

The State Land Board met in regular session on October 12, 2004 in the Land Board Room of the State Lands Building, 775 Summer Street NE, Salem, Oregon 97301-1279.

Present were:

Theodore R. Kulongoski	Governor
Bill Bradbury	Secretary of State
Randall Edwards	State Treasurer

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

The Governor called the meeting to order at 9:05 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).

The Governor introduced Mike Carrier, former director of Oregon Parks and Recreation Department, as the new Policy Advisor to the Governor on Natural Resources and Land Board assistant, replacing Jim Brown who retired.

Director Hanus explained that the order of the agenda items would be changed from the published agenda and that discussions on the Rogue River navigability issue would begin at 10:00 am.

2. Request for reappointment of Ann Hanus as Director of the Department of State Lands.

Director Hanus thanked the Board for their support and confidence in her as Director of the Department of State Lands. She also thanked the staff for their work over the last four years for the agency. Secretary of State Bradbury performed the oath of office.

Consent Agenda

- 1. a. Request for approval of the sale of State Land Board mineral rights to Peter Kingzett.**
- b. Request by the Oregon Department of Transportation to acquire a permanent roadway easement over and upon the submerged lands of the Siuslaw River, Highway 101, located in Lane County.**
- c. Request by the Oregon Department of Transportation to construct and maintain a permanent roadway easement for a public highway within the right-of-way boundaries of Oregon State Highway No. 97.**
- d. Request for approval of the addition of one site, North Fork of the Owyhee River, owned by The Nature Conservancy, to the Oregon Register of Natural Heritage Resources.**
- e. Request for approval of the addition of one site, Marie Lake, adjacent to the Umpqua Lighthouse, owned by the Oregon Parks and Recreation Department, to the Oregon Register of Natural Heritage Resources.**
- f. Request for approval to appear before the November 2004 Legislative Emergency Board to submit reports required by the 2003 Legislative Assembly and request permission to apply for a grant for South Slough.**
- g. Request for authorization to pre-session file 2005 legislative proposals.**
- h. Request for approval of the June 8, 2004, minutes of the State Land Board.**

Director Hanus briefly outlined each item 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.

4. Ocean Policy Report.

Renee Davis-Born, Faculty Research Assistant at the Institute of Natural Resources at Oregon State University, explained that the Institute convened a Marine Science Advisory Panel to review the draft report of

the U.S. Commission on Ocean Policy and to help provide scientific input to the Governor in formulating his response to the Commission's draft report. Borne introduced Dr. Mark Abbott, Dean of College of Oceanic and Atmospheric Science at OSU and one of the members of that Panel, to discuss the Institute's recommendations regarding the Commission's report.

Abbott discussed changing issues concerning the ocean and the impact of those issues on people and the environment. He said new approaches and new policies in management are needed in the face of very complex and often poorly understood ocean processes.

He said the U.S. Commission on Ocean Policy report proposes a whole new framework for governance, research and education regarding the ocean. He reviewed some of the Commission's recommendations. Abbott said one of the report's recommendation of an adaptive management approach engaging all segments of society is the only realistic response to the challenge of our oceans. He detailed what this will mean for Oregon.

Secretary Bradbury expressed his appreciation for their bringing science to the public. He commended them for the work being done.

Governor Kulongoski stressed the importance of collaboration between groups, saying that this will encourage the approval of grants.

5. Common School Fund Forest Annual Report.

Marvin Brown, Director of the Department of Forestry (ODF), reviewed the Common School Fund Forest Annual Report saying this year's return to the Common School Fund was better than last year's at \$14.3 million, representing 32.5 million board feet, a 23 percent increase in revenue to the fund, with a six percent increase in costs. He credited the better return this year to a higher volume of harvest and a better timber price.

Brown said though it is anticipated that the values received for board feet will stay within the last year's range, planned sales for 2005 are actually down a little. He said this is due in part to the constraints ODF is under with the current Northern Spotted Owl HCP, since it puts nearly half the forest into a status where it is difficult to do any harvesting.

Brown noted that Sun Pass State Forest, 26,000 acres north of Klamath Falls, generates funds to the CSF. He said it is held up as the standard for how these forests should be managed.

6. Update on Elliott Management Plan and Habitat Conservation Plan.

Jim Young, Coos District Forester, provided an update on the Elliott State Forest Plan (FMP) and an update on the Habitat Conservation Plan (HCP).

