IN THE COMMONWEALTH COURT OF PENNSYLVANIA
NO. 1317 CD 2007

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, PENNSYLVANIA FISH AND BOAT COMMISSION,

Appellees

v.

CONNIE L. ESPY, t/d/b/a CAMP ESPY FARMS, DONALD L. BEAVER, JR., HIDDEN HOLLOW ENTERPRISES, INC., t/d/b/a PARADISE OUTFITTERS, LEGACY CONSERVATION GROUP, LLC, t/d/b/a SPRING RIDGE CLUB, ANGLING FANTASIES, LLC, AND BELLWOOD-ANTIS ENTERPRISES, INC.,

Appellants

BRIEF OF APPELLEES, COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, PENNSYLVANIA FISH AND BOAT COMMISSION

On Appeal from the Order of the Court of Common Pleas of Huntingdon County, Pennsylvania, Civil Division, No. 03-781 and No. 03-1297, entered June 13, 2007

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Cases

PA. Cases

Rules

Regulations

PA. Constitution

PA. Statutes

Newspapers

Attorney General Opinions

COUNTERSTATEMENT OF SCOPE AND STANDARD OF REVIEW

This Court's review of the trial court's grant of the Commonwealth Agencies' Complaint for Declaratory Relief is limited to determining whether the trial court's findings of fact are supported by substantial evidence, whether the court committed an error of law, or whether the court abused its discretion. *City Council, City of Reading v. Eppihimer*, 835 A.2d 883 (Pa. Cmwlth. 2003). The test in an appeal from a grant of declaratory judgment is not whether the appellate court would reach the same result as the trial court on the evidence presented, but whether the trial court's conclusion reasonably can be drawn from the evidence. *Scalp Level Borough v. Paint Borough*, 797 A.2d 395 (Pa. Cmwlth. 2002). Where the trial court's factual determinations are supported by substantial evidence, this court may not substitute its judgment for that of the trial court. *Consolidation Coal Co. v. White*, 875 A.2d 318 (Pa. Super. 2005). Substantial evidence is such relevant evidence as a reasonable mind might find adequate to support a conclusion. *One Meridian Partners, LLP v. Zoning Bd. of Adjustment of City of Philadelphia*, 867 A.2d 706 (Pa. Cmwlth. 2005).

In assessing whether there is substantial evidence to support the trial court's findings, this court must review the record in the light most favorable to the Commonwealth as the prevailing party, and give the Commonwealth the benefit of all inferences that logically and reasonably can be drawn from the record. *Penn Hills School District v. Unemployment Compensation Board of Review (Baratta)*, 496 Pa. 20, 437 A.2d 1213 (1981); *Bradford County Children and Youth Services v. Department of Public Welfare*, 613 A.2d 48 (Pa. Cmwlth. 1992). This court may not reweigh the evidence nor resolve issues of credibility. *Westinghouse v. Department of Environmental Protection*, 705 A.2d 1349 (Pa. Cmwlth.), *appeal denied*, 566 Pa. 717, 729 A.2d 1133 (1998).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the 1.3 mile section of the Little Juniata River from its confluence with Spruce Creek downstream is navigable at law where the Commonwealth's 1803 land grant to Appellants' predecessor in title, Joseph Heister, was subject to the February 5, 1794 public highway declaration.

Answered in the affirmative by the trial court.

2. Whether the Little Juniata River is navigable in fact such that the title of all riparian landowners along the river extends only to the low water mark and that the lands below the ordinary low water mark are owned by the Commonwealth and held in trust for the public.

Answered in the affirmative by the trial court.

I. COUNTERSTATEMENT OF THE CASE

A. Procedural History

Introduction

In Pennsylvania, the beds of rivers that are navigable at law or navigable in fact historically are owned by the Commonwealth. These "submerged lands" of the Commonwealth are imbued with the "public trust," and must be conserved and maintained for the benefit of all the citizens of Pennsylvania. Commonwealth owned submerged lands are among the "public natural resources" that the Appellee Commonwealth Agencies – the Department of Environmental Protection (DEP), the Department of Conservation and Natural Resources (DCNR) and the Pennsylvania Fish and Boat Commission (PFBC) - as trustees are constitutionally mandated to "conserve and maintain for the benefit of all the people." Pa. Const. Art. I, § 27. The public's rights in Commonwealth owned submerged lands include the right to fish, boat, wade and recreate.

The Commonwealth government historically has treated the Little Juniata River as navigable water held in trust for the benefit of the public and for which title to the riverbed has always been in the Commonwealth. Prior to 1992, the public's rights and landowners' riparian interests in the disputed 1.3-mile section of the Little Juniata River here at issue coexisted peacefully. However, for the ten years preceding the filing of the Commonwealth Agencies' Complaint in this matter and with increasing frequency immediately prior to the filing, the Commonwealth Agencies received numerous complaints that Appellants (Defendants below), their employees and their agents verbally and physically harassed members of the public seeking to lawfully use this 1.3-mile section of the river. Notwithstanding their receipt of notice from the Commonwealth Agencies of the longstanding status of the Little Juniata River as a public

navigable water and of the Commonwealth's claim of title to the riverbed, Appellants, their employees and their agents, in Spring, 2003, hung cables with signs at the upstream and downstream ends of the 1.3-mile section in dispute and posted other signs on the riverbanks warning the public not to trespass. Appellants are various individuals, corporations, associations and/or clubs associated with the operation of a private, for-profit fly-fishing guiding business located on riparian property along the Little Juniata River at Spruce Creek.

The Commonwealth Agencies, after review and consideration of the unusual volume and intensity of complaints and escalating level of interference, concluded that the actions of the Appellants in effect constituted an unlawful appropriation of public land for private use and private gain. The Commonwealth Agencies thereafter filed the Complaint described below to protect and uphold the public's right to fish, to boat and to recreate on the Little Juniata River, a navigable river, and to enjoin violations of the navigation servitude, the Dam Safety and Encroachments Act (Dam Safety Act), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§693.1 – 693.27, and the Fish and Boat Code, 30 Pa. C.S. §101 – 7314.

Commonwealth Agencies

DEP is the executive agency of the Commonwealth with the power to administer and enforce, *inter alia*, the Dam Safety Act, Section 514 of the Administrative Code of 1929 (Administrative Code), Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 194, and the rules and regulations promulgated thereunder at 25 Pa. Code Chapter 105. DEP is a trustee of the Commonwealth's natural resources under Article I, § 27 of the Pennsylvania Constitution.

Section 6 of the Dam Safety Act requires a permit from DEP for the construction, operation and maintenance of all dams, water obstructions and encroachments located in, along, across or projecting into *any* water of the Commonwealth. 32 P.S. § 693.6. Section 15 of the

Dam Safety Act implements Art. I, Section 27 of the Pennsylvania Constitution and the Public Trust Doctrine with regard to Commonwealth submerged lands, and designates DEP as the executive agency charged with administering the submerged lands program thereunder. 32 P.S. § 693.15. When a dam, water obstruction or encroachment is located in, along, across or projecting into a submerged land of the Commonwealth, "in any navigable lake or river or stream declared a public highway", the permittee must also obtain an "easement, right-of-way, license or lease", in most cases from the DEP. 32 P.S. Section 693.15.

DCNR is the executive agency of this Commonwealth created by the Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, 71 P.S. § 1340.101 *et seq.*, and is charged with the duty and authority to conserve, maintain and hold title to and administer public parks and forest lands for the use and benefit of all Pennsylvania citizens. DCNR also is charged with the duty of assuring that Pennsylvania's navigable rivers, including the Little Juniata River, are conserved and maintained for the benefit of all the current and future citizens of Pennsylvania, and is one of several state agencies empowered to act as an advocate for Pennsylvania's rivers as natural resources for its citizens. In addition, DCNR owns approximately 2.2 million acres of land within the Commonwealth, administered by the Bureau of State Parks and the Bureau of Forestry. The Bureau of Forestry administers the Rothrock State Forest in Huntingdon County with part of that acreage bordering on the Little Juniata River along the 1.3-miles at issue.

The PFBC is the state agency with responsibility to enforce the Fish and Boat Code. The statutory mission of the PFBC includes encouraging, promoting and developing fishing interests and recreational boating in the Commonwealth. 30 Pa. C.S. § 321. As a part of its mission, the PFBC acts on behalf of anglers and boaters to preserve public access to waters and protect the public's rights pertaining to fishing and boating.

Complaint

The Commonwealth Agencies commenced the instant matter in June, 2003 with the filing of a Complaint in Equity and for Declaratory Judgment. (R. 7a).[1] In the complaint, the Commonwealth Agencies sought a declaration that the Little Juniata River is a navigable river, that the lands below the ordinary low water mark are submerged lands owned by the Commonwealth, and that the public has the right of use and enjoyment of the river, including the right to fish, boat, wade and recreate. (R. 17a – 20a). The Agencies further requested that the court enjoin Appellants and their agents and employees from interfering with the public's rights in the Little Juniata River, from interfering with the navigation servitude in the Little Juniata River, from violating the Dam Safety Act, and the regulations promulgated thereunder at 25 Pa. Code Chapter 105, and from violating the Fish and Boat Code. (R. 17a – 27a).

Preliminary Objections

Appellants filed Preliminary Objections to the Commonwealth's Complaint. (R. 31a). In the preliminary objections, they asserted, *inter alia*, that the Little Juniata River is not "one of the great rivers of the Commonwealth" and that the Commonwealth Agencies "fail[ed] to meet the legal test for determining whether the Little Juniata River (or any portion thereof) is navigable in fact." (R. 33a). Appellants' brief in support of their Preliminary Objections revealed this latter issue to be an assertion that navigability in fact must be determined by reference to present and future conditions rather than to historic uses. (R. 45a).

The Commonwealth Agencies in their Memorandum in Opposition asserted that navigability in Pennsylvania for purposes of title is not limited to the "great rivers," that the Little Juniata River is navigable at law, that navigability in fact is evaluated by examining

[1] Citations to Reproduced Record will be designated as "(R. __)."

historic uses, and that the Little Juniata was historically navigable. (R. 63a). Additionally, the Agencies asserted that Appellants' suggested test is contrary to established federal and state case law. (R. 63a).

The court heard argument on the Preliminary Objections, and by Order dated January 13, 2004, denied them. (R. 91a). Appellants thereafter filed an Answer to the Commonwealth's Complaint with New Matter, to which the Commonwealth Agencies filed an Answer. (R. 92a; R. 118a).

Trial

Trial on the Commonwealth's Complaint was held before the Honorable Stewart Kurtz on June 12 through June 16, 2006. The Commonwealth Agencies presented the testimony of DEP Deputy Secretary Cathleen Curran Myers; Rodger Cook, the chief of DCNR's Land Records Section and a licensed surveyor; and Judith Heberling, Ph.D., a professional historian. (R. 160a – 498a, 532a – 579a). The Agencies also presented the testimony of retired Waterways Conservation Officer (WCO) Walter Rosser and WCO Craig Garman of the PFBC. (R. 499a – 524a). The parties entered into an extensive Joint Stipulation. (R. 944a).

Proposed Findings and Conclusions of Law

By Order dated September 21, 2006, the trial court directed the parties to file proposed findings of fact and conclusions of law along with a memorandum in support not later than November 30, 2006. (R. 3a). Appellants in their Memorandum asserted that the Commonwealth's evidence did not meet the established standard for finding navigability in fact, echoing their great rivers and contemporary test assertions from their Preliminary Objections. (R. 2100a). The Commonwealth Agencies filed extensive Proposed Findings and Conclusions of Law, and a comprehensive Memorandum in support thereof, in which the Agencies cited the

evidence presented and the existing case law to establish that the bed of the Little Juniata River is owned by the Commonwealth and is therefore navigable at law and that the Little Juniata River is navigable in fact. (R. 2114a; 2192a). The Commonwealth Agencies provided detailed analysis of the Commonwealth's ownership versus that claimed by Appellants and debunked Appellants' attempt to extrapolate and impose 21st century conditions on 18th and 19th century commercial navigation as contrary to law and entitled to little weight. (R. 2243a – 2247a).

January 29, 2007 Decision

Judge Kurtz issued his Decision on January 29, 2007. (R. 2257a). Based upon extensive Findings of Fact that are detailed below, Judge Kurtz found that the disputed 1.3 mile section of the Little Juniata River was navigable at law because the 1803 land grant to Appellants' predecessor in title, Joseph Heister, was as a matter of law subject to the 1794 public highway declaration covering that portion of the river. (R. 2304a). Judge Kurtz also held, based upon his finding that "[t]he opinion of Dr. Heberling that the [Little Juniata] river was a highroad for commerce was persuasive and supported by a substantial body of evidence," that the Commonwealth Agencies met their burden and established by a preponderance of the evidence that the Little Juniata River was navigable in fact during the period following the Revolutionary War through the advent of the Pennsylvania Railroad in the 1850's. (R. 2308a – 2311a).

Post-Trial Motions

Appellants on February 8, 2007 filed a Motion for Post-Trial Relief. (R. 2315a). In their motion, Appellants asserted for the first time in any pleading (the issue was raised for the first time at argument on Proposed Findings and Conclusions of Law) that their predecessors in title enjoyed an equitable claim that predated the aforementioned 1794 public highway declaration. (R. 2315 – 2316a). Appellants also asserted that the Commonwealth did not meet the established

standard for navigability in fact, based upon their reading of two United States Supreme Court decisions. (R. 2317a – 2318a).

