

Minutes of the Meeting of the
Arizona Game and Fish Commission
Friday, May 20, 2005 – 8:00 a.m.
Hassayampa Inn
122 E. Gurley Street
Prescott, Arizona 86301

PRESENT: (Commission)

(Director's Staff)

Chairman W. Hays Gilstrap
Commissioner Joe Melton
Commissioner Michael M. Golightly
Commissioner William H. McLean

Director Duane L. Shroufe
Deputy Director Steve K. Ferrell
Assistant Attorney General Jim Odenkirk
Assistant Attorney General Shelley Cutts

Chairman Gilstrap called the meeting to order at 8:00 a.m. The Commissioners introduced themselves and Chairman Gilstrap introduced the Director and the Director's staff. Commissioner Hernbrode was not present.

This meeting followed an agenda revision dated May 16, 2005.

* * * * *

1. An Update on Current Issues, Planning Efforts, and Proposed Projects on State and Federal Lands in Arizona and Other Matters Related Thereto.

Presenter: Bob Broscheid, Habitat Branch Chief

The Commission was briefed on the latest developments relating to the implementation of land and resource management plans and projects on state and federal lands in Arizona and other related matters. The update addressed decisions or activities since the April 2005 Commission meeting. A copy of this update titled Lands Update was provided to the Commission prior to today's meeting and is included as part of these minutes. This update is in fulfillment of the Department's commitment to brief the Commission on a regular basis regarding decisions and actions on all state and federal lands in Arizona.

Mr. Broscheid provided additional information on the update regarding the Resolution Copper land exchange. The Department recently received a draft of the resolution bill regarding this proposed land exchange. The party is Resolution Copper and the exchange entails the acquisition of over 3000 acres of Forest Service land east of Superior to conduct long term underground mining operations. Resolution Copper has preliminarily identified several parcels of land throughout the State that would be transferred to Federal ownership, mainly the Forest Service. At this time, this legislation has not been introduced for Congressional consideration. The Department has been working with Resolution Copper to identify the fish and wildlife resources within its selected and offered lands involved in the exchange. We've also been working to ensure that either specific language is included in the legislation or rights-of-way for public access are in place prior to approval by Congress. Specifically, the Cowboy Miller Road and the Copper Creek Road are historic access routes in the Galiuro Mountains, but are currently locked by the Resolution Copper Company to prevent illegal dumping. Resolution Copper has been amiable to including this language. Prior to the exchange, full mining operations have been

estimated to begin in late 2015. The Department will continue to track this project and provide the Commission with regular updates as information becomes available.

Commissioner McLean clarified that Cowboy Miller Road and Copper Creek Road would provide access to the wilderness area, to which Mr. Broscheid stated that they would. Further, Commissioner McLean commented that we need that access and encouraged Mr. Broscheid to continue working to make that happen.

Chairman Gilstrap requested that Mr. Broscheid add to his updates the kind of techniques used by Resolution Copper to minimize the effects to the landscape when that information becomes available.

Commissioner Golightly pointed out on the Lands Update, the Tonto National Forest section where it refers to using domestic goats as an herbivore treatment, and asked for additional information on that plan. He understands that there is some scientific research on wildlife diseases that are carried by goats, such as with the Silverbell bighorn sheep incident, and would like to be provided with the scientific evidence that this might not be good for wildlife.

Mr. Broscheid stated that the Payson Wildlife Urban Interface (WUI) goat project that the Tonto National Forest Basin Ranger District is proposing is to use goats as an herbivore tool to thin the brush along the urban interface area. Region VI personnel attended a discussion on what this entails. These goats are domestic and require a high level of herding and a high level of human involvement to ensure that they don't wander out of the area and are not preyed upon by predators. They are directed to specific areas where they can graze for the day and then they go back to herding pens at night. They do an effective job at removing the low hanging and ground fire potential, but there is the potential for disease transmission to wildlife. The science is not there to determine what the effect will be to wildlife, particularly deer in that area. It is in the urban interface and they are going to be required to do a lot of disease testing on the goats, almost on a weekly basis. It's an intensive operation to maintain these goats in this area. They are proposing to do this on a trial basis and the Department will be fully involved and will provide the scientific backing to make sure that disease is not transmitted from the domestic goats to wildlife. It's a new tool and we don't have much information at this time, but our main concern is that they don't negatively impact wildlife habitat and/or transmit disease to wildlife.

Commissioner Golightly stated that he wanted the Commission to be aware of this project and the potential issues that may arise as this project progresses.

Commissioner Melton commented on other situations where goats ate the brush down to the point where there was nothing left and where predation by coyotes was a big problem.

Commissioner Golightly commented on another item in the Lands Update regarding the Big Ranch A Allotment. The Department has still not received a schedule of events from BLM regarding Department concerns. There are areas within that allotment that are unsuitable for cattle grazing in terms of cattle being able to coexist with bighorn sheep. One of the problems is a water issue where portable water was placed in the higher slopes that sheep currently occupy and the concern is that it will attract burros and predators. Additionally, a fire went through there and destroyed a lot of the browse, further complicating some of the habitat issues. We asked BLM for a schedule to reevaluate the allotment, especially considering that the last

evaluation occurred in the 1970's. That bighorn sheep population is down significantly and our concerns have been communicated to BLM. Initially, after the Commission addressed this in August or September of 2004, Commissioner Golightly expected that the Department would be provided with a schedule where that allotment would be reevaluated for suitability. As of today BLM has yet to acknowledge that they are even willing to look at it. Commissioner Golightly suggested that the Commission direct the Director to meet with Elaine Zielinski with BLM and get some type of schedule for them to look at this.

The Commission gave a consensus on this direction.

Chairman Gilstrap commented on the illegal activities along the border. One of the things most disturbing is related to the springs and small waters in the Mountains, which are utilized by people conducting illegal activities, and the decimation of the area around the waters. Some of these waters have now gone underground and may not come back. Not only are we having issues with new roads and habitat loss, but we are losing vital waters that are critical. Chairman Gilstrap asked that the Department bring this issue to the highest authority and contact President Bush and our Congressional leadership in Arizona stating that what is happening to our wildlife in Arizona is totally unacceptable. In addition to a letter, pictures could be sent to show where waterholes once were and are now no longer there.

Motion: Melton moved and McLean seconded THAT THE COMMISSION DIRECT THE DEPARTMENT TO DRAFT A LETTER TO PRESIDENT BUSH AND THE ARIZONA CONGRESSIONAL DELEGATION IN BOTH THE HOUSE AND THE SENATE REGARDING THE ILLEGAL ACTIVITIES ALONG THE BORDER THAT IS DESTROYING WATERS AND HABITAT AND BRING THAT DRAFT LETTER BACK TO THE COMMISSION FOR REVIEW.

Commissioner Golightly asked whether the letter would be informational only or if it would be a request for relief.

