

HOUSE COMMITTEE ON NATURAL RESOURCES

March 18, 1993 Hearing Room D 4:00 p.m. Tapes 21 - 22

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

MEMBER EXCUSED: Rep. Nancy Peterson

STAFF PRESENT: Kathryn Van Natta, Committee Administrator
Catherine Fitch, Committee Administrator Karen McCormac, Committee Clerk

MEASURES CONSIDERED: Work Session - HB 2682 - HB 2848 - HB 2209
- HB 2993 - SB 115 - HB 2340

WITNESSES: PHIL WARD, Department of Agriculture STEVE
SANDERS, Department of Justice

KIP LOMBARD, Oregon Water Resources Congress

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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
Graphic ---]

TAPE 3, SIDE A

005 CHAIR BAUM: Calls meeting to order at 4:04 p.m.

OPENS WORK SESSION ON HB 2682

010 CATHERINE FITCH, Committee Administrator: Describes effects of HB
268 2 regarding the use of sulfites as a food additive in
licensed

restaurants. 030 MOTION: REP. JOSI moves HB 2682 to the floor
with a DO PASS RECOMMENDATION, as recommended by the Subcommittee of
Agriculture and Forestry.

033 CHAIR BAUM: Restates motion and calls for discussion.

035 REP. HOSTICKA: If a bottle of wine is ordered in a restaurant,
and it contains sulfites, is that will that be acceptable with passage
of this bill?

036 FITCH: Wine is considered a processed food.

042 VOTE: REPS. DELL, DOMINY, FISHER, HOSTICKA, JOSI, LUKE,

MARKHAM, NORRIS, REPINE, VanLEEUEWEN and CHAIR BAUM vote AYE. REP. PETERSON is EXCUSED.

047 CHAIR BAUM: The motion CARRIES. REP. JOSI will lead discussion on the floor.

Additions to the record: HB 2682 Preliminary Staff Measure Summary (EXHIBIT A) HB 2682 Fiscal Impact Assessment (EXHIBIT B) HB 2682 Revenue Impact Analysis (EXHIBIT C)

CLOSES WORK SESSION ON HB 2682

OPENS WORK SESSION ON 2848

053 FITCH: Describes effects of HB 2848 regarding the endangered species act. Introduces letter (EXHIBIT D) from Rod Ingram, Department of Fish

and Wildlife. At our last Full Committee meeting, there was a question regarding the Fiscal Impact Statement proposed by the Department of Agriculture. Representatives from the Department of Agriculture are here today to respond to your questions.

065 CHAIR BAUM: This bill contains a provision which allows a contested case hearing to take place before a species is listed as endangered.

069 PHIL WARD, Department of Agriculture: The fiscal impact statement shows that the contested case process is different than a general rule-making process. Because of that, our staff determined that it would require

additional workload and funding to conduct contested case hearings.

073 STEVE SANDERS, Department of Justice: In a contested case proceeding, the hearings officer will need to be an attorney, because case law

requires contested case orders to be legally reasoned and founded within the framework of the record that's been prepared. Second, parties must spend more time and money to participate in contested case proceedings than in rule-making because corporations and associations must be represented by legal counsel. Third, because a contested case proceeding is more like a trial, there must be a complete record which must be transcribed if appealed. The expense of preparing the record on which the decision is made is more expensive.

Currently, the agency is required to offer a contested case within 90 days of a petition. Consequently, the agency would be required to go through repeated contested cases repeatedly because it would not have

the authority to refuse, as they can for rule-making. Listing or de-listing a species would not necessarily be the end of the matter, because a person who is not a party in the first contested case, or maybe even the same party, can repeatedly request the agency to go through contested case proceedings. The statute as drafted requires the agency to offer that contested case hearing.

129 REP. JOSI: Would the contested case process require "sound verifiable scientific data"?

131 SANDERS: Yes. However, there are additional requirements for contested cases which require an explanation of why the agency reached its

conclusion. There are a number of appellate cases wherein agency decisions were struck down not because they reached the wrong conclusion, but because the court was not convinced they adequately explained the reasoning behind it. Furthermore, in a contested case proceeding, the decision must be based on substantial evidence from the entire record.

