

1 John B. Weldon, Jr., 003701  
2 Mark A. McGinnis, 013958  
3 R. Jeffrey Heilman, 029525  
4 **SALMON, LEWIS & WELDON, P.L.C.**  
5 2850 East Camelback Road, Suite 200  
6 Phoenix, Arizona 85016  
7 (602) 801-9060  
8 [jbw@slwplc.com](mailto:jbw@slwplc.com)  
9 [mam@slwplc.com](mailto:mam@slwplc.com)  
10 [rjh@slwplc.com](mailto:rjh@slwplc.com)

11 *Attorneys for Salt River Project Agricultural*  
12 *Improvement and Power District and Salt*  
13 *River Valley Water Users' Association*

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

16 In re Determination of Navigability of  
17 the Verde River

18 No. 03-009-NAV

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

21 Pursuant to the Chairman's Order,<sup>1</sup> the Salt River Project Agricultural Improvement  
22 and Power District and Salt River Valley Water Users' Association (collectively, "SRP")  
23 submit their closing brief in this matter regarding the Verde River ("Verde"). Based upon the  
24 evidence in the record and application of the appropriate legal test, the Commission should  
25 again find that the Verde is not navigable. The Commission need not address "segmentation"  
26 issues in detail because no significant portion of the Verde is navigable.<sup>2</sup>

27 A table of contents begins on page ii. For purposes of this brief, exhibits from the  
hearings before 2014 are referred to as "EI \_\_\_." Supplemental exhibits from the 2014/15  
hearings are referred to as "X \_\_\_." Citations to the reporter's transcript of proceedings at the  
hearings appear as "Tr. at [DATE]:[PAGE] (WITNESS)."

<sup>1</sup> First Amended Order Consolidating Cases, Setting Deadlines for Evidence Submissions, Setting Dates and Guidelines for Future Hearings and Meetings (May 20, 2015).

<sup>2</sup> For purposes of this brief, SRP accepts the "segments" developed by the Arizona State Land Department ("ASLD"), but SRP takes the position that none of those segments is or was navigable.

**Table of Contents**

1		
2	I.	Introduction and Summary of Argument 1
3		
4	II.	Evidence in the Record 2
5		
6	A.	History of the Verde 2
7		
8		1. Historic and prehistoric Indian use 2
9		2. Spanish explorers 3
10		3. American trappers and mountain men 3
11		4. Military expeditions 4
12		5. Settlers 5
13		6. Federal land surveys 6
14		7. Federal and state land patents 7
15		8. Boating attempts 8
16		9. Other historical descriptions of the river 8
17	B.	Hydrology of the Verde 9
18		
19	C.	Geomorphology and Impediments to Navigation 11
20	D.	Boating 16
21	III.	The Proponents of Navigability Bear the Burden of Proving that the Verde is Navigable. 19
22		
23	IV.	The United States Supreme Court’s Decision in <i>PPL Montana</i> is Instructive with Regard to the Verde. 19
24		
25	V.	Based upon the Evidence in the Record, the Verde is Not “Navigable.” 21
26		
27	A.	The Verde was never actually used as a “highway for commerce.” 22

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

**Table of Contents (cont.)**

B.	The Verde has never been “susceptible to being used” as a “highway for commerce.”	25
1.	If the Verde had been “susceptible” to navigation, people would have navigated it.	25
2.	Evidence of modern-day recreational boating on the Verde does not satisfy the <i>PPL Montana</i> criteria for indicia of “navigability” for title.	27
3.	Mr. Hjalmarson’s flawed attempts to reproduce predevelopment flows do not support a finding of “susceptibility” to navigation.	29
VI.	Summary and Requested Action	30

1 **I. Introduction and Summary of Argument**

2 On March 24, 2008, after a full evidentiary hearing, this Commission found: “[T]he  
3 Verde River from its headwaters at Sullivan Lake to its confluence with the Salt River was  
4 not used or susceptible of use as a highway for commerce over which trade and travel was or  
5 may be conducted in the ordinary modes of travel on water as of February 14, 1912.”<sup>3</sup>

6 The Commission’s determination was appealed to the Superior Court, and that appeal  
7 was stayed pending a decision by the Court of Appeals on the Lower Salt River. The  
8 Commission’s Lower Salt decision, which had been issued in 2005 (three years prior to its  
9 2008 Verde decision), was vacated by the appellate court in 2010.<sup>4</sup> The Court of Appeals  
10 found that, with respect to the Lower Salt, the Commission had failed to properly view the  
11 river in its “ordinary and natural condition” because it had failed to consider diversions of  
12 water prior to construction of Roosevelt Dam. *State v. ANSAC*, 224 Ariz. at 241-42, 229 P.3d  
13 at 253-54.

14 In addition, while the Verde case was pending in the Superior Court, the United States  
15 Supreme Court issued its opinion in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012),  
16 the first significant navigability case decided by that Court in several years. Although the  
17 flaws that the Arizona appellate court found in the Commission’s 2005 Lower Salt decision  
18 were not present in its 2008 decision on the Verde,<sup>5</sup> the parties agreed to remand the Verde  
19

---

20 <sup>3</sup> ANSAC, Report, Findings and Determination Regarding the Navigability of the Verde River from  
21 Its Headwaters to the Confluence with the Salt River, at 53-54 (March 24, 2008) (“2008 Decision”).

22 <sup>4</sup> See *State v. Arizona Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 229 P.3d 242 (App.  
23 2010) (“*State v. ANSAC*”). By the time the Commission issued its Verde decision in March 2008, the  
24 Superior Court already had ruled on the Lower Salt appeal, and the appellate briefs had been filed in  
that case. See Ruling Minute Entry, *State v. ANSAC*, Maricopa County Superior Court No. LC2006-  
000413-001DT (August 6, 2007); Salt River Project’s Answering Brief, *State v. ANSAC*, Arizona  
Court of Appeals, Division One, Case No. 1 CA-CV 07-0704 (December 21, 2007).

25 <sup>5</sup> In the Verde decision, for instance, the Commission specifically stated that it considered the river in  
26 its “ordinary and natural condition as of the date of statehood.” 2008 Decision, at 49. With respect to  
27 Bartlett and Horseshoe Dam, “[t]he Commission considered the Verde River streambed as it existed  
on February 14, 1912, in its ordinary and natural course under Bartlett and Horseshoe Reservoir and  
found that the watercourse was not navigable.” *Id.* at 51.

1 appeal (along with those for the Lower Salt and four other watercourses) to ANSAC, in order  
2 to give the Commission the opportunity to consider the evidence in light of the *State v.*  
3 *ANSAC* and *PPL Montana* holdings.

4 On remand, the Commission held an additional sixteen days of hearings<sup>6</sup> and reviewed  
5 several thousand pages of supplemental exhibits. This additional fact-finding, if anything,  
6 further emphasized the correctness of the Commission's 2008 Decision. The Verde is not and  
7 never has been a navigable watercourse that was or could have been used as a "highway for  
8 commerce." The Commission should again find the Verde non-navigable.

9 **II. Evidence in the Record**

10 The Commission has, over more than a decade, continued to receive and review  
11 evidence regarding whether the Verde was navigable in its "ordinary and natural condition"  
12 on February 14, 1912. *See* A.R.S. §§ 37-1101 to -1156. The Commission held nineteen days  
13 of hearings between 2005 and 2015. Despite these hearings, the proponents of navigability  
14 have been unable to show that the Verde is or ever was navigable.

15 **A. History of the Verde**

16 **1. Historic and prehistoric Indian use**

17 Prehistoric evidence in the Verde River Valley reveals that the river provided an  
18 accessible route to water, but the river was used primarily for canal irrigation.<sup>7</sup> Despite the  
19 proximity to the river, there was no documented evidence of any prehistoric boating. *See*  
20 Fuller 2003, at 2-14 [EI 31]. As Mr. Fuller, witness for the ASLD, concluded at the January  
21 18, 2006 hearing: "We found no evidence in the archaeological record of any use of boats on  
22 the Verde River." *See* Tr. at 1/18/06:10 (Fuller); *see also* Fuller 2003, at 3-1 [EI 31].

23 In its 2008 Decision, the Commission found that "[t]here is no evidence in the  
24 archaeological record that would indicate that any of the prehistoric cultures located in the  
25

26 <sup>6</sup> Those additional hearing days are referred to herein as the "2014/15 Hearings."

27 <sup>7</sup> *See* Fuller, et al., "Arizona Stream Navigability Study for the Verde River: Salt River Confluence to  
the Sullivan Lake," at 2-14 (June 2003) [EI 31] ("Fuller 2003").

1 study area used the Verde River as a means for transportation by boat or other water craft and  
2 there has been no documented use of the river as a highway for commerce for commercial  
3 trade and travel or regular floatation of logs. All travel in the study area during this period  
4 was by foot.” 2008 Decision, at 23.

5 During the 2014/15 Hearings, Mr. Fuller testified that “[w]hen it comes to  
6 archaeology, there’s not a lot to be said in terms of navigability.” *See* Tr. at 12/15/14:118  
7 (Fuller). He made it clear that “we have no accounts of boats or boating from the  
8 archaeological period. We have no preserved records that say the Native Americans were  
9 using boats. So I’ll say it again. Native Americans, we have no evidence that they were  
10 using boats.” *Id.* at 12/15/14:119 (Fuller).<sup>8</sup>

## 11 2. Spanish explorers

12 In the 1500s, Spanish explorers are known to have traveled in central Arizona in search  
13 of mines. *See* Fuller 2003, at 3-8 [EI 31]; Tr. at 2/24/15:2336-37 (August). Although the  
14 Spanish were very experienced boaters, *see* Tr. at 2/24/15:2337-38 (August), no evidence  
15 exists that these explorers ever used boats on the Verde. *Id.* at 2/24/15:2336-37 (August);  
16 Fuller 2003, at 3-8 [EI 31]. The Spanish explorers who encountered the Verde “came through  
17 on foot and on horseback.” *See* Tr. at 12/15/14:120 (Fuller).