Chairman Gilstrap suggested that the issues be documented in the letter and that we ask what they are going to do about it. This needs to be a well thought through process and that Mr. Broscheid and the Director can work on it and then bring it back to the Commission for a detailed review.

Commissioner McLean commented that Federal officials all the way up to the President are aware of the problems on the border. The only two ways to address it is with additional enforcement or with a modification of the immigration policy. It's a national policy issue and we need to let them know that the problem is serious and affecting and impacting wildlife and wildlife habitat in the State of Arizona. We have to let the officials know that they have to stand up and be counted. Putting more border guards down there will not have a substantial impact on the overall problem. The only thing that will have a substantial impact is the reevaluation and change in national policy in regards to immigration.

Chairman Gilstrap concurred.

Commissioner Melton commented in regards to the documentation for the letter. There are plenty examples to use. For instance, a water catchment in the Mohawk Mountains is frequently

used by undocumented aliens (UDAs). A spicket had to be installed because the UDAs would cut the lines and drain the tank. Right below where the border patrol catches them, there are hundreds of plastic bottles that they left behind. This is pretty evident and could be used as documentation.

Commissioner McLean stated that in addition to the water bottles, they drop packs and anything else they are carrying. Simply hiring more border patrol agents will not solve the problem. We need to look at a new national policy at the Federal level.

Motion Restated: Melton moved and McLean seconded THAT THE COMMISSION DIRECT THE DEPARTMENT TO DRAFT A LETTER TO PRESIDENT BUSH AND THE ARIZONA CONGRESSIONAL DELEGATION IN BOTH THE HOUSE AND THE SENATE AND ASK FOR RELIEF REGARDING THE ILLEGAL ACTIVITIES ALONG THE BORDER THAT IS DESTROYING WATERS AND HABITAT AND BRING THAT DRAFT LETTER WITH DOCUMENTATION BACK TO THE COMMISSION FOR A DETAILED REVIEW.

Vote: Unanimous

Mr. Broscheid stated that we received word last week from BLM. They received a memo from the Solicitor's Office regarding the IBLA decision process for the 15 water catchments in the Sonoran Desert National Monument, and that the case has been assigned to a panel. It's unclear right now what that panel's role is in the process, but the information received from BLM was that an administrative judge reviews the case and makes a decision. That decision is then forwarded on to a panel of judges for their review to make sure it is consistent. Then the panel will sign off or send it back for revisions. We think the decision has been made and the panel is reviewing it now and it should be released soon.

Chairman Gilstrap commented on another issue regarding the change in the Roadless Rule and requested that Mr. Broscheid and the Director take the initiative in aggressively and actively working with the Governor's Office, in conjunction with the Forest Service, on how we can take this opportunity to develop a plan that is most efficient for Arizona's wildlife and Arizona's recreational activities.

Mr. Broscheid clarified that the Forest Service has agreed to work with the Governors of each state to develop a petition to allow certain roads to be constructed or reconstructed to meet the needs of the state. One of the issues that came up at the recent Forest Health Council Meeting was the fact that forest health and restoration needs to be done in a lot of these areas. Mr. Broscheid offered to provide more information to the Commission including maps. The timeline is the end of June for the Governor to get a petition to the Secretary of the Interior regarding the need to develop a plan, so we need to move fast. Inventoried Roadless Areas (IRAs) that allow road construction is 699,000 acres, IRAs that do not allow road construction or reconstruction is 415,000 acres, and then the designated wilderness areas outside of those IRAs is 2,000,000 acres. A map is available showing exactly where these locations are and we need to evaluate what those IRAs are and what our needs are for wildlife management in the future.

Commissioner McLean asked what role the Department is playing in regards to participating with the Governor's Office in formulating that response in the next six weeks.

Mr. Broscheid responded that the Director sent a letter to the Governor's Office nine months ago, when this concept of the state petitions first came out, expressing our desire to be closely involved in this; not only from a forest health perspective, but also from a wildlife management perspective. This rule was finalized three days ago, so we just need to be aggressive and let them know we are interested in working with them. In fact, we asked be the lead state agency to help the Governor's Office.

Chairman Gilstrap stated that the Department's action should not just be in the form of a letter, but that we need to take the initiative, and with the permission of the Governor's Office, become the center of both the State and Federal activities by causing a plan to be established.

Director Shroufe commented that it would be an adequate follow up to the letter that has already been sent. However, this may be one of those issues that they decline to participate in. We didn't receive any response to the letter we sent, but we've talked to them about it and now that the dates are out and the decision has been made, we need to be aggressive in indicating that we want this to be acted upon and that we want to help.

Motion: Melton moved and McLean seconded THAT THE COMMISSION DIRECT THE DEPARTMENT TO AGGRESSIVELY AND ACTIVELY INITIATE AND WORK WITH THE GOVERNOR'S OFFICE TO TAKE THE LEAD, IF POSSIBLE, IN BOTH STATE AND FEDERAL ACTIVITIES AND CAUSE A PLAN TO BE ESTABLISHED USING THE NEW ROADLESS RULE CHANGE THAT ALLOWS THE GOVERNOR OF EACH STATE TO DEVELOP A PETITION TO ALLOW CERTAIN ROADS TO BE CONSTRUCTED OR RECONSTRUCTED TO MEET THE NEEDS OF THE STATE.

Vote: Unanimous

* * * * *

2. A Briefing on the Impacts and Limitations that Special Land Designations have on the Department's Current and Future Ability to Conduct Fish and Wildlife Management Actions.

Presenter: Bob Broscheid, Habitat Branch Chief

Currently in Arizona, there are approximately 6 million acres of public lands designated as Wilderness areas and National Monuments. These acreages do not take into account approximately 4 million acres of other federal lands that currently have similar restrictions (e.g., National Parks, National Wildlife refuges). Once public lands, these areas supported a wide array of multiple uses and public recreational opportunities. However, special land designations include additional restrictive management guidelines that clearly limit appropriate wildlife management activities, public and administrative access and wildlife-related recreational opportunities.

As Arizona's population continues to expand, so too will the need to manage wildlife resources and sustain a wide range of recreational opportunities on public lands. Special land designations (e.g., Wilderness areas, National Monuments, National Park expansions) limit or restrict public access and associated recreational opportunities, and result in redirecting and concentrating public uses on adjacent lands. The concentration of wildlife-related recreation in ever-smaller

areas, the hampered ability to manage fish and wildlife populations and their habitats, and reduced access for wildlife habitat improvement projects, all result in our reduced capacity for effectively managing fish and wildlife resources in Arizona.

These designations have diminished the Department's jurisdiction and resulted in the loss of a wide range of wildlife-related recreational opportunities. They have also created an unnecessary burden on limited staff resources by requiring the Department to divert time and expertise from constructive, on-the-ground wildlife projects, to the planning and protection of reasonable access for wildlife management and other purposes. Furthermore, the Department's staff time associated with such negotiations will likely continue to be supported by funding generated by sportsmen that would otherwise be used for necessary wildlife management activities and wildlife habitat enhancement projects.

