

HASSAYAMPA RIVER

BEFORE THE

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE
NAVIGABILITY OF THE HASSAYAMPA
RIVER FROM ITS HEADWATERS TO,
ITS CONFLUENCE WITH THE GILA
RIVER, YAVAPAI AND MARICOPA
COUNTIES, ARIZONA

No.: 05-004-NAV

**REPORT, FINDINGS AND DETERMINATION
REGARDING THE NAVIGABILITY OF THE
HASSAYAMPA RIVER FROM ITS HEADWATERS TO
ITS CONFLUENCE WITH THE GILA RIVER**

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

I. Procedure

Pursuant to A.R.S. §37-1123(B), the Commission gave proper notice by publication of its intent to receive, compile, review, study and consider all relevant historical and scientific data and information, documents and other evidence regarding the issue of navigability or nonnavigability of the Hassayampa River from its headwaters in the Bradshaw Mountains of Yavapai County through the counties of Yavapai and Maricopa to its confluence with the Gila River. The notice was published on February 10, February 17 and February 24, 2005 in the Prescott Courier published in Prescott, Yavapai County, Arizona; and on July 21, July 28 and August 4, 2005 in the Arizona Republic published in Phoenix, Maricopa County, Arizona. Copies of the Notice of Intent to receive, compile, review, study and consider evidence on the issue of navigability of the Hassayampa River in Yavapai and Maricopa Counties, Arizona, are attached hereto as Exhibit "A."

After collecting and documenting all reasonably available evidence received pursuant to the Notices of Intent to receive, compile, review, study and consider evidence, the Commission scheduled public hearings to receive additional evidence and testimony regarding the navigability or nonnavigability of the Hassayampa River in Yavapai and Maricopa Counties. Public notice of these hearings was given by legal advertising for the Yavapai County hearing on March 4, 2005 in the Prescott Courier published in Prescott, Yavapai County, Arizona; on March 4, 2005 in the Arizona Republic, a newspaper of general circulation in Arizona; for the Maricopa County hearing on August 18, 2005 in the Arizona Republic, a newspaper of general circulation in Arizona, published in Phoenix, Maricopa County, Arizona pursuant to A.R.S. §37-1126 and, in addition, by mail to all those requesting individual notice and by means of the ANSAC website (azstreambeds.com).

The hearing for Yavapai County was held on March 29, 2005, in the City of Prescott, the county seat of Yavapai County and for Maricopa County on September 21, 2005, in the City of Phoenix, the county seat of Maricopa County. These hearings were held in the county seats of each county through which the Hassayampa River flows to give the greatest opportunity possible for any person interested to appear and provide evidence or testimony on the navigability of the Hassayampa River in their county and, further, because the law requires that such hearings be held in the counties in which the watercourse being studied is located. Attached hereto as Exhibit "B" are copies of the notices of the public hearings.

All parties were advised that anyone who desired to appear and give testimony at the public hearing could do so and, in making its findings and determination as to navigability and nonnavigability of the Hassayampa River, the Commission would consider all matters presented to it at the hearings, as well as other historical and scientific data, information, documents and evidence that had been submitted to the Commission at any time prior to the date of the hearing, including all data, information, documents and evidence previously submitted to the Commission under prior law. Following the final public hearing on the Hassayampa River held on September 21, 2005 in Phoenix, Arizona, all parties were advised that they could file post-hearing memoranda pursuant to Commission Rules. Three post-hearing memoranda were filed by the parties, including the Arizona Center for Law in the Public Interest on behalf of its clients, Defenders of Wildlife, Donald Steuter, Jerry Van Gasse, Jim Vaaler; the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users Association. Attached as Exhibit "C" is a list of the three post-hearing memorandum filed by the various parties.

On April 11, 2006, at a public hearing in Phoenix, Arizona, after considering all of the evidence and testimony submitted and the post-hearing memoranda filed with the

Commission, and the comments and oral argument presented by the parties, and being fully advised in the premises, the Commission, with a unanimous vote, found and determined in accordance with A.R.S. § 37-1128 that the Hassayampa River from its headwaters in Yavapai County to its confluence with the Gila River in Maricopa County, Arizona, was not navigable as of February 14, 1912 nor was it susceptible of navigability. A copy of the notice for the hearing held on April 11, 2006 at Phoenix, Arizona, is attached as a part of Exhibit "B." Copies of the agenda and minutes of all of the hearings held on March 29, 2005 in Prescott, Yavapai County, Arizona and on September 21, 2005, and April 11, 2006 in Phoenix, Maricopa County, Arizona are attached hereto as Exhibit "D."

II. The Hassayampa River from its Headwaters to its Confluence with the Gila River

The Hassayampa River drains a 1504 square mile area in central Arizona, approximately half of which is in Yavapai County and the other half in Maricopa County. Its headwaters are near Mount Union in the Bradshaw Mountains east and a little south of Prescott, Arizona, at an elevation of 7700 feet above sea level, at approximately latitude 34°25'11" north, longitude 112°24'64" west in the Northwest Quarter of Section 6, Township 12 North, Range 1 East, Gila and Salt River Base & Meridian. The river flows in a generally southerly direction from its headwaters, through Prescott National Forest and various canyons in the central Arizona highlands until it opens into the Hassayampa plain south of Wickenburg, Arizona, and flows into the Gila River approximately 40 miles west of Phoenix at an elevation of 780 feet above sea level at approximately latitude 33°18'39" north, longitude 112°43'68" west in the middle of Section 25, Township 1 South, Range 5 West, Gila and Salt River Base & Meridian. The Hassayampa River is approximately 114 miles long but it flows through only one incorporated town, Wickenburg, and flows near small unincorporated communities of Walnut Grove, Wagoner, Arlington, and Hassayampa. Attached as

Exhibit "E" are maps showing the watershed basin area drained by the Hassayampa River.

The headwaters of the Hassayampa River are in the Bradshaw Mountains, which form the northeastern boundary of the watershed. To the west, the basin is bounded by the Weaver and Date Creek Mountains in southern Yavapai County, and the Belmont Mountains in Western Maricopa County. To the east, the basin is bounded by the Wickenburg Hieroglyphic and White Tank Mountains in Maricopa County. Near the town of Wickenburg, the river bisects the extent of the Vulture Mountains forming a narrow canyon reach with a perennial flow. After leaving the short canyon of the Vulture Mountains, the river enters into the broad alluvial valley of the Hassayampa plain.

The Hassayampa River may be divided into two reaches. The upper reach of the Hassayampa River extends from its headwaters near Mount Union in the Bradshaw Mountains to the southern limit of the Vulture Mountains several miles downstream from Wickenburg where the river exits a bedrock canyon and enters the Hassayampa plain. The river is perennial or intermittent in its upper reach, except through and just upstream of Wickenburg. The upper reach includes the Nature Conservancies' Hassayampa River Preserve ("HRP"), a perennial reach downstream of Wickenburg. The lower reach of the Hassayampa River extends from the end of the upper reach where it enters the Hassayampa Plain to the confluence with the Gila River. In the lower reach, the river is ephemeral.

The upper Hassayampa River is characterized by narrow canyons, shallow bedrock and riparian vegetation. It typically has a single channel or minor grades within a confined channel area. In normal times, it has a small but perennial flow fed by snowmelt, rainfall and natural springs. This perennial flow allowed the construction of a dam and reservoir at Walnut Grove in the late 1880's, which is the only structure of

this nature built on the Hassayampa River. In February 1890, a flood caused the Walnut Grove dam to collapse and the resulting flood downstream scoured the bed of the river and destroyed the mill town of Seymour and washed away many farms.

The lower Hassayampa River is an abraded straight stream with a bed up to one mile in width, consisting of coarse sands and gravels. It is an ephemeral stream with surface flows only during precipitation or wet periods.

The climate in the Hassayampa River watershed varies with elevation. Precipitation, snow accumulation and vegetative cover density and temperatures increase and decrease with the change in elevation. The local climate causes a bi-modal stream flow distribution with the highest average runoff caused by snow melt and precipitation from the Pacific cyclonic storms in January through April. Winter storms generally are more regional in extent with longer durations and can generate significant flow volumes. The second period of runoff occurs during the summer (monsoonal) rainfall caused by tropical moisture entering Arizona from the south. These storms produce more localized, intense rains which produce flash floods with high peak flow rates and relatively low volumes. The vegetation in the watershed also varies with the elevation. In the northern one-third of the basin, cover consists of heavy forest vegetation, including pine/oak woodlands. In the central one-third of the basin grass and scrub brush vegetation covers the rolling terrain. In the southern, lower one-third, the Sonoran Desert lowland vegetation occupies alluvial surfaces dominated by erosion rather than soil development.

III. Background and Historical Perspectives

A. Public Trust Doctrine and Equal Footing Doctrine

The reason for the legislative mandated study of navigability of watercourses within the state is to determine who holds title to the beds and banks of such rivers and watercourses. Under the Public Trust Doctrine, as developed by common law over

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

An ancient doctrine of common law restricts the sovereign's ability to dispose of resources held in public trust. This doctrine, integral to watercourse sovereignty, was explained by the Supreme Court in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). A state's title to lands under navigable waters is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. *Id.* at 452, 13 S.Ct. at 118; *see also Martin v. Waddell*, 41 U.S. (16 Pet.) at 413 (describing watercourse sovereignty as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish").

