

BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE
NAVIGABILITY OF THE SAN PEDRO
RIVER FROM THE MEXICAN BORDER
TO THE CONFLUENCE WITH THE
GILA RIVER, COCHISE, PIMA AND
PINAL COUNTIES, ARIZONA

No.: 03-004-NAV

**REPORT, FINDINGS AND DETERMINATION
REGARDING THE NAVIGABILITY OF THE
SAN PEDRO RIVER FROM THE MEXICAN BORDER
TO THE CONFLUENCE WITH THE GILA RIVER**

BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE
NAVIGABILITY OF THE SAN PEDRO
RIVER FROM THE MEXICAN BORDER
TO THE CONFLUENCE WITH THE
GILA RIVER, COCHISE, PIMA AND
PINAL COUNTIES, ARIZONA

No.: 03-004-NAV

**REPORT, FINDINGS AND DETERMINATION
REGARDING THE NAVIGABILITY OF THE
SAN PEDRO RIVER FROM THE MEXICAN BORDER
TO THE CONFLUENCE WITH THE GILA RIVER**

Pursuant to Title 37, Chapter 7, Arizona Revised Statutes, the Arizona Navigable Stream Adjudication Commission ("Commission") has undertaken to receive, compile, review and consider relevant historical and scientific data and information, documents and other evidence regarding the issue of whether the San Pedro River from the Mexican border to the confluence with the Gila River was navigable or nonnavigable for title purposes as of February 14, 1912. Proper and legal public notice was given in accordance with law and hearings were held at which all parties were afforded the opportunity to present evidence, as well as their views, on this issue. The Commission having considered all of the historical and scientific data and information, documents and other evidence, including the oral and written presentations made by persons appearing at the public hearings and being fully advised in the premises, hereby submits its report, findings and determination.

I. PROCEDURE

On December 25, 2002, in accordance with A.R.S. § 37-1123B, the Commission gave proper notice by publication of its intent to study the issue of navigability or nonnavigability of the San Pedro River from the Mexican border to the confluence with the Gila River. A copy of the Notice of Intent to Study and Receive, Review and Consider Evidence on the issue of navigability of the San Pedro River in Cochise, Pima and Pinal Counties, Arizona, is attached hereto as Exhibit "A."

After collecting and documenting all reasonably available evidence received pursuant to the Notice of Intent to Study and Receive, Review and Consider Evidence, the Commission scheduled public hearings to receive additional evidence and testimony regarding the navigability or nonnavigability of the San Pedro River. Public notices of these hearings was given by legal advertising on January 28, 2003 as required by law pursuant to A.R.S. § 37-1126 and, in addition, by mail to all those requesting individual notice and by means of the ANSAC website (azstreambeds.com). Hearings were held on March 12, 2003 in the City of Bisbee, the county seat of Cochise County, on January 22, 2004 in Tucson, the county seat of Pima County, and on March 9, 2004 in Florence, the county seat of Pinal County, since the law requires that such hearings be held in each county in which the watercourse being studied is located. Attached hereto as Exhibit "B" are copies of the notices of the public hearings.

All parties were advised that anyone who desired to appear and give testimony at the public hearing could do so and, in making its findings and determination as to navigability and nonnavigability, the Commission would consider all matters presented to it at the hearing, as well as other historical and scientific data, information, documents and evidence that had been submitted to the Commission at any time prior to the date of the hearing, including all data, information, documents and evidence previously submitted to the Commission. Following the public hearings held on

March 12, 2003, January 22, 2004 and March 9, 2004, all parties were advised that they could file post-hearing memoranda pursuant to Commission Rules. Post-hearing memoranda were filed by the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users Association, Phelps Dodge Corporation, and the Center for Law in the Public Interest.

On September 26, 2004, at a public hearing in Phoenix, Arizona, after considering all of the evidence and testimony submitted and the post-hearing memoranda filed with the Commission, and the comments and oral argument presented by the parties, and being fully advised in the premises, the Commission, with a unanimous vote, found and determined in accordance with A.R.S. § 37-1128 that the San Pedro River from the Mexican border to the confluence with the Gila River in Cochise, Pima and Pinal Counties, Arizona, was nonnavigable as of February 14, 1912.

II. THE SAN PEDRO RIVER FROM THE MEXICAN BORDER TO THE CONFLUENCE WITH THE GILA RIVER

The San Pedro River is one of the most studied rivers in the southwest. Its headwaters are in the mountains around Cananea, Sonora, and it flows approximately 123 miles generally north northwest, crossing the border between Mexico and the United States a few miles south of Palominas in Cochise County, Arizona, approximately in the center of the southern boundary of Section 18, Township 24 South, Range 22 East, of the Gila and Salt River Base and Meridian, approximately latitude 39° 20' North and longitude 110° 5' West. The portion of the San Pedro River in Mexico is not considered in this report because it is not located in Arizona.

The San Pedro River flows north from the international boundary through Cochise County, passing through the town of Hereford, the ghost town of Charleston, Fairbank, St. David, Benson, Pomerene and Cascabelle. From there it flows in a northwesterly direction cutting through a corner of Pima County and passing by

Reddington before entering Pinal County where it flows north northwest past the towns of Mammoth and Dudleyville until it flows into the Gila River near Winkleman and Hayden in Pinal County, Arizona, approximately in the center of Section 23, Township 5 South, Range 15 East of the Gila and Salt River Base and Meridian, approximately latitude 32° 54' north, longitude 110° 46' 12" west.

The river drains a watershed in southeastern Arizona of approximately 4,453 square miles. The total drainage area of the San Pedro River is approximately 4,720 square miles, including that portion which lies in Sonora, Mexico. The elevation at the border with Mexico is 4,260 feet above sea level, and the elevation of the river at its confluence with the Gila River is 1,920 feet above sea level. The highest point in elevation in the watershed is 9,466 feet at Miller Peak in the Huachuca Mountains and the lowest point in elevation is 1,920 feet at its confluence with the Gila River. Its tributaries are mostly ephemeral washes with the one exception being Aravaipa Creek, which flows into the San Pedro approximately eleven miles south of its confluence with the Gila River. Climate in the San Pedro River valley varies with elevation. Overall, the valley is semi-arid. The San Pedro River watershed can be broken into two reaches based on environmental, archaeological and geomorphic characteristics, but was studied by the Commission as one entire watercourse. Maps of the San Pedro River watershed lying within the United States are attached hereto as Exhibit "C".

A. The Upper San Pedro River Valley

The upper San Pedro River encompasses the reach from the Mexican border to "the Narrows," a bedrock constriction located between the foothills of the Rincon Mountains to the west and the Little Dragoon Mountains to the east, approximately half way between the towns of Benson and Cascabelle in Cochise County. The upper San Pedro River is perennial from about Hereford to Fairbank and intermittent downstream of Fairbank. The upper San Pedro River has a variable

entrenched braided channel with steep banks that meanders through a mature riparian area. Within the entrenched channel are coarse-grained point bars that deflect stream flow and play an important part in meandering and channel widening and are impediments to any navigation. The bed is coarse sediment consisting of sand pebbles and cobble, with some clay, silt and fine sand. The vegetation is dominated by grass scrub of the Chihuahua Desert with scrub brush and oak woodlands in the higher elevations.

B. The Lower San Pedro River

The lower San Pedro River encompasses the reach from "the Narrows" to the confluence with the Gila River. It, too, has an entrenched channel which makes it hard to approach the water, but the channel tends to widen and is less sinuous than the upper river. The base flow channel is braided and contains coarse grained (pebbles and cobbles), point bars that deflect the water and contribute to its sinuosity and impede navigation. The stream flow in the lower San Pedro River is intermittent, and vegetation is characteristic of the Sonoran Desert--mostly mesquite and tamarisk with some cottonwood and willows.

III. BACKGROUND AND HISTORICAL PERSPECTIVES

A. Public Trust Doctrine and Equal Footing Doctrine

The reason for the legislative mandated study of navigability of watercourses within the state is to determine who holds title to the beds and banks of such rivers and watercourses. Under the Public Trust Doctrine, as developed by common law over many years, the tidal lands and beds of navigable rivers and watercourses, as well as the banks up to the high water mark, are held by the sovereign in a special title for the benefit of all the people. In quoting the U. S. Supreme Court, the Arizona Court of Appeals described the Public Trust Doctrine in its decision in *The Center for Law v. Hassell*, 172 Arizona 356, 837 P.2d 158 (App. 1991), *review denied* (October 6, 1992).

An ancient doctrine of common law restricts the sovereign's ability to dispose of resources held in public trust. This doctrine, integral to watercourse sovereignty, was explained by the Supreme Court in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). A state's title to lands under navigable waters

is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Id. at 452, 13 S.Ct. at 118; see also *Martin v. Waddell*, 41 U.S. (16 Pet.) at 413 (describing watercourse sovereignty as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish").

Id., 172 Ariz. at 364, 837 P.2d at 166.

This doctrine is quite ancient and was first formally codified in the Code of the Roman Emperor Justinian between 529 and 534 A.D.¹ The provisions of this Code, however, were based, often verbatim, upon much earlier institutes and journals of Roman and Greek law. Some historians believe that the doctrine has even earlier progenitors in the rules of travel on rivers and waterways in ancient Egypt and Mesopotamia. This rule evolved through common law in England which established that the king as sovereign owned the beds of commercially navigable waterways in order to protect their accessibility for commerce, fishing and navigation for his subjects. In England the beds of non-navigable waterways where transportation for commerce was not an issue were owned by the adjacent landowners.

This principle was well established by English common law long before the American Revolution and was a part of the law of the American colonies at the time of the Revolution. Following the American Revolution, the rights, duties and responsibilities of the crown passed to the thirteen new independent states, thus

¹ Putting the Public Trust Doctrine to Work, David C. Slade, Esq. (Nov. 1990), pp. xvii and 4.

making them the owners of the beds of commercially navigable streams, lakes and other waterways within their boundaries by virtue of their newly established sovereignty. The ownership of trust lands by the thirteen original states was never ceded to the federal government. However, in exchange for the national government's agreeing to pay the debts of the thirteen original states incurred in financing the Revolutionary War, the states ceded to the national government their undeveloped western lands. In the Northwest Ordinance of 1787, adopted just prior to the ratification of the U.S. Constitution and subsequently re-enacted by Congress on August 7, 1789, it was provided that new states could be carved out of this western territory and allowed to join the Union and that they "shall be admitted . . . on an equal footing with the original states, in all respects whatsoever." (Ordinance of 1787: The Northwest Territorial Government, § 14, Art. V, 1 stat. 50. See also U.S. Constitution, Art. IV, Section 3). This has been interpreted by the courts to mean that on admission to the Union, the sovereign power of ownership of the beds of navigable streams passes from the federal government to the new state. *Pollard's Lessee v. Hagan, et al.*, 44 U.S. (3 How.) 212 (1845), and *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987).

In discussing the Equal Footing Doctrine as it applies to the State's claim to title of beds and banks of navigable streams, the Court of Appeals stated in *Hassell*:

The state's claims originated in a common-law doctrine, dating back at least as far as Magna Charta, vesting title in the sovereign to lands affected by the ebb and flow of tides. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 412-13, 10 L.Ed. 997 (1842). The sovereign did not hold these lands for private usage, but as a "high prerogative trust . . . , a public trust for the benefit of the whole community." *Id.* at 413. In the American Revolution, "when the people . . . took into their own hands the powers of sovereignty, the prerogatives and regalities which before belong either to the crown or the Parliament, became immediately and rightfully vested in the state." *Id.* at 416.

