

HOUSE COMMITTEE ON WATER POLICY

March 6, 1997 Hearing Room D

3:00 P.M. Tapes 45 - 46

MEMBERS PRESENT: Rep. Ken Messerle, Chair

Rep. Tim Josi, Vice-Chair

Rep. Jo Ann Bowman

Rep. Steve Harper

Rep. Jeff Kruse

Rep. Jim Welsh

MEMBER EXCUSED: Rep. Tony Corcoran

VISITING MEMBER: Rep. Bob Jenson

STAFF PRESENT: Pat Zwick, Policy Analyst

Rebecca M. Nickel, Administrative Support

MEASURE/ISSUES HEARD: HB 2768 - Work Session

HB 2627 - Public Hearing

HB 2629 - Public Hearing

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 45, A | | |
| 002 | Chair Messerle | Calls meeting to order at 3:06 p.m. |
| 003 | Karen Frachiseur | Testimony submitted to committee regarding HCR 3. (EXHIBIT A) |
| 004 | Susan Delles | Testimony submitted to committee regarding Oregon Coastal Salmon Restoration Initiative. (EXHIBIT B) |
| | | |
| HB 2768 - | | |

| <u>WORK SESSION</u> | | |
|----------------------------|----------------|--|
| 005 | Chair Messerle | Opens work session on HB 2768. |
| 014 | Richard Koesan | Representing Water for Life, discusses proposed amendments to HB 2768. Clarifies exemption of livestock watering. Encourages that provisions pertaining to access by livestock be clarified. |
| 036 | Jan Lee | Executive Director, Oregon Water Resources Congress, submits and reviews testimony regarding amendments to HB 2768. (EXHIBIT C) |
| 061 | Chair Messerle | Asks for discussion of proposed amendment. |
| 062 | Lee | Clarifies testimony. |
| 097 | Rep. Josi | Asks regarding the proposed amendment. |
| 108 | Lee | The concern is with non-patrons of the district who would have access to the water. There has to be a provision whereby they must go to the district prior to access. |
| 119 | Rep. Josi | Asks if there is a problem now with unauthorized access. Asks for examples. |
| 120 | Lee | There has been occasionally. There are people who live along the canals who are not a part of the irrigation system who pump water for their own use. There are also incidences of cattle drinking directly from the ditch or canal. The bank can be destabilized by the cattle. |
| 131 | Rep. Josi | Asks if water districts have ability to exclude cows from their facilities. |
| 133 | Lee | From the canals they do. If it is not a patron of the district, our authority is less clear than it is for a patron. |
| 137 | Rep. Josi | Ask about access to water delivery facility through a non-patron's property. |
| 140 | Lee | We can stop this if they are caught and if no one else has given them legal access. Under existing law, there is not enough clarification in the language. |
| 145 | Rep. Josi | Asks if canal facilities are habitat for fish. |
| 147 | Lee | There are major screens at diversion points, and there is a fisheries biologist looking at those. |
| 154 | Chair Messerle | Comments on cattle having access to water. |
| 161 | Rep. Harper | Asks about the basic intent of the bill. |
| 167 | Rep. Josi | Comments on intent of the bill. |
| 182 | Lee | Thought the intent was to look at natural sources of waters, and did not want to include water storage facilities. |
| 192 | Rep. Josi | Asks for clarification. |
| | | Problems resulted in the addition of the phrase "other surface waters of the |

