

House Committee on Water February 19, 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.

House Committee on Water Policy February 28, 1991 - Page

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HOUSE COMMITTEE ON WATER POLICY

February 28, 1991Hearing Room D 1:30 p.m.Tapes 23 - 24

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:Alan Cook, State Parks and Recreation Department Jim Myron,  
Oregon Trout Jerry Justice, Clackamas County John Borge, Clackamas  
County Burton Weast, Oregon Association of Water Utilities Doug Myers,  
Water Watch Dave Nelson, Oregon Water Resources Congress Jan Boettcher,  
Oregon Water Resources Congress Liz Frenkel, Sierra Club Louise  
Bilheimer, Oregon Rivers Council Bill Young, Water Resources Department  
Richard Koesan

MEASURE CONSIDERED:HB 2677 - Provides for preference of human and  
livestock uses of

water within scenic waterways when proposed uses of water are in  
mutually exclusive conflict or where available supplies of water are  
insufficient for all who desire to use them. - Public Hearing

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statements made during this session. Only text enclosed in quotation  
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proceedings, please refer to the tapes.

TAPE 23, SIDE A

010 CHAIR NORRIS: Calls the meeting to order at 1:30 p.m.

Asks Committee Administrator to review HB 2677.

010 BETH PATRINO, COMMITTEE ADMINISTRATOR: Summarizes HB 2677.

PUBLIC HEARING HB 2677

025 CHAIR NORRIS: Testifies in support of HB 2677 as chief sponsor giving reasons for the bill.

It was brought to my attention that the Water Resources Commission could no longer consider any application for water for human and livestock consumption from any scenic waterway or tributaries thereto.

I had a bill to address that concern drafted for the 1989 session but the bill was not considered.

HB 2677 is a repeat of that bill which would reinstate the fact that human and livestock uses shall maintain the preference granted in ORS 536.310 (12).

The provision was evidently overruled by the Diack decision.

I hope we can give consideration to Water Resources Commission looking at and granting permits for very small amounts of water that can be taken from any of the wild and scenic rivers strictly for human domestic consumption or a reasonable amount of livestock.

Taking water from the rivers for livestock use would protect riparian zones.

055 REP. SOWA: One of our scenic waterways is the Sandy River. Did you intend that if something happened to the Bull Run watershed, you would want to allow Portland to take all of its water out of the Sandy River?

068 REP. NORRIS: I will provide the Committee members with Parks and Recreation's best estimate of the wild and scenic rivers private and public ownership in the riparian zones. A substantial amount of the riparian area is privately owned. This is the area of chief concern.

In the John Day drainage, the majority of the riparian zone is privately owned.

Open for further discussion on the Sandy question.

077 REP. SOWA: Is it your determination that you don't want limitations on the wording of the bill, but would allow any person or municipality that desires to use water in a scenic waterway to be able to do so?

082 REP. NORRIS: That is not my intent. I am inviting tightening and clarification to where we are talking about one family with some livestock. We are not talking power plants or cities, but only small incidental use.

090 REP. SCHROEDER: Are we talking about existing domestic uses and existing livestock on the land, or new uses?

095 REP. NORRIS: We are talking new uses because since the Diack decision the Water Resources Commission can not entertain consideration of any applications for permits.

102 ACTING CHAIR DWYER: Is that because the Commission did not want to condition the permits?

103 REP. NORRIS: Unable to comment. Believe they thought there was a prohibition against considering applications for permits out of wild and scenic streams.

107 ACTING CHAIR DWYER: Is it the intent of the bill to have an impact on the Diack decision? 115 REP. NORRIS: It is to accommodate some small personal uses for people and their livestock living along the river. It is not the intent to overturn the Diack decision.

120 REP. MARKHAM: What is the Diack decision?

125 REP. DWYER: The Diack decision is a substantial decision relating to scenic waterways emanating from the decision of a utility to divert water from the Sandy River to generate power and discharge the water into the Columbia rather than return it to the Sandy River.

134 REP. SCHROEDER: If someone owns private property along a scenic river, and have held it for a number of years anticipating putting a home there, would this bill allow them to draw out water?

140 REP. NORRIS: Yes. For small use, but not for power plants or irrigation.

142 REP. SOWA: A couple of years ago the people passed a law adding additional scenic waterways. Do you remember the advertisement by people opposed to that addition?

150 REP. NORRIS: No. I remember the issue was passed by a ballot measure.

152 REP. SOWA: Everything you could imagine was feared by people living on or near the scenic waterways as a result of those designations, so there was a lot of negative advertising. The people passed those additional waterways over negative objections and I think it is the decision of the people of Oregon to protect their scenic waterways to the maximum.

