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BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

**IN THE MATTER OF THE)
NAVIGABILITY OF THE SAN)
PEDRO RIVER)**

**MEMORANDUM
SUBMITTED FOR HEARING
MARCH 12, 2003**

Phelps Dodge Corporation ("Phelps Dodge") presents this memorandum to be considered at the March 12, 2003 public hearing regarding the navigability of the San Pedro River. See A.R.S. § 37-1126; Ariz. Admin. Code R12-17-106.3 (Draft, Nov. 24, 2002). Phelps Dodge requests that the Arizona Navigable Stream Adjudication Commission ("ANSAC" or "Commission") determine that the San Pedro River is not navigable as that term is defined in A.R.S. § 37-1101(5). As set forth in detail below, the evidence submitted to date simply does not support a finding of navigability under state or federal law.

I. Navigability for Title Purposes Has Important Ramifications and Thus a Precise Statutory Definition.

Title to the beds of navigable watercourses passed to the State of Arizona when it joined the United States on February 14, 1912. See Defenders of Wildlife v. Hull, 199 Ariz. 411, 415-16, 18 P.3d 722, 726-27 (App. 2001); Arizona Ctr. for Law in the Public Interest v. Hassell, 172 Ariz. 356, 360, 837 P.2d 158, 162 (App. 1991). Arizona statutes define a navigable watercourse as one

1013

that 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) (2001); Defenders, 199 Ariz. at 426, 18 P.3d at 727; see id., 199 Ariz. at 419, 18 P.3d at 730 (quoting The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)). Numerous characteristics of a watercourse are relevant to an inquiry into its navigability. See Defenders, 199 Ariz. at 421-26; 18 P.3d at 732-37. Characteristics that support a finding of navigability include use of a river for commercial purposes, recreational boating, and log flotation. See id. On the other hand, characteristics that support a finding of non-navigability include flow only in response to rain, and transportation by other means in close proximity to the river. See id. While none of these characteristics is dispositive, the Commission may consider them as relevant to its ultimate determination of navigability for purposes of the State's title to the riverbed.

ANSAC is charged with gathering and considering evidence of these and other relevant characteristics of a river at the time of Arizona's statehood in order to determine the river's navigability. A.R.S. § 37-1123. Navigability must be established by a preponderance of the evidence. A.R.S. § 37-1128(A). The preponderance of the evidence standard requires that the totality of the evidence makes it more probable than not that the characteristics of a navigable stream existed. See Arizona Navigable Stream Adjudication Commission Report, Findings and Determination Regarding the Navigability of Small and Minor Watercourses in Yuma County, Arizona (Feb. 20, 2003), at 16-17 (quoting Black's Law Dictionary (5th ed. 1979) at 1064); see also Ison v. Western Vegetable Distributors, 48 Ariz. 104, 111-12, 59 P.2d 649, 653 (1936). Mere anecdotal examples are insufficient to

carry this evidentiary burden. See Estate of Harber, 102 Ariz. 285, 294 (1967) (“Mere . . . speculation [is] no substitute for evidence); see also United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 822 (2000) (“[T]he Government must present more than anecdote and supposition” to withstand a First Amendment challenge).

II. Evidence Regarding the San Pedro River Does Not Meet the Statutory Definition of a Navigable River.

With respect to the San Pedro River, the evidence provided to the Commission before this hearing fails to satisfy the statutory test for a navigable river. The most thorough examination to date of the San Pedro’s navigability is a report titled “Arizona Stream Navigability Study for the San Pedro River: Gila River Confluence to the Mexican Border,” which was prepared by CH2M Hill for the Arizona State Land Department and revised in September 1997 (hereinafter “Revised CH2M Hill Report”).¹ All of the evidence in this report, when analyzed according to the relevant navigability characteristics, demonstrates that San Pedro River was not navigable on February 12, 1914.

A. Streamflows in the San Pedro Were Too Low for Water Trade or Transportation

Nineteenth century travelers through the area described the San Pedro River as “sluggish,” “insignificant,” “muddy,” “boggy,” “small,” and “affording no great quantity of water.” See Revised CH2M Hill Report, at 3-13 through 3-20. The median flow in the best reaches of the San Pedro River at the time of statehood is estimated to have been

¹ The Revised CH2M Hill Report was submitted to the Commission on September 4, 1997 and is numbered “96-004-008 San Pedro River.” The Commission may consider the Revised CH2M Hill Report without having it readmitted into evidence. See Ariz. Admin. Code R12-17-106.01(C) (Draft, Nov. 24, 2002). See also Laws 2001, Ch. 166, Sec. 1(B) (“The legislature intends that the commission may use the evidence produced and gathered to date . . .”).

approximately half a foot, with a median width of ten feet and a median velocity of 2 feet per second. See id. at 7-21. Lower reaches are estimated to have had lower flow depths. See id. Irrigation diversions had begun well before statehood. See id. Quite simply, there was not enough water in the San Pedro River for it to be susceptible to trade or transportation.

B. The San Pedro River Did Not Support Trade

Throughout the San Pedro River's history, "travel was along the river rather than in it." Revised CH2M Hill Report, at 3-1. Overland transportation was always the primary means of travel along the river. See id. at 3-23. There is no record of "trade or travel along the river," including no evidence that goods, such as logs, were floated or could have been floated on the river. See id. at 3-26. .

C. The San Pedro River Did Not Support Transportation

The San Pedro River has never been used for water-borne transportation. Early travelers "did not consider the stream to be boatable." See Revised CH2M Hill Report at 3-25. Explorers who attempted to use boats on other rivers apparently made no such effort on the San Pedro. See id. The only evidence of boating on the San Pedro that may have taken place around the time of statehood is an undocumented anecdotal recollection that a ferry may have operated downstream of Pomerene. See id. at 3-26. Even in modern times, the San Pedro is not classified by the Arizona State Parks Department as a boating stream. See id. at 8-4. Quite simply, "there is no documentation of boating of any kind on the San Pedro River." See id. at 3-26. Accordingly, the San Pedro River cannot be considered navigable when there is no evidence of transportation on the river itself at the time of Arizona's statehood.

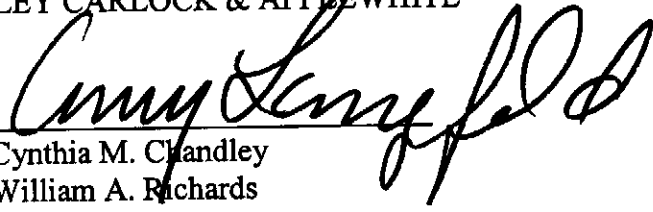
III. Conclusion

The evidence collected prior to the March 12, 2003 hearing regarding the San Pedro River falls far short of proving that the river was navigable for purposes of title to its bed and banks. "Navigable" has a precise legal definition. Arizona's navigability statutes require this Commission to be convinced by a preponderance of the evidence that "trade and travel were or could have been conducted . . . on water." A.R.S. § 37-1101(5). On or around February 12, 1914, the San Pedro River lacked sufficient streamflows to support either trade or travel on water, and, not surprisingly, no evidence was found that either trade or travel took place on the waters of the San Pedro at the time of Arizona's statehood. The San Pedro River fails to meet the statutory definition of "navigability." Therefore, Phelps Dodge requests that the Commission find the San Pedro non-navigable.

RESPECTFULLY SUBMITTED this 12th day of March, 2003.

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Original and six copies HAND DELIVERED

this March 12, 2003, to

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