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State Land Board

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State Land Board

Regular Meeting
June 10, 2008
Agenda Item 2

SUBJECT

Request for Land Board decision regarding whether the federal government transferred the ownership of the land underlying the Rogue River, between River Mile (RM) 68.5 (at Grave Creek) and RM 157.5 (at Lost Creek Dam), to the State of Oregon at statehood in 1859.

This request was first brought to the attention of the Land Board as an Information Memorandum at its October 6, 1997 meeting. However, for reasons discussed later in this agenda item as well as in the final navigability report, the Board did not authorize the Department of State Lands (Department) to conduct the study until its October 12, 2004 meeting.

ISSUE

Whether the State Land Board should, based on the evidence in the agency record: (1) adopt the findings and conclusions of the Department of State Lands that are stated in the Rogue River Final Navigability Report (**Appendix A**), including that in 1859 the Rogue River from RM 68.5 to RM 157.5 (the study segment) satisfied the federal test for title navigability; and (2) decide the nature and extent of the state's interest in the land underlying the study segment. The Rogue River Final Navigability Report was prepared in accordance with ORS 274.400 to 274.412 and OAR 141-121-0000 through 141-121-0040.

AUTHORITY

ORS 273; regarding the creation and general powers of the Land Board and of the Department.

ORS 274; regarding use and management of submersible and submerged lands, navigability studies, and determining ownership of submersible and submerged lands in navigable waterways.

OAR 141-121-0000 through 141-121-0040; regarding navigability studies and determining ownership of submersible and submerged lands in navigable waterways.

BACKGROUND

In 1995, the Oregon Legislature enacted HB 2697 (later codified as ORS 274.400 through 274.412). This act authorizes the Department and Land Board to conduct navigability studies, and authorizes the Land Board to determine the nature and extent of the state's interest in the land in waterways that were navigable for title purposes in 1859. In April 1996, the Land Board adopted administrative rules (OAR 141-121-0000 to 141-121-0040) pursuant to the requirements of HB 2697 (**Appendix B**).

Soon after the Land Board's adoption of the administrative rules, a number of persons interested in determining the ownership of various waterways in Oregon began to prepare navigability study requests for Land Board consideration. The first such request was received by the Department in November 1996, from the Sandy River Chapter of the Association of Northwest Steelheaders, for a navigability study of the Sandy River from RM 0.0 to 37.5. This was followed by seven other requests, the third of which was submitted by Josephine County District Attorney Timothy R. Thompson for the study segment of the Rogue River.

Since receipt of the Rogue River navigability study request, the Department has followed the 18-step navigability determination process embodied in OAR 141-121-0000 to 141-121-0040 (**Appendix C**). In the time since the Land Board heard public comments in Medford, Oregon, on March 19, 2008, the Department has completed Steps 15 and 16 in this process.

Step 15: Requires the Department to consider and summarize all the evidence received and to prepare the Rogue River Final Navigability Report.

Step 16: Requires the Department to prepare a public notice to be placed in newspapers and sent to affected property owners and interested persons describing the findings and conclusions of the Rogue River Final Navigability Report and date and time of presentation of the report to the Land Board.

Two steps now remain in the navigability study process:

Step 17: The Department presents the Rogue River Final Navigability Report to the Land Board, and the Land Board considers the evidence. The Land Board may adopt the findings and conclusions of the Department and, if it does so, the Board shall also decide the nature and extent of the state's interest.

ORS 274.404 provides in part:

> *(1) "...the board and the Department of State Lands shall make a final administrative determination as to whether a waterway or a part of a waterway is navigable, and if so, the extent of the interest claimed by the State of Oregon in the navigable portion of the waterway."*
>
> *(2)(e) "...the board may adopt the...report submitted by the Department if substantial evidence in the record supports the report's findings and conclusions, or the board may refer the report to the Department for further action as determined by the board."*

ORS 274.406 provides in part:

> *(1) "Upon the adoption of a report by the State Land Board under ORS 274.404(2)(e), the board shall declare the nature and extent of the state's claim to any interest that remains or is vested in the State of Oregon with respect to any land or waterway described in the report."*