## 18 3. American trappers and mountain men

19 Beginning in 1826, American trappers, such as James Ohio Pattie and Ewing Young,  
20 trapped in the vicinity of the Verde.<sup>9</sup> Ewing Young trapped along the Verde, from its  
21 confluence with the Salt River to its headwaters, but there is no evidence in the record that  
22 Young’s party ever traveled by water on the Verde itself. *See* Fuller 2003, at 3-2 [EI 31]

---

24 <sup>8</sup> *See also* Tr. at 12/15/14:118, 12/17/14:657 (Fuller); *id.* at 2/24/15:2318-19, 2328 (August); *id.* at  
25 2/20/15:1785-87 (Randall); Burtell, “Declaration of Rich Burtell on the Non-Navigability of the  
26 Verde River at and Prior to Statehood,” at 4 (September 2014) [X009] (“Burtell 2014”); Affidavit of  
Vincent E. Randall, ¶¶ 33-36 (February 11, 2015) [X055-YAN 1] (“Randall 2015”).

27 <sup>9</sup> *See* Fuller 2003, at 3-8 [EI 31]; Tr. at 1/18/06:11 (Fuller); “Declaration of Jack L. August, Jr., Ph.D.  
on the Non-Navigability of the Verde River at and Prior to Arizona Statehood, February 14, 1912,” at  
9 (February 17, 2015) [X067] (“August 2015”).

1 (noting that, in 1829, Young’s trapping party “traveled along the Verde River”). In its 2008  
2 Decision, the Commission determined that “[t]hese mountainmen generally rode horseback or  
3 walked through the southwest and did not use canoes, rafts or other types of boats on the  
4 Verde River or other Arizona rivers, except for the Colorado.” 2008 Decision, at 24.

5 The 2014/15 Hearings revealed no additional evidence of waterborne transportation by  
6 these trappers and mountain men. Mr. Fuller testified that there are no mentions of boats on  
7 the Verde by these early adventurers.<sup>10</sup> They were aware of and capable of building and  
8 piloting boats customarily used elsewhere for trapping in the Southwest, but there is no  
9 evidence they used such boats on the Verde. *See* Tr. at 2/25/15:2375-77 (August).

#### 10 4. Military expeditions

11 Later in the nineteenth century, military expeditions conducted surveys of railroad  
12 routes in the area of the Verde. *See* Fuller 2003, at 3-9 [EI 31]. There is no recorded history  
13 of boat travel by these military parties. *Id.* at 3-9 to 3-10. The Commission in 2008 discussed  
14 the presence of military expeditions and posts in the area but found that “[e]arly transportation  
15 in the middle Verde River Valley was by horseback, mule train, wagon and stage.” 2008  
16 Decision, at 26.

17 The 2014/15 Hearings involved a significant amount of evidence regarding the early  
18 military activities in the Verde Valley but no credible evidence of use of the Verde as a means  
19 of transportation by the military. “By the mid to late 1860s, four military camps were  
20 established on or near the Verde River, farming settlements had begun in the Verde Valley,  
21 and Prescott had been named the capital of the territory.” *See* Burtell 2014, at 9 [X009]  
22 (citation omitted). “With this level of early development, it is difficult to explain how  
23 military personnel, farmers, and townspeople all failed to use the Verde River as a highway  
24 for commerce if it were susceptible to commercial navigation.” *Id.*

25  
26  
27 <sup>10</sup> *See* Tr. at 12/15/14:120-21 (Fuller); Fuller, “Presentation to ANSAC: Verde River Navigability  
(Revised),” Slide 80 (December 8, 2014) [X035, ASLD 167] (“Fuller Power Point”).

1 The 2014/15 evidence showed that efficiency and ease of transportation was a  
2 “constant[]” concern for the military, but they did not use the Verde. *See* Tr. at 2/25/15:2389-  
3 90 (August). “They instead used ‘cumbersome’ wagons, horses, and pack animals.” *Id.* For  
4 instance, the military even cut the Stoneman Road, which “was not easy,” instead of using the  
5 Verde. *See* Tr. at 2/25/15:2391-92, 2409-10 (August); *id.* at 3/30/15:2630 (Burtell). With  
6 regard to the Stoneman Road, Mr. Burtell testified: “I can’t believe that if the Verde River was  
7 navigable, everybody would have ignored it because a road was so much easier. They were  
8 expensive to build. They were expensive to maintain.” *Id.* at 3/30/15:2633 (Burtell).

### 9 5. Settlers

10 Following the discovery of gold in Arizona, permanent settlement was established in  
11 central Arizona. *See* Fuller 2003, at 3-9 [EI 31]. Early settlers commented on the Verde,  
12 revealing its variable nature and indicating that it was impeded by beaver dams and had  
13 extensive marshes in the floodplains. *Id.* at 3-13 to 3-14. These early residents along the  
14 Verde used water from the river for farming, mining, and hydroelectric power. *Id.* at 3-15 to  
15 -17. Farmers in the middle Verde River Valley constructed irrigation ditches. *Id.* at 3-15.  
16 Ranchers and farmers raised products and crops that were transported overland to the military  
17 forts. *Id.* Yet, despite substantial usage of the waters of the Verde, there is no evidence that  
18 the river itself was used for the transportation of any goods or people. *Id.*

19 Early transportation in the Verde River Valley was primarily limited to horseback,  
20 mule trains, wagons, and railroad. *See* Fuller 2003, at 3-19 [EI 31]. “Mining and farming  
21 began back in the 1860s, and particularly with the farming began the diversions.” *See* Tr. at  
22 12/15/14:121 (Fuller). There is no evidence, however, that miners and farmers along the  
23 Verde in the 1860s used boats on the Verde. *Id.* at 12/17/14:657 (Fuller).

24 Like the military, these early settlers also had a significant need for practical and  
25 reliable transportation near the river. A stage line that carried passengers and mail between  
26 Prescott and Maricopa Wells had begun in August 1868. *See* Burtell 2014, at 11 [X009].  
27



1 “[H]ad the Verde, Salt, and Gila rivers been navigable, these streams would have offered as  
2 direct a route between the two towns as passing overland by stage through Wickenburg.” *Id.*

### 3                   6.       Federal land surveys

4           Another group of individuals who were present along the Verde at a relatively early  
5 date were the federal land surveyors who were responsible for conducting the rectangular  
6 survey in the new territory. Dr. Douglas Littlefield testified, both at the 2006 hearing and  
7 again in 2015, regarding surveys on the Verde.<sup>11</sup> Each of these surveyors was under specific  
8 instructions to distinguish between navigable and non-navigable streams. *See* Note 11, *supra*.  
9 None of these Government representatives ever indicated that the Verde was navigable. *See*  
10 Littlefield 2005, at 73 [EI 32].

11           The Commission discussed the federal land surveys in its 2008 Decision. At that time,  
12 the Commission stated that “[t]he surveyors’ opinions, as shown by their action and reports,  
13 are not determinative of the issue of navigability, but their actions and opinions are probative  
14 and support the position that the watercourse was not navigable.” 2008 Decision, at 32  
15 (citing, among other cases, *Lykes Bros., Inc. v. United States Army Corps of Engineers*, 64  
16 F.3d 630 (11th Cir. 1995)).

17           In his 2014 report, Dr. Littlefield stated: “Since surveyors were required to ‘meander’  
18 all navigable bodies of water (follow the sinuosities of the banks) and to keep detailed notes  
19 of those meanders, survey documents are vital to understanding what the Verde was like at  
20 the time of survey.” *See* Littlefield 2014, at 7 [X002]. “Federal government surveyors were  
21 specifically charged with the task of identifying navigable streams as part of their surveying  
22 duties, and the manuals and instructions under which they carried out their work were very  
23 precise about how navigable bodies of water were to be distinguished from non-navigable  
24 streams.” *Id.* at 49. “As part of the U.S. Government’s surveying efforts, the areas along

---

25 <sup>11</sup> *See* Littlefield, “Assessment of the Verde River’s Navigability Prior to and on the Date of  
26 Arizona’s Statehood, February 14, 1912,” at 11-13, 37-45 (July 7, 2005) [EI 32] (“Littlefield 2005”);  
27 Tr. at 1/18/06:68-69 (Littlefield); Littlefield, “Revised and Updated Report: Assessment of the  
Navigability of the Verde River Prior to and on the Date of Arizona’s Statehood, February 14, 1912,”  
at 13-50 (April 3, 2014) [X002] (“Littlefield 2014”).

1 parts of the Verde River were surveyed and resurveyed many times in the years before 1912.”  
2 *Id.* at 49-50. “Significantly, while those surveys were done at varying times of year, in  
3 different years, and by at least eight individuals, all of the descriptions and plats that resulted  
4 from this work consistently portrayed the Verde River as a non-navigable stream.” *Id.* at 50.

5 Dr. Littlefield examined all of the survey notes and plats “for the entire Verde River,  
6 from its headwaters near Paulden, Arizona to the Verde’s confluence with the Salt River,  
7 except for those surveys that were done long after statehood.” *See* Tr. at 2/18/15:1465  
8 (Littlefield). “Most federal surveyors along the Verde River did not meander the stream, thus  
9 indicating a lack of navigability in their viewpoints.” *Id.* at 2/18/15:1473 (Littlefield). “In  
10 those few instances where the surveyors did meander the Verde, all of those instances are  
11 attributable to instructions in different surveying manuals for meanders of nonnavigable  
12 bodies of water under certain special circumstances.” *Id.* at 2/18/15:1473-74. “Thus, there  
13 were eight different federal surveyors, who were specifically charged with recording  
14 navigable bodies of water, and who undertook surveys along the Verde in different years, that  
15 indicated the Verde River, in their view, was not navigable.” *Id.* at 2/18/15:1474; *see also*  
16 Littlefield Power Point, at 16 [X024]. “[N]ot one of the surveyors recorded information about  
17 the Verde River that would be consistent with a determination of navigability.” *See*  
18 Littlefield 2014, at 26 [X002].

### 19 7. Federal and state land patents

20 The federal and state land patents issued along the Verde also are persuasive evidence  
21 of non-navigability. For example, the Federal Government granted over one hundred separate  
22 patents that touched or overlay the Verde to private individuals. *See* Littlefield 2005, at 110  
23 [EI 32]; Tr. at 1/18/06:71 (Littlefield). In not one case did any of those patents (or the  
24 supporting patent files) indicate that acreage was being withheld because the Verde was  
25 navigable. *See* Littlefield 2005, at 110 [EI 32]; Tr. at 1/18/06:71 (Littlefield).

