

BEFORE THE
ARIZONA NAVIGABLE STREAM ADJUDICATION COMMISSION

IN THE MATTER OF THE
NAVIGABILITY OF SMALL AND
MINOR WATERCOURSES IN YUMA
COUNTY, ARIZONA, EXCLUDING
THE COLORADO RIVER AND GILA
RIVER

**REPORT, FINDINGS AND DETERMINATION
REGARDING THE NAVIGABILITY OF SMALL AND
MINOR WATERCOURSES IN YUMA COUNTY, ARIZONA**

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 any small and minor watercourse in Yuma County, Arizona, excluding the Colorado River and the Gila River, was navigable or nonnavigable for title purposes as of February 14, 1912. Proper and legal public notice was given in accordance with law and a hearing was held at which all parties were afforded the opportunity to present evidence, as well as their views, on this issue. The Commission having considered all of the historical and scientific data and information, documents and other evidence, including the oral and written presentations made by persons appearing at the public hearing and being fully advised in the premises, hereby submits its report, findings and determination.

There are 1,475 documented small and minor watercourses in Yuma County. Of this number 1,403 are unnamed. All of these watercourses, both named and unnamed, are the subject of and included in this report. Excluded from this report is the Colorado River which was long ago determined to be navigable and serves as the boundary between Yuma County, Arizona, and the State of California. Also excluded is the Gila River which is deemed to be a major watercourse and is the subject of a separate report. Attached hereto as Exhibit "A" is a list of all of the small and minor watercourses in Yuma County, Arizona, both named and unnamed, covered by this report.

I. Procedure

On July 8, 2002, the Commission gave proper prior notice of its intent to study the issue of whether small and minor watercourses in Yuma County, Arizona, were navigable or nonnavigable for title purposes as of February 14, 1912, in accordance with A.R.S. § 37-1123B. A copy of the Notice of Intent to Study and Receive, Review and Consider Evidence on the issue of navigability of small and minor watercourses in Yuma County is attached hereto as Exhibit "B."

After collecting and documenting all reasonably available evidence received pursuant to the Notice of Intent to Study and to Receive, Review and Consider Evidence, the Commission scheduled a public hearing to receive additional evidence and testimony regarding the navigability or nonnavigability of small and minor watercourses located in Yuma County, Arizona. Public notice of this hearing was given

by legal advertising on August 22, 2002, 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 (<http://aspin.asu.edu/ansac>). This hearing was held on September 23, 2002, in the City of Yuma, the county seat of Yuma County, since the law requires that such hearing be held in the county in which the watercourses being studied are located. Attached hereto as Exhibit "C" is a copy of the notice of the public hearing.

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

Following the public hearing held on September 23, 2002, all parties were advised that they could file post-hearing memoranda pursuant to Rule R12-17-108.01. Post-hearing memoranda was filed by The Center for Law in the Public Interest on behalf of the Defenders of Wildlife, the Salt River Project, and the Attorney General of Arizona on behalf of the State Land Department.

On December 9, 2002, at a public hearing in Kingman, 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 all small and minor watercourses in Yuma County, Arizona, were nonnavigable as of February 14, 1912.

II. Yuma County, Arizona

Yuma County, Arizona, is located in the southwestern portion of the state and is approximately 5,523 square miles in land area. It borders the State of California to the west and the counties of La Paz to the north and Pima and Maricopa to the east and the State of Sonora, Mexico to the south. Yuma County lies within the following latitude and longitude ranges: latitude from 32° 02' 00" north to 33° 28' 00" north and longitude from 113° 20' 00" west to 114° 49' 00" west.

Yuma County is xeric in character located almost entirely within the Sonoran Desert. It has some desert mountains, mostly rocky with little foliage. The average annual precipitation for Yuma County is 2.3 inches. The highest point in the county is Castle Dome Peak in the Castle Dome Mountains at 3793 feet above sea level. The lowest point is approximately 80 feet above sea level at the center of the Colorado River where it flows into Mexico.

