

IN THE COURT OF COMMON PLEAS
HUNTINGDON COUNTY, PENNSYLVANIA
CIVIL DIVISION

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

Plaintiffs

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.

Defendants

No. 2003-781

**COMMONWEALTH'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

The Commonwealth of Pennsylvania, Department of Environmental Protection ("DEP"), Department of Conservation and Natural Resources ("DCNR"), and the Pennsylvania Fish and Boat Commission ("PFBC") (collectively "Plaintiffs" or "Commonwealth Agencies"), by and through their undersigned counsel, hereby file their Proposed Findings of Fact and Conclusions of Law in the above-referenced matter.

PROPOSED FINDINGS OF FACT

Parties

1. Plaintiff DEP is an executive agency of the Commonwealth with the power to administer and enforce, *inter alia*, the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1-

693.27 and Section 514 of the Administrative Code and 25 Pa. Code Chapter 105. DEP is a trustee of the Commonwealth's natural resources under Article I, § 27 of the Pennsylvania Constitution. (Stipulation ¶ 1).

2. DEP is the state agency charged with administering the Commonwealth's submerged lands license program pursuant to 35 P.S. § 693.15 and Section 514 of the Administrative Code, 71 P.S. §194. (Stipulation ¶ 2).

3. Plaintiff DCNR is an executive agency of the Commonwealth charged with the duty to conserve, maintain and hold title to and administer public parks and forest lands for the use and benefit of all Pennsylvania citizens. DCNR is a trustee of the Commonwealth's natural resources under Article I, § 27 of the Pennsylvania Constitution. (Stipulation ¶ 3).

4. Plaintiff PFBC is an independent administrative commission of the Commonwealth with the power to administer and enforce the Fish and Boat Code, 30 Pa. C.S. § 101, et seq and 58 Pa. Code Chapters 51-119. PFBC is a trustee of the Commonwealth's natural resources under Article I, § 27 of the Pennsylvania Constitution. (Stipulation ¶ 4).

5. Allan Bright, the plaintiff in *Bright v. Espy et al.*, Civil Action Docket No. 2003-1297 (CCP, Huntingdon County), which has been consolidated with the above-captioned action for the purpose of discovery and the adjudication of issues relating to the navigability of the Little Juniata River, is a natural person which the Court has found has an interest in the outcome of this case. (Stipulation ¶ 5).

6. Defendant Connie Espy is a natural person who owns land situated at the confluence of Spruce Creek and the Little Juniata River sometimes referred to as the Espy Farm. (Stipulation ¶ 6).

7. Defendant Donald L. Beaver, Jr. (“Mr. Beaver”) is a natural person and resident of Huntingdon County, Pennsylvania, and the majority stockholder in, and chief executive officer of, Hidden Hollow Enterprises, Inc. (“Hidden Hollow”), the managing member of Pamdon LLC (“Pamdon”), and the managing member of Cold Current, LLC (“Cold Currents”). (Stipulation ¶ 7).

8. Defendant Hidden Hollow is a Pennsylvania corporation, and the sole shareholder of Defendant Angling Fantasies, Inc. (“Angling Fantasies”). (Stipulation ¶ 8).

9. Defendant Bellwood Antis Enterprises, Inc. (“BEA”) is a Pennsylvania corporation. (Stipulation ¶ 9).

10. Defendant Legacy Conservation Group LLC (“Legacy LLC”) is a Pennsylvania limited liability company, which has changed its name to Spring Ridge Club LLC (“Spring Ridge”). (Stipulation ¶ 10).

11. Pamdon is the managing member of Spring Ridge. (Stipulation ¶ 11).

12. Cold Currents is a Pennsylvania limited liability company and the general partner of Rural Conservation Partners, LP (“Rural Partners”), a Pennsylvania limited partnership. (Stipulation ¶ 12).

Procedural History

13. The instant action is a complaint for declaratory and injunctive relief filed by DEP, DCNR and PFBC in which they allege that the Defendants, their employees, agents and assigns have interfered with the public’s rights in and use of the Little Juniata River near

the village of Spruce Creek in Huntingdon County, Pennsylvania, at the confluence of Spruce Creek for 1.3 miles downstream. The Commonwealth Agencies also allege violations of the Dam Safety and Encroachments Act and the Fish and Boat Code. (Stipulation ¶ 22).

14. Defendants filed preliminary objections which were denied by the Court by order dated January 13, 2004. (Stipulation ¶ 23).

15. Defendants filed an answer in which they deny that the public has a right to access the 1.3 mile section of the Little Juniata at issue and in which they deny that any defendant has violated any Commonwealth statute. (Stipulation ¶ 24).

16. A trial in this matter was held before the Honorable Stewart Kurtz on June 12, 2006 through June 16, 2006.

The Little Juniata River

17. The Little Juniata River is approximately 32 miles long. The headwaters of the Little Juniata River are situated on the north side of the City of Altoona, from which the river flows northeast past Bellwood through Blair County, bending at Tyrone and then flowing southeast past Birmingham, Spruce Creek (village) and Barea in Huntingdon County. Spruce Creek flows into the Little Juniata River at the village of Spruce Creek downstream from Tyrone. Further downstream near the Borough of Petersburg, the Little Juniata River joins the Frankstown Branch to form the main stem of the Juniata River. (Stipulation ¶ 25).

Relevant Riparian Interests of the Defendants

East/North Bank of the Little Juniata River

18. Of the disputed 1.3 mile section of the Little Juniata River south of its confluence with Spruce Creek, Defendant Connie L. Espy owns all the land adjacent to the easterly and northerly side of the river (“Connie Espy Property”) but owns no property adjacent to the westerly bank of the river below the confluence with Spruce Creek. (Stipulation ¶ 26).

19. BEA has entered into a land sales installment contract with Mrs. Espy to purchase the Connie Espy Property. (Stipulation ¶ 13).

20. Mrs. Espy has also leased to BEA the right to occupy and use the Connie Espy Property. (Stipulation ¶ 14).

21. BEA has entered into a lease agreement with Spring Ridge authorizing Spring Ridge to occupy and use the Connie Espy Property. (Stipulation ¶ 15).

22. Spring Ridge has entered into a sales agreement with BEA to purchase the Connie Espy Property. (Stipulation ¶ 16).

23. Spring Ridge has assigned its interest in the Spring Ridge Lease and Spring Ridge Sales Agreement to Rural Partners. (Stipulation ¶ 17).

24. Mr. Beaver, Spring Ridge and Rural Partners currently operate a private fishing club/lodge on the Connie Espy Property. (Stipulation ¶ 18).

West/South Bank of the Little Juniata River

25. None of the defendants in this case owns any property directly adjacent to the Little Juniata River on the west/south side in the 1.3-mile section in dispute. (Cw. Ex. 33; Stipulation ¶ 26).

26. On or about June 18, 2002, Defendant Hidden Hollow entered into an unrecorded lease agreement with Norfolk Southern Railway Company for lease of 0.60 acres of land adjacent to the westerly side of the Little Juniata River just downriver from the confluence with Spruce Creek. (Stipulation ¶ 27; Cw. Ex. 14).

27. The terms of this lease limit use by Hidden Hollow of the land down to the “low water line” and only authorizes Hidden Hollow to “use the Premises for the purpose of general beautification and security and for no other purpose.” (Stipulation ¶ 27; Cw. Ex. 14).

Relevant Riparian Interests of Plaintiffs and Other Owners

West/South Bank of the Little Juniata River

28. Plaintiff DCNR owns and manages State Forest lands adjacent to the West/South Bank of the Little Juniata River downstream of the confluence of the Little Juniata River and Spruce Creek. This state-owned land is administered as part of the Rothrock State Forest and includes the Little Juniata Natural Area through which the Little Juniata River flows. (Stipulation ¶ 28; Cw. Ex. 2 and 33; N.T. 6/14/06 at 14, 28-29).

29. Norfolk Southern Railway Company and John P. Espy, Jr., neither of whom is a party to this litigation, own the remainder of the land on the westerly and southerly side of and adjacent to the Little Juniata River south of Spruce Creek in the disputed section. (Stipulation ¶ 28; Cw. Ex. 9-13, 33; N.T. 6/14/06 at 43-47).

30. There is no evidence in the record that either Norfolk Southern Railway Company or John Espy, Jr., claims any ownership interest to the bed of the Little Juniata River.

Longstanding Commonwealth Claim of Ownership of Bed of Little Juniata River

DEP Historic Treatment of the Little Juniata River as Navigable

31. Cathleen Curran Myers is the Deputy Secretary for Water Management of the Department of Environmental Protection. Ms. Myers was appointed to this position in 2003. (N.T. 6/12/06 at 11, 17).

32. DEP is the state agency charged with administering the Commonwealth's submerged lands license program pursuant to Section 15 of the Dam Safety and Encroachments Act (DSEA), 35 P.S. § 693.15, and Section 514 of the Administrative Code, 71 P.S. §194. (Stipulation ¶ 3).

33. The beds of navigable waters in Pennsylvania are owned by the Commonwealth as submerged lands of the Commonwealth. (N.T. 6/12/06 at 20-21).

34. When a water obstruction or encroachment is located in, along, across or projecting into a submerged land owned by the Commonwealth for which a permit is required, the permittee must also obtain a submerged lands license from DEP for the right to occupy Commonwealth land. (32 P.S. §§ 693.6, 693.15).

35. In administering the Submerged Lands License Program, DEP utilizes a guidance document comprised of three lists of navigable waters. The first list included in this guidance is the "Public Highway Declarations" list. The second is the "Oberdorfer List," and the third is the Army Corps of Engineers list of Pennsylvania Waters of the United States. This guidance document is available to the public, but it is not a formal policy document. (N.T. 6/12/06 at 22-29).

36. The Public Highway Declarations list is 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 rafts, boats and other vessels, or to improve navigation. The passage of such Acts was evidence that the Legislature considered the subject stream or river to be navigable at law. (N.T. 6/12/06 at 22-29; Cw. Ex. 21, 23-24).

37. DEP uses the Public Highway Declarations list in administering the submerged lands license program, because the agency and legal scholars have concluded that these declarations are compelling contemporaneous statements by the General Assembly that such waters were used or could have been used for commerce and should be legally preserved for such use through legislation in the late 18th century and early 19th century. (N.T. 6/12/06 at 22, 24-25).

38. For lands that were still owned by the Commonwealth at the time of the public highway declaration, a public highway declaration is conclusive. (N.T. 6/12/06 at 26).

39. 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. (N.T. 6/12/06 at 22-27).

40. In 1987, Wilson Oberdorfer, former Director of the Bureau of Legal Services of DEP’s predecessor agency, the Department of Environmental Resources, compiled a list of Pennsylvania navigable waters for purposes of administration of the submerged lands license program (the Oberdorfer List). (N.T. 6/12/06 at 23-24).

41. The Oberdorfer List is based upon Mr. Oberdorfer’s research conducted in the Pennsylvania Archives that the rivers, streams and lakes were navigable in fact, i.e. were

historically used for commerce. The Oberdorfer List also takes into account other historic evidence of Commonwealth ownership of submerged lands, such as the existence of mining patents and island patents. (N.T. 6/12/06 at 24-27; Def. Ex. 1).

42. The Army Corps of Engineers list is the list of navigable waters of the United States that the Corps utilizes in administering its federal statutory programs. (N.T. 6/12/06 at 27).

43. A DSEA permit applicant must obtain a Submerged Lands License from DEP if their project is located in, along, across or projecting into a water listed on any of these three lists. (32 P.S. §693.15; N.T. 6/12/06 at 29).

44. The Little Juniata River is on both the Public Highway Declaration list and the Oberdorfer List. (N.T. 6/12/06 at 29).

45. The General Assembly issued three public highway declarations for the Little Juniata River for sections of the river all including and above the 1.3 mile section in question here. (Cw. Ex. 21, 23-24, 44; N.T. 6/12/06 at 68).

46. Mr. Oberdorfer's research indicates that the Little Juniata River was declared a public highway three times and that there was additional historic evidence of use of the Little Juniata River for commerce and treatment of the river as navigable by the sovereign historically as evidenced by the issuance of mining and island patents. (Cw. Ex. 15-20, 26, 31; N.T. 6/12/06 at 29-30; Def. Ex. 1).

47. DEP and its predecessor agencies viewed the Little Juniata River as a navigable river, the bed of which is a submerged land owned by the Commonwealth. (N.T. 6/12/06 at 29-30).

48. 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. (Stipulation ¶¶ 38 and 78(H); N.T 6/12/06 at 30-31, 37-38).

49. DEP or its predecessor agencies issued the following submerged lands licenses for the Little Juniata River:

- a. E07-052 to Blair County Commissioners on June 20, 1983.
- b. E07-061 to Borough of Tyrone on March 12, 1984.
- c. E07-063 to Peoples Natural Gas Co. (Dominion Peoples) on April 20, 1984.
- d. E07-096 to Bald Eagle Water Company (now Team Ten LLC) on March 7, 1986.
- e. E07-102 to Bald Eagle Water Company (now Team Ten LLC) on June 12, 1986.
- f. E07-128 to The Peoples Natural Gas Co. (Dominion Peoples) on September 16, 1987.
- g. GP050701101 to PA Electric Co. (aka Penelec) on March 19, 2001.
- h. GP050705102 to PA Electric Co. (aka Penelec) on April 19, 2005.
- i. GP050793108 to Altoona City Authority on November 12, 1993.
- j. GP050793114 to Northern Blair County Regional Sewer Authority on December 15, 1993.
- k. GP050793115 to Peoples Natural Gas Co. (Dominion Peoples) on November 19, 1993.
- l. GP050795110 to Jeff S. Long on August 22, 1995, assigned to the Altoona City Authority on April 17, 1998.

