

Helm, Livesay & Worthington, Ltd.
1619 E. Guadalupe, Suite One
Tempe, Arizona 85283-3970
(480) 345-9500
office@hlwaz.com
John D. Helm - AZ Bar # 002584
Sally Worthington - AZ Bar # 012424
Jeffrey L. Hrycko - AZ Bar # 023280
*Special Counsel for Maricopa County and
The Flood Control District of Maricopa County*

**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

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

No. 04-009-NAV

**Maricopa County and The Flood Control
District of Maricopa County's Response
to Opening Briefs in regard to the
Navigability of the Verde River**

Maricopa County and the Flood Control District of Maricopa County (herein Maricopa County) hereby file their response to the opening briefs filed by interested parties in regard to the navigability or non-navigability of the Verde River from its headwaters at Sullivan Lake to its confluence with the Salt River.

As explained in its opening brief, the County's interest is in promoting a defensible and legally correct decision that will conclude 30 years of litigation and legislation which started on the Verde River in 1985. The County does not promote any finding regarding the navigability of the Verde other than one that will withstand the future court scrutiny it is sure to get.

1. What Use Is Required After PPL Decision? Just Navigation.

In *PPL Montana*, the Supreme Court recognized that "'extensive and continued [historical] use for commercial purposes' may be the 'most persuasive' form of evidence, but the 'crucial question' is the potential for such use at the time of statehood, rather than 'the mere manner or extent of actual use.'" *PPL Montana, LLC*, 132 S. Ct. 1215, 1233; 182 L.Ed.2d 77 (2012)(quoting *United States v. Utah*, 283 U.S. at 82-83).

Although the Court looked at commercial uses, it ultimately settled on just "navigability" for title determinations. See PPL at 1229. This is contrary to the assertions in several opening briefs. (See, for example, Yavapai -Apache page 18, lines 13-21; Freeport-McMoran page 23, lines 12-13; SRPMIC page 6, line 19-21; page 11, lines 8-12).

The PPL court also retained the "susceptibility" test, contrary to several briefs (See, for example, City of Phoenix, page 10, line 19-21, page 11, lines 18-22.)

2. Segmentation Is Necessary.

Segmentation is also a part of PPL. The Supreme Court recognized that many river courses vary along their length causing some segments to be navigable while others may not be navigable and when dealing with a whole river courts must look at all varying segments to determine if any might be navigable standing alone from the entire river. See *PPL*, supra at 1230. Those who say disregard segmentation are simply parroting the argument made by the Montana Supreme Court and rejected in *PPL*. The U.S. Supreme Court stated "The segment-by-segment approach to navigability for title is well settled, and it should not be disregarded" *PPL* supra at 1229. The segmentation

proposed by the Arizona State Land Department was not opposed by any party and thus should be adopted by the Commission.

The Commission's 2008 Report, Findings and Determination (hereinafter 2008 Report), did not include the segmentation analysis mandated by the Supreme Court in the *PPL* decision. Many of the briefs urge this Commission to just adopt the 2008 report; indeed, the Yavapai-Apache brief urges the Commission to take the river as a "whole" and finds segmentation to be a "convenience" for ANSAC. (Brief page i, footnote 1). SRP opens its brief by stating that no segmentation was necessary because no part of the Verde River is navigable (page i, lines 19-20). How SRP can arrive at this conclusion without doing a segmentation analysis to determine if there are any separate segments that are navigable is problematical, at best. One cannot determine a river is entirely non-navigable without first doing the segmentation analysis to determine if any reaches of the river are different thus requiring separate analysis. No one has set forth any evidence that the Verde River was uniform for its entire length or presented evidence to refute in any way the differing characteristics set forth and used by the expert for the state in its segmentation analysis (See ASLD brief Subsection C, pages 16-29).

In *PPL*, supra, at 1230, the Court held that when making a determination of navigability of an entire river for title purposes under the equal footing doctrine, the Court must consider the various appropriate segments of the river and determine whether each segment is navigable or not. The Supreme Court further stated that segments must be discrete and substantial, and evaluated based upon their

administrability. *Id.*, at 1230-31. The segments must have appropriate beginnings and endings. *See id.*, at 1230.

