

1 Michael C. Shiel, AZ Bar #006968
2 Office of the General Counsel
3 Salt River Pima-Maricopa Indian Community
4 10005 East Osborn Road
5 Scottsdale, Arizona 85256
6 Telephone: 480-362-7544
7 michael.shiel@srpmic-nsn.gov

8 Thane D. Somerville, AZ Bar #030870
9 Morisset, Schlosser, Jozwiak & Somerville
10 801 Second Avenue, Suite 1115
11 Seattle, WA 98104-1509
12 Telephone: 206-386-5200
13 t.somerville@msaj.com
14 Attorneys for Salt River Pima-Maricopa
15 Indian Community ("SRPMIC")

16
17 **BEFORE THE ARIZONA NAVIGABLE STREAM
18 ADJUDICATION COMMISSION**

19 IN RE DETERMINATION OF NAVIGABILITY
20 OF THE VERDE RIVER FROM ITS
21 HEADWATERS TO THE CONFLUENCE
22 WITH THE SALT RIVER

No. 04-009-NAV

SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY'S CLOSING
BRIEF OPPOSING NAVIGABILITY

23 Pursuant to the Commission's order dated May 20, 2015, the Salt River Pima-Maricopa
24 Indian Community (SRPMIC) submits the following brief in support of a determination that the
25 Verde River was not navigable on February 14, 1912, the date of Arizona statehood. The
26 Commission's prior determination in this proceeding that the entirety of the Verde River was
27 not navigable on February 14, 1912 is supported by substantial evidence and remains correct.
28 The proponents of navigability have failed to meet their burden of proving that any segment of
the Verde River was navigable-for-title purposes upon the date of Arizona statehood.

**I. The Commission's Prior Determination of Non-Navigability Was Thorough,
Well-Reasoned, Supported by Substantial Evidence, and Remains Correct.**

On March 24, 2008, this Commission published its "Report, Findings and Determination
Regarding the Navigability of the Verde River From Its Headwaters To The Confluence With
The Salt River." ("2008 Decision"). The 2008 Decision was based on extensive evidence,

1 expert reports, public hearings, and testimony received by the Commission pursuant to public
2 notice. 2008 Decision, pp. 1-3, 19-20. In its 2008 Decision, the Commission concluded:

3 Based upon all of the historical and scientific data and information, documents and
4 other evidence produced and considered by the Commission, the Commission finds
5 that the Verde River, from its headwaters at Sullivan Lake to its confluence with the
6 Salt River, is erratic, unstable and unpredictable, characterized by periodic floods,
7 sometimes extreme, in its ordinary and natural condition. . . . In the Verde Valley
8 and the reach below Bartlett Dam, the river spreads out over a large flood plain and
9 has braided characteristics with shifting sandbars and sand islands, which make it
10 impossible to be considered as navigable or susceptible of navigation.

11 Accordingly, the Commission finds and determines that the Verde River from its
12 headwaters at Sullivan Lake to its confluence with the Salt River was not used or
13 susceptible of use as a highway for commerce over which trade and travel was or
14 may be conducted in the ordinary modes of travel on water as of February 14, 1912.

15 2008 Decision, at pp. 53-54 (emphasis added).

16 In its 2008 Decision, the Commission relied on multiple lines of evidence supporting its
17 non-navigability finding. Regarding prehistoric use of the Verde River, the Commission found:

18 no evidence in the archaeological record that would indicate that any of the
19 prehistoric cultures located in the study area used the Verde River as a means for
20 transportation by boat or other water craft and there has been no documented use of
21 the river as a highway for commerce for commercial trade and travel or regular
22 flotation of logs.

23 2008 Decision, p. 23.

24 Evaluating the “historic development of the Verde River Valley,” the Commission
25 described the exploration of the area by trappers and other “mountainmen” who “generally rode
26 horseback or walked through the southwest and did not use canoes, rafts or other types of boats
27 on the Verde River or other Arizona rivers, except for the Colorado.” 2008 Decision, p. 24.
28 The Commission also discussed pre-statehood development and settlement of areas near the
Verde River by Indian people, the United States military, miners, and farmers/settlers. Despite
the presence of individuals in the region who clearly needed an efficient and reliable means of
transportation for travel and trade, the Commission found that: “All transportation in the area in
the early days was by means of wagon, horse and carriage, and later by train and automobile,
but there is no evidence of any significant use of the Verde River for transportation or as a

1 highway for commerce or that it was susceptible to such use.” 2008 Decision, pp. 23-28. Oral
2 histories regarding the Verde River prior to statehood provided further evidence that it was not
3 used for navigation, nor susceptible to such use. 2008 Decision, pp. 28-31.

4 The Commission also received and reviewed substantial historical evidence and expert
5 testimony that strongly supported a determination of non-navigability. 2008 Decision, p. 31-35.
6 “No contemporary observer believed [the Verde River] was navigable in a reliable way.” 2008
7 Decision, p. 31. None of the federal government’s surveys made between 1850 and 1912
8 determined any portion of the Verde River to be navigable. 2008 Decision, p. 32. None of the
9 land patents issued along the banks of the Verde River suggested that the Verde River was
10 navigable. Significantly, most of these patents along the Verde River were issued under the
11 Desert Land Act, which required that the water used to irrigate the land be taken from a non-
12 navigable stream. 2008 Decision, p. 33. Many of the patent applications expressly stated that
13 the Verde River was not navigable. 2008 Decision, p. 33. Actions of the State of Arizona and
14 its representatives, at and near the time of statehood, further evidenced their contemporaneous
15 belief that the Verde River was not navigable at statehood. 2008 Decision, pp. 33-35.

