

**SAN FRANCISCO RIVER**

**BEFORE THE  
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION**

IN THE MATTER OF THE  
NAVIGABILITY OF THE SAN  
FRANCISCO RIVER FROM THE  
NEW MEXICO BORDER TO ITS  
CONFLUENCE WITH THE GILA  
RIVER, GREENLEE COUNTY,  
ARIZONA

No.: 03-010-NAV

**REPORT, FINDINGS AND DETERMINATION REGARDING  
THE NAVIGABILITY OF THE SAN FRANCISCO RIVER FROM THE  
NEW MEXICO BORDER TO ITS CONFLUENCE WITH THE GILA RIVER**

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Pursuant to Title 37, Chapter 7, Arizona Revised Statutes, the Arizona Navigable Stream Adjudication Commission ("Commission") has undertaken to receive, compile, review and consider relevant historical and scientific data and information, documents and other evidence regarding the issue of whether the San Francisco River from the New Mexico border to its confluence with the Gila River was navigable or nonnavigable for title purposes as of February 14, 1912. Proper and legal public notice was given in accordance with law and a hearing was 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 hearing and being fully advised in the premises, hereby submits its report, findings and determination.

## **I. Procedure**

On August 20, 2003, the Commission gave proper prior notice of its intent to study the issue of navigability or nonnavigability of the San Francisco River from the New Mexico border to its confluence with the Gila River. A copy of the Notice of Intent to Study and Receive, Review and Consider Evidence on the issue of navigability of the San Francisco River in Greenlee County, Arizona, is attached hereto as Exhibit "A."

After collecting and documenting all reasonably available evidence received pursuant to the Notice of Intent to Study and Receive, Review and Consider Evidence, the Commission scheduled a public hearing to receive additional evidence and testimony regarding the navigability or nonnavigability of the San Francisco River. Public notice of this hearing was given by legal advertising on September 5, 2003 as required by law pursuant to A.R.S. § 37-1126 and, in addition, by mail to all those requesting individual notice and by means of the ANSAC website ([azstreambeds.com](http://azstreambeds.com)). This hearing was held on October 15, 2003, in the City of Clifton, the county seat of Greenlee County, since the law requires that such hearing be held in the county in which the watercourse being studied is located. Attached hereto as Exhibit "B" is a copy of the notice of the public hearing.

All parties were advised that anyone who desired to appear and give testimony at the public hearing could do so and, in making its findings and determination as to navigability and nonnavigability, the Commission would consider all matters presented to it at the hearing, as well as other historical and scientific data, information, documents and evidence that had been submitted to the Commission at any time prior to the date of the hearing, including all data, information, documents and evidence previously submitted to the Commission. Following the public hearing held on October 15, 2003, all parties were advised that they could file post-hearing memoranda pursuant to Rule R12-17-108.01. Post-hearing memoranda were filed by the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users Association and Phelps Dodge Corporation.

On January 27, 2004, at a public hearing in Phoenix, Arizona, after considering all of the evidence and testimony submitted and the post-hearing memoranda filed with the Commission, and the comments and oral argument presented by the parties, and being fully advised in the premises, the Commission, with a unanimous vote, found and determined in accordance with A.R.S. § 37-1128 that the San Francisco River from the New Mexico border to its confluence with the Gila River in Greenlee County, Arizona, was nonnavigable as of February 14, 1912.

## **II. The San Francisco River from the New Mexico Border to the Confluence with the Gila River**

The headwaters of the San Francisco River are on the southern flanks of the Escudillo Mountains, north and east of Alpine, Arizona. The river flows east into New Mexico where it drains a large portion of that state's western uplands. Near Luna, New Mexico, it turns south running parallel to highway 180 and south of Pleasanton, New Mexico, it turns west again and crosses the Arizona-New Mexico border between Sections 21 and 28, Township 2 South, Range 32 East, Gila and Salt River Base and Meridian (approximately latitude  $33^{\circ}14'17''$  North and longitude  $109^{\circ}02'48''$  West). From there it flows through mountains and steep canyons in a general southwesterly direction for a distance of 45 miles through the town of Clifton until it joins the Gila River eleven miles south and east of Clifton between Sections 22 and 27, Township 6 South, Township 29 East, Gila and Salt River Base and Meridian (approximately latitude  $32^{\circ}58'13''$  North and longitude  $109^{\circ}22'12''$  West). The entire San Francisco River basin encompasses approximately 2804 square miles of which only 887 square miles lie within Arizona after the river crosses the Arizona-New Mexico border above Clifton. The small portion of the San Francisco River from the headwaters at Escudillo Peak before entering New Mexico is considered a small or minor watercourse and is not treated in this report. Likewise, the area in which the river flows through New Mexico is not covered in this report.

The elevations in the San Francisco River basin run from 10,912 feet at Escudillo Mountain to 3,436 at Clifton, and somewhat less at its confluence with the Gila River eleven miles southeast of Clifton. The San Francisco River watershed is bounded by the Gila Mountains to the west, the San Francisco and White Mountains to the north, the Tularosa Mountains to the east, and the Gila River watershed to the south. The major tributary to the San Francisco River is the Blue River, which flows generally south in Arizona from Luna Lake to its confluence with the San Francisco River about half way between the Arizona-New Mexico border and Clifton, Arizona, generally parallel to the flow of the San Francisco River in New Mexico. A map of the San Francisco River watershed in Arizona is attached hereto as Exhibit "C".

Although the San Francisco River flows through broad valleys in New Mexico, the channel in Arizona is characterized by relatively narrow canyons of the central mountain province of Arizona. The average width of the canyons is about 500 feet, with a very narrow floodplain terrace. The shallow bedrock and confined canyons limit the lateral movement of the stream channel. While large floods may have altered the geometry of the river in a small way, the overall channel pattern has remained unchanged during the current era. Discharges from springs in the bedrock aquifers constitute a significant source of the ordinary and natural flow of the San Francisco River and make it a perennial gaining stream. The rugged terrain and remoteness of the canyons of the San Francisco River have minimized the potential for human impact

on the watershed and few towns have been located in the area.

