

SENATE COMMITTEE ON WATER AND LAND USE

April 8, 1999 Hearing Room B

1:00 p.m. Tapes 56 - 57

MEMBERS PRESENT: Sen. Veral Tarno, Chair

Sen. Tony Corcoran, Vice-Chair

Sen. Gary George

Sen. Marylin Shannon

Sen. Thomas Wilde

STAFF PRESENT: Raymond J. Kelly, Administrator

Diana Bronson, Administrative Support

MEASURE/ISSUES HEARD: SB 804 Public Hearing and Work Session

SB 805 Public Hearing and Work Session

SB 600 Work Session

SB 601 Work Session

These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

TAPE/#	Speaker	Comments
TAPE 56, A		
005	Chair Tarno	Opens meeting at 1:08 p.m. and asks Senate President Brady Adams to make opening remarks on SB 804 and SB 805.
<u>SB 804 AND SB 805 PUBLIC HEARING</u>		
011	Senate President	Senate District 25. States there will be testimony regarding a dam in his district

	Brady Adams	and the controversy it has created. States the experiences that are to be heard today are valuable and should be shared with the members of the committee.
030	Sen. Wilde	Asks if there is a way to take one of his hearings officer's bills from local governments and stuff it in here. States it is just as applicable to local government situations when hearings officers are coached by legal counsel that tell them how to testify.
040	Chair Tarno	Asks if there was a question in that statement.
042	Sen. Wilde	Replies he is sure there was.
043	Sen. Adams	States there is a need to provide an equitable system in the way it treats issues and allows the system to function in a fair manner.
048	Chair Tarno	Comments there are four bills addressing this particular issue and in discussions with the Sen. Brown, Senate Minority Leader, she has agreed to defer to SB 804 or SB 805. Asks Cauble if he is aware of her concerns and asks for a brief overview of these issues.
057	Christopher Cauble	Grants Pass. States that one of his clients is Grants Pass Irrigation District (GPID). Sen. Brown was approached last session and the issues were heard. Presents (EXHIBIT A) . States that SB 804 and SB 805 would rectify confusion caused by the Oregon Water Resources Department's practice of refusing to affirmatively assert in writing when its actions are final orders, in other than contested cases.
075	Chair Tarno	Reminds witness that no one on the committee is an attorney. Asks for clarification of a contested case hearing.
077	Cauble	States that a contested case hearing is a fact-finding hearing in which evidence is taken and legal issues are decided before the agency and the agency is then presented by the attorney general and a hearing officer, who act as the deciding officer in the hearing. States it is somewhat like an administrative trial. Continues to testify in support of SB 804 and SB 805.
099	Sen. Corcoran	Asks if the contested case is then appealed to the court of appeals.
101	Cauble	Replies that is correct.
101	Sen. Corcoran	Asks if the court of appeals can rule on the subject matter or only on the procedural issues.
102	Cauble	Replies that the scope of review from the court of appeals is different, depending on what is being reviewed. States that if there is evidence in the record

		supporting factual conclusions by the agency, then generally, the court of appeals will defer to the factual conclusion of the agency.
109	Sen. Corcoran	Notes that the court of appeals considers the facts of law.
112	Cauble	Describes different cases on appeal from the circuit courts. Continues testimony in support.
170	Cauble	Continues testimony regarding the appeals process affecting the GPID.
239	Chair Tarno	States he wants to poll the members of the committee.
244	Sen. Corcoran	Asks if the chair wants to refer this matter to the Judiciary Committee.
244	Chair Tarno	Agrees.
244	Sen. George	States he understands it, but these issues belong in Judiciary Committee.
251	Cauble	States that since they are here, and it is in front of the committee, he would like to continue.
260	Sen. Corcoran	States these issues will end up being a judiciary question and to continue is a duplication of the process.
279	Sen. Wilde	States Cauble has a valid point in that this is not proper notice.
287	Cauble	States the law needs to overrule, or deal with the Teal case because Cauble has another client that received a letter very similar from state lands denying an emergency request to remediate his banks to prevent flooding.
317	Sen. Corcoran	Asks why an agency would not allow itself to be able to walk through this process. States it may be an adversarial process, but there are attorneys on both sides.
337		Discussions between Cauble and Sen. Corcoran in an attempt to understand the attorney-agency situations o the GPID issues.
396	Chair Tarno	States he spoke with Senate President Brady Adams concerning this bill and is going to refer SB 804 and SB 805 to Judiciary Committee, but this committee will hear testimony today.
412	Cauble	Thanks the chair and admits he had concerns with SB 804 and SB 805 being in

