

Oregon Water Resources Commission Meeting
December 18, 1998
Salem

Members

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

Others

Bob Hawley
Kimberley Priestley
Ed Henricks
Roger Bachman
Steve Applegate
Wade Hathhorn

Staff

Martha Pagel
Geoff Huntington
Diane Addicott
Meg Reeves
Al Cook
Tom Byler
Barry Norris
Bruce Moyer
Marc Norton
Tom Paul
Fred Lissner
Dwight French
Adam Sussman
Dave Jarrett
Larry Nunn
Donn Miller

In addition to those listed above, other staff were present for particular segments of the meeting. 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.

Vice-Chair Jewett called the meeting to order. Minutes from the previous meeting were not available and there were no comments from the Commissioners so the meeting began with the Director's Report.

C. Director's Report

Geoff Huntington, Deputy Director, discussed the agenda items slated for future meetings, and the dates for those meetings. Commissioners agreed on the 1999 meeting schedule, including regular teleconferences for discussions regarding pending legislation.

Hansell asked for an update on Columbia River issues and a report from Oregon Fish and Wildlife staff explaining their process for arriving at the flow requested for instream water rights.

Pagel gave the Commissioners a general update on Department happenings. Staff have been preparing for the upcoming legislative session. There has been continuing work on the Klamath Basin adjudication and alternative dispute resolution process; the open inspection will occur in the summer of 1999. Pagel continues to meet regularly with the Interstate Work Group which is an outcome of Western States Water Council and the interstate effort to manage the Columbia and Snake Rivers. In the next year the biological opinion, which covers the federal projects and is the basis for the present flow targets, will be reviewed. The states of Montana, Oregon, Idaho, and Washington are working together to clarify issues and develop some joint comments to submit to the National Marine Fisheries Service (NMFS).

Pagel said that she, Geoff Huntington, Dick Bailey, and Meg Reeves have been involved in negotiations on the Inland Land permit extension issue. All parties are hoping that a negotiated outcome will be reached.

Frewing asked about the status of the agency backlog on transfers. Tom Paul, Northwest Region Manager, responded that the agency has received since the program began a total of approximately 8,200 transfer requests. At the present time the Department has around 500-600 requests that have not yet received a final determination. Last year the agency received 221 transfer applications, and staff processed approximately 260. Transfers that would benefit an environmental interest, a land sale, or financing are being processed as quickly as possible.

Frewing asked about the Willamette reauthorization process. Roger Bachman, Oregon Trout, said that the most recent meeting of the Willamette River Task Force was just a week ago. Water Resources staff and the Corps of Engineers are refining a model which shows various ways of managing dams, releases from the dams, and an attempt to anticipate a listing of anadromous fish. The task force is first dealing with fish issues, then with flat water recreation, agriculture, municipal/industrial, and the industries that divert directly from the stream. At the January meeting they plan to have someone from National Marine Fisheries Service present who will offer comments. Public meetings have been held—the overwhelming response was to take care of the fish needs and water quality first.

D. Uniform and Model Rules

Tom Byler, Legislation and Rules Coordinator, presented changes to the model rules pertaining to administrative procedures for the Commission's approval. He explained that the Administrative Procedures Act (APA) applies to all state agencies except those specifically exempted by statute. The APA calls for state agencies to adopt rules of procedure for use in rulemaking and in contested cases. The APA requires the Attorney General to adopt Uniform Rules and Model Rules of procedure. These new rules became effective September 15, 1997.

Staff recommended adoption of the Model Rules with the exception of OAR 137-003-0090 to 137-003-0092 which are procedural rules for petitioners seeking stays of final orders in contested cases which have been appealed to the Court of Appeals. Because of the automatic stay provision in ORS 537.075(5), those rules are not applicable to orders of the Commission or the Director and have not been adopted by the Commission in the past.

After discussion, Frewing moved to approve an order as proposed in Attachment 3 of the staff report adopting the Attorney General's September 15, 1997, version of the Model Rules and Uniform Rules with the exception of OAR 137-003-0090 to 137-003-0092 and amending OAR 690-001-0005 to reflect this adoption. The motion was seconded by Nakano; all voted approval.

