

Oregon Water Resources Commission
Meeting
December 15, 2000
Salem

Members

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

Staff

Paul Cleary
Meg Reeves
Sharyl Kammerzell
Tom Byler
Diane Addicott
Fred Lissner
Donn Miller
Adam Sussman
Cindy Smith
Dave Jarrett
Barry Norris
Gary Ball
Bob Rice

Others

Dan Bradley
Barry Beyeler
Kimberley Priestley
Karen Russell
Ed Henricks
John Killin
Scott Ashcom
Katie Cate
Willie Tiffany
Todd Heidgerken
Jerry Schmidt
Lorna Stickel
Doug Myers

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. In Chair Leonard's absence, Vice-Chair Hansell opened the meeting.

A. Commission Meeting Minutes

The minutes of the May 11, 2000; May 18-29, 2000; and August 24, 2000, were offered for approval. Thorndike moved that the proposed minutes be approved; seconded by Nakano. All voted approval.

B. Commission Comments

Nelson announced that Gail Achterman is the new director for the Deschutes Resources Conservancy.

Nakano said he attended a National Marine Fisheries Service 4(d) rule meeting held in La Grande. He thanked Dwight French and Jake Szramek for quick work in issuing a limited license to allow permittees to set up a pipe line in order to take 700 head of cattle off the Owyhee River.

Fregonese said he recently completed a land use project in Utah and was impressed with their interest in water conservation. Utah has the highest water consumption per capita in the country; they have resource limitations and are facing many of the same problems as we are in Oregon.

C. Director's Report

Cleary said the Deschutes Steering Committee is making progress on bringing that effort to closure and working toward consensus on a mitigation plan. In the Deschutes Basin a USGS study has documented the hydrologic connection between ground water and surface water. To protect instream flows and scenic waterway flows on the lower Deschutes, new water development must be carefully considered and mitigation measures implemented.

In the Klamath Basin there will be a meeting January 10, 2001, with the Bureau of Reclamation and project irrigators to look at supply augmentation and dry year options.

Cleary said there was a Government to Government Summit early this week which included the Governor, state agencies and Tribes. WRD is working closely with the Warm Springs Tribes to ratify their water agreement; with the Klamath Tribes under the Alternative Dispute Resolution settlements; and will be meeting next week with the Umatilla Tribes.

Cleary said he met recently with his counterparts from Washington, Idaho, and Montana to discuss the Columbia River Basin and ESA issues. These states are wanting an opportunity to work collectively with fish and wildlife agencies and Northwest Power Planning Council representatives to examine the flow releases on the Columbia and to look at a form of interstate mitigation banking.

Cleary attended conferences of the Oregon Ground Water Association, Oregon Cattlemen's Association, Oregon Water Utilities Council, and Oregon Water Resources Congress. A meeting is scheduled for later this month with various conservation groups to look at the Department's flow restoration program.

In planning for next year, Commissioners agreed to check their schedules with the proposed 2001 meeting schedule.

D. Request for Adoption of Rule Amendment to OAR Chapter 690, Division 315, Regarding Municipal Use Permits

Tom Byler, Director's Office; and Dwight French, Water Rights Manager, offered this request to the Commissioners for their consideration. They explained that the amendment would extend by two years the time period that municipal use permits are exempt from permit extension application requirements. The extended exemption period is critical to allow the Community Water Supply Work Group sufficient time to complete its policy recommendations. The proposed amendment would also require the Commission to review the progress of the Work Group no later than July 1, 2002. Five written comments in support of the proposed rules were received by the Department.

Commissioners Nelson, Fregonese, Thorndike, and Smith asked that the Commissioners be regularly updated on the progress of the Work Group.

Smith moved to ask that the Director schedule work sessions on this topic for Commission review and discussion at least twice yearly until such time that it is resolved; seconded by Fregonese. All voted approval.

Smith moved to adopt the proposed rule amendment as presented in Attachment 1 of the staff report; seconded by Thorndike. All voted approval.

E. Consideration for Approval of Appointments to the Ground Water Advisory Committee (GWAC)

Barry Norris and Donn Miller, Technical Services Division, presented GWAC nominees to the Commission for their consideration. Staff recommended reappointment of Barry Beyeler (local government category) and Terry Fisk (hydrogeology category), and appointment of Ed Butts (well industry category) for terms beginning immediately and ending November 30, 2003.

