

some of which quickly become outdated and less useful. The Stewardship and Supply Initiative is an effort to provide meaningful and up-to-date water resources information that is easily accessible to the public. Attempts in the 1999 and 2001 Legislative Sessions to obtain funding

were not successful; staff developed this "proof-of-concept" for the Klamath Basin to demonstrate the technology when seeking funding in the future.

#### Public Comment on Item E

Karen Russell, WaterWatch, said she had hoped Devyldere's presentation would cover in more detail the Department's work last summer inventorying diversions in the Upper Klamath Basin.

Russell said the inventory work was very important. WaterWatch had come before the Commission and had talked with Cleary and staff about the importance of measurement of water use in the Basin. There was at that time discussion of this inventory that could eventually lead to measurement. She said the information is now available -- so what are the next steps the Department and Commission will take with regard to the inventory? She had been told that one of the biggest problems to understanding what is going on is that most of the diversions were not measured. The report concluded with a Department proposal which WaterWatch supports of putting pressure gauges on pumps; however, only 50 percent of the diversions inventoried are covered by pumps. WaterWatch staff still believe measurement is critical throughout the Basin.

Russell said that in the inventory report a staff conclusion indicated that during the field work no observations were made that suggested that excessive diversion rates were a significant factor in determining water supply for the Klamath Project. In the past, particularly in the Wood River, where WaterWatch believed there were diversions above the authorized rates, the Department's first reaction was to believe that no problem existed. WaterWatch took measurements of those diversions and documented diversions in excess of rates. The Department's reaction was to question the reliability of the data, and also to question whether measurement would help. The Department, to its credit, went out and required locking head gates, and tried to restrict users to their rate. WaterWatch then commissioned a study which revealed that just by installing head gates and requiring measurement, 30 cfs was put back into the stream system. That 30 cfs benefits the Wood River and the Upper Klamath Lake.

Cleary said the inventory was taken July through September 2001. As this was a water-short year, there were many diversion pumps not in use because of the low water level. Staff plan to revisit the diversions with the land owners present in 2002. The Department has proposed this in a grant request to the Oregon Watershed Enhancement Board; asking for \$320,000 to capitalize our measurement cost share account. Using pressure gauges to measure pumps is less costly, and can help in estimating the diversion rate. As last summer's inventory was taken, staff observed no diversions that appeared to be much greater than claims or permits would allow. And they

were pleased to see that so many fish screens had been installed. Work will continue on their report findings and recommendations — it is of great interest to the Department and the Bureau of Reclamation.

#### **F. Amendments to Instream Lease Rules (Division 77)**

Adam Sussman, Senior Policy Coordinator; and Bob Rice, Field Liaison, presented this request for adoption of amendments to OAR Chapter 690, Division 77. Rice thanked the members of the Rules Advisory Committee who worked with staff to develop the amendments. He reviewed the written staff report, the growth in the leasing program since its inception in 1994, and explained the background of the rule amendments which reflect changes in statute enacted by House Bill 2712 of the past Legislative Session. He said the proposed changes would describe the process for administering split season use instream leasing; would increase the maximum term length from two to five years; would include an application submittal deadline; would require a watermaster assessment; and would modify the instream transfer process to be consistent with statute. Rice also said that new forms are being developed to help simplify the application process.

Nakano expressed concern about the loss of recharge of subsurface storage water when irrigation is voluntarily shut off. In Eastern Oregon, with the shortage of rainfall, ranchers depend upon storage. He said Oregon State University conducted a study on Bear Creek, a tributary to the Silvies River. In that study, water was kept in the canals rather than watering the meadows. Nakano was told the study showed subsurface storage water returning to the canals for four to six weeks from the time irrigation was cut off. This study will continue the summer of 2002 and more data will be collected.

Sharyl Kammerzell, Assistant Attorney General, said the rules do provide for an injury analysis; and approving an instream lease would not prevent reassessing an injury.

Cleary said this issue requires consideration of both out-of-stream and instream uses. The idea behind the instream leasing program is to enhance flows for fisheries. The Department of Fish and Wildlife staff could identify when water is needed instream for the fish; and it may be that we will not want to encourage leases in areas where there are low late season flows that would be fed by subsurface storage.

Hansell said the return flow from subsurface storage can be 10-15 degrees cooler than the stream flow which would help bull trout.

Nakano said stream temperature will also be a big issue in meeting TMDL limits.

Public Comment on Item F

Kimberley Priestley, WaterWatch, commented on the retention of the irrigation districts as co-lessors. WaterWatch is very concerned about the inclusion of this provision. There is nothing in the statutes that allows for veto power of the irrigation districts over the instream transfers, and it is inconsistent with the Attorney General's advice on voluntary cancellations. That opinion was specific to voluntary cancellations but there is some general analysis in it that points to the conclusion that the water right goes to the land owner. In reading through the comments of the irrigation districts, the common theme seems to be concern that they would not be able to review for injury. The rules as drafted do allow for special notice to the irrigation districts and the irrigation districts have the opportunity to protest so they could raise injury issues; they would have ample opportunity through the transfer process. In general WaterWatch does not think it is good public policy at a time when the state is trying to get water back instream for fish to allow some of the biggest users in the Basin to have veto power over instream transfers. She urged the Commission to delete that section of the rule as a majority of the RAC recommends.

