

Oregon Water Resources Commission  
Special Meeting  
October 13, 1999  
Salem

Members

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

Staff

Martha Pagel  
Tom Byler  
Meg Reeves  
Dave Jarrett  
Gary Ball  
Weston Becker  
Al Cook  
Diane Addicott

Others

Doug Myers  
Bob Hunter  
Laura Schroeder  
Chris Cauble  
Don Greenwood  
Marjorie Spickler  
L. H. Kirtley  
Ed Henricks  
Reed Benson

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.

Chair Leonard opened the meeting and immediately called the Commission into an Executive Session to discuss with legal counsel written legal advice and pending litigation pursuant to ORS 192.660(1)(f) and (h). Following the Executive Session, the public meeting continued.

Chair Leonard explained that this special meeting was called to reconsider action taken by the Commission at its August 27, 1999, meeting on the request by Grants Pass Irrigation District (GPID) to extend water right Permit 50957. This permit would otherwise expire on October 15, 1999. At the August meeting, the Commission denied the extension on the basis that the permit for which the extension was sought had already been canceled by the Commission. Following the Commission meeting, questions arose concerning the effect of the Commission's action.

Leonard said that the Commission had received many letters from individuals on this issue including over 100 form letters collected by WaterWatch requesting the Commission deny GPID's request for an extension.

### Public Comment

Attorneys Laura Schroeder and Chris Cauble; and Don Greenwood, Vice Chair of the GPID Board, spoke first. Schroeder reviewed a memorandum she distributed to the Commissioners at this meeting. The first section of the memorandum discussed the stay order. She read the language of ORS 536.445(2) which provides that if a petition for judicial review of an order canceling a permit or appropriation is filed under ORS 536.075, the Commission shall not cancel the permit or appropriation under ORS 537.440 until the petitioner's right of review is exhausted and the order is finally approved. Schroeder said that appropriation means the actual use of the water rather than the legal document that grants that right of use. She believes this provision supports GPID's right to use the water while the petition for review is proceeding through the judicial review process. This provision also provides that an order on cancellation really is not a final order until exhaustion occurs. Schroeder pointed out that the last paragraph on page two of her memorandum talks about why the stay provision and appropriation provision were added to the statute. She stated the legislature pre-determined that injury would occur if a district or an individual is denied the use of water.

Schroeder said page three of the memorandum talks about the issue of "separate matters." Before the last proceeding she asked the Court of Appeals not to let the Commission consider this extension request because the extension request was part of the permit. Schroeder said the Court of Appeals overruled her on that matter. The Court of Appeals said that the extension request and the cancellation order are separate proceedings, and cannot be considered together. This is important because the staff report suggests the Commission can reach a result for the extension by using the record decided in the cancellation proceeding. According to Schroeder, this could not happen given the distinction between the two proceedings. The argument is that if these are distinct proceedings, then it is necessary to separate cancellation issues from extension issues. Schroeder said it would not be right to pull out a record from a previous proceeding and use it in this proceeding. This is further outlined in Section II of her memorandum.

Schroeder said that Section III of her memorandum discusses the entitlement of water. She said the original staff report did not include anything on water use, but the supplemental staff report does address this issue. The whole issue revolves around the point of whether there is an expiration or not, and what an expiration means. At the August Commission meeting, Schroeder said she suggested to the Commission that there is no legal way the Department or the Commission can issue a permit that has a limited duration, except under a limited license; and that cannot be for irrigation. Schroeder said if there could be a permit at all, it had to be a permit that expires pursuant to all other permits — on its development right, not on the right of use. She pointed out that the argument in Section III is similar to the one she used before the Court of Appeals. Page 6 of her memorandum talks about expiration. An expiration of a permit means that the time for development has passed, and if that development has not occurred an extension

could be requested. She said since GPID has developed its beneficial use, some may ask why they are requesting an extension. Schroeder said the extension is only to preserve the question as to whether those conditions apply. If the Commission decides they want to make a decision upon the word expire as it fits in permits, she urged them to issue a declaratory ruling on that point. Section IV deals with the disposition of the extension request, and Schroeder pointed out that Exhibit 1 lists the chronology of permit 50957. She noted that GPID filed for a completion notice of beneficial use of water to the lands on October 1, 1999.

