

WATER RESOURCES COMMISSION

MEETING

PENDLETON

MAY 11, 1990

MINUTES

Commission members present:

Bill Blosser, Chair
Lorna Stickel, Vice-Chair
Dierdre Malarkey
Cliff Bentz
Jim Howland
Mike Jewett
Hadley Akins

Commissioner-elect Roger Bachman

Water Resources staff:

Bill Young
Jan Shaw
Beverly Hayes
Becky Kreag
Tom Kline
Ves Garner
John Borden
Marc Norton
Fred Lissner
Ken Weese
Mike Ladd
Steve Applegate
Bud Bartels
Weisha Mize

Others:

Audrey Simmons
David Castleberry
Frank Gunner
Deane Seeger
Roberta Bates
Steve Brown
David Childs
Jon Germond
James Burns
Karl Niederwerfer
Jill Zarnowitz
Judge Kevin Campbell
H. Lee Wallace
Harold Otley
Jack Cavender
Ronald Jacobs
Representative Chuck Norris
Lynn Beaton
Kip Lombard
Gerald Maxwell

The staff reports presented at this meeting, which contain the Director's recommendations mentioned in these minutes, are on file in the Office of the Director of the Water Resources Department, 3850 Portland Road, NE, Salem, Oregon. Written information submitted at this meeting is hereby made a part of this record and is on file at the above address. Audiocassette recording tapes of the meeting are also on file in the Water Resources Department office.

A. MINUTES OF THE MARCH 29-30, 1990 WRC MEETING AND WORK SESSION

It was MOVED by Lorna Stickel, seconded by Hadley Akins, and passed unanimously to approve the minutes as submitted.

B. REQUEST FOR AUTHORIZATION TO CONDUCT A PUBLIC HEARING ON AMENDMENTS TO WATER RIGHTS ADMINISTRATIVE RULES, CHAPTER 690, DIVISIONS 11 AND 15 CONCERNING WATER USE PERMITS, TRANSFERS AND CERTIFICATES

Senate Bills 146 and 1102 from the 1989 legislative session contained provisions that required minor additions or revisions to the existing water rights rules in Divisions 11 and 15.

In addition, other revisions have been identified by staff as being necessary at this time. These needs have been prompted by directives from the Commission, from the public and by staff in the conduct of daily business. In most cases, the changes are an effort to describe current statutory interpretation, policies, standards and procedures in rule form.

The proposed additions (__) and deletions ([]) are incorporated in complete copies of the current versions of OAR 690-11 and OAR 690-15.

Director's Recommendation

The staff recommended that the Commission authorize a hearing on the proposed rules, to be held in Salem.

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

C. REQUEST FOR AUTHORIZATION TO CONDUCT A PUBLIC HEARING ON MONITORING WELL AND OTHER HOLES RULES, OAR CHAPTER 690, DIVISION 213

Since the late 1960's, wells have been drilled in ever-increasing numbers for the purpose of accessing ground water to make water quality determinations. These wells, generally called monitoring wells, were first used to make judgments of the impact of sanitary landfill design, construction, and operation on ground-water quality. They have also been used extensively in monitoring and testing ground water around hazardous-waste and accidental-spill sites.

As ground water protection has grown in importance at the national level, progressively more and more ground-water monitoring and testing have been mandated by federal as well as state programs. Early in the development of monitoring-well technology, their construction deviated little from that of water-production wells. However, with time it became apparent that water-well technology was inappropriate when it came to monitoring ground water. By the mid-80's, the Department was dealing with requests for variance from the well-construction standards almost on a daily basis. As a result, in 1986, the Department began developing construction rules specific to wells used for monitoring ground water.

It immediately became apparent that these would be controversial rules. Three prominent areas of disagreement developed. 1) In the area of responsibility, well drillers wanted authority since they envisioned being responsible under terms of their license. However, professional

engineers and geologists felt they needed the ability to design and construct monitoring wells to suit particular conditions at the site being investigated. 2) Regulatory agencies, principally the Department and the Department of Environmental Quality (DEQ), wanted construction standards because of ease of enforcement, while the engineering and geological community wanted performance standards to give them maximum flexibility. 3) Water-well drillers wanted the same licensing, bonding, and start card requirements for monitoring wells as for water-production wells. Others questioned the need for a license.

After many meetings with representatives of the various groups interested in the issue, the Department finished a set of proposed rules that, while not being wholeheartedly accepted, embodied concessions to some middle ground on the part of all concerned.

