

The State Land Board met in regular session on December 10, 1996 in the Land Board Room of the State Lands Building, 775 Summer Street NE, Salem, Oregon 97310.

Present were:

John Kitzhaber	Governor
Phil Keisling	Secretary of State
Jim Hill	State Treasurer

Assistants

Paula Burgess
Cynthia Griffin
Rollie Wisbrock

Staff

Paul Cleary
John Lilly
Steve Purchase
Gary Van Horn
Jenifer Robison
Gail Lowry
Jeff Kroft
Steve Moser

Dept. of Justice

Bill Cook

Governor Kitzhaber called the meeting to order at 9:10 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, Salem, Oregon 97310 (phone: (503) 378-3805).

Consent Agenda

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| Land Sale | Request for approval of the sale of 117 acres of state trust land located near Prineville, in Crook County. |
| Legislation | Request for authorization to pre-session file legislative concepts. |
| Scenic Waterway | Request for approval of a scenic waterway permit to be issued to Pioneer Resources of Eugene to remove assorted debris from the North Fork John Day River Scenic Waterway. |
| Scenic Waterway | Request for approval of a scenic waterway permit to be issued to the Bureau of Land Management for erosion |

protection at twenty locations within the Deschutes River State Scenic Waterway.

Scenic Waterway Request for approval of an emergency scenic waterway permit issued to Oregon Department of Transportation for I-84 bridge repair on the Deschutes River State Scenic Waterway.

Minutes Request for approval of the October 8, 1996 minutes of the State Land Board meeting.

Director Cleary briefly outlined the Consent Agenda items. Secretary of State Keisling moved the Consent Agenda be approved. Governor Kitzhaber seconded the motion and the approval was unanimous.

404 Program Request for approval to continue the process for potential state assumption of the Clean Water Act Section 404 regulatory program.

Director Cleary explained this proposal concerns potential state assumption of the Clean Water Act Section 404 regulatory program from the Corps of Engineers. House Bill 2785 which passed in the 1995 session encouraged the Division to assume the 404 permitting program by July 1, 1997, with a hammer that prohibited the agency from exercising removal-fill jurisdiction after that date on any project on which the Corps of Engineers issues an individual permit.

At its meeting in December 1996, the Board approved a placeholder application to be submitted to the EPA and asked staff to work with stakeholders to evaluate the issues and options. Cleary discussed some of the major issues such as statutory revisions necessary to assume the program, endangered species consultation requirements, maintaining resource protection while streamlining the process, and obtaining the necessary federal funding to cover the estimated \$1 million increase in annual costs for the Division of State Lands, as well as the Department of Fish and Wildlife.

Four options were evaluated: A) proceed with statutory revisions and change the hammer date from July 1, 1997 to July 1, 1999; B) do not proceed with legislative changes in this session, but change the hammer date and pursue the changes in the 1999 session; C) let the hammer fall, then sort out the new jurisdiction with the Corps of Engineers; D) propose a repeal of the hammer date and preserve the dual permitting program currently in place with the Corps of Engineers.

Cleary said the goals of assumption are less process, enhanced resource protection, a greater certainty, increased state control, and elimination of duplication.

He said the agency recognizes the concerns that exist within the conservation/environmental community that the standards may be lowered. He stressed that the intent of the proposed assumption is to maintain the state's resource protection standards.

Cleary said the staff recommendation is to proceed with Option A—legislative changes and changing the hammer date to 1999. He said a fall back provision would be Option B.

Richard Olson said he has had experience with the Corps of Engineers and doesn't understand why the Division would be taking over work that the Corps is already doing.

Robert Pierce, Northwest Environmental Defense Center, shared concerns of the Center such as the possibility of the loss of access to the process through federal laws. They would like to see the 50-cubic yard threshold removed. He stressed that they don't want less process (since that enables the public to participate), but they favor less duplication. Other concerns were with ESA issues—believing the state law is inadequate to address consultation needs and that ODFW will not have adequate funding to do consultation. In addition he said it's important that DEQ has the ability to certify water quality issues and have adequate funding to develop site specific standards when evaluating projects.

