

Minutes of the Meeting of the
Arizona Game and Fish Commission
Friday, March 15, 2002 – 8:00 a.m.
Arizona Game and Fish Department
Regional Office, 5325 N. Stockton Hill Rd.
Kingman, AZ

PRESENT: (Commission)

(Director's Staff)

Chairman Michael M. Golightly
Commissioner Joe Carter
Commissioner Sue Chilton
Commissioner W. Hays Gilstrap
Commissioner Joe Melton

Director Duane L. Shroufe
Deputy Director Steve K. Ferrell
Asst. A.G. Jay R. Adkins
Asst. A.G. Jim Odenkirk

Chairman Golightly called the meeting to order at 8:00 a.m. The commissioners introduced themselves and Chairman Golightly introduced Director's staff. The meeting followed an addendum dated March 8, 2002.

Awards and Commissioning of Officers

Greg Smith and Jackie Gonzalez of the Arizona Falconers Association (AFA) presented the Vic Hart Award to Director Shroufe and Bruce Taubert, Assistant Director for Wildlife Management. This award was given annually for excellence in falconry and raptor conservation. Ms. Gonzalez read a short note from AFA President Randy Hale stating appreciation to the Department in bringing the peregrine back from the point of extinction and allowing for legal harvest. A check for \$800 was presented to the Department for raptor research and preservation.

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1. Litigation Report

- a. *Forest Guardians v. APHIS*, CIV 99-61-TUC-WDB; *State of Arizona v. Norton*, CIV 98-0632-PHX-ROS; *Conservation Force v. Shroufe*, CIV 98-0239 PHX RCB; *In Re General Stream Adjudication for the Little Colorado River and Gila River*; *Mark Boge v. Arizona Game and Fish Commission & Shroufe*, CIV 2000-020754; *Mary R. LLC, et al. v. Arizona Game and Fish Commission*, CIV 2001-015313 and *Defenders of Wildlife et al. v. United States Fish and Wildlife Service*, CIV01-934 (HA) (U.S.D.C. Ore.)

A copy of the update, which was provided to the Commission prior to today's meeting, is included as part of these minutes.

Mr. Adkins noted the Commission was granted formal intervenor status in *Defenders of Wildlife et al. v. United States Fish and Wildlife Service*, CIV01-934 (HA) (U.S.D.C. Ore.).

Mr. Odenkirk stated a complaint was filed on March 7, 2002, in *State of Arizona v. Norton*, CIV 98-0632-PHX-ROS. A decision will probably be made by the United States within the next 60 days.

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3. Informational Presentation on Hunt Structure Strategies and Options on Bison Hunting in Units 12A and 12B (House Rock Bison Herd)

Presenter: Tice Supplee, Game Branch Chief

(For background information, see minutes for the February 22, 2002, Commission meeting, pages 8-10).

An internal Bison Management Team was established in May 2001 to look at management of the Department's two bison herds at Raymond Ranch Wildlife Area and at House Rock Wildlife Area.

Bison became a component of Arizona's wildlife resources in 1905 when they were brought here and ultimately gifted to the Game and Fish Commission in 1926. Several hunt structures have been used historically to attempt to regulate the population of bison that occupy Units 12A and 12B.

On February 12, 2002, the Department hosted a stakeholder meeting at the Flagstaff Regional Office to solicit input on future harvest management from individuals who participated in multiple bison hunts associated with the House Rock Wildlife Area.

The Bison Management Team's options for House Rock include:

- Fencing wildlife area boundary or an alternate alignment avoiding the wilderness boundary
- Working with the U.S. Forest Service, Bureau of Land Management, and livestock permittees to allow bison to range freely
- Reducing or increasing herd size
- Habitat enhancements on the wildlife area

The final Team report should be completed by May 1, 2002. Ron Sieg, Region II (Flagstaff) Supervisor, was present at today's meeting to provide more information on the report.

In October 2001, the Grand Canyon National Park (NP) contacted the Department regarding what they considered to be a high number of bison on the Park (up to 55 animals) causing resource damage. The NP requested the Department remove all bison from NP lands immediately. The Department offered to attempt to haze the bison north of the NP boundary using contract helicopters. The NP subsequently refused permission to allow the Department to use this technique. On October 24, 2001, regional staff met with members of the NP to respond to Park concerns. Little was accomplished at this meeting. The NP was still discussing its internal assessment of the status of this bison herd. They suggested bison were livestock; then it was suggested bison were exotic wildlife.

The Department finished compiling the recommendation package for the fall 2002-spring 2003 hunts. These recommendations will be presented at the April 2002 Commission meeting. With the new strategies, hunter success is expected to be 25-48% for the fall hunts and spring hunt hunter success is expected to be higher. Hunt opportunity will be extended to 26 days for each season.

Commissioner Carter wanted to see the Team focus on areas that kept bison free roaming to try to keep them off NP lands.

Mr. Sieg stated the NP was concerned about resource damage to the Park. All of Department staff and most NP staff agreed hazing by helicopter would not be effective because of the terrain the bison inhabited. The Park has had a lot of prescribed fires and wild fires the last few years, which resulted in desirable habitat on the Park side. The Department has been working for 20 years with the Kaibab National Forest (NF) to try to do similar habitat treatments on the Department's side without much success. This past year the Kaibab NF started doing environmental compliance necessary to allow the Department to do some prescribed burning, pinyon-juniper treatment and grassland/sagebrush renovation. Most of 2002 will be consumed with NEPA compliance; hopefully in 2003, habitat improvements can be done to make the House Rock valley more appealing.

Mr. Sieg noted the majority of the House Rock valley's 63,000 acres is on NF land where the bison are considered to be wildlife; however, if bison on NP lands are considered to be trespass livestock, the NP Service has the right to impound the bison and bill the Department for costs associated with killing them. At this point, the NPS is considering bison as exotic, non-native mammals. This does not change NP authority to directly take an action without needing Department or Commission approval.

On February 12, 2002, representatives of the Department, Kaibab NF and the NP met to further discuss concerns of the NP.

Mr. Sieg mentioned that as a result of the February meeting, on March 25, a work group would be held with one representative each from the NP, FS and Department. The NP is intending to fence the northern boundary to exclude livestock from the forest. The Department would be working with them to incorporate a fence design that would allow most of the bison to be turned and to allow the mule deer herd to continue move north and south.

Chairman Golightly noted the final Team report would be completed by May 1, 2002. The hunt set Commission meeting was set for April 13. He did not want to see another year of the same results and asked if the report could be done before the hunt set meeting. Ms. Supplee noted one of her concerns with the content of the larger report was that it dealt with the Raymond Ranch Wildlife Area as well. It goes into more detail on management mechanics. She did not want to rush the quality of the report because it had many other components. Chairman Golightly was concerned about the amount of time it was taking to address management of the bison on House Rock. He asked to move the House Rock component forward. Ms. Supplee stated the Department could excise from the report the pertinent elements for House Rock and incorporate them into the hunt recommendations that the Commission will be taking action on. The Department could guide the Commission through some decision points. There has been some discussion

today about the herd being or not being free ranging; that, to some extent, is pivotal to the Commission's concerns put before the Department. The Department can include content from the report regarding House Rock in the packet provided to the Commission for its April meeting. Information will be added as an expanded component to the package.

Commissioner Gilstrap recommended using that information as a first step, with the understanding there would be continued efforts for a solution and resolution.

Chairman Golightly was concerned about the fence because there was a lot of deer coming off the Kaibab. He asked if the fence went through NEPA compliance. Mr. Sieg stated it did not, which was much to the surprise of the FS. The NP is rebuilding a fence, which does not have to go through a NEPA process. The NP is cognizant of wildlife movement; they are working with the Department on fence design.

Ms. Supplee noted if the lower end of the harvest range occurs next year (20-30%) bison would be added to the population. The total number of hunters affects the availability of the animals. Each hunter on a buffalo hunt has an entourage; maybe if hunters worked more cooperatively, there might have been more success. If hunters do not work cooperatively, they can actually work against one another.

