

The Oregon State Land Board met in regular session on February 8, 1994 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

<u>Assistants</u>	<u>Staff</u>	<u>Dept. of Justice</u>
Anne W. Squier	Gary Gustafson	Bill Cook
Nina Johnson	Steve Purchase	
Rollie Wisbrock	Gary Van Horn	
	Gail Lowry	
	agency staff	

The meeting was called to order at 10:00 a.m. 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).

NHAC Request by the Natural Heritage Advisory Council for registration of three sites on the Oregon Register of Natural Heritage Resources.

Director Gustafson noted that all three sites have received the concurrence of the respective landowners. He stated they are located within separate and distinct areas of the state and will enhance the overall Register. He recommended approval of the registration of the sites.

Secretary of State Keisling moved the item be approved. State Treasurer Hill seconded the motion and the approval was unanimous. Secretary of State Keisling noted for the record that his wife works for The Nature Conservancy.

Scenic Waterway

Request by the Oregon Department of Transportation to reconstruct 14.22 miles of the North Umpqua Highway (State Highway 138) within the North Umpqua River Scenic Waterway corridor.

Director Gustafson said the approval of any permit for removal, fill or alteration of material within a state scenic waterway must have Land Board approval. He said this request is to approve a permit for the reconstruction of approximately 14 miles of Highway 138, along the North Umpqua Scenic Waterway. This involves the extension of six culverts where they encompass tributaries of the North Umpqua, as well as riprap positioned around some bridge embankments. Under the State Scenic Waterway Act, tributaries are considered part of the corridor and subject to the Act. An environmental assessment of the project was done and the reconstruction work was set further back from the river as a result. Gustafson reported that the agency has worked with the Department of Transportation and the other affected resource agencies to ensure that the project meets the intent of the Scenic Waterway Act. Gustafson stated the recommendation is for approval of the permit, subject to the standard conditions and final order, as outlined in the appendices to the written agenda materials.

Governor Roberts thanked Director Gustafson for the extra care taken to ensure this permit meets the standards of the Act.

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

Minutes

Request for approval of minutes from December 20, 1993 State Land Board meeting.

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

Grazing

Informational update on the proposed grazing rules.

Governor Roberts reminded those at the meeting that the Board would not be making a final decision today on the grazing rules. She explained that this would be an opportunity to comment following the first three public hearings regarding the proposed grazing rules and stressed that more public hearings would be held later when the rules are revised (likely in March).

Director Gustafson said the grazing issue is important to the Division of State Lands, since 650,000 acres of state land (mostly in southeastern Oregon) has been, or is currently involved in grazing. Most of this land is common school trust land and is subject to the fiduciary responsibility outlined in the Constitution. Approximately 26,000 acres of the Division's landholdings in eastern Oregon are swamplands, which were the result of a special federal grant to the state and are not under the same fiduciary standards as common school lands. A minor amount of acreage was also acquired through foreclosure sales using Common School Funds.

The Division administers about 170 grazing leases at present. Forty-four of these leases encompass approximately 543,000 acres--which are called "large block leases." There are also a number of isolated tract leases. Gustafson explained that rules for management of these leases have never been adopted. Instead, the Division relied historically upon applicable statutes as well as Land Board policy and expertise of its rangeland managers to manage the lands. In 1992 a number of public meetings were held and a proposed policy was developed, which was approved in concept by the Land Board in January 1993. This was the first step to formal administrative rulemaking.

Gustafson stated that the current grazing fee has not changed since 1979. He said a Grazing Fee Advisory Committee was formed last year (1993) to address the issue of fees. The Committee made a number of recommendations--one of which was to use the cropshare method of determining fees. He told the Board that the draft rules specified the state's share under the cropshare approach would begin at 15.5 percent, then over four years, increase gradually to 20 percent. At 20 percent, the state's share would equate to approximately \$4.56/per AUM, as opposed to the current rate of \$2.50/per AUM.

Gustafson reviewed that public meetings were held in Burns, Bend, Lakeview and Salem to discuss the proposed administrative rules. He introduced Jeff Kroft from the Division's Policy and Planning Section, who chaired the Advisory Committee and has led the rulemaking process for the Division.