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

This principle was well established by English common law long before the American Revolution and was a part of the law of the American colonies at the time of the Revolution. Following the American Revolution, the rights, duties and responsibilities of the crown passed to the thirteen new independent states, thus making them the owners of the beds of commercially navigable streams, lakes and other waterways within their boundaries by virtue of their newly established sovereignty. The ownership of trust lands by the thirteen original states was never ceded to the federal government. However, in exchange for the national government's agreeing to pay the debts of the thirteen original states incurred in financing the

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



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.<sup>2</sup> 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

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<sup>2</sup> 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.

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

The 1992 Act provided that the Commission would make findings of navigability or non-navigability for each watercourse. *See* former A.R.S. § 37-1128(A). Those findings were based upon the "federal test" of navigability in former A.R.S. § 37-1101(6). The Commission would examine the "public trust values" associated with

a particular watercourse only if and when it determined that the watercourse was navigable. *See* former A.R.S. §§ 37-1123(A)(3), 37-1128(A).

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

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

down that legislation in its *Hull* decision, finding that the Legislature had not applied the proper standards of navigability. *Id.* 199 Ariz. at 427-28, 18 P.2d at 738-39.

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

#### **IV. Issues Presented**

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

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

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

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

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

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

Thus, in compliance with the statutes, the Commission is required to collect evidence, hold hearings, and determine which watercourses in existence on February 14, 1912, were navigable or nonnavigable. This report pertains to the forty-five mile reach of the San Francisco River from the point where it crosses the New Mexico – Arizona border, flowing through the town of Clifton and on southwesterly until it joins with and flows into 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 small and minor watercourses in Mohave County, 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 (8<sup>th</sup> 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 (5<sup>th</sup> ed. 1979).

The “preponderance of the evidence” standard is sometimes referred to as requiring “fifty percent plus one” in favor of the party with the burden of proof. One could image a set of scales. If the evidence on each side weighs exactly evenly, the party without the burden of proof must prevail. In order for the party with the burden to prevail, sufficient evidence must exist in order to tip the scales (even slightly) in its favor. See generally *United States v. Fatico*, 458 U.S. 388, 403-06 (E.D. N.Y. 1978), *aff'd* 603 F.2d 1053 (2<sup>nd</sup> 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).

## **VI. Standard for Determining Navigability**

The statutes defines a navigable watercourse as follows:

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

A.R.S. § 37-1101(5).

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

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

77 U.S. at 563.

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 small and minor watercourses in Mohave County are navigable at statehood.

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

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

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

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

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

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

## **VII. Evidence Received and Considered by the Commission**

Pursuant to A.R.S. § 37-1123, and other provisions of Title 37, Chapter 7, Arizona Revised Statutes, the Commission received, compiled, and reviewed evidence and records regarding the navigability and nonnavigability of the San Francisco River from the New Mexico border to the confluence with the Gila River. 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 and Study prepared by SFC

Engineering Company in association with George V. Sabol Consulting Engineers, Inc., JE Fuller/Hydrology and Geomorphology, Inc., and SWCA, Inc. Environmental Consultants, submitted by the Arizona State Land Department. Documents were also submitted by the Arizona Center for Law in the Public Interest, the Central Arizona Paddlers Club, Friends of Arizona Rivers (Timothy Flood), Phelps Dodge Corporation, Apache County Board of Supervisors, Greenlee County Board of Supervisors, and Eastern Arizona Counties Organization. The list of evidence and records, together with a summarization is attached as Exhibit "D". A public hearing was held on October 15, 2003, at Clifton, Arizona, in Greenlee County, for the public to present testimony and evidence on the issue of navigability of the San Francisco River. A number of individuals appeared at the hearing in Clifton and gave testimony. A public hearing was also held on January 27, 2004, in Phoenix, Arizona, to consider the evidence submitted and the post-hearing memoranda filed. The minutes of these hearings are attached hereto as Exhibit "E."

**A. Prehistoric Conditions on San Francisco River Watershed**

Only a limited amount of archaeological study has been performed on the San Francisco River basin in Arizona. No paleoindian or archaic sites have been recorded in the San Francisco River basin, although such sites are fairly abundant in the general

vicinity of central and southeastern Arizona and western New Mexico.<sup>3</sup> A number of formative period sites (A.D. 1 to 1540) have been found near the San Francisco River, but most are small and considered primitive. Most archaeologists classify these sites as being of the Mogollon Culture, and the earliest recorded have been approximately 50 B.C. One archaeologist recorded seven minor sites above Clifton. A ruin consisting of twenty rooms in two structures, with a plaza between them, was excavated at the point where the Blue River flows into the San Francisco River. Archaeologists are of the opinion that the reason there are few sites in the lower reaches of the San Francisco River in Arizona is due to the geography and deep canyons. The largest sites in the San Francisco basin are located in New Mexico where the ground is more level and susceptible to farming. Also a large site of 100 pithouses has been excavated near Luna, New Mexico.

The Mogollon culture has been defined as a population, probably migrating or influenced by migration from northern Mexico, which inhabited the mountains and mountain lowland transition zones in east central Arizona and western New Mexico. This culture originated at about 300 B.C. and is generally defined on the basis of pithouse architecture, brownware pottery, and flexed burials. It was predominant in the San Francisco basin although possibly influenced by Hohokam from the upper Gila

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<sup>3</sup> The paleoindian period is generally recognized to be between 9000 to 6000 B.C., and the archaic period from 6000 B.C. to A.D. 1.

River valley until about A.D. 1200 when the Salado Culture developed and became the more predominant for a couple of centuries. Also, recent discoveries indicate that between 1275 and 1325, a group of Anasazi Indians from the Kayenta region of northern Arizona migrated south into the Mogollon highlands and the upper Gila and San Francisco River basins.

There is no archaeological evidence of any prehistoric irrigation agriculture along the San Francisco River in Arizona, and it is felt that the inhabitants of the small sites along that river were probably hunters and gatherers living off berries and other food items they could collect from the wild. There is no archaeological evidence of use of the rivers and streams by any of these prehistoric Indians for commercial trade or travel nor of any flotation of logs. Some time between 1300 to 1400 and prior to 1540, the earlier Mogollon Salado Anasazi peoples were replaced by the Yavapai Culture and the area remained very sparsely populated. The Yavapais were a Yuman speaking people who apparently migrated from the Colorado River across central Arizona, reaching the San Francisco River basin. In the late 1600's and early 1700's the Athabascan speaking western Apaches migrated into the area and displaced the Yavapai. Both the Yavapai and Apache were relatively nomadic, living by hunting and gathering, and occupied shelters of overhanging rocks and brush wickiups.



