

Hunter said that condition 5 ends with the sentence, "If the Commission finds that the permittee has failed to exercise due diligence toward implementation of the plans, the Commission may take action as provided under condition 9. Condition 9 reads, "Failure to comply with any of the provisions of this permit, including the exercise of due diligence as described in condition 5, may result in action including, but not limited to restrictions on the use, civil penalties, or modification or cancellation of the permit."

Hunter said it is very clear that due diligence with respect to dam removal was a requirement of the permit and if that was not complied with, the Commission has the authority under the permit to cancel.

Hunter said the District raised the issue of burden of proof. He believes there is adequate discussion of that in the written document the Commissioners have. The record is overwhelming in its support that the District did not exercise due diligence and did act in bad faith.

Regarding due diligence, the District is trying to argue that each time the Commission did not take action after an annual report review to cancel or make a lack of due diligence, that somehow they got beyond that and did not look back. At the meetings, the District would represent to the Commission certain things they were going to do. The Commission would not find out until later whether those projects were actually accomplished — and many times they were not. The record is very complete in lack of due diligence, and the Commission has the right to look at the whole period of time in question.

Hunter said it is difficult to understand exactly what the District is asking for in the modification request. It seems that what they are really asking for is more time. As Reeves stated, the original permit gave the District four years to do a study, and the District had the obligation. During that four years the District did not make a decision on how to resolve the fish passage issue. It would not be good public policy or in the public's interest to allow more time.

Hunter said that regarding the beneficial use and waste issue, the District acknowledges that the law does not recognize seepage as a beneficial use. The District is acknowledging to that wasteful use.

Hunter said the District indicates that the duty they were granted did not include carrying capacity. However, their original permit gave a rate and duty where that was factored in. But their system is so insufficient that it was not enough.

Hunter summarized by saying that if conditions are placed on an order and those conditions are not met, there must be consequences or the order is meaningless.

Schroeder spoke next. She said that regarding comments by Reeves and Hunter on whether the District was on notice of cancellation, she agrees that the District was indeed on notice of cancellation; the point she had been making was that the notice for the contested case hearing did not include cancellation as an issue for the hearing record.

Schroeder said that conditions 5 and 9 in the 1994 Order appear to be integrated. Condition 9 refers to failure to comply with any of the provisions of this permit — Schroeder said that since we are talking about an order, not the permit, this is a problem. This order also makes a condition of due diligence that is different than the statutory requirement. Schroeder does not believe the Commission has the authority to do that. She asked the Commissioners if they believe the order is valid and that they can take action on cancellation.

Schroeder said that according to the order, cancellation was not the only thing the Commission could do. Schroeder said the hearings officer took no evidence on any other types of remedies as would be done in a civil or criminal proceeding as to the appropriateness of those remedies.

Schroeder asked to focus on those issues she brought before the Commission in her earlier comments — the issues frame and the burden of proof. It is important in a case of cancellation that the proper burden of proof be established. The case law GPID presented in its briefs shows that clear and convincing is the standard when you are trying to take a property right. Schroeder said that in some cases on this topic the opposing side did not present evidence.

Schroeder said that regarding the conditional nature of the 1994 Order, there have been suggestions that the conditions should have been put into the order itself. They were referenced in the order as chapters in the Newton report. One of the conditions that has not been brought up is the money to take out the dam or install pumps. Schroeder said the 72 findings of fact in the GPID proposed final order lay out due diligence in trying to get the money.

Schroeder said that in the 1994 Order the District is required to submit annual reports. That order also granted an extension to 1999. GPID presented those due diligence and conservation issues before the Commission each year, and the Commission approved them.

Schroeder said the hearings officer incorrectly looked back to the beginning of the 1994 Order through the present time to analyze due diligence. The Commission issued final orders every year up through 1996 approving due diligence; GPID believes that the only year the Commission can now consider is the current year.

