

Oregon Water Resources Commission Meeting
August 27, 1999
Roseburg

Members

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

Staff

Martha Pagel
Tom Paul
Dave Williams
Al Cook
Sharyl Kammerzell
Gary Ball
Adam Sussman
Meg Reeves
Diane Addicott
Tom Paul
Norm Daft
Bruce Sund
Larry menteer
Lloyd VanGordon

Others

Bob Hunter
Ray Cox
Ed Henricks
Ed Gabriel
Eric Glover
Laura Schroeder
Judy Gove
Peter Mostow
Chris Cauble
Dennis Becklin
Jennie Bricker
Chris Skrepetos

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.

A. Commission Meeting Minutes

Minutes from the meetings of July 12, 1999; June 24-25, 1999; June 7, 1999; and October 23, 1998, were presented to the Commission for approval. Jewett moved for approval of all the minutes presented; seconded by Nelson. All voted approval.

B. Commission Comments

Nakano said he has been attending the public meetings in Baker City on the Powder River Reservation.

Thorndike said he accepted an invitation from Weyerhaeuser for a tour of their corrugated paper plant in Springfield, their saw mill in Cottage Grove, and their woodlands. Other participants of the tour were from local governments and varied interest groups which made discussions of potential conflicts very interesting

Nelson thanked staff who worked on arranging the previous day's panel presentation and tour. He apologized for missing the June Commission meeting, explaining that he had been invited to Washington D.C. to give a presentation to congressional, federal government, and White House staff on behalf of the Oregon Water Trust. Early in August Nelson attended the summer meeting of the National Water Resources Association in Durango, Colorado.

Hansell said he is serving on a planning team for the John Day drawdown. Information on this drawdown is now available on the Internet. He also mentioned an interesting study on nitrates sent to him by Smith Frozen Foods that is available on the Internet.

Frewing said he met with Rick Sohn, outgoing chair of the local watershed council, early this morning. Sohn spoke highly of Roseburg area watermaster Dave Williams, and hopes the Commissioners will continue to support local decision-making and management of water resource activities.

Leonard also thanked staff for the interesting tour, saying it was most enjoyable and very educational.

C. Director's Report

Pagel briefly recapped Thursday's work session and tour which focused on the process of hydroelectric reauthorization. She gave a special thanks to Dave Williams and John Sample who put so much effort into planning both the panel discussion and tour.

Pagel introduced the staff of the Department's Southwest Region to the Commission.

She said the summary of water-related legislation passed during the Session is being compiled and will soon be available. Staff are also planning for the upcoming Commission workshop which will be held at Silver Falls Conference Center in November.

Pagel has been working with executive staff on a reorganization of the Department's administrative structure. This reorganization calls for eliminating the Resource Management Division which over time has greatly decreased in size; and dividing the Field and Technical Division which has increased in size into two divisions. Barry Norris will continue to head Technical Services and Tom Paul will head the Field Division. There will also be a new position

in the Director's Office which will be focused on policy assistance and participating in efforts such as those underway in the Deschutes Basin and Klamath Basin.

Pagel announced that Geoff Huntington, Deputy Director, has been named by the Governor to be the Director of the new Oregon Watershed Enhancement Board, formerly the Governor's Watershed Enhancement Board. This appointment is subject to Senate confirmation.

D. Presentation to Superior Lumber Company for Oregon Plan Efforts

Chair Leonard presented a letter of appreciation from Governor Kitzhaber to representatives of Superior Lumber for their contribution in enhancing streamflows in Windy Creek near Glendale. Dave Williams, Roseburg area watermaster, expressed appreciation for the willingness of Superior Lumber to work with the state in improving the natural environment. Williams explained that Superior Lumber agreed to lease a portion of the company's water rights for instream use so that streamflow in Windy Creek could be greatly improved. The company also agreed to move its diversion downstream to add streamflow to more than a mile of the creek that once ran dry at the time it was most needed to support migrating salmon. Steve Swanson, Dick Parks, and Ed Sutch from Superior Lumber were present at the meeting to receive the letter.

