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14 **BEFORE THE ARIZONA NAVIGABLE STREAM**
15 **ADJUDICATION COMMISSION**

16 In re Determination of Navigability of
17 the Verde River

18 No. 04-009-NAV

19 **SALT RIVER PROJECT'S**
20 **RESPONSIVE CLOSING BRIEF**

21 Pursuant to the Chairman's Orders,¹ the Salt River Project Agricultural Improvement
22 and Power District and Salt River Valley Water Users' Association (collectively, "SRP")
23 submit their responsive closing brief in this matter regarding the Verde River ("Verde").
24 Based upon the evidence in the record and application of the appropriate legal test, the
25 Commission should again find that the Verde is not navigable.

26 SRP received the following closing briefs:

- 27 1. Freeport Minerals Corporation's Opening Post-Hearing Memorandum
Concerning the Non-Navigability of the Verde River (September 28, 2015) ("Freeport
Brief");
2. Joint Post-Hearing Closing Brief for the Yavapai-Apache Nation and the Fort
McDowell Yavapai Nation (September 28, 2015) ("YAN/FMYN Brief");

¹ First Amended Order Consolidating Cases, Setting Deadlines for Evidence Submissions, Setting Dates and Guidelines for Future Hearings and Meetings (May 20, 2015); Order Amending Memorandum Submission Deadlines, Setting Page Limits, and Permitting Service of Documents by E-Mail (September 15, 2015).

1 3. Salt River Pima-Maricopa Indian Community’s Closing Brief Opposing
2 Navigability (September 24, 2015) (“SRPMIC Brief”);

3 4. City of Phoenix Closing Brief (September 28, 2015) (“Phoenix Brief”);

4 5. Arizona State Land Department’s Opening Post-Hearing Brief on the
5 Navigability of the Verde River (“September 28, 2015) (“ASLD Brief”);

6 6. Closing Memorandum regarding the Navigability of the Verde River, filed by
7 Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (September 28,
8 2015) (“DOW Brief”); and

9 7. Maricopa County and the Flood Control District of Maricopa County’s Post-
10 Hearing Opening Brief Regarding Navigability of Verde River (September 28, 2015)
11 (“County Brief”).

12 SRP, Freeport, YAN/FMYN, SRPMIC, and Phoenix each took the position in its
13 closing brief that the Verde was not navigable. The ASLD, DOW, and the County (the
14 “Proponents” of navigability) all argued that the river was navigable. Most of the
15 Proponents’ arguments already were addressed in SRP’s closing brief, and SRP incorporates
16 those portions of its prior brief herein by this reference.² In this responsive brief, SRP
17 addresses Proponents’ other arguments not previously discussed in SRP’s closing brief.

18 **I. The ASLD’s Evidence and Argument Focus Primarily on Segment 2.**

19 Despite espousing a belief in the segmentation analysis set forth by the United States
20 Supreme Court in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), the ASLD’s brief
21 focuses primarily upon Segment 2 (the Verde Valley area) and attempts to conflate the
22 evidence regarding that segment with that for the segments for which significantly less
23 evidence exists (Segments 1, 3, 4, and 5). For instance, in Section V of its brief, the ASLD
24 spends at least twice the number of pages addressing Segment 2 as it does any of the other
25 segments. *See* ASLD Brief, at 20-30. Even more significantly, the vast majority of the

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² *See generally* Salt River Project’s Closing Brief (September 28, 2015) (“SRP Brief”).

1 evidence that the ASLD discusses in the more general portions of its brief purportedly relating
2 to the entire river comes from Segment 2. *See id.* at 5-12.

3 For instance, although the ASLD contends that the Verde is “boated year-round, by
4 various types of boats, commercially and recreationally,” *see* ASLD Brief, at 5, its entire
5 discussion of Mr. Lynch and his “duckies” applies exclusively to Segment 2. *See* ASLD
6 Brief, at 6-7. Likewise, the ASLD’s arguments regarding how the “surrounding
7 communities” profit from boating on the river are based upon evidence submitted regarding
8 Camp Verde, Clarkdale, and nearby areas located in Segment 2. *Id.* at 8-9. The Verde
9 RiverFest, Verde River Days, Verde River Runoff, and Verde River Race all occur on
10 Segment 2. *Id.* at 9. The “two men in a boat” photograph allegedly was taken in the area of
11 Camp Verde, which is in Segment 2. *Id.* at 23.

12 Mr. Fuller, the ASLD’s primary witness, listed Segment 2 as the “most navigable” of
13 the segments. *See* Tr. at 04/03/15:3549 (Fuller). He ranked Segment 2 first because there is a
14 “stronger historical record” of navigation for Segment 2 than for the other segments, *id.* at
15 3551; according to Mr. Fuller, Segment 2 is “quite easy to boat,” *id.*; and he believes that he
16 could take a small boat upstream on Segment 2 under “ordinary and natural conditions.” *Id.*

17 Mr. Fuller opined that Segment 4, by comparison, is “less navigable” because “[t]here
18 are more rapids in Segment 4 than there are in 2.” *See* Tr. at 04/03/15:3551 (Fuller).
19 Segment 5, in modern times, “tends to be a little strainer.” *Id.* at 3552. Segment 5 is wider,
20 which makes it less deep for an equivalent amount of flow. *Id.* at 3553-54. Segment 5 also
21 has more braiding and more split channels. *Id.* at 3554. Mr. Fuller testified that Segment 3 is
22 the “whitewater reach” and that is where the Class V rapid (Verde Falls) is located. *Id.* at
23 3555. Punk Rock Rapid (Class III) also makes Segment 5 less navigable. *Id.*

24 Segment 2 is an alluvial reach where modern recreational boating occurs. Although
25 SRP contends that Segment 2 is not navigable, most of the evidence of navigability that does
26 exist on the river relates to Segment 2. By designating Segment 2 as a discrete segment, the
27 ASLD has admitted that there are differences in hydrology, geomorphology and other factors

1 that make that portion of the river distinct from the other segments. The Commission should
2 resist the ASLD's efforts in its post-hearing briefing to extrapolate the evidence from
3 Segment 2 to help support its case on the other, even less navigable segments.