## **B. Historic Development of San Francisco River Watershed**

The first Europeans came into the area with the Coronado Expedition of 1540. Historians dispute Coronado's route from northern Mexico to the Zuni pueblos and on to the pueblos along the Rio Grande River. While the main highway north from Clifton is called the "Coronado Trail," it is unlikely that the Coronado expedition came that far east and actually passed through the San Francisco River basin, except possibly portions of the northern and western Blue River area. Coronado did encounter native peoples living in the vicinity of Chichitcale, a ruin at the northern edge of the Sonoran Desert, the exact location of which is still disputed. These people were probably Yavapai, as they were described by Coronado's chroniclers as the most barbarious and primitive people yet seen.

After the Coronado Expedition of 1540, Europeans did not explore the mountainous area around the San Francisco River until approximately 1800 when mining began at Santa Rita del Cobre near present day Silver City, New Mexico. According to the historians, Apache Indians showed copper ore deposits to Colonel Jose Carrasco about 1800 and soon thereafter Don Francisco Elguea applied for and received a land grant for the area and developed mines. Mexico won its independence from Spain in 1821 and, although it tried to keep citizens of the expanding United States out of its territory, some began to settle in Taos and Santa Fe in the 1830's and 1840's.

In the 1820's, American fur trappers began trapping beaver along the rivers of the southwest. Their general route was from Santa Fe to the Santa Rita copper mines near what is now Silver City, New Mexico, and then westward to the Gila River. The first documented trapping expedition up the San Francisco River occurred in 1826 when a portion of a trapping party going down the Gila branched off to try the San Francisco, as well as Bonita Creek. Throughout the late 1820's, 1830's, and as late as 1842, other trapping parties traveled down the Gila and some may have traveled up the San Francisco, but did not leave specific and definite records. These mountain men in trapping the rivers of the southwest, traveled by foot and horseback. There is no record of their having used canoes, rafts, or other types of boats, except when they reached the Colorado River.

In 1846 war broke out between the United States and Mexico, and a number of military expeditions passed through southern Arizona, but none traveled down the San Francisco River. In 1846 General Stephen Watts Kearny, who was guided by Kit Carson, and the Army of the West traveled down the Gila River through southern Arizona on their way to California. They may have passed by the mouth of the San Francisco River, but did not go up the river to any extent. Lt. William Emery who was a topographical engineer mapped the route for the Army of the West and recorded information regarding the area. He reported on the stream he called the Prieto River, which is believed to be today's San Francisco River, and stated that it flowed through

the mountains and that its sands were reputed to contain gold, and that the river though small was good for hunting beaver. Lt. Philip St. George Cook and the Mormon Battalion also passed through the area at this time, but its route was further south, and he did not cross or come in contact with the San Francisco River.

After the Treaty of Guadalupe Hidalgo ending the war with Mexico in 1848 and the subsequent purchase in 1853 of the area south of the Gila River by the treaty accomplishing the Gadsden Purchase, the present boundaries of the United States were set and the Army undertook extensive topographical and geographical review of the area. The Apache Indians were a great problem and, beginning the 1860's, the United States military established a system of military posts throughout southern Arizona to control these Indians. The nearest of these posts were Ft. Apache near the confluence of the White and Black Rivers in the mountains to the west and Camp San Carlos and Ft. Thomas on the Gila River below where the San Francisco River ran into the Gila. During the Apache wars, troops discovered copper deposits on the San Francisco River, which began to be developed in 1872, resulting in the creation of the Clifton-Morenci Mining District. The first prospectors came from Silver City, New Mexico, and explored the area and established the copper mine locations. The mines near Clifton and Morenci have continued to produce copper, and the great open pit mine at Morenci is one of the largest producers of copper in the world today. Clifton was the major town in the area and reached its peak population in 1910 when it had about 5,000

residents (in 1993, its population was 3,000).

Farming and ranching developed at about the same time as mining in the San Francisco River basin during the 1870's. Most farming was concentrated to the south on the Gila River, but a very limited amount of irrigation agriculture was practiced on small farms on the San Francisco River and its major tributary, the Blue River. One of the earliest cattle trails through southern Arizona passed through the upper Gila River following the route of the Army of the West. Other than mining in the Clifton-Morenci area, most of the commercial activity along the San Francisco River related to ranching. There are some 45 homesteads and other government grants located in the San Francisco River basin through which the river flows. Except for Clifton and Morenci, the small settlements mostly supported the ranching industry. Two of these small settlements located in the San Francisco River basin were Benton, which was located on the Blue River, and Oroville, which was located on the San Francisco River a few miles above Clifton. Transportation in the area was by horseback, ox and mule teams, and stagecoach. Railroads were built between the mines and smelters as early as 1878, and in 1883 to 1884, the Arizona and New Mexico Railroad constructed a line that connected Clifton to the main line of the Southern Pacific Railroad at Lordsburg, New Mexico. Several toll roads were constructed in the 1880's and 1890's, and by the early 1900's, highways suitable for automobile and truck traffic were in place.

Several accounts describe boating on the San Francisco River, but they consisted of recreational floating down the San Francisco River to the confluence of the Gila and then perhaps on down the Gila using small rafts and canoes when the water was high enough to allow it. In its opinion in *Hassell*, the Court quoted the U.S. Supreme Court in its decision in *The Montello*, 87 U.S. (20 Wall.) 430, 22 L.Ed. 391 (1874) in which it stated “it is not . . . every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable.” 172 Ariz. at 363, 837 P.2d at 165. There is no historical evidence of any commercial boating on the San Francisco River in ordinary and natural conditions.

