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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 regarding the
	)	Navigability of the San Pedro River
	)	
	)	
	)	

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler

(collectively, "Defenders") hereby submit their memorandum regarding the navigability of the San Pedro 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 San Pedro 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 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. *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 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).

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

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 fact, 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 San Pedro 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.**

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 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 (9<sup>th</sup> 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 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 that Commerce Actually Be 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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,” Portions of the San Pedro Were Navigable at Statehood.**

**A. Evidence Applicable to the Whole River.**

The evidence provided to the ANSAC regarding the San Pedro River demonstrates that under the test required by federal law, some segments 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 stretches that were perennial and susceptible to navigation. 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 (“State Report”). According the State 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." State Report 3-17.

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 State 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.

State Report, p. iv. Consistent with the removal of the beavers and the increased grazing, the State 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, stream flow in the upper San Pedro was largely perennial and shallow, and stream flow in the lower San Pedro was largely intermittent with short reaches of perennial flow. State 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.

**B. Evidence Regarding Specific Segments.**

The San Pedro is typically divided into two reaches. The first reach, the Upper San Pedro, originates in Mexico and flows through Santa Cruz County to “The Narrows,” a bedrock constriction located north of Benson, between the foothills of the Rincon Mountains to the west and the Little Dragoon Mountains to the east. *Id.* at 7-1. The second reach, the Lower San Pedro, runs from The Narrows, north to Winkleman where San Pedro flows into the Gila River. *Id.*

**1. Upper Reach.**

**a) Actual Condition at Statehood.**

The first determination that needs to be made is the actual condition of the Upper San Pedro at the time of statehood. Although there is some information from the year 1912, much of the evidence necessary to establish its actual condition at statehood must be interpolated from the years immediately before and after 1912.

**Channel**

At the time of statehood, most of the channel was entrenched, except along bedrock reaches like The Narrows. State Report, p. 5-15. The channel was braided. *Id.* Frequent flooding in the late 1800s resulted in a channel wider than what was recorded in the survey notes of the 1870’s and 1880’s. *Id.* at 5-16. It is estimated that at that time, the width of the channel on the Upper San Pedro averaged between 130 and 260 feet. *Id.*

## **Stream Flow**

In 1912, the stream flow in the Upper San Pedro was largely perennial and shallow, with less than 10 cfs baseflow. State Report 5-15. Three USGS gaging stations were operated on the Upper San Pedro prior to or during 1912: 1) San Pedro at Charleston; 2) San Pedro near Fairbank; and 3) San Pedro at Fairbank. *Id.* at 7-15 (see also Figure 7-2 on p. 7-7). Although there is no data from 1912 from the Charleston station, long term stream flow records indicate that the average flow rate for the month of February is 28 cfs, with an average annual flow rate of 13 cfs. *Id.* at 7-5 through 7-6. The San Pedro near Fairbank station showed a flow in the river of 14 cfs, 22 cfs and 18 cfs on January 19, March 18, and April 20, 1912. *Id.* at 7-6. The San Pedro at Fairbank gage began operating in 1912, and showed an average monthly discharge for February between 1913 and 1920 of 47 cfs, with an average annual discharge of 96 cfs. *Id.* Based upon this, and other more recent data, the State Report concludes that at the time of statehood, the Upper San Pedro River near St. David was perennial, with an average annual flow rate of about 50 cfs, and a median flow rate of about 10 cfs. *Id.*

## **Depth**

The flow rates estimated for the Upper San Pedro correspond to an annual average flow depth of about 1 foot, and a median depth of about 0.5 feet. *Id.* at 7-22. Applying rating curves to gage records show that in 1904 to 1906, the annual average depth at the Charleston gage was 1.3 feet, with a range from 0.2 in June to 1.9 in August. *Id.* at 7-13. Similarly, at the Fairbank gage station from 1915 to 1924, the annual average depth is estimated to be 0.9 feet, with a range of .5 in June to 1.3 feet in August. *Id.* at 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.* Near Tombstone, the average depth is estimated to be 0.5 feet. *Id.* at 7-16.

