

Oregon Water Resources Commission
Work Session
April 11, 2002
Salem

Members

Tyler Hansell
Ron Nelson
Dan Thorndike
Susie Smith
Jay Rasmussen
Jim Nakano

Staff

Paul Cleary
Meg Reeves
Shannon O'Fallon
Adam Sussman
Diane Addicott
Debbie Colbert
Cindy Smith
Tom Paul
Richard Whitman
Barry Norris
Lisa Juul
Renee Moulun
Dwight French
Juno Pandian
Craig Kohanek
Laura Snedaker
Kyle Gorman
Bob Rice

Others

Brad Harper
Doug Myers
Paul Echley
Douglas MacDougal
Dick Helgeson
Rick Kepler
Bruce Estes
Cathy VanHorn
Gail Achterman
Terrance Anthony
Pete Test
Roger Prowell
Dan Bradley
Kimberley Priestley
Karen Russell
Libby Barg
Brad Taylor
Gene Klopfenstien
Aubrey Russell
Rex Barber
Neil Bryant
Steve Shropshire
Todd Heidgerken
John Killin
Terry Buchholz

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.

The work session was opened by Chair Thorndike. Paul Cleary introduced Shannon O'Fallon, Assistant Attorney General, who will be working with the Department.

Community Water Supply Work Group

Adam Sussman, Senior Policy Coordinator; and Dwight French, Water Rights Manager, presented an overview and status report on the Community Water Supply Work Group, and its work focusing on permit extensions and water management and conservation plan rules.

French reviewed a data sheet of the 132 pending requests for extensions on file from community water suppliers. He displayed maps showing the location and size of each extension request and whether they are for surface or ground water. Approximately 61 percent of the requests are for ground water.

Sussman reviewed the written staff report with the Commissioners. He explained that in the development of the Division 315 and 320 permit extension rules, Department staff and community water suppliers recognized that issues regarding extensions of permits for community water suppliers were unique; and those issues needed to be handled separately. It was decided to provide an exemption in the extension rules until July 2001, which was later extended until July 3, 2003. In November 1998 the Department formed the Community Water Supply Work Group to address these unique issues either through statute or administrative rule changes. The Division 315 rules require the Commission to review the progress of the Work Group before July 1, 2002. Sussman said the Department supports the direction of the work group and plans to proceed with rulemaking. Staff tentatively plan to have rules for the Commission's consideration and adoption at its August 2002 meeting.

Panel Discussions:

Members of the first panel of stakeholders were Willie Tiffany, League of Oregon Cities; Lorna Stickel, Portland Water Bureau; and Todd Heidgerken, Tualatin Valley Water District. Tiffany submitted and reviewed written comments from the Oregon Water Utility Council that reflect the collective position of Oregon public drinking water providers. Stickel spoke to the Commission on how municipalities are addressing water conservation and environmental mitigation issues; she also submitted written comments.

Heidgerken encouraged the Commission to approve the water right permit extension rule minor housekeeping amendments to be offered for their consideration at the next day's meeting. He explained the changes that have occurred in the past few years in the permit extension process, saying that as recent as five years ago a municipality could request an extension by postcard, and cancellation of that right was never an issue. He said there is agreement among municipalities on the following: there is a need for broader application of the water management and conservation plans; the Division 86 plans need to be strengthened along with the rules that govern them; the incremental process for developing the water rights should be used; and the process should encourage water providers to work together in developing water sources. Through this

rulemaking process he hopes there will be a better understanding by non-municipal entities of the unique nature of municipal water rights and requirements. In light of the various restrictions and conditions to comply with, municipalities would like to see a permit extension process that provides some certainty. Municipalities offer an important service to the public in providing water to patrons.

Members of the second panel of stakeholders were Karen Russell, WaterWatch of Oregon; and Aubrey Russell, Oregon Trout. Both of these speakers submitted written copies of their comments for the meeting record. Both emphasized the need for greater conservation and stewardship emphasis, and securing streamflow mitigation through the extension process.

Following each panel presentation, speakers responded to Commissioners' questions and comments.

Nelson encouraged members of the Community Water Supply Work Group to continue to work on their differences related to the draft rules, and present the rules for the Commission's consideration at the August meeting if at all possible.

Thorndike suggested forming a subcommittee that would include a few Commissioners to discuss some of the complicated issues being dealt with by the Community Water Supply Work Group. Smith, Thorndike and Rasmussen volunteered to serve on this subcommittee.

Public Comment on the Community Water Supply Work Group Item:

Pete Test, Oregon Farm Bureau, said his organization was just recently invited to join the Community Water Supply Work Group. He said that ground water is the main source of water for agriculture in the Willamette Valley. Agriculture producers currently applying for use of ground water would be junior to any existing rights being held, and not used, by municipalities. Agriculture producers who have senior rights that have not yet been fully developed are concerned about losing irrigation water because of deeper municipal wells.

Deschutes Ground Water Mitigation Issues Overview

Meg Reeves, Deputy Director, led this discussion on mitigation issues. She reviewed the provisions of the Scenic Waterway Law, enacted in SB 1033 in the 1995 Legislative Session. The law provides that a new ground water use in or above a scenic waterway cannot be approved if generally accepted hydrogeologic methods show that a new use will measurably reduce scenic waterway flows, unless either mitigation is provided or evidence is submitted to overcome that measurable reduction finding. In a study recently completed by the Department and the U.S. Geologic Survey a hydraulic connection between ground water in the upper and middle basin and surface water flows in the Deschutes River and various tributaries has been established.