| | | |
|-------------------|----------------|--|
| 193 | Lee | state." The bill needs to exclude canals and reservoirs. |
| 196 | Rep. Josi | Comments that the current language would include canals. Asks if the phrase "would otherwise have access" is a gray area. |
| 204 | Lee | Yes. This language could cause access by conscription or prescription. |
| 221 | Josi | Asks if there are any concerns regarding the bill or amendment and if so, what. |
| 229 | Koesan | No concerns, but the language is not obtuse. The access question was debated two years ago. Discusses possibilities for change. |
| 255 | Rep. Josi | Asks how to clear up the confusion. |
| 269 | Koesan | This debate was held two years ago, and it was clear then. Has not seen any specific problems arising from this or from the changes made in the law two years ago. |
| 277 | Martha Pagel | Director, Water Resources Department. Discusses the language of the bill. The amendment would clear up the language. |
| 333 | Rep. Harper | Comments on changing the language to specify springs. |
| 339 | Chair Messerle | Asks if this would change the intent. |
| 343 | Koesan | If clarifying amendments are necessary, suggest that the clarifications should clarify the specific situation dealing with irrigation districts. |
| 355 | Pagel | Concerned that this would protect irrigation districts, but not other reservoir owners. Suggests that specific provisions should include that if facility is owned by someone other than the owner of the livestock, then permission must be granted by the owner. |
| 367 | Lee | Discusses provision of a different bill regarding permission. |
| 384 | Rep. Josi | Comments on his support of HB 2768. |
| TAPE 46, A | | |
| 009 | Rep. Josi | Comments that it is a good bill, but it opens up complications. Access to public water in private facilities. Private owners need to be able to require written permission for use of facilities. |
| 020 | Chair Messerle | Comments that the language is not bad, just unnecessary. |
| 021 | Rep. Kruse | Suggests language change. |
| 032 | Pat Zwick | Policy Analyst, comment that there is a fiscal impact statement on bill, and this would not be changed by proposed amendment. |
| 037 | Koesan | Voices concerns regarding exemption of other reservoirs. |
| 046 | Chair Messerle | Closes work session on HB 2768. |
| | | |
| HB 2627 - | | |

| <u>PUBLIC HEARING</u> | | |
|------------------------------|----------------|--|
| 052 | Chair Messerle | Opens public hearing on HB 2627. |
| 054 | Zwick | Summarizes the bill. |
| 065 | Susan Delles | Testimony submitted in opposition to HB 2627. (EXHIBIT D) |
| 066 | Jeff Kruse | State Representative, District 45, offers testimony in support of HB 2627. Bill was submitted in 1995 Session, and passed both the House and the Senate, but was vetoed by the Governor. The bill protects the water users by prohibiting the State of Oregon from reserving any more in-stream water rights than are necessary. |
| 085 | Rep. Bowman | Asks for discussion on lake levels. |
| 088 | Rep. Kruse | It would prohibit the state from reserving any more water in the lake than is necessary for the recreational benefit. The lake level would be sufficient for the integrity of the lake. |
| 093 | Rep. Bowman | Asks for discussion of recreational uses in relation to fish and water quality issues. |
| 098 | Rep. Kruse | Discusses Berry Creek Dam in regards to this issues. The purposes of the reservoir included recreation, stream enhancement, and agricultural and municipal use. The plan was that water sold from the reservoir would help to maintain it, and it would prohibit the state from holding more water in the reservoir than necessary for the benefit that they had already described. Would allow the excess water to go to other beneficial uses. |
| 111 | Rep. Jenson | Asks if current definition of in-stream flow has enough flexibility to allow for seasonal changes of water quantity. |
| 116 | Rep. Kruse | Where instream flow becomes significant is during low-flow time of the year. Most users, other than municipal, will be accessing the water during high-flow times. |
| 124 | Rep. Jenson | Comments that the current definition is "the minimum quantity of water necessary to support the public use requested." Asks if this takes into account the effects of seasonal changes. |
| 130 | Rep. Kruse | Not sure of the intent of Rep. Jenson's question. |
| 135 | Rep. Josi | Asks for a discussion on adequate flow, and what baseline studies would entail. |
| 141 | Rep. Kruse | There has been a history of minimum flow standards that are unrealistic. This allows for baseline data that was more based in reality. |
| 153 | Rep. Josi | Asks about standardized methodology. Asks if federal agencies, other states, and the state of Oregon have standardized methodology for determining amount of an in-stream flow. |
| 163 | Rep. | Yes, but can not provide details other than that Oregon differs from |

