

S t a t e L a n d B o a r d

**Regular Meeting
October 12, 2004
Agenda Item 3**

SUBJECT

Request for authorization to initiate a navigability study of a portion of the Rogue River from Grave Creek (River Mile 68.4) to Lost Creek Dam (about River Mile 158).

ISSUE

Whether the Land Board should authorize the Department of State Lands (DSL) to undertake a study to determine the title navigability of the Rogue River from Grave Creek (River Mile 68.4) to Lost Creek Dam (about River Mile 158).

AUTHORITY

ORS 273; regarding the creation and general powers of the Land Board.

ORS 274.400 through 274.412; regarding administrative determinations of navigable waterways.

OAR 141-121-0000 through 141-121-0040; regarding navigability determinations.

BACKGROUND

On July 14, 1997, Timothy R. Thompson, then District Attorney for Josephine County, submitted a navigability study request for the Rogue River from Grave Creek (River Mile 68.4) to Lost Creek Dam (about River Mile 158) (Appendix A). DSL informed the Land Board of receipt of this request at its October 6, 1997 meeting. At the same time, DSL also told the Land Board that it had determined that the

request was complete pursuant to the requirements of OAR 141-121-0020, and that it was in the process of compiling a list of property owners of record along the requested 90-mile study segment. Approximately 39 miles of the river segment is within Josephine County and 51 miles in Jackson County.

On December 2, 1997, DSL sent a notice to all property owners then of record along the 90-mile segment for which the study was requested asking for their comments concerning whether there was substantial economic justification or a broad and substantial public interest for the proposed study.

Additionally, DSL asked the property owners if they had any ideas concerning ways other than a navigability study that the problems and issues identified by the Josephine County District Attorney's request could be resolved.

As a result of this notice, DSL received 97 letters, 32 of which were in support of, and 49 against conducting a navigability study. Sixteen of the letters were either requests for additional information or expressed no opinion whether such a study should be conducted. DSL provided the Land Board with a summary of the comments received in an Information Item presented to the Board on February 10, 1998 (Appendix B). As indicated in this Appendix, opinions varied widely as to the need for the requested study

Following the February 10, 1998 Land Board meeting, DSL forwarded a copy of the request to the Joint Legislative Interim Committee on Navigability for its review and recommendations. The Committee did not provide any comment on the navigability study request.

No further action was taken on this navigability study request until December 2003 by the Land Board. At that meeting, DSL reported that it planned to go before the Board in February 2004 with a recommendation concerning the navigability study request. However, during the Board's discussion of this item, the question arose whether the current District Attorney, Mr. Clay Johnson, believed that this study was still warranted. Pursuant to a request by the Board, DSL contacted him to seek his opinion concerning the present need for this study.

In response to our inquiry, Mr. Johnson confirmed that this study is still needed stating:

"I am in complete agreement with his (Mr. Timothy Thompson's) request for the study. The rights of the public, vis-à-vis the property owners along the Rogue River, is a significant issue in Southern Oregon and needs to be officially determined." (See Appendix C for a copy of this letter.)

Upon receiving this confirmation, DSL proceeded in early April 2004, to send a notice to approximately 2,000 landowners of record along the 90-mile stretch of the Rogue River for which the navigability study has been requested (Appendix D). The purpose of this notice was to advise the property owners of the status of the navigability study request and to let them know how they can obtain additional information concerning the request and the topic of navigability in general.

In response to this notice, DSL received five letters and approximately 12 telephone calls. The writers of three of the letters expressed opposition to the conduct of a navigability study; one writer supported the activity. Another person wrote to provide information concerning an earlier court case that he believed was significant to answering the question concerning whether a part of the Rogue River proposed for the navigability study is/is not navigable for title purposes. The majority of the phone calls were to obtain more information concerning the topic of navigability, and what the conduct of a study would mean to the caller.

At its June 8, 2004 meeting, the Land Board considered a request by DSL to proceed with the conduct of a study to determine the title navigability of the Rogue River from Grave Creek (River Mile 68.4) to Lost Creek Dam (about River Mile 158). At that meeting, the Board discussed the merits of conducting this study and listened to comments made by Clay Johnson (Josephine County District Attorney); Gary Berlant (a Grants Pass city councilman); and Lawrence Edwards and Art Israelson (interested citizens). Each of these persons supported the conducting of the study.

After some discussion, the Board decided that a decision concerning whether to direct DSL to conduct the study should not be made at that time. The Board contended that the public needed to be given more information concerning why the issue of the study was before it at this

time. The Board then directed DSL to write a letter to landowners along the affected segment of the Rogue River and other interested persons:

- Stating that the Land Board met on June 8 and decided to reconsider this issue at their October 2004 meeting, and
- Explaining why it has taken nearly seven years since the time that the Rogue River navigability study request was received by DSL for it to be considered by the Board.

