

Cynthia Chandley – 013315
L. William Staudenmaier – 012365
Michael T. Kafka – 021850
Ryley Carlock & Applewhite
One North Central Avenue
Suite 1200
Phoenix, Arizona 85004-4417
(602) 258-7701
Attorneys for Phelps Dodge Corporation

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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

**IN RE DETERMINATION OF
THE NAVIGABILITY OF
THE VERDE RIVER**

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No. **03-009-NAV**

**PHELPS DODGE CORPORATION'S
RESPONSIVE POST-HEARING
MEMORANDUM**

Phelps Dodge Corporation (“Phelps Dodge”) submits this Responsive Post-Hearing Memorandum regarding the navigability of the Verde River in accordance with the briefing schedule established by the Commission following the January 18, 2006 Verde hearing. In their opening post-hearing memoranda, Defenders of Wildlife (“Defenders”) and the Arizona State Land Department (“ASLD”) (collectively, “Proponents”) argued that the Arizona Navigable Stream Adjudication Commission (the “Commission”) should find the Verde River navigable. However, neither the facts nor the law supports Proponents’ arguments. Proponents have failed to produce sufficient evidence for the Commission to find that the Verde River was actually used or was susceptible to use for navigation at the time of Arizona’s statehood. Lacking evidence of navigability, Proponents attempt to stretch Arizona’s navigability test beyond the reach of judicial precedent. In addition to the points made by Phelps Dodge in its Opening Post-Hearing Memorandum filed with the Commission on March 21, 2006, and its Brief Regarding the Meaning and Necessity of “Commerce” when Determining the Navigability of a Watercourse, filed with the Commission on February 27, 2006, and incorporated herein by this reference, Phelps Dodge offers the following additional points and joins Salt River Project (“SRP”) and the Yavapai-Apache Nation in requesting that the Commission find the Verde River non-navigable.

I. Proponents Have Fallen Far Short of Satisfying Their Burden of Proof.

Throughout their opening post-hearing memoranda, Proponents confuse the burden of proof they must satisfy. Proponents bear the burden of proving by a preponderance of the evidence that on February 14, 1912, the Verde River was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water. *See* A.R.S. § 37-1101(5); A.R.S. § 37-1128(A) (requiring that anything less than a preponderance of the evidence results in a determination that a watercourse is non-navigable); *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 363 n.10, 837 P.2d 158, 165 n.10 (App. 1991) (“The burden of proof rests on the party asserting navigability. . . .”). However, Proponents have presented no persuasive evidence that the Verde River was used or was susceptible to being used as a “highway for commerce” at any time. Lacking evidence to prove navigability, Proponents rely upon a small number of anecdotal accounts contained in JE Fuller Hydrology and Geomorphology, Inc.’s report titled *Arizona Stream Navigability Study for the Verde River: Salt River Confluence to Sullivan Lake* (June 2003) (the “Fuller Report”), misinterpret facts in the record, and ask the Commission to consider legal theories that have not been accepted by the courts. In so doing, Proponents have not carried their burden of proof.

In its Opening Post-hearing Memorandum regarding the navigability of the Verde, the ASLD stated that all seven of the anecdotal accounts contained in the Fuller Report describe successful boating trips and none report problems with navigability. *See* ASLD’s Br. at 12. *See also* Defenders’ Br. at 13 (citing same anecdotal accounts as evidence of the use of the Verde for travel). However, as analyzed in SRP’s and Phelps Dodge’s opening post-hearing memoranda, these stories actually demonstrate that the Verde River was not susceptible to being used for trade or travel, and, at times, served as an impediment to transportation. *See* SRP’s Br. at 6-7; Phelps Dodge’s Br. at 14-15. At least four of the accounts included in the *Fuller Report* lack veracity, are unsubstantiated, or serve as evidence of *failed* boating attempts. *See* Phelps Dodge’s Br. at 14-15. Proponents’ reliance on such stories demonstrates that there is insufficient probative evidence to show that the Verde River was a navigable stream as of February 14, 1912.

Certainly, if Proponents had better evidence they would have included it in their briefs. The State attributes this lack of evidence to a “sparse population” and the absence of “local news source[s] around the time of statehood.” ASLD’s Br. at 12. However, at the Verde hearing, Jon Fuller stated that by 1864 “real activity in the Verde Valley” had begun. Tr. at 11. Furthermore, given the fact that two of the accounts mentioned in the Fuller Report were articles from the *Arizona Gazette* and *Phoenix Herald*, it cannot be said that the region was ignored by contemporary news sources. *See Fuller Report*, at 3–20-21.

