

Oregon Water Resources Commission Meeting
May 11, 2000
Salem

Special Meeting

Members

Nancy Leonard
Dan Thorndike
Ron Nelson
Tyler Hansell
John Fregonese - Phone
Jim Nakano - Phone

Staff

Martha Pagel
Meg Reeves
Tom Byler
Sharyl Kammerzell
Bill Fujii
Kelly Starnes
Cindy Smith

Others

Margie Taylor
Albert Depenbrock
Preston Foster
Richard Ross
Jef VanValkenburgh

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 97301-4172. Audiotapes of the meeting are on file at the same address.

Chair Leonard called the meeting to order and announced that Fregonese and Nakano were participating by phone.

1. **Temporary Rulemaking - Water Right Transfer Application Requirements for Public Entities Acquiring Real Property by Condemnation.**
2. **Adoption of Temporary Rule Amendment to OAR 690-002-0170, Delegating Authority to Enter a Final Order and to Establish the Time for Filing Exceptions for Facilities Sited Under Oregon Laws Chapter 982, 1999 (SB 686)**

Meg Reeves, Deputy Director, asked the Commission to consider (1) a request for temporary rulemaking to allow public entities to apply for and receive a water right transfer on property that the public entity is in the process of acquiring through condemnation proceedings; and (2) a temporary rule amendment regarding delegation of authority to enter a final order and to establish the time for filing exceptions for facilities sited under Oregon Laws Chapter 982, 1999 (SB 686).

Reeves explained that staff were asking the Commission to adopt two temporary rules to expedite the construction of the Women's Prison and Intake Center in Wilsonville.

The prison facility at issue was sited pursuant to SB 686, which was enacted by the 1999 legislature. That bill is referred to as a "supersiting" bill, because once the decision is made to put the facility on the chosen site, all permitting agencies are required to issue any necessary permits. The supersiting bill also requires that the permits be issued within 60 days of receipt of a completed application.

The Department of Corrections (DOC) is asking to make a change in the point of appropriation and the place of use for an existing right on the prison property. Once the Department receives a complete transfer application, it must take final action within 60 days.

DOC undertook a condemnation proceeding to acquire some of the property for the prison site. The water right for which Corrections needs a transfer is on the part of the property that is the subject of the condemnation. Oregon law allows a public entity that is condemning property to take possession of the property if it places just compensation in a fund with the court. DOC has done so. So, the state has possession of the property, but the valuation stage of the condemnation is ongoing.

Division 15 rules require a transfer applicant to have either a deed to the property to which the water right is appurtenant, or to have permission from the deeded owner. Although DOC had possession of the property and will indisputably acquire a deed once the condemnation process is complete, it does not currently have a deed. One of the temporary rule changes is designed to allow a public entity in possession of property subject to a condemnation proceeding to apply for and receive a transfer.

Reeves said the other rule before the Commission is designed to fit the transfer application process into the 60-day time frame mandated under the supersiting law. The transfer statutes require a 30-day opportunity for protest by any person. If any person protests, the Department must conduct a contested case hearing. The hearing must be conducted by a hearing officer, and the participants are given 30 days to file exceptions to the hearing officer's proposed order. If exceptions are filed, the Commission makes the final decision on the transfer application. If no exceptions are filed, the Director makes the final decision.

With these time frames in place, if any person files a protest, the Department will not be able to conduct a hearing and issue a final order within 60 days.

To address this problem, staff recommended adoption of an amendment to Division 2 rules. The amendment would authorize the Department to establish a shortened time period for filing exceptions, and would delegate to the Director the authority to make the final decision on the transfer application. The rule is very narrowly drafted to apply only to a transfer application submitted for a facility sited under SB 686, the Wilsonville women's prison.

Reeves explained that these rules are proposed for immediate adoption without the usual rulemaking procedures. Oregon law allows for adoption of temporary rules when prompt action is necessary to avoid prejudice to the public interest or the interest of the parties concerned. DOC must have this facility ready for occupancy by October 2001.

The Department was able to provide advance notice of the amendment to Division 15. On Monday, May 1, 2000, the Department mailed notice of this meeting to the Commission's regular rulemaking list, and to interested parties including owners of the property subject to the condemnation proceeding. The Department was not able to provide advance notice regarding the Division 2 rule amendment, but because of the earlier notice, people who have an interest are on notice that the Commission may be taking action that relates the Women's Prison.