On August 10, 2004, DSL sent a letter to all owners of record along the 90-mile segment of the Rogue requested for study and other interested persons discussing the Board's action at its June 8th meeting and "Why the Rogue River now?" Included with this letter was a chronology of the events relating to the Rogue River navigability study request (Appendix E).

DISCUSSION

ORS 274.404 and the Board's rules (OAR 141-121) provide that the Land Board may direct DSL to "make a determination of navigability" if there is either "sufficient economic justification" or a "broad and substantial public interest" to undertake such an effort.

Sufficient economic justification is determined by administrative rule to exist when:

"the Land Board decides that a determination of navigability will result in revenues accruing to the Common School Fund from a leasable use (as defined by Department administrative rules) of the waterway segment or underlying land (for example, the placement of marinas or log rafts, or the extraction of aggregate)."

Within the requested Rogue River study segment, DSL does not believe there are many uses at present that would constitute "sufficient economic justification" to conduct a navigability study. Aside from the Gold Ray Dam (at about River Mile 158) and the Savage Rapids Dam (at about River Mile 107) (which is being considered for removal), there appear to be few other uses of the Rogue River within the requested study segment, which would result in revenue accruing to the Common School Fund.

The administrative rule states that a broad and substantial public interest exists when:

"the Land Board, after considering the public's right to the use of a waterway segment and the authority of the state and local governments determines that an administrative determination of navigability is required to:

- (a) Help resolve conflicts between property owners, between users (including recreational users), or between users and affected property owners of a waterway segment;*
- (b) Facilitate management or protection of a waterway segment (for example, its environmental components or scenic, historic and cultural values); and/or*
- (c) Facilitate and promote commerce."*

With regard to whether a broad and substantial public interest exists to justify this study, it is clear that opinions vary widely as to the need for this study.

Josephine County District Attorney Study Justification

In his original letter of request for a navigability study, former District Attorney cites as justifications for a study:

- *"Local courts in Josephine and Jackson counties have had to address the issue (the navigability of the Rogue River from Grave Creek to Lost Creek Dam) on an irregular basis."*
- *"Law enforcement officers are continuously asked to enforce laws relating to claims and asserted rights which are unclear at best, throughout the entire middle and upper Rogue River."*
- *"To the best of my knowledge, no definitive or binding decision has been rendered by either the appellate courts or any state agency charged with making such a determination. In the absence of such a study, the interests of landowners and a variety of other users remain in limbo and subject to inconsistent interpretations."*
- *"The Rogue River between Lost Creek Dam and Grave Creek is subject to extensive commercial and non-commercial use. Actual and potential conflicts between users and landowners are increasing in frequency and volatility. For example, property owners bordering the Rogue River are frequently faced with conflicts and disputes with members of the fishing or rafting public over access to land-based sites. As the pressure from*

development and commercial/recreational use of the river increases, these conflicts will increase. A primary source for the conflict is, in my judgment, related to the absence of a definitive interpretation of "navigability" on the middle and upper portions of the river. So long as the navigability of the river remains uncertain, the rights and responsibilities of the public and landowners remains uncertain."

He further provides as an appendix to his letter a 1988 District Court case (No. 88-08154 and 88-07996) that relates to an alleged trespass by anglers on the Rogue River. In that case the judge found that:

- *"The Rogue River between River Mile 132 and 150 is navigable in fact,"* and
- *"While engaged in a legitimate use of the Rogue River between River Mile 132 and River Mile 150, members of the public have the right to make appropriate ancillary use of the bank of the river to the ordinary high water mark, provided that the use of the bank is consistent with the otherwise permissible navigational use of the river."*

In a letter dated March 1, 2004, current Josephine County District Attorney Clay E. Johnson stated that:

"The rights of the public, vis-à-vis the property owners along the Rogue River, is a significant issue in Southern Oregon and needs to be officially determined. No one really knows what the rights with respect to these two groups are. This creates continual frustration with law enforcement and has the potential for being the cause of violent conduct."

Mr. Johnson reaffirmed this position concerning the need to do this study in testimony he gave to the Land Board at its June 8, 2004 meeting.

Public Comments Received By DSL From Landowners from December 2003 through June 2004.

The majority of the letters received by DSL in response to its December 2, 1997 notification of receipt of the navigability study request indicated that they were landowners. In their letters, the landowners often cited the following concerns regarding the use of the waterway by recreationists:

- The amount of trash recreationists leave on the beds and banks of the river; the damage done by recreationists not only to upland property but also to vegetation and wildlife.
- The disorderly conduct by some recreationists.
- The trespass by recreationists across upland ownership to gain access to the river or to use the privately-owned property as if it was their own.

