

Oregon Water Resources Commission

Work Session

August 24, 2000

Salem

Members

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

Staff

Paul Cleary
Meg Reeves
Sharyl Kammerzell
Cindy Smith
Tom Byler
Diane Addicott
Mike Ladd
Bob Main
Al Cook
Dave Jarrett
Dick Bailey
Jerry Rodgers
Tom Paul
Barry Norris
Gary Ball
Laura Snedekar
Bob Rice
Renee Moulun
Lara Burgel
Richard Whitman

Others

Marc Thalacker
Greg Corbin
Jim Johnson
Justin Gericke
Reed Benson
Pete Test
Andrew Purkey
Brent Stevenson
Todd Heidgerken
David Johns
Aubrey Russell
Sandy Thiele-Cirka
Rick Kepler
Dianne Gray
Jerry Franke
David Moon
Roger Nicholson
Susan Hammond
Brad Harper
Steve Applegate
Jan Lee
David Filippi
Bev Bridgewater
Douglas MacDougal

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.

Meg Reeves, Deputy Director; Richard Whitman, Attorney-in-Charge, Natural Resources Section of the Department of Justice; and Tom Byler, Senior Policy Analyst, spoke on recent developments regarding the Endangered Species Act (ESA) and the Columbia and Snake River Basins.

Whitman opened the discussion with a brief overview of how the federal Endangered Species Act (ESA) works. He said the All-H Paper (covering habitat, harvest, hatcheries and hydro) serves as a framework for a recovery plan and as part of the draft National Marine Fisheries Services (NMFS) Biological Opinion for the operation of the federal Columbia River power system and Bureau of Reclamation (BOR) projects in the Columbia Basin. He spoke on the draft NMFS Biological Opinion which, if successful, will provide authorization for the continued operation of BOR projects and federal dams on the Columbia River under the federal ESA.

Reeves explained that there is a lot of overlap between the All-H Paper and the NMFS Biological Opinion. The All H-Paper identifies fast start actions the federal agencies could get underway immediately such as acquiring habitat, restoring tributary flow, screening, and reducing passage obstructions. The Bureau of Reclamation is to identify these three priority subbasins per year to focus "fast start" resources. Federal agencies are encouraged to work closely with the states to ensure that mechanisms to protect stream flows are effective.

Reeves reviewed the "Four Governors' Paper." This is a list of recommendations agreed upon by the Governors of Idaho, Montana, Oregon and Washington for the protection and restoration of fish in the Columbia River.

Whitman spoke on the NMFS 4(d) rules which set the "take" prohibition. Take means killing or injuring a member of the species as a result of one's action. If a private party believes that take is likely there are four options for compliance with the ESA: they can on their own try to avoid take; they can take a more formal approach by trying to fit under Section 4(d) limitations/exemptions; or if there is a federal connection to what they are doing they can try to get approval through a Section 7 consultation; or if there is no federal connection they can seek incidental take authorization under Section 10 through a habitat conservation plan.

Examples of take include constructing or maintaining structures that block passage; discharging pollutants; removing water or altering stream flow in a manner that significantly impairs essential behavioral patterns; and inadequate or no screening on diversions.

The second part of the take prohibition in the 4(d) rules is limitations or exemptions. These are areas of activity where NMFS has decided it is not necessary to prohibit take. Generally, this is due to existing adequate regulatory protections to avoid take under either federal, state, or local laws.

Byler spoke on the Northwest Power Planning Council's draft Columbia River Basin Fish and Wildlife Program amendments. The program is implemented by the Bonneville Power Administration, Army Corps of Engineers, Bureau of Reclamation, and the Federal Energy Regulatory Commission and its licensees. It protects, mitigates and enhances all fish and

wildlife that could be affected by hydropower. Public hearings will be held and comments will be accepted prior to its adoption in final form.

