

**Oregon Water Resources Commission Meeting
November 17, 1995
Astoria, Oregon**

Members

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

Others

Phil Matson
Rick Kruger
Kimberley Priestley
Jan Boettcher
Gayle Killam
Roger Bachman
Roy Elicker

Staff

Martha Pagel
Jerry Lidz
Diane Reynolds
Danielle Clair
Steve Applegate
Rick Bastasch
Tom Paul
Tom Byler
Al Cook
Jeannette Holman
Michael Mattick

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 Street NE, Salem Oregon 97310. Audiotapes of the meeting are on file at the same address.

Chairman Cliff Bentz opened the meeting and introduced Ron Nelson, newly-appointed to the Commission, from the Bend area.

A. Commission Meeting Minutes

Corrected and amended minutes for the July 28, 1995, meeting were offered for approval by the Commission. Relating to Item D.1 on page 5, first paragraph, delete the sentence, "Sussman also noted that SB 494 (1995 Session) would not be usable by a district that had not submitted a petition under HB 3111." Add in its place as a correction, "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." Add after that sentence as an amendment to the minutes, "However, there is no requirement for a district to go through HB 3111 before they can utilize SB 494."

Commissioner Jewett moved approval of the corrected minutes; the motion was seconded by Commissioner Hansell. All voted in favor. Commissioner Frewing moved approval of the amended minutes; the motion was seconded by Commissioner Johnson. All voted in favor.

Commissioner Jewett moved for approval of the September 11-13 minutes; the motion was seconded by Commissioner Hansell. All voted in favor.

B. Commission Comments

Commissioner Hansell reported that he attended a Congressional hearing on water issues in Hermiston and a meeting on the technical merits of the John Day drawdown.

Commissioner Johnson attended the Department of Environmental Quality hearing on the Willamette River held in Eugene. She also visited a successful watershed restoration project on Knowles Creek on the Siuslaw.

Commissioner Frewing commended staff for planning the informal meeting session Thursday evening. Attendance was light but he thinks the effort is worthwhile and encouraged staff to try again. Referring to the Silver Falls Commission/Department retreat, Frewing said he thinks a major issue is that the Department is timid about asking for money to support programs. Frewing distributed a draft initiative that would create a Streamflow Protection Fund by assessing various fees.

Commissioner Bentz stated that the initiative being circulated by Commissioner Frewing is personally his own and does not reflect the Commission or Department.

Frewing reported he attended some meetings on the Portland Metropolitan Area Water Supply Plan. He is concerned about a big expense to gain potable water when much of the water use would be for watering lawns in the summer.

Commissioner Leonard invited those present to the Annual Coast Conference hosted by the Oregon Shores Conservation Coalition to be held in Newport November 18. The main topics will be water quality, water quantity, and growth management issues.

Leonard met with the Mid-Coast Watershed Council and has drafted a County Commission Order to formally recognize this new group.

Bentz appreciated the informal public meeting held Thursday evening and is curious to know what could make that type of setting more productive. He brought up the subject of holding Commission meetings throughout the state -- the cost to the Department and benefits derived. Pagel said that is a hard call to make. We have not generally had a good public turn out when we've been on the road. On the other hand, it has been helpful to be able to report to

the Legislature and to citizens that we are meeting throughout the state and not just sitting in Salem making decisions.

Commissioner Leonard said she is concerned about the cost of out-of-town meetings and suggested that the Commission meet outside of Salem only when there is a relevant issue in another area.

Commissioner Jewett said he supports the plan for more meetings on the road. It is helpful for the Commissioners to visit areas around the state and gives individuals an opportunity to be involved when local issues are discussed. Commissioner Hansell agreed.

Commissioner Jewett suggested Bend, Gold Beach, Portland, Cottage Grove or Eugene as possible meeting sites. Commissioner Frewing suggested Bandon and Hermiston. Commissioner Nelson said it is helpful to meet in Eastern Oregon now and then so that people don't always have to travel to Salem to deal with water-related issues.

Commissioner Johnson said the balance of meetings in Salem and around the state has been quite good.