When determining segmentation, the PPL court stated that physical conditions (*e.g.*, terrain, flow rates, topography, and geography) provide a practical means of identifying starting and ending points for segments. *Id.* The Court reiterated, however, that the "navigability in fact" requirement set forth in *The Daniel Ball* (*i.e.*, whether navigation had occurred or the segment was susceptible of navigation in its natural and ordinary condition, if navigation had not occurred), still applied to determinations of navigability for title. *Id.*, at 1228.

3. Proponents Must Prove A Segment Is Navigable By Only A Preponderance Of The Evidence.

Consistent with federal law, Arizona Revised Statutes ("A.R.S.") § 37-1128(A) (Supp. 2014) provides the standard of proof for navigability determinations.

That section states:

After the commission completes the public hearing with respect to a watercourse, the Commission shall again review all available evidence and render its determination as to whether the particular watercourse was navigable as of February 14, 1912. If the preponderance of the evidence establishes that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was navigable. If the preponderance of the evidence fails to establish that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was nonnavigable.

Once the proponents of navigability have met their burden, the burden shifts to the opponents. The opponents of navigability then have a burden to refute the evidence of navigability that has been presented showing why a segment should be declared not

navigable¹. For example, while their briefs dismiss the evidence of navigation presented by the State and others, there was no contrary boating evidence introduced by competent witnesses. (See Yavapai-Apache brief page 24, lines 20-22 “boating not meaningfully similar”; page 27, lines 16-20; Phoenix brief, page 12, lines 13-17; SRP brief evidence “not credible” in writer’s opinion, page 22, line 8; Freeport-McMoran brief emphasizing “rubber ducky” use and ignoring wooden and other boats use both pre statehood and in modern times, see page 19).

Several briefs relied on the Burtell opinion on boating. While Burtell is qualified as an expert to testify on the geology and hydrology of the river, he was not an expert on boating and his opinion on boating on the Verde is irrelevant. (See Transcript pages 3294-3297) The earlier opinions of Shumm were reviewed and adopted by Mussetter, and those opinions are also irrelevant as none of these individuals had boated on the Verde nor applied the ordinary and natural standard correctly. (see SRPMIC brief page 14, lines 1-21; Freeport-McMoran page 6, line 11-13; SRP page 3, footnote 8; page 4, lines 1-4; page 5, lines 24-26). The Commission must remember that an expert qualified to give testimony in one area of expertise does not qualify him or her to give testimony in other areas of expertise unless shown to have the qualifications to do so. See *523 1P LLC V. CURE MD.Com*, 48 F. Supp. 3d 600, 642 (S.D. New York, 2014).

¹ One could argue that since the Court of Appeals in *Winkleman* found there was substantial evidence of navigability in the record the burden of proof was met by the proponents and it thus shifted to the opponents. Since the Superior Court ordered the Commission to reconsider its ruling on the Verde in light of the *Winkleman* holding and since the evidence is similar to that presented on the Salt the burden of proof has also been met on the Verde and it now falls to the opponents to prove non-navigability. See *Winkleman* at 242.

4. Findings On Natural and Ordinary Are Both Required.

Under applicable law, a watercourse is navigable for title purposes if watercraft in use at the time of statehood could have navigated the watercourse as it was in its natural and ordinary condition.

A river is navigable, or not, based on its natural and ordinary conditions. *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Common*, 224 Ariz. 230, 229 P.3d 242 (App. 2010); *Defenders of Wildlife*, 199 Ariz. at 423, 438, 18 P.3d at 744; *see e.g. The Montello*, 87 U.S. (20 Wall) 430, 440-443 (1874); *United States v. Utah*, 283 U.S. at 76.

The Federal test for navigability in fact only requires that the Verde River be susceptible to navigation in its natural and ordinary condition, not that navigation actually have occurred. *See The Daniel Ball*, 77 U.S. (10 Wall.) at 563. Determination of navigability to fix ownership of the riverbed is decided as of the date a state enters the Union. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377,408 (1940); *United States v. Utah*, 283 U.S. at 75.