The issue of camping locations was discussed. It is FS property and the Department has made proposals in the past to limit camping to selected locations in the forest. The Department is discussing this point with the FS and will work with the FS to have campers stay in one location during the bison hunts at House Rock. Also, the Department was trying to balance hunter densities for bison hunts and deer hunts.

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

Presenter: John Kennedy, Habitat Branch Chief

A copy of the printed update, which was provided to the Commission prior to the meeting, is included as part of these minutes.

Clarification was noted on two issues. Clarification was given in the update (page 4) regarding the Verde Rim Allotments. Most of the Department's comments were focused on working with the Forest and permittee on the allotments to try to enhance habitats for pronghorn. The other point of clarification was specific to shutting off waters/springs. The Forest and permittee are proposing to use water to distribute wildlife; the report was confusing in that regard. Rather than setting up a pasture system with fencing, waters are being used to distribute livestock. The next available water is about one and one half miles from the spring site and the water that will be shut off; there should not be significant adverse impacts to wildlife associated with that action.

Another point of clarification dealt with the Department's work with the Department of Defense (DOD) on Camp Navajo. The main issue of importance to the Department was regarding a preliminary proposal by DOD that involves several thousand acres of

proposed forest restoration, which the Department and U.S. Fish and Wildlife Service had concerns with. The final INRMP will be rescinded and the planning and review process will be reinitiated for the draft INRMP. A new forest restoration proposal will be developed with the Department.

Commissioner Melton had concerns regarding the military withdrawal and wildlife management on the Barry M. Goldwater Range. He saw information that stated the DOD was going to draft a management plan, and the Department could agree or disagree with it. If the Department disagreed with the plan, would there be an option for the Director and Colonel Uken to get together and resolve issues. Mr. Kennedy stated the process varies from one installation to another. The Department hoped that the team responsible for developing the plan and proposed alternatives in the plan will submit their recommendations to the executive level (Barry Goldwater Executive Council). Final negotiations and decisions are to be made at that level regarding the management plan and proposed alternatives. It is clearly the most important management plan on DOD lands in Arizona and the Department is working hard to resolve issues associated with wildlife management and wildlife-related recreation.

Commissioner Melton was concerned about access on wildlife refuges in southwestern Arizona. He asked if it would be possible to request a letter from the director of the U.S. Fish and Wildlife Service be sent to all refuges stating they needed to go through their management plans again to get them more in line with the state management plans and to increase outdoor recreational opportunities. Director Shroufe stated he would have an opportunity to talk with the new FWS director in early April about refuge planning and several other issues. Mr. Kennedy stated the Department is working with the FWS's Washington, D.C. staff to develop draft policies. There are several draft policies pertaining to management on refuges. These policies would be critical with respect to future planning on the refuges. The Department will keep the Commission informed on this project.

Commissioner Chilton referenced page 5 (Safford Field Office-BLM) regarding introductions of Gila topminnow and desert pupfish into the Aravaipa watershed. Cooperators, including The Nature Conservancy, BLM Safford Field Office and the FWS, agreed the proposed restoration project would not impact current activities in the area, including livestock grazing and recreation. The issues the Department was facing now deal with access, management and multiple use. When there are cooperators that have good purposes in mind to introduce endangered species, then other groups who are not members of the cooperating group can utilize the presence of that species to stop the management, access and multiple use envisioned by the original cooperators. She asked if there was an instrument on paper that assures the FWS will defend access, the right of management of that land and the right to continue multiple uses. Mr. Kennedy stated there could be an agreement for these types of projects. The Department has already met with the federal regulatory agencies and the cooperating entities and discussed the potential effects to historical uses associated with the project. Commissioner Carter agreed with Commissioner Chilton but wanted to make sure the Department's legal counsel was comfortable with a written agreement that may be taken to the courts in the future. Mr. Kennedy thought that a "boilerplate" document would not be reasonable because projects would vary on a case-by-case basis.

Chairman Golightly referenced page 4 (Prescott National Forest) regarding the proposed reduction of permitted numbers for the Squaw Peak Allotment along with the seasonal shut-off of developed waters to improve distribution problems associated with the lack of a pasture system. He asked if this was an opportunity to have a permanent wildlife water source installed in some of the areas. He asked if an inventory of existing catchments could be made within regions so that many would not be in one area and none in others. Mr. Kennedy stated the Department wanted to do that with a proactive approach and look at enhancing habitat on the allotments, as well as improving allotments for the rancher or the permittee.

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5. State and Federal Legislation

Presenter: Duane L. Shroufe, Director

Because there was some relief from the 2002 budget issue on Wednesday, the Senate started hearing bills yesterday. The Department had three bills scheduled in the Senate Natural Resources and Agriculture Committee. The Key Bill Status Report as of 3/15 was distributed to the Commission.

H 2048 (Game and Fish Commission) has gone through the House and Senate Committees and is up for a vote on the Senate floor; this could occur next week.

S 1367 (Hunting licenses) and S 1370 (Fishing tournament penalties) were submitted by the Department this year. These bills should be heard this morning.

Attention was given to S 1250 (Watercraft; towing companies). The Commission wanted to closely monitor this bill. The Department had been working with the towing companies and the current language is now agreeable to the Department. Director Shroufe asked for a Commission vote to support S 1250.

S 1274 (State Land) was noted under closely monitor. It is the Department's feeling and recommendation that the process the State Land Department goes through in providing permits to potential lessees is not an issue with Game and Fish.

Motion: Carter moved and Gilstrap seconded THAT THE COMMISSION VOTE TO SUPPORT S 1250.

Vote: Unanimous

Commissioner Gilstrap asked about assigning commissioners to respond quickly to legislation before all the commissioners hear or know of it. Director Shroufe noted the advantage of having a formal process this year by the Commission to designate certain commissioners to deal with legislation in a preliminary manner if certain legislation was important and needed a Commission position. Chairman Golightly stated that unless there was a dire emergency, the designated commissioners would make an attempt to phone other commissioners if something was going to occur that day. If there was an emergency, the designated commissioners had the right to commit the Commission. He wanted to reaffirm that process.

Motion: Gilstrap moved and Carter seconded THAT THE RECOMMENDATION BE MADE THAT THOSE COMMISSIONERS WHO HAVE BEEN GIVEN THE PRINCIPAL RESPONSIBILITY OF DEALING WITH THE LEGISLATORS, HAVE THE LATITUDE WHEN LEGISLATION IS MOVING QUICKLY AND COMMUNICATION CANNOT BE MADE WITH ALL COMMISSIONERS TO CHECK WITH PRIMARILY THE CHAIRMAN AND AS MANY OTHER COMMISSIONERS AS POSSIBLE TO TAKE WHAT ACTION SEEMS TO BE NECESSARY IN CONCERT WITH THE DEPARTMENT.

Commissioner Chilton was concerned with the motion. She wanted it RESTRICTED TO EMERGENCY CIRCUMSTANCES AND THOSE CIRCUMSTANCES WHERE THE COMMISSION WAS SUBSTANTIALLY IN AGREEMENT AND HAD PREVIOUSLY DISCUSSED IN PUBLIC. Commissioner Gilstrap concurred with Commissioner Chilton and wanted to add as part of the motion THAT THIS IS FOR ONE YEAR ONLY AND THAT EACH YEAR THE PROCESS WOULD BE RENEWED.

Commissioner Carter recommended reaffirming the process each year at the beginning of the legislative agenda. Even if the designated commissioners were to take a position on behalf of the Commission, it did not prohibit the Commission in a future meeting to modify its position on an issue.

Vote on Amended Motion: Unanimous

Director Shroufe noted that Heritage Fund cuts were not in the Senate's 2002 budget; a new debate will probably occur with the 2003 budget.

On Wednesday night a proposed striker amendment to H 2592 was obtained regarding changing the trespass bill. The language states that land does not have to be posted and a person wanting to hunt, fish or trap needs written permission or else be cited for trespass. This will probably be heard in the House next week.

Several commissioners noted they received comments from the sporting community in opposition.

Motion: Melton moved and Chilton seconded THAT THE COMMISSION STRONGLY OPPOSE THIS BILL.

