

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

May 14, 1991Hearing Room D 1:15 p.m.Tapes 68 - 70

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

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

WITNESSES:Bev Hayes, Water Resources Department Rep. Rod Johnson Steve Applegate, Water Resources Department Jim Myron, Oregon Trout Ward Armstrong, Oregon Forest Industries Council Doug Myers, Water Watch Jeannette Holman, Legislative Counsel Dave Nelson, Oregon Water Resources Congress John Borden, Water Resources Department Rep. Tim Josi John Ramig Steve Marks, Senate President's Office Jill Zarnowitz, Oregon Department of Fish and Wildlife John Mellott, Department of Agriculture

MEASURES 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. - Work Session

HB 3389 - Exempts from requirement to obtain water right permit or certificate, use of water for pond or reservoir located on seasonal water source and having capacity of less than five acre feet or being less than 10 feet in height. - Work Session

SB 839 A - Prohibits construction, operation or maintenance of dam or hydroelectric facility on portion of North Umpqua River and main stem of Umpqua River to ocean. - Public Hearing

HB 3323 - Exempts portion of Nestucca River from scenic waterways designation. - Work Session

HB 3404 - Allows Natural Resources Division in State Department of Agriculture to collect fees from owners of container nursery operations to defray costs of carrying out water management plans. - Work Session

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TAPE 68, SIDE A

005 CHAIR NORRIS: Calls the meeting to order at 1:19 p.m.

Opens work session on HB 2677.

WORK SESSION HB 2677

020 BETH PATRINO, COMMITTEE ADMINISTRATOR: Reviews provisions of 2677-4 (EXHIBIT A) and 2677-5 (EXHIBIT B) amendments.

046 MOTION: REP. DWYER: Moves adoption of 2677-5 amendment (EXHIBIT B).

050 CHAIR NORRIS: Prefers 2677-4 amendments.

055 PATRINO: In drafting the 2677-5 amendment, "above or within a scenic waterway" was omitted on line 6 after "uses". That language needs to be added so that this limited license the Commission is allowed to issue is restricted to those areas.

063 REP. DWYER: Mr. Hutchison recognized that there was some benefit to keeping livestock off the riparian area and that is why he put the language in regarding stock watering. Thinks 2677-5 amendment would give people a better comfort level and stand a better chance of passage in the Senate.

075 MOTION: REP. DWYER: Moves 2677-5 amendment.

077 REP. SOWA: With added language noted by Beth?

079 REP. DWYER: Yes.

With the 2677-5 amendment, would help the Chair get the bill through on the Senate side.

078 CHAIR NORRIS: Reviews 2677-5 amendment.

Does not see much happening out there two years from now and much hope for it.

089 REP. DWYER: There is nothing permanent about 2677-5.

094 REP. SCHROEDER: Is there a way to incorporate the idea of stock watering out of the riparian zone in 2677-4 if 2677-5 is defeated?

096 REP. DWYER: That could probably be done to give some direction to Water Resources.

107 VOTE: On a roll call vote, motion fails. Rep. Sowa and Rep. Dwyer vote Aye. Rep. Markham, Schroeder, Norris vote No.

110 MOTION: REP. MARKHAM: Moves adoption of the 2677-4 amendment.

112 REP. SOWA: Reiterates his concern that the bill could result in an overturning of the Diack decision and more extensive court battles, especially on the Sandy River.

122 REP. DWYER: Would like to amend 2677-4 to deal with the fact that these licenses for de minimis uses are subservient to the scenic waterway.

We have deleted the material that affects the Diack. Heard the Department talk about adopting a rule that would allow them to grant these kinds of permits where the cumulative total will not exceed one cubic foot per second. Does not think we are overturning anything. Does not think this has the chance to pass the Senate that the 2677-5 amendment did.

144 CHAIR NORRIS: Would accept friendly amendment to prevent livestock watering along the stream bed.

148 REP. DWYER: Thinks that paragraph 5, (4) is important, as is the part that says nothing in this section shall allow a license using water pursuant to a limited license issued under this section to acquire a vested water right to any water. A limited license shall not be construed to allow use of surface waters of this state that is not otherwise permitted or allowed. That clears up some things and we do not give people false expectations regarding the use of this water.

