

Oregon Water Resources Commission
Work Session
May 19, 2000
Pendleton

Members

Nancy Leonard
Tyler Hansell
Dan Thorndike
Susie Smith
John Fregonese
Ron Nelson
Jim Nakano

Staff

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Meg Reeves
Diane Addicott
Tom Byler
Tom Paul
Cindy Smith
Sharyl Kammerzell
Bruce Moyer
Fred Lissner
Lara Burgel
Brendalee Wilson
Dwight French
Jerry Rodgers
Vickie Leonard
Tony Justus
Mike Ladd
Richard Whitman

Others

Tim Bailey
Chuck Howe
Kent Madison
Rick Kepler
Michael Farrow
Fred Ziari
Steve Bloom
John Barkley
David Filippi
Norm Kessler
W. H. Wright
Jennie Bricker
Paul Cleary
Reed Benson
John Brogoitti
Rep. Bob Jenson

Others

Jan Lee
Scott Ward
Dan Shepard
Marge Wattier
Chuck Schonneker
Bill Ganong
Bev Bridgewater
John Herlocker
Kimberley Priestley
Karen Russell
Bryan Wolfe
Harmon Springer
Lyle Umpleby
Russ Rhoden
Jerry Franke
Douglas MacDougal
Bill Stanley
Lee Montavon
John Ross
Bill Richard
Brent Stevenson
Bob Dougherty
Ron Brown
Elmer McDaniels
Larry Burd
Tom Calebrese
Chuck Wilcox
John Zorha
Dennis Doherty
Audie Huber
John Buckley

Written material submitted at this work session 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 work session are on file at the same address.

Chair Leonard opened the work session announcing the topics of discussion as the Endangered Species Act (ESA), Oregon Water Law, and the Columbia River Basin. Meg Reeves, Deputy Director, said the Commission had expressed interest at their March meeting in taking a more active part in discussions with respect to the ESA. Today's speakers have expertise in those related areas.

Richard Whitman, Attorney-in Charge, Natural Resources Section of the Oregon Department of Justice, opened up the discussion with an overview of the Endangered Species Act and its interaction with Oregon water law. He reviewed the key provisions of the ESA, including Section 9, the prohibition on take of threatened and endangered species; Section 4(d); and Section 7. Through a series of case examples and overheads he spoke on how the federal Endangered Species Act interplays with prior appropriation in western water law.

Whitman said the purpose of the ESA is to conserve species of fish, wildlife, and plants and the ecosystems they depend on. The act sets forth a category of duties for federal agencies and another for all others. Federal agencies have a duty to conserve the species; for everyone else there is a duty to avoid take of species. The two Federal agencies with primary authority for implementing the Act are the U.S. Fish and Wildlife Service (USF&W) and National Marine Fisheries Services (NMFS).

Whitman commented that the NMFS 4(d) rules, which are to become final in June 2000, will include guidance to the public about what will constitute take of a specific species, and proposed limitations. Section 7, the consultation requirement, is triggered by federal funding, federal authorization of any kind, or federal action by the agency itself.

John Brogoitti, Northwest Power Planning Council, spoke on ways in which the ESA plays out in the Columbia Basin. He spoke on dam breaching alternatives to aid in salmon recovery. Brogoitti said that no one believes that dam breaching alone will save the fish. Any successful effort to recover salmon and restore a functioning ecosystem must address not only the harm caused by the hydro system, but also the harm caused by degraded habitat, unscientific hatchery practices and outdated harvest policies. If the four lower Snake River dams are not breached, more will have to be done in the other aspects of the salmon life cycle including hatcheries, habitat, and fishing to achieve the same level of ecosystem restoration and salmon recovery. The region's challenge is to develop a plan that spreads the cost as broadly as possible so that no one economic interest bears a disproportionate burden. (tape 2, mark 74).

Pagel asked Brogoitti in what ways the Commission could offer comments and become involved in this process. Brogoitti said the Power Planning Council would be pleased to have the Commission and other state natural resources boards and commissions become active, perhaps forming subcommittees to offer comments.

Reed Benson, WaterWatch of Oregon; David E. Filippi, Stoel Rives; and Douglas W. MacDougal, Schwabe Williamson and Wyatt, spoke as a panel on the stakeholder perspectives on the ESA and Oregon water law, and responded to questions and comments by Commissioners.

MacDougal spoke first pointing out that copies of a report he and David Filippi prepared for the Oregon Water Resources Congress (OWRC) were available at the information table. The report lays out OWRC's perspectives on many of the issues being discussed at this meeting. MacDougal shared some typical situations where the federal agencies might believe there is a take occurring. He said he believes the WRD and WRC might be able to act as an intercessor between the water user and the federal government in these situations.