E. Butter Creek Ground Water

Barry Norris and Marc Norton, Field and Technical Services, presented this request to initiate rulemaking to establish a new subarea in the Butter Creek Critical Ground Water Area. Two small irrigators in the North Subarea pump water from a different aquifer than other uses in that subarea. This shallow aquifer is relatively stable and has not shown any impact from use of the closest large capacity wells that belong to the city of Umatilla. Creating a new subarea would allow the two users, Mr. Nobles and Mr. Wadekamper, to irrigate 9.8 acres and 7.5 supplemental acres; under the existing rules, neither user is allowed to irrigate. Ground water level and pumpage data collected by the Department over the last 15 years indicate that use of these two wells will not impact other permitted wells in the North Subarea.

Staff also proposed setting a bottom elevation for the new subarea. The Nobles and Wadekamper wells could not be deepened below this boundary.

Norton explained that the Department is planning a major update on the condition of the ground water resources within the Umatilla Basin. Some of the work will begin in the next biennium; other portions of the study may begin in approximately five years.

After discussion, Ron Nelson moved for approval of the request to initiate rulemaking to modify the Butter Creek rules and to appoint Tyler Hansell to conduct the public hearing; seconded by Thorndike. All voted approval.

F. Langell Valley Water Exchange

Tom Paul, Deputy Administrator, Field and Technical Services; Larry Nunn, Transfer Coordinator; and Adam Sussman, Protest Coordinator, presented this request for a water exchange in the Lost River Basin in southern Oregon and responded to questions by Commissioners.

Adam Sussman explained that an exchange application was submitted by Langell Valley Irrigation District as part of a negotiated settlement on a ground water application submitted by Richard A. Smith. The proposed exchange of water submitted by the District would allow Mr. Smith use of surface water from Miller Creek and Gerber Reservoir for irrigation. In exchange, Mr. Smith would appropriate and discharge ground water to the District canal to make up for the diverted District irrigation water. Mitigation conditions were incorporated into the draft approval order to address public interest concerns regarding ground water/surface water interference.

Public Comment

Kimberley Priestley, WaterWatch, said she did not have detailed comments but wanted to express concern regarding the proposed mitigation. Adam said the plan is to keep ten percent of the permitted water in the canals and that water is to be dumped into the river. Priestley said there is nothing in the proposed permit to require that full ten percent to end up in the river. On page 9 of the staff report, subsection 3, she requested that the third sentence be changed to read, "The amount of water needed to mitigate for impacts to surface water shall remain in the irrigation district system and the full amount shall be discharged to the Lost River." She also suggested that the Department require a meter at the bottom end where water is dumped into the river. Priestley said Sussman did mention there is typically more water going in than .34 cfs. However, this is only the second exchange that has come before the Commission and, as such, will set precedence so clear language is very important. (tape 1, mark 647)

Reeves suggested that the Commission approve the exchange conceptually and she will work with staff to clarify language in the order and make any changes requested by the Commission.

Thorndike moved to approve the exchange and direct staff to prepare an order reflecting the following findings and additional direction given by the Commission; seconded by Hansell. The findings and direction included: to clarify that the full amount of the mitigation water is discharged to the Lost River and that the District is to install a meter at the point the water is returned to the river; incorporate some of the findings on page 3 and 4 of the staff report as facts into the order, and these findings would include the second paragraph under Findings on page 3 beginning with the sentence, "The stated purpose in Water Exchange Application 7935E is to save water" and the first four paragraphs on page 4. All voted approval.

G. Ground Water Advisory Committee Appointments

Barry Norris and Donn Miller, Field and Technical Services, presented names of three candidates for appointment to the Ground Water Advisory Committee (GWAC). Offered for reappointment was Gayle Killam, environmental category. Offered for appointment as new members were Tim Kreder, ground water user category; and Paul Christiansen, well industry category. Tim Kreder was present at the meeting and introduced himself to the Commissioners.

Hansell moved to appoint the slate of three candidates for a term beginning December 1, 1998, and ending November 30, 2001; seconded by Nelson. All voted approval.

H. Public Comment

No one requested to speak to the Commission during the Public Comment period.

I. Triennial Rules Review

Geoff Huntington, Deputy Director, and Tom Byler, Legislation and Rules Coordinator, offered this informational report to the Commission. Oregon law requires that all agencies review all their administrative rules at least once every three years. Byler said that earlier this year the Department published a notice and request for comments on our rules. Five members of the public and Department staff responded with comments. The staff report provided a summary of each comment, followed by the Department's response and recommended course of action.

