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IN THE PUBLIC INTEREST
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BEFORE THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

In re Determination of Navigability of)
the Lower Salt River) Case No. 03-005-NAV
) Memorandum on Remand
)
)
)
_____)

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, "Defenders") hereby submit their memorandum on remand. For the reasons set forth herein, Defenders request that the Arizona Navigable Stream Adjudication Commission ("ANSAC") apply the correct legal standard to the evidence in the existing record and find that the Lower Salt River was navigable when Arizona entered the Union on February 14, 1912.

I. Court of Appeals Decision.

In determining how ANSAC should proceed on remand, it is most appropriate to begin with a review of the Court of Appeals' decision and the directives set forth by the

Court in the Opinion itself. Significantly, the Court remanded the matter back to ANSAC because it found that “although ANSAC considered a great deal of evidence concerning the condition of the River, and reviewed evidence from various times before statehood, ANSAC ultimately failed to apply the proper legal standard to the evidence presented.” *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, , 224 Ariz. 230, 242 ¶28, 229 P.3d 242, 254, (App. 2010). Thus, the Court held that “[b]ecause the proper legal test was not applied, we must vacate the superior court's judgment and remand for ANSAC to consider whether the River would have been navigable had it been in its ordinary and natural condition on February 14, 1912.” *Id.* at ¶29.

In articulating the proper legal test, the Court instructed that ANSAC is “required to determine what the River would have looked like on February 14, 1912, in its ordinary (i.e. usual, absent major flooding or drought) and natural (i.e. without man-made dams, canals, or other diversions) condition.” *Id.* at 241 ¶28, 229 P. 3d at 253. The Court also provided specific guidance regarding what constituted the “best evidence” of the River’s natural condition, and concluded that “the River could be considered to be in its natural condition after many of the Hohokam’s diversions had ceased to affect the River, but before the commencement of modern-era settlement and farming in the Salt River Valley...” *Id.* at 242 ¶30, 229 P. 3d at 254.

With respect to whether it is necessary for ANSAC to reopen the evidentiary hearing in order to address its previous error, the Court’s opinion suggests that the existing record is sufficient. Although it held that ANSAC applied an incorrect standard to the evidence before it in the prior proceeding, the Court did recognize that the evidence

considered by ANSAC and submitted to the superior court contained “‘substantial evidence...’ from which a factfinder might conclude that [the River] met the applicable standard of navigability at the time that Arizona became a state....” *Id.* at 242 ¶29, 229 P. 3d at 254 quoting *Arizona Center for Law in the Public Interest v. Hassell*, 172 Ariz.356, 363, 837 P.2d 158, 165 (App. 1991). However, the Court did caution that in reviewing the evidence before it, it is critical that ANSAC “not begin its determination with any presumption *against* navigability. Instead ANSAC’s approach and analysis must be wholly impartial and objective, while utilizing the proper legal test.” *Id.* at 239 ¶18, 229 P. 3d at 251 (emphasis in original).

Regardless of whether ANSAC elects to reopen the evidentiary portion of the proceedings before the commission, Defenders submits that ANSAC should request that the parties fully brief the issue of the navigability of the Lower Salt River applying the appropriate standard as articulated by the Court of Appeals. In the event ANSAC declines to allow further briefing, the following abbreviated discussion of the evidence is hereby submitted.

II. The Evidence in the Record Demonstrates that in its Ordinary and Natural Condition the Lower Salt River was Navigable.

The evidence presented to the ANSAC during and in advance of the Lower Salt River hearings demonstrates that in its “ordinary and natural condition,” the Lower Salt River was navigable in 1912. As noted above, in its decision the Court of Appeals indicated that the best evidence of the River’s “natural condition” was the 1800s, before the commencement of modern-era settlement and farming in the Salt River Valley. The

following summarizes the evidence already in the record regarding the condition of the River at that point in time.

A. Flow Rates on the Lower Salt River Prior to Modern Development.

Prior to modern development, the Lower Salt River was a perennial stream with an average annual discharge of over 1,000 cfs. EIN 030 at 7-12; Transcript at 201 (Schumm); EIN 018, Ex. 182 (Thomsen and Porcello). Flow rates on the Lower Salt River vary significantly depending on what year they were measured and the season of measurement. The impact of dams and diversions became most pronounced after the early 1870s, so pre-1870 flow rates are most telling of the Lower Salt River's natural and ordinary condition. EIN 030 at 7-1, Transcript at 149, 224. The pre-1870 flow rates are estimated to have been at least 1,000 cfs with minimum rates in the 260-300 cfs range. EIN 030 at 7-26 to 7-27, Transcript at 16, 17-18.