Reeves updated the Commissioners on the work of the Endangered Species Act/Oregon Water Law Work Group and asked them to consider the group's recommendations. The Work Group had been asked to explore existing and potential state law mechanisms for protecting ESA flow needs within the state water right system, and to consider ways of promoting improved communication between the state and federal agencies that administer the ESA.

The Work Group suggested that the Department evaluate ways to improve the Allocation of Conserved Water Program and promote the use of voluntary agreements among water users and water exchanges to enhance and protect instream flows. And they recommended continued evaluation of other means of achieving the benefits of split season and split duty leasing.

The Work Group also suggested that the Department begin discussions with policy-level representatives from NMFS, U.S. Fish and Wildlife Service, and other federal and state agencies with responsibilities under the ESA. The goal would be to help the Department understand the needs identified in federal priority areas, and then to work with people in those areas to enhance and protect needed stream flows. Those discussions could also help educate the federal agencies about state water law and to develop a more consistent federal approach toward enforcement under the ESA.

The Work Group recommended that the Commission ask the Governor's Office to facilitate a dialogue between boards and commissions of the natural resource agencies regarding the impacts of the ESA on state programs.

Thorndike suggested quantifying the economic impact of the effect of ESA regulation on the big water users compared to regulation by priority date.

Fregonese added that some of the larger water users support several other users — while curtailing the water right of smaller users together may be detrimental to them, curtailing an entire large group's water rights might have economic ripples. Examples would be the farm, the farm store, the equipment dealer, etc. Whole economies based on production agriculture could be destroyed depending on the water right that is curtailed.

Reeves reviewed with the Commissioners a matrix of potential mechanisms for creating and protecting ESA flows (Attachment B of the staff report).

Director Cleary said it was his understanding that the Work Group began with three major concerns: Improving the interagency contact and coordination on ESA issues to help the users get ahead of the curve rather than be reactive; providing win/win solutions that protect flows but

also provide certainty to the water uses and users; and acting with a sense of urgency. He said that because of the potential for affecting next year's irrigation season there is a reason to act with urgency. The matrix includes a number of potential tools to help us develop a win/win solution.

Cleary spoke on behalf of Commissioner Ron Nelson who was not able to attend this meeting, saying Nelson has a concern for the state to become as pro-active as possible on the ESA situation and to retain state sovereignty over water allocation and use.

Whitman said that states have not had much luck in developing protocol on the enforcement side under Section 9. The NMFS enforcement arm has not been as easy to set up a cooperative federal/state relationship with as other parts of NMFS. So it might be good to make a joint effort with one or more states on this.

Smith said she was pleased to read the Four Governors' Recommendations — this is what ties us with the other states and provides us with the foundation to get the state agencies' staff working together.

David Filippi, Attorney with Stoel Rives, offered an update on the Walla Walla Basin situation. Filippi said the three irrigation districts, U.S. Fish and Wildlife Service (USF&WS), seven separate conservation groups, and the Confederated Tribes of the Umatilla Indian Reservation reached an interim settlement on ESA issues on June 9, 2000. The irrigation districts received an enforcement notice in January 2000 that said more needed to be done for fish or there would be potential take liability for 1999 through 2000. The potential fine could be \$25,000 per fish. On the Oregon side the irrigation districts agreed to bypass thirteen cfs of their diversion; to work with the Oregon Water Resources Department to come up with a mechanism to protect those bypass flows, and ramp their diversion rates trying to give the fish more time to know that flows were on the way down and they needed to get to the head waters; to increase their assistance for the fish rescue operation led by the Tribes and Oregon Department of Fish and Wildlife; to coordinate and be responsible for a host of measurements on flows and temperature; to upgrade screens; to spend money on receivers and tags for a fish study to be led by the Tribes; and to work toward a basin-wide habitat conservation plan. In exchange, the water users can continue to irrigate this year except for the 13 cfs being bypassed. USF&WS agreed to waive any potential civil penalties for 1998, 1999, and 2000. USF&WS also agreed to not pursue the districts in any sort of Section 9 enforcement action.

