

DIVISION OF
STATE LANDS

The Oregon State Land Board met in regular session on July 13, 1993 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
Jim Hill State Treasurer

STATE LAND BOARD

BARBARA ROBERTS
Governor

PHIL KEISLING
Secretary of State

JIM HILL
State Treasurer

Assistants

Anne W. Squier
Nina Johnson
Rollie Wisbrock

Staff

Gary Gustafson
John Lilly
Gary Van Horn
Steve Purchase
agency staff

Dept. of Justice

Bill Cook

The meeting was called to order at 10:04 am by Governor Roberts. The topics discussed and the results of those discussions in the regular session of the meeting 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 N.E., Salem, Oregon 97310 (phone: 378-3805).

Scenic Waterway Request by the U.S. Forest Service for approval of two removal/fill permit applications for fish enhancement structures or modifications to existing structures within the Clackamas River Scenic Waterway.

Director Gustafson introduced this item for approval of two applications for fish enhancement structures within the Clackamas River Scenic Waterway. This project involves the reconstruction of side channels displaced years ago when a



Forest Service road was constructed. The project also involves installation of in-stream structures in Cub Creek, a tributary of the Clackamas River. The project was reviewed by the appropriate agencies and conditions were included to comply with both the Removal-Fill Law and the Scenic Waterway Act. Director Gustafson said that with the special conditions, the Division recommends the Board approve the applications.

Secretary of State Keisling recommended approval of the applications. State Treasurer Hill seconded the motion and the approval was unanimous.

Scenic Waterway Request by the Federal Highway Administration (FHA) for a removal/fill permit to reconstruct a segment of Blaine Road in Tillamook County as it crosses Slick Rock Creek and Clarence Creek, tributaries to the Nestucca River Scenic Waterway.

Director Gustafson said this request was for a permit to place culverts in two tributaries to the Nestucca River Scenic Waterway in Tillamook County during the reconstruction of Blaine Road, as proposed by the FHA. The FHA had determined the existing road to be a public safety hazard. The project would not impact the Nestucca River directly; however, it would impact two tributaries within the corridor of the Nestucca Scenic Waterway. Two existing culverts would be lengthened and replaced with arched culverts with a slightly different design. These improved culverts are proposed to enhance fish passage on the two tributaries (Slick Rock Creek and Clarence Creek). This portion of the scenic waterway has been given a recreation designation, allowing landscape alterations such as roads and associated improvements, if they are substantially screened from the view of the river. Director Gustafson said a general road construction authorization was given to this project a year and one-half ago, before the agency realized the two tributaries were within the Nestucca Scenic Waterway. Once this was discovered, the applications were reopened and recirculated to ensure that requirements of the Oregon Scenic Waterway Act would be fully complied with, including Land Board review.

Director Gustafson said the Division has carefully reviewed the project in conjunction with other agencies and interested parties. He recommended the Board approve the applications, subject to the special conditions outlined in the written agenda materials. One condition specifies that the culvert reconstruction work be adequately screened from the Nestucca River.

Director Gustafson explained there has been considerable opposition to the project. Letters of objection and the Division's responses are included in the written materials provided the Board. He also said the two creeks are nonnavigable and that no other land use authorizations are required from the Division or the Land Board.

State Treasurer Hill asked who at the county and the Department of Fish and Wildlife approved the project. Director Gustafson replied that Keith Braun, Fishery Biologist with ODFW, reviewed and approved the project, subject to conditions, as well as Rick Klumpf and others. The project has been involved in an environmental assessment at the federal level. Director Gustafson indicated that a representative from the Tillamook County Board of Commissioners was also present to speak regarding their involvement. He said a letter has been included in the written materials which outlines Tillamook County's support.

Governor Roberts clarified that the issue before the Board is solely the approval of the two culverts and not the entire roadway. She asked that those testifying today keep that in mind, since decisions regarding the roadway are beyond the authority of the Board.

