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8 **BEFORE THE ARIZONA NAVIGABLE STREAM**  
9 **ADJUDICATION COMMISSION**

10 In re Determination of Navigability of the ) No. 03-004-NAV  
11 San Pedro River )  
12 ) **SALT RIVER PROJECT'S**  
13 ) **RESPONSIVE POST-HEARING**  
14 ) **MEMORANDUM**

15 The Salt River Project Agricultural Improvement and Power District and Salt River  
16 Valley Water Users' Association (collectively, "SRP") submit their responsive post-hearing  
17 memorandum on the navigability of the San Pedro River. SRP filed its opening memorandum  
18 on April 8. See Salt River Project's Opening Post-Hearing Memorandum (April 8, 2004).  
19 SRP received an opening memorandum from Defenders of Wildlife, et al. ("DOW"). See  
20 Opening Post-Hearing Memorandum Submitted by Defenders of Wildlife (April 8, 2004)  
21 ("DOW Memorandum"). Thus, this memorandum responds to the issues raised by DOW.

22 **I. The Evidence of Attempted Boating Does Not Establish Navigability.**

23 Virtually all of the evidence in the record favored a finding that the San Pedro River  
24 was not navigable. DOW itself states in its memorandum that there simply was no record of  
25 boating on the San Pedro River. See DOW Memorandum, at 11. It is undisputed, therefore,  
26 that no historical boating occurred on the river prior to statehood.

1           Because DOW concludes that, in fact, the San Pedro River was not actually used as a  
2 “highway for commerce,” it argues that occasional modern uses of the river by canoers and  
3 kayakers demonstrates that it was susceptible to navigation at statehood. See DOW  
4 Memorandum, at 12. However, DOW neglects to point out that there have been only six  
5 reported accounts of boating on the San Pedro River from 1973-1992. See SRP  
6 Memorandum, at 12. The SLD report stated that any recent boating attempt was based upon a  
7 daily weather evaluation, mostly during the monsoon months, as to whether rainy conditions  
8 would produce enough streamflow in the river on that particular day. Id. DOW’s reliance  
9 upon six sporadic modern boating attempts does not support a finding that the San Pedro  
10 River was “susceptible” to navigability at statehood.

11 **II. DOW Misstates the Legal Standard of Navigability.**

12           DOW substantially understates the rigor of the test for navigability under the federal  
13 cases and the Arizona statutes.

14 **A. The case law upon which DOW relies does not support its position.**

15           In general, DOW cites to prior court decisions that espouse platitudes about the “equal  
16 footing” and “public trust” doctrines but do not address the “navigability” of any specific  
17 river. Like the three published Arizona opinions, the public trust law is full of decisions in  
18 which the courts have discussed the general scope of the legal doctrines without ever getting  
19 to a factual determination of navigability.<sup>1</sup>

20           In its memorandum, DOW cites North Dakota v. Andrus as a case where “[t]he broad  
21 jurisdictional construction of ‘navigability’ is well-illustrated.” DOW Memorandum, at 9.  
22 DOW states that, in 1982, the federal “court found the Little Missouri River navigable at  
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27 <sup>1</sup> See, e.g., Land Dep’t v. O’Toole, 154 Ariz. 43, 739 P.2d 1360 (App. 1987); Arizona Ctr. for Law in the Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (App. 1991), review dismissed (Oct. 6, 1982); Defenders of Wildlife v. Hull, 199 Ariz. 411, 18 P.3d 722 (App. 2001), reconsideration denied (May 8, 2001).

1 statehood.” Id. at 8. That 1982 finding is, however, not the end of the story and, as a matter  
2 of law, is not even any longer part of the story.<sup>2</sup>

3 The Little Missouri River navigability litigation began sometime prior to 1981 as a  
4 dispute between the United States and the State of North Dakota. See North Dakota v.  
5 Andrus, 506 F. Supp. 619 (D.N.D. 1981). The United States, throughout the first phases of  
6 that litigation, consistently contended that the Federal Quiet Title Act applied and that, under  
7 that act, North Dakota had waited too long to bring its “public trust” title claim. See North  
8 Dakota v. Andrus, 671 F.2d 271, 273 (8<sup>th</sup> Cir. 1982). In part for that reason, during the first  
9 hearing before the federal district court, the United States “did not present any evidence on  
10 navigability.” Id. Both the federal district court in 1981 and the court of appeals in 1982  
11 rejected the United States’ legal argument and found that the statute of limitations in the  
12 Federal Quiet Title Act did not apply. Id. at 276.

13 In 1983, the U.S. Supreme Court reversed the lower courts’ decision and agreed with  
14 the United States that North Dakota’s “public trust” title claims were subject to the statute of  
15 limitations under the Federal Quiet Title Act and, therefore, North Dakota had waited too long  
16 to bring those claims. See North Dakota v. Andrus, 461 U.S. 273 (1983). Following that  
17 decision, North Dakota led a successful initiative to amend the Quiet Title Act and relieve  
18 itself from the effects of the statute of limitations. See North Dakota v. U.S., 972 F.2d 235,  
19 237 n.2 (8<sup>th</sup> Cir. 1992).

