

our natural resources to protect the quality of life in Yamhill County. This organization is neither anti-growth nor pro-growth, but instead in favor of responsible growth taking into consideration the sustainability of the natural resources. He urged the Commission to expand the Department's study area to include the remainder of Eola Hills and approve this expansion request. Reeves asked that any action taken by the Department include an opportunity for the public to be educated on the situation and give their response. (tape 3, mark 117)

Chair Leonard asked Mr. Reeves if members of Friends of Yamhill County understand that even if the Department would go through rulemaking and expand the Ground Water Limited Area at this time, it would not really have an impact on the residential exempt uses. Mr. Reeves responded that he is not sure that issue is clear to the group, and that he would like to see a statement on that point.

Mary Phillips, submitted written testimony and spoke in support of the rulemaking. She is very much concerned with increased residential construction on five-acre lots. Because of HB 3661 a number of new homes have been built with many more pending. Yamhill County is not currently considering a land use ordinance that addresses water availability. (tape 3, mark 312)

Jaime Sanders, homeowner in the area, asked the Commission to adopt alternative one in the staff report with the revision that rather than rulemaking hearing being limited to expanding the Eola Hills Ground Water Limited Area that it also include as possible alternatives creating a new Critical Ground Water Area or creating a new Ground Water Management Area. In quarry land proceedings Sam Allison, hydrogeologic expert and former Water Resources Department employee, was retained. He was one of the authors of the Eola Hills Ground Water Limited Area. Allison said that if he had known then what he now knows about the hydrogeology of this area, and if the development threats then had been as apparent as now, he would have recommended including this in the designated area at the very beginning. Sanders said that the designation of a Ground Water Limited Area should not require evidence that all of the wells in the area are uniformly depleted now. She quoted the statutory definition for designation of a Critical Ground Water Area in ORS 537.730(1)(e) which would give the Department the regulatory authority to limit the number of exempt uses per a certain number of acres and interfere if there were non-permitted interception of the ground water. There seems to be enough evidence to suggest that the ground water is about to be overdrawn to justify referring this to a rulemaking procedure in which all the evidence can be presented. The city of Amity is also experiencing water shortages. (tape 3, mark 470)

Norton explained that the basin program limits development in the Eola Hills to exempt uses, irrigation, and rural residential fire protection. Expanding this area north would not prevent such exempt uses as residential, stock watering, and lawn and garden non-commercial up to one-half acre.

Pagel said the Commission's authority to place restrictions on exempt uses is limited by a change in the law two years ago that says any rule restricting ground water use must be based on substantial evidence in the record to justify the restrictions.

Frewing suggested holding a public information hearing, inviting the county and local land owners, to consider the alternatives mentioned in the staff report: creating a new Critical Ground Water Area; creating a new Ground Water Management Area; or directing staff to hold a rulemaking hearing to expand the Eola Hills Ground Water Limited Area. Information could then be evaluated and the Commission and staff could determine what option to pursue.

Leonard asked Norton how staff could regulate an exempt well if it is found to be interfering with a neighboring well. Norton replied that this has not yet been done, but it would be based on the well drilling priority date.

Jaime Sanders said that a ground water limited designation would alert the county land use decision-makers to an issue they should consider.

Frewing moved to deny the rulemaking request, and ask staff to hold an informational meeting in Yamhill County to help gather more information and alternative views on whether the Eola Hills GWLA should be expanded north or whether some other restrictions on ground water ought to be applied in the future, and report back to the Commission by the end of the year; seconded by Jewett. All voted approval.

#### **H. Request for Adoption of Revised Proposed Order in Contested Case on Three Water Use Applications in the Name of Meadows Water Company**

Weisha Mize, Administrative Law Judge, explained that this case involves water use applications for surface water, ground water, and a reservoir. In 1991 staff reviewed the applications and recommended they be approved; however, the Oregon Department of Fish and Wildlife (ODFW) and our agency were not able to agree on the permit conditions. The Commission then referred this to a contested case hearing. The parties included WaterWatch, Friends of Mt. Hood, Hood River Valley Residents Committee, and the Warm Springs Tribe; ODFW was named as an interested agency. The issues raised at the hearing included water availability, ground water/surface water interference, and whether the fishery resources would be harmed in the East Fork of the Hood River. A proposed order was issued, exceptions were filed, and a Commission subcommittee was appointed to consider the exceptions and the staff recommendation. The hearing record was reopened to allow additional staff evaluation and data on ground water/surface water interference and water availability.

A revised proposed order was issued and exceptions again filed. Staff met with the parties and some exceptions were resolved and withdrawn as noted in "Revised Proposed Order 2." The

remaining exceptions were grouped into the following six categories: calculation of water availability; surface water availability; ground water/surface water interference; public interest considerations posed by sensitive fish stocks; sufficiency conditions; and miscellaneous.

Commissioners Jewett, Frewing, and Nelson served on the subcommittee. They reviewed the exceptions, met with the parties, and made recommendations included in the staff report. The subcommittee recommended the Commission hear arguments from the parties on the public interest consideration issue relating to fisheries. The subcommittee determined that the water availability methodology used by staff was appropriate; and that water is available. The conditions proposed to be placed on the ground water permit would be sufficient to mitigate for impacts between ground water and surface water. The subcommittee recommended that the staff's recommendation on the miscellaneous category should be accepted.