Mr. Broscheid further reported on several successes: 1) The re-evaluation and re-enforcement of the Policies and Guidelines regarding fish and wildlife management in Forest Service and BLM administered Wilderness. This work is being accomplished under Director Shroufe's leadership at the national level in cooperation with IAFWA, other state wildlife agencies, and USFS and BLM personnel; 2) The same efforts are underway for the draft Refuge Policies regarding Wilderness Management on National Wildlife Refuges; 3) Recent guidance provided by the BLM's State Office regarding the use of wilderness characteristic allocations during the Resource Management Planning process. The Department has been working with BLM to incorporate specific language regarding our ability to conduct fish and wildlife management activities within National Monuments and proposed areas managed for wilderness characteristics; 4) Some favorable IBLA decisions for state wildlife agencies regarding fish and wildlife management activities within National Monuments (Southern Utah Wilderness Alliance v. BLM- species transplants and predator control; 5) Department discussions with Wilderness advocacy groups regarding the need to further discuss necessary fish and wildlife management in designated Wilderness; 6) Congressional awareness of the limitations experienced by state wildlife agencies and federal agencies has caused a greater tentativeness to support legislation that creates additional special land designations.

Chairman Gilstrap stated that one could say that the Wilderness Act and logic do not have much in common.

Commissioner Melton stated that the success we have accomplished in the last few years was directly related to the fact that we had two thirds of our antelope die off due to the drought. People realized that we have to manage these species and not just talk about it. Also, it may be due to a new administration and people who are more concerned about wildlife management than preservation. Commissioner Melton thanked Director Shroufe for his efforts and accomplishments in moving this on the national level and for bringing it to public's attention.

Director Shroufe followed up on the issues mentioned by Mr. Broscheid. We are in very tenuous negotiation with the Chief of the Forest Service and the Director of BLM about trying to ensure that we exercise our authorities under the Wilderness Act. State agencies have indicated to the Forest Service and BLM that we are at the end of this and probably need to go to Court. With the examples outlined by Mr. Broscheid, we could go to Court, but would prefer not to go to the 9th Circuit, so we are hesitant. We hope that the Chief of the Forest Service and the Director of BLM will coordinate and communicate, and be sensitive enough to our needs that we can revise

the policy and then get the adequate training, education and information to State and Federal agency employees, which would make this issue a lot less expensive for all of us, especially the wildlife that ultimately suffers because we can't manage how we need to manage.

* * * * *

Director Shroufe stated that the original agenda item number 3 regarding the acquisition of approximately 26 acres of Circle 5 Ranch and a Perpetual Access Easement into Peck Canyon in the Atascosa Mountains in Santa Cruz County was deleted. We had a willing seller and a good plan and then at the last moment the price went up considerably over the appraisal, so the purchase was cancelled.

3. Request for the Commission to Authorize the Department to Spend Funds Out of the Wildlife Conservation Fund on Dam Repairs on River Reservoir.

Presenter: Duane Shroufe, Director

Director Shroufe asked the Commission to authorize the Department to spend up to \$950,000 for part of the repair cost to the River Reservoir Dam. We've have been talking with several legislators in both the House and the Senate about this issue, and with former Commissioner and Senator Guenther, who is now the Director of the Department of Water Resources. This is not only an issue for that area, it's an issue for the Game and Fish Department because the Greer lakes in the lower LCR that runs through there add a lot of fishing recreation and a lot of economy to that part of the State. As the Commission knows, that is one of the areas where we justify our existence with the counties in the fact that hunting and fishing brings great economic opportunity to those areas. The Department has data regarding the economical benefits and what the State will get back for this participation. We have recent field surveys and other data including how many fish we've stocked up there and feel that the cost is really slanted to the benefit of the economy. The contract bid came in at 1.4 million, so we are partnered in this with several other entities, but for our investment of up to \$950,000, the economic benefit of what the State will receive back is between 2.5 and 3 million dollars. This is based on the fisheries that those reservoirs provide, which is believed to be about 60% of that. If amortized over the 30 year life of the dam, it becomes 85-90 million dollars of economic benefit that the State is going to get back for ensuring that those lakes are in good shape and can be used by recreational users. The funds are there in the Wildlife Conservation Fund and certainly these negotiations played a big part in helping our fee bill get through the last few hours of the legislature.

Commissioner Melton asked if the State Lake Improvement Funds (SLIF) could pay for this or does it not qualify.

Director Shroufe stated that besides not qualifying for SLIF, the SLIF has been used every year for other reasons and there is an acute sensitivity at the Legislature for using SLIF for any other reasons.

Commissioner McLean commented that his understanding was that the lake is currently dry and not being stocked.

Director Shroufe confirmed that was true. The problem is that the unsafe part of the dam is lower than where the water level would be held at normally, and we're not stocking in there anymore because it's going dry. In addition to being a recreational lake, most of the year it's needed for irrigation.

Commissioner McLean asked why the Department didn't own that dam, to which Director Shroufe replied that we could have owned it, but didn't want the liability.

Motion: McLean moved and Melton seconded THAT THE COMMISSION AUTHORIZE THE DEPARTMENT TO SPEND UP TO \$950,000 FOR PART OF THE REPAIR COST TO THE RIVER RESERVOIR DAM.

Vote: Unanimous

Chairman Gilstrap commented that this was an opportunity for the Department to step forward and do something to benefit our mission as well as benefit the public.

* * * * *

4. Request for the Commission to Approve a New Cooperative Agreement with the Town of Pinetop-Lakeside for the Continued Use and Maintenance of a Trail through Commission-owned Property at the Pinetop Regional Office, Navajo County, Arizona.

Presenter: Bob Broscheid, Habitat Branch Chief

This Cooperative Agreement with Pinetop-Lakeside provides for the continued use of Commission property at Pinetop as part of the urban trail system and the White Mountain trail system. The existing trail, through the Pinetop Regional Office parcel, provides a link between the urban trail system and the White Mountain trail system. The trail provides access on the back (north) portion of our property along upper Billy Creek. The attached Cooperative Agreement also provides for the Town's limited use and maintenance of the property of the trail.

Motion: Melton moved and Golightly seconded THAT THE COMMISSION VOTE TO APPROVE A NEW COOPERATIVE AGREEMENT WITH THE TOWN OF PINETOP-LAKESIDE FOR THE CONTINUED USE AND MAINTENANCE OF A TRAIL THROUGH COMMISSION OWNED PROPERTY AT THE PINETOP REGIONAL OFFICE, NAVAJO COUNTY, ARIZONA, AND AUTHORIZE THE DIRECTOR TO EXECUTE THE AGREEMENT AS ATTACHED OR AS RECOMMENDED OR APPROVED BY THE OFFICE OF THE ATTORNEY GENERAL, AND TO AMEND OR EXTEND THE AGREEMENT AS NECESSARY.

