

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.

HOUSE COMMITTEE ON WATER POLICY

April 25, 1991Hearing Room D 1:15 p.m.Tapes 55 - 56

MEMBERS PRESENT:Rep. Chuck Norris, Chair Rep. Bill Dwyer, Vice-Chair Rep. Bill Markham Rep. Walt Schroeder Rep. Larry Sowa

VISITING MEMBER:Rep. Dave McTeague

STAFF PRESENT: Beth Patrino, Committee Administrator Pat Zwick, Committee Assistant

WITNESSES:Jim Myron, Oregon Trout David Moskowitz, Northwest Steelheaders Kip Lombard, Oregon Water Resources Congress Jerry Schmidt, Oregon Association of Realtors Audrey Simmons, Water Watch Bev Hayes, Water Resources Department Rep. Mike Nelson Richard Koesan, Oregon Cattlemens Association Larry Trosi, Oregon Farm Bureau Dale Pearson, Restoration & Enhancement Board Charles Woosley, Izaak Walton League Jeff Curtis, Oregon Department of Fish & Wildlife Kay Brown, Oregon Department of Fish & Wildlife

MEASURES CONSIDERED:HB 3425 - Establishes policy of state to require showing that unappropriated water is available before granting water right permit or certificate for out-of-stream use. - Public Hearing

HB 3465 - Requires agency applying for in-stream water right to give public notice of application. - Public Hearing

SB 246 A - Extends to 1997 surcharges on certain wildlife and commercial fishing law fees to finance fish restoration and enhancement. - Public Hearing and Work Session

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TAPE 55, SIDE A

010 CHAIR NORRIS: Calls the meeting to order at 1:50 p.m.

Opens public hearing on HB 3425.

PUBLIC HEARING HB 3425

012 BETH PATRINO, COMMITTEE ADMINISTRATOR: Reviews provisions of HB 3425.

020 JIM MYRON, OREGON TROUT: Presents and reads written testimony in support of HB 342 5 (EXHIBIT A).

055 REP. MARKHAM: What would Water Resources Department have to do to ascertain if water is available?

060 MYRON: The Department currently checks with the local watermaster to see if there have been past problems with water availability, which happens on a complaint driven basis.

087 CHAIR NORRIS: In 1985 in the Umatilla Basin we requested that the river be withdrawn from further appropriation. Suspect there are other basins where voluntary withdrawal has taken place.

How would an applicant determine the availability of water?

098 MYRON: The applicant would have to provide the Department with information on what the stream flow is and what applications there are.

We think it is time that the applicant share the cost in making those determinations.

108 REP. DWYER: Would there be no more withdrawals if all the streams are already overappropriated?

113 MYRON: Yes.

The Department has a definition of "overappropriated" in their rules. If water is not available 80 percent of the time, the stream is considered overappropriated.

130 DAVID MOSKOWITZ, NORTHWEST STEELHEADERS: Testifies in support of HB 342 5 which would take some of the burden off Water Resources in making determinations.

Should look at how many applications Water Resources has granted in the past several years.

150 REP. MARKHAM: What would it cost a farmer who might want to make an application?

155 MOSKOWITZ: The cost might be high. The Department might be able to extrapolate the cost for an applicant based on their costs.

165 REP. DWYER: Since 1957 we have required a determination that water is available. Every appropriation since 1957 was supposed to have been based on availability.

Where would a person go to get information needed to determine availability?

180 MOSKOWITZ: Call local watermaster to find out if water is available. In some cases, a farmer could utilize the same resources. Main problem is that data is not available. The Department should not grant a permit on the basis of no data. The individual who is determined to get a permit might need to make the business decision, as

a cost of doing business, to hire a consultant to gather that data.

205 REP. DWYER: Is there a contested case process if you intervene?

210 MOSKOWITZ: Yes. Do not know what has to be shown.

220 KIP LOMBARD, OREGON WATER RESOURCES CONGRESS: Presents and reads written testimony in opposition to HB 3425 feeling that the bill is unnecessary and expressing a number of concerns (EXHIBIT B).

322 LOMBARD: Explains difference between permit and certificate to Rep. Markham.

We are saying that all these determinations should be made before a person is even given a permit.

345 REP. MARKHAM: Until you have a certificate your permit can be rejected.

350 LOMBARD: A permit can be rejected if you do not use it. If you follow the conditions and the requirements of the permit it is automatic that you will receive a certificate. There are sometimes changes between the permit and the certificate.

360 REP. MARKHAM: How do you determine if the water is unappropriated?

365 LOMBARD: Appropriated means that there are so many water users who have applied for and obtained permits or certificates or have inchoate rights which have yet to be adjudicated. If you total all those that total in almost every stream in the state will probably be more than the total amount of water that comes through at any given time.

