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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

**In re Determination of Navigability of
the Verde River**

No. 04-009 NAV

**STATE LAND DEPARTMENT'S
RESPONSE TO OTHER PARTIES POST-
HEARING MEMORANDA**

Under the equal footing doctrine, the State of Arizona received title to the River's bedlands on February 14, 1912, because the River was a navigable waterway in its ordinary and natural condition.¹

I. Title to the Verde River's Bed Passed to the State of Arizona at Statehood Under the Equal Footing Doctrine.

All parties agree that ANSAC must apply the *Daniel Ball* test to determine whether the River's bedlands passed to the State of Arizona in 1912.² The parties, however, disagree on how to apply the test, which provides as follows:

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

The Daniel Ball, 77 U.S. 557, 563 (1870); *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 419, ¶ 17, 18 P.3d 722, 730, ¶ 17 (App. 2001). Although *Daniel Ball* involved a navigability determination

¹ ASLD uses the same abbreviations that it used in its Opening Memorandum for this Response.

² FATCO's Joinder in SRP's and Phelps Dodge's Opening Memoranda was filed untimely on March 27, 2006. The State objects to the untimely filing of this Joinder, and requests that the Joinder be stricken from the record.

under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, the case remains “the starting point” for determining navigability-for-title issues under the equal footing doctrine. *Defenders*, 199 Ariz. at 419, ¶ 17, n. 10, 18 P.3d at 730, ¶ 17, n. 10. In navigability-for-title cases, title to navigable riverbeds passes at statehood to the state in which the river flows. *United States v. Utah*, 283 U.S. 64, 75 (1931). All parties also agree that at Arizona’s statehood in 1912, the River was not in its ordinary and natural condition; its waters having been diverted for irrigation.³ The parties disagree, however, on how to apply the requirement that the River be considered in its ordinary and natural condition. In title cases, the equal footing doctrine operates to pass title to navigable bedlands at statehood. *See Defenders*, 199 Ariz. at 419, ¶ 17, 18 P.3d at 730, ¶ 17 (stating that the “federal standard that needs to be applied when determining the extent of watercourse bedlands a state takes by operation of the equal footing doctrine has remained virtually unchanged since the classic definition of navigability was provided by *The Daniel Ball*” (emphasis added)). Thus, title to watercourses that were navigable in their ordinary and natural condition passes on the date of statehood.

It is important not to confuse navigability-for-title concepts with those applicable to Commerce Clause cases. For purposes of Congress’s regulation of navigable waterways under the Commerce Clause, a waterway may be found navigable if it could be made so through artificial aids. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940). Thus, a waterway that is not currently navigable but that could be made so with reasonable improvements could become subject to Congressional regulation; artificial conditions such as diversions that could be abated by due exercise of the public authority do not prevent a finding of navigability. *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 118 (1921). This possibility does not exist in navigability-for-title cases where title must be determined once and for all as of the date of statehood. Thus, to determine whether the River could have been used as a highway for commerce,

³ The ancient canals on the Verde indicate that the River was used for irrigation for at least 1,000 years. ASLD Verde at 2-9. There is no evidence that suggests that anyone – from the earliest inhabitants to the current civilization – decided to harness and divert the Verde River’s reliable flows for domestic use and irrigation only because the Verde was not useful for navigation, or because it was prone to floods or drought.

ANSAC must assess the River's pre-statehood ordinary and natural condition, disregarding all man-made obstructions and diversions.

