REVISED MINUTES – SEE PAGE 5

Oregon Water Resources Commission
July 28, 1995, Meeting
Burns, Oregon

Members
Cliff Bentz
Mike Jewett
John Frewing
Nancy Leonard
Tyler Hansell

Staff
Martha Pagel
Steve Sanders
Rick Bastasch
Diane Reynolds
Steve Applegate
Danielle Clair
Bob Main
Kent Searles
Bill Beal
Rob Carter

Others
Jerry Franke
Rick Kruger
Roger Bachman
Kimberley Priestley
Jan Boettcher
Gail Achterman
Ladd Henderson
Reed Benson
Todd Heidgerken
Jerry Schmidt
Pete Test
Phillip E. Graf

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

Agenda reports and other written material submitted at this meeting are part of the meeting record and are on file at the Oregon Water Resources Department, 158 12th St. NE, Salem, Oregon 97310. Audiotapes of the meeting are on file at the same address.

A.1 Minutes

Pagel explained revision of the April meeting minutes, as discussed at the June meeting. A list of Commissioner Frewing's suggestions were proposed to be included as a supplement to the minutes. Frewing noted that his comments have largely been addressed. Frewing moved approval of the April 6 and 7 minutes, with the supplement as proposed; the motion was seconded by Commissioner Leonard. All voted in favor. Commissioner Jewett moved approval of the June 6 and 7 minutes; the motion was seconded by Commissioner Hansell. All voted in favor.

A.2 Request for Appointment of Members to the Ground Water Advisory Committee

Rob Carter presented this report recommending appointment of Gayle Killam and Jim Graham. Commissioner Hansell moved to appoint; the motion was seconded by Commissioner Leonard. All voted in favor.

A. 3 Request for Adoption of Standard Notice Form for Well Ownership as Required under House Bill 3456 (1993 Session)

Rob Carter presented the standard well ownership form report and explained the statutory background and agency development. Carter noted that the Ground Water Advisory Committee (GWAC) added one sentence to the draft now before the Commission. In the first sentence, relating to rights and responsibilities, "or" was replaced by "and." Commissioner Frewing asked if GWAC members unanimously agreed on the form. Carter answered affirmatively. Frewing moved to adopt the form with amendments; the motion was seconded by Commissioner Hansell. All voted in favor.

B. Commission Comments

Commissioner Frewing reported that he reviewed a copy of the agency public notice mailing list, which includes local governments. He surveyed three county courthouses and found none posted the Department's application notice. The agency should improve getting notice to the public more effectively. Steve Applegate, acting Water Rights Administrator, explained that the list currently contains about 100 names. There is a $50 per year fee for mailing. The notice is also mailed to every county planning department, affected Indian tribes, state agencies, interest groups and affected property owners. Watermasters post notices in their offices. Commissioner Bentz suggested that we might write to county planning offices to remind them it's important to post. Frewing did not have any "prescriptive" answers. Applegate said that Agenda Item F will also contain information about public notice. Commissioner Leonard said counties get several notices daily with the request to post; because of the volume, it is just not possible.

Commissioner Hansell reported that Pagel and staff came to the Umatilla area in June to discuss well shut-off activities. August 10 he will meet with the Oregon delegation of the Northwest Power Planning Council in Hermiston.

C. Director's Report

Pagel summarized Thursday's tour of the Malheur Wildlife Refuge & afternoon work Session.

Commission members approved the Department's proposed 1996 Commission meeting schedule.

Pagel explained that the Department has received several anonymous letters addressed to the Commission regarding water regulation in the Grande Ronde.

Department staff have been very busy understanding and implementing new legislation.

Pagel has attended many speaking engagements. She will speak before the Real Estate and Land Use Section of the Oregon State Bar in August and before the Washington State Bar in September. She will attend the Western States Water Council (WSWC) meeting in Rapid City next week to talk about the connection between conservation and basin planning efforts. Two weeks ago Pagel was the keynote speaker at a WSWC conference on conservation and watershed health in San Diego. She accompanied the Governor to Klamath Falls to meet with area water users. These users would like the Department to move forward as aggressively as possible with adjudication, even in the face of *US v. Oregon*. Steve Sanders is looking at a number of legal issues in this context.