160 REP. NORRIS: Those of us in the rural areas are getting used to that.

Speculates that few of the people who voted yes because it is an appealing concept, understood they were shutting off those people who owned and lived along those streams from any form of water use.

170 REP. MARKHAM: Compares the issue to the riparian rules of the Board of Forestry.

Considers both issues takings.

190 ALAN COOK, OREGON STATE PARKS: Reads written testimony expressing concerns with HB 2677 (EXHIBIT A).

265 REP. SOWA: Have you visited with your Assistant Attorney General

about the language of HB 267 7 and your proposed amendments?

270 COOK: No.

280 REP. SOWA: My concern is not whether we allow people to use water from a scenic waterway, but that if we change the law I want someone from the Attorney General's office to tell me that there is no interference with the Diack decision.

Prefers that the opinion come from Parks' Assistant Attorney General rather than from another agency which is involved.

285 REP. DWYER: Would prefer having Bill Hutchison who represented the plaintiff in the Diack decision to tell me because I feel he is much more capable of knowing the details and the court's arguments in regard to reaching the decision.

Would like Mr. Hutchison to say what kind of language can be constructed, in his opinion, which will not impact the Diack decision. Not sure that is possible.

300 REP. MARKHAM: Our job is to create decent law for the people we represent. Court decisions have to come under the state law.

309 REP. DWYER: We represent the people. The people spoke and picked the scenic waterways. Why should we impact what the people have done?

320 REP. MARKHAM: Do you have state parks along the scenic waterways?

325 COOK: Yes. Approximately 24.

333 REP. MARKHAM: Do any of the parks take water out of a scenic rivers?

335 COOK: Unable to answer.

345 REP. MARKHAM: Please provide that information to the committee.

350 BILL YOUNG, WATER RESOURCES DEPARTMENT: Introduces himself.

370 REP. DWYER: Recalls a discussion of the Diack decision in a committee meeting with involved parties in the 1989 Session.

375 YOUNG: We did discuss the Diack matter before the committee during the 198 9 Session. The bill submitted did not have a hearing.

Gives his recollection of the discussion.

400 REP. DWYER: Not willing to overturn the Diack decision, but is willing to accommodate the people addressed in HB 2677.

410 YOUNG: Submits and paraphrases written testimony detailing what the bill does, the problem, history, and the Department's and Commission's position (EXHIBIT B).

Proposed amendment to HB 2677 and letter from Anne Squier, Assistant Attorney General to Bill Young and Bill Blosser are part of (EXHIBIT B).

TAPE 24, SIDE A

REP. McTEAGUE: Joins the committee at 2:00 p.m.

YOUNG: Continues his testimony from (EXHIBIT B).

070 REP. MARKHAM: Would you support legislation to help protect the riparian area by allowing Water Resources to allow the farmer to pump water into a water tank?

075 YOUNG: Yes.

We are currently unable to issue that type of permit unless we are able to determine that waters in excess of the needs of the scenic waterway are available.

090 REP. DWYER: Refers to HB 2677. Could we substitute "However, de minimis uses for human and livestock consumption may be allowed, but may not seriously impact the free flowing character of these waters for recreation, fish and wildlife uses" for the bolded language in Section 1?

101 YOUNG: In that case we would continue to amend that section in a place different than our review would suggest.

No immediate reaction to the language.

The Attorney General, in the opinion in (EXHIBIT B) has interpreted the relationship of the statutes for our Commission and says there is not a preference for human and livestock consumption, even though ORS 536.310 seems to recite one. He arrived at that conclusion because we start off with the declaration that the highest and best use of waters within scenic waterways are for the satisfaction of scenic waterway characteristics.

I think we would get more specifically to the issue intended by HB 2677 with the language that Water Resources proposed. We think that would be the more appropriate modification to make it clear that, if it is the intention of the legislature, they do not intend for the scenic waterways to command attention over human and livestock.

We did try specifically asking the Attorney General if de minimis uses could be allowed if we have the opportunity and the answer was no, if there is a theoretical depletion of those flows and if we are not able to make a finding that the needs of the scenic waterway are fully met.

135 REP. DWYER: Repeats his proposed language.

That recognizes and gives Water Resources the authority to allow those de minimis withdrawals up to the point that they impact the scenic waterway and not beyond that point.

Does not like Mr. Young's proposed language.

155 YOUNG: Has no quarrel with language proposed by Rep. Dwyer.

The legislature can modify the statute and make your intentions clear.

Our Commission would welcome clear direction from the legislature.

166 REP. SCHROEDER: Reviews a conversation with, and letter to, Mr. Young concerning being allowed to divert water from a stream over the

riparian zone into a stock tank and allowing the surplus to run back through an overflow tank into the stream.

Also talked to Rep. Norris about the idea.

