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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In the Matter of the Navigability of)	Case Nos. 03-005 and 04-008 NAV
the Salt River from the Confluence of the)	(Consolidated Salt)
White and Black Rivers to the Gila River)	
Confluence, Maricopa County, Arizona)	Response Memorandum regarding the
)	Navigability of the Salt River

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

I. Burden of Proof and Commission’s Obligation to be Impartial and Objective In Evaluating the Evidence.

In their post-hearing Opening Memoranda, all of the navigability opponents rely heavily upon the fact that navigability proponents have the burden of proof and baldly assert that navigability proponents have failed to meet their burden to prove that the Salt River is navigable. *See, e.g.* Salt River Project’s Opening Memorandum (“SRP Op. Mem.”) at 26; Freeport Minerals Corporation’s Opening Post-Hearing Memorandum Concerning the Non-Navigability of the Salt River (“FMC Op. Mem.”) at 1; Salt River Pima-Maricopa Indian Community’s Brief Opposing

Navigability (“SRPMIC Brief”) at 11. Their assertions are not only belied by the overwhelming amount of evidence introduced by the State, but also imply a burden more stringent than the one imposed by the case law. As the Arizona Court of Appeals observed in *Winkleman*, the preponderance of the evidence standard “essentially allocates the risk of error equally between the parties involved.” *Winkleman v. ANSAC*, 249 Ariz. 230, 239 ¶18, 229 P. 3d 242, 251(2010) (quoting *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, 110 P.3d 1013, 1018 (2005)). Moreover, as the *Winkleman* court made clear, “ANSAC may not begin its determination with any presumption against navigability. Instead, ANSAC’s approach and analysis must be wholly impartial and objective, while utilizing the proper legal test.” *Id.* (citing A.R.S. § 37-1121(B) (requiring that members of ANSAC be unbiased and not have interests affected by the Commission’s determination)).

Furthermore, while it is true that “all evidence should be examined during navigability determinations,” SRP Opening Brief at 24 (quoting *Defenders of Wildlife*, 199 Ariz. at 425, 18 P.2d at 736), *Winkleman* also directs that “[e]vidence from that early period [1860s] should be considered by ANSAC as the best evidence of the River’s natural condition.” 224 Ariz. at 242, 229 P. 3d at 254. As discussed in detail below, when *all* of the evidence is considered *in its totality*, it compels the conclusion that it is *more probable than not* that segments 2 through 6 of the Salt River, in their ordinary and natural condition, were navigable at the time of statehood.

II. *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 Op. Mem. at 26. 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.* 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 its 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 27. 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 *Winkleman*, 224 Ariz. at 241, 229 P.3d at 253 (“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 its 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 Op. Mem. at p. 26-27) 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 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. SRP Op. Mem. at p. 27. In fact, SRP misstates the law. *PPL Montana* did not state that “post-statehood use of the river can be considered only if that use involves the same river conditions and the same types of boats that existed at statehood.” *Id.* (emphasis added). *PPL Montana* states only that watercraft must be “meaningfully similar to those in customary use for trade and travel at the time of statehood” and that “the river’s post-

statehood condition is not materially different from its physical condition at statehood.” 132 S. Ct. at 1233 (emphasis added). 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 law¹, 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”).

PPL Montana, 132 S. Ct. at 1233.² The U.S. Supreme Court’s decision to reverse was, in part, because the Montana court did not make a finding that watercraft used today were similar to those used at the time of statehood and no evidence to that effect had been presented by the State of Montana. *Id.* Where such evidence is presented, it is entirely appropriate to consider modern day usage of the river. *See, e.g. Hardy v. State Land Board*, 274 Ore. App. 262 (2015)(“[T]he board’s analysis of the physical conditions of the river, as well as its comparative assessment of watercraft in use at statehood and today satisfies the requirements of *PPL Montana* and permits

¹ GRIC’s argument that the *PPL Montana* case somehow overruled *U.S. v. Utah* or narrowed its holding is without legal or factual basis. Had the Court intended to overrule the earlier authorities it cited, it would have said so. It did not. It is a long-established rule that the Supreme Court does not overrule by implication. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997)