Alan Lively, Oregon Department of Transportation (ODOT), thanked the Division for the participatory process they have used. He said ODOT has a good working relationship with the Corps. He said he views the 404 assumption as a vehicle to incorporate the regulatory and land use processes, enabling decisions to be made regarding resource protection at a community level. He supports Option A.

Joel Shaich, environmental protection specialist with the EPA, said the Clinton Administration, through the Clean Water Act, is encouraging states to assume the 404 program. He said the Region 10 EPA office also supports the Division's recommendation to pursue Option A, as it appears to meet all the federal requirements for statutory changes the state would need to make for 404 assumption. He listed a number of reasons why EPA supports Option A. EPA i9

s not opposed to Options B and D, but Option C that would allow HB 2785 to take effect is unacceptable to EPA. It could substantially decrease resource protection in the state. Shaich said it would also mean that projects with major impacts would only require the one permit from the Corps, while projects with minor impacts would require two permits, one from the state and one from the Corps. Under HB 2785, the state would be dependent on the federal government to determine the type of permit required before the state could take action for enforcement and permits. He said this would lead to more delays and confusion for applicants, landowners, and interest groups. He said Option C would abandon Oregon's and EPA's investment in wetland planning and affect state and local wetlands management programs.

Lyn Mattei Oregon Sierra Club and Northwest Environmental Advocates, said they would rather not choose any option, but if they had to, they would choose Option B, since it allows more time and flexibility. Mattei said if federal laws will be eliminated, then Oregon law should be as good or better than the federal laws.

Mattei expressed her concerns that the draft legislative proposal doesn't include some of the agreements and concepts that were discussed during her involvement with the stakeholders. She said the 50 cubic yard exemption is still included, though it had been previously removed from the draft. She said the exemption conflicts with the requirements of the Clean Water Act and EPA's implementing guidelines on state assumption. She stressed the need for assuming the Clean Water Act as a whole package.

Mattei said the fiscal impact estimate of zero was baffling to her. She said ODFW would need to play a major role and they aren't funded at all to work on the removal fill program. She also mentioned concerns with DEQ, saying the funding issue is not addressed in the legislation.

She said they have problems with the Division's ability to implement this program because of the B-1 guidelines and the lack of funding and other issues.

Pete Test, Oregon Farm Bureau, said they view the proposal as one that would benefit agriculture and the state in general by simplifying and keeping people out of trouble. Test said one of the Farm Bureau's largest concerns is to ensure that the 50 cubic yard exemption will be retained. He said other states that have gone through assumption were almost forced to adopt a minimum cubic yard exemption, because of the massive amount of regulation that took place when any amount of material was removed.

Test also stated that they would like to see a guarantee that the NRCS's position and authority within the realm of wetlands continue if the state assumes the program. He said Option B would be their second choice, but said they would be working with the Legislature for amendments, if the Option A recommendation went forward.

Mel Pittmon, representative of the Columbia River Yachting Association, said until last month their organization had not been aware of the ongoing process for 404 assumption, though they are stakeholders. He suggested the implementation be delayed to allow for their review of the process. He reported that the relationship that they currently have with the Corps and the Division in regards to the current dredging permit is favorable. He asked what will happen across the river in Washington regarding issues such as boundary decisions, if the regulatory responsibility is assumed at the state level. He also cited sources of funding for the program as a concern.

He concluded by saying that they aren't prepared to support or oppose assumption, but would like to be involved in a review of it.

Governor Kitzhaber reviewed letters received for the record regarding the 404 assumption from the Oregon Association of County Engineers and Surveyors (in support of Option A), Hutchinson, Anderson, Cox and Coons (representing Oregon Environmental Council not opposing assumption but listing some concerns), Oregon Shores Conservation Coalition (supporting assumption if it's equivalent to the federal program), and Liz Frenkle (not opposed, but listing concerns).