Kroft said that several changes had been made to the draft rules after the hearings: 1) clear emphasis that the rules are for livestock grazing, 2) redefining "isolated parcel" to be no larger than 640 acres, determined by the Division as difficult or uneconomical to manage, 3) that no subleasing be allowed; 4) the Division may post public notice before closing a road, if the road is deemed to be substantial enough to the community; and 5) requiring in the notice of competitive bidding, as well as the notice of availability of a parcel, that applicants may have to put in fencing commensurate with the open-range law.

Kroft said the time period for review of rangeland management plans would be reduced from 45 to 30 days. He said the Division also redefined what would be considered "unintentional" or poor lease management in terms of unauthorized grazing. A provision was added to the draft rules allowing the Division to consider whether or not to put a leasehold up for competitive bidding--if doing so may have an adverse and significant impact on the local economy. Fencing requirements were also discussed, from the standpoint of whether a new lessee wants to make an alternative use of the site. He said the AUM rate, determined from the formula, is the base rate to be used in all negotiations, and there may possibly be bonus bidding. Another possibility would be that, instead of terminating a lease for a default, the lease might be modified to take into account the default.

Director Gustafson said three options have been proposed on the most contentious issue--competitive bidding. These options will be reviewed in public hearings:

Option 1) Provides that isolated tracts will not be subject to competitive bidding, since they are isolated and, therefore, not conducive to public bidding. Other tracts may be subject to competitive bidding at the discretion of the Division.

Option 2) Requires competitive bidding on not less than a 10-year basis for all tracts, except isolated parcels. The successful bidders would have to use the tract for grazing.

Option 3) Is similar to Option 2, except that the successful bidder could use the land for alternative activities.

Director Gustafson discussed the complexity of the grazing issue when areas encompass three ownerships--federal, state and private. Ranchers often rely upon all three land ownership types to have a viable operation.

Governor Roberts explained that a number of people from both the grazing community and the environmental community had signed up to testify. She requested that testimony time in total for each side be kept to 30 minutes, since there were people on the next issue regarding placer mining who also want to testify during the meeting.

State Treasurer Hill asked for a discussion of the fiduciary responsibility that the Board is under, to ensure that everyone understood that aspect of the issue.

Assistant Attorney General Bill Cook said the fiduciary responsibility of the Land Board as trustee requires they manage the school trust lands as assets of the Common School Fund to maximize revenue for the Common School Fund for the long term. He said a trustee must avoid wasting a trust asset, must be loyal to the beneficiaries of the trust, and "look out only for the interests of the trust."

Governor Roberts reported that during the 91-93 biennium the revenue on these 650,000 acres was \$397,000, whereas administrative costs were \$357,000 (Note: The \$357,000 figure includes administrative costs for agricultural leases).

Senator Eugene Timms said he would introduce representatives from Harney County, Malheur County and Lake County to testify. He first introduced Dale White, County Judge for Harney County. Judge White said the two main issues he would be addressing were the increase in grazing fees and the proposal for competitive bidding. He said he had been part of the Grazing Fee Advisory Committee that recommended an initial fee of \$3 per AUM with a formula for adjustments and a continuance of the present non-competitive bidding practice on a case-by-case basis. He said to disregard these recommendations and start over because of protests from those not interested enough to participate in the decision process seems to make the participation process meaningless.

He feels competitive bidding for grazing use and for non-use is not in the best interests of the state. He said it isn't required per Attorney General opinion; doesn't encourage responsible land stewardship; may be difficult to implement due to lack of fencing, water and livestock handling improvements; doesn't encourage lessor/lessee cooperation; makes the agency's management of the lands difficult and more expensive; may result in less revenue and degradation of the land in the long run; and will result in no one left in the business to be a competitive bidder the next time around. He said that the Board is required to manage the lands for the greatest benefit for the people of the state. He said management is an action requiring the Board to do something positive. To do nothing, or to put the land in non-use, he stated, isn't management. He said to lease for non-use would be a violation of the Oregon Constitution. According to a December 16, 1984 policy statement of the Land Board, he said all leases since that time should have been issued for 20-year periods with the right for a 20-year renewal. He said the block land leases other than those in Harney County were issued as 10-year leases and expire in 1994--inconsistent with the Board policy. He urged the Land Board to maintain the proven method of awarding leases which has increased income and improved the land.

