

Oregon Water Resources Commission
Meeting
December 14, 2000
Salem

Members

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

Staff

Paul Cleary
Meg Reeves
Sharyl Kammerzell
Tom Byler
Diane Addicott
Al Cook
Tom Paul
Bruce Moyer
Adam Sussman
Dave Jarrett
Cindy Smith
Dwight French
Mike Ladd
Barry Norris
Jerry Rodgers

Others

Sara Coffey
Jim Brown
Jim Coffey
Rob Schab
Dave Van't Hof
Karen Russell
Brian Posewitz
David Moon

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.

Consideration of Exceptions and Direction for Issuance of Final Order on Application S-70256 in the Name of Coos Bay North Bend Water Board

Adam Sussman, Manager of the Enforcement Section, introduced Jim Coffey and Dave Van't Hof, representing Coos Bay North Bend Water Board (CBNB); Rob Schab, Manager, Coos Bay North Bend Water Board; Brian Posewitz, representing WaterWatch of Oregon, et al; and David Moon, representing the City of Lakeside. Sussman reviewed the staff report, and responded to

questions and comments by Commissioners, explaining that the task before them was to consider exceptions filed to the Hearing Officer's proposed order. The order was the result of a lengthy contested case hearing over Application S-70256. Sussman provided history and background information regarding the water right application, the Hearing Officer's determinations, and exceptions to those determinations. The two main determinations at issue were "need of water" and "impact on fish and wildlife resources." Attachment 7 of the staff report summarizes the issues and the exceptions.

Sussman said Department staff concur with the Hearing Officer's determinations and her proposed order, and recommended to the Commission that all the exceptions be denied.

Party Comments

Brian Posewitz, attorney representing WaterWatch, et al:

Posewitz gave the Commissioners photos of Tenmile Creek along with a graph entitled "Average Million Gallons Per Day." He said that Tenmile Creek is about seven miles north of the Coos Bay area. It runs out of a natural lake called Tenmile Lake, near the city of Lakeside. It runs through the Oregon Dunes National Scenic Area into a big estuary. When the flows are high enough it goes across the beach and into the ocean. Tenmile Creek has been designated by the U.S. Forest Service to be eligible as a scenic river under the national Wild and Scenic River Act. The creek has a number of fish and wildlife species present; the most important of those are probably the Coho salmon which is now a federally listed threatened species, and the snowy plover. The Oregon Department of Fish and Wildlife (ODFW) biologists have essentially signed off on the proposed permit as it has been conditioned and proposed at this point. But they have not done that based on any kind of hydrological study or data collection. That is one reason for concern about the 50 cfs bypass even though an earlier ODFW document had said they think there ought to be at least 200 cfs in the stream. There was no explanation of what the basis was for going from 200 to 50 cfs.

Posewitz said he wanted to focus on how the issuance of this proposed permit and order would effectively allow CBNB to use the water appropriations permit system to reserve water for the future. Allowing this use of the appropriations permit system essentially as a way to reserve water for the future is fundamentally contrary to the overall water appropriations permit system. The statutes that deal with water appropriation permits are intended for parties who are ready to put the water to beneficial use now or within the next five years. CBNB could always apply for water when its need is more apparent and real. There are other mechanisms in the statutes and rules that expressly allow for water to be set aside for future economic development. Posewitz referred to the graph in his hand out. He said CBNB has had a supply capacity of about 9 million gallons per day. Their historic water demand shows how much water CBNB has actually used from 1968 through 1999. The water right application was made in 1990 asking for 38.68 cfs which translates into 25 million gallons per day. This request would more than triple their

supply capacity. The motivator for that requested amount was a potential new development of a big water intensive pulp mill — a potential that has now gone away. But the Board continued with a long-term water supply planning strategy. Out of that strategy arose a plan to expand the water supply system, not from Tenmile Creek, but from other sources. In this new plan CBNB would add about 5 million gallons per day of additional capacity.

Posewitz said the graph also shows other rights CBNB is not using; these rights could be converted and CBNB would have about 26 million gallons per day of supply capacity. That is why one of the conditions now on this proposed permit is that they have to give up some of those existing rights. Since this application has been filed, the population has been declining, and, at least recently, water demand has not been increasing. On the graph the lowest one of the demand forecasts is what CBNB has called their low growth forecast. This forecast actually is based on what has happened in the past. The base case plus industrial demand forecast assumes there will be a population growth and some significant new industrial demand. Poswetiz said that looking at the graph CBNB will not need water until almost the year 2050. The Board said their planned expansions using the graph's base case plus industrial demand may show a need for water from another source in about 25 years; and that is why they want Tenmile Creek. In the next 5 years the Board plans to install gages and collect data.

