

Oregon Water Resources Commission Meeting
January 23, 1998
Salem

Members

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

Staff

Martha Pagel
Geoff Huntington
Tom Byler
Diane Addicott
Meg Reeves
Tom Paul
Dick Bailey
Patrick Lee
Barry Norris
Fred Lissner
Marc Norton
Bill Fujii
Dwight French

Others

Jan Lee
Merilyn Reeves
Kimberley Priestley
Ed Henricks
Ves Garner
Roger Bachman
Bob Hawley
Ken Friday
Lorna Youngs
Todd Heidgerken
Doug Myers
John Arnold
Gail Johnson
Michael Fife
Dick Verboort
David Filippi
Mike Lewellyn
Mary Phillips

Other 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 Street NE, Salem, Oregon 97310. Audiotapes of the meeting are on file at the same address.

A. Commission Meeting Minutes

The minutes of the November 20-21, 1997, meeting were offered for consideration. Frewing moved that the minutes be accepted as presented; seconded by Thorndike. All voted in favor.

B. Commission Comments

Nakano thanked the stakeholders for their participation in the December subcommittee meeting. At that meeting various issues were considered for presentation to the Commission in upcoming meetings.

Thorndike agreed with Nakano's comments.

Nelson mentioned that he attended the signing ceremony of the Confederated Tribes of the Warm Springs Reservation Water Rights settlement.

Hansell spoke at the Oregon Water Coalition annual meeting in Pendleton recently.

C. Director's Report

Pagel offered a quick update on the Grants Pass Irrigation District (GPID) situation. In a special telephone conference meeting of the Commission held January 16, the Commissioners directed that a contested case hearing be held at the request of the GPID board. Since then, Steve Elmore of the Employment Division has agreed to serve as the hearing officer. The hearing is scheduled for February 19, 1998. On this schedule the Commission should be able to make a final decision by the beginning of the irrigation season in early April in case enforcement is necessary. The next regularly scheduled Commission meeting is March 20 which will occur before the completion of the contested case process. Pagel asked the Commissioners if they would be interested in changing that meeting date or scheduling another special meeting. Commissioners agreed to move the regular meeting to the week of March 30 if it would work with their individual schedules.

Huntington reviewed the list of suggested topics to be discussed at future meetings and responded to questions and comments by Commissioners.

The location of future Commission meetings was discussed. Hansell suggested that the May meeting be held in Hermiston and include an update on the Columbia River. Klamath Falls will be the location for the July meeting; Baker City in September; and Gold Beach or Tillamook will be considered for November.

Tom Byler, Director's Office, gave a brief update on a tentative Department rulemaking schedule. Rulemaking issues will likely include the Powder River Basin Reservation, the John Day River Basin Reservation, well construction, and water distribution. The triennial review of the Department's rules may also result in the need for rulemaking. Frewing asked if a discussion regarding the rules for rare and endangered species on the Columbia River could be included in an informational report on interstate water management issues at a future meeting.

Pagel reviewed the previous day's work session discussion regarding split season and partial duty leases. No decision was made yesterday. The Department would recommend not to proceed with rulemaking or a pilot program at this time, but to continue studying the issue. A concern of staff is whether the potential risk from the standpoint of changing the way the Department characterizes a water right, the policy underpinnings of water law, would be worth the benefit of the limited number of leases that would come forward through a very narrow pilot program.

Leonard asked Pagel if split season and partial duty leases might possibly be made part of the conserved water statute. Pagel said this would be worthy of further review.

Thorndike said it would be interesting to know if other states are allowing such leases. Frewing suggested staff continue to work with stakeholders on the concept of a potential project. Nakano and Hansell expressed concerns and would like to see staff continue to look at the issue. Nelson would like discussions continued with staff and stakeholders, and the topic brought back to the Commission at a future meeting. Jewett would also like more discussions in the future, but would defer to staff regarding rulemaking.

Dick Bailey, Water Rights/Adjudication Administrator, gave an update on the water right permits program. There is only one staff person available to review claims of beneficial use for over 4,000 pending certificates. Hopefully, in the next budget and legislative process (for 1999-2001) another position will be funded to assist in this. Bailey said the Department received approximately 16,000 requests for registration of ponds; 1,000 allegations of injury relating to those ponds were filed; 450 of those allegations met statutory guidelines. Letters were mailed to pond owners informing them of the allegations and asking for comments. Mitigation orders were then mailed to approximately 270 pond owners. Pond owners can ask for a contested case hearing if they do not agree with the mitigation requested; however, most issues can be resolved through a dispute resolution process.

