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BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

In re Determination of Navigability of)	Case No. 04-009 NAV
the Verde River)	Memorandum on Remand
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_____)	

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 Verde 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 Verde 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 Verde 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 Verde 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 Verde 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. Highway for Commerce.

Because the Court of Appeals in *Winkleman v. ANSAC* declined to reach the issue of “highway for commerce,” it warrants further discussion here. The term “highway for commerce” can be misleading and should not be interpreted by this Commission as a requirement that commercial activity occur on the river in order for it to be navigable.

Rather, this requirement is satisfied by either trade or *travel* on the river. 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.

A.R.S. §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.” A.R.S. §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 v. Hull*,

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. 411, 416, 18 P.3d 722, 727 (2002) In *Defenders*, the Arizona Court also rejected the argument that the trade and travel must be upstream and downstream, or that the travel must be for a profitable commercial enterprise. Rather, the Arizona 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 recently 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, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (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 (WD 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 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 F2d 1401, 1405 (9th Cir. 1989).

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. As the Arizona Court 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.

Defenders, 199 Ariz. 729-30, 18 P. 3d at 418-19 (citations omitted). Thus, 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.

III. Susceptibility for Use.

It is also important to recognize that the definition of navigability does not require that the watercourse actually have been used for trade or travel, but rather, only requires that it 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. 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).

IV. The Evidence in the Record Demonstrates the Verde River in its “ordinary and natural condition” was Navigable at Statehood.

The Hydrology of the Verde River at Statehood

The evidence presented to the Commission establishes that the hydrology of the Verde River has not changed significantly since 1912. See Arizona Stream Navigability Study for the Verde River, Salt River Confluence to Sullivan Lake (“State Report”), p. 7-1. According to the State Report, average flow rates have not changed markedly over the past 80 years except for the reach downstream of Horseshoe and Bartlett Reservoirs. State Report p. 7-11. Irrigation has been practiced on the Verde River since prehistoric times and there were irrigation diversions along the entire Verde River at the time of statehood. State Report, p. 7-22. In 1914, twenty-five diversions diverted more than 121 cfs for more the 5,000 acres of farm land between Perkinsville and the Salt River. *Id.* These diversions lowered the measured streamflow and depleted the stream resources.

Id. The hydrology of the Verde River has also historically been adversely impacted by groundwater pumping, evapotranspiration, reservoir impoundments, and watershed impacts such as grazing, timber and fire. State Report, p. 7-4. Yet, despite these diversions, even today there are depths sufficient for shallow draft boating in the Verde River every month at every station. Testimony of John Fuller, Transcript, p. 34, EIN 038.

Historic evidence of boating

Even with all of the diversions, there are numerous historical accounts of actual river travel on the Verde. Most of the historic accounts of boating occurred along the middle and lower Verde. State Report, p. iv. There are accounts of soldiers boating down the Verde River from Fort McDowell to Phoenix. *Id.* and 3-20. At Camp Verde, the army apparently used a boat to ferry couriers across the river during periods of high water. *Id.* In 1903, a newcomer to the area described traveling 16 miles in a steel boat down the middle Verde to hunt ducks. *Id.* What was noteworthy about the account is the fact that the horse that pulled the boat from the general store to where the hunters put in did it so often, it was trained to return to the store with the axle alone. *Id.* at 3-21. There is also an early account of floating logs or sawn timber from Fort McDowell. *Id.* In sum, there are several accounts of boating on the river at or near the time of statehood.

Evidence of modern boating

The Commission also received significant evidence of modern boating on the Verde. This is particularly relevant because, as noted above, the hydrology of the Verde

River has not changed significantly since the time of statehood. As documented in the *State Report*, the Verde River is regularly boated in modern times. *State Report*, p.8-4 – 8-5. According to the United States Forest Service Records, during the period from January 2001 to March 2005, there were at least 863 boaters in 728 different boats that boated from Beasley to Horseshoe. Transcript, p. 36-37. Moreover, these records indicate that there were boaters every month of the year. *Id.*

In addition to the testimony and report presented by the State Land Department, the Commission received direct evidence from modern boaters, both in the form of letters submitted by individuals who have boated the Verde, and in the form of live testimony. First, David Weedman, a biologist from the Arizona Game and Fish Department, testified about his experiences boating the Verde. See Transcript of Hearing, Exhibit A, pp. 211-212. According to Mr. Weedman, he has boated the Verde from Childs power plant down to Sheep Bridge, just above Horseshoe Reservoir. *Id.* at 217. Mr. Weedman also testified that he had canoed from Beasley Flats down to Childs. *Id.*

The Commission also heard testimony from John Colby of Cimarron River Company. Mr. Colby testified that he has been boating privately on the Verde River since 1985 and has done commercial tours with Cimarron. Transcript, p. 55. His personal boating experience included from Beasley Flat all the way through Childs, Arizona and all the way down to Sheep Bridge and Horseshoe Reservoir. *Id.* He also testified to boating between the Horseshoe and Bartlett reservoirs through the Tonto National Forest all the way to the confluence with the Salt River. *Id.* Finally the

Commission heard testimony and saw photographs from Jim Slingluff, author of who described his extensive experience boating the Verde River. Transcript pp. 101-122.

In summary, evidence provided to the ANSAC regarding modern boating on the Verde River demonstrates that under the liberal test required by federal law, the river is navigable today and was navigable at the time of statehood.

V. Conclusion.

In the present case, there is ample relevant, persuasive evidence demonstrating that the Verde River meets the Arizona and federal standards of navigability. In summary, the evidence demonstrating navigability includes information regarding boating on the Verde, past and present use of the water as a conduit for travel and trade (of water and other goods), and flow rates necessary to support trade and travel on the watercourse (thereby demonstrating susceptibility). We therefore urge the ANSAC to find that the Verde River was navigable at statehood.

Respectfully Submitted this *27th* day of January 2012.

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