

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

January 29, 1991Hearing Room D 1:30 p.m.Tapes 10 - 11

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

MEMBER EXCUSED: Rep. Bill Dwyer, Vice-Chair

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

MEASURE CONSIDERED:HB 2192 - Establishes procedure for defining boundary of critical ground water area. Pub. Hearing HB 2188 - Modifies requirements relating to records of Water Resources Department. Pub. Hearing and Work Session

WITNESSES:Bill Young, Water Resources Dept. Fred Lissner, Water Resources Dept. Dave Nelson, Oregon Water Resources Congress Marjo Nelson, Darrow Rock Community Assn. Audrey Simmons, Water Watch Larry Trosi, Oregon Farm Bureau

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TAPE 10, SIDE A

010 CHAIR NORRIS: Calls the meeting to order at 1:32 p.m.

Reviews agenda for the day.

After HB 2188 was heard and passed out of committee with a do pass recommendation, objections were raised that the bill did not require that the original hard copies of the water right certificates be maintained, and be maintained in a safe place.

We pulled the bill off the floor and have drafted an amendment to address that concern.

Opens public hearing on HB 2188.

PUBLIC HEARING HB 2188

029 REP. SCHROEDER: Does the Department currently keep a hard copy of water rights?

030 BILL YOUNG, WATER RESOURCES DEPT.: Yes. The amendment is not a problem for WRD.

050 REP. SOWA: The bill was originally sold to us as a money saving scheme. Will requiring the paper record prevent the bill from being a money saving scheme?

055 YOUNG: This may erode it a little, but we would continue to favor the bill as streamlining our operation with the amendment the committee is looking at.

060 CHAIR NORRIS: Closes public hearing and opens work session on HB 2188.

WORK SESSION HB 2188

065 MOTION: REP. SCHROEDER: Moves adoption of LC 2188-1 (EXHIBIT A).

075 VOTE: Amendment is adopted on a roll call vote. Rep. Sowa votes no. Rep. Dwyer is excused.

080 REP. SCHROEDER: Asks Rep. Sowa why he objects and if he has other objections.

082 REP. SOWA: I think the original bill would save money, and this amendment will erode the money saving.

089 MOTION: REP. SCHROEDER: Moves passage of HB 2188 as amended to the floor with a do pass recommendation.

091 VOTE: Motion passes on a roll call vote with all members present voting Aye. Rep. Dwyer is excused.

095 CHAIR NORRIS: Closes work session on HB 2188 and opens public hearing on HB 2192 which establishes the procedure for defining boundary of critical groundwater area and was filed at the request of Water Resources Department.

PUBLIC HEARING HB 2192

100 BILL YOUNG, WRD: Introduces Fred Lissner.

Reviews provisions of HB 2192 which will clarify in statute the process that WRD would use to declare a critical ground water area, paraphrasing (EXHIBIT B).

Elaborates on current process.

We believe the benefits of HB 2192 are that they better define the critical groundwater area process and makes the process comport with the body of administrative law that we have. HB 219 2 would allow us to focus on issues of substance and protect the interests of the more senior users in the area.

Offers proposed amendment (EXHIBIT C).

255 REP. MARKHAM: Are you trying to get rid of a cumbersome process to protect water and senior water right users?

265 YOUNG: Yes. The current process does not work well. We are not anxious to limit anyone's ability to participate.

We are charged with managing the resource on a renewable, sustainable basis. If our process is delayed over long periods of time, we find ourselves observing the groundwater continuing to decline, becoming more expensive for everyone to use, and we suspect that some senior users drop out of the process because we move too slowly to protect their interest.

Talks about declines in the basalts.

315 REP. SOWA: Are the Willamette Valley basalts beginning to have problems?

320 YOUNG: Yes. As we continue to do the Willamette Basin Plan and look at groundwater, our experience suggests that we will begin to have problem in the basalts.

Our interest is to get ahead of the problem and make judgments about limiting the demand on water before having to roll back peoples' ability to use the water.

340 REP. SOWA: Is it true in every case that pending permits could come under the rule making process rather than under the contested case or would we change the focus of the law?

Would the provisions for requesting a contested case be changed under this bill?

355 YOUNG: If we concluded that a current water right application was to be rejected, it is conceivable that that individual water right holder could ask for a contested case on the circumstances surrounding that one water right.

If we were considering a critical ground water area, and as part of the rulemaking, the Commission said we don't think there is sufficient water to support any further use and instructed the Department to reject the applications, there might be occasions where that individual water right holder could come in on that one individual water right and ask for a contested case. That would not change with this bill.