MacDougal also commented briefly on potential Fifth Amendment taking claims that could arise under the ESA. He referred to *Lucas v. South Carolina Planning Commission*, a U.S. Supreme Court case, that described two fundamental hurdles to be overcome in order to prevail. He also reviewed a hypothetical case printed on page 31 of their report. (tape 2, mark 400)

Filippi said he was speaking on behalf of Oregon Water Resources Congress, and three irrigation Walla Walla Basin irrigation districts. He said there are ESA issues that are in desperate need of the WRC's leadership. The issues are very difficult and highly emotional. Filippi said his handout provides the Commission with some excellent background. The three topics Filippi covered in his comments to the Commission were: the urgency of the problem; how the Walla Walla districts have approached the problem with respect to the allegation of a take of listed species and water allocation issues; and individual issues in the Walla Walla Basin and some possible solutions. Filippi said the OWRC wants the federal government to have a consistent approach in how the ESA is enforced and how water is put back in stream. More flexibility is needed for watermasters to protect water being kept in stream, perhaps through legislation and emergency rulemaking. Current conservation efforts take too long and are too cumbersome. Funding to compensate people for their water rights and giving more flexibility to districts to move water around are issues to consider. (tape 3, mark 46)

Reed Benson, WaterWatch, distributed an outline of his comments. He admitted there are many more questions than answers on how the ESA will affect established water uses and water laws. Where there are endangered species the ESA will restrict new water withdrawals, forcing them to meet standards of mitigation or reducing the impacts of uses over and above anything the states seem prepared to impose. Also active diversions that are harming listed species will have to

change. Bureau of Reclamation and Corps projects will have to be reauthorized. The Oregon Plan is probably not enough to tackle these issues effectively. There is a need for a statewide program to manage water aggressively limiting new water withdrawals. A more aggressive measurement program is necessary. Stronger enforcement and more watermasters are needed. A more aggressive approach to conservation and improving water use efficiency is necessary. Eliminating the obstacles toward streamflow restoration in the water laws would help. The state needs to be a key player in basin-wide approaches, being most fair and effective to all users. The need for public funding is unavoidable to help among other things with water right acquisitions. (tape 3, mark 300)

Thorndike said there seems to be agreement that the ESA has the possibility of imposing a super priority instream flow, and in that light the prior appropriation doctrine is affected.

Nelson asked how the Department is working with the federal government regarding their approach, and requesting that they honor state water law. Meg said a meeting has been scheduled at the end of the month to address this issue.

Whitman said many people are coming together to work out solutions to basin issues at the basin level rather than through litigation.

Page1 agreed that bringing forward cooperative solutions is a good strategy to pursue. Having a priority date under state law does not protect anyone from the potential for regulation under the ESA. One of the most powerful ways to help would be to work more pro-actively with people, getting local watershed groups and water user groups working ahead of the first contact from NMFS; working on basin plans and offering them for a sign-off and approval. NMFS is more likely to look elsewhere if they see people stepping forward and making improvements.

Public Comment

Fred Ziari, IRZ Consulting, thanked the Commission for meeting in Pendleton. In his business he is involved in water management and conservation. Solutions are there for errors made in the past. He said it is not necessary to have the heavy hand of NMFS or USF&W to make us shape up. He spoke about lack of trust in NMFS and encouraged the Commission to be strong and make a hard stand. The Commission's job is to protect the Oregon water laws. He said the no net loss policies on the Columbia River violate state water law. Fish need to be protected and increased because they are a food source for our growing population and future generations. Irrigation is necessary because we need to retain our farm land. (tape 4, mark 184)

John Zerba, Chairman of the Walla Walla Basin Watershed Council, said the problem with the Walla Walla situation is that a state line runs through their basin. Dealing with two states, two sets of laws, and three counties is a challenge. Traditionally, Oregon has not wanted to spend

any money that might benefit the state of Washington, and Washington does the same thing regarding Oregon. At some point it would be helpful for the Commission to get together with its Washington counterpart and form a bi-state organization to deal with these issues. One water authority in the basin is needed. (tape 4, mark 316)

Jan Lee, Executive Director of the Oregon Water Resources Congress, said it makes more sense that NMFS and USF&W come to the Water Resources Department with their request for flows. WRD would then get the people together in the basin to work out a solution that follows state law. It may be possible in the next legislative session to do something similar for the ESA situation as was done with drought emergency management. She would like to see some kind of oversight hearing that Senators Wyden and Smith might put together on water issues related to NMFS and USF&W enforcement. (tape 4, mark 332)

Kent Madison said if we were to move the clock back 150 years, and our society would be as affluent as it is now with the same priorities as we have today, to reallocate water we would probably do so toward minimum stream flows first. Minimum stream flows would then be the highest priority on the stream, which is what the ESA is advocating. That would put us today arguing for water for agricultural, industrial, and municipal uses because minimum streamflows would be the highest priority water right. We really should be saying today, if we want to make minimum stream flows and fisheries our highest concern, are we willing as a nation to put up the dollars to do it. He encouraged the Commission to try to create within law opportunities for the public to spend their money toward the enhancement of water storage. In most basins, there is water that goes out the mouth of rivers in excess of all the needs at some point of time in the year. If that water could be captured, it could probably be reallocated to meet minimum stream flows year around. As a society, we need to say we are willing to have fish, pollution-abatement, and aesthetic value; and we are willing to spend a certain amount of money a year to have it. (tape 4, mark 368)