The San Francisco River is a perennial stream and generally flows year round. It is considered a recreational boatable stream for floating, canoeing or kayaking downstream. Its average annual discharge is between 90 and 215 cubic feet per second (“cfs”) and its median flow is 76 cfs at Clifton, Arizona. It is between 25 and 50 feet in width and between a few inches to a foot and a half deep. During its history, Clifton has reported a number of significant floods resulting in a number of drownings. For example, the 1903 flood killed at least 13 people and prompted the Arizona Copper Company to build a stone wall ten feet high on one side of Chase Creek to protect the mining property. Floods occurring in 1905 and 1906 also killed a number of people. It has been difficult to gauge the actual flow of these floods, but the five-year flood is rated at approximately 17,000 cfs and some of the major floods may have run as high as

50-60,000 cfs, but only one in recorded history was estimated as high as 90,000 cfs. However, the river during flood stage is not at all navigable and is in fact very dangerous. Annual high flows of 500 cfs typically occurs during late winter and early spring months, and occasionally in summer floods. As pointed out above, the San Francisco River is not subject to upstream navigation although downstream floating in canoes, rafts, kayaks, flatboats or inflatables is possible during semi-flood or high-water stage. Use of keelboats, steamboats or powered barges is not possible on the San Francisco River in ordinary conditions.

One instance of floating logs downstream during wet years and high water for use in the mines of Clifton and Morenci was reported in 1916 or 1917. The logs were cut and stacked along the side of the Blue River and, when the water rose high enough, were pushed into the river and floated down the Blue River to its confluence with the San Francisco River and then floated on down the San Francisco to Clifton. It was not attempted before or in later years as there was inadequate water to float logs which would seem to prove that floating logs for commercial use is not feasible in ordinary and natural conditions. "The mere fact that a river will occasionally float logs, poles, and rafts downstream in times of high water does not make the river navigable." *United States v. Crow, Pope & Land Ents., Inc.*, 340 F.Supp. 25, 32 (N.D. Ga. 1972) (citing *United States v. Rio Grande Dam & Irr. Co.*, 174 U.S. 690 (1889)). "The waterway must be susceptible for use as a channel of useful commerce and not merely capable of

exceptional transportation during periods of high water.” *Id.* (citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77 (1922)).<sup>4</sup>

Due to the high narrow canyons, and rapids, sandbars and other alluvial deposits, and obstructions that would impede navigation, commercial transportation on the river is not feasible. The narrow bedrock high-walled canyons do not provide a favorable environment for agricultural operations. Other than minor diversions upriver for irrigating small fields and gardens, there were only two diversions from the San Francisco River which occurred near Clifton. One was for the purpose of irrigation and is described as a small ditch one and three-quarter miles above the bridge, and the second diversion was located one and a half miles below the bridge for power development by the Arizona Copper Company. The evidence and witnesses all agreed that the weather and climatic conditions existing at the present time are the same as or very similar to those existing in 1912 when Arizona became a state.

Based on all of the evidence considered, it appears at the time of statehood the San Francisco was susceptible to limited forms of recreational floating downstream. During the winter rains and spring runoff, there was sufficient water in the river to allow the use of shallow water rafts, canoes and kayaks passing downstream, but upstream navigation was not feasible. There is no historical evidence of any

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<sup>4</sup> See, also, *United States v. Harrell*, 926 F.2d 1036, 1040 (11<sup>th</sup> Cir. 1991) (“susceptibility of use as a highway for commerce should not be confined to ‘exceptional conditions or short periods of temporary high water’”) (quoting *United States v. Utah*, 283 U.S. 64, 87 (1931)).

commercial enterprise conducted on water using the San Francisco River for trade and travel as of the time of statehood. Rapids, sand bars and other alluvial deposits in the narrow canyons through which the San Francisco River flows would be an impediment to navigation. The San Francisco River is not listed under the Rivers and Harbors Act of 1899. The customary mode of transportation in the region of the San Francisco River was not by boat. Prior to and at the time of statehood, travel was by foot, horseback, mule train, wagon and stagecoach and, after 1883, by train. At the time of statehood and immediately thereafter, trucks and automobiles were also used as the road system was expanded and improved. No evidence was presented as to whether the homesteads or other federal land patents on the San Francisco River were covered by the Desert Land Act of 1877.

### **VIII. Findings and Determination**

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



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

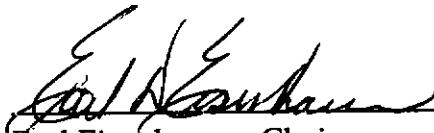
The Commission also finds that there is no evidence of any historical or modern commercial boating having occurred on the San Francisco River.

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

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

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

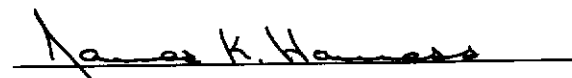
DATED this 28 day of June ~~February~~ 2004.

  
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Earl Eisenhower, Chair

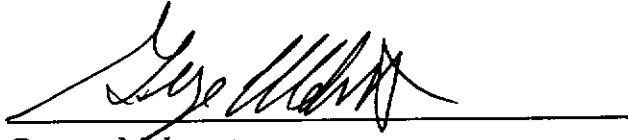
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Dolly Echeverria, Vice Chair

  
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Jay Brashear, Member

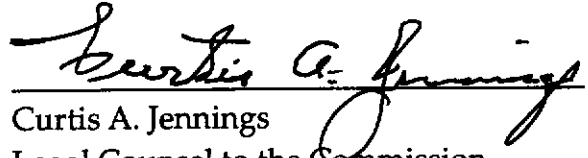
\_\_\_\_\_  
Cecil Miller, Member

  
\_\_\_\_\_  
James Henness, Member

STAFF MEMBERS:

A handwritten signature in black ink, appearing to read "George Mehnert", written over a horizontal line.

George Mehnert  
Executive Director

A handwritten signature in black ink, appearing to read "Curtis A. Jennings", written over a horizontal line.

Curtis A. Jennings  
Legal Counsel to the Commission

AFFIDAVIT/PROOF OF PUBLICATION

**THE COPPER ERA**

PO Box 1357 Clifton, AZ 85533  
Phone: (928) 428-2560 / Fax: (928) 428-5396  
E Mail: [mwatson@eacourier.com](mailto:mwatson@eacourier.com)

Susan G. Curtis being duly sworn deposes and says:  
That she is the legal clerk of The Copper Era, a newspaper  
published in the Town of Clifton, Greenlee County,  
Arizona; that the legal described as follows:

Arizona Navigable Stream  
Adjudication Commission  
Statement of Intent

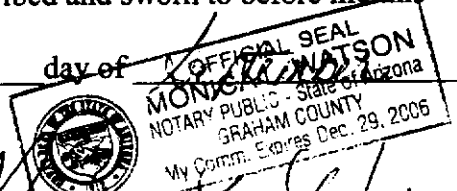
a copy of which is hereunto attached, was first published in  
said newspaper in its issue  
dated Aug 20, 2003 and was  
published in each 3 issue(s) of said newspaper  
for 3 consecutive weeks, the last  
publication being in the issue  
dated Sept 3, 2003.

