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7 BEFORE THE

8 ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

9
10 IN THE MATTER OF THE NAVIGABILITY
OF THE VERDE RIVER

NO. 03-009-NAV

11 **CITY OF PHOENIX CLOSING**
12 **BRIEF**

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14
15 The City of Phoenix (“Phoenix”) hereby submits its Closing Brief regarding the
16 navigability of the Verde River (“Verde”). After a review of the evidence, and as more fully
17 stated below, the Arizona Navigable Stream Adjudication Commission (ANSAC) should
18 find that the Verde is not navigable in any of its segments.

19 **I. The burden of proof is on the parties asserting navigability.**

20 In 2005 and 2006, ANSAC conducted four (4) days of hearings in an effort to
21 determine the navigability of the Verde River on the date of Arizona statehood. In 2014 and
22 2015, ANSAC conducted another sixteen (16) days of supplemental hearings in order to take
additional evidence about the “ordinary and natural” condition of the Verde River on the date

1 of statehood. Despite hundreds of pages of exhibits and briefs and twenty (20) days of
2 hearing, the proponents of navigability failed to provide evidence that the Verde River was
3 navigable in its ordinary and natural condition on the date of statehood. In order for ANSAC
4 to determine the Verde River was navigable on the date of statehood, the State and other
5 proponents of navigability must establish it by a preponderance of the evidence. *State ex rel.*
6 *Winkleman v. Arizona Navigable Stream Adjudication Commission*, 224 Ariz. 230, 238-39;
7 229 P.3rd 242, 250-51 (Ariz. App. 2010) (*Winkleman*); Arizona Revised Statutes (A.R.S.) §
8 37-1128(A).

9 The test of navigability is a federal test. *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215,
10 1227 (2012) (*PPL Montana*). The proponents of navigability must, by a preponderance of
11 the evidence, establish that on the date of statehood (February 14, 1912), the Verde River
12 “was used or was susceptible to being used, in its ordinary and natural condition, as a
13 highway for commerce, over which trade and travel were or could have been conducted in
14 the customary modes of trade and travel on water.” A.R.S. § 37-1101(5). This is consistent
15 with the requirements of the federal test for navigability found in *The Daniel Ball*, 10 Wall.
16 557, 563, 19 L.Ed. 999 (1871)(“Those rivers must be regarded as public navigable rivers in
17 law which are navigable in fact. And they are navigable in fact when they are used, or are
18 susceptible of being used in their ordinary condition, as highways for commerce, over which
19 trade and travel are or may be conducted in the customary modes of trade and travel on
20 water.”).

21 **II. According to *Winkleman*, the Verde River was in its “natural” condition prior to**
22 **modern diversions.**

1 In *Winkleman*, the Arizona Court of Appeals held that ANSAC erred in its previous
2 determination of non-navigability of the Lower Salt River because it failed to properly
3 consider the Lower Salt in its “natural” condition. *Winkleman*, at 242, 229 P.3rd at 254. In
4 following the logic of the *Winkleman* Court, the Verde River was in its “natural” condition
5 during the period between the decline of the Hohokam civilization and modern diversions of
6 the Verde River.¹ *Id.* Although the *Winkleman* Court did not review ANSAC’s
7 determination of navigability on the Verde, upon remand, ANSAC decided to conduct
8 additional evidentiary hearings and issue a new navigability determination on the Verde
9 River based on the applicable legal test established in *Winkleman*.

10 **III. Historical evidence is the best available evidence to determine navigability**

11 In order to determine the “natural” condition of the Verde River, the *Winkleman* Court
12 was very specific in its direction to ANSAC on remand. Evidence from the period prior to
13 modern diversions from the Verde River “should be considered by ANSAC as the best
14 evidence of the River’s natural condition.” *Winkleman*, at 242, 229 P.3d at 254. During the
15 hearing, the parties generally agreed that the Verde River was in its natural condition some
16 time between 1400 and 1870. Tr. at December 15, 2014, Vol. 1, page 123, lines 14-17 (Jon
17 Fuller); Tr. at February 24, 2015, Vol. 10, page 2315, lines 2-4 and 22-24 (Jack August Jr.).
18 Moreover, sources contemporaneous with that period provide the best evidence of the natural
19 condition of the Verde River.²

20 _____
21 ¹ Based in part on the United States Supreme Court’s decision in *PPL Montana*, Phoenix believes the Arizona Court of
22 Appeals erred in holding that the federal test of navigability requires a review of the “natural” condition of the Verde
River at a time other than on the date of statehood. However, for purposes of this Closing Brief, Phoenix will follow the
analysis in *Winkleman* as it understands ANSAC may be required to do so at this time.