166 PATRINO: The language to which Rep. Dwyer refers would only apply to the limited license under the 2677-5 amendment. Under the 2677-4 amendment, what you are looking at issuing is a right that could eventually turn into a vested right to use the water.

Understands that under the 2677-4 amendment up to the level that it limits it to, 1 cfs, or an amount determined by rule of the Commission, that amount of water could be issued to an applicant and could turn into a vested right. The effect on the scenic waterway is not considered.

177 CHAIR NORRIS: What would happen if we substitute "permittee" for "licensee" in (4) of the 2677-5 amendment? The 2677-4 amendment does not address the issue of the limited license.

187 PATRINO: Feels that before committee takes such action Legislative Counsel should be consulted to make sure that language is correct because you would then be looking at a permit that you would not allow to turn into a certificate.

203 REP. SOWA: Is (3) part of the motion?

229 VOTE: On a roll call vote, 2677-4 amendment is adopted in concept. Rep. Dwyer votes No.

222 CHAIR NORRIS: Proposes that we get acceptable language by Thursday to incorporate the essence of (3) of the 2677-5 amendment and modify (4) and vote the bill up or down.

Closes work session on HB 2677.

Opens work session on HB 3389.

WORK SESSION HB 3389

255 PATRINO: Updates committee on HB 3389. Reviews provisions of 3389-3 amendment (EXHIBIT C).

365 BEV HAYES, WATER RESOURCES DEPARTMENT: Reviews discussion conducted in work group meetings.

To address Rep. Johnson's concern that the language did not make it clear that a person gets a permanent license, we agreed to use the word "perpetual" to make it clear that it is a permanent license, like any other license. It does not have a priority date, and can be revoked if it harms other uses, but if that is not the case you get a permanent license that is only subject to forfeiture.

394 REP. DWYER: Why can't we just say "license"?

TAPE 69, SIDE A

REP. ROD JOHNSON: The issue was raised that it may not be sufficiently clear elsewhere in the proposed statute that these fees could not be turned into annual fees. A one time fee is intended. Adding the word "perpetual" was to make that clear. Could substitute "one time fee".

007 REP. DWYER: Would feel more comfortable with that.

Wants to make it clear that it is a one time application fee and just say "license".

015 CHAIR NORRIS: Do we have a limited license in use?

017 HAYES: Yes.

020 CHAIR NORRIS: Do we need to make a distinction for this license?

022 HAYES: That was a concern.

024 REP. DWYER: Does not think the concern is valid.

025 HAYES: Will respond to suggestions or comments others will make.

We have agreed to the 3389-3 amendments.

032 REP. SOWA: How many licenses would the forest industry have to get for their multiple ponds?

040 HAYES: Currently, a water right is required to use any surface water. HB 3389 would allow them to apply for a single license on an unlimited number of ponds in a single drainage.

050 REP. SOWA: Would that single license be sufficient if the ponds were in a stream bed that dried up, In an active running stream, or a hole by the side of a stream?

055 STEVE APPLGATE, WATER RESOURCES DEPARTMENT: We have held to the view of the Commission and the Department that we not issue this kind of a license to someone who build a structure across a stream which has appreciable flow in the summer time. That type stream would be one that has zero flow from at least June 1 through the end of October.

070 REP. SOWA: If this stream or seep does not get down to main stream in the summer time, but accumulates enough water that it does not dry up, we could not consider it under this provision.

078 APPLGATE: That is correct.

079 REP. SOWA: What if the pond was an off-stream pond?

081 APPLGATE: We would assume that an off-stream facility would be built totally off the channel of the stream and the only way to get water into it is to make a physical diversion of water from the stream into the storage facility.

If the pond is built over the spring or the spring is within the pond itself, we would probably consider it to be on the channel.

Springs that rise on property and never leave the property are exempt from permit requirements and would be exempt from the requirements of this license as well.

100 REP. SOWA: Will a person with a variety of ponds have to get a variety of permits?

117 HAYES: We are trying to provide people with an alternative to a full-blown water right. The bill came about because of the cost of doing that for small water users by reducing the cost and saying if you are not injuring anyone, you can use this kind of water license.