16 The Commission received evidence of sporadic, non-commercial, and often
17 unsuccessful boating efforts on the Verde River at or near the time of statehood. 2008 Decision,
18 pp. 35-41. The Commission concluded that “while we have historical accounts of boating on
19 the Verde River, it does not appear that any of these attempts were used for commercial
20 transportation or use of the river as a highway for commerce.” 2008 Decision, at p. 36. Also,
21 “none of the boating incidents carried goods for commercial trade and there was no navigation
22 upriver.” 2008 Decision, at p. 37. Evidence of modern recreational boating on the Verde River
23 did not support a finding of navigability on the date of statehood, because “the technological
24 advances in the type of materials, such as rubber or neoprene rafts, and even stronger materials
25 for kayaks, which were not available in 1912, make the trips much more possible and enjoyable
26 from a recreational standpoint after the 1950’s.” 2008 Decision, at p. 39. In addition, these
27 modern boating events are purely recreational, not for commercial purposes, and generally
28 occur only during times of year when water in the river is higher than average. *Id.*

1 The Commission also received and reviewed evidence, expert reports, and testimony
2 regarding the geology, geomorphology, and hydrology of the Verde River which supported its
3 determination of non-navigability. The Commission received evidence that the mean average
4 flow from the period of 1910 to 1914 below Bartlett Dam ranged from 523 cfs to 918 cfs. 2008
5 Decision, at p. 45. Other data suggested that the estimated average flow of the Verde River
6 prior to diversions that commenced in 1860 was between 758 cfs and 901 cfs at Ft. McDowell.
7 2008 Decision, at p. 46. The Commission noted that use of average flow data is problematic on
8 the Verde River given the occurrence of large flood flows that distort the average upward. 2008
9 Decision, at p. 44. Even the upwardly distorted average flow of the Verde River at the time of
10 Arizona statehood (and without subtracting diversions) was far less than any other watercourse
11 previously found navigable by a federal or state court using the *Daniel Ball* test. 2008 Decision,
12 at p. 46 (noting federal/ state courts found watercourses navigable in whole or in part in only 4
13 out of 21 cases and the average flows in the four navigable watercourses were 7,316 cfs, 6,930
14 cfs, 4,066 cfs, and 2,277 cfs). The Verde River was not navigable at statehood.

15 Following the Commission's 2008 Decision, the Arizona Court of Appeals issued its
16 opinion in *State v. Arizona Navigable Stream Adjudication Comm'n*, 224 Ariz. 230 (App. 2010)
17 relating to the Commission's 2005 decision that the Lower Salt River was not navigable. The
18 Court of Appeals found that, with respect to the Lower Salt River, the Commission had failed to
19 consider diversions of water prior to the construction of Roosevelt Dam and thus had failed to
20 properly evaluate the Lower Salt River in its "ordinary and natural condition." *Id.* at 241-242.

21 The deficiencies that the Court of Appeals found in the Commission's 2005 decision on
22 the Lower Salt River were not present in the Commission's 2008 decision on the Verde River.
23 The two dams and reservoirs on the Verde River, Bartlett Dam and Horseshoe Dam, were
24 constructed well after statehood and thus not directly relevant to conditions at the time of
25 statehood. 2008 Decision, p. 6. The Commission did expressly consider the impacts of other
26 diversions from the Verde River that did exist at the time of statehood. Page 28 of the 2008
27 Decision states: "In order to consider the river in its ordinary and natural condition, the
28 Commission considered its condition prior to 1860 and the initial diversion of water for

1 irrigation by modern settlers.” 2008 Decision, p. 28. On pages 44-46 of the 2008 Decision, the
2 Commission expressly determined the number of water diversions that existed near the date of
3 statehood and the quantity of water being diverted. “Considering the above information, the
4 estimated average flow of the Verde River prior to diversions, which commenced in 1860, was
5 between 758 and 901 cfs at Ft. McDowell near the Verde River confluence with the Salt River.”
6 2008 Decision, p. 46. In its conclusion, the Commission explained:

7 There is evidence, somewhat questionable, that the average annual flow of the
8 Verde River adding in the estimated amount diverted for irrigation was between
9 758 cfs and 901 cfs near its confluence with the Salt River. Even taking the
10 higher figure of 901 cfs, it is below the flow of any river found navigable by any
11 court, which was reported to the Commission.

12 2008 Decision, p. 52 (emphasis added). The 2008 Decision was not only strongly supported by
13 substantial evidence supporting non-navigability, but the 2008 Decision was legally sound and
14 not subject to the criticisms expressed by the Court in *State v. ANSAC*.

15 The proponents of navigability have not presented sufficient evidence on remand
16 (especially in light of the considerable supplemental evidence and analysis supporting non-
17 navigability) to carry their burden of proving navigability at statehood or to justify any change
18 in the Commission’s prior determination of non-navigability. The Commission should again
19 find the Verde River, in its entirety, was not navigable as of the date of Arizona statehood.

20 II. **The U.S. Supreme Court Decision, *PPL Montana*, Further Supports the**
21 **Commission’s 2008 Decision and Requires A Finding of Non-Navigability.**

22 On February 22, 2012, the United States Supreme Court issued a decision concerning
23 navigability-for-title in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), which further
24 supports the Commission’s 2008 Decision and strongly refutes the arguments and efforts made
25 here by the proponents of navigability. In reversing the Supreme Court of Montana’s finding of
26 navigability, the U.S. Supreme Court rejected the Montana court’s “very liberal” construction of
27 the federal navigability-for-title test and its “very broad” construction of the term “commerce.”
28 *PPL Montana v. State*, 355 Mont. 402, 446-47 (2010), *rev’d*, 132 S.Ct. 1215 (2012).

 In *PPL Montana*, the U.S. Supreme Court reaffirmed that navigability-for-title is to be
determined as of the date of statehood and on a “segment by segment basis.” 132 S. Ct. at

1 1227-29. The Court confirmed the navigability-for-title test relates to use or susceptibility to
2 use as a highway for commerce. 132 S.Ct. at 1233. *See also U.S. v. Holt Bank*, 270 U.S. 46,
3 55-56 (1926) (stating that navigability depends on whether the water in its natural and ordinary
4 condition “affords a channel for useful commerce.”). “Navigability must be assessed as of the
5 time of statehood, and it concerns the river’s usefulness for ‘trade and travel,’ rather than for
6 other purposes.” 132 S.Ct. at 1233. “Mere use by initial explorers or trappers who may have
7 dragged their boats in or alongside the river despite its non-navigability in order to avoid getting
8 lost, or to provide water for their horses or themselves, is not enough.” *Id.*; *see also United*
9 *States v. Oregon*, 295 U.S. 1 (1935) (lakes non-navigable where boating evidence did not
10 involve commercial aspect and was primarily limited to seasonal trapping and duck hunting).