Following the parties' rebuttal, Dennis Becklin, Grants Pass Irrigation District Board Chair, responded to a comment made by Reeves regarding the modification request. He said that in relation to the fact that National Marine Fisheries Service (NMFS) made statements that dam removal is the most practicable and that an HCP would not be granted unless the dam was

removed, that is in the record. But the HCP process is still going on and is in negotiation. In the GPID Exhibit 152, NMFS made the statement that they have not made the determination that Savage Rapids Dam has to be removed before an HCP is issued.

Chair Leonard thanked the attorneys for their comments and closed the argument portion of the hearing. The Commission deliberations then followed.

Frewing moved that the Commission accept into the record those materials that were described and read this morning as ex parte communications and are relevant to issues at hand but that the Commission not consider those in its decision; seconded by Nelson. All voted approval.

Thorndike moved that the proposed order submitted Thursday, November 5, 1998, by the Grants Pass Irrigation District be accepted as additional argument; seconded by Frewing. All voted approval.

Thorndike said he agrees with WaterWatch's comments about their Exhibit 35, the GPID Board minutes from the January 13, 1995, meeting. He believes a legible copy of those minutes should be allowed and not be excluded based on the argument of prejudice. The minutes are relevant and should be accepted. Thorndike moved that the legible version of WaterWatch Exhibit 35 be admitted into evidence in the final order; seconded by Frewing. All approved.

Hansell moved that the Commission accept staff's recommended action on each of the exceptions filed by the parties subject to the three changes previously voted on in terms of additions to the record, and adopt a final order which is consistent in form and substance to the draft final order set forth in Attachment B of the staff report. The three changes previously voted upon are: to accept into the record those materials received and read that were disclosed at this meeting as ex parte communications and relevant to issues at hand but that the Commission will not consider those in its decision; that the proposed order submitted by GPID November 5, 1998, be accepted as additional argument; and to accept a legible copy of WaterWatch Exhibit 35 as evidence in the final order (the District Board minutes from their January 13, 1995, meeting). The motion was seconded by Frewing. All voted approval.

Chair Leonard commented that this has been a difficult process for all involved. She expressed appreciation for the respect people gave to one another during this time.

Hansell said that no one has come out the winner in this situation. It is a shame to see this community so badly divided on this issue. It was not an easy decision for the Commission to make, but the only one that could be made.

H. Public Comment

Dennis Becklin, Chair of the Grants Pass Irrigation Board, commented that he would be recommending to the Board of Directions that this order passed by the Commission be appealed to the Oregon Appellate Court. He will also recommend that GPID's lawyers seek a stay of execution of this order. During the appellate process he would hope that the Commission would not attempt to enforce the stoppage of water flow.

Becklin said there are two underlying pieces of what he considers to be Frankenstein logic that underlie the decision made at this meeting. The first is to argue that seepage from GPID's system that has supported an aquifer that serves hundreds or thousands of wells in the community is not a beneficial use. He will argue in the legislative session that beneficial use of water that seeps out of a canal system and supplies an aquifer that supports the quality of life in his region and supports the ecosystem is not to be terminated.

Becklin said he does not agree with the policy of natural flow that continues to be argued by the Water Resources Department. That policy means that water is appropriated in this area not on basis of the amount of water going down the river which is stored and managed at Lost Creek Reservoir, but it is appropriated on the basis of the amount of water that flows into the reservoir during the summer months. Becklin said this is illogical and needs to be addressed either in the legislature or in the courts.

Becklin said that we as a community will stand and fight on the basis of good sound logic against your tight legal definitions.

Representative Carl Wilson, said he is disappointed with the Commission's decision. This is a divisive issue in the community. He said he has chosen to believe in dam retention. He believes in placing the needs of humans before all else. He thinks that the overall tenure of this issue has been initiated by radical environmentalists, aided and abetted by many in government with a similar agenda. He said he will continue to resist the federal and state government in attempts to intimidate GPID into a solution that is not beneficial to the citizens and the historic livability of the community.

