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Attorney for Defenders of Wildlife, Donald

Steuter, Jerry Van Gasse, and Jim Vaaler

BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

No.: 04-009-NAV

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

COMBINED RESPONSE JOINTLY SUBMITTED
BY THE ARIZONA STATE LAND
DEPARTMENT AND THE ARIZONA CENTER
FOR LAW IN THE PUBLIC INTEREST TO THE
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW SUBMITTED BY THE
SALT RIVER PROJECT, FREEPORT MINERALS
CORPORATION, THE YAVAPAI-APACHE
NATION AND THE FORT McDOWELL
YAVAPAI NATION REGARDING THE VERDE
RIVER

The State of Arizona, on behalf of the Arizona State Land Department (“ASLD,” “Department,” or the “State”), and the Arizona Center for Law in the Public Interest, on behalf of Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (“ACLPI” and “Defenders”), jointly submits this Combined Response to the Proposed Findings of Fact (“FOF”) and Conclusions of Law (“COL”) separately submitted by the Salt River Project (“SRP”), Freeport Minerals Corporation (“Freeport”), and Yavapai-Apache Nation and Fort McDowell Yavapai Nation (“YAN”). This combined Response is within the page limitation for two navigability Proponents’ Responses to three separate navigability Opponents’ Findings of Fact and Conclusions of Law. (See Commission Order, December 23, 2014.)

RESPONSE TO SALT RIVER PROJECT’S FINDINGS OF FACT

7. Admit, but incomplete. Mr. Fuller testified as an expert in geomorphology and hydrology. He is a registered professional engineer in six states, a registered professional hydrologist, a registered geologist, and the founder of the firm J.E. Fuller Hydrology and Geomorphology, Inc. X017-103 (Resume); X035-160, at 8-10.
8. Admit, but incomplete. Mr. Fuller also submitted and presented a comprehensive boating presentation, Boating in Arizona PPT. X017-107 (PPT), X035-160, at 1-95 (Transcript).
10. Admit, but incomplete. Brad Dimock is also the author of multiple books on boating in Arizona. Tr. 3/31/14, at 2822, 2888.
15. Incomplete. Mr. Hjalmarson also produced a Power Point presentation summarizing his report, dated 12/8/2014, X036-1, and an additional document entitled “Additional GLO maps for upper Verde River and settler impact on base Q” dated 3/31/2015, X075.
27. Deny. Mr. Burtell is a registered geologist not an engineer. X009, Attachment A.
35. Deny. Mr. Fuller used Mr. Williams’ book for river mile designation, not for a determination of the segmentation. Tr. 12/15/14, at 48-49.
37. Admit. However, Mr. Fuller added that there has been “some ranching in the area and some damage the cattle have done, as well as a few other structures that are built in the River, but they’re relatively minor and limited to an extent. Tr. 12/15/14, at 49 (Fuller).
38. Admit. However, Mr. Fuller added that “it is the beginning of the boating part of the reach of the Verde downstream Granite Creek.” Tr. 12/15/14, at 49 (Fuller).
41. Admit. (Citation should be to Tr. 12/15/14, at 53-54).
43. Admit this is what this record reflects. (Citation should be to Tr. 12/15/14, at 55.)
44. Admit this is what this record reflects. However, Mr. Fuller also stated that he has canoed in Segment 0-B and that it “wasn’t particularly difficult.” Tr. 12/15/14, at 58.
45. Admit this is what this record reflects, although Mr. Fuller had only minor difficulty navigating this reach. See Tr. 12/16/14, at 276-77.

46. Admit this is what this record reflects. Mr. Fuller also stated: "I did not find it that way." Tr. 12/15/14, at 59.
50. Admit this is what this record reflects. (Citation should be to Tr. 12/15/14, at 217-18.)
59. Admit this is what this record reflects. However, Mr. Fuller and his party took this trip on a week day - a Friday - and during their trip they saw a canoe tied to a tree on the side; the canoe had a flat stern for attaching a motor. Tr. 12/15/14, at 77-79 (Fuller).
61. Admit this is what this record reflects. (Citation should be to Tr. 12/16/14, at 421.)
65. Mr. Farmer testified concerning one spot in Segment 1: Bear Siding or US Mines, not, as the statement implies, all of Segment 1. Tr. 12/16/14, at 472-3. He stated: when I boated it at base flow, which was 26 cfs, I would find myself having to get out of the boat, one foot out of the boat, and kick it over a rock about once a mile." This is not the ordinary and natural condition.
67. Admit this is what this record reflects. (Citation should be to p. 80 and not 79).
75. In the referenced pages (Tr. 12/15/14, at 113-15) Mr. Fuller mentions "compound channel" only once as he describes the video - "you can see that compound channel here" (p. 113). He also testified that the defined low-flow channel is where people boat (p. 114, lines 1-4), and that the main channel is quite obvious (p. 114, line 14).
76. The referenced statement in the report is: "Archaeological evidence indicates that the Verde River has provided accessible, permanent water to the Verde Valley area since the region was first inhabited." i.e., SRP omits the word "permanent."
77. The ASLD 2003 Report does not mention "proximity to the river," and it is unclear what that means.
79. Deny that the citation supports the contention. Page 3-1 of the 2003 ASLD Report talks about recorded history starting with the Spanish and also mentions the various tribes that "used the Verde River Valley," but it does not mention Native-Americans not navigating the River. ASLD 2003 Report, 3-1 (Exhibit 031).
- 80-88. Admit this is what this record reflects.
92. Mr. Randall then went on to state one could have floated boats in the Camp Verde area:
- [I]f I was thinking about moving goods and so forth and taking a look at the river itself and I was above Camp Verde and I wanted to move things south, maybe it would be feasible...because all I would have to do was float down.
- Tr. 2/20/15, at 1818.
- Mr. Randall also provided sensible reasons why the Yavapai and Apache did not use boats, including, among other things, that the main trade was done with the Hopi who were away from the Verde. Id. at 1792-94. See also, 1776, 1781, 1789-90, 1795.
93. Admit this is what this record reflects (at paragraph 34 of Randall Affidavit).
94. Admit this is what this record reflects (at paragraph 35 of Randall Affidavit). See Response to 92.

95. Admit this is what this record reflects (at paragraph 36 of Randall Affidavit).
96. Deny. Mr. Fuller responded in the affirmative to a question that was limited to reservations in the 1870s: “Q. How about Indian Reservations in the 1870s; you don’t have any evidence of boat use associated with those, right? A. I do not.” Tr. 12/17/14, at 657 (Fuller).
97. Deny.
98. Admit that in the 1500s Spanish explorers are known to have traveled in central Arizona in search of Indian mines, but their exact destination and routes are not known. Fuller 2003, at 3-8 (EI 31].
99. Admit that no evidence was presented that these Spanish explorers used boats on the Verde. However, the citation to Fuller 2003, 3-8, contains no discussion of boats - their presence or absence - on the Verde.
100. Deny. Dr. Littlefield did not search for the word “boat” and as a consequence did not include many boating accounts in his report or testimony.
101. Deny. *See* response to 100.
102. Historian Jack August acknowledged that horses were the best way for the Spanish to travel through Arizona, as well as the trappers who came from New Mexico, because of the overland travel that was necessary for exploration and getting furs to market, respectively. Tr. 2/25/15, at 2436, 2453-54, 2458-59, 2463-64 (August).
103. Deny that “multiple” Spanish explorers traveled through the Verde area in the context of the question, which addressed only Antonio Espejo and Marcos Farfan. Admit that neither of those explorers navigated on the Verde. Tr. 02/24/15, at 2336 (August).
104. Admit that Dr. August testified that the Spanish were expert boatsmen, but he confined his answer to seafaring navigation. Tr. 02/24/15, at 2337-38.
106. Admit this is what this record reflects. However, Father Kino “really did not approach” the River; he and Juan Mateo Manje saw the River from atop the Estrella Mountains many miles away. Tr. 2/25/15, at 2355-57 (August).
113. Deny.
117. Admit this is what this record reflects. However, Mr. Fuller also stated that “some of the later trappers who were living in the area did use boats to go down the river, all the way down to the Salt, after there was some development of population centers.” Tr. 12/15/14, at 120. Horses were essential for the early trappers who needed to bring their furs overland to the market in New Mexico. *See* response to 102.
118. Admit this is what this record reflects (Tr. 02/25/15, at 2373).
119. Deny. *See* response to 117.
120. Deny. Dr. August discussed territorial mapmakers, not settlers.
123. Deny.

125. There is no mention of records of boat travel by nineteenth century military parties in Fuller's 2003 Report.
126. Deny. Fort Whipple was over 30 miles from the Verde and Camp Reno was also over 30 miles from the Verde. X009, Figure 4.
133. Admit this is what the record reflects (at Tr. 3/30/15, at 2629). Mr. Bartell did not address anywhere in his report that the Forts were fighting the Indians along the Verde which made it unsafe for travel.
135. Deny.
137. Admit this is what this record reflects. However, the early settlers also made other comments, such as "It becomes a fine river eighty feet in width about 50 miles northeast of Prescott," and Martha Summerhayes, the wife of an officer at Fort McDowell, wrote of swimming the River near the Fort in 1877. Fuller 2003, 3-13 (Exhibit 031).
138. Admit this is what this record reflects, except that these pages do not discuss evidence of transportation of goods or people on the River.
145. Deny.
147. Deny. No surveyor ever indicated the Verde was non-navigable. Tr. 2/19/15, at 1575.
150. Deny. The United States Supreme Court has stated that the action of surveying officers in meandering a river had "little significance . . . [because] those officers were not clothed with power to settle questions of navigability." *Oklahoma v. Texas*, 258 U.S. 574, 585 (1922).
156. Deny.
158. Federal and State land patents are not determinative of navigability. In *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 648 (1970), the Supreme Court specifically stated that "such disposals by the United States 'during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.'"
166. Deny.
167. Deny that Dr. Littlefield addressed the issue of the River's susceptibility to navigation in his 2005 Report at the cited page.
- 169-70. Deny.
173. Deny. The Hayden attempt was stopped because of fear of logs destroying Arizona dam downstream, not because of character of the Verde. Tr. 12/15/14, at 160-161 (Fuller).
174. Deny. Mr. Fuller testified that in 1878 troops at Fort Verde used a ferry primarily during high flow. Tr. 12/15/14, at 153; X035-167, PP 127.
178. Deny that Mr. Fuller's testimony at the cited pages supports the statement.
179. Admit this is what this record reflects. However, Mr. Fuller testified that it was "not probable" that the boat got there any other way. Tr. 12/18/14, at 896.

