

SENATE COMMITTEE ON
WATER POLICY

January 31, 1991 Hearing Room 137
3:00 p.m. Tapes C - 7
MEMBERS PRESENT: Sen. Larry Hill, Chair
 Sen. Wayne Fawbush
 Sen. Bob Kintigh
 Sen. Eugene Linens
 Sen. Dick Springer
MEMBER EXCUSED: Sen. John Kitzhaber, Vice Chair
STAFF PRESENT: Lisa Zavala, Committee Administrator
 Bernadette Williams, Committee Assistant
MEASURES
CONSIDERED SB 266 - Mining, WS
 SB 233 - Riparian Exemption, PH & WS
 SB 236 - Permit Suspension, PH

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TAPE 6, SIDE A

006 HILL: Calls the meeting to order at 3:15 p.m.. Explains that SB 266 should have gone to the Agriculture and Natural Resources Committee because it deals with wildlife rather than water issues.

NOTION: SEN. HILL moved that SB 266 be returned to the President's desk pursuant to 8.50, with a letter attached without recommendation as to passage, and requesting a subsequent referral to the Agriculture and Natural Resources Committee.

VOTE: In a roll call vote, the motion carried with all the members present voting AYE.

025 HILL: Opens public hearing on SB 233.

(Tape 6 Side A)

SB 233 - RIPARIAN EXEMPTION, PUBLIC HEARING

Witnesses: Janet Neuman, Division of State Lands

Sue Greer, Sen. Bill Bradbury's Office

Jan Boettcher, Oregon Water Resources Congress

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026 JANET NEUMAN, DIVISION OF STATE LANDS:

We are here to speak in favor of SB 233, which was filed at our request. Submits and summarizes written testimony on SB 233. (EXHIBIT A)

076 KINTIGH: How widespread is this? Is it a common problem?

078 NEUMAN: It has become a fairly significant problem. Until recently, we interpreted the law by requiring a lease if it was someone other than the riparian owner. When we got clarification from our Attorney General, we realized we were going further than we are allowed by current law.

087 KINTIGH: As it now stands, anybody can go and put up a floating dock even if they weren't an adjacent land owner?

089 NEUMAN: That is correct.

090 HILL: The exemption in current law is only for commercial marinas, boat launch ramps, or personal use boating structures. What is a "personal use boating structure"?

093 NEUMAN: We have interpreted that to mean a small dock used for personal purposes (i.e. a fishing dock or small boat dock).

097 HILL: How about a houseboat?

098 NEUMAN: Houseboats have not been considered exempt.

099 HILL: The new language states "abutting or affronting on a riparian

owners property", what does "affronting" mean?

104 NEUMAN: The surveying convention in law is that you take the inner section of the tax lot lines with the line of state ownership (usually ordinary highwater) and extend those lines out into the water perpendicular to the thread of the stream.

107 HILL: How far out?

108 NEUMAN: We do not have an outward limit to the riparian preference right.

111 HILL: There has to be a reasonable limit.

114 NEUMAN: We haven't placed a limit on it, but we haven't had the problem either.

123 HILL: On some of the lakes along the coast, there are a lot of arms and inlets. If there are property owners that have facing properties across the inlet and their frontage crosses, how would that be handled?

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127 NEUMAN: We would look at the water body and divide it among the owners' property from a center point drawn out. There are judgement calls involved.

135 SUE GREER, SENATOR BILL BRADBURY'S

OFFICE:

I would like to convey that this is an important issue for Senator Bradbury. The situation Ms. Neuman has referred to is one from his district and has caused a number of problems. This seems to clear it up.

155 JAN BOETTCHER, OREGON WATER RESOURCES CONGRESS:

Our only concern is regarding definitions. Submits and summarizes written testimony on SB 233. (EXHIBIT B)

170 HILL: Are you suggesting that we define "riparian" to be one or the other of the two definitions; lakes or rivers?

172 BOETTCHER: Or both. Just so that there is a definition that people can rely on.

175 TIMMS: There is no problem when we relate it to lakes or rivers in regards to the non-leasing of small...

177 BOETTCHER: That is my understanding. We had Kip Lombard, our Legal Counsel, look at this area as to how it could possibly affect the districts' reservoirs and their other operations. And for our water users, it was defined that there were not any specific problems.

182 HILL: You also raised the question, "Should someone who has an easement of right-of-way across another's property down to the bank also be included in the definition of the owner?" Is that what you intended?

