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

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

Case No. 04-009-NAV (Verde)

**YAVAPAI-APACHE NATION'S
AND
FORT McDOWELL YAVAPAI
NATION'S RESPONSIVE CLOSING
BRIEF**

15 In conformance with the Chairman's Order Amending Deadlines for Submission of
16 Briefs, dated October 23, 2015, the Yavapai-Apache Nation and the Fort-McDowell Yavapai
17 Nation (collectively, the "Nations") submit this Joint Responsive Closing Brief on the
18 determination of the navigability of the Verde River in response to the Opening Briefs filed
19 by the Arizona State Land Department ("ASLD"), Defenders of Wildlife, et al.
20 ("Defenders") and Maricopa County and the Flood Control District of Maricopa County
21 ("County") (collectively, "Proponents").¹ For the reasons explained in the Nations' Opening
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24 ¹ The following parties filed Opening Briefs in opposition to navigability: (1) Salt River Project
25 Agricultural Improvement and Power District and Salt River Valley Users' Association ("SRP"); (2),
Freeport Minerals Corporation; (3) the Salt River Pima-Maricopa Indian Community; and (4) City of
Phoenix. Given the Nations' general agreement with the positions taken by these parties, the Nations
do not address the arguments made in their briefs here.

1 Brief, which is incorporated here by reference, and as highlighted further below, the
2 Commission should once again determine that the Verde River (Segments 1-5) is non-
3 navigable. See *The Daniel Ball*, 77 U.S. (10 Wall) 557, 19 L.Ed. 999 (1870).²

4 **I. PROPONENTS' RELIANCE ON MODERN DAY RECREATIONAL**
5 **BOATING TO PROVE THE VERDE RIVER'S SUSCEPTIBILITY TO**
6 **NAVIGATION IS MISPLACED**

7 Proponents continue to rely almost exclusively on modern day recreational boating as
8 proof of the Verde River's navigability for purposes of title under *Daniel Ball*. Indeed, the
9 ASLD seemingly concedes in its Opening Brief that the Verde was **not** used for commercial
10 navigation prior to statehood admitting, in reference to current recreational boating, that
11 "[c]ommercial utilization of the Verde River is now a reality, and its use is only
12 increasing." ASLD Opening Post-Hearing Brief on the Navigability of the Verde River,
13 September 28, 2015 ("ASLD Brief") at 3 (emphasis added). Proponents' heavy reliance on
14 modern day recreational boating to establish the susceptibility of the Verde River for
15 commercial navigation is misplaced.

16 **A. Evidence of the Verde River's Susceptibility to Navigation Is of Limited**
17 **Value to the Commission Under the Facts of this Proceeding**

18 Since Proponents have been unable prove that the Verde River was **actually** used as a
19 highway for commerce, Proponents' now emphasize that the "crucial question" for the
20 Commission is not whether the Verde was historically used for navigation, but rather,
21 whether the Verde was "susceptible" to such use at the time of statehood as proven
22 (according to Proponents) by the relatively recent use of modern recreational boating on the
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25 ² Throughout this Brief, citations to the reporter's transcripts for the Commission's most recent
hearings on the Verde River are abbreviated as follows: "TR [FULL DATE]: [PAGE] (Witness)." Exhibits from the prior case hearings (2005-06) are referred to as Evidence Introduced ("EI"). Supplemental exhibits from the current case (2014-15) are referred to as "X__."

1 River. ASLD Brief at 2-4; *see also* Defenders of Wildlife Closing Memorandum Regarding
2 the Navigability of the Verde River, September 28, 2015 (“Defenders Brief”) at 16-18.

3 In support of this argument, the ASLD relies on the U.S. Supreme Court’s decision in
4 *United States v. Utah*, 283 U.S. 64, 82-83 (1931). *See* ASLD Brief at 2-3; *see also*
5 Defenders Brief at 19. A close reading of *Utah*, however, reveals a **clear distinction**
6 between the legal and historical circumstances confronted by the Court in *Utah* and those
7 faced by the Commission on the Verde River today.

8 First, while it is true that the Court in *Utah* sanctioned the use of the susceptibility test
9 for purposes of determining navigability for title, 283 U.S. at 82, the Court also made clear
10 that the “most persuasive” evidence of navigability is found in the “**actual use of streams,**
11 and especially of extensive and continued use for commercial purposes....” 283 U.S. at 82
12 (emphasis added). However, Proponents have seemingly now conceded (and certainly have
13 not proved) that the Verde River was **not** navigated for commercial purposes prior to
14 statehood in any meaningful way.

15
16 Next, it is important to understand that the Court in *Utah* applied the susceptibility
17 test to the facts in that case solely because the Court agreed with the Special Master’s finding
18 that the historical “conditions of exploration and settlement [in Utah] **explain** the infrequency
19 or limited nature of such use” of its rivers prior to statehood. *Id.* at 82 (emphasis added).³
20 Specifically, the Court found that rivers in Utah (which are located on the eastern side of the
21 State) were **not needed** for purposes of navigation prior to statehood due to, among other
22 things, a lack of population in the region and their location, which did not make them useful
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25 ³ *See also Utah*, 283 U.S. at 81 (“The Master points out that the non-settlement of eastern Utah in these years, the fact that none of the trails to western Utah or to California were usable to advantage in connection with these rivers, and many other facts, are to be considered in connection with that of non-use.”).

1 for east/west migration – the predominant path of travel at the time. *Id.* at 81-83. In light of
2 these facts, the Court concluded that the State of Utah should not be precluded from the
3 benefits of the equal footing doctrine, if, in fact, it could later be proven that the rivers were
4 historically “susceptible” to navigation prior to statehood, but the need for trade and travel on
5 the rivers awaited future demands. *Id.* at 83. The Court explained:

6 Utah, with its equality of right as a State of the Union, is not to be denied
7 title to the beds of its rivers as were navigable in fact at the time of the
8 admission of the State either **because the location of the rivers and the**
9 **circumstances of the exploration and settlement of the country through**
10 **which they flowed had made recourse to navigation a late adventure, or**
11 **because commercial utilization on a large scale awaits future demands.**

12 283 U.S. at 83 (Emphasis added).

