

Oregon Water Resources Commission Meeting  
October 17, 1996  
Bend, Oregon

Members

Nancy Leonard  
Mike Jewett  
John Frewing  
Tyler Hansell  
Ron Nelson

Staff

Martha Pagel  
Geoff Huntington  
Steve Sanders  
Diane Reynolds  
Bob Main  
Dick Bailey  
Tom Byler  
Dwight French  
Charlotte Haynes  
Doug Parrow  
Bob Rice  
Kimberly Grigsby  
Sharon Steckler  
Barbara Drabell

Others

Sen. Neil Bryant  
Ralph McNulty  
Jan Boettcher  
Pat Zwick  
Kimberley Priestley  
Jerry Schmidt  
Ves Garner  
Roger Bachman  
Marc Liverman  
Gayle Killam  
Jerry Franke  
Steve Applegate  
Dave Anderson  
John Wynn  
Leo Busch

**A.1 Commission Meeting Minutes**

The minutes of the July 1996 teleconference and the August 1996 meeting were offered to the Commission for their consideration. Hansell moved for acceptance of the minutes; seconded by Jewett. All approved.

**A.2 Informational Report on Instream Water Rights**

Barry Norris, Administrator for Field and Technical Services Division, reviewed this report with the Commission and responded to their questions and comments.

Frewing asked if the Department is making progress toward meeting the percentage of instream flows suggested in the Oregon Benchmarks. Norris will check on this and get back to him.

Nelson asked if any of the gage stations are tied in with telemetry systems. Norris responded that several of them are currently tied in with telemetry and staff are trying to increase the numbers.

#### **B. Commission Comments**

Hansell reported that he chaired a public hearing in Pendleton August 28 on proposed basin rulemaking and will be chairing another hearing on the same rulemaking in LaGrande on October 21 and Baker City the following day.

Nelson said he was invited by staff to chair an August 27 public hearing on rulemaking to amend the John Day Basin Program.

Jewett attended the first meeting of the Water Quality/Quantity Task Force in September.

Frewing chaired the August basin program rulemaking hearing in Hood River and will be attending the Ontario and Jordan Valley hearings.

Leonard mentioned the good attendance at the Salmon Restoration Initiative meeting in Newport.

#### **C. Director's Report**

Pagel asked Bob Main to introduce Barbara Drabell and Sharon Steckler of the Bend regional office. Pagel introduced Charlotte Haynes, newly hired administrator for the Resource Management Division; and Dick Bailey, newly hired administrator for the Water Rights/Adjudication Division.

Pagel reported that negotiations with the Confederated Tribes of the Warm Springs Reservation have been temporarily delayed. The U.S. Department of Justice had some last-minute concerns and questions that must be addressed. At about the same time, federal legislation was proposed which would nullify the Tribes' 1865 treaty. This legislation did not pass. The Governor is committed to work with the Tribes and state agencies to resolve questions and move forward with similar legislation.

There have been meetings with the Klamath Tribes regarding quantification of their tribal rights and how that fits into the process of basin adjudication. The Klamath Compact Commission is offering to facilitate a basin-wide meeting to consider ways the water can be better managed.

Pagel and department staff have attended several of the public meetings on the Governor's Coastal Salmon Restoration Initiative. These meetings were held to kick off the public comment period of the draft plan.

A Water Quality/Quantity Task Force has been created as a result of SB 674 administrative rulemaking. This group will offer recommendations to the Commission on how allocation decisions on new water right applications should fit in with water quality issues, particularly the new temperature standards and the Department of Environmental Quality's 303d list. Another objective will be to look at how the state goes about integration of water quality and quantity decision making.

The Governor submitted to the Senate as Commission nominees Mike Jewett, Alice Kilham, and Jim Nakano. All three nominees were withdrawn at the last minute. The Governor and legislative leadership intend to meet and resolve issues before names are again submitted.

