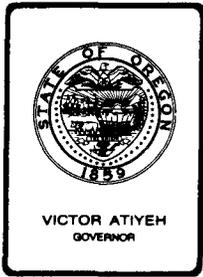


**REPORT AND RECOMMENDATION  
on the  
NAVIGABLE WATERS OF OREGON**

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DIVISION OF STATE LANDS  
JANUARY 1983

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## *Division of State Lands*

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OREGON STATE  
LAND BOARD

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### *To The 62nd Legislative Assembly*

*The issue of navigability is one of the most controversial subjects to be discussed by the 1983 Legislature because it involves two critical matters: Land and water. Both are controversial independently; much more so when taken together.*

*In reviewing the subject of navigability, the question is often asked, "Why is the State of Oregon determining the ownership of the beds and the banks of Oregon's streams or lakes?" As we answer this question, we will begin to identify some of the advantages and disadvantages of public ownership. Advantages: Public access and ability for the general public to use the beds and the banks of a stream or lake; public ownership of natural resources such as oil, gas, gold, sand and gravel; control of the use of the beds and banks for commercial development; Disadvantages: The claiming of land which riparian owners feel is theirs and has been a part of their family for years; the responsibility of the State in becoming a riparian owner in a community; the public's frustration with and its perception of the State as it apparently attempts to "take" land and water.*

*There are many issues which will affect the decisions which the Legislature must make. This document is designed to provide you with a historical background on*

*the issue of navigability, to explain the federal test of navigability, and to bring you up to date on the McKenzie decision and the State's current position on navigability.*

*To assist you, we have summarized the many volumes of information on navigability obtained during the past 13 years. This is outlined as it applies to each river and lake under consideration. An executive summary has been prepared which will further direct you on how to use this report. You will find the State's summary of evidence of navigability, the summary of public testimony, and the Division of State Lands recommendation for each river and lake.*

*The State Legislature should work toward a State definition of navigability based on sound historical data, common sense, and a practical application of the law. The longer this issue is discussed, the more ambiguous the findings, the greater the frustrations in the community and the likelihood of a poor decision. I strongly recommend that a decision be made in 1983 and this issue resolved to the best of our abilities and in the best interest of the State.*

A handwritten signature in black ink, appearing to read "Ed Zajonc". The signature is stylized and cursive, with a large initial "E" and "Z".

*Ed Zajonc, Director  
Division of State Lands*

## EXECUTIVE SUMMARY

The question of navigability is one of the most difficult issues that will be faced by the 1983 Legislative Assembly. This report presents the Division's position on navigability. This developed from the history of the State's administration of its properties in submerged and submersible lands, Federal laws governing the subject, Legislative directives during recent years, historical investigation, and public hearings during 1981 and 1982.

The first part of the report narrates the history of Oregon's ownership of tidelands and the beds of navigable rivers and lakes. Federal court decisions governing claims of navigability and consequent ownership are also set forth and discussed in Section I.

The main body of the report deals with the rivers recommended for a declaration of navigability. They are listed alphabetically. Each presentation contains an outline of the State's position, a summary of the testimony received at the hearings with Division comments and a resultant recommendation. Hearing testimony generally dealt with one or more of these areas of navigability: vessel traffic, log drives and commercial tourism. Evidence and testimony upon each type of navigability has been segregated under each river and labeled in the margins for easier reference.

Part three contains information on the meandered lakes of Oregon that the Division believes may qualify as navigable waters.