Jim Zotter, Deputy Regional Counsel with the FHA, U.S. Department of Transportation, Pacific Northwest Region, asked that the Board approve the general authorization permit for the replacement of the two road culverts on Blaine Road in Tillamook County. He said the major thrust of the project is to provide a wider, safer roadway. Zotter said that Natalie Richards, hydraulic engineer and permit coordinator; Michael Odom, design project manager; Jim Crutcher, construction project manager; John Oshoe, Tillamook County Public Works Director; and Ken Burdick, Chairman of the Tillamook County Commission were also present and could answer any questions for the Board.

Zotter said in 1986 the FHA was requested by Tillamook County, the U.S. Forest Service and the Oregon Department of Transportation to consider reconstruction of approximately 7 1/2 miles of Blaine Road under the Federal Forest Highway Program. The affected section of road begins at Blaine and runs easterly to the base of the coast range and the border of the Bureau of Land Management's property. He said the roadway has an unstable subgrade, poor drainage, inadequate width, deteriorating pavement, with landslide problems present, especially along this section. During 1987 and 1988 a multi-agency environmental study team looked at alternatives for a safer, more efficient and more economical roadway for the public's use in that area, as well as a no-build alternative, and the environmental impacts

of those alternatives. A public meeting was held in Beaver, and coordination occurred among federal, state and local resource agencies regarding the project. An environmental assessment was prepared, describing the alternatives considered with their resulting environmental impacts. The agency chose a 24-foot wide road, with 2-foot shoulders and a 30 mile-per-hour speed design. The Parks and Recreation Department concurred that the project would be compatible with the Oregon Scenic Waterways program. At the current time, only a 3.3 mile section of the project is proposed for construction, since that is all current funding will allow. A joint permit application and floodplain development plan were submitted to the Army Corps of Engineers and to the Division of State Lands in April 1992. In May 1992 Tillamook County issued a development permit and the Division of State Lands granted a general authorization to proceed. The Corps of Engineers determined the project was exempt from the permitting requirements of the Clean Water Act.

Following these authorizations, Tillamook County acquired the right-of-way needed to widen the road from 16 adjacent landowners. The reconstruction project was advertised and the bid was awarded to Fabricators, Inc., M.L. Houck Company from Salem in the amount of \$2,839,000. At that time FHA was unaware that approval was needed from the Land Board. The project is currently under construction. Road clearing work has been done, though no work has been done in the streams. The plan would require all widening be done away from the river in order to eliminate any encroachments into the banks of the Nestucca River. Where necessary, retaining walls are to be installed to avoid having to go into the banks of the river. Zotter said the project meets the public need for a safe, economical and efficient transportation facility, and that it is consistent with the intent of the Oregon Scenic Waterway Act. He said the FHA has in good faith attempted to coordinate with all the resource agencies to comply with all the applicable statutes and regulations and to provide an efficient, economical, safe road that is environmentally compatible with the Nestucca River.

Secretary of State Keisling asked what would happen if the Board were to reject the approval of the application. He asked whether everything else could be done but the road widening and culvert work. Zotter said he would feel very uncomfortable doing that, saying this would be building unsafe features into the project. He said someone beyond him would have to make that decision; however, he believes it's in the public interest to improve these culverts, since the fish cannot pass through the existing culvert at Slick Rock Creek.

Rick Klumpf, District Fishery Biologist with Oregon Department of Fish and Wildlife (ODFW), said that Slick Rock and Clarence Creeks both have anadromous fish values, but fish passage is currently difficult. Specific criteria for culvert installation

to insure fish passage was provided in the comments ODFW sent to the Division of State Lands. State Treasurer Hill asked when ODFW would make the assessment that the culvert work meets those standards. Klumpf responded that ensuring the work is done properly would be up to the engineers doing the work. He said that normally time is not available to follow up on all the culvert installations. It is assumed when a permit is issued with specific conditions, those conditions will be met by the applicant.

