

The State Land Board met in regular session on December 14, 2004, at the Hotel Condon in Condon, Oregon.

Present were:

Bill Bradbury	Secretary of State
Randall Edwards	State Treasurer

<u>Assistants</u>	<u>Staff</u>	<u>Dept. of Justice</u>
Mike Carrier	Ann Hanus	Lore Bensel
Kevin Max	John Lilly	
Jesse Cornett	Steve Purchase	
	Jeff Kroft	
	Monte Turner	
	Gail Lowry	

Secretary of State Bradbury called the meeting to order at 9:01 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 Department of State Lands, 775 Summer Street NE, Suite 100, Salem, Oregon 97301-1279, (phone: (503) 378-3805, ext. 224).

### **Consent Agenda**

- 1.a. Request for Land Board to authorize the Department to initiate the rulemaking process to amend the rules governing the sale, exchange and purchase of Department and Land Board-managed lands.**
- b. Request for approval of the minutes of the October 12, 2004, State Land Board meeting.**

Director Hanus 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. Status Report on Agency Strategic Plan.**

### **4. Department of State Lands Reorganization.**

### **5. Performance Measures.**

### **6. Asset Management Plan Revision.**

Director Hanus explained that there were four informational items. She said the Board could read the written agenda materials at a later date.

## **Public Hearing**

### **2. Public hearing regarding the John Day navigability study request.**

Mayor Dale Thompson was introduced, and he welcomed the hearing attendees to Condon.

Secretary of State Bradbury also welcomed the hearing attendees. He reviewed the agenda for the hearing, saying the purpose of the hearing was to receive public testimony on the following two questions:

- Does the evidence presented in the revised draft navigability study for the John Day River meet the requirements of the federal test for title navigability?
- Should the Land Board make a declaration of public ownership of the John Day River from RM 10 to RM 184?

Bradbury asked that the testimony given be limited to answering both of these questions. He stressed that the hearing was for the purpose of receiving testimony and that no decision would be made today. He noted that comments would be accepted until Tuesday, December 21, at 5:00 pm.

State Treasurer Edwards said this controversial issue is important to the state. He asked those present to assist the Board in finding a long-term, workable solution.

Mike Carrier, the Governor's Natural Resource Policy Advisor, expressed the Governor's regrets that he was unable to attend the hearing due to a military funeral. He said the Governor understands the issue of navigability is an important issue to Oregonians and will carefully study the comments before making a decision.

Secretary Bradbury said he agreed with the Treasurer that a long-term solution is needed.

Director Hanus reviewed the purpose of the hearing and gave a brief overview of the history of navigability in general. She reviewed the chronology of the John Day River Study, saying the request for the study had been submitted by the Northwest Steelheaders in early 1997. She said the Board deferred authorizing the Department to undertake the study until October 2002, contingent upon whether the 2003 Legislature made any progress on resolving the navigability issue.

Hanus also discussed the February 2002 decision by Marion County Circuit Court Judge Paul Lipscomb, who found that the Land Board had unreasonably delayed taking action on the Steelheaders' request for a navigability study and ordered the Board to make a decision.

Hanus reviewed the federal test requirements for navigability, saying at the time of Oregon's statehood in 1859 the waterway must have been used or susceptible to being used in its natural and ordinary condition as a highway of commerce over which trade and travel were, or could have been conducted in the customary modes of trade and travel on the water.

She said in light of the evidence concerning the historical use and conditions of the 174-mile segment, the Department believes it is reasonable to conclude that the John Day River from Kimberly to Tumwater Falls meets the requirements of the federal test for navigability. Hanus discussed the basis for the Department's conclusion.

Judge Laura Pryor commented that she felt a decision to declare this stretch of the John Day River navigable would be made, regardless of the outcome and testimony of the meeting today. She voiced concerns over reviewing rivers and streams by stretches, saying this will only continue the process of confrontation.

She suggested that long term, there might be a different way to look at this issue, than just declaring navigability. Pryor stressed that good government is sometimes based on risky decisions.

Art Israelson, Association for Northwest Steelheaders, said the issue of navigability has been around since statehood. He provided the Board a copy of a newspaper article from 1919 that discussed the controversy back then. He believes the issue is not access, but clarity regarding where users can legally be and what they can legally do.

Israelson said the Steelheaders believe the evidence presented in the second draft study meets the federal test of title navigability. He said the Board should make a declaration of public ownership of the 174-mile segment of the John Day River in question. He reviewed the outcome of the Board's declaration on navigability on the Sandy River. He asked the Board to proceed with the study.

Rick Allen, Mayor of Madras, said the Board tried unsuccessfully to do something different to settle the issue during the last Legislative Session. He said this issue has been going on far too long and the public needs answers.

Mayor Allen related an incident that occurred while he was floating down the John Day River with his nephews. While stepping out of the raft and onto a gravel bar to wait for a second raft, Allen was confronted by a landowner who demanded they get off her property and threatened them with a rifle. Allen asked the Board to move forward with the request and declare the river segment navigable.

Wheeler County Judge Jeanne Burch expressed her disappointment that the Legislature was not able to pass the legislation last session. She said the unintended consequences of this would be more confrontations that law enforcers will need to deal with. She expressed concerns over lawsuits she believes will occur with the passage of Ballot Measure 37, with landowners wanting reimbursement for land they have been taxed on.

Wheeler County Assessor Donald Cossitt also expressed his concerns regarding the outcome of a navigability determination in light of Ballot Measure 37. He said the State of Oregon would bear the brunt of this.

Sherman County Judge Gary Thompson said this is a very serious issue that will be very costly. He said this issue is in the Board's hands.