The population of Yuma County is 165,000. The major population center is the city of Yuma, Arizona, which is also the county seat. Small towns or settlements located in Yuma County are Summerton, San Luis, Dome, Wellton, Roll, Tacna, Dateland and Aztec. The major commercial industry of Yuma County is farming, including cotton, lettuce, and other vegetables which are irrigated primarily with waters from the

Colorado River. Interstate 8 is the main corridor of transportation east and west, and Highway 95 is the principal corridor going north and south. The main line of the Union Pacific/Southern Pacific Railroad, generally running parallel to Interstate 8, also traverses the county in an east-west direction. The Cocopah Indian Reservation is located south of the City of Yuma. Major areas of interest in Yuma County are the Kofa National Wildlife Refuge, Yuma Marine Air Training Station, U. S. Army Yuma Proving Ground, the Barry M. Goldwater Air Force Range, the Cabeza Puerta National Wildlife Refuge, Yuma Crossing State Historical Park, and the Yuma Territorial Prison.

III. Background and Historical Perspectives

A. Public Trust Doctrine and Equal Footing Doctrine

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

An ancient doctrine of common law restricts the sovereign's ability to dispose of resources held in public trust. This doctrine, integral to watercourse sovereignty, was explained by the Supreme Court in *Illinois Cent. R.R. v. Illinois*, 146 U.S.

387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892). A state's title to lands under navigable waters

is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Id. at 452, 13 S.Ct. at 118; *see also Martin v. Waddell*, 41 U.S. (16 Pet.) at 413 (describing watercourse sovereignty as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish").

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

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

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

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 navigable inland watercourses as well. See *Barney v. Keokuk*, 94 U.S. 324, 24 L.Ed. 224 (1877); *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 434, 13 S.Ct. 110, 111, 36 L.Ed. 1018 (1892). Moreover, by the "equal footing" doctrine, announced in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845), the Supreme Court attributed watercourse sovereignty to future, as well as then-existent, states. The Court reasoned that the United States government held lands under territorial navigable waters in trust for future states, which would accede to sovereignty on an "equal footing" with established states upon admission to the Union. *Id.* at 222-23, 229; accord *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Land Department v. O'Toole*, 154 Ariz. 43, 44, 739 P.2d 1360, 1361 (App. 1987).

The Supreme Court has grounded the states' watercourse sovereignty in the Constitution, observing that "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively." *Pollard's Lessee*, 44 U.S. (3 How.) at 230; see also *Oregon ex rel. State Land Board v.*

Corvallis Sand & Gravel Co., 429 U.S. 363, 374, 97 S.Ct. 582, 589, 50 L.Ed.2d 550 (1977) (states' "title to lands underlying navigable waters within [their] boundaries is conferred . . . by the [United States] constitution itself").

Id., 172 Ariz. 359-60, 837 P.2d at 161-162.

In the case of Arizona, the "equal footing" doctrine means that if any stream or watercourse within the State of Arizona was navigable on February 14, 1912, the date Arizona was admitted to the Union, the title to its bed is held by the State of Arizona in a special title under the public trust doctrine. If the stream was not navigable on that date, ownership of the streambed remained in such ownership as it was prior to statehood--the United States if federal land, or some private party if it had previously been patented or disposed of by the federal government--and could later be sold or disposed of in the manner of other land since it had not been in a special or trust title under the public trust doctrine. Thus, in order to determine title to the beds of rivers, streams, and other watercourses within the State of Arizona, it must be determined whether or not they were navigable or non-navigable as of the date of statehood.

B. Legal Precedent to Current State Statutes

Until 1985, most Arizona residents assumed that all rivers and watercourses in Arizona, except for the Colorado River, were non-navigable and accordingly there was no problem with the title to the beds and banks of any rivers, streams or other watercourses. However, in 1985 Arizona officials upset this long-standing assumption and took action to claim title to the bed of the Verde River. *Land Department v. O'Toole*,