At the November 20, 1987, Commission meeting, several individuals offered testimony to the effect that the rules were unacceptable. They further indicated they did not believe the Commission had authority to adopt standards for the construction of monitoring wells. At that time the Commission agreed not to forward the draft rules to hearing until the Department had a legal opinion on jurisdiction.

In May of 1988, the Attorney General (AG) issued an opinion to the effect that a monitoring well, by virtue of its being a hole through which water is sought, is by definition a well. As such, the Department has authority and responsibility for its construction.

While waiting for the opinion, the Department became aware of another problem. A large number and variety of holes other than water wells and monitoring wells (other holes) are being constructed in the state each year. These other holes often pose as much of a threat to ground-water quality and quantity as wells.

In recognition of this, the Department pursued clarifying legislation in the 1989 Session. As a result of the legislation, the Department now has authority to adopt rules for the construction, maintenance, and abandonment of any hole through which ground water may become contaminated. The Department is also specifically authorized to delegate to other state agencies control over various types of other holes.

With these clarifications of authority, the Department once again developed a set of draft rules, statement of need/fiscal impact, and hearing notice. The current set of draft rules addresses monitoring wells and other holes.

Director's Recommendation

The staff recommended that the Commission authorize the Department to conduct rulemaking hearings on the proposed rules for the construction of monitoring wells and other holes.

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

PUBLIC COMMENT

Kevin Campbell, Grant County judge and representative of the Association of Oregon Counties and the Columbia-Blue Mountain Resource, Conservation and Development Council, welcomed the Commission to Northeast Oregon and announced an Oregon Water Forum to be held a year from now. This will be a three-day gathering of water interest groups. The

purpose of the forum would be to bring divergent water interests together for dialogue, better understanding and cooperation in solving concerns. The outcome is hoped to be a process that will continue after the forum disbands that enhances divergent water interest understanding of water concerns and improves conservation, management and use of our water resources.

Campbell said he hoped that the Commission and Department would take an active part in this program.

Lee Wallace, Harney County commissioner, thanked the Commission for its help and hard work in his part of the state.

James Burns, farmer, complained of the intrusion of government bureaucracies into the lives of private citizens. He claimed that the Commission and Department ask for testimony from citizens and then do not consider that testimony in formulating final rules or determining other action. He further protested the additional expenses impose upon farmers by "bureaucrats who want to "turn Eastern Oregon into a recreational playground for Western Oregon."

Roberta Bates, from La Grande and representing two environmental bodies, thanked the Commission for meeting in the Pendleton area. She appreciated the fact that some agencies are working hard to protect the natural resources and thanked the Department and Commission for hearing the private citizen and for "bringing about laws which will provide protection for everybody."

D. COMMISSION COMMENTS.

1. Hadley Akins asked to have the September Commission meeting date changed to one week later because the original date conflicted with the Pendleton Round-up, an important event in the Pendleton area. The meeting will be held on September 21 in Coos Bay.
2. Jim Howland asked the staff about the water rights applications that are coming in. Steve Applegate was able to explain the process the Department uses in addressing them.

Harold Otley, Harney County, was concerned that the Department is focusing on "water use" instead of "water rights." Chairman Blosser responded that the water right is a right to use water beneficially without waste. It is not an ownership of water, per se.

3. Didi Malarkey said that she would not be leaving the Commission as she had announced, because she no longer planned to move abroad, and would remain for her full term.

Malarkey is travelling with a rangeland management group to Middle Mongolia and Western China. She expects to talk to groups there about riparian and watershed enhancement and about BLM projects in Oregon.

4. Cliff Bentz had a question about the conservation and riparian workshop schedule. The staff described the breadth of notice sent out across the state. The Commission was also reminded that they could submit guest editorials or make personal visits to their local media to explain the conservation and riparian-area workshops being conducted around the state.

Bentz described a news article from the Idaho Statesman about how Idaho uses water and that state's reaction to California's request for Northwest water.

Bentz reminded the group that the Commission would be meeting in Ontario in August and he was looking forward to having them in his area.

E. DIRECTOR'S REPORT

1. NEED FOR EARLY AUTHORIZATION FOR FILING NOTICE OF RULEMAKING HEARING WITH SECRETARY OF STATE ON PROPOSED DIVISION 17 RULE AMENDMENTS

The 1989 legislature adopted Senate Bill 153 which amended some of the laws on water-right cancellation. The changes in the forfeiture laws require commensurate changes in the Commission's administrative rules on forfeiture and cancellation.