II. The River Was Susceptible to Use as a Highway For Commerce in Its Natural and Ordinary Condition.

The State incorporates by this reference its memorandum regarding highway-for-commerce requirements filed on February 27, 2006. The Verde is currently navigated. The Yavapai-Apache Nation (the "Nation") erroneously claims (OM at 2-8) that to demonstrate navigability for title purposes, a proponent must show "sustained beneficial commercial use," but no such requirement exists. *See Defenders*, 199 Ariz. at 421, 18 P.3d at 732 (stating that "the federal test has been interpreted to neither require both trade and travel together nor that the travel or trade be commercial"). The Nation's cited authorities are unpersuasive. In *United States v. Oregon*, 295 U.S. 1 (1935), the Court merely pointed out that small boats drawing one to six inches of water were insufficient to demonstrate a capacity for general and common usefulness for purposes of trade or travel. *Id.* at 21. Similarly, in *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), the Ninth Circuit discussed the transportation for profit involved in boating on the Gulkana River but, again, did not require such proof. Indeed, the *Ahtna* court permitted actual current commercial use to demonstrate susceptibility for use as a highway for commerce at statehood: "[w]e think the present use of the lower Gulkana is commercial and provides conclusive evidence of the lower Gulkana's susceptibility for commercial use at statehood." *Ahtna*, 891 F.2d at 1405. Under this test, the River is clearly navigable. The Nation's reliance on *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975) is erroneous. *Adams* is an admiralty case and is inapplicable to this navigability-for-title case. "[W]hen discussing navigability, any reliance on judicial precedent should be predicated on a careful appraisal of the purpose of which the concept of navigability is invoked." *Defenders*, 199 Ariz. at 419, 18 P.3d at 730.

The authorities SRP relies on (OM at 10 - 18) do not preclude a finding of navigability based on the River's susceptibility for use as a highway for commerce. The State has clearly met its burden of proof that the River was susceptible for use as a highway for commerce. *See Utah v.*

United States, 403 U.S. 9, 11-12 (1971) (finding that farmers boating their livestock to an island in the Great Salt Lake from time to time, along with evidence of other sporadic use of the Lake, provided adequate proof of use as a highway for commerce); *Puget Sound Power & Light Co. v. F.E.R.C.*, 644 F.2d 785, 789-90 (9th Cir. 1981) (finding navigability based mainly on river transportation of moderately sized timber supplies); *Oregon v. Riverfront Protective Assoc.*, 672 F.2d at 795 (finding that historic long-term log floating, even with natural obstructions in the river, was sufficient to find navigability); *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (N.Y. 1998) (recreational use is sufficient to satisfy the historical navigable-in-fact test to show whether a river has practical utility for trade or travel). Recent navigability-for-title decisions reflect a more liberal view of the federal title test. *See Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, Richard M. Frank, University of California, Davis Law Review, Vol. 16:579, 592 (1983). Gila River E.I. 96-003-012.

III. Federal Surveyors' Opinions on Non-Navigability, Even If They Could be Discerned, Are Irrelevant.

Much has been made in these proceedings of the nineteenth century federal surveyors' failure to note in their surveys that the River was navigable. *See* SRP OM at 4-5; PD OM at 4-6; Nation OM at 10-11. SRP's expert, Dr. Littlefield, finds this highly significant and places great weight on the surveyors' supposed belief that the River was non-navigable. *See generally* Littlefield, Tr. at 69 – 70. However, it is impossible to know what the surveyors actually believed, and in any event their beliefs are irrelevant.

Dr. Littlefield reached his hypothesis about the surveyors' beliefs based upon surveying instruction manuals and surveyors' actions taken in apparent compliance with the instructions. Although the manuals' requirements changed from time to time for non-navigable waterways, the instructions to meander both sides of a navigable waterway did not change. Thus, the instructions made a crucial distinction between "navigable" and "non-navigable" waterways, but neither the instructions nor the underlying statute (U.S.C. § 43-931) defined "navigable." Contrary to his final opinion, Dr. Littlefield testified that surveyors' navigability decisions were discretionary with each