Cleary stressed that the action before the Board is just a proposal to introduce a legislative concept. He said the issue would be brought before the Board again after the legislation is passed to see if they are still comfortable with it. After the EPA completes its formal review of the Division's assumption application, the issue would be revisited to ensure the Board is comfortable with the conditions coming out of the review. Then again after the federal funding has been identified and committed, the issue will be revisited. Cleary said that there are opportunities along the way for the Board to discontinue pursuing assumption of the program if they are uncomfortable with the proposal, the conditions, or the funding.

Cleary explained that the Corps' jurisdiction over Section 10 Commerce Clause waters and removal-fill activities related to navigation channel maintenance is not assumable.

He said the legislation would need to be filed by December 15, so another stakeholder meeting could be scheduled before the end of the week to review it again to cover some of the concerns. He clarified that the legislation is on an “if/then basis.” If the state assumes the program, then the statutory changes take place. There is no fiscal impact beyond the ongoing regulatory streamlining effort until assumption actually occurs. Cleary said this is not an endorsement of the bill draft as it is written, but legislation is needed to move the hammer date and deal with necessary statutory changes.

Secretary of State Keisling moved approval of Option A, reiterating that this doesn't imply an endorsement by the Land Board of this particular piece of legislation, but a means to have the process continue forward with the stakeholders working with the Legislature. Governor Kitzhaber agreed with the motion and it was unanimously approved. Governor Kitzhaber reminded Cleary that another stakeholder meeting should take place prior to introducing the legislation.

Grazing

Request for approval of amended administrative rules revising the state rangeland grazing fee formula pursuant to the recommendations of the State Land Grazing Fee Advisory Committee.

Director Cleary explained that legislation in the 1995 session established the State Land Grazing Fee Advisory Committee. This committee has proposed a revision in the grazing fee formula to change the price factor from a five-year average to the preceding one-year average, to be easier to understand and administer and to make it more responsive to the current market changes. Other proposed changes would be to revise the state's share of the weight gain to 20 percent in 1997, rather than waiting until 1998. That share would be applied the same to all leaseholds regardless of size—currently the rules apply different weight gain shares to blocked leases as opposed to isolated small leases. Cleary said these changes will better reflect the lessee's ability to pay based on the current calf receipts, but the total payments to the Common School Fund will be the same in the long term.

Cleary remarked on a request made by lessees to consider a 40 percent reduction in the fee for late-season forage use to reflect the reduced productivity of dried forage. He replied that the current average weight gain of 30 pounds per month is a year-long average and reflects the productivity difference between early and late season forage.

Another request was for 12 percent of the annual lease receipts to be directed toward the rangeland improvement fund. Cleary said staff agreed and suggests the agency dedicate an equivalent amount (which would be somewhere between \$20,000 - \$35,000) per year from the property improvement funding that is being requested from the Legislature this year, and that an advisory committee be formed to assist in selecting, monitoring and inventory projects that enhance resource conservation and productivity.

Bob Phillips, Rest the West, said the proposed grazing fee formula ignores the obligations of the State Land Board to maximize revenue from the leasing of school land. He cited a 1975 Attorney General Opinion regarding the need for receiving full monetary value for the sale, rental or use of Admission Act lands. He stated the Board should be basing the lease fees on the state's obligation to maximize revenue to the Common School Fund, rather than on the prices for weiner calves. He compared the state's fees to those of grazing non-irrigated private land, saying the Division's fees were only 25 percent of the private fee in 1996. He said, if adopted, these fee change rules would be a violation of the Board's duty as a trustee for the school lands. He said a market-valued grazing fee could net \$500,000 annually for the Fund, which could be used to better protect the productive capacity of the school lands by monitoring the leases and reducing instances of abuse to soil, water and fish and wildlife habitat.

Phillips said they have mixed reactions to the suggested rangeland improvement fund. While they would approve funding for improving rangeland health and fish and wildlife habitat, they would not support so called improvements such as reservoirs and pipelines. He suggested the Board limit the proposal only to projects that would restore rangeland health.