185 BOETTCHER: Yes. We were pointing out what kinds of concerns might occur if the confusion in the definition were not clarified.

193 NEUMAN: I want to address the point raised by Jan Boettcher. There isn't a lot of language in the statute explaining the definition of "riparian". We have included within the definition of riparian both rivers and lakes. As to the holders of easements, we have kept it narrowly defined to the actual fee owners. If you are the fee title owner, you're the one who gets to exercise the riparian preference right. An easement holder doesn't hold the whole fee title to that property. The only exception is a buyer on a land sale contract, where the buyer is considered the owner and can exercise the preference right.

223 HILL: Wouldn't we want a street that abuts the waterway and which would be suitable for a boat ramp be able to obtain the

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benefits of this Legislation?

229 NEUMAN: Boat ramps constructed on the end of street ramps are automatically exempt under the current statute. If it has been dedicated as public access to the lake or river, we have tended to honor that and consider it an appropriate public trust purpose and not make it available to lease for other private purposes. This is done on a case by case review and negotiation.

240 HILL: Why shouldn't the leaser of property, that otherwise qualifies, be able to obtain the benefits of legislation? Someone with a longterm lease, for instance, may lease property from a company that has forest land and use that property for recreational purposes. Why shouldn't they be able to put out a float and be protected?

248 NEUMAN: We still insist that the lessor is the one who owns the fee title or preference right, however by contract they can get those rights in their lease. We still deal with the fee title owner.

258 HILL: Asks Bill Cook to give a definitive answer to what "affronting" means?

261 COOK: Jan Neuman is correct in looking to the basics of surveying and how that translates into legal descriptions.

265 HILL: Can we adopt a limited interpretation of what this term "affronting" means? For instance, can we choose to stop the eligibility 100 yards from the shore or three miles from the shore or anything in between.

270 COOK: Yes, I think you can.

272 HILL: Closes the public hearing on SB 233. Opens public hearing on SB 236 .

(Tape 6, Side A) SB 236 - PERMIT SUSPENSION. PUBLIC HEARING Witnesses: Earle Johnson, Division of State Lands Janet Neuman, Division of State Lands William Cook, Department of Justice

286 EARLE JOHNSON, DIVISION OF STATE

LANDS:

Submits and summarizes written testimony regarding SB 236. (EXHIBIT C)

376 HILL: Basically, this allows you to suspend the permit and stop the activity pending contested case proceedings? And all the current requirements for contested case procedures have to be met just as they are for fill permits, except that this

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would apply to removal permits?

382 JOHNSON: Yes, that is correct.

393 HILL: Is there a particular case that triggered this, or is this just a general cleanup of the statute?

395 JOHNSON: In my recollection, there have been three instances. Two were removals, so we couldn't grant the opportunity. One was a fill and we did hold that project during proceeding.

415 HILL: The stay is permissive, i.e. you may suspend their permit, but you are not required to. Is that correct?

419 JOHNSON: That is correct.

422 TIMMS: The main persons able to use removal would be aggregate persons, class reminers... those types of situations?

429 JOHNSON: That is the typical type of situation. Also channel dredging and aggregate removal.

434 TIMMS: Are you saying that you have very few problems with regards to that? That this would seldom happen?

437 JOHNSON: That is correct.

439 TIMMS: So we have a lot of agencies that are regulating those people. In the Bonanza Mine, there were five different Departments involved. Were you the lead agency?

TAPE 7 SIDE A

004 JOHNSON: We were not the final issuing agency. We have had joint jurisdiction in that instance with DOGAMI (Department of Geology and Mineral Industries); we both issued a permit.

007 TIMMS: Were other people involved? In that the permit is issued by the State Lands Division?

010 JOHNSON: We both have permits and ours doesn't override theirs. DOGAMI generally looks at the upland mining activities occurring with a project and prescribes restoration of the mining area after completion of work. Our focus is on the rechannelling of a stream.

017 NEUMAN: There is a group convened that is trying to look at the question of placer mining and who has jurisdiction, because that is an area where mining and removal in the waterways overlap. Generally, whenever it involves fill removal in the waters, we

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have a permit, which sometimes overlaps with a mining permit. All the agencies have a chance to tell us whether or not we should grant or deny the permit first.

