

HOUSE COMMITTEE ON NATURAL RESOURCES ENVIRONMENT AND ENERGY SUBCOMMITTEE

March 29, 1993 Hearing Room D 1:30 p.m. Tapes 57 - 58

MEMBERS PRESENT: Rep. Bob Repine, Chair Rep. Marilyn Dell, Vice-Chair
Rep. Sam Dominy Rep. Bill Fisher Rep. Carl Hosticka Rep. Dennis Luke
Rep. Bill Markham Rep. Ray Baum

MEMBER EXCUSED: Rep. Nancy Peterson

VISITING MEMBER: Rep. Tim Josi

STAFF PRESENT: Catherine Fitch, Committee Administrator Karen
McCormac, Committee Clerk

MEASURES CONSIDERED: Informational Meeting - Right to Farm and
Forest Issue

Public Hearing - HB 3196 - HB 2734 - HB 3359

WITNESSES: REP. BILL MARKHAM LARRY TROSI, Oregon Farm
Bureau JOE HOBSON, Oregon Farm Bureau

DOUG HOPPER, Clackamas County Farmer BILL MOSHOFSKY, Oregonians in
Action DAVE SMITH, Oregonians in Action DENNIS OLMSTEAD, Department of
Geology and Mineral

Industries QUINCY SUGARMAN, Oregon State Public Interest Research Group

[--- Unable To Translate Graphic ---]

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
Graphic ---]

PHIL WARD, Department of Agriculture RAY WILKESON, Oregon Forest
Industries Council LIZ FRENKEL, Sierra Club ELIZABETH LIPPERT, Citizen
JULIE BRANDIS, Oregon Small Woodlands Association

TAPE 57, SIDE A

005 CHAIR REPINE: Calls meeting to order at 1:41 p.m.

OPENS PUBLIC HEARING ON HB 3196, HB 2734 AND HB 3359

025 CATHERINE FITCH, Committee Administrator: Introduces meeting
materials, including a memorandum (EXHIBIT A) from Legislative Counsel
dated March 11, 1993, which summarizes the effects of HB 3196, HB 3359
and SB 116,

and a memorandum (EXHIBIT B) from Annette Talbott dated May 20, 1992 regarding "trespass" and "nuisance."

Explains effects of HB 3196, HB 2734 and HB 3359.

097 REP. MARKHAM: Testifies in support of HB 2734.

126 REP. JOSI: Is the intent of the bill to address the issue of whether smoke drifting over adjoining property constitutes trespass?

128 REP. MARKHAM: Yes. That is what the Ream v. Keen lawsuit was about, which irritated the entire farm and forest community. We thought we had already addressed that problem with the use of the term "nuisance" in

the statutes.

188 LARRY TROSI, Oregon Farm Bureau: Presents written testimony (EXHIBIT C) in support of HB 3196.

199 REP. DOMINY: Do you recall the bill number for the right-to-farm bill introduced during the 1991 Oregon Legislative Session?

200 TROSI: There were actually two bills. I could provide you with that information.

204 JOE HOBSON, Oregon Farm Bureau: Testifies in favor of HB 3196. Development in rural areas is a matter of concern due to conflicts

between farm and urban activities. This measure basically paraphrases existing law as in ORS 215.243. We are facing ever-increasing non-farm populations in rural areas, with an increasing likelihood of conflict.

Also, there is a growing body of case law which is making farmers liable for practicing acceptable farm practices which impact non-farm neighbors.

Provides information regarding the impetus behind HB 3196. We're suggesting that language be added to the current warning placed on deeds and contracts by statute, which would state that purchasing property in some zones may affect the buyer's legal remedies.

313 REP. LUKE: Due to a recent Supreme Court ruling, the same thing affects aggregates over in central Oregon. If someone is building within a

one-mile radius of an aggregate pit, they must sign an agreement acknowledging that they know the pit is there.

325 TROSI: Most aggregate pits are sited under a Goal 5 process. Under that process, there is an overlay zone which provides restrictions for

activities as they are sited or as new sites come in. 336 REP. LUKE:
What you are proposing is not unique, since it's already being done
in the aggregate field.

344 REP. DELL: When the statute was first written and only
applied to nuisance, there were a couple of exceptions, such as
growing certain

diseased crops and allowed devices for birds. Should this bill include
some exceptions, such as exceptions for released water?

358 HOBSON: We discussed that. But rather than include
specific exceptions, we decided to concentrate on three things;
whether a

practice is common, whether all rules and regulations were followed, and
whether the practice was done in a reasonable and prudent manner. We

wanted to give the court a broad framework with which to work.

382 REP. HOSTICKA: The first section of HB 3196 addresses the
policy of protecting resource-based activities. I assume that was
included to

provide a rational basis for other aspects of the bill. You mentioned

that increased urbanization creates these conflicts. If state policy

facilitates this increase, does that say that the policy of the state is
to protect resource land? Do we then have to pass other laws which also
protect resource activities?