11 The U.S. Supreme Court rejected the Montana court’s liberal use of modern-day
12 recreational boating as evidence to prove navigability as of the date of statehood. 132 S.Ct. at
13 1233-34. Post statehood use of the river can be considered only if it is established that such use
14 involves the same river conditions and the same types of boats that existed at statehood. *Id.* at
15 1233. The party seeking to prove navigability must show that “the watercraft are meaningfully
16 similar to those in customary use for trade and travel at the time of statehood.” *Id.* “If modern
17 watercraft permit navigability where the historical watercraft would not, . . . then the evidence
18 of present-day use has limited or no bearing on navigability at statehood.” *Id.* at 1233-34.

19 The U.S. Supreme Court further confirmed and clarified that a river cannot be
20 navigable-for-title purposes if its susceptibility to navigation is “so brief that it is not a
21 commercial reality.” 132 S.Ct. at 1234. In addition, the Court emphasized that natural
22 obstructions, obstacles, and other impediments to navigation are highly relevant to the
23 navigability determination, especially if they require portage on land around the obstruction. *Id.*
24 at 1231. Finally, the Supreme Court found it relevant that the State of Montana had waited a
25 century after the first dams were built on the river without previously asserting state ownership.
26 “The reliance by PPL and its predecessors in title upon the State’s long failure to assert title is
27 some evidence to support the conclusion that the river segments were non-navigable for
28 purposes of the equal footing doctrine.” *Id.* at 1235. “It is not for a State by courts or

1 legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for
2 determining navigability which . . . would enlarge what actually passed to the State, at the time
3 of her admission . . .” *Id.* The Court’s decision in *PPL Montana* provides strong support for
4 the Commission’s 2008 Decision and requires a finding of non-navigability here.

5 **III. The Proponents of Navigability Have The Burden of Proving Each Segment**
6 **of the Verde River Was Navigable-In-Fact on the Date of Statehood.**

7 In *State of Arizona v. Ariz. Navigable Stream Adjudication Commission*, 224 Ariz. 230,
8 229 P.3d 242 (App. 2010), the Court of Appeals of Arizona confirmed that “the burden of proof
9 rests on the party asserting navigability.” 229 P.3d at 250. “Consequently, the burden of proof
10 lies with . . . the proponents of navigability, who must prove navigability by a preponderance of
11 the evidence.” 229 P.3d at 251. *See also* A.R.S. 37-1128 (requiring that a claim of navigability
12 be established by a preponderance of the evidence). Federal courts have also placed the burden
13 of proof on the proponents of navigability. *North Dakota ex rel. Bd. of Univ & Sch. Lands v.*
14 *United States*, 972 F.2d 235, 238 (8th Cir. 1992); *Mundy v. United States*, 22 Cl.Ct. 33, 34-35
15 (1990) (“Navigability is a question of fact, and the burden of proof is on the party asserting
16 navigability.”); *see also* 78 AM. JUR. 2d *Waters*, Sec. 133, at 480 (2002) (“the burden of proof
17 rests upon the party asserting navigability”).

18 As described by the Commission in its 2008 Decision:

19 The “preponderance of the evidence” standard is sometimes referred to as
20 requiring “fifty percent plus one” in favor of the party with the burden of proof.
21 One could imagine a set of scales. If the evidence on each side weighs exactly
22 evenly, the party without the burden of proof must prevail. In order for the party
23 with the burden to prevail, sufficient evidence must exist in order to tip the scales
24 (even slightly) in its favor [citations omitted].

25 2008 Decision, at p. 16. *See also* Black’s Law Dictionary (7th ed) at 1201 (“preponderance of
26 the evidence” means “the greater weight of the evidence”).

27 Whether a river is navigable for title purposes is a question of federal law. *PPL*
28 *Montana*, 132 S. Ct. at 1227. Under the applicable federal navigability-for-title test, the
proponents of navigability here must prove, by a preponderance of the evidence, that the Verde
River (or each segment thereof) at the date of statehood: (1) was used or was susceptible of

1 being used, (2) as a highway of useful commerce, (3) in its natural and ordinary condition, and
2 (4) by the customary modes of trade and travel. *North Dakota*, 972 F.2d at 238, citing *United*
3 *States v. Holt State Bank*, 270 U.S. 49, 56 (1926). The proponents of navigability failed to meet
4 their burden of proving navigability by a preponderance of the evidence prior to the 2008
5 Decision. Nor have they met their burden of proof in this remanded proceeding. The
6 proponents have failed to establish that any segment of the Verde River was navigable on the
7 date of statehood. The Commission should again find that the Verde River was not navigable.

8 **IV. The Supplemental Evidence Provided to the Commission on Remand Does**
9 **Not Establish Navigability – That Evidence Supports Non-Navigability.**

10 On remand, the Commission received a substantial number of additional exhibits and
11 reports from both proponents and opponents of navigability and conducted sixteen additional
12 days of hearings regarding the navigability of the Verde River. While the sheer amount of
13 evidentiary submissions and hearings were extensive, the substance of the evidence was similar
14 to what the Commission received in the prior proceedings leading up to the 2008 Decision. The
15 supplemental evidence and testimony supports the correctness of the 2008 Decision as to the
16 entirety of the Verde River including the reach now identified as Segment 5, part of which flows
17 through the Salt River Pima-Maricopa Indian Reservation.

18 **A. There Remains No Evidence That the Verde River Was Navigable or Used for**
19 **Navigation By Native Americans During the Pre-Historic Period.**

20 Although Native Americans have inhabited lands near the Verde River for thousands of
21 years, there remains no evidence in the archaeological record that any of the prehistoric cultures
22 used the Verde River as a means for trade or travel. 2008 Decision, at pp. 20-23. An expert
23 witness for the navigability proponents testified at the December 15, 2014 hearing as follows:

24 But we have no accounts of boats or boating from the archaeological period. We
25 have no preserved records that say the Native Americans were using boats. So
26 I'll say it again. Native Americans, we have no evidence that they were using
27 boats. So you guys don't need to ask me that question six more times. We're
28 readily acknowledging that.