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

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

This principle was well established by English common law long before the American Revolution and was a part of the law of the American colonies at the time of

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

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

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

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

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

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

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

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

B. Legal Precedent to Current State Statutes

Until 1985, most Arizona residents assumed that all rivers and watercourses in Arizona, except for the Colorado River, were non-navigable and accordingly there was

no problem with the title to the beds and banks of any rivers, streams or other watercourses. However, in 1985 Arizona officials upset this long-standing assumption and took action to claim title to the bed of the Verde River. *Land Department v. O'Toole*, 154 Ariz. 43, 739 P.2d 1360 (App. 1987). Subsequently, various State officials alleged that the State might hold title to certain lands in or near other watercourses as well. *Id.*, 154 Ariz. at 44, 739 P.2d at 1361. In order to resolve the title questions to the beds of Arizona rivers and streams, the Legislature enacted a law in 1987 substantially relinquishing the state's interest in any such lands.² With regard to the Gila, Verde and Salt Rivers, this statute provided that any record title holder of lands in or near the beds of those rivers could obtain a quitclaim deed from the State Land Commissioner for all of the interest the state might have in such lands by the payment of a quitclaim fee of \$25.00 per acre. The Arizona Center for Law in the Public Interest filed suit against Milo J. Hassell in his capacity as State Land Commissioner, claiming that the statute was unconstitutional under the public trust doctrine and gift clause of the Arizona Constitution as no determination had been made of what interest the state had in such lands and what was the reasonable value thereof so that it could be determined that the state was getting full value for the interests it was conveying. The Superior Court entered judgment in favor of the defendants and an appeal was taken. In its decision in *Hassell*, the Court of Appeals held that this statute violated the public trust doctrine and the Arizona Constitution and further set forth guidelines under which the state could set up a procedure for determining the navigability of rivers and watercourses in Arizona. In response to this decision, the Legislature established the Arizona Navigable Stream Adjudication Commission and enacted the statutes pertaining to its

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

operation. 1992 Arizona Session Laws, Chapter 297 (1992 Act). The charge given to the Commission by the 1992 Act was to conduct full evidentiary public hearings across the state and to adjudicate the State's claims to ownership of lands in the beds of watercourses. *See generally* former A.R.S. §§ 37-1122 to -1128.

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

The Commission began to take evidence on certain watercourses during the fall of 1993 and spring of 1994. In light of perceived difficulties with the 1992 Act, the Legislature revisited this issue during the 1994 session and amended the underlying legislation. *See* 1994 Arizona Session Laws, ch. 278 ("1994 Act"). Among other things, the 1994 Act provided that the Commission would make a recommendation to the Legislature, which would then hold additional hearings and make a final determination of navigability by passing a statute with respect to each watercourse. The 1994 Act also established certain presumptions of non-navigability and exclusions of some types of evidence.

Based upon the 1994 Act, the Commission went forth with its job of compiling evidence and making a determination of whether each watercourse in the state was navigable as of February 14, 1912. The Arizona State Land Department issued technical reports on each watercourse, and numerous private parties and public agencies submitted additional evidence in favor of or opposed to navigability for particular watercourses. *See Defenders of Wildlife v. Hull*, 199 Ariz. 411, 416, 18 P.3d 722, 727 (App. 2001). The Commission reviewed the evidence and issued reports on each watercourse,

which were transmitted to the Legislature. The Legislature then enacted legislation relating to the navigability of each specific watercourse. The Court of Appeals struck down that legislation in its *Hull* decision, finding that the Legislature had not applied the proper standards of navigability. *Id.* 199 Ariz. at 427-28, 18 P.2d at 738-39.

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

IV. Issues Presented

The applicable Arizona statutes state that the Commission has jurisdiction to determine which, if any, Arizona watercourses were "navigable" on February 14, 1912 and for any watercourses determined to be navigable, to identify the public trust values. A.R.S. § 37-1123. A.R.S. § 37-1123A provides as follows:

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

1. Based only on evidence of navigability or nonnavigability, determine which watercourses were not navigable as of February 14, 1912.
2. Based only on evidence of navigability or nonnavigability, determine which watercourses were navigable as of February 14, 1912.
3. In a separate, subsequent proceeding pursuant to section 37-1128, subsection B, consider evidence of public trust values and then identify and make a public report of any public trust values that are now associated with the navigable watercourses.

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

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

its determination confirming the watercourse was navigable. If the preponderance of the evidence fails to establish that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was nonnavigable.

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

Thus, in compliance with the statutes, the Commission is required to collect evidence, hold hearings, and determine which watercourses in existence on February 14, 1912, were navigable or nonnavigable. This report pertains to the Hassayampa River from its headwaters to its confluence with the Gila River. In the hearings to which this report pertains, the Commission considered all of the available historical and scientific data and information, documents and other evidence relating to the issue of navigability of the Hassayampa River from its headwaters to its confluence with the Gila River, in Yavapai and Maricopa Counties, Arizona as of February 14, 1912.

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

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

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

The 2001 *Hull* court, although finding certain defects in specific aspects of the statute then applicable, expressly recognized that a determination of “navigability” was

essential to the State having any “public trust” ownership claims to lands in the bed of a particular watercourse:

The concept of navigability is “essentially intertwined” with public trust discussions and “[t]he navigability question often resolves whether any public trust interest exists in the resource at all.” Tracy Dickman Zobenica, *The Public Trust Doctrine in Arizona’s Streambeds*, 38 Ariz. L. Rev. 1053, 1058 (1996). In practical terms, this means that **before a state has a recognized public trust interest in its watercourse bedlands, it first must be determined whether the land was acquired through the equal footing doctrine. However, for bedlands to pass to a state on equal footing grounds, the watercourse overlying the land must have been “navigable” on the day that the state entered the union.**

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

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

V. Burden of Proof

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

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

its determination confirming that the watercourse was navigable. If the preponderance of the evidence fails to establish that the watercourse was navigable, the commission shall issue its determination confirming that the watercourse was nonnavigable.

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

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

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

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

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

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

VI. Standard for Determining Navigability

The statutes defines a navigable watercourse as follows:

"Navigable" or "navigable watercourse" means a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

A.R.S. § 37-1101(5).

The foregoing statutory definition is taken almost verbatim from the U.S. Supreme Court decision in *The Daniel Ball*, 77 U.S. (10 Wall) 557, 19 L.Ed. 999 (1870), which is considered by most authorities as the best statement of navigability for title purposes.⁴ In its decision, the Supreme Court stated:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for

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

⁴ The *Daniel Ball* was actually an admiralty case, but the U.S. Supreme Court adopted its definition of navigability in title and equal footing cases. *Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2 279 (1971) and *United States v. Oregon*, 295 U.S. 1, 55 S.Ct. 610, 70 L.Ed.2 1263 (1935).

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.

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

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

270 U.S. at 55-56.

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

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

5. "Navigable" or "navigable watercourse" means a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

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

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

6. "Ordinary high watermark" means the line on the banks of a watercourse established by fluctuations of water and indicated by physical characteristics, such as a clear natural line impressed on the bank, shelving, changes in the character of the soil, destruction of terrestrial vegetation or the presence of litter and debris, or by other appropriate

means that consider the characteristics of the surrounding areas. Ordinary high watermark does not mean the line reached by unusual floods.

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

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

VII. Evidence Received and Considered by the Commission

Pursuant to A.R.S. § 37-1123, and other provisions of Title 37, Chapter 7, Arizona Revised Statutes, the Commission received, compiled, reviewed and studied evidence and records regarding the navigability and nonnavigability of the Hassayampa River from its headwaters in the Bradshaw Mountains to its confluence with the Gila River in Yavapai and Maricopa Counties, Arizona. Evidence consisting of studies, written documents, newspapers and other historical accounts, pictures and testimony were submitted. There were a number of separate documentary filings, the most comprehensive of which was the Final Report of the Arizona Stream Navigability Study for the Hassayampa River prepared by CH2M Hill; SWCA Environmental Consultants; Arizona Geological Survey and revised by JE Fuller/Hydrology & Geomorphology, Inc. dated June 2004 submitted by the Arizona State Land Department. The Maricopa County Department of Transportation also submitted a report on the Hassayampa River corridor and the Friends of Arizona Rivers-Timothy J. Flood submitted a letter with exhibits regarding a boating trip on the Hassayampa River. The Arizona Center for Law in the Public Interest also submitted a letter/brief on its opinions regarding navigability on all of the rivers of Arizona. The Small and Minor Watercourse Final Report and the Final Report on the Three County Pilot Study and letters from Candace S. Hughes and Nancy Orr were submitted and considered. The list of all evidence and documents submitted is attached as Exhibit F.

A public hearing was held on March 29, 2005 at Prescott, Yavapai County, Arizona, and on September 21, 2005 at Phoenix, Maricopa County, Arizona for the public to present testimony and evidence on the issue of navigability of the Hassayampa River. A number of individuals appeared at these hearings in Prescott and Phoenix and gave testimony. A public hearing was also held on April 11, 2006 at Phoenix, Arizona to consider the evidence submitted and the post-hearing memoranda. The minutes of these hearings are attached hereto as Exhibit "D."

A. Prehistoric Conditions on the Hassayampa Watershed

The archaeological evidence accumulated on the Hassayampa River watershed indicates that it was sparsely occupied during early prehistoric times. For the most part, the cultural history of the Hassayampa River Valley is based on what is known of the area surrounding it. This is due in part to the scant amount of archaeological work conducted within the valley itself. However, There are some major villages, mounds and other sites which date from the 800 to 1400 A.D., which have been excavated.

There is no evidence of Paleo-Indian occupation (10,000 to 8,000 B.C.) probably because such sites have not been discovered. There are Paleo-Indian artifacts in the surrounding area so it is only logical that these early Paleo-Indian would have used the Hassayampa River Valley as a highway of movement from one area to another, as well as for hunting. The earliest evidence of human occupation dates from the archaic period (8,000 B.C. to 1 A.D.).⁵ One archaic site was found near the river on the southwest slope of the Hieroglyphic Mountains and was identified by lithic scatters where the archaic people made tools. It is felt that the archaic population used the river valley on a seasonal basis for exploitation of native plants and animals. The site described above was probably a base camp that was used for processing wild plants

⁵ The Paleo-Indian period is generally recognized to be between 10,000 B.C. or 12,000 B.P. (before present) to approximately 8,000 B.C.. The Paleo-Indian period was followed the archaic period 8,000 B.C. to 1 A.D. when the classical cultures called Anasazi, Hohokam, Sinagua and Mogollon began to develop.

and small animals with the use of manos, metates and roasting pits. Also, isolated projectile points dating from the archaic period and lithic scatters have been found in other areas along the Hassayampa watershed. In the Harquahala Valley late archaic sites (post-1500 B.C.) have been located indicating temporary camps used during seasonal rounds of hunting and plant gathering. Also, isolated projectile points in the Bradshaw Mountains to the east of the Hassayampa River suggest occupation at least on a temporary basis during late archaic, between 2000 B.C. and 1 A.D.

