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IN THE PUBLIC INTEREST**
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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In re Determination of Navigability of)	Case No. 03-007-NAV
the Gila 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 Gila 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 Gila
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 Gila 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 Gila 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 Gila 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. at 416, 18 P.3d at 727. 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. 9, 11 (1971). 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 (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.

199 Ariz. at 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. 64, 82 (1931). 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 that in its Ordinary and Natural Condition the Gila River was Navigable.

A. Extensive Diversions Impacted the Ordinary and Natural Condition of the Gila River at Statehood.

In order to evaluate the natural and ordinary condition of the Gila River, it is important to first understand the types of diversions that have occurred historically on the Gila, and how those diversions affected stream flow in 1912 when Arizona entered the Union. Dams and irrigation diversions located on the Gila River and other rivers have affected the flow within the Gila River since before the turn of the century. By 1912, there were numerous diversions all along the river that removed water from the Gila. See Transcript, pp. 96:23 – 98:24. In fact, by 1913, virtually all of the water available in the river had been diverted. Transcript, pp. 194:23-195:6. Much of the water was diverted for irrigation by canals. See Arizona State Land Department’s “Arizona Stream Navigability Study for the Gila River: Colorado River Confluence to the Town of Safford” (rev. June 2003 by JE Fuller/Hydrology & Geomorphology, Inc.) (“State Report Lower Gila”) at IV-52 to 59. Large-scale irrigation diversions on the Upper Gila often

diverted all of the flow during peak irrigation seasons in the reaches with irrigated agriculture. See Arizona State Land Department's "Arizona Stream Navigability Study for the Upper Gila River: Safford to the State Boundary (rev. June 2003 by JE Fuller/Hydrology & Geomorphology, Inc.) ("State Report Upper Gila") at 5-14. Diversions on the lower Gila, as well as diversions on the Salt River, had almost depleted the entire flow by the time of statehood in 1912. State Report Lower Gila at X-2. Groundwater pumping was also responsible for diverting a significant amount of water from the river. State Report Upper Gila at 5-14; see also Transcript at p. 256-58.

In determining the navigability of the Gila River at statehood, the Commission must evaluate the river without these diversions. At the previous hearing, expert testimony was offered that made that evaluation. See testimony of Hjalmar "Winn" Hjalmarson. Transcript 256:21-25. Mr. Hjalmarson testified that without diversions—thus in its "natural" condition-- the Gila River was navigable. *Id.*

B. Historic evidence of boating

Even with all of the diversions, there are numerous historical accounts of actual river travel on the Gila. As Dennis Gilpin testified before the Commission, the state discovered nine accounts of boating along the entire length of the Gila between 1846 and statehood. Transcript, p. 37:17-19. There are also historical accounts of fur trapping expeditions along the Gila River. Transcript 211:22-212:14. The pioneer James O. Pattie canoed the river as part of a fur trapping expedition in the 1850's. *Id.* Moreover, during the territorial period, ferries were common along the Gila River. Transcript, p. 40:17-24. Indeed, there is even a picture of Governor Hunt crossing the Gila in 1916 on a ferry.

Transcript 109:13-21. Thus, even though the flow of the river was adversely impacted by the numerous diversions, it was nonetheless boatable at or near the time of statehood.

B. Evidence of modern boating

In addition to the testimony and report presented by the State Land Department regarding modern boating (Transcript p.64:4-11) the Commission received direct evidence from modern boaters, both in the form of letters submitted by individuals who have boated the Gila in recent years, and in the form of testimony from John Colby of Cimarron Adventures River Company. Transcript 331:15 – 339:4. Mr. Colby described his experiences running a commercial river trips on the Gila River. This testimony is further evidence that even with the diversions, the Gila River remains boatable today.

In summary, the evidence provided to the ANSAC regarding the Gila River demonstrates that under the liberal test required by federal law, the river was navigable at the time of statehood.

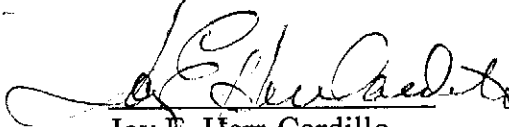
V. Conclusion.

When the best evidence regarding the River's natural condition is considered, it is clear that there is ample relevant, persuasive evidence demonstrating that the Gila River meets the Arizona and federal standards of navigability. The evidence demonstrating navigability includes information regarding boating and commercial ferry operations on the Gila, 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).

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

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