

1 SPARKS, TEHAN & RYLEY, P.C.
2 ATTORNEYS
3 7503 FIRST STREET
4 SCOTTSDALE, ARIZONA 85251
5 TELEPHONE 480-949-1339

6 Joe P. Sparks, Attorney I.D. No. 2383
7 John H. Ryley, Attorney I.D. No. 2095
8 Attorneys for the Yavapai-Apache Nation

9 **BEFORE THE ARIZONA NAVIGABLE STREAM**
10 **ADJUDICATION COMMISSION**

11) No. 04-009-NAV
12)
13 In re Determination of Navigability of the)
14 Verde River)
15) **RESPONSE MEMORANDUM OF THE**
16) **YAVAPAI-APACHE NATION TO**
17) **DETERMINE WHETHER THE VERDE**
18) **RIVER WAS NAVIGABLE AT THE TIME**
19) **OF STATEHOOD**

20 The Yavapai-Apache Nation (the "Nation") submits its Response Memorandum to
21 determine whether the Verde River was navigable at the time of statehood under the equal footing
22 doctrine.

23 The Nation requests the Arizona Navigability Stream Adjudication Commission (the
24 "Commission") to determine that the Verde River was non-navigable throughout its entire reach
25 at the time of statehood, including the reach of the Verde River running through the lands owned
26 by the Nation in fee or held in trust for the Nation by the United States ("Reservation").

27 The parties generally agree on most of the facts presented, but they do not agree on the
28 federal legal test and criteria to determine navigability under the equal footing doctrine.

A. Burden of Proof

The Proponents¹ of navigability have the burden of proof to establish that the Verde River
is navigable under the equal footing doctrine.²

In fact, when the relevant federal test and criteria are applied, the procedures of the

¹Arizona Center for Law in the Public Interest ("ACLPI"), and the Arizona State Land Department ("ASLD"), or (collectively "Proponents").

²See *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158, at 363, fn.10 (App. 1991), and see also A.R.S. § 37-1128(A).

102
Received by Mail
4-12-06
Posted 4-11-06
JLW

1 evidence shows that the Verde River was non-navigable at the time of statehood under the equal
2 footing doctrine.

3 **B. The Federal Test and Criteria to Determine Navigability Under the**
4 **Equal Footing Doctrine Requires That the Verde River Was Navigable**
at the Time of Statehood

5 Proponents argue that the Commission must consider the Verde River's pre-development
6 virgin condition prior to statehood in determining whether the Verde River is navigable under the
7 equal footing doctrine.³ They are wrong. In addition, they have provided no credible evidence of
8 the predevelopment conditions to prove navigability.

9 The federal test and criteria to determine navigability under the equal footing doctrine
10 clearly requires that a river be navigable at the time of statehood. *See United States v. Utah*, 283
11 U.S. 64, 75 (1931) ("In accordance with the constitutional principle of the equality of States, the
12 title to the beds of rivers within Utah passed to the State when it was admitted to the Union, **if the**
13 **rivers were then navigable**; and, if they were not then navigable, the title to the river beds
14 remained in the United States.") (emphasis added); and *Land Department v. O'Toole*, 154 Ariz.
15 43, 44, 739 P.2d 1360, 1361 (1987) ("The federal Equal Footing Doctrine grants each state
16 property rights to the riverbeds of all of its waterways which were navigable on the date of
17 statehood.")⁴

18 The federal criteria that a river must be navigable at the time of statehood under the equal
19 footing doctrine, differs from the federal criteria to determine navigability to assert federal

22 ³See ASLD's Opening Memorandum at 6-9 ("The existing hydrologic condition of the
23 Verde River, as well as the River's condition in 1912, is substantively different from the
24 River's natural, pre-development condition."). *Id.* at 9. See ACLPI's Opening Memorandum
25 at 5-7 ("...when determining navigability, the ANSAC must evaluate a watercourse in its
26 *natural* state---as though any existing dams or manmade diversions did not exist."). *Id.* at 7.
27 Proponents have made the same incorrect legal argument in all of the other ANSAC hearings to
28 determine navigability.

26 ⁴See the Nation's Opening Memorandum at pp. 8-10. In *State of Oregon v. Riverfront*
27 *Protection Association*, 672 F.2d 792, 795, fn.1 (9th Cir. 1982), the Ninth Circuit Court of
28 Appeals clearly held that the federal criteria to determine navigability for title purposes under
the equal footing doctrine requires that a river be navigable based upon its condition at the time
of statehood, and differs in this respect from the federal criteria to determine navigability for
the purpose of asserting federal regulatory jurisdiction over power plants under the Commerce
Clause.

