WaterWatch also submitted comments. The group asked if there is to be cancellation, does entity cancel the most junior right or is there other guidance? Can a priority date be moved along the length of a ditch? Bob Main replied that staff analysis has concluded that the district can take any approach it chooses, as long as existing water rights are not injured. In this case, one of the main laterals of the association has 1907 rights at the north and downstream and 1897 rights upstream; the petition asks that these be switched. WaterWatch is concerned that junior rights will get benefit they wouldn't otherwise. Main said that if this were to occur, the watermaster would control seepage onto lands that aren't allowed to be served under the new setting.

Commissioner Frewing asked if enforcement would be in the nature of requiring ditch-lining. Main replied that the watermaster cannot require ditch lining, but he could inform the district of improper irrigation, and threaten to reduce the diversion if practice isn't stopped.

Public Comment

Reed Benson said that WaterWatch had one issue that hadn't come up in the previous item. The policy question is whether the Commission wants to allow HB 3111 to be used for transfers to what a district wants its rights to be, rather than limiting it to a reflection of transfers which have already occurred. This particular type of transfer could be approved under the regular transfer process, which allows for more public intervention than HB 3111.

WaterWatch is concerned that the petition seeks cancellation of a 1907 certificate, even though change occurs in lands covered by a 1902 right, which is an expansion of the 1902 rights. If seepage irrigates the 1902 lands after July 1, then it would be out of the season allowed in the 1907 rights. The Department has responded by saying that the 1907 lands had probably been irrigated in this questionable fashion for a long time and that the petition brings it into compliance with reality. Benson stated that this was not good enforcement practice. He would like the agency to recognize that injury can result from seepage. Tape 3, mark 633.

Commissioner Bentz commented that this is an enforcement issue and that the WaterWatch position is based on the premise that the Department will not regulate or take enforcement action when it is needed. If the district had actually in effect already swapped the priorities, then HB 3111 would apply.

Commissioner Frewing asked that the HB 3111 injury test be articulated in writing. Pagel noted that there is no separate test for injury in HB 3111. Main said that injury exists if the water legally available will be less than the water available before the

Division 77 regarding when we will presume that something will impair or be detrimental to the public interest. If the Department maintained the existing rules as presumption, then Pagel thinks the Department would be overstepping the intent of SB 674. The existing rules 690-11-195 are in two parts. It is staff's view that 195 has been impliedly repealed as it relates to the initial presumption. Frewing asked how the Department will make the initial review. SB 674 will be the primary document the Department would rely on to process applications; then the Department would look at all other Department rules that are not in direct conflict with SB 674. Commissioner Bentz said he thinks that the Legislature was trying to take away from the Commission the role of weighing and balancing. The Legislature would have liked to have said, if four things apply, then issue the right. Bentz thinks that the refinement that Director Pagel is requesting of the Commission is not actually what the legislators wanted in passing SB 674. Sanders said that the statute says that one of the aspects of the presumption is if the proposed use complies with rules of the Commission. He pointed out the difference between a standard for protecting a threatened and endangered species versus the laundry list of public interest factors. Bentz asked what rules the Department would be following to make a public interest determination. Pagel said the Department would look at Division 33 or any other rules that set standards with which an applicant must comply. The Legislature will be looking to us, in respect to the presumption, to stick to those particular standards. The Legislature did not put any limit on rules the Commission could adopt, but to tinker with the four public interest determination presumptions would be problematic. One of the groundrules that we thought we heard from the Commission during one of our teleconferences was that you didn't want the Department to work under new policy. From the standard of what we want to do with temporary rules, the question of policy can wait for permanent rulemaking.

Pagel clarified that the diagram is intended to apply up to the point of the Department issuing a proposed final order. It would then go out for public review, and protests could at that time come in which might try to rebut the presumption.

Public Comment

Pagel noted that Anne Squier, Department of Environmental Quality, had sent a memo stating she did not think that the presumption applies to instream as well as out-of-stream water rights. Steve Sanders said there may be some ambiguity in the statute about this.

Kimberley Priestley, WaterWatch, commended the Department for the good job of upholding the intent of public interest determinations. Her organization thinks that 185 and 195 are in conflict. The introductory language of 195 which calls for a public interest review after there has been a finding that the presumption has been rebutted

is in direct conflict with the mandates of 185. How can it be shown that the public interest will be impaired without doing a full public interest determination according to all the factors in 195? Tape 5, mark 318.

Sanders explained that under 185 we still view this as sort of a mechanical test. We are not going to do a complete public interest determination, but merely trying to identify if there is a public interest issue at all. The 195 review process would be one more comprehensive balancing test.

Pagel said that clearly SB 674 does not tell us how to decide whether the presumption has been rebutted. It says we have to have a preponderance of evidence that one of these issues is not in the public interest. This is an area that the Commission may want to consider for permanent rulemaking.

Rick Kruger, Department of the Oregon Department of Fish and Wildlife, stated that his agency agrees with the wording suggested by WaterWatch. Tape 5, mark 558.

Gail Achterman, attorney representing Oregon Water Resources Congress, agreed with Steve Sanders' and Martha Pagel's understanding of the statute and the public interest presumption, but didn't understand WaterWatch's concerns.

