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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

**ARIZONA STATE LAND
DEPARTMENT'S RESPONSIVE
CLOSING BRIEF REGARDING
THE VERDE RIVER**

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I. Introduction: The Verde Is a Navigable River.

What was originally intended to be an honest presentation to the Commission about the facts of Arizona's last perennial and largely free-flowing River and the law surrounding navigability-for-title has devolved into an ugly ordeal: Opponents¹ make baseless claims about historical accounts, completely ignore relevant facts, and take words from knowledgeable experts on the Verde out-of-context to patch together misleading arguments about this treasured River.

While the State is confident that the facts and the law support a finding of navigability for the Verde River, and the State will zealously argue for navigability, the State has never distorted the record or misled the Commission. Opponents' discussion of the facts and the law, however, cannot be relied upon to be accurate and is certainly not straightforward.

Despite their efforts, Opponents have failed to dislodge the State's case that the Verde was navigable in its ordinary and natural condition and that it remains navigable today.

II. The River Was Repeatedly Used for Commercial Purposes But Opponents Rely on Casting Dispersions of Doubt When They Have Absolutely No Disputing Material Evidence.

A. The River Was Repeatedly Used by Boats for Commercial Trapping and Hunting.

In 1892 an article appeared in the Arizona Sentinel that described in detail how the Day Brothers used the Verde repeatedly for commercial trapping of beaver and otter using a small boat. X001-18. Brothers J.K. and George Day left Camp Verde in a boat, traveled down the Verde River (Segments 2-5), and ultimately ended up in Yuma, on the Colorado. The trips were commercial: it talks about J.K. as a professional trapper earning a "very remunerative profit out of the business," it details that beaver and otter furs always command good prices and that the demand is greater than the supply, and finally, it specifies that the brothers "brought a large quantity of furs." This trip was the "fifth one made by J.K. Day" and the brothers planned to "repeat the trip next September." *Id.* This was not a novel use of the River. It was Arizona men consistently boating the Verde to earn a living. The article does not report any difficulties encountered by the men; quite the contrary, it describes the Verde's waters as "beautiful" and "limpid." *Id.*

This article was not found and submitted until April 2014. New historical newspaper searching technology has enabled more primary source boating accounts to be exposed, providing further evidence that the record only contains what has been found, and is almost certainly incomplete. Even with new searching technology, the historical record from 100 to 150 years ago will be limited as demonstrated by

¹ Opponents refers to: Salt River Project ("SRP"); Freeport Minerals Corporation ("Freeport"); Yavapai Apache Nation and Fort McDowell Yavapai Nation ("YAN"); City of Phoenix ("Phoenix"); and Salt River Pima-Maricopa Indian Community ("SRP-MIC").

the record containing no local Verde Valley papers prior to statehood. The Day Brothers trip was reported by the Arizona Sentinel, a newspaper out of Yuma, not the Verde Valley. Based on the Day Brothers account, it is also clearly evident that not all boating accounts made the news: this was the fifth trip for J.K. Day on the Verde but none of the previous four accounts could be located and neither could the referenced forthcoming trip.

There is ample support for the veracity of the Day Brothers commercial trapping account. The historical record shows that J.K. Day, who reported on his trip to the Arizona Sentinel, was a trustworthy individual who was eventually appointed to public office based on his trapping expertise. In 1898, J.K. Day was appointed Fish and Game Commissioner for Arizona, with The Arizona Republic announcing “[t]he new commissioners know more about game, especially big game, than anybody else in the territory.” Upon his death on January 26, 1902, The Arizona Republic printed an obituary the next day that read, in part:

Mr. Day was a member of the I.O.O.F. lodge of this city, and was a greatly respected man, of quiet habits and never indulged in liquor. . . . Mr. Day was an experienced mountaineer and trapper and was for years associated with Mr. McCarty.

X102-212.

Commercial trapping on the Verde was a reality during the period when J.K. Day reported his endeavors. Dr. Edgar Mearns, in his book “Mammals of the Mexican Boundary of the United States,” specifically mentions that he “purchased from a professional trapper 17 beaver skins, taken on the Verde River during the winter of 1884-85” and then mentions another trapper on the Verde and Gila during the winter of 1886-87. X011-67, at 351, 354. While it is unknown who Dr. Mearns was referring to, certainly Dr. Mearns’ account confirms that the Verde was trapped during the same time period the Day Brothers were trapping in their boat. In 1931, the Verde Copper News published an article about Fogal and Gireaux “navigating the Verde river” for the purpose of trapping “fur-bearing varmits.” X017-125. The two men left Clarkdale and were headed down the Verde and to Granite Reef Dam on the Salt (Segments 2-5). The newspaper was providing word of their success to date, as the men were heard from in the Bloody Basin country (Segment 4). *Id.* Although this account comes after statehood, at a time when the River was undoubtedly more diverted and depleted than when the Day Brothers trapped, it serves as another example that the River was indeed boated commercially for trapping.

Even more support is found in primary source books like “Doctor on Horseback” where Dr. Ralph Palmer recalls a hunting trip on the Verde made during the Apache war years, in the 1860s and 1870s. X017-97, at 29. Dr. Palmer and the District Attorney, Joe Morrison, borrowed a steel boat in Camp Verde and floated down-river 16 miles hunting duck (Segment 2). They “got about a dozen ducks

and had a swell time.” *Id.* This account had no hardships, as Dr. Palmer was keen to note details about various events throughout his book when they did occur. Although this account was most likely not for commercial purposes, it serves as further support, along with other boating accounts detailed in the Arizona State Land Department’s Opening Post-Hearing Brief on the Navigability of the Verde River (“State’s Opening Brief”), that commercial trapping and hunting did occur because the River is susceptible to such use. *See also, e.g.*, X017-123 (Major Spaulding and Captain Hatfield canoeing from Fort McDowell to Phoenix, duck hunting as they traveled).

Evidence of the River’s physical characteristics and testimony from qualified experts also confirms the Verde can undoubtedly support the types of commercial boating engaged in by the likes of the Day Brothers. The commercial trapping articles come as no surprise to the State’s expert witnesses and to those who actually know the River. Mr. Farmer testified that based on his numerous trips down the Verde, it is clearly apparent that the River can be used by boats for historical commercial purposes, like trapping and hauling mining gear. Tr. 12/16/14, at 435, 437, 465 (Farmer) (personal experience transporting 700 lbs of gear, and hunting and mining equipment). Mr. Fuller testified similarly, and he frequently compared his experiences on the River to the boating accounts in the record as a way to gage how the present day physical characteristics of the River can demonstrate the susceptibility of boating the more natural River that was in existence during the time period of many of the historical boating accounts. Tr. 12/15/14, at 153-171 (Fuller). Mr. Fuller, indeed, testified that the combination of historical accounts, modern evidence of boating, and the physical characteristics of the River serve as good checks against each other and further confirm that the Verde was navigable at statehood in its ordinary and natural condition. *Id.* at 250, 229-30, 255.

B. Opponents’ Claims Contesting the Commercial Use Are Unsupported and Misleading.

Despite the clear evidence, Opponents have claimed incorrectly that trappers that followed the Verde did not use boats. City of Phoenix Closing Brief (“Phoenix Brief”) at 6, Salt River Project’s Closing Brief (“SRP Brief”) at 3-4, Joint Post-Hearing Closing Brief for the Yavapai-Apache Nation and the Fort McDowell Yavapai Nation (“YAN Brief”) at 5. Obviously, based on the above evidence, such a categorical statement is wrong and misleading. What is true, however, is that the trappers who lived in Arizona closer to statehood, like the Day Brothers and Fogal and Gireaux, did use boats to sell furs in Yuma, while the trappers of the early 19th century like Kit Carson, Ewing Young and James Ohio Pattie did not generally use boats. Opponents of course do not candidly explain to the Commission why that was the case.

The early trappers did not use boats because they traveled overland by horse to and from the

closest fur trading posts of Taos and Santa Fe, New Mexico, St. Louis, Missouri, and later California. X017-94, at 5, 10, 17, 19, 21, 25-26 (Fur Trading: Forerunner of Industry in Arizona). These trading posts were disconnected from the waterways of Arizona; travel by horseback was the only way to move between the fur trading posts and the Arizona waterways. Horses were essential to the early explorers and trappers, and extra horses were brought to carry additional furs. *Id.* at 9. “The loss of horses meant the loss of the means of transportation of furs to the market.” *Id.* at 5. In fact, in one instance where James Ohio Pattie was trapping on the Colorado River using boats, it was noted that “[s]ince their horses had been previously stolen by Indians, it was impossible to transport the furs.” *Id.* at 14. The trappers had resorted to using boats because their horses had been stolen, and they were worse off for it. Additionally, the early trappers were frequently evading or sustaining attacks by Indians, and horses were their means of escape. *Id.* at 5-6, 10-13. Opponents’ suggestion that had the Verde been navigable, the trappers would have left behind their horses in favor of boats is a nonsensical idea contrary to the facts. It shows a clear misunderstanding of the reality of travel and trapping in the early 1800s. Opponents’ briefs are even contrary to their own witness: historian Dr. Jack August agreed, “[trappers] would be in big trouble” without their horses. Tr. 2/25/15, at 2453. Boats were not a favored option by out-of-state trappers in the 1800s.

Opponents also claim that the Day Brothers’ account is “full of holes,” SRP Brief at 24, has been “largely discredited,” YAN Brief at 20, is “unreliable,” Salt River Pima-Maricopa Indian Community’s Closing Brief Opposing Navigability (“SRP-MIC Brief”) at 10, is too close to a “German syrup” article to be accurate, Phoenix Brief at 9, should not be counted as five trips even though the article says it was the “fifth one,” YAN Brief at 20, occurred during the monsoon, YAN Brief at 20, or they have surreptitiously avoided mentioning the commercial boating accounts to the Commission altogether, Freeport Minerals Corporation’s Opening Post-Hearing Memorandum Concerning the Non-Navigability of the Verde River (“FM Brief”) at 8. With such conclusory statements, one naturally wonders what evidence Opponents presented that does indeed render the Day Brothers account “unreliable.” On closer examination, Opponents have put forth absolutely no evidence regarding the Day Brothers account, let alone any evidence that in any way discredits that primary source newspaper article. It’s all blustering. Opponents mislead the Commission when the facts are inconvenient to their non-navigability position.

