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**STATE LAND BOARD MEETING**

**Tuesday, October 11, 1994**

**State Lands Building**

**775 Summer Street NE, Salem, Oregon**

**10:00 a.m.**  
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**DIVISION OF STATE LANDS**

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**GOVERNOR BARBARA ROBERTS:** Welcome. We are in session. We're going to begin with Item No. 1, which is the request by the Natural Heritage Council for approval of the dedication of Onion Peak. Gus, you want to--

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AGENDA ITEM NO. 1

**DIRECTOR GARY GUSTAFSON:** Good morning, Governor, members of the Board. As you recall at the last meeting, we had a public hearing on the subject of whether or not to dedicate Onion Peak. We received testimony from Steve Anderson, who is also here today as chair of the Natural Heritage Advisory Council. No other comments were received on this proposal. We had earlier, of course, got a letter from the County supporting this proposal. At this point, we have, of course, closed the public hearing, analyzed the one comment, and at this point have concluded in our recommendation that it is appropriate to proceed with the dedication.

As a reminder, we have carefully qualified in the proposed implementation agreement that the Land Board can withdraw this if we need to, under State law. And again, this is Common School Trust land, so we need to have that out for the Land Board if circumstances should so dictate.

So at this point, both the Natural Heritage Advisory Council and the Division recommend that the Land Board approve the dedication of the site as a Natural Heritage Conservation area, and join us by entering into an instrument of dedication, which I have here today.

**GOVERNOR BARBARA ROBERTS:** Questions or comments on part of the Board?

**SECRETARY OF STATE PHIL KEISLING:** Madame Chair,  
I would move approval of the dedication of Onion Peak for  
Agenda Item No. 1.

**STATE TREASURER JIM HILL:** Second.

**GOVERNOR BARBARA ROBERTS:** You've heard the motion  
and the second. Is there any discussion? If not, those  
in favor will signify by saying aye; those opposed, nay.  
The motion has passed unanimously.

Item No. 2 is sort of in the same vane. Gus,  
would you like to comment on that one?

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AGENDA ITEM NO. 2

**GARY GUSTAFSON:** Yes. The Natural Heritage Advisory Council has proposed the addition of two new sites to the Register of Natural Heritage resources. These sites are Rough and Ready Creek, which is a ten-acre parcel in Josephine County. It is Unique Savanna shrub land. It has large populations of three rare plants, and also provides access to adjacent Forest Service property.

In addition, eight individual parcels that are collectively in holdings within the Hart Mountain National Wildlife Refuge in Lake County. Together these parcels total about 1800 acres. These are examples of mountain high sagebrush and low sagebrush communities, and they also contain one of only three stands of Great Basin White Fir forest.

Both of these nominations are owned, in whole, by the Nature Conservancy. The Nature Conservancy has proposed their entry into the register. Natural Heritage Advisory Council has studied and recommended these as well. As a result, we also at the Division believe that these possess the special natural area qualities that would dictate to be entered into the Register, and thereby, recommend that Hart Mountain and Rough and Ready Creek tracts be added to the Oregon Register of Natural Heritage Resources.

**GOVERNOR BARBARA ROBERTS:** Comments, questions, a motion?

**STATE TREASURER JIM HILL:** Yes, Governor. I move that the Land Board approve the addition of the Hart Mountain and Rough and Ready Creek tracts to the Oregon Register of Natural Heritage Resources.

**SECRETARY OF STATE PHIL KEISLING:** Second the motion.

**GOVERNOR BARBARA ROBERTS:** You heard the motion, are there comments or questions? Let me just briefly make a comment before we do this with Item 1 and 2.

I would just like to make a note today of Caryn Talbot Throop's service to the Natural Heritage Advisory Council. She served ten years on that Council, and eight years as its chair. She's moving to Wyoming with her husband to begin new careers. She really had a great deal to do with the leadership on this Council with building consensus with helping bring these kinds of items to us, and helping the State agencies begin to understand our role in this process. So she really has made a tremendous amount of difference in the early years of this Council. I just wanted to make note of that today. And hope that Steve or others will share with her how much we appreciate that dedication. And how much we're going to miss her in Oregon, keeping us on task with the Natural Heritage Conservation areas, registrations, and recognitions. So I just wanted to make note of that today before we voted on this item.

Other questions or comments? If not, those in favor will signify by saying aye; those opposed, nay.

**SECRETARY OF STATE PHIL KEISLING:** Madame Chair, can I just real quick--

**GOVERNOR BARBARA ROBERTS:** Yes.

**SECRETARY OF STATE PHIL KEISLING:** So I can catch this before we vote? My wife no longer works for the Nature Conservancy. But I think she is currently doing a small consulting contract that has nothing to do with these sites or this land. But I did want to announce that as potential -- or what can be seen as a potential conflict of interest.

**GOVERNOR BARBARA ROBERTS:** We appreciate that accuracy beyond need. Thank you.

Now, those in favor will signify by saying aye; those opposed, nay. The motion has passed. Thank you very much.

We now have an issue relating to funding and the Legislative Emergency Board. Gus, I'm going to let you lay this item before the Board, so we can take action on it.

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AGENDA ITEM NO. 3

**GARY GUSTAFSON:** Thank you, Governor. The Division of State Lands' current biennial budget includes \$331,000 and change to cover Attorney General's expenses. This amount was reduced about \$100,000 from the actual costs incurred -- that we incurred during the previous biennium.

The reduction reflected a couple of things. First, the removal of several large one-time expenditures in the prior biennium. What were those one-time expenditures? I think all of us remember the famous 1992 Trust Opinion that the AG's office put together on the use of Common School Funds. That was a big part of it. The second part were some of the contentious issues that dealt with the discovery of the Northern Spotted Owl in the Elliott State Forest, and how we dealt with that. We also incurred a mandated ten percent base budget reduction, which affected this entry.

Now, the \$331,000 allocated for this biennium breaks down to a mean average of about a little less than \$14,000 a month. As we proceeded during the beginning part of the current biennium, our AG expenses averaged about \$23,500 a month, or almost \$10,000 larger than anticipated. Now, this caused some concern, but we also recognize that in the beginning of the biennium we were engaged in something that we knew was going to absorb AG

costs. That was taking the Chetco lawsuit, State v. Tidewater to trial. There was a lot of consultant costs and so on that went into preparing that case for trial.

We assumed also that because of that our AG expenses for the balance of the biennium would come back down; however, unfortunately this did not occur. Until the end of May 1994, we continued to accumulate large bills related to the Chetco case. In addition, during the months of January to June of 1994, we also saw significant unbudgeted AG expenses related to the Cresmont lease at North Tongue Point.

Early in 1994, we recognized the problem and alerted our budget analysts that we may need to make budgetary adjustments to cover some costs. In early June we formally instituted AG cost curtailment measures within the Division. However, to a large extent, our AG expenses are being driven by trial proceedings over which we have little or no actual control.

Specifically, I mentioned the largest one is the Chetco case, as we all know, we have prevailed in U.S. District Court in Eugene in the first round of the Chetco case. The State has been awarded a significant outcome in the navigability status of the Chetco River. The first 11 miles of the Chetco have been found navigable. That is a landmark case. Unfortunately there is still another step to go, and that is that once you determine navigability,

you also have to determine where the ordinary high water mark is. So that part of the case goes to trial this February. So we've still got a fair amount of money to go in the Chetco case.

We expect, however, as a result of our prevailing on the issue of title navigability to receive approximately \$30,000 to \$70,000 per year from the Chetco River alone, from gravel sales that we were not previously receiving. Also, this case is expected to have a bearing on other cases where gravel may be removed in State waterways. An additional revenue would be therefore attributed to the State in the future.

We also initiated one other lawsuit during this biennium. It's known as State v. Cars. This case is reflective of the fact that the previous lessee at North Tongue Point had not paid its property taxes. We initiated a lawsuit against them, and I'm very pleased to say that this case is just about to be concluded. The judge has indicated that he will soon pass judgment in favor of the State and award us \$42,000. We incurred somewhat less than half of that in legal fees to get that far, so we do have at least a favorable outcome to show for that case. I think, frankly, it's also very important that the State stands by what it must do in order to get to this point.

A new significant lawsuit has been filed against us. We are currently defending ourselves in six lawsuits. The newest one, and the most significant, is the one that is known as the Mendietta (phonetic) lawsuit. That, among other things, challenges our recently enacted rangeland rules. These rules, as you recall, as we went through the process, will result in an additional \$150,000 per year, approximately, to the State of Oregon and the Common School Fund by the year 1998. That is based on just the base fee increase on those rules alone. Anything that we receive through competitive bidding would be on top of that.

We are currently defending five other lawsuits as well at this time in court. They are all in various stages of the process. Now, we have more recently taken several additional steps to help us contain and deal with this situation. Our legal advisor, Bill Cook, has curtailed his DSL activity by about one-third. That's two-thirds of Bill Cook you see sitting there.

**SECRETARY OF STATE PHIL KEISLING:** Out of his formal self.

**GOVERNOR BARBARA ROBERTS:** Sort of gives you a whole other view of him, doesn't it?

**BILL COOK:** Where is the rest of me?

**GARY GUSTAFSON:** We are initiating rule making to allow the Division to use its employees to conduct

contested case proceedings. In fact, that very subject is before you today, at today's meeting.

Each existing lawsuit that we're now engaged in, both those we have initiated and those that have been initiated against us, have been examined to determine the feasibility of cost-containment measures, including possible settlement. We have also affected other DSL program reductions to help do what we can to absorb these costs.

