

In April 1991, the Commission authorized a hearing on the proposed amendment of the rule to allow protection of stored water if needed to meet the stored water components of converted instream water rights. The proposed amendment prompted considerable concern regarding the effect of the change on existing water rights and the legal authority of the Commission to allocate uncontracted stored water to the instream water rights.

In July 1991, the Commission approved a process for conversion of the remaining Willamette Basin minimum streamflows. Based on the staff recommendation, the Commission agreed to delay action on the rule amendment and to proceed with contested case hearings on the conversions. The purpose for the delay in adoption of the amendment was to ease concern about the effects of the amendment on existing rights. Staff believed that the best method for evaluating the public interest in protecting stored water for instream purposes compared to continuing to allow use out-of-stream was through the case-by-case approach offered by contested case hearings. Through these hearings, modifications in the minimum streamflows could be considered to reduce or eliminate the effects on existing water rights.

In the absence of the rule amendment, conversion of the minimum streamflows likely would raise no significant public interest questions because there would be no effect on existing water right holders. Therefore, staff recommended that the contested case hearings proceed on the assumption that the rule would be amended after completion of the conversions. The purpose was to allow existing users to identify any negative effects and to argue that the public interest required that the effects be avoided or mitigated by modifying or conditioning the minimum streamflows.

The Assistant Attorney General recently advised staff that the contested cases cannot proceed based on the assumption that the rule would be changed. Most parties in the Coast Fork proceeding also filed petitions requesting that the hearing be delayed pending a Commission decision on the rule amendment. As a result, staff requested that the Commission reconsider the action taken at the July 1991 meeting and approve a revised strategy for conversion of the flows.

Director's Recommendation

The staff recommended that the Commission adopt the revised proposed amendment. In addition, staff recommended that the Commission re-authorize contested case hearings on conversion of all remaining minimum streamflows in the Willamette Basin for the purpose of determining the quantities of stored water needed and clarifying the conditions under which the Department would protect the stored water for instream uses.

Kip Lombard, representing the Santiam Water Control District, Oregon Water Resources Council and others, recommended language changes to the proposed rules.

David Moon, Water for Life and Lane County Farm Bureau, supported retaining the current rule on management of stored water.

Karen Russell, WaterWatch of Oregon, Inc., opposed the Department's position on this matter.

Joe Hobson, attorney representing the Oregon Farm Bureau Federation and the agricultural water users in the Ochoco and Prineville Reservoir areas, opposed any rule amendment that would treat stored water as natural flow for some purposes but not for others, saying the Commission lacked the authority to make such a distinction. His clients were generally opposed to amending the rule as proposed and recommended that the Commission gather more information before making any decision. They advised against using a contested case to develop that information.

R. G. Andersen-Wyckoff, mayor of Salem, spoke in opposition to the Director's recommendation.

Sharon Gray, Friends of Mill Creek, offered two solutions paralleling the City of Salem's sentiments: (1) delay the implementation for further study, and (2) direct the Department to conduct necessary studies to define flows for Mill Creek.

Bruce Wulf, Mission Mill, urged the Commission to retain streamflows year-round to produce sufficient power necessary to operate the Mission Mill, which has educational and tourism appeal.

John Yoder, biology teacher at North Salem High School, described the Mill Creek Enhancement Project, one of the projects accomplished by students of the school, and said he opposed the Director's recommendation.

Edward Hemenway, Cottage Grove dairy farmer and irrigator of 400 acres, opposed the rule proposed by the Department. He had always been able to rely on these flows and said it would idle much equipment and slow work without them. It seemed wrong to him to interrupt 100 years of water law.

Mark Kintigh, Kintigh Mountain Home Ranch, said that his company's development is dependent on the current streamflows.

Joe Glicker, Portland Water Bureau, said that (1) the stored water rules should be subject to additional public comment; (2) the minimum flow conversions should be handled comprehensively; (3) conversion decisions must be based on technically sound information; and (4) operation of Corps of Engineers projects must be reevaluated.

Tom Johns, Territorial Seed Company, was concerned that his water right would be lost. He urged the Department to keep the system the way it was currently and urged the Commission not to forget about water right holders who are situated above the storage facility site.

Stephanie Burchfield and Al Mirati, ODFW, said certain flows were necessary to protect the wild fish runs, but supported reducing their requests for some parts of the stored water components. They did not support the staff recommendation for recommended changes but did

support some changes in Subsection 4.