1 regulatory jurisdiction over power plants under the Commerce Clause of the U.S. Constitution.⁵
2 Proponents incorrectly rely upon cases based upon Congressional power under the Commerce
3 Clause, such as, *Economy Light & Power Company v. United States*, 256 U.S. 113 (1921), and
4 *United States v. Appalachian Electric Power & Co.*, 311 U.S. 377 (1940). ASLD cites *City of*
5 *Centralia v. F.E.R.C.*, 851 F.2d 278 (9th Cir. 1988), for the proposition that the federal criteria
6 under the equal footing doctrine and Commerce Clause are the same. ASLD Opening
7 Memorandum at 6. These are not “equal footing” cases, *City of Centralia* acknowledged that
8 the criteria are not identical, citing *State of Oregon v. Riverfront Protection Association*, 672
9 F.2d 792 (9th Cir. 1982). The federal criteria under the Commerce Clause and equal footing
10 doctrine to determine navigability are quite different in this respect. The Commission must
11 therefore analyze the Verde River based upon its condition at the time of statehood to determine if
12 it was navigable under the equal footing doctrine.

13 The proponents also cite, *State of Arizona v. Bonelli Cattle Company*, 107 Ariz. 465, 489
14 P.2d 699 (1971); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); and *Oregon ex rel. State*
15 *Land Department v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), to argue that the adverse
16 effect of man-made artificial obstructions, dams, or diversions, at the time of statehood, must be
17 ignored, and that only the pre-development virgin condition of the Verde River can be considered
18 to determine navigability.⁶ All three cases involve the Colorado River, which has long been
19 deemed navigable in the stretch subject to these cases.

20 These three cases do not involve the federal test and criteria to determine navigability
21 under either the equal footing doctrine or Commerce Clause. They only involve the issue of
22 whether a state’s title to a riverbed for a river which has been determined to be navigable under

23
24 ⁵Article I, Section 8, of the U.S. Constitution, referred to herein as the “Commerce
Clause.”

25 ⁶For example, see ASLD’s Opening Memorandum at 6, arguing, “Moreover, the State’s
26 title to the beds of all navigable streams within its borders may not be defeated merely because
27 the bed was channeled, artificially controlled, dammed, or its waters diverted,” citing *Bonelli*
28 *Cattle Company*, 107 Ariz. 465, 489 P.2d 699. Also, see ASLD’s Opening Memorandum at 8
again citing *Bonelli* for the same proposition. ASLD here confuses the federal test and criteria
to determine navigability under the equal footing doctrine, with the unrelated legal issue which
deals with a state’s title to the bed of a navigable river where the riverbed has shifted and
relocated after statehood.

1 the equal footing doctrine, follows the course of the river where the riverbed shifts and relocates
2 after statehood by accretion or avulsion.⁷ The Commission must clearly understand that these
3 three cases have no application to the determination of navigability under the equal footing
4 doctrine.

5 In *State of Arizona v. Bonelli Cattle Company*, the issue to be decided was whether the
6 State of Arizona acquired title to private land which had been conveyed by the United States by
7 government patent in 1910, where the bed of the Colorado River, a river which had already been
8 determined to be navigable,⁸ had shifted east over time after statehood due to accretion to include
9 and cover such private lands. The Arizona Supreme Court held that under the Arizona law
10 relating to accretion, Arizona acquired title to these private lands conveyed by the United States
11 prior to statehood, because the bed of the Colorado River had shifted gradually over time after
12 statehood to include and cover such private lands.

13 The Arizona Supreme Court in *Bonelli* also held that the State of Arizona did not lose title
14 to such private lands thereafter, when the Colorado River had been brought under control by
15 Hoover Dam, and later dredged and channelized, so that the Colorado River's riverbed had then
16 subsequently shifted back to the west, and no longer flowed over or covered the private property:

17 Arizona does not lose title to the bed of the river to high water mark
18 simply because the river has been dammed and its water channelized
to a part of the bed. [464 P.2d at 468].

