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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 Gila River	)	Case No. 03-007-NAV
	)	Closing Memorandum regarding the
	)	Navigability of the Gila River
_____	)	

Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, and Jim Vaaler (collectively, “Defenders”) hereby submit their memorandum regarding the navigability of the Gila River. 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 the supplemental evidence submitted upon the reopening of the evidentiary record, and find that in its ordinary and natural condition, the Gila River was navigable when Arizona entered the Union on February 14, 1912.

**I. Statement of Facts.**

**A. The Gila River Watershed.**

The Gila River is the primary drainage for southern Arizona with a drainage area of approximately 150,000 km<sup>2</sup> (60,000 mi<sup>2</sup>) that extends into western New Mexico and

northern Sonora. Arizona Stream Navigability Study for the Gila River: Colorado River Confluence to the Town of Safford (rev. June 2003 by JE Fuller/Hydrology & Geomorphology, Inc.), (Evidence Item ("E.I") 04) ("ASLD Lower Gila Report"), VII-2. See also, Hearing Transcript ("TR") Vol. 1, p. 122-123.

The upper Gila River watershed extends into the Mogollon Highlands of eastern Arizona and western New Mexico. The drainage basin area at the mouth of the Safford Valley is approximately 29,800 km<sup>2</sup> (11,500 mi<sup>2</sup>). *Id.* There are no major dams upstream from the Safford Valley, but streamflow on the Kearny reach is partially controlled by Coolidge Dam which was completed in 1928. *Id.* Mean annual precipitation within the upper Gila watershed ranges 20-100 cm (8-40 in) and averages approximately 36 cm (14 in). *Id.* at VII-2 – 3. There are two periods of peak flow that are directly linked to two rainy seasons. Summer peak flow occurs between July and October and is predominantly linked to monsoonal, convective storms. Winter peak flow occurs November through June and is supplied largely by frontal storms, snowmelt, and groundwater storage. *Id.* at VII-3.

The middle Gila River extends from the Ashurst-Hayden Diversion Dam to the Salt River and is largely located within the Gila River Indian Community. *Id.* at VII-4. The climate along the Middle Gila River is arid and warm. *Id.* Mean annual rainfall ranges from 19 cm at Maricopa to 21 cm at Sacaton and 24 cm at Florence. *Id.*

The Lower Gila flows from the confluence of the Salt River near Phoenix southwestward towards the Colorado River near Yuma. *Id.* at VII-5. The climate is arid

and hot. Mean annual precipitation at Yuma and Buckeye is 7 cm (2.8 in) and 18 cm (7.1 in), respectively. *Id.* at VII-6.

For purposes of analysis, the Arizona State Land Department (“ASLD”) has divided the Gila River into 8 segments. The segmentation is based upon the changes in geology between broader alluvial valleys and intervening bedrock canyons as well as the resulting changes in the channel characteristics, patterns of width and depth variation, and the changes in hydrology along the river. Tr. Vol. I, p. 123. The segments identified by the ASLD are as follows: Segment 1: New Mexico to Gila Box; Segment 2: Gila Box; Segment 3: Gila Box to San Carlos Reservoir; Segment 4: San Carlos Canyon; Segment 5: San Carlos Canyon to Ashurst-Hayden Dam; Segment 6: Ashurst-Hayden Dam to Salt River Confluence; Segment 7: Salt River Confluence to Dome; Segment 8: Dome to Colorado River. See Fuller Powerpoint re Gila Navigability, E.I. X020 (“Fuller Navigability PPT”), slides 32, 35, 38, 41, 44, 47, and 56, respectively.