Tr. at [12/15/14], p. 119, lines 6-12 (Fuller). When asked whether there were any records of
boats or boating in the archaeology period, Mr. Fuller's answer was: "So no known boats or

1 boating. Got it.” Tr. at [12/15/14], p. 119, lines 13-23; *see also* Tr. at [12/17/14], p. 753-54
2 (Fuller). Mr. Fuller suggested that a reason for the lack of Native American boating might be
3 they found alternative modes more suitable, such as walking. Exh. X017-107, p. 60. Yet, this
4 simply supports a conclusion that the river was not navigable, nor susceptible to navigation.
5 Mr. Fuller has also suggested that cultural beliefs about rivers might be a reason for lack of
6 Native American boating, yet no evidence was offered to support such a statement as it relates
7 to the Indians that inhabited the lands near the Verde River. *Id.* In sum, there is no evidence
8 that the Verde River was used by Native Americans for trade or travel in the pre-historic period.

9 **B. Evidence Regarding Boating Attempts on the Verde River, or the Lack Thereof,**
10 **Prior to Statehood Supports A Finding of Non-Navigability.**

11 Extensive and continued historical use of a river for commercial purposes is the most
12 persuasive form of evidence regarding its susceptibility for navigation. *PPL Montana*, 132
13 S.Ct. at 1233, *citing United States v. Utah*, 283 U.S. 64, 82-83 (1931). As in the previous
14 proceedings, the Commission received accounts of sporadic, non-commercial, often
15 unsuccessful boating efforts on the Verde River between the 1860s and 1912. These sporadic
16 attempts are insufficient to show that the Verde River was actually used or susceptible of use as
17 a highway for commerce. Given the significant need for reliable means of transportation for
18 trade and travel by inhabitants including Native Americans, explorers, trappers, settlers, and the
19 United States military, the minimal record of boating on the Verde River and the infrequent
20 (and often unreliable) accounts strongly support a finding that the Verde River was neither
21 actually used nor susceptible of use as a highway for commerce. If the Verde River was
22 navigable at statehood, it seems both logical and probable that the region’s inhabitants would
23 have navigated it. Tr. [2/24/15], pp. 2318-19 (August). The best explanation for the lack of
24 boating accounts or other reports of navigation is that the Verde River was in fact not navigable.

25 The September 2014 Declaration of Rich Burtell on the Non-Navigability of the Verde
26 River At and Prior to Statehood reported ten possible historic accounts of any form of boating
27 on the Verde River in a 44-year span from 1868 through the date of statehood in 1912. Exh.
28 X009, Table 1. Only four of these ten accounts reportedly took place within Segment 5. None

1 of these accounts, and especially none of the accounts relevant to Segment 5, suggest that the
2 Verde River was used or susceptible for use as a highway for commerce. The first account
3 relating to Segment 5 was a “likely recreational” journey in 1883. Exh. X009, p. 5 & Table 1.
4 The second account relating to Segment 5 was a reported hunting trip in 1888. *Id.* The third
5 account relating to Segment 5 relates to a purported trapping journey from Camp Verde to
6 Yuma (in which they alleged traveling 800-miles in a little less than six months – rendering the
7 report unreliable). *Id.* See Tr. at [2/25/15], pp. 2412-18 (August); Tr. at [3/30/15], pp. 2596-
8 2601 (Burtell) (questioning accuracy). The last report of any potential boating in Segment 5
9 prior to statehood was the planned 1905 “iron boat cruise,” though it is unknown whether this
10 likely recreational trip was actually made. *Id.* The other reports of boating on other upstream
11 segments of the Verde River include four accounts of ferrying across the river and two other
12 hunting/trapping journeys spread out over four decades. There is no evidence of any journey
13 being made upstream. The reports, possibly unreliable, of very sporadic attempts to boat the
14 Verde River at or prior to statehood, often for non-commercial purposes, despite the need for
15 reliable means of transportation for trade and travel strongly supports a finding of non-
16 navigability. This record of historic boating is consistent with that produced by the navigability
17 proponents through Mr. Fuller’s testimony. Tr. at [12/17/14], pp. 655-57 (Fuller). As Mr.
18 Burtell put it, “there is simply no evidence of extensive or continued use of the river at that time
19 [at or prior to statehood] for commercial purposes.” Exh. X009, p. 5.

20 In its 2008 Decision, the Commission correctly stated that “for a river to be considered
21 navigable or susceptible of navigability, there must be a showing of commercial activity for the
22 river to be used as a ‘highway for commerce’ or susceptible to such use.” 2008 Decision, p. 40.
23 The evidence presented in this proceeding is more similar to cases such as *United States v.*
24 *Oregon*, 295 U.S. 1, 21 (1935), where lakes were found non-navigable because the only boating
25 which took place in the area involved no commercial aspects and was of such a character as to
26 be no indication of navigability. Boating evidence in the *Oregon* case was primarily limited to
27 seasonal trapping and duck hunting. In *Harrison v. Fite*, 148 F. 781, 784 (8th Cir. 1906), the
28 Court found that “mere depth of water, without profitable utility, will not render a watercourse

1 navigable in the legal sense . . . nor will the fact that it is sufficient for pleasure boating or to
2 enable hunters or fishermen to float their skiffs or canoes”). *See also Monroe v. State*, 175 P.2d
3 759, 761 (Utah 1946) (no evidence that lake was used for transportation of goods or that “it is
4 likely ever to develop as a valuable means of public commercial transportation”); *Proctor v.*
5 *Sim*, 236 P. 114, 116 (Wash. 1925) (principal use of non-navigable lake included recreational
6 boating, fishing, swimming, and skating). The need for a showing of significant commercial
7 activity to support navigability (i.e., to make such use a “commercial reality”) was re-affirmed
8 by the Supreme Court in *PPL Montana*. There was no evidence presented of any commercial
9 boating in lower reaches of the Verde River between 1892 and the date of statehood in 1912.
10 Exh. X009, Table 1; Tr. at [12/17/14], pp. 575-78, 687-97, 778-79 (Fuller). Even if the few
11 accounts of boating after 1860 can be taken as reliable evidence, they are not sufficient to
12 establish any segment of the Verde River (and especially not Segment 5) as navigable-for-title.

