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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

**ARIZONA STATE LAND
DEPARTMENT'S MEMORANDUM**

On April 27, 2010, the Court of Appeals found that the Arizona Navigable Stream Adjudication Commission (“ANSAC” or the “Commission”) misapplied the pertinent test for determining navigability of the Lower Salt River. The Court vacated the superior court’s decision and remanded the matter back to ANSAC for further proceedings. *State ex rel. Winkleman v. Arizona Navigable Stream Adjudication Comm’n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010) (“*Winkleman*”). On October 24, 2011, the superior court remanded the Verde River (“River” or “Verde”) matter to ANSAC for all further proceedings consistent with the *Winkleman* decision. At ANSAC’s December 14, 2011, meeting, the Commission requested that interested parties submit memoranda with their recommendations on how ANSAC should

comply with the *Winkleman* decision. The Arizona State Land Department (the “ASLD” or the “State”) submits the following Memorandum in response to ANSAC’s request.¹

The Commission’s navigability determination is governed by the federal test of navigability, known as the “*Daniel Ball*” test that provides as follows:

[t]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they 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.

The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); see *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 420, 18 P.3d 722, 731 (App. 2001) (*Daniel Ball* test correctly paraphrased in A.R.S. § 37-1101(5)). The *Daniel Ball* test requires ANSAC to determine the characteristics of the Verde River in its ordinary and natural condition and whether, at statehood, the River was used or would have been susceptible to use as a highway-for-commerce in that condition. *Winkleman*, 224 Ariz. at 239, 229 P.3d at 251.

In the *Winkleman* decision, the Court of Appeals found that ANSAC failed to evaluate the Lower Salt River’s ordinary and natural condition in light of the numerous dams, canals, and other diversions aside from Roosevelt Dam. *Winkleman*, 224 Ariz. at 240, 229 P.3d at 252. The Court of Appeals directed ANSAC 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.” *Winkleman*, 224 Ariz. at 241, 229 P.3d at 253. The Court found that the Lower Salt River was “in its natural condition after many of the Hohokam’s diversions had ceased to affect the River, but before the commencement

¹ The State requests that the Commission delay any action on contested rivers until the U.S. Supreme Court issues its decision in *PPL Montana, LLC v. Montana*, 355 Mont. 402, 229 P.3d 421 (2010), *cert. granted in part & denied in part*, 79 U.S.L.W. 3102* (U.S. June 20, 2011) (No. 10-218). The *PPL* decision could potentially affect application of the federal test in the contested rivers before ANSAC.

of modern-era settlement and farming in the Salt River Valley, when some of the Hohokam's diversions were returned to use and other man-made diversions and obstructions began to affect the River." *Winkleman*, 224 Ariz. at 242, 229 P.3d at 254. In applying the *Winkleman* Court's instruction to the Verde River, the Verde River should be assessed in its pre-statehood ordinary and natural condition, disregarding all man-made obstructions and diversions.²

Farming on the middle Verde River, near Camp Verde, began in 1865 just after the establishment of the garrison. See ASLD Verde Report, 3-9. By 1880, most of the farmable land in the Verde Valley was under cultivation. ASLD Verde Report, 3-16. In 1884, 3,000 acres along the Verde River were being farmed and that a canal under construction would bring another 1,000 acres under production. ASLD Verde Report, 3-15. Although ANSAC is not limited to considering evidence of the Verde River's natural condition solely from the time before significant diversions began, "that early period should be considered by ANSAC as the best evidence of the River's natural condition." See *Winkleman*, 224 Ariz. at 242, 229 P.3d at 254.

Ample historical evidence exists in the well-developed record describing the River's ordinary and natural condition in this time frame. For example, Anglo fur trappers came to the Verde River in the early 1820s and through the 1840s. Jonathan E. Fuller, P.E., R.G., P.H., CFM, ("Fuller") Transcript of the ANSAC hearing Jan. 18, 2006, (hereinafter "Tr. 1/18/06 at ___") at 11. In 1826, trappers James Ohio Pattie, Ewing Young, and others traveled up the Salt

² Indian peoples had been irrigating with river water, but Euro-American diversions began around 1865 with the construction of Camp Lincoln on the middle Verde River. *Arizona State Land Department Rep., Arizona Stream Navigability Study for the Verde River: Salt River Confluence to Sullivan Lake* (rev. June 2003 by JE Fuller/Hydrology & Geomorphology, Inc.), Evidence Item ("E.I.") 31 ("ASLD Verde Report"), 3-9. According to Margaret Goddard, the principal irrigation ditches in the middle Verde River and their dates of establishment were the Eamon or Diamond Ditch (1865), the Wood Ditch (1868), the Cottonwood Ditch (1869), the O.K. or Middle Verde Ditch (1873), and the Hickey Ditch (1874). ASLD Verde Report, 3-15.

River, trapping beaver along the way. ASLD Verde Report, 3- 8. As part of this expedition, Young went up the Verde River and followed it up to its headwaters, then returned to the Salt River. *Id.* In 1829, Young returned with 40 other trappers (including Kit Carson), traveling up the Verde River to the Chino Valley. *Id.* John Wolfskil, George Yount, and Pauline Weaver trapped the Verde River in 1829 and 1830. ASLD Verde Report, 3-9.