Vote: Unanimous

* * * * *

5. State and Federal Legislation

Presenter: Julie Rosen, Assistant Legislative Liaison

Julie Rosen briefed the Commission on current legislative activities. Regarding Federal legislation, on May 11, President Bush signed the Emergency Supplemental Appropriations Bill. This basically provided funding for the troops in Iraq, but included in that bill was the Reid Legislation, that's the reaffirmation of the State's rights to regulate hunting and fishing. That will provide relief and alleviate some pressure that some of the other State wildlife agencies are experiencing, but that will not immediately affect the Arizona Game and Fish Department, because we have to go back to the Court to get the injunction lifted.

Regarding State legislation, on Friday, May 13 at 1:25 a.m., they adjourned, Sine Die. They were a couple of weeks past their target Sine Die day, but that was not bad compared to last year. There were 1,443 bills, memorials and resolutions introduced in the legislature this session and 550 of those were passed. So far the Governor has vetoed 48 of those bills, mainly because the budget packages consisted of over 15 bills and she vetoed the mid-session budgets that were released.

The general effective date for the bills passed in the legislature will be August 12 unless otherwise specified in the bill. There were a large number of bills passed out of the House and Senate in the last two days of the legislature. The Governor has until midnight, May 25 to either sign or veto these bills. If she chooses to take no action, the bills will be filed into law regardless. So far, no bills that were passed in the last two days of session have been signed or vetoed. Included in those bills is Senate Bill 1365, the Game and Fish Fee Increase Bill. Since this is a Prop 108 bill it will become effective immediately upon signing, however we included conditions within the bill that specified that the effective date for the watercraft registration fees will go into effect September 1. Also, the license fee increases are subject to Rulemaking by the Commission, so we don't expect it to effect licenses until 2007. The one portion that will become effective immediately upon signing or by May 26 is the lifetime licenses.

About a week before the end of session the Legislature passed the budget and we expect the Governor will sign it. There was a new item in this budget, the 1.6 million dollar appropriation for the Zuni Tribe Water Rights Settlement Bill and that money is coming from the Watercraft License Fund.

Chairman Gilstrap noted that in getting the License Fee Increase Bill passed, both Senator Blendu and Senator Gray changed their vote from no to yes and made it possible for this bill to pass.

* * * * *

Meeting recessed for a break at 9:45 a.m.

Meeting reconvened at 10:00 a.m.

* * * * *

6. Harrington Petition to Close a Road on State Trust Land Approximately Five Miles North of Chino Valley, Arizona

Presenter: Mark Weise, Development Branch Chief

Ann Nelson Harrington submitted a petition requesting a road closure on State Trust land located

approximately five miles north of Chino Valley. The road is approximately one half mile long and dead ends at the Game and Fish property on Granite Creek.

The primary purpose of this proposed road closure is to protect the riparian habitat along Granite Creek. The proposed closure will be accomplished by means of a locked gate. Regional personnel support this closure for natural resource protection. Access will be permitted on foot and horseback into the area. Additionally, the lessee holds an exclusive easement leading to the proposed closure site and the Department holds an easement to assure public access to the developed portion of the Upper Verde River Wildlife Area. We've received a letter of concurrence from the State Land Department, so all entities involved seem to be on board.

The Commission was provided with a map of the area.

Motion: McLean moved and Melton seconded THAT THE COMMISSION VOTE TO APPROVE THE PETITION FOR A ROAD CLOSURE ON STATE TRUST LAND LOCATED APPROXIMATELY FIVE MILES NORTH OF CHINO VALLEY.

Vote: Unanimous

* * * * *

7. Statewide Shooting Range Briefing

Presenter: Don Winslow, Education Branch Chief

Department Owned Ranges

Ben Avery Shooting Facility in Phoenix - In April the Department adjusted the number of temporary laborers working at the facility under a state contract, based on the discovery of administrative issues related to the contract. Facility operations remain at their usual full-service level.

We are pleased to report some new initiatives and improvements at BASF, including: assistance from the Arizona State Rifle and Pistol Association to help the Annie Oakley program participants organize into their own volunteer group and to assist them with training costs; installation of a second cash register in the shooting sports center to further improve record keeping; new internal procedures to improve and simplify bookkeeping and scheduling; new volunteer coordination processes being set-up by our Hunter Education staff; launch of a Web-based e-news system to allow BASF volunteers to receive news from the Department and to help the Department coordinate volunteer meetings.

We are also planning improvements in signage. Meantime, work continues on the Hunter Education shooting range, and work is set to begin on repairs and upgrades to the electrical system at the range and at the Clay Target Center.

Sierra Vista Shooting Range – The state Land Department has put the right-of-way out for appraisal. The new agreement with the Sierra Vista Rod and Gun Club was approved by the Commission at the April meeting.

Three Points Shooting Range in Tucson - The agreement to continue DPS operation of the range has been signed by both the Department and DPS; it is now at the State Land Commissioner's office, after which it will go to the office of the Governor for a final signature. During the approval process DPS continues to operate the range.

Usery Mountain Shooting Range in Mesa - The remediation project on the old Usery Mountain septic system is underway.

Shooting Programs and Other Activities

Northern Arizona Shooting Range - The Department remains committed to siting a shooting facility in the Flagstaff area and will work with the U.S. Forest Service to identify potential locations.

Scholastic Clay Target Program (SCTP) - The SCTP Commissioners' Cup events began in late April and continued in early May. The Department expects to have announced the winning teams by the time of the May Commission Meeting, and to have publicized the names of the winners to their hometown news organizations. There were 120 teams in the inaugural season of this program.

Shooting Range Partnerships

St. John, Arizona - The Department is continuing discussions with the Navajo Apache Sportsmen's Association concerning private lands located next to the proposed range; since the last update, we have also discussed the issue with members of the Apache County Board of Supervisors.

Commissioner Golightly commented, in regards to the Ben Avery Shooting Facility, that a shooting range needed oversight (a prelude to agenda item 9). He further noted that the Department provides this service for the people of Arizona, and that the Department owns it and is entrusted with the management of it.

Chairman Gilstrap asked, in regard to the Ben Avery Shooting Facility Clay Target Center, if it would be timely to start the RFP process to take a look at how we are going to handle that.

Mr. Winslow replied that it has already been started and we will be getting a recommendation from a gentleman from Houston who operates American Shooting Centers on whether we should operate it ourselves or hire someone from the outside.

* * * * *

8. Briefing on the Archery in Schools Program

Presenter: Don Winslow, Education Branch Chief

Don Winslow provided a Power Point presentation for the Commission. At its March meeting, the Commission requested a briefing on the status of the Archery in Schools program. The

program, which teaches Olympic-style target archery, was established in Kentucky in 2002, and one year later Arizona became an expansion state. Arizona currently has 46 schools and 94 Department-certified instructors. The cost to outfit a school is \$2,400. We have 60 teachers on a training waiting list.

