

Senate Committee on Water Policy
April 23, 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 23, 1991Hearing Room 137
3:15 p.m. Tapes 48 - 49

MEMBERS PRESENT:Sen. Wayne Fawbush
Sen. Bob Kintigh (Arrived at 3:45 p.m.)
Sen. Dick Springer, Vice-Chair (Excused at 3:50 p.m.)
Sen. Larry Hill, Chair

MEMBER EXCUSED:Sen. Eugene Timms

VISITING MEMBER:Rep. Dave McTeague

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, WRK

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

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

SB 1164 - Withdraws from further appropriation waters of the state that are natural habitat of species proposed as threatened or endangered, PPW

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TAPE 48, SIDE A

010 CHAIR HILL: Calls the meeting to order at 3:40 p.m..

(Tape 48, Side A)
SM1, SM2, SR2 - WORK SESSION

Witnesses:Lisa Zavala, Administrator

010 HILL: Opens work session on SM1, SM2 and SR2.

028 MOTION: SEN. SPRINGER moved SM1 to the floor with a "do pass" recommendation.

VOTE: In a roll call vote, the motion carried with all members present voting AYE. Senators Kintigh and Timms were excused.

039 MOTION: SEN. SPRINGER moved SM2 to the floor with a "do pass" recommendation.

039 FAWBUSH: Questions SM2. Asks for a reason why we want to pass it.

048 HILL: The basic argument is that the Federal Energy Regulatory Commission (FERC) is unable to issue a permit until DEQ issues a water quality permit. DEQ has stated that the dam would have an adverse affect on water quality and FERC's response is to lobby the state to reverse it's position. In effect, FERC is acting as an advocate for the City of Klamath Falls and not as an independent regulatory agency.

056 FAWBUSH: If the DEQ permit does not permit construction, is there anything FERC can do to override it?

058 HILL: Our current knowledge is that FERC can't permit the dam unless the water quality permit is issued. Apparently the DEQ Water Quality Permit is the only thing holding up the FERC application; nothing else the state does could stop the issuance of license.

067 FAWBUSH: I won't support SM2.

073 HILL: The purpose of SM2 is to encourage FERC to deny the permit based upon the actions the State has taken and to persuade FERC to stop putting pressure on the State.

FERC has threatened to take the state to court to override the state jurisdiction. Asks Lisa Zavala for confirmation.

081 LISA ZAVALA, ADMINISTRATOR:
That is my understanding of the situation at this point.

084 FAWBUSH: DEQ has disapproved the permit?

085 ZAVALA: That is correct.

086 FAWBUSH: Has FERC started the appeals process?

087 ZAVALA: It is being appealed to the Environmental Quality Commission at this point.

088 FAWBUSH: If the Commission upholds DEQ's actions, then FERC may or may not take them to court.

089 ZAVALA: The next step would be the City of Klamath Falls possibly taking it to the appeals court.

092 FAWBUSH: I think SR2 covers it.

096 VOTE: In a roll call vote, the motion carried, with Senator Kintigh voting NAY. Senator Timms was excused.

101 HILL: Recognizes the difficulty of Senator Fawbush's vote.

101 FAWBUSH: I'm not committed to support it.

105 MOTION: SEN. SPRINGER moved SR2 to the floor with a "do pass" recommendation.

109 FAWBUSH: We should say something in SR2 about why they should disapprove.

111 HILL: That is what all the "whereas" are.

112 VOTE: In a roll call vote, the motion carried, with Senator Kintigh voting NAY. Senator Timms was excused.

(Tape 48, Side A)
SB 1164 - PUBLIC HEARING
Witnesses: Bill Bakke, Oregon Trout
Jim Myron, Oregon Trout
Louise Bilheimer, Oregon Rivers Council
Jeff Curtis, Oregon Department of Fish and Wildlife
Bev Hayes, Oregon Water Resources Department
John Borden, Oregon Water Resources Department

116 HILL: Opens public hearing on SB 1164.

Senator Springer is excused to attend Redistricting Committee.

131 BILL BAKKE, OREGON TROUT:
Summarizes SB 1164. Presents a slide show detailing the endangered and "at risk" fish species in Oregon.

155 HILL: This doesn't show what would be affected by the bill?

157 BAKKE: Potentially, all the watersheds could be affected by the bill if it were passed as stated now.

Continues slide show. Oregon has 177 fish populations that are at risk. Seventy of those are Salmon; others include trout, steelhead, suckers, and minnows.

The American Fisheries Society recently published a paper on anadromous fish at the crossroads from California through Washington. Two hundred fourteen stocks are at risk on the coast. Seventy six populations are at risk in the Columbia River (salmon, steelhead and cutthroat trout). Fifty eight populations are at risk on the Oregon Coast. Of the 214 populations, 101 are at high

risk of extinction.