² Likewise, the statement in SRPMIC’s Brief that “[t]he U.S. Supreme Court’s recent decision in *PPL Montana* reaffirms that the determination of navigability is to be assessed at the time of statehood and that evidence of modern recreational boating is not sufficient evidence to meet the burden of proof in establishing navigability,” is absolutely false. SRPMIC Brief at 21 (emphasis added). The Court held no such thing.

the conclusion that the upper portion of the river was capable--at statehood--of sustaining travel and trade by means of dugout canoes.”).

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. Therefore, nothing in *PPL Montana* altered the existing law with regard to relying upon modern use of a river to establish navigability.

The fifth “clarification” cited by SRP is a single phrase, with virtually no explanation or discussion by the Court, about seasonal flows. SRP Op. Mem. at 27. 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).

It is also incorrect as a matter of law for SRP to state that the U.S. Supreme Court in *PPL Montana* “rejected the ‘liberal’ interpretation of the federal test of navigability....” SRP Op. Mem. at 26. Nowhere in the opinion does the Court “reject a liberal interpretation,” and in fact, the Court expressly avoids doing so by not addressing Petitioner PPL Montana’s third contention about why the Montana Supreme Court’s decision is flawed—that contention being the “liberal construction of the navigability test.” Petitioner’s contentions were as follows:

PPL contends the opinion of the Montana Supreme Court is flawed in three respects: first, the court’s failure to consider with care the navigability of the particular river segments to which title is disputed, and its disregard of the necessary overland portage around some of those segments; second, its misplaced reliance upon evidence of present-day, recreational use; and third, what the state court itself called its liberal construction of the navigability test, which did not place the burden of proof upon the State to show navigability. Brief for Petitioner 26.

PPL Montana, 132 S. Ct. at 1226. The Supreme Court addressed the first two specific contentions in Parts A and B of Section IV of its opinion, respectively, and then had the following to say about Petitioner’s third contention: “The above analysis is sufficient to require reversal of the grant of summary judgment to Montana. Therefore, the Court declines to decide whether the Montana Supreme Court erred as to the burden of proof regarding navigability.” *Id.* at 1234. Thus, the issue was never reached.

In sum, each of the items enumerated by SRP as examples of where the *PPL Montana* Court was ostensibly “clarifying” existing law have been recognized by the Arizona courts as part of the body of law since the issue of title to the streambeds first arose in the mid-1980s.

SRP and the other navigability opponents' attempts to make *PPL Montana* into some sort of groundbreaking "game changer" is nothing more than mere wishful thinking.

III. Because the Salt 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 Salt River was susceptible to navigation then people would have navigated it. See, e.g. SRP Op. Mem. at 29; SRPMIC Brief at 12. Of course, when proponents then respond with evidence of actual navigation before statehood, shortly after statehood, and even during modern times, suddenly the opponents claim that none of these examples of 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. Yet, as these proceedings have dragged on over the years, more and more incidents of historical navigation have come to light and the record regarding modern usage has become more fully developed. And 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. However, when all of the evidence is considered *in its totality*, the conclusion that the Salt River, had it been in its ordinary and natural condition on February 14, 1912, would have been susceptible to being used as a highway for commerce is inescapable.

A. Historical Navigation

Despite the increasing amount of evidence that early Arizona residents successfully navigated the Salt River before and shortly after statehood, it is no surprise that once again we are hearing from navigability opponents that historic accounts of boating on the Salt 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. Cemex Cement, Inc.'s Opening Memorandum ("Cemex Op. Mem.") at 3-4, 19; SRP Op. Mem. at 23; FMC Op. Mem. at p. 11-14; San Carlos Apache Tribe's Closing Brief ("SCAT's Closing Brief") at 11; SRPMIC Closing Brief at 11-12, 23. 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 Op. Mem. at 28, 30-33; Cemex Op. Mem. at 11. Boat travel is discounted if it occurred during "high water." FMC Op. Mem. at p. 11. The use of boats to cross the river rather than travel upstream or downstream is dismissed. SRP Op. Mem. at 5. The use of other modes of transportation are cited as evidence that the river was non-navigable. SRP Op. Mem. at 9, FMC Op. Mem. at p. 12-13.

