

DIVISION OF
STATE LANDS

STATE LAND BOARD

BARBARA ROBERTS

Governor

PHIL KEISLING

Secretary of State

ANTHONY MEEKER

State Treasurer

The Oregon State Land Board met in regular session on December 10, 1991, at 10:00 a.m. in the Land Board Room of the State Lands Building, 775 Summer Street N.E., Salem, Oregon, 97310.

Present were:

Barbara Roberts	Governor
Phil Keisling	Secretary of State
Tony Meeker	State Treasurer

<u>Assistants</u>	<u>Dept. of Justice</u>	<u>Staff</u>
Martha Pagel Nina Johnson Michael Ryan	Bill Cook	Janet Neuman Gary Gustafson Earle Johnson Gary Van Horn Steve Purchase agency staff

The meeting was called to order by Governor Roberts. The topics discussed and the results of those discussions are listed as follows. Further details of the discussions may be obtained in the written transcript of the meeting available at the Division of State Lands, 775 Summer Street NE, Salem, Oregon 97310.

Exchange

Request for approval of a proposed exchange in Lane County of Board of Forestry mineral and geothermal rights for mineral and geothermal resource rights owned by International Paper Company.



Director Neuman introduced the item. She said the Board of Forestry is proposing an exchange of 20 tracts of Board of Forestry mineral and geothermal resource rights along with surface ownership totalling 2839.3 acres for 18 tracts of property and mineral rights owned by International Paper Company totalling 5269.17 acres. This is all Board of Forestry land, not Common School Fund or State Land Board land. She explained that the exchange will consolidate ownership for the Board of Forestry, allowing for better management. The state will acquire an additional 2429.87 acres of mineral rights through the exchange. The Department of Geology and Mineral Industries reviewed the proposed exchange and did not oppose, since both the state and International Paper Company landholdings are in an area with similar geologic environments.

State Treasurer Meeker moved the item be approved. Secretary of State Keisling seconded the motion and the decision was unanimous.

Navigability

Director Neuman introduced this item, stating that the issue of navigability and ownership of navigable waters has been a controversial and confusing issue for many years. She stated that there is a need for clarification of state and private ownership. She said the reason for raising the issues at this meeting was not to discuss specific waterways, but to receive policy clarification from the Land Board on the issue and to outline some recent developments in federal case law.

Director Neuman introduced Deputy Director Gustafson who addressed the Board next. He stated the three main reasons for bringing the issue before the Board were: 1) the membership of the Board has changed since the issue was discussed last; 2) an evolution has taken place in federal court case law relating to title-navigability, mostly favoring state-ownership interests; and 3) to ensure that our program is legally defensible, public interests are maintained and articulated, and the public is dealt with in a consistent manner.

Deputy Director Gustafson discussed the equal footing doctrine and the 1953 Submerged Lands Act, entitling the state to be granted title to the beds and banks of the submerged and submersible lands under navigable waterways. He explained that whether a waterway is navigable is a federal question, so it is important to rely on the evolving federal court cases to determine the navigability of certain waterways. He requested the Board's support for the agency's efforts to identify and assert state ownership to entitlement lands under the navigable waters of Oregon.

Assistant Attorney General Bill Cook presented a simplified overview of the navigability law. He reiterated that the equal footing doctrine provides that any state is entitled to receive lands beneath navigable waterways automatically upon entering the Union. To determine whether a waterway is navigable or not, he said, really depends on whether that waterway was used or susceptible of being used as a highway for transportation of people or goods at the time that Oregon entered the Union in 1859. He affirmed that, if there is a controversy regarding navigability, the federal courts will make a determination on a case-by-case basis.

David Marlow from the US Forest Service expressed the Forest Service's desire to cooperate with the state in resolving title navigability issues.

Fred Smith, who had signed up to address the Board, announced that he would save his comments until after he found what the Board was recommending.

Director Neuman described a problem the agency has frequently with State Police requesting the Division of State Lands to clarify state ownership claims dealing with riparian property owners and recreational users of the waterways. She also pointed out there are many situations where people are using public resources without compensating the Common School Fund, because the agency hasn't asserted state ownership. She stressed to the Board that there will be some legal issues arise from the assertion of ownership and reviewed that the agency is simply exercising the state's entitlement to the extent allowed by federal law. This is the policy clarification that is being requested.