Vote: Unanimous

Commissioner Carter asked about the progress of SCR 1019 (Federal monies; legislative control). Director Shroufe suggested that the Department look at it and monitor it closely. It would greatly affect the Commission and the Department would lose all of its ability to get federal funds if it passed.

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Meeting recessed at 9:30 a.m.

Meeting reconvened 9:45 a.m.

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6. Call to the Public

Emmett Sturgill, representing the Arizona Farm Bureau and a rancher in Mohave County, was past chairman of the Habitat Partnership Committee for Mohave County. He referenced a quail survey that was sent. The mailing was by the Western Gamebird Alliance. The brochure was paid for and mailed by the Game and Fish Department, which means the Department legitimized this brochure. The brochure was not accurate, not based on facts and was 100% anti ranching. A Department employee drafted it. There are other studies that disprove everything in the brochure. Ranching is beneficial to quail. The state cattlegrowers have taken up this issue and a letter has been drafted to the governor. He was asking for an investigation into this solicitation. He asked that this be put on the next agenda for discussion. He hoped the Commission would not endorse this survey and take appropriate action.

Rad Green, representing self, spoke with regard to bonus points and multi-land use. These two programs could be used in conjunction to create a positive environment. He thought that bonus points should be given to people who volunteer to do work programs administered by the Department and/or other organizations on ranches. These programs would save ranchers money. Game habitat would be enhanced, more hunting licenses would be sold and non-signatory ranchers would see how well the program was working for their neighbors. Bonus points would attract the quality hunter.

Ed Young, representing self, requested lower fishing license rates for senior citizens. Chairman Golightly stated the Department would send him a response letter.

Charles Lange, a rancher representing the Mohave Livestock Association, spoke also regarding the quail survey mailing. The Department should look into this and investigate the parties responsible. This blatant act was undermining the relationship between the ranching industry and sportsmen. He wanted to see a letter of retraction addressed to all of the parties who received the mailing stating it was not based on sound science.

Don Martin, representing the Mohave Sportsman Club, spoke regarding the reopening of the Hualapais (Unit 16A) for archery deer hunting in December. The Club opposes that for a few reasons: 1) there was a juniors only muzzleloader hunt in December in the Hualapais, which would create a safety issue; 2) during the archery hunt in December, there are 25 other units open in Arizona and 12 in Region 3 that are open for hunting at the same time and 3) Unit 16A is the only game management unit in Region 3 that is showing a rebound in mule deer and the unit should be given a rest. With regard to permitting archery hunters on the North Kaibab, including the Arizona Strip (Unit 13B), the Club supports permitting the archery deer hunt on the Kaibab for biological reasons and to gather data. The Club thought Unit 13B should have an allocation for archers and they should be given an archery only hunt there separate from the rifle hunters. The archers who have tried to hunt during that time have been unsuccessful because there were so many rifle hunters and their entourage.

Jeff Hough, representing the Arizona Bowhunters Association (ABA), also spoke with regard to the archery Kaibab hunt. The ABA felt that going to a draw unnecessarily restricts archery hunt opportunities. Members of the ABA agree changes were needed in the structure of the archery Kaibab hunt. The ABA requested five things: 1) table the

archery deer hunt draw proposed for 2002-2003; 2) implement a stamp system to provide a forum to gain relevant factual data concerning this hunt; 3) limit the number of out-of-state archery tags in Units 12A, 12B and 13A to a level that approximates 10% of the total estimated archers in these units from previous years' estimations; 4) move the data of the archery deer hunt on the Kaibab to coincide with the statewide August-September archery hunts and 5) introduce a one week antlerless hunt in October during the time suggested in the 2002-2003 hunt guidelines. Implementation of these items should provide an effective short-term solution to minimize impact and to gain valuable data to monitor the North Kaibab archery situation.

Glenn Sheldon, representing self and owner of Wild West Archery Inc., agreed with the ABA. Going to a permit for archers in Arizona is a serious loss of privilege. It would create a loss of revenue to the Department and small communities.

Jerry Stewart, representing self, agreed with the ABA. He wanted to see more public input before a decision was made on permitting the Kaibab archery hunts. A check station should be set up on the Kaibab to obtain more data.

Bill Brannen, representing self, supported the ABA and agreed there was not enough data to go with permitting, but going with a stamp would provide that data. After that was done, then the Commission could decide whether or not permitting was a feasible method.

Robert Swig, representing self, requested that senior citizens be given special considerations and requested either/or gender hunts for CHAMP hunters.

Fred Arbona, representing the Arizona Quail Alliance, spoke regarding Mearns' quail. A study was done this year on hunters of Mearns' quail. The printed results were given to the Commission so that they would have time to study the data before the April hunt set meeting. There were 12 key questions given to Director Shroufe to answer. This was a new opportunity for hunters and the Department to work in a better way in the future and for better results in the field.

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7. Statewide Shooting Range Project Update

Presenter: Kerry Baldwin, Acting Assistant Director, Information and Education

Written updates were provided to the Commission on major issues in the program prior to today's meeting.

Pima County has been moving along with the shooting range and timelines are being met. A shooting range grant has been received from the county as a part of the project.

Commissioner Gilstrap asked if there was any feedback from the meeting with Maricopa County. Mr. Baldwin stated he attended the meeting relative to the Buckeye Hills shooting facility. The Department was trying to facilitate as many different shooting opportunities on the site as possible. Phoenix Trap and Skeet might be able to find a new home on that site. The county did not close any doors but it has concerns that, as the park

stands today, there was not really any room within existing park land to fit Phoenix Trap and Skeet in the location and orientation it desired. The Bureau of Land Management has been sent a letter requesting communication with the Department regarding the possibility of looking at another section of land immediately adjacent to the existing park that could be considered as a possible site. Phoenix Trap and Skeet has concerns because of the nature of the relationship it has to have with the county; e.g., getting lease and being able to operate on the property. Phoenix Trap and Skeet has a timeline issue in that its property has been sold. If property is not turned over to a new land purchase or if land is not found that is agreeable with the Internal Revenue Service, it will be hit with a significant capital gains bill. Phoenix Trap and Skeet is planning on clearing approximately \$1 million off the sale of its existing facility. If they were lose a big part of that, its ability would be limited in creating a new facility some place later.

Public comment

Jim Jett, representing the Mohave Sportsman Club, felt it was imperative to have some form of range protection act this year in Arizona. He wanted to know what type of action the Commission was taking as far as trying to get an act passed in the Legislature. Chairman Golightly noted S 1008 (Shooting ranges) was in the Legislature. Its sponsor was Senator Smith. Chairman Gilstrap stated testimony was given in the Senate Natural Resources Committee in support of the bill. Mr. Jett wanted to know if there was a date set for another statewide shooting range meeting.

Mr. Baldwin gave an update on the Tri-State Shooting Recreation Center. Region III (Kingman) Supervisor Bob Posey informed him of a tour on March 28 to look at the existing and alternate sites.

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8. Request to Approve the Public Outreach Plan and Draft Rule Language Amendments for R12-4-101, R12-4-102, R12-4-104, R12-4-107, R12-4-114, R12-4-115, and R12-4-609 for Implementation of the Department's Elk Harvest Management Strategy

Presenters: Richard Remington, Region I Supervisor
Dana Yost, Executive Staff Assistant

(For background information, see Commission meeting minutes for January 18, 2002, pages 34-37).

The Department incorporated the recommendations approved by the Commission in January into specific draft rule language amendments. This new material and the new public outreach plan were presented to the Commission today.

Via a Powerpoint presentation, Mr. Yost described the specifics of the draft rulemaking.

R12-4-101. Definitions

- Adds the following definition: "Restricted nonpermit-tag" means a tag issued to a hunter pool applicant for a supplemental hunt under R12-4-115.

- Makes technical corrections and drafting style changes to make the rule language consistent with the current requirements for rulemaking language and style.

R12-4-102. Fees for Licenses, Tags, Stamps and Permits

- Adds a provision that will allow the Director to reduce fees for population management hunts if necessary under R12-4-115.
- Makes technical corrections and drafting style changes to make the rule language consistent with the current requirements for rulemaking language and style.

