

Oregon Water Resources Commission  
Meeting  
July 27, 2001  
Portland

Members

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

Staff

Paul Cleary  
Meg Reeves  
Sharyl Kammerzell  
Day Marshall  
Cindy Smith  
Fred Lissner  
Dick Bailey  
Tom Paul  
Dwight French  
Ivan Gall  
Norm Daft

Others

David Moon  
Eric Carlson  
Jerry Cheek  
Karen Russell  
Kimberley Priestley  
Judy Gove  
Bert Doshier  
Dan Shepherd  
Don Greenwood  
Chris Cauble  
Aubrey Russell  
Bob Hunter

Written material submitted at this meeting is part of the official record and on file at the Oregon Water Resources Department, 158 12<sup>th</sup> Street NE, Salem, Oregon 97301-4172. Audiotapes of the meeting are on file at the same address. Copies of written material and tapes are available upon request.

**A. Commission Meeting Minutes**

The minutes of the May 31-June 1, 2001, meeting were offered for approval. Thorndike moved to approve the minutes as presented; seconded by Nakano. All voted approval.

**B. Commission Comments**

Nakano commented on a Walla Walla River Basin tour that Mike Ladd, North Central Region Manager, took him on recently.

Fregonese said his office is working on a regional plan for the Chicago area, never thinking there would be water-related issues. Chicago has a Supreme Court decision limiting the city to 3,200

cfs of Great Lakes water, so with the large population they will have to be looking at water rights, allocations, conservation, etc.

Hansell said the people who farm watermelons with him received a notice in June that their water use would be shut off; they have a 1910 water right on their leased property. They had 17 acres of melons, worth approximately \$200,000, that would be without irrigation water. Tony Justus, District 5 Watermaster, helped all the concerned parties work out the situation with the District. If split season leasing for agriculture use would be allowed it might be helpful in this type of situation.

### **C. Director's Report**

Replying to Hansell's comments, Cleary said that split season leasing for instream flows just became law this past legislative session and the Department's rulemaking process is currently under way. If the administration of this concept works well, perhaps it could be broadened by statute in the future to apply to other uses.

Cleary updated the Commissioners on the Klamath Basin situation and the Department's efforts to offer drought assistance and emergency relief. He acknowledged the efforts and hard work of the staff in processing over 80 emergency drought permits and 15 Bureau of Reclamation limited licenses. Mediation still continues with representatives of state, federal, and local governments; Tribes; irrigators; and environmental and fish and wildlife interests. The goal is to reach a reasonable balance between biological sustainability and business certainty in the Klamath area.

Cleary said he attended a climate/global warming workshop in Washington recently. When considering warming trends from a water supply perspective, the effect may be a wet winter and dry summers but the snow line moves up. States like Oregon that don't have substantial storage facilities are hurt because they rely on the snow pack to store water.

### **D. Contested Case Exceptions**

Renee Moulun, Protest Program Coordinator, presented exceptions filed by Ronald L. and Susan K. Crume in a contested case proceeding on water right application S84129. The application requested the use of 229 gallons per minute (gpm) of wastewater from Grants Pass Irrigation District (GPID) for irrigation of 20.2 acres within the Rogue River Basin in Josephine County. She reviewed for the Commissioners the facts of the case, the proposed order findings, and the Department's exceptions to the proposed order.

#### Party Comments:

David Moon, attorney representing Ronald and Susan Crume, reviewed the applicants'

exceptions to the proposed final order. He spoke on the definition of wastewater in the administrative rules, and that it is recognized as a separate category of water. The third sentence of OAR 690-300-10(56) reads, "Wastewater abandoned to the channel of a natural stream becomes a part of that stream and is subject to appropriation." Moon said if you grant an application to divert the wastewater, then it is diverted before it returns to the stream and legally a part of that stream. The ability to capture wastewater and divert it for appropriation only exists for a limited amount of time. It has to be beyond the control of GPID and it must be diverted before it returns to the channel of the natural stream. He said the ALJ did rule that we are dealing with GPID's wastewater, but from that point on she ignores her ruling and the fact that wastewater is a unique source of water.

Moon referred to the definition "Water is Available" in OAR 690-300-10(57) which refers to the requested source. He said the availability analysis needs to be based on whether there is wastewater available. He said there clearly is water available from GPID's wastewater because no other applications have been filed for that wastewater. The Crumes are trying to make their water use legal, and make the most efficient use of this water possible. The same water has been used illegally for many years by the Apple Rogue Irrigation District. The Crumes are the only users of sprinkle irrigation in a district where everyone else flood irrigates. They have spent a lot of money on very expensive systems to be efficient water users. Moon said the water allocation policy supports his position regarding wastewater.