Secretary of State Keisling made a motion that the Land Board support efforts by the Division of State Lands to identify and assert the state's title to navigable waters to the extent allowed by recent developments of federal law and that the agency communicate with the Board on a regular basis regarding specific issues of potential litigation. State Treasurer Tony Meeker seconded the motion. He cautioned that interest earnings not be used to pursue claims when the agency has nothing to gain financially by pursuing particular cases. The motion was approved.

Surplus Property Request for approval to pursue discussions with Department of General Services concerning possible acquisition of state surplus property near Wilsonville, in Clackamas County.

Director Neuman introduced this request to continue discussions with General Services to determine if it would be in the interest of the State Land Board and the Common School Fund to acquire a 256 acre parcel of property surplused by Dammasch State Hospital near Wilsonville. She described the property and some of the current uses of it, indicating that it appears that the purchase price could be earned back quickly through the existing uses of the property. If the Board approves, the agency will come back to the Board with further details to make a final decision on purchase.

State Treasurer Meeker asked about the timber on the property and whether it was appraised by the Forestry Department. Bill Nickelberry said it was done through a private timber cruise.

In response to a question by Treasurer Meeker, Director Neuman indicated that the market value of the entire property has been estimated at \$1.2 million, and the starting purchase price for the property is expected to be about \$60,000. She stated the current income from the property is suppose to be \$36,000 annually, and while earning income from the property, the agency could protect and manage its natural values, since about eight acres have been identified as wetlands.

A discussion ensued about the process for notification to the agencies of property that is being surplused.

Secretary of State Keisling made a motion to allow the agency to pursue acquisition of the property and return to the Board with more information. Governor Roberts seconded the motion. The vote was two to one, State Treasurer Meeker being opposed to the motion. He stated that if the state purchases the property at \$60,000, keeping it off the tax rolls, it will lessen the income to the local school district by \$20,000 to \$30,000 per year. He said that the Board shouldn't enter into what he felt to be a local land use issue.

Secretary of State Keisling reminded the Board of some property that was passed out of state ownership early in the state's history. He cautioned that that the Board should move carefully and not dismiss what could be a real asset in the long term, both financially for the benefit of the Common School Fund and for management of the natural value of the site. He agreed with the Treasurer that it possibly should return to private ownership, but felt options should be explored.

State Treasurer Meeker cautioned against buying the property to create a park, since the Board's responsibility is primarily fiduciary.

Governor Roberts disagreed with the Treasurer's suggestion that the Board would be interfering with local land use issues and stated that the intent was not to create a park but along with the purchase for income production, to manage natural wetlands.

Forestry Clarification of instructions to
Department of Forestry on Elliott State
Forest timber sales.

Director Neuman introduced this item reviewing the discussion that occurred at the previous month's Board meeting regarding the results of last summer's owl surveys on the Elliott State Forest and how the Board wanted Forestry to proceed with sales. She stated that, though there was no formal vote, there was considerable discussion about the way that Forestry had been proceeding to determine impacts of federal law on timber cutting on the Elliott. At the end of the meeting, Forestry staff was clear that sold sales were supposed to go forward as they had been cleared through consultation with the Department of Fish and Wildlife as not violating the Endangered Species Act, but there was uncertainty in how to handle prepared and planned sales.

State Treasurer Meeker pointed out that if the minutes of the previous Board meeting were available, as they usually were, that it might resolve some of the issues of uncertainty. He advised that the minutes always be available for the Board to review and approve.

He also stated his dissatisfaction regarding a memo that was distributed by Director Neuman in an effort to clarify action of the Board, when he said, there was no action taken.

State Forester Jim Brown reviewed the results of the survey of the Elliott State Forest indicating that 20 pairs of owls were found nesting on the forest. He said that Forestry is following the US Fish and Wildlife guidelines to avoid incidental take of the owl. A set of concentric circles is set up around the owls within which certain management practices should apply to avoid a take. As a result of this, the planned harvest of 52 million feet would be reduced to 18 million feet that could be sustained within such a circle paradigm.

He stated by taking advantage of Section 6 and 9 of the federal Endangered Species Act, providing for a cooperative agreement with the US Fish and Wildlife Service, that would allow us to move away from the circle paradigm and into a broader land management scheme, perhaps enabling us to get closer to the 52 million feet harvest.