R12-4-104. Application Procedures for Issuance of Hunt Permit-tags by Drawing

- Adds a provision to the rule to allow an applicant to apply for a hunt permit-tag electronically over the Internet.
- Clarifies that in the case of Department error in the issuing of a hunt permit-tag, only applicants that would have been successful based on the random number of their applications are eligible for the issuance of replacement tags.
- Revises existing subsection (C)(9)(b) to clarify regulations for species that have multiple hunts within a single calendar year. The following changes will be made to the rule to replace existing subsection (C)(9)(b) with new subsection (K)(2):

2. For species that have multiple hunts within a single calendar year, hunters that successfully draw a hunt permit-tag during an earlier season may apply for a later season for the same genus if they have not taken the bag limit for that species during a preceding hunt in the same calendar year.

- Makes technical corrections and drafting style changes to make the rule language consistent with the current requirements for rulemaking language and style.

R12-4-107. Bonus Point System

- Revises the rule to clarify that bonus points will only be gained or lost through the computerized hunt permit-tag draw (which excludes restricted nonpermit-tags issued through the hunter pool from the bonus point system).
- Makes technical corrections and drafting style changes to make the rule language consistent with the current requirements for rulemaking language and style.

R12-4-114. Issuance of Nonpermit-tags and Hunt Permit-tags

- Makes administrative housekeeping changes to clarify the requirements of the rule.
- Makes technical corrections and drafting style changes to make the rule language consistent with the current requirements for rulemaking language and style.

R12-4-115. Depredation Hunts

- Changes the name of the rule to Supplemental Hunts and Hunter Pool

- Defines supplemental hunts to include depredation hunts, emergency seasons (using existing language from R12-4-609 (B)(3), and population reduction hunts.
- Adds the following definition for “hunter pool”

B. For the purposes of this Section, “hunter pool” means a file of applications for supplemental hunts

- Adds new language delegating Commission authority to the Director for establishing season dates, hunt areas and restricted nonpermit-tag numbers within a maximum number pre-determined by the Commission for population reduction hunts
- Adds new language delegating Commission authority to the Director to reduce restricted nonpermit-tag fees for population management hunts determined to be less desirable
- Replace all existing references to “depredation tags” with “restricted nonpermit-tags” (note: depredation tags will no longer exist).
- Consolidates exemptions currently found in R12-4-609 (B)(3)(b) and (c) for emergency seasons into existing exemptions within R12-4-115. The exemptions will now apply to all supplemental hunts.
- Adds the following language to the rule to clarify that the 10% cap for nonresidents applies to restricted nonpermit-tags:

J. The Department shall ensure that no more than 10% of the total available restricted nonpermit-tags issued for population management hunts are issued to nonresidents for the following hunts, except that when population management hunts have ten or less available restricted nonpermit-tags, no more than one restricted nonpermit-tag shall be issued to a nonresident:

1. All hunts for bull elk and
2. All hunts for antlered deer north of the Colorado River

- Makes technical corrections and drafting style changes to make the rule language consistent with the current requirements for rulemaking language and style.

R12-4-609. Commission Orders: Emergency Seasons

- Makes administrative housekeeping changes to the rule language to make the rule consistent with the new provisions of R12-4-115.
- Makes technical corrections and drafting style changes to make the rule language consistent with the current requirements for rulemaking language and style.

The preliminary economic impact was briefly discussed.

Rule changes proposed for R12-4-101, 102, 107, 114 and 609 are largely administrative in nature; no impact to small businesses is anticipated as a result of these draft rule changes.

R12-4-104. Application Procedures for Issuance of Hunt Permit-tags by Drawing

The draft rule changes recommendation allows application over the Internet. This proposed change will benefit customers by giving them another option for the purchase of hunt permit-tags. It is hoped this will reduce errors in the process.

The public and Department will benefit in the issuance of replacement tags.

Regulations will be clarified and simplified for species that have multiple hunts. It provides for additional hunting opportunities and will give the Department flexibility to schedule additional hunts and to increase revenues.

R12-4-115. Depredation Hunts

Draft rule changes will establish a hunter pool for supplemental hunts to allow hunters to be used to quickly remove elk that are negatively impacting private property or habitat. Implementation of supplemental hunts will result in landowners or land management agencies getting relief from the problems being caused by elk. The Department will incur limited additional costs to issue restricted nonpermit-tags and to provide law enforcement personnel to oversee supplemental hunts. Equipment and employees to complete these tasks are already in place so the increased costs to the Department will be minimal. The draft rule changes will impose no new requirements on small businesses, but will instead enable them to provide additional goods and services to hunters. The goal of this process is to streamline hunters in the field and should reduce the Department's elk management costs.

The proposed timeline and outreach plan were described.

Locations for public meetings to be held April 30-May 30, 2002 were: Flagstaff, Snowflake, Payson, Safford, Tucson, Mesa, Prescott, Kingman and Yuma.

Public input on final draft language will also include a mailing to HPC members, partner organizations and other stakeholders. Information will be available on the Internet. Information will be available at the regional offices and the Phoenix office front counters.

Press releases will be put out on all planned public meetings.

A summary of public comments will be presented to the Commission at the August 2002 Commission meeting.

Commissioner Gilstrap suggested adding Phoenix to the public meeting schedule. Commissioner Chilton suggested adding a public meeting location in Greer (the area that would be impacted). Mr. Remington noted these two locations would be added.

Referring to Commissioner Carter's questions on R12-4-115, Mr. Remington explained the wildlife managers would be making additional permit recommendations that would go through the normal process in April. The Commission would be approving a number of permits that could be authorized for supplemental hunts if the need arises. This could include a large geographical area or it could be very specific. Once the Commission

authorized the location and the times and numbers of the permits, the Director would have the authority within that criteria to allow some or all of those permits. The whole concept behind the hunter pool is to get hunters into the field very quickly. If upon contacting hunters in the pool, the Department finds it cannot move permits at the current fee, the Director would be notified. The Director may then reduce the fees. The Commission would have the authority to establish the process by which that would happen.

Regarding Commissioner Melton's question on R12-4-104 to allow a person to lawfully take a second animal, Mr. Remington cited several circumstances in the past by which the Commission allowed hunters to have a second tag. There are many ways in which a hunter can have multiple big game tags. Issuance of a second tag would give the Commission an opportunity to decide how to authorize the second tag so that it would not penalize someone if the bag limit went to two.

Motion: Carter moved and Chilton seconded THAT THE COMMISSION VOTE TO APPROVE THE PUBLIC OUTREACH PLAN AND DRAFT RULE LANGUAGE AMENDMENTS FOR R12-4-101, R12-4-102, R12-4-104, R12-4-107, R12-4-114, R12-4-115, AND R12-4-609 FOR IMPLEMENTATION OF THE DEPARTMENT'S ELK HARVEST MANAGEMENT STRATEGY.

Vote: Unanimous

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9. Request for Consideration of Mr. Raymond Hogan's Petition to Amend Rule R12-4-318, Seasons

Presenter: Mark E. Naugle, Rules & Risk Manager

Mr. Hogan's request that Commission Rule R12-4-318, Seasons, be changed to include a Seniors Hunter Season for individuals 70 years of age or older for deer, antelope and elk only. The rationale for only these species is to improve the drawing odds for senior hunters. He also requested that once such a season is established that the hunting dates should occur prior to the traditional opening dates for these species to give the senior hunters an added advantage with fewer people in the field and first opportunity to hunt the animals.

The demographics of Arizona hunters are an aging population. The percentage of those over the age of 65 is increasing, although still low at approximately 7% of the hunter population. Current hunting license sales are a little under 200,000 and over 110,000 participate in the big game drawings. Therefore, about 7000 individuals would potentially be eligible for a seniors only season.

Implicit in the proposal from Mr. Hogan is the assumption the Commission Orders for a senior season would offer desirable hunts, such as bull elk, early in the year (during the rut) and buck deer. The permits currently authorized for early season firearms bull elk hunts are less than 500 with individuals with maximum bonus points vying for these premium hunt opportunities.

Creating additional specialized seasons to further split the opportunity “pie” for hard to draw big game hunts will mean taking that opportunity away from the General season hunters, as is currently done to accommodate all the existing special season opportunities.