### **Diversions and human alterations.**

Although the San Pedro wasn't subjected to the same level of diversions and human impacts as other Arizona rivers by statehood, it nonetheless was not in its "natural" condition in 1912. Irrigation diversions for Tombstone mining increased during the period around statehood. State Report, p. 5-11. Beaver dams were destroyed and swamps drained to lower the water table. *Id.*

#### **b) Ordinary and natural condition at statehood**

To determine the natural condition of the river, it is necessary to consider it before it was depleted by all of the diversions. One of the earliest descriptions of the Upper San Pedro River was from Trapper James Ohio Pattie who visited the River during the 1820's. According to the State Report, "his accounts imply perennial streamflow throughout most of the San Pedro River." State Report, p. 5-9 through 10. Later, in 1851, J.R. Bartlett also noted continuous streamflow in the upper San Pedro. *Id.* Immediately upstream from The Narrows, in 1859 Hutton described the river as having a width of approximately 12 feet and a depth of 12 inches. Surveyors' measurements suggest that between St. David and The Narrows, the channel width in 1873 averaged less than 36 feet, and between San Juan de las Boquillas y Nogales land grant and St. David, the channel width in 1881 averaged approximately 60 feet. *Id.* at 5-10 through 5-

11. Descriptions from the 1870's and 1880's describe a river with alternating entrenched and unentrenched reaches and overall perennial flow. *Id.* at 5-11.

**c) Evidence of navigation of the Upper San Pedro:**

As the State Report observes, "modern use of a river reach by canoes probably indicates that canoes could have been used at the time of statehood." *Id.* at 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, including the Upper San Pedro. *Id.* at 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 State Report finds, there has been a general decline in the San Pedro's stream flow since statehood, and that decline is due in part to groundwater withdrawals in excess of natural recharge. *Id.* at 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 Upper San Pedro was susceptible of being used as a highway.

**2. Lower Reach:**

**a) Actual condition at statehood:**

Determining the actual condition of the Lower San Pedro at the time of statehood requires the same interpolation of data that was necessary for the upper reach.

**Channel**

In the late 1800s, the channel of the Lower San Pedro was generally less than 40 feet wide. However, beginning in 1890, things started to change. A series of large floods

led to channel cutting and widening and considerable farm property was lost along the river. State Report, p. 5-13. At the time of statehood, the width of the channel between The Narrows and Redington is estimated to have averaged 130 to 260 feet. *Id.* at 5-16. Downstream from Redington, the channel was even wider averaging 330 to 650 feet. *Id.*

### **Stream Flow**

On the Lower San Pedro River, stream flow was largely intermittent with short reaches of perennial flow (less than 10 cfs). *Id.* at 5-15. Although there were four gaging stations on the entire San Pedro River around the time of statehood, only one, San Pedro at Winkleman, was located on the Lower San Pedro. That gaging station operated from April through August 1890 with average monthly flows ranging from 0 cfs to 295 cfs. *Id.* at 7-6. Because the hydrology of the river has not radically changed since 1912, the State Report looks to long term modern gage records, recognizing that the average annual stream flow rates have progressively declined since the 1920s. *Id.* at 7-6. Average annual flow rates at Redington and Winkleman were 45 cfs and 44 cfs respectively. Median flow rates at 1 and 3, cfs. *Id.*

### **Depth**

Given the lower annual flow rate, the depths in the Lower San Pedro tend to be lower as well. Applying the rating curve to long term gage records, the annual average depth at Redington is 0.5 feet, ranging from 0.3 feet in April, May and June to 0.8 in August. State Report, p. 7-17.

