

The State Land Board met in regular session on April 14, 1998 in the Land Board Room of the State Lands Building, 775 Summer Street NE, Salem, Oregon 97310.

Present were:

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

<u>Assistants</u>	<u>Staff</u>	<u>Dept. of Justice</u>
Paula Burgess	Paul Cleary	Bill Cook
Rick Hanson	John Lilly	
Rollie Wisbrock	Steve Purchase	
	Jenifer Robison	
	Gail Lowry	

Governor Kitzhaber called the meeting to order at 10:14 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).

CSF Annual review of the Common School Fund investment policy and performance. (Informational Item)

Director Cleary said the Fund had a 26 percent increase over the last year, and the corpus of the Fund has nearly doubled over the last four years. He went on to explain that investment allocations had been shifted to 63 percent of the investments in equities, 32 percent in bonds, and five percent in cash. Annual distributions to schools have increased by over \$1 million since 1996. The average yield on bonds is now about 7.15 percent; domestic equities return was 33.25 percent and foreign equities (only a small portion of the portfolio) was 1.77 percent. Director Cleary said no changes in the investment allocation/distribution policies are being recommended at this time. He introduced Dan Smith, Director

of Investments for State Treasury, to further discuss the performance of the Common School Fund investments. Smith said the strategy has been to increase the equity portion to the maximum amount feasible, given the distribution policy adopted by the Board and the statutory limitation on equity investments, which the 1997 Legislature increased from 50 percent to 65 percent of the contributions to the Fund.

Smith said in June of 1992 the Board voted to reemphasize equity investments. He said that was excellent timing with the market and since that time the value of the fund has more than doubled. Smith finished by saying the estimated return for the entire Common School Fund was around 22 percent—a very satisfactory year.

State Treasurer Hill complimented Smith and his staff for taking full advantage of the market.

Action Agenda

Administrative Rules Request for final adoption of administrative rules governing the registration of non-commercial docks/floats and/or boat houses, floating recreational cabins, and water sport structures on state-owned submerged and submersible land. (Final Board Action)

Cleary said that 13 different hearings and public meetings have been held since starting the waterway rule review two years ago. He said the rulemaking today would level the playing field for non-commercial docks and floats by exempting them from leasing and, instead, requiring a five-year renewable registration at reasonable rates—\$100-250 for docks and floats; \$300 for recreational cabins; and \$100 for water sport structures. The rulemaking also implements 1991 legislation requiring registrations for lease-exempt private docks and floats.

For any new or substantially modified structure that touches an upland owners' land the applicant must gain permission from the riparian landowner. In grant rivers, such as the Willamette, for any structure that's located above ordinary low water the adjacent landowner's permission must be obtained. Comments from landowners within 200 feet of any proposed new or modified structure will be seriously considered by the Division.

At a later date, it may be suggested that these registrations don't need to be reviewed on a five-year basis, but could be extended to ten, 15 or 20. Any proposed changes in the rates would require extensive public notice, rulemaking and Board approval.

Bill Montgomery, from the Portland Rowing Club, said that two-weeks didn't allow the public enough review time to respond and comment in detail on the rules. He believes the proposed changes to be "ambiguous, inconsistent and potentially

disastrous” in empowering the Division of State Lands. He asked the Board to hold off on adopting the rules for leasing until the “river folks” can propose changes and clarifications.

Montgomery asked Cleary whether the Land Board is empowered to change the rules for leasing being considered today. Cleary affirmed they were. Montgomery then asked if the Board would consider written recommendations to change the rules to make them less restrictive. Governor Kitzhaber said they are more than willing to consider recommendations from anyone. He said he would like to hear all the testimony prior to making a decision.

Dick Olson, floating homeowner in Clatsop County, said all users should be under some type of registration, lease or tax. He said his particular situation is not covered under the rules being proposed today, but he would like for some action to take place in the near future regarding individual houseboats and other moorages.

