

Subsection 6, rewording the second sentence to read "In making this determination the Department shall not consider competing demands for the water other than demands of other affected water rights." The position of OWRC is that there is a need in the short-term period for a clarification in rules that good cause on these existing permits is going to be judged solely on the basis of the due diligence of the applicant and any impact on other existing water rights.

Roger Bachman, Oregon Trout, said he believed there was a reasonable compromise even though Oregon Trout objected to some of the opportunities presented in the long-form rules for existing users with pending extensions. Bachman said the issue of concern is speculation of water rights. It cannot be proven, but it seems logical that people are trying to grab the last water available and then decide what to do with it. This could be stretched out for years. Oregon Trout did not want to delay the effect of the long-term rules until the middle of 2000 because the people involved have had plenty of notice that something would change. Oregon Trout objected to having reasonable return on investment and hardship even mentioned because they are nearly impossible to define. The decision on reasonable return and hardship is in the hands of the Director. Bachman requested that standards and guidelines on these two issues be developed. Bachman said he does agree with Achterman that these rules should be adopted. The staff has done a terrific job in trying to reach consensus, but consensus is just not going to come. In the long-form and short-form rules the streamflows need to be given equal or higher weight than the economics of someone in business. (tape 3, mark 4)

Marc Liverman, National Marine Fisheries Service, spoke on concerns that permit extension requests might affect salmon. All the ESA listings of salmon as threatened and endangered so far include flows as a factor for their decline. Flows will need to be restored for the recovery of the long-term survival of these listed species. The state, the Department, and the Commission are committed to the flow restoration process. The primary tool to support salmon recovery at this point is the maintenance of existing flows where they are identified as important. For new applications the Department uses the legislative public interest test; the Commission adopted the Division 33 rules to clarify this public interest test as related to sensitive, threatened and endangered species. Before the implementation of Division 33 when the SB 674 backlog was being resolved, over 1,200 permits were successfully reviewed on a case-by-case basis by an interagency team to assist the public interest determination on pre-1994 applications. The number, volume, and location of the permit extensions in question do pose an important issue. The proposed new rules will grant a significant benefit to permit holders by allowing them extensions so they can complete their projects. These permit holders have argued that extensions should include some sort of dispensation from the public interest scrutiny that is based on current conditions which include the Oregon Plan, the Governor's Executive Order, and the listings. In his Opinion, Assistant Attorney General Steve Sanders summarized the basic test as whether the Department should grant an extension now based on its evaluation of current circumstances. The Opinion also says that in addition to permittee good faith, the Department must consider some factors unrelated to the last extension period or anything the permittee has done or failed to do.

Liverman said the Department's contribution to the Oregon Plan is relevant to permit extensions because it says, in part, the growing recognition of the need to protect instream values such as fish and wildlife requires that creative new approaches be crafted within the existing legal framework that already allows for changing consideration of the public interest and critical instream needs. The Department's submission to the Oregon Plan sites Division 33 as the primary tool and model for that purpose. Liverman urged the Commission to connect approval of permit extensions and fish needs either by tiering extensions directly through rule to Division 33 if possible or by providing some sort of case-by-case interagency review. (tape 3, mark 78)

Kimberley Priestley, WaterWatch, responded to Achterman's comments. Priestley agreed with Achterman on the three outstanding issues. With regard to standing, Priestley agreed with Achterman that this is a difference in legal interpretation. Priestley expressed concern regarding the request for assurance for the existing permittees that they will go forward under the status quo. The statute says that in order to get an extension, the Department for good cause shown shall allow an extension. Good cause is further defined in statute. Some factors that go into that reading of good cause include the good faith of the appropriator, the market for water or power to be supplied, and the present demands therefore. Achterman has asked that the present demands be limited to the effect on people who currently hold water rights — WaterWatch believes the statute is broad and the rules cannot legally limit that to people who hold water rights. Achterman put forth the idea that for people who currently hold extension requests, the review should be limited to diligence — WaterWatch does not believe the rules can legally limit the review to due diligence. Good cause is laid out in the statute, not rule. WaterWatch has been involved in the Rules Advisory Committee from the beginning. It has been clear that the Department has intended that the A.G. Opinion would apply to both the long- and short-form rules. People who currently have extension requests do not want to be limited to one year; they want to get the long-term extensions with no further review. That is totally unacceptable. These rules represent a huge compromise. The resource has some limited protections; the users are getting a great deal. Regarding the issue of municipal water users versus the municipal water right, WaterWatch strongly opposes changing this language. If these folks want their uses which are not municipal uses to fall under the held harmless language of these rules, they have other avenues such as applying for a transfer. (tape 3, mark 153)