181. Deny. Soldier died when gun went off as he was carrying boat around man-made Mesa Dam.
185. Deny. Mr. Fuller testified that he believed there was one other account after statehood “where they came down trapping.” Fogal and Gireaux trapped on the River in 1931. Tr. 12/17/14, at 656; 696-97.
186. Deny. Mr. Fuller testified (at Tr. 12/17/14, at 697) that the Day brothers’ trip was “the only written account we have.”
- 188-90. Deny. Opponent witnesses Burtell and August have no trapping experience and cited no trapping or boating evidence for their claims, and therefore have no idea that commercial trapping is not a simple trip from point A to point B but rather it entails rechecking trap lines and trapping tributaries. Tr. 2/25/15, at 2473, 2510-14 (August); Tr. 4/2/15, at 3307 (Burtell); X017-94, at 6-7.
193. Deny. *See* response to 189.
199. Admit this is what this record reflects, except that Mr. Fuller testified that the party left from Camp Verde, not Jerome. And some turned around due to low flow, presumably because irrigation was diverted in June. Tr. 12/15/14, at 163.
207. Admit this is what this record reflects. However, Mr. Fuller also testified that Mr. Byrkit said that someone used floating logs to build a lodge someplace in Segment 3; Mr. Munson and another historian thought that mountain men may have used canoes on the River; and Ms. Tome, talked of Fort Verde soldiers using a fishing boat. Tr. 12/15/14, at 172.
208. Deny.
209. Deny. *See* response to 100 and 147.
212. Deny. Not what record reflects.
229. Deny. Dr. Littlefield is not a hydrologist and has no expertise determining what constituted undependable and unpredictable streams and how to assess how a river’s flood to compare rivers and streams and have dryer periods.
231. *See* response to 229. Dr. Littlefield’s comments display a lack of understanding of how USGS gages are used, including how wading measurements are periodically made to calibrate and confirm mechanical measurements.
248. Deny.
255. Admit. However, the Verde is a perennial stream feeding springs, and perennial springs feed tributaries. 031, 7-3.
260. Incomplete. Verde may be dangerous to boat during the flash flood, not generally because flash floods exist. Tr. 12/16/14, at 296.
262. Deny – out of context. “Up in the Clarkdale and the middle Verde stretch, there’s just more water up there because there’s less water users. There’s less diversion dams in those particular stretches.” Tr. 12/16/14, at 312. Mr. Lynch was speaking about the non-natural river.

263. Deny – out of context. Mr. Lynch was speaking about the area affected by diversion dams. Tr. 12/16/14, at 312-313.
264. Deny – out of context. Mr. Lynch was speaking about the area affected by diversion dams. Tr. 12/16/14, at 312-313.
265. Deny – out of Context. Mr. Lynch was speaking about the area affected by diversion dams. Tr. 12/16/14, at 312-313.
266. Deny – out of context. Mr. Fuller, a professional engineer and hydrologist, explained that hydrology has statistical probability but there are no guarantees or absolutes and thus he could not “guarantee” a particular flow on a particular day. Tr. 12/17/14, at 624 (subsequent page not included in SRP citation).
267. Deny in part. – First sentence has no citation to anything in the record.
- 270-71. Admit. Gage data reflect non-natural conditions.
- 273-79. Admit. Gage data reflect non-natural conditions.
280. Deny – incorrect. SRP cited wrong version of its own expert’s report with incorrect numbers, but it isn’t clear that correct version was actually submitted by SRP. Transcript reflects Dr. Mussetter believes natural flow for Segments 3 and 4 would have been “350 about 50 percent of the time, less than 350 cfs, and less than 420 75 percent of the time.” Tr. 2/23/15, at 2055-56 (Mussetter).
- 285-89. Admit. Gage data reflect non-natural conditions.
294. Deny – incomplete. Entire listing of Gage data record dates used is found in 031, 7-8. Most data is from mid-1900s to late 1991.
300. Deny – incorrect and incomplete. 100 cfs difference was for entire watershed cultivation, not just upper watershed. Tr. 12/18/14, at 997-98. Mr. Hjalmarson also used Method 1, which was an accounting of the diversions based on GLO surveys and other information. Tr. 12/18/14, at 983-87.
302. Deny – incomplete. Mr. Hjalmarson did three separate methods for estimating natural streamflow as independent checks. X015, at 40.
306. Deny – incomplete. Mr. Hjalmarson submitted a Corrigendum that addressed a book keeping error he came across when reviewing his work on his own initiative. X059, at 2-5. A digit was added by mistake and that caused a higher number of historical irrigated acres to be listed. He corrected the mistake and fully disclosed the changes. That did not substantively change his natural flow or depth reconstructions and did not affect his assessment of navigability. *Id.* at 5. The number of historically irrigated acres in the Verde headwaters was 7025 acres. *Id.* at 2.
307. Deny – incomplete. Mr. Hjalmarson submitted additional information detailing how his estimates were conservative. X075. In addition, SRP submitted X061, which is their estimate for what the diverted water would have been. This estimate (23 cfs) is much closer to Mr. Hjalmarson (30 cfs), X061, than Mr. Burtell’s estimate (4 cfs), X009, Table 6 (Del Rio and Granite Creek contribution to Estimated Reduction in Flow near Clarkdale).

308. See response to 306.
310. Deny – incorrect. Mr. Hjalmarson indicated that “anything’s possible, yeah” but that what Opponent counsel Mr. McGuinness was suggesting Mr. Hjalmarson do was impossible to do and historical figures had said the same. Tr. 2/18/15, at 1270.
311. See response to 306.
313. Deny – incorrect. Mr. Hjalmarson found old canals from tributaries to the Verde in the upper watershed. E.g., Tr. 12/19/14, at 1199.
319. Deny – incomplete. Mr. Hjalmarson used a number that had consumptive use both for areas that used more water and areas that used less water. Tr. 2/18/15, at 1284-86 (Hjalmarson).
320. Deny, See response to 319.
324. Deny – incorrect and incomplete. Mr. Hjalmarson did not agree with that statement. 2/18/14, at 1301-03. See also response to 307.
325. Deny – incomplete and out of context. Tr. 2/18/15, at 1396-98.
326. Deny – incorrect. See response to 307. Mr. Hjalmarson estimated that the natural median flow at the Clarkdale gage was 116 cfs. X015, at 41. Mr. Burtell estimated that the natural median flow at the Clarkdale gage was 93 cfs. X009, Table 5.
327. Deny – incomplete. Mr. Hjalmarson considered dryland farming and determined that it was not a profitable enterprise to dryland farm and that it wasn’t occurring much, but where it did occur he excluded it from his total of historically irrigated acreage. Tr. 2/18/14, at 1273-74, 1415; Tr. 12/19/14, at 1115. Commissioner Allen in fact pointed out that a reference by Opponents to dryland farming was not in the Verde Valley. Tr. 12/19/14, at 1121-22.
329. Deny – out of context. Tr. 12/19/14, at 1115. Tr. 2/18/15, at 1273-74.
330. Deny – incomplete. See response to 327.
331. Deny – incomplete. Mr. Hjalmarson said he did take cienegas and dryland farming into account and did not agree his figure was wrong. Tr. 2/18/15, at 1274. See also response to 310.
332. Deny – conclusory. Even today that area is not dryland farmed; it is watered by wells. Tr. 2/18/15, at 1275.
333. Deny. Fort Whipple was in Prescott, not the Upper Verde Watershed.
334. Deny. Article cited was talking about entire Yavapai County, which included many higher elevation areas that are different than the Upper Verde watershed.
337. Deny – incorrect. The railroad crosses in Seligman, substantially higher than the Verde Valley. Tr. 12/19/14, at 1122.
338. Deny.

341. Admit. However, Dr. Schumm's testimony contradicts his associate, Dr. Mussetter's later testimony, who testified that only in Segment 5 does the River have any braided character. Tr. 2/23/15, at 1926. Dr. Mussetter also stated that the Verde in Segment 5 looks more like channel type 4 in Dr. Schumm's diagram, Tr. 2/23/15, at 1993, not like channel type 5, as Dr. Schumm wrote in his report, EI 30, at 2. Then Dr. Mussetter seems to contradict his own testimony when he states the Verde never has extreme braiding, he has no idea how much of the river is actually braided in Segment 5, and he can't even confirm that the word "braiding" is actually the appropriate word to use for what he sees because simply saying the River has some split channels may be accurate. Tr. 2/23/15, at 1997-99. Finally, both Dr. Mussetter and Dr. Schumm testified that even a braided river can be navigated if the water is deep enough. Tr. 2/23/15, at 2030.

342-43. Admit that is what he said.

345. Deny – incorrect and out of context. Dr. Pearthree on the same page actually said: "The low-flow channel morphologies and patterns actually don't vary as much and that makes sense. The pattern of a single channel or a couple channels, the width of those channels doesn't vary that much, even if they reestablish after flood. They don't vary that much through time." Tr. 1/18/06, at 27.

348. Deny – unsupported conclusion and factually incorrect. The river did support and continues to support significant boating on all parts of the Verde River.

360. Deny – out of context. Mr. Fuller actually said on the same page "You will get nearly identical channel conditions overall. You know, there will be some shifting here and there, but as a whole, looking at a segment, I would expect the same kind of low flow channels return after a flood." Tr. 12/17/14, at 614-15.

361. Deny – incorrect quote. Mr. Hjalmarson actually said on the same page, "In many areas there's basically a bedrock confinement. It wouldn't happen very much in there. It wouldn't be moving much in there." Tr. 2/18/15, at 1333.

362. Deny – out of context. Quote is from Dr. Pearthree, not Hjalmarson, and continues on to say: "The size and general form of low-flow channels in Verde Valley, however, was about the same in the 1870's as it is today."

364. Deny – out of context. Quote continues on to say: "This how meandering rivers behave....Meanders grow and move naturally..." X015, Appendix L, at 7.

368. Deny – unsupported conclusion. See response to 341.

369. Deny – out of context. Actually quote was "But I am looking at that going, well, again, mostly single channel. It looks like there was a smaller braid that took off in this area right there. You can't see that very well. So if that's what braided means, sobeit; but there's a main channel and I know where I'd put my boat." Tr. 12/15/14, at 148-49.

372. Deny – out of context. This quote is not referring to the natural condition of the River because dams prevent flood flows from washing out the corridor. Entire quote is: "There's a bit of braiding. I didn't see

anything extensive. It was just normal. It looked like the Verde River. It is influenced by the dams above it. Generally, lower flows allow the willow trees to grow a little bit more tangled, and they don't have the high flood flows, generally, to clean it out in the wintertime. So, yeah, it was a little bit braided in some areas, and the brush was a little bit thicker." Tr. 12/16/14, at 414 (Farmer).

373. Deny – out of context. *See* response to 372.

374. Deny – out of context. Mr. Farmer was referring to flood channels, not the low flow channel where boating occurs. "[I]f you know the river and you stay in the low flow channel, where most of the water goes year-round, you don't have any obstructions." Tr. 12/16/14, at 450.

375. Deny – out of context. Mr. Fuller goes on to say, "Just to be clear, I'm not calling Segment 5 braided. I'm saying there are parts of it that a reasonable person could call braided." Tr. 12/17/14, at 605.

376-77. Deny – out of context. *See* response to 375.

380. Deny – out of context. Mr. Fuller was talking about flood conditions. He goes on to say that in natural conditions, when river was not in flood stage but had more water than it does in the non-natural condition today, it would not be more braided, with "a high degree of scientific probability." Tr. 12/17/14, at 612-13.

382. Deny – out of context. Mr. Hjalmarson actually says he doesn't consider those photos he was shown braided. "Not what I would call braiding. Some of the questions you've asked me about braiding, you're using the term incorrectly." Tr. 2/18/15, at 1362-63. "You could - - it might be a good term to define a very localized area, but it does not mean it's a braided river." *Id.* at 1363.