13 The rationale applied by the Court in *Utah* is inapplicable to the Verde River. As
14 discussed in greater detail in the Nations’ Opening Brief, *see* Opening Brief, Section
15 IV(B)(1), unlike in *Utah*, there was both a population and a need for navigation along the
16 Verde River on or before statehood. Prior to statehood, settlements and military forts existed
17 up and down the Verde River, while the need for reliable and affordable transportation was
18 great. Settlers and miners needed a means to communicate, ship timber, ore, equipment and
19 supplies and to move people to and from the populated communities located in the Verde
20 Valley and downstream to Phoenix and beyond.⁴ Prescott’s location as the territorial capital
21 (from 1863 to 1867 and 1877 to 1889) presented an extra incentive to use the Verde River as
22 a means of communication and for trade and travel to and from Prescott and Phoenix, and
23 then to the outside world. *See* Burtell at ¶¶ 40-48. By the turn of the Century, Arizona was

24 ⁴ *See Declaration of Rich Burtell on the Non-Navigability of the Verde River at and Prior to*
25 *Statehood. In re Determination of Navigability of the Verde River* (Case No. 04-009-NAV) at ¶¶ 49-
53, September 2014 [X009-FMC] (“Burtell”); Arizona Department of Transportation History, Final
Report 660, December 20, 2011, at 12-14, 17 [X100_FMYN 17] (“ADOT Report”).

1 plainly poised for an economic boom, but for the lack of reliable “highways of commerce” to
2 compliment the railroads.⁵

3 Accordingly, in contrast to *Utah*, a lack of pre-statehood demand for highways of
4 commerce cannot be used to “explain the infrequency or limited nature of such use” of the
5 Verde River for navigation prior to statehood. *Utah* at 82. In truth, the Verde River has no
6 meaningful history of commercial navigation because it was **not navigable**, not because it
7 awaited “future demands” as contemplated in *Utah*. *Id.* at 83. Given the distinguishing facts
8 of *Utah*, the Commission should place a limited value on Proponent’s reliance on the
9 susceptibility test and modern day recreational boating as a primary means to prove
10 navigability for title under *Daniel Ball*.

11
12 **B. Proponents Stretch the Evidence of Recreational Boating in a Failed**
13 **Attempt to Prove that the Verde River was Historically Susceptible to**
14 **Navigation**

15 Proponents vehemently argue that evidence of modern day recreational boating is
16 proof that the Verde River was susceptible to navigation under *Daniel Ball* and applicable
17 law. *See, e.g.*, ASLD Brief at 4; Defenders Brief at 10-11. In fact, this contention is the
18 cornerstone of Proponents’ entire position. Perhaps because of this, Proponents have
19 stretched the record too far in attempt to prove that the recreational boating occurring on the
20 Verde River today can be used by the Commission as evidence of the historic susceptibility of
21 the Verde for navigation under *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1233 (2012)
22 (“*PPL Montana*”).

23 **1. The Verde River is Not a Central Driver For the Local Economy**

24 ⁵ *See Report of the Governor of Arizona to the Secretary of the Interior*, at 22, (1901) [X100_FMYN 12];
25 *Report of the Governor of Arizona to the Secretary of the Interior*, at 32, 34, (1905) [X100_FMYN
13]; *see also* Stinson and Carter, *Arizona: A Review of its Resources* (1891) [X100_FMYN 14];
Edward J. Peplow, Jr. *History of Arizona*, 1958, at 356, 360-61 [X100_FMYN-26] (“*History of*
Arizona”).

1 The ASLD perhaps exemplifies the Proponents' propensity to stretch the evidence in this
2 case. Among other things, the ASLD grossly overstates the current commercial value of
3 recreational boating on the Verde River, declaring, "**The Verde's navigability is a central
4 driver for the local economy.** Its importance as a public navigable watercourse cannot be
5 overstated." ASLD Brief at 5 (emphasis added).

6 However, there is no evidence in the record to indicate that navigating the Verde River
7 has become a "central driver" in local economy of the Verde Valley or elsewhere on the River.
8 In fact the ASLD acknowledges that the "main commercial operator on the Verde" is Mr.
9 Richard Lynch, who owns Verde River Adventures in Clarkdale, Arizona. *Id.* at 6. However,
10 Mr. Lynch testified that his operation is "seasonal", TR 12/16/14:286, and that at most, he
11 employs no more than 18 to 25 employees during the height of the season. *Id.* While it is
12 true that a handful of other small commercial operators on the Verde have existed at one time
13 or another on the Verde, *see e.g.*, TR 12/16/14:297-98, 330 (Lynch), and that there is at least
14 some revenue generated from park fees and events like the Verde River Days,⁶ this hardly
15 establishes the Verde as important "public navigable watercourse" or supports a finding that
16 the handful of commercial operators and boating events have become a "central driver" to the
17 local economy. Certainly, both the Yavapai-Apache Nation and the Fort McDowell Yavapai
18 Nation, that collectively employ hundreds of people for their commercial enterprises in
19 Segments 2 and 5, cannot agree with the ASLD's characterization.

20
21 **2. The ASLD's Reliance on *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th
22 Cir. 1989) is Misplaced**

23 Having overstated the value of modern day recreational boating on the Verde River, the
24

25 ⁶ *See* TR 12:15/2014:237 (Fuller); ASLD X035_167 198-200. It is noteworthy that the Verde River Days and other similar events are only held during the spring runoff or at other periods of high water. *Id.*

1 ASLD next suggests that the existence of this **new** form of commercial use of the River proves
2 that the Verde was **susceptible to being used**, in its ordinary and natural condition, as a highway
3 for commerce, **at the time of statehood**. ASLD Brief at 4. This simply goes too far. First, there
4 is no evidence in the record that the Verde was used for **commercial** recreation or any other
5 commercial purpose prior to statehood. Second, as discussed in Section I(A) above, ASLD's
6 suggestion that the Verde River was not needed as a means of commercial trade and travel prior
7 to statehood is simply wrong, and thus it does not follow (as suggested by ASLD) that the "future
8 demands" alluded to *Utah*, 283 U.S. at 82-83, have only now "arrived" on the Verde in the form
9 of commercial recreational boating as suggested by the ASLD. *See* Brief at 5.

10
11 Third, the Proponents' strong reliance on the case of *State of Alaska v. Ahtna, Inc.*, 891
12 F.2d 1401 (9th Cir. 1989) is misplaced. The ASLD points to *Ahtna* in support of its assertion that
13 the relatively recent (post-statehood) development of commercially based recreational boating on
14 the Verde is **proof** of the Verde River's navigability at the time of statehood. *See, e.g.*, ASLD
15 Brief at 2 (citing *Ahtna* for proposition that susceptibility as a highway of commerce can be
16 proven by current day commercial recreational use such as guiding fishing trips and sightseeing
17 trips); *Id.* at 4 (arguing that guided fishing and sightseeing trips are "conclusive evidence" of
18 susceptibility for commercial use at statehood under *Ahtna*). Yet, the facts of *Ahtna* are clearly
19 distinguishable from the Verde.

20 In *Ahtna*, the Court examined whether or not the lower Gulkana River in Alaska was
21 navigable under *Daniel Ball* at the time of statehood.⁷ Because Alaska was admitted to the
22 Union much later than its sister states (1959), there was already significant evidence of extensive
23 recreational boating on the Gulkana **prior to statehood**: "In the years immediately preceding
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25 ⁷ The Court also considered whether certain submerged lands underneath the Gulkana River were
subject to the Submerged Lands Act of 1953. *Ahtna*, 891 F.2d at 1404.

