217.

28 ⁴¹TR, Exhibit "A," at 217.

⁴²TR at 36-37.

1 Reservoir.⁴³ There was not any evidence of guided recreational float trips for which fees are
2 charged through the Verde River Valley including either the Reservation or Camp Verde. Jon
3 Fuller testified that there is very little evidence of modern-day private non-commercial
4 recreational float trips upstream from Camp Verde through the Verde River Valley, including the
5 Reservation:

6 Upstream of Camp Verde, we are unable to find any records
7 like—extensively as what I just showed you through the rest of the
8 Verde Valley [float trips starting at Beasley Flat]. Boating through
9 that reach right now is more difficult because there are fences across
10 the river and there are a number of irrigation diversions that you have
11 to portage across. A lot of private property and lot of the water is
12 taken out for the irrigation diversions.⁴⁴ [TR at 39].

13 This evidence of modern-day recreational float trips on the Verde River is not sufficient to
14 establish that the Verde was navigable for commerce at the time of statehood on any reach under
15 the equal footing doctrine, particularly the reach of the Verde River through the Verde River
16 Valley, including the Reservation, where a large volume of the Verde River has been diverted for
17 irrigation prior to statehood.

18 Private non-commercial recreational boating does not establish that the Verde was
19 navigable for commerce under the equal footing doctrine, and therefore cannot serve to establish

20 ⁴³John Colby testified as a representative of Cimarron River Company that his company
21 conducts multi-day commercial recreational float trips, using canoes, or inflatable kayaks or rafts
22 on the Verde River, starting at Childs, Arizona, downstream to Horseshoe Reservoir. TR at 55-
23 56. Mr. Colby testified that these multi-day trips starting at Childs are unique, hard to market,
24 and that his company only averages “one or two of those per year,” usually in the spring when
25 there are higher flows. TR at 57. Mr. Colby also testified that his company conducted single day
26 tours on the Verde River primarily through the Fort McDowell community up until 1999. TR at
27 57.

28 ⁴⁴There are a lot of irrigation diversions upstream from Camp Verde, including water
diverted for the Reservation. As Jon Fuller testified, “As of 1914, there were 25 diversions
between Perkinsville and the Salt River. Most of those are concentrated in the Verde Valley, and
some of those are very old water rights and they extend back to the 1860s when the earliest
agriculture went in.” TR at 29. Mr. Fuller reported that in 1914, “25 diversions diverted more
than 121 cfs for more than 5,000 acres of farmland between Perkinsville and the Salt River.” E-
31 at 7-22. Mr. Fuller also reports that “By 1980, about 30 irrigation diversions existed in the
upper and middle Verde, these diversions took more than half the ordinary flow of the Verde
River...” E-31 at 7-22. Mr. Fuller states that the similarity of the modern and historical irrigation
diversions “give further evidence of the hydrologic similarity of the statehood and modern
periods.” See ASLD Verde River Report, Table 7-16, at p. 7-23, which shows the pre-statehood
irrigation diversion canals in the Verde River valley, their capacities, normal diversion rates, and
the dates that they were constructed.

1 navigability under the equal footing doctrine. *See United States v. Oregon*, 295 U.S. 1 (1935);⁴⁵
2 Section B(1) herein, and the Nation’s separate brief as authorized by the Commission relating to
3 the federal meaning and requirement of commerce under the equal footing doctrine, which
4 concludes that private non-commercial recreational float trips do not constitute commerce as
5 required under the equal footing doctrine.

6 The very limited evidence regarding the few sporadic modern-day guided multi-day
7 recreational float trips each year for which fees are charged in the reach of the Verde River from
8 Childs to Horseshoe Reservoir, in the springtime when flows are higher than under ordinary
9 conditions, is insufficient to establish that the Verde was navigable or susceptible to support for
10 commerce in this reach of the Verde River at the time of statehood under normal and ordinary
11 conditions.

12 There must be evidence of sustained beneficial commercial navigation under ordinary
13 conditions to satisfy the commerce requirement, and establish navigability. *See Oklahoma v.*
14 *Texas*, 258 U.S. 574 (1922). Furthermore, modern-day boatability, or “floatability,” using canoes,
15 and high-tech inflatable kayaks or rafts, is insufficient to establish that the River was navigable for
16 commerce at the time of statehood under the “susceptibility” doctrine. *See North Dakota v.*
17 *United States*, 972 F.2d 235, 240 (8th Cir. 1992).

18 In *North Dakota*, the Eighth Circuit held that “evidence of modern day recreational canoe
19 use” on some portions of the Missouri River, and modern day “boatability data” are not reliable
20 indicators to prove navigability at the time of statehood under the “susceptibility” doctrine. *Id.*, at
21 240.