Kimberly Grigsby, Resource Management Division, reviewed the order and format of the staff report. She explained that staff will draft language for a final order to reflect the guidance given at this meeting by the Commission, take the language to the parties, and return for clarification if there is disagreement.

Geoff Huntington, Deputy Director, said that the exceptions deleted by consensus (listed in Attachment 8) have been added in bold print in the Revised Proposed Order 2.

Jewett reported on the subcommittee's deliberations. They dealt with the first categories 1-3 and 6 without too much difficulty; category 4 (the public interest considerations involving sensitive fish stocks) was difficult and would affect category 5 (sufficiency of permit conditions). The subcommittee decided to bring category 4 and 5 to the full Commission for consideration without recommendation. The report submitted by the subcommittee was written by Department staff.

Frewing asked that "prior to diversion" be added after "at a time" in line 6 of section 5a. on page 3 of Attachment 1 (the subcommittee report). All agreed.

Chair Leonard asked for comments by the parties on category 4, public interest considerations posed by sensitive fish stocks.

Howard Arnett, and Jody Calica, representing the Confederated Tribes of the Warm Springs Reservation, spoke on the Tribes' interest in the proceeding stemming from the Tribes' Treaty fishing rights. These permits if issued would have potential impacts on the fisheries resource in the Hood River Basin. The Tribes are interested in getting fish back to the Basin and protecting the fish that are now present. The Northwest Power Planning Council adopted a Columbia Basin Fish and Wildlife Program that included various subbasin plans. The subbasin plan mentioned in the record is the Power Council's fish plan with very ambitious goals for fish

production in the Hood River Basin. The fishery resource in the Basin is currently in very serious trouble. There are six different anadromous fish species that either do use or could use the East Fork of the Hood River. Salmon need high flows in the river to flourish. Arnett asked the Commission to deny the application for the permits. (end of tape 4 and into tape 5)

Bill Cook, Assistant Attorney General, representing Oregon Department of Fish and Wildlife (ODFW), said that on the Hood River stakes are high for fish and getting higher. The Hood River Basin is home to several salmonid species, such as chinook salmon, spring salmon, fall chinook, and coho salmon. Coho salmon are listed as state sensitive and present in the East Fork of the Hood River. National Marine Fisheries Service (NMFS) has proposed winter steelhead statewide as a threatened species; ODFW is working on a steelhead plan similar to that of the coastal salmon, to avoid listing and attempt to recover the species on a state plan. NMFS is doing a status review under the federal Endangered Species Act regarding the potential listing of summer steelhead. There are both anadromous and resident coastal cutthroat in the East Fork. The anadromous cutthroat are already listed by the state as sensitive. The data is accumulating and showing there are serious problems with particular species of fish in the Hood River Basin. Any withdrawal from the East Fork would adversely affect fish production. The instream right on the East Fork is aimed at a minimum flow, not an optimum flow. A minimum flow is enough to maintain a minimum level of fish production. If fish are listed on the Hood River or protected by a state plan, meeting the minimum flow may not be enough for fish recovery. Cook said it would be most prudent and in the public interest not to grant these permits at this time. (tape 5, mark 147)

Karen Russell, WaterWatch, distributed a hand out and spoke on water availability and how it relates to the fishery issue. When considering water availability the question to ask is what are expected demands of existing rights. Department staff have historically used estimates of current use, not an expected demand. WaterWatch believes there are recent attorney general opinions and changes in the statute that make the current use number an underestimation of what would be the expected demand. For purposes of this proceeding the subcommittee did not recommend revisiting that issue at this time, but perhaps in the future. An estimate of current use is not necessarily an accurate estimate of expected demand under existing interpretation of law. The revised proposed order stated that the full face value of water rights with the exception of municipal and irrigation were taken into account. When Russell reviewed a print out of water rights of record included in the applicant's materials, there were 59 cfs of agricultural rights that were not accounted for in the availability analysis, 21.8 cfs of industrial rights not accounted for, .23 cfs of commercial rights, 4.2 cfs of domestic rights, and .07 cfs of livestock rights not accounted for. Staff said that some of that was because they assume a ten percent consumption rate. There was also 21.3 cfs worth of municipal rights that were not included in the water availability analysis. Russell said that the bottom line for fish is that the minimums represented in the instream water right are not being met at least June through November looking at true expected demands. Russell asked that the expected demand be considered when making a

public interest determination on protecting the fish resource. Russell asked that the Commission deny the applications. (tape 5, mark 240)

