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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 the Santa Cruz River	)	Case No. 03-002-NAV
	)	Memorandum on Remand
	)	
	)	
	)	

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler  
(collectively, "Defenders") hereby submit their memorandum on remand. For the  
reasons set forth herein, Defenders request that the Arizona Navigable Stream  
Adjudication Commission ("ANSAC") apply the correct legal standard to the evidence in  
the existing record and find that the Santa Cruz 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  
Santa Cruz 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 Santa Cruz 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 Santa Cruz 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 Santa Cruz 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).

**III. The Evidence in the Record Demonstrates that in its “ordinary and natural condition” the Santa Cruz was navigable at Statehood.**

The evidence provided to the ANSAC regarding the Santa Cruz River overwhelmingly demonstrates that under the liberal test required by federal law, the river was navigable at the time of statehood. As the study commissioned by the State Land

Department explains, the Santa Cruz River has been the site of settlements since prehistoric times. Arizona Stream Navigability Study for the Santa Cruz River, Final Report prepared by SFC Engineering, George V. Sabol, SWCA, Inc. and J. E. Fuller, dated November 1996, Report revised by JE Fuller, January 12, 2004, Executive Summary, p. 2 (hereinafter "State Report"). The State Report found that historically, the Upper Santa Cruz was perennial, and remains perennial today. State Report, Section 3, Executive Summary, p. 5. As for the Middle Santa Cruz, which runs through Pima County, the Report found that "until the 20<sup>th</sup> century, this portion was perennial, and in fact supported early Indian agriculture for hundreds of years." State Report, Section 3, A Historical Study of the Santa Cruz River, p. 9. In Pinal County, the river's flow was only continuous during flood times. *Id.*

The State Report, however, also documents that the river underwent significant change during the territorial period, from 1850 to 1912. State Report, Historical Study, pp. 32 – 49. The livestock industry moved into to southern Arizona in the 1880s, and cattle and sheep grazed until much of the valley was denuded. *Id.* at 35. Agriculture also expanded and along the river was characterized by the diversion of surface flows. *Id.* p. 37. When the groundwater table began to drop, cross-cut ditches were dug across the river to intercept shallow subsurface flows. *Id.* According to the Report, groundwater pumping arrived in Southern Arizona by 1890, and with its advent, the water table began to drop significantly. *Id.*

In the 1860s a dam across the Santa Cruz a mile south of "A" mountain created "Silver Lake." *Id.* at 40. The lake was used for milling flour and recreation. Several

years later, a second dam was built north of Silver Lake to create Walker Lake. Local residents used the lakes for recreation and boating. *Id.* During this period, however, drought and flood cycles periodically washed out the dams. *Id.* at 44. The dams were rebuilt until February 1890 when flooding washed out the dams and created such entrenchment that neither the dams nor the lakes were rebuilt. *Id.*

The entrenchment caused by the combination of factors, cattle, pumping, and diversions, had radically changed the Santa Cruz River. *Id.* Moreover, the groundwater pumping had become so prevalent that it was virtually impossible for the river to return to its natural condition. *Id.* 44-45. By the time of statehood, then, the river had been significantly altered from its “natural and ordinary condition.” According to the State Report, “[a]t the time of statehood, the river was probably still perennial – flowing year round – in some of the reaches that had historic surface flow, but intermittent – flowing only during portions of the year – in more areas than previously.” State Report, Executive Summary, p. 4. Moreover, according to the U.S. Geological Survey, essentially the entire flow of surface waters from the river were diverted both at the Nogales and Tucson gauging stations by irrigation ditches. *Id.* Agricultural water use used most of the available surface water and also intercepted groundwater and subsurface flow. *Id.* Diversions and pumping were also impacting tributaries, especially the Rillito River, further diminishing the Santa Cruz River’s flow. *Id.*

Even though damage from groundwater pumping continued past statehood to modern day, many sections of the Santa Cruz River persisted well after statehood. *Id.* at 7. Even the section of the river near Tucson probably had some perennial flow in 1912,

although the river was deeply entrenched. *Id.* Parts of the river remain perennial to this day. *Id.* For further documentation regarding the degradation of the Santa Cruz River, see EIN 15, Glennon, WATER FOLLIES, How Does a River Go Dry? (2002) and EIN12, Logan, THE LESSENING STREAM (2002).

In evaluating the navigability of the Santa Cruz River, the greatest challenge is the fact that by 1912, the river had been so altered by human activities, it is difficult to assess its condition in its “natural and ordinary” state. There is no question that the river had a substantial natural flow. The reason that the natural flow did not find its way into the river channel is human interference through diversions, cross-cutting, and groundwater pumping. Yet, as the Arizona Court of Appeals made clear, the commission must evaluate the river as though those activities did not occur. When such adjustments are made, it is apparent that several reaches of the Santa Cruz River were sufficiently perennial or intermittent to support a finding that they were susceptible to be used as a highway for commerce and, therefore, were “navigable.”<sup>1</sup> Neither the fact that they were not actually used for boating nor the fact that some reaches only flowed part of the year precludes a finding of navigability. *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,

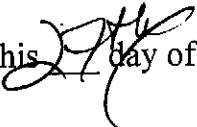
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<sup>1</sup> Indeed, On May 23, 2008 (while this matter was stayed), Colonel Thomas H. Magness, United States Army, acting as the Commander of the Los Angeles District of the Army Corps of Engineers, issued a written determination that two reaches of the Santa Cruz River traditional navigable waters (“TNW”) pursuant to 33 C.F.R. § 328.3. That finding was affirmed by the U. S. Environmental Protection Agency on December 3, 2008.

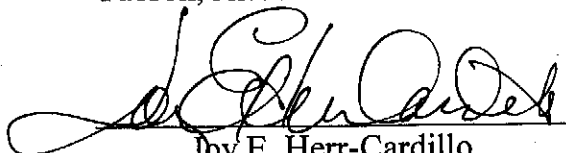
1404-1405 (9<sup>th</sup> Cir. 1989). Indeed, the long history of settlement along the Santa Cruz River clearly demonstrates that it is appropriately considered a common resource to be shared by all of the people.

### **III. Conclusion.**

In the present case, there is ample relevant, persuasive evidence demonstrating that the Santa Cruz meets the Arizona and federal standards of navigability. In summary, the evidence demonstrating navigability includes information regarding the perennial flow of the river prior to territorial days, the significant damage done to the river by diversions, dams, and groundwater pumping, and the persistence of the river even until today. When the objective evidence submitted is evaluated in light of the appropriate standard, it is clear that at the time of statehood the Santa Cruz River in its natural and ordinary condition was susceptible for use as a highway for commerce, over which trade and travel could be conducted in the customary modes of trade and travel on water. We therefore urge the ANSAC to find that the Santa Cruz was navigable at statehood.

Respectfully submitted this  day of January 2012.

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