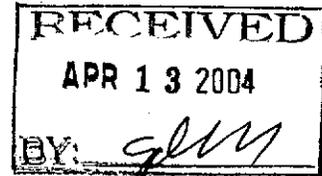


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BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

In re Determination of Navigability of the Santa Cruz River)	Case No. 03-002-NAV
)	Opening Post-Hearing Memorandum
)	
)	
)	
)	

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, "Defenders") hereby submit their post-hearing opening memorandum in accordance with R12-17-108.01 regarding the navigability of the Santa Cruz River. For the reasons set forth herein, Defenders requests that the Arizona Navigable Stream Adjudication Commission ("ANSAC") find that the San Pedro River was navigable when Arizona entered the Union on February 14, 1912.

I. The History of Arizona's Navigability Laws and the Public Trust Doctrine.

In order to render a decision regarding the navigability of any of Arizona's watercourses, it is necessary to understand the historical context of streambed legislation and regulation in Arizona. The issue of bedland ownership and administration (as it relates to land other than the land beneath the Colorado River) first came to the forefront in Arizona during the mid-1980s. At that time, the State of Arizona Attorney General's Office, invoking the public trust doctrine,

asserted title to lands underlying the Verde River in an attempt to protect the land from use by a sand and gravel company. *Arizona State Land Dept. v. O'Toole*, 154 Ariz. 43, 739 P.2d 1360 (Ariz. App. 1987). The Arizona Legislature disagreed with the Attorney General's action and responded to the state's assertion of title by enacting House Bill ("HB") 2017 which relinquished the state's interest in all lands underlying Arizona's rivers and streams, except the Colorado River. *See Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P. 2d 158 (App. 1991)(*"Hassell"*). Defenders of Wildlife, and others, brought an action challenging HB 2017 on various grounds, including a claim that the relinquishment of the public trust assets violated Article IX §7 of the Arizona Constitution (gift clause). *Id.*

In 1991, the Arizona Court of Appeals ruled in favor of the plaintiffs and against the State of Arizona. *Hassell*, 172 Ariz. 356, 837 P.2d 158. The *Hassell* Court first addressed the issue of the public trust doctrine and found that under that doctrine, all of the state's navigable waterways are held in trust by the state for the benefit of the people and that the state's control of those waters is forever subject to that trust. 172 Ariz. at 366, 837 P. 2d at 168. The Court in *Hassell* based its decision, in part, on a United States Supreme Court case, *Illinois Cent. R.R. v. Illinois*, stating, "[f]rom *Illinois Central*, we derive the proposition that the state's responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself. . . [W]e also derive the core proposition that the state must administer its interest in lands subject to the public trust consistently with trust purposes." *Hassell*, 172 Ariz. at 366, 827 P. 2d at 168, *citing Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 13 S.Ct. 110, 36 L. Ed. 1018 (1892). In developing Arizona's public trust jurisprudence, the *Hassell* court also relied upon the Arizona Constitution's separation of powers provision and gift clause. *Hassell*, 172 Ariz. at 366-369; 827 P. 2d at 168-171, *citing* Ariz. Const. Art. III and IX § 7.

In discussing the state's responsibilities under the public trust doctrine, the Court in *Hassell* found that public trust resources are not like other state resources and "any public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations." *Hassell*, 172 Ariz. at 368, 837 P. 2d at 170. In determining whether a dispensation meets the state's obligation to maintain the trust, the court must consider "the degree of the effect of the project on public trust uses, navigation, fishing, recreation, and commerce." *Id.*

With respect to HB 2017, the *Hassell* court found that it failed to provide, [A] mechanism for the particularized assessment of (1) the validity of the equal footing claims that it [the state] relinquishes; (2) the continuing value of land subject to such claims for purposes consistent with the public trust; (3) equitable and reasonable consideration for claims that may be relinquished without impairing the public trust; and (4) conditions that may be necessary to any transfer to assure that public trust interests remain protected.

Hassell, 172 Ariz. at 371, 837 P.2d at 173. These factors are now known as the "particularized assessment requirements" and it is the duty of the State, as trustee, to undertake this particularized assessment analysis prior to any dispensation of trust resources.