Dick Jenkins, a third generation rancher from Harney County, stressed that in this policy making the Board needs to consider that they are dealing with people's lives. He said as the state acquired the lands from the BLM, the lessees were assured they would continue to be managed as they had been through the BLM. In order for the state to be able to obtain the lands through exchange with the BLM, the individual ranchers had to give up their Class I rights, which were awarded to them under the Taylor Grazing Act.

Lou Davies, state lessee and school board member of the Crane High School District, said when a decision is made by the school board, they aren't allowed to change their vote. He said that wasn't the case with the Grazing Fee Advisory Committee that was convened. Governor Roberts clarified that there is a great deal of difference between an advisory committee and a legally-elected Board. She also reminded Mr. Davies that a decision was not being made today.

Davies said the quality of the land since he has taken over the lease has increased dramatically. The amount of feed in his lease has tripled or more. He urged the Board to visit his leasehold area, to see an example of good stewardship. He said until now there were incentives to improve the land. If the grazing fees are raised above the \$3 per AUM recommended by the Grazing Fee Advisory Committee, this will remove the ability to pay bills and raise families--taking away the incentive.

With regard to competitive bidding, he said a great risk is taken if someone bids too much, as well as a possibility of abuse to recover some of the money. He said no one will take better care of the land than the ranchers that are currently there. He said grass that isn't grazed properly becomes a fire hazard.

Secretary of State Keisling said there is a difference between the BLM and the Land Board--since the BLM doesn't have the same fiduciary responsibility. He asked Judge White if someone offered five times the money for a piece of property to lease for non-use for the next century, whether he thought this would be violating the Constitution. White said in 1968 the constitutional mandate was broadened to include sound management of the land as well as furthering the public interest. He said the responsibility of the state is to manage the land for the greatest good over the long run. If, after a hundred years, nothing is left, it wasn't managed in the best interests of the state. He said the Board would need to turn the offer down, under the techniques of sound land management--which is just as much a constitutional requirement as the fiduciary responsibility.

Jim Myron, Oregon Trout, said he is pleased to see the agency is taking the issue out again for further public hearing. He said they support the adoption of rules for the management of publicly-owned state lands. Some of the issues needing attention at the next round of public hearings are suitability for livestock grazing; current ecological condition and carrying capacity; effective monitoring and evaluation; and public participation in the development of grazing plans. He said that resting certain lands for periods of time can be sound resource management. He submitted a copy of Oregon Trout's policy on public land grazing, and added that Liz Frenkel asked that he state the Oregon Chapter of the Sierra Club agrees and is in support of the testimony. He said they support the idea of allowing competitive bidding and, knowing the fiduciary responsibility of the Board, if as much money can be gained by leasing to someone that is going to rest the land rather than use it for livestock grazing, he doesn't believe the Board has an obligation to use the lands exclusively for livestock grazing.

John Bishop, Malheur County Commissioner and lessee, explained to the Board that he paid \$19,800 to the prior owner of the lease to obtain the lease, at the same time he purchased the land. He showed the Board a map of his land. He said if the state doesn't lease to him and the federal government doesn't lease to him, he has the only water on his private land, and asked where other lessees would get their water for the land. He voiced his concerns about the importance of schools to Malheur County and that the children in the rural area are moving away after receiving an education, and asked who will continue the ranching operations.

Las Mandieta, lessee living in southern Malheur County, said he is concerned about the inconsistency in the way the state has handled the blocking of lands, without reducing the carrying capacity of the BLM permit to the holder. He also mentioned certain clauses in his lease requiring the Division to compensate him, should he lose his lease. He asked that this issue be handled in the policy and rules.

Jeff Davis, lessee from Jordon Valley, said that using the state leases along with their own private lands assists in resting the land, resulting in improved production. He said in the last twenty years production has nearly doubled by using all three ownerships (federal, state and private lands). He questioned whose responsibility it would be if a fire destroys the federal or private lands, due to mismanagement or non-management of state lands.