380 REP. SCHROEDER: How do you interpret "potential interference" in this measure?

390 FRED LISSNER, WATER RESOURCES DEPARTMENT: As a well is pumped, the effects of the pumping are spread out in the aquifer until a source of surface water is encountered.

In the process of the effects spreading out, other wells are encountered and drawn within the radius of influence of the pumping well.

The impact on the affected well is a reduced ability to produce water.

TAPE 11, SIDE A

LISSNER: Just the existence of two wells in a resource creates that

potential. It does not necessarily create a condition that needs regulation. Regulation need come into play only if the interference exists, and that it is substantial interference, as defined in rule.

030 REP. SOWA: Asks for explanation of how interference language affects irrigation wells and wells for private use which are exempt from most water right statutes?

040 YOUNG: Domestic use, or pumping of groundwater for livestock water purposes, is not exempt from the water law. It is only exempt from permit requirements.

We use well logs for a date associated with one of those exempt uses that did not have a permit. Once we have done that, unless there was specific language in a given area that prompted us to do otherwise, we would regulate on a priority basis.

A domestic water use requires small amounts of water so would seldom interfere with a large production well.

It would not be unusual to have a later priority production well that might interfere with some already existing exempt uses. Those are subject to regulation by the Department, both in our watermaster corps and in our planning process, since the 1989 Session.

055 REP. SOWA: If you declared a groundwater problem area, and an irrigation well was permitted by you to be used, and that well drew down the table or interfered with a private well, would you be required to regulate an irrigation well?

060 YOUNG: Yes.

090 REP. SCHROEDER: Are there any other critical areas besides Hermiston and the Tigard area?

095 YOUNG: We have six. Lists them.

We have also had areas where we were alerted more quickly to the potential of groundwater decline and have regulated those areas from further development, but have not had to cut back current users. Our goal is to prevent declines from occurring rather than trying to recover from a decline.

No coastal areas are currently designated as critical groundwater areas. There are coastal areas where groundwater is difficult to find.

150 REP. MARKHAM: Can a city lose its water right?

155 YOUNG: Not under the normal abandonment standards.

170 DAVE NELSON, OREGON WATER RESOURCES CONGRESS: Submits and reads written

testimony reviewing current law, and changes proposed with HB 2192 (EXHIBIT D).

Comments: Under the APA it seems that the agency could serve notice of a public hearing on a specifically designated critical groundwater area that may be defined as this area. After the hearing, perhaps the agency would have the authority to enlarge the area and leave those persons in

the enlarged area without having had the benefit of the notice supplied to the people within the area at the first notice.

If the agency is going to draw the boundaries larger than the initial proposal, those folks who would then be included should have an opportunity to be included in a subsequent hearing on that process.

Continues reading (EXHIBIT D).

Comments: Believes that procedures conducted under the APA would be appealable only to the Court of Appeals and an individual may not have a court hearing on the facts of the case, but only on the procedures and the propriety under which the proceeding was determined. Under the current process, the affected parties can appeal to the Circuit Court of their jurisdiction for redress of what they feel is in error.

Continues reading (EXHIBIT D).

Reviews proposed amendments which are a part of (EXHIBIT D).

We have no complaint with the ideals or necessities in certain areas of adopting critical groundwater areas. Our interest is in full and complete notification of the affected parties so that they have an opportunity to enter into the discussions.

390 CHAIR NORRIS: Do you feel that HB 2192 as written, and if put into effect, could lead to the declaration of a critical groundwater area, including people and claimants who had no way of knowing that it was coming?

395 NELSON: That is possible, but it would be more possible by conversion from a cumbersome process to a more generalized process.

405 CHAIR NORRIS: We are dealing with a procedural issue rather than a policy issue.

410 MARJO NELSON, DARROW ROCKS COMMUNITY ASSN.: We are concerned about the notification process after going through a process with our water.

We have no problem being notified by regular mail rather than certified mail, but do have a problem with being dropped off completely.

Emphasizes the need for broad notification.

TAPE 10, SIDE B

020 CHAIR NORRIS: Is the notification issue separate from what we are concentrating on today? The relating clause relates to specifically to critical groundwater areas.

030 DAVE NELSON: Agrees with chair.

060 AUDREY SIMMONS, WATER WATCH: Refers to contested case procedure recommended. The Department is assuming there will be a contested case that will bring out the issues they are talking about. Can the Department initiate a contested case to do this if a request for a contested case is not filed?

075 YOUNG: Yes. Under current law we have the ability to commence a

critical area process on our own motion and would have the ability to initiate both rulemaking and contested processes under the proposal we presented to you today.

