

HOUSE COMMITTEE ON NATURAL RESOURCES SUBCOMMITTEE ON AGRICULTURE

March 5, 1993          Hearing Room D 1:00 p.m.      Tapes 22 - 23

MEMBERS PRESENT:            Rep. Liz VanLeeuwen, Chair Rep. Marilyn Dell  
Rep. Sam Dominy Rep. Bill Fisher Rep. Tim Josi Rep. Dennis Luke Rep.  
Bill Markham Rep. Chuck Norris

MEMBER EXCUSED:            Rep. Ray Baum

STAFF PRESENT:            Catherine Fitch, Committee Administrator Sue  
Nichol, Committee Clerk

MEASURES CONSIDERED:

SB 115 - Public Hearing HJM29 - Work Session HB 2848 - Work Session

WITNESSES:                Rod Ingram, Oregon Department of Fish and  
Wildlife Phil Ward, Department of Agriculture Steve Sanders, Attorney  
General's Office Bill Johnson, ENUF, Inc.

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These minutes contain materials which paraphrase and/or summarize  
statements made during this session. Only text enclosed in  
quotation marks report a speaker's exact words. For complete contents  
of the proceedings, please refer to the tapes. [--- Unable To Translate  
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TAPE 22, SIDE A

005    CHAIR VanLEEUEWEN:    Calls the meeting to order at 1:05.

WORK SESSION ON HJM29

015    MOTION:    REP. DOMINY:    Moves HJM 29 to the full committee with  
a DO PASS recommendation.

017    CHAIR VanLEEUEWEN:    Calls for discussion on HJM29.

028    REP. DELL:    I will vote, "no" because this is a large change to  
make and it does not address the need that we have which is the  
application of

the term "science."

033    CHAIR VanLEEUEWEN:    When "best available science" has been used, in  
this day and age, they use no actual science; it's often conjecture.

037    REP. DELL:    The focus needs to be on the definition of "science"  
not on "best available" or "verifiable."

045    REP. DOMINY:    When these bills were discussed in committee last

week, HB 2848 is the only one where law would be changed. A memorial just sends

Congress a message. Some amendments to HB 2848 have been proposed that would address the concerns you're talking about. HJM29 is a letter to Congress saying this is the thought of the legislature. For this reason, I support it.

056 REP. NORRIS: On so many of these issues, "scientists" and various biologists will get totally different conclusions on the same stretch of river or species. Their scientific opinions may be diametrically

opposed. If it's true science, verifiable, all scientists should agree on that particular thing. A lot of "science" is opinionated and anecdotal.

050 VOTE: In a roll call vote, REP. DELL votes NAY. REPS. DOMINY, FISHER, JOSI, LUKE, MARKHAM, NORRIS and CHAIR VanLEEuwEN vote AYE.

REP. BAUM is EXCUSED.

075 CHAIR VanLEEuwEN: HJM29, having received the majority vote, goes to the full committee.

REP. DOMINY: Will carry the bill to the full committee.

WORK SESSION ON HB 2848

092 CATHERINE FITCH: Explains amendments (2848-1) to HB 2848 (Exhibit A). Amendment 2848-1 responds to testimony heard at the last meeting

regarding the change in statute which would affect the general rule-making authority for Environmental Quality, Forestry, Agriculture, and Fish and Wildlife Departments. Sections have been crossed out so the standard of "best verifiable scientific data" is applied only to endangered species regulations.

115 MOTION: REP. DOMINY: Moves to ADOPT the hand-engrossed HB 284 8-1 amendments (LC 1808) dated 3/4/93.

117 CHAIR VanLEEuwEN: Calls for discussion.

120 REP. DOMINY: Does this really do what we're trying to do and not be too broad?

128 ROD INGRAM, Oregon Department of Fish and Wildlife: This satisfies the concerns that the agency brought forth.

132 PHIL WARD, Department of Agriculture: This satisfies our

concerns. 136 REP. DELL: Will there then be two different sets of criteria - State and Federal - used for endangered species listings if no change is made in the federal legislation?

140 INGRAM: This shouldn't cross purposes with the federal laws.

157 REP. DELL: Are you saying "it makes no difference?"

161 INGRAM: I don't think it does in this section on criteria used in the listing process.

167 CHAIR VanLEEUEWEN: If the federal government lists it, we don't have much choice since their listing would supersede the state.

172 REP. DOMINY: If we pass the bill in this form, would that make a difference in what kind of scientific data you used?

176 INGRAM: I will have to consult with legal counsel. But, I don't see it making that much difference in terms of criteria we use to list a

species.

182 WARD: The procedures we follow currently fit the language that is being proposed.

195 REP. DOMINY: Would the information used to list the marbled murrelet still be able to be used if it were listed under the language of this

bill?

200 CHAIR VanLEEUEWEN: Neither one of these agencies were involved in this listing.

207 REP. DOMINY: Would that kind of information be restricted or changed by passage of this legislation?

210 WARD: Our process involves a number of very involved steps that incorporate intense research. I doubt that we would list a plant only

with the documentation of historic journal.