154 Ariz. 43, 739 P.2d 1360 (App. 1987). Subsequently, various State officials alleged that the State might hold title to certain lands in or near other watercourses as well. *Id.*, 154 Ariz. at 44, 739 P.2d at 1361. In order to resolve the title questions to the beds of Arizona rivers and streams, the Legislature enacted a law in 1987 substantially relinquishing the state's interest in any such lands.² With regard to the Gila, Verde and Salt Rivers, this statute provided that any record title holder of lands in or near the beds of those rivers could obtain a quitclaim deed from the State Land Commissioner for all of the interest the state might have in such lands by the payment of a quitclaim fee of \$25.00 per acre. The Arizona Center for Law in the Public Interest filed suit against Milo J. Hassell in his capacity as State Land Commissioner, claiming that the statute was unconstitutional under the public trust doctrine and gift clause of the Arizona Constitution as no determination had been made of what interest the state had in such lands and what was the reasonable value thereof so that it could be determined that the state was getting full value for the interests it was conveying. The Superior Court entered judgment in favor of the defendants and an appeal was taken. In its decision in *Hassell*, the Court of Appeals held that this statute violated the public trust doctrine and the Arizona Constitution and further set forth guidelines under which the state could set up a procedure for determining the navigability of rivers and watercourses in

² Prior to the enactment of the 1987 statute, the Legislature made an attempt to pass such a law, but the same was vetoed by the Governor. The 1987 enactment was signed by the Governor and became law. 1987 Arizona Session Laws, Chapter 127.

Arizona. In response to this decision, the Legislature established the Arizona Navigable Stream Adjudication Commission and enacted the statutes pertaining to its operation. 1992 Arizona Session Laws, Chapter 297 (1992 Act). The charge given to the Commission by the 1992 Act was to conduct full evidentiary public hearings across the state and to adjudicate the State's claims to ownership of lands in the beds of watercourses. *See generally* former A.R.S. §§ 37-1122 to -1128.

The 1992 Act provided that the Commission would make findings of navigability or non-navigability for each watercourse. *See* former A.R.S. § 37-1128(A). Those findings were based upon the "federal test" of navigability in A.R.S. § 37-1101(6). The Commission would examine the "public trust values" associated with a particular watercourse only if and when it determined that the watercourse was navigable. *See* former A.R.S. §§ 37-1123(A)(3), 37-1128(A).

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

Based upon the 1994 Act, the Commission went forth with its job of compiling evidence and making a determination of whether each watercourse in the state was navigable as of February 14, 1912. The Arizona State Land Department issued technical reports on each watercourse, and numerous private parties and public agencies submitted additional evidence in favor of or opposed to navigability for particular watercourses. *See Defenders of Wildlife v. Hull*, 199 Ariz. 411, 416, 18 P.3d 722, 727 (App. 2001). The Commission reviewed the evidence and issued reports on each watercourse, which were transmitted to the Legislature. The Legislature then enacted legislation relating to the navigability of each specific watercourse. The Court of Appeals struck down that legislation in its *Hull* decision, finding that the Legislature had not applied the proper standards of navigability. *Id.* 199 Ariz. at 427-28, 18 P.2d at 738-39.

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

VI. Issues Presented

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

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

1. Based only on evidence of navigability or nonnavigability, determine what watercourses were not navigable as of February 14, 1912.

2. Based only on evidence of navigability or nonnavigability, determine whether watercourses were navigable as of February 14, 1912.

3. In a separate, subsequent proceeding pursuant to section 37-1128, subsection B, consider evidence of public trust values and then identify and make a public report of any public trust values that are now associated with the navigable watercourses.

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

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

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

Thus, in compliance with the statutes, the Commission is required to collect evidence, hold hearings, and determine which watercourses in existence on February 14, 1912, were navigable or nonnavigable. This report pertains to all of the small and minor watercourses in Yuma County, Arizona and excludes the Colorado River and the Gila River. In the hearings to which this report pertains, the Commission considered all of the available historical and scientific data and information, documents and other evidence relating to the issue of navigability of the small and minor watercourse in Yuma County, Arizona as of February 14, 1912.

Public Trust Values were not considered in these hearings but will be considered in separate, subsequent proceedings if required. A.R.S. §§ 37-1123A3 and 37-1128B.

In discussing the use of an administrative body such as the Commission on issues of navigability and public trust values, the Arizona Court of Appeals in its decision in *Hassell* found that State must undertake a “particularized assessment” of its “public trust” claims but expressly recognized that such assessment need not take place in a “full blown judicial” proceeding.