#### **B. Human Impacts on the Gila River.**

Although Indian peoples had been irrigating with river water for centuries, it was Euro-American diversions that created a water shortage in the Gila River. Irrigation started in the mid-1800s, and in 1849, some of the Forty-niners described “the whole stream” as being drawn off for irrigation. Tr. Vol. I, p. 179. The diversion became even more severe starting around 1886 with the construction of the Ashurst-Hayden Dam and Florence Canal. ASLD Lower Gila Report VI-1. By 1899, there were 17 diversions in the Duncan Valley and 28 diversions in the Safford Valley on the Upper Gila River. Arizona State Land Department Rep., Arizona Stream Navigability Study for the Upper Gila

River: Safford to the State Boundary (rev. June 2003 by JE Fuller/Hydrology & Geomorphology, Inc.) ("ASLD Upper Gila Report") E.I. 02, 5-8. It was not unusual for irrigation diversions to completely drain the Upper Gila during some months of low flow. *Id.* That same year, the United States Geological Survey ("USGS") recorded that local farmers were diverting water from the Lower Gila through 450 miles of ditches, delivering water for 220,000 acres along the River. ASLD Lower Gila Report, IV-62. Groundwater pumping was also responsible for diverting a significant amount of water from the river. ASLD Upper Gila Report at 5-14.

### **C. Historic Descriptions of the Gila River.**

There are numerous historic descriptions of the Gila River, some going back centuries. For example, in the late 16<sup>th</sup> Century, Coronado referred to the Gila River near the San Pedro Valley as a "deep and reedy stream." Tr. Vol I, p. 176. Members of the Juan Bautista de Escalante party of 1697 found the river to be so deep that they had to swim across to examine Hohokam buildings on the other side. ASLD Lower Gila Report, IV-1. Members of a Spanish expedition in 1775 traveling from the Casa Grande Ruin to the Colorado River described various reaches of the river as "dry," "half way up his legs," "reaching to the shoulder blades of the horses," and "very deep and ran very slowly." *Id.*

In 1825, James Ohio Pattie described the River as "beautiful, running between banks covered with tall cottonwoods and willows." Fuller Navigability PPT, slide #80; Tr. Vol. I, p. 177. He described a part of the river as being 200 yards wide and too deep to ford. *Id.*

During the Mexican War in 1846, Stephen Watts Kearney led a battalion of men to survey the area, and they mapped the entire Gila River. Lieutenant Emory of that party estimated the River's flow at about one-half of the Colorado's flow, and he saw large fish, weighing between 25 and 30 pounds, in the river. ASLD Lower Gila Report, IV-1; Tr. Vol. I, p. 178. The Kearny Expedition described part of the river as being 80 yards wide, 3 feet deep with a rapid current. *Id.* They said the river was navigable as far as the Pima Villages possibly with small boats at all stages. *Id.*

That same year, Henry Smith Turner noted in his journal that the Gila River about eighty miles west of Gila Bend had attained the width from 100-150 yards and was in average depth about 4 feet "quite deep enough to float a steamboat." Revised and Updated Report: Assessment of the Navigability of the Gila River Between the Mouth of the Salt River and the Confluence with the Colorado River Prior to and on the Date of Arizona's Statehood, February 14, 1912, Douglas R. Littlefield, Ph.D. (November 12, 2013), E.I. X002 ("Littlefield Report -Revised"), 95.

Consistent with that description, the river was then reportedly 60-80 yards wide and three feet deep at Gila Bend, and in 1846-48 it measured 150 yards wide and three to four feet deep. Confidential Notes, The Ability to Navigate the Gila River Under Natural Conditions, Below the Confluence with the Salt River to the Mouth at Yuma, Arizona, Hjalmar W. Hjalmarson, P.E., E.I. 25 ("Hjalmarson Confidential Notes") at 47, citing a U.S. Corps of Engineers 1995 study of the River from Gillespie Dam to Yuma (Reconnaissance The Gila: River of the Southwest, Edwin Corle, New York; Rinehart (1951). A mid-1850s illustration shows that the River was about 300 feet wide with tree-

lined banks and contained enough water for swimmers. See Hjalmarson Confidential Notes, 7.

