

June 25, 2004

DEPARTMENT OF STATE LANDS

TRANSCRIPT OF TESTIMONY

JOHN DAY RIVER DRAFT NAVIGABILITY STUDY REPORT HEARINGS

Glover Memorial (Senior) Center
Fossil, Oregon
June 22, 2004

3 PM to 5 PM Hearing

Attendees 40

Susie Anderson	Condon, Oregon
John Asher, Commissioner	Fossil, Oregon
Dan Bishop	John Day, Oregon
Jim Brown	Kent, Oregon
Judge Jeanne Burch	Fossil, Oregon
Eric Carlson	Salem, Oregon
Thomas Cutsforth, District Attorney	Fossil, Oregon
Peter Dobitt	Bend, Oregon
Duane Doran	Portland, Oregon
Royce Dotson	Prairie City, Oregon
Lawrence Edwards	Silverton, Oregon
Richard J. Eldred	Mitchell, Oregon
Chad Freeman	John Day, Oregon
Michael Greenbaum	Vida, Oregon
Mal Hawley	Mitchell, Oregon
Heather Hepburn	Bend, Oregon
Todd Hoodenpyl	Condon, Oregon
Art Isrealson	Portland, Oregon
Charles Kunde	Lake Oswego, Oregon
Brian Meece	Bend, Oregon
David Messenger	Condon, Oregon
Vic Miller	Condon, Oregon
John Morris	John Day, Oregon
Craig Obermiller	Prineville, Oregon
Ole Olsen	West Linn, Oregon
Louie Pitt, Jr.	Warm Springs, Oregon
David Rouse, Sheriff	Fossil, Oregon
Bob Stark	Portland, Oregon
Janice Steele	Bend, Oregon
Mike Steele	Bend, Oregon

Adam Temple
 Kent Toombs
 Theresa Ward
 Tina Welch
 Wes Whelchel
 Matt Williams
 Gabe Williams
 Marty Wilson
 Sara Leigh Wilson
 Jim Woodward

Mitchell, Oregon
 Lebanon, Oregon
 Fossil, Oregon
 Prineville, Oregon
 Spray, Oregon
 Mitchell, Oregon
 Mitchell, Oregon
 Crooked River Ranch, Oregon
 Crooked River Ranch, Oregon
 Mitchell, Oregon

Questions Asked

- Is DSL doing this navigability study to clear up title; that is, to determine if the federal government holds title to the bed and banks of the John Day River?
- Did all of the land come from the federal government through land patent?
- If the Land Board asserts a claim of ownership to the bed and banks of the John Day River, how can it do so? How can the state go back on the original transfer of the land by the federal government since it had forfeited all its rights and interests to that parcel of land at the original time of transfer?
- What will a declaration of navigability by the Land Board mean to property owners along the John Day River?
- What access will the public have to the John Day River if it is declared navigable? Will access to the John Day River be allowed through private property or only by means of the waterway?
- Who is going to determine the location of the line of ordinary high water and how will that determination be enforced?
- What constitutes a “dispute” to warrant an on-site determination of the line of ordinary high water by DSL staff?
- Who is going to pay for any tax-related surveys required to adjust the change in ownership in the land?
- How will DSL adjust the line of ordinary high water when the river changes course?
- Does DSL know how many property owners along the John Day will be affected by a possible declaration of navigability?
- How will an assertion of navigability affect prior land trades between individual landowners and the BLM?
- What is DSL’s burden of proof in proving navigability?
- Is it an equally valid assumption based on the evidence presented in the Draft Navigability Study Report that the John Day River was not navigable?
- Are rafters and canoeists who currently use the John Day River considered a form of commerce with respect to the federal test requirement “highway of commerce?”
- Does DSL consider rafters and canoeists a “commercial-type” of travel?

- Why does the study cover only the segment of the John Day River from Kimberly to Tumwater Falls?
- Why didn't you consider a longer segment of the John Day River?
- Is the time of sufficient draft to allow canoes to float just between January and June or when?
- Did DSL determine that the John Day River was navigable for only one day a year or for a longer period of time?
- Did DSL determine that the John Day River is navigable for less than the majority of a year?
- If the John Day River were navigable for just one day a year, is that enough for a declaration of navigability?
- How does the construction/use of splash dams impact of the determination of its navigability?
- Doesn't anyone other than the Northwest Steelheaders have a say in how long of segment of the John Day River should be studied?
- What difference will it make to the public and landowners if the Land Board determines that the John Day River is navigable?
- Is a navigability study an expensive determination?
- If the Land Board determined that the John Day River is navigable, what implications will this assertion of public ownership have on tributaries to the waterway?
- Has there been any court cases testing the impact of an assertion of navigability on tributaries to a waterway?
- What happened to SB 928 concerning the John Day River?
- Is it the opinion of the Land Board that the plan contained in SB 928 is not viable? Why can't this plan be resurrected?
- Is the Land Board is operating under a time limit concerning navigability studies?

Testimony Presented

Ole Olsen

West Linn, Oregon

"I've got only five of these, and it's for people...you guys are together? There kind of part of my documents? For people that like legalese. I've got two more."

Hearings Officer: "May we have one too for the public record?"

