BEFORE THE

ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE NAVIGABILITY OF THE SANTA CRUZ RIVER FROM THE MEXICAN BORDER TO THE CONFLUENCE WITH THE GILA RIVER; SANTA CRUZ, PIMA AND PINAL COUNTIES, ARIZONA	No.: 03-002-NAV

REPORT, FINDINGS AND DETERMINATION REGARDING THE NAVIGABILITY OF THE SANTA CRUZ RIVER FROM THE MEXICAN BORDER TO THE 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 Santa Cruz River from the Mexican border to the confluence with the Gila River was navigable or nonnavigable for title purposes as of February 14, 1912. Proper and legal public notice was given in accordance with law and 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 December 24, 2002, in accordance with A.R.S. § 37-1123B, the Commission gave proper prior notice of its intent to study the issue of navigability or nonnavigability of the Santa Cruz River from the Mexican border to the confluence with the Gila River. A copy of the Notice of Intent to Study and Receive, Review and Consider Evidence on the issue of navigability of the Santa Cruz River in Santa Cruz, Pima and Pinal Counties, Arizona, is attached hereto as Exhibit "A."

After collecting and documenting all reasonably available evidence received pursuant to the Notice of Intent to Study and Receive, Review and Consider Evidence, the Commission scheduled public hearings to receive additional evidence and testimony regarding the navigability or nonnavigability of the Santa Cruz River. Public notices of these hearings 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). Hearings were held on March 11, 2003 in the City of Nogales, the county seat of Santa Cruz County, on January 22, 2004 in the City of Tucson, the county seat of Pima County, and on March 9, 2004 in the City of Florence, the county seat of Pinal County, since the law requires that such hearings be held in the county in which the watercourse being studied is located. Attached hereto as Exhibit "B" are copies of the notices of the public hearings.

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

March 11, 2003, January 22, 2004 and March 9, 2004, all parties were advised that they could file post-hearing memoranda pursuant to the Commission's Rules. Post-hearing memoranda were filed by the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users Association, Phelps Dodge Corporation, the Defenders of Wildlife, and the Arizona Center for Law in the Public Interest.

On September 16, 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 Santa Cruz River from the Mexican border to the confluence with the Gila River in Santa Cruz, Pima and Pinal Counties, Arizona, was nonnavigable as of February 14, 1912.

II. THE SANTA CRUZ RIVER FROM THE MEXICAN BORDER TO THE CONFLUENCE WITH THE GILA RIVER

The Santa Cruz River has its headwaters at the southern base of the Canalo Hills in Santa Cruz County, Arizona, and flows generally south as a shallow perennial stream through the San Rafael valley before crossing into Mexico near the town of Loquiel. The river describes a loop of about 30 miles with a 348-square mile contributing drainage area in Mexico before reentering the United States approximately six miles east of Nogales, approximately in the center of the southern edge of Section 16, Township 24 South, Range 14 East of the Gila and Salt River Base and Meridian, approximately at Latitude 31° 20′ North and Longitude 110° 55′ West. The small portion of the Santa Cruz River in Santa Cruz County before entering Mexico is considered a small or minor watercourse and is not treated in this report. Likewise, neither is the area in which the river flows through northern Mexico.

The river channel continues northward from the international boundary with Mexico past Rio Rico, Tumacacori National Monument, Tubac, Green Valley, San

Xavier del Bac, and Tucson, and then in a northwesterly direction past the town of Marana, south of Eloy and Casa Grande near the Indian village of Chui Chu in Pima County, and then flows into Pinal County past the settlement of Maricopa where it flows into the Gila River a few miles south of the confluence of the Gila and Salt River, approximately in the center of the north half of Section 17, Township 2 South, Range 2 East of the Gila and Salt River Base and Meridian approximately Latitude 33° 15.75' North and Longitude 112° 10.75' West. The reach of the river considered in this report is a total distance of about 225 miles.

The entire Santa Cruz River basin encompasses approximately 8,581 square miles. The elevation at the point the Santa Cruz River crosses the international boundary near Nogales is approximately 3,875 feet above sea level and the elevation at the Santa Cruz River confluence with the Gila River is approximately 940 feet above sea level.

The major tributaries of the Santa Cruz River from south to north are Nogales Wash, Sonoita Creek, Rillito Creek, Canada del Oro Wash and the Altar-Brawley Wash. The Santa Cruz River watershed can be broken into two reaches based on environmental, geomorphic and hydrologic characteristics, but was studied as one entire watercourse by the Commission. A map of the Santa Cruz River watershed is attached hereto as Exhibit "C."

A. The Upper Santa Cruz River Valley

The upper Santa Cruz River encompasses the reach from the Mexican border near Nogales to Marana, Arizona. In the upper portion of this reach, the river is perennial, but is dry most of the year north of the Pima County line. The channel lies within an inner valley created within broad dissected pediments and alluvial base and deposits flanked by mountains. The well-defined entrenched channel in the upper reach is considered arroyo in nature. It is a semi-desert grassland with mesquite and

many perennial grasses. There are also riparian areas fed with low flowing perennial streams and springs.

B. The Lower Santa Cruz River

The lower Santa Cruz River valley reach extends from Marana to the Santa Cruz River's confluence with the Gila River. Below Marana the river is clearly ephemeral and flows only when there is significant precipitation. It flows into the "Santa Cruz Flats" which is a broad plain of indistinct non-continuous channels. In this area floodwaters spread over a wide area with flow concentrated in various small washes. Distinct channels exist only along the former alignment of a canal and near the Santa Cruz River's confluence with the Gila River. The vegetation is typical Sonoran Desert, with creosote bush, salt bush, ironwood, ocotillo, saguaro and cholla.

III. BACKGROUND AND HISTORICAL PERSPECTIVES

A. Public Trust Doctrine and Equal Footing Doctrine

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

> An ancient doctrine of common law restricts the sovereign's ability to dispose of resources held in public trust. This doctrine, integral to watercourse sovereignty, was explained by the Supreme Court in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). A state's title to lands under navigable waters is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over

> them, and have liberty of fishing therein freed from the obstruction or interference of private parties.
>
> *Id.* at 452, 13 S.Ct. at 118; *see also Martin v. Waddell*, 41 U.S. (16 Pet.) at 413 (describing watercourse sovereignty as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish").

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

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

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

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

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.
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> 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 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.

[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.

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 225-mile reach of the Santa Cruz River from the point where it crosses the Mexico – Arizona international border, approximately 6 miles east of Nogales flowing north through Rio Rico, Tubac, Tucson, Marana, Casa Grande and Maricopa 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 Santa Cruz River in Santa Cruz, Pima and Pinal Counties, Arizona as of February 14, 1912.

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

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

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

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

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

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

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

V. BURDEN OF PROOF

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

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

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

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

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

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

The "preponderance of the evidence" standard is sometimes referred to as requiring "fifty percent plus one" in favor of the party with the burden of proof. One could image a set of scales. If the evidence on each side weighs exactly evenly, the party without the burden of proof must prevail. In order for the party with the burden

to prevail, sufficient evidence must exist in order to tip the scales (even slightly) in its favor. See generally *United States v. Fatico,* 458 U.S. 388, 403-06 (E.D. N.Y. 1978), *aff'd* 603 F.2d 1053 (2nd Cir. 1979), *cert.denied* 444 U.S. 1073 (1980); *United States v. Schipani,* 289 F.Supp. 43, 56 (E.D.N.Y. 1968), *aff'd,* 414 F.2d 1262 (2d Cir. 1969).[3]

VI. STANDARD FOR DETERMINING NAVIGABILITY

The statutes defines a navigable watercourse as follows:

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

A.R.S. § 37-1101(5).

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

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

[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).

> 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, which are generally used by the authorities in applying the federal test for navigability to assist it in determining whether the Santa Cruz River was navigable at statehood.

> 11. "Watercourse" means the main body or a portion or reach of any lake, river, creek, stream, wash, arroyo, channel or other body of water. Watercourse does not include a man-made water conveyance system described in paragraph 4 of this section, except to the extent that the system encompasses lands that were part of a natural watercourse as of February 14, 1912.
>
> 5. "Navigable" or "navigable watercourse" means a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.
>
> 4. "Man-made water conveyance system" means:
>
> (a) An irrigation or drainage canal, lateral canal, ditch or flume.