It should be noted, this does not necessarily mean that the determination is based on the physical condition of the river, but only that the determination is made as of that date. *See United States v. Utah*, 283 U.S. at 82. In *The Montello*, the Supreme Court held that the Fox River in Wisconsin was a navigable water of the United States even though it had been significantly improved from its natural condition. 87 U.S. (20 Wall) at 443. The Court held that although early efforts to navigate the Fox River proceeded with difficulty.

[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

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. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

Id. at 441-42 (emphasis added).

The federal navigability test requires using a pre-diversion natural and ordinary flow rate. *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921). Further, *Winkelman, supra* at 241, requires separate findings on what constitutes the natural condition of the river and what constitutes the ordinary condition of the river and makes clear that the navigability determination excludes drought and flood conditions.

5. Current Recreational Boating Use Can Be Evidence of Navigability.

The Supreme Court stated in *PPL* that evidence of recreational (*i.e.*, noncommercial) boating should be considered as bearing on navigability for title purposes if it "shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood." *PPL, supra*, at 1233. Susceptibility to navigation at the time of statehood is the applicable test, not whether actual use for commercial purposes occurred. *Id.* In order to use present day use as

evidence of navigability the proponent must show that the watercraft in use are “meaningfully similar” and conditions are “not materially different.” See *PPL* at 1234

6. Floods and Droughts Are Not Used To Determine Navigability.

Extraordinary low flows, some of which may have allowed crossing on foot at some locations, and extraordinary high flows or floods are not ordinary flows (see *Winkleman, supra* at 241). The 2008 Report and several current briefs make the legal error of relying on floods as evidence of non-navigability. (See the Yavapai-Apache brief equating flooding with the ordinary flow at Page 8, lines 17-22; see also page 10, lines 4-7; page 11, lines 3-7; page 16, lines 15-21, and page 22, lines 1-3.; see also SRPMIC brief page 13, lines 24-27; page 15, lines 1-9 arguing that no significant portion of segments 3, 4 and 5 are navigable in ordinary conditions due to significant flood events.)

The Commission's determination of “ordinary” and “natural” will require looking at the information submitted by the several qualified hydrology and geomorphology experts testifying and making a determination of the “ordinary” flows in terms of cubic feet per second or “cfs.” High or low flows within that calculation would not defeat navigability. Diversions and floods do not figure in the examination of the navigability of a watercourse. *Winkleman* mandates the “ordinary” standard regarding floods and droughts which, along with the *PPL* segmentation requirements, defines navigability. Some of the opening briefs regarding the Verde fail to mention the *Winkleman* decision and therefore do not reconcile any navigability assessment with

the Winkleman requirements to determine and consider the river's ordinary and natural condition.

7. Minor Impediments Do Not Affect Navigability Determinations.

Minor impediments to navigation do not prevent a watercourse from being determined to be navigable under the equal footing doctrine. The Arizona Court of Appeals in *Defenders of Wildlife* stated that "the fact, however, that artificial obstructions exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state. 199 Ariz. at 424, 446, 18 P.3d at 735 (quoting *Economy Light*, 256 U.S. at 118).

The mere presence of occasional difficulties in navigation does not render non-navigable an otherwise navigable river. *United States v. Utah*, 283 U.S. at 76, 82. Applying this rule, *The Montello*, 87 U.S. (20 Wall) 430, 433 (1874) held that the district court had erred by holding that the Fox River was not navigable because various obstacles to navigation had to be removed before it was usable for navigation. *Id.* The Court stated:

Indeed, there are but few of our fresh water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, ... they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars. *Id.* at 443; accord *Holt State Bank*, 270 U.S. at 56.

Only one major rapid or waterfall, Verde Falls, was identified by the experts from both sides. Also identified by various experts were various pools and riffles, beaver dams, sand bars, and other smaller obstacles to navigation. The Commission should examine and cite to the portions of the record the specific impediment it analyzes and set forth the exact evidence and testimony by the experts on the effect the impediment has and if it is such an impediment that it makes a segment non-navigable (such as the various falls identified in 17 miles in the *PPL* case.) Reliance on the conclusions of any brief drafter that marshes and beaver dams were or were not impediments would be misplaced without full analysis and disclosure of the exact factual evidence that proves the existence of the impediment and its impact.