1 Alaska's admission into the Union, from the 1940's to 1959, fisherman travelled the River in
2 powered 16 to 24-foot fiberglass and aluminum watercraft. The watercraft has a load capacity of
3 approximately 1,000 lbs." *Id.* at 1401. These facts were stipulated to by the parties. *Id.* at 1405.

4 Not long after Alaska's admission to the Union, a substantial commercial recreational
5 industry developed on the lower Gulkana using powerboats similar to those just previously used
6 for recreational boating prior to statehood. *Id.* at 1405. This industry employed approximately
7 400 people. *Id.* In light of these undisputed facts, the Court determined that the relatively
8 contemporaneous post-statehood commercial use of the lower Gulkana for recreational purposes
9 – using modern day powerboats similar to those used for recreation prior to statehood – provided
10 “conclusive evidence” of the susceptibility of the Gulkana under *Daniel Ball*. *Id.*⁸

11
12 The facts on the Verde River contrast sharply to those of *Ahtna*. At the time of Arizona's
13 statehood in 1912 the concept of recreational boating at any level of significance had yet to
14 develop. Indeed, Proponents have pointed to accounts that could be considered “recreational”
15 boating attempts on the Verde prior to statehood. These limited boating accounts are few and far
16 between, unlike the record of extensive pre-statehood recreational use in *Ahtna*. Moreover, the
17 pre-statehood recreational uses on the Lower Gulkana (including the use of power boats for
18 fishing and sightseeing) had a direct nexus to the beginning of commercial uses developed post-
19 statehood. This is not the case on the Verde.

20 **3. Today's Modern Recreational Boats Are NOT Meaningfully Similar to the**
21 **Customary Watercrafts in Use at the Time of Statehood**

22 Finally, as discussed in the Nation's Opening Brief and below, unlike in *Ahtna*, the boats
23 in use today on the Verde are not meaningfully similar to those in use prior to statehood and the

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⁸ It is also significant that, unlike the Verde River proceedings, the parties in *Ahtna* stipulated that the power boats used prior to statehood were similar to those in present day use and that the River's physical characteristics had remained unchanged since statehood. 891 F.2d at 1405.

1 physical conditions of the Verde River have changed substantially over time. The U.S. Supreme
2 Court in *PPL Montana* set out a bright line test for when evidence of modern day recreational
3 boating can be considered to determine navigability for title. 132 S. Ct. at 1233. To be
4 considered at all, the Proponents must show (1) the watercraft are “meaningfully similar” to
5 those in customary at the time of statehood; and (2) that the Verde River’s post-statehood
6 condition is not “materially different” from its physical condition at statehood. *Id.* The Court
7 cautioned however, that evidence of present-day boating “may **only** be considered to the
8 extent it informs the **historical** determination whether the river segment was susceptible of
9 use for commercial navigation at the time of statehood.” *Id.* (emphasis added).

10
11 Once again, on this point, Proponents have overstated the evidence in the record in an
12 attempt to prove that the modern day boats, including the popular kayaks, “duckies” and
13 canoes in use today, are “meaningfully similar” to those in customary use for trade and travel
14 prior to statehood. *See, e.g.*, ASLD Brief at 14-16. However, the ASLD’s own witnesses
15 testified to substantial differences between the modern recreational boats in use today and
16 those in existence at the time of statehood. *See* Nations’ Opening Brief at 25-27. For
17 example, both Jon Fuller and Brad Dimock described today’s modern day boats as generally
18 being made of plastic or rubber, not wood. TR 12/15/14:227 (Fuller); TR 03/31/15 (Dimock).
19 They also admitted that plastic and rubber boats are more durable than wood boats. *Id.*; *see*
20 *also* TR 12/15/14:250 (Fuller); TR 03/31/15:2842 (Dimock). Dimock testified that “modern
21 boats . . . can land in the rocks, you can park in the rocks, you can bounce off rocks and
22 walls. And the wood boats you can’t do those things.” TR 03/31/15:2869.

23 In an attempt to inoculate itself against the testimony of its own witnesses on this
24 subject, the ASLD tries to minimize the importance of boat durability by speculating
25 (without support in the record), “where rivers are deep enough, durability become less

1 important because boats are floating in the water.”⁹ ASLD Brief at 15-16. Yet, Fuller
2 testified that durability is “one of the **most important** characteristics” of boats, TR
3 12/17/14:588 (emphasis added); *see also* TR 03/31/15:2869 (Dimock). Defenders makes a
4 similar argument, reasoning that because the Verde River can be boated in modern times in
5 its depleted form, “it follows that in its ordinary and natural condition, the river was even
6 more navigable.” Brief at 9.¹⁰

7
8 Furthermore, ASLD’s simplified assumption that more water equals safer conditions
9 (thereby eliminating the need for durable boats and increasing the boatability of the River),
10 also ignores **other hazards** to boating, many of which are actually enhanced with deeper and
11 potentially faster flows, such as boulders, rapids and waterfalls, and strainers. *See, e.g.*, TR
12 12/16/14:455 (Farmer) (noting that in deeper water, rocks can be an extra hazard, “I’ve been
13 stuck on plenty of rocks that I didn’t see...If you’re unfamiliar with the river, you should

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15 ⁹ The ASLD further concludes (again without citation to the record) that the “Verde is not a river
16 where boats must be dragged and subjected to constant shallow water that threatens the integrity of
17 boats.” Brief at 16. This statement is belied by voluminous evidence in the record to the contrary.
18 *See, e.g.*, TR 4/1/15:3155 (Burtell) (discussing shallow conditions, including riffles and related
19 obstacles); TR 12/16/14:474-75 (Farmer) (describing the need to drag your boat in shallow conditions
20 on the Verde); TR 3/31/15:2902 (Dimock) (admitting he hits rocks all the time on the Verde); TR
21 12/16/14:408 (Farmer) (discussing dragging his boat across slick rocks near Verde Falls); TR
22 3/31/15:2943 (Burtell) (Testifying that the rounded keel in certain steel-bottomed boats is “very
23 vulnerable in shallow streams” like the Verde, a “shallow, rocky type of small stream.”).

