

Senate Committee on Water Policy
February 28, 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.

SENATE COMMITTEE ON
WATER POLICY

February 28, 1991Hearing Room 137
3:00 p.m. Tapes 23 - 24

MEMBERS PRESENT:Sen. Larry Hill, Chair
Sen. Wayne Fawbush
Sen. Bob Kintigh
Sen. Eugene Timms
Sen. Dick Springer

MEMBER EXCUSED:

STAFF PRESENT: Lisa Zavala, Committee Administrator
Bernadette Williams, Committee Assistant

MEASURES
CONSIDERED: SB 240 - Work Session
SB 208 - Work Session

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TAPE 23, SIDE A

007 CHAIR HILL: Calls the meeting to order at 3:23 p.m.. Submits and summarizes articles relating to hydroelectric licensing. (EXHIBIT A and B) Submits and summarizes a letter to be sent to Oregon's Congressional Delegation relating to the proposed National Energy Security Act. (EXHIBIT C)

034 KINTIGH: What is the motive of the proposed change?

035 HILL: It is uncertain to me except that they want to make their decisions without state input. Representative Bob Smith and Peter Defazio are opposed to the legislation. Federal agency versus states.

MOTION: CHAIR HILL moved that the committee send the letter

(Exhibit C) to Oregon's Congressional Delegation.

VOTE: With no objections the motion carried.

046 SPRINGER: Why don't we send a copy to the Senate Committee?

048 HILL: Agrees with suggestion. Let us send a copy to each member of that committee. Opens work session on SB 240.

(Tape 23, Side A)

SB 240 - Work Session

Witnesses: Jill Zarnowitz, Oregon Department of Fish and Wildlife
Libby Henry, Eugene Water and Electric Board
Denise McPhail, Portland General Electric
Bev Hayes, Water Resources Department

071 JILL ZARNOWITZ, OREGON DEPARTMENT OF FISH AND WILDLIFE:
Submits and summarizes written testimony relating to SB 240.
(EXHIBIT D)

110 HILL: Itemize where the \$1.04 million would go.

113 ZARNOWITZ: It buys two FTEs in the Portland office, which are currently working full time on hydro projects.

115 HILL: Are they spending part of their time on other activities, such as fish screening?

116 ZARNOWITZ: One has been working on Bureau of Reclamation projects, but is not funded by the hydro program. The hydro program keeps them busy full time. The vast majority of the money goes out to the regions and districts which also provide review of hydro projects on a local level. We are reviewing 61 active hydroelectric projects.

126 HILL: Do you have a list of those? Are those projects licensed or up for relicensing?

129 ZARNOWITZ: We can get you a listing. Those projects are either licensed or are in the preliminary permit stage, which are considered new projects and haven't been licensed.

133 HILL: 61 projects are of active concern?

134 ZARNOWITZ: There are seven projects currently being relicensed.

138 HILL: What do the two FTE do?

141 ZARNOWITZ: They coordinate all of the information and consult with the federal government.

155 HILL: Two FTEs are around \$200,000 for two years. Where does the other \$800,000 go?

158 ZARNOWITZ: Most of that goes to the districts and regions.

158 HILL: How is that distributed?

159 ZARNOWITZ: It is used by projects. An example would be Salt

Caves, which required a lot money.

169 HILL: ODFW feels that the \$1.04 million is necessary for its activities directly related to relicensing?

172 ZARNOWITZ: That is correct.

176 HILL: If we were to divert some of that money to WRD, what activities would not occur in ODFW?

181 ZARNOWITZ: That would probably curtail our overall activities in consultations with these hydro projects. We would otherwise have to provide it through hunting and angling dollars, if that was available.

186 HILL: Is your role in relicensing contingent to ODFW work?

194 ZARNOWITZ: I believe it would proceed regardless of whether we did our work or not, but it would proceed without fish or wildlife protection.

196 HILL: You are not in a position of authority over the license, but strictly advisory?

198 ZARNOWITZ: To the federal government.

199 FAWBUSH: Even without the fund, you would have an ongoing obligation to hydroelectric projects?

204 ZARNOWITZ: Applicants are required by federal law to check with state agencies concerning hydro projects and they would request our information. The quality of that information and time spent on it would be directly affected. I believe that on new projects there would have to be some sort of sign off by ODFW that says that we approve.

