

Johnson used a simple hypothetical situation to show some practical limitations the Commission should now consider. Assume the Commission has issued an order out of a contested case — that being Order No. 1. There were two parties to the contested case plus the department. Party number one appeals that order. Under the terms of the statute the order is automatically stayed. Party number two can then come in and petition to lift that stay. The Commission would then consider whether the stay should be lifted using the requirements of the statute. Assuming they determine there is substantial public harm that will result if they allow the stay, they issue an order denying the stay. So now there is a second order. Under the general terms of ORS 536 party number one can appeal that order lifting the stay. Once the appeal is filed, that order is automatically stayed so everyone is right back where they started. The stay would then still be allowed. Then party number two can come back in and petition to lift the stay; and you end up with a circle of appeals. Everyone ends up spending a lot of resources on litigation instead of resolving the actual issue. If you add the scenario that party number one objects to party number two's party status, and if they petition to lift the stay, party number one will go to the Court of Appeals and appeal that order and ask that the issue be abstained from any decision until party number two's status is resolved. So then the practicality of actually lifting the stay looks a little messy. This illustrates more than anything the intent of the statute, that lifting the stay should be an extraordinary measure. It is not the rule; it is the exception. It should only be used in rare circumstances. The public harm almost has to be at catastrophic levels before it would make any sense to engage in this circle of appeals. (tape 2, mark 288)

Thorndike asked Johnson if she had any authority or legislative history on that interpretation or is that her interpretation. Johnson replied that this is her interpretation.

Johnson said in the legislative history of ORS 536.075(5) the concern was always centered around whether the appeals in general were going to go to the Court of Appeals or Circuit Court. There is almost no mention in the legislative history as to the stay provisions other than at one joint committee meeting a department witness said it is a different kind of burden that is being placed on the department because this is not the norm for agencies. Most agencies' stays are the exception, not the rule.

Tom McMurray, GPID patron, said he is one of the petitioners who requested that the stay be lifted. This request was made because he believes the District failed to show due diligence relating to the permit condition to remove Savage Rapids Dam. That decision for removal supported by the GPID Board in 1994 and later in 1996 and 1997 is still in effect; the current Board has never taken it out. This condition was put into place to address the public harm to the Rogue River's salmon and steelhead population caused by the dam and to mitigate for the public harm caused by the District's wasteful use of water (the current GPID chair admits that the additional water granted in the permit is lost to seepage). One of the reasons for the need of excess water is to get the water to the end of the 160 miles of canals for all the patrons. The effort to line canals with gunnite has been totally discontinued. The continued use of the water

and operation of the dam continues to cause substantial public harm. Coho salmon are listed as threatened and the District has yet to obtain an incidental take permit or submit an acceptable application for one. They do not even have an acceptable habitat conservation plan in effect that has been accepted by the National Marine Fisheries Service; consequently they do not have an incidental take permit. The stay has encouraged the current Board to continue its futile battle to save the dam at great expense to District patrons and to the state and federal taxpayers. The District spent \$323,000 last year on legal fees. Additional money was spent on fish enhancement but ended up with a screen that only helps coho, not steelhead or salmon.

McMurray said he believes the appeal was filed to delay the implementation of the cancellation order that will ultimately result in loss of the case and the water. The patrons need a wake-up call so the District does not collapse if the water is lost. This permit ends in 1999 in any case. The District needs water until they can remove the dam and install pumps. One of the concerns is the power costs. The power costs have been mitigated in eastern Oregon. Fifty-nine percent of the patrons did not vote in the last election. McMurray said that if he were to lose his water, he would just lose his lawn and garden. People with acreages will lose their livelihood. Feeling the consequences this season may prompt the patrons and the Board to seek a reasonable solution without continuing to drag out the legal battles at the state and federal level. McMurray believes the current Board will continue to lead the District down a destructive path without this action. (tape 2, mark 514)