Moon said OAR 690-410-70(1) states that waters of the state shall be protected from over-appropriation by new out-of-stream uses of surface water. The Crume application is not for an out-stream use; the requested source is wastewater. The Department and ALJ arguments talk about new uses instead of new out-of-stream uses. The ALJ said that if the water is not diverted, at least part of it will return to the Rogue River. Moon said the fact is that this is a unique category of water and somewhat akin to stored water. If he were an applicant for stored water, under the Department's analogy in this case, the Department could say if you don't divert or use that water it will return to the stream and contribute to the Rogue River's scenic waterway flow. Perhaps that is true, but a person would have the legal right to apply for and be granted a permit to use that stored water. Moon said in the same way the Crumes have a right to apply for and use wastewater.

One of the exceptions Moon made to the ALJ's findings was that she found no evidence showing that this water was not going to return to the river. Moon said that Watermaster Bruce Sund testified that the impact would be negligible — such a small amount of water would not be felt on the Rogue River from a regulatory perspective. Sund said the application should be denied based on a cumulative impact. Moon said that although the Crumes are requesting 229 gpm, much less water is often available at this point of diversion at the very end of the GPID system where GPID loses control of the water. One of the key issues is water availability. Moon said the only water availability analysis that has ever been done is on the Rogue River. No analysis has ever been

done on GPID's wastewater. All reference to a model is actually on the Rogue River. The water at the end of GPID's system could be used by the Crumes. After the water leaves GPID's control, it runs over land, into the Apple Rogue Irrigation District ditch, seeps and evaporates, running down The Canyon into a gravel pond near the Rogue River. The quality of water that would make it back to the river is also a concern. This water would have traveled 16 miles through the GPID system.

Moon said that except for a small amount of acreage the Crumes have water rights from the Rogue River for this land. The application in question is for a supplemental use. Moon said he and his clients believe the permit should be granted because the law supports it and the clear language of the rules supports it. The requested source is GPID's wastewater, not the Rogue River. As a practical matter, very little if any water will return to the Rogue River and it won't be of high quality. If the Crumes don't get this wastewater application they'll use water from the Rogue River.

Susan Crume said she and her husband want to utilize the contaminated wastewater instead of taking clean water out of the Rogue River.

Meg Reeves, Deputy Director, said there is a specific statutory scheme that allows applicants to apply for secondary permits from stored water. It sets out information needed by the Department in order to get a secondary permit. There is no such statute, rule, or case law that she is aware of that speaks to wastewater as a separate source from public waters that are otherwise available for appropriation.

Moulun said the Department appreciates the efficient use of water the applicants are demonstrating, but the issue is that staff cannot allocate additional water on an over-allocated system. It is against the statutes and rules that govern the Department's allocation of surface water. She said it is important to look at the definition of wastewater. Case law holds clearly that wastewater becomes wastewater at the point that the original appropriator has lost control of it. The natural stream channel can be used as a vehicle for wastewater provided the intent to recapture the water is present as soon as the water is released into the natural stream channel.

Hansell said he hopes the Commission can revisit the issue of wastewater.

Thorndike moved to deny the applicants' exceptions, grant the Department's exceptions and issue a modified Final Order substantially in the form of the draft Final Order in Attachment D of the staff report; seconded by Fregonese. The motion passed with 5 votes; Hansell abstained from voting.

#### **E. Ground Water Advisory Committee (GWAC) Appointment**

Fred Lissner, Manager of the Ground Water and Hydrology Section, offered this request to the Commission. He explained that this GWAC vacancy is due to the resignation of Chair Terry Fisk who has accepted employment out of state. Staff recommended the appointment of David Graham, a hydrogeologist from the Medford area.

Hansell moved to appoint Mr. Graham to fill the vacant term beginning immediately and expiring on November 30, 2003; seconded by Nelson. All voted approval.

#### **F. Grants Pass Irrigation District (GPID) Water Right Cancellation Settlement Proposal**

Reeves presented Commissioners with this request to approve the state's participation in a proposed federal court Consent Decree that would resolve the water right proceeding and related litigation currently pending in the Oregon Supreme Court and Jackson County Circuit Court for the state, and the Endangered Species Act take enforcement pending in Federal District Court.

