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BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

In re Determination of Navigability of the Santa Cruz River	Case No. 03-002-NAV Memorandum regarding the Navigability of the Santa Cruz River

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, "Defenders") hereby submit their memorandum regarding the navigability of the Santa Cruz River. For the reasons set forth herein, Defenders request that the Arizona Navigable Stream Adjudication Commission ("ANSAC") apply the correct legal standard to the evidence in the existing record and find that portions of the Santa Cruz River were navigable when Arizona entered the Union on February 14, 1912.

I. Legal Discussion.

A. State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n.

In determining whether the Santa Cruz River was navigable at the time statehood, it is appropriate to begin with a discussion regarding the Court of Appeals' decision

regarding the Lower Salt River and how the directives set forth by the Court in that Opinion should inform the proceedings for other rivers. *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n,* , 224 Ariz. 230, 229 P.3d 242 (App. 2010). Significantly, in the case of the Lower Salt River, the Court remanded the matter back to ANSAC because it found that "although ANSAC considered a great deal of evidence concerning the condition of the river, and reviewed evidence from various times before statehood, ANSAC ultimately failed to apply the proper legal standard to the evidence presented." *Id.* at 242 ¶28, 229 P.3d at 254. The Court held that "[b] ecause the proper legal test was not applied, we must vacate the superior court's judgment and remand for ANSAC to consider whether the river would have been navigable had it been in its ordinary and natural condition on February 14, 1912." *Id.* at ¶29.

In articulating the proper legal test, the Court instructed that ANSAC is "required 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." *Id.* at 241 ¶28, 229 P. 3d at 253. The Court also provided specific guidance regarding what constituted the "best evidence" of the Lower Salt's natural condition, and concluded that with respect to that watercourse, "the river could be considered to be in its natural condition after many of the Hohokam's diversions had ceased to affect the river, but before the commencement of modern-era settlement and farming in the Salt River Valley...." *Id.*at 242 ¶30, 229 P. 3d at 254.

Although ANSAC's earlier determination regarding the Santa Cruz River was appealed to the Superior Court, the parties agreed to stay that appeal (as well as several

others) pending the resolution of the appeal of the Lower Salt River to the Court of Appeals. After the Court of Appeals remanded the Lower Salt matter, the parties all agreed that the stayed appeals should all be remanded as well. Consequently, unlike the adjudication of the Lower Salt River, here there is no specific instruction from the reviewing court as to what constitutes the "best evidence" of the natural and ordinary condition of this river. Therefore, in determining navigability for the San Pedro River, the inquiry is two-fold. First, the ANSAC must determine what time period, if any, represents the best evidence of the river's "natural condition," and second, whether the evidence from that time-period demonstrates that in its ordinary condition the river was "used or susceptible to being used...as a highway for commerce, over which trade and travel were *or could have been conducted* in the customary modes of trade and travel on water." A.R.S. §37-1101(5)(emphasis added). *See also, Defenders of Wildlife v. Hull,* 199 Ariz. 411, 18 P. 3d 722 (App. 2001).

B. ANSAC Must Consider the river on a Segment-by-Segment Basis.

The fact that an entire river was not perennial does not preclude a finding of navigability. There is no requirement that the entire length of the river must be susceptible to navigation for portions of the river to be found navigable. The statute defines "navigable watercourse" as "a watercourse that was in existence on February 14, 1912 ...." A.R.S. §37-1101(5). Further, "watercourse" is defined as "the main body *or a portion or reach of* any lake, river, creek, stream, wash, arroyo, channel or other body of water." A.R.S. §37-1101(11)(emphasis added). Courts have routinely limited their navigability determinations to a portion or particular reach of a watercourse. *See, e.g.*

United States v. Utah, 283 U.S. at 75-79 (1931)(holding that sections of the Green, Grand and Colorado Rivers were navigable at the time of statehood and thus, state held title to those sections); *Alaska v. Ahtna*, 891 F.2d 1401, 1404-1405 (9th Cir. 1989)(holding that lower 30 miles of Gulkana River was navigable at statehood); and *State of Oregon v. Riverfront Protective Ass'n*, 672 F.2d 792, 795 (9th Cir. 1982)(holding McKenzie River between river mile 37 and its confluence with the Willamette River was navigable under federal law on February 14, 1859 when the State of Oregon was admitted to the Union).

Recently the United States Supreme Court held that a river's navigability must be determined on a segment-by-segment basis. *PPL Montana LLC v. Montana,* 132 S. Ct. 1215 (2012). The Court recognized that "[p]hysical conditions that affect navigability often vary over the length of a river." *Id.* at 1230.