Even in 1893, John W. Powell estimated that the River's average annual flow was 2,844 cfs. EIN 030, 5-5. The Arizona State Land Department ("ASLD") estimates that when the River was in its natural and ordinary condition, its average annual flow was approximately 1,500 cfs. EIN 030 at 7-6 through 7-12; 7-26 through 7-27.

In terms of flow characteristics, the data show that the predevelopment flow rate was between 300 cfs and 3,000 cfs ninety percent of the time (90%) and less than 20,000 cfs ninety nine percent (99%) of the time. EIN 030 at 7-17 (Table 7-13). Flow depths varied seasonally. During the driest summer months, typical flow depths averaged between one and two feet, although there were deeper pools and shallower riffles. Typical winter flow depths were generally greater than two feet. EIN 030 at 7-10, 7-17,

7-25. These conditions exceed the minimum stream conditions for recreational boating.
EIN 030, 8-1, 8-2.

B. Historical Accounts of the River's Condition.

In the 1820s, beaver abounded on the River, and trappers, such as James Ohio Pattie and Ewing Young, traveled along the river as they trapped. EIN 030 at 3-6, 3-10. In February 1826, Pattie described the River at its confluence with the Verde as follows: "It affords as much water at this point as the Helay [Gila] . . . We found it to abound with beavers. It is a most beautiful stream, bounded on each side with high and rich bottoms." EIN 030 at 3-14. A few years later, in 1852, John R. Bartlett of the U.S. Boundary Commission conducted a reconnaissance of the River from its confluence with the Gila to present-day Mesa. EIN 030 at 3-6. In July of that year, Barlett described the River at a point twelve miles up-river from its confluence with the Gila as follows:

The bottom, which we crossed diagonally, is from three to four miles wide. The river we found to be from eighty to one hundred and twenty feet wide, from two to three feet deep, and both rapid and clear. . . . The water is perfectly sweet, and neither brackish nor salty, as would be inferred from the name. We saw from the banks many fish in its clear waters, and caught several of the same species as those taken in the Gila. The margin of the river on both sides, for a width of three hundred feet, consists of sand and gravel, brought down by freshets when the stream overflows its banks; and from the appearance of the drift-wood lodged in the trees and bushes, it must at times be much swollen, and run with great rapidity. . . . [A]long the immediate margin of the stream large cotton-wood trees grow." [Ellipses and brackets in ASLD Report.]

EIN 030 at 3-15.

By 1867, Beaver were still abundant. EIN 030 at 3-15. The River was then a deep and narrow stream with a permanent flow.¹ EIN 016, 189 (quoting Odd S. Halseth, who gave a speech entitled “1500 Years of Irrigation History” at a 1947 National Reclamation Association meeting in Phoenix). In December 1868, W.F. Ingalls (also a government surveyor and brother of G.P. Ingalls), who was conducting a cadastral survey of the area, described the River as follows:

Salt River is at this season of the year at least a large stream . . . nor do I think it ever entirely dry. It has moreover a very heavy fall of I should think 12 to 15 feet to the mile which makes it especially valuable for irrigating. I consider this valley from 6 to 10 miles wide . . . as some of the best agricultural land I have yet seen in the Territory and should recommend that it be subdivided at an early day. [Ellipses in ASLD Report.]

EIN 030 at 3-15; EIN 016, 28. Even as late as 1884, the River was described by Wallace W. Elliot & Co. as being capable of irrigating vast stretches of land, and as a clear beautiful stream at low water, having an average width of 200 feet for a distance of 100 miles above its junction with the Gila, and a depth of two feet or more. EIN 030 at 3-8 (Table 3-1).

C. Historical Evidence of Boating on the River.

At least six ferries operated on the River between Granite Reef Dam and the Gila River between 1860 and 1915. In later years, the number of ferries diminished as the ordinary and natural flow was impounded in reservoirs, diverted to canals, and as bridges over the River were constructed. EIN 030 at 3-25. The Marysville Ferry on the Fort

¹ *Assessment of the Salt River's Navigability Prior to And on the Date of Arizona's Statehood, February 14, 1912*, by Douglas R. Littlefield, Ph.D., Littlefield Research Associates, Oakland, California, December 5, 1996. EIN 016.