Although watercourse sovereignty ran with the tidewaters in England, an island country, in America the doctrine was extended to navigable inland watercourses as well. See

Barney v. Keokuk, 94 U.S. 324, 24 L.Ed. 224 (1877); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 434, 13 S.Ct. 110, 111, 36 L.Ed. 1018 (1892). Moreover, by the "equal footing" doctrine, announced in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845), the Supreme Court attributed watercourse sovereignty to future, as well as then-existent, states. The Court reasoned that the United States government held lands under territorial navigable waters in trust for future states, which would accede to sovereignty on an "equal footing" with established states upon admission to the Union. *Id.* at 222-23, 229; accord *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Land Department v. O'Toole*, 154 Ariz. 43, 44, 739 P.2d 1360, 1361 (App. 1987).

The Supreme Court has grounded the states' watercourse sovereignty in the Constitution, observing that "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively." *Pollard's Lessee*, 44 U.S. (3 How.) at 230; see also *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 97 S.Ct. 582, 589, 50 L.Ed.2d 550 (1977) (states' "title to lands underlying navigable waters within [their] boundaries is conferred . . . by the [United States] constitution itself").

Id., 172 Ariz. 359-60, 837 P.2d at 161-162.

In the case of Arizona, the "equal footing" doctrine means that if any stream or watercourse within the State of Arizona was navigable on February 14, 1912, the date Arizona was admitted to the Union, the title to its bed is held by the State of Arizona in a special title under the public trust doctrine. If the stream was not navigable on that date, ownership of the streambed remained in such ownership as it was prior to statehood--the United States if federal land, or some private party if it had previously been patented or disposed of by the federal government--and could later be sold or disposed of in the manner of other land since it had not been in a special or trust title under the public trust doctrine. Thus, in order to determine title to the beds of rivers, streams, and other watercourses within the State of Arizona, it must be determined whether or not they were navigable or non-navigable as of the date of statehood.

B. Legal Precedent to Current State Statutes

In 1865, the Arizona Territorial Legislature declared the Colorado River to be “navigable.” See Memorial of the Legislature of Arizona, 38th Cong. 2nd Sess., Mis. Doc. No. 17 (January 25, 1865). The Territorial Legislature, in its first session, expressly held that “the Colorado River is the only navigable water in this Territory” *Id.* (emphasis added). For the next 120 years, the public trust and equal footing doctrines were neither discussed nor asserted in Arizona and until 1985, most Arizona residents assumed that all rivers and watercourses in Arizona, except for the Colorado River, were non-navigable and accordingly there was no problem with the title to the beds and banks of any rivers, streams or other watercourses. However, in 1985 the State Attorney General upset this long-standing assumption and took action to claim title to the bed of the Verde River. *Land Department v. O’Toole*, 154 Ariz. 43, 739 P.2d 1360 (App. 1987). Subsequently, various State officials alleged that the State might hold title to certain lands in or near other watercourses as well. *Id.*, 154 Ariz. at 44, 739 P.2d at 1361. The State’s assertion of these claims had the predictable impact of upsetting long-held assumptions concerning private ownership of lands in or near other watercourses and cast into doubt the title to more than 40,000 separate parcels of property. *Hassell*, 172 Ariz. At 359, 362, 837 P.2d at 161, 164. In Maricopa County alone, the property in question was estimated to be worth “hundreds of millions, if not billions of dollars. . . .” *O’Toole*, 154 Ariz. At 45, 739 P.2d at 1362.

In order to resolve the title questions to the beds of Arizona rivers and streams, the Legislature enacted a law in 1987 (house bill 2017) substantially relinquishing the state's interest in any such lands.² With regard to the Gila, Verde and Salt Rivers, this statute provided that any record title holder of lands in or near the beds of those rivers

² Prior to the enactment of the 1987 statute, the Legislature made an attempt to pass such a law, but the same was vetoed by the Governor. The 1987 enactment was signed by the Governor and became law. 1987 Arizona Session Laws, Chapter 127.

could obtain a quitclaim deed from the State Land Commissioner for all of the interest the state might have in such lands by the payment of a quitclaim fee of \$25.00 per acre. The Arizona Center for Law in the Public Interest filed suit against Milo J. Hassell in his capacity as State Land Commissioner, claiming that the statute was unconstitutional under the public trust doctrine and gift clause of the Arizona Constitution as no determination had been made of what interest the state had in such lands and what was the reasonable value thereof so that it could be determined that the state was getting full value for the interests it was conveying. The Superior Court entered judgment in favor of the defendants and an appeal was taken. In its decision in *Hassell*, the Court of Appeals held that this statute violated the public trust doctrine and the Arizona Constitution and further set forth guidelines under which the state could set up a procedure for determining the navigability of rivers and watercourses in Arizona. In response to this decision, the Legislature established the Arizona Navigable Stream Adjudication Commission and enacted the statutes pertaining to its operation. 1992 Arizona Session Laws, Chapter 297 (1992 Act). The charge given to the Commission by the 1992 Act was to conduct full evidentiary public hearings across the state and to adjudicate the State's claims to ownership of lands in the beds of watercourses. *See generally* former A.R.S. §§ 37-1122 to -1128.

The 1992 Act provided that the Commission would make findings of navigability or non-navigability for each watercourse. *See* former A.R.S. § 37-1128(A). Those findings were based upon the "federal test" of navigability in former A.R.S. § 37-1101(6). The Commission would examine the "public trust values" associated with a particular watercourse only if and when it determined that the watercourse was navigable. *See* former A.R.S. §§ 37-1123(A)(3), 37-1128(A).

The Commission began to take evidence on certain watercourses during the fall of 1993 and spring of 1994. In light of perceived difficulties with the 1992 Act, the

Legislature revisited this issue during the 1994 session and amended the underlying legislation. *See* 1994 Arizona Session Laws, ch. 278 (“1994 Act”). Among other things, the 1994 Act provided that the Commission would make a recommendation to the Legislature, which would then hold additional hearings and make a final determination of navigability by passing a statute with respect to each watercourse. The 1994 Act also established certain presumptions of non-navigability and exclusions of some types of evidence.

Based upon the 1994 Act, the Commission went forth with its job of compiling evidence and making a determination of whether each watercourse in the state was navigable as of February 14, 1912. The Arizona State Land Department issued technical reports on each watercourse, and numerous private parties and public agencies submitted additional evidence in favor of or opposed to navigability for particular watercourses. *See Defenders of Wildlife v. Hull*, 199 Ariz. 411, 416, 18 P.3d 722, 727 (App. 2001). The Commission reviewed the evidence and issued reports on each watercourse, which were transmitted to the Legislature. The Legislature then enacted legislation relating to the navigability of each specific watercourse. The Court of Appeals struck down that legislation in its *Hull* decision, finding that the Legislature had not applied the proper standards of navigability. *Id.* 199 Ariz. at 427-28, 18 P.2d at 738-39.

In 2001, the Legislature again amended the underlying statute in another attempt to comply with the court’s pronouncements in *Hassell* and *Hull*. *See* 2001 Arizona Session Laws, ch. 166, § 1. The 2001 legislation now governs the Commission in making its findings with respect to rivers, streams and watercourses.

IV. ISSUES PRESENTED

The applicable Arizona statutes state that the Commission has jurisdiction to determine which, if any, Arizona watercourses were “navigable” on February 14, 1912

and for any watercourses determined to be navigable, to identify the public trust values. A.R.S. § 37-1123. A.R.S. § 37-1123A provides as follows:

A. The commission shall receive, review and consider all relevant historical and other evidence presented to the commission by the state land department and by other persons regarding the navigability or nonnavigability of watercourses in this state as of February 14, 1912, together with associated public trust values, except for evidence with respect to the Colorado river, and, after public hearings conducted pursuant to section 37-1126:

1. Based only on evidence of navigability or nonnavigability, determine what watercourses were not navigable as of February 14, 1912.

2. Based only on evidence of navigability or nonnavigability, determine whether watercourses were navigable as of February 14, 1912.

3. In a separate, subsequent proceeding pursuant to section 37-1128, subsection B, consider evidence of public trust values and then identify and make a public report of any public trust values that are now associated with the navigable watercourses.

A.R.S. §§ 37-1128A and B provide as follows:

A. After the commission completes the public hearing with respect to a watercourse, the commission shall again review all available evidence and render its determination as to whether the particular watercourse was navigable as of February 14, 1912. If the preponderance of the evidence establishes that the watercourse was navigable, the commission shall issue its determination confirming the watercourse was navigable. If the preponderance of the evidence fails to establish that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was nonnavigable.

B. With respect to those watercourses that the commission determines were navigable, the commission shall, in a separate, subsequent proceeding, identify and make a public report of any public trust values associated with the navigable watercourse.

Thus, in compliance with the statutes, the Commission is required to collect evidence, hold hearings, and determine which watercourses in existence on February 14, 1912, were navigable or nonnavigable. This report pertains to the

approximate 120-mile reach of the San Pedro River from the point where it crosses the Mexico – Arizona border a few miles south of Palominas, Cochise County, flowing in a northerly direction through Cochise, Pima and Pinal Counties until it joins with and flows into the Gila River a little to the west of Winkleman in Pinal County. In the hearings to which this report pertains, the Commission considered all of the available historical and scientific data and information, documents and other evidence relating to the issue of navigability of the San Pedro River, as well as the small and minor watercourses in Cochise, Pima and Pinal Counties, Arizona as of February 14, 1912.

Public Trust Values were not considered in these hearings but will be considered in separate, subsequent proceedings if required. A.R.S. §§ 37-1123A3 and 37-1128B. In discussing the use of an administrative body such as the Commission on issues of navigability and public trust values, the Arizona Court of Appeals in its decision in *Hassell* found that State must undertake a “particularized assessment” of its “public trust” claims but expressly recognized that such assessment need not take place in a “full blown judicial” proceeding.

We do not suggest that a full-blown judicial determination of historical navigability and present value must precede the relinquishment of any state claims to a particular parcel of riverbed land. An administrative process might reasonably permit the systematic investigation and evaluation of each of the state’s claims. Under the present act, however, we cannot find that the gift clause requirement of equitable and reasonable consideration has been met.

Id., 172 Ariz. at 370, 837 P.2d at 172.

The 2001 *Hull* court, although finding certain defects in specific aspects of the statute then applicable, expressly recognized that a determination of “navigability” was essential to the State having any “public trust” ownership claims to lands in the bed of a particular watercourse:

The concept of navigability is “essentially intertwined” with public trust discussions and “[t]he navigability question often resolves whether any public trust interest exists in the

resource at all.” Tracy Dickman Zobenica, *The Public Trust Doctrine in Arizona’s Streambeds*, 38 Ariz. L. Rev. 1053, 1058 (1996). In practical terms, this means that **before a state has a recognized public trust interest in its watercourse bedlands, it first must be determined whether the land was acquired through the equal footing doctrine. However, for bedlands to pass to a state on equal footing grounds, the watercourse overlying the land must have been “navigable” on the day that the state entered the union.**

199 Ariz. at 418, 18 P.3d at 729 (also citing *O’Toole*, 154 Ariz. at 45, 739 P.2d at 1362) (emphasis added).

The Legislature and the Court of Appeals in *Hull* have recognized that, unless the watercourse was “navigable” at statehood, the State has no “public trust” ownership claim to lands along that watercourse. Using the language of *Hassell*, if the watercourse was not “navigable,” the “validity of the equal footing claims that [the State] relinquishes” is zero. *Hassell*, 172 Ariz. at 371, 837 P.2d at 173. Thus, if there is no claim to relinquish, there is no reason to waste public resources determining (1) the value of any lands the State **might** own if it had a claim to ownership, (2) “equitable and reasonable considerations” relating to claims it might relinquish without compromising the “public trust,” or (3) any conditions the State might want to impose on transfers of its ownership interest. *See id.*

V. BURDEN OF PROOF

The Commission in making its findings and determinations utilized the standard of the preponderance of the evidence as the burden of proof as to whether or not a stream was navigable or nonnavigable. A.R.S. § 37-1128A provides as follows:

After the commission completes the public hearing with respect to a watercourse, the commission shall again review all available evidence and render its determination as to whether the particular watercourse was navigable as of February 14, 1912. If the preponderance of the evidence establishes that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was navigable. If the preponderance of the evidence fails to establish that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was nonnavigable.

