



October 2, 1996

STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

1700 WEST WASHINGTON, PHOENIX, ARIZONA 85007
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96-002-015
SALT RIVER
001

CHRISTINA WADDELL
Executive Director

Robert B. Hoffman
Snell & Wilmer
One Arizona Center
Phoenix, AZ 85004-0001

ORIGINAL

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Re: Salt River: Initial classification

Dear Mr. Hoffman:

This is written in response to your facsimile dated August 30, 1996.

After review of the records provided to this staff by the State Land Department, we have been unable to identify which documents and Appendices were provided by which interested party. Unfortunately, we must request your assistance in identifying the specific documents submitted during the previous proceedings before the commission.

Please call at your earliest convenience to set an appointment and review the documents.

Sincerely,

Christina Waddell

Christina Waddell, MBA
Executive Director

Maricopa County, Lower Salt River
03-005-NAV
4/7/03
Evidence Item No. 015

Snell & Wilmer

L.L.P.
LAW OFFICES

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Robert B. Hoffman (602) 382-6315

August 30, 1996

VIA FACSIMILE ONLY

Stream Adjudication Commission
1700 West Washington
Room 404
Phoenix, AZ 85007

Re: Salt River: Initial Classification

Dear Sirs:

Prior to the reconstitution of the Commission, I had submitted material to the Commission for its consideration in deciding whether certain rivers in Arizona were navigable at statehood. Much of this material related to the Salt River and should be considered by you in making your initial classification of the Salt.

Please consider this a formal request for you to consider that previously submitted material in your current deliberations including, but not limited to, the copy of the Special Action No. CV-94-0093-SA before the Arizona Supreme Court and Appendices thereto served on the Commission on March 9, 1994, and Petitioners' Reply Brief served on the Commission on March 31, 1994.

Yours truly,

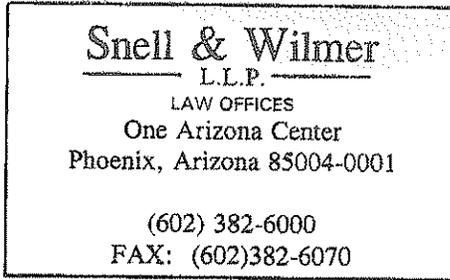
SNELL & WILMER L.L.P.



Robert B. Hoffman

RBH:dm
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1. Stream Adjudication Commission

(602) 542-9220

FROM:

Robert B. Hoffman *RBH*

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IN THE SUPREME COURT

STATE OF ARIZONA

CALMAT CO. OF ARIZONA, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CALMAT PROPERTIES CO., a California corporation, CALMAT LAND CO., a California corporation, ALLIED CONCRETE & MATERIALS CO., an Arizona corporation, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT and SALT RIVER VALLEY WATER USERS' ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Petitioners,

v.

THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION, an agency of the State of Arizona, and CURTIS JENNINGS, JAY BRASHEAR, MARGARET S. PETERSON, HAROLD RAMSBACHER and TROY L. PEWE, in their official capacities as members of and constituting The Arizona Navigable Stream Adjudication Commission,

Respondents.

No. CV-94-____-SA

96-002-015

SALT RIVER

002

ORIGINAL

PETITION FOR SPECIAL ACTION

Robert B. Hoffman # 004415

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& POWER DISTRICT and SALT RIVER

VALLEY WATER USERS' ASSOCIATION

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JURISDICTIONAL STATEMENT

The Court has jurisdiction of this Petition for Special Action pursuant to Article 6, Section 5(1) of the Arizona Constitution, A.R.S. § 12-102 and Rules 1 and 7 of the Rules of Procedure for Special Action.

This Petition seeks relief against officers of the State of Arizona. The Supreme Court has original jurisdiction to issue such writs by special action. See State Compensation Fund v. Symington, 174 Ariz. 188, 191, 848 P.2d 273, 276 (1993). Concurrent jurisdiction to issue writs to state officers is vested in the superior courts by Article 6, Section 14 of the Arizona Constitution and A.R.S. § 12-123. This Court has not yet ruled on the issue of whether the Court of Appeals also has jurisdiction to issue such writs. Arizona Corporation Comm'n v. State ex rel. Woods, 171 Ariz. 186, 288 n.2, 830 P.2d 807, 809 n.2 (1992).

The Petition is directed to this Court because the issue presented -- the preclusive effect of a prior determination of non-navigability upon the Arizona Navigable Stream Adjudication Commission pursuant to Laws 1992, Ch. 297, § 1.F.2 -- is a question of statewide importance. A matter that bears so directly on the health and welfare of the citizens of Arizona merits resolution by this Court. See also discussion in Section II., infra.

The Court should address this issue at this stage of the proceedings because of the enormous amount of time and expense that will be involved for the State of Arizona and for the private parties in the pending Commission hearings. The determination of the navigability of the Salt River from Granite Reef Dam to the Gila River confluence will involve over 6,000 landowners with title to lands along the river. The Commission has

scheduled the hearings in five-day blocks; the hearings could require several months of trial. Each of the 6,000 affected landowners will have the opportunity to appear in these proceedings. As of February 14, 1994, forty-five separate notices of appearance had been filed by parties and groups of parties. These notices listed twenty-four different witnesses. The hearings also will involve the introduction of numerous historical and factual exhibits. For example, the report recently prepared on the issue by the State Land Department's consultant listed 466 separate references. See CH2M Hill, "Arizona Stream Navigability Study for the Salt River: Granite Reef Dam to the Gila River Confluence," at 107-47 (December 1993). The deadline for filing notices of appearance has not yet passed, so many more parties, witnesses, and exhibits likely will be involved in the Commission hearings.

The Commission, the State, and the private parties will devote large amounts of resources to these proceedings. If the Commission lacks jurisdiction to make a determination as to the navigability of this reach of the Salt River, all of this time and expense will be for naught. The Court should examine this issue now in order to determine whether the Commission has jurisdiction to undertake this important task.

STATEMENT OF THE ISSUE

Are:

- 1) The Final Judgment entered on April 13, 1977 by the United States District Court for the District of Arizona in Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Company, et al., Action No. CIV 72-376 PHX;

- 2) Decree No. 4564 entered by the Third Judicial District, Territory of Arizona, County of Maricopa on March 1, 1910 in Hurley v. Abbott; or
- 3) Decree No. 708 entered by the Second Judicial District, Territory of Arizona, County of Maricopa on March 31, 1892 in Wormser v. Salt River Valley Canal Co.

prior determinations of navigability of the Salt River from the Granite Reef Dam to the confluence with the Gila River within the meaning of Laws 1992, Ch. 297, § 1.F.2, thus depriving the Arizona Navigable Stream Adjudication Commission of jurisdiction to conduct a hearing on the navigability of the Salt River between the Granite Reef Dam and the confluence with the Gila River as of February 14, 1912?

STATEMENT OF FACTS

THE PARTIES

Petitioners CalMat Co., CalMat Co. of Arizona, CalMat Properties Co., CalMat Land Co., Allied Concrete & Materials Co. (collectively, "Petitioner CalMat") are landowners in Maricopa County. Petitioners Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association (collectively "Petitioner Salt River Project") are also landowners in Maricopa County. Petitioner Salt River Pima-Maricopa Indian Community is a federally recognized Indian tribe that has use and benefit rights in land within the boundaries of its reservation.

Curtis A. Jennings, Jay Brashear, Margaret S. Peterson, Harold Ramsbacher and Troy L. Pewe are the members of and constitute the Arizona Navigable Stream Adjudication Commission created pursuant to Laws 1992, Ch. 297 (A.R.S. §§ 37-1101,

et seq.) Curtis A. Jennings is the Chairman of and Jay Brashear is the Vice Chairman of the Arizona Navigable Stream Adjudication Commission.

THE 1992 ACT

H.B. 2594, entitled "An Act Repealing Title 37, Chapter 7, Arizona Revised Statutes, by Adding a New Chapter 7; Making an Appropriation; Relating to Navigable Watercourses," was enacted as Chapter 297 of the session laws of the Second Regular Session of the 40th Legislature of the State of Arizona. This legislation, hereinafter referred to as "the 1992 Act," became effective when signed by the Governor on July 7, 1992. A copy of the 1992 Act is included in Appendix #1 at 00001-13.^{1/}

The 1992 Act created the Arizona Navigable Stream Adjudication Commission. This enactment has been codified in part at A.R.S. §§ 37-1101 to 37-1156. The 1992 Act provides the sole authority for any and all activities undertaken by the Commission; the Commission has no statutory authority apart from this act to conduct hearings or to make determinations of navigability.

Section 1 of the 1992 Act has not been codified into the Arizona Revised Statutes. This section, entitled "Purpose and Intent," sets forth the general purposes behind the act. In addition to the general purpose statement, however, this section also contains an important limitation on the Commission's authority under the 1992 Act. Section 1.F provides as follows:

^{1/} For ease of reference, pages in Appendices 1 through 12 are consecutively numbered. Page references are to Appendix page numbers.

- F. This act does not affect:
1. This state's title, or claims relating, to the bed of the Colorado River.
 2. Reaches of watercourses where determinations have been made by judicial actions before the effective date of this act.
 3. Any existing public right to use the watercourses of this state as otherwise provided by law.

THE PRIOR DETERMINATIONS

At least three courts have determined that the portion of the Salt River between the Granite Reef Dam and the confluence with the Gila was not navigable on or before February 14, 1912, the day Arizona became a state. Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co., D.Ariz. (April 13, 1977) (Cause No. CIV 72-376 PHX) ("The 1977 Final Judgment"); Hurley v. Abbott, No. 4564, Third Judicial District, Territory of Arizona, County of Maricopa (March 1, 1910) (the "Kent Decree"); Wormser v. Salt River Valley Canal Co., No. 708, Second Judicial District, Territory of Arizona, County of Maricopa (March 31, 1892) (the "Kibbey Decree").

The 1977 Final Judgment

On July 17, 1972, Petitioner Salt River Pima-Maricopa Indian Community filed a complaint in United States District Court for the District of Arizona, Action No. CIV 72-376 PHX. Defendants in that action included the State of Arizona, Allied Concrete & Materials Co., one of the Petitioners herein, and Arizona Sand & Rock Company, whose successor in interest is CalMat Co. of Arizona, also one of the Petitioners herein. A copy of the Complaint was attached to Petitioner Calmat's Notice of Lack of Jurisdiction and Request for Termination of Proceedings as Exhibit A (Appendix #3 at 000041-47).

The dispute in CIV 72-376 PHX involved the location of the south boundary of the Salt River Indian Reservation. The Salt River has or had two channels as it passed along the south side of the Salt River Pima-Maricopa Indian Reservation.^{2/} Appendix #3 at 000052. The south boundary of the Reservation as established by Executive Order dated June 14, 1879, was "up and along the middle of [the Salt River]." Appendix #3 at 000083. The defendants contended that the boundary of the Reservation was the middle of the north channel as established by a 1962 survey and decided by the United States Bureau of Land Management. Appendix #3 at 000078-79. The Community claimed the boundary to be the middle of the south channel. Appendix #3 at 000080-81. The Secretary of the Interior had determined, on January 17, 1969, that the southern boundary was in the south channel. Appendix #3 at 000080. Thus, the area in dispute lay in between the two channels and included a portion of each. The State of Arizona claimed rights in the land in dispute by virtue of permits and licenses granted on and after 1942 from the Bureau of Land Management and a right-of-way also granted from the Bureau for Country Club Drive. Appendix #3 at 000055-56.

On April 13, 1977, Final Judgment was entered in Action No. CIV 72-376 PHX. Appendix #3 at 000142-160. Incorporated by reference and made a part of the Judgment were Findings of Fact and Conclusions of Law. Appendix #3 at 000142. The judgment makes the following statement:

^{2/} The Pretrial Order and the Findings of Fact and Conclusions of Law in the case were attached as Exhibits B and C to Petitioner CalMat's Notice of Lack of Jurisdiction and Request for Termination of Proceedings and are contained in Appendix #3 at 000048-000089.

XXIII

The Court finds all of the facts agreed to by the parties in the Pre-Trial Order.

From the foregoing Findings of Fact the Court draws the following Conclusions of Law:

Appendix #3 at 0157.

In the Pre-Trial Order, the parties agreed and the Court ordered in relevant part as follows:

6. . . . Fee title to [the disputed] property is vested in the United States.

* * * *

30. The Salt River is not now and never has been a navigable river.

Appendix #3 at 000053, 000058. These facts formed the basis of the Findings of Fact and Conclusions of Law (Appendix #3 at 000074-89) upon which the Judgment (Appendix #3 at 000142-160) was based.

The Kibbey Decree

The 1892 "Kibbey Decree" arose out of a suit instituted by downstream water users and canal companies against upstream appropriators. See generally Kibbey Decree, Appendix #9 at 000273-78. The court characterized the plaintiffs' complaint as follows: "[The plaintiffs] filed their complaint in this court against the Arizona canal company, alleging that the Salt River is a natural **unnavigable** stream rising in the mountains in the eastern part of the territory and running thence in a westerly direction to its junction with the Gila River in Maricopa County." Appendix #9 at 000278-79 (emphasis added).

When addressing the issue of what law to apply in the case, Judge Joseph Kibbey first reviewed the 1864 codification of the laws of the Territory of Arizona, commonly known as the "Howell Code." Appendix #9 at 000295. The Howell Code adopted the system of prior appropriation of water rights and rejected the riparian system that was common in the eastern United States. Id.

In addition to examining the territorial laws, however, Judge Kibbey also analyzed the relevant federal law on the subject. Appendix #9 at 000298. In particular, the Judge relied upon the Desert Land Act of 1877. Act of March 3, 1877, 19 Stat. 377. As the Judge explained, the Desert Land Act provides, in pertinent part:

[T]he right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres 'shall depend upon a bona fide appropriation: and all surplus water over an above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.'

Id. (emphasis added). After deciding that territorial appropriation law applied because the Salt River was not navigable, Judge Kibbey went on to apply such law to decide the dispute.

The Kent Decree

Events subsequent to the issuance of the Kibbey Decree, including the pending development of the Salt River Federal Reclamation Project, made it necessary that rights be established as between individual appropriators and not just between the canal companies. The determination of these rights was set forth in 1910 in the Kent Decree. Appendix #9 at 000353-435. Judge Kent relied heavily upon the legal rules set forth in

the Kibbey Decree. Appendix #9 at 000358-59. Judge Kent did not specifically examine the issue of whether the territorial prior appropriation law applied because that issue had been decided by Judge Kibbey. Judge Kent found that the relevant portion of the Salt River was "a non-navigable stream," and, therefore, applied territorial law. Appendix #9 at 000356.

THE PROCEEDINGS BELOW

On December 3, 1993, the Commission issued notices for a hearing to be commenced on February 14, 1994, regarding the navigability of the Salt River. Appendix #2 at 000014-30. Later, after unprecedented public outcry, the State Land Department issued a "Disclaimer of Ownership" regarding "property outside the channel of the Salt River." Appendix #3 at 0000136-141. On December 22, 1993, Petitioner CalMat filed a Notice of Lack of Jurisdiction and Request for Termination of Proceedings. Appendix #3 at 000031-194. The State Land Department filed a Response to this Notice on January 9, 1994. Appendix #4 at 000195-220. Petitioner CalMat filed a Reply on January 14, 1994. Appendix #5 at 000221-235. On December 30, 1993, Petitioner Salt River Pima-Maricopa Indian Community filed a Motion and Notice of Lack of Jurisdiction and Request for Termination of Proceedings. Appendix #6 at 000236-238. Petitioner Salt River Pima-Maricopa Indian Community filed a Reply on January 11, 1994. Appendix #7 at 000239-250. The Commission also accepted for filing on January 10, 1994, a Response from the Arizona Center for Law in the Public Interest. Appendix #8 at 000251-257. On January 14, 1994, Petitioner Salt River Project filed a Motion to Dismiss. Appendix #9 at 000258-435. The State Land Department filed a Response to this Notice on January 21, 1994.

Appendix #10 at 000436-448. Petitioner Salt River Project filed a Reply on February 7, 1994. Appendix #11 at 000449-463.

On January 19, 1994, the Commission heard oral argument on the Petitioners' Notices and Motions, and on February 16, 1994, denied the Motions and reset the hearing to commence on April 11, 1994. The transcript of the January 19, 1994 argument is attached hereto as Appendix #12 at 000464-565. No transcript yet exists as to the February 16, 1994 Commission meeting.

ARGUMENT

I. INTRODUCTION

The 1992 Act creating the Commission and defining its jurisdiction is the most recent attempt to address an issue of statewide importance: the ownership of the beds of rivers other than the Colorado River.^{3/} The importance of this issue is manifest from the intense public attention that followed the Commission's issuance of its notice of this proceeding. The Arizona Republic and Phoenix Gazette alone have devoted 22 articles to this issue since November 26, 1993. Other media, including the Tribune newspapers, radio and television, have also devoted extensive coverage to this issue.

The importance, and hence, the intense public interest in this issue is caused by the cloud that has been created on the title to land of thousands of Arizonans. These landowners face the possibility that they may lose their lawful titles due to a claim of ownership by the State under the "Equal Footing" Doctrine. Pursuant to this doctrine,

^{3/} The Colorado River has been determined judicially to be navigable, and is not the subject of the 1992 Act or this Petition.

each state succeeded to the title to the beds of all navigable waters within its boundaries at statehood. Shively v. Bowlby, 152 U.S. 1, 49-50 (1894).^{4/} Thus, the effect of a finding of navigability is, potentially, to void the titles of existing landowners.

The test first articulated by the United States Supreme Court in The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870), continues to be the standard by which navigability claims are measured. That test provides:

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 (emphasis added).

The Arizona Navigable Stream Adjudication Commission was created by statute to conduct hearings and make findings on navigability. A clear limitation on its jurisdiction, however, is the provision in Section 1.F.2 that "prior determinations" are not affected by the enactment of the 1992 Act. The Commission, having been notified of these prior determinations, has refused to recognize them, and is proceeding beyond its jurisdiction to the detriment of thousands of landowners.

^{4/} The Equal Footing Doctrine arises by implication from the United States Constitution, and provides that new states must be admitted on an equal footing with the original thirteen states. New states therefore have the same governing powers, including the power of governance over federal lands, as the original states. New states also acquire, as of the instant of statehood, the title to the beds of navigable rivers and lakes because the original thirteen states held such titles. Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367 (1842).

II. THE COURT SHOULD ACCEPT JURISDICTION OF THIS PETITION

The Commission's threat to conduct hearings on the navigability of the Salt River in excess of its jurisdiction as defined by the statute creating it states a justiciable controversy that merits special action treatment by this Court. Moreover, the Commission's determination as to its subject matter jurisdiction was arbitrary and capricious and an abuse of discretion, also warranting special action treatment.^{5/}

A. Special Action Treatment Is Warranted Here

This Court should accept jurisdiction of this Petition. First, the Petition presents a substantive issue of statewide significance. Arizona Corporation Comm'n v. State ex rel. Woods, 171 Ariz. 286, 287-88, 830 P.2d 807, 808-09 (1992). Second, the matter is one of first impression, for there are no reported decisions defining "determinations" for purposes of the 1992 Act. Rios v. Symington, 172 Ariz. 3, 5, 833 P.2d 20, 22 (1992). Third, the definition of "prior determination" under the 1992 Act turns on the application of legal principles and not the determination of disputed facts. State Compensation Fund v. Symington, 174 Ariz. 188, 191-92, 848 P.2d 273, 276-77 (1993); Arizona Corporation Comm'n, supra. Fourth, the significance of this issue, combined with the uncertainty over whether the Court of Appeals has original jurisdiction to issue a writ to a state officer by special action, warrants resolution of this Petition by the Supreme Court. Arizona Corporation Comm'n, supra, 171 Ariz. at 288 n.2, 830 P.2d at 809 n.2.

^{5/} A special action is available to review an erroneous finding of subject matter jurisdiction. Ringling Bros. & Barnum & Bailey Combined Shows, Inc. v. Superior Court, 140 Ariz. 38, 680 P.2d 174 (Ct. App. 1983).

B. The Petition Presents a Justiciable Controversy

Because Arizona has no counterpart to the "case or controversy" requirement of the federal constitution, standing is not a constitutional mandate but simply a question of prudential or judicial restraint. Armory Park Neighborhood Ass'n v. Episcopal Community Services, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). "We impose that restraint to insure that our courts do not issue mere advisory opinions, that the case is not moot and that the issues will be fully developed by true adversaries." Id. Thus, the "issue in Arizona is whether, given all the circumstances in the case, a party possesses an interest in the outcome of the litigation." Citibank (Arizona) v. Miller & Schroeder Financial, Inc., 168 Ariz. 178, 181-82, 812 P.2d 996, 999-1000 (Ct. App. 1990). Petitioners here possess the requisite "interest in the outcome of the litigation." Each Petitioner either owns (or, in the case of the Community, has use and benefit rights in) land in or near the bed of the Salt River. If the Commission makes a finding of navigability that causes the State Land Department to pursue title claims, the Petitioners will be directly and substantially affected.

The issue raised in this Petition is not moot and does not involve an advisory opinion, for this question presents a genuine controversy. The 1992 Act is presently in effect, and the Commission is acting in excess of its jurisdiction by intending to reschedule hearings previously scheduled for April 11 through 15, 1994, on the issue of the navigability of the Salt River. The Commission's Notice cancelling the April hearings and indicating an intent to reschedule the hearings is Appendix 13 at 000566. Finally, the

Court can be assured that the issues presented here will be fully developed by Petitioners and the Respondent Commission.

III. THE COMMISSION HAS NO JURISDICTION TO MAKE ANY DETERMINATION AS TO THE NAVIGABILITY OF THE SALT RIVER BETWEEN GRANITE REEF DAM AND THE CONFLUENCE WITH THE GILA RIVER

The gravamen of this Petition is simple. The Legislature has imposed a specific limitation on the jurisdiction of the Arizona Navigable Stream Adjudication Commission and the Commission has blatantly ignored that limitation. The 1992 Act provides that: "This act does not affect: . . . Reaches of watercourses where determinations have been made by judicial actions before the effective date of this act." Laws 1992, Ch. 297, § 1.F.2 (emphasis added). Through this proviso, the Legislature has deprived the Commission of jurisdiction to make navigability determinations where there has been a prior determination. The 1977 Final Judgment, the Kent Decree and the Kibbey Decree are all such prior determinations. The Commission is thus divested of jurisdiction to make any determination concerning the Salt River between Granite Reef Dam and the confluence with the Gila River.^{6/}

A. Three Courts Have Made Prior Determinations Of The Salt River's Non-Navigability Between Granite Reef Dam And The Confluence With The Gila

"Determination" is not further defined in Laws 1992, Ch. 297. There is no standard definition of "determination" in other Arizona statutes or case law. Many other

^{6/} It is axiomatic that the statutes by which the Legislature defines the powers of a governmental body are strictly construed. Southern Pacific Co. v. Arizona Corporation Comm'n, 98 Ariz. 339, 345, 404 P.2d 692, 696 (1965). Moreover, the Commission has "no implied powers." Thus, the powers the Commission may exercise do not exceed those to be derived from a strict construction of its implementing statutes. Rural/Metro Corp. v. Arizona Corporation Comm'n, 129 Ariz. 116, 117, 629 P.2d 83, 84 (1981) (emphasis omitted).

courts, however, have used definitions of "determined" in the context of statutes or procedures being examined in cases before them. These definitions may be instructive as to what the Arizona Legislature meant in the streambed legislation.

In Piccone v. United States, 407 F.2d 866 at 873 (Ct. Cl. 1969), the Court of Claims said: "In ordinary usage, 'determination' refers to a final decision." The Wisconsin Supreme Court reached a similar conclusion in stating that the term "determination" meant "final judgment" in an appeals statute. Thomas/Van Dyken Joint Venture v. Van Dyken, 279 N.W.2d 459, 463 (Wis. 1979). A New York court indicated that "determination" implies an ending or finality and is used frequently as an equivalent with judgment or decree. People v. Rubinstein, 20 Misc.2d 410, 193 N.Y.S.2d 117, 118 (1959).

In response to the CalMat Petitioners' Motions below, the State argued before the Commission that since the parties stipulated to the finding of non-navigability, the issue of navigability was not "determined" by the 1977 Final Judgment. This argument flies in the face of the principles of interpretation of judgments. Arizona courts have stated that that which is necessarily implied by a judgment is included therein. In Re Estate of Thompson, 1 Ariz. App. 18, 398 P.2d 926 (1965). Here, the determination of non-navigability was necessary to the entry of each of the 1977 Final Judgment, the Kent Decree and the Kibbey Decree.

1. **The Determination Of Non-Navigability Was Necessary To Entry Of The 1977 Final Judgment**

The 1977 Final Judgment, of course, is explicit with its finding of non-navigability. But even had it not been, the finding of non-navigability was necessary in order for

judgment to be awarded to the Salt River Pima-Maricopa Indian Community. From the beginning of the action leading to the 1977 Final Judgment, it was recognized by all the parties that title to the land from which the Indian Community sought to eject the defendants and sought damages for trespass was a critical issue. For example, in paragraph III of the Second Claim for Relief, the Indian Community alleged "Title to this land [at issue] is held by the United States as trustee for plaintiff." Appendix #3 at 000046.

Moreover, in its motion to dismiss the complaint, the State of Arizona recognized that the Indian Community was required to demonstrate a superior interest in the land at issue in order to succeed in its ejectment and trespass action and that therefore title to the land was a critical issue in the case. See Appendix #3 at 000108-111. The State made this understanding explicit:

The Respondent [the State of Arizona] therefore contends that it would be virtually inconceivable that this action, allegedly brought in trespass **but which could more accurately be characterized as a quiet title action** in which Plaintiffs are seeking to obtain a **determination** as to the exact location of the boundary of their Executive Order Indian Reservation, could possibly proceed to judgment without first joining those departments and agencies of the United States Government which presently claim ownership of those disputed riparian lands . . .

"Reply to Plaintiffs' Memorandum in Opposition to United States Attorney's Motion to Dismiss" (Appendix #3 at 000133-34) (emphasis added).

The riparian lands at issue as to which title was determined in the 1977 Final Judgment were lands in the bed of the Salt River in the reach between the Granite Reef Dam and the confluence of the Gila River. Because the Commission intends to conduct

proceedings as to these same lands, it is clear that the Commission is exceeding its jurisdiction as specifically circumscribed by the Legislature.

2. **The Determination Of Non-Navigability Was Necessary To Entry Of The Kibbey Decree**

Based upon the law as it existed in 1892, a finding of non-navigability was certainly necessary for Judge Kibbey's decision in the case. In fact, given the historical setting in which Judge Kibbey entered his decree, his determination might have been quite different had he found the Lower Salt River to be navigable.

Prior to 1866, water in the western states and territories "generally was fixed and regulated by local rules and customs." California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154 (1935). Most states and territories in the arid West (including Arizona) adopted the prior appropriation system, which was much different from the riparian system in place in the Eastern states. See, e.g., Howell Code, supra. The Federal Government silently acquiesced in this practice until 1866, when it formally confirmed rights recognized by local customs and laws. Act of July 26, 1866, ch. 262, 14 Stat. 251.

In 1877, Congress passed additional legislation to promote development in the West. Desert Land Act, supra. This act provided for a bifurcation of the methods of acquiring land and water rights. Land rights were to be purchased or otherwise acquired from the Federal Government; water rights were to be regulated under state and territorial appropriation systems. California v. United States, 438 U.S. 645, 658 (1978); State v. Dority, 225 P.2d 1007, 1003 (N.M. 1950), appeal dismissed, 341 U.S. 924 (1951).

Therefore, the Desert Land Act granted the states the power to regulate the appropriation and use of water from most rivers and streams.

Under the Desert Land Act, the state's right to regulate water matters was subject only to two limitations:

First, in the absence of any specific authority from Congress, that a state could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow, so far, at least, as might be necessary for the beneficial use of the government property; and second, that its power was limited by that of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

California Oregon Power Co., 295 U.S. at 159 (emphasis added); see also, e.g., California v. United States, supra, 438 U.S. at 663. Therefore, in passing the Desert Land Act, the United States relinquished complete control of only non-navigable waters; all navigable streams remained subject to Congress' plenary power over commerce. U.S. Const. art. 1, § 8.

When the Kibbey Decree was decided in 1892, the United States retained control over all navigable streams. See generally Federal Power Comm'n v. Oregon, 349 U.S. 435, 454 n.2 (1955) ("If this were a navigable stream, the authority of the United States in the water power would be complete without reference to state law."); United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806, 837 (S.D. Cal. 1958). Although it is now somewhat uncertain exactly what law Judge Kibbey would have applied had he found this portion of the Salt River to be navigable, it is possible that a quite different body of law would have developed had he determined that the Salt River was subject to the navigation servitude of the United States. Instead, Judge Kibbey found that, because the Salt River

was not navigable, the territorial law of prior appropriation applied. Thus, his finding of non-navigability was necessary to his decision in the case.

3. The Determination Of Non-Navigability Was Necessary To Entry Of The Kent Decree

The legal determination of non-navigability was similarly important to the determination of rights in the Kent Decree. If Judge Kent would have found the Lower Salt River to be navigable, he might well have applied something other than territorial prior appropriation law.

B. The Commission Has Acknowledged That It Has No Jurisdiction To Act Where A Prior Determination Has Been Made In Connection With A Stipulated Judgment

The Commission itself has acknowledged the effect of a determination of non-navigability within a stipulated judgment. In June of 1993, Petitioner CalMat filed with the Commission a petition for determination of non-navigability of the Agua Fria River. Appendix #5 at 000228-230 and 000233-000235. The Petition sought (1) a ruling that there had been a prior determination of non-navigability regarding the Agua Fria River and (2) confirmation that the Commission therefore had no jurisdiction over the Agua Fria River. Significantly, the prior determination as to the Agua Fria was made in connection with a **stipulated** amended order and judgment entered by the Maricopa County Superior Court. Appendix #5 at 000233-000235. In that amended order and judgment, the State disclaimed any interest under the Equal Footing Doctrine in lands constituting the beds of the Agua Fria River and certain tributaries thereof because "these reaches of rivers and tributaries were not navigable at the time of statehood." Id. at 000233.

In response to that Petition, the Commission made this finding in its August 3, 1993

meeting:

The following motion was made:

Section 1F of the Act creating this Commission provides: This Act does not affect reaches of watercourses where determinations have been made by judicial actions before the effective date of this Act.

The Commission finds that the judgment contained in No. 93-2, No. C-569870 in the Superior Court of Maricopa County, dated November 20, 1986 is a judicial determination before the effective date of this Act.

Therefore, the Commission determines that it has no jurisdiction over the navigability of the reach of the watercourses as contained in the judgment in No. 93-2.

Motion passed.

Minutes of the August 3, 1993 Commission meeting. Appendix #5 at 000232.

The Commission thus agreed that, because there had been a prior determination of non-navigability in connection with the Agua Fria River, the Commission had no jurisdiction to act. Moreover, the Commission recognized that a judgment based upon a stipulation constitutes a prior determination within the meaning of the 1992 Act.

The stipulation entered as part of the 1977 Final Judgment with respect to the Salt River should have no less weight than the stipulation entered in the Agua Fria case. Each stipulation formed the basis of a judgment which determined that the respective river was not navigable at statehood. The Commission recognized the judgment in the Agua Fria case as a prior determination depriving it of jurisdiction. Any supposed distinction

between the stipulated Agua Fria judgment and the stipulated 1977 Final Judgment involving the Salt River is arbitrary and capricious.

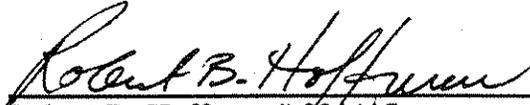
V. CONCLUSION

Petitioners and the 6,000 other landowners who have received notice of the State's potential claim have had title to their property clouded and have suffered and are suffering untold, incalculable and irreparable damage during the pendency of the Commission's proceeding. If the Court does not accept jurisdiction and the Commission is permitted to go ahead with hearings in this matter, Petitioners and others will be forced to spend considerable time and funds preparing for a hearing that the Commission has no jurisdiction to conduct.

This Court should therefore accept jurisdiction of this Petition for Special Action and rule that the Commission has no jurisdiction to conduct any hearings or make any determinations with respect to the navigability of the Salt River. Petitioners further request that they be awarded their costs and attorneys' fees in accordance with A.R.S. § 12-348 and Rule 4(f) of the Rules of Procedure for Special Actions.

RESPECTFULLY SUBMITTED this 9th day of March, 1994.

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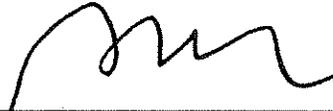
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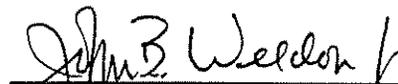
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of March, 1994, two copies of the foregoing Petition for Special Action and Appendix to Petition for Special Action were hand-delivered to each of the following Respondents:

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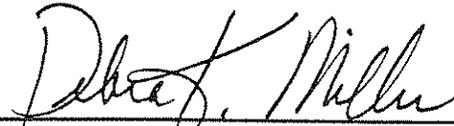
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IN THE SUPREME COURT

96-002-015

STATE OF ARIZONA

SALT RIVER
003

CALMAT CO. OF ARIZONA, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CALMAT PROPERTIES CO., a California corporation, CALMAT LAND CO., a California corporation, ALLIED CONCRETE & MATERIALS CO., an Arizona corporation, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT and SALT RIVER VALLEY WATER USERS' ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

No. CV-94-0093-SA

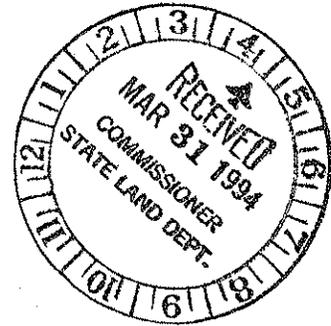
ORIGINAL

Petitioners,

v.

THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION, an agency of the State of Arizona, and CURTIS JENNINGS, JAY BRASHEAR, MARGARET S. PETERSON, HAROLD RAMSBACHER and TROY L. PEWE, in their official capacities as members of and constituting The Arizona Navigable Stream Adjudication Commission,

Respondents.



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VALLEY WATER USERS' ASSOCIATION

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Petitioners CalMat Co., CalMat Co. of Arizona, CalMat Properties Co., CalMat Land Co., Allied Concrete & Materials Co. (collectively, "Petitioner CalMat"), Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association (collectively "Petitioner Salt River Project"), and Salt River Pima-Maricopa Indian Community hereby reply to the Response filed by the Attorney General, on behalf of Intervenor-Respondent Milo J. Hassell in his capacity as State Land Commissioner ("Intervenor-Respondent"). The Respondents in this Special Action have not filed any Response in opposition to the Petition for Special Action. The only Response was filed by the Intervenor-Respondent.

The Response filed by Intervenor-Respondent attempts to read into a statute a restriction that was not imposed by the Legislature, namely that only a judgment that is entitled to res judicata or collateral estoppel against the State Land Department is a "prior determination" within the meaning Section 1.F.2 of Chapter 297, Laws of 1992. This tortured construction is internally inconsistent with the arguments of Intervenor-Respondent in this Special Action, and runs counter to the plain language of Section 1.F.2 and the intent of the 1992 Act.

I. THE DEFINITION OF A "PRIOR JUDICIAL DETERMINATION" WITHIN THE MEANING § 1.F.2 IS WHOLLY DISTINCT FROM, AND DOES NOT REQUIRE, A FINDING OF "RES JUDICATA"

The subject of this Special Action is the meaning of the phrase "judicial determination" in Section 1.F.2 of Chapter 297 of the 1992 Act. The issue before this Court, then, is strictly one of statutory interpretation, not the law of res judicata or collateral estoppel. The Arizona Legislature, in defining the jurisdiction of the Arizona Navigable Stream Adjudication Commission (the "Commission"), precluded that jurisdiction where there had been a "prior determination" of non-navigability. Intervenor-Respondent, by focusing on the law of res

judicata, seeks to divert the Commission and the Court to a different standard -- one that runs contrary to the express intent of the Legislature.

Intervenor-Respondent argues for the imputation of a requirement not found in Section 1.F.2: that the prior judicial determination must be "res judicata" on the parties to the proceeding before the Commission. This requirement is not found in Section 1.F.2 and, indeed, would be absurd in light of the purpose of the statute. The 1992 Act was adopted to permit the Commission to conduct investigations regarding navigability for streams where no prior judicial determination had been made. Section 1.F.2, by its terms, does not require that the judicial determination be "res judicata" or "collateral estoppel" in favor of the party raising it. Indeed, the Legislature would not have needed to enact Section 1.F.2 to codify the law of res judicata or collateral estoppel, for those doctrines are binding on parties in accordance with the provisions of the common law. Res judicata and collateral estoppel would apply as a matter of law, even in the absence of Section 1.F.2.

This Court, in interpreting the meaning of a statute, must strive to discern the intent of the Legislature and give effect to statutory terms in accordance with their commonly accepted meanings. A.R.S. § 1-213; State v. Reynolds, 170 Ariz. 233, 823 P.2d 681 (1992). Each word, phrase, clause and sentence must be given meaning so that no part will be rendered void, inert, redundant or trivial. Adams v. Bolin, 74 Ariz. 269, 247 P.2d 617 (1952); Terry v. Lincscott Hotel Corp., 126 Ariz. 548, 552, 617 P.2d 56, 60 (Ct. App. 1980). It is presumed that the Legislature did not intend to do a futile act by including a provision that is not operative or that is inert and trivial. Campbell v. Superior Court, 105 Ariz. 252, 255, 462 P.2d 801, 804 (1969).

Had the Legislature intended merely to codify the law of res judicata and collateral estoppel, it could have done so explicitly. For example, the Legislature could have employed the traditional test of res judicata, requiring identity of parties and issues. Alternatively, the Legislature could have defined the res judicata effect of a particular court order, as it has done elsewhere. For example, A.R.S. § 48-3731 provides for an action to test the validity of a contract between a multi-county water conservation district and the United States Government. A.R.S. § 48-3734, in turn, defines the "res judicata" effect of issues that were raised or could have been raised in such a proceeding. Section 1.F.2, in contrast, precludes Commission jurisdiction where there has been a "prior determination" of non-navigability, not merely where a judgment is res judicata as to all parties before the Commission.

If, as Intervenor-Respondent urges, Section 1.F.2 were limited to merely codifying the existing law of res judicata and collateral estoppel, the section would be futile and redundant. Clearly, the Legislature intended to do more than merely codify existing law. In fact, Section 1.F.2 denies the Commission jurisdiction to conduct a hearing where there has been a prior judicial determination, whether or not that determination would be res judicata as to all the parties in the hearing.

The issue of res judicata or collateral estoppel is a decision for a court, not the Commission. If a prior determination exists with respect to a particular reach of a watercourse, the Commission lacks jurisdiction. Such a finding of a "prior determination" does not decide the substantive issue. It merely dictates the forum. If the prior determination is entitled to res judicata effect, a court may so rule. The issue, however, is removed from Commission jurisdiction.

The Commission itself, and the Attorney General, have acknowledged the absurdity of Intervenor-Respondent's position. In granting CalMat's Petition for Determination of Non-Navigability, the Commission terminated all proceedings regarding the Agua Fria River because of the prior determination. Appendix 5 at 000228-235. This determination of lack of jurisdiction was binding in favor of all parties to the current proceedings, not merely these who had been parties to the prior determination and who could have claimed res judicata protection.^{1/}

Under Intervenor-Respondent's theory, Section 1.F.2 means merely that the Commission must refrain from acting only where a judgment is res judicata or where the State is collaterally estopped. Thus, a court could enter final judgment in a case involving the State (indeed, the Land Commissioner) and explicitly rule on the issue of navigability. In the face of that Final Judgment, persons who were not parties to the prior litigation (such as the thousands of landowners who received notice of the proceeding on the Salt River) would be unable to argue that the Commission lacked jurisdiction because they would not be able to invoke the doctrine of res judicata. Such a nonsensical theory would render Section 1.F.2 meaningless, since the Commission would never be denied jurisdiction -- there would always be some party not bound by res judicata, and the Commission could always conduct a hearing, notwithstanding Section 1.F.2.

^{1/} In general, a person who is not a party to an action is not bound by the result. See Restatement (Second) of Judgments § 34(3) (1982). Whether by way of res judicata or collateral estoppel, the preclusive effect of a judgment is limited to parties and persons in privity with parties. Fremont Indemnity Co. v. Industrial Commission, 144 Ariz. 339, 342, 697 P.2d 1089, 1092 (1985) ("a stranger to a litigation may not be bound by a determination made therein for purposes of subsequent litigation"); Farmers Insurance Co. of Arizona v. Vagnozzi, 138 Ariz. 443, 675 P.2d 703 (1983).

Intervenor-Respondent now wishes to say to the thousands of landowners who crowded the public hearings on this matter that they may not avail themselves of prior determinations of non-navigability because they were not parties to the Agua Fria Final Judgment or the Salt River 1977 Final Judgment. This argument is contrary to the Legislature's intent as expressed in Section 1.F.2.

The Commission and Intervenor-Respondent themselves recognize that the question of lack of jurisdiction (based on a prior determination of non-navigability) is a different issue than res judicata (as their handling of the Agua Fria issue demonstrates). The clear legislative intent underlying Section 1.F.2 was to define the Commission's jurisdiction, not merely to say that the Commission is bound to respect the law of res judicata.

II. EVEN UNDER INTERVENOR'S THEORY, THE 1977 FINAL JUDGMENT IS RES JUDICATA AGAINST THE STATE

Even under Intervenor-Respondent's tortured interpretation, the 1977 Final Judgment qualifies as a "prior determination" because it is res judicata as against the State of Arizona. Under the doctrine of res judicata, a judgment on the merits in a prior suit involving the same parties or those in privity with them bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Chaney Building Co. v. City of Tucson, 148 Ariz. 571, 716 P.2d 28 (1985), citing Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955). "For purposes of res judicata, there is 'privity' between representatives of the same government." Matthews v. United States, 805 F. Supp. 712, 714 (E.D. Wis. 1992). The Supreme Court of the United States has held that litigation conducted before one agency or official is generally binding on

another agency or official of the same government because officers of the same government are in privity with each other. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 402-03 (1940).^{2/} Similarly, in Safir v. Gibson, 432 F.2d 137 (2d Cir.), cert. denied, 400 U.S. 850 (1970), the Second Circuit relied on this principle in holding that the Federal Maritime Commission's determination that the rates of a conference of common carriers were unfair and discriminatory precluded the independent Maritime Administration from relitigating the issue.

The Court explained:

It is the FMC, not the Maritime Administration, that has the expertise to pass on whether rates are unfair or unduly discriminatory, and it would be quite unseemly for the Maritime Administration to conclude that its sister agency had been wrong on a fully litigated issue the decision of which Congress had confided to it.

432 F.2d at 143 (emphasis supplied) (citations omitted).

Even where an earlier judgment establishing title is alleged to be erroneous, it is binding on the State of Arizona, including the State Land Commissioner. State ex rel. Lassen v. Self-Realization Fellowship Church, 21 Ariz. App. 233, 517 P.2d 1280, review denied, 111 Ariz. 84, 523 P.2d 781 (1974). In that case, the Court of Appeals rejected the State Land Commissioner's claim that a final judgment quieting title in favor of a grantee under a tax sale deed was subject to collateral attack some 20 years later. The State argued that because the procedures for disposition of "trust lands" were not complied with in earlier case, the court had lacked jurisdiction to enter the 1945 Final Judgment. The Court explicitly rejected this argument:

It is thus clear that both in 1945 and in 1964 when the jurisdiction of the Maricopa County Superior Court was invoked, it had jurisdiction (both over the subject matter and

^{2/} "There is privity between officers of the same government so that a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." Id.

to enter the judgment entered) to determine whether the sale of this property to appellee's predecessor in interest complied with the applicable provisions of the Enabling Act. That in 1945 the superior court may have determined the issue incorrectly is of no moment as far as the effects of Res judicata are concerned. Secrist v. State, 2 Ariz. App. 240, 407 P.2d 781 (1965). Nor is the fact, if it be a fact, that the effects of the Enabling Act were not argued to the Court in 1945 a hindrance to invoking the doctrine of Res judicata.

21 Ariz. App. at 235, 517 P.2d at 1282.

The 1977 Final Judgment is binding on the State of Arizona. There can be no argument that the United States District Court lacked jurisdiction (subject matter or personal jurisdiction) to enter the 1977 Final Judgment. The Intervenor-Respondent, through the Office of the Attorney General, makes the extraordinary claim that the Department of Transportation, represented by the same Office of the Attorney General, lacked the power to assert a claim of title based on navigability. This argument is contrary to law.

A. The Department of Transportation Had Full Authority to Litigate The Issue of Navigability Leading to the 1977 Final Judgment

It is well established that the Department of Transportation^{3/} has authority to acquire and dispose of lands, including "trust lands" and to conduct litigation to determine the rights in such lands. Grossetta v. Choate, 51 Ariz. 248, 75 P.2d 1031 (1938); State ex rel. Conway v. State Land Department, 62 Ariz. 248, 156 P.2d 901 (1945).

In the litigation leading to the 1977 Final Judgment, the State, acting through the Department of Transportation, was sued by the Salt River Pima-Maricopa Indian Community for trespass and damages. The State, acting through the Department, sued the United States to validate its claim to certain land in the streambed of the Salt River by virtue of permits and

^{3/} The Department of Transportation's predecessor, the State Highway Department, is sometimes referred to in the cited case law.

licenses issued to it by the United States. The streambed property that was the subject matter of the litigation was used by the State, acting through the Department of Transportation, as a source of sand and gravel for the construction of highways and roads. Customarily, such a source of sand and gravel, commonly called borrow pits, were made available to contractors building highways and roads under contract with the State acting through the Department of Transportation. The construction of roads and highways and the awarding of contracts for such construction is central to the powers of the Transportation Board. A.R.S. § 28-106 (enacted by Chapter 146, Laws of 1973). The Director of the Department of Transportation had among its specific duties the obligation to:

Exercise such other powers and duties as are necessary to fully carry out the policies, activities and duties of the Department.

A.R.S. § 28-108 (also enacted by Chapter 146, Laws of 1973).

The same act provided for the obligations of the Attorney General in regard to the Department of Transportation:

The Attorney General shall be the legal advisor of the Department and shall give legal services as the Department requires. He shall prosecute and defend in the name of the State all actions necessary to carry out the provisions of this title.