Phillips concluded by saying the Board should decline the Advisory Committee's recommendation. He suggested leaving the present grazing fee formula in place and proceeding to maximize the revenue for the Common School Fund. He stated also that a competitive bidding process is the best means of obtaining fair market value for leasing of state rangeland.

Lindsay Slater, Oregon Cattlemen's Association, said they are, for the most part, in agreement with the revisions to the fee formula. Some of the members feel that applying a grazing fee formula to the entire state is like comparing "apples and oranges," since range areas differ. He said they would like this reconsidered.

Lou Davies, state lessee, said the Division had a conflict of interest when its Director, Paul Cleary, chaired the Advisory Committee. He said that no mention

was made in the Committee minutes of a request that Marty Vavra chair the Committee. (He mentioned several other issues he said were discussed at the committee meetings, but left out of the minutes.) He suggested if another committee is appointed that neither the Division nor the lessees should chair it.

Davies said there is no documentation for a fee over \$3.00. He said by using the Oregon Agricultural Statistics Service as well as OSU documentation as to what it costs to run cattle on land, a fair fee could be derived.

He said people in his community feel sold out, since many of the recommendations of the fee committee take away profit from the ranchers. He said there was no good reason to raise the price for isolated parcels surrounded by private land.

Davies gave the Board a conditional termination for his lease which included a formula for what he said would be a fair lease rate for the state.

Governor Kitzhaber asked Davies if the recommended fee schedule is an improvement over the fee in place before. Davies said the only improvement was changing from a five-year average to a one-year average.

Governor Kitzhaber asked Lindsay Slater about the position of the Cattlemen's Association. Slater responded that most can accept the proposed revision, but said there are situations such as Davies' where it won't work. He said Bob Skinner and Fred Otley developed the fee reduction for late-season forage use which would help individual areas. Cleary said it is necessary to take a standardized approach to operating a program in a least-cost manner. He added that Davies told him his calves were weighing 360-385 pounds coming off the range, which is consistent with the 30 pounds per month yearlong weight gain average.

Cleary said he asked not to be appointed chairman at the first meeting. He said Marty Vavra was asked to be vice-chairman.

Cleary said the only way he can gauge whether the fee is responsible from the trust perspective is to compare Oregon's rates to other high-elevation, semi-arid states, such as Wyoming (\$3.50), New Mexico (\$3.54), western Montana (\$4.05), Washington (\$4.55) and Idaho (\$4.88), with Oregon's fee range of \$2.60 to \$4.60 falling in the same ballpark.

Governor Kitzhaber asked Lindsay Slater if the Cattlemen were supporting this. He responded they were.

Secretary of State Keisling said the fee previous to 1994 was a “one-size fits all” approach, not considering the calculation of weight gain or price fluctuations. He said this fee is based on cattle prices and the market and is a substantial step forward from the old system.

Davies said there is documentation that says the fee should be a lot lower.

Governor Kitzhaber said the policy issue stated today has been a generation of more money for the Common School Fund, but he said another larger policy issue is whether we want cattle grazing on our public land. Since the amount of money that will be generated is minor in the larger school funding debate, he said the real debate is how to balance natural resource uses on public land with good stewardship. Governor Kitzhaber said he will support the recommendations of the Advisory Committee.

Secretary of State Keisling moved approval of the item, adding support for the dedicated improvement funding approach. He said additional rulemaking is needed to address various other comments. The Governor seconded the motion and the approval was unanimous.

Governor Kitzhaber noted for the record that a letter was received from Jim Myron showing that he supports competitive bidding as the best alternative for complying with the fiduciary responsibility of the Board.

CSF Request for approval of revised Common School Fund investment allocation and distribution policies.