The Arizona program is made possible through partnerships with the National Wild Turkey Foundation, Archery Trade Association and Tucson-based equipment manufacturer PSE. Participating schools are very pleased with the program and the kids like it, too: instructors in Camp Verde have observed an 8% increase in attendance on days the archery program is offered. The only limitation on the program is resources. Following is an estimate of equipment costs associated with program expansion:

| | |
|--|-------------------|
| Archery equipment: Train and equip 40 schools per year | 100,000 |
| Archery equipment: 20 pieces equipment for Special Olympics AZ | 50,000 |
| Total | \$ 150,000 |

Additionally, the Department is considering the idea of a full-time hunter recruitment and retention position. If the Department and Commission decide to create such a position, it would provide additional support to the Archery in Schools program. The cost of creating such a position would be approximately \$83,000 annually for personnel, equipment and travel expenses.

Commissioner McLean asked what type or kind of support we are getting from the archery industry.

Mr. Winslow stated that we received a grant from the Archery Trade Association of \$15,000 and also \$5,000 from the National Wild Turkey Federation. Those have been extremely helpful in getting this program out there. Also, Arizona companies who manufacture archery equipment have helped in other indirect ways.

* * * * *

9. Request to Create the Position of State Shooting Range Administrator

Presenter: Don Winslow, Education Branch Chief

The Department has received the Director's authorization and now seeks Commission approval to create a new position, that of State Shooting Range Administrator. This position would be funded using existing Information and Education Division monies in Federal Grant W-93-S, Hunter Education; no new monies would be needed. This position is critical if the Department wishes to keep pace of growing public demand for safe, convenient places to shoot. As you are aware, growing population centers generate demand for ranges.

The Commission has repeatedly expressed its commitment to shooting range development, and to the public processes needed to ensure that ranges are good neighbors to their host communities. The Department has found in the past several years that the process of range operation and range development—including the time-intensive process of addressing public concerns related to safety, noise and land use—has become a full-time job. The Education

Branch Chief has been unable to keep up with public demand related to range development while attending to the requirements of Branch administration. The creation of this position is necessary if the Commission is to fulfill its pledge to constituents to make shooting range development a priority.

Motion: McLean moved and Melton seconded THAT THE COMMISSION VOTE TO APPROVE THE CREATION OF A NEW FULL-TIME POSITION, THAT OF STATE SHOOTING RANGE ADMINISTRATOR.

Vote: Unanimous

* * * * *

10. Request to Approve a Notice of Proposed Rulemaking to Add R12-4-309, Restrictions on the Use of Artificial Light.

Presenter: Sherry Crouch, Acting Rules and Risk Manager

At their February 2004 meeting, the Arizona Game and Fish Commission approved a petition from the Arizona Deer Foundation requesting that the Commission amend its rules in order to further restrict use of spotlights to take wildlife during big game seasons. Under A.R.S. § 41-1033, the Commission must initiate rulemaking in accordance with Title 41 to amend its rules as requested by the petition.

The Department has developed a Notice of Proposed Rulemaking, which contains proposed rule language, to achieve the objective of the petition for rule while staying in the confines of Commission rule and statute. As part of its rulemaking process, the Department performed public meetings at its regional offices in Phoenix, Tucson, Flagstaff, and Pinetop to receive comment. The Department has incorporated these comments where appropriate to address any public concerns.

The Department asked that the Commission approve the draft Notice of Proposed Rulemaking so that the Department may continue the process to amend Article 3, Taking and Handling of Wildlife, as requested by the petitioner and approved by the Commission.

IMPACT OF THE RULEMAKING

The objective of the Notice of Proposed Rulemaking is to provide adequate notice to the public when rulemaking is being proposed and to provide sufficient opportunity for the public to make comment. The Department is proposing amendments to its rules to achieve the objective stated in the petition for rule and/or with the same intent of rule as was petitioned by the Arizona Deer Foundation. The Department proposes to add R12-4-309, dealing with restrictions on the use of artificial lights, as follows:

- The rule will clearly state what types of light are considered to be artificial lights, as well as clearly state the time of day when these lights may not be used.
- The rule will allow individuals to continue to use artificial lights if it is an authorized method of take in another rule.

- The rule will contain clear presumptive evidence that would indicate whether or not an individual is using an artificial light to locate wildlife during a time of day when it is not lawful. The Department does this to establish clear criteria for the public's understanding and effective enforcement.
- The rule will clearly state that an individual shall not use artificial light to find or identify wildlife in a hunt area starting 48 hours before the opening of a season for deer or elk if such a season will take place in that hunt area. Clear presumptive evidence is included in the rule to indicate whether or not an individual is using an artificial light to locate wildlife during that time.
- This rule will not apply to individuals acting in an official capacity on behalf of a natural resources or law enforcement agency.

The Commission will have the opportunity to approve or review amendments to the rules as a part of the Proposed and Final Rulemaking process, and will maintain the ability to reject the petition or modify the Rule. If approved by the Commission, the Notice of Proposed Rulemaking will be filed with the Secretary of State, for publication in the Arizona Administrative Register. The Department's Rules and Risk Office will then notify the public that such a submission has taken place. The Department anticipates that the Article 3 amendments will become effective December 2005.

The draft Notice of Proposed Rulemaking, the preliminary Economic Impact Statement, all Public Comments, and the anticipated schedule for the Article 3 rulemaking were provided to the Commission for consideration and approval.

Commissioner McLean stated that he does not support this proposed rule change as he understands it. He had some difficulty understanding the applicability of R12-4-313, Methods of Take and asked how this applies.

Ron Day, Law Branch Chief, addressed the Commission. R12-4-313 refers to methods of take and as such, the exemptions mentioned refer to those exemptions that allow people to pursue raccoons and certain types of aquatics and amphibians at night.

Commissioner McLean further questioned the way the rule was written and stated that perfectly innocent behavior with regard to improper use of lights and wildlife could make a person a criminal.

Discussion continued between Commissioner McLean and Mr. Day regarding the definition and constitutionality of the word "take" as defined and used by Law Enforcement.

Commissioner Golightly pointed out that this rule change was designed to stop people from harassing wildlife, especially during hunting season. However, Commissioner Golightly agreed with the concerns raised by Commissioner McLean.

Commissioner McLean stated that the proposed Rule change was overly broad, vague and unconstitutional.

Steve Ferrell commented that the Game and Fish Department has been writing that ticket for over 50 years and it has consistently been upheld by every Justice of the Peace. It is not uncommon for the violator to say he forgot his gun was in the seat.

Commissioner McLean suggested that perhaps the weapon has to be more than immediately accessible, and perhaps has to have it and be using it in such a way as to show intent to discharge. Commissioner McLean offered that he had several suggestions in drafting language for the combination of the artificial light and the means of take.

