

Oregon Water Resources Commission Meeting
August 23, 1996
Newport, Oregon

Members

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

Staff

Martha Pagel
Geoff Huntington
Steve Sanders
Diane Reynolds
Steve Applegate
Tom Kline
Tom Paul
Weston Becker
Adam Sussman
Fred Lissner
Dave Jarrett
Sandy Cairns

Others

Kimberley Priestley
Jack Fishner
Mollie Chaudet
Jan Boettcher
Robert Van Creveld
Roger Bachman
Jerry Schmidt
Onno Husing
Paul Berg
Annie Graham
Steve Brutscher

A. Commission Meeting Minutes

The minutes of the June 1996 meeting were offered to the Commission for their consideration. Johnson moved for acceptance of the minutes; seconded by Leonard. All approved.

B. Commission Comments

Hansell mentioned the upcoming public hearings on the proposed rules amending the Hood River, John Day, and Umatilla Basin programs to reserve unappropriated water.

Hansell and the other Commissioners all agreed that Anita Johnson would be greatly missed on the Commission. This was Johnson's last meeting after serving five years as a Commissioner.

Johnson encouraged everyone to attend the November 14 and 15, 1996, Governor's Watershed Enhancement Board biennial conference, "Who Will Catch the Rain" to be held in Seaside. She thanked everyone for adding to her positive experience as a Commissioner.

Jewett added that not only will we all miss Anita Johnson, but also Steve Applegate who is leaving his position with the Department.

C. Director's Report

Pagel introduced Sandy Cairns, Assistant Water Master, visiting from the Pendleton office. Cairns was attending the Commission meeting as a reward for her excellent work and value as a staff member.

The signing ceremony for the Confederated Tribes of the Warm Springs Reservation treaty water rights agreement is scheduled for September 16 in Kah-Nee-Ta.

Pagel asked about changing the date of the October Commission meeting in Bend; however, new dates did not work for everyone so the date of October 17 and 18 remains.

Pagel thanked Steve Applegate and Anita Johnson for their invaluable contributions to the Commission and Department.

Steve Sanders, Assistant Attorney General, reported to the Commission on legal activities. In the *Clausen v. Water Resource Department* case the Court of Appeals affirmed without an opinion the suspension of Mr. Klaussen's well drilling license. In the *Teel v. Water Resources Department* case the Oregon Supreme Court affirmed the Court of Appeals. In both cases, the court supported the actions of the Department staff.

D. Update on the Elimination of Water Right Applications Backlog

Steve Applegate, Acting Administrator for the Water Rights Division, provided this update for the Commission. The backlog number as of August 23, 1996, was 1,858 – applications yet to receive a final order or have a contested case scheduled. Pagel recently signed approximately 120 final certificates on instream water rights, and is due to sign a similar amount within the week.

About 400 protests have been received since July 1995, of which 155 have yet to be resolved or scheduled for a contested case.

E. Scenic Waterways Rules for Department of Parks and Recreation

Mike McCord, Resource Management Division, presented these rules for the Commission's consideration. Mollie Chaudet, U.S. Forest Service, and Steve Brutscher, Oregon Parks and Recreation Department, were present at the meeting to offer comments on the rules and respond to Commissioners' questions. Ms. Chaudet invited the Commissioners to attend the September 26 signing ceremony for the Upper Deschutes River Plan.

Nelson moved to concur with the rules; seconded by Johnson. All voted approval.

F. Willamette Basin Exception

Adam Sussman, Water Rights Division, presented this request to the Commission and reviewed the exception process in ORS 536.295. This exemption request came from the Kingswood Heights Water Cooperative, a rural subdivision in Clackamas County consisting of 44 homes and two future buildable lots. About 18 months ago the Cooperative was informed that a water right is necessary; when the subdivision was built the developer had no idea this was so. The subdivision is located in the Damascus Ground Water Limited Area. There is no commercial irrigation occurring within the subdivision -- according to the applicant, the total water use does not exceed 15,000 gallons per day. The water use request is for approximately 8,000 gallons per day for the irrigation of lawn and garden. Sussman has worked with the applicant to make sure all possible alternatives for access to water have been explored.

