

ARIZONA CENTER FOR LAW
IN THE PUBLIC INTEREST
2205 E. SPEEDWAY BLVD.
TUCSON, ARIZONA 85719
(520) 529-1798
(520) 529-2927 (FAX)

Joy E. Herr-Cardillo (State Bar #09718)

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

Received
by
mail
2-28-06
Postal
2-27-06
Jy [Signature]

BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

In re Determination of Navigability of)
the Gila River) Case No. 03-007 NAV
) Response Memorandum
)
)
)
)
_____)

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler
(collectively, "Defenders") hereby submit their response memorandum in accordance
with R12-17-108.01 regarding the navigability of the Gila River. For the reasons set
forth herein, Defenders requests that the Arizona Navigable Stream Adjudication
Commission ("ANSAC") find that the Gila River was navigable when Arizona entered
the Union on February 14, 1912.

The arguments offered by Salt River Project ("SRP"), Phelps Dodge Corporation
("PD") The Gila River Indian Community ("GRIC") and the San Carlos Apache Tribe
("SCAT") (collectively "the Navigability Opponents") are largely a reprise of the
rejected arguments that SRP and PD previously asserted in *Defenders of Wildlife v. Hull*,

199 Ariz. 411; 18 P.3d 722 (2002). However, as the Arizona Court of Appeals held in that case, the assertions by the Navigability Opponents are not consistent with federal law regarding navigability.

1. The Navigability Opponents Apply A Narrow Definition of “Highway for Commerce” and Erroneously Assert that the Gila River Has Never Been Used as a Highway for Commerce.

In asserting that the Gila River has “never actually been used as a ‘highway for commerce,’” SRP completely ignores the statutory definition of that term and improperly suggests that the federal test for navigability requires a showing of commercial use. See SRP Opening Memorandum, p. 14¹. The Arizona statute A.R.S. §37-1101(3) 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.” Thus, transportation of people alone qualifies a watercourse as a “highway for commerce.” There is no requirement in the statute that the transport be for a fee or even have a commercial purpose.

Moreover, the assertion by SRP that the use must be for “commerce” or commercial in nature was emphatically rejected by the Court of Appeals in *Defenders*. In *Defenders*, the Court struck down a statutory presumption against navigability if there was no profitable commercial enterprise conducted on the watercourse. SRP and PD intervened in the litigation and argued that federal case law required a showing that the

¹ It should be noted that PD makes a similar assertion in its Opening Brief in the argument heading at page 4; however, the argument itself focuses solely on the second assertion included in the heading that “nor was it [the Gila] ever considered navigable.” SCAT makes a similar argument on pg. 4 of its Opening Brief, relying upon Commerce Clause cases and failing to address the express holding in *Defenders*.

watercourse be susceptible to “commercial use.” Answering Brief of SRP and Phelps Dodge, p. 31. The Court of Appeals, however, rejected that argument and held, “[t]he federal test has been interpreted to neither require both trade and travel together nor that the travel or trade be commercial.” *Defenders*, 199 Ariz. at 421 18 P.3d at 732. Further, the *Defenders* Court pointed out that the case relied upon by SRP in its brief (and cited here in its Opening Brief) *Lykes Bros., Inc. v. Corps of Eng’rs*, 821 F. Supp. 1457 (M.D. Fla.), was inapplicable to a navigability for title analysis because it involved a navigability determination under the Commerce Clause. *Defenders*, 199 Ariz. at 421, 18 P. 2d at 732. Yet, despite this clear direction from the Court of Appeals, SRP continues to assert that commercial use is required to show navigability and to rely upon the *Lykes Bros.* case as support for that assertion.

It is only by adopting this narrow and erroneous definition of “highway for commerce” that SRP can assert that the Gila River has never been used as a “highway for commerce.” As the evidence provided to the Commission unequivocally established, the Gila River has historically been used to transport people, and continues to be used for transportation in modern times. Moreover, even though a showing of commercial use is not required to establish navigability, the river has been used for commercial purposes. See Transcript 211:22-212:14 (fur trapping) and 331:15-339:4 (commercial river trips). Thus, SRP’s assertion that the Gila River has never been used as a “highway for commerce” is without support in the law or the facts.

2. The Navigability Opponents' Assertion that Travel Must Be Upstream and/or Downstream, and that the Operation of Ferries Is Not Evidence of Navigability Is Not Supported By the Law.

The contention by the Navigability Opponents that the operation of ferries across the Gila River are not evidence of navigability is illogical and not supported by the law. As support for their contention, they rely upon a two cases where courts found the operation of ferries the functional equivalent of a bridge and therefore unpersuasive evidence of navigability. See SRP Opening Memorandum, p. 8. PD Opening Brief, 12. Yet, many courts have explicated relied on ferry travel across a watercourse as evidence of navigability, most recently in Louisiana and Oregon. See *Trahan v. Teleflex, Inc.* 2006 La. App. LEXIS 154 (Feb. 1, 2006); *Northwest Steelheaders Ass'n v. Simantel* 199 Ore. App. 471; 112 P.3d 383 (2005); See also *City of Centralia v. F.E.R.C.* 851 F. 2d 278, 282 (9th Cir. 1988); *United States v. Appalachian Electric Power*, 311 U.S. 377 (1940). In *Trahan*, the issue was whether the English Bayou is a navigable waterway for purposes of admiralty jurisdiction. In holding that the bayou was navigable, the court considered among other things, the fact that a ferry operated on the bayou until 1924 when the first bridge was built. 2006 La. App. LEXIS *12.