13 The lack of actual boating accounts is striking in light of the substantial need for reliable
14 transportation for trade and travel at and prior to statehood. For example, despite a need for
15 transportation, the military did not navigate the Verde River. Tr. at [2/25/15], pp. 2388-1401
16 (August). As Mr. Burtell explained, at page 9 of his Declaration (Exh. X009):

17 The first Anglos to occupy the Verde River watershed were military and settlers in the
18 Verde Valley and near Prescott. Although both required a ready means of transporting
19 people and goods through the area, neither the military nor the settlers utilized the
20 Verde River for that purpose, further indicating that the river was not navigable. . . .
21 By the mid to late 1860s, four military camps were established on or near the Verde
22 River, farming settlements had begun in the Verde Valley, and Prescott had been
23 named the capital of the territory. With this level of early development, it is difficult
24 to explain how military personnel, farmers, and townspeople all failed to use the Verde
25 River as a highway for commerce if it were susceptible to commercial navigation.

26 C. The Historical Record Regarding Contemporaneous Views, Statements, and
27 Opinions of the Navigability of the Verde River Support Non-Navigability.

28 The Commission received supplemental evidence from Douglas R. Littlefield, Ph.D.
regarding the non-navigability of the Verde River. The Commission favorably relied on Dr.
Littlefield’s report and testimony in its 2008 Decision. In this remanded proceeding, Dr.
Littlefield expanded his already extensive research to provide a historical record of whether the

1 Verde River was considered navigable at the date of statehood. The historical materials show
2 overwhelmingly that the Verde River was not thought to be navigable by contemporary
3 observers at or prior to statehood. Dr. Littlefield confirmed again that not one survey of the
4 Verde River stated that it was navigable. Exh. X024, pp. 10, 16. Dr. Littlefield reviewed over
5 100 land patents issued by the United States that touched or overlay the Verde River and in no
6 instance did the United States, in granting such patent, state or suggest that the Verde River was
7 navigable. Exh. X024, p. 27. Arizona authorities also sold three parcels as state patents for
8 lands lying over the Verde River, suggesting their view was of non-navigability. *Id.* Dr.
9 Littlefield reviewed various government reports and documents, which all support a view of
10 non-navigability. Exh. X024, pp. 28-35. He cites a statement of the 1865 Arizona Territorial
11 Legislature that “the Colorado River is the only navigable water in this Territory.” Exh. X024,
12 at p. 37. He further cites newspaper articles, including one from September 24, 1875 which
13 declares that: “The San Francisco or Verde River . . . are the most important rivers of Yavapai,
14 but there is no navigable water in the county; all freight is moved by large trains of pack mules
15 or heavy wagons . . .” Exh. X024, at p. 41. Upon review of “multitudes of historical documents
16 [that] describe the Verde River at many points in time before and near Arizona statehood in
17 1912,” and a “wide spectrum of published and unpublished sources,” Dr. Littlefield found:

18 From this wealth of information, covering a huge array of documentary sources,
19 only one conclusion can be reached – a conclusion also reached by literally
20 hundreds of contemporaneous observers: *The Verde River was not navigable or*
susceptible of navigation on or before February 14, 1912.

21 Exh. X024, at p. 75 (emphasis in original). He adds: “It is especially important to note that this
22 conclusion comes from literally hundreds of documents, maps, and illustrations created by
23 people who knew the Verde River as it existed in their own time – not a reconstruction of the
24 past looking backward in time.” Exh. X024, at p. 75. The historic accounts and assessments of
25 navigability were further supported by Rich Burtell and Jack August, Jr. The navigability
26 proponents have presented effectively no evidence to rebut or contradict the contemporaneous
27 historical views presented by Dr. Littlefield, Mr. Burtell, or Jack August, Jr. The historical
28 evidence strongly supports a finding of non-navigability.

1 D. Evidence Regarding the Geology, Geomorphology, and Hydrology of the Verde
2 River Strongly Support A Finding of Non-Navigability, Especially In Segment 5.

3 In 2008, the Commission found the Verde River “erratic, unstable and unpredictable,
4 characterized by periodic floods, sometimes extreme, in its ordinary and natural condition.”
5 2008 Decision, p. 53. Specifically, regarding the reach downstream of Bartlett Dam (within the
6 area referred to as Segment 5 in these proceedings), the Commission found that “the river
7 spreads out over a larger flood plain and had braided characteristics with shifting sand bars and
8 sand islands, *which would make it impossible to be considered as navigable or susceptible of*
9 *navigation.*” 2008 Decision, p. 52 (emphasis added). The evidence received in the remand
10 proceeding continues to strongly support the Commission’s prior decision with regard to the
11 entirety of the Verde River, but especially the reach downstream of Bartlett Dam (Segment 5).
12 Segment 5 is by far the most braided segment of the River. Tr. at [12/17/14], p. 604 (Fuller);
13 Tr. at [2/20/15], pp. 1882-83 (Mussetter); Tr. at [2/23/15], pp. 1926 (Mussetter). Obstructions to
14 navigation including sandbars and beaver dams also existed in Segment 5 at or near the time of
15 statehood. Tr. at [12/17/14], pp. 625-27, 666-67 (Fuller).

16 There is no dispute that the Verde River by its nature is “erratic, unstable and
17 unpredictable, characterized by periodic floods, sometimes extreme, in its ordinary and natural
18 condition.” 2008 Decision, p. 53. This undisputed fact has a number of relevant implications.
19 First, large flood flows limit the usefulness of average annual flow data on the Verde River,
20 because these large flood events (at least one exceeded 150,000 cfs) upwardly distort the
21 average. 2008 Decision, p. 44. Second, the large flood events can cause significant changes in
22 channel position and character, especially in the downstream reaches. 2008 Decision, p. 42.
23 Third, the erratic and unstable nature of the Verde River, with potential for violent floods would
24 generally discourage its use as a “highway for commerce,” favoring use of land routes. This is
25 especially true in the years prior to statehood, since the “flood of 1891 was the largest during
26 the historical period and caused a considerable amount of damage and change in flood channel
27 position and morphology.” 2008 Decision, p. 43. There were also very high discharge years in
28 1889, 1890, 1905, 1906, and 1907, resulting in major channel erosion. Schumm 2004 Report,

1 p. 8. Mr. Burtell's Declaration did not identify one confirmed account of boating in the reach
2 now labeled as Segment 5 in the years preceding statehood between 1892 and 1912 (the only
3 potential account, the 1905 "iron boat" trip, was not confirmed to occur). Exh. X009, Table 1.
4

