

Oregon Water Resources Commission Meeting
September 11, 1998
Baker City

Members

Mike Jewett
Dan Thorndike
John Frewing
Tyler Hansell
Jim Nakano

Others

Roger Bachman
Gail Achterman
Kimberley Priestley
Jerry Franke
Sharon Beck
Lyle Umpleby
Larry Trosi
Patty Perry
Byron Brinton
Kent Searles
Bill Lovelace
Barry Beyeler
Marc Liverman

Staff

Martha Pagel
Geoff Huntington
Diane Addicott
Tom Byler
Tom Paul
Bob Main
Lara Burgel
Vern Church
Jerry Rodgers
Adam Sussman
Barry Norris
Pat Lee
Mike Ladd
Rick Lusk
Larry Powers
Weston Becker
Colt Nudd
Robin Moen
Meg Reeves

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

Minutes of the July 2 workshop on basin stewardship and water supply issues and the July 9-10 Commission meeting were offered for consideration. Frewing moved that the minutes be approved; seconded by Hansell. All voted approval.

B. Commission Comments

Hansell said he has been asked to speak October 9th in Pendleton before the annual meeting of the Oregon Ground Water Association.

Frewing reminded Commissioners and staff of the October 14 and 15 meeting of the Governor's Watershed Enhancement Board in Ontario.

Nakano thanked all the those involved in the planning of yesterday's tour — it was most interesting.

Jewett also enjoyed yesterday's tour of local water resource sites; and he extended best wishes to Kent Searles in his well-deserved retirement.

Thorndike thanked everyone who helped plan yesterday's tour — he has also enjoyed cycling around the beautiful Baker City area when not in a meeting.

C. Director's Report

Pagel reviewed the previous day's work session and tour. She said staff have been working with the Governor's office to develop the Governor's recommended budget to the Legislature. Pagel attended the August quarterly meeting of the Western States Water Council (WSWC) held in Idaho; at that meeting she was elected Treasurer of the organization. WSWC is working with the Western Governors' Association to obtain federal funding for the adjudication process.

Frewing asked about the report of the Western Water Policy Review Advisory Commission. Pagel said she would provide the Commissioners with a copy of the executive summary; and perhaps Janet Neuman, law professor from Lewis and Clark and a member of the Commission, might be able to attend a future WRC meeting to discuss the report.

Frewing also said that during yesterday's tour there were comments regarding the economics of the use of water. Perhaps it would be helpful to consider at a future meeting an informational report on this issue and the crop cost production work sheets offered by Oregon State University to farmers and ranchers.

Geoff Huntington distributed copies of the agenda forecast for future meetings and reviewed it with Commissioners. It was decided to plan a special meeting in October to consider the permit extension rulemaking.

D. Request for Exceptions to Proposed Final Order

Adam Sussman, Water Rights Division, offered this report on exceptions filed by David P. Bird on a contested case proposed order. Mr. and Mrs. Bird along with their attorney Steve Joseph were also present to speak to the Commission. Jewett reminded all parties involved that discussion must be limited to the hearing record.

Sussman said the proposed well is in the Clear Creek Basin within the Powder Basin. The ground water application is for 0.75 cubic feet per second (cfs) of water for irrigation of 5.5 acres and supplemental irrigation of 54.5 acres. Department staff determined that this well is hydraulically connected to Clear Creek with potential for substantial interference. The Proposed Final Order would conditionally allow use of the well for the period of April 1 through April 14.

A contested case hearing was held in April 1998. The Administrative Law Judge (ALJ) issued a proposed order affirming the Department's proposed seasonal limitations, and denying the application on the basis that the applicant cannot make beneficial use of the water for those two weeks in April. The applicant then filed exceptions to the ALJ's proposed order.

Frewing asked Sussman to explain the relation of the application to the Division 33 rules. Sussman said that this application was received August 28, 1992; the Division 33 rules are effective for any application submitted after July 17, 1992 — so these rules do apply to this application.

Attorney Steve Joseph spoke on behalf of his clients Mr. and Mrs. David Bird (tape 1, mark 270). Joseph said the well in question was drilled in May 1992 by a certified well driller; it is 175 feet deep, cased to 169 feet, perforated from 30 to 60 feet, and sealed to 20 feet. The well as constructed is within 500 feet of Clear Creek. Joseph said Mr. Bird made it clear in the record that the Pine Valley area is a unique geographic area with many little creeks and tributaries.

Mr. Joseph referred to Oregon Administrative Rule 690-09-040 which provides that all wells located a horizontal distance less than one-fourth mile from a surface water source, and produce water from an unconfined aquifer, shall be assumed to be hydraulically connected to the surface water source unless the applicant or appropriator provides satisfactory information or demonstration to the contrary. Joseph said this creates a legal presumption which imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The law presumes the Birds obeyed the law — they did this in 1992 by getting an application to drill a well and hiring a certified well driller. Three years later in the application review process WRD staff expressed a concern regarding the hydraulic connection. His clients asked Department staff to provide testing in establishing that this permit should be approved. Staff did provide hydraulic and geology information on a neighboring well, but not on the Bird well. On the issue of potential for substantial interference with ground water, Mr. Joseph said the record clearly shows there have been no complaints of interference and no evidence of interference by the Bird well in the five years of its use. Mr. Joseph said there are no complaints, and there is no finding or record by WRD of potential for significant interference with surface water.