| | | |
|-------------------|----------------|---|
| | Kruse | national model. |
| 167 | Rep. Josi | Ask what the impact would be on Oregon Coho restoration. |
| 173 | Rep. Kruse | The minimum stream flows that were set were based on fish habitat, therefore one would assume that this would not impact the restoration. |
| 179 | Rep. Josi | Comments on the need to have more information regarding baseline studies and standardized methodology. |
| 185 | Pagel | Submits and reviews written testimony in opposition to HB 2627. (EXHIBIT E) |
| 234 | Rep. Josi | Asks if those 17 permits in back-logged water rights are new or clean up. |
| 241 | Pagel | New, because the back log was covered. |
| 244 | Jill Zarnowitz | Assistant Director, Habitat Conservation Division, Department of Fish and Wildlife (ODFW). Those 17 are not recent, but are ones that were reissued. Only one was new, and that was part of a contested case hearing. |
| 252 | Rep. Josi | Asks if a majority of the in-stream rights were not really an issue. |
| 259 | Pagel | Correct, they were not contested. |
| 260 | Rep. Josi | Asks how many in-stream water rights applications are in ODFW. |
| 261 | Zarnowitz | There are a few with data, and it will be slow to collect new data because it is labor intensive. |
| 264 | Rep. Kruse | Asks how long it took to remove backlog. |
| 268 | Pagel | About 15 months. |
| 271 | Rep. Kruse | Comments on the volume of backlog. |
| 284 | Rep. Josi | Discusses the backlog. |
| 289 | Pagel | Clarifies for the record that almost all the contested ones are pending. |
| 291 | Rep. Josi | Asks if this bill passed, would that backlog of in-stream water rights on record have to be reviewed to ensure that they met a standardized methodology or were based on adequate baseline studies. |
| 299 | Pagel | That question has not been addressed. General rule is that it would not affect existing rights. |
| 305 | Rep. Josi | Asks for discussion regarding standardized methodology. |
| 311 | Pagel | For the contested cases, this may need to be applied, but not for those which have received certificates. |
| 328 | Pagel | Continues review of testimony. |
| 378 | Pagel | Continues review of testimony. |
| TAPE 45, B | | |
| 005 | Pagel | Continues testimony. |
| 016 | Rep. Josi | Asks for additional discussion regarding methodologies being used now. |
| 022 | Zarnowitz | ODFW has administrative rules which allow the use of the Oregon Method, the One-Flow Method, the US Forest Service Method, and the In-Stream |

| | | |
|-------------------------------|-----------------|--|
| | | Flow Incremental Methodology Indirect Flow Measurement. |
| 028 | Rep. Josi | Asks if these are all separate methodologies incorporated into one administrative rule. |
| 030 | Zarnowitz | Correct. ODFW needed to define which method to use. Some are more appropriate for different streams than others. |
| 042 | Rep. Josi | Asks for further discussion on the Oregon Method. |
| 046 | Zarnowitz | Explains the methodology used by the State of Oregon. |
| 069 | Rep. Josi | Asks if there is the ability to do this for every stream. |
| 072 | Zarnowitz | Yes. Every stream, with the exception of one, were done in this manner. |
| 076 | Rep. Josi | Asks if there are adequate baseline studies for in-stream flow requests. |
| 078 | Zarnowitz | Yes, but unclear of the intent |
| 081 | Pagel | Baseline studies discussion. |
| 103 | Pagel | Continues review of testimony. |
| 111 | Zarnowitz | Submits and reviews testimony in opposition to HB 2627. (EXHIBIT F) |
| 149 | Steve Brutscher | Planning and Development Division, Parks and Recreation Department, submits and reviews testimony in opposition to HB 2627. (EXHIBIT G) |
| 199 | Jeff Curtis | Representing Water Watch, offers testimony in opposition to HB 2627. |
| 219 | Gayle Killam | Water Program Director, Oregon Environmental Council, submits and reviews testimony in opposition to HB 2627. (EXHIBIT H) |
| 258 | Jim Myron | Representing Oregon Trout, submits and reviews testimony in opposition to HB 2627. (EXHIBIT I) |
| 261 | Chair Messerle | Closes public hearing on HB 2627. |
| | | |
| | | |
| HB 2768 - WORK SESSION | | |
| 268 | Chair Messerle | Reopens work session on HB 2768. |
| 275 | Koesan | Have reached agreement for clarification regarding HB 2768. Discusses the amendments which have been agreed upon. |
| 294 | Zwick | It would most likely be safe to pass bill out with conceptual amendment. |
| 304 | Rep. Josi | MOTION: Moves to ADOPT the amendments offered by the Richard Koesan to HB 2768. |
| | Chair Messerle | Hearing no objection, declares the motion CARRIED. |
| 311 | Zwick | Requests caveat of adjustment in case Legislative Counsel needs to change language. |
| 318 | Rep. Josi: | MOTION: Moves HB 2768 be sent to the floor with a BE ADOPTED AS AMENDED recommendation. |
| | | |