383. Admit. Note Dr. Mussetter's use of the term "flood channel" not the boating or low-flow channel.

384-85. Deny – incorrect. *See* response to 341.

390. Deny – inconsistent with previous testimony. *See* response to 341.

392. Admit. However, referring to non-natural condition below dam.

393. Admit. However, full quote is: "There's some that you could loosely call sandbars in Segment 5; but, again, most navigable rivers have bars of some kind." Tr. 12/15/14, at 190.

394. Deny.

400. Deny – conclusory. Mr. Fuller believes the marshes were in the floodplain and that there was a clear river channel. Tr. 12/15/14, at 134-36.

402. Admit. Note the fact that the marshes are adjacent to the river.

403. Deny. Malaria was present at confluence of Beaver Creek and Verde (Segment 2), not Segment 5. Regarding Segment 5, the War Report of 1870 actually said "The river is thus well confined, and its bottom lands free from marshes." X035-90, Tr. 12/15/14, at 130.

407. Deny – incomplete. Mr. Lynch was talking about non-natural conditions when irrigation diversions remove much of the Verde's water. Tr. 12/16/14, at 290, 299-300, 313-315, 376.

408. Deny – incomplete. Mr. Lynch testified that he did that to provide a better and safer experience for his recreational customers, but a commercial boat loaded with goods could go down the River without those improvements. Tr. 12/16/14, at 309-310.
- 409-11. Deny – incomplete. See response to 407-8.
415. Admit. However, Mr. Williams includes all riffles and rapids, no matter their class. Mr. Williams states: “Generally speaking, the Verde is a mild Class I/II river.” X035-155, at v.
416. Deny – conclusory.
417. Deny.
418. Admit. However, Mr. Fuller then states: “Of the 60, 55 are Class II’s. Class II rapids are straightforward, wide, clear channels in the novice level ability. So most of the rapids, 99.8 percent of the river’s length, are Class II or less; and 97.4 percent of it is not rapids at all. It’s pools or Class I’s.” Tr. 12/15/14, at 64.
420. Deny – conclusory. Mr. Fuller doesn’t believe that Verde Falls is really a waterfall and in any case it is the only such feature on the entire river. Tr. 12/15/14, at 41-42, 190. People run it; Mr. Fuller has chosen to drag his canoe around it 30 feet and get back into his boat. Tr. 12/15/14, at 97-98.
421. Deny – conclusory.
422. Deny – incorrect. Mr. Fuller notes that there are four Class III’s and one Class IV. Tr. 12/15/14, at 64-65.
423. Deny – incorrect. It’s 4-6 feet tall and washes out at high flows. Tr. 4/3/15, at 3514 (Fuller)
424. Admit this is what he said. However, Dr. Mussetter has never been to this point on the ground and has never boated it. Tr. 2/23/15, at 2045 (Mussetter). This exact area has been boated many times. 12/16/14, at 431 (Farmer).
425. Deny. It was navigated historically and is boated extensively today.
426. Admit in part; deny – conclusory in other parts. See response to 424.
427. Deny – incorrect. Mr. Fuller’s seat broke before Punk Rock so he was sitting on the bottom of his canoe unplanned by the time he got to Punk Rock. Tr. 12/15/14, at 95-96.
428. Deny. Dr. Mussetter has never been to this point on the ground and has never boated it. Tr. 2/23/15, at 2045 (Mussetter).
429. Deny. Mr. Fuller notes that there are four Class III’s and one Class IV on the entire river. Tr. 12/15/14, at 64-65.
431. Deny. Thousands of people boat this reach. Tr. 12/15/14, at 92.
432. Admit. Commercial operators have operated below Beasley Flat. X035-167, at 210; Tr. 1/18/06, at 55-56.
433. Deny – incorrect. Mr. Lynch actually said he would not take his ducky out below Beasley Flats on high flow days, meaning large snow melt or flood. Tr. 12/16/14, at 334.
434. Admit. Mr. Fuller went on to say, “It’s a relatively small river, plenty wide for boats, small boats, very pretty canyon, good vegetation, nice places to camp.” Tr. 12/15/14, at 70

439. Deny. Mr. Fuller has listed three class III rapids and one class IV. Tr. 12/15/14, at 93-94.
- 440-41. Admit.
442. Admit. Mr. Farmer also testified that the drag around is 10 minutes. 12/16/14, at 391-92.
446. Admit. Mr. Farmer also testified that it would have taken two hours for him to do it by himself. Tr. 12/16/14, at 437-38.
447. Admit. He also testified that it took 10 minutes. Tr. 12/16/14, at 391-92.
448. Admit. Mr. Farmer was talking about his canoe fully loaded with 700 lbs. See response to 446.
452. Admit. Note the reference to “high water”.
453. Admit. Mr. Farmer then stated “It’s like you would be stupid to go in it. It’s easily avoided.” Tr. 12/16/14, at 459.
459. Deny – conclusory. Mr. Burtell has never talked to any Verde boaters or commercial boating operators. Tr. 4/1/15, at 3032 (Burtell).
463. Deny – incomplete. Beaver dams are not blocking the main channel of the Verde. As Mr. Slingluff wrote in his book, Verde River Recreation Guide, “The largest beaver dam on the Verde is located at the point where the ditch that waters the Perkinsville Ranch starts. It is, to my knowledge, also the last dam on the Verde. Downstream of here, the river is often tightly gripped by canyons and it picks up considerable drainage. The floods that regularly result from this combination would simply wipe out all the dams. The beavers adjust by building their dams in the banks. They do exist on the Verde main stem below here. Beavers just don’t build dams on the main stem. They do build dens on some of the tributaries of the Verde in the Verde Valley.”
467. Admit. However, Mr. Lynch actually testified: In the upper Verde I’ve seen ponds where they’ve – they block things up. I wouldn’t necessarily call them a dam, but, you know, they’re out there trying to retain water in the deep pools where they live. They live in the banks, yeah, the beavers in this part of the world. So they’re trying to keep their pools full, and so they’ll go down and they’ll – but they’ll never dam it up. It just is helping the water not flow through the reeds so quickly.” Tr. 12/16/14, at 295.
- “Again, they’re not dams. They’re – but, yeah, beavers are doing stuff all the time.” Tr. 12/16/14, at 295.
469. Deny - incomplete. Mr. Farmer on one occasion had to “stop the boat at the top of the dam, step out of boat, push the boat over the top, and reenter the boat and continue on.” Tr. 12/16/14, at 399-400.
472. Deny – conclusory and unsupported.
473. Deny – conclusory. See response to 463.
475. Admit quoted language is part of general safety guidelines included in Verde River Blue Trail Guide.
478. Admit this is what this record reflects, however, the condition is due to the influence of the dams.
480. Deny – out of context. Tr. 12/16/14, at 309-310 (Lynch).
481. Admit this is what this record reflects. (citation should be to Tr. 12/16/14, 404 Farmer).

483. Deny – out of context. Mr. Farmer was testifying as to strainers in the braided channel of the Verde River, not the low flow channel or boating channel.

486. Deny.

487. Deny. Mr. Slingluff, a white water canoeist, testified that “the entire Verde is boatable because the entire Verde is being boated.” Tr. 1/18/06, at 117. Moreover, the pictures Mr. Slingluff provided showed children (his godchildren and nephews) boating the River. Tr. 1/18/06, at 106-109. He concluded that most people who have had a bad time on the Verde were not prepared, so that it is not a water or river issue, but a wilderness issue. Tr. 1/18/06, at 113. He testified that there are no Class IV rapids, and only one or two Class IIIs. Tr. 1/18/06, at 110. Lastly, he testified that canoes have not “fundamentally changed in design from Native American days to today.” Tr. 1/18/06, at 121.

488. Deny. Mr. Slingluff testified that there was “quick water or something like a rapid.” Tr. 1/18/06, at 125. Again, Mr. Slingluff testified that “[m]ost of the folk who have a bad time on the Verde aren't prepared and their problem then becomes not that they hurt themselves in the river, the problem is that they have lost their boat or broken their boat or lost their paddles or something, they're out in middle of nowhere. So it's not fundamentally a water or river issue, it's the fact that it's in the wilderness issue.” Tr. 1/18/06, at 113.

489. Deny. Mr. Slingluff testified that “Verde doesn't have a death count” compared to other rivers. Tr. 1/18/06, at 113. The two times he encountered difficulties on the Verde involved a flow of over 6,000 cfs, and the other involved a strainer. Tr. 1/18/06, at 112-113.

490. Deny. Mr. Lynch did not say he is the only commission operator. Mr. Colby's multi-day trips for up to six passengers include everything that a person might conceivably need for a camping expedition over several days, which includes all the kitchen facilities, a toilet system, a metal pan to contain all fire ash, sleeping gear, extra clothing, and standard rescue gear and repair equipment – “essentially everything that people need to live for several days in the wilderness has to be carried on boats.” Tr. 1/18/06, at 58. Moreover, the majority of Mr. Colby's business was single day trips. Tr. 1/18/06, at 57-58.

491. Admit this is what the record reflects. Mr. Byrkit acknowledged that “it may be navigable perhaps in a shallow-bottomed boat going downstream.” EI 31, 4-2.

497. Admit this is what the record reflects. Mr. Fuller went on to testify that “clearly, for hauling small amounts of goods, hauling passengers, use of flatboats by the military, ferries, fishing, trapping, and hunting and travel, those are all things that could and did happen in small boats on the Verde River as of the time of statehood.” Tr. 12/15/14, at 180.

498. Deny. Mr. Lynch actually testified that he has seen 18-foot rafts on the Verde. Tr. 12/16/14 at 317.

499. Deny. Mr. Lynch testified that he sees the large, 18-foot rafts during the during spring runoff and monsoon season. Tr. 12/16/14, at 317-318.

500. Deny. Mr. Farmer refused to testify to a brand. He testified that certain types of boats---pool toys and inadequate craft for a river such as a fragile canoe built for lakes are not intended to be used on the River. Tr. 12/16/14, at 438-439.

501. Admit this is what the record reflects. Mr. Dimock was comparing historic boaters to modern boaters. Tr. 3/31/15, at 2846-2847.

504. Deny. Mr. Dimock testified that if he made a hypothetical boat that was loaded at maximum capacity that would affect its maneuverability and quick-turning ability. Tr. 3/31/15, at 2915.

507. Admit this is what the record reflects. Mr. Slingluff in the next sentence states “[s]ince most canoes are about a yard wide, the theoretical minimum is a stream of water 5 inches deep and four feet wide.” Slingluff, E.I. 35, “Stream Canoeing In Arizona,” Arizona Hunter and Angler, April 1991, 22.

511. Admit this is what the record reflects. Citation should be Tr. 12/16/14, at 388.

513. Deny. Misquoted.

515. Admit this is the testimony from Mr. Dimock; deny that he was specifically testifying as to wooden dories and modern rubber rafts. Further, citation should be Tr. 3/31/15, at 2842.

516. Deny. Misquoted.

521. Admit this is what the record reflects, but misquoted.

524. Admit this is what the record reflects. Mr. Lynch’s testimony actually was that he would rather be in an inflatable ducky rather than a canoe bouncing on rocks. Tr. 12/16/14, at 314.

527. Admit this is what the record reflects. However, Mr. Farmer testified that the shape and function of canoes has not changed. Tr. 12/16/14, at 388.

