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12 **BEFORE THE ARIZONA NAVIGABLE STREAM**
13 **ADJUDICATION COMMISSION**

14 Case No. 04-009-NAV (Verde)

15 IN THE MATTER OF THE
16 NAVIGABILITY OF THE VERDE
17 RIVER FROM ITS HEADWATERS
18 AT SULLIVAN LAKE TO THE
19 CONFLUENCE WITH THE SALT
20 RIVER, YAVAPAI, GILA, AND
21 MARICOPA COUNTIES, ARIZONA

22 **THE YAVAPAI-APACHE NATION'S**
23 **AND THE FORT McDOWELL YAVAPAI**
24 **NATION'S**
25 **JOINDER IN SALT RIVER PROJECT'S**
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND ADDITIONAL PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Pursuant to the Chairman's Order Amending Deadlines for Submission of Briefs, dated October 23, 2015, the Yavapai-Apache Nation and the Fort-McDowell Yavapai Nation (collectively, the "Nations") join in the Proposed Findings of Fact and Conclusions of Law filed by the Salt River Project Agricultural Improvement and Power District and Salt River Valley Users' Association ("SRP") on November 9, 2015.

In addition to SRP's Findings of Fact and Conclusions of Law, which are expressly incorporated here, the Nations submit the following additional Proposed Findings of Fact and Conclusions of Law for the Commission's consideration. For the Commission's convenience,

1 the Nations have listed the following additional Findings of Fact and Conclusions of Law
2 under the same headings used by SRP in their filing.¹

3 **FINDINGS OF FACT**

4 **SUMMARY OF EVIDENCE RECEIVED**

5 1. The Commission has received Evidence Nos. 001 through 038 (referred to as “EI __”)
6 from the hearings held in 2005 and 2006. The Commission has also received Evidence Nos.
7 X001 through X103 from the hearings held from 2014 and 2015. Transcripts for these hearing
8 dates have also been received.

9 **SEGMENTATION**

10 **Methodology**

11 2. Dr. Mussetter testified that it is his opinion that “all of the segments on the Verde River
12 were not navigable at the time of statehood”. *See* Tr. at 2/24/15:2282-83 (Mussetter).

13 3. Dr. Mussetter testified that he has looked at Dr. Schumm’s work, and accepts and
14 endorses “the science of Dr. Schumm’s report about the characteristics of the [Verde] river.”
15 Tr. at 2/24/15:2207-10 (Mussetter).

16 4. Dr. Mussetter testified that he reviewed “other professional journals and Mr.
17 Schumm’s report” and his own opinion on Segment 2, and he agrees that Segment 2 was “not
18 navigable at the time of statehood”. *See* Tr. at 2/24/15:2278-83 (Mussetter).

19 5. Dr. Mussetter testified that “changes in the flow regime and the other changes
20 associated with bridge crossings and development” have made the river channel in Segment 2
21 more navigable today than at the time of statehood. *See* Tr. at 2/24/15:2270-80 (Mussetter).

22
23
24 ¹ The Nations’ Joinder in SRP’s Proposed Findings of Fact and Conclusions of Law is made for the
25 limited purposes of the Verde River proceedings (No. 04-009-NAV (Verde)) before ANSAC. The
Nation’s Joinder in SRP’s Proposed Findings of Fact and Conclusions of Law is not intended to and
should not be characterized to extend to any other proceedings, either pending or future.

1 **Segment 2**

2 6. Mr. Fuller describes the Verde River in Segment 2 as “wide” and “shallow,” with
3 “marshy” and “swamp like” conditions. *See* Fuller 2003 at iii, 3-1, 3-8, 3-12, 3-13, 3-14.

4 7. The Commission has previously found Segment 2 to be a broad river valley with a
5 relatively wide floodplain. *See* 2008 Decision at 42.

6 8. The Commission has previously found that floods at Segment 2 “cut into banks” and
7 the river “changed course” from the main river channel “so the river bed spread out in many
8 places.” *See* 2008 Decision at 29.

