

Senate Committee on Water Policy
May 16, 1991 - Page

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.

SENATE COMMITTEE ON
WATER POLICY

May 16, 1991 Hearing Room 137
3:15 p.m. Tapes 70 - 72

MEMBERS PRESENT: Sen. Larry Hill, Chair
Sen. John Kitzhaber, Vice-Chair
Sen. Wayne Fawbush
Sen. Bob Kintigh
Sen. Eugene Timms

MEMBER EXCUSED: Sen. Dick Springer

STAFF PRESENT: Lisa Zavala, Committee Administrator
Bernadette Williams, Committee Assistant

MEASURES Executive Appointment, Jack C. Delay, Water Resources Commission
CONSIDERED: SB 1163
SB 204

SB 1129
SB 1183

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TAPE 70, SIDE A

003 CHAIR HILL: Calls the meeting to order at 3:25 p.m.

JACK C. DELAY - EXECUTIVE APPOINTMENT NOMINEE

WITNESSES: Jack Delay, appointee

070 HILL: Reviews nominee's background (EXHIBIT A).

019 DELAY: States that he is pleased to serve on the Water Resources Commission. Wishes to help resolve issues, develop prudent public policy, and facilitate meetings. He welcomes input from water users.

030 HILL: Points out that Mr. Delay was recently named to the Eugene Water & Electric Board, and is serving as vice-president. Mr. Delay played a key role in facilitating an issue between EWEB and fishermen on the MacKenzie River.

035 DELAY: Comments that there was a good resolution to the EWEB-McKenzie fishermen issue. Offers occupational background information.

048 TIMMS: Asks how Mr. Delay can travel the state seeking input for the Water Resources Commission and still run a business.

051 DELAY: Replies that he has control over his schedule, and is also reducing his time commitment to the corporation to 80 percent.

064 MOTION: Sen. Hill moves the executive appointment of Jack C. Delay to the Water Resources Commission.

VOTE: Hearing no objection, Chair Hill so orders.

SB 1163 - Work Session

WITNESSES: Bev Hayes, Water Resources Department
Becky Kreag, Water Resources Department
John Borden, Water Resources Department
Reed Marbut, Water Resources Department
Dick Nichols, Dept. of Environmental Quality
Tom O'Connor, League of Oregon Cities
Brad Higby, Oregon Assn. of Sewerage Agencies
Steve Hall, City of Ashland
Bill Gaffi, City of Ashland

088 HILL: Notes that the latest amendments are not yet available.

097 BEV HAYES, WATER RESOURCES DEPARTMENT: Gives general overview of the bill (Exhibit B). The Commission believes the -1 amendments greatly improve the bill. There is still some concern regarding the language "highest priority within existing resources." When a final draft is ready, the Department would like an opportunity to analyze how it fits in with current law, and prepare a final fiscal impact statement.

149 FAWBUSH: Asks if the Department has met with the other interested parties to explore their concerns.

157 HAYES: Stats they had met with Waterwatch and the Water Resources Congress and reviewed - 1 amendments twice, and had reached some tentative agreements. If the new amendments reflect these agreements, their concerns would be reduced significantly. In response to Rep. Fawbush, Ms. Hayes states that she believes that Waterwatch is largely responsible for the language in the - 2 amendments, however they don't cover all of the department's concerns, but they are very much aware of their concerns. Some concerns need to be stated clearly on the record so there won't be confusion regarding intent, later.

190 HILL: Clarifies that the -2 amendments originate from WaterWatch and the Congress, based on conversations with the department, but they may not address all the department's concerns.

197 BECKY KREAG: States that concerns are fewer than with the original bill. Reviews section 2 - of her written testimony (EXHIBIT B).

TAPE 71, SIDE A

024 KREAG: Adds that the reporting aspect of section 4 does have a fiscal impact. A program coordinator would be needed, as well as 8 FTEs (cartographers) for section 3. In response to Sen. Hill, Ms. Kreag stated that the department already has this personnel.