In response to the *Hassell* decision, the Legislature established the ANSAC. Ariz. Rev. Stat. Ann. §§ 37-1121-1131 (1993), *See also, Defenders of Wildlife v. Hull*, 199 Ariz. 411, 416, 18 P.3d 722, 727 (2001) ("*Defenders*"). The ANSAC was charged with the duty to collect information, in conjunction with the State Land Department, regarding the navigability of Arizona's rivers and streams. In 1994, when it appeared that ANSAC might conclude that some of Arizona's rivers were navigable at the time of statehood (and thus subject to the public trust), the Legislature made significant changes to the authority of ANSAC, essentially ensuring that ANSAC would find major rivers nonnavigable. 1994 Ariz. Sess. Laws, Ch. 277, §§ 1-14, eff. April 25, 1994. The Legislature later enacted SB 1126 which declared many of Arizona's

watercourses, including the Lower Salt, Hassayampa and Verde, nonnavigable. 1998 Ariz. Sess. Laws, Ch. 43, § 2.

Once again, Defenders of Wildlife, and others, successfully challenged the constitutionality of this enactment. In *Defenders*, the Court found SB 1126 invalid under the U.S. and Arizona Constitutions. The Court further found that the Legislature had failed to comply with the “particularized assessment” requirements described in *Hassell*. Consequently, the Court of Appeals held that the attempted relinquishment was unconstitutional. In 2001, the Arizona Legislature enacted Senate Bill (“SB”) 1275, amending A.R.S. §§ 37-1101-1156.¹ The ANSAC’s role as an adjudicatory body was reinstated and, after great delay, the ANSAC began holding hearings. The ANSAC held hearings on the navigability of the San Pedro River in three counties as follows: March 11, 2003, Cochise County; January 22, 2004, Pima County; March 9, 2004, Pinal County.

II. The Definition of Navigability Under Arizona and Federal Law.

The definition of navigability for purposes of the public trust doctrine is well-established under both Arizona and Federal law and requires that the watercourse be evaluated in its natural and ordinary condition. According to Arizona law, a watercourse is navigable if

it 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.

A.R.S. § 37-1101 (5). As noted by the Arizona Court of Appeals in *Defenders*, Arizona law essentially adopted the federal standard of navigability which was first defined by the U.S.

¹ In June, 2002, a lawsuit was filed by Defenders of Wildlife, and others, alleging the unconstitutionality of SB 1275 among other complaints. This lawsuit is currently pending before the Arizona Court of Appeals, but it may impact the ANSAC’s hearing process. Any decision made by the ANSAC under an unconstitutional statute will be declared invalid and void.

Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870). See also Transcript of Lower Salt River Hearing, April 7-8, 2003 in Phoenix, Arizona at 276. The question of navigability is a federal question, and must be determined based upon either state laws that mirror the federal definition or federal law itself.² *Utah v. United States*, 403 U.S. 9, 10, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971), *Alaska v. United States*, 754 F.2d 851, 853 (9th Cir. 1985), *Defenders*, 199 Ariz. at 419, 18 P.3d at 730. The precedent established in *The Daniel Ball* defined a navigable watercourse as follows:

Those 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.

Id. . Subsequent Supreme Court cases further refined the definition to clarify that the river must be evaluated in its *natural* state. *The Montello*, 87 U.S. (20 Wall) 430, 440-443 (1874). In *The Montello*, the issue was whether the Fox River, in the State of Wisconsin, was a navigable water of the United States. Originally there were rapids and falls in the river, but these had been obviated by locks, canals, and dams with the result being that the river was more readily navigable in its current state than in its natural state. It was argued that with the improvements the river had become a highway for commerce, but because it was not navigable in its natural state it was not navigable under *The Daniel Ball* which required that the river be evaluated in its “ordinary” condition. The court agreed that proper test was whether the river was navigable in its natural state, but then proceeded to find that, even before the improvements, a large and

² This raises the obvious question regarding whether the ANSAC even has the authority to make a determination regarding the navigability of a watercourse for title purposes under the equal footing doctrine. However, so long as the ANSAC follows federal law standards and precedents, then the ANSAC’s decision may be lawful. See, e.g., *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 478, 108 S. Ct. 791, 98 L.Ed. 2d 877 (1988). *Brewer Oil Co. v. United States*, 260 U.S. 77, 89, 43 S. Ct. 60, 67 L.Ed. 140 (1922).

successful interstate commerce had been carried through the river. In holding the river navigable, the Court stated:

[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market. It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in this natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

