

**ARIZONA CENTER FOR LAW  
IN THE PUBLIC INTEREST**  
P.O. BOX 41835  
TUCSON, ARIZONA 85717  
(520) 529-1798

Joy E. Herr-Cardillo (State Bar #09718)  
Timothy M. Hogan (State Bar #04567)

Attorneys for Defenders of Wildlife,  
Donald Steuter, Jerry Van Gasse, and Jim  
Vaaler

**BEFORE THE ARIZONA NAVIGABLE STREAM  
ADJUDICATION COMMISSION**

	)	Case No. 04-009 NAV
In re Determination of Navigability of	)	Response Memorandum regarding the
the Verde River	)	Navigability of the Verde River
_____	)	

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler  
(collectively, “Defenders”) hereby submit their response memorandum regarding the  
navigability of the Verde River.

**I. *PPL Montana v. Montana* Did Not Alter the Test for Navigability and,  
Therefore, Has No Legal Effect on Arizona’s Reported Decisions.**

The navigability opponents’ attempt to persuade the Commission that the U.S.  
Supreme Court case decided in 2012, *PPL Montana LLC v. Montana*, 132 S. Ct. 1215  
(2012), broke new legal ground with regard to navigability for title is misguided at best.  
In order to appreciate how little impact *PPL Montana* has on the proceedings before this  
Commission, it is important to first understand the nature of the issues before the  
Supreme Court in that case and how those issues were decided. The Montana case

involved three rivers which flow through the State of Montana—the Missouri River, the Madison River, and the Clark Fork River. The State of Montana claimed title to the riverbeds of these three rivers under the equal footing doctrine. Based on these title claims, the State sought compensation from PPL Montana, LLC, (“PPL”) a power company, for its use of the riverbeds. PPL owns and operates hydroelectric facilities, ten of which are built upon the three rivers at issue. Five of those facilities are located along the Great Falls reach.

The facilities had existed on the riverbeds for years and the state had never sought compensation from the power company until 2003. The State first asserted the claim in the context of litigation brought by parents of schoolchildren against PPL in federal court. The issue was ultimately resolved in state court when, in 2010, the Montana Supreme Court held that the State held title to the riverbeds and awarded it \$41 million in past due rent for the period from 2000 to 2007. *PPL Montana, LLC v. State* 355 Mont. 402, 229 P. 3d 410 (2010).

The United States Supreme Court accepted review to consider whether, in holding the entire river navigable at the time of statehood, including the disputed segments where the facilities were located, the Montana Court had properly applied the rules of navigability for title under the equal-footing doctrine. In particular, the issue was whether the Montana Court had erred by refusing to make the navigability determination on a segment by segment basis. *PPL Montana*, 132 S. Ct. at 1229 (“The primary flaw in the reasoning of the Montana Supreme Court lies in its treatment of the question of river segments and overland portage.”) In reversing the Montana Court’s decision, the United

States Supreme Court first reviewed the law regarding navigability for title under the equal-footing doctrine. **Notably, the Court did not make any changes to the existing law regarding the navigability for title test.** Rather, the Court simply held that the Montana court has misapplied the law. *Id.* at 1229. (“The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded.”)

SRP, in its Opening Memorandum, accuses navigability proponents of “downplaying” the case by focusing on its actual holding regarding segmentation, which was the basis of the Court’s reversal, and claims, incorrectly, that navigability proponents in this case have advocated the Montana Court’s interpretation of the navigability for title test. SRP Closing Brief at 19. SRP seizes on the Court’s use of the word “liberal” in discussing the Montana court’s incorrect interpretation of the federal test regarding segmentation to suggest that in *PPL Montana* the Supreme Court altered the law to make the test more stringent or rigid. *Id.* at 20. It did not. In fact every single one of the “restatements” enumerated by SRP to ostensibly support its claim that the Court “took the opportunity to...rein in the more ‘liberal’ and expansive constructions of that law proffered by some state courts and lower federal courts in recent years,” have been either codified in Arizona’s statutes or acknowledged and applied by Arizona’s courts. *Id.* In other words, *PPL Montana* did not impact existing Arizona case law regarding the test for navigability.

For example, in paragraphs 1 and 3, SRP asserts that *PPL Montana* “[r]eaffirm[s]” and “[c]onfirm[s]” that the navigability test is applied as of the date of statehood. *Id.* at 20-21. This is hardly breaking news. The fact that navigability for title is determined as

of the date of statehood was first recognized by the Arizona Court of Appeals in 1991 in *Arizona Ctr. For Law in the Public Interest v. Hassell*, 172 Ariz. 356, 362-3, 837 P. 2d 158, 164-5 (App. 1991)( “Navigability is determined by reference to the ordinary and natural condition of the watercourse **at the time of the state’s admission to the Union.**”)(emphasis added). It was reiterated in 2002 in *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426 ¶55,18 P.3d 722, 737 (2002)(“We hold that, to prove navigability of an Arizona watercourse under the federal standard for title purposes, one must merely demonstrate the following: **On February 14, 1912**, the watercourse, in its natural and ordinary condition, either was used or was susceptible to being used for travel or trade in any customary mode used on water.” )(emphasis added). And most recently, it was acknowledged by the Court of Appeals in *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 241, 229 P.3d 242, 253 (App. 2010)(“Applying these definitions, we conclude that ANSAC was required to determine what the River would have looked like **on February 14, 1912**, in its ordinary (i.e., usual, absent major flooding or drought) and natural (i.e., without man-made dams, canals, or other diversions) condition.”)(emphasis added). Finally, it should be noted that the date of statehood requirement is also codified in Arizona’s statutory definition of navigability. Ariz. Rev. Stat. §37-1101(5)(“‘Navigable’ or ‘navigable watercourse’ means a watercourse that was in existence **on February 14, 1912**, and at that time 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). In sum, the operable

date for determining navigability has never been an issue in Arizona (or elsewhere) and nothing in *PPL Montana* shed new light on that aspect of the navigability for title test.