surveyor (Tr. at 80), there was no precise definition of navigability (Tr. at 80 “under the statute” or “according to law”), and that navigability was in the eye of the beholder (Tr. at 81). On cross-examination at the hearing, he was asked for his own definition of “navigability” and he responded: “My definition is based on what a reasonable person at the time thought of the river. And that presumably would mean also their understanding of what watercraft were available at the time.” Tr. at 94. Although Dr. Littlefield could not have known what “navigable” meant to the surveyors; he still defended his opinion by claiming that he had looked at many documents and “that contemporaneous observers did not believe the river was navigable.” Tr. at 90; *see also* Tr. at 91. Dr. Littlefield’s very comprehensive research did not find any historical document where a contemporaneous observer stated it was not navigable. Undaunted by his lack of understanding of critical terms, Dr. Littlefield nevertheless stuck to his hypothesis that the surveyors’ actions demonstrated their belief that the River was non-navigable. Tr. at 93. However, considering the context in which the federal surveyors were in the field, it is more likely that they considered the term “navigable” in federal terms, that is related to interstate - or at least federally-navigable - waterways, and waterways that would provide a way to transport goods to the country’s interior. The interpretation of federal surveyors’ beliefs: that “navigable” referred to interstate rather than intrastate streams, is consistent with a leading surveying authority’s definition of “navigable stream.” Frank Clark notes in his surveying and boundaries treatise that “[t]he United States Supreme Court has defined the term ‘navigable stream’ in a most satisfactory way.” *See* Clark on Surveying and Boundaries, 3rd ed., Frank Emerson Clark, Bobbs-Merrill Co., Inc., Indianapolis, Ind., 1959, Section 576 (citing *The Montello*, 87 U.S. 430, 443 (1874), which found that the term means interstate but not intrastate waterways); *see also United States v. Utah*, 283 U.S. at 75 (stating that navigable waters of the United States are those that are navigable in interstate or foreign Commerce).

GLO surveyors meandered portions of the Verde River. Although the surveyors did not indicate why they meandered both banks of the River, Dr. Littlefield speculated that the surveyors’

actions indicated that the River was greater than three chains; however, he admitted that a river could be more than three chains and still be navigable. Tr. (Littlefield) at 88.

None of the opponents of navigability has cited persuasive authority that surveyors' opinions are important to ANSAC's determination of navigability. The Nation cites *Oklahoma v. Texas*, 258 U.S. 574 (1921) (OM at 10 n.16) for the proposition that surveyors' actions in not meandering a river, while not conclusive or presumptive evidence of non-navigability, are highly relevant. That case actually found the opposite. The Court stated that the action of surveying officers in meandering a river had "little significance . . . [because] those officers were not clothed with power to settle questions of navigability." 258 U.S. at 585. PD cites *Lykes Bros. Inc. v. United States Army Corps of Engineers*, 64 F.3d 630, 635-36 (11th Cir. 1995) and *Harrison v. Fite*, 148 F. 781, 784 (8th Cir. 1906) (OM at 6) for the proposition that government surveyors' actions are to be considered as evidence of navigability or non-navigability. However, *Lykes* which was decided under the Rivers and Harbors Act, provided that surveyors' actions are merely probative, not determinative, and may be considered in light of all the evidence. 64 F.3d at 635-36. *Harrison* is equally unpersuasive. The court stated that evidence of surveyors' actions was not conclusive on the question of navigability, because "[t]he surveyors are invested with no power to foreclose inquiry into the true character of the water." 148 F. at 784.

Dr. Littlefield's testimony provides no basis upon which to discern the nineteenth century federal surveyors' beliefs on whether the River was navigable for title purposes, and surveyors' beliefs on the issue are irrelevant.

IV. Federal Patents and State Land Grants That Do Not Reserve Bedlands Do Not Demonstrate Non-Navigability.

SRP (OM at 4 - 5, 14), PD (OM at 7 - 11) and the Nation (OM at 12 -13) assert that the failure of federal and state land patents to reserve land representing the River bed shows that federal and state officials regarded the River as non-navigable and that this fact is somehow significant. The State disagrees. Federal authorities in all likelihood believed that the River was not navigable only for federal purposes under a Commerce Clause analysis (*see* discussion above), and it is well

known that the State did not assert its interest in Arizona's bedlands until the 1980s. *Defenders*, 199 Ariz. at 415, 18 P.3d at 726; *Hassell*, 172 Ariz. 356, 359-60, 837 P.2d 158, 161-62 (App. 1992). Moreover, both governments were more interested in irrigation than in navigation in the nineteenth and early twentieth centuries. See ASLD Gila OM at 4 - 6, 23 - 24.