The Montello, 20 Wall at 441. This same definition of navigability was applied by the Supreme Court in 1921 to hold that just because a river was currently non-navigable due to artificial obstructions, it could nonetheless be found navigable under the federal test if had been navigable in its natural state. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122, 123 (1921). In finding the Desplaines River a navigable watercourse, the Supreme Court observed,

The Desplaines River, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation; improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream

256 U.S. at 124.

Significantly, the Arizona Court of Appeals relied upon *Economy Light & Power v. United States* when it considered the legislature's attempt to create a presumption that if a dam or other obstruction existed on a watercourse, the watercourse was deemed nonnavigable. *Defenders*, 199 Ariz. at 424, 18 P.3d at 735. In holding the presumption unconstitutional, the

Arizona Court of Appeals quoted the Supreme Court, “[t]he fact, however, that artificial obstructions exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state.” *Id.*, quoting, *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 118, 41 S. Ct. 409, 65 L.Ed. 847 (1921). Thus, as both federal and state case law makes clear, when determining navigability, the ANSAC must evaluate a watercourse as though any existing dams or diversions did not exist. *See also, United States v. Utah*, 283 U.S. at 75-79, 51 S.Ct. 438, 75 L.Ed. 844.

Moreover, as these cases demonstrate, the federal test for navigability for title (under the Equal Footing Doctrine) is a liberal one. First and foremost, the definition of navigability does not require that the watercourse actually have been used has a highway for commerce, but rather, be 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, 51 S. Ct. 438, 75 L. Ed. 844 (1931), *see also, Alaska v. Ahtna*, 891 F.2d 1401, 1404-1405 (9th Cir. 1989). In addition, a river may be deemed navigable despite occasional impediments such as sand or gravel bars, and despite the fact that it is only navigable a few months out of the year. *See e.g., State of Oregon v. Riverfront Protective Ass’n*, 672 F.2d 792, 795 (9th Cir. 1982). Actual use for boating, whether commercial or recreational, can demonstrate susceptibility as a “highway for commerce.” *See, e.g., Utah v. United States*, 403 U.S. at 11. Although state ownership turns on navigability at the time of statehood, evidence of current boating, recreational or otherwise, by small watercrafts such as canoes, is probative of navigability and susceptibility to navigability at statehood. *See, e.g., North Dakota v. Andrus*, 671 F.2d 271, 277-278 (8th Cir. 1982), *rev’d on*

other grounds (statute of limitations), *Block v. North Dakota*, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983), *see also*, *State of Alaska v. United States*, 662 F. Supp. 455, 465 (D. Alaska 1986), *aff'd by Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989) (a river may be deemed navigable if it is susceptible to transporting goods or people by any conveyance, not merely those in use at the time of statehood).

Furthermore, the remoteness of a river or lack of actual use at statehood as a “highway for commerce” does not defeat a finding of navigability because the definition includes not only watercourses that were certainly used as a highway for commerce, but also those watercourses that are susceptible to such use, even if they were never used for that purpose. *See, e.g., United States v. Utah*, 283 U.S. at 83, 51 S. Ct. 438, 75 L. Ed. 844. In *Utah v. United States*, the U.S. Supreme Court found a lake navigable when used for hauling of livestock across the water even though it was done by owners and not for any commercial purpose or to make money. *Id.*, 403 U.S. 9, 11, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971). Certainly, as noted by *Defenders I*, there is no requirement that the trade or travel must have resulted in a “profitable commercial enterprise.” *Id.*, 199 Ariz. at 422, 18 P.3d at 733.

In addition, navigation can take many forms. For example, floating logs down a river is a recognized form of navigation for purposes of the Equal Footing Doctrine. *Oregon*, 672 F.2d at 795. The “‘ordinary modes of trade and travel’ element of the Daniel Ball test are not fixed and need not be construed with reference only to the ‘ordinary modes of trade and travel’ in existence at the time of statehood.” *Defenders*, 199 Ariz. at 423, 18 P.3d at 734, *see also*, *State of Alaska v. United States*, 662 F. Supp. 455, 463 (D. Alaska 1987) (cited with approval in *Defenders* for this proposition). Rather, “evidence of the river’s capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or travel.”

Adirondack League Club, Inc. v. Sierra Club, 706 N.E.2d 1192, 1194 (N.Y. 1998) (cited with approval in *Defenders*, 199 Ariz. at 423, 18 P.3d at 734). Similarly, the Ninth Circuit Court of Appeals has held that guided fishing and sightseeing trips, although recreational in nature, could be considered commercial activity under the *Daniel Ball* test. See, *State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989).

