

HOUSE COMMITTEE ON NATURAL RESOURCES SUBCOMMITTEE ON WATER

March 9, 1993 Hearing Room D 1:00 p.m. Tapes 36 - 38

MEMBERS PRESENT: Rep. Chuck Norris, Chair Rep. Ray Baum Rep.
Carl Hosticka Rep. Tim Josi Rep. Bill Markham Rep. Bob Repine Rep. Liz
VanLeeuwen

MEMBER EXCUSED: Rep. Nancy Peterson

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

MEASURES CONSIDERED: HB 2109 - Public Hearing HB 2340 -
Work Session

WITNESSES: Martha Pagel, Department of Water Resources
Reed Marbut, Department of Water Resources Antone Minthorn, Confederated
Umatilla Tribes Dan Hester, Confederated Umatilla Tribes Jan Boettcher,
Oregon Water Resources Congress Kip Lombard, Oregon Water Resources
Congress Richard Kosesan, Water for Life Bev Hayes, Department of Water
Resources Doug Parrow, Department of Water Resources John Borden,
Department of Water Resources

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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 36, SIDE A

008 CHAIR NORRIS: Calls the meeting to order at 1:07.

015 CATHERINE FITCH: Summarizes HB 2109 which extends the Water
Resources Department current authority to negotiate water rights with
the Warm

Springs Tribes to any federally recognized Indian tribe having reserved
water rights claims (Exhibit A).

043 MARTHA PAGEL, Department of Water Resources: Explains the
background and need for HB 2109 (Exhibit B).

084 REED MARBUT, Department of Water Resources: I have worked
on the technical aspects of putting the negotiations together. I am
open for

any questions you have.

097 CHAIR NORRIS: Do you have an executive summary version of the

status with Warm Springs?

100 MARBUT: Yes, I can quickly summarize that for you. That statute was passed in 1987. It permitted the tribes to prepare internally for the

negotiations. That took about two years. These negotiations take place between the tribe, the United States and the State of Oregon. The tribe then came to the state and provided a draft copy of their recommendations. The state determined the mechanics of the negotiations. Five negotiation sessions were held. The tribe presented a proposed settlement agreement and we are currently working on a state amendment to that amendment.

126 CHAIR NORRIS: If the proposal from the tribes was adopted, would it be an encroachment on present water users?

130 MARBUT: It is not a simple answer. There is subordinate language in the tribal settlement that would ensure state rights being protected.

We're not sure this language expresses a clear intent to protect existing state rights.

147 PAGEL: The legal authority for tribal rights and federal government reserved claims do have the potential to encroach on existing state

rights.

157 MARBUT: That's true, the reserved rights have a treaty priority date. These senior rights have impacted existing state water rights throughout the west.

163 REP. VanLEEuwEN: What amounts are we considering? How many federally recognized tribes are there?

172 MARBUT: We have been working with several tribes concerning their water rights. There are a number of tribes in Oregon that hold some kind of

allocation. No one has come forward with a written claim. There could be about six or eight or ten tribes who may come to us to discuss rights.

200 REP. VanLEEuwEN: We need to know the magnitude of this issue.

209 CHAIR NORRIS: Can you summarize the experience of other states with litigation?

210 MARBUT: Oregon has two patterns of experience in litigation revolving around the Klamath. The Bighorn litigation in Wyoming has been ongoing

for a long time. It has cost the state of Wyoming between \$50 and \$100 million. It resulted in a 107,000 acre reserved right for the tribe.

249 CHAIR NORRIS: Can you give us a short written summary of cases going on?

255 REP. HOSTICKA: What is the conclusion of the negotiation?

260 MARBUT: A settlement agreement between the state, the tribes and the federal government. Once that is signed by all parties, it will be

submitted to a court and approved.

278 REP. HOSTICKA: What is our legal posture so we don't have to continue to negotiate?

286 MARBUT: A court result would be binding because of the McCarran Amendment adopted in 1952.

305 REP. HOSTICKA: Do the tribes have to waive any sovereignty?

310 MARBUT: No, because the sovereign immunity is created by a federal sovereign immunity. The tribes have a full right to argue their case

and can request going to a federal court instead of a state court.

321 REP. MARKHAM: What is a "federal reserved water right claim"?

330 MARBUT: The concept is based on a case that held that where the Federal Government set aside an area of land out of the public domain, it also

implied to set aside an amount of water sufficient to provide water for that area.

380 ANTONE MINTHORN, Confederated Umatilla Tribes: Testifies in favor of HB 2109. Summarizes testimony in Exhibit C.

TAPE 27, SIDE A

122 REP. HOSTICKA: Who pays for your litigation?

126 DAN HESTER, Tribal Attorney, Umatilla Tribe: The federal government.

134 CHAIR NORRIS: You objected to participating in filing a registration statement for the water rights held. What was your objection?