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

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

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

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

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

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

compromising the “public trust,” or (3) any conditions the State might want to impose on transfers of its ownership interest. *See id.*

V. Burden of Proof

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

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

This statute is consistent with the decision of the Arizona courts that have considered the matter. *Hull*, 199 Ariz. at 420, 18 P.3d at 731 (“... a ‘preponderance’ of the evidence appears to be the standard used by the courts. *See, e.g., North Dakota v. United States*, 972 F.2d 235-38 (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 overbear, in some degree, the weight upon the other side.

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

The "preponderance of the evidence" standard is sometimes referred to as requiring "fifty percent plus one" in favor of the party with the burden of proof. One could image a set of scales. If the evidence on each side weighs exactly evenly, the party without the burden of proof must prevail. In order for the party with the burden to prevail, sufficient evidence must exist in order to tip the scales (even slightly) in its favor. *See generally United States v. Schipani*, 289 F.Supp. 43, 56 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969).

VI. Standard for Determining Navigability

The statutes defines a navigable watercourse as follows:

"Navigable" or "navigable watercourse" means a watercourse that was in existence on February 14, 1912, and at that time was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce,

over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

A.R.S. § 37-1101(5).

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

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

77 U.S. at 563.

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

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

270 U.S. at 55-56.

The Commission also considered the following definitions contained in A.R.S. § 37-1101 to assist it in determining whether small and minor watercourses in Yuma County are navigable at statehood.

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

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

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

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

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

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

VII. Constitutional and Legal Issues Raised by Defenders of Wildlife

One of the parties to the proceedings was the Defenders of Wildlife who style themselves as the citizen parties and is represented by the Arizona Center for Law in the Public Interest. The primary thrust of the Defenders of Wildlife's position is that the statutes providing for the Commission violate the U. S. Constitution, the Arizona Constitution and the public trust doctrine.

SB 1275 [the current statutes enacted in 2001] is unconstitutional for three main reasons. First, SB 1275 ignores the presumption in favor of sovereign ownership of bedlands; second, SB 1275 establishes an improper standard of review; and third, SB 1275 violates the Supremacy Clause of the U. S. Constitution, the gift clause of the Arizona Constitution, and the public trust doctrine.

Defenders of Wildlife, Post Hearing Memoranda, p. 4.

The Commission is an administrative/quasi judicial agency which is bound to follow the statutes that created it and govern its proceedings. It does not have jurisdiction or authority to question the constitutionality of such statutes. *Corp. Comm'n v. Tucson Gas, Elec. Light & Power Co.*, 67 Ariz. 12, 14, 189 P.2d 907, 908 (1948); *Manning v. City of Tucson*, 2 Ariz. App. 310, 312, 408 P.2d 414, 416 (1965). The Commission may not ignore its powers and duties as defined by statute. *See Kendall v. Malcolm*, 98 Ariz. 329, 334, 404 P.2d 414, 417 (1965); *Phoenix v. Phoenix Civil Serv. Bd.*, 169 Ariz. 256, 259, 818 P.2d 241, 244 (App. 1991).

Even if the Commission could address its statutes' constitutionality, it must find them constitutional because all legislative enactments enjoy the presumption of

constitutionality. *Hull*, 199 Ariz. at 426, 18 P.3d at 737; *In re San Carlos Apache Tribe V.*, 193 Ariz. at 204, ¶ 11, 972 P.2d at 188; *In re One 1965 Ford Mustang*, 105 Ariz. 293, 463 P.2d 827 (1970).³

The Defenders of Wildlife argue that the law holds that there is a strong presumption against defeat of the State's title to streambeds since title passed automatically to the State upon statehood and that this affects the burden of proof.

However, as the *Hull* court stated:

... [B]efore 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).