Barry Beyeler was present at the meeting and had an opportunity to visit with Commissioners. He is currently the Utilities/Natural Resources Director for the City of Boardman.

Commissioner Smith abstained from voting on the appointment of Ed Butts because of a possible conflict of interest. Mr. Butts is on contract with the Eugene-Springfield Metropolitan Wastewater Management Commission.

Thorndike moved to reappoint Barry Beyeler; seconded by Nakano. All voted approval.

Thorndike moved to reappoint Terry Fisk; seconded by Fregonese. All voted approval.

Thorndike moved to appoint Ed Butts; seconded by Fregonese. All voted approval (Smith abstained from voting).

F. Little Creek -- Protest on Transfer Application T-8058

Tom Paul, Field Services Division Administrator; and Adam Sussman, Enforcement Section Manager, presented this request for approval to hold a contested case hearing on protests to Instream Water Right Transfer Application T-8058. They also requested authorization to initiate rulemaking to amend OAR 690-077-0075 so that it agrees with the controlling transfer statutes regarding the handling of protests.

Sharyl Kammerzell, Assistant Attorney General, informed the Commissioners that they would be asked to make a decision on a procedural issue that is collateral to the substantive issue which is currently before a hearings officer in a contested case. Because of that it would be inappropriate to take public testimony on the substance of the transfer.

Sussman explained that this application proposes to transfer two irrigation water rights instream; the source of this proposed transfer is Little Creek which is a tributary to Catherine Creek in the Grande Ronde Basin. The applicant seeks to have the irrigation rights transferred instream and to run from the existing authorized points of diversion on Little Creek to the mouth of Little Creek.

Sussman said staff have preliminarily determined that the transfer as proposed would not injure existing water rights. However, the Department received six timely protests to the proposed transfer alleging that it would cause injury. Attempts to reach a negotiated settlement have been unsuccessful.

Cleary explained that it is the filing of protests that triggers a contested case hearing, not the failure of either party to negotiate.

Public Comment

Katie Cate, Oregon Cattlemen's Association, read a letter from Tim Sheehy who owns land along Little Creek and represents the Little Creek Water User Association. In the letter Mr. Sheehy asked that the Commission not move forward with a contested case hearing at this time, but return the matter to the Director for additional findings, and then return the matter to the Commission for further action once sufficient findings have been made.

Nelson suggested that the Department offer to host a mediation meeting between the parties to resolve some, if not all, the issues. Sussman agreed this would be done.

Thorndike moved to direct this matter to contested case hearing to determine whether the proposed instream water right should be denied, modified or conditioned to meet the legal requirements for transferring a water right under OAR Chapter 690, Division 15, and continue with efforts to seek mediation. The motion was seconded by Fregonese. All voted approval.

Thorndike moved to authorize staff to initiate rulemaking on OAR 690-77-075 in order to make the rule consistent with the controlling statutes regarding the handling of timely protests; seconded by Smith. All voted approval.

G. Instream Leasing Program Update and Associated Request for Rulemaking

Tom Paul, Field Services Division Administrator; and Bob Rice, Field Liaison, offered this program update and request for rulemaking to the Commission. There has been a dramatic increase in the number of instream leases — from 6 leases in 1994 to 93 active leases in 2000. This growth has occurred without claims of injury from water right holders. Review of the program suggests that leases are used appropriately as a mechanism for keeping water instream. Program numbers reveal that 80 percent of the transfers and 33 percent of the conserved water projects originated as instream leases. The legal processes for enhancing instream flows include a short-term lease, a time-limited transfer (also known as a long-term lease), and a permanent transfer.

Staff convened a stakeholder meeting on September 19, 2000, to review the instream leasing program. This group generally supports rulemaking to increase the maximum term of short-term instream leases from two years to five. Increasing the permissible length of an instream lease would reduce applicant and staff time spent on renewals.

Fregonese moved to authorize staff to initiate rulemaking to consider changes to the lease term and/or renewability provisions of the instream leasing rules; seconded by Thorndike. All voted approval.

H. Voluntary Cancellation Update

Tom Paul and Greg Nelson, Field Services Division; and Tom Byler, Director's Office, presented this update to the Commission. In August 1999 the Commission directed staff to form a rules advisory committee (RAC) to develop recommendations on issues associated with the voluntary cancellation of water rights.