Likewise, SRP's suggestion in paragraph 2 that the Court's reiteration of the "use or susceptible to use as a highway for commerce" standard is somehow intended to "rein in" applications of the test (SRP Closing Brief at p. 20) is simply puzzling, since that element of the test has likewise been present in every articulation of it in the major Arizona cases and in the Arizona statute. *See Hassell*, 172 Ariz. at 363, 837 P. 2d at 165 (rivers "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.") (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)); *Defenders*, 199 Ariz. at 426 ¶55, 18 P.3d at 737 ("We hold that, to prove navigability of an Arizona watercourse under the federal standard for title purposes, one must merely demonstrate the following: On February 14, 1912, the watercourse, in its natural and ordinary condition, either **was used or was susceptible to being used for travel or trade in any customary mode used on water.**") (emphasis added); *Winkleman*, 224 Ariz. at 239, 229 P.3d at 251 ("This test required ANSAC to determine the characteristics of the River 'in its ordinary and natural condition' and whether, at the time of statehood, the River **was used or would have been susceptible to use as a highway for commerce** in that condition.") (emphasis added). *See also*. Ariz. Rev. Stat. §37-1101(5) ("Navigable' or 'navigable watercourse' means a watercourse that was in existence on February 14, 1912, and at that time **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).

Similarly, SRP’s reference to post-statehood use of the river (SRP Closing Brief at p. 21) suggests a change in the law despite the fact that the Court’s discussion of the relevance of evidence of modern boating did not depart from existing law. For example, in holding that the Montana court erred when it relied upon evidence of present day, primarily recreational, use of the Madison River, the Court was careful to note, “[e]rror is not inherent in a court’s consideration of such evidence...” *PPL Montana*, 132 S. Ct. at 1233. Relying upon well-established case law, the Court explained:

Evidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use at the time of statehood. See *Appalachian Elec. Power Co.*, 311 U.S., at 416, 61 S. Ct. 291, 85 L. Ed. 243 (“[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation”); *Utah*, 283 U.S., at 82, 51 S. Ct. 438, 75 L. Ed. 844 (fact that actual use has “been more of a private nature than of a public, commercial sort . . . cannot be regarded as controlling”). Similarly, post statehood evidence, depending on its nature, may show susceptibility of use at the time of statehood. See *id.*, at 82-83, 51 S. Ct. 438, 75 L. Ed. 844 (“[E]xtensive and continued [historical] use for commercial purposes” may be the “most persuasive” form of evidence, but the “crucial question” is the potential for such use at the time of statehood, rather than “the mere manner or extent of actual use”).

*Id.* This is entirely consistent with the Arizona court’s holding in *Defenders*, which struck down the statutory presumption that a river was non-navigable if “any boating or fishing was for recreational and not commercial purposes.” 199 Ariz. at 423, ¶41, 18 P. 3d at 734 (“evidence of the river’s capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or travel.”)(quoting *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194

(N.Y. 1998)). Further, as the Arizona Court of Appeals recognized in *Winkleman*, “[e]ven if evidence of the River’s condition after man-made diversions is not dispositive, it may nonetheless be informative and relevant.” 224 Ariz. at 243, ¶31, 229 P. 3d at 255.

The fifth “clarification” cited by SRP is a single phrase, with virtually no explanation or discussion by the Court, about seasonal flows. SRP Closing Brief at 21. Moreover, the Court’s statement quoted by SRP was hardly groundbreaking, particularly in the context that it was offered. In acknowledging that “the Montana court was correct that a river need not be susceptible of navigation at every point during the year,” the Court was not, at that time, passing on the sufficiency of the river’s flow. Rather, it offered its observation as part of its criticism that the Montana court had apparently ignored “meaningful evidence that the river’s conditions had changed since statehood in ways that made present-day navigation of the river easier in all seasons than it was at the relevant time.” *PPL Montana*, 132 S. Ct. at 1234. Thus, there is nothing in the Court’s holding in *PPL Montana* that disturbs the well-established law that a river may be found navigable even if it not navigable every month of the year. *See, e.g. Defenders*, 199 Ariz. at 422, 18 P. 3d at 733, (“periodic navigability is enough, even if the river is not susceptible to navigation at all seasons of the year or all stages of the water”) *citing Economy Light Co. v. United States*, 256 U.S. 113, 122 (1921).

In sum, each of the items enumerated by SRP as “clarifying” existing law have been recognized by the Arizona courts since the issue of title to the streambeds first arose in the mid-1980s. SRP’s attempt to make *PPL Montana* into some sort of groundbreaking “game changer” is nothing more than mere wishful thinking.

## **II. Because the Verde River was and is Navigable, People Navigated it Both Before and Shortly After Statehood, and Continue to Navigate it Today.**

Navigability opponents are fond of quipping that if the Verde River was susceptible to navigation then people would have navigated it. *See, e.g.* SRP Closing Brief at 25; Joint Post-Hearing Closing Brief for the Yavapai-Apache Nation and the Fort McDowell Yavapai Nation (“Nations’ Closing Brief”) at 22. Of course, when proponents then respond with evidence of navigation that ranges from before statehood, shortly after statehood, and even during modern times, suddenly the opponents claim that none of these examples of actual navigation qualify as evidence of “navigability.” Since the 1990s, navigability opponents have attempted to minimize the evidence of navigation of Arizona’s rivers by grafting all sorts of conditions upon what qualifies as evidence of navigability. Initially, these conditions were codified in Arizona’s ANSAC statutes, until the Arizona Court of Appeals struck them down in *Defenders*. Yet, despite the court’s admonition that they were contrary to the *Daniel Ball* test, navigability opponents continue to trot them out during every adjudication. Ironically, as these proceedings have dragged on over the years, more and more incidents of historical navigation have come to light. Yet, whenever opponents are presented with a new piece of evidence, they scramble to minimize it often using the same discredited arguments to claim that actual navigation of the river doesn’t prove it was navigable.