528. Admit this is what the record reflects. Mr. Dimock testimony was in response to an Arizona Highways article in which he was referring to how most boatmen on the Colorado train on rubber rafts and do not use a wooden boat. He explained that “commercially, we’re running very heavy loads with large, litigious people, and you don’t really want to take chances.” Tr. 3/31/15, at 2869.

529. Admit this is what this record reflects. Mr. Dimock was testifying as to the invention of plastic kayaks which made kayaking more popular. Tr. 3/31/15, 2888.

531. Mr. Dimock went on to say regarding the short portage around Verde Falls, “I don’t remember it being much of a project at all. I think you just get out on the right bank and walk around the main drop and get back in.” Tr. 3/31/15, at 2883.

533. Mr. Dimock actually stated. “You might want to just lower it by ropes, just drop the Falls with a couple of ropes.” Tr. 3/31/15, at 2883.

538-39. Deny.

541. Admit this is what the record reflects. However, Mr. Fuller testified that death or serious injury must be related to boating, and the boat is not repairable. Tr. 12/15/14, at 173.

542. Deny.
544. Admit this is what the record reflects. However, Mr. Farmer's testimony was in response to the River rising 6,000 cfs in one day.
546. Deny -- misquoted and out of context. Mr. Farmer was testifying to the River at lower levels.
548. Mr. Farmer went on to say, "I empty it. With a baler or I tip it over." Tr. 12/16/14, at 468.
550. Admit this is what the record reflects. Mr. Farmer testified that he had not heard of emergencies in this Segment.
552. Mr. Fuller went on to say, "But, you know, in none of the trips that I've been involved with, none of my friends, people that I talk to about the Verde have talked about wrecking any canoes or irreparably damaging them." Tr. 12/17/14, at 590.
554. Deny -- out of context. Mr. Farmer never stated the Verde is an extreme low flow river in its natural condition.
556. Deny -- out of context. Mr. Farmer was not saying in any way that the Verde has depths of two inches in its natural condition or that the average depth of the Verde is from two to six inches. Tr. 12/17/14, at 548-49.
557. Deny. Mr. Fuller's testimony on analyzing rapids included Don Farmer's testimony, and Mr. Fuller's own boating experience. Tr. 12/15/14, at 65.
559. Deny. Forest Service Guide does not address navigability-for-title. In any case, the Guide only addresses Segments 3 and 4.
- a. Admit this is what the record reflects under the "Safe Boating Considerations" section of the Guide.
 - b. Admit this is what the record reflects. Emphasis is not in the original.
 - g. Admit this is what the record reflects, although misquoted.
561. Admit this is what the record reflects. Citation should be Tr. 12/15/14, 231-232.
563. Admit this is what the record reflects. Mr. Lynch's testimony addressed that when he was first learning about the Verde, Mr. Slingluff's guide was the only guide available, unlike now where there is a lot of information available on the River. Tr. 12/16/14, 337. Mr. Lynch also testified that he didn't use a boating guide when he first came to the Verde Valley. He just boated the river. "But primarily physically doing it, you know, going out and boating all these different spots." Tr. 12/16/14, at 336.
565. Deny. The Slingluff Guide does not address navigability-for-title.
- b. Mr. Slingluff was referring to deaths in general.
 - n. Admit this is what the record reflects. However, the Mr. Slingluff writes in the next sentence, "I've boated it at 2000 cfs (Camp Verde) and the trip has taken four hours." Also, 97 cfs is not the natural condition of the River.
 - q. Deny. Misquoted.

- s. Admit this is what the record reflects, however it is misquoted.
569. Deny. *See* response to 35.
570. Admit this is what the record reflects as to Mr. Fuller's testimony as to Segment 0-B, including Bob Williams' boating guide on this particular Segment.
571. Deny. The Williams Guide does not address navigability-for-title.
- 572-78. Deny.
581. Admit this is what the record reflects as to Mr. Burtell's testimony on the development of large capacity, electric pumping.
582. Admit that Bartlett Dam and Horseshoe Dam were constructed on the Verde after statehood. E.I. 31, 3-1. However, significant irrigation diversions occurred on the Verde before statehood. E.I. 31, 7-22 – 7-23 (Table 7-16).
583. Deny.

RESPONSE TO FREEPORT MINERALS CORPORATION'S FINDINGS OF FACT

11. Deny proposed finding that Mr. Burtell's testimony is credible and persuasive.
13. Admit that Mr. Fuller has been involved in preparing reports regarding the navigability of rivers throughout Arizona and that Mr. Fuller testified on behalf of the State Land Department regarding the Verde River in 2005 and 2006.
15. Admit. Mr. Fuller's Power Point regarding the Verde is EIN X035. *see also*, Fuller Power Point re Boating, EIN X017.
16. Admit that Mr. Fuller's 2003 Verde Report is quoted accurately.
18. Admit that the Commission's 2008 Report is quoted accurately. As discussed *infra* it would be error for this Commission to adopt the prior report as navigability opponents have urged.
20. Deny. Although Freeport attempts to make much of the fact that there has been no evidence presented to the Commission on the use of boats by Native Americans, their conclusion from that fact - that therefore the Verde must not have been suitable for boats - is faulty logic. There are other reasons that boats may not have been used by the Indians and their predecessors - either Indians did use boats but the physical evidence did not survive (Fuller Boating Power point) or there were cultural prohibitions against the use of boats (*see* XOI6-9, p. 25-6 (Utah Special Master) ("It seems likely that use must have been made of the rivers by these Indians, though no trace of boats or canoes used by them has been found. The present day Indians, the Navajos and the Utes, probably owing to old superstitions and legends, have not navigated these rivers in boats and do not now navigate them except to cross at fords").
21. Admit that Mr. Fuller's 2003 Verde Report is quoted accurately.
22. Admit that Mr. Fuller's 2003 Verde Report is quoted accurately.

23. Admit that Mr. Burtell included information regarding historic accounts of boating on the Verde in Table 1 to his Declaration.
24. Admit that ferries were used on the Verde River. Deny the inference that the use of ferries is somehow evidence to support a finding of non-navigability. *See, e.g. Hardy v. State Land Board*, 274 Ore. App. 262 (2015)(“ [W]e need not address the parties' arguments with respect to evidence of post-statehood ferry use, except to note that *such usage would not, in any event, defeat a finding of navigability* based on the other evidence.”)(emphasis added).
25. Admit that some of the historical accounts of boating on the Verde involved recreational excursions but deny the implication that recreational use is not evidence of navigability and/or is not commerce. As discussed *infra* there is no requirement that the use of a river be for commercial purposes. Even purely recreational use is evidence of a river's *susceptibility* for commercial use.
26. Admit that three of the reported seventeen trips were, arguably, unsuccessful. *See* State's FOF 280. Likewise, there are some historical account that suggest, but do not confirm, whether a boat trip took place. However, there are numerous accounts in the historical record of boat trips that did occur prior to statehood. *See* State's FOF 399-401; 458-469; 500-503; 520-522; 553-559 and Defenders' FOF 24-33.
27. Admit this is an accurate transcription of Mr. Fuller's testimony. Deny the inference that use of the river by small boats does not establish navigability.
28. Admit that the Commission's 2008 Report is quoted accurately. As discussed *infra* it would be error for this Commission to adopt the prior report as navigability opponents have urged. Moreover, the quoted language reveals that the Commission in 2008 applied an incorrect standard. Neither the fact that use of the river was not commercial, nor the fact that transportation in the area was by other modes defeats a finding of navigability. *See Defenders of Wildlife v. Hull*, 199 Ariz. at 421-25. 18 P.3d at 732-36 (stating that the federal test does not require travel or trade on the waterway to be commercial, sustained, successful or upstream.).
29. Deny. *See* response to 28.
30. Admit that this is an accurate quote from Mr. Burtell's declaration; deny that the evidence in the record supports his erroneous conclusion.
31. Deny that the record supports the proposed finding.
32. Admit that this is an accurate quote from Mr. Burtell's declaration.
35. Admit that bases were established prior to 1870 but deny that River was in its ordinary and natural condition after irrigation diversions began, no matter how “minimal.”
36. Admit that this is an accurate quote from Mr. Burtell's declaration; deny that his observation is relevant.
37. Admit that this is an accurate transcription of Mr. Burtell's testimony.
41. Admit that Mr. Burtell expressed this opinion, which is purely speculative.

43. Admit this is what the record reflects. Stoneman's road was built using established Apache trails. *See* State's FOF 227.
45. Admit that this is an accurate transcription of Mr. Burtell's testimony.
46. Admit that travelers on wagon roads were robbed and killed by bandits and Native Americans. *See* State's FOF 208, 220, 226.
47. Deny. The evidence does not support this inference as the military did, in fact, use the Verde River. *See* State's FOF 282; 460-462; 553; 556.
48. Admit that a stagecoach route was established. Deny the inference regarding susceptibility.
49. Admit that Mr. Burtell's Declaration includes the quoted excerpt.
50. Deny that the Verde River was not used for trade or travel or that the establishment of a stage line was evidence that it was not susceptible to such use.
51. Admit that the Commission's 2008 Report included such a conclusion but deny that it is either a requirement of navigability, or that the lack of a "fishing industry" is evidence of nonnavigability. As discussed *infra* it would be error for this Commission to adopt the prior report as navigability opponents have urged.
52. Admit that Antoine Leroux, a trapper, provided some of the earlier descriptions of the Verde River. *See* State's FOF 422-23 for his specific descriptions.
53. Deny Mr. Burtell's characterization of Leroux's descriptions of the Verde. *See* State's FOF 422-23 for his specific descriptions.
54. Admit that Allyn traveled along the Verde and described the river, comparing it to the Rio Grande for irrigation purposes. *See* State's FOF 425. The fact that the Rio Grande was declared non-navigable is irrelevant to the Verde River, as the law is clear that each river is to be judged on its own facts.
55. Admit this is what the record reflects. Deny that the legislature's pronouncements regarding the Colorado River are relevant to this proceeding.
56. Admit that Prescott was the territorial capital and that Prescott is near the Verde. Deny all further inferences as mere speculation.
57. Admit this is what the record reflects. Deny that a conclusion regarding "navigability" by a Prescott newspaper has any relevance, particularly in the absence of any clarification of the paper's understanding of the term "navigable."

RESPONSE TO YAVAPAI-APACHE NATION and FORT McDOWELL YAVAPAI NATIONS'
FINDINGS OF FACT

3. Admit that Dr. Mussetter stated that "I endorse the science of Dr. Schumm's report about the characteristics of the river." However, Dr. Mussetter also stated that Dr. Schumm "may not have put enough

emphasis on the true historical natural condition of the river” and that, to Dr. Mussetter’s knowledge, Dr. Schumm did not adjust his assessment of flows to allow for the impact of civilization. Tr. 02/24/15, at 2209-10.

4. Admit this is what this record reflects. However, Dr. Mussetter also testified that he did not do detailed work on Segments 1 and 2. Tr. 02/24/15, at 2278. His opinion therefore lacks a sound basis.

5. Admit that the quoted language is found at Tr. 02/24/15, at 2280, but Dr. Mussetter also testified there that Dr. Schumm’s chart (Mussetter Power Point, X060, p. 4), represented only a “general proposition” regarding relative navigability.