A.R.S. § 28-109 (Chapter 146, Laws of 1973) (emphasis added).

Thus, the Department of Transportation had full authority to protect the interests of the Department as the Director understood them, and the Attorney General had the obligation under law to provide legal services as directed by the Department. Those legal services are provided "in the name of the State." The Attorney General represented the Department of Transportation in the litigation leading to the 1977 Final Judgment, and in the course of that litigation raised

the issue of navigability in the Answer of the State of Arizona and stipulated that the Salt River was non-navigable and that fee title to the streambed was vested in the United States.

Intervenor-Respondent seeks to cast doubt on the validity of 1977 Final Judgment by suggesting that the Court "did nothing more than adopt as its own [sic] the findings all of the facts agreed to by the parties in the Pretrial Order." Intervenor-Respondent's Brief at 7. This attempt to denigrate the role of the United States District Court ignores the fact that there was a trial in the matter, and that the issues (including navigability) were fully litigated.

B. The 1977 Final Judgment Determined Navigability For Title Purposes

The predecessor to A.R.S. § 37-1101 was enacted in 1987. Before that time, what was understood to be "trust lands"^{4/} were enumerated in § 24 of the Enabling Act and in Article 10, Sec. 1 of the Constitution. At the time of the 1977 Final Judgment, there was no Arizona statute providing for the adjudication of the question of navigability of streams. The issue arose as the result of the claim by the Salt River Pima-Maricopa Indian Community that its boundary extended to the southern channel of the Salt River. That claim directly attacked the State of Arizona's claim of right to sand and gravel resources by virtue of federally-issued permits and licenses. If the Community's claim prevailed, the permits and licenses issued to the State would be void. If the Community's claim did not prevail and the bed of the Salt River remained in the ownership of the United States, then the State's permits and licenses would be valid.

Intervenor-Respondent's argument that the 1977 Final Judgment was merely "a determination by the Secretary of Interior that the boundary of the reservation is in a certain place" ignores the Final Judgment itself. The issue of navigability for title purposes was

^{4/} In responding to the argument of Intervenor-Respondent, the Petitioners do not concede that any "public trust" lands are implicated by the issue of the navigability of the Salt River.

litigated, was essential to the judgment, and was stipulated by the State of Arizona, through its counsel the Office of the Attorney General.

The issue of navigability was raised, fully litigated, and a Final Judgment was entered on the stipulation of all the parties that the Salt River was not navigable and that the United States owned the fee interest in the streambed. Thus, a United States District Court invested with subject matter jurisdiction over the issue determined that the Salt River was non-navigable and that the boundary of the Salt River Pima-Maricopa Indian Community extended south to the middle of the south channel of that River. This prior determination divests the Commission of jurisdiction pursuant to Section 1.F.2.

C. The "Res Judicata" Effect of the 1977 Final Judgment Was Not Addressed in CalMat of Arizona v. State ex rel. Miller

Intervenor-Respondent flatly misstates the holding of CalMat of Arizona v. State ex rel. Miller, 172 Ariz. 300, 836 P.2d 1010 (Ct. App. 1992), affirmed in part, vacated in part, 176 Ariz. 190, 859 P.2d 1323 (1993). Intervenor-Respondent's Brief at 18, n.10 states that:

One of the Petitioners, CalMat of Arizona, has already argued the 1977 Judgment as precluding the State from litigating the navigability of the Salt River. The court ruled against CalMat in CalMat of Arizona v. State ex rel. Miller, 172 Ariz. 300, 311, 836 P.2d 1010, 1021 (App. 1992), affirmed in pertinent part, vacated in part, 148 Ariz. Adv. Rep. 3, 859 P.2d 1323 (1993) after a full briefing of the issue. See Petitioners' Appendix 4 pp. 208-220.

This statement is false. The cited decision does not contain a reference to the 1977 Final Judgment. The issue of the res judicata effect of the 1977 Final Judgment was not before the Court of Appeals or the Supreme Court, and is not discussed in the Brief cited as authority by the Response of Intervenor-Respondent. Moreover, Intervenor-Respondent's characterization of the decision as "affirmed in pertinent part" is incorrect. The "equitable estoppel" issue

addressed by the Court of Appeals at 172 Ariz. at 311, 836 P.2d at 1021, was not addressed by the Supreme Court.

III. THE KENT DECREE AND THE KIBBEY DECREE ARE EACH "PRIOR DETERMINATIONS" OF NON-NAVIGABILITY WITHIN THE MEANING OF THE 1992 ACT

Intervenor-Respondent argues without support that the Kent Decree and Kibbey Decree are not "prior determinations" of non-navigability because the standard of navigability for purposes of determination of water rights is allegedly different than the test of navigability for title purposes. The case law cited (at page 14 of Intervenor-Respondent's Brief) does not support the proposition proffered by Intervenor-Respondent. Indeed, Intervenor-Respondent once again resorts to misstating the holding of the case cited.

Oregon v. Riverfront Protection Ass'n, 672 F.2d 792 (9th Cir. 1982), does not hold that navigability for purposes of determination of water rights is governed by a different test than navigability for title purposes. Rather it states, in dictum, the well-established principle that navigability for title purposes is narrower than the criteria used in analyzing navigability for purposes of the Commerce Clause jurisdiction of the federal government. 672 F.2d at 794 n.1.^{5/} Petitioners can cite no case law that would support the Intervenor-Respondent's proposition that navigability for title is different than navigability for purposes of determination of water rights.

Intervenor-Respondent also seeks to distinguish the effect of the judicial determinations in the Kent Decree and the Kibbey Decree by arguing that the United States did not appear "as

^{5/} Even if the test of navigability used the Kibbey Decree and the Kent Decree were the easier, broader Commerce Clause test rather than the narrower, more stringent "navigability-for-title" test, a finding of non-navigability for Commerce Clause purposes would necessarily include the fact that the Salt River is not navigable for title purposes.

predecessor trustee for the Public Trust." Intervenor-Respondent's Brief at 9. This argument is incorrect, at least as to the Kent Decree. "The United States of America" appeared as a party litigant in the Kent Decree proceedings. The appearance of the United States as a party was not so limited as Intervenor-Respondent urges.

**IV. AN AWARD OF ATTORNEYS' FEES PURSUANT TO
A.R.S. § 12-348 IS APPROPRIATE IN THIS CASE**

Intervenor-Respondent makes the astonishing assertion that a proceeding that will require substantial resources within which to participate and which may prompt litigation to deprive landowners of their titled property is not truly an action "by the state against the party" within the meaning of A.R.S. § 12-348. Intervenor-Respondent suggests that landowners such as the Petitioners should be pleased to have an opportunity to expend funds for attorneys' fees and expert witness consultant fees in a proceeding as to which the Commission has no jurisdiction. Petitioners submit that this arbitrary and capricious assumption of jurisdiction in the face of a statutory limitation on such jurisdiction is precisely the situation to which A.R.S. § 12-348 is addressed. The Court should therefore award attorneys' fees and costs pursuant to A.R.S. § 12-348.^{9/}

V. CONCLUSION

Respondents have not filed a brief in opposition to this Petition for Special Action. Intervenor-Respondent's Brief misstates the law, ignores the intent of the Legislature as expressed in the 1992 Act and is internally inconsistent. The Commission, with the support of

^{9/} Intervenor-Respondent argues that fees should be denied because of an issue regarding one Petitioner, Salt River Project Agricultural Improvement and Power District. Intervenor-Respondent also suggests that Petitioner Salt River-Pima Indian Community "may" be ineligible for a fee award because it is in some way equivalent to a subdivision of the State. This argument is wholly specious. Other Petitioners, including Salt River Valley Water Users' Association, have no such alleged disability.

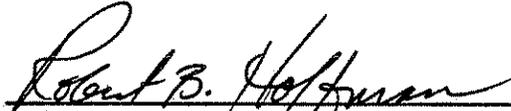
Intervenor-Respondent, conceded that the prior determination of the Maricopa County Superior Court regarding the Agua Fria divested the Commission of jurisdiction pursuant to Section 1.F.2 of the 1992 Act, without consideration of whether such judgment may not have been res judicata as to all parties before the Commission. Intervenor-Respondent now presses a contrary position that is inconsistent with the express intent of the Legislature.

The purpose of Section 1.F.2. was to limit the Commission's jurisdiction to preclude hearings on reaches of watercourses for which a prior judicial determination of non-navigability had been made. Contrary to Intervenor-Respondent's continued assertions, Section 1.F.2 does not codify the doctrines of res judicata and collateral estoppel. If the Arizona Legislature had intended to codify those doctrines, it could have done so explicitly, as it has in other enactments. The intent and action of the Legislature in enacting Section 1.F.2 was to withhold jurisdiction from the Commission in certain specific instances. Because the existence of one or more "prior judicial determination(s)" of non-navigability is just such an instance, the Commission has no jurisdiction with respect to the reach of the Salt River at issue in these proceedings. Moreover, even under the test for res judicata, the 1977 Final Judgment is binding on the State of Arizona.

This Court should therefore accept jurisdiction of this Petition for Special Action and rule that the Commission has no jurisdiction to conduct any hearings or make any determinations with respect to the navigability of the Salt River. Petitioners continue to request that they be awarded their costs and attorneys' fees in accordance with A.R.S. § 12-348 and Rule 4(f) of the Rules of Procedure for Special Actions.

RESPECTFULLY SUBMITTED this 31st day of March, 1994.

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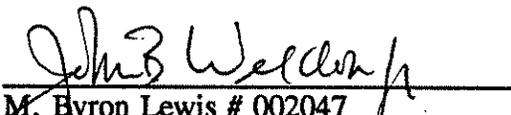
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of March, 1994, two copies of the foregoing Petitioner's Reply Brief in Support of Petition for Special Action were hand-delivered to each of the following:

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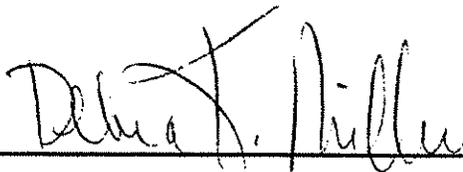
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Debra K. Miller

IN THE SUPREME COURT
STATE OF ARIZONA

CALMAT CO. OF ARIZONA, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CALMAT PROPERTIES CO., a California corporation, CALMAT LAND CO., a California corporation, ALLIED CONCRETE & MATERIALS CO., an Arizona corporation SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT and SALT RIVER VALLEY WATER USERS' ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Petitioners,

v.

THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION, an agency of the State of Arizona, and CURTIS JENNINGS, JAY BRASHEAR, MARGARET S. PETERSON, HAROLD RAMSBACHER and TROY L. PEWE, in their official capacities as members of and constituting The Arizona Navigable Stream Adjudication Commission,

Respondents,

and

M. J. HASSELL, in his official capacity as the State Land Commissioner,

Intervenor-Respondent.

No. CV-94-0093-SA

Arizona Navigable
Stream Adjudication
Commission No. 94-1

96-002-015

SALT RIVER

004

ORIGINAL

RESPONSE TO PETITION FOR SPECIAL ACTION

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JURISDICTIONAL STATEMENT

The Arizona Constitution grants this Court original jurisdiction over the issuance of extraordinary writs against state officers. Art. VI, § 5.1; see also Rios v. Symington, 172 Ariz. 3, 5, 833 P.2d 20, 22 (1922). The Court's jurisdiction in such cases "is not exclusive but concurrent with that of the superior court." Arizona Corporation Comm'n v. Superior Court, 107 Ariz. 24, 26, 480 P.2d 988, 990 (1971).

Petitioners direct their request for relief to this Court because the issue of the jurisdiction, or lack thereof, of the Arizona Navigable Stream Adjudication Commission (hereinafter the "Commission") is a matter of statewide significance that merits resolution by this Court. Petition for Special Action p. 1.

Intervenor-Respondent State Land Commissioner (hereinafter "Respondent Land") essentially agrees with Petitioners' Jurisdictional Statement and urges this Court to take jurisdiction. Respondent Land asks the Court to decide this issue at this time, but under a different rationale from that articulated by Petitioners. Petitioners assert that the determination of navigability of the Salt River will affect the title of 6,000 private landowners. This assertion is somewhat misleading in light of the fact that the State Land Commissioner, on behalf of the State of Arizona, has disclaimed any ownership interest in lands lying outside the existing bed of the Salt River. See Petitioners' Appendix 3, p. 136, for a copy of the Disclaimer.

The number of persons whose title may be affected by a determination of the navigability of the Salt River comes nowhere near the number asserted by Petitioners.

Respondent Land urges instead that special action jurisdiction is warranted because of the larger task with which the Commission is charged; namely, determining the navigability of any and all watercourses in the State. The Commission has set its first list of priorities under which it will make such determinations. See Respondent's Appendix A p. 103.

If this issue is not decided at this time, the Commission will proceed with its statutory duty of determining the navigability of the other rivers on the first list of priorities. If in fact the Commission does not have jurisdiction to proceed as to any watercourse that was the subject of a lawsuit, wherein any two parties could have, at any time in the past, stipulated that a watercourse was or was not navigable, then it is in the best interest of all parties to this proceeding, as well as parties to future hearings on the other rivers that will be considered in the near future, that this issue be decided now.

STATEMENT OF THE ISSUES

1. Should this Court (1) construe section 1(F)(2) of the Commission's enabling act¹ as a legislative statement of principles of collateral estoppel and thereby carry out the intent of the legislature that the Commission determine the extent of the State's Public Trust interest in the bed of an entire reach of the Salt River; or (2) construe section 1(F)(2) to defeat Commission jurisdiction, leaving title disputes to be resolved parcel by parcel in separate quiet title suits in derogation of legislative intent?

2. Were the Kibbey Decree, the Kent Decree and the 1977 Judgment judicial "determinations" in which (a) the issue of Salt River navigability as of statehood for title purposes was actually litigated, (b) the trustee of the Public Trust, acting in that capacity, was a party against whom the doctrine of collateral estoppel may be invoked, (c) the trustee had a full opportunity to litigate the issue and actually did litigate it, and (d) the issue of title navigability of the Salt River was essential to the determination?

¹ 1992 Ariz. Laws 2d Reg. Sess. ch. 297 (hereinafter the "1992 Act").

STATEMENT OF FACTS²

The administrative decision challenged by this special action is the Commission's denial of Petitioners' Notices of Lack of Jurisdiction and Motion to Dismiss, Petitioners' Appendices 3, 6 and 9, respectively, in an open meeting held on February 16, 1994. See Respondent Land's Appendix B. This decision is memorialized in Chairman Jennings' Order of March 8, 1994. Respondent Land's Appendix C.

I. THE PARTIES

M.J. Hassell, in his official capacity as State Land Commissioner, has intervened and responds to the Special Action Petition as the Public Trust advocate pursuant to A.R.S. § 37-1102, and pursuant to his general obligation to exercise all powers vested in, and to perform all duties imposed upon the State Land Department. A.R.S. §§ 37-102(B),(C) and 37-132(A)(1). Public Trust lands fall within the ambit of Land Department delegated authority.

II. THE 1992 ACT

Petitioners' entire argument regarding the 1992 Act focuses on a single sentence: "This act does not affect: . . . Reaches of watercourses where determinations have been made by judicial actions before the effective date of this act." Respondent Land's position is that this Court must examine the 1992 Act as a whole, and in the context of its history.

² For easier understanding Respondent Land will follow the organization of Petitioners' Statement of Facts.

The 1992 Act was enacted after the decision in Arizona Center for Law in Public Interest v. Hassell, 172 Ariz. 356, 837 P.2d 158 (App. 1991). In 1987 the legislature attempted to solve the problem of titles clouded by the claim of State ownership of lands in the beds of Arizona watercourses by enacting Chapter 127 of Arizona Session Laws (the "Quit-Claim Act). The Court of Appeals found that the Quit-Claim Act:

fails to provide a mechanism for particularized assessment of (1) the validity of the equal footing claims that it relinquishes; (2) the continuing value of land subject to such claims for purposes consistent with the public trust; (3) equitable and reasonable consideration for claims that may be relinquished without impairing the public trust; and (4) conditions that may be necessary to any transfer to assure that public trust interests remain protected.

Id. at 371, 837 P.2d at 173. The court held that the challenged portions of the Quit-Claim Act were invalid under the Public Trust Doctrine and the Gift Clause of the Arizona Constitution. Id. The court also suggested that an administrative process might reasonably permit the systematic investigation and evaluation of each of the State's claims. Id. at 370, 837 P.2d at 172. The legislature responded to the Center for Law decision with the 1992 Act.

The legislative intent and purpose preceding the Act states in pertinent part:

C. . . . it is apparent that this state's claims to many watercourses in this arid state are of doubtful validity and that while this state's claims to other watercourses are believed to be more viable, a systematic process must be established to document this state's claim, to locate the precise lands that are subject to such claims and to preserve and protect the public trust in those instances where trust values exist.

D. A review of the experience of other states having similar claims indicates that in the absence of legislation, protracted, difficult, expensive and disruptive fact-finding processes and litigation may be needed to resolve the claims.

E. The purpose of this act is to establish an administrative procedure for the necessary fact-finding efforts and the determination of the extent of this state's ownership of the beds of watercourses located in this state.

1992 Act § 1 (emphasis added). The 1992 Act required that the Commission establish priorities for its title-navigability determinations. A.R.S. § 37-1123(D). On December 16, 1992, the Commission acted to set priorities. It set the Salt, Gila, Verde, San Pedro and Hassayampa Rivers as priority watercourses. Respondent Land's Appendix A. The Commission noticed its hearing on title navigability of the Salt River as the first watercourse to be heard before the Commission. Petitioners' Appendix 2 pp. 14-15.

III. THE PRIOR DETERMINATIONS

A. The 1977 Final Judgment

In response to Petitioners' recitation of the consolidated proceedings in Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co., Cause No. CIV 71-376 PHX (D. Ariz., April 13, 1977), Respondent Land directs the Court's attention to the following clarifications:

First, the named defendant in Cause No. CIV 72-376 PHX was the Arizona State Highway Commission.³ The named plaintiff in

³ The Arizona Department of Transportation was created in 1973 (during the course of these lawsuits) and replaced the Arizona Highway Commission, which was terminated by the 1973 legislation. Respondent Land's Appendix D.

CIV-74-529-PHX was the State of Arizona ex rel. W.A. Ordway, Director of the Arizona Department of Transportation.⁴

Petitioners' Appendix 3 pp. 41, 75 and 77.

Second, the issues essential to the final Judgment were 1) whether the location of the Reservation Boundary was within the scope and authority of the Secretary of Interior to determine and 2) whether a survey and plat approved in 1972 established the south boundary of the reservation as a fixed boundary line. Petitioners' Appendix 3 pp. 142-143, 157-160.

Third, the court did nothing more than adopt as its own findings all of the facts agreed to by the parties in the Pretrial Order. Petitioners' Appendix 3 p. 157. The court stated:

The following facts are admitted by the parties and require no proof:

6. [T]he Secretary of the Interior [withdrew certain lands]. . . . It is within this area that the Bureau of Reclamation issued sand and gravel permits to the

⁴ The Findings of Fact and Conclusions of Law described the pertinent lawsuits as follows:

"No. CIV-72-376. This is an action filed by the Indian Community against Arizona Sand and Rock Co., et al., for trespass, ejectment and damages for the removal of sand and gravel. . . . Of the defendants originally named in this action, only the following still remain: [various private parties and Maricopa County] Arizona State Highway Commission (now the Arizona Department of Transportation). . . ."

"No. CIV-74-529. This is an action brought by the State of Arizona on behalf of the Director of the Arizona Department of Transportation. The State of Arizona claims an interest in a portion of the disputed property by reason of certain licenses and permits for the removal of sand and gravel and rights of way which were granted to the Department by the Bureau of Reclamation, Department of Interior." (Emphasis added.) Petitioners' Appendix 3 pp. 146 and 148, respectively.

Arizona Highway Department and Maricopa County. Fee title to this property is vested in the United States.

. . . .

14. The Arizona Department of Transportation has claimed certain rights to remove sand and gravel . . . pursuant to permits and licenses issued by the . . . Bureau of Reclamation, which date from and after 1942 and has been granted rights of way covering portions of Country Club Drive by the Bureau of Reclamation.

. . . .

30. The Salt River is not now and never has been a navigable river.

Petitioners' Appendix 3 pp. 51, 53, 55-56 and 58, respectively, (emphasis added).

Fourth, the court concluded that the Secretary of Interior's reservation boundary determination was reasonable. Petitioners' Appendix 3 p. 159.

Finally, no damages were adjudged against the Department of Transportation in the Judgment or the Findings of Fact and Conclusions of Law attached to the Judgment. Appendix 3 pp. 142-144, 145-160.

B. The Kent Decree

Hurley v. Abbott was a pre-statehood (1910) water rights adjudication. Petitioners' Appendix 9 at 354. The parties were: (1) plaintiff, P.T. Hurley, an early appropriator of water; (2) defendants, a large number of individual land owners in the valley; and (3) intervenor and cross complainant, the United States,⁵ as owner of the canals on the north side of

⁵ As a result of the adjudication, United States Reclamation officials were subject to the control of the court with respect to the impounding, diversion and distribution of the flow of the water in the river. Petitioners' Appendix 9 p. 369.

the river, and in its capacity as guardian of individual reservation Indians. The United States asked for a judgment establishing and prioritizing the rights of each individual defendant and each parcel of land to the waters of the Salt River. Petitioners' Appendix 9 p. 360-361.

The United States did **not** appear in its capacity as predecessor trustee for the Public Trust. The Decree adjudicated water rights, **not** interests in land; title navigability was **not** at issue. Id.

C. The Kibbey Decree

Wormser v. Salt River Valley Canal Co., was an 1892 decision involving the rights of canal companies in distributing appropriated water. **No trustee** of the Public Trust was a party. Salt River navigability arose in the context of the Desert Land Act of 1877 and prior appropriation of water. **No one** litigated or had an interest in litigating title navigability. Title navigability was **not** an issue.

The best description of this case was made by Judge Kent:

In . . . 1887 a suit was begun . . . for the purpose of enjoining . . . owners of the canal systems from the diversion of water from the Salt river The purpose of such suit and the reasons for it . . . are set forth in . . . the opinion of Judge Kibbey . . . :

"The earlier efforts of the settlers . . . [were] confined to the production of hay and grain, and a few garden vegetables. . . . As the settlement became older and its population increased . . . the ranchers gradually began the planting and cultivation of alfalfa, fruits and vines, which required water during the entire year. . . . [T]here were many usurpations and concessions of rights to the diversion of water . . . because of the then abundance of water. As the population increased and with it the more extended form of cultivation, a deficiency in

water began to be noticed. While the river during the months in which hay and grain and the ordinary agricultural crops are being grown had in it a vast volume of water, this volume diminished with the advance of the season, from thousands of cubic feet per second to about, at a minimum of, three hundred cubic feet per second, and . . . the demand for water in the summer months, when the supply is the least . . . exceeded the supply. This deficiency of supply made at once the question of priority of right to appropriate water, important, and that question is the subject matter of this suit."

[In that case] Judge Kibbey . . . decreed that the amount of water which the various canal companies were entitled in each year to divert from the Salt river . . . was the amount necessary . . . to cultivate and irrigate the number of quarter sections set forth [in decision tables], but did not find the amount of water actually necessary for such cultivation.

Petitioners' Appendix 9 pp. 358-359.

IV. THE PROCEEDINGS BELOW

On February 16, 1994, the Commission unanimously denied various Notices and the Motion filed by Petitioners.⁶ On March 8, 1994, the Chairman memorialized the decision. Respondent Land's Appendix C.

⁶ Petitioners have listed the various notices, motions, responses and replies by date. It may help the Court to know that two "Notices of Lack of Jurisdiction" were filed, one by CalMat/Allied Concrete and one by the Salt River Pima-Maricopa Indian Community. Petitioners Appendices 6 and 3, respectively. The Land Department filed one Response to both Notices; so did the Center for Law in the Public Interest. Petitioners' Appendices 4 and 8, respectively. Replies to the Land Department's Response were filed. Petitioners' Appendices 5 and 7, respectively. Later Salt River Project and the Water Users' Association filed a Motion to Dismiss. Petitioners' Appendix 9. The Land Department responded, Petitioners' Appendix 10, and the Project and Association replied, Petitioners' Appendix 11.

The Notices were argued on January 19, 1994, Petitioners' Appendix 12 pp. 504-529, 533-540. The Motion to Dismiss was argued, and all argued Notices and Motions were decided by the Commission on February 16, 1994. Respondent Land's Appendix B.

ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In 1912 this State acquired title to the lands below the high-water mark in all navigable watercourses within its borders. In 1985, for the first time, the State asserted its claim to a watercourse other than the Colorado River. Existing title assumptions were threatened, and in 1987 the legislature enacted the Quit-Claim Act in an attempt to settle clouded titles. See Arizona Center for Law in Public Interest v. Hassell, 172 Ariz. 356, 360, 837 P.2d 158, 162 (App. 1991). The Court of Appeals held that the Quit-Claim Act was invalid under the public trust doctrine and under the Gift Clause of the Arizona Constitution.⁷ Id. at 371, 837 P.2d at 173.

In 1992 the legislature responded to the Center for Law decision by enacting the 1992 Act.

Petitioners now ask this Court to construe a single sentence in the Act so restrictively as to override the intent of the legislature to delegate to the Commission the necessary fact finding and decision making regarding title navigability on the first priority river. They ask the Court to construe the phrase "determinations . . . made by judicial actions" to mean **any** final judgment in **any** action between **any** parties, whether or not this construction completely defeats the intent of the legislature in enacting the 1992 Act. The result of

⁷ The court in Center for Law reviews fully, for the first time in Arizona, the Equal Footing Doctrine and the Public Trust Doctrine. Id. at 362-69, 837 P.2d at 164-71.

such an overly restrictive construction would be to remove Commission jurisdiction and shift title navigability determinations to the superior court on a parcel-by-parcel basis, the very evil the Act was meant to remedy.

Respondent Land asks the Court to construe section 1(F)(2) as it was intended, which was to codify common law principles of res judicata and collateral estoppel.

The interests of the beneficiaries of the Public Trust are important interests that require the same protections as the property interests of individuals. Arizona Center for Law in Public Interest v. Hassell, 172 Ariz. 356, 364-66, 837 P.2d 158, 166-68 (App. 1991). Those interests are protected by principles of res judicata and collateral estoppel. The argument that a final judicial determination resulting from litigation between any parties, in any context, wherein the trustee of the Public Trust has had no opportunity to litigate on behalf of the public beneficiaries, removes Commission jurisdiction over a title-navigability determination is manifestly unjust and legally indefensible.

Common sense should prevail. Those policies that assure finality when an issue has already been decided between parties apply with equal force to the present situation. Section 2(F)(2), when interpreted correctly, does nothing more than codify the reasonable premise that title navigability of a river reach has already been decided, and the prior litigation meets all the requisites for collateral estoppel. It would then be a waste of resources to relitigate the issue before the

Commission or any other tribunal. If the issue could not be relitigated in the courts because of issue preclusion, then it should finally be laid to rest as having been decided. However, a construction of section 1(F)(2) that simply ousts Commission jurisdiction and leaves the issue of title navigability to be litigated piecemeal in the superior court does not serve either the public policy favoring finality of determinations or the legislative purpose in enacting the 1992 Act.

A sensible construction of section 1(F)(2) recognizes that this provision is legislative shorthand for the common-law doctrines of res judicata and collateral estoppel, enacted for the purpose of keeping the Commission from expending time and resources to determine a matter which would be found to be precluded from relitigation upon administrative review.

II. ORDINARY PRINCIPLES OF STATUTORY CONSTRUCTION APPLY

A. **Determining Legislative Intent Is the Principle First Applied in Construing⁸ Section 1(F)(2) of the 1992 Act**

In construing section 1(F)(2), the Court must first determine the legislative intent behind the 1992 Act. In determining intent, the Court looks to the policy behind the Act, the evil it was designed to remedy, the words, the context, the subject matter and the effects and consequences of the entire Act. The Court must give meaningful operation to all of its provisions. See Calvert v. Farmers Insurance Co. of

⁸ Although not briefed below, this argument was made to the Commission at their meeting on February 16, 1994 before the members considered and denied the pending jurisdictional motions. Respondent Land's Appendix E for transcript.

Arizona, 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985) (citations omitted); accord Wyatt v. Wehmuehler, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991).

The legislative policy implemented by the 1992 Act is to clear title to land located in or near watercourses in this State, for both private landowners and the Public Trust, and where appropriate, to protect and preserve Public Trust values. 1992 Act § 1(A)(B). The evil the legislature intended to remedy was that experienced by other states, where, in the absence of specific legislation, "protracted, difficult, expensive and disruptive fact-finding processes and litigation" were necessary to resolve Equal Footing claims. Id. § (D). Moreover, the 1992 Act was enacted in the context of a court decision which held a prior legislative attempt to solve the problem unconstitutional and a violation of the Public Trust. See Statement of Facts, ¶ II, p. 5, supra.

Finally, the legislature expressly stated its specific intent to create an administrative process to determine the extent of the Public Trust interest, 1992 Act § 1(E), and has enacted specific provisions requiring the Commission to set as priorities the most important river reaches, A.R.S. § 37-1123(D), and to determine title navigability through an administrative hearing process, A.R.S. §§ 37-1126, -1128, provisions which must be given meaningful operation.

After application of these statutory construction principles of statutory construction, it becomes clear that section 1(F)(2) cannot be construed to defeat Commission jurisdiction

to determine title navigability of the reach of the Salt River which the Commission is now considering.

B. Section 1(F)(2) Must Be Construed as Consistent with Common Law Principles of Res Judicata and Collateral Estoppel

Petitioners rely entirely on the definition of "determination" in support of their argument. A "determination" is a decision of a court that implies an ending or finality of a controversy or suit. Black's Law Dictionary 405 (5th ed. 1979). However, every final judicial decision incorporates the doctrines of res judicata and collateral estoppel. These doctrines have developed through case law to establish when repose is appropriate and when litigation is appropriate.

Res judicata and collateral estoppel are common law doctrines that apply with full force in Arizona unless a statute, by express language or necessary implication, abrogates the common law. Wyatt v. WehmueLLer, 167 Ariz. 281, 284, 806 P.2d 870, 873 (1991) citing S.H. Kress & Co. v. Superior Court, 66 Ariz. 67, 73, 182 P.2d 931, 935 (1947). Nothing in the 1992 Act expressly abrogates or necessarily implies that Section 1(F)(2) abrogates the common law principles of res judicata or collateral estoppel. Instead, Section 1(F)(2) appears to partially codify the law of res judicata. Cf. Tucson Gas & Electric Co. v. Schantz, 5 Ariz. App. 511, 515, 428 P.2d 686, 690 (1967) (a shareholder' common law right of inspection, which exists independently of statute, is not

abrogated by statutory remedy). In this instance, the common law rule applies and must be harmonized with Section 1(F)(2).

The Court of Appeals has set out the proper way to construe Section 1(F)(2):

Where a right exists at common law and a statute is enacted which could be construed as being consistent with the common law, then rules of statutory construction require [the decision maker] to indulge every intendment in favor of consistency with the common law. We are not to presume that the Legislature has repudiated the common law without a clear manifestation that such was its intent.

In re Estate of Thelen, 9 Ariz. App. 157, 160-61, 450 P.2d 123, 126-27 (1969).

The legislature created the Commission to determine title navigability of the State's watercourses in the order of their importance, see Statement of Facts, ¶ 2, p. 5-6, supra, and has required the State Land Commissioner to be an advocate for the Public Trust before the Commission, A.R.S. § 37-1102(1). Both the State, as trustee of the Public Trust, and the beneficiaries of the Public Trust themselves have the right to the benefit of principles of collateral estoppel that have been developed to give every litigant a fair opportunity to be heard in the appropriate forum when important rights are involved. Section 1(F)(2) merely codifies principles of res judicata and collateral estoppel to prevent the Commission from expending time and resources to decide a matter which, upon administrative review, would be precluded from relitigation.

III. THE COMMISSION IS NOT HEARING A MATTER THAT HAS BEEN LITIGATED AND DECIDED IN ANY PRIOR JUDICIAL DETERMINATION

Once the proper construction of section 1(F)(2) is applied, Respondent Land asks the Court to examine the prior determinations raised by Petitioners in light of the doctrine of collateral estoppel and to direct the Commission, not only that it has jurisdiction to hear and determine the issue of Salt River title navigability,⁹ but also that the Land Commissioner, as Public Trust advocate, is not precluded from litigating the issue before the Commission.

A. The 1977 Judgment, the Kent Decree and the Kibbey Decree Do Not Meet the Necessary Elements to Invoke Principles of Collateral Estoppel

The elements required to establish collateral estoppel or issue preclusion against a party in a new and different proceeding have been succinctly stated in Chaney Building Co. v. City of Tucson:

Collateral estoppel or issue preclusion is applicable when the issue or fact to be litigated was actually

⁹ In a simple court case, if either the plaintiff or the defendant is precluded from relitigating the defining issue, the case ends because the court will not permit a collateral attack on a former judgment. The Commission's adjudication of navigability raises collateral estoppel in a very different process. The adjudication is noticed by direction of the statute, A.R.S. § 37-1126. All interested persons are invited to participate and advocate for either navigability or nonnavigability, A.R.S. § 37-1123(B), and the Land Commissioner is directed to advocate on behalf of the Public Trust, A.R.S. § 37-1102(1). The arguments that follow explain why the Public Trust advocate should not be estopped from advocating for the navigability of the Salt. However, if this Court should decide that the State, including the Public Trust advocate, is barred, jurisdiction should remain in the Commission so that the beneficiaries, represented by the Center for Law in the Public Interest or others, are not barred. See Petitioners' Appendix 4 p. 203, Appendix 8 p. 255.

litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it, provided such issue or fact was essential to the prior judgment.

148 Ariz. 571, 573, 576 P.2d 28, 30 (1986).

In deciding whether the Commission has jurisdiction to decide title navigability of the Salt River, the Court "must look both to the degree of identity of the parties and to the degree of identity of the issues in the two actions." Industrial Park Corp. v. U.S.I.F. Palo Verde Corp., 26 Ariz. App. 204, 206, 547 P.2d 56, 58 (1976).

1. **The Public Trust Advocate Is Not a Party Estopped by the Department of Transportation's Ultra Vires Admissions in Prior Litigation**

With regard to the degree of identity of the parties,¹⁰ Petitioners disingenuously refer to the "State of Arizona" as the party in the litigation resulting in the 1977 Judgment (hereinafter the "1977 trespass case"). The record of that proceeding plainly shows that the party was the State on the relationship of the Director of Transportation. The Department of Transportation and the office of Director were created by 1973 legislation. See Statement of Facts, ¶ III(A)(1) pp. 6-7, supra.

¹⁰ One of the Petitioners, CalMat of Arizona, has already argued the 1977 Judgment as precluding the State from litigating the navigability of the Salt River. The court ruled against CalMat in CalMat of Arizona v. State ex rel. Miller, 172 Ariz. 300, 311, 836 P.2d 1010, 1021 (App. 1992), aff'd in pertinent part, vacated in part, 148 Ariz. Adv. Rep. 3, 859 P.2d 1323 (1993), after a full briefing of the issue. See Petitioners' Appendix 4 pp. 208-220.

It is well established that administrative officers and agencies have no common law or inherent powers, and that the powers and duties of an agency are to be measured by the statute creating them. Kendall v. Malcolm, 98 Ariz. 329, 334, 404 P.2d 414, 417 (1965); Cochise County v. Kirschner, 171 Ariz. 258, 261, 830 P.2d 470, 473 (App. 1992) (citations omitted). A review of the Department of Transportation's powers discloses no statutory power delegated to it or to its Director to dispose of or to deal in any way with Public Trust land. See Respondent Land's Appendix D for copy of the Department's enabling act in effect during the litigation. State government is not one homogeneous entity with a single responsibility. The mere fact that one agency was a party to an action, because of its particular responsibilities, does not give a judgment preclusive effect on the entire state government. This principle is particularly true here, where the bar would estop the Land Department from acting in its capacity as trustee for the Public Trust.¹¹

¹¹ Long before the legislature enacted the 1992 Act, the State Land Department was authorized to have charge and control of all lands owned by the State except lands under the specific use and control of state institutions. Moreover, the Land Department was authorized to defend all actions and proceedings to protect the interest of the State in State lands. See current codification of this authority at A.R.S. § 37-102(B), (C).

It should also be noted that the Attorney General on his own has no authority to sue or defend interests in State land managed by the Land Department. Arizona State Land Department v. McFate, 87 Ariz. 139, 144-48, 348 P.2d 912, 915-18 (1960).

Section 36 of Restatement of Judgments 2d (1981) deals with parties appearing in different capacities and states: "A party appearing in an action in one capacity, individual or representative, is not thereby bound by . . . the rules of res judicata in a subsequent action in which he appears in another capacity."¹²

A recent case is illustrative. In CalMat of Ariz. v. State ex rel. Miller, the Court of Appeals held:

Generally, equitable estoppel does not apply to the state in matters affecting sovereign immunity, and this is especially true if the claim of estoppel is based upon an ultra vires or illegal act of a government official. However, this rule is not absolute. Estoppel may apply against the state only when the public interest will not be unduly damaged or when its application will not affect the exercise of governmental powers or make binding the unauthorized acts of the government. . . . Binding the state by estoppel to a position asserted in another lawsuit, after that position has been declared unconstitutional, would unduly damage the public interest. Since Hassell determined that the state held the land of all navigable water courses within its boundaries as of February 14, 1912, when Arizona achieved statehood, the state must be allowed to put on evidence as to whether any of the condemned property in this case falls within the boundaries of any navigable watercourse. To agree that the state is estopped from presenting this evidence on remand would be inconsistent with our holding in Hassell that quit claims of riverbed land are unconstitutional and that the state cannot waive its right to hold such lands in the public trust. Therefore the state has the duty to assert, and must assert, this ownership interest in

¹² Comment f speaks directly to separate government agency responsibilities:

If the second action involves an agency or official whose functions and responsibilities are so distinct from those of the agency or official in the first action that applying preclusion would interfere with the proper allocation of authority between them, the earlier judgment should not be given preclusive effect in the second action.

this and any future condemnation litigation involving riverbed land.

172 Ariz. 300, 311, 836 P.2d 1010, 1021 (App. 1992), vacated in part, but aff'd in pertinent part, 148 Ariz. Adv. Rep. 3, 859 P.2d 1323 (1993) (emphasis added).

The ultra vires actions of officers of the Department of Transportation and its lawyer in admitting that the Salt River was not navigable cannot bind the Land Department.

This argument applies with equal or greater force to the Kibbey and Kent Decrees. The State did not yet exist when these actions were litigated. The United States was not a party to the action resulting in the Kibbey Decree. Although it intervened in the 1910 water adjudication, the United States appeared as owner of canals on the north side of the Salt River and as Guardian for certain Indians. See Statement of Facts, ¶ III(B)(C), pp. 8-10, supra. The United States did not appear as predecessor Trustee of the Public Trust under the Equal Footing Doctrine.¹³

2. The Arizona Department of Transportation Had No Incentive to Protect Public Trust Land Ownership

In order for the doctrine of issue preclusion to apply, it is essential that the incentive of the "State" in the prior litigations must be sufficient for the "State" to obtain a full and fair adjudication of the issue in that action. In the 1977

¹³ The land under navigable waters is an incident of sovereignty. The federal government holds such lands in trust for future states, to be granted to such states when they enter the Union and assume sovereignty on an "equal footing" with the established states. Montana v. United States, 450 U.S. 544, 551, 101 S. Ct. 1245, 1251, 67 L. Ed. 2d 493 (1981).

trespass case the Department of Transportation had an interest in the subject property only because of certain licenses and permits for the removal of sand and gravel, and because of rights-of-way that were granted to the Department of Transportation by the Bureau of Reclamation. See Statement of Facts ¶ III(A) p. 8, supra.

Although a determination of navigability and State ownership would have countered the Salt River Pima-Maricopa Indian Community's rights to land in the bed, it would also have undermined the Department of Transportation's licenses and rights-of-way granted by the federal government, with no guarantee that Public Trust land could be used for sand gravel extraction or for rights-of-way. Thus, the Department had no incentive to press for title navigability of the Salt River. The requisite identity of interest to apply collateral estoppel against the Land Commissioner is missing.

3. Whether the Salt River Was Navigable for Purposes of Title at Statehood Was Not Essential to the Prior Judgment and Decrees

The issue of whether the Salt River was navigable at statehood was not essential to the Court's ruling in the 1977 trespass case. In King v. Superior Court the court held that issue preclusion arises only when an issue was actually litigated and determined in the prior suit; if an issue was neither essential nor necessary to the prior judgment, preclusion is inappropriate. 138 Ariz. 147, 150, 673 P.2d 787, 790 (1983).

A review of the Judgment and Findings of Fact and Conclusions of Law in the 1977 trespass case conclusively demon-

strates that, although all parties admitted that the Salt River was not navigable at statehood, title navigability was not litigated, determined or essential¹⁴ to the ruling on the case. See Statement of Facts, ¶ III(A), pp. 7-8, supra.

Again, this argument applies with equal or greater force to the Kibbey and Kent Decrees. The only issue in these cases was distribution of water according to the doctrine of prior appropriation. Title navigability was not an issue. See Statement of Facts, ¶ III(B)(C), pp. 8-10, supra.

4. **"Navigability" for Purposes of Adjudicating Water Rights Is Different from "Navigability" for the Purpose of Determining Title to the Riverbed**

A determination of navigability for title purposes is not the same thing as a determination of navigability for purposes of determining water rights under prior appropriation. See Oregon by Division of State Lands v. Riverfront Protection Asso., 672 F.2d 792, 794 n.1 (9th Cir. 1982). The Commission's charge is to determine navigability for purposes of land title. Nonetheless, Petitioners' discussion of the law of prior

¹⁴ A determination by the Secretary of the Interior that the boundary of the reservation is in a certain place is not the equivalent of a determination that the Salt River Pima-Maricopa Indian Community owns the bed of a navigable river within the bounds of the reservation. See generally, Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (quiet title action between United States on behalf of the Crow Tribe and for itself against Montana; title of Big Horn River passes to Montana upon its admission to the Union); United State v. Holt State Bank, 270 U.S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926) (quiet title litigation between United States and successor in interest to Minnesota; bed of navigable lake within Indian reservation passed to Minnesota upon its admission to Union).

appropriation as it has developed in Arizona does provide important insights into the jurisdiction of the Commission.

The first insight is that under the Desert Land Act, "all navigable streams remained subject to Congress' plenary power over commerce." Petition for Special Action at 18. The importance of this insight is that a determination of navigability for purposes of title to riverbeds¹⁵ differs from a determination of navigability for purposes of federal regulatory jurisdiction under the commerce clause. No interstate commerce requirement exists when the issue is navigability for title. See Riverfront Protection Asso., 672 F.2d at 794 n.1. Thus, although courts may look at some of the same or similar evidence to determine navigability for both purposes, the fact that a court has made a determination that a river is nonnavigable for federal commerce clause purposes is not determinative in title cases. Id.

The second insight is that the Desert Land Act provided for the "bifurcation of the methods of acquiring land and water rights. Land rights were to be purchased or otherwise acquired

¹⁵ Control over Public Trust land is strongly identified with the sovereign power of government. It will not be held that the United States has conveyed such land except because of some international duty or public exigency. A court deciding a question of title to such land must begin with a strong presumption against conveyance by the United States and must not infer such a conveyance unless the intention was definitely declared or otherwise made by the appropriate federal authority. Montana v. United States, 450 U.S. 544, 552-557, 101 S. Ct. 1245, 1251-54, 67 L.Ed. 2d 493 (1981). Intervention by the United States as a canal owner, or on behalf of individual Indians, in a water rights case cannot affect the Public Trust interest in the bed of the Salt River.

from the Federal Government; water rights were to be regulated under state and territorial appropriation systems." Petition for Special Action at 17. The importance of this insight is that it clearly demonstrates that we must look to federal law to construe a federal grant of land, but to state law to determine water rights.¹⁶ Thus, we apply federal law for the presumption that the State owns the beds of watercourses navigable as of statehood, but look to the state law of prior appropriation to determine rights to use surface waters. Different law applies, different rights are involved.

Nothing in either the Kibbey or Kent decisions shows the specific bases for the determination of nonnavigability. A review of these decisions does show that they were water rights cases concerned only with the Desert Land Act requirements and the apportionment of the waters of the Salt River, a watercourse not required for interstate commerce purposes. The references to navigability made in these two decrees do not involve the same issues as the issue involved here so as to

¹⁶ There is some confusion as to whether the Howell Code rejection of the doctrine of riparian water rights and the same provision in the Arizona Constitution, Article 17, Section 1, reject principles that apply to land ownership in or near watercourses. That issue was settled in State v. Gunther & Shirley Co., 5 Ariz. App. 77, 83, 423 P.2d 352, 358 (1967), which holds that ownership rights in land situated along or on (or riparian to) a watercourse are not affected by the rejection of riparian rights to water in that watercourse. See also State v. Bonelli Cattle Co., 107 Ariz. 465, 469, 489 P.2d 699, 503 (1971) (Lockwood, J., dissenting), Supp. op. 108 Ariz. 258, 495 P.2d 1312 (1972), rev'd, Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 38 L. Ed. 2d 526, 94 S. Ct. 517 (1973), overruled by Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977).

preclude the Commission from determining navigability for purposes of title.

IV. ATTORNEYS' FEES ARE INAPPROPRIATE IN THIS CASE

Respondent Land opposes Petitioners' request for attorneys fees pursuant to A.R.S. § 12-348 and Rule 4(f) of the Rules of Procedure for Special Actions. The statute provides that fees shall be awarded in special actions to a party challenging an action "by the state against the party." The instant proceeding does not come within the ambit of the statute.

The task set by the legislature for the Commission pursuant to the 1992 Act is unique. The legislative purpose and intent set forth in the Act states that in order to avoid litigation, the Commission is charged with a role that is essentially fact finding in adjudicating the navigability of the State's watercourses and the concomitant extent of the State's interest in such watercourses. 1992 Act § 1.

The purpose of the hearing is to determine title navigability at statehood. At this point, there simply is no "action by the state against" Petitioners. Instead, the Commission is conducting the fact finding necessary to make its determination. If in fact the Salt River is found not to have been navigable, there will never be an action against Petitioner, but instead a process by which title to their property was cleared. This is not the type of case contemplated by the legislature in enacting A.R.S. § 12-348.

