

The State Land Board met in regular session on October 8, 2002 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
Randall Edwards	State Treasurer

<u>Assistants</u>	<u>Staff</u>	<u>Dept. of Justice</u>
Peter Green	Ann Hanus	Bill Cook
Paddy McGuire	John Lilly	
Inga Deckert	Steve Purchase	
	Jeannette Holman	
	Gail Lowry	

The Governor called the meeting to order at 10:00 am. 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, ext. 224).

Action Agenda

- 1. Request for the Land Board to authorize the Division to undertake a title navigability study of the John Day River from Kimberly (Grant County) at about River Mile 184 to Tumwater Falls (Gilliam/Sherman Counties) at about River Mile 10.**

Director Hanus introduced this item, saying that after reviewing all the information, it appears there is broad and substantial interest to determine whether the John Day River is navigable between River Mile 184 to River Mile 10. Hanus recommended the Board authorize the study, but delay the initiation of that study until hearing in February from the navigability stakeholder workgroup.

Joan Silver, resident of Grant County, said by voting to do the study, the Board would be agreeing to take responsibility as owner of the submerged and submersible lands on this 174-mile stretch of the John Day River.

Silver made the case that there is already plenty of access to the river, since much of the land is owned and managed by the BLM. She also noted that conservation efforts on the private land are ongoing and have been successful. She believes state ownership could halt those efforts on the most sensitive portion of the land between the low and high water mark.

Regarding "sufficient economic justification," Silver said this criterion could not be met, since there is no economic activity on this stretch of the river that returns money to the Common School Fund.

When considering "broad and substantial public interest," Silver said she doubts the state has the money and manpower to undertake the task of protection of this waterway segment from the people who are currently doing the job.

Silver said that there is no evidence that conflict between users and affected landowners is such that this much land should be removed from private ownership. She added that moving the line of ownership to the ordinary high water mark would not solve any conflicts. She commented that law enforcement response time is slow and often does not occur until the next day.

She outlined her other concerns such as counties losing property taxes, the cost of redrawing property descriptions, and amending titles and deeds to this much property. She also asked what might happen when the EPA or DEQ determine the land is contributing adversely to water quality or habitat. She asked who would ensure protection of the sensitive habitat for endangered and anadromous fish.

Silver urged the Board to deny the study request, require reports from the workgroup, test the viability of a management plan that would be created on the John Day and then make whatever decision seemed to be in the best interest of Oregon. She put forth a suggested motion for the Board to consider along those lines.

Jean Underhill-Wilkinson, Oregon Farm Bureau, said she agrees with Silver's comments. She said the navigability study request on the John Day River should be denied.

She added that the workgroup should explore options for solutions to the issue. She reviewed what has taken place to date at the workgroup meetings. Their next meeting would review Senate Bill 832. She said this bill gives public access to too broad a range of waterways in the state, with no incentive for the landowner to compensate them for the liabilities that would accompany public use.

She concluded by saying that good management planning is the key—and she believes this can happen under private ownership. She suggested this section of the John Day River under consideration could be split up into segments and briefly outlined how a management plan could be developed with ownership continuing as it is currently. She suggested some ideas to explore, such as tax incentives and immunity from environmental liability for the landowners that provide public access.

Governor Kitzhaber said he agrees that the best solution is one in which people at the local level would have some ownership. He added that, as the population grows, conflicts along these waterways would also grow. He asked the two previous speakers to address how to get individuals serious enough to work to solve this.

He commented that the motion that Director Hanus presented would allow the Board two meetings prior to the time when the study would actually begin. He said this might allow the workgroup to develop some ideas for handling the issue.

Joan Silver stated that, prior to the 1999 lawsuit being filed, she had received written agreement from the three primary county judges in Sherman, Gilliam, and Wheeler Counties to engage in management planning. There were 130 named defendants in this lawsuit. Silver said she had visited with all of them, if not in person, then by writing. She said most landowners were willing to give public access if they could work out the conditions. She believes this could be a model for handling the issue throughout the remainder of the state.

Silver again expressed her desire for the Board to deny the study request so that she could in good faith work with others toward conditions of an agreement. Both Governor Kitzhaber and State Treasurer Edwards said approving the study, but delaying action on it may be the nudge that folks need to work at an agreement.