Governor Roberts asked whether the two existing culverts are conducive to fish population, enhancement and passage as they stand currently. Klumpf confirmed that passage is possible, but difficult. The Governor also asked if the reconstruction project was done according to the plans (including the special stipulations from ODFW), would there be an enhancement of passagability of the fish in those tributaries. Klumpf affirmed that there would be.

Les Helgeson showed the Board pictures of the work that has been done in the area as well as a sample of the geotextile retaining fabric being proposed for use. He asked that the application be denied, maintaining that the proposed culvert at Slick Rock will block fish passage altogether, requiring additional construction activities in the near future. He said the application also fails to disclose additional culvert installations on perennial streams at four other stations, as well as two wetland impacts. He believes the geotextile retaining walls will also require replacement with riprap or concrete structures in the near future. He said the applicant has failed to demonstrate the need for the extensive widening and realignment of the road, and he claimed "the process has been fatally flawed from the start by the omission and misrepresentation of the facts regarding the permit application as well as the project in whole." He said the application indicates excavation below the stream bed will be required. Because the streambed is shale bedrock and lies at a 3.5-5% gradient, substantial blasting of the bedrock will be required. Although granular material will be placed in the pipe arch, he doesn't believe the material will remain in the pipe due to extremely high water velocities. Helgeson said he believes the Division has ignored their own policy regarding scenic waterway removal and fill permits when recommending the approval of this permit, due to the overwhelming public opposition to this project.

He also cited his concerns about the lack of evaluation regarding the suitability and longevity of the materials being used for the geotextile retaining walls, stating they are unproven and will not hold up over time. He also stated that the classification of both undeveloped public forest land and

long established private residential property was convenient, but "not very practical." He said the environmental assessment indicates that log hauling is no longer a justification for the project, that there is no evidence of a need for specific safety improvements, and that the accident rate is acceptable for rural secondary roads. He therefore suggested the other option listed in the permit application be used in order that the job might be of minimum size and scale to accomplish its purpose.

Governor Roberts asked what Helgeson meant by "Phase II" when he said "a number of additional culverts are planned for Phase II of the project." He replied that he meant the lower half of the 7 mile project (the 3.3 miles being Phase I).

He also commented that federal funding for this project was appropriated without due process and public involvement.

Bill Holmes, attorney representing Mr. Helgeson, spoke next saying that, though the Land Board doesn't have authority over approval of the road, if the road is not needed (which he believes it is not), then the culverts are not needed. He agreed with Helgeson that, due to the spotted owl and other difficulties with the forest, the road will be in less demand as a logging road than previously thought. He also said this situation is not normal, since this involves a wild and scenic river. Because the Division issued a general authorization for the project (not realizing that it would require Land Board authorization), contracts were entered into and work had already begun. He believes that because of this, the Land Board may feel the need to go ahead with the project. Governor Roberts stressed to him that was not the case.

Holmes said he's seen no comments from DEQ and presumes they weren't consulted regarding this project. He said it was important that the Division consult with DEQ and the Corps of Engineers, regarding the clean water effects the project may have on the river.

Secretary of State Keisling asked Holmes if the road projects weren't done, whether the culverts would still need improvements or, if in his estimation, they are fine. Holmes indicated that under the 404 certification an open-bottom culvert would be required for the Clarence Creek passage. He said Slick Rock is less than ideal, but fish are able to pass.

His recommendation would be to widen the road to 24 feet, make some minor improvements, then use the savings for building a bridge across both Slick Rock Creek and Clarence Creek.

Holmes indicated that Helgeson is resisting condemnation and has filed a Petition for Review with the Oregon Supreme Court. He said they sent the FHA a notification that they have not obtained the Section 404 removal permit required from the Corps and told them a citizen suit may be filed in federal court for failure to obtain that permit.

Sally Cross, Oregon Natural Resources Council, expressed her concerns with the culverts. She said there is no evidence that other alternatives were seriously examined that would result in fewer impacts to the scenic waterway. She urged the Board to reject the permit, or to direct the agencies to consider whether or not this larger project is necessary, given that it impacts the scenic waterway system.

