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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

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

No. 04-009-NAV

**Maricopa County and The Flood Control
District of Maricopa County's Response
to Findings of Fact and Conclusions of
Law Regarding Navigability of the
Verde River**

Maricopa County and the Flood Control District of Maricopa County (hereinafter County) submit this Response to the proposed findings of fact and conclusions of law regarding the navigability of the Verde River from its headwaters in Northern Arizona to its confluence with the Salt River. Proposed Findings of Fact and Conclusions of Law were submitted by or joined by the parties participating in the Arizona Navigable Streams Adjudication Commission (ANSAC) hearings on the Verde River. The parties that filed or joined in opposing a navigability finding are the Salt River Project (SRP), Freeport Minerals Corporation (Freeport), the Salt River Pima-Maricopa Indian Community (SRPMIC), the Yavapai-Apache Nation and the Fort McDowell Yavapai

Nation (Nations), and the City of Phoenix (Phoenix). The Arizona State Land Department (ASLD) and Arizona Center for Law in the Public Interest (Center) representing the Defenders of Wildlife filed in support of a finding of navigability on the Verde River.

As directed by the Arizona Court of Appeals in the *Winkelman* decision, ANSAC now has the duty to “make its determination ‘in writing with sufficient documentation and detail to confirm the rationale and basis for the determination’” whether the Verde river or any segment thereof was navigable on the date of statehood. *State Ex Rel. Winkleman v. Navigable Stream Adjudication Commission*, 224 Ariz. 230, 237, 229 P 3rd 242 (App. 2010).

As previously stated in all of their submittals, the County urges ANSAC to closely examine the evidence, review the expert testimony offered by those individuals qualified in the applicable fields, and make findings of facts based on the preponderance of evidence accompanied by citations to the record in this case. ANSAC must then take those facts and apply the law to its factual decisions on each segment of the river and find whether the Verde River, from its headwaters to its confluence with the Salt River, or any part thereof, is navigable in its ordinary and natural condition in accord with the legal requirements set down in the applicable Federal and Arizona court decisions.

In making this navigable or non-navigable decision federal law controls. As a result the Commission must use federal evidence standards to establish the factual basis for its decision. Evidence is something, including testimony, documents and tangible

objects that tends to prove or disprove the existence of an alleged fact. Black's Law Dictionary, Abridged Seventh Edition, page 457. Federal law defines "admissible evidence" as evidence that is relevant, "relevancy" meaning that it logically advances a material aspect of the party's case. In addition, "expert testimony" must be both relevant and reliable. *Estate of Barabin v. Asten-Johnson, Inc.*, 740 F.3d 457, 463 (C.A. 9, 2014). The District Court in navigability for title purposes is normally the fact finder and the gatekeeper on evidence questions. In Arizona's unique attempt to shortcut the federal determinative process the Commission is the trier of fact and must also act as the gatekeeper on evidence questions. As the gatekeeper the Commission must insist that the experts it relies on have sufficient knowledge to qualify as experts, and that they know and have applied and relied upon the principles and methods required of a federal court expert. Rule 702, Federal Rules of Evidence.

I. ERRORS IN FINDINGS OF FACTS SUBMITTED

1. The County has not taken a position in regard to the navigability or non-navigability of the Verde River. The County's interest in the Verde proceedings is to urge the Commission to produce its decisions in a form that meets the federal standards outlined by the U.S. Supreme Court in *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012), and other federal cases and the Arizona Court of Appeals in the numerous cases that they have considered and interpreted under federal law particularly *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P.2d 722 (App. 2001) and *Winkleman*, supra. Both

Phoenix (footnote 1, page 2) and the Nations (page 1) erroneously refer to the County as proponents of navigability of the Verde. This is incorrect.

2. The County also did not retain or present any expert witnesses in the Verde proceedings, contrary to the SRP statement in paragraph 12, page 7 that Win Hjalmarson testified on behalf of Maricopa County.

3. In its paragraph 3 on page 6 SRP makes the statement that the Commission scheduled hearings after "collecting and documenting all reasonably available evidence received". As explained in SRP's paragraph 1 on the same page, the statutes require the Commission to receive, compile, review and consider evidence; however, the Commission does not have the resources to document all evidence received. In its report the Commission should clarify how the evidence received was compiled and made available to interested parties.