142 HESTER: The regulations were in violation of the McCarran Amendment since they were not tied to a formal adjudication of water rights.

162 CHAIR NORRIS: Have you given thought to the impact of you claiming these water rights on other water users?

170 HESTER: The tribe has water rights going back to 1855 and so could have wreaked havoc to users in the Umatilla Basin if they had gone to court

to have treaty rights respected. Instead, they instigated the Umatilla Basin Project which has initiated negotiations with water rights users throughout the basin and has resulted in a project that is returning water to the river for fish, and ensured that the water districts down at the west end of the basin continue to get the water they need. It's not in their interest to collect their water rights and devastate the surrounding community because that's where their economy is based. Negotiation is much better than a court solution.

213 MINTHORN: The tribe would take the same approach as they have taken with the Umatilla Basin Project.

219 CHAIR NORRIS: My experience would suggest that, but I wanted to made it clear.

229 JAN BOETTCHER, Oregon Water Resources Congress: Expresses support for HB 2109 as it's a much more viable and less expensive process than going through the courts.

269 KIP LOMBARD, Oregon Water Resources Congress: States support for HB 2109.

279 RICHARD KOSESAN, Water for Life: We would urge consideration of the following points: 1. Look at the current litigation pending in the 9th circuit court

which could impact the way future rights are considered. 2. "Appropriate court" is ill-defined and should be clarified. 3. Notification of impacted water permit certificate holders should be required following the agreements.

336 CHAIR NORRIS: Do you have specific language you want considered amending this bill?

341 KOSESAN: We could promptly.

346 REP. HOSTICKA: Why do we need separate notice at the conclusion of the agreement?

352 KOSESAN: That's what is there now.

366 CHAIR NORRIS: I would think that one of the progress reports required could be the final report. That is subject to interpretation.

400 CHAIR NORRIS: Are there other tribes interested in this?

410 MINTHORN: We have not heard from other tribes.

440 CHAIR NORRIS: Closes the public hearing on HB 2109.

TAPE 36, SIDE B

WORK SESSION ON 2340

020 CATHERINE FITCH: Explains HB 2340 which addresses voting rights, renaming Water Resources Congress, enables districts to provide water

for domestic and municipal purposes, and allows districts to apportion water and maintain facilities on member properties. Explains the amendments contained in Exhibit D.

040 Page 2a on the hand engrossed amendment contains the disagreement on the measure. It has to do with what the Water Resources Department will

receive in terms of a conservation plan when filing a reallocation application. An irrigation district may furnish water for lands not included within the district in certain circumstances. The Water

Resources Department has suggested on page 2a that this would be allowed when a conservation plan approved by the Water Resources Commission has been submitted along with it.

060 KIP LOMBARD, Oregon Water Resources Congress: We are a couple years away from having the rules in place for the development of water

conservation plans. We suggest that since these additional uses will be small, that these conservation plans are overly burdensome. The districts are required to develop water conservation plans and so that will happen eventually.

087 CHAIR NORRIS: Can anyone from the Department add anything to this?

091 BEV HAYES, Department of Water Resources: The subcommittee asked us if we could give examples of what would be in a conservation plan. Doug

Parrow, our conservation manager, is prepared to give these examples.

099 BOETTCHER: Some districts are more than ten years away from this process.

134 LOMBARD: Clarifies how the amendment on page 2a would read.

135 CHAIR NORRIS: The only issue of contention is the provision that a conservation plan must be approved and submitted.

138 DOUG PARROW, Conservation Program Manager at the Department of Water Resources: Distributed a copy of the hearing draft of the

Water

Management Planning Rules (Exhibit E). These are being revised. A conservation plan would include a description of the water system, and an assessment of how much water was being used, where it was going and where it was being lost. An assessment of problems and solutions in the district would need to be made.

175 CHAIR NORRIS: The whole range of conservation plans won't be available for quite some time, correct?

177 PARROW: That's correct.

188 CHAIR NORRIS: Do you think it would be reasonable for a district to apply for a water right or transfer if they had at least a summary of a conservation plan?

196 LOMBARD: We're just starting to get the rules for developing a conservation plan. It will be at least a couple of years before

districts can begin to put a conservation plan together. The Department could attach conditions on permits for those who apply for a water right under these authorizations, either the district or the end user.

237 REP. JOSI: What is your response to Kip's replies that there are adequate measures under current law to require conservation practices?

251 BEV HAYES, Department of Water Resources: Yes, we can condition permits to require conservation plans. If the conservation plan is the holdup

on the bill, we can take it out.