Tom Paul, Northwest Region Manager, updated the Commissioners on the water right transfer program and responded to their questions. In October 1996 the regional field offices began assisting with processing transfers. Before that time, there was one staff person in Salem working on them. In 1997 over 250 final orders for transfers were processed. There are approximately 600 transfer applications currently pending.

D. Eola Hills Ground Water Limited Area Update

Fred Lissner and Marc Norton, Field and Technical Services; and Bill Fujii, Resource Management Division, offered this report to the Commission. The Department held a public information meeting in Amity on October 7, 1997, to discuss general ground water concepts, the statutory authority regarding exempt ground water uses and water rights regulation, the Eola

Hills Ground Water Limited Area (GWLA), and local area ground water data. Yamhill County Planning Department staff presented information on land use and zoning regulations for the Eola Hills and Walnut Hills area.

Frewing asked how the Department's model ordinance might apply in this situation. Fujii said that Marion County recently passed an ordinance which might be helpful to Yamhill County staff as they consider one of their own.

Pagel briefed the Commissioners on a lawsuit relating to the Jackson County ordinance. This ordinance was tailored to local issues but did incorporate some concepts from the Department's model ordinance. In this lawsuit the Department's authority to promote a model ordinance was challenged. The state succeeded on a summary judgment action in the Jackson County Circuit Court in favor of the state. Issues against the county related to whether this type of ordinance which would limit an exempt ground water use might constitute a taking of a private property right. A brief was filed by Jackson County addressing the taking issue — after that brief was filed, the action was dismissed. The Department staff are comfortable promoting the concept of a model ordinance which would basically fill the gap when there is not enough information about a ground water resource for staff to give a specific conclusion on any proposed use. The counties under their land use authority can indicate that this issue needs to be addressed before further development is allowed.

Pagel said it is important to have a partnership between state and local government. The Department role has evolved over time as the information supplier; we are best equipped to do the ground water studies and provide the information to local government— but there is a funding problem. The Department has a prioritized list of studies currently underway. The model ordinance would give local governments a basis on which to evaluate whether to allow further development or not, and to what extent.

Department staff believe there is not supportive data to expand the Eola Hills Ground Water Limited Area, but staff will continue to collect and analyze data, keep interested parties informed, and work with the county. If the data collected during the next two to three years indicates that ground water conditions warrant further considerations, staff will report back to the Commission.

Public Comment

Merilyn B. Reeves, Vice-President of Friends of Yamhill County, thanked the staff and Commission for providing good information to area citizens. She said there is no critical water shortage at this time. Friends of Yamhill County are concerned about preventing a critical water shortage and wells going dry. There is a need for more data collection. The Yamhill County Planning Commission is reviewing the zoning ordinances and the ground water issue needs to be

included in this review. Reeves said she would like to have the Water Resources staff speak to the Planning Commission regarding the lack of information on the hill area which is currently under extreme developmental pressure. Ten dwellings have been approved on a 50-acre tract within this old subdivision on the hill. Another 13 dwellings have been approved in a canyon area. Outside the arbitrary line that was drawn across the Eola Hills as the Ground Water Limited Area border are old subdivisions in which there is a potential for 500 new homes. Yamhill County does require a developer of four or more lots to show there is adequate water available prior to approval for new subdivisions only, not for old subdivisions. Friends of Yamhill County believe there must be more attention by state and county agencies to preventing ground water problems in the future. Reeves would like to see a comprehensive plan developed and urged Department staff to work with Yamhill County. (tape 2, mark 180)

Mary K. Phillips, a property owner in the Eola Hills area, agreed with Reeves' comments. Phillips said that since presenting the Commission with a letter of concern regarding this issue in 1996, there have been many dwelling approvals. Thirteen dwellings were approved last month on a sixty-acre tract adjacent to the Phillips' property. Several large homes have been constructed in the Eola Hills area, and at least 25 new dwellings were approved in the last year. This is a forest and farm resources area—there has never been irrigation in the Eola Hills. Phillips said this is a serious concern, and she hopes there will be cooperation between the state and the county. Prevention is the answer. The Phillips' well was drilled in 1981 and came in at 30 gallons a minute; today the Phillips cannot refinance their house because the flow is under 5 gallons a minute. (tape 2, mark 340)

David Filippi, attorney for GKP, Inc. and Koss, Brod, Goodrich and Associates, Inc., commented. The entities he represents maintain development interests in the area under consideration, the east side of Eola Hills, Walnut Hills and Amity Hills. He urged the Commission to follow the recommendation provided in the December 18, 1997, staff report. There simply is no evidence in the record to support any sort of expansion of the existing Eola Hills Ground Water Limited Area, and there is no evidence that the planned development will negatively impact either ground water or spring supplies. He concurs with the comments made by staff in response to some of the inquiries made at the October 7, 1997, Eola Hills public meeting. The Department is charged by statute to fully develop the ground water resource within the capacity of the resource. This is the policy that is set forth in ORS 536.220 and 537.525. Absent any scientific evidence to the contrary, the Department and the Commission have an obligation to allow ground water development to proceed in a reasonable manner. Many of the wells experiencing problems currently were in place many years ago and may need to be reconditioned. (tape 2, mark 400)

