



***Division of  
State Lands***

***June 1996***

**THE HISTORY OF THE  
ADMINISTRATION OF OREGON'S  
SUBMERGED AND SUBMERSIBLE LANDS  
BY THE OREGON STATE LAND BOARD**

# INTRODUCTION

The following document is a history of Oregon's administration of its submerged and submersible lands. This project was conducted in order to provide the Division of State Lands' staff with a comprehensive view of the laws, policies, rules, and events shaping the State Land Board's management of submerged and submersible lands over the past 137 years.

This document was prepared after review of the minutes of the State Land Board meetings, State Land Board and Division of State Lands Biennial Reports, Oregon and federal case law, statutes, the First and Second Biennial Reports of the Advisory Committee to the State Land Board, and Opinions of the Attorney General. Kimberly Grigsby conducted this research from February through May of 1996.

References in the text which are not otherwise credited are from the minutes of the State Land Board meetings. It should be noted that standard citation form has not been used and footnotes have been structured for ease of use by Division staff.

Appendix A lists the rivers and lakes which have been leased by the State Land Board. Waterways subject over time to easements are listed in Appendix B. Appendix C describes the assertions of navigability made in various ways.

Filling on submersible lands, and the regulation of the resulting new lands is beyond the scope of this paper. The history of sand and gravel leasing has been reviewed previously and is, consequently, not included here. Leasing of other minerals, oil and gas has also been omitted. Finally, the quitclaims of abandoned river beds have not been covered in detail.



# HISTORICAL REVIEW

## 1859

Oregon was admitted to the Union on February 14, 1859, and under the Equal Footing Doctrine<sup>1</sup> became the owner of submerged and submersible lands under all tidal waters and navigable rivers and lakes<sup>2</sup>. The test of navigability for title was articulated by the Supreme Court as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.<sup>3</sup>

Oregon was admitted to the Union on February 14, 1859, and under the Equal Footing Doctrine became the owner of submerged and submersible lands under all tidal waters and navigable rivers and lakes.

Additionally, the Oregon Admission Act stated that "all the navigable waters of (the) State, shall be common highways and forever free, as well as to the inhabitants of (the) State as to all other citizens of the United States, without any tax, duty, impost or toll therefor."<sup>4</sup>

The Oregon Constitution established "a board of Commissioners for the sale of School, and University lands, and for the investment of the funds arising therefrom."<sup>5</sup> The board was comprised of the Governor, Secretary of State and State Treasurer.<sup>6</sup> This board was originally titled the Board of Commissioners for the Sale of School and University Lands, but was later named the State Land Board (hereafter referred to as Board).

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<sup>1</sup> The Supreme Court enunciated the Equal Footing Doctrine in *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845). It states that since the original thirteen states took ownership of these lands at the time the Union was established, the remaining states, being on an equal footing with the original states, also took title upon their admission to the Union. *Id.* at 220.

<sup>2</sup> *United States v. Oregon*, 295 U.S. 1, 14 (1935).

<sup>3</sup> *The Daniel Ball*, 77 U.S. 557, 563 (1870). This navigability for title test is applied as of the date of statehood.

<sup>4</sup> 11 Stat. 383, sec. 2 (1859).

<sup>5</sup> Oregon Const., Art. VII, § 5. This section of the constitution was amended in 1968.

<sup>6</sup> *Id.*

# 1862



In 1862, the State promptly began asserting its authority over the submerged and submersible lands it acquired at statehood. In that same year, the Governor signed House Bill 100, which became known as "The Wharf Act."<sup>7</sup> This act allowed the owner of land "lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town" to construct one or more wharves upon his/her property and to extend the wharves into the water beyond low water mark as far as "necessary and convenient" to accommodate vessels navigating that water.<sup>8</sup> The Wharf Act also granted towns the authority to regulate the construction of these wharves in order to limit interference with navigation.<sup>9</sup>

# 1872

In the early 1870's, state dominion over the tide lands came under scrutiny. The Governor's 1872 biennial message estimated that the State owned, by virtue of its sovereignty, one-half million acres of lands "lying between the ebb and flow of the tide."<sup>10</sup> He noted that United States Government survey lines "should have been limited to the line of ordinary high tide" but had extended onto the tidelands.<sup>11</sup> The Governor declared that any transaction with the federal government including these lands gave "no title as against the right of this State."<sup>12</sup> The Governor recommended passage of an act "providing for the legal disposal of all the tide lands belonging to the State," stating that "no greater public service can be rendered at this period of the development of our State, than to assure to the people sound titles to their lands."<sup>13</sup> To protect settlers claiming tide lands via grant from the United States, the Governor proposed an initial sale of these lands to adjacent settlers at a set price, followed by sales of remaining lands to the highest bidders at public auction.<sup>14</sup>

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<sup>7</sup> Oregon General Laws of 1862, p. 96.

<sup>8</sup> Id. at sec. 1.

<sup>9</sup> Id. at sec. 2.

<sup>10</sup> Documents and Messages of 1872, Governor's Message, p. 20. This is the standard definition for tide land.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Documents and Messages of 1872, Governor's Message, at 21.

<sup>14</sup> Id.

The legislature responded by passing an act which authorized the Board to sell tide lands to owners of land abutting the shore of any "bay, harbor or inlet, on the sea coast of this State."<sup>15</sup> The act's preamble focused on the erosion of shore land from bays, harbors and inlets, and expressed the desirability of expensive improvements being placed on tide and overflow land to prevent such encroachments.<sup>16</sup> The act further granted owners of lands abutting these tide lands "the right to purchase ... all tide land in front of such owner."<sup>17</sup> Additionally, owners of valuable improvements on tide lands made prior to statehood were allowed one year in which to purchase improved lands extending to the low water mark.<sup>18</sup> The Board was authorized to sell the tide lands at the appraised value, not to be less than \$1.25 per acre, and each applicant was required to have the land surveyed.<sup>19</sup> If the State Land Board had evidence of the true value of the property, the Board was authorized to set aside an appraisal and to substitute an accurate appraisal.<sup>20</sup> One year after passage of the act, any citizen and resident of the State of Oregon could purchase such tide lands.<sup>21</sup> Grantees of land under this act held subject to the easement of the public to enter the lands and remove oysters and other shell fish.<sup>22</sup>

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<sup>15</sup> Oregon General Laws of 1872, p. 129, 130.

<sup>16</sup> Id. The definition of "tide and overflow lands" has changed over time. Overflow lands were described as those lands subject to annual overflow in the Tide Lands Act of 1878 (see p. 9). In 1907 tide and overflow land was defined as "all lands over which the tide ebbs and flow...all islands, shore lands, and other such lands held by the State by virtue of her sovereignty. Chapt. 117, sec. 4(f), Oregon Laws of 1907.

<sup>17</sup> Sec. 1, Oregon General Laws of 1872, p. 129.

<sup>18</sup> Id.

<sup>19</sup> Sec.s 4 and 7, Oregon General Laws of 1872, p. 129.

<sup>20</sup> Id. at sec. 4.

<sup>21</sup> Id. at sec. 5.

<sup>22</sup> Id. at sec. 6.

# 1874



The Governor's biennial message in 1874 revisited the tide land issue.<sup>23</sup> The Governor explained the difference between tide lands and swamp lands and included a lengthy summary of the Pollard v. Hagan case to emphasize the State's title in the tide lands.<sup>24</sup> The Governor criticized the Tide Lands Act passed in 1872, and proposed that tide lands abutting the Pacific ocean and "all waters confluent thereto, and lying between the ebb and flow of the tide," should be offered for sale.<sup>25</sup>

The legislature responded by passing an amendment to the Tide Lands Act which extended the sale to tide lands abutting the Pacific Ocean, and rivers and bays in which the tide ebbs and flows.<sup>26</sup> Owners of abutting lands were given three years to purchase these tide lands before the sale became open to any citizen and resident of the State.<sup>27</sup> However, persons owning or possessing abutting lands were to be given notice of tide land sales and had sixty days to exercise their preference right to purchase.<sup>28</sup> Additionally, the act declared the Willamette River not to be tidal, but granted the "tide and overflowed lands" on the river to the owners of adjacent lands, or the purchasers of the tide lands if such lands had been sold.<sup>29</sup> Finally, the act confirmed title in purchasers of tide lands under the Tide Lands Act of 1872.<sup>30</sup>

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<sup>23</sup> Documents and Messages of 1874, Governor's message, p. 22.

<sup>24</sup> Id. at 23, citing Pollard v. Hagan, 3 Howard 212 (1845).

<sup>25</sup> Documents and Messages of 1874, Governor's message, p. 22, 23.

<sup>26</sup> Sec. 1, Oregon General Laws of 1874, p. 76.

<sup>27</sup> Sec. 2, Oregon General Laws of 1874, p. 76 (amending sec. 5, Tidelands Act of 1872).

<sup>28</sup> Id.

<sup>29</sup> Id. at sec. 1.

<sup>30</sup> Id. at sec. 3.

# 1876

The Tide Lands Act was again amended to grant the State's title in tide and overflowed lands upon the Coquille, Coos and Umpqua rivers to adjacent land owners.<sup>31</sup> The legislature did not include an explanatory preamble to these acts granting selected river lands. However, the court in *State v. McVey* stated that passage of these acts "was undoubtedly due to the fact that many riparian owners along the Willamette, Coos, Coquille and Umpqua Rivers had treated the river beds between high and low water marks as private property and had sometimes improved such beds of the river by erection of expensive structures."<sup>32</sup> The court stated that the amendments to the Tide Lands Act were intended to protect the riparian owners' investments by granting them title to the beds above the low water mark.<sup>33</sup>

# 1878

The Tide Lands Act was repealed . . . to sell "tide and over-flowed lands on the sea coast . . . not exceeding three hundred and twenty acres to any one person, at a price not less than ... \$2 per acre."

The Tide Lands Act was repealed in 1878.<sup>34</sup> Prior to repeal, the Board had sold 3120 acres of tide land for \$4,594.38.<sup>35</sup> The repealing act authorized and required the Board of Commissioners for the Sale of School and University Lands to sell "tide and overflowed lands on the sea coast, owned by the State, in such quantities as they shall deem most advantageous to the State, not exceeding three hundred and twenty acres to any one person, at a price not less than ... \$2 per acre."<sup>36</sup> Owners of land abutting "the shore of the Pacific ocean, bay, harbor, inlet, lake or water course" were given one year to purchase

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<sup>31</sup> Sec. 1, Oregon General Laws of 1876, p.69 (amending sec. 1, Tidelands Act of 1872).

<sup>32</sup> 168 Or. 337, 353 (1942).

<sup>33</sup> Id.

<sup>34</sup> Sec. 34, Oregon General Laws of 1878, p. 41 (repealed in 1899).

<sup>35</sup> See Biennial Reports of the Board of Commissioners for Sale of School Lands and Management of the Common School Fund, 1872 - 1878 reports.

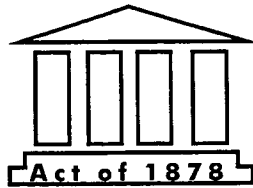
<sup>36</sup> Sec. 4, Oregon General Laws of 1878, p. 41.

tide lands.<sup>37</sup> As in the Tide Land Act, the applicant to purchase tide lands or "lands subject to annual overflow"<sup>38</sup> was required to pay for a survey of the property and took the property subject to the regulation of wharves and an easement for the public to enter and remove oysters and other shell fish.<sup>39</sup>

## 1881

As authorized by the 1878 act, the Board adopted rules governing the sales of tide lands on April 26, 1881, including establishing a minimum sale price of \$10.00.<sup>40</sup>

## 1890



The Board ordered that, "in accordance with the Act of 1878 requiring the Board to sell Tide Lands, sale thereof be made to the bank owners in such areas, as the Board shall, in each case, deem advantageous to the State; provided such sale shall not be detrimental to the interests of navigation or commerce."<sup>41</sup> The Governor voted against the measure, stating that under an Oregon Supreme Court case, the bank owner had all the rights of property in such lands which it was possible for the State to convey, without prejudice to the right of others.<sup>42</sup>

## 1891

The 1891 Act for the Sale of Tide and Swamp Lands in the Tide Waters of the Columbia River and Tributaries, and in the Waters of Coos Bay, required the Board to sell "the remaining unsold tide ... land, including tide flats not adjacent to the shore and situate (sic) within the tide waters of the Columbia River and Coos Bay" to Oregon citizens.<sup>43</sup> A limit of three hundred and twenty acres per person was imposed and a minimum price of \$1 per acre was

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<sup>37</sup> Id. at Sec. 17.

<sup>38</sup> Id. at sec. 16.

<sup>39</sup> Id. at sec. 17.

<sup>40</sup> Minutes of Board Meeting, Land Department (hereafter Land Board minutes), April 26, 1881.

<sup>41</sup> Land Board minutes, July 15, 1890.

<sup>42</sup> Id. It is unclear to which Oregon Supreme Court case the governor was referring.

<sup>43</sup> Sec. 1, Oregon General Laws of 1891, p. 189.



set.<sup>44</sup> Actual settlers and persons having *bona fide* improvements on the tide lands had the privilege of purchasing the land for sixty days following passage of the act.<sup>45</sup> Finally, the act confirmed title in tide flats in the Columbia River and Coos Bay to grantees of the State by previous conveyance.<sup>46</sup> It should be noted that an 1891 Attorney General Opinion stated that, due to a drafting error, tide lands along tributaries of the Columbia River could not be sold under this act.<sup>47</sup>

## 1896-1897

During the 1890's, the Board became more involved in the management, instead of just disposal, of submerged and submersible lands. The Board issued quitclaim deeds for portions of an undetermined lake bed to "riparian" owners on the lake in October of 1891, claiming that no portion of the lake was susceptible of deed.<sup>48</sup> In response to a complaint from the Astoria Chamber of Commerce in 1896, the Board ordered future applications for the purchase of tide islands or flats not be considered because private ownership of such properties caused obstruction to navigation and prevented dredging.<sup>49</sup> In 1897, the Board denied an application to purchase certain tide land on Skipanon Creek, Clatsop County, stating that it was against public policy.<sup>50</sup> Selling the land would damage abutting property owners and the land would have little value, except to sell to the abutting property owners, and the sale price would not "materially add to the school fund."<sup>51</sup>

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<sup>44</sup> Id.

<sup>45</sup> Id. at sec. 2.

<sup>46</sup> Id. at sec. 4. (The 1891 General Laws mislabeled this section (3)).

<sup>47</sup> 1 Op Atty Gen. 1, (1891).

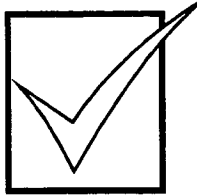
<sup>48</sup> Land Board minutes, October 13, 1891. The lake was not identified.

<sup>49</sup> Land Board minutes, April 14, 1896.

<sup>50</sup> Land Board minutes, July 13, 1897.

<sup>51</sup> Id.

# 1899



Senate Bill 126

The legislative authority to sell tide lands changed again in 1899 with the passage of Senate Bill 126.<sup>52</sup> The Governor, Secretary of State and State Treasurer, now called the State Land Board, were authorized (but not required) to sell tide lands, tide flats not connected with the shore, and all lands held by the State by virtue of her sovereignty.<sup>53</sup> Sales were to be made at a price representing true value, but not less than \$2 per acre, and no sale was to total less than \$10.<sup>54</sup> Additionally, the Governor was appointed land commissioner, and the Board was empowered to appoint a clerk to perform a variety of administrative functions.<sup>55</sup>

# 1902-1905

The trend away from hasty sales of tide lands continued in 1902, when the Board established a "rule of action" requiring applications for tide land purchases to be read and then held over until the next Board meeting to provide ample time for thorough consideration.<sup>56</sup> The Board also withdrew tide lands in Coos Bay from sale, speculating that future improvements on this land could injure "important interests."<sup>57</sup>

In its 1905 Biennial Report, the Board recommended that applicants wanting to purchase tide lands be required to give public notice by publication of their application.<sup>58</sup> This amendment to the tide land sales laws was suggested because such lands were of interest to people other than shore owners, and

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<sup>52</sup> Oregon General Laws of 1899, p. 156 (codified at Bellinger and Cotton's Annotated Codes and Statutes of Oregon, sec. 3301). Sec. 28, Oregon Laws of 1899, p. 158, repealed the 1878 Tideland Act, p. 42.

<sup>53</sup> Id. at sec.s 2 and 8.

<sup>54</sup> Id. at sec. 8.

<sup>55</sup> Id. at sec.s 1 and 3.

<sup>56</sup> Land Board minutes, May 27, 1902.

<sup>57</sup> Land Board minutes, May 23, 1905. These interests were not defined.

<sup>58</sup> State Land Board Biennial Report, Oct. 1, 1902 - September 1, 1904, p. 10.

notice would provide all persons an opportunity to purchase or to object to these sales.<sup>59</sup>

# 1907

Tide and overflow lands were defined as "all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, and all islands, shore lands, and other such lands held by the State by virtue of her sovereignty."

A 1907 Attorney General Opinion stated that the Board could not give upland owners a preference right for the sale of tide lands.<sup>60</sup> The Board had previously only sold tide lands to abutting property owners or persons holding waivers from such owners.<sup>61</sup> However, the Attorney General explained that the preference right created by the 1878 sale statute expired after one year.<sup>62</sup> Additionally, the 1878 statute was repealed in 1899 by a new law which did not contain a preference right.<sup>63</sup> The 1899 law was in effect at the time of the sale in question, so the Board's rule granting a preference right was invalid.<sup>64</sup> The legislature responded to the recommendation in the Board's 1905 Biennial Report by passing House Bill 324.<sup>65</sup> The 1907 legislation required advertisement of pending sales or leases of tide and overflow lands for "sixty days in two or more newspapers of general circulation in the State, one of which must be a paper published in the county in which the lands lie."<sup>66</sup> Additionally, the act launched the Board's waterway leasing program. Tide lands were to be sold or leased to the highest bidder, and a minimum sale price of \$5 per acre was established.<sup>67</sup> Owners of abutting lands were given the preference right to buy or lease tide and overflow lands at the highest price offered.<sup>68</sup> The new legislation also prohibited leasing accretions to islands previously sold by the State and withdrew tide and overflowed lands not connected with the shore from sale for 10 years.<sup>69</sup> The Act of 1907 also authorized the State Land Board to classify state lands as school lands,

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<sup>59</sup> Id.