- m. GP053199140 to PA Electric Co. dba GPU Energy (aka Penelec) on January 5, 2000.
- n. 12905 to Peoples Natural Gas Co. (Dominion Peoples) on July 7, 1958.
- o. 19014 to Bell Telephone Company of Pennsylvania on October 13, 1970.

(Stipulation ¶ 78(H); Cw. Ex. 48).

50. License # GP053199140 issued to PA Electric Co. dba GPU Energy (aka Penelec) is located on or near Defendants' property and is located adjacent to the 1.3-mile section of the Little Juniata River that is in dispute in this case. (Cw. Ex. 48).

PFBC Treatment of the Little Juniata River as Navigable

51. Mr. Walter Rosser is a retired Waterways Conservation Officer with the PFBC. (N.T. 6/13/06 at 174).

52. Officer Rosser served as a Waterways Conservation Officer from September 1969 to January 2000. (N.T. 6/13/06 at 174).

53. From 1969 to 2000, Officer Rosser's district of responsibility included Blair County. The portion of Huntingdon County that includes the townships of Warriors Mark, Spruce Creek, Franklin and Morris was added in the 1970's to Officer Rosser's district. (N.T. 6/13/06 at 174-75).

54. Mr. Craig Garman is currently a Waterways Conservation Officer with the PFBC. (N.T. 6/13/06 at 157-58).

55. Since January of 2000, Officer Garman has been responsible for enforcement of the geographic district that includes all of Blair County and the portion of Huntingdon County that includes the townships of Warriors Mark, Spruce Creek, Franklin and Morris. (N.T. 6/12/06 at 159).

56. The district of Officer Garman and Officer Rosser includes the section of the Little Juniata River near the confluence of Spruce Creek that is in dispute. (N.T. 6/13/06 at 159, 175).
57. A waterway conservation officer's duties include enforcing the Fish and Boat Code. (N.T. 6/13/06 at 158).
58. The PFBC started stocking the Little Juniata River in the mid-1970's after the paper mill at Tyrone closed and the river's water quality improved to support stocking. (N.T. 6/13/06 at 175-176).
59. Officer Rosser stocked the Little Juniata River from Bald Eagle to the confluence with the Frankstown Branch. (N.T. 6/13/06 at 175).
60. Officer Rosser stocked the disputed section of the Little Juniata River from the mid-to-late 1970's until the early 1990's. (N.T. 6/13/06 at 175).
61. Officer Rosser stocked the entire property owned by Herman Espy, except right in front of Mr. Espy's house. (N.T. 6/13/06 at 175).
62. The results of PFBC's stocking efforts have resulted in the Little Juniata becoming a well known and wonderful fishery. (N.T. 6/13/06 at 176).
63. During the 1970's and 1980's, fishing pressure on the Little Juniata was heavy. (N.T. 6/13/06 at 176).
64. The disputed section of the Little Juniata River was used for canoeing and kayaking. (N.T. 6/13/06 at 177).
65. The PFBC still stocks the Little Juniata River with fingerlings every year, but it does not stock the 1.3-mile section in dispute. (N.T. 6/13/06 at 160-161).

66. The PFBC does not stock waters that are closed to public fishing. As a general rule, any water areas in this Commonwealth stocked with fish furnished by the PFBC must be open to the public for the purpose of free lawful fishing. (N.T. 6/13/06 at 160-161; 30 Pa. C.S. § 2103).

67. Throughout the present dispute with Defendants, Officer Garman stocked above and below the disputed section. (N.T. 6/13/06 at 161-62).

68. One of the methods used by Officer Garman to stock fish in the Little Juniata River was by float box, where the fish are loaded into float boxes and released in the water by officers and volunteers in canoes. (N.T. 6/13/06 at 162).

69. PFBC personnel canoed through the disputed section of the Little Juniata River with the float boxes to stock downstream. (N.T. 6/13/06 at 162).

70. Herman Espy closed off the disputed section of the Little Juniata River to the public in the early 1990's, which led to a decrease in the public's use of this section. (N.T. 6/13/06 at 177-78).

71. On February 26, 1992, the PFBC notified the owners of the Connie Espy Property of the PFBC's belief that the Little Juniata River is a navigable water of the Commonwealth, and thus, it flows over submerged lands owned by the Commonwealth and is held in trust for the benefit of the public. (Stipulation ¶ 29; Cw. Ex. 49; N.T. 6/12/06 at 48-49).

Current Controversy

72. Defendant Angling Fantasies, a fly-fishing guiding enterprise operated from the Connie Espy Property through lease agreement dated January 1, 1996, was acquired by

Hidden Hollow and converted to a Limited Liability Company on May 26, 2000. (Plaintiffs' Complaint and Defendants' Answer ¶ 25).

73. Since on or about 2000, Defendants Hidden Hollow, t/d/b/a Paradise Outfitters, and Mr. Beaver have operated a for-profit fly fishing and recreational business, including facilities and operations located on the Connie Espy Property under various names including "Camp Little J." (Plaintiffs' Complaint and Defendants' Answer ¶ 22).

74. Defendant Legacy LLC, t/d/b/a Spring Ridge Club, is a private fly-fishing membership-based club providing lodging and fishing-related services that advertises private access to several streams and rivers in Central Pennsylvania. Spring Ridge maintains operations and facilities along the Little Juniata River, including Camp Little J on the Connie Espy Property. (Plaintiffs' Complaint and Defendants' Answer ¶ 24).

75. Spring Ridge's marketing materials advertise "access to our private stretch of the Little Juniata." (Stipulation ¶ 30).

76. Officer Garman patrols the disputed section on the Little Juniata about once a week to twice a week between January and April and about once a week to once every two weeks during the rest of the year. (N.T. 6/13/06 at 164).

77. Since 2000, Officer Garman received numerous complaints regarding the disputed section of the Little Juniata River while on patrol or through telephone calls. (N.T. 6/13/06 at 163-164).

78. DEP received complaints beginning on or about 1999-2000 that the public was being excluded by some of the Defendants from boating and fishing in this disputed section of the Little Juniata River. (N.T. 6/12/06 at 42).

79. DEP, DCNR and PFBC received numerous complaints of exclusion by Defendants or their agents from this 1.3 mile section of the Little Juniata River as well as complaints of harassment and threats by and/or from Defendants and their agents while fishing, boating or recreating in this section of the river. (Stipulation ¶ 35).

80. If called as witnesses for the Plaintiffs at the trial in this matter, the parties stipulated that the following individuals would have testified as follows:

A. Kathryn Ombalski, Boalsburg, PA: On May 29, 1999, Ms. Ombalski and her ex-husband, Dan, went canoeing on the Little Juniata River. They put in just below what she believes is called Ironville and took out at the Barree river access. When they passed the Espy Farm just below the confluence with Spruce Creek, a man was standing on the banks with a camera. He claimed that they were trespassing and not allowed to continue. He had a camera and told them that he takes pictures of people who trespass and then has the police waiting for them further downstream. He also explained how much he charges anglers to fish on his property and indicated that Kathryn and Dan would disturb them. After some discussion and seeing that they did not have any fishing tackle, he decided to let them through.

B. John Farson String, Columbus, OH: In April 2001, Mr. String, a licensed fisherman, stayed at a bed and breakfast and paid approximately \$25.00 to fish the last mile of Spruce Creek. At approximately 8:00 p.m., Mr. String was in the Little Juniata River at Spruce Creek and began to fly fish in the Little Juniata River. At about 8:00 p.m., String was approximately twenty (20) yards downstream from the Rt. 45 bridge and was in the water fishing when an individual came up behind him and started yelling at him and told him he was on private property. The individual was using four letter words and accused him of trespassing and stated he was not allowed to fish there. The individual was an older male, tall and lanky. The individual was very agitated and threatened to call the state police and told String he was poaching. String then left the area due to the threats he received. Afterwards, String emailed Donny Beaver regarding the status of the river. Mr. Beaver responded that other areas of the river both above and below the disputed section were "public waters" available for public fishing and that Mr. String should fish there.

In April 2002, thinking that the dispute was over, Mr. String again fished the same area as before, late in the evening. Mr. String was in the river across from the lodge on the Connie Espy Property, and there were about six (6) men on the porch using swear words and throwing stones at Mr. String. None of the stones hit him.

C. Steven Bugbee, Petersburg, PA: In April 2001, Mr. Bugbee, a licensed fisherman, fished on the Little Juniata River with Douglas Pauline, a fishing guide. Mr. Bugbee and Mr. Pauline had floated into the section of the river adjacent the Connie Espy

Property. Mr. Bugbee and Mr. Pauline were out of their boat fishing when Donny Beaver, who was on the bank, told them they could not fish there because it is private property. Mr. Bugbee and Mr. Pauline advised Mr. Beaver that they were not on private property. Mr. Beaver threatened to call the state police.

D. Douglas Stewart Pauline, State College, PA: In April 2001, Mr. Pauline, a professional fly fishing guide and licensed fisherman, was guiding Mr. Bugbee. Mr. Pauline and Mr. Bugbee had floated in the section of the Little Juniata adjacent the Connie Espy Property, anchored their boat and began to fish. At this point an individual told them they were trespassing on private property and threatened to call the state police.

On another date in April 2001, Mr. Pauline was guiding another client, Mark Sanders. Mr. Pauline and Mr. Sanders were fishing in the same section of the Little Juniata River. An individual, who identified himself as the manager of the property, yelled at them from the Espy farm property and told them to continue through the property and not to fish because it was private property.

E. Mark Sanders, Sewickley, PA: In April 2001, while fly fishing in the disputed section of the Little Juniata River, Mr. Sanders, a licensed fisherman, and his guide, Mr. Pauline, were confronted by an unknown individual at the beginning of their canoe trip. They had entered the river about ¼ miles above the Espy farm property. Within ten minutes, the manager of the property told them to “keep riding through the area.”

F. Jim Rivello, Chambersburg, PA: In April 2001, Mr. Rivello, a licensed fisherman, and Stephen Kowalski were fishing the Little Juniata River. They anchored their canoe next to the white barn opposite the island in the middle of the disputed area. When they began to fish, Dave McMullen of Paradise Outfitters, drove up and told them they were trespassing and threatened to call the state police. They then floated the canoe further down the river into an area where the state forest ends. Fifteen minutes after they passed a club member, the club member approached Mr. Rivello and Mr. Kowalski and told them they were trespassing. The club member threatened to call the state police.

In May 2001, Mr. Rivello was floating down the river in a canoe and came into the disputed area. Mr. Rivello anchored approximately 500 yards below other fisherman on the river. Mr. Jimmy Swagger, a guide for Paradise Outfitters, told Mr. Rivello to leave the area. Mr. Rivello started to move downstream, but before he left, Mr. Swagger pulled a camera out of his pocket and took pictures of Mr. Rivello and Mr. Kowalski.

In May 2002, Mr. Rivello canoed into the disputed area passing several guides and club members fishing in the river. Mr. Rivello moved ½ mile past the guide and his clients, anchored the boat and began to fish. They had been fishing for about ten (10) minutes when Donny Beaver approached and began videotaping both of them.

G. Ronald Arthur Kuntz, Alexandria, PA: On June 21, 2002, Mr. Kuntz, a licensed fisherman, entered the Little Juniata River from the Pennsylvania State Forest property. When he entered the waterway, he was 20 to 30 yards below the area of the

property that was marked with posters. Mr. Kuntz moved up stream into the disputed section of the Little Juniata River to fish. A white male individual sat and watched him from a truck. Mr. Kuntz observed the individual take out a video camera and start to videotape him. Mr. Kuntz became unsettled and shaky and walked out of the disputed section.

On June 25, 2002, Mr. Kuntz was fishing in the Little Juniata River with Paul Lutz. They began fishing at 7:00 a.m. below the disputed area and then up into the disputed section. While they were fishing a truck came down the roadway and stopped. A white male between 30 and 40 stepped out of the truck and began videotaping. The male individual videotaped Mr. Kuntz and Mr. Lutz for around 5 to 10 minutes. Mr. Kuntz and Mr. Lutz continued to fish moving upstream. Approximately 20 minutes later a white female in her late twenties drove down the road to where the men were fishing, got out a video camera and filmed the men fishing.

H. Thomas R. Brouse, III, Altoona, PA: In early June 2002, Mr. Brouse, a licensed fisherman, was fishing in the Little Juniata during the evening with Mike Clair. Mr. Brouse and Mr. Claire entered the river in Barree, Pennsylvania. They walked a ½ mile up from where they entered the water. They were spincast fishing from the bend in the river when a vehicle approached from the opposite side of the river. A white man in his 40s began video taping Mr. Brouse and Mr. Claire.

In late June 2002, Mr. Brouse fished the Little Juniata with his brother, John Brouse and with Mike Claire. The three individuals utilized a float-boat and went up above the area of the Connie Espy Property. They floated the boat past the Espy farm and then anchored the boat in the river and began fishing. An older white male in his 60s drove up to where they were fishing. The older white man told Brouse and the others that they “had a judge and it was going to go back to the way it was.” When the white male left, a white female in her late 20s arrived at the location. She had a small digital camera and filmed them when they caught fish.

I. Mike Clair, Altoona, PA: During May and June 2002, Mr. Clair, a licensed fisherman, was fishing in the area with Mr. Brouse and Mr. John Coonsbeck. As Mr. Clair was fishing, an unknown white male with black hair went in front of him and began to videotape them fishing. While they continued to fish that area, this same individual went above the stream from where they were fishing and threw dog food into the water, which floated downstream to where they were fishing. This activity ruined the fishing for them and they left the area. The same individual followed Clair to his truck and it appeared he was writing down Clair’s license plate number. Mr. Clair felt he was being harassed by this individual.