24
25 ¹⁰ Defenders’ assumptions pertaining to pre-development flow conditions are based on the work of
Hjalmar W. Hjalmarson, who utilized an alternative flow reconstruction method, which purported to
analyze the historic irrigated acreage and other information on the Verde River with the goal of
“putting the water back in the River” to quantify predevelopment flows. TR 12/18/14:1000-01, 1051-
54; TR 02/18/15:1391-93. However, Hjalmarson’s conclusions were shown to be unreliable during
his testimony before the Commission. For example, Hjalmarson repeatedly changed the upstream
amount of irrigated acreage upon which his calculations were based, *see, e.g.*, TR 12/18/14:1073,
1123-25 and admitted in his testimony that a number of his calculations were in error or could be
inaccurate. *Id.* at 1268, 1269-71, 1271. He also acknowledged that his 3.15 AFY consumptive use
figure did not take into consideration different crops or differentiate for elevation or precipitation. *Id.*
at 1286-87, 1281-82. And that his evaluation did not take into consideration the fact that some of the
upstream acreage he attributed to depletions might have actually been dryland farmed, that is,
irrigated solely from precipitation versus diversions from the Verde or its tributaries. *Id.* at 1115,
1118. All of this severely undercuts Hjalmarson’s conclusions.

1 scout everything that you can't see the bottom of."); *see also* Bob Williams. *A Floater's*
2 *Guide to the Verde River* [X035_ASLD 155] ("Floater's Guide") at 9 (From Granite Creek to
3 Forest Road: "[I]f this river is running high in the spring or if it is in flash flood, it can be
4 critically dangerous for boaters. The same lush and beautiful riverside greenery that
5 embraces you during normal flow trips will turn into the severest of strainers."); TR
6 12/16/14:474-75 (Farmer) (agreeing with Slingluff's description of the area between
7 Perkinsville and TAPCO that "in high water this whole section becomes challenging.
8 Increased water volume brings increased water velocity. The creek is narrow with lots of
9 high water strainers and limited spaces to get out and scout.").¹¹

10
11 Proponents' experts also testified that in addition to being more durable, modern day
12 boats are more maneuverable and easier and convenient to use. For example, Fuller testified,
13 "[y]ou're able to do more things with plastic that are more difficult to do with wood", TR
14 12/15/14:227, while Dimock testified that modern kayaks "turn quicker." TR 03/31/15:284.
15 Dimock also explained that historic wood boats "are narrower, and they're going to draw a bit
16 more [water]." TR 03/31/15:2843-2844. Lynch testified that duckies are "a lot more" stable
17 than a canoe and "draw less water." TR 12/16/14:293.

18 Based on the foregoing, it is clear that modern day boats are not meaningfully similar
19 to those "customary modes of trade and travel on water" available at statehood as required by
20 *PPL Montana* and that, even under increased flows, the less durable and maneuverable boats
21 available prior to statehood would have been difficult to use in any meaningful way for trade
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24 ¹¹ The hazard caused by strainers would only be exacerbated by higher flows. As Farmer explained:
25 "imagine yourself going down this highway, and you have this set of trees coming up in front of you
and you're about to hit them and you're going to wrap your boat around it. Now you're swimming or
– you're swimming if you're lucky. You might get tangled up in the tree and drowned also." TR
12/16/14:450-51. In addition, Fuller testified that as the flow in the Verde increased, so too would
the braided condition of the River. TR 12/17/2014:609.

1 and travel for purposes of commerce.

2 Finally, it should be recalled that while the Supreme Court in *PPL Montana* did not
3 entirely foreclose consideration of modern day boats as potential evidence of a river's
4 historical susceptibility to navigation at the time of statehood, it did caution, "[m]odern
5 recreational fishing boats, including inflatable rafts and lightweight canoes or kayaks, may be
6 able to navigate waters more shallow or with rockier beds than the boats customarily used for
7 trade and travel at statehood." 132 S.Ct. at 1234. This is certainly the case on the Verde.

8 In addition to the differences in the modern day boats, Proponents also ignore the
9 important role that information and technology, as well as the development of modern day
10 boating equipment, plays in today's recreational boating scene. *See* Nations' Opening Brief
11 at 25-28. These modern advancements, like the advancements in boat technology itself,
12 substantially undermine the overall value of evidence of modern day recreational boating to
13 the Commission's historical consideration of whether the Verde River was susceptible to use
14 for commercial navigation prior to statehood under the rationale outlined in *PPL Montana*,
15 132 S. Ct. at 1233.

17 **4. The Verde River's Post-Statehood Condition IS Materially Different**
18 **Today Than It Was At Statehood**

19 In addition to the fact that modern day recreational boats are not meaningfully similar
20 to those in use at the time of statehood, Proponents also ignore substantial evidence in the
21 record demonstrating that the Verde River's post-statehood condition (at least in Segments 2
22 & 5) is **materially different** today than it was prior to statehood as outlined in *PPL*
23 *Montana*. *See, e.g.*, ASLD Brief at 17 (arguing that the Verde River's "geomorphology is
24 relatively unchanged and demonstrates that a single, low-flow channel has always existed on
25

1 the River.”).¹²

2 The changes to the Verde River’s physical conditions have been significant. For
3 example beavers have been eradicated throughout much of the Verde, eliminating the
4 obstacles caused by beaver dams and the dense riparian underbrush and associated strainers
5 caused by their dams. *See* Nation’s Opening Brief at 28-29. In the Verde Valley (Segment 2),
6 construction of flood control measures, impoundments, roads and bridges and other human
7 activities have drastically modified the physical condition of the River, which has resulted in
8 an increasingly channelized and more stable river in contrast to the once wide, shallow and
9 marshy, and erratic River seen in pre-development conditions. *See* Nation’s Brief at 29.
10 Richard Lynch even testified that his company makes **physical modifications** to the River
11 that “creates a deeper channel” for boating. TR 12/16/15:331-333.

13 Finally, in Segment 5, the Verde is highly regulated by the upstream construction of
14 Horseshoe and Bartlett Dams, making this reach less erratic or subject to torrential floods,
15 among other modifications, and thus more amenable to modern recreational boating. *See*
16 Nation’s Brief at 30. The Dams have had other significant impacts to the physical features of
17 the Verde as well. *See id.*

18 These facts are not dissimilar to the facts analyzed by the Supreme Court in *PPL*
19 *Montana*, where the Supreme Court, upon reading the opinion of an expert in fluvial
20 geomorphology in the case, observed that “as a result of PPL’s dams, the river has become
21 ‘less torrential’ in high flows and less shallow in low flow periods” and thus, “may well have
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¹² The ASLD later admitted that the geomorphology of the Verde River **has** changed, but contends this has “decreased boatability” on the Verde. Brief at 24. Defenders also admits that “[h]umans began having a significant impact on the Verde River beginning in around 1860s when mining and farming began in the Verde Valley and Jerome area,” Brief at 4, and that changes to the Verde continued to occur even after statehood, including as the result of the construction of Bartlett and Horseshoe Reservoirs. *Id.*

1 be easier to navigate now than at statehood.” 132 S.Ct. at 1234. Against this backdrop, the
2 Court held that the Montana Supreme Court’s reliance upon the State’s evidence of present-
3 day, recreational use, at least without further inquiry, was wrong as a matter of law. *Id.*

4 In short, the Supreme Court’s analysis in *PPL Montana* warrants careful
5 consideration by the Commission. While all parties agree that the Verde has been impacted
6 by irrigation diversions and other uses over time, the record shows that the Verde River’s
7 post-statehood condition is materially different than before statehood and that, on balance,
8 “the river may well be easier to navigate now than at statehood.” *Id.* In which case,
9 Proponents’ suggestion that the Commission can use evidence of modern day recreational
10 boating to inform the Commission’s historic analysis of the susceptibility of the Verde River
11 to navigation under the equal-footing doctrine should be rejected.