Governor Roberts reminded her that the Board isn't the designer of the roads and alternatives--that the authority the Board has is with the culvert and its effect upon the waterway.

Secretary of State Keisling asked whether a bridge would be an alternative with a lesser impact. Cross said as far as she knew, the bridge alternative was not discussed at all, since she saw nothing regarding it in any of the documentation. Cross said it may be that all the Board could do would be to ask the agencies involved whether or not the overall project they have given approval to is necessary, to the extent it is being proposed.

Governor Roberts reiterated that the Land Board's authority for decision making is within the framework of the protection of the river, fish populations and the scenic quality involved in the siting of the culvert. The road design, the federal funding, and other issues are all outside of the realm of the authority of the Board. The question before them is with the design of the culvert and whether it is appropriate, given the fish population and the nature of the stream. Holmes said he didn't agree that the authority of the Board was that narrow, since the Division's scenic waterway policy guidelines give consideration to whether or not the proposed project is actually necessary. He said it is appropriate for the Board to consider the cumulative impacts of the project that will result as a consequence of these two culverts. Governor Roberts disagreed with him. State Treasurer Hill asked for Assistant Attorney General Bill Cook to respond to these discussions. Cook said he didn't see anything in the Scenic Waterway Act or in the Division's policies for scenic waterway approvals to back up the Land Board having authority further than the culvert issue. He said the Act breaks down the authority for the agencies, and said the Land Board's concern is only with the fill and removal within the scenic waterway

corridor. Responding to Holmes' testimony about the issue of need, Cook said that referred to the need for the proposed activity within the Board's jurisdiction, which in this case would be the culverts.

Jim Zotter spoke again saying that a number of inaccurate statements were made today by Mr. Helgeson and Mr. Holmes that were difficult to respond to, since his agency has tried to act in good faith and to the best of their ability be up front, open and honest with everyone in this process. He said a total of 27 communications had occurred with Mr. Helgeson. He also said he has no doubt that the improvements planned in the project are needed. He stated his company stands behind the quality of the highway construction work they have done in the past 73 years in this state and others.

Governor Roberts asked to have a hydrologist speak regarding the design of the present culverts and the fish passage, as well as the design of the new culverts and any damage that might be implied by the insertion of the new culverts into the projects. She asked whether there might be a better alternative, design or material than the proposed culvert. Natalie Richards, professional civil engineer and hydraulics engineer for the FHA and said the two culverts were designed with features to improve natural flow conditions, depth and velocities occurring throughout the pipe. After the designs were created, the FHA met with Oregon Department of Fish and Wildlife (ODFW) to review them. The FHA addressed the concerns of the ODFW and submitted permits accordingly. Throughout the entire process, she said, FHA has done their best to meet the needs and enhance the conditions of fish passage.

Governor Roberts asked Rick Klumpf whether there would be any changes to the culvert design that he would propose if he were making the decision for this project. Klumpf said if the culverts function in the manner in which they are designed, they will pass fish and be an improvement to the current culvert system. Governor Roberts asked whether the design could be improved, in his estimation, as a method of moving both water and fish. Klumpf said if the culverts fail to meet these two criteria, it would be because of the size of the material not holding up to the flows that they could be subject to during the winter. He said larger boulders could help improve its performance. Governor Roberts asked Richards whether she believed larger material in the culvert may or may not be of benefit. Richards said the way the culverts were designed, the larger material may or may not be of benefit. She said that since the slope design is very flat (a .5 percent slope), the condition is almost conducive to deposition of material within the pipe. Secretary of State Keisling asked if, at a later

date, it was determined that larger material should have been used, whether it could be added at that time. Mike Odom, project manager, stated the company would stand behind their work and be back to remedy the situation, if it was determined later that the pipes didn't function properly. Governor Roberts asked if the larger materials could be added to the original project design while it is being done (since there was a question of needing the larger material later) in order to avoid the need to again disrupt the scenic waterway. Zotter said that could be accommodated.