26 Dr. Littlefield obtained all of the patent files that either overlay or touch the Verde and  
27 reviewed all of those patent files. *See* Tr. at 2/18/15:1476 (Littlefield). “[T]here are over 100

1 of them . . . that the Verde River came in contact with.” *Id.* “In not one instance did the U.S.  
2 government, in granting any type of patent along the Verde River, indicate a belief that the  
3 stream was navigable by withholding acreage for the bed of the river.” *Id.* at 2/19/15:1517.  
4 (Littlefield). In fact, if you go through the homestead patent files, which Dr. Littlefield did,  
5 “many of the patent applicants and their witnesses specifically noted that their patent claims  
6 included the bed of the river.” *Id.* “[N]one of the federal patents that overlay the Verde River  
7 (regardless of their respective dates) contain any provisions for reserving the bed of the river  
8 to Arizona.” Littlefield 2014, at 62 [X002].

### 9 **8. Boating attempts**

10 Additional evidence in support of a finding of non-navigability comes from the  
11 accounts of the Verde in the decades prior to statehood, including the early accounts of  
12 attempts by an ambitious few to actually float boats on the river. The evidence shows a  
13 sparse record of a handful of individuals who actually did attempt to navigate the Verde in the  
14 late 1800s.

15 As Mr. Fuller and his colleagues concluded when they were serving as impartial fact  
16 witnesses in 2003 (before Mr. Fuller took on the role of an advocate for navigability):  
17 “Historical accounts of boating on the Verde River do exist, though the vast majority of  
18 transportation in the region [was] by horses, mule trains, wagons, and railroad.” *See Fuller*  
19 *2003*, at 3-22 [EI 31]. As discussed in detail in Section V(A) below, the few historic accounts  
20 of attempted navigation on the Verde do not show that the river was actually used as a  
21 “highway for commerce.”

### 22 **9. Other historical descriptions of the river**

23 Other historical accounts of the Verde also support a finding of non-navigability.  
24 Perhaps the best example is a statement by the Arizona Territorial Legislature (which stood to  
25 gain title to the streambed upon statehood if the Verde had been navigable) in 1865 (when the  
26 river clearly was in its “ordinary and natural condition”). On December 28, 1865, the  
27 legislators passed a “Memorial Asking Congress for an Appropriation to Improve the

1 Navigation of the Colorado River,” seeking \$150,000 to remove obstacles such as sand bars,  
2 snags, boulders, and other obstructions in the bed of the Colorado River. *See* Littlefield 2014,  
3 at 95 [X002]; *see also* Tr. at 2/19/15:1535 (Littlefield). That memorial declared that “**the**  
4 **Colorado River is the only navigable water in this Territory.**” *See* Littlefield 2014, at 95  
5 [X002] (emphasis added).

6 Mr. Burtell summarized the pre-statehood contemporaneous descriptions of the Verde  
7 as follows in his 2014 declaration: “Prior to development and under ordinary conditions,  
8 travelers along the river observed a relatively shallow stream characterized by both rapids and  
9 wide lagoons.” *See* Burtell 2014, at 2 [X009]. For example, an article published in 1892  
10 noted that “[t]he Rio Verde, like all Western streams, is quite copious during the spring  
11 months from the periodical rains and melted snow, but during the summer and autumn it is  
12 only a creek of 500 inches.” *See* Littlefield 2014, at 99 [X002]. Mary Boyer’s recollection of  
13 the Verde at Segment 2 in 1874 was that the river was “about the size of Woods ditch.” *See*  
14 Tr. at 12/15/14:131 (Fuller); Fuller Power Point, Slide 92 [X035, ASLD 167]. Dan  
15 Huntington described the Verde in Segment 5 in 1880 as “full of beaver dams.” *See* Tr. at  
16 12/15/14:136 (Fuller); Fuller Power Point, Slide 96 [X035, ASLD 167].

17 **B. Hydrology of the Verde**

18 The hydrology evidence shows that the Verde was not susceptible to being used as  
19 “highway for commerce.” The Verde watershed “is smaller in watershed area than the Gila.”  
20 *See* Tr. at 12/15/14:130 (Fuller); Fuller Power Point, Slide 89 [X035, ASLD 167]. As the  
21 ASLD’s own witnesses testified, the flows in the river are extremely variable. *See* Tr. at  
22 12/16/14:418, 448 (Farmer). The Verde “is a dynamic river. It changes constantly.” *Id.* at  
23 12/17/14:561 (Farmer). Mr. Farmer testified that the Verde “is dynamic. The water comes  
24 up, it shifts the rock and the sand and the gravel around. It can topple trees. It can move  
25 objects. It’s got that much power.” *Id.* at 12/16/14:451 (Farmer). Mr. Lynch, the owner of  
26 an outdoor recreation company who testified for the ASLD, stated that flash floods can make  
27 boating the Verde “very dangerous.” *Id.* at 12/16/14:296 (Lynch).

1           When asked how shallow the river can get, Mr. Lynch testified: “It gets pretty skinny.  
2 I mean in terms of cubic feet per second, the Camp Verde stretch has been down into the 17,  
3 18 cubic feet per second, and which isn’t a lot of water; but, again, it all stays in the channel.  
4 We’re out there moving rocks. We’re **helping to keep the water in channels so that it is**  
5 **boatable in different sections.**” *See* Tr. at 12/16/14:311-14 (Lynch) (emphasis added). Mr.  
6 Lynch, whose recreation company uses rubber “duckies” on the river, has a whole staff of  
7 people who move rocks, downed trees, and other obstacles from the river so that his  
8 customers can maneuver their “duckies” down a sort stretch of the river. *Id.*

9           The Verde is prone to long periods of low water. Mr. Burtell analyzed predevelopment  
10 flows on the river and estimated that, “for 75% of the time, undepleted streamflows along the  
11 Verde River remained (a) below 100 cfs in Segment 1 and the upper reach of Segment 2; (b)  
12 below 500 cfs in Segment 3 and the lower reach of Segment 2; and, (c) below 600 cfs in  
13 Segments 4 and 5.” *See* Burtell 2014, at 15, 20 [X009]. Mr. Burtell “found that undepleted  
14 flows in the Verde River typically had a mean depth of less than 2.0 feet during 75% of the  
15 year.” *See* Burtell 2014, at 20 [X009].

16           Mr. Hjalmarson attempted to reconstruct predevelopment flows on the Verde, but his  
17 methodology was not sound. As discussed in Section V(B)(3) below, his testimony does not  
18 support a finding that the Verde was “susceptible” to navigation in its “ordinary and natural  
19 condition.”

20           In its 2008 Decision, this Commission found that “the area is subject to great variation  
21 in flow due to extremes in precipitation.” 2008 Decision, at 44. “The river will have a very  
22 low flow during dry months and whenever there is a drought and then have annual high  
23 waters during the water and monsoon seasons. . . .” *Id.* The Commission found that the  
24 Verde, “while a perennial stream and flowed year round prior to statehood, was a very erratic,  
25 unstable and unpredictable stream because the flow varies from the very low, sometimes less  
26 than 200 cfs [cubic-feet per second], to annual floods estimated between 13,000 and 20,000  
27

1 cfs with periodic floods exceeding 100,000 cfs.” *Id.* at 52. The hydrology evidence  
2 introduced during the 2014/15 Hearings was consistent with those prior findings.

3 **C. Geomorphology and Impediments to Navigation**

4 The Commission also received a substantial amount of evidence regarding the  
5 geomorphology of the Verde and natural impediments to navigation. In conjunction with the  
6 prior hearing, geomorphologist Dr. Stanley Schumm presented a written report in 2004  
7 regarding the geomorphology of the Verde.<sup>12</sup> Dr. Schumm stated that substantial portions of  
8 the Verde have a braided channel along with bedrock controls and geologic structures and that  
9 the channel of the Verde changed historically, with channel erosion and channel widening  
10 largely as a result of floods in the early 20th century. *See* Schumm 2004, at 2, 8, 14 [EI 30].  
11 Dr. Schumm concluded that “the numerous rapids and bedrock impact on the river prevent  
12 navigation, but even more important are the very steep gradients ranging from 12 to 25  
13 ft/mile” that would make navigation “impossible.” *See* Schumm 2004, at 2, 14 [EI 30].

14 Those conclusions regarding the variable nature and overall extremely steep slope of  
15 the Verde were consistent with the geomorphic information presented by the ASLD’s  
16 consultants at the 2006 hearing.<sup>13</sup> The ASLD’s 2003 report stated: “The bed forms of the  
17 low-flow channels are characterized by a repeating sequences of pools (deeper water areas)  
18 and riffles or rapids (shallow water areas typically dominated by cobbles and small  
19 boulders).” *See* Fuller 2003, at 5-6 [EI 31].

20 The Commission examined the geomorphology evidence in depth in its 2008 Decision.  
21 For instance, with respect to the canyon reaches of the Verde, the Commission found:

22 In the area above Bartlett Dam, excluding the Verde Valley, the Verde  
23 River flows through some of the most rugged country in Arizona. In these  
24 mountain canyons, the flood plain is limited in extent and the potential change

25 <sup>12</sup> *See* Schumm, “Geomorphic Character of the Verde River” (December 2004) [EI 30] (“Schumm  
26 2004”).

27 <sup>13</sup> *See* Tr. at 01/18/06:18-19, 26-27 (Pearthree) (“I hammered home the point the Verde is a variable  
floodplain, valley morphology changes a lot up and down the river.”); Fuller 2003, at 5-26 [EI 31]  
(noting that the width of the flood channels varies substantially).

1 in channel position is also limited. The riverbank in these canyons is steep,  
2 making it difficult for people to reach the river. The river flows fast and  
3 contains rapids, waterfalls and other obstacles. The gradients range from 12 to  
4 25 feet per mile, with the rapids, waterfalls and other obstacles in these narrow  
canyons and the steep gradient, navigation would be impossible . . . .

5 2008 Decision, at 42-43 (citing Dr. Schumm’s testimony). With regard to the more alluvial  
6 reaches, the Commission determined:

7 In the Verde Valley and the reach below Bartlett Dam, the river spreads out  
8 over a larger flood plain and had braided characteristics with shifting sand bars  
9 and sand islands, which would make it impossible to be considered as navigable  
or susceptible to navigation.