At the present time, we have accumulated AG billings, at least as of the beginning of September, our latest reporting cycle, the October reporting cycle will be due, in fact, tomorrow. I was hopeful we'd have it by today, but that wasn't possible. But anyway, our existing billings in this biennium have been about \$445,000.

I recently met with Bill Korn, head of the Attorney General's Trial Division to estimate the costs associated with pursuing the outstanding litigation cases that are now out there. We went through each case, in addition to talking strategy about the case, we also -- I asked Bill to give me his best estimate on additional costs that may be associated with those, he's done that. We have also factored in the additional general counsel costs associated with Bill Cook's time over the balance of this biennium, because it is very important, and I can't stress this enough, that this agency be appropriately represented.

We have done, and will continue to do what we can to reduce our AG expenditures. But very simply, when you're in the regulatory business and you're a proprietary manager, you have got to have legal assistance. To reduce beyond a certain point, may cause you long-term damage greatly in excess of what you might absorb otherwise.

We estimate that there could be as much as \$260,000 in additional AG costs during the last ten months of this biennium. Therefore, our total cost estimate for the Attorney General's office is approximately \$705,000 for the entire biennium. Now, you subtract from that \$331,500 that we have already -- has already been included in our current biennial budget, as well as approximately \$55,000 that we will absorb internally. We project that we are going to need \$319,000 and change for the balance of this biennium. I might also mention before anyone asks, that in our budget proposal for the next biennium, we are projecting over \$800,000 in AG expenditures.

Governor, as a result of this situation, we feel that we have no choice but to request that you authorize us to appear before the Legislative Emergency Board to request another funds expenditure limitation increase of \$319,249 to cover unprojected AG expenses. We need to do this now rather than wait for the Legislature to come into session, because frankly, the situation continues to get worse before it's getting better. We need to deal with

it now. And depending on the outcome of the Legislative Emergency Board meeting, we also need to stand prepared to use any other tools that may be at our ability, depending on what they may do if you allow this to go forward.

**STATE TREASURER JIM HILL:** Yes, thank you, Governor. Gus, in the lawsuits that we're involved in, is there a provision that the prevailing side would receive attorney -- would be awarded attorney's fees?

**GARY GUSTAFSON:** I'm going to ask Bill to answer that.

**BILL COOK:** Treasurer Hill, I'm going to wing this because I'm not the trial lawyer, but I know that in the Carg case concerning Tongue Point, that is possible. We're expected to get them. As to the others, I will have to check on that. But we certainly -- that's something that we discussed with Gus. I know that our trial lawyers are looking for every opportunity to recover those.

**STATE TREASURER JIM HILL:** Could you find out if it's a standard provision?

**BILL COOK:** Sure.

**STATE TREASURER JIM HILL:** I mean, in those situations, unless it's something different for the State, because if there's a chance that we could recoup some of the attorney's fees later on if we prevail, and there is a provision for--

**BILL COOK:** Right.

**STATE TREASURER JIM HILL:** The prevailing side to get attorney's fees.

**GOVERNOR BARBARA ROBERTS:** Other questions or comments?

**SECRETARY OF STATE PHIL KEISLING:** Madame Chair, just to follow up with that. It actually could bite us the other way too. I think -- I'd also like to know the extent to which we might have to pay attorney costs if we end up losing some of the suits.

**BILL COOK:** I could check on that.

**SECRETARY OF STATE PHIL KEISLING:** Sure.

**BILL COOK:** I'll check on that.

**SECRETARY OF STATE PHIL KEISLING:** There's a vulnerability there too.

**GOVERNOR BARBARA ROBERTS:** Other questions? Jim?

**STATE TREASURER JIM HILL:** I guess just really a comment. As you know, I sent a letter to the other Board members concerning the handling of Cresmont, and the amount of time and attorney's fees that went into that. I think going through an exercise like that would help get an idea of how we incur costs may be a better way of getting in some way of reducing costs. That went on for, is it 15 months, the Cresmont negotiations. Anyway, that would be something that I think would be worth looking at if we encounter a situation like that in the future to see

if that time could be -- why that took so long. It may have been justified, I'm not prejudging the situation, but it did go on for some time. We incurred quite -- I think over \$100,000 of attorney's fees just with Cresmont alone.

**GOVERNOR BARBARA ROBERTS:** Anything else?

**SECRETARY OF STATE PHIL KEISLING:** Just one question, Gus. Our budget that we built for '95-97 of \$800,000, does that anticipate that Bill Cook goes back to full time?

**GARY GUSTAFSON:** Yes.

**SECRETARY OF STATE PHIL KEISLING:** I guess I just want to say this is a problem that certainly involves a lot of things, not just billings for Cresmont. I think -- and I take responsibility for this. I was on the Land Board, we approved a budget last time that I think was woefully unrealistic about Attorney General anticipated costs. To have cut what we had on the assumption of well, because we had the owl opinion, and we had a few other things, that those were extraordinary. I think we should know -- as Chief Elections Officer I have the same problem in the Elections Division. You cannot control who sues you. You can't walk away from defending the law as you believe the law is, you know, just simply because you think you can't afford the legal costs. I mean, you just can't do that. This is a real difficult arena in which

we are in. We were out of the gate within two to three months clearly heading for a problem here. Rather than getting better it just merely got worse. I didn't see it. I think we've learned that particular lesson. I think also that we need to be prepared in going before the Emergency Board to -- I would anticipate some questions about additional cuts rather than the \$50,000 that we've taken in other funds by Legislators scrutinizing this. I think we need, you know, to be candid with them, and be honest about that if they ask, because they very well might. But not a good position to be in. We need to learn a whole bunch of lessons about that as we move on. We're just in areas where the potential for litigation is greater, and of course, we just can't control who's going to sue us.

**GOVERNOR BARBARA ROBERTS:** I think the last remark that the Secretary of State made that we're in an area where we're likely to be in constant conflict with someone in terms of legality and their view of it. I mean, anything that's natural resources related in this day and age is a potential lawsuit. I don't care what part of the natural resources arena you're in. Since a huge part of what we do is clearly natural resources related, I think that will continue to be the reality of the work we do, at least during this period of time in history. Also, it's just a period of time where people are not happy with

government. That causes, I think, more legal suits than you might see in another period of time. It's unfortunate that that's the way we handle our differences in this culture, but, in fact, it is.

I think as we cut more and more, both general funds and other funds in State government, in an attempt to reduce government in an attempt to make the public happier that we are doing efficient government, we will occasionally find ourselves in a circumstance where an attempt at efficiency turns out to be an inaccurate estimate of what we're able to do, and I think this reflects one of those. I think the hardest thing to explain to citizens is that a budget is an estimate. It is our best guess, if you will, about what it's going to cost us to do our business. We are not always in control of those costs. I think the legal arena is the best example I know of of things over which we have no control in terms of those who may disagree with our points of view or actions.

So I think it's unfortunate to go back to the Emergency Board. I can't think of a group that probably rather do it less than three State-wide office holders. But I think the reality is that we must do what we must do. I do agree with Phil that you will be asked by that Emergency Board what other cuts you could take and would take and should take in order to justify this additional

amount of legal expenditures. I think that you should be prepared as you go before the Emergency Board to have very clear answers about other parts of your budget. I think that will be one of the requirements, it will be more than the \$50,000 question. I think you're going to need to be prepared to respond to those questions before the Emergency Board. Jim?

**STATE TREASURER JIM HILL:** Thank you, Governor. Another question that they will probably ask is what have we done in working with the Attorney General to help reduce attorney's fees in terms of case management or whatever. Gus, have you had any discussions with the AG about ways that -- things that could be done to reduce costs?

**GARY GUSTAFSON:** Yes, we certainly have. As I mentioned, Bill Korn and I sat down with the people who are involved in these trial proceedings, and went through every case. There are a couple where we think we can do some things. One of which is to convert it to a contested case proceeding, which we think will reduce costs. Another one we believe has certainly the potential, good potential for settlement. We're going to take a look at those. If we can achieve those in the State's interest and reduce costs, then we will try to do that.

**GOVERNOR BARBARA ROBERTS:** Go ahead, Jim.

**STATE TREASURER JIM HILL:** Thank you. Usually the idea is that if you use your attorneys up front that they can save you costs--

**GARY GUSTAFSON:** Right.

**STATE TREASURER JIM HILL:** As you move along. Has that been the experience with you, Gus.

**GARY GUSTAFSON:** That's always a hard one, but generally I'd say yes. Certainly an investment by having your attorney look over a decision is usually going to pay off in the future, and I think that's fair. To Bill Cook's credit, Bill is really excellent in that. We often have him review our decisions, letters, and that sort of thing, and I think that's paid great dividends.

**STATE TREASURER JIM HILL:** Thank you.

**SECRETARY OF STATE PHIL KEISLING:** One other thing just as I was sitting here thinking about it. Gus, do we account for Attorney General's costs through the management of the Elliott State Forest in a separate manner?

**GARY GUSTAFSON:** We have -- actually there are two things going on here. Forestry's Attorney General expenses attributed to the Elliott are all Common School Trust Land, for that matter, is charged against Forestry's AG expenses. For instance, Melinda Bruce, who has been here on many occasions, you know, we charge against Forestry. Bill, however, when he does something directly

representing the Land Board, will charge against our AG expense account.

**SECRETARY OF STATE PHIL KEISLING:** But in theory, there are costs that ultimately come back and we have a share of it through what we pay the Forestry Department to manage the--

**GARY GUSTAFSON:** Correct.

**SECRETARY OF STATE PHIL KEISLING:** To manage the Elliott State Forest. Does Forestry keep a separate accounting of the legal -- their legal expenses associated with the Elliott?