Cy Green, member of the Waterway Leasing Task Force, said he supports the rules with one modification. He asked that the 90-day advance notification requirement for new placements of, or substantial enlargements to, a non-commercial dock be shortened to no greater than 30 days. On a coastal river where pilings must be driven to anchor the dock, he said there is a short window of a few weeks each year when pilings must be driven. The 90-day notice could effectively cause the owner to have to wait until the next year for the dock to be constructed.

Cleary said the 90-day notice was proposed to allow time to resolve potential conflicts between riparian landowners and non-riparian applicants. He said those docks being proposed by riparian landowners could be processed in 30 days, and the rest could have a 90-day notice requirement.

Charles Heimlich, Chairman of the Tenmile Lakefront Owners Association, said his organization opposes the Division “generating revenue” from the registration program. He said the process should be simpler and docks should be registered by a fee of \$20-25. He also voiced concerns that these registration rates could be raised.

He commented that since the docks, boathouses and log booms provide a shelter for the fish and prevent the shoreline from deteriorating, he doesn’t feel that the public needs to be compensated financially by registration fees for their use of the water.

Heimlich discussed the question of ownership and navigability of the lakes. He then discussed the degradation of the lake both with weeds and toxic algae. He commended John Lilly, Division of State Lands Assistant Director for Policy and

Planning, on his efforts to coordinate funding from agencies to help alleviate these conditions.

Dave Miller said that he was concerned over the latest change that allows a non-riparian applicant to build a structure in front of a riparian landowner's property without their consent. He said this change was made without enough time for comments. He discussed possible scenarios that could occur with this change and problems that would arise.

Cleary said applications could be made by either riparian or non-riparian owners. He said a structure requested by a non-riparian owner that is to be located in front of a riparian owner's property on a grant river like the Willamette would probably have to be placed entirely below low water, putting it into the navigational channel, which could interfere with boating and therefore be denied by the Division. He said that the permission issue is a difficult one. The Land Board has been given jurisdiction over the lands by statute and that jurisdiction or veto power can't be transferred to riparian landowners, although their concerns will be taken seriously.

Dave Miller said as there are more boats on the river, docks are becoming more in demand, increasing the possibility of non-riparian applicants wanting to locate docks in front of riparian owner's properties. Cleary again reiterated that the proposed rules don't disturb the permission that is needed from the riparian owner for crossing or attaching structures to their land, but said that the jurisdiction over the submerged and submersible lands must rest with the Board. He added that the riparian owner still has the preference right to lease.

Governor Kitzhaber said he wouldn't want the Willamette or any other river littered with floating structures. Cleary said the rules will provide a process to prevent that from happening through the requirement for comment and through the ability to close waters to new structures.

State Treasurer Hill asked Assistant Attorney General Bill Cook if there might be a legal question regarding the delegation of authority. Cook responded that, though he hasn't researched this, there may be a delegation issue involved.

Dave Wiley said there are only a few choice locations where docks can be located. He said an upland owner with one of those good locations may be forced to take an expensive lease on the state land in front of his property, to ensure that someone doesn't locate a dock on the waterfront in front of his home.

Wiley stated another concern is the requirement for riparian owners within 200 feet of a proposed dock to give their consent. He said this could create problems if you don't get along with the neighbor and they refuse to grant consent. He said only the immediately adjacent upland owner should have a say in the decision.

Governor Kitzhaber said that a reasonable balance must be struck. Cleary said any registration for new or substantially modified structures will be reviewed thoroughly, and an appeal provision will be available if people aren't satisfied with the decision made.

Miller said that puts the individual in the position of just trusting the Division. He said he's been told if it doesn't block navigation or public use, the concern of the upland owner in not wanting a dock placed in front of his property isn't a valid concern.

State Treasurer Hill asked if language could be drafted that would not take the authority of the Board and transfer it to individuals, but would in essence give the landowner some preference or a greater status in the matter. Cleary said they had tried to do this in the proposed rules with the notice and appeal provisions. He said the agency could include more detail in the rules as to how specific situations could be handled. He reminded the Board of their ability to close certain waterways to new structures or restrict seasons of use. Cleary said the agency could report to the Board on any registrations from non-riparian owners with any concerns of the adjacent landowners, so they can give direction on how to proceed.