Bob Hunter, representing WaterWatch, began with a discussion of process. He said he agrees that the Commission has the authority to lift the stay if it determines substantial public harm will occur if it stays in place. He does not believe there would be a spiral loop of stays and appeals. He said he does not agree that the Commission would have to show more public harm exists today than did at the time the permit was issued. WaterWatch supports lifting the stay that currently prevents the implementation of the Commission's November 13 order canceling permit 50957. WaterWatch may be requesting Commission action to lift the stay depending upon the status of the February 26 settlement negotiations. WaterWatch has filed a motion to dismiss their appeal for failure to serve WaterWatch in a timely fashion. If some settlement is reached or the appeal is dismissed then it makes this issue moot. WaterWatch is not making a formal request at this time but will wait until the end of the month to see what the status is. WaterWatch believes the record in the contested case and the findings as made by the Commission already support lifting the stay, for the reason that the stay will result in public harm. GPID's continued use of water is wasteful, uneconomic, unreasonable and contrary to Oregon law. The record is clear on the District's inefficiencies and wasteful use of water. The Newton study found that the overall system efficiency was only 18 percent. It has 160 miles of open leaky canals; the District has acknowledged that the 52 cfs represents seepage water. The District has introduced a bill to give beneficial use status to seepage water; hopefully that will not go far. Case law in Oregon has a strong policy to suppress all waste in water and that wasteful use of water constitutes a nonbeneficial use. Hunter said in this case not only is the use of water wasteful but it is hard to

make an argument that it is being used for really valid economic or agricultural purposes. Over 52 percent of the lots are less than one-half acre in size; 71 percent are less than one acre in size; there are only fifteen lots greater than twenty acres. Eighty-nine percent of the water is used for pasture and small lots. In 1993 the Oregon State University Extension Service estimated that the agricultural production value of GPID was \$1.1 to \$1.2 million. The cost of harm to the fishery estimated by the Bureau of Reclamation is approximately \$5 million annually. The continued use of the water and operation of the District's diversion facility at Savage Rapids Dam cause substantial public harm.

Hunter said that initially a condition was put in the permit to address these issues of waste, Diack and the fishery. The condition is that the District would remove Savage Rapids Dam and move forward with due diligence to do so. The record in the contested case and the findings of the Commission are very clear that the District did not comply with that condition.

Jewett said the Commission made a finding in the cancellation order last year that the District was duly diligent on conservation. He asked Hunter if that precludes that from being the basis for lifting the stay.

Hunter responded that he does not believe so. The Commission had two conditions that were put in the plan — one was to implement a conservation plan and the other was to move forward to remove the dam. It was a total package. Hunter said that waste would still occur even under that conservation plan. People were willing to sign off on a conservation plan that was fairly inexpensive to the District; it did not eliminate all the waste but that in conjunction with the public benefits of dam removal made it in the public interest. The conservation plan was rather soft and did not require actual structural lining, but was more aimed toward educating patrons in careful water use. There is still very much a waste issue.

Hunter said that regarding the Diack issue, it is clear from the record that wild and scenic flows in the Rogue River are not met during the irrigation season. Currently it is not possible to get a water right permit in the Rogue; an exception was made for the District. That exception was made based on the District's promise and commitment to move forward and remove the dam. The idea was that mitigation would occur because of the fish benefits in dam removal and would outweigh any damage to the fishery because of the lack of flow.

The coho salmon were listed in 1997 as a threatened species; steelhead and chinook will probably also be listed. Whether there are further listings or not, all fishery agencies agree that the dam causes substantial public harm to the fishery. It is also agreed by these agencies that the best way to solve it is by dam removal. The Bureau of Reclamation indicates that with the dam in place as it is now operating, about 22 percent of the fishery run are affected; with state of the art ladders and screens there would still be 5 percent affected; that still translates into 20-25,000 salmon per year. NMFS believes the loss would be closer to 9 percent.

Hunter said by having the stay in place there is no incentive for the District to, at least in the short term, move forward to remove the dam. This means another season where fish are harmed, or possibly longer in the appellate process. More significantly, there is a water right where the state is allocating a resource that is causing substantial public harm. The water should not be used because of GPID's failure to comply with the condition to make that use in the public interest. Hunter referred to Joe Rohleder's testimony in the contested case indicating that severe restrictions had been placed on guides, and sport and commercial fishermen to increase adult fish returns in light of the federal listing. It is time for GPID to do their share as well. With the stay in place the District continues to divert at a higher rate; if the stay were removed their diversion would decrease. WaterWatch believes that the Commission should lift the stay. Perhaps this issue should be revisited by the end of March or in early April. WaterWatch will wait until the end of March and see what the status is before making a formal motion. The Commission should keep this in mind and think about scheduling a meeting. At that meeting the Commission would have available to them the entire record from the contested case; parties can then argue from that record and submit additional pertinent information.

