



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

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GEORGE MEHNERT
Executive Director

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

COMMISSION MEMBERS PRESENT

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

COMMISSION MEMBERS ABSENT

None.

STAFF PRESENT

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

1. CALL TO ORDER.

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

2. ROLL CALL.

See above.

3. APPROVAL OF MINUTES.

A. Minutes of January 22, 2004.

Motion: To approve minutes.

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

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

Motion: Non-Navigable.

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

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

Motion: Non-Navigable.

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

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

Motion: Non-Navigable.

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

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

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

Motion: Non-Navigable.

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

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

Motion: Non-Navigable.

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

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

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

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

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

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

Vote: All aye.

9. CALL FOR PUBLIC COMMENT (comment sheets).

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

There was no public comment.

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

11. ADJOURNMENT.

Motion: To adjourn.

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

Meeting adjourned at approximately 08:40 a.m.

Respectfully submitted,



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