380 REP. DWYER: Why haven't your 1915 permits been certificated?

390 LOMBARD: They are large permits requiring a lot of construction. They were extended because construction was not completed. Extensions are permitted by law.

TAPE 56, SIDE A

LOMBARD: Final proof surveys will be done beginning in October, 1991. The Department provided statistics how far they were behind in final proof surveys due to financial and personnel constraints.

015 REP. DWYER: Is it possible to get a permit for more use of water than you could use in order to get an early permitted date?

020 LOMBARD: Knows of a few situations where that was done.

Districts will not get water for more acreage than they are irrigating at the time of final proof survey.

A combination of factors prevent proving up.

060 REP. SOWA: What do you want to do?

If we could write the law in terms that you agreed with, and used the basic philosophy of final proof surveys being done by private engineers, do you still object to a new person coming in and asking for water and applying for a permit, and providing their own engineer to prove that

there is water there?

090 LOMBARD: Feel that the current administrative rule procedure is appropriate.

There should be a determination of water availability.

Feels that expense to prove availability could be so high that you would effectively deny every de minimis use.

108 REP. SOWA: What if we exempted de minimis use?

110 LOMBARD: Hope you would.

Thinks that to shift the whole burden on the water user would be prohibitive.

120 REP. SOWA: Could a private individual do the process less expensively than the Department?

125 LOMBARD: Possibly, but still feels it would be a very costly process.

135 REP. DWYER: Asks Rep. McTeague how he would define "unappropriated water"?

140 REP. McTEAGUE: I introduced the bill at the request of Oregon Trout.

144 MYRON: If water is not available 80 percent of the time, it is overappropriated.

150 JERRY SCHMIDT, OREGON ASSOCIATION OF REALTORS: Feels provisions of HB 342 5 are harmful. There are statutory provisions and administrative rules to address the problems of over-appropriation. In the Hoodland Corridor where an irrigator had to prove whether or not a surface water stream was interconnected with the well he was proposing to use, consulting fees were \$60,000. That is not altogether equivalent, but gives an idea of costs.

If you are shifting the burden to the applicant, it is a mistaken state policy. Does not think the applicant can sort through the maze of public interest that needs to be considered.

175 REP. McTEAGUE: Feels the witness has made a stirring argument for why we need a broader based funding source for Water Resources Department and a water use fee in the future to pay for needed programs and studies.

180 AUDREY SIMMONS, WATER WATCH: Speaks in support of the concept and intent of HB 342 5.

Water Watch has always felt there was a real question of whether we were issuing permits for water that was not in the stream.

The Department and the Commission has recently addressed this problem and funds were made available to the Department.

Believe that users who have had a relatively free ride with the water resources of the state have reached the point where it is time for them

to carry some of the responsibility when they want to withdraw the waters of the state for their own personal use.

215 BEV HAYES, WATER RESOURCES DEPARTMENT: The Commission has no position on HB 3425.

Thinks they view part of it favorably as they have decided to require, by rule. that users in the Malheur Basin must show by a preponderance of evidence that water is available before they can apply for a permit.

The Commission believes it can do this administratively and has chosen to do it on a site by site basis.

There would be a substantial cost to the applicant but it would reduce the Department's cost for processing applications if the applicant had to show that water was available before they could apply.

The rule adopted in the Malheur says that the applicant must show by a preponderance of evidence, and that would be evidence gathered by a qualified hydrologist or Water Resources Specialist, that water is available. Would require them to use streamflow measurements, gauged records if available, or a good estimate of water availability.

Adopted the rule as a requirement in the Malheur Basin because the Department's preliminary analysis of the Malheur Basin suggested that water was not available.

Commission has adopted definition of "over-appropriated" in its statewide policies. The definition says that if water is not available four out of five years it is considered overappropriated.

In the Water Availability Report produced for the Commission last week, we say that 63 percent of the sites we investigated showed that water is not available at least one month out of the year. This would suggest that not all the streams are overappropriated, but we do have problems on a good many of them.

255 CHAIR NORRIS: Do existing statutes and/or administrative rules achieve what this bill purports to achieve?

260 HAYES: Our Commission, by administrative rule, can require that where they want to. The bill would require this to be the case anytime anyone applied for a permit or certificate for out of stream use. Assuming that "unappropriated water" refers to the Department definition.

270 REP. SOWA: If you know that 63% of the streams are overappropriated, you have some available figures for streams or river basins that are overappropriated.

280 HAYES: Our Department water availability expert used gauged records when available and computer models. This is a beginning effort and is not definitive. We hope to refine the effort.

290 REP. SOWA: Has anyone applied for a permit in the Malheur Basin?

300 HAYES: Not yet.

305 REP. SOWA: What would it cost the Department to do what the sponsors of this bill are envisioning?

306 HAYES: Unable to give dollar figure. Will provide later.

314 REP. SOWA: How many applicants have been denied permits because water was not available.

325 HAYES: Have rejected hundreds and canceled hundreds.

330 REP. SOWA: Do you have enough data or access to data to satisfy the preponderance of the evidence to deny applicants?