Thus, it is no surprise that once again we are hearing from navigability opponents that historic accounts of boating on the Verde River don’t establish navigability because the trips were “unsuccessful,” they were not sufficiently commercial, or they were not a



sustained commercial enterprise. *See, e.g.* SRP Closing Brief at 22-25; Freeport Opening Memorandum at p. 9; Nations' Closing Brief at 18-25; Salt River Pima-Maricopa Indian Community's Closing Brief ("SRPMIC Closing Brief") at 9-11. Likewise when confronted with evidence of boat travel on the river, they imply that if a trip did not involve "trade" or was recreational it is somehow less probative. *See, e.g.* SRP Closing Brief at 22; Freeport Opening Memorandum at pp. 8. Boat travel is discounted if it occurred during "high water." Freeport Opening Memorandum at p. 8. The use of boats to cross the river rather than travel upstream or downstream is dismissed. *Id.* at 8-9; SRP Closing Brief at 23. The use of other modes of transportation are cited as evidence that the river was non-navigable. SRP Closing Brief at 5, Freeport Opening Memorandum at p. 8-13; San Carlos Opening Memorandum at p. 15. And finally, the extensive amount of evidence regarding modern boating on the river is dismissed as irrelevant because, according to opponents (and contrary to the evidence before the Commission), modern boats make navigation easier. SRP Closing Brief at 29-30; Freeport Opening Memorandum at pp. 23-29; Nation's Closing Brief at 23-30; SRPMIC Closing Brief at 16-17.

Of course, as the Arizona Court of Appeals made clear in *Defenders*, none of these conditions created and imposed by navigability opponents is actually a requirement of the *Daniel Ball* test. As noted above, the previous statute struck down in *Defenders* mandated a presumption of non-navigability if any of the following applied: (1) there had been previous findings of non-navigability; (2) the watercourse flowed only in direct response to precipitation; (3) no profitable commercial enterprise was conducted; (4) no

sustained trade and travel occurred both upstream and downstream in the watercourse; (5) vessels customarily used for commerce in 1912, such as keelboats, steamboats or powered barges, were not used on the watercourse; (6) diversions were made from the watercourse for various purposes that would have been inconsistent with or impediments to navigation; (7) any boating or fishing was for recreational and not commercial purposes; (8) any flotation of logs or other material that occurred or was possible on the watercourse was not and could not have been regularly conducted for commercial purposes; (9) there were structures constructed in or across the watercourse that would have been inconsistent with or impediments to navigation; (10) transportation in proximity to the watercourse was customarily accomplished by methods other than by boat; or (11) the United States did not regulate the watercourse under the Rivers and Harbors Act of 1899. *See* Ariz. Rev. Stat. §37-1128(B)-(D)(1994)(repealed). The 1994 Act also barred consideration of the following evidence in finding whether a watercourse was navigable: (1) previously appropriated water as being within the ordinary and natural condition of a watercourse; (2) the use of ferries to cross a watercourse; (3) fishing from the banks; or (4) uses of the watercourse under flood conditions. *See* Ariz. Rev. Stat. §37-1128(E)(1994)(repealed). The court in *Defenders* painstakingly went through each of these “presumptions” and rejected all of them as contrary to the *Daniel Ball* test. *See* 199 Ariz. at 420-426, ¶¶20-56, 18 P. 3d at 731-737.

The much more limited showing required by the *Daniel Ball* test was recently reiterated by the Oregon Court of Appeals in *Northwest Steelheaders Ass’n v. Simantel* 199 Ore. App. 471; 112 P.3d 383 (2005)(cited with approval in *Winkleman*):

First, with respect to “actual use,” it is not necessary that the historic use made of the river have been either widespread or commercially profitable. “The extent of \* \* \* commerce is not the test.” . . . For example, the Court’s most recent application of the *The Daniel Ball* test upheld a determination of the navigability of Utah’s Great Salt Lake based on evidence that the Court described as “sufficient” but “not extensive.”

*Id.* at 389 (quoting *Utah v. United States*, 403 U.S. 9, 11 (1971)). Further, as the Oregon court observed, “qualifying travel and trade is not limited to large-scale commercial or multiple passenger vessels of the sort typically engaged in modern commerce.” *Id.* at 390. Navigation by small boats has often been recognized as evidence of navigability. *Block v. North Dakota*, 461 U.S. 273(1983) (“Canoe travel at the time of North Dakota’s statehood represented a viable means of transporting persons and goods.”); *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65 (W.D. Wash 1981), *aff’d*, 717 F.2d 1251 (9th Cir 1983)(declaring navigability on the basis that “Indians navigated the river with their fishing boats and canoes”).

As Defenders pointed out in their Closing Memorandum, in the case of the Verde River, there is ample evidence of actual navigation both prior to statehood and after, even though when much of that boating occurred, the river was already no longer in its natural condition. The record contains numerous accounts of boating on the Verde River in the 1800s and even into the early 1930s using a variety of vessels that range from wooden flat boats, canvas boats, iron boats, and canoes. The river was used to haul goods, carry passengers, transport military goods and personnel, fish, trap beaver and otter, and hunt. Thus, it was not only “susceptible” to being used as a highway for commerce, it was actually used as one both before and shortly after statehood. Moreover, as the evidence

regarding modern boating demonstrates, even in its current state, the Verde River continues to be used as a highway for commerce today.

In its effort to refute this overwhelming evidence, SRP takes particular aim at the State Land Department's expert witness Mr. Jon Fuller. SRP attempts to impeach Mr. Fuller's testimony about historic evidence of boating as well as his own personal experience boating the Verde River by deriding his testimony and ascribing to him a fictitious "nobody died" standard of navigability. SRP Closing Brief at 25. Yet the attempt to skewer Mr. Fuller only reveals the fundamental flaw in SRP's own understanding of the *Daniel Ball* test.

Under *Daniel Ball*, "[t]hose rivers must be regarded as public navigable rivers in law **which are navigable in fact.**" *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). Further, they are "navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.* In other words, if—when the river is in its ordinary and natural condition— you can travel on it in a boat, the river is navigable in fact. And if it is navigable in fact, it follows that it is navigable in law. Mr. Fuller's articulation of the *Daniel Ball* test is completely consistent with the case law.

SRP's claim that Mr. Fuller adopted some sort of "nobody died" standard to determine navigability is simply incorrect. That testimony related to Mr. Fuller's opinion regarding what qualified as a "successful" trip. Notably, there is nothing in *Daniel Ball* or its progeny that requires that every trip by every boater on a river be an unqualified

success in order for a river to be a highway for commerce. That is a “requirement” that navigability opponents dreamed up—and they offer no legal authority to support it. The simple fact is that Mr. Fuller accurately applied the *Daniel Ball* test to both the historic evidence of boating on the Verde (which involved boats that were customary at the time of statehood) and his own recent experience boating the river (using a modern boat that was comparable to boats available at the time of statehood) to conclude that the Verde River was a navigable watercourse.