In addition, one or more of the Petitioners may not be eligible for fees under A.R.S. § 12-348. See Maricopa County

v. Maricopa County Municipal Conservation Dist. No. 1, 171 Ariz. 325, 830 P.2d 846 (App. 1991), where the court held that a water conservation district could not recover fees under the statute because it was considered a political subdivision of the State. Under this decision, Salt River Project is not eligible for an award of fees from this Court. The rationale for the holding in Maricopa County may preclude an award of fees to the Salt River Pima-Maricopa Indian Community as well. See discussion, 171 Ariz. 332-33, 830 P.2d at 853-54. Petitioners' request for attorneys' fees should be denied.

CONCLUSION

Public policy considerations concerning state sovereignty and the rights of the public beneficiaries to use Public Trust lands are important. These considerations are important enough for the Commission to continue its deliberations on title navigability of the Salt River irrespective of the numerous red herrings pulled from the history of Salt River litigation over other matters and between other litigants.

Petitioners have failed to demonstrate that Respondent Land is estopped from advocating for title navigability of the Salt River or that the Commission lacks the requisite jurisdiction to hear the matter. The petition for termination of the Commission's proceeding should be denied.

RESPECTFULLY SUBMITTED this 22 day of March, 1994.

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ORIGINAL AND SIX COPIES filed with
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22nd day of March, 1994.

TWO COPIES mailed this 22nd day of
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Materials Co.

BY Shirley J. Simpson

0921A.21
v

IN THE SUPREME COURT

STATE OF ARIZONA

CALMAT CO. OF ARIZONA, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CALMAT PROPERTIES CO., a California corporation, CALMAT LAND CO., a California corporation, ALLIED CONCRETE & MATERIALS CO., an Arizona corporation SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT and SALT RIVER VALLEY WATER USERS' ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Petitioners,

v.

THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION, an agency of the State of Arizona, and CURTIS JENNINGS, JAY BRASHEAR, MARGARET S. PETERSON, HAROLD RAMSBACHER and TROY L. PEWE, in their official capacities as members of and constituting The Arizona Navigable Stream Adjudication Commission,

Respondents,

and

M. J. HASSELL, in his official capacity as the State Land Commissioner,

Intervenor-Respondent.

No. CV-94-0093-SA
Arizona Navigable
Stream Adjudication
Commission No. 94-1

96-002-015
SALT RIVER
005

ORIGINAL

APPENDICES TO RESPONSE TO PETITION FOR SPECIAL ACTION

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APPENDICES TO RESPONSE
TO PETITION FOR SPECIAL ACTION

- Appendix A Portions of Arizona Navigable Stream Adjudication
Commission Transcript, dated December 16, 1992
- Appendix B Portion of Arizona Navigable Stream Adjudication
Commission Transcript, dated February 16, 1994
- Appendix C Arizona Navigable Stream Adjudication Commission,
Admin. Docket No. 94-1, Order, dated March 8, 1994
- Appendix D 1973 Ariz. Laws, ch. 146
- Appendix E Portion of Arizona Navigable Stream Adjudication
Commission Transcript, dated February 16, 1994

program. Finally, the appendices in the back of the report include listings of _____ state contacts such as land commissioners and staff, technical references such as _____ legal references such as case law, listing of aerial photography and maps that are available to us, listing of Arizona's historical societies and archaeologists _____ Returning to prioritization, under the statute four factors were identified for the commission and the department to clear when determining navigability or non navigability of a the stream. The four considerations and factors are number and value of the real property parcel affected by this program. Degree of hardship to private owners of political subdivisions such as city or county under this program. Significant trust values and the _____ of those values. A potential liability of the state sovereign claim to the watercourses under this program. In order to deal with these four factors we _____ three categories based on the information that was available to us. Those three categories were economic hardship, we broke those out into demand and access. Social and environmental conditions, we broke those out into recreational and wildlife. And finally quantity,

quality and value of existing resources on those parcels, such as agriculture, grazing, forestry, and minerals. After we identified the three categories, set up a matrix based on an overall view of the state's water courses based on the existing information available to us, we rated twenty four streams or rivers in the state. We then ranked the top ten of those twenty four for this review and based on those top ten we recommend that the board set priority for the top six we have identified in that matrix. The six are - the six rivers we have identified are the Salt River from the Gila River to Granite Reef, The Agua Fria River from Buckeye Road to its headwaters, The Gila River from the Colorado River to the town of Safford, the San Pedro River, the Verde River and the Hassayampa River. We'll be discussing the question of prioritization again this afternoon. It's on the agenda. Are there any questions?

Jennings

The top ten - six you selected I assume that contemplates that those are the ones we will undertake first and then some years in the future perhaps we'll look at the other four in the top

ten and maybe the other fourteen beyond that that you have identified.

Anderson Yes, sir. We anticipate reviewing the prioritization that we've done, the matrix that we've got and expanding it to - we don't pretend or want anybody to believe that we're locked in to only twenty four rivers or ten rivers. There are hundreds of rivers, we've included a list of those rivers and streams in the report we have before you. And there is no reason that we won't look at every one of those eventually.

Ott If I may say so. The reason we _____

Jennings Any other questions. Go ahead, proceed, please.

Anderson That ends my presentation. As I said we will be going into the _____ again in the afternoon. It's shown on your agenda for further discussion. You will have a chance to go over it during the lunch break and come back with some questions. We would like to commence to set priorities today, if possible _____

Jennings Well, as I understand your matrix, you are taking those that there is most likely to be say adverse claims to what interest the state might claim from putting those pretty much at the top of the list. I don't mean exactly in order, but the ones where we're going to have to really look at -

Anderson That's one factor, yes, sir.

Jennings And the, well, and the other factors that you mentioned, the trust benefits and that sort of thing too. Some of the others that are lower in priority, there may not be really any issues other than identifying and making the determination. In other words, there may or may not be adverse interests and that sort of thing, is that -

Anderson That is possible. I'd like at the time add the information that we based all these ratings on were information that we gathered from other state agencies such as Environmental Quality and Water Resources, _____, and other private agencies and within the State Land Department, outside private _____ we appreciate the help we were given.

Jennings Well, it appears that your selection, your matrix is a lot on the plate right there, already, so - do we have any other questions or any comments from the commission.

Ramsbacher Was the Geological Survey - The State Geological Survey consulted in any of this.

Ott Yes _____

Ramsbacher No, no, the State Geological Survey.

Ott Yes, that's _____ that information will be used tremendously _____ ongoing research _____

Brashear In the establishment of priorities, was there an opportunity for affected parties and for the public to have any sort of say about your recommendations.

Anderson At this time, we based our matrix on information we were provided by other agencies and other outside parties, who did provide some information.

of the imagination be considered navigable, but there may be somebody would have an eye on that to do something with it. It would be easier to resolve it now, all is there are critters and rocks and it would be ten or fifteen years from now or twenty till the commission finally gets around to this.

Ott I agree with you that some situations that we have to look at that but however based on the funding and limitation and so on I do believe the ranking that we have -

Brashear We would have to just do it that way.

Ott We would have to address it, mainly based on the need base. I do seem that the second year we go in we will address to some of those streambed, as you say, that we should maybe quick and done with it, you know, don't have any major issues or we will examine that as well.

Brashear Okey.

Jennings Which four the the priority six do you plan to issue studies on? Obviously the Salt River is

your number one. You will take the first four in order unto the matrix.

Ott We have to back up _____

Jennings Could you please put on the chart up there the six priority areas that you have. I just wondered, are you going to take them in order of the matrix. In other words, the first four or are you going to select four out of the six or just -

Ott My recommendation was follow order of ranking, in other words, the Salt River comes first. Regarding the Agua Fria, I believe, I have to turn it to Shirley Simpson to say something on that.

Simpson The Agua Fria is an interesting situation, there has been a judicial determination. Mr. Ching can probably speak to it even better than I could because he was involved in the case before any of the - I think even before the initial streambed act was enacted. It was in litigation and that ties in judicially determined to be non navigable and the state doesn't have any interest in that. Tony, you can probably speak to them what the length of that reach was.

they have no information at all. Just to answer your question, _____ sometime we decide to go with some river that have no information. It can be very costly, too, as well, because when you have no information it means you have to come up with specifics, methodology to handle that.

Brashear Well I'll certainly support a motion that we adopt the six rivers on the list as a item of immediate concern to the commission. If we put them in numerical sort of order and then at our next meeting in January once we get the matter of the Agua Fria moved upon and so forth.

Jennings Do I hear a second.

Ramsbacher Second.

Jennings Do I understand then that the commission, the motion is that we will adopt the six selected project reaches as the first priority with the Department to take them in the order in which they have made them with the one exception that we will take a re-look at the Agua Fria at a January meeting for the legal aspects of that.

Brashear Well, I would like, if you have no objection to that, the actual motion was that we establish a numerical priority of the six rivers we are going to look at. Which ones of the six gets labeled number one, two and three would come after we have a update on the Agua Fria and a little bit more aware of the resolution of the conflict and that court decision.

Jennings Will that give you enough time to get the requested proposals out.

Ott Yes.

Jennings Is there any discussion from the commission on that? Is there anything the Department wants to add to it?

Ott We've been looking for conference room bigger than this room 321. In the basement of this building is a bigger conference room and only thing in January that is available for us is on the 19th and 28th. Is this a good date for the commission members.

Brashear The nineteenth is fine.

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION
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TRANSCRIPT

Tape 2

Jennings Thank you, sir. Any other comments from the audience.
Do we have anything from the commission, then.

Brashear Well, with my head swimming with the eloquence of the
arguments that I've heard, is that I would like to
move, Mr. Chairman, that we deny the motions that are
before us from CalMat, Schlosser and the Salt River
Pima Maricopa Indian Community with the, with a
provision that they can refile at the close of the
evidentiary hearing.

Jennings Do I hear a second to that motion?

Péwé Second.

Jennings It's been moved and seconded that the three motions
which we have had under consideration, have been
deliberating on in public to wit those filed by
CalMat, the Salt River Indian Community and the
Schlosser group. I hope you're not offended by my -
but I don't know what else to call the Schlosser
family?

Schlosser I'm just one of the parties pro per and other clients.
Yes.

Jennings That those motions or notices, however, they're styled
by denied at this time with leave to refile after we
have taken evidence in this matter. Is there any
discussion on that?

Schlosser Mr. Chairman, will the commission promptly prepare a
written order of those findings in the event any party
should choose to go to another forum to challenge
those rulings. So we have a formal document if
someone should choose to go further.

Jennings An order will be issued. I don't believe anyone - and
I don't think it would be appropriate on the denial of
a motion to issue findings of fact or anything of that
nature, but an order will be issued, if the motion
passes. Is there any other discussion on it. Yes,
sir.

?? What about the motion from Buckeye.

Jennings It's not been argued. It's not under consideration.
Mr. Schaper, the representing the moving party asked

that it be deferred from this meeting. Any other discussion. Do I hear a call for the question?

Petersen Question.

Jennings The question has been called for. All those in favor of the motion say "aye".

All responded "aye".

Jennings All those opposed. It appears that it's unanimous with those people present. We're prepared to take up the oral argument on the Salt River Project's motion. Mr. Bryon Lewis.

.

Petersen Mr. Chairman, I'd like to make a motion that we deny this motion and as in the previous one that it could be refiled at the close of the evidentiary hearing.

Jennings Do I hear a second?

Péwé Second

Jennings Any discussion. Call the question. All those in
 favor say "aye".

All responded "aye".

Jennings All those opposed. It is again unanimous.

premises, by motion duly made, seconded and passed unanimously in open session of the Commission, it was determined that said motions should be denied.

IT IS THEREFORE ORDERED that the said motions be and they hereby are denied subject to being refiled at a future meeting at the close of an evidentiary hearing on the issues.

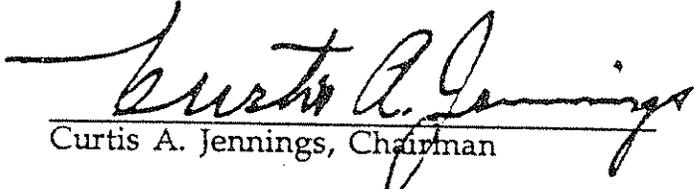
The motion of the Salt River Project Agriculture Improvement and Power District and the Salt River Water Users Association to dismiss the proceedings relating to the navigability of the Salt River from Granite Reef Dam to the Gila River confluence having come on regularly for hearing on February 16, 1994, and the Commission having heard oral argument by the party who filed the motion and by those opposing the same and having deliberated on said motion and opposition thereto, and having heard comments, advice and further argument by the proponent and opponents of said motion and other persons attending said Commission meeting, and having reviewed and read the said motion and papers filed in opposition thereto and being fully advised in the premises, upon motion duly made, seconded and passed unanimously in open session of the Commission, it was determined that said motion should be denied.

IT IS THEREFORE ORDERED that the said motion be and the same is hereby denied, subject to being refiled at a future meeting at the close of an evidentiary hearing on the issues.

IT IS FURTHER ORDERED, at the request of counsel for the moving party, and no objection being made by the opponents, that the Objection to Jurisdiction and Motion to Dismiss and Terminate Proceedings filed by Buckeye

Irrigation Company and Buckeye Water Conservation & Drainage District be and the same is hereby continued until a time to be set in the future at the convenience of the Commission.

DATED March 8, 1994.


Curtis A. Jennings, Chairman

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LAWS OF ARIZONA

CHAPTER 146

Senate Bill 1143

AN ACT

RELATING TO TRANSPORTATION; ESTABLISHING A DEPARTMENT OF TRANSPORTATION; PROVIDING FOR A TRANSPORTATION BOARD; PROVIDING FOR A DIRECTOR; PRESCRIBING THE ORGANIZATION, POWERS AND DUTIES OF THE DEPARTMENT; AMENDING SECTIONS 2-303, 8-232, 20-224.01, 23-391, 26-401, 26-402 AND 26-403, ARIZONA REVISED STATUTES; REPEALING TITLE 28, CHAPTER 1, ARTICLE 1, ARIZONA REVISED STATUTES; AMENDING TITLE 28, CHAPTER 1, ARIZONA REVISED STATUTES, BY ADDING A NEW ARTICLE 1; REPEALING SECTIONS 28-201 AND 28-308, AS AMENDED BY LAWS 1964, CHAPTER 143, SECTION 3, ARIZONA REVISED STATUTES; AMENDING SECTIONS 28-208, 28-221, 28-302, 28-308, AS AMENDED BY LAWS 1972, CHAPTER 170, SECTION 3, 28-431, 28-451, 28-627, 28-641, 28-642, 28-650, 28-701.01, 28-702, 28-702.02, 28-703, 28-704, 28-706, 28-708, 28-727, 28-728, 28-733, 28-751, 28-797, 28-852, 28-855, 28-873, 28-873.01, 28-874, 28-900, 28-930, 28-948, 28-953, 28-958, 28-959, 28-962, 28-964, 28-982, 28-984, 28-1004, 28-1005, 28-1008, 28-1011, 28-1012, 28-1058, 28-1122, 28-1404, 28-1407, 28-1502.01, 28-1521, 28-1525, 28-1527, 28-1570, 28-1602, 28-1611, 28-1614 AND 28-1617, ARIZONA REVISED STATUTES; REPEALING TITLE 28, CHAPTER 2, ARTICLE 3, ARIZONA REVISED STATUTES; REPEALING SECTIONS 28-1121, 28-1597 AND 41-505, AS AMENDED BY LAWS 1972, CHAPTER 192, SECTION 17, ARIZONA REVISED STATUTES; AMENDING TITLE 28, ARIZONA REVISED STATUTES, BY ADDING CHAPTERS 12 THROUGH 16; AMENDING SECTIONS 32-2351, 32-2352, 32-2371 THROUGH 32-2375, 32-2391, 35-116, 36-1754, 41-505, AS AMENDED BY LAWS 1972, CHAPTER 141, SECTION 65, 41-511.05, 41-1742 AND 42-643, ARIZONA REVISED STATUTES; REPEALING TITLE 2, CHAPTERS 1, 2 AND 4 AND TITLE 18, CHAPTERS 1, 5, 6 AND 7, ARIZONA REVISED STATUTES; CHANGING THE DESIGNATION OF TITLE 28, ARIZONA REVISED STATUTES, FROM "MOTOR VEHICLES" TO "TRANSPORTATION" AND PROVIDING FOR TERMINATION OF TERMS OF MEMBERS OF THE AERONAUTICS BOARD AND HIGHWAY COMMISSION.

Be it enacted by the Legislature of the State of Arizona:

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B. Cooperative agreements authorized by this chapter shall, when feasible, enumerate as closely as possible all items of costs and expenditures for which the United States agency is obligated to reimburse the state-highway-department STATE DEPARTMENT OF TRANSPORTATION.

Sec. 7. Section 26-403, Arizona Revised Statutes, is amended to read:

26-403. Authority of director of state department of transportation as to funds

A. When the ~~state-engineer~~ DIRECTOR OF THE STATE DEPARTMENT OF TRANSPORTATION determines it necessary for the expeditious completion of a cooperative agreement undertaken pursuant to this chapter, ~~the~~ THE DIRECTOR OF THE STATE DEPARTMENT OF TRANSPORTATION may pay from the state highway fund, or any account within the state highway fund, all costs of construction, including the acquisition of lands or property necessary to the project, engineering costs, operational expense, equipment rentals and all other costs that have prior approval of the United States department or agency with which the cooperative agreement is made.

B. The ~~state-engineer~~ STATE DEPARTMENT OF TRANSPORTATION may CAUSE TO BE set up proper budget items within or without the state highway fund or special accounts with such fund, and may make and certify transfers of funds among or between such accounts and the special trust account referred to in section 26-402, or any other trust account established by the United States, or by the state-highway-department STATE DEPARTMENT OF TRANSPORTATION, for carrying out cooperative agreements as provided by this chapter.

Sec. 8. Repeal

Title 28, chapter 1, article 1, Arizona Revised Statutes, is repealed.

Sec. 9. Title 28, chapter 1, Arizona Revised Statutes, is amended by adding a new article 1, sections 28-101 through 28-104, 28-104.01, and 28-105 through 28-109, to read:

ARTICLE 1. GENERAL PROVISIONS

28-101. Definitions

IN THIS TITLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

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1. "AUTHORIZED EMERGENCY VEHICLE" MEANS VEHICLES OF THE FIRE DEPARTMENT, POLICE VEHICLES AND SUCH AMBULANCES AND EMERGENCY VEHICLES OF MUNICIPAL DEPARTMENTS OR PUBLIC SERVICE CORPORATIONS AS ARE DESIGNATED OR AUTHORIZED BY THE DEPARTMENT OR LOCAL AUTHORITIES.

2. "BICYCLE" MEANS EVERY DEVICE PROPELLED BY HUMAN POWER UPON WHICH ANY PERSON MAY RIDE, HAVING TWO TANDEM WHEELS EITHER OF WHICH IS MORE THAN SIXTEEN INCHES IN DIAMETER.

3. "BOARD" MEANS THE TRANSPORTATION BOARD.

4. "BUS" MEANS A MOTOR VEHICLE DESIGNED FOR CARRYING MORE THAN TEN PASSENGERS AND USED FOR THE TRANSPORTATION OF PERSONS, AND EVERY MOTOR VEHICLE, OTHER THAN A TAXICAB, DESIGNED AND USED FOR THE TRANSPORTATION OF PERSONS FOR COMPENSATION.

5. "BUSINESS DISTRICT" MEANS THE TERRITORY CONTIGUOUS TO AND INCLUDING A HIGHWAY WHEN WITHIN ANY SIX HUNDRED FEET ALONG SUCH HIGHWAY THERE ARE BUILDINGS IN USE FOR BUSINESS OR INDUSTRIAL PURPOSES, INCLUDING HOTELS, BANKS OR OFFICE BUILDINGS, RAILROAD STATIONS AND PUBLIC BUILDINGS WHICH OCCUPY AT LEAST THREE HUNDRED FEET OF FRONTAGE ON ONE SIDE OR THREE HUNDRED FEET COLLECTIVELY ON BOTH SIDES OF THE HIGHWAY.

6. "CHAUFFEUR" MEANS A PERSON WHO IS EMPLOYED BY ANOTHER FOR THE PRINCIPAL PURPOSE OF DRIVING A MOTOR VEHICLE OR A PERSON WHO DRIVES A SCHOOL BUS TRANSPORTING SCHOOL CHILDREN OR ANY MOTOR VEHICLE WHEN IN USE FOR THE TRANSPORTATION OF PERSONS OR PROPERTY FOR COMPENSATION.

7. "COUNTY HIGHWAY" MEANS ANY PUBLIC ROAD CONSTRUCTED AND MAINTAINED BY A COUNTY.

8. "DEALER" MEANS ANY PERSON ENGAGED IN THE BUSINESS OF BUYING, SELLING OR EXCHANGING MOTOR VEHICLES, TRAILERS OR SEMITRAILERS, AND WHO HAS AN ESTABLISHED PLACE OF BUSINESS.

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9. "DEPARTMENT" MEANS THE DEPARTMENT OF TRANSPORTATION ACTING DIRECTLY OR THROUGH ITS DULY AUTHORIZED OFFICERS AND AGENTS.

10. "DIRECTOR" MEANS THE DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION.

11. "DISTRIBUTOR" INCLUDES ANY PERSON WHO REFINES, MANUFACTURES, PRODUCES, COMPOUNDS, BLENDS OR IMPORTS MOTOR VEHICLE FUEL IN THE ORIGINAL PACKAGE OR CONTAINER OR OTHERWISE, AND INCLUDES EVERY PERSON IMPORTING MOTOR VEHICLE FUEL BY MEANS OF A PIPE LINE OR IN ANY OTHER MANNER, BUT DOES NOT INCLUDE PERSONS IMPORTING MOTOR VEHICLE FUEL IN THE FUEL TANK OF A MOTOR VEHICLE.

12. "DRIVER" MEANS A PERSON WHO DRIVES OR IS IN ACTUAL PHYSICAL CONTROL OF A VEHICLE.

13. "ESSENTIAL PARTS" MEANS INTEGRAL AND BODY PARTS, THE REMOVAL, ALTERATION OR SUBSTITUTION OF WHICH WILL TEND TO CONCEAL THE IDENTITY OR SUBSTANTIALLY ALTER THE APPEARANCE OF THE VEHICLE.

14. "FARM TRACTOR" MEANS A MOTOR VEHICLE DESIGNED AND USED PRIMARILY AS A FARM IMPLEMENT FOR DRAWING IMPLEMENTS OF HUSBANDRY.

15. "FOREIGN VEHICLE" MEANS ANY MOTOR VEHICLE, TRAILER OR SEMITRAILER BROUGHT INTO THIS STATE OTHERWISE THAN IN THE ORDINARY COURSE OF BUSINESS BY OR THROUGH A MANUFACTURER OR DEALER, AND WHICH HAS NOT BEEN REGISTERED IN THIS STATE.

16. "IMPLEMENTS OF HUSBANDRY" INCLUDE VEHICLES DESIGNED PRIMARILY FOR AGRICULTURAL PURPOSES AND USED EXCLUSIVELY IN THE CONDUCT OF AGRICULTURAL OPERATIONS. ANY IMPLEMENT OR VEHICLE, WHETHER SELF-PROPELLED OR OTHERWISE, WHICH IS USED EXCLUSIVELY FOR CARRYING PRODUCTS OF FARMING FROM ONE PART OF A FARM TO ANOTHER PART THEREOF, OR FROM ONE FARM TO ANOTHER FARM, AND IS USED SOLELY FOR AGRICULTURAL PURPOSES, INCLUDING THE PREPARATION OF HARVESTING OF COTTON, ALFALFA, GRAINS AND OTHER FARM CROPS, AND

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WHICH IS ONLY INCIDENTALLY OPERATED OR MOVED ON A HIGHWAY WHETHER AS A TRAILER OR SELF-PROPELLED UNIT, IS AN IMPLEMENT OF HUSBANDRY EXEMPT FROM REGISTRATION AS A MOTOR VEHICLE.

17. "IMPROVED HIGHWAY" MEANS A HIGHWAY PAVED WITH CEMENT CONCRETE OR ASPHALTIC CONCRETE, OR HAVING A HARD SURFACE AND DISTINCT ROADWAY NOT LESS THAN FOUR INCHES THICK, MADE UP OF A MIXTURE OF ROCK, SAND OR GRAVEL, BOUND TOGETHER BY AN ARTIFICIAL BINDER OTHER THAN NATURAL SOIL.

18. "LOCAL AUTHORITIES" MEAN THE COUNTY, MUNICIPAL AND OTHER LOCAL BOARD OR BODY EXERCISING JURISDICTION OVER HIGHWAYS UNDER THE CONSTITUTION AND LAWS OF THIS STATE.

19. "MANUFACTURER" MEANS ANY PERSON ENGAGED IN THE BUSINESS OF MANUFACTURING MOTOR VEHICLES, TRAILERS OR SEMITRAILERS.

20. "MOTORCYCLE" MEANS A MOTOR VEHICLE HAVING A SEAT OR SADDLE FOR THE USE OF THE RIDER AND DESIGNED TO TRAVEL ON NOT MORE THAN THREE WHEELS IN CONTACT WITH THE GROUND, BUT EXCLUDING A TRACTOR.

21. "MOTOR-DRIVEN CYCLE" MEANS A MOTOR CYCLE, INCLUDING EVERY MOTOR SCOOTER, WITH A MOTOR WHICH PRODUCES NOT TO EXCEED FIVE HORSEPOWER, AND EVERY BICYCLE WITH MOTOR ATTACHED.

22. "MOTOR VEHICLE" MEANS ANY SELF-PROPELLED VEHICLE, BUT FOR THE PURPOSES OF THE LAWS RELATING TO THE IMPOSITION OF A TAX UPON MOTOR VEHICLE FUEL THE TERM MEANS ANY VEHICLE OPERATED UPON THE HIGHWAYS OF THIS STATE WHICH IS PROPELLED BY THE USE OF MOTOR VEHICLE FUEL.

23. "MOTOR VEHICLE DIVISION" OR "VEHICLE DIVISION" MEANS THE DIVISION OF MOTOR VEHICLES OF THE DEPARTMENT OF TRANSPORTATION ACTING DIRECTLY OR THROUGH ITS DULY AUTHORIZED OFFICERS AND AGENTS AS DESIGNATED BY THE DIRECTOR.

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24. "MOTOR VEHICLE FUEL" INCLUDES ALL PRODUCTS COMMONLY OR COMMERCIALY KNOWN OR SOLD AS GASOLINE, INCLUDING CASING HEAD GASOLINE, NATURAL GASOLINE, AND ALL FLAMMABLE LIQUIDS, OTHER THAN KEROSENE USED AS AIRCRAFT FUEL, COMPOSED OF A MIXTURE OF SELECTED HYDROCARBONS EXPRESSLY MANUFACTURED AND BLENDED FOR THE PURPOSE OF EFFECTIVELY AND EFFICIENTLY OPERATING INTERNAL COMBUSTION ENGINES. THE TERM "MOTOR VEHICLE FUEL" DOES NOT INCLUDE "FUEL" AS DEFINED IN SECTION 28-1551.

25. "NONRESIDENT" MEANS A PERSON WHO IS NOT A RESIDENT OF THIS STATE AS DEFINED IN SECTION 28-102.

26. "OPERATOR" MEANS A PERSON, OTHER THAN A CHAUFFEUR, WHO DRIVES OR IS IN ACTUAL PHYSICAL CONTROL OVER A MOTOR VEHICLE UPON A HIGHWAY OR WHO IS EXERCISING CONTROL OVER OR STEERING A VEHICLE BEING TOWED BY A MOTOR VEHICLE.

27. "OWNER" MEANS A PERSON WHO HOLDS THE LEGAL TITLE OF A VEHICLE OR, IF A VEHICLE IS THE SUBJECT OF AN AGREEMENT FOR THE CONDITIONAL SALE OR LEASE THEREOF WITH THE RIGHT OF PURCHASE UPON PERFORMANCE OF THE CONDITIONS STATED IN THE AGREEMENT AND WITH AN IMMEDIATE RIGHT OF POSSESSION VESTED IN THE CONDITIONAL VENDEE OR LESSEE, THE CONDITIONAL VENDEE OR LESSEE, OR, IF A MORTGAGOR OF A VEHICLE IS ENTITLED TO POSSESSION, THE MORTGAGOR.

28. "PEDESTRIAN" MEANS ANY PERSON AFOOT.

29. "PERSON" MEANS EVERY NATURAL PERSON, FIRM, CO-PARTNERSHIP, ASSOCIATION OR CORPORATION.

30. "PNEUMATIC TIRE" MEANS EVERY TIRE IN WHICH COMPRESSED AIR IS DESIGNED TO SUPPORT THE LOAD.

31. "POLE TRAILER" MEANS A VEHICLE WITHOUT MOTIVE POWER DESIGNED TO BE DRAWN BY ANOTHER VEHICLE AND ATTACHED TO THE TOWING VEHICLE BY MEANS OF A REACH OR POLE, OR BY BEING BOOMED OR OTHERWISE SECURED TO THE TOWING VEHICLE, AND ORDINARILY USED FOR TRANSPORTING LONG OR IRREGULARLY SHAPED LOADS AS POLES, PIPES OR

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STRUCTURAL MEMBERS CAPABLE, GENERALLY, OF SUSTAINING THEMSELVES AS BEAMS BETWEEN THE SUPPORTING CONNECTIONS.

32. "PUBLIC TRANSIT" OR "MASS TRANSIT" MEANS THE TRANSPORTATION OF PASSENGERS ON SCHEDULED ROUTES BY MEANS OF A CONVEYANCE ON AN INDIVIDUAL PASSENGER FARE-PAYING BASIS, AND EXCLUDING TRANSPORTATION BY A SIGHT-SEEING BUS, SCHOOL BUS, TAXI OR ANY VEHICLE NOT OPERATED ON A SCHEDULED ROUTE BASIS.

33. "RECONSTRUCTED VEHICLE" MEANS ANY VEHICLE WHICH HAS BEEN ASSEMBLED OR CONSTRUCTED LARGELY BY MEANS OF ESSENTIAL PARTS, NEW OR USED, DERIVED FROM VEHICLES OR MAKES OF VEHICLES OF VARIOUS NAMES, MODELS AND TYPES, OR WHICH, IF ORIGINALLY OTHERWISE CONSTRUCTED, HAS BEEN MATERIALLY ALTERED BY THE REMOVAL OF ESSENTIAL PARTS, OR BY THE ADDITION OR SUBSTITUTION OF ESSENTIAL PARTS, NEW OR USED, DERIVED FROM OTHER VEHICLES OR MAKES OF VEHICLES.

34. "RESIDENCE DISTRICT" MEANS THE TERRITORY CONTIGUOUS TO AND INCLUDING A HIGHWAY NOT COMPRISING A BUSINESS DISTRICT WHEN THE PROPERTY ON THE HIGHWAY FOR A DISTANCE OF THREE HUNDRED FEET OR MORE IS IN THE MAIN IMPROVED WITH RESIDENCES OR RESIDENCES AND BUILDINGS IN USE FOR BUSINESS.

35. "RIGHT-OF-WAY" MEANS THE PRIVILEGE OF THE IMMEDIATE USE OF THE HIGHWAY.

36. "ROAD TRACTOR" MEANS ANY MOTOR VEHICLE DESIGNED AND USED FOR DRAWING OTHER VEHICLES AND NOT CONSTRUCTED TO CARRY A LOAD THEREON EITHER INDEPENDENTLY OR ANY PART OF THE WEIGHT OF A VEHICLE OR LOAD SO DRAWN.

37. "SAFETY ZONE" MEANS THE AREA OR SPACE OFFICIALLY SET APART WITHIN A ROADWAY FOR THE EXCLUSIVE USE OF PEDESTRIANS AND WHICH IS PROTECTED OR IS SO MARKED OR INDICATED BY ADEQUATE SIGNS AS TO BE PLAINLY VISIBLE AT ALL TIMES WHILE SET APART AS A SAFETY ZONE.

38. "SCHOOL BUS" MEANS A MOTOR VEHICLE OWNED BY A PUBLIC OR GOVERNMENTAL AGENCY OR OTHER INSTITUTION,

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AND OPERATED FOR THE TRANSPORTATION OF CHILDREN TO OR FROM SCHOOL OR PRIVATELY-OWNED AND OPERATED FOR COMPENSATION FOR THE TRANSPORTATION OF CHILDREN TO OR FROM SCHOOL.

39. "SEMITRAILER" MEANS A VEHICLE WITH OR WITHOUT MOTIVE POWER, OTHER THAN A POLE TRAILER, DESIGNED FOR CARRYING PERSONS OR PROPERTY AND FOR BEING DRAWN BY A MOTOR VEHICLE AND SO CONSTRUCTED THAT SOME PART OF ITS WEIGHT AND THAT OF ITS LOAD RESTS UPON OR IS CARRIED BY ANOTHER VEHICLE.

40. "SERVICE STATION" MEANS A PLACE OPERATED PRIMARILY FOR THE PURPOSE OF DELIVERING MOTOR VEHICLE FUEL INTO THE FUEL TANKS OF MOTOR VEHICLES.

41. "SOLID TIRE" MEANS A TIRE MADE OF RUBBER OR OTHER RESILIENT MATERIAL WHICH DOES NOT DEPEND UPON COMPRESSED AIR FOR THE SUPPORT OF THE LOAD.

42. "SPECIALLY CONSTRUCTED VEHICLE" MEANS ANY VEHICLE NOT ORIGINALLY CONSTRUCTED UNDER A DISTINCTIVE NAME, MAKE, MODEL OR TYPE BY A GENERALLY RECOGNIZED MANUFACTURER OF VEHICLES.

43. "STATE ENGINEER" MEANS THE ASSISTANT DIRECTOR OF THE HIGHWAY DIVISION OF THE DEPARTMENT OF TRANSPORTATION.

44. "STATE HIGHWAY" MEANS ANY STATE ROUTE, OR PORTION THEREOF, ACCEPTED AND DESIGNATED BY THE TRANSPORTATION BOARD AS SUCH, AND MAINTAINED BY THE STATE.

45. "STATE ROUTE" MEANS ANY RIGHT-OF-WAY, WHETHER ACTUALLY USED AS A HIGHWAY OR NOT, DESIGNATED BY THE TRANSPORTATION BOARD AS A LOCATION FOR THE CONSTRUCTION OF A STATE HIGHWAY.

46. "STATE AIRPORTS" MEANS STATE OWNED AIRPORTS.

47. "STREET" OR "HIGHWAY" MEANS THE ENTIRE WIDTH BETWEEN THE BOUNDARY LINES OF EVERY WAY WHEN ANY PART THEREOF IS OPEN TO THE USE OF THE PUBLIC FOR PURPOSES OF VEHICULAR TRAVEL.

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48. "SUPERINTENDENT" MEANS THE ASSISTANT DIRECTOR FOR THE MOTOR VEHICLE DIVISION OF THE DEPARTMENT OF TRANSPORTATION.

49. "TRAILER" MEANS A VEHICLE WITH OR WITHOUT MOTIVE POWER, OTHER THAN A POLE TRAILER, DESIGNED FOR CARRYING PERSONS OR PROPERTY AND FOR BEING DRAWN BY A MOTOR VEHICLE AND SO CONSTRUCTED THAT NO PART OF ITS WEIGHT RESTS UPON THE TOWING VEHICLE.

50. "TRUCK" MEANS ANY MOTOR VEHICLE DESIGNED OR USED PRIMARILY FOR THE CARRYING OF PROPERTY OTHER THAN THE EFFECTS OF THE DRIVER OR PASSENGERS, AND INCLUDES A MOTOR VEHICLE TO WHICH HAS BEEN ADDED A BOX, PLATFORM OR OTHER EQUIPMENT FOR SUCH CARRYING.

51. "TRUCK TRACTOR" MEANS ANY MOTOR VEHICLE DESIGNED AND USED PRIMARILY FOR DRAWING OTHER VEHICLES AND NOT CONSTRUCTED TO CARRY A LOAD OTHER THAN A PART OF THE WEIGHT OF THE VEHICLE AND LOAD SO DRAWN.

52. "VEHICLE" MEANS A DEVICE IN, UPON OR BY WHICH ANY PERSON OR PROPERTY IS OR MAY BE TRANSPORTED OR DRAWN UPON A PUBLIC HIGHWAY, EXCEPTING DEVICES MOVED BY HUMAN POWER OR USED EXCLUSIVELY UPON STATIONARY RAILS OR TRACKS.

28-102. Resident defined; exceptions

A. "RESIDENT" FOR THE PURPOSE OF REGISTRATION AND OPERATION OF MOTOR VEHICLES, INCLUDES THE FOLLOWING:

1. ANY PERSON, EXCEPT A TOURIST OR OUT-OF-STATE STUDENT, WHO OWNS, LEASES OR RENTS A DWELLING WITHIN THE STATE AND OCCUPIES IT AS A PLACE OF RESIDENCE, OR ANY PERSON WHO, REGARDLESS OF DOMICILE, REMAINS IN THE STATE FOR A CONSECUTIVE PERIOD OF SIX MONTHS OR MORE.

2. ANY PERSON WHO ENGAGES IN A TRADE, PROFESSION OR OCCUPATION IN THIS STATE OR WHO ACCEPTS EMPLOYMENT IN OTHER THAN SEASONAL AGRICULTURAL WORK.

3. ANY PERSON PLACING CHILDREN IN A PUBLIC SCHOOL WITHOUT PAYMENT OF NONRESIDENT TUITION.

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4. ANY PERSON WHO DECLARES HIMSELF TO BE A RESIDENT OF THIS STATE FOR THE PURPOSE OF OBTAINING AT RESIDENT RATES A STATE LICENSE OR TUITION FEES AT AN EDUCATIONAL INSTITUTION MAINTAINED BY PUBLIC FUNDS.
5. ANY INDIVIDUAL, PARTNERSHIP, COMPANY, FIRM, CORPORATION OR ASSOCIATION WHICH MAINTAINS A MAIN OFFICE, BRANCH OFFICE OR WAREHOUSE FACILITIES IN THE STATE, AND WHICH BASES AND OPERATES MOTOR VEHICLES IN THE STATE.
6. ANY INDIVIDUAL, PARTNERSHIP, COMPANY, FIRM, CORPORATION OR ASSOCIATION WHICH OPERATES MOTOR VEHICLES IN INTRASTATE TRANSPORTATION.
7. THE TERM "RESIDENT" DOES NOT INCLUDE:
 1. A NONRESIDENT OWNER OF A FOREIGN VEHICLE REGISTERED AND LICENSED IN A STATE ADJOINING THIS STATE, WHICH IS USED IN THIS STATE FOR OTHER THAN THE TRANSPORTATION OF PASSENGERS OR PROPERTY FOR COMPENSATION, IF THE NONRESIDENT OWNER AND VEHICLE ARE DOMICILED IN AN ADJOINING STATE BUT WITHIN TWENTY-FIVE MILES OF THE BORDER OF THIS STATE, AND IF THE STATE IN WHICH THE OWNER HAS HIS RESIDENCE AND IN WHICH THE VEHICLE IS REGISTERED EXEMPTS FROM PAYMENT OF REGISTRATION AND UNLADEN WEIGHT FEES LIKE VEHICLES FROM THIS STATE, REGARDLESS OF WHETHER SUCH NONRESIDENT OWNER ENGAGES IN A TRADE, PROFESSION OR OCCUPATION IN THIS STATE OR ACCEPTS EMPLOYMENT IN OTHER THAN SEASONAL AGRICULTURAL WORK, SUCH NONRESIDENT OWNER MAY APPLY FOR EXEMPTION FROM PAYMENT OF THE REGISTRATION AND UNLADEN WEIGHT FEES IN THE MANNER PRESCRIBED BY SUBSECTIONS E, G AND H OF SECTION 28-501.
 2. THE NONRESIDENT OWNER OF A FOREIGN VEHICLE REGISTERED AND LICENSED IN A STATE ADJOINING THIS STATE, IF THE FOREIGN VEHICLE IS EXEMPT FROM PARTIAL OR TOTAL PAYMENT OF LIEU TAXES, AND PARTIAL OR TOTAL PAYMENT OF REGISTRATION FEES BY VIRTUE OF AN AGREEMENT ENTERED INTO WITH AN ADJOINING STATE UNDER AUTHORITY OF SUBSECTION C OF SECTION 28-202, MAY APPLY FOR EXEMPTION FROM PAYMENT OF PARTIAL OR TOTAL LIEU TAXES, REGISTRATION AND PAYMENT OF PARTIAL OR TOTAL FEES IN THE MANNER PRESCRIBED BY SUBSECTIONS F, G AND H OF SECTION 28-501.

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- 28-103. Department of transportation
 - A. THERE IS ESTABLISHED A DEPARTMENT OF TRANSPORTATION WHICH SHALL PROVIDE FOR AN INTEGRATED AND BALANCED STATE TRANSPORTATION SYSTEM.
 - B. THE ADMINISTRATION OF THE DEPARTMENT IS THE RESPONSIBILITY OF THE DIRECTOR.
 - C. THE TRANSPORTATION BOARD SHALL HAVE THE POLICY POWERS AND DUTIES PRESCRIBED IN SECTION 28-106 AND SHALL BE ADVISORY TO THE DIRECTOR ON OTHER MATTERS AS REQUIRED.
- 28-104. Department jurisdiction; organization
 - A. THE EXCLUSIVE CONTROL AND JURISDICTION OVER STATE HIGHWAYS, STATE ROUTES, STATE AIRPORTS AND ALL STATE OWNED TRANSPORTATION SYSTEMS OR MODES IS VESTED IN THE DEPARTMENT OF TRANSPORTATION.
 - B. THE DEPARTMENT SHALL BE ORGANIZED INTO DIVISIONS ENUMERATED AND HAVING AREAS OF RESPONSIBILITY AS FOLLOWS:
 1. MOTOR VEHICLE DIVISION, WHICH SHALL BE RESPONSIBLE FOR VEHICLE REGISTRATION, DRIVER LICENSING, REVENUE AND ACCOUNTING SERVICES, ENFORCEMENT, INVESTIGATION AND OTHER RELATED FUNCTIONS.
 2. TRANSPORTATION PLANNING DIVISION, WHICH IS RESPONSIBLE FOR STATE PLANNING STUDIES, INCLUDING BUT NOT LIMITED TO, PRIORITY PROGRAMMING, LOCAL GOVERNMENT COORDINATION, TRANSPORTATION SAFETY AND OTHER RELATED FUNCTIONS.
 3. HIGHWAY DIVISION, WHICH IS RESPONSIBLE FOR BUILDING AND MAINTENANCE OF HIGHWAYS, HIGHWAY SAFETY AND OTHER RELATED FUNCTIONS.
 4. ADMINISTRATIVE SERVICES DIVISION, WHICH IS RESPONSIBLE FOR MANAGEMENT, OPERATIONS ANALYSIS, FINANCIAL SERVICES, DATA PROCESSING, PROJECT SCHEDULING AND CONTROL, GENERAL SERVICES, PERSONNEL, RECRUITMENT,

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SECTION 38-211. OF THE MEMBERS FIRST APPOINTED FROM A TRANSPORTATION DISTRICT, ONE MEMBER SHALL BE APPOINTED FOR A TERM ENDING ON THE THIRD MONDAY IN JANUARY OF 1975, AND ONE MEMBER SHALL BE APPOINTED FOR TERMS ENDING ONE, TWO, THREE AND FOUR YEARS THEREAFTER. OF THE MEMBERS FIRST APPOINTED AT LARGE, ONE MEMBER SHALL BE APPOINTED FOR A TERM ENDING ON THE THIRD MONDAY IN JANUARY OF 1977 AND ONE MEMBER SHALL BE APPOINTED FOR A TERM ENDING ON THE THIRD MONDAY IN JANUARY OF 1979. SUBSEQUENT APPOINTMENTS SHALL BE FOR A FULL TERM OF FIVE YEARS WHICH SHALL EXPIRE ON THE THIRD MONDAY IN JANUARY OF THE APPROPRIATE YEAR.

D. A PERSON SHALL NOT BE QUALIFIED TO BE A MEMBER OF THE TRANSPORTATION BOARD REPRESENTING A TRANSPORTATION DISTRICT WHO HAS NOT BEEN A RESIDENT AND TAXPAYER OF THE STATE AND COUNTY FROM WHICH HE IS CHOSEN FOR AT LEAST FIVE YEARS IMMEDIATELY PRIOR TO HIS APPOINTMENT.

E. A MEMBER SHALL NOT BE APPOINTED TO SERVE TWO TERMS IN SUCCESSION. IF A TRANSPORTATION DISTRICT INCLUDES TWO OR MORE COUNTIES THE APPOINTMENT OF MEMBERS FOR THE DISTRICT SHALL BE ROTATED BETWEEN EACH COUNTY IN THE DISTRICT.

F. IF A MEMBER WHO REPRESENTS A TRANSPORTATION DISTRICT CHANGES HIS RESIDENCE TO ANOTHER COUNTY HIS OFFICE SHALL BECOME VACANT.

G. EACH MEMBER SHALL RECEIVE COMPENSATION AS DETERMINED PURSUANT TO SECTION 38-611.

H. THE TRANSPORTATION BOARD MAY MEET, WHEN NECESSARY, AT ANY PLACE WITHIN THE STATE. THE TRANSPORTATION BOARD SHALL MEET FOR THE PURPOSE OF ORGANIZING ON JANUARY 31 OF EACH YEAR AT WHICH TIME THEY SHALL SELECT FROM THEIR MEMBERSHIP A CHAIRMAN WHO SHALL PRESIDE AT ALL SESSIONS. THE BOARD SHALL SELECT A VICE CHAIRMAN WHO SHALL PRESIDE IN THE ABSENCE OF THE CHAIRMAN.

I. IF THE CHAIRMAN'S MEMBERSHIP ON THE TRANSPORTATION BOARD IS TERMINATED FOR ANY REASON, THE REMAINING

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TRAINING, SAFETY, CLASSIFICATION AND SALARY ADMINISTRATION, MINORITY EMPLOYMENT, RECORDS AND BENEFITS ADMINISTRATION, PUBLIC INFORMATION AND OTHER RELATED FUNCTIONS.

5. AERONAUTICS DIVISION, WHICH IS RESPONSIBLE FOR REGISTRATION AND LICENSING OF AIRCRAFT, ENFORCEMENT AND OTHER RELATED FUNCTIONS.

