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BEFORE THE ARIZONA NAVIGABLE STREAM  
ADJUDICATION COMMISSION

In re Determination of Navigability of the San Pedro River	)	Case No. 03-004-NAV
	)	Memorandum on Remand
	)	
	)	
	)	
	)	

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, "Defenders") hereby submit their memorandum on remand. 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 the San Pedro River was navigable when Arizona entered the Union on February 14, 1912.

Defenders submits that regardless of whether the evidentiary record is reopened, ANSAC should request that the parties fully brief the issue of the navigability of the San Pedro River applying the appropriate standard as articulated by the Court of Appeals in *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz. 230,

229 P.3d 242 (App. 2010). In the event ANSAC declines to allow further briefing, the following abbreviated discussion of the evidence is hereby submitted.

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

In determining whether the San Pedro 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. 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." *Winkleman v. ANSAC*, 224 Ariz. 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 San Pedro 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).

**II. The Evidence in the Record Demonstrates that in its “ordinary and natural condition” the San Pedro was navigable at Statehood.**

The evidence provided to the ANSAC regarding the San Pedro River demonstrates that under the liberal test required by federal law, stretches of the river were navigable at the time of statehood. There is no question that the river existed at the time of statehood

and, when considered in its natural condition, had significant portions that were perennial. For example, the study commissioned by the Arizona State Land Department reports that prior to 1890 the San Pedro River was “an irregularly flowing stream, marshy in places, free-flowing in other places, entrenched or subsurface in still other places.” Arizona Stream Navigability Study for the San Pedro River: Gila River Confluence to the Mexican Border” prepared by CH2MHill, revised by JE Fuller/Hydrology & Geomorphology, Inc. June 1997 and January 2004 (“ASLD Report”) According the ASLD Report, analysis of the hydrology of the San Pedro reveals that portions of the river are currently perennial and were probably perennial at statehood as well. *Id.* p.iv. Similarly, government surveys from the 1850’s describe the San Pedro as “about 18 inches deep and 12 feet wide” with “a rapid current.” EIN1(1)Exhibit 1.<sup>1</sup>

From 1904 to 1906, the San Pedro River gage at Charleston recorded an average depth of 1.3 feet and an average top width of 10 feet. State Report, p. 7-13. Moreover, the gage records show at least 0.5 feet depth and 4 ft width for ten of the twelve months of the year. Even when the Charleston gage measurements are averaged from 1904 to 1991, the annual average depth is 0.8—sufficient to support a canoe or kayak. *Id.* at 7-14. Similarly, from 1915 to 1924, the gage at Fairbank recorded an annual average depth of 0.9 and average top width of 20 ft. State. Report, p.7-15. In fact, during those years the gage showed average depths of 0.5 ft or more *all twelve months of the year.* *Id.* The

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<sup>1</sup> Although the Evidence Index indicates the EIN 1 is a Letter from David Baron dated 2/18/97, copies of evidence obtained from ANSAC show the date of the letter submitting the government surveys to be 10/10/96.

gage records for Tombstone and Redington, more recent in time, both show annual average depths of 0.5 feet, sufficient to support a canoe or kayak. State Report, p. 7-16.

Both cienegas and beavers were common along the San Pedro in the 19<sup>th</sup> Century, and in 1879 there was so much standing water in the river that the Arizona Daily Star described it as “the valley of the shadow of death” due to frequent outbreaks of malaria, dengue and yellow fever. EIN 4, Glennon, WATER FOLLIES, Chap. 4, p. 51. Because of these health concerns, in the 1880s area residents removed the beavers and their dams from the San Pedro. *Id.* at 52. Around the same time, cattle grazing destroyed the grassland and shrubs, producing quicker runoff and even greater erosion. Glennon, 52, According to the ASLD Report,

[B]y 1890, the San Pedro River was a highly variable stream, both seasonally and along its length. In some areas, it was primarily a marsh with no discernible bed. In other areas, it was a flowing stream several feet wide and as much as one foot deep, but a few miles away, surface water might not be present at all. In a few places, the stream flowed through arroyo cuts as much as 10 feet deep.

ASLD Report, p. iv. Consistent with the removal of the beavers and the increased grazing, the ASLD Report found that sometime around 1890, arroyo cutting significantly changed the character of the San Pedro, and both upper and lower reaches experienced channel entrenchment and widening. *Id.* According to the Report, by 1912, streamflow in the upper San Pedro was largely perennial and shallow, and streamflow in the lower San Pedro was largely intermittent with short reaches of perennial flow. ASLD Report, p. 5-15. The Report concludes that although entrenchment and widening appear to be a

natural cycle within the fluvial system, human disturbances had probably affected the magnitude and rate of channel change. *Id.* at 5-16.

The fact that the 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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). In determining the navigability of the San Pedro River, this Commission must do the same. It would be contrary to well-established federal law to find an entire watercourse “nonnavigable” simply because portions of the river were not susceptible to navigation, yet others clearly were.

Further, although there is no documented history of boats on the San Pedro at the time of statehood, that fact alone is not dispositive. Case law is clear that in order to establish navigability, it is not necessary to show that 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 (9<sup>th</sup> Cir. 1989).

In determining whether a watercourse was “susceptible” of such a use, evidence of modern use is appropriately considered. *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.”). 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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). “[E]vidence 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).

As the ASLD Report observes, “modern use of a river reach by canoes probably indicates that canoes could have been used at the time of statehood.” ASLD Report, p. 8-4. According to a survey conducted for the state, recreational boaters have, at one time or another, boated the entire length of the San Pedro. ASLD Report, p. 8-5. The fact that these outings have largely been seasonable is most likely more a reflection of the reduction in the river’s flow since the time of statehood. As the ASLD Report finds, there has been a general decline in the San Pedro’s streamflow since statehood, and that decline is due in part to groundwater withdrawals in excess of natural recharge. ASLD Report, p 8-6. In sum, the fact that the stream is currently used for canoeing, kayaking and rafting, combined with the fact that currently flows are significantly diminished from human impacts, suggests that at the time of statehood, the river was susceptible of being used as a highway.

### **III. Conclusion.**

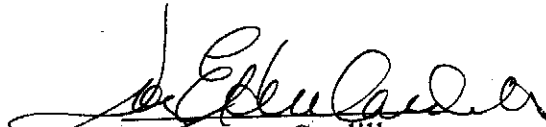
In the present case, there is ample relevant, persuasive evidence demonstrating that portions of the San Pedro River meets the Arizona and federal standards of navigability. In summary, the evidence demonstrating navigability includes information regarding the perennial flow of the river, the width and depth of the river in its natural condition, 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 the



San Pedro 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 San Pedro was navigable at statehood.

Respectfully Submitted this 27<sup>th</sup> day of January 2012.

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A handwritten signature in black ink, appearing to read "Daniel Moore", written in a cursive style. The signature is positioned below the typed name and address of Daniel Moore.