10 *Id.* at 52.

11 During the 2014/15 Hearings, additional evidence was presented regarding physical  
12 characteristics of the Verde that make it not suitable for navigation. For instance, the  
13 evidence showed that the channel of the Verde is not confined and shifts over time, especially  
14 during floods and other high flow events.<sup>14</sup> “During floods, the flows are so powerful that  
15 they can rapidly and significantly alter the channel and adjacent overbanks.” *See* Mussetter  
16 2014, at 6 [X016]. The Verde is a “flood dominated” stream. *See* Tr. at 12/15/14:30 (Fuller).  
17 Mr. Lynch testified that

18 whenever we get the big flash flooding, of course, everything changes. . . . And  
19 then when we have the big flood events it cleans the whole corridor out.  
20 There’s no more trees. Because once we get into low water times, the entire  
21 river corridor becomes – is overgrown with trees and brushes and all kinds of  
22 vegetation, and when we have our big flood events, bam, I mean it’s just cleared  
out.

23 *Id.* at 12/16/14:302-03 (Lynch). “Sometimes after the big floods it just rechannelizes  
24 everything.” *Id.* at 12/16/14:332 (Lynch). Large floods can shift the channel over the “entire  
25 reach” of the river. *Id.* at 2/18/15:1333 (Hjalmarson).

26  
27 <sup>14</sup> *See* Mussetter, “Declaration: Navigability of the Verde River,” at 6 (October 10, 2014) [X016]  
 (“Mussetter 2014”).

1 Also, certain portions of the Verde (especially in Segments 2 and 5) have a braided  
2 channel, which is not conducive to navigation. *See* Mussetter 2014, at 24 [X016]. Mr. Fuller  
3 testified, for instance, that a photograph of Segment 2 from 1800 shows a braided portion of  
4 the river.<sup>15</sup> Mr. Hjalmarson admitted that a number of the photographs included in his report  
5 depict braiding. *See* Tr. at 2/18/15:1350-52 (Hjalmarson). Mr. Farmer stated that “[w]hen  
6 you get out of the low flow channel and you get out into the braided channels that now are  
7 watered, yes, you have severe hazards of trees.” *Id.* at 12/16/14:450 (Farmer). Dr. Mussetter  
8 testified about significant braiding in Segment 5.<sup>16</sup>

9 The steep slope of the Verde also acts as an impediment to navigation. For example,  
10 “[t]he approximately 17-mile segment of the Verde River between Beasley Flat and Verde  
11 Hot Spring is relatively steep (~19 feet/mile).” *See* Mussetter 2014, at 11 [X016]. Mr. Fuller  
12 “didn’t do any particular analyses, mathematical analyses, of slope” of the Verde, but he  
13 agreed that generally, as the slope of the river increases, it becomes less navigable. *See* Tr. at  
14 12/17/14:636-37 (Fuller).

15 The existence of marshy areas on the Verde in predevelopment times also would have  
16 impaired navigation. *See* Tr. at 12/17/14:657-58 (Fuller). These conditions were most  
17 prevalent in the Camp Verde area, but such conditions existed in other parts of the Verde. *Id.*  
18 at 12/17/14:660-61 (Fuller); Tr. at 12/18/14:990 (Hjalmarson). In the 1870s, Segment 5 was a  
19 “source of malaria.” *Id.* at 12/15/14:130 (Fuller); Fuller Power Point, Slide 90 [X035, ASLD  
20 167]. Also in the 1870s, Segment 2 “was so marshy that the Yavapais were able to farm only  
21 20 of the 125 acres available on the floodplain.” *See* Tr. at 12/15/14:131 (Fuller).<sup>17</sup>

22 \_\_\_\_\_  
23 <sup>15</sup> *See* Tr. at 12/15/14:149 (Fuller); Fuller Power Point, Slide 118 [X035, ASLD 167]; *see also, e.g.*,  
Tr. at 12/15/14:115, 12/17/14:609 (Fuller) (discussing “highly braided” reaches of other segments).

24 <sup>16</sup> *See* Tr. at 2/20/15:1883, 2/23/15:1944-45 (Mussetter); *see also* Mussetter, “Verde River  
25 Navigability,” at 53 (February 2015) [X060] (“Mussetter Power Point”).

26 <sup>17</sup> *See also* Fuller Power Point, Slide 91 [X035, ASLD 167]; Tr. at 12/15/14:132 (Fuller); Fuller  
27 Power Point, Slide 93 [X035, ASLD 167]. In its 2008 Decision, the Commission found: “In the  
middle Verde area, there were marshes that served as breeding grounds for mosquitoes causing  
malaria, and this was the subject of a report by the Surgeon General of the Army in 1879.” 2008  
Decision, at 29.



1           The presence of large boulders in the stream also limits navigation on the Verde. Mr.  
2 Hjalmarson’s 2014 report states that “[t]here is also evidence of large boulders that rolled in  
3 and along the river channel and floodplain from adjacent steep slopes.”<sup>18</sup> When asked  
4 whether there are times when the flow is too low to run a guided tour, Mr. Lynch testified:  
5 “But the river – and we’ve done a lot of work to it. When the water gets low, we’ve gone out  
6 there, we have to move rock around.” *See* Tr. at 12/16/14:293 (Lynch). When asked whether  
7 he could still boat the Verde if his company did not move rocks, Mr. Lynch testified: “You  
8 would be getting out of your boat a lot” on “all” sections of the river. *Id.* at 12/16/14:293  
9 (Lynch).

10           Perhaps the most significant impediment to navigation on the Verde (other than  
11 shallow water depths) is the presence of numerous rapids, especially in Segment 3. Mr.  
12 Lynch, for instance, testified that he would not operate even his “duckie” operation below  
13 Beasley Flats. *See* Tr. at 12/16/14:334 (Lynch). Mr. Fuller agreed with Jim Slingluff’s  
14 previous testimony that there are “probably 130 rapids or riffles on the river and that probably  
15 only 30 of them are large enough to have names.” *Id.* at 12/17/14:722-23 (Fuller); *see also id.*  
16 at 12/15/14:64 (Fuller).<sup>19</sup> Mr. Hjalmarson testified that “physical features of the channel  
17 itself, the number of, say, riffles or a major waterfall” affect navigability. *See* Tr. at  
18 2/18/15:1264-65 (Hjalmarson). The largest of these features is Verde Falls. *Id.* at  
19 2/23/15:1897-98 (Mussetter); Mussetter Power Point, at 18 [X060]. Even Mr. Farmer, a self-  
20 acknowledged “mountain man,” warns people to use extreme caution when approaching  
21 Verde Falls. *See* Tr. at 12/16/14:457, 500 (Farmer). Despite his extensive time spent  
22 canoeing the Verde, Mr. Farmer has never run Verde Falls in a canoe. *Id.* at 12/16/14:457  
23

---

24 <sup>18</sup> *See* Hjalmarson, “Navigability Along the Natural Channel of the Verde River, AZ, Detailed  
25 Analysis from Sullivan Lake to the USGS Gage Near Clarkdale and General Analysis from Clarkdale  
26 Gage to Mouth,” Appendix G, at 78 (October 4, 2014) [X015] (“Hjalmarson 2014”).

27 <sup>19</sup> “Williams (1996, pp.iii through 119) identified over 100 rapids along the Verde River from its  
headwaters to Horseshoe Reservoir.” *See* Burtell 2014, at 13 [X009].

1 (Farmer). In fact, Mr. Farmer has never seen a person run Verde Falls in a fully loaded canoe.  
2 *Id.* at 12/16/14:458 (Farmer).

3 Another category of impediments to navigation which occur mostly on the upper  
4 reaches of the Verde is beaver dams. As noted in the “Verde River Blue Trail Guide” that  
5 Mr. Hjalmarson included with his report: “Numerous and prolific, beavers are the engineers  
6 of the Verde! In the stretches from the headwaters downstream to Perkinsville they have built  
7 dam after dam, creating habitat for plants, fish and mammals.” *See* Hjalmarson 2014,  
8 Appendix I, at 13 [X015]. In the late 1800s, beaver dams were common along Segments 1, 2,  
9 and 5 of the river. *See* Burtell 2014, at 13 [X009]. Beaver dams are “part of the ordinary and  
10 natural condition of the river.” *See* Tr. at 12/15/14:186 (Fuller).

11 “Strainers” also can make navigation more difficult and dangerous. The “Verde River  
12 Blue Trail Guide,” for instance, warns: “Be aware of wildlife and river hazards such as  
13 strainers (fallen trees or debris) that are partially submerged in the water. They allow water to  
14 rush through but can pin a boat or body underwater.” *See* Hjalmarson 2014, Appendix I, at 2  
15 [X015]. Mr. Fuller, Mr. Lynch, and Mr. Farmer testified about strainers in Segments 1, 2, and  
16 4. *See* Tr. at 12/15/14:71, 108 (Fuller); *id.* at 12/16/14:332 (Lynch); *id.* at 12/16/14:403  
17 (Farmer). When asked if he thought other portions of the Verde River were navigable other  
18 than the portions where he operates his tours, Mr. Lynch replied:

19 They’re tougher because there’s a lot – you know, since nobody’s out there  
20 maintaining them on a regular basis, there’s a lot more tree growth, strainers,  
21 trees that have fallen. What we do on the stretches that we commercially boat  
22 all the time, we’re out there **constantly** cutting back the bushes, the trees.  
23 When things fall into the river, we go out there **with our chainsaws**, because  
24 we’ve got to get all that stuff out of the river or people – it’s just not safe. You  
can’t get around it. So when you go into stretches of the river that we don’t  
boat commercially, that can get relatively **overgrown with all kinds of strange  
things.**”

25 Tr. at 12/16/14:309 (Lynch) (emphasis added). Mr. Farmer testified: “You don’t want to get  
26 washed into a strainer. It can cause all kinds of problems. They’re pretty much probably the  
27

1 most dangerous part of the river if you would get swept into one.” *See* Tr. at 12/16/14:404  
2 (Farmer); *see also id.* at 12/16/14:450-51 (Farmer).

