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7 **BEFORE THE ARIZONA NAVIGABLE STREAM**
8 **ADJUDICATION COMMISSION**

9 IN THE MATTER OF THE
10 NAVIGABILITY OF THE VERDE
11 RIVER FROM ITS HEADWATERS
12 AT SULLIVAN LAKE TO THE
CONFLUENCE WITH THE SALT
RIVER, YAVAPAI, GILA, AND
MARICOPA COUNTIES, ARIZONA

Case No. 04-009-NAV (Verde)

JOINT
POST-HEARING CLOSING BRIEF
FOR THE YAVAPAI-APACHE
NATION AND THE FORT
McDOWELL YAVAPAI NATION

13 The Yavapai-Apache Nation and the Fort-McDowell Yavapai Nation (“Nations”)
14 submit this Joint Post-Hearing Closing Brief on the navigability of the Verde River. The
15 Verde runs through the heart of the Yavapai-Apache Reservation near Camp Verde, Arizona
16 and through the Fort McDowell Reservation, north of its confluence with the Salt River, in
17 Segments 2 and 5, respectively.¹ Based on the evidence in the record, the Commission should
18 once again determine that the Verde River, from its headwaters near Sullivan Lake to its
19 confluence, was not navigable at the time of statehood.²

21 _____
22 ¹ The use of the segments suggested by the Arizona State Land Department (“ASLD”) is for the
convenience of the Commission only. This use is not intended to suggest the Nations’ agreement with
the ASLD on the geographical delineation of any particular segment.

23 ² The Nations’ participation in these proceedings does not waive their right (or that of the United States
24 as their trustee) to challenge any future claim by the State of Arizona to the Nations’ Reservation lands
in the event of a finding of navigability, including, but not limited to, under controlling principles of
25 federal law, Article 20, Part 4 of the Arizona Constitution and Section 20 of Arizona’s Enabling Act,
36 U.S. Stat. 557 (1910).

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1 **I. INTRODUCTION**

2 On May 24, 2006, at a public hearing in Phoenix, the Commission determined that the
3 Verde River was not navigable or susceptible to navigation in its ordinary and natural
4 condition on the date of statehood (February 14, 1912).¹ The Commission unanimously found:

5 All transportation in the area in the early days was by means of wagon, horse an
6 carriage, and later by train and automobile, but there is no evidence of any significant
7 use of the Verde River for transportation as a highway for commerce or that it was
8 susceptible to such use. *Id.* at 27-28.

9 Now, after having the benefit of an additional **16 days** of hearings and the opportunity
10 to submit thousands of additional pages of evidence (much of which re-hashed information
11 previously presented), the proponents are no closer to meeting their burden of proof than they
12 were on May 24, 2006 – the date of the Commission’s original decision.² Under the most
13 objective standard, the proponents have once again failed to show that any segment of the
14 Verde River was “navigable” within the meaning of the *Daniel Ball* and A.R.S. § 37-1101(5).³
15 Specifically, proponents were required to demonstrate **all** of the elements for defining a
16 “navigable water course” set forth in A.R.S. § 37-1101(5):

17 “Navigable” or “navigable watercourse” means a watercourse that was in existence on
18 February 14, 1912, and at that time was used or was susceptible to being used, in its
19 ordinary and natural condition, as a highway for commerce, over which trade and travel
20 were or could have been conducted in the customary modes of trade and travel on water.

21 Unlike the Commission’s decision on the Lower Salt River, which was overturned in
22 2010 by the Arizona Court of Appeals because the Commission did not consider the effects of

23 ¹ See Report, Findings and Determination Regarding the Navigability of the Verde River from Its
24 Headwaters to the Confluence of the Salt River, March 24, 2008, at 3 (“2008 Decision”).

25 ² A preponderance of the evidence standard is applied in these proceedings. See A.R.S. § 37-1128(A);
2008 Decision at 15-16.

³ A.R.S. § 37-1101(5). Arizona’s definition of navigability is taken from *The Daniel Ball*, 77 U.S. (10
Wall) 557, 19 L.Ed. 999 (1870), which the Commission concluded was the “best statement” for
navigability for title purposes. 2008 Decision at 17.

1 diversions and dams on the “ordinary and natural condition” of the river,⁴ the Commission’s 2008
2 Decision **did** take into account the Verde River in its “ordinary and natural condition” **prior to**
3 significant diversions or other human impacts.⁵ Nevertheless, in a clear effort to ensure an
4 impartial review of the evidence, the Commission reopened the record on the Verde on October
5 22, 2012. As part of this decision, the Commission also provided an opportunity for the parties to
6 address the U.S. Supreme Court’s recent opinion in *PPL Montana, LLC v. Montana*, 132 S. Ct.
7 1215 (2012) (“*PPL Montana*”), which reflected the Supreme Court’s most recent thoughts on
8 navigability for title.

9 At this point in time, there can be no doubt that proponents have taken full advantage
10 of the opportunities presented by the Commission. Yet, they remain unable to prove that the
11 Verde River (or any segment of the Verde River) was navigable.

12 **II. PEOPLE AND THE VERDE RIVER**

13 There is no evidence in the voluminous record before the Commission that pre-historic
14 people, Native Americans, Spanish explorers, trappers, settlers, miners or the military, ever
15 used the Verde River in any significant way for trade and travel for purposes of commerce
16 prior to statehood. Similarly, there is no evidence to show that people at the time actually
17 **believed** that the Verde was susceptible to such a use.

18 **A. Prehistoric People and the Native Americans**

19 The Commission discussed the archaeological evidence in some detail in its 2008
20 Decision. *See* Decision at 21. The Commission found that, despite the documented need for

21 ⁴ *State v. Arizona Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010)
22 (“*State v. ANSAC*”).

23 ⁵ The Commission explained, “[i]n order to consider the river in its ordinary and natural condition, the
24 Commission considered its condition prior to 1860 and the initial diversion of water for irrigation
25 by modern settlers.” 2008 Decision at 28 (emphasis added). The Commission also went on to note that
because Horseshoe and Bartlett Dam were constructed on the Verde after statehood, “their effect on the
flow of the river was not considered by the Commission, and the fact that their construction was after
statehood was not considered relevant to the issues before the Commission.” *Id.* at 6.

1 means of trade and travel along the Verde throughout this period, there was no evidence in the
2 archeological record to indicate that any of these prehistoric cultures used the Verde River as a
3 means of transportation. *Id.* at 23.⁶ ASLD Witness, Mr. Jon Fuller, agreed with this conclusion
4 in his most recent testimony, conceding, “we have no accounts of boats or boating from the
5 archeological period.” TR 12/15/14: 119 (Fuller).⁷

6 According to the Commission, by the late 1600’s or 1700’s, both the Yavapai and the
7 Apache had migrated into the Verde River Watershed. 2008 Decision at 22. The Yavapai were
8 a culture of hunters and gatherers, although they also had some permanent settlements where
9 they cultivated crops. *Id.*; see also Harrison and Williams, *Oral History of the Yavapai*, (2012)
10 at 37-40 [X100_FMYN 31] (“*Oral History of the Yavapai*”). The Yavapai’s vast ancestral
11 territory spanned throughout portions of what is present-day Arizona, ranging from south of
12 the current Fort McDowell Yavapai Reservation to as far north as Flagstaff and Williams,
13 Arizona. *Id.*⁸ The Verde River ran through the eastern portion of the Yavapai’s ancestral
14 territory. *Id.* Despite the massive size of the Yavapai’s territory and the long distances they
15 travelled for hunting and gathering purposes and for trade among their fellow tribes, there has
16 been no evidence presented to the Commission that the Yavapai ever used the Verde River for
17 trade and travel. *Id.* at 38-43. In Declarations filed by Tribal Elders for the Fort McDowell
18 Yavapai Nation, the Elders testified there was no mention in their family histories, either
19 written or oral, that the Yavapai ever boated the Verde River or used it as a means of

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21 ⁶ See also Declaration of Jack L. August, Jr., Ph.D. on the Non-Navigability of the Verde River at and
22 Prior to Arizona Statehood, February 14, 1912, at 4 [X067] (“August”) (Hohokam traded with peoples
in Mexico to northern Arizona, but [t]hese early inhabitants traveled by foot and there was no
archeological evidence of boats or water-based transportation.”).

23 ⁷ Throughout this Brief, citations to the reporter’s transcripts for the Commission’s most recent
hearings on the Verde River are abbreviated as follows: “TR [FULL DATE]: [PAGE] (Witness).”

24 ⁸ See Affidavit of Vincent E. Randall, February 11, 2015, at ¶ 15 and Exhibit A (Map of Yavapai and
25 Apache Aboriginal Territories) [X055_YAN 1] (“Randall”); see also *Oral History of the Yavapai*, Map
6 (Ancestral Yavapai Territory).