OAR 141-121-0040 provides in part that:

> *(1) "The Department shall select a date and time when it will present the Final Navigability Report to the Land Board, and shall prepare a meeting notice."*
>
> *(2) "The Land Board shall consider the evidence in the record and the Department's findings and conclusions as contained in the Final Navigability Report, and shall make a decision concerning the nature and extent of the state's claim to the land underlying the waterway segment. Based on the information provided, the Land Board may adopt the findings and conclusions contained in the Final Navigability Report if substantial evidence in the record supports the report's findings and conclusions."*

Based on advice from the Department of Justice, in these circumstances, the Department and the Land Board apply the standard of proof of preponderance of the evidence.

Step 18: If the Land Board decides the nature and extent of the state's interest, it will also describe the location of the land, advise persons that they may seek judicial review, publish the declaration in newspapers, send the declaration to listed places and some persons, and serve the declaration on each owner of record of land described

in the declaration. More information is available in ORS 274.408 and OAR 141-121-0040.

As stated in the beginning of this agenda item, the Department first brought the request for this study to the attention of the Land Board at its October 6, 1997 meeting. However, the Land Board did not authorize the Department to initiate the study until its October 12, 2004 meeting. The principal reasons for this five-year delay between receipt of the request and initiation of the study were:

- The Land Board wanted to give the Joint Legislative Interim Committee on Navigability sufficient time to see if it could develop any viable resolutions to on-going disputes over the ownership and use of lands underlying and adjoining Oregon's waterways. This committee, established by the 69th Legislative Assembly, first met in 1997. However, after conducting public hearings throughout Oregon to gain an in-depth understanding of navigability issues, the committee was disbanded in 1999, with no proposed recommendations or resolutions to the issues it identified.
- The Land Board also wanted to give the Department time to work with landowners and recreationists to develop on its own a resolution to navigability issues. Toward this end, the Department held numerous meetings with the public during 2000 and 2001 – but failed to find a way to avoid having to conduct navigability studies to address conflicts between landowners and recreationists on waterways.
- In October 2002, the Land Board, as ordered by Marion County Circuit Court Judge Paul Lipscomb, directed the Department to conduct a navigability study of a 174-mile segment of the John Day River. Because of limited Department staff and resources, doing this study (which was completed in 2005) precluded the conduct of the Rogue River study.
- In 2004, the Land Board sought confirmation that the Rogue River navigability study was still required. Toward this end, it contacted District Attorney Clay Johnson, successor to Timothy Thompson (who first requested the study). In his response, District Attorney Johnson stated: *"I am in complete agreement with his* [Mr. Timothy Thompson's] *request for the study."* The Land Board also directed the Department to request public input concerning the continued need for the study. A summary of the comments received were presented to the Board at its October 2004 meeting as well as the Department's recommendation that the Board give its authorization to the agency to begin conducting the study.
- It wasn't until early 2005 that Department staff were able to commence research into the historical use and condition of the Rogue River study segment.

NAVIGABILITY STUDY DOCUMENTS AND PUBLIC PARTICIPATION IN THE STUDY PROCESS

The Department has prepared three navigability study reports of the Rogue River since the initiation of the navigability study. The report being considered by the Land Board at this meeting is the third and last of these reports. It summarizes the evidence in the record and states the findings and conclusions of the Department.

First Draft, Hearing and Public Comment Period

The first of these reports was made available to the public on September 7, 2007, the second on February 19, 2008, and the final study on May 19, 2008. Following the release of the first two of these reports, two public hearings and one informational open house were held.

The first public hearing was conducted in Grants Pass on October 24, 2007, and was attended by approximately 200 persons, 30 of whom presented testimony. The purpose of this meeting and public comment period (which extended from September 7, 2007 through November 9, 2007) was for Department staff to obtain public input concerning:

- The accuracy of the data presented in the first draft of the report, and
- Any additional information concerning the historical uses and condition of the waterway that could be used to support or refute the information presented in the report.