None of the authorities that the opponents of navigability have cited requires a different conclusion. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922) dealt with the boundaries of an Indian reservation. In *Brewer-Elliott*, the only reason the Court inferred that the Congressional grant extended to the main channel of the river was because Congress already knew that the river was not navigable, 260 U.S. at 87. The Court expressly did not address the question whether it would have been outside Congress's authority to make the grant if the river was navigable. In *United States v. Oregon*, 295 U.S. 1, 23 (1935), the Supreme Court noted that the Secretary of the Interior had described Lake Malheur as "nonnavigable . . . [as] little more than a swamp or marsh," and the Oregon Supreme Court had also described the Lake as non-navigable. But the United States Supreme Court stated in *Economy Light & Power*, 256 U.S. 113 (1921) that a state supreme court ruling of non-navigability was not *res judicata* on the issue because the United States had not been a party to the earlier case and because the district court in that case had more evidence before it upon which to determine navigability. *Id.* at 123. In these proceedings, no governmental pronouncements on the River's navigability or non-navigability exists, much less by federal and state high officials. The patents that SRP mentions and that PD lists were presumably issued by low-level government employees in the performance of their day-by-day duties. Neither the personnel who prepared the patents nor the patents themselves included a reasoned evaluation of the River's navigability. More important, in navigability-for-title cases, each waterway must have its own particularized assessment to determine navigability under the *Daniel Ball* test. *Defenders*, 199 Ariz. at 418, ¶ 12, 18 P.3d at 729, ¶ 12. In *Oregon Div. of State Lands*, 672 F.2d at 796, the court reversed the district's finding of non-navigability, thereby defeating federal patentees' successors-in-interest title to the bedlands (the patents at issue in *Riverfront* must not have

contained reservations for the McKenzie's riverbed, but the court nevertheless found the river navigable). Even Congressional indications of navigability are not necessarily persuasive in title cases. In *Oklahoma v. Texas*, Oklahoma asserted title to the Red River's bed and argued that because Congress had permitted bridges to be constructed over the River and had required that the bridges not interfere with navigation, Congress must have considered the River navigable. The Court rejected this argument, finding that the non-interference provision was merely "precautionary and not intended as an affirmation of navigable capacity." *Id.* at 585-86. SRP also cites (OM at 14) *Washington Water Power Co. v. F.E.R.C.*, 775 F.2d 305, 332 (D.C. Cir. 1985); *Lykes Bros. Inc. v. United States Army Corps of Engineers*, 821 F. Supp. 1457, 1460 (M.D. Fla. 1993); and *Koch v. Department of Transportation*, 47 F.3d 1015, 1019 (10th Cir. 1995) for authority that courts should consider the government's treatment of a watercourse as non-navigable in their analysis of navigability. However, none of these authorities is persuasive. *Washington Water* involved a determination of whether the Spokane River was navigable under the Federal Power Act, not for title purposes. The issue in *Lykes* was whether a certain creek was a navigable water of the United States under the Rivers & Harbors Act of 1899, a very different question from whether a river is navigable for title purposes. And *Koch* is simply irrelevant to any issue raised in these proceedings. In fact, the *Koch* court acknowledged that the issues of whether the land passes to the state or passes under a patent are analytically distinct. 47 F.3d at 1019, n. 3. Thus, in navigability-for-title cases, incidental use of the word "navigable" in other contexts is not persuasive, and ANSAC should disregard the opponents' arguments.

V. The River's Hydrology and Geomorphology Demonstrate That the River Was Susceptible to Use as a Highway for Commerce.

A. The River's Ordinary and Natural Hydrology Demonstrates That the River Was Susceptible to Use as a Highway for Commerce.