Although Opponents have no evidence that discredits the Day Brothers account, they did grasp at many straws, so ensuring the Commission is presented with the truth requires a deconstruction of their claims. Opponents argue that the Day Brothers account can’t be true because the article reports the

brothers traveled over 800 miles yet the direct distance from Camp Verde to Yuma is only 360 miles. FM Brief, at 8; SRP-MIC Brief, at 10; Phoenix Brief, at 9; SRP Brief, at 23-24; YAN Brief, at 20. They also questioned why traveling that distance would take 6 months. *Id.* What Opponents failed to do is consider that this was an account about trapping, not a recreational trip from point A to point B. As was pointed out during cross-examination of Opponents' witnesses – who cited no trapping or boating evidence for their claims, Tr. 2/25/15, at 2473 (August), Tr. 4/2/15, at 3307 (Burtell) – trappers set trap lines and then revisit the lines sometimes multiple times over the course of days to give themselves a chance to successfully trap beavers. Tr. 2/25/15, at 2510-2514; X017-94, at 6-7. Once a trapper catches a beaver, he skins it, stretches it, and dries it before moving on to the next spot. *Id.* As a trapper moved down the Verde River in the Verde Valley area, he would also have many tributaries to trap that were abundant with beaver, such as Sycamore Creek, Oak Creek, Beaver Creek, West Clear Creek, Fossil Creek, and the East Verde River. *See* X017-124 (Map of Verde Valley). Dr. Edgar Mearns indeed wrote about the abundance of beavers in these Verde tributaries in the 1880s. X011-67, at 354, 356, 358.

Given that beaver were abundant along the Verde and its many tributaries, and knowing that the process of trapping beaver likely involved returning multiple times to trap lines and taking time to prepare the beaver skins, one can easily imagine a trip that spanned 800 miles over almost 6 months. Simply returning once to revisit trap lines, without considering trapping the tributaries, could easily double a trip to 720 miles.

Additionally, Opponents claim that the Day Brothers boated during the monsoon period when water levels could have been higher. YAN Brief, at 20. Not only did the September to April trips not span across the monsoon period of July and August, but the boats trips also occurred during some of the hydrologically drier months on the Verde, September through November. X035-167, at 160 (Verde seasonal flow variation). Opponent YAN's claim must be disregarded.

Opponents also imply that the Day Brothers portaged throughout their trip, but present no supporting evidence for their claim. Phoenix Brief, at 9. The Commission heard from various boaters who have actually been on the River, and the boaters testified that the only place on the Verde where it may be necessary to line or drag around is Verde Falls, and the 30-foot drag takes approximately 10 minutes. Tr. 12/16/14, at 391-92, 408 (Farmer); Tr. 12/15/14, at 96-97 (Farmer); Tr. 3/31/15, at 2819, 2883-84 (Dimock).

Opponents attempted to impugn the credibility of the Day Brothers' commercial trapping account by claiming that Mr. Day was involved in a conspiracy to defraud life insurance companies, but they did not tell the complete story, particularly the part about the insurance companies ultimately

finding no fraud and paying out the claims. Tr. 4/3/15, at 3547-48 (SRP cross of Fuller); X102-218-222. Mr. Day's hunting partner, Mr. McCarty, died while on a hunting expedition and his body was not found until four months later. X102-220. Mr. McCarty had taken out multiple life insurance policies, presumably because he was in the dangerous business of being a professional hunter. *Id.* Like Mr. Day, Mr. McCarty was a game and fish commissioner for the territory of Arizona. X102-222. Upon his death, his wife Lillie sought payment of the policies but the companies refused, alleging that Mr. McCarty was still alive in Canada. X102-220.

Ultimately, Mr. McCarty's body was found in Miller's Canyon, where Mr. McCarty had died by the explosion of his own shotgun. X102-220. Mr. Day's suspicion about Mr. McCarty's cause of death had been correct. X102-221. The newspaper reported that insurance companies "are satisfied that McCarty is dead and that the body was not substituted. The insurance in the two orders named has been paid to the attorneys of the widow, Mrs. Lillie McCarty." X102-220. Mr. Day was not found to have acted fraudulently in any manner. The Day Brothers boating account is clear evidence of commercial use of the River.

All of the evidence supports that the Verde was used by boats for commercial trapping along its length. Courts have consistently found that commercial trapping is evidence that supports a finding of navigability. *See* State's Opening Brief, at 4-5. Even Opponents agree that trapping using boats demonstrates a river is navigable. *See* SRP Brief, at 24 ("The story about the Day brothers . . . if it is true, is perhaps evidence that could support the proponents' position . . ."); Tr. 4/1/15, at 3159-61 (Burtell) (Freeport expert Mr. Burtell agreeing that boat use for trapping "would support a determination" that a river is being used as a highway for commerce). These accounts alone prove the Verde River was used as a highway for commerce, and the accounts certainly support a finding that the River was susceptible to such use when coupled with all of the other lines of evidence that have been presented. The Commission did not have the benefit of considering the Day Brothers commercial use of the River before making its prior determination.

III. The Facts Underlying Non-Navigability Findings for the Rio Grande, Red River, San Juan, and Three Lakes In Oregon, Are Clearly Distinguishable from Facts Supporting a Navigability Finding for the Verde.

Opponents' comparisons of the Verde to the non-navigable Rio Grande of Texas, Red River of Oklahoma, San Juan of Utah, and three non-perennial lakes in Oregon, are superficial and must be disregarded. FM Brief, at 2, 3, 17, 22; YAN Brief, at 17 and 20; Phoenix Brief, at 8; SRP-MIC Brief, at 10-11; SRP Brief, at 26. Opponents fail to disclose to the Commission the underlying facts which led to the non-navigability findings.

Before distinguishing those cases, however, it is important to note that the Supreme Court has explicitly stated that determinations of the navigability or non-navigability are to be made by considering only the facts present for that particular waterway. *United States v. State of Utah*, 283 U.S. 64, 87 (1931). The Court even addressed faulty comparisons to the very rivers Opponents use to compare to the Verde:

The government invites a comparison with the conditions found to exist on the Rio Grande river in New Mexico, and the Red river and the Arkansas river, above the mouth of the Grand river, in Oklahoma, which were held to be nonnavigable, but the comparison does not aid the government's contention. *Each determination as to navigability must stand on its own facts.*

Id. (emphasis added). In each case discussed below, when courts have determined that a waterway is not navigable it was because of a dearth of evidence to the contrary, and the courts were forced to make a finding with the record they had. That is simply not the case for the Verde, where the record shows multiple lines of evidence that support a finding of navigability.

A. RIO GRANDE: *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

In this case, a private company sought to place a dam across the Rio Grande in New Mexico when it was still a territory. 174 U.S. at 701. The federal government claimed that the River was navigable and that it therefore owned the bed. The Supreme Court, however, agreed with the lower court's taking of judicial notice that, although the river is generally navigable, it is not navigable within New Mexico. The government's evidence, submitted by affidavit, was apparently sparse, because the Court's only comment about the evidence was that "logs, poles, and rafts are floated down a stream occasionally and in times of high water" and the Court concluded that evidence was insufficient to show navigability. 174 U.S. at 698.

These facts are easily distinguished from those of the Verde's use that have been presented to the Commission. The Verde had actual boating accounts, for commercial purposes, repeated, and occurring during the low water times of the year. *See* X035-167, at 127-147. The Commission also has the benefit of seeing how the Verde is used for commercial purposes during more modern times, which supports a finding that the River was certainly susceptible for use at statehood. At the time the Court reviewed the Rio Grande's navigability, there was just no evidence of boating in that record. That is distinctly different from the record for the Verde that is before this Commission.

B. RED RIVER: *State of Oklahoma v. State of Texas*, 258 U.S. 574 (1922).

In an original suit in equity to determine ownership of oil and gas deposits in the bed of the Red River, in which Oklahoma sued Texas and in which the United States intervened, the Supreme Court

found that the Red River was not navigable throughout Oklahoma. 258 U.S. at 578-79, 588, 591. The facts that Oklahoma presented in an effort to prove navigability were woefully inadequate: the Court found the Red River to be a very shallow stream that frequently runs completely dry and could not even support a flat bottom boat drawing five and a half inches. *Id.* at 587-88. The Court noted that “for long intervals the greater part of its extensive bed is dry sand interspersed with irregular ribbons of shallow water and occasional deeper pools. Only for short intervals, when the rainfall is running off, are the volume and depth of the water such that even very small boats could be operated therein.” *Id.* at 587. The depth of the river in places was one third of a foot, and at the Denison gage during one period of study, the depth ranged from zero to one foot. *Id.* at 588. When the flat boat drawing five and a half inches was loaded for a field examination, “[t]here was not a single day during a field examination upon which it was not necessary to remove part of the load and drag the boat over sand bars from 300 to 1,000 feet in length. On some days this would occur very often.” *Id.* at 588.

Opponents give no reason for citing this case to support their claim that the Verde River is not navigable. The facts are very different: The Verde never runs dry because it is “sustained by springs and perennial tributaries” not rainfall. 031, 7-3. Mr. Fuller presented non-natural average depths that demonstrate the River always has substantial depths even in today’s non-natural conditions. X035-167, at 166-170. Mr. Hjalmarson, an expert witness for navigability proponent The Center for Law in the Public Interest (“Center”), found that boating channel depths on the Verde for natural median flows ranged from 1.9 feet to 4.0 feet at various gages and cross sections. X015, at 101, Appendix G at 78. *See also* X059, at 10-11 (explanation of the use of the boating channel). Even the Opponent expert Mr. Burtell found that at all gages, for median flows, the Verde had depths of at least one foot, and four out of five gages had depths of over one and a half feet for most of the year. X009, Table 5. Either way one slices it, depths on the Verde can certainly accommodate a loaded flat boat drawing five and a half inches.