8. What Type Of Boat Is Determinative Of Navigability?

"[N]avigability does not depend on the particular mode in which such use is or may be had-whether by steamboats, sailing vessels or flatboats:" *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). Evidence of current boating is probative of the susceptibility of the Verde River's navigability at statehood. See *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989).

ANSAC needs to make its own findings regarding boating and types of boats used at statehood. Several experts testified regarding boats that were and are used on the Verde River including current use of replicas; several non-qualified experts also opined about boating. It is the Commission's job to sort it out and cite to the supporting evidence in the record when it makes its findings.

ANSAC's duty is to look at river segments in their separate ordinary and natural states as per *Winkleman*, and make the *PPL* determinations regarding the meaningful similarity of current day watercraft to those in use at statehood and deal with the post-statehood condition of the river in its current physical condition. *PPL*, supra at 1234. It is also the Commissions duty to deal with the replica issue. Does a replica of a boat used at statehood that travels the river today constitute the use of a meaningful similar watercraft? The parties cite to no case law that says you can't rely on a skilled boater for a determination of navigability; there is also no law that less skilled recreational boaters can't show navigability. ANSAC must state why it is or is not persuaded by boating evidence if it is going to hold the Verde not navigable, particularly in view of the fact that the opponents presented no expert testimony to contradict the proponents evidence regarding boating on the Verde. Not just freight hauling craft are required - canoes can establish navigability (see i.e. *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission* 644 F.2d 785, 788-89 (9th Cir. 1981)).

The durability of boats is irrelevant. The question is susceptibility and measuring the river against the old boats. There is no admissible evidence that old boats could not have navigated the segments at issue on the Verde River at statehood when it was in its' ordinary and natural condition. The *PPL* decision, Id at 1234, only requires that watercraft are "meaningfully similar", not exactly the same types of boats in use around statehood. That's all that is needed to establish navigation.

9. Existence or Use of Roads or Other Land-Based Transportation Not Determinative of Navigability.

Proving that a river was or was not navigable because people used other land-based transportation does not meet the *Defenders Of Wildlife* standards. *Defenders, supra* at 242. Several parties have relied heavily on this incorrect legal analysis in their opening briefs.

The use of non-boat transportation in proximity to a watercourse is not probative of non-navigability and violates the federal test for navigability. See *Defenders of Wildlife v Hull*, 199 Ariz. 411, 424-425, 18 P3d 722 (App. 2001). (See for example SRP brief page 4, lines 14-15; page 5, lines 4-8; Freeport-McMoran brief at page 1, lines 11-15; page 8, lines 11-13; page 9, lines 8-13; page 10, lines 3-6; page 16, lines 10-14).

Speculation by the brief writers that the farmers, citizens of Prescott and military would have used the Verde if it was navigable miss the geographic point that the Verde River is more than 20 miles from the settlement area. Would farmers and fishermen, among others, have attempted to send fresh meat and produce many miles in the summer heat? Significantly there are no citations to any records that support these suppositions by various parties. (See Freeport-McMoran brief page 13, footnote 37; SRPMIC brief page 3, line 6; page 10, lines 12-16; page 13, lines 23-24; Phoenix brief page 4, lines 14-16; page 7, lines 18 to 20; page 11, lines 2-5; SRP brief page 5, lines 16-18 and lines 24 to page 6, line 2).

There is also much speculative language that wading or foot traffic along the river by trappers or others proves non-navigability. As the record has no real evidence

of the actual trapping process on the Verde and transportation choices, this unsupported evidence should just be disregarded. (See for example Phoenix brief, page 7, lines 1-3).

10. Navigability Findings On Other Rivers Not Applicable To The Verde.

The navigability or non-navigability of other rivers is irrelevant to the determination on the Verde. The Commission must make its decision based on the record made in the Verde hearings and evidence. Several parties attempt in their opening briefs to compare the Verde to other rivers and urge the Commission to consider those findings, which are not before this Commission, as evidence of the non-navigability of the Verde.