Mr. Young indicated to me that it would take legislation to do this. I think HB 2677 may allow Water Resources to give a permit for this purpose.

180 YOUNG: Recalls that the question was "Is there any way a person could simply be allowed to do that without having to go through the permit process?" My answer was not without legislation, because there are very limited exceptions to the authorization process in the use of surface water.

We have attempted to create a less expensive process to use in order to do that, but it would still require Commission authorization.

190 REP. SCHROEDER: I asked Jill Zarnowitz of Fish and Wildlife to come up with some ideas of how we could do this without impacting the fish in the stream.

200 REP. MARKHAM: Asks for definition of "de minimis"?

205 YOUNG: Does not know that there is a good one.

Gives example of a use that he would characterize as de minimis.

220 REP. SOWA: Do you see anything in this language or present law that would solve the problem of people living above a scenic waterway and wanting to use a small amount of water.

225 YOUNG: Nothing in current law solves their problem unless it is concluded that waters are in excess of the needs of the scenic waterway. I don't read anything in HB 2677, in our language, or in Rep. Dwyer's language that would keep a limited domestic use to a single family.

The level of prevention would be that you are not talking about diversion of water under the language used in the bill for the broader household uses.

260 CHAIR NORRIS: This is not a hero bill.

I feel it is a question of people first.

250 JIM MYRON, OREGON TROUT: Reads written testimony in opposition to HB 2677 and submits copies of species reports from Oregon Trout and Department of Fish and Wildlife (EXHIBIT C).

345 REP. DWYER: Asks Mr. Myron's opinion of his (Rep. Dwyer's) proposed amendment.

415 MYRON: Understands what Rep. Dwyer is trying to do.

Most scenic waterways are already impacted by existing uses and the question of availability must be considered.

TAPE 23, SIDE B

010 JERRY JUSTICE, CLACKAMAS COUNTY: We are not here to drain the Sandy

River or send it into the City of Portland, but we do have a unique situation in the Hoodland corridor area for which we believe HB 2677 provides a possible solution.

Water service in the area was delivered by a poor system during initial development of the area and it is anticipated that there will be some growth in the area.

We hope the committee will be able to find a method that would allow an area such as ours to come into the category of de minimis use or diversion and not be isolated to one house.

055 JOHN BORGE, CLACKAMAS COUNTY: People in the area we are talking about traditionally supported scenic waterways. We have a major tourist area and considerable public investment in the area. The sewage treatment plant is operating at one third capacity. 7,500 people in the area use a number of water systems. The water systems do not enjoy the municipal ability to stockpile water rights.

We are looking at a planned growth area in jeopardy of having safe drinking water supplied to them in the future. HB 2677 will be a step in resolving some of the difficulties Mr. Young spelled out.

The Federal Safe Water Drinking Act is forcing many of the present systems to change sources. If we can not change sources, existing users will have no water.

Would like you to consider HB 2677 very seriously.

095 REP. DWYER: The Senate is considering a bill which relates development to availability of water. That should be a requirement.

Why should the state legitimize an illegal water right?

107 BORGE: We are not asking for that. We want Water Resources to be able to address the issue of reestablishment of human consumption as a priority.

112 REP. DWYER: What makes you think that the de minimis withdrawal of that water would meet the federal standards of safe water and how would you propose to meet those standards?

125 JUSTICE: Recognizing the position of Water Resources Commission based upon the best legal advise they have been able to obtain, people are being told they need to improve and meet standards and comply with federal regulation. We hope there is a way for the legislature to break the stranglehold on the Commission so that these people can approach a source. Once they are allowed to apply for a use, they will have to take several steps to meet treatment standards under the Clean Water Act, but at this point when you try to apply for a permit, the answer is we are not allowed under current interpretation of the statutes to consider your permit.

Doesn't think that anyone will suggest that the streamflow on the Sandy Basin is seriously impeded at the present time. We want the committee to consciously, in determining what language to put into HB 2677, recognize that existing current diversion is one thing. The de minimis nature should be applied to the increased diversion to be sure that that does not begin to significantly affect the ability of the stream to sustain fish and be a legitimate wild and scenic river.

170 BURTON WEAST, OREGON ASSOCIATION OF WATER UTILITIES: The issue on the Sandy that concerns us is that if the choice was simply not drawing from a surface source and moving to a well system at another location in the basin, this would not be a problem. But because wells are considered part of the hydraulic process for supplying water to the stream, the same restrictions apply with the Scenic River Act that apply if you were taking it directly out of the river.

The Scenic River Act protects segments. The Diack decision says that Water Resources has to worry about what happens above and below that segment. We have over 7,000 people who are getting water in an area now and Water Resources has told us that it is possible that an interpretation could be made to cut off their water.