036 HILL: Are you not allowed to suspend a permit on your own motion?

038 NEUMAN: We have not faced that situation yet. I don't think we have the ability to suspend it on our own motion. We have the responsibility to protect the resource.

042 HILL: What if you have granted a permit and you become convinced that this permit would damage resources irrevocably?

044 NEUMAN: We could probably try to take it back, but we might get sued in the process.

046 HILL: You are not aware of an un-motion process or statutory authority that gives you the privilege of suspending a permit even if there is no contested case? What if there is not a complainant, but you become aware of a problem?

049 NEUMAN: I don't think there is an explicit statutory authority that says we can do that. I think we would be well within Chapter 196, which sets out strict requirements and resource protection standards.

056 FAWBUSH: Is 50 yards the minimum for your permits?

057 JOHNSON: Yes, 50 cubic yards.

058 FAWBUSH: Could someone drive down to the river and get a pickup load of gravel?

059 JOHNSON: They may remove up to 50 cubic yards without a permit.

061 FAWBUSH: What if it is public lands?

068 JOHNSON: The law applies to all ownerships, not just state owned lands.

070 FAWBUSH: I could go in and get five dumptruck loads of gravel from the Hood River County property?

074 JOHNSON: Yes, five dumptrucks.

076 NEUMAN: But, you might be trespassing on someone else's property.

078 HILL: What if he uses a public boat ramp?

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078 NEUMAN: Both the removal/fill law and the State Leasing Law for sand

and gravel removal have a 50 cubic yard minimum.

082 HILL: Even on Scenic Waterways?

082 JOHNSON: Scenic Waterways are a little different. You cannot remove or fill any material within a State Scenic Waterway without approval from the Land Board.

085 HILL: So it is more stringent?

086 FAWBUSH: Although Hood River is not a Scenic Waterway, there is public access to it. Can I still remove material out of the bed?

090 JOHNSON: The county would be the property owners and you should have the approval of the county before you take the material out.

092 FAWBUSH: But you said that all public lands are subject to the same minimum permit requirement. How could a county stop you?

095 JOHNSON: If the county has an ordinance that prevents you from doing so or they say you have to get a conditional use permit.

097 FAWBUSH: Your permitting process doesn't override? It can be superseded by any other local jurisdiction?

098 JOHNSON: That is correct.

099 FAWBUSH: But if there was a place that I could get to on a public stream, I could get materials from that stream?

103 JOHNSON: That is correct.

105 HILL: Looking at ORS 196.825, do you have knowledge of any language that gives the Director the authority, either explicitly or implicitly, to modify a permit previously granted or suspended or cause?

115 COOK: In ORS 196.865, there is a provision for revocation or suspension of permits that have been issued in which the permit holders have been violating permit conditions.

123 HILL: That looks like that is about it, if they violate permits conditions.

124 COOK: I believe that is all you find in the removal fill statute explicitly.

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126 JOHNSON: On every permit that we issue, there is a special condition that says the Director may suspend or modify a permit in the instance that the project is causing significant impacts on water resources.

132 HILL: Would you provide us a copy of that language. I'd like to know if you feel that there is any way that the Director can take action short of having this authority.

141 COOK: The permitting section of the statute says that she may include any conditions she believes necessary to carry out the act.

145 HILL: Can you put in a condition that she may suspend the permit pending a contested case proceeding if it is a fill or removal permit?

148 COOK: I haven't thought of that one. As far as other authority, you referred to it as implied own motion authority; they haven't asked that question before.

152 HILL: Please look into that and let our committee staff know your results. Closes the public hearing on SB 236.

Opens work session on SB 233. The effect would be to allow the riparian owner who has land affronting or abutting the water to not get a lease in order to construct any of these structures that are abutting or affronting on that riparian owners property. If the riparian owner chooses not to exercise their privilege of putting a structure in that water without getting a lease, could other people then put structures in that water and under what conditions?

176 NEUMAN: Currently the law allows anybody to place a small structure up

without a lease. SB 233 would limit it to a riparian owner.

184 HILL: Sen. Fawbush has some frontage on Packinage Lake. He would have the privilege of placing a swimming float out there without a lease and no one can place a swimming float in his stretch of water without a lease. However, I can come along and lease that property for my two story houseboat and plant it in front of his property.

190 NEUMAN: But he would be able to prevent you from doing that by taking that lease first.

191 HILL: What if he chose not to take the lease?

192 NEUMAN: The statute requires competitive bid and auction of that parcel. We have the authority not to withdraw parcel from lease or we can refuse to grant a lease.