C. Director's Report

Pagel reported that Ron Nelson was confirmed by the Senate as a member of the Water Resources Commission.

Pagel has hired Geoff Huntington as Deputy Director for the agency; he will be on the job December 1. Huntington is currently an attorney with the Department of Justice, Trial Division.

Federal reserved water right negotiations with the Confederated Tribes of the Warm Springs Reservations are continuing to move toward agreement. A formal session has been scheduled for Monday, November 20, in Portland.

Pagel mentioned the letter from Tom Paul which responds to recipients of the latest in a series of anonymous letters regarding the Wallowa Basin. She has been ignoring these letters but this particular letter made specific allegations that the Department has information and is refusing to take appropriate action. Pagel and Rudy Rosen, Director of the Department of Fish and Wildlife, met with staff in that area to convey concerns about anonymous letters and remind staff that they are always willing to listen to any of their concerns.

Pagel reported that natural resource agencies are really focusing on water and fish issues. The Governor is working toward a more pro-active state role to protect the coastal coho salmon and avoid a federal listing.

D. Request to Issue a Final Order Approving the Petition and Maps Submitted by Little Butte Irrigation Company under ORS 541.325 to .331 (HB 3111)

Adam Sussman, Northwest Region, presented this report. The Little Butte Irrigation Company is a corporation that was formed in 1911 for distributing water. The company now has 11 certificates which make up the water rights and seven points of diversion. The company is seeking in this petition to confirm the place of use of water rights for irrigation of approximately 683 acres.

Finding that the petition had met the requirements of statute and rule the Director issued a proposed order on March 6, 1995, which started a 120-day comment period.

There were three water users within the company that protested the petition. Working together, the protestants, the company and the department resolved the protests by proposing modifications to the petition. The protests were withdrawn.

WaterWatch submitted comments on the petition regarding remaining and overlapping rights and the definition of assessment. Direction from the Commission to staff on the issue of remaining and overlapping rights was applied in this case. Although the term "assessment" is not defined in statute or rule, staff have used a common-sense definition reflecting historical practice and experience. Assessment is considered to be any portion of the work, expenses or services needed to carry out the purpose of an irrigation district shared among its users. In this particular case, that type of in-kind service is ditch maintenance.

Commissioner Frewing asked if accurate records would be required of in-kind services offered. Sussman responded that some districts might keep meticulous records, and other districts would not. After going through this HB 3111 process, companies should be aware of the importance of records and have a good start toward accurate record-keeping for the future. The Department has no legal authority over districts' record-keeping. The Director does have the ability to request additional information if there are concerns.

Staff recommended that the Commission approve the petition and maps, and issue a final order.

Public Comment

Kimberley Priestley, WaterWatch, expressed concern about what qualifies as "assessment" and the need for more documentation from the district in order to make the no injury determination. Tape 2, mark 255.

Jan Boettcher, Oregon Water Resources Congress, commented on the distinction between an irrigation company and a district. Districts are held to very strict audit requirements by

independent auditors. HB 3111 allows a company formed prior to 1917 for the purpose of distributing water for irrigation to use this process even though it is not actually an irrigation district. Tape 2, mark 284.

Commissioner Jewett moved approval of the staff's recommendation to approve the petition, maps and issue a final order; Hansell seconded the motion. All voted in favor.

E. Information Report on Alternative Dispute Resolution Activities in the Croft Lake Basin

Al Cook, Southwest Region Manager, briefed the Commission on Department efforts to identify and resolve issues involving a number of water right applications pending in the New River drainage south of Bandon. Last summer the Department held a facilitated meeting in Coquille to define the issues; major stakeholders and the general public were invited and attendance was good. Al Cook has been meeting with individual growers in the area to discuss their pending applications. In September he met with local cranberry growers in Bandon to discuss SB 674 and other legislation that might affect them.

The Bureau of Reclamation has entered into an agreement with the cranberry growers to perform a surface water study to be completed late in 1996. This agreement resulted in the funding of four staff gages in the coastal area of Curry County. The cranberry growers have contracted with a consultant to do a ground water study.