6. PUBLIC TRANSIT DIVISION WHICH IS RESPONSIBLE FOR PUBLIC TRANSIT PLANNING STUDIES, PRIORITY PROGRAMMING AND COORDINATION.

28-104-01 Transportation districts

THE STATE IS DIVIDED INTO FIVE TRANSPORTATION DISTRICTS AS FOLLOWS:

- 1. FIRST DISTRICT, MARICOPA AND YUMA COUNTIES.
- 2. SECOND DISTRICT, PIMA, PINAL AND SANTA CRUZ COUNTIES.
- 3. THIRD DISTRICT, COCHISE, GRAHAM AND GREENLEE COUNTIES.
- 4. FOURTH DISTRICT, APACHE, GILA AND NAVAJO COUNTIES.
- 5. FIFTH DISTRICT, COCONINO, MOHAVE AND YAVAPAI COUNTIES.

28-105. Transportation board; members; appointments; terms; compensation

A. THERE SHALL BE A TRANSPORTATION BOARD IN THE DEPARTMENT OF TRANSPORTATION.

B. THE TRANSPORTATION BOARD SHALL CONSIST OF SEVEN MEMBERS, ONE FROM EACH OF THE FIVE TRANSPORTATION DISTRICTS AND TWO FROM THE STATE AT LARGE. AT LEAST THREE MEMBERS OF THE BOARD SHALL HAVE EXPERIENCE IN AVIATION.

C. THE GOVERNOR SHALL APPOINT MEMBERS OF THE TRANSPORTATION BOARD FOR A TERM OF FIVE YEARS PURSUANT TO

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MEMBERS OF THE TRANSPORTATION BOARD SHALL SELECT ANOTHER MEMBER TO SERVE AS CHAIRMAN UNTIL THE REGULAR ORGANIZATIONAL MEETING ON JANUARY 31 OF EACH YEAR.

J. THE TRANSPORTATION BOARD SHALL HOLD OTHER REGULAR MEETINGS AS IT MAY DETERMINE. SPECIAL MEETINGS MAY BE CALLED BY THE CHAIRMAN, WITH THE CONCURRENCE OF NOT LESS THAN TWO MEMBERS.

28-106. Powers and duties

A. WITH RESPECT TO AERONAUTICS, THE TRANSPORTATION BOARD SHALL:

1. DISTRIBUTE MONIES APPROPRIATED TO THE DIVISION FROM THE STATE AVIATION FUND FOR CONSTRUCTION AND DEVELOPMENT OF PUBLICLY OWNED AND OPERATED AIRPORT FACILITIES IN COUNTIES AND INCORPORATED CITIES AND TOWNS. THE DISTRIBUTION OF SUCH MONIES SHALL BE MADE ACCORDING TO THE NEEDS FOR SUCH FACILITIES AS DETERMINED BY THE BOARD.

B. WITH RESPECT TO HIGHWAYS, THE TRANSPORTATION BOARD SHALL:

1. ESTABLISH A COMPLETE SYSTEM OF STATE HIGHWAY ROUTES.
2. DETERMINE WHICH STATE HIGHWAY ROUTES OR PORTIONS THEREOF SHALL BE ACCEPTED, AND WHICH STATE HIGHWAY ROUTES SHALL BE IMPROVED.
3. ESTABLISH, OPEN, RELOCATE, ALTER, VACATE OR ABANDON ANY PORTION OF A STATE ROUTE OR STATE HIGHWAY.
- C. THE TRANSPORTATION BOARD SHALL AWARD ALL CONSTRUCTION CONTRACTS FOR TRANSPORTATION FACILITIES.
- D. THE TRANSPORTATION BOARD SHALL DETERMINE PRIORITY PROGRAM PLANNING WITH RESPECT TO TRANSPORTATION FACILITIES.

28-107. Director; deputy director; appointment; compensation

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A. THE DIRECTOR SHALL BE APPOINTED BY THE GOVERNOR PURSUANT TO SECTION 38-211 FROM A LIST OF QUALIFIED CANDIDATES SUBMITTED BY THE TRANSPORTATION BOARD AND SHALL SERVE AT THE PLEASURE OF THE GOVERNOR.

B. THE STATE PERSONNEL COMMISSION SHALL PREPARE A JOB DESCRIPTION FOR THE POSITION OF DIRECTOR AND RECRUIT CANDIDATES FOR THE POSITION. THE TRANSPORTATION BOARD SHALL RECEIVE AND REVIEW APPLICATIONS FOR THE POSITION OF DIRECTOR AND SHALL FORWARD THE NAMES OF ALL QUALIFIED APPLICANTS TO THE GOVERNOR. THE GOVERNOR MAY ASK FOR ADDITIONAL NAMES AND RECOMMENDATIONS AT ANY TIME.

C. COMPENSATION FOR THE DIRECTOR SHALL BE ESTABLISHED PURSUANT TO SECTION 38-611.

D. THERE MAY BE A DEPUTY DIRECTOR OF THE DEPARTMENT WHO SHALL BE APPOINTED BY THE DIRECTOR WITH THE APPROVAL OF THE GOVERNOR. THE DEPUTY DIRECTOR SHALL SERVE AT THE PLEASURE OF THE DIRECTOR. THE DEPUTY DIRECTOR WILL BE DIRECTLY RESPONSIBLE FOR THE DUTIES DELEGATED TO HIM BY THE DIRECTOR.

28-108. Powers and duties

A. THE DIRECTOR SHALL:

1. SUPERVISE AND ADMINISTER THE OVERALL ACTIVITIES OF THE DEPARTMENT, ITS DIVISIONS AND EMPLOYEES.
2. APPOINT ASSISTANT DIRECTORS FOR EACH OF THE DIVISIONS WHICH ASSISTANT DIRECTORS SHALL BE EXEMPT FROM THE STATE PERSONNEL SYSTEM.
3. PRESCRIBE SUCH RULES AND REGULATIONS AS HE DEEMS NECESSARY FOR THE COLLECTION OF TAXES AND LICENSE FEES.
4. PROVIDE FOR THE ASSEMBLY AND DISTRIBUTION OF INFORMATION TO THE PUBLIC CONCERNING THE DEPARTMENT ACTIVITIES.
5. PRESCRIBE SUCH RULES AND REGULATIONS AS HE DEEMS NECESSARY FOR PUBLIC SAFETY AND CONVENIENCE.

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6. PRESCRIBE STANDARD BOARD AND ROAD SIGNS, OR OTHER DEVICES, AND PROVIDE A UNIFORM SYSTEM OF MARKING AND SIGNALING ON STATE ROUTES AND STATE HIGHWAYS, WHICH SHALL CORRELATE WITH AND SO FAR AS POSSIBLE CONFORM TO THE SYSTEM AS APPROVED BY THE AMERICAN ASSOCIATION OF STATE HIGHWAY OFFICIALS, AND REGULATE THE USE OF ADVERTISING SIGNBOARDS AND ROAD SIGNS ON STATE ROADS OR STATE HIGHWAYS.
7. PRESCRIBE RULES AND REGULATIONS FOR CLOSING STATE HIGHWAYS UNDER CONSTRUCTION OR REPAIR.
8. RECEIVE, ALLOCATE, CONTROL AND DISPERSE ALL FUNDS DESIGNATED FOR MASS TRANSIT BY FEDERAL OR STATE LAW, REGULATION OR RULES.
9. PASS UPON PROJECTS FOR CONSTRUCTION IN COOPERATION WITH THE UNITED STATES, AND NEGOTIATE AND ENTER INTO CONTRACTS ON BEHALF OF THE STATE WITH THE UNITED STATES FOR THE COOPERATIVE CONSTRUCTION AND MAINTENANCE OF FEDERAL AID MASS TRANSIT SYSTEMS WITHIN THE STATE.
10. ENTER INTO AGREEMENTS ON BEHALF OF THE STATE WITH COUNTIES, CITIES, TOWNS, MASS TRANSIT DISTRICTS, OR WITH ANY OTHER POLITICAL SUBDIVISION FOR THE IMPROVEMENT OR MAINTENANCE OF MASS TRANSIT SYSTEMS, OR FOR THE JOINT IMPROVEMENT OR MAINTENANCE THEREOF, AND ENTER INTO CONTRACTS FOR THE CONSTRUCTION OF MASS TRANSIT SYSTEMS.
11. PRESCRIBE RULES AND REGULATIONS FOR THE APPLICATION FOR AND THE EXPENDITURE OF ALL MASS TRANSIT FUNDS.
12. EXERCISE SUCH OTHER POWERS AND DUTIES AS ARE NECESSARY TO FULLY CARRY OUT THE POLICIES, ACTIVITIES AND DUTIES OF THE DEPARTMENT.
13. DELEGATE SUCH FUNCTIONS, DUTIES OR POWERS AS HE DEEMS NECESSARY TO CARRY OUT THE EFFICIENT OPERATION OF THE DEPARTMENT.
14. CONTRACT FOR BOTH THE OPERATION OF STATE OWNED

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- AIRPORTS AND FOR THE PURPOSE OF SECURING AIR SEARCH AND RESCUE SERVICES.
 15. PLAN, BUILD AND DEVELOP IN CONJUNCTION WITH LOCAL AUTHORITIES, AIRPORTS, AIRPORT TERMINALS AND OTHER RELATED NAVIGATIONAL FACILITIES.
 16. OPERATE AND MAINTAIN THE GRAND CANYON NATIONAL PARK AIRPORT LOCATED IN THE KAIBAB NATIONAL FOREST, COCONINO COUNTY.
 17. ENTER INTO AGREEMENTS ON BEHALF OF THE STATE WITH COUNTIES, CITIES, TOWNS OR RURAL DISTRICTS FOR THE IMPROVEMENT OR MAINTENANCE OF STATE ROUTES, OR FOR THE JOINT IMPROVEMENT OR MAINTENANCE THEREOF, AND TO ENTER INTO CONTRACTS FOR THE CONSTRUCTION OF STATE HIGHWAYS.
 18. PRESCRIBE RULES AND REGULATIONS FOR THE EXPENDITURE OF ALL MONEY IN THE STATE HIGHWAY FUND.
 19. EXERCISE CONTROL AND JURISDICTION OVER THE USE OF STATE HIGHWAYS AND ROUTES AND PRESCRIBE SUCH RULES AND REGULATIONS REGARDING SUCH USE AS HE DEEMS NECESSARY.
 - B. THE DIRECTOR MAY PROVIDE TECHNICAL TRANSPORTATION PLANNING EXPERTISE TO LOCAL GOVERNMENTS WHEN REQUESTED, COORDINATE LOCAL GOVERNMENT TRANSPORTATION PLANNING WITH REGIONAL AND STATE TRANSPORTATION PLANNING, AND GUIDE LOCAL TRANSPORTATION PLANNING TO ASSURE COMPLIANCE WITH FEDERAL REQUIREMENTS. SUCH PLANNING AUTHORITY SHALL NOT, HOWEVER, PREEMPT PLANNING RESPONSIBILITIES AND DECISIONS OF LOCAL GOVERNMENTS.
- 28-109. *Legal counsel*
- THE ATTORNEY GENERAL SHALL BE THE LEGAL ADVISOR OF THE DEPARTMENT AND SHALL GIVE LEGAL SERVICES AS THE DEPARTMENT REQUIRES. HE SHALL PROSECUTE AND DEFEND IN THE NAME OF THE STATE ALL ACTIONS NECESSARY TO CARRY OUT THE PROVISIONS OF THIS TITLE.

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THERETO, THE CURRENT BYLAWS, MINUTES OF THE CORPORATION, AND ALL SHAREHOLDER AGREEMENTS. IF THE FLYING CLUB IS A PARTNERSHIP, THEN THE CURRENT ARTICLES OF PARTNERSHIP AND ALL CURRENT PARTNERSHIP AGREEMENTS.

3. ALL CLUB OPERATING RULES.
4. THE SHARE IN CLUB ASSETS HELD BY EACH MEMBER, STATED BY PERCENTAGE.
5. THE VOTING RIGHTS OF EACH MEMBER, STATED BY PERCENTAGE.
6. THE RIGHTS OF EACH MEMBER TO THE ASSETS OF THE CLUB, STATED BY PERCENTAGE, IN CASE OF DISSOLUTION OF THE CLUB IF A CORPORATION, AND IN CASE OF TERMINATION OF THE CLUB, IF A PARTNERSHIP.
7. A STATEMENT OF THE FINANCIAL CONDITION OF THE FLYING CLUB AT THE END OF ITS PRECEDING FISCAL YEAR, OR AT THE END OF ITS PRECEDING CALENDAR YEAR, AS THE CASE MAY BE, SHOWING THE ASSETS AND LIABILITIES OF THE CLUB.
8. AN OPERATING STATEMENT OF THE CLUB FOR THE PRECEDING FISCAL YEAR, OR THE PRECEDING CALENDAR YEAR, AS THE CASE MAY BE.

28-1784. Annual registration of flying clubs

EACH FLYING CLUB, WHICH AT ANY TIME DURING A PRECEDING CALENDAR YEAR HAD FOUR OR MORE MEMBERS, SHALL REGISTER ANNUALLY WITH THE DEPARTMENT. SUCH REGISTRATION SHALL REPORT CONDITIONS AS OF DECEMBER 31 OF EACH YEAR, SHALL BE FILED WITH THE DIRECTOR BY JANUARY 31 OF EACH YEAR, AND SHALL CONTAIN THE FOLLOWING INFORMATION:

1. THE NAME AND ADDRESS OF THE FLYING CLUB, THE AIRPORT OR AIRPORTS AT WHICH ITS AIRCRAFT ARE BASED, AND THE MAKE, MODEL AND "N" NUMBER OF THE AIRCRAFT THAT THE CLUB EITHER OWNED OR USED DURING THE PAST CALENDAR YEAR.
2. WHETHER THE CLUB IS ORGANIZED AS A CORPORATION OR A PARTNERSHIP.

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3. THE NAME, HOME ADDRESS, AND PHONE NUMBER, AND BUSINESS ADDRESS AND PHONE NUMBER, OF THE CLUB SAFETY AND OPERATIONS OFFICER.

4. A STATEMENT DESCRIBING WHAT REMUNERATION WAS PAID TO MEMBERS OF THE CLUB, MONTHLY AND ANNUALLY, DURING THE PRECEDING CALENDAR YEAR OR PRECEDING FISCAL YEAR, AS THE CASE MAY BE, A DESCRIPTION OF THE SERVICES RENDERED BY SUCH MEMBERS TO THE CLUB, AND A DESCRIPTION OF THE GOODS SOLD BY SUCH MEMBER TO THE CLUB.
5. A STATEMENT SETTING FORTH EXISTING INSURANCE COVERAGE ON CLUB AIRCRAFT, THE LIABILITY LIMITS OF SUCH POLICY AND THE NAME OF THE INSURER.
6. THE NUMBER OF CLUB MEMBERS AS OF DECEMBER 31 EACH YEAR.

28-1785. Authority of director to inspect records

THE DIRECTOR OR ANY EMPLOYEE OF THE DIVISION OF AERONAUTICS DESIGNATED BY HIM, SHALL HAVE THE RIGHT TO INSPECT THE BOOKS AND RECORDS OF ANY FLYING CLUB, INCLUDING, BUT NOT LIMITED TO, THE RECORDS REFERRED TO IN SECTION 28-1783.

CHAPTER 13
HIGHWAY DIVISION
ARTICLE I. GENERAL PROVISIONS

28-1801. Definitions

IN THIS CHAPTER, UNLESS THE CONTEXT OTHERWISE REQUIRES:

1. "ASSISTANT DIRECTOR" MEANS THE ASSISTANT DIRECTOR FOR THE HIGHWAY DIVISION OF THE DEPARTMENT OF TRANSPORTATION.
2. "BUDGET" MEANS THE ANNUAL HIGHWAY PROGRAM PREPARED BY THE DEPARTMENT.
3. "COUNTY HIGHWAY" MEANS A PUBLIC ROAD CONSTRUCTED AND MAINTAINED BY A COUNTY.

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4. "DIVISION" MEANS THE HIGHWAY DIVISION OF THE DEPARTMENT OF TRANSPORTATION.
5. "HIGHWAY" MEANS THE ENTIRE WIDTH BETWEEN THE BOUNDARY LINES OF EVERY WAY WHEN ANY PART THEREOF IS OPEN TO THE USE OF THE PUBLIC FOR PURPOSES OF VEHICULAR TRAVEL.
6. "LOCAL AUTHORITIES" MEAN EVERY COUNTY, MUNICIPAL AND OTHER LOCAL BOARD OR BODY EXERCISING JURISDICTION OVER HIGHWAYS UNDER THE CONSTITUTION AND LAWS OF THE STATE.
7. "RIGHT-OF-WAY" MEANS THE PRIVILEGE OF THE IMMEDIATE USE OF THE HIGHWAY.
8. "STATE ENGINEER" MEANS THE ASSISTANT DIRECTOR FOR THE HIGHWAY DIVISION.
9. "STATE HIGHWAY" MEANS A STATE ROUTE, OR PORTION THEREOF, ACCEPTED AND DESIGNATED BY THE TRANSPORTATION BOARD AS SUCH, AND MAINTAINED BY THE STATE.
10. "STATE ROUTE" MEANS A RIGHT-OF-WAY, WHETHER ACTUALLY USED AS A HIGHWAY OR NOT, DESIGNATED BY THE TRANSPORTATION BOARD AS A LOCATION FOR THE CONSTRUCTION OF A STATE HIGHWAY.
11. "VEHICLE DIVISION" MEANS THE DIVISION OF MOTOR VEHICLES OF THE DEPARTMENT ACTING DIRECTLY OR THROUGH ITS DULY AUTHORIZED OFFICERS AND AGENTS.

28-1802. Assistant director; state engineer; qualifications; compensation

- A. THE DIRECTOR SHALL APPOINT AN ASSISTANT DIRECTOR TO HEAD THE HIGHWAY DIVISION AND WHO SHALL ALSO BE THE STATE ENGINEER.
- B. THE STATE ENGINEER SHALL BE A CIVIL ENGINEER REGISTERED TO PRACTICE IN THIS STATE AND SHALL BE FAMILIAR WITH THE THEORY OF AND EXPERIENCED IN THE PRACTICE OF HIGHWAY CONSTRUCTION, MAINTENANCE, DESIGN OR ENGINEERING.

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- C. THE ASSISTANT DIRECTOR SHALL BE POSSESSED OF A THOROUGH KNOWLEDGE OF MODERN BUSINESS METHODS OR SHALL HAVE NOT LESS THAN TEN YEARS' EXPERIENCE IN A BUSINESS OR PROFESSION OF WHICH AT LEAST FOUR YEARS WAS IN A RESPONSIBLE ADMINISTRATIVE CAPACITY. ALL OR PART OF THE EXPERIENCE MAY HAVE BEEN WITH THE UNITED STATES GOVERNMENT, ANY STATE OR A POLITICAL SUBDIVISION THEREOF. THE ASSISTANT DIRECTOR SHALL DEVOTE FULL TIME TO THE DUTIES OF THE OFFICE, AND SHALL NOT ENGAGE DIRECTLY OR INDIRECTLY IN ANY OCCUPATION WHICH CONFLICTS WITH HIS DUTIES.
 - D. COMPENSATION OF THE ASSISTANT DIRECTOR SHALL BE DETERMINED PURSUANT TO THE PROVISIONS OF SECTION 38-611.
- 28-1803. Powers and duties of director
- A. THE DIRECTOR OR HIS AUTHORIZED AND BONDED AGENT SHALL ADMINISTER ALL HIGHWAY AND MAINTENANCE WORK AUTHORIZED BY THE TRANSPORTATION BOARD, WITH POWER AND DUTY TO:
 1. DIRECT THE PREPARATION OF ALL PLANS AND SPECIFICATIONS FOR WORK ON STATE HIGHWAYS OR STATE ROUTES APPROVED BY THE TRANSPORTATION BOARD.
 2. ADVERTISE FOR COMPARATIVE BIDS FOR WORK ON STATE HIGHWAYS OR STATE ROUTES, AND UPON AUTHORIZATION OF THE TRANSPORTATION BOARD, AWARD AND ENTER INTO CONTRACTS FOR THE WORK.
 3. DIRECT SUPERVISION OF ALL CONSTRUCTION WORK ON STATE HIGHWAYS AND STATE ROUTES AUTHORIZED BY THE TRANSPORTATION BOARD, AND HAVE CHARGE OF MAINTENANCE AND UPKEEP OF SUCH HIGHWAYS AND ROUTES.
 4. APPROVE PAYMENT FOR WORK DONE BY THE STATE OR IN CONNECTION WITH STATE HIGHWAYS OR STATE ROUTES, PROVIDED THAT NO CLAIM SHALL BE ALLOWED BY THE DIRECTOR OF FINANCE FOR WORK WITHOUT THE APPROVAL OF THE ASSISTANT DIRECTOR OR HIS AUTHORIZED AND BONDED AGENT.

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5. NEGOTIATE AND AWARD CONTRACTS TO PRIVATE CONSULTING ENGINEERS OR CONSULTING ENGINEERING FIRMS WHEN DEEMED IN THE PUBLIC INTEREST BY THE ASSISTANT DIRECTOR AND THE TRANSPORTATION BOARD FOR THE PERFORMANCE OF SUCH ENGINEERING WORK AS MAY BE REQUIRED TO FORMULATE AND COMPLETE HIGHWAY CONSTRUCTION CONTRACTS.

B. IN ADDITION TO THE POWERS AND DUTIES PROVIDED BY THE TERMS OF SUBSECTION A, THE ASSISTANT DIRECTOR SHALL BE THE CHIEF EXECUTIVE AND ADMINISTRATIVE OFFICER OF THE DIVISION AND SHALL HAVE CHARGE OF THE ADMINISTRATION OF ALL HIGHWAY AFFAIRS AUTHORIZED BY THE TRANSPORTATION BOARD. THE DIRECTOR SHALL:

1. DIRECT THE ORGANIZATION OF THE DIVISION, APPOINT, SUSPEND AND DISCHARGE, FIX THE DUTIES AND PRESCRIBE RULES AND REGULATIONS FOR THE CONDUCT OF EMPLOYEES, SUBJECT TO THE APPROVAL OF THE TRANSPORTATION BOARD.
2. MAKE MONTHLY REPORTS TO THE TRANSPORTATION BOARD OF ALL EXPENDITURES OF THE DIVISION, OF THE WORK ACCOMPLISHED UNDER HIS DIRECTION, TOGETHER WITH SUCH OTHER MATTERS THAT HE DEEMS PROPER.
3. ASSIGN TO THE TRANSPORTATION BOARD, UPON REQUEST, SUCH CLERKS OR OTHER EMPLOYEES AS IT REQUESTS.
4. PRESCRIBE PROCEDURES FOR USE FOR DIVISION PERSONNEL, FACILITIES, EQUIPMENT, SUPPLIES AND OTHER RESOURCES IN ASSISTING SEARCH OR RESCUE OPERATIONS BY REQUEST OF THE DIRECTOR.
5. EXERCISE SUCH OTHER POWERS AS ARE NECESSARY TO CARRY OUT THE WORK OF THE DIVISION AND PERFORM SUCH OTHER DUTIES AS THE TRANSPORTATION BOARD PRESCRIBES, OR AS PRESCRIBED BY LAW FOR THE DIVISION OF THE DEPARTMENT OF TRANSPORTATION.

28-1804. Bids for construction, reconstruction, equipment or supplies; procedure; bond

A. ALL ITEMS OF CONSTRUCTION OR RECONSTRUCTION INVOLVING AN EXPENDITURE OF FIFTY THOUSAND DOLLARS

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OR OVER SHALL BE CALLED FOR BY ADVERTISING IN A NEWSPAPER OF GENERAL CIRCULATION PUBLISHED WITHIN THE STATE FOR TWO CONSECUTIVE INSERTIONS IF IT IS A WEEKLY NEWSPAPER, OR FOR TWO INSERTIONS NOT LESS THAN SIX NOR MORE THAN TEN DAYS APART IF IT IS A DAILY NEWSPAPER. THE ADVERTISEMENT SHALL STATE SPECIFICALLY THE CHARACTER OF THE WORK TO BE DONE.

B. IF THE BIDS RECEIVED FOR CONSTRUCTION OR RECONSTRUCTION ARE NOT SATISFACTORY, A SECOND CALL SHALL BE MADE. IF THEY ARE AGAIN REJECTED BY THE DIRECTOR, HE MAY AUTHORIZE THE STATE ENGINEER TO CONSTRUCT OR RECONSTRUCT THE ITEM AS HE DEEMS MOST ADVANTAGEOUS. SHOULD A BID SATISFACTORY TO THE DIRECTOR BE RECEIVED, HE SHALL LET A CONTRACT TO THE LOWEST RESPONSIBLE BIDDER, UPON THE CONTRACTOR GIVING SUCH BOND OR BONDS AS REQUIRED UNDER THE PROVISIONS OF TITLE 34, CHAPTER 2, ARTICLE 2.

28-1805. Reproduction of records; notification of reproduction; admissibility of reproductions as originals; destruction of non-essential or obsolete records

A. THE DIRECTOR MAY CAUSE ANY RECORDS KEPT BY THE DEPARTMENT TO BE PHOTOGRAPHED, MICROPHOTOGRAPHED, PHOTOSTATED OR REPRODUCED ON FILM. THE FILM OR REPRODUCING MATERIAL SHALL BE OF DURABLE MATERIAL AND THE DEVICE USED TO REPRODUCE THE RECORDS ON THE FILM OR MATERIAL SHALL BE SUCH AS TO ACCURATELY REPRODUCE AND PERPETUATE THE ORIGINAL RECORDS IN ALL DETAILS.

B. WHEN SUCH PHOTOSTATIC COPIES, PHOTOGRAPHS, MICROPHOTOGRAPHS OR REPRODUCTIONS ON FILMS ARE PLACED IN CONVENIENTLY ACCESSIBLE FILES AND PROVISIONS MADE FOR PRESERVING, EXAMINING AND USING THEM, THE DIRECTOR MAY CERTIFY SUCH FACT TO THE DEPARTMENT OF ADMINISTRATION ASSISTANT DIRECTOR FOR LIBRARY, ARCHIVES AND PUBLIC RECORDS, WHO SHALL THEREAFTER, WITHIN NINETY DAYS, DIRECT THE DISPOSAL, ARCHIVAL STORAGE OR DESTRUCTION OF THE RECORDS OR PAPERS.

C. SUCH PHOTOSTATIC COPY, PHOTOGRAPH, MICROPHOTOGRAPH OR PHOTOGRAPHIC FILM OF THE ORIGINAL RECORDS SHALL BE DEEMED TO BE AN ORIGINAL RECORD FOR ALL

PURPOSES, AND SHALL BE ADMISSIBLE IN EVIDENCE IN ALL COURTS OR ADMINISTRATIVE AGENCIES. A FACSIMILE, EXEMPLIFICATION OR CERTIFIED COPY THEREOF SHALL, FOR ALL PURPOSES RECITED IN THIS SECTION, BE DEEMED TO BE A TRANSCRIPT EXEMPLIFICATION OR CERTIFIED COPY OF THE ORIGINAL.

D. UPON CERTIFICATION BY THE DIRECTOR OF ANY OBSOLETE OR NONESSENTIAL RECORDS, WHICH THE DIRECTOR DETERMINES ARE NOT OF SUFFICIENT VALUE TO BE PRESERVED BY BEING PHOTOGRAPHED, MICROPHOTOGRAPHED, PHOTOSTATED OR REPRODUCED ON FILM, THE DEPARTMENT OF ADMINISTRATION ASSISTANT DIRECTOR FOR LIBRARY, ARCHIVES AND PUBLIC RECORDS SHALL ORDER THEIR DESTRUCTION WITHIN NINETY DAYS FROM THE CERTIFICATION, BUT THE ASSISTANT DIRECTOR FOR LIBRARY, ARCHIVES AND PUBLIC RECORDS MAY ELECT TO HAVE ANY SUCH DOCUMENTS PROPOSED TO BE DESTROYED TRANSFERRED TO HIS DIVISION UPON REQUEST THEREFOR, WITHIN THE NINETY DAY PERIOD.

28-1806. Contract counsel revolving fund; appropriation; exemptions; disbursements; reimbursement

A. THE SUM OF THIRTY THOUSAND DOLLARS IS APPROPRIATED FROM THE STATE HIGHWAY FUND TO THE HIGHWAY DIVISION, WHICH SUM SHALL BE PLACED IN A SPECIAL FUND DESIGNATED AS THE "CONTRACT COUNSEL REVOLVING FUND" AND SHALL BE EXPENDED BY THE HIGHWAY DIVISION TO REIMBURSE THE ATTORNEY GENERAL FOR DEPARTMENT OF LAW SERVICES.

B. THE APPROPRIATION MADE BY THE TERMS OF THIS SECTION SHALL BE LIMITED TO THE HIRING OF ATTORNEYS FOR CONDEMNATION CASES PERTAINING TO THE PURCHASE AND ACQUISITION OF RIGHTS-OF-WAY ON FEDERAL AID PROJECTS.

C. THE DIVISION OF FINANCE SHALL TRANSFER AND REPLENISH THE SUM APPROPRIATED UNDER THE TERMS OF THIS SECTION FROM MONIES IN THE STATE HIGHWAY FUND APPROPRIATED FOR CONSTRUCTION OF STATE HIGHWAYS TO THE CONTRACT COUNSEL REVOLVING FUND, WHICH SHALL BE A REVOLVING FUND FOR EXPENDITURES AUTHORIZED BY THIS SECTION. UPON RECEIPT OF ITEMIZED VERIFIED STATEMENTS ACCOMPANIED BY PROPER RECEIPTS AND VOUCHERS SHOWING

IN DETAIL THE EXPENDITURES FROM THE CONTRACT COUNSEL REVOLVING FUND, THE DIVISION OF FINANCE SHALL ISSUE A WARRANT TO FULLY REPLENISH THE REVOLVING ACCOUNT FROM MONIES APPROPRIATED FOR CONSTRUCTION OF STATE HIGHWAYS, BUT THE TOTAL THEREOF SHALL NOT AT ANY TIME EXCEED THIRTY THOUSAND DOLLARS.

D. THE APPROPRIATION MADE UNDER THE TERMS OF THIS SECTION IS EXEMPT FROM THE PROVISIONS OF SECTION 35-190. RELATING TO LAPSING OF APPROPRIATIONS.

28-1807. Highway priority planning committee

A. AN ARIZONA HIGHWAY PRIORITY PLANNING COMMITTEE IS ESTABLISHED TO RECOMMEND STATEWIDE HIGHWAY CONSTRUCTION PROJECT PRIORITIES TO THE TRANSPORTATION BOARD. THE COMMITTEE SHALL CONSIST OF THE ASSISTANT DIRECTOR FOR HIGHWAYS WHO SHALL SERVE AS CHAIRMAN, THE ASSISTANT DIRECTORS FOR TRANSPORTATION PLANNING AND ADMINISTRATIVE SERVICES AND TWO OTHER OPERATING EXECUTIVES OF THE DEPARTMENT WHO SHALL BE APPOINTED BY THE DIRECTOR. IN ADDITION, THE COMMITTEE SHALL INCLUDE THE DIRECTOR OF THE OFFICE OF ECONOMIC PLANNING AND DEVELOPMENT AND THE STAFF DIRECTOR OF THE JOINT LEGISLATIVE BUDGET COMMITTEE WHO SHALL BE NON-VOTING MEMBERS. MEETINGS OF THE COMMITTEE FOR THE ALLOCATION OF PRIORITIES BETWEEN HIGHWAY CONSTRUCTION PROJECTS SHALL BE OPEN TO THE PUBLIC.

B. THE COMMITTEE SHALL:

1. ESTABLISH A RATING FORMULA FOR SETTING PRIORITIES ON HIGHWAY CONSTRUCTION PROJECTS WHICH SHALL TAKE INTO ACCOUNT BUT NOT BE LIMITED TO THE FOLLOWING CRITERIA:

- (a) SUFFICIENCY RATING.
- (b) USER BENEFITS.
- (c) ECONOMIC FACTORS.
- (d) CONTINUITY OF IMPROVEMENT.
- (e) SOCIAL FACTORS.

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B. NO PORTION OF A PUBLIC HIGHWAY WITHIN THE LIMITS OF AN INCORPORATED CITY OR TOWN HAVING A POPULATION OF MORE THAN TWENTY-FIVE HUNDRED SHALL COME UNDER THE PROVISIONS OF THIS SECTION EXCEPT AS SPECIFICALLY PROVIDED FOR IN THIS TITLE.

28-1863. Designation of state route as state highway; notice; limitation; maintenance

A. NOT LESS THAN TWO WEEKS PRIOR TO THE DESIGNATION AND ACCEPTANCE BY THE TRANSPORTATION BOARD OF A STATE ROUTE, OR PORTION THEREOF, AS A STATE HIGHWAY, THE TRANSPORTATION BOARD SHALL GIVE NOTICE TO THE BOARD OF SUPERVISORS OF THE COUNTY IN WHICH THE PROPOSED HIGHWAY LIES OF THE INTENTION OF THE TRANSPORTATION BOARD TO CONSIDER THE DESIGNATION, AND THE BOARD OF SUPERVISORS MAY APPEAR BEFORE THE TRANSPORTATION BOARD AND BE HEARD UPON THE PROPOSAL. THE BOARD OF SUPERVISORS MAY ALSO PETITION THE TRANSPORTATION BOARD TO TAKE OVER AND DESIGNATE A STATE ROUTE AS A STATE HIGHWAY.

B. UNTIL DESIGNATED AND ACCEPTED AS STATE HIGHWAYS, ALL STATE ROUTES SHALL BE COUNTY HIGHWAYS, AND SHALL BE CONSTRUCTED, IMPROVED AND MAINTAINED AS SUCH, EXCEPT AS OTHERWISE PROVIDED IN THIS TITLE.

C. NO PART OF A STATE ROUTE SHALL BE TAKEN OVER OR DESIGNATED AS A STATE HIGHWAY UNTIL FUNDS FOR ITS IMPROVEMENT ARE PROVIDED IN THE BUDGET OF THE DEPARTMENT, BUT WHEN SO DESIGNATED AND ACCEPTED BY THE TRANSPORTATION BOARD, THE HIGHWAY SHALL THEREAFTER BE MAINTAINED BY THE DEPARTMENT.

28-1864. Opening, altering or vacating highway; review of order

A. WHEN THE DIRECTOR OR THE TRANSPORTATION BOARD DESIRES TO ESTABLISH, OPEN, RELOCATE, ALTER, VACATE OR ABANDON A STATE HIGHWAY, OR ANY PORTION THEREOF, THE DIRECTOR SHALL MAKE AND DELIVER A WRITTEN REPORT TO THE TRANSPORTATION BOARD DESCRIBING THE HIGHWAY, OR PORTION THEREOF, TO BE AFFECTED THEREBY. IF THE TRANSPORTATION BOARD DECIDES THAT THE PUBLIC CONVENIENCE WILL BE SERVED, IT SHALL ENTER A RESOLUTION UPON ITS

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IN AND TO SUCH IMPROVEMENTS. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO DEPRIVE THE TENANT OF ANY RIGHTS TO REJECT PAYMENT UNDER THIS SECTION AND TO OBTAIN PAYMENT FOR SUCH PROPERTY INTERESTS IN ACCORDANCE WITH APPLICABLE LAW, OTHER THAN THIS SECTION.

ARTICLE 4. STATE HIGHWAYS AND ROUTES

28-1861. State highways and routes defined

THE STATE HIGHWAYS, TO BE KNOWN AS STATE ROUTES, SHALL CONSIST OF THE HIGHWAYS DECLARED PRIOR TO AUGUST 12, 1927 TO BE STATE HIGHWAYS, UNDER AUTHORITY OF LAW, WHICH THE TRANSPORTATION BOARD, AFTER RECEIPT OF A RECOMMENDATION FROM THE DIRECTOR, MAY ADD TO, ABANDON OR CHANGE. IF THE TRANSPORTATION BOARD PROCEEDS CONTRARY TO THE RECOMMENDATIONS OF THE DIRECTOR, IT SHALL FILE A WRITTEN REPORT WITH THE GOVERNOR, STATING THE REASONS FOR SUCH ACTION. THE STATE HIGHWAYS SHALL CONSIST OF SUCH PARTS OF THE STATE ROUTES DESIGNATED AND ACCEPTED AS STATE HIGHWAYS BY THE TRANSPORTATION BOARD. NO HIGHWAY WHICH HAS NOT BEEN DESIGNATED A STATE ROUTE SHALL BECOME A STATE HIGHWAY. NOR SHALL ANY PORTION OF A STATE ROUTE BECOME A STATE HIGHWAY UNTIL IT HAS BEEN SPECIFICALLY DESIGNATED AND ACCEPTED BY THE TRANSPORTATION BOARD AS A STATE HIGHWAY, AND ORDERED CONSTRUCTED AND IMPROVED.

28-1862. Width of highways; errors in establishing

A. ALL HIGHWAYS CONSTRUCTED, LAID OUT, OPENED OR ESTABLISHED PRIOR TO AUGUST 12, 1927 AS PUBLIC HIGHWAYS BY THE TERRITORY OR STATE, OR BY A BOARD OF SUPERVISORS OR LEGAL SUBDIVISION OF THE STATE, AND WHICH HAVE BEEN USED CONTINUOUSLY BY THE PUBLIC AS THOROUGHFARES FOR FREE TRAVEL AND PASSAGE FOR TWO YEARS OR MORE, REGARDLESS OF ANY ERROR, DEFECT OR OMISSION IN THE PROCEEDING TO ESTABLISH THE HIGHWAYS, OR IN RECORDING OF THE PROCEEDINGS, AND ALL HIGHWAYS ESTABLISHED PURSUANT TO LAW, ARE DECLARED PUBLIC HIGHWAYS SIXTY-SIX FEET WIDE, UNLESS THE WIDTH THEREOF IS OTHERWISE SPECIFIED.

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MINUTES APPROVING THE PROPOSED ACTION AND AUTHORIZING THE DIRECTOR TO PROCEED THEREON, AND TO ACQUIRE ANY PROPERTY THEREFOR BY CONDEMNATION OR OTHERWISE.

B. THE SUPERIOR COURTS MAY REVIEW BY CERTIORARI THE ACTION OF THE TRANSPORTATION BOARD ESTABLISHING, OPENING, RELOCATING, ALTERING, VACATING OR ABANDONING STATE HIGHWAYS.

28-1865. Purchase, sale or condemnation of land for highway purposes

A. THE DIRECTOR, IN THE NAME OF THE STATE, MAY ACQUIRE, EITHER IN FEE OR A LESSER ESTATE OR INTEREST, REAL PROPERTY WHICH HE CONSIDERS NECESSARY FOR TRANSPORTATION PURPOSES, BY PURCHASE, DONATION, DEDICATION, EXCHANGE, CONDEMNATION OR OTHER LAWFUL MEANS WITH MONIES FROM THE STATE HIGHWAY FUND OR ANY OTHER MONIES APPROPRIATED TO THE DEPARTMENT. PROPERTY ACQUIRED FOR SUCH PURPOSES SHALL INCLUDE LANDS OR ANY INTEREST THEREIN CONSIDERED NECESSARY FOR RIGHTS-OF-WAY OR CAMP SITES, ROADSIDE REST AREAS, WATER OR MATERIAL NEEDED IN THE CONSTRUCTION, IMPROVEMENT OR MAINTENANCE OF STATE HIGHWAYS, AIRPORTS, RUNWAYS OR TAXIWAYS OR OTHER PROPERTY UNDER THE JURISDICTION, POSSESSION OR CONTROL OF THE DEPARTMENT, OR FOR SPOIL BANKS, ROCK QUARRIES, GRAVEL PITS, SAND OR EARTH BORROW PITS, OR FOR RIGHTS-OF-WAY TO THE PLACE WHERE MATERIAL REQUIRED IN THE CONSTRUCTION, IMPROVEMENT OR MAINTENANCE OF STATE HIGHWAYS MAY BE LOCATED, FOR OFFICES, SHOPS, MAINTENANCE CAMPS, STORAGE YARDS, INSPECTION OR WEIGHING STATIONS, RADIO TRANSMITTER OR REPEATER STATIONS, AND FOR RIGHTS-OF-WAY FOR ACCESS TO SUCH LOCATION AND AIRPORTS, RUNWAYS OR TAXIWAYS.

B. WHENEVER A PART OF A PARCEL OF LAND IS TO BE TAKEN FOR TRANSPORTATION PURPOSES AND THE REMAINDER IS TO BE LEFT IN SUCH SHAPE OR CONDITION AS TO BE OF LITTLE VALUE TO ITS OWNER, OR TO GIVE RISE TO CLAIMS OR LITIGATION CONCERNING SEVERANCE OR OTHER DAMAGE, THE WHOLE PARCEL MAY BE ACQUIRED BY ANY MEANS PROVIDED IN SUBSECTION A OF THIS SECTION, AND THE REMAINDER MAY BE SOLD OR MAY BE EXCHANGED FOR OTHER PROPERTY NEEDED FOR TRANSPORTATION PURPOSES.

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C. THE RIGHT OF EMINENT DOMAIN MAY BE EXERCISED BY THE STATE FOR SUCH PURPOSES AND THE COURT IN WHICH THE ACTION IS PENDING SHALL GIVE THE ACTION PRECEDENCE OVER OTHER CIVIL ACTIONS, WHENEVER PROPERTY WHICH IS DEVOTED TO OR HELD FOR SOME PUBLIC USE OTHER THAN EXISTING STREET, HIGHWAY OR AIRPORT USES FOR WHICH THE POWER OF EMINENT DOMAIN MIGHT BE EXERCISED IS TO BE TAKEN FOR SUCH TRANSPORTATION PURPOSES, THE DIRECTOR MAY, WITH THE CONSENT OF THE PERSON OR AGENCY IN CHARGE OF SUCH PUBLIC USE, PURCHASE REAL PROPERTY OR AN INTEREST THEREIN TO BE EXCHANGED WITH SUCH PERSON OR AGENCY FOR THE REAL PROPERTY SO TO BE TAKEN FOR TRANSPORTATION PURPOSES. THIS SECTION DOES NOT LIMIT THE AUTHORIZATION TO THE DEPARTMENT TO ACQUIRE, OTHER THAN BY EXCHANGE, PROPERTY FOR SUCH PURPOSES, OR TO ACQUIRE DIRECTLY, BY CONDEMNATION, PURCHASE OR OTHERWISE, WITHOUT SUCH EXCHANGE, PROPERTY HELD FOR SOME OTHER PUBLIC USE BY ANY LAWFUL MEANS SET FORTH IN SUBSECTION A OF THIS SECTION.

D. THE AUTHORITY CONFERRED BY THIS SECTION TO ACQUIRE REAL PROPERTY FOR TRANSPORTATION PURPOSES INCLUDES AUTHORITY TO ACQUIRE FOR FUTURE NEEDS PROVIDED THE TRANSPORTATION BOARD HAS AN ADOPTED AND APPROVED STATE ROUTE PLAN OR AIRPORT SITE LOCATION FOR SUCH TRANSPORTATION SHOWING A REASONABLE NEED FOR SUCH PROPERTY. THE DIRECTOR IS AUTHORIZED TO LEASE OR LET AT FAIR RENTAL VALUE ANY LANDS WHICH ARE HELD FOR TRANSPORTATION PURPOSES AND ARE NOT PRESENTLY NEEDED THEREFOR ON SUCH TERMS AND CONDITIONS AS THE DIRECTOR MAY FIX AND TO MAINTAIN AND CARE FOR SUCH PROPERTY IN ORDER TO SECURE RENT THEREFROM ON TERMS CONSISTENT WITH THIS SECTION. RENTS RECEIVED FROM PROPERTY ACQUIRED IN WHICH FEDERAL FUNDS PARTICIPATED IN THE COST OF ACQUISITION SHALL BE DEPOSITED IN THE STATE HIGHWAY FUND. TWENTY-FOUR PER CENT OF ALL OTHER RENT SO RECEIVED SHALL BE DEPOSITED IN THE TRANSPORTATION PROPERTIES RENTAL FUND IN THE STATE TREASURY, WHICH FUND IS HEREBY CREATED. THE BALANCE OF SUCH RENTS SHALL BE DEPOSITED IN THE STATE HIGHWAY FUND. INCOME RECEIVED FROM RENTALS UNDER THIS SECTION SHALL BE CREDITED TO THE BUDGETARY ITEM FROM WHICH THE PROPERTY WAS ACQUIRED.

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COUNTY RECEIVES A PAYMENT PURSUANT TO THIS SECTION IN THE AMOUNT OF TWENTY-FIVE DOLLARS OR LESS IN RESPECT TO ANY PARCEL OF LEASED PROPERTY, ALL OF SUCH PAYMENT SHALL BE DISTRIBUTED TO THE COUNTY FOR DEPOSIT IN THE COUNTY GENERAL FUND. THE MONEY RECEIVED BY THE RESPECTIVE JURISDICTIONS UNDER THIS SECTION MAY BE EXPENDED BY THEM FOR ANY PROPER PUBLIC PURPOSE NOT PROHIBITED BY THE STATE CONSTITUTION.

G. THE DIRECTOR MAY DISPOSE OF REAL PROPERTY OR ANY RIGHT, TITLE OR INTEREST THEREIN, WHEN HE DETERMINES THAT IT IS NO LONGER NEEDED OR USED FOR TRANSPORTATION PURPOSES. THE DIRECTOR MAY AFTER THE ESTABLISHMENT, LAYING OUT OR SUBSTANTIAL COMPLETION OF A TRANSPORTATION IMPROVEMENT, CONVEY OUT ANY SUCH REAL PROPERTY OR ANY INTEREST THEREIN WHICH WAS ACQUIRED PURSUANT TO SUBSECTION D OF THIS SECTION AND WHICH IT DETERMINES IS NOT NECESSARY FOR SUCH IMPROVEMENT. SUCH CONVEYANCE SHALL BE MADE TO THE HIGHEST AND MOST RESPONSIBLE BIDDER AT A PUBLIC SALE HELD FOR THAT PURPOSE. SUCH SALE MAY BE MADE FOR CASH OR ON TERMS OF NOT LESS THAN TWENTY PER CENT DOWN WITH BALANCE PAYABLE IN ANNUAL INSTALLMENTS FOR TEN YEARS, THE UNPAID BALANCE THEREOF TO BEAR INTEREST AT THE RATE OF SIX PER CENT PER ANNUM. THE DIRECTOR MAY EXECUTE ALL DEEDS OR CONVEYANCES NECESSARY TO CONVEY ANY REAL PROPERTY OR INTEREST THEREIN TO BE SOLD OR EXCHANGED UNDER THE PROVISIONS OF THIS SECTION. THE DIRECTOR MAY INSERT IN ANY SUCH DEED OR CONVEYANCE SUCH CONDITIONS, COVENANTS, EXCEPTIONS AND RESERVATIONS AS HE DEEMS TO BE IN THE PUBLIC INTEREST OR MAY CONVEY IN FEE SIMPLE ABSOLUTE. IT SHALL BE CONCLUSIVELY PRESUMED IN FAVOR OF ANY PURCHASER FOR VALUE AND WITHOUT NOTICE OF ANY REAL PROPERTY OR INTEREST THEREIN CONVEYED PURSUANT TO THE PROVISIONS OF THIS SECTION THAT THE DEPARTMENT ACTED WITHIN ITS LAWFUL AUTHORITY IN ACQUIRING THE PROPERTY, AND THAT THE DIRECTOR ACTED WITHIN ITS LAWFUL AUTHORITY IN EXECUTING ANY DEED OR CONVEYANCE OR LEASE AUTHORIZED BY THIS SECTION.

