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28  
29 **BEFORE THE ARIZONA NAVIGABLE STREAM  
30 ADJUDICATION COMMISSION**

31 IN THE MATTER OF THE  
32 NAVIGABILITY OF THE VERDE  
33 RIVER FROM ITS HEADWATERS  
34 AT SULLIVAN LAKE TO THE  
35 CONFLUENCE WITH THE SALT  
36 RIVER, YAVAPAI, GILA AND  
37 MARICOPA COUNTIES, ARIZONA

No. 03-009-NAV (Verde)

**FREEPORT MINERALS  
CORPORATION AND THE SALT  
RIVER PROJECT'S  
JOINT RESPONSES TO THE  
PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW  
SUBMITTED BY THE  
PROONENTS OF NAVIGABILITY**

1 The Salt River Project Agricultural Improvement and Power District and Salt River  
2 Valley Water Users' Association (collectively, "SRP") and Freeport Minerals Corporation  
3 ("Freeport") jointly respond to the separate sets of proposed findings of fact ("FOF") and  
4 conclusions ("COL") of law submitted by Arizona State Land Department ("ASLD"),  
5 Defenders of Wildlife, *et al.* (collectively, "Defenders"), and Maricopa County and the Flood  
6 Control District of Maricopa County (collectively, "Maricopa County") (collectively, the  
7 "Proponents") in this matter regarding the Verde River ("Verde").

8 The Proponents' proposed findings and conclusions are already addressed in  
9 alternative proposed findings and conclusions submitted separately by SRP and Freeport.  
10 Rather than reiterating their respective proposed findings of fact in response, SRP and  
11 Freeport jointly submit a table, attached as **Appendix 1**, that cross-references Proponents'  
12 proposed findings of fact with the relevant alternative proposed findings submitted by SRP  
13 and Freeport.<sup>1</sup> These cross-references constitute SRP and Freeport's responses to the  
14 individual proposed findings submitted by the Proponents. SRP and Freeport also have  
15 included additional responses to select Proponent findings of fact. *See* Section V, *infra*. Any  
16 finding of fact not specifically addressed in the body of this response is explicitly responded  
17 to via the table in Appendix 1.

18 With respect to Proponents' proposed conclusions of law, SRP and Freeport rely upon  
19 their own proposed conclusions in refuting the conclusions submitted by Proponents. In  
20 addition, SRP and Freeport respond more generally below concerning a few topics of  
21 overarching importance.

22 **I. THE DANIEL BALL TEST CONCERNS COMMERCIAL TRADE AND**  
23 **TRAVEL, NOT MODERN RECREATION.**

24 As they have done in each of the prior proceedings concerning the San Pedro, Santa  
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26 <sup>1</sup> As described in Section V(C), *infra*, Maricopa County's submittal does not include any  
27 proposed findings of fact, and it therefore does not require any response from Freeport or  
SRP. Because there are no factual assertions to respond to, the table in Appendix 1 does not  
address Maricopa County's submittal.

1 Cruz, and Gila Rivers, the Proponents rely heavily on modern recreation in modern  
2 recreational craft to support their position that the Verde River is navigable. *See, e.g.*, ASLD  
3 FOF 344-350; ASLD COL 647-652; Defenders FOF 34-50; Defenders COL 21-23.  
4 However, the United States Supreme Court has eliminated any lingering doubt about the  
5 nature of the test for navigability for title – the inquiry relates to a watercourse’s usefulness as  
6 a highway for commerce in the crafts commonly used for commerce at the time of statehood.  
7 *PPL Montana v. Montana*, 132 S. Ct. 1215, 1233-34 (2012). “Navigability must be assessed  
8 as of the time of statehood, and it concerns the river’s usefulness for ‘trade and travel,’ rather  
9 than for other purposes.” *Id.* at 1233. A finding of navigability must be founded on the kind  
10 of trade and travel on water that constitutes “a commercial reality.” *Id.* at 1234. Accordingly,  
11 evidence of navigability “must be confined to that which shows the river could sustain the  
12 kinds of commercial use that, as a realistic matter, might have occurred at the time of  
13 statehood.” *Id.* at 1233.

14         Based on these standards, the Supreme Court rejected a lower court ruling that the  
15 Madison River in Montana was navigable because the lower court had relied primarily on  
16 evidence of modern-day boating. While the Supreme Court noted that such evidence could be  
17 considered, it would support a finding of navigability only if “[a]t a minimum, ... the party  
18 seeking to use present-day evidence for title purposes” can show that “(1) the watercraft are  
19 meaningfully similar to those in customary use for trade and travel at the time of statehood;  
20 and (2) the river’s post-statehood condition is not materially different from its physical  
21 condition at statehood.” *Id.* at 1234. The Court noted that these requirements are critical  
22 because “[m]odern recreational fishing boats, including inflatable rafts and lightweight canoes  
23 or kayaks, may be able to navigate water much more shallow or with rockier beds than the  
24 boats customarily used for trade and travel at statehood.” *Id.*

25         The Proponents’ heavy reliance on modern recreational boating suffers from the same  
26 fatal flaws as the State of Montana’s use of this same type of evidence in *PPL Montana*. The  
27 Proponents’ witnesses base their navigability opinions on recreational boating standards

1 concerning the minimum amount of water needed to use modern low draft recreational craft,  
2 not for commercial purposes, but for recreation. *See, e.g.*, Freeport FOF 106-139; Freeport  
3 COL 16-23; SRP FOF 505-539; SRP COL 14-20. The watercraft that these witnesses rely  
4 upon in forming their opinions are modern recreational craft, such as Kevlar canoes and  
5 inflatable kayaks, not the watercraft that were “in customary use for trade and travel at the  
6 time of statehood...” *PPL Montana*, 132 S. Ct. at 1234. The record is clear that these  
7 modern recreational crafts are not meaningfully similar to “the boats customarily used for  
8 trade and travel at statehood.” *Id.* The modern recreational craft are significantly more  
9 durable, which allows their use on rocky rivers like the Verde that were not susceptible to use  
10 by the wooden boats that were customarily used to conduct commerce circa 1912. *See, e.g.*,  
11 Freeport FOF 106-139; Freeport COL 16-23; SRP FOF 505-539; SRP COL 14-20; *compare*  
12 *with PPL Montana*, 132 S. Ct. at 1234. They are also lighter, meaning that they draw less  
13 water and therefore require less flow and less depth. *See, e.g.*, 2/24/15 Trans. 2284:1 –  
14 2285:5 (Mussetter). This allows use of these modern low-draft recreational craft on shallow  
15 rivers not previously susceptible to regular use by the wooden boats that were customarily  
16 used to conduct commerce circa 1912.

