

The State Land Board met in regular session on June 10, 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	Lore Bensel
Paddy McGuire	John Lilly	
Inga Deckert	Steve Purchase	
	Jeannette Holman	
	Jeff Kroft	
	Gail Lowry	

The Governor called the meeting to order at 10:00 a.m. 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 (State Lands), 775 Summer Street NE, Suite 100, Salem, Oregon 97301-1279, (phone: (503) 378-3805, ext. 224).

Director Ann Hanus introduced Victoria Guillebeau and Diana Oberbarnscheidt, Chairperson and President (respectively) of the Oregon Parent Teachers Association (OPTA). Oberbarnscheidt commended Hanus for her direction of State Lands, adding that the agency has done much in educating the public about school trust lands.

Oberbarnscheidt spoke to the Board regarding her concern over the Legislature wanting to "rob funds" from the Common School Fund. She emphasized that the Common School Fund belongs to the present and future generations of public school children of Oregon and urged the Land Board to discourage other uses of the Fund.

Guillebeau also cautioned that the Common School Fund is in danger of "being raided" by the Legislature for causes other than its intended purpose. She stated that the OPTA is opposed to this action, stating that the Fund is not a "piggy bank to be raided when economic times are tough." She asked that the Land Board use their authority to protect the Fund.

Governor Kulongoski thanked Oberbarnscheidt and Guillebeau for their presentations and requested permission to distribute copies of their testimony to members of the Legislature.

Secretary of State Bradbury and State Treasurer Edwards thanked them for their work and advocacy for the Fund.

3 e. Request for approval of the April 8, 2003, minutes of the State Land Board.

Governor Kulongoski requested approval of the April 8, 2003 Land Board minutes. Secretary Bradbury moved the minutes be approved and Treasurer Edwards seconded the motion. The approval was unanimous.

Action Agenda

- 1. Whether the State Land Board should direct DSL to postpone commencement of the John Day River navigability study until either the Governor signs legislation passed by the 2003 Legislature (Regular Session) to address the public's rights to use waters of the state not declared navigable or the close of the 2003 Legislature (sine die).**

Director Hanus said the Legislature was deliberating on Senate Bill 293, which included concepts developed by Treasurer Edwards' navigability workgroup. The bill would provide for development of a management plan approach in lieu of a navigability ownership determination for the John Day River and other rivers subject to a navigability study. Other provisions in the bill were discussed. Hanus said the bill is set up as a pilot project and would sunset in 2007.

Hanus explained that DSL is recommending the Board postpone commencement of a navigability study on the John Day River until the end of the legislative session or when the Governor signs the bill, if it is passed by the Legislature. This would allow time through the end of the session to determine the outcome of the workgroup and the Legislature.

Lawrence Edwards, private citizen, expressed his displeasure over the Board considering postponement of the navigability study. By doing this, he suggested they were "pandering to the few at the expense of the rest of Oregonians." Edwards said information he received showed that, when surveyed, only 30 out of 110 John Day River property owners responded that they wanted a navigability study. He cited Oregon Marine Board's 2002 Triennial Boating Survey summarizing the John Day River recreational activities as follows: 6,422 boat use days, 4,828 total trips, 6,524 activity days and 5,767 fishing days.

Edwards asked the Land Board whether it made more sense to clarify the rights of recreational river users or to dodge the issue and postpone the navigability study to appease a minority of landowners. He stated that the John Day River is a publicly-owned navigable waterway and asked the Board whether it would be in Oregon's best interest to allow a few to dictate their decision by sending it through the legislative process.

In regards to ownership of the beds and banks of navigable waterways, Edwards stated that in 38 different states the federal law has withstood numerous court challenges and said that Oregon should consider ways to avoid the potential cost of federal court battles. He urged the Land Board to take action and initiate the John Day River navigability study.