The RAC suggested a legislative concept to allow a district or federal reclamation project to transfer a water right proposed for voluntary cancellation in a manner similar to that allowed by ORS 540.572. That statute establishes a process for a district to transfer the use of water to new lands prior to the water right being forfeited due to five consecutive years of non-use. The

proposed legislation would provide a similar opportunity for a district or project to avoid losing water rights that make up part of its operations. The proposed legislation also potentially meets the needs of landowners within districts or federal projects who no longer use water, do not want to be assessed for water they are not using, and wish to abandon the water right appurtenant to their property. The legislative concept would require notice to districts and the Bureau of Reclamation (BOR) when voluntary cancellations of water rights are sought within district or BOR boundaries. After receiving notice, the district or BOR would then have an opportunity to transfer the water right to other lands within their boundaries.

Department staff are working with RAC members to craft legislation on this issue and Jan Lee, newly-elected State Representative, has offered to sponsor the legislation. Further consideration of possible Division 17 rule changes would be put on hold pending passage of the legislation.

I. Water Use Measurement Status Report

Barry Norris, Administrator for Technical Services; and Gary Ball, Hydrographics/Water Use Reporting Section Manager, presented this report to the Commission. Norris said in November 1999 the Commission held a workshop on water measurement; as a result of that workshop the Commission asked staff to develop strategies for consolidating all measurement and reporting activities, and to find a way to eventually achieve measurement on all significant diversions in Oregon. Staff then reported back to the Commission at their January 2000 meeting (Attachment I of staff report). Norris said that interest in water measurement continues to grow.

Norris reviewed the twelve strategies listed in the staff report which included: developing an inventory of significant diversions; assessing compliance of water measurement devices at significant diversions; developing a water use report database accessible through the Internet; assessing water use reporting requirements for instream water rights and public entities; developing strategies to ensure expeditious entry of water use data including electronic submittal of reports; identifying report data quality issues; consolidating water use reporting data required under permit/certificate conditions into the annual use reporting program database; developing a measurement device inspection and review program; eliminating the hydrographics record backlog; developing a ground water measurement plan; assessing the ground water pump test program; and developing a centralized ground water database. For each of these strategies the staff report listed detailed implementation steps, and estimated time lines for completion.

Thorndike asked if there is data on ground water domestic exempt wells. Norris responded that any well drilled is required to have a start card and a well log, but there is no database on the use of exempt wells. He said it would be useful in areas where there are ground water problems and where there has been development or subdivisions. That data would allow us to advise the counties as to how much water is available for continued development, and alert staff if regulation is necessary.

Fregonese said the Willamette Livability Forum has put together digital tax lots for the entire Willamette Valley — that information might be helpful to the Department. Norris agreed that would be helpful and he will check into it.

Fregonese congratulated staff on beating their deadline by 50 percent in developing an inventory of significant diversions. He suggested there may be some way to strategically improve on the four year estimate for completion of the compliance assessment and installation of measuring devices on significant diversions. He asked that staff report back to the Commission with a strategic plan with interim goals to work with as many water users as possible in a short time, and then take longer to work with those who might be less cooperative. Fregonese asked for details on the outreach plan to contact property owners regarding voluntary compliance, and asked for the number of water right holders who are required to measure but do not.

Fregonese asked about procedures to verify that measurement devices are installed and measurement is occurring shortly after a permit is issued. Users should have to measure and voluntary compliance needs to be encouraged; having sanctions might help.

Tom Paul said staff do not go out shortly after the permit is issued to verify whether the permit conditions are being complied with or not; however, as part of the final proof survey process, the Certified Water Right Examiners who do the final proof surveys submit a report to the Department and do address the permit conditions in that report. Government entities are required to report; reminders are mailed to them and compliance is tracked.

Hansell said staff check wells in the Hermiston critical ground water area and the ones without a meter or in need of repair are red tagged. Staff do check, and users do report. He asked if staff could give the Commissioners the ten major river basin areas in need of measurement and reporting. A major hurdle for water users is the expense of hiring someone to come out and install a measuring device on a pump; and if they are going to that expense it's important for the Department to be using the data.

