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**BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION**

**In Re Determination of Navigability )                   No. 03-002-NAV**  
**Of the Santa Cruz 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 Santa Cruz 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. The only factual guidance which Defenders offer this Commission in their opening memorandum focuses

primarily on the agricultural activities of non-Indian settlers along the Santa Cruz River prior to Arizona's statehood. Defenders' Memo. at 10-11. Defenders ask the Commission to disregard those activities and imagine how the Santa Cruz River might have appeared in their absence. Defenders' Memo. at 11.

Even if Defenders were correct in asserting that the actual condition of the Santa Cruz River must be ignored, Defenders have not presented any evidence that the river likely was used or 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 Santa Cruz 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 Santa Cruz River was not navigable.

Defenders offer no explanation for the complete lack of evidence that the Santa Cruz River actually was used as a “highway for commerce.” For more than 11,000 years, the Santa Cruz River has sustained settlement by both Indians and non-Indians. See SFC Engineering Co., “Arizona Stream Navigability Study for the Santa Cruz River” (Final Report 1996) (hereinafter “State Land Department Report”), Sec. 2, at 29 (“Archeological studies have demonstrated long-term (11,500 years) occupation of the Santa Cruz River generally . . .”). This pattern of settlement contrasts with other areas in the West in which “conditions of exploration and settlement explain the infrequency or limited nature” of trade or travel on a river. United States v. Utah, 283 U.S. 64, 82 (1931). Despite centuries of opportunity to conduct “trade or travel” on the Santa Cruz River, nobody in these communities appears ever to have done so.

Similarly, Defenders offer no support for their argument that the Santa Cruz River was susceptible to use as a “highway for commerce.” There is no evidence that the Santa Cruz River had both a streamflow and channel that could sustain trade or travel on the water. Defenders repeatedly refer to “perennial” flows at certain times and certain places along the Santa Cruz River. Defenders’ Memo. at 10-11. However, Defenders offer no evidence that any such flows had a volume and rate sufficient for boating. Defenders do not even attempt to estimate the width and depth of the Santa Cruz River, apparently leaving the Commission to guess the dimensions of this “perennial” flow. Furthermore, the geomorphology of the Santa Cruz River also precluded trade or travel on the water. See State Land Department Report, supra, Sec. 4, Executive Summary (describing the “often entrenched channel” in the river’s upper reaches, and its “ill-defined system of braided channels” downstream). Trade or travel on the Santa Cruz River itself would have been difficult in light of the springs and marshes along its

channel. See id. Even Defenders acknowledge that flooding on the Santa Cruz River prior to statehood caused entrenchment. Defenders' Memo. at 11 (discussing the demise of Silver Lake and Warner Lake). Thus even by Defenders' own account, natural forces diminished the Santa Cruz River's suitability for navigation.

Defenders have not presented this Commission with a preponderance of evidence that the Santa Cruz 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 Santa Cruz River not navigable.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of May, 2004.

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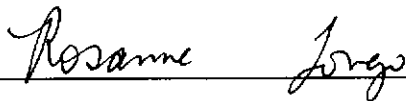
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