215 REP. DWYER: Where did you get the information that it affects what they do below a scenic waterway?

220 WEAST: In the meeting we had with Water Resources.

225 YOUNG: A downstream activity could not affect an upstream scenic waterway.

270 REP. SCHROEDER: Are the homes in the area you are concerned with primary homes?

272 WEAST: Fifty percent of the homes are year-round residences.

Next nearest water right is the City of Sandy but drawing on that or the City of Portland is not economically feasible.

290 REP. DWYER: Wants Young to address issue of withdrawal of subsurface water.

300 DOUG MYERS, WATER WATCH: Given the limits discussed today, Water Watch could support the uses that this bill aims at if the uses don't overappropriate the stream.

Looks forward to working with work group.

310 DAVE NELSON, OREGON WATER RESOURCES CONGRESS: HB 2677 is a good concept that needs to move forward so that people upstream from scenic waterways have at least some opportunity to get drinking water to water their livestock.

322 JAN BOETTCHER, OREGON WATER RESOURCES CONGRESS: We are not attempting to overturn the Diack decision, but only to clarify the ambiguity.

335 REP. SOWA: Has seen a bill that gives water districts authority to deliver drinking water to municipalities. Do you think that HB 2677 would give irrigation districts the ability to take additional waters from streams above scenic waterways and deliver them to municipalities to which they don't presently?

340 NELSON: Don't think this bill would grant an additional diversion by an irrigation district, but only allow an individual to make a de minimis appropriation.

365 LOUISE BILHEIMER, OREGON RIVERS COUNCIL: Likes the discussion heard



today better than the printed bill.

The Council opposes the bill as printed because it changes the preference for scenic waterways from fish, wildlife, and recreational uses, to human and livestock uses.

The principal behind the state's scenic waterway system came about through a 1970 Initiative.

1,143 river miles are designated as state scenic waterways. The Diack decision affects those waterways, and the waterways upstream from those river miles.

There are a total of 90,000 river miles in the state of Oregon and with the exception of the state scenic waterways, human and livestock consumption take priority.

We have only just begun the quantification process for the state scenic waterways. If HB 2677 should pass as printed, we will be back at the same point we were before we had instream water rights and water rights will continue to be issued for human and livestock consumption on many streams already appropriated, including the scenic waterways, without quantities necessary to support the fish, recreation, and wildlife uses.

Understands chair's concern and intent. Likes Rep. Dwyer's suggested language and Water Watch's testimony. It is important that we remember the state scenic waterway system came about by ballot initiative.

460 REP. MARKHAM: Refers to past ballot initiatives that the legislature has overturned.

480 LIZ FRENKEL, SIERRA CLUB: The Sierra Club does not support HB 2677 as printed.

Questions if you are moving from an appropriation doctrine to a riparian water rights doctrine when you are looking at streamside use getting preference under HB 2677.

TAPE 24, SIDE B

FRENKEL: Continues her testimony.

031 Are you dealing with new uses, which could be substantial, or existing uses?

The Park system already has severe limitations under the Scenic Waterway Act.

Not sure what I would accept for the Sierra Club until I had a chance to speak to Mr. Hutchison who argued this issue. Might be useful for the committee to hear from him.

065 CHAIR NORRIS: The bill is not an attempt to revert to a riparian concept or to furnish any large new uses.

I visualized the bill benefiting people owning property along a stream channel.

077 REP. DWYER: People testifying seem to be asking for an expansion of

the doctrine utilizing HB 2677 as the vehicle.

Would welcome hearing from Mr. Hutchison.

100 CHAIR NORRIS: My chief concern is to address people concerns. I don't want to do that with the result of raping a river. We must find solutions to this if we are going to support not growth, but survival.

We will hear more on the bill next Thursday.

112 REP. DWYER: Wants to hear from the attorney general's office.

110 CHAIR NORRIS: Announced that the committee took a field trip February 26 to tour Water Resources Department and received an instructive visit with respect to Water Resources' record keeping and data capabilities.

120 RICHARD KOSESAN, OREGON CATTLEMEN'S ASSOCIATION AND OREGON SHEEP GROWERS ASSOCIATION: We support the concept of HB 2677 and Rep. Dwyer's amendment. We also support Rep. Schroeder's comments regarding the management of riparian areas.

130 CHAIR NORRIS: Adjourns meeting at 3:07 p.m.

Submitted by:      Reviewed by:

Pat Zwick,              Beth Patrino, Assistant Administrator

EXHIBIT LOG:

A            -            HB 2677 Testimony - Alan Cook - 1 pages B            -            HB 2677  
Testimony - Bill Young - 7 pages C            -            HB 2677 Testimony - Jim Myron  
- 26 pages