4 **II. The ASLD Overstates Its Evidence of Navigability, Even for Segment 2.**

5 Despite submitting thirty pages of micro-sized type with virtually no margins, the
6 ASLD still is unable to make its case on navigability for any segment of the Verde, even
7 Segment 2. Faced with insufficient evidence to carry its burden of proof, the ASLD resorts to
8 hyperbole and broad exaggerations of the available evidence.

9 In several instances, the ASLD takes liberties with the evidence and stretches the facts
10 beyond their breaking point. In addition to the story of the Day brothers discussed in Section
11 III, *infra*, the ASLD also exaggerates the account regarding Dr. Palmer, Mr. Crain, and their
12 steel boat. *See* ASLD Brief, at 17. The ASLD argues that “[a]pparently this type of trip
13 happened with some frequency because the horse that hauled the boat was trained to return to
14 its stable downriver, and the general store had a boat to rent.” *Id.* First of all, the source
15 document [X017, SLD 97, at 29] refers to the boat being “borrowed,” not “rented.” Second,
16 that a general store in Camp Verde had a boat on hand is not surprising when one considers
17 the variable and flashy nature of the river. Given those conditions, a boat might be required
18 to cross the river during floods. Third, the fact that the horse could find its way back to the
19 corral does not mean that the horse learned this by repeatedly hauling boats up and down the
20 river. The Commission can take judicial notice of the fact that horses, dogs, and other
21 animals often find their way home. No evidence shows that this was not a route that was
22 familiar to the horse for other reasons. Contrary to the ASLD's assertions, it is far from
23 “apparent” that “this type of trip happened with some frequency.” *See* ASLD Brief, at 17.

24 The ASLD quotes Vincent Randall as making the preposterous statement that “it may
25 have been possible” to paddle a Mississippi River boat up the Verde. *See* ASLD Brief, at 18.
26 The quotation and citation in the ASLD's brief is cut and pasted and taken out of context.
27 What Mr. Randall really said was:

1 A. . . . So my question to myself would be how am I going to get a
2 Mississippi River boat over here to paddle up the river?

3 Q. But you think you might be able to get downriver?

4 A. About the point in time, if I didn't know anything about the
5 treacherous water below Beasley Flat, I might have fooled myself into thinking
6 I could move it down.

7 *See* Tr. at 02/20/15:1818-19 (Randall). Mr. Randall's testimony was quite a bit different from
8 the way the ASLD characterized it in its brief.

9 At the conclusion of its section regarding historical boats, the ASLD boldly asserts
10 that, "[o]n the Verde, there is historical evidence of boating being used to support military
11 forts, to transport people and their goods, and for hunting, trapping, and fishing." *See* ASLD
12 Brief, at 14. As support for this broad statement, the ASLD cites only Slides 127 to 147 of
13 Mr. Fuller's Power Point [X035, SLD 167]. The ASLD overstates the evidence that is
14 summarized in that presentation. For instance, the only evidence that Mr. Fuller discusses on
15 those pages regarding boats "being used to support military forts" is on Slides 127 and 129,
16 where he mentions two instances of a boat or a raft being used as a ferry to cross the river
17 "during high flow." *See* X035, SLD 167, at 127, 129. The 1888 canoe trip from Fort
18 McDowell to Mesa Dam (*id.* at Slide 130) perhaps could be characterized as a "military"
19 venture because one of the participants (who died during the trip) was a "Major," but nothing
20 in the record supports the ASLD's assertion that boats ever were used on the Verde to
21 "support military forts."

22 The ASLD's assertion that boats were used to "transport people and their goods" also
23 is grossly exaggerated. Even if one assumes that the descriptions on Slides 127 to 147 of Mr.
24 Fuller's Power Point are entirely accurate, the only one of those accounts that even remotely
25 refers to transporting "goods" is the Day brothers' trapping excursion. *Id.* at Slide 132. That
26 account, as discussed below, is ambiguous at best. The record does not support the assertions
27 in the ASLD's brief.

1 **III. The Newspaper Article Regarding the Day Brothers Does Not Support a Finding**
2 **of Navigability.**

3 The ASLD continues to place substantial reliance upon a three-paragraph newspaper
4 article from 1892 relating to the Day brothers' purported trapping expedition down the Verde.
5 The ASLD relies upon this single story as evidence of historic commercial navigation on
6 Segments 2, 3, 4, and 5, counting it as five separate instances of navigation on all four
7 segments. See ASLD Brief, at 23, 26, 27, and 29. With regard to Segment 5, for example,
8 the ASLD asserts that "[t]he Day brothers continued on **their** fifth trapping trip from Camp
9 Verde and successfully passed through this Segment [5] on their way to Yuma." *Id.* at 29
10 (emphasis added).³

11 A more careful review of the article itself shows little to support actual boating on each
12 of those four segments.⁴ The first paragraph of the article states that the two brothers left
13 Camp Verde on September 1, 1891 "in a small boat on a trapping expedition." See Day
14 Story. Camp Verde is in Segment 2, so that statement arguably does lend some support for
15 the conclusion that the brothers were in the boat on at least some parts of Segment 2. The
16 only other portion of the article that even refers to the boat floating on the water is the end of
17 the second paragraph, where the article refers to "their boat floating upon the waters of the
18 great Colorado of the west," but that passage obviously is referring to the Colorado River, not
19 the Verde.

