Oregon
Division of
State Lands

SUMMARY OF

OPINIONS/ADVICE OF **THE OREGON ATTORNEY GENERAL**

RELATING TO

SUMBMERGED AND SUBMERSIBLE LANDS

1928-1997

APRIL 1998

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INTRODUCTION

When Oregon became a State on February 14, 1859, it entered the Union on an "Equal Footing" with the original thirteen States. As a result, Oregon's Statehood rights included title to navigable waterways and tidally influenced waters within its borders as a part of its sovereignty. In addition, the Oregon Admission Act states that "all navigable waterways of the State, shall be common highways and forever free."

The responsibility for administering the public and private use of beds and banks of state owned submerged and submersible lands, rests with the State Land Board and its administrative agency, the Division of State Lands.

Since statehood, the Board has established policies and rules to guide the management of these waterway lands and to carry out laws passed by the Oregon Legislature.

ABOUT THIS SUMMARY

The Division of State Lands, with the assistance of the Oregon Department of Justice, compiled this summary of Opinions and letters of advice of the Attorney General as a part of a comprehensive review of the administration and management of State-owned submerged and submersible land.

Every effort has been made to include citations pertinent to the subject. The Division, Land Board and the Department of Justice files were carefully researched.

READERS ARE REMINDED THAT OVER TIME, POLICIES, RULES AND LAWS CHANGE. ADDITIONALLY, COURT DECISIONS MAY CHANGE THE INTERPRETATION AND APPLICATION OF THE LAWS, RULES AND POLICIES OF THE LAND BOARD. ACCORDINGLY, DO NOT ASSUME THAT (FOR EXAMPLE) AN ATTORNEY GENERAL'S OPINION ISSUED IN 1936 IS STILL GOOD LAW, IN PARTICULAR, MAJOR ATTORNEY GENERAL OPINIONS AND COURT CASES ISSUED BEGINNING IN 1972 CHANGED MUCH OF THE LAW RELATING TO (IN PARTICULAR) WATERWAY LEASING AND NAVIGABILITY DETERMINATIONS.

Copies of many of the cited opinions/letters of advice are available from the Division at the address below.

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SUMMARY OF ATTORNEY GENERAL OPINIONS/ADVICE RELATING TO SUBMERGED AND SUBMERSIBLE LAND

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DATE	OPINION NUMBER	QUESTIONS/TITLE	RESPONSE/COMMENTS
7/20/1928		Whether or not the State of Oregon should disclaim title to the bed of Summer Lake/lease of Summer Lake.	If State Land Board adopted the proposed resolution it would be equivalent to disclaiming title to Summer Lake. AG advised not to adopt the resolution.
8/14/1939		What state action, if any, should be taken by the Land Board to protect the interests of the state in certain islands in the Columbia River.	Whether or not the state has an interest depends upon the date of the island's formation. If they existed at statehood, title remains with the United States; if they were formed subsequent to statehood, title is vested in the State of Oregon.
9/27/1939		Port of Arlington requesting advice on whether or not it would need to purchase shoreland required by the port to construct wharves.	The State Land Board has authority to sell or lease shoreland to the Port of Arlington for certain purposes.
12//2/1946	152	Whether or not under the terms of a lease granted by the Fish Commission, the State Land Board is excluded from having jurisdiction over the state-owned tideland. Jurisdiction is lessened only if leasehold is sold.	Jurisdiction of State Land Board over state-owned tideland, "wherein are located natural oyster beds" is restricted to sale thereof subject to lease granted thereon by Fish Commission.
2/13/1947	221	Port of Coos Bay intends to apply to purchase state land; can Land Board sell without advertising?	Providing such property shall be used and continue to be used for a public purpose, yes. The State Land Board, in making sale of tideland to a municipal corporation, is not required to advertise for sale as provided in section 106-312, O.C.L.A.
2/19/1947	227	Whether the State Land Board has authority to enter into a lease with a private person or corporation for the purpose of installation and use of piling, dolphins, et cetera, driven into the bed of a navigable stream or other body of water below mean low water line, without calling for bids after being advertised.	State Land Board may lease a portion of the bed of a river without advertising the same, provided the land is not needed for public use and navigability is not impaired.

