this issue due to his acquaintance with Provost and that the case would likely be heading back to Jackson County where he has been hired as County Counsel.

Adam Sussman, Water Rights Division, introduced attorney Greg Hathaway representing the applicant Provost Development Company, attorney Jeff Kleinman representing the protestant Skrepetos, and Mr. Chris Skrepetos. Sussman explained that the Commission is being asked to consider some exceptions that were filed on a contested case proposed order. The contested case was held in May 1999 on the Department's proposed approval of application G13287 in the name of Provost Development Company. The Department conditionally approved a permit for 85 gallons a minute for quasi-municipal use and the requested water is to be part of the water budget for a proposed destination resort which is to be constructed in Jackson County. The proposed order was protested by WaterWatch and Mr. Skrepetos. However, WaterWatch and the applicant settled their differences so WaterWatch did not participate in the hearing. Sussman said there were several issues before the hearings officer in this case. After testimony and two days of cross-examination the hearings officer issued a proposed order affirming the Department's approval of the application and proposing to deny the Skrepetos protest. Skrepetos then filed exceptions to that proposed order.

Sussman said it is noteworthy that after the hearing there was no exception filed regarding any substantive ground water issue which was largely what this case was about. The only exception filed was on whether the proposed use complies with rules of the Water Resources Commission regarding land use compatibility. He said this issue has already been argued by all the parties and ruled on by the hearings officer in favor of Provost and the Department, and this is the issue before the Commission at this meeting. The specific administrative rule that the exceptions assert the Commission is not following correctly is OAR 690-05-035(4). This rule allows the Commission to conditionally approve a water use when land use approvals are pending.

Sussman said the Department and the Commission assures land use compatibility through its state agency coordination program. This program used by the Department was approved by the Department of Land Conservation and Development. The applicant's proposed destination resort where the water will be used is currently engaged in the Jackson County Land Use process to site a destination resort. That process is a three-step process and ends in a final approval which also comes along with an ordinance that amends the comprehensive plan. Sussman said the interim approvals in this three-step process limiting the use of water do not make this use incompatible with the comprehensive plan. The permit the Department proposes to issue states that the water cannot be used until all the required land use approvals are obtained and all appeal periods have run.

Jeffrey Kleinman introduced himself as the attorney for the protestants who own property adjacent to the site and are also ground water users. He said the question before the Commission is a very important and substantive issue of ground water law. The hearings officer erred as a

matter of law on the issue and the exceptions. That is why the exceptions are before the Commission — to evaluate the interpretation of the Oregon Administrative Rules and decide these questions of law. The rebuttable presumption which received so much emphasis under ORS 537.621(2) as to the Department's initial determination in this case is rebutted as a matter of law. Kleinman said in the interest of time he would focus on just the basics. The applicant has applied to Jackson County to designate a destination resort. Under the county's provisions that have been cited, this requires an amendment of the comprehensive plan and the zoning map. In other words, unless the county finally approves this proposal, any destination resort on this site or any ground water right for a destination resort will violate the comprehensive plan. Approval by the county is a three-step process for this sort of amendment. First, there is a conceptual site plan — the county's code and ordinance provide that the steps the applicant takes have to comply with the conceptual site plan. The applicant then must file a preliminary development plan for approval; and thereafter a final development plan to be approved. In 1992 Jackson County approved the conceptual site plan filed by the applicant; this included certain conditions that are set out at pages six and seven of the exceptions. These conditions include the following language: Surface water will be the basis for the domestic water supply for the resort; surface and reclaimed water will be the basis for the irrigation water supply; well water may be used to supplement the domestic water system subject to the terms of this condition but shall not be used for irrigation under any circumstance. Kleinman said that use of any other water system would require review at the conceptual level. The county's order approving the conceptual site plan was a final land use decision which was appealable to the Land Use Board of Appeals (LUBA), but was not appealed. The applicant has not requested an amendment.

Kleinman said that a preliminary development plan was approved in 1994 — this was appealed by opponents to LUBA. On grounds unrelated to ground water issues LUBA remanded that plan to the county; the county has not acted on that remand. So the last thing that was adopted is the conceptual site plan with the restriction on ground water use. He read to the Commission a section from the conditions of approval of the preliminary plan which ultimately LUBA sent back on other grounds. The county has been consistent in the conceptual site plan which still stands and the preliminary development plan, that this ground water use is not allowed unless an application is filed to amend, hearings held, and then an agency review. So, the existing comprehensive plan of Jackson County does not allow the proposed resort and therefore the approval of the ground water right by the Commission would violate the existing plan. The final conceptual site plan literally forbids this water use without a further local proceeding that the applicant has not commenced. So what is really pending under the rule in Jackson County is not an approval but, based on the conflict between the proposed water right and the conceptual site plan, is a denial.