5 In the 2008 proceedings, Dr. Stanley A. Schumm filed an expert report with the
6 Commission that supported the position of non-navigability. He found that the steep gradients
7 of the Verde River, ranging from 12 feet per mile at locations downstream of Bartlett Dam to 25
8 feet per mile at locations between Horseshoe and Bartlett Dam preclude navigation. Schumm
9 2004 Report, p. 14. Dr. Schumm cited a letter from Captain John A. Mellon, who had over 40
10 years of experience on the Colorado River, which stated: "I have come to the conclusion that
11 any river that has over 4 feet fall to the mile cannot compete with a railroad for freight or
12 passengers." This is a notable contemporaneous opinion of river navigability with available
13 watercraft at or near the time of Arizona statehood. Dr. Schumm concluded that: "If at 4 feet
14 per mile, commercial navigation is inhibited, certainly at 10 to 25 feet per mile, the gradients
15 measured on the Verde River, navigation would be impossible." Schumm 2004 Report, at p.14.
16 *See also* Tr. at [2/23/15], p. 1924, lines 15-22 (stating that Segment 5 has 13 ft./mile gradient).

17 In the remand proceeding, Robert A. Mussetter, PhD, PE, submitted a Declaration re
18 Navigability of the Verde River. Exh. X016. Dr. Mussetter reviewed the prior work of Dr.
19 Schumm and also "made an independent assessment of the navigability of the Verde River."
20 Exh. X016, p. 1. Dr. Mussetter agreed with Dr. Schumm's work and conclusions. Although
21 Dr. Mussetter concluded that no reach of the Verde River could be considered navigable, he
22 made specific observations with respect to the downstream reach labeled as Segment 5 here:

23 The downstream approximately 18 miles of the reach flows through a wider
24 valley where the river is bounded by modern, more erodible alluvium in most
25 locations. Under present conditions, the reach has an island-braided character,
26 with multiple channels in many locations that are stabilized by riparian vegetation
27 that remains relatively stable due to the upstream flow regulation. Under natural
28 conditions prior to significant upstream flow regulation, this reach responded to
periodic high flow events such as those that occurred in the late-19th and early 20th
centuries by developing a wide, braided pattern with multiple, unstable low-flow
channels that would have precluded reliable navigation using the watercraft that
were in customary use at and prior to Arizona's statehood.

1 Exh. X016, p. 3. Dr. Mussetter specifically concluded that “no significant portion of ASLD
2 Segments 3, 4 and 5 was navigable in its ordinary and natural condition at the time of Arizona’s
3 statehood.” Exh. X016, p. 3. Dr. Mussetter noted that due to significant flood events in the
4 early 1900’s “that completely destroyed the meander pattern and floodplain vegetation, the
5 average width of the river had increased [from about 150 feet in 1875] to about 2000 feet by
6 1917.” Exh. X016, p. 7. Thus, at and near the time of statehood, the Verde River was subject
7 to even more violent, erratic, and unstable variations in flow and channel modification than
8 usual, which would logically inhibit, discourage, and preclude use of the Verde River for
9 navigation. *See also* Exh. X016, p. 24 (describing the braided character of the river in Segment
10 5 under un-regulated flow conditions existing at the time of statehood). Concluding his analysis
11 regarding the character of the river and average flow depth at study sites in Segment 5, Dr.
12 Mussetter concluded that “ASLD Segment 5 was not navigable under ordinary and natural
13 conditions at Arizona’s statehood.” Exh. X016, p. 32.

14
15 The work of Dr. Schumm and Dr. Mussetter was further supported by Rich Burtell, who
16 conducted an analysis to re-construct stream flow and depth in its ordinary and natural condition
17 at the time of statehood. Mr. Burtell concluded that, for 75% of the time, undepleted
18 streamflows along the Verde River were below 600 cfs in Segments 4 and 5. Exh. 009, p. 15.
19 In Dr. Schumm’s 2004 report, he reported an average annual flow in the Verde River of 612 cfs.
20 Because of flood flows, average annual flow data is distorted upward. As previously noted in
21 the 2008 Decision, the lowest average annual flow of any watercourse determined navigable by
22 a federal or state court is 2,277 cfs, or almost four times greater than the average annual flow of
23 the Verde at statehood. Mr. Burtell also conducted a river depth reconstruction in which he
24 determined that the Verde River typically had a mean depth of less than 2.0 feet during 75% of
25 the year. Exh. X009, p. 20 & Table 5. Mr. Burtell provided his opinion that the Verde River, in
26 its ordinary and natural condition at statehood, was neither navigable nor susceptible to
27 navigation. Exh. X009, p. 21-22.
28

1 E. Navigability Proponents Rely Primarily on Modern Recreational Boating
2 Evidence, Which Is Insufficient to Establish Navigability In Light of the
3 Substantial Historical and Scientific Evidence Supporting Non-Navigability.

4 The U.S. Supreme Court's recent decision in *PPL Montana* reaffirms that the
5 determination of navigability is to be assessed at the time of statehood and that evidence of
6 modern recreational boating is not sufficient evidence to meet the burden of proof in
7 establishing navigability. In this case, opponents of navigability have presented substantial
8 evidence that conditions in the Verde River at and near the time of statehood were not
9 conducive to navigation, that no contemporaneous observer at or near the time of statehood
10 considered the Verde River to be navigable, and that the inhabitants of the region did not in fact
11 use the Verde River for navigation or as a highway for commerce.

12 Evidence that persons currently float the Verde River for recreation, primarily in boats
13 made of materials not available in 1912, is not sufficient to overcome the vast weight of
14 historical and scientific evidence opposing navigability. This is especially true in downstream
15 reaches of Segment 5 that have been subject to significant flow regulation since the Bartlett and
16 Horseshoe Dams were developed upstream in the 1930s and 40s. For Segment 5, navigability
17 proponents cannot show that "the river's poststatehood [modern] condition is not materially
18 different from its physical condition at statehood." *PPL Montana*, 132 S.Ct. at 1233. In
19 Segment 5, the modern dam-regulated Verde River is materially different than its unregulated
20 condition at statehood, which was not conducive to navigation. *See, e.g.*, Exh. X016, p. 3. In
21 addition, modern use of the Verde River for recreation purposes requires affirmative human
22 maintenance of the channel through removing rocks and trees, especially following recurring
23 flood events. Tr. at [12/16/14], pp. 331-332, 354 (Lynch). The need for improvement of the
24 river for modern recreational use counsels against a navigability finding. *North Carolina v.*
Alcoa Power Generating, Inc., 2015 WL 2131089, at *5 (E.D. N.C., May 6, 2015).