| | | |
|--|-----------------------|---|
| 320 | | <p>VOTE: 5-1</p> <p>AYE: 5 - Harper, Josi, Kruse, Welsh, Messerle</p> <p>NAY: 1 - Bowman</p> <p>EXCUSED: 1 - Corcoran</p> |
| | Chair Messerle | <p>The motion CARRIES.</p> <p>REP. JOSI will lead discussion on the floor.</p> |
| 338 | Chair Messerle | Closes work session on HB 2768. |
| <u>HB 2629 - PUBLIC HEARING</u> | | |
| 342 | Chair Messerle | Opens public hearing on HB 2629. |
| 350 | Zwick | Summarizes the bill. |
| 367 | Rep. Kruse | Offers testimony in support of HB 2629. In the 1995 Session, this bill was passed by both houses then vetoed by the Governor. The bill is in reference to the Water Resources Commission and their ability to make determinations on water rights in terms of ground water. Currently, if one is denied or cut-off on a water right because of assumptions as to priority on that water right, it is left up to the landowner to reinstate water right. It should be the responsibility of the state to be more clear in proving those assumptions. |
| TAPE 46,B | | |
| 011 | Rep. Bowman | Asks if ground water and surface water are connected. |
| 013 | Rep. Kruse | Yes. |
| 014 | Rep. Bowman | Asks how it could be ensured that surface flows were not depleted if this bill was passed. |
| 017 | Rep. Kruse | There is some knowledge of what happens with ground water, but to a degree, some of what is being discussed is based on theory. The intent of the bill is to put the burden of proof on the state instead of the landowner. |
| 026 | Rep. Bowman | Asks where the state would get the resources to accomplish this. |
| 029 | Rep. Kruse | Asks where the individual would get the resources. It is a burden of proof issue, and it is a question of how much of a burden should be placed on the landowner. If the state is going to impact the rancher's livelihood, the burden should be on the state. |
| | Rep. | Comments on the responsibility of the state to provide water for the people |

| | | |
|-----|--------------|---|
| 038 | Bowman | of Oregon. Asks if this bill would change current law. |
| 048 | Rep. Kruse | No. |
| 052 | Pagel | Submits and reviews written testimony in opposition to HB 2629. (EXHIBIT J) |
| 100 | Rep. Josi | Asks for discussion on ground water studies. |
| 108 | Pagel | In the process of doing comprehensive ground water studies, the Deschutes Basin is finished. There is a large amount of information which is worked with. There is a long way to go, but we are not operating in the dark. |
| 113 | Rep. Josi | Asks if the information for most of the basins is sufficient for identification of substantial interference. |
| 120 | Fred Lissner | Manager, Ground Water and Hydrology Section, Water Resources Department. There is very good information for most of the state, but there is also a great deal of information still in the data stage. In most of the state, WRD is able to do a fairly complete determination on the potential for substantial interference. |
| 130 | Pagel | Substantial interference is defined as being tied to the impact it will have on other water rights. This gives WRD something concrete to build around and also because current rules and process are based upon generally accepted hydrologic principals. Make calculations following these rules which give WRD the best estimate with the data available. |
| 144 | Rep. Welsh | Asks what type of technology is available which could truly determine this. |
| 147 | Lissner | Mathematical modeling and all the different stages of modeling. WRD bases mathematical model on field data. This is being done in the Deschutes and Willamette Basins. This allows WRD to predict what will happen if new stresses are applied to the system. This tool is very expensive. |
| 167 | Rep. Bowman | Asks if terminology would impact senior water right users. |
| 173 | Lissner | There is no clear answer. The bill seems to limit the scope of what is substantial interference. Discusses interference as compared to substantial interference. Seems to eliminate the amount of protection for ground water users and may open ground water to increased permit issuance. Also has impact on surface water users by stating that the only test would be if there is reasonable reduction in stream. It doesn't address whether that reasonable reduction impacts someone else's water rights. That may cause WRD not to issue ground water rights where there is measurable reduction when in fact, no one is impacted by the issuance of that water right. |
| 206 | Pagel | WRD opposed this measure in the past and continues to oppose it due to potential limitations for both senior and junior water right users. |
| 213 | Rep. Kruse | Asks if the same methodology and assumptions are used when making ground water determinations on both sides of the mountains. |
| 224 | Lissner | Yes, the rules apply statewide. |