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

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

(d) A hydropower inlet and discharge facility.

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

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

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

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

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

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

VII. EVIDENCE RECEIVED AND CONSIDERED BY THE COMMISSION

Pursuant to A.R.S. § 37-1123, and other provisions of Title 37, Chapter 7, Arizona Revised Statutes, the Commission received, compiled, and reviewed evidence and records regarding the navigability and nonnavigability of the Santa Cruz River from the Mexican border to the confluence with the Gila River. Evidence consisting of written documents, studies, newspapers and other historical accounts, pictures, testimony and recordings, were submitted. In all there were more than 23 separate documentary filings. The Arizona State Land Department, Arizona Center for Law in the Public

Interest, Central Arizona Paddlers Club, Arizona Audubon Council, Friends of Arizona Rivers, Rio Rico Properties, Inc., and several individuals including Richard Lee Duncan, Mark Larkin, James T. Braselton, Leonard and Phillip Halpenny, Frank Brophy, Jr., Brian Woodford, Amy Langenfeld, Nancy Orr and Jean Keller submitted evidence including letters and maps regarding the navigability or nonnavigability of the Santa Cruz River. The State Land Department submitted a comprehensive study dated November 1996, prepared by S.F.C. Engineering Company, in association with George V. Sobel Consulting Engineers, J. E. Fuller Hydrology and Geomorphology, Inc., SWCA, Inc. Environmental Consultants, University of Arizona Water Resources Research Center and the Arizona Geological Survey, through a contract with the Arizona State Land Department. An updated version of this report, dated January 12, 2004, was also submitted and reviewed. The Arizona Center for Law in the Public Interest submitted a comprehensive brief pertaining to the Santa Cruz River and other rivers in the state. Mr. Leonard C. Halpenny submitted a comprehensive review of the hydrology of the Santa Cruz basin in the vicinity of the Santa Cruz-Pima County line, prepared by Water Development Corporation, consultants in water resources, and further submitted a paper presented at the first annual conference of the Arizona Hydrological Society on September 16, 1988, regarding the hydrology of the Santa Cruz basin. The list of evidence and records, together with a summarization, is attached as Exhibit "D." The Commission also heard testimony and received and considered evidence at the public hearings held in Tucson on January 22, 2004, in Nogales on March 11, 2003, and in Florence on March 9, 2004. The meeting minutes of those hearings, as well as the final hearing held on September 16, 2004 at in Phoenix, Arizona, which the Commission found and determined that the Santa Cruz River was nonnavigable on the day Arizona became a state, are attached as Exhibit "E."

A. Prehistoric or Pre-Columbian Conditions on Santa Cruz River Watershed

The paleoindian tradition (13500 B.C. to 8000 B.C.) and early stages of the subsequent cultural tradition, the archaic period, are not as well represented along the Santa Cruz River as they are along the San Pedro River. Some Clovis points have been found in excavations along the Santa Cruz River, but the situation along the Santa Cruz contrasts sharply with the San Pedro River valley where varied Clovis kill sites have yielded evidence that continues to be remarkable in the context of new world prehistory. Since the weather and climate is very similar, the lack of paleoindian sites in the Santa Cruz River valley is probably due to the fact that they have not been discovered or, if they were present, have been destroyed by erosion or covered over by flood deposits.

The archaic period (8000 B.C. to 100 B.C.), sometimes known as the Cochise culture, is better represented by known sites in the Santa Cruz River valley. These sites are mostly occasional camps indicating that the primary activity was to gather and prepare food. Some structures such as temporary brush shelters have been found. As is well documented in other sites in southern Arizona, the Archaic culture developed into the Hohokam culture some time between 300 A.D. and 300 B.C. Excavations in the Tucson basin area have lent support to the theory that the Hohokam culture developed, at least in this area, out of the archaic tradition. Others maintain that the Hohokam culture was greatly influenced by immigration from meso-america. In the Tucson basin the evidence shows a transition between archaic and Hohokam traditions that ultimately saw the development of crop dependency, new and better ceramic and lithic technologic and larger and more permanent houses. Burials during this period show a mixture of inhumations and cremations indicating the transition of culture. After 400 A.D. the prehistoric occupation along the lower Santa Cruz River greatly resembles the Hohokam cultural patterns and appears to be greatly influenced by the Hohokam culture developing along the Gila River to the north. There is some

indication of Mogollon culture influence during this period in the middle Santa Cruz River valley. The upper Santa Cruz River valley, primarily in Santa Cruz County, shows little, if any, settlement during this early period.

In the lower and middle Santa Cruz valley there is evidence of continuing village development after 750 A.D. and ball courts are found, which is indicative of meso-american influence. The population expanded somewhat between 750 and 950 A.D. and there is evidence of seasonal flood water farming using the natural runoff from gullies and arroyos in the Tucson basin and other areas of the middle Santa Cruz River valley. The population apparently continued to expand and villages or settlements became larger although fewer in number up through 1400 A.D. Platform mounds appeared and there was more extended use of non-riverine agricultural systems and well as flood water farming. Probably due to lack of water there is not much evidence of irrigated farming, although in the middle and lower Santa Cruz River valley some canals have been found, but not nearly to the extent of their usage in the Gila and Salt River valley. By 1400 many of the prehistoric sites appear to have been abandoned. There appears to have been a large decline in population, and the few sites that remained occupied after 1400 have been tied into the upper Pima culture. During this prehistoric period, the river appears to have been intermittent and did flow periodically above ground, especially when fed by springs in the Canoa, San Xavier, and Tucson areas. These early indigenous inhabitants used the valley as a transportation corridor, but there is no evidence whatsoever of any use of the river for travel or navigation. It was a source of water for people traveling through the area and sometimes in flood season could be used for irrigation.

B. Historic Development of Santa Cruz Watershed

The earliest Spanish or western explorers to enter southern Arizona was a party led by Alvaro Nunez Cabeza de Vaca who ventured through the southeastern portion of the state in 1536. Because of tales of rich Indian cities further north, "the

Seven Cities of Cebola," the viceroy of New Spain sent Fray Marcos de Niza to explore the region in 1539. The following year de Niza returned with a full scale expedition led by Don Francisco de Coronado. De Niza and Coronado did not travel up the Santa Cruz valley, although Coronado may have gone through the San Rafael valley to the east of the Santa Cruz valley. There is no history of any Spanish travelers or settlers in the Santa Cruz valley until 1691 when a Jesuit missionary, Father Eusebio Francisco Kino, came to the valley to establish missions and convert the indigenous population to Christianity. The impact Father Kino had on the Santa Cruz valley, either directly or indirectly, cannot be underestimated. The first large settlement in the area was the Jesuit mission of Santa Maria Soamca, later known as Santa Cruz (Mexico). Father Kino used the Santa Cruz valley extensively as a travel route into the northern portion of Pimeria Alta. His missionary efforts in the twenty years between 1691 and his death in 1711, led to the establishment of San Xavier del Bac, Guevava, and Tumacacori. Some smaller missionary posts or visitas were also established at Tubac and San Augustin del Tucson. The greatest impact Kino and subsequent missionaries had in the Santa Cruz valley was the introduction of new technologies in crops and domestic animals. The new information and crop species brought by the Spanish missionaries to the Pima Indians living in and near the Santa Cruz valley led to an expansion of farming. The crops of the missions relied on irrigation from the Santa Cruz River surface waters flowing through canals, some of which may have been originally dug by the Hohokam. The missionaries also brought cattle, sheep, and goats into the area from the herds maintained further south in Mexico.

In 1775, Captain Juan Batista de Anza came to the Santa Cruz valley where the missions were under pressure from marauding Apaches. A presidio was established at Tubac in 1751 and one was established at San Augustin del Tucson in 1757, although they were defended or manned only intermittently. In 1767, the Jesuits were expelled from New Spain and the Franciscans entered the area, taking their place

and taking charge of a seriously deteriorated mission system. The churches presently seen at San Xavier del Bac and Tumacacori were completed by them in 1797 and 1822, respectively, although prior to their construction they were centers of missionary activity.