Ole Olsen: "I'll determine that just at the end. If it's the legalese part of it. I want to...after I give my testimony I'll determine the process. Anybody else? Can I sit here?"

Hearings Officer: "Certainly."

Ole Olsen: “My name’s Ole Olsen. I’m a long time friend of Jim Woodward. I’ve been to this county quite a few times. I’ve testified before Wheeler County Court. I know a lot of you. I’m here to testify in opposition to this. I believe that the statute referring to navigability done in 1995 type of stuff. If you believe that that is correct, you’ll lose. If you believe that the administrative laws by the DS – the Division of State Land, that exists right now is correct, you will lose. If you believe what John Lilly told you in his presentation, you will lose. This is a title grab, not a navigability study. I have a friend of mine that had recent conversation with the governor who told me that he’d been waiting for what I would call a position paper from you that owned the property on this to address the issues appropriately in a document and properly presented to him addressing the thing in proper stuff. OK. I believe, and I will volunteer to assist you in addressing that position paper if you so decide. I live close enough to Lewis & Clark’s law library to find case law; to find anything you want about this thing any place you want in time. And I will be willing to commit a certain amount of time to it. With that said, I’d like to start my presentation.”

“I’m going to have to read a little tiny bit so you understand so you understand what’s going on here. In the Act of Congress admitting Oregon into the Union it says, “The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon so far as the same shall form a common boundary to said state and any other state or states now after to be formed are bounded by the same. And said rivers and waters and all navigable waters of the state shall be common highways and forever free as well as to the inhabitants of said state as to all other citizens of the United States without any tax, duty, or impose of toll thereof.” I then go a little bit fast forward so you guys that are got the books, you got to follow me. On the next page it talks about school lands. They said they gave the section number 16 and 36 to Division of State Lands to watch for your schools. And then on the right hand side, please pay attention to this. “The people of Oregon shall provide an ordinance irrevocable without the consent of the United States that said state shall never interfere with the primary disposal of the soil within the same by the United States or with any regulations Congress may find necessary for securing the title in said soil to bonafied purchasers thereof.” If you believe that you’re supposed to follow the laws, then why are we here? If John Lilly says that he is a man to comply with the laws, and this is the fundamental thing which started our state in, what, February 14, 1859, evidentially some people have not properly looked into the processes that we have done. They’ve gotten things all confused, and that’s why I’m here.”

“I actually went to the law library after even hardily looking at things under the assumption that if I were going to be asked to do this like the Division of State Land was asked to participate, to see what I could do irrevocable of what the Division of State Lands did so I wouldn’t be done. And my outline became almost identical. The first thing I went and found was the chronology and history of Oregon out of the Blue Book. And it’s right in the front of the next pages.

Then it goes on and it has some of the history of Oregon. And then it goes on and the first that it says specifically about John Day is, they're building some roads. The third connection to Dalles, via the John Day watershed to Boise. Under the terms of the grant as soon as the company had completed a stretch of road it could apply to the governor for certification of its success. The governor's designates official would visit the route. If the road would deemed suitable for wagon use, the company would receive three square miles of land for every mile of road. The tally of the five roads ran into millions of acres. It seems to me, a hundred and what fifty years later we're going to take away what was given to'em? Of all their hard work. Whooh! Good thing it's not my property. Now we're going to get down to some facts. In the laws that were adopted, the federal government adopts laws and restrains things. One of the things they adopted was called 33 CFR 329. And it's called "Definition of Navigable Waters of the United States." If you believe what John Lilly told you, you will loose. Here is the definitions in brief. Done by the statutes that the state government has already established and has been around here for, oh my gosh, for an awful long time. This is done in, you know, 1980s – I don't know where, how long ago this particular part of it was. And the thing it goes on. And one of the things you gotta recognize. Here's the fundamental problem. There are three types of navigability: federal, state, private. The navigability that was referred to here, in this, is federal navigability. All information I have is, and all information that the Division of State Lands is is the only federal navigable rivers in the state of Oregon are the Columbia River and that portion of the Willamette River. Now I live along the Willamette River. Now, what happened was, is, obviously, somebody got mixed up. So here's how you do it. Interstate navigability is for interstate commerce. That's under the Commerce Clause of the Constitution. And we have, it's under the direction of the Army Corps of Engineers and they have established all the laws and rules necessary to establish it. Here's interstate deal. And it says, and I'll just going to read a few things. "Private ownership of lands underlying the water body or of the lands through it runs does not preclude a finding of navigability. Ownership does become a controlling factor for private constructed and operated canals is not used to transport interstate commerce or used by the public." In other words, in going on to tell you, interstate is regulated by Congress, is, that the power and control by Congress is regulated by the Army Corps of Engineers enforced, enforced probably the Army Corps of Engineers and the Marines, and the people who go out in ocean. OK? As we go on, OK, what this does is start to tell you how navigability is actually done. Although conclusive determinations of navigability can be made only by federal courts. Those made by federal agencies are nevertheless accorded substantial weight. Now this, the Division of State Land is not a federal agency and your, you, your courts around here are not federal courts. We have a district, we court for the state of Oregon, a federal court for the state of Oregon. I've been there. It is therefore necessary that when jurisdictional questions arise district professional personnel carefully investigate. On the last page it gives you an outline that you have to submit to the engineer of the Army Corps of Engineers who establishes and assist you in establishing

navigability. In order to complete this process, it has to go back and be approved by Congress.”