335 HAYES: Do not believe our data could meet the test of preponderance of evidence.

Explains what the Department does following an application.

35REP. SOWA: Does a person who is denied a permit have recourse?

360 HAYES: Yes. They can request a hearing and we will conduct a contested hearing. They would have the opportunity to produce evidence that contradicts what the Department suggests. Parties who might be contesting the application would be admitted to the case.

370 REP. SOWA: Would people lose their ability to go through a contested case process with this bill?

375 HAYES: No.

377 REP. SCHROEDER: Does adjudication give you an idea if streams are under or overappropriated?

380 HAYES: No. If you are talking about old adjudicated rights they are in the same situation as any other water certificate holder. Adjudication does not give us better information.

About two thirds of Oregon has been adjudicated.

Explains adjudication process. Rights to water that began before 1909 are determined in the adjudication process.

TAPE 55, SIDE B

HAYES: Continues explanation of adjudication process.

010 REP. DWYER: What level of evidence standards do you use?

011 HAYES: The water availability analysis we do is to determine if anyone has concern about the permit application, check gauge data if available, watermaster information, and any other available source.

023 REP. SOWA: Concerned that we allow people to utilize water of state for free. In 1987 we began to say that some of those people will start picking up the cost for the final proof survey. Is interested in as much data from the Department as possible on what it is costing the state to give the water away free.

038 CHAIR NORRIS: Closes public hearing on HB 3425.

Opens public hearing on HB 3465.

PUBLIC HEARING HB 3465

042 PATRINO: Reviews provisions of HB 3465 which has no fiscal or revenue impact, and no subsequent referral.

050 REP. MIKE NELSON: Speaks in support of HB 3465 which he sponsored at the request of many of his constituents.

HB 3465 will allow citizens to know when in-stream water rights are being filed.

100 REP. SCHROEDER: Why didn't you include fees to be paid with those filing for instream water rights?

105 REP. NELSON: Thought it might jeopardize the bill.

110 REP. McTEAGUE: What would you think about adding the reason for the application to the publication notice?

120 REP. NELSON: Would consider that a friendly amendment.

145 REP. SOWA: Thought Water Resources Department sent out notices when an instream application was pending.

150 REP. NELSON: My bill says that notice will be given in a newspaper. Present law says that the Department give public notice to all county planning departments.

162 REP. SOWA: States his understanding of the instream water right application process.

170 REP. NELSON: Does not want duplication. Wants better notification to the public.

175 REP. SCHROEDER: Would two weeks notice be adequate rather than the four weeks specified in the bill?

180 REP. NELSON: Two weeks would be adequate.

190 JIM MYRON, OREGON TROUT: Reads written testimony in support of HB 3425 if it were amended to apply to all water rights application. Without that change, Oregon Trout will oppose the measure (EXHIBIT C).

215 DAVE MOSKOWITZ, NORTHWEST STEELHEADERS: Concurs with Mr. Myron's testimony.

230 KIP LOMBARD, OREGON WATER RESOURCES CONGRESS: Significant reason why there is a good public reason to publish notice on instream water right applications without imposing that condition on all water right applications.

This does not duplicate the water Resources Department notice, because their rules do not require publication of notices in the newspapers. You pay \$95 to get on their notification list each year.

A large number of water right applications have been filed in my district, and people are disturbed by the lack of sufficient notice to allow them to comment.

Feels it is good public policy to give public notification.

There is more protection for the public in consumptive use permits than there is in the instream application process where no permit is issued, but a certificate is issued.

300 REP. McTEAGUE: Are people less opposed to instream rights if they know the reason for the application?

310 LOMBARD: More information than just the fact that there has been an application will satisfy some people, but some people will oppose instream water rights even if you give them additional information.

350 REP. SOWA: Would you prefer public notification before or after the application for instream water rights is made?

360 LOMBARD: People would like the opportunity for input earlier than when the application has been made.

Will protest lack of input in Parks and Recreation Department's proposed rules for applications for instream rights which will be heard tonight.

Will support HB 3465.

TAPE 56, SIDE B

008 JERRY SCHMIDT, OREGON ASSOCIATION OF REALTORS: His association supports

HB 3465. Supports Mr. Lombard's testimony.

Does not feel consumptive and instream water rights are comparable. Does not think the provisions of HB 3465 are applicable to consumptive water uses.

030 RICHARD KOESAN, OREGON CATTLEMENS ASSOCIATION AND WATER FOR LIFE: Both organizations support HB 3465.

035 LARRY TROSI, OREGON FARM BUREAU: Speaks in support of HB 3465.

040 REP. SOWA: How long after you receive a request from Fish and Wildlife for an instream water right do you send out notification asking people if they object to it?