12
13 **II. PROPONENTS HAVE FAILED IN THEIR ATTEMPT TO EXPLAIN AWAY**
14 **THE LACK OF HISTORICAL EVIDENCE OF NAVIGATION ON THE**
15 **VERDE**

16 While on the one hand Proponents insist that the historical pre-statehood accounts of
17 boating in the record “demonstrate that the River was generally successfully navigated”,
18 ASLD Brief at 17, on the other hand, Proponents appear to concede there was “limited,
19 reported actual use of the River before statehood.” *Id.* at 18. Rather than admit that the
20 Verde River was not commercially navigated prior to statehood because it just wasn’t
21 navigable (a point they most assuredly cannot concede), Proponents instead try to explain
22 away this problem in a number of ways.¹³

23
24 ¹³ Because the Nations have already addressed the limited value of Proponents’ historical boating
25 accounts in some detail in Section II(D) of their Opening Brief, the Nations will not reiterate this
discussion here. Suffice it to say that Proponents have vastly overstated the strength of these accounts,
many of which were already considered by the Commission as part of its previous determination that
the Verde River was not navigable at statehood under *Daniel Ball* and A.R.S. § 37-1101(5). *See also*

1 First, the ASLD takes great latitude in summarizing the testimony of Apache Elder,
2 Mr. Vincent Randall, suggesting, among other things, that the Yavapai and the Apache did
3 not use the Verde River because its north-south direction was not useful to them for trading
4 with neighboring tribes or as a means of traveling between their “homes,” and because the
5 River’s meandering nature simply made it faster to walk or run along the River as opposed to
6 using a boat. *See* ASLD Brief at 18. The ASLD misstates Mr. Randall’s testimony and the
7 evidence in the record.

8 First, while Mr. Randall testified that one of the reasons the Apache may not have
9 boated the Verde River was because it was faster to travel overland, TR 02/20/15:1795,
10 1852-53, he also discussed a myriad of other reasons why the Apache did not use boats on
11 the Verde, including the obstacles created by the dense riparian growth along the River, *id.* at
12 1790, the fact that it was shallow above Beasley Flat, but treacherous below, *id.* at 1841, and
13 the existence of rapids and shallow points where you would have to “drag your boat.” *Id.* at
14 1853.¹⁴

15
16 In fact, had the Verde River been a realistic means of trade and travel, both the Yavapai
17 and the Apache would have had many reasons to use it. The Verde River runs through the
18 heart of the Yavapai and Apache ancestral homeland, which ranges across present day
19 Arizona for more than 2,400 square miles. *See* Randall at ¶ 15 & Exhibit A; *see also*
20 Harrison and Williams, *Oral History of the Yavapai*, (2012) at Map 6, 36-40 [X100_FMYN
21 31). The Yavapai and *Dilzhé’e* Apache were a hunting and gathering culture (the word
22 *Dilzhé’e* is from “to go hunting”) TR 2/20/15:1821 (Randall). Mr. Randall also testified that
23

24 Report, Findings and Determination Regarding the Navigability of the Verde River from Its
Headwaters to the Confluence of the Salt River, March 24, 2008, at 36-37 (“2008 Decision”).

25 ¹⁴ Mr. Randall also made clear that the Apache did not avoid boating the Verde for any cultural or
religious reasons, noting it was more a matter of practicality and the difficult conditions on the river.
TR 02/20/15:1852-53.

1 the Apache used to trade and visit throughout the entire region, travelling as far east as *Tú*
2 *cho náh nliini* (“the real big waters”), meaning the Mississippi River. TR 2/20/15:1851-52
3 (Randall). They also traveled widely throughout the region to raid other Indian tribes, *see*
4 TR 2/20/15:1793 (Randall), including the *Sai kiné* (referring to the Pimas), who were located
5 down the River. TR 2/20/15:1852 (Randall). Yet, the Apache did not use the River to raid
6 the Pimas. *Id.* Instead, the Yavapai and Apache travelled using an extensive network of trails
7 across the state, including several which ran in a north-south direction, generally parallel to
8 the Verde River. TR 2/20/15:1784-85, 1790 (Randall); *see also* ADOT Report at 7.

9
10 The ASLD also makes much of Mr. Randall’s suggestion that he might take a flyer on
11 trying to boat down the Verde River from Camp Verde, but would not want to boat up it. *See*
12 Brief at 18. Yet, this testimony does not, by itself, support Proponents’ argument in favor of
13 navigability, especially in light of the totality of Mr. Randall’s testimony and that of the Yavapai
14 Elders who filed Declarations testifying there has been no mention in their family histories,
15 whether written or oral, that the Yavapai ever boated the Verde River or used it as a means of
16 transportation for goods or people. *See* Elder Declarations 2014 [X100_FMYN 5].

17 Proponents next argue that the threat of attack by hostile Yavapai or Apache Indians
18 explained the lack of evidence in the record of actual use of the Verde River for trade and
19 travel prior to statehood. For example, the ASLD argues that because of the threat of hostile
20 attack by Indians, “[t]ransportation along the Verde was not a safe option, and alternative
21 transportation methods were developed accordingly.” ASLD at 19. However, the record
22 shows that Indians frequently attacked travelers on roads just as they would have attacked
23 them on the Verde River. Indeed, Mr. Randall testified, “[i]t would have been unsafe
24 anywhere, because we were ready to protect our land...If you know your gorilla (sic) tactics
25 like we did, we’ll get you anytime.” TR 2/20/15:1826-27; *see also* TR 3/30/15:2633-34

1 (Burtell) (“[T]here certainly is a strong record of Native Americans attacking wagons that
2 were on these roads. So to paint the picture that, well, if you’re on a road, it’s so much safer
3 is ludicrous. The historic record just doesn’t support that.”); *see also* Jim Schreier, *Born a*
4 *Cavalryman* [X011_AS LD 50] (“Cavalryman”) at 148-154 (discussing the need to defend
5 roads, and that “hostile Indians render traveling unsafe to small parties”).¹⁵