Otis Swisher, Medford, said that all waters in Oregon belong to all of the people of Oregon. Those who use these waters must prove up on the amount they will use; only then can they claim a water right. In his view, GPID has no claim to a right for the excess water the Commission allowed them to use. There are too many valuable public uses for that water with higher priorities, uses such as instream flows for the fishery and public recreation on the Rogue; and most important, the long-term requirement and need of the Rogue River itself to maintain its own health. Since GPID has not acted in good faith to live up to the requirement of dam removal which led the Commission to appropriate that excess water, he heartily endorsed the

Commission's decision to withdraw that water from the District. There are several thousand acre feet of water behind Lost Creek Dam that Grants Pass could purchase if water is needed.

Stan Vejtasa, GPID patron, said he has been a patron of the District for 12 years. He is an engineer and has a little understanding of dams. He expressed frustration because he believes this proceeding could have been avoided if GPID had submitted a credible dam removal program in the last year. The only people at this meeting who are happy are the GPID attorneys who see a future of full employment on the backs of GPID patrons. A real irrigation district would be more concerned about saving the water than employing attorneys and trying to save an outdated dam. He said he believes we need a new GPID board, and he urged patrons to vote in the upcoming election.

Lawrence H. Kirtley, spoke on behalf of himself and his wife. He said he does not believe that any of the present Commission members were serving on the Commission in 1994. There were 11 conditions given which included money for everything. He was at that Commission meeting and those were the conditions and their intent. He said he believes the Commission was not due diligent. The Commission knew that Grants Pass did not have the money to take the dam out. If there is enough water to give the patrons all they need if the dam is removed, then he believes that is nothing but blackmail, true and simple.

John Ferris, retired attorney from Ashland, said he has been Bob Hunter's partner for 20 years, and said he is not in favor of retaining the dam by any means. In reference to Chris Cauble's suggestion that the Commission slow down this process, he said he very much appreciated the Commission for proceeding with a definitive action.

Ferris said it is illogical to say that the ground water charge from this area of Grants Pass is dependent upon the dam. It is clear that it is not dependent upon the dam at all. It is dependent upon the water flowing through the canals, if that is even appropriate. And that can come from pumps in the river or from the dam. It is certainly not an argument to retain the dam.

Ferris said it is disingenuous for the District to say there is no money to remove the dam. If all the effort put into what has gone on to date by the District, the patrons, and Mr. Becklin had been oriented toward a legislative process creating pressure on Senator Adams and federal representatives, the money would be there quite clearly. The best example of that is illustrated by the screen money that was generated. \$450,000 was generated by the District in just a few months.

Donald Greenwood, member of the GPID Board, said he was a member of the board in 1994, and he has followed this controversy for over ten years. He said he believes the Commission has established a frightening precedent in Oregon water law. He said this is the first Water Resources Commission to use blackmail to achieve an end. He hopes all the Commissioners

when they are back in their comfortable houses will think about all the low income and retired folks who will see their wells go dry and not be able to raise a garden to feed themselves.

Doug McGeary said he spoke last night at the public meeting with Martha Pagel. He is from southern Oregon. McGeary spoke before the Commission in 1994 and has been to the legislature to argue his case in opposition to the dam. He has had the benefit of being involved in this process and believes it is very important. It is an honor to be a part of this process. He takes no glee in the fact that GPID has lost its water. In 1994 McGeary believed that the District should not have received this water, but Mr. Hunter and others convinced him it was a good idea. It was to try to get them to get an alternative; it took this process to finally do it, and it has not been fun. He said he is sorry it had to come to this, but he believes the process worked. He expressed appreciation for the Commission's involvement and for volunteering their time. It was a hard decision.

Ashley Henry, Oregon Trout, thanked the Commission for the decision made today. Oregon Trout in no way opposes the use of water for beneficial uses. The recent emotional statements that this decision would result in people not being able to feed themselves is manipulative and simply takes away from the real issue at hand which is the removal of the dam, not the removal of the water. We are asking the District to serve their patrons in a more effective and, in the long run, a more cost-effective and friendly way. Henry hopes that everyone will work together with the District patrons who wish to see the dam removed so that water can be allowed to flow through the canals and serve all the patrons. The Commission's decision does not preclude the District from changing its course of action. GPID could certainly proceed with dam removal rather than spending thousands of dollars on litigation fees. GPID could spend the money wisely and proceed with dam removal, which would then allow the continued water flow through the canals. Henry urged all patrons to participate in the upcoming election.