On another Saturday or Sunday during this May – June 2002 time, while fishing with Tom Brouse in the disputed area, a woman came to the area they were in and began to videotape him fishing. The woman spoke into the video camera stating, “They are keeping the fish.” After a short time, the woman left, and returned with a white male with a white beard. The white male told Mr. Clair and Mr. Brouse that it was illegal to

fish there. He then threatened that if they ever came back that he was going to call the state police and have them arrested. Mr. Clair fished the area approximately 1 ½ to 2 hours more, working his way down the river while fishing. As they reached the end of the posted property, three pick-up trucks containing 6 or 7 white males pulled up to the area in an aggressive fashion, exited their trucks and began to put on their fishing “waders.” Upon seeing this, Clair exited the area quickly. During these incidents, Mr. Clair felt harassed by these individuals.

J. Paul M. Lutz, Portage, PA: In late June 2002, Mr. Lutz, a licensed fisherman, was fishing with Ron Kuntz, near the disputed area on the Little Juniata River. Upon entering the area approximately 200 yards, Mr. Lutz observed two individuals he believed to be club members, fishing approximately 300 to 400 yards upstream from where they were fishing. A very short time later, a blazer type jeep came down the road to where Mr. Lutz and Mr. Kuntz were. A white male exited the vehicle and began to videotape them fishing. This individual continued to tape them for 10 to 15 minutes, then left. Mr. Lutz and Mr. Kuntz then proceeded upstream another 50 to 75 yards and began to fish. Approximately 30 minutes later, a girl in her mid 20s drove up to the area and began to videotape them fishing in the area. Mr. Lutz considered the videotaping to be a subtle form of harassment.

K. Stephen Kowalski, Gettysburg, PA: In April 2001, Mr. Kowalski, a licensed fisherman, and Mr. Jim Rivello went fly fishing for trout on the Little Juniata River. They put their canoe in the river at Tyrone, PA, approximately ten miles upstream from the Espy Farm area of the creek. Around noontime, Mr. Kowalski and Mr. Rivello stopped to fish approximately 200 yards past the house used by Paradise Outfitters. A short time passed when Joe McMullen pulled up in truck and informed them they were trespassing on private property.

After going downstream further, Mr. Kowalski and Mr. Jim Rivello passed a club member fishing in the creek and proceeded another 100 yards past this person and stopped to fish again. Approximately 20 minutes later, this unidentified approached them and stated that they were trespassing on private property and told them to leave. Mr. Kowalski told them that was not his belief. The unidentified man then stated that he was going to call the state police.

In February 2002, while fishing this area of Spruce Creek with Ray Snyder, Mr. Joe McMullen threw dog food into the creek causing the fishing to be interrupted.

L. John Carolus, Huntingdon, PA: On April 3, 2003, at or around 9:00 a.m., Carolus and Chad Confer unloaded their kayaks along the Little Juniata River, in Tyrone, Pennsylvania. Both individuals were going to float the Little Juniata River to Carolus' camp located in the Allison Road Camp Ground, Ironville, Pennsylvania, near Pennsylvania State Route 305. The water level that day was 1.5 feet higher than normal and the river was muddy. At or around 1:00 p.m., Carolus was navigating his 6 foot kayak on a section of the river at Spruce Creek and adjacent the Connie Espy Property. As Confer and Carolus navigated under a cable, Carolus noticed 20 to 25 individuals

picking up garbage on both sides of the river. When the individuals viewed Confer and Carolus, the individuals ran from a barn on the Connie Espy Property towards Carolus and Confer. A male who appeared to be in his late fifties with white hair began yelling at Carolus to “get out of the river” and “it was his property” and “they were not allowed to fish or float through the area.” Once Carolus and Confer floated under the cable that the same older man informed them that “it was okay to float through this time but not next time.” The older man began filming Confer and Carolus as they were floating through. As Confer and Carolus proceeded to navigate through that section of the Little Juniata, when they were traveling through the turn in the river, Carolus flipped his kayak over. Carolus was submerged under water for 20 to 30 seconds. He traveled a distance of approximately 150 feet under water. While he was trying to right himself, Carolus viewed some of the male individuals following him in vehicles while still filming him. As Carolus continued under water, he finally released himself from the kayak. He came up out of the water around an area near big rocks. Carolus was 10 to 15 feet from the shoreline and was within the riverbed area. He then emptied the water out of the kayak and got back in. The same older man with the white hair was still filming him at this time, and Carolus heard the older man say again that “he wasn’t supposed to be there” and that “he should get out of there” and then that “it was funny he was upside down in the river.” At no time, did any of these individuals with the older man try to assist Carolus while he struggled to right himself. It took Carolus 5 to 10 minutes to get back in the kayak to proceed on the trip. Both Confer and Carolus floated out of the area and arrived at Carolus’ camp between 5 and 6 p.m. Carolus reported the incident to WCO Garman of the Pennsylvania Fish and Boat Commission.

(Stipulation ¶ 35).

81. In response to the numerous complaints, on March 27, 2002, DEP on behalf of the Plaintiffs, sent a letter to Defendants Beaver and Paradise Outfitters. The letter expressed the Commonwealth’s claim of ownership of the submerged lands of the Little Juniata River and the consequent right of the public to fish and boat in the river. (Cw. Ex. 50; N.T. 6/12/06 at 43).

82. On June 17, 2002, DEP sent a second letter on behalf of the Plaintiffs to Defendants Beaver and Hidden Hollow, clarifying and reaffirming the Commonwealth’s claims regarding the public’s rights in and the Commonwealth’s ownership of the submerged lands of the Little Juniata River. (Cw. Ex. 51; N.T. 6/12/06 at 44).

83. In early Spring 2003, one or more of the Defendants or their agents erected a cable across the Little Juniata River in the vicinity of the confluence with Spruce Creek, with four 4' x 8' signs stating "Keep Out", "No Trespassing", "Private Property" and "No Entry." (Stipulation ¶ 31).

84. Also in early Spring 2003, one or more of the Defendants or their agents erected a cable across the Little Juniata River approximately 1.3 miles downstream of the river's confluence with Spruce Creek, at the lower end of the Connie Espy Property adjacent to DCNR's Rothrock State Forest property, with two 4' x 8' signs stating "No Entry" and "No Trespassing." (Stipulation ¶ 32).

85. The cables with hanging signs described in the above paragraphs are "stream crossings" regulated as encroachments under the DSEA. 25 Pa. Code § 105.1.

86. Defendants did not apply for or obtain a permit for their cables and signs hung across the Little Juniata River in the Spring of 2003. (Stipulation ¶ 33).

87. Defendants did not apply for or receive a submerged lands license and DEP did not enter into a submerged lands license agreement with any Defendant for the signs and cables that were hung across the Little Juniata River in the Spring of 2003. (Stipulation ¶ 34).

88. Prior to the actions of Defendants and their predecessors in interest, public fishing and boating occurred in the 1.3 mile section of the Little Juniata River peaceably and without interference. (N.T. 6/13/06 at 160, 176-177).

89. It is unlawful for a person to intentionally obstruct or physically interfere with lawful fishing and boating. 30 Pa. C.S. § 909.

90. Due to the ongoing dispute, Officer Garman has not issued any citations for interference with lawful fishing and boating related to the section of the Little Juniata River in question. (N.T. 6/13/06 at 167).

Commonwealth Agencies' Decision to File Complaint

91. Upon learning of the public's complaints, DEP, DCNR and PFBC, as joint trustees of the Commonwealth's submerged lands, met and consulted regarding the appropriate response on behalf of the Commonwealth. (N.T. 6/12/06 at 46-47).

92. Thereafter, the Commonwealth Agencies confirmed the long-standing Commonwealth claim of ownership of the bed of the Little Juniata River. (N.T. 6/12/06 at 46-49).

93. The Commonwealth Agencies concluded that Mr. Beaver together with the other Defendants was engaging in conduct that "essentially resulted in the privatization of this one mile of a navigable river and that he [Beaver] had therefore wrongfully appropriated Commonwealth property for his private use and by excluding the public, was abrogating their rights to the waters which we [DEP, DCNR and PFBC] hold in trust for them." The Commonwealth Agencies then determined "that we needed to take legal action to vindicate the Commonwealth's rights on behalf of the public." (N.T. 6/12/06 at 47, 50-51).

94. On June 11, 2003, DEP, DCNR and PFBC jointly filed the Complaint, initiating the litigation of this matter.

95. Sometime after June 11, 2003, Defendants removed cables and the signs that were hanging across the river in the disputed section. (Stipulation ¶ 31).

**Facts Supporting the Conclusion that the Bed
of the Little Juniata River is Owned by the Commonwealth**

Little Juniata River Public Highway Declarations

96. By Act of February 5, 1794, Law Book V, page 1882, the Pennsylvania General Assembly declared the Little Juniata River in Huntingdon County from the mouth up to the head of Logan's Narrows to be a public highway for the passage of boats and rafts. (Cw. Ex. 21).

97. By Act of March 26, 1808, Law Book XI, page 233, P.L. 141, the Pennsylvania General Assembly declared the Little Juniata River from Logan's Narrows to the mills of Edward Bell, Allegheny Township, Huntingdon County [as of 1846, Blair County], to be a public highway for the passage of rafts, boats and other vessels. (Cw. Ex. 23).

98. By Act of April 1, 1822, P.L. 117, the Pennsylvania General Assembly declared the Little Juniata River in Antis Township, Huntingdon County [as of 1846, Blair County], as far up the river as the saw-mill dam of Alexander and Daniel Ale to be a public highway. (Cw. Ex. 24).

Title Documents

99. The parties agreed to the ownership interests entered into evidence in this matter without entering into the record all previous deeds in the chains of title. Further, the parties agreed to the authenticity and admissibility of the Warrants, Surveys, Patents, Deeds and Unrecorded Lease, listed for the respective ownerships, from which title to the respective properties derived, as well as the Islands and Mining, Warrants and Surveys. The parties agreed that in regard to interpretation of the documents, the documents speak for

themselves. The parties also agreed to the authenticity, accuracy, and admissibility of the maps prepared by the DCNR and the submerged lands licenses. (Stipulation ¶78).

East/North Bank of the Little Juniata River

100. Connie L. Espy's title to the property located adjacent to the East/North Bank of the Little Juniata River south of Spruce Creek, is traced back to the Peter Young Warrant and Abraham Sells Warrants. (Cw. Ex. 32, 33).

101. The Connie Espy titles to property adjacent to the Little Juniata River on the East/North Bank derive from Peter Young and Abraham Sells Warrants as follows:

- a. Peter Young Warrant, 85 acres, No. 294 – PHMC Certified/Sealed copies
 - i. Warrant Application dated August 1, 1766, Warrant to Joseph Heister August 31, 1803
 - ii. Surveyed October 20, 1767, and Return of Survey dated August 31, 1803
 - iii. Patent enrolled September 5, 1803 to Joseph Heister

(Stipulation ¶ 78(B); Cw. Ex. 3).

- b. Abraham Sells Warrant, 25 acres, No 145 – PHMC Certified/Sealed copies
 - i. Warrant dated February 22, 1785
 - ii. Surveyed May 28, 1791 and Return of Survey (28 acres) dated August 31, 1803
 - iii. Patent (110 acres, combined with (c) below) dated September 2, 1803 and enrolled September 5, 1803 to Joseph Heister

(Stipulation ¶ 78(B); Cw. Ex.4).

- c. Abraham Sells Warrant, 100 acres, No. 18 – PHMC Certified/Sealed copies
 - i. Warrant dated June 7, 1792
 - ii. Surveyed October 30, 1798 and Return of Survey (81 acres) dated August 31, 1803
 - iii. Survey and Return of Survey (110 acres, combined with (b) above) returned August 31, 1803.

(Stipulation ¶ 78(B); Cw. Ex. 5).

- d. Current Deed: DB 135, Page 608
Herman and Connie Espy to Herman and Connie Espy
Dated March 11, 1977
Recorded March 14, 1977

(Stipulation ¶ 78(B); Cw. Ex. 6).

102. The Patents related to the Peter Young and Abraham Sells Warrants described above resulted in title to these parcels being conveyed out of the Commonwealth to private parties as of 1803. (Cw. Ex. 3-5; N.T. 6/14/06 at 32-38).

West/North Bank of the Little Juniata River

103. Title to the Rothrock State Forest land owned by DCNR, which includes the Little Juniata Natural Area through which the Little Juniata River flows, is traced back to the Ann Brown Warrant. (Cw. Ex. 32, 33).

104. The Commonwealth's Rothrock State Forest title derives from the Ann Brown Warrant as follows:

- a. Ann Brown Warrant, 249 acres – Pennsylvania Historical and Museum Commission (PHMC) Certified/Sealed copies
 - i. Surveyed January 7, 1795, and Return of Survey dated July 12, 1802 in pursuance of a Warrant dated March 5, 1794
 - ii. Patent enrolled July 23, 1802 to Alexander Fullerton¹

(Stipulation ¶ 78(A); Cw. Ex. 1).

- b. Current Deed: DB U-4, Page 32
Harry Mumper, et. al. to Commonwealth of Pennsylvania
Dated January 21, 1902
Recorded January 30, 1902

(Stipulation ¶ 78(A); Cw. Ex. 2).

105. John P. Espy, Jr., who is not a party to this litigation, owns a portion of the property located adjacent to the West/South Bank of the Little Juniata River south of Spruce

¹ The stipulation agreed to by counsel and entered into the record has the patent enrolled to Ann Brown. This was incorrect. At trial, counsel agreed that it should be as listed above: "patent enrolled to Alexander Fullerton."

Creek, which title is traced back to the Honorable the Proprietaries Warrant. (Cw. Ex. 32, 33).