Glen Stonebrink, Executive Director of the Oregon Cattlemen's Association (OCA), stated OCA believes that the management plan concept is a reasonable alternative to navigability, but shared two concerns with the proposed legislation: 1) that the John Day River landowners would be given the same option as landowners of other rivers had been given to decide within 75 days whether to be under a recreational management plan or be considered for a navigability study; and 2) that the legislation does not specify that funding would be available to implement the plan before opening the rivers to public use. This funding was to cover additional services to the recreational

areas such as law enforcement, garbage removal, public restrooms, and compensation for property damages that are incurred.

Phil Donovan of the Association of Northwest Steelheaders said that the Association voted to support the postponement of the John Day River navigability study. He pointed out that the recreationists and property owner groups are closer than they have ever been to a compromise solution and credited the work of Treasurer Edwards and, in particular, Inga Deckert, who coordinated legislative visits and kept the group well informed about amendments to the bill.

Jean Underhill-Wilkinson, Oregon Farm Bureau, commended Treasurer Edwards and Inga Deckert's efforts. She said she views this bill as a reasonable compromise and a good thing for the landowners and the recreationists. She agreed with Stonebrink that the John Day riverfront property owners should be allowed 75 days to make a decision to opt in to the public access and management planning effort. She said the Farm Bureau would agree with the Land Board if it decides to specify this option.

Wilkinson said she has heard that the Board prefers to specifically mention the John Day River in statute rather than allowing the landowners to use the 'opt in' provision that the other riverfront property owners will be using in the future. She asked to hear the Board's definite recommendation on this. Wilkenson added that the workgroup could use all the lobbying assistance the Board could offer in the next few weeks in trying to get the bill through the Legislature.

Art Israelson reminded the Land Board that some of the John Day riverfront property owners were taken to court in 1998 and all of them were notified in 1998 that there was going to be a navigability study. He maintained they were given plenty of time to decide what they want to do. He said a majority of citizens did not request a study when Senator Ferrioli sent them a letter. They were told that a majority vote was needed from the workgroup before the bill would go forward. He said the bill went forward anyway, though there was not a majority. Israelson said he wonders when citizens will have a clear sign from the Land Board about what they are going to do. He does not believe navigability studies are the real answer and said Oregon should use Montana's plan. This plan, he said, is working well for Montana and was upheld in the Supreme Court.

The Governor said he has been involved in studies on the McKenzie and Willamette Rivers through the years since litigating the Chetco River case as Attorney General. He acknowledged that navigability is a difficult issue to resolve. He commented that the workgroup's plan to deal with the common law floatage issues (as Montana did), rather than navigability and ownership is good.

Governor Kulongoski said he wants to ensure this postponement does not convey that the Land Board is signing on to the legislation. He said that the reason for the legislation was that the Board wanted to clarify the rights of the public and private landowners on waterways not yet determined by the Board or the courts to be navigable. The Governor continued by outlining four principles for any legislation: 1) A bill must provide clarity and certainty of law to users, property owners and to law enforcement personnel. 2) It must clarify status quo and assure public rights to the beds and banks of the rivers, consistent with current common law doctrine; to float, fish, anchor, portage and use banks up to the line of ordinary high water or reasonable and incidental uses. 3) The bill must move toward reasonable, realistic and a long-lasting solution to the issue. It should assure that, if a pilot approach is chosen, that it test-drives a solution that is reasonable, realistic and easily applied on a statewide basis. 4) There should be no moratorium on other navigability issues that are in line to be studied.

He expressed his concern that if legislation does not meet these principles, it would extenuate the debate. He said that he wants to give the legislature the opportunity to work out these issues.

Secretary Bradbury supported the Governor's comments, saying he also would like to give the legislature an opportunity to come up with a solution. He agreed that whatever the legislature decides should clearly address the public's right to use the waterways and the concerns of the riverfront property owners.

Treasurer Edwards agreed with the other two members, stating that as a Land Board member he would not sign off on a bill that does not meet the principles outlined by Governor Kulongoski. He said if no legislation is passed, there is no alternative but to move forward with navigability studies.