Citing to the *Fuller Report*, Proponents note that around the time of Arizona’s statehood, irrigation diversions had depleted the Verde’s resources. *See* ASLD’s Br. at 9-10; Defenders’ Br. at 12-13. Although irrigation diversions may have had some effect on the Verde River’s flow, they do not explain its nonuse for navigation. The *Fuller Report* and Dr. Littlefield’s *Assessment of the Verde River's Navigability Prior to and on the Date of Arizona's Statehood, February 14, 1912* (July 7, 2005) (the “*Littlefield Report*”), contain excerpts from nineteenth century reports and letters written by United States government officials and residents of the region. Time after time these reports and letters describe the Verde’s unsuitability for navigation. *See Fuller Report*, at 3–12-15; *Littlefield Report*, at 113-28. While some of these contemporary accounts describe the Verde River as “shallow,” “spread out wide,” and “stagnant,” *see Fuller Report*, at 3–13-14, most of them consistently described it as “dangerous,” “erratic,” and “torrential in character.” *See Littlefield Report*, at 114-15, 117, 122. It is these unpredictable and undependable conditions – conditions unrelated to the diversion of water for irrigation – that explain the Verde’s nonuse as a highway for commerce. These historical accounts demonstrate that torrential flood events occurred on the Verde with sufficient frequency to make it not susceptible to navigation. Therefore, contrary to the ASLD’s contention, descriptions of flood hazards and flood conditions on the Verde *are* relevant to a determination of its navigability in its ordinary and natural condition. *See* ASLD’s Br. at 9.

Lacking factual evidence to support actual use or susceptibility of use of the Verde River for navigation, the ASLD asks the Commission to adopt the concept of “indelible navigability,”

which is based on a 1966 law review article. See ASLD's Br. at 6. According to the author of this 40 year old article, "a state should not lose title to a riverbed even if the river is presently nonnavigable. As long as [the] river was navigable *at some point* in the past." *Id.* (emphasis added). This argument, however, conflicts with numerous precedents regarding the test for navigability for title purposes. As those cases uniformly hold, the test must be evaluated as of the date a state is admitted to the Union. See *United States v. Utah*, 283 U.S. 64, 75 (1931) (explaining that title to beds of rivers passed to state "when it was admitted to the Union if the rivers were then navigable"); *Oregon v. Riverfront Protection Association*, 672 F.2d 792, 795 n.1 (9th Cir. 1982) ("Navigability . . . must exist at the time the State is admitted into the Union."); *Alaska v. Ahtna*, 891 F.2d 1401, 1404 (9th Cir. 1989) (expounding that under the test, "river must be navigable at the time of statehood"); *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426, 18 P.3d 722, 737 (App. 2001) (holding "that to prove navigability of an Arizona watercourse under the federal standard for title purposes," it must have either been used for navigation or been susceptible to such use as of February 14, 1912); *Hassell*, 172 Ariz. at 363, 837 P.2d at 165 (stating that navigability is determined by reference to the watercourse's condition "at the time of the state's admission to the Union"). Therefore, the requirement that the watercourse was navigable at the time of statehood cannot be defeated based on a theory of "indelible navigability" – a theory never accepted by our courts and contrary to established federal and Arizona case law. Furthermore, even if this theory did apply for purposes of determining the title to riverbeds, which it clearly does not, it would be of no help to Proponents given the fact that the Verde River is not now or ever was a navigable watercourse.

II. The Verde River Is Not and Has Never Been Susceptible to Use as a Highway for Commerce.

Not having probative evidence that the Verde River was ever actually used as a highway for commerce, Proponents misapply case law and Arizona statutes in a failed effort to show that the Verde was somehow susceptible to such use at the time Arizona was admitted into the Union.

A. An Analysis of Established Case Law Reveals that, to Have Been Susceptible to Use as a Highway for Commerce, Far More is Required than Bald Assertions of Susceptibility.

