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BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

In re Determination of Navigability of the Upper Salt River)	Case No. 04-008 NAV
)	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 Upper Salt 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 Upper Salt 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 Upper Salt 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 Upper Salt 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 Upper Salt 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).

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

A. Condition of the Upper Salt at Statehood.

Historical accounts of the upper Salt River indicate that it flowed year-round, although the flow fluctuated seasonally. See "Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the confluence of the White and Black Rivers" prepared by SFC Engineering Company et al, revised June 2003 by J E Fuller/Hydrology & Geomorphology, Inc. ("State Report"), p. 3-24. The river was generally difficult to access because of the canyons above and below the Tonto basin, and major diversions from the stream began in 1885, when the Arizona Diversion Dam was completed. *Id.* 3-40. The introduction of cattle in the 1870s also impacted the river significantly. *Id.* a 3-27-28. The loss of vegetation due to widespread overgrazing caused floristic degradation and stream channel entrenchment. *Id.* Roosevelt Dam was constructed between 1903 and 1911, which also impacted the flow of the river. As discussed above, for purposes of determining navigability at statehood, however, the Commission must evaluate the river

as if the diversions and dams did not exist. According to the State Report, “without considering any disturbance by humans, the mean annual flow rate ranges from about 700 to 1,500 cfs, with relatively minor flow attenuation with the Reach due to shallow groundwater levels, narrow bedrock canyons and perennial flow.” State Report, p. 8-2. Typical flow depths for the average annual flow were three to five feet deep, with low flows of one to three feet. *Id.* Typical flow widths ranged from 50 to 100 feet depending on the channel. *Id.*

B. Historic evidence of boating

There is ample evidence before the Commission of historic boating on the Upper Salt River. The State Report prepared for and submitted by the State Land Department documents at least eight attempts to boat or transport goods down the Salt River between 1873 and 1910. State Report, pp. 3-34 through 3-40. And, as the State Report notes, this was true even in light of the dams and diversions that were in existence on the river at that time. Although some of these trips were unsuccessful, they all achieved some navigation of the river and demonstrate that navigation at the time of statehood was not only feasible, but actually occurred. *Id.*

In addition to written accounts of trips, there is photographic evidence of boating on the Upper Salt. *Id.* at 3-37. Several photographs of people in boats on the river were published in the early 1900s. *Id.* Boats were also used in the construction of dams on the Upper Salt. *Id.* For example, during the construction of Roosevelt Dam, boats were used to transport workers, materials, and equipment, as well as to cross the stream. *Id.* at p. 3-

38. Similarly, “clamshell” derricks were used to assist in the construction of the Horse Mesa Dam. In sum, there is substantial evidence before the Commission that, at the time of statehood, boats were common on the Upper Salt and the river was frequently navigated.

C. Evidence of modern boating

The Commission also received significant evidence of modern boating on the Upper Salt. This is particularly relevant because, as noted in the State Land Department report, there is no evidence of substantive change in the geomorphology and hydrology for Reach 1 of the Upper Salt from the time of statehood until the present. State Report, p. 6-5. As documented in the State Report, the entire Upper Salt River study reach is regularly boated in modern times. *Id.* at 6-6. Several commercial rafting outfits conduct operations on the Upper Salt. *Id.* The evidence establishes that modern boating using canoes, rafts and kayaks occurs year round, although most of the commercial trips occur in the late winter and spring during the annual high flow period. *Id.* According to the State Report, Reach 1 is boated primarily for recreational purposes, primarily during the winter and spring months; Reach 2 is currently boated throughout the year; and Reach 3 is boated for recreational purposes whenever flow is released from the dams. *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 Upper Salt, and in the form of testimony from David Weedman, a biologist from the Arizona Game and Fish Department.

According to Mr. Weedman, for the past 20 to 30 years the Arizona Game and Fish Department has regularly taken trips down the Salt River using a variety of watercraft, during various times of the year, to take fishery surveys. See Transcript of Hearing, pp. 135-142. Mr. Weedman described his own experience navigating the river and observing others navigate the river.

In summary, as the State's State Report concludes, "The Salt River could have and did support some types of boating during the period prior to statehood. By 1912, use of boats on the river had declined *but was still possible during most years*, a condition which persists today." State Report, p. 8-3 (emphasis added). The evidence provided to the ANSAC regarding the Upper Salt River demonstrates that under the liberal test required by federal law, the river was navigable at the time of statehood.

Respectfully Submitted this  day of January 2012.

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A handwritten signature in black ink, appearing to read "John Helm", written in a cursive style.