The Commonwealth Agencies on February 20, 2007 timely filed their Motion for Entry of Judgment and in Opposition to Defendants' Motion for Post-Trial Relief. (R. 2321a). As to Appellants' "equitable title" argument, the Agencies pointed out that this assertion was foreclosed by controlling Pennsylvania Supreme Court and Superior Court precedent, by the type of warrant involved, and also was waived. (R. 2327a – 2330a). As to the standard for navigability in fact, the Commonwealth Agencies stated that the application of the test for navigability was a matter of state law and that the federal decisions cited were factually distinguishable. (R. 2329a).

June 13, 2007 Opinion and Order

Judge Kurtz denied Appellants' Motion for Post-Trial Relief in an Opinion and Order issued June 13, 2007. (R. 2347a; 2352a). Regarding Appellants' equitable title claim, Judge Kurtz concluded the claim was "baseless," relying upon the Pennsylvania Supreme Court's decision in *Emery v. Spencer*, 23 Pa. 271 (1854). (R. 2357a – 2358a). As to Appellants' argument regarding navigability in fact, Judge Kurtz provided a thoughtful analysis based upon the United States Supreme Court's decision in *United States v. Appalachian Electric Power*, 311 U.S. 377 (1940), and, in rejecting Appellants' claim, noted that the quantum of evidence found sufficient to establish navigability in fact in *Appalachian Electric Power* "is far less than the evidentiary presentation made by [the Commonwealth Agencies] in this case." (R. 2363a).

B. Factual History

The Trial Court's Findings of Fact

The Appellants, in their brief, have largely eschewed the trial court's findings with respect to the commercial use of the Little Juniata and the evidence regarding its navigability, which are supported by substantial evidence. The Commonwealth Agencies therefore begin the factual history portion of their Counter Statement of the Facts with a statement of the facts as found by the trial court below. The Agencies will outline some of the substantial evidence in the record supporting these key findings of the trial court.

The trial court found that Camp Espy Farms, the property operated as a private fishing club by Spring Ridge Club and Rural Partners, is situated on the east/north bank of the Little Juniata River.[2] (R. 2260a-2261a, FF 12, 14).[3] In addition, since 2002, the fishing club has leased 0.60 acres of land on the west/south bank of the Little Juniata River from the Norfolk Southern Railroad Company, which provides that the leased property could be used "for the purpose of general beautification and security and for no other purpose."[4] (R. 2261a, FF 15-17). The operators of the Spring Ridge Club have claimed ownership of the streambed of the Little Juniata River. (R. 2261a, FF 18). The Appellants advertised this section of the Little Juniata

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[2] The Camp Espy Farms Property is designated as parcels A and B on Exhibit A of the trial court's opinion. (R. 2260a-2261a, 2313a). This Exhibit is a reduction of the Commonwealth Agencies Exhibit 33, which was prepared by Rodger Cook, Chief of the Land Records Section, of DCNR. (R. 539a-540a). Mr. Cook conducted a deed and property records search for the parcels at issue along the 1.3 mile disputed stretch and compiled a map of the relevant warrants as Commonwealth Exhibit 32. (R. 536a-540a, 1115a).

[3] Citations to trial court's findings of fact as set forth in its January 29, 2007 opinion will be designated as "(FF___)."

[4] The property subject to the beautification lease is designated as parcel I on the Court's Exhibit A. (R. 2261a, 2313a).

River as their "private stretch of the Little Juniata" and caused a substantial public outcry with respect to the "closing to the public of the 1.3 mile stretch of the Little Juniata River adjacent to Espy Farms." (R. 2262a, FF 19-21). Appellants subsequently strung cables across the river stating "Keep Out", "No Trespassing", and "Private Property" and the Commonwealth received "[c]omplaints from individuals who attempted to use the river adjacent to Camp Espy Farms."[5] (R. 2263a, FF 24-27). As a result of the actions of the Appellants and the complaints from the public, the Commonwealth Agencies filed suit on June 11, 2003. (R. 2264a, FF 28-29).

Judge Kurtz found that the Little Juniata was one of three branches of the Juniata River, along with the Frankstown Branch and the Raystown Branch. (R. 2264a, FF 30-31). The Little Juniata River is located on the western edge of the Ridge and Valley Province of the Appalachian Highlands, which is characterized by a series of long, narrow parallel ridges running in a general northeast-southwest direction. (R. 2265a, FF 35-36). The ridges through which the Little Juniata runs are separated by rolling upland of inter-mountain valleys that lie a thousand feet or more below the ridge tops. (R. 2265a, FF 36). The trial court specifically found that Bald Eagle Ridge and Tussey Mountain were formidable barriers to travel in this region, and as a consequence of which, water gaps such as the ones carved by the Little Juniata and by the Frankstown Branch were important components of late eighteenth and early nineteenth century transportation. (R. 2265a, FF 37). Although Appellants' geologist testified that the Little Juniata River contained nic-points, the trial court also found that "nic-points are not uncommon in the inland rivers of Pennsylvania." (R. 2266a-2267a, FF 43-44).

[5] Retired WCO Rosser testified at trial that during the 1970's and 1980's, the PFBC stocked this section of the Little Juniata River and it developed into a wonderful fishery that was fished heavily. (R. 517a-518a). WCO Garman testified, however, that in 2000, he began receiving numerous complaints regarding the disputed section of the Little Juniata River while on patrol and through telephone calls. (R. 505a-506a).

The court below made a number of uncontested findings regarding the state of road transportation with respect to commerce. Roads in the late eighteenth and nineteenth centuries were unimproved and extremely poor by any standard. (R. 2272a, FF 73). The trial court correctly noted that "[n]o evidence at trial suggested that early residents transported their excess produce to eastern markets over a road system." (R. 2273a, FF 74). The trial court found that "the bulky nature of grain, flour, whiskey and lumber made long distance movement by road difficult and expensive even when it was possible." (R. 2273a, FF 75). The finding that "roads were so poor and not an option for the transportation of commerce" and that "roads were not a viable means for transporting goods" was supported by findings from several sources including the testimony of Dr. Heberling, her expert report, and several primary and secondary historical sources. (R. 2273a-2276a, FF 76-85).

Judge Kurtz also found that "the manner of transportation necessitated development of a vessel capable of navigation in the shallow, inland waters" of Pennsylvania. (R. 2276a-2277a, FF 86). Arks became the boat of choice for moving goods on inland rivers and revolutionized commercial traffic on these rivers. (R. 2277a-2278a, FF 87, 90). As Dr. Heberling noted, "Arks were basically roughly and strongly constructed boxes with flat bottoms and perpendicular sides, measuring sixty to ninety feet long, fifteen to twenty feet wide, and three to five feet high/deep." (R. 2277a, FF 89). Arks "could operate in water as shallow as twenty to twenty-four inches and were able to carry about *fifty tons of goods*." (R. 2277a, FF 89) (emphasis added).

The trial court found that the Little Juniata River was subject to public highway declarations[6] that are pertinent in this case. In 1790, the Pennsylvania Legislature "appointed

[6] A public highway declaration is an act passed by the Legislature declaring certain streams or rivers to be public highways for the passage of rafts, boats and other vessels, or to improve navigation. (R. 1071a, 1075a, 1076a).

Commissioners to examine and survey the waters of a number of Pennsylvania Rivers including the Juniata." (R. 2278a, FF 92). As a result of this action, the Legislature declared the portion of the Little Juniata River in Huntingdon County to be a public highway on February 5, 1794. (R. 2279a, FF 93-95). The declaration stated that the "Little Juniata, in the county of Huntingdon, from the mouth up to the head of Logan's Narrows, shall be … a public highway, for the passage of boats and rafts…; and it shall and may be lawful for the inhabitants, desirous of using the navigation of the said creek, to remove all natural and artificial obstructions, form the mouth thereof up the head of Logan's Narrows aforesaid, and to erect such slopes and locks at the mill-dams now built, as may be necessary for the passage of boats and rafts." (2279a, FF 94). There were two additional public highway declarations that were passed by the Legislature in 1808 and 1822 for the remainder of the Little Juniata River in Blair County. (R. 2280a, FF 96). The trial court found that if the declarations were intended to improve navigation of the Little Juniata, "a reasonable inference is that the river was in fact navigable." (R. 2281a-2282a, FF 104).

Judge Kurtz found that the land comprising Camp Espy Farms was owned by the Commonwealth on February 5, 1794, the date on which the public highway declaration was passed. (R. 2282a, FF 105). Title did not pass from the Commonwealth until three patents were issued in August/September 1803 to Joseph Heister. (R. 2282a, FF 106-107). These findings are supported by historical land records certified by the Pennsylvania Historical and Museum Commission and entered into evidence at trial. (R. 2282a-2284a, FF 107-120).

The General Assembly passed other acts that were pertinent to the issue of the Little Juniata River's navigability. (R. 2284a, FF 121). The Act of April 8, 1799 was passed "to prevent the erection of fish-dams and baskets in the rivers Schuylkill, Susquehanna and Juniata, and the Branches thereof…which have been, or hereafter may be, declared public highways."

(R. 2285a, FF 122-123). The Act of February 21, 1801 was passed to authorize the building of a bridge over the Little Juniata River, specifically noting that the "bridge shall not injure or impede the navigation of said river." (R. 2285a, FF 124-125). The trial court found that in "March 1803, the General Assembly passed an act 'to authorize any person or persons owning land adjoining navigable streams of water, declared public highways, to erect dams…for mills and other water works,'" but such dams "shall not obstruct or impede navigation of such stream." (R. 2285a-2286a, FF 126-127).

The court below found that the public highway declarations were recognized in the Dam Safety Act as relevant in defining the submerged lands of the Commonwealth. (R. 2286a, FF 128-129). Section 15 of the Act, 32 P.S. § 693.15, provides: "No permit shall be granted pursuant to this act for any project to occupy submerged lands of the Commonwealth in any navigable lake or river or stream declared to be a public highway unless the applicant has obtained an easement, right-of -way, license or lease pursuant to this act, or holds an estate or interest in such submerged lands pursuant to other specific authority from the General Assembly." (R. 2286a, FF 129). "DEP considers the declarations to be 'extremely compelling evidence' of navigability." (R. 2280a, FF 98-99). Judge Kurtz made several findings of fact regarding the breadth and scope of industry along the Little Juniata River, including at the town of Birmingham (which is upriver from the 1.3 mile section in dispute). John Cadwallader purchased a large tract of land on the Little Juniata River in 1788 that he platted and on which he founded the town of Birmingham in 1797. (R. 2287a, FF 132, 135). In 1788, Mr. Cadwallader's land contained a grist mill (for converting wheat to flour) and a saw mill, and he added a paper mill in 1795 and a distillery (for converting corn to whiskey) after that. (R. 2287a, FF 133- 134). Mr. Cadwallader advertised the town as a "manufacturing town…[s]ituated on the north bank of

the [Little Juniata] River, at the head of navigation…." (R. 2288a, FF 139). Although a manufacturing town the scope and size of Birmingham, England (the town's namesake) never materialized, the trial court found that "a substantial community nevertheless developed." (R. 2288a, FF 140). The trial court found that Mr. Cadwallader's plans for Birmingham included a public landing, and both the Huntingdon County histories by Mr. Lytle and Mr. Africa (relied upon by both historical experts) referenced arks being used to ship commerce from Birmingham down the Little Juniata River. (R. 2288a-2289a, FF 141-143). In its findings of fact, the trial court quoted the history by Mr. Lytle at length:

> During the interval between 1835 and 1846, Birmingham attained the zenith of its prosperity and a population of about four hundred. … The staple articles of trade were iron, lumber, shingles, hoop-pools [used for making barrels], hides and whiskey. There were three distilleries in the place at an early day, making the last mentioned article to their fullest capacity. *Many arks loaded with these commodities left the Public Landing and 'Laurel Spring wharf.'*"

(R. 2288a-2289a, FF 141) (emphasis in original finding of fact).[7]

Indeed, Judge Kurtz found that industry along the Little Juniata River was not limited to Birmingham. The court found that the following industries existed along the Little Juniata:

- A gristmill was built in 1774 at Barree. (R. 2289a, FF 144).
- There was a forge near Barree that became the Barree Ironworks. (R. 2289a, FF 145).
- Sawmills, gristmills, a chopping mill, a carding machine and a woolen mill were operated on properties near the confluence of the Little Juniata with the Frankstown Branch. (R. 2290a, FF 146).

[7] Milton Lytle published his history of Huntingdon County in 1876. Dr. Heberling noted that Lytle did write about the period during which he lived and talked to people who were alive at the time he was writing about. As such, his history does contain "primary source material." (R. 400a).

- A gristmill at the junction of Spruce Creek and the Little Juniata (which is in the disputed 1.3 mile stretch of river) was built in 1775. (R. 2290a, FF 147).
- A sawmill and distillery were added to the Spruce Creek property near the Little Juniata River. (Id.).
- In Antis Township, Blair County, Edward Bell built a gristmill, distillery and a sawmill after 1800 (in the area that is now Bellwood). (R. 2290a, FF 149).
- Edward Bell and his sons later developed Elizabeth Furnace and Mary Ann Forge on the Little Juniata River. (R. 2291a, FF 150).