Steve Sanders offered the following legal update:

The Department largely prevailed in *Teel v. WRD*, especially with the alternate acreage issue. The case was decided on procedural rather than water law basis; Teel has appealed for Supreme Court Review.

In *US v. Oregon*, the time to appeal to the US Supreme Court has expired; the federal government did not appeal, but the Klamath Tribe may have petitioned for review. The US Supreme Court will likely decide in a month or two whether to accept the petition. The state may also cross-petition the US Supreme Court on issues we lost on.

In Trial Court, one case involves the issue of whether we can regulate wells for hydraulic connection to surface water; one has to do with regulating a spring that flows off property; another has to do with how Cold Springs Reservoir can be

operated. The Water Development Loan Fund also has two active cases involving repayment method and water right appurtenancy.

D.1 Request for Issuance of a Final Order Approving the Petition and Maps Submitted by Santiam Water Control District under ORS 541.325 to .331 (HB 3111)

Commissioners Bentz and Hansell disclosed they both own property that exists within an irrigation district. Steve Sanders said that fact would not preclude their voting on this issue, even about a HB 3111 petition submitted by a district within whose boundaries they own property.

Adam Sussman, Northwest Region, summarized the staff report. The Santiam Water Control District petitioned under HB 3111 all of the water rights within its boundaries that were eligible to be petitioned. Any rights held outside its boundaries are not eligible and were not petitioned. The petitioned rights come from three permits and a decree with a 1909 priority date. The petitioned rights form a total of approximately 15,500 acres.

Sussman made over 100 visits to the site and worked closely with the district. The proposed order contains the staff findings that the district had met all the requirements of the statute. The director signed the proposed order. There were no protests submitted. WaterWatch submitted timely comments to the proposed order.

Commissioner Jewett asked whether the fact of issuing a remaining right forecloses the Department from pursuing forfeiture for nonuse. Sanders responded that this had been raised in a legal case. In that instance, the existence of a remaining right did not establish whether the right had not been forfeited by nonuse.

Commissioner Hansell asked about the rights held by the district that exist outside the boundaries of the district. Sussman responded that the district could apply for a regular Division 15 transfer. In this case, the Santiam Water Control District could amend its boundaries. Sanders pointed out that even if the boundaries were adjusted, because the deadline for submittal of HB 3111 petitions was June 1994, the newly-incorporated lands still would not be eligible.

Commissioner Frewing asked about the legal significance of a HB 3111 notebook. Sussman said there are three copies of the notebook; the final order refers to the "notebook." Frewing also asked how much actual change in location occurred as a result of the petition. Sussman had studied a final proof survey map from 1978 and found no trend discernible in the changed rights.

Commissioner Bentz asked, assuming the final order is approved, what benefit would accrue to the Department. The Department's information base of actual water use would be greatly improved. **Sussman also noted that the HB 3111 process provides a clean slate and a good starting point for districts that may later use SB 494. However, there is no requirement for a district to go through HB 3111 before they can utilize SB 494.**

The action requested of the Commission chair is to sign the final order but to delegate to the Department the issuance of the confirming rights, a ministerial act. The Department would hold off on issuing the certificates until the water right conflicts described in the staff report are resolved.

Public Comment

Reed Benson with WaterWatch stated that the prevailing goal of HB 3111, record improvement, should guide the agency. He raised four issues.

1. Overlapping rights -- There was a good indication that one right probably hasn't been used and probably is not valid; inquiry into this would be beneficial and not overly burdensome.
2. Remaining rights -- There should be some investigation before a remaining certificate is issued to improve the agency's records. Staff's response that such an effort would be overly burdensome is not accurate. It could involve an initial check from aerial photos already submitted to see if there's a serious discrepancy. When, if not during this process, would the Department conduct this kind of check?
3. Changes in type of use -- Does the statute actually allow this?
4. Mapping permitted rights -- It's good to show them, but permitted rights and acreage as submitted aren't double-checked against record; this has been a problem in water spreading, in that if an agency receives information and doesn't challenge it, it suggests that the agency has tacitly approved the information.

Benson noted that the staff alternatives are to approve the final order or to refer to contested case; however, WaterWatch issues are not the stuff of contested case. Rather, they are questions requiring Commission discussion and guidance. Tape 2, mark 234.