Since April 1995 the number of applications in the area has grown from 93 to 110. Activity on these permit applications has been suspended until March 1, 1996, to further explore resolution on outstanding issues. These outstanding issues to be dealt with include negotiating instream water needs and acceptable permit conditions, establishing the boundaries of the area under discussion, determining seasons of use, and anadromous fish concerns on various streams.

Commissioner Johnson asked if the Economic Development Department (OEDD) might offer help to the cranberry growers in developing storage. Pagel responded that OEDD is participating with other state agencies in the interagency water strategy. The focus in this group is to make sure that the incentives in state law are moving forward, and that OEDD is aware of the priorities among the natural resource agencies.

Commissioner Leonard mentioned that the Department of Agriculture has money available to assist with mediation of agriculture-related issues.

Public Comment

Kimberley Priestley, WaterWatch, urged the Department to include Two Mile Creek in the New River negotiations. Tape 3, mark 72.

Priestley asked Pagel if coastal applications that already have proposed final orders issued are on hold. Pagel responded that they are on hold and the Department is focusing on other areas at this time.

Rick Kruger, Oregon Department of Fish and Wildlife, said he would be glad to check with his department on any concerns regarding Two Mile Creek and will send the information to Pagel. Tape 3, mark 166.

Commissioner Jewett said he would support whatever staff decide should be the area to include in this alternative dispute resolution process.

Chair Bentz asked for a report on this issue at the January meeting. This was an information report only; no action was requested of the Commission.

F. Information Report on Water Quality Issues

Russell Harding, Department of Environmental Quality (DEQ), spoke to the Commission on the close link between water quality and water quantity. Harding explained that DEQ operates under the federal Clean Water Act. With the use of charts he explained some of the administrative and regulatory tools that DEQ uses in protecting the state's water quality and answered Commissioners' questions.

G. Public Comment

Gayle Killam, Oregon Environmental Council, distributed written comments on aquifer storage and recovery rules. She briefly reviewed these comments and will bring them forward at the rulemaking hearing. Tape 4, mark 291.

Kimberley Priestley, WaterWatch, announced that on November 17, 1995, WaterWatch, Oregon Trout, Northwest Environmental Defense Center, National Wildlife Federation, and the Columbia Basin Institute filed a petition asking Pagel to reconsider her recent order extending the time to develop nine permits in the Umatilla basin. Tape 4, mark 390.

Roger Bachman, Oregon Trout, asked that the approval of the Boeing permits extension be reconsidered. The U.S. Geologic Survey has proposed to abandon five or six gages in Oregon and is asking for financial assistance; Bachman urged the Department and anyone else to help fund these gages if possible. Oregon Trout is working on a healthy fish stock

initiative. The organization is now identifying healthy trout stocks in Oregon and proposing to have them designated as heritage stocks. A technical team of scientists is establishing criteria which should be used to designate certain streams as refuges for these heritage fish stocks. Tape 4, mark 529.

H. Progress on Implementation of New Water Right Application Process

Rick Bastasch, Director's Office, and Steve Applegate, Water Rights and Adjudication, briefed the Commissioners in a three-part report which included production statistics, pending instream water right applications, and proposed administrative rules on water right application processing.

Applegate distributed a chart on the backlog monthly production target plan. On July 1, 1995, the Department had approximately 5,722 pending applications. As of November 9, 1995, the number was reduced to 4,905. The chart showed work completed and proposed to be completed on initial reviews, proposed final orders, and final orders.

Approximately 60 of the 97 protests filed with the Department were filed before SB 674 implementation. Staff are working on recommendations to the Director on the handling of these protests. Some will be recommended for contested case and will go to the hearings section by the end of November.

Applegate highlighted other projects of the water rights staff including issues raised in the ponds bill of last session, processing transfer applications, planning a December workshop for Certified Water Right Examiners, and developing a report to present to the Legislative Emergency Board in January on backlog elimination efforts.

Commissioner Hansell asked for the number of pending ponds applications. Applegate said there are approximately 2,600 or 2,700 exempt pond requests and 3,500 applications for permits under HB 2153 (1993 Session).