“Let’s go on. Under these things there’s a process and the stuff that you get. You can find a lot of stuff in the process called the United States Code Service – USCS. And for example, you start to do it and you’ll see something about Oregon called the Mill Slough. They requested and got non-navigability. I live by Lake Oswego. They requested and got non-navigability. Under the present rules that were introduced here you should be able to go back and get Lake Oswego to be declared navigable because the Division of State Land would have to go back and declare it navigable and oversee what has happened and all the people along Lake Oswego, I will guarantee you, will come unglued and they will get an attorney to help solve this. To go on and start talking about this stuff in great detail. In case of navigable streams, so you got to get the picture. We got federal navigability. We got state navigability. And we got private navigability. So when somebody says navigability, you got to which one are you talking about. ‘cause they’re all different. The state in fact can control navigability within the navigable streams within a state. They can actually work with the government in a stream that was previously state navigable, can be declared to be useful for the federal, for interstate commerce, and then changed after time if things change. Private property can still be part of it. And it gets to be a strange bunch of equations. And I’m not here to tell you what to do. I’m here to trying to get you to change thought process a little bit and say, “Hey, wait a minute.” You got a battle on your hands. And the battle is not like you think. You’re being tricked. In case of navigable streams, state authority is subject to paramount authority of Congress to This is, this is. This is case law. The same case law that they’re describing. I brought it all. I went and got everything. You can look at everything that they said. You can look at everything that anybody else said. I brought ten copies. I’m going to give five today, four tonight, and I’m going to keep one for myself. You want any more you’ll have to work with me. It was very time consuming to prepare this. I spent five days at it.”

“In case of navigable streams, state authority is subject to paramount authority of Congress to control navigation so far as may be necessary for regulation of commerce. Among states, and with foreign nations, exercise of the authority being subject in its turn inhibition of the Fifth Amendment against taking a private property for public use without just compensation. That’s what’s happening here. You’d better get an attorney that knows how to go the Court of Claims. The right of federal government to regulate commerce, under Commerce Clause of the Constitution, confers supreme authority over navigable rivers and streams for purpose of regulating navigable navigation and all that pertains thereto. And this authority may not be interfered with the laws of states. These guys are talking about a law that got adopted in about ’95. There were all kinds of other things. I haven’t got time to argue that today. That is adopted laws. They refute a whole pile of things that constitution and the law that directed you to do, and it’s right came right out of the law library, Lewis & Clark law library, and I copied it direct.

It's recent. If you don't like to believe this, you can go look it up yourself. Private ownership of property and beds and banks of navigable rivers is subject to exercise of public right of navigation. So you can have private property, but hey, you gotta watch it. And government control and regulation necessary to give effect to that right is fully established. The United States versus Cress, 1917. Most state and riparian owners in case of navigable waters hold waters and land under their, under them subject to power of Congress to control waters for purposes of commerce. Congress possesses navigable servitude with respect to navigable waters. All navigable waters are under the control of the United States for the purpose of regulating and improving navigation and all legal title to shore and submerged soils in various states and individual owners under them it is always subject to servitude in respect of navigation created in favor of federal control of constitution. Do you believe that the State of Oregon can have the right to declare your property to them because they declared it navigable when the case law exists that says otherwise? Let's go on. Waters entirely within state navigable to vessels are not quite, are not public navigable waters of the United States. They're getting this all mixed up. And therefore are not subject to federal regulations. If the State of Oregon wanted to create a state navigability process, they have the right to do so. If the river in front of your place has been deemed to be a state navigability thing, it has within its process the power and right to do so. Can you imagine that we didn't even create this process until 1995 and you think that it was done correct and be able to do back in time? How many of you guys have ever heard of the ex post facto law? The ex post facto law say you can't go back in time. You can only go forward. If they pass a law, it can only go after that point on, and as part of our Constitution."

"The test of navi, navigability generally. That is what they are talking about. It's Part 15. It says right here, "What are navigable waters of the United States and contra distinction to navigable waters of states. It depends on whether stream, in its ordinary conditions affords channel for useful commerce." If you're going to argue constitutional law and you're going to argue case law, you'd better get somebody that knows how to talk. I don't. The test of navigability of river is whether in its natural state...now compare between what they say and what this says, is used or is capable of being used as highway for commerce. Federal. Over which trade and travel is or may be conducted in customary modes of trade and travel on water. Navigability in sense of law is not destroyed because a watercourse is interrupted by occasional natural obstructions or portages. Nor need navigation be open at all seasons of the year or at all stages of water. You gotta take the good with the bad. Waters are navigable in fact where they are use or susceptible to being used in their natural and ordinary condition. Term, navigable waters of the United States as referenced to commerce in substantial and permanent character to be conducted thereon. River having actual navigable capacity in its natural state and capable of carrying commerce among states or is power of Congress to reserve for purposes of future transportation even though it is not presently used for such commerce and be acceptable for such use and so forth. Now I have here all the case law covering all of the

issues that I suspect exist. In there for example it talk about Mill Slough in Oregon. It went to the federal government and had their slough non-navigable. Here's what Lake Oswego, Oregon, went to the federal government and had their lake declared unnavigable. They did not go to the Division of State Lands. I am, in here, you can get down to heavy duty stuff because it now starts talk about things that you are talking about. Congress control of navigable waters. Congress may. Congress alone. Congress's seldom..."