Kleinman said OAR 690-05-035(4)(c) is the only provision that the hearings officer relied on in denying the protest of the Department's issuance of the permit. It does allow for conditional permit approval tied to local government land use decisions — but that is not all that the rule

says. It adds the additional requirement that local land use approval must be pending. This language was obviously adopted intentionally with a great deal of thought. Kleinman said the key issue in this case as it stands before the Commission this day is a small but critical portion of the hearings officer's opinion. Her decision says the Department's brief lays out clearly the steps the applicant is taking to pursue the approvals needed to amend or modify previous approvals. She continues to say these steps as described are sufficient to allow the Department to issue a conditional permit. Kleinman disagreed with that because the pursuit of the necessary county approvals has not occurred. The Department has previously stated in its submissions that the conceptual site plan affords an opportunity for later modification, but Kleinman said that an opportunity is not the same thing as a pending request or application to modify.
(tape 2, mark 636)

Greg Hathaway, attorney with Davis, Wright, Tremaine, representing Provost Development Company, commented next. He said he has been representing this company for twelve years in an effort to get destination resort siting in Jackson County. Hathaway said he and his client represent the decision by the hearings officer not just with regard to the land use issue but also the way she resolved the water issues before her in the contested case hearing. Conditions were imposed that the applicant negotiated with WaterWatch that involve a monitoring program so there would be no injury to adjacent wells or streams. As a result of those negotiations, WaterWatch dropped out of the case. Hathaway said it is important for the Commission to realize what his client is trying to accomplish in this process. He believes the rule the Commission is operating under in this case fits perfectly. Adequate water for this destination resort has been a concern for Jackson County. The county does not have the expertise to make this determination; but looks to the state to determine the issue of whether water can be provided to this resort. Since 1993 his clients have been working with the Department to try to get these ground water permits approved. The Jackson County planning director clearly says the preliminary development plan review is awaiting the Department's approval of a water source. This is the "chicken and the egg" dilemma. It makes no sense for the applicant to proceed to amend the conceptual plan or the preliminary plan regarding the issue of ground water until it is known whether the state will allow the use of ground water. The Department and the hearings officer have said that would be allowable. His client would now like the Commission's opinion with regard to whether ground water could be used; then his client would return to the county and proceed with the completion of the process. (tape 3, mark 215)

Nelson moved to deny the protest and exceptions, and direct issuance of a final order conditionally approving application G-13287 substantially in the form of the draft final order and permit in Attachment 8 of the staff report; seconded by Hansell. All voted approval; Jewett did not participate in the discussion and did not vote on this issue.

G. Voluntary Cancellations

Tom Paul, Northwest Region Manager, introduced this item on voluntary cancellations of water rights under OAR 690-017-100. In review, he said that the Commissioners at their June 1999 meeting had rejected a petition to amend this rule and asked staff for more information. Staff then worked with the office of the Attorney General and met with stakeholders to better frame the Department's response to issues raised at the June Commission meeting.

Sharyl Kammerzell, Assistant Attorney General, offered written draft advice and reviewed it with the Commissioners. The issue of concern is who is the owner of the water right for purposes of a voluntary cancellation. The statute refers to owner through rule; the Commission has previously interpreted owner to mean the owner of the land to which the water right is appurtenant. Kammerzell said that after reviewing case law, the statutory context and text, she reached the conclusion that the rule as it is written is the best interpretation of the statute; that the owner is the land owner for purposes of voluntary cancellation. At the meeting with the stakeholders, she was asked to look closer at that question with regard to Bureau of Reclamation (BOR) projects, and she reached the same conclusion.

Tom Paul said that the Department's water right transfer application form asks if the lands proposed for transfer are within an irrigation district, and whether or not there is a mortgage holder. The Department has been providing notice to both of those entities upon receipt of an application for transfer of a water right. Recently staff have modified the voluntary cancellation forms to include similar questions so that notice is then mailed to an irrigation district or mortgage holder.

Pagel commented on the meeting she attended with stakeholders regarding these rules. The meeting was well attended with good representation by various interest groups. There was a split of opinion of the group as to supporting the current provision of the rule and the A.G. advice. It may take either a judicial interpretation of the issue or a legislative change. The group agreed that further legal analysis would be helpful; they also agreed that it in the meantime it would be fine to amend the rules to seek more information on the voluntary cancellation application form.

