
DIVISION OF
STATE LANDS

The Oregon State Land Board met in regular session on October 11, 1994 in the Land Board Room of the State Lands Building, 775 Summer Street N.E., Salem, Oregon 97310.

STATE LAND BOARD

Present were:

Barbara Roberts Governor
Phil Keisling Secretary of State
Jim Hill State Treasurer

BARBARA ROBERTS
Governor

PHIL KEISLING
Secretary of State

JIM HILL
State Treasurer

Assistants

Anne W. Squier
Nina Johnson
Rollie Wisbrock

Staff

Gary Gustafson
Steve Purchase
Gary Van Horn
Jenifer Robison
Gail Lowry
Marcella Easley
Ken Bierly
agency staff

Dept. of Justice

Bill Cook

The meeting was called to order at 10:00 a.m. by Governor Roberts. The topics discussed and the results of those discussions are listed as follows. Further details of the discussions may be obtained in the written transcript of the meeting available at the Division of State Lands, 775 Summer Street N.E., Salem, Oregon 97310 (phone: 378-3805).

NHAC

Request by the Natural Heritage Advisory Council (NHAC) for State Land Board approval of the dedication of Onion Peak, a registered natural area, as a natural heritage conservation area.

Director Gustafson explained that a public hearing was conducted during the September 13 Land Board meeting to receive comments on the proposal for dedication of the Onion Peak site as a natural heritage conservation area. He said that Stephen Anderson, Chairman of the NHAC, was the only one at that meeting that commented on the proposal. He also reported that a letter was received earlier from Clatsop County in support of the dedication.



Gustafson said both the Division of State Lands and the NHAC recommend the dedication proceed. He reminded the Board that the implementation agreement states that the Land Board can withdraw the dedication of the site, should circumstances later warrant it.

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

NHAC Request by the NHAC for State Land Board approval of the registration of two additional sites on the Oregon Register of Natural Heritage Resources.

Director Gustafson described the two sites being proposed for registration to the Oregon Register of Natural Heritage Resources. Rough and Ready Creek is a ten-acre site in Josephine County and the other consists of eight individual parcels, totaling 1800 acres, within the Hart Mountain National Wildlife Refuge in Lake County--all lands owned in total by The Nature Conservancy. Gustafson said that the Division of State Lands and the NHAC believe the sites possess special natural area qualities and should be added to the Oregon Register of Natural Heritage Resources.

State Treasurer Hill moved the item be approved. Secretary of State Keisling seconded the motion. Governor Roberts commented that Caryn Talbot Throop, who served on the Council for ten years (including eight years as chairperson), would be moving away from the area. She credited Throop's leadership for much of the progress the Council had made and asked that this be noted in the record. Secretary of State Keisling mentioned for the record that his wife, though no longer working with The Nature Conservancy, is doing a small consulting project for the Council on issues unrelated to the sites proposed for registration. A vote was taken and the decision was unanimous in favor of registration of the two sites.

E-Board Appearance Request by the Division for State Land Board approval to appear before the Legislative Emergency Board to request an Other Funds (OF) expenditure limitation increase of \$319,249 to cover unprojected Attorney General (AG) expenses during the 1993-95 biennium.

Director Gustafson said the budgeted AG expenses for the agency this biennium were approximately \$331,000. This amount is approximately \$100,000 less than the actual AG costs of the last biennium, due to several unusual one-time expenditures such as production of the 1992 AG trust opinion regarding use of the Common School Fund, as well as other legal issues regarding the northern spotted owl in the Elliott State Forest. Gustafson said another factor causing a reduction from the prior budgeted amount was the mandated base budget reduction of ten percent.