This statute is consistent with the decision of the Arizona courts that have considered the matter. *Hull*, 199 Ariz. at 420, 18 P.3d at 731 (“... a ‘preponderance’ of the evidence appears to be the standard used by the courts. See, e.g., *North Dakota v. United States*, 972 F.2d 235-38 (8th Cir. 1992)”); *Hassell*, 172 Ariz. at 363, n. 10, 837 P.2d at 165, n. 10 (The question of whether a watercourse is navigable is one of fact. The burden of proof rests on the party asserting navigability . . .”); *O’Toole*, 154 Ariz. at 46, n. 2, 739 P.2d at 1363, n. 2.

The most commonly used legal dictionary contains the following definition of “preponderance of the evidence”:

Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proven is more probable than not. *Braud v. Kinchen*, La. App., 310 So.2d 657, 659. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. The word “preponderance” means something more than “weight”; it denotes a superiority of weight, or outweighing. The words are not synonymous, but substantially different. There is generally a “weight” of evidence on each side in case of contested facts. But juries cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side.

Black’s Law Dictionary 1064 (5th ed. 1979).

The “preponderance of the evidence” standard is sometimes referred to as requiring “fifty percent plus one” in favor of the party with the burden of proof. One could image a set of scales. If the evidence on each side weighs exactly evenly, the party without the burden of proof must prevail. In order for the party with the burden to prevail, sufficient evidence must exist in order to tip the scales (even slightly) in its favor. See generally *United States v. Fatico*, 458 U.S. 388, 403-06 (E.D. N.Y. 1978), *aff’d* 603

F.2d 1053 (2nd Cir. 1979), *cert.denied* 444 U.S. 1073 (1980); *United States v. Schipani*, 289 F.Supp. 43, 56 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969).³

VI. STANDARD FOR DETERMINING NAVIGABILITY

The statutes defines a navigable watercourse as follows:

"Navigable" or "navigable watercourse" means 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.

A.R.S. § 37-1101(5).

The foregoing statutory definition is taken almost verbatim from the U.S. Supreme Court decision in *The Daniel Ball*, 77 U.S. (10 Wall) 557, 19 L.Ed. 999 (1870), which is considered by most authorities as the best statement of navigability for title purposes. In its decision, the Supreme Court stated:

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.

77 U.S. at 563.

³ In a recent Memorandum Decision of the Arizona Court of Appeals, the Defenders of Wildlife and others through their representative, Arizona Center for Law in the Public Interest, attacked the constitutionality of the burden of proof for navigability determination by the Commission specified in A.R.S. § 37-1128(A). In that case, the Defenders claimed that the burden of proof specified in the statute conflicts with federal law and should be declared invalid because it is contrary to a presumption favoring sovereign ownership of bedlands. In discussing and rejecting *Defenders* position the Court stated: “. . . In support of this argument, Defenders cite to our decision in *Defenders*, see 199 Ariz. At 426, ¶ 54, 18 P.3d at 737, and to *United States v. Oregon*, 295 U.S. 1, 14 (1935). But neither of these decisions held that the burden of proof in a navigability determination must be placed on the party opposing navigability. Moreover, this court has twice stated that the burden of proof rests on the party asserting navigability. *Hassell*, 172 Ariz. At 363 n. 10, 837 P.2d at 165 n. 10; *O’Toole*, 154 Ariz. At 46 n. 2, 739 P.2d at 1363 n. 2. We have also recognized that a ‘preponderance’ of the evidence appears to be the standard used by the courts” as the burden of proof. *Defenders*, 199 Ariz. At 420, ¶ 23, 18 P.3d at 731 (citing *North Dakota v. United States*, 972 F.2d 235, 237-38 (8th Cir. 1992)). Defenders have not cited any persuasive authority suggesting that these provisions in § 37-1128(A) are unconstitutional or contrary to federal law. We agree with this court’s prior statements and conclude that neither placing the burden of proof on the proponents of navigability nor specifying the burden as a preponderance of the evidence violates the State or Federal Constitutions or conflicts with federal law.” *State of Arizona v. Honorable Edward O. Burke* 1 CA-SA 02-0268 and 1 CA-SA 02-0269 (Consolidated); Arizona Court of Appeals, Division One, (Memorandum Decision filed December 23, 2004).

In a later opinion in *U.S. v. Holt Bank*, 270 U.S. 46 (1926), the Supreme Court stated:

[Waters] which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their 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; and further that navigability does not depend on the particular mode in which such use is or may be had--whether by steamboats, sailing vessels or flatboats--nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the [water] in its natural and ordinary condition affords a channel for useful commerce.

270 U.S. at 55-56.

The Commission also considered the following definitions contained in A.R.S. § 37-1101 to assist it in determining whether the San Pedro River was navigable at statehood.

11. "Watercourse" means the main body or a portion or reach of any lake, river, creek, stream, wash, arroyo, channel or other body of water. Watercourse does not include a man-made water conveyance system described in paragraph 4 of this section, except to the extent that the system encompasses lands that were part of a natural watercourse as of February 14, 1912.

5. "Navigable" or "navigable watercourse" means 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.

4. "Man-made water conveyance system" means:

(a) An irrigation or drainage canal, lateral canal, ditch or flume.

(b) A municipal, industrial, domestic, irrigation or drainage water system, including dams, reservoirs and diversion facilities.

(c) A channel or dike that is designed, dedicated and constructed solely for flood control purposes.

(d) A hydropower inlet and discharge facility.

(e) A canal, lateral canal, ditch or channel for transporting central Arizona project water.

3. "Highway for commerce" means a corridor or conduit within which the exchange of goods, commodities or property or the transportation of persons may be conducted.

2. "Bed" means the land lying between the ordinary high watermarks of a watercourse.

6. "Ordinary high watermark" means the line on the banks of a watercourse established by fluctuations of water and indicated by physical characteristics, such as a clear natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation or the presence of litter and debris, or by other appropriate means that consider the characteristics of the surrounding areas. Ordinary high watermark does not mean the line reached by unusual floods.

8. "Public trust land" means the portion of the bed of a watercourse that is located in this state and that is determined to have been a navigable watercourse as of February 14, 1912. Public trust land does not include land held by this state pursuant to any other trust.

Thus, the State of Arizona in its current statutes follows the Federal test for determining navigability.

VII. EVIDENCE RECEIVED AND CONSIDERED BY THE COMMISSION

Pursuant to A.R.S. § 37-1123, and other provisions of Title 37, Chapter 7, Arizona Revised Statutes, the Commission received, compiled, and reviewed evidence and records regarding the navigability and nonnavigability of the San Pedro River from the Mexican border to the confluence with the Gila River. Evidence consisting of studies, written documents, newspapers and other historical accounts, pictures, testimony and recordings, were submitted. There were over 27 separate documentary filings, the most comprehensive of which was a detailed study completed by CH2MHILL through a contract with the Arizona State Land Department in February 1997 and revised in September 1997 and again in January 2004 by JE Fuller/Hydrology and

Geomorphology, Inc. The Arizona Center for Law in the Public Interest also submitted a comprehensive brief. The list of evidence and records, together with a summarization is attached as Exhibit "D". Public hearings were held on March 12, 2003 in Bisbee, Cochise County, Arizona, on January 22, 2004 in Tucson, Pima County, Arizona, and on March 9, 2004 in Florence, Pinal County, Arizona, in Pinal County, for the public to present testimony and evidence on the issue of navigability of the San Pedro River. A number of individuals appeared at the hearings in Bisbee, Tucson and Florence and gave testimony. A public hearing was also held on September 16, 2004, in Phoenix, Arizona, to consider the evidence submitted and the post-hearing memoranda filed. The Commission found and determined at that hearing that the San Pedro River was not navigable on the day Arizona became a state. The minutes of these hearings are attached hereto as Exhibit "E."

A. Prehistoric Conditions on San Pedro River Watershed

The archaeological evidence indicates the presence of paleoindians in the San Pedro River valley as early as 11,500 B.C. At that time the weather was much more humid due to the end of the last ice age, and southeastern Arizona resembled a savanna in which megafauna such as mammoth, giant bison, and giant sloth lived and were hunted by paleoindians as food.⁴ One of the most interesting archaeological sites in North America was excavated at the Lehner Ranch southwest of Hereford, Arizona, where the remains of a mammoth with clovis projectile points embedded in the spinal column were found. The conclusion is that the paleoindians had killed the mammoth and were using the site for butchering and processing of the large animal. Other paleoindian sites have been found at Murray Springs and elsewhere along the upper San Pedro River. The San Pedro River valley was probably occupied by various paleoindian and archaic populations during the entire pre- Columbian period.

⁴ The Paleoindian period is generally accepted as being from 13500 B.C. to 8000 B.C. It was followed by the archaic period, also known in Southern Arizona as the Cochise period, from 8000 B.C. to 100 B.C.

Following the paleoindian megafauna hunters, the Cochise Culture evolved, which was a hunting and gathering culture that looked to smaller animals after the large animals died out. As time progressed, the plant gathering activities gained more emphasis and permanent living sites were developed, which contained storage pits, pithouses and later surface pueblos. Following the archaic period which ended around 100 B.C. to 100 A.D., the people who occupied the San Pedro valley were classified as a poorly understood mix of Hohokam and San Simon Mogollon cultures. Generally speaking, the Mogollon influence prevailed south of Benson and the Hohokam influence prevailed to the north of Benson, although there was some overlap.

In the lower San Pedro River valley where the Hohokam influence prevailed, there is evidence of irrigation systems with diversion dams built on the river to divert water to canals on the floodplain. The period of A.D. 850 to 1000 was a time of population expansion, especially in the lower San Pedro River valley, with a number of sites having 25 to 30 houses, ball courts and settlements dispersed in the standard Hohokam rancheria pattern. By A.D. 1200 there was a marked population decline and many sites were abandoned. However, in 1250 A.D., a new influence described by archaeologists as the Salado culture was in evidence in this area and was accompanied by an increase in population. The archaeologists cannot agree whether the Salado culture is a late branch of the Mogollon or a later branch of the Hohokam culture. Other archaeologists claim that there was a continuous infusion of immigration from mesoamerica, probably from population centers in northern Mexico.

There is no evidence of prehistoric boating on the San Pedro River or of river conditions that would support navigation or use of the San Pedro River as a waterway. The paleoindians, archaic culture, Cochise and other prehistoric cultures were attracted to the valley because of the availability of water, at least at some times during the year. This water made possible some river-irrigated farming which supplemented the dry

farming techniques and the hunter-gathering activities of these early indigenous inhabitants.

B. Historic Development of San Pedro River Watershed

Historical documentation of the San Pedro valley begins with the Spanish expeditions from Mexico, perhaps as early as Marco de Niza's journey through the region in 1539. Although the exact route is not agreed upon by all of the experts, most think that in 1540 the Coronado Expedition crossed from Mexico into what is now Arizona near the San Pedro River and followed it downstream to a point near Cascabelle where he turned northeast, passed between the Winchester and Galliuro Mountains into the Sulphur Spring and Aravaipa valleys, and continued north across the Gila River through the White Mountains to the Zuni pueblos.

Father Eusebio Kino, a Jesuit missionary, traveled in the area between 1691 and 1702 with a view toward extending his ministry to the Sobaipuris (upland Pimas) who were living there at the time. These Indians were engaged in irrigation and dry farming. Other missionaries followed in his steps but no permanent missions were established. Because of attacks by the Apache Indians who came into the area during the early 1700's, a presidio called Santa Cruz de Terrenate was established north of the present town of Fairbank. It lasted only a short time and the garrison was evacuated to Tucson because of the danger of Apache Indian attack. In the early 1800's, settlers from the Tucson and San Cruz valley established some rancherias in the San Pedro valley and conducted farming and ranching enterprises.