19 The Arizona Supreme Court reasoned that:

20 We believe, however, that the dredging of the river is an engineering
21 relocation of the waters of the river by artificial means and is not a
22 true case of withdrawal or retrogression. **** In the instant case, the
exposed channel was not brought into existence gradually or
imperceptibly. The exposure was man-made and the channel was

23
24 ⁷The term "accretion" is defined as "The act of growing to a thing; usually applied to
25 the gradual and imperceptible accumulation of land by natural causes, as out of the sea or
26 river." Black's Law Dictionary, 5th Ed. (1979). The term "avulsion" is defined as "A sudden
27 and perceptible loss of addition to land by the action of water, or a sudden change in the bed or
course of a stream." Black's Law Dictionary, 5th Ed. (1979). Generally, where a river moves
28 by accretion (gradual erosion), the boundary or title moves with the stream, but where the river
moves by avulsion, the boundary or title remains in the center of the old channel. *Accord*,
Bonelli, 489 P.2d at 701.

⁸See *Arizona v. California*, 283 U.S. 423, 453-454 (1931), (taking judicial notice that
the Colorado River was navigable in the reach being analyzed).

1 uncovered rapidly and perceptibly [avulsion]. [464 P.2d at 468].

2 The Arizona Supreme Court therefore held that the subsequent change in the course of the
3 Colorado River was due to man-made causes, and therefore was an avulsion rather than an
4 accretion under Arizona law, and accordingly, Arizona still held title to the property once private
5 under principles of accretion. *Id.* at 702-703.

6 The U.S. Supreme Court in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) ("*Bonelli*
7 *Cattle*"), reversed the Arizona Supreme Court in *Bonelli*, holding that the question of the State of
8 Arizona's title to such private lands was a question which had to be decided as a matter of federal
9 common law because of the equal footing doctrine. The Supreme Court then determined that
10 under federal common law, while the State of Arizona had succeeded to the title to such private
11 lands under the doctrine of accretion, the State of Arizona's title to such lands was subsequently
12 defeated when the bed of the Colorado River was relocated west based upon man-made and
13 artificial changes, such as, Hoover Dam and the dredging and rechannelization project:

14 The doctrine of accretion [under federal common law] applies to
15 changes in the river course due to artificial as well as natural causes.
Id. at 327.

16 The U.S. Supreme Court in *Bonelli Cattle* reasoned that federal common law applied to
17 determine the State of Arizona's title because the equal footing doctrine was never intended to
18 provide the State of Arizona with a windfall of thousands of acres of exposed dry land which
19 could no longer serve any navigational purpose under the equal footing doctrine. *Id.* at 323-324.

20 Four years later, the U.S. Supreme Court in *Oregon ex rel. State Land Department v.*
21 *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) ("*Corvallis*"), reversed *Bonelli Cattle*,
22 holding that once title to a riverbed had vested in a state under the equal footing doctrine, the
23 determination of the ownership of the riverbed thereafter must be decided under each state's
24 property law, but not under federal common law:

25 Although federal law may fix the initial boundary line between fast
26 lands and the riverbeds at the time of a State's admission to the
27 Union, the State's title to the riverbed vests absolutely as of the time
of its admission and is not subject to later defeasance by operation of
any doctrine of federal common law. [429 U.S. at 370-371].
[Emphasis added].

28 The Supreme Court in *Corvallis* further held:

1 Once the equal-footing doctrine had vested title to the riverbed in
2 Arizona as of the time of its admission to the Union, the force of that
3 doctrine was spent; it did not operate after that date to determine what
4 effect on titles the movement of the river might have. [429 U.S. at
5 371].

6 The two *Bonelli* and the *Corvallis* cases therefore offer no legal support for proponents'
7 argument that a river is navigable under the equal footing doctrine, if it was navigable under pre-
8 development virgin conditions prior to statehood, even though a river may be non-navigable at the
9 time of statehood, due to the adverse effect of man-made obstructions, dams, or diversions.

10 **C. The Evidence Shows That the Verde River Was Non-Navigable at
11 the Time of Statehood**

12 **1. The Hydrology of the Verde River at the Time of Statehood Was
13 Insufficient to Support Commercial Navigation**

14 The Commission must analyze the condition of the Verde River based upon its condition at
15 the time of statehood, regardless of any effect that man-made obstructions, dams, or diversions,
16 may have had upon the flow of the Verde River at that time. For example, the U.S.G.S. Verde
17 River gage at Camp Verde shows an annual median flow rate of 189 cfs from 1912 through 1920,
18 closely approximating the median flow rate of the Verde River at the time of statehood.⁹

19 The Nation argued that a median flow rate of 189 cfs, representing the median condition of
20 the Verde River, was insufficient to support commercial navigation at the time of statehood.¹⁰
21 Jon Fuller testified that diversions of water from the Verde River for irrigation started in the
22 1860s (TR at 29), and that by 1914, 25 diversions diverted more than 121 cfs for more than 5,000
23 acres of farmland between Perkinsville and the Salt River, mostly in the middle Verde Valley. E-
24 31 at 7-22. *See* Table 7-16, E-31 at 7-23 ("Historical Irrigation Diversions on the Verde River.").

