

The State Land Board met in regular session on April 8, 2003 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>
Jim Brown	Ann Hanus	Bill Cook
Paddy McGuire	John Lilly	Lore Bensel
Inga Deckert	Steve Purchase	
	Jeannette Holman	
	Jeff Kroft	
	Gail Lowry	

The Governor 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, Suite 100, Salem, Oregon 97301-1279, (phone: (503) 378-3805, ext. 224).

Director Hanus introduced Lore Bensel, Assistant Attorney General, recently hired to handle Division and Land Board issues.

Action Items

- 1. Request for endorsement of the policy regarding anchoring by vessels off the Oregon coast: *"Anchoring is not recommended off the Oregon coast."***

Director Hanus introduced this item. She said this issue came before the December 2002 Land Board, where staff was asked to work with all parties concerned to reach a consensus on a policy regarding anchoring in the Territorial Sea. This originated from the recommendations coming out of the New Carissa Review Committee. The recommended policy reads: "Anchoring is not recommended off

the Oregon coast." If approved, Hanus said this policy would be published in the National Oceanic and Atmospheric Administration's *Coast Pilot*, a series of nautical books and associated navigational charts used by mariners.

Jeff Kroft, Policy Specialist, said the original recommendation coming from the New Carissa Review Committee was to restrict vessels above 300 tons, which precluded fishing vessels. The final recommendation was changed to leave the policy broader, just using the term "vessels." In response to a question by Treasurer Edwards, Kroft said the *Coast Pilot* is a well-used publication, carried by all vessels and serving as the official reference guide that is used by masters of vessels in waters of the United States.

Kroft said the recommendation to all vessels is that anchoring is not recommended. Director Hanus said this is not a prohibition, but rather an advisory.

Secretary of State Bradbury moved the Board adopt the policy and approve publication of the policy in the *Coastal Pilot*. State Treasurer Edwards seconded the motion and the approval was unanimous.

2. Request for approval of the Second Status Report on the Implementation of the Asset Management Plan, and approval to transmit the Report to the 2003 Legislature.

Director Hanus explained that in 1995 the Land Board first adopted the Asset Management Plan, which represents the Board's vision and strategic plan for management of Common School Fund real estate assets. She said, according to statutes, the agency must make periodic status reports to the Legislature on implementation of the Plan. She explained that this is the second of those reports. This status report was distributed for public comment, but no comments were received. Hanus said much work is left to be done to implement the Plan.

John Lilly, Assistant Director for Policy and Planning, added that very little comment was received for the first status report presented to the Legislature. Lilly said the Board authorized the agency to update the Plan. He said this should be done within the next biennium.

Secretary of State Bradbury moved the item be approved. State Treasurer Edwards seconded the motion, and the approval was unanimous.

3. Request for approval to make a one-time accounting change to shift expenditures away from investment earnings to the corpus and/or gross revenue stream in order to provide adequate distributable income for the Common School Fund final distribution of the 2001-2003 biennium.

Director Hanus explained that the agency would be unable to meet the Board's two percent distribution to the schools for this period. She said the request is for the Board's approval to make a one-time accounting change to shift expenditures from investment earnings to the corpus and/or proceeds to provide adequate distributable income for the Common School Fund final distribution for the current biennium.

Hanus said another option would have been to tap into the accumulated statutory revenues, but the Legislature used these revenues for a special distribution sent out in December. Hanus said advice was requested from the Department of Justice. Richard Whitman, Assistant Attorney General, believes a one-time accounting shift would be appropriate to meet the distribution policy for this biennium.

Governor Kulongoski asked if this would reduce the corpus of the Common School Fund over the long term. Whitman said this action would authorize DSL to pay certain expenses out of the corpus or the body of the Common School Fund and confirmed that it would reduce the size of the Fund. He said this is why the recommendation is for the Board to adopt findings as to why they are taking the action, since it is not the normal policy of the Board.

Whitman said there have been 53 Attorney General opinions written over the past 25 years mentioning the Common School Fund, seven or eight of them being major opinions. He added that the Department of Justice is currently working on advice regarding authorization of this action. He said extra time has been needed to ensure the advice is consistent with prior opinions. Whitman believes the authority for this action exists from Article VIII, Section 2 (2) of the state's Constitution.

Governor Kulongoski said there would be a motion for the Board to approve, a resolution and then a legal opinion. He said he is relying on all three to be consistent.

Jim Brown, the Governor's Natural Resources Policy Director, noted that the resolution makes it clear the action can only occur if the Attorney General's opinion is consistent with the action.

State Treasurer Edwards noted that an analysis was done to show the potential shortfall to the long-term corpus of the Fund. He stated that the Board's desire is to try to provide some surety in the distribution to schools. Treasurer Edwards contended that this action helps to achieve this. He stated that he would like the Board to explore the possibility of adopting this on a more permanent basis, after reviewing the Attorney General's opinion.