State Treasurer Hill suggested there be a requirement for a higher standard for those who want to place a structure in front of an objecting riparian owner's land. He said the issue comes down to whether the riparian owner should be given a special status. Cook said language could possibly be drafted that would avoid giving a direct veto to a riparian owner, but be structured so the concern is built in.

Governor Kitzhaber said that some clarification could be drafted and the issue revisited at a later date to see what has been taking place. He stressed that the landowner's concerns should be taken very seriously.

Don Lampi, floating recreational cabin owner on the Columbia River, spoke on behalf of 30 duck shack owners in the lower Columbia River in support of the rules, with a few minor concerns. He said the registration fee of \$300 is reasonable for a five-year period, but they don't want to see it increased. Their other concern was that someone may try to take away the use right they have had over the years. He asked that their use right be protected.

Lampi said he was impressed with the way the Division staff listened and communicated at the public hearings.

Mel Pittmon spoke for the Waterfront Owners and Operators Association, people from the Woahink Lake, south coast private dock owners, Paul Hanneman from the central coastal area, and John Englund and other north coast business lessees. He said they oppose the rulemaking for three reasons: 1) The

requested inventory hasn't been completed which was to be included as part of the whole leasing/registration/compensation package for consideration. 2) The changes to the rules have not been distributed to the potential affected private dock owners, nor were they discussed at the regional meetings. 3) The time frame of changes is too short to evaluate and make judgment whether to accept or oppose changes.

He asked the Board to delay action on the rules until the next Board meeting to allow time to consider their concerns.

John Davis, landowner along the upper Willamette, said he believes the upland owner should have a right of priority and not fear that someone would locate a dock in front of their property.

Secretary of State Keisling asked whether the Board could place a moratorium on any new approvals of docks for a period of time for non-riparian owners pending review of the issues. Governor Kitzhaber agreed this could be done, grandfathering existing structures and placing a moratorium on any requests for new or modified structures from non-riparian owners for six months.

Cleary recommended the Board adopt the rules with the 30-day/90-day modification, add a provision that the Division not approve any requests for docks by non-riparian owners, and report back to the Board in six months.

Governor Kitzhaber agreed he would like a moratorium on the granting of authorizations for non-riparian owners until the Board has received legal advice. He added that six months will give the agency time to determine if there are other implementation issues. He suggested the Board review the issue in October.

Secretary of State Keisling asked for clarification on the moratorium. Cleary said the agency could accept applications during the six-month period, but would not process/approve any from non-riparian owners.

Secretary of State Keisling moved the Board approve the two changes in Attachment A to OAR 141-082-0045(5) and (6); add a provision that the notice for a riparian owner be 30 days; require that objections of any riparian owners must be answered in writing; and place a moratorium on approving applications from non-riparian owners for docks for six months, at which time the agency will bring the issues that have arisen before the Land Board at its October meeting. State Treasurer Hill seconded the motion.

State Treasurer Hill complimented Cleary and Division staff for their work on what he said are sensitive issues. The motion was approved.

Emergency Request for approval to appear before the Legislative
Emergency

Board Board to request the allocation of \$3.5 million to be transferred to the Common School Fund as compensation to the trust for implementation of a forage lease renewal preference/assured lease system pursuant to SB 5523 (1997).

Director Cleary explained that the \$3.5 million would compensate the Trust for granting lease renewal preferences to current lessees and would become part of the Common School Fund corpus invested with the distribution of earnings to schools.

Lessees in good standing would get a preference to lease and renew if the land continues to be classified as suitable for grazing. The Board could continue to be able to adjust AUMs in response to rangeland and riparian concerns. The lands could be reclassified upon lease expiration to meet public infrastructure, community expansion, or economic development needs.

Cleary said if the Board approves the agency's appearance at the Emergency Board, staff will continue to work with the lessees and conservation interest to revise the rules and lease form for adoption at the August Board meeting.

