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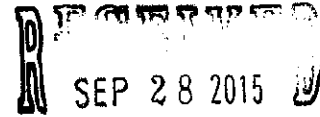
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BY:

BEFORE THE ARIZONA NAVIGABLE STREAM

ADJUDICATION COMMISSION

**In The Matter Of The Navigability Of
The Verde River From Its Headwaters At
Sullivan Lake To The Confluence With
The Salt River, Yavapai, Gila And
Maricopa Counties, Arizona**

No. 04-009-NAV

**Maricopa County and The Flood Control
District of Maricopa County's Post-
Hearing Opening Brief Regarding
Navigability of Verde River**

Introduction

This Opening Brief is submitted by Maricopa County and the Flood Control District of Maricopa County ("County and FCD") by undersigned counsel in regard to the deliberations and written report to be done by the ANSAC on the navigability of the Verde River. The Commission is considering this matter again because of an order from the Superior Court of Maricopa County, Arizona in Cause Number LC 2006-000413 DT et.al. directing the Commission to reconsider its prior decision dated March 24, 2008 in light of the decision of the Court of Appeals in State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm'n, 224 Ariz. 230, 229 P.3d 242 (App, 2010) handed down after the Commission's March decision in this matter (Minute Entry from Judge Crane McClennen dated 10/29/11, docket code 029).

In addition, the Commission, on its own motion, determined, on remand, to also consider the impact of PPL Montana, LLC v. Montana, 132 S. Ct 1215, 565 U.S. 1 (2012) on its decisions in all cases remanded to it by the Superior Court. The purpose of this Memorandum is to suggest changes in methodology for the Commission to follow when it produces its new report to replace its March Report on the Verde to bring it into compliance with the Winkleman decision regardless of the Commission's ultimate determination on the navigability issue of the Verde River. It is time to have closure on this matter thus these participants want the Commission to write a report that will withstand the scrutiny of the courts in its fourth attempt to determine the navigability of the Verde River.

The Winkleman Court stated that the Commission in conducting its "particularized assessment" as required must "make its determination "in writing with sufficient documentation and detail to confirm the rationale and basis for the determination." Id. at 237, Fn 9. Put another way, the Court told the Commission that it must set out the law and facts that support its decision with appropriate specific reference to the portion of the record that supports any factual statement and explain why, in their view, the law and facts constitute substantial evidence supporting its decision so that the reviewing courts will be able to determine whether the Commission "exercised its discretion reasonably and with due consideration." Id. at 238.

To aid the Commission in making its determination Winkleman first instructs that, under A.R.S. § 37-1101(5), ANSAC must determine the characteristics of the subject river "in its ordinary and natural condition" and that after making such determination it must then determine "whether the river was used or would have been susceptible to use as a highway for commerce" in the natural and ordinary condition, earlier determined, if that condition had existed at the time of statehood. Id. at 239. To aid the Commission further, the Court explained that in doing this assessment it must evaluate

the ordinary and natural condition of the river as separate elements. Id. at 241. It also gave the Commission the definitions it must use in determining the two conditions and the time frame applicable to the determinations. Id. at 241, 242.

This means that the Commission must now, in its written decision, set forth the natural condition of the river identifying the facts it relies on to support this determination and also set forth the ordinary condition of the river and the facts that it relies on to establish that condition. In setting forth these facts it must give sufficient reference to the record to allow a court to determine if the evidence the Commission is relying on is sufficient to confirm the rationale and basis for the conclusion drawn from it.

The Commission must set forth these facts no matter whether it determines the river is navigable or non-navigable. In doing this the Commission must “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 or conditions.”) Winkleman at 241. In order to meet the writing requirements the Commission must specify the methodology it followed to make its natural and ordinary determinations as well as setting forth the facts (evidence) they relied on and the location in the record where the evidence may be found.

The Commission must also follow these procedures in setting forth its segmentation analysis based on PPL Montana, *supra*. In its March 24, 2008 decision the Commission did not do this. In fact, in the 54 page decision there are only eight citations to the record and of those eight, three citations appear on page 43 thus leaving 53 pages of alleged facts, determinations and conclusions to share the remaining five references. This virtual lack of factual citation to the record be it testimony, written reports or other evidence is inadequate under the requirements of Winkleman for a

segmentation determination let alone for the determinations necessary to set out the ordinary and natural conditions of the river. The Commission needs to start over with a written determination that gives specific citation to facts in the record that are the basis for their conclusion on the condition of the river in its natural and in its ordinary condition as well as setting forth its segmentation determinations. In doing this, the law ANSAC applies to make these determinations and conclusions must be federal law or state law that meets federal law standards. See Defenders of Wildlife v. Hull, 199 Ariz. 411, 419, 18 P.3d 411 (App. 2001).

