

WATER RESOURCES COMMISSION

MEETING

DALLAS

OCTOBER 26

MINUTES

**Commission members present:**

Lorna Stickel, Chair  
Cliff Bentz  
Jim Howland  
Hadley Akins  
Mike Jewett  
Roger Bachman  
Dierdre Malarkey

**Water Resources Staff**

Bill Young  
Jan Shaw  
Steve Sanders  
John Borden  
Becky Kreag  
Steve Applegate  
Steve Brown  
Tom Paul  
Tom Kline  
Steve Brutscher  
Rick Bastasch  
Ves Garner  
Bill Fujii  
Greg Nelson  
Bev Hayes  
Lorraine Stahr  
Vivienne Torgeson  
Doug Parrow  
Bob Rice

**Others**

Karen Russell  
Fred Otley  
Harold Otley  
David Childs  
David Getzendanner  
Roy Webster  
Marshall Coba  
Ian Whitlock  
Dennis Goecks  
Marion Wilder  
Mitch Conley  
F.C. Eddy  
Alice Propes  
Rep. Gene Derfler  
Comm. Andy Zedwick (Lincoln Co.)  
Comm. Dennis Goecks (Yamhill Co.)  
Comm. Mike Propes (Polk Co.)

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 SEPTEMBER 20-21, 1990, WRC WORK SESSION AND MEETING

Jim Howland asked that additional language be added to his motion appearing on Page 5 of the minutes. Howland's additional direction was for the "staff to work with Forestry to see if something amenable to both departments could be worked out."

The minutes were unanimously approved as amended.

B. REQUEST FOR AUTHORIZATION TO CONDUCT A PUBLIC HEARING ON PROPOSED RULES FOR OUT-OF-BASIN TRANSFERS

In its 1982 decision, Sporhase v. Nebraska, the US Supreme Court ruled that state law prohibiting export of water is unconstitutional. The decision said that water is an article of commerce subject to interstate commerce laws. Furthermore, state statutes creating barriers to interstate commerce are protectionist. The decision also said regulations that apply equally instate and out of state are allowable.

Until passage of Senate Bill 205 in 1989, Oregon law prohibited out-of-state export of water without consent of the Oregon Legislature. This was a different standard than for diversion and use of water instate. In view of the ruling in Sporhase, Oregon's law was unlikely to survive a court challenge. Senate Bill 205 was intended to make Oregon's water export law more equitable and more defensible if faced with legal challenge.

ORS 537.803 focuses mainly on application requirements. Out-of-basin transfer applications must include an analysis of several resource conditions in the basin of origin. These include water availability, surface water-groundwater relationships, existing water rights and planned water uses and developments, quantity and quality of water for municipal use, potential impacts on public water uses, and alternative sources of water not relying on out-of-basin transfer. These analyses requirements apply to applications filed after October 3, 1989, but not applications for exchange of water or for applications of under 0.5 cubic feet per second. Cities diverting water out of basin to facilitate regional municipal water service are exempt from the analyses requirements if the city has historically transported water between the basin of origin and the receiving basin.

ORS 537.805 prescribes the out-of-basin transfer application review and approval process. Applications to divert water out of basin must undergo a comprehensive review by the Commission followed by a public hearing in the basin of origin. If the application is for 50 cfs or more, the Commission must submit a report to the Legislature. Applications to divert water from the Klamath or Goose or Summer Lakes Basins, which are governed by interstate compacts, are exempt from legislative approval, as are cities facilitating regional municipal water service.

ORS 537.809 requires the Commission to reserve adequate water for future needs in the basin of origin before approving an out-of-basin use.

SB 205 also amended existing statutes ORS 537.810 and 537.830. ORS 537.810 formerly prohibited out-of-state transfers without legislative approval. The "out-of-state" wording was amended to "out-of-basin." Provisions were added to this statute exempting diversions under 50 cfs, diversions in the Klamath and Goose and Summer Lakes Basins and cities facilitating regional municipal water service.

ORS 537.830 formerly prohibited condemnation of waters in Oregon without legislative approval. This statute was amended to require that such condemnation proceedings comply with the same provisions as for out-of-basin diversions.