3 **D. Boating**

4 One of Arizona’s premier white water boaters, Mr. Jim Slingsluff, testified in 2006  
5 regarding some of the boating trips he has taken on the Verde. *See* Tr. at 1/18/06:101-31  
6 (Slingsluff). His stories indicated that, at various points along its course, the river has natural  
7 impediments that would have prevented navigation at statehood and continue to do so. His  
8 slides depicted canoes and other modern craft hung up on boulders, trapped in rocky areas,  
9 and overturned after encountering falls or rapids.<sup>20</sup> Mr. Slingsluff readily acknowledged that  
10 many stretches of the river are hazardous—even with modern equipment and his substantial  
11 expertise. *See* Tr. at 1/18/06:112-13 (Slingsluff).

12 Two authors, Mr. Jim Byrkit and Mr. Bob Munson, who have written extensively on  
13 the history of the Verde, stated that the river is not navigable, even though they were aware of  
14 recreational boating on the river. *See* Fuller 2003, at 4-2 [EI 31]. Mr. Byrkit noted that such  
15 boating is normally possible only in February and March, and that in other months, “the  
16 Verde River cannot be run because it dries up or because it is dangerous, and that a lot of  
17 people have died in the Verde River because they enter the river during flooding.” *Id.*

18 Most, if not all, of the modern-day boating on the Verde is recreational. People take  
19 boats on the Verde for fun, not for transportation or to move goods. In his 2015 testimony,  
20 for example, Mr. Fuller agreed that recreational boaters “may choose to take the shallower  
21 channel because it’s a, quote, more fun ride.” *See* Tr. at 12/15/14:23 (Fuller). “The purpose  
22 of [modern boating on the Verde] was (and continues to be) recreational.” *See* Burtell 2014,  
23 at 5 [X009].

24 The boats that people try to use on the Verde (now and in the past) are small. Every  
25 witness who was asked went out of his way to make it clear that barges cannot navigate the

26 <sup>20</sup> *See* Tr. at 1/18/06:106-13 (Slingsluff); *see* Slingsluff, Power Point Presentation, Slides 21, 27, and 35  
27 (boulders), 8, 19, and 38 (rapids), 40 (canoe pinned in boulder) (January 18, 2006) [EI 34].

1 Verde. *See* Tr. at 12/15/14:39 (Fuller); *id.* at 12/16/14:355 (Lynch); *id.* at 12/19/14:1084-85  
2 (Hjalmarson). As Mr. Fuller testified:

3 [T]he boats that were being used are small boats. So I'm not here to say that  
4 you could take a steamboat down the Verde River. I think the rapids that are  
5 there, albeit they're mostly Class II, are enough to prevent that kind of use; nor  
6 even haul ore. Hopefully we can just dispel that whole argument and not have  
7 to come back to that. The river depths, the kinds of boats that you can get down  
8 this river are not sufficient that you're going to be hauling vast quantities of ore,  
9 certainly not the economic operations of the mines at Jerome. You needed to  
10 take that heavy stuff different places.

11 Tr. at 12/15/14:180 (Fuller).

12 It is also clear from the evidence in the record that the types of boats that people are  
13 using recreationally on the Verde today are far different from any boats available or used in  
14 Arizona in 1912. Canoes are "more durable than they were before." *See* Tr. at 12/15/14:57-  
15 58 (Fuller). Mr. Fuller testified that modern boats compared to historical boats have  
16 "improved durability, no doubt about that." *Id.* at 12/15/14:250 (Fuller). The primary  
17 difference between a modern plastic boat and a wooden boat of 1912 is that the plastic boat  
18 can take more abuse ("maybe even a lot more abuse, depending on the design of the boat").  
19 *Id.* at 12/15/14:227 (Fuller). Every ASLD witness testified that modern boats are more  
20 durable than older boats.<sup>21</sup> Durability "is one of the important characteristics" for boating on  
21 a river that has rocks and rapids. *Id.* at 12/17/14:588 (Fuller).

22 Modern-day recreational boaters also have the benefit of technology that was not  
23 available in 1912. Mr. Lynch uses stream gage data from the U.S. Geological Survey and  
24 weather radar when operating his tours. *See* Tr. at 12/16/14:339 (Lynch). Mr. Lynch testified  
25 that "[p]retty much everybody" checks the internet for conditions before boating the Verde.  
26 *Id.* at 12/16/14:366 (Lynch). As Mr. Dimmock explained, 21st century watertight containers  
27 are exponentially more effective than anything that was available in 1912. *Id.* at 3/31/15:2841

---

28 <sup>21</sup> *See* Tr. at 12/17/14:588 (Fuller); *id.* at 3/31/15:2841, 2869, 2888 (Dimmock); *id.* at 12/16/14:483  
29 (Farmer); *id.* at 12/16/14:314 (Lynch).

1 (Dimmock). This technology combines with more than one hundred years of skill  
2 development by boaters to make modern boaters able to traverse rivers at more shallow  
3 depths and over more significant obstructions than could have occurred in 1912.<sup>22</sup>

4 Despite a century of advances in equipment and techniques, modern-day recreational  
5 boating on the Verde is not without its dangers. Mr. Farmer, for instance, has had “near  
6 misses” on the Verde and has “wrecked” his canoe “completely.” *See* Tr. at 12/16/14:409-10,  
7 446 (Farmer). Mr. Farmer has swamped his canoe “many times” on the Verde, and he has  
8 seen wrecked canoes and boats in Segment 3. *Id.* at 12/16/14:467-68, 505 (Farmer). He  
9 testified: “There’s some places where you might be caught out in an inappropriate craft or in  
10 an inappropriate spot, and you’re going to have to bivouac until the water goes down a little  
11 bit.” *Id.* at 12/16/14:441 (Farmer).

12 The proponents of navigability also rely upon use by the so-called “ELFers,” a subset  
13 of boaters who enjoy boating in extreme low flow conditions. *See* Tr. at 12/16/14:497-98  
14 (Farmer). Mr. Fuller, the ASLD’s primary witness, is an admitted ELFer himself:

15 You know, my own personal experience has been that, you know, you see the  
16 low month being July there. You know, there’s some stuff that’s written in the  
17 guides that say, hey, you don’t want to go out there in low water season because  
18 it’s, you know, too rocky and difficult. And I kind of like those conditions. I  
19 like being on the river when it’s hot. And so lately I’ve gone down rivers at low  
20 flows and I’ve found them to be extremely boatable, in contrast to what’s  
written in the guide. So my own personal experience is they’re a lot more  
boatable and are very enjoyable at low water.

21 *Id.* at 12/15/14:249 (Fuller). ELFers do not set the standard of navigability for title, though.  
22 The fact that someone enjoys being in a boat on a river specifically when nobody else is there  
23 because the flows are low and the depths are shallow is the antithesis of that watercourse  
24

25  
26 <sup>22</sup> “And so what are some of the skills that have developed over the last hundred years that are so  
27 critical to what – you know, you said we can run anything now. We’ve got the knowledge. We’ve  
got the background. We’ve learned from our predecessors and built upon that.” *See* Tr. at  
3/31/15:2940-41 (Dimmock).

1 being a “highway for commerce” over which trade and travel could occur “in the customary  
2 modes of trade and travel on water.” See A.R.S. § 37-1101(5) (definition of “navigable”).

3 **III. The Proponents of Navigability Bear the Burden of Proving that the Verde is**  
4 **Navigable.**

5 The Arizona courts have long held that the proponents of navigability bear the burden  
6 of proving that a river is navigable.<sup>23</sup> The Arizona statutes further support this allocation of  
7 the burden. In order for the Commission to determine that a particular watercourse or  
8 segment thereof is “navigable,” the proponents of navigability must establish that fact by a  
9 “preponderance of the evidence.” See A.R.S. § 37-1128(A). If sufficient evidence is not  
10 presented to show navigability for a particular watercourse or segment, the Commission must  
11 find that watercourse or segment non-navigable. *Id.*; see also 2008 Decision, at 15-17.

12 **IV. The United States Supreme Court’s Decision in PPL Montana is Instructive with**  
13 **Regard to the Verde.**

14 Although the additional sixteen days of hearings in 2014/15 and the thousands of pages  
15 of supplemental evidence perhaps did not shed much additional light on the navigability of  
16 the Verde, the United States Supreme Court’s 2012 *PPL Montana* decision is particularly  
17 persuasive on the issue. The Court’s opinion in that case is consistent with and strongly  
18 supports this Commission’s conclusions in its 2008 Decision.

19 Proponents of navigability often have referred to the *PPL Montana* opinion as a  
20 “segmentation” case, in an apparent effort to downplay the importance of that Court’s  
21 decision on other issues. The Court’s decision in that case did address “segmentation” issues,  
22 but it also did a lot more.

23 For instance, the United States Supreme Court in *PPL Montana* rejected the “liberal”  
24 interpretation of the federal test of navigability that had been adopted by the Montana

25  
26 <sup>23</sup> See *Land Dep’t v. O’Toole*, 154 Ariz. 43, 46 n.2, 739 P.2d 1360, 1363 n.2 (App. 1987); *Arizona*  
27 *Ctr. for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 363 n.10, 837 P.2d 158, 165 n.10 (App.  
*Defenders of Wildlife v. Hull*, 199 Ariz. 411, 420, 18 P.2d 722, 731 (App. 2001); *State v.*  
*ANSAC*, 224 Ariz. at 238, 229 P.3d at 250.

1 Supreme Court, an interpretation that has been advocated by the proponents of navigability in  
2 this and other Arizona cases. The Montana Supreme Court had stated: “Broadly speaking,  
3 the District Court perceived the navigability for title test as somewhat ‘fluid.’ . . . Our  
4 independent review of the caselaw in this area establishes unequivocally that the District  
5 Court’s understanding of the navigability for title test was correct. The concept of  
6 navigability for title purposes is very liberally construed by the United States Supreme Court.  
7 . . .” *PPL Montana v. State*, 355 Mont. 402, 229 P.3d 421, 446 (2010), *rev’d*, 132 S. Ct. 1215  
8 (2012). The Montana Supreme Court had applied that “very liberal” interpretation of the  
9 navigability test and also had adopted a similarly broad definition of “commerce”:  
10 “Additionally, the term ‘commerce’ in the navigability for title context is very broadly  
11 construed. . . . Because navigability is based upon a broad definition of commerce combined  
12 with an ‘actual’ or ‘susceptible of use’ standard, present-day usage of a river may be  
13 probative of its status as a navigable river at the time of statehood. . . .” *Id.* at 446-47  
14 (citations omitted).