212 INGRAM: Our data didn't show the marbled murrelet as either endangered or threatened when it was studied three or four years ago.

231 CHAIR VanLEEUEWEN: My research noted that the entries in the Federal Register did not bear up to verifiable science.

255 REP. DOMINY: I hope the message is clear on what is intended, even though it may not make much difference.

260 VOTE: CHAIR VanLEEUEWEN: Hearing no objection, the HB 284 8-1 amendments are ADOPTED. REP. BAUM is EXCUSED.

261 FITCH: Explains HB 2848-2 amendments (Exhibit B). They insert into the endangered species listing process a requirement that all activity will be conducted in a contested case hearing format. This makes a contested case hearing examination an automatic part of the listing

procedure.

309 REP. NORRIS: Should the same things be stricken out of 2848-2 that have been stricken from 2848-1?

310 CHAIR VanLEEuwEN: Yes.

319 REP. MARKHAM: This would be one way to eliminate some opinionated people who want things listed. It puts one more step in the listing

process so the facts are clear.

334 REP. JOSI: What is the history of listing? Now we can take it into the court system right away?

353 REP. MARKHAM: I don't think it is a court procedure. It's a contested case hearing which is not in the court system. The findings from the

contested case hearing can be appealed to the court.

357 FITCH: Explains what a contested case hearing is.

361 REP. JOSI: Can anyone bring a contested case hearing about after a species has been declared endangered?

367 FITCH: I'm not certain.

370 REP. MARKHAM: The public can ask for a listing.

374 STEVE SANDERS, Attorney General's Office: A contested case hearing can be invoked by anyone who has an interest in listing the species.

403 REP. JOSI: Is the contested case hearing one of the requirements for the enactment of a listing?

409 SANDERS: Under current rule, no.

414 REP. JOSI: Can someone interested in delisting a species request a contested case hearing?

519 SANDERS: Yes.

TAPE 25, SIDE A

005 REP. JOSI: How often does that happen and by whom in the Northwest?

007 SANDERS: We haven't done it by this process, so I wouldn't be able to estimate.

008 REP. JOSI: We've never had a contested case hearing in Oregon on a species listing?

009 SANDERS: No.

012 REP. LUKE: Does the individual who initiates a contested case hearing to list a species as endangered have to prove that the

animal is

016 SANDERS: The burden of proof would be on the person who is petitioning.

020 CHAIR VanLEEuwEN: Several months ago we petitioned to delist the Northern Spotted Owl and no action has been taken. What was not done to do what Mr. Sanders is talking about?

025 INGRAM: I don't believe the Commission accepted the petition.

035 For someone to petition to list or delist you must show the same information necessary to list.

046 CHAIR VanLEEuwEN: If an individual can do this and doesn't get any more clear information than we got, it's not going to be possible for him to carry it through.

051 REP. MARKHAM: With this amendment, scientific backup of assertions could be required by the hearings officer, couldn't it?

063 SANDERS: No, the hearing officer relies on the parties supplying the information.

070 REP. MARKHAM: But doesn't it give a more complete record if we have a contested case hearing than when we don't have one?

072 SANDERS: It wouldn't necessarily, you may restrict the number of people that can provide testimony.

078 REP. DOMINY: How long does it usually take to have a contested case hearing?

083 SANDERS: In my experience, a year, not counting appeals.

085 REP. DOMINY: What happens in the year we're waiting between the time someone files for a contested case hearing to list a species and when

the case is actually held?

091 SANDERS: It is not listed until an order is issued by a contested case hearing.

093 REP. DOMINY: So if it shouldn't be listed, does the process continue?

099 SANDERS: The process could continue if the case was appealed to the court of appeals, or another party could petition for the listing.

106 CHAIR VanLEEuwEN: Could they request another contested case hearing even if it were the same issues involved?

110 SANDERS: Yes, because a contested case only binds the parties to the contested case.

112 CHAIR VanLEEUEWEN: Then what would be a better way around this?

113 SANDERS: Rule-making would be a better option because it can be established once and for all what the agency's opinion is.

114 REP. DOMINY: Is there any price tag on the contested case hearing? Who has to pay the bill?

120 SANDERS: Each side pays their share. A contested case requires a much more carefully crafted order.

134 REP. DOMINY: Who would write the order?

138 SANDERS: The hearing officer, usually from the agency.

143 REP. DOMINY: Does anyone else have a say in who the hearings officer is?

150 SANDERS: You must show personal bias against you or a financial interest held by the officer to contest the selection of the hearings

officer.

162 REP. DELL: Do you think inserting a contested case procedure helps Rep. Markham's problem?

172 SANDERS: It will not guarantee that the most up-to-date information is used in listing.

176 CHAIR VanLEEUEWEN: Is information from both sides considered?

180 SANDERS: The public at large can't bring in information, only those who petitioned to bring in information.

191 REP. NORRIS: The hearings officer has to rely on the record, as opposed to the testimony at the moment?

201 SANDERS: Yes, testimony at the contested case would be a part of the record. As opposed to rule-making where a person could just send in

information without coming in and it would become a part of the record

without the person having to petition to be admitted as a party. It is

true that even if all of the evidence supports one side or the other in a rule-making hearing, the agency is not bound by that.