<sup>60</sup> Op Atty Gen, June 7, 1907.

<sup>61</sup> Id.

<sup>62</sup> Id., discussing sec. 4, Oregon Laws of 1878, p. 42; codified in Hill's Annotated Laws of Oregon, sec. 3599.

<sup>63</sup> Sec. 8, Oregon Laws of 1899, p. 158.

<sup>64</sup> Op Atty Gen, June 7, 1907. It should be noted that the process established by the Act of 1899 was amended that same year (1907).

<sup>65</sup> Chapt. 117, Oregon Laws of 1907.

<sup>66</sup> Id. at sec. 19.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id.

indemnity lands, university lands, college lands, swamp lands, tide and overflow lands, or farm lands.<sup>70</sup> Tide and overflow lands were defined as "all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, and all islands, shore lands, and other such lands held by the State by virtue of her sovereignty."<sup>71</sup> Applicants for tide or overflow land were required to submit their application with an accurate map, a survey, payment in full, and a waiver relinquishing any claim against the State for return of the purchase price in case the land did not belong to the State.<sup>72</sup> Additionally, purchasers of tide and overflow lands held the land "subject to the easement of the public, as provided by the existing laws of this State, to enter thereon and remove...oysters and other shell fish."<sup>73</sup> Finally, the Governor was instructed to appoint a State Land Agent who was to record the losses sustained by the State in Sections 16 and 36 for various reasons and to replace the losses from vacant government land, in addition to duties required by the Governor and the Board.<sup>74</sup> The Land Agent was also "directed and empowered to investigate all trespasses on and damage to state lands and prosecute the same under the law."<sup>75</sup>

## 1908

In 1908, the Oregon Supreme Court stated that the Willamette River was a navigable stream and a public highway, and that the bed and banks of the river belonged to the State.<sup>76</sup>

## 1909

The Board minutes first reflected an application for a lease of tide lands, a tide island in the Columbia River, on May 4, 1909.<sup>77</sup> In accordance with the 1907

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<sup>70</sup> Chapt. 117, sec. 4, Oregon Laws of 1907.

<sup>71</sup> Id. at section 4(f).

<sup>72</sup> Id., sec.s 11 and 12.

<sup>73</sup> Id., sec. 34.

<sup>74</sup> Chapt. 117, sec. 2, Oregon Laws of 1907.

<sup>75</sup> Id. at sec. 31.

<sup>76</sup> Oregon v. Portland General Electric Co., 52 Or 502 (1908) on petition for Rehearing. This was not the holding of the case, but a statement of fact by the court. The State had sued to recover 10% of the profits from tolls collected from the canal and locks at Oregon City as per an agreement.

<sup>77</sup> Land Board minutes, May 4, 1909. It is unclear whether this lease was ever executed.

law, the Board authorized advertisement in two Astoria newspapers, thereby providing notice of the date when the island would be leased to the highest bidder.<sup>78</sup> During the same month, the Board also gave the first waiver to allow dredging to the City of Marshfield.<sup>79</sup>

## 1911

Prior to 1911, the Board had primarily exercised its authority over the tide lands by authorizing sales of those lands. Sales to that date totalled 14,113 acres and \$33,828.90.<sup>80</sup> Beginning in 1911, the Board began to assert its authority by other means. The Board refused to lease Summer and Abert Lakes, Lake County, and requested the Governor to select the lands surrounding the lakes as indemnity land and to endeavor to acquire title to the lakes as an asset to the school fund.<sup>81</sup> The lakes were leased in March of 1912. Although the lakes were meandered, authority to lease may have emanated from ownership as indemnity school selections. The first rights of way over submerged and submersible lands were also granted that year for railroad bridges crossing Lake Creek, Siuslaw River, Lake Siltcoos, Lake Tahkenitch and the Umpqua River.<sup>82</sup>

## 1912

On June 25, 1912, the Board authorized the Clerk to execute the first lease of tide lands after he received the remainder of the payment owed.<sup>83</sup> Following advertisement in the Astoria and Seaside papers, J.E. Meehan submitted the only bid of \$250 for a five year lease of a 27.22 acre tide island in the Columbia River.

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<sup>78</sup> Id.

<sup>79</sup> Land Board minutes, May 25, 1909.

<sup>80</sup> Figure calculated from the sales totals printed in the Biennial Reports to that date.

<sup>81</sup> Land Board minutes, September 26, 1911.

<sup>82</sup> Land Board minutes, May 11, 1911 and Dec. 5, 1911.

<sup>83</sup> Land Board minutes, June 25, 1912, vol. 6, p. 202.

# 1913

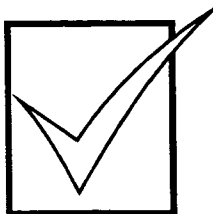
The Commission of Public Docks of the City of Portland passed a resolution which was presented to the Board. The resolution called the attention of the Governor and the Attorney General to the filling of submerged lands and requested them to take action to preserve the public ownership of these lands.<sup>84</sup> The Commission was concerned that some submerged land below the ordinary high water line would pass into private ownership because the Port of Portland was filling these lands.

# 1910-1920

The scope of the Board's management continued to widen during the next decade. In addition to the continued sale of tidelands, the Board authorized legal actions in an attempt to regain tide lands from Corvallis and Eastern Railroad, granted a dredging permit, considered a reclamation permit, sold river bed lands, and granted rights of way across submerged and submersible lands.

# 1917

Ten years after enactment of section 19 of the 1907 Tideland Sales Act an act with identical wording was passed.<sup>85</sup> The Act of February 16, 1917 created a ten-year extension of the ban on the sale of tide and overflowed lands not connected with the shore.



Senate Bill 289

Another 1917 act related to the Board's authority over submerged and submersible lands. Senate Bill 289 declared that the title to the beds of all navigable lakes in the State was "vested in and claimed by the State," provided

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<sup>84</sup> Land Board minutes, April 4, 1913.

<sup>85</sup> Chapt. 202, Oregon General Laws of 1917 (codified at sec. 5564, Oregon Laws).

that the State had not previously sold the land.<sup>86</sup> The Act precluded other people, firms or corporations from acquiring any interest in the beds of such navigable lakes by reliction, drainage, or otherwise, except in any manner provided by law.<sup>87</sup>

## 1920

In January, the Board granted the first "structure-type" lease to Big Creek Logging Co. for the right to drive piling in Blind Slough. The next month, the Board received the first reported sand and gravel lease application. In March, the first recorded sand and gravel leases were granted on the Umpqua River at a rate of \$.10 per cubic yard.

Beginning around 1920, the Board began selling river beds at a fairly rapid pace. It is unclear from the Board's minutes whether these river beds were abandoned or if they still contained water during part or all of the year. In 1925 the Board received an Attorney General Opinion stating that there was no objection to the State relinquishing its claim to an old Rogue River bed, but that the State would not warranty title.<sup>88</sup>

## 1920-1925

An Attorney General Opinion issued during this time advised that abutting owners of tidelands should be notified of the highest bid received and allowed reasonable time to exercise the preference right.<sup>89</sup> While a waiver would be preferable, actual notice and an opportunity to purchase was adequate. However, advertising alone was not sufficient since it did not provide notice of the highest bid.<sup>90</sup> A 1924 Attorney General Opinion stated that the law required tide lands to be sold or leased to the highest bidder only after having been advertised for 60 days, and that the abutting property owner had a

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<sup>86</sup> Chapt. 278, sec. 1, Oregon General Laws of 1917. (This chapter was codified at ORS 274.420 and later renumbered 274.025). In 1967, this chapter was amended to also apply to the submerged and submersible lands of streams, and to incorporate the new "submerged and submersible" terminology. Chapt. 421, sec. 100, Oregon Laws of 1967.

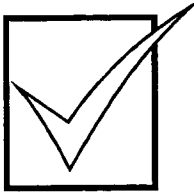
<sup>87</sup> Chapt. 278, sec. 2, Oregon General Laws of 1917.

<sup>88</sup> 12 Op. Atty Gen. 244 (April 21, 1925).

<sup>89</sup> Op Atty Gen, Jan. 14, 1921.

<sup>90</sup> *Id.* It appeared that the Board had been advertising sales, but not giving adjacent property owners notice.

preference right to buy or lease at the highest price offered, provided the offer was made in good faith.<sup>91</sup> Two Attorney General Opinions in 1925 advised that the State would not warrant the title to submerged and submersible lands.<sup>92</sup> A third opinion issued that year advised that the proper procedure for exercising an upland owner's preference right was to offer the highest lease bid in good faith, and to pay that price.<sup>93</sup>



House Bill 244

House Bill 244 was passed in 1921, and asserted Oregon's sovereignty over all meandered lakes in Oregon.<sup>94</sup> The act declared these lakes "to be navigable and public waters, and the waters ... to be of public character, and the title to the bed and land thereunder, including the shore ... between ordinary high and low water lines, ... to be in the State of Oregon."<sup>95</sup> Upland owners were prohibited from acquiring any interest in the beds of these public waters "by reliction, accretion or otherwise, or by reason of the lowering or drainage of the waters of such lakes."<sup>96</sup> Finally, the Board was authorized to acquire riparian rights that a court held to be vested in an upland owner.<sup>97</sup> In 1923, Senate Bill 216 granted qualifying settlers the right to acquire up to 160 acres of lands within the meander lines of these lakes.<sup>98</sup>

## 1923

In April, the Board authorized a lease of submerged lands of the Columbia River for driving pilings and constructing dolphins, after advertisement, unless valid objections were received within 15 days. The charge was to be \$80.00, which was the first mention of payment for a lease. The 1923 State Land Board Biennial Report also listed the first lease of tide lands for booming privileges. The cost was \$350. The report also noted that 316.63 acres of tide

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<sup>91</sup> 12 Op Atty Gen 50 (Nov. 24, 1924).

<sup>92</sup> 12 Op Atty Gen 213 (April 1, 1925) stated that the State would not warrant the title to lake beds sold. 12 Op Atty Gen 244 (1925) stated that the State not warrant the title to tide lands sold along the Rogue River.

<sup>93</sup> 12 Op Atty Gen 454 (Nov. 28, 1925).

<sup>94</sup> Chapt. 280, sec. 1, Oregon General Laws of 1921. (This section was later codified at ORS 274.430 and amended in 1967 for clarity and to incorporate "submerged and submersible" terminology by chapt. 421, sec. 132, Oregon Laws of 1967.)

<sup>95</sup> Id.

<sup>96</sup> Id. at sec. 3.

<sup>97</sup> Id. at sec. 4.

<sup>98</sup> Chapt. 282, sec. 1, Oregon General Laws of 1923. (codified as amended at ORS 274.470).



and overflow lands, as well as river and lake beds had been sold during that period.

# 1924

The Board reasserted "ownership. . . over all sand, gravel and rock in and forming the beds and bars of navigable streams, including all that portion thereof below ordinary high water mark and above low water mark."

The following year, the Board stated its policy as well as rules and regulations related to sand and gravel leasing in the beds of navigable portions of navigable streams. The Board reasserted "ownership and sovereignty of the State of Oregon over all sand, gravel and rock in and forming the beds and bars of navigable streams, including all that portion thereof below ordinary high water mark and above low water mark."<sup>99</sup> The rules defined "navigable portions of navigable streams" to include "that portion of the bed of a navigable stream from the farthest point up stream toward its source at which the point of navigability commences, down to the farthest point down stream toward or at the mouth, at which the stream is navigable, including all sand bars and islands."<sup>100</sup>



The Board began granting royalty leases for fishing rights during this time. When leasing sand bars and tide flats for fishing purposes, the Board adopted the policy of requiring as consideration a minimum annual rental in addition to a specified percent royalty on the amount of fish caught or landed on the property.<sup>101</sup>

The Board received applications for river-front lands in Hood River County which the Board decided to lease. The Board authorized an advertisement stating "(i)f the lands are to be used for fishing purposes, bids will be received on royalty basis, the bidders being required to specify in their bids not only the amount they are willing to pay the State per pound on all fish caught or landed on or abutting upon said lands, but also the minimum amount of such royalty or yearly rental."<sup>102</sup> Bids were received in February of the next year. The bids ranged from 1 cent per pound for all fish during the spring season and 1/4 of 1 cent for salmon taken during the fall to 6 cents for bluebacks, 3 1/2 cents for

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<sup>99</sup> Land Board minutes, October 9, 1924.

<sup>100</sup> Id.

<sup>101</sup> 1927 State Land Board Biennial Report. Royalties received for fish during the biennium ending in 1927 were reported to be \$229.86. The 1929 State Land Board Biennial Report showed that royalties had increased substantially and were reported to be \$2,031.75.

<sup>102</sup> Land Board minutes, Nov. 25, 1924.

chinook, 2 1/2 cents for steelhead and sturgeon, and 1 1/2 cents for silversides, and no payment for chinook caught during fall season.<sup>103</sup> The Board referred the matter to the State Engineer. Fishing leases with royalty payments would continue to be granted through 1951, the last lease was scheduled to terminate in 1961.

Preference rights were applied to fishing leasing as well. When a property owner protested against issuance of a fishing lease for abutting shore lands, the Board granted the riparian a lease for \$500 and 15% of the catch. However, the rental rate for the proposed lease had only been \$200 and 10% of the catch. It should be noted that the land owner requested and received a refund of his deposit the next year, and the shore lands were re-advertised for lease.

## 1925

At times, the Board demonstrated more concern for the distribution of land than in acquiring compensation for the Common School Fund. The Board offered to grant an applicant for shore lands in Hood River County a five-year lease for \$25 per year. However, after the applicant claimed a lease would not be feasible, the Board granted him a deed for the consideration of \$50.00.<sup>104</sup> Fishing rights were reserved to the State.<sup>105</sup>

The 1925 State Land Board Biennial Report reported no tide land sales for that period. Sales of these lands were never reported again, except for four sales related in the 1931 report.

## 1927

Generally, the Board appeared to assert its sovereignty without making any factual determinations about the land at issue. However, in 1927 the State Engineer was directed to determine state ownership of land along Lake Ewauna, Klamath County. The Engineer was to examine records and survey the land abutting the lake to determine whether certain lands were below the line of ordinary high water before alterations had been made. An incident that

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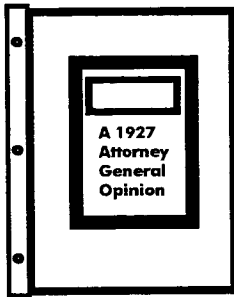
<sup>103</sup> Land Board minutes, February 17, 1925.

<sup>104</sup> Land Board minutes, March 5, 1925.

<sup>105</sup> Id.

year demonstrated that other state agencies recognized the Board's jurisdiction over submersible lands. The State Fish Commission required an applicant to obtain a lease from the State Land Board if the lands between high and low water marks along navigable rivers were of sufficient area for fishing operations independent of riparian owners.

A 1927 Attorney General Opinion stated that if the Big Nestucca River was navigable or affected by the tides, the public would have the right to fish the stream and to walk along the stream between high and low water marks.<sup>106</sup> If it was not navigable, then the fishermen could not use the stream banks.<sup>107</sup>



During the same year, the Board began to take legal action to establish the State's ownership of submerged and submersible lands within the State. The Attorney General was requested to secure title to a sand bar in the Willamette River, if possible. The Board considered proceedings to quiet title to the bed and waters of Malheur Lake. Additionally, the Board considered it prudent to act to protect the State's interests in the beds of Silver Lake, Lake County, and Ewauna Lake, Klamath County.<sup>108</sup>

The first sale of lake shore lands was authorized in 1927. The Clerk was instructed to execute a deed for approximately 5 acres along Triangle Lake, Lane County, after he received a certificate that the bidder was the abutting property owner, or a waiver from other abutting owners.

In 1927, House Bill 324 amended the 1917 Tidelands Sales and Leasing Act.<sup>109</sup> The advertisement period for sales and leases was reduced from sixty to thirty days, and tide and overflowed land not connected to the shore continued to be withheld from sale until February 16, 1937.<sup>110</sup> The minimum sale price remained \$5 per acre.<sup>111</sup>

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<sup>106</sup> 13 Op Atty Gen 236 (June 17, 1927). The opinion did not, however, determine if the river was navigable.

<sup>107</sup> *Id.* It is notable that use of the river was not prohibited if the stream not navigable.

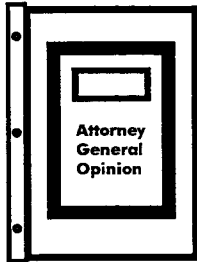
<sup>108</sup> The Land Board minutes did not explain why such protection was necessary.

<sup>109</sup> Chapt. 177, sec. 1, Oregon General Laws of 1927.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

# 1929



The first lease of a lake bed owned by the State by virtue of her sovereignty occurred in 1929. 830 acres in Round Lake, Klamath County, were leased after upland owners failed to exercise their preferential rights. The first sale of lake bed lands also occurred that year with the sale of 281.42 acres of lake bed lands in Scappoose Drainage District.

The Attorney General issued an opinion that stated that the McKenzie River did not appear to be navigable for title purposes but did appear to be navigable for purposes of floatage.<sup>112</sup>

# 1930

The Board requested that the Attorney General bring a suit to determine title to certain shore lands at Celilo in 1930. But it is unclear if such a suit was filed, and if so, what the outcome was.

# 1931

In 1931, the Board demonstrated an inconsistent approach to generating moneys for the Common School Fund. The Board granted permission for an applicant to drive piling on the edge of Lake Tahkenitch, Douglas County, to moor a boathouse, without requiring any rental to be paid. The Board required that the applicant agree to remove the pilings if so requested. On the other hand, the Board directed the Clerk to notify parties having fish traps along the Oregon side of the Columbia River that an annual charge of \$50 per trap site would be assessed.