I. Evidence Used To Determine Navigability Must Be Relevant.

In determining the natural and the ordinary conditions of the Verde River the Commission is required to answer fact questions on both conditions. Since there is no federal statutory law to look to, this means that the Commission must look to the federal rules of evidence and case law for controlling authority as to what constitutes admissible evidence to establish what is the substantial evidence necessary to support their decisions under the federal system regarding the river's conditions. To the extent state law differs, federal law controls what is admissible evidence in navigability cases where title to the land underlying the watercourse is at issue. See PPL Montana, 565 U.S. at 12. The basics state that for evidence to be admissible in federal court, it must be relevant. See Rule 402, Federal Rules of Evidence. Relevant evidence is defined "as evidence tending to prove or disprove a matter in issue." See BLACK'S LAW DICTIONARY, Abridged Seventh Edition at page 460. In discussing the definition of "relevant evidence" American Jurisprudence 2d, Evidence, vol.29, sec. 306, pages 321-22 states:

"As generally defined, relevancy means the logical relation between the proposed evidence and a fact to be established. Evidence is relevant if it has any logical tendency to prove any material fact. For evidence to be relevant it must have a logical tendency to aid the trier in the determination of an issue or tend to convince the jury that the fact sought to be established exists. There must be some material or logical

connection between the asserted facts and the inference or result they are intended to establish.”

What all this means in terms of the Commission's deliberations and decision is that it must now address its findings of fact with evidentiary specificity in its written decision. If the Commission makes an inference from the evidence that it wants the Court to sustain, but the inference is not obvious from the fact relied on, then the Commission must explain why the evidence is relevant. If the Commission wants to use a condition of the river in its upper segment that makes that segment non-navigable to establish that the river in other segments is not navigable it must demonstrate by relevant evidence that the condition existing in the upper segment or its impact is also present in the other segments it wishes to declare non-navigable. If there is no evidence regarding the lower segment that shows the condition or its impact exists there, then it cannot be a basis for a non-navigable finding for the lower segment. The evidence on the lower segments establishes the material or logical connection discussed above. Without the connection the non-navigable inference will fail and a Commission decision made without it will be reversed.

For example, the Commission in its March 24 Report claims there were a number of waterfalls present on the Verde as part of its evidence of non-navigability but gives no citation to the record for this claim. *See* page 38 of Commission Report. A review of the Arizona State Land Department's Report and the testimony of Mr. Slingluff finds no mention at all of waterfalls in the Land Department's Report and Mr. Slingluff only identifying one waterfall, that being Verde Falls. *See* Transcript ANSAC meeting, January 18, 2006 at pages 105-107. Without factual reference to the other waterfalls the inference the Commission attempts to draw from Mr. Slingluff's testimony about one waterfall to create many waterfalls must fail. As PPL Montana, *supra*, indicates, waterfalls can be a reason for a non-navigable determination thus if the Commission

stills maintains that such a claim is true for the Verde it should supply the evidentiary support per the direction in Winkleman that includes specific citations to the record that support the claim, in this case the page references to the testimony of Mr. Slingluff or others who the Commission claims testified to a number of falls on the Verde.

These evidentiary requirements apply equally to all the Commission's determinations and must be set forth in written form with appropriate reference to the factual record that supports the determinations. See A.R.S. § 37-1128 A-C, Winkleman at 237. Following these established legal standards will increase the likelihood of a decision that survives the court tests it must go through.

II. Evidentiary Standards Applicable to Commission Determinations.

A decision on navigability must be supported by substantial, reliable and probative evidence. See A.R.S. § 41-1062 (A); Callen v. Rogers, 216 Ariz. 499, 502, ¶ 9, 168 P.3d 907, 910 (App. 2007) ("On appeal from the superior court's review of an administrative decision, we consider whether the agency action was supported by the law and substantial evidence and whether it was arbitrary, capricious or an abuse of discretion. . . . [In] reviewing factual determinations, we decide 'only whether there is substantial evidence to support the administrative decision. A decision supported by substantial evidence may not be set aside as being arbitrary and capricious.'"). Substantial evidence is evidence that a reasonable mind would accept as adequate to support a conclusion; evidence beyond a scintilla. BLACK'S LAW DICTIONARY 580 (7th Ed. 1999). Reliable evidence is evidence "supported by appropriate validation—i.e., "good grounds," based on what is known." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993). Probative evidence is evidence that tends to prove or disprove a point in issue. BLACK'S LAW DICTIONARY 579 (7th Ed. 1999). If the proper legal test is not applied to evidence being considered, decisions based on substantial, reliable,

probative evidence will not support a finding of navigability or non-navigability. Winkleman, 224 Ariz. at 242, ¶ 28, 229 P.3d at 254.