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201 HILL: So the property owner has a right of first refusal for any structure requiring a lease. But if they refuse the lease, then it is open to other people obtaining that lease following your process.

205 NEUMAN: Of the leases that we have now, many of them are held by non-riparians, mostly log raft leases.

213 HILL: The owner would have to lease the property to prevent it from being used for log rafting.

214 NEUMAN: Or somehow convince us that it shouldn't be offered for lease at all.

217 FAWBUSH: That is present law?

218 NEUMAN: Correct. The effect of this proposed amendment to 274 is to insure that it is only the riparian owner who gets to take advantage of the exemption for the small structures and that we can either require a lease or deny the ability of a third party to encroach with an exempt structure on someone else's frontage.

227 FAWBUSH: Give me an example of how somebody could encroach...If I owned the waterfront how could somebody encroach on it?

229 NEUMAN: You own the land down to the water and the State owns the submerged land. Under current statute, we can't require a lease from those little structures who can just squat on the state owned submerged land.

252 KINTIGH: Do we want to consider including a definition of the "riparian"?

254 HILL: Come back with a definition of the riparian using the existing language in the statutes and reference existing language.

260 NEUMAN: We would be glad to do that.

264 SPRINGER: The Marine Board has a bill in. Is there any relationship between these two? It deals with exempt docks and questions of proliferation of these docks and public access or any other adverse impacts. Is there anything we should be aware of? Any overlap in these issues?

274 NEUMAN: There isn't any direct overlap. The leasing statute says that we can't lease underneath and we're saying that is fine. Leave that exemption in place but make it clear that it doesn't allow encroachment by somebody else on riparian frontage. We could require lease for small structures in

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front of someone else's frontage and marine board is asking for some regulatory authority over those small structures. In some instances, there might be some overlap, but generally we are just trying to sort them out and keep them lined up. The Marine Board is asking for separate authority to deal with the proliferation of small structures. Their areas of concern are more rivers than lakes, because of proliferation of large areas where there are no wake zones, etc.

292 HILL: This applies to rivers and lakes?

293 NEUMAN: Yes.

294 HILL: So it would apply to the Columbia and the sloughs? If we wanted to address proliferation of small structures, we might want to address the actual exemption of the size of the structures exempted.

298 NEUMAN: It is 1000 sq. ft for residential docks and 2250 sq ft for marinas (commercial).

302 HILL: Those are exempt from the leasing program? In existing law, commercial marina means publicly or privately owned float or dock having a surface area of less than 2250 sq ft. and offering the general public boat moorage, boat storage, boat rentals, and marine services...No lease?

310 FAWBUSH: Is that the dock itself or the water area that might be enclosed?

311 NEUMAN: The statute says surface area. The way we have applied that is if you have a structure that surrounds water, we square it off and count the whole surface area that no one else would think was open to the public.

317 HILL: Does the State let people use property free for commercial purposes in any other case?

320 NEUMAN: I can't answer that.

324 SPRINGER: How many people are now exempt? We are talking thousands, correct?

329 NEUMAN: Probably so, but I couldn't give you a number. This has become an issue for us recently because the structures have been getting bigger and encroaching on more.

336 HILL: If I have a two story houseboat and the surface area was under 2250 sq. ft., it would still be under the exemption, correct? Is the surface area each story?

343 NEUMAN: We have some situations where we have an exempt wharf

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structure, where they load and unload fish, and the second floor is the fish processing office. We said that it was leasable and will count this footprint at least once. We start to deal with administrative rule making with the double structure exempt issue.

358 HILL: All this money is lost from the common school fund?

359 NEUMAN: That is correct. All the proceeds from this program go to the common school fund.

362 HILL: Closes Work Session on SB 236. Adjourns meeting.

368 HILL: Reconvenes meeting. We will schedule an informational meeting with Water Resources Department to look at the fee structure. Adjourns the meeting at 4:05 p.m..

Submitted by: Reviewed by:

Bernadette Williams Lisa Zavala
Assistant Administrator

EXHIBIT LOG:

- A - Testimony on SB 233 - Janet Neuman - 2 pages
- B - Testimony on SB 233 - Jan Boettcher - 2 pages
- C - Testimony on SB 236 - Earle Johnson - 2 pages

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