Mr. Hogan was not present. Mr. Naugle noted he received a phone call at 9:15 a.m. today from Dick Smith who stated he supported this petition for a rule change.

Motion: Gilstrap moved and Carter seconded THAT THE COMMISSION VOTE TO DENY THE PETITION FROM MR. RAYMOND HOGAN REQUESTING THE AMENDMENT OF R12-4-318, SEASONS, TO ALLOW FOR A SENIORS HUNTER SEASON FOR INDIVIDUALS 70 YEARS OF AGE OR OLDER FOR DEER, ANTELOPE AND ELK ONLY.

Vote: Unanimous

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10. Request to Approve the Notice of Proposed Rulemaking and the Preliminary Economic Small Business and Consumer Impact Statements for R12-4-501, R12-5-502, R12-4-503, R12-4-505, R12-4-506, R12-4-507, R12-4-511, R12-4-512, R12-4-513, R12-4-517, R12-4-520, R12-4-522, R12-4-523, R12-4-524 and R12-4-525

Presenter: Mark E. Naugle, Rules & Risk Manager

(For background information, see Commission meeting minutes for March 24, 2001, pages 22-23).

The Notice of Rulemaking Docket Opening was filed with the Secretary of State on March 26, 2001, and the Department then developed the Notice of Proposed Rulemaking and the preliminary Economic, Small Business, and Consumer Impact Statements.

The draft rulemaking package was sent to the Governor’s Regulatory Review Council (GRRC) on October 16, 2001, for a Courtesy Review. GRRC staff returned comments to the Department on January 23, 2002. The Department made all suggested non-substantive and language and style changes suggested by GRRC and incorporated them into the Notice of Proposed Rulemaking and the preliminary Economic, Small Business and Consumer Impact Statements presented to the Commission.

GRRC’s January 2002 review of the original rulemaking package also included rules R12-4-504 and R12-4-509. GRRC recommended potential substantive and technical changes that were never identified or communicated to the Department in GRRC’s 2000 5-year rules review of Article 5. In order for the Department to maintain the original July 2002 timetable and effective date for the larger main suite of rules, these two remaining rules have been separated for additional review. The Department anticipates bringing a Notice of Docket Opening and Notice of Proposed Rulemaking for 504 and 509 to the May 2002 Commission meeting. An anticipated effective date is October 2002.

Motion: Golightly moved and Chilton seconded THAT THE COMMISSION VOTE TO APPROVE THE NOTICE OF PROPOSED RULEMAKING AND THE PRELIMINARY ECONOMIC, SMALL BUSINESS AND CONSUMER IMPACT

STATEMENTS FOR R12-4-501, R12-4-502, R12-4-503, R12-4-505, R12-4-506, R12-4-507, R12-4-511, R12-4-512, R12-4-513, R12-4-517, R12-4-520, R12-4-522, R12-4-523, R12-4-524 AND R12-4-525 FOR FILING WITH THE SECRETARY OF STATE.

Vote: Unanimous

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Meeting recessed at 11:12 a.m.

Meeting reconvened at 11:40 a.m.

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11. Request to Close the Rulemaking Record for Docket N and to Approve the Notice of Final Rulemaking Package for R12-4-701, R12-4-702, R12-4-703, R12-4-705, R12-4-706, R12-4-708, R12-4-709, R12-4-711, and R12-4-712

Presenter: Mark E. Naugle, Rules & Risk Manager

(For background information, see Commission meeting minutes for December 8, 2001, page 34).

An anticipated effective date for the rule amendments is June 21, 2002.

Motion: Gilstrap moved and Melton seconded THAT THE COMMISSION VOTE TO CLOSE THE RULEMAKING RECORD FOR DOCKET N AND APPROVE THE NOTICE OF FINAL RULEMAKING; THE ECONOMIC, SMALL BUSINESS AND CONSUMER IMPACT STATEMENTS AND THE CONCISE EXPLANATORY STATEMENT FOR R12-4-701, R12-4-702, R12-4-703, R12-4-705, R12-4-706, R12-4-708, R12-4-709, R12-4-711, AND R12-4-712 FOR FILING WITH THE GOVERNOR’S REGULATORY REVIEW COUNCIL.

Vote: Gilstrap and Melton – Aye

Chilton – Nay

Carter – Absent

Chair voted Aye

Motion carried

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12. Appeal of Private Game Farm License Denial-E Z Ranch, L.L.C.

Director Shroufe requested a postponement to this item. An agreement came in yesterday and the Department has not had time to evaluate it and the issue may be resolved.

Motion: Gilstrap moved and Melton seconded THAT THE COMMISSION CONTINUE ITEM F-12 UNTIL IT IS RESOLVED OR IT HAS TO COME BACK TO THE COMMISSION.

Vote: Chilton, Gilstrap and Melton – Aye

Carter – Absent

Motion carried

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13. Appointment of Commission Representative to a Public Committee Addressing the Renewal of the Arizona State Lottery

Presenter: Duane L. Shroufe, Director

(For additional background information, see minutes for the February 22, 2002 Commission meeting, page 17).

Chairman Golightly recommended Commissioner Gilstrap to be the Commission's representative to a public committee addressing the renewal the Arizona State Lottery.

Motion: Melton moved and Chilton seconded THE CHAIRMAN'S RECOMMENDATION.

Vote: Chilton, Gilstrap and Melton – Aye
Carter – Absent
Motion carried

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16. Request for the Commission to Approve a Resolution Opposing the Proposal to Add Approximately 20,000 Acres to the Walnut Canyon National Monument and Create the Walnut Canyon National Park and Preserve

Presenter: John Kennedy, Habitat Branch Chief

The Walnut Canyon National Monument (NM) currently occupies approximately 3600 acres and is surrounded by public lands managed by the Coconino National Forest and the Arizona State Land Department.

During the planning process associated with the development of the Draft Environmental Impact Statement and Draft General Management Plan for the Walnut Canyon NM (September 2001), consideration was given to additional expansion of the boundaries at Walnut Canyon. The National Park Service's boundary expansion assessment determined that natural and cultural resources that contribute to the purpose and significance of the monument still remain outside current management boundaries. However, further expansion of existing boundaries at Walnut canyon was not recommended because any further expansion would unreasonably complicate the management and land use planning on adjoining lands administered by other agencies.

There is an effort by the Friends of Walnut Canyon to extend the boundaries of the monument through Congressional action. Their goal is to complete the proposal presented in the late 1980s and early 1990s that was partially addressed with the expansion in 1996. The boundary expansion proposal would add approximately 20,000 acres to the Walnut Canyon NM and create the Walnut Canyon National Park and Preserve. The Coconino National Forest manages most of the 20,000 acres involved in the exchange proposal. Approximately 1280 acres involved in the proposal are managed by the Arizona State Land Department.

The Department is concerned about the proposed expansion as it could impact the Department's jurisdiction and responsibilities with respect to wildlife management on nearly 20,000 acres of lands currently managed by the Forest Service and State Land Department. This proposal could impact wildlife-related recreational opportunities, including hunting, within the project area. In addition, designating these lands as a national park and preserve to be administered by the National Park Service has the potential to conflict with several on-going interagency planning efforts that are focused on the future management of this area. These planning efforts include the Flagstaff Area Open Spaces and Greenways Plan, the Flagstaff/Lake Mary Ecosystem Analysis, the Draft Flagstaff Area Regional Land Use and Transportation Plan, and the General Management Plan For the Walnut Canyon NM. This proposal would also have an impact on the ability of the Forest Service to implement the National Fire Plan and to reduce the risk of wildfires in proximity to Flagstaff.

The Commission's Resolution opposes the proposal to expand the Walnut Canyon NM and emphasizes the importance of continued multiple use management of the Forest Service and State Trust lands involved in the expansion proposal.

Motion: Chilton moved and Gilstrap seconded THAT THE COMMISSION VOTE TO APPROVE A RESOLUTION OPPOSING THE PROPOSAL TO ADD APPROXIMATELY 20,000 ACRES TO THE WALNUT CANYON NATIONAL MONUMENT AND CREATE THE WALNUT CANYON NATIONAL PARK AND PRESERVE.

