

L. CONSIDERATION FOR APPROVAL OF APPLICATIONS R-69680 AND 69681 TO STORE AND USE WATER FOR A MITIGATION POND, TRIBUTARY TO THE COLUMBIA RIVER FOR WILDLIFE USE, PORT OF THE DALLES, WASCO COUNTY

On August 12, 1988, the Port of The Dalles filed Applications R-69680 and 69681 which proposed to store 25 acre-feet of water behind a dam two feet high for wildlife use in conjunction with construction of Riverfront Park. The pond would be maintained by pumping from an underground water collection system (infiltration gallery) during the low-flow periods of the Columbia River. Columbia River water would enter the infiltration gallery and would be pumped from there into the pond. The pump would be controlled by a float valve. The second application proposed to use water to maintain the pond.

The question before the Commission was whether the issuance of the storage permit would impair or be detrimental to the public interest. Administrative Rule 690-11-080(2)(a)(C) specifies that dams greater than ten feet in height or impounding more than 9.2 acre-feet of water be referred to the Commission. The Commission must determine the need to make a public interest determination under ORS 537.170.

Director's Recommendation

The staff recommended that the Commission find that the project would not impair or be detrimental to the public interest and authorize the Director to issue the permits for the use of water as outlined in the application.

It was **MOVED** by Lorna Stickel, seconded by Didi Malarkey, and passed unanimously to approve the Director's recommendation.

M. PROPOSED ORDER ON NORTH WASCO COUNTY PUD WHITE RIVER HYDROELECTRIC PROJECT

Application 60425 was filed by the North Wasco County PUD in 1980. A hearing was held before the Water Policy Review Board (Board) in February 1981. The Board entered an interim order, finding that the project was not detrimental to the public interest but continuing the hearing to allow the applicant to provide additional information. The hearing was continued a number of times after 1981.

Following adoption of House Bill 2990, passed in 1985, and of the Commission's Division 51 rules, the hearing was continued again and the applicant instructed to provide information demonstrating project compliance with Division 51 standards. The applicant provided the necessary information and requested that the matter be taken to hearing and completion. The project proposal was also subject to later review based on Diack.

A cumulative impacts analysis was done as required by Division 51 and the matter presented to the Commission for entry of an order of determination on cumulative impacts. The Commission entered an order on May 26, 1989, finding that the project would have no cumulative impacts with any existing, proposed or approved projects in the Lower Deschutes Basin. The Commission directed that the hearing be reconvened and completed.

The matter was brought to hearing at The Dalles Oregon in August 1989. ODFW had requested and was granted interested agency status, filed written recommended conditions, but did not otherwise appear at the hearing. No other individual, group or state agency requested party status. Only the applicant, represented by legal counsel, appeared and testified. The record was then closed.

Based on a review of all testimony and evidence in the record, a proposed order was prepared approving the White River hydroelectric project, subject to certain conditions.

Director's Recommendation

Staff recommended that the Commission approve for the Chairman's signature the proposed order on Application 60425.

Jim Howland reported that North Wasco County PUD had been a client of his firm, CH2M Hill, but that he did not think that the company was currently involved in this project. Because of that, Howland said he chose not to abstain from discussion or voting on this matter.

It was MOVED by Mike Jewett, seconded by Didi Malarkey, and passed unanimously to approve the staff recommendation, as amended.

N. CONSIDERATION TO AMEND ORDER ON APPLICATION HE 404 FOR A HYDROELECTRIC PROJECT ON THE NORTH FORK SPRAGUE RIVER

Application HE 404 was submitted by Frederick Ehlers, now HDI Associates V, an Oregon limited partnership, asking the Commission to amend the minimum flow conditions for this project.

At its December 2, 1985 meeting, the Commission approved Application HE 404 for a license to construct and operate a hydroelectric project using up to 100 cfs of water to generate up to 1,020 kilowatts of power. The license has not yet been issued. The project is to be located near Bly in Klamath County. The Commission approved the application with specific conditions, including:

"At all times during the project operation, a flow of water in the river shall be maintained as follows: October-May, 40 cfs; June, 40 cfs; July, 20 cfs; August-September, 15 cfs."

