

Oregon Water Resources Commission Meeting
June 28, 1996
Ashland, Oregon

Members

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

Staff

Martha Pagel
Geoff Huntington
Cindy Smith
Steve Sanders
Mike McCord
Tom Kline
Larry Nunn
Weston Becker
Steve Applegate
Tom Byler
Barry Norris
Al Cook
Ben Bishop
Sue DeHaas
Gary Ball

Others

Kathleen Moss
Phil Matson
Don Huberty
Dennis Chamberlin
Alice Kilham
Myra Erwin
Kip Lombard
Jeff Curtis
Val Swanson
W. D. Kennedy
Kristin Walp
Barbara Brown
Larry Zellen
Christine Allen
Ron Roth
Francie Hansell

Agenda reports and other 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. Consent Agenda

The minutes from the March and May 1996 Commission meetings and a request for authorization to use startcard fees to purchase two global positioning system devices were presented for approval. Frewing moved approval of the minutes and authorization request; motion was seconded by Jewett. All approved.

B. Commission Comments

Ron Nelson said he appreciated participating in the interviews for the resource management division administrator. He also attended the Menucha Retreat and found it most helpful.

Anita Johnson reported on the Governor's Watershed Enhancement Board grants. \$700,000 was distributed for 37 watershed restoration projects. Johnson expressed concern that out of 75 project proposals received only 15 of these were for educational projects. She asked Commissioners to encourage citizens from their area to apply for GWEB grants for educational projects since education is such an important role of GWEB.

John Frewing agreed with Nelson that the Menucha Retreat was very helpful to him, especially the discussions on restoring instream flows. He asked how Watershed Councils could be encouraged to work on efficiency standards and guides. Perhaps a conference at Menucha with Watershed Council members would be an opportunity to discuss this and other issues.

Pagel agreed that holding a workshop at Menuca would be a good way to begin the discussion of efficiency with Watershed Councils.

Cliff Bentz reminded everyone that this was his last meeting as a member of the Commission. He thanked staff for their patience in working with the Commission on technical issues that are often very complicated. He also thanked the Commission members for working together in resolving some very difficult issues. He expressed appreciation to the interest groups for their hard work and input to the Commission and Department staff.

C. Director's Report

Martha Pagel introduced Ben Bishop, Field Water Right Technician, from the Bend office. Ben was invited to the Commission meeting as a reward for his hard work and valuable contributions as a Department employee.

Pagel reviewed the itinerary of the Thursday morning tour and the issues discussed at the Thursday afternoon work session.

Since the last meeting Pagel spoke on Oregon's Watershed Program at an environmental conference at the Smithsonian. She participated in a field tour dealing with monitoring and enforcement in the Hells Canyon area with Paula Burgess of the Governor's Office; Rudy Rosen, Director of the Department of Fish and Wildlife; and Captain Lindsey Ball, Oregon State Police.

Pagel traveled to La Grande to meet with the Oregon Board of Agriculture to talk with members about the activities of the Water Resources Department and Commission. She met with the Klamath Tribe in Klamath Falls regarding the Klamath Basin adjudication and their treaty water rights.

Pagel spent a week at the U.S. Army War College participating in a training program with other invited civilians. This training for military personnel included an exchange of ideas and concerns from civilians from various walks of life. Pagel challenged participants on some management/resource issues regarding land managed by the Department of Defense.

Pagel said that the Menucha Conference was a positive way to bring people together to brainstorm issues such as restoring instream flows.

Geoff Huntington, Deputy Director, led a discussion on rulemaking which would authorize the Department representation in agency contested case hearings. The Department holds contested case hearings in a number of different areas where the Department has proposed to take some action, such as civil penalty assessments, protested water use applications, protested conversions of minimum perennial streamflows to instream water rights, and requests for reservations of water for future economic development. A Commission teleconference has been scheduled for the morning of July 22 for a decision on this rulemaking.

D. Proposed Amendments to Division 33 Rules Regarding Sensitive, Threatened and Endangered Fish Species

Tom Kline and Mike McCord, Resource Management Division, presented these rule amendments to the Commission. Kline thanked the members of the rules advisory committee for their hard work and time commitment.