9 **Segment 5**

10 9. The lower Verde River, from Fossil Creek to the Salt River confluence, “is
11 characterized by a cobble and gravel-bedded channel formed over shallow or exposed bedrock,
12 Sonoran vegetation, and flow alteration by construction of Horseshoe and Bartlett Dams.” *See*
13 Fuller 1993, at 73.

14 10. The Commission has previously found that Segment 5 has been “altered considerably
15 since statehood by construction of Horseshoe and Bartlett Dams.” *See* 2008 Decision at 6.

16 11. Indian Service agents described the Verde at Segment 5 as subject to severe flooding
17 and “great erosion” during heavy rainfall, which often destroyed tillable land. *See* 2014
18 Littlefield at 92-93.

19 **HISTORY OF THE VERDE**

20 **Historic and Prehistoric Indian Use**

21 12. Fort McDowell Yavapai Nation Tribal Elders Martha Camacho, Linda Eben-Jones,
22 Shirley A. Taho, Ralph Jones, and Wayne Shenah have declared there is no mention in their
23 family histories, either written or oral, that the Yavapai people ever boated the Verde River or
24 used it as a means of transportation for goods or people. *See* Elder Declarations 2014
25 [X100_FMYN 5].

1 13. The Yavapai and Apache used an extensive system of trails, including many that ran in
2 a north/south direction, generally paralleling the Verde River. *See* Tr. at 2/20/15:1784-85,
3 1790 (Randall). *See also* ADOT Final Report p. 7 [X100_FMYN 17].

4 14. Mr. Randall stated: “The Yavapai and Apache aboriginal territory spans across Arizona
5 for more than 2,400 square miles. The Verde River travels through the heart of our aboriginal
6 territory.” *See* Randall affidavit, ¶ 15 & Exhibit A.

7 15. The Yavapai ancestral land area “measured some 20,000 square miles” and included
8 the headwaters of the Verde River to the north, and parts of the Colorado River Valley to the
9 west. *See* Harrison and Williams, *Oral History of the Yavapai*, (2012) at Map 6, and 36-40
10 [X100_FMYN 31] (“*Oral History of the Yavapai*”).

11 16. The Yavapai ancestral land area “remained relatively constant” until May 1, 1873
12 when the United States took over 9 million acres from them without any compensation. *See*
13 *Oral History of the Yavapai* at Map 6, and 36-40.

14 17. The Apache used many overland travel routes, trails and crossings in the Verde River
15 valley including between Camp Verde and Clarkdale on the Verde River. *See* Tr. at
16 2/25/15:1784-85, 1790 (Randall).

17 18. The Apache traded and visited as far east as *Tú cho náh nliini* (“the real big waters”),
18 meaning the Mississippi River. TR 2/20/15:1851-52 (Randall).

19 19. Mr. Randall testified that the Apache raided the Pimas, however no Apaches that he
20 knew of ever used the Verde River to get to the Pimas. *See* Tr. at 2/20/15:1852 (Randall).

21 20. The Hohokam along the Lower Verde cultivated crops, gathered, hunted, “traded with
22 other peoples in Mexico and northern Arizona. These early inhabitants traveled by foot and
23 there was no archaeological evidence of boats or water-based transportation.” *See* August
24 2015, at 4 [X067].
25

1 21. Mr. Randall testified that the Apache people used an overland trail to trade with the
2 Hopi: “Our biggest trading partners were the Hopis, and there is a trail that starts down there
3 by Camp Verde and goes up to what we call Beaver Head Flat and goes across to Stoneman
4 Lake and then past Stoneman Lake to Jarvis Pass and then to the gap where Highway 87 goes
5 and crosses just south of Winslow and then on up to Second Mesa. And that was the trail that
6 both the Hopis and the Apaches used and traded with each other.” *See* Tr. at 2/20/15: 1790-93
7 (Randall).

8 22. Mr. Randall definitively testified that the Apache did not boat the Verde as a matter of
9 “practicality” and difficult conditions, not because of cultural or religious reasons. *See* Tr. at
10 2/20/15:1852-53.

11 23. The Commission finds, as a matter of fact, that the Apache and Yavapai did not use the
12 Verde as a highway for commerce. *See* Findings of Fact 21-21.