During the same year, a suit was filed against the United States to determine title to Malheur Lake, Harney County. A committee made up of the Attorney General, State Engineer, representatives of the State Game Commission, settlers, the State Land Board and the U.S. Department of Justice agreed on the advisability of establishing a game refuge at Malheur Lake, under the complete authority of the federal government. The committee also recommended that the suit be prosecuted to determine important questions of

<sup>112</sup>

14 Op Atty Gen 431 (Dec. 26, 1929).

law necessary to determine the rights of persons owning land adjacent to the lakes.

The Attorney General was requested by the Board to act on two relevant occasions that year. The first was to protect the State's interests in a water adjudication because Oregon owned the bed of Malheur Lake. The second occasion was to bring a suit against parties in possession of the lake bed of Summer Lake, Lake County, exposed by reliction. These parties later agreed to apply to purchase the lands, with the understanding that the public would have an easement cross the land to hunt on State lands.

An Attorney General Opinion issued in 1931 stated that the Board did not have statutory authority to lease the beds of navigable streams for raising oysters. . . . to lease the bed of navigable streams for any purposes other than the sale of sand and gravel. . . . the beds of navigable streams were held in trust for public uses of fishery and navigation and . . . the Board could not dispose of the beds of navigable streams in a way that would interfere with these activities.

An Attorney General Opinion issued in 1931 stated that the Board did not have statutory authority to lease the beds of navigable streams for raising oysters.<sup>113</sup> In fact, no statutes authorized the Board to lease the beds of navigable streams for any purposes other than the sale of sand and gravel.<sup>114</sup> Additionally, these beds were not included in the definition of tide and overflow lands, and so could not be leased under tide and overflow leasing statutes.<sup>115</sup> Finally, the opinion stated that the beds of navigable streams were held in trust for public uses of fishery and navigation and, accordingly, the Board could not dispose of the beds of navigable streams in a way that would interfere with these activities.<sup>116</sup>

During this time, the Board was granting rights of way across submerged and submersible lands to railroads without charge, but was exacting payment for powerline crossings.

## 1934

The United States Supreme Court ruled that Malheur, Mud and Harney Lakes, all in Harney County, were not navigable. Consequently, title to these lake beds remained in the United States when Oregon became a state.<sup>117</sup> The Court also

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<sup>113</sup> 15 Op Atty Gen 329 (July 18, 1932).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*, citing Cook v. Dabney, 17 Or. 529 (1914).

<sup>117</sup> United States v. Oregon, 295 U.S. 1 (1934).

stated that navigability was a federal question to be determined by applying The Daniel Ball test.<sup>118</sup>

In 1934, the Board began to consider other values of submerged and submersible lands, aside from the sale or lease price they might generate. The Board declined to sell land bordering Triangle Lake, Lane County, due the recreational value of the property.<sup>119</sup> Similarly, sales of land bordering on Siltcoos Lake, Douglas and Lane Counties, were not being made by the Board because of the "recreational character of the lake."<sup>120</sup> In 1937, the Board also rejected an application to lease or purchase shore land on Siltcoos Lake upon the Clerk's recommendation that the land be reserved as public property.

## 1935



House Bill 291

The 1935 legislature passed House Bill 291 reconfirming the title to tide lands and tide flats sold by the State.<sup>121</sup> The bill amended the 1899 statute by confirming title in heirs, successors and assigns of the original purchasers, with the provision that the tide lands were not obtained fraudulently.<sup>122</sup>

## 1938

The Board authorized quitclaim deeds for two tracts of land along the Clackamas River during 1938. A suit brought by William E. Smith in Clackamas County in 1934 had resulted in a decision that the Clackamas River was non-navigable at that location.<sup>123</sup>

In April, the Board went on record as adopting the policy of not selling any more tide lands. It should be noted, however, that only one State Land Board

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<sup>118</sup> Id. at 14-15, citing The Daniel Ball, 19 L.Ed. 999, 1001 (1871). The Court declared that this test applied to all water courses and not just rivers. U.S. v. Oregon, 295 U.S. at 14.

<sup>119</sup> Land Board minutes, January 22, 1934.

<sup>120</sup> Land Board minutes, November 13, 1934.

<sup>121</sup> Chapt. 133, sec. 1, Oregon Laws of 1935.

<sup>122</sup> Id.

<sup>123</sup> Smith v. Meier, Clackamas County Judgment Roll No. 25643 (1934).

Biennial Report had recounted tide land sales since the biennium ending in 1925.

The Board leased 3108 acres of the bed of Summer Lake that year. The lease stipulated that it conveyed-whatever title the State had and no refund would be granted if the State did not have title to the land.

## 1939

In 1939, the Clerk informed the Board that boat houses were anchoring on the bed of Devils Lake, Lincoln County, the State owned the beds of navigable lakes, and that Devils Lake was navigable. Accordingly, the Board instructed that the State Police were to notify parties using the lake that the State Land Board would not permit such use of the lake.

## 1940

In a rare move, the Board refused an offer to purchase land due to insufficient consideration. An offer of \$25 was made for purchase of a small island in Devils Lake. The Board, however, would not accept a bid less than \$250 after the applicant had the property surveyed and the sale advertised, as required by law.

The Board responded to threats to its ownership of Upper Klamath Lake, Klamath County, in 1940. California-Oregon Power Co. applied for an easement to raise and lower the lake that year. Due to concerns over loss of sovereignty rights, the Board withdrew all appurtenant lands from sale.

The Board continued to be interested in fishing easements and ownership of the tide islands. The Board authorized the Attorney General to take the action necessary to protect the State's interest in shifting sand islands. The Clerk was ordered to survey one island and advertise it for lease. The Clerk was also directed to determine the name of the party claiming title to an island owned by Oregon, and to learn how long he had fished from the island and how much fish had been taken. The Clerk was then to clear title to the island and to recover the rental value of the property and to advertise the property for lease.

## 1941

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In 1941 a meeting was held regarding the use of Goose Lake, Lake County, which had been ceded to the federal government for reclamation by the legislature in 1905. Stockmen stated they would prefer state regulation. The United States gave Oregon a quitclaim deed to the lake bed in 1942. The conveyance was approved by the Attorney General and recorded, and the Board accepted title in April, 1943.

## 1942

The Oregon Supreme Court heard a case filed by the Board regarding the removal of gravel from the Willamette River near Newberg without a lease.<sup>124</sup> The court stated without discussion that the Willamette River was a navigable stream.<sup>125</sup>

## 1943

Approximately 20,000 acres of land on Goose Lake between the second meander line and the water's edge were being claimed by the upland owners as accretions to their property. In 1943, the Board instructed the Attorney General to act to protect the State's title to those lands.

## 1944

In 1944, the Game Commission requested to purchase 6163.89 acres of the bed of Summer Lake for \$15,000. However, because Chapter 203, Oregon Laws of 1943 established a rate of \$2.50 per acre, the Board believed it lacked the authority to comply and rejected the bid.<sup>126</sup>

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<sup>124</sup> State of Oregon v. McVey, 168 Or. 337 (1942).

<sup>125</sup> *Id.* at 340.

<sup>126</sup> The bid was approximately \$2.43 per acre.



# 1945

Leases and sales were not always made with profit in mind. In 1945, the Board leased shore land along the Columbia River for \$1 per year to the War Department "for the duration of the national emergency and 6 months." The land was to be used for "practicing bridge heads for military purposes."

Leases and sales were not always made with profit in mind. In 1945, the Board leased shore land along the Columbia River for \$1 per year to the War Department "for the duration of the national emergency and 6 months." The land was to be used for "practicing bridge heads for military purposes."

In May, the Board adopted a resolution stating that the State of Oregon "... (had) always claimed title and does now claim title to all of the tide land and submerged land along the coast of the State of Oregon and in the bays and harbors thereof and three nautical miles westward from the coast line in the bed of the ocean; also from the banks of any navigable stream from the point of mean high water along said banks; and ... the State Land Board ... petitions its Representative in the Senate and the House of Representatives in the Congress of the United States to give their full support to the passage of the above mentioned resolution quieting the title of all tide and overflow lands in the respective States to the States in which said lands are located."<sup>127</sup>

# 1946

In 1946, the Board refused to sell tide lands on the Coquille River for log boom purposes, but would lease the land to the highest bidder, provided the bid was over \$100 per year. The Clerk was directed to investigate uses occurring on coastal streams and lake beds and to require compliance with the leasing laws.<sup>128</sup>

An Attorney General Opinion issued that year stated that the Rogue River was not a navigable river for title purposes at a point 7 or 8 miles west of Grants Pass, based on the information submitted.<sup>129</sup>

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<sup>127</sup> Land Board minutes, May 15, 1945.

<sup>128</sup> Land Board minutes, November 26, 1946.

<sup>129</sup> 22 Op Atty Gen 409 (March 5, 1946).

# 1947

A 1947 Attorney General Opinion stated that the bed of a navigable stream could be leased by the Board in accordance with §97-701 O.C.L.A., which authorized the leasing of state property whenever the public interest would be furthered if the property was not needed for public use.<sup>130</sup> Since the beds of streams were not "tide lands," the §106-312 O.C.L.A. requirement that leases be advertised did not apply.<sup>131</sup>

An Attorney General Opinion that year stated that the Board did not have the authority to require a permit or charge a fee for the installation of wharves, piers, or booms within the limits of a city or town.<sup>132</sup>

Leases during this time differentiated between leasing of the submerged and submersible land, and approval of structures placed on that land. A lease would be granted for tide and overflow lands and a permit would be included for installation of piling, a log dump or log moorage.

That same year, the Board ordered a study of encroachments on state-owned tide and overflow lands, lake and river beds. The Board wanted recommendations on appropriate rental charges for tide and overflow lands, and permit charges for driving piling in stream and lake beds for commercial purposes, and charges for driving piling in beds for private use, and recommendations regarding sale of such tide and overflow lands. The Board's goal was to create a general policy regarding leasing river and lake beds, and leasing and sale of tide and overflow lands.

The Board began a new type of leasing arrangement in 1947. Lake beds in Lake County were leased for agricultural purposes, and the Board was to receive royalties based on a portion of the crops grown.<sup>133</sup> The leases may have included a clause that the State did not warrant title to the land.

Leases during this time differentiated between leasing of the submerged and submersible land, and approval of structures placed on that land. A lease would be granted for tide and overflow lands and a permit would be included for installation of piling, a log dump or log moorage.

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<sup>130</sup> 23 Op Atty Gen 142, 143 (Feb. 19, 1947). Chapt. 138, Oregon General Laws of 1935, was codified as §97-701 O.C.L.A.

<sup>131</sup> Chapt. 177, sec. 19, Oregon Laws of 1907 was codified as §106-312 O.C.L.A.

<sup>132</sup> 23 Op Atty Gen 290 (July 23, 1947).

<sup>133</sup> North Campbell, Stone Corral, and Turpin Lakes were the subjects of such leases. The leases generally called for payment of 1/8 of the first year's crop and 1/4 of the crop for the remaining years of the lease.

Although the Board had articulated a policy of not selling any more tide land, in August, the Board agreed to sell 6.5 acres of tide lands to the Port of Coos Bay for a small-craft moorage dock. The sale included a reversion clause if the property was not used as a public port.

Also during 1947, the Board received an inquiry regarding the lease of Summer and Abert Lakes. The applicant was advised that although the federal government maintained the lakes are not navigable and are under federal jurisdiction, Oregon claimed ownership of the beds and would consider leasing them.

## 1948

In 1948, the Board approved a lease of tide and overflow lands on the Columbia River for the installation of a small wharf for commercial purposes. It appears to be the first wharf lease. The Board also approved the first lease for a marina that year. A lease on Siltcoos Lake was granted for operation of a "boats for hire" resort, for \$50 annually.

The Board continued to assert the State's sovereignty over the tide and overflow lands. The Clerk was instructed to demand parties unlawfully using these lands to apply for leases or vacate the property, or the matter would be referred to the Attorney General for appropriate action to protect the State's interests.

The Board refused to grant a waiver of the lease requirement as requested by a timber company because it was the Board's policy to require a lease. The timber company had argued that the land was only a ribbon barrier between privately-owned land and the Yamhill River.

The Board authorized a sale of tide lands adjacent to the Siuslaw River, stating the lands were only suitable for agriculture. After appraisal, the Board set a minimum price of \$75 per acre.

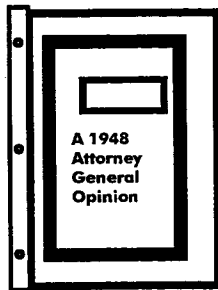
Oregon's conflict with the federal government over lake beds in the Warner Valley continued. The BLM demanded that uses under lease from the Board be discontinued at the end of the growing season based on a study showing the lakes not to be navigable.

However, the Board ordered the request be held in abeyance since ownership had not been adjudicated.

The Board demonstrated some flexibility in its leasing procedure for use of submerged and submersible lands. The Highway Commission had assumed it had jurisdiction over tide lands abutting Sunset Bay and had entered a lease for operation of pleasure boats. The Board approved rental of the land to the Commission under the terms of the existing lease, which were 15% of gross returns with a minimum consideration of \$250.

The Board appeared to differentiate between leases for commercial and non-commercial purposes. The Board granted a lease to an abutting property owner along the Siletz River, but if a commercial enterprise was installed on the premises, the property would be subject to reappraisal and rental adjustment. The Board made one reference to a forty-eight hour period allowed for the exercise of preference rights to lease property, "as provided by law," however it is unclear when this rule was created or repealed.<sup>134</sup>

A 1948 Attorney General Opinion clarified that a stream could be navigable, even if navigability was interrupted by rapids or other natural obstructions.<sup>135</sup>



## 1949

The Board gave up its battle with the federal government over the lake beds in Warner Valley in 1949. The Clerk was instructed to terminate the crop leases because the cost of adjudication required to continue leasing could not be justified, particularly since some leased lake beds were not being farmed.

The Board issued a permit to construct a footbridge over the Alsea River. The Board appears to have been issuing permits for structures put on the land and leases for the land itself.

Also during 1949, the Board appears to have discovered that sales of submerged and submersible lands were not the best way to make money for the Common School Fund. The Board declined to sell tide and overflow land

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<sup>134</sup> Land Board minutes, Dec. 7, 1948. In April 1923, the minutes had referred to a 15-day period in which abutting owners could exercise their preference rights. See p. 22.

<sup>135</sup> 24 Op Atty Gen 128 (Dec. 20, 1948).

because the lands were generating substantial revenue from rental fees. Also, the Board declined to sell the drained bed of Mud Lake. The Clerk had reported that the property, if handled properly, would return the Board's investment in rental fees.

Leasing began to be used as a means of promoting social policy that year. An extension was granted, without consideration, to lay a pipe across the Snake River because the project would "be of public benefit and should be encouraged."

Statements by the public regarding the Board's tideland-leasing policies were received in the October meeting. The Attorney General planned to prosecute a test case on the subject, and the Board stated it would continue to accept applications and process leases during pendency of the case. In February of the next year, another meeting was held regarding leasing policy. While some people expressed opinions that rental rates were excessive, the consensus was that it would be in everyone's best interest to avoid litigation. No one contested the fact that the lands were owned by the State or that a reasonable rental should be charged. During the meeting, it was decided that a committee or delegation of three should be appointed to work, in conjunction with the Clerk and the Attorney General, to create fair solutions to the problems in the leasing system.

## 1950

During 1950, the Board considered the needs of communities when making leasing decisions. The Brookings Chamber of Commerce objected to a lease application on the Chetco River for storing booming logs because the lessee would be able to control shipping of logs, which would have a serious effect on the local economy if ocean transportation facilities were made available. The Board directed that no lease be negotiated for the tide lands at that time.

## 1951

The leasing procedures were amended in 1951 after upland owners objected to the advertisement procedures. New procedures would require that abutting owners be identified and given notification during the advertisement period.

Additionally advertisements were to describe property in reference to upland parcels.

## 1952

During 1952, the Board, in consultation with the Attorney General, discussed prosecution of a case against users of tide or overflow lands refusing to apply for a lease. Due to an adverse ruling in a previous case, the Board chose a non-riparian user who was not affected by construction of a dam.<sup>136</sup> Mr. Emmenegger of Tillamook was chosen and the Board approved filing suit. Henry Sause and his son were Mr. Emmenegger's lessees and the suit was filed under their name.

During that same year, the Board was faced with the uncertainty of the State's ownership of river bed land. BPA had applied for an easement across the Santiam River, but the Clerk reported that navigability of the river at that location had not been determined by adjudication.

Also, the Board refused a request for a 25-year lease on tide and overflow lands on Ten Mile Creek and Ten Mile Lake, Coos County, because it was Board policy not to lease tide lands "of the character in question" for a period in excess of 15 years.

## 1953



State files two suits

The suit was filed against Mr. Sause for failure to proceed with leasing requirements for shore land along the Tillamook River. In September of 1953, he offered to settle the dispute by proceeding with leasing, paying for past use and the current year's rental. The Board authorized settlement and directed another suit be filed against another trespasser.<sup>137</sup>

The Board was faced with opposition to its authority to lease tide and overflow lands in October of 1953. Weyerhauser, disputed the State's ownership of overflow lands along the Millicoma River, Coos County, contending that the

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<sup>136</sup> In a case against the Port of Cascade Locks, a lower court decided that the state's tide and overflow lands do not follow the raised water level behind a new dam. The case was not appealed to the Oregon Supreme Court.

<sup>137</sup> However, the case did go to trial and was eventually decided by the Oregon Supreme Court in State Land Board v. Sause, 217 Or. 52 (1959). See p. 43.

land was included in the grants authorized by the Act of 1876. However, the Attorney General advised that this river was not affected by that act. The matter was submitted to the Attorney General. The Attorney General concluded that the 1876 Act did not convey land along the Millicoma River to riparian owners, and that the Millicoma was not included in the 1876 Act under the name North Fork Coos River. Weyerhauser was then advised by the Board to enter into a lease or the matter would be turned over to the Attorney General for appropriate action.