133 REP. SCHROEDER: What is your definition of a watershed?

140 HAYES: We do not have drainage defined by rule.

145 APPLGATE: We do not have drainage defined.

Our concern over having it limited to a single drainage system is over our ability to regulate at some later date and catalog it within our records.

150 CHAIR NORRIS: If we could say a single drainage is a year round stream, whether or not it is a tributary, would we know what we are talking about?

156 APPLGATE: If we had the opportunity to consider defining drainage as described in this bill, in rule form, we might be able to do that. It would take a lot of time to figure out how to characterize that. Does not think we would want to define drainage as a river. Some rivers have substantial tributaries.

165 CHAIR NORRIS: Would you consider a live, year-round stream, a discreet drainage?

168 APPLGATE: That is a possibility. Wants more time to consider the issue.

There is language that we currently have in rule form as it relates to the standard permits for these kinds of ponds. We issue permits for multiple ponds and a few permits where we require separation because they are on two drainages. Normally, on a standard farm or ranch, you will not have more than one drainage on the same contiguous piece of property.

An unlimited number of ponds could be on a single application if they are on that single drainage.

200 JIM MYRON, OREGON TROUT: Reads written testimony commenting on HB

3389-3

amendment (EXHIBIT D).

245 REP. SOWA: Was Mr. Myron a member of the work group?

246 MYRON: Part of it.

250 WARD ARMSTRONG, OREGON FOREST INDUSTRIES COUNCIL: Have participated in work group sessions. Have been trying to participate in a solution that makes the traditional uses of water legal and does not create too much of an uproar with the many ponds that are being used.

Proposes and reviews amendments to the original HB 3389 (EXHIBIT E).

296 CHAIR NORRIS: How would you make the existing ponds a matter of record?

300 ARMSTRONG: Line 12 of the printed bill refers to a way to get that information.

306 REP. DWYER: You are saying if someone has an illegal pond, we should make it legal.

310 ARMSTRONG: Yes, if they are not harming downstream users.

315 REP. DWYER: Why should we reward illegal activity?

320 ARMSTRONG: Does not characterize it as a reward, but rather recognizing a widespread long-standing use of excess water.

People have been using this water for good public purposes.

330 REP. DWYER: Could make that argument for everyone who drilled a well without a license. Maybe we should expand this to cover them.

340 ARMSTRONG: Continues review of his proposed amendment (EXHIBIT E). This seems to be a practical solution to a large problem.

380 CHAIR NORRIS: Is it common practice to fill ponds from the live mainstem?

385 ARMSTRONG: Yes, on forest land. It is a way of filling a small pond to hold water to fight fire in the event of the need.

400 REP. DWYER: Most ponds come out of some side stream before the water gets to the mainstream.

TAPE 68, SIDE B

005 DOUG MYERS, WATER WATCH: We worked with the work group and the bill is now much more complicated than it was to solve Rep. Johnson's and Sen. Kitzhaber's problem of consolidating applications for permits for ponds for seasonal uses of water.

Is amazed at the length and depth of the amendments.

015 CHAIR NORRIS: Should we go back to the printed bill?

020 MYERS: There are ways to amend the printed bill and keep it small

to solve the original problem without getting into forest practices and other illegal water uses.

020 REP. SOWA: Comment on your feelings about the recent Forest Industry Council amendment.

027 MYERS: If the uses were made legal on the effective date of this Act, it would allow someone six months to get some uses going and have them declared legal. We do not support those amendments.

030 REP. SOWA: Do these amendments tend to encourage or discourage additional ponds and additional diversion of water from the wetlands?

050 MYERS: The bill was aimed at dealing with problems that arose in Douglas County where there are ponds that come off seasonal sources of water. Does not know how wetlands would happen.

060 REP. SOWA: That was the original intent, but all the language in the bill and the amendments address thousand of other ponds around the state that were built for different purposes and are not necessarily on seasonal streams.

064 MYERS: Agrees with Rep. Sowa.

070 REP. SCHROEDER: Would it be legal for us to put in an effective date of January 1, 1991 or 1990 to alleviate that concern?

