



STATE OF ARIZONA
NAVIGABLE STREAM ADJUDICATION COMMISSION

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GEORGE MEHNERT
Executive Director

Meeting Minutes

Phoenix, Maricopa County

September 23, 2003

COMMISSION MEMBERS PRESENT

Jay Brashear, Dolly Echeverria, Earl Eisenhower, James Henness, and Cecil Miller (arrived approximately at 9:20 a.m.).

COMMISSION MEMBERS ABSENT

None.

STAFF PRESENT

Curtis Jennings, George Mehnert.

1. CALL TO ORDER

Chair Eisenhower called the meeting to order at approximately 9:05 a.m.

2. ROLL CALL

See above.

3. RULES (discussion and action).

4. JUNE 23, 2003 LETTER FROM THE ARIZONA CENTER FOR LAW IN THE PUBLIC INTEREST (discussion and action).

There were two instances where rulings regarding motions or objections at two hearings were either not acted on or were not clear. One was an objection was in Cochise County by Wayne Klump on (March 12, 2003) that attorney Very Kornylak not be allowed to participate because of her lack of standing. The Chair overruled that objection, because the Commission wants to provide the widest possible latitude insofar as receipt of information is concerned. The other objection was at the (April 7, 2003) Lower Salt River hearing when attorney Very Kornylak objected that the information provided by attorney Grady Gammage Jr. was not relevant and neither his testimony nor his materials should be admitted. The Chair overruled this objection saying that the Commission accepts hearsay and that the Commissioners, concerning both objections, are each intelligent enough and able to discern which information is pertinent and which is not.

Rules: Administering oaths: The Commission decided it will administer oaths if someone testifying would like to be sworn in. The Commission needs to make their process as easy as possible for people to participate. The chair updated Commissioner Miller who entered and Mr. Miller indicated that he did not believe oaths were necessary given the nature of the Commission and the evidence. Attorney Mark McGinnis pointed out that our statutes, in fact, state (37-1122.A.3.), and the point of the statute is to get the most best evidence you can. AAG Laurie Hachtel indicated that while she tends to agree with Mr. McGinnis and that the Commission should get as much evidence as it can, that it is a good idea to use oaths to better preserve the record. Attorney Curtis Jennings pointed out that much of the evidence we receive is

historical and that the statutes say the Commission should be as lenient as possible regarding the admission of evidence. He also pointed out that using oaths may raise objections regarding hearsay, and that if someone wants to take an oath then the person can. Mr. Brashair pointed that we receive evidence not offered at the hearing and about which people do not testify. Doug Martin indicated that as an official of the state, when he speaks before a board or a commission under oath that he is required to have an assistant attorney general there to represent him. And, if this is the case, then this creates other problems. Jim Henness indicated that even in many other matters he has been involved in for the state, oaths were not required. Attorney Bill Staudenmaier stated that the Commission Rules presently accommodate leniency in taking testimony and other evidence. He indicated that according to the Commission draft Rules the Commission can already exclude evidence that is unduly repetitious, incompetent or irrelevant. And that the Commission should balance this with the statute and the Commission's need to invite as many people to participate who want to. Attorney Joy Herr-Cardillo, ACLPI, echoed Bill Staudenmaier's statement and that she would like to stress uniformity and fairness; she would also evaluate testimony partly based on whether it is offered under oath. Mr. Brashear indicated that we should insure the policy that an oath will not be administered unless a person requests to be placed under oath should be clear. The chair will look into the matter.

Party: Who is a party at a hearing: Joy Herr-Cardillo; the concern was that there was some confusion because they were sure who they should copy with post-hearing memoranda and they would just like some clarity. Mrs. Herr-Cardillo indicated that the Chair might instruct people at hearings about how to become a party, and, perhaps. Chairman Eisenhower indicated he might explain both at the beginning of each hearing and at the end of each hearing what you must do to become a party. Attorney Curtis Jennings indicated that there are people who submit written materials and do not attend hearings and that under the Commission's statutory language, those people are parties. The Chairman said we have to sort this one out and insure that at the beginning and end of a hearing he will provide more notice. Mr. Mehnert indicated that we need to change the rules, based on Mr. Jennings statement, because the rules do not presently include anyone as a party by virtue of having submitted evidence. Mark McGinnis reminded that at Yuma the sign in sheet was difficult to find and he thought that if you appear at the hearing, sign in as a party on the sign in sheet or file something beforehand indicating you want to be a party, then you are a party. Mr. McGinnis said there were some people who checked the party box who really did not intend to be parties and others who did not sign in who probably did want to be parties and that it will be beneficial if the Chair restates how and why someone becomes a party. The Chairman indicated that he and the Director will work on the matter. Mr. Jennings believes that someone who files evidence, even if they do not say they want to be a party, they should be considered a party.

Post hearing legal memoranda: The Chairman indicated that he and the Director would resolve this question.

5. **APPROVAL OF MINUTES** (discussion and action).
 - A. March 11, 2003, Santa Cruz River, Santa Cruz County.
 - B. March 11, 2003, Small and Minor Watercourses, Santa Cruz County.
 - C. March 12, 2003, San Pedro River, Cochise County.
 - D. March 12, 2003, Small and Minor Watercourses, Cochise County.
 - E. April 7 & 8, 2003, Lower Salt River, Maricopa County.
 - F. June 24, 2003.