Proponents cite to *United States v. Utah*, 283 U.S. 64 (1931), in an ineffective attempt to substitute for the scarcity of evidence demonstrating the actual use of the Verde River as a highway for commerce. See ASLD's Br. at 7; Defenders' Br. at 10-11. However, this attempt fails because *Utah* does not stand for the proposition that, without more, an allegation of susceptibility is sufficient to support a determination of a river's suitability for navigation. Instead, *Utah* instructs, "where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway for commerce may still be satisfactorily proved." *Utah*, 283 U.S. at 83 (emphasis added). In the case of the Verde River, however, not only is there a dearth of evidence of its use as a highway for commerce, there has been no showing of conditions that would explain the infrequency of its use for such purposes. To the contrary, the evidence shows that *despite* the fact people have lived near the Verde River for thousands of years, none of them conducted or could have conducted effective trade or transportation on the river.

Of significance is the fact that the regions through which the rivers under consideration in *Utah* flowed were "sparsely settled." See *id.* In the words of the Court, "the country in the vicinity of the streams ha[d] but few inhabitants[,] . . . the location of the rivers and the circumstances of the exploration and the settlement of the country through which they flowed had made recourse to navigation a late adventure. . . ." *Id.* Here, in contrast, the evidence presented to the Commission demonstrates that, by the time of Arizona's statehood, the area through which the Verde River flowed had already been populated by Native Americans for at least a thousand years. See *Fuller Report*, at 2-9. Furthermore, as Dr. Littlefield testified at the Verde hearing, by the mid-1800s, "[t]here were a lot of people along the Verde. . . ." who were engaged in military and mining activities. Tr. at 96. Therefore, unlike in *Utah*, Arizona's history of settlement played no part in the nonuse of the Verde as a highway for commerce. The

logical inference to be drawn from this nonuse is that the Verde River was not susceptible to navigation.

B. Evidence of Opportunistic and Sporadic Modern Day Recreational Boating Does Not Demonstrate that the Verde River was Susceptible to Use as a Highway for Commerce at the Time of Arizona's Statehood.

Proponents refer to evidence of scattered modern day opportunistic recreational boating trips in a failed attempt to show the Verde's susceptibility to navigation. See ASLD's Br. at 14-15; Defenders' Br. at 13-14. However, case law instructs that, contrary to Proponents' assertions, such evidence is not probative of navigability or susceptibility to navigability at statehood.

In *United States v. Crow, Pope & Land Enterprises, Inc.*, 340 F. Supp. 25 (N.D. Ga. 1972), the court stated "no meaningful argument can be made" that evidence of modern day use of a waterway for recreational purposes, which is "limited to very light sporting craft such as canoes, kayaks and rubber rafts, drawing no more than a few inches of water . . . [that] often scrape the rocky bed of the river," demonstrates the river's susceptibility for use for commercial navigation¹ *Id.* at 34. Similarly, in *Lykes Brothers, Inc., v. United States Army Corps of Engineers*, 821 F. Supp. 1457, 1463 (M.D. Fla. 1993), the court found that adventure trips in small, shallow-draft canoes for recreational purposes do "not support a conclusion" that the creek had been used for commercial navigation. *Id.* at 1464. Finally, in *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968), the Eighth Circuit held that conducting boating trips on a river in flat bottom boats with drafts of two to six inches does not constitute commerce and transportation sufficient to characterize it as navigable.

¹ Although *Crow* involved a determination of navigability for purposes of federal regulatory jurisdiction under the commerce clause, rather than a determination of title to riverbeds, the Ninth Circuit has recognized that "the two standards are nearly identical, with the commerce clause test being adopted and applied to riverbed title cases." *City of Centralia v. Federal Energy Regulatory Commission*, 851 F.2d 278, 281 (9th Cir. 1988). Accordingly, the Commission may consider case law involving determinations of navigability under the commerce clause when determining the navigability of Arizona's streams. However, it is important to note that navigability for title to riverbeds differs in three significant respects from navigability for purposes of determining the extent of federal regulatory jurisdiction under the commerce clause. See *Riverfront*, 672 F.2d at 795 n.1. When deciding navigability for title, navigability must exist at the time of statehood, and it cannot occur as a result of reasonable improvements. See *id.* In addition, unlike when determining navigability under the commerce clause, the commerce required when deciding navigability for title need not be interstate or foreign. See *id.*

The above cited cases instruct that evidence of sporadic, present-day low-draft recreational boating on the Verde River – a stream generally characterized by minimum flows and less frequent torrential peak flows – is not probative of its susceptibility to navigability as of February 14, 1912.

