

## DEPARTMENT OF STATE LANDS

### ROGUE RIVER DRAFT NAVIGABILITY STUDY REPORT

#### Summary of Public Input Received During the Public Comment Period: September 7, 2007 – November 9, 2007

#### Background Information

On September 7, 2007, the Department of State Lands (DSL) sent a notice to property owners of record along the 89-mile Rogue River study segment as well as to other interested persons advising them of the availability of the first draft of the Rogue River navigability study (dated September 7, 2007). This notice also gave the date, time and location of a public hearing that was held in Grants Pass on October 24, 2007, and stated that DSL specifically wanted public input during the three-month public comment period concerning:

- (1) The accuracy of the data presented in the report, and
- (2) 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 public comment period, DSL received 183 e-mails and 8 letters addressing various aspects of the first draft of the navigability study and the navigability study process. Additionally, nearly 200 persons attended DSL's Grants Pass public hearing, 30 of whom presented testimony.

#### Summary of Public Input

Many of the individual e-mail responses and letters received by DSL contained opinions as well as asked questions. A small number also primarily addressed the accuracy of the information presented in the report or provided additional evidence for consideration by DSL in developing the second draft of the report. Therefore, it is difficult to provide a precise breakdown by content of the public input.

Nevertheless, in general, of the 191 e-mail and letter responses received by DSL:

- 148 indicated support for the study, many through an e-mail simply stating: *"I support the DSL's preliminary finding that the Rogue River from mile 68.5 to 157.5 meets the federal test for navigability."*

- 20 were written primarily to indicate opposition to the conduct or preliminary findings and conclusions of the study, or questioned the relevance of the evidence presented in the study.
- 23 consisted primarily of opinions or questions concerning, for the most part, the need for the study, impacts of a determination of navigability, or the determination of the line of ordinary high water. In addition, several e-mails (not included in this total) were received that simply asked for a copy of the draft report or for other related information such as a copy of the sign-in sheets for attendees or transcript of testimony given at the Grants Pass hearing.
- 10 provided comments principally addressing the accuracy of the data or provided additional information.

The content of the testimony presented at the Grants Pass public hearing was also of a mixed nature. In many instances, the testimony consisted of questions concerning the need for the study and the impacts of a possible determination of navigability. Of the 30 persons presenting testimony, only two indicated that they supported the conduct of the study.

### **Discussion of Input**

Although the public input received by DSL addressed a wide variety of issues, the following presents a summary of the comments and questions most often submitted.

### **Reasons Given for Opposing the Study/Preliminary Study Recommendations and Conclusions**

- Court decisions have already been made finding that various segments of the Rogue River are not navigable.
- An assertion of ownership will create more problems than it solves and a legal quagmire.
- How could the Rogue River be navigable if there are places where it has often been completely dry in the past?
- A finding of navigability will cause more people to use the waterway. This will result in increased vandalism, littering, trespass, destruction of spawning beds, etc.
- Neither the requirement that a broad and substantial public interest or a sufficient economic justification exists to warrant the conduct of this study.
- The draft study is biased and only presents evidence supporting the requirements of the federal test for navigability.
- A determination of ownership will cause persons holding mining claims along the river to lose their rights to mine.

<b>Reasons Given for Supporting the Study/Preliminary Study Recommendations and Conclusion</b>
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- Court decisions have already been made finding that various segments of the Rogue River are navigable.
- The study of history of the Rogue indicates that it has long been used for transportation of people and goods.
- Oregon's waterways should remain in the public domain as much as possible.
- The economy of the Rogue River Basin depends on recreation. A finding of navigability will encourage recreational activities on the waterway.
- Discussions with law enforcement indicate uncertainty concerning the ownership status of the bed and banks of the Rogue River and the rights of the public to use them.
- The Rogue River *"has perhaps the richest history of public use for recreation and commerce than almost any river in America. Its historic use is well documented and continues today."*
- The study segment is geomorphologically similar to the lower 68 miles of the river which already has been determined to be navigable.
- The Rogue River belongs to all Oregonians.

<b>Questions Asked/Comments Made Concerning The Evidence Presented in the Draft Navigability Study Report</b>
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**Concerning ferry use**

- A ferry operated at one time in the vicinity of Griffin County Park (River Mile 87) and should be noted.
- A ferry that only crosses the Rogue River does not constitute a use of the waterway that is evidence of its navigability.

**Concerning recreational use**

- The ability of recreationists to use the Rogue River should not be evidence of that it could have been used in 1859. Materials used in modern watercraft far exceed the strength of Indian canoes.