106. John P. Espy, Jr.'s title to property adjacent the Little Juniata River on the West/South Bank derives from the Proprietaries Warrant as follows:

- a. Proprietaries Warrant (west bank of Little Juniata), 5,913 acres, PHMC Certified/Sealed copies
 - i. Surveyed November 4, 1762 and Return of Survey dated April 25, 1765

(Stipulation ¶78(C); Cw. Ex. 8).

- b. Current Deed: DB 70, Page 243
James and Geraldine Harpster to John and Barbara Espy
Dated June 22, 1966
Recorded July 1, 1966

(Stipulation ¶78(C); Cw. Ex. 9).

107. Norfolk Southern Railway Company (Pa. Lines LLC), which is not a party to this litigation, owns a portion of the property located adjacent to the West/South Bank of the Little Juniata River south of Spruce Creek, which title is traced back to the Honorable Proprietaries Warrant. (Cw. Ex. 32, 33).

108. Norfolk Southern Railway Company's title to property adjacent to the Little Juniata River on the West Bank also derives from the Proprietaries Warrant listed in the paragraph above relating to the John Espy, Jr. title as follows:

- a. Current Deed: DB 519, Page 527
Consolidated Rail Corporation to Pennsylvania Lines LLC, Norfolk Southern Railway Company
Dated May 19, 1999
Recorded November 1, 1999

(Stipulation ¶78(D); Cw. Ex. 10).

- b. Current Deed: DB G-2-157 (Exception in Herman and Connie Espy Deed above)
George Hickle to Pennsylvania Railroad Company
Dated February 14, 1848
Recorded July 11, 1848

(Stipulation ¶78(D); Cw. Ex. 11).

- c. DB Q-5-258 (Exception in Herman and Connie Espy Deed above)
Susan Fetterhoof to Pennsylvania Railroad Company
Dated July 13, 1911
Recorded July 17, 1911

(Stipulation ¶78(D); Cw. Ex. 12).

- d. DB T-5, Page 557
Lucetta K. Thompson to Pennsylvania Railroad Company
Dated June 14, 1913
Recorded June 24, 1913

(Stipulation ¶78(D); Cw. Ex. 13).

109. Connie Espy owns property on West/North Bank that is not adjacent the river in the disputed section, and in that regard is not directly relevant to this dispute. The deeds for these parcels, for which no further title research was done or presented to the Court by any party to this litigation, are in evidence and listed as follows:

- a. Quitclaim Deed, DB 320, Page 763
Penn Central Corporation to Herman and Connie Espy
Dated March 4, 1993
Recorded March 16, 1993
Three (3) Tracts

(Cw. Ex. 7, 33).

110. The Commonwealth's Comparison Table of Warrants and Surveys, attached hereto, accurately reflects the Commonwealth's Exhibit Nos. 1 through 33 as introduced and admitted by the Court.

111. All relevant Warrants, Surveys, Returns of Survey and Patents identified in the Comparison Table describe the properties by metes and bounds as being along the bank

of the Little Juniata River or situate on a particular side of the Little Juniata River (or down the “Little Juniata Creek” to a point on the River and “between Little Juniata and Carrawe Mountain” as in the Proprietaries Warrant). (Cw. Ex. 1, 3 – 5, 8).

112. All relevant deeds describe the currently owned properties by metes and bounds as being “along the bank” of the Little Juniata River, to a post on the Little Juniata River, or to or along the low water mark or water line of the Little Juniata River. (Cw. Ex. 2, 6, 7, 9, 13).

113. The Peter Young Warrant and the 25-acre Abraham Sells Warrant from which the titles to the Connie Espy Property derive are both General Warrants rather than Descriptive Warrants. (Cw. Ex. 3, 4).

114. The Public Highway Declaration known as the Act of February 5, 1794 concerning the Little Juniata River predates all the relevant Warrants or Return of Surveys for Defendant owned property as depicted in the Commonwealth’s Comparison Table of Warrants and Surveys. (Cw. Ex. 21).

115. None of the public highway declarations for the Little Juniata River predate the Honorable Proprietaries Warrant for properties owned by entities not party to this litigation located adjacent to the West/South Bank. There is no evidence in the record that a patent was issued for this warrant. (Cw. Ex. 8).

116. There is no evidence of record that anyone on the West/South Bank of the river is asserting ownership of the bed of the Little Juniata in the disputed 1.3 mile section.

117. The Commonwealth and the Defendants and other entities identified above hold the interests in land conveyed by the instruments entered into evidence. To the extent those instruments establish ownership of the relevant parcels of land to the banks of the

Little Juniata, the parties stipulated as follows: If the Little Juniata is found by the Court to be navigable, the non-Commonwealth parties' and entities' ownership or other interest extends to the ordinary low water mark with a public easement between the ordinary high and low water marks. If the Little Juniata is found by the Court to be non-navigable, the riparian landowners who are party to this matter own the land to the middle of the river. (Stipulation ¶ 21).

Islands in the Little Juniata River

118. 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. (Cw. Ex. 26).

119. There are three major islands in the Little Juniata River for which warrants were issued and which were surveyed:

- a. Peter Swine, Island, 5 acres, 106 perches PHMC Certified/Sealed copies
 - i. Surveyed November 2, 1827, Survey Returned November 24, 1827, in pursuance of a warrant granted to Peter Swine dated October 4, 1827
 - ii. Patent dated November 24, 1827

(Stipulation ¶ 78(F); Cw. Ex. 15; N.T. 6/13/06 at 17-20).

- b. Jonathan Dorsey, Island, 6 acres, 78 perches, PHMC Certified/Sealed copies
 - i. Surveyed April 22, 1836, Survey Accepted May 5, 1836, in pursuance of a Warrant granted to Jonathan H. Dorsey dated February 17, 1836

(Stipulation ¶ 78(F); Cw. Ex. 16; N.T. 6/13/06 at 20-21).

- c. Jacob Isset, Island, 7 acres, 13 perches, PHMC Certified/Sealed copies
 - i. Surveyed May 17, 1809, Survey Accepted March 1, 1810, on a Warrant granted to Jacob Issett May 1, 1809

(Stipulation ¶ 78(F); Cw. Ex. 17; N.T. 6/13/06 at 21-23).

120. There are additional islands within the Susquehanna River and its tributaries for which warrants were issued and which were surveyed. (Cw. Ex. 18-19; N.T. 6/13/06 at 23-28).

Mining in the Little Juniata River

121. 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.” This Act was repealed by the Act of March 29, 1849. (Cw. Ex. 31).

122. 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, after the date of the Act of April 11, 1848, P.L. 533, No. 379, but before its repeal. (Stipulation ¶78(F); Cw. Ex. 20; N.T. 6/13/06 at 32-34).

Facts Supporting the Conclusion that the Little Juniata River is Navigable in Fact

Dr. Heberling’s Qualifications

123. The Commonwealth Agencies presented the testimony of Dr. Judith Heberling, Senior Historian and Chief Operating Officer of Heberling Associates, Inc., a historical and archeological consulting company. (N.T. 6/12/06 at 78-79).

124. Dr. Heberling is a native of Huntingdon County who earned a B.A. in history from Juniata College and a master’s degree and a Ph.D. in United States history from the University of Delaware. (N.T. 6/12/06 at 80-82; Cm. Ex. 42).

125. Dr. Heberling is a professional historian trained in the U.S. history research methodology and has worked as a research historian for the past 30 years. (N.T. 6/12/06 at 80-81, 86).

126. Dr. Heberling performed in-depth historical research for the United States Army Corps of Engineers, documenting and interpreting the navigation history of the Allegheny and Monongahela Rivers. (N.T. 6/12/06 at 87-88; Cm. Ex. 42).

127. Dr. Heberling's historical research has focused on 18th and 19th century politics, transportation and manufacturing. She was qualified and accepted by the Court as an expert in history with a specific focus on those subjects. (N.T. 6/12/06 at 87-89).

128. Dr. Heberling prepared a report in conjunction with the action, which was admitted into evidence at trial in this matter. (Def. Ex. 52).

129. This report was co-authored by Dr. Michael Husband, who did not testify at trial. (Def. Ex. 52).

130. Dr. Michael B. Husband, Ph.D. is a professional historian and an expert on American history. (Stipulation ¶ 40).

Research, Methods and Opinion

131. Dr. Heberling was tasked by the Commonwealth Agencies with determining whether or not the Little Juniata River served as a commercial or trade route historically. (N.T. 6/12/06 at 89-90).

132. Dr. Heberling began her research with a very broad literature review which she subsequently refined to sources specific to the period from the Revolutionary War era until around 1850, when the railroad came through the area. (N.T. 6/12/06 at 90-93).

133. These sources included letters, business records, court records, newspapers, historical accounts, the Pennsylvania archives and economic histories (N.T. 6/12/06 at 90-100; Cw. Ex. 52).

134. Upon finishing her research, Dr. Heberling reached a conclusion regarding whether or not the Little Juniata River served as a commercial or trade route historically. She testified that in her professional opinion “the historical evidence clearly indicated . . . that the Little Juniata River was used as a commercial route over a long period of time.” She defined that period as the revolution through 1850. Dr. Heberling stated that she held her opinion within a reasonable degree of historic certainty. (N.T. 6/12/06 at 100).

Settlement of the Region and Development of Markets

135. Despite some earlier settlement attempts, sustained settlement in the Juniata Valley did not occur until the late 1780’s after the end of the Revolutionary War. (N.T. 6/12/060 at 118-121; Cw. Ex. 52).

136. The Pennsylvania economy during the late 18th to mid-19th century period was largely rural and based on two things: agriculture and commerce. In addition, many grist mills (to convert grain into flour) and distilleries (to convert corn or rye into whiskey) developed. Because shipping goods over the mountains was both difficult and expensive, trade developed primarily with Baltimore due to the flow direction of the Juniata River. (N.T. 6/12/06 at 122-125; Cw. Ex. 52).

137. More specifically, bulky commodities tended to go down the river to the Baltimore market because those products would have been prohibitively expensive if they had been sent in any great quantity over land. (N.T. 6/13/06 at 120).

138. Defendant’s Exhibit 5 provides insight into the market for these goods: “On Monday or Tuesday of this week nine arks laden with flour passed this place in safety destined for the Baltimore market. The Baltimorians, we hope, will compensate our industrious citizens for their early visit.” (Def. Ex. 5; N.T. 6/15/06 at 170).

139. During one year in the early 19th century, nearly 1100 arks, rafts and keel boats had passed by Columbia on the Susquehanna River from its branches and tributaries (which include the Little Juniata River). (Cw. Ex. 55).

140. According to the historical record, two-fifths of all the grain, flour and whiskey that were exported from the cities of Philadelphia and Baltimore found their way to market by means of the Susquehanna River and its tributaries (which include the Little Juniata River). (N.T. 6/13/06 at 38; Cw. Ex. 41).

Transportation History of the Juniata Valley

141. The Little Juniata River flows through the ridge and valley province of the Appalachian Highlands. These ridges were a formidable barrier to travelers and to commerce, leaving the Little Juniata and similar rivers as the only way to move goods, aside from traveling the ridges on extremely rudimentary and rugged roads. (N.T. 6/12/06 at 101-104; Cw. Ex. 52).

142. The Juniata River as fed by the Little Juniata River and by the Frankstown Branch was a major transportation source. (N.T. 6/12/06 at 104-105; Cw. Ex. 52).

143. 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. (N.T. 6/12/06 at 105-106; Cw. Ex. 52).

144. Due to the rugged topography of the Juniata Valley, travel over land was difficult and expensive if you were hauling goods. (N.T. 6/12/06 at 104).

145. Both Plaintiffs' and Defendants' 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. (N.T. 6/12/06 at 118; 6/15/06 at 132; Cw. Ex. 52).

146. Road building was not an easy task with 18th and 19th century technologies, as it was basically hand labor. (N.T. 6/12/06 at 149).

147. Roads were a local responsibility, so normally there was not a lot of money available for road building projects. (N.T. 6/12/06 at 149).

148. Roads were muddy, rutted and narrow and in a lot of cases the stumps were barely cut out of the road. (N.T. 6/12/06 at 149).

149. 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. (N.T. 6/12/06 at 150).

150. Water transportation was cheaper than land transportation. If given a choice, people used the river. The main mode of transport was shallow draft boats, including arks and rafts. (N.T. 6/12/06 at 135-140; Cw. Ex. 52).

151. 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. (N.T. 6/12/06 at 168).

152. The reason that shallow draft boats were favored on Pennsylvania's inland rivers was because they did not have to displace a lot of water and they did not have to have a deep channel in order to go. (N.T. 6/12/06 at 137-8).

153. Barrels of goods are easier to haul on an ark that is designed for such a purpose. (N.T. 6/12/06 at 152).

154. Wagons did not carry very much, and the cost for overland transportation was very high. Therefore, it did not make economic sense to move a lot of goods via wagon. (N.T. 6/12/06 at 152).

155. The consensus of economic historians is that if a person could possibly ship by water, they would do so if the water was going in the right direction. (N.T. 6/12/06 at 153).

156. Arks or flatboats and rafts were used on the Little Juniata River. (N.T. 6/12/06 at 162, 166).

157. Flatboats were called the boat that never came back because the lumber comprising the boat was sold downstream along with its cargo. (N.T. 6/12/06 at 163).

158. Roads developed along the river as a way for people to get back after they had sold off their boats at the end of the journey. (N.T. 6/12/06 at 163).

159. Arks or flatboats were flat-bottomed, approximately 60 to 90 feet long and 16 to 20 feet wide. They had sides ranging from two feet to three and half feet high to provide protection between the water and the boat. (N.T. 6/12/06 at 163-164).

160. 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. (N.T. 6/12/06 at 164; Cw. Ex. 41).

161. Arks or flatboats were designed to draw no more than about 24 inches of water and could draw less than that depending on how heavily they were loaded. (N.T. 6/12/06 at 165).