Posewitz said that CBNB doesn't plan to do much of anything during the next 5 years except collect some data and the hope is that down the road they'll apply for an extension and get up to 50 years before they ever have to do anything on Tenmile Creek.

Posewitz said that ORS 537.130 describes who can get a permit. The overall scheme clearly suggests that you don't get a permit to appropriate water until you're ready to put the water to beneficial use. Municipalities were not intended to have the kind of exemption that allows them to get a water appropriation permit for a use that's 25 to 50 years in the future -- that is made clear in ORS 537.230(1). There is a standard condition in this proposed permit that says complete construction within 5 years. ORS 537.260(4), mentioned in WaterWatch's closing brief, says that a municipality may perfect not less than 25 percent of the water authorized by its permit without loss of priority or cancellation of the municipality's permit under this section.

Posewitz said the appropriate mechanism for future planning for CBNB would be the reservation process, a water withdrawal process, or the classification process. The public interest determination would then be considered when actual use of the water would occur.

(tape 1, mark 639)

David Moon, Attorney for the City of Lakeside:

Moon said that Tenmile Creek is a unique and fragile resource. The flow of Tenmile Creek varies every year to such an extent that the stream closes at the mouth of the Pacific Ocean, and at times flows backwards into Tenmile Lake. The dunes and the wave actions of the ocean

combine to open the mouth of the stream and even allow salmon to migrate up the stream. The Administrative Law Judge (ALJ) did determine that the conditions being proposed adequately protect threatened species, but what she has really found is those conditions are adequate to preserve fish and wildlife resources and maintain aquatic life and habitat. The Endangered Species Act and the Oregon Plan requires much more — to protect and restore threatened species and their habitat.

Regarding the bypass flows, Moon said it is the City of Lakeside's position that the conditions are not adequate to protect fish and wildlife resources. The way to alter them would be to increase the minimum bypass flow to 200 cfs, and that no diversion be allowed in November. The reason the 200 cfs bypass flow is important to the City is that ODFW believes the 50 cfs is adequate because they think the berm opening condition is what protects the flows more than the bypass flows. The problem is that we don't know when that stream mouth opens. There should be a more objective condition than the berm opening condition.

Moon referred to ORS 540.610(4) on Page 12 of Attachment 2 of the staff report that affirms the fact that cities can apply for water use in the future. But Moon said they should have a reasonable need and be limited to an amount as reasonably anticipated by growth of population or emergency. Water speculation is not allowed under any statute. Using overheads Moon discussed the amounts of water granted in the proposed order. He said the ALJ's findings on reasonable need are critical and support his position. The 4.6 cfs represents a reasonable need; the 18.6 cfs is a cushion. Since this cushion is beyond the applicant's reasonable need under their own forecast it should not be allowed under Oregon law.

Moon said the ALJ discussed ORS 540.610 saying that the statute allows municipalities to acquire rights to water for reasonably anticipated future needs. She agreed with the Department that the base case plus industrial scenario is reasonable. Moon said that when the industrial component is already built into the base case it's double counting when an additional amount of 12 million gallons a day is offered. The shortfall by 2050 is 3 million gallons a day; giving CBNB an additional 12 million gallons a day would be 400 percent beyond what they reasonably need. Oregon's water law is based on reasonable need, not reasonable need plus a cushion.

Moon said the projection is that CBNB needs 15.7 million gallons per day during peak season; 9 million gallons per day is their current peak season supply. CBNB will get 2 million gallons per day from the dunes well field expansion; and, Moon believes, 11 million gallons per day from expanding Upper Pony Creek Reservoir. There is no way to determine how much they will get from Joe Ney Creek. The result is that CBNB will have a 13 million gallon per day increase from their preferred alternative even without Joe Ney Creek. This would give them a surplus — they don't really need Tenmile Creek water at all under the base case plus industrial forecast. As Posewitz pointed out, demand for water is decreasing from their industries. At the present time

they have a 29 percent surplus of water in their peak season. Moon said a storage facility would be needed for Tenmile Creek water which CBNB does not have. (tape 2, mark 254)

James Coffey, representing CBNB:

Coffey said in terms of the resource issues protecting fish in Tenmile Creek, that the creek is only a migration facility. The evidence in the record shows this creek is not a spawning or rearing habitat. During the month of November there is 164 cfs in Tenmile Creek — the permit is for only 23.2 cfs. The sand berm does not get blown out until there is at least a minimum of 50 to 100 cfs in the creek. ODFW doesn't care about 200 cfs in the winter time because the data and studies show that the flow is there after the berm has been breached. This is just a small amount of water that otherwise flows out to the ocean.