In 1849, the Forty-Niners described the Gila River near the confluence with the Salt as deep, narrow with a rapid stream. Tr. Vol. I, p. 179. They described segment 7 as “300 ft. wide...deep enough for swimmers.” *Id.* According to Audubon, who was traveling with the group, the river was 18-20 inches deep, 150 yards wide, with very deep holes in place. *Id.*

Boundary Surveyors’ descriptions range from 50 yards wide to 9 inches deep in 1849, to 20 feet wide and 12 inches deep in 1855, to 12 to 15 feet deep in 1890 and 18 inches to 2 feet deep in 1907. Fuller Navigability PPT, Slide #86. Tr. Vol. I at p. 179. Later, GLO surveyors, who were creating a land grid for the State of Arizona in the 1870s and 1890s, described the river as “too deep to cross except by swimming,” having an “abundance of water,” being “16 inches deep” with a lively current, having “deep water” and a “deep & swift channel.” Tr. Vol. 1, p. 180-81. Fuller Navigability PPT, Slide #87.

As the State’s expert witness Mr. Fuller summarized:

So this is what I draw from these photographs and these historical descriptions, is that dominantly I saw a river channel that was a single channel. It was described mostly as a river with relatively moderate depths ranging from a foot to four feet, occasionally greater than that. But I would say that was kind of the sweet spot of the range of descriptions. There were some areas that were deeper. The widths were relatively moderate as well, 20 to 150 yards, let's say. Some subjects -- some of the reach segments are subject to seasonal and annual fluctuations where we see some segments that are periodically dry, but dominantly the descriptions were of a wet river with reliable, significant flow volumes, and also a river that was characterized by a corridor of vegetation along it. I would say that would be

the overall characteristic of the Gila River through all of its segments in Arizona in its ordinary and natural condition.

Tr. Vol. I, p. 187

**D. Actual Condition of the Gila River in 1912**

By 1912, the Gila River's naturally perennial flow had been adversely impacted by irrigation diversions (ASLD Lower Gila Report, IV-52 - IV-59; ASLD Upper Gila Report, 5-8), water supply impoundments behind dams (ASLD Lower Gila Report, IV - 61) and groundwater withdrawal (ASLD Upper Gila Report, 5-14). Diversions on the Lower Gila and diversions and impoundments on the Salt River had almost depleted the entire flow by the time of statehood. ASLD Lower Gila Report, X-2. The Roosevelt Dam on the Salt River was completed in 1911 but water was impounded behind dam as early as 1909, which further depleted the flow below the Gila-Salt confluence. *Id.* at IV-54. Throughout the river's length in Arizona, the Gila River's condition in 1912, was substantially different from its natural, predevelopment condition. ASLD Lower Gila Report, VI-9; Navigability Along The Natural Channel of the Gila River (From the confluence with the Salt River to the mouth at the Colorado River near Yuma, Arizona) , Hydrologic, hydraulic and morphologic assessment by Hjalmar W. Hjalmarson, PE, October 25, 2002 (“Hjalmarson Report”) E.I. 023, at 8.

**E. Evidence of Navigation on the Gila River.**

**1. Historical Boating Accounts.**

There are numerous historical accounts of boating on the Gila River. As the State's expert, Mr. Fuller, testified, many of the historical accounts were included in previous ASLD reports; however, more have come to light in more recent years.

The largest boats to travel the river were the steamboats used primarily in the 1860s. Tr. Vol. I, p. 188. Some steamboats ran up to Dome, as described in newspaper articles. *Id.*

Other accounts of navigation on the Gila include the use of bull boats and wicker baskets by the Chiricahua Apaches in earlier years. *Id.* at p. 189. James O. Pattie, who trapped beaver on the Gila River in the 1820s, wrote in his diary that he used a canoe to cross the Gila because the river was too deep to ford on horseback. In the diary, he also described making eight dugout canoes and using them to carry furs from Safford to Yuma. *Id.* at 190.

In 1846, the Mormon Battalion lashed two wagons to cottonwood logs and used the modified wagons to float supplies down the Gila River to Yuma, where the “boats” arrived before the ground troops. *Id.* at 192-3. A few years later, in 1849, the Howard family took a 16 x 5.5 wooden boat from Pima Villages to Yuma, where they sold the boat. Their baby boy was born during the trip and named “Gila” after the river. *Id.* at 194. According to the Daily Tribune, many of the 49ers used small boats to travel to Yuma. *Id.* at 195.