#### **D. Rulemaking for Water Reservations in the Hood Basin and an Informational Report on Progress in Considering other Reservation Requests**

Doug Parrow, Resource Management Division, reviewed this report with the Commissioners and responded to their questions and comments. Public hearings were held on amendments to the Hood, John Day, and Umatilla Basin Programs. Parrow discussed some of the concerns that were raised at these hearings.

One concern was that all remaining water in the respective basins would be allocated to the reservations. Parrow said the proposed reservations do tend to allocate most of the remaining available water in the particular subbasin in which a reservoir site is identified. However, substantial quantities of water continue to be available for other uses in other areas of the basin.

Another concern expressed was that the need for the reservations has not been clearly established. Parrow explained that the proposed reservations would provide prospective reservoir sponsors with an assurance that water will be available to store in a proposed project. This assurance is critical in securing project financing and making the necessary investments in feasibility studies and environmental assessments. Applications for permits to actually store water reserved will be subject to all other public interest review requirements in effect at the time the review is conducted.

An additional concern was that the Department's method of assigning reservations to specific water availability subbasins restricts the amounts of water proposed for these reservations. Department staff believe this is important to ensure that the potential effects of development of the reservations on other users are predictable.

Commissioner Leonard asked Parrow to explain the term "water availability subbasin." Parrow responded that it is actually a sub-subbasin and referred the Commission to the map in Attachment 2 which shows water availability subbasins within a basin.

Commissioner Frewing asked how staff are calculating consumptive use for municipal water rights. Barry Norris, Field and Services Division, responded that the amount of water that has been developed for municipal use to date is calculated. Steve Sanders, General Counsel, explained that several statutory provisions give municipalities special preferences.

Commissioner Jewett asked about the water availability consideration. Pagel responded that when staff consider a reservation application, they make a factual determination of water availability at that time. However that water availability determination is no guarantee that water will be available on the day a permit holder may want to exercise their right. That is when priority dates are considered.

Parrow said these rules have been modified to require that the Water Resources Department, in consultation with the Department of Agriculture and other agencies, will determine whether applications for permits to store reserved water are consistent with the purposes of the reservation.

These rules were also modified regarding storage seasons. Under the proposed rules, projects could start filling during the first month in which water is available. Storage could then continue through May of each year. The total quantities of water which could be stored under the reservations would continue to be limited by water availability. The Department will consider the need for inclusion of a condition at the permit stage establishing minimum bypass flows on permits to store reserved water when necessary to protect senior water rights.

Frewing suggested adding, "included but not limited to instream flows" following "instream values" in 690-504-100(5)(d) and (7)(b).

#### Public Comment

Kimberley Priestley, WaterWatch, spoke in opposition to the reservation. She expressed concerns with the proposed new language including the change of storage seasons. To allow storage in months when there is no water available is contrary to the state's allocation policy; the expansion is inequitable because instream water rights are not given the same opportunity to take advantage of peak flows; the proposed expansion will impact fish. In the last few weeks consumptive water right users have filed many protests to instream water rights throughout the state. This raises great uncertainty about when and if the instream water rights will be adopted and what flow levels will be protected. Priestley also expressed concern about the language governing the consultation with the Departments of Fish and Wildlife and Environmental Quality. The proposed language does not require that a certain percentage of water be designated in stream. She asked that reservations be revised to include the language as suggested earlier and also include language that states that the Department shall find that the proposed project storing water reserved under these rules will have a significant quantity or percentage of water

dedicated to instream values and flows. WaterWatch would like more discussion at this meeting from staff on their position regarding the John Day and Umatilla reservation requests. (tape 2, mark 389)

Sanders said that in administrative rule 690, chapter 410, the water allocation policy requires that a permit not be granted when it would contribute to over appropriation. The Commission, however, adopted a special rule with respect to storage recognizing that there may be times when high flow events might occur. In the water allocation policy, a storage season will be set giving consideration to when the flows are low and imposing conditions consistent with the state water policy. For storage purposes, the reservoir permit can be conditioned at the time of application so that the instream values will be protected.