25 ASLD argues that the gaging stations near Camp Verde do not account for the amount of
26 water that was diverted upstream in the Verde Valley for irrigation by the time of Arizona's
27 statehood, and that therefore, the flow rate of the Verde River for purposes of determining
28 navigability under pre-development virgin conditions before such diversions, is "underestimated"
29 by as much as 121 cfs. ASLD Opening Memorandum at 10. First, they offer no credible

⁹*See* ASLD Verde River Report (E-31), Table 11(b).

¹⁰*See* Nation's Opening Memorandum at 16-17.

1 evidence to show pre-development conditions. Moreover, the Commission should reject this
2 argument by ASLD, since the effect of man-made obstructions, dams, or diversions on the flow of
3 the Verde River at the time of statehood is irrelevant for purposes of determining the navigability
4 of the Verde River under the equal footing doctrine.

5 **2. The Historical Evidence Establishes That the Verde River Was Non-**
6 **Navigable at the Time of Statehood**

7 ACLPI argues that the testimony and report of Douglas R. Littlefield, Ph.D. is irrelevant
8 because he failed to apply the appropriate legal standard in concluding that the Verde River was
9 non-navigable.¹¹ We do not recite his work for any legal standard. Rather his work reflects
10 examination of historical documents. Dr. Littlefield, as an historian examined thousands of
11 historical documents related to the Verde, including U.S. government surveys and patents which
12 established that none of the federal government officials who were contemporary observers of the
13 Verde River prior to and at the time of statehood, and who were required to report whether the
14 Verde River was navigable as part of their official duties, believed that the Verde River was
15 navigable.¹² This strong relevant historical evidence of the non-navigability of the Verde River at
16 the time of statehood.

17 **D. Federal Common Law Controls the Federal Test and Criteria to**
18 **Determine Navigability Under the Equal Footing Doctrine**

19 Federal common law controls the federal test and criteria to determine navigability under
20 the equal footing doctrine. *See United States v. Holt State Bank*, 270 U.S. 49, 55 (1926):

21 Navigability, when asserted as the basis of a right arising under the
22 Constitution of the United States, is necessarily a question of federal
23 law to be determined according to the general rule recognized and
24 applied in the federal courts.¹³

25 In *United States v. Oregon*, 295 U.S. 1, 14 (1935), the U.S. Supreme Court also held that
26 federal law is controlling but for a different reason:

27 ¹¹ACLPI Opening Memorandum at p. 15.

28 ¹²See Nation's Opening Memorandum at pp. 10-14.

¹³In *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P.2d 158, 164 (1991), the court acknowledged that the "standard of navigability for equal footing claims is established by federal law."

1 Since the effect upon the title to such lands is the result of federal
2 action in admitting a state to the Union, the question whether the
3 waters within the State under which the lands are navigable or non-
4 navigable, is a federal, not a local one. It is, therefore, to be
determined according to the law and usages recognized and applied in
federal courts, even though, as in the present case, the waters are not
capable of use for navigation in interstate or foreign commerce.

5 Despite the fact that navigability for equal footing purposes must be determined under
6 federal common law, ACLPI states that the question of navigability “must be determined based
7 upon either state laws that mirror the federal definition or federal law itself.”¹⁴ This is incorrect.

8 Federal law supercedes state law to determine navigability under the equal footing doctrine
9 because of the Supremacy Clause of the U.S. Constitution.¹⁵ While states may adopt their own
10 more liberal definitions of navigability for regulatory purposes other than determining title under
11 the equal footing doctrine, such state laws cannot be applied or interpreted to determine
12 navigability under the equal footing doctrine. *See Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18
13 P.3d 722, 729, 730, 737 (2001).

14 ACLPI also argues that the statutory definition of “highway for commerce” found in
15 A.R.S. § 37-1101(3),¹⁶ should be interpreted¹⁷ under the *Daniel Ball* test¹⁸ to include the
16 “transportation of persons” for any reason, including for private non-commercial recreational float
17 trips.

18 ACLPI’s interpretation of the term “highway for commerce” as defined under A.R.S. § 37-

19 _____
20 ¹⁴ACLPI Opening Memorandum p. 4.

21 ¹⁵See U.S. Constitution, art. VI, cl. 2.

22 ¹⁶This statute provides in relevant part, “‘Highway for commerce’ means a corridor or
23 conduit within which the exchange of goods, commodities or property or the transportation of
persons may be conducted...” (emphasis added).