H. THE DIRECTOR MAY AT ANY TIME PRIOR TO PAYMENT OF THE COMPENSATION AND DAMAGES AWARDED THE DEFENDANTS BY THE COURT OR JURY ABANDON THE PROCEEDINGS

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E. WHENEVER IT IS DETERMINED BY THE DIRECTOR THAT ANY RENTAL REVENUE COLLECTED UNDER THE PROVISIONS OF THIS SECTION REPRESENTS OVERPAYMENT OR PAYMENT IN DUPLICATE, THE DIRECTOR MAY AUTHORIZE THE REFUND OF SUCH OVERPAYMENT OR PAYMENT IN DUPLICATE FROM THE TRANSPORTATION PROPERTIES RENTAL FUND AND THE STATE HIGHWAY FUND.

F. THE DEPARTMENT OF ADMINISTRATION DIVISION OF FINANCE SHALL, NOT LATER THAN THE FIRST DAY OF NOVEMBER NEXT FOLLOWING THE CLOSE OF ANY FISCAL YEAR AFTER THE EFFECTIVE DATE OF THIS SECTION, PAY THE RENTS DEPOSITED IN THE TRANSPORTATION PROPERTIES RENTAL FUND TO THE COUNTY ASSESSOR IN THE COUNTY IN WHICH SUCH REAL PROPERTY IS SITUATED. THE DIRECTOR SHALL CERTIFY TO THE DIVISION OF FINANCE THE AMOUNT OF SUCH RENTALS ATTRIBUTABLE TO EACH COUNTY AND SHALL NOTIFY EACH COUNTY OF THE RENTAL AND LOCATION OF EACH PIECE OF RENTAL PROPERTY FOR WHICH RENTS ARE DEPOSITED IN THE FUND. THE COUNTY ASSESSOR SHALL DISTRIBUTE ANY PAYMENT RECEIVED BY HIM PURSUANT TO THIS SECTION TO THE COUNTY. TO EACH REVENUE DISTRICT FOR WHICH THE COUNTY ASSESSES AND COLLECTS REAL PROPERTY TAXES OR ASSESSMENTS, AND TO EVERY OTHER TAXING AGENCY WITHIN THE COUNTY IN WHICH THE PROPERTY IS SITUATED. THE AMOUNT DISTRIBUTABLE TO THE COUNTY AND EACH SUCH REVENUE DISTRICT OR OTHER TAXING AGENCY SHALL BE PROPORTIONATE TO THE RATIO WHICH THE AMOUNT OF THE TAXES AND ASSESSMENTS OF EACH ON SIMILAR REAL PROPERTY SIMILARLY SITUATED WITHIN THAT PART OF THE COUNTY EMBRACING THE SMALLEST IN AREA OF THE REVENUE DISTRICTS OR OTHER TAXING AGENCIES OTHER THAN THE COUNTY, LEVIED FOR THE FISCAL YEAR NEXT PRECEDING, BEARS TO THE COMBINED AMOUNT OF THE TAXES AND ASSESSMENTS OF ALL SUCH DISTRICTS AND AGENCIES, INCLUDING THE COUNTY, ON SUCH PROPERTY LEVIED FOR THAT YEAR. THE COUNTY ASSESSOR SHALL DETERMINE AND CERTIFY THE AMOUNTS DISTRIBUTABLE TO THE BOARD OF SUPERVISORS, WHICH SHALL THEREUPON ORDER THE MAKING OF THE DISTRIBUTION. ANY MONEY DISTRIBUTED PURSUANT TO THIS SECTION TO ANY COUNTY, REVENUE DISTRICT OR OTHER TAXING AGENCY SHALL BE DEPOSITED TO THE CREDIT OF THE SAME FUND AS ANY TAXES OR ASSESSMENTS ON ANY TAXABLE SIMILAR REAL PROPERTY SIMILARLY SITUATED, WHERE A

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AND CAUSE THE ACTION TO BE DISMISSED WITHOUT PREJUDICE PROVIDED, HOWEVER, THAT THE COURT MAY REQUIRE THAT REASONABLE ATTORNEYS' FEES, EXPERT WITNESS FEES AND THE COSTS BE PAID AS A CONDITION OF DISMISSAL.

I. THE DIRECTOR SHALL JUSTIFY EACH ACQUISITION OR DISPOSAL OF REAL PROPERTY UNDER THIS SECTION BY AT LEAST ONE APPRAISAL REPORT, IN SUFFICIENT SCOPE TO DOCUMENT AND JUSTIFY THE ECONOMIC BASIS FOR THE ACQUISITION OR DISPOSAL.

J. NONE OF THE PROVISIONS OF THIS SECTION ARE INTENDED TO LIMIT, OR SHALL LIMIT, THE PROVISIONS OF ANY OTHER SECTION, EACH OF WHICH IS A DISTINCT AND SEPARATE AUTHORIZATION.

28-1865.01. Lease of areas above and below highways; exemptions

A. THE DIRECTOR MAY LEASE TO ANY PUBLIC AGENCY, AS DEFINED IN SECTION 11-951, OR TO PRIVATE PERSONS OR ENTITIES, THE USE OF AREAS ABOVE OR BELOW STATE HIGHWAYS, SUBJECT TO SUCH RESERVATIONS, RESTRICTIONS AND CONDITIONS AS HE DEEMS NECESSARY TO ASSURE ADEQUATE PROTECTION TO THE SAFETY AND INTEGRITY OF HIGHWAY FACILITIES AND TO SECURE THE SAFETY OF MOTORISTS. PRIOR TO ENTERING INTO ANY SUCH LEASE, THE DIRECTOR SHALL DETERMINE THAT THE PROPOSED USE BY ANY LESSEE IS NOT IN CONFLICT WITH THE ZONING REGULATIONS OF THE LOCAL GOVERNMENT CONCERNED. SUCH LEASES SHALL BE MADE IN ACCORDANCE WITH PROCEDURES TO BE PRESCRIBED BY THE TRANSPORTATION BOARD, EXCEPT THAT IN THE CASE OF LEASES WITH PRIVATE PERSONS OR ENTITIES SUCH LEASES SHALL ONLY BE MADE AFTER COMPETITIVE BIDDING. THE TRANSPORTATION BOARD MAY REJECT ANY OR ALL BIDS OR CALL FOR ADDITIONAL BIDS IF IN THE OPINION OF THE TRANSPORTATION BOARD THE BIDS SUBMITTED ARE NOT IN THE BEST INTEREST OF THE STATE. NO BID SHALL BE ACCEPTED WHICH DOES NOT YIELD AT LEAST A FAIR RENTAL VALUE FOR THE PROPERTY TO THE STATE HIGHWAY FUND. REVENUES DERIVED FROM SUCH LEASES SHALL BE DEPOSITED IN THE STATE HIGHWAY FUND.

B. PROVISIONS OF THIS SECTION SHALL NOT APPLY TO PERMITS, EASEMENTS AND RIGHTS-OF-WAY FOR PUBLIC SERVICE CORPORATIONS.

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28-1866. Use of streets to connect highways and routes

WHEN THE STREETS OF AN INCORPORATED CITY OR TOWN FORM NECESSARY OR CONVENIENT LINKS FOR THE CONNECTION OF SECTIONS OF STATE HIGHWAYS OR STATE ROUTES, OR FOR CARRYING THE HIGHWAYS OR ROUTES THROUGH THE CITY OR TOWN, THE STREETS MAY, BY AN AGREEMENT BETWEEN THE DIRECTOR AND THE GOVERNING BOARD OF THE CITY OR TOWN, IN THE CASE OF STATE HIGHWAYS, OR BETWEEN THE BOARD OF SUPERVISORS AND THE GOVERNING BOARD OF THE CITY OR TOWN, IN THE CASE OF STATE ROUTES, BE CONSIDERED AND DEEMED STATE HIGHWAYS, OR COUNTY HIGHWAYS RESPECTIVELY. THE AGREEMENT SHALL MAKE PROVISIONS FOR MAINTENANCE OF THE STREETS SO CLASSIFIED.

28-1867. Designation of secondary state highways

A. UPON PETITION OF THE BOARD OF SUPERVISORS OF A COUNTY, THE TRANSPORTATION BOARD SHALL, IF IT DECIDES THAT THE PUBLIC CONVENIENCE IS SERVED AND THE DESIGNATION WILL NOT INTERFERE WITH THE COMPLETION AND UPKEEP OF THE PRESENT STATE HIGHWAY SYSTEM, DESIGNATE AS A SECONDARY STATE HIGHWAY ANY INTERCOUNTY STATE HIGHWAY ROUTE WHICH EXTENDS ACROSS THE BORDER OF THE COUNTY FOR A DISTANCE OF NOT LESS THAN THIRTY MILES ON EACH SIDE THEREOF.

B. THE SECONDARY STATE HIGHWAY SHALL BE ORDERED CONSTRUCTED, IMPROVED, REPAIRED AND MAINTAINED UNDER JURISDICTION OF THE DEPARTMENT, SUBJECT TO APPROVAL OF A MAJORITY OF THE BOARD OF SUPERVISORS OF BOTH COUNTIES.

C. THE CONSTRUCTION, IMPROVEMENT, REPAIR AND MAINTENANCE OF THE SECONDARY STATE HIGHWAY SHALL BE BORNE IN THE FOLLOWING MANNER:

1. THE STATE SHALL BEAR ONE-THIRD OF THE COSTS.
2. EACH COUNTY THROUGH WHICH THE SECONDARY STATE HIGHWAY EXTENDS SHALL BEAR A PRO RATA SHARE OF SUCH COSTS OUT OF THE REVENUES ACCRUING TO THE COUNTIES FROM THEIR RESPECTIVE APPORTIONMENTS OF THE MOTOR VEHICLE FUEL TAX, BASED ON THE NUMBER OF MILES THE SECONDARY STATE HIGHWAY EXTENDS IN EACH COUNTY.

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D. WHEN TWO OR MORE COUNTIES DESIRE TO ESTABLISH, OPEN, RELOCATE OR CONSTRUCT AN INTERCOUNTY HIGHWAY WHICH EXTENDS ACROSS THE BORDERS OF THE COUNTIES, AND FOR THE PURPOSE OF SECURING FEDERAL AID IN THE CONSTRUCTION THEREOF, THEY MAY ENTER INTO COOPERATIVE AGREEMENTS WITH EACH OTHER WHICH MAY PROVIDE FOR THE AMOUNT OF MONEY TO BE ADVANCED BY EACH COUNTY TOWARDS THE CONSTRUCTION THEREOF, REGARDLESS OF THE COUNTY IN WHICH THE MONEY IS EXPENDED, WHEN SUCH AN AGREEMENT IS CONCLUDED, THE COUNTIES MAY REQUEST THAT THE DEPARTMENT INCLUDE THE INTERCOUNTY HIGHWAY INVOLVED IN THE FEDERAL AID SECONDARY SYSTEM, UPON APPROVAL OF THE INCLUSION IN THE SYSTEM, THE COUNTIES AND THE DEPARTMENT ARE AUTHORIZED TO ENTER INTO A COOPERATIVE AGREEMENT FOR THE CONSTRUCTION OF THE HIGHWAY BY THE DEPARTMENT WITH MONIES FURNISHED BY THE COUNTIES AND WITH FEDERAL AID.

28-1868. Actions against state concerning lands taken or damaged in construction of highway or airport: limitation

AN ACTION BROUGHT TO RECOVER POSSESSION OF OR TO CLEAR TITLE TO REAL PROPERTY CLAIMED BY THE STATE, OR ANY LEGAL SUBDIVISION THEREOF, AS A PUBLIC HIGHWAY OR AIRPORT, OR AN ACTION BROUGHT TO RECOVER COMPENSATION OR DAMAGE FOR PROPERTY TAKEN OR DAMAGED IN OR FOR THE CONSTRUCTION OF A PUBLIC HIGHWAY OR AIRPORT, SHALL BE COMMENCED WITHIN TWO YEARS AFTER THE CAUSE OF ACTION HAS ACCRUED AND NOT AFTERWARDS.

28-1869. Roadside parks; historical markers

A. THE DEPARTMENT MAY CONSTRUCT, MAINTAIN AND OPERATE ON HIGHWAY PROPERTY ROADSIDE PARKS FOR THE USE AND BENEFIT OF THE PUBLIC.

B. THE DEPARTMENT MAY CONSTRUCT AND ERECT ON HIGHWAY PROPERTY SIGNS AND PLAQUES MARKING POINTS OF HISTORICAL IMPORTANCE, BUT SUCH SIGNS AND PLAQUES SHALL NOT BE ERECTED UNLESS THEY HAVE BEEN CERTIFIED AS REASONABLY AUTHENTIC AND HISTORICALLY CORRECT BY THE DIRECTOR OF THE DEPARTMENT OF LIBRARY AND ARCHIVES.

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28-1870. Misuse of public highway or airport defined; abatement; penalties

A. A PERSON WHO COMMITS OR CAUSES TO BE COMMITTED ANY OF THE FOLLOWING ACTS IS GUILTY OF A MISDEMEANOR:

1. PLACES OR MAINTAINS AN ENCROACHMENT OR OBSTRUCTION UPON, OR MAKES ANY USE OF, OR OTHERWISE OCCUPIES A PUBLIC HIGHWAY OR AIRPORT OF THE STATE OR ANY OF ITS LEGAL SUBDIVISIONS FOR ANY PURPOSE OTHER THAN AUTHORIZED PUBLIC TRAVEL, OR FOR COMMUNICATION, TRANSPORTATION OR TRANSMISSION PURPOSES EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION. THE TERM "ENCROACHMENT" INCLUDES ANY STRUCTURE OR OBJECT OF ANY KIND OR CHARACTER WHICH IS PLACED IN, UNDER OR OVER ANY PORTION OF THE PUBLIC HIGHWAY OR AIRPORT.

2. PLACES OR MAINTAINS AN ENCROACHMENT OR OBSTRUCTION UPON, USES, OCCUPIES, DAMAGES OR OTHERWISE INTERFERES WITH A PUBLIC HIGHWAY, AIRPORT OR A PUBLIC BRIDGE, CAUSEWAY, VIADUCT, TRESTLE OR DAM, UNLESS AUTHORIZED BY THE DIRECTOR, OR IF NOT A STATE HIGHWAY OR STRUCTURE, OR AIRPORT FACILITY UNLESS AUTHORIZED BY THE GOVERNING BODY OF THE LEGAL SUBDIVISION IN WHICH SUCH ACT IS COMMITTED.

3. MOLESTS OR DESTROYS ANY PART, PROJECTION, STRUCTURE, APPURTENANT OR ACCESSORY OF A PUBLIC HIGHWAY OR AIRPORT, OR DESTROYS OR OTHERWISE INTERFERES WITH A DRAINAGE DITCH CONSTRUCTED FOR THE PROTECTION OF A PUBLIC HIGHWAY OR AIRPORT, OR A DIKE, DITCH, LEVEE, JETTY OR AN EMBANKMENT APPURTENANT THERETO.

4. DESTROYS OR INTERFERES WITH A FORD, DIP, CULVERT OR CROSSING OF A CREEK, GULCH, RIVER OR STREAM BY DIGGING AWAY THE BANKS, OR BY DAMMING, DEEPENING OR WIDENING ANY THEREOF SO AS TO DIVERT WATERS UPON THE PUBLIC HIGHWAY OR AIRPORT OR CAUSE INJURY OR DAMAGE THERE TO BY FLOODING OR OTHERWISE.

5. PLACES OR MAINTAINS ANY VEHICLE, AIRCRAFT OR STRUCTURE, PARKED OR PLACED WHOLLY OR PARTLY WITHIN ANY PUBLIC HIGHWAY, RUNWAY OR TAXIWAY SPECIFICALLY FOR THE PURPOSE OF SELLING THE VEHICLE, AIRCRAFT OR

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TRANSCRIPT

Tape 2

Simpson Mr. Chairman, if I may, most of these arguments seem to have come down to a statutory construction argument as to the lien and the construction of the one section, one sentence in the first section of the enabling legislation for this Commission.

Jennings Yes.

Simpson That section is the one that says, "This Act does not affect reaches of watercourses where determinations have been made by judicial actions before the effective date of this Act." An argument I'm hearing here today is that you have to take, look at that literal language and determine if that means any decision between any parties on any issue at any time will remove the jurisdiction of this Commission. Now, I would like to get back to a little common sense here. The major and foremost principle of statutory construction is to look to the intent of the legislature, and here we have some additional benefit because the legislature has told us in the rest of section one what the purpose and intent of the

statute was. And the purpose was, in subsection C, that a systematic process needs to be established to document the State's claims, to locate where private lands that are subject to such claims, and preserve and protect the public trust and all its interests where the trust values exist. Also, still, a review of the experience of other states having similar claims indicates that in the absence of legislation, meaning this legislation, protracted, difficult, expensive and disruptive fact-finding processes, and litigation may be needed to resolve these claims.

And subsection D says that the purpose of the act is to establish an administrative procedure for this necessary fact-finding effort, and a determination of the extent of this state's ownership in the beds of the watercourses.

Now, if you interpret the section that everyone is relying on, section 1.F.2, to take away the jurisdiction of this commission on the very river that under the legislative criteria is deemed to be the first priority to have this determination made for the purposes that I just read you, then you override the most important purposes of the legislation to remove jurisdiction from this commission and throw it back

to a piecemeal determination in the superior court. I just say to you that that violates the most important principle of statutory construction -- to read the whole statutory scheme together and you determine the intent of the legislature and you interpret the provisions of the Act to promote the purpose and the intent of the legislature in enacting the scheme, not to completely override it and make the whole scheme inapplicable.

SALT RIVER

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Rec'd	<u>1-13</u>	10	<u>94</u>
By:	<u>R. Good</u>		
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION			

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ORIGINAL

BEFORE THE
 ARIZONA NAVIGABLE STREAMBED ADJUDICATION COMMISSION

IN THE MATTER OF THE)
 NAVIGABILITY OF THE SALT RIVER))
 [From Granite Reef Dam to the)
 Gila River Confluence])

ADMIN. DOCKET NO. 94-1
 MARICOPA COUNTY'S
 RESPONSE TO OBJECTION TO
 JURISDICTION AND MOTION
 TO DISMISS AND TERMINATE
 PROCEEDINGS BY BUCKEYE
 IRRIGATION CO. ET AL

Maricopa County, by and through counsel undersigned,
 hereby submits its Response to Motion to Dismiss and
 Terminate Proceedings.

Respectfully submitted this 10th day of January,
 1994.

HELM & KYLE, LTD.

Sally Worthington

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MEMORANDUM OF POINTS AND AUTHORITIES

The Objection to Jurisdiction and Motion to Dismiss and
 Terminate Proceedings filed by Buckeye Irrigation Company
 ("Buckeye" hereinafter) raises two main issues. First, it is
 asserted that the Arizona Navigable Stream Adjudication
 Commission ("Commission" hereinafter) was unlawfully created

1 in violation of Article III of the Arizona Constitution and
2 that therefore the Commission lacks jurisdiction to determine
3 the navigability of the Salt River. The Objection also
4 raises the issue of due process. Assuming arguendo, that
5 there is jurisdiction, it is asserted that the statutes
6 creating the Commission do not afford even the most basic
7 tenets of due process, which are notice and an opportunity to
8 be heard.

9 The first argument raised in the Objection is that the
10 Commission is illegal and violative of the separation of
11 powers section of the Constitution because it will be making
12 judicial determinations. Oddly, even though Buckeye argues
13 that the Commission cannot make judicial determinations, it
14 is asking just that with its motion by asking the Commission
15 to terminate the proceedings pending before it. A state
16 commission has no powers, implied or otherwise, other than
17 those derived from the Constitution and the commission's
18 implementing statutes. Trico Electric Cooperative v.
19 Ralston, 67 Ariz. 358, 196 P.2d 470, 473, (1948). Nothing in
20 A.R.S. § 37-1101 et seq. empowers the Commission to dismiss
21 the proceedings and on this basis alone, the Objection should
22 be denied.

23 The Trico case states quite clearly that the Corporation
24 Commission cannot rule on the construction of a contract
25 since that is a judicial function, and the courts, not the
26 Corporation Commission have the jurisdiction to determine the
27 validity of a contract. Trico, 196 P.2d at 474. This is in
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1 accord with the general rule that the doctrine of separation
2 of powers of government operates to restrict the exercise of
3 judicial powers by administrative agencies. 1 Am Jur2d §145
4 Administrative Law. Nevertheless, it is well known that
5 administrative agencies have and exercise determinative or
6 adjudicatory functions and these powers and functions are
7 often quasi judicial in nature. 1 Am Jur2d §138
8 Administrative Law. Some well known examples are zoning
9 boards, our Game and Fish Commission and the Equal Employment
10 Opportunity Commission (EEOC).

11 The Commission is empowered to make factual findings
12 regarding the navigability of the Salt River and in doing so,
13 it may interpret the law created by the legislature. This is
14 permissible under Arizona law. Rio Rico Properties v. Santa
15 Cruz County., 172 Ariz. 80, 89, 834 P.2d 166, (Tax 1992) .

16 The statutes at issue empower the Commission to
17 determine which watercourses and portions and reaches of
18 watercourses were or were not navigable on February 12, 1914.
19 A.R.S. §§ 37-1122 and 37-1123. It is a well known
20 proposition of law that the question of navigability is one
21 of fact. Arizona Center for Law v. Hassell, 172 Ariz. 356,
22 837 P.2d 158, 165 (Ariz.App. 1991). Under Arizona law, the
23 legislature may pass to administrative agencies the right or
24 power to find facts, but it may not permit the board to say
25 what the law shall be. Loftus v. Russell, 69 Ariz. 245, 212
26 P.2d 91, 97 (1949), and Hernandez v. Frohmiller, 68 Ariz.
27 242, 204 P.2d 854, 862 (1949). The Commission is not
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1 violating the separation of powers doctrine by determining
2 the navigability of the Salt River. It is specifically
3 empowered to make such determination by the legislature and
4 this is a power that the legislature can grant to an
5 administrative agency.

6 The Texas case cited by Buckeye bears some discussion
7 because the underlying facts are different from the situation
8 here. In State v. Bradford, 50 S.W.2d 1065 (Tex., 1932), the
9 state of Texas sued private property owners along a
10 particular river in order to recover land underneath what it
11 claimed was a navigable stream. The land had come into the
12 possession of private property owners due to the actions of a
13 state surveyor who, in performing the survey in the area, ran
14 the survey lines across the river. Id. at 1068. In so
15 doing, the surveyor made a determination that the river was
16 not navigable. Id. The surveyor then issued patents for
17 the parcel. The court ruled that under Texas law, the
18 surveyor was not "clothed with the power" to settle questions
19 of navigability of streams and that such questions were in
20 fact, questions for the judiciary. Id. at 1070. We are not
21 presented here with a case where an administrative official
22 was deeding away public trust property. The commission is an
23 administrative agency created by the legislature to determine
24 title to river beds. The purpose of the act is set out in
25 H.B. 2594. It is "to establish an administrative procedure
26 for the necessary fact-finding efforts and the determination
27 of the extent of this state's ownership of the beds of
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1 watercourse located in this state." As Hassell points out,
2 each state must develop its own jurisprudence for the
3 administration of the lands it holds in public trust.
4 Hassell, 837 P.2d at 167. In Texas, the determination of
5 navigability may be judicial question.¹ In Arizona,
6 navigability is a question of fact. Hassell, 837 P.2d at
7 165. Under Arizona law, the legislature may delegate to
8 administrative agencies the right or power to find facts or
9 conditions properly prescribed under which the law as passed
10 will or will not operate. Loftus, 212 P.2d. at 97 and
11 Hernandez, 204 P.2d. at 862. Clearly then the Commission has
12 jurisdiction to determine the navigability of the Salt River,
13 and to interpret the law as set out by the legislature. Rio
14 Rico, 172 Ariz. at 89.

15 Buckeye's argument regarding due process likewise has no
16 merit. The Objection filed by Buckeye assumes that due
17 process requires that notice be given now, prior to the Salt
18 River hearings. This claim at best is premature. Notice is
19 not required on the initial fact finding. Pursuant to
20 A.R.S. § 37-1128, the Commission will be making a final
21 determination as to the navigability of the Salt River at the
22 upcoming hearings. After such decision, record owners of the
23 river bed are to be notified of the decision. See A.R.S.
24 § 37-1128. Persons aggrieved by the commission's decision

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26 ¹Interestingly, a later Texas case ruled that a state
27 commission had jurisdiction to determine navigability of the
28 state's streams. In Re Adjudication of Upper Guadalupe
River, 625 S.W.2d 353 (Tex.App. 1981). Arguably, this case
abrogates the rule set out in Bradford.

1 may appeal to the superior court and there is no requirement
2 that the person must have participated in the action before
3 the Commission in order to have appeal rights. See A.R.S
4 §37-1129. This situation is analogous to the taxing
5 authorities placing a valuation on real property. In the
6 case of a tax valuation, taxpayers are afforded due process
7 as long as the taxpayer can appeal to an impartial tribunal
8 any act of government which affects the validity or amount of
9 any tax to which the government asserts the taxpayer is
10 subject. Seafirst Corp. v. Dept. of Revenue, 172 Ariz. 54,
11 57, 833 P.2d 725 (Tax, 1992). Record owners are given notice
12 pursuant to A.R.S §37-1128 and record owners or anyone
13 aggrieved by the Commission's decision are given an
14 opportunity to be heard in the superior court. A.R.S. § 37-
15 1129. Under Seafirst, this comports with due process.

16 Even assuming that due process requires notice at this
17 stage of the proceedings, it is evident that the requisite
18 notice has been given. Buckeye's Objection is correct in
19 that the statutes creating the Commission do not require that
20 any notice be given prior to a hearing to determine
21 navigability to anyone who has record title to real property.
22 Objection, page 4. The pertinent statute only requires that
23 a notice of hearing be published in two newspapers at least
24 thirty days before any public hearing and that the Commission
25 mail notice of the hearing to anyone specifically requesting
26 notice of hearings. See A.R.S. § 37-1126. Any concerns
27 about due process deficiencies of this statute are easily
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1 remedied by the rules promulgated by the Commission.
2 Pursuant to R12-17-106², prior to any public hearing under
3 A.R.S. § 37-1126(B) notice is required to be given to all
4 record owners or lessees of property located within the bed
5 of a watercourse. Buckeye complains that this is not proper
6 notice because it was the State Land Department and not the
7 Commission that mailed the notices. Buckeye also complains
8 that neither the Commission nor the State Land Department
9 obtained title reports prior to such mailing. It is alleged
10 that the mailing was based upon the records of the Maricopa
11 County Assessor. It bears repeating that due process does
12 not require a specific kind of notice. Rather the test is,
13 whether the notice is reasonably calculated, under all the
14 circumstances, to apprise interested parties of the pendency
15 of the action and to afford them an opportunity to present
16 their claims or objections. In the Matter of the Rights to
17 the Use of the Gila River, 171 Ariz., 230, 236, 830 P.2d 442
18 (1992) (citing Mullane v. Central Hanover Bank & Trust Co.,
19 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). It does not
20 matter, then, who sent the notice, so long as the notice was
21 sent. The State Land Department, a large state agency, is
22 obviously in a much better position to make a mailing of the

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24 ²Buckeye also appears to raise the argument that one
25 cannot cure the due process deficiencies of a statute by a
26 rule. Due process procedures do not have to be a creature of
27 statute in order to be constitutionally valid. This argument
28 ignores the reality that judges can and do order requirements
for providing notice that may go beyond the statute. For
instance, in Matter of Gila, the Supreme Court also reviewed
the sufficiency of notice and filing requirements of the
trial court's Pretrial Order.

1 type required by the rule, because of its staff size and
2 budget, than a five member commission that only employs a
3 minimal staff, including a secretary and an attorney. The
4 fact that title reports were not utilized to create a mailing
5 list of record owners is not detrimental to due process
6 either. The records of the Maricopa County Assessor are a
7 sufficient basis from which to create a list of record
8 owners. Buckeye has not alleged that such records are not
9 reliable. Further, the Commission may take judicial notice
10 that such records are used by the taxing authorities for the
11 preparation of tax bills and therefore such records should be
12 accorded a high degree of reliability. Buckeye also argues
13 that a yet another due process problem arises because no
14 notice was sent until a preliminary determination of
15 navigability had been made by the commission. This concern
16 also lacks merit because no rights were lost by the
17 preliminary determination.

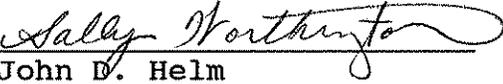
18 Due process is not a static concept, but depends upon
19 the circumstances of each case and must also consider
20 practical considerations. Matter of Gila, 171 Ariz. at 241.
21 Under the circumstances, records owners have been given
22 adequate notice, both by personal notice and notice by
23 publication, prior to the hearings. The basic components of
24 due process have been met; there was meaningful notice prior
25 to the opportunity to be heard. Matter of Gila River, 171
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1 Ariz. at 236.³ Lastly, too much reliance should not be put
2 on the notice procedures in Matter of Gila, even though both
3 are real property adjudications. A review of Matter of Gila
4 makes it clear that case is a much more massive undertaking
5 than the Salt River hearings, which are currently the only
6 noticed hearings pending before the Commission.

7 In conclusion, the determination of navigability of the
8 Salt River by the Commission does not violates the separation
9 of powers doctrine. Navigability is a question of fact, and
10 fact questions may be determined by agencies. As to the due
11 process concerns raised by the Objection, the procedures set
12 out in the applicable statutes and rules comport with due
13 process. Meaningful notice and an opportunity to be heard
14 has been afforded. For the foregoing reasons, Buckeye's
15 motion should be denied.

16 Respectfully submitted this 10th day of January,
17 1994.

18 HELM & KYLE, LTD.

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25 ³The other two cases cited by Buckeye are
26 distinguishable on the facts. Phoenix Metals Corporation v.
27 Roth, 79 Ariz. 106, 284 P.2d 645 (1955) deals with the notice
28 surrounding a default judgment. Likewise, the case State v.
Phoenix Savings and Trust Bank, 60 Ariz. 138, 132 P.2d 637
(1942) is inapposite; it deals with escheat and the property
of decedents.

1 Original and 5 copies filed this
2 10th day of January, 1994, with

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Filed 1-12 1994
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96-002-015

SALT RIVER
 007

ORIGINAL

7 Attorneys for Arizona State Land Department
 8

9 BEFORE THE ARIZONA NAVIGABLE STREAM
 ADJUDICATION COMMISSION

10 IN THE MATTER OF THE) ADMIN. DOCKET NO. 94-1
 11 NAVIGABILITY OF THE SALT RIVER)
 [From Granite Reef Dam to the) RESPONSE TO OBJECTION TO
 12 Gila River Confluence]) JURISDICTION AND MOTION
) TO DISMISS AND TERMINATE
 13) PROCEEDING BY BUCKEYE
) IRRIGATION CO. ET AL
 14)

15 The Arizona State Land Department, by and through its
 16 undersigned counsel, hereby concurs in the Response to Objection
 17 to Jurisdiction and Motion to Dismiss and Terminate Proceeding,
 18 filed by Maricopa County on January 10, 1994.

19 RESPECTFULLY SUBMITTED this 11th day of January, 1994.

20 GRANT WOODS
 Attorney General

21
 22 Karen Clark
 23 Shirley S. Simpson
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 24 Assistant Attorneys General
 Attorneys for the Arizona State
 25 Land Department
 26

1 ORIGINAL AND FIVE COPIES of the
2 foregoing filed this 11 day of
January, 1994, with:

3 Rebecca Good, Secretary
4 Arizona Navigable Stream Adjudication
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96-002-015

SALT RIVER

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Rec'd 1-3-94
By: R. Good
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ADJUDICATION COMMISSION

Attorney for Buckeye Irrigation Company and
Buckeye Water Conservation & Drainage District

ORIGINAL

BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY)	
OF THE SALT RIVER)	Docket No. 94-1
(From Granite Reef Dam to the)	
Gila River Confluence.))	OBJECTION TO JURISDICTION
)	AND MOTION TO DISMISS AND
)	TERMINATE PROCEEDINGS

COME NOW the Buckeye Irrigation Company, a corporation organized under the laws of the Arizona Territory, and the Buckeye Water Conservation & Drainage District, a municipal corporation, and object to the jurisdiction of this Commission, and move that the above matter be dismissed upon the grounds that the Arizona Navigable Stream Adjudication Commission was unlawfully created in violation of Article III of the Arizona Constitution, and that the Commission lacks any jurisdiction to determine whether the Salt River was or was not a navigable watercourse on February 14, 1912.

This motion is further made upon the grounds set forth in the Memorandum attached hereto and incorporated herein by reference thereto.

It is requested that the Commission expedite determination of the foregoing objection and motion; and that a ruling be made by the Commission without delay in order to avoid the time and expense which will be required by numerous parties to file their notices of appearance in this matter prior to January 14, 1994,

1 and to prepare for the hearing now scheduled for February 14, 1994.

2 DATED this 3rd day of January, 1994.

3
4 

5 John S. Schaper
6 Attorney for
7 Buckeye Irrigation Company and
8 Buckeye Water Conservation &
9 Drainage District

8 MEMORANDUM

9 Article III of the Arizona Constitution provides:

10 "The powers of the government of the State of
11 Arizona shall be divided into three separate
12 departments, the Legislative, the Executive, and the
13 Judicial; and except as provided in this Constitution,
14 such departments shall be separate and distinct, and no
15 one of such departments shall exercise the powers
16 properly belonging to either of the others."

17 Under the quoted provision, the Legislature cannot give a
18 "Commission" the authority to exercise either a legislative or
19 judicial function. See: Wells-Stewart Const. Co. v. Martin
20 Marietta Corp., 103 Ariz. 375, 442 P.2d 119 (1968); Trico
21 Electric Co-op v. Ralston, 67 Ariz. 358, 196 P.d 470 (1948). It
22 has improperly done so in creating the Arizona Navigable Stream
23 Adjudication Commission (ANSAC) under A.R.S. Sec. 37-1101, et
24 seq.

25 First, ANSAC is not an administrative or fact-finding body.
26 It is a "Stream Adjudication Commission." The Commission members
27 are not called upon to simply resolve factual questions
28 concerning conditions which existed in 1912, but must adjudicate
a variety of purely legal questions, e.g.: Can the Commission
ignore prior judicial determinations of non-navigability? If so,
is navigability to be determined on the basis of actual

1 conditions existing in 1912, or on the basis of conditions which
2 might have existed at some other time prior to the extensive
3 appropriation of water from Arizona's rivers and streams? If
4 some other time is to be used, what time is appropriate? What
5 specific legal criteria of navigability are to be applied by the
6 Commission? Those are not factual questions.

7 The 1992 statute creating ANSAC failed to recognize that the
8 navigability of a stream is a matter for judicial determination,
9 and not an appropriate subject for ministerial decision. State v.
10 Bradford, 121 Tex. 515, 50 S.W.2d 1065 (1932). The Legislature
11 could not grant authority to the Commission to adjudicate those
12 legal questions. See: 73 C.J.S., Public Administrative Law and
13 Procedure, Sec. 33, p. 420. In attempting to do so it has
14 violated Article III of the Arizona Constitution.

15 Second, ANSAC cannot, in effect, legally quiet the title to
16 the bed of a watercourse in favor of the State of Arizona against
17 an unknown owner who may have no knowledge of these proceedings.
18 The legislation authorizing such a process is both substantively
19 and procedurally defective.

20 The authority to determine the title to real property is a
21 judicial function vested in a court having jurisdiction over the
22 property. See: A.R.S. Sec. 12-1101 et seq.; Snow v. Kennedy, 36
23 Ariz. 375, 286 P. 930 (1930). Only those courts authorized and
24 created pursuant to Article VI, Sec. 1 of the Arizona
25 Constitution can exercise judicial power; and, as noted
26 previously, Article III of the Arizona Constitution prohibits the
27 delegation of such authority to ANSAC.

28

1 Moreover, even if ANSAC could legally adjudicate rights to
2 real property, the statutory process for determining the
3 navigability of a stream fails to provide procedural due process.
4 The statute does not require that any notice be given prior to a
5 hearing to determine navigability to anyone who has record title
6 to any real property located within a streambed. The statute
7 states that notice of a hearing is to be published in two
8 newspapers 30 days before the hearing, and sent by mail to those
9 who have requested notice in writing. A.R.S. 37-1126(B).

10 The statute is a less than feeble gesture at protecting
11 basic rights to notice. Article II, Section 4 of the Arizona
12 Constitution and the Fourteenth Amendment to the United States
13 Constitution require something more. The deprivation of property
14 by adjudication must be preceded by notice and an opportunity to
15 be heard before a judicial officer which is appropriate to the
16 nature of the case. In re Rights to the Use of the Gila River,
17 171 Ariz. 230, 235, 830 P.2d 442 (1992); Phoenix Metals
18 Corporation v. Roth, 79 Ariz. 106, 109-110, 284 P.2d 645 (1955).
19 The statute creating ANSAC makes no provisions for appropriate
20 notice to those whose properties are located within a streambed.
21 Certainly, the provision that notice be given to each record
22 owner of land within the bed of a stream after it has been
23 determined to be navigable does nothing to protect anyone from
24 the adverse effect of a predetermined issue of ownership.
25 Certainly, a proceeding which results in a confiscation of
26 property without notice to all interested parties and the
27 opportunity for a judicial hearing violates every principle of
28 due process. State v. Phoenix Savings & Trust Bank, 60 Ariz. 148,

1 153, 132 P.2d 637 (1942).

2 Even if it is assumed that the due process deficiencies of
3 the statute could be remedied by Commission rules, a problem
4 remains in the instant proceeding. R12-17-106 provides that the
5 Commission shall serve notice to the owner or lessee of property
6 within the bed of a watercourse which is the subject of a
7 hearing. The State Land Department - not the Commission -
8 attempted to comply with that rule by mailing notices to persons
9 whose names were shown on records in the office of the Maricopa
10 County Assessor. But, in order to save money neither ANSAC nor
11 the State Land Department attempted to obtain title reports from
12 which to determine the actual ownership of lands affected by this
13 proceeding. Notices were not sent until a preliminary
14 determination of possible navigability had been made by the
15 Commission. No attempt was made to provide anyone with notice
16 that any specific parcel of real property would be claimed by the
17 State. The notices simply advised numerous people of the
18 proceedings. Therefore, it is not possible for the State or the
19 Commission to assume that all owners and lessees have been served
20 with adequate notice required by the rule, or that the service
21 complied with due process requirements.

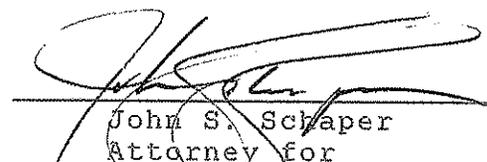
22 If the State of Arizona wishes to assert a title to
23 streambed property based upon an allegation of navigability, the
24 State should at a minimum determine actual ownership of the
25 properties it intends to claim, serve process upon those persons,
26 and then prove its claims. Instead, we have a system under
27 A.R.S. Sec. 37-1123 and 1124 in which the State Land Department
28

1 provides ex parte "assistance" to the Commission to support the
2 State's claims, specific owners of those properties claimed by
3 the State are not identified, no notice of the claim is given to
4 each record owner of the the subject properties, the Commission
5 then conducts a hearing at which the record owner may or may not
6 appear, and the Commission and the State Land Department are both
7 represented by the Attorney General. The Commission then enters
8 findings of fact and conclusions of law which may deprive an
9 individual of a title to property never previously claimed (and
10 in some instances disclaimed or granted) by either the United
11 States or the State of Arizona. Due process is not served by
12 such a system.

13 In summary, ANSAC is an illegally constituted body to which
14 the Legislature has improperly granted judicial authority which
15 can be exercised only by a court; the statute creating ANSAC
16 fails to provide for any rights of due process for those who may
17 be affected by its actions; and the attempts which have been made
18 to provide notice of ANSAC's proceedings are insufficient.

19 The Arizona Navigable Stream Adjudication Commission cannot
20 lawfully proceed with a determination of the navigability of the
21 Salt River, and it should terminate its proceedings immediately.

22 Respectfully submitted,

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25 
26 John S. Schaper
27 Attorney for
28 Buckeye Irrigation Company and
Buckeye Water Conservation &
Drainage District

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Original and 5 copies filed this
3rd day of January, 1994, with:

Rebecca Good
Arizona Navigable Stream Adjudication Commission
1616 West Adams
Phoenix, AZ 85007

and copies mailed to:

Shirley S. Simpson
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007

Robert B. Hoffman
Snell & Wilmer
One Arizona Center
400 East Van Buren
Phoenix, AZ 85004-0001

John B. Weldon, Jr.
Jenning, Strouss & Salmon, P.L.C.
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Phoenix, AZ 85014

James Johnson
Fennemore Craig
Two North Central
Phoenix, AZ 85004-2390



IN THE SUPREME COURT

STATE OF ARIZONA

CALMAT CO. OF ARIZONA, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CALMAT PROPERTIES CO., a California corporation, CALMAT LAND CO., a California corporation, ALLIED CONCRETE & MATERIALS CO., an Arizona corporation, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT and SALT RIVER VALLEY WATER USERS' ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Petitioners,

v.

THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION, an agency of the State of Arizona, and CURTIS JENNINGS, JAY BRASHEAR, MARGARET S. PETERSON, HAROLD RAMSBACHER and TROY L. PEWE, in their official capacities as members of and constituting The Arizona Navigable Stream Adjudication Commission,

Respondents.

No. CV-94-____-SA

REQUEST FOR ORAL ARGUMENT

96-002-015

SALT RIVER

009

ORIGINAL

Pursuant to Rule 7(d), Rules of Procedure for Special Actions, Petitioners request oral argument in the above-entitled matter. Oral argument is merited in this case because the issue whether there has been a prior determination that the Salt River is not navigable could affect titles to thousands of parcels of land. As shown by recent newspaper coverage (See Petition at 10) the public is intensely interested in this issue. Oral argument would also assist the Court in resolving this question.

RESPECTFULLY SUBMITTED this 9th day of March, 1994.

Richard B. Wilks # 001188
SHEA & WILKS
114 West Adams Street
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(602) 257-1126
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Indian Community

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Attorneys for Petitioners Salt River Project
Agricultural Improvement & Power District and
Salt River Valley Water Users' Association

and

SNELL & WILMER

By Robert B. Hoffman
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Bruce P. White # 004802
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(602) 382-6233
Attorneys for Petitioners Calmat Co. of Arizona,
Calmat Properties Co., Calmat Land Co., and
Allied Concrete & Materials Co.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of March, 1994, a copy of the foregoing Request for Oral Argument were hand-delivered to each of the following Respondents:

Rebecca Good, Secretary
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

Curtis A. Jennings, Esq.
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

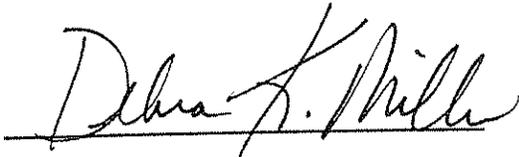
Harold Ramsbacher
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Phoenix, Arizona 85007

J. Grant Woods, Esq.
Shirley S. Simpson, Esq.
Office of the Attorney General
1275 West Washington
Phoenix, Arizona 85007


Debra K. Miller

SUPREME COURT OF ARIZONA

FILED
MAR 10 1994
NOEL K. DESSAINT
CLERK SUPREME COURT
BY

CALMAT CO. OF ARIZONA, and Arizona
corporation and successor in
interest by merger to Arizona Sand
and Rock Company, CALMAT PROPERTIES CO.,
a California corporation, CALMAT LAND
CO., a California corporation, ALLIED
CONCRETE & MATERIALS CO., an Arizona
corporation, SALT RIVER PROJECT
AGRICULTURAL IMPROVEMENT & POWER
DISTRICT and SALT RIVER VALLEY WATER
USER'S ASSOCIATION, SALT RIVER PIMA-
MARICOPA INDIAN COMMUNITY,

Petitioners,

vs.

THE ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION, an agency of
the State of Arizona, and CURTIS
JENNINGS, JAY BRASHEAR, MARGARET S.
PETERSON, HAROLD RAMSBACHER and TROY L.
PEWE, in their official capacities as
members of and constituting The
Arizona Navigable Stream Adjudication
Commission,

Respondents.

)
) Supreme Court
) No. CV-94-0093-SA

)
) 96-002-015

)
) SALT RIVER
) 010

)
) ORIGINAL

)
) ORDER SETTING DATE
) OF HEARING, DIRECTING
) SERVICE, and FIXING TIME
) FOR RESPONSE AND REPLY

A Petition for Special Action and Request for Oral Argument having been filed in the above-captioned matter,

IT IS ORDERED that the Petition for Special Action shall be considered by the court, on Tuesday, April 19, 1994.

IT IS FURTHER ORDERED granting the Request for Oral Argument and setting oral argument before this Court in its Courtroom, Arizona State Courts Building, 1501 West Washington, Phoenix, Arizona, at the hour of 9:30 A.M. Counsel are allotted twenty (20) minutes per side.

IT IS FURTHER ORDERED that service of the Petition and this Order shall be made by the attorneys for the Petitioners or their agents within two (2) days from the date hereof:

(a) upon the remaining respondents, by serving the attorney of record for each respondent, to be served personally (or by ordinary mail).