6 Nevertheless, the danger of Indian attacks did not deter people from using the roads
7 any more than it would have deterred people from using the Verde. This was true even
8 though the roads were difficult and costly to build and maintain. *See, e.g.*, TR 3/30/15:2632-
9 33 (Burtell) (“These early roads were very difficult to build. They were very expensive....”);
10 *see also* Burtell at ¶¶ 47-48 (discussing Crook’s request for funds to build new roads and
11 improve Stoneman’s Road).¹⁶ In *History of Arizona*, the author explains travel in Arizona
12 this way: “[i]t was travel [...] accompanied by extreme physical hardships plus the ever-
13 present danger of Indian attack. Yet, in the inexorable advance of civilization, roads grew
14 where travelers wanted them, and later travelers went where the roads led.”¹⁷

15
16 Even if Proponents were correct in their suggestion that Indian hostilities prevented
17 the use of the Verde River (which they are not), their rationale does not explain why the
18 Verde was not **later** used as a highway after 1880, when the vast majority of Yavapai and

19
20 ¹⁵ Hostile Indians did not present the only threat of attack on Arizona’s early roads. *See, e.g.*, TR
21 3/30/15:2634 (Burtell) (“[I]t’s not just Native Americans. There were bandits back then that liked to
go after stagecoaches... Europeans [...] would attack these wagons and stagecoaches.”).

22 ¹⁶ *See also* ADOT Report at 22 (from 1879 and 1885, Arizona’s counties spent close to \$60,000 in
23 bonds to fund road projects, “a sum almost as great as that spent by the Territory on road building
24 during that period.”); TR 4/2/15:3424 (Burtell) (due to time and expense, “[y]ou’re not going to build
a road unless you really need it.”); Bridges at 12, 14 (noting that between 1877 and 1881 the Arizona
Territory issued bonds totaling only \$70,000 to fund road construction, and yet, by 1900, “it became
apparent that many major road and bridge projects were beyond the capacity of the individual
counties.”).

25 ¹⁷ *History of Arizona* at 360.

1 Apache Indians were subdued or imprisoned on the San Carlos Apache Reservation. *See*
2 Randall, at ¶¶ 16-18 (describing the military’s force march of the Yavapai and Apache to San
3 Carlos). In fact, after the end of Indian hostilities, there was an even **greater** need for
4 “highways of commerce”, as the region became safe for settlement, mining, agriculture and
5 other economic endeavors.¹⁸ Yet, the Verde River was not used for navigation, even then.

6 While Proponents try to explain this problem away by suggesting that there was no
7 need to navigate the Verde River after the end of Indian hostilities because “a number of
8 alternatives to boating the River had developed for travelers and those engaged in
9 commerce”, ASLD Brief at 19, this contention is not supported by the record. To the
10 contrary, well after the conclusion of Indian hostilities, the numerous territorial and later
11 county officials struggled to fund and develop roads throughout the region. *See, e.g.* ADOT
12 Report at 21 (“The early officials of Arizona Territory were in a difficult position when it
13 came to building roads...the financial resources available to the Territory were limited.
14 Arizona was sparsely populated and there was little taxable economic activity.”); Arizona
15 Historic Bridge Inventory (“Bridges”) [X100_FMYN 19] at 10 (“After its formation in 1863,
16 the Arizona Territorial Assembly immediately recognized the need for transportation routes
17 to connect the widely scattered settlements and foster economic growth. Money for road
18 construction was scarce, however.”).¹⁹ This challenge continued well after the railroads
19 arrived and was not fully resolved until the development of the interstate highway system.
20 ADOT Report, at (pdf) p. 6.

21
22 Accordingly, given the effort and cost expended on building and maintaining roads,
23

24 ¹⁸ *See, e.g.*, TR 4/1/15:3082-83 (Burtell) (“hostilities continued in Arizona, but at least in the Verde
25 Valley, as one tracks the increase in irrigated lands, obviously the area became safe enough for
agricultural activities to continue to increase from 1864 through the 1880s and 1890s.”).

¹⁹ *See also* footnote 14, *supra*.

1 had the Verde offered an additional means of transportation for commercial purposes, there is
2 no doubt it would have been used, regardless of Indian hostilities or later, the existence of
3 other means of travel. In an attempt to avoid this logical conclusion, the ASLD further
4 speculates that depletions to the Verde River resulting from “early diversions” were another
5 reason why the Verde “wasn’t the transportation of choice for early settlers.” Brief at 19.
6 This argument also misses the mark.

7 First, Burtell noted that irrigation by Anglo settlers along and near the Verde River
8 increased from approximately 200 acres in 1864 to nearly 4,000 acres by 1883 (or 80 c.f.s.),
9 but concluded that such increased diversions were **unlikely** to “have substantially changed
10 the depth of the stream and impacted its susceptibility to navigation” prior to statehood.
11 Burtell at ¶ 29. Burtell also testified that widespread groundwater pumping did not begin in
12 Arizona until well after statehood. TR04/02/15:3437-38. Thus, it is unlikely that these early
13 depletions would have presented such an obstacle to navigation prior to statehood as to force
14 transportation-needy settlers, miners and other entrepreneurs to turn exclusively to the use of
15 roads for trade and travel for purposes of commerce – especially when the difficulties using
16 roads and the costs of building and maintaining roads was extreme.

18 The ASLD’s argument in this regard also cuts against its own position in this case.
19 After all, if Proponents are correct and modern day recreational boats **are meaningfully**
20 **similar** to boats in use prior to statehood and the physical condition of the river **has not**
21 **changed** in such a way as to make boating easier today than it was in its ordinary and natural
22 condition, then, given the evidence of present day recreation boating on the Verde introduced
23 by Proponents, there is simply no reason why the Verde River would **not** have been the pre-
24 statehood “transportation method of choice for early settlers”, regardless of its depleted
25 conditions. *See* ASLD Brief at 19.

1 This sort of “have it both ways” approach to Proponents’ arguments only proves the
2 fallacy of their position. It isn’t that complicated. If the Verde River had been navigable in
3 its ordinary and natural condition prior to statehood, it would have been navigated. It wasn’t
4 because it was not navigable in fact.²⁰

5 **III. THE TEST FOR NAVIGABILITY IS NOT WHETHER JON FULLER OR**
6 **DON FARMER CAN BOAT THE VERDE TODAY**

7 Throughout these proceedings it has been difficult to discern with any precision what
8 Proponents’ standard is for determining whether the Verde River was susceptible to
9 navigation at the time of statehood under *Daniel Ball* and A.R.S. § 37-1101(5). Boiled down,
10 their test seems to hinge on a single standard – the fact that Don Farmer, Jon Fuller, and
11 similarly experienced recreational enthusiasts can boat the River in a modern day kayak or
12 canoe. This, they argue, is “compelling evidence” of the River’s historical susceptibility to
13 navigation for trade and travel for purposes of commerce under the applicable test. *See, e.g.,*
14 *ASLD Brief at 10-12; see also Defenders’ Brief at 9-10.* For example, the ASLD argues,
15 “Mr. Farmer’s experience and expertise in boating the Verde in all flow rates, throughout the
16 year, for decades provides ANSAC with an invaluable factual basis for understanding the
17 River, as opposed to the theoretical ideas proffered by Opponents.” *Id.* at 10 (emphasis in
18 original).