Judge Kurtz credited Dr. Heberling's testimony that the "output of the industries along the Little Juniata was impressive given the population" and further credited her conclusion as a finding of fact:

> The Little Juniata River from the beginning, then, specifically attracted entrepreneurs who recognized the advantage of locating industries along a body of water that offered both the power to drive the machinery and transportation for the products made there. Gristmills, sawmills, carding mills, furnaces, forges, textile mills and a paper mill were located along the entire length of the river within easy launching distance of the boats, rafts and arks available to carry the mills' products to market.

(R. 2291a, FF 151-152). Judge Kurtz also used personal correspondence and newspapers to support his conclusion that the Little Juniata River was used to carry substantial commerce. An 1826 letter from Conrad Bucher (who owned property on the Frankstown Branch) noted that "more than 120 arks [were] built in [Huntingdon] county this winter, each of them will carry from 350 to 450 barrels of flour, but few of them will take on pig metal [iron]." (R. 2292a, FF 155). The trial court found that the letter verifies the use of rivers to transport commerce and noted Dr. Heberling's opinion that if there were ark traffic on one branch of the Juniata (the Frankstown Branch), there would have been ark traffic on the other branches as well (Little

Juniata and Raystown Branch). (R. 2293a, FF 157-158). The trial court further found that the "close proximity of the two branches [Little Juniata and Frankstown]—and their comparability support this opinion." (R. 2293a, FF 159).[8]

Judge Kurtz further found that *The Gazette*, a Huntingdon newspaper, made several mentions of navigation on the Juniata and its Branches:

- A March 8, 1826 article stated: "The rain which has fallen for the last eight days, has kept the Juniata in fine boating order—twenty-three, or twenty-four Arks laden with Flour & Pig Metal have passed this place on their way to Market, and a number of Arks have descended the Raystown Branch also." (R. 2294a, FF 166).
- A March 19, 1826 report noted: "Notwithstanding all the branches of the Juniata, in this County, were in good boating order for the five or six days, two Arks belonging to M. Wallace were totally lost, in the 'Little River', on Saturday last—cargoes principally saved. … The greater part of the surplus produce of this County has descended the river within the last few weeks, but unfortunately to a bad market." (R. 2295a, FF 167).
- A February 28, 1827 feature captioned as "Ark News" noted: "On Monday and Tuesday of this week, nine arks laden with flour, passed this place, in safety, destined for the Baltimore market." (R. 2295a-2296a, FF 169).

[8] The Appellants take issue with what they call Dr. Heberling's "assumption." (Appellants' Brief at 20-21). However, they do not note that the court specifically considered Dr. Heberling's testimony and made findings of fact consistent with the expert testimony she provided, nor do Appellants argue that these findings are not supported by substantial evidence. They also ignore Judge Kurtz' statement on page 53 of his January 29, 2007 Decision that "[t]he opinion of Dr. Heberling that the river was a highroad for commerce was persuasive and supported by a substantial body of evidence." (R. 2309a)

- A May 30, 1827 report stated: "The rain which fell last week, swelled our streams sufficiently high to carry off all the produce intended for an eastern market. There were not less than 50 arks, heavily laden, passed down the Juniata, from its several branches, in this and Bedford County." (R. 2296a, FF 170).

In conclusion, the trial court looked at the presentation of the evidence on commercial use by the Commonwealth in this case and found, "by a preponderance of the credible evidence", that "[d]uring the period after the Revolutionary War until 1850, the Little Juniata River was a highway of commerce for the surplus produce produced by the residents living in the Little Juniata watershed." (R. 2297a, FF 174-174.1).

Longstanding Commonwealth Claim of Ownership of Bed of Little Juniata River

Cathleen Curran Myers, Deputy Secretary for Water Management of DEP, testified that the beds of navigable waters in Pennsylvania are owned by the Commonwealth as submerged lands of the Commonwealth. (R. 170a, 176a, 179a-180a). DEP utilizes a list of all the "public highway declarations" issued by the Pennsylvania General Assembly, designating certain streams or rivers to be public highways for the passage of boats or rafts, or to improve navigation, and the passage of such Acts was evidence that the Legislature considered the subject stream or river to be navigable at law. (R. 181a-188a; 1071a-1072a, 1075a-1078a). For lands that were still owned by the Commonwealth at the time of the public highway declaration, a public highway declaration is conclusive. (R. 185a). If title to lands transferred out of the Commonwealth prior to a public highway declaration, such declaration is compelling evidence of "navigability in fact," for which title to the submerged lands is also in the Commonwealth. (R. 181a-185a). DEP and its predecessor agencies have entered into at least 15 submerged lands license agreements for the Little Juniata River dating from 1958 to the present, representing the

long-standing treatment by the Commonwealth agencies of the Little Juniata River as a submerged land of the Commonwealth. (R. 955a, R. 963a-964a; R. 189a-190a, 196a-197a; R. 2286a-2287a, FF 130-131).

The Commonwealth's claim of ownership of the bed of the Little Juniata River was further evidenced by its control and disposition of islands located in the Little Juniata River. The Act of April 8, 1785 authorized the sale of islands in the Susquehanna River and its branches, the Ohio River, the Allegheny River and the Delaware River. (R. 1082a-1091a). There are three major islands in the Little Juniata River for which warrants were issued and which were surveyed:

- Patent dated November 24, 1827 to Peter Swine, Island, 5 acres, 106 perches. (R. 962a; R. 1050a-1053a; R. 359a-362a).
- Warrant dated February 17, 1836 granted to Jonathan Dorsey, Island, 6 acres, 78 perches. (R. 962a; R. 1054a-1056a; R. 362a-363a).
- Warrant dated May 1, 1809 granted to Jacob Isset, Island, 7 acres, 13 perches. (R. 962a; R. 1057a-1059a; R. 363a-365a).

Additionally, the Act of April 11, 1848, P.L. 533, No. 379, provided for the purchase of mining patents in the streambeds "of any of the public navigable rivers of this Commonwealth." Prior to the Act's repeal, the Commonwealth issued at least one warrant for a mining patent in the Little Juniata River – the David Caldwell Warrant (Mining) of 100 acres within the bed of the Little Juniata River, which warrant was issued on October 10, 1848. (R. 963a; R. 1068a-1070a, R. 1103a-1114a; R. 374a-376a).

Transportation History of the Juniata Valley

The Juniata River as fed by the Little Juniata River and by the Frankstown Branch was a major transportation source. (R. 263a-264a; R. 1334a-1391a). The other principal inland rivers in Pennsylvania, such as the Allegheny, the Monongahela, the Ohio and the Susquehanna Rivers, all of which are navigable, presented the same natural conditions and difficulties as did the Little Juniata River. (R. 264a-265a; R. 1350a-1357a).

Due to the rugged topography of the Juniata Valley, travel over land was difficult and expensive if one were hauling goods. (R. 263a). Both Appellants' and Appellees' expert historical witnesses agreed that most roads in this period were absolutely terrible by modern standards. Even roads that were considered improved would be considered impassable today. (R. 277a; R. 814a; R. 1348a-1350a). Road building at the time was not an easy task, as it was basically hand labor, and money for road building was scarce as it was a local responsibility. (R. 308a). Roads were muddy, rutted and narrow and in a lot of cases the stumps were barely cut out of the road. (*Id.*). Travel on the roads was affected by weather and the seasons. When it was dry, they were too dusty; when it was wet, they were too muddy. The best time to use the roads was when they were snow packed and sleds could be used. (R. 309a).

Water transportation was cheaper than land transportation. (R. 295a). If given a choice, people used the river, and the main mode of transport was shallow draft boats, including arks and rafts. (R. 294a-299a; R. 1356a-1357a). Even with the development of the Pennsylvania canal in the 1829 to 1832, arks may have used the river rather than incur the expense of interrupting the journey to be placed on the canal depending on the destination. (R. 327a). These shallow draft boats were favored on Pennsylvania's inland rivers because they did not have to displace a lot of water and they did not need a deep channel in order to go. (R. 296a-297a). Barrels of goods are

easier to haul on an ark that is designed for such a purpose, as wagons did not carry very much, and the cost for overland transportation was very high. (R. 311a). Therefore, it did not make economic sense to move a lot of goods via wagon. (*Id.*).

An ark could carry between 300 and 450 barrels or between 1200 and 1500 bushels of grain or comparable cargo and a few people to steer it. (R. 323a; R. 1149a). Arks or flatboats were designed to draw no more that about 24 inches of water and could draw less than that depending on how heavily they were loaded. (R. 324a). Arks were typically built by farmers in the off season or merchants who were shipping cargo had them built for their goods. (R. 325a-326a).

Need for and Use of the Public Highway Declarations

The local residents sought public highway declarations for a number of reasons: (1) to promote basic economic development; (2) to provide greater control of navigation on the river, i.e., control mill dams and man-made obstructions; and (3) to provide a mechanism to make improvements to the river, *e.g.*, the removal of rocks and boulders. (R. 330a). Appellants' historical expert concurred that a public highway declaration by the General Assembly would be an advantage to a "town proprietor" and that a town's location "on navigable waters was a great advantage to the developer of that plan." (R. 818a). Indeed, the Public Highway Declarations did have an effect as Appellants' historical expert testified that the General Assembly appropriated money for river improvement that presumably included the Little Juniata. (R. 820a).

Moreover, the Act of March 23, 1803, regarding obstructions on navigable rivers, listed those rivers and provided a process for resolving and dealing with those obstructions, which were the result of public petitions to address impediments to navigation. (R. 337a-338a; R.

351a-353a; R. 1079a-1081a; R. 1129a-1140a; R. 1362a). The evidence shows that local residents made effective use of the public highway declarations and the Act of 1803 to complain about mill dams obstructing the navigation on the Little Juniata River. (R. 331a-335a; R. 1129a-1140a). When local residents complained about an obstruction, they petitioned the Court of Quarter Sessions, and the Court appointed three people to view the area and make a report. (R.331a). There were a number of petitions regarding the obstructions in the Little Juniata River, including a report by the three person panel that viewed 10 dams that were the subject of complaints and determined that seven of those dams did indeed obstruct navigation on the Little Juniata River. (R. 331a-335a; R. 1129a-1140a). In this respect, the public highway declarations were successful in that they gave local users of the Little Juniata River a recourse with respect to dams and fishing weirs on the river that were obstructing navigation. (R. 427a).

Industry Along the Little Juniata River and Use of the Little Juniata for Commerce

There was considerable historical evidence of the scope and sheer volume of industry along the Little Juniata River. For example, a newspaper article examined industry in Huntingdon County in 1826 in the townships located along the Little Juniata; including (county-wide) 120 saw mills, 62 grist mills and 84 distilleries. (R. 270a-273a; R. 1118a-1122a). A comparison of this industry and the historical map of the Little Juniata watershed show the industries located in townships that bordered the Little Juniata River in 1826:

a. Morris Township: 3 Grist Mills, 5 Saw Mills, 2 Distilleries, 1 Forge.

b. Tyrone Township: 3 Grist Mills, 6 Saw Mills, 8 Distilleries, 2 Furnaces, 1 Forge, 1 Nail Factory, 4 Tan Yards.

c. Porter Township: 1 Grist Mill, 3 Saw Mills, 6 Distilleries, 1 Tan Yard, 1 Carding Machine.

d. Franklin Township: 4 Grist Mills, 7 Saw Mills, 1 Fulling Mill, 2 Furnaces, 4 Forges.

e. West Township: 5 Grist Mills, 10 Saw Mills, 7 Distilleries, 2 Forges, 1 Tan Yard.

f. Barree Township: 4 Grist Mills, 18 Saw Mills, 3 Distilleries, 2 Fulling Mills, 1 Tan Yard.

g. Warriors Mark Township: 5 Grist Mills, 4 Saw Mills, 2 Distilleries, 1 Fulling Mill, 1 Slitting and Rolling Mill, 1 Mill for Cleaning Cloverseed, 1 Paper Mill, 1 Furnace now building.

h. Antis Township: 4 Grist Mills, 8 Saw Mills, 1 Distillery, 1 Powder Mill

(R. 1118a-1122a and R. 1158a, read together).

Review of census documents bears out the newspaper description of the Little Juniata Valley as an industrial center. The area along the Little Juniata River and Spruce Creek was the center of the world famous Juniata Iron, the center of the iron industry in Pennsylvania for a significant period during the 18th and 19th centuries. (R. 274a-275a; R. 1345a-1347a). There were a large number of iron works, both furnaces and forges, in the Juniata Valley as well as other kinds of mills and nail factories associated with the iron production of the region. (R. 275a).[9] The proliferation of grist mills and distilleries occurred because it was more effective and easier to convert grain to flour and corn to whiskey in order to transport it than to carry the raw materials. (R. 273a). Agricultural products were converted to whiskey, in part, because the product lasted longer in order to get to market. (R. 458a).

Dr. Heberling looked at the Census of Manufacturers from 1820 and 1850, in part, to survey the industrial concerns along the Little Juniata River. (R. 285a-286a). The federal census of manufacturers confirmed the existence of grist mills, saw mills and distilleries. (R. 284a-286a). During the late 18th and early 19th centuries, there developed a critical mass of industries

[9] Appellants' historical expert also stated that the historical evidence she relied upon showed that at least some pig iron was shipped down river on arks. (R. 902a-903a).

along the Little Juniata River. The output of these industries was impressive when viewed in the context of the times and the population of Huntingdon County. (R. 288a-290a).