20 After the federal statute was amended, North Dakota filed a second lawsuit in the same  
21 court to assert its same claims to streambed lands against the United States. This time,  
22 however, the United States hired experts, submitted evidence, and vigorously presented its  
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24 <sup>2</sup> DOW also cites Oregon v. Riverfront Protection Ass’n, 672 F.2d 792 (9<sup>th</sup> Cir. 1982), for the proposition that  
25 a watercourse can be determined navigable even though it “was used for log drives for as little as three months  
26 per year even though suffering frequent log jams, flooding and low flows.” DOW Memorandum, at 9. The  
27 record is clear, however, that the Mackenzie River at issue in that case supported the transportation of  
“[t]housands of logs and millions of board feet of timber,” 672 F.2d at 795, and had an annual mean flow rate  
of approximately 4,000 cfs. Those characteristics bear no relation to those of the San Pedro River, during any  
time period.

1 factual case regarding “navigability.” North Dakota v. United States, 770 F. Supp. 506  
2 (D.N.D. 1991). When presented with a more complete evidentiary record, the same federal  
3 district court that had in 1981 found the river navigable at statehood held in 1991 that “North  
4 Dakota ha[d] failed to prove by a preponderance of the evidence that the Little Missouri River  
5 was a navigable river when North Dakota was admitted to the union and became a state in  
6 1899.” Id. at 513. The Eighth Circuit Court of Appeals affirmed in 1992. North Dakota v.  
7 U.S., 972 F.2d at 240.

8 DOW, however, relies solely upon the 1981 and 1982 decisions, not even mentioning  
9 the later decisions. DOW’s reliance is severely misplaced. First, as a practical matter, the  
10 1981 and 1982 decisions are less persuasive authority because they were both issued  
11 following a hearing at which only one side presented evidence. The United States, choosing  
12 to rely upon its statute of limitations argument under the Federal Quiet Title Act, submitted no  
13 evidence on the actual issue of navigability. North Dakota v. Andrus, 671 F.2d at 273.  
14 Second, and more important, because the 1981 decision was made by a court acting outside its  
15 authority under the Federal Quiet Title Act (as subsequently found by the U.S. Supreme Court  
16 in 1983), neither the 1981 nor the 1982 decision has any force or effect as a matter of law. In  
17 fact, in the second round of litigation starting after the federal act was amended, North Dakota  
18 argued that the 1981 decision was entitled to great weight as “law of the case,” but the court  
19 of appeals firmly rejected that argument: “In view of our holding that the trial court was  
20 without jurisdiction to inquire into the merits of North Dakota’s complaint, however, we need  
21 not belabor this point. **Entered in the absence of jurisdiction, the entire judgment must be**  
22 **reversed.”** North Dakota v. Block, 789 F.2d 1308, 1314 (8<sup>th</sup> Cir. 1986) (emphasis added).<sup>3</sup>

23 Although SRP agrees with DOW that much can be learned from the Little Missouri  
24 River litigation regarding application of the federal “navigability” test to particular  
25 watercourses, that information must come from the proper and final disposition of that case—  
26 not from an interim decision that was issued by a court lacking jurisdiction and with only one

27 <sup>3</sup> See also North Dakota v. U.S., 770 F. Supp. at 508 n.6; North Dakota v. U.S., 972 F.2d at 237 n.3.

1 side presenting evidence. When presented with complete evidence and legal argument  
2 regarding the Little Missouri River, the federal district court found that it was not navigable at  
3 statehood, and the Eighth Circuit Court of Appeals affirmed. North Dakota presented  
4 evidence of a “tie drive,” which the courts found did not prove navigability. See 770 F. Supp.  
5 at 509-10. North Dakota put forth evidence of cable ferries used to cross the river, and the  
6 courts found that such evidence “does not establish that the river is a channel for useful  
7 commerce.” Id. at 511. North Dakota presented evidence of prehistoric boating on the river;  
8 no such evidence exists for the San Pedro River. Id. at 511-12. The North Dakota court also  
9 was not persuaded by the state’s “statistical analysis” of the river’s “boatability,” finding that  
10 such analysis “is not a reliable indicator of the river’s navigability at the time of statehood.”  
11 Id. at 512. The Little Missouri River cases strongly refute DOW’s position that the San Pedro  
12 River is “navigable.”

13 **B. Seasonal and irregular streamflow does not demonstrate navigability.**

14 Despite DOW’s contention to the contrary, streamflow that is only seasonal and  
15 irregular precludes a finding of navigability. The Supreme Court came to that conclusion  
16 decades ago in Oklahoma v. Texas, 258 U.S. 574 (1922). In that case, the Court decided the  
17 navigability of Red River, upon which boats were able to move on the river only during times  
18 where flow on the river was “intermittent, of irregular and short duration, and confined to a  
19 few months in the year.” Id. at 589. In concluding that Red River was not navigable the  
20 Court stated: “Its characteristics are such that its use for transportation has been and must be  
21 exceptional, and confined to the irregular and short period of temporary high water. A greater  
22 capacity for practical and beneficial use in commerce is essential to establish navigability.”  
23 Id. at 591. Simply put, occasional use of rivers that flow only during exceptional times does  
24 not support a finding of navigability. See also Brewer-Elliott Oil & Gas Co. v. United States,  
25 260 U.S. 77 (1922); United States v. Crow, Pope & Land Ents., Inc., 340 F. Supp. 25, 32  
26 (N.D. Ga. 1972).

1 DOW's assertion fails in light of federal case law. The San Pedro River was a highly  
2 variable stream along its reaches around the time of statehood. It did not support boating or  
3 commerce, nor was it "susceptible" to navigation.

4 **III. Summary and Requested Action**

5 DOW has not satisfied its burden of showing that the San Pedro River was "navigable"  
6 at statehood or ever has been "navigable" as defined in A.R.S. § 37-1101. SRP requests that  
7 the Commission find the San Pedro River "non-navigable."

8 DATED this 28<sup>th</sup> day of April, 2004.

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