

Oregon Water Resources Commission Meeting
January 16, 1998
Salem

Members

Nancy Leonard
Mike Jewett
John Frewing
Tyler Hansell
Jim Nakano
Ron Nelson
Dan Thorndike

Others

Doug Myers
Jim Dole
Bob Hunter
Kim Burchfield
Cindy Long
Karen Russell

Staff

Martha Pagel
Geoff Huntington
Diane Addicott
Dick Bailey
Barry Norris
Weston Becker
Fred Lissner
Al Cook
Bruce Sund
Karen Moynahan
Meg Reeves
Norm Daft
Larry Menteer
Lara Burgel

Some staff were present for specific portions of the meeting only. Written material submitted at this meeting is part of the official 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.

The meeting opened with introductions — the Commissioners were participating by telephone. Some regional staff and other members of the public and press participated by phone also.

Jewett asked if anyone was present from the Grants Pass Irrigation District (GPID). Pagel responded that no one was present in the Salem office.

Jim Dole, attorney, joined the conference call saying his firm represents GPID at this time. He said his firm has associated with Ms. Schroeder for the purposes of this matter. Mr. Dole said he understood Laura Schroeder would be attending this meeting; his assistant was presently trying to ascertain Schroeder's location.

Pagel explained that the general purpose of the meeting is for the Commission to take action as needed on several pending matters relating to GPID. The Commission had received a request for an extension of time for GPID to decide whether or not to file a contested case hearing. Following that, the Department received a request for a contested case hearing; then the Department was served notice of a proceeding filed in the Circuit Court for judicial review. The Commission will later move into an Executive Session for a briefing from legal counsel on the filing for judicial review.

Assistant Attorney General Meg Reeves briefed the Commission on the issues associated with the request for the extension of time and the request for the contested case hearing. The Commission may go forward with the contested case hearing even though there is litigation pending in Circuit Court. GPID has asked for more time than the sixty days that were allotted to decide whether to ask for a contested case hearing due to District upheaval and the fact that part of the sixty day period occurred during the holiday season. Reeves indicated that the request was arguably moot because in fact the District did ask for a contested case hearing.

Reeves said with respect to the contested case hearing the Commission needs to decide whether to appoint an outside hearing officer, one of its own members, or a subcommittee to hear the matter. Department staff recommend the appointment of an outside hearing officer and would request delegation of authority to appoint that person promptly. Timelines under which this contested case would be conducted must also be agreed upon. The enforcement action that the Commission proposed in the November Order was reducing delivery of water to the District if the Order was not adhered to. If the Commission wants to preserve that option and go forward with that enforcement action, the hearing would have to be conducted on a very short timeline. Reeves said that the Commission may want to require adherence to an end date which would enable the Commission to make a decision by April 3rd. Another way to provide for a more efficient and orderly hearing would be to require that issues be raised by the prehearing conference and the hearing officer would not consider issues raised after that date.

Jewett asked why the date of April 3rd was chosen. Pagel replied that April 3rd was chosen because staff hoped to have a decision made by April 1st which is the beginning date for the irrigation season. However, the past practice of the District is to begin irrigating in mid April. Huntington added that there are certain procedural requirements after a hearing officer is finished, to provide adequate opportunity for the hearing officer's proposed decision to be reviewed by the parties to the contested case proceeding and to bring any issues to the Commission by filing "exceptions" to the proposed order.

Jewett asked if it would be impossible to have this decided before the March 20th Commission meeting. Reeves said that it would be impossible because of various timelines imposed by statute or rule.

Pagel said that by proceeding with the contested case, the Commission's review would be complete and a final Order could be issued prior to or at the beginning of the irrigation season, so the District patrons have notice of whether they will have water or not. One of the motivating factors in October was to give the District patrons adequate notice that this consequence could happen.

Thorndike said that under the November 1997 Order the Commission delegated to the Department the ability to determine whether GPID satisfactorily accomplished the specific items; and if GPID did not, the Department would regulate. Under this 1997 Order there were several timelines. Has GPID met these timelines that are already past? Al Cook said the District has complied with A, B, the latter part of C and D.