Director Hanus reviewed options that have been considered such as moving from 70 percent equities, to a 50-50, which she said would give a lower return over the long term. A current Legislative proposal would allow the creation of a deferred distribution account, which could smooth out distributions over time. A drawback of that proposal is that, unless firm sideboards are established for this account, it might be used for something other than just smoothing out distributions. The action taken today of moving expenditures, if done on a permanent basis, would provide a one to two percent decrease in the corpus over a 10-20 year period. She added that the Board would need to consider policy options of assurance of meeting the two percent versus maximizing the size of the Common School Fund.

Governor Kulongoski said he has always considered the Common School Fund as a "sacred entity" and acknowledged that in difficult times the Legislature looks for revenue from every available source. He stressed that it is important that whatever legal opinion comes forth, that it does not open the door to allow the Fund to be tapped for other purposes.

Whitman said during the special sessions of the Legislature there was interest in using the money in the Fund as a source of increased funding for schools. Advice from an Attorney General opinion issued

during that time made it clear that the Board and the Legislature do not have the authority to expend moneys in the Fund for the support of schools, rather they can expend only the income that is earned. He said the current advice being developed by the Attorney General's office is completely consistent with that.

He explained the language in Section 2 (2) of Article VIII of the Oregon Constitution gives limited authority to authorize payment of certain expenses from the principle or corpus of the Fund. He added that the Common School Fund is a trust and cautioned that the Board, in electing whether to pay expenses out of income of the body of the Fund, should only do this in special circumstances where it is necessary to even out the distribution from the Fund. He said the findings today set out why this is consistent with the trust limitations of the Board's authority.

Director Hanus added that the resolution caps the amount of expenses that can be moved at \$8 million. She further clarified that it would be the forestry expenses that would be moved, since these are most closely identified as constitutional expenses.

Chuck Bennett, representing the Confederation of the Oregon School Administrators, said they support the resolution. He said one of their concerns through the past special sessions has been the trust status of the Common School Fund and access to the Fund for short-term use.

Bennett told the Board that he sat through the Division's budget process. He urged the Board to find a way to separate the costs of management for the agency from direct allocation to the students.

Treasurer Edwards moved the Board authorize the Director of the Division of State Lands to do a one-time accounting change to shift expenditures away from investment income to the corpus and/or proceeds to the Fund and to adopt findings as a basis for this action. Governor Kulongoski clarified that the resolution would become part of the motion and be adopted with the motion. There was no discussion. The motion was approved.

Consent Items

4a. Request for approval of the addition of one site (Camassia Natural Area Preserve), owned by The Nature Conservancy, to the Oregon Register of Natural Heritage Resources.

b. Request for approval of February 11, 2003 State Land Board minutes.

Director Hanus introduced the Consent Agenda, including the approval of the Camassia Natural Area Preserve, owned by The Nature Conservancy, to be added to the Oregon Register of Natural Heritage Resources.

The second item on the Consent Agenda included a request for approval of the February 11, 2003 State Land Board minutes.

Secretary of State Bradbury moved the Board approve the Consent Agenda. Treasurer Edwards seconded the motion and the approval was unanimous.

Informational Items

5. Report on the Navigability Workgroup.

John Lilly provided an overview of the meetings of the Navigability Work Group in their dealing with the matters of public access and protection of waterfront property owners' interests. He said the Work Group developed a management framework plan and has taken this out for public comment through a series of public meetings held in Mill City, Sweet Home, Fossil, Tillamook and Monument, where over 600 people attended these sessions. These sites were chosen because the Work Group's proposal encompassed a number of rivers: North and South Santiam, Rogue, John Day, and Trask. They focused their attention on a four-year pilot project to be enacted through Legislation. Lilly said a meeting for the Rogue River area has not been scheduled yet.

He said over 250 letters, emails and faxes were analyzed by the workgroup, in addition to the comments received at the various meetings. Lilly summarized those comments as follows:

- Many river users are opposed to the river user fee.
- For many property owners, allowing any public use of the riverbank, even within the proposed "ten foot rule" is unacceptable. Use of the riverbed is more acceptable.

- Many respondents feel that the management plan would not solve problems inherent with public use of rivers such as littering, illegal campfires, etc.
- For some property owners and river users, determining the ownership of the beds and banks of waterways by doing a navigability study is preferred over the Management Proposal. Some South Santiam and Trask property owners spoke of preferring the navigability study process.
- Riverfront property owners along the rivers being considered want a voice in the process if it is to be continued.

The Group reviewed all the input received during the process. Lilly said they found little support overall for the proposal as it was presented at that time. Several particular concerns were expressed with that proposal, such as a user fee, and use of the bank by the public. After a review of all input it was felt that, though there was much work remaining, good progress had been made. Other issues were:

- Based on the public comment, should the pilot include only the John Day River, or only the John Day and the North Santiam?
- How can we pay for the planning and implementation of the management plan?
- Should the proposal continue to allow some limited public use of the riverbank? If so, should it be the "ten foot rule" or something else?