Secretary Bradbury moved that the Board direct the Division of State Lands to postpone commencement of the John Day River navigability study until either the Governor signs legislation passed by the 2003 Legislature or the close of the regular 2003 legislative session. Treasurer Edwards seconded the motion and the approval was unanimous.

- 2. Letter of request submitted by Mr. Michael E. Haglund and a petition by seven present or former owners of alder sawmills in Oregon and Washington that the Land Board:
(1) Adopt an emergency rule repealing OAR 141-016-0010(2), and
(2) Direct the agency to initiate rulemaking to implement a permanent repeal of the subject administrative rule governing the export of unprocessed hardwood timber from Common School and other Land Board-managed land.**

Having been one of the decision makers in the early stages of the rule, as well as having been State Forester and Director of the Department of Forestry, Jim Brown stepped down as the Governor's Land Board Assistant and Jim Myron sat in for him during the discussion of this agenda item.

Director Hanus introduced this item saying that DSL received the request in early May. She stated that under the Administrative Procedures Act, the agency has 30 days to respond to the request. This does not allow adequate time to study the complex issue, gather public input and determine the impact of repealing the rule. Hanus said that State Lands proposes that it work with the Department of Forestry (DOF) to hold a public forum to gather input and conduct an economic analysis to determine short- and long-term effects on the Common School Fund and the state. She said that State Lands would then return to the Board in October with a recommendation on rulemaking. She asked that the Board deny this request to allow time to hold public forums.

Governor Kulongoski asked whether there were any questions and invited Mike Haglund, the attorney representing seven different parties in this case, to begin the public discussion session. He asked Haglund to outline procedurally his view of how the request came about.

Haglund, from the firm of Haglund, Kirtley, Kelley, Horngren Jones, LLP, explained that Weyerhaeuser had no involvement in the alder industry in Oregon prior to 1995 when it acquired Diamond Wood Products of Eugene with mills in Garibaldi and Eugene. He said the company elected not to export softwood saw logs from their Oregon land holdings for several years, which allowed them to continue buying alder from the state lands. He added that Weyerhaeuser convinced the State Forester to initiate rulemaking to allow them to have an exemption like they have in Washington where they cannot bid directly on state sales, but they can purchase the alder or hardwood component from those who do buy at state sales. He said that the parallel tracking of what the State Forester did ultimately led to the Board adopting an identical regulation governing the forest lands that ODF manages for the Land Board and the Common School Fund.

Governor Kulongoski asked if there was any connection between the softwood and hardwood on the substitution rule off of state lands. Haglund said there is no connection and that, prior to this exemption, Weyerhaeuser would have been prohibited from buying any logs, soft or hardwood. The exemption allowed them to export softwood logs and buy state hardwood.

Haglund said that he supports the staff recommendation to deny the petition and to join with the State Forester to engage in a public review process, allowing time for a more thorough review of the matter. Haglund explained that he and those companies he represents want the Board to re-examine the issue and seriously consider repealing the exemption. He said the exemption was secured through misrepresentations made to the State Forester, which the Board then relied on to make their decision. He said one misrepresentation was that the Eugene Weyerhaeuser mill was 34 percent dependent upon state alder. Haglund said the facts from the anti-trust case showed that the percentage was between 3.9 to 6.1 percent. He added that the Garibaldi figures were also substantially inflated, though not as drastically as those of the Eugene mill.

Haglund said it is important to examine the potential financial impacts to the state. He said Weyerhaeuser claims, if it loses this exemption, the state will see a decline in alder revenues. After a public review, Haglund believes revoking Weyerhaeuser's exemption would cause no final impact to the state.

He said that the anti trust case showed one way that Weyerhaeuser successfully monopolized the industry in Oregon and Washington is by bringing pressure on some softwood sawmills and operators to deliver their alder component to Weyerhaeuser's hardwood mills in Eugene or Garibaldi. He added that these companies fear if they do not deliver the alder to Weyerhaeuser, they will lose their source for softwood.