25 Nor can proponents meet the second prerequisite identified by the Court in *PPL*
26 *Montana* that "the watercraft are meaningfully similar to those in customary use for trade and
27 travel at the time of statehood." *PPL Montana*, 132 S. Ct. at 1233. As this Commission
28

1 previously recognized in 2008: “Boat-making technology has improved since the time of
2 statehood and with the use of inflatable rubber or neoprene rafts and hard-shelled kayaks have
3 become the more preferred modes of rafting. These modern boats were not available at
4 statehood.” 2008 Decision, at p. 37. In general, use of the Verde River for recreational boating
5 is a relatively modern phenomenon. Tr. at [12/17/14], pp. 651-652, p. 733, lines 6-9 (Fuller)

6 “If modern watercraft permit navigability where the historical watercraft would not, or if
7 the river has changed in ways that substantially improve its navigability, then the evidence of
8 present-day use has little or no bearing on navigability at statehood.” *PPL Montana*, 132 S. Ct.
9 at 1233-34. That is the case here – the evidence of modern recreational boating should be given
10 little or no weight. It is inconclusive and speculative at best. But even if the Commission
11 provides the evidence of modern recreational boating some weight, that evidence still pales in
12 comparison to the substantial historical and scientific evidence supporting a non-navigability
13 determination, including the River’s actual condition at statehood and how the Verde River was
14 actually used and thought of by contemporaneous observers and inhabitants. The weight of the
15 evidence strongly favors a determination of non-navigability.

16 F. Arizona Did Not Assert Any Claim of Navigability For More Than Seventy
17 Years After Statehood, Which Is Also Evidence In Favor of Non-Navigability.

18 In *PPL Montana*, the Supreme Court found that the State of Montana’s “long failure to
19 assert title [via navigability] is some evidence to support the conclusion that the river segments
20 were non-navigable for purposes of the equal footing doctrine.” *PPL Montana*, 132 S.Ct. at
21 1235. Similarly here, as the Commission previously noted:

22 Until 1985, most Arizona residents assumed that all rivers and watercourses in
23 Arizona, except for the Colorado River, were nonnavigable and accordingly there
24 was no problem with the title to the beds and banks of any rivers, streams or other
25 watercourses. However, in 1985 Arizona officials upset this long-standing
26 assumption and took action to claim title to the bed of the Verde River.

27 2008 Decision, at p. 10. The lack of action by the State to assert title for a period of seventy-
28 three years is further evidence that the Verde River was not navigable at the time of statehood.
In addition, in this case, historical evidence was presented by Dr. Littlefield regarding

1 contemporaneous actions by the State of Arizona and its officials at and near the time of
2 statehood confirming the State's contemporaneous view that the Verde River was not navigable.
3 "It is not for a State by courts or legislature, in dealing with the general subject of beds or
4 streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what
5 actually passed to the State, at the time of her admission . . ." *PPL Montana*, 132 S. Ct. at
6 1235. That is exactly what the State has attempted to do in this proceeding. The Commission
7 should find, as it did in 2008, that the Verde River was not navigable at the time of statehood.

8 V. **Any Determination of Whether the Verde River Was Navigable At**
9 **Statehood Can Have No Effect on Title to Portions of Riverbed Lying**
10 **Within the Salt River Indian Reservation.**

11 The Commission should find, as it did in 2008, that the Verde River was not navigable
12 as of February 14, 1912. The evidence strongly supports a finding of non-navigability for the
13 entirety of the Verde River, and especially the portions of the River labeled here as Segment 5,
14 which partially pass through the Salt River Indian Reservation. However, in an abundance of
15 caution, SRPMIC notes that any determination of navigability made in this proceeding cannot
16 and will not provide Arizona with any right, claim, or interest to the bed of that portion of the
17 Verde River that lies within the boundaries of the Salt River Indian Reservation. Any
18 determination of navigability made by this Commission is relevant only to those portions of
19 water courses that had not been previously reserved or set aside by the United States prior to
20 statehood. The Salt River Indian Reservation was reserved and set aside for the exclusive use
21 and occupation of SRPMIC in 1879, thirty-three years before Arizona achieved statehood. Any
22 title that the State might have acquired in 1912 by way of the equal footing doctrine could not
23 include riverbeds within Indian lands previously set aside by the United States.

24 The U.S. Supreme Court has made clear that a determination of navigability, standing
25 alone, will not affect title to Indian lands set aside prior to statehood. If the Federal Government
26 has set aside lands prior to statehood in a way that shows intent to retain title, a determination of
27 navigability is not dispositive. *Alaska v. United States*, 545 U.S. 75 (2005). "Creation of an
28 Indian reservation [containing the bed of navigable waters] is an appropriate public purpose

1 justifying defeat of state title to submerged lands.” *Idaho v. United States*, 533 U.S. 252, 276 n.
2 6 (2001). In addition, in Article 20, Part 4 of the Arizona Constitution, the State of Arizona
3 affirmatively disclaimed ownership of any portion of the bed of the Verde River located within
4 the Salt River Indian Reservation on the date of statehood. Finally, given the fee title ownership
5 interest that the United States holds in Indian reservation lands, the United States is an
6 indispensable party to any determination involving title to Indian lands. *United States v. City of*
7 *Tacoma*, 332 F.3d 574, 579-80 (9th Cir. 2003).

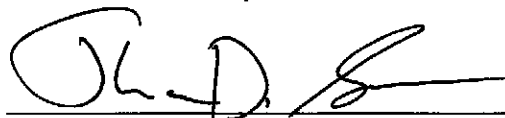
8 If the Commission determines, as it should, that the Verde River was not navigable as of
9 February 14, 1912, these unique issues of federal Indian law will have no relevance. The
10 State’s belated claim to title will simply fail on the Commission’s findings. However, if the
11 Commission makes a determination in favor of navigability for Segment 5 of the Verde River,
12 the Commission must make clear that its determination has no application or effect within
13 Indian lands that were reserved and set aside by the United States prior to Arizona statehood,
14 such as those portions of the riverbed lying within the Salt River Indian Reservation.

