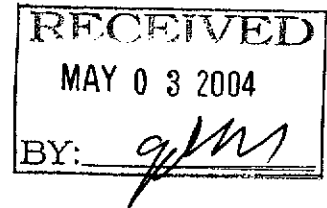


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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

In Re Determination of Navigability)	No. 03-004-NAV
Of the San Pedro River)	
)	PHELPS DODGE CORPORATION'S
)	RESPONSIVE POST-HEARING
)	MEMORANDUM

Phelps Dodge Corporation ("Phelps Dodge") files this post-hearing memorandum in response to the opening post-hearing memorandum filed by Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, "Defenders").

As the only proponents of navigability in this proceeding, Defenders bear the entire burden of proving by a preponderance of the evidence that on February 14, 1912, the San Pedro River

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(6); A.R.S. § 37-1128(A) (requiring that anything less than a preponderance of the evidence results in a determination that a watercourse is nonnavigable).

However, Defenders have not carried this burden of proof. Defenders have not presented any evidence that the river was used or was susceptible of being used as a "highway of

commerce” at any time. Defenders offer speculation instead of evidence, and this Commission cannot base a navigability determination on such guesswork. See In re Harber, 102 Ariz. 285, 294, 428 P.2d 662, 671 (1967) (“Mere suspicion, innuendo, insinuation, and speculation are not substitute for evidence.”); Cyprus Bagdad Copper Corp. v. Arizona Dep’t of Revenue, 196 Ariz. 5, 8, 992 P.2d 5, 8 (App. 1999) (“Mere speculation does not substitute for proof.”).

In contrast, the opening memorandum filed by Salt River Project reviews the evidence and presents a clearer picture of the San Pedro River. Without repeating that overview here, Phelps Dodge urges the Commission to focus on the evidence before it and avoid the conjecture offered by Defenders. Defenders’ evidence “does not meet the necessary minimal requirements found sufficient” in other navigability determinations. United States v. Crow, Pope & Land Enterps., Inc., 340 F. Supp. 25, 27-28 (N.D. Ga. 1972) (noting that “the application of common sense . . . demands a finding” of nonnavigability, despite arguments that the river at issue “could have been made navigable in 1880” by engineering projects that never happened). Defenders simply have not carried their burden of proof, and therefore the Commission must determine that the San Pedro River was not navigable.

Defenders present no evidence that trade or travel actually was conducted on the San Pedro River. As for the susceptibility of the San Pedro River to trade or travel on its water, Defenders’ evidence does not sustain the inferences Defenders ask this Commission to make.

- Defenders offer measurements of the San Pedro River’s depth and width from mid-nineteenth century surveyors, and a description of the streamflow then as “rapid.” Defenders’ Memo. at 10. Defenders cite to no information specifying where along the San Pedro River these measurements were taken. Accordingly, the Commission can only guess at whether these dimensions apply to a few feet of the San Pedro

River, or a few miles, and whether “rapid” means the streamflow was sufficient for any type of boat. Similar references to “perennial” flows are meaningless in this navigability determination without a context to estimate the volume, rate and consistency of those flows. See Defenders’ Memo. at 11.

- Defenders refer to reports that more than thirty years before Arizona’s statehood, there was so much standing water along the course of the San Pedro River that it was essentially a breeding ground for mosquitoes bearing serious diseases. See Defenders’ Memo. at 10. It is absurd for Defenders to argue that an area referred to as “the valley of the shadow of death” was navigable. See id. If anything, such reports prove only that the San Pedro River was not susceptible to trade or travel because movement on the river was interrupted and hazardous to human health. In fact, Defenders quote conclusions that twenty years before Arizona’s statehood, the San Pedro River was “highly variable,” ranging from marshes to entirely subterranean flow. See Defenders’ Memo. at 11 (quoting 1997 State Land Department Report). It is impossible to rationally conclude that such a variable and discontinuous watercourse was susceptible to being used as a “highway for commerce.”
- Defenders claim that the San Pedro River “had frequent depths” of at least one foot. See Defenders’ Memo. at 11. No evidence is cited to document this statement. Accordingly, it is nothing better than speculation.
- Defenders claim that “human disturbances had probably affected” the geomorphology of the San Pedro River. See Defenders’ Memo. at 11. However, the source which Defenders cite for this proposition takes a more nuanced approach to the causes of

channel change along the San Pedro River. In its entirety, the State Land Department sentence Defenders direct the Commission to reads as follows:

Human disturbances probably have also affected the magnitude and rate of channel change on the San Pedro River, but the driving force in these changes are probably not anthropogenic.


2004 State Land Department Report, at 5-16 (citations omitted) (emphasis added).

In other words, the primary cause of changes in the San Pedro River's channel is not necessarily human activity. Defenders fail to recognize that natural forces may have diminished the San Pedro River's suitability for navigation.

In conclusion, Defenders have not presented this Commission with a preponderance of evidence that the San Pedro River was navigable under any conditions at any time, as "navigable" is defined for purposes of title determinations and as Defenders is statutorily required to do. A.R.S. § 37-1128. Accordingly, Phelps Dodge requests that the Commission find the San Pedro River not navigable.

RESPECTFULLY SUBMITTED this 3rd day of May, 2004.

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