Proponents cite the Ninth Circuit’s holding in *Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989), in support of their argument regarding evidence of recreational boating to establish navigability. See ASLD’s Br. at 12; Defenders’ Br. at 10. However, in that case, the court was presented with sufficient evidence to establish that a “substantial industry” of guided sightseeing and fishing trips with watercraft existed on the Gulkana River, which industry employed approximately 400 people. See *Ahtna*, 891 F.2d at 1405. In addition, the parties stipulated that the Gulkana was either being used or susceptible to being used by powerboats 16 to 24 feet long by four to ten feet wide, capable of carrying loads of up to one ton. See *id.* at 1402. The parties also stipulated that “the watercraft customary for the River’s use at statehood included powered boats with a load capacity of approximately 1,000 pounds,” which watercraft “could have at least supported commercial activity of the type carried on today. . . .” *Id.* at 1405. Unlike in *Ahtna*, no evidence has been presented to the Commission that suggests the Verde River was of practical utility for any commercial purpose, let alone commercial activities of the magnitude of those conducted on the Gulkana. Furthermore, the Gulkana River’s hydraulic characteristics were far more impressive than the Verde’s. The *Ahtna* court stated that the river “displaces 3,600 to 4,800 cubic feet per second (“cfs”) from May to September, decreasing to 200 to 300 cfs from November through April, when the River lies frozen [and, therefore, is not being navigated].” *Id.* at 1402.

The Verde’s flows are not comparable to those of the Gulkana. The United States Geological Survey (“USGS”) operated only two gauges along the Verde River prior to Arizona’s statehood: at McDowell and near Camp Verde. See *Fuller Report*, at 7-5. According to USGS records, the average monthly stream flow rate in February, 1912 was 300 cfs, and although no discharge calculations were reported for individual days during that month, an isolated discharge

calculation of a mere 269 cfs was reported for February 16, 1912. *See id.* at 7-6. As for the gauge near Camp Verde, although “[d]ischarges were not computed from most stage readings taken in 1912,” the *Fuller Report* estimates that flow at this station was a meager 200 cfs in February, 1912. *Id.* Within three years of Arizona’s statehood, the USGS established two additional gauges, one at Clarkdale and the other at Camp Verde. Average flows at the Clarkdale gauge averaged a mere 270 cfs from 1916 to 1921, while annual flows at the Camp Verde Station averaged only 435 cfs from 1913 to 1920. *See id.*

Because “[f]loods with high peaks tend to skew the average,” a consideration of the Verde River’s base flow, which “is the non-flood component of streamflow,” is instructive as to the Verde’s susceptibility to navigation at statehood. *Id.*, at 7-10. An examination of dry flow records at three Verde River gauging stations (Paulden, Clarkdale, and Camp Verde) reveals that the winter base flow of the Verde River ranged from 22 cfs (Paulden) to 200 cfs (Camp Verde), and the summer base flow ranged from 22 cfs (Paulden) to 72 cfs (Clarkdale). *See id.* Furthermore, the two-year, 30-day flow ranged from a mere 22 cfs at Paulden to only 76 cfs at Camp Verde. *See id.*

Defenders also cite to *North Dakota v. Andrus*, 671 F.2d 271 (8th Cir. 1982) (“*Andrus I*”) to support their argument that modern day recreational boating is probative of navigability. *See* Defenders’ Br. at 10. However, an examination of the facts of that case and its subsequent procedural history reveals that it is not helpful to a determination of the Verde’s susceptibility to navigation.

For example, in finding the Little Missouri River navigable, the *Andrus* court considered persuasive evidence that only seven years earlier the United States Army Corps of Engineers issued a report in which it stated that “[d]ue to historical and potential use, it is recommended that the Little Missouri River be classified as a navigable waterway of the United States.” *Andrus II*, 671 F.2d at 278. There is no evidence that such statements have been made by governmental bodies concerning the Verde River.