Haglund said the Board should be fostering an approach that supports a competitive industry that would include other Oregon mills, many of which are suffering shutdowns due to the lack of available alder logs.

Haglund continued by saying that the anti-trust case showed that Weyerhaeuser monopolized the industry in Oregon and Washington by developing right of refusal relationships with companies. He said that Weyerhaeuser made it clear that a softwood lumber producer that also owns forest land in Oregon feels significant pressure to deliver their alder component to Weyerhaeuser's Northwest Hardwood's mills in Eugene or Garibaldi, fearing they will lose that source if they do not.

Weyerhaeuser's exemption allows them not to bid on state timber sales, but only to buy the alder logs and certify to the seller, who bid on and bought the timber sale, that they have not exported alder in the last 24 months. Haglund feels if the exemption is removed, other alder sawmills in the region will compete. Haglund said that he sees this affecting what happens in connection with the state sales also. He said that his clients, being alder mill owners, are not bidding for the Douglas fir, which is the dominant part of the industry. This scenario leaves Weyerhaeuser open to get the state alder because they have an exemption, which allows them to buy it. Haglund added that no one knows what is being bid on the alder portion, since the sales are lump sum. He said that over 60 percent of the alder resources in Oregon was sold outside of competitive bidding. Haglund expressed that his clients are not getting a chance to bid on these, but said, if the Board takes away this exemption, they and other non-Weyerhaeuser companies would be able to compete.

Haglund said he supports what the staff is trying to do and said he expects Judge Panner to make a decision soon about unsealing the records in the anti-trust case.

When questioned by Governor Kulongoski, Haglund confirmed that Weyerhaeuser opposes the release of the information. He encouraged the Governor to consider the evidence and pursue a path that ensures

a competitive industry. He cited softwood landowners who had testified that they would not bid their alder for fear of losing their softwood trade relationship with Weyerhaeuser. He also cited testimony that revealed that a Grays Harbor area office head told a logger that they were going to have to insist that the loggers who want to supply export grade saw logs to be shipped to their facility to agree to only take the alder component to their alder division.

Haglund reiterated that a special verdict found Weyerhaeuser had monopolized the saw log market and the jury awarded \$26 million.

Governor Kulongoski asked whether Haglund could make his case before the Land Board and the Department of Forestry if the court refuses to release these documents. Haglund confirmed that he would need access to the sealed information, especially the charts and graphs. He added that, if there would be a hearing officer who would be willing to issue subpoenas, he could make his case.

Treasurer Edwards asked whether the Board should move forward with the recommendation, delay and then do a public hearing. He also asked if Weyerhaeuser plans to appeal and, if so, how likely it is that the information would be made public. Haglund said that he expected the documents would be made public by August 1.

Greg Miller, manager of Oregon Government Affairs for Weyerhaeuser Company, testified that his company supports the Department of Forestry's and Land Board's decision to hold the public forum this summer to review the status of the hardwood log exemption administrative rule.

He stated that there is a wide gap in the difference of facts and opinions from the previous testimony. He requested that the Board grant Weyerhaeuser adequate time during the public forum to present their case for their Northwest Hardwoods. Miller then said that the current administrative rule is in the public's interest to deliver full fair market value to and generate revenue for the state of Oregon. He said the company's involvement in the market is financially good for all Oregonians and for the creation of jobs in rural Oregon.

Governor Kulongoski asked how the process between State Lands and Department of Forestry would be coordinated. Hanus said the two agencies would jointly hold the public forum, report back to the Board and then give a full report at the October Land Board meeting.

Haglund reiterated that if the public forum is just that, where both bodies have denied the petition, there will not be a tie to the administrative rules governing the rulemaking or the right to have a hearings officer who would issue subpoenas. He amended his previous request that would grant the temporary order and repeal the exemption. He requested that the Board grant the petition to the extent that it initiates a rulemaking procedure, which will begin with a public forum managed by a hearings officer with the powers that go with the Administrative Procedures Act rules.

