

Oregon Water Resources Commission Meeting
February 7, 1997
Salem

Members

Nancy Leonard
Mike Jewett
Tyler Hansell
John Frewing
Ron Nelson

Others

Kimberley Priestley
Ves Garner
Jan Boettcher Lee
Phil Castle
Paul Berg
Jerry Schmidt
John Remm

Staff

Martha O. Pagel
Geoff Huntington
Steve Sanders
Diane Addicott
Tom Paul
Charlotte Haynes
Barry Norris
Dave Jarrett
Kimberly Grigsby
Roelin Smith

In addition to those listed above, other staff were present for particular segments of the meeting. Written material submitted at this meeting is part of the meeting record and 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. Commission Meeting Minutes

The minutes of the December 1996 meeting were offered to the Commission for their consideration. Jewett moved for approval of the minutes; seconded by Hansell. All approved.

B. Commission Comments

Hansell thanked staff for the informative presentations at the previous day's work session. He also mentioned that he participated on a panel at the Oregon Water Coalition's annual meeting in Hermiston.

C. Director's Report

Pagel summarized the previous day's work session. She asked the Commission about tentative dates that might work for the Commission's fall work session/meeting. Diane will work with the Commissioners on this. Pagel invited Commissioners to the quarterly meeting of the Western States Water Council which will be held March 12-14 in Portland. Pagel received a letter of appreciation from Ellen Warring for the successful New River dispute resolution process. Notice of the Willamette Basin Reservoir Study has gone out -- there will be several public meetings scheduled for early 1997. Geoff Huntington presented issue topics for upcoming Commission meetings.

D. Big Falls: Request for Exception to Proposed Final Order

Weisha Mize, Hearings Officer; Karen Russell, WaterWatch; and Neil Bryant, Big Falls Ranch addressed the Commission on exceptions to a proposed contested case order for an application to use ground water.

Steve Sanders, Legal Counsel, reminded the Commissioners to limit their consideration of this item to what is in the record.

Mize gave the background of this water right application and responded to questions by Commissioners. Big Falls Ranch filed this application on May 15, 1989. A contested case hearing was convened but continued after the hearings officer determined that the ground water-surface water provisions of Division 9 did not apply to potential interference between the proposed use and scenic waterway flows. The 1995 Legislative Session passed Senate Bill 1033 which sets standards for review of an action on ground water applications which propose appropriation of water in or above scenic waterways. The contested case hearing was reconvened to apply the provisions of SB 1033 and a proposed order was issued. Both WaterWatch and Big Falls Ranch filed exceptions to the proposed final order.

Karen Russell, WaterWatch, made four points. (1) The failure to determine the amount of reduction of scenic waterway flows when pumping wells that are clearly hydraulically connected to surface waters is contrary to the goals of the Scenic Waterways Act. WaterWatch thinks it is bad policy to issue a permit knowing there will be a reduction of an unknown amount and thinks the Department should determine what the number of flow reduction would be or the permit should be denied.

(2) Russell said that the Scenic Waterway Act requires mitigation even if you do not come up with a number. Mitigation should be a one-for-one exchange. WaterWatch requested a permit condition that would allow the Department and Commission to adjust mitigation requirements in a permit if new information shows the mitigation is insufficient.

(3) This proposed use is not classified as a beneficial use under the basin plan.

(4) WaterWatch strongly disagrees with the assertion in the staff report that the Commission has no jurisdiction to protect flows for rivers that have received federal Wild and Scenic River designation. The federal law requires preservation of the free flowing condition of the federally-designated stretch and there are no exceptions in that statute. WaterWatch believes the Department has the authority to consider that federal designation.