080 JEANNETTE HOLMAN, LEGISLATIVE COUNSEL: You can put in an emergency clause so that it goes into effect immediately upon passage.

088 REP. DWYER: Believes the Constitution prohibits us from making laws retroactively.

097 CHAIR NORRIS: Would it be possible to append an emergency clause on the bill?

098 HOLMAN: Yes.

102 REP. SOWA: We are attempting, under some of these provisions, to make legal what he is doing.

Also have new provisions in the law that require that wetlands are not disturbed.

117 REP. SCHROEDER: Speaks of ponds he has seen in Douglas County which are not on a wetland.

125 DAVE NELSON, OREGON WATER RESOURCES CONGRESS: We conceptually support the direction that HB 3389 is going.

The Ward Armstrong amendment to grandfather existing ponds may not be as unusual as some of the questioning led it appear to be. On domestic water wells no permit is required for drilling those wells or use of the water.

Making these ponds legal, would be similar to domestic use of water in drilling a well.

The notice that you are claiming one of those ponds to be in existence could be done simply, following the model already in use for pre-1909

water right filing.

Addresses his points of concern.

The bill is going in the right direction and should solve a lot of problems.

The original printed bill was a straightforward solution to the problem.

205 REP. SCHROEDER: Would your people be affected much if we left out the word "perpetual"? Would adding on page 3, line 25 "one time application fee for the license" solve some of the concerns expressed?

215 NELSON: Perpetual, etc. is only descriptive. Not sure it is necessary. Leaving it out probably does no harm to the purpose or intent.

The one time fee would help to clarify if there are concerns.

235 HAYES: In the case of an all-out exemption and in the fee issue, should the committee decide to do that, Water Resources Department will be opposing the bill in the Senate and with the Governor as strongly as we can.

248 CHAIR NORRIS: It is our job to do policy.

250 REP. ROD JOHNSON: My preference would be to go with the original bill because it was a clean way of addressing the problem.

Could take a look at the original bill but limit it to ponds in existence now or on January 1, 1991.

Would like committee to consider that course of action.

We are trying to benefit the state of Oregon by holding back water in various ponds when it is not being used by anyone else.

Reviews 3389-3 amendments.

Suggests further changes.

Would still prefer original bill as written. Second choice is to grandfather existing ponds and have new ponds comply with 3389-3 process limited under the license process. Third choice is to go with the 3389-3 amendment as written.

385 CHAIR NORRIS: Does not agree with or appreciate the Department's position that they will vociferously oppose any effort to grandfather. Would the 3389-3 amendment be an improvement in your situation?

TAPE 69, SIDE B

REP. JOHNSON: The 3389-3 amendment would be better than the existing situation, at least to the extent that the existing situation is enforced. People have been thinking for decades that their use of these ponds is legal. They are now subject to fees or will be charged with violation of the law.

If we pass the original bill or put a grandfather clause into the 3389-3 amendments and send it to the Senate that will give us something to

discuss. Sen. Kitzhaber introduced SB 742 that starts to address this issue. The Senate has not done the work that our work group has developed with the 3389-3 amendments. The -3 amendments could be made available to the Senate after we send them our bill for discussion.

008 REP. SCHROEDER: We are talking about grandfathering the people in.

Asks Water Resources Department how much money they have collected from people having ponds.

010 HAYES: Have issued five or six thousand water rights for ponds on forest and agricultural land.

012 REP. SCHROEDER: If we don't grandfather these folks is it the purpose of the Department to try to collect a lot more money or to make the people legal?

020 HAYES: If you grandfather them in you may be creating a situation where a pond owner who has already applied for a water right, and is a legitimate user of water, is now going to be subordinate to someone else because they can claim their use of water began before the other persons even though they never filed a water right on it.

Currently, if someone wants to have a water right for his pond, and it is an illegal use, he would have to pay the full fees required under the law and would have to hire a Certified Water Rights Examiner. Fees in the draft amendment were means to greatly reduce the amount of money they would have to spend to become a legal user of water.

035 REP. SCHROEDER: Thinks this would not have precedence over a person with a bona fide water right.

040 HAYES: The original bill says that if the Department regulates the use of water, we would use the information provided by the user showing when water use began.