Bob Phillips spoke on behalf of the Oregon Natural Desert Association and the Oregon Natural Resources Council. He said they reviewed the proposed assured leasing system from the viewpoint of the Trust Doctrine and Admission Act of 1859, which require the trustee to act on behalf of the beneficiaries of the Trust, kindergarten through 12th grade. This, he said, requires the state to act as a prudent investor to obtain market value when selling or renting Trust lands and to manage the lands to preserve their productivity. He believes the actions called for in SB 5523 fail to meet these standards and questioned whether the transfer of \$3.5 million is legal. He characterized it as "continuing to subsidize the lessees at the expense of the K through 12 school children."

He asked who would own the grazing rights if the \$3.5 million is transferred to the Common School Fund. He concluded that the lessees would own them, subject to certain restrictions and conditions. Their leases would be rolled over every ten years unless the terms are violated or the lands are reclassified for other uses. Lessees would be compensated for lost grazing and any improvements they have made if grazing is terminated during their lease. Lessees would have the ability to transfer or sublease the grazing rights. Phillips said that lessees could pocket \$4.14 per AUM by subleasing at private land rates.

Another concern they had regarding the proposal is that productivity would not be assured. He said the rangeland management plans provide inadequate direction for achieving healthy, productive rangelands. He said the latest state rangeland condition report (1970) showed that 75 percent of the state's rangelands were in unsatisfactory conditions.

Phillips said his group opposes the transfer of the \$3.5 million to the Common School Fund and the proposed assured lease provisions. He requested the Board not grant permission for the Division to proceed with these.

Phillips asked whether the Board agreed with his conclusion that the lessees would at least partially own the grazing rights to state trust lands. Assistant Attorney General Bill Cook said the situation is the same as with the previous system. The lease describes the leasehold interest that the lessees have, how that leasehold interest operates and how it can be assigned to others.

Cleary agreed saying when a lease is executed, the lessee receives the benefits of that lease, as long as they conform to the terms of the lease. Cook said the State Land Board/Common School Fund trust continues to own the land. The leasehold interest is leased to the lessee for use as the lease allows.

Governor Kitzhaber asked why the lease includes the provision to sublease. Cleary responded that grazing leases have always provided for subleasing and that subleasing has been used in times of crises to help operators hold on to family ranches. He said that it does require the permission of the Division for either subleasing or assignment.

Governor Kitzhaber asked whether the stewardship requirements had been strengthened. Cleary said that additional provisions have been added to the lease, with specific references to riparian health and compliance with water quality standards.

Governor Kitzhaber then asked about the status of the *Mendieta* lawsuit. Cleary said the Supreme Court accepted the lessees' petition to review the Court of Appeals' decision. The Court of Appeals held on the side of the Board and the state. Attorney Dan O'Leary filed a brief to which the state is to respond within 28 days. Cleary suggested that if the Board approves the Emergency Board appearance, that we ask to have the court case put in abeyance for six months. He said if the rules and the lease are approved in August, then the Board could ask the lessees to consider that a resolution of the matter.

Governor Kitzhaber commented that it might be better to ask O'Leary for a resolution before taking this action, since it involves \$3.5 million of the taxpayer's money. State Treasurer Hill said he understands that O'Leary is preserving his right of appeal. He asked if it might be of help to talk to him before the Board takes action. Cleary said that our Emergency Board request must be to the Department of Administrative Services by the middle of May. He said the Land Board could instruct the agency to approve preparation of the request, waiting to file until the court case has been put into abeyance. Governor Kitzhaber said he's unwilling to agree to the transfer if we will still be subject to all the ongoing legal costs. He said that if the court case does not go into abeyance, this request must come back before the Board before being sent forward. Governor

Kitzhaber moved that the Board tentatively approve the \$3.5 million transfer, subject to putting the lawsuit into abeyance, with the agreement that if this does not occur, the issue must come back to the Land Board for another affirmative vote before proceeding to the Emergency Board. State Treasurer Hill seconded the motion.

Secretary of State Keisling asked Assistant Attorney General Bill Cook how the Board could determine that the lawsuit had been put into abeyance and that the standards have been met. Cook asked whether the Board would like the lawsuit to be put in abeyance (on hold), or whether they want the assurance that the lawsuit has been withdrawn. Governor Kitzhaber responded that he would like the lawsuit withdrawn. He said the lessees went to the Legislature and got \$3.5 million from the General Fund at a time when the state is laying off school teachers, etc. He added that he is not willing to proceed if we are going to be pursuing this through the courts and also through a General Fund appropriation. He said that's not a good use of the taxpayers' money.