Governor Kulongoski asked whether individuals understand navigability and the common law floatage issues. Lilly said he believes that after the last two public meetings, there is much better understanding by those around the John Day River. He noted that the issues are less understood by those on the other rivers.

Treasurer Edwards said the workgroup did a good job of moving the issue before a select group of people. He said he hopes that a bill will result from the process to take to the Legislature. He suggested narrowing the scope to only the John Day River, since it is the river where the most education has occurred. Governor Kulongoski and Secretary Bradbury agreed with this approach. Bradbury suggested the North Santiam River might be added to the John Day River.

Governor Kulongoski commented that paying for the planning and implementation would be a critical issue. Hanus agreed saying that will be the key to making this work. The proposal is for a fee to be charged for those using the river for boating, an idea that is controversial to some.

Phil Donovan, Association of Northwest Steelheaders, said they became involved with river access issues to ensure the rights of their members and the general public to safely access and enjoy Oregon's rivers and streams. He said they are interested in getting clarity in the laws that define where anglers and the public can legally be. He discussed the navigability study process, saying it is heavy handed, divisive, and does not serve the best interests of the recreational public.

Donovan said his association does not support the proposed framework agreement brought forward, because of opposition they have encountered from both recreationists and landowners.

He said the best resolution to this conflict would be a legislative compromise similar to the Montana access law. Donovan expressed concerns about limiting the legislative proposal to only the John Day River. He suggested that handling five rivers at once could help move the process along more quickly.

His organization is in favor of the fee for river access, but he believes this will be difficult to enforce. He said this could help fund important programs.

Jean Underhill-Wilkinson, Oregon Farm Bureau Federation, said there was clearly a lack of support for including several of the rivers originally intended to be part of the proposal. She said she is interested in going forward with at least the John Day River and perhaps the North Santiam River.

She noted the main issues of concern for landowners are public use of the banks and development of a management plan that includes maintenance and enforcement. Wilkinson presented copies of photos to the Board showing trash and debris left along the North Santiam River, exhibiting the need for maintenance and enforcement when

public use is allowed. She said landowners along the riverbank are asking how these costs will be covered. She discussed the need for a way of identifying sportsmen that are using the waterway to assist with enforcement issues.

Harlan Levy, Oregon Association of Realtors, said Treasurer Edwards attended one of their committee meetings where he spoke on pros and cons of the access plan, navigability studies and the floatage easement. He discussed the opposition from landowners to the proposed access plan. He said with respect to the John Day River, he believes it is a good idea to move forward with an access plan, since landowners there are in support of an alternative to a navigability study and declaration by the Board.

He said with that access plan, the issue of enforcement is very important to his members and the landowners they represent. This includes patrols of the area, garbage receptacles, and restroom facilities.

Frank Dayton, landowner on the Trask River, requested the Board approve a management plan for the Trask River similar to the one requested by the Oregon Cattlemen's Association. Dayton voiced concern about the fragile nature of some of the riparian areas along the Trask River, saying these banks are mostly silt and subject to erosion from foot traffic.

Eleanor Dayton, landowner on the Trask River, urged the Board to adopt the four-year pilot project, as she said was agreed by a vote of the Trask River landowners. She said this would allow the public floatage and anchoring rights, but access only in an emergency or at the discretion of the landowner. As a result, everyone wins.

State Treasurer Edwards asked if navigability were determined on a river such as the Trask, whether protection would occur and how local management would be handled. John Lilly said when the state owns a waterway up to the line of ordinary high water, for instance as a result of a navigability determination, the state has the responsibility to manage the land in compliance with all applicable laws and in consideration of environmental issues. He said management plans would need to be tailored to consider any special issues such as endangered species and use of firearms in close proximity to homes along particular waterways.

Governor Kulongoski asked about the state's role, absent a declaration of navigability on a waterway. When a private party is floating on a waterway and coming on the land of a private landowner, he asked about the basis for the state's management and enforcement of rights between the two private parties.

Lilly said the agency frequently gets complaints from either property owners regarding the activities of recreational users on the waterways or from fishermen regarding landowners prohibiting use of the bed and banks. He said navigability cannot be asserted or waived unless the Board has authorized a navigability claim or decision. Where there has been no navigability declaration, it is not clear what the rights of the public are to use the beds and banks of waterways, or what are the rights of adjacent property owners where there may be a cloud of sorts over title. The Board has been drawn into the matter around the issue of who owns the beds and banks.

Lilly said the hope is that a floatage easement could help solve the issue statewide without having to do navigability studies on each waterway. The challenge has been how to codify the floatage easement and determine where the administrative responsibility would lie within the state of Oregon for implementation and enforcement, making rules, plans and other items.