White settlement in the Verde Valley began in 1863. ASLD Verde Report, 3-2, Table 3-1. A surveyor, Mr. Foster, described the River of the 1870s as “a beautiful stream of clear, pure water with an average width of 100 links (66 feet) and an average depth of three feet” He estimated the banks of the low-flow channel at three feet, and he described cottonwoods, willows, and mesquite lining much of the river bank. ASLD Verde Report, 5-15. An 1884 account of the Verde River describes it as “clear and limpid,” “as large as the Gila,” “well stocked with fish,” and “capable of irrigating vast stretches of land.” ASLD Verde Report, 3-4, Table 3-1. Dr. Ralph F. Palmer arrived in Camp Verde in 1902 and described the River as 50 feet wide, no more than waist deep with banks two to three feet high. ASLD Verde Report, 3-15. At statehood, the Verde’s perennial flow was sufficient to supply irrigation for thousands of acres of farmland, to supply water and power for local residents, and to support native fish and aquatic mammal populations and lush riparian habitat.

Moreover, probative evidence exists of the River’s ordinary and natural physical characteristics that could support navigation. The Verde is perennial, with reliable flows sufficient for shallow draft boating throughout the year. Fuller PowerPoint Slides, E.I. 38, 18 - 21. The Verde is supported by a steady discharge from springs and ground water. ASLD Verde Report, 7-3. However, the River’s naturally perennial flow has been adversely impacted by irrigation diversions. ASLD Verde Report, 7-22 – 7-23. Throughout the River’s length in

Arizona, the existing hydrologic condition, as well as the River's condition in 1912, is substantively different from the River's natural, predevelopment condition.

Systematic hydrologic measurements made by the United States Geological Survey ("USGS") and others that extend back well before statehood provide an undisputable record of reliable, perennial flow throughout the year. ASLD Verde Report, 7-4 – 7-10, Tables 7-1 – 7-7. The hydrologic data is reported as median (50%), monthly average minimum, monthly average maximum, and flow duration records. ASLD Verde Report, 7-9, Table 7-5; Fuller Tr. 1/18/06 at 31; Fuller PowerPoint Slides, 17-22. USGS gauge readings from 1889 through 1939, the average annual flow at McDowell was 781 cfs. ASLD Verde Report, 7-10, Table 7-6. In addition to this flow data, archaeological records of irrigation extending back more than 1,000 years (Fuller Tr. 1/18/06 at 10), tree-ring studies (Fuller Tr. 1/18/06 at 29) and historical descriptions of the River (Fuller Tr. 1/18/06 at 13) that include not just reliable flow, but also healthy fish, beaver, and otter populations (Fuller Tr. 1/18/06 at 11), paint a consistent picture that supports the long-term stream gauge information. Collectively, this hydrologic data shows that in the River's ordinary and natural condition, it regularly had enough water and was deep enough to support navigation by a variety of boats.

Moreover, floods are not the ordinary condition of the River.³ In fact, long-term flow records demonstrate that, while large flash floods can occur on the Verde River, flood conditions that might inhibit boating occur less than one percent of the time. Fuller, Tr. 1/18/06 at 31, Fuller PowerPoint Slides, 18-21. Therefore, descriptions of flood hazards and flood conditions are irrelevant for determining navigability in the "ordinary and natural" condition of the River.

³ While the River's ordinary and natural condition is in neither flood nor drought, flooding on the Verde has caused changes that should be considered by ANSAC. Namely, the 1891 flood may have changed the flood-channel position and morphology, and decreased the marsh surrounding the River. Fuller PowerPoint Slides, 9; ASLD Verde Report, 5-12.

The dominant low flow channel at ordinary flow rates is a single channel with a pool and riffle pattern. Philip Pearthree, Arizona Geological Survey (“Pearthree”) Tr. 1/18/06 at 20-21. Thus, the River’s ordinary and natural flow conditions and its natural geomorphology—that is before numerous irrigation diversions depleted the River’s waters—establish that the River was susceptible for use as a highway-for-commerce.

The Court of Appeals declined to consider whether ANSAC misconstrued the “highway-for-commerce” component of the *Daniel Ball* test. See *Winkleman*, 224 Ariz. at 242 n.16, 229 P.3d at 254 n.16. There is substantial evidence that when the River was in its ordinary and natural condition, it was actually used as a highway-for-commerce, or was at least capable of use as a highway-for-commerce within the meaning of the *Daniel Ball* test.⁴ Despite a very sparse population in the Verde Valley and no local news source around the time of statehood, there are seven recorded accounts of boating during this historical period. ASLD Verde Report, 3-20 – 3-21, 8-2 – 8-4. All of the accounts describe successful boating trips and none report problems with navigability. Fort Verde personnel and civilians kept boats to reach the other side of the River during periods of seasonal high flow. ASLD Verde Report, 8-3. A photograph shows two men on the Verde in a collapsible U.S. Army boat about 1887. ASLD Verde Report, 3-20. At least two newspaper accounts describe soldiers boating down the Verde River from Ft. McDowell to Phoenix. ASLD Verde Report, 3-20. In 1931, two men boated seventy miles down the Verde, trapping all of the way. ASLD Verde Report, 3-21.