During the three-month public comment period, the Department received 183 e-mails and 8 letters addressing various aspects of the first draft of the study. Of these responses:

- 148 indicated support for the study;
- 20 opposed the study; and
- 23 consisted primarily of opinions or asked questions.

Only 10 comments primarily addressed the accuracy of the information presented in the report, or provided additional evidence for consideration by the Department concerning the historical use and condition of the 89-mile waterway study segment. **Appendix D** presents a summary of the public input received.

Based on the issues raised during the public comment period, the Department developed a question and answer brochure to address many of the concerns most frequently raised by the public (**Appendix E**). This brochure was mailed in mid-February to all persons who signed-in at the first public hearing in Grants

Pass. It was posted, along with all other documents made available to, or received from the public, on the Department's Web site.

The informational open house was held in Medford on March 5, 2008. An estimated 250 people attended this meeting. The purpose of this open house was to discuss, in an informal setting, the study and to answer questions. No presentation was given.

Second Draft, Land Board Meeting and Public Comment Period

One March 19, 2008, the Land Board conducted a meeting in Medford to obtain input on the following two questions:

- Does the factual evidence presented in the second draft of the Rogue River navigability study meet the federal test for title navigability?
- Should the Land Board, based on the factual evidence contained in the second draft of this study, make a declaration of public ownership of the 89-mile study segment?

Of the approximately 350 people who attended the March 19th Land Board meeting, 40 presented oral testimony to the Board. In addition, during the public comment period, which was from February 19, 2008 through March 26, 2008, the Department received 467 submissions from approximately 450 members of the public. As indicated in **Appendix F** (summary of the public input received during this comment period), of the 467 comments received:

- 168 were in favor of the study or an assertion of ownership by the Land Board
- 257 were opposed to the study or an assertion of state ownership; and
- 42 did not indicate a clear preference either supporting or against the study or a declaration of state ownership.

COMMENTS RECEIVED FROM THE PUBLIC

An analysis of the comments received during the first and second draft public comment period indicates that a sharp division of opinion exists regarding the need for a navigability study of the submerged and submersible land below the line of ordinary high water along the study segment. There are also many respondents who do not accept either the:

- Factors embodied in the federal test for navigability as the criteria which must be used to determine whether the bed and banks of a waterway were to be granted to the public at the time of statehood; and

- Validity, utility or applicability of some or all of the factual evidence presented in the report as it bears on the requirements of the federal test for navigability.

Conversely, many respondents took the opposite viewpoint and supported the need for the study and an assertion of public ownership as well as the accuracy and sufficiency of the evidence presented.

Analysis of Comments Received

Regarding the need for the study and a determination of navigability by the Land Board.

Although the Land Board did not request input concerning the need for the study and a determination of navigability by the Board, many comments were nonetheless received concerning these issues. These comments typically fell into one of two categories: those submitted by persons who strongly believe that the study and an assertion are unnecessary, and those who contend that the Land Board must take these actions.

It was clear from a number of the comments received that the persons submitting them hoped they could compel the Land Board to reconsider the need for the study and either immediately terminate or indefinitely delay the effort.

The reasons most often given that there is no need for either the navigability study of the Rogue River or an assertion of state ownership are:

- Conflicts between landowners and recreationists have been "few and far between."
- Law enforcement officials concur with this assessment (that there have been few conflicts requiring their assistance) based on their experience in responding to calls for assistance.
- Many landowners recognize that the public has a right to use the waterway up to the line of ordinary high water based, variously, on what is cited to be a "floatage easement" or "public use doctrine" as determined by court decision, or as discussed in the April 21, 2005 opinion of the Oregon Attorney General concerning the public's right to use waterways.
- The courts have already determined ownership of segments of the Rogue River within the study area.

Conversely, many persons submitted comments supporting the conduct of the navigability study and an assertion of state-ownership. Typically, the reasons given for this position are:

- Conflicts have occurred between landowners and recreationists.

- There should be no confusion as to the rights of recreationists to use the waterway.
- Whether the Rogue River and other waterways in the state are navigable is a decision that should be made based on factual evidence, not on the basis of popular opinion. Navigable rivers are a legacy of the people and the state must protect the right of the people to use them.
- Rivers should be kept open to the public in a manner similar to Oregon's beaches.