17 While the Proponents baldly assert that these modern, plastic and inflatable low-draft  
18 recreational craft are somehow “meaningfully similar” to the wooden boats that were  
19 customarily used to conduct commerce circa 1912, *see, e.g.*, ASLD FOF 340, the undisputed  
20 record demonstrates that this assertion is inaccurate. In fact, even the ASLD’s lead witness in  
21 this case, Jon E. Fuller, acknowledged that the introduction of the types of modern, durable,  
22 low-draw recreational craft that were not available at statehood was the primary driver behind  
23 the development of recreational boating well after statehood.

24 The development of durable small boats – plastic, fiberglass and  
25 other modern types of canoes and kayaks, inflatable boats for  
26 single paddlers and for groups – all contributed to the rising  
27 popularity of river running in Arizona especially on rivers not  
previously considered boatable, or boatable only very rarely  
because of low water.

1 Freeport FOF 134.<sup>2</sup>

2 **II. THE HISTORY OF THE VERDE DEMONSTRATES THAT IT IS A NON-**  
3 **NAVIGABLE WATERCOURSE.**

4 The Proponents also rely heavily on the sparse early accounts of ambitious attempts to  
5 boat the Verde River. *See, e.g.*, ASLD FOF 399-401, 460-469, 500-503, 520-522, 553-559;  
6 Defenders FOF 24-33. These limited instances of adventuresome efforts to travel the Verde,  
7 many of which were unsuccessful or during periods of high flow, and most of which were  
8 recreational in nature, *see, e.g.*, Freeport FOF 26, are addressed in detail in the proposed  
9 findings and conclusions submitted by SRP and Freeport. *See, e.g.*, SRP FOF 170-208;  
10 Freeport FOF 21-31; SRP FOF 170-208. These sparse accounts do not depict a watercourse  
11 that was susceptible to use as a highway of commerce in its ordinary and natural condition.  
12 As Mr. Burtell described,

13 [t]aken together, these historic accounts do not demonstrate that  
14 the Verde River was reliably used, or susceptible to use, for trade  
15 or travel prior to statehood. Most of the accounts either involved  
16 using boats to cross the river or were downstream recreational  
floats. There is simply no evidence of extensive or continued use  
of the river at that time for commercial purposes.

17 Freeport FOF 30; *compare with PPL Montana*, 132 S. Ct. at 1233-34. Indeed, the  
18 Commission already considered most of the sparse accounts of historic boating attempts, and  
19 it reached essentially the same conclusion:

20 [a]lthough there was some boating on the Verde River during  
21 historical times and use of boats to hunt ducks and other game,  
22 and likewise there is evidence in historical times as well as  
23 modern times of fish in the river and evidence that people did  
24 catch fish in the river, there was no fishing industry ever  
established. It appears that all fishing was for recreational or  
personal consumption. None of the boating incidents carried  
goods for commercial trade and there was no navigation upriver.

25 Freeport FOF 28 (quoting the Commission's Report, Findings and Determination Regarding  
26

27 <sup>2</sup> Quoting Mr. Fuller's 1998 Final Report, Criteria for Assessing Characteristics of  
Navigability for Small Watercourses in Arizona, Freeport 6, p. 32 [XO23].

1 the Navigability of the Verde River from its Headwaters to the Confluence with the Salt River  
2 dated March 24, 2008 at p. 37). The Verde River was simply unable, in its ordinary and  
3 natural condition, to “sustain the kinds of commercial use that, as a realistic matter, might  
4 have occurred at the time of statehood.” *Id.* at 1233.

5 This finding is consistent with the undisputed fact that the Native Americans who  
6 inhabited the region for thousands of years did not use the Verde River as a highway for  
7 commerce. In his 2003 Verde Report,<sup>3</sup> Mr. Fuller states that “[t]he fact that the Verde River  
8 served as a communication and trade link and focus is evident in settlement patterns,  
9 architectural and artifactual traits, and site structure.” Freeport FOF 16. Despite thousands of  
10 years of inhabitation of the region, and the central role that the Verde played in the cultural  
11 aspects of the inhabitants’ lives, there is no evidence to suggest that any prehistoric peoples  
12 ever used the Verde River for boating of any kind. *See* Freeport FOF 17; SRP FOF 76-97.  
13 As Mr. Fuller acknowledged at the hearing in 2014, “we have no accounts of boats or boating  
14 from the archaeological period. We have no preserved records that say the Native Americans  
15 were using boats. So I’ll say it again, Native Americans, we have no evidence that they were  
16 using boats.” Freeport FOF 19.

17 The fact that the Native Americans did not use the Verde for boating of any kind  
18 during the thousands of years in which they inhabited the region is compelling evidence that  
19 the Verde River was not susceptible to use as a highway of commerce in its ordinary and  
20 natural condition. *See* Freeport FOF 20. In fact, this is another conclusion already reached by  
21 the Commission in its 2008 Report, Findings and Determination:

22 There is no evidence in the archeological record that would  
23 indicate that any of the prehistoric cultures located in the study  
24 area used the Verde as a means for transportation by boat or other  
25 water craft and there has been no documented use of the river as a  
highway for commerce for commercial trade and travel or regular

26 <sup>3</sup> JE Fuller Hydrology & Geomorphology, Inc., Arizona Stream Navigability Study for the  
27 Verde River: Salt River Confluence to Sullivan Lake (revised June 2003) (“Fuller’s 2003  
Verde Report”) [EI31].