279 REP. JOSI: What is your position on the amendment?

280 BOETTCHER: We wanted to ensure that these expanded water uses would be done efficiently.

286 REP. JOSI: Do you feel comfortable that there are adequate measures that would require conservation?

292 HAYES: Yes, we can do all of that.

298 REP. JOSI: You can require piping or whatever is needed, in the permit division, which would insure that proper conservation usage was in

place.

302 JOHN BORDEN, Department of Water Resources: Explains process of requiring a conservation measure be in place before an industrial use of water takes place.

337 FITCH: Continues to explain amendments to HB 2340.

355 LOMBARD: The statutory reference in the amendment proposed by Water Resources was inclusive of transfer provisions that were authorized by

HB 2191 passed in 1991. That legislation does not authorize a district to transfer water to new lands other than agricultural lands for irrigation purposes. This would have broadened our authority.

382 Under the conservation statute, if an individual conserves water, a portion will go instream. The portion the conserver can use can be used for uses other than what was authorized under the water users permit.

TAPE 37, SIDE B

020 REP. HOSTICKA: If the irrigation district applies for a water right, what kind of right is that?

021 LOMBARD: They have categories for industrial or municipal uses.

023 REP. HOSTICKA: That would be in the name of the irrigation district?

024 LOMBARD: Yes.

028 REP. HOSTICKA: If you transfer a water right, does that mean that the irrigation district may transfer a water right?

029 LOMBARD: The irrigation district may transfer subject to regular transfer laws.

033 REP. HOSTICKA: The Supreme Court said proportional voting was okay. One of the reasons it said it was okay was because the districts do not own, buy, or sell water, nor do they control the use of the water they

have delivered. I don't think you should have it both ways - to have the ability to own, buy and sell water and have proportional voting.

048 LOMBARD: In Oregon, water rights are issued in the name of the district, often, and Oregon courts have said the district owns the title of the water right but holds the water in trust for the landowner.

063 REP. HOSTICKA: But then you're saying you can transfer it.

066 LOMBARD: Correct.

068 REP. HOSTICKA: My feeling is that if we pass this bill we open ourselves up to potential litigation.

079 CHAIR NORRIS: The only entity that owns the water is the public. The thing you own is the permit to use the water.

089 LOMBARD: This language (the insert in page 2-A) is not adding anything new to the law.

105 REP. HOSTICKA: You're expanding the powers of the irrigation district and at the same time you're instituting a weighted voting scheme. I

don't feel you can do both.

140 REP. JOSI: What happens if we have the expanded powers of the irrigation district and the weighted voting systems?

143 REP. HOSTICKA: If the district makes broad decisions, I think they should be governed by the principle of one man-one vote.

162 FITCH: Continues explanation on page 2c of the amendments.

178 CHAIR NORRIS: Providing the landowner the opportunity to perform maintenance and repair themselves would impose some potential

responsibilities on the board of directors of the districts. Would that be a problem with the Water Congress?

180 LOMBARD: Those were our amendments in response to concerns by Farm Bureau.

186 FITCH: Continues to Section 4.

207 CHAIR NORRIS: Is this the incorporation of other bills?

211 FITCH: Yes.

212 Continues in Section 5.

227 REP. REPINE: Is this the first time we've seen the amendments in Section 4d, subparagraph 3?

236 CHAIR NORRIS: Yes. 238 LOMBARD: This is correct. This is to ease concerns that the district may require the most expensive type of measuring device. To ease this

concern, we added this section to require the district to notify and work with the user to come up with the most workable solution.

270 FITCH: Section 5, page 3c is the text of HB 2343 which is concerning the recovery of lien costs.

279 CHAIR NORRIS: Any further questions?

283 REP. VanLEEuwEN: The new language increases the rate of interest from 1 to 1-1/2%?

290 LOMBARD: Yes.

292 REP. VanLEEuwEN: What does line 15 of page 3c require?

294 LOMBARD: We have provided that the user would need to pay recording costs of recording the lien and the satisfaction of lien.

308 A typo error is on page 2, delete "the board of" in second half of line 5.

332 MOTION: REP. REPINE: Moves to adopt amendments on 2a which reads as Water Resources Department Option to insert "apply for a water right, or transfer a water right under ORS 540.520 and 540.530, or convey

water on behalf of a person or entity who holds a water right,"

348 REP. HOSTICKA: Would like the committee to consider to have the language read, starting on page 2 "An irrigation district may convey

water on behalf of a person or entity who holds a water right for domestic, municipal or industrial purposes" striking the first part of the section dealing with applying for a water right or transferring a water right. And then for the rest of that section change the word "furnish" to "convey".