E. Grants Pass Irrigation District Permit Extension Request

Mike Jewett announced that he would remain present for this item but would not be participating in the discussion or voting on any proposed action by the Commission. Al Cook, Southwest Region Manager, introduced this item for consideration. He said Grants Pass Irrigation District (GPID) had requested extension of Permit No. 50957 which would otherwise expire on October 15, 1999. Cook explained that this request gives rise to three alternatives: defer action on the extension request; deny the extension request on the basis that the permit has already been canceled; or schedule a contested case in order to consider the extension request on its merits.

Public Comment

Laura Schroeder, Attorney for GPID, commented. Schroeder handed out an August 26, 1999, memorandum in support of deferral, and an application for extension of time dated August 26, 1999. Schroeder said one of the Commissioners had asked if she had made a submission on the merits — she said a request had been sent by Department staff some time ago to the District directly to supplement the information. In response to that request she submitted a supplemental application on the merits entitled "application of extension of time." Schroeder said the other handout is the District's memorandum in support of deferral and would be helpful for the Commissioners to read before they made a decision. She said she believes the District and the Commission are in an adversarial positions — and that is troubling to her. She believes they both have the same goals — to put pumps in the river and take out the dam. Schroeder referred to

page two of the supplemental application for extension of time which lists each condition in the permit and explains how that condition has been met. The only condition in the permit or extension that has not been met by GPID is the implementation schedule for removing the dam or meeting the fish plan of the 1994 extension order. The District asked the Commission to modify that implementation schedule but it was denied; that denial is up on appeal. Therefore, the District takes the position that the two are tied. She pointed out the charts on pages three and four that show the reduction in water use GPID has made on their permit. As of yet no one has heard from the Court of Appeals so GPID does not know if condition four had to be met and how it will play into the certification of this right. So Schroeder said GPID applied for a cautionary extension, even though it may not be needed.

Schroeder agreed that this permit expires by its own terms. She then referred to ORS 537.260 as noted in Section B, page four, of her memorandum handout. In water law expiration means the holder cannot develop any more acres. GPID needs no more time to develop perfection, so the expiration is only important in terms of condition four. Schroeder argued that the idea that after October 15, 1999, the permit somehow evaporates is a notion that is not supported by Oregon law. Under Oregon law there is no such thing as a permit that has a limited duration for irrigation use. The Commission has a right to issue permits and limited licenses. Limited licenses are for a limited duration, but the only irrigation purposes they would allow would be for water short years in order to start a crop. The Department and Commission are not allowed to issue permits that evaporate. The reason is a public policy one — the water user has made an investment and is dependent upon the use. Schroeder said the notion of evaporation will not sustain the idea that there will be no continued irrigation under this permit. She asked the Commission to defer this ruling until it is known whether an extension is required. (tape 1, mark 516)

Meg Reeves, Assistant Attorney General, said there are some disagreements on fundamental legal issues, including the significance of the expiration of the permit and whether the Commission is authorized to issue time-limited permits. Reeves said she would not recommend the Commission defer action at this meeting.

Pagel said that from a policy and administrative standpoint a concern would be that deferring action would simply postpone to a critical time the decision of whether the District is entitled to divert water under the permit, if it expires without any action being taken. The water users within the District would be waiting right up to the next irrigation season before they would know for sure if they have water or not. Pagel agreed with Reeves that there are fundamental disagreements as to the legal consequence and significance of the permit conditions and the way this permit was structured in the first place. The delivery system was fully developed at the time that permit was issued which makes it very different from any other traditional water right. It was issued as a "supplemental" permit because it was to give more water to serve the existing system. So the question of whether a person is entitled to continue using water that has been

fully developed at the time the permit would ordinarily expire, if it is not otherwise extended, is one that is applied very differently in this situation than in the ordinary course of events. There are a number of points of disagreement in interpreting the legal significance of the permit and the actions of the Department and Commission.

Schroeder said if there is a condition of "evaporation" of the permit, perhaps the Commission should put this in an Order or declaratory ruling to make the issue clear so that it could be argued in a legal context and a decision made. The extension is a separate issue from the language of expiration. She said that in the 1994 Order one of the conditions provides that if there is completion that Department would issue a certificate for 52+ cfs this year or in 2002. The 1994 Order by its terms provided an extension through 2002 and there cannot be any objections to that extension because the public interest objections were stayed for that period of time to give GPID a chance to develop. Schroeder said that an extension to 2002 was contemplated by the very terms of the permit and it was also contemplated that a certificate would be issued.

