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**BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION**

In re Determination of Navigability of the)
Santa Cruz River) No. 03-002-NAV
)
) **SALT RIVER PROJECT'S**
) **RESPONSIVE POST-HEARING**
) **MEMORANDUM**

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

I. DOW Misstates the Legal Standard of Navigability.

DOW substantially understates the rigor of the test for navigability under the federal cases and the Arizona statutes. DOW also misstates the law on the interpretation of the phrase "natural and ordinary condition" of the river.

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

2 In general, DOW cites to prior court decisions that espouse platitudes about the “equal
3 footing” and “public trust” doctrines but do not address the “navigability” of any specific
4 river. Like the three published Arizona opinions, the public trust law is full of decisions in
5 which the courts have discussed the general scope of the legal doctrines without ever getting
6 to a factual determination of navigability.¹

7 In its memorandum, DOW cites North Dakota v. Andrus as a case where “[t]he broad
8 jurisdictional construction of ‘navigability’ is well-illustrated.” DOW Memorandum, at 9.
9 DOW states that, in 1982, the federal “court found the Little Missouri River navigable at
10 statehood.” Id. at 8. That 1982 finding is, however, not the end of the story and, as a matter
11 of law, is not even any longer part of the story.²

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

22
23 ¹ 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);
24 Defenders of Wildlife v. Hull, 199 Ariz. 411, 18 P.3d 722 (App. 2001), reconsideration denied (May 8, 2001).

25 ² DOW also cites Oregon v. Riverfront Protection Ass’n, 672 F.2d 792 (9th Cir. 1982), for the proposition that
26 a watercourse can be determined navigable even though it “was used for log drives for as little as three months
27 per year even though suffering frequent log jams, flooding and low flows.” DOW Memorandum, at 9. The
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 Santa Cruz River, during any
time period.

1 In 1983, the U.S. Supreme Court reversed the lower courts' decision and agreed with
2 the United States that North Dakota's "public trust" title claims were subject to the statute of
3 limitations under the Federal Quiet Title Act and, therefore, North Dakota had waited too long
4 to bring those claims. See North Dakota v. Andrus, 461 U.S. 273 (1983). Following that
5 decision, North Dakota led a successful initiative to amend the Quiet Title Act and relieve
6 itself from the effects of the statute of limitations. See North Dakota v. U.S., 972 F.2d 235,
7 237 n.2 (8th Cir. 1992).

8 After the federal statute was amended, North Dakota filed a second lawsuit in the same
9 court to assert its same claims to streambed lands against the United States. This time,
10 however, the United States hired experts, submitted evidence, and vigorously presented its
11 factual case regarding "navigability." North Dakota v. United States, 770 F. Supp. 506
12 (D.N.D. 1991). When presented with a more complete evidentiary record, the same federal
13 district court that had in 1981 found the river navigable at statehood held in 1991 that "North
14 Dakota ha[d] failed to prove by a preponderance of the evidence that the Little Missouri River
15 was a navigable river when North Dakota was admitted to the union and became a state in
16 1899." Id. at 513. The Eighth Circuit Court of Appeals affirmed in 1992. North Dakota v.
17 U.S., 972 F.2d at 240.

18 DOW, however, relies solely upon the 1981 and 1982 decisions, not even mentioning
19 the later decisions. DOW's reliance is severely misplaced. First, as a practical matter, the
20 1981 and 1982 decisions are less persuasive authority because they were both issued
21 following a hearing at which only one side presented evidence. The United States, choosing
22 to rely upon its statute of limitations argument under the Federal Quiet Title Act, submitted no
23 evidence on the actual issue of navigability. North Dakota v. Andrus, 671 F.2d at 273.
24 Second, and more important, because the 1981 decision was made by a court acting outside its
25 authority under the Federal Quiet Title Act (as subsequently found by the U.S. Supreme Court
26 in 1983), neither the 1981 nor the 1982 decision has any force or effect as a matter of law. In
27 fact, in the second round of litigation starting after the federal act was amended, North Dakota

1 argued that the 1981 decision was entitled to great weight as “law of the case,” but the court
2 of appeals firmly rejected that argument: “In view of our holding that the trial court was
3 without jurisdiction to inquire into the merits of North Dakota’s complaint, however, we need
4 not belabor this point. **Entered in the absence of jurisdiction, the entire judgment must be
5 reversed.**” North Dakota v. Block, 789 F.2d 1308, 1314 (8th Cir. 1986) (emphasis added).³