		the Water and Land Use Committee. States that the water department's statute has a miniature Administrative Procedures Act (APA) which, basically, mirrors the major APA and SB 804 would amend the Water Resources statute and SB 805 would amend the APA.
421	Chair Tarno	Asks if Cauble will support SB 805 as the primary bill to work.
423	Cauble	States SB 804 amends Chapter 536 and includes the language that he is proposing. SB 805 amends ORS 183, which is the big APA which applies to all other agencies. States that both statutes need to be amended in one bill, but is not sure how to approach it.
437	Chair	Asks if the committee sent SB 805 to Judiciary Committee, if Cauble could draft amendments to SB 805 out of SB 804.
440	Cauble	Replies he believes he can, in that the relating clauses are the same.
TAPE 57, A		
007		Quick statements are made about the relating clauses in SB 804 and SB 805 between Chair Tarno, Sen. Corcoran, Sen. Wilde, and Cauble.
009	Kristi Johnson	Certified law clerk with Schroeder Law Offices. States her office also represents GPID and are, primarily, their water attorneys. Points out several other portions from EXHIBIT A.
068	Sen. Corcoran	Suggests creating a mockup of the elements necessary for a proper order, including the word "final," if it needs to be said, and including a summary of appeals.
081	Dennis Becklin	Chairman, GPID. Testifies in support of SB 804, SB 805, SB 660, and SB 661. States these bills will benefit the people of Oregon by clarifying the legal remedies available to respondents of orders that are issued by Oregon state agencies. Submits (EXHIBIT B) .
146	Becklin	Continues testimony in support of SB 804, SB 805, SB 660 and SB 661. Describes details of lawsuit wherein Water Watch was allowed to be a party throughout the process. States GPID is now appealing to that decision in the Court of Appeals.
201	Sen. Corcoran	Asks where the statutory prohibition is against Water Watch from being a party.
206	Becklin	States there are certain provisions under the law that allow the commission to make them a party, but the law needs to be followed. Explains that in this particular case, the law was not followed in GPID's view.

215	Sen. Corcoran	Asks if it would be correct to state that the costs to the GPID in this legal action is subsidiary to the main issue taken with the Water Resources District.
219	Becklin	Replies that is a correct statement. States that while the district has spent \$200,000 in these contested case matters during the year, perhaps \$20,000 to \$25,000 of that has gone toward the GPID's request for the judicial review at the circuit court level.
267	Don Greenwood	Board member of the GPID. States it may be a little late for the GPID, but it is incumbent upon the legislature to provide an "even playing field" for a citizen, an irrigation district, or whomever, to get the same treatment, the same legal avenue, the same notice of appeal that everyone should get.
280	Sen. George	Describes other testimony the committee has received throughout this session, and states he hopes it makes it through as it gives a legal remedy.
302	Becklin	States that the Oregon attorney general's office, in support of Water Resources Department, has spent \$127,000 of tax monies just on cases relating to GPID.
375	Becklin	Continues with testimony. States that everyone needs to know the process.
383	Greenwood	Suggests to the Senate, the committee, and the House, that every single citizen of this state should be accorded the same rights.
395	Nancy Bieber	Department of Consumer and Business Services, Workers' Compensation Division. Presents (EXHIBIT C) . Testifies on SB 660 and SB 805.
432	Chair Tarno	Thanks the witness and states these issues will be sent to the Judiciary Committee.
445	Jim Neeley	Department of Human Resources. Testifies on the cost of mailing notices per biennium. Presents (EXHIBIT D) . States it has very significant fiscal impact on the department.
TAPE 56, B		
014	Sen. Corcoran	Asks how many cases are contested.
014	Neely	Replies that approximately 60 hearings a month out of 270,000 notices per month are contested.
030	Sen. George	Asks if the people who receive these notices understand the notice to be a preliminary or final notice.

