

SENATE COMMITTEE ON WATER POLICY

May 20, 1993 Hearing Room 137 3:00 p.m. Tapes 45 - 46

MEMBERS PRESENT: Sen. Bill Dwyer, Chair Sen. Wes Cooley Sen.
Tricia Smith

MEMBERS EXCUSED: Sen. Bob Kintigh, Vice-Chair

Sen. Frank Roberts

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

MEASURES CONSIDERED: HB 2155-A HB 2110-A

[--- 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 45, SIDE A

004 CHAIR DWYER: Calls the meeting to order at 3:15 p.m. - Opens the public hearing on HB 2155-A.

PUBLIC HEARING ON HB 2155-A - EXHIBIT A

WITNESSES: Martha Pagel, Water Resources Department Becky Kreag,
Water Resources Department Anne Perrault, WaterWatch Doug Heiken,
WaterWatch

Kip Lombard, Oregon Water Resources Congress

ADMIN. ZAVALA: Reviews the provisions of the bill which relate to streamlining the water right application process.

028 MARTHA PAGEL (introduces EXHIBIT A) Offers testimony in support of HB 2155-A. - Reviews the intent of the department in introducing the bill. - Notes the development of the consensus amendments. - WaterWatch remains uncomfortable with one provision of the bill.

057 BECKY KREAG: Reviews specifically the two major provisions of the bill.

CHAIR DWYER: Gives a hypothetical situation on irrigation and asks if it illustrates how the bill would impact conservation.

KREAG: That is how the formula would work. - Discusses the past use of the term "irretrievably lost." - Discusses determinations based upon evaluation of injury rather than

consumption. - Notes definitions that were removed.

110 SEN. SMITH: Joins the meeting.

KREAG: Simplified and clarified some provisions for applications and evaluation of the review. - On page 3, line 5, "significant" was inserted before "injury." - Water distribution has been fixed at a specified percentage. - The individual may offer the state a higher percentage. - The priority date would be one minute after the original date. 161 - We generalized the rulemaking criteria. - Technical adjustments were made on the last page. - On page 5, section 9 addresses one application presently on file with the department.

193 ADMIN. ZAVALA: Is ORS 778.010, under section 8 (3)(b) what you were referring to when you said Congress would be addressing it later?

KREAG: Yes.

PAGEL: This may be imperfect, but the current law is even more so. - We may return next session to further refine this statute; however,

we support this proposal.

SEN. SMITH: Assumes the chair.

228 ANNE PERRAULT: Offers testimony in opposition to HB 2155-A. - There are significant changes being proposed by this bill. - The 50/50 allocation of water we propose would give users more water

that the 25/75 existing in current statute because of these proposed changes. - By removal of the "irretrievably lost" language, a larger quantity of water is being opened up to the user. - WaterWatch proposes a 50/50 allocation. - Explains a scenario illustrating why this would be fair. 265 - Other problems with the proposal include it doesn't adequately address the problem of injury. - We proposed a water bank to assist injured parties.

CHAIR SMITH: Please give an example showing why this wouldn't be fair.

277 PERRAULT: Provides a specific hypothetical situation.

CHAIR SMITH: Under that scenario, the user would have more water than under the current system?

PERRAULT: Yes.

CHAIR SMITH: That would defeat the purpose of conservation.

323 PERRAULT: The intention is to give users incentives to conserve. - Presently, the quantity of saved water is unknown, and the conserved

water statute proposes to divide that unknown quantity. - Mitigation would have to occur once the water is conserved, if

someone protests and wants that water.

359 DOUG HEIKEN: Offers testimony in opposition to HB 2155-A. - Reviews another major change in the bill. - By deleting certain criteria and with the discretion of the

commission, in-stream interests are giving up something significant. -
On page 2, lines 21 and 22, a statement of the amount of water the
water right holder is using beneficially is being deleted from the
application requirements. - Notes why this information is vital.

396 KIP LOMBARD: Offers testimony in support of HB 2155-A. - A major
area in which we differ with WaterWatch is we believe if you
go to a 50/50 standard you take away a major incentive for
conservation. - In 1987, when legislation was first enacted, we
supported the bill;
we thought it would work; however, the original language was too
limiting.

CHAIR DWYER: Assumes the chair.

442 SEN. SMITH: Do you agree or disagree that a 75/25 split may give
some users more water than they would have currently?

LOMBARD: I don't think it would give them more water than they
currently have. - Explains why he holds this view. - The total quantity
of water is going to be diminished by the amount
to be allocated in-stream, but the water user will be able to use it on
more lands or dispose of it by lease, sale or other means.