Between 850 A.D. and 1300 A.D. a more sedentary culture known as the Prescott Culture developed in the area around the town of Prescott and north of the head waters of the Hassayampa River. This culture has been identified by the particular pottery type known as Prescott Gray Ware and other traits such as pit houses that later changed to surface masonry pueblos with the presence of some agriculture and occurrence of hilltop enclosures described as forts. The Prescott Culture is not categorized by archaeologists as being a part of any of the major cultures in the area, such as the Hohokam, Sinagua or Anasazi. It probably was a group of people related to these others that settled in the area and developed their own style of pottery. They may have been an offshoot of the Anasazi culture that developed to the north near Kayenta. They clearly traded with the Hohokam since the buff colored Hohokam pottery is found in the area which was probably brought up the river corridor, as well as Sinagua pottery which was brought over from the Verde Valley.

A number of major ruins have been identified with the Prescott Culture and have been excavated in recent times. There is some archaeological evidence of agriculture along the upper reaches of the river because of terraced gardens that subsequently eroded. These terraces suggest that flood irrigation may have occurred there. The Prescott culture has been divided into two phases by archaeologists. The Prescott phase of this culture is estimated to have occurred between A.D. 850 and 1025. A second

phase, called the Chino phase occurred from A.D. 1025 to 1300. The Prescott phase is characterized by disbursed settlement pattern consisting of shallow pithouses and masonry forts sites, and pottery from the Kayenta Anasazi area, as well as some Hohokam red on buff and Sinagua pottery. The Chino phase, which came later, is characterized by pueblos and masonry forts and having more population concentration. The Hohokam who came up the Verde River Valley and mingled with the Sinagua, which came down from the Flagstaff area, quite obviously spilled over into the Prescott area and influenced the development of the Prescott culture. The lower reaches of the Hassayampa River were influenced more by the Hohokam culture since the area was closer to the Gila and Salt River Valleys, the Hohokam homeland. Following A.D. 1300, the Prescott region and the Hohokam periphery in the south of the Hassayampa River Valley appears to have been abandoned.

Some time later, after A.D. 1450, the area was re-occupied by Yavapai and other historically documented hunter/gatherer groups who probably developed from the Cerbat culture of the Colorado River Valley. While there is some evidence of irrigation agriculture in the lower Hassayampa River Valley, it was relatively sparse, probably because of the low annual runoff carried by the Hassayampa River. Also, floods would have washed out diversion dams and ditches. The use and occupation of the lower reach of the river was probably seasonal or temporary. One large, permanent site, Allah Springs, which was just south of Wickenburg had an extensive system of irrigation canals and was no doubt influenced substantially by the Hohokam. Maize or corn and beans seemed to have been the major crops cultivated by these people. Climatic conditions prevailed historically which were very similar to the period around statehood. There is no evidence of prehistoric use of the Hassayampa River either by the Prescott Culture or the Hohokam on the lower reaches of the river for commerce or water travel.

B. Historical Development of the Hassayampa River Valley

The Hassayampa watershed was neither explored nor occupied during the Spanish and Mexican era. There is no record of any Spanish expeditions coming into the area although the Spaniards explored many other rivers in Arizona. No missions or presidios were built. After Mexican independence in 1821, the Mexican government having internal disputes in Mexico showed little or no interest in the Hassayampa River area.

The Hassayampa River also seems not to have attracted the attention of trappers in the 1820s and 1830s as did other rivers in Arizona, probably due to its low rate of flow and thus lack of beavers. The Hassayampa River was not on any of the major trails crossing the state and the area was bypassed by the 49ers on their way to California. One historian hypothesizes that Joseph Reddeford Walker might have visited the river in the 1820s in the company of Kit Carson and Pauline Weaver. This theory is grounded solely on Walker and Weaver's later prospecting of the Hassayampa River area in 1863.

The earliest documentation of visitors to the Hassayampa River basin dates to 1863 when two parties of prospectors explored and investigated the stream. The first was led by mountain man Joseph Walker who was accompanied by Daniel Ellis Connor, who later wrote of his adventures. The Walker party was the first group to use the name "Hassayampa," which, according to Connor, was "pronounced by the Indians as "Haviamp." The Walker party traveled all the way up the Hassayampa River from its mouth to its headwaters. Here the Walker party began prospecting in earnest and had enough success that on May 10, 1863, the miners held a meeting, elected a governor of the district and staked their claims and they began constructing some improvements. The Hassayampa River received its correct spelling at that time. The mining district did not last. Within a year or two after the Walker party established the district the

Hassayampa in the vicinity of the Walker camp and corral was deserted for months at a time and was only known to be inhabited occasionally by straggling newcomers who would take temporary quarters in the old deserted cabin along the creek while engaged in prospecting the hills for quartz mines.

The second group of prospectors along the Hassayampa River in 1863 was led by mountain man Pauline Weaver and a miner named A.H. Peeples. This group included Henry Wickenburg, who in October of 1863 discovered the deposit eight miles west of the Hassayampa River which became the Vulture Mine. Gold was discovered on the Hassayampa River basin in the adjacent mountains in 1863 leading to small permanent settlements in the area. In 1864, Walnut Grove was settled and even proposed as the capital site by the first territorial legislature. The waters of the Hassayampa River were used primarily as a source of water for milling of ore from the mines in the upper Hassayampa River basin and for the Vulture Mine near Wickenburg. Later the waters were used for irrigation agriculture which was practiced primarily above Wickenburg.

Smith's Mill was established by W.C. Smith as a mill for the ore from the Vulture Mine and other mines. A post office was established there in 1874. In 1879, James Seymour and J.C. Cusenberry of the central Arizona Mining Company bought the Vulture Mine. They established the town of Seymour and an associated mill on the Hassayampa River two miles below Smith's Mill. Water from the Hassayampa River was used in this mill and piped 14 miles to the Vulture Mine. Wagoner on Huss Creek a tributary to the Hassayampa was established as a farming community. Its post office was established in 1893.

In 1886, the Walnut Grove Water Storage Company was organized and began construction of the Walnut Grove Dam. The reservoir behind the dam was to provide water for the hydraulic mining and some irrigation. As originally planned, a flume would have carrier the water 20 miles downstream on the Hassayampa River. In

practice however, the water was released into the stream bed of the river as needed and a diversion dam was constructed some 6 miles above the claims which was to provide water via short flume. A flood in 1889 filled Walnut Grove reservoir but destroyed other minor dams and catchments along the river. On February 22, 1890, a severe flood caused the Walnut Grove Dam to collapse which resulted in serious flooding and destruction of the mill town of Seymour and many farms. The number of people who lost their lives in the dam collapse and resulting flood damage was estimated between 70 and 129. In the days following the flood, workmen at the dam construction site made coffins and floated them (empty) to sites down the river in order that those who had died in the flood could be buried. The dam was not rebuilt.

The early miners stated that the river was dry along most of its length for most of the year. For about 4 miles above the present day Wickenburg, it may have been perennial and below Wickenburg it was a swamp. The lower Hassayampa was almost always a dry sand bed while the canyons on the upper Hassayampa were jammed with boulders. When wet, the river could be treacherous with quicksand. In 1867 General James F. Rusling traveled from Fort McDowell on the lower Verde to Wickenburg by way of roads that ran along the Salt River, then cross-country to White Tanks and up the Hassayampa River. He wrote that the Hassayampa ordinarily is a dry river like the Agua Fria, but we found 3 feet or more of water in it and bottomless quicksand nearly everywhere. The road, then the only road from southern to northern Arizona, ran directly up the Hassayampa for 12 or 15 miles, using the riverbed as a roadway. It was the only practicable route through the mountains, and nobody had ventured through for a month or more. The upper Hassayampa itself flows through a wild and rocky canyon with high precipitous walls on each side.

Between 1867 and 1869 newspapers repeatedly stated that Wickenburg suffered from malaria, the source of which was the swamp downstream. The *Weekly Arizona*

Miner of October 9, 1869, said that Wickenburg would, today, contain several thousand inhabitants and be the most important point in the territory, but for its sickly climate. In February of 1872, army paymaster T.H. Stanton traveled up the Hassayampa River following the old Walker route. He described the river as follows:

"We followed the bed of Hassayampa Creek several miles before coming to water. The stream, which is a small one, rises and sinks in many places, but just below this ranch it sinks under the ground and is seen no more.

W.C. Smith, who had built the mill to deliver water to the mines, described the river as follows:

* * *

The Hassayampa River is characterized by cycles of alternating flash floods and searing drought. Unfortunately the Hassayampa River was bone dry during most of the year as floods from seasonal rains quickly soaked into the deep outwash of the desert.

In 1888, the Buckeye Canal, which was fed by waters from the Gila and Salt Rivers, was extended across the Hassayampa River near its confluence with the Gila by simply building a sand dam across the narrow dry stream bed and continuing the canal on the opposite side. This crossing was described as follows:

The water was to be carried across the Hassayampa River by means of a sand dam built across the river four or five feet high. The water ran in above the dam until the dam was full, and then it ran out the other side. This means of carrying the water across the river was maintained for many years although the dam was washed out every time a little flush of water came down the Hassayampa River.

Even to this day there has been no great population increase in the Hassayampa River watershed. In the early days mining was a big industry but most of the mines had pretty well played out and were closed by statehood. Some farming was carried on in areas that could be irrigated but even the farms in the vicinity of Wickenburg were not sufficient to provide all of the foodstuffs for the people living there. Ranching has become the major industry in the area supplemented by some farming and orchards. The disaster of the Walnut Grove dam, which broke in 1890, largely destroyed most of the farm land and irrigation ditches although some were rebuilt around the turn of the

century. There are no accounts of any boating or use of the Hassayampa River for travel during the historical era. Boats apparently were used on Walnut Grove reservoir for the few years it was in existence before the dam collapsed in 1890. Also, there are some records of fishing being accomplished on that reservoir.