Navigability opponents also assert, without any evidence whatsoever, that the modern boats used to navigate the Verde River in modern times by thousands of Arizonans are not “meaningfully similar” to the type of watercraft commonly used in 1912. *See, e.g.* Freeport Closing Brief at p. 28 (“Not only are these modern craft dissimilar to what was commonly used for trade and travel at statehood, but the modern recreational activity for which they are used is a recent phenomenon.”) They are simply wrong. As the extensive evidence regarding both historic and modern boats presented by Mr. Fuller in this case has established, there is very little difference between the historic boats available and used on the Verde River around the time of statehood and the modern boats navigating the river today. EIN X017; 107 (“Fuller Boating PPT”), slides 109-117. In fact, the only arguably significant difference between the historic canoes, kayaks, flat boats and row boats and their modern counterparts has no impact on their ability to float and navigate the river. *Id.* at slide 109. As Mr. Fuller testified modern boats are made of materials that are more durable. *Id.* The boat designs, however, are virtually identical

and any modern “improvements” in the durability of the boats do not make it any easier for them to navigate the river. *Id.* at slide 114.

Nor do modern boats require less flow to navigate the river; their draw is identical to the draw of historic boats. *Id.* at slides 109, 116, 117. As the Special Master reported in *United States v. Utah*, 283 U.S. 64 (1931):

The watercraft most commonly used in commercial navigation on these Rivers at various periods of time have been rowboats of 16 to 18 feet in length, *drawing 6-12 inches*; rowboats 18 to 22 feet long, *drawing 14-18 inches*; steel rowboats 18 feet long, *drawing 7-19 inches*; motorboats of 20 to 27 feet in length, *drawing 10 inches to 2 1/2 feet*; rowboats 16-18 feet in length, propelled by outboard motors *drawing 15-18 inches*; scows 32 by 8 feet, and 24 by 6 feet, *drawing 8 inches*; ... Such commercial navigation would seem to be conducted according to the “customary modes of trade and travel on water”.

Report of the Special Master filed on October 15, 1930, EIN X017:92, (“Special Master Report”) at p. 117 (emphasis added). Similarly, among the specific accounts of boating experiences on the Green and Grand Rivers, the Special Master provided the following details about specific watercraft, their tonnage and their respective drafts:

In 1893, July, Joseph A. Ross took a trip down the River in a flat-bottom boat, 16 feet long, *drawing 5-6 inches, with a 500 pound load* of drills, supplies, etc. The purpose of the trip was to prospect a mining claim 8 or 10 miles above Valentine Bottom (84 miles), where his partner, Bullitt, and his wife, were living.

\* \* \*

In 1900, February, Edward T Wolverton (a witness) went from Wimmer’s Ranch (opposite the mouth of San Raphael River) to the Junction and return, in a rowboat, *with a 9 inch draft*, at a very low stage of water, spending 10 or 12 days prospecting.

\* \* \*

In 1900, September 9, A. V. Stevenson and son of Colorado Springs, *with 2,000 pounds of supplies*, left the town, expecting to go through to the Needles, in California, prospecting, in about 18 feet long with 5 foot beam, *drawing 8 inches*.

*Id.* at pp. 59-60 (emphasis added). *See also* Fuller PPT slides 116 and 117 (comparing draws required for modern boats and historic boats). Thus, Freeport's claim that the Hyra guide for minimum and optimal flows is limited to modern recreational boating and inapplicable to commercial navigation is refuted by actual historic accounts.

Confronted with this overwhelming evidence that not only makes modern boating relevant to the Commission's inquiry under *PPL Montana*, but unequivocally establishes the river's navigability, the navigability opponents offer arguments that border on the ridiculous. For example, they actually suggest that dry suits, water proof containers, and cell phones with GPS capabilities affect the boaters' ability to float their boats in the water and paddle down the river. Nations' Closing Brief at p. 27. Likewise, they claim that having internet access to flow data, maps and weather forecasts before heading out to the river somehow has a similar affect. *Id.*; see also SRP Closing Brief at p. 17. While this technology may make it easier for modern boaters to plan their trips, it has no impact whatsoever on whether their boats can travel down the river.

### **III. The Cases Cited by the Navigability Opponents as Support for their Arguments are Inapposite to the Verde and Actually Support a Finding of Navigability in this Case.**

All of the navigability opponents argue that rivers that can only be boated during "temporary high waters" are not navigable, citing *United States v. Rio Grande Dam &*

*Irr. Co.*, 174 U.S. 690 (1898) or *Oklahoma v. Texas*, 258 U.S. 774 (1922). See, e.g. Freeport Closing Brief at 2-3; SRP Closing Brief at 26; Nations’ Closing Brief at 17-18. Similarly, they often quote the *PPL Montana* case regarding the river use of initial explorers or trappers who “may have dragged their boats in or alongside the river...” See Freeport Closing Brief at 3 citing *PPL Montana*, 132 S. Ct. at 1234. What these parties fail to acknowledge, however, is that the rivers described in those cases are nothing like the Verde River in its ordinary and natural condition. For example, in *Oklahoma v. Texas*, the Court noted with regard to the western half of the Red River that “for long intervals the greater part of its extensive bed is dry sand, interspersed with irregular ribbons of shallow water and occasional deeper pools. Only for short intervals, when the rainfall is running off, are the volume and depth of the water such that even very small boats could operated therein....The rises usually last from one to seven days, and in the aggregate, seldom cover as much as forty days in a year. 258 U.S. at 587. And in describing the eastern half of the river, stated, “[b]oats with a sufficient draft to be of any service can ascend and descend only during periods of high water. These periods are intermittent, of irregular and short duration, and confined to a few months of the year. *Id.* at 589. Similarly, in *U.S. v. Rio Grande Dam*, the Court found that the river’s use for transportation was “exceptional and only in times of temporary high water.” 174 U.S. at 669.