Furthermore, although the Eighth Circuit affirmed the district court's holding that the Little Missouri River was navigable in *Andrus I*, 506 F. Supp. 619 (D. N.D. 1981), it is essential to point out that the United States argued the case on statute of limitation grounds and did not present any evidence regarding the river's non-navigability. See *North Dakota v. United States*, 770 F. Supp 506 (D. N.D. 1991). After review of the statute of limitations issue by the Supreme Court, see *Block v. North Dakota*, 461 U.S. 273 (1983), the case was ultimately remanded to the district court with directions to dismiss the state's complaint. See *North Dakota v. Block*, 789 F.2d 1308, 1314 (8th Cir. 1986). Five years later, after "Congress amended the Quiet Title Act to allow states to sue the federal government without regard to the twelve-year statute of limitations under some circumstances," North Dakota again filed suit. *North Dakota v. United States*, 770 F. Supp 506, 508 (D. N.D. 1991). However, unlike in *Andrus I*, in *North Dakota* the federal government proffered evidence of non-navigability, and with this complete record the district court concluded that the Little Missouri River was not navigable at the time North Dakota was admitted into the Union in 1889. See *id.* at 512-13, *aff'd by North Dakota v. United States*, 972 F.2d 235 (8th Cir. 1992). Accordingly, North Dakota is the controlling final determination regarding the navigable status of the Little Missouri River, and, as a result, the *Andrus I* and *II* holdings are wholly without significance.

Proponents rely on evidence of opportunistic modern day recreational boating trips to demonstrate the Verde's susceptibility to navigation. See ASLD's Br. at 14-15; Defenders' Br. at 13-14. However, the evidence shows that such trips are fraught with difficulties and are made in inflatable kayaks and canoes made of plastic in order to contend with the Verde River's shallow and rocky conditions. See Tr. at 125; Jim Slingluff, *Stream Canoeing in Arizona*, Arizona Hunter & Angler (April 1991), at 22 [035] ("The Verde . . . [is] shallow and rocky. I believe plastic canoes are the best single craft to have. They do not conduct heat or cold very well, they are durable, and they slide easily off rocks. . . . Wood . . . lack[s] the durability necessary to boat shallow creeks."). Concerning the importance of using boats on the Verde constructed from modern day materials, Mr. Slingluff testified that

one of the things with contemporary materials, the plastics in particular, is they slide, they're slippery. So if you get some velocity and if there's some algae or stuff like that in there and you hit it at the right speed and you might have to rock your boat up, you know, to get a little more depth on one side and a little less width, but you can do it.

Tr. at 117.

When determining whether a stream is navigable, the focus is on the technology *at the time of statehood* rather than at the time of the navigability determination. See *Ahtna*, 891 F.2d at 1405 (taking into account the "limited load capacity and rudimentary technology" that existed at time of statehood when making determination as to navigability). Therefore, based on the Ninth Circuit's conclusions in *Ahtna*, it is irrelevant that cutting-edge technology now allows light, low-draft boats, such as inflatable kayaks and plastic canoes, to float sporadically certain portions of the Verde at certain times of the year. This technology should be discounted when determining a stream's susceptibility to navigation. In other words, the Commission must focus on boat technology as it existed as of February 14, 1912, not as it exists in 2006. See A.R.S. 37-1101(5) (defining a navigable watercourse as one that at the time of statehood "was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the *customary modes of trade and travel on water*") (emphasis added). See also *The Daniel Ball*, 77 U.S. 557, 563 (1870) (stating same). According to Dr. Littlefield, "[t]he status of watercraft at the time of Arizona's statehood in 1912 – as described in historical literature and illustrated in photographs – make it clear that no such vessels could be utilized on a regular and reliable basis on the Verde River." *Littlefield Report*, at 173.

Furthermore, it is clear that even with the benefit of modern day boat technology, the Verde River is far from being susceptible to navigation. In his report titled *Geomorphic Character of the Verde River* (December 2004) (the "*Schumm Report*"), Dr Stanley Schumm stated that in the 61-mile stretch of the Verde River from Horseshoe Reservoir to Camp Verde there are a total of 14 rapids. *Id.*, at 14. He also stated that the overall gradient of the river varies from 10 to 25 feet per mile. Based on these findings, Dr. Schumm concluded that the Verde's

numerous rapids and bedrock negatively impacts navigation of the river, and its steep gradients render navigation impossible. *See id.* *See also* Pearthree: Tr. at 20 (explaining that the Verde “carries a pretty course bed load”). Mr. Slingluff testified that overall, there are some 130 rapids on the Verde River. Tr. at 125.