Similarly, in *Northwest Steelheaders Ass'n*, the question before the Oregon Court of Appeals was the navigability of certain stretches of the John Day River for title purposes. In holding that the river was navigable at the time of statehood, the court cited the fact that the Twickenham Ferry had operated along one of the reaches at issue. 112 P. 3d at 392. Based primarily on this evidence, the Oregon court held that portion of the river navigable.

3. The Arguments and Expert Testimony Offered by the Navigability Opponents Are Legally Irrelevant Because They Fail To Properly Evaluate the Gila River In Its Natural and Ordinary Condition.

Finally, all of the arguments, evidence, and expert testimony offered by the Navigability Opponents are fundamentally flawed by their refusal to account for the negative impacts that human interference had on the flow of the Gila River even by the time of statehood. As discussed at length in Defenders' Opening Brief, federal law is clear that any determination of navigability at the time of statehood must be based upon the watercourse's *natural* condition. Opening Memorandum, p. 5-6. Thus, where a river's flow has been altered by a dam or diversions, the Commission must evaluate the river as though such alterations had not occurred. *See e.g. Defenders of Wildlife v. Hull*, 199 Ariz. 411; 18 P.3d 722 (2002)(holding that statutory provision which precluded consideration of diverted waters was unconstitutional); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 116, (1921)(holding that watercourse must be considered navigable if it would have been passable in its original condition, regardless of whether the construction of dams or diversions may have created impediments to navigation by the time of statehood).

Because Arizona joined the Union relatively late, most of our rivers had been subjected to significant alteration by the time of statehood. In the case of the Gila, by the time of statehood, the river's natural flow had been adversely impacted by irrigation diversions (ASLD Lower Gila at IV-52 -59; ASLD Upper Gila at 5-8), dams (ASLD Lower Gila at IV-61) and groundwater pumping (ASLD upper Gila at 5-14). Because the evidence and analysis relied upon by Navigability Opponents, fails to account for

these impacts, its probative value is minimal. The relevant question before this commission is whether in 1912 the river would have been navigable if it was still in its natural condition. Consequently, any “expert” opinion regarding “navigability” that fails to factor in the impact of the dams and diversions in existence in 1912 is fatally flawed. Similarly, actual use or perceptions of the river at the time of statehood are of limited probative value for the same reason. For example, while the parties may certainly debate what inferences can and should be drawn from surveyors’ decisions to meander or not meander the river, the fact remains that those decisions were undoubtedly influenced by the reduced flow of the river that was the result of the multitude of diversions that took vast amounts of water out of it. The same historical reality undermines the persuasiveness of SRP’s assertion that if the river were “navigable” at statehood then people would have “navigated” it. The fact is that the inquiry of “navigability” for purposes of title is not that simple. The Court (and in this case Commission) must attempt to determine what, in fact, the river was like in its ordinary and *natural* condition. Where, as here, you have a river that was no longer in its *natural* condition, the Commission is obligated, under the *Daniel Ball* test, to attempt to determine, to the best of its ability, what the natural condition would have been if the dams and diversions had not existed at the time of statehood.

Indeed, the only expert testimony offered at the hearing that applied the proper definition of navigability was that 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.* Because Mr. Hjalmarson is the only expert witness who

based his opinion on the appropriate and applicable definition of "navigability," his is the only competent testimony as to that question.

Respectfully submitted this 27th day of February, 2006



Joy E. Herr-Cardillo
Arizona Center for Law
in the Public Interest
2205 E. Speedway Blvd.
Tucson, Arizona 85719

Original and six copies mailed this 27th day of February 2006:

Arizona Navigable Stream Adjudication Commission
George Mehnert, Director
1700 W. Washington, Suite 304
Phoenix, AZ 85007

A copy of the foregoing was mailed on this 27th day of
February 2006:

Curtis A. Jennings, Esq.
Jennings, Haug & Cunningham
2800 N. Central Avenue, Suite 1800
Phoenix, AZ 857004-1049

Laurie Hachtel
Arizona Attorney General's Office
1275 West Washington Street
Phoenix, Arizona 85007-2997

Mark A. McGinnis
Salmon, Lewis & Weldon, P.L.C.
2850 East Camelback Road, Suite 200
Phoenix, Arizona 85016

Cheryl Doyle
Arizona State Land Department
1616 W. Adams
Phoenix, AZ 85007

Cynthia M. Chandley
L. William Staudenmaier
Michael T. Kafka
Ryley Carlock & Applewhite
One North Central Avenue, Suite 1200
Phoenix, AZ 85004-4417

Kirsten Copeland
Meyer, Hendricks & Biven
3303 N. Central Ave. Suite 1200
Phoenix, AZ 85012-2915

Brad Woodford
Jeff Zimmerman
Moyes Storey, Ltd.
1850 N. Central Ave. Ste 1100
Phoenix, AZ 85004

Julie Lemmon
930 S. Mill Ave.
Tempe, AZ 85281

Paul Li
Robert S. Lynch Assoc.
340 E. Palm Ln. Ste 140
Phoenix, AZ 85042

John T. Hestand
Gila River Indian Community
5002 N. Maricopa Rd., Box 5090
Chandler, AZ 85226-5177

Allen Gookin
4203 N. Brown Ave
Scottsdale, AZ 85251

By: 