These descriptions of the Red and Rio Grande rivers are what led the Special Master (and subsequently the Court) in *U.S. v. Utah* to reject the United States government’s contention that the decisions in *Oklahoma v. Texas* and *U.S. v. Rio Grande*



*Dam*, compelled a finding on non-navigability in that case. *See* Special Master Report at 118. In finding the authorities inapplicable, the Special Master specifically noted how different the rivers in those cases were to the Green, Grand and Colorado Rivers at issue in the case before it. For example, in comparison to the description of the western half of the Red River, the Special Master explained,

It will be apparent that the facts thus summarized by the Court with reference to conditions on the western portion of the Red River are not similar to the facts and conditions on the Green and Grand Rivers as testified to in the present suit. For instance, no portion of the bed of those Rivers is “dry sand interspersed with irregular ribbons of shallow water and occasional deeper pools.” On the Red River, even very small boats could be operated “only for short intervals when the rainfall is running off. • • • as much as 40 days in a year.” *On the Green and Grand Rivers, on the contrary, boats drawing from 1 to 2 ½ feet of water can operate in at least nine months of the year, except possibly on a few days of unusually extreme low or high water. The boat trips testified to in the present case were not made under “exceptional conditions in time of temporary high water, [”] but were made under great varieties of conditions and in many varying stages of the water.*

Special Master Report at 119 (emphasis added)(quoting *Oklahoma v. Texas*)(ellipsis in original). Similarly, with respect to the eastern half of the Red River, the Special Master found the rivers significantly different:

It is apparent that the chief facts and conditions on the eastern portion of the Red River on which the Court based its decision, are not similar to those on the Green and Grand. Thus, it is said that on the Red River “boats can ascend and descend only during periods of high water.” On the Green and Grand, on the contrary, boats can ascend and descend, and have done so, during all stages of water, during at least nine months of the year (except possibly on a few days of unusually extreme low or high water)(though as before found by me, both propelled by orders can ascend only with great difficulty at certain periods).

*Id.* at 120 – 121 (quoting *Oklahoma v. Texas*). And with regard to the Colorado River, the Special Master stated “I do not find that the facts and river conditions in the cases cited by the Government and considered *supra*, pp. 118-123, are similar to the facts and river conditions on the Colorado River; ...” *Id.* at 153.

Indeed, although navigability opponents repeatedly tout *U.S. v. Utah*, and the Special Master’s conclusions in that case regarding the San Juan River, as a basis for finding the Verde River non-navigable, the significance of that finding is extremely limited and not applicable to the facts regarding the Verde River. The finding by the Special Master that the San Juan was non-navigable was, in his words, based upon the fact that “the testimony is too meagre to establish affirmatively susceptibility of commercial use.” *Id.* at 179. Notably, the Special Master observed that “[e]xcept the miners’ supplies, no articles of commerce have ever been transported down or up the River. No keelboat or motorboats or outboard-motorboats have been used upon it. *No tourists or other persons have been transported for hire or otherwise.* No boats have ascended except for short distances, and boats ascending must generally be towed, dragged or pulled up.” *Id.* at 180 (emphasis added). Finally, the Special Master concluded, “[a]part from the insufficiency of the evidence as to actual use, the physical characteristics of this River are such as, in my opinion, make it impossible that boats could be navigated practically or safely for commercial purposes. The evidence as to depth makes it clear that boats with a draft of 2 feet could navigate not more than half the year, and probably for the less portion of the year.” *Id.* Because the parties did not contest the Special Master’s finding regarding the San Juan River when the matter went

before the Supreme Court, the Supreme Court simply adopted the Special Master's finding and made no independent findings or conclusions about that river. *U.S. v. Utah*, 283 U.S. at 74.

The evidence before the Commission regarding the Verde River establishes that in its ordinary and natural condition it was significantly more susceptible to navigation than the San Juan River as described by the Special Master. For example, there is ample evidence of actual use of the river from a variety of sources—military accounts, newspaper accounts, photographs, and memoirs. Shortly before and after statehood, people used the Verde River as a highway for commerce both to move military goods, and to hunt and trap. The evidence of modern use also demonstrates that navigating the Verde River continues to be a source of commerce. The evidence of actual use is further bolstered by the river's physical characteristics. Modern flow data, which due to human diversions represent less than the natural flow, indicate that segments 1 through 5 are navigable by canoe 99% of the time or 360 days of the year. Segments 4 & 5 are navigable by flatboats 90% of the time (330 days of the year). Segment 3 is navigable by flatboats 80% of the time (290 days of the year), and Segment 2 is navigable by flatboats 85% of the time (310 days of the year). Even Segment 1 is navigable by flatboats 30% of the time (110 days a year). Thus, the Special Master's conclusions regarding the San Juan, which was at most navigable only half the year, are simply not applicable to the Verde River.

More importantly, in concluding that the Colorado, Grand and Green Rivers were navigable, the Special Master rejected many of the same arguments advanced by

navigability opponents in this case. In fact, when the Special Master's Report is considered in its entirety, it not only fails to support a finding that the Verde is non-navigable, it actually undermines and discredits the navigability opponents' arguments to that effect.

For example, before the Special Master, the U.S. Government argued that evidence of boating on the Grand and Green Rivers did not prove navigability because the trips were recreational as opposed to commercial in nature. Specifically, the U.S. Government argued, “[t]ravel for personal purposes unaccompanied by any element of trade is not useful commerce according to the decisions of the United States, and it also follows that the susceptibility of the stream for use in commerce must include substantial commercial operation of boats.” Special Master Report at 106 (quoting U.S. Government's Brief). The Special Master, however, disagreed, finding that the definition of “commerce” or “useful commerce” insisted upon by the government “appears to me to be altogether too restricted. ‘Commerce’, of course includes the element of barter, purchase, sale and exchange of goods; but it is not limited to such elements.” *Id.*

Similarly, the U.S. Government in *U.S. v. Utah*, argued (like the navigability opponents in this case) that “[c]ommerce in boats must be of a substantial or permanent character. It cannot be a commerce which is temporary, precarious, and unprofitable; neither does a theoretical commerce meet the test.” *Id.* at 109. But again, the Special Master disagreed: “In every decision of this Court ‘capability’ or ‘susceptibility’ of use has been emphasized as the test of navigability, as well as actual use.” *Id.* at 110. The Special Master elaborated further,

Counsel argue that the use of these Rivers has not been of a permanent or substantial character. They again overlook the fact that the evidence as to actual use since 1896 has only been relevant upon the question of its susceptibility of use in that year.... A very small amount of actual trade or travel when shown by satisfactory evidence may constitute ample proof of susceptibility to large amounts of similar trade or travel in the future, should occasion arise. I find that the evidence shows that these rivers are susceptible of use by boats in commerce whenever commerce of the kind heretofore afforded shall again present itself. Thus the transportation of passengers or tourists for hire is clearly a form of commerce of which these rivers were in 1896, and are, susceptible.