225 LIBBY HENRY, EUGENE WATER AND ELECTRIC BOARD: I doubt that FERC is going to be honoring relicense applications with the state agencies (tape inaudible). They have the federal authority to do that and can go ahead and (tape inaudible).

236 HILL: But it is not a veto role.

238 HENRY: No it is not legally.

241 HILL: What if there is no recommendation because ODFW doesn't have the resources to include a recommendation?

242 HENRY: I believe FERC would go forward without it. I think it is the agencies option to respond, FERC solicits their comments but doesn't require them.

245 ZARNOWITZ: I don't believe so. On new projects I think they require a letter of consultation.

250 HILL: What if ODFW was unable to conclude the work it considered necessary to making recommendations on a project? What would be the recommendation at that point?

258 ZARNOWITZ: Depending on the amount and type of information we

had up to that time, we might ask them to hold up the project until we have the ability to process the information. If it was minor, we might just say that we don't know.

265 HILL: The agency is willing to make a recommendation to hold up the relicensing or licensing process pending adequate review even if you are unable to do everything in a timely fashion?

270 ZARNOWITZ: We have requested extensions before to slow the process, but we can't stop it.

282 FAWBUSH: Do you have some record of the time spent on different projects and how the monies have been allocated?

284 ZARNOWITZ: I can get you list of projects by locations. We keep around \$200,000 in the Portland office for the program and the remaining goes to the regions. That would be parceled out to the regions according to the number of active projects they have.

299 FAWBUSH: I would like to see some type of accounting of how the money is delegated. We have a problem with a different state agency needing and wanting the same money. I encourage you to find out how the money has been applied outside.

314 ZARNOWITZ: As an example, any hydroelectric project involves at least one or two biologists in the region. The amount of time spent on those projects is great.

330 FAWBUSH: What you are saying is that it is a general resource of the Department and you can't really specify that it is actually being used in hydroelectric projects.

333 ZARNOWITZ: We can according to region.

337 FAWBUSH: Maybe we can start with the breakout of the hydro projects you are working with and the allocation to each of those regions. We will ask WRD to do the same.

357 HILL: We have a fiscal breakout of the original bill. We can look at the sum that the original proposal would produce for ODFW and WRD, so we can look at the respective, self defined needs.

367 ZARNOWITZ: There is a possibility for it to go up, but it would never get below the existing budget.

379 HILL: Submits SB 240-1 amendments from PGE and EWEB.
(EXHIBIT E)

384 DENISE MCPHAIL, PORTLAND GENERAL ELECTRIC (PGE):
Submits and summarizes written testimony relating to SB 240.
(Exhibit F) Our recommendation would be to leave the dollar figure open for Ways and Means and at least give the department time to figure out what their costs would be.

TAPE 24, SIDE A

051 HILL: You've included amendments speaking to the fee issue.

WRD was seeking around \$200,000 with the original bill and your amendments would provide 1/3 of that fund. How much would that be?

058 MCPHAIL: We would want the developers to fully compensate the Department. We feel that the current fees are inadequate and that the department should be fully compensated.

072 HILL: This would have the hydroelectric facilities funding the studies. Does it propose to provide the same mechanism for studies required by ODFW?

077 MCPHAIL: We didn't go into fish and wildlife statutes. I think it would be appropriate for developers to pay ODFW costs.

083 HILL: The cost should be linked to the demand for a particular project. A mature project that doesn't require much work shouldn't pay the same fees as a new project that requires much work.

087 MCPHAIL: Or a small project that has fewer fish impacts or other things that the WRD has to be involved in. Our concept is graduated fees.

092 HILL: Asks Jill Zarnowitz if she sees that as compatible with what ODFW is required to do?

098 ZARNOWITZ: Yes, I can see that as one method of expanding the hydroelectric fund without charging the existing projects more.

102 HILL: So we would have the problem cases. Do any of the big projects currently fall within the problem case category?

107 ZARNOWITZ: We have been doing a lot of work on the Leeburg and Waltervill projects through relicensing, but those should be the easiest in terms of working relationships. A lot of relicensing projects are very old and didn't have mitigation for problems for fish and wildlife. There may be considerable studies in trying to work out what the mitigation would be. They would be paying their way and should have the funds.

122 HILL: You would still need the same amount of money. This is another way to allocate those costs.

127 HENRY: I think that might be an equitable solution as well. If the studies that ODFW requires for relicensing exceed what we pay into that fund, we would rather have a one time billing than pay every year and subsidize the other applications for fifty years.