Hull also stated that "a 'preponderance' of the evidence appears to be the standard used by the courts." *Hull*, 199 Ariz. at 420, 18 P.3d at 731.⁴ Thus, the correct

³ As an interesting aside in view of the discussion of burden of proof, it should be noted that before invalidating a statute, an appellate court must be satisfied beyond a reasonable doubt that the statute is unconstitutional. *Flood Control Dist. of Maricopa County v. Gaines*, 202 Ariz. 248, 43 P.3d 196 (App. 2002); *New Times, Inc. v. Arizona Board of Regents*, 110 Ariz. 367, 519 P.2d 169 (1974); *Osborne v. Massachusetts Bonding & Ins. Co.*, 229 F. Supp. 674 (D. Ariz. 1964).

⁴ See also *Mundy v. United States*, 22 Cl.Ct. 33 (1990); *Mintzer v. North Am. Dredging Co.*, 242 F. 553, 559, *aff'd* 245 F.2d 297 (9th Cir. 1916); *Andersen v. Village of Little Chute*, 549 N.W.2d 737 (Wis. App. 1996); *E.D. Mitchell Living Trust v. Murray*, 818 S.W.2d 326 (Mo.App. 1991).

standard of proof is a preponderance of the evidence and the burden rests on the party asserting navigability. *Hassell*, 172 Ariz. at 363, n. 10, 837 P.2d at 165, n. 10; *Secretary of State v. Wiesenberg*, 633 So.2d 983, 992 (Miss. 1994) *rehearing denied* (March 31, 1994); *see also* Section V above.

The Defenders of Wildlife also argues that the statutes define “public trust values too narrowly. While other states may expand their definition through statute or case law, Arizona states that “[p]ublic trust purposes’ or ‘public trust values’ means commerce, navigation and fishing.” A.R.S. § 37-1101(9). As pointed out above, the Commission must follow the statutes which define its powers and duties. In any event, the extent of “public trust purposes” is not an issue in these proceedings. The only issue is navigability of Yuma County’s small and minor watercourses. “Public trust values” will be considered in a separate subsequent proceeding, if required. A.R.S. §§ 37-1123A3 and 37-1128B.

In considering all of the evidence submitted (Exhibit “D”), the Commission did consider the Defenders of Wildlife’s arguments regarding the evidence and do not find them persuasive. A great deal of evidence as shown by the listing in Exhibit “D” was collected and reviewed. The studies and reports prepared and submitted by the State Land Department and its contractors were done in consultation and coordination with the Department of Water Resources, the Game and Fish Department, State Parks Board and other interested persons and public and private entities. A.R.S. § 37-1123D. Private citizens, clubs, organizations, corporations, partnerships, unincorporated associations,

municipal corporations and public entities were invited to submit evidence and information (A.R.S. § 37-1123C) and many did. The collection, review and consideration of this evidence by the Commission complies with the “particularized assessment analysis” requirement for determining navigability set forth in the *Hassell* decision, 172 Ariz. at 371, 837 P.2d at 173.

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 small and minor watercourses located in Yuma County, Arizona. Evidence consisting of studies, written documents, newspapers and other historical accounts, pictures and testimony were submitted. A comprehensive study entitled "Final Report - Small & Minor Watercourses Analysis for Yuma County, Arizona" prepared by JE Fuller/Hydrology & Geomorphology, Inc. under supervision of the Arizona State Land Department, dated September 4, 2002, was reviewed and considered by the Commission. Various earlier draft reports of this study were also reviewed and considered by the Commission. Also reviewed and considered by the Commission were documents, photographs and records submitted by the Arizona Center for Law in the Public Interest, the Central Arizona Paddlers Club (Dorothy Riddle), Chicago Title Insurance Company, Dr. Douglas Littlefield, Salt River Project and the Gila River Navigability Studies submitted by the Arizona Land Department in connection with the hearings on the Gila

River as well as many others. The list of evidence, records and documents reviewed and considered, together with a summarization is attached as Exhibit "D". The public hearing on small and minor watercourses located in Yuma County, Arizona, was held in Yuma, Arizona, on September 23, 2002, and the minutes of the meeting are attached hereto as Exhibit "E" as are that portion of the minutes of the public hearing held on December 9, 2002, which pertains to small and minor watercourses in Yuma County.