20 Nothing in the article states or even implies that the brothers were **in** the boat at any
21 time after they left Camp Verde. They both arrived in Yuma in late March or April 1892, so
22 they apparently made it all the way there, but nothing in the article shows that they got to
23 Yuma by riding in the boat on the river.

24 The facts that do appear in the article would suggest otherwise. The article specifically
25 refers to "a small boat" and says they ended up with "a large quantity of furs." If both

26 ³ This statement, among other things, even exaggerates the ASLD's own prior assertion that it was the
27 fifth trip for **one** (but not both) of the brothers. See ASLD Brief, at 23.

⁴ See "A Long Journey," *Arizona Sentinel* (April 2, 1892) [X001, SLD 18] ("Day Story").

1 brothers were riding in the “small boat,” where did they put the “large quantity of furs”? The
2 ASLD jumps to the conclusion that the brothers rode in the boat the whole way, but nothing
3 in the article states or implies that is true. An equally plausible explanation, based upon this
4 newspaper article, is that they used the boat to carry their furs and walked or waded alongside
5 it. Especially given that they were gathering what ended up being “a large quantity of furs” as
6 they went, no basis exists upon which to conclude that one or both brothers also was riding in
7 the boat with the furs and whatever other supplies they were carrying.

8 The possibility that the brothers walked or waded at least part of the way while pulling
9 the boatload of furs also might help to explain why it took them **six months** to go from Camp
10 Verde to Yuma. The ASLD speculates that the brothers “travel[ed] slowly” because they
11 were “likely setting traps, travelling several times between their camp and the traps to check
12 for beaver, and then skinning and drying any beaver hides before once again travelling
13 downriver.” See ASLD Brief, at 23.⁵ Although it is difficult to ascertain how it could take
14 two brothers six months to ride from Camp Verde to Yuma in a boat on an allegedly
15 “navigable” stream, the possibility that they were walking or wading and dragging a boatload
16 of furs would be much more consistent with a six-month trip. That conclusion also is
17 consistent with the practice of other trappers in the West, who were known to use rivers as a
18 source of water (or beavers and otters) while walking or wading and dragging their boats
19 alongside them. See generally *PPL Montana*, 132 S. Ct. at 1233 (“Mere use by initial
20 explorers or trappers who may have dragged their boats in or alongside the river despite its
21 nonnavigability in order to avoid getting lost, or to provide water for their horses or
22 themselves, is not enough.”).

23 That the brothers walked or waded and pulled their boat alongside them in at least
24 some portions of the river likewise is consistent with the other contemporaneous descriptions
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26 ⁵ This speculation, in addition to being wholly unsupported by the newspaper article, also is contrary
27 to the substantial evidence in the record that it was and is difficult, if not impossible, to travel
upstream on the Verde. See Tr. at 12/15/14:122, 182 (Fuller), 12/15/17:691-92 (Fuller), 2/20/15:1975
(Randall), 2/25/15:2436 (August), 4/03/15:3486, 3522 (Fuller).

1 of the Verde that refer to marshes, boulders, rapids, strainers, braiding, low spots, and beaver
2 dams. See SRP Brief, at 11-15. The ASLD's conclusion that the two brothers traversed all
3 these obstacles while riding in a "small boat" full of "a large quantity of furs" in Segments 2,
4 3, 4, and 5 is not supported by the evidence.

5 The newspaper article refers to the two brothers leaving "in a small boat" from Camp
6 Verde and then reappearing six months later with "the boat [not necessarily with the brothers
7 in it] floating upon the water of the great Colorado of the west." See Day Story. There
8 simply is not enough information in the article to substantiate a finding that the brothers rode
9 in the boat (navigated) on the rest of the Verde or to determine anything else that happened
10 during the intervening six months. There certainly is not enough information to support the
11 ASLD's conclusion that the brothers "continued through [Segment 3], successfully trapping
12 in their small boat," see ASLD Brief, at 26; "continued" in Segment 4 "in their small boat,"
13 id. at 27; and "successfully passed through" Segment 5 in that boat on their way to Yuma. Id.
14 at 29. If the brothers did not ride in the boat, and instead used it only to carry the furs while
15 they walked or waded and dragged the boat along in some reaches, the article is not evidence
16 of actual navigation under the *PPL Montana* standard. 132 S. Ct. at 1233.

17 **IV. The "Susceptibility" Element of the Test Only Arises if There Was No Need for**
18 **Actual Navigation.**

19 Because there is insufficient evidence to show actual historic use of the Verde as a
20 "highway for commerce," Proponents are forced to rely upon the "susceptibility" prong of the
21 federal test. See, e.g., ASLD Brief, at 2-3; DOW Brief, at 16-21. Referring to susceptibility
22 as the "crucial question," the ASLD quotes the key language from the Supreme Court's
23 opinion in *United States v. Utah*, 283 U.S. 64 (1931), but then goes on to ignore the important
24 dictates of that language. See ASLD Brief, at 3.