Sussman said that his reading of the Division-09 rules is that a well within a quarter mile that develops water from an unconfined aquifer shall be assumed to be hydraulically connected unless

the applicant or appropriator demonstrates otherwise. A hearing was held that gave the applicants an opportunity to bring evidence forward that the well was not hydraulically connected. At that hearing Department staff provided evidence that a nearby well in a similar situation is hydraulically connected, and since they had collected that data they believed that it was not necessary to test the Bird well. That test on the nearby well was a very extensive 24-hour aquifer test — staff believe data taken from that test are clearly applicable to the Bird well.

Page1 explained that one clear reason for the distinction between potential for substantial interference and actual substantial interference is that in most instances when staff consider a new water right application, there is not an active well in place on which to consider whether substantial interference has occurred. Staff are instead looking prospectively at what could occur. The evaluation still must be done when considering a new water right application whether there is a well in place or not.

After much discussion, Frewing moved for adoption of Alternative 1 in the staff report, to deny the exceptions, amend Finding of Fact and Conclusion of Law 4, delete Finding of Fact and Conclusion of Law 7, and direct issuance of a final order denying the application substantially in the form of the modified proposed order in Attachment 6. The motion was seconded by Jewett. The motion failed with three Commissioners voting in favor, and Nakano and Hansell voting against. Because of quorum requirements, four votes are required to pass a motion.

After further discussion, Thorndike moved to reopen this issue for further hearing to develop the record on the question of potential for substantial interference and also to develop information with respect to the application date and how that relates to the application of Division 33 rules; seconded by Hansell. All voted approval.

E. Amendment to Definition of "Quasi-Municipal Water Use"

Tom Byler, Director's Office, presented this item for consideration by the Commission. He explained that the proposed rule change is intended to broaden the definition of quasi-municipal water use to include entities, such as federally recognized Indian Tribes, that reasonably require this type of water use. The proposed rules would apply to all water right applications pending at the time of adoption.

Byler pointed out one correction to the draft proposed rules on page four of Attachment 1. Subsection 40, line four, should read "recognized Indian tribe that operates a water supply system... ."

Hansell moved to adopt amended Oregon Administrative Rule 690, Division 300, as shown in Attachment 1 with the additional change in Subsection 40 suggested by Byler; seconded by Nakano. All voted approval.

F. Information Item on Proposed New Rules Pertaining to the Permit Extension Process

Tom Byler, Director's Office, reviewed this issue with the Commissioners. The rulemaking started in August 1997. A Rules Advisory Committee (RAC) met seven times between September 1997 and April 1998, to review several preliminary drafts of proposed rules. Although the group reached consensus on many of the proposed rule revisions, they did not agree on all issues. Despite the lack of final consensus, a draft of the proposed rules (long-form rules) was made available to the public in May 1998. In response to the polarized comments received on the long-form rules, the Department re-opened the public comment period and made available an alternative draft (short-form rules) in July 1998. After reviewing comments on the short-term rules, Department staff remained concerned about serious questions being raised. It was decided to re-open the rulemaking and provide more time for review of the staff report prepared for this September 11, 1998, WRC meeting. Staff then plan to bring proposed administrative rules to the Commission in November or at a special meeting to be called at an earlier date.

Public Comment

Gail Achterman, Attorney for Stoel Rives, said she represents several clients including the Oregon Water Resources Congress (OWRC), Inland Company, and several municipalities and ports. Achterman said the critical issue relates to what rules will apply to people holding existing permits, particularly those who have had extensions in the past. Achterman named three fundamental policy issues needing to be addressed. One is that of standing and the right to protest, especially on the short-form rules. The legal position of OWRC and other permit holders is that there is no authority for the Department to adopt rules that would allow anyone other than holders of existing water rights to protest permit extensions. The second issue is how to apply the good cause test for an extension. The third issue is the question of when the special exemption from these rules is applied for municipal water rights; will it be provided for water rights for municipal use or for water rights held by municipal corporations. Achterman said that OWRC and others have consistently emphasized the importance of giving existing permit holders the opportunity one time to complete their projects under the Department's prior policies with the good cause determined only by the permittee's diligence and impacts on other existing water rights. Achterman urged that the Commission consider adoption of these rules at a special October meeting. (tape 2, mark 621)

Pagel asked Achterman to clarify her comment regarding a continuation of the current rules with a good cause determined only by due diligence. Pagel said the current rules refer to good cause and the statute; it is not solely a due diligence test.

Achterman agreed with Pagel that the existing rules just refer to good cause. She requested a change and clarification of the existing rules to comport with Department past practice. Achterman suggested a change in the proposed long-form rules in Attachment 1, page 1,