

The State Land Board met in regular session on February 11, 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 Myron	Ann Hanus	Bill Cook
Paddy McGuire	John Lilly	
Inga Deckert	Steve Purchase	
	Jeannette Holman	
	Gail Lowry	

The Governor called the meeting to order at 10:00 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 welcomed Governor Kulongoski to his first meeting of the State Land Board. She introduced staff of the Division of State Lands and Assistant Attorney General Bill Cook to the Governor.

Action Agenda

1. Request for the Land Board to direct the Division to postpone commencement of the John Day River navigability study for 120 days to provide the Navigability Work Group time to complete the development of a bill for the 2003 Legislature that addresses the public's rights to use waters of the state not declared navigable.

Director Hanus introduced this item regarding a request to postpone commencement of the John Day River Navigability Study for 120 days to allow the workgroup time to complete a bill for the Legislature addressing the public's rights to use waters of the state not declared navigable.

Treasurer Edwards thanked everyone involved in the workgroup, which he said was formed to develop a way to manage conflicts that have occurred over time on navigable and non-navigable rivers. He said the group is looking for a way to help the state and citizens have the ability to use these waterways, minimizing the debate between landowners and those wanting to use the waterway.

Governor Kulongoski commented on the challenges the navigability issue presents. He stated he hopes to be able to get direction for resolving the issue and provide some certainty for the landowner, but also confirming the constitutional rights of the users of those waterways. This is the balance, he said, that is important to everyone.

Gary Benson, co-President of Northwest Steelheaders, said they filed the lawsuit on the John Day River to protect the interests of an angler who was unjustly cited for trespass. He said the lawsuit was filed after working towards a legislative solution that failed. He said the Steelheaders would support the Division's recommendation on the 120-day extension.

Phil Donovan, Government Affairs for the Association of Northwest Steelheaders, said they have been appreciative of the work the landowner community has brought to the table at the workgroup sessions. He said there is a very genuine desire to seek a solution that will work for both the landowners' interests and recreational interests along the waterways.

Benson explained the workgroup has come up with a framework that includes establishing some type of public right to use five rivers on which navigability requests have already been submitted. These rivers were selected because they represented diversity in the state (one eastern, one southern, one coastal and two valley). The proposal will limit public use on private river frontage, but will allow some recreational use and establish a moratorium on any navigability studies during the four-year period. He said there are many other details that need worked out.

Donovan described the "soggy sneakers" rule, or the ten-foot rule, allowing the public to come down a waterway, safely portage around barriers--basically the public's right to access the ordinary high water mark or vegetation line. He said this addresses appropriate concerns

of the landowners regarding beer parties and other detrimental activities.

Benson commented that one of the difficult issues is finding funding for needed enforcement programs.

Governor Kulongoski asked Director Hanus about the legislation the agency had pre-session filed regarding navigability. Hanus explained the bill was a placeholder and said it provides a way to deal with the navigability study process. She said the agency requested this bill be held (along with several other bills) pending the results of the Treasurer's workgroup.

In response to a question by Governor Kulongoski, Donovan explained that if the Steelheaders were able to institute some compromise legislation statewide, they would not need to request navigability determinations for the issue of public access.

Benson added that the Legislature solved the beach problem by ignoring ownership and adopting a public easement. He said conceptually that is what his group is wanting. He said if a situation came up where there was major extraction of gravel with no royalties for the state, there would be a mechanism to remedy that.

Assistant Attorney General Bill Cook said this proposal appears to codify the common law floatage rights. He said the courts over the years have considered the rights floaters have on streams regardless of who owns the beds and banks (like common highways). He said this proposal would be to take those common law rights and codify them, basically setting aside the ownership issue for now. Cook said when a bill is introduced into the Legislature, the Attorney General's Office will provide legal advice. Governor Kulongoski said if the Attorney General has any disagreement, he wants those discussions to be prior to meetings with the Legislature.

Joan Silver said she is a resident of Grant County and not a waterfront property owner. Her attendance at the meeting was from a landowner perspective and being concerned with the rights of landowners in Oregon. She said she was also requested by the Oregon Farm Bureau Federation to represent them on the issue of navigability.

After being involved with this issue for seven years, she said she believes this workgroup is viable and can be successful. She said

those with opposing views on the workgroup have learned a great deal about each others' view points and needs.

She urged the Board to grant the next 120 days extension to allow them time to continue to work on legislation.

Greg Leo, Sandy River Property Owners Association, said he supports the granting of the 120-day extension, but he would like the Sandy River to be included in the process, irrespective of the fact that a navigability determination was made a year ago. He commented that any solution would be incomplete, unless it includes the Sandy River. He said his organization would oppose any proposal where ownership is taken away.