Frewing asked about the definition of "hardship." Pagel responded that staff have been working from the precedent developing as the Commission has considered basin exception requests -- to define the word "hardship" the Department would have to conduct formal rulemaking. Staff have been focusing on hardship from the standpoint of availability of water and the logistics involved. Pagel said the issue today is to bridge the current situation to a long-term solution, and make the Cooperative legal in the meantime. If a permit is eventually issued on this water use request, it is limited to five years -- during this period the Cooperative will be needing to look at longer-term solutions.

Public Comment

Roger Bachman, Oregon Trout, did not agree that this was an extreme hardship. Trucking the water would not seem to him too expensive for the home owners. (tape 2, mark 93)

Frewing suggested that the applicant be encouraged to meet efficiency standards.

Johnson moved approval of the request for this basin program exception and acceptance of application G-14097; seconded by Leonard. All approved.

G. Public Comment

Onno Husing, Director of the Oregon Coastal Zone Management Association (OCZMA), greeted the Commissioners and welcomed them to Newport. OCZMA is a voluntary organization of 42 units of local government on the coast -- counties, cities, port districts, and soil and water conservation districts. OCZMA is very active in the legislature working with the coastal caucus. Husing told the Commissioners that OCZMA is available to work with them on problems that will be emerging regarding water availability on the coast. His organization has been actively involved with watershed councils and salmon issues -- it has been inspiring to see what a little federal money has done to get watershed councils going and help meet other local needs. (tape 4, mark 122)

H. Western Water Policy Review Advisory Commission

Janet Neuman, a member of the Western Water Policy Review Advisory Commission and professor at Northwestern School of Law, provided this informational report and responded to questions and comments. She encouraged all those present to follow the activities of the Advisory Commission and become involved in upcoming studies. This Commission was established by Congress in 1992. There are ten presidential appointees on this Commission plus ten voting "ex-officio" members. The Commission is to review the water problems of the 19 Western states, concentrating on water supply needs and conservation; review rural problems; review augmentation, storage and conservation possibilities; examine current and proposed federal programs and make recommendations for the next 20 years; review the history, use and effectiveness of various institutional arrangements to address water problems; and review federalism issues -- the federal role in Western water. With limited staff, less than one million dollars appropriated for a two-year process, the Commission will attempt to make progress on their assigned legal mandates. Two Commission meetings have been held -- the next one will be in November in San Diego. Nine regional river basin workshops were held in March and April throughout several states. Input from local participants attending these workshops was incorporated into a work plan which Neuman included in her handout.

A series of basin studies are now being commissioned on the Colorado, the Rio Grande, the Columbia, the Sacramento and San Joaquin rivers, the upper Platte, and the Truckee and Carson Rivers. Investigators will soon be chosen for each study -- they will work closely with local water leaders.

I. Thatcher Loen Contested Case Exception

Steve Elmore, Hearings Officer, offered the Commission comments on exceptions to the Proposed Order filed by Attorney Thomas Wettlaufer. The three major points on the exceptions are: the violations are not moderate and should be found to be minor; the repeat factor was

incorrectly applied; and the facts and circumstances of this particular case should cause the Commission to lower the penalty. Regarding the argument that the violations are not moderate, Elmore said that the evidence offered by the Water Master was that Mr. Loen was applying water both to permitted and to unpermitted lands. The Tualatin is a severely water quality limited basin -- any use could cause moderate harm. Elmore found potential for harm in this unpermitted use.

Regarding the repeat factor, the Water Resources Commission rule sets forth a mathematical formula and steps that a hearings officer has to follow. There is little discretion in addressing a penalty case. There are rule-based considerations that the Director can then examine to determine whether the penalty should be adjusted. Elmore found no basis for a penalty adjustment on the facts that he found regarding Mr. Loen's actions. It would be up to the Commission to reduce or raise the penalty after the penalty has been calculated.