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LOMBARD: I don't agree with WaterWatch that the total water consumed by
the user will result in greater water volume.

SEN. SMITH: You don't think it would be better to make that water
available to other users? - I don't know why we have to provide an
incentive to conserve a
precious resource.

LOMBARD: The rules are the stick rather than the carrot. - This program
is an incentive to encourage people to do something,
rather than force them to do it. 038 - Discusses who should pay for
the water. - Gives example of a situation where public funding is
providing
improvements.

SEN. SMITH: Please respond to the statement "water conserved should
remain."

058 LOMBARD: Water users have to prepare an estimate of what they
expect to save. - You may have a water user who is unable to tell you

what they have

used every single year. - The language says, use "each year."

SEN. SMITH: If this meant "into the future," would you have a problem with this language remaining?

LOMBARD: I'm not sure.

081 KREAG: That provision in the rules did look to the past because it related to an application requirement to compare what had been used to

what is used in order to determine "irretrievably lost." - In changing the definition, we moved away from that strict

measurement of previous use to new use. - How much was used in the past few years is no longer an essential

part of the formula. - Reporting on the new water right at the conserved value amount would

not be opposed.

SEN. SMITH: Isn't there a benefit to the department in administering this if you know what they are using? - Might lines 21 and 22 be reworked rather than deleted?

108 CHAIR DWYER: Why did we eliminate section 4(3) on page 3? - Why would the state acquiesce its ability to keep more water in particular streams?

KREAG: This was of most concern to WaterWatch. - This was determined to not provide incentive. - Anything less than 25 percent would not provide incentive; more than

that would provide disincentive.

SEN. SMITH: What criteria was used to make this determination?

134 CHAIR DWYER: The criteria is in ORS 537.480. - Reads the criteria.

SEN. SMITH: Did you add additional criteria in your rules?

152 KREAG: The allocation criteria were in our rules. - I believe we added Indian tribal rights, as well.

SEN. SMITH: In cases of critical groundwater, why would you be willing to give up that flexibility?

KREAG: We felt it acceptable because the funding agency would have the power with their own funds to negotiate a larger percentage. - The conservation proposals could be funded by the applicant or the

Bureau of Reclamation or the water conservation district.

SEN. SMITH: Would they have area-specific information and be interested in mitigating those concerns?

185 KREAG: The Bureau of Reclamation would be involved. - They were very interested in this proposal in order to implement

conservation and to see in-stream benefits result. - They have not negotiated an allocation higher than 25 percent.

SEN. SMITH: Nobody has the interests of the state at heart like the State. - Would their interests be maximized where we really need the water

back in the stream?

KREAG: I can't answer that. - The recent work with the Bureau of Reclamation indicates their two

highest priorities are restoration of environmental impacts they have had and increasing efficiency of their systems.

206 CHAIR DWYER: This bill has serious problems. - Lists the deletions being made. - I don't believe this is good public policy.

KREAG: We feel this will make the conservation program more accessible without creating greater injury to the water resources. - In terms of allocation, the commission felt the 75/25 split would provide more incentive.

CHAIR DWYER: I don't want to give away the farm.

243 ADMIN. ZAVALA: Requested clarification of the conservation policy adopted by the commission. - Is there any mechanism for allocating conserved water, similar to

that in statute?

KREAG: No, the policy addresses the agency's program to see that waste is eliminated over time and the highest efficiency of water use is achieved. - Lists other provisions of the policy.

ADMIN. ZAVALA: If a water right holder implements conservation measures outside this process, they are not able to use the saved water? - When was this policy adopted?

KREAG: This policy was adopted December, 1990.

271 CHAIR DWYER: How can you conserve water when you don't have enough?

KREAG: The Prior Appropriation Doctrine does not treat people fairly. - We would like to see a change in the face value of their water right.

CHAIR DWYER: Closes the public hearing on HB 2155-A. - Opens the public hearing on HB 2110-A.