A. Small & Minor Watercourses Analysis for Yuma County, Arizona

1. Analysis Methods.

Due to the large number of small and minor watercourses located in Yuma County, Arizona (1,475 watercourses of which 1,403 are unnamed), it is impractical and unnecessary to consider each watercourse with the same detail that the Commission will consider major watercourses. The study of small and minor watercourses developed by Stantec Consulting Inc. and its associates J. E. Fuller Hydrology & Geomorphology, Inc., and the University of Arizona Water Resources Research Center provided for an evaluation using a three-level process which contained criteria that would be necessarily present for a stream to be considered navigable. A master database listing all small and minor watercourses was developed from the Arizona Land Resource Information System (ALRIS) with input from the U. S. Geological Survey, the U. S. Environmental Protection Agency and other agencies and sources. The final version of the master database called "Streams" includes a hydrological unit code (HUC), segment number, mileage, watercourse type and watercourse name, if

available. Thus there is a hydrological unit code for each of the segments of the 1,475 small and minor watercourses in Yuma County, Arizona. In addition, the database locates each segment by section, township, and range. Some of the satellite databases discussed below also locate certain significant reference points by latitude and longitude.

Using the master database, the contractor also set up six satellite databases, each relating to a specific stream characteristic or criterion, that would normally be found in a watercourse considered to be navigable or susceptible of navigability. These stream criteria are as follows:

1. Perennial stream flow;
2. Dam located on stream;
3. Fish found in stream;
4. Historical record of boating;
5. Record of modern boating; and
6. Special status (other water related characteristics, including in-stream flow application and/or permit, unique waters, wild and scenic, riparian, and preserve).

All watercourses were evaluated at level one which is a binary (yes or no) sorting process as to whether or not these characteristics are present. For a stream or watercourse not to be rejected at level one, it must be shown that at least one of these characteristics is present. If none of these characteristics are present, the stream or

watercourse is determined to require no further study and is rejected at level one as having no characteristics of navigability.

All streams and watercourses surviving the level one sorting (*i.e.*, determined to have one or more of the above characteristics) are evaluated at level two. The level two analysis is more qualitative than level one and its assessment requires a more in-depth analysis to verify and interpret the reasons which caused a particular stream to advance from level one. Each of the above characteristics on which there was an affirmative answer at level one is analyzed individually at level two to determine whether the stream is potentially susceptible to navigation or not susceptible to navigation; for example, a watercourse that at first appears to be perennial in flow but upon further analysis is determined to have only a small flow from a spring for a short distance and therefore cannot be considered perennial for any substantial portion of the watercourse.

In addition, the level two analysis utilizes a refinement with value engineering techniques analyzing watercourses with more than one affirmative response at level one and assigned values to each of the six categories mentioned above. Clearly, perennial flow, historical boating, and modern boating are more important to the issue of navigability than the categories of dam impacted, special status, or fish. Thus, for the purpose of the value engineering study, the following rough values were assigned to each of the six categories: historical boating-10, modern boating-8, perennial stream-7, dam impacted-4, fish-4, and special status-2. This system is a recognized tool used in value engineering studies, and seven qualified engineers from the state Land

Department and consulting staff of the contractor participated in determining the values used for each category. This system establishes that a value in excess of 13 is required for a stream to survive the level two evaluation and pass to level three for consideration. Thus, a stream having both perennial flow and historical boating (sum value of 17), or a combination of the values set for other criteria equaling more than 13, would require that the stream pass to evaluation at level three. If a stream does not have a sum value greater than 13, it is determined to require no further study and is rejected at level two as having no characteristics of navigability.

If a stream survives the evaluation at level two, it goes on to level three which uses quantitative hydrologic and hydraulic analysis procedures including any stream gauge data available, as well as engineering estimates of depth, width and velocity of any water flow in the subject watercourse and comparing the same to minimum standards required for different types of vessels. Also considered is the configuration of the channel and whether it contains rapids, boulders or other obstacles. If a stream or watercourse is not rejected or eliminated at level three, it is removed from this process and subjected to a separate detailed study similar to that performed on a major watercourse, and a separate report will be issued on that stream or watercourse.