**GARY GUSTAFSON:** They do.

**SECRETARY OF STATE PHIL KEISLING:** Okay. Another question you might get asked. I personally would be interested in seeing how that is changed, because again, that's an arena in which we've not only had a number of expenses, contracts, HCP, and the like, but as we struggle through exactly how we're going to be going with this HCP and what might lie ahead, that also might be an area of additional litigation as well. That ultimately could affect us.

**GOVERNOR BARBARA ROBERTS:** Any other questions or comments? If not, is there a motion to give approval for the appearance?

**SECRETARY OF STATE PHIL KEISLING:** I'll move the Land Board approve appearance for the Legislative Emergency

Board to request another funds expenditure increase of -- let's see, what is it? \$319,000?

**GOVERNOR BARBARA ROBERTS:** 19.

**SECRETARY OF STATE PHIL KEISLING:** To 49. We got that exact. To cover unprojected Attorney General expenses during the '93-95 biennium.

**GOVERNOR BARBARA ROBERTS:** Is there a second?

**STATE TREASURER JIM HILL:** Second.

**GOVERNOR BARBARA ROBERTS:** It's been moved and seconded that we approve the request to go to the Emergency Board. Is there further discussion or comment?

**STATE TREASURER JIM HILL:** Just one, Governor. I guess, and it's sort of in response to what you mentioned about being able to look at other parts of the budget, and we know that that's what we're going to -- that DSL is going to have to do. But it really is unfair, I think, to -- when you have a situation where something is out of control, then the attorney's fees come up and then they have to look at cutting the rest of their budget. I think if we make it the case that we are managing our legal affairs as best we can, I guess it's just, and maybe you can say it's coming from a Land Board member, that's not fair to cut into your operating budget because of these issues. We haven't been managing our legal affairs as economically as possible, then that's another matter that they will dig into. But I just want

to say that it's just unfair because of these legal costs to be having them cut into other parts of their budget. I know they will look at it anyway because of the circumstances that the State -- the financial circumstances the State is under, but at least if it starts to go too far that way, then I'll come in and try to personally support whatever we can to keep that from happening beyond a reasonable point.

**GOVERNOR BARBARA ROBERTS:** I think that's a good point, Jim. I was just recalling as Jim was speaking an opportunity I had a few years ago to serve on a national children's board, and one of the questions on the application to be a board member was "Have you been" -- this is when I was Secretary of State, "Have you been sued in the last three years?" "Explain," it said. Explain, with two lines. I thought, now, how do you explain to someone that you have been sued 192 times in two years. I mean, which is the role of the Secretary of State, you get sued on ballot titles, you get sued on voters pamphlets, you get sued on everything you do.

**SECRETARY OF STATE PHIL KEISLING:** I think I have surpassed the record, Madame Chair.

**GOVERNOR BARBARA ROBERTS:** I'm sure you have. But I couldn't help but think about that, because, as I indicated earlier, some of this is out of our control and some of it deals with the arena in which we operate. The

other management roles we have besides the legal costs are critical to our managing these lands in trust to us. It is probably a realistic thing that Jim has raised, that it is not fair to do less than an adequate management job with what else we have before us in order to deal with some things that are not always within our jurisdiction to control, which is the legal costs. I think that's a very good point, Jim.

Are you ready to vote? Those in favor will signify by saying aye; those opposed, nay? Approval.

**GARY GUSTAFSON:** Thank you.

**GOVERNOR BARBARA ROBERTS:** Item 4. Request for adoption of Administrative Rules regarding the unclaimed property law.

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AGENDA ITEM NO. 4

**GARY GUSTAFSON:** The 1993 Legislature passed a House Bill 2033, and that significantly changed the State's unclaimed property statutes. That law, of course, was largely our initiative.

In order to conform with the provisions of that law, we've had to make a number of changes to our Administrative Rules. Those are outlined in your Agenda Item. We've had to eliminate the existing dual report/remit cycles. Reduce the dormancy for safekeeping of repository contents, like safety deposit boxes, and so on. We've raised the aggregate amount that triggers the detailed individual owner accounting reporting from \$25 to \$50. We're now able to assess civil penalties and interest charges to individuals and corporations who fail to comply with the unclaimed property statutes. Essentially, we have brought our Administrative Rules into compliance with State law. It took a while, like all things do, but we've now done it.

We've conducted ten public seminars throughout the state on our proposed rules. We had a formal public hearing in July of this past year. We've incorporated the comments that we've received. We think at this point now we've got rules that do what we set out to do, and also reflect the public comments.

I also want to mention that Marcella Easley, of my staff, is here should you have any specific comments regarding the rules.

With that, we recommend that the Land Board adopt the revised rules pertaining to holder reporting and remitting activities for unclaimed property in order to meet the new statutory requirements.

**GOVERNOR BARBARA ROBERTS:** Gus, I do have a question or two, if I might. I guess, definition first to be sure that I understand. Are we speaking not only of safety deposit boxes and savings accounts that no one acts on for several years, and those kinds of things that we think of as cash-related bonds and other things? Are we also speaking if someone dies and doesn't leave a will, and they have personal property left in a rental house, you know, which is very common, does it refer to that kind of property as well as the more bank kind of property that's spoken of in the rules?

**MARCELLA EASLY:** No, it does not. The unclaimed property is strictly any asset that another person is holding that they can't find the owner to. There are other statutes that cover the estate aspect. We do get those in a different sense, but they're not covered in this particular rule or law.

**GOVERNOR BARBARA ROBERTS:** So it is an asset that someone else is holding, and the owner cannot be found or

an heir cannot be found to that being held by others.

**MARCELLA EASLY:** That's correct. Usually the heir situation is perhaps somebody will die and they have a safety deposit box that the family doesn't know about, or a savings account, or stock -- stock is a big one. A lot of times they just don't realize they dabbled in the stock market, and that would be the heir situation. But here again, it's a little bit of a different statute than the probate statute. But, yes, it would include heirs or any owner that can't be found.

**GOVERNOR BARBARA ROBERTS:** Is the dormancy period on the safety deposit box part of the legal change that the Legislature made in the bill, or is that our reaction to some kind of cost reduction?

**MARCELLA EASLY:** Governor Roberts, that was a request of the Bankers Association. For years they have been trying to -- we've been in kind of an adversarial relationship with the bankers because they think we should bear the costs of drilling the boxes, which we disagree, that's the cost of doing business. So to compromise, what we did is lowered the dormancy period to two years. We still hold the contents for one year after we receive them before they're sold. We advertise the owners' names, and we do everything we can to try to find the owner before we sell the assets. Then the assets or the money that we receive, of course, is available for claim at all

times.

We still have -- we retain possession of the personal papers, and usually that's what the heirs are more interested in. It's like the family photos and anything like that. The only thing we sell is anything that has actual commercial value, like coins or jewelry and this type of thing. To be -- I know there was a question during the Legislature hearings about this, because they were concerned about the family losing these assets. I can only think of one case in the eight years that I've been here where anybody was ever unhappy that we sold anything. Usually what's happened is the person's deceased almost 99 percent of the time. They're really kind of relieved that the assets have been sold because they can just split the money easier than the assets.

**GARY GUSTAFSON:** You forgot to mention statutory.

**MARCELLA EASLY:** Oh, excuse me, I did miss the one part, as Gus pointed out. It is a statutory change that the bankers did ask for, so yes, we changed it.

**GOVERNOR BARBARA ROBERTS:** The two year--

**MARCELLA EASLY:** From five years.

**GOVERNOR BARBARA ROBERTS:** Bank deposit, and then we do another year, so there's actually a three-year period of, if you will, dormancy before the assets are sold.

**MARCELLA EASLY:** That's correct. Then, like I say, we still retain the personal papers, so the only

thing that is sold is just the commercial value things. Because we still have boxes and boxes of personal papers for people, so it's not like they can't ever redeem everything.

**GOVERNOR BARBARA ROBERTS:** Okay. Other questions, concerns?

**SECRETARY OF STATE PHIL KEISLING:** Yeah, just a real brief. Marcella, under the old way of doing things, approximately how much has been -- has come in like on a yearly basis through this?

**MARCELLA EASLY:** Okay. Secretary of State, we take in anywhere between \$5 and \$8 million a year, that comes into the Division. And then through our efforts of trying to find people before--

**SECRETARY OF STATE PHIL KEISLING:** Right.

**MARCELLA EASLY:** In the advertising, we usually find between \$2.5 and \$3 million.

**SECRETARY OF STATE PHIL KEISLING:** Is there an estimate, if any, of how these new rules might change that?

**MARCELLA EASLY:** This year we expect a significant increase because of the dormancy change, and also including the State government's. Before the State agencies didn't report, and that dormancy period went from seven to five for a lot of them. So this year we expect a significant increase. I'm going to just say roughly maybe \$8 million,

\$10 million, that's just kind of, you know, swag. Then after that, I think it will level out to probably about \$8 million a year, or roughly.

**SECRETARY OF STATE PHIL KEISLING:** Okay. Good.

**MARCELLA EASLY:** Okay.

**GOVERNOR BARBARA ROBERTS:** There's nothing in the Administrative Rules that changes the way that our employees handle items of value once they're in our possession?

**MARCELLA EASLY:** Governor Roberts, no, we have, if anything, we have increased the responsibility that we have here. It hasn't changed from what we do. We still require two people at all times to open the contents and we are very careful about the value that's placed on them. So that didn't really change significantly at all.