² Both proponents and opponents of navigability introduced evidence and expert testimony about what the hydrology and
geomorphology of the Verde River might have been in the 1860’s. While Phoenix maintains the historical record of the
period is the best evidence for the natural condition of the Verde River, this is not to suggest such scientific evidence is

1 **IV. The historical record clearly demonstrates that in its natural state, the Verde**
2 **River was not used as, or susceptible for use as, a highway for commerce.**

3 During the period between 1400 and 1870, numerous peoples lived, worked and
4 traveled in and around the Verde River. Tr. at February 24, 2015, Vol. 10, page 2318
5 (August); *see also* Arizona State Land Department (ASLD) Exhibit X001(25), *A Log of the*
6 *Verde*, page 32 (“People have been living along the Verde for around five or six thousand
7 years.”). The Hohokam civilization declined at the beginning of that period. Tr. at February
8 24, 2015, Vol. 10, page 2315 (August). While there are no written records of the Hohokam
9 civilization, there is ample archaeological evidence of their culture. The archaeological
10 record does not include evidence that the Hohokam used boats. Tr. at December 15, 2014,
11 Vol. 1, page 119, lines 6-7 (Fuller). The Hohokam did, however, travel widely and traded
12 with other civilizations. They traded small items such as beads and pottery, which they
13 could have easily transported in a small boat if there was a navigable waterway. Tr. at
14 February 24, 2015, Vol. 10, pages 2324-25 (August). The Hohokam did not navigate the
15 Verde River (or any other river in central Arizona), but traveled on foot and carried their
16 goods for trade. *Id.*

17 Sometime after the decline of the Hohokam, the Yavapai and Apache traveled and
18 traded throughout modern-day Arizona. Tr. at February 20, 2015, Vol. 8, page 1792
19 (Vincent Randall). Although they lived and traveled along it, neither the Yavapai nor Apache
20 navigated the Verde River. Tr. at December 15, 2014, Vol. 1, page 119, lines 6-10 (Fuller)
21 (“We have no preserved records that say the Native Americans were using boats. . . . We’re

22

without merit; however, Phoenix will not advance arguments regarding the scientific evidence and testimony in this Closing Brief, and instead joins in the positions asserted by the Salt River Project on these issues.

1 readily acknowledging that.”); Tr. at February 24, 2015, Vol. 10, page 2328 (August); Tr. at
2 February 20, 2015, Vol. 8, page 1786 (Randall).

3 From 1583 to 1821, the Spanish explorers also traveled the Verde, but did not do so in
4 boats. They provided an extensive record of their travels and observations, looking for
5 minerals, a northwest passage through Arizona into California and areas that could be
6 colonized. Each exploration team included two accounts – one ecclesiastical and the other
7 military. These accounts were not personal diaries as might be kept by American explorers
8 such as Lewis and Clark, but were instead very legalistic, precise and painstaking. Tr. at
9 February 24, 2015, Vol. 10, page 2332 (August). The Spanish were familiar with
10 exploration by boat and intentionally followed rivers in their travels throughout the northern
11 boundary of their colonial influence, the Pimeria Alta. Locating a river susceptible to
12 navigation would have been a critical find and certainly noted for the officials in Santa Fe,
13 Mexico City and Madrid. *Id.* at 2330-40. In two separate trips, Antonio Espejo and Marcos
14 Farfan traveled up the Verde River at least as far as Jerome. *Id.* at page 2359; *see also*,
15 ASLD Exhibit X001(25), *A Log of the Verde*, pages 32-34. Despite their travel and trade in
16 the Jerome area, in the extensive record of their travels along the Verde, neither Espejo nor
17 Farfan actually navigated the Verde River or noted the possibility that it could be done. *Id.*

18 Mention of navigation on the Verde River was conspicuously absent in numerous
19 subsequent accounts from the Spanish, including Onate, Velarde, Kino and others. Tr. at
20 March 30, 2015, Vol. 12, page 2530-42 (August). They did seek out and keep records of the
21 location of water, because in a desert, knowing the nearest location of water for humans and
22 animals is paramount. The Spanish explorers would have considered discovery of a river