In May of this year, the Secretary of State reduced its schedule for printing agencies' Notices of Proposed Rulemaking and rule adoptions in the Oregon Bulletin from the 1st and 15th of each month to only on the 1st of each month. In order to be included in the next month's printing, Notices must be filed with the Secretary of State by the 15th of the preceding month.

The schedule approved by the Commission for adoption of the Division 17 amendments requires that the Notice of Proposed Rulemaking and Statement of Need and Fiscal Impact be published in the July 1 Bulletin. The Notice must therefore be provided to the Secretary of State by the 15th of June. The Commission has no meeting scheduled between today's meeting and the 15th of June.

Director's Recommendation

The staff recommended that the Commission authorize filing the Notice of Rulemaking Hearing and Statement of Need and Fiscal Impact with the Secretary of State on or before June 15, 1990.

It was MOVED by Jim Howland, second by Didi Malarkey, and passed unanimously to approve the Director's recommendation.

2. The Director told the Commission that the Department had received one application from the Mt. Hood Irrigation District for conserved water. He said the Department needs to continue working on this. The staff will meet with the local people involved and take a careful look at the area.

3. Columbia River Compact: The statutes obligate the Department to review with other states of the Columbia River Basin, the Director said, regarding their interest in pursuing discussions on re-forming the Columbia River Compact Commission. There was a meeting on May 2 in Portland of six of the seven Columbia Basin states. The group also included Oregon's Fish and Wildlife Department, the Department of Energy, and representatives from Gail Achterman's office. No final decision was made, but the sense was that the participants were not enthusiastic about reactivating the Columbia River Compact Commission.

Of greater interest, however, has been the discussion of the proposed listing of several threatened and endangered salmon species in the river and the impact that would have uses of the Columbia River.

One formal request for listing the sockeye salmon has been submitted to and will be under consideration by the National Marine Fisheries. Another request will be submitted

on the upriver bright chinook and, on the lower river, wild coho. More discussions will be planned, and the governors of Columbia Basin states will decide whether to form a group on this one issue.

4. Klamath River Compact: The Director reported that on May 13 and 14, a meeting would be held of the Klamath River Compact in Klamath Falls.

F. WITHDRAWAL OF PROTEST BY NORTH UNIT IRRIGATION DISTRICT AGAINST CONVERSION OF 3 MINIMUM STREAMFLOWS ON THE DESCHUTES RIVER TO INSTREAM WATER RIGHTS

Background

In January 1989, the North Unit Irrigation District (NUID) filed a request for a contested case hearing on the proposed conversion of three 1983 Deschutes Basin minimum stream flows to instream water rights. NUID was concerned that its 1913 storage rights in Wickiup Reservoir would be subordinate to the converted instream right and that the conversion would also impact its ability to store water during the months of April and October.

NUID's request was presented to the Commission at its March 2, 1989 meeting. On reviewing the request, the Commission directed that a contested case hearing be held on these conversions.

Shortly thereafter, the Attorney General issued an opinion directly addressing NUID's concerns. The opinion found that water rights to store water are not subordinate to water rights for direct use unless the storage right is made so by explicit conditions imposed in the certificate. NUID was provided with a copy of the opinion.

The Department gave public notice of the contested case hearing on March 14, 1990. The hearing was set for May 9 in Bend. Approximately 13 organizations petitioned for party status. ODFW and the Parks Department petitioned for interested agency status. The petitions were provided to NUID for its response, as required by the Oregon Administrative Procedures Act. NUID had until April 13 to file its response to the petitions with the hearings referee.

In a phone conversation with NUID's counsel on April 10, counsel indicated that on review of the Attorney General's opinion and NUID's certificate, NUID found that it no longer had any concerns regarding the conversions.

On April 11, NUID formally withdrew its request for a contested case hearing on the conversions and requested that the conversions be taken to the Commission for approval.

The hearings referee postponed the hearing and notified those interested parties that the request for a contested case hearing on the conversions had been withdrawn. Postponement allows the Commission an opportunity to consider the NUID's withdrawal of its protest and whether to dismiss the matter and order direct conversion of the minimum stream flows in question.

Director's Recommendation

The staff recommended that the Commission direct that the matter be dismissed and instruct the Director to issue Certificates for the instream water rights on the Deschutes River.