There are also several reports of people boating from Phoenix to Yuma in the late 1800s. In January 1879, three men, Mssrs. Hamilton, Jordan, and Halesworth boated from Phoenix to Yuma in a homemade skiff. Afterward, they declared that the river was perfectly practicable for navigation. They only found one obstruction—rocks near Gila Bend. *Id.* They suggested that the river could be used to transport produce from Phoenix to Yuma. *Id.* at 195 to 196.

In 1881, two men named Cotton and Bingham also traveled by boat from Phoenix to Yuma. *Id.* at 196. They used an 18 foot flat-bottomed skiff. *Id.* Later that same year, in November 1881, Bucky O'Neill travelled by boat from Phoenix to at least as far as Gila Bend, although he claimed that he made it Yuma. *Id.*

Another trip around the same time period, later reported in 1945, was made by Stanley Sykes and Charlie McLean sometime in the winter during the 1890s. They reported taking a canvas boat from Phoenix to Yuma. *Id.* at 197-198. Although they had some difficulties during the trip, they reported that once they got past the dam, they made good time to Yuma. *Id.*

In April 1891, the Tombstone Epitaph reported that two men had boated the entire Gila River from the New Mexico highlands down to Yuma in a homemade boat, hunting and trapping all along the way. *Id.* Similarly, the Arizona Sentinel in April of 1882 reported on two brothers who took a long trip from Camp Verde down to Yuma trapping beaver and otter. *Id.* at 199. They described the trip as very profitable and told the paper that they planned to going back and doing the same thing the next year. *Id.*

In January and February of 1895, G.W. Evans and Amos Adams traveled the Gila River in an 18 x 3.5 ft. homemade wooden flat boat with a cabin. *Id.* at 199-200. They first traveled from Clifton to Sacaton by way of the water, and then hauled their boat overland to Tempe, where they put back in and traveled to Yuma. They only reported having any difficulty in one segment. *Id.*

Around the same time, Lt. Gully and Richardson traveled in a homemade wooden boat from Pima Villages to Yuma. The only trouble that these travelers reported was with hostile Indians. *Id.* at 200-01.

In the 1800s, boats were also used on the Gila River to ship firewood; however, in 1897, the LA Harold reported that the use of boats was discontinued. Instead, the wood was just floated downstream and a boom in the river was used to collect it. *Id.* at p. 188; 201.

Boats were also used by GLO surveyors on at least two occasions. *Id.* at 202. In 1890, a surveyor noted that he used a boat to complete his survey. *Id.* And in 1911, a surveyor used a rancher's skiff to cross the Gila River. *Id.*

There were also multiple ferries operating on the Gila River for many years. *Id.* at 208. Beginning in 1867, Henry Morgan began a 25 year long ferry operation near Maricopa Wells. ASLD Lower Gila Report at IV-5. In 1884, the Phoenix Herald reported that A.J. McDonald was building a large ferry boat (16 x 18 ft.) for the Gila and Salt River Ferry Co. which was the same dimension as one that had been sent to the Gila. *Id.* The Arizona Sentinel reported on March 28, 1891 that Strauss, Dallman & Co. had put a large new ferryboat in service. *Id.* at IV-8. By 1905 two new ferry boats 20 ft. long and 6 ft. wide and capable of carrying at 3000 pound load were introduced into service. *Id.* at IV-13. Finally, on February 9, 1916, the Arizona Blade Tribune reported that an automobile had slipped off a ferry boat into five feet of water. *Id.* at IV-19.

Again, as the State's expert witness Jon Fuller summarized:

So my conclusion is dominantly the historical boating accounts are accounts of successful boating.

On the Gila River, what kinds of -- types of boating were they doing? What kind of trade and travel were they doing? We have accounts of people hauling goods, carrying passengers, doing exploration, military use, ferries, fishing, trapping, hunting, survey, and travel; and the boats that they were done in, dominantly, as I said earlier, in small, low draft boats dominantly in the downstream direction.

These are the segments in which these historical accounts occurred, most of them in Segment 8. But some kind of account in every segment.

