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OPINION

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Re: Wilbur Hardy et al. vs. Oregon State Land Board

Dear Parties,

This matter came before the Court on April 5, 2010, on petitioner and respondents cross motions for partial summary judgment. Petitioner represented by attorney Beverly Pearman and Amy Edwards, respondent represented by attorney Matthew Donohue, Interveners Northwest Steel Rogue Riverkeeper and Northwest Environmental Defense, represented by attorney Thane Tienson. The Court having heard the parties' argument reviewed the briefs and responsive briefs filed in the matter and supporting documents together with the 142 exhibits submitted by respondent and 25 exhibits submitted by petitioners finds as follows:

Because of the number of issues which were raised by the parties a brief summary of the respective positions is appropriate.

Respondent moved initially for summary judgment contending six grounds to support their position: 1) Petitioner waived the right to contest the underlying navigability study by not filing for judicial review within 60 days of the final order of October 12, 2004. 2) The State Land Board's final order authorizing the navigability study of river miles 68.5 to 157.5 (hereafter subject portion) complies

with requirements of law and is supported by substantial evidence. 3) Petitioners have not pled sufficient facts to challenge the reliability of the information the Department of State Lands relied on in determining the subject portion of the Rogue River is navigable. 4) State Land Boards declaration of ownership of the subject portion of the Rogue River is consistent with legal requirements governing determination of navigability and supported by substantial evidence. 5) State Land Boards declaration of ownership doesn't create an unconstitutional "taking" of private property. 6) The State Land Boards declaration of ownership is sufficiently concise as to comply with requirements of OAR 141-121-0040(3).

Petitioner's reply that respondents Motion for Summary Judgment is not appropriate on any of these matters and move for partial summary judgment on their own petition in the following particulars. Petitioners without waiving the other challenges to the State action contend the declaration of ownership does not comply with the requirement of ORS 274.408(1)(a) and OAR 141-121-0040(3)(b) in that it is not a concise identification or description of private and public property boundary lines. Petitioners next argues that the State's declaration of ownership would allow the State to acquire title to "formerly submerged" and (dry land) as well as submerged and submersible land. The petitioners contend this is not permitted by statute ORS chapter 274 and is time barred.

Both parties have submitted voluminous responsive briefs to counter the others position. Before addressing both parties Motion for Summary Judgment in the order set out above, the Court needs to determine the standard of review that applies here as the parties disagreed even on this.

Petitioners who are both responding to respondent's Motion for Summary Judgment and moving for partial Summary Judgment on their claims take the position that the Courts' role is simply to apply the summary judgment standard for review as set out in ORCP 47C. In other words, petitioner argues the Courts' role is to determine if there is a disputed issue of material fact and if not, the moving party is entitled to judgment as a matter of law.

Respondents disagree with this analysis and take the position that the Courts' scope of review on all matters is controlled by ORS 183.484.

The respondent argues that for the most part the Court is only to determine if the agency action is supported by substantial evidence. The Court is also to determine if respondents' final order violates any provision of the State or Federal constitution according to respondent.

The difference in these two analysis are significant in that petitioners would like the Court to "compare" the parties factual positions on the subject issues to see if they are "disputed," whereas respondent would simply have the Court determine if the earlier agency record is supported by "substantial evidence" without any further comparison of petitioners' factual challenges.

The law is well settled that judicial review of an agency administrative order does not allow the Court to “weigh” or compare the parties’ evidence. The standard as articulated by case law requires the Circuit Court to review the record to determine if there is substantial evidence that would permit a reasonable person to make the determination made by the agency. Garcia v. Boise Cascade Corporation 309 Or 292 (1990), Norden v. State of Oregon 329 Or 641 (2000). In fact the Courts have expressly declared the summary judgment standard is not to be used in the Circuit Court’s review of an agency action, Powell v. Bunn 185 Or App 334 (2002).