In determining the navigability of the Santa Cruz River, this Commission must undertake the same approach. It would be contrary to well-established federal law to find an entire river "nonnavigable" simply because portions of the river were not susceptible to navigation, when others clearly were.

C. Navigability at Statehood Can Be Established with Evidence of Modern Boating.

Case law is clear that in order to establish navigability, it is not necessary to show that navigation or commerce was actually conducted on the watercourse. The standard is whether the river was used or susceptible of being used as a highway for commerce. *United States v. Utah*, 283 U.S. at 82, 51 S. Ct. 438, 75 L. Ed. 844 (1931)("The question of … susceptibility in the ordinary condition of the rivers, rather than of the mere manner

or extent of actual use, is the crucial test ... The extent of existing commerce is not the test."); *see also, Alaska v. Ahtna*, 891 F.2d 1401, 1404-1405 (9th Cir. 1989).

In determining whether a watercourse was "susceptible" of such a use, evidence of modern use is appropriately considered. *PPL Montana,* 132 S. Ct. at 1233 (holding that evidence of present-day, primarily recreational boating can be considered provided it is "confined to that which shows the river could sustain the kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood."); *see also See Winkleman v. ANSAC,* 224 Ariz. at 242 ¶31, 229 P.3d at 254. ("Even if evidence of the river's condition after man-made diversions is not dispositive, it may nonetheless be informative and relevant.").

D. There is No Requirement to Show that Commerce Was Actually Conducted on the river.

The term "highway for commerce" can be misleading; as the cases make clear, this requirement is satisfied by either trade or *travel* on the river, even if the travel is noncommercial. Moreover, the definition of navigability does not require that the watercourse actually have been used for trade or travel, but rather, requires only that it was susceptible to such a use. "The question of ... susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial test ... The extent of existing commerce is not the test." *United States v. Utah*, 283 U. S. at 82; *see also, Alaska v. Ahtna*, 891 F.2d 1401, 1404-1405 (9th Cir. 1989).

The term "highway for commerce" is first found in the definition of "navigable" or "navigable watercourse." The Arizona statute (which codifies Federal law) defines both as:

> [A] watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, *over which trade and travel* were or could have been conducted in the customary modes of trade and travel on water.

Ariz. Rev. Stat. §37-1101(5). The statute more specifically defines "highway for commerce" as "a corridor or conduit within which the exchange of goods, commodities or property *or the transportation of persons* may be conducted." Ariz. Rev. Stat. §37-1101(3). Thus, the statutory definition of "highway for commerce" does not require the transport of goods; the transportation of persons alone is sufficient to establish a "highway for commerce."

This interpretation of the phrase "highway for commerce" is consistent with federal case law. As the Arizona Court of Appeals explained in *Defenders,*

> The federal test has been interpreted to neither require both trade and travel together nor that the travel or trade be commercial. *See Utah,* 403 U.S. at 11 (hauling of livestock across lake even though done by owners and "not by a carrier for the purpose of making money" was enough to support a finding of navigability because "the lake was used as a highway and that is the gist of the federal test")

199 Ariz. at 416, 18 P.3d at 727. In *Defenders*, the court also rejected the argument advanced by the Salt River Project and Phelps Dodge that the trade and travel must be both upstream and downstream, or that the travel must be for a profitable commercial enterprise. Rather, the court observed that, "nothing in the *Daniel Ball* test necessitates that the trade or travel sufficient to support a navigability finding need be from a

'profitable commercial enterprise.'" *Id.* at 422, 18 P. 3d at 733. *See also United States v. Hill,* 248 U.S. 420, 423 (1919) ("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,* 9 Wheat 1, 188 (1824).

As the Oregon Court of Appeals explained in *Northwest Steelheaders Ass'n v. Simantel* 199 Ore. App. 471; 112 P.3d 383 (2005):

> First, with respect to "actual use," it is not necessary that the historic use made of the river have been either widespread or commercially profitable. "The extent of * * * commerce is not the test.". . .. For example, the Court's most recent application of the *The Daniel Ball* test upheld a determination of the navigability of Utah's Great Salt Lake based on evidence that the Court described as "sufficient" but "not extensive."

Id. at 389, *quoting Utah v. United States,* 403 U.S. at 11. Further, as the Oregon Court observed, "qualifying travel and trade is not limited to large-scale commercial or multiple passenger vessels of the sort typically engaged in modern commerce." *Id.* at 390. Navigation by small boats has often been recognized as evidence of navigability. *Block v. North Dakota,* 461 U.S. 273(1983) ("Canoe travel at the time of North Dakota's statehood represented a viable means of transporting persons and goods."); *Puyallup Tribe of Indians v. Port of Tacoma,* 525 F. Supp. 65 (W.D. Wash 1981), *aff'd,* 717 F.2d 1251 (9th Cir 1983), *cert den,* 465 U.S. 1049(1984) (declaring navigability on the basis that "Indians navigated the river with their fishing boats and canoes").