Jean Underhill-Wilkinson said there is the potential here to make this work and to use it as a successful model. She stressed the desire for the state to provide resources and lead in this effort to help assure success.

Phil Donovan, from the Association of Northwest Steelheaders and representing the Recreational Rights Coalition, said they are pleased to participate on the navigability workgroup, and hope the group will be able to come up with a statewide solution to the problem of public access. At this point, he said their progress is somewhat speculative and they have not cleared any of the hurdles yet.

He urged the Board to move forward with the navigability study on the John Day River.

Art Israelson, volunteer with Northwest Steelheaders, compared this issue to the beach bill, dealing with private and public ownership of land. He said the cost of the study has for the most part already been covered in the lawsuit. Israelson disagreed with some that have said this is not a financial issue for the State of Oregon and that there have not been conflicts.

He said his organization represents the present and future generations who want to use the land. He said the study should not be postponed any longer.

Governor Kitzhaber asked if there was a clear resolution of the ownership issue on navigability, how this would be made to work, since applying it on the ground is a different issue.

Donovan commented that people need a line in the sand to understand where they can and cannot be; which is why he believes the navigability study process is valuable. He reminded the Board of Montana's floatage law which was enacted in 1983 and has withstood legal challenges.

Israelson said the Steelheaders do not desire to have every stream declared navigable, though management could occur on some of them. The John Day River, he said, is used by thousands, has gone through court and the judge and jury both agreed the river is navigable.

State Treasurer Edwards commented that a navigability determination would decide the ownership question, but he asked how they could ensure responsible use by the public. Donovan said that happens with proactive education programming. He said at the recent declaration of the Sandy River, his organization was very proactive in going into the Sandy Basin and educating the anglers that with public ownership comes public responsibility.

He added that under a navigability declaration, a public process is established for how the public may or may not be excluded from the river, such as happened with the closure of the Sandy River to fires and overnight camping.

Phil D. (last name not given), a property owner on the Applegate River, discussed his concerns that the Applegate River might soon be on the list for a navigability study request. He shared incidents that have occurred with users on his property and how he has been able to handle them. He stressed his stewardship approach of ownership of the riverfront and working with recreationists as they want to use the river.

Governor Kitzhaber said a statewide solution is needed so the Board does not have to go through the process river after river. He said lawsuits will continue to be filed, requests will continue to be brought to the Board or the courts will direct us to take up the issues. He said the proposed motion might allow a window of opportunity for the workgroup to work towards developing some consensus on how they would like the river managed. If the workgroup has a recommendation, there would be another four-month delay to give the 2003 Legislature opportunity to address the issue. He said this would allow two to four opportunities to reverse the study decision.

State Treasurer Edwards said the workgroup has been meeting for several months to find a solution to this. He added that navigability is litigious, time consuming, and expensive. Even after ownership of the rivers is determined, he commented that the issue of responsible use of the waterways remains. The goal of the workgroup is to come up with an idea that can go before the Legislature that can be a statewide policy on how to proceed.

Secretary of State Bradbury agreed saying he is supportive of this approach, since it offers an opportunity for a statewide solution.

Governor Kitzhaber reminded the Steelheaders that in supporting this motion, he still has an opportunity in December to decide not to go ahead with the navigability study. He wants to ensure that they are as seriously motivated as the landowners in coming to a workable solution. He suggested the Oregon Office of Dispute Resolution or the National Policy Consensus Center at PSU might be able to assist with this process.

Hanus said the recommendation before the Board is A) find that there is a broad and substantial public interest to justify a navigability study of the John Day River from its confluence with the Columbia River, River Mile 10, to Kimberly, River Mile 184; B) direct the Division to initiate the study immediately following the February 2003 Board meeting; C) request the Navigability Public Access Workgroup to report its progress to the Board at the Board's February 2003 meeting and D) if the workgroup presents to the Board at its February meeting a consensus set of written principles or legislative concepts, the Board shall delay the study for 120 days.