### Directors Recommendation

The staff recommended that the Commission authorize the proposed rules for public hearing.

A number of amendments were made, as follows:

Page 1: 690-\_\_\_-020:

(1) "Basin" means one of the [18] river basins within this state as defined by [shown on] Water Resources Department map number 0.2, dated 1987, and entitled "Oregon Drainage Basins," unless the context requires otherwise.

Page 3: 690-\_\_\_-040:

... provided in the application, [and] during the public hearing and in written comments received within 20 days after the date of the public hearing. Information required in the application shall include ...

(1) ... an out-of-basin-transfer application shall demonstrate [that] the amount of water [is available] in the basin of origin available for future appropriation in the basin of origin and for the proposed use.

Page 4: 690-\_\_\_-040(2)(a):

... University and the individual city and county planning departments ...

Page 8: 690-\_\_\_-040:

(1) ... for an out-of-basin transfer. An application for an out-of-basin transfer shall be accompanied by the following fees:

(a) An examination fee of \$1,500;

(b) A publication of analysis fee of \$1,000; and

(c) A hearing fee if \$1,200.

(2) ... for all costs incurred in excess of the examination, publication, and hearing fee amounts listed in section (1) of this rule. The first billing ...

([Bracketed] language to be deleted; underlined language to be added.)

It was MOVED by Cliff Bentz and seconded by Didi Malarkey to send the proposed rules, as amended, to public hearing. The motion passed unanimously.

## C. REMARKS BY POLK COUNTY REPRESENTATIVES

Speaking on behalf of the tri-county area were the following participants:

Polk County Commissioner Mike Propes spoke about development and water needs in the area and reviewed some of the spots the Commission saw during their morning tour.

Marjo Nelson spoke about the region's groundwater needs and on anticipated problems in securing a reliable supply.

Yamhill County Commissioner Dennis Goecks reviewed water needs for Yamhill County.

State Representative Gene Derfler, Lincoln County Commissioner Andy Zedwick, and a representative from the Grande Ronde Indian tribe also made brief comments.

## PUBLIC COMMENTS

Karen Russell, WaterWatch of Oregon, Inc., said that her group supports the Department's proposed rule in agenda item K. Russell also urged the Department to enforce its water rights rules in the case of F.B.C. Salmon Farms on the Pistol River.

Harold Otley, a rancher from Diamond, expressed concerns about water management in and around Malheur Lake.

Fred Otley, representing Water for Life and the Oregon Cattlemen's Association Land and Resource Committee, commended the Department on its responsiveness throughout the 13 public hearings held recently around the state. Otley requested that the rule on water availability in the Malheur Lake Basin be delayed until the Commission has acted on the statewide management program, including a proposal for having local committees make plans for local areas.

Roy Webster said that the Department is obligated to inform people about any actions the Commission might be planning and complained that he was not receiving timely notices of Commission or Department activities. He asked the Commission to do more to inform the public on water matters. The Commission must get with the Department's public information people, he said, to develop a better method for notifying citizens about water activities.

David Childs, John Day Basin Council, spoke of the advantages of storing water when it flows in the winter so that it is available in the summer. "We need to both store and conserve water," he said.

## D. COMMISSION COMMENTS

1. Cliff Bentz complimented Beverly Hayes on her recent appearance on Channel 2. Hayes spoke on the proposed conservation policy.

Bentz suggested that the Commission ask the Oregon Department of Fish and Wildlife (ODFW) and Department staff to review for the Commission the process for issuing instream water right certificates so that the Commission can be more familiar with the mechanics of this procedure. For this presentation, said Bentz, one or more instream certificates should

be selected at random. Didi Malarkey asked that one of the Fish and Wildlife commissioners be present at the presentation, as well. Lorna Stichel asked that the informational report include a look at potential capability for water storage, as well as analysis of natural flow levels. The Commission agreed with these requests and asked the Department to pick two or three example instream water rights and present an informational report at the December Commission work session.

Hadley Akins expressed concern that the setting of instream water rights by ODFW could preclude future storage of water. He thought that ODFW's requested flows sometimes exceeded existing flows, even at highest runoff periods.