On December 20, 1985, Mr. Ehlers obtained a license from the Federal Energy Regulatory Commission (FERC). The FERC license contained the same minimum flow requirements as those above. Design changes recommended by ODFW and new information about streamflows prompted Mr. Ehlers to petition FERC for a change in minimum flow requirements. In a letter dated July 3, 1987, FERC told Ehlers he would have to file documentation that he had consulted with state and federal environmental agencies and that they agreed to the proposed design changes.

In October 1987, Ehlers submitted the proposed changes to the Department, ODFW, and others, soliciting their approval.

The Department did not formally respond to this inquiry and submitted no comments to Ehlers or FERC on the proposed changes. In September 1987, ODFW advised Ehlers that it would accept an alternative minimum flow of 30 cfs in October through July and 25 cfs in August and September.

In July 1988, FERC amended its license to change, among other things, the minimum flow requirement to 30 cfs in October through July and 25 cfs in August and September. In September 1988, Ehlers and his attorney contacted the Department concerning Ehlers' desire to proceed with the approved project. Any state license that is issued for the project must conform with the Commission's order approving the application.

To modify a hydroelectric license condition under ORS 543.300(7), the Commission must find "by order, after full investigation and public hearing," that the condition makes construction of the project impracticable. The public hearing is not a contested case hearing.

The issue that the Commission was requested to act on was not a new application or a modification of the original application. It was a request to amend a statutorily authorized license which has not yet been issued. The purpose of allowing such amendment under ORS 543.300(7) is to reconcile the inconsistencies between conditions imposed by state law and conditions imposed by the FERC license, when those inconsistencies might otherwise prevent construction of the project.

Because the application is not at issue, the request for amendment of the order does not reopen the record on the application and HB 2990 does not apply to the amendment of the order authorizing the issuance of the license. The only relevant considerations at the public hearing were the inconsistencies which led to the modification request and whether, in the Commission's view, those inconsistencies make the project impracticable.

Director's Recommendation

The Director recommended that the Commission concur with staff findings and adopt the amendment to the December 2, 1985, order to be consistent with FERC.

It was **MOVED** by Mike Jewett, seconded by Jim Howland, and passed unanimously to approve the Director's recommendation.

P. PROPOSED AMENDMENT OF RULES FOR THE CONSERVATION AND USE OF CONSERVED WATER (OAR 690-18)

Senate Bill 24 was passed in 1987. The purpose of this legislation was to promote the conservation of water, maximize beneficial use and enhance streamflows. The incentive to accomplish this would be the ability to use, sell, lease or reserve instream some portion of the conserved water.

An advisory committee drafted rules to guide the Department in administering these statutes. OAR Chapter 690, Division 18 was adopted on October 28, 1988.

The 1989 Legislature enacted Senate Bill 151. This bill was sponsored by the Commission, at the request of the advisory committee, to amend ORS 537.470. The bill made minor amendments to the original legislation:

1. It required that applicants adequately mitigate any effects on other water users.
2. It allowed the applicant or anyone objecting to the Commission's allocation of conserved water to request a contested case hearing before the Commission.

On December 18, 1989, the Department held a public hearing on the proposed rule amendments. Although three people attended the hearing, no testimony was given regarding the proposed amendments.

Written comments were submitted by the Oregon Water Resources Congress which supported the proposed changes.

Director's Recommendation

The staff recommended that the Commission amend the Division 18 rules as shown in the attachment to the staff report.

It was **MOVED** by Jim Howland and seconded by Didi Malarkey to approve the staff recommendation. The motion passed unanimously.

Q. RECOMMENDATION FOR MANAGEMENT OF THE UMATILLA RIVER

Historically, the Umatilla River has not been closely managed due to lack of complaints from water users and insufficient personnel to manage the resource. The Department is moving toward a more active role in managing the state's water resources, though, and the Umatilla River will need closer management to protect the water rights of the various users, including instream water rights.