4. Upon review ANSAC will find that the very lengthy and sometimes confusing proposed findings of fact make similar major errors in their summary of the evidence. Because of the lengthy nature of the filings (i.e. SRP over 120 pages) with attachments, the County will only give examples of some representative errors, with the goal of convincing the Commission that it should take time to do its own comprehensive review of the facts proven by competent evidence and testimony admissible in federal court and federal law applicable to the Verde River. No matter how much the Commission may desire to depart from federal law it cannot. It is the applicable law of this case and every title for navigability case ever decided in the United States.

5. None of the proponents or opponents of navigability have summarized collectively appropriate evidence in the record to separately establish the two conditions of the Verde that must be defined, “ordinary” and “natural”. This is a task that must be undertaken wholly by the Commission.

6. Many of the experts called to testify gave opinions that were not within their scope of expertise, and their opinions on those areas outside of their areas of expertise, though inadmissible as evidence, have been given the same deference in the documents submitted by parties as true expert testimony. This is error. Just because an expert is qualified in one area doesn’t make him qualified in another. *523 IP LLC v. CureMD.Com*, 48 F. Supp. 3d 600, 642 (S.D.N.Y. 2014). For example:

a. Rich Burtell’s qualifications as a geologist, hydrologist, and hydrogeologist were established during the hearings. However, Mr. Burtell is not a historian, a boater or a boat builder, nor did he establish any expertise in road building, transportation geography, or many other areas that he offered testimony about during the Verde hearings. See his statement of qualifications in Transcript 3/30/15, page 2586, line 23, to page 2589, line 1. Mr. Burtell’s opinions in his declaration (SRP paragraph 28, page 9) as to navigability based on history, boating and boat building, and other subjects that he testified about outside of his area of expertise should not be considered by the Commission. His testimony within his field must be evaluated by what he did to establish his claims. He testified that he counted trips from other reports, never boated the Verde, never crossed it, never went to the gauges he reports on, and got much of

his information second hand by reading previous Commission transcripts (See Transcripts pages 2665, lines 12-16; page 2989, lines 2-6; page 3093, line 23 to page 3094, line 18; page 3033, line 8 to page 3034, line 10.) As a result, much of his testimony simply does not meet the standard set by federal courts for expert evidence that may be relied on for a navigability determination.

b. Robert Mussetter has established qualifications as an engineer and expert on river mechanics and the Commission could rely on his testimony in those areas. However, Mussetter was the majority owner of the firm that employed Dr. Stan Schumm, now deceased, and has based a large part of his testimony on the work of Dr. Schumm. Dr. Schumm based his ordinary and natural determinations on studies conducted in the 1930s (See for example Salt River Transcript dated 4/7/03, page 197), well after the time set out in *Winkleman* for determination of ordinary and natural conditions. This is error. To the extent Mussetter adopts Schumm's work it makes Mussetter's work incorrect and should not be part of the findings. An expert may not simply adopt the work of another without having done any of the work himself. The Commission may not rely on an expert's opinion or testimony that is based solely or primarily on the opinions of other experts. See *Hunt v McNeil Consumer Healthcare*, 297 F.R.D. 268, 275 (E.D. La, 2014); *Fosmire v. Progressive Max Ins. Co.*, 277 F. R.D. 625, 630 (W.D. Wash., 2011). A testifying expert cannot simply be a conduit for a non-testifying expert's opinion. *State v. Lundstrom*, 161, Ariz. 141, 148 776 P.2d 1067 (1989). Further, without the ability to ask questions of Dr. Schumm, how can the

Commissioners judge the veracity or test the depth of his expert knowledge, or establish the important standards for judging navigability? Declarations by absent witnesses or non-experts cannot be turned into reliable evidence sufficient to meet the federal tests by having another witness testify on them who did not do the work. (See Transcript 2/20/15 regarding Schumm navigability graph page 1876, lines 4-7; page 1885, lines 7 to 17; also reliance on Burtell for flow numbers Transcript 2/23/15, page 1905, line 9 to 17).

c. Historian Dr. Littlefield testified on surveyor work and other items but he had never been instructed by his client nor knew from his own work how to do his research based on the proper legal standards in navigability cases for title. He did not apply the federal test (Transcript page 1570, line 22 to page 1571, line 21) did not understand the term "commercial" (Transcript page 1674, lines 14-20) and did not determine "ordinary" or "natural" (Transcript page 1664, lines 5-11, page 1691, lines 11-22). He relies on the surveyor opinions as to whether the Verde was navigable, but testified that the GLO never told the surveyors how to identify what was "navigable" (Transcript page 1520, lines 14-24). For these reasons the Commission should not use the proposed findings of fact in the SRP document that are based on Littlefield's work because he does not use the correct legal standards. Further it must be remembered that Dr. Littlefield is a historian, not a trained surveyor (Transcript 2/19/15, page 1726, lines 1-10).