Hanus asked Lore Bensel for further clarification on the process. Bensel concurred with Hanus that under the Administrative Procedures Act there is a 30-day deadline for making a decision on the petition for rulemaking. She laid out the options for rulemaking: 1) hold a public forum; 2) not take a position on whether to repeal the rule and instead initiate the rulemaking process, which would allow the more formalized processes of rulemaking, including having a hearings officer to conduct the hearing; or 3) issue an emergency rule. Bensel told the Governor that he has the authority to deny the petition entirely and initiate rulemaking and instruct State Lands to conduct the public forum in coordination with the Department of Forestry.

Hanus proposed a motion that the Board deny the request by Mr. Haglund and those he represents, to immediately repeal and enter into emergency rulemaking, and approve the initiation of rulemaking for permanent rules concerning the proposed repeal of OAR 141-016. She said that would then direct State Lands to proceed to hold a public hearing this summer in coordination with the Department of Forestry to obtain public input concerning the impact of repealing the hardwood export rule provision. She proposed that the Division of State Lands present a report to the Board regarding the results of the study of the repeal, resulting from the public hearing and make a recommendation about the proceeding with rulemaking.

Secretary Bradbury stressed that the Board must have the ability to get the documents and information it needs by either the court releasing them, or through a subpoena process.

Treasurer Edward moved the motion suggested by Director Hanus. Secretary Bradbury seconded the motion. The decision was unanimous.

Consent Agenda

- 3.a. Request for approval of an exchange of Board of Forestry mineral rights for mineral rights owned by Longview Fibre Co.**
- b. Request for approval of an exchange of Division of State Lands' mineral rights for mineral rights owned by Charles V. Canham.**
- c. Request by Coos County Board of Commissioners to acquire two permanent natural gas pipeline easements across state-owned submerged lands of the Coquille River and the North Fork of the Coquille River located in Coos County.**
- d. Request for authority to initiate rulemaking to amend the rules governing the unclaimed property and estates programs.**

Secretary Bradbury moved the approval of the consent agenda and Treasurer Edwards seconded it. The approval was unanimous.

Senate Bill 311

The formal signing ceremony for SB 311 took place. This bill allows State Lands to enter into agreements with voluntary associations, such as the Friends of Dibblee Point, the Friends of Fox Creek and the Friends of South Slough. It also changes the name of the Division of State Lands to the Department of State Lands.

Retirements

Steve Moser and Jerry Hedrick, long time state employees, were recognized for their many years of service to the State of Oregon and congratulated on their retirements.

Informational Agenda

4. Update on Ross Island.

Director Hanus introduced this item, saying this is the culmination of a multi-year effort to end up with a permit for Ross Island. Hanus

named the members of the Ross Island restoration advisory committee.

Jim Rue of Ross Island Sand and Gravel said the previous plan had no provisions for wildlife. He expressed gratitude to those involved in the 14-month process to update the reclamation plan for Ross Island. He also complimented the members of the Audubon Society for their work with the committee.

Treasurer Edwards thanked Ross Island for their hard work and accomplishment. He said that he thinks it will be a workable solution, which will benefit the state and its citizens.

Secretary Bradbury also complimented those who worked on the plan. Governor Kulongoski expressed his pleasure with the agreement and complimented Director Hanus and everyone involved in the process for the cooperative effort and great achievement.

Governor Kulongoski left for another meeting and assigned Secretary Bradbury as chair of the Board for the remainder of the meeting. Director Hanus reviewed the rest of the Informational Agenda and invited everyone to stay for a retirement reception.

- 5. Strategic Plan Status Report.**
- 6. Customer Service and Outreach.**
- 7. Removal-Fill Rule Revision Approval.**
- 8. Update on Legislation.**

The meeting was adjourned.

Theodore R. Kulongoski, Governor

Ann Hanus, Director