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BEFORE THE ARIZONA NAVIGABLE STREAM  
ADJUDICATION COMMISSION

In re Determination of Navigability of )  
the Upper Salt River ) Case No. 04-008 NAV  
) Opening Post-Hearing Memorandum  
)  
)  
)  
)

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, “Defenders”) hereby submit their post-hearing opening memorandum in accordance with R12-17-108.01 regarding the navigability of the Upper Salt River. For the reasons set forth herein, Defenders requests that the Arizona Navigable Stream Adjudication Commission (“ANSAC”) find that the Upper Salt River was navigable when Arizona entered the Union on February 14, 1912.

**I. The History of Arizona’s Navigability Laws and the Public Trust Doctrine.**

In order to render a decision regarding the navigability of any of Arizona’s watercourses, it is necessary to understand the historical context of streambed legislation and regulation in Arizona. The issue of bedland ownership and administration (as it relates to land other than the land beneath the Colorado River) first came to the forefront in Arizona during the mid-1980s. At that time, the State of Arizona Attorney General’s Office, invoking the public trust doctrine,

asserted title to lands underlying the Verde River in an attempt to protect the land from use by a sand and gravel company. *Arizona State Land Dept. v. O'Toole*, 154 Ariz. 43, 739 P.2d 1360 (Ariz. App. 1987). The Arizona Legislature disagreed with the Attorney General's action and responded to the state's assertion of title by enacting House Bill ("HB") 2017 which relinquished the state's interest in all lands underlying Arizona's rivers and streams, except the Colorado River. *See Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 837 P. 2d 158 (App. 1991) ("*Hassell*"). Defenders of Wildlife, and others, brought an action challenging HB 2017 on various grounds, including a claim that the relinquishment of the public trust assets violated Article IX §7 of the Arizona Constitution (gift clause). *Id.*

In 1991, the Arizona Court of Appeals ruled in favor of the plaintiffs and against the State of Arizona. *Hassell*, 172 Ariz. 356, 837 P.2d 158. The *Hassell* Court first addressed the issue of the public trust doctrine and found that under that doctrine, all of the state's navigable waterways are held in trust by the state for the benefit of the people and that the state's control of those waters is forever subject to that trust. 172 Ariz. at 366, 837 P. 2d at 168. The Court in *Hassell* based its decision, in part, on a United States Supreme Court case, *Illinois Cent. R.R. .v. Illinois*, stating, "[f]rom *Illinois Central*, we derive the proposition that the state's responsibility to administer its watercourse lands for the public benefit is an inabrogable attribute of statehood itself. . . [W]e also derive the core proposition . . . that the state must administer its interest in lands subject to the public trust consistently with trust purposes." *Hassell*, 172 Ariz. at 366, 827 P. 2d at 168, *citing Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 13 S.Ct. 110, 36 L. Ed. 1018 (1892). In developing Arizona's public trust jurisprudence, the *Hassell* court also relied upon the Arizona Constitution's separation of powers provision and gift clause. *Hassell*, 172 Ariz. at 366-369; 827 P. 2d at 168-171, *citing* Ariz. Const. Art. III and IX § 7.

In discussing the state's responsibilities under the public trust doctrine, the Court in *Hassell* found that public trust resources are not like other state resources and "any public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations." *Hassell*, 172 Ariz. at 368, 837 P. 2d at 170. In determining whether a dispensation meets the state's obligation to maintain the trust, the court must consider "the degree of the effect of the project on public trust uses, navigation, fishing, recreation, and commerce." *Id.*

With respect to HB 2017, the *Hassell* court found that it failed to provide, [A] mechanism for the particularized assessment of (1) the validity of the equal footing claims that it [the state] relinquishes; (2) the continuing value of land subject to such claims for purposes consistent with the public trust; (3) equitable and reasonable consideration for claims that may be relinquished without impairing the public trust; and (4) conditions that may be necessary to any transfer to assure that public trust interests remain protected.

*Hassell*, 172 Ariz. at 371, 837 P.2d at 173. These factors are now known as the "particularized assessment requirements" and it is the duty of the State, as trustee, to undertake this particularized assessment analysis prior to any dispensation of trust resources.