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 and most are actually inconsistent with it. 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. However, to eliminate any doubt each of these “objections” once again raised by navigability opponents is addressed below.

1. There is no requirement that every excursion be “successful” to demonstrate navigability.

The idea that a historical account of navigation on the Salt River is only probative of the river’s susceptibility to use as highway of commerce if the excursion was “successful” is not a requirement imposed by law, but is the brainchild of navigability opponents. In their effort to discredit evidence of actual historical navigation, the navigability opponents have seized on the argument that navigation of the river can only prove navigability if the boat trip is completely without difficulty and satisfies their, as yet, unarticulated definition of “success.” Notably, this

concept of “success” was first introduced by navigability opponents in their cross-examination of the State’s expert Jon Fuller in the previous ANSAC proceedings; however, when, on remand, and in response to the previous cross-examination, Mr. Fuller affirmatively addressed the issue in his presentation of evidence regarding historical accounts—demonstrating that with few exceptions the boating excursions reported in the news were “successful,”—navigability opponents then shifted their objection to what they claimed was his “low standard” of success, even in some proceedings referring to it as the Fuller “nobody died” standard. *See, e.g.* Verde River – SRP Closing Brief at 25.

Of course, this is nothing more than an attempt at misdirection. The fact that early boaters encountered occasional difficulties when boating the Salt River does not obviate the fact that they did, in fact, navigate the river. The law is well-established that in order to be found navigable a river need not be free of obstructions or difficulty. “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. *See also*, *Holt State Bank*, 270 U.S. 49, 56 (1926)(Navigability does not depend on an absence of occasional difficulties in navigation); *U. S. v. Utah*, 283 U.S. 64, 84, 86 (1931)(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”); *Oregon v. Riverfront Protective Ass’n*, 672 F.2d 792, 795 (9th Cir. 1982)(A river’s use “need not be without difficulty, extensive, or long and continuous” for the river to be a

highway for commerce)(holding portion of the McKenzie River navigable when used to transport “thousands of logs,” even though shallow areas and sand bars made the transport difficult).

The fact is, as Mr. Fuller testified, despite the increasing diversions of and depletions to the river’s flow, people boated and continued to boat the Salt River both before statehood and after. These reported accounts of boating the river clearly provide compelling evidence that at the time of statehood, had the river been in its natural condition, it would have been even more navigable.

2. Navigability proponents do not have to demonstrate that there was sustained commercial use—or *any* commercial use—of the Salt River to prove navigability.

Here again, navigability opponents latch onto and promote an argument that has been repeatedly rejected by the courts. They suggest that the only way navigability proponents can prove navigability is by producing evidence that the river was extensively used for commercial purposes at the time of statehood or prior. The law, however, is very clear that no such showing is required.

The most authoritative case on the commerce requirement in title cases is the United States Supreme Court case of *U. S. v. Utah*, 283 U.S. 64 (1931). That case was a quiet title action brought by the United States to quiet title to riverbed lands in Utah under portions of the Colorado River and its tributaries the San Juan, Green and Grand Rivers. It was undisputed that the portions of the rivers under consideration were not “navigable waters of the United States,” that is, they were not navigable in interstate or foreign commerce. *Id.* at 75. In arguing that the rivers were non-navigable for title purposes, the federal government made virtually the same arguments asserted by navigability opponents in this case:

No lake or stream has been declared navigable by this Court unless it appeared from the evidence that the stream or lake had actually supported a substantial waterborne commerce. The outstanding thought in all of these cases was the use of the stream or lake as a highway of commerce.

In all such cases before this Court there was evidence of varying degrees of actual operation of boats both privately and for profit. This Court has never held that the mere operation of small boats, although commercially in some cases, was sufficient evidence to constitute a river a highway of commerce.