Transportation in the area both at statehood and prior thereto was by horse, mule, wagon and stagecoach. The first roads to Wickenburg and on up to the headwaters of the Hassayampa River were constructed in the river bed which was normally dry or had only a shallow flow upstream to the Walnut Grove area. A stage stop at Wickenburg was established in 1865. By 1868 Wickenburg was served by the California and Arizona Stage Company which operated the line from La Paz and Ehrenburg through Wickenburg to Prescott and another line from Wickenburg to Phoenix; also, a wagon road from Wickenburg through Peeples Valley to the Ehrenburg Prescott road.

A railroad was constructed from Phoenix up through Prescott in the latter part of the 19th Century which did provide some alternate transportation. In 1881 a post office was established at Hassayampa at a small settlement near the mouth of the river and the Santa Fe, Prescott and Phoenix railroad was complete to Wickenburg in 1895. Other than the railroad to Prescott, all transportation was by horse and buggy, mule or stagecoach or wagon until the road system was improved when automobiles began to be used.

Historical descriptions of the river suggest that the upper Hassayampa for several miles upstream of Wickenburg to the headwaters was perennial and intermittent and that the lower river was normally dry. Even the perennial reaches were described as shallow with some or all of the flow disappearing into the streambed during the day and reappearing at night. The lower Hassayampa is ephemeral flowing only during precipitation and floods. There was some evidence submitted of an

occasional use that the river reach of eight miles above Wickenburg for recreational boating by kayak but only during periods of heavy precipitation. The river was never used for transportation by boat or as a highway for commerce.

C. Geology, Geomorphology and Hydrology

Arizona is comprised of two great physiographic provinces – the Colorado plateau province in the north and the basin and range province in the south with a transition zone or central mountain province dividing them. The Hassayampa River is divided into two principal reaches for geological consideration. The upper Hassayampa River originates and flows within the central mountain region and the lower Hassayampa River reach flows within the northern limit of the basin and range province.

The central mountain region is characterized by mountains of Precambrian igneous and metamorphic rocks, capped by remnants of Quaternary and Late Tertiary volcanoes. Regional uplift of the entire state, including the Central Mountains, is thought to have occurred during the Laramide Orogeny in late Cretaceous/early Tertiary period, approximately 65 million years ago. The mountain ranges in the Hassayampa River basin include the Bradshaws, Weaver, Date Creek, Vulture and Hieroglyphic Mountains. These mountains generally experience longer periods of erosion resulting in generally lower elevations than mountains in the other two provinces. These ranges consist primarily of Precambrian, metamorphic and igneous rock with more recent volcanoes. The Vulture Mountains however are formed of Cretaceous-aged rhyolites, particularly in the reach traversed by the canyons of the Hassayampa River.

South of the Vulture Mountains, the river enters the Basin and Range Province. The Basin and Range Disturbance (8-15 million years ago) was a most recent tectonic event to affect Arizona. This event consisted of tensional stress resulting in steep,

normal block faulting which formed a northwest-southeast trending series of alternating basins and mountain blocks. Uplift was accompanied by extensive erosion and deep filling of basins with alluvium. Alluvium shed from the eroding mountain blocks formed interconnected alluvial fans which apron the mountain fronts and became dissected as the influence of tectonism waned and climatic influences became more prominent. Basin and Range mountains in the Hassayampa River watershed include the White Tanks and Belmont Mountains. The White Tanks mountains are a metamorphic core complex consisting of Precambrian granitic gneiss capped by Cretaceous-aged granites and crystalline rocks. The Belmont Mountains, which more directly impact the geology of the Hassayampa River, consist of older Precambrian granites capped by Cretaceous-aged rhyolitic and andesitic dikes and plugs.

Along most of the upper Hassayampa River the crystalline bedrock basement is only thinly covered by alluvium. Where these rocks are fractured, they may supply ground water to the river via springs and seeps. Elsewhere, bedrock rises force the alluvium to deliver water to the surface. More significant alluvial deposits occur in two basins, the Hassayampa Plain to the south, and an unnamed basin immediately upstream of Wickenburg and north of the Vulture Mountains. Water levels vary with depth of alluvium, from several feet above the ground surface near Wagoner, to over 1,000 feet on the older geomorphic surfaces distal from the river. Available data suggest little or no regional change in ground water elevations, though short-term fluctuations occur in response to periods of stream flow or pumping.

The bedrock geology exerts the strongest control on stream flow and channel geomorphology in the upper Hassayampa River. Much of it flows through canyons which have boulders in them that would be significant impediments to boating even if there was enough water. In the lower Hassayampa River, the channel geomorphology is more strongly influenced by climatic and tectonic effects on the deposition of

alluvium during recent geologic history. This reach of the river is mostly dry except during precipitation when there can be some rather large floods. The early surveyors who laid out the sections, townships and ranges between 1866 and 1917 did note water depending on the time of year in the upper Hassayampa River reach, particularly from the Hassayampa Preserve canyon up to Wickenburg, but while the river might more than one chain wide, it was not very deep, probably six inches at most locations, so it had no possibility of providing a highway for transportation.

Below the Box Canyon where the river flows into the Hassayampa Plain, there is generally no water at all, except when heavy rains provide it. When the lower Hassayampa River does flow, it is a braided, straight stream sometimes quite wide but having a very shallow depth. In summarizing the channel conditions, the observers from the early times to statehood reported that the upper Hassayampa River is characterized by narrow canyons, shallow bedrock, dense riparian vegetation and reaches of perennial flow. Short, broader reaches of alluvial fill occur upstream of Wagoner and through Wickenburg. The river pattern varies from straight to slightly sinuous. The lower Hassayampa River is a braided stream with a bed of up to one mile in width narrowing in the upstream direction. Bed sediments consist of coarse sands and gravels and throughout the reach, channel bars and topographically low islands exist which are usually vegetated with desert lowland species such as creosote, catclaw, and small trees such as palo verde and mesquite. The low flow channel shifts during floods and high flow through bank erosion and in-channel stream capture.

Springs and groundwater discharge supply sufficient flow to maintain perennial and intermittent flow from the headwaters through the Box Canyon several miles north of Wickenburg. The stream becomes ephemeral near where it exits Box Canyon and flows south passed Wickenburg and into the Nature Conservancy's Hassayampa River Preserve. The headwaters of the Hassayampa River are fed by springs on the slopes of

Mount Union, the discharge rate of which has been described by some as being measured by the spoonful. The springs and groundwater discharge, as well as snow melt, supply sufficient water to maintain perennial and intermittent flow through Box Canyon several miles north of Wickenburg. The stream becomes ephemeral where it exits Box Canyon. Shallow bedrock near the Nature Conservancy's Hassayampa River Preserve causes perennial flow through that reach. The flow returns underground near the point where the river exits HRP Canyon. Downstream from the Hassayampa River Preserve, the river has a large braided channel that flows only after significant rainfall. The highest average runoff occurs in the months between January and April, which is caused by snowmelt and precipitation from cyclonic storms originating over the Pacific Ocean. Such storms can generate significant flow volumes and create floods. A second period of above-average runoff occurs in the summer monsoon season, with rainfall caused by tropical moisture entering Arizona from the south. The monsoon storms produce more localized, intense rain and do produce flash floods with high peak flow but relatively low flow volumes.

Only limited data is available to describe the stream flow prior to and at the time of Arizona's statehood. The gauge stations established by the geological survey were never operated for a long period of time and the actual flow of the Hassayampa River impeded information being collected. Between October 1910 and October 1912, a gauge station located 4½ miles downstream of Wickenburg recorded discharges of 4 to 5 cfs and while the stream had a width of 6 to 7 feet, the depth was only about 5 inches. This gauge did show an 8.5 cfs in 1911, although a flood in August of that year took the gauge out. The gauge station at Walnut Grove, which was in operation from 1916 to 1928, recorded an average annual discharge of 42 cfs. Likewise, the gauge station at Box Canyon, between 1916 and 1982 recorded the same amount. The gauge station at

Morristown, which operated between 1939 and 1946, recorded an annual average of 18 cfs. Other short-term operated gauge stations showed similar figures.

On the other hand, 100-year floods, as recorded by FEMA in 1991, showed a flow at the confluence of the Hassayampa with the Gila River at 72,966 cfs and at Wickenburg, 71,000 cfs. Other large floods recorded during the 1970's and 1980's were recorded at between 20,000 and 58,000 cfs. These floods could be very damaging to life and property. Thus, the historical records of stream flow on the Hassayampa River, excluding major floods, are described as perennial and intermittent, with minor flows in the upper reaches and normally dry conditions in the lower reaches. There are no historical accounts of boating on the Hassayampa River except on the Walnut Grove Reservoir for the few years it was in existence. The geomorphology and the hydrology of the Hassayampa River indicate it was not susceptible for use as a highway of commerce and cannot be considered navigable or susceptible to navigability as of February 14, 1912.

VIII. Findings and Determination

The Commission conducted a particularized assessment of equal footing claims the State of Arizona might have to the bed and banks, up to the high-water mark, of the Hassayampa River and, based on all of the historical and scientific data and information, documents, and other evidence produced, finds that the Hassayampa River from its headwaters to its confluence with the Gila River, was not used or susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water as of February 14, 1912.

The Commission also finds that the Hassayampa River, while considered to be a perennial stream, has an almost insignificant flow during the dry seasons of the year.

As of February 14, 1912 and currently, it flows/flowed primarily in direct response to precipitation and snow melt.

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

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

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

In view of the foregoing, the Commission, pursuant to A.R.S. § 37-1128A, finds and determines that the Hassayampa River in Yavapai and Maricopa Counties, Arizona, was not navigable or susceptible of navigability as of February 14, 1912.

DATED this 17 day of November, 2009.