In response to the *Hassell* decision, the Legislature established the ANSAC. Ariz. Rev. Stat. Ann. §§ 37-1121-1131 (1993), *See also, Defenders of Wildlife v. Hull*, 199 Ariz. 411, 416, 18 P.3d 722, 727 (2001) ("*Defenders*"). The ANSAC was charged with the duty to collect information, in conjunction with the State Land Department, regarding the navigability of Arizona's rivers and streams. In 1994, when it appeared that ANSAC might conclude that some of Arizona's rivers were navigable at the time of statehood (and thus subject to the public trust), the Legislature made significant changes to the authority of ANSAC, essentially ensuring that ANSAC would find major rivers nonnavigable. 1994 Ariz. Sess. Laws, Ch. 277, §§ 1-14, eff. April 25, 1994. The Legislature later enacted SB 1126 which declared many of Arizona's

watercourses, including the Lower Salt, Upper Salt and Verde, nonnavigable. 1998 Ariz. Sess. Laws, Ch. 43, § 2.

Once again, Defenders of Wildlife, and others, successfully challenged the constitutionality of this enactment. In *Defenders*, the Court found SB 1126 invalid under the U.S. and Arizona Constitutions. The Court further found that the Legislature had failed to comply with the “particularized assessment” requirements described in *Hassell*. Consequently, the Court of Appeals held that the attempted relinquishment was unconstitutional. In 2001, the Arizona Legislature enacted Senate Bill (“SB”) 1275, amending A.R.S. §§ 37-1101-1156. The ANSAC’s role as an adjudicatory body was reinstated and, after great delay, the ANSAC began holding hearings. The ANSAC held hearings on the navigability of the Upper Salt River in two counties as follows: March 29, 2005 Yavapai County; September 21, 2005 Maricopa County.

## **II. The Definition of Navigability Under Arizona and Federal Law.**

The definition of navigability for purposes of the public trust doctrine is well-established under both Arizona and Federal law and requires that the watercourse be evaluated in its natural and ordinary condition. According to Arizona law, a watercourse is navigable if

it was in existence on February 14, 1912 and at that time 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 (5). As noted by the Arizona Court of Appeals in *Defenders*, Arizona law essentially adopted the federal standard of navigability which was first defined by the U.S. Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1870). The question of navigability is a federal question, and must be determined based upon either state laws that mirror the federal definition or federal law itself. *Utah v. United States*, 403 U.S. 9, 10, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971), *Alaska v. United States*, 754 F.2d 851, 853 (9<sup>th</sup> Cir.

1985), *Defenders*, 199 Ariz. at 419, 18 P.3d at 730. The precedent established in *The Daniel Ball* defined a navigable watercourse as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

*Id.* . Subsequent Supreme Court cases further refined the definition to clarify that the river must be evaluated in its *natural* state. *The Montello*, 87 U.S. (20 Wall) 430, 440-443 (1874). In *The Montello*, the issue was whether the Fox River, in the State of Wisconsin, was a navigable water of the United States. Originally there were rapids and falls in the river, but these had been obviated by locks, canals, and dams with the result being that the river was more readily navigable in its current state than in its natural state. It was argued that with the improvements the river had become a highway for commerce, but because it was not navigable in its natural state it was not navigable under *The Daniel Ball* which required that the river be evaluated in its “ordinary” condition. The court agreed that proper test was whether the river was navigable in its natural state, but then proceeded to find that, even before the improvements, a large and successful interstate commerce had been carried through the river. In holding the river navigable, the Court stated:

[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market. It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in this natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.

*The Montello*, 20 Wall at 441. This same definition of navigability was applied by the Supreme Court in 1921 to hold that just because a river was currently non-navigable due to artificial obstructions, it could nonetheless be found navigable under the federal test if had been navigable in its natural state. *Economy Light & Power Co. v. United States*, 256 U.S. 113, 122, 123 (1921). In finding the Desplaines River a navigable watercourse, the Supreme Court observed,

The Desplaines River, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade or methods of navigation, or changes in its own condition, partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation; improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream

256 U.S. at 124.

Significantly, the Arizona Court of Appeals relied upon *Economy Light & Power v. United States* when it considered the legislature's attempt to create a presumption that if a dam or other obstruction existed on a watercourse, the watercourse was deemed nonnavigable. *Defenders*, 199 Ariz. at 424, 18 P.3d at 735. In holding the presumption unconstitutional, the Arizona Court of Appeals quoted the Supreme Court, "[t]he fact, however, that artificial obstructions exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state." *Id.*, quoting, *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 118 (1921). Thus, as both federal and state case law makes clear, when determining navigability, the ANSAC must evaluate a watercourse as though any existing dams or diversions did not exist. *See also, United States v. Utah*, 283 U.S. at 75-79.

