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BEFORE THE ARIZONA NAVIGABLE STREAM  
ADJUDICATION COMMISSION

In re Determination of Navigability of )  
the Verde River ) Case No. 04-009 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 regarding the navigability of the Verde River. For the reasons set  
forth herein, Defenders requests that the Arizona Navigable Stream Adjudication  
Commission ("ANSAC") find that the Verde River was navigable when Arizona entered  
the Union on February 14, 1912.

The arguments offered by Salt River Project ("SRP"), Phelps Dodge Corporation  
("PD") the Yavapai-Apache Nation ("Nation")(collectively "the Navigability  
Opponents") are largely a reprise of the rejected arguments that SRP and PD previously  
asserted in *Defenders of Wildlife v. Hull*, 199 Ariz. 411; 18 P.3d 722 (2002). However,

as the Arizona Court of Appeals held in that case, the assertions by the Navigability Opponents are not consistent with federal law regarding navigability.

**1. The Navigability Opponents Apply A Narrow Definition of “Highway for Commerce” and Erroneously Assert that the Verde River Has Never Been Used as a Highway for Commerce.**

In asserting that the Verde River has “never actually been used as a ‘highway for commerce,’” SRP completely ignores the statutory definition of that term and improperly suggests that the federal test for navigability requires a showing of commercial use. See SRP Opening Memorandum, p. 11-12<sup>1</sup>. The Arizona statute A.R.S. §37-1101(3) defines highway for commerce as, “a corridor or conduit within which the exchange of goods, commodities or property *or the transportation of persons* may be conducted.” Thus, transportation of people alone qualifies a watercourse as a “highway for commerce.” There is no requirement in the statute that the transport be for a fee or even have a commercial purpose.

Moreover, the assertion by SRP that the use must be for “commerce” or commercial in nature was emphatically rejected by the Court of Appeals in *Defenders*. In *Defenders*, the Court struck down a statutory presumption against navigability if there was no profitable commercial enterprise conducted on the watercourse. SRP and PD intervened in the litigation and argued that federal case law required a showing that the watercourse be susceptible to “commercial use.” Answering Brief of SRP and Phelps

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<sup>1</sup> It should be noted that PD makes a similar assertion in its Opening Brief in the argument heading at page 4; however, the argument itself focuses solely on the second assertion included in the heading that “nor was it [the Verde] ever considered navigable.” The Nation makes a similar argument on pg. 3 of its Opening Brief, relying upon Commerce Clause cases and failing to address the express holding in *Defenders*.

Dodge, p. 31. The Court of Appeals, however, rejected that argument and held, “[t]he federal test has been interpreted to neither require both trade and travel together nor that the travel or trade be commercial.” *Defenders*, 199 Ariz. at 421 18 P.3d at 732. Further, the *Defenders* Court pointed out that the case relied upon by SRP in its brief (and cited here in its Opening Brief) *Lykes Bros., Inc. v. Corps of Eng’rs*, 821 F. Supp. 1457 (M.D. Fla.), was inapplicable to a navigability for title analysis because it involved a navigability determination under the Commerce Clause. *Defenders*, 199 Ariz. at 421, 18 P. 2d at 732. As one commentator explained: “To be navigable for commerce clause purposes, a waterway must service as a link in interstate or foreign commerce. **The title test contains no such requirement.**” Frank, *Forever Free: Navigability, Inland Waterways, and Expanding Public Interest* 16 U.C. Davis L. Rev. 579, 588 (1983)(emphasis supplied). Yet, despite this clear direction from the Court of Appeals, SRP continues to assert that commercial use is required to show navigability and to rely upon the *Lykes Bros.* case as support for that assertion.

It is only by adopting this narrow and erroneous definition of “highway for commerce” that SRP can assert that the Verde River has never been used as a “highway for commerce.” As the evidence provided to the Commission unequivocally established, the Verde River has historically been used to transport people, and continues to be used for transportation in modern times. Moreover, even though a showing of commercial use is not required to establish navigability, the river has been used for commercial purposes. See Transcript p. 55 (commercial river trips). Thus, the assertion that the Verde River

has never been used as a “highway for commerce” is without support in the law or the facts.

## **2. The Evidence of Modern Boating Supports a Finding of Navigability**

The extensive evidence of modern boating on the Verde River demonstrates that the river is not only navigable but is used for travel year round. In their Opening Briefs, SRP and PD attempt to diminish the significance of the evidence of modern day boating by focusing on the obstacles in the river and exaggerating the difference between modern boats and historic vessels such as the canoe. It has been well-established that evidence of modern use for recreational boating can provide conclusive evidence of navigability under the federal test. *Alaska v. Ahtna, Inc.* 891 F. 2d 1401, 1405 (9<sup>th</sup> Cir. 1989) *cert. denied*, 495 U.S. 919 (1990); *Adirondack League Club v. Sierra Club*, 706 N. E. 2d 1192, 1195 (N.Y. 1998). Navigability does not depend upon the particular vessel used:

The 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 Montello*, 87 U.S. (20 Wall) 430, 441, 22 L. Ed. 391 (1874). *See also United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (“Navigability does not depend on the particular mode in which such use is or may be had--whether by steamboats, sailing vessels or flatboats.”).