Three major Mexican land grants were established in the 1800's: San Ignacio de Babocamari, lying east and west from modern day Elgin to the San Pedro River, established in 1827; San Rafael de Valles, running north and south along the riverbed from Hereford to a few miles south of Charleston, established in 1828; and San Juan de las Boquillas de Nogales, running north and south and lying in the riverbed from

Charleston north to about five miles south of St. David, established in 1833. James Ohio Paddy led a company of trappers from the Gila River up the San Pedro in 1824 and '25 and again in 1827 and '28, trapping beaver along the way. In 1846, during the Mexican-American War, the Mormon Battalion on its trek from Santa Fe to California, passed over and along the San Pedro River and found it to be marshy, with plenty of grass and water. This war ended in 1848 with the Treaty of Guadalupe Hidalgo whereby Mexico ceded to the United States all of its territory north of the Gila River.

In 1853, the Gadsden Purchase took place whereby the United States acquired from Mexico by purchase the land south of the Gila River to the present-day border of Mexico, which encompasses all of the watershed of the San Pedro River with which we are concerned. After the Gadsden Purchase, military surveyors crossed the area for purposes of surveying the international boundary and for a railroad route to the west coast. In 1857 the Butterfield Stage Line was established from San Antonio to California. It crossed the San Pedro River at Benson where there was a stage station. Following the American Civil War, the Army established camps and forts in southern Arizona. Camp Grant was located at the junction of the Aravaipa Creek and the San Pedro River but was later moved to the base of the Pinaleno Mountains in the Sulphur Springs valley. Ft. Huachuca was established to the west of the San Pedro River. These military establishments, together with various mines that were established, resulted in additional population in the San Pedro valley and additional roads. A large copper mine was established at Bisbee in 1877, and silver was discovered in Tombstone in 1878. The town of Charleston was established in 1880 alongside the river, and it is reported that a dam was constructed creating a pond, and the water was used for milling ore from Tombstone. The Mammoth and San Manuel mines began copper production in 1881. The Southern Pacific and El Paso and Southwest Railroads were built in southern Arizona in the early 1880's and crossed the San Pedro River at Benson. A number of

spur lines were built from these railroads to the various mines in the last decade of the 1800's.

**C. Evidence of Conditions in the San Pedro River Valley
During the Last Half of the 1800's up to Statehood in 1912**

The early visitors to the San Pedro River valley during the 1850's and thereafter had many descriptions of the river. Some described it as very marshy and others described it, particularly the upper reach, as a perennial flowing stream from which some water could be taken for irrigation. There was also enough water for beaver ponds allowing the trapping of beavers. It is clear that there was a fairly good flow of water in the river at this time, but there are no reports of enough water to conduct boating or any other type of navigation on the river. The early explorers also reported that there were catchable fish in the river. Southern Arizona was one of the principal routes of the 49ers on their way to the gold fields in California, and they found the San Pedro River a welcome source of water on their travel across southern Arizona. None of the early military parties or other exploring parties felt there was sufficient water in the river to navigate or travel by boat.

Clearly the primary use of the water in the San Pedro River historically was for irrigation agriculture, ranching, and milling of ore. By the 1890's over 3000 acres were irrigated from ten canal systems. This irrigation plus the milling of ore diverted most all of the flow from the river. While fish were caught occasionally, there are no reports of any fishing industry on the San Pedro. The primary means of transportation along the San Pedro River has always been by horseback, wagon and later by rail and automobile as the road system improved. Records indicate that a larger section of the upper San Pedro River was intermittent after 1890. This change in stream flow may be related to the large Pitaycachi earthquake that shook the region in 1887 and modified spring activity in the San Pedro valley. A severe drought occurred in this area in the late 1880's and 1890's, which coincided with large floods that occurred on the San Pedro

between 1886 and 1896 that resulted in expanding the entrenched reaches upstream and expanding channel width via bank cutting and collapse. Beaver dams had checked the flow of water and prevented channel cutting but, with increased Anglo settlement, beaver dams were destroyed and swamps drained. The series of large floods, the 1887 earthquake, along with the loss of beaver dams and less vegetation on the hillside, resulted in channel cutting such that by the time of statehood the riverbed itself was found in a channel with steep banks making it difficult to approach and cross the river. Thus many of the historical descriptions of the stream prior to 1880 do not apply to the river as it existed at the time of statehood. As of the date of statehood, portions of the San Pedro River might be perennial, but the major portion would be considered intermittent and the river channel had become arroyo-like. Portions of the river may have been dry due to irrigation and mining diversions, but changes in historical flow rates also contributed to this condition.

The San Pedro River valley served as an overland trade route during historical times, and there is no documented record of trade or travel on the river during the period leading up to statehood. Several of the diversion dams and later bridges on the San Pedro, as well as the point bars in the channel itself, would have been impediments to navigation. Clearly the most serious impediment to navigation was the shallow water or dry riverbed. As pointed out above, transportation in the area near the San Pedro River was primarily accomplished by methods other than boat. At the time of statehood, these included horseback, wagons, pack mule, trains, and later automobile as the road system improved. The San Pedro River is not listed in the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 through 467(e)).

D. Evidence of Conditions After Statehood

Most of the dramatic changes in the channel conditions of the San Pedro River occurred in the period prior to statehood. Since 1912, the hydrology and other

conditions on the river have not changed radically, although average annual stream flow rates have progressively declined since statehood due to increased diversion of water for irrigation and mining purposes. There has also been a good deal of pumping of groundwater which has lowered the groundwater table. The first systematic aerial photography of the lower San Pedro valley was performed by the Soil Conservation Service in 1934, revealing a shallow, braided channel within an incised flood plain. The upper San Pedro River was almost entirely entrenched by 1920. The flood of 1924 was the largest gauged flood on the upper San Pedro, resulting in tremendous bank erosion and channel widening throughout the San Pedro River system.

The Central Arizona Paddlers Club, an organization of recreational boaters conducted a survey of their members and, with 20% of the membership responding, found the general opinion was that the San Pedro has been boated in recent years, especially from Palominas to Hereford Road. Most of this boating was during above-average water and was downstream. All such boating was for recreational purposes only and did not establish any commercial or trade use on the river. It was brought to the Commission's attention that the San Pedro Riparian National Area along the San Pedro River is one of the premier riparian areas and has public trust value. The Commission's charge, however, is only to consider public trust values with respect to watercourses or portions or reaches of a watercourse that the Commission finds navigable. A.R.S. § 37-1128 H. Accordingly, while appreciating the public trust value of this riparian area, the Commission does not find it persuasive as to the issue of navigability.

E. Title to Lands Covered by Mexican Land Grants

In the course of a hearing on the Santa Cruz River, the owners of Rio Rico Properties, Inc., by and through their attorneys, filed a memorandum with the Commission claiming that the Commission and the State of Arizona had no jurisdiction

to consider the navigability of that portion of the Santa Cruz River encompassed within their property. Rio Rico Properties, Inc. is the successor in interest to the heirs of Luis Maria Cabeza de Baca, who acquired a land grant from the Mexican government in 1821 known as the "Las Vegas Grandes" near Las Vegas, New Mexico. Since this grant was in conflict with another later grant, Congress passed an Act in June of 1860 (12 Stat. 71, c. 167) allowing the heirs of Cabeza de Baca to select an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. In 1863, as one of the five parcels, the Baca heirs selected the tract known as Baca Float No. 3, which is the area encompassed by the property now owned by Rio Rico Properties, Inc.⁵

Although not specifically raised at the hearings involving the San Pedro River, since there are at least three Mexican Land Grants in the San Pedro River valley, two of which (San Ignacio de Boquillas and San Rafael del Valle), the river flowed through, it is appropriate to deal with this issue in this report.

The owners and holders of Baca Float No. 3 claimed to hold their title by Act of Congress from the original Las Vegas land grant which was made in 1821 prior to the treaties.

The position of the holders of what was formerly Mexican Land Grant land is that the original Mexican Land Grant was made prior to the Treaty of Guadalupe Hidalgo (9 U.S. Stat. 922, Feb. 2, 1848) ending the war between the United States and Mexico and also before the treaty formalizing the Gadsden Purchase (10 U.S. Stat. 1031, Dec. 30, 1853) whereby the United States bought from Mexico the area south of the Gila River to the present international border. Both of these treaties provide that the United States would honor property rights and titles in land held by Mexican citizens prior to the date of the treaties. Because there were no title restrictions under

⁵ In American land law, particularly in the western states, a Float is a certificate authorizing the entry by the holder of a certain quantity of land not yet specifically selected or located. Black's Law Dictionary, 5th ed. 1979.

the Mexican Land Grants and Mexican law apparently did not recognize the Public Trust Doctrine as we know it (whereby the title to land under tidal waters and navigable rivers and the banks thereof was held by the sovereign for the benefit of all the people), it is their position that their title to the Santa Cruz River where it flowed through Baca Float No. 3 should be absolute and not subject to the Public Trust Doctrine. In support of their position, they cite City and County of San Pedro v. Le Roy, 138 U.S. 656, 11 S.Ct. 364, 34 L.Ed. 1096 (1891); Knight v. United Land Association, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974 (1891); Shaw v. Kellogg, 170 U.S. 312, 18 S.Ct. 632, 42 L.Ed. 1050 (1898); United States v. Coronado Beach Co., 255 U.S. 472, 41 S.Ct. 378, 65 L.Ed. 735 (1921).

Based on the foregoing authority, it appears that this position has considerable merit. However, in view of our finding in this report, we need not make a specific finding as to jurisdiction.

VIII. FINDINGS AND DETERMINATION

The Commission conducted a particularized assessment of equal footing claims the State of Arizona might have to the bed and banks, up to the high-water mark, of the San Pedro River, and based on all of the historical and scientific data and information, documents, and other evidence produced, finds that the San Pedro River was not used or 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 as of February 14, 1912.

The Commission also finds that the San Pedro River, while considered to be a perennial stream, has an almost insignificant flow during the dry seasons of the year. As of February 14, 1912 and currently, it flows/flowed primarily in direct response to precipitation and snow melt.

The Commission also finds that there is no evidence of any historical or modern commercial boating having occurred on the San Pedro River.

The Commission also finds that there is no evidence of any commercial fishing having occurred on the San Pedro River.

The Commission further finds that all notices of these hearings and proceedings were properly and timely given.

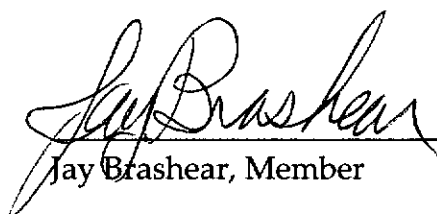
In view of the foregoing, the Commission, pursuant to A.R.S. § 37-1128A, finds and determines that the San Pedro River in Cochise, Pima and Pinal Counties, Arizona, was not navigable as of February 14, 1912.

DATED this 18 day of October, 2006.




Earl Eisenhower, Chair

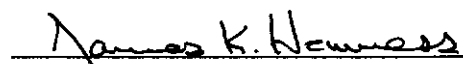
Dolly Echeverria, Vice Chair



Jay Brashear, Member

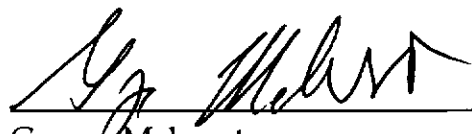


Cecil Miller, Member

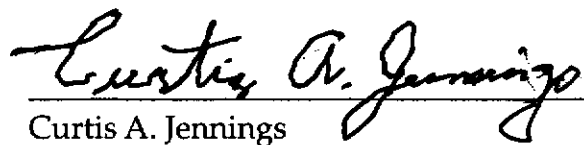


James Henness, Member

STAFF MEMBERS:



George Mehnert
Executive Director



Curtis A. Jennings
Legal Counsel to the Commission

EXHIBIT A

Arizona Range News

PUBLISHER'S AFFIDAVIT

STATE OF ARIZONA }
COUNTY OF COCHISE } SS.