State law gives municipalities the right to plan for future reasonable usual purposes as may be anticipated by reason of growth of population or to secure sufficient water supply in case of emergency. The test in terms of demand projections is not whether it's 100 percent accurate or certain, but whether they fit the standard as to whether they are in the realm of reasonable anticipation of future growth. The protestants in this case have not offered any affirmative evidence in this record that the projects relied upon by CBNB do not meet the reasonable anticipation standard. The FEIS that was done was for a purposed immediate water supply expansion project to raise Upper Pony Dam, to increase pumping out at Joe Ney, and to expand the use of the water in its well field. Upper Pony is the main storage source for the CBNB service area; a maximum of 9 million gallons per day can be treated. Joe Ney supplements Upper Pony during times when rainfall has not filled the upper reservoir. Water is then pumped over a hill from Joe Ney into Upper Pony. The dunes well field is another supply area — water pumped from wells in the sand dune aquifer. The capacities for use of the dunes well field are strictly limited and supervised by the U.S. Forest Service (USFS). USFS required CBNB to adopt a surface water management plan to make sure that well pumping will not impact surface water recreational scenic values. It is difficult to say with any certainty how much water CBNB can get from this well field at any time. Ninety percent of the time the dunes well field does not supply water for domestic or commercial purposes, but could supply untreated water for future industrial use.

Coffey said there are multiple ways Tenmile water can be used on a treated and untreated basis. One alternative would be to pipe untreated water directly from Tenmile and no storage would be necessary. Another alternative might be to use Tenmile water directly in the dunes to recharge the wells. Coffey said CBNB needed to expand its existing water storage system so it would be possible in years of drought to supply the community with water -- the Environmental Impact Statement and process fashioned the ultimate alternative to immediately address this problem. Many water providers on the coast need to have flexibility in their storage, supply, and delivery system because, for example, during high tides in December salt water backs up over the impound facility and spills into the fresh water area. Drilling wells in the dunes was not very

successful. Tenmile Creek would give CBNB the flexibility they need. The ALJ found that it is reasonable to anticipate that the CBNB area will be able to attract another large industrial water user. The base case plus industrial figures came out of the Environmental Impact Statement to plan for the current water supply expansion project.

Coffey said the reading of the statute by WaterWatch and Lakeside is very narrow and unreasonable. It is not possible to complete this in five years considering complying with permit conditions and going through the NEPA process. The statutory construction urged by Mr. Posewitz ignores the reason for the statute that allows extensions of time in which to put water to beneficial use. Coffey said the term speculation has been used a lot in these proceedings — what actually is the definition of speculation in the context of future municipal planning versus reasonable anticipation of future needs. He said the statutes suggested at this meeting by other counsel — reservations, basin classifications, etc. — do not apply to this application and proceeding, have never been used by municipalities in this particular context to his knowledge, and would not provide for a retention or transfer of the CBNB permit priority date.

Coffey said the facts that the ALJ had before her and the facts that she found more than adequately support her factual findings and her conclusions of law in the proposed order. Referring to Attachment 2 of the staff report, the proposed order on contested case hearing, Coffey said that in the last paragraph on Page 26 Mr. Rumbaugh is referred to as working with the Port of Portland — he actually works with the Port of Coos Bay.
(tape 2, mark 831)

Paul Cleary also corrected a reference in Attachment 2 of the staff report. In the last paragraph of Page 19 "South Slough National Stream Research Reserve" should actually be "South Slough National Estuarine Research Reserve."

Hansell moved to deny the exceptions and direct issuance of a final order conditionally approving Application S-70256 substantially in the form of the draft final order and permit in Attachment 8 of the staff report. Nakano seconded the motion. All voted approval.

There being no further business to discuss, the Commission adjourned the meeting. Following lunch, they met in a work session.

Respectfully submitted,



Diane K. Addicott
Commission Assistant