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TESTIMONY RELEVANT TO ALL WATERCOURSES

Presented by Arizona Center for Law in the Public Interest

to the

Arizona Navigable Stream Adjudication Commission

February 18, 1997

The Arizona Center for Law in the Public Interest offers the following testimony relevant to all findings and recommendations of the Commission on whether watercourses were navigable as of statehood. We made many of these points in preliminary testimony to the Commission on February 6, 1996.

As amended, the state statute governing Commission proceedings contains grossly illegal and inaccurate standards for the determination of navigability and non-navigability. Federal law, as developed by the federal courts, sets the test for determining title to the beds of watercourses. Arizona Center for Law v. Hassell, 837 P.2d 158, 164-65 (Ariz. App. 1991). That test is a liberal one: Whether the waterway was at statehood susceptible for use as a highway for transporting people or goods. Utah v. United States, 403 U.S. 9, 11 (1971). A river may be found navigable for title purposes despite occasional impediments such as sand or gravel bars, and despite the fact that it is only navigable a few months out of the year. State of Oregon v. Riverfront Protective Association, 672 F.2d 792, 795 (9th Cir. 1982). Actual use for boating, whether commercial or sporting, can demonstrate susceptibility as a highway for public passage. Utah v. United States, 403 U.S. at 11. Although state ownership turns on navigability at the time of statehood, evidence of current recreational use by small craft such as canoes is probative of navigability at statehood. North Dakota v. Andrus, 671 F.2d 271, 277-78 (8th Cir. 1982).

The remoteness of a river and lack of actual use at statehood does not defeat a finding of navigability: The question is whether the river was susceptible of transporting people or goods. United States v. Utah, 283 U.S. 64, 83 (1931). A river is deemed navigable if it could transport people or goods by any conveyance - not merely those in use at the time of statehood. State of Alaska v. Ahtna, Inc., 891 F.2d 1401, 1405 (9th Cir. 1989). In fact, present-day use of a river for guided recreational trips can provide conclusive evidence of navigability at statehood. Id. at 1405. Conversely, the fact that dams or diversions render a waterway non-navigable today does not matter, as long as it was passable in its original condition. See Frank, Forever Free, 16 U.C. Davis L. Rev. 579, 586 (1983).

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Under the standards set forth above, the Arizona Court of Appeals concluded in 1991 that there was substantial evidence from which a factfinder might conclude that portions of rivers and streams other than the Colorado met the applicable standard of navigability at the time Arizona became a state. Hassell, 837 P.2d at 165. In reaching that conclusion, the Court had before it much of the same evidence that is now before this Commission. If anything, the Commission has before it even more substantial evidence of navigability than was before the Court, due to extensive studies conducted by the State Land Department since the Court's decision, and other evidence offered by various parties.

Unfortunately, the Legislature has tried to restrict this Commission's ability to find watercourses navigable by imposing a number of tests and presumptions that are flatly contrary to the federal test of navigability. These include the following:

1. A presumption that the entire watercourse was nonnavigable if any determination of nonnavigability in a public proceeding exists for the watercourse or a portion thereof. ARS §37-1128.B. The presumption can be overcome only by "clear and convincing evidence." There is absolutely no such presumption under the Federal test, and the presumption is absurd on its face. The mere fact that a "public proceeding" took place does not mean that the state's title claims were properly adjudicated (or even represented). Moreover, the state does not have the authority to relinquish its public trust ownership where the watercourse was in fact navigable at statehood. Illinois Central RR v. Illinois, 146 U.S. 387 (1892). Further, the mere fact that a small reach of a river was found nonnavigable hardly means that another reach (which could be hundreds of miles away) is presumptively non-navigable. It is also violative of the public trust doctrine for the state to place a higher burden of proof on itself to show navigability than applies in an order civil case.

2. A requirement that the Commission must find and recommend a watercourse was nonnavigable, if as of statehood it either was not used or susceptible of being used for both commercial trade and travel; or flowed only in direct response to precipitation and was dry at all other times. ARS 37-1128.C. There are absolutely no such restrictions on finding navigability under the federal test. As noted above, the federal test merely requires susceptibility for use as a highway for the transportation of people or goods. There is no requirement that such transportation be "commercial." Nor does the federal test in any way prohibit a finding of navigability where a watercourse flows "only in direct response to precipitation." The issue under the federal test is susceptibility for use for transportation -- if that susceptibility is due to rain events, then the test is met.

3. A presumption of non-navigability, defeatable only by clear and convincing evidence, if any of the following applied: i)

no sustained trade and travel occurred both upstream and downstream in the watercourse; ii) no profitable commercial enterprise was conducted; iii) vessels customarily used for commerce in 1912, such as keelboats, steamboats or powered barges, were not used on the watercourse; iv) diversions were made from the watercourse for various purposes that would have been inconsistent with or impediments to navigation; v) any boating or fishing was for recreational and not commercial purposes; vi) any flotation of logs or other material that occurred or was possible on the watercourse was not for commercial purposes; vii) there were structures constructed in or across the watercourse that would have inconsistent with or impediments to navigation; viii) transportation in proximity to the watercourse was customarily accomplished by methods other than by boat; ix) the United States did not regulate the watercourse under the rivers and harbors act of 1899. ARS §37-1128.D.

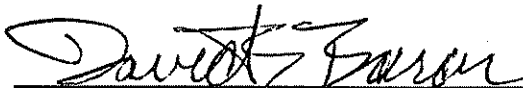
None of the above create any sort of presumption of non-navigability under the federal test, let alone the kind of presumption against navigability imposed by ARS 37-1128.D. As the above discussion of the federal test shows, the federal test does not require evidence of actual use for travel at all, let alone commercial use by large vessels of the period. Moreover, the federal test looks to the watercourse's ordinary and natural condition - not its condition when altered by human activity. The fact that floating of logs, boating, and fishing occurred is probative of navigability under the federal test: it does not become evidence of non-navigability merely because it was not commercial. Nor does the federal test create any presumption of non-navigability merely because a rivers was not regulated under the rivers and harbors act, or because travel near the watercourse was customarily done other than by boat. The test is susceptibility for use in travel, not whether the watercourse was regulated under other laws or whether boats were the preferred mode of travel.

4. A bar on consideration of: a) previously appropriated water as being within the ordinary and natural condition; b) use of ferries; c) fishing from the banks; d) use under flood conditions. ARS §37-1128.E. There is absolutely nothing in the federal test that allows these types of exclusions. Federal law looks to whether the watercourse was navigable in fact - it does not impose artificial restrictions on what can be considered in making that determination. For example, federal courts have explicitly relied on ferry travel as evidence of navigability. City of Centralia v. FERC, 851 F.2d 278 (9th Cir. 1988). They also routinely consider evidence of actual boating and fishing use, and do not bar such evidence based on the conditions or location of use.

5. A requirement to considers dams and diversions and other human uses as part of the ordinary and natural condition of the watercourse. Such a requirements is not a part of the federal test, and conflicts with the plain meaning of the word "natural."

For all the foregoing reasons, any determination of non-navigability by this Commission under the tests set out in ARS §37-1128 will have no legal validity or persuasive value in establishing ownership of streambeds. Accordingly, we urge the Commission to: a) suspend further proceedings to determine navigability or non-navigability of watercourse; b) refrain from making any findings or recommendations on navigability or non-navigability; and c) advise the legislature that there is no point in conducting further proceedings or making findings and recommendations unless and until the standards for determining navigability in ARS 37-1128 are changed to accurately reflect federal law.

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