13 **Spanish Explorers**

14 24. The Commission previously concluded: “There is some historical reference to Spanish
15 missionaries coming into the area, but no missions or permanent establishments or settlements
16 were made by the Spanish.” *See* 2008 Decision at 24.

17 25. Jack August testified about the recordkeeping practices for Spanish explorations prior
18 to 1821: “It was a very regulated form of exploration and colonization, and so there would be
19 relations, R-E-L-A-C-I-O-N-E-S. There would be diarists. There would even be scholarly
20 studies.” *See* Tr. at 3/30/15:2530 (August).

21 26. “Yeah, and they had scribes. People would copy things, anything written in duplicate,
22 triplicate; and, thus, we have a really detailed record of the Spanish borderlands frontier.”
23 *See* Tr. at 03/30/15:2535 (August).

24 27. “Kino was a mapper. He was a cartographer. He wrote what he saw. He described the
25 Indians. He described the topography and reported back to his superiors. And there is an

1 extensive record that was discovered by H.H. Bancroft and then Herbert Eugene Bolton at the
2 beginning of the 20th Century, and he and his students did the first initial translating at the
3 beginning of the 20th century, and into the mid century they were still finding materials.” See
4 Tr. at 3/30/15:2534 (August).

5 **Military Expeditions**

6 28. Mr. Randall testified that in 1875, the United States revoked the Camp Verde Indian
7 Reservation it had created in 1871, and forcibly marched many of the Yavapai and Apache
8 people to the San Carlos Apache Reservation. *See* Randall Affidavit ¶ 16-18.

9 29. When asked about the end of Verde Valley hostilities between settlers and Indian
10 tribes, Mr. Burtell agreed that hostilities had reduced by the 1870s and testified: “obviously the
11 area became safe enough for agricultural activities to continue to increase from 1864 through
12 the 1880s and 1890s. *See* Tr. at 4/1/15:3082-83 (Burtell).

13 30. “As indicated in his autobiography, Crook (1960) was familiar with the use of inland
14 waterways for military purposes. He notes trips he made up the Columbia, Klamath and
15 Sacramento rivers by canoe and steamboat (p.13, 58 and 73), being ambushed by Native
16 Americans who utilized canoes on the Wenatchee River (p.64), and receiving supplies on the
17 Yellowstone River via steamboat (p.204). As to the Verde River, he describes a trip made in
18 1873 from Tucson to Fort Whipple and then to Camp Verde via a military wagon or
19 “ambulance” (pp.177-180).” *See* Burtell 2014, at 11 & note f.

20 31. General George Crook, successor to Colonel Stoneman, stated: “An appropriation is
21 asked for to build good roads from Camp McDowell, near the center of Arizona, to Prescott,
22 and to Camp Verde.” (Arizona Weekly Citizen, 1874).” *See* Burtell 2014, at 11.

23 32. General Crook “understood how important it was to establish a road between
24 McDowell and Whipple.” He requested and obtained Congressional funds to make
25

1 improvements to the General Crook Trail and Stoneman Road. *See* Tr. at 3/30/15:2630-31
2 (Burtell).

3 33. Regarding Martha Summerhayes' book "Vanished Arizona," Dr. August testified that
4 her accounts showed overland travel as "really very, very tough" and that sometimes the travel
5 was so difficult that travelers would have to "get out and pick their way down rocky areas."
6 *See* Tr. at 2/25/15:2400-01 (August).

7 34. From 1879 to 1885, Arizona counties issued nearly \$60,000 in bonds to fund road
8 projects, "a sum almost as great as that spent by the Territory on road building during that
9 period." After the Harrison Act was passed in 1886, "the Arizona legislature was forced to
10 stop issuing bonds for roads and other public works." Counties then took over all road
11 construction and maintenance in Arizona and by the later Territorial years, "Arizona's counties
12 together were spending an average of \$200,000 a year". *See* ADOT Final Report p. 22
13 [X100_FMYN 17]

14 35. The military recognized the importance of roads, and repeatedly attempted to establish
15 an overland route of communication between the military bases despite the difficulties
16 encountered. *See* Tr. at 03/30/15:2626-29 (Burtell).