Applying the “substantial evidence” standard to the issues presented here (as well as additional recognized legal principles) the Court finds as follows:

Respondent’s 6 issues for Summary Judgment:

- 1) Respondent’s 1st motion contends petitioner waived the right to contest the agency navigability study ordered October 12, 2004, by not filing for judicial review within 60 days of the final order. The Court orders this motion granted. The order authorizing the navigability study was a final order. The board followed its statutory mandate ORS 274.404(2)(9) and the applicable regulations including OAR 141-121-0020. Among other things the procedures for allowing notice and extensive opportunity to be heard before the decision is made to undertake the study and the lengthy time-consuming and expensive procedures for conducting the navigation study, persuade this Court that the legislature did not intend for persons dissatisfied with the decision to conduct the study to sit on their rights to object for a period of years rather than a period of weeks or months. The Court orders that all questions associated with the October 12, 2004 order, including the findings of broad and substantial interest in having a navigation study conducted, are time barred.
- 2) Respondent contends the State Land Boards’ final order authorizing the navigability study of the subject portion of the river complies with requirements of law and is supported by substantial evidence. In light of the Court’s finding that petitioner’s challenge to the October 12, 2004 order is time barred, this portion of the State’s motion is moot.
- 3) Respondent contends petitioners have not pled facts sufficient to challenge the reliability of the information the Department of State Lands relied on in determining the subject portion of the Rogue River navigable. The Court orders this motion denied. Regardless of whether or not petitioner’s ultimately succeed in their claims their petition is pled sufficiently to withstand the Rule 21 Motion to Dismiss and this portion of the State’s motion is denied.
- 4) Respondent contends the State Land Board’s declaration is consistent with State and Federal law governing determination of “navigability” and supported by substantial evidence. This issue is clearly at the heart of the

matter and requires the most analysis of the agency record. Any determination of this issue requires the Court to find and state the law defining navigability as it has been construed in other cases. The Court then will apply the evidence from the record at the agency level to determine if there is substantial evidence to support the agency conclusion.

A river is considered navigable when it is navigable in fact. That is "...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...", The Daniel Ball, 77 US 557, 563 (1870). The parties agree this determination is to be made by examining the river as it existed at the time of Oregon's statehood (02/14/1859), US v. Oregon, 295 US 1, (1935). US v. Utah, 283 US 64 (1931), The Daniel Ball Id.

The test isn't limited to actual use but can also include "susceptibility" to use or "capacity to carry travel and trade," US v. Utah, 283 U.S. 64 (1931).

It is also well recognized that navigability may be determined for a portion of a river and not its entire length. US v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 699 (1899), US v. Appalachian Electric Power Co., 311 U.S. 377, 410 (1940), Loving v. Alexander, 548 F Supp. 1079, 1086 (1982).

A review of the facts generated in the agency record and applied to these established legal principles will determine if substantial evidence exists to support the State Land Board's declaration of ownership.

Respondent's exhibit 6 (agency record) as included in respondent's Motion for Summary Judgment contains the most information on the subject. The Court has cited to particular page references of respondent's exhibit 6 to assist in evaluating the extent and the location of activity of the study section. (Respondent contends the entire study section Rogue River mile 68.5 to 157.5 is all navigable). Pages 20, 55 and 56 of exhibit 6 reference the use of "canoes" from approximately Evans Creek (mile 110) downriver to Graves Creek (mile 68.5) of the study section. There is one reference to a canoe on page 56 near Table Rock (mile 130). Page 20 refers to a difficult "portage" near Graves Creek (mile 68.5). There is a reference to log rafts by Indians "upriver" from Table Rock (mile 130) on page 20 and 56.

The use of ferries was found from Hog Creek (mile 80) all the way upriver to what is now Shady Cove (mile 145), pages 20 and 65. It is important to note however that ferries provide evidence that a river is more an "obstruction" to commerce which must be overcome, than evidence the river was itself used for commerce, State of North Dakota ex rel. Bd. of University and School Lands v. US, 770 F Supp 506 aff'd, 972 F2d 235 (1992). Ferries have been referred to like a bridge or rail trestle whose primary purpose is to avoid the river rather than use it. US v. Crow, Pope & Land Enterprises Inc., 340 F Supp 25, 35 (1972) app dismissed 474 F2d 209 (1973). The Court concludes here that ferries work against navigability.