24 ¹⁷See ACLPI Opening Memorandum p. 7. ACLPI interprets the term, “or the
25 transportation of persons may be conducted” to include private non-commercial recreational
float trips, as opposed to an interpretation that the “transportation of persons” must be for
commercial reasons.

26 ¹⁸See *The Daniel Ball*, 77 U.S. 557, 563 (1870), “...they are navigable in fact when
27 they are used, or are susceptible of being used, in their ordinary condition, as **highways for**
28 **commerce**, over which **trade and travel** are or may be conducted in their customary modes of
trade and travel on water.” The *Daniel Ball* test therefore requires commerce over which
both trade and travel are conducted, not just the movement a person for personal reasons or
people for recreational purposes as ACLPI argues.

1 1101(3) to include private non-commercial recreational float trips violates the federal law of
2 navigability. The only case known to the Nation which discussed recreational boat trips as
3 commerce under the navigability test is *State of Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989),
4 *cert. denied.*, 495 U.S. 919 (1990). However, recreational boat trips in *Ahtna* sustained a
5 substantial profitable industry employing over 400 people, which the Court described as
6 “commercial activity” meeting the commerce requirement. This statutory provision must
7 therefore be interpreted that the “transportation of passengers” must constitute significant and
8 beneficial commerce in order to comply with the federal common law.¹⁹

9 As reviewed in the Nation’s Opening Memorandum, there is a complete lack of evidence
10 that the Verde River was ever navigated for commerce prior to or at the time of statehood.²⁰

11 **D. Evidence of a Few Modern-Day Recreational Float Trips on a**
12 **Limited Stretch of the Verde River Does Not Establish**
13 **Navigability Under the Equal Footing Doctrine**

14 Proponents argue that evidence of a few modern-day recreational float trips down limited
15 stretches of the Verde River demonstrates navigability at the time of statehood under the
16 “susceptibility rule” of the equal footing doctrine. This evidence does not satisfy the
17 “susceptibility rule.”

18 The federal law of navigability under either the Commerce Clause,²¹ or the equal footing
19 doctrine, requires a “highway for commerce,” over which “trade and travel” are conducted, under
20 the *Daniel Ball* test.²² There must therefore be evidence of the navigability of a river which
21 serves commerce in order for Congress to regulate navigation under the Commerce Clause.

22 ¹⁹State statutes which attempt to define navigability under the equal footing doctrine, or
23 which are interpreted in any way which conflicts with the federal law, are superceded and
preempted under the Supremacy Clause of the U.S. Constitution.

24 ²⁰See Nation’s Opening Memorandum at 14-16.

25 ²¹See Article I, § 8, of the U.S. Constitution.

26 ²²In *The Daniel Ball*, 77 U.S. 557 (1871), the *Daniel Ball*, a steamship, transported
27 goods and passengers in Michigan on the Grand River. The U.S. Supreme Court held that the
28 transportation of goods solely within Michigan, but which were destined for other states,
constituted interstate commerce subject to the regulation by Congress under the Commerce
Clause. The court established the classic test to determine the navigability of a river for the
purpose of regulating commerce under the Commerce Clause which is now known and referred
to as the *Daniel Ball* test.

1 In *Oklahoma v. Texas*, 258 U.S. 574 (1922), the U.S. Supreme Court held that the eastern
2 reach of the Red River in Oklahoma was non-navigable under the equal footing doctrine, applying
3 the *Daniel Ball* test to the equal footing doctrine to determine the navigability of a river. The
4 court held that the Red River has an insufficient capacity for practical and beneficial use in
5 commerce:

6 While the evidence relating to the part of the river in the eastern half
7 of the State is not so conclusive against navigability as that relating to
8 the western section, we think **it establishes that trade and travel
9 neither do nor can move over that part of the river, in its natural
10 and ordinary condition....Its characteristics are such that its use
11 for transportation has been and must be exceptional, and
12 confined to the irregular and short periods of temporary high
13 water. A greater capacity for practical and beneficial use in
14 commerce is essential to establish navigability. [*Id.* at 591].
15 [Emphasis added].²³**

11 In *The Montello*, 87 U.S. 430 (1874), the second case of the U.S. Supreme Court which
12 involved the regulation of navigation by Congress under the Commerce Clause, the U.S. Supreme
13 Court further elaborated on the *Daniel Ball* test to determine navigability, and held that there must
14 be “commerce” to establish navigability:

15 **The capability of use by the public for purposes of transportation
16 and commerce affords the true criterion of the navigability of a river,
17 rather than the extent and manner of that use. If it be capable in its
18 natural state of being used for commerce, no matter in what mode
19 the commerce may be conducted, it is navigable in fact, and
20 becomes in law a public river or highway. [Emphasis added].**

19 *Id.* at 441.