**GOVERNOR BARBARA ROBERTS:** Well, I ask that question, I don't believe either Phil or Jim were on the Board when we had a real problem a few years ago -- and DSL -- we actually had employees going into inventory items and ending up with a storehouse or two of items that did not belong to them, because we did not have two people handling the assets. So I wanted to make certain we hadn't done anything to lose that precautionary administrative handling of other people's valuables. So I appreciate that.

**MARCELLA EASLY:** Okay.

**GOVERNOR BARBARA ROBERTS:** Questions, concerns?

A motion?

**STATE TREASURER JIM HILL:** Yes, Governor, I move that the Board adopt the revised rules pertaining to holder reporting and remitting activities for unclaimed property to meet the new statutory requirements.

**SECRETARY OF STATE PHIL KEISLING:** Second the motion.

**GOVERNOR BARBARA ROBERTS:** You heard the motion and the second. Is there further discussion? If not, those in favor will signify by saying aye; those opposed, nay? The motion has passed unanimously. Thank you very much, Marcella.

Item 5, administrative rule dealing with wetland resources. Gus, I think you may have a comment before the Board, before we go into this Item.

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AGENDA ITEM NO. 5

**GARY GUSTAFSON:** I do. Governor, members of the Board, I want to first of all make sure that each of you have in your packet an amendment dated October 6, an amendment to Land Board Agenda Item No. 5. Does everyone have that?

That talks about amendments to two sections of the proposed rules. Triple E and Triple M. It deals with how the rule defines terms by reference to federal administrative rules. We made this change to avoid the possibility that future amendment of the federal rules could cause unintended changes to our rules. So we went ahead and spelled out the definitions rather than just reference the federal rule, which could change.

In addition, let me just briefly introduce the topic, and then mention a late-breaking development that I want the Board to be aware of.

**GOVERNOR BARBARA ROBERTS:** Gus, you're just going to -- you're not going to go through the whole--

**GARY GUSTAFSON:** No, I'm not.

**GOVERNOR BARBARA ROBERTS:** Process before we do that?

**GARY GUSTAFSON:** Not at all.

**GOVERNOR BARBARA ROBERTS:** Thank you. I appreciate that.

**GARY GUSTAFSON:** The Oregon Legislature passed Senate Bill 3 in 1989, and among other things, it charges the Division to review and approve or disapprove wetland conservation plans under the law.

We have developed administrative rules to implement that requirement. We solicited comments on the draft rules in two separate periods of public notice, and held a public hearing in January of this year. We've got a summary of all the public comments received, which I will not go into, but it tells you what they were and how we dealt with them. The biggest focus we received in the public comments was the need for additional clarity.

This morning, just before the meeting, as a matter of fact, I received a call from Lyn Mattei, representing the ONRC, the Oregon Natural Resources Council. Lyn expressed to me her concern about these rules, particularly, what she perceived to be a conflict with federal law, and also mentioned that she questioned whether or not the U.S. Fish & Wildlife Service had been properly coordinated in the amendment process of these rules, as the rules evolved. Lyn asked that the Board postpone any action on these rules.

I've asked Ken Bierly, the wetland program manager of the Division, to come to the table today, so that Ken could specifically address Lyn's concerns as we understand them, and give you a little bit of perspective of what we

believe these concerns are before you make your decision.

**GOVERNOR BARBARA ROBERTS:** Let me, if I might, just a minute, Ken. I had asked Gus before we actually went into the Item before us, to have some understanding of what -- as nearly as we could, of what Lyn -- the concern Lyn had raised or was attempting to raise. She could not be here today. Because if we're not going to -- if for some reason we decide we want to postpone the Item, I didn't want us to spend a great deal of time going through the detail of the rule, and then deciding we might be better off to postpone the decision. We had talked earlier about going ahead and moving the rules, and then if there was need to do an amendment, we would do it. But, if in fact, we went back to do an amendment, we would have to go through the rule-making process as if we were doing a brand new rule. So I think the question before us is if there is enough validity in our minds to postpone the rule, or whether we feel that there is not, and so I think as Ken talks to us, it will be useful to understand that maybe the question before us rather than just the rule. So, Ken.

**KEN BIERLY:** Thank you very much. For the record, Ken Bierly, Wetlands Program Team Leader for the Division.

To give you a little bit of background, what we were trying to do with these administrative rules is to

define how local communities can utilize the wetland conservation planning authority under -- that was developed by the 1989 Legislature, to develop plans that define where wetlands would be developed within their local communities, where they would be protected. There were -- conservation actions would apply to local wetlands.

It is an inherently difficult process to integrate the land use planning program with wetland regulations which are reactive to an individual's proposal to develop a piece of land. Oregon is unique in that we do have a structured land use planning program. I think the primary issue that Lyn raised is a misunderstanding of the application of the Clean Water Act regulations, which is a reactive permitting program to Oregon's situation where we're trying to develop wetland conservation plans that define, in advance, where wetlands can be developed.

Her comments, and these are taken from an extensive voice mail that was left on the machine at 9:30 last night, had to do with concern that the rules would not include how federal law protects wetlands. This is basically State rules that we are trying to apply, and we have referred to the -- in the rules specifically that local community must comply with federal law.

She expressed a concern that we -- that the State was dwelling on EPA and Corps of Engineers on how wetland protection should be applied. Those are the administrative

agencies of the federal government, and we have coordinated with them extensively since June of 1993 on these rules. In fact, have support from the Environmental Protection Agency in taking into consideration the other federal agencies' comments, both US Fish & Wildlife Service and Corps of Engineers. She believes that the regulations can be interpreted by reading the statute of the Clean Water Act, and the Section 404(b)(1) guidelines. Again, we're trying to focus on State law and State regulations. We have asked the federal government, EPA, and the Corps to assist us in providing further guidance if they feel that it is appropriate and necessary.

Her concern is that we are asking the federal government to lower the standard for wetland development. What we -- that we -- there is no request to such, we are simply trying to define a wetland planning process in Oregon, and have coordinated extensively with federal government to see if there are ways that they can problematically recognize a process that the State is taking. She indicates that the rules are on a collision course with federal regulations. We have not been given to believe that that is the case by the federal agencies that administer those regulations.

She indicated that we should be telling the local government how to comply with federal law. We have many responsibilities, that one appears to be beyond our

capability or ability. We are not interpreters of federal law in this instance. She believes that the State needs to give guidance to local governments on how to comply with the Clean Water Act, and that was one of the very specific issues that we attempted to deal with in interacting with Corps of Engineers, EPA, U.S. Fish & Wildlife Service, is to get them to react in their federal perspective on whether these rules would be appropriate or not for designating areas for development, for protection, or conservation.

Her further concern has been that we have -- that we have not addressed or have not considered US Fish & Wildlife Service's comments, and in fact, we have, explicitly. The comments that were relevant to the issues that the rules applied to, we have utilized either specifically to change the rules or to have reason to respond and why we did not accept their comments. In addition, US Fish & Wildlife Service made numerous comments on issues that were not at the table on the rule -- in the rule making process. They were trying -- they have asked, and it's to provide better clarity on mitigation and other standards that would be applied in wetland conservation plans, in this instance we were not dealing with those issues. So when we do deal with those issues, we will be in direct conversation with them.

I think the process is important. We started this in June of '93. We have had two formal notices, one in December of '93, and one in May of '94. We have had informal workshops with local communities who are proposing to apply these rules, and we have had workshops with State and federal resource agencies to get their input.

That's kind of the status as I'm aware of it, and the nature of the issues as I understand them.

**GOVERNOR BARBARA ROBERTS:** Let me see if I can direct two questions to you, and maybe one then to Bill Cook, as we try to decide whether we should move forward or not.

Do we have any pending developments that will be delayed if we delay this to the next -- postpone this to the next Board meeting? Do we have anything that's standing at risk of delayed decision by this as far as you know?

**KEN BIERLY:** No, there is no wetland conservation plan that has been submitted that would be delayed by this action or inaction, however.

**GOVERNOR BARBARA ROBERTS:** Did Lyn reference any particular section of the rules in her voice mail? Any particular sections that she had concerns about?

**KEN BIERLY:** No. Some comments were generic, and broadly expressed.

**GOVERNOR BARBARA ROBERTS:** Now, let me ask Bill a question, if I may. Bill, if we adopt these rules, and then there is a challenge of them, I assume that we risk financial costs related to litigation.

**BILL COOK:** Governor Roberts, I would assume so. Obviously before one challenges rules, one has to come up with some legal flaw in your rule-making process. I haven't seen one yet.

**GOVERNOR BARBARA ROBERTS:** Either in the process or the rule itself.

**BILL COOK:** That's right. Or the interpretation of statutes that underlie the rules.

**GOVERNOR BARBARA ROBERTS:** And as I understand it, Ken, she thinks that the State rules that we're putting together right now are in conflict with federal law in some way. Is that the basis of--

**KEN BIERLY:** That's fundamentally the concern that was expressed.

**BILL COOK:** Governor, can I jump in on that one, if I could? May be able to shed some light on it. Lyn's comments are new to me, so I really can't make a judgment call on them. But what strikes me is what Ken mentioned is true, and I think it's sort of foundation of the whole thing; that what is being done under the rules here is implementing a State statute. There's no requirement to use these rules to implement, for instance,

the Clean Water Act's regulation of wetlands. So if you want to be concerned about interface with federal regulatory jurisdiction, it's not so much a legal call as it is a policy call. I don't think anyone can force you to do anything particular in these rules based upon federal law.