413 HOBSON: How the state chooses to protect resource activities is
outside the realm of claims for relief and causes of action. That's a
question

for the legislature to ask itself.

TAPE 68, SIDE A

001 REP. HOSTICKA: If we revise land-use laws to encourage
further urbanization of rural areas, can we turn around and say that
it's state policy to offer protection from these conflicts?

019 HOBSON: I don't think that would be successful.

024 REP. FISHER: Current law already states that "a farming practice
shall not be declared or held to be a private or public nuisance
or a

trespass." Also, "any local government ordinance now in effect or
subsequently adopted to make farming practice a nuisance or trespass,"

which is retroactive. Am I right?

038 TROSI: I think that was the reason we wanted to retain
existing legislation. Existing ordinances were protected when the

original

right-to-farm bill was passed. If we were to delete the existing right to farm, we would be subject to local ordinances, which may affect existing practices. We tried to keep this law rather than delete it.

050 REP. FISHER: I wanted to make sure this handles problems retroactively, and wasn't sure whether HB 2734 does. If half of local government

already had ordinances that said that smoke was a trespass, would HB 2734 erase that?

069 HOBSON: From the farmer's perspective, I recommend the language in HB 3359, as opposed to HB 2734.

065 REP. DELL: Could you address due process questions which are likely to arise with the passage of HB 3196?

079 HOBSON: We were trying to provide something that was not "cause of action" specific. We do not intend to take away someone's

constitutional due process rights. However, we would like the next right-to-farm bill to be as broad as possible. It would not be prudent

for the legislature to advocate that if something is a farming practice, it can occur, and the farmer cannot be sued. HB 3196 does not say that. It says that the farmer can be sued, but it must be proven that what he was doing is not common, or that he did not follow the rules and regulations associated with that kind of practice, or that what he did was done in other than a reasonable and prudent manner.

117 DOUG HOPPER, Clackamas County Farmer: Presents testimony in support of HB 3196 (EXHIBIT D).

151 BILL MOSHOFSKY, Oregonians in Action: We generally support the concepts of all three bills (HB 2734, HB 3359 and HB 3196). Taking away the

right to sue is far less severe than the outright denial of the right to occupy adjoining property. We addressed this problem in the 1991

session with HB 2571, in which we amended the right-to-farm and the right-to-forest laws.

Concerned about potential misinterpretations of broad terminology such as "nuisance" or "trespass," and recommends approach used for HB 2571,

in which nuisance includes but is not limited to trespass resulting from the drift of smoke or dust. Lawyers may construe particulates of smoke

or dust to be equivalent to trespass, rather than merely a nuisance.

200 DAVE SMITH, Oregonians in Action: Both HB 3359 and 2734 address trespass. Trespass could be limited to trespasses that arise out of the drift of smoke or dust derived from accepted farming practices.

231 CHAIR REPINE: How would you deal with drainage?

234 SMITH: In many circumstances, liability for trespass arising from the release of impounded water in a drainage situation would lie just under common law.

254 MOSHOFSKY: I don't think that's an area this bill should address. The obligation a landowner has to protect against runoff is another issue.

It might be wise to adopt the provision relating to trespass which is more limited in its scope to limit problems and resultant lawsuits.

262 SMITH: In the bill brought before the 1991 legislature, we limited trespass to the drift of smoke and dust. I wasn't surprised by the

decision regarding Reams v. Keen. The original case is Martin v. Reynolds Metals, in which the plaintiff slept on his rights until he could no longer bring a nuisance tort, so he sued for trespass based on the deposit of particulate aluminum matter onto pasture land. The Oregon Supreme Court found a trespass. The only reason he got a trespass out of it was that he waited too long to bring a nuisance action in the first place.

288 REP. HOSTICKA: If the farmer can sue Reynolds for trespass, but Reynolds couldn't sue the farmer for trespass if plowing dust fell on

the Reynolds plant and caused injury, could you explain the rational policy behind that?

298 SMITH: Ideally, Reynolds Metals should not be conducting their operations on farmland. If they are on industrial land within city

limits, they would be insulated from such claims.

338 REP. LUKE: Introduces informational material (EXHIBIT E) regarding the Surface Mining Impact Area Combining Zone from the Deschutes County

Community Development Department. The third page contains a waiver which must be signed if you build within a surface mining zone.

351 FITCH: Introduces a letter from the League of Oregon Cities dated

March 29, 1993 (EXHIBIT F) regarding HB 3359.

364 DENNIS OLMSTEAD, Department of Geology and Mineral Industries:
Presents written testimony (EXHIBIT G) regarding HB 3196. We are neither
for nor against HB 3196. Wants to alert committee to the fact that
"resource"

might include mining.