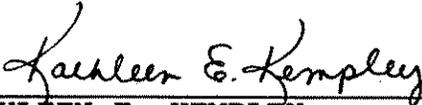
IT IS FURTHER ORDERED that the response to the relief requested in the Petition shall be filed and served not later than Tuesday, March 22, 1994.

IT IS FURTHER ORDERED that Petitioner may file a reply to the response not later than Thursday, March 31, 1994.

Proof of service shall be promptly filed in this court indicating SPECIFICALLY the method and date of service.

See attached "Appellate Advocacy Instructions for Oral Arguments."

DATED this 10th day of March, 1994.



KATHLEEN E. KEMPLEY
Chief Deputy Clerk

**ARIZONA SUPREME COURT
APPELLATE ADVOCACY INSTRUCTIONS
FOR ORAL ARGUMENTS**

1. If there is any change in positions or status of the case, the court is to be informed immediately.
2. If the lawyer arguing fails to sign in at the clerk's office at least thirty minutes before the time scheduled for argument, the case may be moved, vacated, or argument commenced without the lawyer being present, whichever the court deems best under the circumstances.
3. If the lawyer intends to refer to exhibits during argument, he or she must deliver six copies to the clerk at the time of sign-in, plus one copy to each opponent.
4. If a chart, graph, or exhibit is to be used on an easel during argument, the clerk must be notified at sign-in or before so that proper arrangements can be made before argument commences. If such a chart, graph, or exhibit is used, it is helpful to the court if photos or other replicas are given to the clerk at the time of sign-in.
5. There is an attorneys' lounge located near the Supreme Court courtroom for use by all attorneys arguing before the Court. Please check with the clerk's office and a deputy clerk will direct you to Room 424.
6. A dress code is enforced. Lawyers, male and female, are required to dress appropriately for court appearances.
7. Each lawyer should identify himself or herself at the time he or she commences argument.
8. The microphone at the podium is for the purpose of recording and separate sound amplification; do not block microphone with your papers.
9. The time remaining for each lawyer's argument is kept by the clerk. Each lawyer must keep himself or herself aware of the time. If the lawyer with opening argument wishes to save time for rebuttal, he or she will be responsible to conclude opening argument before the allotted time has been used. The lawyers should bear in mind that time spent answering questions is charged against the allotted time for argument.

10. No one is allowed at the counsel table in front of the bar except those who have been admitted to the bar and who are connected in some way with the case being argued. This includes, of course, members of the firms of those arguing or those who have appeared on the brief. Non-lawyers are not permitted at the counsel table or in front of the bar. Lawyers who are not connected with the case are also not permitted.
11. If a lawyer has any questions about procedure, protocol, or the like, these may be addressed to the clerk before argument commences.

Rec'd 3-11-94
By: R Good
ARIZONA NAVIGABLE STREAM
ADJUDICATION COMMISSION

IN THE SUPREME COURT
STATE OF ARIZONA

CALMAT CO. OF ARIZONA, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CALMAT PROPERTIES CO., a California corporation, CALMAT LAND CO., a California corporation, ALLIED CONCRETE & MATERIALS CO., an Arizona corporation, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT and SALT RIVER VALLEY WATER USERS' ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Petitioners,

v.

THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION, an agency of the State of Arizona, and CURTIS JENNINGS, JAY BRASHEAR, MARGARET S. PETERSON, HAROLD RAMSBACHER and TROY L. PEWE, in their official capacities as members of and constituting The Arizona Navigable Stream Adjudication Commission,

Respondents.

No. CV-94-0093-SA

Arizona Navigable Stream
Adjudication Commission No.
94-1

PROOF OF SERVICE

96-002-015

SALT RIVER

011

ORIGINAL

The undersigned counsel for Petitioners hereby certifies that on March 9, 1994, copies of this its Petition for Special Action, Appendix to Petition for Special Action and Request for Oral Argument, were hand-delivered to each of the following which includes each of the Respondents and the counsel to the Respondent Commission:

Rebecca Good, Secretary
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

Curtis A. Jennings, Esq.
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

Harold Ramsbacher
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1616 West Adams Street, 3rd Floor
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Jay Brashear
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Margaret S. Peterson
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Troy L. Pewe
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Phoenix, Arizona 85007

J. Grant Woods, Esq.
Shirley S. Simpson, Esq.
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007

In addition, the undersigned counsel for Petitioners hereby certifies that on March 11, 1994, copies of this Court's March 10, 1994, "Order Setting Date of Hearing, Directing Service, and Fixing Time for Response and Reply" were hand-delivered to the same with an additional copy being served as follows:

Anthony J. Ching
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007
Attorney for Arizona Navigable Stream Adjudication Commission

J. Grant Woods and Shirley S. Simpson were served with the Order in their capacity as Attorneys for Potential Intervenor-Respondent M. J. Hassell, in his official capacity as Commissioner of the State Land Department.

RESPECTFULLY SUBMITTED this 1st day of March, 1994.

Richard B. Wilks # 001188
SHEA & WILKS
114 West Adams Street
Suite 200
Phoenix, Arizona 85003
(602) 257-1126
Attorneys for Petitioners Salt River Pima-Maricopa Indian
Community

M. Byron Lewis # 002047
John B. Weldon, Jr. # 003701
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2 North Central Avenue
Suite 1600
Phoenix, Arizona 85004
(602) 262-5826
Attorneys for Petitioners Salt River Project Agricultural
Improvement & Power District and Salt River Valley Water Users'
Association

and

SNELL & WILMER

By Robert B. Hoffman
Robert B. Hoffman # 004415
Bruce P. White # 004802
One Arizona Center
400 East Van Buren Street
Phoenix, Arizona 85004-0001
(602) 382-6233
Attorneys for Petitioners Calmat Co. of Arizona, Calmat
Properties Co., Calmat Land Co., and Allied Concrete &
Materials Co.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of March, 1994, a copy of the foregoing Proof of Service were hand-delivered to each of the following:

Rebecca Good, Secretary
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

Curtis A. Jennings, Esq.
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

Harold Ramsbacher
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
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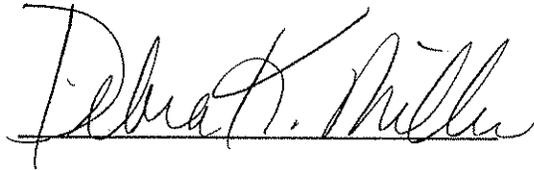
Jay Brashear
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

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1616 West Adams Street, 3rd Floor
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Troy L. Pewe
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

J. Grant Woods, Esq.
Shirley S. Simpson, Esq.
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007
Attorneys for Potential Intervenor-Respondent
M. J. Hassell, in his official capacity as
Commissioner of the State Land Department

Anthony J. Ching
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007
Attorney for Arizona Navigable Stream Adjudication
Commission

A handwritten signature in cursive script, reading "Debra K. Miller". The signature is written in black ink and is positioned to the right of the typed text.

IN THE SUPREME COURT

STATE OF ARIZONA

CALMAT CO. OF ARIZONA, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CALMAT PROPERTIES CO., a California corporation, CALMAT LAND CO., a California corporation, ALLIED CONCRETE & MATERIALS CO., an Arizona corporation, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT and SALT RIVER VALLEY WATER USERS' ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Petitioners,

v.

THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION, an agency of the State of Arizona, and CURTIS JENNINGS, JAY BRASHEAR, MARGARET S. PETERSON, HAROLD RAMSBACHER and TROY L. PEWE, in their official capacities as members of and constituting The Arizona Navigable Stream Adjudication Commission,

Respondents.

No. CV-94-0093-SA

Arizona Navigable Stream
Adjudication Commission No.
94-1

NOTICE OF PENDING
LEGISLATION

96-002-015

SALT RIVER

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ORIGINAL

Attached hereto is a copy of the Senate engrossed version of House Bill 2589. The undersigned is advised that it is likely that the House will concur in the Senate amendments and the bill will be sent to the Governor. The effect, if any, that the bill would have on the pending proceeding, should the bill become law, is likely to be raised at oral argument.

RESPECTFULLY SUBMITTED this 3rd day of April, 1994.

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Phoenix, Arizona 85003
(602) 257-1126
Attorneys for Petitioners Salt River Pima-Maricopa Indian
Community

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Phoenix, Arizona 85004
(602) 262-5826
Attorneys for Petitioners Salt River Project Agricultural
Improvement & Power District and Salt River Valley Water Users'
Association

and

SNELL & WILMER

By Robert B. Hoffman
Robert B. Hoffman # 004415
Bruce P. White # 004802
One Arizona Center
400 East Van Buren Street
Phoenix, Arizona 85004-0001
(602) 382-6233
Attorneys for Petitioners Calmat Co. of Arizona, Calmat
Properties Co., Calmat Land Co., and Allied Concrete &
Materials Co.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of April, 1994, a copy of the foregoing Notice of Pending Legislation were hand-delivered to each of the following:

Rebecca Good, Secretary
Arizona Navigable Stream Adjudication Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

Curtis A. Jennings, Esq.
Arizona Navigable Stream Adjudication Commission
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Phoenix, Arizona 85007

Harold Ramsbacher
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Jay Brashear
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Phoenix, Arizona 85007

Margaret S. Peterson
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1616 West Adams Street, 3rd Floor
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J. Grant Woods, Esq.
Shirley S. Simpson, Esq.
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007
Attorneys for Potential Intervenor-Respondent
M. J. Hassell, in his official capacity as
Commissioner of the State Land Department

Anthony J. Ching
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington
Phoenix, Arizona 85007
Attorney for Arizona Navigable Stream Adjudication
Commission

A handwritten signature in black ink, reading "Robert K. Miller". The signature is written in a cursive style and is positioned above a horizontal line.

State of Arizona
House of Representatives
Forty-first Legislature
Second Regular Session
1994

HOUSE BILL 2589

AN ACT

AMENDING SECTIONS 37-1101, 37-1121 THROUGH 37-1128, ARIZONA REVISED STATUTES; REPEALING SECTION 37-1129, ARIZONA REVISED STATUTES; AMENDING SECTIONS 37-1130, 37-1131, 37-1151, 37-1154, 37-1156, 41-192, 41-1304 AND 41-3000.09, ARIZONA REVISED STATUTES; AMENDING TITLE 37, CHAPTER 7, ARTICLE 2, ARIZONA REVISED STATUTES, BY ADDING SECTION 37-1132; AMENDING TITLE 41, CHAPTER 8, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 1.1; CHANGING THE CHAPTER HEADING OF TITLE 37, CHAPTER 7, ARIZONA REVISED STATUTES, TO "STATE CLAIMS TO STREAMBEDS"; MAKING APPROPRIATIONS; RELATING TO PRIVATE PROPERTY OWNERSHIP.

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 37-1101, Arizona Revised Statutes, is amended to
3 read:

4 37-1101. Definitions

5 In this chapter, unless the context otherwise requires:

6 1. "Arizona navigable stream adjudication commission" or
7 "commission" means the Arizona navigable stream adjudication commission
8 established by section 37-1121.

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

11 ~~3. "Groundwater" has the meaning assigned to that term pursuant to~~
12 ~~section 45-101.~~

13 3. "DETERMINATION OF NONNAVIGABILITY IN A PUBLIC PROCEEDING" MEANS
14 A DETERMINATION THAT A PARTICULAR WATERCOURSE WAS NOT NAVIGABLE BEFORE, OR
15 AS OF, FEBRUARY 14, 1912 BY A FINAL, UNAPPEALABLE DECISION OF A JUDICIAL
16 OR ADMINISTRATIVE BODY, INCLUDING ANY DETERMINATION OF NONNAVIGABILITY OF:

17 (a) ANY PORTION OF THE SALT RIVER LYING BETWEEN GRANITE REEF DAM
18 AND ITS CONFLUENCE WITH THE GILA RIVER.

19 (b) THE AGUA FRIA RIVER.

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

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

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

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

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

10 (d) A hydropower inlet and discharge facility.

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

13 6. "Navigable" or "navigable watercourse" means a watercourse, or a
14 portion or reach of a watercourse, that was in existence on February 14,
15 1912, and AT that TIME was used or was susceptible to being used, in its
16 ordinary and natural condition, as a highway for commerce, over which
17 trade and travel were or could have been conducted in the customary modes
18 of trade and travel on water.

19 ~~7. "Ordinary high watermark" means the line on the shore of a~~
20 ~~watercourse established by the fluctuations of water and indicated by~~
21 ~~physical characteristics such as a clear, natural line impressed on the~~
22 ~~bank, shelving, changes in the character of the soil, destruction of~~
23 ~~terrestrial vegetation or the presence of litter and debris, or by other~~
24 ~~appropriate means that consider the characteristics of the surrounding~~
25 ~~areas. Ordinary high watermark does not mean the line reached by unusual~~
26 ~~floods.~~

27 7. "ORDINARY LOW WATERMARK" MEANS THE LINE ON THE BANKS OF A
28 WATERCOURSE CREATED WHEN THE WATER RECEDES AT ITS REGULARLY RECURRING
29 LOWEST STAGE IN NORMAL YEARS WITHOUT REFERENCE TO UNUSUAL DROUGHTS.

30 8. "Public entity" means the United States and its agents, this
31 state, a county, city or town, a county flood control district or any
32 other entity established under title 48.

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

37 10. "PUBLIC TRUST PURPOSES" OR "PUBLIC TRUST VALUES" MEANS COMMERCE,
38 NAVIGATION AND FISHING.

39 ~~10.~~ 11. "Riparian area" means a geographically delineated area with
40 distinct resource values, that is characterized by deep-rooted plant
41 species that depend on having roots in the water table or its capillary
42 zone and that occurs within or adjacent to a natural perennial or
43 intermittent stream channel or within or adjacent to a lake, pond or marsh
44 bed maintained primarily by natural water sources. Riparian area does not
45 include areas in or adjacent to ephemeral stream channels, artificially
46 created stockpounds, man-made storage reservoirs constructed primarily for
47 conservation or regulatory storage, municipal and industrial ponds or

1 man-made water OR EFFLUENT transportation, distribution, off-stream
2 storage and collection systems.

3 ~~11. "Surface water" has the meaning assigned to that term pursuant~~
4 ~~to section 45-101.~~

5 12. "Watercourse" means the main body or a portion or reach of any
6 lake, river, creek, stream, wash, arroyo, channel or other body of water.
7 Watercourse does not include a man-made conveyance system described in
8 paragraph 5 of this section, except to the extent that the system
9 encompasses lands that were part of a natural watercourse as of February
10 14, 1912.

11 Sec. 2. Section 37-1121, Arizona Revised Statutes, is amended to
12 read:

13 37-1121. Arizona navigable stream adjudication commission

14 A. The Arizona navigable stream adjudication commission is
15 established through July 1, 2000 AS A SEPARATE AGENCY AND INDEPENDENT OF
16 THE STATE LAND DEPARTMENT. The commission consists of five persons, not
17 more than three of whom shall be of the same political party, appointed by
18 the governor pursuant to section 38-211. Persons who are appointed to the
19 commission must be well-informed on issues relating to rivers and streams
20 in this state. The commission shall select a presiding officer from among
21 its members.

22 B. Members of the commission are public officers for purposes of
23 title 38, chapter 3, article 8 and title 38, chapter 3.1. A person who
24 has advocated for or expressed a desire that a watercourse in this state
25 be determined to have been navigable or nonnavigable may not serve as a
26 commission member. A COMMISSION MEMBER WHO IS A WITNESS, GIVES EVIDENCE
27 OR MAKES STATEMENTS OF PERSONAL KNOWLEDGE OF THE CHARACTERISTICS OF
28 NAVIGABILITY OF A WATERCOURSE FOR THE COMMISSION'S CONSIDERATION SHALL NOT
29 PARTICIPATE AS A COMMISSION MEMBER IN PROCEEDINGS RELATING TO THAT
30 WATERCOURSE. A commission member shall not:

31 1. Have any bias regarding the possible navigability of any
32 watercourse or a portion or reach of a watercourse.

33 2. Own, obtain a significant portion of income from or claim any
34 ownership or possessory interest in lands affected by this chapter.

35 3. Directly or indirectly receive a significant portion of income
36 from a person who claims an ownership or possessory interest in lands
37 affected by this chapter or from a person who obtains a significant
38 portion of income from such lands nor have been employed by such persons
39 within two years before, or be employed by such persons within two years
40 after, the commission member's term of office.

41 C. Funding for the commission and its necessary and reasonable
42 expenses, including contracting for private services, shall be provided
43 ~~from the sale and use of public trust lands~~ and from such legislative
44 appropriations as may be necessary to permit the commission to fulfill its
45 responsibilities.

46 D. The governor, on good cause shown, may remove a member for
47 neglect of duty or misconduct or malfeasance in office. On removal, the
48 governor shall file with the secretary of state a complete statement of

1 all charges made against the member, the governor's findings and a
2 complete record of the disciplinary proceedings conducted with respect to
3 the removal.

4 E. Members are eligible to receive compensation pursuant to section
5 38-611 for service on the commission, unless a member who is otherwise
6 employed as a public officer is prohibited from receiving additional
7 compensation.

8 F. The commission shall maintain its principal office at the state
9 capital but may hold meetings or hearings any place in this state. The
10 commission shall meet at least once each calendar quarter, except THAT if
11 the commission has completed all ~~investigations~~, inquiries and hearings
12 required under this chapter, the commission shall not be required to meet.
13 The presiding officer or a majority of the members may call additional
14 meetings. On termination, the commission shall transmit all of its
15 records to the ~~department~~ SECRETARY OF STATE.

16 G. In the event of a vacancy on the commission, the governor may
17 appoint a replacement member pursuant to section 38-211.

18 H. NOTWITHSTANDING SECTION 41-192, THE ATTORNEY GENERAL SHALL NOT
19 ADVISE OR REPRESENT THE COMMISSION.

20 ~~H.~~ I. For purposes of subsection B of this section, "significant
21 portion of income" means ten per cent or more of gross personal income for
22 a calendar year.

23 Sec. 3. Section 37-1122, Arizona Revised Statutes, is amended to
24 read:

25 37-1122. General powers and duties of the commission

26 A. The commission shall:

27 1. Adopt rules and establish procedures and services that are
28 necessary or desirable to carry out the provisions and purposes of this
29 chapter.

30 2. Assemble and distribute information to the public relating to
31 the commission's ~~determination~~ FINDING AND RECOMMENDATION of navigability
32 of any watercourse and the commission's other activities.

33 3. Conduct ~~investigations~~, inquiries or hearings in performing the
34 commission's powers and duties. THE COMMISSION SHALL CONDUCT ITS
35 PROCEEDINGS INFORMALLY WITHOUT ADHERENCE TO JUDICIAL RULES OF PROCEDURE OR
36 EVIDENCE. THE COMMISSION SHALL FACILITATE PARTICIPATION BY PERSONS WHO
37 ARE NOT REPRESENTED BY LEGAL COUNSEL AND SHALL NOT REQUIRE A PERSON TO
38 FILE DOCUMENTS OR NOTICES IN ORDER TO BE HEARD AND PARTICIPATE IN
39 PROCEEDINGS BEFORE THE COMMISSION.

40 4. Exercise such other powers as may be necessary to fully carry
41 out its responsibilities imposed by this chapter.

42 B. THE COMMISSION MAY EMPLOY OR CONTRACT FOR LEGAL COUNSEL,
43 INDEPENDENT FROM THE ATTORNEY GENERAL, AND OTHER PROFESSIONAL AND
44 ADMINISTRATIVE SERVICES. CONTRACTS FOR LEGAL AND PROFESSIONAL SERVICES
45 ARE EXEMPT FROM SECTION 41-192 AND TITLE 41, CHAPTER 23.

46 Sec. 4. Section 37-1123, Arizona Revised Statutes, is amended to
47 read:

1 37-1123. Receiving and compiling evidence and records
2 A. ~~The commission, with the assistance of the state land~~
3 ~~department,~~ shall collect, ~~compile,~~ receive, review and consider all
4 relevant historical and other evidence ~~available or~~ presented to the
5 commission BY THE STATE LAND DEPARTMENT AND BY OTHER PERSONS, regarding
6 the navigability OR NONNAVIGABILITY of watercourses in this state as of
7 February 14, 1912, together with associated public trust values, EXCEPT
8 FOR EVIDENCE WITH RESPECT TO THE COLORADO RIVER, and, ~~based on that~~
9 ~~evidence,~~ AFTER PUBLIC HEARINGS CONDUCTED PURSUANT TO SECTION 37-1126:
10 1. BASED ONLY ON EVIDENCE OF NAVIGABILITY OR NONNAVIGABILITY,
11 ~~determine~~ MAKE FINDINGS AND RECOMMENDATIONS TO THE LEGISLATURE PURSUANT TO
12 SECTION 37-1128 AS TO which watercourses and portions and reaches of
13 watercourses were not navigable ~~on that date~~ AS OF FEBRUARY 14, 1912.
14 2. BASED ONLY ON EVIDENCE OF NAVIGABILITY OR NONNAVIGABILITY,
15 ~~determine~~ MAKE FINDINGS AND RECOMMENDATIONS TO THE LEGISLATURE PURSUANT TO
16 SECTION 37-1128 AS TO which watercourses and portions and reaches of
17 watercourses were navigable ~~on that date~~ AS OF FEBRUARY 14, 1912.
18 3. IN A SEPARATE, SUBSEQUENT PROCEEDING PURSUANT TO SECTION
19 37-1128, SUBSECTION H, CONSIDER EVIDENCE OF PUBLIC TRUST VALUES AND THEN
20 identify AND MAKE A PUBLIC REPORT OF any public trust values that are now
21 associated with the navigable watercourses.
22 B. BEFORE RECEIVING, REVIEWING OR CONSIDERING ANY EVIDENCE PURSUANT
23 TO SUBSECTION A OF THIS SECTION FOR A PARTICULAR WATERCOURSE, THE
24 COMMISSION SHALL PUBLISH NOTICE ONCE EACH WEEK FOR THREE CONSECUTIVE WEEKS
25 IN A NEWSPAPER OF GENERAL CIRCULATION IN EACH COUNTY IN WHICH THE
26 WATERCOURSE IS LOCATED. THE NOTICE SHALL INCLUDE:
27 1. A STATEMENT OF THE INTENT TO RECEIVE, REVIEW AND CONSIDER
28 EVIDENCE.
29 2. AN ADDRESS TO WHICH INTERESTED PARTIES MAY SUBMIT EVIDENCE FOR
30 THE COMMISSION'S REVIEW.
31 3. A DATE BY WHICH EVIDENCE MUST BE SUBMITTED.
32 4. A GENERAL DESCRIPTION OF THE PROCEDURES THE COMMISSION WILL USE
33 TO REVIEW THE EVIDENCE.
34 B- C. Private citizens, clubs, organizations, corporations,
35 partnerships, unincorporated associations, municipal corporations and
36 public entities may present evidence to the commission ~~in writing or by~~
37 ~~sworn testimony~~ at a hearing according to commission rules. THE
38 SUBMISSION OF EVIDENCE BY ANY PARTY PURSUANT TO THE COMMISSION'S NOTICE
39 UNDER SUBSECTION B OF THIS SECTION DOES NOT PRECLUDE THAT PARTY FROM
40 SUBMITTING ADDITIONAL EVIDENCE AT ANY HEARING BEFORE THE COMMISSION.
41 G- D. The ~~commission~~ STATE LAND DEPARTMENT shall consult and
42 coordinate its efforts to gather ~~and review~~ evidence of navigability and
43 public trust values with the department of water resources, the game and
44 fish department, the state parks board and other interested persons and
45 public and private entities. ~~and~~ THE COMMISSION shall consider the
46 information that those persons and entities have compiled regarding the
47 navigability of watercourses.

1 ~~D. E.~~ After consulting with the state land department, and After
2 public notice, the commission shall set priorities for investigating and
3 ~~adjudicating~~ CONDUCT HEARINGS ON the navigability of the watercourses in
4 this state. In setting the priorities, the commission shall consider:
5 1. The number and value of parcels of real property that are
6 affected by a state claim of sovereign ownership to the bed of the
7 watercourse.
8 2. The degree of hardship to private parties and political
9 subdivisions due to title uncertainties relating to the bed of the
10 watercourse.
11 3. The significance of the public trust values associated with the
12 watercourse and the degree to which those values are threatened.
13 4. The potential viability of this state's sovereign claims to the
14 watercourse, giving higher priority consideration to more viable claims.
15 ~~E. F.~~ A person who is aggrieved by the undetermined navigability
16 status of a watercourse may petition the commission to modify the priority
17 set under subsection ~~D- E~~ of this section and grant expedited
18 consideration for a particular watercourse or portion or reach of a
19 watercourse. The commission shall grant the petition if justified by the
20 factors listed in subsection ~~D- E~~ of this section.
21 ~~F. G.~~ No judicial action seeking a determination of navigability
22 of a watercourse, TO ESTABLISH OR OBTAIN OWNERSHIP OF LAND WITHIN THE BED
23 AND BANKS OF A WATERCOURSE OR TO DETERMINE ANY PUBLIC TRUST VALUES
24 ASSOCIATED WITH A WATERCOURSE may be commenced, continued or completed
25 unless a petition is first filed under subsection E of this section or the
26 commission has taken final action with respect to the watercourse under
27 section 37-1128. If the commission has not taken final action within one
28 hundred eighty days after filing a petition under subsection E of this
29 section, the judicial action may proceed THE LEGISLATURE HAS FOUND THAT
30 THE WATERCOURSE WAS NAVIGABLE OR NONNAVIGABLE PURSUANT TO SECTION 37-1128.
31 This subsection does not preclude the department from seeking a temporary
32 restraining order or injunctive relief at any time to prevent loss or
33 damage to public trust resources.
34 H. NOTWITHSTANDING SUBSECTION G OF THIS SECTION, ANY CONDEMNATION
35 ACTION BY THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE MAY PROCEED
36 TO TRIAL AND CONCLUSION, INCLUDING THE PAYMENT OF COMPENSATION, REGARDLESS
37 OF THE POTENTIAL CLAIM OF TITLE BY THIS STATE BASED ON THE NAVIGABILITY OF
38 THE WATERCOURSE. IN ANY ACTION COMMENCED OR CONTINUED PURSUANT TO THIS
39 SUBSECTION, THE COURT SHALL NOT CONSIDER OR DECIDE THE NAVIGABILITY OF THE
40 WATERCOURSE. ANY JUDGMENT IN ANY ACTION COMMENCED OR CONTINUED PURSUANT
41 TO THIS SUBSECTION SHALL BE SUBJECT TO A POTENTIAL CLAIM OF TITLE BY THIS
42 STATE BASED ON THE NAVIGABILITY OF THE WATERCOURSE.
43 Sec. 5. Section 37-1124, Arizona Revised Statutes, is amended to
44 read:
45 37-1124. Compiling evidence and records by department
46 A. Beginning on or about the date that the commission establishes
47 priorities pursuant to section 37-1123, subsection ~~D- E~~, but in no event
48 later than January 2, 1993, the department shall begin the necessary

1 investigation and inquiries to assemble the evidence relevant to
2 ~~determining~~ FINDING navigability with respect to those watercourses given
3 the highest priority by the commission. The department shall continue the
4 investigations and inquiries as resources permit, in the order of priority
5 set by the commission.

6 B. After collecting and documenting all reasonably available
7 evidence regarding the condition and usage of a watercourse as of February
8 14, 1912, the present uses of the underlying land and the public trust
9 values associated with the watercourse, if any, the department shall
10 promptly transmit all of the evidence to the commission.

11 C. The department shall maintain a permanent record of the material
12 assembled and transmitted to the commission.

13 Sec. 6. Section 37-1125, Arizona Revised Statutes, is amended to
14 read:

15 37-1125. Initial classification of watercourses

16 A. After the commission receives and reviews sufficient information
17 to permit ~~an initial determination~~ A PRELIMINARY FINDING with regard to
18 possible navigability of any reach or portion of a watercourse, the
19 commission shall initially classify the watercourse or portion or reach of
20 the watercourse into one of the following categories:

21 1. The watercourse has characteristics of possible navigability as
22 of February 14, 1912.

23 2. The watercourse has no such characteristics of navigability.

24 B. The commission shall make its ~~determination~~ PRELIMINARY FINDING
25 under this section in an expeditious manner.

26 C. The commission shall maintain a permanent public record of the
27 classifications of watercourses and portions and reaches of watercourses
28 made under this section.

29 Sec. 7. Section 37-1126, Arizona Revised Statutes, is amended to
30 read:

31 37-1126. Hearings; notice

32 A. After the commission completes the initial classification of any
33 watercourse or portion or reach of a watercourse under section 37-1125,
34 the commission shall schedule public hearings to receive additional
35 evidence and testimony relating to navigability or nonnavigability of any
36 such reach or portion, and, ~~if potentially~~ AFTER THE COMMISSION FINDS A
37 WATERCOURSE IS navigable, THE COMMISSION SHALL SCHEDULE PUBLIC HEARINGS TO
38 IDENTIFY AND MAKE A PUBLIC REPORT OF any public trust values associated
39 with the watercourse. The hearings shall be held at the commission's
40 office or, in the case of a hearing concerning a watercourse located
41 principally outside of Maricopa county, at the county seat of the county
42 in which the predominant portion of the particular watercourse is located.
43 The commission may schedule additional hearings at other locations at the
44 commission's discretion.

45 B. At least thirty days before any public hearing under this
46 section, the commission shall cause notice of the hearing to be published
47 in two newspapers, one of statewide circulation and another of general
48 circulation in the county where the hearing is to be held. In addition,

1 the commission shall mail notice of the hearing to any person who has
2 previously requested notice of hearings in writing from the commission.

3 Sec. 8. Section 37-1127, Arizona Revised Statutes, is amended to
4 read:

5 37-1127. Boundary agreements; negotiations; recording;
6 effect

7 A. At any time before a final JUDICIAL determination ~~under section~~
8 ~~37-1128~~ as to whether a watercourse or a portion or reach of a watercourse
9 was navigable as of February 14, 1912, the commissioner may negotiate with
10 any person or public entity having or claiming an interest in any land
11 affected by this state's claim of sovereign ownership due to navigability
12 for the purpose of reaching a boundary or exchange agreement.

13 B. At least thirty days before submitting a proposed boundary or
14 exchange agreement to the board of appeals for approval under subsection C
15 of this section, the commissioner shall provide written notice of the
16 proposed action and an opportunity to comment to any person who has
17 previously requested written notice of actions under this section. The
18 commissioner shall provide contemporaneous written notice of the final
19 decision to any person who filed a comment.

20 C. The board of appeals established under section 37-213 must
21 approve each boundary or exchange agreement. In considering whether to
22 approve a boundary or exchange agreement, the board shall consider whether
23 the agreement is prudent and consistent with the public trust and the
24 Constitution of Arizona.

25 D. The board of appeals may allow an exchange only if both of the
26 following conditions are met:

27 1. The land being transferred by the state is not of material use
28 for trust purposes.

29 2. The land being acquired by the state is of material use for
30 trust purposes and has an appraised value equal to or greater than the
31 value of the land being transferred by the state.

32 E. Lands that are transferred to this state in an approved boundary
33 or exchange agreement become public trust lands.

34 F. An approved boundary or exchange agreement is binding on this
35 state and other parties to the agreement but is not admissible as evidence
36 and may not be cited as precedent in any judicial or administrative
37 proceeding involving the ~~determination of~~ navigability of any watercourse,
38 portion or reach.

39 G. A boundary or exchange agreement shall be recorded in the office
40 of the county recorder of each county in which all or part of the affected
41 land is located.

42 Sec. 9. Section 37-1128, Arizona Revised Statutes, is amended to
43 read:

44 37-1128. Determination of navigability; quiet title
45 action

46 A. After the commission completes the public hearing ~~and~~
47 ~~consultation activities~~ with respect to a watercourse, the commission
48 shall again review all available evidence and render its ~~decision~~ FINDING

1 AND RECOMMENDATION as to whether the particular watercourse, or any
2 portion or reach of the watercourse, was navigable as of February 14,
3 1912.

4 B. IF ANY DETERMINATION OF NONNAVIGABILITY IN A PUBLIC PROCEEDING
5 EXISTS FOR A WATERCOURSE OR A PORTION OR REACH OF A WATERCOURSE, IT IS
6 PRESUMED THAT THE ENTIRE WATERCOURSE WAS NONNAVIGABLE AS OF FEBRUARY 14,
7 1912, AND THE COMMISSION SHALL FIND AND RECOMMEND THAT IT WAS NONNAVIGABLE
8 UNLESS THERE IS CLEAR AND CONVINCING EVIDENCE THAT THE WATERCOURSE WAS
9 NAVIGABLE.

10 C. THE COMMISSION SHALL FIND AND RECOMMEND THAT A WATERCOURSE WAS
11 NONNAVIGABLE IF, AS OF FEBRUARY 14, 1912, THE WATERCOURSE EITHER:

12 1. WAS NOT USED OR SUSCEPTIBLE OF BEING USED FOR BOTH COMMERCIAL
13 TRADE AND TRAVEL.

14 2. FLOWED ONLY IN DIRECT RESPONSE TO PRECIPITATION AND WAS DRY AT
15 ALL OTHER TIMES.

16 D. UNLESS THERE IS CLEAR AND CONVINCING EVIDENCE THAT A WATERCOURSE
17 WAS NAVIGABLE, IT IS PRESUMED, AND THE COMMISSION SHALL FIND AND
18 RECOMMEND, THAT THE WATERCOURSE WAS NONNAVIGABLE IF, WITH RESPECT TO THE
19 WATERCOURSE AS OF FEBRUARY 14, 1912, ANY OF THE FOLLOWING APPLIED:

20 1. NO SUSTAINED TRADE AND TRAVEL OCCURRED BOTH UPSTREAM AND
21 DOWNSTREAM IN THE WATERCOURSE.

22 2. NO PROFITABLE COMMERCIAL ENTERPRISE WAS CONDUCTED BY USING THE
23 WATERCOURSE FOR TRADE AND TRAVEL.

24 3. VESSELS CUSTOMARILY USED FOR COMMERCE ON NAVIGABLE WATERCOURSES
25 IN 1912, SUCH AS KEELBOATS, STEAMBOATS OR POWERED BARGES, WERE NOT USED ON
26 THE WATERCOURSE.

27 4. DIVERSIONS WERE MADE FROM THE WATERCOURSE TO IRRIGATE AND
28 RECLAIM LAND BY PERSONS WHO MADE ENTRIES UNDER THE DESERT LAND ACT OF
29 1877, AS AMENDED (43 UNITED STATES CODE SECTIONS 321 THROUGH 339), ANY
30 OTHER FEDERAL ACT OR TO PROVIDE WATER TO LANDS THAT ARE INCLUDED IN A
31 FEDERAL RECLAMATION PROJECT OR AN INDIAN RESERVATION THAT WOULD HAVE BEEN
32 INCONSISTENT WITH OR IMPEDIMENTS TO NAVIGATION.

33 5. ANY BOATING OR FISHING WAS FOR RECREATIONAL AND NOT COMMERCIAL
34 PURPOSES.

35 6. ANY FLOTATION OF LOGS OR OTHER MATERIAL THAT OCCURRED OR WAS
36 POSSIBLE ON THE WATERCOURSE WAS NOT AND COULD NOT HAVE BEEN REGULARLY
37 CONDUCTED FOR COMMERCIAL PURPOSES.

38 7. THERE WERE BRIDGES, FORDS, DIKES, MANMADE WATER CONVEYANCE
39 SYSTEMS OR OTHER STRUCTURES CONSTRUCTED IN OR ACROSS THE WATERCOURSE THAT
40 WOULD HAVE BEEN INCONSISTENT WITH OR IMPEDIMENTS TO NAVIGATION.

41 8. TRANSPORTATION IN PROXIMITY TO THE WATERCOURSE WAS CUSTOMARILY
42 ACCOMPLISHED BY METHODS OTHER THAN BY BOAT.

43 9. THE UNITED STATES DID NOT REGULATE THE WATERCOURSE UNDER THE
44 RIVERS AND HARBORS ACT OF 1899 (33 UNITED STATES CODE SECTIONS 401 THROUGH
45 467e).

46 E. IN FINDING WHETHER A WATERCOURSE WAS NAVIGABLE, THE COMMISSION
47 SHALL NOT CONSIDER:

1 1. WATERS THAT HAD BEEN APPROPRIATED FOR BENEFICIAL USES ON OR
2 BEFORE FEBRUARY 14, 1912 AS BEING WITHIN THE ORDINARY AND NATURAL
3 CONDITION OF THE WATERCOURSE.

4 2. THE USE OF FERRIES TO CROSS A WATERCOURSE.

5 3. FISHING FROM THE BANKS OF A WATERCOURSE.

6 4. USES OF THE WATERCOURSE UNDER FLOOD CONDITIONS.

7 F. IN FINDING WHETHER A WATERCOURSE WAS NAVIGABLE, THE COMMISSION
8 SHALL CONSIDER THE EXISTENCE OF DAMS AND DIVERSIONS OF WATER AND THE
9 IMPACT OF OTHER HUMAN USES THAT EXISTED OR OCCURRED AT THE TIME OF
10 STATEHOOD AS PART OF THE ORDINARY AND NATURAL CONDITION OF THE
11 WATERCOURSE.

12 G. SUBJECT TO THE SPECIFIC STANDARD OF PROOF STATED IN SUBSECTION D
13 OF THIS SECTION, ~~if the preponderance of the evidence~~ PRESENTED BY THE
14 STATE LAND DEPARTMENT OR BY ANY OTHER PERSON CLAIMING THAT THE WATERCOURSE
15 WAS NAVIGABLE does not establish that the watercourse was navigable, the
16 commission shall issue its ~~determination~~ RECOMMENDATION ~~confirming~~ FINDING
17 THAT the watercourse ~~to be~~ WAS nonnavigable.

18 H. With respect to those watercourses or PORTIONS OR reaches of
19 watercourses that the commission ~~determines to be~~ FINDS WERE navigable,
20 the commission shall ~~document~~, IN A SEPARATE, SUBSEQUENT PROCEEDING,
21 IDENTIFY AND MAKE A PUBLIC REPORT OF any public trust values associated
22 with the navigable watercourse or portion or reach of the watercourse.
23 These ~~determinations~~ FINDINGS of nonnavigability or navigability and
24 IDENTIFICATION OF any public trust values shall be in writing and shall be
25 supported with sufficient documentation and detail to confirm the
26 rationale and basis for the decision. THE COMMISSION'S ACTION PURSUANT TO
27 THIS SECTION IS NOT A FINAL ADMINISTRATIVE DECISION SUBJECT TO JUDICIAL
28 REVIEW PURSUANT TO TITLE 12, CHAPTER 7, ARTICLE 6. ~~The commission's~~
29 ~~decision under this subsection constitutes a final administrative~~
30 ~~determination.~~

31 I. THE COMMISSION SHALL REPORT ITS FINDINGS AND RECOMMENDATION TO
32 THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF
33 REPRESENTATIVES. THE PRESIDENT AND THE SPEAKER SHALL PROVIDE FOR
34 LEGISLATIVE HEARINGS, AND IF THE LEGISLATURE FINDS THAT THE WATERCOURSE
35 WAS:

36 1. NONNAVIGABLE, THE LEGISLATURE SHALL ENACT LEGISLATION RATIFYING
37 THE COMMISSION'S FINDINGS AND RECOMMENDATION AND DISCLAIMING TITLE AS
38 PROVIDED BY SECTION 37-1130.

39 2. NAVIGABLE, THE LEGISLATURE SHALL ENACT LEGISLATION TO AUTHORIZE
40 THE STATE LAND DEPARTMENT TO CLAIM THE LAND IN THE BED OF THE WATERCOURSE
41 AND TO AUTHORIZE THE DEPARTMENT TO FILE AN ACTION TO QUIET TITLE TO THE
42 LAND.

43 J. IN AN ACTION TO QUIET TITLE TO LAND IN THE BED OF A WATERCOURSE
44 BROUGHT PURSUANT TO SUBSECTION I, PARAGRAPH 2 OF THIS SECTION BOTH OF THE
45 FOLLOWING APPLY:

46 1. THE COMMISSION'S RECOMMENDATION AND THE LEGISLATIVE FINDING
47 SHALL NOT BE USED TO SUPPORT THE STATE'S CLAIM OF TITLE.

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2. THE COURT MAY MAKE A DETERMINATION OF ANY PUBLIC TRUST VALUES ASSOCIATED WITH THE LANDS IF TITLE IS QUIETED IN THE STATE.

~~B. The commission shall immediately notify the department of any watercourse or portion or reach of a watercourse that the commission determined to be navigable or nonnavigable under subsection A of this section. Within ninety days after receiving notice from the commission, the department shall notify each record owner or lessee, each person and entity that has an interest of record in the property and each person or entity who has requested such notice of any determination of nonnavigability and whether the department will seek judicial review.~~

~~C. After the commission issues its determination with respect to the navigability of a watercourse or a portion or reach of a watercourse and the time for appeal or judicial review of the determination as provided by section 37-1129 has expired, the commission shall cause a record of its determination to be recorded in the office of the county recorder of each county in which any portion of the watercourse affected by the determination is located.~~

Sec. 10. Repeal

Section 37-1129, Arizona Revised Statutes, is repealed.

Sec. 11. Section 37-1130, Arizona Revised Statutes, is amended to read:

37-1130. Title to bed of nonnavigable watercourse; appropriation of waters for public trust values

A. ~~Subject to judicial review, the commission's determination~~ THE ENACTMENT OF LEGISLATION FINDING that a watercourse, portion or reach is nonnavigable constitutes a waiver, relinquishment and disclaimer of this state's right, title or interest in the bed of the watercourse based on its navigability.

B. THIS STATE MAY OBTAIN ANY WATER THAT IS NECESSARY TO MAINTAIN AND PROTECT PUBLIC TRUST VALUES THAT ARE IDENTIFIED BY THE COMMISSION PURSUANT TO SECTION 37-1128, SUBSECTION H ONLY BY COMPLYING WITH THE REQUIREMENTS OF TITLE 45.

Sec. 12. Section 37-1131, Arizona Revised Statutes, is amended to read:

37-1131. Notice to landowners

A. If the ~~commission determines~~ LEGISLATURE ENACTS LEGISLATION FINDING a watercourse to be navigable AS PROVIDED IN SECTION 37-1128, THE STATE LAND DEPARTMENT SHALL DO THE FOLLOWING BEFORE IT FILES QUIET TITLE ACTIONS:

1. COLLECT INFORMATION AND PERFORM LAND SURVEYS THAT ARE NECESSARY TO DETERMINE WHERE THE DEPARTMENT BELIEVES THE EXACT LOCATION OF THE BOUNDARIES OF THE BED OF THE WATERCOURSE ARE LOCATED. THE BED OF THE WATERCOURSE TO WHICH THE STATE CLAIM APPLIES IS THE BED OF THE WATERCOURSE EXISTING ON THE DATE OF THE LEGISLATURE'S FINDING, UNLESS CLEAR AND CONVINCING EVIDENCE ESTABLISHES A DIFFERENT LOCATION. BEFORE MAKING THIS DETERMINATION, THE DEPARTMENT SHALL PROVIDE PUBLIC NOTICE AND ANY OPPORTUNITY FOR COMMENT BY THE PRIVATE PROPERTY RIGHTS OMBUDSMAN AND ANY

1 OTHER PERSON. ~~the boundaries of the state's ownership shall be~~
2 ~~determined by a land survey to be obtained by the department. It is~~
3 ~~presumed that the bed of the watercourse to which state ownership applies~~
4 ~~is the bed of the watercourse existing on the date of the commission's~~
5 ~~determination, unless clear evidence establishes a different location.~~
6 ~~The department shall note the location of public trust lands on the~~
7 ~~department's records.~~

8 2. COMPILE A COMPLETE DESCRIPTION OF EACH PARCEL OF LAND LYING
9 WHOLLY OR PARTIALLY IN THE BED OF THE WATERCOURSE, INCLUDING RECORD TITLE
10 OWNERSHIP BY ANY PERSON, AND A COMPLETE TITLE SEARCH OF EACH PARCEL TO
11 SHOW HOW AND WHEN THE LANDS WERE FIRST CONVEYED IN APPARENT VIOLATION OF
12 THE PUBLIC TRUST.

13 3. IF THE LAND WAS CONVEYED IN APPARENT VIOLATION OF THE PUBLIC
14 TRUST BY AN AGENCY OF THE UNITED STATES, BRING AN ACTION AGAINST THE
15 UNITED STATES FOR DAMAGES AND PROSECUTE THE ACTION TO FINAL JUDGMENT. ANY
16 DAMAGES COLLECTED SHALL BE PLACED IN THE RIPARIAN TRUST FUND ESTABLISHED
17 BY SECTION 37-1156.

18 B. ~~Within ninety days after receiving notice from the commission~~
19 ~~pursuant to section 37-1128~~ THIRTY DAYS AFTER COMPILING THE PARCEL
20 INFORMATION PURSUANT TO SUBSECTION A, PARAGRAPH 2 OF THIS SECTION, the
21 department shall notify each record owner or lessee of property that is
22 located in the bed of the navigable watercourse, and each person and
23 entity that have an interest of record in the property, of the decision
24 ~~of the commission~~ FINDING BY THE LEGISLATURE and that, by virtue of the
25 decision, ALL OR a portion of the property ~~has been determined to be~~ WILL
26 BE CLAIMED AS public trust land of this state IN A QUIET TITLE ACTION.
27 THE NOTICE SHALL ALSO PROVIDE INFORMATION PREPARED BY THE PRIVATE PROPERTY
28 RIGHTS OMBUDSMAN EXPLAINING THE PERSON'S RIGHTS AND ANY SERVICES AVAILABLE
29 FROM THE OMBUDSMAN.

30 C. ~~Not later than six months after the date of notice from the~~
31 ~~department under this section, the record owner or lessee of the property~~
32 ~~may petition the department in writing to disclaim, release, relinquish or~~
33 ~~dispose of the property from public trust land status as no longer~~
34 ~~necessary or materially useful for the purposes of the trust.~~

35 C. THE STATE LAND DEPARTMENT SHALL NOT COMMENCE AN ACTION TO QUIET
36 TITLE TO LAND UNDER THIS ARTICLE WITHOUT LEGISLATIVE AUTHORIZATION
37 PURSUANT TO SECTION 37-1128.