Freeport-McMoran made numerous comparisons to other rivers (Brief page 2, lines 28 to page 3, line 16; page 13, line 23; page 17, line 7-13, page 18, line 6-17; page 20, lines 1-7; page 21, lines 13-17). SRPMIC also discussed findings on other rivers (Brief page 10, lines 20-26; page 15, lines 20-23) as did the Yavapai-Apache Brief (Brief page 17, line 12 to page 18, line 7; page 22, lines 6-8 and footnote 39). The navigability or non-navigability of other rivers is simply not relevant to the determination for the Verde. No evidence or testimony of any kind was given to link the diverse rivers in other determinations with the Verde, nor was the brief writer, or this Commission, privy to the record and deliberations in those navigability determinations on other rivers. Although comparisons with other rivers is tempting, the *U.S. Supreme Court in U.S. v. Utah*, 283 U.S. 64, 87, 51 S. Ct. 438 (1931) held that “each determination as to navigability must stand on its own facts.”

11. Federal Land Patent Evidence Is Not Determinative Of Navigability For Title Purposes.

The Commission should look to and cite the actual evidence and testimony in the 2014 and 2015 hearing records for its determination of navigability and not rely on federal land patents or the Desert Lands Act for a quick determination. The 2008 Commission report made that error and there is no case law to support such conclusions. Several briefs submitted to the Commission also make the same error.

For example, in the brief submitted by the Yavapai-Apache Fort McDowell community it incorrectly states that in-lieu land selections included the bed of navigable rivers, citing the 2008 report but no supporting statutory or case law (Yavapai-Apache Brief page 14, footnote 25). The SRPMIC brief misstates the effect of federal patents and the Desert Land Act (page 3, lines 10-12) and federal surveys (brief page 11, line 3-8, page 17, line 23 to page 18, line 7). The SRP brief also misinterprets the lack of provisions regarding rivers in the federal deeds as implying that the riverbeds were included and mistakes the effect of federal surveys (see brief page 7, lines 20-25; page 26, footnote 28.)

To the contrary, in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 648 (1970), the U.S. Supreme Court stated that "[c]onveyance of a river bed would not be implied and would not be found unless the grant 'in terms embraces the land under the water of the stream: Such disposals by the United States' during the territorial period are not lightly to be inferred, and should not regarded as intended unless the intention was definitely declared or otherwise made very plain:" (internal citations omitted).

Dr. Littlefield, who testified on this point, has not pointed to one grant which had a specific statement in it that it intended to convey title to land under the Verde River and, under the forgoing federal law, such inference will not be made. "Although the Federal Government could dispose of lands pre-statehood, if the grant was not explicit it did not include the land underlying a navigable waterway and that land was transferred to the state upon admission to the Union under the 'equal footing' doctrine." *Defenders of Wildlife*, 199 Ariz. at 41, 51, 218 P.3d at 726.

Dr. Littlefield's treatment of surveyor notes and opinions disregards controlling U.S. Supreme Court authority. *State of Oklahoma v. State of Texas*, 258 U.S. 574,585 (1922), holds that surveyors were not cloaked with the powers to settle questions of navigability and their actions in performing the survey were of little significance. All of Dr. Littlefield's statements regarding what instructions a surveyor was following are solely his assumptions not backed up by any written documentation from the surveyors themselves. For such an important fact, Dr. Littlefield's reports do not mention one instance where the surveyor wrote down what instructions he was following.

Although he has no idea about the legal significance of any deeds issued by a government, Dr. Littlefield believes that examination of patents issued by the federal government are important because if they had thought a river was navigable the patent would not of been issued. Again, Dr. Littlefield applies the wrong legal standard. The U.S. Supreme Court held long ago that a patent will not convey navigable land underneath a river unless the federal government definitely declares its intention to convey such land in the conveyancing document or otherwise makes its intention "very

plain." *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S. Ct. 197, 199 (1926); see also, *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427, 443 P.2d 421, 423 (1968) (Executive order creating tribal reservation lacked a "clear intention" to reserve beds and waters of Colorado River to the Indian tribe and no showing of "peculiar need" to reserve the lands to the tribe, therefore the State holds title to land underlying Colorado River.).

In summary, Dr. Littlefield has made the point numerous times in this testimony that he is not basing his conclusions and factual determinations on any legal standard.