Salmon runs on the Columbia River have declined by 85 percent and the wild component of salmon and steelhead runs have declined by 97 percent. We have calculated 220 populations that are extinct in the Columbia River (consulted historic data and built in an extinction record for the basin).

185 HILL: Are those primarily in the Snake River basin above the dams?

185 BAKKE: They are above the Hells Canyon Dam and Grand Cooley Dam, but it is lower in the basin as well. Basically, the causes of decline are excessive adult and juvenile mortality, habitat degradation and artificial propagation.

One of the problems identified at the Salmon Summit was a lack of water for transport of juvenile salmon to the sea; this is also true for adult populations trying to ascend the river during low flows.

The problem remains that water availability is essentially unknown in the Columbia River. Presently, there isn't enough water in the Snake River to protect the petitioned stocks of salmon and we are unable to find adequate flows for those petitioned stocks.

220 JIM MYRON, OREGON TROUT:
The listing of the fish has brought out a new interest in filing for additional water rights. Four large applications are pending: three in the Umatilla area which total 644 cubic feet per second (cfs) and one in the Owyhee Basin for 64,000 acre feet of stored water. There is no hard data on water availability in the Columbia River and until such time as the information is available, we question whether Water Resources Department (WRD) should be issuing additional consumptive water rights.

248 FAWBUSH: I'm surprised to hear that there is not enough data on water availability in the Columbia System to determine whether those withdrawals are going to affect the fish run problems. Could you be more specific?

254 MYRON: In our discussions with WRD, they can't quantify what is needed for the protection and passage of fish. They have told us they are in the process of additional water availability studies.

268 FAWBUSH: Was anything said at the Salmon Summit about putting in a moratorium on withdrawals?

285 BAKKE: The Salmon Summit did discuss a moratorium on water withdrawal and it gathered support. The proposal is moving forward in a conservation plan proposed by the utilities and

Oregon Trout for fall chinook in the Snake River.

There isn't enough water in the Snake and Columbia River to accommodate all uses, but WRD is proposing to go forward with further appropriations. We have been protesting those and asking for water availability studies prior to their approval.

314 FAWBUSH: During the Salmon Summit, was there discussion as to what will be done retroactively if you determine you have to have more water flow? Will there be the ability to restrict water withdrawal and will that be based on the latest application?

327 HILL: WRD has always maintained that they have no right to restrict appropriation of water under a permit or a certificate, unless there is a condition in the water right that allows them to do so.

334 BAKKE: There was a water right we protested from Umatilla County and the proponent for that water right has accepted a condition upon that water right. The Water Resources Commission wouldn't allow the condition to go forward.

343 HILL: Who recommended the condition?

346 MYRON: WaterWatch was involved in the protest also. They had a meeting with the applicant and the applicant agreed to subordinate their water right to a future instream water right to the Columbia; the Commission objected to that.

352 HILL: There is currently not an instream water right on the Columbia?

353 MYRON: That is correct. We have asked ODFW to research that and file for an instream water right.

356 HILL: They have not done so?

356 MYRON: Not at this time.

358 BAKKE: In talking with Morrow County, we mentioned that condition would be possible, but they have no assurance that other applicants following their water right would also be conditioned. There is very little certainty for both the business and fisheries concerns.

469 HILL: Did the Commission grant that particular water right?

371 MYRON: Yes, but without the condition.

375 LOUISE BILHEIMER, OREGON RIVERS COUNCIL:
We support Oregon Trout's efforts with regard to SB 1164. The Threatened and Endangered Species Act is really a "management by crisis" situation. We must take a hold of this issue within Oregon before it is put in the hands of the Federal government.

It seems logical that where you already have a proposal for a T&E listing,

that you would
quantify the flows needed to support the fish and that only after
quantification and issuance of
an instream water right would a permit be issued for out of stream uses.

405 HILL: That is not happening now?

406 BILHEIMER: No.

422 JEFF CURTIS, OREGON DEPARTMENT OF FISH AND WILDLIFE (ODFW):
SB 1164 would mean that anytime a species is proposed to be listed and
water is part of its
natural habitat, that stream would be withdrawn from further appropriation.

But many of the
species listed are in trouble for reasons other than water availability
(hatchery and harvest
practices).

477 HILL: Are you suggesting that it doesn't make sense to use this kind of
a solution where there
is not a water quantity problem?

485 CURTIS: That is correct.

485 HILL: What about limiting it to areas where there is a species proposed
for listing as a result
of quantity issues or quality issues that are affected by quantity?

TAPE 49, SIDE A

028 HILL: How can we sort this? Does ODFW have a map for sensitive and
endangered species
as a result of water withdrawals from the stream?