20 The Supreme Court in *The Montello* quoted with approval from a Massachusetts Supreme
21 Court opinion, *Rowe v. The Granite Bridge Corporation*, 38 Mass. (21 Pickering at 344) 344,
22 347 (Mass. 1838), that “commerce” must be useful to some purpose of “trade or agriculture”:

23 **It is not...every small creek in which a fishing skiff or gunning
24 canoe can be made to float at high water which is deemed
25 navigable, but, in order to give it the character of a navigable stream,
26 it must be generally and commonly useful to some purpose of
27 trade or agriculture. [Emphasis added]. *Id.* at 442.**

27 ²³See *Lykes Bros. Inc. v. U.S. Army Corps of Engineers*, 821 F. Supp. 1457, 1463
28 (M.D. Fla. 1993) (“...water levels must be able to sustain commercial navigation on a
predictable and reliable basis.”), *aff’d.*, *Lykes Bros., Inc. v. U.S. Army Corps of Engineers*, 64
F.3d 630 (11th Cir. 1995), holding that small, shallow-draft recreational canoe use does not
support a finding of commercial navigability.

1 In *Adams v. The Montana Power Company*, 528 F.2d 437, 438 (9th Cir. 1975), the Ninth
2 Circuit Court of Appeals, held that “[n]either non-commercial fishing nor pleasure boating
3 nor water skiing constitutes commerce” under the *Daniel Ball* test [Emphasis added].

4 ACLPI cites *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192 (N.Y. 1998)
5 (“*Adirondack*”), for the proposition that private non-commercial recreational boating can satisfy
6 the commerce requirement under the equal footing doctrine.²⁴ *Adirondack*, however, was based
7 upon a New York statute regulating navigation under New York law. *Adirondack* was not
8 decided under the equal footing doctrine, and it therefore does not apply.²⁵

9 The court in *Adirondack* referred to a New York statute, ECL 15-2701, the purpose of
10 which was to preserve rivers for “recreational uses.” The court cited this statute in support of its
11 holding that private non-commercial recreational boating can be considered under New York law
12 to determine navigability under New York navigation law. The court held that “Rivers, long-
13 recognized as unique natural resources, are no longer primarily subjects of commercial
14 exploitation and gain but instead are valued in their own right as a means of travel.” *Id* at 1195.

15 *Adirondack*, however, does not support the proponents’ argument that non-commercial
16 private recreational rafting can satisfy the commerce requirement under the equal footing
17 doctrine, since it was decided under New York statutes regulating public waters. In *LeBlanc v.*
18 *Cleveland*, 198 F.3d 353, 359 (2nd Cir. 1999), the court held that *Adirondack* is limited to New
19 York law, and whether waterways are subject to public easements, and does not apply to the
20 navigability requirement under federal law. *LeBlanc* also held that navigability under federal
21 admiralty law requires that a waterway “be capable of supporting commercial maritime activity,”
22 and that it is irrelevant that it might be capable of supporting “non-commercial” fishing or
23 pleasure boating. *Id.* at 360.²⁶

24
25 ²⁴See ACLPI Opening Memorandum p. 11.

26 ²⁵See *Adirondack* at 1195, citing New York Navigation Law, NY CLS Nav. Law § 2(5),
27 (“to be navigable in fact a lake or stream must have practical usefulness to the public as a
highway for transportation.”). This is different than the *Daniel Ball* test.

28 ²⁶In *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P.3d 722 (App. 2001), the court stated
that state laws which expand the definition of navigability under state laws, “do not implicate
navigability under the equal footing doctrine.” *Id.* at 418, fn. 7. The *Hull* court’s reliance on

1 ACLPI also cites *United States v. Hill*, 248 U.S. 420 (1919), to support its argument that
2 the transportation of persons for non-commercial recreational purposes satisfies the commerce
3 requirement under the equal footing doctrine.²⁷

4 In *Hill*, the U.S. Supreme Court **upheld the power of Congress**, based upon the
5 Commerce Clause, **to enact legislation which prohibited the transportation of liquor into any**
6 **state** which prohibited the manufacture or sale of liquors. In *Hill*, one person who was carrying a
7 quart of liquor for personal reasons across a state line into a state prohibiting liquor was charged
8 with violating federal law. The court held that the mere transportation of liquor across state lines
9 for personal reasons constituted interstate commerce, even though the transportation of liquor did
10 not serve any commercial purpose, and that Congress therefore had the power to pass such
11 legislation under the Commerce Clause.