The historical evidence presented to the trial court on this matter reveals that the average amount that a grist mill along the Little Juniata River produced was about 1200 barrels of flour a year. (R. 289a). Forges along the Little Juniata River handled about a thousand tons of iron in a year. (*Id.*). One saw mill along the Little Juniata River produced 60,000 board feet of lumber in a year. (*Id.*). The growth of industries around the Little Juniata was driven by the natural resources available, particularly water and timber. The Little Juniata was a natural highway for taking the products of these industries to market. (R. 291a-293a).

Dr. Heberling testified that the bulky materials produced by these mills, such as barrels of flour, barrels of whiskey and lumber, were easier to ship on the Little Juniata River. (R. 295a-296a). Pig iron, the product of the iron furnaces, was shipped by land and water. (R. 295a-296a; R. 381a; R. 847a; R. 1149a-1150a). The historical record in evidence before the trial court shows that the Juniata River and its branches carried grain, flour, whiskey, rye, corn, potatoes, hides, lumber, shingles, locust posts, hoop poles, peach brandy, apple whiskey and country gin in small amounts. (R. 1149a-1150a; R. 1334a-1391a; R. 381a, R. 466a-467a). All three Huntingdon County histories, by Jones, Lytle and Africa, reference arks and rafts going down the Little Juniata River at various times. (R. 297a-298a).

Birmingham

Appellants argue at length that the town of Birmingham was not a significant commercial center and that there is no evidence of a public landing on the banks of the Little Juniata River that could have been used to launch boats and arks. (Appellants' Brief at 17-20). The Appellants state that "[t]here is nothing in the record to support any finding except that

Birmingham never materialized as Mr. Cadwallader hoped it would, and that, at best, it was a 'local point' of interest to the limited number of residents who lived along the Little Juniata." (*Id.* at 18). This statement stands in sharp relief to the multiple findings of fact made by the trial court on this issue and is not credible as there is ample testimony and documentary evidence in the record to support the trial court's findings. (R. 2287a-2289a, FF 132-143).

The Commonwealth introduced specific evidence of the Birmingham landing's existence. The landing is referenced in the Birmingham Borough Council minutes from 1901 and again in 1902, wherein the Council directed that a survey be done of the location of Cadwallader's landing. (R. 396a-399a, 1151a-1155a, 1370a). According to the June 30, 1902 minutes, the survey was completed and the landing was located. (R. 1370a.) There was also a landing on the Little Juniata River at the Laurel Springs Paper Mill. (R. 307a). Dr. Heberling testified that both the Jones and Lytle county histories note that arks and rafts were consistently departing from the public landing in Birmingham and the landing at the Laurel Springs paper mill. (R. 387a).[10]

Some of the most telling evidence of the commercial use of the Little Juniata River comes from the Appellants' own exhibits introduced at trial. For example, Appellants own Exhibit 7 notes that "The rain which fell last week swelled our streams sufficiently high to carry off *all the produce intended for an eastern market*. There were not less than 50 arks, heavily laden, passed down the Juniata, *from its several branches*, in this and Bedford County." (R. 1460a-1461a; R. 422a) (emphasis added). Appellants' own Exhibit 4 notes that "Notwithstanding *all the branches of the Juniata*, in this county, were in good boating order for the last five or six days. Two arks belonging to M. Wallace were totally lost in the 'Little River'

[10] Dr. Heberling also testified that the Huntingdon County history by Jones was written in 1856 and that Jones "was alive during part of that period" of which he wrote. (R. 387a).

on Saturday last." (R. 1455a) (emphasis added). With respect to Mr. Wallace, the record before the trial court shows that, in 1823, Michael Wallace bought the Laurel Spring Paper Mill and other mills around Birmingham previously owned by Mr. Cadwallader and he built a new grist mill and added an oil mill, a plaster mill and another saw mill. (R. 386a; R. 419a; R. 1455a). Accordingly, Mr. Wallace's industrial establishments were on the Little Juniata River at Birmingham. The evidence with respect to the arks lost by Mr. Wallace on the Little Juniata and the evidence of his extensive industrial activity in Birmingham is in direct contradiction of Appellants' contention with respect to Birmingham and is substantial evidence supporting the trial court's finding that the Little Juniata supported commercial navigation

II. SUMMARY OF ARGUMENT

The issue before the Court is whether the bed of the Little Juniata River is owned by the Commonwealth. Commonwealth ownership of submerged lands is based upon navigability. Courts in Pennsylvania recognize three categories of navigable waters: 1) "Great Rivers"; 2) navigable at law and 3) navigable in fact. The Little Juniata River is both navigable at law and navigable in fact.

Legislative public highway declarations which predate title to riparian lands granted out by the Commonwealth, establish some rivers as navigable at law. Legislative declarations are dispositive as to the limits of a grantee's title unless an original land grant was made prior to the date of the declaration. The Little Juniata River is navigable at law because the public highway declaration of February 5, 1794 preceded the 1803 grant of land by the Commonwealth to Appellants' predecessor in title.

As to navigability in fact, Pennsylvania follows the federal rule: streams and rivers are navigable in fact where 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." Courts employ an historic test of navigability because the public's right to fish and otherwise use navigable waters vested unequivocally when the country was formed. The record evidence in this matter establishes that the Little Juniata was a highroad for commerce from the period just after the Revolutionary War through the construction of the Pennsylvania Railroad in the 1850's. The Little Juniata River is navigable in fact, and consequently the title of all riparian landowners along the river extends only to the low water mark. The lands below the low water mark are owned by the Commonwealth and held in trust for the public.

III. ARGUMENT

A. Introduction

The question of whether the public has the right to fish, boat and recreate in the 1.3-mile section of the Little Juniata River in dispute is dependent upon the ownership of the bed of the river. This case is therefore about who owns the bed of the Little Juniata River and in turn has the right to control access to the river. If the bed of the river is a submerged land owned by the Commonwealth, it is held in trust for the benefit of the public and the public may not be excluded. *Shrunk v. Schuylkill Navigation Co.*, 14 Serg. & Rawle 71 (Pa. 1826); *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463 (Pa. 1810); *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718 (Pa. Super. 1999), *petition for allowance of appeal denied*, 563 Pa. 702, 761 A.2d 550 (2000).

In Pennsylvania, it is well established that riverbed ownership turns on navigability. In 1810, the Pennsylvania Supreme Court first held navigability as the benchmark for determining ownership of the bed of Pennsylvania's rivers in the case of *Carson, supra*. So vital is the public's interest in the beds of its rivers that the *Carson* court determined that title to the beds of all rivers is *presumed* to be held by the Commonwealth. *Id.*[11]

From this foundation, the test in Pennsylvania evolved through the 19th and early 20th centuries to recognize the three categories of navigable waters that were correctly and succinctly described by the trial court. (R. 2300a – 2308a). First are the judicially declared "principal" or "great" rivers as described by the Pennsylvania Supreme Court in *Shrunk, supra*. These rivers are the "Ohio, Monongahela, Youghiogeny, Allegheny, Susquehanna, and its north and west,

[11] *See also Martin v. Waddell*, 41 U.S. 367, 411 (1842) (With regard to navigable waters held in trust by the sovereign, there is no presumption in favor of private rights; rather grants of interests by the sovereign to individuals from the public domain must be strictly construed).

branches, Juniata, Schuylkill, Lehigh and Delaware." *Id.* at 79. Second are those rivers that are navigable at law. *Leaf v. Pennsylvania Co.*, 268 Pa. 579, 112 A. 243 (1920). Third are those rivers that are navigable in fact. *Fulmer v. Williams*, 1 L.R.A. 603, 15 A. 726 (1888); *Cleveland & Pittsburgh Railroad Co. v. Pittsburgh Coal Co.*, 317 Pa. 395, 176 A. 7 (1935). In Pennsylvania, rivers that are navigable in fact are considered navigable as a matter of law. *Cleveland*; *Flanagan v. Philadelphia*, 42 Pa. 219 (1862).

The Commonwealth is not asserting that the Little Juniata River is one of the "great rivers" recognized by Courts in Pennsylvania as navigable. Great river status, however, is not a prerequisite to navigability in law or navigability in fact. *See Shrunk*, 14 Serg. & Rawle at 79; *Lehigh Falls*, 735 A.2d at 721. The Commonwealth Agencies' case has focused on the remaining two categories of navigability at law and navigability in fact. Both of these tests require the application of old law to old facts.

The Commonwealth Agencies are not trying to create new law. Nor are the Agencies attempting to modify the public status of the Little Juniata River. Relying on well-settled Pennsylvania law, the Commonwealth Agencies took the rare step of bringing an action in Court to protect the long established public rights in the Little Juniata River. It is indeed the Appellants who are urging this Court to change the test for riverbed ownership in Pennsylvania. And it is the Appellants who are asking this Court to convert to private ownership, for private gain, a river – which today is an exceptional, world-renowned fishery – that Pennsylvania government and the Pennsylvania citizens have treated as a navigable public highway for over 200 years. The trial court correctly applied the law in Pennsylvania and correctly found the Little Juniata River

is navigable at law and navigable in fact. For the reasons set forth below, this Court should affirm the trial court's opinions and order in their entirety. [12]

B. The Bed of the Little Juniata River is Owned by the Commonwealth and is Navigable at Law.

The trial court's conclusion that the Little Juniata River is navigable at law is supported by substantial evidence and is in accord with controlling precedent that provides that public highway declarations are dispositive of navigability for purposes of determining ownership of a riverbed where they precede the original land grant out of the Commonwealth. Appellants' attempts to manufacture a claim of equitable title are without support in law and are contrary to the facts of record. The trial court's order and memorandum dated June 13, 2007 provide a clear and concise discussion on navigability at law, the specific facts in this case, and the reasons why

[12] The Appellants assert that they have found no decision of any court holding that the Little Juniata River is one of the "great" rivers or that it is navigable in fact. (Brief at 32, n.7) They then cite *Commonwealth ex rel. Tyrone v. Stevens,* 178 Pa. 543, 36 A. 166 (1897) and *Glasgow v. Altoona,* 27 Pa. Super. 55 (1905). Although the Court in *Tyrone v. Stevens* stated that the Little Juniata was not a principal river of the Commonwealth, the decision does support a conclusion by this Court that the Little Juniata River is navigable in fact. The lower court in *Tyrone* found as fact that "the Little Juniata River . . . was a public stream or highway for the purpose of navigation" at the time of the grant of the original warrants to the properties adjoining the portion of the river which was the subject of the litigation. *Id.* at 549. In addition, the lower court stated that the Little Juniata River was declared a public highway by the legislature of Pennsylvania in 1808, "but that said Little Juniata River has not been used as a public highway for the passage of rafts, boats and other vessels for more than 30 years past." *Id*. Both of these findings of fact are significant in that they are statements by a Pennsylvania court that the Little Juniata River was used by "rafts, boats and other vessels" and was navigable in fact as early as the mid to late 1700s.

On the other hand, this Court should discount *Glasgow*, wherein the court described the Little Juniata River as non-navigable. It should be noted that this "description" of the Little Juniata River was merely a restatement of the allegations made by the plaintiff in the case, not a holding or ruling by the court or even dictum. Further, *Glasgow* was a nuisance case, and the navigability of the river was never an issue before the court.

Appellants' claim of prior equitable title must fail. Accordingly, the trial court's opinion should be affirmed.

1. Because the Commonwealth's land grant to the Appellants' predecessor in title was subject to a prior public highway declaration, title to the bed of the Little Juniata River is held by the Commonwealth.

To determine the extent of a riparian owner's title versus the Commonwealth's ownership, this Court must examine the original land grant out the Commonwealth from which a riparian owner's title derives. Legislative declarations of navigability, such as public highway declarations, are dispositive as to the limits of that title unless the original land grant was made prior to the date of the declaration. *Leaf, supra*.

As found by the court below, there are three public highway declaration acts concerning the Little Juniata River. (R. 2278a – 2280, FF 93 – 96). The only one relevant to this appeal and Appellants' claimed ownership by virtue of equitable title is the Act of February 5, 1794, declaring the Little Juniata River a public highway from its mouth to Logan's Narrows. (R. 2279a, FF 93 – 94). With that date in mind, this Court must examine the ownership of the disputed 1.3-mile section of the Little Juniata River.[13]

To determine title to the land along the disputed 1.3-mile section of the Little Juniata River, there are only two relevant ownerships that must be analyzed for purposes of this appeal.

[13] In order to simplify this task for the trial court, the Commonwealth Agencies prepared and attached to their Post-Hearing Brief a document that is entitled "Commonwealth – Comparison Table of Warrants and Surveys." (R. 3a). This Comparison Table sets forth not only the original warrants, dates of survey, dates of returns of survey, and dates of patents (where available), the relevancy of which is discussed in this brief, but also the current owners of the properties adjacent to the Little Juniata River in the disputed 1.3-mile section. Finally, the Table indicates whether or not any of the public highway declarations predated the warrant or return of survey, which is necessary for the Court to determine whether the Little Juniata River is navigable at law. The Table accurately reflects the Commonwealth's Exhibit Nos. 1 through 33 as introduced and admitted by the trial court.