Herbert Neelund, GPID Patron, thanked Martha Pagel for facilitating the public meeting Thursday night. She did a great job with a difficult subject. People resist change — this community is polarized over this dam. After observing what is going on he joined the group Citizens for Responsible Irrigation. Neelund said this organization has offered three educated and knowledgeable candidates for the upcoming GPID Board of Directors election. Part of the problem with the Board leadership is communication and the wrong type of communicator communicating. He hears now we are going into the appellate court, the supreme court; that just shows a continual love of fighting. A new Board is needed that will represent us and not dabble in design packages. Neelund said we are at a point where we are having trouble getting federal and state agencies to even listen to us. He believes the right decision was made by the Commission. Neelund said he has many pieces of property that are served by District water; he needs water and believes there are ways to solve all of these problems. He believes the patrons will have water and this valley will continue to be green.

Bob Hunter, staff attorney for WaterWatch, thanked the Commission for their strong decision. When this process started several years ago he had hoped this would have been a win-win situation where the District would receive the needed water with an affordable conservation plan. He had hoped the District would address and solve public interest concerns including Savage Rapids Dam which for years has killed fish. WaterWatch needed from the District their good faith to move forward to help obtain funding. Hunter said he is offended at the use of the words blackmail and intimidation. Those terms do not describe people sitting down to negotiate, bringing different views to the table, and trying to reach a solution. He said reaching a solution is what we had been trying to achieve. WaterWatch does not believe that GPID's conservation plan was stringent enough or what it ought to have been. Hunter said his organization had problems with the precedent of enlarging a water right and Diack flows, but were willing to give a little bit to get something back as well.

If the GPID Board had agreed to work with people on a cooperative basis, the problems likely could have been solved and the patrons would have water in the canals through a pump. However, the Board has indicated they will continue to put the water at risk and fight. Reasons given for saving the dam are that it does not kill fish — yet scientists do not agree with that; that the sediment release contaminates would cause terrible trouble— but the Bureau studies indicate that is not true. Dennis Becklin's own studies indicate that is not true; his studies were reviewed by the Environmental Protection Agency and they also conclude that there is no contamination problem with the sediment. The Bureau and other federal agencies have indicated that they can manage the sediment and will continue to look at it further as any advanced planning moves forward. Another reason to save the dam is that pumps will not work. Pumps are working all over the nation. The Bureau is confident they can design pumps that will work which would be put in place before the dam is removed.

Hunter said the first lawsuit brought against GPID was not by environmental groups but by Dennis Becklin and Marjorie Spickler who sued the prior Board of Directors trying to stop them from implementing the dam removal plan. That is where it started. Hunter said he is still hopeful that there will be satisfactory resolution, but time is running out.

Dave Strahan, Northwest Sportfishing Industry Association, said he has been a lifelong resident of the Rogue Valley. He believes the primary reason this area has such a strong tourist-based economy is because of the historical reputation of the fishing in our river. He seriously doubts that any tourist plans a summer vacation around a visit to an area of pasture lands or green lawns. Savage Rapids Dam is responsible for severe losses of fish that are vital to the local tourist-based economy. Strahan said that due to the basic design of this outdated dam, regardless of what the District does to improve fish ladders, it will still be a fish killer. Only dam removal will make the middle Rogue truly fish friendly. The sport fishing industry has no desire to deny anyone their water right; they ask only that the District change the way they put the water into the ditches. The sport fishing industry, the timber industry, and the tour boat industry have endured

countless regulations over the years mandating the way they do business for the benefit of the fisheries. GPID is no different.

Strahan said the current Board has brought on the problems the District is now facing; it is up to the patrons to demand a change in direction that can result in a truly win-win situation. It is possible to enjoy irrigation and a strong fishery-based tourist economy, but not if the District is allowed to continue with business as usual. Strahan thanked the Commission for making the tough decision they were forced to make.