As a result of that study, the Department initiated rulemaking to address the impact of current and future ground water withdrawals on existing water rights and the Deschutes River Scenic Waterway flows. Reeves said that today's discussion relates to the major outstanding policy issues raised by the rulemaking. She reviewed the written staff report which provided a summary of the issues and a map of the Deschutes Basin, and responded to Commissioners' comments and questions.

Public Comment on Deschutes Ground Water Mitigation Issues:

- *Neil Bryant, Attorney with Bryant, Lovlien and Jarvis*, representing the cities of Bend and Redmond, Avion Water Company, Big Falls Ranch, Deschutes Valley Water District, and Water for Life spoke on Deschutes Basin water management and submitted written comments. He said that SB 1033 (1995 Legislative Session), signed by Governor Kitzhaber, intended to amend the Oregon Scenic Waterway Act. He asked that the Commission not try to impose mitigation on existing water rights that only include a regulation requirement; mitigation, in this case, would have to be voluntary. This is an issue of fairness. Mitigation is not a subset of regulation. It is important that the Commission make a policy decision about whether or not mitigation can be imposed on existing post-July 1995 water rights.
- *Roger Prowell, City of Bend*, said he drove over the Santiam Pass that morning in a blinding rain storm falling on several feet of snow and realized the Deschutes Basin aquifer was in full recharge mode. He shared a story about the history of water in the Deschutes Basin, "Mother Water," from the early 1800s. Prowell said the goal now is to work on getting the basin to a more natural hydrograph. The Madras gauge has been selected and chosen for the site at which the flows on the certificates of the 1989 and 1991 instream water rights must be met. The certificates say the flows should be measured at the lower river Moody gauge. Meeting the required lower river flows upstream from the Moody gauge is not possible. The 70-30 split is a dream of hydraulic reality. He said the USGS study says that no measurable impact has occurred from existing ground water pumping; yet, it is proposed that holders of existing water rights must somehow mitigate 30 percent of their right for an issue that is already determined—the lower river meets all those required flows.
- *Rex Barber, member of the Deschutes Basin Steering Committee*, submitted written comments on the proposed rules. He suggested that requiring mitigation of the post July 19, 1995, permits cannot be made as a policy decision; but rather on a case-by-case basis, notwithstanding the legalities of trying to add new provisions to existing permits.

Meg Reeves said what the proposed draft rules intend to say is that existing conditioned permit holders can mitigate as an option in lieu of being regulated off.

- *Aubrey Russell, representing Oregon Trout*, said he had already submitted written comments at the February 2002 Commission meeting. Restoring flow in the middle Deschutes is a priority for fish restoration projects and it will provide tremendous benefit to the region. One of the goals of these rules, as listed in the staff report, is to facilitate restoration of the middle Deschutes River and tributaries; but Russell said he is not convinced there is a need to link that restoration concept with these mitigation rules. There are causes for concern about standards not being applied to all methods of mitigation. He said if the Department proceeds with payment-to-provide, there should be accountability.
- *Terry Anthony, Oregon Water Trust*, said he will be supplying written comments on the proposed rules. His organization is concerned whether the rules as drafted have adequate standards to ensure that their implementation will turn acquired credits into meaningful flow mitigation. He is not sure that the correct balance between process and protection has been obtained. He asked for additional standards that would address location and timing of mitigation for the payment-to-provide and mitigation credit options.
- *Kimberley Priestley and Karen Russell, WaterWatch*, reviewed written comments they submitted to the Commission. Regarding the performance-based approach, they expressed concern that the Department proposes as a baseline that flows continue to be met on at least an equivalent or more frequent basis as compared to the established long-term running average base period flows — this is not a standard. Rather than using payment-to-provide as a workable solution, they suggested including the mitigation strategy developed by the steering committee and also codifying it into law. By doing so, the river would be protected and new ground water development could be allowed. There has been substantial public comment on these proposed rules — a majority of those comments ask the Department to protect the Deschutes and put strong standards into the rules. Constituents asking for strong rules include ten conservation groups, a number of state and federal agencies, fly fishing groups, local businesses, rafters, fisher folks, and numerous residents in the basin. WaterWatch does not believe this rulemaking process has gone well — the proposed rules do nothing but provide loop holes to the law. The river is just not being protected.

Cleary reminded Commissioners that public comments are being accepted through May 7. The goals of the proposed rules are to protect the flows in the lower Deschutes, restore flows in the middle Deschutes, and meet the basin's growing water supply needs. There are tools within the proposed rules which should be able to accomplish those goals — comments on how to refine these tools are most welcome.

Smith said she would like to see more accountability in the rules' payment-to-provide concept.

- *Gail Achterman, Executive Director of the Deschutes Resources Conservancy*, said the Conservancy has requested recognition as a mitigation bank and is also interested in being a qualified entity to accept payments-to-provide mitigation. The Conservancy's business is the restoration of stream flows in the Deschutes Basin. However, since 1996 the Conservancy has received less than \$2 million in federal funds in spite of the \$2 million per year authorization. She cautioned the Commission that in adopting the rules and asking people to mitigate, it will take time and money for those acting as a mitigation bank to be ready to do business. Payment-to-provide becomes really important if you want to be able to respond to people who want to mitigate before the bank is capitalized and credits are developed.

It was decided to adjourn the work session and hear the report on Legislative Concepts and Budget Development at the next day's meeting.

Respectfully submitted,



Diane K. Addicott
Commission Assistant