Steve Ferrell stated that this would be a change in the way the Department does business. The whole purpose of this rule change was driven by the Arizona Deer Association's (ADA) request to address item number 2, where they wanted the Department to be able to address spotlighting when a person does not have means of take. ADA's perception is that a whole new element has become common in the field and that is the person who is spotlighting without means of take, but has a radio and the guy behind him has a means of take, or the guy who is putting that elk or mule deer to bed at two hours before dawn and then comes back at dawn with means of take and harvests that animal.

Mr. Odenkirk commented on Commissioner McLean's concerns about the constitutionality in terms of whether the rule is vague or overbroad. This is a difficult area of trying to find a balance between prohibiting certain conduct, but not going so far as to catch innocent behavior. In the context of this kind of statute, because it's not a first amendment issue, typically what Courts do is look at whether or not it's unconstitutionally vague or overbroad as applied to an individual in the particular conduct and not whether it's unconstitutional on its face.

Overbroad, as the Courts have talked about is this, is the regulation addressing conduct within the legitimate authority of the State to regulate. Some of the Courts that have looked at spotlighting cases talk about the need to protect wildlife and that at times you'll need to prohibit conduct that might otherwise be innocent in an effort to achieve the goal of protecting wildlife. That's an important issue here. Is it essential to protecting wildlife that you prohibit all forms of use of artificial light under any circumstances, which may suggest that somebody could be taking wildlife. That's the difficult balance that this rule making is trying to address. Up to this point, it's been difficult for the Department to enforce the spotlighting statute because it's all based upon the subjective intent of the hunter. What the Department and the petitioner are trying to do with this rule is to focus more on objective criteria.

Vagueness is a different issue. Typically, what the Courts have said in regards to vagueness is does the statute of rule draw clear distinction between what is unlawful and what is innocent conduct. Again, it's not unconstitutional on its face, it would be unconstitutional if it's applied in a manner that goes to innocent conduct. There is a recent case out of Wisconsin that upheld a spotlighting rule similar in nature to what is being proposed here today. The language of the rule from Wisconsin says: No person shall throw or cast the rays of a spotlight or other artificial light from any vehicle from any field, woodland or forest, while having in his possession a hunting device, or throw or cast the rays of spotlight or other artificial light from any vehicle in the field, woodland or forest for the purpose of locating a wild animal. There is nothing in that statute that requires the intent to hunt or intent to take animals. Objective conduct of shining artificial light in the direction of wild animals while you have a means of take makes it unlawful and the Wisconsin law upheld that under constitutional challenges of that being overbroad. The

Wisconsin Court said if the State has a legitimate interest in protecting wildlife and this rule furthers that interest, then you can interfere with constitutional privileges in doing so.

Mr. Odenkirk further stated that it's a challenge to draft the language in a way that will withstand the constitutional test, but he believes that the language that is proposed would meet that test, however, no one can predict how a Court will ultimately decide that issue.

Chairman Gilstrap asked if there was a distinction between being in a vehicle or not and Mr. Odenkirk stated that he did not think so. It gets back to what is the State's interest in prohibiting this conduct, whether on foot or in a vehicle.

Commissioner Melton stated that he also had issues with the way it was written. You can use artificial light at night to hunt and take raccoon, and a trapper will use a light at night to check his traps and look for wildlife. There would have to be a number of exemptions written in the language to deal with issues where we already have legal methods of using light at night. Another issue is the use of night vision equipment for viewing wildlife.

Mr. Day explained that the laws are written to take these things into consideration.

Commissioner McLean commented in regards to Mr. Odenkirk's statements that he would argue that, even though he absolutely trust Mr. Day to train his officers, he does not believe he should have to rely upon the professionalism of a Law Enforcement Officer. If a sufficient element of intent to take was added to the rule, then he would be all for it, but he is unwilling as a Commissioner to create a rule that creates the potential inclusion of innocent behavior as he believes these rules do.

After further discussion the Commission gave a consensus that Commissioner McLean would work on this proposed rule change with the Department and it would be brought back to the Commission as soon as possible.

* * * * *

11. Petition to Revise Rule R12-4-315, Allowing for the Live Transport of Black Bass for Off-site Tournament Weigh-ins.

Presenter: Lawrence M. Riley, Fisheries Chief

Mr. Charlie Evans, of Benton, Kentucky, on behalf FLW Outdoors, submitted a petition to revise A.A.C. R12-4-315 (Possession of Live Fish; Unattended Live Boxes and Stringers). Mr. Evans petition requests that the rule be revised to allow transport of black bass alive from the water where taken to an off-site weigh-in location. The proposed language provides for written authorization from the Department, authorization up to 40 anglers over two consecutive days, and transport requirements for return of the fish to the waters where taken.

The petition will likely require changes to other rules and the proposed language will require development and support of a permitting process. Consideration of this rule change should include public input and careful consideration of impacts to other rules and Department staff and

budget, prior to rule making. The existing 5-year rule review process is the appropriate venue for consideration of this petition whereby a full and careful analysis can be conducted.

Public Comment

Don Lee, Western Coordinator with FLW Outdoors, addressed the Commission in support of the petition.

Commissioner McLean asked when the next review of Article 3 would be, to which Mr. Riley stated it is about two years.

Carlos Ramirez from the Department's Rules and Risk Management Section addressed the Commission and confirmed that it was about two years out. It will be due to the Governor's Office in 2007, so we will start the process next year.

Motion: Golightly moved and McLean seconded THAT THE COMMISSION VOTE TO DENY THE PETITION BUT DIRECT THE DEPARTMENT TO CONSIDER ALLOWING THE LIVE TRANSPORT OF BLACK BASS FOR THE PURPOSE OF OFF-SITE TOURNAMENT WEIGH-INS DURING THE NEXT REVIEW OF ARTICLE 3.

Vote: Unanimous

* * * * *

13. Selection of Replacement Member for the Heritage Public Advisory Committee

Presenter: Steve Ferrell, Deputy Director

The Region I position of the Heritage Public Advisory Committee (HPAC), with term due to expire in March 2006, is currently vacant. In accordance with the HPAC Charter, two nominees for this position were provided to the Commission for their consideration of appointment to the HPAC. Biographical information for each nominee was also provided. The nominees were Paul E. Gomben and Mary Ellen Bitteroff.

Director Shroufe distributed ballots to facilitate the Commissioners. Steve Ferrell read the two nominees biographical information.

The votes were tallied and Paul E. Gomben won the vote.

Motion: McLean moved and Melton and Golightly seconded THAT THE COMMISSION VOTE TO APPOINT PAUL E. GOMBEN TO THE VACANT REGION I HERITAGE PUBLIC ADVISORY COMMITTEE POSITION.