1 transportation for goods or people.⁹ Rather, the Yavapai (like their Apache counterparts) used
2 an extensive system of trails, including many that ran in a north/south direction, generally
3 paralleling the Verde River.¹⁰

4 Vincent Randall, a Tribal Elder and the Apache Cultural Director for the Yavapai-
5 Apache Nation, also provided extensive evidence to the Commission, both in his written
6 Declaration and in his testimony, pertaining to the relationship of the Apache (*Dilzhé'e*) to the
7 Verde River. The ancestral home of the Apache, like the Yavapai, ranged for great distances
8 across present day Arizona and included the Verde River. *See* Randall at ¶ 15 & Exhibit A.

9 In his Declaration, Mr. Randall explained that he has personally reviewed thousands
10 upon thousands of historical records pertaining to both the Apache and the Yavapai people. *Id.*
11 at ¶¶ 8-11. Mr. Randall, like his Yavapai counterparts, also confirmed that neither the Apache nor
12 the Yavapai boated or used the Verde River for trade and travel. *Id.* at ¶33.¹¹

13 **B. The Spanish Explorers and the Mountain Men**

14 In 1582 and 1583, the Spanish explored the Verde Valley (Segment 2) looking for silver.
15 2008 Decision at 23. Additional Spanish explorations occurred on the Verde River and in the
16 surrounding region between 1598 through 1600. *Id.* at 24. Over 100 years later, in 1696, Father
17 Kino viewed the confluence of the Verde River and the Salt River from atop the Estrella
18 Mountains. *Id.* at 6-7. He perceived the Verde as little more than an *arroyo*. *Id.* Other Spanish

19 ⁹ Compiled Declarations of Yavapai Tribal Elders, X100-FMYN [X100_FMYN 5].

20 ¹⁰ *See, e.g., Arizona Department of Transportation History, Final Report 660*, December 20, 2011, at 7
21 [X100_FMYN 17] (“ADOT History”); *see also* TR 02/20/15:1792-1793 (Randall) (describing a well-
22 used trail between Camp Verde and to Second Mesa on what is now the Hopi Reservation); TR
23 02/20/15:1790 (Randall) (describing Apache travel routes between Camp Verde and Clarkdale on the
24 Verde River); *Id.* at 1784-1785 (discussing various trails and crossings in the Verde River valley and
25 the trail that became General Crook trail).

¹¹ Randall also explained that of the many Military, Bureau of Indian Affairs and other government
records he has reviewed, none of these records evidenced the use of the Verde River by the military or
settlers for any form of meaningful trade and travel, *id.* at ¶¶ 33, 42, and further, that Tribal Elders did
not have any recollection or oral histories pertaining to the use of the Verde for trade and travel during
the period from the 1890’s and up to statehood. *Id.* at ¶ 39.

1 visited the Verde River during this time period, including Father Juan Bautista Nentvig, who
2 published the first map to use the name “Verde” in 1764. *Id.* at 7.

3 While the Spanish were known for their mapmaking skills and for compiling detailed,
4 contemporaneous diaries (which would later be recorded in triplicate or quadruplicate upon their
5 return to Spain), TR 2/24/15: 2331, 2334-2336 (August), they largely ignored the Verde River.
6 August at 8. This despite the critical importance for the Spanish to locate routes that could be used
7 for trade and travel in the New World. TR 2/24/15:2339-2340 (August). Ultimately, despite
8 multiple accounts of Spanish exploration in and around the Verde River, “no missions or permanent
9 establishments or settlements were made by the Spanish on the Verde.” 2008 Decision at 24.

10 Later, the first Anglo frontiersmen encountered the Verde in search of beaver. *Id.* at 24.
11 While they trapped extensively on the Verde River, (substantially eradicating the beaver
12 population by 1833), these “mountain men” generally rode horseback or walked. *Id.* The
13 Commission found there was no meaningful evidence they used canoes, rafts or other types of
14 boats on the Verde for transportation or commerce. *See id.*; *see also* August at 10.

15 C. The Military, Miners and Settlers

16 After gold was discovered near present day Prescott in 1863, hopeful miners flooded
17 into the region and, by the end of the Civil War in 1865, the full might of the U.S. Military
18 was focused on subduing the Indians. 2008 Decision at 25; *see also* Randall at ¶ 16. During
19 this period, the military established forts and outposts up and down the Verde River Watershed
20 to ensure that the region remained open for non-Indian settlement. 2008 Decision at 25;
21 August at 12-13. These included: Camp McDowell on the lower Verde (Segment 5), Camp
22 Verde (Segment 2), and Ft. Whipple, near Del Rio Springs in the Big Chino Basin. *Id.* Despite
23 the need and the location of these military forts on or near the Verde River, there is no
24 evidence that the military used the Verde to move materials, munitions, men, or animals from
25 one post to another. August at 14. Civilian settlement followed closely on the heels of the

1 military. *See* 2008 Decision at 25. In 1875, the vast majority of Yavapai and Apache were
2 force-marched by the military from their homeland to the San Carlos Reservation, where they
3 would remain imprisoned until the military declared an end to hostilities. Randall at ¶ 18.

4 By 1880, most of the arable lands in the Verde Valley were under cultivation by non-
5 Indians, the United Verde Copper Company was mining in Jerome, and a series of wagon
6 roads and stage lines had been developed to connect settlements in the Verde River Valley
7 with major cities, such as Prescott and Phoenix in the Salt River Valley. 2008 Decision at 25-
8 26. Yet, **despite the incredible need**, the Verde River was not used for trade and travel for
9 purposes of commerce. Instead, as the Commission noted in 2008, trade and travel was
10 conducted by horseback, mule train, wagon and stage. *Id.* at 26-2.

11 **D. Historic Boating Accounts**

12 To be sure, the proponents of navigability have devoted many hours of testimony to the
13 handful of historic boating accounts on the Verde River. Nevertheless, most of these accounts
14 were **previously considered and rejected by the Commission** in rendering its non-
15 navigability determination in 2008.¹² For example, in considering accounts of the collapsible
16 boat issued by the U.S. Army at Camp Verde (Segment 2), documented in a picture from *circa*
17 1887 (the now infamous, “two men in a boat” picture),¹³ the Commission concluded, “it would
18 appear that this boat was used more as a ferry to cross the river rather to travel up and down
19 the river.” 2008 Decision at 36.¹⁴ The Commission was similarly not impressed with accounts

21 ¹² For a concise summary of boating accounts, *see Table 1, Declaration of Rich Burtell on the Non-*
22 *Navigability of the Verde River at and Prior to Statehood, In re Determination of Navigability of the*
Verde River (Case No. 04-009-NAV), September 2014 [X009_FMC] (“Burtell”).

23 ¹³ Fuller, *Presentation to ANSAC: Verde River Navigability*, September 2014, at 110 [X035_AS LD
24 167] (“Fuller PPT”); *see also* Douglas R. Littlefield, Ph.D., *Revised and Updated Report: Assessment*
of the Navigability of the Verde River Prior to and on the Date of Statehood, February 14, 1912, April
25 3, 2014, at Fig. 26 [X002_SRP] (“2014 Littlefield”).

¹⁴ While proponents have suggested the “two men in the boat” could have been using a **different boat**
than the collapsible boat used as a ferry by the military during high water periods, and even that the picture

1 of floating logs on the River from Fort McDowell, the purported use of a canvas skiff during a
2 **high water** event from Fort McDowell to the Salt River in 1883 (the “jolly mariners”
3 account), or by two reports of duck hunting on the Verde River (during the rainy season) – one
4 at Fort McDowell in 1888 and one upstream, near Camp Verde, in 1903 (the “Palmer
5 expedition”). *Id.* at 36.¹⁵ After discussing these and other boating accounts, the Commission
6 concluded: “Thus, while we have historical accounts of boating on the Verde River, it does not
7 appear that any of these attempts were used for commercial transportation or use of the river as a
8 highway for commerce. The vast majority of transportation in the region was by horse, mule,
9 wagon and later railroad.” *Id.* at 36. The Commission also went on to state in reference to these
10 accounts: “None of the boating incidents carried goods for commercial trade and there was no
11 navigation upriver.” *Id.* at 37.

12 After apparently scouring the public domain to find additional references to boating on
13 the Verde River, proponents **did** introduce several new “boating accounts” in the latest round
14 of hearings before the Commission. None of these offer any reason for the Commission to
15 change its prior findings. One account, taken from the Verde Independent on February 27,
16 1980 [X017_AS LD 121] shows a photograph of a man and woman in a boat on a recreational
17 trip somewhere in the Verde Valley. The caption explains, however, that the boat was built in
18 the spring of 1917 (post statehood) so that Fred Stevens and Jake Webber could take “a trip

19
20 could have been taken further downstream near Beasley Flat, there is simply no evidence in the record
21 to support this speculation. To the contrary, Fuller concluded in his 2003 Report that “[d]uring the 1880s,
22 Fort Verde was issued a collapsible boat, because they needed a way to get messages and messengers across
the river in times of high water. The boat was also **used for fishing**, and **there is a photo of the boat
at the Fort.**” Fuller, et al., *Arizona Stream Navigability Study for the Verde River: Salt River Confluence to
Sullivan Lake*, June 2003, at 4-2 [Evidence Index (“EI”) 31] (“2003 Fuller Report”) (emphasis added).

