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7 BEFORE THE

8 ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

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

NO. 03-009-NAV

**CITY OF PHOENIX RESPONSIVE  
CLOSING BRIEF AND JOINDER  
IN SALT RIVER PROJECT  
FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

14  
15 The City of Phoenix (“Phoenix”) hereby submits its Responsive Closing Brief  
16 regarding the navigability of the Verde River (“Verde”). Phoenix also adopts the Findings of  
17 Fact and Conclusions of Law submitted this day by the Salt River Project Agricultural  
18 improvement and Power District and Salt River Valley Water Users’ Association (SRP).  
19 After further review of the evidence, and arguments asserted in the Opening Briefs, the  
20 Arizona Navigable Stream Adjudication Commission (ANSAC) should find that the Verde is  
21 not navigable in any of its segments.

22 **I. Proponents of navigability did not meet their burden of proof.**

1 Proponents of navigability<sup>1</sup> do not meet their burden of proof simply by establishing  
2 there was water in the Verde River in 1860. They also do not meet their burden by relying  
3 on a single boating expert who was paid to get a modern canoe down the Verde River at  
4 optimal times and dates of his choosing. Yet this is the primary basis for their contention of  
5 navigability. While they cite to evidence of historic accounts, those are, at best, limited,  
6 sporadic and in many cases, failed attempts to navigate the Verde River.

7 **II. The historical record indicates the Verde River was not susceptible to**  
8 **navigation in its ordinary and natural condition.**

9 The historical record introduced by the parties during the twenty (20) days of hearings  
10 does not prove the Verde River was navigated as a highway of commerce. The reports  
11 introduced by proponents of navigability were scant and in many cases failed attempts at  
12 navigation. The opponents of navigability<sup>2</sup> introduced extensive evidence of various groups  
13 of native peoples, explorers, trappers, military and settlers who travelled through all areas of  
14 the Verde River, yet did not use it as a means of navigation (i.e. transportation for travel or  
15 trade). Moreover, the proponents of navigability failed to meet their burden of  
16 demonstrating susceptibility of navigation based on actual navigation. However, the  
17 historical record is not useful solely to demonstrate actual instances of navigation; it also  
18 indicates that people who observed the Verde River in its natural condition did not believe it  
19 to be susceptible to navigation.

20 There are no historical descriptions of the Verde River in its natural condition that  
21 describe it as being suitable or susceptible for navigation. This is despite the fact that all  
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<sup>1</sup> "Proponents of navigability" generally refer to the Arizona State Land Department, the Arizona Center for Law and the Public Interest, and potentially, the Maricopa County Flood Control District.

1 civilizations and groups of people who have explored or lived near the Verde River needed a  
2 navigable river. They struggled with transportation. Although horses and subsequently  
3 wagons were available (and present in Arizona prior to statehood, unlike the majority of  
4 boats described by the State), that did not mean transportation was readily available. Given  
5 that need for transportation, it is very likely that if one of those observers of the Verde River  
6 thought it was capable of navigation, it at least would have been mentioned.

7       The lack of observations about susceptibility for navigation can be contrasted with  
8 other utilitarian observations that were consistency made over recorded history. Those  
9 observations frequently mentioned the clarity or color of the water which would have  
10 pertained to its suitability for consumption by horses and humans, and in some cases, the  
11 presence of fish, presumably as a food source. The ready availability of beavers (which does  
12 indicate the presence of water) was also mentioned. Fishing and trapping do not require  
13 navigation; in fact, the evidence overwhelmingly indicates that professional commercial  
14 trappers who were in Arizona during the years of beaver trade did not use boats for trade or  
15 travel. The other notable observation about the Verde River was its suitability for *irrigation*.  
16 This was a universal observation from the time of the earliest Spanish explorers to the time  
17 of the settlers, who ultimately acted on that susceptibility. Moreover, observations of the  
18 Verde River in its ordinary and natural condition indicate that it was suitable (susceptible)  
19 for drinking, trapping, possibly fishing in certain areas and irrigation even if the individual  
20 making the observation did not use it for that particular purpose. There are no observations  
21 that mention the Verde River being susceptible for navigation for travel or trade.

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22 <sup>2</sup>“Opponents of navigability” generally refer to SRP, Freeport Minerals Corporation, the Yavapai-Apache Nation, the Fort McDowell Yavapai Nation, the Salt River Pima-Maricopa Indian Community and the City of Phoenix.

1       **III. The proponents' reliance on evidence of modern boating is misplaced.**

2           The proponents of navigation place great emphasis on examples of modern  
3 recreational boating as evidence that the Verde River was susceptible for navigation in its  
4 ordinary and natural condition. The United States Supreme Court described the  
5 requirements for using evidence of modern recreational boating in *PPL Montana, LLC v.*  
6 *Montana*, 132 S. Ct. 1215, 1233 (2012):

7           At a minimum, therefore, the party seeking to use present-day evidence for title  
8 purposes must show: (1) the watercraft are meaningfully similar to those in  
9 customary use for trade and travel at the time of statehood; and (2) the river's  
poststatehood condition is not materially different from its physical condition  
at statehood.

10 (citations omitted). The proponents certainly made *conclusions* about the “meaningful  
11 similar” portion of the test, arguing that modern plastic and rubber watercraft (including  
12 “duckies” and kayaks) are just like watercraft available that could navigate the Verde River  
13 on all but one segment on the date of statehood. However, the materials used to construct  
14 these modern watercraft were not available in 1912. More critically, the proponents of  
15 navigability failed to demonstrate the condition of the Verde River prior to diversions in the  
16 1860s.

17           While expert witnesses on both sides of the navigability discussion testified about the  
18 volume of water in the Verde River and the presence of possible obstacles to navigation in its  
19 natural condition, there was no attempt to demonstrate all aspects of the physical condition at  
20 statehood compared to today. The proponents' experts indicated that floods could alter the  
21 channel and there was plenty of evidence that the Verde River experienced floods prior to  
22 statehood. While floods are not part of the “ordinary” condition of the river, it is undisputed


1 that those events changed the Verde River in the last 150 years. In addition, while there is  
2 only minimal evidence of beavers on the Verde today, the ample supply of beavers in the  
3 river's natural condition makes its physical condition different from today. Other  
4 descriptions of the Verde River during that period do not seem to resemble today's river in  
5 width or plant life. Moreover, regardless of whether one accepts the proponents' conclusion  
6 that the Verde River had more water in it (which was not universally accepted), it is overly  
7 simplistic to conclude that is the only factor of the river's "physical condition." The  
8 proponents of navigability cannot say the Verde River is not materially different from its  
9 physical condition on the date of statehood. Evidence of recreational boating (however  
10 limited) in a river that is not physically similar to the river that existed in its natural condition  
11 on the date of statehood has no bearing on susceptibility for navigation.

12           Considering the weight of the evidence provided to ANSAC during the most recent  
13 and previous hearings, it should find that the Verde River was not navigable in any segment  
14 in its ordinary and natural condition on the date of Arizona statehood.

15           RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of November, 2015.

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