d. Dr. Jack August is also a qualified historian, but he also did not apply the correct legal standards for navigability (Transcript 2/24/15 pages 2439, line

22 to page 2440, line 2; page 2497, lines 9-11; page 2503, lines 10-14) or ordinary and natural determinations (Transcript 2/24/15, page 2504, lines 7 to 17). His testimony is also largely about the Spanish and earlier native activities regarding the Verde but much of it is irrelevant (see SRP Facts 84, 85 and 86) because outside the time frame for navigability determinations recommended by the *Winkleman* decision, see *Id* at 242. For example, Father Kino was exploring in the early 1700s and Dr. August testified that he apparently only viewed the Verde from a mountain forty miles away (SRP paragraph 111), thus it is not relevant time wise; also it is certainly not compelling evidence either for or against navigability that Kino made no statement that the Verde appeared navigable or non-navigable. Therefore the Commission can just disregard the recitations and “facts” in paragraphs 103 to 113 of the SRP document and paragraph 17 on page 4 of the Freeport submittal. Further it is incredulous to believe that anyone, let alone the Commission, would accept evidence of navigability from a 40-mile-away view.

7. Some of the experts called to testify were qualified in their field of expertise but have not been given correct legal definitions to work with, so their conclusions and recommendations of navigability are based on an incorrect legal definition, standard or were not made using the “ordinary” and the “natural” condition of the Verde in accordance with applicable law.

8. Some facts have a summary of the citation that severely misstates the actual testimony or evidence given. See for example SRP paragraph 35, which states that

Fuller used Bob William's boating guide for his segmentation. He did use his mile markers (Transcript 12/15/14, page 49, lines 4-5), but he also used Slingluff's book, and his own experience on the river (Transcript 12/15/14 page 65, lines 9-16) and "further subdivided" as he felt was necessary (Transcript 12/15/14 page 50, line 4-6). The proposed finding of fact is not totally incorrect but incomplete in statement. The Commission must make its own examination and conclusions of the evidence and testimony.

9. The parties often rely on the 2008 Report, Findings, and Determination Regarding The Navigability of the Verde River From Its Headwaters to the Confluence With The Salt River (2008 Report) by the Commission as evidentiary proof of facts and law about the Verde. Assuming the same infirmities found by the *Winkleman* court with the Commission's Salt determination, this reliance does not meet the factual or legal requirements for a navigability determination. The report on the Verde cannot be used as an evidentiary basis to support a finding of fact or law by the Commission for the following reasons:

- a. The 2008 Report does not include the necessary citations to evidence or statements of law relied on by the Commission, such as there being multiple waterfalls on the Verde when at best there is only Verde Falls (if it is not to be considered a rapid) and even Verde Falls admittedly has been boated. (See Report descriptions on pages 37, 42, 48, 52, and 53 of multiple waterfalls).

b. The 2008 Report fails to differentiate between natural and ordinary conditions of the river as a whole and within segments. *PPL* requires a segmentation analysis even if it is determined that the whole river is not navigable (See discussion of segmentation in Section IV.A of *PPL* beginning at 29). Such a determination does not demonstrate that some portion of the river that fits the *PPL* definition for segmentation purposes is not present thus the analysis must be completed. Obviously this will be part of the purpose of any new Report the Commission issues.

c. The Commission membership has changed significantly and the members have heard many additional days of testimony and received additional documentation submitted to ANSAC. The general rule in Arizona is that a reversal of a judgment restores the parties to the same position as if the action had never been tried. *Tucson Gas & Electric Co. v. Supreme Court In and For Pima County*, 9 Ariz. App. 210, 213, 450 P.2d 722, 725 (1969); *Markel V. Transamerica Title Insurance Co.*, 103 Ariz. 353, 362, 442 P.2d. 97, 106 (1968). Therefore the earlier findings of fact in the 2008 Report cannot be used to justify a new decision. The Commission may consider the earlier transcripts and submissions and incorporate them as appropriate into the new findings of fact for the Verde but new findings are required to comply with *Winkleman*.

