

WATER RESOURCES COMMISSION MEETING
JUNE 2, 1995
SALEM, OREGON

MINUTES

MEMBERS

Cliff Bentz
Mike Jewett
John Frewing
Anita Johnson
Tyler Hansell
Nancy Leonard

STAFF

Martha Pagel
Steve Sanders
Diane Reynolds
Cindy Smith
Bob Main
Larry Toll

OTHERS

Jan Boettcher
Kimberley Priestley
Mark Bautista
Roger Bachman
Roberta Jortner
Phil Castle
Joni Low
Jim Myron
John Hogan
Kevin Hanway
George Beall
Gail Achterman
Todd Heidgerken
Bruce Lovelin
J.D. Thomas
Andrew Purkey

In addition to the individuals listed above, report authors and other staff were present for particular agenda items.

The 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, 158 12th Street NE, Salem, Oregon 97310. 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.

A. CONSENT AGENDA

1. COMMISSION MINUTES

Commissioner Frewing suggested changes to the minutes of the April 6 and 7, 1995, meeting.

After discussion, approval of the minutes was delayed until the July meeting to give staff time to review the meeting tapes and to give Commissioners time to review the suggested changes.

2. REQUEST FOR ADOPTION OF AMENDMENTS TO OAR CHAPTER 690, DIVISION 19 (DROUGHT MITIGATION)

The Commission authorized a hearing on proposed amendments to OAR 690, Division 19, Drought Mitigation, to make the rules consistent with the enabling legislation. A hearing was held in Salem on March 31, 1995. No testimony was submitted at the hearing; one comment, in support of the Department's proposed amendments, was received by April 7, 1995, the end of the comment period.

DIRECTOR'S RECOMMENDATION

The Director and staff recommended the Commission adopt the proposed amendments.

A motion was made by Commissioner Frewing and seconded by Commissioner Jewett to adopt the proposed amendments. The motion passed unanimously.

B. COMMISSION COMMENTS

Commissioner Hansell said that he attended the National Marine Fisheries Service hearing held in Richland regarding its proposal for the Columbia River. Approximately 100-120 people were in attendance.

Commissioner Johnson said that the Governor's Watershed Enhancement Board will be looking at more than 50 grant applications at their meeting this month. Johnson visited the New River area; it's very beautiful.

Commissioner Bentz complimented Director Pagel and Beth Patrino for their hard work during the Legislative session. He was invited to a legislative committee meeting yesterday and was impressed with the patience and understanding that Director Pagel showed in working through complex issues.

Bentz reminded Commissioners that they need to elect a Vice-Chair. A motion was made by Commissioner Johnson and seconded by Commissioner Frewing to elect Commissioner Jewett as Vice-Chair. The motion passed unanimously.

C. DIRECTOR'S REPORT

1. Pagel has devoted most of her time to legislative matters since the last meeting. Commission teleconference meetings will stop once the

Legislature is adjourned.

2. Staff changes have occurred. The public information officer position held by Bev Hayes and the assistant position held by Danielle Clair were eliminated in the budget. A new public information position was created in place of these. Bev Hayes was hired as the hydroelectric coordinator and Danielle Clair was hired into the new public information position. The hydroelectric program staff will be working with a task force of hydroelectric representatives, interest groups, environmental groups, and agencies to develop new program recommendations.
3. There is an issue of concern about our process for regulating groundwater uses that may affect surface water flows in the Umatilla River area. A number of groundwater users are facing regulation to meet senior surface water rights on the Umatilla River. Pagel and staff are planning on meeting with these groundwater users to explain the evidence to support the conclusion to regulate. About 30 wells and approximately 1,500 acres are affected. Regulating will likely begin next week. Fred Lissner further explained the situation to the Commission.

Jan Boettcher, Oregon Water Resources Congress, said that the Bureau of Reclamation contract requires a call on the water before West Extension District can pump from the Columbia. Tape 1, mark 390.