Proponents of navigability bear the burden of demonstrating navigability or susceptibility to navigation by a preponderance of the evidence. *See*, A.R.S. § 37-1128(A). A “preponderance of the evidence” means that the evidence is sufficient to persuade the finder of fact that the “existence of a fact is more probable than its nonexistence.” In re Winship, 397 U.S. 358, 371 (1970).

It is evidence which, “though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” BLACK'S LAW DICTIONARY 1201 (7th ed. 1999).

With respect to the “ordinary” condition of the Verde, the Commission must disregard both the unusual flashy high-flow flood conditions, and drought low-flow conditions as both are not the usual, normal, or everyday condition of the Verde River. Winkleman, 224 Ariz. at 241, ¶ 27, 229 P.3d at 253.

Because the Commission must base its decision on what it finds are “ordinary” conditions, rather than rare or extreme conditions of flood or drought, the Commission should determine at what level (cubic feet per second) the river goes into flood stage or drought based on admissible evidence calculated by a witness with proper credentials in hydrology, hydraulics and/or engineering. This would be the best available evidence.

In determining the ordinary and natural conditions of the river the Commission must set forth the evidence it relies on for its determination of the condition of the river. Failure to do so violates Winkleman requirements at 224 Ariz. at 250, 229 P.3d at 238.

All relevant evidence can be received and considered by the Commission according to A.R.S. § 37-1123(A). To survive federal court scrutiny, however, final decisions by the Commission on the federal question of navigability that rely on expert

testimony must be based on admissible expert testimony that would be permitted in federal court. Failure to do this would result in the Commission relying on something that does not meet the federal standard and probably guaranteeing another reversal. The applicable federal standards for admissible expert testimony are specific.

Federal Rule of Evidence Rule 702, 28 U.S.C.A., (identical to Arizona Rule of Evidence 702) governs the admissibility of expert opinion testimony. The Rule states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on **sufficient facts or data**;
- (c) the testimony is the product of reliable principles and methods;
- and
- (d) **the expert has reliably applied the principles and methods to the facts of the case.**

(Emphasis added). This Rule of admissibility applies to expert testimony of engineers and other non-scientists, and requires trial courts (and the Commission, as the trier of fact in the hearings) to serve as gatekeepers ensuring that proposed expert testimony is reliable and helpful); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999) (“We conclude that Daubert's general holding—setting forth the trial judge's general “gatekeeping” obligation—applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge.”).

An expert who is qualified in one subject matter does not thereby become an expert for all purposes. Testimony on subject matters unrelated to an expert's area of expertise are prohibited. 523 IP LLC v. CureMD.Com, 48 F.Supp 3d 600, 642 (S.D. N.Y., 2014). Mr. Burtell illustrates this point with his testimony about rapids where he admits

to not being an expert and he states he is relying on a book written by Williams for his conclusions on the impact of rapids on the Verde. See TR pages 3294-3297.

Further, pursuant to Rule 702, if the expert's testimony lacks a sufficient factual basis or the expert has not conducted sufficient studies to gather relevant data to base his opinions on such as where the expert bases his opinion solely on his own experience, he must go on to show how the experience led to his conclusion, why the experience is a sufficient basis for the conclusions reached and how that experience is reliably applied to the facts. *Id* at 643. The expert's testimony must rest on knowledge that is sufficiently connected to the facts of the case. *Id* at 643. "(W)hen an expert opinion is based on data, methodology or studies that is simply inadequate to support the conclusions reached, Daubert and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Id* at 644.

