

October 15, 2002

PETITION FOR A RULE OR REVIEW OF A PRACTICE OR POLICY
(A.R.S. 41-1033)

Mr. Kenneth Travous, Executive Director
Arizona State Parks
1300 W. Washington
Phoenix, AZ 85007

Dear Mr. Travous,

As you may know, I have been a critic of the Open Space Reserve grants program (A.R.S. 41-511.23.G.2), and the manner in which it was implemented this year. So I was slightly encouraged when I received a phone call from an Arizona Department of Agriculture employee last summer in which she explained that her agency was considering revising the eligibility criteria for the 2003 round of grants. She asked me for suggestions I gave her several. However, one of the main points I made was that the new eligibility criteria should be formulated using Arizona's public rulemaking process, as per A.R.S. 41-1011, and that calling a small group of selected individuals was inadequate to meet this legal standard.

Last week I received a copy of the agenda for the next State Parks Board meeting, which will be held in Tombstone this Thursday, October 17. According to the agenda, one of the items up for consideration is a revision of the eligibility criteria for the Open Space Reserve grants program.

I requested a copy of the proposed new eligibility criteria and hoped that they would be vastly improved, despite the fact that the official rulemaking process was not engaged to draft them. I was disappointed, however, because the new criteria are essentially the same as the old ones. The only significant difference is that a preference would be given to those applicants who have endured historical grazing permit reductions, versus those whose permits have been more recently cut. This will mean those applicants whose permitted livestock numbers have been recently cut to respond to the current drought may be less likely to receive a grant. But this minor change fails to address the major issues concerning this grant program.

Subsequently, I am petitioning your agency, as is my right under A.R.S. 41-1033, requesting a formal review using Arizona's official rulemaking process to review and make final rules for the 2003 Open Space Reserve grants eligibility criteria. In June of this year I requested your agency's guidelines for submitting a petition for review. In a letter dated June 13, 2002, you responded with a list of things that had to be included in a valid petition. (See attached.) "If the request is for the amendment of a current rule," it explained, "a statement of fact, followed by the text of the existing rule, with language to be deleted struck out (but still clearly readable) and language to be added underlined." This is obviously impossible, since your agency has never adopted any formal rules for this grant program. In fact, it's precisely because you have failed to do so that I am submitting this petition.

According to A.R.S. 41-1033.A, a rulemaking petition may be requested to "review an existing agency practice or substantive policy statement that the petitioner alleges to constitute a rule." The eligibility criteria for the Open Space Reserve grants program are used to determine the distribution of \$2 million in public funds annually. Obviously, they constitute an "agency practice or substantive policy statement" and are monetarily significant enough to warrant the engagement of Arizona's official public rulemaking process.

Furthermore, the existing and proposed eligibility criteria for the grants conflicts with the language in A.R.S. 41-511.23.G, which states that grants will be awarded, "To an individual landowner or grazing or agricultural lessee of state or federal land who contracts with the Arizona state parks board to implement conservation based management alternatives using livestock or crop reduction practices, or reduce livestock or crop production, to provide wildlife habitat or other public benefits that preserve open space. The conservation acquisition board shall give priority under this paragraph to lessees of state or federal land who are required to reduce livestock production to provide public benefits, such as wildlife species conservation or wildlife habitat."

Under the program's existing and proposed eligibility criteria, even though the grants are intended to preserve open space, the ranchers receiving grants are not prohibited from subdividing their private base properties during the terms of the grant contracts. Furthermore, the law says that the reduction of livestock production is the primary eligibility factor, but the grant eligibility criteria focus on reductions in permitted livestock numbers, instead of actual livestock numbers. Since many Arizona public lands ranchers routinely graze fewer livestock than they are permitted, some grant monies in 2002 went to pay for reductions in grazing that only occurred on paper. And last, but not least, the eligibility criteria still allow grants to be awarded to compensate grazing permit reductions in response to temporary drought conditions, which also appears to be outside the intent of the law.

I request that the State Parks Board delay the adoption of new Open Space Reserve grant eligibility criteria until new rules are adopted using Arizona's official public rulemaking process, and that no new grants be awarded until this process has been completed. I look forward to your response within 60 days.

Thank you.

Sincerely,

Jeff Burgess

Cc: Arizona Wildlife Federation
Center for Biological Diversity
Ms. Joy Hernbrode, AZ Attorney General
Ms. Suzanne Pfister, AZ State Parks Board, Chair
Sierra Club, Grand Canyon Chapter
Western Watersheds Project