Schroeder said the extension request does not have to be considered at this meeting. Some of the issues being considered in the Court of Appeals may affect what the Commission will have to consider in the extension request. Exhibit 3 of her memorandum is a proposed order that would give the Commission a procedural out and would not create another appeal. (tape 1, mark 30)

Chris Cauble spoke next on the meaning of a stay. He said he made an exhaustive search of federal cases around the country and did not find many cases that exactly define a stay. His argument puts together a few of the analyses and comes to a conclusion that essentially the stay prohibits the Commission from taking any action that would deprive the District of its water. Under Oregon water law the analysis of an administrative stay is different than under the Administrative Procedures Act (APA). Under the APA the law provides that the filing of a petition for review in either Circuit Court or Court of Appeals shall stay enforcement of the order of the Commission or Director, unless the Commission or Director determines that substantial public harm will result if the order is stayed. Cauble said there is a case that defines a stay under APA which is different since it is not automatic — the applicant must actually apply for a stay with the agency. That agency then makes the determination as to irreparable harm and the public interest considerations. In Oregon water law it is automatic upon the filing of judicial review. In one particular case, the court does announce the policy considerations with regard to its stay — the risk of irreparable harm on the applicant as balanced from the public harm in denying the stay. But Cauble said there really has been no discussion in Oregon law as to what a stay means. Cauble read a definition of stay — to stop, arrest or forbear; to stay an order or decree is to hold in abeyance or to refrain from enforcing it. And he also commented on a federal case that discussed the meaning of a stay — the stay does not reverse, annul, undo or suspend what already had been done, or what is specifically stayed, nor pass on the merits of orders of the trial court, but merely suspends the time required for performance of a particular mandate stayed to preserve the status quo pending appeal. Cauble said he believes this is the central language here, preserving the status quo. He asked that the administrative court process be allowed to be completed; when that occurs, the status quo is over. The proposed final order submitted by Schroeder does preserve the status quo and would prevent a procedural nightmare. Cauble said this nightmare would occur if the Commission issues an order that makes a determination that the District will not have water use next spring which would lead to appeals.

Cauble said the Commission was provided with a copy of GPID's proposed resolution. However, there is still a gag order from the federal court that prevents disclosure of matters related to settlement, but the Commission really does need to know what the District is intending to do. The District will be taking some action when the stay is lifted to essentially unilaterally invoke what that proposed resolution is; the District will ask the patrons for their approval. He said the District is serious about resolving the differences between the parties. (tape 1, mark 206)

Don Greenwood, GPID Board member, said he was attending this meeting with fellow board members Marjorie Spickler and L. H. Kirtley. The Board is desperately trying to convince everyone that they are in earnest about the resolution and working very closely with National Marine Fisheries Service and the Oregon Department of Fish and Wildlife to do whatever possible to improve fish passage at the dam. An action to deny the District water next spring would be punitive. If the water is cut back to approximately 52 cfs the District will not have enough water to operate -- the water seepage alone is that amount. (tape 1, mark 333)