035 KREAG: Continues summary of EXHIBIT B, picking up with section 7.

046 TIMMS: Asks if basin committees are advisory.

048 KREAG: Responds that these would be different groups under the bill.

If basin planning continues under this bill, the department would turn to this group as opposed to the groups put together now (ad hoc basin committees are formed now).

065 HILL: Announces delivery of the -2 amendments (EXHIBIT C). He states that some of the department's concerns appeared to be addressed.

067 KREAG: Continues summary of EXHIBIT B, while looking at the -2 amendments. Notes that "shall" has been changed to "may" in regards to forming basin advisory groups, which would save the department money. There would be a higher cost for an optimal committee, and a lesser cost for a more basic advisory committee.

112 HILL: Asks if the department has a dollar figure.

113 KREAG: Notes that the department has an FTE figure, not a dollar figure. At a minimum, WRD would need a clerical and planning position in each region to maintain four basin counsels, each. That would be 10 FTEs; half professional and half office specialists.

138 TIMMS: Asks for clarity; many river basins don't now have basin committees with appointed chairpersons, but under this bill such committees would be required?

140 KREAG: Under this bill, committees would be formed by the WRC; existing committees have been formed by the county government.

150 TIMMS: Observes that state government would control the process and membership, rather than the counties on a local level, who have always appointed interested persons who have done excellent work in the past. Local government does not like that. Also, it appears that a state bureaucracy is being created.

166 KREAG: Only about one-third of the counties have basin committees.

179 HILL: Would these be the agencies of state government? Would they be subject to open meetings law?

185 KREAG: Replies that it might be possible; the department had not checked with the AG; however, they are subject to the authority of the Commission.

188 HILL: Suggests that they could act as an advisory committee to the Commission. If the committees are made up of users, how are the broader public interests represented, such as fisheries and recreational users?

200 KREAG: In response, Ms. Kreag stated that the Oregon Rivers Council has another bill that calls for a different type of committee, one that was local.

221 KREAG: Submits and summarizes briefing paper (EXHIBIT D). Notes that when it was written last year, the department envisioned much of the same type of work with committees as proposed by SB 1163. The department's concern with the structure set forth in the bill was that it might be more rigid and bureaucratic than it needs to be.

239 JOHN BORDEN, WRD: Continues summary of EXHIBIT B. He states that the Commission is concerned that the courts might end up directing many of the department's priorities. The

department appreciates, in subsection 4, an attempt to allow some of the administrative process to commence prior to entering the courts. The Commission would prefer that due process be exhausted unless new resources are given to the department; the WRD will not be able to meet the 60-day period. In subsection 6, determining who the prevailing party is, is not easy or clear cut. A fiscal impact was attempted, but it is estimated that at least two hearings officers, a program coordinator will be needed, as well as court costs. A guess is \$350,000. In section 10, sub 1, it appears that there is no opportunity for public interest determination for the in-stream water rights. There might be some argument for wanting to determine the public interest at the time of permit issuance.

304 TIMMS: Asks if state agencies are required to have public input regarding in-stream water rights.

309 BORDEN: There are opportunities for input, but they are more limited than for an out-of-stream appropriation.

313 TIMMS: The difference being that out-of-stream users must notify the other water right holders; do in-stream water right holders have to notify other water right holders?

318 BORDEN: Replies that in the cases of out-of-stream appropriations, water right holders are notified through public notice only. There is slightly broader notice for the in-stream water right holders.

358 BORDEN: Continues summary of EXHIBIT B. In section 10(a)(1), the ODFW reached an agreement relating to in-stream water rights generally, which allow 1 percent of the average available flow for the lowest low month for human consumption and livestock uses. SB 1163 would put that into statute and might limit the department's flexibility. Subsection 2 would preclude the Commission from having any say over whether any additional water rights could be issued.

363 TIMMS: Regarding livestock, does the department currently have the ability to divert water during a drought?

372 BORDEN: Replies that jurisdictions in the drought counties may request from the department a preference for use of water consumption for human and livestock use, but is not aware of any requests of this nature. If SB 1163 passes, section 22 may impact this statute.

