

BEFORE THE  
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE  
NAVIGABILITY OF THE  
VERDE RIVER FROM ITS  
HEADWATERS AT SULLIVAN  
LAKE TO THE CONFLUENCE  
WITH THE SALT RIVER, YAVAPAI,  
GILA AND MARICOPA  
COUNTIES, ARIZONA

No.: 04-009-NAV

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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 Verde River from its headwaters at Sullivan Lake to the confluence with the Salt 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 hearings were held at which all parties were afforded the opportunity to present evidence, as well as their views, on this issue. The Commission, having considered all of the historical and scientific data and information, documents and other evidence, including the oral and written presentations made by persons appearing at the public hearings and being fully advised in the premises, hereby submits its report, findings and determination.

## I. Procedure

On September 1, September 8 and September 15, 2005 in the Arizona Republic in Maricopa County and on February 10, February 17 and February 24, 2005 in the Prescott Courier in Yavapai County, 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 Verde River from its headwaters at Sullivan Lake to the confluence with the Salt River for title purposes as of February 14, 1912. Copies of the Notices of Intent to Study and Receive, Review and Consider Evidence on the issue of navigability of the Verde River was published in Yavapai and Maricopa, Counties, Arizona and are 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 Verde River in Yavapai, Gila and Maricopa Counties. Public notice of these hearings was given by legal advertising in the Arizona Republic in Maricopa County on October 6, 2005 for the hearing in Maricopa County, on March 4, 2005 in the Arizona Republic in Maricopa County and in the Prescott Courier in Yavapai County for the hearing in Yavapai County as required by law pursuant to A.R.S. § 37-1126 and, in addition, by mail to all those requesting individual notice and by means of the ANSAC website ([azstreambeds.com](http://azstreambeds.com)). These hearings were held on March 29, 2005, in the City of Prescott, the county seat of Yavapai County, and on November 16 and 17, 2005 and January 18, 2006 in the City of Phoenix, the county seat of Maricopa County, since the law requires that such hearings be held in the county seat of the county in which a substantial portion of the particular 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 a 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 hearings, as well as other historical and scientific data, information, documents and evidence that had been submitted to the Commission at any time prior to the date of the hearing, including all data, information, documents and evidence previously submitted to the Commission. Following the public hearings held at Phoenix, Arizona on January 18, 2006, all parties were advised that they could file post-hearing memoranda pursuant to the Commission 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, Yavapai-Apache Nation, State Land Department of Arizona, Arizona Center for Law in the Public Interest, and First American Title Insurance Company. A list of the eleven (11) post-hearing memoranda filed and considered by the Commission is attached as Exhibit "C."

On May 24, 2006, at a public hearing in Phoenix, Arizona, after considering all of the evidence and testimony submitted and the post-hearing memoranda filed with the Commission, and the comments and oral argument presented by the parties, and being fully advised in the premises, the Commission, with a unanimous vote, found and determined in accordance with A.R.S. § 37-1128 that the Verde River from its headwaters at Sullivan Lake to the confluence with the Salt River in Yavapai, Gila, and Maricopa Counties, Arizona, was nonnavigable as of February 14, 1912. A copy of the notice of this hearing is attached as a part of Exhibit "B." Copies of the minutes of the March 29, 2005 hearing in Prescott, Arizona, and the November 16 and 17, 2005 and May 24, 2006 hearings at Phoenix, Arizona, are attached hereto as Exhibit "D." The hearings were recorded by electronic recorder, and in addition, a transcript of the hearing on November 16 and 17, 2005 and May 24, 2006 in Phoenix was made by Coash

& Coash, a registered court reporter who attended the hearings. The transcript of testimony of what was said at the hearings was considered by the Commission and is available for review.<sup>1</sup>

## **II. The Verde River from Its Headwaters to the Confluence with the Salt River**

The Verde River is one of the most scenic rivers in Arizona. It flows in an easterly and southerly direction, a distance of 189 miles from its headwaters to its confluence with the Salt River, draining the central part of the state. The Verde River's headwaters are at Sullivan Lake in Section 15, Township 17N Range 2W, Gila and Salt River Base and Meridian, approximately at latitude 34°51'16.6" north and longitude 112°27'24.7" west, south of Paulden, Yavapai County, Arizona near Highway 89. Sullivan Lake is created by the confluence of Williamson Wash and Big Chino Wash. From its headwaters, the Verde River flows generally in an easterly direction through the canyons of Prescott National Forest to Perkinsville, where it turns southeasterly to pass near Clarkdale and Cottonwood, and then in a southerly direction passing by Camp Verde and into the deep canyons and mountainous area of Central Arizona, by the settlement of Childs and below that, it is joined by the East Verde River and forms the boundary between Yavapai and Gila Counties for a few miles until it again passes solely into Yavapai County and then into Maricopa County and on south through the Salt River Indian Reservation to its confluence with the Salt River just above the Granite Reef Dam in Section 5, Township 2N, Range 7E, Gila and Salt River Base and Meridian, approximately at latitude 33°32'43.6" north and longitude 111°39'27.1" west. The elevation at Sullivan Lake is 4,366 feet above sea level, and the elevation of the river at the confluence with the Salt River is 1,335 feet above sea level. The Verde River drains a

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<sup>1</sup> When a quote from a study, report or other document is referred to in this report, it will be denominated by the number given in Exhibit "F," with the title, if appropriate, followed by the page number. The testimony of a witness given at the hearing will be designated as TR ("Transcript of Record"), followed by the page number and line number if necessary.

watershed with a total of 6,188 square miles. The actual watershed drained by the Verde River ranges in elevation from about 12,643 feet at Mt. Humphrey near Flagstaff to 1,335 feet at the mouth of the river where it flows into the Salt River. The watershed drained by the Verde River is bounded by the Mogollon Rim and San Francisco Peaks to the north and east, the Mingus, Juniper, Bradshaw, and New River Mountains (Black Hills) to the west, and the Mazatzal Mountains to the east.

Major perennial tributaries to the Verde River include Granite Creek, Sycamore Creek, Oak Creek, Beaver Creek, West Clear Creek, Fossil Creek, the East Verde River and Tangle Creek. These tributaries generally drain the area north and east of the Verde River toward the Mogollon Rim. Other major tributaries include intermittent or ephemeral streams with large drainage areas such as Williamson Wash, Big Chino Wash, and Partridge Creek. The Verde River flows through the central mountains of Arizona and into the basin and range province of southern and western Arizona. The Verde River watershed can be broken into three reaches based on environmental, archaeological and geomorphic characteristics, but was studied as one entire watercourse by the Commission. Vegetation in the Verde River watershed ranges from pine-oak woodlands on the Mogollon Rim and upper elevation areas, to Sonoran Desert Scrub along the lower Verde River. Significant portions of the watershed upstream of Sullivan Lake are grassland transitioning to chaparral and juniper-pinyon woodland at higher elevations. Along the river itself, deciduous riparian woodland and emergent marshland communities are found. Maps of the Verde River watershed are attached hereto as Exhibit "E."

#### **A. The Upper Verde River Valley**

The upper Verde River encompasses the reach from the headwaters at Sullivan Lake in Chino Valley to Sycamore Canyon southeast of Perkinsville. Most of the upper Verde River floodplain is narrow and the topographic relief along the river is moderate. The lower end of this reach is characterized by steep narrow canyons formed in

bedrock, with a rather narrow riparian corridor and springs which provide a perennial base flow for the river.

**B. The Middle Verde River Valley**

The middle Verde River continues south and east from Sycamore Canyon to Fossil Creek. The floodplain is generally broader than the upper reach, with a diversity of land forms such as mesas, ridges, and canyons. This reach is the most densely populated as the river flows near the towns of Clarkdale, Cottonwood and Camp Verde, and contains the richest historical record.

**C. The Lower Verde River Valley**

The lower Verde River Valley reach extends from Fossil Creek to the Verde River's confluence with the Salt River. The floodplain in this reach generally broadens and topography decreases from mountainous to gentle sloping bajadas as the river flows from north to south. The lower Verde River reach is characterized by a cobble and gravel bedded channel formed over shallow or exposed bedrock and upper Sonoran Desert vegetation. The flow in this reach has been altered considerably since statehood by the construction of Horseshoe and Bartlett Dams.

**D. Horseshoe Dam and Bartlett Dam**

There are two dams and reservoirs on the lower Verde River, Bartlett Dam and Horseshoe Dam, both of which were constructed after statehood. Bartlett Dam was completed in 1939 and backs up Bartlett Reservoir, which has a capacity of 178,186 acre feet, and Horseshoe Dam was completed in 1948 and backs up Horseshoe Reservoir, which has a capacity of 109,217 acre feet.<sup>2</sup> Since both dams were constructed after statehood, their effect on the flow of the river was not considered by the Commission, and the fact that their construction was after statehood was not considered relevant to the issues before the Commission.

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<sup>2</sup> See Salt River Project website: <http://www.srpnet.com/water/dams/default.aspx>.

### 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 Ariz. 356, 837 P.2d 158 (App.1991), review denied October 6, 1992.

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

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

This doctrine is quite ancient and was first formally codified in the Code of the Roman Emperor Justinian between 529 and 534 A.D.<sup>3</sup> The provisions of this Code, however, were based, often verbatim, upon much earlier institutes and journals of Roman and Greek law. Some historians believe that the doctrine has even earlier progenitors in the rules of travel on rivers and waterways in ancient Egypt and Mesopotamia. This rule evolved through common law in England which established that the king as sovereign owned the beds of commercially navigable waterways in order to protect their accessibility for commerce, fishing and navigation for his subjects.

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<sup>3</sup> *Putting the Public Trust Doctrine to Work*, David C. Slade, Esq. (Nov. 1990), pp. xvii and 4.

In England the beds of nonnavigable 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 western lands. In the Northwest Ordinance of 1787, adopted just prior to the ratification of the U. S. Constitution and subsequently re-enacted by Congress on August 7, 1789, it was provided that new states could be carved out of this western territory and allowed to join the Union and that they "shall be admitted . . . on an equal footing with the original states, in all respects whatsoever." (Ordinance of 1787: The Northwest Territorial Government, § 14, Art. V, 1 stat. 50. See also U. S. Constitution, Art. IV, Section 3). This has been interpreted by the courts to mean that on admission to the Union, the sovereign power of ownership of the beds of navigable streams passes from the federal government to the new state. *Pollard's Lessee v. Hagan, et al.*, 44 U.S. (3 How.) 212 (1845), and *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987).

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

The state's claims originated in a common-law doctrine, dating back at least as far as Magna Charta, vesting title in the sovereign to lands affected by the ebb and flow of tides. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 412-13, 10 L.Ed. 997 (1842). The sovereign did not hold these lands for private usage, but as a "high prerogative trust . . . , a public trust for the

benefit of the whole community." *Id.* at 413. In the American Revolution, "when the people . . . took into their own hands the powers of sovereignty, the prerogatives and regalities which before belong either to the crown or the Parliament, became immediately and rightfully vested in the state." *Id.* at 416.

Although watercourse sovereignty ran with the tidewaters in England, an island country, in America the doctrine was extended to navigate 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. Under certain limited circumstances, the United States may transfer title to bedlands to third parties prior to statehood, or withhold title from the states by withdrawing the land from the public domain and preventing it from being transferred to the state under the Equal Footing Doctrine. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). The U. S. Supreme Court in *U.S. v. Holt State Bank*, *supra*, explains this qualification as follows.

. . . subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such

lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or **carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly.** (numerous cites omitted) (emphasis added)

270 U.S. at 54-55, 46 S.Ct. at 198-99. The intention of the United States to withhold land from a state under the Public Trust Doctrine must be definitely declared and otherwise made very plain. *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331.

If the stream was not navigable on the date of statehood, 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 nonnavigable 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 nonnavigable and accordingly there was no problem with the title to the beds and banks of any rivers, streams or other watercourses. However, in 1985 Arizona officials upset this long-standing assumption and took action to claim title to the bed of the Verde River. *Land Department v. O'Toole*, 154 Ariz. 43, 739 P.2d 1360 (App. 1987). Subsequently, various State officials alleged that the State might hold title to certain lands in or near other watercourses as well. *Id.*, 154 Ariz. at 44, 739 P.2d at 1361. In order to resolve the title questions to the beds of Arizona rivers and streams, the Legislature enacted a law in 1987 substantially

relinquishing the state's interest in any such lands.<sup>4</sup> With regard to the Gila, Salt and Verde 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 37-1128.

The 1992 Act provided that the Commission would make findings of navigability or nonnavigability 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

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<sup>4</sup> Prior to the enactment of the 1987 statute, the Legislature made an attempt to pass such a law, but the same was vetoed by the Governor. The 1987 enactment was signed by the Governor and became law. 1987 Arizona Sessions Law, Chapter 127.

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. 178 ("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 nonnavigability 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.3d 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 the issues of navigability of all watercourses within the State.

#### IV. Issues Presented

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

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

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

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

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

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

Thus, in compliance with the statutes, the Commission is required to collect evidence, hold hearings, and determine which watercourses in existence on February 14, 1912, were navigable or nonnavigable. This report pertains to the 189 miles of the Verde River in Yavapai, Gila and Maricopa Counties, Arizona. 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 Verde River and evidence relating to of the small and minor watercourses in Yavapai, Gila and Maricopa Counties, Arizona, as of February 14, 1912.

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

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

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

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

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

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

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

#### **V. Burden of Proof**

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

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

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

rests on the party asserting navigability . . . ."); *O'Toole*, 154 Ariz. at 46, n. 2, 739 P.2d at 1363, n. 2.

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

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

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

The "preponderance of the evidence" standard is sometimes referred to as requiring "fifty percent plus one" in favor of the party with the burden of proof. One could imagine a set of scales. If the evidence on each side weighs exactly evenly, the party without the burden of proof must prevail. In order for the party with the burden to prevail, sufficient evidence must exist in order to tip the scales (even slightly) in its favor. See, generally, *United States v. Fatico*, 458 U.S. 388, 403-06 (E.D. N.Y. 1978), *aff'd* 603 F.2d 1053 (2nd Cir. 1979), *cert. denied* 444 U.S. 1073 (1980); *United States v. Schipani*, 289 F.Supp. 43, 56 (E.D. N.Y. 1968), *aff'd*, 414 F.2d 1262 (2nd Cir. 1969). *Goose Creek Hunting Club, Inc. v. United States*, 207 Ct.Cl. 323, 581 F.2d 579 (8<sup>th</sup> Cir. 1975), citing

*Iowa-Wisconsin Bridge Co. v. United States*, 84 F.Supp, 852, 867, 114 Ct.Cl. 464, 509 (1949), cert. denied, 339 U.S. 982, 70 S.Ct. 1020, 94 L.Ed. 1386 (1950).<sup>5</sup>

## VI. Standard for Determining Navigability

The statute 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.<sup>6</sup> 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

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<sup>5</sup> 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 (8<sup>th</sup> 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).

<sup>6</sup> The *Daniel Ball* was actually an admiralty case, but the U.S. Supreme Court adopted its definition of navigability in title and equal footing cases. *Utah v. United States*, 403 U.S. 9, 91 S.Ct. 1775, 29 L.Ed.2 279 (1971) and *United States v. Oregon*, 295 U.S. 1, 55 S.Ct. 610, 70 L.Ed.2 1263 (1935).

are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

77 U.S. at 563.

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

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

270 U.S. at 55-56.

The Commission also considered the following definitions contained in A.R.S. § 37-1101 to assist it in determining whether this reach of the Verde 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.

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 Verde River from its headwaters at Sullivan Lake to the confluence with the Salt River. Evidence consisting of studies, written documents, newspapers and other historical accounts, pictures, and testimony were submitted. There were thirty-eight (38) separate documentary filings, including a preliminary and final Report and Study prepared by CH2M Hill, SWCA Environmental Consultants, Arizona Geological Society and revised by J. E. Fuller Hydrology and Geomorphology, Inc. dated June 2003, a PowerPoint printout from John Fuller and Phil Peartree; a report entitled "Assessment of the Verde River's Navigability Prior to and on the Date of Arizona's Statehood, February 14, 1912" by Dr. Douglas R. Littlefield, Ph.D., revised July 7, 2005, a report with pictures and graphs by Dr. Stanley A. Schumm, Ph.D., P.G., entitled "Geomorphic Character of the Verde River." Documents were also submitted by the Arizona Center for Law in the Public Interest and its principal, David Baron, the Town of Camp Verde, Maricopa County Department of Transportation, a book entitled "Verde River Recreation Guide" by Jim Slingluff, other magazine articles and publications authored by Jim Slingluff, a report by the Maricopa County Department of Transportation, U.S. Forest Service Analysis for Criteria for Navigability on the Verde River, other documents and reports from the

Forest Service, letters, documents and photographs from Timothy Flood, report of Allen Gookin, letters from numerous people expressing their thoughts on the navigability of the Verde River, and information regarding navigability of selected U.S. watercourses submitted by Salt River Project. The Commission also considered documents and papers submitted in connection with the hearings on Yavapai County, Maricopa County, Gila County, the Upper and Lower Salt River, as they pertain to the issue of navigability on the Upper Salt. The list of evidence, records, studies and documents submitted is attached as Exhibit "F." Public hearings were held at Prescott, Arizona in Yavapai County on March 29, 2005 and at Phoenix, Arizona, in Maricopa County on November 16 and 17, 2005 and January 18, 2007, for the public to present testimony and evidence on the issue of navigability of the Verde River from its headwaters at Sullivan Lake to its confluence with the Salt River, as of the date of statehood. Eleven (11) witnesses appeared at the two (2) hearings and gave testimony. At least five (5) of the witnesses were acknowledged experts in the fields of geology, hydrology, hydraulics, geomorphology and history. Others were well-informed individuals in the areas of environmental law, land use and development and surveying. The hearings were recorded by electronic recorder and in addition a transcript was made by a court reporter of the hearings in Phoenix. The transcript of testimony of what was said at the hearings in Phoenix was reviewed and considered by the Commission and is available for public review. The minutes of those hearings are attached hereto as Exhibit "D."