**GOVERNOR BARBARA ROBERTS:** Questions, concerns, comments on part of the other Board members?

**STATE TREASURER JIM HILL:** Yes, Governor, thank you. Maybe I missed your comments. How many hearings have you held concerning these rules?

**KEN BIERLY:** We've had two specific public hearings.

**STATE TREASURER JIM HILL:** Did anyone from the ONRC have an opportunity to testify or--

**KEN BIERLY:** Yes, they commented, and we've addressed their comments in the rules that they are currently drafting.

**STATE TREASURER JIM HILL:** Are these the same comments that you addressed, or were these something --

**KEN BIERLY:** They're being expressed in a more generic term at this point. They are being expressed in broader characterization.

**STATE TREASURER JIM HILL:** But it's the same subject?

**KEN BIERLY:** It's the same subject.

**STATE TREASURER JIM HILL:** Thank you.

**GOVERNOR BARBARA ROBERTS:** And as I understood before the meeting it had been about three weeks since the final information that we have before us, these final rules, have been out for about three weeks, available to members of the community at large. With exception, I assume, of these final set of amendments, which --

**KEN BIERLY:** Correct.

**GOVERNOR BARBARA ROBERTS:** Are only out, when?

**KEN BIERLY:** In the final set of amendments were developed at a -- at the specific request of legal counsel -- raised the explicit concern about tying to federal definitions it could change by--

**GOVERNOR BARBARA ROBERTS:** And when were these--

**KEN BIERLY:** Federal action.

**GOVERNOR BARBARA ROBERTS:** Available?

**KEN BIERLY:** About a week ago, I believe, is -- as my -- as I recall.

**GOVERNOR BARBARA ROBERTS:** These have been available last week, and the Board just got them this morning?

**SECRETARY OF STATE PHIL KEISLING:** Governor, we've had them --

**GOVERNOR BARBARA ROBERTS:** We've had them before that, okay.

**SECRETARY OF STATE PHIL KEISLING:** Right.

**GOVERNOR BARBARA ROBERTS:** Okay.

**SECRETARY OF STATE PHIL KEISLING:** I'll just add, I mean, I think it's a general process thing, short of what is a pretty compelling argument about a process problem, and at 9:30 the eve before a Land Board, call, I'm very disinclined to, you know, to postpone things on that basis. I have not heard a thing about this concern either -- directly on it. Obviously it's an extremely complicated area of law, but based on what I've heard, I'm fairly comfortable going ahead. I recognize that it's tough sometimes to keep up with all this stuff, but it's important to donner (phonetic) that process, because we've got to apply that standard to anybody.

**GOVERNOR BARBARA ROBERTS:** Well, I just would comment that we have on other occasions postponed a decision if there was some concern about new information, and we just sat here a while ago talking about \$319,000 legal problem, and talked about prevention. I don't know whether this is one of those prevention situations. ONRC, to the best of my knowledge, has never asked us to postpone action on anything in the ten years I've been on this Board. I'm not necessarily knowing that that's the place we should go, but I -- if nothing is at risk, nothing is pending that will be affected by these rules, and we don't quite understand the concern, and the person who raised them can't be here, I do know that on many occasions over the last year even, we have postponed a

decision to allow others to come and comment. I guess I would ask the Board if this feels like one of those same issues, or whether this is somehow different.

**SECRETARY OF STATE PHIL KEISLING:** I'm trying to think of what have I heard that tells me it is, and maybe -- I guess I gotta put -- maybe I ought to ask Ken to put his, you know, put the best argument on the other side. When you -- obviously you got some stake in this. You've been shepherding this through.

**KEN BIERLY:** I am not an unbiased participant.

**SECRETARY OF STATE PHIL KEISLING:** I understand that. I suppose -- or any of us. I'm just struggling to know, you know, kind of what's new here. What's new that would affect an argument. It seems argumentative to me rather than new facts. It seems, just from how much you described it -- a concern that in a sense that there is a conflict -- with possible conflict with federal law. Fish & Wildlife, for example, if we had someone here from Fish & Wildlife Service to say, "Geez, there's concern that it is inconsistent with you," what would they say?

**KEN BIERLY:** I'm at a bit of a loss to fathom the extent of the concerns. I do know they are sufficient to, you know, make 11th-hour telephone calls. We have -- have coordinated extensively with the federal resource agencies, because we do realize that there is an important interplay between the Clean Water Act regulations and State

regulations. But we also recognize that they're separate. To the extent that we have been able to develop consistency in those two programs, we have -- we have attempted to do so.

I think -- I don't know how to read another individual's mind.

**SECRETARY OF STATE PHIL KEISLING:** Was there a new fact that came to you from this phone call? A single new fact that you or anyone in your staff was unaware of prior to the phone call?

**KEN BIERLY:** The nature of the concern that we're -- the manner in which they were expressed were generic, and so it was not factual based. It was concern about the direction and the potential outcomes and what was intended.

**GARY GUSTAFSON:** Were they all raised before that?

**KEN BIERLY:** In most of the comments that had been discussed in generic terms previously. But I think there is a misunderstanding between the parties, and I think that that needs to be worked on regardless of your vote today.

**GOVERNOR BARBARA ROBERTS:** What does that mean "that needs to be worked on"?

**KEN BIERLY:** We need to have better communication so that the expectations on the part of ONRC is to comment on State law -- State regulations instead of federal

regulations.

**GOVERNOR BARBARA ROBERTS:** Desire of the Board?

**SECRETARY OF STATE PHIL KEISLING:** Well, Madame Chair, I'm disinclined. I guess, you know, one of the questions I asked if for some reason we need -- if new facts come to light where someone can make a -- what would be considered as a compelling case, we would then amend the rule that we had just adopted. How long would that take?

**GARY GUSTAFSON:** Outside, three months minimum.

**SECRETARY OF STATE PHIL KEISLING:** To do any amendments?

**GARY GUSTAFSON:** That's about what it takes. Depending on the timing of filing with the Secretary of State's office.

**GOVERNOR BARBARA ROBERTS:** Oh, how efficient they are--

**SECRETARY OF STATE PHIL KEISLING:** Personally expedite this particular one. I guess I'm open to argument right now, Madame Chair, but I'm disinclined. I also think that I remember that -- I'm trying to remember -- I had thought that ONRC had come in and asked for some extension on some of our scenic waterway stuff, placer mining, elk--

**GOVERNOR BARBARA ROBERTS:** Well--

**SECRETARY OF STATE PHIL KEISLING:** One on that.

**GOVERNOR BARBARA ROBERTS:** In my memory, they --

**SECRETARY OF STATE PHIL KEISLING:** That's probably not the issue so much--

**GOVERNOR BARBARA ROBERTS:** No.

**SECRETARY OF STATE PHIL KEISLING:** With this particular organization, it's just kind of process.

**GOVERNOR BARBARA ROBERTS:** Jim, do you have a reaction?

**STATE TREASURER JIM HILL:** Well, Governor, I have to say I'm inclined to agree with Phil. It seems as though they've had the opportunity to address the issue. I think that in delaying, we set a precedent in allowing this to happen. But at the same time, Governor, it sounded as though you have some fairly strong feelings about this. I would say as a courtesy to you, and that would be the only reason that I would do this at all, because I'm in complete agreement with Phil. I know that if people have an opportunity, especially an organization that has the resources, an opportunity to comment, and they wait until the last minute, I'm just not sympathetic to it. I don't think that we should hold up our process for months in doing it. Governor, I mean, as -- I felt, not my arm being twisted--

**GOVERNOR BARBARA ROBERTS:** No, no, I don't want you to -- I mean, I can count, Jim--

**STATE TREASURER JIM HILL:** Because I know you wouldn't do anything like that, Governor.

**GOVERNOR BARBARA ROBERTS:** I know what two to one looks like.

**SECRETARY OF STATE PHIL KEISLING:** Let me just--

**GOVERNOR BARBARA ROBERTS:** I don't want you to do it because of my leanings to think that if it cause -- I mean, we just heard how long, minimum, it takes to amend this. It may not be a legitimate concern. It may not have validity, and maybe that means we should proceed. But if there's legitimacy, and next month we come in here and found out there was, the difference is one month to come back and finish the process after all the months of work we put into it and starting out at ground zero with an amendment that will take three to six months, which is my guess of what it would take.

We can move forward with it. I am perfectly content to do that as long as we understand the choice we're making, and as long as we still keep in mind the prevention we just discussed on an earlier item. If this is a prevention issue, a month isn't going to make any difference. If it is not a prevention issue, and it doesn't have validity, and the majority of this Board feels it does not, I'm very comfortable to move forward and take action on what we have before us.

**SECRETARY OF STATE PHIL KEISLING:** Madame Chair, I think if I remember right, we actually don't have another Land Board meeting until December. Is that right?

**GARY GUSTAFSON:** Correct.

**SECRETARY OF STATE PHIL KEISLING:** I'm wondering, just as an option, in effect, to give a decent interval of time to have staff truly look at this concern, and others of us as well. Are there options for a specific meeting to convene to look just specifically at this short of having to wait another two months on it? I appreciate--

**GOVERNOR BARBARA ROBERTS:** I forgot that there wasn't a November meeting.

**SECRETARY OF STATE PHIL KEISLING:** The point about another three to six months, there's not a November meeting. I guess -- I share Treasurer Hill's sense that this is a collegial body and there are -- and sometimes you have instincts about something, sometimes it's better safe than sorry, to weigh the pros and cons. I think it doesn't take away from being cranky about the process on this, quite honestly. I have some strong--

**GOVERNOR BARBARA ROBERTS:** Legitimately.

**SECRETARY OF STATE PHIL KEISLING:** Feelings about that, but let's not let that, you know, in a sense maybe blind us to what might be the best protection. Is that something that might be a reasonable way to proceed? Have

we done it before? We've had specific meetings for a specific purpose with notice and the like, that could be done very quickly?