Similarly, the lack of actual use at statehood as a "highway for commerce" does not defeat a finding of navigability. *See, e.g., United States v. Utah,* 283 U.S. at 83. As the United States Supreme Court noted in that case:

> Utah ...is not to be denied title to the beds of such of its rivers...either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population....And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

Id. at 83.

Finally, in considering the issue of "commerce," it is important to distinguish between cases involving navigability under the Commerce Clause and cases involving navigability for title. In Commerce Clause cases, in order to support federal regulatory jurisdiction over power plants the river must by statute be, or have been, "suitable for use for the transportation of persons or property in interstate or foreign commerce." 16 U.S.C. §796(8)(2006). No such "interstate or foreign commerce" requirement exists when the issue is navigability for title. *Oregon v. Riverfront Protective Ass'n*, 672 F.2d 792, 795 n. 1 (9th Cir. 1982). Again, as the court of appeals explained in *Defenders,*

> A federal determination of "navigability" may serve many different purposes, the three most typical being: to confer admiralty jurisdiction, to define Congress' reach under the commerce power, and to grant title under the equal footing doctrine. * * * Because of the variant circumstances in which navigability is raised, the cases interpreting navigability "cannot be 'simply lumped into one basket.'"... Indeed, when discussing navigability, any reliance on judicial precedent should be predicated on a careful appraisal of the purpose for which the concept of navigability is invoked.

199 Ariz. 729-30, 18 P. 3d at 418-19 (citations omitted). In sum, when the issue is navigability for title purposes, there is no requirement that the watercourse was actually

used for commerce or any commercial activity. It is sufficient to show simply that the watercourse was susceptible to use for travel.

E. Opinion Evidence that is Not Based Upon the Appropriate Definition of "navigability" has minimal probative value, if any.

Finally, because the Commission has elected not to reopen the evidentiary record, it is important to emphasize that any earlier opinion testimony that was not based upon the definition of navigability recognized by the court of appeals in *State ex rel. Winkleman v. ANSAC* has minimal probative value, if any. 224 Ariz. at 243 ¶31, 229 P.3d at 255.

II. The Evidence in the Record Demonstrates That in Their "Ordinary and Natural Condition" the Upper and Middle Reaches of the Santa Cruz Were Navigable at Statehood.

A. Evidence Applicable to Whole River.

The evidence provided to the ANSAC regarding the Santa Cruz River overwhelmingly demonstrates that under the test required by federal law, significant portions of the river were navigable at the time of statehood. As the study commissioned by the State Land Department explains, the Santa Cruz River has been the site of settlements since prehistoric times. Arizona Stream Navigability Study for the Santa Cruz River, Final Report prepared by SFC Engineering, George V. Sabol, SWCA, Inc. and J. E. Fuller, dated November 1996, Report revised by JE Fuller, January 12, 2004, Executive Summary, p. 2 (hereinafter "State Report"). The State Report, however, also documents that the river underwent significant change during the territorial period, from 1850 to 1912. State Report, Section 3, pp. 32 – 49. The livestock industry moved into to

southern Arizona in the 1880s, and cattle and sheep grazed until much of the valley was denuded. *Id.* at 35. Agriculture also expanded and along the river was characterized by the diversion of surface flows. *Id.* p. 37. When the groundwater table began to drop, cross-cut ditches were dug across the river to intercept shallow subsurface flows. *Id.* According to the Report, groundwater pumping arrived in Southern Arizona by 1890, and with its advent, the water table began to drop significantly. *Id.*

The entrenchment caused by the combination of factors, cattle, pumping, and diversions, had radically changed the Santa Cruz River. *Id.* Moreover, the groundwater pumping had become so prevalent that it was virtually impossible for the river to return to its natural condition. *Id.* at 44-45. By the time of statehood, then, the river had been significantly altered from its "natural and ordinary condition." According to the State Report, "[a]t the time of statehood, the river was probably still perennial – flowing year round – in some of the reaches that had historic surface flow, but intermittent – flowing only during portions of the year – in more areas than previously." State Report, Executive Summary, p. 4. Agricultural water use used most of the available surface water and also intercepted groundwater and subsurface flow. *Id.* Diversions and pumping were also impacting tributaries, especially the Rillito River, further diminishing the Santa Cruz River's flow. *Id.*

Even though damage from groundwater pumping continued past statehood to modern day, many sections of the Santa Cruz River continued to have perennial flow well after statehood. *Id.* at 7. Even the section of the river near Tucson probably had some perennial flow in 1912, although the river was deeply entrenched. *Id.* Parts of the

river remain perennial to this day. *Id.* For further documentation regarding the degradation of the Santa Cruz River, see EIN 15, Glennon, WATER FOLLIES, How Does a River Go Dry? (2002) and EIN12, Logan, THE LESSENING STREAM (2002).