25 The *United States v. Utah* Court stated:

26 . . . Utah . . . is not to be denied title to the beds of such of its rivers as were
27 navigable in fact at the time of the admission of the state **either because the**
location of the rivers and the circumstances of the exploration and

1 **settlement of the country through which they flowed made recourse to**
2 **navigation a late adventure or because commercial utilization on a large**
3 **scale awaits future demands.** The question remains one of fact as to the
4 capacity of the rivers in their ordinary condition to meet the needs of commerce
5 as they may arise in connection with the growth of the population, the
6 multiplication of activities, and the development of natural resources. And this
7 capacity may be shown by physical characteristics and experimentation as well
8 as by the uses in which the stream have been put.

7 283 U.S. at 83 (emphasis added). Thus, the ASLD is correct that susceptibility to navigation
8 is an element of the analysis, but that element becomes particularly important only if “the
9 location of the rivers and the circumstances of the exploration and settlement of the country
10 through which they flowed made recourse to navigation a late adventure or because
11 commercial utilization on a large scale awaits future demands.” *Id.* In other words, if the
12 river was not actually navigated before or at statehood because there was no need for
13 navigation at that time, the court must look to whether the river was susceptible to navigation.

14 The ASLD’s brief makes little mention of any “circumstances of the exploration and
15 settlement of” the area near the Verde that “made recourse to navigation a late adventure” or
16 any reason why “commercial utilization on a large scale await[ed] future demands.” The vast
17 majority of the evidence in the record on those two points has been submitted by the parties
18 opposing navigability, not the Proponents who bear the burden of proof on those issues.

19 At every stage of history on the Verde, there has been a need for waterborne
20 transportation if such activity had been possible. The Yavapais and Apaches traded up and
21 down the river, and navigation on the river would have been useful for them in these
22 pursuits.⁶ The Spanish explorers traveled on foot or horseback in the area of the river, and it

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26 ⁶ See Tr. at 12/15/14:118, 12/17/14:657 (Fuller), 2/20/15:1785-87 (Randall), 2/24/15:2318-19, 2328
27 (August); Fuller, et al., “Arizona Stream Navigability Study for the Verde River, Salt River
Confluence to the Sullivan Lake,” at 3-1 (June 2003) [EI 31] (“Fuller 2003”); Affidavit of Vincent E.
Randall, at 7 (February 11, 2015) [X055].

1 certainly would have been easier for them to travel if they could have done it by boat.⁷
2 Similarly, the American trappers and mountain men would have had an easier time if they
3 could have boated the river.⁸ The military groups that were present in the area went to great
4 expense to build primitive roads to traverse the area and could have done that more easily and
5 directly if the river had been navigable.⁹ The early settlers also had a significant need for
6 practical and reliable transportation near the river. *See* Burtell 2014, at 11. All of this need
7 occurred prior to significant diversions of water from the Verde, when the river was in its
8 “ordinary and natural condition.” And yet none of these groups used boats on the river.

9 The circumstances of exploration and settlement of the Verde area do not explain why
10 nobody navigated it. People were there, and they had a strong need for transportation. Thus,
11 Proponents’ reliance on the “susceptibility” prong of the test is largely misplaced. If the river
12 had been navigable in the late 1800s, people would have navigated it, and such navigation
13 would have been a significant benefit to their daily lives. People did not navigate it on any
14 regular basis. Thus, in conducting any “susceptibility” analysis, the Commission should bear
15 in mind that people had a substantial need for reliable transportation routes in the area and
16 still did not navigate the Verde.

17 **V. Modern-Day Recreational Boating on the Verde Does Not Support a Finding of**
18 **Susceptibility.**

19 Part of the legal impetus of these proceedings is the “equal footing doctrine,” which
20 provides that subsequent states enter the Union on an “equal footing” with the original
21 thirteen colonies. *See Arizona Cntr. for Law in the Public Interest v. Hassell*, 172 Ariz. 356,
22 358, 837 P.2d 158, 161 (App. 1991). The doctrine ensures that later-admitted states receive

24 ⁷ *See* Tr. at 12/15/14:120 (Fuller), 2/24/15:2336-38, 2355, 2565 (August); Fuller 2003, at 3-8; August,
25 “Declaration of Jack L. August, Jr., Ph.D. on the Navigability of the Verde River at and Prior to
Arizona Statehood, February 14, 1912,” at 5-8 (February 17, 2015) [X067] (“August 2015”).

26 ⁸ *See* Tr. at 12/15/14:121 (Fuller), 2/25/15:2375-77, 2380 (August); August 2015, at 10.

27 ⁹ *See* Burtell, “Declaration of Rich Burtell on the Non-Navigability of the Verde River at and Prior to
Statehood,” at 9 (September 2014) [X009] (“Burtell 2014”).

1 equal treatment and are not treated less favorably than the original states with regard to their
2 streambed lands simply because they entered the Union at a later date.

3 With their heavy reliance upon modern-day recreational boating to prove navigability,
4 Proponents are touting what is tantamount to an “*unequal footing doctrine*.” Proponents base
5 much of their argument on recent boating that uses improved boats, improved technology, and
6 improved techniques, such that Arizona would be treated significantly more favorably than
7 earlier states simply because Arizona entered the Union at a relatively late date and then sat
8 on its hands for many decades before addressing the navigability of its watercourses.

9 The United States Supreme Court in *PPL Montana* made it abundantly clear that post-
10 statehood use of the river can be considered only if that use involves the same types of boats
11 that existed at statehood. 132 S. Ct. at 1233. The party seeking to prove navigability must
12 show that “the watercraft are meaningfully similar to those in customary use for trade and
13 travel at the time of statehood.” *Id.* “If modern watercraft permit navigability where the
14 historical watercraft would not, . . . then the evidence of present-day use has limited or no
15 bearing on navigability at statehood.” *Id.* at 1233-34.