In addition, if the expert incorrectly applies established principles and methods to the facts in coming up with his opinion, then that expert's opinion should not be considered. For example, in his testimony Mr. Burtell, at least in part, based his non-navigability opinion on the fact that he found the river was not used for transportation because there was no evidence of such use (see TR pages 2582-83) and that the road that paralleled it would not have been necessary if the river was used. See TR at 3359-60. He thus relied on the existence of non-boat land transportation, at least in part, to form his opinion that the Verde was not navigable. The fact that the military used wagons to haul goods between Fort Whipple and Fort McDowell was a factor in Mr. Burtell's ultimate finding of non-navigability (see TR pages 2532, 3356 and 3357) even though he admitted that it would have been difficult for the Army to use the Verde River to move materials to or from Fort Whipple as that camp was more than twenty miles from the Verde River (See TR at 3364).

The use of this non-boat land transportation is in direct contradiction to the holding in Defenders of Wildlife v Hull, 199 Ariz. 411, 424-25 that overland

transportation is not “highly probative” of non-navigability and that to use it is contrary to the federal test for navigability. As a result Mr. Burtell has incorrectly applied an established principal of law controlling navigability for title determinations and under Rule 702, set out above, his opinion must be disregarded as inadmissible evidence.¹

The Commission may not rely on an expert’s opinion or testimony that is based solely or primarily on the opinions of other experts. See Hunt v McNeil Consumer Healthcare, 297 F.R.D. 268, 275 (E.D. La, 2014); Fosmire v. Progressive Max Ins. Co., 277 F. R.D. 625, 630 (W.D. Wash., 2011). A testifying expert cannot simply be a conduit for a non-testifying expert's opinion. State v. Lundstrom, 161 Ariz. 141, 148 776 P.2d 1067 (1989). One example of many comes from Mr. Burtell's testimony regarding compound and braided channels. He testified he did not do any studies regarding these types of channels and his opinions regarding them are based on the expert reports of Dr. Mussetter, Mr. Hjalmarson and Mr. Fuller. See TR page 3249, line 22 to TR page 3251 Line 23. His opinions violate the foregoing rule regarding the use of other expert’s opinions and should be disregarded by the Commission because based at least in part on inadmissible evidence.

The courts can review de novo whether the expert opinion evidence relied on by the Commission rests on scientific principles that are accepted generally in the relevant scientific community. See McMurtry v. Weatherford Hotel, Inc., 231 Ariz. 244, 293 P.3d 520 Ct. App. Div. 1, 2013). If they are not based on generally accepted reliable scientific

¹ Chairman Noble (see TR page 3360) asked Mr. Burtell if there was some case that indicated that you could not consider roads as a factor in determining navigability. Mr. Burtell denied the existence of such a case. Participant calls the Chairman’s attention to the Defenders case holding that considering overland transportation as a factor was contrary to the federal test (See Defenders, supra at 424-425). Clearly, the Chairman recognized that Mr. Burtell applied the wrong standard when he asked this question.

principles the Commission should reject the testimony. The Commission should be looking for a “foundation” for the testimony of a particular expert witness - his qualifications, knowledge, skill, experience, training or education that is superior to that of people in general.

“Real world experience” as well as academic study can make one an expert, but that individual still needs to have skill and knowledge superior to that of persons in general. Under Rule 703 an expert may base an opinion on:

- (1) Facts or data the expert has been made aware of or personally observed; and/ or
- (2) Facts or data of a type experts in the particular field would reasonably rely upon in forming an opinion on the subject, which facts or data need not be admissible in evidence.

The professional degree or personal experience goes to the weight of the testimony before the Commission. As an example, the tribal elder who testified could persuasively testify about history and oral traditions and stories passed down, but his testimony regarding hydrology or other technical aspects of the Verde River should not be given weight. Reliable expert testimony has to be more than hearsay or an oft-repeated anecdote. (See Daubert at 509 U.S. 589, 113 S. Ct. 2786).

III. Confusion In Navigability Testimony.

Some areas of confusion in the navigability testimony before this Commission were on the meaning of federal patents, surveys and treaties in relation to navigability of a river; whether the existence of nearby roadways could be evidence that a river was not navigable; whether the type of boats in use for modern boating could be used to demonstrate navigability at statehood; and what does the terminology “highway for commerce” require when determining navigability for title purposes?

A. Nearby Roads And Non-boat Transportation Do Not Indicate Non-navigability.

Defenders says it all. It states "However, the Monroe Court did not use non-boat transportation in proximity to the watercourse as a presumption of non-navigability nor did it ever assert that overland transportation was highly probative on the issue. To do so we conclude, is contrary to the federal test." If the Commission uses non-boat transportation or overland transportation to justify a non-navigability determination it will be clear error and its decision will not stand.