Along with the salutary effects, Europeans brought disease which had a devastating effect on the Indian populations in the valley since they were not immune to western European diseases. Although mining on a small scale had been practiced for centuries by Indians, primarily in small silver mines in the Santa Rita Mountains, the Spanish expanded the mining activity and attempted to establish silver and gold mines. They were not particularly successful in this endeavor, primarily due to the opposition of the Jesuit Order. In order to encourage settlement in Pimeria Alta, the Spanish government in the 17th and 18th centuries made certain land grants to individuals who would go into the area and live on them. After 1821, when Mexico became free of Spain, it continued this practice. Eight claims of land grants were made in the Santa Cruz valley area, the oldest being Tumacacori/Calabasas which dated from 1806. In 1776, the Presidio at Tucson was officially established and permanently manned after that date. Thus the town of Tucson grew up around the Presidio and since that time has been the center of population in southern Arizona.

In 1846 war broke out between the United States and Mexico, which was ended by the Treaty of Guadalupe Hidalgo, wherein Mexico ceded to the United States all of its northern territories north of the Gila River. Almost immediately after this treaty, gold was discovered in California and a large number of people traveled through Arizona on their way to the gold fields of California. Since one of the best routes was south of the Gila River, the United States undertook to buy from Mexico enough land to allow this southern transcontinental route, and this was accomplished in the Gadsden Purchase of 1853 whereby the United States annexed the land south of the Gila River to the present international boundary. Immediately thereafter, a survey

was undertaken to locate a railroad route through southern Arizona to California. Also, the Butterfield Stage Line was established in 1857 from San Antonio through southern Arizona, stopping at Tucson on its way to San Diego and Los Angeles. Some military posts such as Ft. Lowell in Tucson were established in the 1850's, but the United States military presence in Arizona was curtailed by the occurrence of the Civil War. After that War, in 1865, a number of military posts were established in Arizona to quell the marauding Apaches.

The Southern Pacific Railroad was completed from the east as far as Tucson in 1881. Other railroad lines were built, connecting Tucson with Nogales, which grew in size and importance because of the railroad, and north to Phoenix. With the capture of Geronimo in 1886, the Indian Wars were at an end. These two events allowed an expansion of commerce, mining, and ranching in southern Arizona. In the 1880's a large number of cattle were brought to Arizona and cattle ranches established. In the Santa Cruz valley, trees and wood were harvested for fuels and as material to build houses and other structures. Ditches and diversion dams were built to divert water for crops. Groundwater pumping was brought into the area in 1890, which expanded the number of crops grown and this, compounded with the need for water for mining activities and the need for additional water for the increasing population, eventually lowered the water table. Droughts followed by severe storms, coupled with the human activity, resulted in flooding which caused a great deal of erosion and arroyo cutting in southern Arizona, especially in the Santa Cruz River channel.

C. Conditions in the Santa Cruz River Valley During the Last Half of the 1800's up to Statehood in 1912

Early visitors to the Santa Cruz River valley had many descriptions of the river. In the upper valley in Santa Cruz County, it was a low-flowing perennial stream with some marshy areas and cienegas. Near the Pima County line, the river generally went subsurface and was thus dry most of the year but surfaced again near San Xavier

and Tucson. This was due to a geological change from high bedrock in Santa Cruz County to a deep alluvial system in Pima County. In those areas where the river flowed, the Indian population assisted by the missionaries conducted farming from the surface waters. There are reports of fish being caught in pools along the perennial flow areas of the river, but there is no record of the development of any commercial fishing industry. In the lower Santa Cruz River, from Marana on northwest, the river only flowed intermittently and as a result of precipitation.

Although there are reports of attempts at floating down the Santa Cruz River, there are no reports of any successful navigation over any significant portion or reach of the river. Two lakes were built in the 1860's to the 1880's south of Tucson which impounded floodwaters and were maintained by flows from springs and cienegas near Sentinel Hill or "A" Mountain. The waters impounded by these lakes were used to grind grains to supply flour to the nearby community. They were also popular as recreation areas. The drought and flood cycles of the late 1880's and 1890's severely affected these lakes and washed out the dams that impounded them. As the population grew, there were more wells and pumping of water from the basin and wood cutting to the point where most of the trees in the valley near Tucson were cut down. Most of the riparian trees had been cut for use in building homes and other structures and for firewood. Mining activity in the late 1800's and since statehood has required a great deal of water which has resulted in a significant lowering of the water table. By 1910, the entire base flow of the river at both Nogales and Tucson was diverted for agriculture, leaving the mines to pump subsurface water for their operations. Population growth, mining and agriculture have led to the loss of perennial water, an increase in groundwater withdrawal, and an extensive change in the vegetation structure. These factors combined with the alternate drought and flood conditions of the late 1880's and 1890's and the early part of this century caused a great deal of erosion, channel cutting and arroyoization of the upper Santa Cruz River valley.

A land speculator portrayed the Santa Cruz River at Calabasas, just downstream from Nogales, as capable of floating steamboats in the 1880's for consumption by prospective land purchasers back east. This was pure fiction but gave rise to the belief, occasionally even today, that the river was navigable by large ships.

Although the Santa Cruz River has never within history or known prehistory been considered a navigable river, additional requirements for water for mining activities, agriculture and general requirements due to increased population diminished the amount of water available in the riverbed by a significant amount by 1912. As of the date of statehood, while there was some flow in the far upper reaches of the Santa Cruz River, i.e. in Santa Cruz County, the remainder of the river would have to be considered ephemeral or intermittent at best. The lower reach of the river from Marana north to the confluence with the Gila River has always been dry, flowing only in response to significant precipitation. The Santa Cruz River valley has served as an overland trade route from prehistoric times, but there is no documented record of any trade or travel on the river during the period leading up to statehood. Travel in or near the Santa Cruz River was accomplished by horseback, wagon, pack mule, trains and later automobiles as the road system improved. The Santa Cruz River is not listed in the Rivers and Harbors Act of 1899 (33 U.S.C. §§ 401 through 467(e)).

D. Conditions At and After Statehood

There is no record indicating that the lower Santa Cruz River ever supported a perennial flow. The upper Santa Cruz River may be considered prior to statehood to have had a perennial flow, but even then, it was intermittent. By 1910, all of the flow of the river was diverted for municipal use or irrigation and frequently this did not produce sufficient water. The farmers would substitute pumping or would augment the river flow for irrigation by pumping from subsurface waters and mines in the area relied almost entirely on subsurface pumping of water. By statehood, the use of the diversion of water for irrigation and municipal use and subsurface pumping for

irrigation and mining use was so extensive that the vegetation and foliage along the river changed considerably with those plants requiring a near-surface source of water such as cottonwood had died out and were cut and used by the local populace for firewood. The cienegas and riparian areas in the upper reach of the Santa Cruz River from Nogales north dried up also. The Santa Cruz River can clearly not be called navigable or susceptible of navigability as of the date of statehood.

E. Title to Lands Covered by Mexican Land Grants

In the course of a hearing on the Santa Cruz River, the owners of Rio Rico Properties, Inc., by and through their attorneys, filed a memorandum with the Commission claiming that the Commission and the State of Arizona had no jurisdiction to consider the navigability of that portion of the Santa Cruz River encompassed within their property. Rio Rico Properties, Inc. is the successor in interest to the heirs of Luis Maria Cabeza de Baca, who acquired a land grant from the Mexican government in 1821 known as the "Las Vegas Grandes" near Las Vegas, New Mexico. Since this grant was in conflict with another later grant, Congress passed an Act in June of 1860 (12 Stat. 71, c. 167) allowing the heirs of Cabeza de Baca to select an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. In 1863, as one of the five parcels, the Baca heirs selected the tract known as Baca Float No. 3, which is the area encompassed by the property now owned by Rio Rico Properties, Inc.[4] The owners and holders of Baca Float No. 3 claimed to hold their title by Act of Congress from the original Las Vegas land grant which was made in 1821 prior to the treaties.