Secretary of State Keisling clarified that if the lawsuit is not withdrawn, the Board would meet again to revisit the issue. The motion was approved unanimously.

Emergency Board Request for approval to appear before the Legislative Emergency Board for increased Federal Funds expenditure limitation authority for the South Slough National Estuarine Research Reserve to accommodate additional federal grant funds for 1997-99, and to complete projects carried forward from prior biennia.

Director Cleary briefly discussed this request to appear before the Emergency Board. Secretary of State Keisling moved the item be approved. State Treasurer Hill seconded the motion and the approval was unanimous.

NHAC Request for final adoption of the revised Oregon Natural Heritage Plan. (Final Board Action)

Director Cleary introduced Stephen Anderson, Chair of the Natural Heritage Advisory Council, to discuss adoption of the revised Natural Heritage Plan. Anderson introduced Ray Erickson, a Council member, and Jimmy Kagan, coordinator of the Natural Heritage Program.

Anderson said the Plan is the most comprehensive source of data about Oregon's natural heritage, identifying 804 native ecosystem types in Oregon, making Oregon one of the most biologically diverse states.

Anderson commented that the return on the investment that Oregonians are making into protecting and restoring our natural heritage, in future years will be

directly proportional to our investment in the information we put into the front end of these projects. He said that more than in the past, it is important that we invest in biological inventory, information management, and technical assistance to ensure the work that is going on will be successful. He thanked the Board for their support and leadership on these issues.

State Treasurer Hill moved the Board adopt the revised Oregon Natural Heritage Plan. Secretary of State Keisling seconded the motion and the approval was unanimous.

Consent Agenda

Administrative Rules Request for final adoption of amendments to removal-fill permit rules to: (a) implement 1997 legislation regarding emergency letters of authorization; and (b) make minor changes to multi-year permit provisions. (Final Board Action)

Administrative Rules Request for final adoption of amendments to Oregon's state scenic waterway removal-fill permit rules to conform with the following 1997 statutory changes: (a) deleting the requirement for separate Land Board approval of permits; (b) allowing limited scale, non-motorized recreational prospecting without a permit; and (c) establishing conditions for the approval of small scale recreational placer mining. (Final Board Action)

Administrative Rules Request for approval of a temporary rule authorizing the Director to restrict or regulate public use, or close to public use, lands under the Board's jurisdiction. Request to initiate permanent rulemaking.

Administrative Rules Request to repeal the Oregon Natural Heritage Program administrative rules on fees and charges, OAR 141-050-0505 through 141-050-0525, which are being replaced by a provision on fees for data base queries in the revised Natural Heritage Plan. (Final Board Action)

NHAC Request for approval of (1) the addition of two sites to the Oregon Register of Natural Heritage Resources, one owned by The Nature Conservancy and one owned jointly by the Conservancy and a private party; and (2) the addition of tracts to two sites already listed on the Register, one tract owned by The Nature Conservancy and one owned jointly by the Conservancy and the Oregon Department of Fish and Wildlife.

Minutes Request for approval of the February 10, 1998 meeting minutes.

Director Cleary said some technical changes were needed on the final rules on amendments to the State Scenic Waterway removal permit rules, and those corrections will be made. He recommended approval of all the items.

Secretary of State Keisling moved the Consent Agenda be approved. State Treasurer Hill seconded the motion and the approval was unanimous.

Informational Agenda

- Status of navigability study requests.
- Summary of comments received on the proposed Programmatic General Permit for Douglas and Linn Counties.
- Status report on land sales.
- Preliminary legislative concepts for 1999.

Director Cleary said that written materials are available regarding the Informational Items. He offered to speak after the meeting with anyone who may be interested in those items.

The Board adjourned at 12:00 pm.

John A. Kitzhaber, Governor

Paul R. Cleary, Director