State Treasurer Edwards moved the motion. Secretary of State Bradbury seconded the motion. At the request of State Treasurer Edwards, Hanus reiterated that the original request of the Steelheaders was for a study to be done to River Mile 10. She confirmed that the motion was correct, rather than to River Mile 0. Governor Kitzhaber added to the motion that a progress report will be presented at the December meeting to determine how the issue is proceeding. He said he would personally call the National Policy Consensus Center and the Office of Dispute Resolution to get their assistance. The motion was approved without objection.

Secretary of State Bradbury commended the efforts of State Treasurer Edwards for his work with the navigability workgroup.

Bill Cloran

The Board recognized the contributions of Bill Cloran, Assistant Attorney General with the Department of Justice, who has worked principally as a trial attorney and has been involved in a number of lawsuits on behalf of the Division of State Lands concerning environmental protection and Common School Fund trust land issues. Cloran will work in private practice, while he acts as chairman of the United States Figure Skating Championship to be held in Oregon in February. The Board presented a plaque to Cloran in appreciation for his work.

Consent Agenda

- 2.a. Request for approval to appear before the Legislative Emergency Board to obtain an increase of approximately \$54,300 in the 2001-2003 Other Funds expenditure limitation and create a limited duration position in order to accept funds from the Oregon Department of Transportation for increased removal-fill permit program services for Oregon Transportation Investment Act and highway maintenance projects.**
- b. Request for approval to repeal existing administrative rules relating to Wilsonville Tract Use Regulations.**
- c. Request for approval to appear before the September 2002 Legislative Emergency Board for retroactive approval to apply for a U.S. Environmental Protection Agency grant in the amount of \$200,000. The grant implements a two-year trial program to track, evaluate and improve wetland mitigation success and permit compliance and to refine the removal-fill permit decision-making process based on analysis of project and mitigation data.**
- d. Request for approval of the June 11, 2002, minutes of the State Land Board meeting.**

Director Hanus briefly reviewed the items on the Consent Agenda. State Treasurer Edwards moved the Consent Agenda be approved. Secretary of State Bradbury seconded the motion and the approval was unanimous.

Informational Agenda

3. Report on the status of Common School Forest Land Management.

Director Hanus introduced Steve Thomas, Assistant State Forester, and Ross Holloway, Program Director, both from the Department of Forestry. Thomas brought a fiscal year report to the Board as required by the management agreement. He said revenues have been lower than in previous years, due in part to declining stumpage prices. He voiced concerns about whether the volume outlined in the plan will be

met, with the potential impact of the marbled murrelet. He said they are anticipating increased costs in the future due to planning for threatened and endangered species.

Thomas said the planning team has been working to narrow the focus of the revision effort on the Elliott State Forest Management Plan and Habitat Conservation Plan. Three key concepts will be incorporated: 1) reserves for protection of important habitat; 2) revised aquatic/riparian strategies; and 3) use of stand structure concepts in defining habitat. The timeline for completion has been extended until December 2003.

He said they have been working on gathering data, refining concepts, doing additional modeling and trying to complete strategies. They anticipate that everything should be wrapped up with a new plan and the Habitat Conservation Plan to the Services next year as well.

Thomas also highlighted other areas that Forestry is working on such as the forest certification, watershed assessment and The Oregon Plan for Salmon and Watersheds.

Secretary of State Bradbury asked whether the Pinchot Institute is still planning to find funding for the certification review process. Thomas confirmed that the Pinchot Institute is still working on this. He said Forestry is not planning to use state funds for the certification process. This process has been delayed about a year.

State Treasurer Edwards asked about increased costs. Thomas said the increases being projected are due to more complicated management of public lands from threatened and endangered species. Ross Holloway added that increased staffing is being required to handle different needs, such as a full-time public information person and a planning coordinator.

Thomas further explained that the revenue flow is based on the volume of timber sold, which remained fairly constant since the current Habitat Conservation Plan was adopted in 1995. He said the markets have not remained constant—resulting in revenues that have fluctuated from \$14 million in a year to \$24 million in the highest year. He said we are in a point now with markets that are down. He said the costs are more fixed in terms of managing the forests.