The position of the holders of what was formerly Mexican Land Grant land is that the original Mexican Land Grant was made prior to the Treaty of Guadalupe Hidalgo (9 U.S. Stat. 922, Feb. 2, 1848) ending the war between the United

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

States and Mexico and also before the treaty formalizing the Gadsden Purchase (10 U.S. Stat. 1031, Dec. 30, 1853) whereby the United States bought from Mexico the area south of the Gila River to the present international border. Both of these treaties provide that the United States would honor property rights and titles in land held by Mexican citizens prior to the date of the treaties. Because there were no title restrictions under the Mexican Land Grants and Mexican law apparently did not recognize the Public Trust Doctrine as we know it (whereby the title to land under tidal waters and navigable rivers and the banks thereof was held by the sovereign for the benefit of all the people), it is their position that their title to the Santa Cruz River where it flowed through Baca Float No. 3 should be absolute and not subject to the Public Trust Doctrine. In support of their position, they cite City and County of San Francisco v. Le Roy, 138 U.S. 656, 11 S.Ct. 364, 34 L.Ed. 1096 (1891); Knight v. United Land Association, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974 (1891); Shaw v. Kellogg, 170 U.S. 312, 18 S.Ct. 632, 42 L.Ed. 1050 (1898); United States v. Coronado Beach Co., 255 U.S. 472, 41 S.Ct. 378, 65 L.Ed. 735 (1921).

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

VIII. FINDINGS AND DETERMINATION

The Commission conducted a particularized assessment of equal footing claims the State of Arizona might have to the bed and banks, up to the high-water mark, of the Santa Cruz River, and based on all of the historical and scientific data and information, documents, and other evidence produced, finds that the Santa Cruz 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 Santa Cruz 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 seasonal storms.

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

The Commission also finds that there is no evidence of any commercial fishing having occurred on the Santa Cruz 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 Santa Cruz River in Cochise, Pima and Pinal Counties, Arizona, was not navigable as of February 14, 1912.

DATED this 18 day of October, 2006.

Earl Eisenhower, Chair

Dolly Echeverria, Vice Chair

Jay Brashear, Member

Cecil Miller, Member

James Henness, Member

STAFF MEMBERS:

George Mehnert
Executive Director

Curtis A. Jennings
Legal Counsel to the Commission

EXHIBIT A

LEGAL NOTICE

STATEMENT OF INTENT
State of Arizona
Navigable Stream
Adjudication Commission

Pursuant to A.R.S. §37-1101, et. seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold a watercourse navigability hearing regarding the Santa Cruz River in Santa Cruz 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 Santa Cruz River in Santa Cruz County. Interested parties are requested to file all documentary evidence they propose to submit to ANSAC by January 24, 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.

An unbound original plus seven bound copies of documentary evidence is to be submitted. ANSAC offices are located at 1700 West Washington, Room 404, Phoenix, AZ 85007. The telephone number is (602) 542-9214. The web site address is http://www.azstreambeds.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.

Pub: 12/24, 12/31, 1/7/03
Req: State of AZ NSA
Nogales International

AFFIDAVIT OF PUBLICATION

STATE OF ARIZONA }
COUNTY OF SANTA CRUZ } ss.

Bob Kimball being of first duly sworn, deposes and says: that he/she is Publisher of the NOGALES INTERNATIONAL, a newspaper published in the County of Santa Cruz, State of Arizona, and of general circulation in said County, State and elsewhere, and that the hereto attached legal notice

Statement of Intent State of Arizona Navigable Stream Adjudication Commission

was printed and published correctly in the regular and entire issue of said NOGALES INTERNATIONAL for 3 issues; that the first publication was made on the 24 day of Dec, 20 02, and the last publication thereof was made on the 7 day of Jan, 20 03.

NOGALES INTERNATIONAL

By Bob Kimball

Subscribed and sworn to before me this 7 day of Jan 20 03

Notary Public

My commission expires

OFFICIAL SEAL
SANDRA MORALES
Notary Public - State of Arizona
SANTA CRUZ COUNTY
My Comm. Expires Jan. 4, 2005

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Pursuant to A.R.S. §37-1101, et. seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold a watercourse navigability hearing regarding the San Pedro River and the Santa Cruz River in Pima County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-1123 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or nonnavigability of the San Pedro River and the Santa Cruz River in Pima County. Interested parties are requested to file all documentary and other physical evidence they propose to submit to ANSAC by January 12, 2004. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC offices during regular office hours.
Pursuant to A.R.S. §37-1101, et. seq., the Arizona Navigable Stream Adjudication Commission (ANSAC) is planning to hold a watercourse navigability hearing regarding all of the small and minor watercourses in Pima County, Arizona. Notice is hereby given, pursuant to A.R.S. §37-1123 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or nonnavigability of all small and minor watercourses in Pima County. Interested parties are requested to file all documentary evidence they propose to submit to ANSAC by January 12, 2004. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC offices during regular office hours.
The list of small and minor watercourses includes: Agua Caliente Wash, Agua Verde Creek, Aguajita Wash, Aguirre Wash, Alambre Wash, Alamito Wash, Alamo Wash 1 - Pima, Alder Creek - Pima, Alder Wash - Pima, Ali Chuk Wash, Ali Molina Wash, Altar Wash, Amigo Wash, Anegam Wash, Anegan

TUCSON'S NEWSPAPERS
www.tucson.com

STATE OF ARIZONA
COUNTY OF PIMA

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

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

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

Janice Anderson
Agent

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

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

My Commission Expires _____

Notary Public Valerie S Gonzales

M332223603601

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Affidavit of Publication

STATE OF ARIZONA }
ss.
COUNTY OF PINAL }

STATEMENT OF INTENT
State of Arizona
Arizona Navigable Stream Adjudication Commission

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

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

The list of small and minor watercourses - Pinal, Cronley Wash, Cruz Wash, Deer Creek - Pinal, Deer Creek 1 - Graham/Pinal, Dodge Tank Wash, Dodge Wash, Dodson Wash - Pinal, Donnelly Wash, Drew Wash, Dripping Spring, Dry Camp Canyon, Eagle Wash, Eskiminzin Wash, Faraway Wash, First Water Creek, Flag Wash, Garden Creek, Greene Wash, Guild Wash, Gust James Wash, Hackberry Creek - Pinal, Hackberry Wash - Pinal, Hagen Canyon Stream, Haunted Canyon Creek, Hells Half Acre, Holy Joe Canyon, Horse Camp Canyon, Horse Foot Wash, Indian Bend Wash - Pinal, Indian Well Wash, Irene Wash, James Wash, Jim Thomas Wash, Kaka Wash, Kohatk Wash, La Barge Creek, Lemmon Creek, Little Ash Creek - Pinal, Little Gust Jame, Lyons Fork, Mammoth Wash, Margaret Wash, Mesa Wash - Pinal, Milk Ranch Creek, Milky Wash, Mineral Creek - Pinal, Mulberry Wash - Pinal, North Branch San, North Fork Clark, Oak Creek - Pinal, Paisano Canyon Spring, Palmer Wash, Parsons Canyon Spring, Peppersauce Wash, Peters Wash, Piper Springs Wash, Polecat Wash, Potters Wash, Putman Wash - Pinal, Queen Creek, Rainbows End Wash, Rancho Rio Creek, Ray Spring Wash, Redrock Canyon, Reevis Creek, Reymert Wash, Ripsey Wash, Roach Wash, Rock Creek 1 - Pinal, Rock Creek 2 - Pinal, Romero Wash, Santa Cruz Wash, Santa Rosa Wash, Scanlon Wash, Silver King Wash, Silver Reef Wash, Smelter Wash, Smith Wash - Pinal, South Fork Clark, Spencer Spring Creek, Steamboat Wash - Pinal, Swingle Wash, Sycamore Canyon, Tar Wash, Tat Momoli Wash, Threeway Wash, Tilmans Wash, Tipperary Wash, Tom Mix Wash, Tortilla Creek, Tucson Wash, Twentynine Wash, Twentyseven Wash, Vekol Wash, Virgus Canyon St, Weekes Wash, Well Canyon Stream, West Fork Pinto, Whitewash Canyon, Whitlow Canyon, Zapata Wash, and any other named or unnamed small

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

day of JANUARY A.D., 2004

Second publication JANUARY 22, 2004

Third publication JANUARY 29, 2004

Fourth publication _____

Fifth publication _____

Sixth publication _____

CASA GRANDE DISPATCH

By Donovan M. Kramer

DONOVAN M. KRAMER SR., Publisher

Sworn to before me this 31st

day of January A.D., 2004

Debbie L. Mumme

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

DEBBIE L MUMME
Notary Public - Arizona
Pinal County
My Commission Expires
October 23, 2005

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EXHIBIT B

3-11-03

proceedings before the Committee.
ORDERED this 10th day of January, 2003.
/s/ Laurie A.Woodall, Chairman Arizona Power Plant and Transmission Line Siting Committee
03004-January 28, 2003.