162. The development of the ark revolutionized commercial traffic on the inland rivers of Pennsylvania because it was a vessel that was designed to withstand the rigors of

the river, it had sides and it was tough enough to be able to bounce off rocks and go over rough spots in the river that did not draw much water. (N.T. 6/12/06 at 165-166).

163. Arks were typically built by farmers in the off season or merchants who were shipping cargo had them built for their goods. (N.T. 6/12/06 at 166-167).

164. The inland rivers of Pennsylvania, including the Little Juniata River, could be used for ark traffic when the water levels were right. Generally, the spring freshets, the fall freshets and any time there is sufficient rain. (N.T. 6/13/06 at 91, 126).

Little Juniata River as Navigable in Historic Accounts and Records

165. Newspaper articles and other sources described the Little Juniata River in positive terms with regard to business and commercial ventures. (N.T. 6/12/06 at 106-108, 111-116; Cw. Ex. 34, 52).

166. These newspaper articles and notices, *inter alia*, described property for sale along the river situate “in a healthy part of [Huntingdon] County on a navigable stream, while another described the Little Juniata River as “a never failing stream.” (N.T. 6/12/06 at 108, 115; Cw. Ex. 34).

167. The Juniata River and its branches, including the Little Juniata River, were well traveled routes from the Susquehanna Valley to both the west and the south. Their natural importance as a transportation corridor was enhanced by their status as the only navigable rivers flowing generally east and west through and across the region’s ridges (Cw. Ex. 52 at 7).

168. In the late 18th and early 19th centuries, the Commonwealth through various enactments declared the Little Juniata River a public highway and passed laws to preserve free and effective navigation of the river. (Cw. Ex. 21-31).

169. The first public highway declaration was in 1794 and covered the Little Juniata River from its mouth up to Logan's Narrows, south of Tyrone. This declaration covers the 1.3 mile section in dispute before the Court. (N.T. 6/12/06 at 169; Cw. Ex. 21, 44).

170. The second public highway declaration was in 1808 and covered the Little Juniata River from Logan's Narrows to Bells Mills, which is present day Bellwood. (N.T. 6/12/06 at 170; Cw. Ex. 23, 44).

171. The third public highway declaration was in 1822 and cover the remainder of the Little Juniata River from Bells Mills to ostensibly its headwaters. (N.T. 6/12/06 at 170; Cw. Ex. 24, 44).

172. The public highway declarations were a product of a series of petitions by people in the local area. (N.T. 6/12/06 at 170-171).

173. 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. (N.T. 6/12/06 at 171).

174. Defendants' 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." (N.T. 6/15/06 at 136).

175. Defendants' historical expert testified that the General Assembly did appropriate money for river improvement, that presumably included the Little Juniata, including the following exchange with the Court:

THE COURT: You are suggesting that there was money appropriated by the legislature?

MRS. SHEDD: Yeah. There actually was. I believe either Africa or Lytle or both give amounts of money appropriated for various river improvement projects.

THE COURT: So the Commonwealth was investing in the river system?

MRS. SHEDD: Yes.

(N.T. 6/15/06 at 138).

176. An Act from 1801 authorized the erection of a bridge over the Little Juniata provided that said bridge did not "injure or impede the navigation" of the Little Juniata.

(N.T. 6/12/06 at 180; Cw. Ex. 22, 52).

177. The General Assembly addressed navigability on the Little Juniata in other contexts as well. Two Acts, one from 1799 and the second from 1801, regulate fisheries that obstruct navigation on the Juniata and its branches. (N.T. 6/13/06 at 11-12; Cw. Ex. 29, 30, 52).

178. 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. These Acts were the result of public petitions to address impediments to navigation. (N.T. 6/12/06 at 178-179; 6/13/06 at 9-11; Cw. Ex. 25, 38, 52).

179. Local residents made effective use of the public highway declarations and the Act of 1803 to complain about mills dams obstructing the navigation on the Little Juniata River. (N.T. 6/12/06 at 172-176 ; Cw. Ex. 38).

180. 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. (N.T. 6/12/06 at 172).

181. 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. (N.T. 6/12/06 at 172-176; Cw. Ex. 38).

182. Public highway declarations were the result of public petitions and public pressure on the General Assembly. If a stream were declared a public highway, the Commonwealth had some control over it. The acts regulating obstructions to navigation flowed from the public highway declarations. (N.T. 6/13/06 at 10; Cw. Ex. 21-30).

183. Public highway declarations were successful in that it gave local users of the Little Juniata River a recourse with respect to dams and fishing weirs on the river that were obstructing navigation. (N.T. 6/13/06 at 85).

184. The General Assembly passed acts that authorized the sale of islands in rivers listed therein as long as those streams had been declared public highways. The Acts of 1785 and 1793 directed the sale of islands in the Susquehanna River and its branches, which included the Juniata River and the Little Juniata River. The Act of 1806 continued that activity, although not on the Little Juniata. (N.T. 6/13/06 at 12-16; Cw. Ex. 26, 27, 28, 52).

185. The record shows applications for five island warrants on the Little Juniata, the first made in 1797 after the first legislative public highway declaration. Of the five applications for warrants, two applicants, Peter Swine and Jacob Isett, completed the process

and received title to islands in the Little Juniata River. (N.T. 6/13/06 at 16-28; Cw. Ex. 15-19, 52).

186. The legislative acts, island warrant applications and patents indicate that the Commonwealth asserted ownership of the bed of the Little Juniata River. (N.T. 6/13/06 at 20).

187. The General Assembly in 1848 enacted a measure that permitted people to apply for mining patents in the bed of navigable rivers. The Act of April 11, 1848 specifically included the Little Juniata in a list of those rivers. One such patent was applied for in the Little Juniata. (N.T. 6/13/06 at 28-34; Cw. Ex. 20, 52).

188. Mining warrants gave their holders the right to dig and mine iron, coal, limestone, sand and gravel, fire clay and other materials from the bed of the Little Juniata River. (N.T. 6/13/06 at 29).

189. The same year that the General Assembly passed the mining patent legislation, David Caldwell applied for a permit to mine. (N.T. 6/13/06 at 34; Cw. Ex. 20).

Industry Along the Little Juniata River

190. 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. (N.T. 6/12/06 at 111-114; Cw. Ex. 34, 52).

191. In 1826, the industries located in townships that bordered the Little Juniata River were as follows:

- 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 Furnace, 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. Antes Township: 4 Grist Mills, 8 Saw Mills, 1 Distillery, 1 Powder Mill
- (Cw. Ex. 34, 44 read together).

192. As early as 1795, there was a paper mill above Birmingham. (N.T. 6/12/06 at 99-100).

193. 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. (N.T. 6/12/06 at 115-116; Cw. Ex. 52).

194. 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. (N.T. 6/12/06 at 116).

195. 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. (N.T. 6/12/06 at 114).

196. Agricultural products were converted to whiskey, in part, because the product lasted longer in order to get to market. (N.T. 6/13/06 at 116).

197. Dr. Heberling looked at the Census of Manufacturers from 1820 and 1850, in part, to survey the industrial concerns along the Little Juniata River. (N.T. 6/12/06 at 126-127).

198. The federal census of manufacturers confirmed the existence of grist mills, saw mills and distilleries. (N.T. 6/12/06 at 125-127).

199. The growth of saw mills, grist mills and other industries was facilitated by rivers, which provided power and needed water and a means to transport products to market. (N.T. 6/12/06 at 127-128).

200. 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. (N.T. 6/12/06 at 129-131; Cw. Ex. 52).

201. The average amount that a grist mill along the Little Juniata River produced was about 1200 barrels of flour a year. (N.T. 6/12/06 at 130).

202. Forges along the Little Juniata River handled about a thousand tons of iron in a year. (N.T. 6/12/06 at 130).

203. One saw mill along the Little Juniata River produced 60,000 board feet of lumber in a year. (N.T. 6/12/06 at 130).

204. 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. (N.T. 6/12/06 at 132-134; Cw. Ex. 52).

205. One of the most notable developers of industry and user of the Little Juniata River was John Cadwallader. Cadwallader developed a grist mill and a saw mill, and finally a paper mill along the Little Juniata River near present day Birmingham. Cadwallader platted the town of Birmingham, the map of which indicated a public landing. (N.T. 6/12/06 at 140-145; Cw. Ex. 35, 45, 52).

206. John Cadwallader bought a house near Birmingham in 1788, and land that contained a grist mill and saw mill at that time. (N.T. 6/13/06 at 43-44).

207. By 1803, John Cadwallader added a distillery for making whiskey and had two saw mills. (N.T. 6/13/06 at 44).

208. In 1823, Michael Wallace bought the Laurel Spring Paper Mill and other mills around Birmingham previously owned by Mr. Cadwallader. He built a new grist mill and added an oil mill, a plaster mill and another saw mill. (N.T. 6/13/06 at 44).

209. Other industry developed north of Birmingham along the Little Juniata including Tyrone Forge and Bells Mills, which included grist mills and ironworks. (N.T. 6/12/06 at 144-148; Cw. Ex. 52).

210. A number of iron industries developed at Spruce Creek, a tributary of the Little Juniata River. (N.T. 6/12/06 at 133-134).

211. Mills developed near the town of Barree on the Little Juniata River, such as the Barree Ironworks. (N.T. 6/12/06 at 130).

212. The floor plans of grist mills included warehousing space for storage of barrels of flour. (N.T. 6/13/06 at 126-127).

Use of the Little Juniata River for Commerce

213. Dr. Heberling noted that the first mention of an ark to take products down the Juniata River (proper) was as early as 1796 by a Mr. Cryder, “an enterprising German.” The passage from Lytle notes: “The mouth of the Swatara, at Middletown, was then considered [in 1796] the termination of navigation on the Susquehanna. But Cryder surmounted the difficulties by which others had been deterred, passed the falls and cataracts and other obstacles which had been regarded as so dangerous, descended safely to Baltimore, and reaped a rich reward from the profits of his meritorious undertaking. The success of this enterprise becoming known throughout the region from which the Susquehanna and its tributaries flow, numerous arks were built in the following year, and reached tide-water with their cargoes. From the Juniata and its branches, they floated down the current whenever those streams were at a stage to permit, carrying principally flour, grain, and whiskey, three of the staple productions of the times.” (N.T. 6/13/06 at 132-133).

214. 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. (N.T. 6/12/06 at 136).

215. Pig iron, the product of the iron furnaces, was shipped by land and water. (N.T. 6/12/06 at 136-137; 6/13/06 at 39; 6/15/06 at 165; Cw. Ex. 41).

216. The historical record shows that the Juniata River and its branches carried grain, flour, whiskey, rye, corn, potatoes, hides, lumber, shingles, locust posts, and hoop

poles, and peach brandy, apple whiskey and country gin in small amounts. (Cw. Ex. 41, 52; N.T. 6/13/06 at 39, 49-50, 125).

217. All three Huntingdon County histories, by Jones, Lytle and Africa, talk about arks and rafts going down the Little Juniata River at various times. (N.T. 6/12/06 at 139).

218. Several newspaper articles from 1826 and 1827 talk about arks coming down the Juniata River from its various branches. (N.T. 6/13/06 at 41).

219. Indeed, a regular feature in the Huntingdon newspapers was a segment called "Ark News." (N.T. 6/15/06 at 170-171).

220. When arks would pass by Huntingdon, they would not be coming from the Raystown Branch of the Juniata River, but only the Frankstown Branch or the Little Juniata. (N.T. 6/16/06 at 30).

221. One newspaper article from 1826 addressed to the legislature regarding the vibrancy of the Juniata Valley economy referenced 52 arks on Stone Creek, a navigable water, and 7 arks on Spruce Creek, a tributary of the Little Juniata. (N.T. 6/13/06 at 37-40; Cw. Ex. 41, 52).²

222. If an ark is located on Spruce Creek, it can only go down the Little Juniata River. (N.T. 6/13/06 at 40; Cw. Ex. 52).

223. More than 120 arks were built in Huntingdon County over the winter of 1826. (Cw. Ex. 37).

224. Dr. Heberling reviewed several other newspaper articles from 1826 and 1827 that discussed rafts that had come down the Little Juniata. (N.T. 6/13/06 at 41-42).

² Defendants appear to make much of the fact that this article also mentions that some arks will pass by empty meant to be loaded downstream at Lewistown. Of course, Defendants ignore the fact that the arks themselves were valuable commodities being floated down river.

225. In addition to the newspaper articles contained in Cw. Ex. 34 and 41 and discussed in Cw. Ex. 52, Dr. Heberling also reviewed the Cadwallader papers. The plat maps of Cadwallader's town, Birmingham, are in evidence as Cw. Ex. 35 and 45. Mr. Cadwallader also sent letters to various individuals that he was trying to interest in buying property in Birmingham. Throughout this correspondence, Cadwallader consistently referred to navigation on the Little Juniata River. (N.T. 6/13/06 at 47-52; Cw. Ex. 39, 52).

226. Cadwallader also wrote to his brothers and referenced trade and navigation on the Little Juniata. (N.T. 6/13/06 at 52-54; Cw. Ex. 40, 52).

227. In addition to the mention of landings in the Little Juniata on Cadwallader's plat maps (Cw. Ex. 35, 45), those landings also are referenced in the Birmingham Borough Council minutes from 1901 and again in 1902. Therein, Council directs that a survey be done of the location of Cadwallader's landing. (N.T. 6/13/06 at 54-57; Cw. Ex. 42, 52).

228. According to the June 30, 2002 minutes, the survey was completed and the landing was located. Although Birmingham never reached the heights envisioned by Cadwallader, it did turn into a thriving commercial center with a significant number of mills, some of the products of which were shipped by water. (N.T. 6/13/06 at 57-60; Cw. Ex. 52).

