

The State Land Board met in regular session on June 6, 2000 in the Land Board Room of the State Lands Building, 775 Summer Street NE, Salem, Oregon 97301-1279.

Present were:

John A. Kitzhaber	Governor
Bill Bradbury	Secretary of State
Jim Hill	State Treasurer

<u>Assistants</u>	<u>Staff</u>	<u>Dept. of Justice</u>
Paula Burgess	Paul Cleary	Bill Cook
Paddy McGuire	John Lilly	
Rollie Wisbrock	Steve Purchase	
	Gary Van Horn	
	Gail Lowry	
	Jenifer Robison	

Governor Kitzhaber called the meeting to order at 10:12 a.m. The topics discussed and the results of those discussions are listed as follows. Further details of the discussions may be obtained in the written transcript of the meeting available at the Division of State Lands, 775 Summer Street NE, Suite 100, Salem, Oregon 97301-1279 (phone: (503) 378-3805).

Action Agenda

1. Request for approval to submit the Division of State Lands' proposed 2001-03 budget request to the Department of Administrative Services.

Director Cleary reviewed the process for submittal of the agency's budget. He said the Division's 2001-03 proposed budget supports the agency's basic mission with emphasis on enhancing revenue production, resource stewardship and public service. He added that no new programs are being proposed, but rather a shoring up of existing programs with some additional funding and staffing, and then consideration of reallocation of workload within the agency.

Cleary said the total request is for a net increase in Common School Fund (CSF)/Other Funds of 10.2 percent for \$15.9 million; (\$14.1 million in Common School Funds, \$1.4 million in Federal Funds, and \$500,000 in pass through funds to the Natural Heritage Program. Another component of the Division's programs is a contract payment to Forestry, which Forestry will bring before the Board in August.

The agency must give a projection of distributions to the CSF. Using the formula the Board adopted that distributes between two to five percent, Cleary said the agency would suggest to DAS and LFO that they project at the two percent range, considering current market conditions.

Cleary asked for approval from the Board to submit this request to DAS for development of the Governor's Recommended Budget. State Treasurer Hill moved the Board approve submission of the Division's proposed budget to DAS for development of a Governor's Recommended Budget. Secretary of State Bradbury seconded the motion and the approval was unanimous.

Since several individuals had requested to speak to the Board regarding Item #2, Governor Kitzhaber asked that the Consent Agenda and the Information Items be handled first, to allow the remaining meeting time to be devoted to testimony.

Consent Agenda

- 3.a. Request for authorization to initiate public rulemaking to revise and establish new administrative rules governing land sales and land exchanges.**
- b. Request to accept funds from Oregon Watershed Enhancement Board to conduct Local Wetland Inventories for several Oregon communities, and for approval to appear before the September Legislative Emergency Board to seek additional Other Funds expenditure limitation.**
- c. Request for approval of the minutes of the April 18, 2000 State Land Board meeting.**

- d. Request for public comment on and subsequent adoption of regularized procedures, criteria and public directives for hiring a Director for the Division of State Lands as required by ORS 192.660(1)(a)(D).**
- e. Request for approval to adjust the estimate of harvestable timber assigned to the Wilsonville Tract.**

Cleary briefly reviewed each item on the Consent Agenda. Secretary of State Bradbury moved the Consent Agenda be approved. State Treasurer Hill seconded the motion and the approval was unanimous.

Informational Agenda

4. Status report on sale of North Tongue Point.

Cleary reviewed the process for public notice, saying the agency has advertised in five newspapers, and direct mailings have been sent to 70 interested parties. He added that the Port of Astoria has until June 23 to exercise their surplus property rights and that simultaneous advertising will be done for a sealed bid, public auction that will close at noon on June 30. The agency will then bring the results of that process to the Board the first week of July and move forward with completion of the sale. Cleary reported that no bids have been received to date.

5. Status report on removal of the New Carissa wreckage.

Director Cleary said the Responsible Party is still being pressed to address all of the state's concerns to full satisfaction including wreck removal, site management and liability. The Responsible Party, at the state's urging, hired an outside expert, Captain John Noble of Southampton, England, to give a second opinion on removal options. Cleary reported that a meeting is scheduled on June 15 for resource agencies to discuss those options with Captain Noble. Cleary said they are hopeful that fresh eyes will bring a new perspective on how to complete this.

Cleary discussed a report received that sand is building up behind the stern section to the point where it may be possible to wade out to the wreck. He said this increases accessibility for the public and increases the attractive nuisance nature of the wreckage. Cleary said he would be stressing the Responsible Party's responsibility for signage and warnings and remind them they have full liability for whatever happens there. Cleary said this shows that shoreward removal might be a viable option.

Governor Kitzhaber again stated for the record that the position of the Land Board is that they expect the ship to be removed or the Responsible Party to provide payment in lieu of removal. He agreed with Cleary that the sand building up behind the ship actually increases the viability of dismantling and land removal of the ship. Director Cleary said the agency would brief the Board on the outcome of the June 15 meeting.