The issue of declining fish populations presents the Department with a difficult problem. On one side declining species raise significant public policy issues; often decisions made in this arena have profound and wide spread implications. The department is also faced with a mandate to make timely decisions on permit applications. In making those decisions, very often the information necessary is not available or is difficult to obtain. The approach taken in these rules was to establish some general criteria and a focused review process. These rules are expected to be an integral part of a list of actions the Governor will present to the National Marine Fisheries Service later this year.

Another issue that came up during the rulemaking was the relationship of the Division 33 rules to the Senate Bill 674 process. Kline handed out copies of a chart showing how this will work. The notification of the team and interagency review is planned to occur between the release of the initial review of the application and the close of the public comment period. Whether and

with what restrictions the application continues through the process will depend upon the recommendation of the interagency review team.

McCord reviewed the changes in the proposed rules and responded to questions and comments by Commissioners. He explained the four-step process that would be used in the final decision to condition, deny or approve an application. The first step is to use a map developed in cooperation with Oregon Department of Fish and Wildlife (ODFW) to conduct an initial screening of applications in areas where there may be sensitive, threatened or endangered fish runs of concern. The second step is for the interagency team to determine if the proposed use will result in "loss" or "net loss" of the "essential habitat" of a sensitive or listed fish species. The third step is for the interagency team to make a recommendation to the department to either condition or deny the application to protect fish habitat. In step four the department will make its findings in the proposed final order based on the recommendations of the interagency team.

Public Comment

Roger Bachman, Oregon Trout, encouraged the Commission to delay these rules. Bachman recommended changing 690-33-340(2)(b) to read, "A specific basin program has been amended sufficiently to protect sensitive, threatened or endangered fish species and allows the proposed use; or". (tape 5, mark 601)

Gail Achterman, representing the Oregon Water Resources Congress, said the Congress supports the efforts of the Commission and Department to participate in the anadromous fish recovery effort and adopt rules that are designed to protect the habitat of sensitive species. But there is concern that the proposed rules impose stricter protection standards under Oregon's water laws than exist under either the state or federal Endangered Species Act. The rules as drafted do not clearly correlate the proposed rules to the rules in Division 310 regarding how applications are processed. There are serious drafting problems in the proposed rules. Achterman urged the Commission to delay rule adoption so that better language could be developed. (tape 6, mark 13)

Jeff Curtis, WaterWatch, complimented staff on their work on these rules. Curtis disagreed with Achterman's concern about these rules being stricter than the standards in the state or federal Endangered Species Act. These rules would apply to water right applications, not existing water rights. If the federal Endangered Species Act comes into play, then there would be a potential for affects on existing water rights. Curtis urged the Commission to adopt these rules. (tape 6, mark 69)

Commissioner Hansell asked Pagel for her opinion on these draft rules. Pagel said is it important for the Commission to take action at this meeting if members are satisfied that this is an adequate product. Pagel said she believes this is an adequate product -- these rules have been underway for quite some time.

McCord reviewed the suggested corrections on the June 6, 1996, draft of Chapter 690, Division 33 rules. These corrections were listed on the Attachment to the Agenda Item D supplemental report, and are listed below, as well as additional corrections discussed at this meeting.

690-33-000(3) should be retained in its entirety.

690-33-330(2)(a) should read, "In areas of the state outside the Columbia Basin where threatened and endangered fish species are located, no loss of essential habitat as defined in OAR 635-415-005(4)."

690-33-330(2)(b) should read, "In all areas of the state where sensitive fish species are located, no net loss of essential habitat as defined in OAR 635-415-005(4)."

690-33-340(a)(2) should read, "Consistent with 690-33-340(1), the Department shall follow the recommendations of the interagency review team in determining whether the presumption is established pursuant to OAR 690-310-110 or 690-310-130. In completing the remainder of the public interest determination under OAR 690-310-120 or 690-310-140, the Department shall follow the recommendations of the interagency review team unless it finds:"

690-33-340(2)(A) delete "The proposed use is of statewide significance" and insert "The proposed use provides significant basin wide public benefits beyond the benefits to the applicant;"

690-33-340(2)(b) delete ";or" from the end of the sentence and add a period.