Since 1986, there have been fewer than five complaint requests to distribute the Umatilla River. However, there has been a request each of the last three years. The Department delivered McKay Reservoir contract water and regulated water users on the Umatilla River and McKay Creek during the 1989 irrigation season. Although this reflected only one request, it involved monitoring water use for a four-month period. Without the necessary measuring devices in place, the watermaster attempted voluntary water use reporting, which was only moderately successful.

Shepherding exchanged water for the interim portion of Phase I of the Exchange was accomplished in 1989. When all phases of the Exchange are implemented, measuring devices beyond those planned by BOR will be necessary to monitor

usage and properly manage the water. Management of the water from the Umatilla River and McKay Creek will be an integral part of the Exchange.

The diversion of water for prior water rights practically dewateres the Umatilla River in places. This has a detrimental effect on instream flows for fishery purposes.

Currently, the watermaster lacks sufficient staff to handle delivery of the McKay contract water and to regulate water users on McKay Creek and the Umatilla River. The workload will continue to grow as the Exchange becomes fully operational. BOR's new measuring devices will help substantially, but will not eliminate the need for more streamflow and water use data and for more field personnel.

There appears to be adequate reason to consider declaring the Umatilla River and McKay Creek a serious water management problem area (alternative 4) in accordance with ORS 540.435 and OAR 690-020 through -030. Under the statute and administrative rules, the Commission may hold a hearing and designate an area as having serious water management problems if certain criteria are identified. One of these criteria is that there are frequent water management disputes between water users in the area that cannot be privately resolved. A second is that there are frequent occurrences of surface or ground water shortages caused by use of water from streams or wells. The shortages may be evidenced by complaints from water right holders, requests to regulate water use, degraded water quality, or failure to meet administrative restrictions or minimum streamflows. Both criteria in these stream reaches were identified during 1988 and 1989.

The effect of declaring a serious water management problem area is to allow the Commission by rule to require water users to install totalizing flowmeters and submit annual water use reports.

Director's Recommendation

The staff recommended that a public hearing be held to determine if the Umatilla River, from the confluence of McKay Creek to the mouth, and McKay Creek from McKay Dam to the mouth should be declared a serious water management problem area. Staff further recommended that the hearing be used as a forum to solicit alternative solutions from local water users.

It was MOVED by Jim Howland, seconded by Mike Jewett, and passed unanimously to approve the Director's recommendation.

O. INFORMATIONAL REPORT: OPTIONS FOR COMMISSION CONSIDERATION REGARDING CONTESTED CASE HEARINGS

Some time ago, the Commission expressed frustration with the way in which exceptions to contested case proposed orders were presented. Staff was asked to investigate possible alternatives which would relieve the frustration and confusion experienced by participants, including the Commission, in the contested case exceptions process.

The staff report proposed several options for delegation of contested case matters. The first three involved variations on full delegation; the four following discussed variations on partial delegation. The discussion following each option presented the pros and cons. The several options ranged from complete delegation, relieving the Commission of the need to hear exceptions and objections, to retaining the status quo.

Following those options was a chart showing the disposition of cancellations, applications, and transfers handled by the Hearings Section between 1982 and 1988. The figures illustrated the Hearings Section's assessment that providing an additional administrative "ear" to the parties before they ultimately appealed to the court has not reduced the number of cases appealed.

Director's Recommendation

The staff recommended that the Commission consider the proposed options and provide direction.

It was MOVED by Didi Malarkey, seconded by Lorna Stickel, to adopt Option Number 3 from the staff report.

Before the vote was taken, it was MOVED by Mike Jewett and seconded by Lorna Stickel to table the motion until the following meeting so that the Department staff could work further on Option Number 3 with the help of Cliff Bentz. The Director was to schedule a meeting with Bentz after Bentz has had time to review the draft. The motion passed unanimously.

(Didi Malarkey left the meeting at this point.)

