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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

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

No. 04-009-NAV

**Maricopa County and The Flood Control
District of Maricopa County's Proposed
Findings of Fact and Conclusions of Law**

Maricopa County and the Flood Control District of Maricopa County ("County and FCD") by undersigned counsel, hereby submit its Proposed Findings of Fact and Conclusions of Law

A.R.S. § 37-1123 A. instructs the Commission based on evidence of navigability or non-navigability to determine which watercourses of the State were not navigable or were navigable as of February 14, 1912. A.R.S. § 1128 C. requires the Commission to express their decision in writing with sufficient documentation and detail to confirm the rationale and basis of their determination. See also Winkleman, 224 Ariz. 230, 237, 229 P.3d 242 (App, 2010). Respondent FCD and Maricopa County have not taken a position on the navigability of the Verde River. In previous hearing respondents have been unsuccessful in convincing the Commission to adopt its factual findings and the law

that applies to navigability issues. This has, in part, resulted in the Commission having a number of “do-overs”.

Respondents hope, in this submission, to convince the Commission to answer the questions tendered here in the belief that if they are fully answered the rationale and the basis for the decision the Commission writes will be defensible in Court no matter which side of the coin it comes down on. It is the intent of the respondents by tendering the questions to clearly identify why the Commission believes the river is navigable or not navigable. The answers will provide the findings of fact to defend the conclusion of the Commission. Failure to provide the answers will result in the Commission once again issuing a flawed decision and it will once again be “do-over” time.

PROPOSED FINDINGS OF FACT

1. In PPL Montana, LLC v. Montana, 132 S. Ct 1215, 565 U.S. 1 (2012) the U.S. Supreme Court directs lower courts on how to describe and consider portion of rivers. As all the evidence must be analyzed on a segment by segment basis the Commission should first review and adopt or amend the segments described by the State and unopposed by any party, or substitute its own findings as to appropriate segments of the Verde River for the purposed of the Commission’s findings. These facts, the adoptions, amendment or new findings should cite to appropriate evidence or testimony that support the segmentation decisions.

2. For each segment of the Verde River state the CFS flow that needs to exist in that segment of the river to convert the flows of the river from ordinary flow to flood flow. Use the definition of ordinary flow given in State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm'n, 224 Ariz. 230, 229 P.3d 242 (App, 2010).

a. Identify witnesses' testimony including name and the pages of the transcript referenced that support the Commission's determination and that are necessary to understand the rationale and basis for the determination made in this paragraph 2.

b. Identify any writings or pictures the Commission relies on for the determination including the name of the writing or picture exhibit number and the specific page references necessary to understand the rationale and basis for the determination made in this paragraph 2.

c. Identify the width of the river when it is at beginning flood stage at the beginning location of each segment found by the Commission in Paragraph 2.

3. For each segment of the Verde River state the CFS flow that needs to exist in that segment of the river to convert the flows of the river from ordinary flow to drought flow. Use the definition of ordinary flow given in Winkleman, supra.

a. Identify witnesses' testimony including name and pages of the transcript referenced that support the Commission's determination that are necessary to understand the rationale and basis for the determination made in paragraph 3.

b. Identify any writings or pictures the Commission relies on for the determination including the name of the writing or picture exhibit number and the specific page references necessary to understand the rationale and basis for the determination made in paragraph 3.

c. Identify the width of the river when it is at the beginning of drought stage at the beginning location of each segment used by the Commission in paragraph 3.

4. For each segment of the Verde River identified, give the location of, and describe any obstruction located therein which obstructs navigation.

a. Identify witnesses' testimony including name and the pages of the transcript referenced that support the Commission's determination and that are necessary to understand the rationale and basis for the determination made in this paragraph 4.

b. Identify any writings or pictures the Commission relies on for the determination including the name of the writing or picture exhibit number and the

specific page references necessary to understand the rationale and basis for the determination made in this paragraph 4.

c. Describe how the obstruction identified in paragraph 4 interferes with navigation of the river.

5. Identify the amount of water in terms of CFS diverted and not returned to each segment of the river around the time of statehood, February 14, 1912.

a. Identify witnesses' testimony including name and pages referenced that support the Commission's determination that are necessary to understand the rationale and basis for the determination made in paragraph 5.

b. Identify any writings or photographs the Commission relies on for the determination including the name of the writing or picture exhibit number and the page references necessary to understand the rationale and basis for the determinations made in paragraph 5.

c. Describe how the Commission made the determination called for in paragraph 5.