Russell urged the Commission to find that the use will measurably reduce scenic waterway flows based on the information in the record. The water right should not be issued unless staff can find a one-for-one mitigation. If the Commission does not choose to make that finding based on the information in the record, WaterWatch urged the adoption of alternative 2. Russell urged the Commission to direct the Department to follow the law in that mitigation must be considered when looking at pending ground water applications even if the amount of flow reduction is unknown. (tape 1, mark 446)

Neil Bryant, representing Big Falls Ranch; Bob Caine and Rex Barber, owners of Big Falls Ranch, commented. Bryant said they have been in this process for eight years and would hope for a decision today. This situation would provide for more efficient water use on the farm and would return water to the river. Bryant spoke on conditioning of the permit to require the subordination and emergency-use only of the McKenzie Canyon right for 4.5 cfs and the relinquishment of the Squaw Creek right for 10.7 cfs.

Bryant spoke on the exception about the prior appropriation and the chase doctrines. The applicants understand that based on the certificate the Department can shut down or moderate the water use. If for some reason two nearby junior wells are having problems, under prior appropriation those neighbors cannot request that this applicant change the operation of their wells.

Bryant referred to the points raised by WaterWatch. WaterWatch's expert admitted that some of his assumptions were in error. He changed his testimony about flow reduction from 4.2 cfs to 2.1 cfs. With subordination of the McKenzie Canyon right, there is more than a 2-1 mitigation. Mitigation is not an issue, but for the record, there is mitigation. What is being argued by WaterWatch does not follow the clear language of SB 1033. It is clear from other applications that have been approved by the Department that staff are following the law and past practices. Regarding instream water rights, as of the date of this application there are no senior instream water rights.

Referring to page 45 of the staff report, condition number 6, Bryant suggested deleting the last two sentences and adding "Use of the water under this permit shall conform to such reasonable rotation system as may deem a beneficial use without waste. The permittee shall restrict normal

use to pumping from two wells at any given time with the following exceptions: 1) during the height of the irrigation season a maximum of three wells may be used, or 2) when no surface water is being used then all four wells may be used up to a maximum allowed under this permit.”

Bryant referred to page 47 of the staff report, condition number 21. When the new certificate is issued for McKenzie Canyon when it becomes a supplemental water right, the applicants want to make sure they retain the old priority date. Mize explained that she had added in her February 4 memo to the Commission new language to condition number 19, “The priority date will not change.” This language should instead be added to condition number 21.

Bryant referred to Ken Lite’s comment that it is not uncommon to have a drawdown of up to 20 feet in a well due to climatic change. In the final order the drawdown is ten feet. The Commission should realize that perhaps 20-25 feet would be a more normal occurrence.

Time was given by Chair Leonard for Commissioners to ask questions of Russell, Bryant, the applicants, and staff.

Leonard asked how finding of fact number 9 (page 11 of the staff report) was derived. She asked Ken Lite for clarification on where the aquifer flows may be returning to the river as presented at the hearing in relationship to the wells. Using the map, Lite explained that some short term seasonal reduction in base flow would occur in that particular stretch of the river. The major component of flow is to the northwest; contributions from that ground water flow system also occur downstream from McKenzie Canyon.

Frewing asked for a change of language in condition number 17 of the Final Order (page 47 of the staff report). He suggested deleting the words “permit issuance” used twice in the second sentence, and inserting “initial use.” The Commissioners agreed with the concept and asked staff to work on the correct wording.

Frewing asked that “and use” be added to the end of condition 14. Frewing also asked if the reference to well number 7, first sentence in condition 17, should instead be to wells number 1, 3, and 4. Lite agreed that would be a good change to consider. Frewing asked about using “or” instead of “and” in the last line of condition 17; and changing “and” to “and/or” in the third line of condition 16. In condition 19 he asked that language be added to indicate that the pump test would be for wells 1, 3, 4 and 7. Staff offered to work with the applicants on new wording during a break.

Following the break, staff suggested that in finding of fact 14 and 16, and elsewhere, the word “emergency” be deleted in reference to the supplemental use.

Frewing noted that the reference to December 12, 1996, should be changed to February 7, 1997, in the sixth paragraph of page 40 of the report. Mize agreed.