Regarding the sufficiency of the evidence presented concerning the historical use and condition of the Rogue River study segment.

The first question asked of the public by the Land Board when reviewing the second draft of the study was:

"Does the factual evidence presented in the second draft of the study meet the federal test for title navigability?"

Many comments were received concerning this question. Again, as discussed above, two divergent opinions were expressed.

Those who do not believe that the evidence presented in the report is sufficient to meet the federal test for navigability most often cited the following deficiencies:

- Too much of the evidence consisted of uses (for example, log drives) that occurred only a few times, or sporadically, or were unsuccessful.
- The evidence presented too often consisted of single citations in newspapers or other documents.
- The great variability in the flow of the Rogue River and number of obstacles in the waterway would make it difficult for a number of the uses cited in the report to have occurred for more that brief periods of time each year, if at all (for example, the use of canoes by Indians).
- As applied to the evidence, the report too often uses the words and phrases *"could have", "likely", "it is reasonable to conclude"* and *"is believed to have occurred".*
- The evidence concerning the historical flow of the river is inaccurate or misleading.
- The report appears to be biased in favor of emphasizing evidence that supports a determination of navigability.

Additionally, a number of persons indicated:

- That they do not accept the concept of "susceptibility to use" of a waterway as a factor of the federal test for navigability.
- The terms "navigable" and "navigability" are used in a way that doesn't meet dictionary definitions.

Persons who accepted the evidence as valid and as meeting the requirements of the federal test for navigability typically made the following comments:

- The evidence in the report is well documented and accurate, and meets the requirements of the federal test for navigability.
- The courts determined the John Day River was navigable on a less thorough and convincing set of facts than those presented for the Rogue River study segment.
- The decision concerning the evidence and the navigability of the Rogue River study segment is one that should be based on facts concerning its historical use and condition, not public opinion.

Regarding whether the Land Board make a declaration of ownership based on the evidence?

The second question asked of the public by the Land Board was:

"Should the Land Board, based on the factual evidence contained in the second draft, make a declaration of public ownership of the 89-mile study segment?"

With regard to this question, three major opinions were expressed:

- No, the factual evidence does not meet the requirements of the federal test for navigability.
- Yes, the factual evidence does meet the requirements of the federal test for navigability.
- The Land Board should postpone, or not make a decision on this issue,

The reasons most often given why the Land Board should either decide to not declare public ownership of the study segment, or to postpone or defer its decision are as follows:

- The evidence presented in the report does not meet the requirements of the federal test for navigability.

- An assertion of state ownership:
  - Will have significant, adverse impacts on landowners and tax assessors.
  - Constitutes a taking.
  - Is unnecessary (for the reasons discussed above such as there being few conflicts along the waterway and the courts have already ruled on who owns what part of each segment).
  - Will cause more people to use the waterway thereby resulting in:
    - More, not fewer conflicts between recreationists and landowners;
    - More trash, vandalism and trespassing on private property; and
    - A greater need for increased law enforcement.
  - Should not be made without first conducting environmental and economic impact analyses.
  - Will cause property values to decline.
  - Will result in lengthy litigation that will be costly to landowners, local government and the State of Oregon.
- There are other ways to solve the issues prompting the navigability study request such as:
  - Encouraging the Oregon state legislature to enact legislation similar to Montana's stream access law.
  - Establishing a set distance that a person may go on the bank of a waterway above the edge of the water.
- Landowners are better stewards of the submerged and submersible land along the Rogue River than the State of Oregon.
- Because of avulsive changes along parts of the Rogue River study segment, it will be a lengthy, difficult and expensive process for the state, local governments and landowners to determine who owns what.

DEPARTMENT RESPONSE TO CONCERNS

In preparing the Rogue River Final Navigability Report, the Department carefully considered all of the concerns presented to it regarding the evidence summarized in the September 7, 2007, and February 19, 2008 draft reports. Following this review, the Department decided that several changes needed to be made to the report to address issues of concern raised in the public input. Specifically, new sections have been added to the final report regarding:

- The significance of prior court decisions on the ownership of the bed and banks of the Rogue River study segment;

- The avulsive changes that are known to have occurred within the Rogue River study segment; and
- How to determine the location of the line of ordinary high water.