4. Pagel said the WorthyLake application is not ready for further action so will not come before the Commission at this meeting.
5. Pagel met with Paula Burgess and representatives of the Warm Springs Tribe to discuss resuming negotiations on the tribal water right. Reed Marbut will be the lead person on this. We hope to have a formal negotiating session by the end of August or early September.
6. Pagel asked the Commissioners if they would approve a change in the September meeting date to the 11th, 12th and 13th. The Commissioners agreed this change would work with their calendars.

D. STATUS REPORT ON INSTREAM WATER RIGHT LEASING PROGRAM

Andrew Purkey, Executive Director of the Oregon Water Trust (OWT), and Larry Toll, District 3 Watermaster, gave a report on the recent leasing activities and what parties are learning from application of the new process.

The OWT works cooperatively with willing water users to acquire part, or all, of existing out-of-stream water rights and convert them to instream water rights. OWT works closely with community leaders, local watershed councils, government agencies, and a range of public interest groups to prioritize and implement its efforts.

In the 1994 season there were four one-year leases, and in the 1995 season there are 10 leases in various basins throughout the state.

Larry Toll said many people are showing interest in leasing. Information on instream flows prior to the execution of a lease would be most helpful.

Commissioner Frewing asked Purkey if rules would help identify a valid injury claim.

Purkey said he's not too sure how to deal with this. Just gaining experience about what is a valid injury claim as a result of instream water rights will help. It's not an administrative issue at this point; it will take working with the watermasters assessing claims.

Toll said it will make a difference depending on the stream. If it's a stream on which the watermaster has done distribution for years, the question of injury will likely be easy to assess. On less well-known streams, that assessment for injury would be more time-consuming and difficult.

Purkey said OWT is focusing on smaller tributaries that would be appropriate for leasing and using resources in developing the measurement. OWT will then have examples across the state.

E. PRESENTATION BY THE NATIONAL MARINE FISHERIES SERVICE ON THE STATUS OF THE SNAKE RIVER SALMON

Merritt Tuttle, National Marine Fisheries Service (NMFS), discussed the proposed recovery plan for Snake River Salmon, shared information relating to endangered fish species, and responded to the questions of Commissioners.

Commissioner Hansell asked if NMFS has considered other endangered species that will be impacted by the drawdown. He also expressed concerns that scientific facts are not present to support the drawdown which will dry up much of the Umatilla Refuge.

Tuttle said NMFS staff have worked closely with the Department of Fish and Wildlife on the endangered species issue. Tuttle said the John Day Reservoir is one of the largest on the river; it slows fish down more than any other reservoir on the Columbia system.

Commissioner Frewing asked if there is any science in the studies behind the proposed plan that says less river flow is better for the Snake River fish? Tuttle said no.

Commissioner Frewing asked about the NFMS proposal that suggests the states of Oregon, Idaho and Washington should continue their existing moratoriums on issuing water rights in the Snake and Columbia River main stems. Does this apply to the river below Bonneville Dam as well as above it?

Tuttle responded that it doesn't have a large biological basis below Bonneville Dam; but it would be prudent to take into account the number of petitions for other species found in that area.

Bentz asked what technique NMFS or other outside sources have to force the Commission to comply with the plan. Tuttle replied that there would be no way to force compliance.

Bruce Lovelin, Columbia River Alliance, said this is a very complex issue. He supports the NMFS effort as a starting point to help the salmon. The plan needs three components: a good scientific basis; economic realism, which the plan doesn't address; and stakeholder support. Tape 3, mark 308.

F. REQUEST FOR ADOPTION OF ADDITIONAL PUBLIC INTEREST REVIEW STANDARDS FOR NEW APPROPRIATIONS WITHIN THE LOWER COLUMBIA BASIN BELOW BONNEVILLE DAM, OAR CHAPTER 690, DIVISIONS 11 AND 33

Tom Kline and Bob Rice, Resource Management Division, presented this report. This was the second in the three-step rulemaking process which the Commission directed staff to undertake for the protection and recovery of weak, threatened and endangered fish stocks. Staff did extend the public comment period on the proposed Lower Columbia Rules to May 5 and another rules advisory committee meeting was held.