"I'm going to read this last one...it's not the end. Relationship with state powers. While states have until Congress acts in interest of foreign and interstate commerce (tape end/change sides) entire and...look it. You'd better get yourself some help. I'll help you. You'll have to ask me. I have more here. I think that I've said enough. It goes on and gets into things and I get back in and I covered the three chapters, three chapters. 402 doesn't have anything to do, 403 is obstruction of navigable waters. Um..I think that you ought to recognize that my friend is telling you what the truth is. You've got to do some issues. You've got private rights, public rights. Private river. Right now it's a private river. It's going to be made a public river if you follow this process. Right now, private private title; it will become state title. It's now probably the best I can tell, private navigable. You're going to try and make it some combination of interstate and intrastate navigable without any laws or regulating it on the intrastate side. There are no laws. They haven't adopted them yet. The only law they adopted is the one to take away your title. I discuss ex post facto. What is the problem? You'd better figure it out. It's not what it says. You'd better learn how to solve problems. And you'd better learn how to deal with these agencies because..."

"I live in West Linn. They're doing it to my neighbors. Right there in West Linn. They means the Division of State Lands. They have determined my area that every little puddle; every place where water sits is a wetland. Now everybody thinks wetland. Now they've changed it to wet land. If you have any wet land, you're in trouble. And that isn't all. You ought to see what's coming down the pike from the, the Department of Land, I mean the Division of...I can't think of the name. Department of Land Conservation and Development is going to keep coming down on your case. If you don't get a process to solve this thing and send some legal entity and process, you will loose your property and they will continue to loose it and you'll keep on losing it. I hope that you have a chance to read some of this. I hope that a, I hope I can get your attention, because if you don't you will loose. OK, this process cost, the process of learning this cost me personally a million dollars. An agency changed the definition of certified and approved. And they walked around with that and walked around with that until I lost a million dollars. And part of the money was from Jim Woodward. That's why I'm here. I saw it. I went to the court. I told them it was coming. I offered to solve the problem for \$60,000 five or six years ago. No, I never got a call. I got irritated. I was supposed to be placed on the mailing list. That's a violation of the public meetings laws. I was placed on the mailing list for a while then I was

taken off. I will be giving these guys a copy of what happens when you're not on the mailing list. Example..."

Hearings Officer: "Sir, if..."

Ole Olsen: "I can be done."

Hearings Officer: "Thank you."

Hearings Officer called on Gabe Williams and Vic Miller. Neither person wanted to provide testimony at the time.

Jim Brown

Kent, Oregon

"It looks to me like that that makes it so you can't camp. At high water, it makes it so you can't camp without trespassing...according to your map even."

Art Israelson

Portland, Oregon

"I am the Association of Northwest Steelheaders' River Access Director. I'd like to read short, five short laws to you. The United States Supreme Court has said the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the state, respectively. This is saying that land deeds granted by the U.S. Government prior to statehood would not have included the beds and banks of navigable waterways. Oregon was invested with absolute title at statehood to an undefined quantity of riverbank. Number two. The United States Supreme Court has said the state's title to land under navigable waters is a title different in character from that which the state holds in lands intended for sale. It is a title held in trust for all the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, have liberty of fishing therein, freed from obstruction, interference of private parties. Public trust land is not like other property. The United States Supreme Court has said the state's title to lands under navigable waters is different in character than that which the state holds and intended for sale. The state might sell ordinary property for the fair consideration for the public purpose that is enhancing the state (unintelligible). Such a showing, however, would not surprise to validate a dispensation from public trust. Because a state may not dispose of trust resources except for the purpose consistent with the public's right of use and enjoyment of those resources. Any public trust dispensation must also satisfy the state's special obligation to maintain the trust for the use and enjoyment of present and future generations. A state as administrator for the trust in navigable waters on behalf of the public does not have the power to abrogate its role as trustee in favor of private parties. Although Oregon has over 140 years neglected its navigable claims, they remain

totally valid today. The United States Supreme Court has recognized that there is no unfairness or immorality in the state's pursuit of ownership claims based on the equal footing doctrine...even claims that have remained dormant for decades. The generations of trustees that have slept on public rights does not preclose their successors from awakening. In 1919, a local newspaper in Grant County carried an article, and I have enough copies here I hope for everybody, I have 25, about trespass issues on John Day River. Thank you."

Joyce Brown

Kent, Oregon

"I would just like to know why, where the law is that allows these people to litter as they go a river, the John Day River? You know, who's going to come along and pick up all the debris. It's not where it's accessible to the highway or anyway except by river travel. And who is responsible for policing this and cleaning up the mess the rafters and boaters leave behind?"