The vote on this item was postponed until Commissioner Carter's return to the meeting.

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19. Director's and Chairman's Reports

Chairman Golightly attended the joint meeting with Arizona State Parks; the Arizona Mule Deer Foundation banquet in Flagstaff and the annual banquet and meeting of the Flagstaff Trap Shooters Association.

Chairman Golightly worked on shooting range issues in Flagstaff

Director Shroufe worked on legislative issues.

Director Shroufe chaired a meeting of the North American Wetlands Conservation Council in Maryland. At that meeting, approximately \$20 million was allocated to wetland projects through Canada, Mexico and the United States; one of the grants came back to Arizona in the amount of \$30,000.

Director Shroufe reminded the Commission that written Division updates were provided to them.

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20. Commissioners' Reports

Commissioner Melton attended a meeting with the Game and Fish Department, Bureau of Reclamation and Bureau of Land Management related to mitigation on fishing waters in the Colorado River. The BOR will probably pick up the check for this and this will result in fish stockings. He attended the joint meeting with Arizona State Parks. He worked on a water hole project in the Kofas.

Commissioner Gilstrap attended the Elk Symposium meeting and information will be made available to the participants. He attended several "save the lottery" meetings. He met with several House members and gave them an update on the status of the elk management issue. He met with representatives from the Phoenix Trap and Skeet Club regarding new construction. He attended the joint meeting with Arizona State Parks and the Arizona Desert Bighorn Sheep Society banquet.

Commissioner Chilton attended the joint meeting with Arizona State Parks. She attended two meetings of the Altar Valley Conservation Alliance, one of which was a joint meeting with the State Land Department to discuss the possibility of a MOU on a habitat conservation plan for the Altar Valley. She attended a meeting of the Sonora Desert Conservation Plan steering committee.

Commissioner Carter was not available to give a report.

Chairman Golightly encouraged the commissioners to attend hunting and fishing organizations' annual banquets. The Department contributes assets for auction at these functions.

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21. Approval of Minutes

Motion: Gilstrap moved and Melton seconded THAT THE MINUTES BE APPROVED FOR FEBRUARY 22, 2002.

Vote: Chilton, Gilstrap and Melton – Aye
Carter – Absent
Motion carried

The minutes for January 16 and 18, 2002 were signed.

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Meeting recessed at 12:10 p.m.

Meeting reconvened at 12:25 p.m.

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14. Heritage Public Advisory Committee Recommendation

Presenter: Steve K. Ferrell, Deputy Director

The Heritage Public Advisory Committee approved a recommendation at its January 19, 2002 meeting for Commission consideration regarding support for the Black-footed

Ferret Reintroduction Project. The Committee recommended that the Commission support the efforts in continuing and expanding the project.

Motion: Carter move and Melton seconded THAT THE COMMISSION VOTE TO APPROVE THE RECOMMENDATION.

Vote: Carter, Gilstrap and Melton – Aye
Chilton – Nay
Motion carried

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15. Briefing on the Ninth Circuit Decision in *Arizona Cattle Growers' Association v. U.S. Fish and Wildlife Service*, 273 F.3d 1299 9th Cir. Dec. 17, 2001)

Presenter: Jim Odenkirk, Assistant Attorney General

A Powerpoint presentation was given.

The Court found that the U.S. Fish and Wildlife Service (FWS) did not comply with the Endangered Species Act (ESA) (Section 7) when it required an Incidental Take Statement (ITS) for livestock grazing activities when the FWS could not demonstrate grazing would result in the take of listed species. The Court held that FWS was arbitrary and capricious when it issued an ITS that imposed conditions on a land use permit without demonstrating first that endangered species existed on the land or that a take would occur if the FWS issued a permit.

Mr. Odenkirk extracted from the Court's decision the important points for discussion.

The decision involved questions regarding the livestock grazing program conducted by the U.S. Forest Service (FS) and the Bureau of Land Management (BLM) in southeastern Arizona and southwestern New Mexico. It involved review of the permits that were issued for various allotments by these two agencies. The question involved whether or not the FWS appropriately complied with the ESA in issuing an ITS for the livestock grazing program.

The Court stated an ITS under Section 7 of the ESA must be based upon a finding that a land use activity will actually kill or injure an endangered species. An ITS was an authorization by the FWS to allow for take. If there is an otherwise lawful land use activity that was seeking federal permission to occur, the FWS was going to allow take of a listed species to occur as part of that lawful activity and that the take was incidental to the activity; the purpose of the activity was not to take a species but it was incidental to an otherwise lawful activity.

The Court's position shifted the burden from the federal action agency or permittee and put the burden on the FWS to prove that a take will occur as a result of the land use activity, e.g., livestock grazing. The FWS must also prove how much of a take will occur.

In the past FWS based its decision merely on the likelihood that habitat modification will harm species. What is lacking from that analysis is that habitat modification will, in fact, cause injury or death to a species.

Background was given on the ESA and Section 7. Section 7 deals with federal agency actions that may have some impact on a listed species. It places obligation on a federal action agency to insure that its actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat.

There was an obligation by the federal action agency. When the BLM and FS are making decisions about issuing permits to graze livestock on public lands, they have to insure those decisions are not going to violate Section 7.

When a federal agency has a proposed action and that action may affect a listed species, it has an obligation to consult with the FWS. If an endangered species is present in an area, no further action must occur to jeopardize that species. The initial threshold the agency must consider is whether the action is likely to affect such species. At this point it is not relevant that the action will jeopardize a species, but whether or not it is going to have a positive or negative effect on a species

The first consultation requirement is informal and then may move to a formal consultation process. The informal consultation initially determines what kind of effect an action might have on a species. If the determination is that it will cause an adverse effect, then the federal agency must move to formal consultation with the FWS. Part of the formal consultation is that the federal action agency must prepare a Biological Assessment (BA). If the BA finds that the proposed action may adversely affect a species, the FWS will proceed with issuing a Biological Opinion (BO) to determine whether the proposed action is likely to jeopardize the continued existence of a species.

Jeopardy is not just an action that will physically kill or injure a species itself, but also, whether or not a proposed action will adversely modify or destroy critical habitat. The FWS views either aspect under its jeopardy opinion. It will determine 1) whether the action in taking a species will jeopardize the continued existence of that species or 2) whether the destruction or adverse modification of habitat will also result in jeopardy to that species.

If the FWS finds in its review of the best available scientific evidence that the proposed action will jeopardize the species, it has an obligation to then identify reasonable and prudent alternatives that, if followed, will not jeopardize the continued existence of the species. Certain conditions must be imposed upon the proposed action. In a jeopardy opinion, these terms and conditions that are known as R&Ps are going to often incorporate the same kind of terms and conditions that would be involved in an ITS.

Differences between a jeopardy opinion and a non-jeopardy opinion were given. In a jeopardy opinion, the FWS has much more latitude to impose terms and conditions upon a land use activity than it does in a non-jeopardy opinion based up on the court's interpretation in this case.

In a non-jeopardy opinion, the FWS does not issue reasonable and prudent alternatives. Those conditions that would normally be part of a jeopardy opinion do not exist in a non-jeopardy opinion. The federal agency still remains subject to the prohibition of Section 9 of the Act against take of a species. The agency needs some protection that it will not violate Section 9 in the case of a non-jeopardy opinion. In order to protect the federal agency, statute provides for an ITS. This is designed to protect the federal agency in the event a take occurs as a result of an action.

What does the term “take” mean? It includes the word “harm”, which has been further defined as significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or shelter. “Actually kills or injures wildlife” is the language that was focused on in this particular case, because up to this point, it had been alleged the FWS would issue an ITS where there was significant habitat modification that, over time, may have resulted in the decline of the species and that it could not demonstrate a particular proposed action was actually going to kill or injure any particular species. The court has stated that was not a sufficient standard; the FWS must follow the plain meaning of those terms and it must prove, before issuing an ITS, whether or not a proposed action will actually kill or injure wildlife.

The purpose of the ITS under Section 7 is to give the federal agency and the permittee a safe harbor from any liability under Section 9. The ITS is an authorization or a permit by the FWS to take a listed species as part of a land use activity.