Secretary of State Keisling asked each of the three whether they would be interested in purchasing their currently leased lands, if the state decided to sell at the appraised value. John Bishop indicated he would not. Las Mandieta said he didn't think he could afford to finance it. Jeff Davis said he would buy it if it were economically affordable, but not if it were too high.

Bob Phillips, State Coordinator for Rest the West, commended the Division of State Lands for proposing the state hold title to water rights and improvements on these lands, saying it is a prudent ownership responsibility. He said there are omissions in a number of the proposed rules causing his organization concern. There are no grazing suitability standards in terms of forage productivity, or ecological status of the land. The grazing fee formula subsidizes the lessees and diminishes the Common School Fund. The competitive bidding process is restricted to ranchers, disenfranchising others and diminishing the Common School Fund. Public input into the grazing management plan is unnecessarily restricted. Competitive bidding is not automatic at the end of the 10-year lease and applies only if the lease is vacated or withdrawn. Public access to state lands is discouraged by lower fees to lessees by means of a formula (primarily the isolated parcels). He said he believed that the Division had loaned lessees money to do improvements. If the loans were not paid back by the time the leases changed hands, the incoming lessee would have to pay the original lessee, then continue to pay the Division until the loan is paid off. He also said the return to the state from lessee's subleasing is insufficient. He said the proposed grazing rules need major revisions to adequately protect the land and the Common School Fund. He gave the Board a letter with a bid from Rest the West for \$450 annually (as well as an enclosed check) for a 10-year lease for the lands in lease number EXL-04-MA. He said their purpose is to protect the land from domestic livestock grazing and to restore the productivity of native grasses and wildlife. He said he would use the parcel to demonstrate improved land management. (Note: Mr. Phillips later withdrew his check.)

Governor Roberts said that outside the current process she doesn't believe the Board can accept a check without a change in the rules.

Bill Cook agreed. He said additional bids should not be accepted until the rulemaking process is completed.

Phillips asked how the Board could lease the lands for grazing when no rules are in place for doing so. He suggested that with the competitive bidding process, that the Board use sealed bids.

Governor Roberts said the Board could accept the letter, but asked that Phillips retain the check.

Jeremiah O'Leary, Lake County Commissioner, said once again the Division of State Lands and the State Land Board appear bent on destroying and ignoring all that has been good from a management point of view of the state lands in southeastern Oregon. He said the economy in Lake County and eastern Oregon is based primarily on two industries--agriculture and forestry, both of which he said have come under increasing attack from groups not understanding the concept of wise use of our natural renewable resources. He said at least twice in the past year the Division has failed to uphold their fiduciary duties. First, in the apparent mismanagement of funds as reported in the news recently and secondly, when they failed to accept an offer for the sale of property in Lake County that private enterprise wouldn't touch. He said that the ONRC and others are making unwise demands for change in renewable natural resource management, the farms and ranches the Board is hellbent to destroy have been managed for future generations for over a century in many cases, with good stewardship in all their holdings in order that their children and grandchildren will have an opportunity to live on the land. He said the concept of removal of livestock to protect the range is wrong. He believes the Board could not possibly be more successful than under the current practices. He stated that all permittees are willing to accept equitable grazing fees and to continue to help the Board accomplish wise use of renewable natural resources, if they don't change the rules.

John Lane, Warner Valley lessee, said he rotates his private land, as well as those lands leased from the BLM and the state. He said if competitive bidding is allowed and someone outbids them, they will have to sell part of their cattle, which will go out of the country, since there is no excess feed in the valley. Many ranchers will be forced to do something else--eliminating them from the bidding process. He believes that after the ranchers are gone, those that are now wanting to bid on the lands for non-use will not bid against themselves, since their objective has been to remove the cattle. State Lands will have only one bidder after a number of years. He also said these non-profit groups depend on donations and asked what will happen when these funds dwindle. He said the ranchers are more stable over the long run.