The words ‘commerce’ and ‘useful commerce,’ as used in cases where navigability was the issue, must be interpreted as meaning the exchange and transportation of goods and a use of travel by the general public for commercial purposes. Personal use without the commercial element does not satisfy the test. The test can only be met by showing navigation of such proportions that the river may be truly said to be a highway of commerce.

On the rivers in question the uses have been more of a private nature than of a public commercial one.

Cases decided by this Court, holding rivers to be navigable, may be summarized with the statement that in no case has a river been held navigable where commercial navigation by the public upon a substantial scale was not shown.

On the other hand, no decision suggests or intimates that proof of navigability may rest upon evidence that the river was used for floatage for noncommercial purposes, or for pleasure boats, or by a limited use of small boats commercially or semi-commercially. In every one of the cases where the courts have held the streams or lakes to be non-navigable there has been proof of noncommercial navigation, and in many of them proof of a limited commercial navigation.

The evidence amply establishes that the commercial experiments upon the river have resulted in failure and abandonment. Commerce in boats can hardly be said to be “practical,” “useful,” or of “any service,” unless attended with some degree of profit. A river can not become a “highway of commerce,” unless those who operate boats can accomplish trips with sufficient profit to themselves to warrant continuance; and this is especially true when the rivers possess characteristics which will in the future interfere with river traffic as much as they have in the past.

Summary of Brief of United States, 1931 U.S. LEXIS 850.

The Supreme Court, however, rejected all of the federal government’s arguments, declaring that “[t]he question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question.” *Id.* at 82. Quoting from *The Montello*, the Court reiterated that in title cases, actual or extensive commerce was not

required, rather “the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.” *Id.* (quoting *The Montello*, 20 Wall. 430 (1874)).

This same principle has been repeated time and time again in subsequent cases. *See, e.g. Utah v. United States*, 403 U.S. 9, 11, 29 L. Ed. 2d 279, 91 S. Ct. 1775 (1971)(held it is not essential that the river be used for the transportation of water-borne freight by a carrier whose purpose is to make money from the transportation); *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404 (9th Cir. 1989)(held that guiding and sightseeing on the river was "conclusive evidence" of the river's susceptibility to commercial use at statehood). As the Oregon Court of Appeals explained in *Northwest Steelheaders Ass'n v. Simantel* 112 P.3d 383, 389 (Ore. 2005):

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., quoting *Utah v. U.S.*, 403 U.S. at 11. 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.

Indeed, the law is so well-established on this point, just a few weeks ago, on May 3, 2016, the district court for the District of Alaska found that that the Bureau of Land Management’s (BLM) argument that non-commercial use could not be used to establish navigability was so frivolous as to support an award of attorneys’ fees. *Alaska v. United States*, Case No. 3:12-cv-00114-SLG, 2016 U. S. Dist. LEXIS 58880 (May 3, 2016). Specifically, the

district court identified the following arguments (among others made by BLM)³ as being contrary to well-established law:

- "[P]ersonal use is not evidence of navigability in fact or of susceptibility for commercial use. The United States does not dispute that riverboats, launches, scows, airboats, and canoes were available in the area at the time of statehood, but disputes that they were used for commercial purposes. Their use was primarily for personal subsistence activities, such as hunting and fishing, rather than for commercial use."
- "Q: Would it be commercial use if you're just transporting travelers and they don't have any goods? A. Not under the definition that I'm using. Q: What definition are you using? A: Freightng."

Id. at *22. Although counsel for the United States attempted to claim that it was only arguing that private use could not be considered because jet boats and modern inflatable boats were not available at the time of statehood, the court disagreed observing that:

[T]he statements of the United States and its counsel, laid out above, demonstrate that counsel was more clearly asserting that only "freighting" or commercial use could be considered as a matter of law. This position is at odds with both Ninth Circuit and United States Supreme Court precedent, which expressly directs consideration of non-commercial use in determining navigability. The Court finds that counsel's refusal to follow binding precedent that private use may be relevant and its position that Ninth Circuit precedent did not bind it unless expressly "adopted" by BLM was frivolous. And the Court finds that these frivolous arguments were at least recklessly, if not knowingly, raised.