Pagel added that the rules give the maximum window for the storage season -- the permit can be conditioned as necessary to protect other rights. Storage is an opportunistic use as opposed to an irrigation right in which the water must be available throughout the growing season.

Parrow said that when there is not enough water available for senior water right holders, the reservoir operator will not be allowed to store water. This is assured in the rules by including the consideration of a minimum bypass flow.

Marc Liverman, Dept. of Fish and Wildlife, spoke on the proposed expanded storage season. Restoration of Columbia River flows from April 15 through September 30 have been identified as a critical factor for the survival of threatened and endangered salmon. Reduced tributary discharge during that period will exacerbate that concern. This could be addressed at the permit stage. Peak flows have a critical role to create and maintain habitat over the long term. There is also a concern about low stream temperatures in the winter time. Liverman said he supports the new language proposing the interagency coordination requirement, but the analysis called for is insufficient to protect the fish. He suggested that the team should apply a standard that the project shall maintain existing instream values and fish passage opportunities, or if those have been damaged or depleted, the project should be required to contribute to restoration of those depleted values. (tape 3, mark 118)

Ves Garner, Dept. of Agriculture, expressed support for the new interagency coordination language and the change in the storage season. The seasonal limitations were established by an evaluation of water availability based on a fifty percent exceedance value. That model is for identifying the effect on the stream and the other users for consumptive purposes. Reservoirs have many other purposes and that model does not take into consideration any of those other purposes, such as flood control, sediment retention, temperature control, power development, and instream flow values. The Department of Agriculture would like to see the reservations used as a wide-spread working tool for all potential users. Minimum flows for instream rights were first established years ago as a single flow value at a point just to support aquatic life. Over time

those flows have become established on a monthly basis, higher flows for protection of different values of a stream, etc. The same prospectives need to be used in respect to reservoir management -- it is not just a consumptive tool. If the reservoir permit is issued for a period of time and a major flow activity occurs outside of that time, to be lawful the owners of that reservoir would have to pass all of that flow. Huge outlet control structures would have to be designed in the dam. That is really an unnecessary cost. Garner mentioned that the Mill Creek reservation was dropped entirely as a request of The Dalles; he believes this was a result of misunderstanding between the city and the Department of Agriculture. (tape 3, mark 247)

Parrow reviewed the Commission's discussion regarding changes in the proposed rules (Attachment 1 of the staff report). On page 3, 690-504-100(5)(d) new language would be "An analysis summarizing and describing how the proposed project will enhance instream values including, but not limited to instream flows. On page 4, 690-504-100(6), delete "during the months identified in the reservation." On page 4, 690-504-100(7)(b) new language would be "The proposed reservoir will enhance instream values including, but not limited to, instream flows." On page 4, Subsection (7)(c), new language would be "What storage season is appropriate and whether minimum bypass flows or other conditions should be included in the permit to insure no harm to senior water rights and to protect instream values." In 690-504-110, 690-504-120, 690-504-130, 690-504-140, 690-504-160, and 690-504-170(1) and (2) remove any reference to a specific storage season, "during the months \_\_\_\_\_ through May."

### Public Comment

Kimberley Priestley, WaterWatch, spoke in support of the enhanced language but opposed deletion of the historic season.

Commissioner Jewett moved for adoption of the proposed rules with the additional language changes as outlined by Parrow; seconded by Commissioner Hansell. All voted approval.

### **E. Legislative Proposals**

Tom Byler, Director's Office, reviewed the proposed legislative concepts for the 1997 Session, and responded to questions and comments by the Commissioners. Four legislative concepts were developed at the direction of the 1995 Legislative Assembly or the Governor. Six concepts are the result of discussions with the Commission, interest groups and Department staff. Among these six concepts are proposals relating to well construction, instream flows, transfers, housekeeping, emergency water use authorization, and fees.