McDowell-Maricopa Road began operating in 1868 and continued until 1874. EIN 030 at 3-25. Hayden's Ferry was established in 1874 and was used until at least 1909. It was the best known ferry that operated on the River. EIN 030 at 3-7, 3-25 (Table 3-3). Ferries were used to haul commercial freight, including passengers, mail, and large loaded freight wagons with team; a man was reported to have had a boat built to haul 60,000 pounds of freight across the River in 1884 at a profit of 12 ½ cents per 100 [wt]. EIN 030 at 3-26 through- 3-28. Other ferries operated in 1884. For example, the *Phoenix Herald* wrote that "Jesse Bryant and H.H. Hufstetter have a good and safe ferry running." EIN 030 at 3-27.

Generally, there was no shortage of boats in the Salt River Valley. EIN 030 at 8-3. The types of boats typically used were flat-bottomed boats, skiffs, or canvas and wooden canoes. *Id.* The *Weekly Arizona Miner* reported in May 1873 that the "Salt River is navigable for small craft as, last week, L. Vandemark and Wm. Kilgore brought five tons of wheat in a flat boat from Hayden Ferry down the river to the mouth of Swilling canal and thence down the canal to Helling & Co's mill." EIN 030 at 3-18, 3-19 (Table 3-2). 12.

There is ample evidence of boating on the River continuing well past the 1870s. For example, in February 1881, two men - Cotton and Bingham - were reported to be preparing to travel from Phoenix to Yuma in an 18-foot, flat-bottomed skiff. EIN 030 at 3-19 (Table 3-2), 3-20. In 1883, Jim Meadows and three other men floated the Salt River between Livingstone, near present-day Roosevelt Dam, and Tempe. EIN 030 at 3-19 (Table 3-2). The party encountered trouble in the upper canyons (outside the study

reach), but they completed the trip successfully. *Id.* at 3-20 through 3-21. That same year the Arizona Gazette reported that North Willcox and Dr. G.E. Andrews, U.S.A., floated a canvas skiff from McDowell to Barnum's pier on the Salt River Valley Canal and that the "Salt River is a navigable stream and should be included in the Rivers and Harbors appropriation." EIN 030 at 3-19 (Table 3-2). The only discomfort the party experienced was that it rained during the night while they camped. *Id.* at 3-21.

Similarly, in June 1885 the Arizona Gazette reported that William Burch and four other men successfully boated the River in an 18 foot by 5 foot boat from four miles above the Tonto Creek confluence to Phoenix. EIN 030 at 3-19 (Table 3-2). The men's purpose was to see whether logs could be floated down the River. Although the party encountered some difficulties in the upper canyons (outside the study area), "the undisputed conclusion is that such work [log floating] can be successfully carried on." *Id.* A few years later in December 1888, the Phoenix Herald reported that Major E.J. Spaulding (commandant at Fort McDowell) and Capt. Charles A.J. Hatfield canoed from Fort McDowell on the Verde River to the Mesa Dam on the Salt River, where Major Spaulding accidentally shot and killed himself. EIN 030 at 3-19, 3-21.

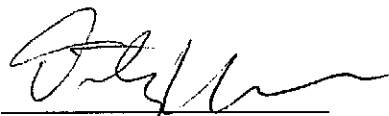
Although there continued to be several other documented instances of boating on the Lower Salt River (see EIN 30, Chapter 3), the foregoing are instances of boating that occurred and were reported during or near the time period identified by the Court of Appeals as representing the best evidence of the River's natural condition. As these historic accounts demonstrate, in its natural condition the River was not only susceptible of being used as a "highway for commerce," it was actually used as such.

III. Conclusion.

When the best evidence regarding the River's natural condition is considered, it is clear that there is ample relevant, persuasive evidence demonstrating that the Lower Salt River meets the Arizona and federal standards of navigability. The evidence from the 1800s demonstrating navigability includes information regarding boating and commercial ferry operations on the Lower Salt, use of the water as a conduit for travel and trade (of water and other goods), and flow rates necessary to support trade and travel on the watercourse (thereby demonstrating susceptibility). As a result, the evidence already in the record establishes by a preponderance of the evidence that the Lower Salt River was used or was susceptible for use its natural and 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. We therefore urge that on remand the ANSAC find that the Lower Salt River was navigable at statehood.

Respectfully Submitted this 13th day of January 2012.

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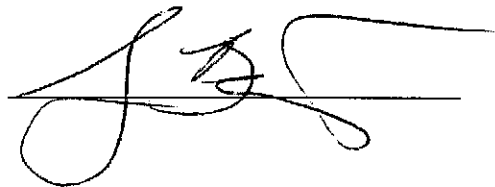
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