Additionally, the Department made several corrections to the information presented in the second report concerning the historical flow data of the Rogue River and the removal of Savage Rapids Dam. Other changes were made throughout the final report, as well, to clarify or expand upon information presented.

In the following section are listed the concerns most often raised by the public in the input received by the Department during the February 19, 2008 through March 26, 2008 public comment period, and the Department's responses to them.

- <u>The courts have already determined the ownership parts of the 89-mile Rogue River study segment</u>.

  Over the years there have been a number of decisions from various state and federal courts and other non-judicial statements (such as opinions of the Office of the Attorney General) that have, in some form or another, addressed the navigability of the Rogue River study segment. DSL received a number of comments from the public concerning the applicability of these decisions and statements on the determination to be made by the Land Board. DSL has considered the decisions and statements cited in the public comment and conclude that they have no direct bearing on the determination to be made by the Land Board. For one or more of the reasons given below, none of the decisions and statements noted in public comment has any preclusive effect on the Land Board's authority to make a navigability determination as to the Rogue River study segment.

  First, as noted above, this study and the determination to be made by the Land Board are undertaken pursuant to the requirements of ORS 274.400 through ORS 274.412. ORS 274.402(1) vests exclusive jurisdiction in the Land Board to *"assert title to submerged or submersible lands in navigable waterways on behalf of the State of Oregon."* Thus, assertions or conclusions as to the navigability of the Rogue River study segment contained in court decisions and other non-judicial statements generally do not preclude the Land Board from exercising its exclusive jurisdiction, although the decision and opinions can be considered as part of the body of evidence.

  Second, ORS 274.402(2) provides that the Land Board cannot assert (or deny) title to any waterway unless:

(1) a *"...court having jurisdiction to determine title to real property in Oregon has determined that the waterway or part of the waterway is navigable and that determination is final"* or,

(2) the Land Board *"...has made a declaration under ORS 274.406 that contemplates the assertion of such title."*

There have been no such judicial decisions or Land Board declarations for the Rogue River study segment.

Third, in most of the cases mentioned in public comment, the state was not a party to the litigation. The state's interest in real property cannot be affected by a decision in a case where the state is not a party. *"Generally speaking, a judgment will not bind a nonparty unless the nonparty was in privity with a party to the underlying action,"* Couch v. Couch, 170 Ore. App. 98, 103, (2000) citing *Stevens v. Horton*, 161 Ore. App. 454, 461, 984 P.2d 868 (1999). There is nothing in ORS 274.400 et seq. (specifically including ORS 274.402(2)) that changes this fundamental principle of property law. Moreover, states are expressly exempted from the statute of limitations set forth in the federal Quiet Title Act, and hence a state would not be barred from bringing its own quiet title action at any time subsequent to such decisions. 28 USC Section 2409a(g).

Fourth, in several of the decisions mentioned in public comment, navigability of the river was not at issue and the court did not did not make a determination as to the navigability of the river based on evidence presented to it. Instead, in these cases the court simply assumed that the river was either navigable or not. This is common in litigation where the only litigants are non-state entities and the litigation concerns some use of the waterway, not its navigability.

Finally, several of the decisions and statements were issued at a time when the legal test for navigability differed from the current test. The law of navigability has evolved considerably in the last half century. Likewise, the methods of historical research have improved, potentially calling into question the evidence that formed the factual basis of the particular decision or statement.

- <u>Ferries cannot be used as evidence that the Rogue River is navigable. They only go from one side of the river to the other and are simply another type of bridge</u>.

The Department does not agree with this contention. Any evidence of the use of the Rogue River study segment was included in the draft study report. Because numerous ferries crossed the Rogue River since statehood at various points along the waterway, this evidence of use cannot be ignored.