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4/11/1947	227	What department of the state has jurisdiction over the matter of issuing permits to lower or raise the water level of navigable lakes or whether such an action would come within federal jurisdiction?	The State Land Board is not authorized to issue permits for raising or lowering the level of navigable lakes. All waters within the state belong to the public, but an application for the appropriation of waters will not be granted unless the proposed use thereof is beneficial and reasonable and does not conflict with determined rights of the public.
4/23/1947	287	Whether present riparian owners who can trace their titles to patents acquired prior to the year 1872 are to be considered owners of land between high and low water marks on the said rivers, or whether the grant and confirmation of title by the state was applicable only to riparian owners who acquired title to such lands during the six year period the 1872 act was in effect.	Riparian owners of land abutting on the Willamette, Coos, Coquille and Umpqua Rivers, who can trace their titles to patents acquired prior to the year 1878, own land between high and low water marks on the said rivers.
5/26/1947	334	Whether the federal government has a right to abrogate a law and build a dam without consent or action of the legislature.	The federal government has the power to construct a dam on the Rogue River for flood control without obtaining the consent or action of the legislature of this state.
6/3/1947	351	Whether title to the lands which has become tidal is in the State of Oregon, or whether the grantee, from the United States Government, continues to hold title thereto regardless of a change in boundary through the process of erosion.	Where land conveyed to the University of Oregon by the United States was partly washed away through the process of erosion, the said grantee was divested of title to lands below high water mark. Title to land which have become tideland is vested in the State of Oregon and the State Land Board is authorized to sell or lease the same.
6/10/1947	363	Whether or not the Clackamas River is navigable near its confluence with	Whether or not a stream or river is navigable is a question of fact

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		the Willamette River.	to be determined from evidence, which must show that in its natural state it is of a depth capable of being a useful means of trade and travel and contributing in some degree to commerce. The Clackamas River is navigable only in a limited or qualified sense.
6/16/1947	370	Whether or not a charge should be made by the State Land Board for sand and gravel removed from the ocean beaches.	The State Land Board may not charge for sand and gravel removed from ocean beaches.
6/18/1947	374	Do changes of the channel of a river (Willamette) by avulsion affect the state's title to that part of the former bed lying below ordinary low water mark?	A change in the channel of the Willamette River would not affect the state's title to the former bed of the river below low water mark, but if the change of channel was due to gradual, imperceptible causes, title to the former bed is vested in owners of adjoining upland.
7/23/1947	421	Status of beds of rivers, bays, sloughs, and other navigable waters in this state relative to the right of the State Land Board to require permits for the installation of wharves, docks and other fixed projections extending into the channel of such navigable waters. Also, may the Board charge a fee for such installations?	Since the legislature has expressly granted the privilege of erecting wharves and docks to riparian owners in incorporated cites and towns, and has further authorized the regulation of such installations by the cities and towns, the State Land Board does not have authority to require permits for such installations.
9/22/1947	485	Whether the State Land Board has authority to designate the amount of royalties to be received from the permits granted by the State Highway Commission.	Royalties received by the State Highway Commission from the removal of sand and rock from the ocean shore under Chapter 493, Oregon Laws 1947, shall be paid over by the said Commission to the State Treasurer for the benefit of the irreducible school fund. The method or procedure to be followed in carrying out the intent

* Opinion is not available from the Division

			and purpose of the act should be resolved by agreement between the State Highway Commission and the State Land Board.
12/26/1947	569	Is the State Land Board required and authorized to pay property taxes; is the lessee required to pay such taxes; if the lessee is required to pay such tax, and fails to do so, does the tax create a lien on the state's property, or does it create a lien only on the property of the lessee; if the tax creates a lien on the state's property, how can it be removed?	Under the provisions of Chapter 382, Oregon Laws 1947, real property of the state, or any agency or department thereof, which is leased to private persons or corporations, is subject to taxation. The statutes of this state relating to taxation of real property make no provision for the assessment of a leasehold interest in the lessee.
1/8/1948	584	If the State Land Board has authority and is required to pay such taxes (property) from the Common School Fund?	The provisions of Chapter 382, Oregon Laws 1947, are not applicable to lands owned by the state when the proceeds or rentals therefrom inure to the benefit of the irreducible school fund.
6/16/1948	757	Whether the State of Oregon has claim to title of an area abutting on the Pacific Ocean near the mouth of Coos Bay, known as the Coos Bay Reservation and South Jetty site.	The State Land Board is not authorized to sell or lease accretions to tideland abutting on the Pacific Ocean, since under Chapter 493, Oregon Laws 1947, the shore of the Pacific Ocean is declared to be a public highway which shall forever remain open as such to the public.
7/6/1948		Whether the State Land Board is authorized to require leases of tide and overflow land located within the state and national parks.	State Land Board has jurisdiction over tide and overflow land located within or abutting on state parks, and may, if so desires, sell or lease the same.
12/20/1948	993	Whether the State Land Board has authority to require royalty leases from persons removing gravel from portions of navigable streams.	The State Land Board is empowered under 121-601, O.C. L. A., to lease navigable portions of navigable streams to persons removing gravel, rock and sand therefrom. A stream or river may