| | | |
|-----|-----------------|---|
| 226 | Rep. Kruse | Asks if there is any difference between subsurface in the different regions because of volcanic strata. |
| 228 | Lissner | Clearly, there is significant difference, but with the way the rules are written, WRD is required to look at the kinds of materials producing water, and to make judgments whether the materials are hydraulically connected to the stream or not. When dealing with basalt on the East side of the mountains, those are typically confined aquifers and the rules make it clear that a confined aquifer is not to be considered to be hydraulically connected by assumption, it must be demonstrated. A gravel aquifer adjacent to a stream and the well is 600 or 700 feet away from the stream in a gravel aquifer, the rules allow WRD to make the assumption that that well is probably hydraulically connected to the stream. |
| 239 | Rep. Welsh | Asks for clarification on the results of this bill. |
| 246 | Lissner | There are different circumstances, under some there will be more regulation of ground water users in favor of surface water users, and in others there will be an inordinate amount of ground water rights being issued because of substantial interference. |
| 259 | Jeff Curtis | Director, Water Watch of Oregon, submits and reviews testimony in opposition to HB 2629. (EXHIBIT K) |
| 309 | Gayle Killam | Water Program Director, Oregon Environmental Council, submits and reviews testimony in opposition to HB 2629. (EXHIBIT L) |
| 366 | Steve Applegate | Representing, Water Resources Congress, testifies in opposition to HB 2629. Has concerns regarding protection of members and water rights. The alternative to the state providing protection is expensive lawsuits. |
| 386 | Susan Delles | Testimony submitted to committee in opposition to HB 2629. (EXHIBIT M) |
| 387 | Vice-Chair Josi | Closes public hearing on HB 2629. |
| 392 | Vice-Chair Josi | Adjourns meeting at 4:50 p.m. |

Submitted By, Reviewed By,

Rebecca M. Nickel, Pat Zwick,

Administrative Support Policy Analyst

EXHIBIT SUMMARY

A - HCR 3, Written Testimony, Susan Delles, 1 pp.

B - Oregon Coastal Salmon Restoration Initiative and Healthy Streams Partnership, Written Testimony, Susan Delles, 1 pp.

C - HB 2768, Written Testimony, Jan Lee, 2 pp.

- D - HB 2627, Written Testimony, Susan Delles, 1 pp.**
- E - HB 2627, Written Testimony, Martha Pagel, 3 pp.**
- F - GB 2627, Written Testimony, Jill Zarnowitz, 2 pp.**
- G - HB 2627, Written Testimony, Steve Brutscher, 2 pp.**
- H - HB 2627, Written Testimony, Gayle Killam, 1 pp.**
- I - HB 2627, Written Testimony, Jim Myron, 1 pp.**
- J - HB 2629, Written Testimony, Martha Pagel, 9 pp.**
- K - HB 2629, Written Testimony, Jeff Curtis, 1 pp.**
- L - HB 2629, Written Testimony, Gayle Killam, 2 pp.**
- M -HB 2629, Written Testimony, Susan Delles, 7 pp.**