

Oregon Water Resources Commission Meeting
November 6, 1998
Grants Pass

Members

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

Others

Rep. Carl Wilson
Kimberley Priestley
Jim Verdick
Steve Bonner
Tony Suttora
Dennis Becklin
Carl J. Palmer
William Butler
Tom McMurray
John Roach
Otis Swisher
Kathy Vejtasa
Stan Vejtasa
Floy Smith
Larry Thornton
Marjorie Spickler
Aimee Buckmaster
Cindy Long
John Johnson
Vivian Kirtley
L. H. Kirtley
Gene Reedy
John Ferris
Aileen Twyman
R. G. Twyman
Donna Johnson
Chris Cauble
Geneva Oran

Staff

Martha Pagel
Geoff Huntington
Bonnie King
Bruce Moyer
Weston Becker
Al Cook
Ivan Gall
Meg Reeves
Larry Mentee
Richard Whitman
Denise Pepperling
Bruce Sund

Others

Robert Oran
Bob Buckmaster
John MacDiarmid
Richard Micher
Herman Schroeder
Marianne Schroeder
Judy Gove
Margaret Jones
Carl Jones
Ruth Feirich
Dave Strahan
Dale Smith
Darrell Stafford
Mike VanLiew
Walter Haines
Gordon Cuning
B. I. Rafalovich
Gordon Ford
W. L. Cauble
Geoff Garcia
George Martin

Others (cont'd)

John Fletcher
Warren Troy
David Grenbemer
John Stram
Ramona Osborn
Eric Grape
James Meorzek
Valdomer Swanson
Richard Kalman
Doug McGear
Herbert Neelund
Ashley Henry
Hank Rogers
John Groves
Bob Hunter
Laura Schroeder

Others (cont'd)

Dorothy Porvos
Steve Beyerln
Bud Combe
Donn Leson
C. Holzkamper
Brad Bayliss
John Hawkely
Don Greenwood
James Hongolz
Lee Wedberg
John Groves
India Minton
Jan Stovall
Bryan Gove
John Ferris
Steve Elmore

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.

Chair Leonard welcomed those in attendance and called the meeting to order. This meeting was a continuance of Thursday's meeting.

Martha Pagel thanked those who attended the Thursday evening public meeting held at the City Council Chambers in Grants Pass. She said the meeting was most helpful.

Leonard read a letter from Mike Jewett recusing himself from participation in the Grants Pass Irrigation District (GPID) agenda item.

Pagel explained that at this meeting Richard Whitman would serve as the Commission counsel from the Attorney General's office so that Meg Reeves could assume the role of a participant in the contested case proceeding.

Leonard asked the Commissioners to disclose ex parte contacts prior to this meeting. Hansell said he received two GPID-related mailings; Hansell did not read the mailing from GPID and read only the note sent by Donald Fox with a newsclipping.

Thorndike received a letter and a Sneak Preview news article from Gene Reedy which he read but it did not seem to be relevant to this agenda item. He received and read a copy of a letter signed by Mayor Gordon Anderson to Martha Pagel. He received the enlarged copy of the February 4, 1998, ad placed by GPID in the Daily Courier; he forwarded this to Geoff Huntington, WRD Deputy Director.

On September 30, 1998, Thorndike received a proposal solicitation addressed to his family business, Medford Fabrication, from GPID relating to the construction of fish screen passages. He had already notified his staff not to respond to any RFP that might be received from GPID. Thorndike also received a GPID Savage Rapids Dam Fish Study by Dennis Becklin and an engineering proposal of Savage Rapids Dam which was addressed to Thorndike as a Commissioner. The Fish Study and engineering proposal Thorndike opened but did not read; he forwarded them on to Huntington.

Frewing received three pieces of GPID-related mail. He received but did not read the same GPID Daily Courier ad sent to the other Commissioners. He received news clippings from Ruth Feirich but did not read them. He received and read a letter from Mayor Anderson indicating the Mayor would not be attending this meeting.

Nelson also received, but did not read, a copy of the GPID ad in the Daily Courier. He received a hand-written note with news clippings from Frank Keifer; Nelson did not read the clippings. He received a fax from Mayor Anderson but did not read it.

Nakano received a copy of the GPID newspaper ad sent to the other Commissioners; he did glance through it.

Leonard said she received a hand written note with newspaper clippings and a typewritten letter — neither of these were read by her. Leonard did receive and read letters relating to Savage Rapids Dam from the National Marine Fisheries Service.