He asked for clarification regarding what to do with prepared sales, where field work has been done and where Forestry has worked with ODFW to ensure they comply with the guidelines. The other question was what to do with planned sales, those that would be prepared for the coming year. He assured the Board that these would be screened, working with ODFW to be sure an incidental take is avoided.

His recommendations were to proceed with the sold sales; reformulating the long-range plan, working with ODFW to ensure compliance with the guidelines.

Secretary of State Phil Keisling reiterated that the Board has never had plans for a 5-year moratorium, as some have said. He proposed a verbal motion for the Board to consider:

1) Confirming that Forestry Department proceed with all sold sales that have been cleared by ODFW as presenting no conflict with the Endangered Species Act.

2) Directing Forestry to work with ODFW and other appropriate agencies to begin developing a new long range management plan for the Elliott which moves away from the circle paradigm for spotted owl protection, and which addresses the entire forest system, including other current and expected endangered species issues, and to present to the Board at the February 1992 meeting, a preliminary analysis of the options for accomplishing these goals and a proposed timeline for decision making.

3) Directing Forestry, in consultation with ODFW, to recommend to the Board at the February 1992 meeting, a list of specific prepared sales in the Elliott which can be sold immediately without significantly reducing the Land Board's options for developing a management plan for the Elliott.

4) Directing Forestry to begin reviewing currently planned sales, and to move forward with preparation and sale of those sales that are consistent with those long-term management objectives.

Secretary of State Keisling moved the above motion be adopted. Governor Roberts seconded the motion, and discussion was invited.

State Treasurer Meeker noted that part two of the motion seems to suggest the Board should begin with a brand new management plan focusing on habitat, rather than yield.

Secretary of State Keisling responded he believed that there is potential for the yield for cutting timber to be much greater under long-range management planning, than under the current circle paradigm method of management.

State Forester Jim Brown stated that if the Board enters into an agreement with US Fish and Wildlife or develops a habitat conservation plan which they accept, they are relieved of having to do annual surveys for the owl and relieved of the circle paradigm requirements.

Gordon Ross, Coos County Commissioner, read a letter to the Board saying that the discovery of spotted owls on the Elliott shows the owl is not old-growth dependent and can live in a sustained yield forest management program. He urged that sales not directly in the spotted owl areas be released as soon as possible. He said the yield from the Elliott could make the difference between jobs or no jobs for as many as 600 people on the south coast. He stated that the Elliott is a good example of how harvesting timber on a sustained yield basis, using best management practices, provides for multiple use of all the forest resources. He said it would be a shame to introduce single specie management into such a well-rounded program.

Rick Barnes, C&D Lumber Company, urged the Board as they make the transition from the circle paradigm to the long term management being discussed, not to put everything on hold. The industry, he said, is in trouble. He stated that the discovery of owls on the Elliott shows that the current management practices are working. He again urged to keep the sales level up and avoid a delay while doing the long term management plan.

Howard Sohn, stated the decline in supply from the federal lands is dramatic. Smaller companies without the private timber holdings of the larger companies are struggling to stay in business. The state has an opportunity to help, he said, by maintaining the state forest harvest program. He also stated that the restrictions on the Elliott should be the minimum required for the owl's protection. He feels much more than is necessary has been set aside on the federal level for the owl's protection. The state should take the lead in maximizing the harvest with owl protection. The forest should continue being managed for multiple use for multiple values--providing what the owl requires and not more.

Allen Ford, Roseburg Forest Products Company, stated the Board should move to continue a sustained timber sale program on the Elliott, because 1) the timber sale program is a significant contributor to the Common School Fund, especially important in economic recession and with the impacts of Measure 5; 2) there is no real evidence that a reasonable harvest program will have any significant

impact on the survival of the spotted owl; 3) a curtail in the timber industry will have a large impact on the 350 people that work in the Coquille operation; and 4) the Board should maintain its historic concern about people in the timber-dependent communities.

Troy Rhinehart, Douglas Timber Operators, felt the motion on the table didn't emphasize managing the forest for jobs and for maximization to the Common School Fund. He suggested that planned sales not be halted during the planning process, to avoid shutting down businesses. He mentioned that the federal guidelines that are being discussed have been rescinded.

Assistant Attorney General Bill Cook responded that the guidelines have been rescinded, but stated it was because of legal strategy and procedural requirements; and that they may be coming back into effect. He said the bottom line is that the Endangered Species Act still requires no owls be taken. Following these guidelines, he said, remains the best protection against being sued.