17 36. Mr. Burtell testified that military roads were "hard to build. They were very expensive"
18 and prone to getting "washed out" during monsoons. *See* Tr. at 03/30/15:2632-33 (Burtell).

19 37. Mr. Burtell notes the "time and expense it took to build a road", and that "You're not
20 going to build a road unless you really need it." *See* Tr. at 4/2/15:3424 (Burtell)

21 38. In the 1800s, anybody traveling by road in the Arizona Territory was "under constant
22 threat from brigands and Apache raiders until the suppression of the Apache." *See* Vignettes in
23 Time – AZ Through Time – Southern Arizona Cultural History p. 1 [X100_FMYN 29).

24 39. Mr. Randall testified about the differences in danger regarding river travel and road
25 travel: "It would have been unsafe anywhere, because we were ready to protect our land...If

1 you know your gorilla (*sic*) tactics like we did, we'll get you anytime." See Tr. at 2/20/15:
2 1826-27 (Randall).

3 40. "[T]here certainly is a strong record of Native Americans attacking wagons that were
4 on these roads. So to paint this picture that, well, if you're on a road, it's so much safer is
5 ludicrous. The historic record just doesn't support that." "So, again, I'm not saying it was easy
6 back then to be traveling anywhere in Arizona, but to paint the picture that somehow a road is
7 the safer way to go certainly isn't borne out by the evidence." See Tr. at 03/30/15:2633-34
8 (Burtell).

9 41. In his reports to the Secretary of the Interior in 1901 and 1905, the Arizona Territorial
10 Governor noted the value of reliable trade and travel routes. In 1901, he wrote: "The benefits
11 of these lines in developing the resources of the territory can not be overstated." In 1905, he
12 described the Butterfield mail route that: "gave access to the interior, which previously had
13 been almost inaccessible, and greatly promoted immigration and the development of the
14 mineral resources of the region." See Reports of the Governor of Arizona to the Secretary of
15 the Interior (1901) at 22, (1905) at 34 [X100_FMYN 12, 13]

16 42. Prescott was the capital of the Arizona Territory from 1863 to 1867, and from 1877 to
17 1889. See Burtell 2014, at 11 (note 3).

18 43. Regarding the territorial capitol in 1875, Mr. Burtell testified: "[A]t that time Prescott
19 was the capitol of Arizona, so certainly there was a population center there."
20 You had the need for getting supplies in and out of the Prescott area." Yet an 1875 Prescott
21 newspaper article stated: "...there is no navigable water in the county [of Yavapai]; all freight
22 is moved by large trains of pack mules or heavy wagons drawn by from four to twenty mules
23 to the wagon." See Tr. at 3/30/15:2614-15 (Burtell).

24 44. Dr. August testified about Stoneman Road: "The Stoneman Road cut off about 80
25 miles of that route" between Fort McDowell and Fort Whipple, which he notes was "critical,

1 because back then 80 miles in a wagon was not a quick trip.” “[K]eep in mind this shortcut
2 shaved off a week of time, a week. So it’s not trivial getting from point A to Point B back
3 then.” *See* Tr. at 3/30/15:2628-29 (August).

4 45. Dr. August notes that “There was also a lot of attention made to improvements to the
5 road between Prescott and the city of Phoenix or the town of Phoenix in 1873, because at that
6 time the military in Camp Verde needed to get supplies, needed to get food, and the Phoenix
7 valley was starting to develop a lot of agricultural products.” He notes an 1873 article in the
8 Arizona Miner, which was “quite proud of announcing that a new road had been established,
9 which was probably some turnoff on Stoneman’s Road, allowing more easily for folks in
10 Phoenix to transport their agricultural products up to Camp Verde.” *See* Tr. at 3/30/15:2637
11 (August).

12 **Settlers**

13 46. During the years of colonial settlement, in order to “extend the productive value of
14 available land,” it became common practice for white settlers to drain wetland areas by
15 digging small ditches. *See* Technical Aspects of Wetlands: History of Wetlands in the
16 Coterminous United States, p. 2. USGS [X000_YAN-11].