Leo explained that they have been outlining the case they will take to federal court. He said if there is a way to work out a management plan and a compromise which equitably deals with issues of access, without taking away people's land, he said an expensive trip to the federal court may not be necessary. He requested the Board rescind the Sandy River decision made a year ago and include the Sandy River on the list of rivers chosen to participate in the process being worked on by the workgroup.

Bev Jones, Sandy River property owner, said she is hoping the Board will not declare the John Day River navigable and will allow the 120-day extension so a management plan can be developed. She provided the Board a copy of an article written by her attorney, Jennie L. Bricker, "Sandy River Navigability Study Comments Opposing a Finding of Navigability."

In response to a question from the Governor, Assistant Attorney Bill Cook said the rules and statute do not address suspending or withdrawing the process of navigability. He said he did not know whether it could be done, but he offered to research the issue.

Leo commented that any legislative solution could rescind the previous law and said he believed this could correct the Sandy River navigability declaration.

State Treasurer Edwards said the Sandy River was not included in the list because the direction given to the workgroup was to consider perspective rivers, not those currently declared navigable.

Governor Kulongoski said, if his understanding is correct, this process would be to help avoid a collision between the federal and state law (or common law). Rather than forcing a navigability study (coming under federal law), he asked whether this would be a mechanism to deal with the floatage easement common law concept, without the state needing to make a decision on navigability? Cook confirmed, saying the intent of the proposal would be to deal with state common law rights and, if a compromise were to be crafted that people could live with, the issue of navigability would not be handled.

In response to questions from the Governor, State Treasurer Edwards said the rivers in consideration are the Trask, Mid and Upper Rogue, John Day, North Santiam and South Santiam. Edwards said property owners have been notified through those individuals that were involved in the workgroup and through the public hearing in Monument. He added that other hearings would be scheduled.

Governor Kulongoski confirmed with staff that only one river at a time will go through the navigability process, and that the John Day was on the top of the list, thus triggering formation of the workgroup. Director Hanus added that the workgroup was also initiated as a result of Judge Lipscomb's ruling that the Land Board had to make a navigability decision one way or the other on the John Day River.

The Governor expressed his concern that property owners around the other four rivers on which the workgroup is centering may not be as informed as those property owners near the John Day River have been. John Lilly, Assistant Director for Policy and Planning, said all riverfront property owners are notified when the agency receives a navigability study request. They are asked whether or not a study should be pursued or if they have recommendations for alternatives to the study. He said this notification process has occurred on the other four rivers. Lilly clarified that those property owners have not all been informed of the specific proposals being fashioned by the workgroup. He said the interest groups involved have been relied upon to act as a conduit to those interests. Lilly said as a proposal from the workgroup matures, notice would be given to all affected landowners.

State Treasurer Edwards said the workgroup has come to a juncture where it needs to be granted the 120-day extension, or go forward with a navigability determination. He said they hope to hold more hearings soon so people can give their input. He added that they also would contact and inform property owners through the associations

involved in the workgroup and plan to make efforts to notify all landowners and to follow up with the input received in that process.

State Treasurer Edwards moved the staff recommendation that the Land Board postpone commencement of the John Day River navigability study for 120-days (from today) to allow the workgroup time to develop a bill outlining an alternative to the navigability process. Secretary of State Bradbury asked that the motion include a request that DSL and the Treasurer report to the Board at the April and June meetings.

Governor Kulongoski said he would prefer the bill developed by the workgroup to be site specific to the John Day River, at least in the beginning. His concern again was that once those on the other rivers are notified and have their input, it might not allow time to get a bill into the legislative process.

Lilly noted that when a letter goes to landowners informing them that a navigability study request has been received, the letter asks the landowner for their opinion on whether the study should be initiated and asks for their ideas for alternatives to the study process. He said no timeline is given to the landowner as to when the study would commence, but he explained that the Board must authorize initiation of any study at a Land Board meeting, where the public would be notified and given opportunity to comment.

Governor Kulongoski commented that, since the issue is such a controversial one, combining five rivers into a discussion, instead of handling one at a time gives the DSL a great exposure as to whether people have been adequately informed.

The motion was approved unanimously.