Public Comment

Nancy Leonard asked for comments on the extension of time request and the conduct of the contested case hearing.

Jim Dole, attorney, said he just spoke to Ms. Schroeder on the telephone. It was her understanding that most of this hearing would be basically in Executive Session. They did not prepare for any additional comments at this point in time; so do not have anything to add. Mr. Dole explained that Ms. Schroeder and another lawyer in Dole's office have been primarily involved in this matter and he is "basically just sitting here as an interested observer taking notes. I don't have anything else to add to the proceeding." (tape 1, mark 469)

Bob Hunter, WaterWatch, commented that the extension of time request is moot and does not have to be granted. WaterWatch would like to be recognized as an intervener in the contested case hearing. The hearing would be completed prior to the irrigation season so that reduction and regulation could be imposed if necessary. The issues at the hearing should be confined to whether or not the Commission acted within its discretion on setting requirements for ongoing due diligence. (tape 1, mark 489)

Jewett said he agrees that the request for extension of time is moot. He does not support withdrawing the November 1997 Order; this was a good order, a fair interpretation of the due diligence requirement. He would like the Commission to proceed ahead with the contested case as rapidly as possible and get an answer to the patrons. This needs to be on the agenda for the March meeting.

Pagel explained that the November 1997 Order requires GPID to submit a report that describes how and when dam removal will occur. In that sense it adds more detail to the 1994 Order which was based on the District's own proposal to move forward with dam removal. Since 1994 the Department has been looking for evidence and progress on implementing that plan requiring dam removal. The November 1997 Order states that GPID has not demonstrated compliance with terms and conditions of the 1994 Order, and lists several actions and timelines that must be met. In a contested case, the issue will be whether or not GPID must complete the actions and timelines of the 1997 Order, not whether the dam is retained or removed. If, after the completion of the contested case, the determination is still that the Commission wants these additional requirements, then some accommodation will have to be made for a time period by which that report is due.

Jewett asked if Laura Schroeder is somewhere on route. Jim Dole responded that Ms. Schroeder knew of this meeting and chose not to attend.

Jewett moved that the request for an extension of time be denied; seconded by Frewing. The motion passed 6 to 1, with Hansell abstaining.

Jewett moved that the Commission authorize the Department to appoint a hearing officer, hold a contested case hearing adhering to a strict timeline so that a decision from the hearing officer can be made at the earliest possible time to allow the Commission to make a decision no later than April 3, and the issues for that hearing be limited to the lawfulness and appropriateness of the November 1997 Order and not include any of the factual or legal underpinnings of the 1994 Order. The motion was seconded by Hansell; all voted approval.

Jewett asked that there be a GPID progress report at the March Commission meeting.

At this time the Commission entered into an Executive Session under ORS 192.660(1)(h) to consult with legal counsel regarding the filing in Circuit Court for judicial review.

Following the Executive Session, the Commissioners returned to public meeting.

Reeves advised the Commissioners of their role during this time that the contested case is pending. During the pendency of this proceeding it must be remembered that each Commissioner is a decision maker in a contested case hearing. Reeves instructed the Commission that their decision will have to be made on a record created by the parties. Commissioners should try to avoid any discussion of the matter. If Commissioners do have such a discussion, it should be added to the proceeding record which would allow a rebuttal. Any

information regarding a contact could be communicated in a letter to the hearing officer. The strong advice and recommendation is that the Commissioners not engage in any discussion, or receive any materials regarding this matter. Commissioners should not comment to the press during this time.

In response to the issues raised by Ms. Reeves, Jewett stated that he is teaching a water law class at Southern Oregon University; two of his students are GPID patrons who very strongly disagree with recent decisions by the GPID Board, but he hasn't discussed the merits of the case with them. Jewett spoke briefly to Bob Hunter about whether WaterWatch intends to mature their request for a contested case on the 1994 Order.

There being no further business, the meeting was adjourned.

Respectfully submitted,



Diane K. Addicott
Commission Assistant