Signed: Susan G. Curtis

Subscribed and sworn to before me this

3 day of SEPTEMBER, 2003

Mona L. Watson  
Notary Public



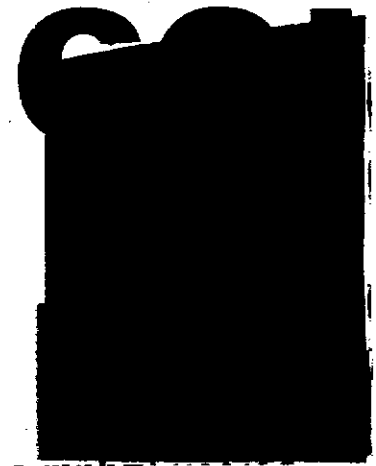
My Commission expires: December 29, 2006

**STATEMENT OF INTENT**  
State of Arizona  
Navigable Stream Adjudication  
Commission

Pursuant to A.R.S. §37-1101, et. seq.,  
the Arizona Navigable Stream  
Adjudication Commission (ANSAC)  
is planning to hold a watercourse  
navigability hearing regarding the  
Gila River, Blue River, and the San  
Francisco River in Greenlee County,  
Arizona. Notice is hereby given, pur-  
suant to A.R.S. §37-1123 (B), that  
ANSAC intends to receive, review,  
and consider evidence regarding the  
navigability or non-navigability of  
the Gila River, Blue River, and the  
San Francisco River in Greenlee  
County. Interested parties are  
requested to file all documentary and  
other physical evidence they propose  
to submit to ANSAC by October 1,  
2003. All evidence submitted to  
ANSAC will be the property of  
ANSAC and the State of Arizona.  
Evidence submitted will be available  
for public inspection at the ANSAC  
offices during regular office hours.

Pursuant to A.R.S. §37-1101, et. seq.,  
the Arizona Navigable Stream  
Adjudication Commission (ANSAC)  
is planning to hold a watercourse  
navigability hearing regarding all of  
the small and minor watercourses in  
Greenlee County, Arizona. Notice is  
hereby given, pursuant to A.R.S. §37-  
1123 (B), that ANSAC intends to  
receive, review, and consider evi-  
dence regarding the navigability or  
non-navigability of all small and  
minor watercourses in Greenlee  
County.

Interested parties are requested to  
file all documentary evidence they  
propose to submit to ANSAC by  
October 1, 2003. All evidence sub-  
mitted to ANSAC will be the proper-  
ty of ANSAC and the State of  
Arizona. Evidence submitted will  
be available for public inspection at  
the ANSAC offices during regular



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BY: \_\_\_\_\_

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SEP 15 2003  
BY:

THE ARIZONA REPUBLIC

STATE OF ARIZONA }  
COUNTY OF MARICOPA } SS.

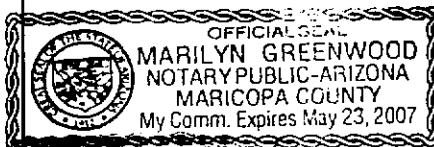
Melissa Daams, being first duly sworn, upon oath deposes and says: That she is a legal advertising representative of the Arizona Business Gazette, a newspaper of general circulation in the county of Maricopa, State of Arizona, published at Phoenix, Arizona, by Phoenix Newspapers Inc., which also publishes 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

Septmeber 5, 2003

Melissa Daams

Sworn to before me this  
5<sup>TH</sup> day of  
September A.D. 2003



Marilyn Greenwood  
Notary Public  
B-1

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 nonnavigability of all watercourses in Greenlee County. The hearings will be held in Greenlee County on October 15, 2003. The hearings will begin at 9:00 AM in an order established by the chair at the Train Depot 100 North Coronado Boulevard, Clifton, Arizona 85533. These are presently the only hearings scheduled for the watercourses in Greenlee County. The list of watercourses in Greenlee include the Gila River, Blue River, and the San Francisco River and the following small and minor watercourses: Al Creek, Alder Creek, Apache Creek, Ash Creek, Bear Creek 1, Bear Creek 2, Willow Creek, Beaver Creek, Benton Creek, Bitter Creek, Black River, Buckalou Creek, Bull Creek, Greenlee, Burro Wash, Greenlee, Bush Creek, Campbell Blue Creek, Canyon Creek 2, Castle Creek, Greenlee, Cat Creek, Cave Creek, Greenlee, Chino Creek, Chitty Canyon Creek, Cienega Creek, Cienega Creek 1, Clear Creek, Greenlee, Coal Creek, Cold Creek, Coleman Creek, Conklin Creek, Corduroy Creek, Greenlee, Cottonwood Creek, Greenlee, Coyote Wash, Greenlee, Crabtree Creek, Deerhead Creek, Dix Creek, Double Cienega Creek, Dromedary Creek, Dry Prong Creek, Dutch Blue Creek, Eagle Creek, East Eagle Creek, Fall Creek, Greenlee, Fish Creek, Greenlee, Fishhook Creek, Foote Creek, Grant Creek, Greenlee, Greaser Wash, Hannagan Creek, Hannah Springs Creek, Harden Cienega Creek, Haris Wash, Heifer Branch, Horton Creek, Greenlee, Indian Creek, Greenlee, Jackson Creek, Juan Miller Creek, K P Creek, Kaywood Wash, Largo Creek, Left Prong Dix Creek, Limestone Gulch, Linden Creek, Little Blue Cree, Little Sand Wash, Lop Ear Creek, Maloy Creek, McKittrick Creek, Middle Prong Creek, Nolan Creek, North Bull Creek, North Corral Creek, North Fork Bear, Oak Creek, Greenlee, Pace Creek, Panther Creek, Pat Creek, Pigeon Creek, Greenlee, Pipestem Creek, Rainville Wash, Raspberry Creek, Right Fork Foote Creek, Right Prong Dix, Rousensock Creek, Salt House Creek, Sand Wash, Greenlee, Sanders Wash, Sandia Wash, Sardine Creek, Sheep Wash, Greenlee, Silver Basin Creek, Silver Creek, Greenlee, Skully Creek, Snake Creek, South Fork Bear, Squaw Creek, Greenlee, Steeple Creek, Stove Wash, Strayhorse Creek, Thomas Creek 1, Greenlee, Thomas Creek 2, Greenlee, Tollgate Wash, Tule Creek, Turkey Creek 2, Tutt Creek, Wampoo Wash, Waters Wash, West Prong Creek, White Mule Creek, Whitefield Wash, Whitewater Creek, Willow Creek 1, Willow Creek 2, Greenlee, Willow Creek 3, Greenlee, and any other named or unnamed watercourse within Greenlee County.