213 REP. NORRIS: Even under the current law, the agency must make the listing on verifiable information. Is this what we already have?

231 SANDERS: Yes, this doesn't change the criteria needs to be shown.

233 REP. MARKHAM: Are either of them appealable?

234 SANDERS: Yes, they both are appealable, either way, to the court of appeals. A contested case would be appealable based on

whether the

order was within the scope of the agency's authority, and whether substantial evidence supported the agency's decision. A rule is only appealable based on whether it's within the scope of the agency's authority.

250 REP. LUKE: The agency can make a rule based on zero facts?

254 SANDERS: Yes, and it's not contestable under the normal circumstances, but it is appealable.

258 REP. LUKE: If that rule is in the scope of their authority, then you can't appeal the rule?

263 SANDERS: That's right.

266 REP. DELL: Is there a better way to allow more input at various stages than a contested hearing?

273 SANDERS: There are other ways you can solicit more information. You might require more notice, require consultation with other agencies, or you could have a special form of contested case.

320 VOTE: On a roll call vote REPS. DOMINY, FISHER, JOSI, LUKE, MARKHAM, NORRIS AND CHAIR VanLEEUEWEN vote AYE. REP. DELL votes NAY. REP.

BAUM is EXCUSED.

331 MOTION: REP. DOMINY: Moves that HB 2848, AS AMENDED, be sent to the full committee with a DO PASS recommendation.

336 CHAIR VanLEEUEWEN: Repeats motion.

VOTE: In a roll call vote REPS. FISHER, JOSI, LUKE, MARKHAM, NORRIS, DOMINY AND CHAIR VanLEEUEWEN vote AYE. REP. DELL votes NAY. REP.

BAUM is EXCUSED.

340 REP. MARKHAM: Will carry the bill to the full committee.

342 CHAIR VanLEEUEWEN: Closes work session on HB 2848.

PUBLIC HEARING ON SB 115

350 CATHERINE FITCH: Gives summary of SB 115 which would delete the provision in ORS 561.240 that requires the State Department of

Agriculture to conduct a hearing before it enters into any contract exceeding \$500. (Exhibit C)

377 PHIL WARD, Department of Agriculture: Testifies in favor of SB 115 (Exhibit D).

TAPE 24, SIDE B

017 STEVE SANDERS, Attorney General's Office: ORS 561.240 is duplicative and has no effect.

049 REP. NORRIS: This law was first passed in 1957?

059 SANDERS: Yes, the \$500 part was added later.

069 REP. DOMINY: There must be a revenue impact on this, can you get information on this? 078 WARD: If the bill is enacted, there would be no fiscal impact. If the bill is not enacted, there is an impact.

087 REP. DOMINY: Can you give us an estimate?

091 WARD: I did an internal estimate which, over a biennium would be 6,978 hearings, each would cost \$300.40, for a total cost of \$489,811.20.

104 REP. FISHER: When you found out about this law, did you immediately start holding hearings?

108 WARD: We have had no meetings to comply with current law yet.

124 BILL JOHNSON, ENUF, Inc.: Testifies against SB 115. Reads testimony (Exhibit E).

177 CHAIR VanLEEUEWEN: What would be a reasonable fee not to require a public hearing?

182 JOHNSON: Probably about \$5,000.

187 REP. DOMINY: What organization are you involved in?

192 JOHNSON: ENUF. We worked to get field burning bill passed.

211 REP. LUKE: Have any of the contracts been contested?

222 PHIL WARD: No.

228 CHAIR VanLEEUEWEN: Don't you notify any time you need to spend above a certain level?

232 WARD: The state has a very prescribed process for entering into contracts, with public notice varying at different levels.

244 SANDERS: Under the traditional public contracting law, the agency is able to short-circuit the process in emergencies. Under this law, the

agency would not be able to deal with emergencies in a timely fashion.

258 REP. LUKE: Is there any appeal if this emergency clause is used too extensively?

265 WARD: People can seek injunctive relief to stop emergency programs.

271 SANDERS: If they could prove we had violated the law, they could



seek damages.

278 CHAIR VanLEEuwEN: Hearing on SB 115 is closed.

297 Meeting adjourned at 2:20.

Submitted by:

Reviewed by:

Sue Nichol  
Administrator

Catherine Fitch Clerk

EXHIBIT LOG:

A - HB 2848 - Hand engrossed 2848-1 amendments - Staff - 8 pages  
B - HB 2848 - Hand engrossed 2848-2 amendments and information  
- Staff - 21 pages C - SB 115 - Preliminary Staff Measure  
Summary - Staff - 1 page D - SB 115 - Testimony - Phil Ward - 1  
page E - SB 115 - Testimony - Bill Johnson - 1 page