

SENATE COMMITTEE ON WATER POLICY

March 16, 1993      Hearing Room 137 3:00 p.m.      Tapes 20 - 22

MEMBERS PRESENT: Sen. Bob Kintigh, Chair Sen. Wes Cooley

Sen. Frank Roberts Sen. Tricia Smith

MEMBERS EXCUSED:              Sen. Bill Dwyer

STAFF PRESENT:              Lisa Zavala, Administrator Pamella Andersen,  
Committee Clerk

MEASURES CONSIDERED:      Public      Hearing:      Backlog      of      Unprocessed  
Water Right Applications

[--- 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 ---]

(TAPE 19 was defective and therefore, discarded.)

TAPE 20, SIDE A

004      CHAIR KINTIGH:      Calls the meeting to order at 3:08 p.m. -  
Senators Smith and Roberts will be arriving later, and Senator Dwyer

is excused. -      Senators Kintigh and Cooley will begin the meeting as a  
subcommittee.

PUBLIC HEARING ON THE      DEPARTMENT OF WATER RESOURCES      BACKLOG OF WATER  
RIGHT APPLICATIONS

WITNESSES:              Representative Lonnie Roberts, House District 21 Jan  
Boettcher, Water Resources Congress Jim Myron, Oregon Trout Commissioner  
Gordon Ross, Coos County Barry Bushue Ken Iverson Art and Judy Ebert  
Theresa Dillard-Lund, William Dillard Nursery Lewis Moller David Moon,  
Water for Life Anthony Wurdinger Scott Ashcom, Oregon Association of  
Nurserymen, Oregon Berry Commissions' Legislative Committee Elizabeth  
Robbins Steve Schneider, Oregon Ground Water Association Ted Pulliam,  
Oregon Ground Water Association James Butsch, Forbey Farms Morris Van  
Meter, Van Meter and Son Nursery John Annen, Oregon Hop Growers  
Association Jeffery Mershon James Carlson, Carlson Nursery Manfred  
Schosnig

015      REP. LONNIE ROBERTS: I have friends who are nurserymen and are  
pressed to get water for their stock. - Oregon is only behind  
California and Florida in nursery stock

production. - It is one of the most important industries in the state.  
- We don't want to endanger that stock. - A resolution needs to be  
found to the backlog to preclude damage to

this industry.

SEN. COOLEY: Do you have any suggestions or opinions on why we are in arrears?

REP. ROBERTS: The department will say they are shorthanded. - If I were on the House committee, I would ask why they are so behind and can only process 50 or 60 applications a year.

044 SEN. COOLEY: How far back do these applications go in terms of time lapse? We talk about possible budget restraints from this time forth,

but we haven't looked at the applications prior to this time.

REP. ROBERTS: I am not sure how much of their budget is fee driven. - A question we must ask is whether the fees should be readjusted to get action.

063 MARTHA PAGEL: Introduces Reed Marbet, the new administrator of the Water Rights Adjudication Division. - We fully recognize the backlog is our greatest problem with which to

contend. - I have been clear with staff and others this has to be one of our top priorities, and we must make more progress than we have so far. 081 - The effects of what we have done are not yet felt by the public. - We have to maintain compliance with federal endangered species acts,

etc. - We expect to be able to deliver technical reviews on 2500

applications by the end of 1993.

099 REED MARBET: When we approached the Emergency Board last summer for additional help, we had about 2700 applications. - Every time there is a drought we get a flood of applications. - Those using water without water rights have their access shut off. - The backlog has several categories of applications. 114 - Notes the categories. - All these types need to be sorted and treated differently. - We have to ensure we don't grant a right that impacts someone else,

or depletes a stream. - All those determinations must be made before granting an application. - Elaborates on how the department is using its labor force to

accomplish the task.

MARBET: We have broken the state up into regions, each with a caseworker that becomes familiar with their region. - Gives example of the processing of an application for use of stored

water. - We trust we will be producing a flood of permits soon. - We do have built-in time constraints. 164 - References chart depicting their process. - Oregon water law is still evolving.

CHAIR KINTIGH: Have the in-stream water rights made a lot of work for

you?

MARBET: No, we are working with the Department of Fish and Wildlife to get the proper documentation into the application files for the eventual fact finding. - The concept is unusual as the law has only been on the books since

1987. - We have not allocated a lot of staff time to that because we are in

the beginning stages of acquiring information.

202 SEN. COOLEY: how far back did the pending applications go when you approached the Emergency Board in the summer of 1992?

MARBET: The greatest number are within the last couple of years. - The remainder scatter back some 10 years.

SEN. COOLEY: We have some applications pending from 10 years ago? - We are holding their money without giving them an answer?

MARBET: Yes, we do. It would be easy to say no.

SEN. COOLEY: If you tell them nothing they have no recourse and cannot appeal. They are hanging in a vacuum.

232 MARBET: We are meeting and communicating with these applicants and they know where they are headed. They would rather work with us than receive a "no."

SEN. COOLEY: Are these applications being judged on the statutes of 10 years ago, or on today's statutes?

244 MARBET: An application is a placeholder and grants a priority date, but no vestedness. The law in effect at the time of processing is the

statute used unless the application is grandfathered in the law.

SEN. COOLEY: In concept, are we saying as the Legislature changes the statute, there is a possibility of the 3800 pending applications, none might qualify?

MARBET: Very few applications are affected by statute changes. - When the scenic waterway law passed, the courts required those

applications be held until the flows were set. - Very few applications will be taken out of business because of the

changes in the law.

SEN. COOLEY: There are 845 groundwater applications pending right now.

Those will go through the process in the next few months? MARBET: If the application is determined to be using alluvial surface

waters, the application will have to be reviewed as though it were removing water from the stream. Those not related to surface water can be moved upon quickly.

SEN. COOLEY: Do you have a guideline for how far a well must be from a stream to not be considered part of the flow?

299 MARBET: Yes, those are listed in Division 9. - Wells that need further study are flagged.

CHAIR KINTIGH: Do you have a lot of appeals or protests from certain groups making more work and therefore delaying the process further?

MARBET: The standards provide for individuals to question the granting of a water right. - Yes, we receive a substantial number. - They are very complex legally and contribute a great deal to our workload. - We must review every one and either accept or reject it.

326 PAGEL: We perform our technical review, which after distribution triggers this opportunity for protest. - We have control over the process until this time.

CHAIR KINTIGH: After the appeal is resolved, is it fairly smooth going to complete the application process?

340 MARBET: Yes. - In June, when the Commission adopted the new rules, they determined the process flow that would be used. - Reviews specifics of the process. - A 60-day objection period is available for response from the public

and for the applicant to object to the findings of the department. - If there are no objections, the process moves very quickly. - The ultimate responsibility of injury to the public interest is on

the director and commission. - There are procedural rights to protest our findings anywhere along

the way.

SEN. ROBERTS: Joins the meeting.

SEN. COOLEY: How many permits have you issued in the last 30 days?

MARBET: None. - In the last 180 days we have issued about 100. - These were in the process before review delays were built into the

process. - Notes the large number of objections to applications. - We have sent out about 300 technical reviews.

SEN. COOLEY: In the last year, how many have been issued?

MARBET: About 100 were issued and they all had objections. - We are in court over the last two major applications granted.

438 CHAIR KINTIGH: As Senator Roberts has arrived, we will convene as a full committee at this time.

449 JIM MYRON: (introduces EXHIBIT A) - Notes issues they believe have exacerbated the backlog problem. - the in-stream water act of 1987; - civil penalty authority granted the department in 1989; - pressure from groups such as WaterWatch to address the issue of illegal use;

TAPE 21, SIDE A

MYRON: Continues list of items impacting the backlog. - the statewide allocation policy adopted in 1992; - the continuing drought and related enforcement activity; - Water for Life lawsuit. - Offers possible solutions in the closing remarks of the written

testimony. - Believes the department has the staff and process to deal with the

backlog now. - The department is doing an admirable job in dealing with the issues.

SEN. COOLEY: I read your solutions to the problems. Do you know how much water in Oregon is being allocated from the total amount for diversions?

MYRON: I have heard about 10 percent.

SEN. COOLEY: Let's say 6 percent. That means at least 90% remains. 037 - So we are not bleeding the supply to death.

MYRON: Our opinions differ. - That figure is on a year-round basis. - We need to review the amount of water diverted during the summer months when most basins are over-appropriated.

COMMISSIONER GORDON ROSS: I represent constituents that are farmers and fishermen. - We have a cranberry culture that demands a lot of water. - Ninety percent of cranberries are grown in the east and land is fully utilized there. - We have land that is good for nothing but growing gorse ??, but it is also prime cranberry land. - Putting cranberries into production is a capital intensive endeavor. - The industry is awaiting the granting of surface water rights before

they can go into production. - Groundwater does not exist in Coos County. - Cranberries are harvested by water and water is needed for

temperature control. - Water rights are granted according to the pump size you intend to

use, even if that amount of water is only used one day a year.

072 - Separate water rights are needed for differing uses. - It is difficult to translate these individual problems into Oregon

water law. - Recommends each community develop coordinated resource management

plans that will address the conflicts. - In-stream water rights allows one to apply for half the average

annual flow. - This amount is 10 to 100 times the amount that will flow in the

summer months. 100 - People have flooded the department with applications to prevent others from obtaining the full appropriation on their particular

stream. - Notes discrepancies in watering livestock. - Our county is seeking to develop a conflict resolution committee to

resolve such before application is made to the department.

121 SEN. COOLEY: Have you had any water permits issued for this industry in your county in the last year?

ROSS: I don't know. Many are pending. - Some have been appealed by the Department of Fish and Wildlife.

138 SCOTT ASHCOM: (introduces EXHIBITS B, C and D) I have been working with individual irrigators and these associations for 15 years. - I disagree with Jim Myron that one of the reasons for the backlog is

illegal users are now applying for water rights. - Requests that letters from Haskins and Co. Inc., and Hemen-Way Farms

be entered into the record. (These are Exhibits D and C,

respectively.) - Relates his opinion for the cause of the backlog. - The department received an Attorney General opinion that they could

retroactively apply rules to applications. - Following this, major rules were adopted by the department. - This caused the successive re-review of applications.

SEN. SMITH: Joins the meeting.

CHAIR KINTIGH: The department earlier reported they do not retroactively apply rules.

210 ASHCOM: Senator Cooley was speaking of retroactive application of statutes, perhaps inadvertently referencing them as rules. Mr. Marbet

responded the A.G. had advised them they can process the applications

according to the rules in place at the time of processing. - The department director stated this before the House Ways and Means

Natural Resource Subcommittee a couple of weeks ago. The department

processes applications under the rules that exist at the time of processing.

SEN. SMITH: Do your clients have any objections to the rules that were adopted, or is the objection that the time was taken to re-review applications when new rules were adopted?

240 ASHCOM: Clients represented by Ted Hughes did not oppose any of the rules adopted by the Commission in the last three to five years. - Other agricultural interest groups may have. - The testimony I give today is on behalf of the Berry Commission and

the Nurserymen. 262 KEN IVERSON: My farm operation is in an area zoned exclusive farm use. - Without use of water, my land is not productive as agriculture. - We have three to four applications pending, some from 1990-91. - Our problem is with the current application we filed last spring. - Gives details of this application, their conservation intentions and

the process through which they went. - We assumed the department would support this type of project. - The Commission adopted a rule that they would process on a time-in

time-out basis which may mean a three-year wait for our project. - Other straightforward applications should be grouped according to

difficulty. - The department told me if I would support funding for more water

right examiners, they would be able to process my application more quickly.

346 BARRY BUSHUE: We applied for our current permit in 1961. - In 1990, we applied for a new permit for groundwater based on

discussions with the department and rules in place at that time. - The letter accompanying the draft permit issued to us in 1991,

indicated a mandatory 30-day waiting period. - If approved under current rules, the right will be on a five-year

renewal basis, which doesn't work for agricultural planning. - To operate a farm such as ours requires long term planning and an

enormous capital investment. - The uncertainty of water has made planning and expansion impossible. - We understand our application is being re-reviewed because of a

single letter from WaterWatch. - Can anyone protest a permit even though they don't live in the area

and have no economic stake in the outcome? - Is it appropriate that we be held hostage by a process controlled by

administrative rules without legislative review? - Water is the one resource that is absolutely crucial to our well

being. - We urge you to consider having all applications reviewed under rules

in place at the time of application.

438 JUDY EBERT: We have 13 acres, 5 acres of which are in blueberries. - These were planted 5 years ago. - We discovered last year that we had to have water rights for

irrigation. - If we have to wait two to three years for water, our berries will

die. - This our only source of income.

TAPE 20, SIDE B

SEN. SMITH: At the time you planted your berries you were unaware you needed a water right?

EBERT: That is correct. We discovered this when we wanted another well dug so we could expand. - We were then told we needed water rights.

ART EBERT: The land has been used for agricultural purposes using the existing well since 1902.

THERESA DILLARD-LUND: Represents family company in the nursery business for 33 years. - A healthy business must expand annually to offset increases in

business costs. - Due to the extended summer conditions of 1991, we chose to dig a

well. - Notes the specific circumstances surrounding their water right

application and the department's response. 059 - Notes the information provided them by the department and the water rights examiner. - They received verbal approval to drill their well on two different

occasions. - The cost of drilling the well was \$70,000. - We were not told until this time that there was a backlog of

applications. - We were told to resubmit our application and received a letter

telling us not to use the well. - We will lose \$1,000,000 in current crop and liners produced for the

next five years' crops. - We were told we could be fined \$1000 per day, if we use this well. 090 - Presently, we are setting up a meeting with Water Resources staff. - If our technical review is done this week, we will still have to wait the 60-day protest period.

SEN. SMITH: (To Martha Pagel) I am surprised the department would tell



a farmer to drill a well. Why would the department do that if there was question?

MARBET: The law is clear on rights without permits. No one on my staff made that statement. It is legal to drill a well before you have a water right; it is illegal to use the water.

SEN. SMITH: I would assume that businesses would be conservative in choosing to spend \$70,000 on a well they might not be able to use.

MARBET: It is my understanding that the crop for which this water will be used, has been in the process for many years. - The problem is the water is in a groundwater-limited area where water is being mined. - It is basalt water, the level of which has dropped in some places 41

feet in the last several years. - Recharge of those aquifers is not keeping up with the use. 155 - Starting next year, in the Butter Creek area of the Umatilla area, we will be curtailing use of water rights that have existed for 20 years because potable water is being tapped. - We hope to work out a solution to allow the Dillard's water for a few years. - On the surface, it would be simple just to deny the application.

179 SEN. SMITH: My concern is the understanding the applicant has when they make application and throughout the process. If the department is

telling people there is no problem and they can proceed with their plans, that is not appropriate.

189 PAGEL: I agree. I don't know who told the Dillard's they could proceed with drilling their well. - We don't want or expect that to happen again. - In the past, there was a reasonable expectation that a permit would

be issued at some point. - We have gone through a process of clarifying procedure internally and with field staff.

215 JAN BOETTCHER: (introduces EXHIBIT E) We don't think that throwing money and resources at the backlog problem is the ultimate answer. - References the flow chart on the application process. - The 60-day objection period generates a lot of lost time. - Public concerns do not need to be addressed twice. - Notes use of ORS 537.170 can allow streamlining of applications that

fall into a particular category. - An additional concern we have is transfers. - Central Oregon irrigation districts had a backlog of 1800 pending

transfers, representing 20 years of backlog. - We are prepared to update those records at the department level.

They represent 415,000 acres of water rights. - This record cost

millions of dollars to develop, and we fear that

when we submit it in July, it will not get attention. - We are concerned about the retroactivity applied to rulemaking. - Some irrigation districts have old water rights that have not been

proven up. - There is discussion about handling these water rights differently

than usual. - HB 3357 and 3358 attempt to rectify this situation.

277 LEWIS MOLLER: (introduces EXHIBIT F) Offers testimony on the impact of the backlog on commercial, industrial and residential property

development. - Notes his development project that will be held hostage. - Mentions the cost to him will be \$4000 per month. - His main concern is the processing of water right applications in a

timely manner. - The problem is a shortage of examiners to review the applications and an illogical method used to process those applications. 328 - Recommends the department categorize the applications and process those separately. - Notes the department's mandate to pass judgement, which is not being

met. - The department should be able to charge a review fee representative

of each type of application. The current fee does not reflect the

cost of developing a well, or the benefit it provides communities or industrial users. 345 - Developers would not have a problem paying a high application fee if it would guarantee completion of the process in a timely manner. - Since HB 2145 will not raise fees high enough to fully fund the

examination process and solve the backlog, it should be amended to

require higher fees. - The appeal criteria needs to be tightened and the period shortened. - A burden of proof should be placed on those wishing to make an appeal. - The appeal period should be shortened to 30 days, at least. - The land use appeal period is 10 days. 406 - Notes the information offered him by the department. References the department's publication. This is a contract that could be taken to

a lawyer.

424 DAVID MOON: The problem is not simply one of delay. - The backlog and the new rules spell rejection for many of these

folks. - We feel this should be the department's highest priority. - Retroactive application of rules adds to the difficulty. - Notes the 80 percent allocation rule and the Willamette Basin Plan

are of particular concern.

TAPE 21, SIDE B

- Is it reasonable to retroactively apply the rules, particularly in

light of the backlog? - Water for Life vehemently objected to some of these rules. - Part of the Willamette Basin Plan rules will no longer allow

irrigation as a new use in many of the main tributaries and main stem of the Willamette River. - The department wants people to buy water from the Bureau of

Reclamation. - We should be able to move those forward where they are buying water. - I complained about the first-in first-out problem, as there are some

areas where grouping would be helpful. - You have to look at these in concert: the backlog and the

retroactive application of new rules. - The backlog will disappear when the department finds with the 80

percent exceedance rule there is no water available.

060 ANTHONY WURDINGER: My brother and I operate a farm in northern Marion/Clackamas County. - We negotiated to pick up an additional farm as part of our expansion

program in 1989. - Notes specifics on researching water rights, etc. with the

department. - References letters received from the department. - Notes effect of the length of wait on his application upon his

productivity. - I have acquired the farm and cannot develop it in order to make the

payments. - Believes the application of rules on a retroactive basis is unfair. - Suggests retroactive legislation to adopted to undue some of the

rules.

SEN. COOLEY: Have you contacted the department recently?

WURDINGER: I have received a total of three letters from them. - My last correspondence was received in early 1992.

105 ELIZABETH ROBBINS: I have been growing blueberries using a surface water right out of a pond. - To meet continuing irrigation needs I applied for a permit to drill a well three years ago. - When I received the permit to drill, I assumed that included the

water right. - I spent over \$25,000 developing that system, after which I discovered I needed a water right to use it. - I could quadruple my production if I had water. - It appears the department has determined Oregon doesn't have enough

water and this is their way to keep from issuing more permits. - The permit process used to be pretty automatic. - I don't think this is a procedural problem, but a reaction to

environmental facts that have yet to be explained.

140 STEVE SCHNEIDER: (introduces EXHIBIT G) Reviews tables he submitted as Exhibit G, showing monthly water right application activity reports. - Permits issued fluctuated from 24 to 109 per month until mid 1992,

when numbers dropped dramatically. - At the present rate, we are looking at a 60-year backlog. 182 - Rumors of the cause of backlog include land use control, retroactive increase in fees and the impact of the June 1992 rules that changed

the processing of applications. - If the Commission created the backlog by adoption of those rules,

they should be held accountable. - They should be directed to adopt emergency rules that would repeal

the 1992 rules, reinstate the previous rules and create a temporary use permit for all groundwater applications pending more than 90

days. 210 - If the Governor declares another drought, uses could proceed without permits. - Notes short term solutions need to be addressed. - Long term solutions need to include additional checks and balances

into the water management system. - Some checks and balances could include: changes in the composition

of the Commission, mandatory attendance at hearings by Commissioners, landowner notification of potential takings of water, proposed disclosure statement attached to property alerting landowners of their limited rights and obligations.

235 TED PULLIAM: Today, we are concerned about how to irrigate our crops tomorrow. How do we survive the next "so many" days while awaiting the

water right permit? - References ORS 536.720, emergency drought relief, and recommends they urge the Governor to declare a drought, today.

ADMIN. ZAVALA: We are still under a declared drought.

PULLIAM: We can use this as the avenue to release us from the immediate problem until legislation can be passed.

269 JAMES BUTSCH: I have several permits pending. - We need an emphasis on water development in this state. - A lot of water flows past us in our streams. Perhaps reservoirs

could be built. - We need some easement in regulation areas.

287 MORRIS VAN METER: On the applications we submitted for two wells on two separate properties, we had to hire a water engineer to do the

groundwork. - We feel that is subsidizing the Water Commission for these

applications. - Most of our land is in small plots so we could use water from one

well to the other except that you can't spread water around in our state.

314 JOHN ANNEN: The Water Resources Department has different forms for different types of water. - We have been trying to rely on stream flows but have been forced to

drill a well because the flows have become so erratic. - Farmers won't be wasting water, as it is costly.

337 JEFF MERSHON: I grow blueberries. - References Water Resources Department publication, printed in October 1989. - No one indicated at any time that the time required for application

processing would vary from the indicated 90 days.

- When the 90 days were expired, I contacted the department and was finally told over the telephone of the backlog.

362 JAMES CARLSON: We have had an application pending since July 1992. - We would like to see it approved as quickly as possible so we can

remain competitive in the nursery industry throughout the country.

379 MANFRED SCHOSNIG: Last summer I learned the land which I use to operate 1/4 of my business was being sold to a development. - I sought to purchase new land, placing earnest money down on a

parcel. - I called the department to determine if the land was in a critical

groundwater area. They said no, it wasn't. - I purchased the property, intending to drill a well this spring. - In the past we have drilled the well and then applied for the water

right permit, using the water in the meantime. - Since this isn't in a restricted groundwater area, why can't we get a temporary permit so we can begin to use the well?

421 SEN. SMITH: (To Martha Pagel) What is the problem with sifting out the applications that are not a problem and won't require a lot of work?

MARBET: That has been going on steadily. We have broken out the applications into categories, moving forward on those that are not as complicated.

SEN. SMITH: So those people should not anticipate a two-year delay on their applications?

MARBET: That is correct. In a few cases, where there are land use

controversies, there can be problems.

TAPE, 22, SIDE A

PAGEL: I don't want it to appear that we can issue a large number of permits in the next 90 days. - We will seek to further refine our system based on the suggestions we have heard today. - We expect to see some results before the session is over.

032 CHAIR KINTIGH: Closed the hearing. - Adjourns the meeting at 5:07 p.m.

Submitted by,

Reviewed by,

Pamella Andersen

Lisa Zavala Clerk  
Administrator

EXHIBIT LOG:

A Testimony on WRD's Application Backlog, Jim Myron, 4 pages B  
Testimony on WRD's Application Backlog, Scott Ashcom, 1 page C Testimony  
on WRD's Application Backlog, Hemen-Way Farms, Scott Ashcom, 1 page D  
Testimony on WRD's Application Backlog, Haskins & Co. Inc.,  
Scott Ashcom, 2 pages E Testimony on WRD's Application Backlog, Jan  
Boettcher, 22 pages F Testimony on WRD's Application Backlog, Lewis  
Moller, 3 pages G Tables Related to WRD's Application Backlog, Steve  
Schneider, 3 pages