He summarized the items covered in the April 2003 Land Board update, saying that the 1995 HCP for owls is still in effect and take avoidance is being done for the marbled murrelet. He said the key issue driving the HCP is managing with the uncertainty of the murrelet issue. He added that the coho listing is another key issue.

Young reviewed the FMP process as it has progressed including the summer public meeting schedule. He said they completed the scientific peer review. Eight scientists from a variety of fields provided comments, which he said were generally constructive. Suggestions were made to clarify the document.

Public meetings were held in Salem, Coos Bay and Roseburg to discuss the draft FMP. These meetings were generally lightly attended, but comments were received. He said that appropriate comments have been incorporated into the draft, but no large strategy changes are being made. A second draft will be ready by December 2004.

In response to questions by both Secretary Bradbury and Governor Kulongoski, Young said the HCP and FMP are two separate documents, but they work together. He explained that the FMP is basically the state's strategic plan or framework for how ODF will manage the forest. The HCP has more detail in it, identifying measures that will minimize and mitigate incidental take. The HCP is submitted to the Federal Services to receive the Incidental Take Permit.

Ross Holloway, State Forest Program Director, explained further why the anticipated harvest levels are lower. He said the number of planned sales is one issue. When the actual sales take place is a different number-- some sales are delayed due to issues such as the marbled murrelet. In any particular year, there can be wide differences between what is planned and what is sold. For this reason, he said you must look at averages over five to ten years to determine whether the planned level is being sold. He added that the planned levels being sold are dropping because of murrelet issues on the Elliott.

In response to a question by Treasurer Edwards, Holloway said the markets are beginning to pick up. He said timber bottomed out at \$300-\$350 per thousand, but it has moved up to as much as \$700-\$800 per thousand in recent months.

In regards to the HCP, Young said ODF has been meeting with the USFWS and NOAA Fisheries to establish strategies to add to the HCP to minimize and mitigate incidental take for the species. In addition to owls, murrelet and coho, other species that might be listed in the future are being considered for coverage under the Federal Endangered Species Act. He said the goal is to have the draft HCP done by February 2005. In addition, the NEPA process will be starting and an Environmental Impact Statement (EIS) developed. That process will go through 2005.

Young summarized by saying that the second draft of the FMP will be completed in December 2004. Peer reviews are scheduled for February/May of 2005, with public meetings being held in June/July. The request for adoption by the Land Board is planned for October 2005.

The HCP is being developed concurrently. The EIS will be developed the first half of next year. The NEPA process is ongoing until the Incidental Take Permit (ITP) is received, which they are anticipating in June 2006. In October 2005, ODF will request approval to submit the HCP to the Federal Services for the ITP.

Young gave an update on the Elliott Cost Benefit analysis. He explained that a budget note from the 2003 Legislative Session directed ODF and DSL to analyze selling the Elliott opposed to continuing to manage the forest to generate revenue. Young said the forest consulting firm of Mason, Bruce and Girard was selected to work with DSL and ODF to do that analysis. Work is currently underway and the final report is expected in December 2004. The firm will be considering timberland valuation, economic impacts, and other forest values such as fish, wildlife, recreation, water and air quality.

7. Oregon Department of Forestry budget revision.

Ross Holloway, State Forest Program Director, gave an update on the budget that ODF prepared for its common school forestland management. In June ODF reported on that portion of the budget that had been developed to that point that would eventually be submitted to the Department of Administrative Services. The Board discussed reduction of some limitation and requested, if feasible, that a reduction package be prepared. Holloway said two policy packages are in their 2005-07 agency requested budget—one with a general decrease in common school

forestland limitation for over \$1 million, and the second a package of positions and other resources needed. He said the two represent a net reduction of over \$750,000 in limitation in the common school forestland budget.

8. Annual report on property management activities.

John Lilly, Assistant Director for Policy and Planning, said this report covers a summary of the land management activities undertaken by the Department within the fiscal year 2003-04. He reviewed the number of authorizations for the different classes of lands such as waterways, rangelands and forestlands. He explained some of the management issues the agency will be addressing over this next year.

Lilly said a contract is being negotiated with Cogan, Owens, Cogan for revision of the Asset Management Plan. He said they would be assisted by Mason, Bruce and Girard, as well as Palmer, Gross and Pietka. He said work is scheduled to be underway shortly.

