

H. Proposed Adoption of State Water Resource Policies for Water Allocation and Storage.

Chair Stickel announced that this was intended to be an "asterisked" item indicating the record is closed and no further testimony will be accepted.

In March 1991 the Commission approved the staff's request to initiate these two policies and authorized formation of an advisory committee for each of them. The committee members were approved by the Commission the following month. Two Commission members served on each committee -- Commissioners Bachman and Jewett served on the allocation committee; and Commissioners Bentz and Howland served on the storage committee. The committees met six times between May and October 1991 to discuss and revise draft policies. The Department held eight public workshops throughout the state on the drafts of the two policies. With public comments, staff revised the draft policies -- these revised drafts were approved for public hearing by the Commission members serving on each of the committees. Four public hearings were held in April 1992. The drafts presented for Commission approval today are a result of comments received at those April hearings.

DIRECTOR'S RECOMMENDATION

The Director and staff recommended the Commission adopt the state water allocation and storage policies in Attachments 1 and 2 respectively. The Director and staff also recommended the Commission amend the Oregon Water Management Program - Introduction - Purpose and Authorization as proposed in Attachment 3. In addition, the Director and staff requested the Commission's concurrence to make minor editorial corrections, and format changes in the proposed documents if necessary.

Sections of Attachment 1, Draft State Policy on Water Allocation, were amended and approved as follows:

Page 2, (c) -- It was MOVED by Cliff Bentz and seconded by Anita Johnson to delete "may" and add "shall." Lorna Stickel and Anita Johnson voted no. Motion passed 5-2.

Page 2, (c) -- It was MOVED by Cliff Bentz, seconded by Mike Jewett, and passed unanimously, to delete "To the extent possible, storage filling seasons shall avoid" and insert "In setting a storage season, consideration shall be given to avoiding" and inserting "are low and" between the words "flows" and "seldom."

Page 2, (c) as approved reads, "New allocations of water for the purpose of filling storage facilities may be allowed notwithstanding subsection (a). Protection may be afforded to all water rights and instream uses by

establishing storage filling seasons in basin rules, by considering the need for minimum pass-through flows on water rights, or establishing by rule other conditions consistent with the state policy on water storage as a prerequisite for allocation. In setting a storage season, consideration shall be given to avoiding periods of the year when flows are low and seldom exceed the needs of water rights and when additional flows are needed to support public uses."

Page 2, (d) -- It was MOVED by Jim Howland, seconded by Hadley Akins, and passed unanimously, to change the word "preclude" back to "affect."

It was MOVED by Jim Howland and seconded by Mike Jewett to make the following amendments to Attachment 3, the Revised Oregon Water Management Introduction, Purpose and Authorization. Motion passed unanimously.

Page 2, under Definitions -- Lorna Stickel suggested the following change: "Capacity of the resource" means the ability of a surface water or groundwater resource to sustain a balance of public and private uses without causing over-appropriation or otherwise significantly impairing the function or character of the resource. No action was taken.

Page 4, under Definitions -- Cliff Bentz suggested amending the definition of storage to read, "Storage means the retention or impoundment of surface or groundwater by natural and/or artificial means for public or private uses and benefits."

It was MOVED by Jim Howland, seconded by Roger Bachman, and passed unanimously to change Number 13, page 8, of the Proposed State Policy on Water Storage to read as follows, "Coordinate and cooperate with owners and operators of existing storage facilities especially federal operating agencies to maximize benefits derived from such facilities."

It was MOVED by Roger Bachman, seconded by Jim Howland, and unanimously passed, to approve adoption of the amended allocation policy, storage policy, and the amendments to the definitions as recommended by staff.

It was MOVED by Cliff Bentz, seconded by Anita Johnson, and unanimously passed, to authorize staff to make any necessary minor editorial and format changes to the allocation policy, the storage policy, and the definitions.

I. INFORMATIONAL REPORT: BASIN PROGRAM RECLASSIFICATION STRATEGY

In order to assist with implementation of the newly-adopted allocation policy (Agenda Item H), the Department will conduct a reclassification of basin programs. The reclassifications of uses will be driven mainly by water availability and the need to protect public uses for which instream water rights have not been issued. Staff described the water availability database to be used, the general reclassification process including land use coordination and public involvement, and the tentative schedule and staffing options. The staff intend to initiate reclassification under a schedule using 2 full-time basin planners plus significant input from the land use coordination group, the groundwater section, and field operations staff. However, because of actions taken on the Columbia and Snake River basins, the initiation of the reclass will be delayed until January 1993.

Karen Russell, WaterWatch, spoke in support of reviewing and updating the basin classifications and urged the Department not to ignore groundwater data in the process. WaterWatch hopes to be involved in this process.

This was an informational report and no Commission action was required.