Id. at *22-23.

The navigability opponents make the same frivolous argument in this case and, like the district court in Alaska, this Commission should reject it. Indeed, the testimony of their expert witness on historical boats, Dr. Mark Newell, adopted a ridiculously narrow view of "commercial use" that was conveniently divorced from any case law. Tr. 3/31/16 at 4319:3-6. According to Dr. Newell, in order for him to consider an actual use of the Salt River to be "commercial," the excursion had to include a large cargo load (at least 15 tons), it had to include

³ BLM had also argued, erroneously, that it was not bound by the Ninth Circuit's decision in *Ahtna*.

upstream and downstream travel for a significant distance and had to have occurred perennially over a multi-year period. Tr. 3/31/16 at 4266:3-5; 4319:1-14; 4372:4-8. No U.S. court has ever adopted such a restrictive definition! However, even if “commercial” use were so constrained, it wouldn’t matter. That’s because the law is clear—in order to prove navigability, the navigability proponents need only demonstrate that the river was *susceptible* to use as a highway for commerce, and they can establish that susceptibility through recreational and non-commercial use of the river.

3. Navigation by small boats, even for travel alone, is evidence of navigability.

Qualifying actual use is not limited to large scale vessels because both the U.S. Supreme Court and the Ninth Circuit Court of Appeals have recognized the importance of small boats like canoes as valuable transports of people and goods. *See The Montello*, 20 Wall. at 441 (finding fur trade which utilized canoes evidence of a navigation on a channel for useful commerce); *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 117 (1921) (finding actual use where Desplaines river was used by the kinds of craft common to early fur-trading days, including canoes); *United States v. Appalachian Electric Power*, 311 U.S. 377, 416 (1940)(holding that lack of commercial traffic does not preclude “a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.” (citing *United States v. Utah*, 283 U.S. 64, 82, (1931)); *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1403 (9th Cir. 1989) (finding lower Gulkana navigable where actual use at statehood was by hunters and fishermen using 16 to 24 ft. boats); *see also Nw. Steelheaders Ass 'n, Inc. v. Simantel*, 112 P 3d 383, 389-90 (2005) (finding John Day river navigable and stating “qualifying travel and trade is not limited to large-scale commercial or multiple passenger vessels of the sort typically engaged in modern commerce”

because “courts have recognized the relevance of the historic role of small boats to transport goods in volumes that might seem insignificant by modern standards.”).

In this regard, the testimony and opinion offered by navigability opponents’ boating expert, that use of the river by canoes and other small boats should be discounted as not sufficiently “commercial” or probative (Tr. 3/31/16 at 4264:19-21; 426:8-13) is completely contrary to well-established law. The fact that the historical accounts of navigating the Salt River generally involved excursions on relatively smaller boats does not in any way discredit the probative value of those accounts for establishing navigability.

Similarly, the fact that in some instances small boats were used solely to transport people does not negate the significance of the navigation. Arizona’s statute specifically defines “highway for commerce” as “a corridor or conduit within which the exchange of goods, commodities or property *or the transportation of persons may be conducted.*” Ariz. Rev. Stat. §37-1101(3)(emphasis added). Thus, the statutory definition of “highway for commerce” does not require the transport of goods; the transportation of persons alone is sufficient to establish a “highway for commerce.” *See also United States v. Hill*, 248 U.S. 420, 423 (1919) (“commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities”) *citing Gibbons v. Ogden*, 9 Wheat 1, 188 (1824); *State of New York v. Federal Energy Regulatory Comm. and Niagara Mohawk Power Corp.*, 954 F. 2d 56, 60 (2nd Cir. 1992)(observing that Niagara Mohawk’s “belittling evidence of ‘mere boating and rafting,’ also demonstrates a misunderstanding of well-settled law.”) In short, any effort to discount historical accounts that only involved the transport of people are contrary to law and should be rejected by the Commission.