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			be navigable notwithstanding interruption of the navigability by rapids and other obstructions.
12/19/1949	1311	Can the State Land Board acquire properties by condemnation proceedings if acquisition thereof cannot be consummated through other sources. Question arose from reclamation project in Warner Valley, there were some small parcels of privately-owned lands that would be either covered with water or upon which the state would require dikes to be erected.	The power of eminent domain may be exercised by the State of Oregon at the request of the State Land Board for condemnation of property of any kind (except United States land) and any and all water rights, easements and appurtenances thereto which may be necessary for carry out the purposes of this act.
3/28/1951	1746	Whether the State Land Board is required to notify personally the upland owner of the highest offer after being advertised?	The statute relating to the leasing of tide and overflow land by the state does not require the State Land Board to notify personally the upland owner of the highest offer, but the board may, under its rule-making power, give such notice if it so desires.
10/8/1951	1922	Whether or not the State Land Board has authority to transfer title of a portion of the bed of the Columbia River to the State Highway Department?	The State Land Board is empowered to convey title to a portion of bed of the Columbia River to the State Highway Department, subject to the public rights of navigation and fishery, provided the real property will be used for a public purpose.
8/28/1953	2536	When a channel has been artificially created, does the state have title to the bed of the channel, and since the same is affected by the tides, does the state have title to the land between ordinary high and mean low tide?	A riparian owner who dredges a navigable channel through his/her land to connect with other navigable waters remains the owner of the fee although the banks of the channel are affected by the ebb and flow of the tide.
2/26/1954		How waterway leasing procedures of the State Land Board are affected by a February 9, 1954 court decision.	Notice to bidders must be changed to include a provision indicating when bids will be opened; rules and regulations

* Opinion is not available from the Division

			must be promulgated establishing a procedure for giving upland owner notice of the highest bid, and providing a reasonable time within which such upland owner may thereafter exercise his/her preferential right; the Land Board must provide that the Notice to Bidders shall call for bids on the respective segregated portions of tidelands fronting on the adjoining upland.
11/19/1954		Whether or not a conveyance to the United States Government, BLM, of a portion of a bed of navigable stream for the purpose of construction and operation of a log rafting, booming and storage facility appurtenant to the Smith River access road would constitute a public purpose as set out in ORS 2721.330.	Public rafting, booming and storage facilities would be considered a public purpose within the purview of the statute, and the State Land Board would be authorized to make a conveyance by deed to the United States Government without consideration.
5/20/1957	3684	What is the State Land Board's authority concerning the power and procedure to grant mineral leases in the bed of the Pacific ocean between ordinary low tide mark and the state boundary?	*At the present time* there is no express statute or regulation recognizing a lease applicant's right to locate the area of the ocean bed which he/she desires to lease by placing a marker on the beach or above high-tide mark and tying in the same with an established section corner and then carrying the claim to the ocean floor by metes and bounds description. However, the State Land Board has authority to adopt rules and regulations establishing a procedure for the manner of locating any such desired mineral lease claim.
8/19/1957		Whether the State Land Board is authorized to enter into a lease with the Port of Umatilla covering certain tide and overflow land for a marina without advertising.	The land to be leased should be advertised for bids with due notice and opportunity to the upland owners to bid on their preferential rights, should they

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			wish to do so.
8/9/1960		Whether the State Land Board may sell or lease beds of navigable rivers to private persons for the purpose of creating permanent additional land by filling in beyond the ordinary low watermark.	The state's power to sell the beds of navigable rivers for private purposes would always be subject to the existing rights of the upland owners.
12/13/1960	5119	Does State Land Board have authority to enter into a lease of Oregon's submerged coast land without competitive bidding?	The State Land Board has no authority to lease offshore land for exploration and discovery of oil and gas.
8/28/61	5295	Whether or not the State Land Board may grant any number of leases to an applicant.	Yes. Leases may be limited in size but not in number.
6/20/1962	5452	Several questions pertaining to the land and waters of Yaquina Bay: In whom does the ownership of the bed of the bay lie upon which the fill was made; Can a riparian owner extend a wharf beyond low water mark; If the state has regulated or authorized regulation of the navigable waters within its borders; Does a fill constitute a wharf:?	Oregon acquired title to the beds of all navigable waters within its borders upon admission into the Union. The state has power to sell or lease tideland in its proprietary capacity, but holds the submerged land in its sovereign capacity in trust for the public. A riparian owner has a right incident to the land to wharf out to navigable water subject however to control and regulation by the state. Waters including wharves within port districts are subject to control and regulation by the port with the same power and authority as lies in the State of Oregon. A wharf has been defined to include a bank or earth fill.
9/28/1962	5508	Whether the State Land Board has the authority to grant an easement over or to sell for purposes of a public airport land lying (a) between ordinary high and mean low tide; and (b) below mean low tide.	The State Land Board has authority to sell or lease tidelands for airport purposes, but the land below mean low tide is held in trust for the public and whether or not such land may be sold or leased is a question for the legislature.

