

Senate Committee on Water Policy  
April 16, 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

April 16, 1991Hearing Room 137  
3:15 p.m. Tapes 43 - 45

MEMBERS PRESENT:Sen. Larry Hill, Chair  
Sen. John Kitzhaber, Vice-Chair (Departed 4:05 p.m.)  
Sen. Wayne Fawbush (Arrived 4:00 p.m., Departed 4:15 p.m.)  
Sen. Bob Kintigh  
Sen. Dick Springer (Arrived 3:55 p.m.)  
Sen. Eugene Timms

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

MEASURES

CONSIDERED:SM1 - Memorializes Congress to designate the Upper Klamath River as National Wild and Scenic River, PUB

SM2 - Memorializes Federal Energy Regulatory Commission to deny permit for any hydroelectric project on Upper Klamath River, PUB

SR2 - Directs Governor and state agencies to disapprove hydroelectric projects on Upper Klamath River, PUB

SB 1163 - Declares existence of emergency for purpose of restoring Oregon's fishery resources, PPW

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.

TAPE 43, SIDE A

002 CHAIR HILL: Calls meeting to order at 3:30 p.m..

003 HILL: Opens public hearing on SM1, SM2 and SR2.

(Tape 43, Side A)  
SM1, SM2 and SR2 - PUBLIC HEARING

Witnesses:Karl Anuta, Northwest Environmental Defense Center  
Mark Nelson, City of Klamath Falls  
Liz Frenkle, Sierra Club  
Louise Bilheimer, Oregon River Council  
Jim Myron, Oregon Trout  
Bill Young, Strategic Water Management Group

022 KARL ANUTA, NORTHWEST ENVIRONMENTAL DEFENSE CENTER:  
The Klamath River is a balanced river with both irrigation and hydroelectric uses attached to it.  
The Salt Caves hydroelectric project is a bad proposal and threatens to damage the current balance and to destroy the existing resource. This proposal has tied up state resources (15 million dollars), state agencies, attorney generals and politicians trying to put this project through.

Submits written testimony supporting SM1, SM2, SR2. (EXHIBIT A)

Summarizes the history of Salt Caves.

Currently, the proposal is before the state Environmental Quality Commission and sits before FERC. FERC is moving ahead aggressively on this project to show they can preempt the state process.

153 HILL: The Klamath River is currently a study river in the Oregon Omnibus Wild and Scenic Rivers Act of 1988 to determine its suitability for inclusion in the National Wild and Scenic River System. What is the status of the studies?

158 ANUTA: The Bureau of Land Management (BLM) analyzed the river and determined that it was eligible and suitable for Wild and Scenic status.

163 HILL: Currently, FERC has a finding on record that there should be no hydroelectric facilities built on that reach of the river?

165 ANUTA: No, FERC currently intends to pursue this project and are providing their own critical analysis to dispute the state's opinion.

The Northwest Power Planning Council has designated this a "protected" area where hydroelectric facilities should not be built due to concern for fisheries and other resources.

172 HILL: Where is it at with FERC?

173 ANUTA: FERC is pursuing the project and wants to preempt the state's authority. They have been trying to convince ODFW to back off on some of the recommendations. They have also been trying to persuade the State Historic Preservation Office that this area is not eligible for National Historic Register status, which the office has said that it is.

They have been trying to persuade the Klamath and Shasta tribes that this is not an area to continue pursuing a religious interest in.

183 HILL: We have FERC lobbying state agencies to change their positions?

184 ANUTA: Yes, FERC is also putting themselves into the state agency process and DEQ is a party. They have critiqued DEQ's analysis and may make themselves available as an expert witness to testify against the state.

189 HILL: Expert on a biased or unbiased basis?

190 ANUTA: Biased, since FERC's only goal is to build hydroelectric projects and they have only turned down one in their entire career.

207 HILL: It might be appropriate to ask agencies to report to us what lobbying FERC has done in regards to the Upper Klamath. Would like to know how much influence FERC has on our state agencies decisions and whether it is acceptable or not.

213 ANUTA: They may not be having as much influence as they would like, but they are making an effort.

221 MARK NELSON, CITY OF KLAMATH FALLS:

The City of Klamath Falls opposes SM1, SM2, SR2 and SB 919. DEQ has denied the water quality permit for the project's fourth reconfiguration.

Summarizes the process of the four reconfigurations.

Citizens of the Klamath Basin support this project and want the opportunity and an equal and fair process to be heard. If the denial of the 401 permit is upheld by the Environmental Quality Commission, it will go to the Court of Appeals. If the Court of Appeals upholds the denial, the project is probably dead. We ask that the process be allowed to continue unfettered in an equitable way.

308 HILL: You would still need water rights even if you get the water quality permit? Does the city currently hold water rights?