Field examinations on the Verde confirm this, in obvious contrast to the field examination done on the Red River. Testimony for the Verde from all boaters who came before the Commission demonstrates that fully loaded flat boats can and have successfully navigated the Verde. *See* Tr. 4/3/15, at 3501-03 (Fuller testifying that he passed a flat-bottomed boat, loaded two feet over the gunnels with gear, with two people and a dog, traveling for weeks from Segments 2 through 5); *see also*, Tr. 12/16/14, at 386 (Farmer testifying to seeing flatboats on the River); Tr. 12/16/14, at 356, 373-76 (Lynch testifying to seeing flatboats on the River with equipment for duck hunting); Tr. 3/31/15, at 2833, 2841 (Dimock) (Dimock testifying that historical 1911 replica wood flat boat Mr. Dimock himself

built could be used on the Verde today, even with reduced flows); Tr. 12/16/14, at 384-87 (Farmer) (Farmer testifying that he has taken his 17.5 ft. canoe on trips for 10 days with 600-700 lbs and experienced no trouble navigating the River).

Boats have been used on the Verde for 150 years. 031, p. 8-3, ASLD Report (boats were used in Verde Valley when Fort Verde was established in the 1860s); X017-125 (Fogal and Gireaux used flat bottomed boat for five-week commercial trapping trip in 1931); X001-18 (Day Brothers repeatedly boated the River for commercial trapping in their small boat in the late 1890s); X017-97, at 26, 29 (Steel boat used on river for duck hunting); X017-23 (Two military men canoeing from Fort McDowell to Phoenix, duck hunting along the way); X017-122 (Two men from Fort McDowell boating from Fort to Salt River Valley Canal in a canvas skiff).

By contrast, there was no evidence of any boating in the western portion of the Red River in Oklahoma, and the eastern portion was boated only during times of high water. 258 U.S. at 588-89. The Red River, which is shallow and dries up, is not like the Verde River, which always has sufficient depths for small boats because it is perennial. *See* X035-167, at 180, 183, 186, 189, 192; X053-174, at 177 (Fuller's estimates for the percentage of time the Verde's segments are boatable by canoes and flatboats, far greater than what was experienced on the Red River).

C. SAN JUAN: *United States v. State of Utah*, 283 U.S. 64 (1931).

Opponents mislead the Commission by claiming that the United States Supreme Court deemed the San Juan River non-navigable. FM Brief, at 18. This is incorrect as a matter of law. The Supreme Court never addressed the facts of the San Juan because the issue was not disputed before the Court. 283 U.S. at 74. "We conclude that the findings of the master, so far as they relate to the sections of the Green, the Grand, and the Colorado rivers, found by him to be navigable, are justified by the evidence and that the title to the beds of these sections of the rivers vested in Utah when that state was admitted to the Union." *Id.* at 89 (emphasis added). What is true is that the Supreme Court decreed that the title to the bed of the San Juan was vested in the United States because the Special Master had found that river non-navigable, and for reasons unknown, the State of Utah did not appeal that finding. 283 U.S. at 90; X017-92, at 181 (1930 Special Master Report).

Opponents do not inform the Commission about the specific reasons for the Special Master's finding of non-navigability, presumably because the facts of the San Juan differ significantly from those of the Verde. As part of his decision, the Special Master found that high velocities and sandwaves cause risks and dangers to navigation that are not present on the Green, Grand, or Colorado rivers. X017-92, at 180-81. Those are also not dangers present on the Verde.

Velocity refers to how fast water is moving; higher velocities can push boats into rocks with greater force and cause more damage. Tr. 12/15/14, at 76 (Fuller). The Special Master found that on the San Juan River, at Goodridge Bridge, there were 308 days in the year in which the velocity exceeds 4 miles per hour (mph) and “such velocities . . . unquestionably make navigation a matter of hazard to boats and cargoes, even if not to life and limb.” X017-92, at 181. The Special Master found that the velocity of the San Juan River “differs greatly” from the Green and Grand rivers, which were found navigable by the Special Master. *Id.* at 171. The Green River had only 80 days and the Grand River 78 days in which the velocity was over 4 mph. *Id.* The velocities on the Verde by comparison are far lower than even the Green or Grand rivers after the appropriate conversion to mph is made from the reported data of feet per second. X035-167, at 166-170. Mr. Fuller did a detailed analysis of the velocities for each segment of the Verde River based on USGS gage data. *Id.* As an example, Segment 2 of the Verde, commonly known as the Verde Valley, has a median velocity of 2.11 mph, and ninety percent of the time, the velocity is 2.9 mph or less. *Id.* at 167. That means that there are only 36 days of the year in which the velocity on the Verde in Segment 2 is 3 mph or more. Compared to the navigable Green and Grand rivers, the Verde is a calmer stream. Compared to the San Juan River, the Verde’s velocities are far less, making it a much calmer and safer stream.

The Special Master had a detailed analysis of the hazards of sandwaves that are a “phenomenon peculiar to the San Juan and the Colorado Rivers and not found on other rivers.” X017-92, at 176. With regard to the San Juan, the Special Master found that “rowing under such circumstances is precarious” and that “sandwaves on this River constitute a much greater danger and impediment to navigation than on the other Rivers and render it less practicable to navigate commercially.” *Id.* at 178. There are no sandwaves on the Verde; that danger is not present. X035-167, at 28-31; Tr. 12/15/14, at 38-42 (Fuller testimony on potential Verde impediments).

Finally, with regard to commercial tourism on the San Juan River, the Special Master noted that “[n]o tourists or other persons have been transported for hire or otherwise.” X017-92, at 180. This undoubtedly factored into the Special Master finding the San Juan non-navigable because he specifically recognized that commercial tourism is a form of commerce:

The Government’s assertion as to lack of commercial possibilities fails to recognize one source of commerce which in the future will undoubtedly develop to a considerable extent—the use of these Rivers for the transportation of tourists for hire, to view the natural scenic wonders and explore the archeological features of these regions.

Id. at 117. For the Green, Grand, and Colorado rivers, which he found to be navigable, the Special Master described commercial recreational trips. *Id.* at 60, 66-68, 71, 77, 128.

As was detailed in the State's Opening Brief, the Verde is being used extensively as a highway for commerce for commercial recreational boating, and that commerce not only supports the operators and its employees but also the entities that depend on tourism, such as businesses like restaurants, shops, and hotels, and local, state, and federal governments that permit boating. *See* State's Opening Brief, at 5-10. Mr. Lynch's commercial operation alone is almost a half million dollar operation, employing 18-25 people in the summer. Tr. 12/16/14, at, 285-87, 329, 372. Today's commerce is possible because the Verde is used like a public navigable stream. A failure to find the Verde navigable-in-fact would have the real potential to shut down the highway of commerce that already exists.

D. NON-PERENNIAL LAKES: *United States v. State of Oregon*, 295 U.S. 1 (1935).

The United States brought suit against the state of Oregon to quiet title to lands beneath five non-perennial lakes. 295 U.S. at 5. Ultimately, the Supreme Court found those water bodies non-navigable. *Id.* at 23. Opponents suggest that the Commission should compare the water bodies in that case to the Verde River. SRP-MIC Brief, at 10; YAP Brief, at 20. They suggest the Verde is "similar." *Id.*

In that case, the Special Master examined the entire area that contained the water bodies and found "the entire area was then dry, and showed no signs in the soil of ever having been under water, except that water one to two inches in depth was found in Harney Lake, and 400 acres in Lake Malheur was covered by water of negligible depth" 295 U.S. at 16. The water bodies had "shallow water without defined banks," were "ice bound from three to four months," "contained a dry season every year," and had "frequent dry years during which Mud and Harney Lakes are almost entirely without water, and Lake Malheur is reduced to a relatively few acres of disconnected ponds surrounded by mud." *Id.* at 23.

To suggest the Verde is similar to the non-perennial, extremely shallow, disconnected lakes in *United States v. Oregon* is irrational. All of the evidence that the State has presented suggest otherwise, from historical descriptions, surveys, and boating to physical descriptions, modern boating, and the testimony of those who has seen the Verde. *See* State's Opening Brief.

E. ADDITIONAL DISTINGUISHABLE CASES CITED BY OPPONENTS.

Opponents also urge the Commission to rely on cases that the Arizona court of appeals previously distinguished and found unconvincing. SRP Brief, at 22, n.26, 26, n.28; SRP-MIC Brief, at 10-11; YAP Brief, at 24, n.42. The *Defenders* Court distinguished the *Lykes Brothers, Inc. v. United States Army Corps of Engineers*, 821 F.Supp. 1457 (M.D. Fla. 1993) as a case that addressed whether a creek was navigable for commerce clause purposes under the Rivers and Harbors Act of 1899, not for title navigability. *Defenders*, 199 Ariz. at 422, 18 P.3d at 733. Similarly, regarding *Monroe v. State*,

175 P.2d 759, 761 (Utah 1946), the *Defenders* Court noted that it involved a small lake where it was easier to simply go around the lake rather than across it. *Defenders*, 199 Ariz. at 424-425, 18 P.3d at 735-736. Lastly, in *Harrison v. Fite*, 148 F. 781, 785 (8th Cir. 1906), the court only considered the most recent conditions affecting Big Lake in determining its navigability. The Lake was not in its ordinary and natural condition based in large part to levee improvements that altered its annual volume of water. *Id.*; see *Defenders*, 199 Ariz. at 422, 18 P.3d at 733 (rejecting the applicability of *Harrison* for a different proposition).