P. A. Tenney

being first duly sworn, deposes and says that he/she is the

Agent to the Publisher

of the ARIZONA RANGE NEWS, a newspaper of general

circulation published in Willcox, Cochise County, State of Arizona; That the

Legal Notice: Notice is hereby given that

the Arizona Navigable Stream Adjudication

Commission (ANSAC) is planning to hold a

watercourse navigability hearing regarding...

a copy of which is hereto attached, was published in said

newspaper for 3 consecutive week(s), the first

publication being in its issue dated the 25th day of

December 20 02 , and the last

publication being in its issue dated the 08th day of

January 20 03 .

P.A. Tenney

Subscribed and sworn to before me 08th day of

January , 2003.

Nancy Johnston

My Commission expires July 25 , 2003

LEGAL NOTICE
STATEMENT OF INTENT
State of Arizona
Navigable Stream Adjudication Commission
Pursuant to A.R.S. §37-1101, et seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold a watercourse navigability hearing regarding the San Pedro River in Cochise County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-1123 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or non-navigability of the San Pedro River in Cochise County, Arizona. The hearing will be held on January 8, 2003 at 10:00 AM at the ANSAC office located at 1700 West Washington, Room 404, Phoenix, AZ 85007. The telephone number is (602) 542-9214. The web site address is http://www.azstreamad.com. The e-mail address is streamad@nps.fws.gov. Individuals with disabilities who need a reasonable accommodation to communicate evidence to ANSAC, or who require this information in an alternate format, may contact the ANSAC office at (602) 542-9214 to make their needs known. Publish: Dec. 25, 2002 and Jan. 1, 8, 2003
Arizona Range News



A-1

STATEMENT OF INTENT

State of Arizona
Navigable Stream
Adjudication Commission
Pursuant to A.R.S. §37-1101, et. seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold a watercourse navigability hearing regarding the San Pedro River and the Santa Cruz River in Pima County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-1123 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or nonnavigability of the San Pedro River and the Santa Cruz River in Pima County. Interested parties are requested to file all documentary and other physical evidence they propose to submit to ANSAC by January 12, 2004. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC offices during regular office hours. Pursuant to A.R.S. §37-1101, et. seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold a watercourse navigability hearing regarding all of the small and minor watercourses in Pima County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-1123 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or nonnavigability of all small and minor watercourses in Pima County. Interested parties are requested to file all documentary evidence they propose to submit to ANSAC by January 12, 2004. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC offices during regular office hours.

The list of small and minor watercourses includes:
Agua Caliente Wash, Agua Verde Creek, Aguajita Wash, Aguirre Wash, Alambre Wash, Alamito Wash, Alamo Wash 1 - Pima, Alder Creek - Pima, Alder Wash - Pima, All Chuk Wash, All Molina Wash, Altar Wash, Amigo Wash, Anegan Wash, Anegan



STATE OF ARIZONA
COUNTY OF PIMA

Janice Anderson, being first duly sworn,
upon oath deposes and says:

That he/she is the agent of TUCSON NEWSPAPERS, publishers of
THE ARIZONA DAILY STAR / TUCSON CITIZEN,
newspapers of general circulation in the County of Pima, State of Arizona,
published at Tucson, Arizona, and that the statement hereto attached is a true representation
of the advertisement published in the said paper(s) 3 times on the
following days:

- Nov 14 2003 in class 918 T-Tucson Classifieds - Daily
- Nov 21 2003 in class 918 T-Tucson Classifieds - Daily
- Nov 28 2003 in class 918 T-Tucson Classifieds - Daily

Janice Anderson
Agent

Subscribed and sworn to before me this 28th day of November, A.D. 2003



VALERIE S. GONZALES
Notary Public - Arizona
Pima County
Expires 09/30/06

My Commission Expires _____
Notary Public Valerie S. Gonzales

M332223603601

A-2

GOVERNMENT BHM SET 1ea
Table, 7 chairs \$500, Cabinet
net & chair, \$250, \$29-4650
COMPUTER DESK, Cherry
matching 2 drawer file cab
\$250, \$29-299-30
COMPUTER & 2 END Tables
\$250, \$29-1438
CHERRY BIRMINGHAM SET, 44"
Round w/feet & drawers
\$2250, Call 232-9329
BLACK LACQUER CHAIRS
Tuff CA King bed with 2 nit
since 1980, ABC 624-4199
5 year warr, new to
ric, used prices, recycl
rice \$125 (K/L) 940-3058
5000 brand most sell sock
bedroom master sleep B
matt, Solid wood, 60x90
& boxspr \$425 (S20) 406-438
\$1475, Bd 54H Perlmatt mt
on 1000, \$1000, \$1000
REAUTHOR, MASTIC MASSK
\$50 * Call 540-8022 *
Bed unit, drawer & shelv
\$2500, 900, Hartmoch, ch
REAUTHOR, QUEEN SIZE W
(S20) 790-2355 or 248-838
REAUTHOR, German Custom
Bed unit, \$2000 ORC
Country club, 321-1990
with 5 miles of 6th St &
& installation in your home
fessional removal, transport
on side, \$1250, includes pro
style, book shelf & drawers, 54
bed, superior quality, sepa
BARELY USED QUEEN wall
Cash n Carry 237-7264
W/assess, \$222 of
Dining table w/4
chairs, \$4950
A STEAL!!!
Dining table & 6 uphol, chair
warranty, \$1500 ORC, 795-223
Lafex mattress, 10yr 100
model 9, elec massage, 100
Address: 1000 E. Electroper
3712 This will go quickly!
sideboard, \$1100, Call 54
ing table, 6 chairs, and lat
A REAUTHOR, Danish teak d
(520) 444-6392
Burl desk, \$650, 90c Art
& access, \$35-5500

Affidavit of Publication

STATE OF ARIZONA

COUNTY OF PINAL

} ss.

STATEMENT OF INTENT

State of Arizona
Arizona Navigable Stream Adjudication Commission

Pursuant to A.R.S. §37-1101, et seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold watercourse navigability hearings regarding the Gila River, the San Pedro River, and the Santa Cruz River in Pinal County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-1123 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or non-navigability of the Gila River, the San Pedro River and the Santa Cruz River in Pinal County. Interested parties are requested to file all documentary and other physical evidence they propose to submit to ANSAC by February 26, 2004. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection by appointment at the ANSAC offices during regular office hours.

Pursuant to A.R.S. §37-1101, et seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold a watercourse navigability hearing regarding all of the small and minor watercourses in Pinal County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-1123 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or non-navigability of all small and minor watercourses in Pinal County. Interested parties are requested to file all documentary evidence they propose to submit to ANSAC by February 26, 2004. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC offices during regular office hours.

The list of small and minor watercours-

Pinal, Cronley Wash, Cruz Wash, Deer Creek, Pinal, Deer Creek 1, Graham/Pinal, Dodge Tank Wash, Dodge Wash, Dodson Wash, Pinal, Donnelly Wash, Drew Wash, Dripping Spring, Dry Camp Canyon, Eagle Wash, Eskiminzin Wash, Faraway Wash, First Water Creek, Flag Wash, Garter Creek, Greene Wash, Guid Wash, Gust James Wash, Hackberry Creek, Pinal, Hackberry Wash, Pinal, Hagen Canyon Stream, Haunted Canyon Creek, Hells Half Acre, Holy Joe Canyon, Horse Camp Canyon, Horse Foot Wash, Indian Bend Wash, Pinal, Indian Well Wash, Irene Wash, James Wash, Jim Thomas Wash, Kaka Wash, Kohak Wash, La Berge Creek, Lammon Creek, Little Ash Creek, Pinal, Little Gust James, Lyons Fork, Mammoth Wash, Margaret Wash, Meas Wash, Pinal, Milk Ranch Creek, Milky Wash, Mineral Creek, Pinal, Mulberry Wash, Pinal, North Branch San, North Fork Clark, Oak Creek, Pinal, Paisano Canyon Spring, Palmer Wash, Parsons Canyon Spring, Peppersauce Wash, Peters Wash, Piper Springs Wash, Polecat Wash, Potters Wash, Putman Wash, Pinal, Queen Creek, Rainbows End Wash, Rancho Pio Creek, Ray Spring Wash, Redrock Canyon, Reevs Creek, Reymart Wash, Ripsey Wash, Roach Wash, Rock Creek 1, Pinal, Rock Creek 2, Pinal, Romero Wash, Santa Cruz Wash, Santa Rosa Wash, Scanlon Wash, Silver King Wash, Silver Reef Wash, Shelter Wash, Smith Wash, Pinal, South Fork Clark, Spencer Spring Creek, Steamboat Wash, Pinal, Swingle Wash, Sycamore Canyon, Tar Wash, Tar Momoli Wash, Threeway Wash, Tillmans Wash, Tipponary Wash, Tom Mix Wash, Tortilla Creek, Tucson Wash, Twentynine Wash, Twentyseven Wash, Vokor Wash, Virgus Canyon, St. Weekes Wash, West Canyon, T Stream, West Fork Pinto, Whitewash, Canyon, Whitlow Canyon, Zapata Wash, and any other named or unnamed small

DONOVAN M. KRAMER, SR. first being duly sworn deposes and says: That he is a native born citizen of the United States of America, over 21 years of age, that he is publisher of the Casa Grande Dispatch, a daily newspaper published at Casa Grande, Pinal County, Arizona, Monday through Saturday of each week; that a notice, a full, true and complete printed copy of which is hereunto attached, was printed in the regular edition of said newspaper, and not in a supplement thereto, for THREE consecutive issues the first publication thereof having been on the 15TH

day of JANUARY A.D., 2004

Second publication JANUARY 22, 2004

Third publication JANUARY 29, 2004

Fourth publication _____

Fifth publication _____

Sixth publication _____

CASA GRANDE DISPATCH

By Don - Kramer
DONOVAN M. KRAMER SR., Publisher

Sworn to before me this 31st

day of January A.D., 2004
Debbie L. Mumme

Notary Public in and for the County of Pinal, State of Arizona

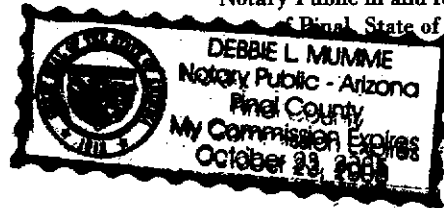


EXHIBIT B

THE ARIZONA REPUBLIC

NOTICE OF PUBLIC HEARING
Hearing Date: March 12, 2003
State of Arizona
Navigable Stream Adjudication Commission
Pursuant to A.R.S. § 47-1126
(A) notice is hereby given that the Navigable Stream Adjudication Commission will hold a public hearing to receive physical evidence and testimony relating to the navigability or nonnavigability of the San Pedro River in Cochise County. The hearing that was originally scheduled in Cochise County for February 12, 2003, has been changed to March 12, 2003. The hearing will begin at 9:00 a.m. at the Cochise County Courthouse, Superior Court Room, Building B, 1415 West Melody Lane, Bisbee, Arizona 85601. This is presently the only hearing scheduled for the San Pedro River in Cochise County. Interested parties must submit evidence to the commission office prior to the hearing. During the public hearing, the Commission will receive additional evidence including testimony. The Commission will conduct its hearings informally, without adherence to judicial rules of procedure or evidence. Evidence submitted in advance of the hearing will be available for public inspection during regular commission office hours from 8:00 a.m. to 5:00 p.m., Monday thru Friday. The public hearing is scheduled for March 12, 2003 at 9:00 a.m. at the Cochise County Courthouse, Superior Court Room, Building B, 1415 West Melody Lane, Bisbee, Arizona 85601. Please call first to reserve evidence at (520) 737-3333. Individuals who need accommodations for communication or sign language evidence to the commission, or who require this information in an alternative format, may contact the commission office at (520) 737-3333 to make their needs known.
George Mehnert, Executive Director, January 22, 2003
©2003 January 22, 2003

STATE OF ARIZONA }
COUNTY OF MARICOPA } SS.