420 QUINCY SUGARMAN, Oregon State Public Interest Research Group:
Presents written testimony (EXHIBIT H) in opposition to HB 3196, HB 2734
and HB

3359.

TAPE 57, SIDE B

054 REP. FISHER: It seems strange that there is such concern
regarding farmers' use of chemicals when there is probably more
unregulated

chemical usage in urban backyards.

063 SUGARMAN: We are concerned about the proper and effective use
of all toxic chemicals by all users of those chemicals.
Organizationally, we

have put out information regarding the use of alternatives to items used
around the home and in the garden. Our concern is the loss of the
possibility of reparations by an injured party.

070 REP. FISHER: My understanding is that if the party could
prove a farming practice was misused, reparations would still be
allowed.

074 SUGARMAN: Pesticide drift may be covered under existing law,
but it also may not be. If trespass is removed as a private right of
action,

some pesticide issues would not be addressed.

097 PHIL WARD, Department of Agriculture: We consider pesticide
drift a violation of the product label. Under federal and state law,
we are

charged with enforcing the label restrictions on pesticides, so we would
not see drifted pesticides as something that would be protected under
this bill. We would consider that an illegal act.

109 CHAIR REPINE: Could you update us regarding SB 116?

112 WARD: There have been two well-attended hearings on the senate
side regarding SB 116. They are working through similar issues
discussed

here today. Because the Department of Agriculture did not consider our
proposal covering forest interests, we did not include protection for

forestry practices under our version of the right-to-farm bill. I heard moments ago that we might not be able to add forestry protections to the senate version of the right-to-farm act because the relating clause is restricted to agricultural activities.

153 RAY WILKESON, Oregon Forest Industries Council: Presents written testimony (EXHIBIT I) in support of HB 2734. Urges committee to

consider amendment to HB 2734 regarding liability of forest landowners.

243 REP. MARKHAM: You have made a good bill better with these amendments.

246 CHAIR REPINE: Calls for a ten minute recess at 2:52 to allow absent witnesses to testify. Reconvenes meeting at 3:03 p.m.

264 LIZ FRENKEL, Oregon Chapter, Sierra Club: Presents written testimony (EXHIBIT J) in opposition to HB 3196, HB 2734 and HB 3359.

398 ELIZABETH LIPPERT, Citizen: Presents written testimony (EXHIBIT K) in opposition to the addition of "trespass" in HB 3359.

TAPE 58, SIDE B

015 JULIE BRANDIS, Oregon Small Woodlands Association: Testifies in support of HB 3359. Supports Oregon Forest Industries Council's amendment to HB 2734.

Additions to the record: HB 3196 Preliminary Staff Measure Summary (EXHIBIT L) HB 3196 Fiscal Analysis (EXHIBIT M) HB 2734 Preliminary Staff Measure Summary (EXHIBIT N) HB 3359 Preliminary Staff Measure Summary (EXHIBIT O) HB 3196 Testimony by Jan Wroncy (EXHIBIT P) HB 3196 and HB 3359 Testimony by David Nelson (EXHIBIT Q)

044 CHAIR REPINE: CLOSES PUBLIC HEARING ON HB 31916, HB 2734 AND HB 3359

Adjourns meeting at 3:46 p.m.

Submitted by:

Reviewed by:

Karen McCormac
Administrator

Kathryn Van Natta Assistant

EXHIBIT LOG:

A - HB 3196 and HB 3359 Memorandum - Staff - 2 pages B -
Memorandum Regarding Trespass and Nuisance Law - Staff - 4 pages C -
HB 3196 Testimony - Larry Trosi - 2 pages D - HB 3196 Testimony -
Doug Hopper - 2 pages E - HB 3196 Reference Regarding SMIA Agreement
- Rep. Luke - 3 pages F - HB 3359 Testimony - Valerie Paulson - 1
page G - HB 3196 Testimony - Dennis Olmstead - 1 page H - HB
3196, HB 2734, HB 3359 Testimony - Quincy Sugarman - 9 pages I - HB

2734 Testimony - Ray Wilkeson - 6 pages J - HB 3196, HB 2734, HB
3359 Testimony - Liz Frenkel - 1 page K - HB 3359 Testimony -
Elizabeth Lippert - 2 pages L - HB 3196 Preliminary Staff Measure
Summary - Staff - 1 page M - HB 3196 Fiscal Analysis - Staff - 1
page N - HB 2734 Preliminary Staff Measure Summary - Staff - 1 page
O - HB 3359 Preliminary Staff Measure Summary - Staff - 1 page P
- HB 3196 Testimony - Jan Wroncy - 1 page Q - HB 3196 and HB 3359
Testimony - David S. Nelson - 6 pages