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12/26/1962	5553	Whether the State Land Board has the authority to enter into leases for land lying between the high and low water lines on non-tidal navigable rivers?	The State Land Board has no authority to alienate or require that leases be obtained for land lying between the high and low water lines on nontidal navigable rivers. Tideland may be alienated, but, if lying within a port district, leasing is subject to the port's authority to control and improve navigation.
7/28/1965	6002	Whether the Land Board can lease submerged or submersible land to which several private individual owners are riparian, to the Port of St. Helens without advertising and without offering preference rights to those private land owners.	The State Land Board is authorized to lease submersible or submerged land in the same manner as tide and overflow land, that is only to the highest bidder after being duly advertised for a period of 30 days in two or more newspapers of general circulation in the state.
12/11/1968	6579	1. Does a riparian upland owner have a right to use adjacent navigable public waters for log raft booming and/or storage without the necessity of obtaining lease from the State of Oregon?	1. Yes, however the size of the log raft would be limited to the extent that it not interfere with the right of navigation.
		2. Does a riparian upland owner on a navigable stream have a right to assign his rights to a second party for the use of adjacent waters for log raft booming and/or storage without either party having first obtained a lease from the state?	2. Yes.
		3. Based upon the usual industry practice of driving piling or dolphins into the state-owned submerged or submersible land to which the log rafts are moored, does DSL have the authority to require a lease for the exclusive, private use of submerged areas for this purpose?	3. No. The adjacent upland owner would have the riparian right to build structures to moor logs, subject to the public rights in the river, until the state decides to use, lease or sell the submerged or submersible land. For this reason the upland owner could not be required to

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			lease the submerged land from the state.
		4. Does ORS 780.040 (statutory wharf right) in any way modify DSL's authority to require a lease for log booming or storage areas?	4. No. Inasmuch as a log boom or raft is not within the general definition of a "wharf," ORS 780.040 is not applicable to log rafts.
		5. Does the DSL's authority over the submerged river extend upward from the bed to the water surface in such a way as to authorize DSL to enter into log raft storage leases in those instances in which the rafts are moored to the upland rather than to other anchoring devices that actually contact the submerged or submersible land?	5. No. This question presumes a right in the owner of a log raft to moor to the upland as either the owner thereof or assignee of the owner's right to use the upland in conjunction with the water. If the owner of the upland can utilize the riparian right to moor logs in the absence of use by the state or third party lessee or purchase, then the upland owner can moor to his upland. In conjunction therewith, he/she can assign such right.
11/4/69	6665	Who owns the land above the former line of ordinary high water now inundated by the construction of the Bonneville Dam?	The ownership of the land submerged by the raising of the navigable waters behind Bonneville Dam, which lands was formerly in private ownership, has now vested in the State of Oregon, subject to the control of navigation by the United States.
*4/6/1971		Assertion of State Ownership of Navigable Lake Beds.	It is apparent that no blanket statement can be made relative to the state's ownership of the bed of lakes. Each case must be determined on its own set of facts. It is our opinion that in most instances the state would encounter difficulty in proving navigability of lakes in the federal sense because of the importance placed by the federal

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			courts on the requirement of the use of a body of water, or its susceptibility of use, as a highway of commerce for trade and travel. This is especially so because most of such lakes do not connect with streams or other bodies of water which form avenues of commerce of any significant length.
9/17/1971	6861	1. Do private owners of tideland have the right to fill the tideland where the fill would unreasonably interfere with public rights in, or uses of navigable waters?	1. No. The paramount policy of the state is to protect and conserve the state's water resources for various public uses such as navigation, fishing and public recreation. Tideland cannot be filled where the fill would unreasonably interfere with public rights in or uses of navigable waters.
		2. Does the filled land law authorize the DSL to permit the filling of tideland where such filling would unreasonably interfere with existing public rights in or uses of navigable waters.	2. No. The filled land law prohibits the filling of submerged or submersible land without the owner's approval.
* 1/26/1972		Acquiring Tideland for State Parks.	The Highway Commission would have the authority to purchase or condemn tideland containing shellfish beds in order to preserve those beds and to enhance their use by the general public for recreational purposes.
*2/23/1972		Safety Regulations on Submerged Lands.	1. The Division of State Lands does have authority to impose reasonable rules and regulations to control the size, specifications, and character of floating structures which are moored in a leased area.
			2. Unable to state if the Division

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			of State Lands can impose rules and regulations on riparian landowners who have wharfed or docked out into the river and who moor floating structures thereon.
*3/13/1972 *5/22/1972	150-01-0311-72	Taxation of Leased State Lands.	In the absence of a statutory provision to the contrary, where state-owned real property is leased to a taxable owner, the burden of the tax imposed by ORS 307.110 falls upon the state, as the legal owner, and not upon the lessee. However, the Attorney General held that the lessor's interest or leasehold was subject to taxation.
*8/22/1972	6936		The State of Oregon owns the beds of those waterways recently declared by the Corps of Engineers for the Portland District to be navigable waters of the United States to the extent that a Corps of Engineers' declaration of navigability relies on valid historical evidence showing that a particular waterway was susceptible of being used in its natural condition as a highway of commerce when the state was admitted into the Union. Such declaration, while not conclusive, does indicate the waterway was navigable and that title to the bed thereof belonged to the state upon its admission into the Union.
10/30/1972	6951	1. Does legislative power exist to require an upland owner on a navigable river to execute a rental lease for building new structures or continuing to maintain existing	1. Yes, except for temporary log booms maintained for periods of short duration incident to a particular movement of logs and