Earl Eisenhower, Chair



Dolly Echeverria, Vice Chair 11/18/09



James Henness, Member



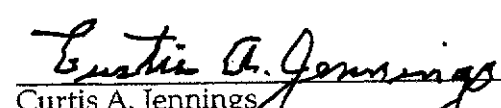
Cecil Miller, Member

Jay Brashear, Member
Deceased September 15, 2007

STAFF MEMBERS:



George Mehnert
Executive Director



Curtis A. Jennings
Legal Counsel to the Commission

EXHIBIT A

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 State of Arizona

Navigable Stream Adjudication Commission
 Pursuant to A.R.S. §37-1101, et. seq., the Arizona
 Navigable Stream Adjudication Commission (ANSAC) is planning to hold watercourse navigability hearings regarding the Agua Fria River, Burro Creek, the Hassayampa River, the Santa Maria River, and the Verde River in Yavapai County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-1123 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or nonnavigability of the Agua Fria River, Burro Creek, the Hassayampa River, the Santa Maria River, and the Verde River.

Interested parties are requested to file all documentary and other physical evidence they propose to submit to ANSAC by March 29, 2005.

All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC offices during regular office hours.

Pursuant to A.R.S. §37-1101, et. seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is also planning to hold a watercourse navigability hearing regarding all of the small and minor watercourses in Yavapai County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-11

Publication

Issues

Starts

Ends

Courier 3 02/10/05 02/24/05
 Chino Valley
 Prescott Val

02/10/05
 02/17/05
 02/24/05

Handwritten signature

THE ARIZONA REPUBLIC

STATEMENT OF INTENT
 State of Arizona
 Navigable Stream
 Adjudication Commission
 Pursuant to A.R.S. 837-1101, et. seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold watercourse navigability hearings regarding the Agua Fria River, and the Hassayampa River, in Maricopa County, Arizona. Notice is hereby given, pursuant to A.R.S. 837-1123 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or nonnavigability of the Agua Fria River and the Hassayampa River in Maricopa County. Interested parties are requested to file all documentary and other physical evidence they propose to submit to ANSAC by September 29, 2005. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC offices during regular office hours. An unbound original plus seven bound copies of documentary evidence is to be submitted. ANSAC offices are located at 1700 West Washington, Room 304, Phoenix, AZ 85007. The telephone number is (602) 542-9214. The web site address is <http://www.azstreams.com>. The e-mail address is streams@mindspring.com. Individuals with disabilities who need a reasonable accommodation to communicate evidence to ANSAC, or who require this information in an alternate format may contact the ANSAC office at (602) 542-9214 to make their needs known.

05-23 July 21, 28; August 4, 2005

STATE OF ARIZONA }
 COUNTY OF MARICOPA } SS.

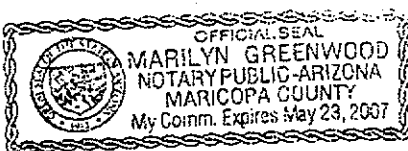
Diana Chavez, being first duly sworn, upon oath deposes and says: That she is a legal advertising representative of the Arizona Business Gazette, a newspaper of general circulation in the county of Maricopa, State of Arizona, published at Phoenix, Arizona, by Phoenix Newspapers Inc., which also publishes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

The Arizona Republic

JULY 21, 28; AUGUST 4, 2005

Handwritten signature

Sworn to before me this
 4TH day of
 August A.D. 2005



Handwritten signature: Marilyn Greenwood
 Notary Public

EXHIBIT B

AFFIDAVIT OF PUBLICATION

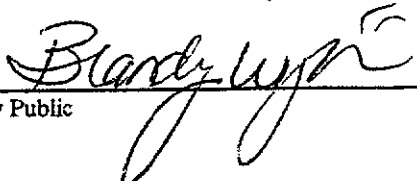
STATE OF ARIZONA)
County of Yavapai) ss.

I, **Aileen A. Kemper**, being first duly sworn on her oath says:
That she is the **Legal Clerk** of **PRESCOTT NEWSPAPERS, INC.**, an Arizona corporation, which owns and publishes the **COURIER**, a Daily Newspaper published in the City of Prescott, County of Yavapai that the notice attached hereto, namely,

**ANSAC
NOTICE OF PUBLIC HEARING
ADVERTISING CORRECTION**

has, to the personal knowledge of affidavit, been published in the news paper aforesaid, according to law, on 4 day of **March, 2005** to 4 day of **March, 2005** both inclusive without change, interruption or omission, amounting in all 1 insertions, made on the following dates:
March 4, 2005

By: 
Dated this 4 Day of **March, 2005**

By: 
Notary Public

My commission expires:



Arizona Navigable Stream Adjudication Commission Advertising Correction
NOTICE OF PUBLIC HEARING
State of Arizona Navigable Stream Adjudication Commission Pursuant to A.R.S. § 47-1129 (A) notice is hereby given that the Navigable Stream Adjudication Commission will hold public hearings to receive physical evidence and testimony relating to the navigability, riparian liability of all watercourses in Yavapai County. The hearings will be held in Yavapai County on March 29, 2005 beginning at 12:00 p.m. in a room established by the chair in the Yavapai County Supervisor's Conference Room located at 1015 Fair Street, Prescott, Arizona, 86305. The following are presently the only hearings scheduled: The Agua Fria River, Burno Creek, the Hassayampa River, the Santa Maria River, the Verde River, and all of the small and minor watercourses in Yavapai County.
1TC PUB March 4, 2005 ad 4401

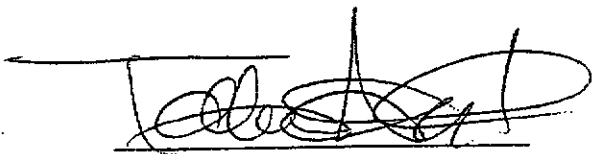
THE ARIZONA REPUBLIC

STATE OF ARIZONA }
COUNTY OF MARICOPA } SS.

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

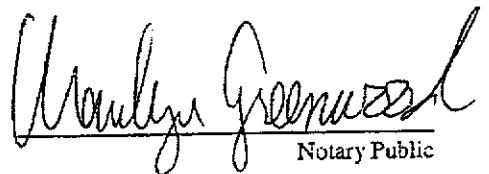
The Arizona Republic

March 4, 2005



Sworn to before me this
4TH day of
March A.D. 2005




Notary Public

NOTICE OF PUBLIC HEARING
State of Arizona
Navigable Stream
Adjudication Commission
Pursuant to A.R.S. § 45-7126
(A) notice is hereby given that the Navigable Stream Adjudication Commission will hold public hearings to receive physical evidence and testimony relating to the navigability of all watercourses in Yavapai County. The hearings will be held in Yavapai County on March 23, 2005 beginning at 12:00 p.m. in an order established by the court in the Yavapai County Supervisory Conference room located at 1015 Fair Street, Prescott, Arizona 86305. The following are the only hearings scheduled:
The Agua Fria River, Surro Creek, the Hassayampa River, the Santa Bear River, the Verde River, and all of the small and minor watercourses in Yavapai County.
05121-March 4, 2005

Ho. 10/20/05

THE ARIZONA REPUBLIC

STATE OF ARIZONA }
COUNTY OF MARICOPA } SS.

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

The Arizona Republic

August 18, 2005

Diana Chavez

Sworn to before me this
18TH day of
August A.D. 2005



Marilyn Greenwood
Notary Public

NOTICE OF PUBLIC HEARING
State of Arizona
Navigable Stream
Adjudication Commission
Pursuant to A.R.S. § 37-1126 (A), notice is hereby given that the Navigable Stream Adjudication Commission will hold public hearings to receive physical evidence and testimony relating to the navigability or non-navigability of the Agua Fria River and the Hassayampa River. The hearings will be held in Maricopa County on September 21, 2005 beginning at 10:00 a.m. in an order established by the chair in the First Floor Conference Room located at 1700 West Washington, Phoenix, Arizona. The following are presently the only hearings scheduled.
The Agua Fria River and the Hassayampa River.
Interested parties may submit evidence to the commission office prior to the hearing and/or during the appropriate public hearing. The commission will conduct its hearings informally without adherence to judicial rules of procedure or evidence.
Evidence submitted in advance of the hearing will be available for public inspection during regular Commission office hours of 8:00 a.m. to 5:00 p.m., Monday thru Friday, except on holidays. The commission office is located at 1700 West Washington Street, Room 334, Phoenix, Arizona 85007. Please call first to review evidence at (602) 542-9214.
Individuals with disabilities who need a reasonable accommodation to communicate evidence to the commission, or who require this information in an alternate format may contact the commission office at (602) 542-9214 to make their needs known.
George Melaret, Executive Director, August 16, 2005.
05535-August 18, 2005.



JANET NAPOLITANO
Governor

STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION
1700 West Washington, Room 404, Phoenix, Arizona 85007
Phone (602) 542-9214 FAX (602) 542-9220

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

GEORGE MEHNERT
Executive Director

AGENDA AND NOTICE OF PUBLIC MEETING
TO BE HELD APRIL 11, 2006 AT 2:00 P.M.
PHOENIX, ARIZONA

Pursuant to A.R.S. § 38-431.02, notice is hereby given to the members of the Navigable Stream Adjudication Commission and to the general public that the Navigable Stream Adjudication Commission will hold a meeting open to the public on April 11, 2006, at 2:00 P.M. in the first floor conference room 1700 West Washington, Phoenix, Arizona 85007.

Pursuant to A.R.S. § 38-431.03(A)(3), the Navigable Stream Adjudication Commission may vote to go into Executive Session for purposes of obtaining legal advice from the Commission's attorney on any matter listed on the agenda, or pursuant to A.R.S. § 38-431.03(A) or for discussion of records exempt by law from public inspection on any matter listed on the agenda.