**A. Prehistoric or Pre-Colombian Conditions on the Verde River (See Generally Items 7 Dated November 1993 and 31 Dated June 2005 of Exhibit F attached hereto)**

Archeological evidence of Paleo Indian occupation of the Upper Verde River Valley is restricted to one obsidian Clovis Point found near Perkinsville. Archaic period occupation is represented by surface manifestations on the pliestocene terraces

overlooking the Verde River and in Chino Valley.<sup>7</sup> These archaic sites are characterized by large thin scatters of diverse lithic materials used for hunting and caring for and processing meat and other food and probably represent base camps and work areas. Sites that were near the river are probably obscured by flooding and later occupation.

The archaeological evidence indicates some settlement in the Verde River Valley between 1 and 700 A.D. when hunting and gathering bands built shallow pithouses and surface dwellings to accommodate seasonal use or even permanent use of area around the Verde River. This earlier formative period represents a period of semi-sedentism with some evidence of the Hohokam tradition in the Southern part of the Verde River Valley and the Sinagua tradition in the Central and Upper Verde River Valley, although some Hohokam traits are noted in the Upper Verde River Valley as well. From 800 to 1125 A.D., much more significant prehistoric settlement occurred, indicating a strong Hohokam influence which was probably the result of migration from the Salt River valley. There is evidence of diversion canals, some as long as a mile, in the lower Verde River valley, with lateral canals for irrigation. Smaller prehistoric irrigation systems were also noted in the Perkinsville Valley. Many of the agricultural features such as canals and laterals in the central Verde Valley have been destroyed by modern development. Some prehistoric classical sites in the upper Verde River Valley are estimated at 100 rooms or more, and certain famous ruins such as Montezuma Castle and Tuzigoot in the middle Verde Valley have been designated National Monuments. During this period, especially the latter part, the Sinagua tradition, which was the result of persons migrating from the Flagstaff area, appears very strong and intermixes with the Hohokam and the middle Verde River Valley area. Also, artifacts and sites from this period show contact with the Kayenta Anasazi, Cohonino and Prescott cultures indicating that the upper and the middle Verde River Valley was a crossroad and

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<sup>7</sup> This Paleo Indian period is generally considered to be from 12,000 B.C. to 8,000 B.C. The archaic period is from 8,000 B.C. to 1 A.D.

meeting place for different cultures. Following 1125, the population increased rather substantially and it seems clear that the river was an accessible permanent water supply and was used for irrigation and possibly fishing.

In the middle and lower Verde River Valley, the late classical period shows a consolidation of population into larger villages, some of which may contain as many as 300 rooms with strong architectural features associated with the Hohokam, including mounds, ball courts and sophisticated irrigation works. Also, the Salado tradition appears in the lower reaches of the Verde River Valley during this period, especially around 1250 and 1300 A.D. Evidence of periodic flooding, which destroyed diversion dams and the irrigation system, were noted. Use of the Verde River Valley and population decline was significant after 1425, which suggests abandonment by the prehistoric people. Clearly, between 800 and 1300, the middle Verde was a crossroads for trade and travel, with the Hohokam and later Salado from the south, Sinagua from the north, and possibly Mogollon influence from the eastern mountains. The cause of the decline in population of the prehistoric peoples is not known, but has been attributed to various causes, including drought, warfare, disease, waterlogged soils and breakdown of trade networks.

Sometime around 1450, people evidencing the Yavapai culture moved into the area, but the Verde River Valley remained sparsely populated. The Yavapais were a yuman speaking people who probably descended from the Cerbat archeological culture that occupied southern Californian and northwestern Arizona, south of the Colorado from about 700 A.D. on. After 1300, the Cerbat apparently evolved into the historic Hualapai, Havasupai and Yavapai cultures. The Yavapais were a culture of hunters and gatherers and had a few permanent settlements where they cultivated crops. In the 1600's and 1700's, the Athabaskan speaking western Apaches began to migrate into the area and, to a certain extent, displaced the Yavapai, although there was intermarriage between the two peoples. Both the Yavapai and Apache were relatively nomadic living

by hunting and gathering and occupying temporary sites consisting of brush wikiups and other natural shelters. Both were primarily nomadic as hunters and gatherers, but did practice some horticulture although the Apache were more mobile than the Yavapai. The Apaches exist today on their reservations in the White Mountains area and also are mixed with the Yavapai and the Mohave on the Ft. McDowell Reservation east of Phoenix, through which the Verde River flows. The Yavapai are also an identified tribe today living on the Camp Verde Reservation and the Prescott Reservation, as well as the Ft. McDowell Reservation, where they are intermixed with the Apache and Mohave.

The Verde River stream flow from 740 A.D. to 1370 was reconstructed by experts using dendrochronology – tree rings – to determine the approximate prehistoric annual discharge of the river. The tree ring data was calibrated using modern gauge records and contemporary tree ring information. The Verde River stream flow was similar to that of the Salt River, which was also reconstructed in the same study. Although the extreme high floods are much less pronounced than those on the Salt River, the studies showed that the average flow from A.D. 740 to 1370 was somewhat less than modern average flows primarily due to a larger number of extremely high average flows or floods in the 1800's.

There is no evidence in the archeological record that would indicate that any of the prehistoric cultures located in the study area used the Verde River as a means for transportation by boat or other water craft and there has been no documented use of the river as a highway for commerce for commercial trade and travel or regular floatation of logs. All travel in the study area during this period was by foot.

#### **B. Historic Development of the Verde River Valley**

The recorded history of the Verde River begins with two Spanish expeditions seeking to find Indian mines in that area. In 1582 and 1583, Antonio de Espejo explored the middle Verde River valley looking for silver he heard the Indians had been mining.

Espejo found no silver, but it is believed he located copper deposits. In 1598 through 1600, at the direction of Governor Oñante of New Mexico, his lieutenant, Marcos Farfan de los Godos also explored the Verde Valley and probably first located the rich body of copper ore at Jerome. He found a series of shafts dug by Indians to extract ore for personal adornment and color of their baskets. The ores in this area come in many different colors. The exact description and routes of these early Spanish explorers is not known. From 1600 to the 1820's, the Verde Valley was occupied by Yavapai Indians in the north and Pima Indians in the south who cultivated land in the Lower Verde Valley near Ft. McDowell. The Western Apache also put in appearances in the Verde River Valley, although they mostly stayed in the mountains to the east.

There is some historical reference to Spanish missionaries coming into the area, but no missions or permanent establishments or settlements were made by the Spanish.

Mexico won its independence from Spain in 1821 and despite attempts to discourage incursions into its territories by citizens of the United States, fur trappers began exploring the southwest in the 1820's, which continued on to 1850. In 1826 American trappers, also called mountainmen, James Ohio Pattie, Ewing Young, and others traveled up the Salt River trapping beaver. At the Verde River, the party split, with Ewing Young going up the Verde River and following it to its headwaters. In 1829, Ewing Young returned to the Verde River with 40 other trappers, including Kit Carson, and apparently found the beaver plentiful. No records were kept by these mountainmen of their experiences in the Verde River Valley. These mountainmen generally rode horseback or walked through the southwest and did not use canoes, rafts or other types of boats on the Verde River or other Arizona rivers, except for the Colorado.

Following the war with Mexico in 1848 and the acquisition of the present western part of the United States down to the Gila River by the Treaty of Guadalupe Hidalgo, the military conducted a number of surveys between 1850 and 1860, primarily to locate

railroad routes from the eastern United States to California.<sup>8</sup> The military surveys conducted during the 1850's for railroad routes did not cross the Verde River Valley due to the difficult and impassible terrain surrounding the river valley.

In 1863, gold was discovered at Lynx Creek, a tributary of the Verde River near Prescott, Arizona, and a gold rush into that area occurred. The First Cavalry, New Mexico Volunteers, established the first Ft. Whipple at Del Rio Springs in Chino Valley. That same year the County of Arizona was detached from the Territory of New Mexico and established as the Arizona Territory. The first capital was at Ft. Whipple, but it was moved in 1864 to Prescott, Arizona. The New Mexico Volunteers also established a garrison on the middle Verde River, officially designated Camp Lincoln but later renamed Camp Verde. The United States military presence in the southwest was greatly reduced in the first half of the 1860's due to the requirement for manpower to fight the Civil War in the east. In 1865, when the war was over, the United States added to the garrisons at Camp Verde and Ft. Whipple and that same year, Ft. McDowell was established on the Verde River eight miles above the confluence with the Salt River. Other forts and posts were also established in the general area.

Civilian settlement of the middle and lower Verde River Valley began in 1865 with farming, primarily to raise barley and hay for the military posts. The early civilian settlement generally clustered around the military posts of Camp Verde and Ft. McDowell. Camp Verde was an important way station on the military road between Ft. Whipple or Prescott and Ft. Apache in the White Mountains, which allowed rapid troop movement in the army's campaigns to pacify the Indians and place them on reservations. More people came into the area, some as farmers and some as disappointed prospectors. By 1880, most of the arable land in the Verde River Valley

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<sup>8</sup> In 1853, the Gadsden Purchase took place whereby the United States purchased from Mexico the land south of the Gila River to the present international boundary with Mexico. This was done to provide a southern railroad route from Texas and the eastern states to California.

was under cultivation. A reservation was established near Clarkdale and the Indians dug a 4-mile long ditch to irrigate 53 acres of corn, melons, pumpkins and potatoes. In 1875, the 1,400 Indians residing there were moved to the San Carlos Indian Reservation. The mining claims near Jerome were patented beginning about 1876 and the company was known as the United Verde Copper Company. The population of Jerome expanded significantly and the Jerome Post Office was established in 1883. With the capture of Geronimo at Ft. Bowie in southern Arizona in 1886, the danger of Indian wars was at an end and in 1890, Ft. McDowell was abandoned. Ft. Verde was also closed in 1891. A number of farmers settled on and homesteaded the old Ft. McDowell property, but all were removed in 1903 when the post was made into an Indian Reservation. The Rio Verde Reservation in the middle Verde Valley was also open for settlement and many homesteads were filed there. Early transportation in the middle Verde River Valley was by horseback, mule train, wagon and stage.

In the 1870's and 1880's, a number of wagon roads and later stage lines were built connecting settlements in and near the Verde River Valley with major cities, such as Prescott, Phoenix, Ash Fork and even Santa Fe (1876).

In 1882 the Atlantic and Pacific Railroad was completed across northern Arizona, and thereafter the Prescott and Arizona Central Railroad constructed a line from Prescott to present-day Seligman. This allowed ore from the Jerome mine to be hauled by wagon to the railhead in Chino Valley and then by rail on to the main line of the Atlantic and Pacific. Between 1893 and 1895, the line was extended from Prescott to Phoenix, and in 1894 and 1895, the United Verde and Pacific Railway built a railroad from the junction in Chino Valley to Jerome. In 1893, the Santa Fe, Prescott and Phoenix Railroad constructed a line between Ash Fork, and Phoenix, which replaced the Prescott and Arizona Central railroad lines. Other railroad lines were established at a later date connecting Jerome in 1885 and Clarkdale in 1911 to Prescott, Phoenix and the mainline of the cross-country railroads.

The Verde River was also used for hydroelectric power. Fossil Springs on Fossil Creek, ten miles above its confluence with the Verde River, was used between 1907 and 1909 providing water for powering a hydroelectric plant on the Verde River at Childs. In 1915, Arizona Power Company built a second hydroelectric plant. These plants have now been abandoned and the obstructions placed in the river taken out to allow the river to flow again in its ordinary and natural condition.

The early settlers all described the Verde River as a perennial, good-flowing river, sometimes 80 feet in width, which was an excellent source of water and in the middle Verde Valley, there was land available along the banks, which could be used for irrigation. They also noted that there were periodic floods that caused much erosion, damage and destruction to the diversion dams, irrigation works and fields. These floods also frequently changed the course of the river channel. Farming, mining and ranching were the main land uses in the vicinity of the Verde River Valley. The river provided a source of water for activities associated with the mines, such as processing and smelting of ores from the Jerome mine at Clarkdale. Some attempts were made to float logs down the Verde River for use in building in the Salt River Valley, but these efforts were not successful. There is also some evidence of the military attempting to use the river to float down to Ft. McDowell. Once the beaver dams were cleared out of the river and the marshes drained, which had earlier supported mosquito populations causing malaria, the land could be used for farming and grazing. The primary crops grown were alfalfa for hay, corn, onions, beets, cabbage, melons, cucumbers and wheat and other grains. There are reports of floating on the river for purposes of hunting ducks and other game. As the population increased and the mines profited, transportation became more important and wagon roads were built between the military camps, mines and agricultural settlements. All transportation in the area in the early days was by means of wagon, horse and carriage, and later by train and

automobile, but there is no evidence of any significant use of the Verde River for transportation or as a highway for commerce or that it was susceptible to such use.

The mines in Jerome closed in the 1950's and the need for diverting water from the river for processing of ore disappeared, although the diversion of water for irrigation, stock raising and domestic use continued. The population of especially the middle Verde River Valley and adjacent areas, such as Sedona and Prescott have continued to increase due to the generally moderate weather and scenic views. This area has also become a haven for retirees. Jerome has become known as an artists colony but as technology improves, there is a possibility that the mine there may be reopened.

**C. Conditions Approaching Statehood: Oral History and Opinions of Pioneers Who Lived or Traveled in the Area Prior to Statehood**

The earliest Spanish explores, Espejo and Farfan de los Godos described the Verde River as a continuing flowing river with an abundance of water. They felt that mills could be established with excellent water wheels, which would make the drawing of water very easy. They also reported many beavers in the river. The mountainmen that followed the early explorers in the 1820's to 1850's left little or no written records, but they found many beaver that would certainly indicate that there was water in the river to allow them to build dams and ponds. Neither the early explorers nor the mountainmen opined that the river was navigable or attempted to use boats or float on the river as a means of transportation. They traveled solely by foot and horseback or mule.

In the 1860's, with the establishment of Camp Verde and Ft. McDowell, settlers followed and began diverting water from the river to grow alfalfa for hay for the army and established other irrigation agriculture. In order to consider the river in its ordinary and natural condition, the Commission considered its condition prior to 1860 and the initial diversion of water for irrigation by modern settlers. These early settlers

also reported that the river was a fine, flowing stream and provided sufficient water for irrigation. Since it was fed at various points by springs, it had a continuous year round flow. It was not stable and dependable and periodically with large winter storms or the summer monsoons, it would flood, taking out the diversion dams and other irrigation works and even destroying fields. In mentioning the propensity of the river to flood, William H. Corbusier stated in February 1875:

This was the flood time of the year. I had seen the Verde suddenly come raging down, tearing away everything before it – great trees and even rocks tossed about like so much straw. On one trip, while crossing a peaceful little stream, a wall of water and debris came out of nowhere and swept away most of our packtrain in the twinkling of an eye, and then in a few minutes subsided to a trickling stream.

F. 31, p. 3-13

In the middle Verde area, there were marshes that served as breeding grounds for mosquitoes causing malaria and this was a subject of a report by the Surgeon General of the Army in 1870. With the marshes drained and the land tamped down by cattle, the ordinary and natural condition that existed earlier was changed, which eliminated the malaria and allowed easier access to the river for diversion dams and canals. One settler reported in the 1870's that the Verde River spread out wide and so shallow, you could cross it on clumps of grass. The undergrowth was very heavy and the water was forced into standing pools that could breed mosquitoes. The floods did cause the river to cut into the banks and change the course of the main river channel so that the river bed spread out in many places. There were many other descriptions of the river as a fine, flowing stream, but none that opined that the river was navigable or useful as a highway for commerce. Most of the memories and writings of the early settlers dealt with the unusually high water and floods that occurred on the Verde River. Archeologists Winifred and Harold Gladwin who studies the Verde River after statehood state: "The only cultivable lands are the alluvial terraces along the bed of the

stream, and these are subject to sudden and violent floods owing to the sharp declivity and the immense watershed drained by the river."

