



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

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Governor

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GEORGE MEHNERT
Executive Director

Meeting Minutes

Phoenix, Maricopa County

May 23, 2002

COMMISSION MEMBERS PRESENT

Jay Brashear, Earl Eisenhower, and Cecil Miller (telephonically).

COMMISSION MEMBERS ABSENT

Dolly Echeverria and James Henness.

STAFF PRESENT

Curtis Jennings, George Mehnert and Tom Vogt.

1. CALL TO ORDER

Chair Eisenhower called the meeting to order at approximately 9:50 a.m.

2. ROLL CALL

See above.

3. APPROVAL OF MEETING MINUTES

A. March 27, 2002 teleconference.

Mr. Brashear asked that it be noted he was absent only because of a technical problem with the telephone system, but he was available and waiting.

Motion by: Jay Brashear Second by: Cecil Miller Vote: All aye
Motion: To adopt the minutes as amended.

4. WATERCOURSE HEARINGS

Chair Eisenhower said the Commission is transferring money to the State Land Department (SLD) to assist in moving the studies forward. He asked the SLD if the money transferred, along with any money they will receive on July 1, would be sufficient for La Paz and Yuma small and minor watercourse studies to be completed in time for hearings in September. Cheryl Doyle, representing the SLD, said until they receive more money for the project, the money transferred by ANSAC is only enough to complete the study for one county. Chair Eisenhower said the order in which future hearings will be conducted contingent on money available to both the Commission and the SLD. In response to a question asking how much money was being transferred by the Commission to the SLD by ANSAC. Mr. Mehnert said the Commission asked for supplemental budgets after the passage of SB1275 last year to get the Commission's work done by June 30, 2004, the Commission's at that time. He said he didn't see any of the people who were complaining the Commission was taking too long to complete its work, supporting the Commission's supplemental budget requests. Mr. Mehnert said he learned in September (2001) that the supplemental budget requests for FY02 and FY03 would not be acted on because of the state revenue situation. He added that about the same time he learned that both the Commission and SLD 02 and 03 budgets would be cut. Mr. Mehnert said since the Commission hasn't had any hearings recently, the Commission is capable of transferring \$15,000.00 of

FY02 money in the next few days to the SLD to use for watercourse studies. He further explained that at the August 14, 2001 meeting the Commission had scheduled hearings in November (2001) for small and minor watercourses, and the Lower Salt River for a March (2002) hearing, but those were cancelled when the SLD and the Commission didn't get any supplemental funding, so there have been some savings as a result of canceling these three hearings.

Chair Eisenhower asked the Commissioners for their opinions on hearing priorities. Mr. Brashear said by starting with the small and minor watercourses instead of the watercourses that affect the most people first, he is concerned the Commission is not proceeding as the statutes require. Mr. Miller said that during the first go-round the Commission did hear the major watercourses first, but since this time there is a funding problem, it makes sense to start with the small and minor watercourses first. A member of the public said there is a lawsuit in progress that may affect the Commission's work. Mr. Brashear said that he doesn't want to wait around for another lawsuit and would like to press forward with the hearings. Chair Eisenhower agreed with Mr. Brashear and said the lawsuit doesn't change the charter we have been given as a Commission. The member of the public said that with the Commission and SLD funding issues, it contradicts that the state's position in the lawsuit that the Commission is doing its work. Chair Eisenhower said the Commission is here as a constituted legal body by the state to do a certain job, and that it is doing its job. Mr. Mehnert said it is interesting since last April the only criticism the Commission has heard is how slowly we are proceeding, however, the people making these criticisms weren't around when we scheduled hearings last August and were not around helping us lobby for supplemental budget monies this last spring and summer. He added, the Commission is not as bad off as the SLD as far as budget issues go, because their budget needs are much greater than the Commissions because the SLD has to hire expert engineers to conduct the research, write the studies, and testify at the hearings. He said the reason for a two year extension of the Commission's sunset date to 2006 is so the Commission can receive less money each year and still get the job done by spreading the funding out over four years instead of over two years.

Mr. Brashear asked why the Commission can't proceed without the updated studies and just use the evidence already in the Commission's possession submitted by the SLD and others. He added that other quasi judicial bodies don't seem to wait for anybody and just proceed at their own speed. Mr. Jennings said that while the statutes may have made the Commission an adjudicatory body, the Commission isn't a court and doesn't have the powers of subpoena, contempt, or others to make people do what the courts want them to do. He said therefore, we need to give everybody the opportunity to provide any evidence necessary to support their positions. He also said the SLD is charged with getting the evidence to the Commission on behalf of the state, but we cannot make things happen when we want, and even though we have reports from the SLD, those reports were based on the criteria in the statutes the courts have found biased and tilted in the finding of non navigability, but experts expected to testify need to look at all the facts and give their opinions based on the new statutes and criteria. Mr. Jennings said the statutes state the Commission shall consider certain things when creating hearing priorities and that it is not mandatory to do the major watercourses first, as they also are the studies that will require additional work and, hence, funding. Judith Darknall, Assistant Attorney General (AAG) representing the SLD, said she is troubled with the comment that the SLD is not fulfilling its statutory duties, and that the SLD is moving as fast as it financially can. She added the reports need to be rewritten because in their present form the old criteria is interwoven in them and needs to be removed.