1 susceptible to navigation of vital importance and would most certainly document it. Tr. at
2 February 25, 2015, page 2355, lines 3-6 (August) (“That’s why water was important, and it
3 was important to locate watercourses and rivers. And Kino wasn’t the only one that did that,
4 of course. I mean it was throughout the Spanish colonial effort.”). The Spanish observed
5 that the rivers in central Arizona, including the Verde, were useful only for drinking water.
6 Despite the need for transportation routes, navigation was not contemplated because they did
7 not see the rivers as highways for commerce. These official records constitute firsthand
8 accounts and descriptions of the Verde River in its ordinary and natural state.³

9 Likewise, the fur trappers, also known as mountain men, traveled up and down the
10 Verde River on multiple occasions. Tr. at February 25, 2015, Vol. 11, page 2372 (August);
11 ASLD Exhibit X001-25, *A Log of the Verde*, pages 34-35. They kept personal diaries and
12 the exploits of Kit Carson were documented in a book about his life. Phoenix Exhibit X067-
13 1 Declaration of Jack August, Jr., PhD, pages 10-11. While they were engaged in beaver
14 trapping along and even in the river, they did not use the Verde River as a highway for
15 commerce. Tr. at February 25, 2015, Vol. 11, page 2377, line 8-10 (August); and Tr. at
16 December 15, 2014, Vol. 1, page 122, lines 5-6 (Fuller). These men were familiar with boats
17 and the use of boats for trapping beaver in the Midwest, yet they did not use boats to trap the
18 plentiful beaver throughout the Verde River. Tr. at February 25, 2015, Vol. 11, page 2375
19 (August). This is consistent with the evidence of trapping noted by the United States
20 Supreme Court in *U.S. v. State of Oregon*, 295 U.S. 1, 21; 55 S.Ct. 610, 618 (1935)(“The
21 state places much reliance on the large amount of testimony relating to the trapping of fur-

22 _____
³ While the terms “ordinary” and “natural” are not synonymous or interchangeable, *Winkleman*, 224 Ariz. At 241, 229 P.3d at 253, based on the definition of “ordinary,” the river would in that condition during many of nearly three hundred

1 bearing animals, principally muskrats, in the contested area. . . . Most of this evidence has no
2 bearing on navigability, for, with a few exception, the trappers appear to have waded or
3 walked.”).

4 Finally, beginning in the 1860s, the United States military and subsequently settlers
5 came to Arizona and built military installations and settlements along the Verde River.
6 Phoenix Exhibit X067-1 Declaration of Jack August, Jr., PhD, pages 12. Fort Whipple,
7 Jerome, Camp Verde, Fort Lincoln and Fort McDowell were built on or near the banks of the
8 Verde River from its headwaters to its confluence with the Salt River. *See*, ASLD Exhibit
9 X001-25, *A Log of the Verde*, pages 33 (map of Verde River). One of the main difficulties
10 the military faced in Arizona was the lack of reliable transportation routes to move men and
11 materials between military installations and out of Arizona to the east or the west. In
12 particular, the military struggled getting food and other goods to Fort McDowell. Phoenix
13 Exhibit X067-1, Declaration of Jack August, Jr., PhD, page 13. This was despite the fact
14 that Fort McDowell was downstream of other military installations and food producing areas
15 in the Verde Valley near Camp Verde. Tr. at February 25, 2015, Vol. 11, page 2401, lines
16 22-25 (August); *see also* Tr. at March 30, 2015, Vol. 12, page 2626 (Burtell). There are at
17 least four (4) written accounts of military personnel attempting to establish difficult overland
18 transportation routes between the forts. The most obvious transportation route would be the
19 Verde River if it were navigable. Freeport Exhibit X009, September 18, 2014, Declaration
20 of Rich Burtell, page 10.