Any person having questions about this report or other matters dealing with the navigability issue may contact:

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## TABLE OF CONTENTS

	<u>Page</u>
Introductory Letter	
Executive Summary	i
<b>I. BACKGROUND</b>	
A. <u>ADMINISTRATIVE</u>	
History of State Ownership	1
Recent Legislative and Administrative Developments	3
Meandering and the Argument of State Taking Property Without Compensation	5
Critique of Corps of Engineers List of Historically Navigable Rivers	7
Potential Benefits	8
B. <u>FEDERAL LEGAL PRECEDENTS</u>	
Tidelands and Navigable Rivers and Lakes	9
The McKenzie Decision	12
The Issue of Commercial Tourism	13
<b>II. MEANDERED NAVIGABLE RIVERS RECOMMENDED FOR NAVIGABILITY DETERMINATIONS</b>	
A. Common Points of Testimony	17
B. Specific Rivers	
Alsea	22
Clackamas	30
Columbia	37
Coquille Basin	38
Deschutes	54
Klamath Basin	58
McKenzie	68
Nehalem	72
Rogue	82
Sandy	92

	<u>Page</u>
Santiam	94
Siletz	100
Silvies	104
Siuslaw	108
Smith	114
Snake	118
Tillamook	120
Umpqua	122
Willamette and Middle Fork	126
Yamhill	132
C. Rivers that Were Not Meandered but had Navigable Use	136
D. Summary Table of Criteria for Claiming Nontidal Meandered Rivers	140

### III. NAVIGABLE LAKES

Clear, Lane County	143
Crater, Klamath County	143
Cullaby, Clatsop County	143
Devils, Lincoln County	143
Ewauna, Klamath County	144
Floras, Curry County	144
Goose, Lake County	144
Upper Klamath and Agency Lake, Klamath County	145
Lost, Hood River County	145
Mercer, Lane County	145
Odell, Klamath County	146
Oswego (original bed of Sucker Lake), Clackamas County	146
Siltcoos, Lane and Douglas Counties	147
Tahkenitch, Douglas County	148
Tenmile and North Tenmile, Coos and Douglas Counties	149
Wallowa, Wallowa County	149
Woahink, Lane County	150
Meandered Tidal Lakes	151
Others Susceptible of Navigation by Virtue of Recreational Uses	151

	<u>Page</u>
<u>Maps:</u> Reaches Affected by Various Criteria of Navigability	
Alsea	23
Clackamas	31
Coquille	39
Deschutes	55
Klamath Basin	59
McKenzie	69
Nehalem	73
Rogue	83
Sandy	31
Santiam	95
Siletz	101
Silvies	105
Siuslaw	109
Smith/Lower Umpqua	115
Middle Umpqua Basin	123
Upper Willamette Basin	127
Yamhill	133
 <u>Appendices</u>	
A. Glossary of Terms	153
B. Oregon Admissions Act, 1859	156
C. U. S. Ninth Circuit Court of Appeals Decision in <u>Oregon v Riverfront Pro-     tection Association</u>	157
D. Senate Bill 930 (ORS 274.029-274.032)	166
E. List of Division Navigability Studies	167

## I. BACKGROUND

### A. ADMINISTRATIVE

#### HISTORY OF STATE OWNERSHIP

The State of Oregon has owned the submerged and submersible lands of all tidal waters and beds of navigable rivers and lakes since it became a State on February 14, 1859. This is a result of the "equal footing" doctrine established by the U. S. Supreme Court in Pollard's Lessee v Hagan (3 Howard 212, 1845). This decision held that all new states admitted to the Union became the owners of the land beneath their navigable waters equally with the original 13 states. Furthermore the Oregon Admissions Act asserted that "all the navigable waters of the said state, should be common highways and forever free" (see Appendix B).

The Oregon State Legislature acted as owner of submerged and submersible tidelands when it passed the Tidelands Sales Acts in 1872 and 1874. They allowed riparian owners to purchase tidelands fronting their property from the State. These statutes were repealed in 1878, and the Land Board, then called "Commissioners for the Sale of School and University Lands", was given power to sell overflowed or submersible lands. In their minutes for April 26, 1881, the Commissioners adopted general rules for surveying parcels of tideland to be granted in the future. Further legislation in 1891 required the State Land Commissioners to sell tidelands of the Columbia River and Coos Bay. The requirement to sell tidelands was removed in 1907, but the Land Board has continued to sell and act as owner of Oregon's tidelands.