PUBLIC HEARING ON HB 2110-A - EXHIBITS B through D

WITNESSES: Robert Hall, Portland General Electric Kevin Hanway, Special Districts Association Reed Marbut, Water Resources Department

304 ROBERT HALL: (introduces EXHIBIT B) Offers testimony in support of HB 2110-A. - States the propose of the bill and discusses the history of that

intent relative to the issue of federal reserve rights in the Klamath River basin. - Notes PGE's concern with pre-1909 water rights filings. - States PGE's pre-1909 water rights on the Willamette and Clackamas

Rivers. - A mini-adjudication process was unintentionally created for all

pre-1909 rights that resulted in the right to call all water from

junior users during times of low water. - As PGE appears to be a senior user and holds claim to such a large

amount of water, a problem is created for all. 377 - A meeting with the Water Resources Department revealed there are 500 other pre-1909 applications upon which the department would have to

do a mini-adjudication, possibly resulting in conflicting water

rights. - The solution to insufficient water on the river was addressed by the

short term solution in this bill. 405 - States the specifics of the solution. - Reed Marbut will ask for a minor amendment to the portion that

corrects the issue relative to the Klamath reserved rights. - We concur with his amendment.

SEN. SMITH: Has anyone asked Legislative Counsel if the state can

assess a fee against the federal government? - I thought they don't recognize state assessments and fees.

444 REED MARBUT: (introduces EXHIBITS C and D) Until 1952, that was true; the state couldn't charge the federal government. - Notes the McCarran Amendment adopted by Congress at that time, which

waived the sovereign immunity of the United States for the purpose of adjudication of water under a suit for full adjudication of a basin. - Reviews the recent Idaho decision.

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MARBUT: Oregon believes the statute, as amended, permits us to charge the United States a fee for the administrative portion of the water

rights claiming for adjudication, but not for an assessment for costs.

- Our fees for processing the claims and doing the administrative portion are much less than Idaho's. - With more water, our fees would be less than 25% of what Idaho was

going to charge for less water. - Our fees are currently in litigation. - When we initiated the Klamath adjudication in the 1970's, it included the Klamath tribes, who promptly took us to court. 042 - Reviews the specifics of this court case, known as the Adair Case. - The case determined the Klamath Tribes have a federal reserved water

right and the quantification of that shall be pursuant to a state

court adjudication. - We began the adjudication proceedings, which resulted in the federal

government filing an injunction against us. - Notes the specifics of the court case. 055 - States the decision from the case. - It was determined the state may not require the federal government to file surface water registrations in the rest of the state, but we do have jurisdiction to bring them into the actual basin adjudications

as each basin is adjudicated. - This case has been appealed. - Compares the difference between the results of the Idaho court case

and the present Oregon case.

SEN. SMITH: If the federal courts don't rule in favor of the state, will that nullify this bill as well; will we have to go through the whole process again?

092 MARBUT: The proposed language on the fee portion of this bill is specifically set to frame our argument within the results in the Idaho

case.

SEN. SMITH: The issues embodied in this bill, one way or the other, will be resolved in the case before the 9th circuit?

MARBUT: Yes, I think they will. - We are confident the way we are amending this statute, and the way we have structured our fees, if any state in the west has a chance of

getting fees, this law will do it.

SMITH: Well, it will be interesting to see.

105 KEVIN HANWAY: Offers testimony in support of HB 2110-A. - Notes the interest of the special districts in the bill. - Fees and the endorsement process are addressed by the bill. - This basically says until the claims have been fully adjudicated,

everyone is left as they are.

142 MARBUT: References his amendments (Exhibit D). - On page 3, line 37, insert "filed or" following the word "claim."

CHAIR DWYER: I have hand-engrossed that on my copy of HB 2110-A.

156 CHAIR DWYER: Closes the public hearing on HB 2110-A. - Opens the work session on HB 2110-A.

WORK SESSION ON HB 2110-A

MOTION: SEN. SMITH: Moves to AMEND HB 2110-A on page 3, line 37, by inserting "filed or" following the word "claim." VOTE: CHAIR DWYER: Hearing no objection the amendments are ADOPTED.

SENATORS KINTIGH and ROBERTS are EXCUSED. MOTION: SEN. SMITH: Moves that HB 2110-A AS AMENDED, be sent to the

Floor with a DO PASS recommendation. VOTE: In a roll call vote, all members present vote AYE. SENATORS

KINTIGH and ROBERTS are EXCUSED.

CHAIR DWYER: The motion CARRIES. SENATOR SMITH will lead discussion on the Floor.

CHAIR DWYER: Closes the work session on HB 2110-A. 169 - Adjourns the meeting at 4:23 p.m.

Submitted by,

Reviewed by,

Pamella Andersen

Lisa Zavala Clerk
Administrator

EXHIBIT LOG:

A Testimony on HB 2155-A - Martha Pagel - 3 pages B Testimony on
HB 2110-A - Robert Hall - 2 pages C Testimony on HB 2110-A - Reed
Marbut - 3 pages D Hand-Engrossed HB 2110-A - Reed Marbut - 6 pages