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BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY)
OF THE VERDE RIVER FROM ITS) NO. 04-009-NAV
HEADWATERS AT SULLIVAN LAKE TO)
THE CONFLUENCE WITH THE SALT) ADMINISTRATIVE
RIVER, YAVAPAI, GILA AND MARICOPA) HEARING
COUNTIES, ARIZONA.)
_____)

At: Phoenix, Arizona
Date: April 1, 2015
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1 light draft boats -- and Utah became a state I believe
2 in the late 1890s. If you need that much water for
3 light draft boats used for commerce at that time, then
4 I don't think that's something to ignore.

5 I understand every river has to be taken by
6 itself, but what it provides us is a guidepost to ask
7 ourselves then what type of depths are needed for
8 commercial navigation.

9 Q. When you were making a decision, were you
10 aware that the Supreme Court has stated that small
11 boats, and other courts like the Ninth Circuit have
12 stated that canoes, can be counted as evidence of
13 navigability?

14 A. I'm certainly aware that cases among all of
15 the evidence that I think that these various courts
16 have looked at, that that is one thing to include; not
17 the only thing. I think I'm at a loss of any river
18 case that I've read, but please correct me, where the
19 deciding factor was by itself the use of a canoe.

20 Q. We'll be happy to put that in the brief, so
21 you can find that in there.

22 And would you agree that canoe use, if used
23 for fur trapping on a river repeatedly for commerce,
24 would that constitute evidence of use of the river as a
25 highway for commerce?

1 A. You know, I don't think that your
2 hypothetical, based on that alone, I would make that
3 determination. Whether or not the Commission will, I
4 don't know; but I believe that if that was all you had,
5 that that would not be enough.

6 Q. Is that different than what you've testified
7 to before?

8 A. I don't -- I don't recall.

9 Q. Do you recall testifying on the Gila that
10 canoe use was, in fact, potentially a commercial
11 activity if done in a repeated fashion?

12 A. As I said, again, Mr. Slade, it certainly is
13 one factor. But I thought the question was by itself,
14 would that be enough to tip the scales, if you will, as
15 to whether a river as navigable; and I don't think I
16 said that in the Gila case. But if I did, I certainly
17 would like to see that.

18 Q. Okay, we'll pull it out.

19 And this is the Gila River transcript,
20 June 20th, 2014, Pages 1175 and 1176, and I'll let
21 you --

22 I can read it or you can. If you want to
23 read the question and then your answer through to
24 Line 18. The question starting on Line 12 of 1175, and
25 it's a little longer, but if we want to get his

1 complete answer and the question, then we'll read the
2 whole thing.

3 And, Debi, if you want to pull that up as
4 well.

5 So the question is on Line 12 of 1175.

6 A. Do you want me to read this, Mr. Slade?

7 Q. Yes, or I can read it.

8 A. Oh, no, that's fine. I was just -- I was
9 reading it, but not on behalf of the --

10 Q. How about I read it, since it's up here.
11 Then you don't have to read it.

12 A. Okay.

13 Q. Okay.

14 The question is: "And when you talked
15 about commercial, what did you mean by -- you
16 talked about sustained, and then commercial.
17 What do you mean by commercial use? At
18 least, what's your understanding of how that
19 term is used by you in your report?"

20 And you say: "Yeah, and that's a fair
21 question. Certainly trade, and I know there
22 was some discussion this morning about -- or
23 this week about is it trade or travel, and
24 trade and travel. I will maybe go on what
25 PPL Montana said, and I think in there it's

1 trade and travel in that case. I think when
2 it comes to commercial, and I certainly
3 understand the arguments that attorneys have
4 had over this issue about does it have to be
5 profitable or not. I think it comes down to
6 if it's not for profit or somebody benefiting
7 from the practice, then it has to be part of
8 their livelihood, perhaps. And, again, I'll
9 try my best to distinguish it from a, let's
10 say, personal recreation. Maybe it's almost
11 easier for me to say what it's not.
12 Sometimes it's easier to do that. I would
13 say that a personal use of a recreational
14 craft in my mind would not be what I consider
15 commercial. And obviously your expert and I
16 differ perhaps on that. So it wouldn't
17 include a personal recreational craft. But
18 conversely, it's certainly, if you've got a
19 trapper who's got a canoe loaded up with
20 pelts and it's being used, and not just one
21 isolated event, but is being used
22 consistently, and there's a record of it. It
23 has become a highway -- when I hear the
24 phrase highway for commerce, I kind of get
25 the impression that this is something that is

1 a reliable, recognizable use."

2 And do you still agree with that statement?

3 A. Then can you restate then? I think it was a
4 hypothetical that you were asking me regarding canoe
5 use.

6 Q. Sure. If you have canoes that are reliably
7 and consistently used, traveling down the Verde for the
8 purpose --

9 A. Use -- oh, I'm sorry. I'll let you finish.

10 Q. -- for the purpose of trapping, canoes or a
11 small boat for the purpose of trapping, are they using
12 the river as a highway for commerce?

13 A. In that circumstance, that would support a
14 determination. However, I would again say that there
15 are other factors that should be considered. But under
16 your hypothetical, that would be something that the
17 Commission should look at.

18 Q. Okay. That's all I have on that. Thank you.

19 A. Okay.

20 Q. I want to turn back to your report, and we
21 are moving along. I am on Page 20 in your report.
22 Actually, let's go to Page 21. Excuse me. And I'm at
23 Paragraph 92. And in 92 you compare the depths from
24 the State of Washington's navigability potential study
25 to the depths of the Verde River; is that correct?