Of the other four legislative concepts, three deal with reclaimed water, reservations and hydroelectric project relicensing, and involve task forces created by the 1995 Legislative Assembly. A fourth concept, water quality/quantity, involves a task force created at the request

of the Governor. The Department will report to the Commission on these legislative proposals at its December meeting.

There was discussion on the proposed language regarding instream flow augmentation in exchange for reduced transfer fees. Staff will work on the minimum percentage of the water right to be transferred or leased or the cubic feet per second that would allow for a fee reduction.

At its August meeting, the Commission asked staff to seek advice from the Ground Water Advisory Committee (GWAC) on the issue of whether the 15,000 gallons per day limit for the exempt use of ground water for single and domestic purposes is unreasonable. Comments from GWAC are attached to the staff report. Staff decided not to recommend a change to the statute at this time. Commissioners Leonard and Frewing expressed appreciation for the information gathered by staff.

#### Public Comment on Legislative Concepts Discussed Above

Gayle Killam, representing Oregon Environmental Council/member of GWAC, spoke regarding exempt ground water uses. The ground water studies the Department is currently working on in the Deschutes and Willamette basins are going to be helpful when they are completed. Perhaps the exempt uses should be more restrictive until they are completed. Killam recommended phasing out exempt well uses eventually. Other recommendations were to break out the single household use, perhaps setting another reasonable rate and considering exceptions and restrictions; consider setting an overall exempt well use maximum; require metering and reporting on the ground water use from exempt wells. (tape 5, mark 39)

Jeff Curtis, WaterWatch, expressed disappointment in the Department's legislative package. WaterWatch had hoped restoration of streamflows would be addressed. He supported the Department's proposed conserved water statute change. The fee proposal will not match the value of the water. Regarding the proposal that the Director could require water use reporting at the request of a Watershed Council, WaterWatch would like others to be able to make this request and for the Director to be able to require reporting on her own. WaterWatch is concerned that the transfer legislative concept could provide more flexibility without restoring streamflows. Curtis commented on the standing issue in the housekeeping legislative concepts -- if WaterWatch files for standing in support of a proposed final order and the Department makes changes to the final order with which WaterWatch does not agree, those with standing should be able to raise concerns. WaterWatch supports the concept that users applying for transfers in watersheds where streamflows are limited be required to put some water back into the stream, and that public interest determination be required on transfers. (tape 5, mark 176)

Jan Boettcher, Oregon Water Resources Congress (OWRC), commented in support of the conservation statute legislative proposal. Boettcher asked if the proposed change to

ORS 540.505(4)(d) calls for transfer applications to be brought before the Commission. To avoid a backlog of transfers Boettcher suggested there be a one-year time period in which to complete them. From a district perspective, under SB 494 (1995 Legislative Session), there may be the ability to provide some instream benefits if water could be taken out of storage for this purpose. Another approach might be to reduce rate and duty without reducing acreage. OWRC is supportive of the reclaimed water workgroup proposal. (tape 5, mark 314)

Tom Byler, with the help of Dwight French, Water Rights Division, and consultant Steve Applegate presented the fees legislative concept to the Commission. The Department fees have not been amended since 1983. An analysis to establish the staff cost of processing applications and transfers (Attachment C and D of the staff report) was reviewed and explained by Byler with the use of overheads. Applegate reviewed the Water Rights and Adjudication Division total expenditures under the 1995-97 budget and explained the 1997-99 agency requested budget. The current fee structure will not support the proposed budget.

French reviewed the water right and transfer fee scenarios in Attachment D and responded to Commissioners' questions. Pagel suggested that the Commission suggest factors staff should consider -- staff would then discuss these issues with user groups. Frewing suggested that the use of transfers be encouraged rather than applications for new water rights. Applegate said the fee increase proposed for water rights and transfers in Attachment D would be approximately 300 percent. Leonard suggested showing what percentage of water right processing the fees supported in 1983, what percentage the fees are currently supporting, along with what the Department is now proposing.