F. JOHN DAY RIVER: *Nw. Steelheaders Ass’n, Inc. v. Simantel*, 112 P.3d 383 (Or. App. 2005).

The Commission should find the more analogous case, the John Day River of Oregon, persuasive. In 1999, Northwest Steelheaders Association, a fishing rights organization, brought suit against property owners seeking a declaration of navigability and state ownership of certain beds and banks of the John Day River, and the property owners counterclaimed for trespass. 112 P.3d at 386-87. The Oregon Court of Appeals, in 2005, found that the John Day is navigable under the *Daniel Ball* test, and that title passed to the State of Oregon at statehood. *Id.* at 385.

The court’s decision that the John Day River was navigable was based primarily on evidence that the River was susceptible to navigation by canoes. First, hydrological evidence indicated that summer flows at statehood were twice the present flows. *Id.* at 391. Second, the court was persuaded by evidence showing that modern recreational boats, of similar draft to dugout canoes used by Native American Tribes in the Columbia River basin, traverse the length of the River with little difficulty. *Id.* at 392.

From those facts, we conclude that, in its ordinary condition in 1859, the John Day River as it passes the defendants' properties would have provided ample capacity for travel and trade by means of dugout canoes. See *The Montello*, 87 U.S. (20 Wall) at 442, 22 L.Ed. 391 (1874) (“Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted.”); *Puyallup Tribe of Indians*, 525 F.Supp. at 72 (declaring navigability on the basis that “Indians navigated the river with their fishing boats and canoes”).

Id.

There was no archaeological evidence or eyewitness accounts of actual boating on the John Day at statehood. *Id.* at 394-95. There were some historical accounts of boating after statehood, but prior to modern times, and those accounts further corroborated the stream’s susceptibility to navigation at statehood. *Id.* at 392. That evidence included a pleasure boat sternwheeler that plied a ten-mile stretch, another sternwheeler that replaced the old one, a ferry that traveled once down river, and a log drive. *Id.* at 392-93.

The Verde has numerous accounts of actual boating prior to statehood, while the John Day had none and had to rely on susceptibility alone. The accounts on the Verde are not limited to dugout canoes; various types of small boats were used prior to statehood and they were used for commercial purposes. Likewise, the modern evidence of boating on the Verde is not limited to canoes as it was for the John Day; various types of small boats are used on the Verde today, and those boats have similar drafts to boats that were used at statehood. The Verde also had its own pleasure boat on the River at Camp Verde. X001-17. Harry King used to operate the boat in the 1980s, and it was capable of carrying 32 passengers and drew two feet of water. *Id.* The Oregon court of appeals found the John Day navigable based on less compelling evidence than exists for the Verde River.

In addition to a comparison of the historical boating on the John Day and the Verde, the Commission has the benefit of comparing the depths of the two rivers. Mr. Hjalmarson did a comprehensive analysis of the natural depths of the John Day and compared those depths to the Verde. X059, at 103-121 (John Day depth comparison analysis); X015, at 101 (original Verde depth analysis). He submitted his data along with his analysis. X059, at 103-121. After comparing the boating channels for both rivers using their natural reconstructed flows, he concluded the following:

The John Day River is similar to the Verde River but the main channel of the John Day River typically is wider with shallower base flow than the main channel of the Verde River. The channel of the upper Verde River is smaller but deeper than that of the John Day River. The depths of base flow (Q90) for the Verde River clearly are greater than the depths of base flow (Q80) on the John Day River.

Id. at 110.

IV. It Is Undisputed That the Verde's Depths Are More Than Sufficient for Small Boats.

A. The Supreme Court Does Not Have a Depth Threshold.

Contrary to Opponent Freeport's statement, FM Brief, at 22, there is no Supreme Court precedent regarding depth requirements for navigability. The Supreme Court has always held that the test is one of "navigability-in-fact." *PPL Montana*, 132 S.Ct. at 1227. It is not navigability based on a certain depth threshold; or navigability done by comparing rivers using out-of-context data; or armchair navigability based on assessments done from a desk. The logical reason that the test is "navigability-in-fact" is because rivers differ in many ways – from their water volumes, widths, and channel patterns, to their velocities, obstacles, and seasonality – and the best way to know if a particular river is navigable is to know if it can be navigated. Only the State's expert Jon Fuller has both assessed the data, and then checked how the actual conditions of the Verde support a finding of navigability. *See* State's Opening Brief, at 16 (Mr. Fuller did a comprehensive assessment utilizing all available sources of information,

from historical information to field assessments).

Opponents attempt to mislead the Commission by focusing only on comparing the average cross-section depths of the San Juan to those of the Verde, implying that greater depths on the San Juan means the Verde cannot be navigable. FM Brief, at 22. As detailed above in the discussion distinguishing the San Juan from the Verde, when considering the San Juan River, the Special Master considered several other factors, besides depth, as arguably more determinative of non-navigability, factors that are not present at all on the Verde, including high velocities and sandwaves. A comparison based solely on depths falls short of a comprehensive assessment of navigability.

B. Depths on the Verde Are More Than Sufficient for Small Boats.

Regardless, depths on the Verde *today* are more than sufficient to support small boats like flatboats and canoes that are meaningfully similar to boats used at statehood, and the River indisputably had more water and greater depths in its natural condition. *See* State's Opening Brief, at 17 (depths of River and depth requirements of boats); *see also* Tr. 3/31/15 at 2850 (Dimock) (historical boat builder and Verde boater, Brad Dimock, testifying that canoes, kayaks, and rowboats available at statehood could have been used on the Verde).

What is absolutely perplexing about Opponents' depth arguments is that Opponents have never said that the Verde's depths are insufficient for small boats. *E.g.*, FM Brief, at 20-23 (section claiming Verde is too shallow with no discussion or reference to depths required of boats); SRP Brief, at 9-10 (hydrology section mentioning depths with no reference to requirements of boats). In other words, Opponents claim that depths are insufficient for a finding of navigability, but then do not tell the Commission what boats can or cannot navigate with those depths based on the draws of those boats. Opponents don't offer information about specific boats because small boats loaded with people and gear, including flat boats, skiffs, canoes, kayaks, and row boats, successfully navigate the Verde. Both the theoretical draws of the various boats and the actual use of these boats on the Verde confirm this. *See, e.g.*, State's Opening Brief, at 14-15 (draws of various historic and modern boats); State's Opening Brief, at 7, 9 (fully loaded flatboats used on the River today); Tr. 12/16/14, at 384-87 (Farmer) (traditional wooden canoes and modern canoes used on the River successfully). Historical boating evidence also confirms that depths were sufficient for various small boats because they were used repeatedly on the River. State's Opening Brief, at 17-18 (historical boating accounts). Opponents have put forth no material evidence regarding small boats and depths. There is no material dispute that the Verde supports small boats.

Courts have consistently found that these boats may prove a river is navigable, and the State

provided numerous supporting court case citations in its Opening Brief, at 4-5. Opponents have not provided any cases to the contrary. Their briefs are largely devoid of references to the abundant navigability cases. However, Opponents' own witnesses testified that transportation of commercial goods or passengers in a canoe or flatboat can be a commercial use of the river. Tr. 2/19/15, at 1569 (Littlefield); Tr. 2/23/15, at 2035, 2046 (Mussetter); Tr. 4/1/15, at 3159-61 (Burtell).

Opponents' confusing position stems from a misunderstanding of the law of navigability for title. Opponents imply that a navigable river must support ships big enough to transport the military and mining ore. SRP Brief, at 16 ("Every witness who was asked went out of his way to make it clear that barges cannot navigate the Verde."). There is simply no support for that position that can be found anywhere in the case law. *See The Montello*, 87 U.S. at 441 ("It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.")

C. Opponent's Depth Assessment Is Inadequate and Is Certainly Not Conservative.

An assessment of depth is also more complicated than Opponents let on. As Mr. Fuller explained, depths from rating curves, like those presented by Opponent expert Mr. Burtell (X009, Table 5), are based on specific points along the River and are not representative of the entire River. Tr. 12/15/14, at 91 (Fuller). Rivers change from point to point and even across the River at a particular point. The depths that Mr. Burtell reported are for the average of a cross-section of the River, and that average includes the shallower edges and the deeper channels. Tr. 12/15/14, at 209-10 (Fuller); X035-167, at 171 (example of a cross-section). Boaters do not boat in the average of a cross-section, however; they boat in the deepest channel, so an average underestimates the depths for boats. Tr. 12/15/14, at 209-10 (Fuller). Mr. Hjalmarson provided the Commission with the depths of the deepest channels at many points along the River, for the reconstructed natural median flow, as opposed to just a few points of average depth that Mr. Burtell provided. X015, at 101, Appendix G, at 78.

Because of the variability of rivers, all depth estimates have uncertainties, and that is why observing the River in the field is essential. Tr. 12/15/14, at 210-12 (Fuller). Mr. Fuller did just that: "Having sat in a boat and looked at the depths of the river, where you can and can't see the bottom, it gives you a perspective on what those rating curves are really telling you and how representative they are of the entire river." *Id.* at 91. Mr. Fuller's experience on the River provided him with valuable information that cannot be learned from a book or a photograph or a picture. *Id.* He learned about depths both by assessing USGS gage data to create depth rating curves and by boating in different parts of the River channel's cross-sections, at different flow rates, and along the entire length of the River.

Id., at 204-208, 211-12. Regarding the benefit of his field experience to his navigability assessment, Mr. Fuller testified, “Frankly, I don’t know how you could offer an opinion on navigability . . . not having looked at the river in person.” *Id.* at 91. Mr. Burtell did not go on the River and or even walk across it to observe actual depths. Tr. 4/1/15, at 3034 (Burtell); Tr. 3/31/15, at 2989 (Burtell). His assessment is inadequate for a determination of navigability.

