

Subject--John Day River Navigability Study

Oregon Department of State Lands
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Salem OR 97301-1279

In May 2004 the John Day River Draft Navigability Report was completed and sent out to all land owners of record along the river and other interested parties.

In that report it was stated that in 1923, the Chee Lumber Company was formed for the purpose of buying timberland, and cutting, transporting and selling processed and unprocessed logs and timber in the John Day River Basin. In that same year, the company filed an application with the Oregon Public Service Commission to obtain a franchise, that is, the exclusive right to drive, boom and sort logs and other timber products on the John Day River from Kimberly to its mouth, as well as on the North and Middle forks of the waterway. The franchise application filed by the Chee Lumber Company stated that no booms, dams or other improvements existed on the portions of the John Day River requested and that the river was not navigable for commercial purposes. However, the company stated that segments of the river could be used in their existing condition for floating logs or be made suitable for this use with the construction of splash dams and other improvements. It was Chee Lumber Company's intention to cut timber in the upper John Day Basin and to float the logs down the John Day River to its confluence with the Columbia River where it planned to build a sawmill.

On August 2 1923, the Oregon Public Service Commission granted the requested franchise to Chee Lumber Company. Following receipt of the franchise, the company proceeded from 1927 to 1929 to purchase timber-bearing parcels of land totaling approximately 5,440 acres in Wheeler County. It also reportedly commenced two test log drives on the John Day River, the first in May 1925 and the second believed to have been in the summer of 1929.

In the 1925 test, the Chee Lumber Company Floated 20, 16-foot logs (200,000 board feet)? from Spray down the John Day River for an undisclosed distance. In 1929 the company reportedly again conducted another test log drive, this time putting the logs in at service creek. In both of these instances, the results of the test drives are not known. No evidence exists that Chee Lumber Company ever built a sawmill at the mouth of the John Day River. Nevertheless, the company indicated through its acquisition of the franchise and large areas of timberland in the John Day Basin that the river was susceptible to driving logs for commercial purposes. Of further significance was that the company held its franchise for 16 years (1923 to 1939) indicating its value and the firm's continuing belief that the John Day River could be used for floating logs on a commercial basis.

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At Fossil on June 22, 2004 during one of the hearings to answer questions concerning the draft navigability study and to receive public input, one person gave a lengthy comment questioning Chee Lumber Company's ability to successfully drive logs down the John Day River, citing for one thing the distance from points on the river where test drives were conducted in 1925 at Spray and in 1929 at Service Creek to a source of timber.

I would like to state that it is my opinion that Chee Lumber Company could have conducted log drives down the John Day River.

While it is true that Spray and Service Creek are both a few miles from where timber could have been obtained, by the late 1920's and early 1930's reliable trucks were available and road conditions in the area were such that it would have been possible to transport logs to the John Day River at Spray and Service Creek.

Also the franchise granted to Chee Lumber Company by the Oregon Public Service Commission included driving logs on the North and Middle Fork of the John Day River.

Both the North Fork and Middle Fork of the John Day had commercial forest lands adjacent to their banks on the upper reaches of the rivers.

It is my opinion that log drives could have been conducted on both the North Fork and Middle Fork during the spring at high water and other times of the year by the use of splash dams.

It is interesting to note that a Mr. W. F. Slaughter who with two other men formed the Chee Lumber Company.

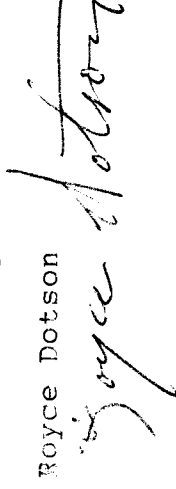
Mr Slaughter for about 15 years logged on the upper Columbia and negotiated the first raft of logs through Cascade locks.

And I would like to mention the fact that log drives were successfully made on the Middle Fork of the Malheur sometime prior to 1919, and that it is possible to identify the places where splash were built, and where the river drivers camped.

Also the Middle Fork of the Malheur is a smaller stream than any of the forks of the John Day River.