414 BORDEN: Continues summary of EXHIBIT B. In section 12, rights which are converted into in-stream water rights would carry a mix of priority dates. Therefore, if there is a junior in-stream water right in existence, it needs to be made clear, that the maximum sum of those in-stream water rights would be senior, despite different dates.

468 HILL: Asks if the department has a summary of all the FTEs needed.

472 BORDEN: Replies that they do not at this time; however a more detailed analysis will be done on the -2 amendments.

TAPE 70, SIDE B

027 BORDEN: Continues to enumerate the WRD concerns. In section 13(6), in the -1 amendments, the only way an applicant would be able to tell the WRD that they have superior water availability information to us would be in a contested case setting, even if WRD staff agreed with their data, and this is expected to add considerable expense to the department and the applicant in hearings related costs. The sponsors have offered to change this to allow the applicant to offer this additional water availability information in the permitting phase; this would avoid contested cases and would reduce the fiscal impact.

039 KREAG: Points out that this change is in the -2 amendments. However, it was hoped the phrase, "provide evidence that the water right would not over-appropriate" and instead, they have inexactly repeated the definition of "over-appropriate" and is not clear.

045 BORDEN: Continues summary of EXHIBIT B, continuing with section 14(1), regarding water conservation, there needs to be real improvements, not "paper" improvements. Regarding section 19(7), the Commission would like to be able to activate the water bank that is described on its own motion, rather than only by a protest. Subsection 9, contains no fees for transfers; this would result in about \$50,000 in revenue. In addition, permitting activity would be reduced by 50%, or a \$325,000 loss to the department in a biennium. The sponsors stated that they would be willing to abolish this section, and the -2 amendments may reflect this.

Section 22 is the supremacy clause; because the bill is complicated, it is difficult to anticipate all the possibilities this clause may allow.

092 HILL: Questions whether this bill would supercede scenic waterways.

096 BORDEN: Responds that he didn't know. The one percent provision in the bill, it would be possible that it would supercede scenic waterways.

098 HILL: Asks the WRD to document the anticipated fiscal impact after reviewing the -2 amendments when the bill is before the committee again.

122 BOB HALL, PGE: Submits and summarizes written testimony on SB 1163 (EXHIBIT E).

SB 204

176 HILL: Introduces the "effluent" bill; refers members to the -1 amendments (EXHIBIT F) and a hand-engrossed bill (EXHIBIT G).

190 REED MARBUT: Submits and summarizes written testimony (EXHIBIT H). Explains that the amendments are a substantial rewrite of the bill. Sections 4 and 5 have been removed, as well as new sections added. Using the hand-engrossed bill, he reviews all the changes made. On page 1, "effluent" is changed to "reclaimed" to be compatible with DEQ rules. Everything beginning on line 5, page 1 through line 3, page 3, is new. Section 3 was changed slightly to make it more compatible with the DEQ process. Section 3(2) is a registration process, so DEQ may tabulate who is using the reclaimed water. It ensures that an entity using reclaimed water will not lose their water right.

253 HILL: This would allow a nursery to use the reclaimed water and not lose their water right.

Does the reclaimed water replace the water right, or supplement the water right?

260 MARBUT: That is why we have a tracking process. Where there is reclaimed water used, the department would not view that as an increase in duty; there would be a maximum duty.

283 HILL: That user is held harmless and does not lose their underlying right.

287 MARBUT: The use of the reclaimed water is not involved with the permit or water right process.

308 HILL: May a member of an irrigation district pass on the right to reclaimed water?

309 MARBUT: That has been left up to the supplier, the user, and the DEQ. The area of use will be described, so the WRD will know where it is.

303 HILL: Asks DEQ if this adequately protects groundwater runoff?

308 DICK NICHOLS: DEQ believes that the reclaimed water can be controlled to protect surface and ground waters.

317 MARBUT: Continues summary of the amendments, beginning with section 3(3). Explains that a portion of the bill was drafted in response to a 1973 AG opinion which states that should a municipality cease delivering water to a water course, and someone downstream had been using that water and had a right to it, there could be a takings issue and the municipality would have to compensate the individual. The process set forth in section 3 is a protection mechanism for the downstream user.