Individuals who were interviewed and from whom oral histories were taken regarding the condition of the Verde River were divided as to whether the river could have been boated at the time of statehood. Records from the military posts indicate attempts to boat on the river and cross it when it was in higher water as if they were using the boat as a ferry. Also, there were records of individuals using a boat to hunt ducks on the river. Most individuals interviewed expressed a lack of knowledge about the subject of boating, although they were knowledgeable on other aspects of the Verde River, such as the floods, which clearly impressed the early settlers due to the damage they caused. The study furnished by Jon Fuller contained a rather extensive interview from Jim Byrkit and Bob Munson who have written extensively on the history of the Verde River. Both stated that the Verde River could not be considered navigable, but both gave examples of boating or transporting goods or products down the stream.

Mr. Byrkit said that the Verde River could not be navigable and that he had not heard and did not know of the Verde River ever being navigated for commercial purposes. According to Byrkit, boating on the Verde River is recreational, or white water boating, and is normally possible only in February and March. Byrkit claims that during other months the Verde River cannot be run because it dries up or because it is dangerous, and that a lot of people have died in the Verde River because they enter the river during flooding. Speaking about the history of the Verde River, he said that when the Spaniards and first Anglos entered the area of the Verde River, they encountered a swamp. Afterwards, with the introduction of cattle, the river environment changes, and it might have been navigable afterwards. Nowadays it may be navigable perhaps in a shallow-bottom boat going downstream. Mr. Byrkit said that the river was used for floating logs to build a lodge in 1958. Bob Munson said that describing the Verde as a navigable river was like "trying to make a silk purse out of a sow's ear." Mr. Munson added that nobody used the river for commercial purposes either prior to or following the territorial period. Mr. Munson thought that it was possible that mountain men may have used canoes but since most of them were illiterate, there are no written records of them having done so. During the 1880s, Fort Verde was issued a collapsible boat, because they needed a way to get messages and messengers across the river in times of high water. The boat was also used for fishing, and there is a photo of the boat at the Fort. Mr. Munson

felt that it was unlikely that the Verde River was ever boated for commercial purposes.

F. 31, p. 4-2.

Other than the few examples given of attempts to boat on the river or float logs on the lower part of it from the dismantling of Ft. McDowell, almost everyone interviewed conceded that travel along the Verde River Valley was mostly by horse or mule, wagon or foot until roads and the automobile came into common use.

In addition to the oral histories discussed above, there were numerous studies by the federal government, including the military, Bureau of Reclamation, Indian Service and others made of the Verde River that were presented as evidence to the Commission. Dr. Douglas Littlefield, an acknowledged expert on history of the American west, in particular water rights and river-related issues, who performed a number of navigability studies on the Salt River, the Gila River and the Verde River, presented his monumental report entitled "Assessment of the Verde River's Navigability Prior to and On the Date of Arizona's Statehood, February 14, 1912" (July 7, 2005). In his report, he referred to the Arizona Territorial Legislature in its first meeting in 1865 that petitioned Congress for funds to improve navigation on the Colorado River. In that petition, the Legislature specifically declared that the Colorado River is the only navigable water in the territory. In his testimony before the Commission on January 18, 2006, Dr. Littlefield stated:

By any reasonable standard that I could find, in relation to the Verde River, no one considered the Verde River to be navigable at or about the time of Arizona's statehood.

T.R. p. 66, ll. 8-11. In support of this conclusion, he cited a huge array of historical documentation that demonstrated that no contemporary observer believed this river was navigable in a reliable way. T.R. p. 66, ll. 18-25. He stated that the historical research he had undertaken included federal government records from the National Archive, the Bureau of Reclamation, the Indian Service, and others, as well as records from state and local agencies such as the Arizona State Land Department and the

Attorney General and the State Archive, and lastly centers and archives that have accumulated collections on this subject, such as Arizona State University, Arizona Historical Society and Foundation, the Salt River Project archives and other local historical archives. His study of all of these resources made him conclude that the Verde River was not considered navigable by anyone at or near the date of statehood.

In Dr. Littlefield's report, he discusses the federal government surveys made between 1850 and 1912. There were eight (8) major surveys done of the Verde River and they followed the various federal survey manuals that were issued between 1851 and 1902. These manuals describe what was to be done if the surveyor considered the stream navigable and while these surveys were done under the instructions of different survey manuals during varying seasons and in a multitude of years, not one of the surveyors determined the stream to be navigable under the surveying instructions. The surveyors' opinions, as shown by their action and reports, are not determinative of the issue of navigability, but their actions and opinions are probative and support the position that the watercourse was not navigable. *Lykes Bros., Inc. v. United States Army Corps of Engineers*, 64 F.3d 630 (11<sup>th</sup> Cir. 1995).<sup>9</sup> In a report of the surveys conducted in 1907-8, Jesse V. Wright indicated he did not consider the stream to be navigable and further that there was a road roughly paralleling the river that suggested to him that the Verde River was not used for transportation. Some of the area along the Verde River was not surveyed due to the extremely mountainous and rough terrain and the fact that land had been withdrawn from the public domain by the federal government for

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<sup>9</sup> "The Corps also contends that in 1871 public land survey performed by a disinterested surveyor, J.C. Tannehill, shows that there was a well-defined channel through Cowbone Marsh because, in mapping the area, Tannehill drew a solid line through his depiction of Cowbone Marsh. However, the line Tannehill drew is accompanied by "meander" readings on one side. Surveyors were required to meander both sides of what they concluded were navigable rivers, and to meander one bank of what the surveyor thought were well-defined natural arteries of "internal communication." Because Tannehill only meandered one bank of Fisheating Creek, the district court found that Tannehill had determined Fisheating Creek to be nonnavigable. Given the instructions under which Tannehill operated, his meandering of only one bank of Fisheating Creek is probative of whether Fisheating Creek was navigable in 1871." 64 F.3d at 635. See, also *Denison v. Stack*, 997 F.2d 1356, 1364-65 (11<sup>th</sup> Cir. 1993). Although we recognize that surveyors do not settle questions of navigability, the surveyors' actions are probative.

reasons such as reclamation projects and potential hydroelectric power generation sites and Indian Reservations. See map of Reclamation Withdrawals and Water Power Designations attached hereto as Exhibit "G.". Likewise, homesteading was not allowed on these areas withdrawn for federal purposes.

In his report, Dr. Littlefield also discussed the land granted by the federal government under the Homestead Acts. Over 120 federal patents were issued that touched the Verde River and in every single case, there is not any reference to any portion of the bed of the river having been withheld due to considerations of navigability. (See Exhibit "H," maps of Federal Land Patents Along the Historic Verde River Channel) Most of these patents were issued under the Desert Land Act which allowed a settler to file an application for up to 640 acres, but required that the water to be used to irrigate the land had to be taken from a non-navigable stream.

Provided however that the right to use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon public lands *and not navigable*, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. (emphasis added)

19 Stat. 377 (1877).

The Verde River actually runs through a number of these patents. In some cases, the application itself, as well as the affidavits of individuals submitted to prove the right of the settler to purchase the land, stated that the Verde River was not navigable. Prior to and at statehood, the federal government granted to the State of Arizona, for support of schools, four (4) sections in each township, totaling 8,093,156 acres throughout the state. In addition, 1,446,000 acres were given to Arizona for internal improvements and college support. Also, 1,000,000 acres was granted to Arizona to pay for bonds issued by various counties. If any of the lands thus granted overlay navigable water, Arizona

could take lands elsewhere equal in size and total in area to the bed of the navigable body of water. It is significant that Arizona made no in lieu selections to compensate for the area covered by the Verde River's bed in the four (4) sections granted in the townships where they overlay the Verde River. The State of Arizona also granted patents to private individuals that were adjacent to or lay on the Verde River and no reservation in any of these patents was made to preserve the land to the sovereignty of the State of Arizona because of navigability.

A number of surveys and studies were performed by federal and state government agencies to determine the advantage of putting dams on the Verde River for use in irrigating other lands. Although many proposals were made, the net result was the building of Bartlett and Horseshoe Dams in the 1930's and 1940's. These government surveys portrayed the Verde River as highly erratic with unpredictable flows and a shifting channel. Such a stream could hardly provide a reliable means for transportation, although there was water in it to provide for irrigation.

Early Phoenix resident, Carl Hayden, also indicated that the Verde River was not navigable in speech in front of the U.S. House of Representatives on February 3, 1916. Hayden stated that he came from a state where we have dry rivers and no harbors and he wanted to see a committee established that would give consideration to the flood problems on non-navigable streams. In commenting on the constitutionality of a federal funding for flood control on non-navigable streams, Hayden argued that the expenditure not only had local advantages, but also was in the national interest. He stated that railroads were often affected by floods, which hurt interstate commerce and that the U.S. Postal Service was also constantly interrupted by flooding. He also argued that the care of national defense would be assisted by finding for flood control, asserting that troops cannot be readily moved or supplied when the rivers are in flood. Congressman Hayden's remarks in this speech made it clear that in his view, all Arizona streams were non-navigable, including the Verde River. What Hayden sought,

therefore, was money to curb flooding on the State's unpredictable streams, including the non-navigable Verde River.

All parties agree that the weather and climate on the Verde River watershed has not changed dramatically since the date of statehood, although there have been dry and wet cycles. The Verde River was not listed in or covered by the Rivers and Harbors Act of 1899, which applies to navigable rivers and other navigable waters of the United States and prohibits, among other things, bridges and other obstacles being placed on the navigable rivers without consent of Congress. 33 U.S.C. § 401, *et seq.*; *Economy Light & Power Co. v. U.S.*, 256 U.S. 113, 41 S.Ct. 409, 65 L.Ed. 847 (1921).

#### **D. Boating on the Verde River**

Boating on the Verde River is documented in the evidence submitted both in the studies and reports and testimony of various individuals. Most of the historical boating occurred in the Verde Valley and from Ft. McDowell down to the confluence with the Salt River since these two areas were by far the most populated. The boating incidents occurred in different months of the year and very few of them state the level of the water at the time the trip was taken, whether high, low or flood, but due to the seasonal high water or smaller floods, we can interpret when some of them were made. In 1873, Charles Hayden, father of U.S. Senator Carl Hayden, attempted to float logs down the Salt River to establish a lumber mill at Tempe, but he was not able to get the logs through the deep mountain canyons upstream. He then turned to the Verde River, thinking it was the next best stream to provide logs for the needs of central Arizona, but this effort also failed. Scott Soladay, research historian of the Tempe Historical Museum, reported that he had seen an article in the Mesa Free Press of 1890 or 1891 describing how, after Ft. McDowell was abandoned, A. J. Chandler had logs or sawn timber from the fort floated down the Verde and then to the headgates of the consolidated canal, but the article itself could not be located.

There are various reports relating to a collapsible boat issued by the U.S. Army and used at Camp Verde to take couriers across the river during periods of high water. This was documented by a picture of two men in a boat on the Verde River about 1887, one of whom appeared to be wearing an army uniform. It would appear that this boat was used more as a ferry to cross the river rather than to travel up and down the river. A newspaper report from 1883 states that two individuals left Ft. McDowell for the Salt River Valley in a canvas skiff. This occurred in February during the seasonal high waters, but no other details were available. Also, in 1888, the post commander at Ft. McDowell, Major E. J. Spalding, and his deputy, Captain Hatfield, took a canoe from Ft. McDowell down river shooting ducks and other game as they came. A tragic incident occurred when they were lifting their boat over the Mesa Dam and a gun discharged killing Major Spalding. Other incidents of hunting on the river were reported, such as Dr. Ralph Palmer and Joe Crane in early 1903 who boated some 16 miles down the middle Verde and harvested a number of ducks. Since this was in early 1903, it must be presumed to have been during the winter high waters or flood season. As late as 1931, individuals reported that they used a canoe to boat on the middle Verde River and downstream trapping along the way. There was one other report, although undated and undocumented, of boats or rafts being used to transport rock in the building of a dam near Perkinsville in 1899. No other information on this was available and there are no reports of boats or rafts being used in the building of either Bartlett Dam or Horseshoe Dam in the 1930's and 1940's. Thus, while we have historical accounts of boating on the Verde River, it does not appear that any of these attempts were used for commercial transportation or use of the river as a highway for commerce. The vast majority of transportation in the region was by horse, mule, wagon and later by railroad. Various government agencies have come up with definitions and criteria for determining navigability or for recreational boating on various rivers. However,

these definitions and criteria do not address themselves to navigability for title. The BLM, however, has issued criteria to determine title and navigability, which includes:

- The original condition of waterway at the date of statehood is used
- Use by small, flat bottom sport boats or canoes is not navigation
- Navigation must occur at times other than during seasonal floods
- Unaccessible streams are not navigable
- Long obstructions such as bars make upstream segments unnavigable

CH2M Hill's Arizona Stream Navigability Study for the Verde River, June 2003, F. 31, p. 8-2. None of the historical accounts of boating fit within the definition or criteria for navigability for title set forth above.

Although there was some boating on the Verde River during historical times and use of boats to hunt ducks and other game, and likewise there is evidence in historical times as well as modern times of fish in the river and evidence that people did catch fish in the river, there was no fishing industry ever established. It appears that all fishing was for recreational or personal consumption. None of the boating incidents carried goods for commercial trade and there was no navigation upriver. The reports do not state the conditions of the river when the attempt was made, whether low water, high water or flood and it would appear that the entire river was not practical for commercial navigation, especially the parts in the deep canyons and mountainous area where accessibility was a great problem and these reaches contained rapids, waterfalls and other obstructions, which would make navigation virtually impossible.

Recreational rafting on the Verde River appears to have begun after World War II when rubber rafts became available to the public. There are reports that indicate that all parts of the river have been used for rafting in recent years. Boat-making technology has improved since the time of statehood and with the use of inflatable rubber or neoprene rafts and hard-shelled kayaks have become the more preferred modes of rafting. These modern boats were not available at statehood. The U.S. Forest

Service grants permits for rafting on the Verde River. Most of this recreational rafting occurs during the winter months and during the spring runoff. Individuals can obtain these permits, but there are some guides who sponsor trips down the Verde River for a fee, but even these are strictly to view the scenery, wildlife and recreational in nature to enjoy the excitement of whitewater rafting in the mountain and canyon area. Mr. Jim Slingluff testified that he has been rafting on the rivers and watercourses of Arizona for well over 20 years. He specifically testified about canoeing and rafting on the Verde River, particularly from the Verde Valley, through the mountains, down to Ft. McDowell. He showed the Commission a number of pictures of this type of whitewater rafting and stated that there were a number of falls, in particular the Verde Falls, and rapids that had to be portaged around. His trips were during different months of the year and most of the time, he said he had 300 cfs water carrying him. He also described floating at a much higher cubic feet per second while hunting deer and that he had had several accidents and came very close to drowning. He was of the opinion that the entire Verde River was boatable for recreational purposes with one or two persons in a canoe or skiff or raft, but offered no opinion as to whether or not the Verde River was navigable. He stated that there are probably 130 rapids or riffles on the river and that probably only 30 of them are large enough to have names. He stated that he had used a canoe on the river in just one inch of water and also had been on the river when it was flowing at 6000 cfs, which he felt was quite dangerous. In the upper river near Perkinsville, he would commonly boat in water that was flowing at 40 to 80 cfs. In that area, if the flow became 1000 cfs, it was very, very dangerous. He said in the lower part of the river, he has seen troops of boy scouts in a number of boats floating and boating on the river.

Mr. David Weedman, a biologist with the Arizona Game and Fish Department also testified. He testified to the types of fish that lived in the river and what he had caught in doing surveys for the Game and Fish Department. He has also boated on a

number of rivers in Arizona, including the Verde. He said he has taken 11 to 12 canoe trips down the Verde doing fishery surveys. He boated the Verde River at low flow of 75 to 80 cfs in the dead of summer. The main area he conducted his surveys was from the Verde Valley, through Childs, and on down to Sheeps Bridge or Tangle Creek. While it would appear from the testimony and exhibits that while there has been boating and rafting on the river, both before and since statehood, all of it has been for recreational purposes, even when a guide is hired and takes clients in canoes or inflatable rafts down the river. These rafting trips occur during the high water period in late winter and early spring. Even then, there is a requirement for portaging around certain rapids and falls. It was noted by the witnesses that while there were kayaks and possibly rafts that could have made these trips in 1912, the technological advances in the type of materials, such as rubber or neoprene rafts, and even stronger materials for kayaks, which were not available in 1912, make the trips much more possible and enjoyable from a recreational standpoint after the 1950's. Also, individuals who had the equipment could do these float trips individually without paying a guide and a company to transport them. The float trips are strictly for recreational purpose, to view the scenery and wildlife and for the excitement of running rapids and possibly some fishing, but not for commercial purposes. Nor did the rafts carry any commercial goods for resale.

The acknowledged definition of navigability as set forth by the Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 at 563, 19 L.Ed. 999 (1870), states:

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

Arizona has codified *The Daniel Ball* definition in A.R.S. § 37-1101(5), which defines "navigable" or "navigable watercourse" as:

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 customer mode of trade and travel on water.