38 Sec. 13. Title 37, chapter 7, article 2, Arizona Revised Statutes,
39 is amended by adding section 37-1132, to read:

40 37-1132. Refunds to record title owners

41 A. IF THIS STATE'S OWNERSHIP OF A PARCEL OR PORTION OF A PARCEL OF
42 PROPERTY IS CONFIRMED IN A QUIET TITLE ACTION UNDER THIS ARTICLE, THE
43 STATE TREASURER SHALL PAY TO THE RECORD TITLE OWNER AN AMOUNT FROM THE
44 STATE GENERAL FUND TO:

- 45 1. REFUND ALL PROPERTY TAXES EVER PAID ON THE PROPERTY.
46 2. COMPENSATE THE PERSON FOR ALL IMPROVEMENTS TO THE PROPERTY.

1 3. REFUND THE PURCHASE PRICE PAID FOR THE PROPERTY, PLUS INTEREST
2 AT THE LEGAL RATE, IF THE PROPERTY WAS PURCHASED FROM THIS STATE BY THE
3 PERSON OR ANY PREDECESSOR IN TITLE.

4 B. THE DEPARTMENT OF ADMINISTRATION, IN COORDINATION WITH THE
5 DEPARTMENT OF REVENUE AND THE STATE LAND DEPARTMENT, SHALL CERTIFY TO THE
6 STATE TREASURER THE AMOUNTS DUE TO THE RECORD TITLE OWNER PURSUANT TO THIS
7 SECTION.

8 Sec. 14. Section 37-1151, Arizona Revised Statutes, is amended to
9 read:

10 37-1151. Petition to release public trust status

11 A. In responding to a petition filed pursuant to section 37-1131,
12 ~~subsection C,~~ BY A RECORD TITLE OWNER OR LESSEE the department shall
13 consider the extent to which the property THAT HAS BEEN CONFIRMED TO THE
14 STATE'S OWNERSHIP IN A QUIET TITLE ACTION, either because of its nature or
15 because of changes, is no longer of material use for ~~the primary trust~~
16 ~~purposes of navigation, fishing and recreation~~ PROTECTING PUBLIC TRUST
17 VALUES. If the department concludes that the property is not of material
18 use for ~~the primary trust purposes~~ PROTECTING PUBLIC TRUST VALUES, the
19 department shall consider the extent to which a release of the trust is
20 appropriate in light of the public benefit to be derived from alternate
21 uses, and the equitable interests or hardships of the record title holder
22 or lessee, including each of the following:

23 1. The year in which the property was acquired by the record owner
24 or lessee.

25 2. The entity or person from whom the property was acquired by the
26 record owner or lessee.

27 3. The manner in which the record owner or lessee acquired the
28 property.

29 4. The purchase price or lease terms paid by the record owner or
30 lessee.

31 5. The amount of property taxes paid each year since the record
32 owner or lessee acquired the property.

33 6. The profit or benefit derived from the property by the record
34 owner.

35 7. The extent to which the record owner on the date of acquisition
36 knew or should have known that the property was potentially trust land.

37 8. All improvements made to the property since the record owner or
38 lessee acquired the property.

39 9. The public trust values identified by the commission.

40 10. Whether any improvements on the property impair, obstruct,
41 promote or destroy the value of the watercourse for public trust ~~or~~
42 ~~navigation purposes~~ VALUES.

43 11. The existing uses of the property, its reasonable highest and
44 best use and whether such uses impair, obstruct, promote or destroy the
45 value of the watercourse for public trust ~~purposes~~ VALUES.

46 12. Whether the physical condition of the watercourse has materially
47 changed since February 14, 1912 adversely affecting the watercourse's
48 capability of being navigated, including changes due to construction of

1 dams, reservoirs, dikes, levees, canals and ditches that were constructed
2 for water conservation or flood control purposes by public entities,
3 municipal corporations or the United States.

4 13. Any diminution in value to the record owner's or lessee's
5 contiguous property caused by this state's ownership.

6 14. The degree of effect of continuation of the current use or any
7 proposed change in use of the property on public trust ~~uses of navigation,~~
8 ~~fishing and recreation~~ VALUES.

9 15. The impact of continuation of the current use or any proposed
10 change in use of the property on the public trust ~~resource~~ VALUES.

11 16. The impact of continuation of the current use or any proposed
12 change in use of the property when examined cumulatively in conjunction
13 with existing authorized impediments to full use of the public trust
14 ~~resource~~ VALUES.

15 17. The impact of continuation of the current use or any proposed
16 change in use of the property on the public trust ~~resource~~ VALUES if ~~that~~
17 ~~resource is~~ THOSE VALUES ARE considered with respect to the primary
18 purpose to which the ~~resource~~ PROPERTY is now suited, ~~such as commerce,~~
19 ~~navigation, fishing or recreation.~~

20 18. The degree to which continuation of the current use or any
21 proposed change in use requires that broad public uses be set aside in
22 favor of more limited and private uses.

23 B. At least thirty days before issuing a decision that land may be
24 released from the public trust under this section the department shall
25 provide written notice of the proposed action and an opportunity to
26 comment to any person who has previously requested written notice of
27 actions under this section. The department shall provide contemporaneous
28 written notice of the final decision to any person who filed a comment.

29 Sec. 15. Section 37-1154, Arizona Revised Statutes, is amended to
30 read:

31 37-1154. Public improvements in beds of navigable
32 watercourses; definition

33 A. A determination ~~by the commission~~ that a watercourse or a
34 portion or reach of a watercourse is navigable does not affect the right
35 of a public entity to own, operate, maintain or repair a public
36 improvement reasonably constructed in the bed of the watercourse under the
37 public entity's powers if the improvement was constructed before the
38 ~~commission's~~ determination that the watercourse, portion or reach is
39 navigable and does not materially impair the public trust. The public
40 entity is considered to have obtained this state's consent to construct
41 the public improvement and is not liable to pay compensation to this state
42 for the land on which the public improvement is constructed if the
43 improvement does not materially impair, obstruct or destroy the function
44 of the watercourse for public trust purposes.

45 B. If the commissioner determines that the public improvement
46 described in subsection A of this section does not, or will not if
47 appropriate conditions are followed, materially impair the public trust
48 uses, the department may require the public entity to obtain a permit for

1 the improvement pursuant to section 37-1153 but shall not assess any fee
2 for issuing the permit.

3 C. At least thirty days before issuing a decision under subsection
4 D or E of this section the department shall provide written notice of the
5 proposed action and an opportunity to comment to any person who has
6 previously requested notice of actions under this section. The department
7 shall provide contemporaneous written notice of the final decision to any
8 person who filed a comment.

9 D. If the commissioner determines that the public improvement
10 described in subsection A of this section destroys the function of the
11 watercourse for public trust purposes and is not in furtherance of the
12 public trust status of the land, the public entity may petition the
13 department for release of public trust status pursuant to section 37-1151.
14 In evaluating the petition, the department shall consider, in addition to
15 the factors prescribed by section 37-1151, whether constructing the public
16 improvement was undertaken pursuant to the public entity's authority and
17 whether the public improvement continues to serve a public purpose.

18 E. If the commissioner determines that a release is appropriate
19 under subsection D of this section, the public entity may purchase this
20 state's interest in the land without a public auction by paying an amount
21 to be determined by the department pursuant to section 37-1152 directly to
22 this state pursuant to section 9-401, subsection A, section 11-251,
23 paragraph 45 or section 48-3603, subsection C, paragraph 2, as applicable.
24 No cause of action or claim for reimbursement accrues for the benefit of
25 any public entity that exercises its right to purchase this state's
26 interest pursuant to this subsection.

27 F. For purposes of this section, "public improvement" includes any
28 facility established, constructed or maintained by a public entity
29 pursuant to law and those works described in section 37-1101, paragraph 5.

30 Sec. 16. Section 37-1156, Arizona Revised Statutes, is amended to
31 read:

32 37-1156. Riparian trust fund; acquisition and management
33 of riparian lands

34 A. The riparian trust fund is established in the state treasury
35 consisting of monies received from the sale or use of sovereign streambed
36 lands and resources under this chapter, DAMAGES COLLECTED FROM THE UNITED
37 STATES PURSUANT TO SECTION 37-1131 and any other appropriations, gifts,
38 grants or donations designated by the donor for that purpose. The state
39 treasurer shall maintain the fund separate and apart from all other funds.
40 On notice from the commissioner the state treasurer shall invest and
41 divest monies in the riparian trust fund as provided by section 35-313,
42 and monies earned shall be credited to the riparian trust fund. The state
43 treasurer shall report and maintain a separate accounting of income and
44 other proceeds from investing trust fund monies.

45 B. The state land commissioner shall use the income, other proceeds
46 and not more than seventy-five per cent of any added principal of the fund
47 in a fiscal year pursuant to this section:

1 ~~1. As the monies become available from the income of the fund, to~~
2 ~~reimburse the state general fund for expenses of the commission and the~~
3 ~~department under this chapter.~~

4 ~~2~~ 1. To acquire, from willing sellers, land or interests in land
5 located in riparian areas in this state for public purposes consistent
6 with conservation of wildlife and recreation.

7 ~~3~~ 2. For such other expenditures as promote the purposes of the
8 public trust.

9 C. The state land commissioner shall consult with and receive
10 advice from the Arizona state parks board and the Arizona game and fish
11 department regarding the acquisition and management of land and interests
12 in land under this section.

13 Sec. 17. Section 41-192, Arizona Revised Statutes, is amended to
14 read:

15 41-192. Powers and duties of attorney general;
16 restrictions on state agencies as to legal
17 counsel; exceptions

18 A. The attorney general shall have charge of and direct the
19 department of law and shall serve as chief legal officer of the state. The
20 attorney general shall:

21 1. Be the legal advisor of the departments of this state and render
22 such legal services as the departments require.

23 2. Establish administrative and operational policies and procedures
24 within his department.

25 3. Approve long-range plans for developing departmental programs
26 therein, and coordinate the legal services required by other departments
27 of this state or other state agencies.

28 4. Represent school districts and governing boards of school
29 districts in any lawsuit involving a conflict of interest with other
30 county offices.

31 5. Represent political subdivisions, school districts and
32 municipalities in suits to enforce state or federal statutes pertaining to
33 antitrust, restraint of trade or price-fixing activities or conspiracies,
34 provided that the attorney general shall notify in writing such political
35 ~~subdivision~~ SUBDIVISIONS, school districts and municipalities of his
36 intention to bring any such action on its behalf. At any time within
37 thirty days after such notification, such political ~~subdivision~~
38 SUBDIVISIONS, school districts and municipalities may, by formal
39 resolution of its governing body, withdraw the authority of the attorney
40 general to bring the intended action on its behalf.

41 6. In any action brought by the attorney general pursuant to state
42 or federal statutes pertaining to antitrust, restraint of trade, or
43 price-fixing activities or conspiracies for the recovery of damages by
44 this state or any of its political subdivisions, school districts or
45 municipalities, in addition to his other powers and authority, the
46 attorney general on behalf of this state may enter into contracts relating
47 to the investigation and prosecution of such action with any other party
48 plaintiff who has brought a similar action for the recovery of damages and

1 with whom the attorney general finds it advantageous to act jointly or to
2 share common expenses or to cooperate in any manner relative to such
3 action. In any such action, notwithstanding any other laws to the
4 contrary, the attorney general may undertake, among other things, to
5 render legal services as special counsel, or to obtain the legal services
6 of special counsel from any department or agency of the United States, of
7 this state, or any other state, or any department or agency thereof, OR
8 any county, city, public corporation or public district in this state or
9 in any other state, that has brought or intends to bring a similar action
10 for the recovery of damages, or their duly authorized legal
11 representatives in such action.

12 7. Organize the civil rights division within the department of law
13 and administer such division pursuant to the powers and duties provided in
14 chapter 9 of this title.

15 8. Compile, publish and distribute to all state agencies,
16 departments, boards, commissions and councils, and to other persons and
17 government entities on request, at least every ten years, the Arizona
18 agency handbook that sets forth and explains the major state laws that
19 govern state agencies, including information on the laws relating to
20 bribery, conflicts of interest, contracting with the government,
21 disclosure of public information, discrimination, nepotism, financial
22 disclosure, gifts and extra compensation, incompatible employment,
23 political activity by employees, public access and misuse of public
24 resources for personal gain. A supplement to the handbook reflecting
25 revisions to the information contained in the handbook shall be compiled
26 and distributed by the attorney general as deemed necessary.

27 B. Except as otherwise provided by law, the attorney general may:

28 1. Organize the department into such bureaus, subdivisions or units
29 as he deems most efficient and economical, and consolidate or abolish
30 them.

31 2. Adopt rules for the orderly conduct of the business of the
32 department.

33 3. Employ and assign assistant attorneys general and other
34 employees necessary to perform the functions of the department. Not later
35 than October 31, 1984, the attorney general shall submit to the joint
36 legislative budget committee a comprehensive performance pay plan for all
37 assistant attorneys general. Notwithstanding the provisions of section
38 38-611, all monies appropriated for salary adjustments for assistant
39 attorneys general to become effective on or after January 1, 1985 shall be
40 allocated in accordance with the performance pay plan as approved by the
41 joint legislative budget committee. If the joint legislative budget
42 committee does not approve a performance pay plan by December 31, 1984,
43 assistant attorneys general shall receive salary adjustments pursuant to
44 section 38-611.

45 4. Compromise or settle any action or claim by or against this
46 state or any department, board or agency thereof. Where such compromise
47 or settlement involves a particular department, board or agency of this
48 state, the compromise or settlement shall be first approved by such

1 department, board or agency. Where no department or agency is named or
2 otherwise materially involved, the approval of the governor shall be first
3 obtained.

4 5. Charge reasonable fees for distributing official publications,
5 including attorney general legal opinions and the Arizona agency handbook.
6 The fees received shall be deposited in a separate account and are
7 available for expenditure by the attorney general solely for the
8 production of official publications.

9 C. Assistants and employees in any legal division subject to a
10 merit system prior to March 6, 1953 shall remain subject thereto.

11 D. The powers and duties of a bureau, subdivision or unit shall be
12 limited to those assigned by law to the department.

13 E. Notwithstanding any law to the contrary, except as provided in
14 subsections F and G of this section, no state agency other than the
15 attorney general shall employ legal counsel or make an expenditure or
16 incur an indebtedness for legal services, but the following are exempt
17 from this section:

- 18 1. The director of water resources.
- 19 2. The residential utility consumer office.
- 20 3. The industrial commission.
- 21 4. The Arizona board of regents.
- 22 5. The auditor general.
- 23 6. The corporation commissioners and the corporation commission
24 other than the securities division.
- 25 7. THE OMBUDSMAN FOR PRIVATE PROPERTY RIGHTS.

26 F. If the attorney general determines that he is disqualified from
27 providing judicial or quasi-judicial legal representation or legal
28 services on behalf of any state agency in relation to any matter, the
29 attorney general shall give written notification to the state agency
30 affected. If the agency has received written notification from the
31 attorney general that he is disqualified from providing judicial or
32 quasi-judicial legal representation or legal services in relation to any
33 particular matter, the state agency is authorized to make expenditures and
34 incur indebtedness to employ attorneys to provide the representation or
35 services.

36 G. If the attorney general and the director of the department of
37 agriculture cannot agree on the final disposition of a pesticide complaint
38 under section 3-368, or if the attorney general and the director determine
39 that a conflict of interest exists as to any matter or if the attorney
40 general and the director determine that the attorney general does not have
41 the expertise or attorneys available to handle a matter, the director is
42 authorized to make expenditures and incur indebtedness to employ attorneys
43 to provide representation or services to the department with regard to
44 that matter.

45 H. Any department or agency of this state authorized by law to
46 maintain a legal division or incur expenses for legal services from funds
47 derived from sources other than the general revenue of the state, or from
48 any special or trust fund, shall pay from such source of revenue or

1 special or trust fund into the general fund of the state, to the extent
2 such funds are available and upon a reimbursable basis for warrants drawn
3 upon the state treasurer, the amount actually expended by the department
4 of law within legislative appropriations for such legal division or legal
5 services.

6 I. Appropriations made pursuant to subsection H of this section
7 shall not be subject to lapsing provisions otherwise provided by law.
8 Services for departments or agencies to which this subsection and
9 subsection G of this section are applicable shall be performed by special
10 or regular assistants to the attorney general.

11 J. Monies in the special fund authorized under subsection B,
12 paragraph 5 of this section that at any time are in excess of fifteen
13 thousand dollars shall immediately revert to the state general fund.
14 Monies in such fund of fifteen thousand dollars or less are exempt from
15 the lapsing provision of section 35-190, except that monies in such fund
16 at the close of the fiscal year in excess of five thousand dollars shall
17 revert to the state general fund.

18 Sec. 18. Section 41-1304, Arizona Revised Statutes, is amended to
19 read:

20 41-1304. Powers and duties

21 A. The legislative council shall:

22 1. Provide bill drafting, research and other services to the
23 legislature deemed necessary or advisable by the council to improve the
24 quality of legislation and to insure full participation by the legislative
25 branch in determining and reviewing policy and the administration of state
26 affairs.

27 2. Adopt rules and formulate policies for the administration of
28 this article and for the conduct of the affairs of the council.

29 3. Appoint such clerical, stenographic, technical and professional
30 assistants deemed necessary or advisable to carry out the provisions of
31 this article, and fix their compensation and prescribe their powers and
32 duties.

33 4. Consult with state departments or officers engaged in carrying
34 out construction programs authorized by law, and investigate the conduct
35 of the programs, with particular reference to the plans for and type of
36 construction.

37 5. Maintain a legislative reference library, containing legal,
38 statistical and descriptive data and authoritative philosophical and
39 scientific treatises on current and potential legislative subjects.

40 6. Procure information at the request of members of the legislature
41 or state officers on any legislative subject.

42 7. Prepare or revise bills and other legislative measures for
43 members or committees of the legislature and, on request of a member of
44 the legislature, for state officers and agencies.

45 8. Prepare and issue styles and forms for drafting bills and other
46 legislative measures for the use of the legislature, state officers and
47 persons interested in drafting bills or measures for introduction in the
48 legislature.

1 9. Prepare and file with the secretary of state, not later than
2 sixty days preceding the regular primary election, an analysis of the
3 provisions of each ballot proposal of a measure or proposed amendment.

4 10. PROVIDE AND MAINTAIN AN OFFICE FOR THE OMBUDSMAN FOR PRIVATE
5 PROPERTY RIGHTS PURSUANT TO SECTION 41-1311.

6 B. The legislative council may purchase, lease and otherwise
7 acquire land and buildings and make improvements to land and buildings it
8 acquires or uses for the purpose of providing suitable facilities for the
9 use of the legislative department. The council may obtain operational,
10 maintenance and security assistance for any legislative facilities without
11 charge from the department of administration, may employ personnel to
12 discharge such functions or may contract for outside services payable from
13 council appropriations.

14 Sec. 19. Title 41, chapter 8, Arizona Revised Statutes, is amended
15 by adding article 1.1, to read:

16 ARTICLE 1.1. OMBUDSMAN FOR PRIVATE PROPERTY RIGHTS

17 41-1311. Definitions

18 IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

19 1. "CONSTITUTIONAL TAKING" OR "TAKING" MEANS THAT DUE TO A
20 GOVERNMENTAL ACTION OR PROPOSED GOVERNMENTAL ACTION PRIVATE PROPERTY IS OR
21 WILL BE TAKEN AND COMPENSATION TO THE OWNER OF THAT PROPERTY IS REQUIRED
22 BY EITHER:

23 (a) THE FIFTH OR FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE
24 UNITED STATES.

25 (b) ARTICLE II, SECTION 17, CONSTITUTION OF ARIZONA.

26 2. "GOVERNMENTAL ACTION" OR "ACTION":

27 (a) MEANS ACTION BY A STATE AGENCY CONSISTING OF:

28 (i) PROPOSED RULES AND EMERGENCY RULES THAT IF ADOPTED AND ENFORCED
29 MAY LIMIT THE USE OF PRIVATE PROPERTY.

30 (ii) PROPOSED OR IMPLEMENTED LICENSING OR PERMITTING CONDITIONS,
31 REQUIREMENTS OR LIMITATIONS TO THE USE OF PRIVATE PROPERTY.

32 (iii) REQUIRED DEDICATIONS OR EXACTIONS FROM OWNERS OF PRIVATE
33 PROPERTY.

34 (b) DOES NOT INCLUDE:

35 (i) ACTIVITY IN WHICH THE POWER OF EMINENT DOMAIN IS FORMALLY
36 EXERCISED.

37 (ii) REPEALING RULES TO DISCONTINUE GOVERNMENTAL PROGRAMS OR
38 AMENDING RULES IN A MANNER THAT LESSENS INTERFERENCE WITH THE USE OF
39 PRIVATE PROPERTY.

40 (iii) LAW ENFORCEMENT ACTIVITY INVOLVING SEIZURE OR FORFEITURE OF
41 PRIVATE PROPERTY FOR VIOLATIONS OF LAW OR AS EVIDENCE IN CRIMINAL
42 PROCEEDINGS.

43 (iv) ORDERS THAT ARE AUTHORIZED BY STATUTE, THAT ARE ISSUED BY A
44 STATE AGENCY OR A COURT OF LAW AND THAT ARE ISSUED AS THE RESULT OF A
45 VIOLATION OF STATE LAW.

46 3. "PRIVATE PROPERTY" MEANS ANY REAL OR PERSONAL PROPERTY IN THIS
47 STATE THAT IS PROTECTED BY EITHER:

1 (a) THE FIFTH OR FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE
2 UNITED STATES.

3 (b) ARTICLE II, SECTION 17, CONSTITUTION OF ARIZONA.

4 4. "SMALL BUSINESS" MEANS A CORPORATION, PARTNERSHIP, LIMITED
5 LIABILITY COMPANY, SOLE PROPRIETORSHIP OR INDIVIDUAL OPERATING A BUSINESS
6 FOR PROFIT WITH NOT MORE THAN ONE HUNDRED EMPLOYEES, INCLUDING EMPLOYEES
7 EMPLOYED IN ANY SUBSIDIARY OR AFFILIATED CORPORATION.

8 5. "STATE AGENCY" MEANS AN OFFICER OR UNIT OF THE EXECUTIVE BRANCH
9 OF STATE GOVERNMENT THAT IS AUTHORIZED BY LAW TO ADOPT RULES. STATE
10 AGENCY DOES NOT INCLUDE THE LEGISLATIVE OR JUDICIAL BRANCHES OF STATE
11 GOVERNMENT, EXCEPT AS TO ACTION TAKEN PURSUANT TO TITLE 37, CHAPTER 7.

12 41-1312. Ombudsman for private property rights

13 A. AN OMBUDSMAN OFFICE IS ESTABLISHED IN THE OFFICE OF THE ARIZONA
14 LEGISLATIVE COUNCIL TO REPRESENT THE INTERESTS OF PRIVATE PROPERTY OWNERS
15 IN PROCEEDINGS INVOLVING GOVERNMENTAL ACTION.

16 B. THE DIRECTOR OF THE ARIZONA LEGISLATIVE COUNCIL SHALL APPOINT
17 THE OMBUDSMAN WHO SERVES AT THE PLEASURE OF THE DIRECTOR OF THE ARIZONA
18 LEGISLATIVE COUNCIL.

19 41-1313. Powers and duties

20 A. THE OMBUDSMAN MAY:

21 1. RESEARCH, STUDY AND ANALYZE ISSUES THAT INVOLVE OR RELATE TO OR
22 THAT MAY INVOLVE CONSTITUTIONAL TAKINGS.

23 2. PREPARE AND PRESENT BRIEFS AND ARGUMENTS, INTERVENE OR APPEAR ON
24 BEHALF OF PRIVATE PROPERTY OWNERS IN GENERAL OR SPECIFIC PRIVATE PROPERTY
25 OWNERS IN ANY JUDICIAL, LEGISLATIVE OR ADMINISTRATIVE HEARING OR
26 PROCEEDING AS A PARTY OR OTHERWISE.

27 3. ADVISE PRIVATE PROPERTY OWNERS ON ISSUES INVOLVING OR RELATED TO
28 CONSTITUTIONAL TAKINGS.

29 4. EMPLOY AND TERMINATE EMPLOYEES, OR CONTRACT FOR SPECIAL
30 SERVICES, AS NECESSARY TO CARRY OUT THIS ARTICLE, INCLUDING LEGAL COUNSEL
31 AND OTHER PROFESSIONAL AND ADMINISTRATIVE STAFF THAT ARE NECESSARY TO
32 REPRESENT AND ADVOCATE THE INTERESTS OF PRIVATE PROPERTY OWNERS.

33 5. CONDUCT INVESTIGATIONS AND INQUIRIES AND ASSEMBLE AND PRESENT
34 EVIDENCE TO THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION REGARDING
35 THE NAVIGABILITY OR NONNAVIGABILITY OF WATERCOURSES.

36 B. THE OMBUDSMAN SHALL:

37 1. NOTWITHSTANDING THE PROVISIONS OF SUBSECTION A OF THIS SECTION
38 OR SECTION 41-1312, REPRESENT THE INTERESTS OF ONLY RECORD TITLE OWNERS OF
39 RESIDENTIAL, NONCOMMERCIAL, SMALL BUSINESS AND AGRICULTURAL PROPERTIES
40 BEFORE THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION, ANY STATE
41 AGENCY, THE LEGISLATURE AND ANY COURT, INCLUDING IN QUIET TITLE ACTIONS,
42 REGARDING ANY ISSUES RELATED TO STATE CLAIMS TO THE BEDS OF WATERCOURSES
43 OR OTHER MATTERS PROVIDED BY TITLE 37, CHAPTER 7.

44 2. RECEIVE COMPLAINTS AND INQUIRIES FROM PRIVATE PROPERTY OWNERS
45 REGARDING CONSTITUTIONAL TAKINGS.

46 3. WITHIN THIRTY DAYS AFTER THE END OF EACH CALENDAR QUARTER,
47 SUBMIT A REPORT TO THE GOVERNOR, PRESIDENT OF THE SENATE AND THE SPEAKER

1 OF THE HOUSE OF REPRESENTATIVES DESCRIBING THE ACTIVITIES AND
2 ACCOMPLISHMENTS OF THE OFFICE.

3 C. THE OMBUDSMAN'S OFFICE SHALL RECORD ALL CONTACTS BY PRIVATE
4 PROPERTY OWNERS WITH REGARD TO ALLEGED CONSTITUTIONAL TAKINGS TO DETERMINE
5 GENERAL CONCERNS OF PRIVATE PROPERTY OWNERS. THE OFFICE MAY ADVISE
6 PRIVATE PROPERTY OWNERS OF THE SERVICES AVAILABLE FROM OTHER GOVERNMENTAL
7 AND PRIVATE AGENCIES THAT MAY BE OF FURTHER ASSISTANCE.

8 Sec. 20. Section 41-3000.09, Arizona Revised Statutes, is amended
9 to read:

10 41-3000.09. Legislative council; ombudsman for private
11 property rights; termination July 1, 2000

12 A. The legislative council ~~terminates~~ AND THE OMBUDSMAN FOR PRIVATE
13 PROPERTY RIGHTS TERMINATE on July 1, 2000.

14 B. Title 41, chapter 8, ~~article~~ ARTICLES 1 AND 1.1 ~~is~~ ARE repealed
15 on January 1, 2001.

16 Sec. 21. Legislative intent

17 The legislature intends to establish an ombudsman for private
18 property rights to represent the interests of private property owners in
19 proceedings involving governmental action.

20 Sec. 22. Appropriation

21 A. The sum of \$43,000 is appropriated from the state general fund
22 in fiscal year 1993-1994 and the sum of \$136,700 is appropriated from the
23 state general fund in fiscal year 1994-1995 to the Arizona legislative
24 council for the purposes of the ombudsman for private property rights as
25 provided by this act.

26 B. The appropriation made by this section is exempt from the
27 provisions of section 35-190, Arizona Revised Statutes, relating to
28 lapsing of appropriations through June 30, 1995.

29 Sec. 23. Appropriation

30 A. The sum of \$43,200 is appropriated from the state general fund
31 in fiscal year 1993-1994 and the sum of \$109,000 is appropriated from the
32 state general fund in fiscal year 1994-1995 to the Arizona navigable
33 stream adjudication commission to carry out its duties as provided by this
34 act.

35 B. The appropriation made by this section is exempt from the
36 provisions of section 35-190, Arizona Revised Statutes, relating to
37 lapsing of appropriations through June 30, 1995.

38 Sec. 24. Transfer of appropriation

39 The sum of \$2,900 in fiscal year 1993-1994 and the sum of \$11,400 in
40 fiscal year 1994-1995 are transferred from the state land department to
41 the Arizona navigable steam adjudication commission.

42 Sec. 25. Effect on prior proceedings

43 This act does not affect proceedings taken by the state land
44 department and the Arizona navigable stream adjudication commission before
45 the effective date of this act to collect, assemble, compile, receive and
46 review relevant historical and other evidence available or presented to
47 the Arizona navigable stream adjudication commission.

1 Sec. 26. Heading change
2 The chapter heading of title 37, chapter 7, Arizona Revised
3 Statutes, is changed from "OWNERSHIP OF STREAMBEDS" to "STATE CLAIMS TO
4 STREAMBEDS".

5 Sec. 27. Severability
6 If a provision of this act or its application to any person or
7 circumstance is held invalid, the invalidity does not affect other
8 provisions or applications of the act that can be given effect without the
9 invalid provision or application, and to this end the provisions of this
10 act are severable.

11 Sec. 28. Emergency
12 This act is an emergency measure that is necessary to preserve the
13 public peace, health or safety and is operative immediately as provided by
14 law.

IN THE SUPREME COURT

STATE OF ARIZONA

CALMAT CO. OF ARIZONA, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CALMAT PROPERTIES CO., a California corporation, CALMAT LAND CO., a California corporation, ALLIED CONCRETE & MATERIALS CO., an Arizona corporation, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT and SALT RIVER VALLEY WATER USERS' ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Petitioners,

v.

THE ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION, an agency of the State of Arizona, and CURTIS JENNINGS, JAY BRASHEAR, MARGARET S. PETERSON, HAROLD RAMSBACHER and TROY L. PEWE, in their official capacities as members of and constituting The Arizona Navigable Stream Adjudication Commission,

Respondents.

No. CV-94-____-SA

96-002-015

SALT RIVER

013-032

ORIGINAL

APPENDIX TO PETITION FOR SPECIAL ACTION

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ATTORNEYS FOR PETITIONER

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INDIAN COMMUNITY

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John B. Weldon, Jr. # 003701

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ATTORNEYS FOR PETITIONERS SALT RIVER

PROJECT AGRICULTURAL IMPROVEMENT

& POWER DISTRICT and SALT RIVER

VALLEY WATER USERS' ASSOCIATION

IN THE SUPREME COURT

STATE OF ARIZONA

CALMAT CO. OF ARIZONA, an Arizona corporation and successor in interest by merger to Arizona Sand & Rock Company, CALMAT PROPERTIES CO., a California corporation, CALMAT LAND CO., a California corporation, ALLIED CONCRETE & MATERIALS CO., an Arizona corporation, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT and SALT RIVER VALLEY WATER USERS' ASSOCIATION, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

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Respondents.

No. CV-94-0093-SA

Arizona Navigable Stream
Adjudication Commission No.
94-1

NOTICE OF SIGNING OF
PENDING LEGISLATION

96-002-015

SALT RIVER

013

ORIGINAL

Governor Symington today signed into law House Bill 2589. Since the bill had an emergency provision and was passed by a two-thirds or more majority of each of the House and the Senate, the bill is immediately effective.

RESPECTFULLY SUBMITTED this 25th day of April, 1994.

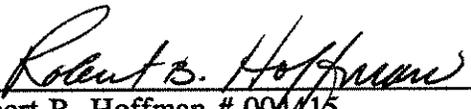
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of April, 1994, a copy of the foregoing Notice of Signing of Pending Legislation were hand-delivered to each of the following:

Rebecca Good, Secretary
Arizona Navigable Stream Adjudication Commission
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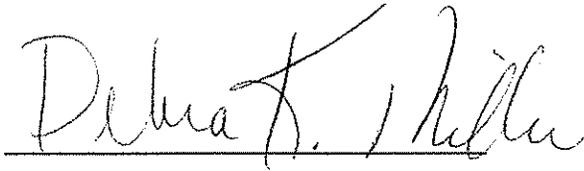
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Commissioner of the State Land Department

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Commission



Debra K. Miller

96-002-015

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NAVIGABLE WATERS—BEDS OF WATERCOURSES—
DETERMINATION OF OWNERSHIP

CHAPTER 297

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H.B. 2594

AN ACT REPEALING TITLE 37, CHAPTER 7, ARIZONA REVISED STATUTES,
AMENDING TITLE 37, ARIZONA REVISED STATUTES, BY ADDING A NEW
CHAPTER 7; MAKING AN APPROPRIATION; RELATING TO NAVIGABLE
WATERCOURSES.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Purpose and intent

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A. In recent years both this state and certain citizens of this state have asserted claims that certain watercourses in this state, other than the Colorado river, were navigable at the time of statehood. If proven, these claims would confirm ownership of all lands located in the beds of these watercourses in the state as part of the public trust. Presently, the viability of these claims is undetermined and their locations are uncertain.

B. For many years before the mid-1980's, private parties and political subdivisions, in many cases as record title owners, assumed and exercised all of the ordinary incidents of ownership over some of these lands. A number of public projects, including dams and other flood control and irrigation works, have been constructed within watercourses in this state. In some cases constructing and operating these projects have diminished the opportunities for further navigation related uses of the watercourses. The recently-asserted claims have, among other things:

1. Clouded the title to lands located in or near many watercourses.
2. Impaired their marketability and development.
3. Reduced their value.
4. Restricted the availability of title insurance.

At the same time, there is a substantial interest in preserving and protecting public trust values.

C. Based on the evidence collected to date, it is apparent that this state's claims to many watercourses in this arid state are of doubtful validity and that while this state's claims to other watercourses are believed to be more viable, a systematic process must be established to document this state's claims, to locate the precise lands that are subject to such claims and to preserve and protect the public trust in those instances where trust values exist.

D. A review of the experience of other states having similar claims indicates that in the absence of legislation, protracted, difficult, expensive and disruptive fact-finding processes and litigation may be needed to resolve the claims.

E. The purpose of this act is to establish an administrative procedure for the necessary fact-finding efforts and the determination of the extent of this state's ownership of the beds of watercourses located in this state. This act is designed to confirm the titles currently held by private parties and political subdivisions to those lands located in watercourses, other than the Colorado river, that are determined not to have been navigable at the time of statehood, to confirm this state's ownership in public trust of lands located in the beds of watercourses determined to have been navigable at statehood and to acknowledge the state's ethical and equitable obligations to deal fairly with those citizens of this state who have in good faith acquired leases or titles, paid taxes, improved land and otherwise acted in justifiable reliance on this state's failure to assert its claims for over seventy years. In addition, this act confirms the state land commissioner's authority to enter into boundary or exchange agreements confirming the limits of private and state ownership of lands affected by this state's claims and allowing for land exchanges to preserve and protect public trust values. Monies received by this state as compensation for lands, or uses of lands, located within navigable watercourses may be used to acquire riparian lands, to further public trust purposes and to help satisfy the expenses associated with establishing and operating the Arizona navigable stream adjudication commission.

F. This act does not affect:

1. This state's title, or claims relating, to the bed of the Colorado river.
2. Reaches of watercourses where determinations have been made by judicial actions before the effective date of this act.

3. Any existing public right to use the watercourses of this state as otherwise provided by law.

Sec. 2. **Repeal**

Title 37, chapter 7, Arizona Revised Statutes, is repealed.

Sec. 3. Title 37, Arizona Revised Statutes, is amended by adding a new chapter 7, to read:

CHAPTER 7

OWNERSHIP OF STREAMBEDS

ARTICLE 1. GENERAL PROVISIONS

§ 37-1101. **Definitions**

In this chapter, unless the context otherwise requires:

1. "Arizona navigable stream adjudication commission" or "commission" means the Arizona navigable stream adjudication commission established by section 37-1121.

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

3. "Groundwater" has the meaning assigned to that term pursuant to section 45-101.

4. "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.

5. "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.

6. "Navigable" or "navigable watercourse" means a watercourse, or a portion or reach of a watercourse, that was in existence on February 14, 1912, and that 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.

7. "Ordinary high watermark" means the line on the shore of a watercourse established by the 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 entity" means the United States and its agents, this state, a county, city or town, a county flood control district or any other entity established under title 48.

9. "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.

10. "Riparian area" means a geographically delineated area with distinct resource values, that is characterized by deep-rooted plant species that depend on having roots in the water table or its capillary zone and that occurs within or adjacent to a natural perennial or intermittent stream channel or within or adjacent to a lake, pond or marsh bed maintained primarily by natural water sources. Riparian area does not include areas in or adjacent to ephemeral stream channels, artificially created stockpounds, man-made storage reservoirs constructed primarily for conservation or regulatory storage, municipal and industrial ponds or man-made water transportation, distribution, off-stream storage and collection systems.

11. "Surface water" has the meaning assigned to that term pursuant to section 45-101.

12. "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 conveyance system described in paragraph 5 of this section, except to the extent that the system encompasses lands that were part of a natural watercourse as of February 14, 1912.

§ 37-1102. Trust advocate

In all activities and proceedings under this chapter, the commissioner shall:

1. Act as an advocate for the public trust.
2. Act diligently to promote trust interests.
3. Challenge or defend commission decisions as the commissioner considers necessary to protect trust interests.

ARTICLE 2. DETERMINING NAVIGABILITY

§ 37-1121. Arizona navigable stream adjudication commission

A. The Arizona navigable stream adjudication commission is established through July 1, 2000. The commission consists of five persons, not more than three of whom shall be of the same political party, appointed by the governor pursuant to section 38-211. Persons who are appointed to the commission must be well-informed on issues relating to rivers and streams in this state. The commission shall select a presiding officer from among its members.

B. Members of the commission are public officers for purposes of title 38, chapter 3, article 8 and title 38, chapter 3.1. A person who has advocated for or expressed a desire that a watercourse in this state be determined to have been navigable or non-navigable may not serve as a commission member. A commission member shall not:

1. Have any bias regarding the possible navigability of any watercourse or a portion or reach of a watercourse.
2. Own, obtain a significant portion of income from or claim any ownership or possessory interest in lands affected by this chapter.
3. Directly or indirectly receive a significant portion of income from a person who claims an ownership or possessory interest in lands affected by this chapter or from a person who obtains a significant portion of income from such lands nor have been employed by such persons within two years before, or be employed by such persons within two years after, the commission member's term of office.

C. Funding for the commission and its necessary and reasonable expenses, including contracting for private services, shall be provided from the sale and use

of public trust lands and from such legislative appropriations as may be necessary to permit the commission to fulfill its responsibilities.

D. The governor, on good cause shown, may remove a member for neglect of duty or misconduct or malfeasance in office. On removal, the governor shall file with the secretary of state a complete statement of all charges made against the member, the governor's findings and a complete record of the disciplinary proceedings conducted with respect to the removal.

E. Members are eligible to receive compensation pursuant to section 38-611 for service on the commission, unless a member who is otherwise employed as a public officer is prohibited from receiving additional compensation.

F. The commission shall maintain its principal office at the state capital but may hold meetings or hearings any place in this state. The commission shall meet at least once each calendar quarter except if the commission has completed all investigations, inquiries and hearings required under this chapter, the commission shall not be required to meet. The presiding officer or a majority of the members may call additional meetings. On termination, the commission shall transmit all of its records to the department.

G. In the event of a vacancy on the commission, the governor may appoint a replacement member pursuant to section 38-211.

H. For purposes of subsection B of this section, "significant portion of income" means ten per cent or more of gross personal income for a calendar year.

§ 37-1122. General duties of the commission

The commission shall:

1. Adopt rules and establish procedures and services that are necessary or desirable to carry out the provisions and purposes of this chapter.
2. Assemble and distribute information to the public relating to the commission's determination of navigability of any watercourse and the commission's other activities.
3. Conduct investigations, inquiries or hearings in performing the commission's powers and duties.
4. Exercise such other powers as may be necessary to fully carry out its responsibilities imposed by this chapter.

§ 37-1123. Receiving and compiling evidence and records

A. The commission, with the assistance of the state land department, shall collect, compile, receive, review and consider all relevant historical and other evidence available or presented to the commission regarding the navigability of watercourses in this state as of February 14, 1912, together with associated public trust values and, based on that evidence:

1. Determine which watercourses and portions and reaches of watercourses were not navigable on that date.
2. Determine which watercourses and portions and reaches of watercourses were navigable on that date.
3. Identify any public trust values that are now associated with the navigable watercourses.

B. Private citizens, clubs, organizations, corporations, partnerships, unincorporated associations, municipal corporations and public entities may present evidence to the commission in writing or by sworn testimony at a hearing according to commission rules.

C. The commission shall consult and coordinate its efforts to gather and review evidence of navigability and public trust values with the department of water resources, the game and fish department, the state parks board and other interested persons and public and private entities and shall consider the information that those persons and entities have compiled regarding the navigability of watercourses.

D. After consulting with the state land department and after public notice, the commission shall set priorities for investigating and adjudicating the navigability of the watercourses in this state. In setting the priorities, the commission shall consider:

1. The number and value of parcels of real property that are affected by a state claim of sovereign ownership to the bed of the watercourse.

2. The degree of hardship to private parties and political subdivisions due to title uncertainties relating to the bed of the watercourse.

3. The significance of the public trust values associated with the watercourse and the degree to which those values are threatened.

4. The potential viability of this state's sovereign claims to the watercourse, giving higher priority consideration to more viable claims.

E. A person who is aggrieved by the undetermined navigability status of a watercourse may petition the commission to modify the priority set under subsection D of this section and grant expedited consideration for a particular watercourse or portion or reach of a watercourse. The commission shall grant the petition if justified by the factors listed in subsection D of this section.

F. No judicial action seeking a determination of navigability of a watercourse may be commenced, continued or completed unless a petition is first filed under subsection E of this section or the commission has taken final action with respect to the watercourse under section 37-1128. If the commission has not taken final action within one hundred eighty days after filing a petition under subsection E of this section, the judicial action may proceed. This subsection does not preclude the department from seeking a temporary restraining order or injunctive relief at any time to prevent loss or damage to public trust resources.

§ 37-1124. Compiling evidence and records by department

A. Beginning on or about the date that the commission establishes priorities pursuant to section 37-1123, subsection D, but in no event later than January 2, 1993, the department shall begin the necessary investigation and inquiries to assemble the evidence relevant to determining navigability with respect to those watercourses given the highest priority by the commission. The department shall continue the investigations and inquiries as resources permit, in the order of priority set by the commission.

B. After collecting and documenting all reasonably available evidence regarding the condition and usage of a watercourse as of February 14, 1912, the present uses of the underlying land and the public trust values associated with the watercourse, if any, the department shall promptly transmit all of the evidence to the commission.

C. The department shall maintain a permanent record of the material assembled and transmitted to the commission.

§ 37-1125. Initial classification of watercourses

A. After the commission receives and reviews sufficient information to permit an initial determination with regard to possible navigability of any reach or portion of a watercourse, the commission shall initially classify the watercourse or portion or reach of the watercourse into one of the following categories:

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1. The watercourse has characteristics of possible navigability as of February 14, 1912.

2. The watercourse has no such characteristics of navigability.

B. The commission shall make its determination under this section in an expeditious manner.

C. The commission shall maintain a permanent public record of the classifica- ~~tions~~ of watercourses and portions and reaches of watercourses made under this ~~section.~~

§ 37-1126. Hearings; notice

A. After the commission completes the initial classification of any water- ~~course~~ or portion or reach of a watercourse under section 37-1125, the commis- ~~sion~~ shall schedule public hearings to receive additional evidence and testimony ~~relating~~ to navigability or nonnavigability of any such reach or portion, and, if ~~potentially~~ navigable, any public trust values associated with the watercourse. ~~The~~ hearings shall be held at the commission's office or, in the case of a hearing ~~concerning~~ a watercourse located principally outside of Maricopa county, at the ~~county~~ seat of the county in which the predominant portion of the particular ~~watercourse~~ is located. The commission may schedule additional hearings at ~~other~~ locations at the commission's discretion.

B. At least thirty days before any public hearing under this section, the ~~commission~~ shall cause notice of the hearing to be published in two newspapers, ~~one~~ of statewide circulation and another of general circulation in the county ~~where~~ the hearing is to be held. In addition, the commission shall mail notice of ~~the~~ hearing to any person who has previously requested notice of hearings in ~~writing~~ from the commission.

37-1127. Boundary agreements; negotiations; recording; effect

A. At any time before a final determination under section 37-1128 as to ~~whether~~ a watercourse or a portion or reach of a watercourse was navigable as ~~of~~ February 14, 1912, the commissioner may negotiate with any person or public ~~entity~~ having or claiming an interest in any land affected by this state's claim of ~~sovereign~~ ownership due to navigability for the purpose of reaching a boundary ~~or~~ exchange agreement.

B. At least thirty days before submitting a proposed boundary or exchange ~~agreement~~ to the board of appeals for approval under subsection C of this ~~section~~, the commissioner shall provide written notice of the proposed action and ~~an~~ opportunity to comment to any person who has previously requested written ~~notice~~ of actions under this section. The commissioner shall provide contempora- ~~neous~~ written notice of the final decision to any person who filed a comment.

C. The board of appeals established under section 37-213 must approve each ~~boundary~~ or exchange agreement. In considering whether to approve a bound- ~~ary~~ or exchange agreement, the board shall consider whether the agreement is ~~prudent~~ and consistent with the public trust and the Constitution of Arizona.

D. The board of appeals may allow an exchange only if both of the following ~~conditions~~ are met:

1. The land being transferred by the state is not of material use for trust ~~purposes.~~

2. The land being acquired by the state is of material use for trust purposes ~~and~~ has an appraised value equal to or greater than the value of the land being ~~transferred~~ by the state.

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E. Lands that are transferred to this state in an approved boundary or exchange agreement become public trust lands.

F. An approved boundary or exchange agreement is binding on this state and other parties to the agreement but is not admissible as evidence and may not be cited as precedent in any judicial or administrative proceeding involving the determination of navigability of any watercourse, portion or reach.

G. A boundary or exchange agreement shall be recorded in the office of the county recorder of each county in which all or part of the affected land is located.