PUBLIC NOTICE

The Arizona Department of Transportation (ADOT) has received an offer to purchase a parcel of excess land located north of Raintree Drive on the east side of the Northeast Outer Loop (Pima Freeway) in Scottsdale, Maricopa County, Arizona. The property consists of 2.25 acres +/- site. The parcel is identified as ADOT Excess Land No. L-M-288. The legal description may be obtained by calling (602) 712-7587. Minimum Bid: $1,176,000. Required Deposit: $100,000.00.

This property is advertised in accordance with ARS 28-7095 as amended. ADOT will accept additional offers on or before February 26, 2003 at 10:00 a.m. MST, for no less than the minimum bid. If any additional offers are submitted, the property will be sold at a public auction on February 27, 2003 at 10:00 a.m., MST, in the Right of Way Conference Room located in Room 301 of the Engineering Building, at the address indicated below.

Arizona Department of Transportation Intermodal Transportation Division Right of Way Group/Property Management Section 205 South 17th Avenue, Room 370, Mail Drop 612E Phoenix, Arizona 85007-3212

Published: January 28, 2003.

NOTICE OF PUBLIC HEARING
Hearing Date: March 11, 2003
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 a public hearing to receive physical evidence and testimony relating to the navigability or nonnavigability of the Santa Cruz River in Santa Cruz County. The hearing that was originally scheduled in Santa Cruz County for February 11, 2003 has been changed to March 11, 2003. The hearing will begin at 1:30 p.m. at the City Hall Complex Council Chambers at 777 North Grand Avenue, Nogales, Arizona 85621. This is presently the only hearing scheduled for the Santa Cruz River in Santa Cruz County.

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

Evidence submitted in advance of the hearing will be available for public inspection during regular commission office hours of 8:00 a.m. to 5:00 p.m., Monday thru Friday, except on holidays. The commission office is located at 1700 West Washington Street, Room 404, 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 Mehnert, Executive Director, January 22, 2003
03020-January 28, 2003.

8830

Legals

Notice is hereby given that the Maricopa County Regional School District will receive bids for Federal Affairs Consultant and Lobbying Services. The scope of work and a full bid packet is available from Kathy Chance at 358 N. 5th Ave, Phoenix, AZ 85003. Questions regarding the bid may be directed to Marc Frazier at 602-452-4700. Each bid must be sealed, identified and received at the above address by Tuesday February 11th, 2003 by 5 p.m. **02825**-January 22, 28, 2003.

NOTICE OF PUBLIC HEARING
Hearing Date: March 12, 2003
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 a public hearing to receive physical evidence and testimony relating to the navigability or nonnavigability of the San Pedro River in Cochise County. The hearing that was originally scheduled in Cochise County for February 12, 2003 has been changed to March 12, 2003. The hearing will begin at 9:00 a.m. at the Cochise County Board of Supervisors Board Room, Building B, 1415 West Melody Lane, Bisbee, Arizona 85603. This is presently the only hearing scheduled for the San Pedro River in Cochise County.

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

Evidence submitted in advance of the hearing will be available for public inspection during regular commission office hours of 8:00 a.m. to 5:00 p.m., Monday thru Friday, except on holidays. The commission office is located at 1700 West Washington Street, Room 404, 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 Mehnert, Executive Director, January 22, 2003

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Creek 2 - Cochise, Cottonwood Creek 3 - Cochise, Cottonwood Draw, Danger Wash, Deer Creek 1 - Cochise, Deer Creek 1 - Pima/Cochise, Dragoon Wash, Dragoon Wash, East Turkey Creek, East Whitetail Creek, Escalante Wash, Fivemile Creek, Gadwall Canyon, Garden Canyon, Glance Creek, Gold Gulch, Guadalupe Canyon, Haberstock Wash, Hackberry Wash - Cochise, Happy Camp Wash, Hay Hollow Wash, Henderson Wash, Hot Springs Canyon, Indian Creek 1 - Cochise, Indian Creek 2 - Cochise, Joaquin Creek, Keating Creek, Lee Creek, Mesa Draw, Mescal Arroyo, Mescal Creek - Cochise, Middle Canyon Wash, Middle Witch Creek, Miller Canyon, Montosa Canyon, Morse Canyon, Mud Spring Wash, Mulberry Draw, Norton Witch Creek, O B Draw, Oak Creek - Cochise, Owl Creek, Owl Creek, Packard Wash, Paige Creek, Palmer Wash, Pine Creek - Cochise, Pinery Creek, Pool Wash, Pridham Creek, Ramsey Canyon, Redfield Canyon, Redrock Creek, Reeve Creek, Reiley Creek, Rich, Rock Creek - Cochise, Rucker Canyon, Sacaton Wash, Sawmill Simon River, Sheep Wash - Cochise, Silver Creek 1 - Cochise, Silver Creek 2 - Cochise, Slaughterhouse Wash, Slavin Wash, Soldier Creek - Cochise, South Fork Canyon, South Fork Cave Creek, South Fork Keating Creek, South Witch Creek, Soza Wash, Spring Creek - Cochise, Stanford Creek, Swamp Springs Canyon, Sycamore Creek - Cochise, Teran Wash, Tres Alamos Wash, Turkey Creek - Cochise, Turkey Creek - Santa Cruz, Vanar Wash, Walnut Gulch, Walnut Wash, West Whitetail Creek, Whitewater Draw, Wildcat Wash, Willow Wash - Cochise, Witch Creek, Wood Canyon Stream, Woods Canyon Wash, and any other named or unnamed minor watercourses in Cochise County.

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

Evidence submitted in advance of the hearing will be available for public inspection during regular commission office hours of 8:00 a.m. to 5:00 p.m., Monday thru Friday, except on holidays. The commission office is located at 1700 West Washington Street, Room 404, 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 Mehnert, Executive Director, January 22, 2003
03020-January 28, 2003.

4060

A Big NO K ILL shelter. Add a healthy Cat or Kitte donation. Help save Mon-Sat L 1-5. 623-934-54

Angora Persian mix, M k white, declawed, all sho months. $320. 602-999-53

Exquisite Bengal Kitt spotted, marble & sepia. $300. 602-942-9078

Free female cat, orange & cream calico mix, 2 yrs Reinaldy, Becky 602-570-6

HIMALAYAN Kittens CF pks old $300. White fl pt. 1yr old $200 623-815-8

Kittens-housebroken, fi shots, $55 ea. & 1 & 2 yr cats, $25 602 451-1670

Kittens, Persian/Mix, Calli black, gray, M/F, shots $20-$50. 602-938-2664

Norwegian Forest Kitten, F, 4mos, Shots, Blue & Cre Tabby $250 623-847-7813

Ocicat Kitten beautiful spots $350 480-423-5029

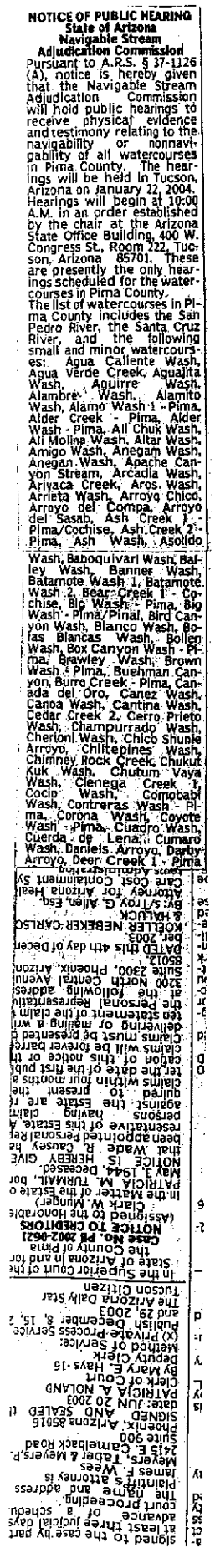
Ocicat Kittens, exotic spo loving pets, $350+. Call nings or wknds 928-37

Arizona Daily Star
www.azstarnet.com

Tucson Citizen
www.tucsoncitizen.com

TUCSON'S NEWSPAPERS
www.tucson.com

1-22-04



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 Pima County. The hearings will be held in Tucson, Arizona on January 22, 2004. Hearings will begin at 10:00 A.M. in an order established by the chair at the Arizona State Office Building, 400 W. Congress St., Room 222, Tucson, Arizona 85701. These are presently the only hearings scheduled for the watercourses in Pima County.