Dan Halttunen, Cottage Grove Board of Realtors, expressed concern about the transfer of water certificates, claiming that it would diminish land values. He asked what recourse owners and realtors have in dealing with disclosure requirements. He wanted to see rights left in place and urged the Commission not to take retroactive rights and require a contract for additional waters. He said that the Department had a quasi-legal requirement to provide the water for the rights.

David Moskowitz, Association of Northwest Steelheaders, urged the Commission to reject the proposed rule changes concerning management of stored water in the Willamette Basin.

Mary Moore, farmer from Eugene, said the state could not sacrifice water used for their livelihood in favor of the environment and wildlife. She wanted to see polluters bearing the brunt of cleaning up the water, not the users.

Jewelee Houston, Eugene, concurred with the testimony of others who spoke before her. She said that there should have been an open hearing before the contested case process began. The state should contract for state water like any other water user, Houston said.

Mary Evonuk, producer of peppermint oil at J & M Farms, Eugene, said she wanted her water rights protected and encouraged the Commission to heed David Moon's testimony.

Bill Trozelle, Bald Knob Land and Timber, said his company needed to use water for fire protection. He went on to say that, as an individual water right holder, he opposed any rule change.

Don Hanson, Cresswell tree farmer, was worried that the proposed Commission action, combined with the Threatened and Endangered Species Act, might affect his water right.

Mike Jewett said that the state should stop treating released water as natural flow and should protect people who have water rights. Department staff was asked to return to a future Commission meeting with solutions and debate the matter fully during a work session.

[At the start of the following item, Cliff Bentz recused himself, citing a conflict of interest.]

K. CONSIDERATION OF BLM'S PETITION TO MODIFY THE COMMISSION'S JANUARY 31, 1992, ORDER OF WITHDRAWAL ON WHITEHORSE AND WILLOW CREEKS IN SOUTHERN HARNEY AND MALHEUR COUNTIES

In early 1991, Oregon Trout requested the Water Resources Commission (Commission) to withdraw, without any exemption, Whitehorse and Willow Creeks from further appropriation. Whitehorse and Willow Creeks are located in southern Harney and Malheur Counties. After holding two public hearings, the Commission withdrew to two creeks and tributaries from

further appropriation on January 31, 1992. The order states, in part,

...the unappropriated waters of Willow Creek and tributaries and Whitehorse Creek and tributaries are withdrawn from all further appropriation except instream uses and limited off-stream stock watering uses that are clearly a part and/or consistent with the United States Fish and Wildlife Service (USFWS) recovery plan for the Lahontan cutthroat trout. A limited amount of irrigation use may be allowed from Whitehorse Creek that is not designated as critical habitat in the USFWS recovery plan for the Lahontan cutthroat trout and which is consistent with that plan.

Permits for limited uses that are part of and/or consistent with the USFWS recovery plan for the Lahontan cutthroat trout in Whitehorse and Willow Creeks shall be conditioned to afford the necessary protection for the trout.

The Lahontan cutthroat trout is listed as threatened under the Federal Endangered Species Act of 1973 (Public Law 93-205) and the Oregon Fish and Wildlife Commission has designated the trout as threatened under Oregon Revised Statutes (ORS) 496.172 to 496.192.

The Bureau of Land Management (BLM) submitted a letter to the Commission at the Commission's March 13, 1992, meeting, suggesting the Commission modify the January 31 order of withdrawal on Whitehorse and Willow Creeks. The BLM's suggested modification would result in deletion of any reference to the USFWS recovery plan and replace it with, "compliance with the Endangered Species Act (ESA)." The Commission directed staff to study the BLM's request and report back at the April Commission meeting.

On March 30, 1992, BLM formally petitioned the Commission to reconsider and amend the January 31 Whitehorse and Willow Creeks order of withdrawal. The petition was submitted within 60 days following the date the original order was served. Interested parties were notified by BLM.

Director's Recommendation

The staff recommended the Commission reconsider and adopt the proposed changes to the January 31, 1992, order of withdrawal on Whitehorse and Willow Creeks.

Karen Russell, WaterWatch of Oregon, Inc., agreed with the views of Rest the West and others in this matter. She thought that there should be a full withdrawal of the waters of Willow and Whitehorse Creeks.

Stephanie Burchfield, ODFW, was not comfortable with the flow amounts proposed

by BLM and suggested changes.

Barry Stein, U. S. Department of the Interior, attorney for BLM, appeared and spoke on behalf of his client.