Motion by: Cecil Miller Second by: James Henness Vote: All aye
Motion: **To approve the minutes listed in item five.** March 11, 2003, Santa Cruz

River, Santa Cruz County. March 11, 2003, Small and Minor Watercourses, Santa Cruz County. March 12, 2003, San Pedro River, Cochise County. March 12, 2003, Small and Minor Watercourses, Cochise County. April 7 & 8, 2003, Lower Salt River, Maricopa County. June 24, 2003.

6. CONSIDERATION REGARDING THE LOWER SALT RIVER COURT REPORTER TRANSCRIPT AS THE OFFICIAL RECORD OF THE HEARING HELD ON APRIL 7, 2003 AND APRIL 8, 2003 (discussion and action).

Mr. Brashear asked if the reporter was a certified court reporter and who owns the transcript, and what the issue is regarding the time delay. Mr. Mehnert indicated the court reporter was a certified court reporter and that the state owns the transcript. Mrs. Herr-Cardillo suggested that the Commission establish a list of court reporters and that reasonable fees for transcripts be established. Mr. McGinnis indicated that establishing a list of reporters would be helpful, and that in the particular case of the Lower Salt, his understanding with the court reporter was that once the transcript went to the Commission it would become a matter of public record. He further stated that he believed he received his copy of the transcript on the same day the Commission received its copy. Mr. Mehnert explained the Commission and Mr. McGinnis received their copies of the transcript of the Lower Salt on the same date and that the time delay in question is something different and that it related to the time during which parties have to file post hearing opening memoranda related to the time they have to wait for the transcript. Mrs. Herr-Cardillo indicated that she does not have a problem with the current method except that the Commission should establish the rate and that the Commission has some leverage in selecting court reporters. Mr. McGinnis reiterated that the official transcript went directly to the Commission, not to him; that he received a copy as did other parties who ordered copies, but that it was not his reporter and his transcript, it was the Commission's transcript. Mr. Mehnert explained the process and that the official transcript went directly to the Commission; and that in the future, if it happens again that someone wants to use a court reporter, the Commission or party may want to file a motion to extend the time for filing post hearing opening memoranda to include the time it takes for the transcript to be available. Mr. Brashear suggested that in the future when a court reporter is used that the time it takes to receive the transcript be added to the time for filing post hearing opening memoranda. Mr. Jennings indicated this needs to be dealt with on a case by case basis.

Motion by: Jay Brashear Second by: James Henness Vote: All aye
Motion: **That the court reporter transcript of the hearing on the Lower Salt be the official transcript of the Commission on that hearing.**

7. CONSIDERATION OF THE COMMISSION REPORT REGARDING THE NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN MOHAVE COUNTY (discussion and action).

Motion by: Jay Brashear Second by: Dolly Echeverria Vote: All aye
Motion: **That the small and minor watercourses report for Mohave County be accepted.**

8. CONSIDERATION OF THE COMMISSION REPORT REGARDING THE NAVIGABILITY OF THE SMALL AND MINOR WATERCOURSES IN LA PAZ COUNTY (discussion and action).

Motion by: James Henness Second by: Dolly Echeverria Vote: All aye
Motion: **That the small and minor watercourses report for La Paz County be accepted.**

9. VOTE TO DETERMINE THE NAVIGABILITY OR NON-NAVIGABILITY OF SANTA CRUZ COUNTY SMALL AND MINOR WATERCOURSES. (discussion and action).

Motion by: James Henness Second by: Dolly Echeverria Vote: All aye
Motion: **That as of statehood the small and minor watercourses in Santa Cruz County are non-navigable.**

10. VOTE TO DETERMINE THE NAVIGABILITY OR NON-NAVIGABILITY OF COCHISE COUNTY SMALL AND MINOR WATERCOURSES. (discussion and action).

Motion by: Cecil Miller Second by: James Henness Vote: All aye
Motion: **That as of statehood the small and minor watercourses in Cochise County are non-navigable.**

11. HEARINGS TIMETABLE. (discussion and action).

12. BUDGET AND REPORT FROM DIRECTOR (discussion and action).

13. CALL FOR PUBLIC COMMENT (comment sheets).

(Pursuant to Attorney General Opinion No. 199-006 [R99-002]. Public Comment: Consideration and discussion of comments and complaints from the public. Those wishing to address the Commission need not request permission in advance. Action taken as a result of public comment will be limited to directing staff to study the matter or rescheduling the matter for further consideration and decision at a later date.)

14. FUTURE AGENDA ITEMS AND ESTABLISHMENT OF FUTURE HEARINGS AND OTHER MEETINGS.

15. ADJOURNMENT

Motion by: Cecil Miller Second by: James Henness Vote: All aye
Motion: **To adjourn the meeting at approximately 10:45 a.m.**

Respectfully submitted,

George Mehnert, Director
Navigable Stream Adjudication Commission

Date: September 24, 2003