Bob Hunter, representing WaterWatch, thanked the Commissioners for taking the time to reconsider their decision made in August. This is an important issue to the people of Oregon; the Rogue River is a national treasure and its fishery is really important. Savage Rapids Dam causes tremendous harm to that fishery. It is also known that the irrigation district is very inefficient and, though some improvements have been made, their water use is wasteful. In 1990 and 1994 people came together to develop a win-win situation to help the fishery, address waste concerns, and move forward to remove the dam. All the District had to do was to exercise due diligence in that respect. It became obvious to the Commission that there were concerns about due diligence and a contested case was held; findings were made that not only was the District not duly diligent but it exercised contempt for the provisions of the permit and its approach was dilatory and one of opposition rather than diligence. Nothing has changed in that respect since the contested case hearing. The District has continued to wage a campaign to save the dam. They went to the legislature to save the dam and get their water without that requirement instead of taking an opportunity to promote dam removal. GPID submitted a report in February 1999 that again showed no indication that steps had been taken toward dam removal. Given that, Hunter said, if no earlier decision had been made in cancellation, and the Commission would now be faced with the fact that this permit has an expiration date and will terminate unless extended by the Commission, and the Court of Appeals has already ruled even with the stay and the cancellation that this is a separate issue that can be addressed, then there would be no question that a determination would have to be made on the merits. The reality is that whether water use will continue under the old decision or a new decision will ultimately be decided by the court. It makes the most sense to make a decision that puts WRD in the best possible legal position to enforce the terms of this permit. It would be surreal to take a step that extends the permit during an appellate process on an earlier decision. As of yet, there have been no opening briefs filed in the case on the cancellation; there is a pending motion that has been filed by the District to abate the briefing schedule. The process in the Court of Appeals could easily take a

year or two and then there would still be the opportunity to appeal to the Supreme Court. By not taking an action on the merits, the Commission would be giving an extension beyond the termination date of the permit that could go on for years. And during that period, there would be little incentive to settle. As long as there is continued water use, GPID has what it wants — use of the water and the dam. Hunter said there needs to be some kind of accountability. Surely, he said, the Commission does not want to send the message that people can ignore conditions in permits with impunity knowing they can tie things up in process and procedure for a number of years and continue to get benefits of a permit without fulfilling responsibilities for a long period of time.

Hunter said the main issue is due diligence in both the cancellation and extension request. So, the factual issue is the same in both cases even though one is a cancellation proceeding and one is an extension proceeding. It would be appropriate to adopt the record of the prior case as it related to due diligence and, given the findings made there, to adopt those findings. To show good cause one has to show due diligence. To the extent the District feels this is not appropriate, they will have an opportunity to challenge the final order and go to contested case hearing. Hunter said regarding a fairness issue, if the Commission makes a decision based strictly on the procedural ground that the permit has been canceled, the District may be allowed to continue water use because they never got their hearing on the merits. If the cancellation order is stayed, that means it can not be implemented. It would be odd to use a stayed order as the basis for further action. Hunter said he believes a hearing on the merits is fundamentally fair and would promote a final decision putting the Department in the best position to enforce the permit. He urged the Commission to make a decision that allows a merits determination. (tape 1, mark 379)

Reed Benson, WaterWatch, followed Hunter with a few comments. Benson said this issue has been going on for way too long. And it will be in the courts for the foreseeable future. There was also an attempt to pass legislation which would bottle up the State's ability to proceed with this matter in litigation by making WRD's budget for this matter subject to Emergency Board approval. Benson urged the Commission to make a final and definitive decision at this meeting. He said this is a very confusing and procedurally-complex matter; and any decision made by the Commission will be challenged so they need to do what they truly believe to be right.

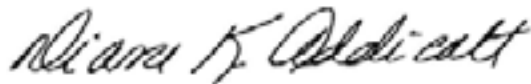
Thorndike agreed with Benson's comments about how confusing this matter has been and that it has been a great demonstration of the doctrine of "unintended consequences." He moved to withdraw for reconsideration the Commission's August 27, 1999, order and issue an order substantially the same as that order but removing the denial and changing it to a rejection of the application for an extension based on the fact that the permit has previously been canceled; seconded by Hansell. All voted approval.

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Reeves said there is a good legal argument to be made that the water use would not be shut off based on this process until the judicial review is concluded on the cancellation. But this is not clear one way or another.

There being no further business, the meeting was adjourned.

Respectfully submitted,



Diane K. Addicott  
Commission Assistant

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