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		structures on the state's submerged and submersible land?	existing wharves still used as wharves and in compliance with ORS 780.040 and 780.050.
		2. Do existing statues authorize DSL to require such rental leases for structures other than wharves?	2. Yes, except for temporary log booms maintained for periods of short duration incident to a particular movement of logs.
11/2/1973	7008	May a lessee of state-owned submersible land on a navigable lake regulate in a reasonable manner public use of the beach developed by the lessee on the leased submersible land?	The lessee may impose regulations that are consistent with a reasonable public use of the beach area, but cannot interfere with public use of the waters abutting the beach. Under the facts presented it is not necessary to determine whether the public has any right to use a privately owned or leased beach area.
6/6/1974		Whether DSL has any authority to issue a lease upon the flowing water of the Columbia River, not for consumptive use.	No. The DSL can require a lease for the portion of the river bed used by the barges for anchoring, but the activity of screening the water for its minerals, as distinct from extracting minerals from the submerged land, is not an activity for which the legislature has authorized the DSL to issue leases, or for which a lease would be required.
7/3/1974	7091	1. May the lease of the area known as Weston Bar for gravel removal be limited to only lease?	1. Yes, provided that the competitive bidding requirements of ORS 274.530(2) are followed and the contract of lease does not grant an option of leasing or purchasing the state's property.
		2. Does the upland owner have a preference right to lease the submersible lands constituting	2. No. While the answer is not free from doubt, the legislative history of the

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		Weston Bar for sand and gravel removal after having offered to meet the highest bid received.	general leasing statute in ORS 274.040 and of the gravel leasing statues in ORS 273.225 and 274.530 indicates no intent to impose a requirement of a preference right.
11/8/1974	3115	Question as to the assignability of the statutory preference right given to an upland abutting owner by the provisions of ORS 274.040, and whether an advertisement or public bid may be so worded as to require the $120 minimum fee for any lease issued.	The preference right is a mere privilege which the state is not required to grant, and which it has chosen to grant only to abutting owners. The privilege is personal to the abutting owner, and is incapable of transfer. No, an advertisement or public bid may not be worded so as to require the minimum fee. Rather the advertisement should advise prospective bidders of the minimum bed acceptable for each parcel comprising the area.
7/9/1976	7314	1. Do oil and gas leases entered into by the DSL subject that land to ad valorem taxation by reason of ORS 307.110? 2. Is the property to be taxed at the true cash value of the fee simple estate or only at the value of the mineral interest?	1. Yes, unless the proceeds from the lease accrue to the Common School Fund. 2. The taxation would be on the mineral or geothermal resource only.
2/1/1977		Are Tenmile Lakes navigable or non-navigable?	The presence or absence of meander lines do not determine navigability. This is a question of fact to be determined in each case. Based upon the facts presented, the AG agrees with the position of DSL, that the lakes are navigable.
8/31/1977		Is submerged or submersible land owned by the state but leased to a person whose real property is taxable subject to taxation under ORS 307.110?	Yes. However AG recommended this new opinion not be adopted without a legislative change to back it up.

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11/20/1978	7686	Do ORS 273.751, 273.761 and 758.010 preclude DSL from recovering its administrative costs in preparing and recording easements to utility and railroad companies over submerged and submersible land?	No, as to ORS 273.751 and 273.76. Yes, as to ORS 758.010. In the case of ORS 273.761, which neither authorizes nor prohibits a charge, the Division may, in addition, impose a rental by virtue of the State Land Board's authority under Article VIII, Section 5(2), Oregon Constitution. ORS 273.751(4) also authorizes such rental in the case of railroad bridge easements.
7/18/1979	7784	1. Did an 1891 State of Oregon deed for the sale of School Land convey submerged land in the bed of North Tenmile Lake, Coos County, Oregon, where the lake was not meandered but lay within the boundaries of the land described in the deed	1. No. The 1891 deed did not affect the state's title to the submerged land.
		2. Was the 1891 deed affected by any of the validating statutes in ORS 273.900 to 273.920, so as to confirm title in the submerged land in the bed of North Tenmile Lake in the grantee, her heirs or assigns?	2. No. The deed in question was issued May 5, 1891, the referenced statute is inapplicable because it validates only those deeds issued prior to February 20, 1891.
8/13/1979	7791	1. May the Division of State Lands require either a lease or a Fill or Removal Permit for dredging of submerged offshore land in the Pacific Ocean by a private company for the purpose of commercially harvesting clams?	1. The Division may require either a lease or a permit for such a dredging operation.