"Highway for commerce" is defined as "a corridor or conduit within which the exchange of goods, commodities or property or the transportation of persons may be conducted." A.R.S. § 37-1101(3).

In *The Daniel Ball* case, the U.S. Supreme Court held that Grand River was navigable because it supported the passage of a steamer that carried 123 tons of merchandise and passengers both upstream and downstream. 77 U.S. at 564-65.

Following the decision in *The Daniel Ball*, the Supreme Court premised its navigability decisions based upon whether the watercourse was used as a "highway for commerce" or was susceptible for such use. For example, evidence of using boats on a watercourse in the fur trade, in the ranching industry, and for the transportation of supplies, passengers, and freight have all satisfied the requirement of commercial activity under the federal test for navigability. See *Utah v. United States*, 403 U.S. 9, 11-12 (1971) (boats had been used on the Great Salt Lake to haul livestock in ranching business and other evidence indicated that boats were used to transport salt, passengers, freight, ore, and cedar posts); *Economic Light & Power Co. v. United States*, 256 U.S. 113, 117-18 (1921) (river was used extensively in the fur trade and for the transportation of large amounts of supplies between Chicago and St. Louis using boats that could carry several tons); *The Montello*, 87 U.S. 430, 441-41 (1874) (finding the Fox River navigable where it had been used considerably in the fur trade and as a route for interstate commerce).

Thus, for a river to be considered navigable or susceptible of navigability, there must be a showing of commercial activity for the river to be used as a "highway for commerce" or susceptible to such use. *United States v. Utah*, 283 U.S. 64, 81-82 (1931) (portions of river held navigable where there was extensive evidence of various boats

that carried passengers and supplies, in exploring, prospecting, surveying and mining operations, and for recreational purposes, both before and after Utah's statehood). Likewise, the Ninth Circuit Federal Court of Appeals has found that commerce is a requisite to determining that a watercourse was susceptible to navigation as of statehood. *Alaska v. Ahna, Inc.*, 891 F.2d 1401, 1405 (9<sup>th</sup> Cir. 1989). As the Ninth Circuit found, guided fishing and sightseeing tours for nearly twenty years was commercial activity where "[a] substantial industry of such transportation for profit emerged in the lower Gulkana, which industry today employs approximately 400 people." *Id.*

In *United States v. Oregon*, 295 U.S. 1, 21 (1935), the Court found that five lakes were non-navigable because the only "boating which took place in the area involved no commercial aspects and was of such a character as to be no indication of navigability. Boating evidence was primarily limited to seasonal trapping and duck hunting. Other cases in which the courts have found no evidence that a watercourse was a "highway for commerce" are *Harrison v. Fite*, 148 F. 781, 784 (8<sup>th</sup> Cir. 1906) ("mere depth of water, without profitable utility, will not render a watercourse navigable in the legal sense . . . nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes"); *Monroe v. State*, 175 P.2d 759, 761 (Utah 1946) (no evidence that the lake was used for transportation of goods or that "it is likely ever to develop as a valuable means of public commercial transportation"); *Proctor v. Sim*, 236 P. 114, 116 (Wash. 1925) (principal use of nonnavigable lake included recreational boating, fishing, swimming, and skating).

Since the majority of evidence submitted regarding boating on the Verde River is one of recreational use, whether personal or commercial, in order to view the scenery and wildlife, enjoy the excitement of whitewater rapid running and perhaps do some recreational fishing, in late winter and spring does not satisfy the federal test for navigability or susceptibility of navigability.

### **E. Geology, Geomorphology and Hydrology of the Verde River**

Prior to modern settlement, the Verde River was a perennial stream that flowed and flows now through the rugged Central Mountain Province of Arizona. The Central Mountain Province is a transitional region between the high elevation relatively flat Colorado plateau of northern Arizona and the lower elevation basin and range province of southern and western Arizona. The Central Mountain Province is characterized by some of the most rugged relief in Arizona, large high mountain ranges and deep canyons. Long-term down cutting and the relative erodibility of pre-Quaternary bedrock and basin fill units effectively control the extent and character of the bed and flood plain along the Verde River. Because the geology of the central mountain area is complex and variable, the Verde River flows through a number of different types of rock units with varying susceptibility to erosion. In areas where the Verde River flows through resistant bedrock, the river valley is steep and narrow and alluvial deposits in the flood plain are limited in extent. This situation typifies nearly all of the Verde River between Paulden and the northern Verde Valley, and most of the river between the southern Verde Valley and Bartlett Dam. There is little potential for significant changes in channel position or character in these reaches. Where the rock is less resistant to erosion, such as most of the Verde Valley and downstream from Bartlett Dam, the river valley is broad and the flood plain relatively wide and the potential for significant changes in channel position is far greater.

In the area above Bartlett Dam, excluding the Verde Valley, the Verde River flows through some of the most rugged country in Arizona. In these mountain canyons, the flood plain is limited in extent and the potential for change in channel position is also very limited. The riverbank in these canyons is steep, making it difficult for people to reach the river. The river flows fast and contains rapids, waterfalls and other obstacles. The gradients range from 12 to 25 feet per mile, with the rapids, waterfalls and other obstacles in these narrow canyons and the steep gradient,

navigation would be impossible in the opinion of Dr. Stanley A. Schumm, who filed his report on the geomorphic character of the Verde River with the Commission. F. 30, p. 14. The forest supervisor of Tonto National Forest also filed a report and study for that portion of the Verde River that flows through National Forest lands. He also opined that the river was not navigable in these areas due to the steep gradient of the river, trees, rapids and waterfalls, and other obstacles that blocked the river. F. 6 In the Verde Valley and the area below Bartlett Dam, although somewhat imbedded, the river does flow through alluvial deposits and is not constrained by steep bedrock. There are 14 major rapids between the lower end of the Verde Valley and Horseshoe Reservoir, a distance of 61 miles. The major floods that occurred in the 1890's and early part of the Twentieth Century eroded and scoured the flood channel in these areas such that it was 200 to 3,200 feet wide and fairly shallow. The flood of 1891 was the largest during the historical period and caused a considerable amount of damage and change in flood channel position and morphology. Several hundred acres of fine bottomland were washed away in the flood and replaced by channel gravel. According to Dr. Schumm, the middle reach of the Verde River, which is mostly within the Verde Valley, has characteristics of braided rivers that are wide, shallow and sometimes steep. This condition is not conducive to navigation. F. 30, p. 14. It is in this area that most of the diversion canals divert water from the river for irrigation purposes.

The hydrology of the Verde River generally has not changed overall since settlement first began in 1860. Using dendrochronology (tree ring studies) and other tests of the bed of the river, scientists have been able to get an approximation of the hydrology of the river as far back as 740 A.D. While the flow during the earlier years may have been somewhat less than the late 1800's, the overall weather and climatic conditions seem to be the same. The evidence all shows that the Verde River is a perennial stream of flowing water and that the low flow is always maintained by springs along the river or the tributaries to the river. Notwithstanding this, the area is

subject to a great variation in flow due to extremes of precipitation. The high established monthly runoff occurs between January and April in response to snow melt and precipitation from cyclonic storms originating over the Pacific Ocean. These winter storms are regional in extent and can generate significant flow volumes. A second period of increased runoff occurs in August and September during the summer monsoon rainfall. Monsoon storms are caused by tropical moisture entering Arizona from the south. These storms produce more localized, intense rains, which produce flash floods with high peak flows, but do not produce the very large peak flows that occur during the winter months. Average precipitation on the Verde River varies between 9 and 12 inches depending primarily on altitude. Higher points of the watershed will have even a higher precipitation. Computing the flow of the Verde River is somewhat difficult with the use of estimated annual flow and estimated mean average flows. The river will have a very low flow during the dry months and whenever there is a drought and then have annual high waters during the winter and monsoon seasons referred to above. Periodically, there will be extremely high flows or floods that do great destruction. The floods especially distort the average and the mean.

The geological survey has operated at least six (6) different stream gauges on the Verde River during various periods over the past 100 years. The Verde River gauges near Ft. McDowell and near Camp Verde are the only ones that operated prior to statehood. The Ft. McDowell gauge, which is near the confluence with the Salt River, is probably the more accurate for defining the discharge from the entire river. It was established in August of 1888. The gauge near Camp Verde was established in February of 1911. They show an average for the year 1912 of 781 cfs at Ft. McDowell and 470 cfs at Camp Verde. Although the month of February, averaged out, appears to be much higher since it is during the winter storm period. Another source in Dr. Schumm's report, F. 30, p. 10, shows the mean annual discharge of the river below

reached in excess of 150,000 cfs. These floods could be quite destructive.<sup>10</sup> One study made indicated that in 1914, there were 25 diversions of water for irrigation of more than 5,000 acres of farmland between Perkinsville and the Salt River (the entire length of the Verde River) and that more than 121 cfs were diverted. The number of acres under cultivation has increased since 1914 so the amount of water diverted has probably increased somewhat. Considering the above information, the estimated average flow of the Verde River prior to diversions, which commenced in 1860, was between 758 cfs and 901 cfs at Ft. McDowell near the Verde River confluence with the Salt River.

Evidence was submitted by Salt River Project of federal and state court decisions in which navigability of the river was actually determined using *The Daniel Ball* test. Four (4) of the 21 watercourses listed in the document were found to be navigable in whole or in part by a federal or state court. Of these four (4) navigable rivers, the lowest average annual flow was 2,277 cfs for the Great Miami River of Ohio, which was found navigable in part and non-navigable in part. The other three watercourses found navigable had average annual flows of 7,316 cfs, 6,930 cfs and 4,066 cfs, all of which are much higher than the estimated average annual flow computed for the Verde River.

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<sup>10</sup> "The yearly reports drafted by the Geological Survey contain detailed information on many streams in the West, including the Verde River. For example, the *Eleventh Annual Report of the U.S. Geological Survey* (1892), which focused specifically on irrigation, generally described streams draining the Gila Basin (which include the Verde River and Tonto Creek). Stating that all rivers in the basin are highly erratic, John Wesley Power [the explorer of the Colorado River in the Grand Canyon in 1869], who authored this *Annual Report*, wrote:

In this basin are found rivers most difficult and dangerous to examine and control, differing in character and habit from those of the North as widely as in geographic position. In place of the regularly recurring annual floods of spring and early summer, so strongly marked on the discharge diagrams of other basins, these rivers show conditions almost the reverse, being that season at their very lowest stages – even dry – and rising in sudden floods at the beginning of and during the winter. These floods are of the most destructive and violent character; the rate at which the water rises and increases in amount is astonishingly rapid, although the volume is not always very great. . . . From this it will be recognized that the onset of such a flood is terrific. Coming without warning, it catches up logs and boulders [sic] in the bed, undermines the banks, and, tearing out trees and cutting sand-bars, is loaded with this mass of sand, gravel, and driftwood – most formidable weapons for destruction."

Bartlett Dam from 1889 to 1935. These mean averages run from 186 cfs in 1882 to 2,401 cfs in 1891, the year of the largest flood in historic times. For the period of 1910 to 1914, the averages range from 523 cfs to 918 cfs.

None of the above average take into account irrigation diversions for approximately 3,800 acres irrigated above the gauges. Estimations from 1914 disclose that approximately 120 cfs was diverted from the river in the Verde Valley for irrigation. Stream flow records after statehood are more available and come from more gauges on the river. One table in the John Fuller report shows that near the upper end of the river, the annual average flow rate at Paulden was 42 cfs. It increases going down river with the Clarkdale gauge showing 192 cfs, Camp Verde, 430 cfs, Tangle Creek, 559 cfs and Ft. McDowell at 781 cfs. Another study disclosed that in the middle Verde, 184 cfs were taken out of the river for irrigation, but this sum needs to be reduced by the inflow of 25 cfs from Oak Creek and some from the other tributaries, such as Beaver Creek, Clear Creek and Fossil Creek.

The general hydrology of the Verde River has remained substantially unchanged since statehood, except for the reach downstream of Horseshoe and Bartlett Reservoirs, which impound significant amounts of water. The average, as stated above, take into the account the normal winter and summer monsoon storms. They also take into account the periodic, very large floods. FEMA and the Geological Survey rate these period large floods on the basis of estimating how often they occur in numbers of years. Between 1891 and 1980, there were a number of large floods on the Verde River that

## F. Bartlett Dam Reservoir and Horseshoe Dam Reservoir

Two dams and reservoirs were constructed on the lower Verde River, the first being Bartlett Dam constructed in 1939 and Horseshoe Dam constructed in 1946. Bartlett Reservoir has a holding capacity of 178,186 acre feet and Horseshoe Reservoir has a capacity for holding 109,217 acre feet. Although each of these Reservoirs are by statutory definition manmade water conveyance systems, they do encompass the Verde River that was in existence as of February 14, 1912. A.R.S. § 37-1101(4) and (11).<sup>11</sup> Since these two dams and reservoirs were constructed after statehood, the Verde River, as it existed in its ordinary and natural condition as of statehood was considered.

A.R.S. § 37-1101(5) states:

“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.

See also, *Defenders of Wildlife v. Hull*, 199 Ariz. at 426, 18 P.3d at 737 (App. 2001). All of the authorities agree that navigability for title purposes must be determined as of the date of statehood.

The U.S. District Court Alaska, in a case involving the Gulkana River, stated “the requirement for title navigability be determined at the time of statehood means only that when making a navigability determination, the *Daniel Ball* test is to be applied to the physical dimensions and physical configuration existing at the time of statehood. *Alaska v. United States*, 662 F.Supp. 455, 463 (D. Alaska 1987); *affirmed* 891 F.2d 1401 (9<sup>th</sup> Cir. 1989), *cert. denied* 495 U.S. 919 (1990). The Ninth Circuit, in a subsequent Alaska

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<sup>11</sup> A.R.S. § 37-1101(4) provides in part:

4. “Man-made water conveyance system” means:

...

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

case regarding the Kukpowruk River stated “the key moment for determination of title is the instant when statehood is created.” *Alaska v. United States*, 213 F.3d 1092, 1097 (9<sup>th</sup> Cir. 2000), quoting *Utah v. United States*, 482 U.S. 193, 196 (1987). The Commission considered the physical dimensions and configuration existing at the time of statehood and the average mean flow before diversions for irrigation.

Due to the configuration of the river and riverbed in the Verde Valley and below Bartlett dam and in the mountain area, where Bartlett Dam and Horseshoe Dam are located, the steep canyons, rapids, exposed waterfalls, exposed boulders and other obstacles, and other evidence of consideration set forth in this report, the entire Verde River was determined to be not navigable or susceptible of navigability in its ordinary and natural condition as of the day of statehood before any diversions or withdrawals for irrigation or other human purposes.

Because of the foregoing finding and determination, the following issue need not be considered and ruled upon, but it should be noted that the United States reserved to itself the land necessary to construct Bartlett Dam and Reservoir and Horseshoe Dam and Reservoir, and although they may hold it in a form of public trust, it may not be available to the state under the equal footing doctrine as of the date of statehood. See Exhibit “G.” Section 28 of the Enabling Act of June 20, 1910, 36 U.S. Stat. 557, 568-579, provides as follows:

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State;

The Enabling Act also provided, after confirming the grant to the territory of Arizona of two sections in each township for schools made by the act establishing the territory of New Mexico in 1850 (9 U.S. Stat. 446), that the State of Arizona was granted sections 2, 16, 32 and 36 in each township to used for the support of schools. If any of

these sections were covered by the waters of Bartlett Reservoir or Horseshoe Reservoir, then the State could make an in lieu selection of other lands from the federal public domain. No such in lieu selections were so recorded or presented to the Commission. The United States also made other grants to the State of Arizona from land in the public domain for other public purposes, such as the support of universities, hospitals, public buildings, prisons, agriculture and mechanical colleges and military institutes. None of these grants was of land under the reservoirs backed up behind Bartlett and Horseshoe Dams on the Verde River.

Section 20 of the Enabling Act, states in part:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof **and** to all of the lands lying within said boundaries and held by any Indian or Indian tribes. (emphasis added) (See also paragraph 7<sup>th</sup> of Section 20)

With a disjunctive “and” used, it can certainly be argued that the people of the State disclaimed any right or title to lands not directly granted to them, which would include other lands owned by the United States, including those under the various reservoirs backed up behind irrigation and flood control and hydro-electric power dams, which would include Bartlett Dam and Reservoir and Horseshoe Dam and Reservoir. Neither of these dams are used at this time for generation of hydroelectric power, but the potential is there. The Commission does not have to reach a finding or decision on this issue since it considered the portions of the river lying under these two reservoirs in their ordinary and natural condition as of statehood and found they were not navigable or susceptible of navigability.