TOM BIANCO, being first duly sworn, upon oath deposes and says: That he is the legal advertising manager of the Arizona Business Gazette, a newspaper of general circulation in the county of Maricopa, State of Arizona, published at Phoenix, Arizona, by Phoenix Newspapers Inc., which also publishes The Arizona Republic, and that the copy hereto attached is a true copy of the advertisement published in the said paper on the dates as indicated.

The Arizona Republic

1/28/2003

[Handwritten Signature]

Sworn to before me this
29TH day of
January A.D. 2003

B-1



[Handwritten Signature: Marilyn Greenwood]
Notary Public



NOTICE OF PUBLIC HEARING

State of Arizona
Navigation Stream
Administration Commission
Pursuant to A.R.S. § 37-1126
(A), notice is hereby given
that the Navigable Stream
Administration Commission
will hold public hearings to
receive physical evidence
and testimony relating to the
navigability or nonnavigability
of all watercourses in
Pima County. The hearings
will be held in Tucson,
Arizona on January 22, 2004.
Hearings will begin at 10:00
A.M. in an order established
by the chair at the Arizona
State Office Building, 400 W.
Congress St., Room 222, Tucson,
Arizona 85701. These
are presently the only hearings
scheduled for the watercourses
in Pima County.
The list of watercourses in Pima
County includes the San Pedro
River, the Santa Cruz River,
and the following small
and minor watercourses:
Agua Caliente Wash,
Agua Verde Creek, Aquilla
Wash, Aguirre Wash,
Alambrera Wash, Alamo
Wash, Alamo Wash 2, Pima,
Alder Creek - Pima, Alister
Wash - Pima, All Chuk Wash,
All Molina Wash, Alvar Wash,
Amigo Wash, Aragon Wash,
Anegas Wash, Apache Canyon
Stream, Arcadia Wash,
Ariaca Creek, Arroyo Wash,
Arroyo Chico, Arroyo del
Compa, Arroyo del Sasah, Ash
Creek 1, Pima/Cochise, Ash
Creek 2, Pima, Ash Wash, Asolito
Wash, Bacoquivari Wash, Bailey
Wash, Bannes Wash,
Batamote Wash 1, Batamote
Wash 2, Beas Creek 1, Cochise,
Big Wash, Big Wash 2, Pima,
Big Wash - Pima/Pinal, Big
Canyon Wash, Blanco Wash, Bolas,
Blancas Wash, Bollen
Wash, Box Canyon Wash - Pima,
Brawley Wash, Brown
Wash 1, Pima, Bushman Canyon,
Burre Creek - Pima, Cañada
del Oro, Cana Wash,
Cana Wash, Canina Wash,
Cedar Creek 2, Cerro Prieto
Wash, Chamurrado Wash,
Cheroni Wash, Chico Shuane
Arroyo, Chiltanines Wash,
Chimney Rock Creek, Chukit
Kuk Wash, Chutun, Yaya
Wash, Cienega Creek 1,
Coclo Wash, Campbahl
Wash, Contreras Wash - Pima,
Cortina Wash, Coyote
Wash - Pima, Cuzco Wash,
Cuerda de Lemas, Curand
Wash, Daniels Arroyo, Deep
Arroyo, Deep Creek 1, Pima

STATE OF ARIZONA
COUNTY OF PIMA

Janice Anderson, being first duly sworn,
upon oath deposes and says:

That he/she is the agent of TUCSON NEWSPAPERS, publishers of
THE ARIZONA DAILY STAR / TUCSON CITIZEN,
newspapers of general circulation in the County of Pima, State of Arizona,
published at Tucson, Arizona, and that the statement hereto attached is a true representation
of the advertisement published in the said paper(s) 1 times on the
following days:

Dec 8 2003 in class 918 T-Tucson Classifieds - Daily

Janice Anderson
Agent

Subscribed and sworn to before me this 8th day of December, A.D. 2003



VALERIE S. GONZALES
Notary Public - Arizona
Pima County
Expires 09/30/06

My Commission Expires

Notary Public Valerie S. Gonzales

M342230705401

B-2

signed to the case by parties
at least three judicial days
in advance of a scheduled
court proceeding, address
the name and address
of the attorney is
James F. Wiles
Meyers, Tabor & Meyers, P.C.
2415 E. Camelback Road
Suite 900
Phoenix, Arizona 85016
SIGNED AND SEALED
DATE JUN 20 2003
PATRICIA A. NOLAND
Clerk of Court
BY MARY E. HAYS - 16
Deputy Clerk
Office of Service
(X) Private Process Service
P.O. Box 1000
Tucson, Arizona 85701
The Arizona Daily Star
and 29, 2003
published December 8, 2003
16
15
14
13
12
11
10
9
8
7
6
5
4
3
2
1

Navigable Stream Adjudication Commission
 Pursuant to A.R.S. § 37-1126 (A), notice is hereby given that the Navigable Stream Adjudication Commission will hold public hearings to receive physical evidence and testimony relating to the navigability or nonnavigability of all watercourses in Pinal County. The hearings will be held in Pinal County on March 9, 2004 at 10:00 a.m. in an order established by the chair in the Pinal County Supervisors' Conference Room, 31 N. Pinal Street, Building A, Florence, Arizona 85232. These are presently the only hearings scheduled for the watercourses in Pinal County. The list of watercourses in Pinal County include the Gila River, San Pedro River, and Santa Cruz River, and the following small and minor watercourses:

Alder Wash - Pinal, Antelope Wash - Pinal, Aravaipa Creek - Pinal, Arnett Creek, Ash Creek - Pinal, Bachman Wash, Batamote Wash, Bear Springs Canyon, Bear Thicket Creek, Big Bertha Wash, Big O Wash, Big Wash, Pima/Pinal, Bitter Well Wash, Bloodsucker Wash, Bogart Wash, Booger Canyon, St. Bowl Creek, Box O Wash, Bulldog Wash, Buzzard Canyon Stream, Camp Grant Wash, Campaign Creek, Canada del Oro, Cabbage Wash, Carpas Wash, Catalina Wash, Cave Canyon Stream, Chalk Creek, China Wash, Chimoon Wash, Circle S Wash, Clark Wash, Comstock Wash, Connelly Wash, Copper Creek, Copper Creek - Pinal, Copper Hill Wash, Cottonwood Wash 1 - Pinal, Cottonwood Wash 2 - Pinal, Cronley Wash, Cruz Wash, Deer Creek - Pinal, Deer Creek 1 - Graham/Pinal, Dodge Tank Wash, Dodge Wash, Dodson Wash - Pinal, Donnelly Wash, Drew Wash, Dripping Spring, Dry Camp Canyon, Eagle Wash, Eskimirzin Wash, Faraway Wash, First Water Creek, Flag Wash, Garden Creek, Greene Wash, Gullid Wash, Gust James Wash, Hackberry Creek - Pinal, Hackberry Wash - Pinal, Hagen Canyon Stream, Haunted Canyon Creek, Hells Half Acre, Holy Joe Canyon, Horse Camp Canyon, Horse Foot Wash, Indian Bend Wash, Indian Well Wash, Irene Wash, James Wash, Jim Thomas Wash, Kaka Wash, Kohatk Wash, La Barge Creek, Lemmon Creek, Little Ash Creek - Pinal, Little Gust, James, Lyons Fork, Mammoth Wash, Margaret Wash, Mesa Wash - Pinal, Milk Ranch Creek, Milky Wash, Mineral Creek - Pinal, Mulberry Wash - Pinal, North Branch San, North Fork Clark, Oak Creek - Pinal, Paisano Canyon Spring, Palmer Wash, Parsons Canyon - Spring, Peppersauce Wash, Peters Wash, Piper Springs Wash, Polecat Wash, Potters Wash, Putman Wash - Pinal, Queen Creek, Rainbows End Wash, Rancho Rio Creek, Ray Spring Wash, Redrock Canyon, Reeves Creek, Reymert Wash, Ripsey Wash, Roach Wash, Rock Creek 1 - Pinal, Rock Creek 2 - Pinal, Romero Wash, Santa Cruz Wash, Santa Rosa Wash, Scamper Wash, Silver King Wash, Silver Reef Wash, Smelter Wash, Smith Wash - Pinal, South Fork Clark, Spences Spring Creek, Steamboat Wash - Pinal, Swingle Wash, Sycamore Canyon, Tar Wash, Tat Momoli Wash, Threeway Wash, Tillmans Wash, Tipperary Wash, Tom Mix Wash, Tortilla Creek, Tucson Wash, Twentynine Wash, Twentysix Wash, Velot Wash, Virgus Canyon, Weekes Wash, Well Canyon Stream, West Fork Pinto, Whitlow Canyon, Whitlow Canyon, Zapata Wash, and any other named or unnamed small and minor watercourses in Pinal County. Interested parties may submit evidence to the commission office prior to the hearing. During the public hearing, the commission will receive additional evidence including testimony. The commission will conduct its hearings informally without adherence to judicial rules of procedure or evidence. Evidence submitted in advance of the hearing will be available for public inspection during regular commission office hours of 8:00 a.m. to 5:00 p.m., Monday thru Friday, except on holidays. The commission office is located at 1000 N. Washington St., Phoenix, Arizona 85003. Upon request, a hearing may be held at a location other than the commission office. For more information, call 602-292-2922 or visit the commission website at www.navigablestream.com.

THE ARIZONA REPUBLIC

STATE OF ARIZONA }
 COUNTY OF MARICOPA } SS.

Gloria Saldivar, being first duly sworn, upon oath deposes and says: That she is a legal advertising representative of the Arizona Business Gazette, a newspaper of general circulation in the county of Maricopa, State of Arizona, published at Phoenix, Arizona, by Phoenix Newspapers Inc., which also publishes The Arizona Republic, and that the copy hereto attached is a true copy of the advertisement published in the said paper on the dates as indicated.