Unlike Dr. Littlefield, the Commission must make its navigability determination based on the statutory and case law governing navigability for title determinations. Dr. Littlefield's failure to comply with the legal standards governing navigability determinations makes his conclusions and opinions meaningless, of no use to this Commission and not admissible in federal court. While many of observations he sets out in his testimony and reports are interesting, his failure to verify them calls them into question. At best, the Commission should follow the direction of the U.S. Supreme Court in the *Oklahoma* case, *supra*, and give his report and testimony "little significance."

Failure to follow the correct legal standard by an expert like Dr. Littlefield makes an expert's evidence and testimony inadmissible. Federal Rule of Evidence Rule 702, 28 U.S.C.A., (identical to Arizona Rule of Evidence 702 and set out in full in the County's opening brief at pages 8-9) governs the admissibility of expert opinion testimony. The Rule requires that (d) **the expert has reliably applied the principles and methods** to the facts of the case (emphasis added). The Commission members, as the trier of fact in

the hearings, serve as gatekeepers ensuring that proposed expert testimony is reliable and helpful); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (“We conclude that *Daubert's* general holding—setting forth the trial judge's general “gatekeeping” obligation—applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge.”).

12. The 2008 Commission Decision on Navigability Is Not Evidence.

On March 24, 2008 the four then serving members of the Arizona Navigable Stream Adjudication Commission issued its “Report, Findings and Determination Regarding the Navigability of the Verde River from Its Headwaters to the Confluence with The Salt River (hereinafter “the 2008 Report”). The Commission’s findings were summarized in Section IX “that the Verde River from its headwaters at Sullivan Lake to its confluence with the Salt River was not used or susceptible of use as a highway for commerce over which trade and travel was or may be conducted in the ordinary modes of travel on water as of February 14, 1912.”

Subsequently the Arizona Court of Appeals ordered the Commission to hold new hearings and consider new evidence. The Commission then decided to also review the *PPL* decision requirements regarding segmentation and to apply the clarified definition of “navigability” articulated by the Court. As a result the Commission must study the *PPL* decision and decide the navigability of the Verde River and make a new report. The 2008 Report has no value as evidence and should not be cited as evidence as it is in several briefs. The general rule in Arizona is that a reversal of a judgment restores the parties to the same position as if the action had never been tried. *Tucson Gas*

& Electric Co. v. Supreme Court In and For Pima County, 9 Ariz. App. 210, 213, 450 P.2d 722, 725 (1969); *Markel V. Transamerica Title Insurance Co.*, 103 Ariz. 353, 362, 442 P.2d. 97, 106 (1968). The 2008 Verde Report suffers from the same warts as the Salt River decision reversed by the Court of Appeals. Like the Salt, the Verde Report did not consider the ordinary and natural conditions separately nor did it consider segmentation. Further, the *Winkleman* court held that the Commission did not apply the right standard to its consideration of the evidence. *Winkleman*, supra at 242. How can one claim a fact is a fact if it is based on an incorrect legal standard that makes it inapplicable for the ultimate Commission decision?

Contrary to the briefs submitted by some parties, the 2008 Report did not make any separate findings on the “ordinary” and “natural” conditions of the Verde River, and it did not have defined segments (see Yavapai brief page 1, line 18 to page 2, line 3). As Maricopa County pointed out in its opening brief, the 2008 Report had only eight citations to the record in its 54 pages of narrative, and did not meet the standard set by the Arizona Courts for the navigability decision. Freeport-McMoran’s report also relied on the 2008 Report as evidence of the correct decision (Page 4, line 18-20; page 6, lines 1 -3. Unfortunately the Commission in 2008 did not cite to the record so it is not possible to know how they made their decision. The 2008 Commission did not do any independent study. Contrary to the statement in the SRPMIC Brief that the 2008 Report is “strongly supported” (Brief page 5, lines 10-12), the 2008 Report is almost devoid of the evidentiary citations that *Winkleman* and other cases require. Nevertheless the SRPMIC Brief relies heavily on the 2008 Report to support a conclusion of non-