It is obvious from the geomorphologic characteristics and the various accounts of modern day boating that the Verde River, in its natural and ordinary condition, is not now and has never been susceptible to navigation. For example, in his 1990 account of paddling the Verde, Mr. Slingluff offers the following account of his encounters with various portions of the river:

Twenty yards downstream the river narrows as it flows over a gravel bar to a width of five feet, and a depth of three inches. * * * We paddle lazily through a series of narrow chutes. The river, a creek really, is only inches deep, with marshy banks. * * * The land closes in on the river and the river responds by turning rocky. . . . The Verde is still shallow and rockstrewn. We still haven't hit knee-deep water, except in an occasional pool. * * * Periodically, the canyon widens and forms extensive floodplains, made up of a mix of rock bars[.] * * * The river channel narrows as it cuts through the gravel bars.

Jim Slingluff, *Shallow Streams: Liquid Paths into Wilderness*, *The Southwestern Sportsman* (Winter 1990-91), at 15–18 [034]. In addition, the chart attached at **Exhibit “A”** to this memorandum summarizes Mr. Slingluff's testimony at the Verde hearing concerning his encounters with the Verde – testimony that clearly illustrates the river's lack of susceptibility to navigation. As the Eighth Circuit stated in *North Dakota*, in the case of a watercourse characterized by shifting channels (like the Verde), “modern day canoe use and modern day ‘boatability’ data are not reliable indicators of the River's navigability at statehood.” *North Dakota*, 972 F.2d at 240.

Finally, Proponents cite to *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1196 (N.Y. 1998), to support their susceptibility argument. ASLD's Br., at 12; Defenders' Br. at 11. However, “[n]avigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.” *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926). *Adirondack* was decided under the laws of the State of

New York and, therefore, is without significance to the Commission's determination of the Verde's navigability.

III. Proponents' Misconstrue the "Highway for Commerce" Requirement as Set Forth in Arizona's Statutes and *The Daniel Ball* and its Progeny.

As a result of the lack of evidence demonstrating that at the time of Arizona's statehood the Verde River was either of practical usefulness for commerce or was susceptible to being used as a highway over which useful trade or travel could be conducted, Proponents attempt to minimize the navigability test's commerce requirement and urge the Commission to liberalize the *Daniel Ball* test by considering case law that has no relevance to a determination of the Verde's navigability. See ASLD's Br. at 11-12, 16; Defenders' Br. at 7-9.

Throughout the years, our courts have discussed the kind of commerce that is required for a watercourse to be navigable. For example, in *Leovy v. United States*, 177 U.S. 621 (1900), after analyzing established case law, including *The Daniel Ball* and *The Montello*, the United States Supreme Court explained that "the term 'navigable waters of the United States' has reference to *commerce of a substantial and permanent character* to be conducted thereon." *Leovy*, 177 U.S. at 632 (emphasis added). Over 60 years earlier, the Supreme Court of Massachusetts stated in *Rowe v. Granite Bridge Corporation*, 21 Pick. 344 (Mass. 1838) – an opinion cited approvingly by the United States Supreme Court in numerous cases, including *Leovy*, *The Montello*, and *Economy Light & Power* – that in order for a waterway to be navigable, "*it must be navigable to some purpose, useful to trade or agriculture.*" *Id.* at 347 (emphasis added).

In *Economy Light & Power Company v. United States*, 256 U.S. 113 (1921), the United States Supreme Court emphasized that a navigable waterway of the United States must be "*of practical service as a highway of commerce.*" *Id.* at 124 (emphasis added). Fourteen years later, the Supreme Court explained that a navigable river is one of "*general and common usefulness for purposes of trade and commerce.*" *United States v. Oregon*, 295 U.S. 1, 23 (1935) (emphasis added).

Holding similarly, in *North American Dredging Co. of Nevada v. Mintzer*, 245 F. 297 (9th Cir. 1917), the Ninth Circuit explained that “[t]o be navigable, a water course must have a *useful capacity* as a public highway of transportation.” *Id.* at 300 (quoting *Harrison v. Fite*, 148 F. 781, 783-84 (8th Cir. 1906), which stated that “to meet the test of navigability . . . a water course should be of *practical usefulness* to the public as a public highway. . . .”) (emphasis added). Consistent with *Mintzer*, over a half century later the same court stated that “[n]avigability depends upon the stream’s *usefulness* as a transportation mechanism for commerce.” *Puget Sound Power & Light Company v. Federal Energy Regulatory Commission*, 644 F.2d 785, 787 (9th Cir. 1981) (emphasis added). Even *Adirondack*, relied on by Proponents, recognizes that “[p]ractical utility for travel or transport nevertheless remains the standard.” *Adirondack*, 706 N.E.2d at 196 (emphasis added).