The agency evidence confirms wooden boats were used from the mouth of the Rogue River as far upriver as Evans Creek (mile 110) (pages 20 and 81 of exhibit 6). The river from approximately Hog Creek (mile 80) to Grants Pass (mile 100) was reported to be used for drift boat fishing (pages 20 and 66). The agency record reveals between 1869 and 1894 three boat trips occurred, hauling people and goods from Grants Pass downriver (pages 20, 59 and 60). There are multiple reports of attempts to float logs but none met with much success. In 1880 an attempt from Grants Pass to Gold Beach was unsuccessful (page 67). In 1889 several discussions occurred, to enable this to occur (granting rights and preparations) but no evidence this activity actually occurred (pages 67 and 68). Two log drives (with difficulty) from Peyton Bridge to Gold Ray (pages 20 and 68) (mile 157.5 to 120). There is evidence mining occurred and supplies were transported from approximately Grants Pass (mile 100) downriver to Gold Beach (page 61, 62, 63 and 64).

These specific activities are also supplemented by multiple journal or diary excerpts of the period from scientific and exploratory expeditions. The record includes the journal of Captain Cram, who concluded the lower portion of the Rogue River as the only navigable part of the river (page 39). U.S. Army Engineer Eastwick concluded in 1878 and 1879 that the river was navigable from miles 35 to 70 and mile 90 to 120 (page 41 and 61). Engineer Shrunk concluded navigability was out of the question from approximately mile 105 to Gold Beach (page 41).

Maps and surveyor notes from 1854-1919 taken from surveyors conducting their cadastral surveys find the river utterly devoid of any reports of usage (page 41 and 42). There are also reports that changes in the river would be required to make the river navigable (page 62 and 63).

Finally it has been considered noteworthy in any navigability study, how far and fast the river drops over its course. Sharp drops clearly make navigability difficult. Between Robertson Bridge (mile 86) and Shady Cove the drop is 7.5 feet per mile, while it's much steeper above Shady Cove. Downriver from Robertson Bridge the drop is approximately 10 feet per mile (page 36).

A chart starting at Gold Beach (mile 0) and diagramming to mile 157.5. was constructed noting the above references together with other references from the agency record herein, which reveals a clear picture of the navigability evidence for the study section. This picture shows a rather startling contrast, which is that the Rogue River from Grants Pass (mile 100) to Gold Beach (mile 0) has an extensive record of usage supporting a finding of navigability while the record of usage from Grants Pass (mile 100) upriver to what is now Lost Creek Dam (mile 157.5) was almost entirely without any such recorded evidence of usage for any purpose related to navigability. The Court cannot help but conclude therefore that the upper portion of the Rogue River was neither used or susceptible to use for travel and trade in the period of Oregon's statehood 1859. More specifically the Court determines there is not substantial evidence in the agency record to support a finding of navigability for this portion of the river.

The Court therefore determines that the portion of the study section of the Rogue River from mile 68.5 to mile 100 is navigable as supported by substantial evidence from the agency record but there is not substantial evidence from the record to support a finding of navigability from mile 100 upriver to mile 157.5. The Court therefore finds the agency declaration of navigability doesn't comply with State or Federal law and is not supported by substantial evidence. Respondent's motion on this point is therefore denied.

- 5) Respondent contends the declaration of ownership does not constitute an unconstitutional taking. Because the Court has determined that there is a lack of substantial evidence to support the agency finding of navigability, as set out above this point is now moot. Clearly without sufficient evidence to support "navigability" over the stretch of river covered by the declaration, the State cannot declare ownership or "take" property in any fashion. Respondent's motion is therefore denied.
- 6) Respondent contends finally that the declaration of ownership by the State Land Board complies with the requirements of OAR 141-121-0040(3). Although not relied on by respondent the requirements of ORS 274.400-274.412 need to be satisfied as well.

To begin the respondent's Motion for Summary Judgment on this issue fails because the Court has determined a significant portion of the study section was not navigable as determined by the record of the agency. To the extent this may be an issue later however, it should be noted, that even if all the study section was determined navigable, the declaration ultimately presented and approved by the State Land Board on June 10, 2008 is woefully insufficient. The declaration, after stating the entire study section is navigable states in subparagraph (3)

"The State of Oregon owns all rights, title, and interest in and to the lands located below the line of ordinary high water (as defined in OAR 274.005) along the 89-mile study segment of the Rogue River, unless lawfully granted or conveyed by the state since statehood on February 14, 1859, and as affected by the principles of accretion, erosion, and avulsion."

