

WATER RESOURCES COMMISSION MEETING

WORK SESSION

SALEM

DECEMBER 19, 1991

MINUTES

Commission members present:

Anita Johnson
Jim Howland
Hadley Akins
Roger Bachman
Mike Jewett

Commission members absent:

Lorna Stickel
Cliff Bentz

Others:

Hal Reed
Ladd Henderson
Lisa Zavala
Shelby Crecraft
Karen Russell
Tad Milburn
Gunnar Schlieder
Jim Whitty
Roy Burns
Bill Brooks
Mike Crouse
Joy Clay
John Borge
Tom O'Connor
Susan Schneider

Water Resources Staff

Bill Young
Jan Shaw
John Borden
Steve Applegate
Rick Bastasch
Steve Brown
Becky Kreag
Fred Lissner
Dave Jarrett
Bud Bartels
Tom Paul
Weisha Mize
Bev Hayes
Tom Kline
Amin Wahab
Ron Campbell
Reed Marbut

The staff reports presented at this meeting, which contain the Director's recommendations mentioned in these minutes, are on file in the Office of the Director of the Water Resources Department, 3850 Portland Road, NE, Salem, Oregon. Written information submitted at this meeting is hereby made a part of this record and is on file at the above address. Audiocassette recording tapes of the meeting are also on file in the Water Resources Department office.

1. Willamette Basin Plan update

The Commission last considered the Willamette Basin Rules in a work session on October 3, 1991. At that time, attention was focused on proposed language changes to the rules as a result of the input from the series of public hearings held earlier in the year.

During that work session, the staff was asked to explore the municipal reservation issue further. The question at issue was whether the Department had the data and ability to

incorporate a municipal reservation into the rules and plan at the same time as a reservation for agriculture.

A second issue involved continued concerns over groundwater management proposals. The primary focus was on the Parrett Mt. area and Spencer Creek.

A third topic of continuing discussion was the land-use dispute resolution process. Five local governments raised concerns that the proposed rules would be incompatible with their comprehensive plans.

Director's Recommendation:

Municipal Reservation: The staff recommended that this issue be dealt with as a high-priority task within the next year following adoption. This will assure greater public involvement and will result in a better product. Staff did not believe that it was appropriate to delay the adoption of the rules/plan any longer.

Groundwater: Staff recommended that further considerations of groundwater issues be dealt with after the rules and plan are adopted. Minor changes in the October draft will be recommended. This direction was provided as an action element of the plan.

Dispute Resolution: No action was required on this issue now. Final discussion of the dispute resolution will be presented at the January Commission meeting.

Eric Lemelson urged the Commission to withdraw the Parrett Mountain aquifer, at least on a temporary basis, because of threats to the aquifer. Residents there believed, he said, that if the Commission did not act, there would be long-term water supply problems in the area.

Gunnar Schlieder asked the Commission to include two sections of land in the Spencer Creek area now without making them a part of the larger area which is still under discussion.

Hal Reed wanted to reinforce what Schlieder said above. Reed requested that Sections 30 and 31 be included in the basin plan, granting only limited water rights in those sections.

Roy Burns, Lane County, urged the Commission to consider their analysis of water-quality-limited zones in the Lane County area. He further encouraged the Commission to consider the information Lane County provided and establish a time frame within which the Department and Lane County could define boundaries to prevent overdrafting of groundwater supplies.

Tom O'Connor appreciated the staff's work with them. O'Connor said that the municipalities want to work with the Department over the next year on the reservation question. More specifically, they do not want to be disadvantaged as to a priority date.

Karen Russell, WaterWatch, thought that the statute and the rules had been violated because reservations were added after the hearing process. WaterWatch wants to see those reservations removed and asked that the Commission conduct a public hearing to determine the public interest on agricultural and municipal reservations. After proper notice, then, the results could be added back to the basin plan.

The Commission directed the Department to develop municipal reservations and concurred with recommendations on groundwater and dispute resolution.