16 In its brief, DOW asserts that “[t]he boats used by modern boaters are meaningfully
17 similar to the boats customarily used at the time of statehood,” and “[t]he same depths are
18 needed for historical and modern boats.” DOW Brief, at 8. As support for these statements,
19 DOW cites nothing more than the testimony of Mr. Fuller, the ASLD’s expert. *Id.* (citing Tr.
20 12/15/14 p. 250:9-16 and 57:24-58:5). In the portion of page 250 of the transcript upon which
21 DOW relies, Mr. Fuller did say that those modern boats are “very similar in draft and design
22 to the historical boats.” *See* Tr. at 12/15/14:250 (Fuller). Being “similar in draft and design”
23 does not necessarily equate to “meaningfully similar” for purposes of navigation, however.
24 Factors other than “draft and design” can affect whether a boat can navigate down a particular
25 watercourse. For example, in that same paragraph on page 250 of the transcript, Mr. Fuller
26 conceded that “there’s improved durability, no doubt about that.” *Id.* Two boats that have the
27 same “draft and design” can have significantly different outcomes on a particular watercourse

1 if they have different durability, especially on a rocky river like the Verde.¹⁰ A modern boat
2 that has a similar “draft and design” as an historic boat but is more durable based upon a
3 century of technological advances is not “meaningfully similar” to that historic boat.¹¹

4 The ASLD’s brief contains more discussion of this subject but no more persuasive
5 support for its arguments. For instance, the ASLD makes the ambiguous and bizarre assertion
6 that “[t]he State has provided the only detailed testimony from two experts who agree that
7 small boats used today on the River are meaningfully similar to small boats used at
8 statehood.” ASLD Brief, at 5.¹² Although it is true, in a general sense, that two of the
9 ASLD’s witnesses were the only witnesses who testified that the modern-day recreational
10 boats are “meaningfully similar” to the boats available at statehood, that is true only because
11 (1) the other witnesses offered the contrary opinion; and (2) even as to its own witnesses, the
12 ASLD ignores the substance of their testimony. The ASLD ignores the question of durability,
13 an issue which its own witness (Mr. Fuller) agrees is an important characteristics with regard
14 to boats used on rivers like the Verde. *See* Tr. at 12/17/14:588 (Fuller).

15 With respect to Mr. Fuller, for instance, the ASLD asserts that “Mr. Fuller has not
16 changed his mind that boats used on the Verde today are meaningfully similarly to those at
17 statehood.” *See* ASLD Brief, at 12-13. Although Mr. Fuller (the ASLD’s primary advocate
18 for navigability) did make this conclusory statement during the hearing, much of the
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20 ¹⁰ DOW also cites Mr. Fuller’s testimony on pages 57-58 of that same December 15, 2014 transcript.
21 *See* DOW Brief, at 8. In that passage, Mr. Fuller stated that modern canoes “are similar to” historical
22 canoes but that the modern canoes are “more durable than they were before.” *See* Tr. at 12/15/14:57-
58 (Fuller).

23 ¹¹ Comparing historical wooden dories at the time of statehood to modern rubber rafts, Mr. Dimmock
24 testified: “Durability, I will say modern rafts take a beating for a lot longer than a wood boat, but
25 modern rafts are designed to be used over and over and over and over and over again; whereas the
26 wood boats in those days were maybe going to do one trip, because there’s nobody there in their car
to drive them back to the put-in. They would probably build another boat. So in terms of durability,
they would last a trip or two, no problem.” *See* Tr. at 3/31/15:2841 (Dimmock).

27 ¹² The ASLD does not identify those “two experts” on page 5 of its brief. Based upon the subsequent
discussion on pages 12 and 13 of that same brief, SRP assumes that such reference is to Mr. Fuller
and Mr. Dimmock.

1 remainder of his testimony conflicts with that conclusion, particularly with regard to
2 durability. Mr. Fuller acknowledged that modern boats, as compared to historical boats, have
3 “improved durability” as compared to boats available in 1912. *See* Tr. at 12/15/14:250
4 (Fuller). Mr. Fuller testified that the primary difference between a modern plastic boat and a
5 wooden boat of 1912 is that the plastic boat can take more abuse (“maybe even a lot more
6 abuse, depending on the design of the boat”). *Id.* at 12/15/14:227 (Fuller). Mr. Fuller further
7 conceded that durability “is one of the important characteristics” for boating on a river (like
8 the Verde) that has rocks and rapids. *Id.* at 12/17/14:588 (Fuller).