Connie Espy's title to the property along the East/North bank derives from the Peter Young Warrant (R. 981a; letter C on R. 1115a), and the 25-acre Abraham Sells Warrant (R. 990a; letter D on R. 1115a). The 100-acre Abraham Sells Warrant (R. 999a) does not apply here because it does not border the Little Juniata River (letter E on R. 1115a). A review of both the Peter Young and the 25-acre Abraham Sells Warrants show that they are general warrants, and not descriptive, because they do not include a specific property description which would obviate the need for a survey. [14] Thus, the date of the return of survey is when title began, which in this case is September 5, 1803. As the trial court found, the public highway declaration of 1794 predates both the returns of surveys, thus providing evidence the Little Juniata River is navigable at law. (R. 2282a – 2284a, FF 101 –120; R 2355a – 2358a). Also on this side of the river, the Commonwealth's property known as the Rothrock State Forest derived from the Ann Brown Warrant (letter B on R. 1115a). Unfortunately, a copy of that warrant was not available, but it is referenced in the return of survey as March 5, 1794. The public highway declaration of February 5, 1794 also predates this warrant and the return of survey, thus providing further evidence the Little Juniata River is navigable at law.

The conclusion, therefore, is that in 1794, the date of passage of the first public highway declaration that the Little Juniata River was navigable, title to Camp Espy Farms was with the Commonwealth. Title to these lands did not pass from the Commonwealth to private hands until 1803 when Joseph Heister obtained patents from the Commonwealth. The trial court correctly concluded that "since the Pennsylvania Legislature declared the Little Juniata River to be a public highway nine years before the grant of the land, the riparian rights of the original patentee,

[14] The issue of a general versus descriptive warrant is discussed in more detail below.

Joseph Heister, were [a]ffected in that he acquired title only to the low water mark of the river." (R. 2354a).

This conclusion is supported by the Pennsylvania Supreme Court opinion in *Leaf*, *supra*.[15] The issue in *Leaf* was the navigability of Beaver Creek in Beaver County. The plaintiffs claimed ownership to the middle of the creek. The plaintiffs' title ran to 1794, and an act declaring Beaver Creek navigable was passed in 1798. Although the creek was found to be navigable in fact, the Supreme Court explained the relationship between the issue of navigability and acts of the General Assembly:

> It is only to small streams not navigable that the principle of ownership to the middle of the stream applies in Pennsylvania. In grants of vacant lands by the proprietors or the Commonwealth, streams not actually navigable, thus conveyed, belong to the owner of the tract; when such stream forms a boundary, the grantee acquires a title to the center, but the large rivers and principal streams, by nature navigable, belong to the commonwealth. This is contrary to the principles of the common law, where the grantee takes title to the middle of the river wherein the tide does not ebb and flow regardless of navigability, but in this state the rule of title to low-water mark applies to rivers actually navigable, or made so by the Legislature; in the former, the test is navigability in fact and the latter does not apply to grants made prior to legislative action.

Leaf, at 582, 112 A. at 243-44 (internal citations omitted). As noted by the trial court, the Pennsylvania Supreme Court in *Leaf* "clearly recognized the right of the Legislature to declare streams navigable. Accordingly, there is, as the Commonwealth asserts, another category of streams that are navigable as a matter of law."[16] (R. 2303a). Legislative declarations of navigability, such as public highway declarations, are dispositive as to the limits of that title

[15] Despite its direct relevance to their argument and the trial court's reliance on *Leaf*, the Appellants fail to reference this case in their brief. (Appellants' Brief at 37-39).

[16] When the trial court speaks of another category of streams that are navigable at law, it is referring to a category in addition to the "principal" or "great" rivers.

unless the original land grant was made prior to the date of the declaration.[17] *Leaf*. In other words, a public highway declaration that predates a grant of land establishes navigability at law.[18]

In summary, the property owned and controlled by Appellee DCNR and the Appellants through Connie Espy was surveyed and patented *after* the public highway declaration of February 5, 1794, and thus the Little Juniata River is navigable at law and the bed is owned by the Commonwealth. The trial court's opinion on this issue accordingly should be affirmed.

2. Appellants' equitable title argument must fail because Appellants failed to raise it at any time prior to argument on the parties' Proposed Findings of Fact and Conclusions of Law**.**

Appellants' assertion that an equitable interest in property somehow predated the 1794 public highway declaration must fail because Appellants failed to raise it at any time prior to *argument* on the parties' Proposed Findings of Fact and Conclusions of Law.

Pa. R.C.P. No. 227.1(b) (1)(2) provides as follows:

> (b) Except as otherwise provided by Pa. R.E. 103(a), post trial relief may not be granted unless the grounds therefor,

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[17] The Appellants' reliance on the Pennsylvania Superior Court cases, *Pennsylvania Power & Light Co. v. Maritime Management, Inc.*, 693 A.2d 592, 595 (Pa. Super. 1997), *petition for allowance of appeal denied*, 550 Pa. 708, 705 A.2d 1310 (1997) and *Commonwealth v. Foster*, 36 Pa. Super. 433, 1908 WL 3714 at *2 (Pa. Super. 1908), is inappropriate. Both cases assume that the owners had title to the center of the respective streams/rivers, which would be the case where the declaration of navigability *post*dates the transfer of the public land to a private landowner. In this instant case, the riparian landowner never took title to the center of the stream/river in the first place as the public highway declaration *pre*dated the transfer of the public land to a private landowner.

[18] As to grants made prior to a declaration, legislative action is still relevant as to whether a stream is navigable in fact. *Leaf, supra. See also McKeen v. Delaware Division Canal Co.*, 49 Pa. 424 (1865); *Lehigh Falls, supra.*

> (1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and
>
> (2) are specified in the motion. The motion shall state how the grounds were asserted in pretrial motions or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

A review of Appellants' pre-trial and post-trial filings in this matter shows that the equitable title question was not raised in any manner until argument on the parties' Proposed Findings of Fact and Conclusions of Law. Appellants raised this issue at that argument notwithstanding the fact that it was not raised or even mentioned in their Proposed Findings or Conclusions of Law or in the supporting Memorandum. As such, Appellants' Motion for Post-Trial Relief understandably was silent (contrary to Rule 227.1(b)(2)) as to how this issue was asserted pre-trial or at trial. A review of the trial transcript shows that this silence was due to Appellants' failure to raise this issue. Similarly, Appellants state here that only the issue of "navigability" generally was raised below, and specifically mention only their assertion that the test for navigability in fact is a current/prospective test rather than an historic test. (Appellants' Brief at 25-26). The absence of any mention of the "equitable title" issue is telling.

The importance of the requirement in Rule 227.1(b)(1)(2) is reinforced by the 1983 comment regarding the promulgation of the rule. In the comment, the Rules Committee states that that "[s]ubdivision (b)(1) incorporates into the rule the principle of *Dilliplaine v. Lehigh Valley Trust Co*., 457 Pa. 255, 322 A.2d 114 (1971), that basic and fundamental error is not a ground for a new trial in the absence of a timely objection at the trial." The Committee goes on to note that a ground for new trial or for judgment notwithstanding the verdict may not be raised for the first time in a motion for post trial relief. Rather, it must be "raised timely in pre-trial proceedings or during the trial," so that the trial court has the opportunity to correct the error.

The Committee further notes that under Subdivision (b)(2), a post-trial motion "must state the specific grounds for the relief sought and 'how the grounds were asserted in pre-trial proceedings or at trial.'" Applying this principle to circumstances similar to this matter, the Superior Court in *Hall v. Jackson*, 788 A.2d 390 (Pa. Super. 2001), held that the defendant doctor's attempt to rely on the hospital's post-trial motion to reserve the issue of whether the trial court erred in its jury instructions in a wrongful death action failed where the hospital waived that issue when it failed to specify in its post-trial motion how the grounds were asserted at trial.

The plain language of the Rule, the Committee's comment, and decisions such as *Dilliplane* and *Hall* instruct that Appellants' failure to raise the equitable title issue at any time prior to *argument* on Proposed Findings and Conclusions of Law, and their failure to specify in their Motion for Post-Trial Relief where that issue was raised pretrial or at trial results in the failure to preserve this issue for review. Under these circumstances, and in accord with Pa. R.C.P. No. 227.1(b), this Court should find that Appellants have waived the issue of an equitable interest in property that some how predated the 1794 public highway declaration.

3. Appellants' equitable title argument must fail because equitable title did not pass to their predecessor in title upon issuance of a general warrant.

Recognizing that the patent for Appellants' property was issued in 1803, nine years after the pertinent declaration of the Little Juniata's navigability by the General Assembly, the Appellants raised a new argument that "equitable title" passed upon the issuance of the warrants. The trial court found the following facts pertinent to this argument:

1. Mr. Heister in 1803 obtained from the Pennsylvania Land Office patents (deeds) for three adjacent properties that bordered the Little Juniata River in Huntingdon County.
2. As to one of these properties (85 acres), a Peter Young applied for a warrant on August 1, 1767. The land was surveyed for Mr. Young October 20, 1767. Mr. Young did nothing more with respect to this property.

3. As to the second of the three properties, an Abraham Sells obtained a warrant for twenty-five acres on February 22, 1785. This land was surveyed May 28, 1791. As to this parcel, Mr. Sells did nothing more.

4. Finally, as for the third property, again Abraham Sells obtained [a] warrant for 100 acres on June 7, 1792. This land was not surveyed until October 30, 1798. Alike his first warrant, Mr. Sells did not return the survey to the Land Office.

(R. 2355a-2356a). Relying on *Keller v. Powell*, 142 Pa. 96, 103, 21 A. 796 (1891), the Appellants argue that the application for a warrant created "an equitable interest in the property that could not be divested by any public highway declaration." (Appellants' Brief at 39). As noted by the trial court, the decision in *Keller* "provides no factual basis and does not address the issue of delay in the process of land acquisition." (R. 2357a).[19] The Appellants' reliance on *Keller* is misplaced and fails to incorporate the body of case law dealing with warrants, surveys and patents.

The law regarding the acquisition of land by way of warrants, surveys, return of surveys, and patents is settled. Generally speaking,

> The public lands were sold by the state in a manner that is well known to the profession. A person desiring to buy made his 'application' in writing, stating what land he wished, and as nearly as possible where it was located. On receiving this application, a warrant issued from the land office, directed to the proper deputy surveyor, authorizing and requiring him to survey and lay off for the applicant the land applied for. This was taken to the deputy, who went upon the land, made a survey of the tract in obedience to it, and then returned it, with a copy or description of the survey so made, to the land office. When this return was accepted, and the land paid for, the state made its deed, called a 'patent,' conveying the tract to the applicant or his vendee.

Ferguson v. Bloom, 144 Pa. 549, 557, 23 A. 49, 49 (1891).

[19] What facts are provided by the Court in *Keller v. Powell*, *supra*, make the case inapposite. The court describes a "descriptive warrant" where "its boundaries are fully set forth therein" as providing equitable title. However, an examination of the warrants at issue in this case reveals that they were not descriptive but rather were general warrants. (R. 981a-1008a).

The warrant issued to the applicant for public lands, upon payment of purchase money, is an authority from the Commonwealth to survey vacant land. *Tryon v. Munson,* 77 Pa. 250 (1875). It is the first document that is needed in order to purchase property owned by the Commonwealth, but the warrant is not the document that conveys legal title.

> [The warrant] is evidence of a contract between the state and the warrantee, to permit him to elect unappropriated land to be surveyed where he shall designate. Though as a contract or permission, paid for, to elect, it is not subject to an adverse levy, either as land or a chose in action; it confers on the owner of the warrant a power to take land where he shall elect to have it. When the election is consummated by a survey, return and acceptance, the title is consummated, and has the effect of a legal title, the patent being of course.

Id.

In order to validate their claim to public lands, warrant holders had to have a survey performed pursuant to the warrant and have the survey returned to the Land Office.

> When it is said that a precisely descriptive warrant gives title from its date, and a vague one from the time of survey, the qualification is sometimes added and always to be understood, *if it be followed up with reasonable diligence*. Whether descriptive or vague, the warrant imposes on the holder the duty of having it surveyed and returned into the surveyor-general's office in a reasonable time, and his supineness is punished by postponing him to a more diligent, though subsequent, claimant. … [A] delay for seven years has been accounted ground of a legal presumption of abandonment. … Payment of purchase-money does not excuse a man from making survey and return of his warrant. … An applicant is not bound to look beyond the land office; and, although a warrant may be issued, and money paid, yet if there be no return of survey in the office, the title under a junior warrant will be good. If he neglects to see to the return of survey for a longer period than seven years, it is at his own peril. … A knowledge of a warrant being issued is nothing, for the applicant has a right to act on the assurance arising from a want of a return of survey, that the original warrantee, for some cause, has abandoned his title. … It is not till he makes return of his survey that the State can know whether she is paid for all the land appropriated, nor what its location and boundaries. … The payment of purchase-money and office fees does not excuse the want of a survey and return.

Emery v. Spencer, 23 Pa. 271, 275-277 (1854) (internal quotations and citations omitted).

The final step in acquiring public lands was the issuance of a patent, which is the "deed of the state to its grantee." *Bushey v. South Mountain M & I Co.*, 136 Pa. 541, 552, 20 A. 549, (1890).

> The patent conveys the full legal title of the state, and is, as to her, a merger of the previous proceedings, and a waiver of informalities. It is, moreover, full and express notice to every person whatever that the land has been granted away, and is not vacant. The patent is therefore prima facie evidence of title and of survey.