Matt Williams

Mitchell, Oregon

"I'd like to, who's going to take care of, you know, like the riparian zones and weed controls and stuff? The State of Oregon? Who's going to take care of the weed problems and the riparian zone? You know, because when you get traffic on the banks and stuff, which you will have when they're unwilling to travel, you'll have a problem with it the State of Oregon's trying to correct. And that's a big concern. You know, we spend a lot of money on that stuff that you got. So who's going to take care of that? The State of Oregon doesn't have enough money for the weed board as such to patrol the weeds in (unintelligible)."

7 PM to 9 PM Hearing

Attendees 28

Judge John Asher, Commissioner
 Renee Baker
 Ken Bond
 Judge Jeanne Burch
 Eric Carlson
 Donald R. Cossitt, County Assessor
 Duane Doran
 Royce Dotson
 Lawrence Edwards
 Dennis Goodie
 Neil B. Hansen
 Heather Hepburn

Spray, Oregon
 John Day, Oregon
 Mitchell, Oregon
 Fossil, Oregon
 Salem, Oregon
 Fossil, Oregon
 Portland, Oregon
 Prairie City, Oregon
 Silverton, Oregon
 Fossil, Oregon
 Kent, Oregon
 Bend, Oregon

Todd Hoodenpyl, Senior Trooper	Condon, Oregon
Art Israelson	Portland, Oregon
Judge Sherry Kaseberg, Commissioner	Wasco, Oregon
Judge Mike McArthur	Moro, Oregon
Herb McKay	Antelope, Oregon
Ole Olsen	West Linn, Oregon
Rita Rattray	Condon, Oregon
Judge Dennis Reynolds	Canyon City, Oregon
David Rouse, Sheriff	Fossil, Oregon
Sidney Seale	Condon, Oregon
McLaren Stinchfield	Condon, Oregon
Robert Stark	Portland, Oregon
Gary Thompson, Commissioner	Moro, Oregon
Kent Toombs	Lebanon, Oregon
Mike Weedman	Wasco, Oregon
Jim Woodward	Mitchell, Oregon

Questions Asked

- The figures reported in the last two paragraphs on Page 22 concerning the volume and number of logs floated down the John Day River by the Chee Lumber Company are inaccurate. If this information is inaccurate, what else in this draft report is not true or that DSL chose to turn a blind eye to?
- On Page 7 is what appears to be a typographical error concerning the date the Legislature adjourned. Is this so?
- Who did the reporting on the Chee Lumber Company? Who submitted that evidence?
- Are the basic documents that were used as sources of information in preparing the Draft Navigability Study Report available to the public?
- What is different about the process here and what happened on the Sandy River?
- What right do the attendees at this meeting have to think that DSL will listen to anything said any more than the agency did when conducting the Sandy River navigability study?
- What other agencies are involved in the development of the BLM's John Day River management plan?
- If the Land Board asserts a claim of navigability on the John Day River, will DSL adopt a permit system for river users?
- How is the Marine Board is involved in the John Day River?
- Who will deal with issues of trespass along the John Day River if the Land Board asserts a claim of navigability?
- Will the federal government consent to the Land Board's claim of ownership should the waterway be determined to be navigable?
- How do you fund policing of the John Day River?
- What is the purpose of this study?

- Is it correct that once a boundary is determined and agreed upon between two parties it can't be changed?
- If the Steelheaders were given an opportunity to buy five miles of river frontage, would they have bought it? Would they make this property open/available to the public or only members?
- Could anyone else have requested this navigability study other than the Northwest Steelheaders? Who else? Could landowners have asked for this study?
- Could you give more information concerning how DSL defines the word "susceptible?"
- What degree of probability is meant by "susceptible?"
- Does "susceptibility" mean "more likely than not," or "it's reasonable doubt it's susceptible," or "it's probable?" So DSL does not assign any level of confidence to the use of the term "susceptibility?"
- If there was just one use, would DSL and/or the Land Board conclude it was navigable?

Testimony Presented

Mike Weedman

Wasco, Oregon

"The other thing is I think you need to go in, and if you really believe in the Constitution of the United States, and in your heart, we're trying to justify and rationalize all this crapola. Instead, I believe in it. Then what you are doing is condemning a man's land and you condemn and pay him for it. Just don't take it away from him.

Unidentified Person

"But you haven't even....this this document that we read hasn't shown even one (use). There's not one use in here that I can remember, now I might be shown wrong, that there was a successful commercial venture. They all ended in tragedy. Now that's commerce, but it's not the kind of commerce that we all would like to have when we think of commerce. You haven't shown us one."

Judge Jeanne Burch

Fossil, Oregon

"I have a short statement. My concern is that if the John Day is declared navigable and the ultimate increase in recreation over what we have now, that it will place a hardship on our local resources, particularly our law enforcement, search and rescue, and fire. And the cost of that will ultimately come back to the citizens of my county. So I'm very very concerned about that and I know that it maybe doesn't address what happened in 1859, but I have to know, we have to work on what's going on today."