148 HILL: We could make it self supporting so that the person who incurs the cost pays the freight. Do you think it would be a burden on some smaller applications?

152 MCPHAIL: You are always looking at investments of millions of dollars and if a person can't pay their fair share then they shouldn't be doing it.

164 JILL: I believe it would be a fair way to approach this. A possible problem is that often a developer may come into this without knowing all the costs involved and their backing falls out. They are still able to proceed with the license. The state agencies may be stuck with the bill, yet the developer can go on to FERC and request a license.

174 HILL: Can we get a lien on their project? If it is personal or real property?

175 ZARNOWITZ: That may exist now in statute, but not with the current hydro statute.

195 MCPHAIL: We are not trying to reduce any existing costs. We are not arguing that there is no amount of that licensing fee we now pay that shouldn't go to help keep those programs on a stable basis.

203 HILL: The unfairness in the current program is that the existing projects have been paying a fee every year. ODFW has been using that to review applications on new projects as well as relicensing on other projects. PGE, EWEB and others have paid quite a bit of freight for other people. Question now is whether we should raise the amount we expect them to pay in order to cover other projects. There is debate over whether ODFW needs all the \$1.04 million. WRD's request may be inflated also. Question is how do we fairly allocate the cost?

253 MCPHAIL: I want to make clear that WRD has not encouraged us to go after the money that was allocated to the other agencies.

262 BEV HAYES, WATER RESOURCES DEPARTMENT:
I am confused about the direction of the discussion. Are you anticipating that what you might do instead of increasing the operating fee is charge more up front for new applications to cover the cost of WRD with hydro?

267 HILL: WRD originally proposed to increase the total charge of these activities (relicensing and new applications) in order to generate \$200,000 for WRD's processing and handling of these applications and leaving the \$1.04 million current revenue intact and dedicated to ODFW's activities. PGE and EWEB have suggested to keep it at its current level but reallocate part of the money from ODFW to the WRD (\$200,000). This would reduce the money that goes to ODFW from the current fund and shift it to WRD. I suggested that instead of having an across the board increase, have additional money generated by charging people the cost of the work and studies.

291 HAYES: If we were presenting our case to FERC, who would we charge for that and how?

297 HILL: The people making application. Do new projects and relicensing projects require equal work?

302 HAYES: Probably not.

303 HILL: Which ones require more or less work?

305 HAYES: You can't always judge that. The problem is that we can't predict how many applications we will receive. Our concern is that if it was all shifted to applicants, that wouldn't be a stable source of funding in and of itself.

323 HILL: We could divide the base funding and then pile on top of that the cost for studies for both sides.

370 FAWBUSH: You almost have to set it in the statute based on size of the project that they would be automatically reimbursed for it. Otherwise, it would be contested every time they tried to charge someone. We should think about looking at some formula.

390 HAYES: Also, one of our functions is to review current facilities to make sure we are charging them the proper amount and checking that they are functioning correctly.

397 FAWBUSH: Are projects that are not now actually operating paying anything?

398 HAYES: Yes, all of the state licensed projects pay into the fund.

400 FAWBUSH: At what point do they begin to pay?

402 HAYES: They pay if they are operating. If they are not operating, we cancel their license.

405 FAWBUSH: What if they are in the application process?

405 HAYES: They pay a nominal fee for that.

407 FAWBUSH: Are the charges in line with the work you do?

410 HAYES: No.

411 FAWBUSH: Why don't you bring us a chart that shows where your charges are and who pays them and we will have somewhere to go. Whoever takes a workload from both of your agencies should be charged. We should realign it so that those who use it pay.

419 HILL: And there are base activities that service everybody and there is no objection to paying for this. Also, there are things special for relicensing and permits that must be done contingent upon some concern with a stream or reach.

427 FAWBUSH: I'm having trouble differentiating between the WRD and ODFW.

440 HAYES: WRD is the agency that licenses hydroelectric facilities in the state. We collect the operating fees and send it to ODFW and we are responsible for monitoring those facilities. WRD takes the lead position before FERC on new and old hydro projects. We turn to ODFW for their recommendation of whether it meets fish standards under the law for citing facilities.

471 FAWBUSH: Your need is based on what you've been charged and you don't feel you are being reimbursed. Let's figure out where the cost is and get it reimbursed by the people who make the cost.