Id. (internal quotations and citations omitted). A warrant is not a deed, and title does not necessarily begin with its issuance, but rather title is perfected by the return of survey and the issuance of the patent. *See Fred E. Young, Inc. v. Brush Mountain Sportsmen's Ass'n*, 697 A.2d 984, 988 (Pa. Super. 1997) ("the warrant imposes on the holder the duty of having it surveyed and returned to the Surveyor-General's Office in a reasonable time.") (R. 546a-548a). "A warrant and survey, returned and accepted, on which the purchase-money has been paid, confers a perfect title against all the world but the Commonwealth, which has itself the legal title only as security for the patenting fees." *Consolidation Coal Co. v. Friedline,* 3 A.2d 200, 201 (Pa. Super. 1938). Much depends on the date of the return of survey, in the event there were two warrants for the same property, which might cause an overlap or encroachment (situations with junior and senior warrants) where the earlier survey would generally hold. *See Emery, supra*. (R. 548a).

Title also depends not only on when the survey was returned, but if the warrant was a descriptive or a general warrant. A precisely descriptive warrant[20] gives title from its date.

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[20] The Pennsylvania Supreme Court in *Keller v. Powell, supra*, explained:

> [With a descriptive warrant,] its boundaries are fully set forth therein. A descriptive warrant gives a right of entry. The warrantee has an equitable title, commencing with the date of the warrant. His title bears a close analogy to that of a vendee under articles of agreement. A descriptive warrant, and payment of

Cassidy v. Conway, 25 Pa. 240, 1 Casey 240 (1855). However, for general warrants where the description is not specific, the title dates from the return of survey.

Furthermore, the law is well settled that deeds speak for themselves and their construction cannot be varied or changed by parol. *Meyers v. Robinson,* 74 Pa. 269 (1874). A review of the metes and bounds description in the original warrants, return of surveys as well as the current deeds in the relevant titles under review provide further evidence as to ownership along the Little Juniata River. Clearly these warrants were not descriptive warrants, referring only to general acreage in a certain township, and therefore no equitable title could possibly have attached at the time the application for warrant was entered.

Accordingly, the issuance of the warrants to Abraham Sells and Peter Young did nothing to confer title to those gentlemen. As found by the trial court, Mr. Sells and Mr. Young "abandoned any interest they had in the real estate." (R. 2357a). *See also Emery, supra.* Title was not perfected until 1803 when Joseph Heister obtained the patents. *Bushey, supra*. Appellants' argument that equitable title to this property passed prior to the 1794 public highway declaration is without merit and should be rejected.

In conclusion, the Commonwealth Agencies assert that based on the trial court's findings, all of which are substantially supported by the evidence in the record concerning the original warrants, surveys, returns of surveys, and patents, the undisputed title to the adjacent lands at issue, the dates of the public highway declarations predating the returns of surveys, the non-

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> part of the purchase money, gives an equitable interest in the land from its date, which can only be divested by conveyance or twenty-one years' adverse possession. When the patent issues, the warrantee becomes possessed of the full legal title, and it relates back to the inception of his equitable title. *Keller* at 103, 21 A.2d at 796 (citations omitted).

descriptive warrants at issue, as well as the evidence concerning the islands and mining patents within the Little Juniata River,[21] there is ample support for a conclusion that the bed of the Little Juniata River is navigable at law and therefore owned by the Commonwealth. To conclude otherwise would be to reverse over 200 years of continuous and unchallenged ownership of the bed of the Little Juniata River by the Commonwealth.

C. The Little Juniata River Is Navigable in Fact.

The trial court correctly concluded that "[t]he determination that the river was navigable in fact in the late 18th and early 19th century is conclusive today on the question of the extent of the Defendants' riparian rights." (R. 2311a). The Court further concluded that because the Little Juniata River meets the test for navigability in fact, the title of all riparian owners of property along the river extends only to the low water mark. (R. 2305a, 2312a). The trial court's application of the law and its factual finding of historic navigability are correct and should be upheld by this Court.

The navigability in fact test in Pennsylvania dates back to 1888. Citing earlier Pennsylvania Supreme Court decisions from 1810 and 1862, the navigability in fact test was set forth by the Pennsylvania Supreme Court in *Fulmer*, *supra*. The *Fulmer* Court explained:

> On this continent the early settlers found large rivers with navigable tributaries, forming vast systems of internal communication, extending above the reach of the tide water. The common-law definition of a navigable river was unsuited to this state of things, and seems never to have been adopted in Pennsylvania; on the contrary, *navigability in fact* was made the test by which the character of a stream, as public or private, was determined, and the great but tideless rivers of the state were held to be navigable rivers, public highways, belonging to the state, and held for the use of all her citizens. The beds of such rivers, between the lines of ordinary low water, on their opposite sides, have not

[21] The evidence concerning ownership of the islands in the Little Juniata River and the mining patents and their support for the Commonwealth's ownership of the bed of the River was discussed in detail in the Commonwealth Agencies' post-hearing brief (R. 2221a – 2222a) and will not be repeated here.

> been granted out by the commonwealth to individuals, but continue to be held and controlled by and for the public. *Carson v. Blazer*, 2 Binn 475 [Pa. 1810]; *Flanagan v. City of Philadelphia*, 42 Pa. 219 [Pa. 1862].

Id. at 206, 15 A. at 727 (emphasis added).

In 1935, in *Cleveland, supra*, the Pennsylvania Supreme Court specifically adopted as the test for determining navigability in fact, the test set forth in the 1870 United States Supreme Court decision, *The Daniel Ball*, 77 U. S. 577 (1870), which provided:

> '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 conditions, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.' *The Daniel Ball*, at p. 563, 19 L.Ed. 999.

Cleveland at 9. The focus of this inquiry is during the time of the "early settlers" when the rivers and their "navigable tributaries" were an essential part of the "vast system of internal communications" for the Commonwealth and for the nation. *Fulmer, supra*.

1. The trial court correctly employed an historic test when deciding the navigability of the Little Juniata River.

In support of their argument that the trial court erred in declaring the Little Juniata River to be navigable in fact, the Appellants assert that the proper test for determining navigability does not permit the type of historical inquiry made by the trial court but rather requires an examination of the current commercial use of the river. (Appellants' Brief at 29 – 31). This Court should reject the Appellants' argument for two reasons. First, this issue has been waived by the Appellants. Second, this contention is contrary to and incompatible with settled law.

a. Appellants waived the argument that the test for navigability in fact is not an historic test, but rather a contemporary test.

This Court must reject the argument because it was not preserved in the proceedings before the court below and thus has been waived. *See P.S. Hysong v. Lewicki*, 931 A.2d 63, 66-

67 (Pa. Cmwlth. 2007); *Siculietano v. K&B Amusements Corp.*, 915 A.2d 130, 132-133 (Pa. Super. 2006). The Appellants did raise this argument in their preliminary objections. The question was briefed in the filings related to the preliminary objections and was the subject of extensive debate during the argument on the preliminary objections. Thereafter, the trial court denied the preliminary objections, and the Appellants subsequently did not assert the issue. Accordingly, the trial court did not directly address the issue in its opinion. The trial court took as established law that the test for navigability in Pennsylvania is an historic test. On this foundation, the court considered and in turn concluded that the Little Juniata River is a legally navigable water of the Commonwealth. Specifically, the court concluded that "[t]he determination that the river was *navigable in fact in the late eighteenth and early nineteenth century is conclusive today* on the question of the extent of the Defendants' riparian rights." (R. 2311a) (emphasis added). The court's conclusion thus clearly referenced the historic nature of the navigability in fact test. To preserve the argument for appeal, Appellants were obligated to assert in their post trial motions their objection to the historic test. The Appellants failed to do so (R. 2315a-2319a). Their failure to preserve the argument precludes the Appellants from raising this issue now. *See Hysong; Siculietano, supra.*

b. Case law supports that the proper test for evaluating navigability in fact is an historic one.

This Court must reject the Appellants' argument that the test of navigability is solely a contemporary test because it is contrary to the law. Pennsylvania's courts, in determining navigability in fact, have necessarily utilized an historic test because as the United States Supreme Court in *Martin, supra*, 41 U.S. at 410, explained, title to navigable waters vested unequivocally in the sovereign states for the benefit of the public at the time of our nation's independence from England. In *Dunlap v. Commonwealth*, 108 Pa. 607, 614 (1885), the

Pennsylvania Supreme Court confirmed that "[w]hen the Revolution took place the states themselves became sovereign, and as such possessed the absolute right over all their navigable waters and the soils under them."[22] Pennsylvania Courts have further held that the public rights in navigable waters may in fact run from a time before the Revolution. In *Carson, supra,* the Pennsylvania Supreme Court in fact looked back to the time when William Penn was granted the charter to Pennsylvania as the time when title to navigable waters vested in the public.

There are several United States Supreme Court cases that provide support for the trial court's application of an historic test of navigability in fact. In 1921, the United States Supreme Court in *Economy Light and Power Company v. United States*, 256 U.S. 113 (1921), rejected the proposition that *The Daniel Ball* test for navigability was a contemporary test. Citing the lower court, the Court found dispositive the findings that although the DesPlaines River in Illinois was not actually navigable within memory of living men, it had been used for navigation and trading from about 1675 (by fur traders using canoes and other boats having light draft) to 1825. *Id.* at 117. Based upon this historic use, the Court concluded that the river was navigable for purposes of determining ownership of the riverbed. *Id.* at 122. In so holding, the Court concluded that disuse of the river for commerce does not divest the sovereign of ownership. *Id.* at 124.

In 1931, the United States Supreme Court in *U.S. v. Utah*, 283 U.S. 64 (1931), confirmed the necessarily historic nature of the proper test for determining navigability, consistent with the type of historical inquiry made by the trial court below. The Court explained that "[i]n accordance with the constitutional principle of equality of states, the title to the beds of rivers

[22]In 1894, the United States Supreme Court in *Shively v. Bowlby*, 152 U.S. 1 (1894) acknowledged the Pennsylvania test: "In Pennsylvania, . . . upon the Revolution, the State succeeded to the rights, both of the Crown and of the Proprietors in the navigable waters and the soil under them." 152 U.S. at 23.

within Utah passed to that state when it was admitted to the Union, *if the rivers were then navigable*." *Id.* at 75 (emphasis added). The Court went on to specifically hold that "the extent of existing commerce is not the test." *Id.* at 82.

Finally, and more recently, in 1971, the United States Supreme Court in *Utah v. United States*, 403 U.S. 9 (1971), addressed the navigability of the Great Salt Lake. Citing *Martin v. Waddell*, *Shively v. Bowlby* and *U.S. v. Utah*, the Court explained that "[t]he operation of the 'equal footing' principle has accorded newly admitted States the same property interests in submerged lands as was enjoyed by the 13 original states as successors to the British crown. . . This means that Utah's claim to the original bed of the Great Salt Lake – whether now submerged or exposed – *ultimately rests on whether the lake was navigable at the time of Utah's admission*." *Id.* at 10 (emphasis added).

While not binding, the Commonwealth Agencies also find persuasive the Attorney General Opinion regarding Public Service Lines Across Rivers, 24 Pa. D&C 332, 1935 WL 7805 (August 13, 1935). Attorney General Margiotti provided his opinion to the Chairman of the Water and Power Resources Board regarding the Board's authority "to impose a reasonable charge upon public service corporations in granting permits to cross the stream beds of the waters of this Commonwealth, either by submerged pipe lines in the river bed or by electric lines crossing overhead." *Id.* at 333. The Attorney General concluded that the Commonwealth could claim title to stream beds of all water courses, "not only naturally navigable, but such as have been made navigable by artificial means." *Id.* at 335. Most pertinently, the Attorney General concluded:

> The Commonwealth may also claim title to stream beds, which, though originally navigable years ago, have become non-navigable by reason of accumulated deposits…. *This is because ownership of the stream beds of such water courses*

> *must be determined according to the navigability of the stream at the time the lands bordering thereon were granted to private owners*.

Id. (emphasis added). The Commonwealth "cannot lose title to the beds of rivers once navigable, no matter what their present status may be." *Id.*

c. The use of the present tense in the applicable precedent does not change the navigability test.

The Appellants argue that *Cleveland, supra*, and *Lakeside Park Co. v. Forsmark*, 396 Pa. 389, 153 A.2d 486 (1959) articulate the standard for determining navigability in the present tense and therefore the appropriate test for navigability is a contemporary one. Other than providing support for the Appellants' grammatical interpretation, neither *Cleveland* nor *Lakeside Park* establishes a contemporary navigation only test for determining navigability in fact. The Appellants' strained reading of this case law fails to acknowledge that the applicable precedent in this case is nearly two centuries old. The binding precedent utilizes the present tense because the relevant timeframe for evaluation of navigability with regard to title to riverbeds was also at least two centuries ago. *Carson* was decided by the Pennsylvania Supreme Court in 1810. The *Carson* Court established navigability as the test for riverbed ownership.[23] As such, this "present tense" language supports the trial court's inquiry into events that took place hundreds of years ago.[24]

[23] The substantial evidence of record demonstrates that in 1810, the Little Juniata River was among the rivers used for commerce.

[24] The Appellants cite *Lakeside Park* as the example of the use of the "present tense" in articulating test for navigability. However, the Commonwealth Agencies note that the *Lakeside* Court in fact acknowledged the historic nature of the test of navigability in its discussion of *Conneaut Lake Ice Co. v. Quigley*, 74 A. 648 (Pa. 1909). *Id.* at 488.

For the foregoing reasons, the Appellants' contemporary test argument should be rejected as inconsistent with the law and as waived.

2. The substantial evidence in the record supports the trial court's conclusion that the Little Juniata River was historically used for commerce.