5. NOTICE REGARDING HEARINGS

Chair Eisenhower said as it appears now, the first hearing will be on the small and minor watercourses in Yuma County and will take place sometime in September of 2002. He added if possible, the Commission would like to also conduct a hearing on the small and minor watercourses in La Paz County as well, if funding permits. Mr. Jennings said the Commission could take action and publish notice of the Intent to Study on two or even three counties and then notice the hearing or hearings thirty days out from the actual date of the hearings.

6. REPORT FROM DIRECTOR

A. ANSAC Administrative Rules & SB 1339.

Mr. Mehnert said the administrative rules are at the Governor's Regulatory Review Counsel (GRRC) and would like to thank those who submitted comments and suggestions. He said GRRC is drafting a rule for the procedures for the Commission to conduct public trust value hearings. Mr. Brashear asked when the rules will be completed. Mr. Mehnert said there is no definitive date when the rules will be completed. Mr. Brashear asked if it makes any difference if the rules are finalized before the first hearing, or if the Commission can proceed anyway. Mr. Jennings said you can operate under the proposed rules even though they are not finalized.

B. Budget FY2002, 2003.

Mr. Mehnert said the FY2002 budget was cut for most agencies including the Commission and said at this time according to the Governor's recommendation, the Commission is to be reduced by about \$4,000.00.

C. Senate Bill 1368.

Mr. Mehnert said the bill simply extends the Commission to June 30, 2006. He said the reason for the extension was based solely on the lack of revenue.

7. CALL FOR PUBLIC COMMENT

Vera Kornylak, representing the Arizona Center for Law in the Public Interest, asked if the Commission was going to appoint someone to represent the public trust interest during the proceedings. Mr. Brashear said the Commission is not charged with that and it would be up to possibly the legislature or governor to arrange for that position. Mr. Jennings said there is no provision or funding for the Commission to provide for a public defender type position. He added the job of representing the public trust passes over to the SLD and believes it is constitutionally mandated to protect all of the public lands in the state which would include public trust lands as well as public lands, and while it is also charged with providing the Commission logistical support on reports, it is charged in both the statutes and the constitution with protecting and representing the state with regard to public trust values. He said the Ombudsman for Private Property Owner's Rights position is still provided for in the statutes, but is not filled or even funded, however, that position was charged with representing individuals affected by the findings of the Commission. AAG Darknall said the constitutional duties of the Land Commissioner goes to school trust funds and the Land Commissioner statutorily has the duty to protect the public trust interest in the land under navigable waters.

Ms. Kornylak asked if the Commission was going to make any recommendations to the state legislature or the SLD to preserve any public trust interest in the land currently being used or otherwise being disposed of in the interim until things are finalized. Chair Eisenhower said the mandate of the Commission is to hold hearings and if something is found navigable then a second hearing on the public trust values associated with that navigable watercourse. He said the Commission has no statutory ability to recommend to the governor or legislature anything other than the navigability issue. Mr. Brashear asked if Ms. Kornylak was referring to potential public trust values of lands where a particular stream may be found navigable where some of those are being disposed. Ms. Kornylak gave an affirmative response. Mr. Brashear then asked Ms. Kornylak that in the event of a navigability finding if she thought it would make any difference who holds those lands at the point of a finding of navigability that they would become part of the public trust no matter or how they are being disposed of now, if a sale takes place or whatever, once the matter is adjudicated, it still becomes part of the public trust no matter what happens in the meantime. Ms. Kornylak said she believes that is subject to debate as to whether the public trust values are still there; they can be destroyed. Mr. Jennings said he believes what Ms. Kornylak is saying is while the legislature is not appropriating money, we're not doing anything and the SLD isn't, that some very valuable piece of public trust might well be destroyed through diversion of water or something like that. He added it is not within

the charge or responsibility of the Commission, at this point the statute makes this Commission an adjudicatory Commission and not an administrative or management Commission. He said once navigability is found, the land would still be there, what condition it would be in is unknown. Mr. Jennings said he could relate specifically to the Homolovi Ruins up on the Little Colorado which are clearly a state treasure if not a national treasure from an archaeological standpoint, and they were being ignored and destroyed totally until the state did take charge of them and make a state park out of them. He added the Commission doesn't have that kind of responsibility and being an adjudicatory agency, if the Commission should step in and say a stretch of a river is a public trust value and therefore it must be preserved until we are sure it is navigable or not, however, he said that would be prejudging the case, and while courts can step in with injunctions or temporary restraining orders, the legislature didn't give the Commission that power and would be accused of prejudging of whether or not the piece of property we are talking about, hypothetically, is even navigable or not. He said it could be done by a court action, but the Commission can't do that. Mr. Brashear asked Mr. Jennings if the statutes prohibit the filing of a lawsuit based on navigability until the work of the Commission is done. Mr. Jennings said the statutes provide that pending the outcome of the Commission, there shouldn't be any lawsuits filed on the issues to be raised by this process including navigability and public trust values. He added someone could go to court and ask a court to determine the navigability issue and he is not sure what the court would do about it.

8. FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE MEETINGS

Chair Eisenhower said there will be another meeting soon to discuss the priority list and set the official date(s) for the September hearing(s).

9. ADJOURNMENT

Motion by: Jay Brashear Second by: Cecil Miller Vote: All aye
Motion: **To adjourn the meeting at approximately 10:54 a.m.**

Respectfully submitted,



George Mehnert, Director

Date: May 24, 2002