*Id.* (emphasis added).

The Special Master also rejected the argument that commerce had to be profitable in order to demonstrate navigability: “The mere fact that any particular act of commerce shown by the evidence in this case has not turned out to be profitable or permanent does not constitute proof that the River is not susceptible of profitable or permanent commerce...And conversely non-navigability of a River cannot be proved merely by evidence of lack of profit or permanence in any particular act of commerce upon it.” *Id.* at 111.

Like the navigability opponents in this case, the Government argued that no one navigated the river, and that fact supported a finding of non-navigability. Again, the Special Master found this argument unavailing:

I do not find that either the limited historical facts put in evidence by the government or the more comprehensive investigation into the history of these regions tend to support the government’s contention that the non-use of these Rivers in this historical period from 1540 to 1879 is weighty evidence that they were non-navigable in 1896 in fact and in law. . . . Undoubtedly, there existed a belief in their non-navigability in certain portions. But the non-use itself I do not find to constitute evidence of their non-navigability in fact, in view of the many other factors in the situation.

*Id.* at 51-52.

Like the navigability opponents in this case, the U.S. Government also claimed that the rivers were non-navigable because they were dangerous, full of obstacles and in particular sandbars. Like the other arguments, this one failed to persuade the Special Master. Citing both *The Montello* and *Economy Light and Power Co.*, where the Court had held that a mile portage wasn't enough to defeat navigability, the Special Master compared getting stuck on a sand bar as comparable:

An obstacle or obstruction, the presence of which is calculable in advance and which merely impedes or retards a boat and which is not dangerous to life or limb does not seem to me to be such as will render a river non-navigable, unless it is such as to render commerce wholly impracticable. It is clear that none of the obstructions or obstacles commonly met with, the sandbars in particular, on these Rivers constituted any substantial danger; for there's evidence that boats carried women and small children both up and down; and were sometimes navigated by women. I find that the sandbars did not render these Rivers non-navigable.

*Id.* at 97.

And, repeatedly throughout his report the Special Master recognized the transportation of tourists as an important source of commerce: “The Government’s assertion as to lack of commercial possibilities fails to recognize one source of commerce which in the future will undoubtedly develop to a considerable extent—the use of these Rivers for the transportation of tourists for hire, to view the natural scenic wonders and explore the archeological features of these regions.” *Id.* at 117. *See also, id.* at 152.

Moreover, contrary to Freeport’s assertion that “recreational boating was not among the commercial uses that realistically might have occurred at statehood,” Freeport Closing Brief at 28, the Special Master’s Report establishes otherwise. Specifically, the

Special Master discussed the September 1909 expedition by Julius F. Stone (a prominent business man from Columbus, Ohio) down the Green and Colorado Rivers. *Id.* at 66. Mr. Stone and his party (ten men) traveled the rivers using four light rowboats built especially for them. *Id.* The boats were 16 feet long with a four foot beams, 18 inches deep and when loaded, drew only 6-8 inches. *Id.* The purpose of the trip, according to the Special Master, was “adventure.” *Id.* And one of the witness appearing before the Special Master testified about a trip made the same month and year “for pleasure and deer hunting.” *Id.*

Thus, the Special Master’s predictions regarding future commercial use of western rivers to transport tourists was prescient. Just as he predicted, in modern times, the use of the Grand, Green and Colorado rivers by tourists and recreational boaters has become a lucrative industry. And as the Commission heard from several witnesses, the Verde River offers the same commercial opportunities today. More Arizona citizens are boating the Verde River than ever before, and the tourist and recreation industries—as well as small businesses in the surrounding areas—are all reaping the benefit. This modern experience is overwhelming evidence that at the time of statehood, the Verde River, in its ordinary and natural condition, was not only susceptible for even greater use as a highway for commerce, but over time has realized that potential.

Thus, as the foregoing discussion demonstrates, well-established case law, even the cases repeatedly cited and relied upon by navigability opponents, support a finding that the Verde River, in its ordinary and natural condition, at the time of statehood was navigable.

#### **IV. Navigability Opponents' Claims About Obstructions in the Verde are Pure Speculation and their Legal Conclusions Regarding their Impact on Navigability are Contrary to the Law.**

The arguments by navigability opponents that rapids, boulders, beaver dams, and braiding in the Verde River render it non-navigable are without any factual or legal support. First, it is important to note that **none of the expert witnesses testifying on behalf of the navigability opponents have ever boated or even *attempted* to boat the Verde River. Nor have navigability opponents offered testimony from a boating expert.** These omissions not only speak volumes about the credibility of their claims, it renders any claims that they make about the so called difficulties of navigating the Verde River purely speculative.

Moreover, the law is well established that a river need not be free of obstructions to be found navigable. “Navigability based on either actual use or susceptibility to use may be established despite the presence of obstacles to free passage, such as rapids, riffles, or occasional areas of low water requiring portage, so long as the ‘natural navigation of the river is such that it affords a channel for useful commerce.’” *Northwest Steelheaders*, 199 Ore. App. at 484, 112 P.3d at 390 *quoting The Montello*, 87 U.S. (20 Wall) at 441. Navigability does not depend on an absence of occasional difficulties in navigation. *Holt State Bank*, 270 U.S. 49, 56 (1926). *See also U.S. v. Utah*, 283 U.S. at 84, 86 (noting that conditions created by flood deposits of logs and driftwood “do[] not constitute a serious obstacle to navigation” and that, with respect to shifting sandbars in the river channel, “the mere fact of the presence of such sandbars causing impediments to



navigation does not make a river non-navigable”). In sum, the navigability opponents’ arguments regarding “obstacles” to navigation are wholly without merit.