Title 2 of the American with Disabilities Act (ADA) prohibits the Commission from discriminating on the basis of disability in its public meetings. Individuals with disabilities who need a reasonable accommodation to attend or communicate at the Commission's meeting, or who require this information in alternate format, may contact George Mehnert at (602) 542-9214 to make their needs known. Requests should be made as soon as possible so the Commission will have sufficient time to respond. For those individuals who have a hearing impairment, this Commission can be reached through the Arizona Relay Service at 1-800-367-8939 (TTY) or 1-800-842-4681 (Voice). The agenda for the meeting is as follows:

1. CALL TO ORDER.
2. Roll Call.
3. Approval of Minutes (discussion and action). Minutes of November 16, 2005, November 17, 2005, and January 18, 2006 as joint minutes.
4. Determination of the navigability of the small and minor watercourses in Maricopa County, 05-014-NAV (discussion and action).
5. Determination of the navigability of the Agua Fria River 05-062-NAV (discussion and action).
6. Determination of the navigability of the Hassayampa River 05-004-NAV (discussion and action).
7. Call for Public Comment (comment sheets).
(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)
8. Future agenda items and establishment of future hearings and other meetings.
9. ADJOURNMENT.

The chair reserves the right to alter the order of the agenda.

Dated this 15th day of April, 2006, George Mehnert, Director, Navigable Stream Adjudication Commission

EXHIBIT C

Post Hearing Memorandums

Hearing No. 05-004-NAV

Page No.

1

Arizona Navigable Stream Adjudication Commission

**Hassayampa River
Maricopa and Yavapai Counties**

Entry Number	Date	Entry	Entry By
1	10/21/05	Opening Memorandum - Arizona Center for Law in the Public Interest, Joy Herr-Cardillo.	George Mehnert
2	10/25/05	Opening Memorandum - Salt River Project, Mark McGinnis	George Mehnert
3	11/16/05	Responsive Memorandum - Salt River Project, Mark McGinnis	George Mehnert

EXHIBIT D



JANET NAPOLITANO
Governor

STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION
1700 West Washington, Room 304, Phoenix, Arizona 85007
Phone (602) 542-9214 FAX (602) 542-9220

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

GEORGE MEHNERT
Executive Director

MEETING MINUTES
Prescott, Arizona, March 29, 2005

COMMISSION MEMBERS PRESENT

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

COMMISSION MEMBERS ABSENT

None

STAFF PRESENT

George Mehnert, and Commission Legal Counsel Curtis Jennings.

1. CALL TO ORDER.

Chair Eisenhower called the meeting to order at approximately 12:23 p.m.

2. ROLL CALL.

See above.

3. APPROVAL OF MINUTES (discussion and action).

A. January 24, 2005, Yuma County.

Motion by: Jay Brashear Second by: Dolly Echeverria

Motion: To approve the minutes of January 24, 2005.

Vote: All aye.

4. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE AGUA FRIA RIVER, 05-002-NAV.

Persons who spoke and responded to questions regarding this matter were Cheryl Doyle representing the State Land Department and Hydrologist Jon Fuller prepared the reports regarding this matter for the State Land Department, and stated among other things that New River and Skunk Creek had been included in an earlier report as small and minor watercourses in Maricopa County with Skunk Creek flowing into New River and New River flowing into the Agua Fria.

5. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF BURRO CREEK, 05-003-NAV. Cheryl

Doyle of the State Land Department said that her statement regarding the State Land Department would be the same for each watercourse hearing, except for report dates, and the Chair stated there would be no point in her repeating it. Hydrologist Jon Fuller who prepared the reports regarding this matter for the State Land Department spoke and responded to questions. Phil Blacet, geologist for Phelps Dodge, also spoke and responded to questions. As a matter of clarification, attorney Curtis Jennings and expert Jon Fuller discussed that the report Mr. Fuller was talking about covered Burro Creek, the Big Sandy River, and the Santa Maria River, all part of a single watershed, and that the Big Sandy River flowed exclusively in Mohave County and not at all in Yavapai County.

6. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE HASSAYAMPA RIVER, 05-004-NAV.** Chair did item 7 followed by item 6. Cheryl Doyle of the State Land Department said that her statement regarding the State Land Department would be the same for each watercourse hearing, and the Chair had previously stated there would be no point in her repeating it. Hydrologist Jon Fuller who prepared the reports regarding this matter for the State Land Department spoke and responded to questions.
7. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SANTA MARIA RIVER, 05-005-NAV.** Chair did item 7 followed by item 6. Cheryl Doyle of the State Land Department said that her statement regarding the State Land Department would be the same for each watercourse hearing, and the Chair had previously stated there would be no point in her repeating it. Hydrologist Jon Fuller who prepared the reports regarding this matter for the State Land Department spoke and responded to questions. Phil Blacet, geologist for Phelps Dodge, also spoke and responded to questions.
8. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE VERDE RIVER, 04-009-NAV.** Cheryl Doyle of the State Land Department said that her statement regarding the State Land Department would be the same for each watercourse

hearing, and the Chair had previously stated there would be no point in her repeating it. Jon Fuller, who prepared the Verde River Report, was present, but Ottozawa Chatupron of the State Land Department spoke and responded to questions regarding the Verde River Report. Attorney John Ryley representing the Yavapai Apache Nation spoke regarding this matter. Shanti Rosette, representing the State Land Department, also spoke. Dolly Echeverria discussed that she has had a lengthy history in Arizona and she mentioned her view that the Verde is used mainly for fun, for kayaking, etc., but indicated it is too difficult to get in and out of for conducting commercial traffic. Ms. Rosette indicated experts will be available at the final hearing in Maricopa County regarding the Verde and that those experts will present the Land Commissioner's position at that time. Mr. Brashear asked the Chair that additional information be provided to the Commission by those who provide the evidence regarding commercial boating.

9. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN YAVAPAI COUNTY, 05-001-NAV.**

Cheryl Doyle of the State Land Department said that her statement regarding the State Land Department would be the same for each watercourse hearing, and the Chair had previously stated there would be no point in her repeating it. Hydrologist Jon Fuller who prepared the reports regarding this matter for the State Land Department spoke and responded to questions. In response to questions from the Commission Attorney Jon Fuller said that information in the report that may be pertinent to the Commission making a decision relating to Curtis Jennings' questions is that Oak Creek would be considered a boating stream for modern boating year round and that he found no evidence of historical boating around the time of statehood, but there is sufficient flow for low-draft boating and that those are some of the facts present in his report. Commissioner Miller clarified that Jon Fuller was referring to that portion of Oak Creek South of Sedona, and Mr. Fuller indicated he was talking about the area between about Cornville to the confluence with the Verde.

10. **BUDGET UPDATE.** The Director and the Chair indicated that ANSAC's base budget has not changed from its original request and that ANSAC asked the joint House Senate budget committee for an additional \$67,000.00 (should be \$64,000.00), a number provided by the State Land Department, for updates and for experts appearing at hearings. The State Land Department asked for an additional \$1,000,000.00 to complete Commission work. The director also said the State Land Department asked for an additional approximately \$7,000.00 for the April 25 and 26, 2005 hearings; and that this is money to pay for the experts, and is money the Land Department Engineering Section had thought was available for this purpose, but is no longer. Commissioner Henness asked what the \$7,000.00 was for and Ottozawa Chatupron indicated it was for the expert consulting engineers for review of data and appearance at hearings. The Chair explained the process that occurred at the budget hearings. Mr. Ott explained that was never an appropriation to the State Land Department for FY2005 monies to do the Commission's work. Commissioner Brashear pointed out that even if we called these hearings off at this time we will have to again pay the \$9,000.00 we have already paid for advertising when we hold these hearings in the future, and suggested that if there is a way we can do this then we should do it. Attorney Curtis Jennings indicated the appearance of the Commission paying for expert witnesses is not a good thing, and that an alternative is to hold the hearings and listen to whomever shows up. Commissioner Echeverria made the point that very few local citizens appear at our hearings. Mr. Ott pointed out that the reason the Land Department provides expert witnesses at hearings is because that is what the Commissioners want, and that they believe the Land Department has satisfied the statute by providing the reports and that it is not necessary to provide the experts at hearings. Mr. Ott pointed out that he believes the purpose for hearings is for others to present evidence and that all of the evidence the Land Department has is in the reports. Commissioner Henness wanted to make clear with Mr. Ott that the report updates contain information that comports with the court rulings and stated that he is concerned about the expert

witnesses; who retains them, who they represent, who selects them for their pedigrees, etc. Commissioner Henness indicated the process involving the Land Department's expert, particularly with the involvement of the attorney representing the Land Department, is beginning to have an edge to it. He also wanted to clarify that the \$7,000.00 is for the balance of the work for this fiscal year.

Commissioner Brashear discussed the benefit of the information and education provided to the public by the engineers who appear at Commission hearings. The Chair indicated we would check on the availability of funds and will notify the Commissioners individually.

11. ATTORNEY PAY (discussion and action).

Motion by: Jim Henness Second by: Jay Brashear

Motion: To increase the Commission Attorney's hourly rate to \$200.00 per hour. Vote: All aye.

12. CALL FOR PUBLIC COMMENT (comment sheets).

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

Attorney Mark McGinnis spoke regarding which watercourses are closed for the taking of evidence today because the closing of the taking of evidence triggers the post hearing memorandum filing clock. The Chair said that only the small and minor watercourses are closed for the taking of evidence.

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

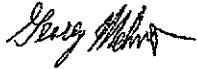
The Chair indicated that Coconino County will be rescheduled for July, 2005 based on Mr. Fuller's unavailability in June. There was discussion of other potential meeting dates for Mohave and Maricopa County.

14. ADJOURNMENT.

Motion by: Jim Henness Second by: Dolly Echeverria

Motion: To adjourn. Vote: All aye.
Meeting adjourned at approximately 1:51 p.m.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "George Mehnert".

George Mehnert, Director
March 30, 2005



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

1700 West Washington, Room 304, Phoenix, Arizona 85007

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

JANET NAPOLITANO
Governor

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

GEORGE MEHNERT
Executive Director

AGENDA AND NOTICE OF A PUBLIC HEARING TO BE HELD
September 21, 2005, at 10:00 a.m. in Phoenix, Arizona

Pursuant to A.R.S. §38-431.02, notice is hereby given that the Navigable Stream Adjudication Commission will hold a meeting open to the public at 10:00 a.m. on September 21, 2005 in the first floor conference room at 1700 West Washington, Phoenix, Arizona.