6. Admit this is what this record reflects. However, Mr. Fuller, Dr. Pearthree, Win Hjalmarson, and Mr. Farmer, all testified that the River has a single low-flow channel. *See* State’s FOFs 62, 65-72, 76, 78, 82-85, 87.

7. Admit this is what the Commission found in 2008.¹

8. Admit this is what the Commission found in 2008. *But see* footnote 1.

9. Admit this is what this record reflects. Nevertheless, boating - recreational, commercial guiding, and rafting - takes place below the dams. *See* State’s FOF 517.

10. The quoted language is not found at the cited page, but the State agrees that the dams have altered the River’s ordinary and natural condition.

11. Admit that this general language is found at X002 regarding Fort McDowell in 1905.

13. The cited records do not support the statement that many Yavapai and Apache trails paralleled the River. The map at X100-FMYN-17, on page 8, shows many trails that lead in all directions. Further, Mr. Randall testified that the main overland route follows today’s highway 260. Tr. 2/20/15, 1790.

21. Admit this is what this record reflects. It is notable, however, that the Hopis, who were the Apaches’ biggest trading partners, did not live near the Verde River but rather lived far to the east of the River. Tr. 2/20/15, 1792-93 (Randall).

24. Admit this is what the Commission stated in 2008. *But see* footnote 1.

27. Admit this is what this record reflects. Dr. August also testified that the Spanish explorers did not leave specific descriptions of the River and did not spend significant time near it. *See* State’s FOF 150.

33. Admit this is what this record reflects. The roads’ roughness has no bearing on the River’s navigability.

34. Admit that this record reflects the first quoted passage, but the second quoted passage is incorrect; it reads as follows: “Arizona’s counties also were forced to limit their debt, though not so much that they could no longer issue road bonds.” X100-FMYN 17, p. 22.

¹ The Commission’s 2008 Determination of the River’s non-navigability is irrelevant to these proceedings, because it was issued without benefit of the voluminous evidence that has been adduced since, and before the Arizona Court of Appeals decided *Winkleman v. ANSAC*, 224 Ariz. 230, 229 P.3d 242 (App. 2010), in which the court reversed ANSAC’s Salt River Determination, and of the United States Supreme Court’s opinion in *PPL Montana LLC v. Montana*, 132 S. Ct. 1215 (2012), both of which are controlling here.

41. Admit this is what this record reflects (except that the 1901 report uses the word “overestimated” and not “overstated”).
42. The language is not found at the cited passage, but the State does not contest that Prescott was the Territorial capital during the stated years.
46. Admit this general language is found at X101-YAN-11, but the language refers to land settled in North Carolina in the 1700s, not to Arizona in the 1800s or 1900s.
47. Admit this is what this record reflects. The statement demonstrates that as of 1870, water was being taken out of the River for irrigation. Old Evidence 007, 36.
48. Admit that the Commission made that unfounded conclusion. *But see* footnote 1.
51. Admit this is what this record reflects. However, for a full discussion of historic flow reconstructions, see the State’s FOFs 32 - 53.
52. Admit this is what the Commission found in 2008. *But see* footnote 1.
54. Admit this is what this record reflects, but modern flow has been diminished by irrigation diversions for agriculture, groundwater pumping, reservoir impoundments and evaporation, groundwater-surface interactions, and watershed impacts including grazing, timber, and fire. *See e.g.* the State’s FOFs 42, 46, 49, and Tr. 4/1/15, 3083 (Burtell) (“agricultural activities [continued] to increase from 1864 through the 1880s and 1890s”).
55. Admit this is what this record reflects (at Schumm, 2004, page 8).
56. Admit this is what this record reflects. Dr. Burtell admitted that he did not do detailed work on Segment 2. Tr. 2/24/15, at 2278. His opinion therefore lacks a sound basis.
57. Admit this is what the Commission found in 2008. *But see* footnote 1.
58. Admit this is what the Commission found in 2008. *But see* footnote 1.
59. Admit that Mr. Randall testified in his affidavit that elders had related the River’s condition to him.
60. Deny as opinion rather than fact.
63. Admit this is what this record reflects (except for the citation to Fuller 1993, p. 3-8). However, Mr. Fuller has also testified that the River has a single, low-flow channel throughout its length. *See* State’s FOF 66.
64. Admit this is what this record reflects. Mr. Farmer also testified that he has boated the Verde from Verde Ranch all the way to the Salt confluence at all times of the year, mostly in a canoe. Tr. 12/16/14, at 381-82.
65. Admit this is what this record reflects. However, the referenced photographs are modern and do not show the River in its natural condition; Mr. Burtell’s comment regarding impediments to navigation being a nuisance to commercial boaters before statehood is thus without basis. Moreover, the River was actually navigated before statehood. *See* State’s FOFs 400, 458-469, 500-503, 520-522, 553-559.
66. Admit this is what this record reflects. However, Mr. Fuller also stated that “in terms of what effects [sic] navigability, there really aren’t substantive differences [between wooden boats and plastic boats].” Tr. 12/15/14, at 227.

67. Admit this is what this record reflects. Mr. Dimock further testified that historic open wood boats took a tremendous amount of gear, and his overall assessment of modern versus historic boats is that they are “similar.” Tr. 3/31/15, at 2843.

68. Admit this is what this record reflects. However, the ASLD Report also states that canoes available as of the time of statehood were not substantially different from criteria for canoes available today. 031, p. 8-3 (ASLD Report); State’s FOF 324.

70. Admit this is what this record reflects. However, navigation occurred on the River before modern technology. See citations to State’s response to paragraph 65,, and State’s response to YAN Conclusion of Law No. 2.

71. Admit this is what this record reflects. See response to No. 70.

72. Admit this is what this record reflects. See response to No. 70.

73. Admit this is what this record reflects. See response to No. 70.

RESPONSE TO SALT RIVER PROJECT’S CONCLUSIONS OF LAW

SRP’s analysis attempts to muddy the clear legal test, reduces the conclusions of law to only those which SRP finds helpful but which are offered out of context or are misrepresented, while it ignores other controlling law entirely.

1. While it is true that “all evidence should be examined during navigability determinations,” SRP neglects to include controlling law that directs the Commission to consider “[e]vidence from that early period should be considered by ANSAC as the best evidence of the River’s natural condition.” *Winkleman*, 224 Ariz. at 242, 229 P. 3d at 254.

2. While navigability proponents bear the burden of proof, the Arizona Court of Appeals made it clear in *Winkleman* “that ANSAC may not begin its determination with any presumption against navigability. Instead, ANSAC’s approach and analysis must be wholly impartial and objective, while utilizing the proper legal test.” *Id.* at 239, ¶18, 229 P. 3d at 251 (citing A.R.S. § 37-1121(B) (requiring that members of ANSAC be unbiased and not have interests affected by the Commission’s determination) and *Kent K. v. Bobby M.*, 210 Ariz. 279, 284, 110 P.3d 1013, 1018 (2005) (recognizing that the preponderance of the evidence standard “essentially allocates the risk of error equally between the parties involved”).

3. No contention.

4. It is incorrect as a matter of law for SRP to state that the U.S. Supreme Court in *PPL Montana* “rejected the ‘liberal’ interpretation of the federal test of navigability....” SRP’s COL, p. 4. SRP’s misstates the law. Nowhere in the opinion does the Court “reject a liberal interpretation,” and in fact, the Court expressly avoids doing so by not addressing Petitioner PPL Montana’s third contention about why the Montana Supreme

Court's decision is flawed, that contention being the "liberal construction of the navigability test." Petitioner's contentions were as follows:

PPL contends the opinion of the Montana Supreme Court is flawed in three respects: first, the court's failure to consider with care the navigability of the particular river segments to which title is disputed, and its disregard of the necessary overland portage around some of those segments; second, its misplaced reliance upon evidence of present-day, recreational use; and third, what the state court itself called its liberal construction of the navigability test, which did not place the burden of proof upon the State to show navigability. Brief for Petitioner 26.

PPL Montana, 132 S. Ct. at 1226. The Supreme Court addressed the first two specific contentions in Parts A and B of Section IV of its opinion, respectively, and then had the following to say about Petitioner's third contention: "The above analysis is sufficient to require reversal of the grant of summary judgment to Montana. Therefore, the Court declines to decide whether the Montana Supreme Court erred as to the burden of proof regarding navigability." *Id.* at 1234.

While the Navigability Proponents do not contend that a "liberal interpretation" of the law is required for the Commission to find the Verde River navigable, they do seek to ensure that the Commission understands and follows an accurate statement of the law before coming to a decision. It is clear that the Court in *PPL Montana* did not address a "liberal interpretation" and it is also clear that the Court did not alter the law regarding navigability for title. The Court in *PPL Montana* relied exclusively on existing case law. One of the well-established principles of that existing law is that "[n]avigability is a flexible concept and 'each application of the [Daniel Ball test] . . . is apt to uncover variations and refinements which require further elaboration.'" *Alaska v. United States*, 754 F.2d 851, 854 (9th Cir. 1985) (quoting *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406, 85 L. Ed. 243, 61 S. Ct. 291 (1940)). Moreover, in the *Alaska* case, the Ninth Circuit expressly noted that it had "liberally construed the phrase customary modes of trade and travel on water, taking into account transportation methods in use at the time of statehood." *Id.* This approach was sanctioned by the Arizona Court of Appeals in *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 423 ¶¶36-37, 18 P.3d 722, 734 (2002) ("More recently, another federal district court has determined that the 'ordinary modes of trade and travel' element of the Daniel Ball test are not fixed and need not be construed with reference only to the 'ordinary modes of trade and travel' in existence at the time of statehood. *State of Alaska v. United States*, 662 F. Supp. 455, 463 (D. Alaska 1987). We agree with the reasoning of Alaska...")