## VIII. SUMMARY AND CONCLUSION

The Commission conducted a “particularized assessment” of potential public trust claims on the part of the State of Arizona on the Verde River as required in *Center of Law v. Hassell, supra.*, and in doing so considered all of the evidence available as to the issue of navigability, including archeology of the Verde River area and prehistoric and

All of the witnesses and the documentary evidence with regard to the geology, geomorphology and hydrology of the Verde River stated that the Verde River, while a perennial stream and flowed year round prior to statehood, was a very erratic, unstable and unpredictable stream because the flow varies from very low, sometimes less than 200 cfs, to annual floods estimated between 13,000 and 20,000 cfs with periodic floods exceeding 100,000 cfs. There is evidence, somewhat questionable, that the average annual flow of the Verde River adding in the estimated amount diverted for irrigation was between 758 cfs and 901 cfs near its confluence with the Salt River. Even taking the higher figure of 901 cfs, it is below the flow of any river found navigable by any court, which was reported to the Commission. In reaches above the Verde Valley (Cottonwood and Camp Verde area) and below the Verde Valley to Bartlett Dam, the steep, narrow bedrock canyons, lack of accessibility to the river, waterfalls, rapids, exposed boulders and other obstacles, and the steep gradient of the river, navigation as a highway for commerce was not possible. In the Verde Valley and the reach below Bartlett Dam, the river spreads out over a larger flood plain and had braided characteristics with shifting sand bars and sand islands, which would make it impossible to be considered as navigable or susceptible of navigation. Even today, with the dams in place, there have been periodic large floods, which floods have caused severe damage to areas in the flood plain and alongside the river.

In *The Daniel Ball*, *supra*, the Court stated that:

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 susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

77 U.S. at 568. See also, *U.S. v. Holt Bank*, *supra*, and *Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428 (9<sup>th</sup> Cir. 1993). The evidence submitted to the Commission did not show that the Verde River is navigable in fact under the federal test as set forth in *The Daniel Ball* and other U.S. Supreme Court decisions in its ordinary and natural condition as of

mode of transportation by people during the period between 1860 and 1912 was primarily by foot, horseback or mule and wagon and later by railroad.

The evidence showed that there were attempts prior to statehood at boating and floating logs down the Verde River, which were generally not successful. A survey of the historical account of boating supports the proposition that the river was not suitable for navigation and that there was never any sustained, successful use of a watercraft on the river or use by the river for floating logs or otherwise as a highway for commerce. Since the 1950's, using modern neoprene and rubber boats, individuals and organizations have been conducting float trips down the Verde. These trips are strictly recreational in nature in order to view the scenery and wildlife, enjoy the excitement and danger of white water rapid running and perhaps do some recreational fishing. These trips occur in later winter and spring and are not use of the river as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water as of February 14, 1912.

The construction of Bartlett and Horseshoe Dams in the 1930's and 1940's and establishment of reservoirs changed the form of the use of the river in the lower reaches of the river. The dams were built for public purposes, such as flood control and the potential for production of hydroelectric power. Neither of the dams are used at present for generating hydroelectric power. In the case of these dams and reservoirs, the federal government withdrew from the public domain all of the property lying under the dams and the inundation levels of the reservoirs under the Enabling Act. No homesteads or other private occupation was allowed. Thus, the federal government owns all of the land under these dams and reservoirs. The Commission considered the Verde River streambed as it existed on February 14, 1912, in its ordinary and natural course under Bartlett and Horseshow Reservoirs and found that the watercourse was not navigable.

pre-Columbian history, history and development of the Verde River area from the time Europeans first came into the area, the views and opinions of people who lived at or about the time Arizona became a state, the geology, geomorphology and hydrology of the Verde River, the actual attempts and potential for boating or use of the river as a highway for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel over water.

The archeological evidence indicates that Paleo-Indians visited the area as early as 9500 to 12,000 B.C. and that later there was some farming by irrigation in the Tonto Basin as a result of Hohokam migration from the Lower Salt River Valley and Sinagua migration from the Flagstaff area. There was no evidence that any of these prehistoric Indians made use of the Verde River for the purpose of transportation. All transportation in this area at that time was by foot and not by any form of watercraft.

Although the Spanish explored the Verde River area as early as 1600, they did not establish any permanent settlements or missions. The first Europeans trappers, mainly for beaver, came into the Verde River area between the 1820's and 1840's, but all traveled by horse, mule and foot. There are no reports of their using any kind of boats or watercraft on the Verde River, although they did use boats on the Colorado River. The United States acquired the area in which the Verde River lies from Mexico as a result of the Treaty of Guadalupe Hidalgo, which ended the Mexican-American war in 1848. Due to the inhospitable mountain geography and deep canyons, there was very little permanent settlement in this area except for the Verde River Valley and the Ft. McDowell area until after the Civil War when the army was again able to undertake pacification of the Apache Indians in the area. Rich mineral deposits did allow mines to be established in the Jerome area and water was used from the Verde River for processing ore at the mills and smelter in Clarkdale. None of these early settlers were of the opinion that the Verde River was navigable as a highway for commerce and the

February 14, 1912. Therefore, the Verde River may not be considered as navigable in law.

The standard of proof for findings by the Commission is a preponderance of the evidence. A.R.S. § 37-1128(A), *Defenders of Wildlife v. Hull, supra* and *North Dakota v. United States, supra*. The burden of proof rests on the party asserting navigability. *Arizona Center for Law v. Hassell, supra*, and *Land Department v. O'Toole, supra*. Clearly, the preponderance of evidence supports a finding that the Verde River was not navigable on February 14, 1912, and further, was not susceptible of navigability in its ordinary and natural condition.

#### **IX. FINDINGS AND DETERMINATION**

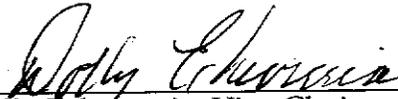
Based upon all of the historical and scientific data and information, documents and other evidence produced and considered by the Commission, the Commission finds that the Verde River, from its headwaters at Sullivan Lake to its confluence with the Salt River, is erratic, unstable and unpredictable, characterized by periodic floods, sometimes extreme, in its ordinary and natural condition. The reach above the Verde Valley and below the Verde Valley to Bartlett Dam, the steep, narrow bedrock canyons, lack of accessibility to the river, waterfalls, rapids, exposed boulders and other obstacles, and the steep gradient of the river, navigation as a highway for commerce is not possible. In the Verde Valley and the reach below Bartlett Dam, the river spreads out over a large flood plain and has braided characteristics, with shifting sandbars and sand islands, which make it impossible to be considered as navigable or susceptible of navigation.

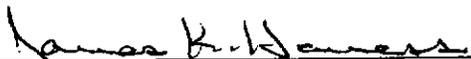
Accordingly, the Commission finds and determines that the Verde River from its headwaters at Sullivan Lake to its confluence with the Salt River was not used or

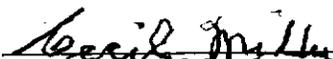
susceptible of use as a highway for commerce over which trade and travel was or may be conducted in the ordinary modes of travel on water as of February 14, 1912.

DATED this 24 day of March, 2008.

  
\_\_\_\_\_  
Earl Eisenhower, Chair

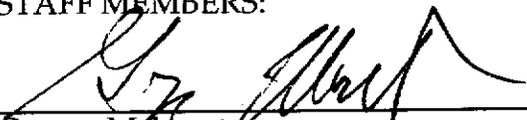
  
\_\_\_\_\_  
Dolly Echeverria, Vice Chair

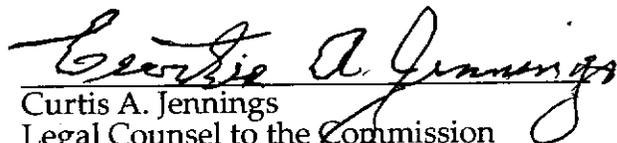
  
\_\_\_\_\_  
James Henness, Member

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

\_\_\_\_\_  
Jay Brashear, Member (deceased, 9/15/07)

STAFF MEMBERS:

  
\_\_\_\_\_  
George Mehnert  
Executive Director

  
\_\_\_\_\_  
Curtis A. Jennings  
Legal Counsel to the Commission

1945-0

# **EXHIBIT A**

# THE ARIZONA REPUBLIC

**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 watercourse navigability hearings regarding the Gila River, the Verde River, and the Maricopa County Small and Minor Watercourses. These hearings will be held in Maricopa County. Notice is hereby given, pursuant to A.R.S. §37-1122 (B), that ANSAC intends to receive, review, and consider evidence regarding the navigability or non-navigability of the Gila River, the Verde River, and the Maricopa County Small and Minor Watercourses. Interested parties are requested to file all documentary and other physical evidence they propose to submit to ANSAC by November 15, 2005. All evidence submitted to ANSAC will be the property of ANSAC and the State of Arizona. Evidence submitted will be available for public inspection at the ANSAC offices during regular office hours.

All unbound original plus seven bound copies of documentary evidence is to be submitted. ANSAC offices are located at 1700 West Washington, Room 204, 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](mailto: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.

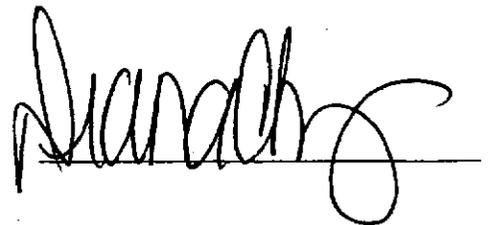
0557 September 1, 8, 15, 2005

STATE OF ARIZONA }  
 COUNTY OF MARICOPA } SS.

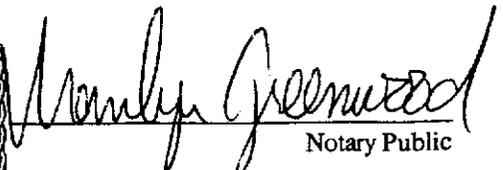
Diana Chavez, being first duly sworn, upon oath deposes and says: That she is a legal advertising representative of the Arizona Business Gazette, a newspaper of general circulation in the county of Maricopa, State of Arizona, published at Phoenix, Arizona, by Phoenix Newspapers Inc., which also publishes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

The Arizona Republic

September 1, 8, 15, 2005



Sworn to before me this  
 15<sup>TH</sup> day of  
 September A.D. 2005

Notary Public

# Prescott Newspapers

Legal Department  
 P.O. Box 312  
 Prescott, AZ 86302  
 (928)445-3333

# Acknowledgement of Classified Advertising

Date: 02/07/05

Customer No: 1297

Ansac  
 George Mehnert  
 1700 West Washington, Ste 304

Phoenix AZ 85007

Your current balance owing is: \$ 574.88

Your current credit balance is: \$ 0.00

<u>Ad #</u>	<u>Words</u>	<u>Charge</u>	<u>Paid</u>	<u>Owing</u>
4208	1407	\$574.88	\$0.00	\$574.88

### Ad Text or Copy

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

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

All evidence submitted to ANSAC will be the  
 property of ANSAC and the State of Arizona.

Evidence submitted will be available for public  
 inspection at the ANSAC offices during regular  
 office hours.

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

### Publication    Issues    Starts    Ends

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

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

# **EXHIBIT B**

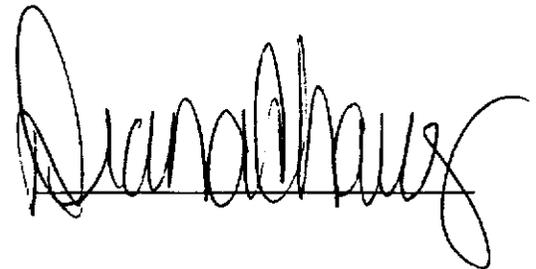
# THE ARIZONA REPUBLIC

STATE OF ARIZONA }  
COUNTY OF MARICOPA } SS.

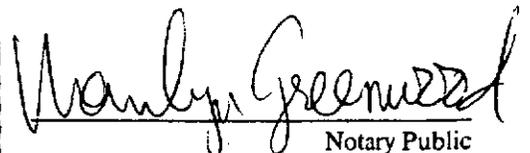
Diana Chavez, being first duly sworn, upon oath deposes and says: That she is a legal advertising representative of the Arizona Business Gazette, a newspaper of general circulation in the county of Maricopa, State of Arizona, published at Phoenix, Arizona, by Phoenix Newspapers Inc., which also publishes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

The Arizona Republic

October 6, 2005



Sworn to before me this  
6<sup>TH</sup> day of  
October A.D. 2005

  
Notary Public

**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 following major watercourses and all of the small and minor watercourses in Maricopa County: The Gila River and the Verde River. The hearings will be held in Maricopa County commencing on September 16, 2005 beginning at 9:30 a.m. in an order established by the chair at the La Quinta Inn, 2510 West Greenway Road, Phoenix, Arizona, (Northeast corner of I-17 and West Greenway Road). The following are presently the only hearings scheduled.  
The Gila River, the Verde River and all of the small and minor watercourses in Maricopa County including but not limited to:  
Alder Creek - Maricopa.  
Apache Wash - Maricopa.  
Ash Creek - Maricopa, Beer Bottle Wash, Bender Wash, Big Maggie May Creek, Blue Wash 1, Blue Wash 2, Bootlegger Wash, Boulder Creek 1 - Maricopa, Boulder Creek 2 - Maricopa, Box Wash, Browns Canyon Wash, Burnt Corral Creek - Maricopa, Camp Creek, Campaign Creek, Canyon Creek - Maricopa, Cave Creek - Maricopa, Cemetery Wash, Centennial Wash, Columbus Wash, Copper Camp Creek, Copper Wash, Corgett Wash, Cottonwood Creek - Maricopa, Coyote Wash 1 - Maricopa, Coyote Wash 2 - Maricopa, Crabtree Wash, Dags Wash, Daniels Arroyo, Davenport Wash, Davis Wash, Dead Horse Wash, Deadman Wash - Maricopa, Delaney Wash, Dickey Wash, East Fork Bronco, East Fork Sycamore, Enterprise Canal, First Water Creek, Flemming Wash, Flying E Wash, Fourmile Wash, Fourth of July Wash, Galloway Wash, Grapevine Wash - Maricopa, Grass Wash, Growler Wash, Hartman Wash, Hickman Wash, Hidden Waters, Indian Bend Wash - Maricopa, Indian Spring Wash, Ironwood Wash, Jackrabbit Wash - Maricopa, Jimmie Wash, Kaka Wash, Kohark Wash, La Barge Creek, Lewis and Pranty, Lime Creek, Lupe Maggie Ma, Little San Domingo, Little Squaw Creek, Loudermilk Wash, Luke Wash, Lum Wash, Mattys Fork, Mesquite Creek, Mesquite Wash, Midway Wash, Mill Wash, Monarch Wash, Morgan City Wash, North Canyon Creek, Northbusch Wash, Old Camp Wash, Ox Wash, Phillips Wash, Picadilla Creek, Pine Creek 1 - Maricopa, Pine Creek 2 - Maricopa, Powerline Wash, Pump Mine Wash, Quail Spring Wash - Maricopa, Quilotosa Wash, Rainbow Wash, Red Cloud Wash - Maricopa, Reeves Creek, Rock Creek - Maricopa, Rodger Creek, Rowe Wash, San Domingo Wash, Sand Tank Wash, Saucedo Wash, Sentinel Wash, Seven Springs Wash - Maricopa, Sheep Creek, Sols Wash, South Fork Sheep, Star Wash, Sycamore Creek - Maricopa, Syndicate Wash, Tank Wash - Maricopa, Tenmile Wash, Tiger Wash - Maricopa, Tortilla Creek, Tournament Creek, Tribby Wash, Tub Spring Wash, Turtleback Wash, Vekol Wash, Wagner Wash, Waterman Wash, Weir Wash, West Fork Sycamore, West Prong Water - Willow Creek - Maricopa, Willow Springs Wash, Winters Wash, Woodchopper Wash, Woolsey Wash - Maricopa, Yellow Medicine, a - Seg 16 Maricopa, a - Seg 6 Pima/Maricopa/Yuma, b - Seg 11 Maricopa, b - Seg 12 Maricopa, b - Seg 9 Maricopa, c - Seg 10 Pima/Maricopa, d - Seg 13 Pima/Maricopa.  
Interested parties may submit evidence to the commission office prior to the hearing and/or during the appropriate public hearing. The commission will conduct its hearings informally without adherence to judicial rules of procedure or evidence. Evidence submitted in advance of the hearing will be available for public inspection during regular Commission office hours of 8:00 a.m. to 5:00 p.m., Monday thru Friday, except on public holidays.  
Website: www.nscadcentral.com  
Great ticket deals!  
WESTERNLAND.COM  
Associates  
800-555-4521  
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1755 E. Camelback Rd., Suite 100, Phoenix, AZ 85016

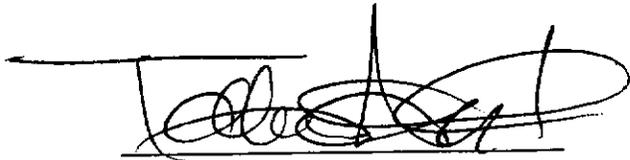
# THE ARIZONA REPUBLIC

STATE OF ARIZONA }  
COUNTY OF MARICOPA } SS.