B. "Boatability" As A Navigability Factor.

The Commission heard testimony from many credible experts in historical and modern boating navigation on the Verde and elsewhere in the state at Statehood. The Commission also heard testimony from several witnesses who were not experts on boating or navigation but gave opinions that should be disregarded in making the final decision.

Mr. Randall, a teacher and tribal member from the Verde area, said he had no information or stories regarding boats, either Indian or Anglo, and that he was not an expert on boating. Mr. Mussetter also testified that he had no idea about the standard of navigation and boats (TR page 2169), but did opine that the Verde was not navigable. Mussetter also had an unclear definition of "commercial navigation," believing that it requires some kind of navigation but he had no particular boat in mind. (TR page 2170, line 6-7). He also stated that if the river was too shallow it was an impediment to navigation, and the historical depth of the Verde should be studied but he had not done such a study. (TR page 2282, lines 20-22).

Mr. Burtell established his experience in water rights but had no experience with boating on the Verde or other rivers in Arizona (TR page 2442, lines 10-11). He did not look at boating records in the time period studied on the Verde (TR page 2496, lines 12-16). He had read a book, talked to many boaters regarding the San Juan River in Utah

and had heard boaters testify but had not boated on the Verde. (TR page 3032, lines 9-17). He had seen boats in the Camp Verde area but only tubed on the Salt River. (TR page 3033, lines 7-10 and 16-19). He had never seen boating on a Class III rapid (TR page 3098, lines 20-24) and never interviewed a boater on the Verde even though he questions when boating can take place. (TR page 3051). He speculates that the riffles on the Verde are impediments to navigation (TR page 3016, lines 1-14), but did not study or attempt to measure the stream miles that were riffles or pools, and he did not locate or measure the thalweg, the deepest part of the river. (TR page 2703, lines 4-6).

Without doing any research Mr. Burtell states that canoe uses are not enough to establish navigability (TR page 3157 line 17-19) and that the boats on Verde now are not similar to those used at statehood (TR page 3276); in fact, there is no evidence according to Mr. Burtell of wooden boats on the Verde (TR page 3285, lines 6-8); no evolution of boat building on the Verde, (page 3277 lines 10-13) and anyway, one can't compare modern wood boats with old, (page 3310, line 6-8). Then, in a conflicting change of testimony Mr. Burtell claimed he **did** study boats used at statehood (TR page 3395) and relied on the research by historian Jack August.

The testimony by Mr. Burtell and Mr. Musseter on the "boatability" of the Verde River now or at statehood should simply be ignored by the Commission.

C. Federal Patents, Surveys And Treaties.

The U.S. Supreme Court held long ago that a patent will not convey navigable land underneath a river unless the federal government definitely declares its intention to convey such land in the conveyancing document or otherwise makes it intention "very plain." United States v. Holt State Bank, 270 U.S. 49, 55, 46 S. Ct. 197, 199 (1926); *see also*, Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 427, 443 P.2d 421, 423 (1968) (Executive order creating tribal reservation lacked a "clear intention" to reserve beds and waters of Colorado River to the Indian tribe and no showing of "peculiar

need” to reserve the lands to the tribe, therefore the State holds title to land underlying Colorado River).

The United States Supreme Court has also held that inferences of navigability drawn from actions of surveyors are of little significance in the final determination stating that surveying officers were not clothed with the power to settle questions of navigability. See State of Oklahoma v. State of Texas(United States, Intervener), 258 U.S 574, 585 (1922).

D. What Is The Commerce Requirement Applicable To Title Cases?

There is none! The Defenders decision interprets the commerce requirement set out in *The Daniel Ball* as neither requiring both trade and travel together nor that travel and trade be for a commercial purpose. Defenders at 421. As PPL Montana succinctly puts it the question is whether the waters in question can be navigated. *Supra* at 1229. If the answer is yes then it is navigable for title purposes.

As the U.S. Supreme Court has written: “The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes, may be most persuasive, but, where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.” U.S. v. Utah, 283 U.S. 64, 82 (1931).

IV. Segments Proposed By The State Meet The PPL Montana “Discrete And Administrable” Test.

The six segments proposed by the State meet the PPL Montana test as discrete and substantial. They have not been legally challenged by the other parties to these proceedings and they should be adopted by the Commission as the Verde segments for its navigability determination.