2. Application of Analysis Methods to Small and Minor Watercourses in Yuma County.

The application of the level one analysis to the 1,475 small and minor watercourses located in Yuma County resulted in 1,458 watercourses or 98.8% being

determined as not having any of the six characteristics listed above, and these 1,458 were therefore rejected or eliminated and did not proceed to a further evaluation at level two. Attached as Exhibit "F" is a list of the watercourses in Yuma County which were determined to have no characteristics of navigability or characteristics indicating susceptibility of navigability at level one.

Only 17 watercourses, approximately 1.2%, received an affirmative response to the above characteristics or criteria and were evaluated at level two. Attached as Exhibit "G" is a list of the 17 watercourses that received a positive response to one of the characteristics listed above. It should be noted that each of these 17 watercourses had a positive response only to the characteristic of stream type (*i.e.*, perennial stream flow) in that a segment of each of these streams was considered perennial. At the level two analysis where this characteristic was considered in greater depth and other sources for stream type were considered, it was determined that such a small portion or segment of each of these streams could be considered as having an annual flow, it was not truly considered as perennial and was therefore rejected at level two. Accordingly, no small or minor watercourses in Yuma County survived level two of the analysis so none were considered or evaluated at the level three analysis.

Evidence consisting of reports, photographs, maps and statements submitted by other parties and considered by the Commission agreed with and confirmed the findings contained in the Fuller report.

B. Prehistoric and Historic Considerations Affecting Small and Minor Watercourses in Yuma County, Arizona

In addition to the Small and Minor Watercourses Analysis and other evidence described above, the Commission also considered evidence of the prehistoric conditions and the historic development of Yuma County as disclosed primarily in the studies submitted in connection with the hearings on navigability of the Gila River. While there is evidence of Paleo-Indian people in Yuma County as long as 12,000 years ago, there was no archaeological evidence that the Paleo-Indian or archaic people traveled on the small and minor watercourses or used the same to float logs downstream or for commerce. These Paleo-Indian and archaic peoples developed into what archaeologists call the Patayan Tradition in Yuma County which existed between A.D. 300 to A.D. 1400. The Patayan and its northern cousin the Cerbat archaeological culture developed into the Yuma, Yavapai and Maricopa Indians who were present in the area when the first Europeans came to southern Arizona, represented primarily by Spanish missionaries accompanied by soldiers.

In support of the Coronado Expedition of 1540-1542 which traveled through eastern Arizona, Captain Hernando Alarcon sailed ships through the Gulf of California or Sea of Cortez to the mouth of the Colorado River and, using small craft, traveled upstream to the Colorado River's junction with the Gila River, the site of the present day city of Yuma. Coronado also sent Captain Melchior Diaz and 25 soldiers in a northwesterly direction to meet Alarcon. At the Yuma Indian villages, Diaz was told of

Alarcon's visit but that he had returned to Mexico. Diaz explored the area around the lower Colorado and then left to rejoin Coronado. In 1604-1606, Juan de Oñate, after establishing the first Spanish colony in New Mexico, explored much of Arizona looking for gold and traveled down the Colorado to the present day site of Yuma.

In the late 1600's and early 1700's Father Esubio Francisco Kino traveled and preached all over southern Arizona. In 1700-1702 he traveled down the Gila River and spent a considerable amount of time at the Yuma villages. In 1771 Fray Francisco Tomas Garces traveled west to Yuma looking for a land route to California. Over the next five years he and Captain Juan Bautista de Anza made a number of expeditions to and through the area, culminating in de Anza's crossing the Colorado at Yuma and going on to establish the city of San Francisco in 1776. A mission and settlement was established at Yuma, but in 1781 a rebellion of the Yuma Indians resulted in the deaths of Father Juan Diaz and Matias Moreno and the closing of the land route to California for the next forty years.⁵

With the acquisition of Arizona from Mexico by the United States by the Treaty of Guadalupe Hidalgo ending the war between the United States and Mexico in 1848 and the purchase by the United States of the area south of the Gila River in 1853 by the Gadsden Purchase, settlement of Yuma County by citizens of the United States began.

⁵ Trimble, Marshall, Arizona, a Cavalcade of History, Chapters 4 & 5, Tucson: Treasure Chest Publications (1989).