Consent Agenda

- 2. a. Request by GCI Communications Corporation for a Territorial Sea statutory easement for a fiber optic communication cable corridor landing in Warrenton, Oregon.**
- b. Request for approval of the addition of Bandon Marsh, owned by The Nature Conservancy, to the Oregon Register of Natural Heritage Resources.**

- c. Request by Warner Munro to acquire a permanent road easement across state-owned trust lands located in Deschutes County.**
- d. Request by Coos County Board of Commissioners to acquire a permanent natural gas pipeline easement across state-owned submerged lands of the Isthmus Slough located in Coos County.**
- e. Request by the Oregon Department of Transportation to acquire a permanent roadway/bridge easement across the submerged lands of the Snake River located in Malheur County.**
- f. Request by Douglas County to classify for sale a tract of isolated Common School forestland, totaling 33.24 acres zoned Exclusive Farm Use in Douglas County.**
- g. Request for approval of December 16, 2002 State Land Board minutes.**

Director Hanus briefly reviewed the items on the Consent Agenda.

Scott McMullen, Chairman of the Oregon Fishermen's Cable Committee, expressed his committee's support for the Board's approval of the Territorial Sea easement request for GCI Communications. He said this would be a redundant cable for their fiber optic system from Puget Sound to Alaska. He said it is currently backed up by satellite, but stressed that it is preferable to have fiber optic backup, since it is faster and has a much greater carrying capacity. In addition, satellites are not secure, but fiber optic cables provide the security necessary such as for any military traffic.

McMullen discussed GCI's selection of the north coast of Oregon over the Washington coast. He said this speaks well of the State of Oregon and the Division of State Lands and the relationship with the cable industry. He also discussed the agreement between the fishers and cable owners to work together on sighting the best cable route and their agreement on a sacrificed gear fund.

McMullen commented on the last cable he helped with sighting for Tyco. He said the installation was absolutely perfect, due in great measure to the cooperative relationship between the parties.

Brad Pettinger, a representative of the Oregon Fishermen's Cable Committee, also commented on the communication and agreement between the cable owners and fishers. He said it is mutual understanding, respect and trust that has marked the process. He urged the Board to support the request.

Secretary of State Bradbury said he continually hears wonderful reports from the Fishermen's Cable Committee. He added that he appreciates the work of the Committee, saying it is great that fiber optic cable is being brought to Oregon, since this is an important industry for the state.

Governor Kulongoski confirmed with Bruce Rein, GCI Program Manager, that bringing cable to the area will allow for placement of a junction, if someone wants to make the investment to get cable farther up into the northern coastal area.

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

Informational Agenda

3. Presentation regarding Marine Reserves.

Director Hanus introduced Bob Bailey, the ocean program coordinator for the Department of Land Conservation and Development. Bailey gave an overview of the marine reserves program and discussed how other state agencies, federal agencies, local governments and other interests have jurisdiction over a broad range of activities, uses and resources in the ocean. He said it was this complexity of the different players and a change in Goal 19 that led to the creation of an overarching ocean program for the state, the Ocean Policy Advisory Council (OPAC).

Bailey said OPAC was asked by Governor Kitzhaber in July 2000 to review the issues of marine reserves and marine protected areas and provide him with a report and recommendation for future state action. Bailey said the OPAC did extensive studying, listening, and involving

many stakeholders. Extensive public hearings were held and a website was created where staff reports, meeting announcements, links to other information and comments could be posted. He discussed some of the comments, saying they ranged from one extreme to the other, with some in favor of the reserves and others totally opposed to them. He said overall there is a broad general public perception that ocean conditions are declining and some support for ocean area closures. On the other hand, he said fishers and coastal communities are very concerned about what effects closures could have on fishing areas and the economy. Bailey said they found that more information and analysis would be needed to identify and establish protected sites.

The recommendation made to the Governor is that Oregon should establish a limited system of reserves to test and evaluate their effectiveness in meeting marine resource conservation objectives, since we need to know more about how they work. The second part of OPAC's recommendation stressed the need to conduct additional study, analysis, and deliberation through a very open process before designating any specific reserves.

When asked by Secretary of State Bradbury about Governor Kitzhaber's response to the recommendation, Bailey responded that the Governor felt this to be an accurate assessment, but asked that OPAC work with fishers and local communities to address their concerns during the process.

State Treasurer Edwards asked about the Board's responsibility for the marine reserves. Bailey said the Board could be a very important instrument in implementing reserves. He discussed the Board's trust and ownership responsibilities of the seabed.

4. Asset Management Plan report.

5. Report of payment of \$25 million by New Carissa defendants and approval of Other Funds increase by Emergency Board.

6. Report on the Statewide Riparian Policy Agency Evaluation.

7. Report on the Oregon Plan for Salmon and Watersheds from Division of State Lands (Executive Order 99-01).

8. Status report on removal-fill streamlining.

9. Status Report on easement rules review.

10. Update report on legislation.

Director Hanus briefly reviewed the remaining items on the Information Agenda.

Governor Kulongoski adjourned the meeting at 11:50 am.

Governor Theodore R. Kulongoski

Ann Hanus, Director