6. Identify each diversion structure in existence on the Verde River that diverted water from the river prior to February 14, 1912. Include its location on the river.

a. Identify witnesses testimony including name and pages referenced that support the Commissions determination that are necessary to understand the rationale and basis for the determination made in paragraph 6.

b. Identify any writings or photographs the Commission relies on for the determination including the name of the writing or picture exhibit number and the page references necessary to understand the rationale and basis for the determinations made in paragraph 6.

c. Identify the amount of water diverted by each diversion structure identified.

7. Describe the various types of boats that were in use in Arizona around the time of statehood, February 14, 1912, and cite to the evidence or testimony in the record regarding boats that the Commission relies on for the determination that the Verde River was navigable or not navigable.

a. Identify witnesses' testimony including name and pages referenced that support the Commission's determination of the type of boats identified in paragraph 7.

b. Identify any writings or photographs relied on by the Commission for the determinations including the name of the writing or picture exhibit number and the specific pages referenced necessary to understand the rationale and basis for the determination made in paragraph 7.

c. Describe how the Commission made the determination called for in paragraph 7.

8. In making its determinations of navigability or non-navigability state how the Commission used the definitions of "ordinary "and "natural" set out in Winkleman.

9. Describe what the river would have looked like for each of its segments on February 14, 1912, in its ordinary condition. Use the definition of ordinary from Winkleman.

a. Identify witnesses' testimony including name and pages referenced that support the Commission's description that are necessary to understand the rationale and basis for the description given in paragraph 9.

b. Identify any writings or photographs relied on by the Commission in its description of the river in its ordinary condition including the name of the writing or picture exhibit number and the specific pages referenced necessary to understand the rationale and basis for the description given in paragraph 9.

10. Describe what the river would have looked like for each of its segments on February 14, 1912, in its natural condition. Use the definition of natural from Winkleman.

a. Identify witnesses' testimony including name and pages referenced that support the Commission's description that are necessary to understand the rationale and basis for the description given in paragraph 9.

b. Identify any writings or photographs relied on by the Commission in its description of the river in its natural condition including the name of the writing or picture exhibit number and the specific pages referenced necessary to understand the rationale and basis for the description given in paragraph 9.

11. In making its determinations of navigability or non-navigability state the legal standard that the Commission applied giving appropriate citation to the case law it applied.

12. In making its determinations of navigability or non-navigability state whether the commission required a commercial component for the river to be navigable in addition to requiring that the river be navigable.

13. In making its determinations of navigability or non-navigability did the Commission use the legal standards applicable to the use of evidence regarding non-boat transportation in proximity to a watercourse as set out in Defenders of Wildlife v. Hull, 199 Ariz. 411, 424-425 (App) 18 P.3d 722 (2001)?

14. In making its determinations of navigability or non-navigability did the Commission rely on old ANSAC findings of fact and law from previous Commission decisions without reviewing and applying current applicable legal standards?

CONCLUSION

Previous findings of facts by the Commission on the Verde and other rivers for which initial reports were drafted repeatedly made the same errors. Those errors were:

- a. The failure to cite to the record to back up the facts relied upon;
- b. Incorrect citations to the record;
- c. Skewed summaries of testimony or evidence unsupported by the actual record and evidence;

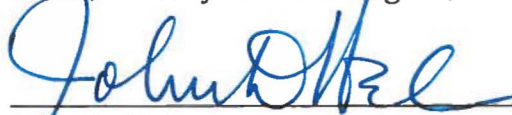
- d. Reliance on experts testifying beyond their expertise;
- e. Application of evidence from one segment of the river to another completely different segment;
- f. Summaries and statements of applicable law that were not complete or correct, lacking citations to the cases cited.

Broad statements of unsupported analysis or opinion submitted by one party may read cleverly but they cannot meet the Winkleman requirement of specific findings by the sitting Commission. Expert witnesses fully qualified to opine on one subject are often totally unqualified to form and give an opinion on other aspects of the ANSAC inquiry into the navigability of the Verde River. Is it fact or hearsay? Anecdotal testimony, common in a historical review that extends prior to Arizona statehood, should be given less weight than evidence that is more technical and verified by experts.

The Commission has the duty to test the depth of knowledge of the experts that testify. It may choose to rely on certain evidence or testimony, or not, but it must give reasons for that choice. (See Winkleman, supra, at 237, fn 9). While the foregoing questions may not be all inclusive to the Commission's determinations it is hoped that in following this kind of outline a decision may be rendered which will stand the court test it is sure to face.

Respectfully Submitted this 9th day of November 2015.

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