Despite these general problems cited by a number of the landowners, few contended that a navigability study is warranted. Many stated that there is neither a "broad and substantial public interest" nor "sufficient economic justification" to conduct a study. Many simply do not believe the need for such a study exists and that conducting one would be a waste of taxpayer money. A number of persons contacting DSL also contended that they had bought their property in good faith believing that their ownership extended to the center of the waterway, and had paid taxes on all of that property for many years.

However, one landowner stated that:

"The present disparity in property lines along the river (or in the middle of it) creates many "sociological" problems – downright enmity. We have owned the property that only goes to the average high water mark but nearby people owned to the middle of the river and went to great lengths to keep trespassers off. "Unless you go door to door along the river you will never know how many unreported examples of conflict have occurred because of this crazy inconsistency in the law."

Public Comments Received by DSL from Recreationists

Many of the persons supporting the navigability study of the Rogue River appeared to be recreational users of the waterway. However, few of the letters received by DSL that expressed a need for the study cited specific reasons beyond the need to ensure that recreationists know the limits of public ownership and to prevent future confrontations with upland landowners.

In several of the letters received by DSL, the writers cited specific instances of confrontation. One person discussed *"being harassed for 40 minutes by a Grants Pass city policemen for supposedly trespassing when I was in fact 70 feet from the nearest private property line and in fact standing in the Rogue River."* Another person stated that they:

"strongly resent challenges and threats of trespass charges for simply beaching my raft or standing on the bottom of the river while holding my raft, awaiting other members of the party's catching up."

Proposed Alternatives to a Navigability Study

A wide range of alternatives was proposed to conducting a navigability study. Among these are:

- Educate the public concerning the rights and responsibilities of both upland owners and river users.
- Increase law enforcement within the proposed study segment.
- Have river users ask upland owners for permission to use the bed and banks of the waterway fronting their property.
- Establish a committee to hear and resolve complaints between upland owners and river users.
- Make more access available to the public to use the waterway.

Other Concerns Raised by the Public

In the letters received by DSL in response to its December 2, 1997 notification of receipt of the navigability study request, the additional following concerns were raised by a number of people:

- A determination that the 90-mile proposed study segment of the Rogue River is navigable would lead to more use of the waterway which would lead to over-fishing and destruction of habitat.
- Should the Land Board assert ownership of the bed and banks of the Rogue River, this action constitutes a taking of private property.
- There is no way that the Rogue River within the requested study area can be navigable because of the great variability in the waterway's flow.

Recent DSL Discussions with Law Enforcement

To obtain a current perspective on the magnitude of the problems, DSL staff recently contacted law enforcement officers from various agencies responsible for patrolling the 90-mile proposed study segment. Among the agencies contacted were the Jackson and Josephine County Sheriff's Departments, and the Oregon State Police. DSL contacted law enforcement agencies and were told by them that they do not receive many reports of conflicts between upland owners

and river users, and are not often called upon to handle such complaints; however, the law enforcement officials said they believe a navigability determination would be useful to clarify ownership and to define better the rights of the public and private riverfront property owners.

Appendix F contains letters from the public recorded since June 2004.

DSL Review of Current Property Descriptions

DSL investigated current property ownership boundaries along the proposed navigability study segment. Staff reviewed a random selection of deed records of the Jackson and Josephine County Tax Assessors. Based on this sampling of records, staff determined that the limit of ownership of the majority of the 42 parcel records examined in Josephine County (River Mile 95 to 107) read "to and along the meander line," "to and along river," and "to bank of river." Conversely, the ownership of about one-half of the 35 parcel records examined for Jackson County (River Mile 107 to 155.5) indicate an ownership limit to what appears to be the line of ordinary high water. The remaining parcel records examined contain wording such as "to and along center of river" and "to center line of river."

While staff examined roughly only ten percent of the deeds, it appears that there is a wide range of interpretations as to the limits of riverfront property ownership.

Letters Received Since June 8, 2004 Land Board Meeting

Since the June 2004 Land Board meeting, DSL has received 12 letters; one e-mail; and approximately 20 telephone calls concerning the proposal to undertake the proposed study of the Rogue River. Nearly all of the letters expressed opposition to the navigability study. Among the reasons given are:

- "Looking at our current economic problems, I cannot support a study to tell us something we already own."
- "Navigability is a joke." "Can't we do without a costly study? The Rogue River is fine just the way it is and has been for the last 100 years. So why change now?" "Adverse changes will take place, such as devaluation of river property; change in taxation; a strong objection by environmental groups; a fight over who is going to enforce changes, and by what means?"