Vote: Unanimous

* * * * *

14. Call to the Public

Tice Supplee, Director of Bird Conservation with Audubon Arizona and former Game and Fish employee, addressed the Commission. Ms. Supplee thanked the Commission for their support of bird conservation in the State. Members of the Audubon Chapter have been attending the Comprehensive Wildlife Conservation Strategy Plan meetings and Ms. Supplee complimented the Department team who put that package together.

* * * * *

Director Shroufe asked the Commission, in regards to agenda item number 8, Archery in the Schools program, to make a motion to give the Department authority to provide a full time position out of the Pittman-Robertson allocation this year to address the issues and specifically expand the Archery in the Schools program.

Motion: Melton moved and McLean seconded THAT THE COMMISSION VOTE TO GIVE THE DEPARTMENT AUTHORITY TO PROVIDE A FULL TIME POSITION OUT OF THE PITTMAN-ROBERTSON ALLOCATION THIS YEAR TO ADDRESS THE ISSUES AND SPECIFICALLY EXPAND THE ARCHERY IN THE SCHOOLS PROGRAM.

Vote: Unanimous

* * * * *

Meeting recessed for lunch at 12:00 p.m.

Meeting reconvened at 1:00 p.m.

* * * * *

15. Executive Session

a. Legal Counsel. The Commission may vote to meet in Executive Session in accordance with A.R.S. § 38-431.03 (A)(3) and (4) for the purpose of discussing and consulting with legal counsel in order to consider its position and to instruct legal counsel regarding the Commission's position on *Montoya v. Manning*, CIV98-0239 PHX RCB; *Re General Stream Adjudication for the Little Colorado River and Gila River*; *Mark Boge v. Arizona Game & Fish Commission & Shroufe*, CIV2000-020754; *Bar D Cattle Co. v. Shroufe*, CIV2002-0872; *Phelps Dodge Corp. v. Arizona Dept. of Water Resources*, LC2003-000243-001DT; *Arizona Zoological Society, et. al. v. BLM, IBLA appeal no. 2002-412*; *Audubon Society of Portland v. USFWS*, CV04-670-KI; and *State of Arizona v. George H. Johnson*, CV2005-002692.

Motion: McLean moved and Golightly seconded THAT THE COMMISSION GO INTO EXECUTIVE SESSION.

Vote: Unanimous

* * * * *

12. Rule R12-4-114(D) and the Ten Percent Cap Associated with Issuing Buffalo Hunt Permit-Tags to Non-Residents.

Presenter: Richard Rico, Assistant Director, Special Services

At the September 17, 2004 Commission meeting the Commission voted to suspend enforcement of a portion of R12-4-114(D) for the spring 2005 buffalo hunts. Specifically, the requirement to ensure that no more than 10% of the total available bighorn sheep or buffalo hunt permit-tags in any calendar year are issued to nonresidents. Since that time, this rule has been modified to accommodate changes associated with the 15% set aside for bighorn sheep. However, the 10% cap related to buffalo was not addressed as part of the out of cycle rule making process. At present, R12-4-114(D) states that the Department shall ensure that no more than 10% of the total available buffalo hunt permit-tags in any calendar year are issued to nonresidents and that no more than 50% nor more than two buffalo hunt permit-tags of the total available in any hunt number are issued to nonresidents.

The problem is that in the decision to not have normally drawn permits at the House Rock Wildlife Area and to try to manage that herd through population management hunts, we are left with only 9 tags available through the draw at Raymond Ranch. That is 9 cow tags divided into 3 permits in 3 separate hunts. So with the 10% cap rule in place it prevents nonresidents from being drawn at all. In order to resolve that issue we've checked with the Regional Office in Flagstaff and they indicated that there would be no impact from a biological standpoint to increase the number of buffalo from 9 to 10. In order to do that we would need to publicly agenda that item and have a telephonic Commission meeting in the next week or so to get that number increased prior to the draw taking place and also in order to give us sufficient time to publicize it. We would be able to change it in the regulations on the Internet, but not the printed version.

Chairman Gilstrap requested that the Director coordinate the telephonic Commission meeting.

* * * * *

18. Litigation Report

Presenter: Jim Odenkirk, Assistant Attorney General

A copy of this report was provided to the Commission prior to today's meeting and is included as part of these minutes.

The Commission had no comments or questions regarding the Litigation Report.

* * * * *

20. Director's and Chairman's Reports

Chairman Gilstrap reported that he attended Rancher/Sportsman meetings regarding Ranching for Wildlife. There were some positive steps made in regards to being responsible to private property ranching interest that have legitimate concerns about wildlife and working in a conscientious way to alleviate some of those challenges, but not necessarily using landowner tags as a viable option. Also, Chairman Gilstrap met with the HPAC in Sierra Vista, was involved at the legislature, and attended the Scholastic Shooting Program with Commissioner

Melton.

Director Shroufe took this public meeting opportunity to announce the Heritage Grant Awards. The Commission was provided with a 2005 Heritage Grant Report prior to this meeting. The Department has up to 1 million dollars set aside out of the 10 million from Heritage that is always issued in grants to other individuals under categories that are depicted in the Heritage Statutes; that would be Environmental Education, IIPAM, Public Access, Schoolyard Grants and Urban Wildlife.

Director Shroufe also reported that he worked in the final hours of the legislature with the Commission and Department employees. He attended a meeting in Denver with the Forest Service and tried to reinvigorate on a national scale and in Arizona, the recreational fishing program the Forest Service is supposed to have and doesn't. From there, Director Shroufe took a one week vacation.

* * * * *

16. Hearings on License Revocations for Violation of Game and Fish Codes and Civil Assessments for the Illegal Taking and/or Possession of Wildlife at Time Certain 2:00 p.m.

Presenter: Ron Day, Law Enforcement Branch Chief.

Record of these proceedings is maintained in a separate minutes book in the Director's Office.

* * * * *

17. Rehearing Request Regarding Previous License Revocation/Civil Assessment

Presenter: Ron Day, Law Enforcement Branch Chief

On the September 30, 2004, Eric M. Johle, was convicted in the Fredonia Justice Court for: Count A: Take big game without tag (Turkey). On January 1, 2005, the Commission revoked Mr. Johle's hunting, fishing, and trapping licenses for a period of five (5) years, and further required him to complete Hunter Education before obtaining any license(s) to take wildlife in the State of Arizona. Mr. Johle has requested a rehearing of this matter and decision and has been notified by certified mail that the Commission will consider this request at the May 20, 2005, meeting, at 2:00 p.m. following any other scheduled hearings. The Commission was provided with the case summary and other pertinent information related to this case prior to this meeting.

Ron Day provided a viewing of a video tape segment taken by Officer Day of Mr. Johle in a vehicle that drives by a turkey decoy and stops. Mr. Johle gets out on the passenger side of the vehicle, nocks his bow and walks around to the other side of the vehicle with apparent intent to take a turkey. At that point, the driver of the vehicle, using binoculars, apparently noticed that it was a decoy and relays that to Mr. Johle. At that same time, Officer Madden announced his presence to stop him before he could shoot. Mr. Johle did not have a valid archery turkey permit, as required by law.