Interested parties may submit evidence to the commission office prior to the hearing. During the public hearing, the commission will receive additional evidence including testimony. The commission will conduct its hearings informally without adherence to judicial rules of procedure or evidence.

Evidence submitted in advance of the hearing will be available for public inspection during regular commission office hours of 9:00 a.m. to 5:00 p.m., Monday thru Friday, except on holidays. The commission office is located at 1700 West Washington Street, Room 304, 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 alternate format may contact the commission office at (602) 542-9214 to make their needs

AFFIDAVIT/PROOF OF PUBLICATION

**THE COPPER ERA**

PO Box 1357 Clifton, AZ 85533  
Phone: (928) 428-2560 / Fax: (928) 428-5396  
E Mail: mwatson@eacourier.com

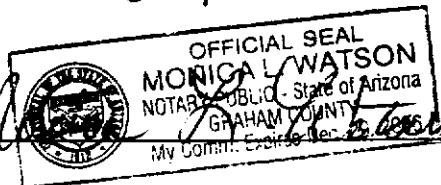
Susan G. Curtis being duly sworn deposes and says:  
That she is the legal clerk of The Copper Era, a newspaper  
published in the Town of Clifton, Greenlee County,  
Arizona; that the legal described as follows:

Arizona Navigable Stream  
Adjudication Commission  
Public Hearing

a copy of which is hereunto attached, was first published in  
said newspaper in its issue  
dated Sept 10, 2003 and was  
published in each 1 issue(s) of said newspaper  
for 1 consecutive weeks, the last  
publication being in the issue  
dated Sept 10, 2003.

Signed: Susan G. Curtis

Subscribed and sworn to before me this  
10 day of September, 2003

  
[Signature] Notary Public

My Commission expires: December 29, 2006

RECEIVED  
OCT 6 6 2003  
BY: \_\_\_\_\_

**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  
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The list of watercourses in Greenlee  
include the Gila River, Blue River,  
and the San Francisco River and the  
following small and minor water-  
courses: Al Creek, Alder Creek -  
Greenlee, Apache Creek - Greenlee,  
Ash Creek - Greenlee, Bear Creek 1 -  
Greenlee, Bear Creek 2 - Greenlee,  
Bear Wallow Creek, Beaver Creek -  
Greenlee, Beeler Creek, Benton Creek  
- Greenlee, Bitter Creek - Greenlee,  
Black River, Blue Creek, Buckalou  
Creek, Bull Creek - Greenlee, Burro  
Wash - Greenlee, Bush Creek,  
Campbell Blue Creek, Canyon Creek  
2, Castle Creek - Greenlee, Cat Creek,  
Cave Creek - Greenlee, Centerfire  
Creek - Greenlee, Chase Creek,  
Chitty Canyon Creek, Cienega Creek,  
Cienega Creek 1 - Greenlee, Clear  
Creek - Greenlee, Coal Creek, Cold  
Creek, Coleman Creek, Conklin

its hearings informally without  
adherence to judicial rules of pro-  
cedure or evidence.

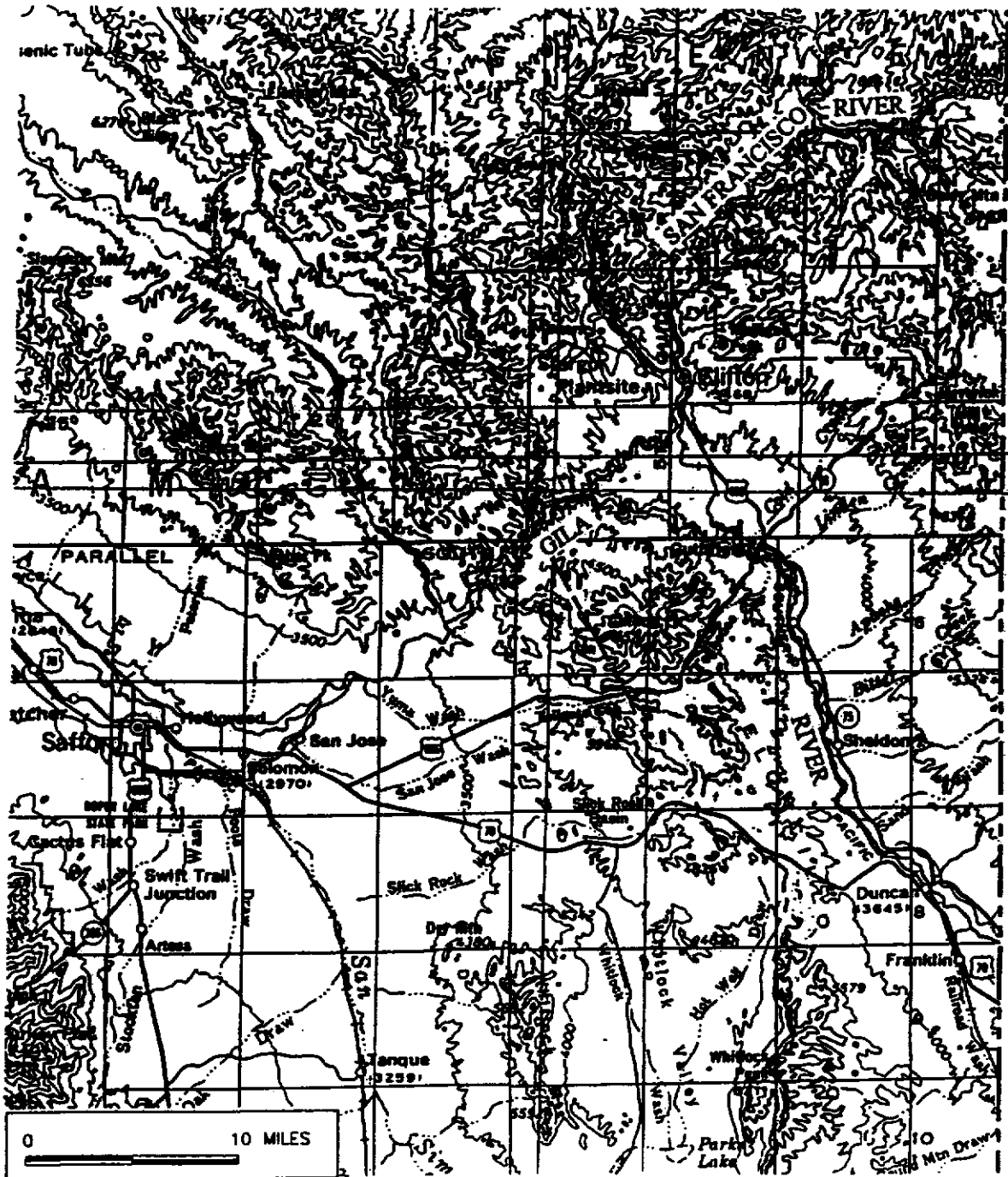
Evidence submitted in advance of  
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85007.