Judy Gove, GPID patron, said it is noteworthy that a current GPID Board member was also a member of the 1994 Board which initiated the agreement for dam removal. It is also noteworthy that the current Board was advised that to break the 1994 agreement would risk losing its supplemental water right and also would risk bankrupting the District. Instead of preparing the community for dam removal, this Board has done the opposite. The actions they have taken have not been in the best interest of the District or the patrons.

Gove said she supports responsible management of water and a responsible and thoughtful Water Resources Commission. She supports the Commission's decision with the hope that this will galvanize the District patrons to stop this irresponsible behavior and move forward with the District's agreement.

Ruth Feirich, said that many people have knowledge about the area, river, dam, and irrigation; but nobody has all of the knowledge that is necessary. Feirich said the District will not have enough water making it down to the end of the irrigation system to meet the needs of everyone. There has been talk about allotting a certain amount of water for each irrigator, limited to taking it every 10 days. So when it is very hot in the summer there will be losses. Feirich said she has a small growth of trees that must be regularly watered. When irrigation water had to be cut off for necessary repairs, she has had to use her well sparingly since it often goes dry or she has had to carry water. People cannot get along without water for 10 days, especially with clay soil. There will be hardships as a result of the Commission's decision today.

Bob Buckmaster, thanked the Commissioners for the time they spent over the years to make a very difficult decision. Buckmaster said his brother worked for the District several years; and his nephew managed the District for several years until politics became so important. Both of these men worked very hard to see that everyone got their water on time. The current Board has done nothing but confuse the public and waste money. Buckmaster urged people to consider electing new Board members.

Tom McMurray, said that the theme of extra water going down to the aquifer is a joke. If that reasoning is accepted it would change Oregon water law. Allowing the extra 52 cfs would also be wrong. Originally the government offered to pay \$11.2 million to remove the dam and install

pumps, and there were discussions of electric fees. These fees were also discussed recently but the amount that could be charged was not as high as originally supposed. McMurray said he served on the Savage Rapids Dam Task Force and was chairman of the GPID Board until October 1997. He expressed displeasure at the Board Chairman and what the Board has been promoting; he thanked the Commission for the decision made today.

Vivian Kirtley, GPID patron, said she thought this meeting would be to discuss additional water, not to discuss whether the dam would be taken out. She disagreed with previous comments relating to not being able to repair the dam just because it is old. Kirtley said that at one point Tom McMurray, as Chair of the GPID Board, had supported dam retention. She said that the current Board has inherited many mistakes made by past Boards. If the dam is replaced by pumps there is no guarantee how high the cost of electricity will be; and there will be no reservoir for storage release in dry years. There is no guarantee the pumps will work. Kirtley said that fish are important but so are people. She asked the Commissioners to have an open mind.

Geoff Garcia, spoke to the Commission about applying for an operating permit to mine in the Briggs Creek Drainage. The mining would reclaim a portion of old mine tailings and possibly leave a small wetland. In the meantime, the Water Resources Department issued an instream water right which makes this area unavailable for placer mining. Garcia asked for information relating to the Department's issuance of this certificate and also asked that the Department reconsider their action.

Steve Beyerle, Curry Guide Association, said he believes that three members of the current Commission were serving in 1994 — Commissioners Leonard, Jewett and Frewing. Senator Brady Adams and Representative Bob Repine attended the October 1994 Commission meeting in Medford and offered comment. Beyerle said he and seven other members of Oregon Guides and Packers went to Washington D.C. to meet with Senator Mark Hatfield regarding funding for the pumps. The day they left D.C., Representative Repine and Senator Adams met with Hatfield and indicated that no money was needed. Since then there has been no consensus in the District regarding dam removal. He said he is more than willing to again work to obtain funding and come up with a solution for the District. Beyerle said he is also chair of the Fish Task Force. Most people are not aware of the many laws guiding the Department and Commission. He said the Commission had no choice but to take this action today.

There being no further business to discuss, the meeting was adjourned.

Respectfully submitted,



Diane K. Addicott
Commission Assistant