Mr. Burtell’s lack of experience with actual depths along the Verde was apparent when he was questioned about a surveyor’s comment that stated he could not survey a section line “on account of high water.” Tr. 3/31/15, at 2795-2802. Mr. Burtell assumed this was because of snowmelt, but on closer examination, the surveyor would have had to walk north through the middle of the Verde River for a mile to survey the section line between sections 5 and 6. *Id.*; X054-38 (survey sections 5 and 6 notes); X059, at 39 (Map of Township 3N, Range 7E). As Mr. Fuller explained, most of the River is deeper pools separated by shallower riffles. Tr. 12/15/14, at 72, 213 (Fuller). Mr. Farmer testified that in Segment 4, nearby the survey sections at issue, the depths are between 3 and 6 feet and the deeper pools can get upwards of more than 20 feet deep. Tr. 12/16/14, at 412-413 (Farmer). A surveyor would have difficulty walking upstream through the middle of the Verde for a mile during any time of year.

Opponents also claim that Mr. Burtell’s depth figures are “extremely conservative” because his streamflow reconstruction was “extremely conservative.” FM Brief, at 20, 22. The evidence suggests otherwise. In reconstructing the natural flow of the Verde, Mr. Burtell estimated that the depletion of the Upper Verde watershed from farming and other diversions had an impact of a mere 4 cfs. *See* X009-Table 6 (Del Rio and Granite Creek contribution to Estimated Reduction in Flow near Clarkdale). Mr. Hjalmarson, by contrast, estimated that the depletion from the Upper Verde watershed was 30 cfs. X059, Corrigendum at 2 (Granite, Williamson Valley, Walnut, and Big Chino Creeks cfs). SRP submitted a document that revised Mr. Hjalmarson’s estimates by utilizing SRP’s estimates of water consumption by crop. X061. The result was that SRP came up with 23 cfs that was depleted from the Upper Verde watershed; less than Mr. Hjalmarson (7 cfs difference), but much more than Mr. Burtell’s estimate (19 cfs difference).

Mr. Burtell’s low depletion estimate resulted in his finding that the natural median flow at Clarkdale was 93 cfs. X009-Table 5. Mr. Hjalmarson estimated the natural median flow was 116 cfs at Clarkdale. X015, at 41. That difference of 23 cfs is 25% more water that Mr. Burtell potentially left out of the Clarkdale gage. That is not a conservative streamflow reconstruction. Since more water means greater depths, that is also not a conservative depth reconstruction. The Clarkdale gage is located in Segment 2, where Mr. Burtell’s client Freeport has a land interest by the River. Tr. 4/1/15, at 3039-40.

V. Opponent Experts Are Either Not Well-Informed or They Are Not Credible.

The Commission is tasked with reviewing all relevant evidence, A.R.S. § 37-1123, but it also has the discretion to determine the “relevance and weight to be afforded the evidence.” *Winkleman*, 242 Ariz. at 243, 229 P.3d at 255. Based on Opponents’ apparent predetermined positions of nonnavigability, Opponents have put forth witnesses who wrote advocacy reports, not objective fact-finding reports, and those reports and the corresponding testimony were uninformed and beyond the scope of expertise of the witnesses. ANSAC should not find them credible, and should give little to no weight to their opinions.

For example, opponent witness Dr. Littlefield is a professional historian, yet when he searched for documentation in the historical record about navigability he chose not to search for the word “boat.” Tr. 2/19/15, at 1558-60 (Littlefield). Not surprisingly, that meant that Dr. Littlefield did not find many of the newspaper reports of people boating the River, and his report could not consider those accounts. *Id.* at 1617, 1622-23. During his testimony he did not even mention the historical boating accounts that are found throughout the record, even though he admitted that boating accounts are relevant to navigability. *Id.* at 1617-18. He also chose not to present all of the photos that showed the historical Verde River after he examined SRP’s archives. *Id.* at 1561-63. In addition, as is discussed in the survey section, Dr. Littlefield fails to report all of the depths recorded by the surveyors, certainly relevant information that the Commission should consider. Because Dr. Littlefield’s work was selective, his report and testimony should be given little weight.

Dr. Mussetter, rests his nonnavigability opinion on two premises: (1) that the River has too many rapids; and (2) that it is braided. X016, at 3. Regarding braiding, on closer examination, Dr. Mussetter is actually only claiming the last 18 miles of the 190-mile River is braided (part of Segment 5). X016, at 3. A detailed 1904 USGS survey was done of the River in that Segment, and it shows that a single channel is overwhelmingly the dominant channel form, and it also indicates a few areas where there are multiple channels. X015, Appendix K (first map); X035-167, at 105. This detailed primary source map conflicts with Dr. Mussetter’s theory, so he claims that “I don’t think you can draw conclusions about whether the river was braided or not from the information in those surveys.” Tr. 2/23/15, at 2073-74 (Mussetter). He at least admits he “[doesn’t] know how to put that in the context of what the overall river looks like there.” *Id.* at 2073. He lacks support for his theory, and he has not done any field examinations of that area to support his conclusion. Tr. 2/23/15, at 2045. Notably, Dr. Mussetter did do some unrelated field work for SRP upstream of the area he is claiming is braided, but Dr. Mussetter did not find that area braided. Mr. Fuller has testified that he would not characterize the Verde as a braided

river in that Segment or any of the Segments, and Mr. Fuller has actually boated and observed that part of the River. Tr. 12/15/14, at 22 (Fuller). In this instance, as is almost always the case, actual evidence trumps theories. Be that as it may, Dr. Mussetter agrees that a braided river can be navigable if the water is deep enough, and that opinion agrees with his predecessor Dr. Schumm. *Id.* at 2030.

Even though he concluded that the Verde is nonnavigable, Dr. Mussetter did not have a boat in mind when he did his work. Tr. 2/23/15, at 2109. “I didn’t do a detailed technical analysis of the boats that the anecdotal evidence said had been used off and on on the Verde River.” *Id.* at 2110. One has to ask, how do you assess navigability without considering a type of boat that can or cannot be used on the River? If he had considered canoes as his criterion craft, perhaps Dr. Mussetter would have found the River navigable. He agrees that canoes can haul cargo and can be used for commercial purposes; he agrees that canoes were available in Arizona; and he agrees that canoe use today “points in that direction” of a navigable River. *Id.* at 2028, 2035, 2046. Dr. Mussetter’s testimony and cross-examination revealed his inconsistencies and a lack of field work to support his opinion.

Opponent witness, historian Dr. Jack August, had a “very limited focus” which was to present research on the Verde prior to development that began around 1866. Tr. 2/25/15, at 2429 (August). However, Dr. August failed to review *any* of the historical boating accounts on the Verde. *Id.* at 2432. On his own admission, he did not have time to review much of the record at all. *Id.* at 2430-31. Dr. August agreed that he was specifically reporting that prior to western settlement in 1866, he did not find the Spanish or early explorers navigated the River, and then he proceeded to also agree that there were many reasons that those groups might not have used the River for travel at that time. *Id.* at 2434-37. He stated that none of the Spanish observers made any statements about the navigability of the Verde. *Id.* at 2465, 68. He also stated that horses were the preferred means of transportation for the Spanish, as well as for the trappers from New Mexico and other explorers, because of the overland travel that was necessary. *Id.* at 2436, 2453-54, 2458-59, 2463-64. Nothing in Dr. August’s report or testimony supports a finding that the Verde is nonnavigable.

Opponent witness Mr. Burtell’s opinions on depths are addressed previously. While Mr. Burtell clearly expended efforts in writing his report, he suffers from the same flaw as many of Opponent witnesses, namely that he did not check his armchair navigability theories against the actual facts, by putting a boat on the River, or talking with a boater, or watching a boater, or walking across the River, or even visiting the River in the recent years prior to writing his declaration. Tr. 3/31/15, at 2989, 3032-37. His lack of familiarity with the actual conditions and uses of the River is apparent. Regarding modern use, he states that “[m]ost trips occur in the winter and spring” to imply that the Verde only

supports boats during snowmelt runoff, however, Mr. Lynch, who runs Verde River adventures with 5000-6000 customers a year, stated that his busiest time is from May to September. *Compare* X009, at 5, *with* Tr. 12/16/14, at 285-86, 290 (Lynch).

Mr. Burtell also assumed that all boats used on the Verde are “lightweight canoes or kayaks” that can navigate only shallow waters. Tr. 4/1/15, at 3043-44 (Burtell). That assumption is incorrect and likely it comes from being uninformed. It has never been reported that only “lightweight canoes” can float the waters of the Verde. In fact, the Commission had the benefit of hearing that boaters still choose to use wooden canoes on the Verde, successfully, 100 years after statehood in reduced flows. Tr. 12/16/14, at 386-87 (Farmer). As discussed earlier, flatboats are frequently used on the Verde, fully loaded. Mr. Dimock, who has actually been on the Verde and has made a life of boating rivers, testified that he could use his flatboat, Edith, on the Verde. Tr. 3/31/15, at 2833. There are certainly modern lightweight canoes and kayaks that are available for use on shallow rivers, but there is an abundance of canoe and kayak types, some heavy and some light, and Mr. Burtell did no research on this issue. Tr. 4/1/15, at 3043. In some ways, the case for navigability by way of susceptibility turns on this very topic, modern boats, but Mr. Burtell’s opinion is limited and unhelpful on this issue. *But see* State’s Opening Brief, at 12-16.

Lastly, Mr. Randall also testified for Opponents but his candid testimony turned out to support navigability, at least in Segment 2.

If I was thinking about moving goods and so forth and taking a look at the river itself and I was above Camp Verde and I wanted to move things south, maybe it would be feasible . . . because all I would have to do was float down.