John Barkley, Vice-Chairman of the Tribal Water Committee for the Confederated Tribes of the Umatilla Indian Reservation, welcomed the Commission to the Pendleton area. The Tribes have been interested and concerned with the Walla Walla Basin situation and all water issues throughout the state of Oregon. The cooperative effort involved in the Umatilla Basin Projects I and II has been highly successful. He said there is a record number of spring chinook returning upstream. Phase III is coming up and hopefully will address all remaining concerns. The latest effort in the Walla Walla Basin is something we all can support. The Tribes' position is to work cooperatively with stakeholders with the high priority being water for fish. The Tribes want to ensure that resources are protected and encourage any kind of enforcement and measurement requirements. (tape 4, mark 418)

Brent Stevenson, Manager of the Walla Walla River Irrigation District, said his district is the largest apple producer in Oregon. It is critical that the Commission act in a timely manner on some of these issues. Some of the issues are very difficult and time consuming. There is much controversy. The process must be kept in a positive light. (tape 4, mark 543)

Rep. Bob Jenson welcomed the Commission to Pendleton. He said he recently attended a meeting on the 4(d) rules hosted by a church group in Washington. One of the presenters was talking about visiting with a farmer in Europe and complaining to this farmer about the restrictions in America. The farmer replied that the trouble with Americans is that they have never been hungry, and never suffered a war in their land. Europeans have suffered war and been hungry — and are committed to not going hungry again. Americans need to keep this in mind. Rep. Jenson urged the Commission and staff to consider all the issues quickly, realizing it takes time to put together good legislation. He said he would sponsor any legislation that would help with Oregon's water management. (tape 4, mark 565)

Meg Reeves asked the Commissioners for their thoughts on how to proceed.

Hansell said he would like to see the federal government give fair notice to state government before taking any action in the state. Establishing ESA mitigation would be helpful for affected water users.

Nelson agreed with Hansell. He encouraged fellow Commissioners and WRD staff to be very supportive of the efforts in the Walla Walla. He would support using any emergency statutes or new legislation that could help the Walla Walla Basin water users. Nelson said the Governor recently announced wanting to approach natural resource management and issues differently, creating new institutions — that might be an area in which the Commission could take some leadership. He said he feels strongly that Oregonians need to interact with the federal government to protect the interests of the state, perhaps with other state agencies, the Governor's Office, and our congressional delegation. We need to engage the federal government in dialogue and encourage them to honor state sovereignty.

Fregonese said it would be helpful for him to hear from staff what an ideal solution might be to maintain the water rights and deal with the ESA listing, and the obstacles involved. This could include legislation, rule changes, attitude changes, etc. Perhaps this could help with developing a strategy. Fregonese asked what would be the incentive for a water user to cooperate with a basin-wide plan.

Susie Smith said she heard several suggestions that would be worthy to pursue. It seems that the ESA issue is an indicator that we are putting extractive pressure on our resource base. She would be supportive of doing a legislative fix, but wonders if a bigger view might be helpful such as looking at watershed and basin approaches in crafting legislation. Another suggestion would be

for the Governor's Community Solutions Team to play a role in this, at least on the economic side. Perhaps Economic Development Department might become involved in funding projects such as conservation efficiency improvements, the purchase of water rights, and paying farmers in lieu of growing crops. Another suggestion would be to approach Representative Wyden and Senator Smith to help state government work closer with federal agencies. Smith said the division of NMFS she has worked with, from a local government consortium perspective, has been responsive to receiving models to follow. She said NMFS is under-funded, under-staffed, and their staff are totally overwhelmed with the job they have to do. She is optimistic about NMFS working with state government to resolve issues.

Thorndike said he agrees with what he has heard. Perhaps there could be a pilot team that would include our Commission and Department, Fish and Wildlife, and all the other players dealing with ESA issues for people to contact when they are affected by ESA requirements. This team could speak as a unified voice to convey concerns and solutions to the federal government. It might also be helpful to communicate with the federal government through the Northwest Power Planning Council. He cautioned that it will be to our benefit to consider all the issues before presenting new legislation.

Nakano agreed with Nelson that we should support the Walla Walla water users in any way we can.

Reeves said staff would report back to the Commission at the August meeting. A subcommittee of the Commission may also be something to consider. Pagel agreed that a task force including a few Commissioners would be most helpful. Hansell and Smith volunteered to serve on the task force.

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

Respectfully submitted,



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Commission Assistant