The Verde River is a naturally perennial river (ASLD Verde at 7-1, 3, 5, 8, 26; Tr. (Fuller) at

28), despite numerous irrigation diversions.⁴ Systematic hydrologic measurements made by the U.S. Geological Survey and others provide an undisputable record of reliable, perennial flow throughout the year. ASLD Verde, Tables 7-1 to 7-7. Proponents of non-navigability continue to misrepresent the flow record of the Verde River as “erratic” or “unreliable.” PD OM at 14. PD erroneously states that “the Verde’s flow was either too low for it to be a reliable mode of transportation for even the smallest of watercraft, or, on those rare occasions when high flow rates did occur, the extremely high velocities and dangerous conditions made the river far too wild and dangerous for it to be used as a highway of commerce.” PD OM at 17. In fact, flow records demonstrate that boatable conditions exist 99% of the time (Figure 5), a fact which is supported by the detailed record of modern boat use. ASLD, Chapter 8; Tr. (Fuller) at 35 - 38; Tr. (Colby) at 55 - 63; Tr. (Slingsluff) at 102 - 127.

SRP attempts to portray the flow data presented in the ASLD Report as unreliable, biased, or generated by the consultant. SRP OM at 7 (“the consultant’s estimate”), 8 (“high peaks skew the average”). In fact, the hydrologic data presented in the ASLD Report is published by the U.S. Geological Survey. Tr. (Fuller) at 30, 33; ASLD Verde, Tables 7-5 to 7-13. Despite criticizing the use of average flow rates, SRP provides an Appendix B that relies completely on average flow rates. However, we also note that the flow data in Appendix B are irrelevant to a finding of navigability for the Verde River, as there is no federal or state standard that defines a minimum flow rate for navigability (See Section C below).

Non-navigability proponents assert the ASLD rating curves indicate that flow is too shallow for boating and that the rating curves overestimate actual flow depths. Tr. (Sparks) at 47. Such assertions reflect a disregard of actual river conditions, since the modern boating record clearly indicates that sufficient depths exist throughout the year. Furthermore, field observations indicate that the rating curves probably underestimate typical flow depths, especially for the pools (Tr.

⁴ Although the hydrology of the River has not changed significantly since statehood, by 1914 121 cfs was diverted by 25 diversions for more than 5,000 acres of farmland between Perkinsville and the Salt River. See Tr. at 29. See also ASLD Verde at 7-4, 6, 7, 11, 22, Table 7-16; Tr. at 10, 29; *On the River*, ARIZONA HUNTER & ANGLER, May 1991 (EI 36) at 8.

(Fuller) at 35, 49), which represent most of the River's length (Tr. at 35). Finally, the opponents' of navigability assertion is unsupported by any type of factual evidence – no rating curve, no depth measurements, and no scientific data. The only depth information in the record is that in the ASLD Report and the statements by boaters who testified at the ANSAC hearings.

B. The United States Geological Survey's Annual Reports Are Irrelevant to Demonstrate the River's Ordinary and Natural Flow Conditions.

PD's reliance on the U.S. Geological Survey's Annual Reports from 1888-90 and 1890-91 is misplaced. PD OM at 19-20. The reports' purpose was to assess water sources for irrigating large areas of the Southwestern United States to promote settlement that would benefit the nation. *See e.g.*, Water Supply Paper 269-1909 (“investigations of stream flow [in the arid West] are not only of first importance in the redemption of the lands, but constitute an insurance of Federal and private investments,” referencing expenditure of \$51,000,000 on federal irrigation systems in West). Clearly, the federal government's concern was not with navigation but with settlement supported by irrigated agriculture.

C. SRP's List of Selected Rivers is Irrelevant to Demonstrate the Natural Flow of the Verde River.

SRP attaches a list of rivers to its Opening Memorandum in an attempt to compare the River with other selected rivers. SRP OM at 8, App. B. However, comparisons to other rivers are inappropriate and certainly determinative. *See Defenders*, 199 Ariz. at 418, 18 P.3d at 729 (citing *Hassell* which requires a particularized assessment of each watercourse); *Appalachian*, 311 U.S. at 404 (stating that there is no “formula which fits every type of stream under all circumstances and at all times”); *Puget Sound Power & Light*, 644 F.2d at 790 (stating that a court must take due account of the changes and complexities of a river when determining the sufficiency of evidence to prove navigability).