**V. The Criticisms of Mr. Hjalmarson’s Analysis Ignore the Fact that His Approach Utilized Numerous Methodologies and Sources to Check and Cross Check His Calculations.**

The navigability opponents attempt to discredit the expert testimony and analysis offered to ANSAC by Hjalmar Hjalmarson, a retired USGS River Engineer with over fifty years of experience on Arizona rivers, and a lifetime of experience on the Verde River as a swimmer, boater, and later, a professional engineer for the USGS. Mr. Hjalmarson devoted hundreds, if not thousands, of hours to his analysis, and submitted it to ANSAC in the form of an in-depth Report with multiple appendices that included extensive historic documentation (EIN X015), an Addendum that supplemented the initial report (EIN X036), a Second Addendum that addressed issues raised about Mr. Hjalmarson’s analysis by other parties (EIN X059) and finally additional GLO maps (EIN X075).

Mr. Hjalmarson is the only uncompensated expert witness to testify before the Commission, and in all of his written work and testimony, he has demonstrated a willingness to dig deep into the data, to reconsider, correct (where necessary) his calculations and to test his conclusions by applying different methodologies to the particular question presented. Notably, the criticism from navigability opponents in their closing briefs is focused entirely on his calculations regarding irrigated farmland near the Upper Verde. See SRP Closing Brief at 29-30; Freeport Closing Brief at 21, no. 62; Nations’ Closing Brief at 16. They attempt to exploit a minor error in his calculation that

he, not they, discovered and disclosed, reducing the amount of total acreage cultivated. Tr. 2/18/2015 1268:3-1269:6; See also EIN X059 at p. 2-3. However, they completely ignore the fact that his opinion was based not just on the calculations regarding irrigated acreage, but also upon the additional methodologies he employed to check and double check those calculations. See Tr. 2/18/2015 at 1390:12 to 1396:21.

Moreover, Mr. Hjalmarson's work was multi-disciplinary; he has not only considered a variety of hydrological and geomorphic studies of the river, but he has also extensively studied historic documents including surveys and newspaper accounts in order to present a more accurate assessment of the river's "ordinary and natural condition." His understanding of Arizona's history and the history of the Verde River is vast. And, his opinion regarding the river's navigability has been informed both by his extensive research and the thousands of hours he has personally spent on the Verde River, both as a professional river engineer for USGS, and as a resident of Cottonwood. In sum, Mr. Hjalmarson's expert opinion regarding the Verde River's navigability is not only extremely credible, it was arrived at through a transparent and unbiased application of the scientific method.

**VI. It Would Be Error for the Commission to Simply Adopt the Prior 2008 Decision by ANSAC.**

In their closing briefs, several navigability opponents either state or imply that this Commission should simply adopt its 2008 decision that found the Verde River non-navigable and simply ignore the supplemental evidence and testimony. The Commission should decline that suggestion for numerous reasons.

First, that suggestion ignores the fact that the make up of the Commission has completely changed. Three of the four current commissioners<sup>1</sup> were named to the Commission years after that decision issued. Only one of the four current Commissioners was present for the prior hearings on the Verde River.

Second, there is a substantial amount of supplemental evidence and testimony that has been submitted to the Commission since the 2008 decision. For example, additional historic accounts of boating have come to light since 2008. The most significant of these, the multiple trapping and hunting trips taken by the Day Brothers, are directly relevant to the navigability of the Verde River. There is also the exhaustive research and presentation by Mr. Fuller regarding historic boats—the types of boats available in Arizona and throughout the west, the types of boats used on Arizona rivers around the time of statehood, and how those boats compare to modern boats in terms of navigability. Additional expert witness testimony was also provided both by Mr. Fuller and Mr. Hjalmarson in support of navigability, as well as testimony from experts advocating for a finding of non-navigability. Even if it wanted to, the Commission does not have the discretion to ignore that evidence. A.R.S. §37-1123 provides that “[t]he commission *shall receive, review and consider all relevant historical and other evidence* presented to

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<sup>1</sup> Notably, ARS 37-1121 provides that “[t]he commission consists of five persons, not more than three of whom are from the same political party, who are appointed by the governor pursuant to section 38-211.” Currently there are only four people on the Commission, three of whom are from the same political party. Although there has been a vacancy on the Commission since May 2015, and ARS §38-211(C) provides, “[i]f the term of any state office which is appointive pursuant to this section. . . becomes vacant during a time in which the legislature is not in regular session, the governor *shall nominate a person* who meets the requirements of law for such office,” no replacement Commissioner has been nominated. A.R.S. §38-211(C)(emphasis added).

the commission by the state land department and by other persons regarding the navigability or nonnavigability of watercourses in this state as of February 14, 1912....”(emphasis added).

Finally, the navigability opponents claim that the prior Commission applied the correct legal standard in the 2008 decision, but that is demonstrably false. Without identifying each and every incorrect statement of the law or improper consideration included in that Report, suffice it to say that the Commission’s conclusion that “[t]hus, while we have historical accounts of boating on the Verde River, it does not appear that any of these attempts were used for commercial transportation or use of the river as a highway for commerce” unequivocally demonstrates that it applied an incorrect test. 2008 Report at 40. As discussed at length above, the correct standard for determining navigability does not require any such use. Moreover, the additional statement that “for a river to be considered navigable or susceptible of navigability, there must be a showing of commercial activity for the river to be used as a ‘highway for commerce’ or susceptible to such use,” is completely erroneous. *Id.* at 41. Nor is it supported by the case cited by ANSAC, *United States v. Utah*, 283 U.S. 64, 81-82 (1931). In that case, the very premise cited by the 2008 Commission for dismissing the evidence of *actual use* was expressly and explicitly *rejected* by both the Special Master and the United States Supreme Court. The Special Master’s response to this argument is discussed above. But if there were any doubt, the Court’s opinion eliminates it. As the Court explained:

The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to

be capable of commercial use. *The extent of existing commerce is not the test.*

*U.S. v. Utah*, 283 U.S. at 82 (emphasis added).

In sum, it would not only be an abdication of its statutory obligation for the Commission to adopt the 2008 decision, it would be clear legal error as well.