Grant County Judge Dennis Reynolds said the evidence presented in the draft study does not meet the federal test for navigability. He cited a number of issues in the draft, saying the reasoning used in the study goes beyond the federal intent. He said he fears the outcome of this decision on life, liberty and the pursuit of happiness guaranteed in the Constitution.

Ron Suppah, Senior Chair of the Confederated Tribes of the Warm Springs, said he has many ancestors buried by the John Day River. He said the Board's decision would affect other rivers as well; therefore, they must consider the broader implication of their decision and its long-term affect. Suppah said when basins are mired in controversy, experience has shown that environmental efforts inevitably suffer.

He said the Tribes believe the most appropriate solution is one that both fairly accommodates the property rights of landowners, while continuing the public recreational access that makes Oregon unique.

He said some of the evidence in the draft report is "scant and speculative." He said evidence should be substantial prior to making decisions affecting the rights of all Oregonians, including private landowners along the John Day River.

He asked the Board to move cautiously regarding a determination and to give the Legislature an opportunity to craft a solution taking into account all interests of all parties, with a focus on wise river management.

Royce Dotson said that anything below the High Water Mark is publicly owned. He supports the navigability determination of this segment of the river and believes the evidence in the draft report does meet the federal test.

Gabe Williams said the evidence presented in the draft study is "shaky at best." He shared several reasons he believes this and asked the Board to address these in a new draft study.

Matt Williams shared a situation where some floaters pointed a gun at him. He said the gravel bar in the incident cited by Mayor Rick Allen would have been in private ownership. Williams said there was testimony missing from all the testimony sent to the agency. He asked the Board to go another route.

Mike Dundee, attorney representing D.R. Johnson who owns property in Wheeler County next to Sprague, said he opposes the John Day declaration of ownership. He said he agrees with Reynolds and Suppah regarding the evidence in the draft report being speculative. He said the declaration should not be issued.

Dundee asked about the process if the Board declares the river navigable. He said written materials from DSL state that only federal courts can adjudicate. If a declaration were issued, he would like assurances that binding declaration of ownership is handled in a federal court. He said his client would like a mutual agreement amendment.

Brian Meese described a situation he encountered with recreational users. He talked about the "narrows" where he said you could hardly get a horse through, let alone a raft.

He states there is a conspicuous lack of evidence of Indian travel. He said the draft report is biased and self-serving. If the navigability determination is allowed to go through, he believes it is giving priority to the Northwest Steelheaders. He added that the people of Oregon are tired of having their rights taken away.

Ole Olsen, West Linn, said he changed his position since the September 3 report he submitted to the Board. He said there was no proper evidence or procedure regarding the draft report.

Olsen said the Department of State Lands has not given him reports that he requested and added that the agency has refused to place him on the mailing list.

Olsen said the answers to both the questions posed today are "no."

Patrick Dunham, owner of RM 25-29 said he was not officially notified regarding the navigability process. He became aware of the hearing through a newspaper article.

He said a navigability declaration would have the following negative impacts:

- 1) Property values will decrease and Ballot Measure 37 may allow recourse.
- 2) Property owners will not be able to use and enjoy the river as much, and there will be major trespassing.
- 3) A public trail will be established across private property wherever access is easiest. Fencing, signing and patrol especially in remote areas will be unlikely.
- 4) There will be too much access with negative impact to the river corridor, wildlife and fisheries.
- 5) The country is very susceptible to fires. With an increased public access, this will increase fire risks.

Dunham requested the Board take more time to receive comments and review the alternatives. He said there are much bigger issues involved. He asked the Board to consider all the impacts.

Jon Justesen said the Board must do what is best for the people and the river. He believes the only problem is with the Steelheaders who are wasting everyone's time.

He said a navigability determination would mean the river is wide enough and deep enough to afford passage by ship.

He told the Board that there is a declared floatage easement and the public has always had the right to use the river. He said if the Board wants the land, they should lease it from the landowner.

He noted that 68 percent of the landmass in Oregon is publicly owned. He said the state has a full time job trying to manage that. He said we should not be here today with this amount of BLM land. He suggested the Board work with the landowners, not against them.

Matt Smith, Cherry Creek Ranch, said he believes the Board has already made a decision. He said the conclusions in the report are illogical. He believes there is no physical evidence that Indians used canoes in this section. The draft report, he said, is unfounded and has no basis. He attests that there were no water transport uses around River Mile 129, and there could not have been any above the mouth of the river.

He said the issues of ferries should not have been included in the draft, since perpendicular travel does not mean navigability. He stated that the River Queen 1 and 2 failed due to the conditions of the river.

Smith reported that the Chee Lumber Company applied for and received a permit, but he said there is no evidence they got logs down the river. They never built a sawmill at the mouth of John Day as planned. He said this proves the river was not susceptible, because they failed. He added that Lewis and Clark did not explore the river. He said the historical record shows no use for commerce. Smith said William Cox, a previous Department of State Lands' director, said the John Day River was not generally considered navigable in this section. He added that non-navigability does not prevent the public's use of the river.

Marta Mikkalo said the Board has made a foregone conclusion. She asked if there is an infrastructure in place once the declaration is made. She discussed issues of concern such as fires, garbage, and vandalism.

Representative John Dallum, House District 59, asked the Board to allow more time for a compromise. He is hoping there will be a piece of legislation that would allow a local solution to the issue.

Sue Greer, Wheeler County Soil and Water Conservation District, submitted a map saying there must be a solution for both landowners and recreational users.

Secretary of State Bradbury asked if there was further testimony. There was none. State Treasurer Edwards thanked everyone for their testimony saying it gives the Board other perspectives to consider.

Secretary of State Bradbury also thanked those participating. He closed the Land Board meeting and hearing at 11:18 am.

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Bill Bradbury, Secretary of State

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Ann Hanus, Director