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tion in an alternate format may con-  
tact the commission office at (602)  
542-9214 to make their needs known.

Req.: Arizona Navigable Stream  
Adjudication Commission  
Published September 10, 003 in the  
Copper Era, Clifton, Arizona 85533.

B-2



Enlarged detail of modern map showing Upper Gila and San Francisco rivers (from State of Arizona, 1:500,000 USGS base map, revised 1981).

C

# Evidence Log

Hearing No. 03-010

Page No.

1

## Arizona Navigable Stream Adjudication Commission

San Francisco River in Greenlee County  
October 15, 2003

Item Number	Received Date	Source to ANSAC	Description	Entry By
1	2/18/97	David Baron ACLPI	Letter from David Baron dated February 18, 1997.	George Mehnert
2	8/15/97 Resubmitted 10/28/03	Phelps Dodge, Dawn Meidinger, Assistant Counsel	Assessment of the San Francisco River's Navigability Prior To and On The Date of Arizona's Statehood prepared by All Lands Title.	
3	1/?/2000	Evidence on hand at ANSAC	San Francisco River Final report by J. E. Fuller and Stantec Consulting	George Mehnert
4	10/1/03	San Francisco River Report Update	Revised June, 2003 Update Report by J.E. Fuller.	George Mehnert

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STATE OF ARIZONA  
NAVIGABLE STREAM ADJUDICATION COMMISSION

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GEORGE MEHNERT  
Executive Director

**Meeting Minutes**  
**Clifton, Greenlee County**  
**October 15, 2003**

**COMMISSION MEMBERS PRESENT**

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

**COMMISSION MEMBERS ABSENT**

Dolly Echeverria.

**STAFF PRESENT**

George Mehnert, Dir; Curtis Jennings, Legal Counsel.

**1. CALL TO ORDER.**

Chair Eisenhower called the meeting to order at approximately 9:10 a.m.

**2. ROLL CALL.**

See above.

**3. APPROVAL OF MINUTES**

A. Minutes of September 23, 2003.

**Motion: To approve minutes of September 23, 2003.**

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

**4. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE GILA RIVER IN GREENLEE COUNTY.**

The following people appeared and gave testimony, other information, or asked questions on October 15, 2003: Cheryl Doyle, Philip Rommerub, Dixie Zumwalt, Steve Wene.

**5. HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE BLUE RIVER IN GREENLEE COUNTY.**

The following people appeared and gave testimony, other information, or asked questions on October 15, 2003: Cheryl Doyle, John Wallace, Philip Rommerub.

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6. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SAN FRANCISCO RIVER IN GREENLEE COUNTY.** The following people appeared and gave testimony, other information, or asked questions on October 15, 2003: Cheryl Doyle, John Wallace, Philip Rommerub, Bill Staudenmaier regarding evidence submitted previously by Cheryl Hodges-insure that this information is still part of the record.

The Chair requested of Cheryl Doyle of the State Land Department that she check with the State Parks Board and find out how the Parks Board determines the designations for recreational boating, and that she send a letter to the Commission regarding this information.

7. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN GREENLEE COUNTY.** The following people appeared and gave testimony, other information, or asked questions on October 15, 2003: Cheryl Doyle, John Wallace, Bill Staudenmaier.

Request by Bill Staudenmaier to postpone the closing of the record and extend by 10 days the due date for the close of receipt of evidence. The Chair clarified that the extension by 10 days of keeping the record open for taking evidence will also extend by 10 days the 30 days for submitting post hearing memorandums.

**Motion: To extend the time for taking evidence by 10 days.**

Motion by: Jim Hennes. Second by: Jay Brashear 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.**

Discussion. Business meeting in December and future dates for hearings. January hearing meeting for Pima County, including the San Pedro and San Francisco River. Cecil Miller cannot meet January 26, 15, or 14. Chair suggested January 22 or 23, 2003 for Pima County hearings.

10. **ADJOURNMENT.**

**Motion: To adjourn.**

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

Adjourned at approximately 10:40 a.m.

Respectfully submitted,



George Melkert, Director, October 17, 2003.



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GEORGE MEHNERT  
Executive Director

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Meeting Minutes  
Phoenix, Maricopa County, Arizona  
January 27, 2004

**COMMISSION MEMBERS PRESENT**

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

**COMMISSION MEMBERS ABSENT**

None.

**STAFF PRESENT**

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

**1. CALL TO ORDER.**

Chairman Eisenhower called the meeting to order at approximately 08:15 a.m.

**2. ROLL CALL.**

See above.

**3. APPROVAL OF MINUTES.**

**A. Minutes of January 22, 2004.**

**Motion: To approve minutes.**

Motion by: Jim Henness. Second by: Dolly Echeverria. Vote: All aye.

**4. VOTE TO DETERMINE THE NAVIGABILITY OR NON-NAVIGABILITY OF THE GRAHAM COUNTY SMALL AND MINOR WATERCOURSES, Cause Number 03-006-NAV.**

**Motion: Non-Navigable.**

Motion by: Jay Brashear. Second by: Cecil Miller. Vote: All aye.