Moreover, as these cases demonstrate, the federal test for navigability for title (under the Equal Footing Doctrine) is a liberal one. First and foremost, the definition of navigability does not require that the watercourse actually have been used as a highway for commerce, but rather, be susceptible to such a use. “The question of ... susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial test ... The extent of existing commerce is not the test.” *United States v. Utah*, 283 U.S. at 82, *see also, Alaska v. Ahtna*, 891 F.2d 1401, 1404-1405 (9<sup>th</sup> Cir. 1989). In addition, a river may be deemed navigable despite occasional impediments such as sand or gravel bars, and despite the fact that it is only navigable a few months out of the year. *See e.g., State of Oregon v. Riverfront Protective Ass’n*, 672 F.2d 792, 795 (9<sup>th</sup> Cir. 1982). Actual use for boating, whether commercial or recreational, can demonstrate susceptibility as a “highway for commerce.” *See, e.g., Utah v. United States*, 403 U.S. at 11. Although state ownership turns on navigability at the time of statehood, evidence of current boating, recreational or otherwise, by small watercrafts such as canoes, is probative of navigability and susceptibility to navigability at statehood. *See, e.g., North Dakota v. Andrus*, 671 F.2d 271, 277-278 (8<sup>th</sup> Cir. 1982), *rev’d on other grounds* (statute of limitations), *Block v. North Dakota*, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983), *see also, State of Alaska v. United States*, 662 F. Supp. 455, 465 (D. Alaska 1986), *aff’d by Alaska v. Ahtna*, 891 F.2d 1401 (9<sup>th</sup> Cir. 1989) (a river may be deemed navigable if it is susceptible to transporting goods or people by any conveyance, not merely those in use at the time of statehood).

Furthermore, the remoteness of a river or lack of actual use at statehood as a “highway for commerce” does not defeat a finding of navigability because the definition includes not only watercourses that were certainly used as a highway for commerce, but also those watercourses that are susceptible to such use, even if they were never used for that purpose. *See, e.g., United*

*States v. Utah*, 283 U.S. at 83. In *Utah v. United States*, the U.S. Supreme Court found a lake navigable when used for hauling of livestock across the water even though it was done by owners and not for any commercial purpose or to make money. *Id.* at 9. Certainly, as noted by *Defenders* there is no requirement that the trade or travel must have resulted in a “profitable commercial enterprise.” 199 Ariz. at 422, 18 P.3d at 733.

In addition, navigation can take many forms. For example, floating logs down a river is a recognized form of navigation for purposes of the Equal Footing Doctrine. *Oregon*, 672 F.2d at 795. The “‘ordinary modes of trade and travel’ element of the Daniel Ball test are not fixed and need not be construed with reference only to the ‘ordinary modes of trade and travel’ in existence at the time of statehood.” *Defenders*, 199 Ariz. at 423, 18 P.3d at 734, *see also*, *State of Alaska v. United States*, 662 F. Supp. 455, 463 (D. Alaska 1987) (cited with approval in *Defenders* for this proposition). Rather, “evidence of the river’s capacity for recreational use is in line with the traditional test of navigability, that is, whether a river has practical utility for trade or travel.” *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1194 (N.Y. 1998) (cited with approval in *Defenders*, 199 Ariz. at 423, 18 P.3d at 734). Similarly, the Ninth Circuit Court of Appeals has held that guided fishing and sightseeing trips, although recreational in nature, could be considered commercial activity under the *Daniel Ball* test. *See, State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1405 (9<sup>th</sup> Cir. 1989).

Further, it is not necessary that the entire river be susceptible to use as a highway for commerce for part of the river to be found navigable. 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(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 Upper Salt River, this Commission must do the same.

In summary, the key elements of the definition of navigability in navigability-for-title cases are (1) the watercourse must be evaluated in its natural and ordinary condition free of dams and diversions; (2) the evidence need only show that the watercourse was susceptible for use as a highway for commerce; and (3) the standard applied must be consistent with federal and Arizona law. If the appropriate definition is applied in the present case, it leads to the conclusion that the Upper Salt, at statehood, was susceptible for use, in its ordinary and natural condition, as a highway for commerce, over which trade and travel could have been conducted.