690-33-340(2)(b) delete "to address management objectives for" and insert "significantly to protect."

Commissioner Jewett moved adoption of the rules with Bachman's proposed language and corrections listed in the staff's Supplemental Report, including the two parallel cites to the additional OAR's as mentioned by staff, and the amendment to Section 340(2)(a)(A). The motion was seconded by Hansell. All approved.

E. Proposed Amendments to Transfer Rules.

Tom Byler, Larry Nunn, and Steve Applegate led the discussion on this report regarding proposed rule amendments. Byler reviewed the history of this rulemaking which opened in February 1996. There were two public hearings in Salem. After reviewing the public comments, staff decided to reopen the public comment period. Following the reopening of the public

comment period two rule advisory committee meetings were held. A status report was presented to the Commission at their May 3 meeting. The second public comment period closed in mid-May.

Byler pointed out a typo on page 3, line 31, Division 15, Attachment 1. The reference should be subsection (4)(b) rather than (5)(b).

Byler said all the bold face type on pages 18, 19, and 20, Division 15, Attachment 1, should have been underlined as new proposed language. On page 2, line 10, Division 15, Attachment 1, the word "and" should be "an." On page 14, line 19, Division 15, Attachment 1, the word "sub" should be "subsection."

Commissioner Frewing expressed concern about the number of transfers and the workability of the process. Larry Nunn, transfer coordinator, said there are approximately 714 transfers that are yet without an order. Approximately 400 of these transfers have not been reviewed. Field staff are helping to process point of diversion transfers. About 200 transfer applications are received each year.

Commissioner Jewett referred to Steve Sanders' June 26 letter regarding injury determination. The proposed rules do not seem to reflect the analysis in the first paragraph of page three of the letter. Frewing pointed to proposed rule 690-15-050(1)(b). Sanders agreed that this could be confusing. The "water use" in subsection (b) could be referring either to the legal category of use or the actual exercise of the right.

Sanders recommended changing 690-15-050(1)(b) to read, "The water right to be transferred would be enlarged." Sanders also recommended changing 690-15-050(2) to read, "An injury to an existing water right or an enlargement of the water right to be transferred shall be determined to result from, but is not limited to, the following:".

Applegate suggested changing 690-15-050(2)(b) to read, "A diversion of more water than is specified as a rate of flow or duty of water per acre for the subject water right; or".

Public Comment

Jeff Curtis, WaterWatch, commented on the June 26, 1996, letter from Steve Sanders. This will allow a transfer of an amount of water that may not have been used for decades. There is nothing in the rules requiring the transfer applicant to show he or she is capable of using the full amount of the water right. Curtis brought to the staff's attention a typo noticed by Roger Bachman -- on line 23, page 19 of Attachment 1, Division 15 -- "affect" should be changed to "effect." (tape 2, mark 237)

Pagel commented that the letter of advice from Sanders dated June 26 is not a change in practice. It clarifies that the way the Department has looked at the nature of the underlying water right for many years does, in fact, apply to the transfer. In every instance there is a fact-intensive review of whether or not injury occurs.

Larry Zellen spoke on a point of diversion transfer. Any unused water was to remain instream for fish and wildlife habitat. The transfer took two years to accomplish and the services required by the Certified Water Right Examiner were very expensive. Zellen asked if any of the paper work could be cut back with transfers. (tape 2, mark 451)

Pagel said that legislation could be considered that would allow the Department to expedite transfer applications that would help promote watershed health projects. There has been a backlog of transfer applications but staff are working to get it under control and prevent this from happening in the future.

