

governing voluntary cancellation of water rights. Statute provides that the Commission has 30 days following such a request to either initiate the rulemaking process or deny the petition.

The OWRC request asked the Commission to amend OAR 690-17-100 pertaining only to voluntary cancellations of water rights serving lands within irrigation districts or subject to jurisdiction of a federal water project. Their petition proposed to require that before acting, the Department notify an irrigation district or federal agency of any request for cancellation of water rights within district boundaries or subject to a federal water project. It also proposed language prohibiting cancellation of a water right within district or federal project boundaries unless the water right holder notifies the district (or federal agency) at least one year prior to the right being deemed abandoned under state law.

Huntington said the Department has received approximately 30 applications for voluntary cancellation of water rights within the Grants Pass Irrigation District. Staff have been working with the Attorney General's office on how to approach a decision on those voluntary cancellation requests. A notice was recently mailed to the applicants informing them that the Department plans to propose a contested case proceeding either consolidating the 30 requests or identifying one or two of them with the intention of resolving the basic legal issues.

Huntington offered a revised staff recommendation for this discussion. The revised recommendation would be to deny the rulemaking petition and direct staff to request the Attorney General's office to assess the law on the respective rights of water right holders in irrigation districts on the cancellation issue, direct staff to meet with interested stakeholders to discuss the Attorney General's assessment of the law and the OWRC request for rulemaking, and report back to the Commission in August on the stakeholders meeting and whether to initiate rulemaking.

Huntington said that in the interim, staff will provide notice to districts and the Bureau of Reclamation when the Department receives a request for a transfer or cancellation of a water right.

Pagel explained that the real issue is who is the owner of the water right and who is entitled to initiate a voluntary cancellation. GPID already has notice of these pending requests — the concern is if the District has notice are they then entitled to participate, do they have a right to assert in that process, and can they stop the land owner from canceling the water right. The statute says that when the owner of a perfected and developed water right certifies under oath that it has been abandoned the Commission shall enter an order canceling the water right. This seems to be a clear directive that if the Commission is asked to do this, it shall happen. Pagel said that in WRD's administrative rules this statute has been translated to say, "perfected water right shall be canceled by order of the Director when so requested by affidavit of the record owner of the land to which the water right in question is appurtenant." The Department has

interpreted by rule the owner of the water right to be the owner of the land; the basis for doing that has been historic practice and case law that talks about the water right belonging to the land to which it is appurtenant. This particular rule, OAR 690-17-100, was last amended in 1990. Legal/policy questions to ask would be is this the kind of term that can be defined by rule, and, if so, have we done a proper rule, and is it still the policy the Commission wishes to have in place. Pagel said while we are struggling with that big question we have before us 30 requests for cancellation in a very contentious district.

Frewing asked if there have been other such cancellations made in Oregon. Tom Paul responded that the Department has received other voluntary cancellation requests from land owners or authorized agents; the Department has acted on those and canceled the rights.

Public Comment

Jan Lee, Oregon Water Resources Congress (OWRC), and Peter Mostow, attorney from Stoel Rives, offered comments.

Lee commented first. She said there is a major concern in that the mortgagor has a number of rights which currently are not being allowed to the district and the Bureau of Reclamation. The Bureau of Reclamation is the largest mortgagor for irrigation rights in Oregon. It is not really the by-laws or the articles of incorporation that drive this issue; it is ORS 545. You won't see much in the by-laws or the articles that give any governing structure about dealing with water rights because that is a legal question. Ditch companies are considerably different. Irrigation districts generally have a water right in the name of the district. Lee said the whole crux of their arguments is whose name is on the water right, who is the applicant, who is the permittee, who is the water right holder. She said she believes the district as the holder of the water right is the real party. Not much of this came to light until the 3111 petitions came along when the Department created a different scenario by going directly to the land owner. In the 3111 process the Department was required to give to each of the districts a listing of their water rights, the amount, the certificates, etc. Lee said that upon receiving these, they realized there were cancellations that neither the districts nor the Bureau knew about. People had either voluntarily notified the Department or Department staff had solicited voluntary forfeitures or abandonment without the districts or Bureau's knowledge. These records came to light in the 3111 process. Some of the irrigation districts received their record and realized they had lost acreage. This significantly reduces the collateral of the district, the Bureau, and the mortgage holder. Generally in transfers and other transactions the Department asks the mortgage holder to sign off. The districts and Bureau are no different than the mortgage holder.