In 1953, Congress passed the Submerged Lands Act.<sup>138</sup> The Act "recognized, confirmed, established and vested" title to lands beneath navigable waters to the respective states, along with the right to "manage, administer, lease, develop, and use" those submerged lands.<sup>139</sup>

## 1954

In 1954, the Board came into conflict with the Wharf Act of 1862. A lease of shore land along Schofield Slough was amended after a portion of the area was determined to be within Reedsport city limits. The lease was amended since the Board did not have jurisdiction to lease tide and overflow land within city limits under ORS 780.040, "The Wharf Act."

At least two court decisions held that upland owners had not received adequate notice of their preference right to lease tide and overflow lands. As a result, the Attorney General made four suggestions regarding tide land lease application procedures: 1) Notice to bidders should be changed to include when bids will be opened; 2) Proper rules and regulations must be promulgated to establish procedures to give upland owners notice of the highest bid on adjacent tide land; 3) Notice to Bidders must call for bids on separate portions of tide lands fronting on the adjoining upland; and 4) Board should continue notifying upland owners by registered mail of the highest bid offered.<sup>140</sup>

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<sup>138</sup> Submerged Lands Act, 43 U.S.C.A. §1301 et seq. (1986 & Supp. 1996).

<sup>139</sup> 43 U.S.C.A. §1311(a) (1986). "Lands beneath navigable waters" were defined to mean "lands covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union ... up to the ordinary high water mark" and lands covered by tidal waters. However, the term was defined not to include river beds which were part of public lands of the United States if the stream was not meandered and if the title had been conveyed by the United States or a State. 43 U.S.C.A. §1301(a)(1)(2) and (f) (1986).

<sup>140</sup> Land Board minutes, April 9, 1954.

Another important occurrence was that the Attorney General advised that no law granted the Board authority to enter into leases for the installation of piling in the bed of navigable waters. According to the Attorney General, the current laws only granted the Board authority to lease tide and overflow lands lying between normal high and normal low water marks on the navigable streams. At the Attorney General's suggestion, the Board responded by authorizing presentation of legislation similar to that of the State of Washington, granting such authority.

## 1955

In 1955, the Circuit Court hearing the Sause case held that the Board did not have jurisdiction within the boundaries of the Port of Tillamook Bay. As a result, the case against Crown Zellerbach was dismissed without prejudice. In 1959, the Oregon Supreme Court also handed down a decision in favor of the defendants, holding that the land in question was not tide lands and, consequently the State did not own the property.<sup>141</sup>



Pope and Talbot suit

That year, Pope and Talbot filed suit against the Board, claiming title to tide land on Scappoose Bay under the Act of 1874. After the hearing Pope and Talbot offered to settle by buying the tide land. The Board agreed to sell under the procedures required by law.

The Board considered the impacts of leasing tide lands in some cases. The Board required the Clerk to consult with the State Game Commission before allowing advertisement of a lease to determine if lease of tide and overflow lands would effect the Commission's fish poisoning program.

## 1956

The State Game Commission requested exemption from leasing fees for placement of public ramps and boat slides over tide and overflow lands. However, the Board required payment of proper rental fees, since it was in the best interests of the Common School Fund.

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<sup>141</sup> State Land Board v. Sause, 217 Or 52 (1959).



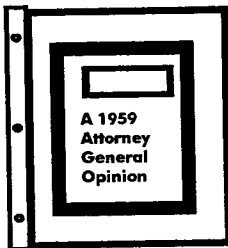
In another fee dispute that year, BPA objected to the policy of raising fees for power line crossings from \$25 to \$100. An independent appraisal found the \$100 fee to be appropriate. The Board maintained that charge for one crossing and reduced the fee to \$25 for another crossing.

## 1957

The Board reflected an increased commitment to the Common School Fund when Georgia-Pacific requested payment for a pipeline easement be refunded since other governmental agencies involved were providing rights of way without charge. The Board determined that it was unable to grant easements without recompense because the Board was responsible for managing the Common School Fund.

## 1959

The Board had a dispute with the State Highway Department after the Highway Department removed fill from below the high water mark on the Santiam River. The State Land Board staff determined that the river was navigable and the Board was entitled to royalties. The Highway Department agreed to pay \$38,498 in royalties, at a rate of ten cents per cubic yard.



A 1959 Attorney General Opinion stated that the Board could sell tide and overflow lands to a port district, county or municipal corporation without advertising for use for public purposes.<sup>142</sup> Another opinion that year stated that the title to the bed of Slusher Lake was in the riparian owner's name. However, the public had an easement on the lake which included the right to hunt because the lake had qualified navigability.<sup>143</sup>

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<sup>142</sup> 29 Op Atty Gen 179 (April 22, 1959).

<sup>143</sup> 29 Op Atty Gen 311 (Dec. 24, 1959).

# 1962

The Attorney General issued several opinions in 1962 which impacted the Board's leasing program. The first found that the Board did not have authority to convey the beds of navigable rivers to the Highway Commission since these lands were held in trust for the public.<sup>144</sup> The second stated that the Board "cannot sell or lease submerged lands since they are held in trust for the use of the public."<sup>145</sup> The opinion differentiated between tide lands which could be sold or leased since they were held in the State's proprietary capacity, and submerged lands which were held in its sovereign capacity in trust for the public.<sup>146</sup> The next month, an Attorney General Opinion expanded the leasing prohibition to include submersible lands as well.<sup>147</sup> Sand and gravel, and minerals leases were not included since such leases were authorized by statutes.<sup>148</sup> The next opinion stated that the Board could sell, lease or grant easements between the ordinary high and low tide lines, but could not authorize sale or easements which would interfere with the public servitude of navigation and fishing.<sup>149</sup> The final relevant opinion for the year stated that the Board did not have authority to sell or lease the beds of navigable rivers, except as specifically authorized by statute.<sup>150</sup>

# 1963

The 1963 legislation enacted House Bill 1538.<sup>151</sup> The bill gave the State Land Board the power to sell, lease or trade submersible or submerged lands owned by the State.<sup>152</sup> This appears to be the first time the Board was authorized to convey submerged lands.

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<sup>144</sup> 30 Op Atty Gen 391 (March 29, 1962).

<sup>145</sup> 30 Op Atty Gen 452 (June 20, 1962).

<sup>146</sup> Id.

<sup>147</sup> 31 Op Atty Gen 16 (July 25, 1962).

<sup>148</sup> Id.

<sup>149</sup> 31 Op Atty Gen 64 (Sept. 28, 1962).

<sup>150</sup> 31 Op Atty Gen 104 (Dec. 26, 1962). Sand and gravel, mineral, and oil, gas and sulphur leases were all allowed by statute. The opinion also noted that sales and leases of tide lands were subject to the public's right of navigation.

<sup>151</sup> Chapt. 376, Oregon Laws of 1963.

<sup>152</sup> Chapt. 376, sec. 3, Oregon Laws of 1963 (codified at ORS 274.915).

The 1964 to 1966 Biennial Report of the State Land Board reported that 945 miles of navigable stream beds were being managed, and that waterfront leases had generated \$34,013, and river crossings and easements produced \$7,060. The Board voiced frustration over its inability to administer waterfront lands more effectively due to its small staff and questionable legal authority. Additionally, the Board found it difficult to mesh the legal rights of port districts, riparian owners and the State. Finally, the Board reported resistance to its increased attempts to place private use of submerged and submersible lands under lease. The result had been that small uses, such as small boat moorages, were generally under lease while large users such as facilities regulated by port districts were not.

## 1967

The Division of State Lands was created in 1967. The Division was to "exercise the administrative functions (previously) exercised by the Clerk and other personnel of the State Land Board."

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Legislation enacted that year required the Division to "give due consideration, in the sale, exchange or leasing of any state lands ... to the protection and conservation of all natural resources, including scenic and recreational resources, ... to conserve the public health and recreational enjoyment of the people, protect property and human life, and conserve plant, aquatic and animal life."<sup>155</sup>

The 1917 legislation declaring title to navigable lake beds to be vested in the State was amended to also include the beds of streams.<sup>156</sup> The same bill established application procedures for tide and overflow land purchases.<sup>157</sup> Finally, the advertising requirements for the sale or lease of tide and overflow lands were changed.<sup>158</sup> ORS 274.040 was amended to require that sales or

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<sup>153</sup> Chapt. 616, sec. 4, Oregon Laws of 1967.

<sup>154</sup> Id.

<sup>155</sup> Chapt. 617, sec. 27b, Oregon Laws of 1967 (codified at ORS 273.051).

<sup>156</sup> Chapt. 421, sec. 100, Oregon Laws of 1967 (codified at ORS 274.420; and renumbered 274.025).

<sup>157</sup> Chapt. 421, sec. 53, Oregon Laws of 1967 (codified at ORS 273.265). This statute was amended in 1969 to replace the term "tide and overflow" with the term "submersible." Chapt. 594, sec. 20, Oregon Laws of 1969.

<sup>158</sup> Chapt. 421, sec. 104, Oregon Laws of 1967 (codified as amended at ORS 274.040).

leases be advertised at least once a week for four consecutive weeks in at least two newspapers, one of which was of general circulation in the county of the sale.<sup>159</sup>

# 1968

In 1968, the Portland City Attorney protested a \$1,000 fee for a 99-year pipeline easement across the Willamette, and any fees for governmental entities for water crossings. Receipt of the protest caused the Division's director to question the Board's policies regarding rights of way and easements. Accordingly, a response to the protest was deferred while the Director developed comprehensive recommendations for future Board policy on all river crossings.

.. the Oregon Constitution was amended to require the State Land Board to manage the public lands under its jurisdiction. The Board was charged with the disposition and management of "lands owned by this State that are placed under their jurisdiction by law." The amendment directed the Board to manage these lands "with the object of obtaining the great-est benefit for the people of this State, consistent with the conservation of this resource under sound techniques of land management."

During that year, the Oregon Constitution was amended to require the State Land Board to manage the public lands under its jurisdiction.<sup>160</sup> The Board was charged with the disposition and management of "lands owned by this State that are placed under their jurisdiction by law."<sup>161</sup> The amendment directed the Board to manage these lands "with the object of obtaining the greatest benefit for the people of this State, consistent with the conservation of this resource under sound techniques of land management."<sup>162</sup>

A 1968 Attorney General Opinion further hampered the leasing program. Opinion #6579 advised that an upland owner could use an abutting navigable waterway for log raft booming or storage without obtaining a lease from the State.<sup>163</sup> This right was only subordinate to the right of navigation, or use by the State or a third party lessee or purchaser.<sup>164</sup> Additionally, a riparian owner

<sup>159</sup> Id. Prior to amendment, that statute had required advertisement for 30 days, and required advertisement in a newspaper published in the county of sale. This statute was amended in 1969 to replace the term "tide and overflow" with the term "submersible;" additionally, the amendment deleted the prohibition on the sale of accretions to islands. Chapt. 594, sec. 32, Oregon Laws of 1969.

<sup>160</sup> Amendment proposed by H.J.R. No. 7, 1967, and adopted by people May 28, 1968.

<sup>161</sup> Oregon Constitution, Art. VIII, sec. 5(1), amended May 28, 1968.

<sup>162</sup> Id. at Section 5(2).

<sup>163</sup> 34 Op Atty Gen 370 (Dec. 11, 1968). This opinion was reversed in 1972 by Opinion #6951.

<sup>164</sup> Id.

could assign this right without a lease.<sup>165</sup> Due to this opinion and vague statutes, waterway leases were generally not required, thereafter.<sup>166</sup>

The 1966 to 1968 Biennial Report stated that the Division had concentrated on the ownership of waterfront areas such as log storage areas and filled tide lands. The Division was concerned with the "private, exclusive, commercial uses of river areas without compensation to the public for its interest in the public waters." Obvious examples were log rafts and wharves which occupied hundreds of acres of public land, most of which were not under lease. The Board reported that a study of log raft stations had concluded that stronger laws, more policing, and more education were required. The Division planned to expand its staff from one to three to meet the challenges of managing such lands. It was also noted that waterfront leases, accounting for \$62,097, were significantly lower than adjacent states. The Board stated that "statutory reinforcement is also needed to make certain of the Division's leasing authority which has been challenged at almost every turn." Finally, the Board noted that the Interim Committee on Public Lands had studied this topic and would recommend important amendments to the law.

## 1969

In 1969, the Board consented to the annexation of a portion of the Willamette River by the City of Independence to enable the city to control boat traffic via ordinances for safety reasons. The City of Umatilla was also allowed to annex a portion of the Columbia River's submerged and submersible land in order to provide fire and police protection to the marina.

During the same year, the Board granted an easement on the submerged land of Windsor Slough, even though the Director reported it was not navigable. The Board also approved two easements for sewer lines across South Waterway, even though South Waterway is a manmade canal of "D" River, Lincoln County.<sup>167</sup>

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<sup>165</sup> Id.

<sup>166</sup> 1968 - 1970 State Land Board and Division of State Lands Biennial Report, p. 10.

<sup>167</sup> D River is the shortest river in the world. Lewis A. McArthur, Oregon Geographic Names 233 (1992).

House Joint Resolution 40 created the Advisory Committee to the State Land Board during the 1969 regular session of the legislature.<sup>168</sup> The nine member committee was to study Oregon's submerged and submersible lands and submit a report by January 1, 1971.<sup>169</sup> The Advisory Committee was to focus on three problems: 1) ownership of constantly changing river, and particularly abandoned channels; 2) conflicting claims of ownership between riparians and the State; and 3) conflicting uses.

## 1970

The Board began consulting other agencies prior to issuing leases in 1970. When more than half of the seven state and federal agencies contacted opposed a log-raft storage lease on the Columbia River, the Division held a hearing. As a result of the hearing, the Division re-commended denying the lease because "Oregon's first consideration in allowing any waterway use is the optimum public interest."<sup>170</sup>

## 1971

In 1971, the Board established a policy for future log raft leases.<sup>171</sup> The policy stated that the maximum lease duration would be three years, with annual review. A lessee would have 30 days to comply before the lease was suspended if found to be in non-compliance with water quality standards or any log storage legislation. Additionally, leases could not be transferred without the Division's approval. Lessees were required to conform to all environmental and land use laws and ordinances promulgated by federal, state and local governments. Finally, violation of the lease terms would result in review and possible termination of the lease.

The Board also set policies for future leases not related to log rafts.<sup>172</sup> The policies were the same as for log raft leases with the following exceptions: 1)

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<sup>168</sup> The joint resolution's preamble noted that the existing confusion regarding the state's interest in submerged and submersible lands jeopardized the public's, as well as the riparian's, right to use these lands.

<sup>169</sup> The Senate President was to appoint three members from the Senate and one member from the public. The Speaker of the House of Representatives was to appoint four members from the House and one member from the public.

<sup>170</sup> Land Board minutes, July 15, 1970.

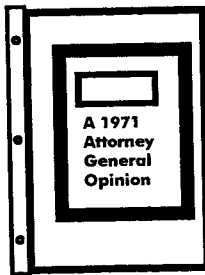
<sup>171</sup> Land Board minutes, April 14, 1971.

<sup>172</sup> Id.

the maximum duration would be 5 years, with reappraisal in 3 years; and 2) the use was to be indicated in the lease.

That year, the Board demonstrated it was interested in aesthetics but not controlled by it. The Board objected to an overhanging cable across the Alsea River, but allowed a two-year lease prior to the time that the cable must be buried.

The Board also added an "environmental condition" to a lease renewal on Clear Lake, Linn County, requiring clean-up of any debris deposited on the lake bed within the leased area. Also, the Board polled state, federal, and local agencies regarding a log raft lease before authorizing a lease to the highest bidder after advertising procedures were followed.



A 1971 Attorney General Opinion defined the public rights of navigation to include fishing, hunting, boating and enjoyment of scenic beauty and other recreational uses.<sup>173</sup>

## 1972

1972 was a year of substantial activity. The Advisory Committee's first progress report was recorded in the Board's January minutes. The Committee reported it was conducting an inventory of navigable lakes, and the count to date was 75. The committee was also studying the Wharfage Act, and investigating the upper limits of navigability on navigable rivers.

The March Advisory Committee report proposed reopening the 1968 Attorney General Opinion which held that the State could not lease state-owned submerged and submersible lands to riparian owners, or to third-party lessees of a riparian owner. "Since that opinion, the State virtually discontinued the leasing of submerged and submersible lands for log storage and rafting, marinas and moorage."<sup>174</sup> The committee also requested an opinion from the Attorney General clarifying whether the Board, in the interest of safety, could create rules and regulations governing leased structures.

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<sup>173</sup> 35 Op Atty Gen 844 (Sept. 17, 1971).

<sup>174</sup> Land Board minutes, March 7, 1972.

The Director reported on the public's right to use submerged and submersible lands on navigable waters. He said that when the State sold tide lands, a public trust easement across these lands was reserved for the public, which remained even when the land was filled. To sever the public trust easement a public hearing would be required. The Board approved this approach.

The April Advisory Committee report noted that the Attorney General had advised that the Board could promulgate safety regulations for leases of submerged and submersible lands.

During the April meeting, the Board approved the annexation of Lake Ewauna to Klamath Falls so that the city could protect the lake for public use through proper zoning.

In June, the Advisory Committee reported that it had adopted Legislative Concept (LC) 38 which would require an application to the Division for creation of wharves constructed of fill. It had also adopted LC 39 which required the Division to study and claim ownership of appropriate lakes in Oregon.

The Board began holding public hearings for the "relinquishment of public right of navigation, fishery and recreation" in order to fill land within estuaries. In one hearing, the Board rejected a request to place fill in the Necanicum River, Clatsop County, because it would be "contrary to the public's trust of the historic rights of navigation, fishery and public recreation and would conflict with ORS 541.610(1) and 541.625(1)-(3)."<sup>175</sup>

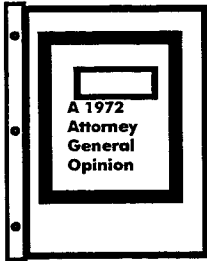
During the August meeting, the Committee reported that LC 131 would allow the State to regulate submerged and submersible land structure leases.