381 HILL: What if there is an impact on in-stream water uses? You don't intend to diminish in-stream water rights?

391 MARBUT: That was not addressed specifically, except for the fact that the removal of the discharged waters would be a benefit to that water flow from the point of view of water quality.

399 HILL: The alternative would be more expensive treatment of the water that would keep quantity intact. That was why the City of Ashland requested this bill, but if it adversely affects the in-stream uses, then perhaps the more expensive alternative must be chosen. How does the bill balance that in-stream question?

414 MARBUT: The bill doesn't address it. Continues summary of the amendments. The new section 4 simply adds to the existing bill in reference to the registration system which is set up in the previous sections. Section 5 is completely new; it makes clear that the water is municipal water.

TAPE 71, SIDE B

039 MARBUT: Section 6 is changed to clarify that reclaimed water is being applied; it may be that there are appropriate uses of effluent which are not on land.

053 HILL: Will this comply with the requirements for the Clean Water Act?

055 NICHOLS: Replies that the bill should assist the state in meeting the Federal Clean Water Act

in that it will allow municipalities alternatives for treatment and control of the waste water. The Act does not have any jurisdiction over waste water unless it is discharged back into the stream.

061 HILL: States that he is satisfied with the amendments with the exception that water could be removed from a stream to the point of damaging in-stream uses. This bill could be implemented to a point - municipalities should not be able to remove water to the detriment of in-stream uses.

070 TOM O'CONNOR: States that he understands the Chair's concerns, but is troubled by the idea that an in-stream water right law established in 1987 now extends in a "great reach" to say that the water which a municipality has a water right to, is somehow now not available for their use and must be kept in-stream. The sewage effluent must be kept in the stream to satisfy an in-stream water right. The consumptive water right that the city has for the use of that water is now being taken away.

093 HILL: Replies that this would be no different from a private water right user downstream who is able to protest and force a change in how the effluent is used, if they are damaged. For example, if Ashland were to stop discharging their effluent into Bear Creak, someone downstream is damaged, the bill would provide a solution.

101 O'CONNOR: Questions the ability of the state to reach out via the in-stream water right law, and require the city to return water to the stream.

112 HILL: Without the bill, the city already has to put the water back into the stream.

115 BRAD HIGBY: In terms of the in-stream water rights, like any existing water right, they are protected under the provisions of the bill, and presumably those agencies which had applied for in-stream water rights would be in the same position as any other water right holder.

125 HILL: Clarifies that the sponsor's intent is not to damage in-stream water rights. Reads section 3 aloud. Observes that section 4 appears to preclude the in-stream water right. It is a solvable problem.

146 TIMMS: Under current law, is the reclaimed water the city puts back into the stream part of the downstream user's water right? It shouldn't be, because the city has priority over in-stream water right. Currently, the city wouldn't have to put the water back into the stream.

158 O'CONNOR: That is the cities' interpretation.

168 KINTIGH: In case of Ashland, is it near 50 percent?

174 STEVE HALL, CITY of ASHLAND: Replies that the flow of Bear Creek during the irrigation season is quite high. Ashland's discharge from the treatment plant, per day, is two million gallons; the total flow is in the range of 40-60 million gallons per day.

191 HILL: What are the sewage treatment flow percentages in the Tualitan Basin?

193 BILL GAFFI: Currently the return flows are close to 50 percent of the streamflows during extreme low flow periods. However, 65 percent of the streamflow was

imported from outside the basin during low flow periods. Rather than reduce existing discharges, he stated they intend to accommodate increased flows through reuse.

208 HILL: Currently, the return flow from the municipal system is treated as waste, correct?

214 MARBUT: It is not currently categorized as waste. The AG opinion indicated that if a downstream water right holder who was diverting and using the water and who had relied upon that flow, was injured, then compensation would be required. That opinion distinguished between water that was not originally diverted from that watercourse (imported), in which case no compensation would be required. Water that is diverted from a stream and returned to that stream was the water the opinion addressed, and it wasn't treated as waste, as such.