Time of year, it wasn't done just during unusual flooding. It was done seasonally. We don't have particular accounts from August, September. Don't know why. But those are typically higher flow months. We have accounts from the winter. We have accounts from the spring. We have accounts from the fall. We have accounts from June, which would be the seasonal low water.

These boating accounts occurred on normal flow ranges, not during floods. They're within expected range time period. They also account some difficulties with some manmade obstacles, such as depleted flows and irrigation diversions. And again, all but one reached its destination.

*Id.* at 210-211.

## **2. Modern Boating.**

Evidence of modern boating on the Gila is relevant for two reasons. First, the boats used by modern boaters are meaningfully similar to the boats customarily used at the time of statehood. Tr. Vol. I, p. 85. The same depths are needed for historical and modern boats. *Id.* The weight and design of modern canoes is essentially the same as a canoe from 1912. *Id.* See also, Fuller Powerpoint re Boating, E.I. X020 ("Fuller Boating PPT") (E.I. X020) Slides 110-117. Moreover, since the flow has been significantly depleted since the time of statehood, the boatability of the modern-day Gila River has only deteriorated. Tr. Vol. I, p. 90. Consequently, if the river is boatable during modern

times, that is persuasive evidence that in its ordinary and natural condition, the river was even more navigable. *Id.* at p. 91. As the evidence presented by Mr. Fuller demonstrated, all eight segments of the river are currently boatable by canoe approximately 90% of the time. Segments 5, 6, 7 and 8 are also boatable by flatboats approximately 90% of the time. Fuller Navigability PPT, slides 158, 162, 166, 170, 175, 180, 184, 189.

Thus, it is not surprising that several of the segments are regularly boated both recreationally and commercially. Tr. Vol. I, pp. 91-93; pp. 257-262. Previously the ASLD provided evidence from the Central Arizona Paddler's Club and a poll of their members that showed that all of Segments 1 and 2 have been boated. Sections 4 and 5 have been boated, and in the past there was a river race in Winkelman on Segment 5. *Id.* at 257. Commercial uses on the Gila River include websites devoted to describing boating conditions on the river in Segments 1, 2, 4, and 5. *Id.* at p. 258. River guides for the Gila have been published by the Arizona State Parks and Southwest Boating Guide. *Id.* at 259. The State has also heard testimony from a business owner who operated a commercial river rafting business on the Gila River for about 17 years. *Id.* at p. 260. Arizona Game and Fish employees also boat the Gila to conduct wildlife surveys while U.S. Bureau of Land Management regularly takes trips down the river. *Id.* at 261. All of this modern recreational and commercial activity on the Gila River is persuasive evidence that the river is navigable today even with the depleted flow, and, therefore, was even more navigable in its ordinary and natural condition.

## **F. The Gila River in its Ordinary and Natural Condition.**

The river's actual condition at statehood was very different from its natural, predevelopment condition. ASLD Lower Gila Report at VI-9; Hjalmarson Report at 8. Before Anglo settlement of Arizona, the river was perennial with reliable flows sufficient for shallow draft boating throughout the year. ASLD Upper Gila Report, Table 23 at 5-43; Hjalmarson Report at 6.

The hydrological analysis of the Gila River indicates that in its ordinary and natural condition, the Gila River had perennial flow that was permanent and perennial in all segments. The flow was predictable and within a reliable flow range that was sufficient at almost all times to float shallow draft boats. Tr. Vol. I, p. 262. It was also sufficient to float shallow low draft boats at almost all times, and to float larger, flat-bottomed boats seasonally. *Id.* In its ordinary and natural condition, the Gila River had a well-defined boating channel that conveyed an ordinary normal flow of the Gila River throughout its course. *Id.*

## **II. Legal Analysis**

### **A. Issue 1: In its Ordinary and Natural Condition, Was the Gila River Navigable at the Time of Statehood?**

#### ***1. State ex rel. Winkleman v. ANSAC***

In determining whether the Gila River was navigable at the time statehood, it is appropriate to begin with a discussion regarding the Court of Appeals' decision regarding the Lower Salt River and how the directives set forth by the Court in that Opinion should inform the proceedings for other rivers. *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz. 230, 229 P.3d 242 (App. 2010). Significantly, in

the case of the Lower Salt River, 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.” *Id.* at 242 ¶28, 229 P.3d at 254. 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 Lower Salt’s natural condition, and concluded that with respect to that watercourse, “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.