Ken Friday, Yamhill County Planning Department, agreed that more information is needed. Bill Fujii has asked to attend a Planning Commission and/or Board of Commissioners meeting to present the Department's current information available. County staff are working with the Water

Resources Department on any land use action that might affect ground water resources. It is true, Eola Hills does have an old subdivision. House Bill 3661 of the 1993 Legislature allows lots of record and forest temple dwellings to be placed on parcels; anyone who owned property prior to 1985 could apply for a lot of record dwelling. Even if the Commission would adopt expansion of the Ground Water Limited Area, there would still be problems; however this would direct the county to develop programs to protect the significant ground water resources during the next periodic review. Yamhill County staff have been following Marion County's ground water ordinance, but adoption of something similar would still only apply to new development.

(tape 2, mark 450)

Frewing asked Mr. Friday if it would be possible to ask a lot developer to obtain information on the water status. Friday said that would be unlikely; there are several specific criteria in statute relating to a forest temple or lot of record dwellings. There had been a court case that essentially said that Yamhill County's comprehensive plan, goals and policies do not apply to the approval of new forest temple and lot of record dwellings.

Frewing expressed concern that this issue is coming to the Commission from various areas in the state—and is all too familiar. Jewett asked if there might be a way to resolve this issue in the next legislative session. Pagel said we can focus on ground water issues as we develop our budget and proposed legislation for the upcoming session. And we can continue our outreach with local governments.

E. Healthy Streams Partnership Discussion

Mike Lewellyn, Department of Environmental Quality (DEQ); and Lorna Youngs, Department of Agriculture (ODA), led a discussion on Oregon's designation of water quality limited waterways under the federal Clean Water Act and the implementation of agricultural water management plans under SB 1010.

Huntington explained that the departments of Environmental Quality and Agriculture are the lead agencies working to build partnerships with land owners across the state to address the water quality concerns by improving overall watershed health. This program is commonly referred to as the Healthy Streams Partnership, which is viewed as a component of the Oregon Plan.

Lewellyn described the federal Clean Water Act which was passed in 1972 at a time when there was a great focus on technology. At that time the methods described for meeting clean water goals primarily focused on point sources of pollution and technology of clean up, rather than prevention and nonpoint source pollution. To meet goals, benchmarks for water quality standards were established. Lewellyn discussed the water quality criteria for clean streams, and DEQ's regulatory program.

Referring to Section 303(d) of the Clean Water Act, Lewellyn explained that the "303(d)" list must be submitted by states to the federal Environmental Protection Agency (EPA) every two years. It is a list of water bodies currently not meeting water quality standards. Total maximum daily load (TMDL) standards for water bodies were developed because of cumulative impacts from a number of point source discharges.

There are 873 water bodies on the current 303(d) list in the state of Oregon. Based on EPA direction and the Healthy Streams Partnership, Oregon is now required to complete all 873 current 303(d) listed water bodies in ten years. DEQ's responsibility will be to do the technical work associated with describing the assimilative capacity of the water body; then the real work will be done at the local level with watershed councils and other state agencies having direct management responsibilities.

Youngs spoke on work being carried on by the staff of ODA and DEQ to plan for and deal with nonpoint source pollution. Agriculture's contribution to water quality pollution is primarily nonpoint source; examples are the run off of agriculture chemicals or soil itself, and animal grazing or confined animal feed operations. In Senate Bill 1010, the 1993 Legislature named the Department of Agriculture as the water quality planner for agriculture where nonpoint source water quality issues exist. Through Senate Bill 1010 a process for water quality planning was developed that would be tailored to local conditions. Youngs distributed handouts that explain this process.