She had one concern with the lower right hand corner of the diagram distributed by staff. She proposed two changes to the July 25 revision of the public interest proposal for Division 11 temporary rules: On the first page, delete the entire subsection (5) under 690-11-185. Those uses on their face raise public interest questions and will be looked at as special cases. On the third page, delete the entire subsections (3) and (4) under 690-11-195, eliminating the laundry list of factors. These were viewed as an articulation of one of the various pieces of information under consideration when the Department was evaluating a proposed use. The context in which this list was developed is now different than when the rule was originally adopted.

Achterman recommended the Commission direct the Department to adhere to the statute using SB 674 as the guiding document until going to permanent rulemaking. Other boards and commissions have done this. That is the context for eliminating subsections (3) and (4) as noted above. The legislators were asked to consider an amendment that would have included this entire list in SB 674 but they rejected it.

She recalled that the understanding during legislative hearings was that Division 11 would be supplanted by SB 674, so "other rules of the Department" would mean rules outside of Division 11.

Pagel asked Achterman why she would leave in 195(2). Achterman responded that she read it as consistent with the rebuttable presumption in SB 674.

Commissioner Leonard asked Achterman about her assumption that SB 674 would replace Division 11. If a measure is intended to repeal a rule, does it ever specifically cite the rule and request its repeal? Achterman answered no, as a matter of law, a rule that is inconsistent with statute does not apply. Steve Sanders said the fact that the Legislature did not incorporate surviving parts of Division 11 as part of the bill, makes a stronger case for not needing to have a specific repeal of inconsistent parts it. Achterman said the context under which Division 11 was developed is now different and because of the level of disagreement, the safest thing would be to rely on the statute.

Commissioner Frewing asked what should staff be doing to determine if the criteria are met. Achterman responded that she agrees with Pagel's concept. Staff should consider whether there are conflicts with existing rights, water availability, the basin program, and non-Division 11 rules, such as Division 33, withdrawal rules, classification rules. There may be good things in Division 11 to be considered that would be consistent with SB 674 too. However, it would be inappropriate to apply at that stage the weighing and balancing tests that are now in the Division 11 rules on the public interest standards.

Sanders said 185 and 195 are directions to the Commission or the Department about how the Department will evaluate an application, not a criteria for a use generally.

Commissioner Frewing said he does not see inconsistency between Subsections 3 and 4 of 195 and SB 674.

Sanders said the question is whether the staff would use 195 to apply the presumption.

Achterman said assuming 195 was not inconsistent, it would play in at the bottom of the process, not up front.

Roger Bachman, Oregon Trout, agreed with WaterWatch; he doesn't agree with the section deletions suggested by Achterman. Tape 6, mark 285.

Commissioner Jewett said the statute is poorly drafted. If the Commissioners would like, they could apply any approach they desire as to what was meant by "other rules of the WRC" (including Division 11). But he doesn't think that was the legislative intent.

Commissioner Leonard asked for guidance from Pagel on what would happen if Subsections (3) and (4) in 195 are deleted.

Pagel said that if the Commission has a policy call to apply 195 only when the presumption has been rebutted or does not apply, you can probably leave in (3) and (4). She would not be comfortable if the Commission would want to use that language to give the Department guidance on rebutting the presumption.

Commissioner Hansell asked Pagel about Subsection (5) in 185. Pagel said that in the original draft that language had been dropped entirely but it was added back because staff thought that during the conference call Commissioners asked to retain as much as possible of existing rules. But she would not oppose dropping it.

Commissioner Frewing asked how staff would read 195 (3) and (4) at the early stage and how it would be read at the later stage. He thinks (3) and (4) are consistent with SB 674.

Pagel said that staff had not considered applying (3) and (4) at the early stages of review because this list does not correlate with specific factors in Subsection 8. This list is not a useful tool for rebutting the presumption.

Commissioner Leonard asked for assurance that these temporary rules would not bind later Commission action on permanent rules. Pagel, Sanders and Gail Achterman agreed that the Commission would have total liberty to look at all issues again in permanent rulemaking.

Commissioner Jewett made a motion to adopt the proposed temporary rules for Divisions 11 and 77 without the public interest sections 11-185 and 195, and 77-036 and 042, and to replace "HB 1033" with "SB 1033." The motion was seconded by Commissioner Leonard. The motion passed unanimously.

Commissioner Jewett made a motion to adopt OAR 690-11-185 and OAR 690-11-195 deleting Subsection (5) of 185 and Subsections (3) and (4) of 195, and deleting corresponding changes in OAR 690-77; and to replace "HB 1033" with "SB 1033." The motion was seconded by Commissioner Hansell. The motion passed 4-1 with Frewing voting no.

F. Progress on Implementation of SB 674

Rick Bastasch and Steve Applegate told the Commission about recent hiring and training of staff, and development of forms and a manual in connection with SB 674. The first group of proposed orders is targeted to be sent out on August 8 and staff

are also working on the Department's public notice. Various teams are working on the new products, such as initial reviews and proposed orders.

Commissioner Frewing asked what the applicant would receive relating to standard measuring and reporting conditions. Applegate said the initial review might include a statement to the effect that a use would likely be subject to conditions. The same would appear on the proposed order.

Applegate explained that the target numbers may look daunting at first glance. Computerized tracking will make monitoring and staffing analyses much more effective.

Frewing asked whether the Department would grant a permit for less than the amount requested. Pagel replied that had been past practice, but it is a policy question that the Department would encourage the Commission to discuss and offer guidance. This and other policy issues would likely be subjects brought up again at the Commission's September retreat.

There being no further business, the meeting was adjourned.

Diane Reynolds
Commission Assistant