9. Update on Removal-Fill Program and State Programmatic General Permit.

Director Hanus said the Statewide Programmatic General Permit is close to completion. She said this is a major part of the Governor's initiative for streamlining. She is hoping issues with USFWS and NOAA Fisheries can be successfully resolved, and the Colonel will sign the permit by the end of the year.

Hanus discussed the customer service survey results, which rose from 61 percent during January through June of 2003 to 76 percent satisfaction for the period of January through June of 2004.

10. Navigability update on other rivers.

Director Hanus said the next navigability hearing would be regarding the John Day River on December 14. This hearing is to be held at the Hotel Condon in Condon, Oregon.

11. Honoring Jim Brown for service.

Director Hanus showed a framed map of the state of Oregon depicting state land ownership, which was signed by the Land Board. This map would be presented to Jim Brown in recognition of his service to the State of Oregon.

3. Request for authorization to initiate a navigability study of a portion of the Rogue River from Grave Creek (River Mile 68.4) to Lost Creek Dam (about River Mile 158).

Director Hanus said this item regarding initiation of a navigability study on the Rogue River had been discussed at the June 8 Land Board meeting. At that meeting, the Board said the public needed more information regarding why the issue of the study was being considered at this time after it had not been brought before the Board for such a long a period. DSL mailed a letter with this information on August 10 to all owners of record along the ninety-mile segment of the river under consideration, as well as to other interested parties.

Hanus said the agency recommends the Land Board 1) find that a broad and substantial interest exists in determining navigability of the Rogue River from Grave Creek to Lost Creek Dam and 2) direct the agency to conduct a study to determine the navigability of that portion of the river.

Roger King, property owner along the Rogue River, said he is opposed to the navigability study. He named several state legislators, as well as Jackson and Josephine County Commissioners that he said are also opposed to the study being done. He said he has spoken with over 50 landowners adjacent to the Rogue River who are opposed and mailed a petition with 61 signatures in opposition.

King said there is no broad and substantial public interest or economic justification for the study. He said there are other ways of addressing problems on the Rogue River. He said the landowner and general public need to be educated as to their rights in using the river. He gave suggestions on how that might take place. He added that enforcement of present laws is needed such as those against trespassing, littering, and building ramps and docks without permits.

He said the state would be taking land from the landowner, which could cause lawsuits. He asked that the study be delayed until all other options are tried.

John Garren, Director of the National Organization for Rivers (NORS), said his agency was organized to protect the rivers and the public's legal right to use them. He reminded the Board that upon statehood, the state's Admissions Act provided that all navigable rivers in Oregon became public property to be shared in common with all the U.S. residents. He said public officials are obligated to protect these rights under the public trust doctrine. He discussed some of the navigability tests.

Mr. Garren believes the law is clear and stated that property owners who think they own to the center of the river need to be educated. He said the County Sheriff also needs to understand the law.

Jennie Bricker, attorney for House of the Metolius Resort, spoke of monitoring legislation they expect will come before the 2005 Legislature, which she said would create and fund a recreation management program that would make this navigability study process unnecessary. She said it is far more effective to manage recreation than to try to decide the actual tidal ownership of the bed and banks below the water. She requested the Land Board hold off on the study and consider whether resources could be better spent on a collaborative solution with a focus on river recreation management.

Secretary of State Bradbury said he is strongly supportive of a bill being brought back to the Legislature regarding navigability, but said until such a time as that is enacted into law, the Board has a responsibility to proceed with the navigability issues.

Treasurer Edwards said they worked hard last session to come up with a compromise. He said there are potentially 100 rivers that could fall under the process. He asked how other states such as Idaho have resolved the issue.

Bricker said she believes a solution is possible, adding that this is not brand new ground that has to be covered. She said the trick is to craft legislation that would solve the takings problem and at the same time preserve the floatage easement, which she said is a comprehensive public right of use. Bricker said there are a number of reasons why the Board should not proceed with the navigability study at this time.

Treasurer Edwards said this is a legally complicated and emotional issue. He said this Board and others before on the Land Board have heard the discussions surrounding navigability. He said, though the Board wants to find an alternative solution, at this time they must follow the law as it is laid out.

Sue King, property owner in Eagle Point, read a letter from the Jackson County Board of Commissioners opposing the navigability study. She commented that she has a hard time understanding spending funds to do a navigability study that so many feel is unnecessary, with the current economic climate.