The Board disclaimed ownership of McIntosh Slough in Reedsport when the Port of Umpqua requested to fill it.

In September, the Board issued a statement of policy on removals and fills in Oregon's estuaries.



The Board also issued a statement of policy on Willamette River Lands. The policy statement instructed the Division to determine the State's interest in submerged and submersible lands, and formerly submerged and submersible lands, along the Willamette River. The Division was to assert ownership of such lands to which the State had an interest.



The Attorney General issued an important opinion on October 30, 1972. Opinion #6951 stated that the legislature had the authority to require a riparian owner on a navigable stream to enter a lease for building structures or maintaining existing structures on the State's submerged and submersible lands.<sup>176</sup> However, temporary log booms maintained for short periods of time and existing wharves<sup>177</sup> still in use were determined to be exempt from leasing requirements.<sup>178</sup>

The Board issued a policy statement regarding leasing of publicly owned submerged and submersible lands in December. The Board referred to the conclusion of Attorney General Opinion #6951 that administrative authority existed for rental leases of all structures except wharves. As a result, the Board had reviewed its leasing policies and found no attempt to lease wharves, and an otherwise "uneven" history since 1907 of requiring leases. The Board said it was "unfair and contrary to the interests of the people to permit a select few exclusively to occupy portion of the beds of navigable rivers and conduct their own activities without paying for the privilege of doing so."<sup>179</sup> The Board stated that it was very important to issue a series of policy statements to relieve the public's doubts about actions to be taken following the Attorney General Opinion. "In making these policy statements, the State Land Board desires to invite public comment at hearings preliminary to the adoption of regulations to implement these proposed policies."<sup>180</sup> The General Management Directive then stated that it would be the policy of the Board "to require rental leases from every person who uses publicly owned submerged and submersible lands for any purpose, excepting only owners of lawful existing wharves used to benefit navigation and commerce and owners of temporary log enclosures not per-

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<sup>176</sup> 36 Op Atty Gen 150 (Oct. 30, 1972) - Opinion #6951. This opinion overruled 30 Op Atty Gen 370 (1968).

<sup>177</sup> It should be noted that at least one wharf lease was issued in 1948. See p. 36.

<sup>178</sup> *Id.* at pp. 36 and 53. Note that owners of permanent log booms and new wharves could be required to obtain a lease.

<sup>179</sup> Land Board minutes, Dec. 8, 1972.

<sup>180</sup> *Id.*

manently affixed to submerged or submersible lands."<sup>181</sup> Riparian owners would have a preference right where required by law. Rental rates would be determined considering the value of the land and the public's right to compensation for its use. Competitive bidding would be used, along with other methods authorized by law. Lease durations would be set for each category of leases. The policy statement also discussed fills on submerged and submersible lands.

The 1970 to 1972 Biennial Report noted a decrease in the "management leasing" of private uses of state-owned submerged and submersible lands, which could be changed by clarifications from the Attorney General "of the public's ownership rights and the Division's authority to manage those rights."<sup>182</sup> The report also noted that the 1971 legislature had again created an Advisory Committee to aid the Board in investigating waterway ownership issues and proposing legislation to the 1973 legislature. Finally, the goals of the water management section or the next biennium were reported to be:

- 1) Completion of waterland management policy and program;
- 2) Clarification of the State's ownership and the State's leasing authority; and
- 3) Stronger involvement in the State's land-use planning efforts.<sup>183</sup>

# 1973



Senate Bill 33

In 1973, the Board directed the staff to create a regulatory program for house boats.

The 1973 legislature passed Senate Bill 33<sup>184</sup> which ordered the Division to investigate and determine the "issue of navigability" for streams by July 1, 1977 on its own or at the request of a person or agency.<sup>185</sup> The bill also required the Division to mail written notice of each hearing at least 20 days in advance to all

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<sup>181</sup> Id.

<sup>182</sup> Biennial Report of the State Land Board and Division of State Lands, 1970 - 1972, p. 6.

<sup>183</sup> Id. at p. 7.

<sup>184</sup> Originally denominated LC 40 by the Advisory Committee, and codified as ORS 274.029 - 274.034.

<sup>185</sup> Chapt. 496, sec. 2, Oregon Laws of 1973. "Issue of navigability" was defined to mean "whether a stream was navigable in fact on February 14, 1859." Chapt. 496, sec. 1, Oregon Laws of 1973. "Navigable in fact" was defined using The Daniel Ball test. See p. 2.

land owners of record abutting the stream at issue.<sup>186</sup> Finally, determinations of navigability would be binding on the Division, but other persons would not be bound by the determination and could contest the navigability status.<sup>187</sup>

The original version of Senate Bill 33 permitted the Division to investigate and determine the issue of navigability, but the House Judiciary committee deleted "may" and inserted "shall."<sup>188</sup> The committee also added the requirement that the Division mail written notice of each hearing to landowners abutting the stream at issue.<sup>189</sup> Finally, the committee amended the bill to state that any navigability determination would only be binding on the Division, and not on other person.<sup>190</sup>

The legislature passed two other measures emanating from the Advisory Committee. The first was Senate Joint Resolution 2 (SJR 2).<sup>191</sup> This resolution directed the State Land Board and the Division to develop safety standards for structures on the leased submerged and submersible lands along the Columbia River. The original draft applied to all navigable waterways. The Senate amended the original draft to apply only to the lands along the Columbia River since the conflict between navigation and floating structures the resolution sought to address was occurring on that river.<sup>192</sup> The second measure adopted was Senate Joint Resolution 3 (SJR 3).<sup>193</sup> This resolution directed the Board and the Division to study the lakes within the State and assert state ownership of the submerged and submersible lands on navigable lakes.<sup>194</sup> This directive was explicitly not limited to meandered lakes.<sup>195</sup> A progress report was to be

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<sup>186</sup> Chapter 496, sec. 2, Oregon Laws of 1973 (codified at ORS 274.034, renumbered as amended at ORS 274.034, and repealed in 1983).

<sup>187</sup> Id.

<sup>188</sup> House Committee Report, June, 22, 1973.

<sup>189</sup> Id.

<sup>190</sup> Id.

<sup>191</sup> SJR 2, Oregon Laws 1973, March 23, 1973, p. 2852 (designated LC 48 by the Advisory Committee).

<sup>192</sup> Senate Agriculture and Natural Resources Committee minutes, Jan. 22, 1973.

<sup>193</sup> SJR 3, Oregon Laws 1973, p. 2853, April 9, 1973 (designated LC 39 by the Advisory Committee).

<sup>194</sup> Id. at sec. (1)(a).

<sup>195</sup> Id.

submitted within 60 days after passage of the resolution, and a final report describing the submerged and submersible lands owned by the State was to be submitted to the legislature at the conclusion of the study.<sup>196</sup> The Senate Agriculture and Natural Resources Committee noted that the Supreme Court, in United States v. Oregon, had said that meandering alone did not demonstrate navigability, and that Chapter 274 had been called into question.<sup>197</sup> Therefore, meandering was only evidence of navigability, so the Division still needed to conduct studies.<sup>198</sup> The House Environmental and Land Use Committee stated that the third phase of this program would be to notify property owners, but did not amend the resolution accordingly.<sup>199</sup>

In July, the Board approved the exchange of quitclaim deeds for formerly submerged and submersible lands lying along the Rogue River bed. It was noted that although there was a basis for considering the Rogue navigable, it had not been adjudicated. This was the first quitclaim deed exchange on the Rogue River.

The Division also reported on the lake study conducted in accordance with SJR 3. 1500 letters were sent to the owners of record on 5 large lakes: Siltcoos, Woahink, Devils, Upper Klamath, and Wallowa Lakes. About 10% of the people responded. "People expressed concern about the effect of the leasing policy on private docks, private boathouses, weed problems, regulation problems, water-surface regulation--everything but ownership."<sup>200</sup>

By August, the Division had drafted waterway leasing rules and policy pursuant to Attorney General Opinion #6951. After the Division presented proposed policy and rules, the Board recommended public hearings be held in Newport, Portland, Eugene and Klamath Falls. The Board deleted sections pertaining to personal use and personal leases.

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<sup>196</sup> Id. at sec. (1)(b) and (c).

<sup>197</sup> Senate Agriculture and Natural Resources Committee Report, Jan. 22, 1973.

<sup>198</sup> Id.

<sup>199</sup> House Environmental and Land Use Committee Report, Feb. 20, 1973.

<sup>200</sup> Land Board minutes, July 18, 1973, vol. 24, p. 418.

In September, public hearings were held in Portland, Klamath Falls, Coos Bay, Newport, and Astoria on the waterway leasing proposed rules.

In October, the Director described the procedures for the hearings, the resulting modifications, and the procedure for the adoption of the administrative rules. He noted that the public's greatest concern voiced at the hearings related to appraisals. The suggestion was made that rules be reviewed after a year or upon a Board member's motion. The Board postponed final approval of the proposed rules until November.

In November another hearing was scheduled in Salem regarding the waterway leasing rules. At the Board's meeting, the Division reported that the public's primary concerns were: 1) rights of upland owners, particularly regarding the bidding procedures; 2) economic hardships on small marinas; and 3) values of submerged and submersible lands. The Division estimated that most small marinas would be charged \$120 annually. There was also concern about a neighbor out-bidding a riparian marina owner for the lands adjacent to his property. The Board recommended that the Interim Committee on Agriculture and Natural Resources study this problem and introduce an amendment which would create a "grandfather clause" to exempt small marinas from the advertisement requirement, and thereby protect the owner from competitive bidding. It was decided that separate rules would be developed for waterway leases for private uses. The Board adopted the final rules as amended.

Also in November, the Attorney General determined that a lessee of submersible land along a lake could impose beach regulations which were consistent with a reasonable public use of the beach, but could not interfere with public use of the abutting waters.<sup>201</sup>

In December, the Director told the Board that the waterway leasing program was the Division's top priority. The Division planned to document waterway uses and establish a "record base" for the leasing program, as well as procure more lease applications, conduct investigations, and continue the public information program. He also noted that the riverbed ownership study was centered on the Willamette River, with some work on the Columbia, and work planned for the Umpqua.

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<sup>201</sup>

36 Op Atty Gen 638 (Nov. 2, 1973) - Opinion # 7008.

Also during 1973, the Board approved a lease for a houseboat that incorporated environmental safeguards specified by DEQ.

# 1974

During 1974, the Division took greater responsibility for the leasing program. The Board granted the Division authority to "proceed administratively" to renew leases which conformed to the environmental criteria, had the fee established by appraisal, and were for ten years or less. Controversial or unusual leases would still require authorization from the Board.

Prior to the Division accepting responsibility for the administration of the leasing program, the Board authorized a lease, as recommended by the Division, for a log raft storage lease due to the "historic nature" of the rafts at that location, and "previous acceptance" of the use by natural resources agencies. The lease was, however, subject to review by natural resource agencies.

In April, the Board expanded the Division's authority again. The Board authorized the Division to grant easements across submerged and submersible lands if the following conditions existed: 1) the use met environmental criteria; 2) the structure existed prior to April, 1974; and 3) waste outfall applications met DEQ and U.S. Corps of Engineers standards. Easements consisted primarily of powerline crossings, bridges and waste outfalls. Applications containing uncommon situations would be brought to the Board. The Board also suggested that the Division review the fee schedule to determine if it was equitable and covered the Division's costs.

In July, an informational hearing was held regarding a lease of state-owned land on Multnomah Channel, since the lease was more than 10 years.<sup>202</sup> Multnomah County requested the moorage lease be reduced from 25 to 10 years, to be within the time frame of comprehensive planning. The Director explained that lending agencies often required a lease to be twice the duration of the loan period, and marina owners often needed loans to meet DEQ requirements. The minutes did not record the final decision. The next month, the Board approved an amendment to the waterway leasing rules. Formal pub-

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<sup>202</sup>

Land Board minutes, August 21, 1974, volume 24, p. 500-501.

lic notice of a lease application up to 25 years in length would be given. Then public hearings would only be held if "sufficient response" was received. Previously, hearings were held for leases longer than 10 years, and often not even the applicant would show up.

In December, the Port of Newport had a suit pending against the State on the matter of the State's right to lease waterway lands to the public. The Board agreed to add a provision to the lease stating that the lease would not affect the lessee's contention that the State did not have the authority to require rentals on the leased property.



Port of Newport suit

The 1972 to 1974 Biennial Report for the State Land Board and the Division of State Lands reported that the Division staff had to shift its efforts under the navigability study required by ORS 274.034 to the Middle Fork of the Willamette River due to the Dexter Dam State Park project, and the Rogue River due to a request for an Attorney General Opinion from a group of legislators. The next study planned was for the Umpqua to settle gravel royalty problems. The McKenzie study was, therefore, behind schedule. In compliance with SJR 3, 1973, the Division had researched seven lakes and would draft reports and hold hearings in the future.

The Biennial Report also noted that the Division had started putting businesses using state-owned waterways for commercial uses under lease in the fall of 1973. Public hearings had been held, and the Division had continued with its program despite opposition from waterway users. The report noted that several organizations were contacting riparian owners in an attempt to interfere with the leasing program. Finally, it reported that the Division had attempted to identify all crossings of state-owned waterways, and noted that easements had produced \$36,182 in revenues for the period of 1970 to 1974.

## 1975

In May, the Board approved the process to amend waterway leasing rules as follows: (1) limit leases to 20 years, if the lease is consistent with Division policy and the use would remain that long; (2) allow extensions of the lease period up to 10 years, if there is documentary proof that the related loan was longer than 20 years; (3) review lease rates after 5 years; (4) conduct public hearings on lease applications at the Division's discretion, rather than

mandated for each application; and (5) delegate the authority to issue leases to the Division.

That same month, the Board officially took the position that the Rogue River was navigable from Grave Creek, at approximately River Mile (RM) 69, to the mouth and reserved the right to examine the navigability of the river at least to Grants Pass. The intention was to avoid the implication that the remainder of the river was non-navigable. This was made a permanent rule in August.<sup>203</sup> The June 4, 1979 State Land Board minutes reflect that the staff's research had revealed evidence that the river had been subject to commercial use to at least RM 102 and that the State might, therefore, claim to that point.

... lands were now to be sold for "a fair appraised value." Also, the minimum lease rate was to be set by the Division.

The leasing program was altered in July by passage of House Bill 2042 and House Bill 2341. House Bill 2042 amended ORS 274.040 by reducing the advertising requirement to once a week for 2 weeks, rather than 4, in one newspaper of general circulation in the county.<sup>204</sup> Sales and leases were now treated separately and the minimum sale price of \$5 per acre was deleted and the lands were now to be sold for "a fair appraised value."<sup>205</sup> Also, the minimum lease rate was to be set by the Division.<sup>206</sup> Owners of abutting land continued to have a preference right to lease submersible land if the lease was for one year or longer, but they were now allowed to lease at the minimum rate set by the Division, rather than the highest bid.<sup>207</sup> The preference right for purchase of these lands allowed purchase at the fair appraised value.<sup>208</sup>

House Bill 2341 further amended ORS 274.040 to state that entering a lease with the Division did not create a waiver of the lessee's claim of ownership in submersible lands leased.<sup>209</sup>

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<sup>203</sup> O.A.R. 141-81-050(1).

<sup>204</sup> Chapt. 547, sec.1, Oregon Laws of 1975 (codified as amended ORS 274.040(1)).

<sup>205</sup> Id. (codified as amended at ORS 274.040(2)). Before a sale, the value of submersible lands was to be determined by an appraiser appointed by the Division. Codified at ORS 274.040(7).

<sup>206</sup> Id. (codified as amended at ORS 247.040(6)).

<sup>207</sup> Id. (codified as amended at ORS 274.040(1)).

<sup>208</sup> Id (codified as amended at ORS 274.040 (2) (c)).

<sup>209</sup> Chapt. 765, sec. 2(8), Oregon Laws of 1975 (codified as amended at ORS 274.040(8)).



In July, the Board adopted rules as "emergency temporary rules" to enable the leasing program to continue under the new laws. The amended rules incorporated changes in the law made by the 1975 legislature and responded to objections of potential lessees. The changes included: (1) cutting process time to 30 days for riparians and 60 days for non-riparians, as opposed to 90 and 120 days, respectively; (2) increasing the minimum lease rate from \$120 to \$150, but exempting small private docks and small commercial marinas; and (3) determining water values by a "value-use" method rather than using upland values.

In November, the Board approved the concept of salvaging logs from navigable waterways. A company had requested a contract to salvage logs from the beds of large Oregon lakes, starting with Eel, Tahkenitch and Tenmile Lakes.

The Board also approved a policy statement regarding its position on leasing submerged and submersible lands. It stated that the leasing program would continue to be directed by several considerations. First, the navigable waterways belonging to the public are a valuable and useful, but not unlimited, resource. Additionally, granting leases by public bidding allows private use in an equitable way on those lands that can be leased "without interfering with the use of the waterway by the public as a highway for navigation, commerce, fishing, and recreation." Finally, since leases remove the land from public use, the rent rates compensate the public for the loss of that use.

At the same meeting, the Director discussed the changes to the leasing program compelled by the passage of House Bills 2042 and 2341. The Board approved amendments to the waterway leasing rules to comply with these new laws. The Director also proposed amending the rules to exempt 3,000-square-foot effective-use areas. This exemption was designed to protect private individual boat docks and "mom and pop" facilities from leasing requirements. Additionally, the minimum fee was increased from \$120 to \$150. The Board directed the changes be sent to the complete mailing list and media with a letter stating that a fee schedule would be adopted later, and asking for comments. The Board appeared to be concerned that under the old rules small commercial facilities required leases but large private ones did not.

