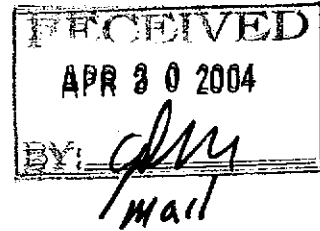


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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In re Determination of Navigability of the San Pedro River)	Case No. 03-004-NAV
)	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 (B).

I. The Evidence Before The Commission Demonstrates That The San Pedro River Was Susceptible To Navigation At The Time Of Statehood.

In its Opening Memorandum, Salt River Project asserts that this Commission must find the San Pedro nonnavigable because the consultant retained by the state found no historic evidence of navigation on the river. SRP Memorandum, p. 9-10. This argument, however, ignores the express holding of the United States Supreme Court in *United States v. Utah*, 283 U.S. at 75-79, 51 S.Ct. 438, 75 L.Ed. 844 (1931). In rejecting a similar argument in that case, the Supreme Court held:

Utah, with its equality of right as a State of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission

of the State 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, the multiplication of activities and the development of natural resources. 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, 51 S.Ct. at 443-4, 75 L.Ed. at 853. Thus, while navigation in fact may be probative of navigability, lack of navigation does not defeat a finding of navigability where the watercourse is otherwise susceptible to navigation.

Moreover, the record in this adjudication is replete with evidence of the river's susceptibility. As noted in Defenders' opening memorandum, boaters have successfully navigated the entire length of the river in recent years. (Opening Memorandum, p. 12). Yet, as the State Report indicates, diversions and groundwater pumping have significantly reduced the river's flow in modern times. (State Report, p. 80) Indeed, the State Report states that the average annual discharge rate from the river at Winkleman would increase by about 43 cfs if existing diversions and other water withdrawals (including groundwater pumping) were removed—in other words if the river were in its “ordinary and natural” condition. *Id.*

This fact is further supported by the gage records. A review of the records of some of the gaging stations along the San Pedro River reveals that during most months of the year, the river's depth and width at these stations would support navigation by at least a canoe and often a row boat. According to the U.S. Fish and Wildlife Service, the required depth for a canoe or kayak is 0.5 feet and the required width is 4 feet. (EIN 1 (1))¹. A drift boat, row boat or raft needs only

¹ Notably, SRP quotes a member of an expedition team in 1846 describing the San Pedro as “an insignificant stream a few yards wide and only a foot deep” as support for a finding of nonnavigability. SRP Memorandum, p. 10. Yet, according to the U.S. Fish and Wildlife

1.0 foot depth and 6 feet width. *Id.* From 1904 to 1906, the San Pedro River gage at Charleston recorded an average depth of 1.3 feet and an average top width of 10 feet. State Report, p. 83. Moreover, the gage records show at least 0.5 feet depth and 4 ft width for ten of the twelve months of the year. Even when the Charleston gage measurements are averaged from 1904 to 1991, the annual average depth is 0.8—sufficient to support a canoe or kayak. *Id.* at 84. Similarly, from 1915 to 1924, the gage at Fairbank recorded an annual average depth of 0.9 and average top width of 20 ft. State. Report, p.85. In fact, during those years the gage showed average depths of 0.5 ft or more *all twelve months of the year.* *Id.* The gage records for Tombstone and Redington, more recent in time, both show annual average depths of 0.5 feet, sufficient to support a canoe or kayak. State Report, p. 86.

Thus, although there may not have been actual navigation of the San Pedro River at the time of statehood, the objective evidence reveals that, even with the many diversions that already existed by 1914, there was sufficient depth and width to support navigation by canoe or kayak, and, in some cases, row boats or rafts.

II. The Entire Watercourse Need Not Be Navigable For This Commission To Find Specific Reaches Navigable.

In its Opening Memorandum, SRP asserts that this Commission must find the San Pedro River nonnavigable because studies indicate that the river was an irregularly flowing stream, marshy in places, free flowing in others. SRP Memorandum, p. 10. Yet, 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

Service, a stream with those dimensions can be navigated by canoes, kayaks, row boats, drift boats and rafts.

“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, 51 S.Ct. 438, 75 L.Ed. 844 (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 (9th 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 (9th 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 determining the navigability of the San Pedro River, this Commission must do the same. It would be contrary to well-established federal law to find an entire watercourse “nonnavigable” simply because portions of the river were not susceptible to navigation, yet others clearly were.

III. The Analyses By SRP and the State Report Fail To Properly Evaluate the San Pedro In Its Natural and Ordinary Condition.

Finally, 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. 4-7. Thus, where a river has been altered by a dam or diversions, the Commission must evaluate the river as though such alterations had not occurred. The same is true for groundwater pumping, which had begun depleting many watercourses by 1912. Indeed, because Arizona joined the Union relatively late, most of our rivers had been subjected to significant alteration by the time of statehood. The fact that the San Pedro was already experiencing reduced flow due to diversions and groundwater pumping by

1912 must be taken into account by the Commission in its evaluation. In determining whether some or all of the San Pedro River was susceptible to navigation at the time of statehood, this Commission must evaluate the river in the condition it would have been in if the diversions and groundwater pumping had not occurred. According to the State Report, near Winkelman, that would represent an increase in the annual discharge rate by about 42 cfs.



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One original and six copies of the foregoing Opening Memorandum was mailed on this 28th day of April, 2004 to:

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One copy of the foregoing Motion was mailed on this 28th day of April 2004 to:

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