Governor Kulongoski said a statutory enactment would establish rights and duties of respective parties. He asked Bill Cook, Assistant Attorney General, to comment on how the state would have the enforcement power in this. Cook said it would be a statute regulating private activity and putting the state into a regulatory role for persons recreating on the river.

State Treasurer Edwards said one problem today is that without a navigability process there is no clarity. He suggested using only the John Day River in the pilot project, since much work has already been done there and a lot of the property is federally owned.

Lilly agreed, adding that Congress designated 290 miles of the John Day as a Federal Wild and Scenic River in 1988, then Oregon designated 184 miles of the Lower John Day as a State Scenic Waterway in 1971 and in 1988. He said both the BLM and State Parks

have done management plans over these reaches of water. The issue remains, he explained, as to what the public can do at the water's edge fronting private property and on a gravel bar in the center of the river.

After discussion with the other members, Treasurer Edwards proposed the pilot project be limited to only the John Day River at this time with the other rivers remaining on the list of rivers slated for navigability studies. He proposed no navigability moratorium be in effect. If a successful alternative could be found for the John Day River he suggested it might be possible to add the other rivers to the project at a later date. Treasurer Edwards asked Director Hanus what the agency could do in terms of navigability studies. Hanus responded that the agency could probably do one study every 10-12 months.

Treasurer Edwards said one fundamental question has been how much access to the riverbank would be allowed. Lilly said he had not attended the meetings regarding the John Day River, but in the other workgroup meetings they spoke of allowing limited public access within ten feet of the water's edge at any time, never more than up to the line of ordinary high water. He said this would include bank fishing and hunting (if legal and appropriate), but no camping or building campfires.

Jean Underhill-Wilkinson from the Oregon Farm Bureau said property owners would prefer there be no access to the bank other than portage and to deal with an emergency. She said it would be helpful for the workgroup members to know what the Board thinks about the issue. Governor Kulongoski said there is no denying the public has a right to float down the river. If there is no access to the land, he asked, what is the change in the common law easement? Lilly said most individuals he has spoken with agree that the public has a right to float the surface of the river. They disagree when it comes to anchoring or standing in the water, or stepping onto a dry bank.

Though not defined in court, Lilly said reviewing the case law on the common law principle floatage easement seems to support reasonable and incidental use of the banks of the river up to the ordinary high water.

Governor Kulongoski recommended Treasurer Edwards negotiate with the workgroup on the ten-foot easement on the John Day as part of the management plan or the ordinary high water line, whichever is less. Secretary of State Bradbury and Treasurer Edwards agreed.

6. Report by John Beuter - Analysis of Oregon's Common School Forest Land.

Director Hanus introduced Dr. John Beuter, former Assistant Secretary of Agriculture, currently a professor at the Oregon State University College of Forestry and consultant, to discuss management costs related to the Oregon Department of Forestry and the Habitat Conservation Plan and its feasibility.

Beuter presented a slide show to the Board focusing mainly on the Elliott State Forest in Coos and Douglas Counties.

He said there has been a 59 percent decrease in revenue from common school forestlands in the past three years. According to Beuter, declining stumpage prices and rising management costs were a contributor, but he cited the primary reason for the decline as being a 56 percent reduction in timber volume sold from the Elliott between 1999-2002. He said the declining timber sale volume and the resulting decline in net revenues were due to the marbled murrelet and the need to survey for each timber sale after expiration of the six-year incidental take permit.

Beuter said the Elliott is currently growing at about 50 million board feet a year. The 1995 management plan projected the yearly harvest level at 28 million board feet a year. He said this would be sustainable, but is not feasible under the current take avoidance strategy for murrelets, which he believes could end up with half the Elliott being off limits to harvesting.

He concluded that the best strategy would be to work towards a multi-species Habitat Conservation Plan that will allow a reasonable timber harvest with a reasonable amount of protection.

Jim Brown, Governor's Natural Resource Policy Director, discussed the process for completing a forest management plan. He said the plan

would come before the Board for approval in December or January, and negotiations would take place with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service regarding a Habitat Conservation Plan.

- 7. Report on sale of Sutherlin 40, Douglas County, isolated state land parcel.**
- 8. Report on initiation of rulemaking to revise the administrative rules on removals and fills and to develop two new General Authorizations for bridge repair and replacement and for the placement or removal of pilings.**
- 9. Report on removal-fill streamlining.**
- 10. Report on removal-fill permitting and industrial lands "shovel-ready" project.**
- 11. Report on legislation.**

Director Hanus said there were no further presentations today. The Board was provided with written information on Agenda Items 7-11. Governor Kulongoski adjourned the meeting at 12:20 pm.

Governor Theodore R. Kulongoski

Ann Hanus, Director