033	Neely	Replies that the actual notice states that the agency intends to take action on the grant, and if the person disagrees with this action, they can talk with the agency and request a hearing on this issue. States it is not an order, but a notice.
046	Peter De Luca	Administrator Department of Consumer and Business Services (OSHA). Testifies in opposition to the proposed language in Section 3, subparagraph 6 of SB 804 and Section 4, subparagraph 6 of SB 805. Presents (EXHIBIT E) .
116	Sen. Wilde	States he would prefer to see the changes in the APA, as opposed to having it applied solely to the Water Resources Department. States the wording might be further defined as "appellate body," "a body" that makes a final decision, or a preliminary decision, at the time the deliberations are entered.
145	De Luca	States there are two kinds of actions that occur and these bills do not differentiate between the two.
160	Sen. George	Asks if the committee could ask De Luca to write a pathway through this maze.
163	De Luca	Replies that he would be happy to lend his services, but there are others who would be in a better position to work on the changes.
195	Geoff Huntington	Water Resource Department. Presents (EXHIBIT F) . States the department understands and supports the policy objectives reflected in Sections 1 and 2 of SB 804. States that if the bill is to proceed, the department recommends amendments to these sections to avoid ambiguity and confusion. States the department opposes Section 3 of SB 804 in that it will greatly increase costs to the department with no benefit to the public.
256	Huntington	Continues testimony regarding SB 804. States the GPID is the first case that he, or the Director, Martha Pagel, knows of that has caused confusion about the orders issued and the clarity of the forum or jurisdiction that an appeal would go to. States the department will form a work group to address the issues.
340	Sen. George	Asks if there have been discussions regarding exhibit 13 of (EXHIBIT A) with anyone on the Senate Water and Land Use Committee.
344	Huntington	Asks if that is in the GPID testimony. States exhibit 13 has not been discussed with this committee before.
353	Sen. George	Asks if there have been discussions with any individual on the committee.
355	Huntington	Replies there have been no conversations that he is aware of. States the department does support the policy in Sections 1 and 2 of SB 804.
385	Philip Schradle	Appellate Division, Department of Justice, Administrative Appeals. States the

		department is concerned with the current way these bills are drafted for two reasons. One is that the bills are drafted so that they amend the APA. Continues describing the APA procedures.
TAPE 57, B		
026	Schradle	Suggests a proper venue might be to review specific agency statutes and the kind of decisions specific agencies make. Secondly, the provisions in the bills that would bifurcate it from an assistant attorney general, who is involved in the investigative process, would not be able to provide legal advice, if that matter goes to a contested case hearing or beyond with a notice.
080	Sen. George	Asks Schradle to prepare the solutions to the problems described and have them ready before the hearing in Judiciary Committee.
084	Schradle	Replies that his solution would be a broad endeavor. States that when he suggests looking at more specific problems, case specific, or program kinds of decisions, then the need arises to determine the problem.
103	Sen. Corcoran	Asks Huntington if he is counsel for Water Resources.
105	Huntington	Replies he is deputy director.
106	Sen. Corcoran	States it would be helpful to work with the lawyers from Grants Pass.
126	Schradle	States he would be willing to sit down and work with the Grants Pass people.
142	Chair Tarno	Apologizes for the inconvenience of needing to transfer SB 804 and SB 805 to Judiciary Committee.
<u>SB 660, SB 661, SB 804 AND SB 805 WORK SESSION</u>		
148	Sen. Corcoran	MOTION: Moves SB 660, SB 661, SB 804, and SB 805 to the floor WITHOUT RECOMMENDATION as to passage and BE REFERRED to the committee on Judiciary.
		VOTE: 5-0
	Chair Tarno	Hearing no objection, declares the motion CARRIED.
147	Chair Tarno	Closes work session and adjourns meeting at 2:45 p.m.

Submitted By, Reviewed By,

Diana Bronson, Raymond J. Kelly,
Administrative Support Administrator

EXHIBIT SUMMARY

A ñ SB 804 and SB 805, written testimony, court documents, letters, Christopher Cauble, 62 pp.

B ñ SB 804 and SB 805, written testimony, Dennis Becklin, 2 pp.

C ñ SB 804 and SB 805, written testimony, Mike Greenfield, 1 p.

D ñ SB 804 and SB 805, written testimony, Jim Neely, 1 p.

E ñ SB 804 and SB 805, written testimony, Peter De Luca, 1 p.

F ñ SB 804 and SB 805, written testimony, Philip Schradle, 3 pp.