Director Cleary said the Board requested Wilshire and Associates, consultants to the Oregon Investment Council, to do an update of the 1992 investment policy study. Wilshire recommends an increase in the allocation to equities and supports Treasury’s proposal to remove the 50 percent statutory cap on equity investments, lifting the Board’s 20 percent restriction on international investments and allowing distributions of dividends or capital gains. Director Cleary recommended the Board revise the investment policies to reflect Wilshire’s recommendations and establish a constant distribution of \$10 million per year, adjusting by five percent per year, for inflation and enrollment growth. Over a ten-year period, the distribution would grow from \$10 million to \$16.2 million per

year and the Common School Fund would increase from \$410 million to \$885 million (doubling the Fund). Cleary said Treasury would give a performance review of the Fund in April.

John Marshall, Oregon School Board's Association, said he supports these investment and distribution policies saying this will assist in the long-term needs of public school funding.

Secretary of State Keisling moved approval of the item. Governor Kitzhaber seconded the motion and the approval was unanimous.

Wetlands Request for approval of new administrative rules providing guidance to local governments for identifying "locally significant wetlands" for land use planning.

Director Cleary said these rules should provide a standardized approach and criteria to improve the consistency and predictability of wetland identification and reduce the planning burden on local jurisdictions. Cleary recognized Betsy Parry's and Janet Morlan's work with the technical advisory committee in development of these rules. A number of comments were received and have been addressed. Cleary said the staff recommendation is to adopt the rules.

Lyn Mattei, spoke regarding the rules on behalf of Duncan Brown, City of Portland Senior Planner. She said there appears to be no grandfather clause in the rulemaking, which may pose a problem in protecting wetlands that have already gone through a local jurisdiction's Goal 5 process. She said many of those wetlands may not fit the new criteria, so it is important to be able to protect them.

Mattei reported that Brown feels the criteria are excellent on the whole, but had a few specific suggestions for the rules, which she shared.

Betsy Parry and Janet Morlan addressed some of the concerns expressed by Mattei. Governor Kitzhaber asked Director Cleary and staff to contact Mr. Brown to discuss his concerns to see if there would be need for some more amendments to the rules.

Secretary of State Keisling moved the rules be adopted, with the direction for staff to contact Mr. Brown. Approval was unanimous.

Rules Triennial review of administrative rules of the Division of State Lands.

Director Cleary said the agency has put out a notice that all the agency's rules are available for comment through February 7. Additional comments on the locally significant wetland rules can be handled through future rulemaking with this project.

S. Tongue Point Status report on South Tongue Point Parcel B land exchange.

Director Cleary reported that the South Tongue Point Parcel B exchange was complete and awaiting final Congressional oversight.

Navigability Status report on navigability issues.

Director Cleary introduced three of the members of the navigability stakeholders group (Greg Leo, Farm Bureau; Bill June, facilitator; and Don Watson, Northwest Steelheader's Association) that were selected to try to reach a consensus between the various groups that use rivers and live beside rivers regarding use of the bed and banks of those streams not covered to date by navigability determinations.

Bill June reported that three large stakeholder meetings were held over the summer and early fall. June said Don Watson agreed to coordinate activities of the river users and formed a caucus, and Greg Leo formed a caucus of landowners. A lawyers caucus was also convened by Bill Cook of the Attorney General's Office. June said it was an extensive effort with some small areas of agreement, but said the issue concerning public use of the bed and banks of the streams is not ripe for negotiations at this time. The progress that was made was substantial issue education; and issue definition has also been improved substantially.

Bill Cook, Assistant Attorney General, discussed the "floatage easement" that gives the public the right to float a river that can be floated and to make use of the bed and banks in a way that is reasonable and incidental to boating, regardless of who may own the bed and banks. Cook said the lawyers' caucus was trying to focus on a possible legislative fix that might bypass the navigability controversy through the floatage easement by giving the recreationists the right to use the bed and banks to a certain extent, while protecting the landowners.

He discussed the agreements and disagreements that the lawyers within the group encountered; the largest disagreement being determining what particular bed and bank uses should be legal.