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		2. If the answer to the first question is "yes," may such a permit or lease provide for exclusive use by the company of the affected area for the purpose of commercial clamming?	2. Yes, subject to qualifications.
12/28/1979	4871	1. Domsea Farms has asked the State Land Board for a lease of upland lying just north of the Siuslaw River North Jetty. Domsea has a permit from ODFW to operate a salmon ranch. The area is included in a parcel leased to Lane County for Harbor Vista Park. The lease expires 6/30/80. Domsea now subleases from Lane County. The question is whether or not the preference right in ORS 274.040 applies in this situation so as to require the Division to first offer the lease to Lane County.	1. The lease in question deals with upland, the statute is inapplicable.
		2. Whether the Division must advertise the site for lease and solicit competitive bids?	2. The Division may enter into a lease without the necessity of competitive bidding.
2/12/1981	7995	Would a lease of the Tongue Point property consisting of submerged and submersible lands and upland be required to be competitively bid?	No. If the Tongue Point parcel is dealt with as a single integrated parcel and if the Board can find that negotiating a lease would produce the greatest financial benefit for the Common School Fund, then competitive bidding of a lease would not be required.
6/8/1981	8033	May the Division of State Lands charge a private company not regulated by the Public Utility Commissioner for an easement on the state's submerged lands for a cable crossing on the Willamette River to provide cable television to the residents of Clackamas County?	Yes. ORS 758.010 does not apply to a cable television company not regulated by PUC. ORS 758.010 therefore does not limit the power of the Division to charge a cable television company for an easement on the state's submerged land.

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1/18/1982	Whether a tax lot consisting entirely of submerged lands as defined by ORS 274.005(7) located under the Columbia River and belonging to the State of Oregon may be assessed for real property taxation by the county?	No. Except as provided by law, all property of the state and all public or corporate property used or intended for corporate property used or intended for corporate purposes of the several counties, cities, towns, school districts, irrigation districts, drainage districts, ports, water districts and all other public or municipal corporations in this state, is exempt from taxation.
4/21/1983	1. Whether the City of Eastside may exercise a preference right on the submerged land adjacent to Bessie, Limnell and Whitty Streets.	1. Any lease obtained by an abutting owner, whose property is subject to a public easement, would also be subject to the public easement. In other words, the abutting owner may not use the leased land in a manner which interferes with the public easement.
	2. Whether the State Land Board may offer the holders of the preference right an undivided interest in the proposed lease or, whether the state must break the lease into sections reflecting the width of the upland parcels and offer each of these sections to the upland owners?	2. Unless the upland owners agree to accept an undivided interest in the lease of the entire area, the law requires that each upland owner be offered a separate lease.
*10/6/1983	Whether a railroad may require a lease before it allows the owner of adjoining property to enter its right-of-way.	Because the railroad has an exclusive right to possession of the right-of-way, even though it does not own the land, and because the railroad would have the right to bring an action in ejectment against any unpermitted user of the land, it follows that the railroad may require a lease before it allows use of the right-of-way by others.

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SUMMARY OF ATTORNEY GENERAL OPINIONS/ADVICE RELATING TO SUBMERGED AND SUBMERSIBLE LAND

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3/14/1985		Analysis of HB 2879, which proposed to transfer management responsibilities for submerged and submersible land from the State Land Board and Division of State Lands to the Marine Board.	The proposed measure may be unconstitutional to the extent that Section 3 would transfer moneys from the Common School Fund to the Marine Board.
10/23/1987	141-410-G0033-87	1. Does DSL have the ability to interpret the provisions of OAR 141-81-010(3)(a) to require leases for barge tie-up or barge storage facilities where the barges are not immediately engaged in navigation or in the receipt or discharge of goods or merchandise?	1. Yes, such a construction by DSL would be permissible.
		2. Whether the described facility could be construed by DSL as a barge storage facility subject to lease?	2. Yes, DSL could conclude that the facility in question is subject to a lease.
9/14/1988	141-110-G0187-88	Is Windsor Island leasable, and without offering it for competitive bid?	Yes, DSL is at liberty to lease some or all of the upland area of Windsor Island together with a small amount of adjacent submersible land without offering any portion of the leased area through competitive bid.
10/26/1988	141-540-G0063-88	1. To whom the lease preference right under ORS 274.040 should be offered when the upland property is under a land sale contract?	1. Where the upland property is subject to a land sale contract, the preference right under ORS 274.040 should be offered to the vendee.
		2. What is the validity of a lease that has been offered in good faith to the wrong party?	2. If the preference is offered to the wrong party, even if the offer is made in good faith, the subsequent lease is void.
11/2/1988	141-540-G0101-87	Does the DSL own structures (five concrete piers, piling or dolphins (the piers) located on state-owned submerged land in the Willamette River?	The piers located on state-owned submerged land are more likely than not the property of the City of Lake Oswego. So long as the riparian owner wishes to continue to exercise the wharfing