Chris Cauble, attorney for GPID, thanked the Commission for considering this important step in the dispute regarding Savage Rapids Dam and GPID's diversion of water. He said this agreement will be entered into by a federal court that will have as parties the U.S. Government, the environment entities, and the State of Oregon.

Don Greenwood, Vice Chair of the GPID Board, said he believes finally people in the community realize that trying to save the dam is a useless futile exercise. The consent decree has been agreed upon by all parties involved in this long-standing issue. This will provide the impetus for the Board and the District to move forward aggressively. The irrigation district is vital to the area. Greenwood apologized to the Commission for all their hard work and hours spent on this controversial issue over the years.

Dan Shepherd, Manager of GPID, said nine years ago when he took the position of manager, he was very naive and so were the Board members at that time. He believes they entered into the agreement with WRD in good faith, but there was not a good understanding of how to go forward; there was a lot of mistrust. Now all sides are working together.

Bob Hunter, WaterWatch, agreed this has been a long process. He urged the Commission to support the agreement which creates a framework allowing all parties to build on the momentum of the past year of working more closely together. The agreement does have enough enforcement hooks to give more certainty of success. Hopefully, this will be a win-win solution. WaterWatch would rather spend energy on a permanent solution that is good for the resource and keeps GPID viable rather than to continue on with litigation.

After discussion, Nelson moved to approve the consent decree; seconded by Thorndike. The motion passed 5-1 with Hansell voting against it.

### **G. Drought Update**

Fred Lissner, Manager of the Ground Water and Hydrology Section, reported that currently there are 16 counties in which drought declarations have been made. Water availability throughout the state is becoming a critical issue. Except for the Deschutes Basin, reservoir storage in the state ranges from 12-74 percent of average for this time of year. Reservoirs in the Deschutes Basin range from 64-94 percent of average storage for this time of year. Except for the Malheur Basin, the cumulative run off that has occurred is very low, ranging from 10-77 percent around the state. The Malheur Basin has substantially above average run off for this time of year, but that will soon change due to lack of storage water. Portland Harbor levels are way down. The Willamette River flows are near record lows for this time of year. The surface water supply index throughout the state is generally dropping. The Klamath Basin was the first county in which a drought declaration occurred. There have been approximately 90 applications for drought emergency permits in the Klamath area, for some 21,000 acres of irrigation. Two-thirds of those drought emergency permits involve the drilling of new wells. Fifteen Bureau of Reclamation limited licenses have been approved to develop wells and use ground water for stream flow, water quality, and project supply augmentation.

Lissner said there are approximately 40 existing well permits in the Klamath Basin due to expire on July 31, 2001. The Department is extending the permit terms of use to December 31, 2002, while staff complete a ground water study.

About one-third of the Klamath Project lands are located in Northern California. California state government has allocated \$5 million for the drilling of wells. Due to a general slope of the basalt aquifer to the bedrock from north to south, these wells must be very deep — 1,800 to 2,400 feet. It is very difficult to know just where to drill in that area.

The Oregon Legislature has offered \$2 million of General Fund money through the Department for grants to irrigation districts to further develop ground water supplies within the Oregon portion of the Klamath Project. A steering committee of Department staff and representatives from 13 water districts has been formed. This steering committee is reviewing applications from individual districts to use this money to drill replacement wells for supplemental water supplies.

The Legislature has also offered the Department \$300,000 to hire 3 staff positions in the Klamath Falls office to collect ground and surface water data, and help with distribution of water according to rights.

#### **H. Upcoming September Commission Worship/Meeting Agenda Discussion**

Reeves led a discussion with the Commissioners on ideas for the upcoming September workshop/meeting agenda. Thorndike said he would suggest an opportunity for a broad discussion and opportunity for Commissioners and staff to think outside the box; including such topics as how can the Commission and advisory committees be best used rather than just being reactive. Leonard said a topic to consider might be the climate changes and its impact on water. Nelson mentioned measurement and supply, and how to stretch the existing supply. Fregonese said he is always interested in municipal water supply, water rights, and water conservation.

Nakano mentioned interest in a presentation by Dr. John Buckhouse, Oregon State University, on peak flows on uplands for subsurface storage. Dr. Buckhouse demonstrates that when uplands are flooded early, water is stored and returned cleaner and cooler later in the season.

Hansell said the Soil and Water Conservation District could be invited to update the Commission on programs available to enhance waterways.

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

Respectfully submitted,



Diane K. Addicott  
Commission Assistant