There is a problem in trying to determine how an order (the document which results from a contested case proceeding) would be served on those who would be affected or bound by the order. Under the Administrative Procedures Act, an order must be directed to named persons, who are then bound by that agency decision. In this instance, we will need to inform the everyone in Oregon about restrictions which are necessary when a species is listed. It is difficult to imagine how the agency could undertake this process.

161 REP. VanLEEUWEN: Why would you be required to notify everyone in the state?

171 SANDERS: When a species is listed, there will be restrictions in the way in which people can deal with that species, and the public will need to be informed of those restrictions.

174 REP. VanLEEUWEN: Have you not heard of the news media?

176 SANDERS: The news media is not legally bound. Even if the public has heard of these restrictions through the news media, they would not be

legally prohibited unless the order from the contested case were specifically directed to them.

180 REP. VanLEEuwEN: I don't think I got a letter when they listed the northern spotted owl.

182 SANDERS: That is because that was done by rule-making.

When an agency issues a rule, those bound by the rule are not only those who participated in the rule-making proceeding, but everyone in the state. Everyone in the state is presumed to know the rules. Rules may be found in accessible areas, such as local libraries, etc. There is no equivalent mechanism by which the state distributes contested case orders, because only the parties which participated are mailed the order. An endangered species act listing presumes that everyone in the state will be equally limited in the way they can interact with an endangered species.

209 REP. DOMINY: In a contested case hearing, if the case fails, can it be brought up again by another person? Or can the same listing be brought

up again by the same person?

217 SANDERS: A different person could bring it up because they would not be bound by the contested case order that had been issued. Even the same

person could slightly amend their previous petition, which would require the agency to go through the process again.

226 REP. DOMINY: How often does that occur?

231 SANDERS: Not often.

252 REP. JOSI: It appears we have bitten off more than we can chew. I recommend returning this bill to the subcommittee.

268 REP. MARKHAM: I disagree.

270 CHAIR BAUM: Rules are required to be published with the Secretary of State. On Page 6, Subsection 6 of the hand-engrossed bill, it refers to publication requirements.

282 SANDERS: A rule is not effective until it is filed with the Secretary of State.

289 CHAIR BAUM: I think Rep. Markham was trying to make the rule-making process more of a fact-finding process. Currently, the rule-making

process makes it difficult for the public to question an expert's background and experience, and whether the data is accurate.

I recommend that HB 2848 be returned to the subcommittee so that it

might be amended before we send it to the Committee on Ways & Means.

242 REP. VanLEEUEWEN: How would fact-finding relate to this?

349 SANDERS: I believe the current statute already requires fact-finding. The agency is already directed to make its evaluation based on the best verifiable scientific information regarding the biological status of a

species. No other rules require a factual predicate as this one does.

362 REP. HOSTICKA: Are witnesses under oath when they testify for rule-making proceedings? I'm referring to unsubstantiated statements.

371 SANDERS: No. The agency which has the technical expertise to evaluate these statements and determine whether credentials are adequate or

whether a study is valid.

413 MOTION: REP. MARKHAM: Moves HB 2848 back to the Subcommittee on Agriculture and Forestry.

416 CHAIR BAUM: Asks whether Chair of Subcommittee on Agriculture and Forestry agrees.

417 REP. VanLEEUEWEN: Agrees.

425 CHAIR BAUM: Restates motion and calls for discussion.

Hearing no objection, the motion is so ordered.

Additions to the record: HB 2848 Preliminary Staff Measure Summary (EXHIBIT E) HB 2848 Revenue Impact Analysis (EXHIBIT F) HB 2848 Fiscal Analysis (EXHIBIT G) HB 2848 Hand-Engrossed with HB 2848-3 Amendments (LC 1808) dated

3/10/93 (EXHIBIT H)

CLOSES WORK SESSION ON HB 2848

OPENS WORK SESSION ON HB 2209

TAPE 22, SIDE A

014 FITCH: Describes effects of HB 2209 regarding the exemption of potatoes which qualify for exemption under state or federal marketing order from mandatory grade inspection. This measure was amended in a compromise

between the Department of Agriculture and the Potato Commission and its membership.

024 MOTION: REP. NORRIS: Moves HB 2209 to the floor with a DO PASS RECOMMENDATION, as AMENDED by the HB 2209-2 AMENDMENTS, LC 516, dated 3-17-93, by the Subcommittee on Agriculture and Forestry.