Byler discussed those divisions that staff are recommending for the rulemaking process. He asked for comments from the Commissioners on the direction staff are heading with regard to proposed rulemaking and said that staff would return to the Commission at an upcoming meeting with a rulemaking schedule.

Public Comment

Kimberley Priestley, WaterWatch, said that her organization did submit detailed comments for the Commissioners to read. She commented on a concern regarding SWMPAs (Serious Water Management Problem Area). The statute does not limit who can petition for a SWMPA, which allows for measurement and reporting of a designated area. However, the administrative rules are more restrictive; she believes anyone should be able to do this since water is a publicly held resource. Measurement and reporting is crucial in regard to managing Oregon waterways. She encouraged the Commission to consider rulemaking on this issue.

Priestley said she does not agree with the Division 9 comments on page two of the staff report regarding exempt wells. There are so many exempt wells that the cumulative impacts are great. User groups are also concerned with this issue. WaterWatch's concern is primarily the effect on stream flows.

Priestley urged the Department and Commission to consider the water quality aspect of transfers. This is increasingly being recognized as a statewide problem. The Water Quantity/Quality Task Force made some recommendations, but not that much has changed. She asked the Department to move forward on the long-term commitments made in the task force. One commitment was to work closely with the Department of Environmental Quality (DEQ) to get instream water

rights for pollution abatement. She would like to see water quality incorporated into the transfer process rules. She said that one of the problems with DEQ relying on the Department of Fish and Wildlife instream water rights, rather than applying for their own, is the injury test. If the instream water right is for fish rather than water quality you have a harder time making the argument that there is injury. (tape 2, mark 279)

Pagel said that most of the short-term recommendations from the Water Quality/Quantity Task Force have been implemented. One of the deferred recommendations was addressing specifically how we deal with transfers and consideration of water quality as an element of injury. That recommendation is still in the work plan and needs to be dealt with.

Frewing asked about the comment submitted by the Department of Land Conservation and Development on the bottom of page 10 and top of page 11 of the staff report. He expressed concern that the Water Resources Department should work with the Division of State Lands (DSL) and be more involved in removal-fill issues. He mentioned the situation in the New River area as an example.

Pagel said in recent years the coordination has increased a great deal between WRD and DSL. Our department is dealing with several historic issues where there are diversions that were authorized years before permits were conditioned to deal with timing. Those issues are now being considered in the water right application review. Division of State Lands is involved in the removal issue — WRD is not. The Corps of Engineers is involved under Section 404 of the Clean Water Act in certain waterways. So there is federal jurisdiction in many cases, state jurisdiction through DSL, and our department's responsibility through the water right process. There is now a high level of coordination particularly in the coastal areas with the Oregon Plan in place.

Jewett said he agrees with the comment submitted by WaterWatch on the top of page nine of the staff report regarding Division 310 and suggested that rulemaking be pursued. The suggestion was to copy into OAR Chapter 690, Division 310, language from OAR 690-002-0050, concerning service of protests.

J. 1999-2001 Budget and Legislation Update

Tom Byler, Legislation and Rules Coordinator, reported to the Commission on legislative concepts for the upcoming legislative session. He handed out a packet of legislative concept drafts that the Department recently pre-session filed. Thorndike asked for an explanation of HB 2164/LC-911 authorizing the Commission to allow new water right applications for uses not specifically allowed under basin programs. Byler said this is current law that sunsets this year. It allows people to appeal to the Commission, based on certain criteria, for permission to file a water right application despite the fact that their use is not contemplated in the basin program.

Byler said the legislative session opens January 11th and committee assignments are now being made. Commissioners will again have access to the Department's bill tracking log on the intranet; printed bills of the concepts should be available in January. Regarding the legislative concept asking for an increase in protest fees, staff have decided not to introduce this bill. The Department has such a small number of protests being filed that it does not seem fee increases are now warranted.

Geoff Huntington, Deputy Director, briefed the Commissioners on the agency's budget. He reviewed with the Commissioners a listing of the department's policy option packages that appear in the Governor's 1999-01 recommended budget. The agency's budget presentations before the Ways and Means Subcommittee will be based on these option packages.

Public Comment

Roger Bachman, Oregon Trout, commented on the allocation of Ballot Measure 66 monies to state agencies. (tape 3, mark 200)

There being no further business, the meeting was adjourned.

Respectfully submitted,



Diane K. Addicott
Commission Assistant