Lee said the contested case, as it applies to Grants Pass Irrigation District, is an unusual situation for a district. Someone placed an advertisement in a Grants Pass newspaper encouraging people to give up their water right to get back at the GPID Board of Directors. The GPID contested case

will have other issues — in GPID the Bureau of Reclamation has no water rights and does not own or operate facilities. So those questions related to the Bureau will not be considered. The Bureau's issues need to be resolved by rulemaking or some forum other than the GPID cancellations. In most districts where there is a Bureau affiliation the Bureau owns title to the reservoir and usually holds the water right for the reservoir; the district holds the water right for the application to the land and usually operates the facility. (tape 3, mark 200)

Peter Mostow commented next. He said the fact that all these different situations come up in districts raises a good issue. How much do we need to solve to meet everyone's needs and who needs to be the decision maker? The question of who should be deciding is why this rulemaking petition was filed. By resolving this in a contested case and ultimately having the Court of Appeals make the decision, it will be based on a certain set or class of facts that might not really cover all the issues. Mostow said no one really knows in litigation how the facts will develop and how the hearings officer, and later a court, will resolve the issue. They may decide to take a relatively narrow way of answering the question to dispose of the case as opposed to answering the question in a way that will help everyone deal with the issue in the future. He agreed with the Department's proposal to spend two months looking at what scope of rulemaking might be appropriate and how much of this issue can be solved by the Commission as opposed to litigation. For that reason, he hopes that at the August meeting there will be a broader discussion of all the issues, and the appropriateness of resolving them by rule. The statute for voluntary cancellation applies to water right owners and the rule for voluntary cancellation interprets that to mean the record owner of the land as opposed to any other concept of the owner of the water right such as a district. That rule could be changed.

Mostow said that an important topic is the distinction between cancellation of a water right by forfeiture for nonuse and canceling a water right because the owner is filing a petition; and although it might have been used yesterday, wanting to abandon it. Who can abandon a water right is an important issue. Mostow said he believes there is much that can be done both within the districts and the Commission by rule to actually address the vast majority of these issues. If there is full notice, a procedural requirement that individual land owners notify districts before they meet five years of nonuse, there would not be many of these cases at all. Mostow said he is concerned about the relationship between the ongoing possibility of rulemaking and the process of adjudicating the contested cases. There is a good possibility that many of these issues can be resolved through rulemaking. He recommended that the contested case proceeding be put off until the rulemaking is completed to see how many substantive issues might be solved through that process. (tape 3, mark 299)

Lee commented further that someone brought up that it is a different process in a transfer because there may be concern about getting water down the canals; that argument applies in the same way to cancellations. She also expressed concern about the 3111 petition at Ridgeview; it is her understanding that the District has been told that if they do not say that they are not

supporting the 31.8 acres belonging to them their entire petition will be thrown out. She said that issue has to be separated, and that the petition less the 31.8 acres could be approved without throwing the whole thing out. Lee said she does not believe that before the 3111 process districts were cut back when cancellations occurred; however, that did happen in the 3111 process. She said the OWRC written testimony talks about how districts are injured and explains the lien and foreclosure procedures. If people cancel without notice to the district, all those provisions for the district and the Bureau are interrupted. Lee said that OWRC concurs with Huntington's presentation on how this process could move forward because time is needed for legal briefing. OWRC would be glad to work with the Department on this.

Pagel said there may be a way to proceed with rulemaking to affect future decisions and future applications, and proceed with the Grants Pass petitions on the basis of the existing rules. She would not recommend that the Commission put those cases on hold while considering changing the rules. This would be retroactive rulemaking.

Steven Shropshire, Schroeder law offices, distributed a copy of draft edits to Division 17 rules and a copy of ORS 540.621-660. He commented on court cases that talk about ownership of water rights in connection with Bureau of Reclamation projects. This is a complex issue and comes down in many situations to a case-by-case analysis of a great number of factors including the authorizing act for the federal reclamation project and what Congress originally intended. It would also depend to a great extent on the individual contracts for delivery of water between the Bureau and the district. He said that analysis can turn on the individual contracts that each of the users have with the irrigation districts. Those factors provide in many situations a case-by-case result as to the ownership question. The ownership issue is often described as a bundle of sticks; the big bundle being the general concept of property ownership with each of the sticks being an individual component of that. In this situation, there are perhaps many different parties with one or more of the sticks of the water rights ownership bundle.