4. Historical accounts that occurred during periods of high water (not flood) are evidence that the river was navigable in its ordinary condition.

Another strategy employed by navigability opponents for discrediting historical accounts of actual navigation is to claim that because some of the accounts occurred during periods of high water, they are not proof of navigability. This argument, however, fails to distinguish between periods of flood (which navigability proponents acknowledge do not represent the “ordinary condition” of the river) with the predictable seasons of high flow (which do). This attempt to portray the Salt River as a river that is only capable of being navigated during a portion of the year is contrary to the facts in evidence. However, even if it were true, it would not defeat navigability. Again, the law is well-established. The fact that a watercourse is not capable of navigation year round is not a bar to a finding of navigability. In *United States v. Utah*, the Supreme Court provided guidance for evaluating whether periodic conditions of navigation-impairing low flow are extensive enough to constitute the “ordinary condition” of a river and, thus, bar a finding of navigability. In comparing the facts before it to cases in which rivers were found nonnavigable, the Court stated,

In each of the cases to which the government refers, it was found that the use of the stream for purposes of transportation was exceptional, being practicable only in times of temporary high waters. In the present instance[,] * * * * [the river’s] susceptibility of use as a highway for commerce was not confined to exceptional conditions or short periods of temporary high water, *but that during at least nine months of each year the river ordinarily was susceptible to such use.*

283 U.S. at 87 (emphasis added). *See also, Econ. Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921)(“Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; *nor need the navigation be open at all seasons of the year, or at all stages of the water.*”)(emphasis added). As the evidence clearly established, Segments 2 through 6 of the Salt River, in their ordinary and natural condition, are

navigable by canoes 90% of the time. Thus, the navigability opponents' assertions regarding "temporary high waters" are contrary to the evidence.

5. Use of the Salt River by ferries provides evidence of navigability.

The contention by navigability opponents that the operation of ferries across the river is not evidence of navigability is illogical and not supported by the law. Many courts have explicitly relied on ferry travel across a watercourse as evidence of navigability. See *Trahan v. Teleflex, Inc.* 2006 La. App. LEXIS 154 (Feb. 1, 2006)(In holding that the bayou was navigable, the court considered among other things, the fact that a ferry operated on the bayou until 1924 when the first bridge was built.); *Northwest Steelheaders Ass'n* 112 P.3d at 392 (In holding that the river was navigable at the time of statehood, the court cited the fact that the Twickenham Ferry had operated along one of the reaches at issue); see also *United States v. Appalachian Electric Power*, 311 U.S. 377, 413 n. 46 (1940)("At different times before 1935 ferries crossed the river at no less than ten points along the Rad-ford-Wiley's Falls stretch. In 1935 there were five such public ferries."); and *City of Centralia v. FERC*, 851 F. 2d 278 (9th Cir. 1988) (holding that a portion of the Nisqually River in Washington (a section called the "Mudflats") was navigable based on evidence that it was accessible by boat at mid- to high-tides, that small ferries were used to carry passengers across the river, and that at times logs were floated on this section).

Clearly, the fact that early settlers regularly used ferries to float across the Salt River suggests that the river was susceptible to navigation for trade or travel. The fact that the ferries were used to cross the river, rather than to travel up or down stream is irrelevant. See *Utah*, 403 U.S. at 11 (hauling of livestock back and forth across lake sufficient evidence to establish navigability); see also *Hardy v. State Land Board*, 274 Ore. App. at 281 n. 18 (" [W]e need not

address the parties' arguments with respect to evidence of post-statehood ferry use, except to note that *such usage would not, in any event, defeat a finding of navigability based on the other evidence.*”(emphasis added). To any objective fact-finder, the numerous ferries that crossed the Salt River demonstrate that there was sufficient water in the river to allow travel by boat.

6. The fact that other modes of transportation were in use at the time of statehood is irrelevant to the issue of whether the Salt River was navigable in its ordinary and natural condition.