### **III. The Evidence in the Record Demonstrates the Upper Salt River was Navigable at Statehood.**

#### **A. Condition of the Upper Salt at Statehood.**

Historical accounts of the upper Salt River indicate that it flowed year-round, although the flow fluctuated seasonally. See “Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the confluence of the White and Black Rivers” prepared by SFC Engineering Company et al, revised June 2003 by J E Fuller/Hydrology & Geomorphology, Inc. (“Report”), p. 3-24. The river was generally difficult to access because of the canyons above and below the Tonto basin, and major diversions from the stream began in 1885, when the Arizona Diversion Dam was completed. *Id.* 3-40. . The introduction of cattle in the 1870s also impacted the river significantly. *Id.* a 3-27-28. The loss of vegetation due to widespread overgrazing

caused floristic degradation and stream channel entrenchment. *Id.* Roosevelt Dam was constructed between 1903 and 1911, which also impacted the flow of the river. For purposes of determining navigability at statehood, however, the Commission must consider the river in its “natural and ordinary condition.” In this case, that means that the Commission must evaluate the river as if the diversions and dams did not exist. According to the Report, “without considering any disturbance by humans, the mean annual flow rate ranges from about 700 to 1,500 cfs, with relatively minor flow attenuation with the Reach due to shallow groundwater levels, narrow bedrock canyons and perennial flow.” Report, p. 8-2. Typical flow depths for the average annual flow were three to five feet deep, with low flows of one to three feet. *Id.* Typical flow widths ranged from 50 to 100 feet depending on the channel. *Id.*

#### **B. Historic evidence of boating**

There is ample evidence before the Commission of historic boating on the Upper Salt River. The Report prepared for and submitted by the State Land Department documents at least eight attempts to boat or transport goods down the Salt River between 1873 and 1910. Report, pp. 3-34 through 3-40. And, as the Report notes, this was true even in light of the dams and diversions on the river. Although some of these trips were unsuccessful, they all achieved some navigation of the river and demonstrate that navigation at the time of statehood was not only feasible, but actually occurred. *Id.* In addition to written accounts of trips, there is photographic evidence of boating on the Upper Salt. *Id.* at 3-37. Several photographs of people in boats on the river were published in the early 1900s. *Id.* Boats were also used in the construction of dams on the Upper Salt. *Id.* For example, during the construction of Roosevelt Dam, boats were used to transport workers, materials, and equipment, as well as to cross the stream. *Id.* at p. 3-38. Similarly, “clamshell” derricks were used to assist in the construction of the Horse Mesa Dam.

In sum, there is substantial evidence before the Commission that, at the time of statehood, boats were common on the Upper Salt and the river was frequently navigated.

**C. Evidence of modern boating**

The Commission also received significant evidence of modern boating on the Upper Salt. This is particularly relevant because, as noted in the State Land Department report, there is no evidence of substantive change in the geomorphology and hydrology for Reach 1 of the Upper Salt from the time of statehood until the present. Report, p. 6-5. As documented in the Report, the entire Upper Salt River study reach is regularly boated in modern times. *Id.* at 6-6. Several commercial rafting outfits conduct operations on the Upper Salt. *Id.* The evidence establishes that modern boating using canoes, rafts and kayaks occurs year round, although most of the commercial trips occur in the late winter and spring during the annual high flow period. *Id.* According to the Report, Reach 1 is boated primarily for recreational purposes, primarily during the winter and spring months; Reach 2 is currently boated throughout the year; and Reach 3 is boated for recreational purposes whenever flow is released from the dams. *Id.*

In addition to the testimony and report presented by the State Land Department, the Commission received direct evidence from modern boaters, both in the form of letters submitted by individuals who have boated the Upper Salt, and in the form of testimony from David Weedman, a biologist from the Arizona Game and Fish Department. According to Mr. Weedman, for the past 20 to 30 years the Arizona Game and Fish Department has regularly taken trips down the Salt River using a variety of watercraft, during various times of the year, to take fishery surveys. See Transcript of Hearing, pp. 135-142. Mr. Weedman described his own experience navigating the river and observing others navigate the river.

In summary, as the State's Report concludes, "The Salt River could have and did support some types of boating during the period prior to statehood. By 1912, use of boats on the river had declined *but was still possible during most years*, a condition which persists today." Report, p. 8-3 (emphasis added). The evidence provided to the ANSAC regarding the Upper Salt River demonstrates that under the liberal test required by federal law, the river was navigable at the time of statehood.

Respectfully Submitted this 9th day of December 2005.



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One original and six copies of the  
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