Jack Flynn, a rancher from Plush, likened the scenario to a time he took a young lady to the dance, paid her admission and bought her a corsage, and she was swept off her feet by "Handsome Harry." He said the ranchers "brought the State Land Board to the dance, and have been good partners." He said if the Board chooses competitive bidding, it will require a lot of paperwork, appraisals, and lawsuits.

Fred Obermiller, Professor of Agriculture and Resource Economics at Oregon State University, said the proposed administrative rules closely follow Secretary Babbitt's rangeland reform 94 program, that he said was filibustered to death. He stated that the process by which the proposed grazing fee has been formulated is, in a legal sense, arbitrary. He believes the net value of the state land forage is about \$2 per AUM less than the \$4.56 per AUM that is being advised. He also said if the state land grazing permits are removed from the whole property unit, then the ranch itself will be devalued by the amount of the capitalized value of the carrying capacity foregone. The grazing permit represents an appurtenant easement which is a property interest subject to regulatory taking under the Fifth Amendment resulting in significant consequences. He stated there is no evidence that ranges have either improved or deteriorated over 100 years with resting. He said it isn't clear whether resting the land is necessary. He told Secretary of State Keisling that it is impossible to appraise the property when it is part of a larger tract of land (BLM and private) that is used for ranching. It is only the whole unit that has an appraised value in the context of market exchange.

Governor Roberts asked Bill Cook to comment on the appurtenant easement concept. Cook disagreed with Obermiller. He said a lease is a privilege with contract rights set forth. If the agency follows the provisions of the contract and chooses not to renew the lease or to give it to someone else, he doesn't believe it constitutes a takings.

Sally Cross, Director of Government Affairs for the Oregon Natural Resources Council (ONRC), reported that the ONRC supports the third option set out by Division staff--to revise the rules to allow full competitive bidding on leases and allow uses other than grazing. She said there are a number of interests willing to enter into a competitive bidding situation and pay the state more than is being received on some of the lands for uses other than livestock grazing--ie habitat conservation, scientific or academic research on rangeland ecology, etc. She stated the ONRC looks forward to participating in further rulemaking hearings.

Secretary of State Keisling asked Cross whether she believed the fiduciary trust responsibility of the Board would demand that the Board give serious consideration to selling some of the land. She agreed in some cases that might be appropriate.

Marc Liverman, Oregon Department of Fish and Wildlife, commended the DSL staff for their patience and hard work in keeping ahead of the controversy regarding grazing on state lands. He identified one of ODFW's main concerns with the draft rules as being the provision restricting public access. He said their

wildlife policy states it is a goal of wildlife management to develop and maintain public access to the land and waters of the state and wildlife resources thereon.

He commented that it is recognized by all fish and wildlife authorities that rest is a critical and primary tool for habitat restoration, particularly for damaged riparian zones. This needs to be determined on a case-by-case basis, but can be extremely effective, and ODFW doesn't want that provision excluded. He said another alternative use for the lands would be the operation of a fee recreation enterprise. He added that allowing open competitive bid and alternative uses may encourage innovation and experimentation with consequent improvements in rangeland habitats, wetlands and local economies. He suggested that Oregon Trout might be willing to assume management responsibility for riparian zones and provide off-stream watering for livestock, while a livestock producer manages the uplands for livestock grazing.

Doug Breese, President of the Oregon Farm Bureau and lessee, said he leases one of the isolated parcels. He voiced his concerns with the fee increases and the competitive bid process. He stated he looks forward to being able to work with the Division as they continue to develop these issues.

Bill Perry, Oregon Farm Bureau, noted that years ago the grazing program was operated with two full-time employees statewide, and that 65-70 percent of the state's grazing fees were returned to the state. He said on the average, there are 4-6 employees managing the program now and only 10 percent of the fees are returned to the state. He suggested the state return to having two employees to save money.

Secretary of State Keisling concluded that the testimonies express the complexity of the issue and show there are a lot of questions to sort through. He agreed that the rulemaking process needs to continue with the three options set forth helping to frame the discussions--realizing there could be other options as well.

Short-term Agenda Update on the short term agenda of the
Division of State Lands.