G. Grants Pass Irrigation District

The Commissioners were asked to consider exceptions filed to the proposed order issued by the hearings officer on September 8, 1998, prior to issuing a final order on this matter. In its Notice of Proposed Action issued April 17, 1998, the Commission proposed to cancel Grants Pass Irrigation District's permit and deny its request for modification. The Commission had asked Steve Elmore, the hearings officer, to consider whether the District has exercised due diligence as required by the October 1994 order; and whether granting the District's January 1998 request to modify would impair or be detrimental to the public interest factors set forth in ORS 537.170 or otherwise as prohibited by law.

The attorneys representing all parties came to the testimony table before the Commission.

Meg Reeves, Assistant Attorney General, introduced herself and said that she had assisted Department staff in the conduct of the contested case by presenting evidence and making argument before the hearings officer, and follow-up exceptions with the Commission in response to the hearings officer's proposed order. Reeves explained to the Commissioners that the staff report before them includes exceptions from all the parties as well as the Department's recommendations as to how to treat those exceptions.

Reeves summarized a few of the exceptions filed by the Department and the Department recommendations. She said the Department agrees completely with the proposed order recommended by the hearings officer particularly with respect to the due diligence determination. Staff did, however, recommend that additional background information be included since this case has a long history. Staff also suggested that more explanation of responses to arguments made by parties in the contested case is warranted. This would help clarify the reasoning underlying Department recommendations relating to due diligence.

Reeves said that the hearings officer looked at the District's modification request and said that it was insufficient to even enable the Commission to make a public interest determination. During the course of the contested case, the District settled on an interpretation of its modification request which was to consider it a request for more time to study fish passage at Savage Rapids Dam. Department staff suggested that a better course would be to indeed treat the District's modification request as a request for more time and evaluate whether it was in the public's interest to grant that request.

Bob Hunter, staff attorney for WaterWatch, introduced himself and said his organization participated in the contested case. Hunter said he agrees with the handling of the exceptions as depicted in the draft final order. Regarding the evidentiary matters, Hunter objected to accepting and including exhibits that were offered at a point in the proceedings when rebuttal and argument with respect to their contents was no longer available to the opposing parties. Hunter said he did not have time to read in detail the proposed final order recently submitted by GPID, but he did skim through it and it does contain recommendations and matters that were not part of the District's exceptions. He objected to it as being a continuation of those exceptions filed late.

Hunter continued saying he believes that a number of exhibits were excluded inappropriately, but the evidence is overwhelming with respect to the issues at hand. One of these exhibits is WaterWatch Exhibit 33, a May 11, 1988, letter from Rogue Flyfishers, Inc. to the Commission. It is basically commenting on the initial application that GPID made for this new water right and deals with public interests such as waste and enlargement of a right. This exhibit serves as a significant basis for the historical record.

Another exhibit Hunter believes was improperly excluded was WaterWatch Exhibit 35, minutes of the January 13, 1995, GPID Board of Directors meeting. These minutes were excluded because the copy submitted was too light to be legible. There were relevant discussions among Board members on due diligence in those minutes.

Hunter said that he believes the final proposed order is very good in terms of its findings and it accurately depicts what the records show in terms of the District's due diligence. However, the proposed order does not indicate a remedy the Commission might take with respect to funding and lack of due diligence. The proposed final order in the staff report corrects that by recommending cancellation of the permit based on lack of due diligence. Hunter said he believes the definition of due diligence in both the hearings officer's proposed order and the Department's draft final order is a good one. Hunter said that based on this standard of due diligence under which we have been operating, the District certainly did not exercise due diligence. Perhaps, for the record, a note should be made for the other definition of due diligence in case law and indicate that GPID did not exercise due diligence according to that definition either.

Hunter said there were two statements on page six and seven of their exceptions that he believes should have been included in the modifications. He said that in a staff report it was indicated that the Department felt that the content of their exceptions was covered, but WaterWatch believes that there should be stronger language in the proposed order; in particular, adding language that would require that the dam be removed and that the District proceed with due diligence to remove the dam in order to make the permit consistent with the State Scenic Waterway Act.

Hunter said he believes the proposed order is correct in stating that the water right would be canceled due to failure to meet a condition, not on the basis of ORS 547.410. However, the Commission would have authority to cancel under that statute as well. Hunter suggested adding a clause stating that the Commission also has satisfied the requirements of ORS 537.420.

Hunter said he believes that a finding that dam removal is the only permanent solution should be in the final order. He would also like to see included in the final order the facts listed in WaterWatch's exceptions to the District's modification request regarding the District's wasteful and inefficient use of water, the miles of open leaky canals, the large percentage of small lots served by the District; and that the 1993 total agricultural value barely exceeded the cost to operate the District.