Lawrence Edwards, Executive Director for the Coalition for Oregon River Rights (CORR), said their premise is that the public has the right to float, anchor, wade and walk along the banks of any river to the high water mark. They do not agree with a pilot program, but said Oregon is ready for a comprehensive solution, and it is time for the Legislature to do the right thing. He stated that two Supreme Court decisions in Oregon have declared the Rogue River already navigable. He added that the Supreme Court ruled that once a river is declared navigable it must remain so forever.

Edwards said that Montana and Idaho have done a reasonable job of solving this issue to the benefit of both public and landowners. In Montana, once the issue was resolved and people understood their rights, tourism burgeoned, since people felt free to plan vacations knowing they can recreate on any of the rivers or streams without threats of lawsuits or trespass violations.

Responding to the issue of a potential "land grab" by the State when declaring rivers navigable, Edwards said the state of Oregon has a dormant title claim to any land under a navigable stream.

He said that CORR is working toward drafting a bill for a solution that will codify the floatage easement and protect the upland property owners. In the meantime, he urged the Board to go forward with the study, saying it is the only legal recourse at this time for the people of Oregon.

Pamela Hackett, property owner in Grants Pass, said her deed says she owns to the middle of the river. She believes this navigability study is a back door way for a land grab. She commented that she has never seen an article in their local paper saying someone has been arrested or cited for fishing on the bank of the Rogue River. Hackett said anglers do not have access problems, and they welcome fishermen to stop and fish.

She believes a few wealthy hotel owners and jet boat owners that want this stretch of the river commercialized will benefit from this study.

She concluded by saying if the state wants a portion of her river, they should compensate her for it.

Phil Donovan, Association of Oregon Steelheaders, said considerable confusion exists about this stretch of the Rogue River, and no one has clarity of the law on this. He said that is why the Steelheaders put forth this request for a study. He believes there is a broad and substantial public interest, and a thorough research of the stretch of river is needed, which this study would provide.

Art Israelson, also of the Northwest Steelheaders, discussed numerous court cases dealing with navigability. He discussed the Montana Supreme Court ruling that says that no owner of property adjacent to state-owned waters has the right to control the use of these waters as they float through their property. He said the public has the right to use waters and the beds and banks to the ordinary high water mark.

He said ORS 274.025 grants that the title to the submerged and submersible lands of all navigable streams and lakes in the state now existing belong to the state of Oregon. He added that the Legislature found submersible lands lying between lines of ordinary high and the ordinary low of all navigable waters within the boundaries of the state.

Israelson asked the Board to approve the navigability study.

Secretary of State Bradbury moved the Land Board authorize the initiation of a navigability study of the portion of the Rogue River from Grave Creek at River Mile 68.4 to Lost Creek Dam, at about River Mile 158.

State Treasurer Edwards seconded the motion. Governor Kulongoski asked for discussion. Treasurer Edwards said the Board wishes to find a long-term solution to the issue. He said that is the ultimate goal, but reiterated that the Board is operating under the current law. That does not stop the opportunity to find that long-term solution.

Secretary of State Bradbury concurred with the Treasurer, saying they would love to see a different solution to this problem, but until such a solution exists, this is the process they must follow.

Governor Kulongoski said he remains committed to see a solution that will provide certainty as to the rights of both citizens and property owners. He said he has dealt with the navigability issue for the past 30 years, having been part of the litigation on the Chetco River as Attorney General of the State. He said both the other Board members are committed as well to having a floatage easement concept through

legislation. The Governor agreed with Mr. Israelson that the legislature has recognized that principle. He stated if the floatage easement has not been codified by the legislature, it is in Oregon case law.

He discussed the frustration of attempting during the last Legislative Session to get the parties together to help resolve the navigability issue. He concluded that neither side would give enough, since both sides believed they would win. He said that the best thing to do is to go forward with the navigability study request, hoping that the parties will sit down and come to some reality check about how to find the middle ground on the floatage easement issue.

Bill Cook, Assistant Attorney General, said the Land Board needs to state the grounds for its decision, that there is a broad and substantial public interest. He asked whether that is part of their motion. Secretary of State Bradbury said it was part of his motion. The motion was unanimously approved.

Director Hanus announced a reception after the meeting. Governor Kulongoski adjourned the meeting at 11:00 am.

Theodore R. Kulongoski, Governor

Ann Hanus, Director