For decades navigability opponents have argued that the fact that settlers used other modes of transportation is proof that the Salt River was not navigable. In *Defenders*, the court of appeals admonished that to use non-boat transportation in proximity to the watercourse as a presumption of non-navigability or to find overland transportation highly probative on the issue was contrary to the federal test. 199 Ariz. at 735-6, 18 P. 3d at 424-5. As with other arguments rejected by the Arizona Court of Appeals in *Defenders*, that hasn't stopped navigability opponents from continuing to assert it. The Commission, however, should heed the court and not be led astray by navigability opponents.

B. Modern Navigation of the Salt River

Navigability opponents also assert, despite overwhelming evidence to the contrary, that the boats used to navigate the Salt River in modern times by thousands of Arizonans are not “meaningfully similar” to the type of watercraft commonly used in 1912. See, e.g. FMC Op. Mem. at p. 25 (“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 historical boats available and used on the Salt River around the time of statehood and the modern boats navigating the river today. EIN C018; 149 (“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. 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 018, pt. 213, (“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 (FMC Op. Mem. at 23) is refuted by actual historic accounts. Moreover, as discussed below in the context of the Special Master Report, recreational uses also represent a commercial use of the river. See also Adams & Winterton, *Navigability In Oregon: Between a River Rock and a Hard Place* 41 Willamette L. Rev. 615 n.99 (2005) (“In 1909 Cary Thompson conducted a guided float trip ... down the [McKenzie] River with a tourist. Within a few years, the guiding business became a strong draw to a growing tourist industry along the [McKenzie] river, an industry that expanded to include lodges, stores, restaurants, boat builders, and shuttle drivers.”)(quoting Dan Alsup, *Driftboats: A Complete Guide* (2000) at 18).

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 have, for the first time in these ANSAC proceedings, retained an expert witness who they claim is an expert on historical boats. This expert, however, has no previous experience with Arizona rivers (Tr. 3/30/16 at 4180:1-11); he has never boated the Salt River (*Id.* at 4186:20-4187:19); he has only observed the river once in February 2016 when it was a 10 cfs (Tr. 4279:20-4280:16); he has never observed any of the thousands of boaters who currently boat the Salt River (*Id.* at 4232:8-14; Tr. 3/31/16 at 4336:13-20); and he did not even attempt to interview or speak with anyone who had boated the river (Tr. 3/31/16 at 4336:13-17). In forming his opinion that the boats used by modern boaters on the Salt

River are not “meaningfully similar” Dr. Newell did not compare weights of modern boats to historical boats; he assumed that all modern boats were lighter than historical boats and based on that assumption, simply assumed that modern boats have a shallower draft than historical boats. He did not compare the construction, design or materials of modern boats with historical boats. Instead, he based his conclusion that modern boats are “not meaningfully similar” on whether the a boat currently used on the river existed at the time of statehood. And even those boats, like canoes, which did exist at the time of statehood, he dismissed from consideration as “not a commercially viable enterprise.” (Tr. 3/31/16 at 4347:6- 4349:24). The Commission should give such an uninformed opinion no weight—particularly in light of the contradictory evidence both presented by Mr. Fuller, and Mr. Dimock.

In sum, despite navigability opponents’ unsupported claims to the contrary, modern boating on the Salt River occurs in boats that are meaningfully similar to those that were customarily available and used at the time of statehood, and, therefore, provide compelling evidence that Segments 2 through 6 are navigable in their ordinary and natural condition.

IV. The Cases Cited by the Navigability Opponents as Support for their Arguments are Inapposite to the Salt River and Actually Support a Finding of Navigability in this Case.

The navigability opponents frequently state 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. FMC Op. Mem. at 3-4; SRP Op. Mem. at 21, 29 ; SCAT Brief at 5-8. 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 FMC Op. Mem. at 4 citing *PPL Montana*, 132 S. Ct. at 1234. These statements, while true, have no application to the Salt River. Moreover, the authorities, cited by navigability opponents are readily distinguishable from the Salt River.