Secretary of State Keisling asked why a bridge was not considered. Zotter said he wasn't involved in the decision making regarding whether or not to use a bridge. He said they elected to use a culvert, since one existed there already. He said the cost consideration may have been the biggest factor in not electing to build a bridge. Richards said a bridge would not eliminate the problems with fish passage at Slick Rock, since the current conditions are steep and not conducive to fish passage. A discussion ensued regarding the visual intrusion of the scenic waterways with bridges, and the need to be sensitive to that issue as well as the fish passage. Governor Roberts said there would be need for concrete footings and all of the factors that go into constructing a bridge.

State Treasurer Hill moved the Board approve the permit for the culverts. Secretary of State Keisling seconded the motion and the approval was unanimous.

Minutes Request for approval of June 8, 1993 State Land Board meeting minutes.

Secretary of State Keisling moved the minutes from the June 8, 1993 meeting be approved. State Treasurer Hill seconded the motion and the approval was unanimous.

Forest Draft report from Department of Forestry regarding marketing forest products on Common School Land.

State Forester Jim Brown presented the Board with a written status report on marketing forest products on common school forest lands. He said a number of other people and organizations are yet on the list to be interviewed in the next month for further input to this process. Forestry will return to the Board in September, he said, with an expanded list of alternatives and recommendations. This will probably be a mix and match of alternatives, to best accomplish the objectives of the Board. Governor Roberts expressed her appreciation of the work the Department is doing in reviewing the issue of marketing of forest products.

Kelp Update on kelp harvesting opportunities and the Kelp Advisory Council.

Director Gustafson gave the Board a report regarding the kelp leasing efforts. He said he appointed a Kelp Advisory Committee earlier this year that worked very hard and did an outstanding job. The report from that committee was provided in the written materials prepared for the Board. Director Gustafson said he intends to accept the recommendations of the committee. A request for information will be sent to producers to gain a better handle on the quantities of kelp necessary for operators to use. Goal 19 findings will be completed and a leasing program of a small scale nature, as outlined in the committee's report, will likely be implemented soon. Secretary of State Keisling said this report was a result of the effort of a lot of people in Curry County. Governor Roberts said it began to look like a major controversy in the community, but thanks to the work of the committee, the issues were focused on and recommendations for solutions were made. Governor Roberts provided a copy of House Bill 2139, dealing with the kelp issue, which went into effect several days before.

Student Loans Update on the interagency agreement with Oregon Health Sciences University for transfer of operation of the Student Loan Program.

Director Gustafson said this written material was provided to the Board to ensure they were aware that the agreement with the Oregon Health Sciences University and the State Scholarship commission, to transfer the functions of the Student Loan Program, had been fulfilled.

October Land Board Meeting

Director Gustafson said he would like to hold the October Land Board meeting in Coos Bay late in the month in conjunction with a meeting with the South Slough Estuarine Management Commission. Elliott State Forest matters would be on the agenda, including the contract between Forestry and the Land Board. The Board generally agreed with this recommendation.

Governor Roberts then called an Executive Session of the Board under ORS 192.660(1)(h) to consult with counsel concerning legal rights and duties of the Board related to current litigation or litigation likely to be filed and under ORS 192.660(1)(e) to deliberate with persons designated by the Board to negotiate real estate transactions.

After the Executive Session the Board resumed regular session. The Board discussed the need for a document from them to Director Gustafson stating that future filled land settlements should, wherever possible, be predicated on receiving a fair market appraised value. This value should be discounted where necessary to reflect the relative strength of the state's claim, with recognition that there may be circumstances extenuating to alter the approach on a case-by-case basis, where the Division will consult with the Land Board and our attorneys. Secretary of State Keisling moved the Board prepare such a document and the approval was unanimous.

The Board adjourned at 12:18 pm.

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