23 ¹⁵ Proponents made much of the fact that the boat used by the Ralph Palmer was hauled on two wheels
24 by a horse that seemingly knew how to find his way back to the corral, inferring that the boat must
25 have been used so much the horse had learned to find its way back to the corral all on its own. There
was, however, no evidence presented to support this inference. Indeed, it is just as likely that the horse knew
its way back to the corral because it had been used by its owners near the river for a variety of purposes,
like hauling goods and transporting people. Tr. 4/02/15: 3430-3433 (Burtell). Or maybe it just smelled oats.

1 down the Verde River” during the “spring floods.” *Id.* The article also explains, “the men
2 couldn’t make it past the falls in the Brown Springs area.” *Id.* Another article entitled,
3 “Mariners Return”, was found in the Weekly Journal Miner, dated May 28, 1905,
4 [X017_ASLD 127]. This article, however, makes clear that while the “mariners” were able to
5 boat an undefined portion of the Verde, “the water was so low that they had to carry the boat,
6 which was too strenuous for them, and they gave up.” *Id.* Finally, the article captioned,
7 “Voyage Postponed”, dated May 24, 1905, [X017_ASLD 126] does not discuss a boating trip
8 at all, but rather, makes reference to plans for a boating trip that **never occurred** because the
9 mail ordered boats never arrived. *Id.*

10 In sum, it is difficult to see how these infrequent accounts of apparent recreational
11 boating, most of which failed – or in one instance, never happened at all – offer anything
12 further for the Commission. The truth is, that despite the best efforts of the proponents to
13 stretch the handful of boating accounts in the record, they have failed to meet their burden to
14 show that any of these accounts (separately or collectively) prove that the Verde River was
15 navigated for trade and travel for purposes of commerce.

16 **III. DESCRIPTIONS OF THE VERDE RIVER IN THE RECORD**

17 Proponents have done little to add to the descriptions and accounts of the Verde River
18 previously considered by the Commission in 2008, from which the Commission found that
19 while the Verde River was a perennial stream that flowed year round prior to statehood, it was
20 also “a very erratic, unstable and unpredictable stream because flow varies from very low,
21 sometimes less than 200 cfs, to annual floods estimated between 13,000 and 20,000 cfs with
22 periodic floods exceeding 100,000 cfs.” 2008 Decision at 52. In the Verde’s more unconfined
23 and alluvial reaches (Segments 2 & 5), the Commission rejected the possibility that the river
24 might have been susceptible to navigation for several, additional reasons, finding that these
25

1 segments contained shifting sandbars and braided conditions. *Id.* Specifically, the Commission
2 observed:

3 In the Verde Valley and the reach below Bartlett Dam, the river spreads out over a
4 large flood plain and had braided characteristics with shifting sand bars and sand
5 islands, which would make it impossible to be considered as navigable or susceptible
6 of navigation. 2008 Decision at 52.

7 **A. Contemporaneous Observations and Photographs**

8 Long before non-Indians first set eyes on the Verde River, the Yavapai and Apache people
9 called the Verde River home. Apache Tribal Elder and cultural expert, Mr. Randall, stated that
10 this place was called, “*Shiikéyaa*”, or “the place where God put us to live.” Randall at ¶ 18.
11 Because water plays a pivotal role in the traditional, cultural and religious values of the Apache
12 and Yavapai People, Mr. Randall explained they have “always been particularly aware of the
13 conditions of the Verde River, including how our elders have observed it in the past and how
14 our families have described it in our oral histories and cultural knowledge base.” *Id.* at ¶¶ 25-26.
15 Before the incursion of non-Indian settlers, the Verde River near Clarkdale and Camp Verde
16 was described by the *Dilzhé’e* Apache as very wide, marshy and so shallow at places that one
17 could cross it on foot. *Id.* at ¶ 28. It was also known to be unstable and prone to large floods.
18 *Id.* at ¶ 30. From the accounts of Apache and Yavapai Elders, “it was always that way.” *Id.* at ¶ 30.

19 Indeed, this historical description can be found in the *Dilzhé’e* name for the River, *Tu*
20 *Cho Lii*, which means “the big water.” *Id.* This is significant, since the *Dilzhé’e* Apache language
21 is “highly contextual and words themselves convey several layers of descriptive information
22 about a particular thing within one word.” *Id.* at ¶ 27. In contrast to the Apache word for the
23 Verde Valley **upstream** of Beasley Flat, the River **below** Beasley Flat is called, “*Tu Cho*
24 *Lini’*”, which means “the really big river” and refers to the flow and speed of the River at this
25 location because this is where the River has gained more inflow from Beaver Creek and West
Clear Creek and becomes more channelized and narrow, making the speed of the water faster.

1 *Id.* at ¶ 29.¹⁶ None of these early Yavapai and Apache descriptions offer any evidence that the
2 Verde River was susceptible to navigation in its ordinary and natural condition, as contemplated
3 by *Daniel Ball* and A.R.S. § 37-1101(5).

4 The military, pioneers and early homesteaders provided the next pre-statehood
5 descriptions of the Verde River for Segments 2 & 5. In Segment 5 near Fort McDowell, Indian
6 Service agents described the Verde River as subject to severe flooding which frequently
7 destroyed tillable land. 2014 Littlefield at 92-93. In describing the river on the Fort McDowell
8 Indian Reservation in 1909, the superintendent of irrigation for the U.S. Indian Service explained,
9 “[t]he Verde River flows through a flat of sand and gravel bars, from one-half to three-quarters of a
10 mile in width, bordered by cut banks from five to twenty feet in height. It swings from one side of
11 the flat to the other, and where it impinges against a cut bank, is continuously eroding away the
12 land.” *Id.* at 93. The Commission described the Verde River at Camp Verde more particularly
13 in its 2008 Decision at 29, noting its shallow and marshy conditions,¹⁷ and that floods “cut into
14 banks” and the river “changed course” from the main river channel “so the river bed spread out
15 in many places.” There were other descriptions of the river as a fine, flowing stream, but none
16 that opined that the river was useful for navigation. *Id.*

17 In addition to the oral history and accounts of the Verde River, there were numerous
18 historical photographs introduced into evidence from before statehood. Most of the
19 photographs, however, were previously introduced and considered by the Commission **prior**
20 **to** the issuance of its non-navigability determination in 2008. *See, e.g.,* Douglas R. Littlefield,
21 Ph.D., *Assessment of the Verde River’s Navigability Prior to and on the Date of Statehood,*
22 *February 14, 1912*, Revised Report, July 7, 2005, at Figs. 51-77 [EI 32_SRP] (“2005

23 ¹⁶ The Yuman (Yavapai) word for the Verde River is “*Hak gah ahmah*”, which means, where the water
24 flows.

25 ¹⁷ *See United States v. Oregon*, 295 U.S. 118, 23-24 (1935) (finding shallow and swamp like conditions to be an indication of non-navigability).

1 Littlefield”). With only a few exceptions, the vast majority of these photographs were simply
2 re-hashed or recast in the most recent round of hearings before the Commission by Mr. Fuller,
3 the witness for the ASLD. Yet, none of them offer any real support for proponents’ case for
4 navigability. For example, many of the photographs were taken during periods of high water,
5 such as the summer monsoon season or winter or spring flows, undermining their utility for
6 documenting the day-to-day conditions on the river.¹⁸ Others appear to show significant flood
7 events, proving the erratic and unreliable nature of the river for navigation.¹⁹ Of the remaining
8 photographs, the vast majority appear to reflect a Verde River that was wide and shallow, often-
9 times riddled with sand and gravel beds and capable of being crossed on foot or by horseback, or
10 wagon or automobile.²⁰ Taken together, these photographs fail to provide any substantive
11 support for the proponents’ position that the Verde River was navigable on or before statehood.²¹

12 **B. Surveys, Patents and Government Reports**

13 In addition to the oral histories and photographs outlined above, the Commission also
14 previously considered “numerous studies by the federal government, including the military,
15 Bureau of Reclamation, Indian Service and others made of the Verde River that were
16 presented as evidence to the Commission.” 2008 Decision at 31. The Commission was
17 particularly impressed with the work of historian and expert, Dr. Douglas Littlefield, calling
18 his 2005 Report, which reviewed and synthesized the various government reports and surveys
19 before the Commission, “monumental.” *Id.* Littlefield’s 2005 Report was revised and updated in

20
21 ¹⁸ See, e.g., Fuller PPT at 115-16.