417 CHAIR NORRIS: The motion that we originally had from Rep. Repine was that we adopt the amendment which would read " an irrigation district

may apply for a water right or transfer a water right under ORS 540 .520 and 540.530, or convey water on behalf of a person or entity who holds a water right,".

423 MOTION: REP. HOSTICKA: Moves to amend Rep. Repine's motion by striking the words "apply for a water right, or transfer a water

right under ORS 540.520 and 540.530 and to further amend that section by changing the word "furnish" to "convey" as it appears on line 33, line 35 and line 36 using the proper tenses and we go through here.

TAPE 38 SIDE B

011 REP. REPINE: I would ask the Water Resources Congress to comment on the amendments.

015 LOMBARD: We would prefer not to limit it in this way because we are asked for small amounts of water which would be prohibited under Rep.

Hosticka's amendment. 037 REP. HOSTICKA: The user of the water should have the right to use the water and then the district would be conveying the water for that use.

I don't want to open the door to a whole lot of other things. They would still have the right to use the water and the district has power to convey the water to them.

049 CHAIR NORRIS: The ability to buy or transfer a water right would be subject to the Water Resource Department action and condition, wouldn't it?

054 LOMBARD: That's correct regarding applying for the water right. The conditions on transferring the right wouldn't be subject to action to

the Water Resource Department.

058 CHAIR NORRIS: Wouldn't the transfer be subject to the Department approval?

059 LOMBARD: Yes, it would.

060 VOTE: In a roll call vote for Rep. Hosticka's motion, REPS. HOSTICKA AND JOSI vote AYE. REPS. MARKHAM, REPINE, VanLEEUEWEN, AND CHAIR

NORRIS vote NAY. REPS. BAUM AND PETERSON ARE EXCUSED.

072 CHAIR NORRIS: The motion has FAILED.

073 We will now turn to the original motion which would be the adoption on the language on page 2a.

077 VOTE: In a roll call vote REPS. JOSI, MARKHAM, REPINE, VanLEEUEWEN AND CHAIR NORRIS vote AYE, REP. HOSTICKA votes NAY. REP. HOSTICKA

later changes his vote to AYE. REPS. BAUM AND PETERSON ARE EXCUSED.

080 REP. HOSTICKA: Changes vote to AYE.

104 REP. REPINE: On page 2, Mr. Lombard pointed out a clerical error. Do we need to make a motion to correct this or will that automatically be

corrected?

107 CHAIR NORRIS: That will be included in all the amendments.

110 MOTION: REP. REPINE: Moves the adoption of amendments to HB 2340 as appearing in the hand-engrossed proposed amendments, dated 3/8/93,

submitted by the Oregon Farm Bureau and the Oregon Water Resource Congress combining HB 2340, HB 2342 and HB 2343 into one bill as amended.

117 CHAIR NORRIS: Rep. Repine has moved that we adopt the balance of the amendments that have been discussed today. Is there any further

discussion?

120 VOTE: In a roll call vote, REPS. JOSI, MARKHAM, REPINE, VanLEEUEWEN AND CHAIR NORRIS vote AYE. REP. HOSTICKA votes NAY. REPS. BAUM AND

PETERSON ARE EXCUSED.

127 CHAIR NORRIS: The amendments are ADOPTED.

131 MOTION: REP. REPINE: Moves HB 2340 as amended be sent to the full committee with a DO PASS recommendation.

133 CHAIR NORRIS: Repeats the motion. Is there any discussion?

134 REP. HOSTICKA: I just want to reiterate that I will vote "no" on this now because I think there are lots of pieces of this bill that are good, but I don't think all the pieces hold together, and the total is less

than the sum of its parts.

142 CHAIR NORRIS: Your objections are noticed and respected.

143 VOTE: In a roll call vote, REPS. JOSI, MARKHAM, REPINE, VanLEEuwEN AND CHAIR NORRIS vote AYE. REP. HOSTICKA votes NAY. REPS. BAUM AND

PETERSON ARE EXCUSED.

127 CHAIR NORRIS: HB 2340, as amended, has been approved for referral to the full committee on Natural Resources with a DO PASS recommendation.

We will address the issue later of who will carry the bill.

151 CHAIR NORRIS: Meeting adjourned at 3:10.

Submitted by:

Reviewed by:

Sue Nichol
Administrator

Catherine Fitch Clerk

EXHIBIT LOG:

A - HB 2109 - Preliminary Staff Measure Summary - 1 page B
- HB 2109 - Testimony - Martha Pagel - 2 pages C - HB
2109 - Testimony - Antone Minthorn - 7 pages D - HB 2340 -
Amendments - Staff - 11 pages E - HB 2340 - Water Management
Planning Rules Draft - Doug Parrow - 12 pages