**5. VOTE TO DETERMINE THE NAVIGABILITY OR NON-NAVIGABILITY OF THE GREENLEE COUNTY SMALL AND MINOR WATERCOURSES, Cause Number 03-008-NAV.**

**Motion: Non-Navigable.**

Motion by: Jim Henness. Second by: Dolly Echeverria. Vote: All aye.

**6. VOTE TO DETERMINE THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SAN FRANCISCO RIVER, Cause Number 03-010-NAV.**

**Motion: Non-Navigable.**

Motion by: Jim Henness. Second by: Dolly Echeverria. Vote: All aye.

7. **VOTE TO DETERMINE THE NAVIGABILITY OR NON-NAVIGABILITY OF THE BLUE RIVER, Cause Number 03-011-NAV.**

Mr. Brashear said that he recalled reading about one attempt to float logs down the Blue River to be used as timbers in the mines around Morenci, and Mr. Brashear indicated this effort to float logs down the Blue River was strong evidence of non-navigability because it was done only one time, and was never tried again. Mr. Brashear further stated, that if the river had been navigable, floating logs down the river would have occurred more than one time. Mr. Brashear said while the evidence seems to be a little murky, this single attempt and no further attempts to float logs, is evidence that the Blue River was not navigable.

**Motion: Non-Navigable.**

Motion by: Jay Brashear. Second by: Jim Henness. Vote: All aye.

8. **VOTE TO DETERMINE THE NAVIGABILITY OR NON-NAVIGABILITY OF THE LOWER SALT RIVER, Cause Number 03-005-NAV.**

**Motion: Non-Navigable.**

Motion by: Cecil Miller. Second by: Dolly Echeverria.

**Discussion:** The only discussion was by Commissioner Brashear. *(Although the following is written in the form of a verbatim statement, it is not intended to be verbatim, but, rather, substantially correct and complete):*

Mr. Chairman. I would like to offer a few observations on the Lower Salt (River) because I think this is one of the most critical decisions and important decisions that this Commission will make and I came to some conclusions on it. I would like to unveil a few of those to the Commission and see if they find me wrong or that I deserve to be corrected before we take the vote. I had something of a struggle with some of the argument that the river, the Lower Salt, was navigable but for man's interference. Man's interference screwed up the river and brought that into question, and this led me to ponder the problem of nature and navigability. It seems to me that there is one view which I discard and that is that you have to consider the river without any human presence around it. That leads me to a further conclusion that if; it is like the philosophy 101 thing that if a tree falls in a forest and there is no one around to hear it fall, did it make a noise when it fell? How can you have a navigable waterway with no human kind to float on it? And it seems to me like the experience on this Commission is that at a very minimum we need some lawyers to argue about whether it was navigable or not, and, so I kind of dismissed the Bambi school of nature when it comes to navigability. Man is a part of nature whether we like it or not, and so I don't think he can be dismissed entirely from these considerations. I don't think it makes any difference whether man was here or not however, to the other characteristics of the river. It seems like the way it was described in the evidence, that it is kind of

an ornery and erratic critter; it's kind of a river in search of a streambed and when it floods it moves cubic yards or maybe cubic kilometers of earth around to make certain that it will never find where it really belongs. In more normal times the river shifts through its own flood stream some of it meandering into other streams. It also may settle into a shallow stream or it may dry up entirely; and those just do not seem to me that they are characteristics that lend to any kind of navigability or susceptibility of navigability.

And I think that there were some other things, some legal decisions that I found very pertinent. Two federal judges, Judge Kibby in 1892 and Kent in 1910 regarding allocating water for the Salt River both declared the river as non-navigable. Now, I have been told by my lawyer friends that this really doesn't count for much because they did not do a particularized assessment of the river, and that their declaration of non-navigability is dicta. And while that may hold some status or standing in law, common sense says to me that if two federal judges, years apart, would not have made allocations of that river to suck it dry if there had been any potential for any use of it as a navigable stream. And I wanted to argue about that because in the middle; between the Kibby and the Kent decrees, the congress enacted the federal rivers and harbors act in 1899 and the idea of that act, apparently of great concern on the part of congress, was to protect the nation's navigable rivers. In 1902 the congress appropriated funds for the construction of Roosevelt dam. If there was this concern in congress about navigable streams it seems unlikely to me that a successful act in congress to block a navigable river would stand much of a chance. And then I think the final evidence on the thing that is mentioned in the evidence is that a boat was constructed to be used in the construction of Roosevelt dam and the boat was hauled overland to get to the construction site and it certainly seems to me that if there had been, even with some manipulation of the stream bed, that if they could have got that boat up to the site by stream, it would have been done rather than moving it over what in 1912 must have been rather primitive roads and difficult conditions. Then there is some argument in the material that was submitted to us that ferries establish evidence of navigability and I have some problem with that because if a stream is navigable and if you build a ferry across it, and it was mentioned in the evidence that one of them broke loose, and apparently you put cables and ropes and stuff to guide the ferry back and forth across. It seems to me that a ferry would certainly not indicate navigability because a cable or something stretched across the stream would interfere with the flow up and down the stream and the use of the Salt as a highway of commerce. So I don't think the ferry argument stands, at least, my test and there was some other evidence at attempts of navigability; one of them floating logs and another about fish catch and stuff. However, those mostly were based on newspaper accounts and having spent a long time in that field I can tell you that newspapers then as now report unusual

activities not common and ordinary activities. Some of those articles were written tongue in cheek. One of them I recall was about the Salt River Admirals or something, and I think that those actually offer evidence that the Salt was not navigable. There were attempts; one of them was floating logs and some other activities that didn't work and the (newspaper) reporting of them at the time; much of which was tongue in cheek, just don't add up to evidence that the river was navigable. So in view of this I have decided, and I am open to argument that I am wrong from the Commission, that the Salt River was non-navigable at the time of statehood, and was not susceptible to navigation.

Vote: All aye.

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

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

There was no public comment.

**10. FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE HEARINGS AND OTHER MEETINGS.**

**11. ADJOURNMENT.**

**Motion: To adjourn.**

Motion by: Jim Henness. Second by: Dolly Echeverria. Vote: All aye.

Meeting adjourned at approximately 08:40 a.m.

Respectfully submitted,



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