**Concerning Indian and early settler and explorer use:**

- Early settlers and Indians traveled through the area on trails crossing the Rogue only when necessary. Instead of being a highway of commerce, the river was, in fact, an obstacle to commerce.
- Several early explorers stated that the Rogue was not or could not be navigated. This information needs to be included in the study.

**Concerning mining use**

- Mining dredges do not constitute a form of navigation. They simply float on water held behind dams.

### **Concerning dams**

- The construction of Gold Ray Dam facilitated log drives. This indicates that the river could not be used for this purpose prior to the dam.
- Does the “80% likelihood” of the flow of the Rogue River take into account the “true and natural conditions” of the waterway prior to the construction of dams?
- The existence of Lost Creek Dam “invalidates the finding that the study segment of the Rogue River was navigable and able to be used as a highway of commerce.”

### **Concerning the Federal Test for Navigability**

- There is too little documentation of historical use to meet the requirements of the federal test for navigability. Other than “a few occasional attempts to navigate [the river] by a few individuals a few time...the river was really off-limits to most of the people...”
- Based on the information contained in the report, only two areas appear to “come close” to being susceptible to navigation: the 19-mile stretch below Grants Pass and the 30-mile stretch above Gold Ray Dam.
- Navigability “requires evidence of commerce, not merely floating a canoe.” No evidence is presented in the report that commerce was undertaken.

### **Concerning the physical characteristics of the study segment**

- The statement that “the general physical orientation of the Rogue River study segment has not changed appreciably since statehood” needs further discussion. What may be an “appreciable” change to one person may not be to another.

### **Concerning other segments of the Rogue River**

- Indicate that the first 68.5 miles of the bed and banks of the Rogue River have been determined to be navigable for title purposes.

<h3><b>Other Questions Asked</b></h3>
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### **Concerning the Line of Ordinary High Water**

- How is the line of ordinary high water determined?
- Who will determine the line of ordinary high water?

### **Concerning the navigability study process**

- Why hasn’t the State of Oregon acted on the ownership status of the submerged and submersible land underlying the Rogue River until now – nearly 150 years after statehood?
- What authority did the Josephine County District Attorney have to make a request for a navigability study of that part of the Rogue River in Jackson County?

- Why didn't the Land Board consider the responses received following the mailing of a 2004 notice concerning the need for this navigability study to determine if there was a broad and substantial public interest?
- Is it possible to designate only some sections of the Rogue River study segment as meeting the federal test for navigability?
- Is an environmental impact study required as a part of the navigability study process?
- Where were the conflicts between landowners and recreationists used to justify the conduct of this study?
- If the state government owned the submerged and submersible land underlying the Rogue River since statehood, why did it let counties deed land to new property owners?

#### **Concerning an assertion of navigability**

- Why isn't an assertion of ownership by the State Land Board considered to be a "taking"?
- What will happen to a person's tax liability if the state asserts an ownership claim on the submerged and submersible land along the Rogue River study segment?
- Who will pay to have changes made to each landowner's deed?
- Will the State of Oregon compensate a landowner for submerged and submersible land described in a deed that is determined through an assertion of ownership to have been owned by the state since statehood?
- Can a landowner assert a claim of "adverse possession" against the state if an assertion of ownership is made by the Land Board for submerged and submerged land described within their deed?
- Is there a way to appeal the Land Board's decision concerning the ownership of the Rogue River study segment?

#### **Concerning impacts of an assertion of navigability**

- What are the impacts to landowners if the study is adopted?
- Will a determination of navigability cause a person to lose their water rights?
- Who will be responsible for injuries to persons using the submerged and submersible land along the Rogue River study segment if an assertion of state ownership is made?
- Who will be responsible for managing the submerged and submersible land along the Rogue River study segment if an assertion of state ownership is made?
- Who will clean up the submerged and submersible land along the Rogue River study segment if an assertion of state ownership is made?
- How does a change in the course of the river impact upland ownership?
- Is the ownership of a waterway that flows into the Rogue River study segment impacted by an assertion of ownership for the Rogue River?

- Will there be sufficient law enforcement to respond to the increased number of incidents resulting from greater public use of the submerged and submersible land along the Rogue River if it is determined to be navigable?

#### **Concerning uses of the waterway**

- Who will clean up the submerged and submersible land along the Rogue River study segment if an assertion of state ownership is made?
- Will owners of mining claims on the submerged and submersible land within the study segment lose their rights to mine if the Rogue River is determined to be navigable?
- The State of Oregon needs to establish what rights the public has to use the land for which an assertion of ownership is made and what behaviors are illegal.
- Many persons use the Rogue River and its bed and banks in an illegal manner and trespass on privately owned property above the line of ordinary high water.

#### **Other Comments**

- Public comment provided by persons living outside of southern Oregon should be disregarded.