312 NELSON: That is a subject of litigation. With the recertification there is a reapplication for the water that was not accepted. The issue of the water right will probably be subject to court action as well. If the 401 permit is granted and the FERC license is issued, then you have the issue of a condemnation proceeding if the water right is not given.

324 HILL: Who would implement a condemnation procedure?

326 NELSON: The City of Klamath Falls would condemn that water right.

330 HILL: Whose water right? Is it the other private users water rights?

331 NELSON: No. One issue is whether they have the authority to deny the acceptance of the application to WRD. That would have to be resolved legally first. If it was resolved in the favor of the city, then we would have a priority date from the time we first tried to apply.

341 HILL: It is a significant development in water law if a municipality can condemn unappropriated water and obtain its use from a condemnation proceeding.

346 NELSON: The issue has to do with the preemption of FERC and what it legally allows the license applicant to do.

351 HILL: Would the FERC license possibly give the city certain standing that would allow them to perfect a condemnation suit?

355 NELSON: Not sure; case law clearly gives preemption to FERC over state statutes.

358 HILL: FERC does have certain preemption over state law but it has to be predicated upon the state previously having approved the usage of the water and the quality level for the project.

372 NELSON: My understanding is the opposite.

373 HILL: Directs staff to consult with Legislative Counsel on this issue.

384 TIMMS: Asks for an explanation of how the project will get done.

396 NELSON: We believe that if the water quality permit is issued, we will build that project.

439 TIMMS: DEQ is stopping the project?

442 NELSON: That is correct.

443 TIMMS: Is FERC lobbying the state agencies?

445 NELSON: I don't know if there has been individual conversations with various state agencies, but FERC has done a critique of the denial in the documents submitted.

457 TIMMS: FERC cannot override DEQ?

458 NELSON: No. FERC is pursuing the project vigorously, but when the 401 permit is denied, everything stops.

469 TIMMS: Will these measures stop the project.

TAPE 44, SIDE A

023 HILL: SB 919 restates current Oregon law. In 1988, Ballot Measure 7 stated that the Upper Klamath River shall not have a hydroelectric project on it. If FERC

respects current statute, they will not grant a permit.

The City of Klamath Falls sold some large bonds and obtained the revenue and invested it at a rate higher than the cost of the bonds. It is obtaining revenue for the city from the arbitrage of that money. As long as the project is alive, revenue is produced for the city. Asks if this is a correct statement.

052 NELSON: Your description of the bonds and higher interest rate and the production of dollars to help pay for the studies is correct. However, the city is required as a result of the bond sale to pursue the project in all due diligence.

063 HILL: How much money is being made on an annual basis from that arbitrage?

066 NELSON: Somewhere between one and a half to two million dollars a year.

068 HILL: What if the project stops; is that when the bonds have to be paid back?

071 NELSON: Doesn't know the actual date, but the bond holders have been paid as the interest becomes due. Those bonds don't build the project; everything is converted to a construction bond. It would be termed an "interim financing"

079 HILL: Are they 20 year bonds?

080 NELSON: The bonds in existence now are for a limited duration. The construction bonds are proposed to be a 25 year limit.

104 LIZ FRENKLE, SIERRA CLUB:

Submits and summarizes written testimony in support of SM1, SM2, SR2.

(EXHIBIT B)

Submits and summarizes newspaper article relating to Salt Caves. (EXHIBIT C)

165 LOUISE BILHEIMER, OREGON RIVERS COUNCIL:

We support SM1, SM2 and SR2. The BLM has found the Upper Klamath as eligible and suitable for Wild and Scenic designation; the study was completed in March 1990. SR2 is consistent with the State Scenic Waterway Act.

193 JIM MYRON, OREGON TROUT:

Submits and summarizes written testimony in support of SM1, SM2 and SR2.

(EXHIBIT D)

207 TIMMS: Was the project improved with the "no dam" proposal?

211 MYRON: There was an improvement over the other proposals, but it is still not acceptable in fish standards.

216 TIMMS: But did it improve as far as the impact on fish?

217 MYRON: That is a fair statement.

225 BILL YOUNG, STRATEGIC WATER MANAGEMENT GROUP:  
Submits and summarizes written testimony on SM1, SM2 and SR2. (EXHIBIT E).

281 HILL: Mark Nelson indicated that there might be an opportunity for the city to obtain water rights by condemnation of unappropriated water. Asks for a response to this issue.

298 YOUNG: In several court cases where the relationship of FERC and state agencies have been tested, the courts have made it clear that the state agency authorities extend to the question of the protection of existing water rights. The courts have said that FERC may empower that licensee to condemn existing water rights if that were necessary for the development of their project.