15 VI. **Conclusion – The Verde River Was Not Navigable at Arizona Statehood.**

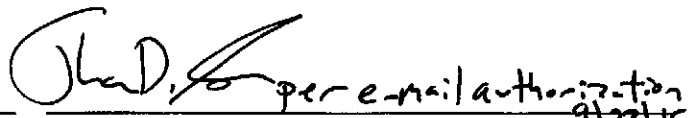
16 SRPMIC respectfully requests that the Commission determine, based on the substantial
17 evidence in the record, that the Verde River in its entirety, and specifically Segment 5, was
18 neither navigable nor susceptible to navigation at the date of Arizona statehood.

19 Respectfully submitted this 24th day of September, 2015

20 MORISSET, SCHLOSSER, JOZWIAK SRPMIC OFFICE OF THE GENERAL COUNSEL
& SOMERVILLE, APC

21 

22
23 Thane D. Somerville, AZ Bar #030870
24 801 Second Avenue, Suite 1115
25 Seattle, WA 98104-1509
26 t.somerville@msaj.com
27 Tel: 206-386-5200
28 Attorneys for Salt River Pima-Maricopa
Indian Community

21  per e-mail authorization 9/24/15

22
23 Michael C. Shiel, AZ Bar #006968
24 Office of the General Counsel
25 Salt River Pima-Maricopa Indian Community
26 10005 East Osborn Road
27 Scottsdale, Arizona 85256
28 Telephone: 480-362-7544
michael.shiel@srpmic-nsn.gov

1 **CERTIFICATE OF SERVICE**

2 ORIGINAL AND SIX COPIES sent for filing this 24th day of September, 2015 to:

3 Arizona Navigable Stream Adjudication Commission
4 1700 West Washington, Room B-54
5 Phoenix, AZ 85007

6 AND COPY mailed this 24th day of September, 2015 to:

7 Fred E. Breedlove, III
8 Associate
9 Squire Patton Boggs (US) LLP
10 1 E. Washington St., Suite 2700
11 Phoenix, AZ 85004
12 *Attorneys for ANSAC*

13 John B. Weldon, Jr.
14 Mark A. McGinnis
15 Salmon, Lewis & Weldon, Plc
16 2850 E. Camelback Rd., Ste 200
17 Phoenix, AZ 85016-4316
18 *Attorneys for the Salt River Project Agricultural Improvement
19 And Power District and Salt River Valley Water User's Association*

20 Cynthia M. Chandley
21 L. William Staudenmaier
22 Snell & Wilmer
23 400 East Van Buren
24 Phoenix, AZ 85004-2022
25 *Attorneys for Freeport-McMoRan Copper & Gold, Inc.*

26 Sean Hood
27 Fennemore Craig, P.C.
28 2394 E. Camelback, Suite 600
Phoenix, AZ 85016-3429
Attorneys for Freeport-McMoRan Copper & Gold, Inc.

Laurie Hachtel
Joy Hernbrode
Attorney General's Office
1275 West Washington Street
Phoenix, AZ 85007-2297
Attorneys for State of Arizona

Joy E. Herr-Cardillo
Arizona Center For Law In The Public Interest
P.O. Box 41835
Tucson, AZ 85717

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

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

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

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

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

18
19 Charles L. Cahoy
Assistant City Attorney
20 City Attorney's Office
CITY OF TEMPE
21 21E. Sixth St, Ste 201
22 Tempe, AZ 85280
Attorneys for City of Tempe

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

27
28

1 Carla A Consoli
Lewis Roca Rothgerber LLP
2 201 E. Washington, St., Suite 1200
Phoenix, AZ 85004-2595
3 *Attorneys for Cemex*

4 James T. Braselton
5 Mariscal, Weeks, McIntyre & Friedlander, P.A.
2901 N. Central Ave, Ste 200
6 Phoenix, AZ 85012-2705
7 *Attorneys for Various Title Companies*

8 Julie Lemmon
1095 W. Rio Salado Pkwy, Ste 102
9 Tempe, AZ 85281-2603
10 *Attorney for Flood Control District
Of Maricopa County*

11 Thomas L. Murphy
12 Linus Everling
Gila River Indian Community Law Office
13 Post Office Box 97
Sacaton, AZ 85147
14 *Attorney for Gila River Indian Community*

15 Sandy Bahr
16 202 E. McDowell Rd, Ste 277
Phoenix, AZ 85004
17 *Sierra Club*

18 Susan B. Montgomery
19 Robyn L. Interpreter
MONTGOMERY & INTERPRETER, PLC
20 4835 E. Cactus Rd., Ste. 210
Scottsdale, AZ 85254
21

22 Brown & Brown Law Offices
David A. Brown
23 128 E. Commercial, PO Box 1890
St Johns, Arizona 85936
24

25 Dr. Carole Coe Klopatek
P.O. Box 17779
26 Fountain Hills, AZ 85269-7179
*Director of Government Relations
Fort McDowell Yavapai Nation*
27
28

1 Mr. Thomas Moriarty,
2 P.O. Box 17779
3 Fountain Hills, AZ 85269-7779
4 *Arizona Attorney of Record*
Acting General Counsel
Fort McDowell Yavapai Nation

5 Ms. Arlinda F. Locklear, Esq.
6 4113 Jenifer Street, NW,
7 Washington, D.C. 20015
8 *D.C. Attorney of Record*
Fort McDowell Yavapai Nation

9 Michael F. McNulty
10 Deputy County Attorney
11 Pima County Attorney's Office
12 32 N. Stone Ave., Suite 2100
13 Tucson, Arizona 85701

14 Mark Horvath
15 Representing the Fort McDowell Yavapai Nation
16 Horvath Law Office, P.C., L.L.O.
17 1505 East Los Arboles Drive
18 Tempe, Arizona 85284
19 402.699.1652
20 mark@horvathlaw1.com
21 mhorvath@ftmcdowell.org

Executed this 24th day of September, 2015



Thane D. Somerville
Morisset, Schlosser, Jozwiak & Somerville
Attorneys for SRPMIC

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18
19
20
21
22
23
24
25
26
27
28