Shropshire said the reason this rulemaking is very important is that the cancellation statute speaks about the owner of the perfected and developed water right. However, the rule indicates it is a request by a record owner of the land to which the water right is appurtenant who submits the voluntary cancellation application. He suggested that this is an inconsistent use of terms and that the proper rulemaking procedure will consider harmonizing the rules with the statute. He referred to his hand out of edited Division 17 rules suggesting they would be appropriate content for conversations leading up to, and including, the rulemaking process. This would be a good time to do some housekeeping on the rules to make them consistent with the statute and then consider the global issues on a case-by-case basis. It is important to do a legal analysis up front — the Supreme Court line of cases with regard to federal project irrigators is instructive. The Oregon statutes on irrigation districts and their ownership is also instructive. As we look at those issues, Shropshire said he believes it will become apparent in August that those are issues to be decided on a case-by-case basis given the individual facts at play, based on one district to the

next, based on an individual water user outside of the district who wants to engage in voluntary cancellation. Those questions will arise in every petition for voluntary cancellation that is submitted to the Department. Because of that fact, the contested case proceeding will possibly resolve only a very narrow set of legal issues.

Shropshire said that to engage in both rulemaking and the contested case proceeding simultaneously would perhaps be a waste of resources and might be unfair to some of the applicants of pending voluntary cancellations. Although those folks are interested in moving forward and have certainly looked at the rules as they exist, Shropshire does not believe that a rulemaking at this point in advance of a contested case proceeding would be retroactive. He said he would not want to advocate that as the way to go either. But there are some definitional questions that could be resolved. The suggestions being proposed as to the notice provisions, the suggestions he has proposed in the hand out, would merely serve to clarify most of these issues. That would be an appropriate exercise to engage in prior to taking the contested cases forward. It would allow some consistent resolution and then the full legal issues could be addressed on a case-by-case basis. An additional concern with the notice provisions is the idea that security interest holders also deserve notice. This issue needs to be addressed in the future. Shropshire closed by saying he believes it would be appropriate to engage in the rulemaking to clarify definitional issues and perhaps put a stay in place on the contested cases.

(tape 3, mark 482)

Jewett asked Pagel to explain her concern that going into the rulemaking process would result in retroactive rulemaking. Pagel said she believes the people who filed petitions were relying on the rule that indicates that they have the interest and the power to dispose of the interest. Our rule says the owner of the land is the one who can exercise this right of voluntary cancellation. If our rulemaking is simply one of notice then it probably does not matter, but if the rulemaking goes in the direction of who is the holder of the water right then they might lose some ground. Pagel said she believes those people would describe that as retroactive rulemaking as to the arguments they could bring forward in the contested case proceeding.

Jan Lee said OWRC does not support going ahead with a contested case with all the things that are on the table because the outcome could perhaps prejudice a policy decision. Her main concern is to delay but not for too long so this is resolved before the next irrigation season.

Shropshire said the overriding concern he has about going at this issue from a contested case angle first is that there could be a number of inconsistent results based on the various facts or the way the court chooses to dispose of a particular case.

Reeves said the cancellation proponents have to decide whether it benefits them or not to wait while the rulemaking proceeding takes place. The Commission's interpretation in rule of the statute entitles these people to voluntary cancellation.

Pagel said the issue is whether the current rule is lawful or not. That can be decided in a contested case hearing. The Department's recommendation for handling the pending cases was to group the ones together that present like facts of a voluntary cancellation; the issue of forfeiture is not in question. It really boils down to does the land owner have the power, or does the district have the power. That would present us with a fairly efficient way to get resolution of the current rule. If the Commission chooses to change the policy in the current rule, Pagel would not recommend that be done in a way that would affect these cases. That could significantly affect the interests of the petitioners.

Ron Nelson asked Huntington to restate the Department's recommendation. Huntington said the Attorney General's office between now and the August Commission meeting would research where the single legal issue unfolds and the question of whether the terms we are defining are outside the scope of the statute. That would be done with the intent of convening a stakeholder discussion prior to the August meeting to talk about that advice and the implications it would have for a rulemaking proceeding. The results of the stakeholders meeting would be brought to the August meeting in the form of a staff recommendation. Regarding the contested case hearings, Huntington said we are simply at a point where we said we would stay the contested case proceedings if the participants in those proceedings all agree to do so. The participants would be noticed within the next few days. In the interim, staff and OWRC would work on the process of notice to districts and the Bureau of Reclamation of voluntary cancellation applications.

Huntington said the rulemaking would move forward on a track separate from the contested case proceeding if the participants in the proceeding want the contested case to go forward. He agreed that any rulemaking should not be retroactive in its application to the pending requests for voluntary cancellation.

Jan Lee said she concurred basically with Huntington's comments. OWRC has asked to be a party in the Grants Pass cases.

Nelson moved to deny the petition for rulemaking and follow the staff's recommendation to bring this before the Commission at their August meeting; seconded by Jewett. All approved.

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

Respectfully submitted,



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