21 Because of the lack of existing transportation routes, such as navigable rivers, the
22 military embarked on a series of road building endeavors, including Crook’s Trail. Tr. at

1 February 25, 2015, Vol. 11, page 2391, lines 21-25 (August). Later, the military built the
2 Stoneman Road from Fort Whipple to Fort McDowell at great expense and difficulty. The
3 details of the construction and use are well documented in military records. The use of the
4 roads to move goods and people is also well documented in official government records.
5 Phoenix Exhibit X067-1, Declaration of Jack August, Jr., page 16-17. Martha
6 Summerhayes, a military wife and a settler to the region, documented the difficulties of
7 traveling overland on the military roads. She described difficult conditions and the fact that
8 the military did not use the Verde River to transport men, material, munitions or animals
9 from one post to another on the Verde. *Id.* at 14.

10 Proponents of navigability introduced a photograph dated 1885 depicting two men
11 who appear to be wearing military uniforms sitting in a boat on a body of water for the
12 proposition that the military used or considered using the Verde River as a highway of
13 commerce. There is no record as to what time of year the photograph was taken, or where,
14 other than a modern notation of Segment 2. The photograph does not indicate movement
15 (navigation) of the boat or whether it was simply floating on a deeper pool in the river.
16 ASLD Exhibit X035-167, page 110. There is no indication the men were transporting goods.
17 The fact that two men could float on a pooled area of the Verde River is inadequate evidence
18 of navigability. *United States v. State of Oregon*, 295 U.S. 1, 23; 55 S.Ct. 610, 619
19 (1935)(“At most, the evidence shows such an occasional use of boats, sporadic and
20 ineffective, as has been observed on lakes, streams, or ponds large enough to float a boat, but
21 which nevertheless were held to lack navigable capacity.”)(citations omitted). Similarly, the
22 proponents of navigability introduced evidence of various attempts to ferry across the Verde

1 during times of flood or high water, most of them failures. ASLD Exhibit X035-167, pages
2 127-129.

3 As historical evidence of navigability of the Verde River in its natural state,
4 proponents of navigability rely primarily on a single newspaper article that described a trip
5 by the Day brothers from Camp Verde to Yuma. According to the article in the Arizona
6 Sentinel, the Day brothers traveled 800 miles down the Verde to the Salt River and to the
7 Gila River to Yuma over the course of six months. ASLD Exhibit X001-18, The Arizona
8 Sentinel “A Long Journey,” April 2, 1892. The source of the information in the article was
9 apparently Mr. J.K. Day, who described his trapping activities. Based on the information in
10 the articles, the brothers traveled approximately 1.7 miles per day, and 363 miles instead of
11 the 800 described in the article. The article does not explicitly say that the Day brothers
12 traveled the entire trip on one or all of the rivers, and it does not say how frequently or for
13 how long they had to portage their small boat. Portage can defeat navigability on some or all
14 of a watercourse. *PPL Montana LLC*, 132 S.Ct. at 1231 (“Even if portage were to take
15 travelers only one day, its significance is the same: it demonstrates the need to bypass the
16 river segment, all because that part of the river is nonnavigable.”)

17 The proponents of navigability present the article as evidence of five (5) separate trips
18 by the Day brothers for trapping, although there is no other evidence of commercial activity
19 or even other journeys by the Day brothers. Tr. at March 30, 2015, Vol. 12, pages 2397-98
20 (Burtell). The article appears two columns away from another “news” article in that same
21 edition of the Arizona Sentinel describing the benefits of “German syrup” for use in treating
22 a “cold on the lungs.” ASLD Exhibit X001-18, The Arizona Sentinel “German Syrup,”

1 April 2, 1892. It was not uncommon for newspapers of the day to publish human interest or
2 novelty articles for entertainment value. Tr. at February 25, 2015, Vol. 11, pages 2418-19
3 (August); Tr. at March 30, 2015, Vol. 12, pages 2397-98 (Burtell). When compared to
4 nearly 300 years of official reports and records of governmental bodies, individual accounts
5 and evidence of the use of other transportation methods, a one paragraph article hardly
6 proves navigability by a preponderance of the evidence.