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 be sent 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 Segments 2 and 3 of the Salt River non-navigable, the significance of that finding is extremely limited and not applicable to the facts regarding the Salt 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 Salt 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 Salt River as a highway for commerce both to move goods, and to hunt and trap. The evidence of modern use also demonstrates that navigating the Salt River, particularly the Upper Salt, 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 2 through 5 are navigable by canoe 90% of the time or 330 days of the year and segments 2 through 4 are navigable by flatboats 50% of the time (180 days of the year). Segment 5 is navigable by flatboats 70% of the time (260 days of the year), and Segment 6 is navigable by canoes 95% of the time (350 days of the year) and is navigable by flatboats

85% of the time (310 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 segments 2 through 6 of the Salt 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 Salt River 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,” FMC Op. Mem. at 25, 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 Salt River offers the same commercial opportunities today. More Arizona citizens are boating the Salt 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 Salt 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.

As the foregoing discussion demonstrates, well-established case law, even the cases repeatedly cited and relied upon by navigability opponents, support a finding that at the time of statehood, segments 2 through 6 of the Salt River, in their ordinary and natural condition, were navigable.

V. Navigability Opponents’ Claims about Obstructions in the Salt River are Not Supported by the Facts and their Legal Conclusions Regarding their Impact on Navigability are Contrary to the Law.

The arguments by navigability opponents that sandbars, rapids and braiding in the Salt River render it non-navigable are without any factual or legal support. First, it is important to note all but one of the expert witnesses testifying on behalf of the navigability opponents have never boated or even attempted to boat the Salt River, and that includes their so-called boating expert, Dr. Newell. Dr. Mussetter, the only expert testifying on behalf of the navigability

opponents who has actually boated any reach of the Salt River, boated portions of segments 5 and 6 (Tr. 1/28/16 at 2424) in November 2015 when the river was at 8 cfs (*Id.* at 2494) well below its median flow by any measure. Dr. Mussetter has never boated the Upper Salt River. *Id.* at 2522. This omission not only speaks volumes about the credibility of the opinions offered, it renders any claims that the expert witnesses make about the so called difficulties of navigating the Salt River purely speculative. Moreover, their claim is refuted by the overwhelming amount of competent evidence of actual navigation introduced by the State. As the State demonstrated, the rapids do not impede navigation and for most boaters enhance it. The few rapids that could be considered impediments, are easily lined or portaged. Further, the State called numerous witnesses who have actually boated the Salt River and they all testified that neither rapids, nor sand bars nor braiding prevented them from successfully navigating the river. In sum, the navigability opponents' arguments regarding "obstacles" to navigation are wholly without merit.

VI. Whether Federal Surveyors Meandered the Salt River is Irrelevant.

Finally, navigability opponents also attempt to draw inferences from federal surveyors' decisions about meandering the Salt River. See e.g. SRP Op. Mem. at p 7-8; FMC Op. Mem. at p. 15. Yet, 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. As the U.S. Supreme Court has explained:

A legal inference of navigability is said to arise from the action of the surveying officers who, when surveying the lands in that region, ran a meander line along the northerly bank and did not extend the township and section lines across the river. But this has little significance. The same thing was done on the Platte and other large western streams known to be unnavigable. Besides, those officers were not clothed with power to settle questions of navigability that surveyors are not "clothes with power to settle questions of navigability" and therefore their actions regarding meandering rivers have little significance, and they were known to meander both navigable and nonnavigable streams.

State of Oklahoma v. State of Texas, 258 U.S. 574, 585 (1922). See also *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 Salt River was not meandered by surveyors 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.

VII. The Patent Evidence Offered by Dr. Littlefield is Likewise Irrelevant.

SRP also cites to federal patents as some evidence of a navigability determination. SRP Op. Mem. at 7. In *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 648 (1970), the Supreme Court specifically stated that “such disposals by the United States ‘during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.’” There is no patent which contains a specific statement that the federal government intended to convey title to land under the Salt River. According to *Choctaw*, no inference should be made.

VIII. Conclusion.

There is ample relevant, persuasive evidence demonstrating that Segments 2 through 6 of the Salt 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 Salt 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 the confluence with the Salt River.

Respectfully submitted this 17th day of August, 2016.

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