Hunter said there is additional reason not to grant the request for modification. If the Commission does find lack of due diligence, as the hearings officer did find, and does proceed to cancel the permit, request for modification becomes moot.

Laura Schroeder, attorney for Grants Pass Irrigation District, spoke to the Commission. She commented on the procedural matters of the disclosure of ex parte contacts. She reminded the Commission that the Department staff report is an ex parte contact. She said she believes this contact has biased the Commission. Schroeder responded to Bob Hunter's suggestion that the proposed final order submitted by GPID is biased. The record cannot be supplemented; however, argument can. In a court often times the attorneys propose orders, but this usually occurs after the judge has considered the evidence. The Department proposed an order for the Commission's consideration. If the Commissioners were to decide this is impermissible for the District to do the same, the Commission must then in fairness delete both orders from their consideration.

Schroeder said the Commission in this contested case has performed three distinct functions — investigated this action through the Department; prosecuted this contested case through attorney Meg Reeves; and now the Commission sits as judge. This adjudication role requires the Commission's actual objectivity and disinterestedness in governmental decisions. Whether or not this impartiality exists in each Commissioner or together as a body acting in a judicial capacity is tested by the U.S. Constitution and by the Oregon Constitution under the fourteenth amendment. In Oregon there are three elements for disqualification. One element is if the Commission acted as an officer or an agency to act as a court; another element is the closer the issues and the interests are at stake that resemble traditional adjudications; the third moves from appearances to impossible temptation. These elements are set out in Thousand Friends which is cited at 304 OR 76.

Schroeder said that in this hearing, the first two elements of disqualification are met. The Commission acts as a court and the issues resemble those that would appear before a court. The third element regards the disqualifying element — a more serious one. The disqualifying element here, if there is one, is not that you as judges have acted to investigate and prosecute this matter. The law provides administrative bodies with that power that a court could not exercise. It is also not that the Assistant Attorney General has acted as the District's adversary and has then become the lawyer for you as judge. The Commission, not the Assistant Attorney General, is the decision maker.

Schroeder read Assistant Attorney General Meg Reeves' language included in the printed agenda for this meeting which indicated that the Commission had asked the hearings officer to consider whether the District has exercised due diligence as required by the October 1994 Order and whether granting the District's January 1998 request to modify would impair or be detrimental to the public interest factors set forth in ORS 597.170 or otherwise is prohibited by law.

Schroeder said that in the closing arguments in the contested case, Reeves advised the hearings officer that this was not a cancellation proceeding. However, in the proposed final order Reeves advises cancellation to the Commission. Schroeder said it is the District's contention that a final

order from a contested case hearing must be based on the record in that contested case. Since cancellation was not noticed or at issue, Schroeder said the Commission cannot make a decision for it.

Schroeder asked the Commissioners to focus on the issue that was framed; the burden of proof and who has it; the conditional nature of the 1994 Order; and the previous orders entered annually by the Commission.

Schroeder advised the Commissioners, if they cannot analyze the record carefully and make an impartial decision, to move the entire proceeding to a judge's panel.

Chris Cauble, attorney for Grants Pass Irrigation District, spoke to the Commission on the exceptions submitted by GPID regarding the modification issue. The modification request was a great deal of information, including flow charts and supporting documents that related to the scientific fish passage issues. Cauble said that since this modification request was made in January 1998 there have been modifications to the dam that have had dramatic impacts in improving fish passage. GPID is willing to work with the Commission and the National Marine Fisheries Service to resolve the fish passage problems. The District, in its modification request, was trying to resurface the recommendations of the Savage Rapids Dam Task Force. The District is trying to resolve fish passage problems in the present and to show that this dam can be operated in a scientifically safe manner. This is in the public interest. The impoundment behind the dam is a very good recreational source which is an important economic benefit to the community. This too is in the public's interest.

Cauble responded to a comment made by Bob Hunter regarding the waste and canal seepage. Cauble said eliminating this seepage would have a devastating affect on area wells causing them to dry up and causing serious damage to the aquifer. When asked by Thorndike if they were arguing that this seepage is a beneficial use, Schroeder did say that this would not be a beneficial use of water under Oregon statute.

Cauble asked the Commission to slow down the process in relation to the modification request. There have been many questions raised and there are serious impacts that need to be studied. The modification request would give the opportunity for further study without having the permit canceled.