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			privilege and will lease the state submerged lands affected by that exercise, the structures themselves remain the property of the riparian owner (City) albeit located on state-owned property.
2/6/1989	141-310-G0075-87	Whether exercise of the preference right by an adjacent owner must be at the minimal rate for ship moorage or may be at some lesser minimum annual rental.	DSL has allowed exercise of the preference right at a minimum lease rate for whatever use the riparian owner proposes rather than requiring the riparian to pay the minimum lease rate for the use the applicant proposes. This is a permissible interpretation of the applicable statutes and rules.
2/10/1989	141-410-NR209-88	Advice regarding determination of rental payments.	The Division may redetermine the rental under lease annually.
3/8/1989	141-410-NR209-88	1. Whether the DSL may equalize the minimum rental rates for leases for extension of upland use? 2. Whether DSL rules or statute establish the proper way to measure a float and dock to determine the size of the leased area.	1. No. Setting minimum lease values in the manner described is not consistent with current DSL rules. 2. OAR 141-82-032(4) merely states that the rental should be on a per acre basis, but does not identify a means of measurement.
9/8/1989	141-310-G0058-84	Whether the Division may lease submerged and submersible land to a riparian who requests such a lease for an otherwise exempt structure.	Yes.
1/24/1990	6358	1. What rights does the public have to use the waters and submersible land of a navigable lake for recreational purposes, and to what extent may the riparian landowner restrict the exercise of those rights?	1. The public has the right to use the waters and submersible land of a navigable lake for recreational purposes free from interference by private parties (including riparian landowners), but subject to legitimate state regulation. Private parties leasing state-owned submerged and submersible land, however,

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		may impose reasonable restrictions upon public use of the leased area.
	2. How do ORS 274.040 (granting riparian owners the preference right to lease adjacent submerged and submersible land) and ORS 274.042 (exempting certain structures from leasing requirements) interact?	2. The riparian landowner's statutorily created preference right to lease adjacent state-owned submerged and submersible land arises only where DSL is authorized to lease such land. But even where that preference right applies, it is not an absolute right. Rather, it is merely a statutorily created preference for the riparian owner to lease the land in those situations in which the Division chooses to exercise its authority to lease. On the other hand, the statute exempting certain structures from leasing requirements bars the Division from leasing submerged and submersible land in certain circumstances. Therefore, where someone other than the owner of the adjacent riparian land constructs and maintains an exempt structure on state-owned submerged and submersible land without a lease, the riparian owner has no preference right to exercise. A riparian owner may seek to prevent construction of exempt structures on adjacent state-owned submerged and submersible land by applying to the Division for a lease. If the Division decided to lease that land, the riparian is entitled to that lease.

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5/7/1990	141-410-G0043-85	Whether OAR 141-92-050(2)(a) prohibits the State Land Board from leasing the state's Tongue Point property as a whole for more than ten years.	The 10 year lease limitation of OAR 141-82-050(2)(a) yields where the Board determines that a lease of longer duration is necessary to produce the greatest financial benefit for the Common School Fund.
1/28/1991	141-430-NR057-90	Whether ORS 274.040 requires the DSL to offer a preference right to the adjacent upland owner when DSL proposes to lease submerged lands for sand and gravel removal.	ORS 274.040 does not require DSL to offer a preference right to adjacent upland owners unless the upland owners also own(s) the submersible land adjacent to the submerged land.
3/23/1993	141-410-NR209-88	Whether the DSL could require a lease for commercial harvest of sea urchins from state-owned submerged and tidal land.	Yes, the prerequisite for any Division urchin harvest lease is that the harvest involve some use of state-owned submerged land (through planting urchins in or on, or removing them from, submerged land or vegetation growing from the land; or placing harvesting equipment on submerged land). However such leases may not be exclusive unless the exclusive right is limited to the privilege of placing equipment on submerged land (or perhaps of harvesting using a particular method) or the urchins harvested are planted by the harvester.
10/27/1995	141-040-NR016-93	What options are available to the Division of State Lands for dealing with navigability ownership questions arising from conflicts.	It is very hard to identify specific options available to the Board and Division now for dealing with ownership conflicts. Unfortunately the legislature gave the Board and the Division no guidance on the issue. Until the process rules are finally adopted and a state position on the navigability of particular waterway is developed through that process, the Board and Division must neither advocate nor waive navigability of a

