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Donald Steuter, Jerry Van Gasse, and Jim  
Vaaler

BEFORE THE ARIZONA NAVIGABLE STREAM  
ADJUDICATION COMMISSION

In re Determination of Navigability of )  
the Santa Cruz River ) Case No. 03-002-NAV  
) Response Memorandum  
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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 Analyses By SRP and the State Report Fail To Properly Evaluate the Santa Cruz In Its Natural and Ordinary Condition.**

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's flow 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

Santa Cruz was already experiencing significantly reduced flow due to diversions and groundwater pumping by 1912 must be taken into account by the Commission in its evaluation. *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). With respect to the Santa Cruz, the State Report found:

The U.S. Geological Survey Streamgauge Summaries report that essentially the entire flow of surface waters from the river were diverted both at the Nogales and Tucson gaging stations by irrigations ditches. (USGS 1907, 1912) Agricultural water use in the Tubac, Tucson, and San Xavier areas used most of the available surface water and also intercepted groundwater and subsurface flow.

State Report, Section 6, p. 4. Similarly, the State Report states:

By 1910, it was reported that the entire base flow of the Santa Cruz River at both the Mexican border and near the Congress Street bridge in Tucson was diverted for agriculture.

*Id.* at 7. Because the State Report was prepared in 1996 under the statute found unconstitutional by the Arizona Court of Appeals in *Defenders*, it did not attempt to determine what the watercourse would be like without these diversions. Similarly, the arguments advanced by SRP in its Opening Memorandum fail to account for these diversions. SRP Memorandum, p. 12. Yet, in determining whether some or all of the Santa Cruz River was susceptible to navigation at the time of statehood, this Commission must, *as a matter of law*, evaluate the river in the condition it would have been in if the diversions and groundwater pumping had not occurred. When the effect of those diversions are abated, the evidence clearly supports a finding of navigability. .

## **II. The Evidence Before The Commission Demonstrates That The Santa Cruz River Was Susceptible To Navigation At The Time Of Statehood.**

In its Opening Memorandum, Salt River Project asserts that this Commission must find the Santa Cruz nonnavigable because the historic evidence of navigation on the river is sporadic

and limited. SRP Memorandum, p. 12-13 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 demonstrates that the absence of navigation is largely due to the fact that the river's flow was almost completely diverted or depleted by groundwater pumping. Yet, even so, there were periods during which navigation was attempted with limited success. As the Ninth Circuit has observed, "use of the river need not be without difficulty, extensive, or long and continuous." *Oregon v. Riverfront Protective Ass'n*, 672 F.2d 792, 794 (9<sup>th</sup> Cir. 1982).

### **III. 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 Santa Cruz River nonnavigable because portions of the river went subsurface and the river was depicted on several old maps as discontinuous. SRP Memorandum, p. 12. 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 “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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 Santa Cruz 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.



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

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

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