Tr. 2/20/25, at 1818. He also said it would have been possible to go up River in Segment 2 if you had a paddle boat. *Id.* at 1818-19. He differs from all other Opponent witnesses in that he actually knows the Verde because he grew up in Clarkdale and still lives there. Tr. 2/20/15, at 1742-43 (Randall). Mr. Randall provided sensible reasons why his ancestors did not use boats on the River, including that they traded almost exclusively with the Hopi who were located by Winslow without a water route between them; that his people built their homes away from the Verde due to periodic flooding; and that because the Verde meandered it was faster to walk or run along the River than it was to boat. *Id.* at 1776, 1781, 1789-90, 192-94.

VI. Information From Surveys Supports A Finding of Navigability.

The evidence does not support Opponents’ claim that federal surveyors believed that the Verde was non-navigable. *See* Freeport Brief at 15, Yavapai-Apache and Fort McDowell Yavapai Brief at 11-15, Salt River Pima-Maricopa Brief at 11-12, SRP Brief at 6-8. No surveyor ever stated that the Verde

was non-navigable. Tr. 2/19/15, at 1575. Dr. Littlefield admitted that surveyors did not meander navigable rivers even though their instructions told them to do so. Tr. 2/19/15, at 1574. That is why the Supreme Court has stated that surveyor meandering should not be used for a determination of navigability for title purposes. In *Oklahoma v. Texas*, 258 U.S. 574, 585 (1922), the Court stated that the action of surveying officers in meandering a river had “little significance . . . [because] those officers were not clothed with power to settle questions of navigability.” Moreover, the surveyors on the Verde frequently did meander the banks of the Verde. Tr. 2/19/15, at 1575-76, 1584, 1597, 1658 Meandering a river means the river is over 3 chains wide or it is navigable or both. *Id.* at 1654.

The surveyors written notes about the River’s depths support a finding that it was susceptible for boats. Mr. Hjalmarson compiled all of the depths written down by surveyors across the length of the Verde. X059, at 29. The depths ranged from 1 foot in the Upper Verde Watershed to 5 feet at the lower Verde. *Id.* The average depth, as recorded by one surveyor in the upper-middle Verde (Segment 1 and 2) was three feet for the entire township. *Id.* When surveying a township in Segment 2, Surveyor Foster recorded the following:

The Rio Verde flowing through the Tp.in a S.E. direction is a stream with banks about 3 feet high and of uniform width. The amount of water flowing with gentle current through its channel at an average depth of about 3 feet varies but little during the different seasons of the year and seldom overflows its banks.

X002, at 35. That description certainly supports a finding of navigability.

VII. Rapids Are Not Impediments to Navigability on the Verde.

The River was segmented by the State based on various physical characteristics and one of those is rapids. While Segment 3 of the Verde does have three class III rapids and one class IV rapid, the Segment is frequently boated at all times of the year, by various boats, without any major difficulty. Tr. 12/15/14, at 92-99 (Fuller); X035-167, at 59-64. The class IV rapid is Verde Falls, and it is the only place on the River where a boater may need to drag his boat around the rapid. Tr. 12/16/14, at 390-92, 408 (Farmer). Mr. Dimock, who has boated this Segment, testified that he could use the historical replica boat the Edith in this Segment, and he would line it at Verde Falls. Tr. 3/31/15, at 2819, 2883-84 (Dimock). Historically, this Segment was boated by multiple parties of commercial trappers, X001-18, X017-125. The Commission should remember that the test for navigability is based on the River’s use or susceptibility to use at statehood, a time when people were heartier and they took responsibility for their own actions, instead of the litigious society that forces boating guidebooks to begin with disclaimers. And yet, the Town of Camp Verde promotes boating in this Segment. X035-167, at 203.

Segment 3 is distinguishable from the other segments, however, especially Segment 2. Segment

2 is in the Verde Valley, and the River there is well-suited for beginning boaters. State's Opening Brief, at 25 (citations to multiple boating guides describing the River). This is the most frequently boated Segment, has multiple commercial operations, and contains the official state paddle trail, the Verde River Greenway. *Id.* At one time, a pleasure boat operated in this Segment that could carry 32 passengers. *Id.* Rapids are particularly not an issue in Segment 2. *Id.*

VIII. Newspapers Are Relevant and Reliable Sources of Navigability Evidence.

Opponents have consistently claimed that newspaper reports are unreliable and that therefore ANSAC should ignore any evidence derived from them. *See, e.g.*, Tr. 2/19/15, pp. 1533-34 (Littlefield); *see also* Phoenix Brief, at 10. However, such reports have been found sufficient by several courts. The Oregon court of appeals cited to newspaper reports of an attempted log drive on the John Day River. *Northwest Steelheaders*, 112 at 392-93, n. 15 (Ore. Ct. App. 2005) (relying on newspaper articles). The Montana Supreme Court has also relied on newspaper reports: "reliance upon historical works, including newspaper accounts, is well-accepted and proper when applying the navigability for title test. Courts applying this test are often required to arrive at factual determinations regarding matters outside the recall of any living witnesses, thus requiring a higher degree of reliance upon historical material than in the run of the mill civil dispute." *PPL Montana, LLC v. Montana*, 229 P.3d 421, 446 (Mont. 2010), *cert. granted in part by*, 131 S.Ct. 3019 (2011), *rev'd on other grounds and remanded by* 132 S.Ct. 1215 (2012); *see also Conn. Light & Power Co. v. Federal Power Comm.*, 557 F.2d 349, 354-56 (2d Cir. 1977) ("[I]t is settled that historical works generally considered authentic are admissible in evidence, especially in cases such as this one which must delve into the relatively ancient and obscure origins of commerce on the nation's rivers.") This concept remains unchanged with recent precedent: the United States Supreme Court references a nineteenth-century newspaper article, Lewis and Clark journals and letters, and other secondary sources in its *PPL Montana* opinion. *PPL Montana*, 132 S.Ct. at 1222 (Sioux City Register), 1223-1234 (Lewis and Clark journals and letters).

It is ironic that SRP's expert witness, Douglas Littlefield, who denigrates newspaper reports on cross-examination, just the day before testified to the happy circumstance of today's research opportunities increasing access to historical newspaper reports. *Compare* Tr. 2/19/15, at 1533-34, *with* Tr. 2/18/15, at 1447-49. In giving reasons for updating his prior reports, Dr. Littlefield testified on direct examination as follows:

Q. Okay. And the revisions that happened for this 2014 report, what was the reason for that?

A. The main reason for it - - none of the conclusions changed, but the main reason is that since the 2005 report there have become a lot more sources for historical newspapers online that can be keyword-searched.

Prior to the previous report, the most - - the best way that you could use historical newspapers was simply scrolling through endless microfilm and hoping to spot a particular useful article.

But now that there are a lot of historical newspapers online, you can keyword search, for example, for Verde River, and you get to see the actual article the way it was printed in the historical paper; and then if it looks useful, you can download it and analyze it and abstract it and so forth. . . . So I was able to supplement the 2005 report with, primarily, additional historical newspapers and historical maps and photos.

Tr. 2/18/15, pp. 1447-49 (Littlefield). As noted earlier though, Dr. Littlefield chose not to make full use of the new searching technology because he never searched for the word “boat” in this navigability case, and he therefore never found many of the boating articles. Tr. 2/19/15, at 1558-60, 1617, 1622-23 (Littlefield). ANSAC should reject Dr. Littlefield’s (and others’) objections to the use of newspaper articles. The articles have provided the Commission with valuable information.

IX. ANSAC Must Consider The River As It Was In Its Natural and Ordinary Condition Pursuant to the *Daniel Ball* Test and Pursuant to *Winkleman*.

All parties agree that *The Daniel Ball* test controls title-for-navigability determinations. *The Daniel Ball*, 77 U.S. 557, 563 (1870). The test requires that five elements be met for a waterway to be considered navigable for title purposes: (1) the river must be used or susceptible to being used; (2) in its ordinary and natural condition; (3) as a highway for commerce, over which trade and travel are or may be conducted; (4) in the customary modes of trade and travel on water; and (5) at statehood. *See The Daniel Ball*, 77 U.S. at 563; *see also* SRP Memo at 21 (navigability established by only two elements: actual use and susceptibility to use as a highway for commerce).

SRP’s continued assertion that the *Winkleman* court’s ruling that a river must be examined in its ordinary and natural condition at the date of statehood conflicts with this test. SRP Memo at 22, n.25, City of Phoenix Memo at 3, n.1. If SRP’s position were correct, which it is not, the River’s actual ordinary and natural condition in 1912 would be irrelevant and the “ordinary and natural” element of the test would thus be rendered superfluous. The court of appeals correctly refused to conflate the test’s “ordinary and natural” and “date of statehood” components, concluding instead that the Commission must determine what the river would have looked like on February 14, 1912, if it had been in its ordinary and natural condition, thus giving force to each of the *Daniel Ball* test’s five elements. *Winkleman*, 224 Ariz. at 241, 229 P.3d at 253. SRP is simply wrong in its assertion.

In making its determination, ANSAC must keep in mind that Arizona’s rivers present an issue of first impression. In neither *Daniel Ball* nor in *PPL Montana* was the U.S. Supreme Court required to address the issue of when a waterway is not in its ordinary and natural condition at the time of the state’s

entry into the Union. Irrigation began in the Verde Valley, as in other parts of Arizona, in the mid-1860s and increased over the years. 031, pp. 3-15-3-16, 7-4 (ASLD Report); Tr. 2/20/15 p. 1839 (Randall); Tr. 2/19/15 p. 1665 (Littlefield). It is therefore irrefutable that the River was not in its ordinary and natural condition in 1912.² ANSAC must follow the dictates of the Arizona court of appeals—the only court to rule on this issue.

X. The State Has Established, Through Present-Day Recreational Boating Evidence, that the Verde is Susceptible to Navigation Within the Meaning of the *Daniel Ball* Test and *PPL Montana*, and Therefore the River Qualifies as a Highway for Commerce.