031 CURTIS: No. But we have looked at these issues in terms of population
studies and our
biologists would know whether it is lack of water or water temperature or
something else. We
could provide you with that information.

035 HILL: The Umatilla River has low flow and T&E species. Do you think it
is good public policy
to stop additional withdrawals and new water rights from this stream or
should we let the water
rights applied for go on?

044 CURTIS: One of the administrative remedies is to apply for instream
water rights as quickly as
possible.

076 HILL: Do we have an instream water right on the Umatilla?

078 BEV HAYES, WATER RESOURCES DEPARTMENT:
We have a minimum flow.

078 HILL: I am asking for an instream water right.

079 HAYES: I believe it is being converted. WRD agrees that a stream
should be withdrawn from
appropriation if the natural habitat of a listed aquatic species is
threatened by low stream flows.

Submits and summarizes testimony on SB 1164. (EXHIBIT A)

110 HILL: The purpose of SB 1164 is to keep the situation from getting worse pending a decision for a listing. A lot of activity can happen on a stream in the few years the listing process happens.

How does WRD know that a particular habitat is threatened by low streamflows? What is your criteria and is that by rule?

133 HAYES: If WRD gets an application for an instream water right, a water availability analysis is done. If it is clear that there is not water available for those public uses or for any other uses, we don't issue permits; it is a de facto withdrawal.

Absent an instream water right or petition asking for withdrawal or public input, we have no good way of knowing if there is a T&E species. We would be depending on ODFW and other agencies to tell us when they review applications if there is indeed a T&E species that needs protection.

151 HILL: Do you currently do a public interest review on each of your water right applications?

151 HAYES: Yes.

152 HILL: Would you do public interest reviews for the Umatilla and Owyhee Rivers?

154 HAYES: I am not familiar with the application before us on the Owyhee.

157 HILL: WRD and the Commission are intending to and do practice making a public interest review for each application now coming before the Commission?

160 HAYES: WRD developed a set of rules that states that applications over a certain size automatically go the Commission for a public interest review. Even without that, we do a water availability analysis to decide if there is water available for that use.

166 HILL: Does that public interest review include taking note of any T&E filings in that particular reach?

169 HAYES: No, those issues would have to be raised by others, absent an instream water right application or basin planning study.

172 HILL: Does WRD automatically receive a copy of the T&E filings?

176 HAYES: I don't know that for sure. I don't think we do.

178 HILL: We need to correct that and get WRD into the loop. Help us find a way to insure that you are notified immediately. Also help us understand how such a notice will impact your

handling of a water right application.

What does it mean to the Commission's considering of a water rights application if a T&E filing is in existence?

188 HAYES: I don't think the Commission has deliberated on that particular issue. The key question is whether streamflow is an issue. In our consideration of instream water rights, if there is a species listed, we would consider that a high priority application.

199 HILL: Where are the public interest hearings usually held?

203 HAYES: If an application goes to the Commission for consideration, we do a staff report and make a recommendation to the Commission about how they are to proceed on the application. They deliberate and if they decide that there is sufficient public interest questions, they will send it out for a contested case hearing. That would be conducted by our hearings officer in an area close to residence of the applicant.

210 HILL: What if the applicant is the ODFW and it is an instream water right? Last week the commission sent a number of instream water right applications out for public hearings or contested case proceedings.

217 JOHN BORDEN, WATER RESOURCES DEPARTMENT:
At this point we don't have petitions we have accepted for contested case on instream water right applications. There have been a number of issues raised and letters received, but they don't meet the threshold test to take them to contested case. There are four conversions to be considered, but none were prompted by new instream water right applications.

224 HILL: On an application for an appropriation of water from a stream on which there is a T&E filing, but not a listing, the public interest would be considered. And that public interest would include considering streamflow and the fact that there is a sensitive species proposed for listing. Is that a public hearing process?

233 BORDEN: It might or might not be. The T&E issue hasn't come before our Commission as of yet. But if there were a listed species, that would be an important parameter. Also, if ODFW made a comment on a particular out of stream appropriation application, we would look at that and give it due consideration.

241 FAWBUSH: WRD is not even in the loop to find out what streams have T&E species? You're Commission hasn't even addressed the issue of what you are going to do if a T&E species shows up in a stream where there are appropriation requests? ODFW has no notification of WRD of any T&E species? Have you looked together at how the state is going to address this issue?

256 CURTIS: When a petition is filed, it goes to a federal agency. There is a notification process for the Governor's office, but there is no specific notification to us. The only notification we would make would be through a request for an instream water right.

772 FAWBUSH: Have either of your Commissions talked prospectively as to what you will do to face the problem of T&E species?