⁴ The Arizona State Legislature has broadly defined the highway-for-commerce requirement as “a corridor or conduit within which the exchange of goods, commodities or property or transportation of persons may be conducted.” A.R.S. § 37-1101(3).

In addition, evidence of modern, recreational boating may demonstrate that a river was susceptible to use as a highway-for-commerce.⁵ See *Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (finding that present recreational guided fishing and sightseeing trips are “commercial activity” under the *Daniel Ball* test and can prove a river’s susceptibility for commercial use at the time of statehood); *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (1998) (holding that evidence of a river’s capacity for recreational use is in line with the traditional test of navigability). Currently, the Verde River is used for significant amounts of modern boating. Modern boating occurs over the entire length of the Verde River (Fuller Tr. 1/18/06 at 34, 37), although some reaches are more popular boating areas than others. From January 2001 to March 2005, the United States Forest Service recorded 728 boating trips by 863 individuals. Fuller Tr. 1/18/06 at 37. Arizona State Parks lists the Verde River from Perkinsville to the Salt River as a boatable stream. ASLD Verde Report, 8-4 – 8-5. Commercial boating is common on the Verde River. See generally, Fuller Tr. 1/18/06 at 40; John Colby (“Colby”) Tr. 1/18/06 at 55–63. Commercial rafting trips include single-day trips on the lower section of the River with as many as one hundred fifty commercial guests. Colby Tr. 1/18/06 at 55–56. The trips on the upper Verde are for up to seven days and with up to twelve commercial guests with water levels ranging from about 32 cfs to up to 3,500 cfs as measured at the Camp Verde gauge. Colby Tr. 1/18/06 at 56. Boats used on the Verde include inflatable rafts, “catarafts,” canoes and inflatable kayaks. Colby Tr. 1/18/06 at 57. The boats carry not only the guests, but also the camping gear and food to be used by the group. See *Ahtna*, 891 F.2d at 1403

⁵ See *Northwest Steelheaders Ass’n, Inc. v. Simantel*, 112 P.3d 383, 391-393 (Or. Ct. App. 2005) (post-statehood use, by comparable vessels, probative because post-statehood conditions were less favorable to navigation than conditions at statehood), *review denied*, 122 P.3d 65 (Or. 2005), *cert. denied*, 547 U.S. 1003 (2006); *Winkleman*, 224 Ariz. at 244, 229 P.3d at 243 (“Even if evidence of the River’s condition after man-made diversions is not dispositive, it may nonetheless be informative and relevant.”)

(guided trips on inflatable rafts carrying five passengers and guide held to support determination of navigability); *Defenders*, 199 Ariz. at 424, 18 P.3d at 735 (guided fishing and sightseeing trips, although merely recreational, are 'transportation for profit' and can be considered commercial activity under the *Daniel Ball* test). The Town of Camp Verde sponsors an annual boat race on the Verde River (Fuller Tr. 1/18/06 at 28, 36) and boating by environmental regulatory agencies (David Weedman, Tr. 1/18/06 Ex. A at 219) also occurs on the Verde River.

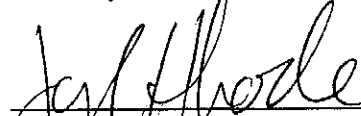
The Court directed ANSAC to properly apply the ordinary and natural component of the *Daniel Ball* test. Equally important is the Court's insistence that ANSAC "may not begin its determination with any presumption *against* navigability." *Winkleman*, 224 Ariz. at 239, 229 P.3d at 251 (emphasis in original). In reaching its determination, "ANSAC's approach and analysis must be wholly impartial and objective, while utilizing the proper legal test." *Winkleman*, 224 Ariz. at 239, 229 P.3d at 251. The Commission should reconsider its prior findings that the Verde River was neither actually navigable nor susceptible to navigation to ensure that its new findings comply with the applicable legal standard.

Substantial evidence exists clearly demonstrating that the Verde River in its ordinary and natural condition before 1912, was used or was capable of being used as a highway-for-commerce. The Commission should consider the significance of post-1865 use of the River—despite decreasing flows due to numerous diversions—in reaching its determination. The Commission also should consider diversions as merely one special factor in the Verde River Valley's development rather than as a condition that precludes a navigability finding, and the River's subsequent limited use as merely a unique circumstance in its overall objective review of the evidence under the *Daniel Ball* test.

The ASLD informs the Commission that due to uncertain resources, the ASLD may be restricted in responding, participating or producing additional evidence in the adjudication proceedings.

DATED: January 27, 2012.

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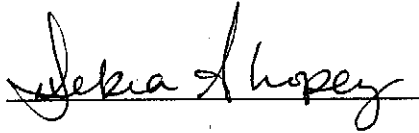
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A handwritten signature in cursive script, appearing to read "Debora Lopez", written over a horizontal line.

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