Each of the above-cited cases underscored the fact that, in order to be navigable, a waterway must, on a consistent basis, be *beneficially useful* – of *practical utility* – to the public for purposes of trade or transportation. The overwhelming weight of evidence in the record clearly demonstrates that the Verde River is not characterized by such capacity for commerce.

The cases cited by Proponents are unpersuasive. For example, Proponents cite *Utah v. United States*, 403 U.S. 9 (1971). *See* ASLD’s Br. at 11; Defenders’ Br. at 12. However, unlike in the case of the Verde where there is no probative evidence of practical use as a highway for commerce, an analysis of *Utah*’s facts reveals that around the time of Utah’s statehood “business” was conducted on the Great Salt Lake. *See id.* at 11. This business included the hauling of sheep, ore, and wood and boating excursions. *See id.* at 11-12.

The ASLD cites *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), *Economy Light & Power*, and *Puget Sound* for the proposition that “the *Daniel Ball* test [] allows the consideration of evidence of the watercourse’s historic navigability.” ASLD’s Br. at 11. However, unlike in the case of the Verde River, in all of these cases probative evidence was offered to establish actual historic use of the watercourses for navigation. *See Appalachian Electric Power Co.*, 311 U.S. at 411-416 (describing various uses of New River for navigation,

including commercial transportation of timber, lumber, tobacco, iron ore, pig iron, and other freight); *Economy Light & Power Company*, 256 U.S. at 117 (explaining Chicago-Desplaines-Illinois route was used for “a leading branch of commerce” that was “regularly conducted upon the Desplaines river” and to transport large quantities of supplies needed by early settlers); *Puget Sound*, 644 F.2d at 788 (affirming Federal Energy Regulatory Commission’s navigability determination of White River based on evidence of actual use of river to transport shingle bolts and float Indian canoes).

Defenders’ rely on *Northwest Steelheaders Ass’n, Inc. v. Simantel*, 199 Or. App. 471 (2005), *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65 (W.D. Wash. 1981), and *Block*.² See Defenders’ Br. at 8-9. However, in *Northwest Steelheaders*, the Court of Appeals of Oregon considered “credible” expert testimony regarding actual “historical uses and capacities for navigation of the John Day River for navigation” based on historical, anthropologic, and archeological evidence. *Northwest Steelheaders*, 199 Or. App. at 485. The court found probative direct evidence that, at the time of statehood, Native American Tribes used dugout canoes for fishing, trade, and travel and that “modern boats of similar draft traverse the length of the John Day River today *with little difficulty*.” *Id.* at 486 (emphasis added). In addition, the court considered probative evidence that a number of pleasure boat sternwheelers plied the river in the late nineteenth and early twentieth centuries. *See id.*

Likewise, in *Puyallup Tribe*, the court relied on evidence that “[s]mall boats have always used the lower portion of the Puyallup River. . . .” *Puyallup Tribe*, 525 F. Supp. at 71. The court found that “Puyallup Indians navigated the river with their fishing boats and canoes, which were especially suited to traversing the perils of the river.” *Id.* at 72.

² *Block* is of no significance given the fact that the Supreme Court did not even consider the Little Missouri River’s navigability. The only issues decided in that case were whether the Quiet Title Act was the exclusive procedure by which states could challenge the title of the United States to real property and whether states were exempt from compliance with the Act’s statute of limitations. *See Block*, 461 U.S. at 276-77. *Block* does not stand for the proposition cited in Defenders’ Opening Post-hearing Memorandum. *See* Defenders’ Br. at 8. In fact, the Court’s only reference to canoe travel in that case is a footnote explaining that the state’s case “consisted of documentary evidence of canoe travel on the river prior to statehood. . . .” *Block*, 461 U.S. at 279 n.5. Furthermore, as discussed in Section II above, when the navigability issue was finally decided in 1991, the court found that the Little Missouri was not navigable. *See North Dakota*, 770 F. Supp. at 512-13, *aff’d by North Dakota*, 972 F.2d 235.

In contradistinction to the John Day and Puyallup Rivers, no such probative evidence of actual historical or archaeological use of the Verde River is included in the record. At the Verde hearing, Mr. Fuller testified that he “found no evidence in the archaeological record of any use of boats on the Verde River.” Tr. at 10. As for historical use of the Verde, Dr. Littlefield testified that despite his extensive research, he did not find any documents “that showed it was used for navigation on any kind of reliable and regular basis[.]” Tr. at 95.