Kip Lombard, Oregon Water Resources Congress (OWRC), and a member of the rules advisory committee, commented on Attachment 2, Division 21, page 4, lines 17 through 23. This language relates to the ability of a district after it has filed its initial application for temporary transfer of acreage to come in prior to June 1 of the first year of the temporary transfer and amend its notice. This may not work well for districts such as the Tualatin Valley Irrigation District that has farmers contracting with food processors to grow many acres of row crops. However, the rules are probably workable for most of the districts. Also, on page 5 of the final proposed rules, OWRC had brought up with the Department the matter of how to deal with those lands currently involved in the 3111 remapping process. The final draft says that a transfer of lands identified in the 3111 process will not be allowed until the final order approving the 3111 map for the district has been approved. There are districts waiting for the 3111 processing which means that some of those lands identified cannot be temporarily transferred until that 3111 map has been concluded. (tape 3, mark 8)

Frewing moved that the following language be added to 690-15-060 as a new subsection 10 and renumber accordingly, "A general description of the current water delivery system including capacity." The motion was seconded by Leonard. Nelson said that pumps and capacities can be changed very easily and in some cases may be changed from year to year. The motion passed 6-1 with Nelson voting no.

Jewett moved to approve the rule amendments as discussed. The motion was seconded by Hansell and all voted in favor.

Those amendments include:

On Page 2, line 10, Division 15, Attachment 1, delete the word "and" and insert the word "an."
On Page 3, line 31, Division 15, Attachment 1, change the reference subsection (5)(b) to subsection (4)(b). On pages 18, 19 and 20, Division 15, Attachment 1, bold face language should be underlined. On page 6, lines 21, 22, and 27, Division 15, Attachment 1, delete the word "use" and insert the word "right." The Commission also directed staff to change the word "use" to "right" wherever appropriate. On page 14, line 19, Division 15, Attachment 1, delete the word "sub" and insert the word "subsection." On page 19, line 23, Division 15, Attachment 1, delete "affect" and insert "effect." On page 7, Division 15, Attachment 1, add a new subsection 10 to read, "A general description of the current water delivery system including capacity" and renumber as necessary.

F. Public Comment

Ron Roth, Ashland, offered strong support for instream water rights for fish and wildlife. How this is to be accomplished is the challenge. The Rogue Valley water delivery system for agriculture is based on old technology and water is wasted. He suggested that the state make a commitment to upgrading water delivery systems. The water that is saved would go to instream use. The state of Montana could serve as a model for Oregon. (tape 3, mark 471)

Myra Erwin spoke in support of protection of instream water rights. She asked to have a notice in local newspapers when the Commission is meeting in the area. (tape 3, mark 561)

Don Huberty, Grants Pass, said he received a mailing from the Department indicating that fish runs are down -- from what he's told the Rogue River has lots of fish. If this is inaccurate information, it should be corrected. He has had personal experience with contested hearings and encouraged the Commissioners to pay attention to how the Attorney General's office defends the actions of the Commission. (end of tape 3)

Valdomar Swanson, Sierra Club, asked the Commission to protect and enhance instream flows, and encourage conservation. (tape 4, mark 1)

Barbara Bean, Ashland, spoke in support of the instream water needs requested by the Department of Fish and Wildlife. The balance has been tipped in favor of out-of-stream water rights over the years. Instream rights should not be threatened by human consumption or livestock use. Flows should be measured at both ends of streams. (tape 4, mark 18)

Christine Allen, Evans Creek Watershed Council, spoke on Larry Zellan's project and point of diversion. Her organization wrote the grant through the Department and administered it. Perhaps the services of a Certified Water Rights Examiner weren't really necessary since it had been surveyed earlier. These people are willing to give water back to the state but they're having to pay a lot to do so. If the procedure could be simplified and made less expensive more people would be willing to help out. (tape 4, mark 68)

Commissioner Frewing asked if staff could send a memo to the Commission summarizing the current status and planned action on that subject.