The Appellants' discussion of the historic test is not consistent with Pennsylvania or federal law construing the test for navigability in fact. Appellants have pieced together dissected fragments from the cases *Cleveland* and *Lakeside Park,*[25] to formulate a new, very narrow test for navigability in fact. Appellants in turn assert that under their test, the record in this case does not establish navigability.

Relying on case *United States v. Appalachian Electric Power*, 311 U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1940), the trial court below correctly rejected the Appellants' interpretation of the test for navigability. (R. 2359a – 2364a). It is telling that in their brief, the Appellants do not cite or discuss *Appalachian Electric*, the case that forms the primary basis for the trial court's rationale in denying their post-trial motions. In *Appalachian Electric*, the United States Supreme Court recognized that "[t]he legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances." *Appalachian Electric* at 404. The trial court found particularly compelling the *Appalachian Electric* Court's strong endorsement of an expansive reading of the test of navigability rather than a restrictive one. (R. 2362a). The trial court's rejection of Appellants' restrictive test of navigability and its conclusion that the Little Juniata River is navigable in fact

[25] The Commonwealth Agencies do not dispute that these cases articulate the appropriate standard in Pennsylvania. It is the Appellants' interpretation of these cases – which the trial court rejected – that the Commonwealth Agencies dispute.

is supported by substantial evidence, is in accord with controlling precedent and should be affirmed by this court.

a. The law does not require evidence of transportation of people in quantity.

The Appellants assert that the test for navigability requires that a river must have been used or have been susceptible of being used for the "transport *in quantity* of goods and *people*," *Lakeside Park* at 396, 153 A.2d at 489 (emphasis added), and that nothing in the record satisfies the requirement that the Little Juniata was ever used to transport people in quantity. (Appellants' Brief at 32). Relying upon the trial court's finding that "[n]o evidence indicated that the river was ever used to transport passengers," (R. 2298a), the Appellants maintain that the trial court's factual findings do not establish that the Little Juniata River was ever used to transport people in quantity. The Appellants' argument is basically that in order to be navigable, there must be commercial passenger traffic in addition to the movement of goods (i.e., movement of people "in quantity").[26]

The Commonwealth agencies never claimed that there was commercial passenger traffic on the Little Juniata River, and accordingly, the trial court did not so find. Notwithstanding this fact, however, people did move down the river with the arks. As Dr. Heberling testified, an ark, in addition to carrying its considerable cargo, had a few people on board to steer it. (R. 323a). Indeed, Dr. Heberling testified that roads were developed along the river as a way for people to get back after they had sold off their ark at the end of their journey. (R. 322a). It is the position

[26] It should be noted that the Appellants' assumption that "in quantity" qualifies both goods and people is a grammatical interpretation. However, such a conclusion is not clear from the case from the language used or the facts of the case.

of the Commonwealth agencies that the movement of passengers is not a prerequisite for a determination of navigability in fact.

The movement in quantity of goods and people was introduced by the Pennsylvania Supreme Court in *Forsmark* in 1954. While other cases repeat the statement in *Forsmark*, no case has held that a stream or river is not navigable because of a lack of commercial passenger traffic or a lack of the movement of people in quantity. A closer of examination of *Forsmark* is necessary to determine the scope of this statement.

In *Forsmark*, the Supreme Court decided the navigability of Sandy Lake, a 149.7-acre lake in Mercer County "with no well defined outlet." *Id.* at 390-91, 153 A.2d at 487. The Court began its analysis by noting that the question of navigability should be somewhat different between lakes and rivers. *Id.* at 391, 153 A.2d at 487 ("This is good law for rivers but must be accepted with caution for lakes."). The Court further explained this difference as follows:

> The difference in modes of trade and travel upon a long thin roadway of water joining regions and communities, which a river is, and upon a small lake, is obvious. Commerce may exist on both and it may move on both, but such movement on a 150-acre lake, unless it is an adequate link in a chain of commercial intercourse, remains local and insignificant in comparison with the argosies of transport that move along the great rivers of the Commonwealth.

Id. at 487, 153 A.2d at 392. The Court in *Forsmark* dismissed the defendant's navigability argument:

> Defendant tries to make a commercial highway of Sandy Lake, out of the long-vanished steamer, with its two-foot draft and its capacity of 35 persons, that hurried back and forth across the mile of water, or its barge that might hold a hundred people for dancing. This falls far short of qualifying as a highway for commerce or a link of a chain, within the reasonable intendment of that phrase. People came to stay and enjoy the lake as an end in itself, not as an incident in a journey along a trade-route.

Id. at 487-88, 153 A.2d at 392. The Court furthered its analysis by noting that "[t]here is a definite body of lake way in Pennsylvania," and concluded that it was extremely rare for lakes to

meet the criteria for navigability. *Id.* at 488, 153 A.2d at 392-393.[27] Finally, in explaining the concept of a "broad highroad for commerce [for] the transport in quantity of goods and people," the Supreme Court noted that the "basic difference is that between a trade-route and a point of interest."

While the evidence showed that Sandy Lake was a point of interest with "no well defined outlet" that would allow it to be a "trade-route" or even a "link in a chain of commercial intercourse," the evidence presented to the trial court in this matter paints a far different picture of the Little Juniata River. The Little Juniata River was an important part of the regional transportation network for Huntingdon County and the only economical way to take goods to eastern markets. (R. 307a-311a). With regard to the Little Juniata River, the evidence showed and Judge Kurtz found that the "Little Juniata River from the beginning, then, specifically attracted entrepreneurs who recognized the advantage of locating rural industries along a body of water that offered both the power to drive the machinery and the transportation for the products made there. Gristmills, sawmills, carding mills, furnaces, forges, textile mills, and a paper mill were located along the entire length of the river within easy launching distance of the boats, rafts, and arks available to carry the mills' products to market." (R. 1347a; R. 2291a, FF 152).

Finally, it is curious that the Appellants' argument assumes that the Little Juniata River must have been used absolutely to transport people in quantity because the very sliver of text relied upon by the Appellants states "used or usable" or as the Appellants state in their brief "susceptible of being used" for the "transport in quantity of goods and people." *Forsmark*, at 396, 153 A.2d at 489. (Appellants' Brief at 32). Given the volume of evidence presented on the

[27] In addition to the *Lakeside v. Forsmark* lake case, the Appellants rely on several other "lake" cases, *Conneaut Lake Ice Co. v. Quigley*, *supra*; *Mountain Properties Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096 (Pa. Super. 2001).

sheer quantity of commerce (goods) that went down the Little Juniata River, it would appear that the river was "susceptible of being used" to transport people, too.

b. The substantial evidence in the record establishes that goods in quantity were transported on the Little Juniata River.

The Appellants assert that the trial court's factual findings do not establish that the Little Juniata River was ever used to transport goods in quantity. This assertion is simply not credible when one reviews the record. The record establishes that the Little Juniata River was used to transport goods in quantity to eastern (downstream) markets, and this conclusion can be drawn from the findings of fact issued by the trial court.

Judge Kurtz found that "the Little Juniata River was a highway of commerce for the surplus produce produced by the residents living in the Little Juniata watershed." (R. 2297a, FF 174.1). Judge Kurtz found that "[a]nnually when the river was swollen by rain, surplus produce would be shipped by ark downriver with an ultimate destination of Baltimore." (R. 2298a, FF 174.2). The Little Juniata River "was the only viable option for transporting commerce to market." (R. 2298a, FF 174.5).

Judge Kurtz found that a single ark could carry "about fifty tons of goods." (R. 2277a, FF 89).[28] As a ton equals 2,000 pounds, this finding shows that a single ark could carry roughly 100,000 pounds of cargo to market. Judge Kurtz found the history of Mr. Lytle persuasive when he noted that "*[m]any arks loaded with [iron, lumber, shingles, hoop-poles, hides and whiskey] left the Public Landing and 'Laurel Springs wharf*'" in Birmingham located directly on the Little Juniata River. (R. 2288a-2289a, FF 141) (emphasis in original finding of fact). The trial court

[28] The trial court also found relevant an 1826 letter from Conrad Bucher noted that more than 120 arks were built in Huntingdon County that winter and that each of them will carry from 350 to 450 barrels of flours. (R. 2292a, FF 155).

also made several findings with respect to types of industries located directly on the Little Juniata River and credited Dr. Heberling's conclusion that the "output of the industries along the Little Juniata was impressive given the population." (R. 2289a-2291a, FF 144-151). Where did this impressive output go? Once local demand was satisfied, the surplus produce had to go somewhere. This output went down the Little Juniata River. (R. 2291a, FF 152; R. 2297a, FF 174.1).

Ark travel on the Juniata River and all its branches was documented in *The Gazette*, a Huntingdon newspaper. (R. 2294a-2296a, FF 166-170). The scope and quantity of goods shipped by river is referenced in these newspaper articles. For example, a March 19, 1826 article noted that "*all the branches of the Juniata*, in this County, were in good boating order" and that the "*greater part of the surplus produce of this County has descended the river within the last few weeks.*" (R. 2295a, FF 167) (emphasis added). Similarly, a May 30, 1827 article reported: "The rain which fell last week, swelled our streams sufficiently high to carry off *all the produce intended for an eastern market*. There were not less than 50 arks, heavily laden, *passed down the Juniata, from its several branches*, in this and Bedford County." (R. 2296a, FF 170) (emphasis added). These findings stand in stark contrast to the assertions made by the Appellants. (Appellants' Brief at 33).[29]

[29] The Appellants assert that "the Federal Government's 1831 McLain Report, establishes that manufacturers along the Little Juniata reported in their own words that they did not use the Little Juniata for transport of their goods." The testimony of Mrs. Shedd, Appellants' expert below, cited to support this statement indicates that the *iron* manufacturers surveyed indicated that they shipped their *iron* to Pittsburgh as of 1831. (R. 863a-869a, 1983a-1984a). The Appellants' omission that this testimony was focused only on the manufacture of iron and not flour, whiskey, shingles, hoop-poles and other products produced along the Little Juniata River is misleading. The weight of this evidence as to the movement of iron is somewhat weakened as even Mrs. Shedd was forced to admit that there was some historical evidence of pig iron being shipped down river on arks as of 1826. (R. 902a-903a).

It is apparent from these findings that all or a greater part of the surplus produce made by the industries along the Little Juniata River was shipped down the Little Juniata River by ark. Indeed, the findings indicate that not only was the output of these industries "impressive" but also the carrying capacity of a single ark was similarly impressive.

The trial court favorably compared the evidence of the quantity of commerce in this case to such evidence in *Appalachian Electric, supra,* and *Economy Light and Power Co. v. United States*, 256 F. 792, 797, 798, *aff'd*, 256 U.S. 113, 41 S. Ct. 409, 65 L. Ed. 847 (1919). As to the volume of commercial traffic necessary for a finding of navigability, the Supreme Court held:

> Nor is it necessary for navigability that the use should be continuous. The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and extent of the use. Small traffic compared to the available commerce of the region is sufficient. Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.

Appalachian Electric, at 409-410 (footnotes omitted). Discussing the evidence in *Economy Light and Power*, the Supreme Court in *Appalachian Electric* stated:

> Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence. Fourteen authenticated instances of use in a century and a half by explorers and trappers, coupled with general historical references to the river as a water route for the early fur traders and their supplies in pirouges and Durham or flat-bottomed craft similar to the keelboats of the New, sufficed upon that phase in the case of the DesPlaines. Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for simpler types of commercial navigation.

Appalachian Electric, at 416 (footnotes omitted). With respect to the assessment of the evidence presented on the question of navigability in *Appalachian Electric*, Judge Kurtz found this inquiry "most relevant since it is clear to us at least that the quantum of evidence which Justice Reed found sufficient to the find the [New] river navigable is far less than the evidentiary presentation made by the Plaintiffs [Appellees] in this case." (R.

2363a). Accordingly, the evidence of the quantity of commercial use in this case is sufficient to support a finding of navigability in fact.

c. The substantial evidence in the record establishes that the Little Juniata River was a broad highway or highroad of commerce.

Relying upon *Cleveland* and *Lakeside Park*, the Appellants assert that the Little Juniata River must have been a broad highroad or highway of commerce in order to be navigable. (Appellants' Brief at 34). In support of their argument, they assert that the record in this matter, as described by the trial court's factual findings, establishes only sporadic and one-way use of the river.

Although the United States Supreme Court has not used the term "broad" as a qualifier for the phrase, "highway for commerce," *see, e.g., The Daniel Ball* and *The Montello*, 87 U.S. (20 Wall) 430 (1874), the Pennsylvania Supreme Court in *Lakeside Park* sought to define what is required in order for a waterway to be considered navigable in fact in the Commonwealth. The Court held:

> We think that the concept of navigability should not be limited alone by lake or river, or by commercial use, or by the size of water or its capacity to float a boat. *Rather it should depend upon whether water is used or usable as a broad highroad for commerce and the transport in quantity of goods and people, which is the rule naturally applicable to rivers and to large lakes*, or whether with all of the mentioned factors counted in the water remains a local focus of attraction, which is the rule sensibly applicable to shallow streams and to small lakes and ponds. The basic difference is that between a trade-route and a point of interest. The first is a public use and the second private.

