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*Received
3-24-06
by mail
Posted 3/21/06*

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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In re Determination of Navigability of the Verde River)	Case No. 04-009 NAV
)	Opening Post-Hearing Memorandum
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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 Verde River. For the reasons set forth herein, Defenders requests that the Arizona Navigable Stream Adjudication Commission (“ANSAC”) find that the Verde 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, Verde 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. 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 Verde River in two counties as follows: Yavapai County; March 29, 2005 and Maricopa County, January 18, 2006.

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

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. Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870). 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. *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. Thus, in order to determine navigability, the Commission must consider whether, at the time of statehood, the Verde River was either used or susceptible to being used as a “highway for commerce” in its “natural and ordinary condition.” Over the years, cases from the United States Supreme Court to the Arizona Court of Appeals have clarified precisely what these terms mean when it comes to determining navigability for title.

A. Natural and Ordinary Condition.

The definition of navigability for purposes of the public trust doctrine requires that the watercourse be evaluated not just in its “ordinary” condition, but also in its *natural* state. One of the earliest Supreme Court cases clarified this requirement. *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 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 (1921). Thus, as both federal and state case law makes clear, when determining navigability, the ANSAC must evaluate a watercourse in its *natural* state-- as though any existing dams or manmade diversions did not exist. *See also, United States v. Utah*, 283 U.S. at 75-79.

B. Highway for Commerce.

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 advanced by intervenors Salt River Project and Phelps Dodge 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. The cases cited by parties who assert that commercial activity is required to establish navigability are Commerce Clause cases. 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.'" *Boone v. United States*, 944 F.2d 1489, 1499 (9th Cir. 1991) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 170, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979)); *see also* Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law*, 3 *Fla. St. U. L. Rev.* 511, 515 (1975). 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.

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—that alone qualifies it as a "highway for commerce."

C. 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, requires only 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, *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. *See, e.g., United States v. Utah*, 283 U.S. at 83. As the United States Supreme Court noted in that case:

Utah, with its equality of right as a State of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the State 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, the

multiplication of activities and the development of natural resources. 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, 51 S.Ct. at 443-4, 75 L.Ed. at 853.

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).

Further, it is not necessary that the entire river be susceptible to use as a highway for commerce for part of the river to be found navigable. 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). In determining the navigability of the Verde River, this Commission must do the same.

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) there is no requirement that the river be used for commercial purposes; (3) the evidence need only show that the watercourse was susceptible for use as a highway for commerce at the time of statehood, not that it was actually used as such; and (4) 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 conclusion that the Verde River, 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.

III. The Evidence in the Record Demonstrates the Verde River was Navigable at Statehood.

A. 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, Draft Final Report ("State Report")*, EIN 031, 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. EIN 031, 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. EIN 031, 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. EIN 031, 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.

B. 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*, EIN 031, 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.

C. 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. EIN 031, 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 powerplant 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.

IV. The Evidence Offered by SRP to Support a Finding of Non-navigability Was Without Foundation and Should be Disregarded by ANSAC .

Although SRP offered evidence and testimony that urged a finding of non-navigability, the opinion offered was based upon faulty premises and failed to apply the appropriate legal standard. Much of the “evidence” offered by SRP is conclusory, asserting that the Verde River was not navigable at statehood. Yet, these conclusions are not based on the applicable legal standard for determining navigability in Arizona. In fact, SRP’s testifying expert witness, Douglas Littlefield, admitted that he did not rely on Arizona or federal law, but rather on their own personal definition of navigability. See Transcript at 94-95 (Testimony of Douglas Littlefield). For this reason, the conclusion drawn by Dr. Littlefield regarding the “navigability” of the Verde River is of absolutely no relevance to the ANSAC’s determination.

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). Moreover, all the information presented which “concludes” that the Verde River was not navigable (mainly offered by retained expert testimony and reports) is not based upon the appropriate standard of navigability. As a result, the competent evidence submitted clearly establishes by a preponderance of the evidence that the Verde River was used or was susceptible for use its natural and ordinary condition, as a highway for commerce. We therefore urge the ANSAC to find that the Verde River was navigable at statehood.

Respectfully submitted this 21st day of March, 2006

A handwritten signature in cursive script, appearing to read "Joy E. Herr-Cardillo".

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One original and six copies of the
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