Although it is correct that these ferries were tethered to a cable and only went back and forth across the waterway, their presence at least at the crossing points (which occurred at various locations along nearly all of the 89-mile study segment) indicates that the river was of a sufficient flow and/or depth for enough of the year to make crossing the river by another means (for example, by horse, foot, swimming, etc.) difficult or impractical. Furthermore, even though the ferries often consisted of little more than logs tied together in order to support a board deck, they nevertheless floated and constituted commerce. Therefore, in determining whether the federal test for navigability was met, DSL considered the existence of ferries as just one of many pieces of evidence of the actual or possible use of the waterway.

- Use of canoes by Indians at around the time of statehood did not occur and, even if it did, the actual or potential use of the Rogue River by Indian canoes is irrelevant to determining the title navigability of the study segment.

  The Department does not agree with these contentions. The federal courts have ruled that use of a waterway by Indians in canoes may establish title navigability. Although the evidence presented in this study indicates that such use of canoes by Indians on the Rogue River occurred at specific locations along the lower half of the 89-mile study segment, the fact remains that such use was observed and recorded in the journals of early explorers prior to and following statehood. Furthermore, a reference was found indicating that Indians living on the upper reaches of the Rogue River used log rafts on the waterway.

- Log drives on the Rogue were unsuccessful, did not occur often, and therefore, should not be used as evidence of the title navigability of the Rogue River at statehood.

  It is correct that the evidence presented in the report does not demonstrate that the driving of logs down the Rogue River was an easy or extremely successful endeavor or important use of the waterway. However, the evidence collected by the Department clearly indicates that such drives were periodically conducted on the upper one-third of the study segment in the late 1800s and early 1900s. Based on one report, these drives may have occurred over many years.

  The federal courts have ruled that log drives are a type of trade that may be the basis for title navigability and that the use of a river need not be without difficulty, extensive, or long and continuous. The courts have also held that the need for constant tending to ensure that logs will float does not mean a river is not navigable.

- Uses such as commercial fishing and log driving have been illegal for many years and therefore should not be considered as evidence for title navigability.

  The legality of a use either now or following statehood does not have any bearing on whether that use can be used as evidence to determine the navigability of a waterway. The criteria directs that we look at use or susceptibility of use at the time of statehood.

- Many of the post-statehood uses of the Rogue River cited in the studies are unproven, limited in duration, or occurred only over short stretches of the river.

  The preponderance of the evidence proves that there have been numerous documented uses of segments of the Rogue River from statehood through at least the early-to-mid 1900s. Furthermore, there is strong and undisputed evidence that the entire length of the study segment has been repeatedly used for the past 65 years by recreationists in watercraft – many of which have the same floatability characteristics as Indian canoes that were customary modes of trade and travel in the region at the time of statehood.

- The historical flow rates for the Rogue River cited in the studies do not reflect the flow that existed at the time of statehood.

  The Department concurs that the historical flows of the Rogue River following statehood are not the same as those that occurred at the time of statehood due to the construction of various dams in the Rogue River watershed, and withdrawals for domestic and municipal use and irrigation. In fact, because of these withdrawals, it was most likely greater than it is today.

  The federal test of title navigability does not require precision in flow measurements; it is not necessary that the evidence demonstrates that the current flows of the waterway are exactly the same as at statehood. Instead, it is only necessary that the evidence support a reasonable inference that the flows at statehood generally match or are greater than the current flows.

  Based on the results of the Oregon Water Resources Department model, and a review of long-term data collected by the USGS, the Department found and concluded that there is an 80% likelihood that the flow of the Rogue River through the study segment at the time of statehood would allow Indian canoes to have used the waterway for much of the year.

- Numerous floods and avulsive changes of the Rogue River have occurred along the 89-mile study segment since the time of statehood.

  The Department concurs with public comments that some major floods have occurred on the Rogue River study segment, and that numerous avulsive changes have resulted from these floods – particularly in the vicinity of Grants Pass, and the stretch of the waterway from Gold Ray Dam to Shady Cove.

  Consequently, at many locations, there is a good possibility that the river is not in the same location where it was at the time of statehood. Although this consideration will be important when determining the extent of state/private ownership should an assertion of state ownership be made by the Land Board, the navigability study process does not address the issue of whether events may have altered the location of property boundaries since statehood.