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

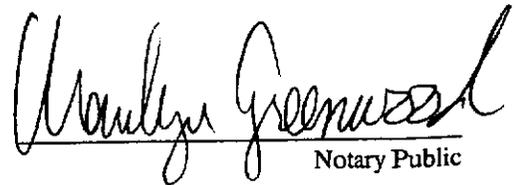
The Arizona Republic

March 4, 2005



Sworn to before me this  
4<sup>TH</sup> day of  
March A.D. 2005



  
Notary Public

**NOTICE OF PUBLIC HEARING**  
State of Arizona  
Navigable Streams  
Adjudication Commission  
Pursuant to A.R.S. § 27-1126  
(A), notice is hereby given  
that the Navigable Streams  
Adjudication Commission  
will hold public hearings to  
receive physical evidence  
and testimony relating to the  
navigability of all water courses  
in Yavapai County. The  
hearings will be held in  
Yavapai County on March 23,  
2005 beginning at 12:00 p.m.  
in an order designated by  
the chair of the Yavapai  
County Supervisor's Confer-  
ence Room located at 1015  
Fair Street, Prescott, Arizona  
86305. The following are the  
scheduled public hearings:  
The Agua Fria River, Barro  
Creek, the Hesperian River,  
the Santa Maria River, the  
Verde River, and all of the  
small and minor water courses  
in Yavapai County.  
06120 March 4, 2005

Arizona Navigable Stream Adjudication  
Commission advertising Correction:

**NOTICE OF PUBLIC HEARING**

State of Arizona Navigable Stream Adjudication  
Commission Pursuant to A.R.S. § 37-1128 (A);  
notice is hereby given that the Navigable  
Stream Adjudication Commission will hold pub-  
lic hearings to receive physical evidence and  
testimony relating to the navigability or non-navi-  
gability of all watercourses in Yavapai County.  
The hearings will be held in Yavapai County on  
March 29, 2005 beginning at 12:00 p.m. in an  
order established by the chair in the Yavapai  
County Supervisor's Conference Room located  
at 1015 Fair Street, Prescott, Arizona 86305.  
The following are presently the only hearings  
scheduled. The Agua Fria River, Burro Creek,  
the Hassayampa River, the Santa Maria River,  
the Verde River, and all of the small and minor  
watercourses in Yavapai County.

1TG PUB March 4, 2005 ad 4401

**AFFIDAVIT OF PUBLICATION**

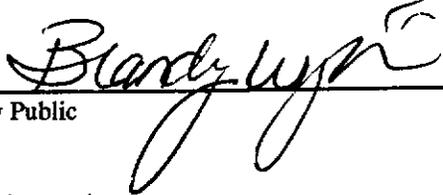
STATE OF ARIZONA     )  
County of Yavapai     ) ss.

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

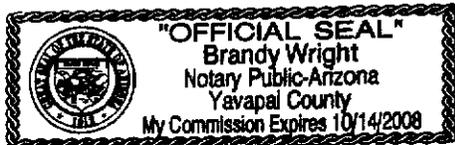
**ANSAC  
NOTICE OF PUBLIC HEARING  
ADVERTISING CORRECTION**

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

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

By:   
Notary Public

My commission expires:



# **EXHIBIT C**

**Post Hearing Memorandums**

Page No.

**1**

Hearing No. 04-009-NAV

**Arizona Navigable Stream Adjudication Commission****Verde River  
Yavapai and Maricopa Counties**

Entry Number	Date	Entry	Entry By
1	03/21/06	Salt River Project's Opening Memorandum.	George Mehnert
2	03/21/06	Phelps Dodge Corporation's Opening Memorandum.	George Mehnert
3	03/21/06	Yavapai-Apache Nation's Opening Memorandum.	George Mehnert
4	03/23/06	State Land Department's Opening Memorandum.	George Mehnert
5	03/24/06	Arizona Center for Law in the Public Interest's Opening Memorandum.	George Mehnert
6	03/27/06	Fatco's Joinder in Salt River Project's and Phelps Dodge Corporation's Opening Memorandums.	George Mehnert
		Response Memorandums	
1	04/11/06	Phelps Dodge Corporation's Response Memorandum.	George Mehnert
2	04/11/06	Salt River Project's Response Memorandum.	George Mehnert
3	04/12/07	Yavapai-Apache Nation's Response Memorandum.	George Mehnert
4	04/12/07	State Land Department's Response Memorandum.	George Mehnert
5	04/14/07	Arizona Center for Law in the Public Interest's Response Memorandum.	George Mehnert

# **EXHIBIT D**



JANET NAPOLITANO  
Governor

STATE OF ARIZONA  
NAVIGABLE STREAM ADJUDICATION COMMISSION

1700 West Washington, Room 304, Phoenix, Arizona 85007

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

E-mail: [streams@mindspring.com](mailto:streams@mindspring.com) Web Page: <http://www.azstreambeds.com>

GEORGE MEHNERT  
Executive Director

---

**MEETING MINUTES**

**Prescott, Arizona, March 29, 2005**

**COMMISSION MEMBERS PRESENT**

Jay Brashear, Dolly Echeverria, Earl Eisenhower, Jim 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 12:23 p.m.

**2. ROLL CALL.**

See above.

**3. APPROVAL OF MINUTES (discussion and action).**

A. January 24, 2005, Yuma County.

Motion by: Jay Brashear Second by: Dolly Echeverria

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

Vote: All aye.

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

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

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

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

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

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

8. **HEARING REGARDING THE NAVIGABILITY OR NON-NAVIGABILITY OF THE VERDE RIVER, 04-009-NAV.** Cheryl Doyle of the State Land Department said that her statement regarding the State Land Department would be the same for each watercourse

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

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

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

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

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

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

**11. ATTORNEY PAY (discussion and action).**

Motion by: Jim Henness                      Second by: Jay Brashear

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

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

*(Pursuant to Attorney General Opinion No. 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.)*

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

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

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

**14. ADJOURNMENT.**

Motion by: Jim Henness                      Second by: Dolly Echeverria

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "George Mehnert". The signature is written in a cursive style with a long horizontal stroke at the end.

George Mehnert, Director  
March 30, 2005



JANET NAPOLITANO  
Governor

STATE OF ARIZONA  
**NAVIGABLE STREAM ADJUDICATION COMMISSION**

1700 West Washington, Room 304, Phoenix, Arizona 85007

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

E-mail: [streams@mindspring.com](mailto:streams@mindspring.com) Web Page: <http://www.azstreambeds.com>

GEORGE MEHNERT  
Executive Director

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**MEETING MINUTES**

**Phoenix, Arizona, May 24, 2006**

**COMMISSION MEMBERS PRESENT**

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

**COMMISSION MEMBERS ABSENT**

None.

**STAFF PRESENT**

Curtis Jennings, George Mehnert.

**1. CALL TO ORDER.**

Chairman Eisenhower called the meeting to order at approximately 10:04 A.M.

**2. Roll Call.**

See above.

**3. Approval of Minutes (discussion and action). Minutes of April 11, 2006.**

Motion by: Jim Henness                      Second by: Dolly Echeverria

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

**4. Determination of the navigability of the small and minor watercourses in Gila County, 04-010-NAV (discussion and action).**

Motion by: Cecil Miller                      Second by: Dolly Echeverria

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

**5. Determination of the navigability of the Gila River 03-007-NAV (discussion and action).**

Motion by: Jim Henness                      Second by: Jay Brashear

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

**6. Determination of the navigability of the Upper Salt River 04-008-NAV (discussion and action).**

Motion by: Jay Brashear                      Second by: Earl Eisenhower

Motion: That the Upper Salt River was navigable      Vote: One aye. Four nay.

Motion by: Jay Brashear                      Second by: Jim Henness

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

**7. Determination of the navigability of the Verde River 04-009-NAV (discussion and action).**

Motion by: Jay Brashear Second by: Earl Eisenhower  
Motion: That the Verde was navigable Vote: Second and Motion  
Withdrawn.

Motion by: Dolly Echeverria Second by: Cecil Miller  
Motion: That the Verde River was not navigable. Vote: All aye.

**8. Motion by the Attorney General in its Response Memorandum relating to the Verde River to strike from the record First American Title Insurance Company of Arizona's Joinder Memorandum to Salt River Project's Opening Memorandum and to Phelps Dodge's Opening Memorandum, on the basis of untimely filing (discussion and action).**

Motion denied by Chair.

**9. Renewal of Attorney Contract to be effective July 1, 2006 through June 30, 2008, (discussion and action).**

Motion by: Jim Hennes Second by: Dolly Echeverria  
Motion: That the contract be renewed through June 30, 2008. Vote: All aye.

**10. Budget/Funding condition and forecast.**

The Chair and the Director explained the condition of the budget.

**11. Budget Supplemental Request for FY2006 regarding notice of intent to seek judicial review.**

The Chair and the Director commented that a supplemental request for \$50,000.00 has been filed but has not yet been acted on.

**12. Call for Public Comment (comment sheets).**

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

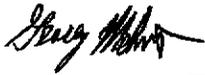
Questions and conversation by an unidentified guest regarding prior Gila River Lawsuit took place.

13. **Future agenda items and establishment of future meetings.**  
None specifically established.

14. **ADJOURNMENT.**  
Motion by: Jay Brashear                      Second by: Cecil Miller  
Motion: To adjourn.    Vote: All aye.

Meeting adjourned at approximately 10:50 A.M.

Respectfully submitted,



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George Mehnert, Director  
May 24, 2006



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

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GEORGE MEHNERT  
Executive Director

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**MEETING MINUTES**

Meeting was held on 3 separate dates, November 16, 2005, November 17, 2005, and  
January 18, 2006.  
Phoenix, Arizona

**November 16, 2005**

**COMMISSION MEMBERS PRESENT**

Jay Brashear, Dolly Echeverria, Earl Eisenhower, Jim Henness & Cecil Miller.

**COMMISSION MEMBERS ABSENT**

None, Jay arrived about 10 minutes after meeting was called to order.

**STAFF PRESENT**

George Mehnert, Dir and Curtis Jennings, Attorney who arrived about 10 minutes after meeting was called to order.

**1. CALL TO ORDER.**

Chair Eisenhower called the meeting to order at approximately 9:36 A.M.

**2. ROLL CALL.**

See Above.

**3. APPROVAL OF MINUTES (discussion and action).**

A. October 20, 2005 Maricopa County

Motion by: Dolly Echeverria Second by: Cecil Miller

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

**4. All motions and responses to "SALT RIVER PROJECT'S MOTION FOR FINDING OF LACK OF STATUTORY SUBJECT MATTER JURISDICTION TO DETERMINE NAVIGABILITY OF ROOSEVELT LAKE" in both 04-008-NAV and 04-010-NAV (discussion and action). Two people spoke on the subject, Mark McGinnis, John Helm.**

**5. Adoption of the Commission report regarding the Pima County Small & Minor Watercourses (discussion and action).**

Motion by: Cecil Miller Second by: Jim Henness

Motion: To adopt the Commission Report as Written. Vote: All aye.

**6. Hearing regarding the navigability of the Gila River 03-007-NAV.**

Witnesses included: Laurie Hachtel, Jon Fuller, Dennis Gilpin, Gary Huckleberry, Douglas Littlefield, Jack August, David Weedman, Alan Gookin, and John Hestand.

7. **Hearing regarding the navigability of the Verde River 04-009-NAV.**  
David Weedman testified because he cannot appear at a later date, and the balance of this hearing was completed on January 18, 2006.
8. **Hearing regarding the navigability of the small and minor watercourses in Maricopa County, 05-014-NAV.**  
Matter was continued to November 17, 2005.
9. **Determination of the navigability of the Coconino County Small and Minor Watercourses 05-010-NAV (discussion and action).**
10. **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.)* None.
11. **Future agenda items and establishment of future hearings and other meetings.**
12. **Commission budget and continuation.** Continued to future date.
13. **Legal advice regarding laws and terms relating to navigability.** Continued to future date.
14. **ADJOURNMENT.** Meeting was not adjourned. At approximately 4:40 P.M. the Chair continued the meeting to November 17, 2005 at 9:00 A.M.

**November 17, 2005**

**Meeting Continued from November 16, 2005**

**COMMISSION MEMBERS PRESENT**

Dolly Echeverria, Earl Eisenhower, & Jim Henness.

**COMMISSION MEMBERS ABSENT**

Jay Brashear, Cecil Miller.

**STAFF PRESENT**

George Mehnert, Dir and Curtis Jennings.

1. **CALL TO ORDER.**  
Chair Eisenhower called the meeting to order at approximately 9:11 A.M.
2. **ROLL CALL.**  
See Above.
3. **APPROVAL OF MINUTES (discussion and action).**  
None.
4. **All motions and responses to "SALT RIVER PROJECT'S MOTION FOR FINDING OF LACK OF STATUTORY SUBJECT MATTER JURISDICTION TO DETERMINE NAVIGABILILTY OF ROOSEVELT LAKE" in both 04-008-NAV and 04-010-NAV (discussion and action).** No discussion.
5. **Adoption of the Commission report regarding the Pima County Small & Minor Watercourses (discussion and action).**  
Completed on November 16, 2005.
6. **Hearing regarding the navigability of the Gila River 03-007-NAV.**  
Witnesses included: Stanley Schumm, Douglas Littlefield, D.C. Jackson, Hjalmar Hjalmarson, and Jon Colby. The Chair closed the hearing for the taking of evidence and indicated that the deadline date for filing post hearing opening memorandums will be determined in relation to the Commission's receipt of the court reporter's transcript of the proceedings.
7. **Hearing regarding the navigability of the Verde River 04-009-NAV.**  
Hearing continued to January 18, 2006.
8. **Hearing regarding the navigability of the small and minor watercourses in Maricopa County, 05-014-NAV.**  
Witness was Jon Fuller. Chair closed this matter for taking of evidence.
9. **Determination of the navigability of the Coconino County Small and Minor Watercourses 05-010-NAV (discussion and action).**  
Motion by: Jim Henness                      Second by: Dolly Echeverria  
Motion: Not navigable as of statehood.                      Vote: All aye.
10. **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.)* None.
11. **Future agenda items and establishment of future hearings and other meetings.**

12. **Commission budget and continuation.** Continued to future date.
13. **Legal advice regarding laws and terms relating to navigability.** Continued to future date.
14. **ADJOURNMENT.** Meeting was not adjourned. At approximately 8:42 P.M. the Chair continued the meeting to January 18, 2006 at 10:00 A.M.

**January 18, 2006  
Meeting Continued from November 18, 2005**

**COMMISSION MEMBERS PRESENT**

Jay Brashear, Dolly Echeverria, Earl Eisenhower, & Jim Henness.

**COMMISSION MEMBERS ABSENT**

Cecil Miller.

**STAFF PRESENT**

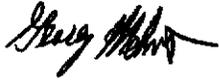
George Mehnert, Dir and Curtis Jennings.

1. **CALL TO ORDER.**  
Chair Eisenhower called the meeting to order at approximately 9:11 A.M.
2. **ROLL CALL.**  
See Above.  
Motion by: Dolly Echeverria                      Second by: Jim Henness  
Motion: To go into executive session.      Vote: All aye.  
Meeting went into Executive Session beginning at approximately 10:04 A.M. regarding agenda items 4, 12, and 13, and the Executive Session ended at approximately 10:38 A.M.
3. **APPROVAL OF MINUTES** (discussion and action).  
None.
4. **All motions and responses to "SALT RIVER PROJECT'S MOTION FOR FINDING OF LACK OF STATUTORY SUBJECT MATTER JURISDICTION TO DETERMINE NAVIGABILILTY OF ROOSEVELT LAKE" in both 04-008-NAV and 04-010-NAV** (discussion and action). The Chair stated that the Commission will accept jurisdiction regarding the navigability of Roosevelt Lake.
5. **Adoption of the Commission report regarding the Pima County Small & Minor Watercourses** (discussion and action).  
Completed on November 16, 2005.
6. **Hearing regarding the navigability of the Gila River 03-007-NAV.**

Completed on November 17, 2005.

7. **Hearing regarding the navigability of the Verde River 04-009-NAV.**  
David Weedman was permitted to testify regarding this matter on November 16, 2005 and did not appear on January 18, 2006; however, the Chair stated that his the transcript of his testimony on November 16, 2005 will be appear as Appendix a to the Verde River hearing transcript. Appearing as witnesses were: Jon Fuller, Philip Pearthree, Jon Colby, Douglas Littlefield, and Jim Slingluff. AAG Laurie Hachtel said she will write a letter to the Commission regarding the status of an appeal regarding Indian Nations and the State Land Department. Following completion of the testimony, the Chair closed the hearing for taking evidence and indicated that a date will be established for the deadline to receive post hearing legal memorandums based on the date the Commission receives the court reporter's transcript of the hearing. Attorney Joy Herr-Cardillo will mail to the Commission a copy of the CD containing the PowerPoint photographic slides presented by witness Jim Slingluff.
  8. **Hearing regarding the navigability of the small and minor watercourses in Maricopa County, 05-014-NAV.**  
Completed on November 17, 2005.
  9. **Determination of the navigability of the Coconino County Small and Minor Watercourses 05-010-NAV (discussion and action).**  
Completed on November 17, 2005
  10. **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.)* None.
  11. **Future agenda items and establishment of future hearings and other meetings.**
  12. **Commission budget and continuation.** Continued to future date.
  13. **Legal advice regarding laws and terms relating to navigability.** Continued to future date.
  14. **ADJOURNMENT.** Meeting was not adjourned. At approximately 8:42 P.M. the Chair continued the meeting to January 18, 2006 at 10:00 A.M.  
Motion by: Jay Brashear                      Second by: Jim Henness  
Motion: To go into executive session.      Vote: All aye.
- Meeting adjourned at approximately 3:30 P.M.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "George Mehnert". The signature is written in a cursive style with a long horizontal stroke at the end.