Part of the ITS imposes reasonable and prudent measures necessary to limit the incidental take of a species. Those reasonable and prudent measures are accompanied by terms and conditions imposed on the permittee.

In this case, the FWS had imposed onerous terms and conditions upon the ITS, e.g., fencing out livestock in certain areas and requiring significant survey and monitoring, reducing the number of livestock that could graze on an allotment. These terms and conditions were passed on to the permittee under the ITS.

In this lawsuit, there was a non-jeopardy opinion associated with the BLM and FS livestock grazing programs. This particular opinion involved more than 1000 allotments combined between the two agencies. The actual number of allotments that became an issue under the ITS was less than 30.

The species at issue and part of the consultation process are razorback sucker, cactus ferruginous pygmy owl (CFPO), Gila topminnow and the Sonora chub. The court held in this decision that the FWS cannot impose conditions on the lawful land use if the take was not reasonably certain to occur as a result of the land use activity and the FWS could not quantify the level of take. The FWS was not able to determine if the species occurred on any of the allotments and could not demonstrate that a take would actually occur. If the FWS could not demonstrate that a species existed in a particular geographic area, it could not prove that take, injury or death of the species could occur.

In this case, the FWS did not meet its burden and could not demonstrate how habitat modification in general would actually kill or injure wildlife.

The Court rejected the FWS's existing approach to ITSs that were based on conditions and assumptions that relied upon general knowledge and species behavior or generalized BOs of the species. There was no data showing that the species were actually using the habitat and that the land use activity would cause harm.

The Court stated that the FWS could not base an ITS on a premise that a land use activity would cause habitat degradation that would eventually result in a species population decline. This standard may be more relevant to the recovery or conservation of a species.

Although this case decision was important to Arizona, it was a factual application of a Supreme Court decision (Sweet Home case). The Sweet Home case established principle relied upon by the 9th Circuit that gave a narrow definition of the term, "harm" as related to endangered species. "Harm" relates to the actual killing or injury of a species. A species' habitat can be modified, but unless you actually cause harm or injury to the species, it does not constitute take. The Court narrowed the definition of "harm" in the Sweet Home case. In the Cattle Growers decision, the 9th Circuit applied that narrow definition to the facts it had before it (the FWS did not have sufficient data to demonstrate a species would be harmed as a result of the land use activity).

What the Supreme Court said was the land use activities were subject to Section 9 liability if the land use activity is the approximate and foreseeable cause of harm

The Court has set the following standards for the prohibition of take in an ITS under Section 7:

1. The land use significantly modifies the habitat of a listed species
2. The modification significantly impairs the essential behavior patterns
3. The modification results in or is likely to cause death or injury

The consequences of this decision to Game and Fish:

1. Most of the projects the Department is involved will not result in adverse effects on any species. The impacts on most of the projects the Department is involved in are mitigated before they get to the point of consulting with the FWS.
2. One example would be the lakes in the White Mountains where there is an ITS for stocking of non-native fish. In looking at the ITS and associated BO, Mr. Odenkirk thought that the FWS could meet its obligation in that situation.
3. This is not the case with Tempe Town Lake. The FWS is indicating that because of the potential harm in transferring non-native fish from Tempe Town Lake to other parts of the Gila watershed, there may be an obligation for the Department to have an ITS as part of its stocking at Tempe Town Lake. It is fairly hard to show that type of causation; that the potential exists that someone could take a fish from the lake and transplant it somewhere else in the state that will cause a take of another listed species.

4. In this decision we found that the FWS did not know a species occupied a particular allotment. The FWS was faulted in this decision for postulating that the species might exist. The FWS is likely to require more rigorous analysis in a BA during the consultation process, which may result in a more expensive, time consuming process.
5. If the FWS cannot exclude livestock from the riparian zone, the restoration and recovery of endangered and other species may be impeded. The Department and Commission should be concerned if there is a negative impact on the ability to recover and restore endangered species. The FWS has been using ITSs under Section 7 to essentially undertake activities that would require recovery and restoration, as opposed to activities that would limit the actual take of a species. This may limit the FWS's ability to require other things, e.g., monitoring and fencing, that would go further towards conservation of a species but may not be directly related to protecting any one particular species.

Things to expect from the FWS or environmental groups from this decision:

1. More detailed analysis in the BA from the FWS
2. Impose R&P alternatives under new standards to evaluate destruction or adverse modification (recovery vs. survival). This decision makes critical habitat a more significant component under Section 7 of the ESA.
3. Citizen suits

Commissioner Melton asked if anyone can overturn a BO of the FWS. Mr. Odenkirk stated a BO is the final decision on a particular decision and anyone who wants to overturn it has to go to court.

Commissioner Carter thought that up front costs would rise if the FWS required more in-depth surveys. He wanted to know what would happen if there was a policy direction from the highest levels that modified current interpretations and whether or not that direction would be tested in court. Mr. Odenkirk stated environmental groups would sue the FWS. There were differences in interpretations of the language in Section 7. The way the language is interpreted determines whether or not something was not appropriately done. The federal action agency does not have the ability to spend many years to determine what certain implications would have on a species. They build in protections in the land use activity; they ensure that those possible actions are mitigated and that is how they try to protect the species. The FWS is being forced to have the best information on which to make a decision. They will require the best information or they will base its decision on the fact they don't have the information. If they lack information, e.g. that harm will occur, it will allow the land use activity to proceed. The environmental groups may go to court and argue that for a ruling on the side of the species if all of the information is unknown and it is uncertain that jeopardy will occur. The court may agree with that.

Commissioner Chilton stated this case opens the door to constructive use of the land. It is extremely difficult to prove a negative. The court ruled the FWS has to prove a positive, i.e., there would be take and there would be harm and there would be a direct result by the act of interpretation of take.

Mr. Odenkirk referred to the “may adversely affect” standard. The decision only focused on the definition of “take” and whether or not an activity would actually take a species. This is a much higher threshold. This was why the burden was placed on the FWS to show not only destruction or adverse modification to habitat, but that the action would kill or injure a species. The kill or injure standard does not apply to the “may affect” standard, which is a lower standard. Most of the Department’s projects are dealt with at the “may affect” level. The only way the Department can benefit from this is with actions that involve formal consultation, BO, and when the FWS wants to impose an ITS in that BO. The burden was on the action agency to do the initial review of its action to determine if that threshold is met. If it is met, it has to go through the consultation process with the FWS.

Commissioner Chilton wondered if it would be easier for the Department to engage in habitat improvement projects such as the wildfire interface and forest restoration. Mr. Kennedy gave background on the process that would in place to accomplish those types of projects.

Commissioner Chilton referred to the CFPO surveys. This case seems to place the burden on the agency to prove the presence and harm to the species rather than placing the burden on the private property owner to prove that the species is not there. She asked if the Department was engaging in activities to prove that the species is not there before doing anything. Mr. Odenkirk understood that the Department’s work on the CFPO was not in response to some obligation associated with an ITS or jeopardy opinion. Commissioner Carter noted this Commission took a stand in opposition to the listing and designation of critical habitat for the CFPO. The Commission wanted to improve and enhance the science it had with respect to 1) the numbers there and 2) the habitat requirements. Mr. Odenkirk understood that the Department’s comments on the proposed listing and critical habitat for the CFPO were not warranted because there was inadequate information about the species; the purpose for the Department’s work was to demonstrate the species was more prevalent that should allow for downlisting. Director Shroufe stated a lot of these listings happened in court by default because information was lacking. The purpose of the Department’s work on the CFPO is to gather data to allow us to go back to the court to state not only is critical habitat not justified, but listing of the species was not justified.

Mr. Odenkirk stated that the Supreme Court in the Sweet Home case set the framework for this decision. The 9th Circuit had a factual base it could apply to the decision in the Sweet home case. He did not think this case (*Arizona Cattle Growers’ Association v. U.S. Fish and Wildlife Service*) was a landmark or benchmark case. It did show a trend that the appellant courts were interpreting the definition of take and the obligation under the ITS more narrowly and requiring the FWS to prove that take will occur. This case was an important part of that trend. There may be other decisions in the 9th Circuit with judges ruling in completely opposite ways. This may occur until there is a stronger trend in other circuit courts that address these types of situations.