B. Evidence Applicable to Specific Segments.

The Santa Cruz River starts at the southern base of the Canelo Hills, travels south through the San Rafael Valley and then crosses into Mexico. In Mexico it makes a loop of about 30 miles before re-entering the United States six miles east of Nogales. It continues north toward Tucson to the Gila River for a distance of about 225 miles. For purposes of a segment by segment analysis, the logical stretches to consider are 1) headwaters to where it crosses into Mexico; 2) the point at which it crosses back into the United States to Marana; 3) from Marana to where it joins the Gila River. Unfortunately, there is little data regarding the hydrology of the Santa Cruz River in 1912. Therefore, the character of the river, and these particular segments, at the time of Statehood must be interpolated from descriptions made before and after that year. State Report, Section 4, p. 1.

1. From Headwaters to the Mexican Border.

According to most historical accounts, the Santa Cruz was largely perennial from its headwaters south into Mexico. State Report, Section 3, p. 7. The channel from the headwaters to the border is shallow. *Id.* Section 4, p. 2. Along the upper Santa Cruz River, the channel is located in an inner valley that was created within broad, dissected pediments and alluvial basin deposits, and flanked by mountains. The channel is well

defined, often entrenched . *Id.* at Section 4, Executive Summary, p. i. There are no reports of boating on the first segment of the upper Santa Cruz.

2. From the Mexican Border to Marana.

There is considerably more evidence regarding the second segment from where the river crosses back into the United States and travels northward up to Marana.

Channel

Along the upper Santa Cruz River, south of Marana, the channel lies within an inner valley created within broad, dissected pediments and alluvial basin deposits and flanked by mountains. *Id.* at Section 4, p. 2. The reach below the present site of Valencia Road was described in 1871 as having a channel with vertical banks 60 feet apart and up to 10 feet high. *Id.* at p. 46. By the time of statehood in 1912, there was a deep channel, perhaps more than 20 feet deep, well into what is now the San Xavier Indian Reservation. *Id.* at Section 3, p. 60.

Flow

The River was historically perennial from where it crossed back into the United States to Tubac and frequently diffused into broad cienegas, and marshy areas near Calabasas. *Id.* at 47. The river was also perennial above Tucson. Perennial subflow maintained several marshes near Sentinel Peak in Tucson, where bedrock forced the groundwater to surface. Cienegas existed about 10 miles south of Tucson above the San Xavier Mission and along both the West Branch and the Santa Cruz River proper about 3 miles south of the Congress street crossing. *Id.* at 13. Near the Santa Cruz/Pima County line, the geology changes from a high bedrock situation to a deep alluvial system and the

river would usually sink below the surface, going underground just north of Tubac and resuming perennial surface flow again when it reached the San Xavier Mission. *Id.* at Section 3, p. 7-8.

The year 1890 was a turning point in the structure of the middle Santa Cruz River. Until then the river structure had remained relatively stable –perennial reaches from its headwaters to just north of Tubac, sinking, then rising again near the Mission and again at Tucson. It was a shallow river with large trees. *Id.* at 60. Figure 4 on page 15 of Section 4 of the Report shows the reaches that were perennial during that time period.

The gage record indicates that by the time of Statehood, the Santa Cruz River at Nogales was no longer perennial but instead had continuous flow during the winter and occasional flow during the spring, summer and fall. Winter discharge averaged about 15 cfs. *Id.* at Section 4, p. 20. The perennial section near Tucson, however, probably had some perennial flow in 1912. *Id.* at Section 3, p. 5. In fact, the perennial waters near San Xavier persisted until 1949 and supported native fish at least until 1937. *Id.* at 57.