9 The ASLD relies upon similar conclusory statements by Mr. Dimmock. *See* ASLD
10 Brief, at 13. When one takes a closer look at Mr. Dimmock’s testimony, however, you find
11 that Mr. Dimmock stated that “modern rafts take a beating for a lot longer than a wood boat.”
12 *See* Tr. at 3/31/15:2841 (Dimmock). He testified that, in the 1970s, “[t]hey invented the
13 plastic kayak, which was more durable than the fiberglass ones and the skin ones before that,
14 and that’s sort of when I got into the kayaking.” *Id.* at 3/31/15:2822 (Dimmock). “And the
15 modern boats, you know, you can land in the rocks, you can park in the rocks, you can bounce
16 off rocks and walls. And the wood boats you can’t do those things.” *Id.* at 3/31/15:2869
17 (Dimmock). Mr. Dimmock stated that modern plastic boats are “pretty much unbreakable.
18 They’re like Tupperware.” *Id.* at 3/31/15:2888 (Dimmock). None of the boats available in
19 1912 was “like Tupperware.” In 1912, Tupperware was not even “like Tupperware.”¹³
20 Tupperware, like the modern rubber rafts and plastic canoes, did not exist in 1912. *Id.*

21 The ASLD’s reliance on the testimony by Mr. Fuller and Mr. Dimmock regarding
22 whether modern boats are “meaningful similar” to boats available in 1912 also conflicts with
23 the testimony by several of the other witnesses, especially as it relates to durability of boats.
24 In an article by Mr. Slingluff submitted in connection with the hearings leading to the

25 _____
26 ¹³ Tupperware was invented by DuPont engineer Earl Tupper in the 1940s, about the same time as the
27 first widespread use of rubber rafts at the end of World War II. *See generally* “Earl Tupper, Father of
Tupperware, Dies,” *New York Times* (October 7, 1983), www.nytimes.com/1983/10/07/obituaries/earl-tupper-the-father-of-tupperware-dies.html (visited October 27, 2015).

1 Commission's 2008 decision, for example, Mr. Slingluff wrote that "[p]lastic canoes are
2 durable, slide easily over rocks, slip quietly through the water, and do not conduct heat or
3 cold."¹⁴ Mr. Farmer, another of the ASLD's witnesses, testified in 2014 that "a plastic boat
4 will take a little more abuse than a wood boat would, certainly." See Tr. at 12/16/14:385
5 (Farmer). Mr. Farmer stated: "Again, if I know that I'm in a wood boat or a fiberglass boat,
6 I'm going to be extra, extra careful with it. If I'm in the plastic boat fully loaded, I might just
7 punch that rock." *Id.* at 12/16/14:483 (Farmer). Mr. Lynch, yet another witness offered by
8 the ASLD, testified that the inflatable kayaks ("duckies") he uses are better for bouncing off
9 rocks than wooden canoes. *Id.* at 12/16/14:314 (Lynch).

10 In addition to ignoring the vastly improved durability of modern boats that makes them
11 not "meaningfully similar" to historic boats for purposes of running a steep, rocky river like
12 the Verde, Proponents also ignore other advances in technology and boating techniques that
13 have taken place over the past century since Arizona's statehood. See SRP Brief, at 17-18.
14 The advent of internet gage data, weather radar, cell phones and satellite phones, and
15 watertight containers makes boating the Verde a much more likely and less dangerous
16 proposition than it would have been at or prior to statehood. *Id.*

17 It beyond reasonable dispute that a court, sitting in Arizona in 1912 and aware of the
18 types of boats and technology that were then available in the state, would have found the
19 Verde non-navigable. We know this because, among other things, the Arizona Territorial
20 Legislature declared in 1865 that the Colorado was the only navigable stream in the
21 Territory.¹⁵ The federal surveyors, who were in the area in the late 1800s and were
22 specifically charged with following particular procedures if a watercourse was navigable,
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25 ¹⁴ Slingluff, "Shallow Streams: Liquid Paths Into Wilderness," *The Southwestern Sportsman
National Magazine*, Winter 1990-1991, at 16 [EI 34].

26 ¹⁵ See Tr. at 2/19/15:1535 (Littlefield); Littlefield, "Revised and Updated Report: Assessment of the
27 Navigability of the Verde River At and Prior to Statehood," at 95 (April 3, 2014) [X002] ("Littlefield
2014").

1 gave no indication that the Verde was navigable.¹⁶ The federal and state land patents issued
2 before statehood and the associated patent files contain no evidence to support a finding of
3 navigability.¹⁷ The ASLD should not be heard to argue that recreational use of the river now
4 (one hundred years later and with the benefit of a century of advancements in boat building
5 and related technology) supports a finding different from that which a court would have made
6 if the matter had been litigated at or before statehood.

7
8 **VI. The County's Brief Provides Some Measure of Guidance to the Commission, but**
9 **the County Selectively Picks and Chooses among the Principles of Evidence Law**
10 **and Misconstrues Certain Elements of the Law of Navigability.**

11 Although SRP does not agree with the entirety of the arguments presented by the
12 County in its brief, the County does present some sound guidance to the Commission that, if
13 adopted, could serve the interests of all parties and the Commission. SRP takes issue,
14 however, with the County's selective reliance upon certain provisions of the case law and
15 court rules regarding the admissibility of evidence and with the County's statement of the law
16 of navigability in certain respects.

17 **A. The Commission should take care in fully documenting its decision.**

18 The County asserts that the Commission's decision should set forth the facts and law
19 that support its findings with appropriate specificity. *See* County Brief, at 2. SRP contends
20 that portions of the Court of Appeals decision in *State v. ANSAC*, 224 Ariz. 230, 229 P.3d 242
21 (App. 2010), were wrongly decided and likely will be overturned by that court or a higher
22 court on appeal, especially in view of the United States Supreme Court's subsequent decision
23 in *PPL Montana*. 132 S. Ct. at 1215. SRP acknowledges, however, that the Commission, at
24 this stage of the proceedings, is bound to follow the decision of the Arizona intermediate
25 appellate court. To the extent that *State v. ANSAC* counsels in favor of this Commission

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27 ¹⁶ *See* Tr. at 2/18/15:1474 (Littlefield); Littlefield 2014, at 7, 26, 49-51.