17 47. “At Fort McDowell, the garrison cleared 150 acres of bottomland for cultivation and
18 irrigated it with river water brought by an acequia from four miles up river.” *See* Fuller 1993 at
19 36.

20 48. The Commission has already considered and issued a conclusion on the two men in a
21 boat photograph: “There are various report relating to a collapsible boat issued by the U.S.
22 Army and used at Camp Verde to take couriers across the river during periods of high water.
23 This was documented by a picture of two men in a boat on the Verde River about 1887, one of
24 whom appeared to be wearing an army uniform. It would appear that this boat was used more
25 as a ferry to cross the river rather to travel up and down the river. *See* 2008 Decision at 36.

1 49. An attempt to ferry across the river using a “frail” raft built of railroad ties was
2 unsuccessful, the raft fell apart during the attempted crossing. *See* Tr. at 12/15/14:157 (Fuller).
3 Mr. Fuller later testified: “But I’m not even sure this was on the Verde, so...” *See* Tr. at
4 12/18/14:892 (Fuller).

5 50. In January 1868, Camillo C.C. Carr attempted to establish a wagon road between
6 McDowell and Camp Lincoln. He reported that during heavy rains, “the Command proceeded
7 to construct a Raft” to cross the Verde. However, the raft “struck a Rock” and capsized.
8 Twenty years later, Carr described the event differently, saying that the raft was swallowed by
9 an “opening” in the “smooth” stream, a “mystery for which no rational explanation has ever
10 been offered.” *See* Schreier, Born a Cavalryman at 149-150 [X011_AS LD 50]

11 **Experts’ Methodology**

12 **Mr. Hjalmarson’s Attempts to Recreate Predevelopment Flows**

13 51. Regarding Mr. Hjalmarson’s reconstructed flow calculations, Mr. Burtell testified that
14 “even though [Hjalmarson] doesn’t talk a lot about it, when he reconstructs his flows, by the
15 time you get down to Camp Verde area, my reconstructed flows are bigger than Mr.
16 Hjalmarson’s reconstructed flows.” *See* Tr. at 3/30/15:2618-19 (Burtell).

17 52. The Commission previously found that 901 cfs “is below the flow of any river found
18 navigable by any court, which was reported to the Commission.” *See* 2008 Decision at 52.

19 **GEOMORPHOLOGY AND IMPEDIMENTS TO NAVIGATION**

20 **Evidence from 2006 Hearing**

21 53. Dr. Stanley Schumm found that: “It is clear that a dramatic change of the Verde River
22 occurred in the late 19th and early 20th century.” *See* Schumm, Geomorphic Character of the
23 Verde River at p. 8 (2004) [EI 030].

1 54. Mr. Lynch agreed that removing obstacles from the channel makes the channel deeper
2 and more fast-moving. *See* Tr. at 12/16/14:354 (Lynch).

3 55. Dr. Schumm also found that the physical conditions of the Verde were materially
4 altered due to a series of “[l]arge floods occurred in the years proceeding statehood, which
5 resulted in the channelization of the middle Verde River, and the elimination of swampy
6 marshland.” *See* Schumm 2004 at 11. *See also* Fuller 2003 at 3-22.

7 56. It is Dr. Mussetter’s professional opinion that “all of the segments on the Verde River
8 were not navigable at the time of statehood,” and that Segment 2 has shifted towards being
9 more navigable due to “changes in the flow regime and other changes associated with bridge
10 crossings and development.” *See* Tr. at 2/24/15:2280-82 (Mussetter).

11 57. The Commission previously determined that “According to Dr. Schumm, the middle
12 reach of the Verde River, which is mostly within the Verde Valley, has characteristics of
13 braided rivers that are wide, shallow and sometimes steep. This condition is not conducive to
14 navigation.” *See* 2008 Decision at 43.

15 58. The Commission also found that: “In the Verde Valley and the reach below Bartlett
16 Dam, the river spreads out over a large flood plain and had braided characteristics with shifting
17 sand bars and sand islands, which would make it impossible to be considered as navigable or
18 susceptible of navigation.” *See* 2008 Decision at 52.