The Eighth Circuit Court of Appeals warned against attempts at liberalizing the test for determining the navigability of a watercourse in the absence of a record of past historical use. *See Beavark, Inc.*, 402 F.2d at 981 (refusing to liberalize test for navigability and stating “we are wary of unnecessary extension of any rule on navigability, particularly when it could well lead to absurdity”). Accordingly, the Commission should decline Proponents’ invitation to stretch the navigability test beyond the reach of judicial precedent and past the point of common sense, and instead apply the appropriate test as set forth in our statutes and *The Daniel Ball* and its progeny.

IV. Conclusion

As the United States Supreme Court expounded in *United States v. Utah*, “[e]ach determination as to navigability must stand on its own facts.” *Utah*, 283 U.S. at 87. An examination of the facts regarding the navigability of the Verde River reveals that Proponents have failed to prove by a preponderance of the evidence that the Verde River was navigable at the time of Arizona’s statehood or at *any* time. Accordingly, Phelps Dodge respectfully asks the Commission to determine the Verde River non-navigable as of February 14, 1912.

RESPECTFULLY SUBMITTED this 11th day of April, 2006.

RYLEY CARLOCK & APPLEWHITE

By Michael J. Kafka
Cynthia M. Chandley
L. William Staudenmaier
Michael T. Kafka
One North Central Avenue, Suite 1200
Phoenix, Arizona 85004-4417
Attorneys for Phelps Dodge Corporation

Original and six copies HAND DELIVERED
this 11th day of April, 2006, to

Arizona Navigable Stream Adjudication Commission
1700 West Washington
Room 304
Phoenix, Arizona 85007


AND one copy MAILED this 11th day of
April, 2006, to:

Laurie A. Hachtel, AAG
1275 West Washington
Phoenix, AZ 85007
For the Arizona State Land Department

Joy E. Herr-Cardillo
2205 East Speedway Boulevard
Tucson, AZ 85719
Arizona Center for Law in the Public Interest

Mark A. McGinnis
Rebecca C. Goldberg
Salmon, Lewis and Weldon, P.L.C.
2850 East Camelback Road, Suite 200
Phoenix, AZ 85016
For the Salt River Project

Joe P. Sparks
John H. Ryley
Sparks, Tehan & Ryley, P.C.
7503 First Street
Scottsdale, AZ 85251
For San Carlos Apache



A handwritten signature in cursive script, appearing to read "Lisa M. Gresh", is written over a horizontal line.

EXHIBIT "A"

(Summary Chart of Slingluff Testimony at the January 18, 2006 Verde Hearing)

<u>Testimony</u>	<u>Citation</u>
"What you have there is a very large cataract that is hung up on the cleaver rock that's just below the falls itself."	Tr. at 105
"That's the prefalls of the Verde at summer base flows. You can see it's a drop, it wouldn't be that easy to run in a canoe just because it's shallow enough to catch on the lip at this cfs rate. This cfs, I'm guessing, was probably about 50 to 70 cfs."	Tr. at 105
"I generally don't paddle the falls. That is predominantly because . . . I don't want to mess up my gear. When I've paddled it, it's typically I've been on a day trip and have a lighter boat."	Tr. at 106
"This side is a fairly gnarly area. . . . And the argument [that it is a class 3 rapid] would be based on the number of rocks below the falls. It's not just the falls as an issue if you try to run it, but then you have this chaos of rock which there is a passageway at this flow rate, down in there through, but if a person missed it, then they would be almost certainly pinned on one or more of those rocks."	Tr. at 106-07
"And you can see I made him wear a helmet in that just because it's a rocky area. . . ."	Tr. at 107
"They scouted for about 15 minutes and got in it and still pinned their canoe."	Tr. at 109
"This is a nasty little dogleg at 300 and some cfs."	Tr. at 111
"Right before Horseshoe Dam is notorious for having way too many strainers and trees to be real safe."	Tr. at 114
"You can see they got sideways going into that reversal, which wouldn't be a good thing because it would tend to flip them, which it did."	Tr. at 115
"[S]ometimes I can get through just what you see in front of you and not get hung up, and other times I can't." [Following is an explanation of how contemporary materials – "plastics in particular" – are required to "get through" this area.]	Tr. at 117