This description cannot possibly be interpreted as satisfying the language of ORS 274.408(1)(a) which requires the declaration,

"Describe the land or waterway affected and the nature and extent of the state's claim. Such notice need not describe the land or waterway in legal terms, but by the use of common descriptions or maps shall be designed to identify the land or waterway in a manner intelligible to the layperson and useful in establishing the exact location of the state claim in relation to existing legal descriptions." (emphasis added)

The declaration here refers to the “ordinary high water ... on February 14, 1859 ... as affected by the principle of accretion, erosion and avulsion.” Declaration page 2 (page 149, of exhibit 6 respondent’s Motion for Summary Judgment).

This language could hardly be described as an “exact location” as required by the statute. At best and this is probably being generous the language might be construed as more of a starting place to determine a location thru other mechanisms at a later date. In fact counsel for respondent essentially admitted as much during argument herein. Clearly the statute requires much more and the idea that this should be “worked out” so to speak with the property owners on an individual basis down the road doesn’t begin to satisfy the specificity required by the law. Respondent’s Motion for Summary Judgment here is also denied.

The Court now turns to petitioners Motions for Partial Summary Judgment. Petitioner challenges the State Land Board’s declaration contending it does not comply with ORS 274.408(1) (a) and OAR 141-121-0040(3)(6).

As the Court stated above the declaration of the State Land Board does not satisfy the requirements of the law and is therefore insufficient. The State takes the position that it is free simply to tell the private property owners and users of the river that it is sufficient merely to say in some vague fashion, “We (the State of Oregon) own some of this land,” but is likewise free to defer to some later date and later process the determination of where this land is actually located. As stated above, the law clearly requires much more and since the law states a lay person should be able to identify the location of the State’s claim (OAR 141-121-0040(3)) this declaration is woefully insufficient.

A review of the agency record reveals that the whole idea behind the request for this navigability study in the first place and the State’s determination of the property it controls was to clearly identify the property boundaries for all who use the river and the private property owners who abut it. This declaration does nothing to assist that effort and may arguably make it more confusing to all concerned. One can only imagine the challenges to each individual property owner in determining first, the high water mark of the river in 1859, and second the changes in the river from accretion, erosion and avulsion. The State contends that each private property owner (or river user?) will be left to make this determination and this is permissible under the statutory language of ORS 274-408(1). This confusing situation cannot be what was envisioned when the study was requested, and is not permitted under Oregon law at any rate. Petitioner’s Motion for Summary Judgment on this issue is therefore granted.

Finally, petitioners contend the State’s declaration of ownership as described above would allow the State to acquire title to “formerly submerged” as well as submerged and submersible land. Petitioners contend this is not permitted under ORS Chapter 274 and is time barred. Because the Court has determined the declaration itself is invalid this may now be a moot point, however, some discussion of the issue is still warranted.

The petitioners make the point that ORS 274.960 was enacted to allow the State to determine ownership of "formerly submerged" lands as opposed to ORS 274.400 – 274.412 which is being used here. ORS 274.960 clearly was designed to deal with lands considered to be formerly submerged. The State's declaration herein was of course made pursuant to a different statute, ORS 274.400 – 274.412 and is being used to include a declaration of State title to lands currently as well as formerly submerged. Petitioner argues that because the legislature enacted ORS 274.960 to deal specifically with formerly submerged land, they clearly understood how to include formerly submerged land in a statute if they wanted to. The Court determines that since formerly submerged land is not included in ORS 274.400 – 274.412, the legislature did not intend to give authority to the State to claim this type of land in this statutory scheme. Since such lands were not included in ORS 274.400 – 274.412 the declaration in this case cannot be used to claim such lands, and for this reason the declaration also fails. Since an application of the States' admittedly vague declaration would most certainly include a declaration of State title to formerly submerged lands, this declaration cannot be enforced. The Court feels that any proposed declaration would be required to claim title only to land lying between the high and low water marks of the river. Petitioner's Motion for Summary Judgment is therefore granted on this point as well.

The Court would like petitioner to prepare an order that complies with this opinion. The Court further will allow the parties to the extent they deem necessary to proceed to trial on any remaining issues.

Sincerely,

Ron Grensky
Circuit Court Judge

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