George Mehnert, Director  
January 19, 2006

# **EXHIBIT E**

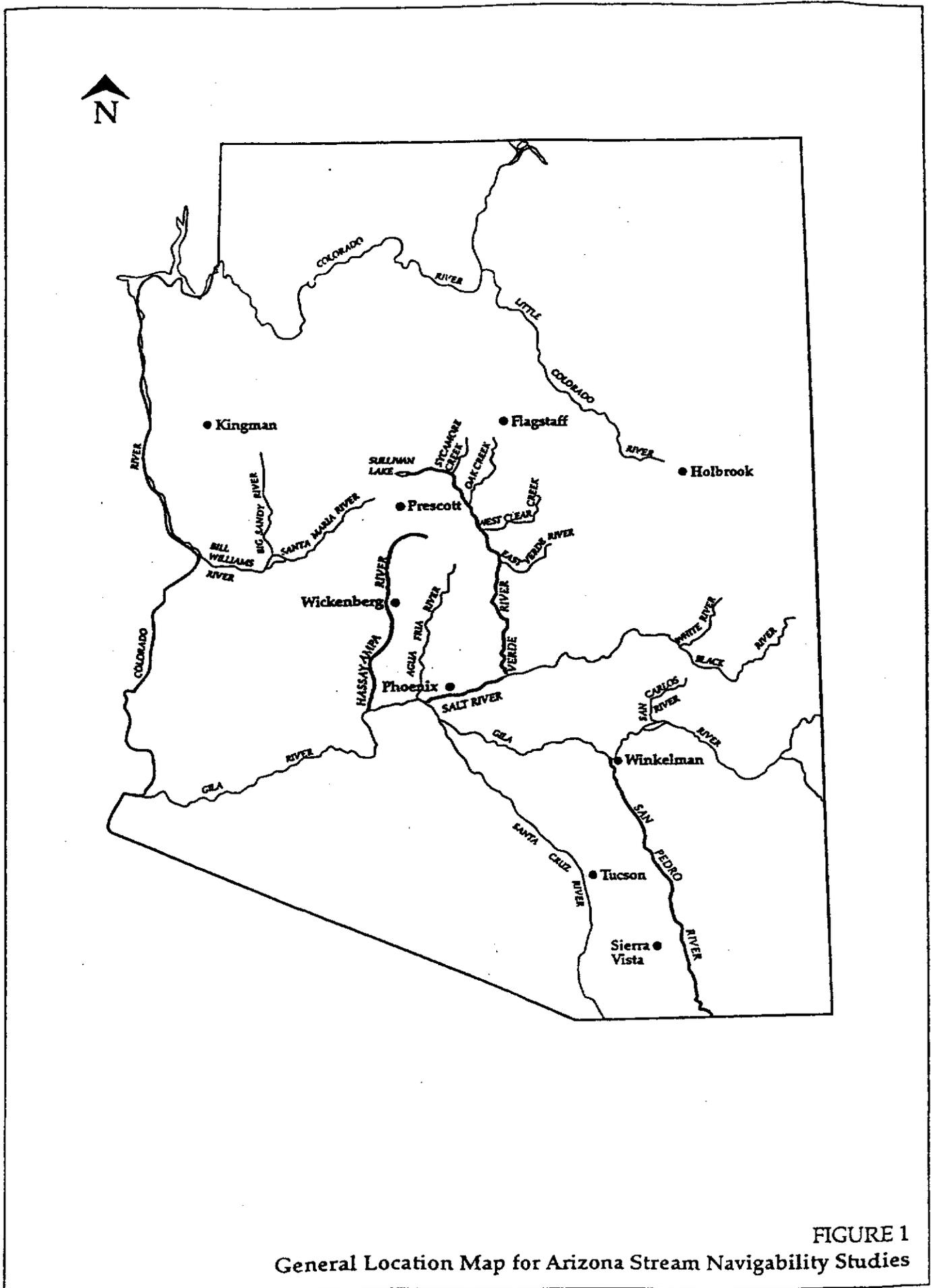


FIGURE 1  
 General Location Map for Arizona Stream Navigability Studies

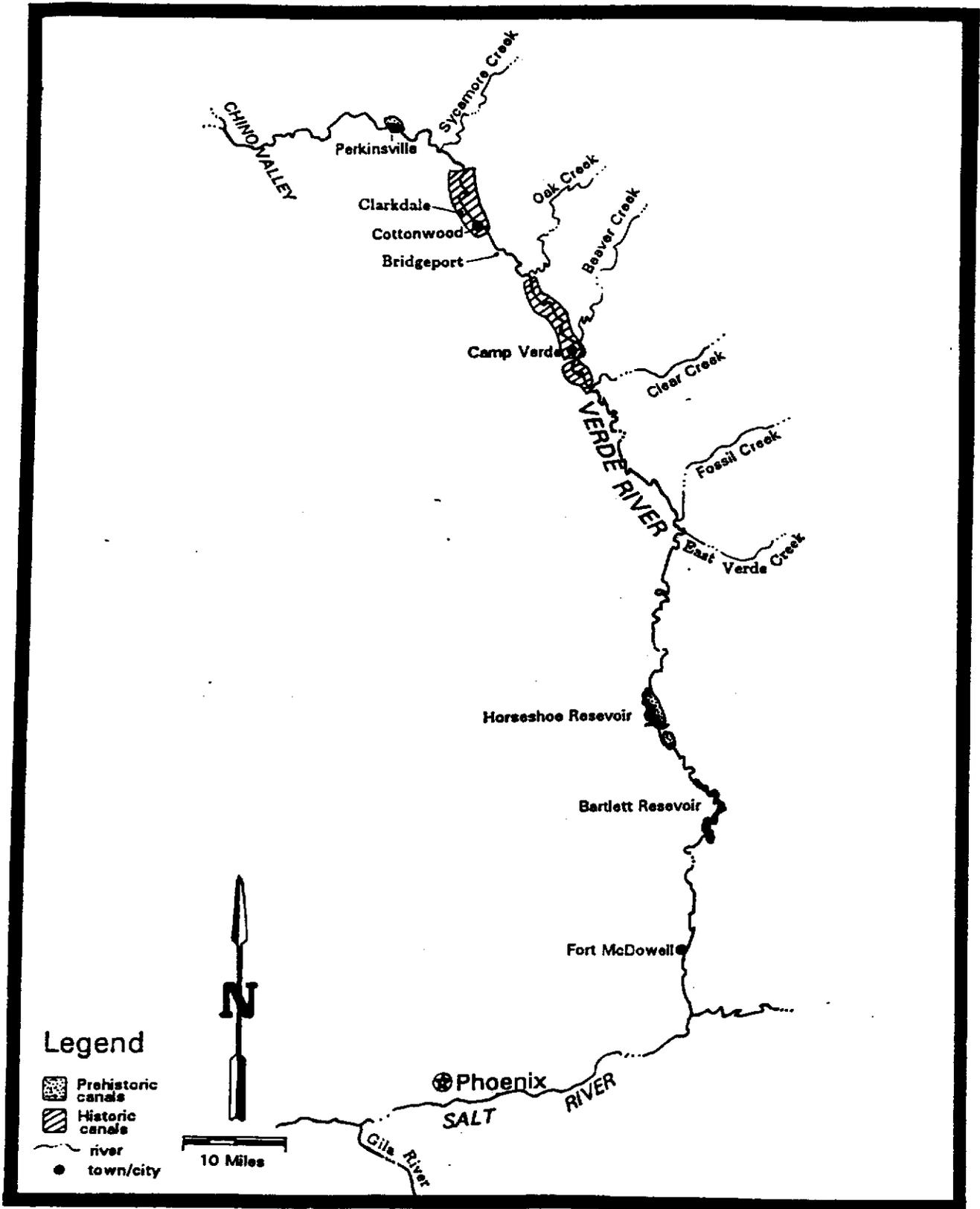


Figure . Canals that have been mapped along the Verde River. Prehistoric canals were mapped by Midvale, and historic canals were mapped by Turney.

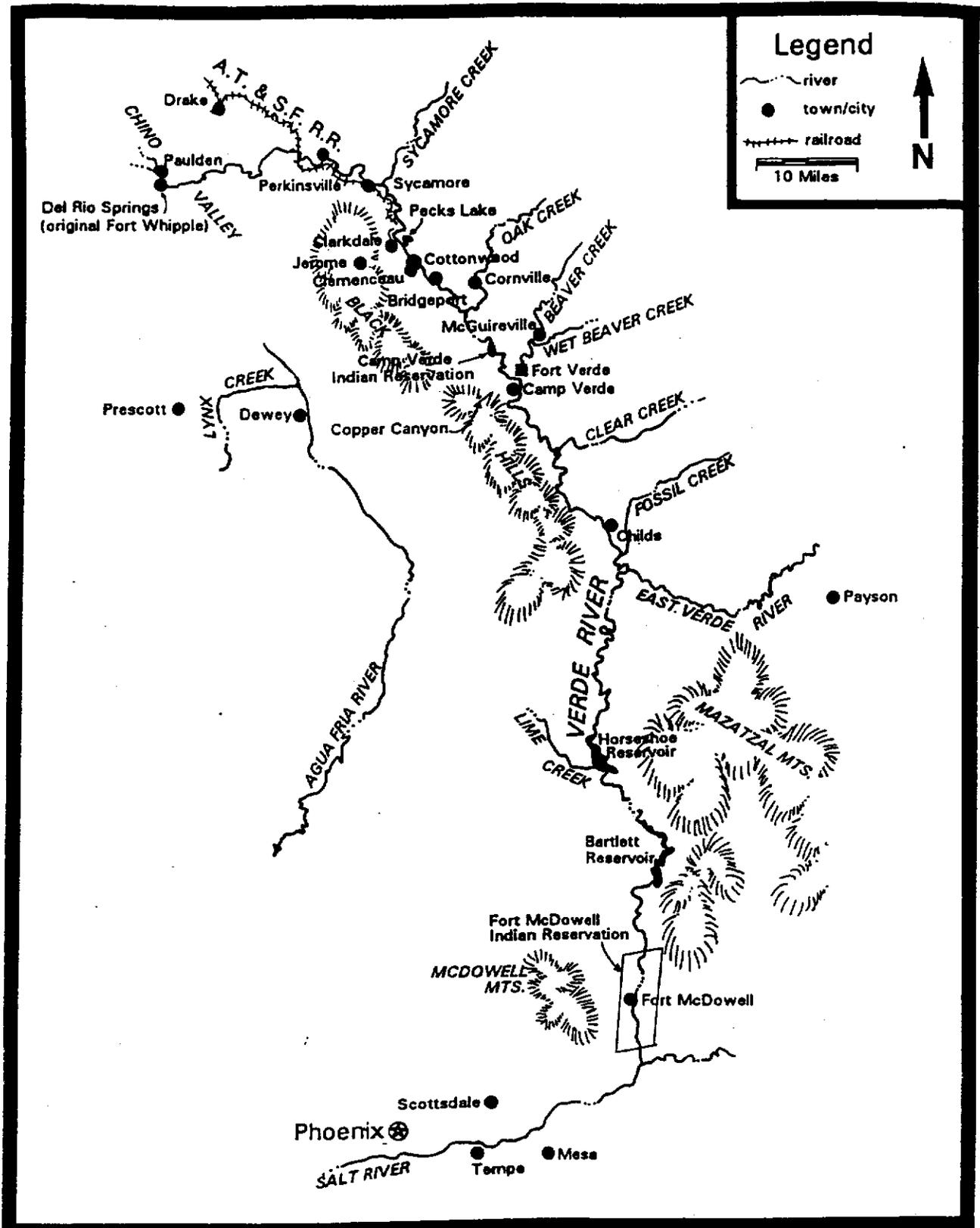
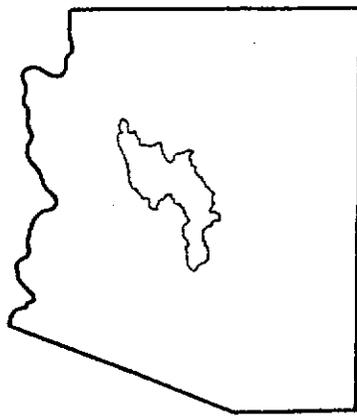
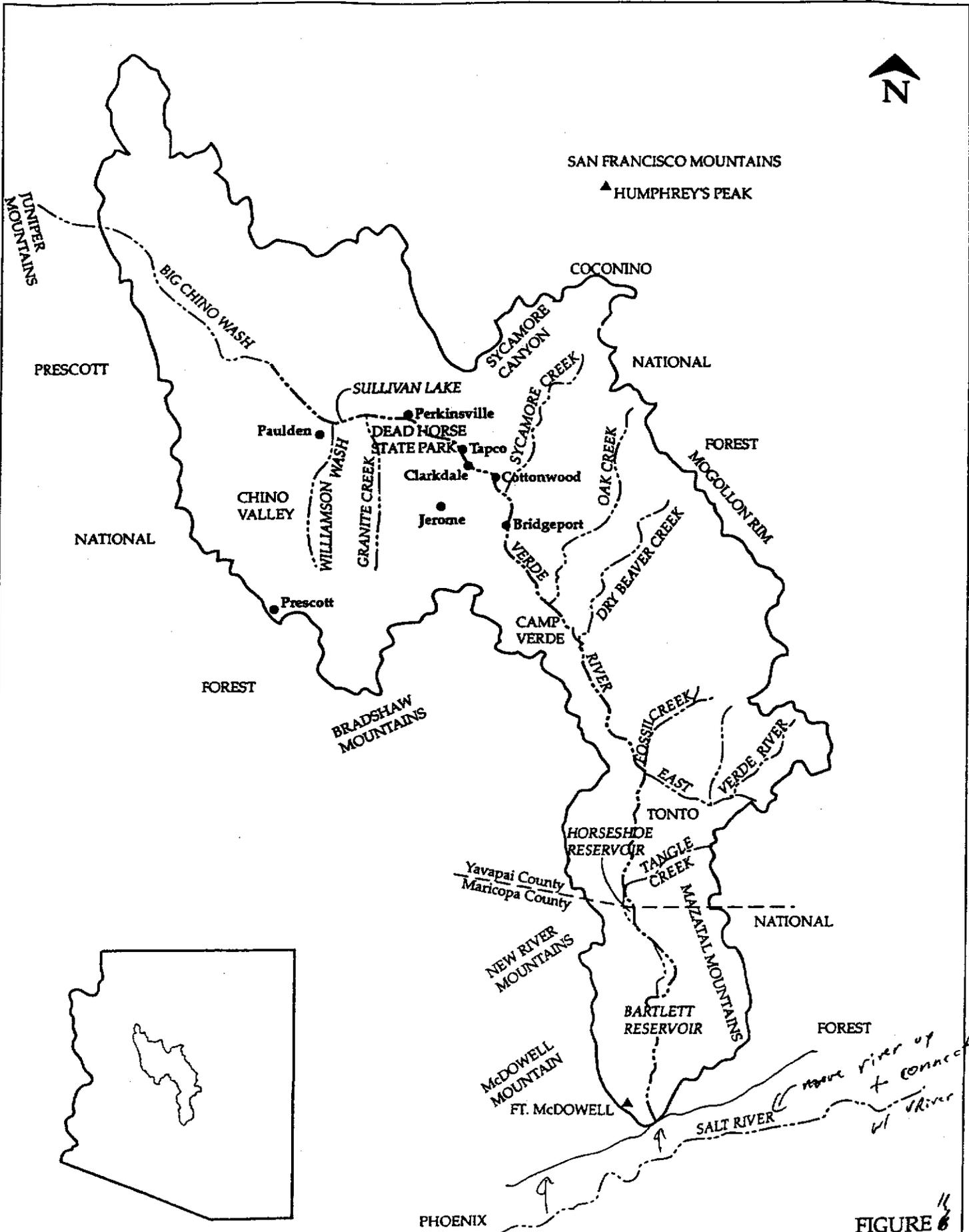


Figure 4b



*move river of + connect w/ river*

FIGURE 6  
Verde River Watershed Map

# **EXHIBIT F**

# Evidence Log

Hearing No. 04-009-NAV

Page No.