042 REP. SCHROEDER: We want to look at the 3389-3 amendment which says that if they don't have their water rights, they are junior to the existing water rights.

045 HAYES: That would be a preferable alternative.

We were originally presented with a case in which an individual was not injuring other users, but using runoff. We agreed that in that case there should be some financial relief. In the discussion, the issue has become larger and many more uses have been included in the original concept. Our idea is not to collect money, but to find a way to provide relief for people and allow them to be legal users.

078 REP. MARKHAM: Are you currently assessing fines on people with ponds who do not have a water right?

080 HAYES: We can do that by law, but have not done so.

085 REP. MARKHAM: Asks Rep. Johnson if he is happy with the violation section in the bill.

087 REP. JOHNSON: Feels a penalty section is necessary.

090 JOHN BORDEN, WATER RESOURCES DEPARTMENT: Under existing law, if we

have

reason to believe there is a violation, we can act in a number of ways.

100 REP. SOWA: What does "complete suppression" on 3389-3, page 5, line 13 mean?

106 HAYES: Work group raised the concern that a fire under control is not always completely suppressed. Wanted to make it clear that you could use water until that time.

115 MOTION: REP. MARKHAM: Moves HB 3389 as originally printed, to the floor with a do pass recommendation.

124 REP. SOWA: Will oppose motion. Likes some provisions of the original bill. Does not have limitations on what the water can be used for.

130 REP. SCHROEDER: We have given messages to people in attendance. Would like to send the bill back to the work group with instructions that they bring something acceptable to the committee on Thursday at which time committee will vote the bill up or down.

145 REP. MARKHAM: Withdraws his motion.

155 CHAIR NORRIS: Closes work session on HB 3389.

Opens work session on HB 3323.

WORK SESSION HB 3323

165 PATRINO: Reviews provisions on HB 3323.

170 REP. TIM JOSI: The Oregon scenic water program is a wonderful program. When a group or organization arbitrarily combines a number of rivers and submits them to the voters through initiative process without due consideration of the justifiability of the portions of rivers that they intend to include and without considering the justification for putting those rivers in a program, they end up diluting a beautiful program.

Thinks that our job, by playing cleanup, adds back to the credibility of the program. Considers this an environmental bill that cleans up mis-work on their part.

191 JOHN RAMIG, COUNSEL FOR FRIENDS OF NESTUCCA: Updates committee on efforts of the group and State Parks to reach an administrative solution to the problem.

We had hoped that discussions with the Department would result in a solution.

An administrative solution recommended by Mr. Piva was acceptable to the Friends of Nestucca but was not accepted by the Parks Department.

My client has requested that I ask the committee to move forward with HB 332 3.

220 MOTION: REP. SCHROEDER: Moves HB 3323 to the floor with a do pass recommendation.

VOTE: On a roll call vote, motion passes. Rep. Sowa votes No. Rep. Dwyer is excused.

230 CHAIR NORRIS: Asks Rep. Josi to carry the bill. Rep. Josi accepts.

Closes work session on HB 3323.

Opens public hearing on SB 839-A

PUBLIC HEARING SB 839-A

238 PATRINO: Reviews provisions of SB 839-A.

240 STEVE MARKS: Our intent with SB 839 was to prohibit the licensing of new hydroelectric facilities on the North Umpqua River from Soda Springs Dam to its confluence with the South Umpqua and the mainstem Umpqua to the ocean.

The bill is designed to address a river conflict of several years standing with respect to the Winchester Dam. That operation was initially provided an exemption from the FERC hydroelectric operating license. After litigation, the Ninth Circuit Court remanded the exemption from license back to the state and the federal agencies.

The hydroelectric facility does not currently have a federal exemption from license and is not federally licensed. The state Water Resources Department approved a hydroelectric license for the facility, the facility operated for a time, but was closed when fish were impacted.

Pacific Corp. bought the power purchase agreement of Winchester Water Control District which controls the dam. They have provided to pay the District \$10,000 per year for five years once the hydroelectric turbines and operational equipment is moved and resold. The intention of the legislation is to insure that a new hydroelectric facility is not granted a license on the existing facility. The intention is not to remove the dam. We believe that the previous statutory language insures that the dam can be repaired, maintained, and improved as the current bill reads.