6 Although SRP agrees with DOW that much can be learned from the Little Missouri
7 River litigation regarding application of the federal “navigability” test to particular
8 watercourses, that information must come from the proper and final disposition of that case—
9 not from an interim decision that was issued by a court lacking jurisdiction and with only one
10 side presenting evidence. When presented with complete evidence and legal argument
11 regarding the Little Missouri River, the federal district court found that it was not navigable at
12 statehood, and the Eighth Circuit Court of Appeals affirmed. North Dakota presented
13 evidence of a “tie drive,” which the courts found did not prove navigability. See 770 F. Supp.
14 at 509-10. North Dakota put forth evidence of cable ferries used to cross the river, and the
15 courts found that such evidence “does not establish that the river is a channel for useful
16 commerce.” Id. at 511. North Dakota presented evidence of prehistoric boating on the river;
17 no such evidence exists for the Santa Cruz River. Id. at 511-12. The North Dakota court also
18 was not persuaded by the state’s “statistical analysis” of the river’s “boatability,” finding that
19 such analysis “is not a reliable indicator of the river’s navigability at the time of statehood.”
20 Id. at 512. The Little Missouri River cases strongly refute DOW’s position that the Santa
21 Cruz River is “navigable.”

22
23 **B. The definition of “natural and ordinary condition” refers to the condition
of the Santa Cruz River at statehood.**

24 In its opening memorandum, DOW argues that the “natural and ordinary condition” of
25 the Santa Cruz River at statehood is difficult to ascertain because of natural changes and
26 human activities that affected the river. DOW Memorandum, at 12. DOW asserts that the

27 ³ 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 Commission must disregard all changes to the river and make “adjustments” to consider the
2 river in some imaginary state, other than as documented by the historical and scientific
3 evidence in the record. *Id.* For example, DOW contends that the Commission must evaluate
4 the Santa Cruz River as if diversion, cross-cutting, and groundwater pumping did not occur.
5 *Id.* However, based on case law and statutes DOW must, in fact, consider the Santa Cruz
6 River as it existed at statehood.

7 DOW’s assessment of the “ordinary and natural condition” of the river ignores the
8 plain language of the Arizona statutes and federal law. The statutes, for example, provide that
9 a watercourse is “navigable” if it “was in existence on February 14, 1912 and at that time was
10 used or susceptible to being used, it is ordinary and natural condition, as a highway for
11 commerce” A.R.S. § 37-1101(5) (emphasis added). The focus of this statutory inquiry is
12 on the river as of February 14, 1912—not upon the river as it might have existed at the dawn
13 of civilization or some speculation about what the river might have looked like in 1912 if
14 nobody lived here to see it. The statutes require that the Commission focus its attention on the
15 river as of the date of statehood.

16 This statutory requirement is consistent with the test applied by the federal courts. In a
17 case involving the Gulkana River in Alaska, for example, the federal district court stated that
18 “the requirement that title navigability be determined at the time of statehood means only that
19 when making a title navigability determination, the *Daniel Ball* test is to be applied to the
20 physical dimensions and physical configuration existing at the time of statehood.” *Alaska v.*
21 *United States*, 662 F. Supp. 455, 463 (D. Alaska 1987), *aff’d*, 891 F.2d 1401 (9th Cir. 1989),
22 *cert. denied*, 495 U.S. 919 (1990) (emphasis added). The Ninth Circuit Court of Appeals, in a
23 subsequent Alaska case regarding the Kukpowrak River, put it even more succinctly: “The
24 key moment for the determination of title is the instant when statehood is created.” *Alaska v.*
25 *United States*, 213 F.3d 1092, 1097 (9th Cir. 2000) (quoting *Utah v. United States*, 482 U.S.
26 193, 196 (1987)).
27

1 The Santa Cruz River never has been continuous on its reaches or throughout the year.
2 See generally SRP Memorandum. The river was not used or susceptible to being used as a
3 “highway for commerce” before, during, or after any natural changes or human interference.

4 **II. Summary and Requested Action**

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

8 DATED this 28th day of April, 2004.

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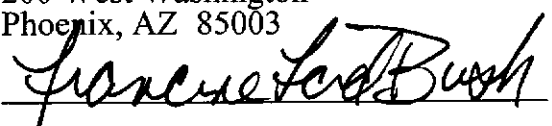
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