1 floatation of logs. All travel in the study area during this period  
2 was by foot.

3 Freeport FOF 18 (quoting Report, Findings and Determination p.23). The evidence presented  
4 to the Commission in 2014 and 2015 only serves to support the Commission's prior  
5 determination.

6 **III. THE VERDE WAS NOT SUSCEPTIBLE TO USE AS A HIGHWAY FOR**  
7 **COMMERCE TO FULFILL NUMEROUS SIGNIFICANT NEEDS FOR**  
8 **TRADE AND TRAVEL.**

9 The Proponents variously attempt to shift focus away from the absence of navigation  
10 by Native Americans and the exceptional nature of the sparse instances of historic boating  
11 attempts by arguing "susceptibility" to navigation. *See, e.g.*, ASLD FOF 647-48. While the  
12 absence of commercial navigation is not dispositive "where conditions of exploration and  
13 settlement explain the infrequency or limited nature of such use," *United States v. Utah*, 283  
14 U.S. 64, 82 (1931), there were clear needs to use the Verde River as a highway for  
15 commerce—if it had been viable for such purposes—in the early years of settlement before  
16 diversions had meaningfully impacted the river. These needs were clear, specific, and  
17 significant. *See, e.g.*, Freeport FOF 32-51. The Proponents can offer the Commission no  
18 plausible explanation for the inability of the military or early settlers to use the Verde to meet  
19 their transportation needs. *See, e.g.*, ASLD FOF 200-248 (outlining activities of early settlers  
20 and needs for a highway of commerce that were not met by the Verde River). The reason is  
21 that the Verde River simply was not susceptible for use as a highway of commerce.

22 **IV. CONTEMPORANEOUS DESCRIPTIONS OF THE VERDE RIVER**  
23 **DEMONSTRATE THAT IT WAS NOT NAVIGABLE IN ITS NATURAL AND**  
24 **ORDINARY CONDITION.**

25 As described in detail in the proposed findings and conclusions submitted by Freeport  
26 and SRP, the contemporaneous observations of government representatives and early settlers  
27 clearly describe a river that was non-navigable in its ordinary and natural condition. *See, e.g.*,  
Freeport FOF 52-61; SRP FOF 136-169, 209-249. These observers included a judge, land  
surveyors, the Arizona Territorial Legislature, a trapper, and the Weekly Journal-Monitor

1 newspaper. *See, e.g.*, Freeport FOF 52-61; SRP FOF 136-169, 209-249. These observers  
2 each described an aspect of the Verde River that relates to its non-navigability (*e.g.*, numerous  
3 rapids or comparability to other non-navigable streams) or directly express the opinion that  
4 the Verde River was not navigable. *See, e.g.*, Freeport FOF 52-61; SRP FOF 136-169, 209-  
5 249. The Proponents largely ignore these contemporaneous observations of the river, and for  
6 good reason—in combination with the other lines of evidence presented to the Commission,  
7 they clearly support a finding that the Verde River was not navigable in its natural and  
8 ordinary condition.

9 **V. ADDITIONAL RESPONSES TO SELECT PROPONENT FINDINGS OF FACT**

10 **A. Responses to ASLD’s Proposed Findings of Fact**

11 1. ASLD ¶ 1: The ASLD is correct that the issue of navigability for title  
12 concerning any Arizona watercourse was first raised in 1985, 73 years after Arizona achieved  
13 statehood. However, the ASLD is incorrect that Arizona officials “asserted a sovereign  
14 interest” in that case. To the contrary, that case was brought by Maricopa County seeking a  
15 declaration as to whether the State owns any river beds within the county, in response to a  
16 newspaper article. *See State Land Dep’t v. O’Toole*, 154 Ariz. 43, 44, 739 P.2d 1360, 1361  
17 (1987); *id.* at 47 (“Here, the State has not asserted its ownership of lands to which the other  
18 parties claim title.”). *See also* Appendix 1.

19 2. ASLD ¶¶ 2-3: The ASLD is correct that the Legislature enacted 1987 Ariz.  
20 Sess. Laws, ch. 127 (H.B. 2017), which “established a quitclaim fee of \$25 per acre, for  
21 which any record titleholder of lands in or near the beds of the Gila, Salt, or Verde Rivers can  
22 obtain a quitclaim deed from the State Land Commissioner for all of the state’s interest in  
23 such lands.” *Center for Law in the Public Interest v. Hassel*, 172 Ariz. 356, 837 P.2d 158  
24 (App. 1991). In *Hassel*, the ASLD defended H.B. 2017. *See id.* at 362 (“Throughout their  
25 briefs, appellees repeatedly dismiss the state’s claims that rivers other than the Colorado were  
26 navigable at statehood as ‘uncertain,’ ‘doubtful,’ and ‘weak.’”). *See also* Appendix 1.



1           3.     ASLD ¶ 17: The second sentence is not supported by its citation. *See also*  
2 Appendix 1.

3           4.     ASLD ¶ 20: Not all historical descriptions in Mr. Fuller’s 2003 Verde Report  
4 describe running water. For instance, Charles Willard, who moved to the Verde Valley in  
5 1879 near Clarkdale wrote: “When I first saw the Verde Valley . . . [t]he land was like a  
6 sponge and when it rained the water was absorbed into the ground immediately, so very little  
7 ran into the river channel and the small amount that did run into the river bed, stood in pools  
8 which became stagnant and polluted with malaria germs.” He goes on to describe how  
9 livestock trampled down the spongy land causing the river to channelize and run. Fuller’s  
10 2003 Verde Report at 3-13 to 3-14 [EI31]. Additionally, Mr. Fuller’s report includes an  
11 account by another early resident of the Verde Valley, stating that the Verde was “dry enough  
12 to step across . . . [and that they] could drive across Verde River in flood . . . there were no  
13 bridges . . . no need for them.” *See id.* at 7-7. *See also* Appendix 1.