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## Arizona Navigable Stream Adjudication Commission

### Verde River

Yavapai County March 29, 2005—Maricopa County November 16, 2005

Item Number	Received Date	Source to ANSAC	Description	Entry By
1	6/10/96	Evidence on Hand— Central Arizona Paddlers Club.	Boating Survey of Arizona Rivers 1992.	George Mehnert
2	11/27/96	Evidence on Hand— Town of Camp Verde.	Letter.	George Mehnert
3	12/2/96	Evidence on Hand— Timothy Flood.	Letter.	George Mehnert
4	12/3/96	Evidence on Hand— Maricopa County Dept of Transportation.	Report.	George Mehnert
5	12/4/96	Evidence on Hand— Thomas Y. Perkins, Per- kins Ranch, Inc.	Letter.	George Mehnert
6	12/6/96	Evidence on Hand—U.S. Dept of Agriculture, For- est Service.	Analysis of the Criteria for Navigability.	George Mehnert
7	2/12/97	Evidence on Hand—Land Department.	Report from CH2MHill, Verde River Salt River to Sullivan Lake.	George Mehnert
8	2/18/97	Evidence on Hand— ACLPI.	Letter from David Baron.	George Mehnert
9	5/20/97	Evidence on Hand—Jim Slingluff.	Book—Verde River Recreation Guide, plus 13 loose photographs.	George Mehnert
10	5/20/97	Evidence on Hand—C.A. McDonald.	3 loose photographs.	George Mehnert
11	5/20/97	Evidence on Hand— Source Unknown.	News article by Diane Rabb "River classroom teaches rafters about Verde".	George Mehnert
12	5/20/97	Evidence on Hand— Source Unknown.	Booklet entitled Recreation Opportunity Guide, Verde River, 1997, Prepared by Forest Service.	George Mehnert

# Evidence Log continuation Page

Hearing No. 04-009

Page No.

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## Arizona Navigable Stream Adjudication Commission

### Verde River

Yavapai County March 29, 2005—Maricopa County November 16, 2005

Item Number	Received Date	Source to ANSAC	Description	Entry By
13	5/20/97	Evidence on Hand— Source Unknown.	Photo #10 Abandoned Canoe.	George Mehnert
14	5/20/97	Evidence on Hand— Source Unknown.	Photo #11 Another View of Verde Falls.	George Mehnert
15	5/20/97	Evidence on Hand— Source Unknown.	2 pages of color photocopies of a total of 5 photographs including statement "Photos by Tim Flood".	George Mehnert
16	9/16/97	Evidence on Hand—Mr & Mrs Aston.	2 B&W Photos, letters, and maps and claim information regarding Gold Tooth Mine Cottonwood, AZ., including letter dated 9/25/97, which was presumably added to file when it was received at ANSAC.	George Mehnert
17	10/6/97	Evidence on Hand—Dr. Douglas Littlefield.	Assessment of the Verde River's Navigability prior to and on the date of Arizona's Statehood, February 14, 1912. Includes loose, large maps.	George Mehnert
18	10/15/97	Evidence on Hand— Source Unknown.	Verde River Recreation Opportunity Guide, U.S. Forest Service.	George Mehnert
19	10/15/97	Evidence on Hand—Sun Country Rafting.	Sun Country Rafting Schedules and Prices.	George Mehnert
20	10/15/97	Evidence on Hand— Source Unknown.	Tonto National Forest, Forest Service Map.	George Mehnert
21	9/98	Evidence on Hand—State Land Department	Final Report, Criteria for assessing Small and Minor Watercourses in Arizona.	George Mehnert
22	4/1/03	Mark McGinnis	Information Regarding Navigability of Selected U.S. Watercourses.	George Mehnert
23	3/8/04	Allen Gookin.	Report.	George Mehnert

# Evidence Log continuation Page

## Hearing No. 04-009

Page No.

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### Arizona Navigable Stream Adjudication Commission

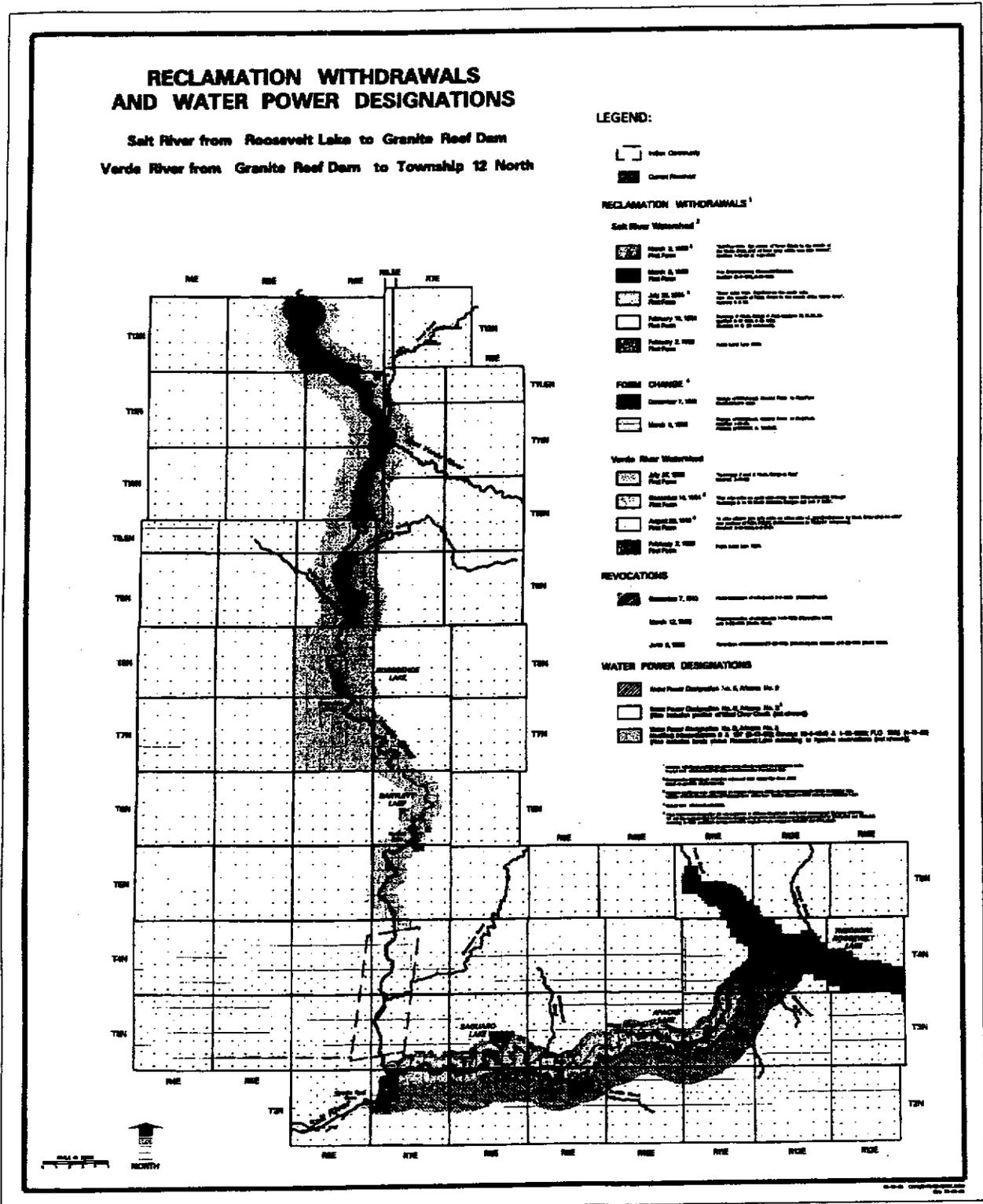
#### Verde River

Yavapai County March 29, 2005—Maricopa County November 16, 2005

Item Number	Received Date	Source to ANSAC	Description	Entry By
24	5/4/04	Richard A. Rupp.	Letter.	George Mehnert
25	5/19/04	Candace S. Hughes.	Letter.	George Mehnert
26	6/15/04	Chuck Kranz.	Letter.	George Mehnert
27	6/15/04	Douglas Rhodes.	Letter.	George Mehnert
28	6/20/04	Coby Muckelroy.	Letter.	George Mehnert
29	6/23/04	Jeanne Keller.	Letter.	George Mehnert
30	12/10/04	Stanley Schumm.	Geomorphic Character of the Verde River.	George Mehnert
31	3/3/05	Land Department.	Report, Jon Fuller, etc.	George Mehnert
32	7/21/05	Dr. Douglas Littlefield.	Revised Report, Assessment of the Verde River's Navigability Prior to and on the Date of Statehood, February 14, 1912	George Mehnert
33	11/15/05	Terrence Colver.	Letter.	George Mehnert
34	1/18/06	Jim Slingluff.	The Southwestern Sportsman Quarterly, Feb 15, 1991, with pages selected by Jim Slingluff, 14, 15, 16, 17, 18, & 19. Plus PowerPoint presentation slides used by Mr. Slingluff on 1/18/06.	George Mehnert

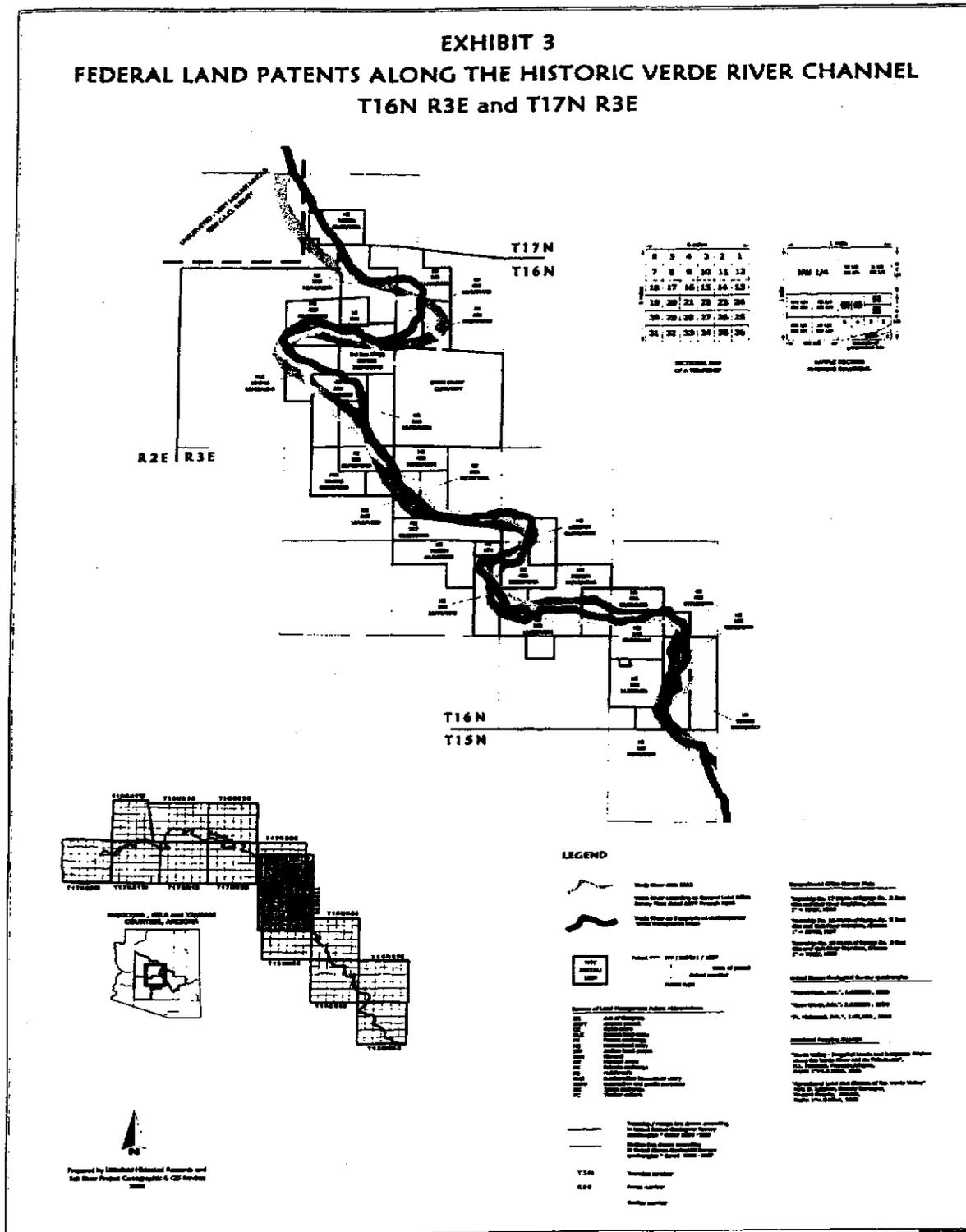


# **EXHIBIT G**



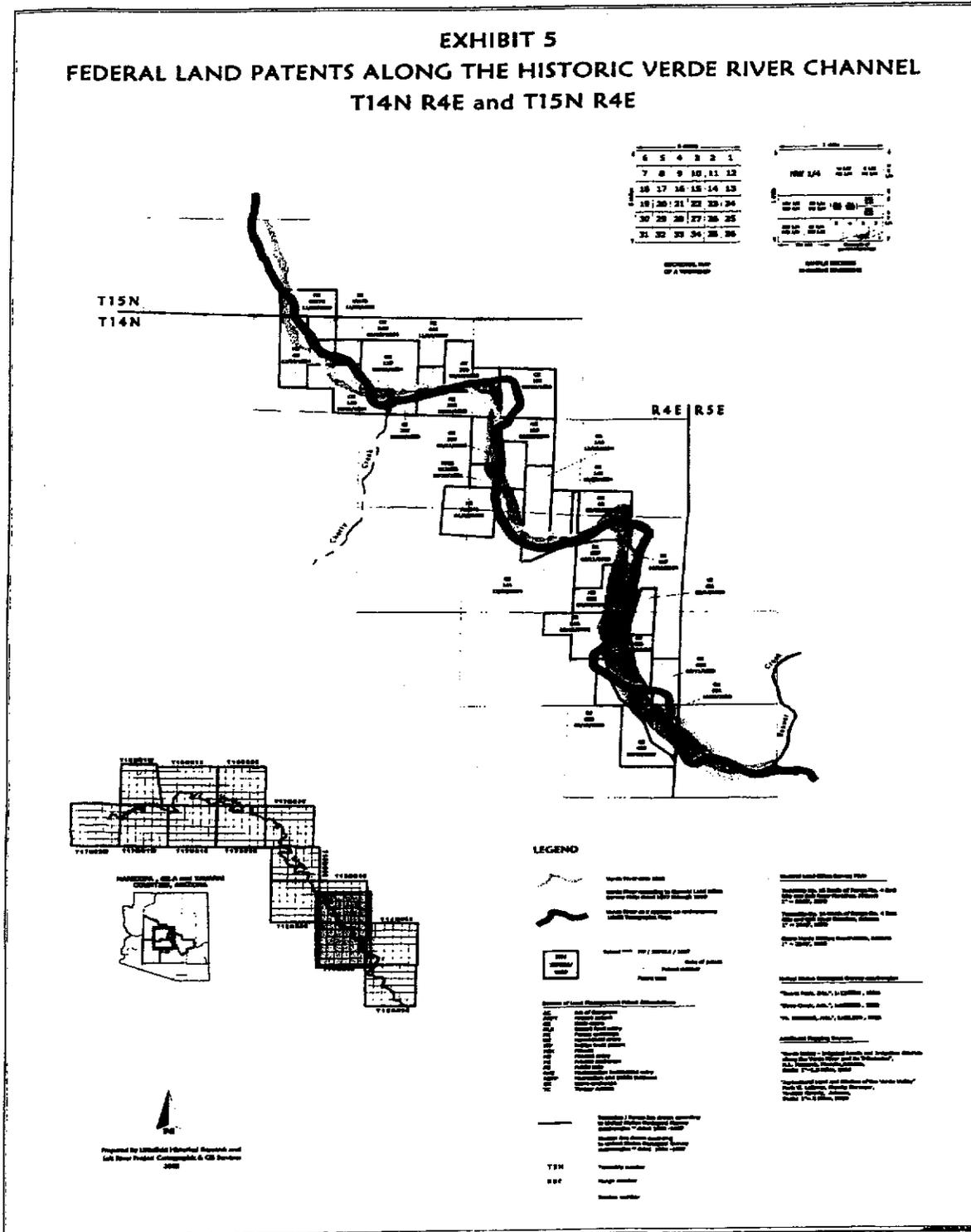
**Figure 40.** Map of "Land Withdrawals and Water Power Designations," Salt River Project, Phoenix, Arizona

# **EXHIBIT H**



**Figure 45.** Exhibit 3, Federal Land Patents along the Historic Verde River Channel – T16N, R3E and T17N, R3E, Littlefield Historical Research and Salt River Project Cartographic & GIS Services, 2005





**Figure 47.** Exhibit 5, Federal Land Patents along the Historic Verde River Channel – T14N, R4E and T15N, R4E, Littlefield Historical Research and Salt River Project Cartographic & GIS Services, 2005

**EXHIBIT 6  
FEDERAL LAND PATENTS ALONG THE HISTORIC VERDE RIVER CHANNEL  
the NW 1/4 and the SE 1/4 of T13N R5E**