12 *Hill* does not involve the navigability of a river under either the Commerce Clause or the
13 equal footing doctrine. It simply involves the power of Congress to regulate interstate commerce
14 under the Commerce Clause. The *Daniel Ball* navigability test, however, requires that there be a
15 “highway for commerce” which includes both “trade and travel.” ACLPI confuses the almost
16 unlimited power of Congress to regulate interstate commerce under the Commerce Clause to
17 restrict and regulate the transportation of goods across state lines for virtually any reason,
18 including safety, economic, or public policy reasons, with the power of Congress to regulate
19 navigable rivers for commerce under the *Daniel Ball* test.²⁸

21 *Adirondack* to invalidate the statutory presumption under A.R.S. § 37-1128(5) must be viewed as
22 the Court’s implicit recognition that a state statute cannot change federal law. Also, *see Hitchings*
23 *v. Del Rio Woods Recreation and Park Dist.*, 127 Cal. Rptr. 830, 834 (Cal. Ct. App. 1976),
24 holding that for purposes of state regulation of public waters, a “state may adopt different and less
25 stringent tests of navigability.” That does not “liberalize” the burden of proof for title under equal
26 footing. Also, *see State of Nevada v. Bunkowski*, 503 P.2d 1231, 1234 (1971), wherein the court
27 held that cases applying state law to regulate public waters “are not authority for the
28 determination of state ownership of navigable watercourse beds” under the equal footing doctrine.

27 See ACLPI Opening Memorandum at 8.

28 ACLPI’s quote of *Hill* at p. 423, is misleading, [“commerce has been held to include
the transportation of persons and property no less than the purchase, sale and exchange of
commodities,” citing *Gibbons v. Ogden*, 22 U.S. 1 (1824). See ACLPI Opening Memorandum
at p. 8.] In *Gibbons*, the U.S. Supreme Court held that Congress had the power to regulate
navigation involving interstate commerce under the Commerce Clause. More specifically, the

1 Thus, modern-day private non-commercial float trips down the Verde River do not
2 constitute commerce required to establish navigability under the equal footing doctrine.
3 Moreover, evidence of such modern-day private non-commercial float trips is also not applicable
4 to establish navigability at the time of statehood under the “susceptibility rule” of the equal
5 footing doctrine. *See North Dakota v. United States*, 972 F.2d 235, 240 (8th Cir. 1992), holding
6 that “evidence of modern day recreational canoe use” on the Missouri River, and modern day
7 “boatability data,” are not reliable indicators to establish navigability at the time of statehood
8 under the susceptibility rule.²⁹

9 The Commission should find that the evidence presented by Proponents regarding the
10 occasional modern-day private recreational float trips down the Verde River using modern-day
11 high tech rafts, kayaks, or canoes, fails to establish the navigability of the Verde River at the time
12 of statehood under the equal footing doctrine.

13 Proponents also argue that evidence of a few modern-day commercial recreational float
14 trips down a limited stretch of the Verde River constitutes commerce under the equal footing
15 doctrine, and therefore establishes as the navigability of the Verde River at the time of statehood,

16 _____
17 court held that it could regulate steamboats carrying passengers or goods for hire in interstate
18 commerce under the Commerce Clause. The court held “If, as our whole course of legislation
19 on the subject shows, the power of Congress has been universally understood in America, to
20 comprehend navigation, its is a very persuasive, if not a conclusive argument, to prove that the
21 construction is correct; and, if it be correct, **no clear distinction is perceived between the
22 power to regulate vessels employed in transporting men for hire, and property for hire.**”
23 *Gibbons* at p. 215. The transportation of persons in commerce is therefore required to establish
24 navigability under the Commerce Clause, despite the above quote from *Hill*, which ACLPI
25 interprets to mean that the “transportation of persons” can be for occasional recreational
26 purposes only. *Gibbons* did not hold this.

