

**UPPER VERDE RIVER WATERSHED PROTECTION COALITION
PRESCOTT, ARIZONA
APRIL 23, 2008**

MINUTES

A MEETING OF THE UPPER VERDE RIVER WATERSHED PROTECTION COALITION WAS HELD ON APRIL 23, 2008 in the Prescott Municipal Building, 201 S. Cortez Street, Prescott, Arizona.

Chairman Fann called the meeting to order at 2:00 p.m.

ITEM NO. 1 INTRODUCTION, AWARDS OR PRESENTATIONS

Members present:

Mayor Karen Fann, Town of Chino Valley, Chairman
Vice Mayor Mike Flannery, Town of Prescott Valley, Vice Chairman
County Supervisor Carol Springer, Yavapai County
Mayor Jack Wilson, City of Prescott
Councilman Len Marinaccio, Dewey-Humboldt

Members absent:

Ernie Jones Sr., Prescott-Yavapai Indian Tribe

Staff present:

Ed Muccillo, Program Manager
Rick Shroads, Assistant Program Manager
Mark Holmes, Town of Chino Valley
Jim Holt, City of Prescott

Guests present:

Councilman Floyd Wright, Dewey-Humboldt
Joanne Oellers
Jeff Humphrey
J. G. Brady
Tom Slaback
Candace McNulty
John Zambrano
Joanna Dodder

The Endangered Species Act and Habitat Conservation Plans, Norman D. James, Esq.

See Attachment A & B

Norman James thanked the Board for being allowed to speak. Mr. James said they have been focusing on the tail of dog and not the dog. He said he is not in disagreement with the bulk of what was presented to the Board by U.S. Fish & Wildlife in February. Mr. James said the reason to do a habitat conservation plan is to get an incidental take permit under Section 10 of the Endangered Species Act. He said the reason to get an incidental take permit is because of some type of non-federal activity that is reasonably certain to take, to kill or injure members of listed species. Mr. James explained that the real issue is will they kill or injure members of a listed species.

Member Jack Wilson asked if they have all of the documents is that known as a constructive defense. Mr. James answered no because every one of the documents can be challenged as being defective in some respect and there is no guarantee that when this process is completed they will be over and done with it because they may find themselves in court three or four years. Mr. James said he is not saying they should not use incidental take permits rather he is trying to give the other side. He said it is a decision that should not be made lightly.

Member Len Marinaccio asked about the difference between harming and annoying because it seems there is a gap. Mr. James said it requires specific evidence that species whereby the activity would actually kill and injure them in some significant fashion. He said it is a matter of degree and being precise in what the facts are. Member Marinaccio said he understands the documentation is what is important and asked about the word "significant," if documentation exists is there a violation. Mr. James answered yes, Section 9 applies to individual members when significant impact can be shown.

Member Wilson asked about the contrast between Section 7 and Section 9, given the complexity of an incidental take permit, why would he not create a federal nexus invoking 404 Permit and ask for a statement. Mr. James said again that everything is fact specific and that is something he would consider from the Board's perspective. Chairman Fann said with all due respect to the profession the only people winning are the attorneys. She said taking this all the way to the 9th Circuit Court it's the fish, the wildlife, the taxpayers, and the property owners that are somehow holding the short end of the bag. Chairman Fann said she hopes they all can get their act together and figure out how to solve their issues without having to go through a lot of expensive litigation. She expressed the Board's appreciation for his presentation.

Howard Mechanic, 309 Bloom Place, said assuming for the sake of argument, one party pumped 10,000 acre feet, which does not prove a take, but more parties each start pumping 10,000 acre feet and the habitat damage results in a take. Mr. Mechanic asked would each party be jointly or separately responsible. Mr. James said that is an open question and cited a court case in the 9th Circuit from the early 1990's where an Indian tribe sued the Department of Navy based on the Navy's land lease program. He said the Navy had land along the Truckee River, the only water source for Pyramid Lake where an endangered fish, the cui-ui, lived. Lessees diverted the water, which lowered the flow and resulted in preventing the fish from spawning. The court held to be liable under Section 9 they have to be the proximate cause of the take, therefore the Department of Navy could not be held responsible for taking species. He said the remedy in Mr. Mechanic's scenario would be an injunction against pumping water on a sub-basin wide scale and he has never seen anything quite like that. Mr. James said one party cannot be singled out when a number of parties are engaging in an activity that is collectively causing the adverse impact.

Chairman Karen Fann asked if party A's pumping does not cause damage but when Party B starts pumping and habitat damage results, then who is responsible. Mr. James said he thinks they would look at all pumping collectively; even the first party may have senior rights. He said in determining causation, proximate cause, does not mean the first pumper is not liable.

Member Wilson asked does the case law establish proportionate liability or direct liability or is there case law to work from. Mr. James answered no, there is no case law and said this is not a damage situation rather the remedy would be injunctive relief.

Member Carol Springer said Arizona's groundwater laws are not based on a priority system and it seems to her that Mr. James' answer is appropriate.

Mr. Mechanic said when Mr. James wrote his letter the western bald eagle was not an endangered species and asked if it has been relisted. He asked if that is so, does it

change any of the comments he made in his letter. Mr. James said an injunction was issued temporarily listed the desert breeding population of bald eagles pending U.S. Fish and Wildlife Service's review of their previous decision to list that distinct population segment. He said he is not sure of the exact status of bald eagles in the Upper Verde and cannot give a response.