¹⁷ *See* Tr. at 2/19/15:1476, 1517-18 (Littlefield); Littlefield 2014, at 62, 76-78.

1 making detailed and specific findings, supported by citations to the record, in its decision,
2 SRP agrees with that proposition.

3 Having gone through the various rounds of appeal and remand in these cases, it is in all
4 parties' interests that the Commission's decision be fully and properly documented in order
5 for the appellate courts to readily determine the basis for that decision. In this round of the
6 proceedings on other watercourses, the Commission has requested and received from the
7 parties literally hundreds of pages of proposed findings and conclusions, with painstaking
8 citations to the record. SRP anticipates that similar information will be submitted to the
9 Commission on the Verde, thus reducing the possibility of another round of remand
10 proceedings, regardless of how the Commission, the superior court, and the appellate courts
11 ultimately rule on the substantive issues. Although SRP disagrees with the County's
12 contention that the Commission "needs to start over," *see* County Brief, at 4, the Commission
13 should take care to fully document whatever decision it makes.

14 **B. State v. ANSAC requires the Commission to assess the river in its "ordinary**
15 **and natural condition."**

16 SRP also agrees with the County that, for purposes of these proceedings and with the
17 understanding that *State v. ANSAC* is presently controlling Arizona precedent, the
18 Commission's decision should consider both the "ordinary" and the "natural" condition of the
19 river and should identify the evidence upon which it makes its decision regarding both of
20 those elements. *See* County Brief, at 2-3. The Commission should make it clear in its
21 decision that it has considered both the "ordinary" and "natural" elements of the analysis and
22 should cite and explain those portions of the record that support its decision on both elements.

23 **C. The segments proposed by the ASLD are reasonable and have not been**
24 **contested.**

25 SRP further agrees with the County that the various segments proposed by the ASLD
26 are proper under *PPL Montana*. Substantial disagreement exists among the parties as to
27 whether particular segments are navigable, but SRP is aware of no evidence in the record to

1 support a determination that the Verde should be segmented in some other manner. Although
2 SRP submits that segmentation is not particularly helpful in this instance because none of the
3 segments is navigable, no significant disagreement exists regarding whether the various
4 segments presented by the ASLD have hydrologic, geomorphic, and other characteristics that
5 are distinguishable from one another.

6 **D. The County misstates the applicability and requirements of the law and**
7 **rules of evidence.**

8 SRP parts ways with the County, however, with regard to the County's discussion of
9 the federal rules and law of evidence. *See* County Brief, at 4-11. SRP disagrees with the
10 County's discussion of the evidentiary issues, for several reasons.

11 First, the Commission's governing statute expressly provides that "[t]he commission
12 shall conduct its proceedings informally without adherence to judicial rules of procedure or
13 evidence." A.R.S. § 37-1122(A)(3). The informal nature of these proceedings as dictated by
14 the Arizona Legislature is further shown by the requirement that "[t]he Commission shall
15 facilitate participation by persons who are not represented by legal counsel and shall not
16 require a person to file documents or notices in order to be heard and participate in
17 proceedings before the commission." *Id.* No party has challenged the application of those
18 statutory provisions. To allow liberal participation by persons not represented by counsel but
19 to then (after the hearing is completed, as the County now suggests) require strict compliance
20 with inapplicable rules for expert witnesses would violate the fundamental requirements of
21 fairness and due process.

22 Second, **even if** the court evidentiary rules applied, the County ignores the provision of
23 those rules specifically allowing experts to rely upon facts or data that are not within his or
24 her personal knowledge and are not themselves otherwise admissible. For instance, Federal
25 Rule 703 provides:

26 An expert may base an expert opinion on fact or data in the case **that the expert**
27 **has been made aware of** or personally observed. **If the experts in the**

1 **particular field would reasonably rely on those kinds of facts or data in**
2 **forming an opinion on the subject, they need not be admissible for the**
3 **opinion to be admitted.** But if the facts or data would otherwise be
4 inadmissible, the proponent of the opinion may disclose them to the jury only if
5 their probative value in helping the jury evaluate the opinion substantially
6 outweighs their prejudicial effect.

7 Fed. R. Evid. 703 (emphasis added); *see also* Ariz. R. Evid. 703. The County has made no
8 showing that any of the expert testimony of which it now complains was based upon
9 information that was not of the type on which “experts in the particular field would
10 reasonably rely.”

11 Third, if the rules of evidence were to be applied in this proceeding, the Commission
12 could rule, without further deliberation, that the Verde is non-navigable. The vast majority of
13 the evidence submitted by the Proponents of navigability, who bear the burden of proof, has
14 been based upon speculation, conjecture, and documents that would not withstand scrutiny
15 under the normal evidentiary rules. The County’s argument, if taken to its illogical extreme,
16 proves too much and would eviscerate the entirety of Proponents’ own case.

17 Fourth, especially based upon the nature of these proceedings, the County’s arguments
18 regarding the expert testimony properly go to the weight of such evidence and not its
19 admissibility. The underlying statute requires the Commissioners to be “well-informed on
20 issues relating to rivers and streams in this state.” A.R.S. § 37-1121(A). Thus, the
21 Commissioners are inherently unlike the lay members of a jury that the court evidentiary rules
22 are intended to protect. The appellate court’s decision in *Defenders of Wildlife v. Hull*, 199
23 Ariz. 411, 18 P.2d 722 (App. 2001) (“*Hull*”), upon which the County so often otherwise
24 relies, requires that “all evidence should be examined during navigability determinations and
25 no relevant facts should be excluded.” *Id.* at 425, 18 P.2d at 736. The Commissioners can
26 consider the evidence and its basis and make a determination as to what weight to give it.
27 *Post-hoc* application of the County’s formalistic evidentiary arguments is neither necessary
nor prudent in this instance.