22 ¹⁹ See, e.g., Fuller PPT at 112; see also 2014 Littlefield at Fig. 33-34; 2005 Littlefield at Fig. 77.

23 ²⁰ See e.g., Fuller PPT at 106, 109, 111, 113, 114, 117, 121-23, 126; see also 2014 Littlefield at Fig. 20,
21, 24, 25, 29, 31, 32.

24 ²¹ Some photographs do not provide a specific day or month in which they were taken, making it
25 difficult to discern whether the conditions of the Verde River shown in the photographs are merely
reflective of temporary, seasonal periods of high flows and not the day-to-day condition on the river, making
them of little use to support proponents’ position. See, e.g., Fuller PPT at 107, 108, 118, 119, 124, 125.

1 2014, to include additional information about the historical characteristics of the Verde River
2 (particularly due to improvements in digital access to documents) and to conform to the decision by the
3 Arizona Court of Appeals in *State v. ANSAC*. See 2014 Littlefield at 1. Dr. Littlefield also
4 testified again before the Commission. See TR 02/18/2015:1442-1485 & 02/19/2015:1505-1733.
5 Based upon his exhaustive review of the historical record, Dr. Littlefield reaffirmed his
6 conclusion that there was no segment of the Verde River, under ordinary and natural
7 conditions, that was navigable or susceptible to navigation on or before statehood. 2014
8 Littlefield at 1; TR 02/18/15:1473-74.

9 As in prior testimony before the Commission, Dr. Littlefield provided an extensive
10 discussion about the pre-statehood U.S. Government surveys conducted by the General Land
11 Office (now BLM), including those that involved lands in Segment 5, near Fort McDowell,
12 and lands near Camp Verde (Segment 2). 2014 Littlefield at 13-50. While the Commission
13 previously concluded that surveyors' opinions "are not determinative of the issue of
14 navigability", the Commission **did find** these opinions to be "probative and support the
15 position that the watercourse was not navigable." 2008 Decision at 32.

16 Littlefield devoted a significant portion of his 2014 Report to explain the historic
17 evolution of the survey manuals that were used to survey the Verde River prior to and around
18 the time of statehood and how these manuals related to the surveyors' navigability
19 determinations. Based upon this information and his detailed review of the federal surveys,
20 Littlefield concluded, "while those surveys were done under the instructions of different
21 survey manuals, at different times of year, and in different years, **not one of the surveyors**
22 **recorded information about the Verde River that would be consistent with a**
23 **determination of navigability."** 2014 Littlefield at 26 (emphasis added).

24 For example, in Robert Farmer's resurvey of the former Fort McDowell Military
25 Reservation from March 1911, Farmer repeatedly describes conditions on the Verde River that

1 reflected a stream that would be difficult to navigate, due to its shallow condition and the
2 presence of **multiple** sand bars. *Id.* at 31. While the surveys of both Phillip Contzen (1901)
3 and Farmer (1911) also showed that the Verde had been meandered, Littlefield concluded that
4 this was not because they deemed the river to be navigable, but rather, due to the requirements
5 of the 1890 instruction, which called for non-navigable bodies of water more than three chains
6 wide to be meandered. *Id.*; *see also id.* at 22 (explaining distinctions between the 1881 and
7 1890 survey manuals). Contzen also noted the presence of roads paralleling the stream on both
8 sides of the River, which Littlefield observed, “implies a lack of navigability.” *Id.* at 29-30; *see*
9 *also* Section IV(B)(1), *infra.* (discussing the costs of building roads versus using the river).

10 As noted above, there were also several different government surveys conducted in the
11 area near present-day Camp Verde, which included a portion of Camp Verde Military
12 Reservation and other areas northeast of Camp Verde, in the Verde Valley. *Id.* at 33-35.
13 Significantly, none of these early surveys in the 1880s by C. Burton Foster meandered the
14 River. *Id.* at 33-34. Foster also noted in at least one survey, the presence of a hay road running
15 parallel to the River, which Littlefield concluded was “another indication on the plat that
16 Foster did not consider the Verde to be navigable.” *Id.* at 35. These surveys are persuasive
17 evidence of the non-navigable condition of the Verde River before statehood.²²

18 In addition to surveys, Dr. Littlefield also reported and testified that he had reviewed
19 all of the federal patents in along the Verde River between township 13 north, range 5 east and
20 upstream to township 17 north, range 2 west (totaling well over 100 patents), and that none of

21
22 ²² While Dr. Littlefield reports that a Daniel Drummond later surveyed the meanders in Camp Verde
23 Military Reservation between 1892 and 1893, it is clear that this was done only because the 1890
24 government survey manual required that the river be meandered for non-navigable bodies of water over
25 **three chains wide**. 2014 Littlefield at 37. Drummond repeatedly included in his field notes the fact that
the Verde River was more than three chains wide, demonstrating to Littlefield “that the basis for his
meanders stemmed from the instructions to meander non-navigable bodies of water over three chains
across.” *Id.* For example, Drummond observed, “[s]ince the flood [1891] the banks of the river average
a width of nearly 20 chains.” *Id.*

1 the federal patents issued to private parties to lands overlaying the Verde River ever identified
2 the Verde River as a navigable stream, or reserved the bed and banks of the Verde River for
3 the State of Arizona.²³ Similarly, after reviewing the federal patent files under the Homestead
4 Act of 1862, including all of the supporting files containing (among other things) witness
5 accounts and settler affidavits, Dr. Littlefield also noted there was simply nothing in these files
6 to ever suggest that the Verde River was navigable.²⁴

7 Dr. Littlefield also discussed the results of his review of the 50 land patents on the
8 Verde River that were applied for under the Desert Land Act of 1877 that cited the Verde
9 River as the source of water as required under the Act. *Id.* at 73. Of the 50 land patents,
10 Littlefield observed, all were initially accepted by the U.S. General Land Office in Phoenix. *Id.*
11 at 73. This is significant because under the Desert Land Act, the land to be patented had to be
12 “reclaimed” by prior appropriation from a **non-navigable** stream. *Id.* at 72; *see also* 2008
13 Decision at 33. Based on the foregoing, Dr. Littlefield found that “[t]he logical conclusion
14 from these applications is that the Verde River (as the source for reclamation of these lands)
15 must have been considered non-navigable by the applicants as well as by the administrators of
16 the U.S. General Land Office.” *Id.* at 73.²⁵

17 Dr. Littlefield’s 2005 Report (which was highly persuasive to the Commission) cited
18 numerous other government reports and papers and military documents to corroborate his
19 finding that contemporaneous observers of the Verde River did not view it as a reliable means
20
21

22 ²³ *Id.* at 63-71.

23 ²⁴ 2014 Littlefield at 62; *see also* TR 02/19/15:1517-18 (Littlefield).

24 ²⁵ It is perhaps equally significant, as noted by the Commission in their 2008 Decision, that the State of
25 Arizona never made any in lieu selections to compensate it for the area covered by the Verde River’s
bed in those sections granted by the federal government to the State of Arizona for the support of
schools and for various other purposes. *See* Decision at 33-34.

1 of commercial navigation.²⁶ Littlefield reiterated this conclusion in his 2014 Report and
2 testimony. 2014 Littlefield at 80; TR02/18/15:1473-74.²⁷

3 In summary, the contemporaneous evidence pertaining to the U.S. government
4 surveyors, land patents, and published and unpublished government reports and papers (most
5 of which were previously considered by the Commission), provides persuasive cumulative
6 evidence that the Verde River was, in fact, non-navigable at the time of Arizona's statehood.

7 C. The Geomorphology and Hydrology the Verde River

8 The record contains extensive descriptions and expert opinions pertaining to the
9 geomorphology and hydrology of the Verde River, the vast majority of which describes the
10 Verde River in a manner that would not have made it conducive to reliable navigation for trade and
11 travel for purposes of commerce.

12 In Rich Burtell's conservative stream flow reconstruction; Burtell determined that
13 approximately 75% of the year, undepleted stream flows along the Verde River ranged from
14 below 100 cfs to no more than 600 cfs. *See* Burtell at ¶ 65 & Table 5 (summarizing
15 reconstructed stream flows and depths); *see also* TR 03/30/15:2684-2691.²⁸ Burtell also found
16 that undepleted flows in the Verde River typically had a mean depth of **less than 2 feet** during

17
18 ²⁶ *See* 2005 Littlefield at 112-162.

19 ²⁷ For example, in the *U.S. Geological Survey's Nineteenth Annual Report to the Department of the*
20 *Secretary of the Interior, 1897-98*, the agency made specific note of the variable flows of the Verde River near
21 the present day Fort McDowell Reservation, noting that the River "is similar to the one of the Gila River –
22 sandy and liable to change during a slight rise. . . . The bed of the river evidently changed during the last
23 freshet, scouring [the channel]. . . . the river fluctuated in this channel until August 23." 2014 Littlefield at 82-83.
24 In another example, Littlefield discusses the opposition by citizens of the Verde Valley to a proposal to
25 construct a dam near present day Camp Verde, after holding public meetings and receiving comments, the
Bureau of Reclamation noted that the concerns from Verde Valley residents were over their loss of water for
irrigation, not the potential loss of the Verde for commercial navigation. *Id.* at 90.