Jerry Brady, 9970 East Shirley Lane, Dewey, said the Washington public interest research group brought suit against the Commandant of the Puget Sound Naval District on essentially these same issues and he was retained by the Pacific Fleet Ballistic Missile Submarine force on account of the U.S Naval Electronics Laboratory Center. He said there are a number of related issues Mr. James might respond to such as the ruling by the Arizona State Supreme Court that the adjudication of water as a property right will be strictly dependent on the Paddleford and Klein decisions of the United States Supreme Court. Mr. Brady said they have released 198,000 case law precedents to electronic publication. Chairman Fann asked Mr. Brady if he has a question for Mr. James. He said the rights of the City of Prescott previously adjudicated under Paddleford and Klein has filed under the accelerated process to appeal them and it costs \$25 to have the issue resolved, so why has this not been done. Member Wilson said that question is for the City of Prescott, it has been raised to their attorney before and they have answered that question.

Michelle Harrington, Center for Biological Diversity, said they continue to believe that ample evidence exists to suggest unmitigated pumping in the Big Chino will eventually reduce the flow the river and impact endangered species. She said the Arizona bald eagle does nest at Perkinsville, having a total of six nests along the Verde that could be impacted. She said the current listing will be valid until December at which time the U.S. Fish & Wildlife Service is supposed to make a final determination on the petition they submitted to list the Arizona bald eagle. Ms. Harrington said regarding the issue of cumulative impacts if they do a habitat conservation plan or any other type of mitigation plan they will be looking at the cumulative impacts so none of those unknowns will be there providing the communities with protection. She said the bald eagle also eats native suckers and the pygmy owl case is not completely applicable to this case.

ITEM NO 2. Call to Public

Tom Slayback, 715 East Goodwin, said the Sierra Club feels the best protection to the cities and the county in any potential pumping is to have a habitat conservation plan. He announced that on April 30, 2008 at 6:45 p.m. in the Prescott Public Library, the senior biologist and project managers for the Verde River and Roosevelt Lake Conservation Plans for SRP will be giving presentations about the process and benefits of doing a habitat conservation plan.

ITEM NO 3. Action – Approval of Minutes for Previous Board Meeting

VICE-CHAIRMAN FLANNERY MOVED TO APPROVE; SECOND BY MEMBER WILSON; APPROVED UNANIMOUSLY.

ITEM NO 4. Discussion – Program Manager's Report

Ed Muccillo said on Tasks 1 and 2 it is typical program management; Task 3 on the Water Conservation Program will be addressed with a presentation later in the meeting; Tasks 4 and 5, the hydrologic monitoring and the recharge mapping being done by Southwest Ground-Water are heading for an update to the TAC on May 14 and an update to the Board at the May Board meeting.

ITEM NO 5. Discussion – TAC Meeting Summary – April 15, 2008

Mr. Muccillo said they reviewed Mr. James presentation for this meeting; they discussed the safe-yield workgroup candidates which will be addressed under Item No. 7; they had a lengthier presentation on the Water Conservation update that Keith Larson will be giving and offered guidance in paring it down.

ITEM NO 6. Discussion – Water Conservation Programs Task Update

See Attachment C

Keith Larson, Larson and Associates, Water Resources Consulting,
Water Conservation Program Inventory and Water Use Trends Presentation

Chairman Fann called for questions. Vice-Chairman Flannery said there is a wealth of knowledge in this presentation and Mr. Larson has done an outstanding job in accumulating the information. He said because Mr. Larson was pressured by time that he encourages others to delve into the information presented.

ITEM NO 7. Discussion – Safe Yield Workgroup

Mr. Muccillo said they issued a press release to solicit candidates to participate in the Safe Yield Workgroup. He said they surprisingly did not receive many applications, only 7 total, and the recommendation of the TAC is to reissue the press release and expand the campaign via phone and conversations. Member Springer agreed. Member Wilson said they need applicants with additional background on water and to raise the bar on what they are looking for. Member Springer agreed and said applicants should have a working knowledge on water. Mr. Muccillo request letters from organizations that candidates were purporting to represent just to verify the candidates are endorsed by their organization.

ITEM NO 8. Discussion – Next Meeting Time / Location / Agenda Items

The next Board meeting is scheduled for May 28, 2008 at 2:00 p.m. at City of Prescott in Council Chambers. The next TAC meeting is scheduled for May 14, 2008, at 1:00 p.m., at the Yavapai County Administrative Services Building, Gladys Garner Room. Mr. Muccillo said the following items will be on the agenda:


- Safe-Yield Workgroup Candidates
- Update on Hydrologic Monitoring Task
- Update on Recharge Task

Vice-Chairman Flannery asked what will they do with today's presentation and what is the next step. Mr. Muccillo said he wants to schedule a one day workshop in June for himself, Rich Shroads and some of the other people on the program management team and come up with a strategic plan to bring back as a recommendation to the TAC and the Board. Vice-Chairman Flannery said he does not want to miss the next threshold for a grant to go by. Chairman Fann suggested they move toward regional policy regarding conservation minimums with the opportunity to offer additional ideas as individual entities. Mr. Muccillo said they could get some economy of scale if they do launch a program regionally.

Meeting adjourned at 3:43 p.m.


KAREN FANN, Chairman

ATTEST:


LORRI CARLSON, Deputy City Clerk