317 REP. SCHROEDER: Did Pacific Corp. buy the power purchase agreement with the intent of using it at another location on the Umpqua?

320 MARKS: Pacific Corp. testified before the Senate committee that they had no opposition to this legislation.

323 REP. MARKHAM: Is the purpose of the bill to prevent the present dam from putting in a generator in the future?

328 MARKS: Yes.

330 REP. MARKHAM: What are we taking out of the law?

333 REP. ROD JOHNSON: The Senate amended the bill so that when you add the word "operation" among the things that people can't do, a lot of things do not need to be included.

360 JILL ZARNOWITZ, OREGON DEPARTMENT OF FISH AND WILDLIFE: Testifies in support of SB 839-A reading written testimony (EXHIBIT F).

380 CHAIR NORRIS: Is there a substantial pool behind the dam?

387 REP. JOHNSON: Yes.

I co-sponsored the bill because an agreement has been reached that there will be no hydroelectric operation at that location, and feels that should be put in statute.

Reviews purpose of 839-A2 amendments (EXHIBIT G) which states that the dam is entitled to remain.

Willing to include language to make it clear that if a replacement dam is built, no larger dam can be built.

TAPE 70, SIDE A

030 MARKS: Our intent is that the present dam continue to exist with repair, maintenance, and improvement.

Believes amendments propose to take that further by speaking of reconstruction and the affirmative language that requires a state agency to issue a permit is perhaps not the policy that the state should espouse. We at least need to have the opportunity for state agencies to review in terms of dam safety. We believe that the language in line 12, (2) gives the Water Control District the ability to repair, maintain, or improve the dam. We would be amenable to an authorization for Winchester Water Control District to move forward and ask for that authorization as opposed to just an action required by a state agency.

047 CHAIR NORRIS: Asks Mr. Marks and Rep. Johnson to meet and work out differences and return with the bill to the committee on May 21.

Closes work session on SB 839-A.

Opens work session on HB 3404.

WORK SESSION HB 3404

060 PATRINO: Reviews provisions of HB 3404. 3404-1 was presented at the last committee hearing on this bill and is before the committee today.

Rep. Dwyer has spoken to Scott Ashcom about changing the sunset date to 1995.

068 SCOTT ASHCOM: Proposes to change sunset date in 3404-1 amendment to 1995.

085 JOHN MELLOTT, DEPARTMENT OF AGRICULTURE: Has discussed the change with Scott and Department staff and the Department can work comfortably with that change.

100 MOTION: REP. MARKHAM: Moves to amend 3404-1 amendment by changing sunset date from 1997 to 1995.

VOTE: Without objection, amendment is amended.

117 MOTION: REP. MARKHAM: Moves adoption of 3404-1 amendment as amended.

120 REP. SCHROEDER: Reviews three categories covered: >No runoff - exempt, no cost >Have discharge - plan required, cost depends on time needed to do investigations > Problem cases - discharge permit required, DEQ charge

VOTE: Without objection, 3404-1 amendment is adopted.

130 MOTION: REP. MARKHAM: Moves HB 3404 as amended to the Committee on Ways and Means with a do pass recommendation.

VOTE: On a roll call vote, motion passes. Reps. Dwyer and Sowa are excused.

139 CHAIR NORRIS: Closes work session on HB 3404.

140 PATRINO: Explains problem with combining 2677-4 and 2677-5 amendments as outlined by Legislative Counsel.

180 CHAIR NORRIS: Adjourns meeting at 3:23 p.m.

Submitted by: Reviewed by:

Pat Zwick, Beth Patrino, Assistant Administrator

EXHIBIT LOG:

A - HB 2677-4 Amendment - Staff - 1 pages B - HB 2677-5
Amendment - Staff - 2 pages C - HB 3389-3 Amendment - Staff - 6
pages D-HB 3389 Testimony - Jim Myron - 2 pages E-HB 3389 Proposed
amendment - Ward Armstrong - 1 page F-SB 839-A Testimony - Jill
Zarnowitz - 1 page G-SB 839-A2 Amendment - Rep. Rod Johnson - 1 page