²⁸ Of the U.S. Geological Survey gages on the Verde River, only the gage near Fort McDowell and the
gage near Camp Verde have been operated since prior to statehood. 2008 Decision at 44. According to
the Commission, these gages show an average flow for the year of 1912 of 781 cfs at Fort McDowell
and 470 cfs at Camp Verde, though the Commission observed that the month of February is much
higher due to the winter storm period. *Id.*

1 75% of the year. Burtell at ¶ 88; TR 03/30/15:2695.

2 While the witness for the Arizona Center for Law in the Public Interest (ACLPI),
3 Hjalmar W. Hjalmarson, testified extensively about his alternative flow reconstruction method
4 (which purported to analyze the historic irrigated acreage and other information on the Verde
5 River with the goal of “putting the water back in the River”), *see, e.g.*, TR 12/18/14:1000-01;
6 TR 12/18/14:1051-54; TR 02/18/15:1391-93, Burtell testified that in fact, Hjalmarson was
7 actually putting **much less** water back in the river per irrigated acre than Burtell’s
8 reconstruction. TR 03/30/15:2618-19. Burtell explained that the reason this is important is that
9 “it shows up, even though [Hjalmarson] doesn’t talk a lot about it, when he reconstructs his
10 flows, by the time you get down to Camp Verde area, my reconstructed flows are **bigger** than
11 Mr. Hjalmarson’s reconstructed flows.” *Id.* at 19 (emphasis added).²⁹ Burtell’s flow
12 reconstruction falls well within the annual flows **previously considered** by the Commission in
13 2008 (ranging between 758 cfs to 901 cfs), which were ultimately found to be insufficient for
14 purposes of navigation. 2008 Decision at 52.³⁰

15 Finally, it is also significant that, in addition to flow depths and averages, the Commission
16 also determined the Verde River was not navigable due to its fluctuating and erratic nature,
17 explaining in its 2008 Decision at 52:

18 All of the witnesses and the documentary evidence with regard to the geology,
19 geomorphology and hydrology of the Verde River stated that the Verde River, while a
20 perennial stream and flowed year round prior to statehood, was a very erratic, unstable
21 and unpredictable stream because the flow varies from very low, sometimes less than
200 cfs, to annual floods estimated between 13,000 and 20,000 cfs with periodic floods
exceeding 100,000 cfs.

22 ²⁹ Burtell estimated that the amount of water he “put back in the river per irrigated acre” is **four times**
greater than what Hjalmarson put back. TR 04/02/15:3375-76.

23 ³⁰ Burtell also challenged Hjalmarson’s estimated flow depths, observing that Hjalmarson’s
24 interpretation of historical survey notes, which he used to arrive at his conclusions on depth, were not
supported by the survey notes themselves, appeared to be inconsistent with Philip Pearthree’s prior
25 conclusions about the same survey notes, and were contrary to Hjalmarson’s own velocity data and
base flow estimates. TR 03/30/15:2715-2727.

1 Based upon its analysis of flows and the erratic nature of the river, the Commission concluded
2 that “[t]he evidence submitted to the Commission did not show that the Verde River is
3 navigable in fact under the federal test as set forth in *The Daniel Ball* and other U.S. Supreme
4 Court decisions in its ordinary and natural condition as of February 14, 1912.” *Id.* at 52-53.

5 Today, after **16 days** of additional hearings and countless additional reams of evidence,
6 proponents have offered little to add to the Commission’s descriptions of the geomorphology
7 or hydrology of the Verde River, set forth above.³¹ Certainly, they have not proven by the pre-
8 preponderance of evidence that conditions of the Verde River on or before statehood
9 (including its flows and geomorphology) were so markedly different than those described by
10 the Commission in 2008 as to **now** establish that the Verde River was navigable under controlling
11 law. To the contrary, the Verde River in both Segment 2 and Segment 5 can be compared the
12 eastern reach of the Red River in Oklahoma, which was determined by the U.S. Supreme Court to
13 be non-navigable for purposes of title. *See Oklahoma v. Texas*, 258 U.S. 774 (1922). While the
14 Supreme Court observed that the Red River “has a practically continuous flow of varying volume”
15 it also described the river in a manner that is remarkably similar to descriptions of the Verde:

16
17 When the water rises it does so very rapidly and it falls in the same way. The river bed
18 has a fall of more than one foot to the mile and consists of light sand which is easily
19 washed about and is carried down stream in great quantities at every rise of the water.
20 At all times there is an almost continuous succession of shifting and extensive sand
bars. Ordinarily the depth of water over the sand bars is from six to eighteen inches and
elsewhere from three to six feet. There is no permanent or stable channel. Such as there
is shifts irregularly from one side of the bed to the other and not infrequently separates

21 ³¹ The geomorphology of the Verde River in Segment 2 (near Camp Verde) and in Segment 5 (near
22 Fort McDowell) was previously described by the Commission as having broad river valleys with a
23 relatively wide floodplain. 2008 Decision at 42. The Commission also noted that these segments were
24 subject to extreme channel changes, especially during flooding. *Id.* This is consistent Dr. Robert
25 Mussetter’s analysis, who concurred with Dr. Schumm’s earlier report and testimony which concluded that
the entire Verde River was non-navigable. *See Declaration, Navigability of the Verde River*, October
10, 2014 [X016_SRP] (“Mussetter”). Dr. Mussetter observed that these wider, less confined reaches
tended to respond to flooding events by lateral migration of the river and braiding and shifting of the
low-flow channels, along with disturbance of the riparian communities. *Id.* at 11.

1 into two or three parts. Boats with a sufficient draft to be of any service can ascend and
2 descend only during periods of high water. These periods are intermittent, of irregular
and short duration, and confined to a few months in the year. *Id.* at 589.

3 Ultimately, the U.S. Supreme Court concluded that the seasonal nature of the river and the fact
4 that boats could only be used during intermittent periods of high water was **not enough** to
5 establish navigability for title under *Daniel Ball*. Rather, “[a] greater capacity for practical and
6 beneficial use in commerce is essential to establish navigability. *Id.* at 591. The same can be
7 said for the Verde.

8 **IV. THE EVIDENCE IN THE RECORD DOES NOT SUPPORT NAVIGABILITY**

9 Proponents have the burden to show that the Verde River was navigable. *See, e.g.,*
10 A.R.S. § 37-1128(A). If proponents are not able to meet this burden, then the Commission
11 must find that the Verde (or the applicable segment) was non-navigable. *Id.*; *see also State v.*
12 *ANSAC*, 224 Ariz. at 238-239, 229 P.3d at 250-251.

13 The Commission must also be mindful of the U.S. Supreme Court’s recent decision in
14 *PPL Montana*, 132 S. Ct. at 1215, which, in addition to confirming the segment-by-segment
15 approach to determining navigability, also clearly rejected the Montana Supreme Court’s use
16 of a liberal test for navigability, including its broad construction of the definition of
17 “commerce.” *Id.* at 1230 (“By contrast, segments that are non-navigable at the time of state-
18 hood are those over which commerce could not then occur. Thus there is no reason that these
19 segments also should be deemed owned by the State under the equal footing doctrine.”). Finally,
20 *PPL Montana* set a bright line for determining whether modern, primarily recreational boating
21 should be considered in determining the susceptibility of a particular river segment. *Id.* at 1233-1234.

22 **A. The Verde River Was Not Used As a “Highway for Commerce”**

23 Despite the overwhelming amount of evidence that has been introduced in this
24 proceeding, there are only a handful of accounts of any form of boating on the Verde River,
25 even in the historically populated areas in the Verde Valley (Segment 2) and downstream, near

1 Fort McDowell (Segment 5). *See* Section II, *supra.*; *see also* 2008 Decision at 35. Certainly,
2 there is no evidence that the Verde was used as a “highway for commerce.” *Id.*

3 Prehistoric people did not boat the River. Neither did the Native Americans, though
4 they certainly traveled throughout Arizona to hunt and trade and they had the most knowledge
5 about the river and its conditions at the time. *See generally*, Randall Affidavit. While Mr.
6 Randall testified that one of the reasons the Apache may not have boated the river was because
7 it was faster to travel overland, TR 02/20/15:1795, 1852-53, he also discussed a myriad of
8 other reasons why the Apache did not use boats on the Verde, including the obstacles created
9 by the dense riparian growth along the river, *id.* at 1790, the fact that it was shallow above
10 Beasley Flat, but treacherous below, *id.* at 1841, and the existence of rapids and shallow points
11 where you would have to “drag your boat.” *Id.* at 1853.³²

12 There is also no evidence the Spanish used boats or even considered the Verde River to
13 have any use for navigation. Section II, *supra.* The early “Mountain Men” traveled along the
14 River trapping beaver and watering their horses, however, they too did not use the River for
15 trade and travel for purposes of commerce. *Id.*³³ There is no evidence the military used the
16 River, despite its desperate need to move troops and supplies between Fort McDowell and
17 Camp Verde, as well as Fort Whipple near Prescott. *Id.* Nor is there evidence the mines used
18 the Verde to transport copper ore or supplies, even when the United Verde Copper Mine was
19 booming in the Verde Valley. *Id.*

20 In fact, while the Commission was presented with days of testimony pertaining to only
21 a handful of historical boating accounts scoured from the record, as noted above, most of these

22 ³² Mr. Randall also made clear that the Apache did not avoid boating the Verde for any cultural or
23 religious reasons, noting it was more a matter of practicality and the difficult conditions on the river.
TR 02/20/15:1852-53.