County Assessor Don Cossitt
Fossil, Oregon

“I’m the County Assessor and you’re looking at my staff. And Wheeler County is, is growing, probably not as great as what we see in Deschutes County. But we’re growing and things are changing to a certain degree and so, needless to say, I’ve become swamped. And what I see of this issue, navigability, trying to define that area, what is it, who can use it, who’s going to pay for it, what are the values, things like that equate to me as a workload issue that cannot be resolved. And not to mention that there’s a survey involved. And I’m told by our county surveyor that that could take a deputy and millions of dollars to get that job done. We have 84 miles plus or minus of John Day River in Wheeler County. That, that concerns me. The other issue is will this, if this goes through and there are trade-offs of land owners, will this be considered “errors and omissions” and there be five years of back taxes paid? Most of the productive river in Wheeler County, this year will be, have a taxable of \$770 per acre. And the reason why I say that is because I’ve heard others saying it’s only a \$1.00 an acre. Well that’s not true in Wheeler County. The other thing is Wheeler County is 98.5% exempt or deferred. That means that 1.5% of our county is a residential base. We have a commercial base that is “Mom and Pop.” In other words, people came here because they liked the area and they bought a job. They’re not doing very well. We have no industrial base; we haven’t since 1978. What we have is the opportunity to change some of our exclusive use which is the two zones that we have in Wheeler County: exclusive timber and exclusive farm. All of the river’s exclusive farm or government owned – or it has been disqualified for the deferral for one reason or another. So what, what that means to Wheeler County in a planning context is the only thing that we have currently in our hands to use to generate future revenue is to change zones, particularly the river and our two highways that come through our county. But particularly the river. And change those zones so people can come buy smaller acreage and build a nice home with a nice view and if this happens what happens that process? I think Wheeler County is taken out of the loop for any future development. I hate to make it that general, but you get the idea. And so I have those kind of concerns and plus trying to value these properties that now no longer have for all intents and purposes frontage.”

Judge Sherry Kaseberg
Wasco, Oregon

“I’m a Sherman County Commissioner. I live about eight miles west of Wasco. I want to point out to all of the state agencies that may be involved here that the impact of public policy on rural places and people is a grave and serious concern. And you’ve heard this all day, I’m sure. It’s just an important bit of information that needs to go up the pipeline to the top. You asked some questions and I’ll answer them. Does the John Day River meet the federal test?

It meets the susceptibility test, and I assume that's all that's important. The factual evidence, however, is not all correct. And your interpretation of history in this document is adjusted inappropriately and inaccurately. The information provided will be used for decades to come as fact. And people who've never been here will believe everything you print. So it's all the more important that you maintain credibility by bearing the burden of proof. You overstate the John Day River commerce in order to call it navigable. You concluded that it's navigable based on the supposition that the John Day River flow was likely greater at the time of statehood than it is today. And then I might ask, "One would conclude it might be less navigable now." These statements, as well as citing the failed commerce of the sternwheelers, the log drives, the one-time exploratory ventures, are not credible examples of navigability. So your errors cast increasing doubt on your credibility. There were some dams, for instance. You didn't manage to remember that and you, your citing commerce in much the same way as the short-lived sawmill on the Harris Place on the Deschutes River that drove the navigability designation there. Commercial ferries, of course, crossed the river; they didn't go up and down it. The assumption about state ownership may amount to something like a taking. Then you ask about other evidence to refute or support this study. The canoes are an issue in my mind and you state that you can't prove they were here. But the historians that you refer to, Murdock in particular, shows a map of the trail coming up the east bank of John Day River from the mouth. The old-timers in Sherman County remember Indians in the late '70s, early '80s coming through with ponies trading fish for produce, that kind of thing. And I think you missed a fact. I just have to tell you that was a cattle rancher that tried using an Army surplus amphibious truck to cross the river with his cows. I would urge you as state agencies to acquire a positive attitude of good neighborliness. As a county commissioner, I rarely see state agency people. They come and go through our county in troops and individually and I never see them. It would be a great move towards support and collaboration if that could be changed. Much like some other concerns, I'm concerned about the increase in funding that's going to be required for law enforcement and public service groups and point out that in Sherman County, the search and rescue group is an all volunteer group. The ambulance is an all volunteer group. And the ambulance cannot get to the John Day but at two sites in our county. I guess I want to simply emphasize that the agencies that will share in this, in the management of this river if navigability is determined must talk to the people who live here."

Judge Gary Thompson
Moro, Oregon

"I've got a problem, a big problem with this navigability thing, and actually the taking of this river. I've been working with SWCD and ASCS trying to bring the river into the Clean Water...to apply with the Clean Water Act. We have two farmers right now that have got trees and brush planted along the river that are receiving approximately \$40,000 a year of federal funding and with this

taking...are the farmers going to have to pay that money back or are they going to be able to continue to receive the funds or what? That is a big question. Another problem I have is does the State of Oregon have the funds available to continue with the process of bringing this river into or becoming a, into the Clean Water. Be able to get it to TDM, TDMDLs, TMDLs. To bring the water temperature down and clean the river up. Is the State of Oregon...does the State of Oregon have the funds available to do this? Right now the funds is coming primarily from Bonneville Power Administration in the form of grants. I think that's about all I have to say."

Judge John Asher

Spray, Oregon

"I read your study. To me there's a lot of guesswork and a lot of false statements which I'll address later in a letter. And also I'm a property owner on the river. My deed says my property line is to the middle of the river. And I see this as a taking with the state of private property with no compensation. And I'll send a letter to that effect."