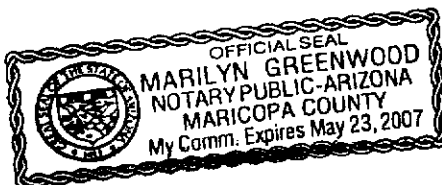
The Arizona Republic

February 6, 2004

Gloria Saldivar

Sworn to before me this
 6TH day of
 February A.D. 2004

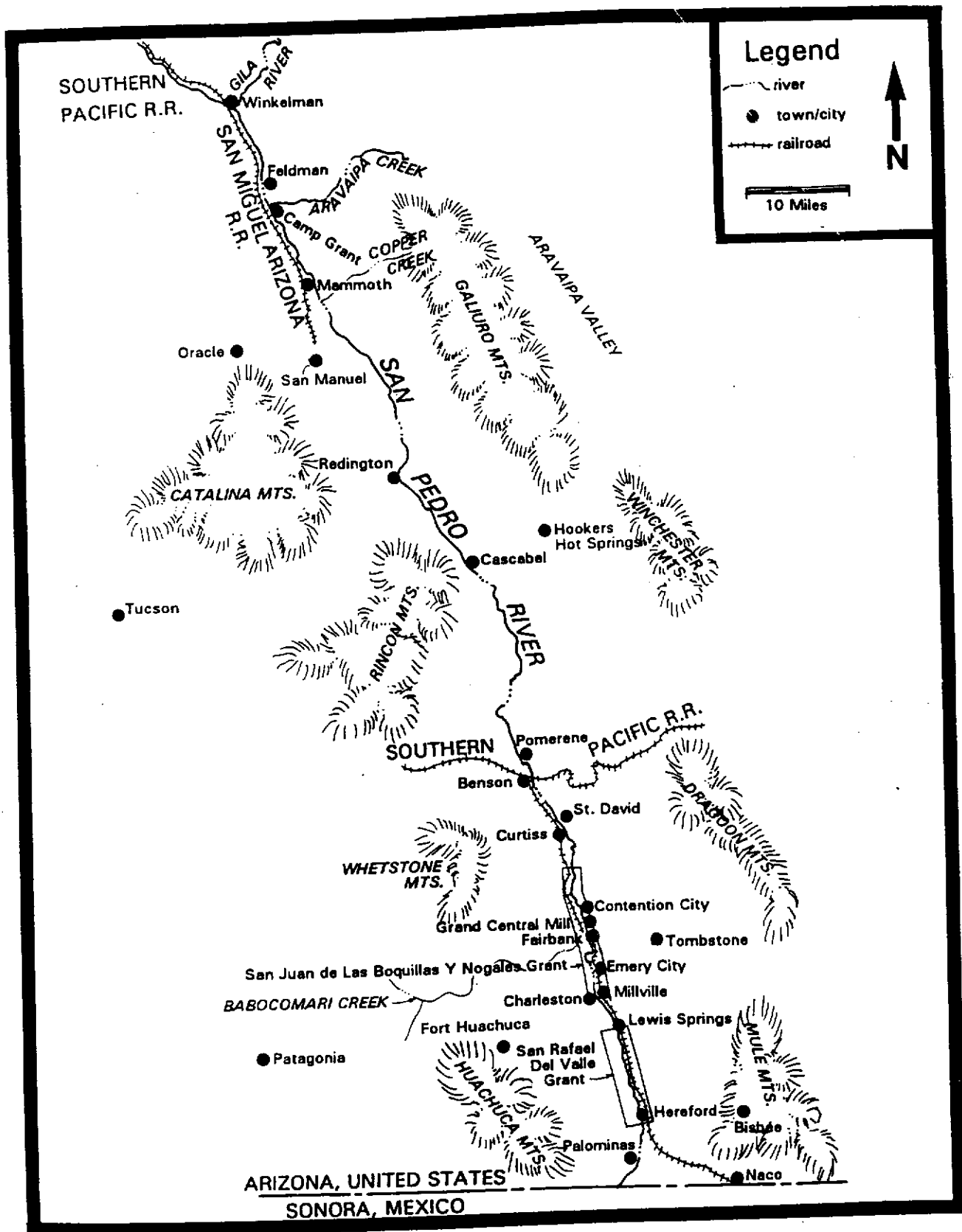
B-3



Marilyn Greenwood

 Notary Public

EXHIBIT C



San Pedro River: Sites of Historical Significance

Figure 3-1

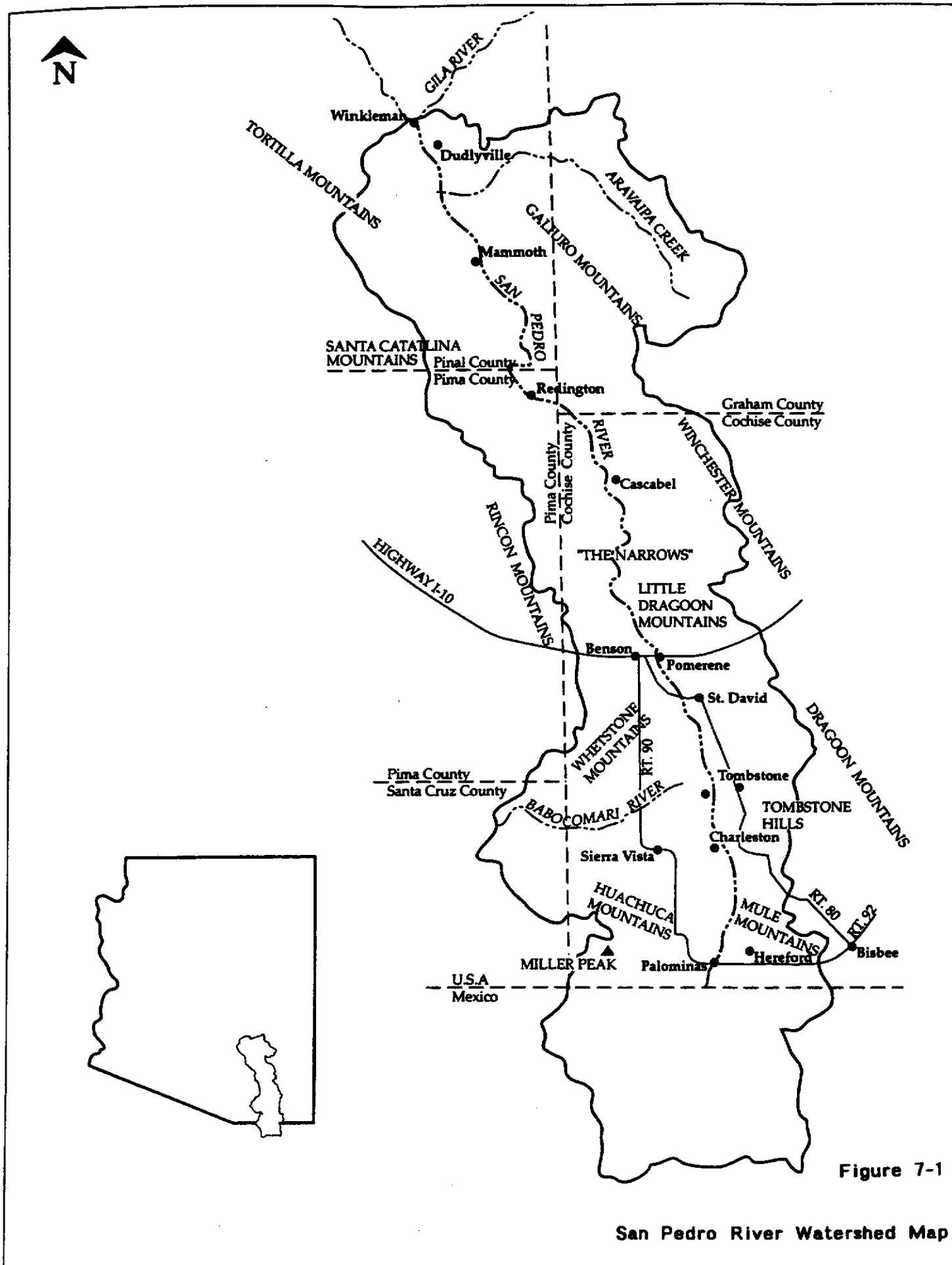


Figure 7-1

San Pedro River Watershed Map

EXHIBIT D

Evidence Log

Hearing No. 03-004-NAV

Page No.

1

Arizona Navigable Stream Adjudication Commission

San Pedro River

March 12, 2003 Cochise County, January 22, 2004 Pima County,

March 9, 2004 Pinal County

Item Number	Received Date	Source to ANSAC	Description	Entry By
1	6/9/00 approx	Evidence on hand at AN-SAC.	Draft Final Report Small & Minor Watercourses Analysis for Cochise County, Arizona dated June 9, 2000.	George Mehnert
2	8/1/00 approx	Evidence on hand at AN-SAC.	Final Report Small & Minor Watercourses Analysis for Cochise County, Arizona dated August 1, 2000.	George Mehnert
3	8/17/00 approx	Evidence on hand at AN-SAC.	Computer printout pages of PowerPoint slide presentation by Stantec and Jon Fuller, titled AN-SAC Public Hearing Cochise County.	George Mehnert
4	9/?/98	Evidence on hand at AN-SAC	Small and Minor Watercourse Criteria Final Report.	George Mehnert
5	9/?/99	Evidence on hand at AN-SAC	Final Report, 3 County Pilot Study.	George Mehnert
6	Received on various dates.	Evidence on hand at AN-SAC previously submitted for watercourse hearings in Santa Cruz County and included in Commission report to legislature, 1 volume.	Volume I of I. 1. Letter from David Baron dated February 18, 1997. 2. 1992 Boating Survey by Central Paddlers Club. 3. Letter from James Braselton dated September 19, 1997. 4. Letter and attachments from Virgil Mercer, Winkelman Natural Resource Conservation District, dated July 17, 1996. 5. Explorations and Surveys from the Mississippi River to the Pacific	George Mehnert

Evidence Log Continuation Page

Hearing No. 03-004-NAV

Page No.

2

Arizona Navigable Stream Adjudication Commission

San Pedro River

Item Number	Received Date	Source	Description	Entry By
			Ocean, and July 15, 1987 affidavit by James Slingsluff. 6. October 6, 1996 letter from Timothy Flood. 7. December 16, 1997 and December 19, 1996 letter from V. Ottozawa-Chatupron. 8. December 26, 1997 letter from Al Anderson, Arizona Audobon Council. 9 Handwritten letter received February 9, 1998 from A. Ralph Curtis. 10. February 22, 1998 comments and exhibits from Richard Lee Duncan. 11. Draft Navigability Study of the San Pedro River by SWCA Environmental Consultants received February 12, 1997. 12. Navigability study of the San Pedro River by Jon Fuller and SWCA Environmental Consultants received September 4, 1997.	
7	1/22/03	Frank C. Brophy Jr	Ltr Re: Babacomari River (Creek), Tributary of the San Pedro River.	
8	1/28/03	Wayne Klump	Letter Notice of Objection	George Mehnert
9	3/10/03	Vera Kornylak	Article, Water Follies by Robert Glennon	George Mehnert
10	3/10/03	Vera Kornylak	Arizona Sonora Desert Museum Newsletter, Summer 1988, Sonorensis, Riparian Habitats.	George Mehnert
11	3/10/03	Vera Kornylak	Arizona State Parks Rivers and Streams Guide, 1989.	George Mehnert
12	3/10/03	Vera Kornylak	Desert Plants Special Issue by Dean Hendrickson and W. L. Minckley.	George Mehnert
13	3/12/03	Amy Langenfeld	Memorandum submitted for hearing March 12, 2003	George Mehnert
14	3/12/03	Cheryl Doyle	Letter from State Land Department and Report Update by Jon Fuller	George Mehnert
15	3/13/03	Robin D. Silver	Letter and Notice to Sue by the Center for Biological Diversity.	George Mehnert
16	1/2004	SLD, Jon Fuller	Update Report for the San Pedro by JE Fuller Hydrology, etc.	George Mehnert

EXHIBIT E



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

1700 West Washington, Room 404, Phoenix, Arizona 85007
Phone (602) 542-9214 FAX (602) 542-9220
E-mail: streams@mindspring.com Web Page: <http://www.azstreambeds.com>

GEORGE MEHNERT
Executive Director

Meeting Minutes
Bisbee, Cochise County
Hearing Regarding the San Pedro River
in Cochise County
March 12, 2003

COMMISSION MEMBERS PRESENT

Jay Brashear, Dolly Echeverria, Earl Eisenhower, James Hennes, and Cecil Miller

COMMISSION MEMBERS ABSENT

None.

STAFF PRESENT

Curtis Jennings, George Mehnert, Tom Vogt.

1. CALL TO ORDER

Chair Eisenhower called the meeting to order at approximately 9:12 a.m.

2. ROLL CALL

All Commissioners present.

Following roll call Chair Eisenhower explained there will be two hearings today; first he will convene the small and minor watercourses hearing for Cochise County, recess that, and convene the major watercourse the San Pedro River hearing, hold that hearing to its conclusion, and then return and complete the small and minor watercourses hearing.

Chairman Eisenhower convened the small and minor watercourses hearing, recessed it, and convened the San Pedro River major watercourse hearing.

3. SANTA PEDRO RIVER WATERCOURSE HEARING (discussion and action).

The following people appeared and spoke, or gave testimony, or asked questions: District 25 State Representative Jennifer Burns, V. Ottozawa-Chatupron, Mary Smallhouse, Susan Krentz, Amy Langenfeld, Jeanne Schwennsen, Daniel Moore, Vera Kornylak, Mark McGinnis, Wayne Klump

CALL FOR PUBLIC COMMENT (comment sheets).