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Meeting recessed at 1:20 p.m.

Meeting reconvened 1:35 p.m.

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17. An Update on the Current Status of Congressional Funding for Urban Interface and Wildland Forest Restoration Projects in Arizona

Presenter: John Kennedy, Habitat Branch Chief

(For background information, see Commission meeting minutes for March 23, 2001, pages 8-10).

In October 2001, Governor Hull established the Forest Health/Fire Plan Advisory Committee to develop and maintain Arizona's portion of the Regional Ten-Year Comprehensive Plan for Reducing Wildfire Risk and Restoring Ecosystems. The Department's Habitat Branch Chief was appointed to the Advisory Committee.

The 2001 Interior and Related Agencies Appropriations Act provided funding in Titles I, II and IV to implement the National Fire Plan. This Act provides \$973 million for the National Fire Plan in Title IV, including \$619 million for the U.S. Forest Service (FS) and \$353 million for the Department of Interior (DOI). Funds appropriated under the normal Titles (Title I for DOI and Title II for FS) for Wildland Fire Management Programs total \$1.3 billion for the FS and \$625 million for the DOI. Fire suppression is funded at the 10-year average annual cost, which is \$320 million for FS and \$153 million for DOI. The Action Plan, as required by the Congressional Report language, includes information on wildland fire preparedness (organizational capacity, personnel and equipment); fire facilities, fire science research and development; rehabilitation and restoration; hazardous fuel treatment; forest health management and community assistance.

Overview material on the National Fire Plan FY 2001 funding, programs and projects was presented to the Commission. Total National Fire Plan allocations to Arizona include approximately \$58.5 million for the FS and approximately \$27 million for DOI.

Congress provided increased funding assistance to states through the Forest Service State and Private Forestry programs and the State Fire Assistance grant program. State Fire Assistance funding is available and awarded through a competitive process with emphasis on mitigating risk in wildland and urban interface areas, including hazard fuel reduction, information and education, and community and homeowner action. Through the Governor's Forest Health/Fire Plan Advisory Committee, the Department has been involved in the review of State Fire Assistance programs and grants in Arizona. Copies of the Arizona Summary of 2001 Grants and 2002 State Fire Assistance Grant Applications Ranked by Score were previously sent to the Commission.

At this time, the Department's priorities include: 1) continuing its direct involvement on the Governor's Advisory Committee to complete Arizona's portion of the Arizona/New Mexico Regional Ten-year Comprehensive Plan for Reducing Wildfire Risk and Restoring Ecosystems, which will guide development of coordinated urban interface and wildland forest restoration projects in Arizona (including large-scale demonstration projects) and 2) working cooperatively with the FS and other agencies to develop and implement forest restoration projects that address wildlife resources and incorporate wildlife-based research.

Consistent with the Commission's resolution concerning forest health and restoration, the Department will seek direct involvement in the planning, decision-making and implementation of plans and projects that focus on forest restoration in Arizona.

Commissioner Carter asked about the status of Dr. Covington's efforts to do a larger scale project than the Blue Ridge Demonstration Project. Mr. Kennedy stated most of the focus has been on the Governor's Advisory Committee (Dr. Covington chairs the committee). Focus has been on the approval of the 2001-2002 state grants. General discussions have continued with the FS on large-scale demonstration projects, but currently there was no implementation of a large demonstration project.

Mr. Kennedy referenced on-the-ground activity in the state regarding forest restoration and forest health. On the Kaibab, Coconino and Tonto National Forests, approximately \$1.3 million has been spent in 2001-02 on on-the-ground forest restoration/forest health projects. Many of those have been focused on the urban interface area in reducing fire risks. The Department has continued work with the FS and other stakeholders on the Blue Ridge area. Also, there is work going on in the Coconino. The FS in Arizona has accomplished about 65,000 acres of restoration in 2001 with those monies. The DOI has expended almost \$1.2 million in 2001 in on-the-ground projects in Arizona.

Many of the leading cooperators and agencies have been focusing primarily on the Governor's Advisory Committee to develop the plan for the Arizona that will guide projects in the next ten years. The Department has put emphasis on that so that it does not get left behind during implementation of forest restoration projects.

Commissioner Chilton asked how this related to the Mount Graham (bug infestation) situation. Mr. Kennedy stated there were large sums of monies to do projects such as on Mount Graham. There have been smaller projects in the area, but nothing significant on a large scale has been done with these funds on Mount Graham. The Department will coordinate with the U.S. Forest Service and U.S. Fish and Wildlife Service to discuss potential forest restoration on Mount Graham.

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18. Call to the Public

Dave Gowdy, representing the Arizona Wildlife Federation, opposed expansion of the Walnut Canyon National Monument since it would limit public access and access to sportsmen. The AWF opposed Representative Marsh's trespass bill. The AWF had serious reservations with regard to the elk management strategy and had concerns with depredation hunts when the herds were not at target management levels. Mr. Gowdy noted Mr. Lukens wanted to have an item on the next agenda on the Mearns' quail study.

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16. Request for the Commission to Approve a Resolution Opposing the Proposal to Add Approximately 20,000 Acres to the Walnut Canyon National Monument and Create the Walnut Canyon National Park and Preserve – cont'd.

Commissioner Carter noted he was familiar with the resolution. He asked the Commission to consider some minor changes. Under the first, "Now, therefore, be it resolved", the word "strongly" should be added before the word "opposes" and instead of the words "the proposal", the words "any proposal" should be used.

Motion: Carter moved and Chilton seconded THE AMENDMENT TO THE MOTION.

Vote on Amendment: Unanimous

Vote on Original Motion: Unanimous

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5. State and Federal Legislation

Commissioner Gilstrap noted a letter was prepared for the Commission to sign in response to action on H 2592 taken earlier. It was requested by the Commission that copies of the signed letter be sent to them.

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22. Future Agenda Items

Director Shroufe noted the Commission had been provided with a copy of the draft agenda for the April Commission meeting. Changes or additions should be given to the Department by next Tuesday.

Commissioner Gilstrap wanted to collect input from the public regarding quail management in Arizona at the Friday meeting in April.

Commissioner Chilton requested that the Department talk to Professor Ric Frost at the University of New Mexico in Las Cruces and request a presentation on the potential impact of CCAAs related to the black-tailed prairie dog on state management of game and habitat. She also wanted to see an informational report on the Department's policy on the inclusion of fund-raising brochures, memberships, and solicitations from private organizations in Department mailings. Commissioner Carter suggested that the Commission direct the Director to provide 1) a resolution of this issue and action taken and 2) verification of the policy and how it is carried out and whether or not this was consistent with that policy and what corrective action would be taken to that policy. He did not want to make this a future agenda item. This information should be provided in a memo to the Commission. Commissioner Chilton agreed with the suggestion. Mr. Odenkirk clarified that the Director was not under a legal mandate by the Commission to respond to this issue.

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2. Executive Session

- a. Legal Counsel. *Forest Guardians v. APHIS*, CIV 99-61-TUC-WDB; *State of Arizona v. Norton*, CIV 98-0632-PHX-ROS; *Conservation Force v. Shroufe*, CIV 98-0239 PHX RCB; *In Re General Stream Adjudication for the Little Colorado River and Gila River*; *Center for Biological Diversity v. Dombeck et al*, CIV00-1711-PHX-RCB; *Mark Boge v. Arizona Game and Fish Commission & Shroufe*,

CIV 2000-020754; *Mary R. LLC, et al. v. Arizona Game and Fish Commission*, CIV 2001-015313 and *Defenders of Wildlife et al. v. United States Fish and Wildlife Service*, CIV01-934 (HA) (U.S.D.C. Ore.)

Motion: Carter moved and Chilton seconded THAT THE COMMISSION GO INTO EXECUTIVE SESSION.

Vote: Unanimous

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Meeting recessed at 2:05 p.m.

Meeting reconvened at 2:35 p.m.

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Motion: Gilstrap moved and Carter seconded THAT THE MEETING ADJOURN.

Vote: Unanimous

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Meeting adjourned 2:35 p.m.

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