22 The Eighth Circuit in *North Dakota* approved the district court’s findings, which ruled that
23 “This modern evidence of ‘susceptibility’ must be considered in relation to the contemporary
24 evidence of use and susceptibility at the time of statehood. The contemporary evidence indicates
25 that the river was neither used nor susceptible to use as a highway for useful commerce.” *State of*
26

27 ⁴⁵The Arizona Center for Law in the Public Interest cites *Adirondack League Club, Inc. v.*
28 *Sierra Club*, 706 N.E.2d 1192 (N.Y. 1998), for the proposition that private non-commercial
recreational boating might satisfy the commerce requirement under the equal footing doctrine.
Adirondack, however, was not decided under the equal footing doctrine, but was decided under
New York state law. *See LeBlanc v. Cleveland*, 198 F.3d 353, 359 (2nd Cir. 1999).

1 *North Dakota v. United States*, 770 F. Supp. 506, 512 (D.N.D. 1991).

2 The U.S. Forest Service in its “Analysis of the Criteria for Navigability: Verde River” (E-
3 6), also concluded that modern-day high-tech boating on the Verde River cannot be related to
4 boating as it existed in 1912 to establish navigability under the equal footing doctrine:

5 Although the 50-mile section of river from Beasley Flat down to the
6 confluence with Tangle Creek has been regularly recreationally-boated
7 for the past 25 years using modern-day inflatable rafts/kayaks as well
8 as plastic/fiberglass canoes and kayaks, even those boats fall victim to
9 the river (see Photos #2, 5, 7, and 9). **River-runners today, with
10 their high-tech equipment and techniques, simply cannot be
11 compared with the situation in 1912;** to do so would be like
12 comparing a delicate apple with a thick-skinned, practically
13 indestructible orange. Proof that boaters have run this river in the
14 recent past is not directly relevant to the criteria for navigability...
15 [Emphasis added]. [E-6 at 6].

16 The evidence of modern-day recreational float trips down the Verde River is insufficient to
17 establish commercial navigability of the Verde River at the time of Arizona’s statehood under the
18 federal test and criteria of the equal footing doctrine.

14 **E. Conclusion**

15 There is no evidence that the Verde River was ever navigated or navigable for commerce
16 prior to or at the time of Arizona’s statehood under the equal footing doctrine.

17 The hydrology and geomorphology of the Verde River is insufficient to support sustained
18 and beneficial navigation for commerce based on its ordinary condition at the time of statehood.

19 All of the historical evidence indicates that contemporary observers of the Verde River
20 prior to and at the time of Arizona’s statehood, believed that the Verde River was non-navigable,
21 including federal government surveyors, and federal government officials issuing patents to lands
22 overlaying the Verde River.

23 Modern-day, private non-commercial recreational float trips down the Verde River,
24 primarily starting at Beasley Flat or Childs, Arizona, downstream from Camp Verde, do not
25 establish that the Verde was navigable for commerce under the equal footing doctrine, at the time
26 of Arizona’s statehood under the “susceptibility” doctrine.

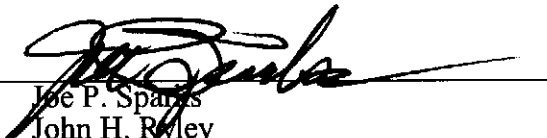
27 The recent few sporadic guided recreational float trips for which fees are charged each year
28 which occur usually in the springtime during snowmelt, starting at Childs, Arizona, down to
Horseshoe Reservoir, are insufficient to establish the commercial navigability of the Verde River

1 in its ordinary condition at the time of Arizona's statehood.

2 The Nation respectfully requests that the Commission determine that all reaches of the
3 Verde River, including the reach through the Yavapai-Apache Reservation, were at the time of
4 Arizona's statehood on February 14, 1912, under the equal footing doctrine.

5 DATED this 21st day of March, 2006.

6 **SPARKS, TEHAN & RYLEY, P.C.**

7
8 By 
9 Joe P. Sparks
John H. Ryley
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10
11 **ORIGINAL** plus six copies of the foregoing
12 mailed this 21st day of March, 2006, to:

13 Arizona Navigable Stream Adjudication Commission
14 1700 W. Washington
Suite 304
Phoenix, AZ 85007

15
16 **COPY** of the foregoing mailed this
17 21st day of March, 2006 to:

18 Laurie Hachtel, AAG
19 for the Arizona State Land Department
1275 West Washington
Phoenix, AZ 85007

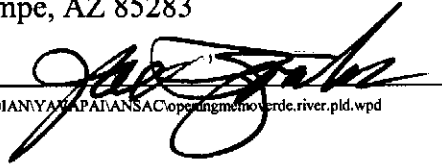
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