20
21 ²⁰ Proponents make several other excuses in an attempt to explain why the Verde River was not
22 navigated after the end of Indian hostilities, including that the Verde was difficult to navigate
23 upstream and the fact that it was not amenable to carrying major tonnage. *See ASLD Brief at 19.*
24 Even assuming these excuses hold any water (which they do not), these difficulties would seem to
25 validate the Nation’s position, not the other way around. In addition, difficult upstream navigation
and limitations on tonnage were also experienced on the Colorado River, and yet, entrepreneurs and
adventurers overcame these difficulties, albeit with great effort. *See, e.g., E. Lingenfelter, Steamboats
on the Colorado River, 1852-1916 [X054_FMC 48]; TR 02/19/15:1551-52 (Littlefield).* The same
cannot be said about the Verde River. Finally, these difficulties pale in comparison to the difficulties
experienced in funding, building, maintaining and using roads, which was the only alternative in
Arizona until the arrival of the railroads.

1 Proponents' test is flawed for several reasons. As an initial matter, it is undisputed
2 that Don Farmer, Jon Fuller, Brad Dimock and Richard Lynch are all highly experienced and
3 skilled boaters who have decades of collective experience boating in Arizona, including on
4 the Verde River. TR 12/16/14:499-500 (Farmer); TR 12/15/14:13-14, 65 (Fuller); TR
5 12/16/14:288, 315 (Lynch); TR 3/31/15:2818-19 (Dimock). However, their opinions on the
6 navigability of the Verde River come from a **modern day recreational perspective** and not
7 the perspective of an early settler, miner, military official or entrepreneur who, upon being
8 confronted with Verde River prior to statehood, would have to make a judgment call as to
9 whether the Verde presented a reliable and safe means for trade and travel for purposes of
10 commerce. Such a potential boater may or may not have boating experience and he would
11 certainly not have the benefit of developed put ins, rubber duckies or Mr. Lynch's chainsaws
12 and rock removal efforts. He would not have the benefit of modern day boats and
13 technology or access to the information, guidebooks or blogs that are available to Mr. Farmer
14 and Mr. Fuller today.

16 Instead, the historical boater would likely know very little about the Verde's
17 geomorphology, hydrology or attendant hazards, other than what could be gleaned from his
18 immediate observations of the River or from fellow settlers or travelers.²¹ Unlike a modern
19 day recreational boater, the historical boater would also not have the luxury of boating the
20 Verde when it was the most convenient or when river conditions were optimal for his
21 commercial purpose. Brad Dimock explained the contrast in mindset between modern day
22 and historic boaters this way:

23 "Modern boaters think everything is going to be just fine, and they've got a
24

25 ²¹ Even the Apache and Yavapai, who knew the most about the Verde River and its conditions, hazards and flows prior to statehood, did not use the Verde River. This, of course, was because they knew enough to know the Verde was not navigable.

1 map and their buddies have all done it, and they think they're going to be
2 able to drink beer all day and get to the end of the trip and be fine. **Historic**
3 **boaters had no such preconceptions. They didn't know what was going**
4 **to happen.**" TR at 03/31/15:2846 (emphasis added).

5 In the end, the lack of historic evidence of the use of the Verde River for commercial
6 purposes proves that when confronted with the opportunity to use the River, settlers, miners,
7 military officials and other entrepreneurs did not believe that the Verde was susceptible to
8 navigation for purposes of commerce, and because of this, they didn't use it. While Mr.
9 Farmer and Mr. Fuller have a different opinion about the navigability of the Verde River as it
10 exists today, their perspective is that of modern day recreational boater and thus, to say that
11 their opinions are "compelling evidence" of the Verde's navigability, drastically overstates
12 the weight their testimony should be given in this proceeding.

13 Along a similar line of reasoning, Proponents contend that canoes would have been
14 the boat of choice for commercial navigation on the Verde River prior to statehood. *See,*
15 *e.g.,* ASLD Brief at 10. In support of this contention, the ASLD relies heavily on Don
16 Farmer's testimony, in which he endorsed canoes as a "craft that's **very suited** for travel up
17 or down the Verde River." *Id.* at 10 (emphasis added). The ASLD makes much of Farmer's
18 testimony in which he stated he "never has trouble on the river." *Id.* at 10-11 (emphasis
19 added). From this statement, ASLD sweepingly argues, "Given the context of Mr. Farmer's
20 experience, with countless trips in canoes, with various loads, in different sections, and in
21 non-natural conditions of reduced flow and depth, **the fact that Mr. Farmer has never had**
22 **trouble is compelling.**" Brief at 11 (emphasis added). However, Farmer testified that he
23 had, in fact, encountered quite a bit of trouble on the Verde River. Farmer admitted he had
24 "wrecked" his canoe "completely" on the Verde at least once, TR 12/16/14:446, had been
25 "stuck on plenty of rocks", *id.* at 455, and had swamped his canoe "many times." *Id.* at 548.
This is hardly "compelling" evidence of the Verde River's susceptibility to navigation under

1 *Daniel Ball.*

2 In addition to the foregoing, canoes are very technical and difficult to use. Even
3 Farmer, who testified about his experience and allegiance to canoes during the Gila
4 proceeding admitted, “[t]hey are by far the most complex craft to navigate....” *See* Gila
5 Transcript, TR at 6/18/14:548 (Farmer) [X054_FMC 45]. Lynch similarly testified, “canoes
6 are very, very technical”, TR 12/16/14:333, and that “you’ve got to have great skill. This is
7 not a boat for just anybody to go out on the water.” *Id.* at 324.²² Dimock also acknowledged
8 the difficulties of using canoes, explaining, “[c]anoes have more wrecks than anything.” TR
9 3/31/15:2849. He also warned that “almost any canoe” would be inappropriate for running
10 the Verde Falls. TR 3/31/15:2882. Finally, in addition to being difficult to operate, unlike
11 the more durable modern canoes, traditional wooden canoes would have been more
12 susceptible to damage from boulders and rocks, strainers and beaver dams and from being
13 dragged during portages around falls and other obstacles. *See* Section I(B), *supra*. Farmer
14 testified as much, noting that he has seen the damaged hulls of canoes on the Verde River
15 “from time to time”, *id.* at 568, and has heard stories of damaged canoes as well. *Id.* at 589.