5. See *supra* 4 above for discussion of SRP's mischaracterization of the *PPL Montana* case.

a. If SRP is attempting to argue that the Commission should apply *The Daniel Ball* test to the non-natural and non-ordinary river at statehood in 1912, it is wrong as a matter of law. *Winkleman* rejected that contention. See State's COL 617 - 622; and *Defenders'* COL 1-4. The fact that navigability for title is determined as of the date of statehood is not disputed. In fact, it was first recognized by the Arizona Court of

Appeals in 1991 in *Arizona Ctr. For Law in the Public Interest v. Hassell*, 172 Ariz. 356, 362-3, 837 P. 2d 158, 164-5 (App. 1991)(“Navigability is determined by reference to the ordinary and natural condition of the watercourse **at the time of the state’s admission to the Union.**”)(emphasis added). It was reiterated in 2002 in *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 426 ¶55,18 P.3d 722, 737 (2002)(“We hold that, to prove navigability of an Arizona watercourse under the federal standard for title purposes, one must merely demonstrate the following: **On February 14, 1912**, the watercourse, in its natural and ordinary condition, either was used or was susceptible to being used for travel or trade in any customary mode used on water.”)(emphasis added). And most recently, it was acknowledged by the Court of Appeals in *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 241, 229 P.3d 242, 253 (App. 2010)(“Applying these definitions, we conclude that ANSAC was required to determine what the River would have looked like **on February 14, 1912**, in its ordinary (i.e., usual, absent major flooding or drought) and natural (i.e., without man-made dams, canals, or other diversions) condition.”)(emphasis added). Finally, the date of statehood requirement is also codified in Arizona’s statutory definition of navigability. Ariz. Rev. Stat. §37-1101(5)(“‘Navigable’ or ‘navigable watercourse’ means a watercourse that was in existence **on February 14, 1912**, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.”)(emphasis added). In sum, the operable date for determining navigability has never been an issue in Arizona (or elsewhere) and nothing in *PPL Montana* shed new light on that aspect of the navigability for title test.

b. No contention that the test is whether the river was used or susceptible to use as a highway for commerce. That too, has been recognized by Arizona courts for the past several decades. See *Hassell*, 172 Ariz. at 363, 837 P. 2d at 165 (rivers ““are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.””)(quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)); *Defenders*, 199 Ariz. at 426 ¶55,18 P.3d at 737 (“We hold that, to prove navigability of an Arizona watercourse under the federal standard for title purposes, one must merely demonstrate the following: On February 14, 1912, the watercourse, in its natural and ordinary condition, either **was used or was susceptible to being used for travel or trade in any customary mode used on water.**”)(emphasis added); *Winkleman*, 224 Ariz. at 239, 229 P.3d at 251 (“This test required ANSAC to determine the characteristics of the River ‘in its ordinary and natural condition’ and whether, at the time of statehood, the River **was used or would have been susceptible to use as a highway for commerce** in that condition.”)(emphasis added). See also, Ariz. Rev. Stat. §37-1101(5)(“‘Navigable’ or ‘navigable watercourse’ means a watercourse that was in existence on February 14, 1912, and at that time **was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.**”)(emphasis added).

c. See *supra* 5(a). Notably the evidence in this administrative proceeding does not support SRP's allusion that the Verde River was solely used by "explorers and trappers who may have dragged their boats in or alongside the river." SRP's COL 6(d) quoting *PPL Montana* at 132 S. Ct. at 1233. Significant evidence was presented to establish actual use of the Verde River as a highway of commerce as well as its susceptibility to such use at the time of statehood. See State's FOF 399-401; 458-469; 500-503; 520-522;553-559 (Historic Boating) 402-409; 470-491; 504-512; 523-533;560-567 (Modern Use); Defenders' FOF 24-33 (Historic Boating) 34-50 (Modern Boating). There was no evidence of the need to drag boats.

d. SRP misstates the law. *PPL Montana* did not state that "post-statehood use of the river can be considered only if that use involves the same river conditions and the same types of boats that existed at statehood." SRP's COL 5(d)(emphasis added). *PPL Montana* states only that watercraft must be "meaningfully similar to those in customary use for trade and travel at the time of statehood" and that "the river's post-statehood condition is not materially different from its physical condition at statehood." 132 S. Ct. at 1233. The U.S. Supreme Court's decision to reverse was, in part, because the Montana court did not make a finding that watercraft used today were similar to those used at the time of statehood and no evidence to that effect had been presented by the State of Montana. *Id.* Where such evidence is presented, it is entirely appropriate to consider modern day usage of the river. See, e.g. *Hardy v. State Land Board*, 274 Ore. App. 262 (2015)("[T]he board's analysis of the physical conditions of the river, as well as its comparative assessment of watercraft in use at statehood and today satisfies the requirements of *PPL Montana* and permits the conclusion that the upper portion of the river was capable--at statehood--of sustaining travel and trade by means of dugout canoes.").

e. No contention regarding the quoted portion of *PPL Montana*; however, the excerpt is inapplicable to the facts in this proceeding. The evidence before the Commission unequivocally establishes that segments 1 through 5 of the Verde River were and are navigated virtually all months of the year. See State's FOF 392(B)(b); 420; 496; 517; 539.

6. *PPL Montana* does indeed address the issue of obstructions to navigation but once again Opponents neglect to include the context of the Court's discussion, presumably because what the Court decided regarding the Great Falls reach of the Missouri River has very little applicability to the Verde River. The Court decided, and for good reason, that the Great Falls reach of the Missouri, which consists of a 17-mile segment with five waterfalls with heights of 87, 19,48, 7, and 26 feet and continuous rapids in between, is non-navigable. *PPL Montana*, 132 S. Ct. at 1223, 1231-32. In contrast, the Verde has no natural obstructions and only a few minor rapids. See State's FOF 357-375.

7. Navigability proponents do not dispute that the *Winkleman* court held that the "ordinary" condition of a river is its "usual" condition, "absent *major* flooding or drought." *Winkleman*, 224 Ariz. at 241, 229 P. 3d at 253 (emphasis added).

8. In response to SRP's proposed COL 8, Navigability Opponents dispute that the *Winkleman* court

addressed, much less held, that channel changes that persist after flood flows recede are part of the “ordinary condition” of a river.

9. Navigability proponents do not dispute that the *Winkelman* court held that the “natural” condition of a river is “without man-made dams, canals, or other diversions.” *Id.*

10. Navigability proponents agree that the Verde River was in its “natural condition” prior to the 1860s. *See State’s COL 622.*

11. This is not a conclusion of law. *See State’s COL 612-616* for conclusions of law regarding segmentation. *See also State’s FOF 24-31* for discussion of segmentation and State’s FOF generally for reasons segments 1 through 5 are navigable as a matter of law.

12. This is not a conclusion of law. No cases exist that state there is a requirement for prehistoric boating or flotation of logs. The Special Master, who was appointed to review the navigability of the Green, Grand, Colorado and San Juan rivers, believed the absence of evidence of Indian use should not be deemed dispositive of a river's navigability:

It seems likely that use must have been made of the Rivers by these Indians, though no trace of boats or canoes used by them has been found. The present day Indians, the Navajos and the Utes, probably owing to old superstitions and legends, have not navigated these Rivers in boats and do not now navigate them except to cross at fords.

Report of the Special Master filed on October 15, 1930, EIN X017:92, (“Special Master Report”) at 25-26; *United States v. Utah*, 283 U.S. 64, 74, 89 (1931) (generally affirming the Special Master's findings with respect to the Green, Grand, and Colorado Rivers).

13. This is not a conclusion of law and is an inaccurate statement of fact. The State has presented myriad evidence that establishes that the Verde River was used as a “highway for commerce.” *See e.g.* State FOF 400; 403-403-405; 407-408; 459-469; 476-483; 487-491; 500-503; 505-510; 520-522; 524-529; 553-559; 561-564. Further, “[t]he extent of existing commerce is not the test.” *United States v. State of Utah*, 283 U.S. at 82; *see also Defenders*, 199 Ariz. at 421-25, 18 P.3d at 732-36 (stating that the federal test does not require travel or trade on the waterway to be commercial, sustained, successful or upstream.).

14. Not a conclusion of law. The Verde was actually used as a highway for commerce at statehood, and is still boated today by meaningfully similar boats, in its substantially depleted condition. *See State’s FOF 399-401; 458-469; 500-503; 520-522; 553-559* (Historic Boating) 402-409; 470-491; 504-512; 523-533; 560-567 (Modern Use)

15. This is not a conclusion of law. Notably, SRP offers no legal authority to support this contention.

16. This misrepresents both the evidentiary record and the holding of *PPL Montana*. As set forth in State’s FOF 399-401; 458-469; 500-503; 520-522; 553-559 (Historic Boating) there is ample evidence of historic boating on the Verde River; further, as discussed *supra* 5(d), it is entirely appropriate for ANSAC to consider

modern day usage of the river. *See, e.g. Hardy v. State Land Board*, 274 Ore. App. 262 (2015) (“[T]he board’s analysis of the physical conditions of the river, as well as its comparative assessment of watercraft in use at statehood and today satisfies the requirements of *PPL Montana* and permits the conclusion that the upper portion of the river was capable—at statehood—of sustaining travel and trade by means of dugout canoes.”). Further, navigability opponents have not presented any competent evidence to support their contention that modern watercraft permit navigability where historic watercraft would not. Rather, the record unequivocally establishes that the modern boats used on the Verde are “meaningfully similar” to boats available at the time of statehood. *See State’s FOF314 – 342.*

17. This is not a conclusion of law. Moreover, the evidentiary record does not support SRP’s contention that modern boats navigate the Verde River more easily than historic boats. The contention that “statehood era craft were likely to last only a trip or two,” (SRP’s COL 17) is irrelevant to the question of navigability.

18. This is not a conclusion of law. Moreover, qualifying actual use is not limited to large scale vessels because both the U.S. Supreme Court and the Ninth Circuit Court of Appeals have recognized the importance of small boats like canoes as valuable transports of people and goods. *See The Montello*, 20 Wall. at 441 (finding fur trade which utilized canoes evidence of a navigation on a channel for useful commerce); *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 117, 41 S. Ct. 409, 410, 65 L. Ed. 847 (1921) (finding actual use where Desplaines river was used by the kinds of craft common to early fur-trading days, including canoes); *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1403 (9th Cir. 1989) (finding lower Gulkana navigable where actual use at statehood was by hunters and fishermen using 16 to 24 ft. boats); *see also Nw. Steelheaders Ass’n, Inc. v. Simantel*, 112 P 3d 383, 389-90 (2005) (finding John Day river navigable and stating “qualifying travel and trade is not limited to large-scale commercial or multiple passenger vessels of the sort typically engaged in modern commerce” because “courts have recognized the relevance of the historic role of small boats to transport goods in volumes that might seem insignificant by modern standards.”).

19. This is not a conclusion of law. SRP continues to cite facts without providing the law to support its implied contention. Whether or not a boat trip down the Verde was “successful” or not was only one of many factors considered by Mr. Fuller in his evaluation of the navigability of the Verde River. Mr. Fuller’s navigability determination was based on the entirety of his report including historical use, scientific reconstruction of the natural and ordinary condition of the Verde, an assessment of the hydrology and geomorphology of the Verde, an assessment of the actual boating that still continues on the Verde, and Mr. Fuller’s actual boating on the Verde to determine its susceptibility to navigation.

20. This proposed conclusion of law is neither supported by the facts nor the law. As set forth in the State’s FOF, there is ample evidence that the Verde River was actually navigated and susceptible to navigation at and around the time of statehood. State’s FOF 399-401; 458-469; 500-503; 520-522; 553-559.

21. No contention. While it is true that “all evidence should be examined during navigability determinations,” opponents neglect to include controlling law that directs the Commission that “[e]vidence from that early period should be considered by ANSAC as the best evidence of the River's natural condition.” *Winkleman*, 224 Ariz. at 242, 229 P 3d at 254.

22. No contention.

23. SRP attempts to restate *The Daniel Ball* test but leave out important components such as the river must also be in its "ordinary and natural condition" A.R.S. § 37-1101(5).

24. SRP cites to the case *Lykes Bros., Inc. v. Corps of Eng'rs*, 821 F. Supp. 1457, 1459 (M.D. Fla. 1993), *aff'd*, 64 F 2d 630 (11th Cir. 1995) for the contention that a river should be deemed non-navigable if military did not transport men and supplies on the river. The Arizona Court of Appeals has already dismissed the use of this case in its decision in *Defenders*, 199 Ariz. 411, 421 (finding the use of the case "unconvincing"). What SRP doesn't mention is that the case was affirmed by the Eleventh Circuit Court of Appeals based on the fact that there was substantial evidence that there was no defined and navigable channel through Cowbone Marsh. 64 F.3d at 638. The evidence in this case established that the Verde had a single low-flow channel in its ordinary and natural condition. State's FOF 62-87. In any case, there is also evidence that settlers did use the Verde. State's FOF 399-401; 458-469; 500-503; 520-522; 553-559. However, even if they did not, the test for navigability does not require *actual* use. *See infra* 27.