14           5.     ASLD ¶ 36: In his affidavit, Mr. Randall fully explains the word *Tu Cho Lii*:  
15 “Our Apache word for the Verde River in [the Camp Verde Area], *Tu Cho Lii*, conveys that  
16 the River was very wide at this location. Our Yavapai and Apache family and cultural  
17 histories are all similar in that they all describe this part of the Verde River as being wide and  
18 having many shallow places where one could cross on foot. Our Yavapai and Apache People  
19 described the bottomlands in Camp Verde before the coming of non-Indians as also being  
20 marshy.” Affidavit of Vincent Randall, ¶ 28 (February 11, 2015) [X055-YAN1]. *See also*  
21 Appendix 1.

22           6.     ASLD ¶ 37: The 657 cfs figure in this finding of fact appears to be a historical  
23 average rather than a median. *See* Birkit, Log of the Verde at 31 (1978) [X001-25].  
24 Therefore, it is highly skewed by the large volume of water flowing during flood periods. *See*  
25 Report, Findings and Determination, p. 44 (“The floods especially distort the average and the  
26 median.”). *See also*, Appendix 1.

1           7.     ASLD ¶ 47: The ASLD lists the median flow rate for Segment 5 to be 781 cfs.  
2 This number is an average rather than a median. *See* Fuller’s Verde Report, at 7-9 (Table 7-5)  
3 [EI31]. Therefore, it is highly skewed by incorporating flood flows. *See* Report, Findings  
4 and Determination, p. 44. The median value would be significantly lower. *See id.* *See also*  
5 Appendix 1.

6           8.     ASLD ¶¶ 50-61: For these findings of fact, the ASLD relies heavily on Mr.  
7 Hjalmarson’s analysis. Mr. Hjalmarson’s analysis was proven to be deeply flawed during his  
8 cross-examination. As indicated by the references in the table in Appendix 1, a long  
9 discussion of the reasons why Mr. Hjalmarson’s methodology is not reliable can be found at  
10 SRP’s FOF 297-338. *See also* Freeport FOF 97-99; Freeport’s Responsive Post-Hearing  
11 Memorandum Concerning the Non-Navigability of the Verde River at Section II(C); SRP’s  
12 Closing Brief, at Section V(B)(3). Mr. Hjalmarson’s analysis of the bankfull discharge on the  
13 Verde is also incorrect. *See* SRP FOF 386-389. Mr. Burtell’s undepleted flow and depth  
14 analysis does not suffer from these same limitations and is much more reliable. *See* SRP FOF  
15 291-292; Freeport FOF 86-105. Moreover, the ASLD focuses its depth analysis based on  
16 average depths and depths in pools. These depths are not the limiting factor when it comes to  
17 navigation. The depths of riffles (causing boats to run aground) is more important. *See* SRP  
18 FOF 283-292. *See also* Appendix 1.

19           9.     ASLD ¶¶ 62-87: In these findings of fact, the ASLD attempts to avoid the fact  
20 that braiding occurs on the Verde River, especially in Segments 4 and 5. Its proposed  
21 findings of fact ignore overwhelming evidence of braiding that includes admissions by their  
22 own witnesses (Mr. Fuller & Mr. Farmer), admissions by Mr. Hjalmarson, the expert  
23 testimony of Dr. Mussetter and Dr. Schumm, historical photographs of braiding, and the  
24 general character of dryland rivers. *See* SRP FOF 368-394. *See also* Appendix 1.

25           10.    ASLD ¶ 113: As Mr. Randall states in his affidavit, the fact that the Apache  
26 People had “*many* shallow places” for crossing the river and felt comfortable carrying their  
27 young children suggests that the Verde had many shallow areas, which would prevent

1 navigation. *See* Randall Affidavit, ¶ 28 [X055-YAN1] (emphasis added). *See also* Appendix  
2 1.

3 11. ASLD ¶ 116: The source cited actually states: “As of 2005, human stresses  
4 that occurred between 1910 and 2005 was estimated to have decreased base flow in the Verde  
5 River.” It goes on to cite figure 15 of that report, which clearly shows that base flow was  
6 unaffected until approximately 1940. *See* USGS, Human Effects on the Hydrologic System  
7 of the Verde Valley, at 23 (2013) [X0116]. *See also* Appendix 1.

8 12. ASLD ¶¶ 128-138: The ASLD acknowledges that civilizations have existed  
9 along the Verde for over 1,000 years and that different populations traded with each other  
10 during that time, but the ASLD fails to provide a plausible explanation as to why those  
11 populations never navigated the river. *See also* Appendix 1.

12 13. ASLD ¶ 154: The ASLD writes: “The risks of transporting furs from the  
13 mountains were great: if traveling by boat the boat could capsize, spoiling furs . . . .” This  
14 would be especially true on a river like the Verde with its steep slope (*see* SRP FOF 395-399),  
15 boulders (*see* SRP FOF 406-411), major rapids (*see* SRP FOF 412-461; Freeport FOF 65-85),  
16 and strainers (*see* SRP FOF 395-399). Boating on the river today is still dangerous, even for  
17 expert recreational boaters like the ASLD’s own boating witnesses. *See* SRP FOF 543-552,  
18 557-572. *See also* Appendix 1.

19 14. ASLD ¶ 155: The only support the ASLD has for this contention is speculation  
20 by Mr. Fuller, who is not a historian. Dr. August, a historian, reached the opposite  
21 conclusion. *See Declaration of Jack August*, 9-11 (February 17, 2015) [X067]. *See also*  
22 Appendix 1.

23 15. ASLD ¶ 188: According to the heading of ASLD’s citation, this description  
24 only applies to surveying instructions prior to 1902. *See* Simpson, River & Lake Boundaries,  
25 at 16 (“Simpson”) [X017-112]. *See also* Appendix 1.