Jewett asked if the District could divert less if the water right were reduced to 97 cfs. Hunter said the District would be losing approximately one-third of their water — perhaps they would manage their system through a rotation schedule. (tape 2, mark 612)

Don Greenwood, GPID Board member, read a letter from Representative Carl Wilson asking the Commission not to lift the stay. Greenwood asked that the normal appellate process be allowed to continue. When the patrons of GPID are forced to pay nearly one-third of their annual operating budget of \$1 million as legal fees at the expense of improving interim fish passage at Savage Rapids Dam and improving the conveyance efficiency of its irrigation system, and the State of Oregon has spent over \$127,000 in legal fees, it seems that it is time for both parties to let the Appellate Court of Oregon bring the case to a close. If the Commission decided to lift the existing stay that action would simply cause GPID to appeal that decision through the courts and further exacerbate the high legal costs to both parties.

Greenwood also asked that agenda items relating to GPID be held in the afternoon to give people more time to drive up from Grants Pass. It is also difficult for most patrons of the District to take a day away from their jobs to attend a Commission meeting. He said several of the people attending the Commission meeting and speaking in objection to GPID are paid lobbyists who do not need to lose a day's wages or travel long distances to voice the views of those they represent. Greenwood suggested that the Commission might want to delegate a few people to hold a public meeting in the Grants Pass area and report back to the Commission about the attitude of the local people and their wishes. (tape 3, mark 46)

Gordon Anderson, Mayor of Grants Pass, said he was speaking for the elected officials including himself as Mayor and the council, the three Commissioners from Jackson County, the three Commissioners from Josephine County, the Mayor of Gold Beach, and the Mayor of Rogue River. All these people are affected by the Commission's decision at this meeting. He asked that the Commission leave the stay in place. The elected officials, representing approximately 100,000 people, other than a few exceptions are in favor of keeping the beneficial use from the dam and keeping the stay until this has gone through the courts. It is unfair to start a legal process and then short circuit it. He said GPID has spent a lot of money and so has the state — this process demands that it be carried through. The Mayor asked to speak to the issues brought up by others present at the meeting. The majority of people feel there is a beneficial use of the greenness of the valley that was not there before Savage Rapids Dam. He said they are working on conservation issues — that has been proven by the Commission. They are working on improving fish passage. The valley greatly depends upon the water that leaks out of the system. As the conservation effort goes forward they will see less and less of that. Anderson said people need that beneficial use of irrigating — he gets both water rights from the irrigation district and some leakage as well. The Mayor sat on the Governor's task force for 18 months and listened to expert testimony about fish. It is incredulous to him to listen to today's testimony that fish are being killed. He said he would like to see the study that scientifically proves that there are fish being killed. No one has proven this. In fact, the irrigation district has recently proved that there are very few fish being killed at the dam. The steelhead population coming up the river is healthier, larger and in greater numbers than it has been in years. The chinook population is good. The populations of fish on the Rogue River are healthy. There has been a political decision that has lumped all the rivers in northern California and much of Oregon together; the fish on the Rogue may well be listed because they are lumped together with other rivers. He encouraged the Commission that on behalf of people of his area, the great majority are still with the irrigation district. The irrigation district is working hard at making the fish population healthier. He said Dennis Becklin and the Board are doing a wonderful job — they are highly respected by local people in western Jackson County, and Josephine and Curry Counties.

(tape 3, mark 126)

Chair Leonard closed the public comment period and asked for discussion by the Commissioners. The Commissioners agreed not to direct staff to proceed with any action at this time, but if a petition is received a meeting will be scheduled to consider it. The Commission agreed to consider this issue later in the year if there is no resolution.

Don Greenwood asked if the Commissioners would consider an extension for the current permit 50957 which expires in October 1999. Meg Reeves said the District has indicated by letter its intention to request an extension, so action on that request should be taken before the expiration date. Pagel added that this issue is somewhat clouded by the fact that the Commission has

already canceled the permit that might otherwise expire; and that cancellation is on appeal. Reeves said this assumes there is no action from the Court of Appeals between now and October 15, 1999. Jewett said he hopes the GPID Board is advising the District patrons to find water since it may be out of the hands of the Commission if the Court of Appeals rules to dismiss the appeal. Greenwood said he wishes the Commission could direct them just how to do that.

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

Respectfully submitted,



Diane K. Addicott
Commission Assistant

M:min