Gustafson said the AG costs for this biennium were projected at roughly \$14,000 monthly. At the beginning of the biennium, the monthly costs were averaging \$23,500--due primarily to the Chetco navigability trial costs, which included a lot of consultant expenses. Gustafson said it was assumed that the AG costs would go down, but they didn't. He said until May 1994, the Chetco continued to require legal attention, as well as negotiations for the proposed lease at North Tongue Point with Cresmont, Inc. In early 1994, the Division alerted its budget analyst to the agency's concerns that budgetary adjustments may be needed to cover legal costs. In early June, the agency instituted AG cost curtailment measures in-house, though it was found that most expenses were driven by trial proceedings over which the agency had little or no control.

Gustafson reported that the first round of the Chetco navigability trial is now finished and that the agency has prevailed. The first 11 miles of the Chetco were declared navigable. He commented that this is considered a landmark case. He said the ordinary high water level must now be determined. This portion of the case goes to trial in February, so a fair amount of expense will still accrue. When the case is complete, Gustafson said, new royalty income is anticipated to be between \$30,000-70,000 per year. He said this case should also influence the outcome of other similar situations.

In State v. CARS, Gustafson said that CARS, Inc., who leased property at North Tongue Point, is being sued over failure to pay their property taxes. He reported that this case is also almost concluded. The judge indicated he will pass judgment in favor of the state, and award the state \$42,000. Gustafson commented that the state should always stand by what it is due.

Gustafson said the agency is currently involved in six other lawsuits. The Mendieta lawsuit is challenging our new rangeland administrative rules. These rules are anticipated to generate an additional \$150,000 per year to the Common School Fund by the year 1998, based on the base fee increase. Added to that will be any increase due to the competitive bidding provision that will be implemented in the new rules.

Gustafson said the agency has recently taken additional steps to curtail the use of Assistant Attorney General Bill Cook's services. Cook has reduced his involvement with the Division by one-third. Gustafson added that a request for rulemaking today also before the Board would allow the Division to represent itself in certain contested case hearings not requiring legal assistance, and should also help reduce the agency's AG expenditures.

At the beginning of September 1994, the AG billings had totaled \$445,000. Gustafson said he met with Assistant Attorney General Bill Cloran to review principal outstanding litigation. Gustafson said each case was reviewed separately and further AG cost estimates were provided for each. Cook's General Counsel costs have also been considered. Gustafson commented that when you are in the regulatory and proprietary business, you must factor in needed legal assistance. He said to reduce legal assistance beyond a certain point may cause long-term damage greatly in excess of what you might absorb otherwise.

Gustafson said there could still be \$260,000 of additional AG costs this biennium, for a total estimate of \$705,000 needed for the entire biennium. This total means that approximately \$319,000 are needed to cover costs (considering that \$55,000 will be absorbed internally). Gustafson said the next biennium's AG budget for the Division request will probably require over \$800,000. He said there is no choice but to go before the Emergency Board to request the additional \$319,249 to cover the unanticipated costs. He said the situation should be dealt with now, rather than waiting for the next legislature to be in session.

State Treasurer Hill asked whether there is a standard provision in our contracts awarding the prevailing party with attorney fees. Cook responded that in the CARS case it is possible. He said it is expected that others will also be required to pay attorney fees--he will check on it. Secretary of State Keisling reminded everyone that this could go either way--that the state could also be responsible if the other party prevails.

State Treasurer Hill stated that he had previously written a letter to the other Board members regarding his concerns about the 15-month long negotiations involving the Cresmont, Inc. lease. He said, though the time and expenses may have been justified, the process needs to be examined. This case alone, he said, incurred over \$100,000 of attorney's fees.

Secretary of State Keisling asked whether the \$800,000 projected AG budget for the next biennium includes 100 percent of the time that Bill Cook would normally spend with the agency. Gustafson affirmed that it does. Secretary of State Keisling said the Land Board approved a budget last time woefully unrealistic in estimated AG costs, below what it should have been. He added that one can't always anticipate or control who sues you. He cautioned that the agency should be prepared for the E-Board request to be highly scrutinized and to expect questions about additional cuts in our budget, above the \$55,000. He noted that lessons need to be learned from this experience.