080 CHAIR NORRIS: What assurance do we have that anyone affected will receive notification in the matter of boundaries?

095 YOUNG: The same assurance that the committee has on notice given in any rule making process under current APA; i.e., the obligation proscribed by the legislature.

It is typically a minimal sort of notice. Agencies also maintain an extensive mailing list. People who have expressed an interest would get the notice directly.

We propose the notification as required under the APA for rulemaking undertaken by any agency to set the boundaries.

Not sure how to give assurance that an individual received notification of a proceeding.

115 CHAIR NORRIS: On Line 40, page 3, you have eliminated an extensive section about notification.

What are we replacing it with?

120 YOUNG: With language in Sec. 2 and Sec. 4.

130 CHAIR NORRIS: Does it compensate for the omission immediately following?

135 YOUNG: Notification about rulemaking activity would be of a more general type. If you are talking about the contested portion, specific notice would be sent to anyone whose water right might be affected.

170 CHAIR NORRIS: What would come out of a rulemaking hearing?

172 YOUNG: Rules that would set boundaries, identify a particular aquifer, a conclusion to close area to further appropriation, a judgment on pending applications, and discussion of geothermal aspects, if applicable.

When we move to a contested case there would be a specific notice sent to that individual saying we are considering reducing the amounts of water that can be removed from this aquifer for these reasons and inviting the individual to be a party to the contested case, testify, cross-examine others testifying, cross-examine the Department when it presents a reflection of the evidence that there was a problem.

Our experience in the contested process to date, has been that we have gone directly to the Court of Appeals.

210 REP. SOWA: Would those people you say will slip through the cracks under the new procedure include pending water right applicants?

220 YOUNG: No. Under our standard practice, we would notify those people and also notify users in the area.

Do not anticipate that the declaration of a critical groundwater area by rule would not receive broad awareness.

310 DAVE NELSON: Concerns not allayed by Mr. Young's explanations.

The substantive change based on the theory that the entire process of the declaration of a critical groundwater area is set in motion at the first hearing and we think it appropriate that since all of the people in the affected area could be substantially, economically, affected, they deserve notice, rather than the general notice that the APA envisions.

The deletions at the bottom of page 3 and top of page 4 of the bill are the critical difference between the APA and the existing procedures.

We would like to retain the direct notice from the Department of known appropriators and groundwater users.

345 YOUNG: Our experience has been that the more we take an activity and make it a specific activity separate from other things done under the law, we raise more and more opportunity for the procedural error.

We will look at the potential of what we could do to satisfy concerns being expressed about notice. Our direction would be to continue to try, consistent with the bill as drafted, to make it very clear that these initial stages are rulemaking. If we can provide comfort in terms of the nature of the notice that will be given, I think that by the time we would be at the point of undertaking an activity like this, our general rulemaking notice will have followed enough activity in the area, that no one will be surprised at what we are doing in the area.

If the committee wants the Department to work to see which of the suggestions offered might be considered, I would want to look carefully with our Attorney General to see whether we begin to verge toward the contested case approach or that we have still left potential confusion out there and become subject to challenge.

It is not our intent to foreclose anyone who has an interest in these matters from talking to us. We would simply like to put it in what we judge to be the proper context; i.e., on the broad issues it is rulemaking, on the specifics of what happens to "my" water right, that is a contested case.

The notice we are talking about giving is the one that the legislature has been comfortable with under the APA that drives most of the administrative activities of all agencies in state government.

410 CHAIR NORRIS: Check with the Attorney General to see if you would be transgressing into the judicial arena if you had some more universal notification.

415 YOUNG: I will. We want to make clear, as we pursue that, that we are talking about notice by regular mail to those in our records.

One of the difficulties we would have with "records of the Department" is that it would include every potential domestic well that might be in a given area even though they may or may not be likely included in any kind of regulation.

460 CHAIR NORRIS: Suggests notification to those permitted or with certified rights.

465 YOUNG: That is a possibility.

TAPE 11, SIDE B

050 LARRY TROSI, OREGON FARM BUREAU: Would prefer to wait until next hearing on the bill to present testimony.

060 CHAIR NORRIS: Asks Mr. Troisi to share the information he received from his legal counsel.

Rep. Schroeder will carry HB 2188.

Adjourns meeting at 3:04 p.m.

Submitted by: Reviewed by:

Pat Zwick, Beth Patrino, Assistant Administrator

EXHIBIT LOG:

A - Amendments to HB 2188 (2188-1) - Staff - 1 pages
B - Testimony on HB 2192 - Bill Young - 2 pages
C - Amendments to HB 2192 - Bill Young - 1 pages D -Testimony on
HB 2192 - Dave Nelson - 8 pages