24 ³³ *PPL Montana*, 132 S. Ct. at 1233 (“Mere use by initial explorers or trappers who may have dragged
25 their boats in or alongside the river despite its non-navigability in order to avoid getting lost, or to
provide water for their horses or themselves is not enough.”).

1 were merely repacked or re-hashed accounts that the Commission had **previously rejected** in
2 rendering its prior ruling against navigability, chiefly because “it does not appear that any of
3 these attempts were used for commercial transportation or use of the river as a highway for
4 commerce.” 2008 Decision at 36. Proponents have not produced any new accounts that, when
5 viewed in addition to the existing record, would change this finding.

6 While proponents made much of the account in the Arizona Sentinel from 1892 that
7 suggested J.K. Day and his brother took a small boat during the monsoon season over 800 miles from
8 Camp Verde to Yuma trapping beaver on the way – going so far as to count this article as evidence
9 of **five** commercial trips due to an unsubstantiated reference to four prior trips – this isolated account
10 was largely discredited during the hearing.³⁴ Even if true, this account, even when coupled with the
11 totality of boating evidence presented, is not sufficient to meet the proponents’ burden of proof.

12 In *United States v. Oregon*, 295 U.S. at 21, the Supreme Court held that three lakes in
13 Oregon were non-navigable under the equal footing doctrine because the Special Master found
14 that the boating which took place in the area involved had “no commercial aspects.”³⁵ The
15 Supreme Court also explained that private non-commercial boating for the purposes of
16 recreational trapping and duck hunting in the spring and fall, could not satisfy the commerce
17 requirement to establish navigability under the equal footing doctrine. *Id.* The accounts of
18 boating on the Verde are plainly more closely aligned to the facts in *Oregon* than those cases
19 that establish navigability for title under *Daniel Ball*.

20 **B. The Verde River Was Not Susceptible to Use as a “Highway for Commerce”**

21 Since the Verde River was not actually used as a “highway for commerce” prior to or

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23 ³⁴ See TR at 02/25/15:2414-2423 (August); TR at 03/30/15:2596-2601 (Burtell); TR at 04/01/15:3064
(Burtell); TR at 04/03/15:3542-3548 (Fuller).

24 ³⁵ The phrase “commerce” is defined as “[t]he exchange of goods and services, esp. on a large scale
25 involving transportation between cities, states, and nations.” *Black’s Law Dictionary* 110 (Pocket Ed.
1996); see also A.R.S. § 37-1101(3) (defining “highway for commerce”).

1 at the time of statehood, proponents must demonstrate that the Verde was “susceptible” for
2 such use. They have failed to meet their burden under *Daniel Ball* and Arizona law. Indeed, in
3 2008, the Commission could find nothing in the record to indicate that the contemporaneous
4 observers of the Verde River believed that it was navigable as a highway of commerce. *See*
5 *Decision* at 50. Today, there is still nothing in the record.³⁶

6 Despite the foregoing, ASLD witness, Jon Fuller, testified that the Verde River was
7 susceptible to navigation under *Daniel Ball* in part because he is **personally** able to boat it in a
8 canoe or kayak under modern day conditions. *See, e.g.*, TR 12/15/14:28-29; 12/16/14: 278-79.
9 ASLD witness, Don Farmer, testified similarly, saying he believed the Verde was navigable
10 “**because I could** get a variety of different watercraft down the river” TR 12/17/14:555-
11 56 (emphasis added). Their testimony appears to discount the “commercial” requirement for
12 proving navigability for title, since, boiled down, it suggests that a river is susceptible to trade
13 and travel for purposes of commerce if a **highly skilled** boater (like Fuller or Farmer)³⁷ could
14 have taken a low draft boat or canoe down the river at some point in time, regardless of
15 seasonality, the need to portage around obstacles, having to drag one’s boat, or being limited
16 in the amount of goods or persons that a boater could fit into canoe. This fails to meet the
17 applicable test.³⁸

18 In *The Montello*, 87 U.S. 430, 442 (1874), the U.S. Supreme Court observed, “It is not

19 ³⁶ Indeed, to the contrary, Dr. Littlefield pointed out that as early as 1865, the Arizona Territorial
20 Legislature declared in a Memorial to Congress seeking funding to improve navigation on the Colorado
21 River, “the Colorado River is the only navigable water in this Territory[.]” 2014 Littlefield at 95
(italics removed).

22 ³⁷ Both men testified extensively about their experience and high skill level for boating. TR
12/15/14:13-14, 65 (Fuller); TR 12/16/14:499-500 (Farmer).

23 ³⁸ Fuller also speculated that the Verde River was more navigable on or before statehood because it had
24 more water. TR 12/15/14:45-46. This ignores other critical conditions on the river that made the Verde
25 insufficient for commercial navigation, such as its wide and shallow nature in Segment 2 and 5, its
marshy conditions in Segment 2, as well as its erratic nature, braided conditions and the presence of
rapids (particularly downstream of Beasley Flat) that would have been made more dangerous with
higher flows.

1 . . . every small creek in which a fishing skiff or gunning canoe can be made to float at high
2 water which is deemed navigable, but in order to give it the character of a navigable stream, it must
3 be generally and commonly be useful to some purpose of trade or agriculture.” (internal citation
4 omitted); *see also Oregon*, 295 U.S. at 23 (“general and common usefulness for purposes of trade
5 and commerce. . . is essential to navigability.”). Both Fuller and Farmer appear to ignore this
6 important aspect of the navigability test. Moreover, this Commission just recently determined that
7 the Gila River was not navigable (despite Fuller’s liberal test), while the ASLD has previously
8 declined to assert that the San Pedro River was navigable, TR 12/17/14:746-48 (Fuller), though,
9 no doubt, Fuller and Farmer would say they could take their canoes down its various segments
10 under pre-statehood conditions. In short, the test for navigability urged by Fuller and Farmer
11 must be rejected. The Verde River, in its ordinary and natural condition, simply was not susceptible
12 to navigation for trade and travel for purposes of commerce on or around statehood.

13 **1. Had the Verde River been “Susceptible” to Navigation, It would**
14 **have Been Navigated!**

15 Perhaps the most compelling evidence of the Verde River’s lack of susceptibility to
16 navigation is the simple fact that it was **not navigated**, despite the **overwhelming need** for
17 practical and reliable transportation up and down the Verde and throughout the Arizona
18 territory. *See* Section II, *supra*.³⁹ The need was great. The military needed a means of
19 communication and to move troops and supplies up and down the river between its existing
20 forts and outposts. August at 13-17; Burtell at 9-11; TR 03/30/15:2626 (Burtell). Mines,
21 including the United Verde Copper Company near Jerome, needed reliable transportation

22
23 ³⁹ Contrast this with the Colorado River – the only navigable river in Arizona. Lingenfelter at 3. While
24 the Colorado presented many difficulties, it nevertheless was used for trade and travel for purposes of
25 commerce by a variety of boats. *See, e.g.* E. Lingenfelter, *Steamboats on the Colorado River*, 1852-
1916 [X054_FMC 48]; TR 02/19/15:1551-52 (Littlefield). It is safe to say that when a river in Arizona
was susceptible to navigation, the strong need for arteries of commerce ensured it would be used. The
Colorado presents strong evidence of this fact.