The broad jurisdictional construction of “navigability” is well-illustrated in the case of *North Dakota v. Andrus*, 671 F.2d 271 (8th Cir. 1982), *rev’d on other gnds, Block v. North Dakota*, 461 U.S. 273 (1983). In that case, the court found the Little Missouri River navigable at statehood based on: a) isolated cases of historic use by small crafts such as canoes; b) an observation from the Lewis and Clark expedition on the river’s width and depth; c) some brief and unsuccessful efforts to float logs downstream; and d) current use annually by hundreds of recreational canoeists. 671 F.2d at 277-278. In another case, a finding of navigability was upheld based on evidence that a river was used for log drives for as little as three months per year even though suffering frequent log jams, flooding and low flows. *Oregon*, 672 F.2d at 295-296.

In summary, the key elements of the definition of navigability in navigability-for-title cases are (1) the watercourse must be evaluated in its natural and ordinary condition free of dams and diversions; (2) the evidence need only show that the watercourse was susceptible for use as a highway for commerce; and (3) the standard applied must be consistent with federal and Arizona law. If the appropriate definition is applied in the present case, it leads to the inescapable conclusion that the Santa Cruz, at statehood, was susceptible for use, in its ordinary and natural condition, as a highway for commerce, over which trade and travel could have been conducted. In a word, navigable.

III. The Evidence in the Record Demonstrates that the Santa Cruz was navigable at Statehood.

The evidence provided to the ANSAC regarding the Santa Cruz River overwhelmingly demonstrates that under the liberal test required by federal law, the river was 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. EIN 6(9), Santa Cruz River final report by SFC Engineering, George V. Sabol, SWCA, Inc. and J. E. Fuller, dated November 1996, Executive Summary, p. 2 (hereinafter "State Report"). The State Report found that historically, the Upper Santa Cruz was perennial, and remains perennial today. State Report, Executive Summary, p. 4. As for the Middle Santa Cruz, which runs through Pima County, the Report found that "until the 20th century, this portion was perennial, and in fact supported early Indian agriculture for hundreds of years." State Report, Section 3, A Historical Study of the Santa Cruz River, p. 6. In Pinal County, the river's flow was only continuous during flood times.

The State Report, however, also documents that the river underwent significant change during the territorial period, from 1850 to 1912. State Report, Historical Study, pp. 30 – 48. 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 33. Agriculture also expanded and along the river was characterized by the diversion of surface flows. *Id.* p. 35. 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.*

In the 1860s a dam across the Santa Cruz a mile south of "A" mountain created "Silver Lake." *Id.* at 39. The lake was used for milling flour and recreation. Several years later, a

second dam was built north of Silver Lake to create Walker Lake. Local residents used the lakes for recreation and boating. *Id.* During this period, however, drought and flood cycles periodically washed out the dams. *Id.* at 43. The dams were rebuilt until February 1890 when flooding washed out the dams and created such entrenchment that neither the dams nor the lakes were rebuilt. *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.* 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. Moreover, according to the U.S. Geological Survey, essentially the entire flow of surface waters from the river were diverted both at the Nogales and Tucson gaging stations by irrigation ditches. *Id.* 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 persisted 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).

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, the law is 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. As discussed above, neither the fact that they were not actually used for boating nor the fact that some reaches only flowed part of the year precludes a finding of navigability. Indeed, the long history of settlement along the Santa Cruz River clearly demonstrates that it is appropriately considered a common resource to be shared by all of the people.

III. Conclusion.

In the present case, there is ample relevant, persuasive evidence demonstrating that the Santa Cruz meets the Arizona and federal standards of navigability. In summary, the evidence demonstrating navigability includes information regarding the perennial flow of the river prior to territorial days, the significant damage done to the river by diversions, dams, and groundwater pumping, and the persistence of the river even until today. When the objective evidence submitted is evaluated in light of the appropriate standard, it is clear that at the time of statehood the Santa Cruz River in its natural and ordinary condition was

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. We therefore urge the ANSAC to find that the Santa Cruz was navigable at statehood.

Respectfully Submitted this 8th day of April 2004



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One original and six copies of the foregoing Opening Memorandum was mailed on this 8th day of April, 2004 to:

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