The Oregon Supreme Court, in a leading decision (Hinman v Warren, 6 Or 408, 1877) regarding a parcel of Columbia River tideland held:

tidelands - those that are uncovered and covered by the ebb and flow of the sea - belong to the State of Oregon by virtue of its sovereignty.

This doctrine was reaffirmed in successive decisions Bowlby v Shively, (22 Or 410, 1892) and Hume v Rogue River Packing Co. (51 Or 337, 4, 10, 11, 13; 1908) as well as an Attorney General's Opinion of 1891.

The position of Oregon on ownership is identical with that of Alaska which also claimed tidelands per se as public domain when it was admitted to the Union in 1959.

#### Navigable River Beds

The State of Oregon acted as owner of the submerged and submersible lands in the beds of tidal rivers in 1874 when the Legislature exempted owners along the Willamette from fees required in the 1872 Tidelands Act. During 1876 it extended this exemption to adjacent owners on the Umpqua, Coos and Coquille Rivers. All three statutes were repealed in 1878.

The Land Board was empowered to grant leases of submerged and submersible lands in 1907. At first these were granted in the mouth of the Columbia and other tidal reaches, but when they began to make leases in the bed of the Willamette, two Oregon Supreme Court cases resulted. State v Imlah (135 Or 66, 1931) and State v McVey (168 Or 337, 1942) extended the terms of the 1874 statute to the non-tidal portions of the Willamette. These cases and Land Board minutes indicate that the State has increasingly tried to obtain royalties for gravel removal and installation of pilings in navigable rivers during this century.

### Navigable Lake Beds

It was not until 1905 that the State acted by legislation as owner of navigable lakes. In that year it granted the beds of Tule, Goose, and the two Klamath lakes upon their drainage to the U. S. Reclamation Service for distribution to private owners. A statute of 1921 asserted the State's title to the beds of all meandered lakes. ORS 274.430 et seq continues to claim the beds of meandered lakes as State property and does not use navigability as a qualification. After 1947 there was increased effort by the Land Board to obtain royalties from moorage leases on Oregon lakes.

### RECENT LEGISLATIVE AND AMINISTRATIVE DEVELOPMENTS

In 1967 the Division of State Lands was created as the administrative arm of the State Land Board. It was anticipated that the expanded staff would more actively pursue State ownership of all lands under its jurisdiction to increase revenue for the Common School Fund and serve other public interests. From 1969 to 1972, a special Advisory Committee to the State Land Board recommended that the precise claims of ownership by the State in navigable waters be inventoried.

Given the fact that the State had taken so long to develop precise claims of ownership, the Committee recommended that the Director of the Division not make unilateral declarations of navigability. Instead, it recommended that any declarations of navigability follow public hearings which would allow for thorough discussion between riparian owners and the State. Since ownership depends on facts of navigation, the administrative rule process allowed local persons with his-

torical knowledge to contribute facts to the determination process. The Advisory Committee's recommendations were enacted into law by the 1973 Legislature (Chap. 496) with a deadline of July 1, 1977 for the Division to complete its investigative task.

By 1976, the Division had prepared recommendations and held hearings for these rivers: Umpqua, Rogue and McKenzie. Additional studies on the Luckiamute, Santiam, Middle Fork Willamette, Yamhill, Clackamas and Tualatin rivers were under preparation.

Log driving became the grounds for declaring navigable the McKenzie as well as other rivers then being investigated. After the Land Board declared the McKenzie navigable below Dutch Henry Rock (map p.69 ), the adjacent owners formed a Riverfront Protection Association to challenge the Board's determination. In 1977, the Legislature (Chap. 471) created a public fund to pay for the judicial review of the matter. The Division was given until July 1, 1981, to complete all of its river navigability determinations.