Karl Anuta, representing the Hood River Valley Residents Committee and the Friends of Mt. Hood, agreed with the other speakers' concerns about the fishery resource issues. The permit conditions proposed by staff will not be able to solve the fishery concerns. The staff recommendation is intended to address both mitigation and regulation. The watermaster in the Hood River Basin does not have sufficient funding or staff to continually monitor and regulate the water. Staff recognize that there was substantial interference between ground and surface water. Ground water is proposed for use in the summer during the low flows. Staff asked that there be a continuous flow condition so that the applicant puts water back into the stream to mask the flow problems that pumping ground water will create. The applicant is not willing to produce continuous flows. Continuous flows above the minimum flows are needed to go beyond just fish survival. The Commission needs to be satisfied that the permit conditions will protect the resource. If the Commission does not feel satisfied that this is the case, the remedy would be to deny. (tape 5, mark 480)

Richard Allen, representing the applicant Meadows Water Company, distributed a hand out dated May 30, 1997, listing three proposed conditions. Allen said ODFW's protest raised two issues — insufficient information to address whether the ground water withdrawals would impact the state's instream flow rights on the East Fork Hood River, and whether the quasi-municipal use proposed would have priority over the state's instream right. The applicant has addressed both of these issues. The applicant is asking for 0.27 cfs from November 1 through the following July; and ground water withdrawal of up to 0.11 cfs from August 1 through October 31. Under the written conditions, the well must be drilled into the aquifer below marker unit 4 cased and sealed into marker unit 4 — the impact, if any, on the East Fork Hood River is going to be delayed by years and felt at least two to three miles away from the point of withdrawal. The revised proposed order says that when the applicant withdraws ground water the impact is spread out over the entire year. ORS 537.153 says that if certain findings can be made there is a rebuttable presumption of public interest. On this record, Mr. Allen believes those four criteria have been satisfied. Therefore, the rebuttable presumption is that granting the application is in the public interest. The state has the ability under the statute to protect instream rights and not just minimum stream flows. The public interest standard does not require the applicant above and beyond the beneficial use of the water to demonstrate some additional benefit to the fish resource. An affirmative harm, not simply a lack of something good happening, would have to be found to deny the application. The evidence in the record submitted by ODFW indicates production of game fish is limited in the Hood River drainage by a variety of physical and environmental constraints that limit the production potential of the drainage that Mt. Hood Meadows is not causing. This is a tough area for fish. The permit conditions will require that there be a meter on the ground water well and on the diversion from the East Fork Hood River. Mr. Allen reviewed the conditions proposed by the applicant in the hand out. He explained that

the condition offered as a replacement for Condition G9 is actually a flow enhancement condition. Flows would be augmented during the low flow portion of the day in the low flow portion of the year. Mt. Hood Meadows Company is willing to install, maintain, and operate a recording device or devices to determine if and when the state's instream flow right on the East Fork Hood River is not being met. Granting this application would benefit the public interest -- the stream gage would allow the Department to regulate and protect the minimum instream flow; the proposed permit conditions say when the applicant would discharge from the wastewater treatment plant and ask that the applicant monitor that discharge so it is an enforceable condition. (tape 5, mark 596)

Rick Cooper, staff hydrologist, spoke briefly on the Department's water availability program and responded to Commissioners' questions. He explained how consumptive use for irrigation and for municipal use is calculated by staff.

Jewett suggested modifying Condition G9 by deleting the last sentence and asking staff to add language regarding achieving even stream flow at all times. Nelson, Nakano and Frewing suggested parties continue to work on mitigation, perhaps working with the local watershed council.

Sanders mentioned some concerns on the conditions proposed by Meadows Water Company. Sanders asked if limiting the discharge not to exceed 0.11 cfs for the three-hour discharge period in the first condition would be feasible. The replacement condition for S6 and G11, says that the sole purpose of the recording device is to determine whether the instream water right is being met -- Sanders said this information would also be used for other regulatory purposes and should not be limited.

Richard Allen explained that the discharge condition is not for discharge of the entire amount between 5 a.m. and 8 a.m. -- it simply is to indicate that the discharge must begin some time in that three-hour period. The 0.11 cfs is to ensure that the discharge is spread out over time.

Jewett moved to accept the subcommittee recommendations recognizing that additional findings will have to be made on the public interest with respect to fish; seconded by Nakano. All voted approval.

Jewett moved to accept those parts of the exceptions that were dropped in exchange for an agreement on particular language as shown on Attachment 8 and in bold language in Revised Proposed Order 2; seconded by Frewing. All voted approval.

Jewett moved to accept conditions as proposed in the subcommittee report with the addition of the conditions proposed in writing by Meadows Water Company, deleting the last sentence of the Replacement Condition G9 and deleting the third sentence in the Replacement for Conditions S6

and G11, and incorporating the conditions proposed by staff; and to allow the staff to negotiate with the parties the precise language to accomplish the intent of these and other proposed conditions. The motion was seconded by Frewing; all voted approval.

Jewett moved that the water use in the three applications is in the public interest as incorporating the three previous motions which accept the subcommittee recommendations, will modify some conditions, and give all parties an opportunity to review the actual language and if there is agreement this would serve as the basis for issuing the three permits. If there is not agreement among the parties with respect to whether the staff has accurately captured the Commission's decision, some part of the final order would come back to the Commission for approval. The motion was seconded by Nelson. The motion passed with four voting approval; and Frewing voting no.

There being no further business, the meeting was adjourned.

Respectfully submitted,



Diane K. Addicott  
Commission Assistant