15 The United States Supreme Court reversed the Montana Supreme Court’s decision and  
16 soundly rejected its reasoning. 132 S. Ct. at 1215. In reaching its decision, the Court took the  
17 opportunity to clarify and restate the law of navigability from its prior decisions and to rein in  
18 the more “liberal” and expansive constructions of that law proffered by some state courts and  
19 lower federal courts in recent years,<sup>24</sup> including:

20 1. Reaffirming that the navigability for title test is applied as of the date of  
21 statehood. 132 S. Ct. at 1227-28. “Upon statehood, the State gains title within its borders to  
22 the beds of watercourses then navigable. . . .” *Id.*

23 2. Reiterating that the basis for a determination of navigability is use or  
24 susceptibility for use of the watercourse as highway for commerce. 132 S. Ct. at 1230. “By  
25

---

26 <sup>24</sup> See James L. Huffman, *PPL Montana v. Montana: A Unanimous Smackdown of a State Land*  
27 *Grab*, 11 *Cato Sup. Ct. Rev.* 167, 178 (2012) (“[T]he Court dismissed the Montana Supreme Court’s  
analysis for what it is: a judicial amendment of the law of title to submerged lands resulting in an  
uncompensated expropriation of lands owned by the United States and private parties.”)

1 contrast, segments that are nonnavigable at the time of statehood are those over which  
2 commerce could not then occur. Thus, there is no reason that these segments also should be  
3 deemed owned by the State under the equal-footing doctrine.” *Id.*

4 3. Confirming its prior pronouncements that the test relates to use or susceptibility  
5 to use for commerce as of the date of statehood. 132 S. Ct. at 1233. “Navigability must be  
6 assessed as of the time of statehood, and it concerns the river’s usefulness for ‘trade and  
7 travel,’ rather than for other purposes.” *Id.* “Mere use by initial explorers or trappers who  
8 may have dragged their boats in or alongside the river despite its nonnavigability in order to  
9 avoid getting lost, or to provide water for their horses or themselves, is not enough.” *Id.*

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

17 5. Reiterating and clarifying its prior opinions regarding seasonal use and its  
18 ability to prove navigability. 132 S. Ct. at 1234. Focusing on the commercial aspects of the  
19 transportation, the Court stated: “While the Montana court was correct that a river need not  
20 be susceptible of navigation at every point during the year, neither can that susceptibility be  
21 so brief that it is not a commercial reality.” *Id.*

22 **V. Based upon the Evidence in the Record, the Verde is Not “Navigable.”**

23 A watercourse can meet the test for “navigability” under the Arizona statute and the  
24 case law if it satisfies either of two elements: (1) If it was actually used as a “highway for  
25 commerce” or (2) if it was “susceptible to being used” as a “highway for commerce.” *See*  
26 A.R.S. § 37-1101(5). In making such determinations, “all evidence should be examined  
27 during navigability determinations and no relevant facts should be excluded.” *Defenders of*



1 *Wildlife*, 199 Ariz. at 425, 18 P.2d at 736. “[A] river is navigable in law when it is navigable  
2 in fact.” *Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1431 (9th Cir. 1993). Thus, the  
3 Commission must consider all of the evidence in the record before it. When the Commission  
4 reviews the evidence, it should determine that the Verde never has been used or susceptible to  
5 being used as a “highway for commerce.”<sup>25</sup>

6 **A. The Verde has never actually been used as a “highway for commerce.”**

7 No evidence exists of any prehistoric boating or flotation of logs on the Verde. *See*  
8 Section II(A)(1), *supra*. Likewise, no credible evidence exists that the early explorers or  
9 soldiers ever used the river—for “commerce” or otherwise. *See* Section II(A)(2)-(8), *supra*.<sup>26</sup>

10 Mr. Fuller’s evidence of the isolated accounts of attempted boating does not establish  
11 that the river was used for any type of sustained trade or travel. For example:

12 1. Mr. Fuller testified that, in 1868, troops at Fort McDowell attempted to build a  
13 raft to ferry across the river at high flow, but the raft capsized. *See* Tr. at 12/15/14:153  
14 (Fuller); Fuller Power Point, Slide 127 [X035, ASLD 167].

15 2. Mr. Fuller testified that, in 1878, troops at Fort McDowell used a boat as a  
16 ferry, but this was only to cross the river and occurred “primarily during high flow.” *See* Tr.  
17 at 12/15/14:153 (Fuller); Fuller Power Point, Slide 127 [X035, ASLD 167].

18 3. Mr. Fuller testified that, in 1887, the U.S. Army used a collapsible boat on  
19 Segment 2, but this was only to take couriers across the river during high flows. *See* Tr. at  
20 12/15/14:155 (Fuller); Fuller Power Point, Slide 129 [X035, ASLD 167].

21 4. On his direct examination during the 2014/15 Hearings, Mr. Fuller showed a  
22 photograph of two soldiers in a boat that he speculated to be approximately ten miles from  
23

---

24 <sup>25</sup> The Court of Appeals’ decision in *State v. ANSAC* remains subject to review by the Arizona  
25 Supreme Court following these proceedings on remand. In making the arguments presented in this  
26 brief, SRP does not waive its right to contend before the appellate courts that *State v. ANSAC* applied  
27 an incorrect legal standard.

<sup>26</sup> *See also Lykes Bros., Inc. v. Corps of Eng’rs*, 821 F. Supp. 1457, 1459 (M.D. Fla. 1993), *aff’d*, 64  
F.3d 630 (11th Cir. 1995) (had river been navigable, it would seem obvious that military and settlers  
would have used the river to transport men and supplies rather than carrying them overland).

1 Camp Verde to conclude that the soldiers had navigated the boat there from Camp Verde. *See*  
2 Tr. at 12/15/14:155-56 (Fuller); Fuller Power Point, Slide 129 [X035, ASLD 167]. Mr. Fuller  
3 admitted, however, that he had no evidence (other than his speculation based upon that  
4 photograph) that any soldiers at Fort Verde ever used boats to go up or down the river. *See*  
5 Tr. at 12/17/14:656-57 (Fuller). He also conceded that the he did not know whether the two  
6 soldiers in that photograph actually travelled downstream in that boat, as opposed to the  
7 equally plausible possibilities that (1) the boat was hauled to that location by wagon or (2) the  
8 boat was already in that location and the soldiers traveled there and then got in the boat. *Id.* at  
9 12/18/14:896 (Fuller). He had no knowledge as to how that boat got to the location of the  
10 photograph. *Id.* at 12/17/14:674 (Fuller). His testimony about the photograph was based  
11 entirely on speculation and conjecture. With regard to this same photograph introduced  
12 during the 2005 hearing, the Commission found: “It would appear that this boat was used  
13 more as a ferry to cross the river than to travel up or down the river.” 2008 Decision, at 36.

14 5. Mr. Fuller testified that, in December 1888, two soldiers traveled from Fort  
15 McDowell to Mesa Dam in a canoe, but one of the soldiers (Major Spaulding) died from an  
16 accidental gunshot discharge during a portage. *See* Tr. at 12/15/14:156 (Fuller); Fuller Power  
17 Point, Slide 130 [X035, ASLD 167].

18 6. Mr. Fuller testified that, in 1891, T. Carrigan attempted to boat Segment 1 in a  
19 raft built of railroad ties, but the raft fell apart trying to cross the river. *See* Tr. at  
20 12/15/14:157 (Fuller); Fuller Power Point, Slide 131 [X035, ASLD 167].

21 7. Based on a single newspaper article from 1892, Mr. Fuller testified that JK &  
22 George Day traveled from Camp Verde to Yuma on a trapping expedition and that one of the  
23 two brothers made that trip five separate times. *See* Tr. at 12/15/14:158 (Fuller); Fuller Power  
24 Point, Slide 132 [X035, ASLD 167]. Mr. Fuller could not offer any example of trappers using  
25 boats on the Verde other than that one account. *See* Tr. at 12/17/14:655-56 (Fuller).  
26 Significant discrepancy existed between the distance (800 miles) the newspaper reported the  
27 brothers as having traveled and the actual distance from Camp Verde to Yuma. *See* Tr. at

1 2/25/15:2420-21, 2/25/15:2426-27 (August); *id.* at 3/30/15:2595 (Burtell). The actual  
2 distance is closer to 260 river miles. *Id.* at 3/30/15:2595, 2600 (Burtell). Despite the several  
3 inconsistencies in this one newspaper article, Mr. Fuller, in his zeal to act as an advocate for  
4 navigability, counted this one article as evidence of five different boat trips on the Verde.

5 8. Mr. Fuller testified that, in April 1905, Hooker, Cox, Smith, and Miller  
6 attempted to use iron boats to travel from Jerome to Phoenix, but they gave up and went back  
7 to Jerome by wagon. *See* Tr. at 12/15/14:164-65 (Fuller); Fuller Power Point, Slide 136  
8 [X035, ASLD 167]. Even Mr. Fuller described this trip as a “failed boating account.” *See*  
9 Tr. at 12/15/14:164-65 (Fuller).

10 9. Mr. Fuller testified that, in August 1910, four men attempted to travel from  
11 “Verde country” to Mesa until their boat wrecked and they lost their gear and had to walk to  
12 Mesa. *See* Tr. at 12/15/14:166-67 (Fuller); Fuller Power Point, Slide 137 [X035, ASLD 167].  
13 Mr. Fuller testified that this August 1910 trip was a failure. *See* Tr. at 12/15/14:168 (Fuller);  
14 Fuller Power Point, Slide 137 [X035, ASLD 167].

15 10. Mr. Fuller testified that, in the spring of 1917, Stevens and Webber attempted to  
16 boat the Verde, but decided that they could not navigate the Verde Falls. *See* Tr. at  
17 12/15/14:169-70 (Fuller); Fuller Power Point, Slide 138 [X035, ASLD 167].