027 CHAIR BAUM: Restates motion and calls for discussion.

VOTE: REPS. DELL, DOMINY, FISHER, HOSTICKA, JOSI, LUKE, MARKHAM,
NORRIS, REPINE, VanLEEUEWEN and CHAIR BAUM vote AYE. REP. PETERSON is
EXCUSED.

050 CHAIR BAUM: The motion CARRIES. REP. NORRIS will lead
discussion on the floor.

Additions to the record: HB 2209 Preliminary Staff Measure Summary
(EXHIBIT I) HB 2209 Fiscal Impact Assessment (EXHIBIT J) HB 2209
Hand-Engrossed with HB 2209-2 Amendments (LC 516), dated

3-17-93 (EXHIBIT K)

CLOSES WORK SESSION ON HB 2209

OPENS WORK SESSION ON HB 2993

065 FITCH: Describes effects of HB 2993, which removes the
restriction on the issuance of hunting tags for mountain sheep ewes.
There were no

amendments to this measure, nor was there any contrary testimony.

078 MOTION: REP. LUKE moves HB 2993 to the floor with a DO
PASS RECOMMENDATION, as recommended by the Subcommittee on Agriculture
and Forestry. 089 CHAIR BAUM: Restates motion and calls for
discussion.

VOTE: REPS. DELL, DOMINY, FISHER, HOSTICKA, JOSI, LUKE, MARKHAM,

NORRIS, REPINE, VanLEEUEWEN and CHAIR BAUM vote AYE. REP. PETERSON is
EXCUSED.

100 CHAIR BAUM: The motion CARRIES. REP. SOWA will lead discussion
on the floor.

Additions to the record: HB 2993 Preliminary Staff Measure Summary
(EXHIBIT L) HB 2993 Fiscal Analysis (EXHIBIT M) HB 2993 Revenue Impact
Analysis (EXHIBIT N)

CLOSES WORK SESSION ON HB 2993

OPENS WORK SESSION ON SB 115

116 FITCH: Describes effects on SB 115-A regarding the deletion of
the statutory requirement for a hearing before the State Department
of

Agriculture enters into contracts or agreements with certain persons or
private corporations. There were no amendments to the measure, but

there was testimony which suggested that Oregon should be conscientious
about all contract-letting. This provision enables them to do that.

141 VOTE: REP. FISHER moves SB 115-A to the floor with a DO
PASS RECOMMENDATION, as recommended by the Subcommittee on Agriculture
and Forestry. 143 CHAIR BAUM: Restates motion and calls for
discussion.

145 VOTE: REPS. DELL, DOMINY, FISHER, HOSTICKA, JOSI, LUKE, MARKHAM, NORRIS, REPINE, VanLEEUEWEN and CHAIR BAUM vote AYE. REP. PETERSON is EXCUSED.

151 CHAIR BAUM: The motion CARRIES. REP. FISHER will lead discussion on the floor.

Additions to the record: SB 115-A Preliminary Staff Measure Summary (EXHIBIT O) SB 115-A Revenue Impact Analysis (EXHIBIT P) SB 115-A Fiscal Impact Assessment (EXHIBIT Q) SB 115-A Senate Vote Count of 2-23-93 (EXHIBIT R)

CLOSES WORK SESSION ON SB 115

OPENS WORK SESSION ON HB 2340

155 FITCH: Describes effects of HB 2340, which would allow irrigation districts to provide water for domestic, municipal and industrial

purposes. There are a number of amendments, which are reflected in the Preliminary Staff Measure Summary (EXHIBIT S).

188 REP. FISHER: Is the increase in the interest rate (from 1% to 1.5%) per month or per year?

190 FITCH: Per month.

191 REP. FISHER: Why are we trying to obtain money from someone who is already in a difficult situation?

195 REP. NORRIS: I don't believe we have a usury law any more. There are a lot of irrigation districts which have delinquent accounts, and this

will provide greater incentive for users to pay their bills on time.

202 REP. FISHER: Disapproves of additional interest.

214 FITCH: There were two other factors behind this. Eighteen percent is an annual amount used by other utilities. Also, 1.5% is referenced in

other irrigation district statutes, and was added to make this bill consistent.

220 REP. LUKE: Are smaller hobby farms protected under this bill?

234 REP. NORRIS: Farmers with less than five acres have one vote. Those with five to twenty acres have two votes, and those with over twenty

acres have three votes.