Director Gustafson reported that the written material provided today on the short term agenda of the Division is for the information of the Board. He explained the agency would return to the Board in six months and at that time propose actual adjustments or additions to the agenda.

Scenic Waterway

Update on proposed scenic waterway removal-fill rules.

Director Gustafson introduced Ken Franklin, from the Policy and Planning Section of the Division, who is leading the rulemaking process for the scenic waterway removal-fill permits. Gustafson noted that the agency doesn't currently have rules for removal-fill in scenic waterways and, therefore, has had no formal mechanism to help it deal with difficult issues. He said a policy was developed and brought to the Board in January of 1993. At that time, a comprehensive discussion took place as to whether or not motorized suction dredges were consistent with the statutory prohibition on placer mining in the Scenic Waterway Act. The Board asked the agency to amend the policy to include the prohibition on placer mining and that it be included in the proposed rules that would go out to public review. Gustafson said he and Martha Pagel, Director of the Department of Water Resources, requested a new Attorney General opinion be issued. The request was to review a prior 1982 opinion dealing with the placer mining issue and to further address the state's ability to regulate activities approved by the federal government under a valid federal mining claim in the state scenic waterway. Bill Cook commented that the opinion is not yet completed. Gustafson said the issue of motorized suction dredges has received 80-90 percent of the comments during the review process. The emergency circumstances permit also received some attention. Gustafson explained the agency is particularly constrained by existing state law. Before an emergency permit can be issued in a scenic waterway, the Director of the Division must make a finding of consistency with the Scenic Waterway Act, consult with the Department of Fish and Wildlife and the Department of Parks and Recreation, and then issue a decision in writing. He noted the difficulty of accomplishing all this on a weekend or evening. He said this will be an area for a legislative proposal for the next biennium. Gustafson summarized that the agency is ready to move ahead with two recommendations for the Board on motorized suction dredges: 1) to continue the proposal to prohibit this activity outright; and 2) to develop additional review criteria to ensure that, if approved on a case-by-case basis, the permit approval for motorized suction dredges would be consistent with the Scenic Waterways Act.

Franklin reiterated the two primary issues that were raised in the public testimony. He said the newly revised draft rules made no changes to the motorized suction dredging issues, pending the outcome of the Attorney General's opinion. He stated the emergency permit review standards and procedures were streamlined as much as possible, allowing a verbal request.

Other changes to the previous set of rules, he said were general housekeeping. He reported that a diverse advisory group had been convened to review standards for motorized suction dredging in the event that it is allowed.

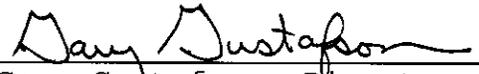
Mel Schmidt, President of the Willamette Valley Minerals, member of the Oregon Independent Miners, Western Mining Council and the Oregon Lands Coalition, discussed the benefits of suction dredging. He noted that the suction dredge that he operates is quiet. Regarding the damage to fish that is reported from the use of the dredges, he stated there is a time limitation usually from the first of July through the first of September, and the material removed is very small. He related a meeting he attended with several people from the Department of Fish and Wildlife who claimed removing this small amount of material would neither harm nor benefit the fish or the environment. He urged the Board to allow motorized suction dredging on the scenic waterways.

Secretary of State Keisling clarified that if the opinion received from the Attorney General says that suction dredging is placer mining, then the Board doesn't have a choice--to allow it would be in violation of the law. If the opinion says it is allowable, then the conditions and the criteria should be regulated. He summarized that the Board is awaiting clarification on the issue.

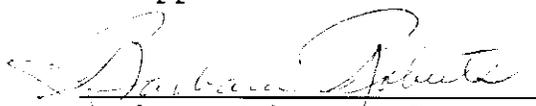
Governor Roberts said if the opinion declares that recreational mining is not placer mining, then the Board would have a range of options, including not permitting it.

Gustafson stated it would probably be at least mid-March before the Division could initiate public hearings on the revised draft rules. If public hearings are held in March, the issue would probably return to the Board in April.

State Treasurer Hill moved the Board adjourn. Secretary of State Keisling seconded the motion and the approval was unanimous.



Gary Gustafson, Director



Barbara Roberts, Governor