Although ANSAC’s earlier determination regarding the Gila River was appealed to the Superior Court, the parties agreed to stay that appeal (as well as several others) pending the resolution of the appeal of the Lower Salt River to the Court of Appeals. After the Court of Appeals remanded the Lower Salt matter, the parties agreed that the stayed appeals should all be remanded as well. Consequently, unlike the adjudication of

the Lower Salt River, there is no specific instruction in this case as to what constitutes the “best evidence” of the natural and ordinary condition of this river. Therefore, in determining navigability for the Gila River, the inquiry is two-fold. First, the ANSAC must determine what constitutes the best evidence of the river’s “natural condition,” and second, whether based on that evidence, the river was “used or susceptible to being used...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). *See also, Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P. 3d 722 (App. 2001).

## **2. The Gila River’s Natural Condition.**

In the case of the Gila River, the evidence is overwhelming that on the date that Arizona became a state, February 14, 1912, the river was no longer in its natural condition. Thus, the question that follows is: at what point in time was the river free from human impacts? The evidence presented to the Commission establishes that although humans have been diverting water from the Gila for centuries, the substantial diversions and depletions of the river’s flow began in the mid 1800s. *See infra* Section I(B). We know that as early as 1849, the “whole stream” of the river was, at times, diverted for irrigation. Tr. Vol. I, p. 179. Thus, any observations or reported experiences on the river from approximately 1840 forward do not reflect the Gila River in its ordinary and natural condition.

## **3. The Gila River’s Susceptibility to Navigation.**

The definition of navigability does not require that the watercourse actually have been used for trade or travel, but rather, requires only that it was 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). The term “highway for commerce” is first found in the definition of “navigable” or “navigable watercourse.” The Arizona statute (which codifies federal law) defines both as:

[A] watercourse 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.

Ariz. Rev. Stat. §37-1101(5). The statute more specifically 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.” Ariz. Rev. Stat. §37-1101(3). Thus, the statutory definition of “highway for commerce” does not require the transport of goods; the transportation of persons alone is sufficient to establish a “highway for commerce.”

The term “highway for commerce” can be misleading; as the cases make clear, this requirement is satisfied by either trade or *travel* on the river, even if the travel is noncommercial. As the Arizona Court of Appeals explained in *Defenders*,

The federal test has been interpreted to neither require both trade and travel together nor that the travel or trade be commercial. *See Utah*, 403 U.S. at 11 (hauling of livestock across lake even though done by owners and “not by a carrier for the purpose of making money” was enough to support a finding of navigability because “the lake was used as a highway and that is the gist of the federal test”)

199 Ariz. at 416, 18 P.3d at 727. In *Defenders*, the court also rejected the argument advanced by the Salt River Project and Phelps Dodge that the trade and travel must be both upstream and downstream, or that the travel must be for a profitable commercial enterprise. Rather, the court observed that, “nothing in the *Daniel Ball* test necessitates that the trade or travel sufficient to support a navigability finding need be from a ‘profitable commercial enterprise.’” *Id.* at 422, 18 P. 3d at 733. *See also United States v. Hill*, 248 U.S. 420, 423 (1919) (“commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities”) *citing Gibbons v. Ogden*, 9 Wheat 1, 188 (1824).

As the Oregon Court of Appeals explained in *Northwest Steelheaders Ass'n v. Simantel* 199 Ore. App. 471; 112 P.3d 383 (2005):

First, with respect to “actual use,” it is not necessary that the historic use made of the river have been either widespread or commercially profitable. “The extent of \* \* \* commerce is not the test.” . . . For example, the Court's most recent application of the *The Daniel Ball* test upheld a determination of the navigability of Utah's Great Salt Lake based on evidence that the Court described as “sufficient” but “not extensive.”