240 REP. REPINE: Until now, the threshold in Josephine County was a two-acre minimum.

256 MOTION: REP. NORRIS moves to floor HB 2340 with a DO PASS AS

AMENDED RECOMMENDATION, as amended by HB 2340-2 AMENDMENTS, LC 1763,
dated

3-15-93 by the Subcommittee on Water.

260 CHAIR BAUM: Restates motion and calls for discussion.

263 REP. HOSTICKA: I will vote against this bill as I did in subcommittee. Each one of these provisions may have some merit, but the combination is possibly unconstitutional. I'm concerned about the provisions regarding the election process which expands the authority of irrigation districts to furnish water and obtain water rights which goes beyond irrigation

purposes.

I'm also concerned about provisions which allow water districts to enter private property and engage in activities for which the landowner is charged. These provisions also allow significant increases in the authority of these districts. According to my interpretation of the U.S. Supreme Court's decisions regarding one-person one-vote, the weighted voting scheme is possibly unconstitutional.

301 REP. NORRIS: I disagree, but I respect your opinion.

304 REP. FISHER: Refers to Page 3B, Lines 17 through 20, in which the delivery of water may be withheld until charges and assessments are

paid. It seems this provision already gives districts the means to collect accounts which are past due.

327 REP. DELL: It is difficult for those of us who are not on the subcommittee to make a decision with such minimal review of the

material. Perhaps the bill carrier can tell me what he wanted to accomplish with this bill, and how some earlier concerns and questions from the subcommittee were addressed.

350 REP. NORRIS: The bill would add some flexibility to the system. Requests clarification by Kip Lombard, Oregon Water Resources Congress.

I want to address the one person-one vote issue raised by Rep. Hosticka. The more acreage you own, the more money you pay, so landowners are already paying a substantial amount for the right to vote.

374 CHAIR BAUM: I want the committee members to know that when bills like this come to the Full Committee, the carrier will need to be ready to

discuss the issues and concerns raised in subcommittee. Encourages full debate of issues in the Full Committee.

391 KIP LOMBARD, Oregon Water Resources Congress: Disagrees with one person-one vote issue.

Addresses concerns of Rep. Fisher by explaining that water users who do not pay their water bill are frequently located in the middle of a lateral. Water delivery is controlled by the district at the head of the lateral, not at individual water user headgates. If the lateral is shut off to penalize one non-payer, everyone is penalized, so there is a real problem with enforcing this provision. Districts generally bill patrons once a year in January, which is well before the delivery season. Consequently, there is no enforcement mechanism until spring, when the water is delivered.

TAPE 21, SIDE B

036 REP. HOSTICKA: In 1981, a 5-4 decision by the U.S. Supreme Court held that an Arizona irrigation district was not considered a governmental

entity subject to one person-one vote. Page 2, Lines 32a through 32b of the hand-engrossed bill states that the irrigation exercises control over water rights. I think we're on very tenuous ground here regarding constitutionality.

058 REP. DELL: Does Rep. Hosticka have another solution?

059 REP. HOSTICKA: My recommendation was voted down in subcommittee. I recommended changing Page 2, Line 32 to "an irrigation district may

convey on behalf of a person or entity who holds the water right."

068 LOMBARD: Irrigation districts have historically been authorized to apply for water rights. The Oregon courts have said that when the water right is held in the name of the district, the district holds it in

trust for the landowners.

093 REP. JOSI: Is there anything in this bill which changes the trust?

098 LOMBARD: No. This bill clearly authorizes districts to obtain water rights for the purpose of delivering water and putting it to municipal

use. That water right must still be tied to that land. 111 REP. JOSI: Will districts have control over water upon passage of this bill? 117 LOMBARD: It retains a certain amount of control over the water for all

its water users. No individual water user may demand a proportionally greater amount of water than the other water users within the district. During the recent drought, water users were only allowed fifty percent of their normal amount of water. Everyone had to abide by that, and the district had the authority to do insure the "equitable distribution of water by district."

153 REP. HOSTICKA: Does every landowner within the district have voting rights?

156 CAMPBELL: Districts have entered into an agreement to deliver a block of water to a municipality.

172 CHAIR BAUM: Over the years, suburbia has started to encroach upon traditional irrigation districts. This is an attempt to keep up with

those changes. Water districts are becoming utilities.