26 16. ASLD ¶¶ 189-196: A careful reading of ASLD’s source for these FOFs shows  
27 that the author is actually cautioning against assuming a meandered river is navigable, and not

1 that a non-meandered river is non-navigable. The author suggests that “the test for  
2 navigability which might have been performed by a deputy surveyor in 1800’s” was based, at  
3 least in part, on the fact “he was to be paid by the mile for the several types of lines to be  
4 measured. Meander lines were paid at a different rate.” *See* Simpson, at 48 [X017-113].  
5 Thus, he suggests there was actually a financial incentive to meander a river. He also  
6 suggests that a surveyor might err on the side of navigability if the river was too deep to  
7 wade. *Id.* at 49. And, that a surveyor could miss a frozen river – something that is not a  
8 problem in Arizona. *Id.* He also does not state that the navigability determinations of  
9 surveyors are irrelevant in navigability for title cases. In fact, he writes “[a]t the present time,  
10 it may be considered that the presence of meanders only creates a rebuttable presumption that  
11 a river was navigable at the time of statehood.” *Id.* *See also* Appendix 1.

12 17. ASLD ¶ 198: The claimant also was required to use a non-navigable water  
13 source. *See* SRP FOF 162. *See also* Appendix 1.

14 18. ASLD ¶ 215: This proposed finding does not contain a verifiable citation. *See*  
15 *also*, Appendix 1.

16 19. ASLD ¶ 259: The ASLD is correct that communities and newspapers engaged  
17 in boosterism during the time of settlement. Accordingly, newspapers would be more likely  
18 to advertise a navigable river and would have no incentive to call a river dangerous. The  
19 dearth of newspaper articles declaring the Verde navigable is compelling evidence of non-  
20 navigability. *See also* Appendix 1.

21 20. ASLD ¶¶ 281-282: The ASLD is correct that there are no instances of upstream  
22 boat travel on the Verde and that depths on the Verde are “insufficient to haul vast quantities  
23 of ore.” *See also* Appendix 1.

24 21. ASLD ¶ 296: The ASLD is correct that the Kolb brothers repeatedly crashed  
25 and repaired the Edith on the Colorado River. This suggests that conducting commerce and  
26 trade with the Edith would not be viable on the Colorado, let alone on the Verde. *See also*  
27 Appendix 1.

1           22.    ASLD ¶ 299: The ASLD’s source states that bull-boats were twelve by thirty  
2 feet. There is no evidence that a boat of that dimension could navigate the Verde River.

3           23.    ASLD ¶¶ 314-329: The evidence is overwhelming that boats available in  
4 Arizona at the time of statehood are *not* meaningfully similar to modern recreational craft.  
5 *See* SRP FOF 505-539, 553-556. As ASLD’s own witness, Mr. Slingluff, wrote:

6                   Shallow creeks and rivers are boatable in many different canoes,  
7 but aluminum, canvas, and wood boats are easily damaged and  
8 difficult to repair. Plastic canoes are durable, slide easily over  
9 rocks, slip quietly through the water, and do not conduct heat or  
cold. Plastic canoes can open areas to sportsmen that are  
otherwise only a wish.

10           *See* Slingluff, *Shallow Streams: Liquid Paths Into Wilderness, The Southwestern Sportsman*  
11 *National Magazine*, at 16 (Winter 1990-91) [EI034-1]. *See also* Appendix 1.

12           24.    ASLD ¶ 337: This FOF speaks volumes with regard to whether statehood-era  
13 craft are meaningfully similar to modern recreational craft. The durability of modern  
14 materials allow boaters to navigate rivers that are not navigable in statehood era boats.  
15 Statehood era boaters would repeatedly crash and have to repair their boat – a substantial  
16 barrier to commercial navigation. This explains why the Verde was *not* navigated until  
17 modern plastic kayaks became available. The fact that modern boaters in modern craft can  
18 assume their safety underscores that they are using very different boats. *See also* Appendix 1.

19           25.    ASLD ¶ 355: An objective reading of these boating guides reveals a river that  
20 is not susceptible to commercial navigation. *See* SRP FOF 557-583. *See also* Appendix 1.

21           26.    ASLD ¶ 404: The ASLD’s characterization of gold pans, shovels, and snuffer  
22 bottles as “mining equipment” is misleading. *See also* Appendix 1.

23           27.    ASLD ¶ 414: This Segment is actually *more* navigable now than it was at  
24 statehood due to the efforts of recreational boaters like Mr. Lynch, who move rocks, branches,  
25 and debris from the channel. Mr. Lynch testified that, if not for these efforts, “you would  
26 have to have people getting in and out of the boat all of the time.” *See* Tr. at 12/16/14:332  
27 (Lynch). *See also* Appendix 1.

1 28. ASLD ¶ 468: The Fogal and Gireaux trip is hardly evidence that the Verde is  
2 susceptible to commercial navigation. It took them five weeks to travel from Clarkdale to 18  
3 miles north of old Fort McDowell. *See also* Appendix 1.

4 **B. Responses to Defenders' Proposed Findings of Fact**

5 29. Defenders ¶¶ 51-68: *See* Response to ASLD ¶¶ 50-61, *supra*. *See also*  
6 Appendix 1.

7 **C. Responses to Maricopa County's Proposed Findings of Fact**

8 30. Maricopa County's filing contains no factual information to rebut. While  
9 Maricopa County purports to set forth "Proposed Findings of Fact," Maricopa County's  
10 numbered paragraphs constitute nothing more than several pages of written instructions to the  
11 Commission about how Maricopa County contends the Commission should go about drafting  
12 its decision in this matter. Maricopa County's submission is entirely non-responsive to the  
13 Commission's request that parties file proposed findings of fact and conclusions of law.

14 RESPECTFULLY SUBMITTED this 7th day of December, 2015.

15 SALMON, LEWIS & WELDON, P.L.C.

SNELL & WILMER L.L.P.