1 routes to exploit Arizona's rich mineral deposits, to ship ore and move equipment and people.
2 *See Affidavit of Richard E. Lingenfelter*, May 16, 2014 [X054_FMC 47] ("Lingenfelter") at 8-
3 10; Sparkes, *Yavapai, The Land Of Opportunity, University of Arizona Bulletin* at 5 (Aug.
4 1917) [X100_FMYN 11]. Settlers needed a means to communicate, ship timber, agricultural
5 equipment and supplies and to move people to and from the populated communities located in
6 the Verde Valley and downstream to Phoenix and beyond. Burtell at ¶¶ 49-53; ADOT Report
7 at 12-14, 17. Prescott's location as the territorial capital (from 1863 to 1867 and 1877 to 1889)
8 presented an extra incentive to use the Verde River as a means of communication and for trade
9 and travel to and from Prescott and Phoenix and then to the outside world. *Id.* at ¶¶ 40-48.
10 Later, the Reports of the Governor of Arizona to the Secretary of the Interior for 1901 and
11 1905 paint a clear picture of an Arizona economy poised for an economic boom, but for the
12 lack of reliable "highways of commerce" to compliment the railroads.⁴⁰

13 Thus, despite this **powerful need**, the record is clear that the Verde River was not used
14 for trade and travel for purposes of commerce.⁴¹ Instead, prior to the development of the
15 railroads, the most common means of transportation and communication was overland, by
16 road. 2008 Decision at 36.⁴² Yet, roads did not come cheap and they were difficult to build.
17 Burtell documented the high cost and difficulty of road building in Arizona. Burtell at ¶¶ 47-

19
20 ⁴⁰ *See Report of the Governor of Arizona to the Secretary of the Interior*, at 22, (1901) [X100_FMYN 12];
21 *Report of the Governor of Arizona to the Secretary of the Interior*, at 32, 34, (1905) [X100_FMYN 13];
22 *see also* Stinson and Carter, *Arizona: A Review of its Resources* (1891) [X100_FMYN 14].

23 ⁴¹ There is no doubt that the military and even individual settlers and miners knew how to build boats.
24 Most came from the east where water was more abundant and presumably many had built or used boats
25 in their past. For example, although General George Crook had used other inland waterways for
military purposes, upon arriving in Arizona, he almost immediately sought additional funding to build
roads. 2014 Burtell at ¶ 47 & note f.

⁴² *See also* 2003 Fuller Report at 3-10 and 9-2 ("early transportation in the middle Verde River Valley
was typically conducted on horseback, mule train, wagon or stage. . . . Overland transportation was
often difficult, especially during the raining periods.").

1 48.⁴³ While the military also made road building a priority, scouting for reliable wagon routes
2 to connect Camp McDowell with Fort Whipple and Camp Verde to the north were at first
3 unsuccessful. *Id.* at ¶ 43; ADOT Report at 12-14, 17. Even after the completion of the
4 Stoneman Road, the U.S. Congress continued to approve and fund additional road building
5 and improvements. *See, e.g.*, Leland L. Hanchett, Jr., *Catch the Stage to Phoenix* [X037_FMC
6 29] (“Stage”) at 16; August at 16.

7 Later, the early officials of the Arizona Territory faced serious financial, technical and
8 logistical challenges as they struggled to connect its sprawling territory of 114,000 square
9 miles and to support and foster economic growth. *ADOT Report* at 12-15; *Arizona Historic*
10 *Bridge Inventory* (“Bridges”) [X100_FMYN 19] at 10-14. During 1877 and 1881, the
11 Territory issued bonds totaling \$70,000 to fund road construction, though more money was
12 needed. *See Bridges* at 12. With the effort and cost expended on roads, had the Verde offered
13 an additional or cheaper means of transportation, it would have been used.

14 Even after roads were constructed, travel remained very difficult, as the “roads” were
15 often little more than tracks that traveled over extremely rough and broken country. *See A Report*
16 *on the Hygiene of the United States Army*, [X055_YAN 7] (“Hygiene Report”) at 552; August
17 at 13-14. Travel on Arizona’s roads was also dangerous and subject to attack by hostile
18 Indians, including the Yavapai and Apache. Jim Schreier, *Born a Cavalryman* [X011_AS LD
19 50] (“*Cavalryman*”) at 155-157; TR 02/20/15:1825-27 (Randall).⁴⁴ Nevertheless, despite all of
20

21
22 ⁴³ *See Lykes Bros., Inc. v. Corps of Eng’rs*, 821 F. Supp. 1457, 1459 (M.D. Fla. 1993), *aff’d*, 64 F.3d
23 630 (had the river been navigable military and settlers would have used the river to transport men and
24 supplies instead of going overland).

25 ⁴⁴ Proponents have suggested that the threat of attack by hostile Yavapai or Apache Indians explained
the lack of evidence in the record of the use of the Verde River for trade and travel. However, Indians also
attacked travelers on the road, but the record clearly shows that roads were used, nonetheless. Even if
proponents were correct in this suggestion (which they are not), their rationale does not explain why
the Verde River was not used as a highway for commerce after 1875, when the vast majority of

1 these difficulties, Arizona's early settlers showed great tenacity in their efforts to fund,
2 construct, maintain and use roads as the only early means of trade and travel for purposes of
3 commence. Had the Verde River been an option, they would have found a way to use it. They
4 didn't because it was not susceptible to such a use.

5 **2. Evidence of Modern, Recreational Boating on the Verde River Fails**
6 **to Meet PPL Montana's Test for Consideration as Evidence of**
7 **Navigability**

8 The U.S. Supreme Court in *PPL Montana* set out a bright line test for when evidence
9 of modern day recreational boating can be considered to determine navigability for title. 132 S.
10 Ct. at 1233. To be considered at all, the proponents must show (1) the watercraft are
11 "meaningfully similar" to those in customary use at the time of statehood; and (2) that the
12 Verde River's post-statehood condition is not "materially different" from its physical condition
13 at statehood. *Id.* Proponents of navigability rely very heavily on evidence of modern day,
14 recreational boating to support their navigability argument; however, because this evidence
15 does not meet the test of *PPL Montana*, the Commission **cannot consider** this evidence as
16 informing "the historical determination [of] whether the river segment was susceptible of use
17 for commercial navigation at the time of statehood." 132 S. Ct. at 1233.

18 During his testimony before the Commission, Fuller admitted that all of the boating he
19 has done recently on the Verde River was done by modern "kayak, canoe or inflatable or
20 rubber raft." TR 04/03/15:3530 (Fuller). Proponents' other witnesses also testified they used
21 only modern kayaks, canoes or inflatable boats on the Verde. *See, e.g.*, TR 12/16/14:382-84
22 (Don Farmer); TR 03/31/15:2822, 2929-30 (Dimock); TR 12/16/14:314 & 432 (Lynch). These
23 witnesses described today's modern day boats as generally being made of plastic or rubber,
24 not wood. TR 12/15/14:227 (Fuller); TR 03/31/15 (Dimock). They also admitted that plastic

25 Yavapai and Apache Indians were subdued or imprisoned at San Carlos and the need for a "highway of
commerce" was at its zenith. *See* Randall at 3-4.

1 and rubber are more durable than wood. *Id.*; *see also* TR 12/15/14:250 (Fuller); TR
2 03/31/15:2842 (Dimock). Fuller testified that durability is “one of the most important
3 characteristics” of boats. TR 12/17/14:588. Brad Dimock, a professional boat builder and
4 historian of the Colorado River, testified that “modern boats . . . can land in the rocks, you can
5 park in the rocks, you can bounce off rocks and walls. And the wood boats you can’t do those
6 things.” TR 03/31/15:2869. Richard Lynch, the owner of a professional river operation that
7 provides boat rentals and guide trips on the Verde River, testified that he used mostly
8 inflatable kayaks, called “duckies”, on the Verde River for his customers. TR 12/16/14:293-
9 94. Lynch acknowledged that he would rather be in an inflatable ducky than in a wooden
10 canoe “bouncing on rocks.” *Id.* at 314.

11 Proponents’ experts also testified that modern boats are more maneuverable, easy and
12 convenient to use. For example, Fuller stated, “[y]ou’re able to do more things with plastic that
13 are more difficult to do with wood”, TR 12/15/14:227, while Dimock testified that modern
14 kayaks “turn quicker”, though he also noted they are small and are “terrible for expeditions.” TR
15 03/31/15:2843. Dimock testified that that historic wood boats “are narrower, and they’re going to
16 draw a bit more [water].” TR 03/31/15:2844. Lynch testified he is “a duckie guy”, explaining
17 duckies are “real safe”, and “[t]hey’re like miniature little rafts, but they’re in the shape of a
18 kayak, and you need absolutely no skill whatsoever to use them.” TR 12/16/14:293. He also
19 testified duckies are “a lot more” stable than a canoe and draw less water than a traditional
20 canoe. *Id.* Based on proponents’ own witnesses, it is clear that modern day boats are not
21 meaningfully similar to those “customary modes of trade and travel on water” available at
22 statehood under *PPL Montana* and the test for navigability set forth in A.R.S. § 37-1101(5).