25. Not a conclusion of law. Navigability proponents have addressed this previously, see *supra* 24.

26. Not a conclusion of law. Navigability proponents have addressed this previously, see *supra* 20.

27. There is no requirement that navigability proponents demonstrate that earlier inhabitants “failed to comprehend the potential usefulness of the river as an avenue for navigation.” SRP's COL 27. Recently, the Oregon Court of Appeals soundly rejected such a contention in *Hardy v. State Land Board*, 274 Ore. App. 262 (2015):

We also reject petitioners' suggestion (at oral argument) that the "susceptibility of use" standard is applicable only where the area in question was essentially uninhabited or only sparsely settled at the time of statehood. Although those may have been the extant circumstances in *United States v. Utah*, the Supreme Court did not then, and has not since, held that the susceptibility-of-use standard is so limited. Indeed, the Court, in *PPL Montana*, cited *United States v. Utah* for the proposition that a river's "potential" for commercial use at the time of statehood is the "crucial" question. *PPL Montana*, 565 U.S. at ___, 132 S Ct at 1233 ("[E]xtensive 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.'" (Quoting *United States v. Utah*, 283 U.S. at 82-83 (brackets in *PPL Montana*))). Notably, the Court did not circumscribe consideration of that "crucial" question to circumstances where only an absence of human habitation could explain the lack of evidence of actual use of the river for commercial purposes. Petitioners' suggestion to the contrary is not well taken.

*Hardy, 2015 Ore. App. LEXIS 1227 at *28-29.*

28. SRP's assertion that "[o]ccasional use in exceptional times does not...support a finding of navigability" is inconsistent with the evidence of this case and, therefore, inapposite. The State's expert, as well as several other boating witnesses, testified that boating can occur at most times of the year on the Verde River today in segments 1-5, and would have only been even more boatable when the river was in its natural and ordinary condition. *See State's FOF 392(B)(b); 420; 496; 517; 539.* The Verde is not a river that only supports navigability occasionally. In any event, most of the cases cited by SRP are not controlling authority and are factually distinguishable from the Verde River. Notably, SRP makes no mention of *Utah v. United States*, where the Supreme Court found sufficient actual use on the lake where the use was "sporadic and their careers were short" because that "does not detract from the basic finding that the lake served as a highway and it is that feature that distinguishes between navigability and nonnavigability." 403 U.S. 9, 12 (1971).

Instead, SRP cites to *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 447 (6th Cir. 1982) as an example of a court finding that sporadic evidence of boat use proves nonnavigability. Again, what SRP fails to disclose is that the Sixth Circuit, not a controlling court for ANSAC, found that "[a]s many as thirty-two men could have been required to pull a loaded flatboat upstream. Military use of the rivers through great quantities of manpower was not the customary mode of travel for settlers and farmers of the time." *Id.* at 451. Additionally, the court found that any keelboat use "included portages of six, twelve, or one hundred fifty miles." *Id.* The facts in that case are inapplicable to the Verde.

SRP also cites *United States v. State of Oregon*, 295 U.S. 1 (1935). The Court in that case found that all "five divisions are shallow bodies of water which, with the exception of Lake Malheur, disappear completely or become negligible during a dry season." *Id.* at 16. With regard to Lake Malheur, the Court found that the water was "not to be continuous enough to afford channels or waterways capable of use in navigation" as it becomes "mud or dry land" in some places. *Id.* at 17. This body of water at issue in *U.S. v. Oregon* bears no resemblance to the Verde in its natural and ordinary condition.

Likewise, SRP cites to *North Dakota v. United States*, 770 F. Supp. at 509-10 for the proposition that "unique, isolated tie drive in time of high water was not enough to establish navigability." SRP's COL 28. Of course the evidence regarding the Verde is hardly comparable to the isolated tie drive in that case. Here, the record establishes historic use and extensive modern use of the river as a highway for commerce.

SRP also cites *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991), another court that is not controlling on the Commission's decision. In that case the court found Lewis Creek nonnavigable for obvious reasons:

Lewis Creek is impassable under ordinary conditions prevailing throughout the year. Only when unpredictable, infrequent, and temporary flooding of the Tombigbee River occurs during parts of the winter months does Lewis Creek become passable; in some years, these floods do not occur at all.

Id. at 1040.

SRP cites to *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906). The Arizona Court of Appeals has also dismissed this case in *Defenders*, 199 Ariz. at 422. This is not a controlling case. Additionally, the Eighth Circuit does not use *The Daniel Ball* test in this decision.

Finally, SRP cites to *In re River Queen*, 275 F. Supp. 403, 407 (W.O. Ark. 1967) *aff'd sub nom. George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968). Again, this is not a controlling authority. In that case the only evidence of actual use of the river for navigability was three witnesses testifying to fishing on the river. *Id.* at 409. Again, in the case of the Verde, the State has presented much more evidence of actual use.

29. SRP continues to cite and re-cite to cases that discuss exceptional use during periods of temporary high water. Those cases are factually and legally distinguishable from the Verde River. The State's expert has testified that the Verde River, in its ordinary and natural condition and even in its current condition is navigable year round. *See* State's FOF 392(B)(b); 420; 496; 517; 539.

30. SRP cites government surveys as indicative of a navigability determination. The U.S. Supreme Court has held otherwise:

A legal inference of navigability is said to arise from the action of the surveying officers who, when surveying the lands in that region, ran a meander line along the northerly bank and did not extend the township and section lines across the river. But this has little significance. The same thing was done on the Platte and other large western streams known to be unnavigable. Besides, those officers were not clothed with power to settle questions of navigability that surveyors are not "clothes with power to settle questions of navigability" and therefore their actions regarding meandering rivers have little significance, and they were known to meander both navigable and nonnavigable streams.

State of Oklahoma v. State of Texas, 258 U.S. 574, 585 (1922).

SRP also cites to federal patents as some evidence of a navigability determination. In *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 648 (1970), the Supreme Court specifically stated that "such disposals by the United States 'during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.'" There is no patent which contains a specific statement that the federal government intended to convey title to land under the Verde River. According to *Choctaw*, no inference should be made. Government officials certainly described the Verde in much detail and with sufficient depth for navigability. *See* State's FOF 56-60; 441; 444; 535; 536; 550-552; Defenders FOF 19-20; 66.

31. The Commission should find segments 1 through 5 of the Verde River navigable based on controlling law as set forth in the State's COL and Defenders' COL, and based on the facts as stated in the State's FOF and Defenders' FOF.

RESPONSE TO FREEPORT MINERALS CORPORATION'S CONCLUSIONS OF LAW

1. No contention. *See* Response to SRP's COL 2 *supra*.
2. No contention. Further, as discussed in Response to SRP's COL 4 *supra*, *PPL Montana* relied upon existing law and did not alter the law with regard to navigability for title.
3. No contention.
4. No contention, but the facts of *The Daniel Ball* case are inapposite and irrelevant to the navigability of the Verde River.
5. No contention.
6. No contention.
7. Freeport's proposed COL 7 accurately quotes *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698-99 (1898), but that case is factually inapposite to the Verde River.
8. *See supra* 7 re inapplicability of *U.S. v. Rio Grande Dam*.
9. Freeport's COL 9 references the Red River and includes an excerpt from *Oklahoma v. Texas*, 258 U.S. 574 (1922), but the citation provided is to *U.S. v. Rio Grande*. Assuming the citation is an error, Freeport's reliance upon *Oklahoma v. Texas* is misguided as that case is factually distinguishable from the Verde River. Notably, the river conditions that gave rise to the Supreme Court's holding in that case were discussed at length in the Special Master's Report in *United States v. Utah*, 283 U.S. 64 (1931). In finding *Oklahoma v. Texas* inapplicable, the Special Master specifically noted how different the river in that case was from the Green and Colorado Rivers at issue in the case before it. For example, in comparison to the description of the western half of the Red River, the Special Master explained:

It will be apparent that the facts thus summarized by the Court with reference to conditions on the western portion of the Red River are not similar to the facts and conditions on the Green and Grand Rivers as testified to in the present suit. For instance, no portion of the bed of those Rivers is "dry sand interspersed with irregular ribbons of shallow water and occasional deeper pools." On the Red River, even very small boats could be operated "only for short intervals when the rainfall is running off. . . . as much as 40 days in a year." *On the Green and Grand Rivers, on the contrary, boats drawing from 1 to 2 ½ feet of water can operate in at least nine months of the year, except possibly on a few days of unusually extreme low or high water. The boat trips testified to in the present case were not made under "exceptional conditions in time of temporary high water, [""] but were made under great varieties of conditions and in many varying stages of the water.*

Special Master Report at 119 (emphasis added)(quoting *Oklahoma v. Texas*)(ellipsis in original). And with regard to the Colorado River, the Special Master stated "I do not find that the facts and river conditions in the cases cited by the Government and considered *supra*, pp. 118-123, are similar to the facts and river conditions on the Colorado River; ..." *Id.* at 153.

10. This is in stark contrast to the Verde River which, according to modern flow data (which due to human diversions represent less than the natural flow) indicate that segments 1 through 5 are navigable by canoe 99% of the time or 360 days of the year. Segments 4 & 5 are navigable by flatboats 90% of the time (330 days of the year). Segment 3 is navigable by flatboats 80% of the time (290 days of the year), and Segment 2 is navigable by flatboats 85% of the time (310 days of the year). Even Segment 1 is navigable by flatboats 30% of the time (110 days a year). *See* State’s FOF 392(B)(b); 420; 496; 517; 539. Thus, *Oklahoma v. Texas* is factually and legally distinguishable from this case.

11. *See supra* 9 discussion re the basis for the Supreme Court’s decision in *Oklahoma v. Texas*. Inasmuch as that case was decided by the Court in 1922, modern recreational boating was not a factor in its decision. Freeport’s assertions regarding susceptibility to modern recreation and the relevance of such evidence is a misstatement of the law. *See supra*, Response to SRP’s COL 5(d) & 16.

12. Freeport’s attempt to rely upon the U.S. Supreme Court’s decision regarding the San Juan River in *U.S. v. Utah*, is equally misplaced. The finding by the Special Master regarding the San Juan was, in his words, based upon the fact that “the testimony is too meagre to establish affirmatively susceptibility of commercial use.” Special Master’s Report at 179. Notably, the Special Master observed that “[e]xcept the miners’ supplies, no articles of commerce have ever been transported down or up the River. No keelboat or motorboats or outboard-motorboats have been used upon it. No tourists or other persons have been transported for hire or otherwise. No boats have ascended except for short distances, and boats ascending must generally be towed, dragged or pulled up.” *Id.* at 180 (emphasis added). Had evidence of modern recreation been available to the Special Master, it is entirely possible he may have come to a different conclusion.