Pursuant to A.R.S. §38-431.03(A)(3), the Navigable Stream Adjudication Commission may vote to go into Executive Session for purposes of obtaining legal advice from the Commission's attorney on any matter listed on the agenda, or pursuant to A.R.S. §38-431.03(A) or for discussion of records exempt by law from public inspection on any matter listed on the agenda, or for personnel matters listed on the agenda.

Title 2 of the American with Disabilities Act (ADA) prohibits the Commission from discriminating on the basis of disability in its public meetings. Individuals with disabilities who need a reasonable accommodation to attend or communicate at the Commission's meeting, or who require this information in alternate format, may contact George Mehnert at (602) 542-9214 to make their needs known. Requests should be made as soon as possible so the Commission will have sufficient time to respond. For those individuals who have a hearing impairment, this Commission can be reached through the Arizona Relay Service at 1-800-367-8939 (TTY) or 1-800-842-4681 (Voice). The agenda for the meeting is as follows:

1. CALL TO ORDER.
2. Roll Call.
3. Approval of Minutes (discussion and action).
 - A. August 8, 2005, Mohave County, Arizona.
 - B. August 9, 2005, La Paz County, Arizona.
4. Hearing regarding the navigability of the Agua Fria River, 05-002-NAV.
5. Hearing regarding the navigability of the Hassayampa River, 05-004-NAV.
6. Call for Public Comment (comment sheets).

(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)
7. Future agenda items and establishment of future hearings and other meetings.
8. Review of laws and terms regarding navigability.
9. ADJOURNMENT.

The chair reserves the right to alter the order of the agenda.

Dated this 17th day of August, 2005, George Mehnert, Director, Navigable Stream Adjudication Commission



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

1700 West Washington, Room 304, Phoenix, Arizona 85007

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

JANET NAPOLITANO
Governor

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

GEORGE MEHNERT
Executive Director

AGENDA AND NOTICE OF A PUBLIC HEARING TO BE HELD

First Amended Agenda

September 21, 2005, at 10:00 a.m. in Phoenix, Arizona

Pursuant to A.R.S. §38-431.02, notice is hereby given that the Navigable Stream Adjudication Commission will hold a meeting open to the public at 10:00 a.m. on September 21, 2005 in the first floor conference room at 1700 West Washington, Phoenix, Arizona.

Pursuant to A.R.S. §38-431.03(A)(3), the Navigable Stream Adjudication Commission may vote to go into Executive Session for purposes of obtaining legal advice from the Commission's attorney on any matter listed on the agenda, or pursuant to A.R.S. §38-431.03(A) or for discussion of records exempt by law from public inspection on any matter listed on the agenda, or for personnel matters listed on the agenda.

Title 2 of the Americans with Disabilities Act (ADA) prohibits the Commission from discriminating on the basis of disability in its public meetings. Individuals with disabilities who need a reasonable accommodation to attend or communicate at the Commission's meeting, or who require this information in alternate format, may contact George Mehnert at (602) 542-9214 to make their needs known. Requests should be made as soon as possible so the Commission will have sufficient time to respond. For those individuals who have a hearing impairment, this Commission can be reached through the Arizona Relay Service at 1-800-367-8939 (TTY) or 1-800-842-4681 (Voice). The agenda for the meeting is as follows:

1. CALL TO ORDER.
2. Roll Call.
3. Approval of Minutes (discussion and action).
 - A. August 8, 2005, Mohave County, Arizona.
 - B. August 9, 2005, La Paz County, Arizona.
4. Hearing regarding the navigability of the Agua Fria River, 05-002-NAV.
5. Hearing regarding the navigability of the Hassayampa River, 05-004-NAV.
6. Adoption of the Commission report regarding the Lower Salt River (discussion and action).
7. Adoption of the Commission report regarding the Pinal County Small & Minor Watercourses (discussion and action).
8. Call for Public Comment (comment sheets).
(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)
9. Future agenda items and establishment of future hearings and other meetings.
10. Commission budget and continuation.
11. Review of laws and terms regarding navigability.
12. ADJOURNMENT.

The chair reserves the right to alter the order of the agenda.

Dated this 13th day of September, 2005, George Mehnert, Director, Navigable Stream Adjudication Commission



JANET NAPOLITANO
Governor

STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION
1700 West Washington, Room 304, Phoenix, Arizona 85007
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GEORGE MEHNERT
Executive Director

MEETING MINUTES
Phoenix, Arizona, September 21, 2005

COMMISSION MEMBERS PRESENT

Earl Eisenhower, Jim Henness, and Cecil Miller.

COMMISSION MEMBERS ABSENT

Jay Brashear, Dolly Echeverria.

STAFF PRESENT

George Mehnert, and Commission Legal Counsel Curtis Jennings.

1. CALL TO ORDER.

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

2. ROLL CALL.

See Above.

3. APPROVAL OF MINUTES (discussion and action).

A. August 8, 2005, Mohave County

Motion by: Jim Henness Second by: Cecil Miller

Motion: To accept minutes as submitted. Vote: All aye.

B. August 9, 2005, La Paz County.

Motion by: Cecil Miller Second by: Jim Henness

Motion: To accept minutes as submitted. Vote: All aye.

4. Hearing regarding the navigability of the Agua Fria River, 05-002-NAV.

Cheryl Doyle and Jon Fuller representing the State Land Department, and attorneys John Helm and Julie Lemmon appeared.

5. Hearing regarding the navigability of the Hassayampa River, 05-004-NAV.

Cheryl Doyle and Jon Fuller representing the State Land Department appeared. The Chair announced that the two previous hearings had concluded and that the time would now begin for filing post hearing memorandums.

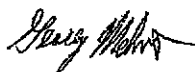
6. Adoption of the Commission report regarding the Lower Salt River (discussion and action).

Motion by: Cecil Miller Second by: Jim Henness

Motion: To adopt the report as submitted. Vote: All aye.

7. **Adoption of the Commission report regarding the Pinal County Small & Minor Watercourses (discussion and action).**
Motion by: Jim Henness Second by: Cecil Miller
Motion: To adopt the report as submitted. Vote: All aye.
8. **Call for Public Comment (comment sheets).**
(Pursuant to Attorney General Opinion No. I99-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)
9. **Future agenda items and establishment of future hearings and other meetings.**
10. **Commission budget and continuation.** A discussion of the budget and request for two-year continuation was discussed by the Commissioners and staff.
11. **Review of laws and terms regarding navigability.**
Entered Executive Session for the purpose of obtaining legal advice at approximately 10:48 a.m. and concluded Executive Session at approximately 11:36 a.m.
12. **ADJOURNMENT.**
Motion by: Jim Henness Second by: Cecil Miller
Motion: To adjourn. Vote: All aye.
Meeting adjourned at approximately 11:36 a.m.

Respectfully submitted,



George Mehnert, Director
September 22, 2005



JANET NAPOLITANO
Governor

STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

1700 West Washington, Room 304, Phoenix, Arizona 85007

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

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GEORGE MEHNERT
Executive Director

MEETING MINUTES

Phoenix, Arizona, April 11, 2006

COMMISSION MEMBERS PRESENT

Cecil Miller, Earl Eisenhower, Jim Henness.

COMMISSION MEMBERS ABSENT

Jay Brashear, Dolly Echeverria.

STAFF PRESENT

Curtis Jennings, George Mehnert.

1. CALL TO ORDER.

Chairman Eisenhower called the meeting to order at approximately 2:00 P.M.

2. Roll Call.

See above.

3. Approval of Minutes (discussion and action). Minutes of November 16, 2005, November 17, 2005, and January 18, 2006 as combined minutes.

Motion by: Jim Henness Second by: Cecil Miller

Motion: To accept minutes as submitted. Vote: All aye.

4. Determination of the navigability of the small and minor watercourses in Maricopa County, 05-014-NAV (discussion and action).

Motion by: Jim Henness Second by: Cecil Miller

Motion: That the small and minor watercourses in Maricopa County were not navigable. Vote: All aye.

5. Determination of the navigability of the Agua Fria River 05-002-NAV (discussion and action).

Motion by: Cecil Miller Second by: Jim Henness

Motion: That the Agua Fria River was not navigable. Vote: All aye.

6. Determination of the navigability of the Hassayampa River 05-004-NAV (discussion and action).

Motion by: Jim Henness Second by: Cecil Miller

Motion: That the Hassayampa River was not navigable. Vote: All aye.

7. Call for Public Comment (comment sheets).

(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the

public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

8. Future agenda items and establishment of future hearings and other meetings.

9. ADJOURNMENT.

Motion by: Cecil Miller

Second by: Jim Henness

Motion: To adjourn.

Vote: All aye.

Meeting adjourned at approximately 2:40 P.M.

Respectfully submitted,



George Mehnert, Director

April 12, 2006



JANET NAPOLITANO
Governor

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GEORGE MEHNERT
Executive Director

AGENDA AND NOTICE OF A PUBLIC HEARING TO BE HELD
March 29 2005, at 12:00 P.M., in Prescott, Arizona

Pursuant to A.R.S. §38-431.02, notice is hereby given that the Navigable Stream Adjudication Commission will hold a meeting open to the public on March 29, 2005 at 12:00 p.m. in the Yavapai County Supervisors' Conference Room located at 1015 Fair Street, Prescott, Arizona.

Pursuant to A.R.S. §38-431.03(A)(3), the Navigable Stream Adjudication Commission may vote to go into Executive Session for purposes of obtaining legal advice from the Commission's attorney on any matter listed on the agenda, or pursuant to A.R.S. §38-431.03(A) or for discussion of records exempt by law from public inspection on any matter listed on the agenda, or for personnel matters listed on the agenda.