045 HAYES: In our next Department bulletin.

050 REP. SOWA: It was my impression that when you received instream water right applications from other agencies you went through a process which said that some have to go to contested case hearings.

059 HAYES: We have no instream water right applications that have gone to contested case hearings. We have had people object to them. We do not automatically go to a contested case hearing when there is an objection. We evaluate the reasons for the objections and evaluate the instream water rights according to our rules. We have 400 pending applications and one person on staff. Some applications are conditioned.

068 REP. SCHROEDER: Will it take the same length of time for an instream water right to get its permit, and if so, does that push the

private ones further back in line?

070 HAYES: We have one person who processes only instream water right applications.

Other people process out-of-stream applications.

The date of receipt of application is the priority date for instream water rights, as it is with other water rights. The right is managed according to that priority date. If you have an instream water right with a 1992 priority date, we will not shut off users with prior water rights to meet the instream water right.

Explains out of stream water use application process.

An instream water right application does not go through that process, but does have to meet standards set by the Commission so they are thoroughly reviewed.

096 CHAIR NORRIS: Closes public hearing on HB 3465.

Opens public hearing on SB 246 A.

PUBLIC HEARING SB 246 A

105 DALE PEARSON, RESTORATION AND ENHANCEMENT BOARD: Testifies in support of SB 246 A and proposes an amendment (EXHIBIT D).

Informational documents are submitted as part of (EXHIBIT D).

170 REP. DWYER: Feels that the Restoration and Enhancement Board is doing a good job.

180 CHARLES WOOSLEY, IZAAK WALTON LEAGUE OF AMERICA: Reads written testimony in support of SB 246 A (EXHIBIT E).

205 JIM MYRON, OREGON TROUT: Reads written testimony in support of SB 246 (EXHIBIT F).

210 JIM MOSKOWITZ, NORTHWEST STEELHEADERS: Echoes Mr. Myron's comments.

217 JEFF CURTIS, OREGON DEPARTMENT OF FISH & WILDLIFE: Speaks in support of

Senate Bill 246, summarizing written testimony (EXHIBIT G).

230 REP. McTEAGUE: Asks for description of size of deferred maintenance backlog on the state hatchery system.

240 KAY BROWN, OREGON DEPARTMENT OF FISH & WILDLIFE: Probably \$10 million. We received budget notes that ask us to come back to the next legislative session and describe the exact extent of the deferred maintenance.

245 REP. McTEAGUE: Is the Restoration & Enhancement process paying for a substantial amount of the restoration and trying to catch up on some of the deferred maintenance of the state hatchery system?

250 BROWN: Yes.

252 REP. McTEAGUE: How much money is in the Department base budget for hatchery maintenance and restoration?

255 BROWN: None.

258 REP. McTEAGUE: This fund and process which is citizen driven is carrying a disproportionately large portion of the burden of what should probably be a base budget program.

The Trade and Economic Development Committee is trying to put some lottery dollars into this program to beef up the money that is coming from the commercial and sport anglers. Any lobbying of the committee by this committee would be appreciated.

320 CHAIR NORRIS: Did the commercial fishermen know about today's hearing on this bill?

330 PEARSON: They were aware of the meeting. In the interest of brevity I asked them to stay home and I would carry the message for the entire board.

Commercial fishermen would be upset if the committee did not pass the bill out.

335 CHAIR NORRIS: Closes public hearing on SB 246 A.

Opens work session on SB 246 A.

336 MOTION: REP. DWYER: Moves SB 246 A-2 amendment to the bill.

VOTE: There being no objection, amendment is adopted.

344 MOTION: REP. DWYER: Moves SB 246 A as amended to the floor with a do pass recommendation.

349 REP. SCHROEDER: In the 1989 session we had a mediocre bill with a great idea and it became a great bill with a great concept which set up the Restoration and Enhancement Board to have some oversight on the program. The Board has been doing a tremendous job.

357 VOTE: On a roll call vote, motion passes. All members are present.

365 CHAIR HAYDEN: Rep. Sowa will carry the bill.

Closes work session SB 246 A.

Adjourns meeting at 3:35 p.m.

Submitted by: Reviewed by:

Pat Zwick, Beth Patrino, Assistant Administrator

EXHIBIT LOG:

A - HB 3425 Testimony - Jim Myron - 2 pages B - HB 3425
Testimony - Kip Lombard - 2 pages C - HB 3425 Testimony - Jim

Myron - 1 page D-SB 246 A Testimony - Dale Pearson - 23 pages E-SB 246 A
Testimony - Chuck Woosley - 1 page F-SB 246 A Testimony - Jim Myron - 1
page G-SB 246 A Testimony - Jeff Curtis - 35 pages