

Oregon Water Resources Commission Meeting

April 30, 1999

Salem

Members

Mike Jewett  
John Frewing  
Jim Nakano  
Dan Thorndike  
Tyler Hansell

Staff

Martha Pagel  
Geoff Huntington  
Dwight French  
Weston Becker  
Tom Paul  
Bruce Moyer  
Meg Reeves  
Dave Jarrett  
Pat Lee  
Dick Bailey  
Dave Williams  
Barry Norris  
Cecil Baird  
Cynthia Byrnes  
Diane Addicott  
Kris Byrd  
Tom Byler

Others

Steve Applegate  
Phil Lane  
Kimberley Priestley  
Roger Bachman  
John Gill  
Timothy Volperte  
James Larpentour, Jr.  
Ed Henricks

Written material submitted at this meeting is part of the official record and on file at the Oregon Water Resources Department, 158 12<sup>th</sup> Street NE, Salem, Oregon 97310. Audiotapes of the meeting are on file at the same address.

**A. Commission Meeting Minutes**

The minutes of the following meetings were offered to the Commission for approval: February 8, 1999; February 18-19, 1999; February 22, 1999; March 8, 1999; March 22, 1999; and April 5, 1999. Frewing moved that these minutes be approved; seconded by Nakano. All voted approval.

**B. Commission Comments**

Nakano said he was invited to participate in interviews for the watermaster position in Vale. Ron Jacobs has since been hired.

### **C. Director's Report**

Pagel reviewed yesterday's work session and gaging station/training site dedication at North Salem High School.

Frewing said he believes the training center located at North Salem High School is very important and if more facilities are developed he would like to see added a process to look at ground water as it relates to instream flow.

Pagel updated the Commissioners on the Willamette Reauthorization Project, the Department's cost-sharing effort with the Army Corps of Engineers and local governments in the Willamette Basin to look at the operation at the existing federal reservoir system. With the recent fish listings and more to come, the schedule has been extended in order to obtain more information from the National Marine Fisheries Service.

The Department issued proposed final orders on the Boeing/Inland Land permit extensions. A lengthy process of negotiations led to this agreement on how to meet obligations under the Federal Endangered Species Act and the State Endangered Species Act, and yet have the potential for a commercially viable farm operation. The proposed final orders are now in a public comment period.

Pagel said she traveled to New Mexico in mid-April to meet with representatives of their Water Resources Department, the Governor's Chief of Staff, and other state agencies and legislators to discuss how Oregon is using collaborative process and dispute resolution techniques to deal with natural resource management.

Geoff Huntington, Deputy Director, reviewed the meeting forecast with the Commissioners. It was decided to hold the August meeting in Roseburg.

#### **D.1 and D.2 Carey Act Lands: Request for Easement and Request for Entry**

Meg Reeves, Assistant Attorney General, announced that Cynthia Byrnes, Assistant Attorney General, would take her place for this discussion.

Bruce Moyer, Administrator for the Administrative Services Division, presented items D.1 and D.2, both related to property with relevance to the Carey Act. Agenda Item D.1 is a request to grant an easement for ingress and egress over a 39.84-acre parcel in Deschutes County owned by the State of Oregon. Agenda Item D.2 is a request under the Carey Act for entry and use onto 119.84 acres of land in Deschutes County owned by the State of Oregon.

Moyer reviewed the history of the Carey Act for the Commissioners. Under the Carey Act of 1894, the federal government entered into contracts with state governments for the irrigation and reclamation of desert lands. In 1901, Oregon officially accepted the conditions of the Act, and those conditions were incorporated in Oregon Revised Statutes, Chapter 555, which remain essentially unchanged today. In 1905, the federal government granted certain desert lands to the State of Oregon subject to the provisions of the Act. Authority to manage and deed those lands was first held by the Desert Land Board in 1910. That authority was transferred to the State Reclamation Committee in 1920, eventually transferred to the State Engineer, and finally to the Water Resources Commission.

Moyer said this particular property changed ownership many times over the years with unrecorded title action. Records do show that a prior entryman already satisfied the irrigation lien and filed a satisfactory proof of reclamation and cultivation, but no deed was recorded which transferred the parcel to that applicant or subsequent assignees. The property was eventually foreclosed upon by Deschutes County because of unpaid taxes. The County deeded the property back to the State of Oregon when they determined they did not have the legal authority to foreclose.

Howard Nicholson petitioned the Water Resources Department for an easement for access across the 39.84-acre parcel for his driveway. Subsequent to that request, the Department received a petition from Phillip Lane for entry onto the entire 39.84-acre parcel, addressed in Agenda Item D.2. Mr. Lane then amended his petition to include 80 acres to the south which appears to be owned by the Division of State Lands.

#### Public Comment

Timothy Volperte, attorney for Mr. Lane, explained that the lawsuit filed was to make sure there was an acknowledgment that a Carey Act application and amended application are on file at the Water Resources Department. The secondary purpose of the lawsuit was to make sure his client gets a decision at some point from the Commission. He said he believes there are two main issues to consider. One would be whether the State can properly charge fair market value for the property. The concept of the Carey Act is that the federal government has deeded the land to the State, the State holds it in trust and finds someone who is willing to spend the money to reclaim the property. So, if the Department were to charge fair market value for property, and then send somebody in to reclaim that property, they would be asking someone to spend fair market value plus additional sums. Volperte said Mr. Lane will explain what he is prepared to accomplish on this property to comply with the terms of the Carey Act. The second substantive issue would be whether or not the 80 acres is Carey Act property. Volperte said he and Mr. Lane believe it is. He believes there are two problems with granting an easement on this 39.84 acres. The State does not own the property but holds it in trust for the federal government limited to conveying that property or some interest in it pursuant to the Carey Act. The easement goes over the 39.84