Pagel mentioned that we have an opportunity this legislative session to talk about the expectations that have been created as a result of SB 674. We have achieved the backlog reduction requirement and now have an expectation to avoid backlogs in the future. To keep up with this timeline we have to meet the costs. The setting seems right for the discussion of true cost recovery.

The Commissioners expressed support for the staff work in progress to propose to the Legislature a just and fair fee increase.

Commissioner Nelson asked if there are any ways application processing costs can be kept down. French responded that easier and more efficient methods are constantly being considered by staff. New application forms are being developed which will be easier for the applicant to understand and will ask for precise information needed for processing.



### Public Comment on the Fee Increase Legislative Concept

Jan Boettcher, Oregon Water Resources Congress, spoke in support of the proposal to increase fees. (tape 6, mark 523)

Frewing moved to approve the six legislative concepts as proposed and discussed; seconded by Nelson. All voted approval.

### **F. Update on the Elimination of Water Right Applications Backlog**

Dwight French, Water Rights and Adjudications Division, presented this update to the Commission. The backlog of 5,722 applications as of July 1, 1995, is currently at 1,030. Approximately 45 new applications are received each month. On November 1 there will likely be 102 applications yet pending; 75 of those are involved in the New River alternative dispute resolution process. Staff are working with the 27 remaining applicants to get the work completed as soon as possible. An additional deadline the Legislature asked staff to meet is to process all applications received between July 1, 1995, and October 31, 1996, by April 29, 1997.

### **H. Coastal Salmon Restoration Initiative**

Bob Rice, Resource Management Division, provided this report and responded to questions and comments by the Commissioners. The west coast coho are in decline on the coast; however, the chinook salmon are improving. The coho ocean migration covers an area from southern Canada to California; El Nino is having an affect on the coho. The chinook have a much wider distribution up into Alaska. In July 1996 the Umpqua cutthroat trout were listed and the steelhead were proposed for listing by the National Marine Fisheries Service (NMFS). The court indicated that NMFS must make a decision on the coastal coho by October 25, 1996 -- however, the listing decision could be deferred for up to six months. Upcoming Endangered Species Act reviews by NMFS next year will include: west coast chum, February 1, 1997; west coast sockeye, September 1, 1997; west coast chinook, December 1, 1997; and cutthroat trout (excluding the Umpqua), January 1, 1998.

The Governor's Coastal Salmon Restoration Initiative (CSRI) relies on grass roots community support; it emphasizes using existing regulations and voluntary compliance as opposed to creating new laws. Hatchery production has declined and will likely continue to do so. The objective is to return the salmon to sustainable levels both from the salmon perspective of rearing and spawning, and the commercial/recreational perspective of the fisheries. Major management measures include limiting the fishery harvests, enforcing existing laws in the habitat areas, and using the hatcheries to supplement stocks. Education will also be a crucial component of the Initiative.

Additionally, information is being gathered on the status of the stocks to determine whether they are stabilizing, declining or increasing. As part of this effort a comprehensive interagency monitoring program is being developed, so that the effectiveness of individual measures can be determined.

A listing of the 25 Department measures are included in the staff report. The measures generally fall into one of five categories: water rights, compliance monitoring, technical assistance, streamflow data collection, and Phase II activities, which are for the next biennium.

The Oregon Progress Board has been working with state agencies to relate the benchmarks directly to the Initiative.


In August 1996 the state submitted its draft CSRI Plan to NMFS. From September 23 through October 17, 1996, public information meetings were held on the plan in eight cities. The deadline for public comment on the draft plan is November 1, 1996. Staff will request money from the legislature to implement the Phase II elements of the plan; continued local support and involvement will be necessary.

#### **I. Other Issues**

Commissioner Frewing asked Martha Pagel if staff would report at the next meeting on SB 1033 from the 1995 legislative session. This bill dealt with criteria for issuance of a ground water right in or above a scenic waterway.

The Commissioners approved the proposed meeting schedule for 1997.

Respectfully submitted,



Diane Reynolds  
Commission Assistant