In December, the Board adopted a revised policy memorandum regarding lease rates for submerged and submersible lands and a rental calculation method for these leases. The policy statement declared that state-owned lands

would not be leased for less than an annual amount of \$150 per acre for the first acre within a lease area and \$90 per acre for each additional acre. Three different rental-rate calculations were listed to cover various types of submerged and submersible land leases. First, "Extension of Upland Uses" rental rates were determined by "multiplying the number of acres to be leased times 6% of the per acre appraised value of the adjacent uplands."<sup>210</sup> Second, "Water Dependent Uses" included log storage and handling operations and marinas, moorage, and similar structures.<sup>211</sup> The annual rental for log storage and handling areas was \$150 per acre annually for the first acre in the lease area and \$90 per acre annually for each additional acre. This rate was adopted as an interim rate subject to a rate study. The annual rental for marinas, moorage, and other similar structures was calculated as 3% of the number of boat slips or tieups, multiplied by the slip rental rates, multiplied by an Occupancy Factor.<sup>212</sup> Finally, the rates for "New, Unusual or Hardship Uses" were to be set by formal appraisal.<sup>213</sup>

## 1976

In 1976, the Board authorized the Division to issue log raft leases not exceeding 10 years. The Division requested this change due to a conflict between the 3-year maximum in the 1971 State Land Board Policy and the 20-year maximum adopted on November 18, 1975 (OAR 141-82-030). Also, the 3-year lease period was a hardship for businesses due to cost and security issues. The minutes recounted that the Board's log raft policy was adopted in 1971 in an effort to improve water quality in numerous navigable waterways. Since that time other state and federal agencies had developed water quality regulations to address the problem.

Accordingly, the Board's policy was no longer necessary as an environmental safeguard.

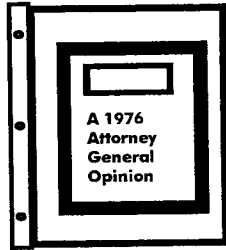
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<sup>210</sup> "Extension of Upland Uses" were defined as "uses of the state-owned submerged and submersible lands for which the leased area becomes an extension of the adjacent uplands."

<sup>211</sup> "Water Dependent Uses" were defined as "uses of state-owned submerged and submersible lands which require location on or over water."

<sup>212</sup> The "Occupancy Factor" was "the percentage of slips filled year around."

<sup>213</sup> "New, Unusual or Hardship Uses" were defined to be "uses of state-owned submerged and submersible lands which are unique and as to which uses the Division has had little or no experience or precedent for setting rental rates."



In May of the same year, the Board accepted a draft report of the Division's findings, conclusions, and order regarding the navigability of the McKenzie River. The report was to be made available to the public and at the next meeting the public was able to address whether the river was navigable between RM 0 and 41.5.

The Attorney General issued important opinions in 1976. A May decision stated that the Division could rely on the existence of log drives in making a navigability determination on the McKenzie River.<sup>214</sup> In July of 1976, the Attorney General issued an opinion that without legislative authorization for a change, a navigability determination for a river made under ORS 274.034 was binding upon the State, and the head of navigation could not be moved further up stream by the State or its agencies.<sup>215</sup> The legislature could, however, permit such a move by legislation.<sup>216</sup>

In July, the Board approved the Division's declaration that the McKenzie River was a navigable river from its confluence with the Willamette River to a point known as Dutch Henry Rocks, at approximately RM 37.<sup>217</sup> The declaration noted that an investigation was conducted pursuant to ORS 274.029 to 274.034, that public hearings had been held, that the Division had prepared a report and that the Board had considered the report.

The Treasurer then read a policy statement which addressed some of the concerns of the property owners along the river.<sup>218</sup> The policy statement directed the Division to institute an action in federal court to determine navigability of the McKenzie River, limited to the section defined in the declaration above. The State was to be the moving party so as to be responsible for carrying the burden of going forward and asserting a claim, and to reduce the expense to the property owners affected. The statement directed the Division to continue with studies pursuant to ORS 274.029 to 274.034, but that it was the policy of the Board not to declare a river to be navigable based solely on evidence of log drives, until a court declares that method to be valid. Also, the Board stated it would advise the legislature of the property owners' concern about protecting

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<sup>214</sup> 37 Op Atty Gen 1342 (1976) - Opinion #7286.

<sup>215</sup> 38 Op Atty Gen. 1.

<sup>216</sup> Id.

<sup>217</sup> OAR 141-81-050(2).

<sup>218</sup> Land Board minutes, July 6, 1976.

their rights under building codes existing at the time of a navigability determination. Finally, the Board explained that the declaration of navigability was not part of a policy to declare the McKenzie a scenic river or a greenway.

Preliminary findings, conclusions and recommendations regarding the navigability of the Umpqua River were presented to the Board in September. The head of navigation was stated to be at Scottsburg. Copies of the report were sent to riparian owners along the river.

Also in 1976, the Division reported that a log raft leasing rate study had been completed by the Division. Additionally, a consulting firm had submitted a report, but that study was limited to leases from public agencies since the private sector would not, reportedly, provide rate information. The Division proposed new log raft rates which would result in slightly lower rates. The lower rates were intended to make Oregon's rates competitive with Washington's rates. However, the Board adopted the present rates as a temporary rule for purposes of expediting the pending court cases.<sup>219</sup>

The Umpqua navigability determination was concluded in 1976. A rules hearing was held on November 16 in Reedsport, and all riparian property owners along the affected portion of the river had been sent a copy of the rule and the Division's staff report on the navigability of the Umpqua River. Fifteen people attended the hearing but no testimony or comments were given. In December, the Board adopted OAR 141-81-050(3) which declared the Umpqua River a navigable river from its mouth to the head of tidewater near Scottsburg, approximately RM 28. The Board minutes note that the river is not navigable above the head of tide because "the river has never been used successfully as a highway for commerce, nor does the river appear to be susceptible of being navigated for commerce above RM 28 if present-day modes of water transport are excluded from consideration."<sup>220</sup>

In 1976, the State sued to prevent defendants from obstructing public access to submersible lands along the Columbia River in Multnomah County.<sup>221</sup> Oregon Court of Appeals held that the State owned the land and that the Acts of 1872 and

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<sup>219</sup> The Board may have been referring to the Brusco Towboat cases. See footnote 234.

<sup>220</sup> Land Board minutes, Dec. 8, 1976. Note that the federal test for navigability does not exclude present-day modes of water transport.

<sup>221</sup> State Land Board v. Heuker, 25 Or. App. 137 (1976).

1874 did not convey the tidelands when the upland owner did not act to take advantage of the legislation.<sup>222</sup>

The State Land Board Biennial Report for 1974 through 1976 reported that navigability studies of lakes were postponed because priority was given to determining navigability of rivers and ownership of abandoned river beds. Although ORS 274.960 - 274.985 gave the Division authority to study the waterway title problem, the Board had postponed contested case hearings until a decision in the Corvallis Sand and Gravel case<sup>223</sup> settled some legal questions.

## 1977

In April of 1977, the Board approved OAR 141-82-032, a new administrative rule and amendment regarding log handling and storage leases. The new rule and amendment were established after a public hearing and negotiations with industry representatives. The rule set annual lease rates, unless a higher bid was received, as follows: \$150 for the first acre and \$90 for each additional acre for the first 5 years; \$150 for the first acre and \$100 for each additional acre for the second 5 years; \$150 for the first acre and \$110 for each additional acre for the third 5 years; and \$150 for the first acre and \$120 for each additional acre for the fourth 5 years.<sup>224</sup> Rates for leases longer than 20 years would be established by the Board.<sup>225</sup> The amendment to the rule stated that leases for log raft stations and log booms longer than 10 years required specific approval from the Board.<sup>226</sup>

The legislature passed Senate Bill 1106 to amend ORS 274.034 by extending the deadline for navigability determinations from July 1, 1977 to July 1, 1981.<sup>227</sup> The legislature also passed House Bill 2853 which required the Division to pay court costs and attorney fees incurred by defendants if the Board determined

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<sup>222</sup> Id. at 144.

<sup>223</sup> Corvallis Sand and Gravel v. State Land Board, 429 U.S. 363 (1977).

<sup>224</sup> OAR 141-82-032 (April 20, 1977).

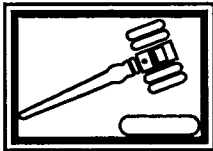
<sup>225</sup> Id.

<sup>226</sup> Id.

<sup>227</sup> Chapt. 637, sec. 1, Oregon Laws of 1977.

that a navigability determination should receive judicial review.<sup>228</sup> The total costs and fees paid for all parties were limited to \$50,000.<sup>229</sup>

In November of 1977, the Board approved a policy that quitclaims would only be issued when the parties were in agreement, otherwise it must be settled by litigation.

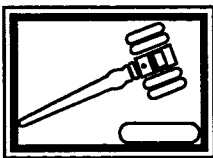


1977 United States Supreme Court decision

The United State Supreme Court handed down a decision in the Corvallis Sand & Gravel v. State Land Board case<sup>230</sup> in 1977. The Court held that the State received title to the land under navigable waters at statehood, and that disposition after that time was governed by state law.<sup>231</sup> The Court also stated in passing that the Willamette River was navigable.<sup>232</sup> On remand, the Oregon Supreme Court held that the State had not relinquished the beds of navigable rivers, and title, therefore, remained in the State.<sup>233</sup>

The 1976 to 1978 Biennial Report of the State Land Board and the Division of State Lands reported that administrative rules regarding easements were being drafted. Also, the Division believed the validity of determining navigability of a river based on log drives should receive judicial review. A suit was planned for the near future.

## 1978



Oregon Supreme Court

In 1978, the Oregon Supreme Court, in Brusco Towboat v. State Land Board, held that the Board had the authority to require leases for the occupation of state-owned submerged and submersible land, as authorized by ORS

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<sup>228</sup> Chapt. 471, sec. 2(1), Oregon Laws of 1977 (codified at ORS 274.032, repealed by chapt. 566, sec. 1, Oregon Laws of 1983).

<sup>229</sup> Id. at sec. 2(2).

<sup>230</sup> 429 U.S. 363 (1977).

<sup>231</sup> Id. at 371.

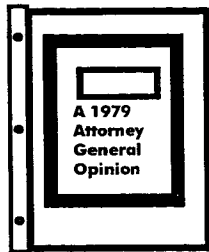
<sup>232</sup> Id. at 365.

<sup>233</sup> Corvallis Sand & Gravel v. State Land Board, 283 Or 147 (1978). The court cited Hume v. Rogue River Packing Co., 51 Or. 237 (1907) *aff'd* 96 P 865 (1908), as the landmark decision asserting Oregon's title to the beds of nontidal navigable rivers. Id.

274.415.<sup>234</sup> Additionally, structures built prior to the inception of the leasing program were also subject to leasing, with the exception of wharves covered by The Wharf Act.<sup>235</sup>

In September of 1978, the Board approved a temporary administrative rule regarding easements and rights of way, including a fee schedule. The purpose of the rule was "to establish formal written policy, to guarantee consistency, and to bring order and clarification to administration of easements, which is controlled by many statutes." The Director noted that previously easements had been granted on an ad hoc basis pursuant to statutes, the April 1974 policy, and the merits of each application. The new rules altered the fee schedule and delegated authority to the Director to review and dispose of easement applications. The Board would be consulted in unusual cases and for policy guidance. The minimum fee was determined by the administrative cost, set at a minimum of \$250, plus \$1 per lineal foot of right of way granted. Additionally, payment for damages was required. The proposed rule was adopted without the fee schedule so as not to limit the Board's discretion regarding two easement requests on the agenda for that meeting.

## 1979



The Attorney General issued an opinion in February, 1979, that explained that ORS 274.440(1) granted the State title to land added to the shore of a meandered lake by accretion or reliction after May 25, 1921.<sup>236</sup>

In February, the Board issued a statement regarding the waterway leasing program in response to the controversy created by the Board's waterway leasing regulations.<sup>237</sup> The statement explained the history of the State's ownership and regulation of the lands under navigable waterways. It clarified that the State had not granted away its title to these lands and that these lands were held in trust for the public. Consequently, it was only fair that people who removed material or exclusively used these lands should compensate the public

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<sup>234</sup> Brusco Towboat v. State Land Board, 284 Or 627, 633 (1978). This case consolidated the Brusco case with Fort Vancouver Plywood and Port of Astoria cases.

<sup>235</sup> *Id.* at 649.

<sup>236</sup> 39 Op. Atty Gen. 517 (1979) - Opinion #7716.

<sup>237</sup> The statement was signed by the Board members and the Director on February 12, 1979.

for this use. Finally, the statement noted that the Oregon Admission Act did not preclude waterway leasing<sup>238</sup> and declared that the goal of the State Land Board was to continue the leasing program under the constitutional responsibility of obtaining the greatest benefit for the people of Oregon.<sup>239</sup> Finally, the Board reiterated the policy considerations it had adopted in November of 1975.<sup>240</sup>

In July, the Board discussed House Bill 2866, which had passed both houses. The bill excluded some structures from the Division's waterway leasing program.<sup>241</sup> These structures were boat launch ramps, private use boating structures of less than 1,000 square feet and commercial marinas of less than 2,250 square feet.<sup>242</sup> The Board directed the Division and the Board's staff to draft proposed rule amendments which would include the HB 2866 exemptions, but would leave the Board with legal control. Although the Board believed any changes should be made by administrative rule, the Governor said he would be very cautious about vetoing the bill. He later signed the bill.

In September of 1979, the Board approved initiation of the process to adopt permanent rules regarding administration of easements over submerged and submersible lands. The only difference from the proposed rules previously presented is that fees would be set by the Division "using standard appraisal techniques, including charges for damage to state lands."

## 1980

In September of 1980, the Board approved a policy statement regarding leasing of submerged and submersible lands for oil and gas exploration.

A case against the Riverfront Protective Association was filed to determine if log drives were a sufficient basis for a determination of navigability. The U.S. District Court held it was not sufficient on December 5, 1980. The State

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<sup>238</sup> 11 Stat. 383. This statute states that the navigable waters of the state "shall be common highways and forever free." *Id.* However, the Board explained that this means that use of the state can not impose a toll for travel on these waterways.

<sup>239</sup> Referring to Oregon Const., Art. VIII, Sec. 5(2).

<sup>240</sup> See 1975.

<sup>241</sup> Chapt. 793, sec. 3, Oregon Laws of 1979 (codified at ORS 274.040 as amended).

<sup>242</sup> *Id.* at sec. 2 (codified at ORS 274.042, and repealed by ORS 274.043).



appealed.

# 1981



Senate Bill 930

In May of 1981, the Board suspended the navigability program and cancelled most of the scheduled public hearings regarding navigability because Senate Bill 930, with amendments, was expected to pass. The bill was signed into law June 22, 1981 and amended ORS 274.034.<sup>243</sup> The new law required 90 day notice of public hearings, and extended the navigability study four years (the previous dead-line was July 1, 1981).<sup>244</sup> The bill also amended ORS 274.029 to make periodic log driving during high water an insufficient basis for a navigability determination, without a judicial determination otherwise.<sup>245</sup> The Division's response to Senate Bill 930 is listed in Appendix D.

House Bill 3066 was also passed in 1981.<sup>246</sup> This bill stated that submersible lands acquired as an investment for the Common School Fund were excluded from the leasing program.<sup>247</sup> Additionally, House Bill 2841 also amended ORS 274.040 that year.<sup>248</sup> This amendment stated that occupants of submersible lands who purchased prior to January 1, 1981 from the abutting land owner were entitled to the preference right granted in ORS 274.040.<sup>249</sup>

In July, the Board approved the Division's proposed program to complete the navigability studies by June 30, 1985. The Division proposed classifying rivers into one of three use categories: A) High floodwater log floating, including the use of freshets, splash dams and other artificial aids; B) Regular and recurrent log floating at ordinary high water or medium stream stages; and C) Regular and recurrent log floating at ordinary high water or medium stream stages, plus recreational boating and/or other uses. The Division would then report which categories each river fit into. This program appears to have been approved during the July meeting. After enactment of SB 930, the list of 65 rivers being

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<sup>243</sup> Chapt. 219, sec. 2, Oregon Laws 1981 (codified at ORS 274.031, previously numbered 274.034, repealed in 1983).

<sup>244</sup> Id.

<sup>245</sup> Chapt. 219, sec. 1, Oregon Laws of 1981 (repealed in 1983).

<sup>246</sup> Chapt. 158, sec. 1, Oregon Laws of 1981 (codified at ORS 274.040(1) as amended).

<sup>247</sup> Id.

<sup>248</sup> Chapt. 432, sec. 1, Oregon Laws of 1981 (codified at ORS 274.040 as amended).

<sup>249</sup> Id.

# 1982

considered for navigability determinations was reduced to 17, since log driving could not be considered. If a court determined log driving alone constituted use of a river for commerce, the Division could re-evaluate the rivers. Informal meetings were to be held in November and December, 1981. Official administrative rule hearings were scheduled for March at the same locations. The Board approved holding hearings on the proposed amendments to the administrative rules.

Also in February, the Board approved public review of the proposed rules regarding easements and rights-of-way across state-owned submerged and submersible lands.

In May, the Ninth Circuit Court of Appeals had ruled that the McKenzie River was navigable between RM 37 and its confluence with the Willamette River based on log floating.<sup>250</sup> The court held that the river was used in its ordinary condition as a highway for commerce when it was used for log driving, and that the use "need not be without difficulty, extensive, or continuous."<sup>251</sup>

As a result of this decision, the Director proposed that the Division submit a report in November or December on the navigability of rivers and lakes, and that the report categorize the waterways as follows: 1) those claimed to be navigable using vessel traffic definition; 2) those claimed to be navigable based on log floating; 3) those with a history of commercial tourism or trade; and 4) those considered navigable by the Corps of Engineers.

In December of 1982, the Director reported that the Division had only included meandered rivers in its study because many riparian property owners had been paying taxes on the beds on non-meandered streams which might be navigable. He stated that deeds don't grant to the center of meandered streams, "so no riparian owner should have been paying taxes on those riverbeds."<sup>252</sup> The Board approved sending the Division's report to the legislature. The report included a draft bill "which disclaimed any interest in the submerged and submersible lands of meandered nonnavigable lakes only if

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<sup>250</sup> State v. Riverfront Protection Association, 672 F.2d 792, 796 (1982).