- "This study makes no sense, costs the taxpayers millions, and in no way benefits the private property owner nor the public! The only entity to benefit is "Government" gaining control of its citizens. We don't need Oregon managing our property – we are capable of doing this ourselves."
- "It is our hope that DSL will ask the Land Board to take no action on the navigability of the Rogue River for at least ten (10) more years which would give more time to see the results of those other rivers – as it stands now, mile 68 is enough."
- "I have read many reports from DSL which includes public comments (105 letters) from the public in 1997. Based on the comments, I can't see any reason for the study. I see a great need for the public to be educated and the present laws enforced."

ANALYSIS OF PUBLIC INPUT

Based on its evaluation of the public input received to date, it is clear to DSL that:

- There is some uncertainty between both upland owners and river users as to how much of the bed and banks of the 90-mile proposed study segment is available for public use. For landowners, this is caused to some extent by differences in the ownership limits of their deeds. Some deeds read that private ownership extends along the waterway to the line of ordinary high water; other deeds indicate other ownership limits (e.g., meander line).
- Although conclusive evidence is unavailable, a general impression exists among the law enforcement officers contacted by DSL and some upland owners that a decline has occurred during the past several years in the number of conflicts occurring between upland owners and river users along the waterway. This is not to say, however, that such conflicts do not still occur. Law enforcement officials felt a navigability determination would be useful.
- Many of the problems reported by the public such as littering and disorderly conduct are misdemeanors regardless of their location of occurrence and hence would not necessarily be reduced or eliminated as a result of a navigability study.
- There is some confusion as to the purpose of the proposed navigability study. Some of the persons contacting DSL believe it is in some way associated with a proposal to establish a trail for the public to use along a segment of the Rogue River.

- Many of the alternatives proposed to DSL in lieu of a navigability study were well conceived and could potentially reduce “friction” between upland owners and river users. However, implementing the majority of them would not solve the fundamental questions concerning who can do what and where on the 90-mile waterway segment proposed for a navigability study.

Other Factors

There are at least two court actions on this segment of the Rogue River that affect the public’s perception of its title navigability. One case, California Oregon Power Company v. Beaver Portland Cement Company, et al. (1935) is a federal court case regarding riparian rights and water quantity issues. In it, the court commented that the Rogue River was “non-navigable.” The second case, referred to earlier, involved three fishermen who were cited for trespass on the river at Shady Cove. In this 1988 Jackson County District Court case, Judge Mark Schively determined that the river between River Miles 132 and 150 is navigable in fact and the public has rights of use up to the line of ordinary high water.

Finally, in 1975, the Land Board declared the Rogue River navigable from Grave Creek (River Mile 68.4) to the head of tide.

RECOMMENDATION

Based on:

- A review of the navigability study request submitted by Josephine County District Attorney Timothy R. Thompson on July 14, 1997;
- Input received by DSL during a two month public comment period (December 2, 1997 to January 16, 1998) in response from a letter sent to property owners of record at that time advising them of receipt of the navigability study request;
- Confirmation of the need for the navigability study by the Mr. Clay E. Johnson, who succeeded Timothy R. Thompson in the position of Josephine County District Attorney;
- Input from local law enforcement officials saying a navigability determination would be useful;
- Input received by DSL in response to its April 5, 2004 Notice, and August 10, 2004 letter to landowners of record concerning the status of navigability study request; and

- The current legal ambiguity that exists as to the rights of private property owners and the public to the beds and banks of the Rogue River in areas not yet subject to navigability studies.

DSL believes that a broad and substantial public interest exists to conduct this study. More specifically, DSL thinks that the conduct of this study will “*help resolve conflicts between property owners, between users (including recreational users), or between users and affected property owners...*” along the waterway.

Therefore, the Department of State Lands recommends that the Land Board:

- Find that a broad and substantial public interest exists in determining the navigability of the Rogue River from Grave Creek (RM 68.4) to Lost Creek Dam (about RM 158); and
- Direct the Department of State Lands to conduct a study to determine the navigability of that portion of the river.

APPENDICES

- A. District Attorney Timothy R. Thompson Navigability Study Request (July 14, 1997)
- B. Land Board Agenda Item of February 10, 1998 and Summary of Public Input Received From December 2, 1997 through January 16, 1998
- C. District Attorney Clay E. Johnson’s Letter of Concurrence for Navigability Study Request (March 1, 2004)
- D. Notice to Landowners of Record of Status of Navigability Study Request (April 5, 2004)
- E. Letter Sent to Landowners of Record of Status of Navigability Study Request (August 10, 2004)
- F. Recently Received Letters from the Public