D. The River's Ordinary and Natural Geomorphology Demonstrates That the River Was Susceptible to Use as a Highway for Commerce.

The Verde River flows through a series of bedrock canyons and intervening alluvial valleys. ASLD Verde, Ch. 5; Tr. (Pearthree) at 17-20. With respect to navigability, the only difference

between the bedrock canyon and alluvial valleys reaches is that in the alluvial valleys some of the natural flow of the River is removed for irrigation and diversions, and fences create minor, non-natural obstructions. The low flow channel characteristics are similar regardless of whether a river is in a bedrock canyon or an alluvial reach. Tr. (Pearthree) at 22, 27. Although floods periodically change the Verde's low flow channel location (SRP OM at 9, Nation OM at 13, PD OM at 24), it is irrelevant to a general navigability determination because the low flow characteristics remain essentially unchanged after the channel moves. Tr. (Pearthree) at 24, 27; Tr. (Fuller) at 28. All natural, navigable rivers experience floods and some degree of channel change---the Verde is no exception.

The opponents' reliance on Dr. Stanley Schumm's flawed geomorphic analysis is misplaced. PD and SRP misstate the record by asserting that Pearthree and Fuller support Schumm's conclusions. PD OM at 24, SRP OM at 9. In fact, Fuller and Pearthree specifically refute them. First, the River is not braided. Tr. (Pearthree) at 20, Tr. (Fuller) at 44; *cf.* ASLD Gila Response at 13 (citing Tr. 11/17/05 at 11, 12, 27) (Dr. Schumm previously testified that braided rivers can be navigated). It has a single channel with a pool and riffle pattern. Tr. (Pearthree) at 20. Photographs depicting a braided river and the Verde River presented at the January 18, 2006 hearing clearly illustrate that the Verde River low flow channel is not braided. Fuller PowerPoint (E.I. 38) Slide 14; Pearthree PowerPoint (E.I. 38) Slides 13, 14, 16. Second, rapids do not prevent navigation. *Compare* SRP OM at 10 *with* Tr. (Slingluff) at 125-126. In fact, of the rapids that the Verde does have, the majority are mild. Tr. (Slingluff) at 125-26. Third, the valley width has little, if any, impact on the low flow channel characteristics which are uniform throughout the River. Tr. (Pearthree) at 22, 27. Finally, bedrock at the mouth of the River in no way prevents navigation, and even if it did, it represents a single point on a very long river.

In summary, the River's ordinary and natural flow conditions and its natural geomorphology establish that the River was susceptible for use as a highway for commerce.