Nelson asked what would happen with the pending requests for voluntary cancellation. Kammerzell said that there are 32 pending requests from landowners within the Grants Pass Irrigation District; three of those have been noticed for contested case, and through this process the legal issue will be before the Court of Appeals.

Public Comment

Peter Mostow and Jennie Bricker, attorneys with Stoel Rives, spoke in behalf of the Oregon Water Resources Congress (OWRC). Mostow said OWRC is very interested in the rulemaking

being pursued with respect to notice. The districts would appreciate having that written into rule rather than having it done as a courtesy. OWRC considers the rulemaking an independent process that addresses an issue raised by the GPID conflict but is broader than that conflict. Under the current rule there is a real life problem with voluntary cancellations that occur without any required notice to irrigation districts and without their participation. Mostow suggested that this could be corrected by a change in the process through administrative rulemaking. He asked that the rulemaking process be continued and an advisory committee formed to look at the issue. When individual members of an irrigation district can cancel their water rights appurtenant to their land without any notice to the irrigation district, there can be potential negative impacts to the district. The irrigation districts are formed because to create the infrastructure there is a need to have many irrigators. It can be a problem if people are able to chip away at the overall size of a district without the district having any managerial discretion. In addition, cancellations have a negative impact on other individual members of the district who may have lands where they could use the water and it might be available to them by a transfer. And there are concerns of people who hold financial interests in the property where the water rights are being canceled that the value of their collateral is being reduced. Mostow said there are three simple parts to the solution: identify people who have an interest in the water right; provide notice to those parties; and condition the cancellation upon allowing the irrigation district to have the right of first refusal. The question is, are there legal impediments to creating such a rule. Mostow agrees that reasonable minds could differ on this issue, so why wait for the court to decide. OWRC believes that a rule such as just described would be upheld.

Jennie Bricker said she does not believe there is disagreement that the relationship with irrigation districts, land owners and irrigators is one of trust. The districts hold vested legal title to the water right in trust for the land owners who apply that water to beneficial use. The Irrigation District Act provides that the districts may acquire and own water rights; ORS 545.253 says that when that happens vested legal title is held by the irrigation district in trust for the land owners. The rule as written is missing the districts' legal vested right. Everyone agrees that the land owners have rights, but the districts also have rights and this needs to be recognized in rule. Regarding voluntary cancellations the statute says that whenever an owner of a perfected and developed water right certifies under oath to the Water Resources Commission that the water right has been abandoned and the owner desires cancellation, the Commission shall in turn order canceling the water right. Bricker said it is far from clear to her that the words owner of a perfected and developed water right mean the record owner of the land to which the water right is appurtenant. Ownership of a water right is double when there is an irrigation district involved — the irrigation district and the irrigator. The irrigation district diverts the water, and the irrigator applies the water to beneficial use. This is a cooperative relationship. Bricker described a trust. She said that if one beneficiary irrigator of the trust property, the water, of an irrigation district sells part of the water right or gives it away, then all the other beneficiaries, irrigators, are affected as well as the legal title holder, the district. If a district patron cancels their water right, a user located at the end of the ditch could be affected since the ditch requires a certain volume of

water to deliver to that patron at the very end. Bricker encouraged the Commission to appoint a rulemaking committee and commence rulemaking. (tape 3, mark 443)

Ed Gabriel, Oregon Department of Veterans Affairs (ODVA), said that over the years the Department has been very good about notifying ODVA about transfers, cancellations and forfeitures. The voluntary cancellation is a new issue for his agency; he would be very interested in begin notified when those applications occur. ODVA has over $300 million worth of agricultural loans and loss of water rights would have a great impact. He encouraged notification of lien holders. (tape 4, mark 112)

Attorneys Laura Schroeder and Chris Cauble, representing GPID; and Dennis Becklin, GPID Board Chair, commented. Schroeder spoke first, saying that Peter Mostow and Jennie Bricker did a very good job explaining a district's role in this situation. She said the Commissioners have received a petition from GPID for declaratory judgment. Schroeder said GPID would prefer that rulemaking would begin, but if not, another option would be to seek a declaratory ruling. The petition for declaratory ruling sets out generic facts and generic questions right to the point. All interested parties may participate in this process by submitting briefs, a contested case could be held, then a ruling is issued. A party could then choose to appeal that ruling. The rule would then be applied to these various land owners. If the rule of the court is that the owner is the appurtenant land owner, the Department can then cancel the water rights.