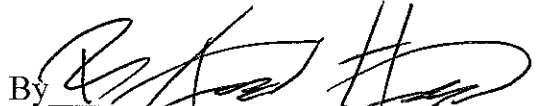
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2 hand-delivered for filing this 7th day of December,  
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3 Arizona Navigable Stream Adjudication Commission  
4 1700 West Washington, Room B-54  
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5 AND COPY mailed this 7th day of December, 2015 to:

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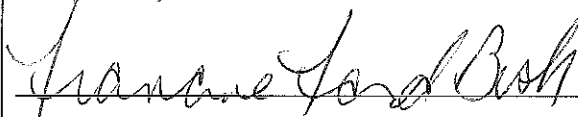
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26 

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**APPENDIX 1**

<b>Proponent FOF</b>	<b><i>Compare with</i></b>
<b>Arizona State Land Department</b>	
ASLD FOF 1-13	SRP FOF 1-6; Freeport FOF 1-5
ASLD FOF 14-15	SRP FOF 29-75
ASLD FOF 16-19	SRP FOF 249-282
ASLD FOF 20	SRP FOF 303-338
ASLD FOF 21	SRP FOF 249-282
ASLD FOF 22	SRP FOF 137, 171, 243, 400-405
ASLD FOF 23	
ASLD FOF 24-31	SRP FOF 29-75
ASLD FOF 32-33	SRP FOF 209-248
ASLD FOF 34	SRP FOF 249-282
ASLD FOF 35	SRP FOF 339-394
ASLD FOF 36	SRP FOF 91-95, 171
ASLD FOF 37-42	SRP FOF 267-282
ASLD FOF 43	SRP FOF 209-248, 267-282
ASLD FOF 44-49	SRP FOF 249-282; Freeport FOF 86-98
ASLD FOF 50-52	SRP FOF 293-338; Freeport FOF 97-105
ASLD FOF 53	SRP FOF 76-97; Freeport FOF 16-20
ASLD FOF 54-61	SRP FOF 283-338; Freeport FOF 86-105
ASLD FOF 62-70	SRP FOF 339-394
ASLD FOF 71-75	SRP FOF 146-169, 293-338; Freeport FOF 86-105
ASLD FOF 76-80	SRP FOF 339-399
ASLD FOF 81	SRP FOF 412-461, 557-572; Freeport FOF 27, 52, 65-85
ASLD FOF 82-87	SRP FOF 349-394; Freeport FOF 27, 52, 65-85
ASLD FOF 88-97	SRP FOF 339-394,
ASLD FOF 98-100	SRP FOF 76-97, 573-583; Freeport FOF 16-20
ASLD FOF 101-102	SRP FOF 136-145, 573-583; Freeport FOF 35, 86-105
ASLD FOF 103-105	SRP FOF 573-583; Freeport FOF 35, 86-105
ASLD FOF 106	SRP FOF 146-169, 209-248; Freeport FOF 59
ASLD FOF 107	SRP FOF 124-145; Freeport FOF 35, 86-105
ASLD FOF 108	SRP FOF 136-145
ASLD FOF 109	SRP FOF 354, 363
ASLD FOF 110-111	SRP FOF 136-145, 336; Freeport FOF 35, 86-105
ASLD FOF 112	SRP FOF 336
ASLD FOF 113	SRP FOF 76-97
ASLD FOF 114-127	SRP FOF 136-145, 209-282, 293-338, 339-486; Freeport FOF 35, 52, 86-105
ASLD FOF 128-138	SRP FOF 76-97; Freeport FOF 16-20, 52
ASLD FOF 139-150	SRP FOF 98-113; Freeport FOF 23-31, 63
ASLD FOF 151-162	SRP FOF 114-123; Freeport FOF 23-31, 52, 63

<b>Proponent FOF</b>	<b>Compare with</b>
ASLD FOF 163-174	SRP FOF 124-169, 209-248
ASLD FOF 175-196	SRP FOF 146-156; Freeport FOF 59
ASLD FOF 197-199	SRP FOF 157-166
ASLD FOF 200	SRP FOF 136-145
ASLD FOF 201	SRP FOF 124-135; Freeport FOF 52-64
ASLD FOF 202	SRP FOF 114-156; Freeport FOF 52-64
ASLD FOF 203-216	SRP FOF 136-145; Freeport FOF 32-64
ASLD FOF 217-220	SRP FOF 124-135; Freeport FOF 32-64
ASLD FOF 221-223	SRP FOF 136-145 Freeport FOF 32-64
ASLD FOF 224-231	SRP FOF 127-135; Freeport FOF 32-64
ASLD FOF 232-237	SRP FOF 136-145; Freeport FOF 32-64
ASLD FOF 238	SRP FOF 303-338; Freeport FOF 98-99
ASLD FOF 240-242	SRP FOF 136-145 Freeport FOF 32-64
ASLD FOF 243	SRP FOF 160-166
ASLD FOF 244-271	SRP FOF 136-145 Freeport FOF 32-64
ASLD FOF 272	SRP FOF 157-166
ASLD FOF 273	SRP FOF 210-211, 238
ASLD FOF 274-275	SRP FOF 136-145
ASLD FOF 276-277	SRP FOF 157-166
ASLD FOF 278-279	SRP FOF 136-145
ASLD FOF 280-282	SRP FOF 170-208, 540-552; Freeport FOF 16-31
ASLD FOF 283-286	SRP FOF 211, 214, 216-17, 232, 501, 505-539; Freeport FOF 55, 57, 107
ASLD FOF 287-297	SRP FOF 494-556; Freeport FOF 107-111
ASLD FOF 298	SRP FOF 114-123; Freeport FOF 52
ASLD FOF 299-313	SRP FOF 494-556; Freeport FOF 112-138
ASLD FOF 314-317	SRP FOF 76-97; Freeport FOF 16-20
ASLD FOF 318-321	SRP FOF 487-491, 505-539; Freeport FOF 112-138
ASLD FOF 322-355	SRP FOF 487-572; Freeport FOF 112-138
ASLD FOF 356-57	SRP FOF 339-486, 557-572; Freeport FOF 62-85
ASLD FOF 358-359	SRP FOF 412-461, 557-572; Freeport FOF 62-85
ASLD FOF 360-61	SRP FOF 204, 422-23, 441-450, 531-535, 557-583; Freeport FOF 62-85
ASLD FOF 362	SRP FOF 264, 347-348, 370-371, 412-461, 557-583
ASLD FOF 363	SRP FOF 211, 406-411, 426, 455, 487, 557-583; Freeport FOF 62-85
ASLD FOF 364-366	SRP FOF 462-474; Freeport FOF 62-85
ASLD FOF 367	SRP FOF 475-486; Freeport FOF 62-85
ASLD FOF 368-369	SRP FOF 349-394; Freeport FOF 62-85