During the war with Mexico the Army of the West led by General Stephen Watts Kearny, followed by the Mormon Battalion led by Captain Philip St. George Cook, traveled down the Gila River and crossed the Colorado at Yuma in connection with their invasion of California. In the 1850's a number of military surveys were undertaken to find railroad routes from the eastern United States to California. One or more of these surveys resulted in the building of the Southern Pacific Railroad through Arizona.

Yuma itself was considered a good crossing of the Colorado River for people on their way to California to work the gold fields. On October 2, 1849, a military post called Camp Calhoun was established on the California side of the Yuma crossing of the Colorado River to control the crossing and keep an eye on the Indians living in the area. A year and a half later this post was renamed Camp Yuma. In 1852 the first steamboat loaded with supplies made its way up the Colorado to Fort Yuma as the post was then named. Steamboats continued to navigate up the Colorado River until 1909. Fort Yuma was the only fort not abandoned by the U. S. Army at the beginning of the Civil War and became the staging ground for the reconquest of Arizona from the Confederates in 1862. In 1864 the Yuma Quartermaster Depot was established on the Arizona side of the river and was the primary military supply depot for the Army in the Arizona Territory until the coming of the railroads.⁶

⁶ Nearing, Richard and Hoff, David, Arizona Military Installations: 1752-1922, pp. 5, 6, 11, Tempe: Gem Publishing Co. (1995).

In 1857 farming began in the lower Gila Valley around Yuma and near Wellton, Arizona, and after World War II the Wellton-Mohawk Irrigation District was formed which allowed up to 75,000 acres along the lower Gila River to be farmed using water from the Colorado River. It and the irrigation of the Yuma Valley and Yuma Mesa has resulted in the large agricultural economy now existing in Yuma County, Arizona.

The first stage line was established in 1857 to carry passengers from San Antonio, Texas, to San Diego, California, which crossed the Colorado River at Yuma. In 1877, the Southern Pacific Railroad entered Arizona from California through Yuma and in March of 1880, this railroad reached Tucson and thereafter extended across eastern Arizona into New Mexico. There are no records of any persons traveling on any of the small and minor watercourses of Yuma County, Arizona, although some trails may have followed these streams as corridors of transportation. Prior to and at the time of statehood, travel in Yuma County, Arizona, was by foot, horseback, mule or ox-drawn wagon and stagecoach and, after the 1880's, by train. At the time of statehood and immediately thereafter, trucks and automobiles were also used as the road system was expanded and improved. None of the streams in Yuma County, Arizona, excluding the Colorado River, has been listed in the Rivers and Harbors Act of 1899 (33 U.S. Code § 401-467e).

Testimony presented at the hearing for all small and minor watercourses in Yuma County established that the present climate and weather conditions in Yuma

County are the same or very similar to that which existed in 1912 when Arizona became a state.

VIII. Findings and Determination

The Commission conducted a particularized assessment of equal footing claims the State of Arizona might have to the beds and banks of the 1,475 small and minor watercourses in Yuma County, Arizona, and based on all of the historical and scientific data and information, documents, and other evidence produced, finds that none of the said small and minor watercourses were used or were susceptible to being used, in their ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water as of February 14, 1912.

The Commission also finds that none of the small and minor watercourses in Yuma County, Arizona, are or were truly perennial and that as of February 14, 1912, and currently they flow/flowed only in direct response to precipitation and are or were dry at all other times.

The Commission also finds that there is no evidence of any historical or modern boating having occurred on any of the small and minor watercourses in Yuma County, Arizona.

The Commission also finds that there is no evidence of any fishing having occurred on the small and minor watercourses in Yuma County, Arizona.

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

In view of the foregoing, the Commission, pursuant to A.R.S. § 37-1128A, finds and determines that the small and minor watercourses in Yuma County, Arizona, were not navigable as of February 14, 1912.

DATED this 20th day of February, 2003.

s/ Earl Eisenhower
Earl Eisenhower, Chairperson

s/ Jay Brashear
Jay Brashear, Member

s/Cecil Miller
Cecil Miller, Member

s/James Henness
James Henness, Member

s/Dolly Echeverria
Dolly Echeverria, Vice Chairperson