23 In addition to the fact the modern day boats are substantially different and easier to use
24 than their historic counterparts, the explosion of technology and the development of modern
25 day boating equipment also **substantially undermines** the use of modern, recreational boating

1 to inform the Commission’s “historical determination” of whether or not the Verde River was
2 “susceptible of use for commercial navigation” at the time of statehood. *See PPL Montana*,
3 132 S. Ct. at 1233. For example, proponents’ witnesses testified they relied on a wide range of
4 modern equipment when on the Verde, such as dry suits, water proof containers, cell phones,
5 trailers to haul their boats, as well as other forms of high tech clothing.⁴⁵ They also rely on
6 weather forecasts, river gages, websites, blogs and guidebooks to check the conditions on the
7 river before going on a boating trip.⁴⁶ Lynch even testified his company was “coming out with
8 an app[lication] . . . that you can have on your phone that will tell you exactly where you’re at,
9 what’s coming up, where you’ve been.” TR 12/16/14:338 (Lynch). All of this, of course, is in
10 stark contrast to the information available to the historic boater on or before the time of
11 statehood. Indeed, Dimock (who built and ran replica boats on the Colorado River) explained
12 the difference this way:

13 Modern boaters think everything is going to be just fine, and they’ve got a map and
14 their buddies have all done it, and they think they’re going to be able to drink beer all
15 day and get to the end of the trip and be fine. **Historic boaters had no such
preconceptions. They didn’t know what was going to happen.**” TR at
03/31/15:2846 (emphasis added).

16 In sum, just as modern day boats are not “meaningfully similar” to those used in
17 historic times and thus, cannot be considered evidence to prove the historic susceptibility of
18 the Verde River to navigation, the explosion of readily available information, equipment and
19 technology in today’s boating world similarly undermines the reliability of present-day boating
20 as evidence of the susceptibility of the Verde River navigation on or before statehood.

22 ⁴⁵ *See, e.g.*, TR 12/16/14:525 (Farmer) (takes a cell phone); TR 12/16/14:526 (Farmer) & TR
23 12/16/14:346 (Lynch) (uses dry suits or neoprene); TR 03/31/15:2839 (Dimock) (uses water proofed
containers); TR 03/31/15:2843 & 2881 (Dimock) (hailed boats by vehicle); TR 12/16/14:287, 364
(Lynch) (uses developed put-ins).

24 ⁴⁶ *See, e.g.*, TR 12/16/14:339, 364, 366 (Lynch) (uses weather forecast, gages, internet); TR
25 12/16/15:338 (Lynch) (uses guidebooks); 12/15/14:250 (Fuller) (internet, blogs); 03/31/15:2871
(Dimock) (started own blog).

1 Accordingly, *PPL Montana* makes clear that evidence of modern day recreational boating should
2 not be considered by the Commissioners. 132 S. Ct. at 1233.

3 Proponents are required to meet **both prongs** of *PPL Montana's* test, before the
4 Commission can use evidence of modern, recreation boating in considering whether the Verde
5 River was susceptible to navigation for purposes of title. Thus, even if proponents could
6 establish that the boats being used today are "meaningfully similar" to those used at the time
7 of statehood (which they cannot), the Commission would still be **unable** to consider evidence
8 of modern day boating (at least in Segments 2 & 5) because the **Verde's post-statehood**
9 **condition** in these segments is **materially different** from its physical condition on or before
10 the time of statehood. *PPL Montana*, 132 S. Ct. at 1233.

11 For example, in Fuller's 2003 Report prepared for the ASLD, Fuller repeatedly cited
12 accounts that described the Verde River above Camp Verde (Segment 2) as being "wide", but
13 "shallow," and as having "marshy" or "swamp like" conditions. *See, e.g.*, 2003 Fuller at iii, 3-
14 1; 3-8, 3-12, 3-13, 3-14. Dr. Stanley Schumm (Dr. Mussetter's predecessor) explained in his
15 2004 Report that the physical conditions of the Verde River in the Verde Valley were
16 materially altered due to a series of "[l]arge floods occurred in the years proceeding statehood,
17 which resulted in the channelization of the middle Verde River, and the elimination of swampy
18 marshland." Stanley A Schumm, Ph.D., P.G., *Geomorphic Character of the Verde River*,
19 December 2004 [EI030_SRP] at 11("Schumm"); 2003 Fuller at 3-22.⁴⁷

20 There are also other factors that have materially altered the condition of the Verde
21 River in Segments 2 and 5. For example, after the eradication of the beavers throughout most

22
23 ⁴⁷ In addition to the unprecedented floods experienced in the years proceeding statehood, Fuller also
24 reported that settlers "drained the marshes" in places and introduced cattle that "tamped down" some of
25 the vegetation in the Verde Valley and helped to eliminate the malaria. *See* 2003 Fuller Report at 4-2;
see also 2008 Decision at 29 ("With the marshes drained and the land tamped down by cattle, the
ordinary and natural condition that existed earlier [in the middle Verde area] was changed, which
eliminated the malaria . . .").

1 of the Verde River, beaver dams were no longer an obstacle for modern day boaters, while the
2 dense riparian underbrush that formed behind these dams is also gone. *See* Burtell at ¶¶ 55-57 &
3 Table 3; TR 03/30/15:2644-45 (Burtell).⁴⁸

4 While it is true that flows in the Verde River have been adversely impacted by human
5 development, at the same time, the construction of flood control measures, impoundments,
6 roads and bridges and other human activities have drastically modified the physical condition
7 of the River (particularly in the Verde Valley Segment 2), resulting in an increasingly
8 channelized and stable Verde River that is less susceptible to flooding and more amenable to
9 boating than the wider, shallower and less stable Verde River on or before statehood.⁴⁹ Dr.
10 Mussetter specifically testified that changes in the flow regime and other changes associated
11 with “bridge crossings” and “development” have made the river channel in Segment 2 more
12 navigable today than it was at the time of statehood. TR 02/24/15:2270-80. Also, in reference to
13 Segment 2, Richard Lynch testified his company has deliberately “modified” the channel of
14 the Verde River to improve boating conditions for their customers. TR 12/16/15:354. Lynch
15 explained, “[b]ut the river – we’ve done a lot of work to it. When the water gets low, we’ve gone
16 out there, we have to move rock around” *Id.* at 292-93. Lynch also testified he uses chainsaws to
17 remove “trees that fall in the river” and that with all of these efforts “the river just tends to flow
18 with it and actually **creates a deeper channel** than it was before.” *Id.* at 331-333 (emphasis added).

20
21 ⁴⁸The copper smelter near Clarkdale also destroyed crops and plants in the Verde Valley, including
22 within the riparian corridor of the River. *See United Verde Copper Co. v. Ralston*, 46 F.2d 1 (9th Cir.
1931) [X101_YAN 13]; *United Verde v. Kovacovich*, 42 Ariz. 159 (1933) [X101_YAN 14]; *see also*
TR 02/20/15:1804-07 (Randall).

23 ⁴⁹ *See, e.g., Biological Opinion Survey, CAP Water Assignment, Cottonwood Water Works and Camp*
24 *Verde Water Systems* (1998) at 37 [X055_YAN 2] (“River channel [in the Verde Valley] has been
25 highly modified by removal or use of riparian vegetation, flood control, construction of diversion dams,
roads and bridges, gravel mining, and agriculture and urban/suburban development of the floodplain.”);
see also Burtell, Attachment B, “*A Floater’s Guide to the Verde River*” by Bob Williams at pdf 76-77;
TR 02/24/2015:2280 (Mussetter).

1 The Commission has also previously found the stretch of river now delineated as
2 Segment 5 “had been altered considerably since statehood by construction of Horseshoe and
3 Bartlett Dams” Decision at 6. As a result of the reservoirs, the Verde in this segment is highly
4 regulated and is no longer the “erratic” stream it once was, while the reduction in downstream
5 peak flows (and their impacts) have also materially altered the physical condition of the Verde
6 in this segment, making it more susceptible to boating than at the time of statehood.⁵⁰

7 In short, proponents cannot show that the modern day watercraft used on the Verde
8 River are “meaningfully similar” to those in customary use at the time of statehood. Further,
9 the Verde River’s post-statehood condition is “materially different” from its physical condition
10 at statehood. Therefore, the Commission cannot consider evidence of modern day boating to
11 inform its historic analysis of the susceptibility of the Verde River to navigation. *PPL*
12 *Montana*, 132 S. Ct. at 1233.


13 V. CONCLUSION

14 The Commission made the correct determination in 2008, concluding that the Verde
15 River was not navigable under its ordinary and natural condition at the time of statehood. The
16 record to date still does not support a finding of navigability. Accordingly, the Commission
17 should once again find that the Verde River was not navigable for purposes of title under
18 A.R.S. § 37-1101 and *Daniel Ball*.

23 ⁵⁰Mussetter at 3 (under present day conditions, the last 18 miles of the Verde River “are stabilized by
24 riparian vegetation that remains relatively stable due to the upstream flow regulation”); *Id.* at 32 (noting
25 that because Segment 5 is largely unconfined, the large floods discussed by Schumm removed
significant vegetation and, “as a result, the low-flow channels were most likely wider, shallower and
less stable than they are under modern conditions.” (emphasis added).

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

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