281 HAYES: We have not discussed that specifically. WRD has relied on ODFW to bring those issues to us and on other state agencies if there is a public use issue.

285 FAWBUSH: Have you thought about the problem you might have under a federal court or restriction of access? I assume they have the authority to tell you to cut back appropriations on a stream if they so choose. How will you handle it?

292 BORDEN: There are two additional things to point out that WRD has done.

1) At the last Commission meeting, some decisions were made on a particular process for processing instream water rights with ODFW. As the instream water rights are filed to the extent that they appropriate the remainder of the water for a period of time, we would automatically put them on a candidate list for withdrawal. A de facto closure goes in for that period of time.

2) ODFW told us that they were contemplating an instream water right filing on the Columbia River. Would like to talk about and sort out the quantity and velocity question. We have commenced discussions with Idaho and Washington to talk about the operational and regulatory aspects.

324 FAWBUSH: If ODFW exercises their present authority on instream water rights, ODFW could effectively set up and use that as a way to serve notice on WRD that something needs to be done and also set aside that remaining instream flow due to a T&E species. Do you have the ability to use that instream water right as a vehicle to achieve what we are after here?

336 HAYES: That does occur here. When we issue the instream water right for the average natural flow, there would be no water available for future appropriations in that case. It is a de facto withdrawal of the stream.

342 FAWBUSH: How are you approaching the instream water right issue and is that a vehicle to look at the T&E situation?

347 CURTIS: We are working through a list in which we are applying for instream water rights, but it is somewhat limited by the information we have. Where there are T&E species is the highest

priority for us in applying for instream water rights.

354 FAWBUSH: What kind of cooperation do you have with the federal government and what is ODFW doing in response to the Salmon Summit in dealing with species that are going to be listed? Are any of the streams that you have the ability of filing for instream water rights on affected by the listings?

362 CURTIS: Yes.

363 FAWBUSH: What are you doing about it? The intent of the bill is to make ODFW and WRD pay attention to the T&E species and not give away water that may have to be taken back. How do we get to that? Do we have the ability under present law to actually do that?

379 CURTIS: We have under present law the ability to apply for instream water rights, which is a de facto withdrawal of the stream.

382 FAWBUSH: Is one of the criteria whether there is a T&E species in the stream? What is the criteria for establishing an instream water right.

388 CURTIS: It has to do with what the various species need as a biological matter to survive in that stream.

394 FAWBUSH: How are you carrying out the law that says you have the ability and the obligation to look at streams with T&E species? What are you doing to anticipate the problem?

403 HILL: One way to deal with the problem is to request instream water rights for those reaches that have a T&E species or will likely have one, and which doesn't have an instream water right. That would implement the solution.

411 CURTIS: ODFW is limited by the number of people we have. We are going through the areas where we can apply for instream water rights as quickly as we can within the limits of our staff. T&E species is a priority, but there are a number of streams where we don't have sufficient information.

427 HILL: Is that the case with the Columbia River? Is lack of information the reason you haven't applied yet?

433 CURTIS: That is a huge situation due to the large size of the river. Due to the damming up of the river, we have found that it will take more water to get the fish down in a given period of time. Figuring out the amount of water needed is an amazing process. You also have to work with the Corps of Engineers to reduce the cross-sectional area and how much water we can get from the Bureau of Reclamation, Idaho, etc. It is very difficult and I

don't know where we are
on it.

458 HILL: How do we stop things from getting worse on a particular reach pending resolution of a T&E filing when we don't have an instream water right?

478 CURTIS: We will all need to be cautious in the issuance of new water rights in areas where there are proposed listings of T&E species.

490 FAWBUSH: There needs to be better coordination. There could be a possible mechanism available to do this.

TAPE 48, SIDE B

034 FAWBUSH: The system is not working when we are issuing water rights on streams that we know are going to be dramatically affected by the T&E Species Act. People need to understand what the risk of their level of investment will be. I would hope that your Commissions would be proactive enough to look at it and come to us with some emergency recommendations as to how to deal with it.

061 HAYES: Offers to bring that up as an issue at the Commission's next meeting.

063 FAWBUSH: I would like to see it discussed by both Commissions. I would also like to see something more definitive as to how you would use the existing instream rights in order to providing assurance to people who want to use water. It is important to look into the future. If we are to continue issuing permits, there ought to be some type of conditional understanding within the permits so that people accurately know what their risk level will be.

073 HILL: Adjourns hearing at 4:45 p.m..

Submitted by: Reviewed by:

Bernadette Williams Lisa Zavala
Assistant Administrator

EXHIBIT LOG:

A - Testimony on SB 1164 - Bev Hayes, Oregon Water Resources Department - 1
page