J. RECONSIDERATION OF GROUNDWATER APPLICATIONS G-12419, G-12420, AND G-12421, KMB ENTERPRISES, DESCHUTES COUNTY, AND RELATED POLICY BRIEFINGS

Director Pagel explained that this item has been divided into three separate staff reports stemming from the discussion at the June 5, 1992, Commission meeting regarding the petition for reconsideration of the KMB application. At that meeting the Commission had directed the staff to address two major policy issues in more detail. Item J.1 addresses the policy issue related to managing the impact of groundwater use on surface water; and Item J.2 covers the policy background on the use of the definition of "quasi-municipal use." Item J.3 is the actual reconsideration of the KMB application.

J.1. MANAGING THE IMPACT OF GROUNDWATER USE ON SURFACE WATER SUPPLIES

Surface water and groundwater are intricately connected. Development of the groundwater resource will impact surface water flows. Interference between groundwater use and surface water flows can develop quickly or over a longer period of time. Division 9 rules address short-term interference, but do not readily address long-term interference. These rules and groundwater permit conditions allow the immediate regulation of wells within one mile of a surface water source. Wells beyond that

distance can only be controlled through a critical groundwater area designation. Basin planning and critical groundwater designations are the only practical management options available for addressing long-term interference.

Staff offered four alternative courses of action to address both short-term and long-term interference.

1. Division 9 rules could be modified only for clarification and continue to focus on short-term interference. Adoption or amendment of future basin rules would then address the long-term interference to the extent possible.

2. Division 9 rules could be modified for clarification and special consideration could be given to proposed amendments to ensure that all short-term interference could be regulated without necessitating a critical groundwater area determination. Adoption or amendment of future basin rules could address long-term interference.

3. Division 9 rules could be modified as in 1 or 2 above and broadened to better address long-term interference.

4. Basin plans could be revised to address the issue of long-term interference where the water availability study suggests that surface water is no longer available for appropriation. To the extent possible this activity could be added into the schedule for revising basin programs.

#### DIRECTOR'S RECOMMENDATION

The Director and staff recommended Alternative 2, proceeding at the present schedule to amend the Division 9 rules, with emphasis on a modification to ensure that all short-term interference with surface water supplies can be regulated without critical groundwater area designation. Until rule modifications are adopted, a heightened scrutiny will be applied to groundwater applications to assure that no new permits are issued which have the potential to result in short-term interference by wells more than one mile from a surface water source. In instances where such potential exists, the permits will be held (with consent of the applicant) until completion of the rule revision process, or the Department will propose to deny the permit and offer the applicant the statutorily required hearing.

[Roger Bachman declared a potential conflict. He was advised by Assistant Attorney General Steve Sanders that he could participate in the discussion and voting.]

Karen Russell, WaterWatch, expressed appreciation for the staff report and this policy discussion. Supports working with LCDC on these groundwater issues. Urged the Commission to direct staff to look at the long-term cumulative effects of each permitting decision. Also suggested amending the rules to put more of the burden of proof on the applicant to show no substantial interference. Urged the department to maintain regulation for long-term interference on groundwater resources. Would like to see more discussion and information on how much interference would be allowed, and the difference between qualitative and quantitative interference.

Karl Anuta, representing Friends of Mt. Hood and Hood River Valley Residents Committee, recommends modifying Division 9 rules to clarify that the Department can regulate on short-term interference beyond a mile, and that if there is insufficient data staff will hold the application until data is available.

It was MOVED by Roger Bachman, seconded by Jim Howland, to approve Alternative 2 with direction to staff that they initiate contact with local governments and planning people of Deschutes and Jefferson Counties to start a cooperative effort on how to deal with long-term impacts; contact will also be initiated with the Land Conservation and Development Commission. The motion passed unanimously.

#### J.2 POLICY BRIEFING ON DEFINITIONS AND DISTINCTION BETWEEN "MUNICIPAL" AND "QUASI-MUNICIPAL" USES

In June of 1987, the Commission adopted OAR Chapter 690, Division 11, governing the processing of both groundwater and surface water applications. That was the first place where municipal and quasi-municipal uses are defined. At that time, the definitions read:

Municipal uses: Delivery and use of water through the water service system of an incorporated municipality for all uses usual and ordinary to such systems. Such use includes but is not limited to uses of water for domestic, irrigation of lawns and gardens, commercial, industrial, fire protection, irrigation and other uses in parks and recreation facilities, and street washing, but does not include the generation of hydroelectric power.

Quasi-municipal use: Delivery and use of water through the water service system of a nonprofit corporation created for the purpose of operating a water supply system, for those uses usual and ordinary to a municipal water supply system. A quasi-municipal water right does not enjoy the statutory preferences given to a municipality under ORS 537.190(2), 537.230(1), or 537.410(2).

At the time these definitions were created the main distinction between the two uses was the entity to which the permit is issued, and the denial of general statutory preferences to quasi-municipal users which are generally available to incorporated municipalities. Only two existing basin programs consider quasi-municipal to be an allowable use.

In August 1990 the quasi-municipal definition was amended and the requirement that the corporation operating the system be "nonprofit" was stricken to allow private, for profit, corporations to serve the needs of small communities.

The issue of whether quasi-municipal use is included in a basin classification is an example of the growing difficulty in applying the classifications during water rights application processing.