19 59. Mr. Randall testified that the Verde River does not flow in a direct path, rather “it
20 flows back and forth over the land and in several places, it is a braided channel.” *See* Randall
21 affidavit at ¶ 30 [X055_YAN-1].

22 60. A majority of the historical pre-statehood photographs have already been introduced
23 and considered by the Commission. Many of these photographs seem to show a Verde River
24 that was wide and shallow, oftentimes riddled with sand and gravel beds and capable of being
25

1 crossed on foot or by horseback, wagon, or automobile. *See e.g.*, Fuller PPT at 106, 109, 111,
2 113, 114, 117, 121-23, 126; *see also* 2014 Littlefield at Fig. 20, 21, 24, 25, 29, 31, 32.

3 **Marshes**

4 61. When Antonio de Espejo arrived in the Verde in 1583, he described the Verde River in
5 his journal as a wide, slow, meandering, marsh-like river. *See* Slingluff, Verde River
6 Recreation Guide, p. 14. [X035_ADWR-162].

7 62. The *Dilzhé'e* Apache and Yavapai all describe the Verde River near Clarkdale and
8 Camp Verde “as being wide and having many shallow places where one could cross on foot.”
9 *See* Randall affidavit, ¶ 28.

10 63. Mr. Fuller cited accounts describing the Verde River at Segment 2 as “wide”, but
11 “shallow”, and as having “marshy” or “swamp like” conditions. *See* Fuller 2003 at iii, 3-1; 3-8,
12 3-12, 3-13, 3-14.

13 **Boulders**

14 64. Mr. Farmer has testified that he has “been stuck on plenty of rocks” because he could
15 not see the river bottom. *See* Tr. at 12/16/14:455 (Farmer).

16 65. Photographs of Segments 1 and 2 “are characterized by boulder-choked channels,
17 drops, and turbulent water. All of these conditions pose an impediment to navigation and the
18 frequency of rapids along the Verde River would have been more than just a nuisance to
19 commercial boaters before statehood.” *See* Burtell, ¶ 59.

20 **Boat Types**

21 66. Mr. Fuller testified that “[y]ou’re able to do more things with plastic that are more
22 difficult to do with wood.” *See* Tr. 12/15/14:227 (Fuller).

23 67. Mr. Dimock testified that modern kayaks today “hold less than historic ones because
24 they’re making them very small. The modern ones turn quicker. But they’re terrible for
25 expeditions.” *See* Tr. at 3/31/15:2843-44 (Dimock).

1 68. Mr. Fuller testified “obviously nobody was using plastic boats in 1912.” *See* Tr. at
2 12/15/14:227 (Fuller).

3 69. When asked about the differences between historic and modern boaters, Mr. Dimock
4 responded: “Modern boaters think everything is going to be just fine, and they’ve got a map
5 and their buddies have all done it, and they think they’re going to be able to drink beer all day
6 and get to the end of the trip and be fine. Historic boaters had no such preconceptions. They
7 didn’t know what was going to happen.” *See* TR at 03/31/15:2846 (Dimock).

8 70. Mr. Fuller testified: “Also, with modern boating, boy, there’s plenty of websites. You
9 drop “Verde River boat” into Google and you’ll get almost a million hits; lots of descriptions
10 in different websites of how to boat this reach, when to boat this reach.” *See* Tr. at
11 12/15/14:250 (Fuller).

12 71. When asked about using Internet data to plan for a trip, Mr. Lynch testified: “We’re
13 weather and river flow junkies. So all of our management staff, guides have access to -- we
14 post every day what the river flows are, what’s to be expected; of course, you know, all of the
15 conditions that are coming about. We’re looking at radar, during the monsoon season
16 particularly, what’s coming over that hill, where it’s going, what’s happening here.” *See* Tr. at
17 12/16/14:339 (Lynch).

18 72. When asked about his ability to predict flows, Mr. Lynch replied: “Yeah, I’m pretty
19 good at it now...Of course, I’m using technology.” Mr. Lynch notes that you can find this
20 “with the click of a button.” *See* Tr. at 12/16/14:364 (Lynch).