Regarding mitigation, Pagel said the statute says mitigation measures should be considered in every case, but mitigation need not be required in every case. Mitigation, however, is included as a condition of this permit.

Ron Nelson moved, seconded by Frewing, to adopt the final order presented by staff with changes previously discussed and with the changes included in the addendum; conceptually noting the changes to be made allowing staff to review and make final adjustments to the wording; and delegating the authority to sign the order to Pagel. The changes discussed include:

- Page 40 of the staff report, sixth paragraph, delete "December 12, 1996" and insert "February 7, 1997."
- Page 42 of the staff report, findings of fact number 14 and 16, and elsewhere, delete the word "emergency" in reference to the supplemental use.
- Page 45 of the staff report, condition number six, delete the last two sentences and insert "Use of the water under this permit shall conform to such reasonable rotation system as may deem a beneficial use without waste. The permittee shall restrict normal use to pumping from two wells at any given time with the following exceptions: 1) during the height of the irrigation season a maximum of three wells may be used, or 2) when no surface water is being used then all four wells may be used up to a maximum allowed under this permit."
- Page 46 of the staff report, condition number 14, at end of second sentence add "and use of wells number 1, 3 and/or 4."
- Page 46 of the staff report, condition number 16, third line delete "Wells Number 1, 3 and 4" and insert "Wells Number 1, 3 and/or 4."
- Page 47 of the staff report, condition number 17, in the second sentence add "use under the" and delete "issuance" twice. In the last sentence of that condition in reference to Wells Number 1, 3, 4 and 7, change the "and" to "and/or."
- Page 47, condition number 18, in reference to Wells Number 1, 3, 4 and 7, change the "and" to "and/or."
- Page 47 of the staff report, condition number 19, first sentence following "shall submit the results of a pump test" add "for wells 1, 3, 4 and 7."

- Page 47 of the staff report, at the end of condition number 21, add the sentence "The priority date will not change." And delete "The priority date will not change" in condition number 19 in the addendum report.

The motion passed 4-1 with Frewing voting no.

E. Request for Adoption of Grande Ronde, Malheur, and Owyhee Basin Program Amendments to Reserve Water for Future Economic Development

Kimberly Grigsby, Resource Management Division, presented this report to the Commission. Basin program amendments for these basins had been previously offered at the December 1996 Commission meeting; however, the Commission deferred action on the rules so staff could draft proposed rule amendments addressing issues identified at that meeting. Grigsby explained three changes suggested by the Department relating to 1) authorized uses of stored water; 2) classification of water for storage; and 3) site-specific public interest at the time a storage permit is requested under a reservation.

Staff retained the language that stored water can be used for any beneficial purpose to be consistent with previous Commission actions. Staff changed the proposed basin programs to clarify that storage is classified as a beneficial use in each basin. Staff added language to clarify that as part of the public interest review, the Department will consider whether the capacity of the resource is sufficient to support the proposed project.

Grigsby suggested changing the language of Section 690-508-120, page 14 of the staff report, to read, "Nine thousand (9,000) acre-feet of unappropriated water of Catherine Creek and tributaries above Ames Creek are reserved. The water is reserved for storage in multi-purpose reservoirs to be constructed in the future. The priority date of the reservation is November 6, 1992." A similar change would be made to 690-511-110, page 21 of the staff report -- "Sixty thousand (60,000) acre-feet of unappropriated water of the Owyhee River and tributaries are reserved. The water is reserved for storage in multi-purpose reservoirs to be constructed in the future. The priority date of the reservation is November 6, 1992."

Leonard asked for an explanation of the specific exceptions listed in 690-508-040(1)(a) of the Wallowa River Subbasin. Pagel responded that when a storage permit is granted, the secondary use of that stored water can be used for any purpose. Whether staff grant the storage right in the first place would depend on whether staff conclude that it is in the public interest. The determination to issue a storage right would not be limited by this language -- storage stands apart in a separate category.