*Id.* at 389, *quoting Utah v. United States*, 403 U.S. at 11. Further, as the Oregon Court observed, “qualifying travel and trade is not limited to large-scale commercial or multiple passenger vessels of the sort typically engaged in modern commerce.” *Id.* at 390.

Navigation by small boats has often been recognized as evidence of navigability. *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.”); *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65 (W.D. Wash 1981), *aff'd*, 717 F.2d

1251 (9th Cir 1983)(declaring navigability on the basis that “Indians navigated the river with their fishing boats and canoes”).

Similarly, the lack of actual use at statehood as a “highway for commerce” does not defeat a finding of navigability. *See, e.g., United States v. Utah*, 283 U.S. at 83. As the United States Supreme Court noted in that case:

Utah ...is not to be denied title to the beds of such of its rivers...either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population....And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.

*Id.* at 83.

Finally, in considering the issue of “commerce,” it is important to distinguish between cases involving navigability under the Commerce Clause and cases involving navigability for title. In Commerce Clause cases, in order to support federal regulatory jurisdiction over power plants the river must by statute be, or have been, “suitable for use for the transportation of persons or property in interstate or foreign commerce.” 16 U.S.C. §796(8)(2006). No such “interstate or foreign commerce” requirement exists when the issue is navigability for title. *Oregon v. Riverfront Protective Ass’n*, 672 F.2d 792, 795 n. 1 (9<sup>th</sup> Cir. 1982). Again, as the Arizona Court of Appeals cautioned in *Defenders*, “when discussing navigability, any reliance on judicial precedent should be predicated on a careful appraisal of the purpose for which the concept of navigability is

invoked.” 199 Ariz. 729-30, 18 P. 3d at 418-19. In sum, when the issue is navigability for title purposes, there is no requirement that the watercourse was actually used for commerce or any commercial activity. It is sufficient to show simply that the watercourse was susceptible to use for travel.

In the case of the Gila River, there is ample evidence of actual navigation both prior to statehood and after, even though when much of that boating occurred, the river was already no longer in its natural condition. The record contains numerous accounts of boating on the Gila River in the 1800s and even into the early 1900s. *See infra* Section I(E)(1). The river was used to haul goods, carry passengers, explore the territory, transport military goods and personnel, fish, trap beaver and otter, hunt and conduct government surveys. Thus, it was not only “susceptible” to being used as a highway for commerce, it was actually used as one. Even today, the river is boated for both recreation and commercial purposes. *Id.* at (2). Moreover, the evidence shows that had the river been in its natural condition at the time of statehood, it would have been even more susceptible to navigation.

## **B. Issue 2: Segmentation.**

The United States Supreme Court held that a river’s navigability must be determined on a segment-by-segment basis. *PPL Montana LLC v. Montana*, 132 S. Ct. 1215 (2012). The Court recognized that “[p]hysical conditions that affect navigability often vary over the length of a river.” *Id.* at 1230. In determining the navigability of the Gila River, this Commission must undertake the same approach. The State has proposed that the Commission consider the river in eight segments and presented evidence of

navigability in that context. However, because the evidence presented demonstrates that each of the eight segments is navigable, the navigability determination of the Gila River does not require segmentation. In its ordinary and natural condition, the entire river was navigable at the time of statehood.

### **III. Conclusion.**

In the present case, there is ample relevant, persuasive evidence demonstrating that the Gila River meets the Arizona and federal standards of navigability. In summary, the evidence demonstrating navigability includes information regarding the substantial flow of the river in its ordinary and natural condition as well as historic and recent incidents of boating. When the objective evidence submitted is evaluated in light of the appropriate standard, it is clear that at the time of statehood the Gila River, in its ordinary and natural condition, was susceptible for use as a highway for commerce, over which trade and travel could be conducted in the customary modes of trade and travel from the New Mexico/Arizona boarder to the confluence with the Colorado River. Therefore, we urge ANSAC to find the river navigable at statehood.

Respectfully submitted this 14th day of November 2014

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