Id. at 396, 153 A.2d at 489 (emphasis added). Although this standard was quoted by courts in a handful of subsequent decisions,[30] the courts did not provide further guidance regarding what

[30] *E.g.*, Pennsylvania *Mountain Properties, supra*; *Maritime Management, supra*; *Livingston v. Pennsylvania Power & Light Co.*, 609 F. Supp. 643 (E.D. Pa. 1985). These cases and *Lakeside Park Co.* address the navigability of lakes. In Pennsylvania, for purposes of determining navigability in fact, the test for rivers is different from the test for lakes.

qualifies as sufficient commerce to be considered "broad."[31] The Commonwealth Agencies therefore assert that a reasonable interpretation of the term "broad" in this context relates to the volume of goods and/or their diversity. This view is certainly consistent with the *Lakeside Park* Court's use of the terminology, "in quantity of goods," and its drawing a distinction "between a trade route and a point of interest." The Commonwealth Agencies further note that there is no support in the case law for Appellants' assertion that continuous and two-way traffic is required.

In *Appalachian Electric*, the United States Supreme Court did provide guidance on the volume of commercial traffic necessary to support navigability. The Court stated that "[s]mall traffic compared to the available commerce of the region is sufficient" to determine commercial use for navigability. *Id.* at 409. Looking at the commercial traffic and available commerce for the industries along the Little Juniata River is telling in this case.

The federal census of manufacturers of 1820 and 1850 confirmed the existence of grist mills, saw mills and distilleries along the Little Juniata River. (R. 284a-286a). During the late 18th and early 19th centuries, there developed a critical mass of industries along the Little Juniata River. The output of these industries was impressive when viewed in the context of the times and the population of Huntingdon County. (R. 288a-290a; R. 2291a, FF 151).

The historical evidence presented to the trial court on this matter reveals that the average amount that a grist mill along the Little Juniata River produced was about 1200 barrels of flour a year. (R. 289a). Forges along the Little Juniata River handled about a thousand tons of iron in a

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[31] We know, however, that the Pennsylvania Superior Court in *Maritime Management*, *supra*, affirmed the trial court's finding that there was insufficient evidence that Wallenpaupack Creek was ever a broad highroad of commerce. The only evidence in that case was a short passage from *History of Wayne, Pike and Monroe Counties, Pennsylvania* that was read into the record by Maritime's Counsel. Certainly, evidence, such as the wealth of historical evidence that was introduced by the Commonwealth Agencies at trial in the present case, was not offered.

year. (Id.). One saw mill along the Little Juniata River produced 60,000 board feet of lumber in a year. (Id.). The growth of industries around the Little Juniata was driven by the natural resources available, particularly water and timber. Further, arks could carry up to fifty tons of goods. (R. 2277a, FF 89). The Little Juniata was a natural highway for taking the products of these industries to market and it was used to take these products to market. (R. 291a-293a; R. 2291a, FF 152).

Given the sheer number of industries along the Little Juniata River and given the prodigious output of those industries and given the fifty ton carrying capacity of arks, it is difficult to imagine how the Little Juniata is not a broad highroad of commerce in all senses of the word broad.

d. The substantial evidence in the record establishes that the Little Juniata River was a highway of commerce under "ordinary conditions."

The Appellants assert that a river must be a highway for the transportation of goods and people under ordinary conditions in order to be navigable. (Appellants' Brief at 34). Appellants further argue that the trial court erred in determining that under ordinary conditions the Little Juniata River was used or susceptible of being used as a highway of commerce.

The Appellants, however, ignore the existing precedent in which the United States Supreme Court, in defining the standard for navigability in fact, clarified the term "ordinary condition." The Court in *Appalachian Electric Power Co.*, 311 U.S. at 407 – 409, indicated that the term "natural or ordinary conditions" refers to the volume of water, the gradients and the regularity of the flow. It does not necessarily mean unimproved or continuous. *Id.* In addition, navigation does not have to be open at all seasons of the year or at all stages of water. *Economy*

Light and Power Co, supra.[32] Nor is navigability, in the sense of the law, destroyed because the watercourse is interrupted by the occasional natural obstructions or portages. *Id.* "The character of the region, its products and the difficulties or dangers of the navigation influence the regularity and the extent of the use." *Appalachian Electric*, 311 U.S. at 409.

The true test of navigability of a river or stream does not depend on difficulties attendant to navigation or the means by which commerce is or may be conducted. *The Montello, supra*. If a river or stream is capable in its natural state of being used for purposes of commerce, no matter what the mode – vessels propelled by animal power, wind or steam – it is navigable in fact and becomes in law a public river or highway. *Id.* at 441-42. The *Montello* Court cautioned, however, that a stream must support more than a "fishing skiff" or gunning canoe [that] can be made to float at high water;" but rather, it must be "generally and commonly useful to some purpose of trade or agriculture." *Id.* at 442. *See also United States v. Holt Bank*, 270 U.S. 49 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77 (1922) (the navigability of a river or stream depends upon whether the river or stream in its natural state affords a channel for useful commerce.)

Applying these precedents to the present case, the trial court correctly found that Little Juniata River is navigable in fact. As noted by the trial court and as described in the

[32] *Cf., State of Oklahoma v. State of Texas*, 258 U.S. 574 (1922). Therein, the Supreme Court, in holding that the Red River is not susceptible of being used in its ordinary condition as a highway for commerce, relied upon the fact that the river does not have a continuous and dependable volume of water. However, the section of the Red River that was at issue had "a fall of three feet or more per mile and for long intervals the greater part of its extensive bed is dry sand interspersed with irregular ribbons of shallow water and occasional deeper pools. Only for short intervals, when the rainfall is running off, are the volume and depth of the water such that even very small boats could be operated in it." *Id.* at 587. The Red River is factually distinguishable from the Little Juniata River.

Counterstatement of the Case, the Commonwealth Agencies presented ample historical evidence to support a conclusion that not only was the Little Juniata River susceptible of being used but it was, in fact, used in its ordinary condition as broad highway for commerce, over which trade and travel were conducted in the customary modes of trade and travel on water.

The Appellants make much of the testimony of their geologist, Dr. Vento, that the Little Juniata River contained nic-points that would have posed hazards to navigation. However, the trial court found that "nic-points are not uncommon in the inland rivers of Pennsylvania" and that the journey on the river was "extremely dangerous."[33] (R. 2266a-2267a, FF 43-44; R. 2298a, FF 174.4). The court concluded that despite these conditions the river was used for commerce because at that time, there were no other options for transporting commerce. (R. 2297a –2298a; 2364a).

The trial court found that the "date of the annual pilgrimage [down the Little Juniata River] was not predictable." (R. 2298a, FF 174.4). However, the pilgrimage was annual, which gives it regularity. Further, the inhabitants along the Little Juniata River converted grain to flour and corn to whiskey. One of the benefits of this process was that it allowed the products to last longer in order to get to market and allowed for easier transportation of the products. (R. 273a, R. 458a). .[34]

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[33] It is interesting to note that the Appellants' Exhibit 10, which contains the names of various nic-points in the Little Juniata River, shows one nic-point being named "Bow Buster." (R. 1467a).

[34] Appellants also try to make issue that Dr. Heberling found no evidence of warehouses in Birmingham where commodities could have been stored prior to transport. (Appellants' Brief at 20). However, Appellants ignore and selectively paraphrase Dr. Heberling's testimony on this point. The question and answer exchange on cross-examination of Dr. Heberling is as follows:

> MR. REED: Now, were there warehouses where people could store or—yeah store their commodities before they could be moved to market in this timeframe, this period of 1780 to 1830?

As documented by contemporaneous newspaper reports, the annual times of high water were used by the inhabitants of Huntingdon County to move "all" or the "greater part" of their surplus produce down river to eastern market. (R. 2295a-2296a, FF 167, 170). Given the character of the region, the nature of the industries along the Little Juniata and the dangers posed by the navigation, it is beyond peradventure that the Little Juniata was used for navigation in its ordinary condition. *See Appalachian Electric, supra*.

3. Appellants' attempts to extrapolate and impose 21st century conditions on 18th and 19th century commercial navigation was properly rejected by the trial court.

The established law cited above requires that navigability in fact must be viewed through the lens of 18th and 19th century America. Appellants' efforts during the trial below, through the testimony of Dr. Vento, Mr. Barone and Captain Aspenleiter, to focus the trial court on contemporary conditions on the Little Juniata River as an indicator of past events correctly was rejected as contrary to law and as contrary to the credible evidence presented by Dr. Heberling on historic uses. Indeed, as Judge Kurtz stated, "The Commonwealth met its burden [and established by a preponderance of the evidence] that for a brief period *in history* the Little Juniata River was navigable-in-fact." (R. 2308a) (emphasis added). Thus, Appellants' focus on contemporary conditions and the conclusions drawn therefrom are contrary to the historical record detailed for the trial court by Dr. Heberling. Moreover, the data upon which Appellants' theory is based is limited at best to a 60-year period between 1939 and 1999 as modeled in 2003,

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DR. HEBERLING: I have not found direct reference as to warehouses, but I have seen references to merchants accumulating materials until they had enough to ship. And part of the purpose—part of the floor plan of grist mills is for storage of barrels of flour.
MR. REED: Those would be the form of a warehouse?
DR. HEBERLING: They would be a rudimentary form of a warehouse.
(R. 468a-469a).

and it omits consideration of important factors such as the impact of human activity on the river. As summarized below, the conclusions drawn by Appellants based upon contemporary conditions are contrary to the historical evidence of record credited by Judge Kurtz.

Appellants' theory had three parts. First, Dr. Vento expressed the opinion that there has been no significant change either in widening or lowering the channel depth of the Little Juniata River within the past 250 years. (R. 619a). However, this opinion came with several caveats. Dr. Vento testified that his opinion was based in part upon the limited stream flow data available from three USGS gauging stations, with collection periods ranging from 1939 to 1945 and from 1939 to 1999. (R. 627a). He testified that he developed his opinion by focusing on geology rather than the uses of the Little Juniata River. (R. at 633a). He did not take into account the historic uses of the river, the impact of the railroad, and the impact of dams or mill races. (R. 634a). Dr. Vento testified that other Pennsylvania rivers such as the Susquehanna between Selinsgrove and Harrisburg, and the Juniata below the Narrows, also have the "nic points" he described as an impediment to navigation on the Little Juniata. (R. 629a). He admitted on cross-examination that the railroad had impacted the bank of the stream channel. (R. 634). He also admitted that manmade activity could have an impact on the stream channel and that the deforestation in the area would increase runoff to the river. (R. 635). Dr. Vento further admitted that human activity could cause the stream channel to constrict. (R. 635). He testified also that an increase in stream volume could cause bank erosion. (R. 635a – 636a). Dr. Vento's testimony did little more than establish that geologic processes are slow. His testimony regarding flows was based upon contemporary conditions and failed to account for factors he admitted existed and could have an impact of the flow and on the channel of the Little Juniata

River. Accordingly, Judge Kurtz properly accorded it little weight vis-à-vis Dr. Heberling's testimony that was based upon historic accounts from the time in question.

Second, Mr. Barone's testimony was aptly summarized by Judge Kurtz as "an opinion about whether a 90 foot by 16 by 5 ark can navigate the Little Juniata based on today's flow information." (R. 735). Based upon two site visits and upon data from one stream gauge collected between 1939 and 1969, and upon a cross-section developed in 2003, Mr. Barone calculated that it would require 37 men to navigate a 90x16x5 ark down the Little Juniata. (R. 694a). The data upon which Mr. Barone relied did not model flows from the late 1700's to 1800's, did not account for human impact on the stream, and did not assess changes to the stream channel. (R. 717a – 727a).

Third, Captain Aspenleiter's limited testimony (R. 755a-758a) established two things. Basic seamanship principles have remained the same over time, and knowledge of the local conditions is important. (R. 776a-777a). While these statements may fall under the category of truisms, they are neither probative nor relevant to the issue at hand. The combined testimony of Dr. Vento, Mr. Barone and Captain Aspenleiter enlightens us to conditions on the Little Juniata River, if the river channel in 2003 and flows from 1939 to 1999 were at issue. They are not. The issue before the trial court required the evaluation of historical evidence to assess conditions in the late 18th to mid-19th century. As such, Judge Kurtz properly disregarded the testimony of these three gentlemen.

4. Because the trial court properly determined that the Little Juniata River is navigable in fact, it remains so in law and is navigable for its entire length.

As the trial court found as fact, the heyday for commercial use of the Little Juniata River ended in the 1850's with the arrival of the railroad. (R. 2299a, FF 174.8 and 174.9). However, the diminishing commercial traffic on the river has no impact on whether the river remains

navigable as a matter of law. The courts have held that once a stream meets the navigability test at any point in history, it remains a legally navigable water. *See, e.g., Lehigh Falls*, 735 A.2d at 719, n. 2. The Commonwealth is not divested of title by disuse for commerce. *Appalachian Electric, supra. See also Poor v. McClure*, 77 Pa. 214 (1874). Therefore, because the trial court correctly found that the bed of the Little Juniata River is owned by the Commonwealth and the river is navigable in fact, it remains a legally navigable body of water today.

Moreover, the courts have declined to examine the navigability of a stream or river on a piecemeal basis. *See Lehigh Falls, supra* (wherein the Pennsylvania Superior Court indicated that it would not re-examine the navigability of the Lehigh River piecemeal by piecemeal). As such, once a stream is determined to be navigable, it is navigable throughout its entire length. *Id.* The Little Juniata River accordingly is navigable in its entirety.

IV. CONCLUSION

WHEREFORE, for the aforestated reasons, this court should affirm the Huntingdon County Court of Common Pleas' grant of Declaratory and Injunctive relief to the Commonwealth agencies and dismiss Appellants' appeal.

Respectfully submitted,

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