1 **E. The County misconstrues the law of navigability.**

2 In the last section of its brief, the County refers to “[s]ome areas of confusion in the
3 navigability testimony.” *See* County Brief, at 11. Any “confusion,” to the extent it exists, is
4 only on the part of the County with regard to the applicable law and the evidence in the
5 record.

6 For instance, the County first quotes (without appropriate citation) a portion of the
7 opinion in the *Hull* case relating to evidence of the presence of roads in the area. *See* County
8 Brief, at 12. The County asserts that the Commission will commit “clear error” if it considers
9 evidence of non-boat transportation. *Id.* Even the language from *Hull* that the County
10 purportedly quotes, however, relates only to whether such evidence is “highly probative.” *Id.*
11 To say that a particular piece of evidence is not “highly probative” is far different from
12 considering that evidence, along with all the other evidence submitted, to make a
13 determination of navigability. The presence of roads in the area, if nothing else, is relevant to
14 the question of susceptibility to navigation and whether a need for transportation existed in
15 the area. *See United States v. Utah*, 283 U.S. 64, 83 (1931) (if a watercourse was not
16 navigated because no need for transportation existed, the court must determine whether it was
17 susceptible to navigation); *see also* Section IV, *supra*. The Commission will not commit
18 “clear error” if it considers such evidence in the context of the record showing that actual
19 navigation did not occur on the Verde under “ordinary and natural conditions” prior to
20 statehood.

21 The County also makes the conclusory statement that any testimony by Mr. Burtell or
22 Dr. Mussetter on the “boatability” of the Verde “should simply be ignored by the
23 Commission.” *See* County Brief, at 13. The entire discussion in that portion of the County’s
24 brief (Section III(B)), however, relates to Mr. Burtell, not Dr. Mussetter. The County does
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26
27

1 not even bother to submit any evidence or argument regarding why the Commissioner should
2 “ignore” Dr. Mussetter’s testimony.¹⁸

3 The County asserts that “inferences of navigability from actions of surveyors are of
4 little significance” County Brief, at 14 (citing *Oklahoma v. Texas*, 258 U.S. 574, 585
5 (1922)). The County’s argument ignores the much more recent and specific discussion of the
6 importance of such survey evidence, however, in which the Eleventh Circuit Court of Appeals
7 found: “While the surveyors’ opinions as shown by their action and reports are not
8 determinative on the issue of navigability, their actions and opinions are probative and
9 support the position that the watercourses were not navigable.” *Lykes Bros., Inc. v. United*
10 *States Army Corps of Engineers*, 64 F.3d 630 (11th Cir. 1995). This view of the survey
11 evidence, which the Commission adopted in its 2008 decision,¹⁹ is consistent with the existing
12 law of navigability.

13 Similarly, the County ignores the recent (and repeated) pronouncements by the United
14 States Supreme Court in *PPL Montana* regarding the “commerce” requirement of the federal
15 test for navigability. See County Brief, at 14. The County contends that *PPL Montana* stated
16 that “the question is whether the waters in question can be navigated,” *id.*, but *PPL Montana*
17 said much more than that. The Court in that case expressly rejected the “liberal”
18 interpretation of the test (similar to what the County advocates here) and found that “segments
19 that are nonnavigable at the time of statehood are those over which commerce could not then
20 occur.” 132 S. Ct. at 1230. “Navigability must be assessed as of the time of statehood, and it
21 concerns the river’s usefulness for ‘trade and travel,’ rather than for other purposes.” *Id.* at
22 1233. “While the Montana court was correct that a river need not be susceptible of navigation
23 at every point during the year, neither can that susceptibility be so brief that it is not a
24

25 ¹⁸ SRP also disagrees with the County’s arguments with regard to Mr. Burtell on that point but defers
26 to Freeport (the party offering Mr. Burtell) for a more substantive response on that issue.

27 ¹⁹ See ANSAC, *Report, Findings and Determination Regarding the Navigability of the Verde River
from Its Headwaters to the Confluence with the Salt River*, at 32 (March 24, 2008) (“2008 Decision”).

1 commercial reality.” *Id.* at 1234. The evidence in the record shows that the Verde does not
2 satisfy the federal test of navigability, as articulated by the Supreme Court in *PPL Montana*.

3 The County’s brief, while generally providing some helpful guidance to the
4 Commission with respect to the benefits of fully documenting its upcoming decision,
5 continues to misapply the law relating to the evidence and the applicable legal standard.

6 **VII. Summary and Requested Action**

7 In order to show that the Verde is or was navigable, Proponents were required to
8 prove, by a preponderance of the evidence, that the Verde (1) actually was used as a “highway
9 for commerce” or (2) was susceptible of such use. Proponents have not carried that burden.
10 The Commission was right in 2008. Even after sixteen more hearing days and thousands of
11 pages of more evidence, the record still does not support a finding that the Verde is or ever
12 was navigable. The Commission should find the Verde non-navigable.

13 DATED 9th day of November, 2015.

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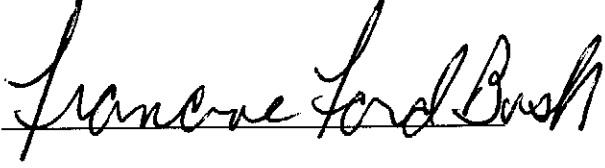
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