21 73. Mr. Farmer agreed that “technology” for canoes has gotten better over the years. *See*
22 Tr. at 12/16/41:388 (Farmer).

23

24

25

1 CONCLUSIONS OF LAW

2 Based upon the record of evidence, and the application of the proscribed legal tests, the
3 Commission makes the following Conclusions regarding questions of law and fact:

4 Actual Navigation on the Verde

5 1. The Commission concludes, as a matter of law, that despite the overwhelming need for
6 a “highway of commerce” in Arizona, the Verde River was not navigated, indicating that it
7 was not navigable nor susceptible to navigation.

8 2. The Commission concludes, as a matter of law, that modern recreational boating is
9 heavily influenced and reliant on modern technological advances, making it not “meaningfully
10 similar” to boating at the time of statehood.

11 3. Based on a review of all of the evidence in the record, the Commission concludes, as a
12 matter of law, that the Verde River’s post-statehood condition is “materially different” from its
13 physical condition at statehood.

14 4. Based on a review of all of the evidence in the record, the Commission concludes, as a
15 matter of law, that the Verde River, in its ordinary and natural condition, was neither navigable
16 nor susceptible to navigation for the purposes of trade or travel at the time of Arizona’s
17 statehood.

18 Susceptibility to Navigation

19 5. Based on a review of all of the evidence in the record, the Commission concludes as a
20 matter of law and fact that the rationale applied by the Court in *United States v. Utah*, 283 U.S.
21 64, 82-83 (1931) is inapplicable to the Verde River because, unlike in *Utah*, there was both a
22 population and a need for navigation along the Verde River on or before statehood and thus, a
23 lack of pre-statehood demand for highways of commerce cannot be used to “explain the
24 infrequency or limited nature of such use” of the Verde River for navigation. *Utah* at 82.

1 6. Based on a review of all of the evidence in the record, the Commission concludes as a
2 matter of law and fact that the rationale of *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir.
3 1989) is distinguishable from the facts in the record on the Verde River, since there is no
4 meaningful evidence in the record of recreational boating on the Verde River prior to statehood as
5 was the case in *Ahtna* and the boats in use today are not meaningfully similar to those in use prior
6 to statehood and the Verde River's physical condition is changed.

7 **Determination of Non-Navigability**

8 7. The Commission has previously concluded, as a matter of law, that the Verde River
9 was not navigable.

10 a. The Commission previously considered evidence, conducted hearings and

11 found that the Verde River "is erratic, unstable and unpredictable, characterized
12 by periodic floods, sometimes extreme, in its ordinary and natural condition."

13 *See* 2008 Decision at 52.

14 b. The Commission previously concluded that on the River above the Verde

15 Valley, and below the Verde Valley to Bartlett Dam, "navigation as a highway
16 for commerce is not possible" due to steep canyons, lack of accessibility,
17 waterfalls, rapids and other obstacles. *See* 2008 Decision at 52.

18 c. The Commission previously concluded that the River in the Verde Valley, and

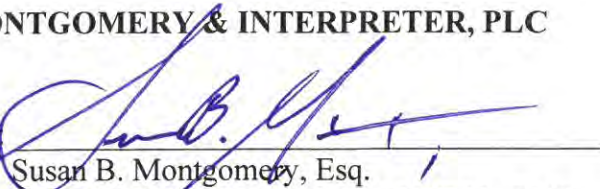
19 below Bartlett Dam is "impossible to be considered as navigable or susceptible
20 of navigation." *See* 2008 Decision at 53.

21 8. Based upon a review of all data, evidence, testimony and materials reviewed and
22 considered by the Commission, the Commission concludes that the Verde River, in its
23 ordinary and natural condition, was not used or susceptible to being used as a highway for
24 commerce on the date of Arizona's statehood, February 14, 1912, and is not navigable as a
25 matter of law.

1 RESPECTFULLY SUBMITTED this 9th day of November, 2015.

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3
4 By


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9 on this 9th day of November, 2015, with
10 the original and six copies mailed this same day:

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