Courts have often based navigability findings on evidence of travel by small boats. *See, e.g. Hume v. Rogue River Packing Co.*, 51 Ore. 237, 246, 92 P. 1065 (1907), on reh'g, 51 Ore. 237, 96 P. 865, 83 P. 391 (1908)(holding that use by "boats of small tonnage" as sufficient evidence to declare the Rogue River navigable up to River Mile 18); *State of N.D. ex rel. Bd. of Univ., etc. v. Andrus*, 671 F.2d 271, 278 (8th Cir 1982), *rev'd on other grounds sub nom, Block v. North Dakota*, 461 U.S. 273 (1983) ("Canoe travel at the time of North Dakota's statehood represented a viable means of transporting persons and goods."); *Alaska v. United States*, 754 F.2d 851, 854 (9th Cir), *cert den*, 474 U.S. 968(1985) ("We have liberally construed the phrase 'customary modes of trade and travel on water,' taking into account transportation methods in use at the time of statehood." (Citation omitted.)); *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65 (WD Wash 1981), *aff'd*, 717 F.2d 1251 (9th Cir 1983), *cert den*, 465 U.S. 1049 (1984) (declaring navigability on the basis that "Indians navigated the river with their fishing boats and canoes").

Further, the fact that the river contains some impediments does not preclude a finding of navigability. As the Ninth Circuit Court of Appeals has recognized, a river's use "need not be without difficulty, extensive, or long and continuous" for the river to be a highway for commerce. *Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 795 (9th Cir. 1982)(portion of the McKenzie River found navigable when used to transport "thousands of logs," even though shallow areas and sand bars made the transport difficult). Rapids, riffles, or occasional areas of low water requiring portage will not defeat navigability, so long as the "natural navigation of the river is such that it affords a

channel for useful commerce." *Northwest Steelheaders Ass'n v. Simantel* 199 Ore. App. 471, 484; 112 P.3d 383 (2005) quoting *The Montello*, 87 U.S. (20 Wall) at 441.

"Navigability does not depend . . . on an absence of occasional difficulties in navigation." *Holt State Bank*, 270 U.S. at 56. See also *United States v. Utah*, 283 U.S. at 84, 86 (noting that conditions created by flood deposits of logs and driftwood "do[] not constitute a serious obstacle to navigation" and that, with respect to shiftings and bars in the river channel, "the mere fact of the presence of such sandbars causing impediments to navigation does not make a river nonnavigable").

In sum, the evidence of modern boating on the Verde River is perhaps the most compelling evidence that the river was susceptible to use for trade and travel at the time of statehood.

**3. The Arguments and Expert Testimony Offered by the Navigability Opponents Are Legally Irrelevant Because They Fail To Properly Evaluate the Verde River In Its Natural and Ordinary Condition.**

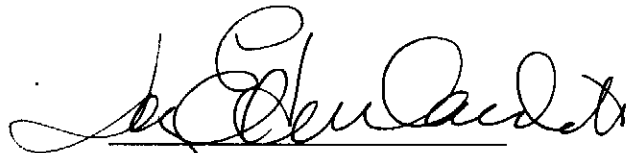
Finally, all of the arguments, evidence, and expert testimony offered by the Navigability Opponents are fundamentally flawed by their refusal to account for the negative impacts that human interference had on the flow of the Verde River even by the time of statehood. As discussed at length in Defenders' 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. 5-6. 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. See e.g. *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); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 116, (1921)(holding that watercourse must be considered navigable if it would have been passable in its original condition, regardless of whether the construction of dams or diversions may have created impediments to navigation by the time of statehood).

Because Arizona joined the Union relatively late, most of our rivers had been subjected to significant alteration by the time of statehood. In the case of the Verde, by the time of statehood, the river's natural flow had been adversely impacted by irrigation diversions (EIN 031, p. 7-22) and groundwater pumping (EIN 031 p. 7-4). Because the evidence and analysis relied upon by Navigability Opponents, fails to account for these impacts, its probative value is minimal. The relevant question before this commission is whether in 1912 the river would have been navigable if it was still in its natural condition. Consequently, any "expert" opinion regarding "navigability" that fails to factor in the impact of the diversions in existence in 1912 is fatally flawed. Similarly, actual use or perceptions of the river at the time of statehood are of limited probative value for the same reason. For example, while the parties may certainly debate what inferences can and should be drawn from surveyors' decisions to meander or not meander the river, the fact remains that those decisions were undoubtedly influenced by the reduced flow of the river that was the result of the multitude of diversions that took vast amounts of water out of it. The same historical reality undermines the persuasiveness of SRP's assertion that if the river were "navigable" at statehood then people would have "navigated" it. The fact is that the inquiry of "navigability" for purposes of title is not

that simple. The Court (and in this case Commission) must attempt to determine what, in fact, the river was like in its ordinary and *natural* condition. Where, as here, you have a river that was no longer in its *natural* condition, the Commission is obligated, under the *Daniel Ball* test, to attempt to determine, to the best of its ability, what the natural condition would have been if the diversions had not existed at the time of statehood.

Respectfully submitted this 11<sup>th</sup> day of April, 2006



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