We would assert on behalf of Oregon that a project of this nature needs a permit from WRD. There have been court decisions that indicate a preemption by FERC over state water laws. If this process goes forward and the 401 permit is issued, the Water Resources Commission will deliberate as to whether or not to assert the state's interest under the Klamath Compact.

344 HILL: Asks for additional information on the Klamath Compact.

348 YOUNG: Oregon has two compacted rivers: The Klamath River and the streams that feed into the Goose and Summer Lakes. Will provide the Klamath Compact.

371 TIMMS: A state has more power under a compact than under state laws.

380 YOUNG: It is not unlike the authority that DEQ has on the 401 permit. The reason that the 401 permit stands in the way of this project is that DEQ is authorized to make judgements of Section 401 of the Federal Clean Water Act. It is the state that makes the judgement about what a federal law says. In the courts, the question of whether DEQ's assertion that the river will be injured is overcome by the applicants assertion that it is not injured; the burden is on the applicant.

405 TIMMS: To what level will the burden be determined?

407 YOUNG: DEQ has made a judgement and it has been appealed to the Environmental Quality Commission. They will render a judgement. If that decision were adverse, it would go to the State Court of Appeals.

417 HILL: Once settled, then the water rights question comes into play?

419 YOUNG: That question of water rights would be taken up assuming that the 401 permit is

issued; it could be the subject of some litigation.

440 HILL: We are not totally sure what condemnation powers exist for the municipality, but they might extend to obtaining existing water rights.

444 YOUNG: This is not about the normal condemnation capability that a local jurisdiction or the state would have. This is a condemnation authority that is conferred upon a licensee by virtue of having gotten a FERC license. It wouldn't matter whether that was a public or private party; the existence of the FERC license empowers them to pursue condemnation against other already issued water rights.

458 HILL: I assume that would extend to instream water rights as well as private/municipally held water rights?

462 YOUNG: There is nothing that would distinguish an existing instream water right from an existing out-of-stream authorization. This issue has never specifically been contested.

471 HILL: If DEQ reversed the 401 finding, there is probability of a suit from the other side.

480 TIMMS: Have there been any instream water rights issued on the Klamath River?

482 YOUNG: There is an application pending for an instream water right on this same reach of the Klamath River. The Klamath Compact characterizes a hierarchy of priorities for uses of the water when in conflict.

TAPE 43, SIDE B

030 YOUNG: That hierarchy gives early preference to domestic, livestock and irrigation rights; it then lists fish and wildlife rights. Hydroelectric priorities are a later right.

039 HILL: Closes public hearing on SM1, SM2 and SR2.

(Tape 43, Side B)

SB 1163 - PUBLIC HEARING

Witnesses: Ray French, Morrow County Commissioner

Judge Kevin Campbell, Grant County

David Moon, Water For Life

040 HILL: Opens public hearing on SB 1163.

071 RAY FRENCH, MORROW COUNTY COMMISSIONER:

Submits and summarizes written testimony opposing SB 1163. (EXHIBIT F)

101 JUDGE KEVIN CAMPBELL, GRANT COUNTY:

Submits and summarizes written testimony opposing SB 1163. (EXHIBIT G)

The primary problem in the John Day basin is finding that many of these

flows have not been adequately quantified; peak events or spikes for fisheries uses are not adequately accommodated in instream water rights. If the burden is placed on any specific user to achieve something that is unquantifiable or unachievable, then the burden will ultimately fall back on the state.

168 TIMMS: What is the drought condition and what is the cfs in the John Day River?

173 CAMPBELL: If Grant County were to determine and ask for drought assistance, it is questionable as to whether we would qualify.

184 TIMMS: Have you gotten some impoundments on the John Day River?

188 CAMPBELL: In the John Day, a "natural healing" process is looked at; it is slower and the more preferred alternative. SB 1163 would set strict timelines and unrealistic demands and is not in the best interest of the residents of the basin or the state.

197 TIMMS: In a meeting with the Northwest Power Planning Council, enhancement programs were discussed. Did we ever enact those programs in the soil and water conservation districts?

204 CAMPBELL: The BPA program is working more effectively since that time with the Soil and Water District and the Oregon Department of Fish and Wildlife working as cooperators with the BPA to implement the program. We are just now starting to see the returns on the investment.

211 TIMMS: What would SB 1163 do to that program?

212 CAMPBELL: Further polarization of the parties is not in the best interest of the program.

221 YOUNG: Submits and summarizes written testimony opposing SB 1163. (EXHIBIT H)

TAPE 44, SIDE B

016 HILL: Since 1955, the statutes required a formal public interest finding before issuance of a water right and in many cases that has not occurred. Asks for his opinion.

020 YOUNG: The current perception of that public interest review was not done in 1955. With the development of basin programs in 1955, the view of the board and the State Engineer's office was that the plans reflected the public interest.

Continues summary of Exhibit H.