## **Diversions and human alterations.**

The Lower San Pedro was also impacted by diversions. The United States Geological Survey reported in 1899 that lower San Pedro River was dry, due in part to the large number of small canals. *Id.* at 7-6. In 1890, 2700 acres were irrigated on the San Pedro River. *Id.* at 7-6 (Winkleman gage)

Human interference with beavers also impacted this part of the river. The extermination of beavers meant that their dams were no longer able to prevent the cutting of a channel. *Id.* at 5-14. And cattle grazing resulted in less grass on the hillsides, which also contributed to greater erosion. *Id.* There was also a general decline in stream flow due, in part, to ground water withdrawals in excess of natural recharge. *Id.* at 7-10.

### **b) Ordinary and natural condition at statehood:**

There are several historic descriptions of the lower San Pedro before the River was impacted by diversions. According to the State Report, descriptions of the lower reach during Spanish, Mexican and early American periods consistently describe the river as “a small entrenched stream with low but generally consistent streamflow.” *Id.* at 5-13. Later, in 1846 an expedition passed down the Gila River and camped on the lower San Pedro one mile from its mouth. Several men in the party kept journals and described the river and terrain. One noted that the San Pedro river was “a few yards wide and one foot deep.” *Id.* Similarly, in 1854, John G. Parke crossed the River and described it as being “eighteen inches deep and twelve feet wide” with a “rapid current, at about twelve feet below the surface of its banks...” *Id.* at 3-17. Park also wrote “[a]t the Tres Alamos [crossing] the stream is about fifteen inches deep and twelve feet wide and flows with a



rapid current over a light, sandy bed about fifteen feet below its banks.” *Id.* That same year, Andrew B. Grey crossed the middle reach of the San Pedro River and described it as “a small stream at this stage, about eight feet wide, and shallow;...” *Id.* In late 1857, James H. Tevis described the lower San Pedro as being “one foot deep six feet wide & runs a mile & half an hour...” *Id.* at 3-18. In 1858, engineers surveying the Leach Wagon Road crossed the San Pedro two miles below where Parke had crossed it and described the River as having a width of about twelve feet and depth of twelve inches...” *Id.* As the State Report summarized, “[p]rior to the 1880’s, more of the San Pedro River flowed year round, in some areas a few feet wide and perhaps a foot deep, in other areas meandering through marshes such that it could ‘hardly be said to have [had] a course’...and several feet deep in other reaches.” *Id.* at 3-26 quoting Hastings and Turner 1965:36.

**c) Evidence of Navigation of the Lower San Pedro.**

Although there are no documented historical accounts of boating, included in the oral histories of the State Report was an account by a Mr. Houston Evans who responded to a mass-mailing letter. According to Mr. Evans, who lived near the river during the 1940s. Mr. Evans recalled that the river had clear water, about two to three feet deep year round during the 1943 to 1945 period. He said that there was a large lake in the middle of the river between the Aravaipa-San Pedro confluence and Dudleyville that is no longer there. He, along with other young family members and friends, would canoe on the San Pedro River from the Mammoth area down to the lake, where they had a raft. State Report, Appendix C, p. 53.


There are also instances of boating in more recent years. According to a survey and poll of members of the Central Arizona Paddlers Club, all of the San Pedro River except the reach from Mammoth to Aravaipa Creek and from Curtis to I-10 have been boated at least once. State Report, p. 8-4. See Table 8-3 on p. 8-5. As the State Report notes, the criteria for canoes available as of the time of statehood are not substantially different from criteria for canoes available today. *Id.* at 8-5.

### **III. Conclusion.**

In the present case, ample relevant, persuasive evidence demonstrates that portions of the San Pedro River meet 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 Upper Reach and portions of the Lower Reach of the San Pedro River in their natural and ordinary condition 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. We therefore urge the ANSAC to find those portions of the San Pedro navigable at statehood.

Respectfully Submitted this 7<sup>th</sup> day of September, 2012.

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A handwritten signature in black ink, appearing to read "Daniel Moore". The signature is written in a cursive style with a horizontal line underneath the name.