Judge Dennis Reynolds

Canyon City, Oregon

"Having not come with a prepared statement this evening. My name is Dennis Reynolds. I'm the Grant County Judge. The, our dog in this fight is only about 300 yards in length. I think its exceptionally important though to understand the principles behind what's happening. I would encourage everybody to read the summary. Everybody to read the subjective nature of the arguments put forth. It's already been mentioned here once this evening that everything is theorized. If you found a body laying along the road you would theorize it was murder. But proving whether or not it is is another issue. We're challenged by the notion that the federal courts have interpreted the word "susceptible" to meaning the wildest imagination of whether or not you could have done commerce on a river. That creates a formable challenge to refute the findings of the state agency. But I would ask, "Did Chee's ever build the sawmill?" I think you'll find the answer is there was never a sawmill built because they could never get the logs to it as they theorized they could. I would also ask you to take judicial note of the fact that both the Middle Fork of the John Day River and the North Fork of the John Day River were initially included in the permit that they asked the State of Oregon to issue them for the sole and singular right of floatation of logs. They admitted at the time they made application that the waterways were not navigable. And yet for 16 years they maintained the theory that they could somehow float logs to a sawmill that was yet unbuilt. The ferries. The *John Day Queen I* and the *John Day Queen II*. Mind you that this was in such an early stage and admittedly in this document it indicates that these were the early times in Wheeler County. Development came slow because it wasn't easy living as it was in the Willamette Valley. Wasn't as easy to raise crops. It took more acres to create commerce.

Imagine if you will in the times when people struggled to put food on their table and maintain their livestock and maintain their way of life in this community and see if you can cope with the suggestion that the ferry, the *John Day Queen I* and *John Day Queen II* were used exclusively for recreational purposes. Sight-seeing. Dances. I think you will find...I'm led to believe that in the library in Sherman County there's a book that will refute that. A book that says that quite possibly it might have been used to move bands of sheep...much contrary to the notion that it is recreational use. I'm troubled by the fact that again, in theory, because the Native Americans used quite prolifically the Deschutes River that there is also an obvious and intuitive assumption that the John Day River was used for the same purposes during the same time in the same manner. Those of you who live here recognize that even today it's difficult to find a 24-inch diameter tree growing adjacent to the banks of the river. I would argue that if we were theorize that tribal members drug those logs from as far away as 15 to 20 miles to the nearest floatable, potable, I mean floatable quantity of water, that it was less likely than on the Deschutes where timber is more prolifically available to the banks of the river. All these things give reason to doubt, in my opinion, that the research has been done adequately, appropriately, and with an open minded approach. As a professional forester, I, too, can say to you that a 16-inch log scales, 16-foot long scales, a hundred and sixty board foot. That means that instead of a 15,000 board foot per log segment as this document reflects, it's more likely to be about 3,200 board foot. Two hundred thousand dollars in the era in which these logs were allegedly attempted to take to a sawmill would have been more than a year's supply of logs with a circle-set saw with 1,000 to 2,000 board foot a day."

"So, we're in the earliest stages as these gentlemen have indicated. What they're interested in knowing, what you need to do to be more productive in this process is to go home; talk to friends and neighbors, historians and see if you can come up with facts that are either contrary or endorse this. This is the information they need. One other issue relates to taxability. There's one line in this document that we should pay attention to. And I would ask that each of you go to the BLM website and ascertain whether your property was conveyed, your property rights were conveyed prior to February 14, 1859 or post February 14, 1859. In the event that your property was conveyed to you from the federal trust or, excuse me, from the public domain, you are exempt from claims by the State of Oregon as to navigability over your land. Now, while I don't want to stray too far from this, I'd also ask you to take a look at the history of Oregon and you'll find out that Oregon City was surveyed in 1844, and it was not surveyed for the exercise and futility of just conducting exercise. You'll more than likely find that rights were conveyed to the bed and banks of the river at Oregon City prior to statehood. In fact the gentleman who petitioned the State of Oregon's establishment was a resident of Oregon City. So, educate ourselves. Try to bring fact to the table. And remember that certain principles, certain things have to be."

"I will say publicly that I cannot concur that it is a taking. And the reason I say that is because if you follow from the King of England's laws through to present day, the State of Oregon has always been, has had the legal right to the banks and beds of navigable rivers. They were given at statehood the right of ownership of the water, not floatage rights, but the right of ownership of the entire depth of the water. But because they are lethargic in identifying those rights, we're in this dilemma we're in today. I thank you for this opportunity, and I'll be trying following up with a little more specific details."