VI. The Incidents of Actual Boating Demonstrate that the River was Susceptible to Use as a Highway for Commerce.

A. The Evidence of Historical Boating is Compelling.

The opponents of navigability generally claim that the historical incidents of boating are insignificant and insufficient to demonstrate the River's navigability. SRP OM at 4-7, Appendix A; PD OM at 14-15; Tribe OM at 14-15. These parties also complain that the evidence is only anecdotal, not subject to verification, and is often taken from newspaper articles which might contain some puffery or boosterism. PD OM at 15-16, SPR OM at 5-7, Nation OM at 14-16.⁵ All of these assertions lack merit. The available historical record demonstrates navigation on the River, despite its diminished ability due to irrigation diversions that have reduced average flow throughout, the nineteenth and early twentieth centuries. PD characterizes an account of commercial boating as a failure "given the fact that the boats needed to be emptied of cargo to pass rapids downstream of Camp Verde." PD OM at 15 (*citing* ASLD Verde at 8-3). PD missed the essential facts of this account which include: (1) the boats carried cargo, *i.e.*, a commercial use of the River; (2) it occurred regularly enough (1910-1920) to be considered typical; and (3) the obstacle created by the rapids was readily overcome by the boaters. ASLD Verde at 8-3. Occasional difficulties do not render non-navigable an otherwise navigable river (*United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); *United States v. Utah*, 283 U.S. at 76), and places of portage have always been considered part of a navigable waterway (*see The Montello*, 87 U.S. at 440 (finding that a short portage between two rivers formed part of the Fox River's highway for commerce for federal navigability purposes); *Econ. Light & Power*, 256 U.S. at 122). PD criticizes one account of a five week trapping expedition on the River as unsuccessful, despite the fact that the historical accounts record no problems of any kind, other than shortening their seventy mile trip by two miles. PD OM at 15. PD again misses the essential facts of this account which include: (1) the men were boating for commercial purposes (trapping); (2) the men boated with no incident of any type over the course of five weeks and seventy miles; and (3) the flow was reliable (non-erratic) and deep enough for two men to carry five weeks of gear, pelts, game, and supplies. ASLD Verde

⁵ Ironically, PD also relies on these news articles to accurately describe difficulties in boating. PD OM at 14-16. One instance that PD cites actually describes farmers' difficulty in pulling a threshold machine over roads along the Verde, not on the River.

at 3-21; Tr. (Fuller) at 14.

SRP repeatedly mischaracterizes historical boating as only occurring during floods or abnormally high flows. SRP OM at 6, Appendix A. For example, an attempt to float logs during the 1891 flood, a rare flood of geologic proportions, is illogical. It would be impossible to retrieve the logs from the River. An extended period of seasonal, non-flood high flow is normal, not abnormal, for the Verde River. SRP further claims that wooden, metal, and canvas boats would be damaged on the Verde. SRP OM at 16. Contrary to SRP's claim, the historical accounts describe use of such boats with no record of damage of any kind to these types of boats.

SRP's incorrect claim that pre-statehood accounts of boating on the Verde is "sparse" must nevertheless take into account the unique characteristics and settlement of the Verde River Valley. The Verde River is somewhat isolated. Moreover, the area surrounding the Verde River was sparsely populated and consequently little commerce had been conducted on it. *See* Tr. (Slingluff) at 122-123; *United States v. Utah*, 283 U.S. at 81-82 (nonuse not indicative of non-navigability based on many factors including non-settlement of the region).

B. The Evidence of Modern Boating is also Compelling.

SRP asserts that Jim Slingluff, the author of a published boating guide book for the Verde River, who has published numerous articles on canoeing the Verde River, somehow testified that the river is dangerous, full of treacherous rapids, and not susceptible to boating. SRP OM at 15. In fact, Mr. Slingluff stated the exact opposite opinion, showing pictures of small children piloting the rapids and telling stories of his many successful canoe trips in all seasons over the entire River length. SRP portrays Slingluff's slide presentation as depicting boats in all manner of hazards (SRP OM at 15), when in fact, of his 42 slides, only one showed an overturned boat, and in that photo, both the boat and the boater are shown to have suffered no damage (Tr. at 119 (Slingluff explains that boater got hung because he was "flirting with the camera" instead of watching the river.)). SRP

further misrepresents Slingluff's testimony about boating dangers. SRP OM at 15. Slingluff's clear point was that the Verde is a safe river, given that all boaters should exercise a certain amount of precaution/logical sense before entering a river. *Stream Canoeing in Arizona*, ARIZONA HUNTER & ANGLER, April 1991 at 24 - 25.

SRP goes on to contradict the record by stating that recreational boating does not occur over the whole River or during all months of the year. SRP OM at 16. On the contrary, U.S. Forest Service ("USFS") records indicate that hundreds of paddlers safely boat the River every year, during every month, and at a wide range of flow rates. Tr. (Slingluff) at 124; (Fuller) at 37. SRP cites a local historian who claims that people have died "entering" the River during flooding. SRP OM at 16 (note also that the same historian also claims that the River "dries up," which is incorrect). However, boating during floods is not at issue, and therefore is irrelevant to the decision before ANSAC.