d. In several sections of their proposed findings of fact the SRP, Freeport and Nations drafters rely on and cite to the 2008 Report. *Winkleman*

rejected the similar Salt River report for its failure to assess natural and ordinary characterizations of the river separately and for failing to deal with diversions of flow that had taken place by statehood. Further the report argues a need for a commercial intent for boating. *PPL* requires only navigation, and *Defenders of Wildlife, supra*, made it clear that commercial use is not required. Therefore citing solely the 2008 Report for these issues is a gross error in any proposed findings of fact or conclusions of law and would leave the new findings open to attack again.

e. The 2008 Report does not meet the standards for *Winkleman* because it did not consider the impact of diversions on the ordinary and natural conditions. It did not do a separate analysis of the ordinary condition of the river and the natural condition of the river.

10. Some experts compare the Verde to other rivers which have been declared not navigable to prove the Verde not navigable. Freeport in particular attempts to make its case for the Verde by relying on other rivers (see paragraph 73 of findings of fact) including in its Conclusions of Law findings on the Rio Grande (paragraph 8) the Red River (paragraph 9) the San Juan and other rivers in paragraph 11. Findings on other rivers are not conclusive for the Verde River as all rivers have different geology, hydrology and other features. Each river stands on its own facts, not on a determination by comparison to another river's navigability or non-navigability. The navigability or non-navigability of other rivers is irrelevant to the determination on the Verde. The Commission must make its decision based on the record made in the Verde

hearings. Several parties attempt in their opening briefs to compare the Verde to other rivers and urge the Commission to consider those findings, which are not before this Commission, as evidence of the non-navigability of the Verde. No evidence or testimony of any kind was given to link the diverse rivers in other determinations with the Verde, nor was the Commission privy to the record and deliberations in those navigability determinations. Although comparisons with other rivers is tempting, the *U.S. Supreme Court in U.S. v. Utah*, 283 U.S. 64, 87, 51 S. Ct. 438 (1931) held that “each determination as to navigability must stand on its own facts.”

11. Expert witnesses also asserted that because land transportation exists in close proximity to the river this proves the river is not navigable. This contravenes *Defenders*, supra, and makes the expert's testimony on navigability not admissible for using an incorrect standard to determine whether the river is navigable. Proving that a river was not navigable because people used other land-based transportation does not meet the *Defenders of Wildlife* standards. *Defenders*, supra at 242, and see SRP Facts 131 to 134 and 143).

12. Some experts require that navigation have a commercial component when the law only requires navigation. See *PPL*, supra and *Utah*, supra.

13. The Commission should also distinguish the commentary on the facts by the authors of report as opposed to actual facts. For example at paragraph 30 of SRP's Facts the words “of course” are added to a statement about river flow. In fact a review of the actual citation discloses that John Fuller does not testify that in all cases flow rates of rivers increase as one moves down stream as the commentary would indicate. The

Commission must also check statement to make sure they tell the whole story. Another example is the statement in SRP paragraph 81 that there is no evidence that “early inhabitants” used the Verde. This may be correct if “early” is pre-1800s but not true during army times closer to statehood. SRP in paragraph 9 incorrectly characterizes witness Don Farmer as a recreational Verde boater when in fact Mr. Farmer testified that he does commercial runs (Transcript 2/20/15, page 376, line 23). He has made 50 or 60 trips on the Verde in all seasons and all flows (Transcript 2/20/15 page 381, line 12.)

14. The Commission must stay focused on the purpose of this study. For example, much is written in the Statements of Fact which is not relevant to a navigability determination. See for example paragraphs 85 and 86 of SRP Facts discussing Hohokam civilization pre 1450 and its successors and paragraphs 98 and 99 discussing Spanish exploration. Also, paragraph 80 states that native inhabitants used the Verde only for “simple ditch irrigation”, which is probably correct but they also drank and used the water for other daily needs. While interesting information, it has no bearing on either boats used around statehood or the natural and ordinary condition of the river or its navigability. See *Winkleman* at 242 (look at river in its natural condition after any early people diversions and prior to modern-era settlement).

15. Because navigability is a historical inquiry the evidence and exhibits from the hearings include many kinds of written documents, such as newspapers or diary accounts. The Commission will have to decide for purpose of its findings how much weight they should be given. *Winkleman* requires the Commission to set out its

reasoning on its decision to use or not to use such documents in its determinations. If the Commission determines not to rely on a newspaper account it should state its reason for discarding it. If the Commission intends to rely on a newspaper account then should indicate the basis for such reliance. *Winkleman*, supra at 237, footnote 9. The Commission must make its own factual analysis because various reports are cited as evidence or discounted by the parties, depending on whether they support or dispute navigability.