During June 1978, a professional historian was placed on staff by the Division as a research analyst in order to complete the navigability studies by the July 1981 deadline. The researcher found log driving and vessel use on an extensive list of Oregon rivers and streams. This evidence was used as the basis of public fact gathering hearings during the spring of 1981.

Immediately prior to these hearings, on December 5, 1980, U. S. District Court found against the State with regard to the navigability of the McKenzie River. The decision was appealed by the Attorney General, but

during the 1981 Legislative Session the Division was instructed:

Unless a court of competent jurisdiction rules otherwise, the periodic use of a stream solely for the floating of logs during high water does not make it a navigable stream for the purpose of defining navigability (ORS 274.031).

The Division was given a further extension, until July 1, 1985, to complete its navigability investigations.

A new director of the Division, appointed during June 1981, proceeded with the navigability determination process on rivers where the State could document commerce other than log driving. Hearings were held during March 1982. While they were underway, the Ninth Circuit Court of Appeals reversed the District Court in the McKenzie case. Their decision determined that the floating of logs did constitute commerce or trade.

The Division has determined not to proceed with additional hearings. Instead it is bringing the matter - including many points raised in public hearings already held - to the Legislature for consideration and further direction or final determination.

#### MEANDERING AND THE ARGUMENT OF STATE TAKING PROPERTY

During the hearings of 1981 and 1982, one of the most commonly heard objections to the State's claim of ownership was that the forebears of a given riparian owner possessed the property since the first days of the region's settlement. Now, a hundred or more years later, the State is finally getting around to claiming ownership. In river reaches that were meandered, this objection is less frequent and generally there was more acceptance of the State's claim.

Government surveys made in Oregon during the late 1900's as a rule preceded grants of real property by the U.S. Government and the State in sections 16 and 36. Surveyors were generally instructed to meander rivers at least 1 chain or 66 feet in width which were presumed to be navigable waterways. Many rivers in Oregon were meandered, though the match between them and rivers that proved navigable in fact was by no means perfect.

Title for land adjacent to meandered rivers extended to the actual bank. Subsequently, assessors accepted that adjacent property did not extend into the river itself. Title insurance companies as a general practice will not insure riparian property on meandered rivers beyond the bank. In summary, meandering has given adjacent riparian owners adequate notice over many years of potential State claim of ownership and discounts the argument that the State is arbitrarily taking property.

For nonmeandered but navigable rivers, the argument of adjacent owners concerning State taking is certainly strong in equity. Rather than upset presumed property rights that are long established, the Division recommends that the State not claim any right, title or interest in the submerged and submersible lands of nonmeandered but navigable rivers of Oregon. This conclusion is stated here because the Division's recommendations which follow are based on this premise.

## CRITIQUE OF CORPS OF ENGINEERS LIST OF HISTORICALLY NAVIGABLE RIVERS

Periodically the U. S. Army Corps of Engineers issues a list of rivers that were historically navigable and specifies the length of navigability. The rivers are often not commercially navigated at the present time but were in the past. The Division has frequently relied on this list to answer questions about State ownership of river beds. But their list has many limitations as a basis for a definitive determination of navigable rivers. These limitations are here set forth.

About 80 percent of the waterways on the Corps list are tidewater reaches of the Columbia or coastal estuaries. In many cases they do not extend to the entire tidal area of the waterway, for example on the North Fork Siuslaw and the Siuslaw main stem.

The Division often has evidence that there was historical navigation on longer reaches than are listed by the Corps.

The reaches specified by the Corps often diverge in significant respects from the list compiled by the U. S. Coast Guard. This is another Federal agency with jurisdiction over navigable waters; it also makes determinations of navigability according to the tests established by the U. S. Courts and issues its own list of navigable rivers. For examples of their divergence, on the Alsea the Corps has established River Mile 11.2 as the head of navigation while the Coast Guard recognizes River Mile 13. On the Rogue the Corps recognizes Agness at River Mile 27.1 as the head of navigation while the Coast Guard has estab-

lished River Mile 101.2 in Grants Pass as the head of navigation! With regard to the latter river, two other Federal agencies, the Bureau of Land Management and U. S. Forest Service, have both gone on record opposing a determination of navigability above Agness.