2. BUREAU OF LAND MANAGEMENT'S STATEWIDE PERMITTING PROCESS

BLM has a significant backlog of existing water developments which will require a substantial effort to bring into compliance with state requirements for acquisition of appropriative water rights.

The vast majority (nearly 90%) of the approximately 1600 water developments were constructed prior to 1981. Prior to the Supplemental Solicitor's Opinion of 1981, it was Department of the Interior policy and direction that BLM and other Interior agencies did not file for state appropriative rights. In fact, the Solicitor's Opinion (M-88914) of June 25, 1979, furthered this assertion by announcing the existence of "non-reserved" federal water rights. These were defined as a class of federal appropriative rights that may be claimed by the United States for Congressionally authorized programs. It asserted that these federal water rights were automatically appropriated by the mere application of water to a beneficial use and were acquired by the United States without regard for compliance with state substantive law.

The Supplemental Opinion issued in 1981 amended the prior opinion by concluding that neither the Federal Land Policy and Management Act of 1976 (FLPMA) nor the Taylor Grazing Act of 1934 authorized BLM to claim water rights under the expansive "non-reserved" right theory. This Supplemental Opinion stipulated that the United States has the power to appropriate water pursuant to state law on federally owned land. It further stated, the priority of an appropriative water right obtained by the United States, whether consumptive or non-consumptive, may not predate actual use...and the United States must comply with state substantive and procedural law.

This change in policy direction has created the dilemma that BLM is currently attempting to resolve. Increased state requirements, especially for preparation by a certified water rights examiner, have greatly exacerbated the situation by increasing the time and financial resources required to comply with state substantive and procedural requirements, they claimed. Though progress has been slow, BLM has taken steps to remedy this situation. Their records indicate that they have nearly 3500 state permitted livestock reservoirs, to date.

In 1991, five bureau employees completed requirements to become certified water rights examiners. Through their assistance, the bureau completed 177 water rights cases. In the current fiscal year, BLM directed all discretionary funding in their soil, water and air resource management efforts to completion of water rights documentation and filing. Field offices have committed to the completion of 399 filings this fiscal year. In addition, the bureau is providing training to its resource managers at its January 22-23, 1992, water rights training session.

A BLM task group is currently developing a report to be carried forward for the fiscal year 1994 budget preparation to highlight to the Secretary and Congress the magnitude of this issue in all of the western states.

BLM was hopeful that they can continue to move forward in a sustained deliberate effort to comply with Oregon appropriative rights requirements and sought Oregon's assistance and counsel in remedying this backlog situation.

Mike Crouse and Bill Brooks, BLM, presented their situation relating to certification of existing water developments.

The Commission took no formal action in this matter.

3. CONSIDERATION OF A COMMISSION POLICY ON THE ACCEPTANCE OF LATE TESTIMONY

At the last Commission meeting, the issue arose about how the Commission should handle material submitted for Commission consideration on agenda items where the record has closed but parties continue to submit letters or make comments during the public comment period. After consultation with Commissioner Bentz, the staff report outlined some of the options the Commission could consider:

1. Reopen the record to permit all persons an opportunity to comment on new information submitted for Commission consideration.
2. Refuse to read, hear, or consider any additional comment.
3. Receive new material but decline to use that as the basis for the Commission's decision.
4. Announce in its rulemaking hearing notice that to be sure of being considered by the Commission, comments must be received by a certain date.
5. Delay the public comment period at Commission meetings until after the Commission considers the asterisked (no public comment) items and distribute for Commission consideration material received the day of, or just prior to, the Commission meeting after those same items have been considered.
6. Set aside time at Commission meetings, work sessions, or hearings to receive public comment on the final revision to rules.

The Commission took no formal action but decided to reconsider this matter at a later meeting to allow time for the members to ponder the options above.

There being no further business, the work session was adjourned.

Respectfully submitted,



Jan Shaw
Commission Assistant