090 TIMMS: How many moratoriums have been established in Oregon in the last four years?

093 YOUNG: We are not issuing permits in areas above scenic waterways where



we have not determined the flows necessary to satisfy the purposes of the scenic waterway. That is more of a delay while some judgements are being made. We will probably conclude that a water right cannot be issued that would allow year round use.

140 DAVID MOON, WATER FOR LIFE:  
There is a problem with definitions.

"Best practicable technology" - This standard is best "available" technology and economic factors are not a consideration.

The definition of waste builds in the "best practicable technology" standard.

Another problem is the 20 year review at the users expense; you would have a waste "witch hunt".

Another provision requires that Oregon regulate the rotation and timing of all water use. We would then have the state involved in the day-to-day practices of irrigation.

The provision regarding citizen suits would encourage litigation and polarization.

The transfer provisions are also a problem.

328 HILL: Current law requires use without waste and there is one proposal for a definition of the "best practicable technology". Asks Mr. Young to bring the Water Resources Commission's definition.

Regardless of which definition is utilized by the Commission, the goal is to reduce waste and free up water currently consumed as waste for other uses.

367 MOON: SB 1163 doesn't free up wasted water for instream water uses or other uses. It would strictly convert them over to instream uses. It is important to maintain the difference between waste and the elimination of waste and the conservation of water through efficient use.

384 HILL: Do you see a difference between the two concepts?

386 MOON: Yes.

388 HILL: Conservation of water is different than use without waste? What is the difference.

391 MOON: Use without waste is using water with reasonable efficiency. If you are using water with reasonable efficiency and then if you take steps to conserve water by improving your efficiency, you would fall under the conserved water statutes, where 25 percent of the water

would go to the state and 75 percent of the conserved water would go back to the water user.

425 HILL: The approach of rewarding the conserver with the value of that water seems to go against the doctrine of prior of appropriation. This use without waste statute was adopted to make sure that water is passed down to the next junior user and that they have an entitlement to water conserved and passed down.

461 MOON: The view of SB 1163 is that unless you are using the most efficient use of water with the best available technology, then you are wasting water. The problem with that standard is that technology changes; do we constantly look to constantly upgrade.

TAPE 45, SIDE A

033 HILL: What is "reasonable"? At what point do they reasonably get new equipment? What is definition of "cutting edge" and reasonable technology?

061 MOON: You can't arrive at a single definition of reasonable efficiency.

062 HILL: But the Commission is required to by law. They are required to decide, in looking at any particular system (municipal or agricultural), if there is reasonable application of technology to prevent waste. How do they decide that?

067 MOON: The factors to consider are site specific (i.e. what the use, what crops, what technology is used, etc.), which relate to an individual. You can't put a definition on it.

081 HILL: It is also necessary to take into account the impact upon other users and other benefits of the water.

097 MOON: In agreement. If you eliminate that waste then it is available for other users. The problem is that SB 1163 doesn't do that.

102 HILL: Mr. Simmons presented an acre feet of water rights for out-of-stream uses for application in agriculture and the irrigated acres and the comparison. If these figures are nearly correct, we have vastly overused the water for the acreage irrigated. Is it some artifact of the system or is it actual wastage or a combination. It appears that there is 200 - 300 percent more water being removed from the streams than is necessary for irrigation.

117 MOON: In agreement, but haven't looked at the figures. The danger with figures are terms such as "return flow", which should not be considered as waste. When the use of water is looked at and how it is actually utilized on the land, those are also factors to be considered.

128 HILL: We should understand return flow and there may be peripheral beneficial impacts to wildlife. But that wasn't the original intent of the diversion and there may be harm done to other users who don't have access to that water or to beneficial uses to the stream. We have to identify the extent of the wastage.

Closes hearing at 5:35 p.m..

Submitted by:      Reviewed by:

Bernadette Williams      Lisa Zavala  
Assistant                   Administrator

EXHIBIT LOG:

A            -            Testimony on SM1, SM2 and SR2 - Karl Anuta, NW Environmental Defense Center - 5 pages  
B            -            Testimony on SM1, SM2 and SR2 - Liz Frenkle, Sierra Club - 2 pages  
C            -            Articles Relating to SM1, SM2 and SR2 - Liz Frenkle, Sierra Club - 1 page  
D-Testimony on SM1, SM2 and SR2 - Jim Myron, Oregon Trout - 1 page  
E-Testimony on SM1, SM2 and SR2 - Bill Young, Water Resources Department - 1 page  
F-Testimony on SB 1163 - Ray French, Morrow County Commissioner - 1 page  
G-Testimony on SB 1163 - Judge Kevin Campbell, Grant County - 2 pages  
H-Testimony on SB 1163 - Bill Young, Water Resources Department - 7 pages