navigability (Brief page 1, line 28 to page 2, line 18; page 13, lines 16-27). The SRPMIC Brief then states that despite the many days of hearing and testimony there is really is no new evidence supporting navigability, but the statement cites to no portions of the record (Page 8, lines 9-17). Salt River Project's Brief also cited the 2008 Report as evidence of non-navigability (Brief page 10, line 20 to page 11, line 2). Remembering that the Superior Court ordered the Commission to review its' Verde decision in light of the holding in *Winkleman*, the only conclusion that can be drawn is that, for purposes of this hearing and the Commissions current decision, the prior Commission decision was reversed by the Superior Court and the parties are back to the same position they were in before the Commission rendered that decision See *Tucson Gas and Electric and Markel*, supra., Superior Court Order signed and dated October 21, 2011 Cause Numbers LC2006-000413-001 DT, LC2008-000602-001 DT, LC2008-000860-001DT, LC2009-000779-001 DT.

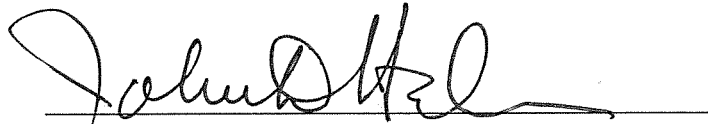
Conclusion

The County urges the Commission to read the *PPL*, *Winkleman* and other relevant cases and apply the law in its consideration of the evidence presented in the recent hearings and to the extent still relevant prior hearings. The Commission should consider the qualifications of each witness and accordingly give weight to their testimony and reports deserved by the qualifications. This means that hydrologists are not historians and their evidence and testimony on topics outside their area of expertise is not admissible and needs to be disregarded by the Commission when it makes its

determination. The 2008 Report, which was devoid of citations to the earlier record, is not evidence: this Commission is a different deliberative body and heard different evidence and testimony than its predecessor. Finally, the Commission must follow the *Winkleman* direction "to make its determination 'in writing with sufficient documentation and detail to confirm the rationale and basis for the determination'" The Commission must cite to the record when preparing its findings of fact and conclusions of law and thereby produce a more defensible document that will allow the reviewing court to determine the Commissions rationale and basis for its decision.

Respectfully Submitted this 9th day of November 2015.

Helm, Livesay & Worthington, Ltd.



John D. Helm
Sally Worthington
Jeffrey L. Hrycko
1619 E. Guadalupe, Suite One
Tempe, AZ 85283-3970
*Special Counsel for Maricopa County and
Flood Control District of Maricopa County*

Original and six copies of the foregoing
hand-delivered/emailed this 9th day of November 2015, to:

George Mehnert, Executive Director
Arizona Navigable Stream Adjudication Commission
1700 W. Washington, Room B-54
Phoenix, AZ 85007
Nav.Streams@ansac.az.gov

One copy emailed

this 9th day of November 2015, to:

Fred Breedlove
Squire Patton Boggs (US) LLP
1 East Washington St, Ste 2700
Phoenix, AZ 85004
fred.breedlove@squirepb.com
Attorneys for ANSAC

John B. Weldon, Jr.
Mark A. McGinnis
Salmon, Lewis & Weldon, Plc
2850 E. Camelback Rd., Ste 200
Phoenix, AZ 85016-4316
jbw@slwplc.com
mam@slwplc.com
*Attorneys for the Salt River Project Agricultural Improvement
And Power District and Salt River Valley Water User's Association*

Cynthia M. Chandley
L. William Staudenmaier
Snell & Wilmer
400 East Van Buren
Phoenix, AZ 85004-2022
cchandley@swlaw.com
wstaudenmaier@swlaw.com
Attorneys for Freeport-McMoRan Copper & Gold, Inc.

Sean Hood
Fennemore Craig, P.C.
2394 E. Camelback, Suite 600
Phoenix, AZ 85016-3429
shood@fclaw.com
Attorneys for Freeport-McMoRan Copper & Gold, Inc.