Eric Johle was present and addressed the Commission. Mr. Johle stated that he pled guilty because he was from out of state and it was easier and less expensive to handle over the phone. He also stated that the only reason he stopped and got out of the truck was to relieve himself. Additionally, Mr. Johle stated that he is not a poacher and has never been in trouble with the law.

Mr. Johle's father addressed the Commission in support of his son and stated that five years loss of hunting privileges was extreme considering that his son did not shoot at the decoy.

The Commissioner asked what the grounds were for a rehearing.

Mr. Odenkirk read to the Commission R12-4-607(D) where it lays out the reasons in which the Commission can grant a rehearing.

Motion: McLean moved and Golightly seconded THAT THE COMMISSION, BASED ON THE CONCLUSION THAT NONE OF THE CAUSES LISTED IN COMMISSION RULE R12-4-607 SECTION D EXIST, VOTE TO AFFIRM ITS ORIGINAL DECISION, AND DENY THE PETITION TO GRANT A REHEARING.

Vote: Unanimous

Commissioner McLean requested that in the future when there are photos or video tapes, that he receive them along with the packets prior to the Commission meeting.

* * * * *

19. Call to the Public

There were no request to speak to the Commission.

* * * * *

21. Commissioners' Reports

Commissioner Golightly reported that he spent part of the past month working on legislative matters. He spent some time on shooting range issues and other issues in Region III.

Commissioner Melton worked on a waterhole project. He also attended the Tucson Trap and Skeet Shoot and the one at the Ben Avery Shooting Facility. Commissioner Melton commented that there were a lot of kids at these events and it's a great thing that the Department is doing with the kids.

Commissioner McLean spent some time on legislative issues, and followed up on some issues relating to the procurement and contracting of our new online license vendor.

* * * * *

22. Approval of Minutes

There were no minutes approved at this meeting.

* * * * *

23. Future Agenda Items

Steve Ferrell noted six future agenda items.

- Provide the Commission with a short briefing on the use of goats for chaparral conversion.
- The Director will meet with the BLM State Director and exhaust all remedies to develop a schedule for reviewing the Big A allotment in 15C North and report back to the Commission as soon as possible. And further advise the Bighorn Sheep Society the results of that review.
- In regards to UDA traffic along the international border, draft a letter for the Chairman's signature to President Bush and the Arizona Congressional Delegation regarding concerns for damage to wildlife habitat. Offer suggested solutions, enclose photos, address litter, impacts to natural waters, wildlife water developments and border patrol activities. Allow the Commission to review that letter at the June Commission meeting prior to its mailing.
- Aggressively take the initiative to assist the Governor's Office in playing a leadership role in developing a plan to benefit the interests of wildlife management in making decisions about roadless areas.
- In coordination with Commissioner McLean attempt to redraft the spotlighting rule so that it better addresses criminal intent and avoids unintended consequences.
- Schedule a telephonic Commission meeting, preferably next week, that would allow the Department to add one cow buffalo tag to the fall 2005 hunt at Raymond Ranch.

Commissioner Golightly requested that the Commission begin the employee salary compensation package program and begin thinking about how and when it's going to be done, and build up to a legislative approval next year. Commissioner Golightly requested that this be a standing agenda item until it is completed.

Commissioner McLean requested an updated report on the Mexican Wolf Reintroduction Program.

Chairman Gilstrap suggested that it was time for a quarterly meeting with the Governor. Also, related to the Clay Target Center (CTC), we need to look at what steps we are going to take in the future, regarding the administration of the CTC.

* * * * *

17a. Discussion of the Department's Wildlife Holding Permit and Scope of Review of the Department's and Commission's Authorities.

Presenter: Jim Odenkirk, Assistant Attorney General

Some concern was expressed after last month's Commission meeting related to the hearing on the live wildlife permit case involving the skunks. The concern was whether or not the

Commission's decision in that matter would somehow establish a precedent that may make it more difficult and create more legal challenges for the Department and the Commission with future applications for wildlife holding permits.

The permit is established by Commission Rule. Its purpose is primarily to allow personal possession of live wildlife, but only under certain and limited circumstances: 1) if related to wildlife management, 2) education, 3) advancement of science and promotion of public health and welfare, and 4) humane treatment when animals cannot survive on their own in the wild.

Often, the Department receives applications or inquiries from the public to possess live wildlife for humane treatment. The Department has taken a very narrow interpretation of that provision so as to prohibit people from possessing live wildlife as pets. It's really reserved for situations where an animal is injured and cannot survive in the wild and not for where an individual has created the situation requiring humane treatment.

The concern is whether the decision last month by the Commission to allow the individuals to possess the skunks and to reverse the Department's decision denying that permit constitutes a precedent. If so, then what is the standard to apply in the future if the Commission decides it doesn't want to follow that type of decision, and are decisions of an agency to deviate from what is an established precedent arbitrary and capricious.

First, you have to establish whether a decision is in fact a precedent. For the most part, Courts would say one decision of the agency does not constitute a precedent. One might even argue that there had already been a precedent established up to this point and the Commission's decision last month was a deviation or change from prior practice. Even if we assume the decision from last month establishes a precedent, how can it avoid a finding that a future decision is arbitrary or capricious. A few ways to overcome that are provided in the case law. Essentially, what the Commission needs to do is show in a later decision that the facts are different and justify a different result. The Commission could also find that their prior decision was an error and state it as such and that would be sufficient as well.

Mr. Odenkirk further stated that he was not concerned that the decision last month would act as a precedent and bind the Commission in any way in the future. It's only one decision and these cases are very fact specific that would allow the Commission to make a reasoned decision on why they are deciding to do something different in the future. However, recognizing that this decision is out there, it cannot be ignored in the future and it would be incumbent upon the Commission to explain in the record as to why a new case that comes before them is different and to explain that decision.

Commissioner McLean asked what we have in the form of Departmental procedures to ensure some degree of similarity of treatment amongst the regional offices when a permit is applied for, as in this case it was applied for at a regional office.

Steve Ferrell replied that the Department has a very extensive Law Enforcement Procedures Manual and an equally extensive manual about the administration of special licenses. There is a tremendous amount of guidance provided to Department officers to ensure consistency in application.

* * * * *

Motion: McLean moved and Melton seconded THAT THE MEETING ADJOURN.

Vote: Unanimous

* * * * *

Meeting adjourned at 4:37 p.m.

* * * * *

W. Hays Gilstrap, Chairman

Joe Melton, Member

Michael M. Golightly, Member

William H. McLean, Member

(Absent)

Robert D. Hernbrode, Member

ATTEST:

Duane L. Shroufe
Secretary and Director