479 MCPHAIL: In Section 8 of page 8 of the LC draft (EXHIBIT E) are WRD's preliminary estimate. The problem is attempting to make flat fees based on some agency judgement on the amount of work that this kind of applicant would put on them. We didn't make an attempt to do that with ODFW's statutes, but we would support that approach.

495 HILL: The total amount the agency could spend on these activities could be limited with an expenditure limitation. The work group will look at the money issue. Come up with a formula that will provide the funding at the levels proposed in the Governor's budget.

TAPE 23, SIDE B

049 KINTIGH: Are you proposing that this be a further refinement of what is in Sections 8 and 9?

051 HILL: An alternative approach that would met everybody's needs better and be passable.

060 HAYES: There are two issues that are outstanding to us still. We didn't support grating ODFW's operating fund money, because it is not part of the Governor's recommended budget. We still have a concern about how we recover legal costs on these projects. We can discuss it in the work group.

066 HILL: Will work on those policy issues after getting past the fee issues. Submits written testimony relating to SB 240. (EXHIBIT G and H). Closes work session on SB 240. Opens work session on SB 208.

(Tape 23, Side B)

SB 208 - Work Session

Witnesses: Daniel Meek, Portland, Oregon
Bev Hayes, Water Resources Department
Barry Norris, Water Resources Department
Denise McPhail, Portland General Electric

087 DANIEL MEEK, ATTORNEY REPRESENTING SELF: Submits and summarizes written testimony relating to SB 208. (EXHIBIT I and J)

127 HILL: Is it keyed to projects that are owned by a person and regulated by the PUC?

128 MEEK: No it is not. It seems to apply to all privately owned projects. The only exceptions are those that are publicly owned. Continues summary of Exhibit J.

153 KINTIGH: I believe that a few years ago there was a Supreme Court decision regarding this in Washington.

157 MEEK: There is no case in Oregon involving these statutes and there is no federal case involving statutes.

159 HILL: Was the case Senator Kintigh was referring to an attempt to buy a privately owned dam?

161 MEEK: That was the attempt by Clark/Cowlitz Joint Operating Agency to acquire by condemnation Pacific Power & Light's Merwin Dam.

162 HILL: This is not condemnation you are talking about? This statute says they "shall" revert to state ownership?

164 MEEK: That is correct. According to the earlier testimony by WRD, they stated that they don't have the staff to run the facilities and therefore doesn't want to take them over. This would be totally unnecessary, since nothing prevents the state from then selling or leasing the projects to a private owner.

179 HILL: Do you have any judicial interpretation of statute or investigation into legislative intent?

183 MEEK: I have not gone to the state archives. The original statute was enacted in 1931 in the public and private power wars.

187 HILL: Your testimony is that this is a historic compromise represented in this statute.

194 MEEK: Continues summary of Exhibit J. The state could sell the facilities to the highest bidder with the condition that all the power be used to serve only customers in Oregon.

230 HILL: We must do some research and if it is true, then we should have a fiscal impact statement that is significantly different.

322 SPRINGER: I would like to hear from the Commissioner and the WRD as to why they recommended to repeal or if they have seen the implication that Mr. Meek has identified.

330 HILL: Asks Bev Hayes if she agrees or disagrees with Mr. Meek.

332 HAYES: I'm not sure at this point. When we looked at the statutes about two years ago, we were also amazed to find this provision. The reason the bill is here today is partly because there are now in the statutes a variety of provisions that deal with hydro facilities that apparently date back to the late 1920's and 30's that have never been implemented by the state.

334 8FAWBUSH: You put this in the bill to raise the issue as a policy question. Why is it in the bill?

350 HAYES: Because we reviewed it and it has never been implemented by the department and we felt that we are not likely to get into the hydro power business. It didn't make sense to keep the statute there.

358 HILL: If this is correct, the state will own these facilities upon expiration of the fifty year license. There would be an

enormous fiscal impact. Did the Commission or Director talk about the potential fiscal effects of this and the value of these projects?

374 HAYES: Yes, they discussed it in depth. We all felt it was unlikely that given the current situation in the state it would be implemented. Are you suggesting that we take over the facilities?

384 HILL: I am not suggesting anything. I am trying to figure out what these statutes say. Reads the ORS 543.520 (EXHIBIT J). It seems to require no action whatsoever, is that correct?

400 BARRY NORRIS, WATER RESOURCES DEPARTMENT:
That is correct. Within these statutes it obligates that the Department to keep a very close accounting of the cost of the project and its amortization. I have found no trace that the Department has ever done that.