229. There was also a landing on the Little Juniata River at the Laurel Springs Paper Mill. (N.T. 6/12/06 at 148).

230. 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. (N.T. 6/13/06 at 45).

231. Defendant's 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” on Saturday last.” Michael Wallace’s industrial establishments were on the Little Juniata River at Birmingham. (Def. Ex. 4; N.T. 6/13/06 at 77)(emphasis added).

232. Defendants own Exhibit 2 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.” (Def. Ex. 2; N.T. 6/13/06 at 80) (emphasis added).

233. Many of the newspaper articles refer to arks coming down all branches of the Juniata River, which would include the Frankstown Branch and the Little Juniata River, and the evidence indicates that if arks were traveling down one branch they were traveling down the other because the conditions on the rivers are pretty much the same. (N.T. 6/12/06 at 161-162).

234. Goods produced by these industries required transportation to market. The Little Juniata River was an important link in the region’s transportation chain. The populace was forced to depend on bad local roads and inland rivers and streams, all of which were impassable at various times of the year. This made the linkage among them critical. The rivers and roads fed into each other so that it was possible to move goods in different directions. As noted above, the Little Juniata River was an important part of the regional transportation network. The problems on the Little Juniata were typical of all inland rivers. (N.T. 6/12/06 at 148-156; Cw. Ex. 52).

235. Five basic types of boats regularly carried goods on Pennsylvania’s inland rivers. Newspaper articles and personal correspondence indicate that the ark was the main

mode of transport on the Little Juniata River, although rafts, flat boats and other such craft were used. (N.T. 6/12/06 at 157-167; Cw. Ex. 36, 37, 52).

236. In addition to the enumerated legislative acts, Dr. Heberling also reviewed newspapers and local historical records. Specifically, she researched the *Huntingdon Gazette* and two collections of letters, the Bucher letters and the Cadwallader papers. (N.T. 6/13/06 at 34-35; Cw. Ex. 34, 52).

237. The newspapers of the 18th and 19th centuries were different from those of today. They were primarily political organs, and most of the articles were taken from other newspapers with a lot of foreign news which was important for trade. Local news consisted mostly of advertisements and notices. (N.T. 6/13/06 at 36-37).

238. The evidence supporting Dr. Heberling's opinion that the Little Juniata River was used as a commercial route over a period from the late 18th century through the 1850 is extensive. Dr. Heberling also noted that in the vast amount of material she reviewed and studied, there was nothing which would indicate to her that the Little Juniata was not used as a corridor of commerce. (N.T. 6/13/06 at 68).

239. The evidence of record indicates that in the period at issue, the late 18th to mid-19th century, the Little Juniata, in its ordinary condition, was used extensively as a corridor for a wide variety of trade and commerce.

Defendants' Evidence and Why It Is Entitled to Less Weight

Nancy Shedd

240. The question presented to Dr. Heberling was a broad one. She was tasked with determining whether or not the Little Juniata River served as a commercial or trade route historically. (N.T. 6/12/06 at 89-90).

241. Mrs. Shedd, on the other hand, was given a narrowly focused question and an explanation of the issue at hand by Defendants' former counsel. Mrs. Shedd was asked "to investigate the historical use of the Little Juniata River as a broad highway of commerce for the transportation of people and goods in quantity in and out of the area in time of ordinary flow." (N.T. 6/15/06 at 119-120).

242. Mrs. Shedd acknowledged her "somewhat unconventional training ... in history" and testified that her methodology was to start with the specific question and to work outward (N.T. 6/15/06 at 118; 6/16/06 at 10-11).

243. Contrast this with Dr. Heberling's research approach that sought to cast wide net and to focus the investigation more narrowly from there. (N.T. 6/12/06 at 90-100; Cw. Ex. 52).

244. Dr. Heberling's method resulted in the examination of a far broader range of documents generally and produced a larger set of relevant documents upon which she could base her opinion. (Cw. Ex. 15-45, 52).

245. Under the methodology employed by Mrs. Shedd, she missed or discounted relevant documents that contained information contrary to the opinion she rendered. (N.T. 6/16/06 at 11-39, 45-47; Cw. Ex. 53, 54, 55; Def. Ex. 3, 4, 5, 6, 8, 25, 38).

246. Materials relied upon by Mrs. Shedd, some of which were introduced into evidence by Defendants, contained information contrary to the conclusions reached by Mrs. Shedd based upon those materials. (N.T. 6/16/06 at 11-39, 45-47; Cw. Ex. 53, 54, 55; Def. Ex. 3, 4, 5, 6, 8, 25, 38).

247. For example, Mrs. Shedd testified on direct that she could find no evidence that any investigation was done by any person to determine navigability before the

Commonwealth taking action on public highway declarations. (N.T. 6/15/06 at 133-134; 6/16/06 at 11-12).

248. However, Cw. Ex. 53, a portion of the Pennsylvania Statutes at Large from 1789, demonstrated that the Supreme Executive Council appointed a Board of Commissioners to view navigable waters including the Susquehanna and its branches. (N.T. 6/16/06 at 13-14; Cw. Ex. 53).

249. The action identified in Cw. Ex. 53 predated the 1794 Declaration of Navigability for the Little Juniata River by 5 years. (N.T. 6-16-06 at 14).

250. Similarly, portions of the Pennsylvania Archives, which document the Commonwealth's official business, further contradict Mrs. Shedd's testimony regarding the public highway declarations. (N.T. at 6/16/06 at 15-17; Cw. Ex. 54).

251. The portion of the Archives contained in Cw. Ex. 54, from 1790, provides that Commissioners were appointed to survey the waters of the "Juniata Rivers." (N.T. 6-16-06 at 15-17; Cw. Ex. 54).

252. The date of this action, 1790, precedes the 1794 public highway declaration for the Little Juniata River.

253. Although Commonwealth Exhibits 53 and 54 are primary sources as defined by Dr. Heberling and by Mrs. Shedd, Mrs. Shedd did not cite them during her research. The failure to review thoroughly the Pennsylvania Archives seems particularly curious. Mrs. Shedd testified that she was familiar with the Archives and that they were available at the Huntingdon County Historical Society and at Penn State. (N.T. 6/16/06 at 15-16).

254. The first example of Mrs. Shedd's citation to materials that contained information contrary to her opinion revolves around the local history produced by Lytle.

(N.T. 6/16/06 at 20-22).

255. On direct testimony, Mrs. Shedd cited to Lytle at page 296 for the proposition that attempts to develop Birmingham were a failure. (N.T. 6/15/06 at 141; 6/16/06 at 20-21).

256. However on the very next page, 297, Lytle noted a population of 400, active trade and industry, and loaded arks leaving the public landing. (N.T. 6/16/06 at 21-22). On cross-examination, Mrs. Shedd admitted the following:

MR. WHITAKER: Did you understand Mr. Lytle when he says left the public landing, did you understand him to be referring to a public landing at Birmingham?

MRS. SHEDD: Yes, I would, from that paragraph.

(N.T. 6/16/06 at 22).

257. Similarly, Mrs. Shedd referenced another local history, Africa at page 394, regarding a plat of Birmingham offered into evidence as Defendants' Ex. 6, in an effort to show the absence of a public landing. (N.T. 6/15/06 at 140-141; 6/16/06 at 22-24).

258. In the *very next paragraph*, Africa states that Birmingham was unsurpassed in importance as a business center, and that products were shipped downriver by arks or flat-bottomed boats. (N.T. 6/16/06 at 22-24).

259. This passage from Africa casts doubt on the Defendants' assertion that river travel on the Little Juniata was completely abandoned upon the arrival of the canal: "Some of the produce brought in by these teams [to Birmingham] was shipped down on the river on arks or flat-bottomed boats, while the remainder was conveyed to the canal at Water Street and found its ways to the eastern markets by that means." (N.T. 6/16/06 at 24).

260. Several of Defendants' Exhibits share similar infirmities. Mrs. Shedd cited to the March 29, 1826 issue of the Huntingdon Gazette (Defendants' Ex. 4) and read the first

paragraph into the record for the proposition that the ark travel on the Little Juniata River was hazardous even when it was in good boating order. (N.T. 6/15/06 at 167-168; 6/16/06 at 25; Def. Ex. 4).

261. However, the second paragraph of that document states that “[t]he greater part of the surplus produce of [Huntingdon] County has descended that river within the past few weeks....” (N.T. 6/15/06 at 168; 6/16/06 at 25; Def. Ex. 4).

262. The testimony regarding Def. Ex. 3, an article from the March 8, 1826 *Huntingdon Gazette* is similar. In the same paragraph cited by Mrs. Shedd, the paper reports: “twenty-four arks laden with flour and pig metal have passed [Huntingdon] on their way to market.” (N.T. 6/15/06 at 165; 6/16/06 at 26-27; Def. Ex. 3).

263. The same failure by Mrs. Shedd to credit contrary information contained in those documents is evidenced again with regard to Def. Ex. 5 and 7. In Def. Ex. 5, a portion of the February 28, 1827 *Huntingdon Gazette*, Mrs. Shedd failed to note a reference to ark traffic. (N.T. 6/16/06 at 28; Def. Ex. 5).

264. Similarly, her testimony regarding Def. Ex. 7, the May 30, 1827 *Huntingdon Gazette*, omits mention of “not less than 50 arks...passed down the Juniata River from its several branches” (N.T. 6/16/06 at 27; Defendants’ Ex. 7).

265. Mrs. Shedd’s research, which focused on a very specific conclusion, produced only a subset of the materials surveyed and relied upon by Dr. Heberling. In rendering her opinion, Mrs. Shedd, missed, ignored, or unreasonably discounted directly relevant primary sources. Of those sources she did cite as supporting her opinion, a significant number contained statements or information that, if not directly contrary to her opinion, certainly gave rise to at least a contrary inference. This circumstance notably is

absent from Dr. Heberling's testimony and opinion. Based upon these reasons and upon the totality of the evidence presented, Dr. Heberling's testimony.

Barone, Vento and Aspenleiter

266. The testimony and documentary evidence presented by Defendants' witnesses Barrone, Vento and Aspenleiter focuses on contemporary conditions of the Little Juniata River. (N.T. 6/14/06 at 108-109; 6/15/06 at 32, 35-36, 74).

267. Many of the "nic-points" identified by Dr. Vento were named, although Dr. Vento did not know why. (N.T. 6/14/06 at 84-85).

268. The Susquehanna River, the Juniata River, and the Youghiogheny River have "nic-points" in addition to the Little Juniata River. (N.T. 6/14/06 at 105-106).

269. Captain Aspenleiter has never navigated a boat in the 19th century and has never been on an ark. (N.T. 6/15/06 at 63).

270. Captain Aspenleiter has never been on any type of boat on the inland waters of Pennsylvania, including the Little Juniata River. (N.T. 6/15/06 at 73).

271. Local knowledge of the river and its hazards would have been tremendous by people living along the Little Juniata River, and such knowledge would have aided in their ability to navigate the Little Juniata River. (N.T. 6/15/06 at 95).

272. The Quad 3 data sets forth calculated annual and monthly statistical mean, median and various low flow flows, velocity and depth/width of such flows within a 6000' foot section of the Little Juniata for the period from 1939 to 1999; cross-sectional representations of the calculated contour of the stream channel over this same 6000 foot section of the Little J at fifty foot intervals over the same period of time, graphically illustrating the modeled depth and width of the annual and monthly statistical mean, median

and 7-10 day year low flows as calculated by Quad 3 for this time period; larger scale the same cross-sectional representations of the calculated contours of the stream channel of the Little Juniata. (Stipulation ¶ 45).

273. The Quad 3 data and testimony do not depict conditions of the river prior to 1939. (N.T. 6/14/06 at 103; 6/15/06 at 32, 35-36).

274. The flow data from the USGS gauging stations at Tipton and Birmingham were of limited utility because both had very limited years of flows on record. (N.T. 6/14/06 at 103).

275. In presenting his conclusions, Dr. Vento did not rely upon any historical information of the use of the Little Juniata River, including the information contained in the report of Nancy Shedd. (N.T. 6/14/06 at 108-109).

276. Along parts of the Little Juniata River, there exists a railroad, which has impacted some areas of the bank of the channel. (N.T. 6/14/06 at 110).

277. Dr. Vento acknowledged that human activity could have an impact on the stream channel of the Little Juniata River, including dredging, deforestation, creation of water obstructions and dam building. (N.T. 6/14/06 at 111-112).

278. Deforestation along the Little Juniata would increase run-off into the river as well as sedimentation. (N.T. 6/14/06 at 111-112).

279. The railroad was constructed along the Little Juniata River during the 1850's. The railroad is located adjacent the banks of the Little Juniata River. (6/16/06 at 41-45).

280. Contemporary analysis and data of river depth and flows do not depict historic conditions of the river prior to construction of the railroad and deforestation in the

watershed, and cannot be used to extrapolate back in time regarding the question of whether or not the river was capable of navigation in the late 1700s and early 1800s.

281. The map prepared by Defendants depicting various rocks and ledges on the Little Juniata River is a depiction of the river in its present day state. (Stipulation ¶ 78).

282. Dr. Vento³ 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. (N.T. 6/14/06 at 95).

283. He further testified that rainfall remained relatively constant during that time, although the data he relied upon was sketchy until the 1890's, and was based upon precipitation records as far as 120 miles away in Harrisburg. (N.T. 6/14/06 at 97-100, 116; Def. Ex. 13).

284. Dr. Vento also testified that his opinion was based 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. (N.T. 6/14/06 at 103).

285. Dr. Vento's stream cross sections were developed during his study. As such, they represent contemporary conditions. (N.T. at 104).