<sup>251</sup> *Id.*, at 795.

<sup>252</sup> Land Board minutes, Dec. 17, 1982, vol. 25, p. 528.

its entire circumference had been surveyed by the U.S. government surveyors on December 31, 1982."

# 1983



Senate Bill 562

In 1983 the legislature passed Senate Bill 562 which repealed ORS 274.029, 274.031, and 274.032, and thereby eliminated the required navigability study program.<sup>253</sup> The bill also declared that "The Report and Recommendation on the Navigable Waters of Oregon" dated January 1983, was an interim report and was not a determination of navigability nor did it create or waive any rights.<sup>254</sup> Nor were the navigability determinations in the report to be considered evidence supporting or disproving navigability.<sup>255</sup> The 1982 to 1984 Biennial Report of the State Land Board and Division of State Lands noted that following passage of Senate Bill 562 the Division conducted extensive historical and hydrologic research specific to each site prior to asserting any ownership claim based on navigability.

The Division hired a consulting group comprised of Pacific Economica, Inc.<sup>256</sup> and a group of Willamette University consulting professors to conduct a study of the Division's waterway lease rates. The Waterfront Owners and Operators Association, Inc. of Portland retained Leland & Hobson Economics Consultants to conduct an independent review of that study. Pacific Economica, Inc. conducted an analysis of the Leland & Hobson review.

During the 1983 legislative session House Bill 2298, relating to leasing fees, was vetoed by the Governor with the understanding that the Board would continue the administrative and public process in the development of administrative rules.

In September of 1983, the Director and the Board members' assistants decided to create two advisory groups, one assigned to marina issues and the other to

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<sup>253</sup> Chapt. 566, sec. 1, Oregon Laws of 1983.

<sup>254</sup> Id. at sec. 3(1).

<sup>255</sup> Id. at sec. 3(2).

<sup>256</sup> An advisory committee to Pacific Economica consisted of representatives of the Association of Oregon Industries, Port of Portland, Oregon Public Ports Association, Oregon Coastal Zone Management Association and the Waterfront Owners and Operators Association.

# 1984

log raft storage rates.<sup>257</sup> The Log Raft Advisory Committee contained representatives of the timber industry, towboat operators and a representative of the Association of Oregon Industries. The Marina Rental Advisory Committee appears to have consisted of representatives of Oregon Coastal Zone Management Assoc., ports, Waterfront Owners and Operations Assoc., Department of Economic Development, Yaquina Development Corp., and schools.

During the May 18, 1984 meeting, the Director said the Division would be going to public rulemaking on the issue of submerged and submersible land lease rates, and reported that one advisory committee had reached consensus on some issues.

In July, the Director reported that the Log Raft Advisory Committee had reached a consensus on a fee proposal. The Marina Advisory Committee did not reach a consensus. That committee had two basic goals: to create a formula which was simple to administer and provided predictability for the industry; and to base the formula on a fair market value/fair rate of return basis. The latter had caused the difficulties. The Board approved the Director's suggestion that a decision on the administrative rules be deferred until the August meeting. In the interim, the Division proposed assessing a flat rate of \$400 per acre for the first acre and \$240 for each additional acre. This was twice the proposed rate for log rafts. Increasing the current rate of 3% of gross income to 4% would also be considered at the hearing. Projected lease incomes under each method would be calculated before the August meeting.

During the August meeting, the Division presented its proposed administrative rules for leasing state-owned submerged and submersible lands, incorporating the recommendations of the advisory committees. The Division noted that a series of hearings had been held and the Division's goal had been to provide a public process in which the public could discuss the impact of the rules and relevant issues.<sup>258</sup> Price and process had been the major issues. Log rates had been agreed to, and it was proposed not to change industrial and commercial use rates. A hearing was held to discuss three options for marina rates: \$1 per lineal foot; 4% gross income; or some multiple of the log raft rates. The Divi-

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<sup>257</sup> The committee was essentially the group that had assisted the consultants, with a few modifications.

<sup>258</sup> Hearings were held in Newport on June 28, in Portland on June 29, and in Salem on July 13, and August 16.

sion recommended twice the log raft rate.

The advisory committee's work had resulted in a recommendation for log raft and booming area rates of \$200 for the first acre and \$120 for each additional acre in a leasehold area. The leases would be "indexed annually based on the percent of increase or decrease of the U.S. Department of Labor, All Urban Consumer Price Index for Portland."<sup>259</sup> The index was to be set at 4% increase or decrease annually, with the Board able to review if the index cumulatively exceeded over 40% within a ten year period.<sup>260</sup> The Division recommended the rates for marinas, houseboats and boathouses be set at twice the log raft rates. Rates for other water-dependent, water-related and extension of upland uses remained at 6% of the per acre appraised value of the adjacent upland acreage. This rate had not changed since 1974. Unusual use rates and hardship rates would be set by the Division staff. The new rates were to be phased in when leases were renewed.

The target figure was to get approximately 4% of gross income from marina operations.

The Port of Portland requested that some of its facilities be exempt from leasing, but the Board members explained that the Board, according to statute, must act to aid the Common School Fund and could not negotiate with the Port. Accordingly, all structures not exempt under the Wharf Act would be subject to leasing. Two issues discussed were whether the Port of Portland's terminals were exempt and whether dry docks were exempt under the Wharf Act. The rules were approved with the understanding that the Port of Portland was not exempted from paying at this time and those issues would be addressed later. The Director said two policies were established with adoption of the rules: moving toward standardized rates for these leases; and the standardized rate should change as the market conditions change. The target figure was to get approximately 4% of gross income from marina operations.

In November of 1984, the Board received a petition to close eight estuaries<sup>261</sup> on the south coast to motorized traffic. After discussion, the Board determined that its authority extended to mean high tide, or if the waterway was navigable, to the extent of navigability. A representative of the Transportation Department stated that Berry Creek, Floras Creek, and Euchre Creek had no tidal influence, and that Sutton Creek, Twomile Creek, and

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<sup>259</sup> Land Board minutes, Aug. 28, 1984.

<sup>260</sup> Id.

<sup>261</sup> The estuaries were: Berry Creek, Sutton Creek, Twomile Creek, Fourmile Creek, New River (north and south), Floras Creek, Euchre Creek and Pistol River.

Fourmile Creek were not navigable, according to their studies. In December, the Division presented a creek by creek analysis of the resources to be protected, the vehicular use, and the impact of closure as determined by public hearing, testimony, and information submitted. Also, the Division provided a discussion of the extent of the Board's jurisdiction. The Board approved a motion to close the area over which the Board had control, which was below mean high tide, over six estuaries. The Board did not close Floras Creek and Fourmile Creek because they were not tidal, and the Board did not want to assume any more authority than it actually had. However, it was noted that by making a presumption of navigability, the Board could extend the closures. A July, 1985 Attorney General Opinion established the State's ownership of the six closed estuaries to the Head of Tide.<sup>262</sup> Consequently, in May 1986 the Board authorized the Division to initiate the rulemaking process to close the estuaries to the extent of tidal influences. In December, the Board extended closure of coastal estuaries to motor vehicle traffic to the Head of Tide on the following estuaries: Berry Creek, Twomile Creek, New River, Euchre Creek, Pistol River, Sand Lake, Siltoos River, Fourmile and Floras Creeks, Tenmile Creek, and Tahkenitch Creek.

## 1985

The rules governing the construction of hydroelectric projects on Oregon's navigable waterways were finalized in February of the next year.

In January, the Board, as landowner of Elliott State Forest, received notification that a company named Small Scale Hydro planned to ask for a conditional use permit to put a hydropower facility on Mill Creek, in the state forest. The Board did not have a policy on hydroelectric projects, so took no position. In December, the Board approved the Division's request to take draft rules relating to hydroelectric project fees to public hearing. The rules governing the construction of hydroelectric projects on Oregon's navigable waterways were finalized in February of the next year.<sup>263</sup> The rules were intended to notify prospective developers in advance of any Board restrictions on submerged and submersible lands.

In March, the Board approved administrative rules for easements over state-owned submerged and submersible lands.<sup>264</sup> The rules authorized the Director

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<sup>262</sup> 45 Op Atty Gen 1 (July 15, 1985). The opinion stated that tidal influence alone was sufficient grounds for the Board to base a claim of sovereign state ownership to beds of the waterway. This opinion reversed a letter opinion dated November 27, 1984, to Ed Zajonc which stated that Oregon could not assert ownership to the beds of nonnavigable tidal streams.

<sup>263</sup> OAR 141-10-201 to 141-87-001 (2/12/86).

<sup>264</sup> OAR 141-83-010 to 141-83-700 (3/13/85).

to grant easements which were not larger than 100 feet wide and 1/4 mile long, and did not have a value of more than \$5,000. All other easements required approval of the Board. County representatives requested a waiver of the appraised value charge, and requested a charge of only administrative costs. The request was denied because the Board members believed they were required to recover costs plus compensation for the use of the property.

During the July meeting, the Board authorized the Division to proceed with the determination of navigability of the Klamath River. The Division requested and received authority to notify all affected individuals of the preliminary determination of state ownership, and to continue with the study to provide findings and present a draft order at the next meeting. Since the legislature had removed the statutes governing the navigability determination process, the Division had consulted the Attorney General's office requesting guidance. The Attorney General had responded that formal rulemaking was not required, but that a reasonable administrative process should be used.

## 1986

On December 12, 1986, the Board asserted "sovereign ownership of the bed and banks of the Klamath River from RM 233 to the California border."<sup>265</sup> Two Board members noted that they had personal reservations, but believed it was their duty as members of the Board, and accepted the advice of counsel and the Division. An attorney for the City of Klamath Falls stated that the same evidence had been the basis of the Board's 1980 declaration that the River was not navigable.<sup>266</sup> He also cited interoffice memos stating the evidence was not sufficient to support a finding of navigability.

## 1987

During the December 1987 Board meeting, the Director stated that in response to direction from the State Land Board assistants, the Division had contracted with ECO Northwest for an analysis of the Board's lease rates. The results were presented to the Board.

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<sup>265</sup> Land Board minutes, Dec. 18, 1986, vol. 26, p. 340.

<sup>266</sup> A 1980 declaration has not been located.

# 1989

The Attorney General issued a letter opinion stating that the Division could redetermine the navigability of the Umpqua River to move the head of navigation further upstream, noting that ORS 274.031 had been repealed.<sup>267</sup> Additionally, navigability determinations could be adopted as administrative rules.<sup>268</sup> The administrative process would generally be as follows: 1) conduct a navigability study, 2) assert the State's title based on navigability, and 3) defend the assertion in a quiet title action, if it is contested.<sup>269</sup>



APG Co. vs. State  
of Oregon

In April of 1989, the Board approved settlement of a suit stemming from a lease with APG Co. for algae removal from Klamath Lake. The Attorney General's office advised that the State did not have authority to require a royalty lease for that activity and the State was now being sued for return of royalties paid.

# 1990

In June, the Director noted that waterway lease rates were not high in comparison to other states and that these rates would probably increase.

# 1991

During the February State Land Board meeting, the Board authorized the Division to begin the rulemaking process to amend administrative rules for leasing state-owned submerged and submersible lands for non-extractive uses, which were last amended in 1984.<sup>270</sup> The Division planned to consult with

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<sup>267</sup> OP-6271, February 22, 1989. Additionally, OP-5431 (Letter of Advice dated February 8, 1983) advised the Division that neither previous judicial determination nor Attorney General opinions stopped the Division from redetermining the navigability of a stream.

<sup>268</sup> Id.

<sup>269</sup> Id.

<sup>270</sup> The uses included log storage, piers, marinas, and commercial and industrial facilities.



lessees, local government entities, and interest groups, as well as with the Board regarding policy issues, prior to submitting proposed rules to the Board for adoption.

The Board approved support for the Division's efforts "to identify and assert the State's title to navigable water to the extent allowed by recent developments of federal law."<sup>271</sup> However, State Treasurer Tony Meeker warned that "interest earnings (should) not be used to pursue claims when the agency has nothing to gain financially by pursuing particular cases."<sup>272</sup>



Senate Bill 233

Senate Bill 233 was passed that year. The bill repealed ORS 274.042, and enacted ORS 274.043 in lieu.<sup>273</sup> The new statute exempted privately owned floats and docks from leases if they were 200 square feet or less and were open and uncovered, and belonged to the adjacent riparian, or if they were exempt under ORS 274.042 and built before September 29, 1991.<sup>274</sup> The bill required the Division to register these exempted structures.<sup>275</sup> However, the registration has not been conducted due to a lack of funds and personnel.

## 1992

A discussion paper was issued in January which stated that it was the policy of the State Land Board and the Division of State Lands to:

- 1) identify, assert and protect navigable waters (rivers and lakes), including the State's ownership to these lands and the public's right of use;
- 2) manage the beds and banks of navigable waters as assets of the Common School Fund in a manner consistent with sound land management techniques and the Public Trust Doctrine; and
- 3) assist in resolving ownership claims to submerged and submersible

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<sup>271</sup> Land Board minutes, Dec. 10, 1991, vol. 27, p. 107.

<sup>272</sup> Id. at p. 108.

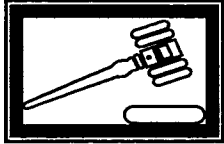
<sup>273</sup> Chapt. 521, sec. 1, Oregon Laws of 1991.

<sup>274</sup> Id. at sec. 2.

<sup>275</sup> Id. at sec. 6 (codified at ORS 274.043(4)).

lands under navigable waters.<sup>276</sup>

In July, the Division presented a navigability status report to the Board. Additionally, an open letter to the editor was to be sent regarding the Chetco River. In December, the Board was discussing litigation on that river. Approximately 40,000 cubic yards of gravel was removed from the river per year, mostly by adjacent property owners. However, the gravel operators would not enter into leases. The Division, based on a study, believed the river to be navigable to RM 18.5. It was estimated that these sand and gravel leases would provide income of approximately \$100,000. The case would be particularly good and there would be fewer defendants if it was limited to RM 11. Other benefits of a suit were educating title companies, and setting a good precedent for other cases.



U.S. District Court for  
the District of Oregon

## 1994

In 1994, the United States District Court for the District of Oregon held that as of the date of admission, Oregon owned the bed and banks of the Chetco River below the ordinary high-water mark to at least RM 11.<sup>277</sup>

## 1995

In response to complaints from some of their constituents, Representative Minnis and Senator Walden sponsored House Bill 2697. Senator Walden stated that the bill was intended to give the Division "clear process and guidelines" regarding navigable waterways.<sup>278</sup> The Senator explained that property owners along the Sandy River had portions of their property removed from the tax rolls without being notified. He said this was the result of a letter from the Director of the Division of State Lands to Multnomah County.<sup>279</sup> The July 7, 1992 letter stated that the State Land Board claimed the submerged and submersible lands of the Sandy River to be state-owned from the Columbia River to the confluence of the Salmon River.<sup>280</sup>

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<sup>276</sup> This internal discussion paper was labeled "State Ownership of Lands Underlying Navigable Waters in Oregon."

<sup>277</sup> Oregon v. Tidewater Contractors, Inc., Order on Motion for Summary Judgement, Aug. 10, 1994, U.S. District Court, Oregon.

<sup>278</sup> House Natural Resources Committee, Subcommittee on Environment and Energy, Bill #2697, Exhibit F, March 8, 1995.

<sup>279</sup> Id.

<sup>280</sup> Id.

House Bill 2697 passed and became effective September 9, 1995.<sup>281</sup> The bill prohibited the Board from asserting title to submerged or submersible lands unless a court had declared the waterway navigable or the Board declared the State's claim to such lands.<sup>282</sup> The statute established the process for making such claims which included public notice at all phases and provided for judicial review of a declaration by the Board.<sup>283</sup>

After the passage of House Bill 2697, the Division requested authorization to begin the rulemaking process. In October of 1995, the Board heard testimony about problems along the Sandy River and concerns about the Division's navigability claims. There was also testimony on waterway lease rates. The Governor reiterated that the Board was not considering a waterway fee increase, but was re-evaluating the fee structure.

In December, 1995, the Board approved the request for adoption of amendments to the administrative rules for waterway leasing to establish an annual base lease rental rate for vessels used primarily for historical or educational uses.

## 1996

During March and April, the Division held nine public hearings regarding the draft administrative rules designed to implement House Bill 2697.<sup>284</sup>

In June, the Board adopted these administrative rules and required the Division to report at the Board's December 1996 meeting on all navigability study requests received by the Division. The Board also authorized the Division to continue to work with stakeholders to study whether alternatives to navigability studies, such as a statutory floatage easement, would provide a more cost and time efficient solution to many of the problems on Oregon's waterways.

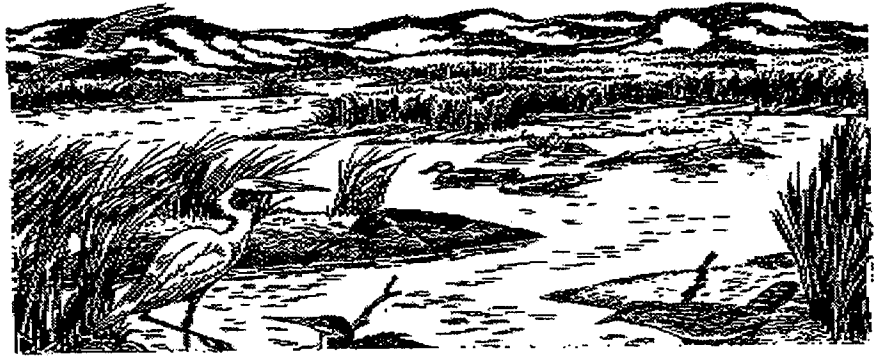
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<sup>281</sup> Chapt. 471, Oregon Laws of 1995 (codified at ORS 274.400 to 274.412).

<sup>282</sup> ORS 274.402.

<sup>283</sup> ORS 274.404 - 274.412.

<sup>284</sup> Hearings were held in Tillamook, Eugene, Coos Bay - North Bend, Medford, LaGrande, John Day, Bend, Gresham, and The Dalles.