Sincerely,

Royce Dotson



The second passage refers to hunting parties of Indians setting out on long excursions up the Deschutes and John Day Rivers....in September. The report concludes that it would be 'logical' to assume that the meat was brought back by water rather than carrying it. I don't know about the Deschutes, but have you **seen** the John Day River in September at RM 129? The conclusion in the report is quite illogical and incorrect. Even in the wettest of years it would be quite impossible to drag a dugout canoe loaded with meat past RM 129 in September.. Probably would be quite difficult to drag an unloaded dugout canoe past RM 129 that time of year. Come by some September and we'll be happy to show you.

As the report states, there is '...no physical evidence exists to prove that Indians used...' dugout canoes (or any other method of waterborne transportation) on the section of River to be influenced by the study. This is true. The assumption that a conclusion can be drawn from Murdock's monograph is incorrect, thus the conclusion drawn in the draft report, that "it is reasonable to assume from this evidence that Indians did use dugout canoes on the John Day River prior to and at the time of statehood" is unfounded and has no basis.

In fact, there is lots of evidence that the Indians didn't use really any kind of watercraft around RM 129. The proof is in the river itself, and I think proper historical analysis would back that up. Murdock's monograph may be evidence of historical use implying navigability in the lower reaches of the river, but it has no bearing on the river much above the mouth. Certainly not at RM 129.

The draft report goes on to mention ferries used to cross the river at various locations.

A perpendicular crossing of the river does not cause the river of being susceptible for use as a 'highway of commerce' and has no bearing whatever on a determination of navigability. It really has no business even being mentioned in the draft study.

The John Day Queen I & II are cited in the report as well. The first boat was operated along the river from RM 109 to 120 for a period of years. One could argue that the river was therefore navigable along that stretch. Why didn't they operate farther upriver? Likely because they couldn't. They couldn't because the river was NOT navigable that far upstream. The second boat never even made it down river to RM 109 before it failed due to the conditions in the river.

This evidence would seem to contradict, rather than support a conclusion of navigability, especially in the reaches of the river above RM 120.

The Chee Lumber company is reputed to have floated logs down the John Day River. They applied for a permit to do so in order to make viable a logging operation in the upper reaches of the river. Though they got the permit, there is no evidence that they were ever successful in getting there logs down the river. Even the draft report acknowledges that the results of the attempts to float logs down the river are 'not known', and that the Chee Lumber Company never built a sawmill at the mouth of the John Day as was their intent. This is probably because they physically couldn't float logs down the river. If they could they would have at least tried to construct a mill, and others likely would have followed suit.

The report concludes that the application is evidence of the river being 'susceptible' to this use. Again, this is incorrect. The fact that the operation was unsuccessful is proof that the river was, in fact NOT susceptible to this use, no matter how long or how hard they tried.

Beyond this, there is much information that indicates that the John Day River has not historically been used for navigation. Lewis and Clark didn't even bother to explore it as they did every

significant stream they encountered along the way. The trappers and mountain men ascended Deschutes and Crooked River and then crossed overland to access the reaches of the John Day above the mouth. The historical record really bears no evidence of the John Day being used as a 'highway of commerce'.

Recreational Use

The technical definition of navigability refers to the river having been used by trade or custom for commerce at the time of statehood. From the historical record it is clear that the John Day was probably not used in this fashion anywhere along its length, and certainly not above RM 120.

The primary recreational use of the John Day is/are float trips for small mouth bass. These fish were not introduced to the river until 1971. The draft report doesn't even mention any recreational use until more than 100 years after Oregon became a state.

Recreational use is hardly 'customary' along the river and it is arguable whether it represents any valid form of commerce. If guiding bass fishermen is considered a viable form of commerce, it wouldn't even have been a use susceptible at the time of statehood, and certainly wasn't customary, as there were no bass in the river.

In any event, using the recreational usage of the river that had occurred in recent years is most certainly not in keeping with the spirit or the intent of the laws governing the determination of navigability of the nations streams, and especially not those that have not customarily been used that way.

Until recently, due to this non-customary recreational use, it wasn't even considered that the John Day could be a navigable stream. This is evidenced by the statement from William Cox, the Director of the Division of State Lands regarding a 'Wild and Scenic River' study of the John Day from RM 10 to RM 157. He said "The John Day River is not generally considered a navigable river – in the traditional sense – in the reach you are considering. Thus the bed and banks are not State owned."