Becklin spoke next saying that there are 32 voluntary cancellation petitions. He said he finds it interesting that all of them are petitions with regard to properties owned by patrons in the Grants Pass Irrigation District. He said he found it disturbing that in yesterday's Grants Pass Daily Courier a story included documentation that the Southwest Region Office staff of the Water Resources Department have encouraged these cancellation petitions. Becklin said this is a reprehensible form of conduct on the part of the Department. If GPID is going to be the test case, they will put up a very appropriate and powerful defense. But in a case that relates primarily to rulemaking that affects the entire state, this should be a matter that is handled on a statewide basis. It is time to diffuse some of the focus on GPID and move instead to an effective resolution of an issue that is important to all Oregonians. (tape 4, mark 157)

Pagel said she is very concerned about the allegation that WRD staff are conducting themselves inappropriately. She said she is not aware of any effort by the Department staff to encourage or solicit these petitions. She and staff have received telephone calls and responded to questions about the process, but staff did not initiate this undertaking. And she told Becklin that if he believes WRD staff have initiated such action, she would like to know the details so an investigation can be made.

Becklin said that information was provided by a few of the District patrons who were interviewed by the reporter who wrote the story. He encouraged the Department to look into the situation.

Pagel, looking at the news article, said she saw nothing in it that indicated staff were soliciting or encouraging filing of the petitions. She said the comments in the article by patrons do not rise to the level of soliciting patrons to voluntarily cancel their water right. Pagel said she is concerned about the exaggeration that portrays this situation as a battle between the Department and the District.

Becklin said the District has a buyout procedure and it is not correct that a patron can submit a voluntary cancellation and then avoid the buyout fee. The District would not allow that to happen.

Eric Glover, Bureau of Reclamation, commented next. He said the concerns of the Bureau are very much the same as those of the Oregon Water Resources Congress. The Bureau was formed to implement national policy related to the settlement and economic development of the west, primarily related to the development of irrigated agriculture. In that process there are several requirements that the federal government asks that would ensure the success of those projects and the investment of tax dollars. One of the more important of those was a commitment by project beneficiaries to work together for the success of the project. Cooperation among the members who are in a district of a project is important — it was required that they organize themselves and form an irrigation district. The state of Oregon recognized this by passing statute requirements that would allow for the organization of an irrigation district. In terms of the Bureau, there are at least three important functions that are required in this cooperative nature — that the federal debt be paid, that the project be operated and maintained, and that the patrons work together for the common good. Glover said the Bureau does not agree with the Attorney General's opinion. There are other cancellation issues which pre-date the issues of Grants Pass Irrigation District. He said he believes there is good public policy in the state's transfer process. In the water right transfer process there is a recognition of the water rights and water interests that irrigation districts have as well as the interests of the patrons. People are notified of pending forfeitures due to non use and the ability of districts to move that water around. This is important for the long-term survival of the district. This goes beyond the physical distribution of water to the financial stability of the district to perform; for the U.S. Government it is important for the repayment of debt as well as the national public policy for economic development in the west. A similar policy should be considered in terms of voluntary cancellations. He said the Bureau encourages the Commission to move forward with rulemaking on voluntary cancellations and consider the best public policy for the state. (tape 4, mark 299)

Pagel suggested that in respect to the pending applications for voluntary cancellation if an applicant believes they may be better off with the new rules they can choose to wait for the new

rules; if they choose to proceed under the existing rules that would be their prerogative. Each application could be handled on a case-by-case basis.

Kammerzell said that to the extent that one of the 32 applicants for voluntary cancellation decides to go forward under the existing rules, unless it is settled, the issue of ownership for the purposes of voluntary cancellation within an irrigation district is going to be decided by the court. However, there is plenty of room below that threshold issue to mold rules and suggest modifications to the existing rule.

Thorndike moved to direct Department staff to form a rules advisory committee, invite participation of the affected interests in the rules process, investigate the issue of voluntary cancellations, and return to the Commission with recommendations. The motion was seconded by Nelson. All voted approval.

H. Public Comment

Ray Cox submitted written testimony and spoke to the Commissioners regarding his concerns with permit application R-74271 filed with the Department in 1994 by the Sutherlin Water Control District. (tape 4, mark 627)

Pagel told Mr. Cox that staff would look into the situation and get back to him right away.

I. Deschutes Ground Water Briefing

In the absence of Geoff Huntington, this item will be rescheduled for a future meeting.

Respectfully submitted,

Diane K. Addicott

Diane K. Addicott
Commission Assistant

M:min