APPENDIX A

**RIVERS AND LAKES HISTORICALLY LEASED**

<b>DATE</b>	<b>RIVER OR LAKE</b>	<b>LEASE PURPOSE</b>
<b>1912</b>	Columbia River	Purpose unknown (application may not have been granted)
	Summer and Abert Lakes	(Note: lease may be based on lakes as indemnity lands)
<b>1920</b>	Blind Slough	Drive piling (logging co.)
	Umpqua River	Sand & Gravel removal
<b>1923</b>	Columbia River	Pilings and dolphins
<b>1925</b>	Columbia River	Fishing
<b>1931</b>	Lake Tahkenitch	"Permission" to drive piling to moor a boat house
	"Tide lands"	Fishing
<b>1938</b>	Summer Lake	Unknown
<b>1939</b>	"Pillar Sands"	Fishing
	Guano Lake	Unknown
	Summer Lake	Agriculture
<b>1940</b>	Columbia	Fishing
	Blue Joint Lake	Unknown
	Round Lake	Unknown
<b>1947</b>	Alsea River	Log boom site
	Hart Lake	Farming and grazing
	Anderson Lake	Farming
	Loon Lake	Log dump and loading dump
<b>1948</b>	Columbia River	Wharf
	Siltcoos Lake	Boats for hire resort
	Siletz River	Noncommercial use

DATE	RIVER OR LAKE	LEASE PURPOSE	
<b>1949</b>	Lake Tahkenitch	Resort	
	Siltcoos Lake	Log dump	
	Fisher Lake	Farming	
	Yamhill River	Log Dump	
	Smith River	Log Dump	
	Mercer and Loon Lakes	Boat for hire resorts	
	Goose Lake	Oil Drilling	
	Siletz River	Unknown	
	Alsea River	"Permit" for cable footbridge	
	Youngs River	Logging use	
	Walluski River	Logging use	
	John Day River	Boat moorage	
	Siuslaw River	Log dump	
	John Day River	Logging use	
	Columbia River	Boat for hire dock	
	<b>1950</b>	Necanicum River	Tidewall
		Youngs River	Logging use
Columbia River		Piling and dolphin	
Crump Lake		Farming	
Fisher Lake		Farming	
Columbia River		Grazing	
Tenmile Lake		Use by a mill	
Siletz River		Ferry crossing site/log basin	
Suttle Lake		Boats for hire	
Siuslaw River		Log slip and dump	
Columbia River	Moor yacht		

DATE	RIVER OR LAKE	LEASE PURPOSE
	Clear Lake	Boat moorage
	Youngs River	Log storage and booming
	Rogue River	Highline for logging
	Yamhill River	Logging purposes
	Siltcoos Lake	Boat moorage
<b>1951</b>	Columbia River	Dock for tugs and barges
	Big Lake	Boat moorage
	Siuslaw River	Logging purposes
	Siletz	Logging purposes
	Ten Mile Creek	Commercial dock and piling
	Round Lake	Unknown
<b>1952</b>	Schofield River	Logging purposes
	Crump	Unknown
	Garrison	Logging purposes
	Lewis & Clark River	Logging purposes
	Columbia River	Commercial boat moorage
<b>1952</b>	Fiddle Creek	Logging purposes
	Devils Lake	Stakes in bed for race course
	Tenmile Lake	Boat moorage
<b>1953</b>	Siltcoos andTahkenitch Lakes	Anacharis densa weed harvest
	Siltcoos River	"Private use"
	Yamhill River	Logging purposes
	Smith River	Logging purposes
<b>1954</b>	Rogue River	Removing logs from river
	Siletz River	Boat operation
	Big Nestucca	Unknown

<b>DATE</b>	<b>RIVER OR LAKE</b>	<b>LEASE PURPOSE</b>
	Siltcoos River	Logging purposes
	Siletz River	Logging purposes
	Loon Lake	Dock for loading lumber
<b>1955</b>	Smith River	Log dump
	Siletz	Log holding pond
<b>1956</b>	Franz Creek	Logging purposes
	Siuslaw River	Boat moorage
	Ten Mile Lake	Logging purposes
<b>1957</b>	Umpqua River	Boat moorage
	Eel Lake	Sawmill
<b>1971</b>	Clear Lake	Boat moorage
<b>1978</b>	Coos River/Coos Bay	Log rafts
<b>1979</b>	Millacoma River, Coos Bay, Coos Cooston Channel	Log rafts



APPENDIX B

**WATERWAYS SUBJECT TO HISTORICAL EASEMENTS**

<b>DATE</b>	<b>RIVER OR LAKE</b>	<b>LEASE PURPOSE</b>
<b>1911</b>	Lake Creek	Railroad bridge
	Siuslaw River	2 railroad bridges
	Willamette River	Railroad bridge
	Lake Siltcoos	Railroad bridge
	Lake Takenitch	Railroad bridge
	Umpqua River	Railroad bridge
<b>1914</b>	Schofield Creek	3 railroad bridges
<b>1918</b>	Columbia River	For OR, WA RR & Nav. Co.
<b>1927</b>	Lake Ewauna	Railroad bridge
<b>1930</b>	Link River	Railroad bridge
<b>1931</b>	Columbia Slough	Power lines
	Bybee Lake	Power lines
	Oregon Slough	Power lines
	Columbia River	Power lines
	Lake Ewauna	Railroad bridge
<b>1940</b>	Willamette River	Place high line across
	Siuslaw River	Water pipeline
	Columbia River	Power lines
<b>1941</b>	Clackamas	(to BPA)
<b>1942</b>	Little Sturgeon, Mouse Island and Marquam Lakes	Drainage ditches
<b>1944</b>	Santiam River	Power line
<b>1945</b>	Columbia River	Submarine cable crossing
	Big Elk and Yaquina Rivers	Power Line crossings
<b>1948</b>	Willamette River	Power line

<b>DATE</b>	<b>RIVER OR LAKE</b>	<b>LEASE PURPOSE</b>
<b>1949</b>	Snake River	Pipeline
<b>1950</b>	Siuslaw River	Pipeline
<b>1952</b>	Link River	Unknown
	Willamette Middle Fork	Unknown
<b>1968</b>	Umpqua River	Scenic easement on 4 islands
	Hawk Creek	Footbridge
<b>1970</b>	South Waterway-man-made canal of "D" River	Sewer line
<b>1971</b>	Alsea River	TV cable crossing overhead
	Big Nestucca River	Pipeline arch bridge
<b>1978</b>	Little Nestucca River	Bridge
	Trask River	Sewer outfall
<b>1979</b>	Youngs River	Bridge
	East Fork of Coquille River	Bridge
	Skipanon River	Railroad bridge easement
	Bear Creek	Bridge
<b>1980</b>	Hood River	Bridge
	Dean Creek	Bridge
<b>1981</b>	Schooner Creek	Sewerline easement
	Yamhill River	Intake easement
	Oar Creek	Bridge
	Nehalem River	Bridge
<b>1982</b>	Tualatin River	Pipeline crossing
	A'D" River	Pipeline
	Smith River	Bridge
<b>1984</b>	Big Nestucca River	Bridge
	Noel and Eslick Creeks	Bridges

DATE	RIVER OR LAKE	LEASE PURPOSE
<b>1984</b>	Coquille River	Bridge
	Necanicum River	Pipeline
	Neawanna Creek	Water line
<b>1988</b>	Klamath River	Television and telephone
	North Tenmile Lake	Communication cable
	Tualatin, Calapooia, Santiam Rivers	Fiber optic cable crossing
<b>1989</b>	Nehalem River	Gas pipeline
	North Umpqua	Fiber optic cable
<b>1991</b>	Marys River	Bridge
	Santiam River	Bridge
	Nestucca River	Bridge
	Sandy River	Sewer outfall
	John Day, Williamson and Lost Rivers	Gas pipelines

## APPENDIX C

# **ASSERTIONS REGARDING NAVIGABILITY**

**June 7, 1907**

**Attorney General Opinion  
Deschutes River**

Attorney General stated his opinion that the Deschutes River would be navigable between the points mentioned based on the given facts. However, the written opinion did not describe those points on the river nor relevant facts.

**August 4, 1908**

**Hume v. Rogue River Packing Company, 51 Or. 237 (1907) affld 96 P 865 (1908)  
Rogue River**

The Oregon Supreme Court affirmed per curiam the decision of the lower court. That court held that the Rogue River is navigable in fact for several miles above tide water. p. 242. "The evidence herein shows conclusively that Rogue River is navigable in fact for boats of small tonnage for some distance above the fishery claimed by plaintiff, and is therefore, a navigable stream in a legal sense as well as in fact; and all the right at common law incident to navigable waters attach, and by reason thereof it is a public highway, where all the people of common right may go, and *prima facie* have a common right to fish." pp 245 - 246. (The area at issue was RM 0 - 18.)

**1908**

**Oregon v. Portland Gen. Elec. Co., 52 Or. 502 (1908)  
Willamette River**

"The Willamette River is a public navigable stream, a public highway, the title to the bed and banks of which is in the State for the benefit of the Public." p.530.

**1912**

**Micelli v. Andrus, 61 Or 78 (1912).  
South Umpqua River**

"The testimony fully supports the finding made by the trial court to the effect that the South Umpqua River, at the place indicated (in Roseburg) is a nontidal, unnavigable stream, though it had been used at time for floating logs and wood.", p.82.

**June 26, 1919**  
**Attorney General Opinion**  
**Siltcoos Lake**

The Attorney General assumed Siltcoos Lake was navigable based on information from people claiming to know. Consequently, the State would own to the high water line and land could be sold by the usual rules.

**October 17, 1919**  
**Attorney General Opinion**  
**Fairview Lake**

The opinion stated that Fairview Lake was navigable and the bed belonged to the State.

**April 9, 1921**  
**Attorney General Opinion**  
**Santiam River**

The opinion stated that the Santiam River is not a navigable stream, and the Board did not have authority to grant a sand and gravel lease.

**November 28, 1923**  
**11 Op Atty Gen 489**  
**North Yamhill River**

The opinion noted that the Oregon Supreme Court, in Trullinger v. Howe, 53 Or. 224, held that the North Yamhill River was navigable or floatable for logs for 10 to 12 miles during winter months.

**January 13, 1926**  
**12 Op Atty Gen 489**  
**North Umpqua River**

The opinion noted that the Oregon Supreme Court held that the South Umpqua River is not navigable. The opinion then stated that the North Umpqua River appeared to be similar to the South Umpqua River, and consequently the North Umpqua River was not navigable. Note: OP-5431, 2/8/83, stated that the Division would not be prevented from asserting that the river was navigable due to this opinion.

**December 26, 1929**  
**14 Op Atty Gen 431**  
**McKenzie River**

The opinion stated "I do not understand that the McKenzie is a navigable stream in the sense that the title to the bed thereof is vested in the state although it may be floatable and therefore navigable, in a qualified sense."

**November 12, 1932**  
**Smith v. Meier, (Judgment Roll No. 25643)**  
**Clackamas River**

In a suit filed against the Governor, Secretary of State and State Treasurer, comprising the State Land Board, the Circuit Court of Oregon for Clackamas County found that the Clackamas River was not navigable at a point defined as tracts 0 and R "Clackamas Riverside." The Attorney General recommended granting quitclaim deeds.

**April 26, 1939**  
**State Land Board Minutes**  
**Devils Lake**

The Clerk stated that Devils Lake was a navigable lake. Accordingly, the Board authorized the Clerk to have owners of boat houses notified that the Board would not permit moorage on the lake bed.

**December 3, 1941**  
**20 Op Atty Gen 485**  
**Marquam Lake**

The opinion stated that the Clerk had stated that the State Land Board claimed title to the bed of Marquam Lake based on its sovereignty.

**1941**  
**Darliner v. Christensen, 166 Or 17 (1941).**  
**Siltcoos Lake**

"Siltcoos Lake is a navigable water body. ... Title being in the state of Oregon. p. 30.

**March 5, 1946**  
**22 Op Atty Gen 409**  
**Rogue River**

The opinion found the Rogue River not to be navigable for title purposes at a point 7 or 8 miles west from Grants Pass.

**April 28, 1947**  
**23 Op Atty Gen 198**  
**Tualatin River**

The opinion found that the Tualatin River is not navigable, except for certain limited purposes, and that title to the river bed was in the riparian owners. The answer was based on Shaw v. Oswego Iron Co.

**June 10, 1947**  
**23 Op Atty Gen 249**  
**Clackamas River**

The opinion held that the Clackamas River was navigable in a qualified sense, in that it was capable of floating small skiffs and boats for pleasure purposes. However, title of the bed was determined to be in the riparian owners and not the state. Note: OP-5431, 2/8/83, stated that the Division would not be prevented from asserting that the river was navigable due to this opinion.

**August 6, 1947**  
**State Land Board Minutes**  
**Summer and Abert Lakes**

The Board directed the Clerk to notify a lease applicant that Oregon claimed ownership of the beds of Summer and Abert Lakes. However, it is unclear if this claim was based on navigability or on the selection of adjacent indemnity lands.

**March 3, 1952**  
**State Land Board Minutes**  
**Middle Fork of the Willamette River**

The Clerk noted that navigability had not been adjudicated for the Willamette. The Clerk's opinion was that the river was not navigable for title.

**May 14, 1959**  
**State Land Board Minutes**  
**Santiam River**

The Land Board Staff determined that the Santiam River was navigable; accordingly, the Highway Department paid \$38,498 in royalties for gravel it had removed from below the high water mark on the river.

**December 24, 1959**  
**29 Op Atty Gen 311**  
**Slusher Lake**

The opinion stated that Slusher Lake was "qualified navigable." The title to the bed was determined to be in the upland owners and the public had an easement which included the right to hunt.

**July 18, 1969**  
**State Land Board Minutes**  
**Windsor Slough**

The Director reported that Windsor Slough was a nonnavigable portion of the Willamette River.

**August 21, 1972**  
**36 Op Atty Gen 61**  
**Tualatin River**

The opinion stated that the Tualatin River had been determined not to be navigable by application of a test which did not conform to the federal navigability test. Additionally, the facts present to the court in Shaw v. Oswego Iron were probably sufficient to satisfy the federal test of navigability for title.

**November 13, 1974**  
**State Land Board Minutes**  
**Triangle Lake**

The Division staff gave the opinion that Triangle Lake should be considered navigable, and was covered by SJR 3, 1973 session.

**August 1, 1975**  
**State Land Board Minutes**  
**Rogue River**

The Board adopted a permanent rule that the Rogue River was a navigable river from its mouth to Grave Creek (RM 68.4).



**July 6, 1976**  
**State Land Board Minutes**  
**McKenzie River**

The Board approved the Division's declaration that the McKenzie River is a navigable river from its confluence with the Willamette River to a point known as Dutch Henry Rocks, at approximately RM 37.

**1977**  
**Corvallis Sand & Gravel v. State Land Board**, 429 U.S. 363 (1977).  
**Willamette River**

The U.S. Supreme Court stated that the Willamette River is navigable, although this was not the issue in the case.

**December 8, 1976**  
**State Land Board Minutes**  
**Umpqua River**

The Board adopted Administrative Rule 141-81-050(3) which declared that the Umpqua River is a navigable river from its mouth to the head of tidewater near Scottsburg, at approximately RM 28.

**1982**  
**Oregon v. Riverfront Protection Association**, 672 F.2d 792 (9th Cir. 1982).  
**McKenzie River**

Oregon sought declaratory judgment that McKenzie River was navigable from to at the time state was admitted to the Union. The Court of Appeals for the Ninth Circuit held that the river was navigable when Oregon was admitted to the Union and, accordingly, title to the river bed was vested in the state.

**December 18, 1986**  
**State Land Board Minutes**  
**Klamath River**

The Board declared the state was the sovereign owner of the bed and banks of the Klamath River from Keno, at RM 233, to the California border.

**1994**  
**Oregon v. Tidewater Contractors, Inc.**, Order on Motion for Summary Judgment,  
Aug. 10, 1994, U.S. District Court, Oregon.  
**Chetco River**

"At the time the state of Oregon was admitted to the Union of the United States of America on February 14, 1859, it became title owner of the bed and banks, below the ordinary line of high water, of the Chetco River, up to at least RM 11.11. "Irrespective of title, submersible lands are subject to the state's sovereign control and are to that extent public lands."

**APPENDIX D**

**NAVIGABILITY PROCESS**

<b>DATE</b>	<b>CHRONOLOGY OF DSL RESPONSE TO SENATE BILL 930</b>
May 19, 1981	Land Board voted to suspend hearings (SB 930 was still in Legislature)
June 22, 1981	Zajonc presented preliminary plan for process to Land Board at breakfast meeting. Sponsors of SB 930 were notified and several attended.
July 22, 1981	At regular Board meeting, Zajonc presented suggested program for completing process, including information meetings and SB 930/OAR hearings. Board authorized request to E-Board for expenses of navigability process.
Oct. 1, 1981	E-Board reviewed and approved request.
Oct. 19, 1981	Navigability program update was included in printed agenda at Land Board meeting at Astoria. Program was not discussed because of lack of time. Video presentation was shown to a few interested persons after meeting.
November	Letter to sponsors of SB 930 outlining program.
Nov. 10, 1981	Land Board again reviewed program and authorized proposed rule for hearings.
Nov. 17 to Dec. 9, 1981	Eight informational meetings were held to explain the program. preceded by paid display ads and news releases. News releases with cover letter were sent to legislators in affected areas.
Dec. 22, 1981	Copies of all hearing notices were sent to sponsors of SB 930.
Dec. 4 - 22, 1981	Notices mailed to riparian owners for all hearings. 1757 pieces mailed. News releases sent to newspapers, including non-affected areas.
Feb. - March, 1982	Reminder display ads and news releases sent to papers in affected areas. Notices sent to legislators in affected areas. Reminder notice published in Secretary of State's bulletin and sent to general mailing list (not to property owners).
Nov. - March, 1982	Staff answered mail and phone inquiries and sent out information as requested.