Conclusion

As landowners, taxpayers, United States Citizens, and residents of Oregon, we have no desire to see the State or the public cut out of what is rightly theirs. A decision of non-navigability does not prevent the public from using the river in the same fashion they do today. They can still float and fish and camp along the river on the adjacent public lands, which are many. A decision of non-navigability certainly doesn't affect the State as it has long considered the bed and banks to be property of other entities, as evidenced by the fact that it has been collecting taxes on them all along. A decision of non-navigability does not have much of an impact on the use of the river, or the State or the public.

A decision of navigability does, however, have a large effect on all involved. Especially those closest to the river – the private landowners who have been paying taxes on the bed and banks of the river ever since the State of Oregon assessed them. That is evidence enough that the John Day has never been considered a navigable waterway. A decision of navigability may represent a 'taking' of lands that have been treated as private by the State and its taxpayers since Oregon has been a State.

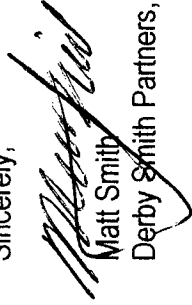
The river has not historically or customarily been used for trade or commerce and is therefore not technically navigable. Attempts to declare it such are not in harmony with the letter, spirit or intent of the laws that were written to confirm navigability.

None of the evidence provides any support for a finding of the John Day as navigable along most of its length, and especially above RM 120.

We sincerely hope that the facts of this case will be reevaluated in a more objective light and that the historical data will be more carefully reviewed before a decision is rendered. There is a huge precedent to be set here, and it is important that it be the right one.

Again, on behalf of Derby Smith Partner's, LLC and the Cherry Creek Ranch I would like to thank you for the opportunity to comment. Please contact us if we can be of help in any way.

Sincerely,



Matt Smith
Derby Smith Partners, LLC

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August 26, 2004 LANDS

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Department of State Lands

Subject: John Day River Navigation Study

I do not agree with your recommendation to the State land Board that the John Day River was navigable at the time of Statehood or even today.

Reasons why John Day River is not navigable:

- History shows travel for trade and commerce was overlaid between places like John Day and The Dalles (including points along the way, e.g. Maupin, Bakeoven, Antelope, Burnt Ranch etc.). Most routes were military Roads.
- Commerce in the early years was mainly mining and dry land farming. The commodities were transported by wagon. The latter by rail from Condon to ports on the Columbia River. There was an attempt to move logs down the John Day River but it failed.
- There has never been a human population along the river because of the geology, geography and the climate. All contribute to the lack of economic development of the region. The geology is very rocky with poor soil conditions. The geography is very rough and steep. The climate has extreme conditions from very hot to very cold. There isn't much rain, yet when it does rain, it can have the devastating effect of flash flooding. This can and often does choke and change the physical conditions of the John Day River.
- The John Day River drains an area with little annual precipitation therefore does not deliver much water. It does however deliver more suspended particles and debris than any other stream in the state, by almost double.
- Oregon has been a state for nearly 150 years. For the first 130 years there has been no interest in this issue. Only in the past few years has it changed. There must be some statute of limitation on this issue. If the John Day were navigable, it would have been declared so a very long time ago.

Your paragraph "What is a navigability study and the Federal test for navigability?" is so confusing and contradictory that it is almost impossible to comment on it. When you are trying to declare a river navigable because of canoes and recreation, you are splitting hairs. Why waste taxpayer's money on a multimillion dollar study when you are obviously determined to declare the John Day navigable anyway. This is just another example of the irresponsibility of our government. When a few hundred fishermen want a trickle of a river, not more

than knee-deep most of the year, declared navigable, they should at least have to pay for the study themselves and not have the taxpayers shoulder the financial burden.

I strongly urge that you recommend to the Land Board that the John Day River was not navigable at the time of statehood, and it is not today.

Sincerely,

A handwritten signature in black ink that reads "Randy Clark". The signature is written in a cursive style with a large, looped initial "R" and a long, sweeping underline.

Randy Clark

See:

H. H. Bancroft "History of Oregon" Vol. 1
Lewis A. McArthur "Oregon Geographic Names" 5th edition