Governor Roberts commented that in any natural resource related area, there are likely conflicts, therefore resulting in potential lawsuits. She added that people also aren't happy with the government in general at this time. She said as more cuts are made in General and Other Funds, we will find ourselves in similar situations. She also added that it is difficult to explain to citizens that a budget represents only the best guess of what our operating costs will run--the Division's AG costs being a good example of this. She said she agrees with Secretary of State Keisling that the agency will likely be asked what other cuts we could or should take, and we need clear answers.

State Treasurer Hill said we will also be asked what we have done with the AG to determine how costs in each case can be reduced. He added that the use of attorneys up front can also save costs. He asked if the agency has done this. Gustafson responded that generally we have, saying that Cook often reviews draft letters and decisions.

Secretary of State Keisling asked whether legal expenses for the Elliott State Forest were accounted for separately. Gustafson said Forestry's expenses and those of their Assistant Attorney General Melinda Bruce are charged against Forestry's AG budget. He said when Cook works on a forestry issue directly for the agency, that is charged to the Land Board. Secretary of State Keisling said he would like to know how Forestry's expenses have changed. He said this could be an area of additional litigation as well, that ultimately could affect the agency.

Secretary of State Keisling moved the Land Board approve the Division's appearance before the Emergency Board to request an additional \$319,249 OF expense limitation to cover unanticipated AG costs. State Treasurer Hill seconded the motion.

State Treasurer Hill commented that it is unfair that the agency must look at cutting other parts of their operating budget, if they are managing the legal costs as best as possible. He vowed to personally support preventing this from happening beyond a certain point. Approval of the motion was unanimous.

**Unclaimed
Property**

Request for State Land Board approval of revised administrative rules regarding holder reporting and remitting activities and implementing changes to the unclaimed property law.

Director Gustafson said that the Legislature passed HB 2033 in the last session, significantly changing the unclaimed property statutes. As a result, a number of these statutory changes required subsequent changes to DSL's administrative rules. He reported that in the rulemaking preparation ten public seminars were held throughout the state, and one formal public hearing was held in July. Comments received were incorporated into the rules. He said the Division requests the Land Board adopt these rules in order to meet these new statutory requirements.

Governor Roberts asked whether these rules involved property left by someone who dies without a will, such as in a rental house, as well as the safe deposit boxes and savings accounts. Marcella Easley, Trust Property Manager, clarified that these rules apply to only those assets being held when the owner is unable to be located. She said other administrative rules govern the estates of those who die without wills.

Governor Roberts asked whether the reduction of the dormancy period on the safety deposit boxes was a change that the agency made, or whether it was done by the legislature. Easley said that it was a legislative change made at the request of the Bankers Association to lower the dormancy period to two years. After the initial two-year period, the contents are kept for an additional year, at which time assets with a commercial value are sold and personal property is permanently retained. She said the agency makes every effort to locate owners. She said they have only had one case in eight years where owners were unhappy with this procedure.

Secretary of State Keisling asked how much money is received each year, and whether there is an estimate of how these rules

might change that. Easley said between \$5-8 million per year is turned over to the Division as being "unclaimed property." She said owners are generally found for \$2.5-3 million. She said a significant increase is expected this year, due to the dormancy period change and a new reporting requirement for state government agencies. She estimated roughly that \$8-10 million would be reported this year, leveling out to around \$8 million per year thereafter.

Governor Roberts asked whether there would be changes in the manner that individuals at the agency level handle safe deposit box contents. Easley stated there would be no changes, since two staff will continue opening the contents and placing a careful value on them. Governor Roberts cautioned that there's always a need for precautionary handling of other people's valuables.

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

Wetlands

Request for State Land Board adoption of administrative rules governing the designation of wetland resources for protection, conservation, or development in a Wetland Conservation Plan (WCP).

Director Gustafson began by asking if each Board member received a copy of the amendments to the agenda item, amending two sections of the proposed rules. He said that SB 2, which passed the Legislature in 1989, directed the Division to approve and disapprove wetland conservation plans for the state. Gustafson said in the rulemaking process for the implementation of that statute, a public hearing was held in January 1994 and public comments were summarized. The biggest concern reflected from the comments was the need for additional clarity.