18 Evidence of use of boats or crude rafts to cross a river during floods or other high  
19 water (e.g., Accounts Nos. 1, 2, and 3 above) is not sufficient to show that the river was  
20 actually used as a “highway for commerce.” A photograph of two soldiers in a boat (Account  
21 No. 4) and speculation about where they were and how they got there likewise does not  
22 satisfy the proponents’ burden of proving that the river was actually navigated. Evidence that  
23 people thought about going down the river in a boat and either decided against it or started  
24 and then changed their mind (Accounts Nos. 6, 8, 9, and 10) also does not help meet that  
25 burden. The story about the Day brothers (Account No. 7), if it is true, is perhaps evidence  
26 that could support the proponents’ position, but that story is so full of holes that it cannot hold  
27 water.

1 During the 2014/15 Hearings, Mr. Fuller reprised his standard articulated in prior  
2 hearings on other watercourses that a boating trip was successful if the passengers and cargo  
3 reached their destination and nobody died. See Tr. at 12/15/14:173 (Fuller); Fuller Power  
4 Point, Slide 141 [X035]. The December 1888 story about Major Spaulding (Account No. 7  
5 above) does not even satisfy that flimsy standard.

6 The proponents of navigability still have submitted insufficient evidence to show that  
7 the Verde ever was actually navigated. As the Commission correctly held in 2008: “A  
8 survey of the historical account[s] of boating supports the proposition that the river was not  
9 suitable for navigation and that there was never any sustained, successful use of a watercraft  
10 on the river or use by the river for floating logs or otherwise as a highway for commerce.”  
11 2008 Decision, at 51.

12 **B. The Verde has never been “susceptible to being used” as a “highway for**  
13 **commerce.”**

14 Because the river was not actually used as a “highway for commerce,” the only way it  
15 can be considered navigable is if it was “susceptible” to such use. Insufficient evidence exists  
16 in the record to show that the river, in any condition at any time, was capable of acting as “a  
17 corridor or conduit within which the exchange of goods, commodities or property or the  
18 transportation of persons may be conducted.” A.R.S § 37-1101(3) (defining “highway for  
19 commerce”).

20 **1. If the Verde had been “susceptible” to navigation, people would have**  
21 **navigated it.**

22 Although the Verde existed in close proximity to much of the exploration and  
23 settlement in early Arizona, it was never used for any type of regular trade or travel. In order  
24 for the Commission to determine that the river was “susceptible to being used . . . as a  
25 highway for commerce,” it must find that the prehistoric inhabitants, the Spanish explorers,  
26 the American trappers and mountain men, the military personnel in the area, and the  
27 thousands of citizens who resided along the river and in the general area prior to statehood

1 simply failed to comprehend the potential usefulness of the river as an avenue for navigation.  
2 No evidence exists to support such a finding. Efficiency and ease of transportation was a  
3 “constant” concern, both for the military personnel and for early settlers, but still they did not  
4 use the Verde as a “highway for commerce.” See Tr. at 2/25/15:2389-90 (August); see also  
5 Sections II(A)(4), (5), *supra*.

6 It might be theoretically possible that, on one or more occasions in particular years, it  
7 would have been feasible for a person to float a boat down some portion of the river.  
8 Occasional use in exceptional times does not, however, support a finding of navigability.  
9 “The mere fact that a river will occasionally float logs, poles, and rafts downstream in times  
10 of high water does not make the river navigable.” *United States v. Crow, Pope & Land Ents.,*  
11 *Inc.*, 340 F. Supp. 25, 32 (N.D. Ga. 1972) (citing *United States v. Rio Grande Dam & Irr.*  
12 *Co.*, 174 U.S. 690 (1989)). “The waterway must be susceptible for use as a channel of useful  
13 commerce and not merely capable of exceptional transportation during periods of high  
14 water.” *Id.* (citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922)).

15 No government agency, including the federal land surveyors, ever indicated that the  
16 Verde was navigable.<sup>27</sup> No federal or state land patent indicated that the Verde was  
17 navigable.<sup>28</sup> The early descriptions of the river by those who were present at the time  
18 describe a river that was erratic in its flow; was full of sand bars, rapids, marshes, and beaver  
19 dams; and was not conducive to navigation. See Section II(A), *supra*. People did not  
20 navigate the Verde because it was not navigable.

---

22 <sup>27</sup> See generally Section II(A)(6), *supra*; see also *United States v. Oregon*, 295 U.S. 1, 23 (1935)  
23 (courts should consider government’s treatment of watercourse as non-navigable in their analysis of  
24 navigability); see also *Washington Water Power Co. v. Federal Energy Regulatory Comm’n*, 775  
25 F.2d 305, 332 (D.C. Cir. 1985) (government’s, including Army Corps of Engineers’, description and  
26 treatment of river is relevant to determination of river navigability).

27 <sup>28</sup> See Section II(A)(7), *supra*; see also *Lykes Bros.*, 821 F. Supp. at 1460 (court found actions by  
State show that, for many years, it considered river non-navigable, e.g., land bordering river had been  
deeded to private ownership and owners paid taxes); *Koch v. Department of Interior*, 47 F.3d 1015,  
1019 (10th Cir. 1995) (because Federal Government did not express intent to retain island in non-  
navigable river, title to island passed to patent holder).

1                   **2. Evidence of modern-day recreational boating on the Verde does not**  
2                   **satisfy the *PPL Montana* criteria for indicia of “navigability” for**  
3                   **title.**

4                   The United States Supreme Court in *PPL Montana* specifically found that post-  
5                   statehood use of the river can be considered in determining navigability for title only if that  
6                   use involves the same river conditions and the same types of boats that existed at statehood.  
7                   132 S. Ct. at 1233; Section IV, *supra*. As part of the evidence Mr. Fuller used to determine  
8                   that the Verde was navigable, he relied heavily upon his opinion that the river is still  
9                   navigable.<sup>29</sup> The modern-day recreational boating on the Verde is not evidence of  
10                  navigability for title under the *PPL Montana* standard, however, for several reasons.

11                  First, the current boating on the river is recreational. *See* Section II(D), *supra*. It is  
12                  done for “fun,” not for transportation or to move goods. Many of the same characteristics that  
13                  make the river more challenging and enjoyable for 21st century urban dwellers looking for  
14                  entertainment are the same characteristics that would have made the river not suitable as a  
15                  “highway for commerce” in 1912 or earlier. As Mr. Fuller readily acknowledged, modern-  
16                  day recreational boaters are looking for an adventure and “may choose to take the shallower  
17                  channel because it’s a, quote, more fun ride.” *See* Tr. at 12/15/14:23 (Fuller). Under *PPL*  
18                  *Montana* and the federal test of navigability for title, a river is not a “highway for commerce”  
19                  just because it is so difficult to navigate that people enjoy testing their skills against its  
20                  various obstacles.

21                  Second, the record is clear that modern boats made of plastic and other synthetic  
22                  materials are much more durable than any boats that were available in 1912. *See* Section  
23                  II(D), *supra*. A modern plastic boat can take more abuse (“maybe even a lot more abuse”)  
24                  than a 1912 boat. *See* Tr. at 12/15/14:227 (Fuller). Although the proponents of navigability  
25                  went to great lengths to argue that “a boat is a boat,” the indisputable evidence shows that  
26                  durability “is one of the important characteristics” for boating on a river (like the Verde) that

27                  <sup>29</sup> “The exact amount of the more flow is almost irrelevant to me at this point, because I know that if I  
go out there in the conditions as they exist now, it’s boatable.” Tr. at 12/15/14:192 (Fuller).

1 has rocks and rapids, *id.* at 12/17/14:588 (Fuller), and the durability of boats is much better  
2 today than it was in 1912. Comparing historical wooden dories at the time of statehood to  
3 modern rubber rafts, Mr. Dimmock testified:

4 Durability, I will say modern rafts take a beating for a lot longer than a wood  
5 boat, but modern rafts are designed to be used over and over and over and over  
6 and over again; whereas the wood boats in those days were maybe going to do  
7 one trip, because there's nobody there in their car to drive them back to the put-  
8 in. They would probably build another boat. So in terms of durability, **they**  
9 **would last a trip or two**, no problem.

10 Tr. at 3/31/15:2841 (Dimmock) (emphasis added). Mr. Slingluff, who previously testified on  
11 behalf of the ASLD, in an article written for *The Southwestern Sportsman National Magazine*  
12 wrote:

13 Shallow creeks and rivers are boatable in many different canoes, but aluminum,  
14 **canvas, and wood boats are easily damaged and difficult to repair.** Plastic  
15 canoes are durable, slide easily over rocks, slip quietly through the water, and  
16 do not conduct heat or cold. **Plastic canoes can open areas to sportsmen that**  
17 **are otherwise only a wish.**

18 Slingluff, *Shallow Streams: Liquid Paths Into Wilderness*, *The Southwestern Sportsman*  
19 *National Magazine*, at 16 (Winter 1990-91) [EI 34-1] (emphasis added).

20 Third, modern boating has the benefit of advances in technology other than simply  
21 boat materials and design, as well as a century of experimentation with boating techniques.  
22 *See* Section I(D), *supra*. The availability of internet gage data, weather radar, cell phones and  
23 satellite phones for communication, and watertight containers makes boating the Verde a  
24 much easier and safer proposition today than it would have been in 1860, 1880, or 1912. *Id.*

25 Fourth, even the recreational boating that takes place on part of the Verde today does  
26 not necessarily meet the standard of boating on a "highway for commerce." *See* Section  
27 II(D), *supra*. The evidence introduced in the 2014/15 Hearings shows that modern boating on  
the Verde comes with "near misses," wrecks, swampings, and situations where the boater  
might need to "bivouac" or hike to safety. *Id.* These events can hardly be said to qualify the

1 Verde as a “highway for commerce” over which trade and travel occurs “in the customary  
2 modes of trade and travel on water.” *See* A.R.S. § 37-1101(5).