The list of watercourses in Pima County includes the San Pedro River, the Santa Cruz River, and the following small and minor watercourses: Agua Caliente Wash, Agua Verde Creek, Aguajita Wash, Aguirre Wash, Alambre Wash, Alamito Wash, Alamo Wash 1 - Pima, Alder Creek - Pima, Alder Wash - Pima, Ali Chuk Wash, Ali Molina Wash, Altar Wash, Amigo Wash, Anegam Wash, Anegan Wash, Apache Canyon Stream, Arcadia Wash, Arivaca Creek, Aros Wash, Arrieta Wash, Arroyo Chico, Arroyo del Compa, Arroyo del Sasab, Ash Creek 1 - Pima/Cochise, Ash Creek 2 - Pima, Ash Wash, Asoldo Wash, Baboquivari Wash, Bailey Wash, Banner Wash, Batamote Wash 1, Batamote Wash 2, Bear Creek 1 - Cochise, Big Wash - Pima, Big Wash - Pima/Pinal, Bird Canyon Wash, Blanco Wash, Bolas Blancas Wash, Bollen Wash, Box Canyon Wash - Pima, Brawley Wash, Brown Wash - Pima, Buehman Canyon, Burro Creek - Pima, Canada del Oro, Canez Wash, Canoa Wash, Cantina Wash, Cedar Creek 2, Cerro Prieto Wash, Champurrado Wash, Cherioni Wash, Chico Shunie Arroyo, Chiltepines Wash, Chimney Rock Creek, Chukut Kuk Wash, Chutum Vava Wash, Cienega Creek 1, Cocio Wash, Comobabi Wash, Contreras Wash - Pima, Corona Wash, Coyote Wash - Pima, Cuadro Wash, Cuerda de Lena, Cumaro Wash, Daniels Arroyo, Darby Arroyo, Deer Creek 1 - Pima

STATE OF ARIZONA
COUNTY OF PIMA

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

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

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

Janice Anderson
Agent

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

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

My Commission Expires _____

Notary Public Valerie S Gonzales

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M342230705401

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

The list of watercourses in Pinal County include the Gila River, San Pedro River, and Santa Cruz River, and the following small and minor watercourses:

Alder Wash - Pinal, Antelope Wash - Pinal, Aravaipa Creek - Pinal, Arnett Creek, Ash Creek - Pinal, Bachman Wash, Batamote Wash 2, Bear Springs Canyon, Bear Thicket Creek, Big Bertha Wash, Big O Wash, Big Wash - Pima/Pinal, Bitter Well Wash, Bloodsucker Wash, Bogart Wash, Booger Canyon St, Bowl Creek, Box O Wash, Bulldog Wash, Buzan Canyon Stream, Camp Grant Wash, Campaign Creek, Canada del Oro, Capgage Wash, Carpas Wash, Catalina Wash, Cave Canyon Stream, Chalk Creek, China Wash, Chirreon Wash, Circle S Wash, Clark Wash, Comstock Wash, Connelly Wash, Copper Creek, Copper Creek - Pinal, Copper Hill Wash, Cottonwood Wash 1 - Pinal, Cottonwood Wash 2 - Pinal, Cronley Wash, Cruz Wash, Deer Creek - Pinal, Deer Creek 1 - Graham/Pinal, Dodge Tank Wash, Dodge Wash, Dodson Wash - Pinal, Donnelly Wash, Drew Wash, Dripping Spring, Dry Camp Canyon, Eagle Wash, Eskiminzin Wash, Faraway Wash, First Water Creek, Flag Wash, Garden Creek, Greene Wash, Guild Wash, Gust James Wash, Hackberry Creek - Pinal, Hackberry Wash - Pinal, Hagen Canyon Stream, Haunted Canyon Creek, Hells Half Acre, Holy Joe Canyon, Horse Camp Canyon, Horse Foot Wash, Indian Bend Wash - Pinal, Indian Well Wash, Irene Wash, James Wash, Jim Thomas Wash, Kaka Wash, Kohatk Wash, La Barge Creek, Lemmon Creek, Little Ash Creek - Pinal, Little Gust Jame, Lyons Fork, Mammoth Wash, Margaret Wash, Mesa Wash - Pinal, Milk Ranch Creek, Milky Wash, Mineral Creek - Pinal, Mulberry Wash - Pinal, North Branch San, North Fork Clark, Oak Creek - Pinal, Paisano Canyon Spring, Palmer Wash, Parsons Canyon Spring, Peppersauce Wash, Peters Wash, Piper Springs Wash, Polecat Wash, Potters Wash, Putman Wash - Pinal, Queen Creek, Rainbows End Wash, Rancho Rio Creek, Ray Spring Wash, Redrock Canyon, Reevis Creek, Reymert Wash, Ripsey Wash, Roach Wash, Rock Creek 1 - Pinal, Rock Creek 2 - Pinal, Romero Wash, Santa Cruz Wash, Santa Rosa Wash, Scanlon Wash, Silver King Wash, Silver Reef Wash, Smelter Wash, Smith Wash - Pinal, South Fork Clark, Spencer Spring Creek, Steamboad Wash - Pinal, Swingle Wash, Sycamore Canyon, Tar Wash, Tat Momoli Wash, Threeway Wash, Tillmans Wash, Tipperary Wash, Tom Mix Wash, Tortilla Creek, Tucson Wash, Twentynine Wash, Twentyseven Wash, Vekol Wash, Virgus Canyon St, Weekes Wash, Well Canyon Stream, West Fork Pinto, Whitewash Canyon, Whitlow Canyon, Zapata Wash, and any other named or unnamed small and minor watercourses in Pinal County.

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

Evidence submitted in advance of the hearing will be available for public inspection during regular commission office hours of 8:00 a.m. to 5:00 p.m., Monday thru Friday, except on holidays. The commission office is located [illegible] Washington

AFFIDAVIT OF PUBLICATION

3-9-04

THE ARIZONA REPUBLIC

STATE OF ARIZONA
COUNTY OF MARICOPA } SS.

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

The Arizona Republic

February 6, 2004

Gloria Saldivar

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

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OFFICIAL SEAL
MARILYN GREENWOOD
NOTARY PUBLIC-ARIZONA
MARICOPA COUNTY
My Comm. Expires May 23, 2007

Marilyn Greenwood
Notary Public

EXHIBIT C

Figure 1. Physiographic Features in the Santa Cruz River Basin.