Filippi said the environmental groups and the Tribes were also part of the settlement process and were able to review draft proposals and make comments on them. In exchange for the districts' commitments, the environmental groups and Tribes issued letters saying they would not pursue citizen suits under Section 9 against the districts for the duration of the agreement. The agreement is good through January 31, 2001.

Filippi said there seem to be some benefits for fish according to preliminary data, but there are unhappy people with very old water rights who are getting cut off while those outside of the districts with new water rights are continuing to irrigate and deliver water.

He said NMFS was invited to the negotiations but did not attend. In addition to bull trout there are also mid-Columbia River steelhead in the Basin, but the 4(d) rule for the Basin will not take effect until September 8. There is no agreement in place with NMFS, but comments from NMFS scientific and technical staff on the proposed settlement agreement were incorporated into the agreement so there was some level of participation. NMFS general counsel in Seattle has said that as long as the Basin water users are showing good progress, they will not be targeted with a Section 9 action from NMFS.

Filippi said that regarding the status of the habitat conservation planning process, outside consultants are being hired to focus on flow issues. This involves identifying stakeholders, setting flow targets, and working on how those targets will be met. The districts are being inclusive in their approach to this basin-wide effort by including conservation groups, Tribes, and other water users.

He said the Walla Walla Basin is unique in that the Walla Walla River originates in Oregon, flows through Washington, and returns to Oregon. Washington has the HB 2514 process, a mechanism for the local governments to receive funds for projects that would improve water quality and benefit fish. It is expected there will be Washington state funds flowing into the Basin on the Washington side. Funding through the Oregon Watershed Enhancement Board is also being pursued. The Walla Walla really provides the Commission and the Governor with a golden opportunity to work jointly with the state of Washington in developing a bi-state solution.

An immediate concern facing the districts and the water users includes the need for mechanisms in place to protect the bypass flows. The Washington Department of Ecology believes split-season and split-duty leasing is allowed under state statute and their current rules; they will be moving forward with a pilot project. Other concerns include funding and getting the state involved in the habitat conservation planning process. (tape 3, mark 200)

Reed Benson, WaterWatch, said there are a number of conservation groups in both Oregon and Washington that have been looking at the Walla Walla for a few years, aware of the fish salvage operation and the annual drying up of the river. Benson said these groups were actively contemplating their own endangered species act lawsuit, but in January the USF&WS surprised everyone by sending their letter to the irrigation districts and the watershed councils. At that point the irrigation districts invited the conservation groups to the table and set about developing their own plan. WaterWatch decided to hold off on a lawsuit and work with the districts on their draft conservation plan; they will continue to work with them in developing a long-term plan to restore flows and protect fish in the Walla Walla. WaterWatch is encouraged by what they have

seen thus far — the districts have taken a very constructive approach and USF&WS has shown a fair amount of flexibility.

Benson said one challenge is that the districts make up approximately 40 percent of the water users in the Walla Walla Basin. The other 60 percent of users may or may not choose to cooperate. Another challenge is that this Habitat Conservation Plan tackles water uses that have been established for 100 years which will make for a very difficult process.

Benson said challenges for Oregon include clearing away the obstacles so that water users in a similar position to that of the Walla Walla water districts do not face barriers to flow restoration and are not in a situation where junior users are taking water that districts are voluntarily leaving in stream. Oregon needs to provide workable tools for restoration that users can start employing immediately, and take a hard look at enforcement measurement and managing water under existing uses. Another consideration is the appropriate role of WRD in the development and implementation of the basin-wide conservation plans. (tape 3, mark 440)

Susie Smith said she would like to see WRD staff participate in the Walla Walla process. Filippi said that water district users and non-district users need to come together to work on issues; perhaps a state agency could serve in the role of bringing people together.

Commissioners agreed on going forward with a pilot project, working with the Walla Walla group. They also agreed to ask the ESA Work Group and WRD staff to choose three or four of the mechanisms from the matrix to bring to the Commission at their next meeting.

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

Respectfully submitted,



Diane K. Addicott
Commission Assistant