**GOVERNOR BARBARA ROBERTS:** We could do a telephone meeting, which we've done before, and it wouldn't have to be delayed very long if we could -- Gus?

**GARY GUSTAFSON:** Governor, members of the Board, certainly that can be done. But to be honest, this issue, frankly, does not probably warrant a special meeting of this body, given what Ken has already explained, and that is, there is nothing going to happen between now and December anyway.

So I guess, you know, my recommendation -- I'm going to change it just sitting here, for you, for your consideration. Is that we do go ahead and just wait until December, but that my staff and I meet with Lyn and ONRC, get the issue framed out, and send you a memo saying where we are in this. Also expressing, you know, a certain amount of crankiness to ONRC, if you will, for coming in at the last minute. Because, you know, a lot of people like to play that game, and we're certainly prepared to deal with real issues, I know all of us are. It's very difficult to respond in this kind of time frame.

**SECRETARY OF STATE PHIL KEISLING:** Can I put forward (phonetic) one other option, Madame Chair? What if we put an effective date of January 1, 1995 on this

rule, adopt it today, but effective January 1, 1995? Wouldn't that, then, allow us a chance at the December 8 meeting to still amend the rule, or would that be even an option? I just want to explore it. I mean, I hear what you're saying on that.

**GARY GUSTAFSON:** Or make it the day after the Land Board meeting in December.

**SECRETARY OF STATE PHIL KEISLING:** The point is is to move as far down the field as we can, and not, in a sense, hold the entire mechanism up. It's probably kind of a clear burden of proof, then.

**BILL COOK:** Governor, excuse me. I just wanted to raise one minor procedural thing to keep in mind. That is, if you are going to reopen the comment period for one party, for instance, ONRC, you have to open it for everybody.

**SECRETARY OF STATE PHIL KEISLING:** That's right.

**BILL COOK:** And you may, under the new APA, you may have to issue Secretary of State's notice and that type of thing to do that, which may add a little bit of time.

**GOVERNOR BARBARA ROBERTS:** But we could delay a decision -- postpone a decision?

**BILL COOK:** Yes, you could.

**GOVERNOR BARBARA ROBERTS:** The Item would still be before us and we still have some ability to amend

within that framework as a Board.

**SECRETARY OF STATE PHIL KEISLING:** A comment. Madame Chair, does this -- if the comment period's over, is this common at 9:30 at night, that Ken Bierly was even within the process?

**BILL COOK:** Technically it's not kosher.

**SECRETARY OF STATE PHIL KEISLING:** Well, this may be a little more specific. I mean, are we required by law--

**GOVERNOR BARBARA ROBERTS:** Ken, we're not operating under kosher laws--

**BILL COOK:** Sorry, Governor.

**GOVERNOR BARBARA ROBERTS:** We have this -- under body of law, we have to deal with it.

**SECRETARY OF STATE PHIL KEISLING:** I mean, short of -- after the comment period is closed, I mean, what -- again, I mean, we have to -- our only reason for considering this is because of a comment, in effect, made to Ken last night. I mean, where are we with that? Go back to the litigation question, (unintelligible) litigation on the other side too.

**GOVERNOR BARBARA ROBERTS:** Yeah, there is the other side of that litigation issue. That's very good.

**BILL COOK:** Secretary Keisling, technically, if I had gotten a call last night at 9:30, and someone said, "Lyn Mattei's on the line," or anybody is on the line, and

they want to talk about the rules, I would have said, "Don't talk to them about it." There was a comment period. There is a Land Board meeting when people may come forward, that's the tradition. Our reading of the APA is that's the only way that public comments ought to come in. The fact is there has been a contact. There are various ways to look at that, but I think if you are going to talk about putting an action on hold to try to address this issue, if you're going to do that, obviously you're going to have to let everybody talk about it.

**GOVERNOR BARBARA ROBERTS:** And that's probably what we maybe would have been (unintelligible) we decided about that a half an hour ago, which we didn't.

But that does mean that once a comment period is over, and then we put together all the amendments based on comments, and then that item goes out, the final version, there is no comment period on final version then. Because there were changes made reflective of the two administrative rule hearings, after the administrative rule hearings, and then three weeks ago the final version went out, and there is no place to make comment on that again?

**BILL COOK:** Except at -- excuse me, Governor, except at the Land Board meeting.

**GOVERNOR BARBARA ROBERTS:** Okay.

**BILL COOK:** As has been the Land Board's tradition.

**GOVERNOR BARBARA ROBERTS:** Could the Land Board amend something after all the administrative hearings were done, the comment period had ended, the final rule was before us, and then the Land Board was acting. Could the Land Board amend that rule?

**BILL COOK:** Yes. Yes.

**GOVERNOR BARBARA ROBERTS:** Okay. So that's the rest of it.

**BILL COOK:** Yes, Governor, the only trick is -- the only thing that made my ears go up, was that any suggestion that you would go and hold a meeting with a particular party.

**GOVERNOR BARBARA ROBERTS:** Okay, that's probably legitimate. So then, I think the issue is, if I understand it then, we either move forward to act on this rule, as it stands--

**SECRETARY OF STATE PHIL KEISLING:** Or with any amendments that we would offer--

**GOVERNOR BARBARA ROBERTS:** Or any amendments that would come from the Board in this process today. Where if someone was signed up to make comment, they could do it here. Or we delay the decision making for -- so that any additional input that comes before the Board, only comes in this setting. Where everybody has full opportunity to come.

**BILL COOK:** That's right. If you are going to postpone it for the purpose getting more comment, it has to be more comment from anybody.

**GOVERNOR BARBARA ROBERTS:** I want to be very clear with the Board. I am perfectly willing to go ahead with this, or perfectly willing to leave this. I think I've made my case very strongly, but I think, clearly, the Attorney General's representative has given us information that makes it clear this isn't something we can just have a discussion about with one party. I think that changes to some degree the comments that were made earlier about this. So what's the pleasure of the Board?

**STATE TREASURER JIM HILL:** Madame Chair, I move that we adopt the rules as presented.

**SECRETARY OF STATE PHIL KEISLING:** I'll second.

**GOVERNOR BARBARA ROBERTS:** It's been moved and seconded that we adopt the rules under Measure 5 dealing with wetland resources and the wetland conservation plan. Thank you, Ken.

Is there discussion?

**SECRETARY OF STATE PHIL KEISLING:** Measure 5?

**GOVERNOR BARBARA ROBERTS:** What did I say?

**SECRETARY OF STATE PHIL KEISLING:** You said Measure 5.

**GOVERNOR BARBARA ROBERTS:** Does this kind of tell you where my head is, then? I've got a ballot measure

press conference coming. Under Item 5 on our agenda. Excuse me. Is there comment or discussion?

**SECRETARY OF STATE PHIL KEISLING:** Just one real technical thing. I think the addendum references triple E, I think it's triple H.

**GOVERNOR BARBARA ROBERTS:** The wetland--

**SECRETARY OF STATE PHIL KEISLING:** Where you remove (phonetic) the reference, rather than triple E. Ken?

**KEN BIERLY:** Phil, the reference should apply to both locations, because it is cross-referenced between triple H back to triple E, the resource designation.

**GOVERNOR BARBARA ROBERTS:** So you believe that's correct, Ken?

**KEN BIERLY:** I believe it's correct as--

**BILL COOK:** Excuse me, Ken, I see the changes in triple H and triple M.

**KEN BIERLY:** I believe the right--

**SECRETARY OF STATE PHIL KEISLING:** Do you want mine?

**GARY GUSTAFSON:** It's -- (3) and triple E references H.

**SECRETARY OF STATE PHIL KEISLING:** Okay. You don't change any language in triple E, but you do change the language in--

**KEN BIERLY:** Okay. It's applied in triple E and triple M.

**GOVERNOR BARBARA ROBERTS:** For those of you who are sitting in the audience not -- without this paper before you, I'm sure this is scintillating.

**KEN BIERLY:** Yeah, it should be H into M.

**GOVERNOR BARBARA ROBERTS:** Government at its best. Okay.

**KEN BIERLY:** The correct reference should be triple H and triple M not triple E and triple M.

**GOVERNOR BARBARA ROBERTS:** We will assume that correction in the motion.

**STATE TREASURER JIM HILL:** So moved.

**GOVERNOR BARBARA ROBERTS:** Okay.

**SECRETARY OF STATE PHIL KEISLING:** I second.

**GOVERNOR BARBARA ROBERTS:** Okay. Discussion, comments?

**SECRETARY OF STATE PHIL KEISLING:** I guess I would just -- the staff has done a tremendous amount of work on this. This was just a huge task before it, and we may want to do some additional things in the future, obviously, as more information comes in, but I just want to applaud Ken and his people for just a tremendous job, public outreach, and working the process. They've just done extraordinary work.

**STATE TREASURER JIM HILL:** Indeed.

**KEN BIERLY:** I think Kimberly Roth and Frank Glenn (phonetic) have put the staff working on this were instrumental--

**SECRETARY OF STATE PHIL KEISLING:** Okay, I retract my thanks to them, but--

**GOVERNOR BARBARA ROBERTS:** And Ken, in no way does -- do my concerns as I raised them earlier reflect any lack of support for the incredible work that's gone into this process, and the delicacy of this issue, and I thank you very much for that.