16. The Commission must decide how much weight to give to early patent and survey testimony. The General Land Office surveys are cited in SRP paragraphs 147, 149, and 150 as evidence of non-navigability but using surveys as a “navigability test” directly controverts the case law. See *State of Oklahoma v. State of Texas*, 258 U.S. 574, 585 (1922). Federal patents are similarly given great significance in the submitted conclusions, but this is an unwarranted legal conclusion. (See discussion in paragraph 6.c above regarding lack of instructions to surveyors, survey errors, and use of terms “navigable” or “non-navigable” in documents.) Federal patents do not convey land under navigable waters. See *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926), *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 427, 443 P.2d 421, 423 (1968) and discussion in County’s Post-Hearing Response, supra. State patents are all dated after statehood and would therefore be granted after the substantial diversion of the river and thus do not reflect the ordinary and natural condition of the river. Case law also contradicts Dr. Littlefield’s erroneous legal conclusions cited in the SRP Facts (see paragraphs 157 to 166) in regard to the Desert Land Act and use of water from non-

navigable streams. This test was rejected in *Defender of Wildlife*, 199 Ariz. 411, 423, 18 P3d 722, (App 2001). The statements from Dr. Littlefield regarding patents should not be included in the Commission's findings of fact and conclusions of law.

17. The Commission needs to look closely at the evidence offered during the hearings and entered into the record regarding historical and current boating on the Verde River. The Commission should also carefully look at the qualifications of the "experts" presented on this topic. In particular, SRP's findings of fact rely heavily on the conclusions of Burtell and Mussetter, neither of who is an expert in modern or historical boat building, and neither of whom has ever boated on the Verde. The Commission needs to study the record and make its own factual findings regarding boats or claims to be expert boaters, and then apply the correct legal standard as most recently articulated in the *PPL* case. Even use of canoes can establish navigability (see i.e. *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785, 788-89 (9th Cir. 1981).

18. One of many defects in the 2008 Report on the Verde by the previous Commission was that it mentioned many waterfalls and impediments to navigation without any citations to the record. The record includes one waterfall, Verde Falls, and many discussions of other possible impediments to navigation including rapids and beaver dams. The Commission should examine the records and testimony of those who have actually boated on the river to make its findings regarding navigation and susceptibility to navigation. The Commission's duty is to look at river segments in their ordinary and natural state per *Winkelman*, read the Supreme Court decisions regarding

obstacles in a river and how you determine if they prohibit navigation, consider the testimony of the expert boater on whether an impediment actually prohibits navigation and then specifically identify any obstacles that prohibit navigation and their location if the existence of obstacles is the reason the Commission determines a segment of the river to be “not navigable.” For example there is no admissible testimony about the location of any specific beaver dam or specific sand bar that controverts the boating experts that beaver dams and sand bars are not obstacles and in fact are routinely boated over and around.

19. Some fact submissions also use the term “equivalent” which is not a correct legal term. In regard to boats *PPL* (supra at 1233) uses “meaningfully similar” watercraft, not exactly the same craft. In Webster’s dictionary “meaningful” is defined as “having real importance or value” and “similar” is defined as “having characteristics in common, alike in substance or essentials.” If the Commission is to reject modern boats and replica boating it must demonstrate how such boats do not meet these definitions. The question for the river is susceptibility and measuring the river against the old boats. Evidence and testimony were presented by experts regarding old boats (and replica boats) and whether they could have navigated the Verde in its ordinary and natural condition. (See testimony and video from Brad Dimock presented to Commission on 3/31/15).

II. CONCLUSIONS OF LAW SUBMITTED DO NOT FOLLOW CORRECT LEGAL TESTS

1. The Commission has the opportunity and the legal duty to follow the standards set out by federal courts in cases like *PPL Montana LLC vs. Montana*, 132 S.Ct. 1215, 182 L.Ed.2d 77 (2012) and the Arizona Courts in *Winkleman* and *Defenders*, supra. The navigability of the Verde River was been the subject of previous court proceedings and other hearings. It is imperative that the Commission use the correct legal standards in its conclusions of law and fact. Some of the proposed conclusions of law misstate or ignore important legal tests in the applicable cases. For example, some ignore a segmentation analysis of the river and conclude this is justified because they believe the whole river is not navigable even though this is the very issue that the *PPL* court reversed the Montana Supreme Court for doing, see *PPL* supra at 1226, 1229-1232. Some provide no separate analysis of ordinary and natural characteristic of the river or its segments even though *Winkleman* demands it, see *Winkleman*, supra at 241.