4. Analysis of Alternative Policies for Common School Fund Asset Allocation and Distributions.

Director Hanus introduced this item saying it is a continuation of the discussion from February Board meeting regarding what should happen with distributions, given the downward trend of the stock market and the advice from the Department of Justice received earlier this year. Hanus said the goal is to try to have more stable and predictable distributions that increase significantly over time. Hanus introduced Cyndi Wickham, Fiscal Manager, to present information on the current issues and opportunities that can be explored.

Wickham reviewed how the distributions to the schools have been set in the past. Previously the amount distributed was determined by whatever the earnings had been, minus the expenses of operating the agency. In 1997 the distribution was set at \$10 million and inflated five percent annually. She said the distribution was set this way to smooth distributions and provide a guaranteed amount for the schools, while growing the Fund as rapidly as possible.

In 2000 the current sliding scale policy was adopted which provided a minimum two percent distribution and a maximum of five percent, depending on the fair market value at the end of the year and the rate of growth of the Fund. Wickham also reviewed several constitutional amendments that took place allowing investments in bonds and equities, which diversified the portfolio and helped grow the Fund. She added that the Legislature increased the allowable equity limits, so the policy was adjusted, again to help grow the Fund, while making distributions.

Wickham said recent Department of Justice advice defined what constitutes "earnings." This advice also clarified that once earnings are reinvested into the Fund, they become corpus and are unavailable for future distribution.

Market volatility and current policy have resulted in cyclical distributions and possibly an inability to meet the minimum distribution. Wickham reviewed various models that were considered by staff that simulated over a 10-year period to determine how alternative policies might smooth out and enhance distributions over the long-term.

Wickham summarized the presentation with three key points: 1) adequately funding the deferred distribution account would require capturing 13-21 percent of the realized gains in positive market years; 2) distributions calculated as a percentage of a rolling average are stable, however, they deliver less over time and under the current asset allocation may not be adequately supported by earnings; and 3) a revised asset allocation policy stabilizes income, but lowers long-term growth of the Fund.

Mike Mueller, Assistant Director of Investments for the Oregon State Treasury, said Treasurer Edwards asked the Frank Russell Company to also perform some simulated asset allocation studies for the Board. They will run a more sophisticated version of the staff analysis.

Mueller said that the expected rate of return on the Common School Fund is 6.6 percent (with inflation between one and a half percent, this gives a real rate of return of five percent). He said if a distribution of five percent were made, the Fund would not be growing.

He said the Frank Russell Company would model different equity allocation scenarios from the current 70/30 equity/bonds to a 30 percent equity allocation, a 50 percent and then up to 80 percent. He explained that the goal would be to maximize the long-term growth of the assets, maximizing the distribution, but minimizing the variability of it. He said this analysis should be completed in late November in time to report to the Land Board at the December meeting.

5. Status of DSL Strategic Plan.

Director Hanus said the agency is nearing completion of the mission, vision and set of goals. She said we will be working with staff, stakeholders, interest groups and then returning to the Board in 2003 with a more refined draft of the strategic plan for review and approval.

6. Removal-fill permit streamlining and rulemaking progress report.

Director Hanus reported that the agency submitted a draft Biological Assessment on the Statewide Programmatic General Permit (SPGP) to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, as well as to other state and federal agency partners. She said it is hoped that the SPGP will be issued by the Corps around June

2003, to be effective December 2003. She commented that there is much work yet to be done, and said that a Technical Advisory Committee devoted to 404 assumption is meeting over the months ahead.

Hanus reported that the agency has been diligently working on the removal-fill rules. A public comment period was opened during the month of July. The agency met with key stakeholders during the month and held another public hearing on July 31. Comments received are being incorporated in the final rules.

7. Navigability status report.

At the request of Secretary of State Bradbury, Hanus confirmed the agency would compile a list of rivers that are being considered for navigability studies, in a prioritized fashion with a timeline of when they might be considered.

8. Statewide riparian management policy.

Hanus said the Board could read the navigability agenda item, as well as the item on the statewide riparian policy at their convenience.

State Treasurer Edwards voiced his appreciation of the agency's strategic planning efforts. He commented that this is a difficult process and is time consuming, but is very worthwhile and the efforts will be rewarded.

Since Governor Kitzhaber had to leave the meeting early, Secretary of State Bradbury adjourned the meeting.

Secretary of State Bill Bradbury

Ann Hanus, Director