Opponents complain that the State’s evidence of recreational boating is insufficient to establish highway-for-commerce requirements (SRP Brief, at 16, 27) and that the State has failed to show commercial use that realistically might have occurred at statehood (FM Brief, at 1, 24, 26-27). These claims are baseless. First, the State presented evidence of pre-statehood boating, some of it commercial, in addition to evidence of modern boating. State’s Opening Brief, at 17-18 (historical boating), 5 (modern boating), 6-9 (commercial, recreational boating). Second, the State’s evidence of post-statehood recreational use complies with *PPL Montana*’s requirements for using such evidence to prove susceptibility.

As defined in the Commission’s own statutes, a “highway for commerce” is a “corridor or conduit within which the exchange of goods, commodities or property or the transportation of persons may be conducted.” A.R.S. § 37-1101(3). Neither actual boating nor actual commerce is necessary. The Supreme Court clarified the “highway for commerce” element in its *Utah v. United States* opinion by stating that the boat did not need to be “a carrier for the purpose of making money.” 403 U.S. at 11; *Defenders*, 199 Ariz. at 422, 18 P.3d at 733 (“nothing in the *Daniel Ball* test necessitates that the trade or travel sufficient to support a navigability finding need be from a ‘profitable commercial enterprise.’”). The *Utah* Court commented that “[t]he business of the boats was ranching and not carrying water-borne freight. We think that is an irrelevant detail. The lake was used as highway and that is the gist of the federal test.” *Utah*, 403 U.S. at 11.

² Opponent SPR-MIC (Brief at 16) claims that Mr. Lynch’s infrequent moving of rocks to augment his client’s experiences on the River during the time when irrigation depletes the flows constitutes an aid to navigation which would support a finding of non-navigability. However, the River in its current state is severely depleted from its natural condition, and Mr. Lynch only made improvements to the River when the irrigation withdrawals had depleted the River’s flows. Tr. 12/16/14 at 293, 309. Moreover, Mr. Lynch’s movement of a few rocks does not even bring the River up to its former natural condition much less does it constitute an improvement of the River. See *PPL Montana*, 132 S.Ct. at 1228-29 (state title is determined at statehood in the river’s ordinary and natural condition); see also *United States v. Appalachian Elec. Power Co.*, 311 U.S. at 407 (federal test for commerce clause purposes allows for reasonable improvements); but see *Oregon v. Riverfront Prot. Ass’n*, 672 F.2d at 796 (“wing dams” to force logs downriver not deemed to alter river’s natural condition for navigability for state title purposes).

The U.S. Supreme Court recently confirmed the use of recreational boating to demonstrate susceptibility of a river for use as a highway for commerce, stating that evidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use at the time of statehood. *PPL Montana*, 132 S.Ct. at 1233 (citing *Appalachian*, 311 U.S. at 416). This is consistent with previous decisions that personal or private use by boats demonstrates the availability of a stream for the simple types of navigation, and that even private actual use rather than public commercial use is sufficient. *Id.* at 1233 (citing *United States v. Utah*, 283 U.S. at 82).

Post-statehood evidence may show susceptibility to use at the time of statehood to the extent that it shows whether the river was susceptible to use for commercial navigation at the date of statehood. *PPL Montana*, 132 S.Ct. at 1233 (citing *United States v. Utah*, 283 U.S. at 82-83). The question is whether the trade or travel could have been conducted “in the customary modes of trade and travel,” over the relevant river segment “in [its] natural and ordinary condition.” *PPL Montana*, 132 S.Ct. at 1233 (citing *Utah*, 283 U.S. at 76). Therefore, a party seeking to use present-day evidence for title purposes must show: (1) that the watercraft are meaningfully similar to those in customary use for trade and travel at the date of statehood, and (2) the river’s post-statehood condition is not materially different from its physical condition at the date of statehood [i.e., that the river is not now more easily navigated than it was at the date of statehood]. *PPL*, 132 S.Ct. at 1233.

Thus, it is clear that Opponents misconstrue and overstate the Supreme Court’s holding in *PPL Montana*. Contrary to Opponents’ mischaracterization, the Supreme Court reaffirmed the use of modern recreational boating evidence for determining navigability rather than rejected it. The Court criticized the record left by the Montana Supreme Court; that court had failed to make the requisite findings regarding modern and historical boats being meaningfully similar, including specifying the types of modern boats used. 132 S. Ct. at 1232-33.

By contrast, the State’s submitted comprehensive evidence and detailed testimony from experts about boat types, boats available in Arizona at statehood, boats that could be used for commercial purposes, boats used today, comparisons of modern boats to historical boats, and the only expert opinions on the subject that concluded modern boats used on the Verde are meaningfully similar to boats available and used at statehood. State’s Opening Brief, at 12-16. The evidence demonstrates that the Verde River in its ordinary and natural condition could have sustained commercial use such as might have occurred, and in fact did occur, in 1912. Tr. 12/15/14, at 122-123, 153-156 (support of military forts), 126, 154-155 (transport of people and/or goods), 158-60, 163, 180-182 (trapping, hunting) (Fuller); X035 132, 145, 147, 166-169, PPT; X001-18 (*Arizona Sentinel*, 4/2/1892). The State’s

evidence shows that these uses were realistic uses of the River at statehood. The State has demonstrated that the watercraft currently in use are meaningfully similar to those in customary use for trade and travel around 1912, and that the River's post-statehood condition is not more conducive to navigation than it was in 1912 (rather, the reverse is true: the River's condition is materially worse for navigation than it was before 1860). State Memo at 12-16 (modern boats meaningfully similar to historic boats, historic boats and modern boat descriptions); Tr. 12/15/14 at 192-193 (Fuller) (additional water would make the River more navigable today than it was historically).

Opponents choose to ignore the only evidence that was provided on meaningfully similar boats and instead make broad sweeping conclusions like, "It is also clear from the evidence in the record that the types of boats that people are using recreationally on the Verde today are far different from any boats available or used in Arizona in 1912." The expert on that subject matter did not conclude that. Neither did any witness. The Commission was fortunate to hear from Mr. Dimock who actually builds historical replica boats, and makes a living on rivers, and who has boated the Verde. Tr. 3/31/15, at 2817-28. After a thoughtful and comprehensive discussion of boating characteristics, he concluded that modern canoes, kayaks, and flatboats used on the Verde are meaningfully similar to boats used at statehood. *Id.* at 2850-51 (Dimock).

Opponents provided scant evidence regarding meaningfully similar boats and what they did provide doesn't support their position. Opponents made the point with Dr. Mussetter that Archimedes principle states heavier objects displace more water and may sit deeper in the water. Tr. 2/24/15, at 2284-85 (Mussetter). They never provide any evidence, however, about weights of various boats, and as the Commission has heard over and over again that various types of boats can be used on the Verde, not just lightweight canoes or kayaks. Opponents also continue to cite to durability and technology improvements as the reason boats navigate the Verde today. This issue has been substantially addressed by credible experts who disagree with Opponents' non-expert opinions. State's Opening Brief, at 12-16.

Finally, but perhaps most importantly, Opponents take Mr. Farmer's and Mr. Fuller's words out of context to claim that the Verde is only boatable by extreme low-flow boaters. SRP Brief, at 18-19. When Mr. Fuller talks about low-flow, he uses it in a relative sense; the Verde has seasonal changes in flow. At no point, however, is the Verde an extreme low-flow river. Neither Mr. Farmer nor Mr. Fuller have said that. For that matter, no one qualified has ever made that claim.

XI. The "Highway for Commerce" Requirement of *The Daniel Ball Test* Must Be Applied to Accommodate Arizona's Special Circumstances.

The United States Supreme Court did not restrict the availability of the susceptibility argument to the circumstances pertaining to Utah in the nineteenth century. Rather, the Court gave an expansive—

not restrictive—interpretation of the *Daniel Ball* navigability-for-title test in light of Utah’s special circumstances and the importance of establishing title. *United States v. Utah*, 283 U.S. at 81-82 (addressing the navigability of some of Utah’s rivers). Utah became a state in 1869, about twenty years after the United States acquired the land from Mexico. *Id.* at 81-82. American settlement and many of the reported navigation incidents thus occurred after statehood, and the government argued that those incidents should be excluded from the navigability-for-title inquiry. *Id.* at 82. The Court disagreed, stating that the “crucial question” was whether the rivers were susceptible to commercial use in their ordinary condition, and the Court was less concerned with “the mere manner or extent of actual use.” *Id.* Moreover, the Court rejected the argument that consideration of future commerce was too speculative, stating as follows: “Rather, it is true that as the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored.” *Id.* at 83.

In a later case, the Court repeated that the relevant inquiry is whether the waterway once had the capacity to carry useful commerce, even if it no longer had that capacity because of changed circumstances. *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 118 (1921). Navigability for title purposes is not a one-size-fits-all test but one that requires an examination of the special circumstances of each river. *See Hassell*, 172 Ariz. at 363, n. 10, 837 P.2d at 165, n.10. The *Daniel Ball* test is flexible and is “apt to uncover variations and refinements which require further elaboration.” *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940). Moreover, the *Daniel Ball* test is only “the starting point” in determining navigability-for-title issues. *Defenders*, 199 Ariz. at 419 n.10, 18 P.3d at 730 n.10. It is therefore ANSAC’s duty to examine Arizona’s special circumstances in determining whether the River was navigable at statehood.

Opponents want to ignore that the River was used for irrigation and that the area was sparsely settled, and then they complain that the River was not used to transport mining materials or agricultural products. *See SRP Brief*, at 5; *Freeport Brief*, at 9-12. At some points on the River today, irrigation diversions take all of the River water and the River is extremely low until that water returns downstream. *Tr.* 12/16/14, at 290 (Lynch). Transportation for mining purposes is not one of the requirements and it also would have been impractical because of irrigation. The State has provided evidence of the types of commercial use that did occur or could have occurred at statehood such as boating, fishing, trapping, and traveling. *Tr.* 12/15/14, at 122-123, 153-156 (support of military forts), 126, 154-155 (transport of people and/or goods), 158-60, 163, 180-182 (trapping, hunting) (Fuller); 031, p. 7-26 (ASLD Report).