- It doesn't make any sense for the Department to base its conclusion concerning the title navigability of the Rogue River that the 89-mile study segment of the waterway was susceptible to being used.

  One aspect of the federal test for title navigability is that a waterway may be proven navigable by evidence that the waterway was susceptible to use at the time of statehood. "Susceptibility to use" is related to "capability" rather than "probability." Susceptibility involves the capability of a waterway, in this case the 89-mile Rogue River study segment, to be used as a highway of commerce.

  During the course of its research, the Department found evidence from which a reasonable person could conclude that there was actual use of the Rogue River study segment at or around the time of statehood. However, the evidence regarding the waterway study segment's susceptibility to use is more abundant and persuasive.

  There is significant evidence in the agency record relating to the physical characteristics of the waterway at and after statehood, and the use of the waterway after statehood by watercraft that require the same depths and flow rates of boats that were customary in 1859. From this evidence, the Department has found and concluded that the Rogue River study segment had the capacity in 1859 to be used as a highway of commence.

The Department understands and appreciates the concerns raised by property owners, county government officials and other individuals regarding:

- Public misuse and misbehaviors along the waterway; and

- Whether other means exist to address the conflicts that have occurred between recreationists and landowners.

However, these considerations do not bear on whether the Rogue River study segment meets the requirements of the federal test for title navigability.

OPTIONS AVAILABLE TO THE LAND BOARD

Under the statutory and administrative rule provisions quoted above when describing the navigability study process, the Land Board has several options available to it:

(1) Adopt the findings and conclusions in the Rogue River Final Navigability Report and declare public ownership of the Rogue River from River Mile 68.5 to 157.5 – if it determines that the preponderance of the evidence in the record proves the factual aspects of the federal test for title navigability;

(2) Adopt the findings and conclusions in the Rogue River Final Navigability Report and declare public ownership of a smaller portion of the Rogue River – if it determines that the preponderance of the evidence in the record proves the factual aspects of the federal test for title navigability on only part of the 89-mile study segment;

(3) Reject the findings and conclusions in the Rogue River Final Navigability Report – if it determines that the preponderance of the evidence in the record does not prove the factual aspects of the federal test for title navigability;

(4) Refer the Rogue River Final Navigability Report to the Department for additional action to be determined by the Board; or

(5) Take no action at this meeting.

RECOMMENDATION

The Department's findings and conclusions are stated fully in the Rogue River Final Navigability Report. The Department has concluded that in 1859 the 89-mile study segment of the Rogue River was used, or susceptible to being used in its ordinary and natural condition as a highway of commerce over which trade and travel could have been conducted in the customary modes of trade and travel at that time; that there was no federal action that reserved or otherwise prevented a transfer of ownership to the state; and that the state has owned the land underlying the study segment of the Rogue River since statehood. Furthermore, the state's ownership extends to all lands located below the ordinary high water line along the 89-mile study segment, unless lawfully conveyed or granted to another entity by the state since statehood. The nature of the ownership includes two components: fee simple title (the jus privatum) and

dominion as the public's trustee over the natural resource for public trust uses such as navigation, commerce, fisheries, and recreation (the jus publicum). The Department recommends to the Land Board that it:

(1) Adopt the findings and conclusions in the Rogue River Final Navigability Report pursuant to OAR 141-121-0040 and in so doing, determine that the State of Oregon has owned – and continues to own – the land of the 89-mile study segment of the Rogue River that lies below the line of ordinary high water since statehood in 1859; and

(2) Issue the written declaration provided in **Appendix G**.

APPENDICES

A. Rogue River Final Navigability Report
B. ORS 274.400 through 274.412 & OAR 141-121-0000 through 141-121-0040
C. 18-Step Navigability Determination Process
D. Summary of Public Input Received Sept. 7, 2007 through Nov. 9, 2007
E. Rogue River Navigability Study: Answers to Questions
F Summary of Public Input Received Feb. 19, 2008 through Mar. 26, 2008
G. Declaration