Attorney Tom Wettlaufer, representing Loen, referred to the three exceptions he raised. The first exception is that the Proposed Order improperly categorizes the violation as moderate as opposed to minor. The regulations state that a moderate violation is defined as when substantial harm is not immediate or imminent but could occur if left uncorrected. The regulation defines a minor violation as one where no substantial harm is apparent. In the proposed order Mr. Elmore made a blanket ruling that any violation or any illegal use of water in the Tualatin Valley Basin could cause substantial harm. Jerry Rodgers testified that the damage that could have occurred as a result of Mr. Loen's use was not measurable. Rodgers also stated that if other individuals in the same area utilized water illegally, the cumulative affect could cause substantial harm. That is not the standard. No evidence was presented that showed that substantial harm could occur if Mr. Loen's use continued. Wettlaufer said that he had no opportunity at the contested case hearing to respond to the escalating repeat factor which is in the Proposed Order. At the hearing a repeat factor of two was discussed. Mr. Loen had received a notice of previous illegal uses but did not receive any notice of the seven violations being considered at the hearing until receiving the final notice of violation and assessment of civil penalty. If the Department would have processed Mr. Loen's applications for water use earlier, he would not be in this situation.

Upon Jewett's request Elmore commented on the adequacy in noticing Loen for each repeat violation. Elmore referred to Oregon Administrative Rule 692-60-055 which says a repeat violation is any similar violation for which the person or agency responsible has received a notice of violation within the last three years. A similar violation is a violation for which the person has previously received a notice of violation. Mr. Loen received a notice of violation in June 1994 and another in October 1994, within the three-year period. He violated the statute seven times during the period relevant to this Order, and therefore committed seven repeat violations.

Dave Jarrett, Acting Enforcement Manager, said the transfer application that Mr. Loen had submitted was rejected prior to the contested case hearing. There are still two pending applications submitted by Loen awaiting land use sign off from Washington County.

Johnson moved acceptance of the staff recommendation to deny the exceptions to the Proposed Order and issue an order assessing the civil penalty as proposed by the hearings officer based on the contested case record; seconded by Frewing. All voted in favor.

J. Petition for Rulemaking Regarding Well Construction Standards in the Blodgett Area

Doug Woodcock and Fred Lissner, Field and Technical Services Division, presented this request. Ground water is difficult to find in the Blodgett area. Mr. Fishner attributes failure of wells in this area to overuse of the resource -- this could be a cause, but it also could be due to the particular rock formation's inability to transmit or store large quantities of water. Fractured rock formations are complex and require intensive detailed field investigations to understand even the basics of the ground water flow system. No such work has been undertaken in the Blodgett area, and so the area and its ground water problems are undefined.

Mr. Fishner would like to have all future wells constructed to be 500 feet apart or as far apart as possible, and cased and sealed to an elevation depth of 680 feet above mean sea level. This would presume that wells drilled to a lower area would not have an impact on the shallower wells -- staff are not convinced that this is the case in this area.

Pagel suggested that the Commission refer this issue of pocket problem areas to the Ground Water Advisory Committee (GWAC) and ask for a follow-up report. With this information the staff would be better equipped to develop a proposed rule if a rule is necessary.

Tom Paul, Northwest Region Manager, said that to regulate between water users, staff would need to know that the user being regulated is impacting the injured user. In this situation, it would be very difficult to make that distinction.

Public Comment

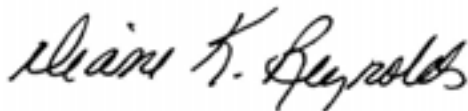
Jack Fishner encouraged the Commission to consider his request -- Benton County will not take action regarding ground water problems. Fishner has filed an appeal with the Land Use Board of Appeals. He explained the map attached to his petition showing potential and existing wells. Fishner encouraged the Commission to consider designating well spacing in the Blodgett area and responded to their questions. He urged the Commission to initiate temporary rulemaking procedures. There is no alternative water source. He also suggested changing the word "appropriations" to "dwellings" in his proposed rule 690-200-028(1). (tape 2, mark 408)

Jerry Schmidt, Oregon Ground Water Association, agreed with the petitioner that bringing this issue before the Commission is the right avenue. However, there doesn't appear that sufficient information is available at this point. Schmidt agreed that the issue of well spacing should be brought to GWAC their consideration. (tape 3, mark 20)

Steve Sanders asked Mr. Fishner if he would agree that by referring to GWAC for advice, the Commission would be taking action on his petition. Mr. Fishner said he would agree to that.

Frewing moved that this matter be tabled and the specific and Oregon-wide issue be referred to the Ground Water Advisory Committee for a follow-up report to the Commission by the end of the year; seconded by Leonard. All voted in favor.

There being no further business the meeting was adjourned.



Diane K. Reynolds
Commission Assistant