Public Comment

Roger Bachman, Oregon Trout, said that the first plan developed is for Bear Creek in the upper Rogue Basin, and was to be the model for other basins. He expressed concern that the plan is weak and lacks standards. Bachman asked Lewellyn if the anti-degradation standard would be applied. The temperature of 64 degrees is an arbitrary standard, and is needed for many runs of salmonids. There is a run of summer steelhead in Malibu Creek and Ventura River in southern California that has adapted to very warm temperatures. It also gets very warm during the summer in the lower Deschutes Basin--summer steelhead that spawn in Trout Creek are very different from the stock of summer steelhead in the mainstem, and those in the west side tributaries which have ample supplies of cold water. (tape 3, mark 527)

Youngs responded to Bachman's comments on the Bear Creek upper Rogue plan. Prior to the development of the Oregon Plan and the Healthy Streams Partnership, ODA and DEQ staff were working on this plan. At that time, staff were looking at Bear Creek primarily on the issue of phosphorus loadings. The primary problem seemed to be point source pollution, and the remaining 20 percent was nonpoint source from agriculture and forestry. The agriculture community in that area encouraged a voluntary approach to the problem. After the Oregon Plan was developed, it was decided to continue using the existing Bear Creek plan because there was a

lot of effort and interest in it. The other pollution issues in that area will yet be considered in the future and included in a larger TMDL effort.

F. Progress Report: Permit Extension Rule Amendment Process

Dick Bailey and Dwight French, Water Rights Division; and Tom Byler, Director's Office, presented this report to the Commissioners.

Bailey reviewed the background of this rulemaking process. Legal counsel has advised the Department that ORS 537.230 requires that water right permit extensions must be based on the expectation that the project can be completed within the time period allowed. Current Department rules allow extensions for periods of one year for non-municipal permit holders, and five years for municipalities. These rules do not allow sufficient time for the completion of construction of some projects. At the August 1997 Commission meeting the Commission directed staff to initiate rulemaking to address this issue and review associated relevant issues.

A rules advisory committee (RAC) was formed, and this committee has met three times. Key issues being considered by the RAC are: time limits for extensions, good cause and reasonable diligence, public notice and comment, protest and appeal process, and irrigation district issues. Draft rules are scheduled to be considered by the RAC at their February and March meetings. A rulemaking notice will be published in the Secretary of State's Bulletin in May; public hearings will likely be held that month. Rules may be ready to go before the Commission for consideration at the July 1998 meeting.

Byler said that the list of key issues listed in the previous paragraph will likely continue to evolve over time. There are many diverse interests and opinions represented on the RAC. This is a challenging rulemaking. The Department is bound by statutory authority; and has the advice issued from the Attorney General's Office to consider along with suggestions from the RAC. Staff will offer another update on this rulemaking at the next Commission meeting.

Public Comment

Jan Lee, Oregon Water Resources Congress, distributed written comments. Lee expressed concern about pending permits, and the permits in the regular process expecting to extend on a regular basis. It would help alleviate concern if these permits are somehow protected in this interim period prior to the rulemaking. Lee had hoped this rulemaking would have been initiated earlier. Some of the irrigation districts and local governments had completed their work as far back as 1925 and filed "C" notices in the 50's and 60's. The state was to have surveyed and proved those rights up — that never did happen. So there are still those water rights in limbo. There is a great diversity of opinion in this rulemaking and consensus may not be reached on all

issues. "Good cause and reasonable diligence," "protest and appeal process" are examples of those issues. Some issues will require legislative change. (tape 4, mark 17)

Gail Johnson, representing the vineyard industry, said that setting up a vineyard is very cost- and labor-intensive. It is impossible to accomplish set-up in the time constraints now provided by permits. Johnson mentioned a letter to the Department from Dick Verboort in which he presents issues of the vineyard industry and some possible options for permit guidelines. (tape 4, mark 76)

Kimberley Priestley, WaterWatch, urged the Commission to support the staff rulemaking schedule. Regarding subsection E of the staff report dealing with irrigation district issues, Priestley said there is a large backlog in the WRD certification process. The extension rulemaking process is not the forum for dealing with this backlog. The law governing extensions of time allows for only an extended period of time to develop the permit; there is no provision in the law that allows for a change in the terms of the permit. It is WaterWatch's understanding that this is what the irrigation districts are proposing. (tape 4, mark 100)

Pagel commented on the concern for enforcement during the hold on extension requests. Department staff do not intend to enforce on any of those requests for permit extension. Staff are moving forward on the permit extension requests that can be processed under the current rules without any disadvantage to the applicant. Some of the issues brought forward in the rules advisory committee must be corrected through legislation, not through rulemaking. The Department's goal is to bring a consensus-based proposal back to the Commission. If consensus is not possible, staff will return with options and the different points of view that have come forward in the rulemaking process.

Frewing said that along with legitimate needs to allow permit extensions, there are also reasons to limit permit extensions to avoid undue water speculation. He would like staff to consider how much speculation might be allowed and tolerable.

Hansell commented that entities such as cities, ports, and counties may need special consideration to plan for future development.

There being no further business, the meeting was adjourned.

Respectfully submitted,



Diane K. Addicott
Commission Assistant