<b>Proponent FOF</b>	<b>Compare with</b>
ASLD FOF 370	SRP FOF 557-583; Freeport FOF 62-85
ASLD FOF 371-372	SRP FOF 349-394 Freeport FOF 62-85
ASLD FOF 373-375	SRP FOF 400-405 Freeport FOF 52, 62-85
ASLD FOF 376-382	Freeport FOF 28, 51
ASLD FOF 383-391	SRP FOF 462-474; Freeport FOF 62-64
ASLD FOF 392	SRP FOF 34-53; Freeport FOF 86-105
ASLD FOF 392(1)(a)	SRP FOF 33, 54-65, 183, 243, 273, 281-282, 285, 434, 464-465, 476
ASLD FOF 393-398	SRP FOF 76-97
ASLD FOF 399	SRP FOF 183; Freeport FOF 21-31
ASLD FOF 400	SRP FOF 196; Freeport FOF 21-31
ASLD FOF 401	SRP FOF 170-208; Freeport FOF 21-31
ASLD FOF 402	SRP FOF 487-539; Freeport FOF 106-139
ASLD FOF 403	SRP FOF 487-539, 571(f); Freeport FOF 106-139
ASLD FOF 404-405	SRP FOF 487-539; Freeport FOF 106-139
ASLD FOF 406	SRP FOF 557-585; Freeport FOF 106-139
ASLD FOF 407-409	SRP FOF 435, 487-539, 557-583; Freeport FOF 106-139
ASLD FOF 410	SRP FOF 66-67, 481, 557-583; Freeport FOF 86-105
ASLD FOF 411-412	SRP FOF 249-292; Freeport FOF 86-105
ASLD FOF 413	SRP FOF 283-292; Freeport FOF 86-105
ASLD FOF 414	SRP FOF 267-292, 349-367, 573-583; Freeport FOF 86-105
ASLD FOF 415	SRP FOF 400-405; Freeport FOF 86-105
ASLD FOF 416-417	SRP FOF 267-282
ASLD FOF 418	SRP FOF 283-292, 293-338; Freeport FOF 86-105
ASLD FOF 419	SRP FOF 267-282
ASLD FOF 420	SRP FOF 492-493, 505-539; Freeport FOF 86-105
ASLD FOF 421	SRP FOF 108; Freeport FOF 63
ASLD FOF 422-423	SRP FOF 171; Freeport FOF 52
ASLD FOF 424	SRP FOF 124-135; Freeport FOF 32-47
ASLD FOF 425	SRP FOF 194; Freeport FOF 54
ASLD FOF 426-428	SRP FOF 124-135; Freeport FOF 32-47
ASLD FOF 429-439	SRP FOF 136-145; Freeport FOF 32-47
ASLD FOF 440-441	SRP FOF 146-156
ASLD FOF 442	SRP FOF 400-405
ASLD FOF 443-449	SRP FOF 209-248
ASLD FOF 450	SRP FOF 213
ASLD FOF 451	SRP FOF 124-135
ASLD FOF 452	SRP FOF 209-248

<b>Proponent FOF</b>	<b>Compare with</b>
ASLD FOF 453-454	SRP FOF 136-145
ASLD FOF 455	SRP FOF 184-193
ASLD FOF 456	SRP FOF 146-156
ASLD FOF 457	SRP FOF 136-145
ASLD FOF 458-459	SRP FOF 170-208; Freeport FOF 21-31
ASLD FOF 460	SRP FOF 172, 174; Freeport FOF 21-31
ASLD FOF 461	SRP FOF 207; Freeport FOF 21-31
ASLD FOF 462	SRP FOF 129, 207, 491; Freeport FOF 21-31
ASLD FOF 463	SRP FOF 184-193; Freeport FOF 21-31
ASLD FOF 464	SRP FOF 197; Freeport FOF 21-31
ASLD FOF 465	SRP FOF 199-200; Freeport FOF 21-31
ASLD FOF 466	SRP FOF 202; Freeport FOF 21-31
ASLD FOF 467	SRP FOF 204; Freeport FOF 21-31
ASLD FOF 468	SRP FOF 205-206; Freeport FOF 21-31
ASLD FOF 469	SRP FOF 207, 491; Freeport FOF 21-31
ASLD FOF 470-474	SRP FOF 492-493, 505-539; Freeport FOF 106-139
ASLD FOF 475	SRP FOF 475-486; Freeport FOF 65-85
ASLD FOF 476-479	SRP FOF 505-539; Freeport FOF 106-139
ASLD FOF 480-485	SRP FOF 11, 498-499, 520-525, 536-537; Freeport FOF 106-139
ASLD FOF 486-491	SRP FOF 487-493, 505-539; Freeport FOF 106-139
ASLD FOF 492	SRP FOF 68-69, 275, 287, 395-399, 422, 557-572; Freeport FOF 65-85
ASLD FOF 493	SRP FOF 204, 371, 422-423, 441-447, 450, 531-535, 559(k)
ASLD FOF 494	
ASLD FOF 495	SRP FOF 487-539, 543-572; Freeport FOF 106-139
ASLD FOF 496	SRP FOF 267-282; Freeport FOF 86-105
ASLD FOF 497	SRP FOF 194; Freeport FOF 54
ASLD FOF 498	SRP FOF 244
ASLD FOF 499	SRP FOF 170-208; Freeport FOF 65-85
ASLD FOF 500	SRP FOF 184-193; Freeport FOF 21-31
ASLD FOF 501	SRP FOF 202; Freeport FOF 21-31
ASLD FOF 502	SRP FOF 204; Freeport FOF 21-31
ASLD FOF 503	SRP FOF 205
ASLD FOF 504-507	SRP FOF 487-539, 543-573; Freeport FOF 106-139
ASLD FOF 508	SRP FOF 204, 371, 422-423, 441-447, 450, 531-535, 559(k); Freeport FOF 65-85
ASLD FOF 509-512	SRP FOF 487-539, 543-573; Freeport FOF 106-139