Gustafson said that Lyn Mattei from the Oregon Natural Resources Council (ONRC) had called this morning (before the Land Board meeting) with a request that action on the rules be postponed. She expressed a concern with what she perceived to be a conflict with the federal law and questioned whether there had been proper coordination with USFWS in the amendment process of the rules as they evolved. Ken Bierly, wetlands program team leader, explained that these rules define how local communities can utilize the wetland conservation planning authority to develop plans that determine where wetlands can be developed in their communities, and where they should be protected. He explained that the primary concern that Mattei raised was a

misunderstanding regarding the application of the Clean Water Act. Bierly said the agency has coordinated with the EPA, the Corps of Engineers and the USFWS; has received the support of the EPA; and has taken comments submitted by the other two agencies into consideration. Mattei indicated the rules were on a "collision course" with the federal regulations. Bierly said that hasn't been the case according to the federal agencies administering those regulations.

Regarding her concern that USFWS' comments haven't been considered, Bierly said USFWS' comments have been considered explicitly. He stressed the importance of providing opportunity for public comment. He said that notices were circulated in June 1993 and May 1994. Informal workshops were held with local communities proposing to apply the rules, and several workshops were held with state and federal agencies, as well, to receive their input.

Governor Roberts asked whether any pending developments would be delayed if the Board waited until the December meeting to deal with this issue. Bierly confirmed there were no pending wetland conservation plans that would be delayed by waiting. Governor Roberts asked whether Mattei referenced a particular section of the rules when she voiced her concerns. Bierly replied that her comments were generic and broadly expressed.

Governor Roberts asked if the Board adopted the rules and they are challenged, whether we would risk associated costs. Assistant Attorney Bill Cook said he assumed that we would risk costs, but stated that before a challenge to the rulemaking process could be made, a legal flaw must be found. He said he hasn't seen one yet, either in the process, the rule itself, or in the interpretation of statutes underlying the rule. He said what is being done in development of these rules is the implementation of a state statute--there is no requirement to use these rules to implement the Clean Water Act's regulation of wetlands.

State Treasurer Hill asked how many hearings had been held and whether ONRC had commented. Bierly said two specific hearings had been held. He confirmed that ONRC commented and their comments were addressed.

Governor Roberts asked whether the rules had been out around three weeks. Bierly confirmed that they had been. He said the final amendments were done at the request of legal counsel--and stated these had been made available about a week ago.

Secretary of State Keisling said he was comfortable with proceeding with action on the proposed rules, saying he hadn't heard a compelling reason to postpone them.

Governor Roberts said the Board had postponed other issues on occasion. She discussed concerns over AG expenses and the need for prevention of legal conflicts, whenever possible. She said that in the ten years she has been on the Board, the ONRC hasn't made a request for a postponement such as this.

Bierly said the Division has coordinated extensively with the federal agencies, realizing that there is an important interplay between the Clean Water Act regulations and state regulations. He said, to the extent that consistency can be developed in the two programs, we have attempted to do so. He noted that there needs to be better communication with the ONRC, so they understand they are expected to comment to us on state regulations and not the federal regulations.

Secretary of State Keisling reminded the Board that, if new facts come to light, the rules could be amended. State Treasurer Hill agreed with Keisling saying they have had previous opportunity to address any concerns. He commented that a delay with these rules could set a precedent for other issues. He said he was willing to go either way, but felt the process should not be held up. Governor Roberts said she also felt comfortable either way.

Secretary of State Keisling asked if the issue was postponed, whether a November meeting could be scheduled to deal with it. Governor Roberts suggested even a phone meeting may suffice. Director Gustafson said that could be done, but offered that this issue alone really doesn't warrant scheduling a specific meeting of this body. He suggested the issue could be dealt with at the December meeting and a memo sent to Mattei requesting a possible meeting, expressing dissatisfaction with a last minute request for postponement.