7 **V. The focus on susceptibility for navigation is misplaced when there is substantial**
8 **historical evidence.**

9 The proponents for navigability rely almost exclusively on the argument that despite
10 the historical record to the contrary, the Verde River was susceptible for navigation and a
11 highway of commerce in its ordinary and natural condition on the date of statehood. While
12 susceptibility for navigation is acceptable evidence to demonstrate navigability, it is not the
13 most persuasive evidence of navigability. *United States v. Utah*, 283 U.S. 64, 82; 51 S.Ct.
14 438, 443 (1931) (“The evidence of actual use of streams, and especially of extensive and
15 continued use for commercial purposes may be most persuasive, but, *where conditions of*
16 *exploration and settlement explain the infrequency or limited nature of such use*, the
17 susceptibility to use as a highway of commerce may still be satisfactorily proved.”). It is not
18 the burden of opponents of navigability to prove the Verde River historically was not used
19 for navigation as a highway of commerce. However, the existence of evidence that the
20 Verde River was not navigated as a highway of commerce negates the need for evidence
21 regarding the susceptibility to navigation during the same timeframe. In *Utah*, the Court
22 found that a lack of population or access to the river at the time of statehood requires a
susceptibility analysis. *Id.* at 81, 51 S.Ct. at 443. The populations and need for a highway of

1 commerce in an around the Verde River during the period 1400 to 1870 are completely
2 different. Multiple *civilizations* traveled and traded in, around and on the Verde River, but
3 none used it as a highway of commerce. To suggest that thousands of people lacking roads
4 or other transportation routes would ignore a river susceptible for travel or trade as a
5 highway of commerce defies logic and is unsupported by the record.

6 In order to prove susceptibility as a highway of commerce, the proponents of
7 navigability bear the burden of establishing that the Verde River could be reasonably and
8 reliably used as a highway of commerce. *United States v. Rio Grande Dam & Irrigation*
9 *Co.*, 174 U.S. 690, 698-99; 19 S.Ct. 770, 773 (1899)(“[N]ot . . . every small creek in which a
10 fishing skiff or gunning canoe can be made to float at high water which is deemed navigable,
11 but, in order to give it the character of a navigable stream, it must be generally and
12 commonly useful to some purpose of trade or agriculture.”)(quoting *the Montello*, 20 Wall.
13 430, 442 (1874)). The idea that floating a boat is the same as navigation as a highway of
14 commerce is exactly the logic advanced by the State’s witness, Jon Fuller:

15 [H]ere’s the logic: I can put a canoe in it. I can boat it without much trouble.
16 A little difficulty here and there. Canoes can be used for commercial purposes,
17 for trade and travel. Canoes are similar. . . . But they’re basically the same
18 kind of draw, how much water it takes to float them. So I can do it.

19 Tr. at December 15, 2014, Vol. 1, pages 57-58, lines 21-25 and 1-4 (Fuller). The fact that he
20 can float a modern day canoe and paddle down portions of a river does not make the river a
21 highway of commerce, especially when thousands of people who were there before him prior
22 to statehood, when the river was in its ordinary and natural condition, failed to make any
significant or effective use of the river as a highway of commerce.

1 **VI. The use of modern-day recreational watercraft provided limited, if any,**
2 **probative evidence of susceptibility for navigation of the Verde River.**

3 The State, as the primary proponent for navigability, relies very heavily on the
4 testimony of Jon Fuller as a boating expert, and documentation of his trip on the Verde River
5 in a modern canoe. While evidence of personal recreational use might have some bearing
6 upon susceptibility for commercial use, it only should be considered in the context of
7 revealing the historical determination of navigability of the river in its ordinary and natural
8 condition at the time of statehood. *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1233
9 (2012). According to the *PPL Montana* Court, in order to use modern-day recreational
10 boating as evidence of the susceptibility of navigation in the ordinary and natural condition
11 of a river on the date of statehood, a proponent of navigability must show: “(1) the watercraft
12 are meaningfully similar to those in customary use for trade and travel at the time of
13 statehood; and (2) the river’s poststatehood (sic) condition is not materially different from its
14 physical condition at statehood.” *Id.* While the State has introduced hundreds of pages of
15 catalogs and other documents showing the types of watercraft in existence on February 14,
16 1912, they are not meaningfully similar to Mr. Fuller’s plastic canoe or Richard Lynch’s
17 rubber “duckie” boats used for recreational outings on the Verde River today. Tr. at
18 December 16, 2014, Vol. 2, page 314 (Lynch). More importantly, the Verde River is not in
19 the same physical condition it was on the date of statehood.

20 Based on the foregoing, the City of Phoenix urges ANSAC to find the Verde River
21 not navigable in its ordinary and natural condition on the date of Arizona statehood,
22 February 14, 1912.

1 RESPECTFULLY SUBMITTED this 28th day of September, 2015.

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