(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

Chairman Eisenhower asked if there were any other questions or comments from anyone. There were none.

E-1

Motion: To adjourn the hearing regarding the San Pedro River.

Motion by: Jay Brashear

Second by: Jim Henness

Vote: All aye

Chair returned to this agenda at approximately 11:00 a.m. regarding items 4 and 5:

4. DETERMINATION REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE MOHAVE COUNTY SMALL AND MINOR WATERCOURSES. (discussion and action).

A. Each party will be given ten minutes to present his or her position. No parties spoke.

Motion: That the small and minor watercourses in Mohave County are not navigable or susceptible to navigability.

Motion by: Cecil Miller

Second by: Dolly Echeverria

Vote: All aye

5. DETERMINATION REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE LA PAZ COUNTY SMALL AND MINOR WATERCOURSES. (discussion and action).

A. Each party will be given ten minutes to present his or her position. No parties spoke.

Motion: That the small and minor watercourses in La Paz County are not navigable.

Motion by: Jay Brashear

Second by: Jim Henness

Vote: All aye

Chairman Eisenhower asked if there were any other questions or comments from anyone. The Commission Attorney discussed the next hearing; the Lower Salt, and the Attorney encouraged the State Land Department to update the report regarding the Lower Salt. The Chair indicated the he and the director will discuss this with the Land Department. Mr. Henness discussed the Lower Salt hearing date as April 7, 2003.

Motion: To adjourn session on San Pedro River.

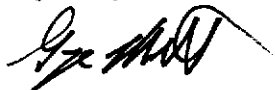
Motion by: Jim Henness

Second by: Cecil Miller

Vote: All aye

Meeting ended at 11:14 a.m.

Respectfully submitted,



George Mehnert, Director

Date: March 14, 2003



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

1700 West Washington, Room 304, Phoenix, Arizona 85007

Phone (602) 542-9214 FAX (602) 542-9220

E-mail: streams@mindspring.com Web Page: <http://www.azstreambeds.com>

GEORGE MEHNERT
Executive Director

Meeting Minutes
Tucson, Pima County, Arizona
January 22, 2004

COMMISSION MEMBERS PRESENT

Jay Brashear, Earl Eisenhower, James Henness, Cecil Miller.

COMMISSION MEMBERS ABSENT

Dolly Echeverria

STAFF PRESENT

George Mehnert, Dir., Curtis Jennings, Legal Counsel.

1. CALL TO ORDER.

Chairman Eisenhower called the meeting to order at approximately 10:16 a.m.

2. ROLL CALL.

See above.

3. APPROVAL OF MINUTES.

A. Minutes of December 16, 2003.

Motion: To approve minutes.

Motion by: Cecil Miller. Second by: Jim Henness. Vote: All aye.

4. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SANTA CRUZ RIVER IN PIMA COUNTY, Cause Number 03-002-NAV.

The following people appeared and gave testimony, other information, or asked questions on January 22, 2004: Cheryl Doyle, Jon Fuller.

HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SAN PEDRO RIVER IN PIMA COUNTY, Cause Number 03-004-NAV.

The following people appeared and gave testimony, other information, or asked questions on January 22, 2004: Cheryl Doyle, Jon Fuller.

5. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN PIMA COUNTY, Cause Number 04-003-NAV.

The following people appeared and gave testimony, other information, or asked questions on January 22, 2004: Cheryl Doyle, Jon Fuller.

6. CALL FOR PUBLIC COMMENT (comment sheets).

(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in

advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

There was no public comment.

7. FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE HEARINGS AND OTHER MEETINGS.

The Chair asked the director to go over the current calendar for scheduled meetings. Mr. Mehnert said there was a meeting scheduled for 8:00 a.m. on January 27, 2004 in Phoenix at which time the Commission may consider and may vote on the navigability of the Graham County small and minor watercourses, the Greenlee County small and minor watercourses, the San Francisco River, the Blue River, and the Lower Salt River.

Mr. Mehnert also said there is a hearing scheduled for March 9, 2004 in Florence, Arizona relating to the Pinal County small and minor watercourses, the Santa Cruz River, the San Pedro River, and the Gila River.

8. ADJOURNMENT.

Motion: To adjourn.

Motion by: Cecil Miller. Second by: Jim Hennes. Vote: All aye.

Meeting adjourned at approximately 11:00 a.m.

Respectfully submitted,



George Mehnert, Director, January 23, 2004
Navigable Stream Adjudication Commission



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

1700 West Washington, Room 304, Phoenix, Arizona 85007

Phone (602) 542-9214 FAX (602) 542-9220

JANET NAPOLITANO
Governor

E-mail: streams@mindspring.com Web Page: <http://www.azstreambeds.com>

GEORGE MEHNERT
Executive Director

MEETING MINUTES
Florence, Pinal County, March 9, 2004

COMMISSION MEMBERS PRESENT

Jay Brashear, Dolly Echeverria, Earl Eisenhower, Jim Henness, and Cecil Miller.

COMMISSION MEMBERS ABSENT

None.

STAFF PRESENT

George Mehnert, and Commission Legal Counsel Curtis Jennings.

1. **CALL TO ORDER.**

Chair Eisenhower called the meeting to order at approximately 10:00 a.m.

2. **ROLL CALL.**

See above.

3. **APPROVAL OF MINUTES** (discussion and action).

A. January 27, 2004 Maricopa County.

Motion by: Jim Henness Second by: Dolly Echeverria

Motion: To approve the minutes of January 27, 2004. Vote: All aye.

4. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE GILA RIVER 03-007-NAV.**

Testimony or other information was presented by Cheryl Doyle representing the State Land Department and by Alan Gookin, Engineer and John Heston, Attorney, representing the Gila River Indian Community. Physical documentary evidence was submitted by Mr. Gookin. (Please refer to agenda item number 8 regarding the testimony of Mr. Gookin and Mr. Heston.)

5. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SAN PEDRO RIVER 03-004-NAV.**

Testimony or other information was presented by Cheryl Doyle representing the State Land Department who stated her information would be the same as she had stated regarding item number 4 regarding the navigability or non-navigability of the Gila River.

At the end of the hearing regarding this matter Chairman Eisenhower announced that the taking of testimony and other evidence was closed.

6. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SANTA CRUZ RIVER 03-002-NAV.**

Testimony or other information was presented by Cheryl Doyle representing the State Land Department who stated her information would be the same as she had stated regarding item number 4 regarding the navigability or non-navigability of the Gila River.

At the end of the hearing regarding this matter Chairman Eisenhower announced that the taking of testimony and other evidence was closed.

7. **HEARING REGARDING THE SMALL AND MINOR WATERCOURSES IN PINAL COUNTY 04-007-NAV.**

Testimony or other information was presented by Cheryl Doyle representing the State Land Department who stated her information would be the same as she had stated regarding item number 4 regarding the navigability or non-navigability of the Gila River, and in addition discussed the small and minor watercourse report. In response to a question by Curtis Jennings Cheryl Doyle stated that the climatic and weather conditions at the time of the study were essentially the same as in 1912.

At the end of the hearing regarding this matter Chairman Eisenhower announced that the taking of testimony and other evidence was closed.

8. **CALL FOR PUBLIC COMMENT** (comment sheets).

E-3

(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

Alan Gookin asked permission to speak regarding agenda item number 4, the Gila River. Mr. Gookin indicated he had arrived late and had missed the presentation regarding the Gila River. He asked the Commission's indulgence and that they return to the Gila River matter so he could provide testimony and other evidence. The chair agreed and Mr. Gookin presented testimony and documentary physical evidence.

The Chairman restated that this is the final opportunity to submit testimony or other evidence regarding the navigability or non-navigability of the San Pedro and Santa Cruz Rivers.

9. FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE HEARINGS AND OTHER MEETINGS.


10. ADJOURNMENT.

Motion by: Cecil Miller Second by: Jim Henness

Motion: To adjourn. Vote: All aye.

Meeting adjourned at approximately 10:55 a.m.

Respectfully submitted,



George Mehnert, Director
March 10, 2004



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

1700 West Washington, Room 304, Phoenix, Arizona 85007

Phone (602) 542-9214 FAX (602) 542-9220

JANET NAPOLITANO
Governor

E-mail: streams@mindspring.com Web Page: <http://www.azstreambeds.com>

GEORGE MEHNERT
Executive Director

MEETING MINUTES
Phoenix, Arizona September 16, 2004

COMMISSION MEMBERS PRESENT

Jay Brashear, Dolly Echeverria, Earl Eisenhower, and Cecil Miller.

COMMISSION MEMBERS ABSENT

Jim Henness.

STAFF PRESENT

George Mehnert, and Commission Legal Counsel Curtis Jennings.

1. CALL TO ORDER.

Chair Eisenhower called the meeting to order at approximately 10:00 a.m.

2. ROLL CALL.

See above.

3. APPROVAL OF MINUTES (discussion and action).

A. June 28, 2004, Maricopa County.

Motion by: Dolly Echeverria Second by: Cecil Miller

Motion: To approve the minutes of June 28, 2004. Vote: All aye.

4. DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SANTA CRUZ RIVER.

Motion by: Jay Brashear Second by: Cecil Miller

Motion: Non Navigable Vote: All aye.

Jay Brashear: Not only was there not a preponderance of evidence of navigability, there was no evidence at all, to speak of, presented regarding navigability.

5. DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SAN PEDRO RIVER.

Motion by: Jay Brashear Second by: Dolly Echeverria

Motion: Non Navigable Vote: All aye.

Jay Brashear: I tried to pay particular attention to this river because of its many attributes and I gave it a really hard look. There may be many things that would cause us to maintain the San Pedro River just as it is but that is not within our charter regarding determination of navigability. It was never a highway of commerce.

Cecil Miller: Indicated he was fascinated by the history of the San Pedro but that does not make it navigable.

6. DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN PIMA COUNTY.

Motion by: Cecil Miller Second by: Dolly Echeverria

Motion: Non Navigable. Vote: All aye.

7. DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN PINAL COUNTY.

Motion by: Dolly Echeverria Second by: Cecil Miller

Motion: Non Navigable. Vote: All aye.

Jay Brashear: Something I have noticed regarding small and minor watercourses is that to call these small and minor watercourses, watercourses at all, is a stretch and perhaps the flood control people use a better term when they call them floodways.

8. DISCUSSION AND ACTION REGARDING EXECUTIVE DIRECTOR SALARY.

Discussion without action. Matter tabled to future meeting.

9. DISCUSSION AND ACTION REGARDING ATTORNEY HOURLY RATE.

Discussion without action. Matter tabled to future meeting.

10. CALL FOR PUBLIC COMMENT (comment sheets).

(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not

request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

11. FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE HEARINGS AND OTHER MEETINGS.

Curtis Jennings: Indicated that he hopes all of the work and hearings can be done for all of the small and minor watercourses and all of the major rivers regarding which there is no controversy concerning navigability. He further indicated that there may be additional time necessary to complete the Commission's work regarding such watercourses as the Salt River, the Verde River the Gila River, and the San Pedro River because of its uniqueness.

Laurie Hachtel representing the State Land Department expressed concerns regarding the Land Department's ability to provide updates for 22 hearings scheduled during the year on the current ANSAC timeline. She said the Land Department will continue to do the best it can regarding updating reports and providing expert testimony. The Chair suggested that Ms. Hachtel let us know if they face problems so that we consider making some adjustments in our schedule. Discussed Gila County meeting dates.

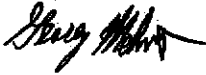
12. ADJOURNMENT.

Motion by: Cecil Miller Second by: Dolly Echeverria

Motion: To adjourn. Vote: All aye.

Meeting adjourned at approximately 10:52 a.m.

Respectfully submitted,



George Mehnert, Director
September 17, 2004