Frewing asked for a listing of municipal permits that would really need the long-term provisions of the rules — perhaps there are some that really do not need an extension for long-term urban expansion. He also asked for a list of municipal permits with pending extension requests, the date of their submission, and the number of renewals granted.

Pagel said when staff looked at the extension issues for municipal uses and reviewed other statutes with special preferences and provisions for municipalities providing municipal water supplies, it was obvious that the question of how to address long-term water supply was a very important one. There are many issues to consider such as how we initially issue permits and for

what period of time, and if they should be subject to periodic extensions or should that be phased in. So it was decided to create a task force to look at municipal water supply and how we deal with it. It boiled down to what was referred to as an exemption in the rules but is really a message that while we are going through this review period, a municipality does not have to come forward and ask for a permit extension request because it is possible we would have some special rules. Pagel said we may not be able to achieve consensus, but our plan is to offer a complete packet of information hopefully at a special meeting before November from which the Commission can make a policy decision.

G. Public Comment

Patty Perry, Executive Director for the Grande Ronde Model Watershed Program, said she appreciates working with the WRD field staff in her area. Perry said that late season low flow is a limiting factor for water quality and benefits to listed salmon. The current mechanisms for leasing water rights to augment flow are either a full season lease or permanent transfer of rights to instream. Perry urged the Commission to consider developing a mechanism for partial season leases which would allow the opportunity for sharing water. Water right holders could utilize water early allowing more flexibility in maintaining their economic stability and later in the season water could be leased for instream needs. This tool would be a great help in implementing local basin plans and addressing local issues. (tape 4, mark 1)

Pagel thanked Ms. Perry for her comments and said the Commission had held a workshop on partial season leases. At the workshop there were many concerns raised about the implications of the partial season lease and general principles of water law. However, the Commission did direct staff to study the possibility of moving forward with partial season leases under the conserved water statute. Staff are currently working on this with the Attorney General's office; when legal advice is available, further discussion will be scheduled at a Commission meeting.

H. Request for Extended Irrigation Season in Powder River Basin

Pat Lee, Water Rights Division, and Steve Applegate, consultant representing the Powder Valley Water Control District, presented this request to the Commission. The request was to extend the North Powder River Sub-Basin irrigation season to allow irrigation from legally authorized stored water during the period October 1 through October 31. By court decree the current season runs through September 30.

Lee explained that in order to protect existing and future water rights, the statute places four conditions on irrigators' use of water during an extended season: use of water shall be limited to stored water; shall be subordinated to all existing and future water rights; shall comply with all conditions and limitations of the permit or certificate under which use is made, including the rate, duty and place of use; and shall be regulated among irrigators for whom the season has been

extended during the extended irrigation season according to the priority date of the permit or certificate.

Applegate spoke on the need for this extension by irrigators. He said it would help with some area water management problems and would supply water to newly-planted cover crops and crops that mature later in the season such as mint and potatoes.

Public Comment

Kimberley Priestley, representing WaterWatch, commented that she does not oppose this irrigation season extension request. She asked that measurement and reporting be required in the month of October. Priestley said the process that gives people an extended irrigation season is an opportunity for the Department and Commission to do something for fish. It is true this is stored water so there is no statutory requirement to protect values for fish, but she encouraged the Commission to consider adding a condition to ensure that minimum flows in Wolf Creek and Anthony Creek would not be affected. (tape 3, mark 560)

After discussion, Priestley agreed that ensuring minimum flows is not statutorily required in the use of stored water but asked that it might be considered as a policy decision. Applegate noted that the representatives of the departments of Fish and Wildlife and Environmental Quality have expressed approval of the proposed season extension.