Bill June said it was a productive process and credited Cook with doing a good job in the group. June expressed the need to exclude from proposed legislation any clearly owned land, such as that owned by federal, state, or local governments. He distributed a packet put together by the state of Minnesota giving information for recreationists regarding locations that are floatable, what sanitation facilities are available, locations where permission must be requested on private land, and etc. He said information such as this is valuable for the recreational public and said people of goodwill will ask permission from private property owners and he believes that landowners will generally allow people on their lands to fish and hunt. He stressed the need for clarity in determining if land is privately owned; ensuring that private property rights are respected and that there be good communication between the recreational public wanting to use the property and the landowner, who has the right to say yes or no to access.

Don Watson, Northwest Steelheaders and spokesman for the river users said the abuse that is occurring by recreationists must be stopped. He said with access rights comes responsibilities, so they are promoting only legal and ethical behavior on the streams. He said his group is not asking for access rights to private property but to state-owned property as the bed and banks of navigable rivers and streams.

He stressed that his group is often called recreationists, but is more than that since they are working with commercial guides and packers, boating associations, and others. He said in 1994 there were approximately 710,000 angling licenses issued, adding up to a billion dollar business. He said there are huge industries in Oregon due to the manufacture and sale of water recreational related items.

Greg Leo distributed a newspaper article from Idaho regarding the effects of recreational use on salmon recovery. He said river management must be viewed in its entire context.

Governor Kitzhaber said he will be supportive in getting some agreement on this in the Legislature to get this issue resolved.

Glen Seidler, former president and secretary of the North Santiam River Guides and Packers Association, shared six points they wanted to express in a

resolution put together by the Association. They are the right to float, the right to anchor, the right to angle, the right to scout, the right to portage and/or line a vessel, and the right to wade and walk upon the bed and/or banks to the line of ordinary high water.

John Colburn who recently moved from Montana said the stream access law there has been so successful that the 1995 conservative legislature didn't even modify it, though it modified a great many of Montana's environmental laws. He said Oregon has a tremendous asset in its fishing. He feels that an access law such as Montana's will work here. He said if access to the river bottom and banks to the normal high water mark is limited or done away with, Oregon will lose a lot of income, since the industry is a tremendous economic asset. He said most people fishing in the high lakes are not going to be sitting down in a boat.

Dave McCurdy, representing Mid-Willamette Valley Fishing Crafts, said his fishing club has adopted a section of the Santiam River to clean up the banks. He said he holds the record for the largest couch ever pulled out of the Santiam. He commented about the efforts of his organization and others (as recreationists) in cleaning up and taking care of the river.

Bill Montgomery, from the Portland Rowing Club, discussed a meeting he had with David Blum, Leon Aliski (both from the Division), Cheri Sprando, Mel Pittmon, and nine others. He distributed a letter and a news article to the Board containing recommendations for the Waterway Task Force that came from that meeting.

Richard Olson said he had no notice of the meetings and asked that people in Clatsop County be kept apprised of issues on the waterways.

Director Cleary thanked everyone who worked on the navigability stakeholder efforts. He said the Division will continue to work with interested parties to find the right balance between providing for appropriate and responsible public use, respect of private property owner's rights, and protection of the resources.

Cleary said two navigability study requests have been received—one on the John Day River, that the Division has been asked to suspend work on by the requestor, and one on the Sandy River. Cleary said the agency will report on the Sandy River request in February, as well as give information on any legislative initiatives.

Cleary thanked his staff for all the help they've given him in his first year with the agency. He also recognized Cynthia Griffin, Executive Assistant for Secretary of State Keisling, saying this will be her last meeting. Cleary said Cynthia continuously encouraged the Division to try to find a right balance between being a good neighbor, a responsible steward and a dependable business partner. He said she asked the hard questions whenever she thought we may have strayed from that track. Cleary wished her well in her new endeavors.

Governor Kitzhaber also expressed his appreciation to Griffin for her work with the State of Oregon and wished her a happy birthday.

Governor Kitzhaber adjourned the meeting.

Paul R. Cleary, Director

John A. Kitzhaber, Governor