Secretary of State Keisling also noted that the rules could be approved today, to be effective at a later date. Cook reminded the Board that if the comment period is opened for one party (ONRC), proper procedures must be carried out and it must be opened for all. He said the only way comments should come in after the comment period is over is at the Land Board meeting, rather than just prior to the meeting over the phone. He voiced concerns regarding a potential meeting with a private party at this point.

State Treasurer Hill moved the Board adopt the rules. Secretary of State Keisling requested that the motion also include a correction stating that the reference to subsection EEE as being amended was incorrect. He said the amendments apply to subsections HHH and MMM. He seconded the motion and the decision was unanimous.

Secretary of State Keisling applauded the work of the staff, stating this has been a huge task. Bierly commended Emily Roth and Frank Flynn of the Division for their work on the rules. Governor Roberts also commended the work done.

Retirement

Governor Roberts presented a plaque to H. Dean Fowler, thanking him for his 19 years of service and dedication to the Division of State Lands and for his 25 years of state employment. Fowler currently serves as the accounts payable and payroll accountant to the Division and will be retiring at the end of October.

Administrative Rules Request for State Land Board approval to initiate rulemaking to permit a Division employee to represent the agency at certain contested case hearings conducted by the Division or any other state agency.

Director Gustafson said that although some contested cases will require a legal expert, others can be held by using a staff person as hearings officer to reduce expenditures. Review and approval will be done on a case-by-case basis by the Attorney General's office. Gustafson said the agency requests authorization to go forward with the rules.

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

Minutes Request for approval of minutes of State Land Board meeting for September 13, 1994.

Secretary of State Keisling asked that it be noted that, although the September minutes said the Habitat Conservation Plan would soon be submitted to the federal government, this has not yet happened. Secretary of State Keisling moved the minutes be approved. State Treasurer Hill seconded the motion and the approval was unanimous.

Asset Management Plan Update on Division of State Land's Asset Management Plan by Cogan Owens Cogan.

Director Gustafson introduced Arnold Cogan of the firm of Cogan Owens Cogan who discussed the progress made to date under their contract to develop the Division's Asset Management Plan. He said that many interviews had taken place and multitudes of

documents had been reviewed. He distributed an information sheet to the Board members, saying that the information provided is preliminary. He outlined a number of findings made regarding the assets and resources of the State Land Board, then outlined a list of work items that need to be completed prior to the finalization of the plan.

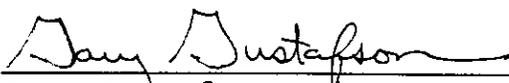
Cogan said more specific results should be available at the December meeting of the Land Board, with the final plan anticipated by June 1995.

State Treasurer Hill inquired about one of the findings indicating that the Division has inadequate staff and financial resources to effectively manage state lands to maximize contribution to the Fund. Cogan said this finding is not unequivocal, but is simply a preliminary observation made at this point. He said it appears that just one person is currently available full time on staff to manage lands in an entrepreneurial manner, to market to potential users and close deals. Cogan stated that final recommendations should detail this information and show how resources can be applied in a very focused, pragmatic way.

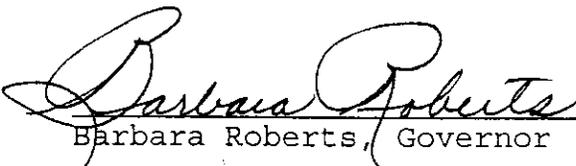
Short Term Agenda Update on the Division of State Land's Short-term Agenda.

Director Gustafson summarized each of the components of the short term agenda. He said two additional things needing to be added to the short-term agenda are the 1995-97 budget and proposed 1995 legislative concepts. He stated that these two items will take a good deal of staff time in the near term.

Secretary of State Keisling moved the Board adjourn. State Treasurer Hill seconded the motion. The Board was adjourned at 11:53 am.



Gary Gustafson, Director



Barbara Roberts, Governor