The Commission began a general discussion of legislative concepts before the meeting was recessed, to be reconvened on the following morning.

FEBRUARY 13:

R. 1991 LEGISLATIVE CONCEPTS

This report was the Department's first cut at possible legislative proposals for the 1991 legislative session.

The Executive Department has not yet released a schedule for submitting budget proposals or legislative concepts to the Governor's Office. The Department usually is required to have those submitted by April or May.

The Executive Department has announced that one or two new reviews may be necessary before legislation can be pre-session filed in December. The Legislative Fiscal Office must review all concepts before Legislative Counsel can draft them. The Governor's Office also wishes to review concepts before they are finally approved by state commissions. Because of the many reviews required, Department staff members thought it critical to get Commission direction early.

In November, Department staff members submitted a list of possible water policy changes that would require legislation. From that list, the Director's Office and the division heads selected 13 general ideas that possibly could move forward, discussed in the staff report. A list of all the legislative concepts compiled by the Department was distributed.

The concepts were not fully developed at the time of the Commission meeting. As future discussions occur within the Department and with others, the list likely would be pared. Staff members were also aware of the Commission's objective from the August retreat, which was to use existing authority before proposing new legislation. After discussion with the Commission in February, staff would return in March with a final list of legislative proposals.

Director's Recommendation

The Department recommended that the Commission review the proposed concepts and give direction to staff members on which ones to pursue.

The Commission discussed each concept and made several changes. The Commission asked the Department to form a working group on the streamflow restoration proposal and to involve the same people who are working on draft transfer legislation.

Dave Hunter, WaterWatch of Oregon, Inc., reviewed for the Commission suggestions and recommendations developed by his group.

(Cliff Bentz left the meeting at this point.)

No formal action was taken on this item, but there was general agreement among the Commission.

S. STATUS REPORT #11: WILLAMETTE-SANDY BASINS PLANNING

At its January meeting, the Commission reviewed two discussion papers that related to the Willamette Basin. This status report conveyed three more discussion papers that related to the Sandy Basin. The three papers covered by the report were Municipal Watershed Protection in Bull Run/Little Sandy, Ground Water Management and Protection Strategies, and Water Conservation.

Director's Recommendation

This was an informational report only, and no action was needed. However, staff was interested in the Commission's thoughts on the discussion papers and the Willamette/Sandy Basins planning process in general.

Frank Gearhart, Citizens Interested in Bull Run, Inc., urged the Commission to study the turbidity problem in the Bull Run watershed. He asked for better coordination with other state agencies to deal more appropriately with this important basin.

Ed Tenny, Portland Water Bureau, answered questions from the Commission regarding a number of issues, including filtration of water in the Willamette/Sandy Basin. The Commission asked him to comment on each alternative, and he did so on a "quick-and-dirty" basis. Tenny said the "filtration" issue in the Bull Run is misunderstood. Bull Run water quality is so good that Portland is one of the few cities for which the new EPA filtration standard has been waived. If anything, filtering Bull Run water is a supply, not a quality, issue. Sediment buildup at the bottom of Portland's reservoirs prevents maximum use of stored water. Tenny commented that Portland will not need to use water from the Little Sandy for a long time. He added that no scientific evidence suggests management activities in the Little Sandy drainage have degraded water quality. At the Commission's request, Tenny commented briefly on each of the management options in the Bull Run discussion paper.

Lorna Stickel asked that the staff specifically invite the Portland Water Bureau, Metro, the Bull Run interest groups, the U.S. Forest Service, the DEQ, and the Health Division to meet and comment on this paper, particularly on the land management aspects.

Jim Howland agreed to join a subcommittee to get up to speed on the allocation aspects of basin planning. Chair Blosser and Stickel asked to be kept up to date but thought they could not make many, if any, of the meetings.

The Commission will submit in writing their comments on Attachments B and C of the report and any other discussion papers.

No formal action was taken on this item.

There being no further business, the meeting was adjourned.

Respectfully submitted,



Jan Shaw
Commission Assistant

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