231 HILL: Replies that the water which could affect downstream users could be categorized as "return flows."

232 MARBUT: Stresses that WRD had not experienced any cases, and did not expect any. The statute was written broadly to address unusual circumstances. The purpose of the 50% was to indicate that it would have to be a major reduction before there's any trigger.

242 HILL: States that he is concerned with the "high trigger" level of 50% or more; also water wouldn't be returned to the stream course, it would be returned to the water rights holder downstream in some other way. There are quality and quantity issues; these are dual tracks which haven't been merged well in statute or agency activity. DEQ deals with quality, and the WRD dealing with quantity, with the fish depending on both. Policy makers will have to consider these two aspects together, rather than separately, which has been done traditionally. Stated that he would like to see language developed that recognized the importance of keeping water in-stream when necessary.

Two additional letters were entered into the record in support of SB 204 (EXHIBITS I, J).

SB 1129

WITNESSES: Kip Lombard, Oregon Water Resources Congress

299 KIP LOMBARD: Submits and summarizes amendments and hand-engrossed amendments (EXHIBIT K and L), but notes a provision to notify the Department of Veterans' Affairs was missed. Submits and summarizes written testimony/additional amendments on SB 1129 (EXHIBIT M). He notes that the hand-engrossed bill contained changes proposed on April 18, as well as some changes submitted last week. Sen. Springer had a concern regarding including ornamental vegetation under the definition of irrigable land. This was not a change in current, allowable use. Some districts provide irrigation for parks, school yards, and cemeteries outside of city boundaries, and it is good public policy to allow for these uses.

TAPE 72, SIDE A

038 HILL: Observes that there are some districts, particularly in the Deschutes area, where there has

been some development on the lands which were formerly irrigated, so the districts are now providing water for residential use, rather than agricultural use. Is the intent to permit this, under this bill?

048 LOMBARD: That is happening today and it is, technically, irrigation and beyond the control of the districts in many cases. These former agricultural lands have water rights for those lands, and are entitled to the water. Frequently this is the only type of water available to them. Land use policy allows this.

082 LOMBARD: Continues summary of the amendments. Notes that the Department of Veterans' Affairs would like to be notified of a possible loss of a water right through disuse, because the water right has a direct impact on the value of their security interest in the property. This has been agreed to. Suggests adding "and any security interest of record" after "user" on line 16c and 18 of the hand-engrossed amendments.

132 HILL: States that amendments will be prepared and the bill rescheduled for Tuesday.

SB 1183

143 HILL: Notes that no one has signed to up to testify on SB 1183.

SB 1163

155 HILL: Asks if anyone wants to add any comments to SB 1163. Noting that witnesses preferred to wait until Tuesday, Sen. Hill adjourns the meeting.

Submitted by,

J.E. McComb

EXHIBIT SUMMARY

Exhibit A - executive appointment background, Jack Delay, 20 pgs.

Exhibit B - testimony, SB 1163, Becky Kreag, 6 pgs.

Exhibit C - proposed amendments, SB 1163, staff, 23 pgs.

Exhibit D - briefing paper, SB 1163, Becky Kreag, 3 pgs.

Exhibit E - testimony, SB 1163, Robert Hall, 2 pgs.

Exhibit F - proposed amendments, SB 204, staff, 4 pgs.

Exhibit G - hand-engrossed bill, SB 204, staff, 5 pgs.

Exhibit H - testimony, SB 204, Reed Marbut, 2 pgs.

Exhibit I - letter, SB 204, Gerald Breazoale, 1 pg.

Exhibit J - letter, SB 204, David Moskowitz, 1 pg.

Exhibit K - proposed amendments, SB 1129, staff, 2 pgs.

Exhibit L - hand-engrossed bill, SB 1129, staff, 7 pgs.

Exhibit M - testimony, SB 1129, Kip Lombard, 4 pgs.