Rick Kepler, Oregon Department of Fish and Wildlife, spoke in favor of the split lease option. His Department sees it as providing more flexibility to both using water on the land and also providing more water instream for fish. Split leasing could help address the issues brought up by Commissioner Nakano; providing irrigation and return flows while timing releases to instream for the fish.

Nelson expressed concern that no processing time lines are included in the proposed rules. Rice said some of the applications arriving in the Salem office are not complete enough to begin the 21-day public notice process. Most applications can be processed in a timely manner and staff are attempting to streamline the process as much as possible. However, establishing a limited time period for processing could lead to some of the incomplete applications being denied.

Nelson suggested that people be provided with an incentive to participate in this program. He proposed that field staff continue to be involved actively in the review of applications, and submit them to the Salem office for processing within a time frame.

Cleary explained that the involvement of the field staff will not be reduced; the change proposed in the rules would merely eliminate the watermaster as an actual signatory to the lease.

Fregonese suggested staff establish a tracking system as soon as possible to include the first date of contact, the date when staff consider the application to be complete, and the date of processing.

Clearly agreed that developing a tracking system for the lease application process would help point out any particular problems that need to be dealt with. Staff are revising the lease form and the internal manual, and a process check list could be put on each lease application file for tracking.

Nelson moved to adopt the rules as proposed; seconded by Fregonese. All voted approval.

Nelson asked the staff to report back to the Commission after a tracking system has been developed. If necessary, the rules could be revisited in the future.

### **G. Ground Water Advisory Committee Appointments**

Barry Norris, Administrator of the Technical Services Division; and Donn Miller, Hydrogeologist, asked for the reappointment of Paul Christensen, well industry category; Gayle Killam, environmental category; and Tim Kreder, ground water user category, to the Ground Water Advisory Committee. The terms of these members would begin immediately and end November 30, 2004.

Nelson moved to reappoint the candidates; seconded by Nakano. All voted approval.

### **H. Retreat Follow-up**

Due to a lack of time, this discussion was set aside.

### **I. Public Comment**

Malia Kupillas, Pacific Hydro-Geology Inc., offered a petition to withdraw an area south of Salem from further appropriation. Kupillas pointed out the area on a topographic map. She said the developer of this particular area had hired a hydrogeologist to prepare a review that was eventually approved by Marion County. At issue is some long-term water level data that were available at the time the review was submitted but were not included in that report. Kupillas said she believes those data would have made a big difference and may have resulted in the report not being approved by the county peer reviewer. She added that the county hearings officer has just approved another five-lot subdivision in this area.

Kupillas asked the Commission to consider issuing an emergency withdrawal effective immediately and lasting for six months to protect the area from well drilling and give the Department time to further study the situation. In addition, Kupillas requested that the area be

considered for withdrawal for a minimum of three years. She said the aquifer showed almost no recovery during last winter's rainfall; and the analysis showing the aquifer is declining is primarily based on data from non-drought years.

Kupillas said she is concerned about protecting this aquifer if it is overdrafted. If the withdrawal cannot be established immediately, nothing would prevent the developer from having wells drilled immediately. She said she understood that if a ground water critical area were to be declared, the Commission could invoke an emergency withdrawal. Activity would cease on the development while the public process proceeds.

Sharyl Kammerzell, Assistant Attorney General, said that regarding withdrawals, staff are guided by statute (ORS 536.410), not administrative rules; and that statute does not provide for an "emergency" withdrawal. The withdrawal process calls for a public hearing, with reasonable notice to the public. She said the decision to initiate the process for a withdrawal must come from the Commission, not by petition. She explained that the declaration of a critical ground water area is a rulemaking process, requiring a significant amount of process before the Department can make such a declaration. She knows of no provision within the law to allow for an emergency declaration.

Fred Lissner, Manager of the Ground Water Section, said staff are familiar with the subject area's water supply concerns and have been collecting data on the aquifer. The Department can adopt emergency rules; but a withdrawal is not a rule, it is an order. There is no provision for adopting an emergency order.

Thorndike said there is also the broader issue of working with other Commissions such as the Land Conservation and Development Commission.

Karen Russell, WaterWatch, suggested the Commission consider amending the Willamette Basin Plan to allow for no more exempt uses of ground water. Ground water use would be allowed through a permitting process.

Kupillas said Marion County thought they had a pro-active system when the sensitive ground water overlay zone passed. She was one of the peer reviewers. The problem is that a consultant presented a report that met the criteria but left out long-term water level data that could have been made available. So the peer review approved the report and there is no mechanism within the ordinance to withdraw that approval.

Fregonese said he is concerned that this may be the tip of the iceberg on a major problem in some Willamette Valley aquifers. Perhaps the best way to deal with such concerns is to investigate the allegations, but not to make it an emergency so staff are not taken from projects they are already committed to complete.

Cleary suggested exploring strategy options with Fregonese, Commissioner Smith, and local planners. Perhaps some statutory changes will be necessary, and staff are currently looking at legislative concepts for the 2003 session.

**J. Other**

Deputy Director Meg Reeves brought before the Commission an order for their approval that would delegate authority to the Director to implement a consent decree in the lawsuit, *United States v. Grants Pass Irrigation District*. Fregonese moved approval of the request; seconded by Nelson. All voted approval.

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

Respectfully submitted,



Diane K. Addicott  
Commission Assistant