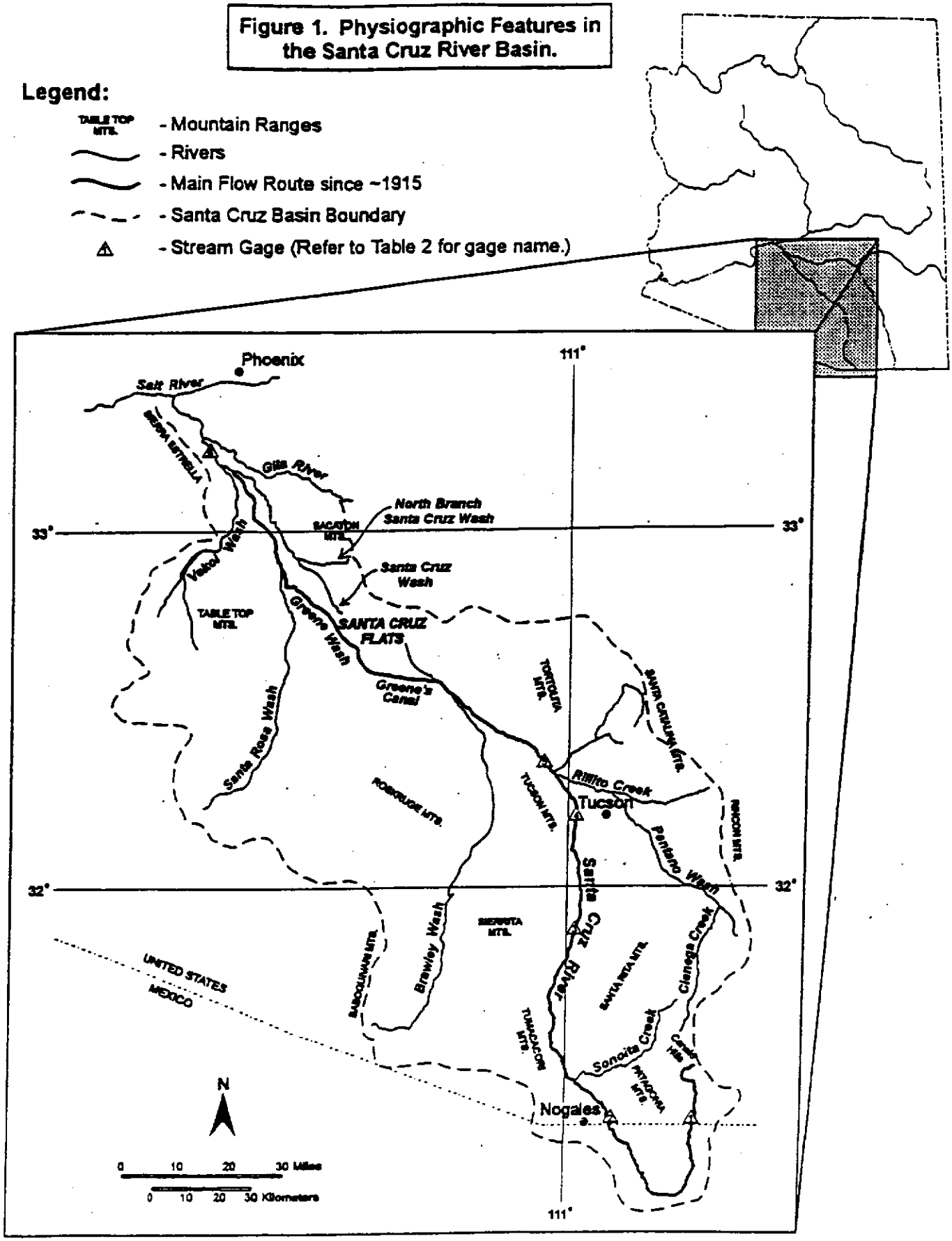

EXHIBIT D

Evidence Log

Hearing No. 03-002-NAV

Arizona Navigable Stream Adjudication Commission

Santa Cruz County, Santa Cruz River
March 11, 2003

Item Number	Received Date	Source to ANSAC	Description	Entry By
1	6/9/00 approx	Evidence on hand at ANSAC.	Draft Final Report Small &Minor Watercourses Analysis for Santa Cruz County, Arizona dated June 9, 2000.	George Mehnert
2	8/1/00 approx	Evidence on hand at ANSAC.	Final Report Small &Minor Watercourses Analysis for Santa Cruz County, Arizona dated August 1, 2000.	George Mehnert
3	8/16/00 approx	Evidence on hand at ANSAC.	Computer printout pages of PowerPoint slide presentation by Stantec and Jon Fuller, titled ANSAC Public Hearing Santa Cruz County.	George Mehnert
4	9/?/98	Evidence on hand at ANSAC	Small and Minor Watercourse Criteria Final Report.	George Mehnert
5	9/?/99	Evidence on hand at ANSAC	Final Report, 3 County Pilot Study.	George Mehnert
6	Received on various dates.	Evidence on hand at ANSAC previously submitted for watercourse hearings in Santa Cruz County and included in Commission report to legislature, 1 volume.	1. Letter from David Baron dated February 18, 1997. 2. Letter from Al Anderson dated December 26, 1997. 3. Letter from Mark Larken dated February 9, 1998. 4. Memorandum from Lee A. Storey dated February 19, 1998. 5. Comments and Exhibits submitted by Richard Lee Duncan February 22, 1998 6. Letter from James Braselton dated September 19, 1997. 7. Review of	George Mehnert

D

Evidence Log Continuation Page

Hearing No. 03-002-NAV

Arizona Navigable Stream Adjudication Commission

Santa Cruz County, Santa Cruz River
March 11, 2003

Item Number	Received Date	Source	Description	Entry By
			Hydrogeology submitted by Leonard and Philip Halpenny. 8. 1992 Boating Survey by Central Arizona Paddlers Club. 9. Santa Cruz River final report by SFC Engineering, George V. Sabol, SWCA, Inc., and J. E. Fuller, dated November 1996.	
7	1/22/03	Frank C. Brophy Jr	Ltr Re: Babacomari River (Creek), Tributary of the San Pedro River.	
8	3/11/03	Jack August	Paper entitled The Upper Santa Cruz River: History of Lessening Stream.	George Mehnert
9	3/1/03	Brian Woodford	Map of Arizona on which it is alleged Baca Float Number 3 is outlined in red.	George Mehnert
10	3/11/03	Jack August	Paper entitled Baca Float Number Three: An Institutional and Legal History.	George Mehnert
11	3/11/03	Amy Langenfeld	Memorandum submitted for hearing March 11, 2003.	George Mehnert
12	3/10/03	Vera Kornylak	Letter dated 3/7/03 and Book titled The Lessening Stream by Michael F. Logan.	George Mehenrt
13	3/10/03	Vera Kornylak	Sonorensis, Arizona Sonora Desert Museum Newsletter, Summer 1998	George Mehnert
14	3/10/03	Vera Kornylak	Article, Desert Plants by Dean A. Hendrickson and W.L. Minckley.	George Mehnert
15	3/10/03	Vera Kornylak	Article Water Follies by Robert Glennon	George Mehnert
16	3/10/03	Vera Kornylak	Article Arroyos and Environmental Change in the SouthWest by Ronald U. Cooke and Richard W. Reeves—excerpts.	George Mehnert
17	3/10/03	Vera Kornylak	Ariticle, Arizona Highways April 1988, El Rio de la Santa Cruz.	George Mehnert

Evidence Log Continuation Page

Hearing No. 03-002-NAV

Arizona Navigable Stream Adjudication Commission

Santa Cruz County, Santa Cruz River
March 11, 2003

Item Number	Received Date	Source	Description	Entry By
18	3/11/03	Cheryl Doyle	Letter from Arizona State Land Department dated March 11, 2003.	George Mehnert
19	1/12/04	Cheryl Doyle	Final Report from J.E. Fuller.	George Mehnert
20	1/20/04	Cheryl Doyle	8 Pages to be added to J.E. Fuller Final Report of 1/12/04.	George Mehnert
21	1/22/04	Cheryl Doyle	10 Pages to replace 8 pages received 1/20/04 to be added to J.E. Fuller Final Report of 1/12/04.	George Mehnert
22	1/23/04	Jeanne Keller	Letter from Jeanne Keller, one page.	George Mehnert
23	7/11/04	Nancy Orr	Letter from Nancy Orr, one page.	George Mehnert

EXHIBIT E

STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION
1700 West Washington, Room 404, Phoenix, Arizona 85007
Phone (602) 542-9214 FAX (602) 542-9220
E-mail: streams@mindspring.com Web Page: http://www.azstreambeds.com

GEORGE MEHNERT
Executive Director

Meeting Minutes
Nogales, Santa Cruz County
Hearing Regarding Santa Cruz River in Santa Cruz County

March 11, 2003

COMMISSION MEMBERS PRESENT
Jay Brashear, Dolly Echeverria, Earl Eisenhower, James Henness, and Cecil Miller

COMMISSION MEMBERS ABSENT
None.

STAFF PRESENT
Curtis Jennings, George Mehnert, Tom Vogt.

1. CALL TO ORDER
Chair Eisenhower called the meeting to order at approximately 1:30 p.m.

2. ROLL CALL
All Commissioners present.
Following roll call Chair Eisenhower explained there will be two hearings today; first he will convene the small and minor watercourses hearing for Santa Cruz County, recess that, and convene the major watercourse Santa Cruz River hearing, hold that hearing to its conclusion, and then return and complete the Santa Cruz County small and minor watercourses hearing.

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

3. SANTA CRUZ RIVER WATERCOURSE HEARING (discussion and action).
Commissioner Brashear explained the Commission did not have the authority to determine constitutional matters, but that the Commission was hear to consider navigability of streams and that was what they were going to do.

The following people appeared and gave testimony or asked questions: Amy Langenfeld, Steve Wene, Brad Woodford, Jack August, Vera Kornylak, Philip Halpenny, Cheryl Doyle, V. Ottozawa-Chatupron, Mark McGinnis

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.)