Fregonese asked about transferring the water right before achieving title to the property.

Reeves said the purpose of the transfer rule is to make sure the person with the ownership interest in the property is either asking for the transfer or agreeing to it. In the case of condemnation, if the entity is at the stage where it has deposited funds in court and has possession, they have the same attributes of ownership except for the evaluation stage of the condemnation.

The water right will not become separate from the property, but some of its attributes are going to change on the property. If the whole thing falls apart, the facility is not sited on the property, it goes back to the original owner. The point of appropriation and place of use could then be transferred back to where they were originally.

Al Deenbrock, Department of Justice, said that it is most likely the government will be able to take the property. When any public agency desires to acquire property for a public project, the courts have said that defeat of the acquisition has to be based upon fraud or abuse of discretion. That is a standard that is almost impossible to meet.

Fregonese asked what would happen if the government abandons the project after the water right has been transferred.

Deenbrock said that he assumes it can be transferred back, but if not, he would assume there would be a remedy in damages to the property owner who lost it.

Deenbrock said for a public entity to acquire the property, there has to be a political decision involved. There has to be a formal resolution by the body acquiring it; an appraisal; funds appropriated, an offer to the owner of the full appraised value; negotiations entertained with the owners having the opportunity to present evaluation information; and an agreement reached. If no agreement can be reached to purchase these properties, then a condemnation case is filed.

There needs to be a balance of public interest.

Tyler Hansell asked if the water issue is resolved, would construction begin before condemnation.

Martha Pagel said the DOC does have possession of the property and has begun construction. The transfer is needed to continue the construction process that is ongoing on the site.

Richard Ross, DOC, said that they have legal possession and own several of the properties on the site. They have a requirement by law to build this prison facility at this site and have the appropriation from the legislature to acquire these properties to make sure the project is constructed. Construction is underway now.

Ross said a citizens' advisory committee was formed to give advice on buffering, landscaping, lighting and noise impacts. Mandatory conditions from Washington County were levied on this project. DOC has made a commitment to be a good neighbor and to assure security for the surrounding environment. The buffers are huge burms that will block the visual views. On the burms are vegetation that currently exist, but will be transplanted, and new vegetation that will require water immediately.

Ross said DOC is required by law to build this facility that houses over 500 female inmates. Currently, they have a bed capacity for just over 400. DOC has suffered over \$8 million in additional charges due to the delay of the construction.

Ron Nelson asked if there could be other needs for irrigation or municipal water.

Ross said the plan is to use this water right for long-term needs. Their alternative backup is an inter-governmental agreement with the City of Wilsonville to provide sufficient domestic source to offset any additional need they may have.

Ross said the current water right has 13 acres established; it is in the northeast quadrant of the facility location. Water will be distributed throughout the facility to irrigate the burming and lawns.

Leonard asked whether additional language should be added to the rule stating that if the proceedings are reversed or abandoned, then any transfer would be considered null and void.

Sharyl Kammerzell, Assistant Attorney General, said that could be considered for a permanent rule. There is a transfer rule that refers to what happens if a transfer is not completed. For a change in a point of appropriation, if the transfer is not completed, after the transfer order is issued but before the new certificate is issued, upon completion of the transfer, it reverts back to the prior point of diversion.

Bill Fujii, Field Services Division, explained the map of the property to the Commission.

Preston Foster, Department of Corrections, explained that there are five existing wells. The wells have been inspected. They intend to use one of those wells for the irrigation of the 13 ½ acres. No new wells will be drilled.

Pagel said the critical question at this meeting is whether to adopt the two temporary rules. If the Commission approves the rulemaking at this meeting, the rules are adopted. No further process is necessary.

Ron Nelson moved to adopt the staff recommendation to approve the temporary rulemaking for the water right transfer application requirements for public entities acquiring real property by condemnation. The motion was seconded by Dan Thorndike. All approved.

Dan Thorndike moved to adopt the staff recommendation for adoption of temporary rule amendment to OAR 690-002-0170, delegating authority to enter a final order and to establish the time for filing exceptions for facilities sited under Oregon Laws Chapter 982, 1999 (SB 686). The motion was seconded by Tyler Hansell. All approved.

There being no further business, the meeting was adjourned.

Respectfully submitted,



Cindy Smith
Executive Assistant