The State has many current problems in relying on the Corps of Engineers list of historically navigable rivers. With the McKenzie decision, the State would seem to own the bed of the McKenzie River to River Mile 37.5, which is not recognized as a navigable river by the Corps of Engineers. Based on that decision the State would also now have a claim to the entire length of the Willamette, not just to the Ferry Street Bridge specified by the Corps as head of navigation.

In the other direction, the Land Board has already rejected the Corps' determination that Roseburg was the head of navigation on the Umpqua. While the Corps recognizes the Tualatin as a navigable river to River Mile 56.8, it is likely that the decision of the Oregon Supreme Court in Shaw v Oswego Iron Co. (10 Or 371) denies the State title to the bed of this river.

Rather than rely on the Corps list, therefore, it is recommended that the Division use its own research in order to establish navigable reaches.

#### POTENTIAL BENEFITS

The largest benefit in the foreseeable future of State ownership of the beds of navigable rivers will be the right of access for the general public. U. S. Courts have held that State ownership of tidal and

navigable waters is to serve the interests of navigation and common fisheries. Oregon has acted as if State ownership were equivalent to common right over these properties. While the jus publicum would seem to be the paramount interest, whether common right extends to other uses besides navigation and fisheries - such as camping - will probably ultimately have to be determined.

Navigability also confers the jus privatum on the State, and it is this aspect of ownership that confers benefit on the Common School Fund. Mainly this has been the charging of lease fees for the use of submerged and submersible lands relative to gravel removal from river beds, particularly on the Willamette. As demand for gravel increases and alternate sources dwindle, this resource will become increasingly valuable. Ownership of river beds could allow outright sale and would also extend to mineral rights.

## B. FEDERAL LEGAL PRECEDENTS

### TIDELANDS AND NAVIGABLE RIVERS AND LAKES

Although state legislatures, courts and administrative bodies may assert State ownership, they do not make the final determination of title. That determination is a matter solely for the federal courts. The federal courts may define navigability and may determine title to a specific waterway when it is contested. Neither the U. S. Congress nor federal administrative bodies have this final power to determine navigability for ownership, only the U. S. court system.

Once navigability is determined, the State has considerable authority over the use of navigable waters they own. They may make rules for use of public waters that do not conflict with federal regulations and do not contradict federal court determinations.

U. S. Courts have set forth the criteria for determination of title to tidelands and freshwater navigable rivers and lakes. With regard to tidelands, the U. S. Supreme Court found in a California case (Weber v Harbor Commissioners, 18 Wall. at 65-66, 1873) that upon its admission:

absolute property in, and dominion and sovereignty over all soils under the tidewaters within her limits passed to the State.

A series of decisions from Hardin v Jordan (140 US at 381) through Barney v Keokuk (4 Otto 324) and Shively v Bowlby (142 US 1) confirms state ownership of these submerged and submersible lands. The federal rule was summarized in Mann v Tacoma Land Co. (153 US at 283, 1894) when the Supreme Court stated:

That the title to tide lands is in the State is a proposition which has been again and again affirmed by this court.

The federal test of navigability in nontidal rivers was enunciated by the U. S. Supreme Court in The Daniel Ball<sup>vs. U.S.</sup> decision (10 Wall. 557, 1870):

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.

Although the case was one regarding admiralty jurisdiction, it has subsequently been held to be the leading case with regard to ownership in the beds of navigable rivers. Succeeding U. S. Supreme Court decisions have

clarified other issues: navigation may be prospective, not actual at the time of statehood; navigation need not persist into the present; noncontiguous segments of a river may be navigable; "ordinary condition" was more fully defined; etc.