3  
4 **3. Mr. Hjalmarson’s flawed attempts to reproduce predevelopment  
flows do not support a finding of “susceptibility” to navigation.**

5 Mr. Hjalmarson attempted to reconstruct predevelopment flows by estimating the  
6 amount of land that was irrigated in the upper reaches of the Verde and its tributaries when  
7 the stream gages were first installed and then adding the presumed amount of water diverted  
8 to irrigate those lands to the gage readings to arrive at a reconstructed higher flow number.  
9 *See* Tr. at 12/18/14:983 (Hjalmarson). Mr. Hjalmarson’s methodology was severely flawed,  
10 in several respects. First, his assumptions about the number of acres historically irrigated in  
11 the Verde headwaters areas changed throughout the hearing. He initially opined that there  
12 were 8,095 cultivated acres in the upper Verde watershed. *Id.* at 12/18/14:1073 (Hjalmarson).  
13 He later reduced that estimate to 7,000 acres. *Id.* at 2/18/15:1268, 2/18/15:1271-72  
14 (Hjalmarson). Mr. Hjalmarson agreed that, if his cultivated acreage number was overstated,  
15 the impacts on base flow that he calculated also would be overstated. *Id.* at 12/19/14:1114  
16 (Hjalmarson).

17 Second, Mr. Hjalmarson assumed a per-acre consumptive use factor of 3.15 acre-feet  
18 per year (“af/yr”). *See* Tr. at 2/18/15:1284-85, 2/18/15:1286-87 (Hjalmarson). That figure,  
19 however, was taken from an Arizona Department of Water Resources (“ADWR”) report that  
20 was for a different region and for different crops.<sup>30</sup> On cross-examination, Mr. Hjalmarson  
21 ultimately conceded that his 3.15 af/year consumptive use factor was used for an area that  
22 includes lands with different elevation and precipitation levels. *See* Tr. at 2/18/15:1281-82  
23 (Hjalmarson). Mr. Hjalmarson admitted that he never even looked at the underlying ADWR  
24 source document. *Id.* at 2/18/15:1289-90 (Hjalmarson)

25  
26  
27 <sup>30</sup> *See* D.R. Pool, et. al., *United States Geological Survey, Regional Groundwater-Flow model of the  
Redwall-Muav, Coconino, and Alluvial Basin Aquifer Systems of Northern and Central Arizona,  
Scientific Investigations Report 2-10-5180, v. 1.1, at 37 (2011) [X037, Freeport 32].*



1 Third, Mr. Hjalmarson ignored the presence of dryland farming (farming without  
2 irrigation) and deficit irrigation (farming using less than optimal amounts of irrigation water)  
3 in these high elevation areas. See Tr. at 2/18/15:1274-76, 12/19/14:1123-25, 1199  
4 (Hjalmarson); see also *id.* at 3/30/15:2736 (Burtell). If and to the extent that these early  
5 farmers practiced dryland farming or deficit irrigation, Mr. Hjalmarson's estimates of the  
6 amount of water diverted for irrigation would be overstated and his resulting recreated river  
7 flows also would be too high.<sup>31</sup>

8 Fourth, Mr. Hjalmarson's analysis pieced together disparate data from multiple years,  
9 so he had no basis upon which to opine that all those acres were irrigated in any one year. See  
10 Tr. at 2/18/15:1269-70 (Hjalmarson). To the extent that certain acres were irrigated in one  
11 year and other acres were irrigated in different years, Mr. Hjalmarson's total number of acres  
12 was never irrigated in any one year and, thus, his annual depletions of river flows were  
13 significantly overstated. He ignored the impacts of crop rotation and thus wrongly assumed  
14 that every farmer irrigated every acre in every year. See Tr. at 2/18/15:1269-71 (Hjalmarson).

15 Mr. Hjalmarson's work on this case, although perhaps laudable for the amount of  
16 effort he expended, contains so many methodological flaws that his results cannot provide an  
17 evidentiary basis upon which the Commission could determine that the Verde was navigable  
18 in its "ordinary and natural condition."

19 **VI. Summary and Requested Action**

20 The Commission was right in 2008. Even after sixteen more hearing days and  
21 thousands of pages of more evidence, the record still does not support a finding that the Verde  
22 is or ever was navigable.

---

24 <sup>31</sup> The record is replete with evidence that dryland farming did occur in the Verde headwaters areas.  
25 See Tr. at 3/30/15:2737 (Burtell); *Arizona Miner* (February 1, 1868) [X037, part of Freeport 8];  
26 *Weekly Arizona Miner* (September 23, 1871) [X037, part of Freeport 8]; F. H. Newell, *Report on*  
27 *Agriculture by irrigation in the Western Part of the United States at the Eleventh Census: 1890*, at 81  
(1894) [X037, Freeport 10]; *The Resources of Arizona, Its Mineral, Farming, and Grazing Lands,*  
*Towns and Mining Camps*, at 85 (1881) [X037, Freeport 11].

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

DATED this 28th day of September, 2015.

SALMON, LEWIS & WELDON, P.L.C.

By Mark A. McGinnis

John B. Weldon, Jr.  
Mark A. McGinnis  
R. Jeffrey Heilman  
2850 East Camelback Road, Suite 200  
Phoenix, Arizona 85016  
Attorneys for SRP

1 ORIGINAL AND SIX COPIES of the foregoing  
2 mailed for filing this 28th day of September,  
3 2015 to:  
4 Arizona Navigable Stream Adjudication Commission  
5 1700 West Washington, Room B-54  
6 Phoenix, AZ 85007  
7  
8 AND COPY mailed this 28th day of September, 2015 to:  
9  
10 Fred Breedlove  
11 Squire Sanders (US) LLP  
12 1 East Washington St., Ste. 2700  
13 Phoenix, AZ 85004  
14 *Attorneys for ANSAC*  
15  
16 Cynthia M. Chandley  
17 L. William Staudenmaier  
18 Snell & Wilmer  
19 400 East Van Buren  
20 Phoenix, AZ 85004-2022  
21 *Attorneys for Freeport Minerals Corporation*  
22  
23 Sean Hood  
24 Fennemore Craig, P.C.  
25 2394 E. Camelback, Suite 600  
26 Phoenix, AZ 85016-3429  
27 *Attorneys for Freeport Minerals Corporation*  
28  
29 Laurie Hachtel  
30 Joy Hernbrode  
31 Attorney General's Office  
32 1275 West Washington Street  
33 Phoenix, AZ 85007-2297  
34 *Attorneys for State of Arizona*  
35  
36 Joy E. Herr-Cardillo  
37 Arizona Center For Law In The Public Interest  
38 P.O. Box 41835  
39 Tucson, AZ 85717  
40 *Attorneys for Defenders of Wildlife, et al*  
41  
42 ...

1 Joe P. Sparks  
2 The Sparks Law Firm  
3 7503 First Street  
4 Scottsdale, AZ 85251-4201  
*Attorneys for San Carols Apache Tribe, et al.*

5 Sally Worthington  
6 John Helm  
7 Helm, Livesay & Worthington, Ltd.  
8 1619 E. Guadalupe, Ste. 1  
9 Tempe, AZ 85283  
*Attorneys for Maricopa County*

9 Steven L. Wene  
10 Moyes Sellers & Sims  
11 1850 N. Central Ave., Ste. 1100  
12 Phoenix, AZ 85004

12 Cynthia S. Campbell  
13 Law Department  
14 City Of Phoenix  
15 200 W. Washington Street, Ste. 1300  
16 Phoenix, AZ 85003-1611  
*Attorneys for City of Phoenix*

17 William H. Anger  
18 Engelman Berger, P.C.  
19 3636 N. Central Avenue, Ste. 700  
20 Phoenix, AZ 85012  
*Attorneys for City of Mesa*

21 Charles L. Cahoy  
22 Assistant City Attorney  
23 City Attorney's Office  
24 CITY OF TEMPE  
25 21 E. Sixth Street, Ste. 201  
26 Tempe, AZ 85280  
*Attorneys for City of Tempe*

27 ...

28 ...

29 ...

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

5  
6 Carla Consoli  
7 Lewis Roca Rothgerber LLP  
201 E. Washington St.  
Suite 1200  
8 Phoenix, AZ 85004-2595  
9 *Attorneys for Cemex*

10 James T. Braselton  
11 Mariscal, Weeks, McIntyre & Friedlander, P.A  
2901 N. Central Ave, Ste. 200  
12 Phoenix, AZ 85012-2705  
13 *Attorneys for Various Title Companies*

14 Julie Lemmon  
15 1095 W. Rio Salado Pkwy, Ste. 102  
Tempe, AZ 85281-2603  
16 *Attorney for Flood Control District  
of Maricopa County*

17 Thomas L. Murphy  
18 Linus Everling  
19 Gila River Indian Community Law Office  
Post Office Box 97  
20 Sacaton, AZ 85147  
21 *Attorney for Gila River Indian Community*

22 Sandy Bahr  
23 202 E. McDowell Rd, Ste. 277  
Phoenix, AZ 85004  
24 *Sierra Club*

25 David A. Brown  
26 Brown & Brown Law Offices  
128 E. Commercial, PO Box 1890  
27 St Johns, Arizona 85936

1 Susan B. Montgomery  
2 Robyn L. Interpreter  
3 Montgomery & Interpreter, PLC  
4 4835 E. Cactus Rd., Ste. 210  
5 Scottsdale, AZ 85254  
6 *Attorneys for Yavapai-Apache Nation*

7 Michael F. McNulty  
8 Deputy County Attorney  
9 Pima County Attorney's Office  
10 32 N. Stone Ave., Suite 2100  
11 Tucson, Arizona 85701

12 Dr. Carole Coe Klopatek  
13 P.O. Box 17779  
14 Fountain Hills, AZ 85269-7179  
15 *Director of Government Relations*  
16 *Fort McDowell Yavapai Nation*

17 Mr. Thomas Moriarty,  
18 P.O. Box 17779  
19 Fountain Hills, AZ 85269-7779  
20 *Arizona Attorney of Record*  
21 *Acting General Counsel*  
22 *Fort McDowell Yavapai Nation*

23 Ms. Arlinda F. Locklear, Esq.  
24 4113 Jenifer Street, NW,  
25 Washington, D.C. 20015  
26 *D.C. Attorney for Fort McDowell Yavapai Nation*

27 Mark Horvath  
Horvath Law Office, P.C., L.L.C.  
1505 East Los Arboles Drive  
Tempe, Arizona 85284  
*Attorney for the Fort McDowell Yavapai Nation*