27 ²⁹ACLPI cites *Block v. North Dakota*, 461 U.S. 273 (1983), to support its argument that
28 modern-day canoe, raft, or kayak float trips, are sufficient to establish navigability at the time
of statehood under the equal footing doctrine. *See* ACLPI’s Opening Memorandum at p. 8.
The U.S. Supreme Court in *North Dakota* made no such ruling, but, in fact, reversed and
remanded *North Dakota v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982), which had held that
“canoe travel at the time of North Dakota’s statehood represented a viable means of
transporting persons and goods on the Little Missouri River.” The Supreme Court in *North
Dakota* held that the 12-year statute of limitation under the Quiet Title Act of 1972, 28 U.S.C.
§ 2409a, precluded North Dakota from claiming title to the Little Missouri River.
Subsequently, the matter was tried anew when Congress amended the Quiet Title Act to allow
states to sue the United States without regard to the 12-year statute of limitations. In *North
Dakota v. United States*, 972 F.2d 235, 240 (8th Cir. 1992), the court rejected evidence of canoe
use prior to statehood, or modern-day canoe use, as reliable indicators of navigability under the
equal footing doctrine at the time of statehood.

1 citing *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989) (“*Ahtna*”).³⁰

2 The meager recent evidence on the Verde is substantially difference from *Ahtna*. In *Ahtna*,
3 the court emphasized that there was a substantial industry of commercial recreational boating on
4 the Gulkana River (3,600 to 4,800 cfs) at all times from May through September employing over
5 400 people. In this matter, the number of commercial float trips downstream from Camp Verde is
6 very limited. Mr. Colby testified that his company only conducted one or two multi-day trips
7 starting at Childs, and they are usually in the spring during the highest flows of the Verde River.
8 TR at 56-57. This does not constitute sufficient or reliable evidence to establish the navigability
9 of the Verde River under “ordinary” conditions at the time of statehood. See *Oklahoma v. Texas*,
10 258 U.S. 574, 591 (1922), which held “a greater capacity for practical and beneficial use in
11 commerce is essential to establish navigability.” Also, see *North Dakota v. United States*, 972
12 F.2d 235, 240 (8th Cir. 1992) (modern-day canoe use not a reliable indicator of navigability for
13 commerce at statehood).

14 **E. Conclusion**

15 The Proponents have failed to carry the burden to establish that the Verde River was
16 navigable at the time of statehood under the equal footing doctrine. The historical evidence does
17 not reflect that the Verde River was ever navigated for the purpose of commerce prior to and at
18 the time of statehood. The hydrology and geomorphology of the Verde River is insufficient to
19 establish navigability for commerce. None of the federal government officials at the time of
20 statehood believed that the Verde River was navigable.

21 There was no evidence that the Verde River was navigable through the several parcels
22 owned by the Nation or held in trust by the United States for the Nation.

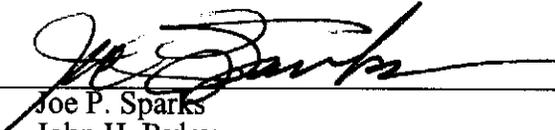
23 The Nation therefore respectfully requests that the Commission determine that all reaches
24 of the Verde River were non-navigable at the time of statehood under the equal footing doctrine.

25
26
27
28

³⁰See ACLPI Opening Memorandum at p. 14, and ASLD Opening Memorandum at p. 9.

1 DATED this 11th day of April, 2006.

2 SPARKS, TEHAN & RYLEY, P.C.

3
4 By 
5 Joe P. Sparks
6 John H. Ryley
7 Attorneys for San Carlos Apache Tribe

8 ORIGINAL plus six copies of the foregoing
9 mailed this 11th day of April, 2006, to:

10 Arizona Navigable Stream Adjudication Commission
11 1700 W. Washington
12 Suite 304
13 Phoenix, AZ 85007

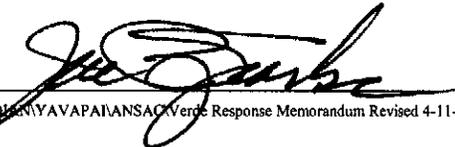
14 COPY of the foregoing mailed this
15 11th day of April, 2006 to:

16 Laurie Hachtel, AAG
17 for the Arizona State Land Department
18 1275 West Washington
19 Phoenix, AZ 85007

20 Joy Herr-Cardillo
21 Arizona Center for Law in the Public Interest
22 2205 E. Speedway Blvd.
23 Tucson, AZ 85719

24 Mark McGinnis
25 Rebecca Goldberg
26 For the Salt River Project
27 Salmon, Lewis & Weldon
28 2850 E. Camelback Road
Phoenix, AZ 85016

Bill Staudenmaier
Mike Kafka
For Phelps Dodge
Ryley, Carlock & Applewhite
1 North Central Avenue, Suite 1200
Phoenix, AZ 85004

29 By 

INDIAN YAVAPAI ANSAC Verde Response Memorandum Revised 4-11-06