Frewing said he understood that the extension to 2002 was contemplated for completion of the dam removal and pump installation, provided that satisfactory progress was being made during the 1994-1999 period. When the Commission acted last fall to cancel, it was on the basis that satisfactory progress was not being made.

Schroeder agreed with Frewing saying this was the matter on appeal as to whether GPID had met that.

Reeves said the permit does provide that if the Commission were to extend the permit to October 15, 2002, objections to the extension of time may not be based on the public interest standards. That says nothing about other standards that apply to any extension request.

Pagel said there was no automatic extension and provision 3 of the permit specifically says this permit shall expire unless extended by the Water Resources Commission or unless earlier canceled for failure to comply with the conditions of the permit.

Dennis Becklin, Chair of the GPID Board, said the District is pursuing in the Appellate Court the cancellation that occurred at the end of last year. The "man on the street" probably believes it really does not matter what the Court of Appeals does with regard to the cancellation because the Commission has decided to take an additional step that guarantees there will be no judicial review. Becklin said that in terms of maintaining the public trust this is a mistake. Speaking to the Commissioners he said that if it were their irrigation district and community, he would doubt if they would support the idea that this is a fair and appropriate approach.

Thorndike asked Becklin what the Commission is doing to preclude further judicial review.

Becklin responded that the position that staff is apparently taking is that this permit evaporates in October 1999. And the District could conceivably be prevented from the use of water in spite of the fact that the Court of Appeals now has the matter before them with regard to the cancellation.

Thorndike explained that the issue before the Commission now is the request for an extension of a permit.

Becklin said he would rephrase his comments by suggesting that the Commission consider this as a matter of good faith in terms of the dealing of the Appellate Court on the appeal of the cancellation. The process at this stage in his view is, and the view of the average person in his community believes, that the process should be in the hands of the Appellate Court. An extension of this permit during the period that the court is reviewing that matter would be a good faith showing on the part of the Commission.

Thorndike asked Becklin if he read the order of the Court of Appeals that was just issued. Becklin confirmed that he did read the order and that he was just making an appeal to the Commission on the basis of the perception of what the Commission's action will be in a community where a great effort is underway to build a consensus toward a final conclusion.

Thorndike said the direction he is heading is to take an action which best preserves the options if the Court of Appeals ends up reversing or remanding the Commission's earlier decision. He said that nothing he as a Commissioner is doing will jeopardize those rights any more than they have already been jeopardized by the action of the District. He suggested that carrying out the spirit of cooperation is best accomplished by following the advice of the Attorney General's office to allow that issue to be maintained in the normal fashion should the District choose to appeal that decision.

Becklin said to the extent that it is the Commission's position that it is intent on protecting the rights of the District, if the Commission takes the action to deny today perhaps a public statement could be issued that this is a step that the Commission believes to be in the best interest of protecting the ongoing rights of GPID. (tape 2, mark 72)

Bob Hunter, WaterWatch, said his organization sent in two letters regarding this matter. He said WaterWatch agrees with the staff report and supports the recommendation that the extension request be denied. The 1990 permit, extended by the 1994 extension order, is a different creature than most water right permits. The District had an original permit in respect to the lands that were irrigated for which a certificate had already been granted. When the District applied for this permit it was actually an application for water to apply on lands for which they already had a certificate. In a sense that the land was already being irrigated and covered by a certificate, it was fully developed in the traditional sense of development. When GPID's new application came in it really did pose a problem because it is unusual to ask for additional water to apply to