## **VII. Whether Federal Surveyors Meandered the Verde River is Irrelevant.**

Finally, navigability opponents also attempt to draw inferences from federal surveyors' decisions about meandering the Verde River. SRP Closing Brief at pp. 7, 28; Freeport Opening Memorandum at p. 15; Nations' Closing Brief at 13. Not surprisingly, in those instances where surveyors did not meander the river, the retained experts for navigability opponents conclude that the lack of meandering is evidence of non-navigability. Yet, remarkably, when the surveyors did meander the Verde, those same experts reach the exact same conclusion! Not only is this "heads we win, tails you lose" argument logically inconsistent, it is legally irrelevant. There is no evidence whatsoever that surveyors understood, let alone applied, the legal definition of "navigable." Moreover, courts have consistently held that meanders have no bearing on the issue of navigability. *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922) (Surveying officers "were not clothed with the power to settle questions of navigability."); *Railroad Co. v. Shurmeir*, 74 U.S. 272, 286 (1868) ("Express decision of the Supreme Court of the State was, that the river, in this case, and not the meander-line, is the west boundary of the lot, and in that conclusion of the State court we entirely concur."); *Micellis v. Andrus*, 61 Or. 7, 88-89 (1912)("[N]avigability in law can never exist independent of navigability in fact, and the fitness of a river in its original condition for the transportation...can never be

settled by fiat or by meandering the banks of the stream.”). Thus, that the Verde River was not meandered by some surveyors but was meandered by others should have no bearing on this Commission’s determination regarding the river’s navigability, which should be based on the evidence regarding the river’s actual condition and its susceptibility to navigation in its ordinary and natural condition.

### **VIII. Conclusion.**

There is ample relevant, persuasive evidence demonstrating that the Verde River meets the Arizona and federal standards of navigability. In summary, the evidence demonstrating navigability includes information regarding the substantial flow of the river both in modern times and in its ordinary and natural condition, as well as historic and recent incidents of boating. When the objective evidence submitted is evaluated in light of the appropriate standard, it is clear that at the time of statehood the Verde River, in its ordinary and natural condition, was susceptible for use as a highway for commerce, over which trade and travel could be conducted in the customary modes of trade and travel from Forest Road 638 to the confluence with the Salt River.

Respectfully submitted this 9th day of November 2015

ARIZONA CENTER FOR LAW  
IN THE PUBLIC INTEREST  
P.O. Box 41835  
Tucson, Arizona 85717

s/ Joy E. Herr-Cardillo  
Joy E. Herr-Cardillo  
Timothy M. Hogan

An electronic copy (PDF) of the foregoing emailed this  
9<sup>th</sup> day of November, 2015:

Arizona Navigable Stream Adjudication Commission  
1700 W. Washington, Ste B-54  
Phoenix, AZ 85007

Fred Breedlove  
Squire Patton Boggs (US) LLP  
1 East Washington St, Ste 2700  
Phoenix, AZ 85004  
Attorneys for ANSAC

John B. Weldon, Jr.  
Mark A. McGinnis  
Salmon, Lewis & Weldon, Plc  
2850 E. Camelback Rd., Ste 200  
Phoenix, AZ 85016-4316  
Attorneys for the Salt River Project Agricultural Improvement  
And Power District and Salt River Valley Water User's Association

Susan B. Montgomery  
Robyn Interpreter  
4835 E. Cactus Rd, Ste 210  
Scottsdale, AZ 85254

L. William Staudenmaier  
Cynthia Chandley  
Snell & Wilmer  
400 East Van Buren  
Phoenix, AZ 85004-2022  
Attorneys for Freeport

Laurie Hachtel  
Edwin Slade  
Attorney General's Office  
1275 West Washington Street  
Phoenix, AZ 85007-2297  
Attorneys for State of Arizona

Sean Hood  
Fennemore, Craig, P.C.  
2394 E. Camelback Rd, Ste 600  
Phoenix, AZ 85016-3429  
Attorneys for Freeport

Mark Horvath Law Office, P.C.  
1505 E. Los Arboles Drive  
Tempe, AZ 85284

Ms. Arlinda Locklear, Esq.  
4113 Jenifer St., N.W.  
Washington, D.C. 20015

Joe P. Sparks  
The Sparks Law Firm  
7503 First Street  
Scottsdale, AZ 85251-4201  
Attorneys for San Carols Apache Tribe, et al

Sally Worthington  
John Helm  
Helm, Livesay & Worthington, Ltd.  
1619 E. Guadalupe, Ste 1  
Tempe, AZ 85283  
Attorneys for Maricopa County

Steven L. Wene  
Moyes Sellers & Sims  
1850 N. Central Ave., Ste 1100  
Phoenix, AZ 85004

Cynthia S. Campbell  
Law Department  
City Of Phoenix  
200 W. Washington Street, Ste 1300  
Phoenix, AZ 85003-1611  
Attorneys for City of Phoenix

Dr. Carole Coe Klopatek  
P.O. Box 17779  
Fountain Hills, AZ 85269-7179



Diandra Day Benally  
P.O. Box 17779  
Fountain Hills, AZ 85269-7179

William H. Anger  
Engelman Berger, P.C.  
3636 N. Central Avenue, Ste 700  
Phoenix, AZ 85012  
Attorneys for City of Mesa

Charles L. Cahoy  
Assistant City Attorney  
City Attorney's Office  
CITY OF TEMPE  
21E. Sixth St, Ste 201  
Tempe, AZ 85280  
Attorneys for City of Tempe

Michael J. Pearce  
Maguire & Pearce, LLC  
2999 N. 44th Street, Ste 630  
Phoenix, AZ 85018-0001  
Attorneys for Chamber of Commerce  
And Home Builders' Association

Michael F. McNulty  
Pima County Attorney's Office  
32 N. Stone Ave Suite 2100  
Tucson, AZ 85701

Carla A Consoli  
Lewis Roca Rothgerber  
201 E. Washington, St., Suite 1200  
Phoenix, AZ 85004-2595  
Attorneys for Cemex

James T. Braselton  
Dickinson Write  
1850 N. Central Ave., Ste. 1400  
Phoenix, AZ 85004  
Attorneys for Various Title Companies

David A. Brown  
Brown & Brown  
128 E. Commercial St.  
PO Box 1890  
St Johns, AZ 85936

Julie Lemmon  
1095 W. Rio Salado Pkwy, Ste 102  
Tempe, AZ 85281-2603  
Attorney for Flood Control District  
Of Maricopa County

Thomas L. Murphy  
Linus Everling  
Gila River Indian Community Law Office  
Post Office Box 97  
Sacaton, AZ 85147  
Attorney for Gila River Indian Community

Sandy Bahr  
514 W. Roosevelt  
Phoenix, AZ 85004  
Sierra Club

s/Joy E. Herr-Cardillo