2. In several conclusions of law (see i.e. SRP paragraph 1) the term “highway for commerce” is used, which is not the correct legal standard in federal law. The term used by the court in *Utah v. U.S.*, 409 U.S. 9, 91 S.Ct. 1773, 29 L.Ed. 279 (1971) is just a highway. The standard in *PPL* is navigation. Evidence of trade on the river is not needed, nor is the use of other transportation not on the river determinative of susceptibility to navigation. Experts who require commerce or travel and commerce together have used the wrong standard and their testimony must be disregarded. See paragraph 26 of the SRP conclusions of law, which wrongly suggests a commerce requirement in *PPL*. In fact *PPL* and *Utah* make clear that, if a commerce element was ever required, it no longer is. The SRP, Freeport, Phoenix and Nations conclusions of

law all misstate the *PPL* decision with dicta not the holding. *PPL* says commerce is not required, just navigation, and did not overrule *Utah v. U.S.*, supra. The navigation may change from one segment to another, just as a showing of the potential or susceptibility to navigation may vary from one segment to another and one season to another (see *PPL* at 43).

3. In Paragraph 22, page 113_of SRP's Determination of Navigability section SRP states that the Commission considered all evidence and refers to and incorporates all of the 583 SRP Findings of Fact as the evidence relied on. Is this incorporation by reference sufficient to meet the *Winkleman* requirements and state statutes that require the Commission to be specific regarding the evidence it relies on? Ultimate conclusions are no longer acceptable unless the Commission tells us the specific facts it relies on to support the conclusion. See *Winkleman*, supra at 237, footnote 9. The court in *Winkleman*, supra, noted that the Commission must make its determination in writing with sufficient documentation and detail to confirm the rationale and basis for the determination. See *Winkleman* at 224 Ariz. 230, 237, footnote 9. The Nations (see page 62, line 8) disagreed with the County's analysis of the evidentiary standards that must be met in the Commissions' determination of navigability or non-navigability, but "declined to brief the issues" or offer any legal alternatives. The County agrees that the Commission should make these determinations on their own.

4. Rather than rely on the opinion of the attorneys who prepared the SRP, Freeport, ASLD and other submittals the Commission must review the testimony and decide for itself. An example of how opinion is used in the proposed findings is SRP

Conclusions of Law which focuses on modern day recreational boating but fails to make a finding regarding the testimony from historical boat builders or address the “meaningfully similar” crafts discussion from *PPL*, which goes to the issue of susceptibility to navigation. Freeport (see paragraph 21 and 22) also concludes that the testimony by the historical boat builders was “unpersuasive” but can cite no evidence to rebut the State’s witnesses regarding whether boating today was “meaningfully similar”. The Nations, after a reciting evidence and testimony from historic boat builders, concludes without citation in the next paragraph (page 11, lines 18-21) “it is clear” that modern boats are not meaningfully similar. The Court of Appeals did not appreciate such misstatements and opinions without any citations to support statements made when it reviewed the *Winkleman* record. See for example, *Winkleman* at 240. The Commission must make its own estimates of the importance and reliability of the evidence, witnesses, and history presented and cite the facts and law that support these estimates in its determinations.

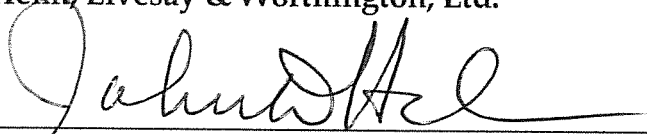
III. CONCLUSION

For the reasons cited in each section above the County urges the Commission to examine the record and the true expert testimony and make its own findings of fact and conclusions of law regarding the navigability and susceptibility to navigation of the Verde River in each of the segments recommended by the State. The Commission should enter findings of fact and conclusions of law that correctly reflect the evidence

and will withstand the scrutiny of any reviewing courts. This effort by the Commission may bring thirty years of litigation to a conclusion.

Respectfully Submitted this 7th day of December 2015.

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