In fact, the detailed record of modern boating is the most definitive evidence of the susceptibility of the Verde River to navigation. Despite attempts to portray modern boating as rare, the actual record clearly demonstrates the opposite. From January 2001 to March 2005, the USFS recorded 728 boating trips by 863 individuals (Tr. (Fuller) at 37), not including the boaters who did not participate in the voluntary registration program. This boating occurred during every month of the year, during some of the most prolonged drought known in Arizona, and occurred at flow rates as low as 30 cfs (ASLD Verde, Table 8-4) and as high as 40,000 cfs (Tr. (Slingluff) at 127). The USFS records show that boaters from as far away as Connecticut and Montana paddled the Verde River. The types of boats reported by the USFS included canoes, kayaks, and rafts. ASLD Verde, Table 8-4; Tr. (Fuller) at 37. Some commercial recreational boating (Tr. (Fuller) at 40; Tr. (Colby) at 56) and boating by environmental regulatory agencies (Gila River Transcript (Weedman) at 219) also occurs on the Verde River. The Town of Camp Verde sponsors an annual boat race on the Verde River. Tr. (Fuller) at 28, 36. Despite opponents assertions to the contrary, the watercraft customary at statehood could have at least supported the activity carried on along the Verde River

today, rendering the Verde susceptible to navigation at statehood. *See Ahtna*, 891 F.2d at 1405 (holding that, with minor modifications, watercraft customary at Alaska statehood could have supported current commercial activity rendering river susceptible to navigation at statehood).

“The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.” *The Montello*, 87 U.S. 430, 440-41 (1874) (stating that the true test of the navigability of a stream does not depend on the mode by which commerce is or may be conducted); *see also Utah v. United States*, 403 U.S. 9, 10 (1971) (holding that the fact that the Great Salt Lake is not part of a navigable interstate or international commercial highway in no way interferes with the principle of public ownership of its bed.”); *Defenders*, 199 Ariz. at 423, 18 P.3d at 734 (discussion of vessels).

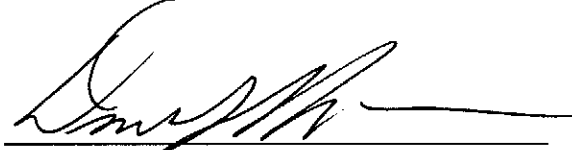
Arizona law supports a finding of navigability based upon modern boating on the Verde. A.R.S. § 37.1101(3) mandates that the following definition of “highway for commerce” be applied by the Commission: “Highway for commerce means a corridor or conduit within which the exchange of goods, commodities or property or the transportation of people may be conducted.” (Emphasis added). Furthermore, in *Defenders*, the Arizona Supreme Court directed that a finding that a river is “susceptible to being used for *travel or* trade in any customary mode used on water” requires a determination of navigability. 199 Ariz. at 737, 18 P.2d at 426 (emphasis added). Consequently, a determination of non-navigability would require that the Commission ignore not only the historical accounts of travel by boat on the Verde River, but also the hundreds of boating trips (including those organized by commercial outfitters) that occur on the Verde over the course of every year.

VII. Conclusion.

For all of the reasons described above and those stated in the State’s Opening Memorandum, the State has carried its burden of proof that the Verde River was navigable within the meaning of the *Daniel Ball* test as interpreted by the applicable case law as of February 14, 1912. A.R.S. § 37-1128(A). ANSAC should declare it so.

DATED: April 11, 2006.

TERRY GODDARD

A handwritten signature in black ink, appearing to read "Laurie A. Hachtel", written over a horizontal line.

Laurie A. Hachtel
Donald J. Baier
Assistant Attorneys General

ORIGINAL and SEVEN COPIES
of the foregoing sent by U.S. mail
this 11th day of April, 2006

Arizona Navigable Stream Adjudication Commission
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