acres which is Carey Act property. The State is holding this property in trust for the federal government and can convey an interest consistent with the purpose of reclamation, and that is the only way it can do so. Therefore, the State does not have an interest to give to someone under these circumstances in the form of an easement. Anyone who takes an interest in this property would have to satisfy the requirements of the Carey Act. Volpente read from a March 27, 1998, letter from Cynthia Byrnes to Roelin Smith in which she said the fee simple is subject to the conditions under which the property was acquired from the federal government. Under the Carey Act the State may not lease, use or dispose of the property except to secure its reclamation, cultivation, and settlement. Thus the Department must meet these requirements in granting an easement over the property. So for those two reasons it does not seem appropriate or possible for the State to grant an easement over Carey Act property without complying with the Carey Act.

(tape 1, mark 577)

Phil Lane said the Carey Act has not been repealed. He has a legitimate claim to make and must comply with the restrictions in order to get a valid deed. Lane said he believes it is a misinterpretation for the Department to indicate they have the power to manage selection of land, etc. under ORS 555 — what needs to be included in that is pursuant to the Carey Act. There is water available to the 39.84 acres; it will cost at least \$25,000 to get it above ground and in a storage unit. The land will have to be fenced, cleared, irrigated, and cultivated; and a house must be built to meet the requirements of the Carey Act. When looking at the entire 119.84 acres as required under the Act, clearing, fencing, planting crops and building a house will be a great expense. Mr. Lane said he does not believe that the area the Department is suggesting for an easement would be the best suited. Mr. Lane said Mr. Keener, an appraiser, told him that Carey Act restrictions would have to be considered in the appraised value of the property.

(tape 1, mark 706)

Mr. Volpente asked if the State is satisfied that as to the 39.84 acres the Carey Act has been complied with in its entirety. Ms. Byrnes replied that her opinion is that proof of reclamation, settlement and irrigation has been made and a certificate issued on that basis, so that requirement has been met.

John Gill and James Larpenteur, Jr., Rock Springs Guest Ranch, expressed concern about the 80-acre parcel.

Larpenteur spoke first, explaining that Rock Springs Guest Ranch is a dude ranch operation in Tumalo and adjoins the 80-acre parcel. It appears the entryman is asking that the Commission have jurisdiction over the 80-acre parcel but the staff believe that would be the role of the Division of State Lands. Larpenteur said they have been fighting this battle of who owns the property since at least the middle of 1970. Donna Gill was the developer and predecessor owner of Rock Springs Guest Ranch. For the two-year period prior to that development, Gill paid the taxes on this 80-acre parcel. In 1975 Gill deeded the property over to Rock Springs Guest

Ranch, and the guest ranch has operated that property since that time. During the course of trying to get title to the property, the title company indicated that the record title was vested in the State of Oregon. So, Donna Gill, Rocky Gill (John's father), and Larpenteur spoke with Chris Wheeler of the Water Resources Department (WRD) who insisted that the property did not belong to the State of Oregon, and that if it were state property it would belong to the Division of State Lands (DSL). Wheeler said WRD had no ownership interest in that property. Larpenteur also dealt with DSL, writing to Director Ed Zajonc in 1984, explaining their situation; a response from DSL indicated that the State of Oregon had no ownership interest in that parcel. Zajonc's letter said remaining undeveloped acreage was returned to the federal government. Larpenteur said, however, there is no deed of record for that transaction. He said as far as they are concerned, they claim title over anybody else other than a governmental organization.

John Gill spoke next, saying that in 1969 his aunt, Donna Gill, had talked with Chris Wheeler, the State Engineer with WRD. Wheeler wrote Gill that this property was not subject to homestead entry. Gill wrote Wheeler back saying she had been seeking ways to find out who really owns this property. Wheeler agreed to check into the ownership himself; he contacted other state agencies with no luck. In the early 1970s John Gill's father filed with WRD a Carey Act Lands application for the 80 acres. Gill said he did not know if the application was returned or denied, but Wheeler did say that WRD had no jurisdiction over the land and furthermore had no Carey Act land in that region of Central Oregon. In 1971 Donna Gill asked for a tax roll change, and had it put on the tax roles; taxes have been paid by Gill or the guest ranch since that time. Gill said she was claiming the land under adverse possession because there was no one who claimed to own the land. In 1978 there were more discussions with Chris Wheeler about state ownership; again, no one claimed the land.

John Gill said he had a few concerns about the easement at issue. The southwest corner of the property abuts Tumalo Irrigation District's canal. Those easements are not public easements. A person cannot just put their driveway over their easement. Gill said the guest ranch is a steward of approximately 1,000 acres of BLM land, helping manage the land and allowing no vehicles or firearms. The guest ranch also leases approximately 12,000 acres from Crown Pacific as well as some Forest Service land. A concern about ingress and egress being available to the general public is the potential for partying and littering. Gill also agreed that the proposed easement would not be the best access because of a steep drop off from the hill. Gill said that access to the 39.84-acre parcel would be no problem since that piece abuts Tumalo Reservoir Road. Access to the 80-acre parcel is an issue since it would necessitate crossing BLM land and the Tumalo Irrigation District easements. (tape 2, mark 267)

Phil Lane said he has a copy of Donna Gill's 1971 request to the Deschutes County Assessor for the tax roll change; in this request, Gill claims the property under adverse possession. Lane said he has not been able to uncover any other document than the 1914 assignment to Charles Mock. Lane said that as explained to him by the County recently, a request for a tax roll change is not