Diversions

Massive diversions of the Santa Cruz began long before statehood. In the late 1880s, the river was diverted to create two lakes, Warner Lake and Silver Lake, near downtown Tucson. *Id.* at 40. Notably, Warner received legal notice that he was interfering with the water in the Santa Cruz and obstructing the "free and continuous passage of the same." *Id.* at 42. Groundwater pumping also depleted much of the river. Pump technology first became available in 1891 and initiated the extensive groundwater pumping that excluded any reasonable chance of recovery of the entrenchment around

Tucson by any natural processes. *Id.* at 44. Groundwater pumping also affected the river's tributaries like the Rillito River. *Id.*

By the time of statehood, diversions had taken all the low flow from both north of the Mexico border and south of Congress Street in Tucson. *Id.* at 60. The United States Geological Survey's "streamgage summaries" report that essentially the entire flow of surface waters from the river were diverted both at Nogales and Tucson gaging stations by irrigation ditches. *Id.* at 54. The springs were drying up in the San Xavier area and diversions and pumping took most if not all of the flow. *Id.* at 62. The City of Tucson and many others had dug wells that intercepted flow and lowered the groundwater table. By 1915, the Santa Cruz and Rillito River flowed less than half the year. *Id.*

Navigation

There are numerous documented instances of navigation on the middle segment of the Santa Cruz River. During the 1880's, people were boating, fishing and swimming on Silver Lake as well as upstream. *Id.* at 63. Describing the Silver Lake resort, the 1881 City of Tucson Directory advised that the resort offered "several boats for sailing and rowing up the river beyond the lake." *Id.* at 43. Similarly, flat bottomed boats launched on Warner's Lake for recreation both on the lake and "up the river." *Id.* at 41. Several years later, there were a few attempts at boating in 1914 during flood conditions, but those were unsuccessful. *Id.* at 63.

There are also several accounts of boating using canoes in the middle segment during modern times. *Id.* at 63-64. Although some of these trips have been during high

water, not all. Wayne Van Vorhees and his wife traveled the river during the winter of 1989-90 and again in the summer. *Id.*

3. Marana to the Gila River confluence

Near the Santa Cruz/Pima County line, the geology changes from a high bedrock situation to a deep alluvial system and the river usually sinks below the surface. *Id.* at 7. Consequently, at that point, the river generally disappears. *Id.* at 8. The lower Santa Cruz river in Pinal County never supported perennial flows. *Id.* at 5. It is only during flood times that the river flows continuously to the Gila River. *Id.* at 8. There are no reported instances of boating at any time on the lower Santa Cruz, although during one high flood event, Tucsonan Sam Hughes opined that the river was "big enough to float a steamboat all the way to the sea." *Id.* at 64.

C. Ordinary and Natural.

In evaluating the navigability of the Santa Cruz River, the greatest challenge is the fact that by 1912, the river had been so altered by human activities, it is difficult to assess its condition in its "natural and ordinary" state. There is no question that the river had a substantial natural flow. The reason that the natural flow did not find its way into the river channel is human interference through diversions, cross-cutting, and groundwater pumping. Yet, as the Arizona Court of Appeals made clear, the commission must evaluate the river as though those activities did not occur. When such adjustments are made, it is apparent that several reaches of the Santa Cruz River were sufficiently perennial or intermittent to support a finding that they were susceptible to be used as a

highway for commerce and, therefore, were "navigable."[1] For example, in the State Report (prepared prior to the Court of Appeals decision in *Winkleman*) it states,

> The river from San Xavier to Tucson could have potentially been navigable, if there had been [ ] a dependable supply of water because of the much deeper channel. By 1912, however, the U.S. Geological Survey reported that the entire low flow of the river was diverted at both the Nogales and Tucson gages making navigation highly unlikely.

Id. at 64. If the diversion of the water had not occurred, which is what the Commission must assume for purposes of assessing navigability, then it follows that this reach would have been navigable in its "natural" condition. The same analysis extends to the other historically perennial reaches, like the stretch from Nogales to Tubac, and especially those that persisted even *after* the major diversions occurred.

III. Conclusion.

In the present case, there is ample relevant, persuasive evidence demonstrating that portions of the Santa Cruz River meets the Arizona and federal standards of navigability. In summary, the evidence demonstrating navigability includes information regarding the perennial flow of the river and historic and recent incidents of boating. When the objective evidence submitted is evaluated in light of the appropriate standard, it is clear that at the time of statehood several reaches in the middle segment of the Santa Cruz River were susceptible for use as a highway for commerce, over which trade and travel could be conducted in the customary modes of trade and travel on water in their

[1] Indeed, On May 23, 2008 (while this matter was stayed), Colonel Thomas H. Magness, United States Army, acting as the Commander of the Los Angeles District of the Army Corps of Engineers, issued a written determination that two reaches of the Santa Cruz River traditional navigable waters ("TNW") pursuant to 33 C.F.R. § 328.3. That finding was affirmed by the U. S. Environmental Protection Agency on December 3, 2008.

natural and ordinary condition. We therefore urge the ANSAC to find those portions of the Santa Cruz navigable at statehood.

Respectfully Submitted this 7th day of September, 2012.

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