Those in favor will signify by saying aye; those opposed, nay? The motion is passed unanimously.

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**GOVERNOR BARBARA ROBERTS:** Just a second. I'm going to take an item out of order in the name of government efficiency.

Today is the birthday of a member of our staff, Dean Fowler. But the reason we're recognizing him today is not because it's his birthday, though that is significant, Dean is retiring at the end of this month after 24 years of State service.

He started his State career as an accounting clerk with the Department of Corrections. He then went to DMV, and afterwards joined the DSL as a revenue auditor in 1975. During his 19 years with DSL, Dean worked with the unclaimed property, something that we were discussing earlier, for about 12 years, and the last seven as the Agency's accounts payable and payroll accountant, very complicated and tough piece of work.

Dean is one of the nicest people that you will ever meet, witnessed by the people in the back of the room. He is truly and genuinely sincere and a caring person, willing to help others, those he works with and those outside of the Agency.

He's been positive for this last year, that he was ready to retire. He's now in his last month and counting his get-up days. Now he is the -- he has only 12 get-up days left. I like this -- I'm going to start counting mine, Dean.

So I would like to present a plaque to Dean for all the years of service and dedication. For your excellent work. We're going to miss you in the Division. This is a symbol of our appreciation. We look forward to you not having anymore get-up days. Dean?

See that government efficiency, they're all going back to work now. Thank you very much for being here, Dean, we appreciate it. Thank you.

We are on Item No. 6. Again, approval to initiate rule making. Gus?

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AGENDA ITEM NO. 6

**GARY GUSTAFSON:** Governor, just a quick aside. You thought the last wetland rules were interesting. Next meeting we're going to have some real interesting ones for you. So we'll keep you posted. That's going to be the wetland mitigation rules.

This Item, Agenda Item No. 6, actually fits into what I mentioned earlier with cost containment with AG expenses. We have a statute that provides that folks can contest decisions related to removal/fill permits, and those go into a contested case proceeding. Oftentimes, it certainly does get complex, in it involves legal issues and so on.

Again, at times we used Bill Cook; and times we used a hearings officer. We figured out that gee whiz, with some up-front training on the simpler cases, at least, we could do these ourselves. We have our own hearings officer for contested cases, and reduce costs associated with it. So we have coordinated this idea with the Attorney General's office, and have received his approval, assuming we answer 11 specific questions in the proper order, and so we're doing that. But this enables us to go forward. If approved to permit a Division employee to represent the Agency, at certain contested case hearings conducted by the Division or any other State agency.

So with that introduction, it fits with our cost containment, and we recommend that you authorize us to go forward.

**GOVERNOR BARBARA ROBERTS:** Motion?

**SECRETARY OF STATE PHIL KEISLING:** I'll move that we go forward with that.

**STATE TREASURER JIM HILL:** Second.

**GOVERNOR BARBARA ROBERTS:** That was scintillating. Two of them. Is there further discussion? I've got a motion and a second on Item No. 6, not measure number 6, Item No. 6. If not, those in favor will signify by saying aye; those opposed, nay? The motion is passed unanimously.

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AGENDA ITEM NO. 7

**GOVERNOR BARBARA ROBERTS:** Item No. 7, approval of the minutes of September 13, 1994. Is there a motion?

**SECRETARY OF STATE PHIL KEISLING:** I'll move -- oh, were--

**STATE TREASURER JIM HILL:** I'm sorry.

**GOVERNOR BARBARA ROBERTS:** No fights.

**SECRETARY OF STATE PHIL KEISLING:** I'll move.

**STATE TREASURER JIM HILL:** Second.

**GOVERNOR BARBARA ROBERTS:** It's been moved and seconded to approve the minutes of the State Land Board meeting of September 13, 1994.

**SECRETARY OF STATE PHIL KEISLING:** Can I just actually ask one question on discussion of this? We actually have in here that HCP would be submitted to the federal government. I'm not -- I'm sure that's what was said, actually, and what was intended at the time. Is there -- should we just -- is it best practice to just let that go?

**GARY GUSTAFSON:** Yes, that is what occurred at that meeting. That's what we have to record even if circumstances have since changed.

**SECRETARY OF STATE PHIL KEISLING:** Okay. We might note, then, in the discussion of the motion of the minutes agenda, that -- or might just point out for those who read the next minutes, it was noted that subsequent to

that, it has not yet--

**GOVERNOR BARBARA ROBERTS:** I think that's an important point. Further comments or amendments to the minutes? If not, those in favor will signify by saying aye; those opposed, nay? The motion is passed. Thank you very much.

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**GOVERNOR BARBARA ROBERTS:** We now have before us two informational items. One, the update on the Division of State Lands asset management plan. I understand that this is going to be about a ten or 15-minute item, and we're anxious to hear your comments.

**GARY GUSTAFSON:** Governor, members of the Board, it's my pleasure to introduce Arnold Cogan, representing Cogan Owens Cogan. As you know, Arnold's firm was selected as our contractor for development of the asset management plan. Arnold has already been around, I believe, and met with each of you, actually, I think he meets with the Governor later today, and has been gathering information and has developed a work plan, and he's going to bring us up to speed on what's going on.

**ARNOLD COGAN:** Thank you, Gus. Governor, members of the Board, thank you for having me here this morning. It's a real pleasure to appear before you and discuss this asset management planning process that we've now begun.

I want to clarify that I'm not here today to suggest any policy decisions today. This isn't a decision-making event, or any recommendations. It's just simply a status report. We've only been working on the study for a couple of months now. We've got quite a few months to go.

**SECRETARY OF STATE PHIL KEISLING:** You've got a couple of grey hairs, though, Arnold.

**ARNOLD COGAN:** They're beginning to sprout. So I just want to emphasize that, and we'll have some other opportunities, I'll mention that when I finish, about when we'll be having some chances to meet again to talk about some of the more substantive parts of our work, and perhaps some decisions at that point.

So far we have been conducting a lot of interviews. I'm looking forward to the interview this afternoon with the Governor. We've sifted through a great deal of material, dozens of documents, lots of other material. But this -- even so, is very preliminary.

I want to qualify what I'm saying here today, and what I think you have before you, in terms of a handout sheet, is really presented with the sideboards of this study. We recognize that a great deal else goes on at the Land Board meetings and within the Division that is not asset management related. What we've done with our work is to put these blinders or sideboards on in talking about this project. These findings and the work yet to happen within those narrow -- within that narrower context.

I present several findings here. The first three are really interrelated about the large inventory of property that the Agency has under its wing. It's primarily a resource base, I think, that's pretty well recognized. At the same time, the portfolio doesn't contain any what I would call spectacular sites, and is

not balanced to maximize revenue production. Let me explain that. The -- when I say spectacular sites, the state of Arizona, for example, finds -- or have found that the area we now know as Scottsdale, Arizona, a more or less resort, but upperscale community, is on predominantly State-owned land, and fortunate for the State of Arizona. So far we haven't found a site like that yet, but we are certainly going to be looking for it.

**GOVERNOR BARBARA ROBERTS:** They're looking.

**SECRETARY OF STATE PHIL KEISLING:** They got a better deal.

**ARNOLD COGAN:** And when I -- or Salishan's or Sun River's, or sites that might suggest future destination resorts. Although, there may be some possibilities for that. Depending on some of this other work that I mentioned. There might be some prospects for that kind of a development.

When I say balanced to maximize revenue production, what I'm talking about here is that private developers, when they put their portfolios together, I'm talking about large private developers comparable to a State agency, or State of Oregon, or the Division. When they put their portfolios together, they look for a variety of income producing or revenue generating opportunities. Some with high risk, perhaps with a great deal of potential to produce large amounts of revenue. Others with lower risk,

but perhaps a more steady state of reliable revenue, but balanced with the high and the low so that they'll balance each other out. Clearly the portfolio that the State has under its control, was never designed to have that kind of balance. I'll get into that in a moment as far as the work to be done. But that's clearly one of our findings.

Then, the final of the first three findings here that are interrelated. At the same time, we see your upland and waterway sites as probably the most likely sources of increased revenue. If we are going to start looking for potential areas for larger revenue production, that's probably going to be the area where it's going to come, not the only, but probably as a large single source.

A dark-horse source here of revenue production is in your minerals production. There is a potential here for relatively large amount of revenue production; however, at the present time that potential is largely unknown, because of the lack of information about location, type, quality, and the value of it. That research is yet to be undertaken, but there is a potential source of some revenue generation in that mineral source.

Unlike most successful private companies, we have found that the Agency isn't able to clearly link revenues and expenditures for most of its specific properties, Elliott Forest, and other specific pieces -- some specific pieces like that aside. This does hamper evaluation of

profitability and return on investment. For example, if you were a private developer and you owned five apartment houses, clearly you would want to know the expenditures on those apartment houses and the income from those apartment houses, and where the source of expenditure, and the source of income is from. Across the board, that isn't possible at the present time. Some changes are going to be happening, we understand. They are in the process to improve that.

At the same time, the inventory of assets is not adequate. What I'm talking about here are the land classifications aren't appropriate to planning, or marketing, or revenue production. Here again, comparing you with a developer, a large developer, would want to know is the only potential revenue-producing property. What the characteristics of that property were in terms of zoning, access, view potential, utilities, water resources, and so forth. That hasn't been by the standard part of the classification process of the Agency. There are other priorities that enter into the classification, historically, for the Agency or the Land Board. So this is an area that we see an important part of our work in developing a land classification system.