Judge Mike McArthur

Moro, Oregon

"I'd like to follow up on Judge Reynolds' excellent testimony. And I support the position that Judge Reynolds is taking. And I think the Division has a very narrow task here. I think I'll try and restrain my comments to that task at hand, and that's this definition. And I take issue with the conclusions the Division's drawn from the facts that they've presented. I think this definition says "the waters are navigable is when they are used" and "in the customary modes of trade and travel on water." So we have to think about what were the customary trades and travel in 1859. And they assert that perhaps that was canoe and there's some evidence been given that it's maybe unlikely that canoes were used on the John Day River. So, I think there's reasonable doubt that this was used in the customary modes of travel or the next part of this definition, susceptible to being used. And that's why I ask John the question earlier about the definition of "susceptibility." Not, to me, susceptibility is not "could have been used," but more likely has been used." Susceptible means "more likely than not." And I believe that the burden of proof used for susceptibility here is an attitude. I don't think that this evidence that we've seen passes the test of susceptibility. And I think there is reasonable doubt that the river could support trade and commerce over the cycle of a year and the ebbs and flows of its, the water that's flowing down and the amount of water that's flowing through the river drops at such a point that it was not susceptible to use in a regular basis for trade and commerce. So, therefore, I think that this the evidence presented fails the test. And I think that there are implications about the evidence. Don Cossitt raised some facts about the miscalculation of the board footage. There was the misrepresentation of a date from the legislature that I found. I wonder how may other factual errors there may be. So, those all need to be checked and I think we all need to do due diligence on those facts as we look forward to December hearings. And I know that this is going to be a recommendation to the State Land Board. The State Land Board needs to make a decision about what's best for the state of Oregon. Whether it's best for the state of Oregon for this river to have that designation and the implications that follow from that, or to look at the actual facts here, and do they support a finding of navigability? And I would assert that facts as presented don't meet that test. I don't believe that this was a customary mode of trade and travel in 1859. This river represented that. And I don't believe that it was even susceptible using a standard of "more likely than not."

Art Isrealson

Portland, Oregon

"I have a copy of the Grant County news dated 1919, July 4th. This issue is not new on the John Day by any means. Clear back then, the judges said the river was navigable. Take this and read it. I think I have enough copies for you here. The questions have been asked frequently, "Where does the state get the rights to do this. I have five laws here, five court decisions that I will pass around for you to take them...that explain where the courts have come from. And the courts, federal courts, have said this is not a taking because the federal government had to hold this land that's submergible for the state and they, the state has to hold it for the general public because the state cannot just dispose of it like they can other lands. And those are all outlined in these things. Please take them. I would like to ask the county assessor, "When was the last time property boundaries were changed on the river?" Who owns which side of the river? OK. Now, one other comment. How many local roads have been closed not having to do with the river?"

Renee Baker

John Day, Oregon

"Well mostly my testimony would be concerning the high water mark. I'm going to study it and I'll submit it in writing. And, also, I guess just for the record this evening, is I did have a question as to the factuality of the board footage that have been on the river and Judge Reynolds addressed that."

Neil Hansen

Kent, Oregon

"Well, I don't know, I haven't read the navigability study here so I was thinking of different things as a landowner on the John Day River. I was thinking more about I don't want to see outhouses and garbage cans like you do on the Deschutes. And I was thinking of other things. So I think maybe I'd better just, you know, back off on that."

Ole Olsen

West Linn, Oregon

"I spoke this afternoon rather lengthly. I've been following this issue since its inception. I have four research deals, just documents out of the library there at Lake Oswego. And I'd like to give them to some of the people like in Sherman and stuff like that that's all it is documents out of the legal, law library at Lewis & Clark College. And they're documents basically directly out of there plus the Blue Book. Jim, would you bring me the Blue Book."

“I will make it brief. I said I’d speak real quickly. This is right out of the Act of Congress admitting Oregon into the Union. “On the condition that the people of Oregon shall provide by an ordinance irrevocable without the consent of the United States that said state shall never interfere with the primary disposal of the soil within the same by the United States or with any regulations Congress may find necessary to secure the title in said soil to bonified purchasers thereof. And that no case shall non-resident proprietors be taxed higher than residents.” That is right out of the front part of our constitution out of the Blue Book. For those who get this, this is broken up into several parts. One is the Act of Congress and a little bit of the history of Oregon that I took out of the Blue Book which referred to the same author that the Division of State Lands is. It discusses the Code of Federal Regulation 329 which addresses navigability, in other words federal navigability is established by the Army Corps of Engineers. It tells you about the process. It tells you everything that you need to know about it. And you have to apply to the Army Corps of Engineers to establish the navigability study. And I suggest somebody here does that. It also covers what is called USCS regarding these issues. United States Code Service. There are only three part, four parts to it. I brought what is navigation generally. It’s the yellow part in this book. The one is construction of bridges which is paragraph 401 of the Rivers and Harbors Act of what...19....oh my gosh....oh my gosh...I can’t remember the date. And in the blue part is the construction of bridges and last one is obstruction of navigation. These are case laws. I brought every case law regarding the subject that was available to me in the U.S. Code. I didn’t cut it and paste it. But I have taken and put a lot of yellows on it for the things I particularly thought might be pertinent on kinda both sides. Any of you that find you want to do any part of it, you’re free to. I think I’ve got my name and address on the front part of it.”

“I have a friend of mine that had a conversation recently with the governor. The governor implied to him that he’s been looking for a position paper summarizing the landowners’ position to the governor and kinda what I call in my field a position paper. I would like to assist you in doing so if you feel that my knowledge of running around this stuff is applicable or maybe you can either do it yourself. But the governor’s kinda given you an opportunity to do this or(tape end/change sides)...not be for myself. I have a master book that I can provide for you if you think it’s useful for you.”