17 Despite the fact that Proponents’ boating witnesses are all highly experienced boaters,
18 the ASLD also argues that a person does not have to be an experienced boater to successfully
19 navigate the Verde River. Brief at 11. However, Farmer testified that at certain points on the
20 Verde an inexperienced boater “would be just fine” if they were “intelligent enough” to “seek
21 the help of an experienced boater and tag along with them. . . .” TR 12/16/14:445. This is
22

23
24 ²² Lynch also testified about the problems encountered with canoes in low flow conditions,
25 explaining, “I can see and I can hear them when they're coming down. When they're coming down the
river at lower flows, you can hear them, you know, going over the rocks. You can see them hitting
things and talking about, oh, yeah, we had to get out and drag here, we had to get out here. . . .”
TR 12/16/14:314-15.

1 consistent with the conclusion of the U.S. Forest Service, which warned in the *U.S. Forest*
2 *Service Recreation Opportunity Guide for the Verde River*, 1997, at 2 [EI 12], that the Verde
3 “very definitely is not a river meant for beginners or novices.” Lynch also testified that the
4 main reason he uses duckies for his customers on the Verde is because of their inexperience
5 and the duckies’ ease of use. TR 12/16/14:306-07 (Lynch).

6 In short, while modern day canoes may be appropriate for use on the Verde River
7 today for a casual recreational outing or well planned overnight trip, the record demonstrates
8 that canoes are highly technical and difficult to use and would have been subject to damage,
9 making them unlikely to be “very suitable” for commercial use on the Verde River for
10 purposes of commerce prior to statehood as suggested by Proponents.

11 **IV. THE COUNTY’S ATTEMPT TO SHIFT THE BURDEN OF PROOF FROM** 12 **PROONENTS TO THE COMMISSION SHOULD BE REJECTED**

13 The County focuses the bulk of its brief not on whether the record before the
14 Commission establishes that the Verde River was navigable or susceptible to navigation prior
15 to statehood as required by the equal footing doctrine, but rather, on various legal standards
16 that it suggests the Commission must meet in this case.

17 In doing so, the County seeks to shift the burden of proof from the Proponents (who
18 must prove their case by a preponderance of evidence) to the Commission itself. Indeed, the
19 County essentially contends (in various forms) that **it is the Commission’s** burden to prove
20 to a future reviewing court that the Verde River was or was not navigable, lest its decision be
21 reversed. *See, e.g.*, Maricopa County and The Flood Control District of Maricopa County’s
22 Post-Hearing Opening Brief Regarding Navigability of Verde River, September 28, 2015
23 (“County Brief”) at 2 (urging that the Commission must “support” and its decision on
24 navigability and “explain why, in their view, the law and facts constitute substantial evidence
25 supporting its decision. . .”); *see also id.* (pointing out that the Commission must make its

1 determination in writing with “sufficient documentation. . . .”); *id.* at 3 (Commission must set
2 forth natural condition of the river, “identifying the facts it relies on to support its decision”
3 and must “give sufficient reference to the record to allow a court to determine if the evidence
4 the Commission is relying on is sufficient to confirm the rationale and basis for the
5 conclusion drawn from it.”); *id.* at 6 (“decision on navigability must be supported by
6 substantial, reliable and probative evidence.”).

7 The County ultimately concludes in its Brief at 5:

8 What all this means in terms of the Commission’s deliberations and decision
9 is that it must now address its finding of fact with evidentiary specificity in
10 its written decision. If the **Commission makes an inference** from the
11 evidence that it wants the Court to sustain, but the inference is not obvious
12 from the fact relied on, then the **Commission must explain why the**
13 **evidence is relevant**. If the Commission **wants to use a condition of the**
14 **river** in its upper segment that makes that segment non-navigable to
15 establish that the river in other segments is not navigable **it must**
16 **demonstrate by relevant evidence** that the condition existing in the upper
17 segment or its impact is also present in the lower segments it wishes to
18 declare non-navigable. If there is no evidence regarding the lower segment
19 that shows the condition or its impacts exists there, then it cannot be a basis
20 for a non-navigable finding for the lower segment. . . .**Without the**
21 **connection the non-navigable inference will fail and a Commission**
22 **decision made without it will be reversed**. [Emphasis added].

23 While there is no doubt the Commission is required to render a decision that is
24 defensible and sufficient under controlling legal precedent, the County’s arguments (stated
25 over and over) would erroneously shift the burden of proof to the Commission to prove or
disprove navigability, while completely ignoring the Proponents’ actual burden of proof to
demonstrate by a preponderance of the evidence that the Verde River was navigable or
susceptible to commercial navigation prior to statehood within the meaning of A.R.S. § 37-
1128(A) and applicable law. The County’s approach should be rejected.

Finally, the County makes a handful of other legal arguments relating to certain
evidentiary standards the County contends are applicable to the Commission’s

1 determinations, including under Rule 402 and Rule 702 of the Federal Rules of Evidence and
2 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and other related cases. *See*
3 County Brief at 4-11.

4 The Commission's consideration of evidence is governed both by Arizona Statutes
5 and Arizona Administrative Code, R12-17-101, *et seq.*, as well as applicable case law, such
6 as *PPL Montana*. The County's arguments offer little to the Commission that the
7 Commission cannot already determine on its own with reference to applicable controlling
8 principles of law. The Nations therefore decline to brief these issues further here.

9 **V. CONCLUSION**

10 In 2006, the Commission unanimously determined that the Verde River was not
11 navigable or susceptible to navigation in its ordinary and natural condition upon Arizona's
12 admission to the Union on February 14, 1912. In the Commission's written decision on the
13 matter, it found:

14 All transportation in the area in the early days was by means of wagon,
15 horse an carriage, and later by train and automobile, but there is no evidence
16 of any significant use of the Verde River for transportation as a highway for
17 commerce or that it was susceptible to such use.²³

18 The Proponents have now had the benefit of 16 additional days of hearings and the
19 opportunity to submit thousands of additional pages of evidence and yet, they still have not
20 been able to prove that the Verde River was navigable within the meaning of the *Daniel Ball*
21 and A.R.S. § 37-1101(5). The Commission was right in 2008, and it should once again
22 conclude the Verde River was not navigable at the time of statehood under the applicable
23 test.

24
25

²³ *See* 2008 Decision at 27-28.

1 RESPECTFULLY SUBMITTED this 9th day of November, 2015.

2
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4
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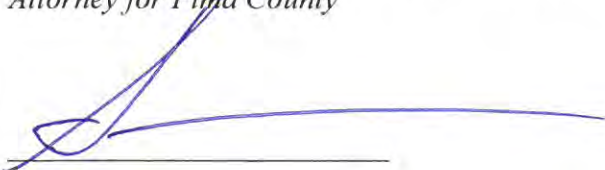
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