Smith thanked staff for the report and the methodical approach taken. She asked for some strategic short cuts, and considers it a top priority. The ESA Work Group has seen a great need for measurement and reporting. At a very minimum staff should address those basins that are mapped out with listed species and enforce if necessary. She said she understands the work load and process issues, but it erodes the Department's credibility to issue paper permits with conditions without following up. It does not make sense to dedicate time in developing ESA tools, asking people to come to the table and work in cooperative partnerships to by-pass flows if there is no water use accountability even among themselves. She said it seems like we need a bridge into the enforcement section. Perhaps sending letters to the users in the significant basins, the high priority areas, would be a start; and see what the response might be.

Clery said a December 21 meeting has been scheduled with conservation interests to look at our streamflow restoration program and split-season leasing. We are also asking for statutory authority to set up a cost-share program for measurement devices. That might be a good vehicle to deal with linking measurement into our streamflow restoration program as well as make that bridge into the enforcement section. Clery said staff are enforcing — he has signed five or six letters in the last few months requiring measuring devices. Staff will plan to report back at the next Commission meeting on the issues of stream flow restoration and compliance assessment.

Thorndike said that the Department has been trying to get money to fund measurement and reporting for at least a couple of legislative sessions, with limited success.

Nakano said that during the 1992 drought there were a lot of wells in the Ontario area drilled for supplemental water. About two years ago they were to be certified under the final proof survey process, but that was not allowed because no metering devices had been installed. So staff are following up — if a required metering device has not been installed, the user does not get a certified permit.

Tom Paul said that since 1994 most of the surface water and ground water permits issued have a measuring requirement and many require reporting — based on the quantity of water being requested. There is a civil penalty opportunity for violation of the permit conditions, but a large number of older water rights do not have a measuring requirement, and have instead a notice condition that in the future measuring may be required. Watermasters do have authority to require measuring devices for purposes of water distribution and regulation. The Department also has statutory ability to require reporting through a rulemaking process, a Serious Water Problem Management declaration. Staff try to be as efficient as possible and, in an area such as the Willamette where ground water problems exist, will be sending letters out to all of the permit holders reminding them of the conditions of their water right permit and the expectation of compliance. The Department can reach a large number of folks with a mailing, then go out and spot check; depending upon how critical the area is, staff may personally contact every water right permit holder. But the permits with conditions are really a fairly small subset. Staff have been relying on prioritizing the water availability basins with the greatest potential for stream flow restoration, largely driven by the ESA and Oregon Plan. Information from ODFW is combined with the Department's to prioritize restoration efforts.

Nelson asked if there has been any redirection of funds or resources toward the hydrographic backlog. Norris replied that there have actually been other higher priorities such as water availability modeling. When the Department addressed the water right permit backlog staff had to have water availability data statewide so the hydrographic staff was asked to work on the water availability model. Then there was a need for concentrating staff to refine water availability data in the Klamath Basin, and after that in the Deschutes Basin. So the water availability program has had a higher priority than hydrographic records even though the data is

needed. Developing the hydrographic record is more of a long-term task and it has just taken a back seat to other assignments.

Cleary told the Commissioners that staff will return to them with this report after working on the issues and concerns identified by the Commission and considering the strategic approach recommendations. The agency budget will show that we are not going to get additional staff and we can not work the staff we have any harder. However, there may be opportunities for us to work smarter, and that is what we will look for.

J. Legislative and Budget Update

Tom Byler, Senior Policy Coordinator, reviewed three legislative concepts for pre-session filing. LC-997 would allow final proof to be filed one year after denial of a permit extension request; LC-998 would create a water mitigation bank revolving fund; and LC-1002 contains recommendations of the Hydroelectric Task Force.

Fregonese asked about split-season leases and cost-sharing for measurement devices. Byler said these issues surfaced after the agency filing deadlines and will likely be brought forward by legislators or perhaps the SB 93 Task Force. The SB 93 Task Force has been discussing some legislative ideas that include a pilot project authorization to address specific needs in basins and a local assessment on water rights created through a local vote and imposed locally to fund water supply needs in that area.

Byler reviewed recent Senate and House committee assignments and responded to questions and comments by Commissioners.

Moyer reviewed the Governor's recommended budget summary for the Department with the Commissioners.

K. Public Comment -- There were no requests to speak to the Commission at this time.

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

Respectfully submitted,



Diane K. Addicott
Commission Assistant