<b>Proponent FOF</b>	<b>Compare with</b>
ASLD FOF 513-519	SRP FOF 70-72, 276, 279, 288, 377, 399, 505-539, 573-583; Freeport FOF 86-105
ASLD FOF 520	SRP FOF 184-193; Freeport FOF 21-31
ASLD FOF 521	SRP FOF 202; Freeport FOF 21-31
ASLD FOF 522	SRP FOF 205; Freeport FOF 21-31
ASLD FOF 523	SRP FOF 487-539; Freeport FOF 106-139
ASLD FOF 524	SRP FOF 70-72, 276, 279, 288, 377, 399, 505-539; Freeport FOF 106-139
ASLD FOF 525-528	SRP FOF 487-539; Freeport FOF 106-139
ASLD FOF 529	SRP FOF 490; Freeport FOF 106-139
ASLD FOF 530-532	SRP FOF 487-539; Freeport FOF 106-139
ASLD FOF 533	SRP FOF 368
ASLD FOF 534	SRP FOF 73-75, 242, 251, 277, 359, 368-394, 403, 573-583; Freeport FOF 86-105
ASLD FOF 535-536	SRP FOF 146-156; Freeport FOF 86-105
ASLD FOF 537	SRP FOF 475-486
ASLD FOF 538	SRP FOF 277; Freeport FOF 86-105
ASLD FOF 539	SRP FOF 74, 573-583
ASLD FOF 540-541	SRP FOF 124-135
ASLD FOF 542-543	SRP FOF 136-145
ASLD FOF 544-545	SRP FOF 403, 209-248
ASLD FOF 546	SRP FOF 124-135
ASLD FOF 547	SRP FOF 242
ASLD FOF 548	SRP FOF 136-135
ASLD FOF 550-552	SRP FOF 146-156
ASLD FOF 553	SRP FOF 172; Freeport FOF 21-31
ASLD FOF 554	SRP FOF 175; Freeport FOF 21-31
ASLD FOF 555	SRP FOF 170-208; Freeport FOF 21-31
ASLD FOF 556	SRP FOF 181; Freeport FOF 21-31
ASLD FOF 557	SRP FOF 195; Freeport FOF 21-31
ASLD FOF 558	SRP FOF 184-193; Freeport FOF 21-31
ASLD FOF 559	SRP FOF 205; Freeport FOF 21-31
ASLD FOF 560-567	SRP FOF 487-539; Freeport FOF 106-139
<b>Defenders of Wildlife, et al.</b>	
DOW FOF 1-9	SRP FOF 29-75, 249-251
DOW FOF 10-11	SRP FOF 573-583; Freeport FOF 35
DOW FOF 12	SRP FOF 280-282, 573-583; Freeport FOF 86-105
DOW FOF 13-15	SRP FOF 297-338, 573-583; Freeport FOF 86-105
DOW FOF 16-18	SRP FOF 209-248, 250; Freeport FOF 52-61
DOW FOF 19-20	SRP FOF 146-156; Freeport FOF 52-61
DOW FOF 21	SRP FOF 365, 368-394
DOW FOF 22-23	SRP FOF 100, 209, 283-284, 369, 381, 384,

<b>Proponent FOF</b>	<b><i>Compare with</i></b>
	391, 394
DOW FOF 24	SRP FOF 170-208; Freeport FOF 21-31
DOW FOF 25	SRP FOF 124-135, 172, 174, 176, 177-181, 207-208; Freeport FOF 21-31
DOW FOF 26	SRP FOF 175, 209-248; Freeport FOF 21-31
DOW FOF 27	SRP FOF 181; Freeport FOF 21-31
DOW FOF 28	SRP FOF 184-193; Freeport FOF 21-31
DOW FOF 29	SRP FOF 199-201; Freeport FOF 21-31
DOW FOF 30	SRP FOF 202; Freeport FOF 21-31
DOW FOF 31	SRP FOF 204; Freeport FOF 21-31
DOW FOF 32	SRP FOF 205; Freeport FOF 21-31
DOW FOF 33	SRP FOF 197; Freeport FOF 21-31
DOW FOF 34	SRP FOF 487-572; Freeport FOF 106-139
DOW FOF 35	SRP FOF 491-493, 502, 506, 508, 525, 528, 553-556; Freeport FOF 106-139
DOW FOF 36-37	SRP FOF 505-539; Freeport FOF 106-139
DOW FOF 38	SRP FOF 487-493, 505-539, 553-572; Freeport FOF 106-139
DOW FOF 39	SRP FOF 487-572; Freeport FOF 106-139
DOW FOF 40	SRP FOF 7, 505-543, 557-572; Freeport FOF 106-139
DOW FOF 41	SRP FOF 9, 61-65, 267-268, 372-374, 430, 441-458, 468-469, 481-485, 511, 519, 543-551, 554-556, 557-572; Freeport FOF 106-139
DOW FOF 42	SRP FOF 10, 501-504, 515-518, 528-539, 557-572; Freeport FOF 106-139
DOW FOF 43-44	SRP FOF 487-493, 505-539; Freeport FOF 106-139
DOW FOF 45	SRP FOF 412, 487-489, 487-489, 505-508, 560-567; Freeport FOF 106-139
DOW FOF 46	SRP FOF 492-493, 505-539; Freeport FOF 106-139
DOW FOF 47	SRP FOF 11, 259-265, 290, 356-57, 407-411, 520-525, 536-537, 557-572; Freeport FOF 106-139
DOW FOF 48-50	SRP FOF 487-493, 505-539, 553-572; Freeport FOF 106-139
DOW FOF 51	SRP FOF 573-583; Freeport FOF 86-105
DOW FOF 52-57	SRP FOF 293-338; Freeport FOF 86-105
DOW FOF 58	SRP FOF 301-302; Freeport FOF 86-105
DOW FOF 59-67	SRP FOF 293-338; Freeport FOF 86-105
DOW FOF 68	SRP FOF 280-282, 293-338; Freeport FOF 86-105

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