Commissioner Frewing asked whether WaterWatch had a basis for believing that overlapping rights in this case have been abandoned. Benson said no.

Jan Boettcher, Oregon Water Resources Congress (OWRC), told the Commissioners that this has been a good process for both district and state. Some districts have

spent over $250,000 for map production. The original reason for HB 3111 had to do with over 1,800 backlogged transfer applications that can now more easily be handled.

SB 494 (1995 Session) allows annual update using HB 3111 as a baseline. Boettcher responded to WaterWatch's comments. She said that the issue of overlapping rights would be a problem in eastern Oregon. OWRC does not think that there should be the additional burden to irrigation districts to investigate whether "remaining rights" are not subject to forfeiture laws. Type of use changes were specifically intended in HB 3111. She also asked that if there were a disclaimer on maps, that the agency add a "stamp," rather than returning maps to districts for labeling. Tape 2, mark 649.

Ladd Henderson, Santiam Water Control District manager, also addressed the points raised by WaterWatch. There are five overlapping rights in this petition: one is resolved; two have existed since 1978, as shown on the Department's 1978 survey; and two others appear by mistake on the part of the district. Regarding remaining rights, parcels which lie partly in and partly outside of district boundaries are the most difficult; HB 3111 doesn't allow addressing parcels outside the boundary. Some are in areas inside city limits and will have to go through the regular process to clean up. There's not a water spreading problem, but there is a serious urban sprawl problem. The Santiam Water Control District's change of use is from irrigation to wildlife habitat. Along with a map showing permitted rights, Henderson brought a map that doesn't show permits, but thinks it's important and useful to show them. The district used AutoCad and input permits as a separate layer.

Henderson said the process has been expensive, long and tedious, but Sussman has been of great help. Tape 3, mark 58.

Commissioner Jewett asked what the district went through to fix the five overlap problems. Henderson said that each was unique, but generally there had been no hostility; he had expected far more problems than were encountered.

Commissioner Frewing asked about an overlap with the Oregon State Penitentiary. He thought that the petition noted the Santiam as the source, but this showed the right on Mill Creek. Henderson answered that the district puts Santiam water into Mill Creek as a conveyance.

Frewing also asked about a change of use, which is small in this instance. What would happen if a chip plant caused a big use change – how would this be handled? Henderson responded that the Board would not approve that. Boettcher added that under HB 3111 new uses in certificate are limited to uses in certificate, so industrial use would have to use another process.

The Commission discussed the policy questions raised by WaterWatch in order that the same issues do not come forward with every HB 3111 petition. Director Pagel summarized the Department's understanding on these points. Staff will:

1) Pursue any egregious anomalies apparent in connection with HB 3111 petitions;
2) void creating the impression of acquiescing with any permitted rights shown on HB 3111 maps; and
3) Refer potential violations to the watermaster to be handled in accordance with enforcement management directives.

Pagel suggested the map and order contain a disclaimer noting that permitted acreage is on the map for information only and does not relate to the 3111 maps and that there is no agency action or judgment about them in any action taken.

Steve Sanders developed new language to be added to the findings in the third page of the order: "Finding #11. This order does not affect or make any legal determination regarding any water right permit within the district." The Department will include this disclaimer in other HB 3111 final orders. In future instances where supplemental permits are part of the petition and where a district has included permitted rights on the map, the Department will modify the disclaimer to fit the situation. In addition, map legends pertaining to permitted acreage will contain the following statement: "This map is not a legal determination with regard to these rights."

Commissioner Hansell moved to adopt the staff recommendation to approve the petition and maps submitted by Santiam Water Control District and to issue a final order, with the addition of Finding #11 and the statement "This map is not a legal determination with regard to these rights" added to map; motion seconded by Commissioner Jewett. All voted in favor.

D.2 Request for Referral of La Pine Cooperative Water Association HB 3111 Petition to Department for Scheduling of Contested Case Hearing

Bob Main, South Central Region Manager, gave a brief presentation of the staff report. He noted that the statute requires that when an unresolved protest is submitted, the Commission must schedule a contested case hearing.

Commissioner Frewing asked whether the protestant has standing, given that the La Pine Association has no boundaries. Sanders responded that he has standing because he has a right that is affected by the proceeding; he must and has shown an interest in the proceeding.