416 HAYES: Chris Wheeler, former Deputy Director of WRD indicated that originally this provision was put into the law so that if there was an emergency or terrorist act on a facility that the state would be in the position of taking over.

425 HILL: I don't believe that at all.

428 FAWBUSH: This statute was written in a time when there was a tremendous conflict between public resources and private uses. You have no right to presume that that is something the state is going to give up just because the Department hasn't fulfilled its obligation under the law.

450 HAYES: If we leave this provision in the law, what would you have WRD do?

454 FAWBUSH: Request an amortization schedule from the owners.

456 HAYES: And then take over those facilities or consider them state owned properties?

458 HILL: If that is what the statute says. We should study this chapter.

TAPE 24, SIDE B

021 MEEK: SB 208 would also repeal ORS 543.510 (see page 2 of Exhibit J). It is WRD responsibility to tell the licensees how to account, how to amortize the investment so that it is fully amortized within the terms of the license and they must obey.

037 FAWBUSH: Were both ORS 543.510 and .520 enacted at the same time?

039 HILL: How do you see this intertwined with the question of taking?

041 MEEK: It would not be a "taking" for a number of reasons:
1) It was a voluntary agreement on the part of the licensee

when the license was drawn up; 2) When the state condemns property, it typically will pay the depreciated book value. The point of ORS 543.510 is that within the license term of 50 years the accounting system is supposed to require the licensee to come to a position of a zero depreciated book value.

055 HILL: That wouldn't be market value. You testified earlier that the market value would be much higher. Usually condemnation is based upon market value.

057 MEEK: In this case, the state is not condemning the facility.

059 HILL: I would like to see the language of the original license.

063 NORRIS: We have the original license at the department.

064 HILL: Could you bring in some samples. Look at them and see if there is anything in there that relates to this issue. How many do you have that are up for relicensing?

068 NORRIS: That starts in 1995 through to 2010.

069 HILL: Bring in the first four or five that are expiring. Plus any addendum to the license or attachments.

078 DENISE MCPHAIL, PORTLAND GENERAL ELECTRIC:
I think that you have just given private developers a powerful incentive to skip the state and go only for a federal license.

080 HILL: Possibly, but we need to understand this statute. Do you agree with this interpretation?

083 MCPHAIL: I'm reserving judgement.

093 MEEK: Requests involvement in the case.

094 HILL: Are you representing an organization or yourself?

096 MEEK: Only myself.

097 HILL: You indicate in your letter that you are an advocate for electric consumers. Is that self defined or are you employed?

098 MEEK: I am a sole practitioner attorney who represents primarily public interest groups for the Oregon Public Utility Commission and other agencies.

103 HILL: We welcome your contributions.

113 KINTIGH: Are you advocating for some group?

116 MEEK: At this point nobody has sought representation on this issue.

121 HILL: Asks Bev Hayes of WRD to ask their attorney how WRD got away with not meeting the requirements of the law in amortization. We will also scrutinize the other statutes you

are proposing to repeal. The question now is what does ORS 543 .510 and.520 mean to WRD and the state and facility owners.

176 FAWBUSH: Someone should look at an amortization schedule; that's probably a PUC question.

182 HILL: I would like to know what our liability is for not meeting these requirements.

185 HAYES: I don't think that anybody within the Department would deny that the statutes have obligations there that the Department did not fulfill. But we are now trying to decide if we want to leave them there and say nothing. We made a judgement call, but we thought it would be best if we weren't going to implement them to remove them from the law.

192 HILL: That is a policy choice you recommended that we may not choose to accept.

Adjourns hearing at 4:45 p.m..

Respectfully Submitted Reviewed by

Bernadette Williams Lisa Zavala
Committee Assistant Committee Administrator

EXHIBIT SUMMARY

A - Newspaper Article - Oregonian	1 page
B - Newspaper Article - Oregonian	1 page
C - Letter to Oregon's Congressional Delegation	1 page
D - Testimony of Jill Zarnowitz, SB 2402	pages
E - Proposed Amendments, SB 240-1	11 pages
F - Testimony of Denise McPhail, SB 240	7 pages
G - Testimony of Jan Boettcher, SB 2401	page
H - Testimony of Neil MacDonald, SB 2401	page
I - Testimony of Dan Meek, SB 208	2 pages
J - Testimony of Dan Meek, SB 208	4 pages