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		waterway where it is at issue.
8/14/1997	1. Existing statutes create a privilege for the construction of wharves, and an exemption from lease requirements for small floats and docks. An earlier statute exempting small marinas was repealed in 1991. Can the Legislative Assembly repeal privileges and exemptions like these, allowing the State Land Board to bring formerly exempt waterway activities under lease?	1. Yes. The public has no "vested rights" to erect permanent structures on state submerged and submersible land beneath navigable waterways, free of charge.
	2. Does the same answer apply to privileges or exemptions found in the State Land Board's leasing rules?	2. Yes. The State Land Board is authorized by law to implement a waterway leasing program, so its rules have an effect similar to statutes. So long as there is consistency, the Board can adopt and repeal exemptions.
	3. Can the Board impose a lease on a wharf?	3. No. The Board's rules must be consistent with statutes, which currently permit wharves in certain circumstances. Wharves within cities and port districts are entitled to a (revocable) privilege and cannot be subject to leases, at least not without provision for recovery of expenditures.
	4. Can the Board impose a lease on a private boat dock or float which is currently exempt under ORS 274.043?	4. No, for the same reasons as #3.
	5. Must the Board pay "compensation" to owners of existing structures brought under lease?	5. No. The Supreme Court has held that the law of franchises, not the law of eminent domain, applies to these waterway leasing

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		issues. The only obligation the Board faces is to allow recovery of expenditures by owners who have made substantial investments in reliance on an express grant of authority in statute or rule. The owners of structures built many years ago may already have recouped their investments.
	6. What about existing structures other than wharves and exempt floats or docks? Are they subject to lease?	6. a) Any structure which isn't exempt under existing law may be brought under a lease. The only question is whether the lease must permit the owner to recover the owner's investment in the structure through a period of rent-free use. b) Structures which are not now, and have never been the subject of a specific statute or regulatory exemption or privilege may be brought under lease without any provision for recoupment or investment. c) Structures which were built before the adoption of a privilege or exemption, but which otherwise would have been covered are in a "gray area" of the law. They may be considered as "grandfathered" and their owners permitted to recoup their investments. Alternatively, an argument can be made that no recoupment is necessary because the owners' initial investments were not made in reasonable

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			reliance on any express permission from the state. d) Structures which have fallen into disrepair can be brought under lease without any provision for recoupment, the reason being that the Board has police-power authority to require the removal of such structures. e) Where a person has begun but not yet completed construction of an exempt structure, and the exemption is repealed, the owner's entitlement to recoupment of investment will most likely be determined by reference to state land use law on the subject of so-called "vested rights." f) Where a person wishes to rebuild or replace a pre-existing structure which was built under an exemption subsequently repealed, the Board may require a lease without providing for recovery of investment.
11/18/1997	141-040-GN0407-97	1. What riparian owner "rights" and/or "privileges" exist relative to waterway access and use under common law and Oregon Law?	1. While a riparian landowner has a proprietary right of access to an abutting waterway, at common law there are no true "rights" to construct structures on state owned submersible land. There are, however, privileges afforded a riparian landowner by statute which allow the construction of structures on state owned submersible land.

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		2. Can any or all of those riparian land owner rights/privileges be severed from riparian ownership and transferred or assigned separate from the conveyance of the riparian land or submersible land (in the case of a grant river)?	2. No, the preference rights associated with riparian ownership cannot be transferred separately from the riparian land.
		3. What rights and recourse does a riparian land owner have in response to a third party waterway lease application fronting the riparian's property?	3. A riparian landowner's only recourse against a third party's waterway lease fronting their riparian land is to exercise their preference rights under ORS 274.040.
		4. Is the riparian landowner's statutory "preference right to lease" submersible land under ORS 240.040: (1) the right to meet the high bid from a third party; (2) the right of first refusal to lease the land at the standard rate for the purpose the third party applied for or; (3) the right to lease the land at the lowest rate charged for any division waterway lease (i.e. log raft rate) regardless of the type or existence of a third party lease application (e.g. a right to foreclose future uses)?	4. Because the statute and DSL's administrative rules are ambiguous, any reasonable interpretation by the agency is entitled to deference.
12/9/1997	141-040-GN0407-97	1. Does DSL have authority to impose civil penalties for failure to register certain waterway uses under proposed new rules?	1. Yes. ORS 274.992(1) provides: any person who violates any provision of ORS 274.040 or any rule, order or lease adopted or issued under ORS 274.040 shall be subject to a civil penalty.
		2. Whether the DSL may charge a fee for registering structures under the proposed rules.	2. Yes. The authority for charging a fee is implicit in the Division's authority to exempt the structures and uses from otherwise

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	applicable lease payment requirement. ORS 274.040(1) and 274.915 authorize the Division to lease submerged and submersible lands and require it to lease only to the highest bidder at least at the minimum amount designated by the Division only those structures mentioned ORS 271.043 or in Division rules are exempt from this lease and payment requirement. Applying the rationale used in OP 5828, the authority to charge a fee in lieu of lease payment is implicit in the authority to exempt certain structures from the otherwise applicable statutory lease and payment requirements.

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