Following a short recess, the parties came back to offer rebuttal.

Reeves spoke first. She said that she is comfortable with the Commission accepting GPID's submission of a final order even though she agrees with Mr. Hunter that there are materials in it that were not raised in the exceptions.

Reeves said she agrees with Mr. Hunter that the definition of due diligence that has evolved in case law with respect to the statutory formulations of reasonable diligence or due diligence is very close to what the hearings officer stated. If anything, it may even be a stricter standard. Reeves said she would not object to including a statement about the formulation that has evolved in case law similar to the definition read by Mr. Hunter as part of the definition of what the Commission would be approving.

Reeves said that regarding WaterWatch's exception about the alleged wasteful use of water within the District, the Department's question is whether the use of water is relevant to the modification request. The Department's position is that it is not. It does not have to do with compliance of a condition requiring dam removal. It is a separate issue under the Newton plan and under the 1994 Order; that is, the District's effort of conservation. The Department does not disagree that the finding would be supported by the record, but does not believe that it is relevant to the question of the requested modification.

Reeves said that Mr. Hunter suggested that perhaps the order should include an observation that if the Commission finds lack of due diligence and cancels the permit, that the modification request becomes moot. Reeves would not advocate including that finding by the Commission. She encouraged the Commission to make the findings with respect to the public interest determination.

Regarding the District's arguments, Reeves said she agreed with Ms. Schroeder's assertion that the Attorney General's Office is not the decision maker, and that the Commission is. Reeves does not agree with Schroeder's assertions that the staff has acted in any way improperly in this contested case. The Department is the Commission's staff and is doing the work that must be done in order for the Commission to make a decision. The staff report is a recommendation which the Commission is free to accept or not.

Reeves said that the District has asserted that she has stated that this is not a cancellation proceeding. That is not accurate. What Reeves said is that this is not a cancellation proceeding under ORS 537.410. The issue does arise by the terms of the permit that the District was granted in 1990 and that was extended in 1994, which expressly provided for cancellation if the District failed to comply with conditions.

Reeves said she did not agree with the District's argument about whether the Commission adequately noticed the fact that it intends to cancel. The notice of proposed action that was sent out after the March 1998 Commission meeting stated that the Commission was proposing to cancel the permit for failure of due diligence, proposing to deny the modification request, and setting the case for a contested case hearing. In that notice the Commission referred specific issues to the hearings officer for a decision — the entire case did not have to be turned over to the hearings officer. The Commission asked the hearings officer for a determination on diligence

and a determination on whether the modification is in the public's interest. Reeves said that now the decision is the Commission's on whether to cancel the permit on the basis of those findings that were made.

Reeves said that the District argued that they were interested in picking up the Savage Rapids Dam Task Force recommendations to see if those recommendations might include a solution for fish passage needs. It is in the record that the National Marine Fisheries Service believes that dam removal is practicable and the best alternative for fish. The record is very clear on the subject of which alternative is the best in terms of fish passage.

Reeves said the District made a request to slow down the process. The Commission asked the District to study this issue eight years ago. After studying it, the District returned to the Commission and said that they believed the solution was to remove the dam. The 1994 Order was to be the beginning of the implementation of that plan, and that has not happened. Reeves said the District is now asking the Commission to go back to 1990 and study it again — it's the Department's position that the District has not given the Commission a reason to do so. In response to the District's request to slow down the process, Reeves said she believes the Commission has been very patient with the District and the request is not warranted.

Bob Hunter spoke next. He addressed the bias issue raised by the District. Hunter said there is a big difference between having a bias and having an opinion or belief based on public testimony or a record. The District's argument would basically disqualify any commission from acting if they have an opinion one way or another since they apparently would have some kind of a prejudice.

Hunter said he disagrees with the District's statement that cancellation is not an issue here. He said the language was clear in the public meeting notice that the Commission would be proposing to cancel permit 50957. The entire contested case was over the issue of due diligence and cancellation and denial of the request based on public interest.

Hunter said the District said that the order did not amend the permit; however, the order does state that all terms of the conditions of permit 50957, except the name and the address of the permittee, the source of the water and the purpose of the permit, the date of priority and the description proposed, are replaced with the following. And then it sets forth all of the conditions that were set forth in that 1994 Order. So the permit was amended to include those conditions.

Hunter continued to say a condition of the 1994 Order was that the permit would expire on October 15, 1999, unless extended by the Commission or unless earlier canceled for failure to comply with the conditions of the permit including, but not limited to, failure to exercise due diligence in implementing the approved conservation and fish passage plans.