It was **MOVED** by Roger Bachman and seconded by Hadley Akins to adopt the recommended flow amount with the addition of the phrase, "....and recommended by the Oregon Fish and Wildlife Department..." in three points in the proposed rule. The motion passed unanimously.

M. REQUEST TO ADOPT ORDERS ACCEPTING TWO PRELIMINARY HYDROELECTRIC PERMITS: MICHAEL L. KEISER - HE 535 AND PORTLAND GENERAL ELECTRIC - HE 536.

At the March 13 Commission meeting, WaterWatch of Oregon questioned the ability of the Commission to act under a provision of Senate Bill 240 (1991), now codified in ORS Chapter-543 and ORS Chapter 537. Senate Bill 240 contains the discretionary language, cited below, in two places--one under ORS Chapter 537 (water appropriation) and again under ORS Chapter 543 (hydroelectric development). The action we are seeking by the Commission was pursuant to ORS 543.280, hydroelectric licensing.

Oregon Revised Statute 543.210 now requires "... anyone who proposes to operate a hydroelectric project in Oregon shall apply for a state preliminary permit." Also, ORS 543.280 (1) states "...For preliminary permits, if the copy of the federal application is filed with the commission at the same time it is filed with the federal agency, at the commission's discretion, such copy may fulfill the requirements of ORS 543.210..."

Director's Recommendation

The staff recommended that the Commission adopt the Orders accepting the information filed with the preliminary permit applications by Michael L. Keiser and Portland General Electric as sufficient to warrant processing of the applications.

It was **MOVED** by Hadley Akins, seconded by Jim Howland, and passed unanimously to approve the Director's recommendation.

[Cliff Bentz returned to the table at this point.]

N. PROPOSED ADOPTION OF AMENDMENTS TO THE BUTTER CREEK CRITICAL GROUNDWATER AREA, MORROW AND UMATILLA COUNTIES (OAR 690, DIV.

Investigations by the Water Resources Department in the Butter Creek Critical Groundwater Area (C.G.A.) have continued for twenty years. At its March 13, 1992, meeting, the Water Resources Commission directed the Department to conduct a rulemaking hearing to clarify the allocation rules adopted on December 20, 1991. The rules set the sustainable annual yield for the Echo Junction Subarea at 1260 acre feet but gradually reduced annual pumpage from 2700 AF in 1992 to 1260 AF in 1996. There are eight valid water rights in the subarea. The existing reduction schedule in the rules would add a percentage of past pumpage above the sustainable annual yield to the annual pumpage volume. The Percent Reduction phased in cutbacks to allow junior water users time to adjust to a reduced water supply. Proposed modifications to the rules would eliminate the allocation of 2190 acre feet of groundwater to five junior water rights. Several minor changes to the rules were also proposed to clear up inconsistencies.

Director's Recommendation

The staff recommended that the Commission adopt Option I in the staff report.

It was MOVED by Jim Howland and seconded by Hadley Akins to approve the Director's recommendation. Roger Bachman voted no. The motion passed.

I. 1993 LEGISLATIVE PROPOSALS

In December, the Commission approved a preliminary list of legislative proposals for the 1993 legislative session. In the last three months, Department staff have worked to develop these concepts further, often with the help of advisory groups.

The Executive Department has instructed agencies to focus on substantive issues and not submit housekeeping-only proposals. While we are moving forward with most of the legislative proposals submitted to the Commission in December, some are probably housekeeping measures and may not get final approval from the Governor.

Both Director Young and newly appointed Director Martha Pagel have reviewed and approved the proposals to be submitted to the Commission for final approval.

Director's Recommendation:

The staff recommended approval the list of nine legislative proposals for submittal to the Executive Department.

Stephanie Burchfield, ODFW, suggested some language changes to the proposed concepts.

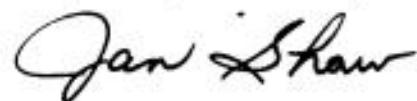
David Moon, Water for Life, thought that the Department should contemplate fewer legislative concepts and rules, all of which require more staff in these budget-tight times.

In connection with concept #4, Moon said that he had no concerns about this requirement if the reporting would furnish useful information, but a blanket water use reporting requirement which would apply to everyone would not produce compliance, in his opinion.

The Commission took no formal action on this item.

There being no further business, the meeting was adjourned.

Respectfully submitted,

A handwritten signature in cursive script that reads "Jan Shaw".

Jan Shaw
Commission Assistant