§ 37-1128. Final determination

A. After the commission completes the public hearing and consultation activities with respect to a watercourse, the commission shall again review all available evidence and render its decision as to whether the particular watercourse, or any portion or reach of the watercourse, was navigable as of February 14, 1912. If the preponderance of the evidence does not establish that the watercourse was navigable, the commission shall issue its determination confirming the watercourse to be non-navigable. With respect to those watercourses or reaches of watercourses that the commission determines to be navigable, the commission shall document any public trust values associated with the navigable watercourse or portion or reach of the watercourse. These determinations of non-navigability or navigability and any public trust values shall be in writing and shall be supported with sufficient documentation and detail to confirm the rationale and basis for the decision. The commission's decision under this subsection constitutes a final administrative determination.

B. The commission shall immediately notify the department of any watercourse or portion or reach of a watercourse that the commission determined to be navigable or non-navigable under subsection A of this section. Within ninety days after receiving notice from the commission, the department shall notify each record owner or lessee, each person and entity that has an interest of record in the property and each person or entity who has requested such notice of any determination of non-navigability and whether the department will seek judicial review.

C. After the commission issues its determination with respect to the navigability of a watercourse or a portion or reach of a watercourse and the time for appeal or judicial review of the determination as provided by section 37-1129 has expired, the commission shall cause a record of its determination to be recorded in the office of the county recorder of each county in which any portion of the watercourse affected by the determination is located.

§ 37-1129. Judicial review

A. Within ninety days after the date of notice from the department under section 37-1131 or within ninety days after notice by the commissioner under section 37-1128, subsection B, the commissioner or any person who is aggrieved by the commission's determination may seek judicial review of the commission's determination in superior court in the county in which all or part of the property that is directly affected by the determination is located.

B. Judicial review shall be conducted pursuant to title 12, chapter 7, article 6.

C. In the event of separate actions under this section with respect to the same watercourse, the same portion or reach of a watercourse or adjacent or proximate portions or reaches of a watercourse, the court, on motion by any party to any such action or on its own initiative, may order a joint hearing or trial of any matter in the actions, or the court may order all of the actions pending in any court to be consolidated and issue such orders concerning proceedings in the

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actions as may tend to avoid unnecessary costs or delay or as may be necessary to avoid inconsistent results.

D. An aggrieved person who seeks judicial review under this section is not subject to the six month time limit prescribed by section 37-1131 for requesting a determination that the property can be disclaimed, relinquished or disposed of from public trust status. The six month time limit is tolled against the aggrieved person until a final judicial determination is entered in the action and the time for appeal has expired.

§ 37-1130. Title to bed of nonnavigable watercourse

Subject to judicial review, the commission's determination that a watercourse, portion or reach is nonnavigable constitutes a waiver, relinquishment and disclaimer of this state's right, title or interest in the bed of the watercourse based on its navigability.

§ 37-1131. Notice to landowners

A. If the commission determines a watercourse to be navigable, the boundaries of the state's ownership shall be determined by a land survey to be obtained by the department. It is presumed that the bed of the watercourse to which state ownership applies is the bed of the watercourse existing on the date of the commission's determination, unless clear evidence establishes a different location. The department shall note the location of public trust lands on the department's records.

B. Within ninety days after receiving notice from the commission pursuant to section 37-1128, the department shall notify each record owner or lessee of property that is located in the bed of the navigable watercourse, and each person and entity that have an interest of record in the property, of the decision of the commission and that, by virtue of the decision, a portion of the property has been determined to be public trust land of this state.

C. Not later than six months after the date of notice from the department under this section, the record owner or lessee of the property may petition the department in writing to disclaim, release, relinquish or dispose of the property from public trust land status as no longer necessary or materially useful for the purposes of the trust.

ARTICLE 3. MANAGEMENT OF PUBLIC TRUST LANDS

37-1151. Petition to release public trust status

A. In responding to a petition filed pursuant to section 37-1131, subsection C, the department shall consider the extent to which the property, either because of its nature or because of changes, is no longer of material use for the primary trust purposes of navigation, fishing and recreation. If the department concludes that the property is not of material use for the primary trust purposes, the department shall consider the extent to which a release of the trust is appropriate in light of the public benefit to be derived from alternate uses, and the equitable interests or hardships of the record title holder or lessee, including each of the following:

1. The year in which the property was acquired by the record owner or lessee.
2. The entity or person from whom the property was acquired by the record owner or lessee.
3. The manner in which the record owner or lessee acquired the property.
4. The purchase price or lease terms paid by the record owner or lessee.

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- 5. The amount of property taxes paid each year since the record owner or lessee acquired the property.
- 6. The profit or benefit derived from the property by the record owner.
- 7. The extent to which the record owner on the date of acquisition knew or should have known that the property was potentially trust land.
- 8. All improvements made to the property since the record owner or lessee acquired the property.
- 9. The public trust values identified by the commission.
- 10. Whether any improvements on the property impair, obstruct, promote or destroy the value of the watercourse for public trust or navigation purposes.
- 11. The existing uses of the property, its reasonable highest and best use and whether such uses impair, obstruct, promote or destroy the value of the watercourse for public trust purposes.
- 12. Whether the physical condition of the watercourse has materially changed since February 14, 1912 adversely affecting the watercourse's capability of being navigated, including changes due to construction of dams, reservoirs, dikes, levees, canals and ditches that were constructed for water conservation or flood control purposes by public entities, municipal corporations or the United States.
- 13. Any diminution in value to the record owner's or lessee's contiguous property caused by this state's ownership.
- 14. The degree of effect of continuation of the current use or any proposed change in use of the property on public trust uses of navigation, fishing and recreation.
- 15. The impact of continuation of the current use or any proposed change in use of the property on the public trust resource.
- 16. The impact of continuation of the current use or any proposed change in use of the property when examined cumulatively in conjunction with existing authorized impediments to full use of the public trust resource.
- 17. The impact of continuation of the current use or any proposed change in use of the property on the public trust resource if that resource is considered with respect to the primary purpose to which the resource is now suited, such as commerce, navigation, fishing or recreation.
- 18. The degree to which continuation of the current use or any proposed change in use requires that broad public uses be set aside in favor of more limited and private uses.

B. At least thirty days before issuing a decision that land may be released from the public trust under this section the department shall provide written notice of the proposed action and an opportunity to comment to any person who has previously requested written notice of actions under this section. The department shall provide contemporaneous written notice of the final decision to any person who filed a comment.

§ 37-1152. Auction and sale of released public trust lands

A. If the department determines that any portion or reach of a bed of a navigable watercourse may be released from the public trust, the department shall cause an appraisal of the property to be made to determine its fair market value. The property shall not be disposed of for an amount less than that appraised value.

B. At the same time, the department shall also cause an appraisal to be made of such reasonable improvements to the property as the record owner or lessee may have made in good faith. The amount of that appraised value of the

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improvements shall be credited and applied to the bid of the record owner or lessee at any sale or public auction of the land that the department conducts. If the record owner or lessee is not the successful bidder at the sale or auction, the successful bidder shall reimburse the owner or lessee by the amount of the appraised value of the improvements.

C. Sections 37-236, 37-237 and 37-238 apply to the sale of such lands at public auction.

§ 37-1153. Permit to use public trust lands

A. On application, the department may permit the use of public trust lands by a public entity or private person or entity if the department determines that such use will be consistent with, and in the best interests of, the public trust. The use may continue only as long as the lands are used for the purposes for which the permit is granted. The permit shall contain terms and conditions that are necessary or appropriate to assure protection of the public trust interests associated with the lands. The user shall pay due compensation to the department that shall be used for the purposes prescribed by this chapter.

B. At least thirty days before issuing a permit under this section the department shall provide written notice of the proposed action and an opportunity to comment to any person who has previously requested written notice of actions under this section. The department shall provide contemporaneous written notice of the final decision to any person who filed a comment.

C. The department may lease rights-of-way in public trust lands for nonexclusive uses for a term of not more than ten years without a public auction, if the conditions prescribed by subsection A are met.

D. The department shall adopt rules relating to granting the use permits and maintaining the public trust land that is subject to permit under this section.

§ 37-1154. Public improvements in beds of navigable watercourses; definition

A. A determination by the commission that a watercourse or a portion or reach of a watercourse is navigable does not affect the right of a public entity to own, operate, maintain or repair a public improvement reasonably constructed in the bed of the watercourse under the public entity's powers if the improvement was constructed before the commission's determination that the watercourse, portion or reach is navigable and does not materially impair the public trust. The public entity is considered to have obtained this state's consent to construct the public improvement and is not liable to pay compensation to this state for the land on which the public improvement is constructed if the improvement does not materially impair, obstruct or destroy the function of the watercourse for public trust purposes.

B. If the commissioner determines that the public improvement described in subsection A of this section does not, or will not if appropriate conditions are followed, materially impair the public trust uses, the department may require the public entity to obtain a permit for the improvement pursuant to section 37-1153 but shall not assess any fee for issuing the permit.

C. At least thirty days before issuing a decision under subsection D or E of this section the department shall provide written notice of the proposed action and an opportunity to comment to any person who has previously requested notice of actions under this section. The department shall provide contemporaneous written notice of the final decision to any person who filed a comment.

D. If the commissioner determines that the public improvement described in subsection A of this section destroys the function of the watercourse for public

Additions are indicated by underline; deletions by strikeout

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trust purposes and is not in furtherance of the public trust status of the land, the public entity may petition the department for release of public trust status pursuant to section 37-1151. In evaluating the petition, the department shall consider, in addition to the factors prescribed by section 37-1151, whether constructing the public improvement was undertaken pursuant to the public entity's authority and whether the public improvement continues to serve a public purpose.

E. If the commissioner determines that a release is appropriate under subsection D of this section, the public entity may purchase this state's interest in the land without a public auction by paying an amount to be determined by the department pursuant to section 37-1152 directly to this state pursuant to section 9-401, subsection A, section 11-251, paragraph 45 or section 48-3603, subsection C, paragraph 2, as applicable. No cause of action or claim for reimbursement accrues for the benefit of any public entity that exercises its right to purchase this state's interest pursuant to this subsection.

F. For purposes of this section, "public improvement" includes any facility established, constructed or maintained by a public entity pursuant to law and those works described in section 37-1101, paragraph 5.

§ 37-1155. Prior use of public trust lands

This state shall not claim compensation for any good faith use of public trust lands made before September 10, 1991 by the record owner or the record owner's lessee if all of the following conditions apply:

1. The landowner had record title to the land at the time of the use.
2. At the time of use, the record landowner did not have actual knowledge, nor did any recorded instrument disclose, that the state had a sovereign claim to the land.
3. The record landowner used the land in a reasonable manner.

§ 37-1156. Riparian trust fund; acquisition and management of riparian lands

A. The riparian trust fund is established in the state treasury consisting of monies received from the sale or use of sovereign streambed lands and resources under this chapter and any other appropriations, gifts, grants or donations designated by the donor for that purpose. The state treasurer shall maintain the fund separate and apart from all other funds. On notice from the commissioner the state treasurer shall invest and divest monies in the riparian trust fund as provided by section 35-313 and monies earned shall be credited to the riparian trust fund. The state treasurer shall report and maintain a separate accounting of income and other proceeds from investing trust fund monies.

B. The state land commissioner shall use the income, other proceeds and not more than seventy-five per cent of any added principal of the fund in a fiscal year pursuant to this section:

1. As the monies become available from the income of the fund, to reimburse the state general fund for expenses of the commission and the department under this chapter.
2. To acquire, from willing sellers, land or interests in land located in riparian areas in this state for public purposes consistent with conservation of wildlife and recreation.
3. For such other expenditures as promote the purposes of the public trust.

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C. The state land commissioner shall consult with and receive advice from the Arizona state parks board and the Arizona game and fish department regarding the acquisition and management of land and interests in land under this section.

Sec. 4. Transfer of trust fund monies

All monies and assets in the riparian acquisition trust fund established under section 37-1127, Arizona Revised Statutes, as repealed by this act, are transferred to the riparian trust fund established under section 37-1156, Arizona Revised Statutes, as added by this act, and remain subject to any existing encumbrances and obligations.

Sec. 5. Appropriation

The sum of two hundred thousand dollars is appropriated from the state general fund for fiscal year 1992-1993 to the state land department for one full-time equivalent employee position and personnel and consulting services that are necessary to fulfill its responsibilities established by this act.

Sec. 6. Temporary exemption from administrative procedures act

The Arizona navigable stream adjudication commission and the state land department are exempt from the requirements of title 41, chapter 6, Arizona Revised Statutes, except the requirements of section 41-1022 and section 41-1023, subsection A, Arizona Revised Statutes, for a period of one year after the effective date of this act for the purpose of adopting rules to administer title 37, chapter 7, Arizona Revised Statutes, as added by this act.

Sec. 7. Severability

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 8. Emergency

This act is an emergency measure that is necessary to preserve the public peace, health or safety and is operative immediately as provided by law.

Approved by the Governor, July 7, 1992.

Filed in the Office of the Secretary of State, July 7, 1992.

WATERS—RIPARIAN PROTECTION PROGRAM

CHAPTER 298

S.B. 1030

AN ACT AMENDING SECTION 45-101, ARIZONA REVISED STATUTES; MAKING AN APPROPRIATION; RELATING TO THE RIPARIAN PROTECTION PROGRAM.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Findings and policy

A. The purpose of this act is to provide for collecting scientific and economic data and developing analyses and reports on which the legislature may base decisions concerning protecting riparian areas.

B. This state's riparian protection program should be based on sound scientific and economic evidence. To develop an effective, well-balanced riparian

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BEFORE THE
ARIZONA NAVIGABLE STREAMBED ADJUDICATION COMMISSION

IN THE MATTER OF THE) ADMIN. DOCKET NO. 94-1
NAVIGABILITY OF THE SALT RIVER))
[From Granite Reef Dam to the) NOTICE OF PUBLIC HEARING
Gila River Confluence])

The Arizona Navigable Streambed Adjudication Commission will begin its hearing to determine if the Salt River from Granite Reef Dam to the Gila River confluence was navigable as of the time Arizona became a State on:

DATE/TIME: FEBRUARY 14, 1994 AT 9:00 A.M.
LOCATION: STATE LAND DEPARTMENT AUDITORIUM
(Basement)
1616 WEST ADAMS, PHOENIX, ARIZONA

A final determination that the Salt River was navigable at Statehood may adversely affect your interest in real property located in or near the bed of the Salt River. The Arizona State Legislature enacted House Bill 2594 to establish an administrative procedure for fact-finding efforts needed to determine if certain watercourses, other than the Colorado River, were navigable when Arizona became a State (February 14, 1912). The Legislature established the Commission to adjudicate the extent of the State's ownership of the beds of such watercourses and to determine any public trust values associated with such water courses, if navigable. The Commission has initially classified the Salt River from Granite Reef Dam to the Gila River confluence as having characteristics of possible navigability as of Statehood. The Commission has scheduled this public hearing to receive evidence relating to the navigability or nonnavigability of the Salt River in this reach pursuant to A.R.S. §§ 37-1122, 37-1126 and 37-1128 and A.A.C. R12-17-101 to R12-17-112.

PARTICIPATION IN PUBLIC HEARING

Anyone who intends to appear and participate in the hearing as a party shall file a Notice of Appearance and Intention to Participate with the Commission at least thirty (30) days prior to the date set for the hearing (file notice not later than January 14, 1994). Anyone who is notified by this publication only and intends to appear and participate in the hearing as a party shall file such Notice with the Commission no later than five days after the last publication date of this notice (file notice not later than December 17, 1993). The Commission may provide persons other than parties an

Arizona
State Land Department
1616 WEST ADAMS
PHOENIX, ARIZONA 85007

1 opportunity to make a statement or file documents on matters
2 relevant and material to the navigability of the Salt River as
3 of Statehood without filing such Notice. Notices and
4 documents shall be filed in person or by mail with Rebecca
5 Good, Secretary, Arizona Navigable Stream Adjudication
6 Commission, 1616 West Adams, 3rd Floor, Phoenix, Arizona.

FOR MORE INFORMATION CONTACT

DONNA SMITH AT (602) 542-3507 OR
REBECCA GOOD AT (602) 542-2630

7 This notice is being published in the Arizona Republic, a
8 statewide newspaper and the Scottsdale Progress, general
9 circulation throughout Maricopa County as required by A.A.C.
R-18-7-110.

=====
10 The Arizona State Land Department will hold a public
11 information meeting to answer questions about the Salt River
12 Navigability Determination at Maricopa County Auditorium, 205
13 W. Jefferson, Phoenix, Arizona from 7 p.m. to 9 p.m. on
14 December 9, 1993.
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ARIZONA STREAMBED PROGRAM
Questions and Answers

The following questions and answers address typical concerns raised by participants at public information meetings regarding the Streambed Program.

1.

Q. If the State land Department sold land that is later determined to be within the normal high water boundary of a navigable water course, does the title holder lose title and have to make application to buy it a second time?

A. This could happen; however, the Department should not have sold the streambed, i.e., the State Land Department may not convey title to riverbeds without the express authority of the legislature.

2.

Q. If the federal government sold land that is determined to be within the normal high water boundary of a navigable water course, does that prevent the State from claiming it?

A. No. The federal government cannot convey streambeds owned by a state.

3.

Q. Will the State compensate title holders for the land it acquires as a result of a determination of navigability?

A. No; however, if the State sells or leases streambed land at public auction, the original owner's improvements will be appraised and credited in the sale price. Any successful bidder, other than the original owner of the streambed, must reimburse that owner for the improvements.

4.

Q. Will the question of the boundary between the State streambed land and private land have to be determined every time a water course (naturally) changes its position?

A. Yes. Once a stream is determined to be navigable, the streambed is owned by the State wherever the stream (naturally) shifts to. Each time such a shift (or meander) occurs, land may be lost or gained.

5.
Q. How is the Commission going to determine the navigability of a stream?

A. By a preponderance of evidence; evidence to show that at time of Statehood a stream (in its natural condition) was used for navigation or could have been used for navigation.

6.
Q. What is the definition of navigability?

A. The Commission must use the definition as set forth in HB 2594; Chapter 7, Article 1, 37-1101 (Definitions).

6. "'Navigable' or 'Navigable Water Course' means a water course, or a portion or reach of a water course, that was in existence on February 4, 1912, and that 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 on water."

7.
Q. Is the air space above a navigable water course considered sovereign?

A. The navigable streambed program is addressing streambeds. The question about the air space above it is a leasing decision made by the Land Department for land that it owns.

8.
Q. How will the Commission deal with the question of water rights.

A. The Commission is not addressing water rights. The Commission's duty is to determine whether or not a water course is navigable. The question of water rights, attached to the land, will be determined according to existing applicable water law.

- 9.
- Q. What are land owners supposed to do until such time that a determination of navigability has been determined?
- A. It must be understood that the title to land in or near a watercourse is clouded. Until such time that the title is clear, a land owner will have to use his own judgement. Title holder may petition the Commission to modify the priority for investigating and adjudicating the navigability of water courses.
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- 10.
- Q. Who will determine what the "Public Trust Values" are?
- A. The Commission is charged with determining what the public trust values are. The public may submit their views on what the public Trust values should be for the Commission's consideration.
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- 11.
- Q. What is the meaning of "ordinary and natural conditions"?
- A. Ordinary and natural conditions will be determined by the Commission, but may not include flood boundaries.
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- 12.
- Q. What is the ordinary high water mark and what criteria will be used to determine it?
- A. The ordinary high water mark is defined in the statutes. The Land Commissioner will order a study and survey and use the results to define the boundaries. "Ordinary high water mark" means the line on the shore of a water course established by the 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 water mark does not mean the line reached by unusual floods.

13.

- Q. Does the Streambeds Act authorize the State to seek damages for sand and gravel excavated prior to the Act?
- A. The Streambed Act provides that the State shall not claim compensation for any good faith use of streambeds made before September 10, 1991, including sand and gravel extracted. Please refer to ARS §37-1155 for further clarification.
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14.

- Q. What happens if a mortgagee abandons or doesn't pay the lien on land that is determined to belong to the State because the water course was navigable at the time of Statehood?
- A. The State will not assume liability for prior liens.

ARIZONA STREAMBED PROGRAM

SUMMARY

The original 13 states were given ownership of and control of the Streambeds of Navigable Waterways within their boundaries. This provision was founded on the English Common Law principal that there was a public need to use the waterways for commerce. Under the "Equal Footing Doctrine" all states entered the Union with this provision. Although the state owned the land, in order to perfect title to the Navigable Streambeds the state was required to make its claim of ownership.

From Statehood until the mid-1980's, Arizona had claimed only the bed of the east half of the Colorado River. This left a cloud on the titles held by land owners whose property included all or a portion of the streambed of potentially navigable streams.

In 1984 in an effort to curtail the activities of a gravel company mining sand and gravel on the Verde River near Deadhorse Ranch State Park the Attorney General's Office used the navigability/state ownership issue as one of their arguments. This case was settled but Pandora's Box had been opened. The legislature recognizing the economic hardships created by the uncertainty of the State's potential future claims on streambed lands passed HB 2017 (Navigable Streambed Act; 1987). HB 2017 outlined a procedure to quit claim any interest of the State in the beds of the Salt, Gila and Verde Rivers for a nominal fee, reaffirmed the State's claim to the Colorado River and waived any claim to all of the other streambeds in the State.

Three months after HB 2017 was enacted, a lawsuit was filed by the Center For Law in The Public Interest challenging the constitutionality of these statutes. The litigation was substantially completed in September of 1991 with a Court of Appeals ruling that HB 2017 was unconstitutional because it did not provide for an evaluation of the validity and value of the State's public trust interest on the individual water courses. (1CA-CV 89-134)

Responding to the Appeals Court decision, a working group made up of industry, private interest, title insurance, agency representatives, and key Legislators, was formed under the Governor's direction to draft new legislation. HB 2594 was signed on July 7, 1992.

The statutes provide for a five member commission appointed by the Governor and confirmed by the Senate to serve for the term of the project. This commission, the Arizona Navigable Streambed Adjudication Commission (ANSAC) has been working since December of

1992. The Commission members are: Curtis A. Jennings, Chairman, an Attorney; Jay Brashear, Vice Chairman, a retired Editor; Margaret S. Peterson, a semi-retired U of A Professor; Troy L. Pêwê, a semi-retired ASU Professor and Harold Ramsbacher, a retired BLM Land Manager. The Commission is responsible for determining which streams in the State were navigable or susceptible to navigation on February 14, 1912 and what public values are associated with these streams. The Commission will also determine which streams were not navigable and all State claim to these streambeds will be waived.

The State Land Department gathers and provides information to the Commission, is an advocate for the Public Trust and will manage the land that is claimed if any.

A defensible adjudication is only possible where studies have been conducted to determine the extent of navigability or non-navigability; therefore, the current studies were mandated by the Courts and are an essential part of the process.

Because of the large number of streams in the state the statutes required that the first order of business for the Commission was the prioritization of the rivers for study. The Salt River from Granite Reef to the Gila, the Gila River from Safford to the Colorado, the Verde, San Pedro and the Hassayampa Rivers were given the highest priority. Studies for the Salt, Verde, San Pedro and Hassayampa are being contracted for by CH₂M Hill. The Gila study is being done by the Land Department staff. All five studies will be completed in draft form by early October. A series of public meetings and formal hearings will be held for each of the streams beginning in January. A second group of studies will be initiated as soon as the contracts can be issued.

If you have any documented evidence or personal knowledge relative to the navigability or non-navigability of these streams we would urge you to bring this information forward during the study process, at the public meetings or during the formal hearings before the Commission.

Commission determinations should begin to be made in late spring or early summer of 1994. These decisions if challenged are subject to judicial review. It is our opinion that, if the statutes and process are carefully followed and the Commission makes its determinations from the information from the comprehensive studies and public input, challenges to the Commission determinations are unlikely to succeed.

If the Commission determines that a stream was navigable at the time of Statehood the Land Department staff will determine the boundary of the high-water mark through survey, hearing process, record the State's claim of ownership and manage the land to protect the public values identified by the Commission.

Any revenue from the lease or disposition of these sovereign lands will go to the Riparian Trust fund established by statute. The revenue will be used to offset cost of the Commission within limits and to acquire riparian land for protection and enhancement.

FOR FURTHER INFORMATION PLEASE CONTACT:

ARIZONA STREAMBED PROGRAM
DRAINAGE & ENGINEERING SECTION
ARIZONA STATE LAND DEPARTMENT
1616 West Adams
Phoenix, Arizona 85007
Telephone (602) 542-5507
Fax (602) 542-4668

ARIZONA STREAMBED PROGRAM I. INTRODUCTION

On July 7, 1992, the Arizona State Legislature enacted House Bill 2594 to determine if certain water courses in the State, other than the Colorado River, were navigable at the time of Statehood (February 14, 1912), and to adjudicate claims of navigability to determine ownership of lands located in or near many water courses in the State. To this end, the Legislature established a five person Commission through July 1, 2000 - The Arizona Navigable Stream Adjudication Commission (ANSAC) - selected by the Governor and confirmed by the State Senate. The Arizona State Land Department provides office space, staff and resources to aid the Commission in discharging its duties.

II. BACKGROUND

When the 13 original colonies became states, they kept control of their riverbeds and coastal areas for the purpose of fishing, commerce, trading and navigation. All states that joined the union, after the formation of the United States, joined with all the benefits of the original 13 colonies. This practice became known as the "Equal Footing Doctrine." As new states joined the union they maintained title to and control of all navigable rivers within their state boundaries. The Equal Footing Doctrine, though recognized by most states over the years, was largely ignored by Arizona. In April 1987 the State Legislature passed and the Governor signed House Bill 2017, that declared all water courses in Arizona to be non-navigable, except for the Salt, Verde, Gila and Colorado Rivers. The bill further declared

that the Salt, Verde and Gila Rivers could be quit claimed to the owners of record for \$25.00 per acre.

In July 1987 the Arizona Center for Law in the Public Interest filed suit, challenging House Bill 2017. In September 1991 the Arizona Court of Appeals overturned the legislation, finding that it provided an illegal gift of the streambeds and might violate the Public Trust Doctrine, a doctrine that recognizes, that in some cases, the State must hold onto property and protect it for the public trust.

With the passage of House Bill 2594, it is now the task of ANSAC, assisted by the State Land Department, to determine which water courses are navigable and which are not, and to adjudicate streambed ownership.

III. IMPLEMENTATION PLAN

To accomplish the task of determining the navigability of certain water courses in the State and adjudicating streambed ownership, the State Land Department, in concurrence with ANSAC, adopted an implementation plan, briefly outlined below:

- 1) Study selected water courses according to a prioritization plan adopted by ANSAC.
- 2) Perform the necessary technical analysis to determine the ordinary high water elevation, using state of the art hydrological and hydraulic methods.

3) Based on the ordinary high water elevations, delineate the boundaries of selected water courses determined to be navigable at the time of Statehood and identify boundary location differences between the present and at the time of Statehood, if they exist.

4) Research historical data/information to determine how water courses selected for the study were used, i.e., navigation, trade, commerce, recreation, etc.

5) Evaluate the extent of the public trust value of the State's ownership of selected streambeds. Determine to what extent selected streambed are of no material use for primary trust purposes.

6) ANSAC adjudicates ownership of the streambed by evaluating all pertinent technical data and historical evidence presented to it by Land Department staff.

7) The State will relinquish interest in the beds of water courses determined to be non-navigable and manage the streambeds of water courses determined to have been navigable at Statehood in accordance with House Bill 2594 to protect public trust values.

Preliminary estimates by the State Land Department staff indicate that there are 600 or more water courses in the State that must be studied and adjudicated.

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BEFORE THE
ARIZONA NAVIGABLE STREAMBED ADJUDICATION COMMISSION

IN THE MATTER OF THE) ADMIN. DOCKET NO. 94-1
NAVIGABILITY OF THE SALT RIVER))
[From Granite Reef Dam to the) NOTICE OF APPEARANCE AND
Gila River Confluence]) INTENT TO PARTICIPATE
_____)

A. NAME, ADDRESS AND TELEPHONE NUMBER OF RESPONDENT

Name: _____

Address: _____

Telephone: _____

(Please check Box B and provide the requested information if you intend to participate as a party in the above-captioned matter. See Commission Rule R12-17-108(A)-(C). Please check Box C and provide the requested information if you intend only to testify before the Commission or to file documents with the Commission, or both, but do not want to participate as a party. See Commission Rule R12-17-108(E). If more room is needed to respond, please attach a supplemental statement identified by paragraph number.)

B. APPEARANCE AND INTENT TO PARTICIPATE AS A PARTY

1. The person named in Section A above intends to appear as a party in the above-captioned matter.

If represented:

Attorney Name: _____

Address: _____

Telephone: _____

2. Concise statement of position as to whether or not the Salt River was navigable as of February 14, 1912.

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3. Concise statement as to the public trust values associated with the Salt River from the Granite Reef Dam to the Gila River confluence if found navigable.

4. List of witnesses, including address and telephone number, and for each witness a brief summary of the testimony that witness will give.

Name: _____
Address: _____

Telephone: _____

Brief summary of testimony: _____

Name: _____
Address: _____

Telephone: _____

Brief summary of testimony: _____

Name: _____
Address: _____

Telephone: _____

Brief summary of testimony: _____

5. Index of Exhibits to be offered at public hearing attached and made a part hereof. Two bound and indexed copies of documentary exhibits have been filed with the Commission this date.

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c. INTENT TO TESTIFY, FILE DOCUMENTS, OR BOTH, WITHOUT FORMAL APPEARANCE AS A PARTY

1. The person named in Section A above intends to testify before the Commission in the above-captioned matter about: _____

Please notify me of the date and time the Commission will hear testimony from the public.

2. The person named in Section A above is submitting the attached documents for the Commission to consider. (Please briefly identify each document submitted.)

DATED this ____ day of _____, 199_.

(Signature of Party, or Attorney, if represented, or of interested person)

TITLE 12. NATURAL RESOURCES

CHAPTER 17. ARIZONA NAVIGABLE STREAMBED ADJUDICATION COMMISSION

(Authority: A.R.S. § 37-1122)

Chapter 17, consisting of Article 1, Sections R12-17-101 through R12-17-112, adopted effective June 15, 1993, through an exemption from A.R.S. Title 41, Chapter 6, pursuant to Laws 1992, Ch. 297, § 6. Exemption from A.R.S. Title 41, Chapter 6 means that the Commission did not submit notice of this rulemaking to the Secretary of State's Office for publication in the Arizona Administrative Register; the Commission did not submit these rules to the Governor's Regulatory Review Council for review; the Department was not required to hold public hearings on these rules; and the Attorney General has not certified these rules. Because this Chapter contains rules which are exempt from the regular rulemaking process, the Chapter is being printed on blue paper.

ARTICLE 1. HEARINGS

- R12-17-101. Definitions
- R12-17-102. Scope of Rules and Waiver
- R12-17-103. Filing and Service of Papers
- R12-17-104. Computation of Time
- R12-17-105. Petition to Modify Priority
- R12-17-106. Notice of Hearing on Watercourse Navigability
- R12-17-107. Conduct of Hearings
- R12-17-108. Appearance and Practice Before the Commission
- R12-17-109. Extension of Time
- R12-17-110. Conferences and Procedural Orders
- R12-17-111. Evidence
- R12-17-112. Decisions

ARTICLE 1. HEARINGS

Editor's Note: The following Section was adopted under an exemption from the rulemaking provisions of A.R.S. Title 41, Ch. 6, which means that the Commission did not submit notice of this rulemaking to the Secretary of State's Office for publication in the Arizona Administrative Register; the Commission did not submit these rules to the Governor's Regulatory Review Council for review; the Department was not required to hold public hearings on these rules; and the Attorney General has not certified these rules.

R12-17-101. Definitions

- A. "Attorney General" means the duly elected, qualified and acting Attorney General of Arizona and his duly appointed assistants.
- B. "Chairperson" means the Chairperson or, in his absence, the Vice Chairperson of the Arizona Navigable Stream Adjudication Commission.
- C. "Person" includes any public or private corporation, company, partnership, firm, association, club, organization, the Federal Government and any of its agencies and departments, the state and any of its agencies and departments or political subdivisions, and an Indian tribe or tribal organization as well as a natural person.
- D. "Party" means the State Land Department and any person who has filed a notice of appearance with the Commission within the time prescribed by these rules.

Historical Note

Adopted effective June 15, 1993, pursuant to an exemption from the provisions of A.R.S. Title 41, Chapter 6 (Supp. 93-2).

Editor's Note: The following Section was adopted under an exemption from the rulemaking provisions of A.R.S. Title 41, Ch. 6, which means that the Commission did not submit notice of this rulemaking to the Secretary of State's Office for publication in the Arizona Administrative Register; the Commission did not submit these rules to the Governor's Regulatory Review Council for review; the Department was not required to hold public hearings on these rules; and the Attorney General has not certified these rules.

R12-17-102. Scope of Rules and Waiver

These rules shall be liberally construed to secure just and speedy determination of all matters presented to the Commission. If good cause appears, the Commission or Chairperson may waive application of these rules when waiver would not conflict with the law and would not affect substantial interests of the parties.

Historical Note

Adopted effective June 15, 1993, pursuant to an exemption from the provisions of A.R.S. Title 41, Chapter 6 (Supp. 93-2).

Editor's Note: The following Section was adopted under an exemption from the rulemaking provisions of A.R.S. Title 41, Ch. 6, which means that the Commission did not submit notice of this rulemaking to the Secretary of State's Office for publication in the Arizona Administrative Register; the Commission did not submit these rules to the Governor's Regulatory Review Council for review; the Department was not required to hold public hearings on these rules; and the Attorney General has not certified these rules.

R12-17-103. Filing and Service of Papers

- A. Filing with the Commission. All papers required or permitted to be filed with the Commission in any proceeding shall be filed with the Secretary of the Commission. Filing may be accomplished by mail addressed to the Secretary of the Arizona Navigable Stream Commission, Arizona State Land Department, 1616 West Adams, Phoenix, Arizona 85007. Filings shall not be timely unless the papers are received by the Secretary within the time fixed for filing, except if filing is made by mailing, then filing shall be deemed timely if the papers are postmarked prior to midnight of the day fixed for filing.
- B. Number of copies. Unless otherwise specifically provided by a particular rule or order of the Commission, an original and five copies of all papers shall be filed with the Secretary.
- C. Service of all papers. Unless otherwise specifically provided by a particular rule or order of the Commission, copies of all papers filed by any party shall, at or before the time of filing, be served on all parties to the proceeding. Service on a party represented by counsel shall be made on counsel.
- D. Manner of service. Service of all papers under these rules (except subpoenas which must be personally served) shall be made by personal service or by mail to the last known address.
- E. Docket of proceedings. A docket of all proceedings shall be maintained by the Secretary and each proceeding shall be assigned a number and all papers filed in such proceeding shall be entered in the docket.

Historical Note

Adopted effective June 15, 1993, pursuant to an exemption from the provisions of A.R.S. Title 41, Chapter 6 (Supp. 93-2).

Editor's Note: The following Section was adopted under an exemption from the rulemaking provisions of A.R.S. Title 41, Ch. 6, which means that the Commission did not submit notice of this rulemaking to the Secretary of State's Office for publication in the

Arizona Administrative Register; the Commission did not submit these rules to the Governor's Regulatory Review Council for review; the Department was not required to hold public hearings on these rules; and the Attorney General has not certified these rules.

R12-17-104. Computation of Time

In computing any period of time prescribed or allowed by these rules, or by order of the Commission, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day. When a period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Historical Note

Adopted effective June 15, 1993, pursuant to an exemption from the provisions of A.R.S. Title 41, Chapter 6 (Supp. 93-2).

Editor's Note: The following Section was adopted under an exemption from the rulemaking provisions of A.R.S. Title 41, Ch. 6, which means that the Commission did not submit notice of this rulemaking to the Secretary of State's Office for publication in the Arizona Administrative Register; the Commission did not submit these rules to the Governor's Regulatory Review Council for review; the Department was not required to hold public hearings on these rules; and the Attorney General has not certified these rules.

R12-17-105. Petition to Modify Priority

- A. When a petition to modify the priorities established by the Commission pursuant to A.R.S. § 37-1123(D) has been filed with the Commission, the matter shall be noticed for consideration at the next Commission meeting.
- B. The petition shall state the petitioner's name, mailing address and telephone number and shall identify with specificity the watercourse or reach sought to be granted expedited consideration. The petition shall state the petitioner's position regarding each of the factors the Commission must consider in setting priorities pursuant to A.R.S. § 37-1123(D).
- C. Any person may oppose or support the petition to modify priorities when the petition is before the Commission on the agenda. At such time as the Chairperson may designate, each person desiring to be heard shall give his name, address and telephone number and shall state his position for the record. If an attorney, other than the Attorney General, appears on behalf of a client, he shall advise the Commission of his name, address and telephone number and give the same information regarding the person on whose behalf he appears and presents a position.
- D. The Commission shall grant or deny the petition on the record and shall state the reasons therefor.

Historical Note

Adopted effective June 15, 1993, pursuant to an exemption from the provisions of A.R.S. Title 41, Chapter 6 (Supp. 93-2).

Editor's Note: The following Section was adopted under an exemption from the rulemaking provisions of A.R.S. Title 41, Ch. 6, which means that the Commission did not submit notice of this rulemaking to the Secretary of State's Office for publication in the Arizona Administrative Register; the Commission did not submit these rules to the Governor's Regulatory Review Council for review; the Department was not required to hold public hearings on these rules; and the Attorney General has not certified these rules.

R12-17-106. Notice of Hearing on Watercourse Navigability

- A. At least 60 days before any public hearing under A.R.S. § 37-1126(B), the Commission shall serve notice to each record owner or lessee of property located within the bed of a watercourse or a reach of a watercourse that is the subject matter of the hearing, and to any person who has requested a notice of

hearing on the subject watercourse, by mail addressed to the last known post office address.

- B. The notice by publication required pursuant to A.R.S. § 37-1126(B) shall be published for three consecutive weeks.
- C. In addition to the matters included in a notice of hearing issued pursuant to A.R.S. § 41-1061(B), the Commission shall include a statement directing any person intending to appear as a party at the hearing to comply with the requirements of R12-17-108.

Historical Note

Adopted effective June 15, 1993, pursuant to an exemption from the provisions of A.R.S. Title 41, Chapter 6 (Supp. 93-2).

Editor's Note: The following Section was adopted under an exemption from the rulemaking provisions of A.R.S. Title 41, Ch. 6, which means that the Commission did not submit notice of this rulemaking to the Secretary of State's Office for publication in the Arizona Administrative Register; the Commission did not submit these rules to the Governor's Regulatory Review Council for review; the Department was not required to hold public hearings on these rules; and the Attorney General has not certified these rules.

R12-17-107. Conduct of Hearings

- A. The Chairperson shall regulate the course of the hearing in an impartial manner. The Commission may consult with the Attorney General during the hearing. The Chairperson and all parties may question witnesses in the order determined by the Commission or the Chairperson.
- B. Transcription of hearings. All hearings shall be electronically recorded, or the Chairperson may, at the request of a party or on his own motion, order the hearing to be stenographically reported. The original transcript of the official record of any hearing, if available, or the original tape of the electronic record, if not transcribed, shall be filed with the Commission as a part of the record.
- C. Filing of motions. Motions calling for a determination of any matter of law shall be filed with the Commission in writing. Any party may file a written opposition to such motion within seven days, unless otherwise ordered by the Chairperson. The Chairperson may permit oral motions during a hearing.
- D. Rulings on motions. The Chairperson may rule on procedural motions but all other motions must be ruled upon by the Commission as a whole.
- E. Consolidation. By order of the Chairperson, proceedings involving a common question of law or fact may be consolidated for hearing of any or all matters in issue where such consolidation may tend to avoid unnecessary cost or delay.

Historical Note

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R12-17-108. Appearance and Practice Before the Commission

- A. A person may appear in a hearing in his own behalf or by counsel. A partnership may appear through a partner, other organizations may appear through a designated officer, and the Department may appear through a designated officer or its attorney.
- B. At least 30 days prior to the date set for hearing, any person notified of the hearing by mail who intends to appear and participate in the hearing shall file with the Commission and serve on the Department a notice of appearance and intention to

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participate. A person notified by publication shall file and serve such notice no later than five days after the last publication date of the notice of hearing. All notices filed pursuant to this rule shall state the name, address and telephone number of the person filing the notice and of his attorney, if represented, and a concise statement of the position taken regarding navigability of the watercourse and the public trust values associated therewith.

- C. The notice of appearance shall include the following information:
1. A list of all witnesses to be called to testify on behalf of the party and a summary of the testimony to be given by each witness; and
 2. An index identifying all exhibits to be offered on behalf of the party.
- D. Two bound and indexed copies of all documentary exhibits shall be filed with the notice of appearance. Within the filing deadlines specified in subsection (B) above, any person may file and serve the parties with a notice of filing documents and provide the Commission with two bound and indexed copies of documents for consideration by the Commission. Copies of Exhibits are not required to be served on other parties but may be examined and copies requested during regular hours of business. Without filing a notice of appearance or copies of exhibits, the Department may call as a witness any consultant or staff member who is identified as having participated in collecting and documenting the evidence transmitted to the Commission and may rely on any document transmitted to the Commission pursuant to A.R.S. § 37-1125. If the Department intends to call additional witnesses or to offer exhibits in addition to those provided pursuant to A.R.S. § 37-1124(B), it shall meet the requirements placed on persons appearing after notice by mail. Any party may file a list of rebuttal witnesses and two bound and indexed copies of rebuttal exhibits five days prior to the date of hearing.
- E. Order of appearance. The Chairperson shall designate the order in which parties shall introduce their evidence.
- F. Other appearances. Notwithstanding other provisions of these rules, the Chairperson may provide any person an opportunity to make a statement on matters relevant and material to the issues being addressed at the hearing at a time designated by the Chairperson. Such statements shall be under oath or affirmation and subject to cross-examination. All parties shall be provided an opportunity to rebut statements and documentary filings of nonparties.
- G. Improper conduct. Conduct at any hearing which in the discretion of the Commission is deemed improper shall be grounds for exclusion from the hearing. Improper conduct includes willful noncompliance with an order of the Chairperson and willful disruption or obstruction of any hearing.

Historical Note

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R-12-17-109. Extension of Time

Except as otherwise provided by law, the Chairperson, on application of a party or on his own motion and for good cause, may extend any

time limits prescribed by these rules or postpone the commencement of the hearing to a mutually satisfactory date and location.

Historical Note

Adopted effective June 15, 1993, pursuant to an exemption from the provisions of A.R.S. Title 41, Chapter 6 (Supp. 93-2).

Editor's Note: The following Section was adopted under an exemption from the rulemaking provisions of A.R.S. Title 41, Ch. 6, which means that the Commission did not submit notice of this rulemaking to the Secretary of State's Office for publication in the Arizona Administrative Register; the Commission did not submit these rules to the Governor's Regulatory Review Council for review; the Department was not required to hold public hearings on these rules; and the Attorney General has not certified these rules.

R12-17-110. Conferences and Procedural Orders

The Chairperson, on application of a party or on his own motion and upon written notice to all parties, may issue and sign procedural orders without convening the Commission. In his discretion, a conference may be held with the parties prior to any ruling on any procedural matter.

Historical Note

Adopted effective June 15, 1993, pursuant to an exemption from the provisions of A.R.S. Title 41, Chapter 6 (Supp. 93-2).

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R12-17-111. Evidence

- A. Presentation and admission of evidence. All witnesses at the hearing shall testify under oath or affirmation. Parties shall have the right to be represented by counsel and present oral or documentary evidence and conduct cross-examination. The Commission shall receive relevant, probative, and material evidence and the Chairperson shall rule upon offers of proof. Objection to the admission or exclusion of evidence must be made on the record and shall state the grounds upon which the objection is based. The Chairperson may limit and exclude all irrelevant, immaterial or unduly repetitious evidence.
- B. Rules of evidence. Pursuant to A.R.S. § 41-1062(A), the Chairperson may conduct a hearing in an informal matter and without adherence to the rules of evidence required in judicial proceedings.
- C. Discovery. Parties do not have the right to conduct discovery for the presentation of evidence except as otherwise provided for in A.R.S. § 41-1062(A)(4) and this rule.
- D. Official notice. The Commission may take official notice of any matter that might be judicially noticed by a superior court of the state of Arizona, any matter in the public official records of the Department, or any matter that is peculiarly within the knowledge of the Department as an expert body.
- E. Subpoenas and motions to quash.
 1. In connection with any hearing, the Chairperson, upon written application of a party or on his own motion, may issue subpoenas requiring the attendance and testimony of witnesses or the production of documentary or other tangible evidence, or both.
 2. Pursuant to A.R.S. § 41-1062(A)(4), the Chairperson, on written application of a party or on the Commission's motion, may permit a deposition to be taken. No deposition may exceed four hours absent express authorization from the Chairperson.

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3. Any application for a subpoena or to take a deposition shall state:
 - a. The case number and the time and place where the witness is expected to appear and testify;
 - b. The name and address of the witness;
 - c. With reasonable particularity, the documents or other tangible evidence, if any, sought; and
 - d. Shall include a showing that the facts sought to be established are relevant, material and not unduly repetitious. An application to take a deposition shall also include a showing that the testimony or materials sought cannot otherwise be obtained through reasonable efforts.
4. Process issued by the Chairperson may be served by such person and in such manner as authorized by the Arizona Revised Statutes.
5. Any person to whom a subpoena is directed may, prior to the time specified therein for compliance but in no event more than five days after the date of service of such subpoena, move the Chairperson to quash or modify the subpoena, accompanying such motion with a brief statement of reasons therefor. The Chairperson shall then rule on the motion to quash.

Historical Note

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R12-17-112. Decisions

- A. Final determination. Except as otherwise provided by law, within 30 days after the conclusion of a hearing conducted pursuant to A.R.S. § 37-1128(A), the Commission shall render a decision in writing and shall include findings of fact and conclusions of law that clearly state the basis and reasoning for the decision. Pursuant to A.R.S. § 37-1128(A), all decisions of the Commission shall be final and there shall be no right to rehearing before the Commission.
- B. initial notice of final determination. In addition to immediately notifying the Department as required by A.R.S. § 37-1128(B), the Commission shall provide a copy of its final determination to all parties and may provide copies of its final determination to any person who has requested a copy of the final determination from the Commission. No deadline for seeking judicial review established by A.R.S. § 37-1129(A) shall be affected by any notice provided by the Commission.

Historical Note

Adopted effective June 15, 1993, pursuant to an exemption from the provisions of A.R.S. Title 41, Chapter 6 (Supp. 93-2).

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