13. Regardless, the physical characteristics of the San Juan, as described by the Special Master, make it factually distinguishable from the Verde River. Finally, because the parties did not contest the Special Master’s finding regarding the San Juan River when the matter went before the Supreme Court, the Supreme Court simply adopted the Special Master’s finding and made no independent findings or conclusions about that river. *U.S. v. Utah*, 283 U.S. at 74. Similarly, in the case of the Rio Grande River, the Court found that the river’s use for transportation was “exceptional and only in times of temporary high water.” *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. at 699. A physical condition that is drastically different from the Verde River.

14. The Arizona Court of Appeals in *Winkleman* defined ordinary condition as, “usual, absent major flooding or drought.” 224 Ariz. 230 at 241 ¶28 (emphasis added). No contention regarding “natural condition.”

15. No contention.

16. No contention.

17. Freeport’s COL 15 is an accurate quote from PPL Montana, but as noted *supra* in response to SRP’s COL 5(c), this reference in PPL Montana to the Oregon case (discussed in response to SRP’s COL 28) has no applicability to the Verde River.

18. This is an accurate quote from the PPL Montana case.

19. This is an accurate quote from the PPL Montana case.

20. Although the excerpted quotes are technically accurate, they are taken out of context such that the proposed COL misrepresents the law. PPL Montana did not hold that present day use could not bear on navigability, rather the Court held only that for such evidence to be relevant, the watercraft used must be “meaningfully similar to those in customary use for trade and travel at the time of statehood” and that “the river’s post-statehood condition is not materially different from its physical condition at statehood.” 132 S. Ct. at 1233. Where such evidence is presented, it is entirely appropriate to consider modern day usage of the river. *See, e.g. Hardy v. State Land Board*, 274 Ore. App. 262 (2015)(“[T]he board’s analysis of the physical conditions of the river, as well as its comparative assessment of watercraft in use at statehood and today satisfies the requirements of PPL Montana and permits the conclusion that the upper portion of the river was capable--at statehood--of sustaining travel and trade by means of dugout canoes.”).

21. No contention.

22. The Court’s statement in PPL Montana that modern recreational boats “may be able to navigate water much more shallow or with rocker beds than the boats customarily used for trade and travel at statehood,” was not based upon any evidence before the Court. Indeed, the Court’s decision to reverse was, in part, because the Montana court did not make a finding that watercraft used today were similar to those used at the time of statehood and no evidence to that effect had been presented by the State of Montana. *Id.* Moreover, the Court in PPL Montana specifically noted that, “[e]rror is not inherent in a court’s consideration of such evidence...” *PPL Montana*, 132 S. Ct. at 1233. Relying upon well-established case law, the Court explained:

Evidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use at the time of statehood. *See Appalachian Elec. Power Co.*, 311 U.S., at 416, 61 S. Ct. 291, 85 L. Ed. 243 (“[P]ersonal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation”); *Utah*, 283 U.S., at 82, 51 S. Ct. 438, 75 L. Ed. 844 (fact that actual use has “been more of a private nature than of a public, commercial sort . . . cannot be regarded as controlling”). Similarly, post statehood evidence, depending on its nature, may show susceptibility of use at the time of statehood. *See id.*, at 82-83, 51 S. Ct. 438, 75 L. Ed. 844 (“[E]xtensive 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”).

Id. This is entirely consistent with the Arizona court’s holding in *Defenders*, which struck down the statutory presumption that a river was non-navigable if “any boating or fishing was for recreational and not commercial purposes.” 199 Ariz. at 423, ¶41, 18 P. 3d at 734 (“evidence of the river’s capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or travel.”)(quoting *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (N.Y. 1998)).

23. The evidentiary record does not support this contention. *See* State's FOF 399-401; 458-469; 500-503; 520-522;553-559 (Historic Boating) 402-409; 470-491; 504-512; 523-533;560-567 (Modern Use); Defenders' FOF 34-37.

24. *See supra* 21.

25. Freeport's proposed COL 23 misrepresents Mr. Fuller's testimony. Mr. Fuller's navigability determination was based on the entirety of his report including historical use, scientific reconstruction of the natural and ordinary condition of the Verde, an assessment of the hydrology and geomorphology of the Verde, an assessment of the actual boating that still continues on the Verde, and Mr. Fuller's actual boating on the Verde to determine its susceptibility to navigation.

26. The evidentiary record does not support this contention. *See* State's FOF 399-401; 458-469; 500-503; 520-522;553-559 (Historic Boating) 402-409; 470-491; 504-512; 523-533;560-567 (Modern Use); Defenders' FOF 24-50.

27. This contention misstates the law. *See supra* Response to SRP's COL 27.

28. The evidentiary record does not support this contention. *See* State's FOF 399-401; 458-469; 500-503; 520-522;553-559 (Historic Boating) 402-409; 470-491; 504-512; 523-533; 560-567 (Modern Use); Defenders' FOF 24-50.

29. The evidentiary record does not support this conclusion. The Commission should find segments 1 through 5 of the Verde River navigable based on controlling law as set forth in the State's COL and Defenders' COL, and based on the facts as stated in the State's FOF and Defenders' FOF.

RESPONSE TO YAVAPAI-APACHE NATION and FORT McDOWELL YAVAPAI NATIONS'
CONCLUSIONS OF LAW

1. Not a conclusion of law. The Verde was actually navigated and continues to be navigated today. *See* State's FOF 343-353; 399-401; 458-469; 500-503; 520-522;553-559 (Historic Boating) 402-409; 470-491; 504-512; 523-533;560-567 (Modern Use); Defenders' FOF 24-50. *See also* State's FOF 392(B)(b); 420; 496; 517; 539.

2. Not a conclusion of law. The evidence in this case establishes that modern boats used on the Verde River are meaningfully similar to the boats used at or near statehood. *See* State's FOF 314-342; *see* Defenders' FOF 34-37.

3. Not a conclusion of law. The evidence in this case establishes that the Verde River, in its ordinary and natural condition, had more flow, and that at the time of statehood its flow was significantly depleted by dams and diversions. *See* State's FOF 46, 49, 101-105, 108, 111-112, 117-119, 124, 434. Opponents apparently misapprehend the U.S. Supreme Court's concern in PPL Montana, (although they do not cite this case

or any other case) which was that a waterway's post-statehood material changes must not enhance post-statehood navigation:

If modern watercraft permit navigability where the historical watercraft would not, or if the river has changed in ways that substantially improve its navigability, then the evidence of present-day use has little or no bearing on navigability at statehood.

PPL Montana v. Montana, 132 S. Ct. at 1233-1234 (emphasis added). By contrast, all of the changes to the River have adversely affected its navigability. Therefore, the River's material changes cannot defeat a finding of navigability under the *Daniel Ball* test.

4. The evidentiary record does not support this conclusion. The Commission should find segments 1 through 5 of the Verde River navigable based on controlling law as set forth in the State's COL and Defenders' COL, and based on the facts as stated in the State's FOF and Defenders' FOF.

5. This proposed conclusion of law misstates the law. *See supra* Response to SRP's COL 27.

6. Not a conclusion of law. The evidence in this case establishes that modern boats used on the Verde River are meaningfully similar to the boats used at or near statehood. *See* State's FOF 314-342; *see* Defenders' FOF 34-37. As the Supreme Court recognized in *PPL Montana*, "[e]vidence of recreational use, depending on its nature, may bear upon susceptibility of commercial use at the time of statehood." *See also, Defenders*, 199 Ariz. at 423, ¶41, 18 P. 3d at 734 ("evidence of the river's capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or travel.") (quoting *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (N.Y. 1998)) and *Hardy v. State Land Board*, 274 Ore. App. 262 (2015)("[T]he board's analysis of the physical conditions of the river, as well as its comparative assessment of watercraft in use at statehood and today satisfies the requirements of *PPL Montana* and permits the conclusion that the upper portion of the river was capable--at statehood--of sustaining travel and trade by means of dugout canoes.").

7. Citation to the 2008 report is improper. Three of the four current Commissioners were named to the Commission years after that decision issued. The Arizona Court of Appeals made it clear in *Winkleman* "that ANSAC may not begin its determination with any presumption against navigability. Instead, ANSAC's approach and analysis must be wholly impartial and objective, while utilizing the proper legal test." 224 Ariz. at 239, ¶18, 229 P. 3d at 251 (citing A.R.S. § 37-1121(B) (requiring that members of ANSAC be unbiased and not have interests affected by the Commission's determination)).

Further, there is a substantial amount of supplemental evidence and testimony that has been submitted to the Commission since the 2008 decision. For example, additional historic accounts of boating have come to light since 2008. The most significant of these, the multiple trapping and hunting trips taken by the Day Brothers, are directly relevant to the navigability of the Verde River. There is also the exhaustive research and presentation by Mr. Fuller regarding historic boats—the types of boats available in Arizona and throughout the west, the types of

boats used on Arizona rivers around the time of statehood, and how those boats compare to modern boats in terms of navigability. Additional expert witness testimony was also provided both by Mr. Fuller and Mr. Hjalmarson in support of navigability, as well as testimony from experts advocating for a finding of non-navigability. Even if it wanted to, the Commission does not have the discretion to ignore that evidence. A.R.S. §37-1123 provides that “[t]he commission shall receive, review and consider all relevant historical and other evidence presented to the commission by the state land department and by other persons regarding the navigability or nonnavigability of watercourses in this state as of February 14, 1912 . . .”(emphasis added).

Finally, the 2008 decision does not apply the correct legal standard. Without identifying each and every incorrect statement of the law or improper consideration included in that Report, suffice it to say that the Commission’s conclusion that “[t]hus, while we have historical accounts of boating on the Verde River, it does not appear that any of these attempts were used for commercial transportation or use of the river as a highway for commerce” unequivocally demonstrates that it applied an incorrect test. 2008 Report at 40. The correct standard for determining navigability does not require any such use. Moreover, the additional statement that “for a river to be considered navigable or susceptible of navigability, there must be a showing of commercial activity for the river to be used as a ‘highway for commerce’ or susceptible to such use,” is completely erroneous. *Id.* at 41. Nor is it supported by the case cited by ANSAC, *United States v. Utah*, 283 U.S. 64, 81-82 (1931). In that case, the very premise cited by the 2008 Commission for dismissing the evidence of actual use was expressly and explicitly rejected by both the Special Master and the United States Supreme Court. As the Court explained:


The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. *The extent of existing commerce is not the test.*

United States v. Utah, 283 U.S. at 82 (emphasis added). In sum, it would not only be an abdication of its statutory obligation for the Commission to adopt the 2008 decision, it would be clear legal error as well.

8. The evidentiary record does not support this conclusion. The Commission should find segments 1 through 5 of the Verde River navigable based on controlling law as set forth in the State’s COL and Defenders’ COL, and based on the facts as stated in the State’s FOF and Defenders’ FOF.

DATED this 7th day of December, 2015.

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ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST



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ORIGINAL AND SEVEN COPIES of the foregoing mailed via U.S. Mail for filing this 7th day of December, 2015, to:

Arizona Navigable Stream Adjudication Commission
1700 W. Washington, Room B-54
Phoenix, AZ 85007

A copy in pdf format of the foregoing was e-mailed with delivery receipt on this 7th day of December, 2015, to each party listed on the ANSAC website, <http://www.ansac.az.gov/parties.asp>, with SERVICE OF ANSAC DOCUMENT, Verde River Case No. 04-009” written in the subject line.



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