Bob Rice guided the Commissioners through the staff report noting the changes made to the draft rules since they had last seen them.

DIRECTOR'S RECOMMENDATION

The Director and staff recommended the Commission adopt the revised rules as presented.

Roberta Jortner, Portland Water Bureau, commented in support of the rules. Regarding new language under 690-33-220(3), the Bureau supports the concept of requiring efficiency standards for new appropriations. She expressed concern about the ability to discern what is meant by reasonably efficient. In 690-33-220(5) there could be difficulty determining what is meant by satisfactory and offset. Under 690-33-230 Flow Management, in the consultation described, it is unclear whether the fish protection applies to all fish or threatened and endangered fish. It needs some clarification and she asked that this apply to threatened and endangered fish species in this case. Tape 4, mark 333.

Kevin Hanway, Special Districts Association, spoke on behalf of Joni Low, League of Oregon Cities, who objects to the change in 690-33-220(3) since the Department already has the authority to impose a conservation requirement on municipalities through other regulations. Hanway explained why the Special Districts Association, Oregon Water Utility Council, Tri-County Water Districts Association, and Rockwood PUD continue to object to reference to the Fish and Wildlife Program in 690-33-220(1). The biological data is not in the NMFS report to apply to flows below Bonneville -- the Fish and Wildlife Program is under that same disability. In 690-33-230 Flow Management, it would be appropriate to identify this as clearly applying only to threatened and endangered fish species. Tape 4, mark 375.

Commissioner Bentz asked what the plans referenced in the second sentence in 690-33-220(1) are supposed to provide.

Bob Rice responded that the Department is doing as much as is appropriate to protect the threatened and endangered fish, making sure staff are aware of the latest guidance that is brought forth within these programs. Any changes from an administrative prospective would be made at the discretion of the Director and the Commission.

Commissioner Bentz suggested changing language in 690-33-230 to read: " The Department shall consult with the affected fish and wildlife agencies and the appropriate Indian tribes to assist in resolving the flow management conflicts, if the flow management objectives for protection of threatened and endangered fish species cannot be achieved because of differing requirements between fish species in the management area."

Commissioner Jewett asked to have the second sentence in 690-33-220(5) changed to read, "The Director shall determine if the proposed use with mitigation offsets the detriment."

The Commissioners discussed the 300 cfs referenced in 690-33-210(4)(b).

Steve Sanders, Legal Counsel, explained that the 300 cfs does not cap the Department's ability to issue new water rights; it triggers review of the rules.

Commissioner Hansell said he is concerned that the scientific evidence is not available to support the NMFS plan. He asked that the rules be tabled until a plan is developed that can be agreed upon.

Commissioner Frewing said he doesn't think these rules go far enough in protecting Lower Columbia flows. He referred to Merritt Tuttle's statement that there is no evidence that less flow helps the survival of the listed fish; yet the Oregon Department of Fish and Wildlife record shows there is a correlation between flow below the dam and the return of Chinook salmon.

Frewing would put a seasonal restriction on withdrawals from the mainstem Lower Columbia and mainstem Willamette up to Willamette Falls.

Director Pagel said the Department understands the NMFS data and Northwest Power Planning Council plan above Bonneville to be based on biological data that concluded a certain amount of flows were needed in certain key areas. That led to a recommendation that if those flows were not being met above Bonneville there would be a prohibition against new water rights at certain times of the year in certain areas. Below Bonneville, we understand there is not much biological data to indicate what the flow requirements are. Rudy Rosen, Director of the Department of Fish and Wildlife, and Roy Hemmingway, the Governor's salmon advisor, did not recommend the need for a prohibition on new water rights so long as other precautionary steps are taken such as reviewing the recovery plans. That is how the recommendation for different standards below and above Bonneville came about.

Steve Sanders suggested a language change in 690-33-210(4)(a) to read, "A final National Marine Fisheries Service Recovery Plan for Snake River salmon is promulgated, or the Northwest Power Planning Council Fish and Wildlife Program is revised after the effective date of these rules providing additional information concerning the recovery of threatened or endangered fish stocks in