181 REP. HOSTICKA: But they will not allow those people to vote.

183 CHAIR BAUM: Irrigation districts may not own water. There are some limits to this one-person one-vote doctrine. Until there is another

U.S. Supreme Court decision, the bill is within the law as we know it.

203 REP. DELL: Reads from U.S. Supreme court decision. "The district did not and could not control the use to which the landowners who were

entitled to water chose to put it."

214 CAMPBELL: That water right is proscribed by Oregon Water Law solely for irrigation purposes. The district cannot change that unless they obtain a transfer in use from the Water Resources Department. They cannot do

that when the landowner is still using that water right to irrigate that land. Many landowners are leaving farming and turning their land into subdivisions. When that occurs, there can be a change in use, and the landowner has the right to seek to transfer water rights.

240 REP. LUKE: For the last two years, the water district took aerial photographs which forced us to use water or sell it. In that case, they did have control over water usage.

257 CAMPBELL: When you apply for a water right permit, it describes the amount of water you can divert, the total amount of water you can use,

and where the water can be used. Surveyors then inspect your property.

If you apply for a permit for forty acres but you never apply water to

more than twenty acres, you will only receive a certificate for the twenty acres.

If you fail to apply water to land for five successive years, you lose the water and the ability to transfer it to other land.

272 VOTE: REPS. DELL, DOMINY, FISHER, JOSI, LUKE, MARKHAM, NORRIS, REPINE, VanLEEuwEN and CHAIR BAUM vote AYE. REP. HOSTICKA votes NO.

REP. PETERSON is EXCUSED.

282 CHAIR BAUM: The motion CARRIES. REP. NORRIS will lead discussion on the floor.

Additions to the record: HB 2340 Fiscal Analysis (EXHIBIT T) HB 2340 Revenue Analysis (EXHIBIT U) HB 2340 Hand-Engrossed HB 2340-2 (LC1763), dated 3-15-93 combined

with Amendments HB 2340-1 plus Conceptual Amendments adopted by the Water Subcommittee (EXHIBIT V)

CLOSES WORK SESSION ON HB 2340

Adjourns meeting at 5:16 p.m.

Submitted by:

Reviewed by:

Karen McCormac
Administrator

Kathryn Van Natta Assistant

EXHIBIT LOG:

A - HB 2682 Preliminary Staff Measure Summary - Staff - 1 page B - HB 2682 Fiscal Impact Assessment - Staff - 1 page C - HB 2682 Revenue Impact Analysis - Staff - 1 page D - HB 2848 Testimony - Rod Ingram - 2 pages E - HB 2848-A Preliminary Staff Measure Summary - Staff - 1 page F - HB 2848-3 Revenue Impact Analysis - Staff - 1 page G - HB 2848-3 Fiscal Analysis - Staff - 2 pages H - HB 2848-3 Hand-Engrossed with HB 2848-3 Amendments (LC 8108) dated 3-10-93 - Staff - 13 pages I - HB 2209-A Preliminary Staff Measure Summary - Staff - 1 page J - HB 2209-2 Fiscal Impact Assessment - Staff - 1 page K - HB 2209 Hand Engrossed with HB 2209-2 Amendments (LC 516) dated 3-17-93 - Staff - 4 pages L - HB 2993 Preliminary Staff Measure Summary - Staff - 1 page M - HB 2993 Fiscal Analysis - Staff - 1 page N - HB 2993 Revenue Impact Analysis - Staff - 1 page O - SB 115-A Preliminary Staff Measure Summary - Staff - 1 page P - SB 115-A Revenue Impact Analysis - Staff - 1 page Q - SB 115-A Fiscal Impact Assessment - Staff - 1 page R - SB 115-A Senate Vote Count 2-23-93 - Staff - 1 page S - HB 2340 Preliminary Staff Measure Summary - Staff - 1 page T - HB 2340 Fiscal Analysis - Staff - 1 page U - HB 2340 Revenue Analysis - Staff - 1 page V - HB 2340 Hand-Engrossed HB 2340-2 (LC1763), dated 3-15-93 combined with

Amendments HB 2340-1 plus Conceptual Amendments adopted by the
Water Subcommittee - Staff - 16 pages