The River’s use for irrigation and thus its limited use for navigation should not preclude a

finding of navigability; these are merely special circumstances that ANSAC must consider in reaching its determination. See *United States v. Utah*, 283 U.S. 64, 81-82 (1931) (discussing reasons why little evidence of actual navigation may exist, such as the fact that the region had not been settled)³. Opponents claim that in spite of the need for transportation the River was somehow overlooked as a “highway for commerce.” See FM Brief, at 9-13, SRP Brief, at 5-6, 25-26. The availability of other means of transportation, however, has no bearing on a navigability determination. See *Appalachian Elec. Power Co.*, 311 U.S. at 405-406 (stating that navigability for title purposes is not affected by the existence of other forms of transportation). Arizona’s decision to irrigate with its rivers’ flows rather than to navigate the rivers should not preclude a claim to the riverbed. *Defenders*, 199 Ariz. at 417 n.4, 18 P.3d at 728 n.4 (“We see no inherent conflict in Arizona’s laws regarding water use under Arizona’s prior appropriation system and land ownership under the equal footing doctrine.”). The *Daniel Ball* test is sufficiently flexible to take into consideration that the River’s waters have traditionally been used for irrigation. See *Appalachian Elec. Power Co.*, 311 U.S. at 404 (stating that there is no “formula which fits every type of stream under all circumstances and at all times” and that “[o]ur past decisions have taken due account of the changes and complexities in the circumstances of a river”).

The River’s special circumstances include that starting in the 1860s, its flows were adversely affected by irrigation diversions, the region was not heavily populated, and the Verde Valley was a warzone. Tr. 2/20/15, at 1839 (Randall); 031, at 3-15-3-16 (ASLD Report); X035-142, p. 107-08 (*Resources of Arizona*) (population of Arizona was 41,580 including 4,545 Indians according to the 1880 census); X035-167, at 86 (1910 Camp Verde population 269, Cottonwood population 91); X009-Attachment C, *The Arizona of Joseph Pratt Allyn*, at 87-90. *United States v. Utah*, 283 U.S. at 82 (stating that where conditions of exploration and settlement explain the infrequency or limited nature of commercial use, the susceptibility to use as highway for commerce may be still satisfactorily proved).

As was detailed in the State’s Opening Brief at 18-19, the River corridor was a dangerous place to boat during the war between the Native Americans and the Army. The record is full of evidence that supports the densely vegetated River corridor was unsafe because the Native Americans were loath to give up their homeland. For example, in Joseph Pratt Allyn’s “Letters from a Pioneer Judge” he writes about a fatal encounter with Indians on the Verde, on March 16, 1864. X009-Attachment C, *The Arizona of Joseph Pratt Allyn*, at 87-90. The pioneering expedition was in the location of ASLD Segment 3, near Gap Creek. At night, while the party was camped, Indians crawled and hallooed at the

³ In Arizona’s case, however, early settlers immediately began taking water out of the River. 031, p. 7-23, Table 7-16 (ASLD Report).

guards. While the party was crossing the River the next day, they were attacked by Indians and they fired back. Private Fisher took an arrow and was badly wounded and five Indians were killed in all. *Id.* By the time the war had subsided, roads had been built around the conflict zone and they had been subsequently improved. X009, Figure 4 (map of roads avoiding Verde River Valley conflict zone); Tr. 3/30/15, at 2631 (Burtell). Boating down the River, settlers would have been sitting ducks.

XII. It Is Not Appropriate for the Commission to Adopt Its Previous Finding.

Opponents of navigability irrationally urge this Commission to readopt its clearly erroneous 2006 Determination, despite the clear, contrary instructions given to ANSAC in *Winkleman*. The opponents of navigability are collectively asking this Commission to disregard the holdings of the Arizona Court of Appeals in *Defenders of Wildlife*, 199 Ariz. 411, 18 P.3d 722 (App. 2001), and *State ex. rel Winkleman v. Ariz. Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010), both of which are wholly consistent with the landmark United States Supreme Court case of *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1870) and its progeny.⁴ The *Daniel Ball* test, which has been applied by the Arizona Court of Appeals and restated in the Commission’s statutes in A.R.S. § 37-1101(5), has not been modified by the U.S. Supreme Court in *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215 (2012), nor is *PPL Montana’s* holding in any way inconsistent with *Defenders* and *Winkleman* as suggested by the opponents of navigability. The focus in *PPL* is twofold: 1) holding that the navigability of a river must be assessed on a segment by segment basis where stretches of a river are clearly navigable and others stretches may not be; and 2) “[e]vidence of present day use of a river may be considered to the extent it informs the historical determination whether the river segment was susceptible of use for commercial navigation at the time of statehood.” 132 S.Ct. at 1229, 1233. The State not only segmented the Verde in accord with the holding in *PPL Montana*, but also met its burden with regards to the use of modern, recreational boating evidence to show susceptibility to commercial navigation at statehood.

Despite Opponents’ focus on a few sentences contained in a 54-page Determination, comments throughout the Commission’s prior Determination provide a solid basis for concern for the Commission’s understanding of the applicable law and facts at that time. *See Winkleman*, 224 Ariz. at 242, 229 P.3d at 254 (Court of Appeals recognizing in the Commission’s Lower Salt Determination that “ANSAC itself has made contradictory findings as to the ultimate question of fact . . . albeit most

⁴ *See, e.g.*, Freeport Brief, at 4-6; Salt River Project Brief, at 1-2; Yavapai-Apache and Fort McDowell Yavapai Brief, at 1-2; Salt River Pima Brief at 1-5; and City of Phoenix Brief, at 1-2.

recently while applying the incorrect standard for determination.”).⁵ First, the prior Determination failed to view the Verde River in its ordinary and natural condition and completely ignored the unrefuted facts that the Verde River today, in its substantially dammed and diverted condition is perennially navigable along almost its entire course in canoes, kayaks and flat boats. It is incredulous to conclude that a river that is navigable today was not susceptible to navigation on February 14, 1912, in its ordinary and natural condition even if there was no credible documented history of its pre-statehood navigation. However, there are multiple examples of the Verde’s historic navigation. State’s Opening Brief at 17-18, 20-29. Next, the Commission’s prior Determination misconstrued and misapplied the “highway for commerce” requirement of the *Daniel Ball* test. See *Defenders*, 199 Ariz. at 421-425, 18 P.3d at 732-36 (stating that the federal test does not require trade or travel on the river to be commercial, sustained, successful or upstream). Moreover, navigability does not depend on a particular mode of commerce, the type of boat that is used or could be used, or on actual use. *United States v. Utah*, 283 U.S. at 76, 51 S.Ct. at 441; *Appalachian*, 311 U.S. at 416 (“[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.”); *Holt State Bank*, 270 U.S. at 56 (“[N]avigability does not depend on the particular mode in which such use is or may be had.”); *North Dakota v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982), *rev’d on other grounds sub. nom. Block v. North Dakota*, 461 U.S. 273 (1983) (stating that a waterway need only support small boats such as canoes to be navigable). Based upon the current use of this substantially dammed and diverted river for commercial, recreational boating in small craft substantially similar to those available at the time of statehood and the historical accounts presented, the Verde River in Segments 1-5 was clearly navigable in its ordinary and natural condition at statehood.

This Commission should not, on a wholesale basis, adopt the findings of its clearly erroneous 2006 Determination because, with the exception of Mr. James Hennes, the current Commission members are newly constituted and did not receive the prior evidence, nor hear the prior witness testimony. In addition, there is a substantial amount of newly presented evidence and testimony that is now before the Commission, including commercial uses of the River.

XIII. The State Has Exceeded Its Burden of Proof.

The State’s burden of proof regarding navigability is proof by a preponderance of the evidence which simply means that navigability or susceptibility to navigation is more likely than not. The burden

⁵ The Court of Appeals also stressed that the Commission must not “begin its determination with any presumption *against* navigability. Instead, ANSAC’s approach and analysis must be wholly impartial and objective, while utilizing the proper legal test.” *Winkelman*, 224 Ariz. at 239, 229 P.3d at 251.

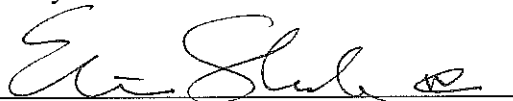
of proof is not a reasonable certainty or beyond a reasonable doubt. There is no credible evidence to contradict the State's expert testimony that the Verde River is navigable today along its near entire course in boats that are meaningfully similar to those available at statehood under today's river conditions which have been substantially diminished by agricultural damming and diversion. Even if the Commission ignores all of the credible evidence of historical descriptions of the Verde River and the boating accounts, which prove the River was actually used as a highway for commerce, a river that is navigable today was certainly susceptible to navigation on February 14, 1912, in its ordinary and natural condition.

XIV. Conclusion.

Law is established to protect values and policy choices. The law of navigability for title has its genesis in protecting waterways so that the public can use them for commerce. The Verde is being used for commerce today. It was used at statehood. For the reasons stated herein, the Commission should find that the Verde River, Segments 1 through 5, was both navigated and susceptible to navigation in its natural and ordinary condition.

DATED: November 9, 2015.

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ORIGINAL AND SEVEN COPIES of the foregoing hand-delivered for filing this 9th day of November, 2015, to:

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A COPY in pdf format of the foregoing e-mailed with delivery receipt this 9th day of November, 2015, to each party listed on the ANSAC website, <http://www.ansac.az.gov/parties.asp>, with "SERVICE OF ANSAC DOCUMENT, No. 04-009-NAV (Verde)" written in the subject line.



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