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

Motion: **To adjourn session on Santa Cruz River. Meeting adjourned at 2:50 p.m.**
Motion by: Cecil Miller Second by: Jim Henness Vote: All aye

Respectfully submitted,

George Mehnert, Director **Date: March 13, 2003**

STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION
1700 West Washington, Room 304, Phoenix, Arizona 85007
Phone (602) 542-9214 FAX (602) 542-9220
E-mail: **streams@mindspring.com** Web Page: **http://www.azstreambeds.com**

GEORGE MEHNERT
Executive Director

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

COMMISSION MEMBERS PRESENT
Jay Brashear, Earl Eisenhower, James Henness, Cecil Miller.
COMMISSION MEMBERS ABSENT
Dolly Echeverria
STAFF PRESENT
George Mehnert, Dir., Curtis Jennings, Legal Counsel.

1. **CALL TO ORDER.**
   Chairman Eisenhower called the meeting to order at approximately 10:16 a.m.
2. **ROLL CALL.**
   See above.
3. **APPROVAL OF MINUTES.**

A. **Minutes of December 16, 2003.**
   Motion: To approve minutes.
   Motion by: Cecil Miller. Second by: Jim Henness. Vote: All aye.

4. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SANTA CRUZ RIVER IN PIMA COUNTY, Cause Number 03-002-NAV.**
   The following people appeared and gave testimony, other information, or asked questions on January 22, 2004: Cheryl Doyle, Jon Fuller.
   HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SAN PEDRO RIVER IN PIMA COUNTY, Cause Number 03-004-NAV.
   The following people appeared and gave testimony, other information, or asked questions on January 22, 2004: Cheryl Doyle, Jon Fuller.
5. **HEARING REAGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN PIMA COUNTY, Cause Number 04-003-NAV.**
   The following people appeared and gave testimony, other information, or asked questions on January 22, 2004: Cheryl Doyle, Jon Fuller.
6. **CALL FOR PUBLIC COMMENT** (comment sheets).
   (Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commisston need not request permission in

E-2

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

There was no public comment.

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

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

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

8. **ADJOURNMENT.**

Motion: To adjourn.

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

Meeting adjourned at approximately 11:00 a.m.

Respectfully submitted,

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

STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION
1700 West Washington, Room 304, Phoenix, Arizona 85007
Phone (602) 542-9214 FAX (602) 542-9220
JANET NAPOLITANO Governor
E-mail: **streams@mindspring.com** Web Page: **http://www.azstreambeds.com**
GEORGE MEHNERT Executive Director

MEETING MINUTES
Florence, Pinal County, March 9, 2004

COMMISSION MEMBERS PRESENT
Jay Brashear, Dolly Echeverria, Earl Eisenhower, Jim Henness, and Cecil Miller.
COMMISSION MEMBERS ABSENT
None.
STAFF PRESENT
George Mehnert, and Commission Legal Counsel Curtis Jennings.

1. **CALL TO ORDER.**
   Chair Eisenhower called the meeting to order at approximately 10:00 a.m.
2. **ROLL CALL.**
   See above.
3. **APPROVAL OF MINUTES** (discussion and action).
   A. January 27, 2004 Maricopa County.
   Motion by: Jim Henness Second by: Dolly Echeverria
   Motion: To approve the minutes of January 27, 2004. Vote: All aye.
4. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE GILA RIVER 03-007-NAV.**
   Testimony or other information was presented by Cheryl Doyle representing the State Land Department and by Alan Gookin, Engineer and John Heston, Attorney, representing the Gila River Indian Community. Physical documentary evidence was submitted by Mr. Gookin. (Please refer to agenda item number 8 regarding the testimony of Mr. Gookin and Mr. Heston.)
5. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SAN PEDRO RIVER 03-004-NAV.**
   Testimony or other information was presented by Cheryl Doyle representing the State Land Department who stated her information would be the same as she had stated regarding item number 4 regarding the navigability or non-navigability of the Gila River.
   At the end of the hearing regarding this matter Chairman Eisenhower announced that the taking of testimony and other evidence was closed.
6. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE SANTA CRUZ RIVER 03-002-NAV.**
   Testimony or other information was presented by Cheryl Doyle representing the State Land Department who stated her information would be the same as she had stated regarding item number 4 regarding the navigability or non-navigability of the Gila River.
   At the end of the hearing regarding this matter Chairman Eisenhower announced that the taking of testimony and other evidence was closed.
7. **HEARING REGARDING THE SMALL AND MINOR WATERCOURSES IN PINAL COUNTY 04-007-NAV.**
   Testimony or other information was presented by Cheryl Doyle representing the State Land Department who stated her information would be the same as she had stated regarding item number 4 regarding the navigability or non-navigability of the Gila River, and in addition discussed the small and minor watercourse report. In response to a question by Curtis Jennings Cheryl Doyle stated that the climatic and weather conditions at the time of the study were essentially the same as in 1912.
   At the end of the hearing regarding this matter Chairman Eisenhower announced that the taking of testimony and other evidence was closed.
8. **CALL FOR PUBLIC COMMENT** (comment sheets).

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

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

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

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

10. **ADJOURNMENT.**

Motion by: Cecil Miller Second by: Jim Henness
Motion: To adjourn. Vote: All aye.
Meeting adjourned at approximately 10:55 a.m.

Respectfully submitted,

George Mehnert, Director
March 10, 2004

STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION
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JANET NAPOLITANO
Governor
E-mail: **streams@mindspring.com** Web Page: **http://www.azstreambeds.com**
GEORGE MEHNERT
Executive Director

MEETING MINUTES
Phoenix, Arizona September 16, 2004

COMMISSION MEMBERS PRESENT
Jay Brashear, Dolly Echeverria, Earl Eisenhower, and Cecil Miller.
COMMISSION MEMBERS ABSENT
Jim Henness.
STAFF PRESENT
George Mehnert, and Commission Legal Counsel Curtis Jennings.

1. **CALL TO ORDER.**
Chair Eisenhower called the meeting to order at approximately 10:00 a.m.

2. **ROLL CALL.**
See above.

3. **APPROVAL OF MINUTES** (discussion and action).
A. June 28, 2004, Maricopa County.
Motion by: Dolly Echeverria Second by: Cecil Miller
Motion: To approve the minutes of June 28, 2004. Vote: All aye.

4. **DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SANTA CRUZ RIVER.**
Motion by: Jay Brashear Second by: Cecil Miller
Motion: Non Navigable Vote: All aye.
Jay Brashear: Not only was there not a preponderance of evidence of navigability, there was no evidence at all, to speak of, presented regarding navigability.

5. **DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SAN PEDRO RIVER.**
Motion by: Jay Brashear Second by: Dolly Echeverria
Motion: Non Navigable Vote: All aye.
Jay Brashear: I tried to pay particular attention to this river because of its many attributes and I gave it a really hard look. There may be many things that would cause us to maintain the San Pedro River just as it is but that is not within our charter regarding determination of navigability. It was never a highway of commerce.
Cecil Miller: Indicated he was fascinated by the history of the San Pedro but that does not make it navigable.

6. **DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN PIMA COUNTY.**
Motion by: Cecil Miller Second by: Dolly Echeverria
Motion: Non Navigable. Vote: All aye.

7. **DISCUSSION AND ACTION REGARDING THE NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN PINAL COUNTY.**
Motion by: Dolly Echeverria Second by: Cecil Miller
Motion: Non Navigable. Vote: All aye.
Jay Brashear: Something I have noticed regarding small and minor watercourses is that to call these small and minor watercourses, watercourses at all, is a stretch and perhaps the flood control people use a better term when they call them floodways.

8. **DISCUSSION AND ACTION REGARDING EXECUTIVE DIRECTOR SALARY.**
Discussion without action. Matter tabled to future meeting.

9 **DISCUSSION AND ACTION REGARDING ATTORNEY HOURLY RATE.**
Discussion without action. Matter tabled to future meeting.

10. **CALL FOR PUBLIC COMMENT** (comment sheets).
(Pursuant to Attorney General Opinion No. I99-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not

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

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

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

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

12. **ADJOURNMENT.**

Motion by: Cecil Miller Second by: Dolly Echeverria

Motion: To adjourn. Vote: All aye.

Meeting adjourned at approximately 10:52 a.m.

Respectfully submitted,

George Mehnert, Director
September 17, 2004