the same lands after going through the entire process and receiving a certificate. An attempt in 1990 was also to find a way to deal with some broad problems faced by the District such as fish passage and water use. The idea was to develop a permit that would allow some time to do some studies and plans; there was a study period between 1990 and 1994. When the 1994 extension order came in place it followed the concept of the 1990 permit which was to give increments of time to a planning phase and an implementation phase. The District helped negotiate the 1990 permit, accepted the 1994 order, and now has taken a position that the permit and order were invalid though they accepted the rights. The rights under the 1990 permit and the 1994 extension order to obtain a certificate were based not just on development as indicated; section 2 of that order talks about the District completing the development of the permit and the determination that terms and conditions of the permit have been met. The terms and conditions of the permit have not been met with respect to dam removal. Another term of the permit was exercising due diligence in respect to implementing the fish passage plan by dam removal — this was the issue of a contested case last summer. The Commission found that not only was there a lack of due diligence but there was opposition to dam removal by the District. The District has continued over the last year a very heated political and legal campaign to preserve the dam. It is this noncompliance to that element of the plan which warranted cancellation of the permit and warrants a denial of any extension request. Hunter said another issue of noncompliance is that the permit required filing a report every February 1 to give the Commission information in terms of its compliance and due diligence, and no report was filed by February 1, 1999. He said he believes the Commission has the right and authority to deny the request based on the fact that the Commission has already addressed the issue and canceled the permit. Hunter agreed with the staff recommendation that the extension request could be denied based on that alone. Hunter said the cancellation order was issued because there has already been a finding of noncompliance under the permit for failing to exercise due diligence. And now there is further noncompliance for not filing a report.

Hunter pointed out the exhibit attached to his August 25, 1999, letter to the Commission suggesting some changes in the Draft Final Order. He also commented on his August 25, 1999, letter to the Commission asking for a reaffirmation of acknowledgment of WaterWatch's interest in proceedings relating to permit 50959 and requesting party status in any further proceedings involving GPID's request for permit extension. Hunter said that without developing any further record, the Commission could merely reiterate what has already been developed — that the Commission has already made a finding in the past of noncompliance for lack of due diligence and for not filing the February 1, 1999, report. And for those reasons, in addition to the other reason, the Commission can deny the extension request. (tape 2, mark 149)

Following Bob Hunter's testimony, he informed the Commission that Al Cook just informed him the District had indeed filed a report in February 1999; no action was taken on that report because of the cancellation.

Judy Gove commented next. She and her husband have been patrons of the Grants Pass Irrigation District for twenty years. They both support the Commission's necessary decision to allow the supplemental water right to terminate under its own terms. She said the present Board is not acting in the best interests of the District when they could easily get the 52 cfs by negotiating a settlement for dam removal. To date, the Board's actions have cost patrons over \$500,000 in legal and expert fees to save their dam. The dam's equipment has deteriorated long past the point of saving, and the Board has not adequately educated the community about this problem. Oregon needs strong and firm enforcement of water law, particularly when there will be more competition as the population grows. All the legal battles and false information the Board circulates about the dam disguise some serious problems. Their actions over the past sixteen months have triggered an out-flight of patrons. The City of Grants Pass has decided to pull its sports park consisting of about 50 acres from the irrigation district. The District's land base is diminishing so rapidly that the certificated water right is in jeopardy. Even if the 52 cfs were allowed, it may not be enough because the 97 cfs is diminishing. There is also an issue of 160 miles of canals that are badly deteriorated and cannot support transporting any less than 150 cfs. Many of those canals are within the urban growth boundaries of the cities of Grants Pass and Rogue River. If the Board were acting in the best interests of the patrons they would not have poisoned the well by further harassing Commissioner Jewett for the past eighteen months, nor would they have sent a letter attempting to prevent his appointment as Jackson County Counsel. Nor would they have defied state and federal agencies by refusing to move forward with dam removal. The present Board has chosen to use the District treasury to follow a political agenda instead of cooperatively seeking solutions to the problems. Gove asked the Commission not to prolong the Board's abuse of this process by granting the additional 52 cfs when it could easily be obtained by negotiating a fair settlement for dam removal. (tape 2, mark 252)

Frewing moved that the Commission adopt staff report alternative B, to deny the extension request on the basis that the permit for which the extension is sought has been canceled, and direct that an order substantially conforming with Attachment 3 of the staff report be prepared for signature by the chair. Thorndike seconded the motion. All voted approval; Jewett did not join in the discussion and did not vote on this issue.

Thorndike said this decision is the only logical step the Commission could take in terms of the basis of denying this request. He said extending a canceled permit is so surreal it is hard to understand. By taking this action, which will likely be appealed, it allows any issues on the merits to be preserved for consideration by the Commission at a later date if necessary.

F. Provost Contested Case Exception

Thorndike disclosed that he has no financial or other interest whatsoever in this project, but he does serve on the Ashland School Board with Kent Provost. Jewett said he would not vote on