6. Status report on easement rulemaking.

Director Cleary reported that these proposed rules have been sent to a large number of parties, with only a few comments received to date, mostly from electrical and telephone utilities. He said the agency is revising the rules where appropriate and will bring them to the August meeting for consideration of final adoption.

7. Status report on removal-fill streamlining activities.

Director Cleary said the agency continues to evaluate both the State Programmatic General Permit and the 404 Assumption options. He noted that the major hurdle is the Endangered Species Act compliance. If ESA consultations are still going to be required at the individual permit level, Cleary said neither alternative would deliver the desired streamlining certainty to applicants. The Division is continuing to have discussions with the Corps, NMFS, USFWS and EPA on these issues. A decision should be made sometime this fall as to what course should be followed.

Governor Kitzhaber expressed his concerns over the number of conditions that are required under the NMFS preliminary draft of landowners who want to do voluntary restoration projects. He said we sometimes lose sight of the objective of the Endangered Species Act, which is to actually do something for the species. He stressed that it is important for the agency to press forward on this.

8. Status of the legislative concepts for the 2001 Legislative Session.

Director Cleary said the agency's legislative concepts have been reviewed by DAS and the Governor's Office staff assigned to our agency, and that they are ready for approval to go to Legislative Counsel for drafting. The agency will continue to work with the stakeholders in that process. Those that are approved through that process will be brought back to the Board in December for pre-session filing.

Territorial Sea

Secretary of State Bradbury discussed a letter he received from the Board of Maritime Pilots suggesting that the Land Board adopt a policy against anchoring in the Territorial Sea, except in cases of emergency. Jenifer Robison of State Lands researched the issue and provided a memo to the Board on this issue. Bradbury commented that a ban like this could possibly prevent an incident such as the New Carissa from occurring and asked Cleary to further explain the situation.

Cleary said the Territorial Sea encompasses an area three-miles out off the coastline, and added that the New Carissa was one to two miles offshore when it anchored. Cleary explained that he believes the Board does have the authority to regulate anchoring within the Territorial Sea. He said we've learned it is far easier to prevent these accidents from happening than to clean up after them.

Cleary discussed an article from a California newspaper regarding designated shipping lanes and moving the more hazardous cargo further away from the coast. Cleary said the agency would schedule a meeting with the Board of Maritime Pilots and the Coast Guard to discuss this request.

2. Request for authorization to initiate a study to determine the navigability of a portion of the Sandy River from its confluence with the Columbia River to River Mile 37.5 at Brightwood.

Cleary said the Northwest Steelheaders filed this request in November 1997 in response to continued river user/landowner conflicts on the lower Sandy River. He noted that this request meets the requirements of 1995 legislation that created the navigability study process. Cleary said this was the first request received; since then a number of additional requests have been filed. He said this request was placed on hold pending the outcome of a 1997-99 legislative interim committee established to try to find a legislative solution. The Steelheaders introduced a bill in the 1999 Legislature to address these issues, but the bill didn't make it through the process.

After the committee was adjourned in December 1999, the agency decided it needed to move forward with the navigability study request process in hopes of bringing a resolution to this issue. Cleary said the agency's goal has always been to promote balanced solutions to real world problems, and to address management concerns on our rivers, but to do it in a way that accommodates responsible public use, protects adjacent landowners and preserves our waterway use legacy.

Cleary explained that the 1995 legislation established two coarse filters to screen navigability study requests: 1) whether there is broad and substantial public interest, and 2) whether there is sufficient economic justification. He added that the Sandy River request passes both those filters, particularly the public interest screening, with the river's location, high recreational use, and the continued management needs and challenges.

Cleary described the steps for the navigability study process, stressing that conducting the study does not predetermine the outcome, since the river must ultimately meet the federal court navigability test to support the state's assertion of ownership.

Secretary of State Bradbury asked whether a request must meet both filters, and asked Cleary to explain what would be considered "sufficient economic justification." Cleary said the request must only meet one of the two filters. He added that the rules define "sufficient economic justification" as existing when a determination results in revenue accruing to the Common School Fund, as opposed to a socio-economic basis.

Gary Benson, Co-President of the Northwest Steelheaders who sponsored this request, said his organization believes there is broad and substantial public interest for the request. He said they vigorously pursued a legislative solution to this problem in the past legislature. Because of the legislation not passing, the postponement of action on their study requests and problems with an individual being cited for criminal trespass on the John Day River below the ordinary high water mark, out of frustration, the Steelheaders filed a lawsuit regarding the John Day. Benson requested the Board go forward with this proposal today.

Larry Beaver, Sandy River Chapter of the Northwest Steelheaders, said they submitted the Sandy River navigability study request 3½ years ago. Beaver cited incidents that occurred on the river, expressing why he believes the river should be declared navigable. He submitted written comments by attorney Michael Drais on the issue. Beaver urged the Board to go forward with the Sandy River navigability request.

Vern Cook, previous state senator and landowner on the Sandy River, supports the agency going forward with the navigability study request. He said it is pointless for anyone to assert that they have prior title to any part of the bed and banks of the Sandy River up to ordinary high water. He added that attorneys preparing deeds to any property adjacent to any potentially navigable waterway should include an exception that title insurance cannot be insured against any claims of the State for the public or any unrecorded interest.