Jewett asked what effect an extended season would have on the water availability calculations for a junior user if this were live flow. Pagel agreed the question is a good one that has not yet been brought up and one that staff could consider.

Frewing suggested that in the future when granting extensions such as this, it might be a good idea to include additional stream measurement and reporting as a condition since the Department is in need of data. It would also be a good idea to negotiate for benefits to fish such as sharing the extra season water with downstream instream needs that might exist.

After much discussion, it was agreed to add the following language to Condition 6 of the proposed order, "Such users shall also measure and report during the extended season."

Hansell moved that the Commission issue an order as presented in Attachment 3, with conditions, extending the North Powder River Sub-Basin irrigation season to include the period from October 1 through October 31 of each year, and with the addition of the sentence, "Such users shall also measure and report during the extended season" to Condition 6. The motion was seconded by Nakano. All voted approval.

I. Request for Extended Irrigation Season in North Santiam River Basin

Pat Lee, Water Rights Division, and Steve Applegate, representing Santiam Water Control District, presented this request from the Department of Agriculture (ODA). The request was for an extension of the North Santiam River Sub-Basin irrigation season during the period March 1 through April 30 and October 1 through October 31. Lee explained that in a particularly dry spring, early plantings may need added moisture in March and/or April to germinate and begin their growing cycle. In October, crops cultivated such as mint, carrots, corn and blueberries will often benefit from irrigation to mature and/or survive.

Lee said staff concluded that water is available to meet ODA's request; that water use during this proposed extended season will not impair instream flows that are necessary to protect aquatic resources; and that water diversion and use will not impair the achievement or maintenance of water quality standards as established for the water source by the Department of Environmental Quality.

After discussion regarding the availability of flow to be released from Detroit Reservoir, the Commission asked in Subsection 3 of the proposed order Findings of Fact and Conclusions of Law section to have "currently" added to the last sentence of the first paragraph before "supplemented." Commissioners also asked staff to work on additional language in the last sentence of the following paragraph of Subsection 3 to reflect the fact that the guiding operations of the Corps at Detroit Reservoir could indeed change in the future.

Public Comment

Kimberley Priestley, WaterWatch, commented on this request. She said that for use of live flow the statute requires that the extension of the irrigation season cannot impair instream values. ODA and WRD staff have worked on language regarding this issue, but Priestley suggested more clarification. She suggested adding "including live flow and the storage component" after "streamflows" in Condition 6 of the Proposed Order, page 30 of the staff report. This would add more assurance that instream values will not be impaired, and that the minimum perennial streamflows in the conversion process will be protected. In order to comply with the law and as a general policy, mandatory measurement and reporting should be required. She suggested the language adopted in the Powder Valley River Basin extension as amended. Priestley said the staff report shows two cfs of water available in October; based on this water would be available. WaterWatch disagrees with this interpretation. Only stored water rather than natural flow should be used for this irrigation season extension in October. Based on the Department's water availability model, no water would be available for future users. Priestley said that her water availability calculations do not agree with those used in the order. (tape 4, mark 180)

Pagel commented that the administrative rules do include both the stored water and live flow components. She said that a new law went into effect within the last few years that says if and

when minimum perennial streamflows are converted to instream water rights, and if they include a stored water component, that stored water has to be under contract. So, more research would be necessary to create the precise language needed here. If this is basically adequate it would be best not to edit it. If it needs to be more fully addressed, staff need to take some time to work on it.

Hansel moved to adopt Alternative 1 in the staff report; to issue an order as presented in Attachment 5, with the changes discussed at this meeting — adding "currently" to the last sentence of the first paragraph before "supplemented" in Subsection 3 of the Findings of Fact and asking staff to work on additional language in the last sentence of the following paragraph of Subsection 3 to show that the guiding operations of the Corps at Detroit Reservoir could change in the future— with conditions, extending the North Santiam River Sub-Basin irrigation season to include the period from March 1 through April 30 and October 1 through October 31 of each year. Motion was seconded by Nakano. All voted approval.

Item J on the agenda, staff report on legislative concepts and agency budget, was not heard at this meeting due to lack of time.

Respectfully submitted,



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