Bentz wanted to learn of any DEQ activities which could have a direct effect on water allocation in connection with their responsibility for water quality and pollution abatement. He also asked what lands would be affected by the proposed riparian policy.

2. Hadley Akins reported that the Lower Umatilla Users Water Management Task Force met twice and toured the region. Akins said that he has faith in local advisory committees and thinks that they would work well in most places in the state.
3. Lorna Stichel said that she, the Director and Steve Sanders attended a Western States Water Council water management symposium on interstate transfers in Arizona. Stichel will distribute some materials from that conference.
4. Jim Howland was concerned about riparian policy on public lands and hoped that the Department and Forestry could agree on certain points so that we can continue to be effective in riparian policies. We should not adopt something that they cannot accept, Howland cautioned.
5. Didi Malarkey thanked the staff and the Commission for their kind letters and for the plant, sent in memory of her late husband.

Malarkey reported that she had attended the Army Corps of Engineers' reconnaissance update in Eugene where she learned how the Corps and the Bureau of Land Management select sites for storage.

Malarkey said that she had attended an Oregon mining issues forum and offered her notes on groundwater issues from that session.

Malarkey asked who was to make our presentation at the November 26 meeting of the Legislative Water Policy Committee. She asked for a copy of the Diack testimony which was to be prepared for that meeting.

## E. DIRECTOR'S REPORT

### 1. Petition to Amend Roberts Creek Withdrawal

The State Water Resources Board withdrew Roberts Creek and its tributaries from further appropriation, except for stored water, on May 22, 1959. On August 16, 1984, Transfer Order 5430 approved a change in use of water from Cooper Spring, tributary to Roberts Creek. The transfer involved 0.004 cfs of an 1871 right for irrigation. The transfer was made in favor of Gregory and Sharon Thrall. The former irrigation use was changed to 0.003 cfs

for domestic use and 0.001 cfs for irrigation. The transfer order clearly stated that the use of water was limited to the irrigation season.

On October 10, 1990, the Department received a letter from Sharon Thrall petitioning the Commission to amend the Roberts Creek Withdrawal. Ms. Thrall seeks an amendment to allow year-round domestic use and hydroelectric use of spring water tributary to Roberts Creek. Attorney General's Uniform Rule OAR 137-01-070 (1) prescribes what such a petition shall include. Assuming the petition is complete, OAR 137-01-070 (3)(c) directs that the agency:

"(c) Shall, in writing, within 30 days after date of submission of the petition, either deny the petition or initiate rulemaking proceedings in accordance with rule 137-01-018 to 137-01-080."

Technically, the petition was deficient though little would be gained by returning it. Three possible options for proceeding are:

- 1) Return the petition with instructions for completing it and wait for its return.
- 2) Include this item in the Director's Report at the Commission's October 26 meeting with a proposal to proceed to rulemaking.
- 3) Advise Ms. Thrall of the deficiencies but agree to bring the matter to the Commission at its December 7 meeting.

In response to a complaint, Gary Ball recently advised Ms. Thrall that her domestic use of 0.003 cfs was restricted to the irrigation season. Ms. Thrall filed the petition on Gary Ball's advice. The petition indicates that Ms. Thrall is also interested in developing hydroelectric power using spring water tributary to Roberts Creek. The hydroelectric facility may already be in place and would use only about six gallons per minute, according to the petition.

#### Director's Recommendation

The staff recommended that the Commission accept the petition and grant staff the authority to schedule a public hearing on the proposed repeal of the Roberts Creek withdrawal and amendment to the Umpqua Basin program.

It was MOVED by Jim Howland and seconded by Didi Malarkey to accept the staff's recommendation. The motion passed unanimously.

2. WRC meeting schedule for 1991: The Commission approved the proposed schedule of meetings for the next year.
3. New State of Oregon letterhead: The Director described the new letterhead style and asked the Commission if they thought it would be useful to have special letterhead for Commission correspondence. The Commission asked Jan Shaw to distribute a sample and let those interested request a supply.

Some Commission members said they would find it helpful to have business cards describing their WRC affiliation. Shaw will send the Commission members a copy of the new State business card style and an order form.