Cook said he supports the state doing the study, saying it could bring important matters of title insurance policies out in public. He said it also could help in matters of abuse of public lands, if the state is determined to be the owner after the study and could authorize some security to areas. He also suggested the state might initiate a claims process to repay adjacent property owners for damages caused by individuals who trespass when using the waterway.

He spoke about log flumes that still exist in the area that were built in the woods and used to float logs down to the river to Portland. He said if old property tax records are checked, one would find a lot of evidence that the Sandy was used to send floating logs to Portland for sale.

Cook concluded by saying if someone doesn't recognize the public's right to use the bed and banks, they shouldn't buy a house on the Sandy River.

Jennie Bricker, attorney from Stoel Rives in Portland, spoke representing Bev and Mike Jones, property owners on the Sandy River. They asked the Board to reject the request for a navigability study on the Sandy. She said the main problem needing to be addressed is the conflict between the private property owners and the recreational users. She discussed some of the misunderstandings, such as many recreational users who believe all streams are bound by public property. She said that education is desperately needed on all sides, adding that there are private property owners who misunderstand the extent of their rights.

She emphasized what she believes are disadvantages to the study process, such as the time involved and the cost. She added that the study will probably be challenged in state court, and any state court determination will then be challenged in a federal court, since navigability is a federal question. She told the Board this would take years, while the conflicts on the river continue.

She discussed other issues that she believes will arise as a result of the study, such as refunds being due for previously paid taxes, as well as payment by the state for diminished value of the uplands for property owners whose deeds show current ownership of the river in front of their property. Bricker said that US surveys done in the 1850s did not meander the Sandy River above River Mile 4-6, so no one at that time thought the river was navigable.

Bricker said that to the property owners and the general public, this process looks and smells like a taking. She requested the Board do the first study on the rivers that were meandered in the original survey, since these owners have been on notice for some time that the state may assert ownership, to save some public policy problems.

She said legislation is the best solution for this. She provided draft legislation that they were proposing that promotes education and intensive management of the waterway. She urged the Board to support the draft bill in the 2001 session.

Art Israelson of the Northwest Steelheaders said they don't support trespassing on private property to get to the river. However, if someone comes by boat down the river and is below the high water mark, he said that person has a right to be there. He added that the state has a right to claim the beds and banks of rivers, even though they didn't exercise that right at statehood. He commented that the best way to approach this problem is to first settle the ownership issue.

Director Cleary commented that the cost of this study is within the agency's existing budget and staffing, since most of the research is already complete. The majority of the cost will be in the public involvement process, which he said is money well spent. He added that anything that can be done to avoid potential litigation is also money well spent on the study side.

Jean Underhill-Wilkinson, with the Oregon Farm Bureau and administrator of the Oregon Agricultural Legal Foundation, said navigability and floatage easement issues are very controversial. She said part of the Senate Bill 832, introduced in the last legislative session, would have given the public access to all streams categorized as floatable, which would include hundreds of thousands of miles of streams in the state currently considered to be privately owned.

She said they are interested in pursuing legislative options, but feel the best option is to negotiate and come to some resolutions. She added that, if the Board takes ownership of the Sandy River to River Mile 37, the state would be assuming some fairly significant responsibilities regarding water quality requirements (sic).

She concluded by saying that the Division should put resources into legislation that would include management of the adjacent landowners and recreationists, perhaps using the Deschutes River as a model, since considerable resources have gone into management of that river already. Secretary of State Bradbury asked whether the Farm Bureau is working with the Steelheaders to develop a proposal for the upcoming session that meets both the concerns of the landowners and recreationists. Wilkinson said they continue to meet with the "barn group" and are very willing to work with the Steelheaders to continue to negotiate legislative options.

Governor Kitzhaber said he would support the agency pursuing the navigability study, which he said determines whether the Sandy is eligible for navigability. He added that the study will take about a year, and if a legislative solution were found in the meantime that is satisfactory to both the river users and the private landowners, nothing would be lost by pursuing the study.

He also noted that, although education is important, you can't educate people until the ownership question is settled. He believes the issue will ultimately be resolved in the courts, and, in his opinion, will probably be settled in favor of the public.

Secretary of State Bradbury said the issue has come up continuously over a long period of time in the legislature. He agrees with the Governor in the need to resolve the ownership question.

State Treasurer Hill said he agrees with the desirability of a legislative solution, but feels it is not forthcoming. He stated that it is time to move forward and he supports pursuing the study process.

Governor Kitzhaber moved the Board authorize the Division to proceed with the study to determine the navigability of a portion of the Sandy River from its confluence with the Columbia River to River Mile 37.5 at Brightwood. State Treasurer Hill seconded the motion and the approval was unanimous.

Governor Kitzhaber stated that determining a river navigable shouldn't necessarily negatively impact the landowner, if it is determined ahead of time how that will be mitigated. The Governor said he expects the state and his successors on the Land Board to work with private landowners on any river deemed navigable to ensure there is a win-win solution.

Governor Kitzhaber adjourned the meeting at 11:35 am.

John A. Kitzhaber
Governor

Stephen J. Purchase
Acting Director