Martha Pagel offered an update on the status of how instream water right applications are being handled. SB 674 was adopted in June 1995 giving us the new process and pressure to move through the backlog of applications by October 1996. At the Commission retreat in early September staff received policy direction and raised questions on how to implement SB 674 to ensure good decision-making. The Natural Resource agency directors and Paula Burgess of the Governor's office held a retreat in September where they established priorities and an agenda which included developing an interagency water strategy.

In October the Governor held a local government summit to discuss ways to improve state agency coordination with local governments in the delivery of public services. In November the Governor's office discussed with agency heads the concept of a Coastal Salmon Steelhead

Initiative to conserve threatened and endangered fish species and avoid a listing under the Federal Endangered Species Act. This initiative must be kept in mind as staff consider applications under the 674 process, develop "weak stock" rules, work with watershed councils and participate in alternative dispute resolution efforts.

The Department of Fish and Wildlife (ODFW) has filed approximately 900 of the 959 pending instream water right applications. This puts a great burden on that department to be able to shepherd their applications through the process. We can expect objections to most of these instream applications which will likely lead to contested cases. WRD staff will be working with ODFW as an applicant to set up a schedule for priority areas and a strategic approach for dealing with all their applications.

Applegate said that 671 of the pending instream water right applications had a technical review issued in the old process. The next step would be a proposed final order. 288 other applications have not had an initial review yet.

Commissioner Jewett asked how staff have been working with the Department of Fish and Wildlife (ODFW). Rick Kruger, ODFW, said discussions have so far related to how applications can be modified based on the average natural flow; some were adjusted from optimum down to minimum. Tape 5, mark 460.

In the spring of 1996 staff hope to be developing the proposed final orders for the pending instream water right applications. The priority date of each application is what determines who has the senior right to the water. In evaluating a junior application taken out of order staff would first subtract the amount of water already requested in a more senior application.

Tom Byler, Jeannette Holman and Rick Bastasch briefed the Commissioners on rulemaking for the water rights application processing. The temporary rules now in effect will expire January 31, 1996. The purpose of the permanent rules will be to incorporate the new statutory language, clarify steps in the new process, and provide better organization of the rules.

Two rule advisory committee meetings have been held along with several interagency meetings. Three public hearings are scheduled for November in various areas of the state. The comment period will close December 8, 1995.

The major issues in the draft rules include the definition of "instream flow," application information requirements, public interest review, and standing to participate in contested cases and judicial review. Bastasch further explained these issues and responded to questions and comments by Commissioners.

Holman said staff hope to meet individually with each Commissioner in person or by phone regarding these draft rules after the comment period closes. That will allow an opportunity to discuss the rules in detail and address individual concerns.

Public Comment

Kimberley Priestley, WaterWatch, commented on policy issues regarding changes that took place between the draft that went to the advisory committee and the draft that came out for hearing. She urged the Commission to look closely at the differences, especially section 310-040 which pertains to the application requirements and the sections pertaining to public interest. Tape 6, mark 508.

Richard Kruger, Oregon Department of Fish and Wildlife (ODFW), said he is pleased at the way the Department staff are closely working with ODFW staff in the processing of applications. He and Roy Ellicker may be the staff assigned to work on the ODFW applications. Tape 6, mark 599.

Roger Bachman, Oregon Trout, said he is very impressed with the staff work on these rules. The problem has been the lack of time to argue all the proposed changes. Bachman also expressed concern about the limited standing. He would need to file for standing on every application because there might be a protest filed; this would get very expensive. Tape 7, mark 12.

Commissioner Bentz suggested that perhaps the agency could establish some type of policy which would allow the request for standing to be withdrawn within a certain period of time and the fee returned.

Jan Boettcher, Oregon Water Resources Congress, agreed with WaterWatch that there is a substantial change between the previous draft and this one because the first draft did not meet the legislative intent. Tape 6, mark 74.

There being no further business, the meeting was adjourned.



Diane Reynolds
Commission Assistant