In PPL Montana, the Supreme Court held that a determination of navigability of an entire river within a state must consider the various segments of the river and determine whether each segment is navigable or not, recognizing that “physical conditions often vary significantly over the length of a river.” PPL Montana, LLC, 132 S. Ct. at 1229-30. The Supreme Court stated that segments must be discrete and substantial, and evaluated based upon their administrability and value. Id., at 1231. The segments must have exact beginnings and endings. Id., at 1229. The State’s segments meet this test.

Five segments for the Verde River are proposed in the State Land Department’s Navigability Memorandum to the Commission dated June 8, 2012. A sixth segment, labeled “0” was added by the Arizona State Land Department, prior to the hearings in December 2014. The segments are identified as follows

Segment 0: Headwaters at Sullivan Lake to Forest Road 638.

Segment 1: Forest Road 638 to Sycamore Creek.

Segment 2: Sycamore Creek to Beasley Flat.

Segment 3: Beasley Flat to Verde Hot Springs.

Segment 4: Verde Hot Springs to Needle Rock.

Segment 5: Needle Rock to Salt River Confluence

Each segment was analyzed and defined by its hydrology, geology and geography and navigability characteristics to establish the natural characteristics of the segment and meets the criteria set by the Court in the PPL Montana decision. Id. The named segments have not been legally challenged as being inappropriate for segmentation review under PPL Montana by any of the other parties to the Verde River proceeding.

At the Commission hearing on December 15, 2014, the six segments listed above were described in detail by their physical and other natural characteristics by Jon Fuller, expert for the State of Arizona. He first gave a generalized discussion of the various

classes and difficulty of rapids and the percentage of rapids on the river (TR page 63, line 16 to page 65, line 8).

Segment 0-A: Sullivan Lake to confluence with Granite Creek; a pool-drop river which would be rapids if sufficient water (TR page 50, lines 7-10).

Segment 0-B: Granite Creek to Forest Road 638; perennial below confluence with Granite Creek, classic pool and riffle in a bedrock canyon (TR p 49, lines 6-13, page 55, lines 12-19); near road crossing at Forest Road 638 expert identifies a "big change in character of the river" (TR p 51, l 16-23; p 52, lines 7-9).

Segment 1: Forest Road 638 to Sycamore Canyon; perennial river, pool and riffle, in a shallow to deep bedrock canyon (TR p. 61, line 24 to p. 62, line 3).

Segment 2: Sycamore Canyon to Beasley Flats; perennial, pool and riffle in an alluvial valley (TR page 79, line 20-21); less than .3 percent rapids (TR p. 80, lines 7-19).

Segment 3: Beasley Flats to Childs Hot Springs; the "whitewater reach," pool and riffles in a bedrock canyon (TR p 92, lines 10-18; page 93, line 11); more commercial trips (TR p 93, line 19).

Segment 4: Childs to Needle Rock, through Horseshoe Reservoir; dominant pools and riffles (TR p 97, line 17, page 98 line 4, page 99, line 1-8); some bedrock canyon (TR p 100 lines 13-15).

Segment 5: Needle Rock to Salt River confluence: compound channel (TR page 11, line 6 to 112, line 3; page 113 lines 23-24).

"So we'll start out with why segment...? Primarily because the Verde River varies as it moves over its course through Arizona. There are changes in geology, bedrock canyons to alluvial valleys. There are changes in the channel characteristics, in the widths and depths, some degrees of

pattern; changes in the character of the rapids, or lack thereof; and, of course, the flow rates increase as we move further downstream.

“Further justification for considering the river in segments, previously we had reaches in the previous reports, but they were more geographical than based on the physical characteristics of the river. Although, there were some similarities as well. And, of course, we wanted to base our segmentation on the ordinary and natural condition of the river, rather than the post development existing condition.”

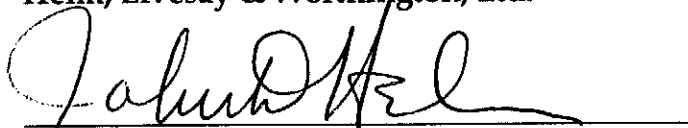
(Testimony of Jon Fuller at TR page 47, line 18 to page 48, line 9).

V. Conclusion.

The Commission must seek out the reliable and admissible evidence of the ordinary and natural condition of the Verde River, and of the navigability uses of the river. The Commission must disregard other unreliable and inadmissible evidence and testimony that was presented. Only by exercising its statutory and court defined duty to focus on only evidence that meets the required standards can the Commission make the necessary navigable or non-navigable decision that will survive judicial scrutiny and be upheld in subsequent appeals.

Respectfully Submitted this 28th day of September 2015.

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