286. Dr. Vento also 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. (N.T. 6/14/06 at 105).

³ During voir dire, Commonwealth Agency counsel pointed out that Dr. Vento's professional geologist license was expired, contrary to his testimony and curriculum vitae which stated that he was in good standing. (N.T. 6/14/06 at 64). Dr. Vento testified that he had reviewed his license and that the requisite license fee was submitted (N.T. 6/14/06 at 65). However, a check of the Pennsylvania Department of State Bureau of Occupational Affairs web site on November 30, 2006 indicates that Dr. Vento's license expired in September 2005 and remains so.

287. Dr. Vento in developing his opinion focused on geology versus uses of the Little Juniata River. (N.T. 6/14/06 at 109).

288. 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. (N.T. 6/14/06 at 108-110).

289. Dr. Vento admitted on cross-examination that the railroad had impacted the bank of the stream channel. (N.T. 6/14/06 at 110).

290. Dr. Vento 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. (N.T. 6/14/06 at 111).

291. He further admitted that certain manmade activity could cause the stream channel to constrict. (N.T. 6/14/06 at 111).

292. He testified also that an increase in stream volume could cause bank erosion. (N.T. 6/14/06 at 113).

293. Dr. Vento's testimony does little more than establish that geologic processes are slow. His testimony regarding flows is based upon contemporary conditions and fails to account for factors he admitted existed and could have an impact of the flow and on the channel of the Little Juniata River.

294. Mr. Barone's testimony was aptly summarized as "an opinion about whether a 90 foot by 16 by 5 ark can navigate the Little Juniata based on today's flow information." (N.T. 6/15/06 at 53).

295. His expertise in geology raised significant questions regarding his ability to opine whether or not watercraft could have navigated the Little Juniata between the late 18th and mid-19th centuries. (N.T. 6/14/06 at 131-134).

296. 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. (N.T. 6/15/06 at 12).

297. Mr. Barone had never before been called upon to render such an opinion, and reviewed only the few primary sources from Mrs. Shedd's report. (N.T. 6/15/06 at 28).

298. The Quad 3 report upon which Mr. Barone relied developed its data by taking one portion of a 220 mile area and multiplying by a factor of 1.5. (N.T. 6/15/06 at 28).

299. The data was developed based upon the one stream gauge with appreciable data. (N.T. 6/15/06 at 32). This stream gauge is located upstream of the confluence of the Little Juniata and Spruce Creek and does not account for the additional flows from the creek. (N.T. 6/15/06 at 60).

300. Mr. Barone's opinion was based upon median flows during the period 1939 to 1999. During that time, the flow in the Little Juniata was equal to or greater than the median flow for the equivalent of 30 years. (N.T. 6/15/06 at 33).

301. The Quad 3 data upon which Mr. Barone relied measured contemporary conditions between 1939 and 1999. The data does not show the stream channel profile during that period the Quad 3 modeling was limited to 1939 and 1999 and 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. (N.T. 6/15/06 at 35-45).

302. Mr. Barone's opinion was based upon median flow only, and did not eliminate the possibility that arks could navigate the river at other times. (N.T. 6/15/06 at 41).

303. The Quad 3 data did not account for human impacts on the stream. (N.T. 6/15/06 at 44-45).

304. The Quad 3 report modeled at 2003 cross-section with data from 1939 to 1999. (N.T. 6/15/06 at 46).

305. Mr. Barone testified on cross-examination that changes in the stream channel affect the manner and type of craft on the river. A higher stream bed affects stream flow and craft type, and human impacts affect the stream. Quad 3 did not take these factors into account. (N.T. 6/15/06 at 47).

306. Mr. Barone's testimony amounted to an opinion as to what would be required to navigate a 90x16x5 foot object through the Little Juniata River channel as it was in 2003 with the median flows from 1939 to 1999. (N.T. 6/15/06 at 48).

307. Mr. Barone's testimony is neither probative nor relevant to the question before the Court, whether the Little Juniata River was navigable during the late 18th through the mid-19th centuries. The testimony attempts to extrapolate a data calculation based upon limited 20th and 21st century circumstance and impose it upon the earlier period.

308. Captain Aspenleiter's limited testimony (N.T. 6/15/06 at 76) established two things. First, that basic seamanship principles have remained the same over time, and that knowledge of the local conditions is important. (N.T. 6/15/06 at 94-95).

Navigation Servitude

309. A navigation servitude exists in favor of the public for safe navigation on all rivers and streams all or partly in the Commonwealth regardless of whether or not the bed of the river is owned by the Commonwealth. (Stipulation ¶ 20).

Injunctive Relief

310. For purposes of any injunctive relief that might issue in this matter an order directed to the following persons and entities, their agents and employees and persons acting in future concert with them will provide the plaintiffs with full relief, to the extent they are entitled to such relief: Connie Espy (if Mrs. Espy then still owns an interest in the Connie Espy Property); BEA (if BEA then still holds an interest in the Connie Espy Property); Mr. Beaver, individually and in his capacity as: (i) the managing member of Pamdon; and, (ii) the majority stockholder and chief executive officer of Hidden Hollow; Spring Ridge (formerly Legacy LLC); Cold Currents LLC; and Rural Partners. (Stipulation ¶ 19).

PROPOSED CONCLUSIONS OF LAW

1. The common law Public Trust Doctrine “provides that public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all the people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses.” The Coastal States Organization, *Putting the Public Trust Doctrine to Work*, 3 (2d ed. 1997); see also *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 452-454 (1892).
2. The Public Trust Doctrine was codified in Pennsylvania in 1971 by the Constitutional Amendment in Article 1, Section 27. PA. CONST. art I, sec. 27.
3. Article I, Section 27 of the Pennsylvania Constitution provides: “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the

Commonwealth shall conserve and maintain them for the benefit of all the people.” PA. CONST. art I, sec. 27.

4. The beds of navigable waters in Pennsylvania are owned by the Commonwealth. *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, 719.

5. 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 Plaintiffs - DEP, DCNR and PFBC - as trustees, are constitutionally mandated to “conserve and maintain for the benefit of all the people.” The sovereign may not alienate the public rights in such lands. PA. CONST. art I, sec. 27; *Martin v. Waddell*, 41 U.S. 367 (1842); *Lehigh Falls Fishing Club v. Andrejewski*, 735 A.2d 718, 719 (Pa. Super. 1999), *petition for allowance of appeal denied*, 563 Pa. 702, 761 A.2d 550 (2000).

6. Commonwealth ownership of submerged lands is based upon historic navigability at law or in fact. Owners of land along banks of navigable waters in Pennsylvania do not have the exclusive right to fish in those waters; that right is vested in the Commonwealth and for the benefit of the public. *Illinois Central Railroad*, 146 U.S. 387 (1892). *Shrunk*, 14 Serg. & Rawle 71 (Pa. 1826); *Carson*, 475, 4 Am. Dec. 463 (Pa. 1810); *Lehigh Falls*, 735 A.2d 718, 719.

7. Streams in Pennsylvania are “navigable at law” when they are declared so by the legislature, and the declaration predates the original land grant. *Leaf v. Pennsylvania Company*, 268 Pa. 579, 582, 112 A. 243, 243-244 (1920).

8. 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*, 268 Pa. 579, 112 A. 243 (1920).

9. Grants made prior to a declaration, legislative action is still relevant as to whether a stream is navigable-in-fact. *McKeen v. Delaware Division Canal Co.*, 49 Pa. 424 (1865); *Lehigh Falls*, 735 A.2d 718, 722.

10. A public highway declaration is presumptive evidence that title in a submerged land declared a public highway is in the Commonwealth as these declarations were contemporaneous expressions by the General Assembly that they believed the waters to be public highways. *Leaf*, 268 Pa. 579, 112 A. 243 (1920).

11. In Pennsylvania, the public lands were sold by the state in a manner that is well known to the profession. First a person had to make an 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. The deputy then made a survey of the tract and returned 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, 23 A. 49 (1891).

12. A warrant, upon which the purchase-money has been paid, is an authority from the Commonwealth to survey vacant land to the person taking it out. It is issued by virtue of law to the surveyor-general, who is bound to execute it. 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. *Tryon v. Munson*, 77 Pa. 250 (1875).

13. The warrant imposes on the holder the duty of having the land surveyed and the survey returned into the surveyor-general's office in a reasonable time. A delay for seven years is 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 (1854).

14. A patent is simply the deed of the state to its grantee. Its execution and delivery are an admission that all previous proceedings have been had, and all necessary formalities have been complied with. 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, and that the title of the

Commonwealth to the land described in it had passed regularly to the patentee. *Bushey v. South Mountain M. & I. Co.*, 136 Pa. 541, 20 A. 549 (1890).

15. 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. *Fred E. Young, Inc. v. Brush Mountain Sportsmen's Ass'n*, 697 A.2d 984, 988 (Pa. Super. 1997). "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 of Pennsylvania, which has itself the legal title only as security for the patenting fees." *Consolidation Coal Co. v. Friedline*, 3 A.2d 200, 201 (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. *Emery v. Spencer*, 23 Pa. 271 (1854).

16. 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 gives title from its date. *Cassidy v. Conway*, 25 Pa. 240 (1855). For general warrants where the description is loose or vague, the title dates from the return and acceptance of the survey.

17. Deeds speak for themselves and their construction cannot be varied or changed by parol. *Meyers v. Robinson*, 74 Pa. 269 (1874).

18. It is unnecessary to analyze all deeds or documents in the chain of title other than the original Warrants, Return of Surveys and Patents together with the current ownership deeds in order to determine the original and the current owners of the relevant properties in this matter.

19. It is unnecessary to analyze the descriptions in all deeds or documents in the chain of title other than the original Warrants, Return of Surveys and Patents together with the current

ownership deeds in order to determine the original and current descriptions of the relevant properties in this matter.

20. The descriptions in the original Warrants, Surveys, Return of Surveys and Patents set forth the official description of the relevant properties in this matter.

21. No party can enlarge or change his ownership by way of deed beyond what was originally granted in the original Warrants, Surveys, Return of Surveys and Patents.

22. A grant of land bordering on a nonnavigable or private stream extends ad filum medium aquae. The conveyance to such grantee by one who owns the land adjacent to and under the stream carries the grantee's title beyond the water line of the stream and gives him the ownership of the soil to the middle of the current. This is grounded on the presumption that such was the intention of the parties to the grant. *Smoulter v. Boyd*, 209 Pa. 146, 58 A. 144 (1904).

23. The grants of the state of lands bordering on navigable streams, even when calling for the river as a boundary, do not extend beyond low-water mark: *Hart v. Hill*, 1 Whart. 124; *Ball v. Slack*, 2 Whart. 508; *Lehigh Valley Railroad Co. v. Trone*, 4 Casey 206; *Jones v. Janney*, 8 Watts & Serg. 436. And even to this extent the grant of title is not absolute, except to high-water mark. As to the intervening space between high and low water mark, the title of the private owner is qualified. The right of passage over it in high water remains in the public. The state may use it for purposes connected with the navigation of the stream without compensation, and may protect it also from an unauthorized use of it even by the owner of the land to low-water mark. *Stover v. Jack*, 60 Pa. 339, 343 (1869).

24. Because the Public Highway Declaration of 1794 predated the Warrants or Return of Surveys on approximately three-fourths of the properties involved, excluding only that portion

retained by the Proprietaries for which the date of the return of survey or patent is unknown, the bed of the Little Juniata River is owned by the Commonwealth and the river is navigable in law.

25. In Pennsylvania, islands in navigable streams belong to the state, and have always been considered as excepted from the general laws for the sale and settlement of the vacant lands of the Commonwealth. They have always been granted under laws of special application to islands. *Stover v. Jack*, 60 Pa. 339, 343 (1869).

26. The Commonwealth's sale of islands in the Little Juniata River is an indicator that the bed of the river is owned by the Commonwealth. If the Commonwealth had not owned the river bed and thus the islands, it could not have sold them. (N.T. 6//12/06 at 27).

27. Authorization to patent land lying in the beds of navigable rivers has occasionally been given by statute. At one time, the Land Office was permitted to sell the right to take coal and other minerals in river beds, provided there was no interference with navigation and rights incidental thereto. *Land Office Business in Pennsylvania, by John G. Stephenson, III, Villanova Law Review, Volume 4, Number 2, P. 175-197 (1959)*. The law referenced is the Act of April 11, 1848, P.L. 533, No. 379, which provided for the purchase of mining patents in the streambeds "of any of the public navigable rivers of this Commonwealth."

28. The issuance of mining patents by the Commonwealth is an indicator that the bed of a river is owned by the Commonwealth. (N.T. 6/12/06 at 26-27).

29. In Pennsylvania, rivers that are navigable in fact are considered navigable in law. *Cleveland & Pittsburgh Railroad Co. v. Pittsburgh Coal Co.*, 317 Pa. 395, 176 A. 7 (1935); *Flanagan v. Philadelphia*, 42 Pa. 219 (1862).

30. Pennsylvania's courts, in determining navigability-in-fact, follow the federal rule as enunciated by the United States Supreme Court in *The Daniel Ball*, 77 U.S. (10 Wall.) 557,

563 (1870); that is, whether the streams or rivers “are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade or travel are or may be conducted in the customary modes of trade and travel on water.” *Lakeside Park Co. v. Forsmark*, 396 Pa. 389, 153 A.2d 486 (1959); *Cleveland & Pittsburgh Railroad*, 317 Pa. 395, 176 A. 7 (1935); *Flanagan*, 42 Pa. 219 (1862).

31. The navigability of a body of water must be viewed through the eyes of 18th and 19th Century America, prior to the invention of modern day modes of transportation and at a time when the only significant routes of travel, trade and commerce were on the waterways. Courts employ a historic test of navigability because the public’s right to fish and otherwise use navigable waters vested unequivocally when the country was formed. *Martin v. Waddell*, 41 U.S. 367 (1842).