Governor Roberts expressed her frustration to Troy Rhinehart for a letter that was written suggesting that she didn't care about children, schools and school books and stating that she was recommending a 5-year moratorium on timber sales. She stated that it was irresponsible to print such things without getting proper information from her office. She stated that the issue of a moratorium was raised at the last meeting and she was very clear at that time that was never an intent.

Mike Miller, , asked how the Board will proceed with the long range planning and whether it will be based on the recovery plan. If so, he felt the Board would need more than a 90-day pause.

Martha Pagel, Senior Policy Advisor for Governor Roberts, said there was no intention to create the impression that either a habitat conservation plan has been agreed to by the Board or that the Board is going to look at the recovery plan (due to be released in draft in early February) as their guidepost. She said they want to make sure that in going ahead with any prepared sales and planned sales, that we are not cutting off some significant long-range options, or reducing them.

State Treasurer Meeker asked what was meant by "trading stock," a phrase that Martha Pagel had used at the previous meeting. She said it was one concept the recovery team had discussed where a group of landowners in

a region put forward a plan allowing tradeoff of harvest scheduling, maximizing protection of the owl and timber supply, and taking advantage of the different age classes on different properties. She stated that she has heard positive feedback from private timber owners and timber industry folks that feel it is a desirable objective, if it is possible.

Mike Miller recommended that the Board proceed with the prepared sales that have been through the consultation process as soon as possible.

Governor Roberts pointed out that the prepared sales were screened under the circle paradigm situation. She said in all likelihood, as the Board prepares the groundwork in the next few months, that these prepared sales will go ahead. She said that doing a prepared sale today, though, might cause a suit with the potential for lasting years, possibly damaging future sales. She stressed the need for making the right short-term decisions today, so that in the long term the proper management framework can be put in place.

Chris West, Northwest Forestry Association, said that his organization opposes any delay in planned or prepared timber sales on the Elliott State Forest for three reasons: 1) public timber in western Oregon is in extremely short supply; 2) the Elliott State Forest plays a crucial role in this timber supply situation; and 3) the Elliott State Forest has never been identified as critical to the survival of the northern spotted owl. He said that any pause in the sale program would likely continue indefinitely since a final resolution to the spotted owl issue is not expected within the next year.

After extensive discussion and changes to the original motion, another motion was presented as follows:

1. Confirm that the Forestry Department proceed with all **sold** sales that have been cleared by ODFW as presenting no conflict with the ESA.
2. Direct Forestry to work with ODFW, DSL and other appropriate agencies to begin developing a new long-range management plan for the Elliott which moves away from the circle paradigm for spotted owl protection, and which addresses the entire forest system and is consistent with the timber management contract between the Oregon State Land Board and the Department of Forestry; and present to the Board at the February 1992 meeting a preliminary analysis of the options for accomplishing these goals and a proposed timeline for decision-making.

3. Furthermore, direct Forestry, in consultation with ODFW, to make available for immediate sale a quarter's worth of the **prepared** sales, choosing those that have the least risk for reducing the long-term management options, and, as to the remainder of the prepared sales, to recommend to the Board at the February 1992 meeting a list of specific prepared sales in the Elliott which can be sold immediately without significantly reducing the Land Board's options for developing a management plan for the Elliott; and the Board shall review and take action on those recommendations at the February 1992 meeting.

4. Direct Forestry to begin reviewing currently **planned** sales, and move forward with preparation and sale of those sales that are consistent with the long-term management objectives of: moving from the circle paradigm to landscape management, not violating the Endangered Species Act, consistent with developing a new long-range management plan on the Elliott, and adhering as much as possible to planned harvest levels; and to consider any modifications in the planned sales consistent with these objectives.

State Treasurer Meeker moved the motion be approved. Secretary of State Keisling seconded the motion and the approval was unanimous.

State Treasurer Meeker asked for clarification on the phrase "landscape maintenance," found in section 4 of the motion. Martha Pagel stated that the term used in respect to the Elliott is intended to cover the whole of the forest boundaries rather than focusing on any one sale at a time or any series of sales--a forest-wide management. State Treasurer Meeker suggested replacing "landscape management" with "entire forest system management" as it had been used previously in the motion in section 2. Governor Roberts moved that change be approved. Secretary of State Keisling seconded the motion, and the approval was unanimous.

The meeting was adjourned.

Janet C. Neuman
Director

Barbara Roberts
Governor