#### DIRECTOR'S RECOMMENDATION

The Director and staff recommended the formation of an interdivisional task force to review all Division 11 definitions and basin classification nomenclature so as to be able to make recommendations for changes where appropriate. Staff will return to the Commission during the fall or in early 1993 to request authority for a rulemaking hearing.

KAREN RUSSELL, representing WaterWatch, stated the staff interpretation creates two concepts of municipal -- one of which isn't currently reflected in the rules. Urged the Department to:

- retain the existing definition of the term municipal and clearly state that quasi-municipal is not a subset of municipal;
- retain the concept of quasi-municipal uses, but change the existing definition to include only uses which are public and governmental in nature and designed to serve a community and municipal type needs;
- develop a new beneficial use category to encompass the use of water for private, for profit, recreational, destination resorts, not allowing them to enjoy any of the statutory preferences extended to municipal entities; and
- apply these policies consistently throughout the rules.

KARL ANUTA, representing Friends of Mt. Hood and Hood River Residents Committee, asked the Commission to check with the Attorney General's office regarding whether quasi-municipalities, as currently defined and as a subset of municipalities, will enjoy the statutory preferences in the statute. The Commission might want to draw the line between profit and nonprofit entities for enjoyment of statutory preferences.

Steve Sanders explained we have interpreted this in such a way that if the Commission, pursuant to a public interest review, concludes that the quasi-municipal applicant ought to get a preference, then it is within the Commission's power to confer that preference upon them, but it would not be automatic.

Director Pagel said that the Department recognizes that there is a problem in the existing rules where we have basin plans that allow municipal uses and we have created a subset of quasi-municipal. The Department proposed to clarify and correct that, and bring back to the Commission specific rulemaking that would define quasi-municipal or another term that would allow for a use to occur and would not provide the benefits that are statutorily afforded to municipalities.

Matt Cyrus, KMB Enterprises, spoke in support of retaining the quasi-municipal use category.

It was MOVED by Cliff Bentz and seconded by Jim Howland, to approve the Director's recommendation. The motion passed unanimously.

J.3 RECONSIDERATION OF GROUNDWATER APPLICATIONS G-12419, G-12420 AND G-12421, KMB ENTERPRISES, DESCHUTES CONTY.

At the April 24, 1992, meeting, the Commission authorized issuing permits for the referenced applications. On June 3, 1992, in its Petition for Reconsideration, WaterWatch requested that the approval of these applications be reconsidered and that the applications be revisited by the Commission once the five issues raised in their petition were addressed. At the June 5, 1992, meeting the Commission approved the reconsideration request and directed staff to evaluate the issues raised by WaterWatch and some additional concerns of their own. After reconsideration of the KMB applications, the Department determined that the proposed uses of water for quasi-municipal use, irrigation, and maintenance of ponds for aesthetics would not impair or be detrimental to the public interest and that the permits should be issued.

Three alternatives were offered by the Department:

1. Table further consideration of the quasi-municipal application pending the outcome of the Mt. Hood Meadows contested case hearing and issue the irrigation permits.
2. Find that the proposed uses of water may impair or be detrimental to public interest, as described in any of the five issues outlined in the staff report, and refer the matter to a hearing to assist the Commission in making its determination.

3. Find that the proposed uses of water would not impair or be detrimental to public interest and authorize the Director to proceed with issuance of the permits with appropriate conditions.

#### DIRECTOR'S RECOMMENDATION

The Director and staff recommended Alternative 3.

Karen Russell, WaterWatch, spoke in opposition to issuance of the permits, and encouraged the Department to gather more information and consider cumulative effects.

Keith and Matt Cyrus, KMB Enterprises, spoke in support of issuance of the permits. Expressed concern that KMB has been singled out since other permits with later priority dates, including two that are quasi-municipal, in the same area have been granted.

Karl Anuta, Friends of Mt. Hood and Hood River Valley Residents Committee, spoke in opposition to issuance of the permits. The decision will affect the Mt. Hood Meadows decision and will have cumulative effects. There is not enough information available about the Deschutes Basin to issue this permit.

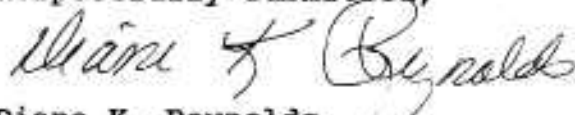
It was MOVED BY Mike Jewett and seconded by Anita Johnson to approve Alternative 1 which would table further consideration of the quasi-municipal application pending the outcome of the Mt. Hood Meadows contested case hearing and issue the irrigation permits. Mike Jewett and Anita Johnson voted yes. The motion failed 5-2.

It was MOVED by Jim Howland and seconded by Hadley Akins to approve the Director's recommendation. Mike Jewett, Anita Johnson and Lorna Stickel voted no. The motion passed 4-3.

The Commission asked staff to provide a report on the long-term resolution of this issue.

There being no further business, the meeting was adjourned.

Respectfully submitted,



Diane K. Reynolds  
Commission Assistant