Based on our observation and our judgment, we don't think the Agency has sufficiently adequate staff in financial resources to effectively manage the State lands

to make a maximum contribution to the Common School Fund. And here again, I'm talking with the sideboards of what we're doing on this as a management plan. We recognize as you do, that much of the Agency's efforts is regulatory in nature. It's not revenue production or maximizing revenue production from a few selected sites. I recognize, in fact, I've been interested in the additional item on your agenda today, having to do with the efforts that the Agency is doing to improve its revenue generation to the Common School Fund. But in terms of our asset management plan, we do not see sufficient staff or resources devoted primarily to asset management or asset enhancement.

And finally, our finding, having to do with resource generation and -- resource generation and allocations, are not in proportion to each other. For certain classes of property, and here's what I'm saying, is grazing land, for example, commands a substantial attention, but generates relatively little revenue beyond costs, comparatively speaking with your entire budget and cash flow. While other sites with potentially large potential. I think -- two adjectives in there -- with great potential.

**GOVERNOR BARBARA ROBERTS:** We got it.

**ARNOLD COGAN:** Don't receive the same attention. So here again, we see some rebalancing here that needs to take place. Well, those findings obviously lead me right

into the work that -- to be completed.

And as I say, this is all in the context of this asset management planning effort, not in the context, particularly, of the multitude of other activities that the Agency is engaged in, of which we haven't been focusing. Many of these work items that I'm suggesting here will ultimately be combined into a -- in an overall recommended set of approaches, but I've sorted them out this way so that -- for clarity.

The first two are really connected. One of the things that we must do is determine and help the Agency, and you all, determine what is an optimum mix of properties that you could call a balanced portfolio that would enable maximum return to the Common School Fund. At the same time finding ways to increase those revenues from submerged and submersible lands, either by raising lease rates, expanding areas to be brought under lease. Here, I'm aware from our interviews that we've conducted, that some areas of the state with high demand, I'm talking about floating homes and marinas and so forth, say, in the Portland area. Areas of high demand and short supply. This should be generating substantially more revenue than they do. Some areas that are not under lease, should and could be brought into lease. So this an area that we'll be looking at.

The third (phonetic) bullet is probably one of the more important ones on here, at least in terms of politically and financial importance. To evaluate, and we will do this, the economic trade-offs from disposing of certain lands. And using that -- those funds from the sale to purchase other sites or assets that have greater potential for generating revenue. We'll develop a system to help you and the Agency make that kind of an evaluation, and how to focus on that.

We need to formulate a cost accounting system, which we recognize is underway now, particularly the new land administration system. But to combine that work with our work so that the Agency will be able to evaluate the profitability of leases and sales in the future.

Again, to enable a smart approach to managing land assets will help design a data base system that does incorporate these land classifications, that I was mentioning before, in an enhanced and reorganized GIS. It's going to be helpful also to develop approaches to coordinate the activities of the Agency. We recognize that is an ongoing effort that happens now. But again, in the context of the asset management plan, there may be other new opportunities to seek coordination with other agencies, like the Department of Economic Development.

We'll be developing an approach for allocating Agency resources to the most productive areas, again, an

important part of this. We will, along with that, structure these area management plans to complement the asset management plan in the resulting generation -- revenue generation opportunities. We see these area management plans as being a critical next step following the completion of this plan that we're working on, it's going to be a crucial step in the implementation of this to move on with area management plans, which will start focusing on specific areas of the state, like the coast, the Columbia River, other river and waterway areas, and even specific sites in those area management plans.

Then finally, we have been doing a considerable effort -- making a considerable effort to contact other government agencies, both in Oregon and outside of Oregon, and in the private sector as well: railroad companies, timber companies, and so forth, who had advanced approaches to asset management programs. To use the best of what they can offer, both in their techniques and their ways of classifying land and recording and maintaining their data bases. That's been going on for sometime. It is continuing -- that will continue on probably through the rest of this month.

So in closing, I could say that we will be prepared, as I mentioned before, to get into some specific policy questions. We'll want to meet with you probably at your December meeting, possibly. I think we'll have some

specific results to share with you then, and to have a discussion. Probably again in February, at your meeting. I think we'll begin to have a report that started to take some shape. We'll be having by then several meetings of the plan oversight committee, which includes your Land Board assistants. But by February certainly I think we'll have a report that starts to take shape.

We're still focused on a June production of the report. In the early part of 1995, probably the first quarter, somewhere in there, we'll be having an extensive opportunity for public review and public input. We'll be going out around the state with that preliminary plan.

**GOVERNOR BARBARA ROBERTS:** Comments, questions from the members of the Board? Jim?

**STATE TREASURER JIM HILL:** Thank you, Governor. One of your findings is that the Agency has inadequate staff and the financial resource to effectively manage State lands to maximize contribution to the fund. Are you unequivocal about that?

**ARNOLD COGAN:** No. No. No, I'm not unequivocal. It's simply our observation that the Agency -- when we have -- we've interviewed the Agency, and we've looked at who's available to be primarily managing land entrepreneurially (phonetic). We're, so far, when we strip everything else away from the general functions of the Agency, it kind of comes down to just a

few people in the Agency who are devoted. In fact, one person devoted full time to that. And to be able to close deals like Cresmont, on your Wilsonville site, and so forth, find other sites that have marketable value, and to market those aggressively on -- to potential users. We get down to very few people. I recognize that there are other people in the Agency, maybe 30, 40 percent of the Agency, I think you could say in the broad (phonetic) context is devoted to managing the assets of the State, and they do a -- do a good job within the context of the planning that's happened so far.

But again, I'll come back to what I said before. The sideboards of our study thinking -- trying to help you and the Agency think entrepreneurial, think in terms of aggressive marketing, think in terms of substantially by substantial margin to increase the revenue going to the Common School Fund, say, by ten-fold, which is really one of the yardsticks that we were given. We're talking about a much different approach to marketing assets and being entrepreneurial about it. Outside of the one or two people that we find in the Agency who are 100 percent devoted to that, we come -- that's where I come to this conclusion.

**STATE TREASURER JIM HILL:** But this is preliminary--

**ARNOLD COGAN:** Absolutely.

**STATE TREASURER JIM HILL:** Okay.

**ARNOLD COGAN:** Yeah.

**STATE TREASURER JIM HILL:** In which we have a -- I mean, obviously something like this -- what it sounded like to me is if you had more people, you could make more money. Maybe justify -- we're coming to a budget period, but if it's preliminary, you certainly don't want to take a preliminary finding, because they'll make you prove it.

**ARNOLD COGAN:** Yes, Mr. Treasurer. Yes, I would agree with that, and I wouldn't take this and run too far with it. I think -- but it's an observation that I thought I had to make here because, again, if I compared you with a development company, the development company, we take the regulatory functions away, take the other management functions away, and come down to who is the profit center here. We're talking about relatively few people in terms of generating that. But I'm not meaning this to say that if we throw more people and throw more money into the Agency, suddenly more revenue will happen, I don't think that'll happen either. I think that this -- I hope that we'll have the road map for making that happen available by the time we're done with this plan. I think that you'll begin to see the clear lines fall into place so that you'll have some advice on how that should happen then if somebody is going to be added, or some additional

resources are going to be supplied. They'll be applied very -- in a very focused, pragmatic way.

**STATE TREASURER JIM HILL:** Thank you.

**GOVERNOR BARBARA ROBERTS:** Other questions, comments? Thank you very much for the preliminary look at what you're doing. Obviously some very interesting slants to what we do here all the time. Good to have somebody else looking at it from a new prospective, and we appreciate that.

**ARNOLD COGAN:** Thank you very much.

**GOVERNOR BARBARA ROBERTS:** We look forward to seeing you this afternoon.

**ARNOLD COGAN:** Good. Enjoy working with you all, and with your assistants, and your staff. Thank you.

**GOVERNOR BARBARA ROBERTS:** Thanks very much. We have one other item left on the agenda. Update on the short-term agenda. Anything quickly on that, Gus?

**GARY GUSTAFSON:** Very quickly, Governor. I'm not going to go through this. We have summarized each of the components on the short-range agenda. Brought you up to speed in what is happening, or in a few cases perhaps, isn't happening.

I also just want to stress that for the near-term future, very clearly we've got two additional things that are on our agenda, and are going to receive a lot of attention. One is going to be our budget. The second

is our legislative agenda. So these will obviously take a lot of staff time, and I just wanted to make sure everybody realizes they are really the heart of our ability to do these other things.

**GOVERNOR BARBARA ROBERTS:** Absolutely true. Anything else from either member of the Board? If not, I would accept a motion for adjournment. I'm going to get through this, Jim.

**SECRETARY OF STATE PHIL KEISLING:** I move we adjourn.

**STATE TREASURER JIM HILL:** Second.

**GOVERNOR BARBARA ROBERTS:** It's been moved and seconded that we adjourn. Those in favor will signify by saying aye. We are adjourned. Thank you.

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CERTIFICATE

I, SUE K. ROBERTS, hereby certify that I am a transcribing machine operator for Business Support Services, Inc., and I prepared from a mechanical recording the foregoing typewritten transcript of the testimony and proceedings had upon the hearing of the above-entitled matter at the time and place set forth in the caption hereof; and that the foregoing pages, which are numbered 1 through 76, both inclusive, contain a full, true and correct record of all the testimony adduced in behalf of the respective parties in the said hearing, except where specifically directed to be off the record.

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