Title 2 of the American with Disabilities Act (ADA) prohibits the Commission from discriminating on the basis of disability in its public meetings. Individuals with disabilities who need a reasonable accommodation to attend or communicate at the Commission's meeting, or who require this information in alternate format, may contact George Mehnert at (602) 542-9214 to make their needs known. Requests should be made as soon as possible so the Commission will have sufficient time to respond. For those individuals who have a hearing impairment, this Commission can be reached through the Arizona Relay Service at 1-800-367-8939 (TTY) or 1-800-842-4681 (Voice). The agenda for the meeting is as follows:

1. CALL TO ORDER.
2. ROLL CALL.
3. APPROVAL OF MINUTES (discussion and action).
A. January 24, Yuma County.
4. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE AGUA FRIA RIVER, 05-002-NAV.
5. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF BURRO CREEK, 05-003-NAV.
6. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE HASSAYAMPA RIVER, 05-004-NAV.
7. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SANTA MARIA RIVER, 05-005-NAV.
8. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE VERDE RIVER, 04-009-NAV.
9. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN YAVAPAI COUNTY, 05-001-NAV.
10. BUDGET UPDATE
11. ATTORNEY PAY (discussion and action).
12. CALL FOR PUBLIC COMMENT (comment sheets).
(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)
13. FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE HEARINGS AND OTHER MEETINGS.
14. ADJOURNMENT.

The chair reserves the right to alter the order of the agenda.

Dated this 24th day of February, 2005, George Mehnert, Director, Navigable Stream Adjudication Commission

EXHIBIT E

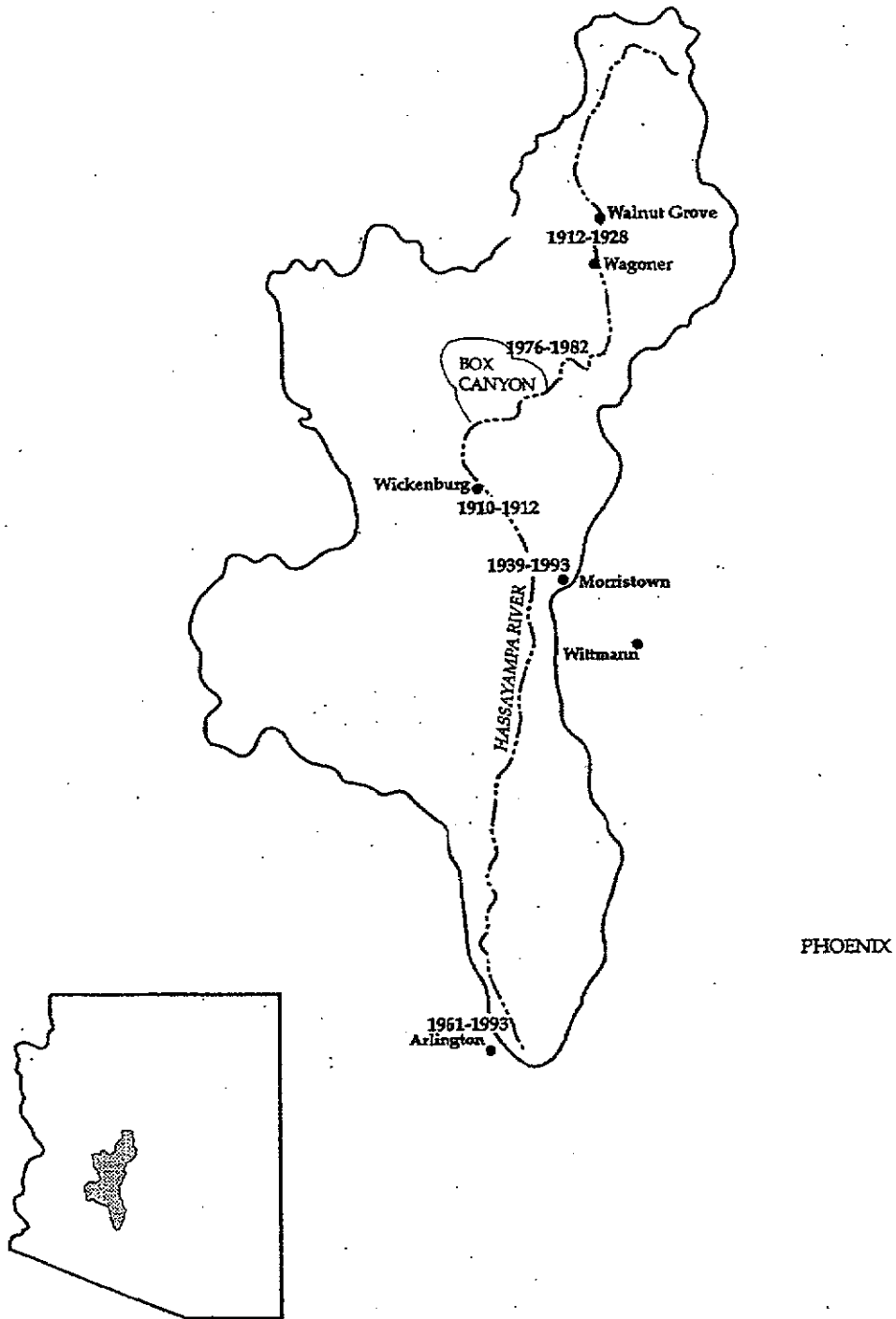


Figure 9 – Location of Hassayampa River Stream Gage Sites

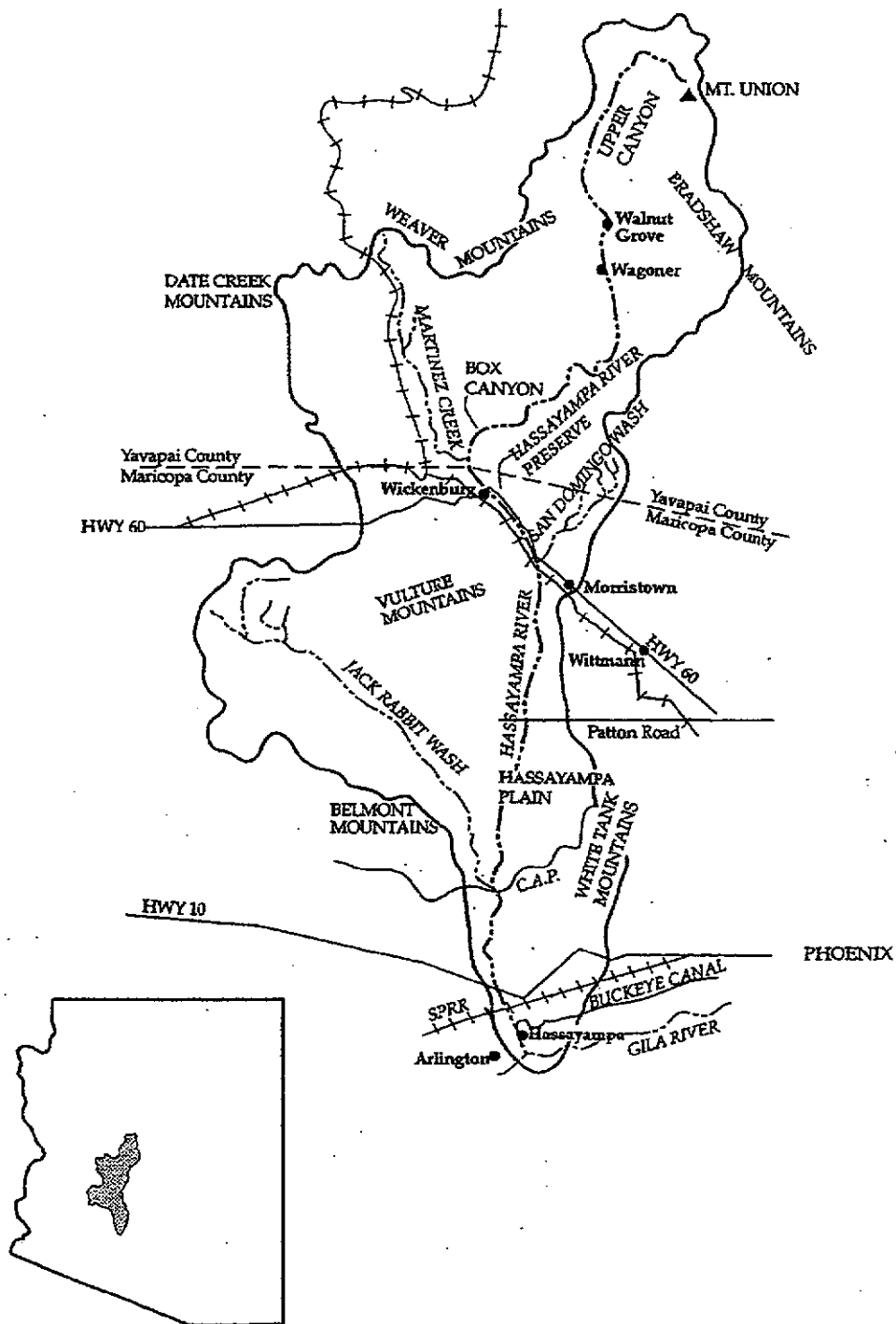


Figure 8 – Hassayampa River Watershed Map

EXHIBIT F

Evidence Log

Hearing No. 05-004-NAV

Page No.

1

Arizona Navigable Stream Adjudication Commission

Hassayampa River

Yavapai County March 29, 2005—Maricopa County September 21, 2005

Item Number	Received Date	Source to ANSAC	Description	Entry By
1	1/6/97	Evidence on Hand at AN-SAC	Hassayampa River Corridor—Red Folder tabbed Hassayampa River.	George Mehnert
2	1/8/97	Evidence on Hand at AN-SAC	Tim Flood letter with attachments, Friends of Arizona Rivers.	George Mehnert
3	2/12/97	Evidence on Hand at AN-SAC	Draft Final Report	George Mehnert
4	2/18/97	Evidence on Hand at AN-SAC	Letter from David Baron relative all watercourses	George Mehnert
5	9/7/98	Evidence on hand at AN-SAC	Small and Minor Watercourse Criteria Final Report	George Mehnert
6	9/7/98	Evidence on hand at AN-SAC	Final Report, 3 County Pilot Study.	George Mehnert
7	5/19/04	Candace S. Hughes	Letter	George Mehnert
8	7/11/04	Nancy Orr	Letter	George Mehnert
9	3/3/05	JE Fuller	Final Report dated June 2004	George Mehnert