Roger Bachman, Oregon Trout, said he appreciated the number of people who spoke in favor of keeping water in streams. He asked folks to keep in mind that the Department and the Commission are limited in what they can do by their elected officials in the legislature. Bachman thanked Cliff Bentz for his good work on the Commission. (tape 4, mark 108)

Jeff Curtis, WaterWatch, also expressed appreciation for Chair Bentz. WaterWatch has protested a number of the instream water right applications in the Rogue Basin mainly on the basis that all of the proposed final orders contain an exception for all human and livestock uses into the future. This exception is not being included in consumptive uses. WaterWatch proposes to place a cumulative cap on human and livestock uses. (tape 4, mark 134)

Gail Achterman, representing Oregon Water Resources Congress, spoke on the Water Development Loan Program. There is a push statewide to do improved fish screening on irrigation facilities and for irrigation districts to be pursuing conservation projects. Financing is an issue. The voters of the state amended the state constitution a number of years ago to create the Water Development Loan Fund (WDLF) that allows state bonds to be sold which reduces the transaction costs associated with a bond sale and allows the irrigation districts the benefit of essentially the state's credit to get a lower interest rate. North Unit Irrigation District is hoping to get a major conservation project underway this October. There is a very narrow time period in which action needs to be taken to use the WDLF -- the Emergency Board meets in September and must authorize the expenditure funds for costs of the bond sale. The timing is critically important for this project to begin on schedule. (tape 4, mark 166)

Pagel said she appreciates the help Boettcher and Achterman have offered on the Water Development Loan Fund program. She expressed concern as to whether the Department is actually set up to administer a bond program -- this is not the expertise that we now have. A team is being established and advice is being gathered from the Treasurer's office and the Department of Administrative Services to create a structure with experienced administrative oversight to protect the agency from getting into trouble. We most definitely want to proceed and make this a viable program.

G. Informational Report on Department Participation in Governor's Coastal Salmon Restoration Initiative (CSRI)

Geoff Huntington, Deputy Director, introduced Jay Nicholas, Department of Fish and Wildlife, who gave this report and responded to Commissioners' questions. Nicholas is the lead for the CSRI Science Team.

Twenty scientists are working on this team. Science cannot give the true prescription for what salmon need. What science can do is examine how many fish are needed in a population so they don't become extinct. However, there are too many variables to measure to agree on a single answer. The ocean environment changes a lot. For example, some years ten percent of the young fish going out to the ocean survive, other years less than one percent survive. This has a great affect on the fish population.

At the turn of the century, coast wide, there were approximately one to two million coho salmon a year. In the last several years, we've had 50,000 fish. Clearly, we don't have nearly as many salmon as we once had. Establishing benchmarks for coho salmon on the Oregon coast can't really be established by science. What science can do is give the public a fairly good idea of the base level without being concerned that the species will become extinct. The Science Team will propose a level for policy makers to consider adopting.

The Science Team is drawing maps within each river basin identifying the locations of most of the salmon. This is difficult because of lack of data and lack of money to support the monitoring and research.

Recovery of the coho will depend on what kind of compromises people are willing to make. Watershed scale plans need to be developed with sound technical advice from biologists, road masters, foresters, agriculturists -- and active participation and ownership by the landowners. It will take all the state agencies working together with the federal and local government to turn things around and help people realize that what they are doing may actually be affecting fish.

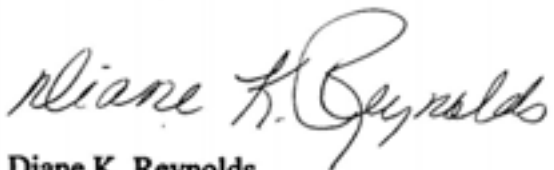
H. Update on the Elimination of Water Right Applications Backlog

Steve Applegate, Acting Administrator for the Water Rights Division, said that with four months remaining, he is confident that the 5,722 backlog will be eliminated by October 31. The count now stands at 2,630. Staff have the additional goal of completing all applications received prior to February 15, 1996 -- that backlog number is currently 2,880. Essentially all the initial reviews have been completed. The members of the initial review team are now working on either final or proposed orders.

Currently the Department has approximately 830 applications for out-of-stream use and approximately 500 applications for instream use that have not been issued a proposed final order.

Staff have received over 300 protests since July 1995. Of this number, approximately 100 have been resolved. Approximately 170 are still active protests that have not yet been scheduled for hearing. Thirty-two contested case hearings have been scheduled involving approximately 40 applications.

There being no further business, the meeting was adjourned.

A handwritten signature in cursive script that reads "Diane K. Reynolds". The signature is written in dark ink and is positioned above the printed name and title.

Diane K. Reynolds
Commission Assistant