32. While the United States Supreme Court has held that title to navigable waters vested in the public at the time of independence from England, the Pennsylvania Supreme Court has 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. *Carson*, 2 Binn. 475, 4 Am. Dec. 463 (Pa. 1810).

33. 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. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

34. Navigation does not have to be open at all seasons of the year or at all stages of water. Nor is navigability, in the sense of the law, destroyed because the watercourse is interrupted by the occasional natural obstructions or portages. *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

35. 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. 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 stream – it is navigable in fact and becomes in law a public river or highway. A stream must be “generally and commonly useful to some purpose of trade or agriculture.” *The Montello*, 87 U.S. (20 Wall) 430 (1874); *United States v. Holt Bank*, 270 U.S. 49 (1926); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77 (1922).

36. 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*, 77 U.S. (10 Wall.) 557 (1870) and *The Montello*, 87 U.S. (20 Wall) 430 (1874).

37. In Pennsylvania, for purposes of determining navigability in fact, the test for rivers is different from the test for lakes. *Lakeside Park Co. v. Forsmark*, 396 Pa. 389, 391-392, 153 A.2d 486, 487 (1959).

38. The Court in *Lakeside Park* equated “broad highroad for commerce and the transport in quantity of goods and people” with a “trade-route” for purposes of the test of navigability. *Lakeside Park*, 396 Pa. 389, 391-392, 153 A.2d 486, 487 (1959).

39. The Little Juniata River was a trade-route with a significant volume and diversity of goods transported for commerce.

40. Because the Little Juniata River was both susceptible of being used and 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, during the relevant timeframe, the Little Juniata River is navigable in fact.

41. Dr. Heberling's opinion and her testimony in support of that opinion, is entitled to greater weight than the opinion and testimony in support provided by Nancy Shedd.

42. The established law cited above requires that navigability in fact must be viewed through the lens of 18th and 19th century America. For this reason alone, the Defendants' efforts, through Dr. Vento, Mr. Barone and Captain Aspenleiter, to focus this Court on contemporary conditions on the Little Juniata River must be rejected as contrary to law.

43. Moreover, the focus on contemporary conditions also must fail because it is contrary to primary and secondary historic sources as detailed for the Court by Dr. Heberling. It also must fail because the data upon which it is based is limited at best to a 60 year period between 1939 and 1999 as modeled in 2003, and because it omits consideration of important factors such as the impact of human activity on the river. Taken in whole or in part, the testimony of Dr. Vento, Mr. Barone and Captain Aspenleiter is speculative at best, is largely irrelevant, and is entitled to little, if any, weight.

44. The state of the law on navigability in fact is discussed extensively above and will not be repeated here. The application of that established law instructs that the testimony regarding contemporary conditions must be disregarded as irrelevant and contrary to law. Dr. Heberling's extensive research, her testimony and her opinion that the Little Juniata River was a corridor of commerce for a wide variety of commercial and agricultural goods from the late 18th century through the mid-19th century also is discussed extensively elsewhere in this Memorandum and will not be repeated here. The conclusions drawn based upon contemporary conditions are contrary to the weight of the historical evidence of record and for that reason should be disregarded.

45. Dr. Vento's testimony does little more than establish that geologic processes are slow. His testimony regarding flows is based upon contemporary conditions and fails 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, it should be accorded little weight vis-à-vis Dr. Heberling's testimony that was based upon historic accounts from the time in question.

46. Mr. Barone's testimony is neither probative nor relevant to the question before the Court, whether the Little Juniata River was navigable during the late 18th through the mid-19th centuries. The testimony attempts to extrapolate a data calculation based upon limited 20th and 21st century circumstance and impose it upon the earlier period. The testimony is so limited and so contrived that it should receive no weight whatsoever.

47. The combined testimony of Dr. Vento, Mr. Barone and Captain Aspenleiter enlightens us to conditions on the Little Juniata if the river channel in 2003 and flows from 1939 to 1999 were at issue. They are not. The issue before the Court requires the evaluation of historical evidence to assess conditions in the late 18th to mid-19th century. As such, the testimony of these three gentlemen is neither relevant nor probative, and should be given no weight.

48. *Commonwealth ex rel. Tyrone v. Stevens*, 178 Pa. 543, 555, 36 A. 166 (1897), supports a conclusion that the Little Juniata River is navigable-in-fact. The findings of fact in the case 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.

49. Once a stream meets the navigability test at any point in history, it remains a legally navigable water. *Lehigh Falls*, 735 A.2d 718, 722.

50. The Commonwealth is not divested of title by disuse for commerce. *Poor v. McClure*, 77 Pa. 214 (1874); *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377, 408 (1940).

51. Because the Little Juniata River is both navigable-in-law and navigable-in-fact, it remains a legally navigable body of water today.

52. Once a stream or river is determined navigable, it is deemed navigable throughout its entire length. *Lehigh Falls*, 735 A.2d 718, 722 (Pa. Super. 1999).

53. The Little Juniata River is navigable in its entirety.

54. The public's rights in submerged lands of the Commonwealth include the right to fish, boat and recreate therein. *Shrunk*, 14 Serg. & Rawle 71 (Pa. 1826); *Carson*, 2 Binn. 475, 4 Am. Dec. 463 (Pa. 1810); *Lehigh Falls*, 735 A.2d 718, 719.

55. DEP, DCNR and PFBC, as Commonwealth trustees, must conserve and maintain the Commonwealth's public trust resources, such as submerged lands of the Commonwealth, and protect the public rights therein pursuant to Art. I, Section 27 of the Pennsylvania Constitution as well as under the statutes they administer.

56. If the Little Juniata River is determined to be non-navigable, the Commonwealth still owns to the center of that portion of the 1.3 miles claimed by Defendants, and Defendants cannot control that portion of the River. Nor would Defendants control the remainder of the West/South bank inasmuch as other entities who are parties to this litigation own that property adjacent to the River.

57. A navigation servitude exists in favor of the public for safe navigation on all rivers and streams all or partly in the Commonwealth regardless of whether or not the bed of the river is owned by the Commonwealth. (Stipulation, ¶20).

58. Private landowners of the beds of non-navigable waters do not have the right to

exclude the public from floating or boating these waters. *The Barclay Railroad and Coal Co. v. Ingham*, 36 Pa.194 (1860).

59. Defendants' and their agents' actions of harassing boaters and hanging cables and signs over and across the Little Juniata River interfere with the navigation servitude in favor of the public. (*See* Stipulation 31, 32, 35A & 35L).

60. The Commonwealth Agencies are authorized to seek injunctive relief enjoining Defendants and their agents from interfering with the navigation servitude pursuant to their implied authority to act under the statutes administered by the Agencies as well as pursuant to their constitutional authority and obligations as trustees of the Commonwealth's public natural resources. PA. CONST. art I, sec. 27.

61. The Dam Safety Act and the regulations thereunder, require a permit for all dams, water obstructions and encroachments located in, along, across or projecting into *any* water of the Commonwealth. 32 P.S. § 693.6.

62. When a dam, water obstruction or encroachment is located in, along, across or projecting into a submerged lands 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" from DEP pursuant to the Dam Safety Act or the permittee must obtain to other "specific authority from the General Assembly" to occupy the Commonwealth submerged lands. 32 P.S. § 693.15.

63. Section 15 of the Pennsylvania Dam Safety Act implements Art. I, Section 27 of the Pennsylvania Constitution and the Public Trust Doctrine with regard Commonwealth submerged lands and designates DEP as the executive agency charged with administering the submerged lands program thereunder. (N.T. 6/12/06 at 20). DEP administers the provisions of

Section 15 of the Dam Safety Act through the “Submerged Lands License Program.” (N.T. 6/12/06 at 21-22).

64. The DEP may issue a “Submerged Lands License” for any project less than 25 acres in size and which meets the public trust purposes set forth in the statute and regulations. Licensees must pay an annual fee as compensation to the Commonwealth for use of these lands. Licensees’ use and occupation of such lands are subject to the terms and conditions set forth in the license agreement. Such licenses are approved by the Governor. 32 P.S. § 693.15. (N.T. 6/12/06 at 33-36).

65. Although the General Assembly charged DEP with administration of the Submerged Lands License Program, DEP is not authorized to make final determinations of historic navigability of waters of the Commonwealth for purposes of title. Only Pennsylvania Courts are authorized to make such final determinations of navigability as it relates to title of submerged lands. (N.T. 6/12/06 at 23, 25).

66. Section 18 of the Dam Safety Act provides that: “[I]t shall be unlawful for any person to: (1) Violate or assist in the violation of any of the provisions of this act or of any rules and regulations adopted hereunder. . .” 32 P.S. § 693.18.

67. Section 6 of the Dam Safety Act provides that: “No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without prior written permit of the Department.” 32 P.S. § 693.6.

68. “Water Obstruction” in the Dam Safety and Waterway Management Regulations is defined as including any “. . . structure located in, along, or across or projecting into a watercourse, floodway or body of water.” 25 Pa. Code § 105.1.

69. Water Obstructions include “stream crossings” which are defined in the regulation as: “[A] pipeline, aerial cable or similar structure which is placed in, along, under across or over the regulated waters of this Commonwealth.” 25 Pa. Code § 105.1.

70. A “regulated water of this Commonwealth” includes: [W]atercourses, streams or bodies of water and their floodways wholly or partly within or forming part of the boundary of this Commonwealth.” 25 Pa. Code §105.1.

71. The Little Juniata River is a regulated water of the Commonwealth under the Chapter 105 regulations, and the cable with signs is a stream crossing requiring a permit under the regulations.

72. Defendants admit they did not apply or receive a permit for this water obstruction. Stipulation ¶ 33. Defendants failure to obtain a permit required under Section 6 of the Dam Safety Act is unlawful conduct pursuant to Section 18, and is a violation of the Act.

73. 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” from DEP pursuant to the Dam Safety Act. 32 P.S. § 693.15.

74. Because the signs and cables are water obstructions across a submerged land of the Commonwealth, the Defendants were required under Section 15 of the Dam Safety Act to also obtain a submerged lands license from DEP.

75. Defendants admit they did not apply for or receive a submerged lands license from DEP for the signs and cables that were hung across the Little Juniata River. Stipulation ¶ 34. Failure to obtain a submerged lands license constitutes unlawful conduct under Section 18 and is a violation of the Act.

76. Defendants actions in hanging cables with signs across the Little Juniata River without a permit and submerged lands license from the DEP constitute violations of the Dam Safety Act.

77. The PFBC may bring an action to restrain conduct declared unlawful in this section and to recover damages. 30 Pa. C.S. §909.

78. Section 909 of the Fish and Boat Code makes it unlawful to intentionally obstruct or physically interfere with lawful fishing or boating and specifically lists activities that violate this section. 30 Pa. C.S. §909. A person violates section 909 if that person intentionally or knowingly commits any of the following:

- a. Disturbs fish in their habitat for the purpose of disrupting the lawful taking of fish where another person is engaged in the process of lawful fishing. 30 Pa. C.S. §909(b)(1).
- b. Blocks or impedes another person who is engaged in the process of lawful fishing and boating. 30 Pa. C.S. §909(b)(2).
- c. Uses natural or artificial visual, aural, olfactory or physical stimuli to affect fish behavior in order to hinder or prevent the lawful taking of fish. 30 Pa. C.S. §909(b)(3).
- d. Creates or erects barriers with the intent to deny ingress or egress to areas where the lawful fishing and boating is permitted. 30 Pa. C.S. §909(b)(4).
- e. Places obstructions or objects in the water of this Commonwealth for the purpose of hindering lawful fishing or boating. 30 Pa. C.S. §909(b)(5).

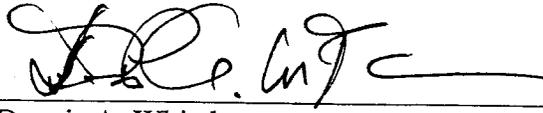
79. One or more Defendants and their agents have intentionally obstructed or physically interfered with lawful fishing and boating in violation of section 909 by doing the following:

- a. Erecting cables across the river and posting “keep out” signs on those cables (Stipulation ¶¶ 31, 32 & 35L).
- b. Confronting boaters and informing them that they may not continue downstream. (Stipulation ¶¶35A & 35L).
- c. Throwing stones at a fisherman wading in the Little Juniata River. (Stipulation ¶35B).
- d. Throwing dog food into the waters of the Little Juniata River where men were fishing. (Stipulation ¶¶ 35I & 35K).
- e. Obstructing fishermen by yelling at them and ordering them out of the Little Juniata River. (Stipulation ¶¶ 35B, 35C, 35D, 35F, 35I & 35K).

80. The PFBC, pursuant to section 909(d), is seeking that Defendants be enjoined from any future activities designed to intentionally obstruct or physically interfere with lawful fishing and boating such as those listed above.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION



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Date: November 30, 2006

IN THE COURT OF COMMON PLEAS
HUNTINGDON COUNTY, PENNSYLVANIA
CIVIL DIVISION

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

Plaintiffs

v.

No. 2003-781

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.

Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Commonwealth's Memorandum of Law and Proposed Findings of Fact and Conclusions of Law in the above-captioned case were served upon the individuals named below by first class mail:

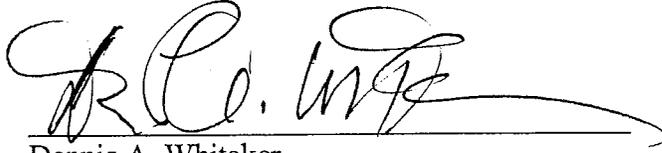
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Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL PROTECTION

A handwritten signature in black ink, appearing to read "D.A. Whitaker", written over a horizontal line.

Dennis A. Whitaker
Assistant Counsel
Supreme Court I.D. No. 53975

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Date: November 30, 2006