Laurie Hachtel
Edwin Slade
Attorney General's Office
1275 West Washington Street
Phoenix, AZ 85007-2297
laurie.hachtel@azag.gov
edwin.slade@azag.gov
Attorneys for State of Arizona

Joy E. Herr-Cardillo
Arizona Center For Law In The Public Interest
P.O. Box 41835
Tucson, AZ 85717
jherrcardillo@aclpi.org
Attorneys for Defenders of Wildlife, et al

Joe P. Sparks
The Sparks Law Firm
7503 First Street
Scottsdale, AZ 85251-4201
joesparks@sparkslawaz.com
Attorneys for San Carlos Apache Tribe, et al

Steven L. Wene
Moyes Sellers & Sims
1850 N. Central Ave., Ste 1100
Phoenix, AZ 85004
swene@lawms.com

Cynthia S. Campbell
Law Department
City Of Phoenix
200 W. Washington Street, Ste 1300
Phoenix, AZ 85003-1611
Cynthia.Campbell@phoenix.gov
Attorneys for City of Phoenix

William H. Anger
Engelman Berger, P.C.
3636 N. Central Avenue, Ste 700
Phoenix, AZ 85012
wha@engelmanberger.com
Attorneys for City of Mesa

Charles L. Cahoy
Assistant City Attorney
City of Tempe
21 E. Sixth St, Ste 201
Tempe, AZ 85280
chuck_cahoy@tempe.gov
Attorneys for City of Tempe

Michael J. Pearce
Maguire & Pearce, LLC
2999 N. 44th Street, Ste 630
Phoenix, AZ 85018-0001
mpearce@mpwaterlaw.com
*Attorneys for Chamber of Commerce
and Home Builders' Association*

Carla A Consoli
Lewis Roca Rothgerber LLP
201 E. Washington, St., Suite 1200
Phoenix, AZ 85004-2595
cconsoli@lrlaw.com
Attorneys for Cemex

James T. Braselton
Dickinson Write
1850 N. Central Ave., Ste. 1400
Phoenix, AZ 85004
jbraselton@dickinsonwright.com
Attorneys for Various Title Companies

Thomas L. Murphy
Linus Everling
Gila River Indian Community Law Office
P.O. Box 97
Sacaton, AZ 85147
thomas.murphy@gric.nsn.us
Linus.Everling@gric.nsn.us
Attorneys for Gila River Indian Community

Sandy Bahr
514 W. Roosevelt
Phoenix, AZ 85004
sandy.bahr@sierraclub.org
Sierra Club

Susan B. Montgomery
Robyn L. Interpreter
Montgomery & Interpreter, PLC
4835 E. Cactus Rd., Ste. 210
Scottsdale, AZ 85254
smontgomery@milawaz.com
rinterpreter@milawaz.com
Attorneys for Yavapai-Apache Nation

David A. Brown
Brown & Brown Law Offices
128 E. Commercial St.
P.O. Box 1890
St. Johns, AZ 85936
david@b-b-law.com

Dr. Carole Coe Klopatek
P.O. Box 17779
Fountain Hills, AZ 85269-7179
cklopatek@ftmcdowell.org
*Director of Government Relations
Fort McDowell Yavapai Nation*

Diandra Day Benally
P.O. Box 17779
Fountain Hills, AZ 85269-7779
DBenally@ftmcdowell.org
*Arizona Attorney of Record
General Counsel Fort McDowell Yavapai Nation*

Arlinda F. Locklear, Esq.
4113 Jenifer Street, NW,
Washington, D.C. 20015
alocklearesq@verizon.net
D.C. Attorney of Record Fort McDowell Yavapai Nation

Michael F. McNulty
Deputy County Attorney
Pima County Attorney's Office
32 N. Stone Ave., Suite 2100
Tucson, AZ 85701
michael.mcnulty@pcao.pima.gov

Mark Horvath
Horvath Law Office, P.C.
1505 East Los Arboles Drive
Tempe, AZ 85284
mhorvath@ftmcdowell.org
Attorney for Fort McDowell Yavapai Nation

Thane D. Somerville
Morisset, Schlosser, Jozwiak & Somerville
801 Second Avenue, Suite 1115
Seattle, WA 98104-1509
t.somerville@msaj.com
Attorneys for Salt River Pima-Maricopa Indian Community

Michael C. Shiel
Office of the General Counsel
Salt River Pima-Maricopa Indian Community
10005 East Osborn Rd.
Scottsdale, Arizona 85256
Michael.shiel@srpmic-nsn.gov

By:
