

SENATE COMMITTEE ON WATER POLICY

March 23, 1993      Hearing Room 137 3:00 p.m.      Tapes 25 - 26

MEMBERS PRESENT:            Sen. Bill Dwyer, Chair Sen. Bob Kintigh,  
Vice-Chair Sen. Wes Cooley

Sen. Frank Roberts Sen. Tricia Smith

MEMBERS EXCUSED:            None

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

MEASURES CONSIDERED:            SB 90 SB 535

[--- 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 25, SIDE A

004      CHAIR DWYER: Calls the meeting to order at 3:07 p.m. - Opens the public hearing on SB 535.

PUBLIC HEARING ON SB 535 - EXHIBITS A through E

WITNESSES:            Senator Dick Springer, District 6 Audrey Simmons,  
WaterWatch Bev Hayes, Department of Water Resources Jill Zarnowitz,  
Department of Fish and Wildlife Robert Hall, Portland General Electric  
Richard Kosesan, Water For Life Kip Lombard, Oregon Water Resources  
Congress

011 SENATOR DICK SPRINGER: (introduces EXHIBIT A) Offers testimony on SB 535. - Would appreciate working with persons who have constructive

amendments. - Our current enforcement system is insufficient to protect public

interest with respect to water-related issues. 043 - This bill is designed to be a deterrent that I hope will never have to be used. - People losing their water is a sanction that should be used. - Band-aids are no longer appropriate when we are talking about

shutting down the fishing industry and impacting other businesses. - This sanction lets people know we are serious. - The message is people will pay the price if they violate the law.

- Federal judges will be running our water systems as they do the forest systems if we don't resolve this. 075 - I would be glad to work with any amendments.

SEN. COOLEY: The language of the bill indicates we will revoke their

water right "in addition to any other civil or criminal penalty." Do you really intend to revoke in addition to other civil penalties?

SEN. SPRINGER: Yes. Civil penalties haven't worked. - References the case on the last page of Exhibit A. - The ratepayers have spent a lot of money and time on the Umatilla

Basin. - When we can spend \$7 million and still have a person or organization

kill 44,000 smolts, the message is not being communicated.

108 SEN. COOLEY: I don't think everyone who uses water is perfect; people make mistakes. - We shouldn't be punishing everyone this harshly who makes a mistake. - There should be some flexibility in the penalty. - Cleaning a screen might be construed as tampering. - The use and possible misuse of the wording needs to be reviewed.

SEN. SPRINGER: We are not talking about routine, necessary or even emergency maintenance. - The cleaning situation is not what I am addressing. - I would be glad to work on clarifying language.

139 SEN. COOLEY: I would entertain something with a little more flexibility. - We need some sort of appeal or review process.

SEN. SPRINGER: I have no problem clarifying a person's due process rights.

159 SEN. KINTIGH: Would an increase in civil penalties accomplish the same purpose?

SEN. SPRINGER: It is possible. - The offense could be prosecuted as a misdemeanor, carrying a maximum

fine of \$2500. - If you are looking at the loss that was sustained, that is not much. - The value we place on water and the accompanying distribution systems is far greater.

SEN. KINTIGH: Are there civil and criminal penalties?

SEN. SPRINGER: A civil suit may be brought seeking to recover civil damages. - Maybe the department could report on the success of any other civil

penalty authority they presently have. - This is a little like forfeiture. - Gives examples of using personal property for illegal activity. - Your car can be impounded for felonies.

190 CHAIR DWYER: I am concerned with innocent third parties, such as banks, the Oregon Department of Veteran's Affairs, Farmers Home Loan

Administration, and others that have lent money. - The value of the property is impacted by the water rights attached to that property. -

You are substantially devaluing the property if you take this right away. - To do this in response to an action over which they had no control is harsh.

SEN. SPRINGER: The innocent third parties can intervene and complain in forfeiture. - This has forced the lenders to accept greater responsibility. - Mentions hazardous waste sites and the response of financial

institutions to clarify their related responsibilities. - The property owner is at the mercy of the elements and other

circumstances beyond their control.

232 CHAIR DWYER: In terms of environmental spill legislation, civil penalties are assessed. - Maybe we could go in that direction to make some gains.

SEN. SPRINGER: I would be willing to take a look at it. - I would like to hear more from the agencies, themselves.

CHAIR DWYER: Senator Cooley would be willing to work with you in researching and reviewing these issues.

245 AUDREY SIMMONS: It was lovely to see a piece of legislation so succinctly drawn. - There has been a cavalier attitude toward the issue of screening. - I hope we can come to grips with something with teeth. - I sat in the Water Resources Commission meeting recently and watched

the Commission's soft response to those pleading hardship. - We need something with teeth beyond an appointed body. - A revocation of a water right is pretty drastic but it would get

people's attention. - On line 5 it says the Commission "may" revoke rather than "shall,"

softening the intent. - We would like to work with any one who wishes to pursue this concept.

312 BEV HAYES: (introduces EXHIBIT B) Reviews the impact of the bill. - The bill would provide an additional enforcement tool to prevent

alteration of fish screening devices. - The department would like to suggest that revocation of a water right be the last resort. - It might make better sense to clarify the Commission may restrict or

deny water use. - Revocation could be time consuming, costly and possibly result in

unsuccessful uncontested case processes. - The Commission feels the bill would provide another useful tool,

since it states the Commission "may" revoke the water right; however, they felt issues needed further clarification: - who identifies when a violation has occurred; - whether the enforcement should remain with the Water Resources Department or the Department of Fish and

Wildlife. - The Commission suggested the words "interferes with or tampers with"

be deleted. - We anticipate the bill would have a large fiscal impact on the

department. 357 JILL ZARNOWITZ: (introduces EXHIBIT C) The Department of Fish and Wildlife supports the basic concepts of the bill. - Notes their recommended changes. - Response to emergency situations such as flooding and necessary

screen maintenance should not be penalized. - When a contracted screen cleaner fails to perform the task and the

water right holder does it themselves, they should not be held

liable. - It would be helpful for a subcommittee to clarify the amount a party

should pay in addition to a settlement for vandalism of fish passage structures.

394 SEN. SMITH: Joins the meeting.

ZARNOWITZ: Notes ORS 183.090 outlines a civil penalty procedure that lends itself to settlement.

SEN. KINTIGH: What is the range of the civil penalties?

423 ZARNOWITZ: For Fish and Wildlife damages, they differ for varied species. - That would have to be decided.

SEN. KINTIGH: What is the range for your existing civil penalties?

ZARNOWITZ: They may range from \$50 to \$1000. - Clarifies pollution statutes allow for damage compensation when

wildlife are killed by a pollution event. - That is damage compensation, not a civil penalty.

434 CHAIR DWYER: I think the damage compensation process has some merit. - I would like you and Bev Hayes to participate in the work group.

TAPE 26, SIDE 1

BOB HALL: (introduces EXHIBIT D) Notes the problem in the bill

relative to possible liability for repair of a damaged screen. - Suggests amendments that would address their concerns. - On lines 4 and 10 following the words "criminal penalty" include a

statement such as "except for actions taken pursuant to maintenance procedures."

022 JIM MYRON: (introduces EXHIBIT E) Oregon Trout supports the concepts in SB 535. - We would be willing to work to resolve any wording problems.

SEN. SMITH: You indicate you were aware of an irrigation district employee tampering with a fish screen, causing great loss. - Is this common?

MYRON: I hope this is an isolated incident. - The language on lines 5 and 6 would not address activity such as in

this specific case. - We don't want to allow a loophole. 054 RICHARD KOSESAN: Water for Life is opposed to SB 535. - It goes too far in light of existing authority held by both the

Departments of Fish and Wildlife and Water Resources. - If there is effort to work on the bill, we would be happy to

participate.

065 KIP LOMBARD: The Oregon Water Resources Congress is opposed to the bill. - A water right is a type of property right. - When forfeiture is mentioned, all sorts of due process concerns are

raised. - There may be other ways to address the problem, such as changing the

civil penalty provisions to make them more substantial. - Mentions SB 88 and SB 912 which create the crimes of unlawful

disposal and unlawful endangerment. - Substantial civil penalties would be a more effective means of

enforcement. - When you take the water away from a district, you impact innocent

users that had no involvement in the violation. - The issue of innocent third parties such as bankers and absentee

landlords whose lessees interfere, needs to be reviewed further. - The department raised the question of which agency should be the

enforcing agency. We believe the Department of Fish and Wildlife

should be the enforcing agency. - We strongly suggest you provide civil penalties and set aside the

question of forfeiture. - Look at the other Senate bills mentioned for other alternatives.

126 SEN. SMITH: What kind of education and training process do districts provide their employees for screen maintenance?

LOMBARD: It differs widely. Those I represent take screen maintenance seriously. - There are unique problems with the screens at times and experts

aren't always available to solve those. - I think they do a reasonable job but I wouldn't say they are on top

of every situation. - I am not aware of situations similar to that in

the Umatilla area.

154 SEN. SMITH: You distribute a publication to your members. Do you offer training in their responsibilities relative to fish screens?

LOMBARD: We have a bi-monthly publication and an annual meeting at which we offer seminars on irrigation district management. - We have had seminars on the fish screening matter. - When the legislation was enacted requiring fish screening on smaller

diverters, that did not affect most of our districts. - Most of them have had to provide screening for many years. - Not all irrigation or water companies are members of our association.

180 CHAIR DWYER: Reminds the Committee, out of \$140 million in screening projects to be done, \$22 million involves projects that are under 30

cfs.

SEN. ROBERTS: Under what circumstances would irrigation districts be affected by this law if they are doing such a good job?

LOMBARD: The bill requires no intent on the part of the tamperer.

SEN. ROBERTS: One's intent doesn't affect the damage done.

LOMBARD: A civil penalty would be just as much a deterrent as the loss of a water right.

SEN. ROBERTS: It depends upon how large a civil penalty is imposed. - I am unaware of the history of civil penalties against major water users to determine whether they were commensurate with the value of the water used.

212 LOMBARD: I don't believe a civil penalty exists for tampering with fish screens. - What presently resides in statute is the ability to get an

injunction. - The Department of Fish and Wildlife also has the ability to file a

civil suit and the ability to pursue criminal action for a

misdemeanor. - Civil penalties should be utilized before forfeiture.

232 CHAIR DWYER: You are part of the work group. - Closes the public hearing on SB 535. - Opens the public hearing on SB 90.

PUBLIC HEARING ON SB 90 - EXHIBITS F through J

WITNESSES: Kip Lombard, Oregon Water Resources Congress Jan Boettcher, Oregon Water Resources Congress Susan Schneider, City of Portland Jerry Schmidt, Oregon Association of Realtors C.J. Annon Richard Koesan, Water For Life Martha Pagel, Department of Water

Resources

244 ADMIN. ZAVALA: Distributes a staff review to members. - The SB 90 work group met three or four times. - Lists work group members. - Consensus was not envisioned. - Four options were developed for consideration by the Committee. - Reminds the Committee of the original provisions of the bill. - The bill does not add retroactive authority to the Commission. - Reviews proposed option #1 (introduces EXHIBIT F). - Reviews proposed option #2 (introduces EXHIBIT G). - Reviews proposed option #3 (introduces EXHIBIT H). - Proposed option #4 is the original bill, unamended.

308 LOMBARD: (introduces EXHIBIT I) The Oregon Water Resources Congress prefers option #2. - We prefer further exempt uses not be contemplated unless there is a

provision for tracking.

SEN. SMITH: Option 2 deletes the allowance for the Water Resources

Department to require by rule water rights for new uses. 355 LOMBARD: This was a contentious issue. - We wanted something with a broader base of support without opening it up totally.

SEN. SMITH: Aside from the political problems of that section, how do you feel?

LOMBARD: I don't know how most of our clients would feel. - Most of our water is from surface water. - Districts don't rely on groundwater sources, except in limited

circumstances.

390 SEN. COOLEY: A large body of people with the same agenda couldn't determine how this should read. What was the big stumbling block?

LOMBARD: I can't answer that. - Jan Boettcher participated in the work group.

405 JAN BOETTCHER: Section 5 was the most contentious section of the bill. - The parties felt it should be treated differently based upon their

particular interests.

SEN. ROBERTS: (To Kip Lombard) I presume your repeated reference to opening up new exemptions refers to lines 17 and 18?

LOMBARD: Yes, with regard to the original bill. - Lines 17 and 18 would open up a general category. - If they were under 5000 gallons a day, and the Water Resources

Commission exempts them by rule there is the potential of opening a floodgate. - It would be difficult to account for these as they accumulate.

TAPE 25, SIDE B

SEN. ROBERTS: The point of contention was there shouldn't be any requirement when people want a new use of groundwater under their existing permit. Why does your proposal delete that?

LOMBARD: From our clients' perspective, groundwater is not their major delivery source. - Our committee didn't take a position on that part of the bill. - This was a major area of contention upon which our clients could not

gain consensus, therefore we deleted it.

CHAIR DWYER: I am disappointed that something this simple couldn't be agreed upon by rational people. - Warns that the politics of this "cuts both ways."

051 SUSAN SCHNEIDER: We participated in the work group and support the original SB 90 or the SB 90-1 amendments. - Giving the Commission the discretion to regulate a water right were

necessary to protect groundwater in a designated region is an important protection.

064 JERRY SCHMIDT: (introduces EXHIBIT J) The Oregon Association of Realtors approves of the original option to table the bill. - We are also amenable to options 2 or 3.

073 SEN. SMITH: I believe adequate water is necessary for development of land, and should be established before land is approved for development. - If I were to introduce such a bill, your association would likely

oppose it. - What do we do to assure that before development occurs, we know there is enough water to service the development over time? - You appear to espouse the "let's do it until we can't do it anymore"

policy. - The government needs the ability to be proactive rather than reactive with respect to a finite resource.

092 SCHMIDT: In good planning the resource needs to be identified. - You can't identify an underground water source with certainty until

you drill into and test it. - We are supporting bills on the House side with the goal of gaining

better data in the Water Resources Department. - No one wants to go out and find water is unavailable. - I don't feel it is good public policy to give the agency more power

to exempt more uses and authority to write more rules to regulate

exempt uses whenever they wish. - I will work diligently to try and identify the resource.



120 SEN. COOLEY: Are you familiar with ORS 537.525 which gives the Water Resources Department power to do all that is listed in this bill? Why

are we massaging this again?

126 SCHMIDT: That is part of my point. - I think we have enough checks and balances now.

SEN. ROBERTS: Explain the Realtors' opposition to section 1(5).

SCHMIDT: Their opposition to that section relates to land use and the Water Resources Department. - Gives example of Parret Mountain. - Some of his group didn't think there were adequate scientific facts

upon which to base a withdrawal. - The issue is, do these small, di minimus uses have a cumulative

impact? - In 98 percent of the cases I see, they don't. - Occasionally, a competing interest problem such as a large-scale

irrigation operation next to a domestic provider depletes the

domestic well. - The agricultural user can be put in a deeper aquifer so both can

exist without conflict.

SEN. ROBERTS: I don't understand the relevance of your comments to the new provision of section 1(5) which addresses new uses of water.

SCHMIDT: Gives example of representative property in Multnomah County, approved by LCDC for residential construction.

- When the Water Resources Department is approached, they can overturn the approved land use. - The approval of LCDC can be negated.

178 SEN. ROBERTS: If this rule were not in effect, could a water right granted for irrigation be used for an entirely different purpose?

SCHMIDT: I don't believe so.

SEN. ROBERTS: What would be the situation under section 1(5) where the Water Resources Commission by rule could require a water right for any new use of ground water? - What do you object to in this rule?

SCHMIDT: Presently, I can drill a well on a parcel of land if I use less than 15,000 gallons a day. That is an exempt use because the legislature has determined that to be a small, di minimus use. - This change requires that an application for a water right now be

filed, with no guarantee of issuance.

SEN. ROBERTS: Isn't that exempted under section 1(1)? Do you read that section 1(5) overrules page 1, line 15 of the existing exemption?

SCHMIDT: Yes, I do.

209 SEN. SMITH: If we were to keep section 1(5) in the bill, but add some parameters (a box to put them in so they don't have blanket rulemaking

authority) under which the department could establish rules, would that ease the concern?

SCHMIDT: I suspect if there was some language my group was comfortable with, that might be possible. We are very uncomfortable giving the agency a blanket power. I am worried that when you and I are gone the statute remains.

SEN. SMITH: I understand your concern regarding giving an agency blanket rulemaking authority. Would you be interested in trying to develop some parameters?

SCHMIDT: Yes.

242 C.J. ANNON: Last summer I watched many Oregon agricultural crops dry up from lack of water. - Even wells dry up, so they are drilled deeper. - Sometimes when digging deeper, salt is found, which is not compatible with crops. - Some farmers are getting together to develop water storage on small

streams. - Lists the creeks and rivers on which they intend to build

impoundments.

CHAIR DWYER: There are water storage bills that are coming before us. - Would you return when we address impoundment bills? - We will notify you when they are to be heard by the Committee.

285 RICHARD KOSESAN: We support options 2 or 3 which delete section 1(5).

SEN. SMITH: Did you hear my question regarding comfort level with respect to the parameters under which the department would approach rulemaking? Do you have the same concern with blanket authority?

KOSESAN: I have a couple of different concerns. - The majority of exemptions for groundwater use have existed since

1955. - The allowance to change this by administrative rule circumvents

exempt uses of those waters.

320 SEN. SMITH: Wouldn't you think it reasonable that the department be allowed to require permits for continued or new uses of water from a

declining aquifer?

297 KOSESAN: I don't know that we need to address the permitting situation. - We need to review existing authorities the department maintains such

as managing the water resource through the establishment of a critical groundwater area, the consideration of a serious water

management area and basin planning. - There are existing avenues which allow the department to manage that

resource. - I do think it essential this resource be managed.

SEN. SMITH: I think you lost me.

340 MARTHA PAGEL: This bill was originally submitted by the department. - We are partial to the options that maintain the original balance of

the bill. - Those would allow the Commission more flexibility to respond to

exempt uses and water management problems by requiring permits. - The department prefers options 1 and 4. - We would be happy to look at language to clarify or place parameters

in section 5. - We would prefer to see the original balance maintained.

377 SEN. COOLEY: Comparing ORS 537.525 to SB 90, what further authority do you feel this provides the department, other than the designation of the amount of water? Don't you have this authority already?

PAGEL: The policy provisions are an expression of guidance by the Legislature but they don't give direct authority enabling us to take specific actions.

SEN. COOLEY: Under this policy, are you allowed to write administrative rules, just as with SB 90?

PAGEL: We didn't think so, but we would be happy to consult further.

417 SEN. COOLEY: Perhaps you should ask your legal counsel for a determination. - Its all there; you already have that power. - I am referring to the whole section ORS 537.525.

PAGEL: Perhaps we should consult with the Attorney General's office. - Generally, policy statements don't authorize any specific action. - We

wouldn't be able to add or subtract to a list of exempt uses  
without statutory authority.

SEN. COOLEY: Wouldn't you agree you have great flexibility and through  
the administrative rule process nebulous areas could be tightened?

PAGEL: We will look at that.

010 CHAIR DWYER: Closes the public hearing. - Adjourns the meeting  
at 4:35 p.m.

Submitted by,

Reviewed by,

Pamella Andersen

Lisa Zavala Clerk  
Administrator

EXHIBIT LOG:

A Article: "Eco-Cops; Police in Three States Go After Habitat  
Criminals," Senator Dick Springer, 5 pages B Testimony on SB 535,  
Bev Hayes, 1 page C Testimony on SB 535, Jill Zarnowitz, 2 pages D  
Testimony on SB 535, Robert Hall, 1 page E Testimony on SB 535,  
Jim Myron, 1 page F Senate Bill 90-1, Staff, 2 pages G Senate  
Bill 90-2, Staff, 4 pages H Senate Bill 90-3, Staff, 2 pages I  
Testimony on SB 90, Kip Lombard, 2 pages J Testimony on SB 90, Jerry  
Schmidt, 1 page