Two U. S. Supreme Court cases recognize state ownership of the beds of navigable rivers bounding Oregon, Shively v Bowlby (Columbia River) and Scott v Lattig (227 US 220, 1913 - Snake River). State Land Board v Corvallis Sand and Gravel Co. (429 US 363, 1977) recognizes the navigability of the Willamette River.

The leading case regarding ownership of lake beds is U. S. v Oregon (295 US 1, 1934). The case arose because of the State's doctrine that the beds of all meandered lakes belong to the State. The Malheur Lakes south of Burns were meandered, but they are shallow, intermittent, and subject to pronounced shifts of location depending on the direction of high winds. The Federal government therefore contested Oregon's ownership of the lake beds. The litigation involved extensive physical investigation of the lakes and historical examination of their use. The U. S. Supreme Court determined that they were not navigable bodies of water and denied title to the State. Oregon statutes on other nonmeandered lakes have not been brought into conformity with this decision.

Subsequent to this decision, the Ninth Circuit Court determined that adjacent owners of these and other non-navigable meandered lakes own to the center of the lake (US v Otley, 127 Fed Rp 2d, 988, based on Hardin v Jordan, 140 US 371, 1891). Utah v US (403, US 9, 1971) establishes that rules for determining navigability of lakes are the same as those for determining navigability of rivers.

## THE MCKENZIE DECISION

Oregon v Riverfront Protection Assoc., popularly referred to as the "McKenzie Case", was decided by the Ninth Circuit Court of Appeals on March 26, 1982 (App. B). It was based upon a precedent established in that court a year earlier in Puget Sound Power and Light Co. v FERC (644F. 2d 785). That case was denied review by the U. S. Supreme Court (102 S. Ct. 596, 1981). This suggests that review of Oregon v Riverfront Protection Assoc. will likewise be denied and thus establishes the rules of law for navigable rivers in Oregon.

The Puget Sound decision similarly establishes rules of law in Oregon. This case concerned the White River, a snowmelt river flowing from the north side of Mt. Rainier. In its middle reach near the present Mud Mountain Dam, it sustained shingle bolt drives by several operators during a 17 year period around the turn of the century. The slope of the river in the reach used is 43 feet per mile, the mean flow is 1420 cubic feet per second, and the bolts had to be constantly handled. They were never driven during the winter or early spring flood stages, but generally in late spring and summer when floating the White River's moderated flow was more manageable.

The main terms of the McKenzie decision, Oregon v Riverfront Protection Assoc., are 1) that log driving constitutes ordinary commerce even though attended by difficulties and 2) the installation of river improvements could be aspects of a river in its natural condition and did not render it an artificial waterway.

The implication of both the McKenzie case and

Puget Sound is that one-way traffic constitutes valid navigation for title purposes. Both the McKenzie case and Puget Sound require that the river be used in its ordinary condition as distinct from "occasionally and in times of high water". This reiterates a limitation against a finding of navigability established in US v Rio Grande Dam and Irrigation Co. (174 US 690). On the other hand, the thrust of both Ninth Circuit Court decisions is that commercial use, no matter what the mode, is the critical basis of navigability determination. The court also held that abundant evidence was not necessary to prove navigability in streams long abandoned by water commerce.

Less clear in the McKenzie case is the charge to Oregon courts to determine whether the State had in any way divested itself of title to the McKenzie after 1859. The Division of State Lands does not believe that any such divestiture occurred, but the courts have yet to draw their conclusions on this issue. This charge may be important for State claims on other waterways.

The McKenzie decision has a major bearing on the Division's present navigability determinations, because several of the rivers on which hearings were held in 1982, as well as other rivers, had important log driving use which would strengthen the State's claim of ownership.

#### THE ISSUE OF COMMERCIAL TOURISM

Commercial tourism is the third most important base of Oregon economy following agriculture and forestry. With the current log depression in the wood products industry, many regions of the State are turn-

ing decisively to tourism as an economic alternative. Given the economic significance of this activity, may it legally form a basis of title claim to the beds of Oregon rivers?

One must first distinguish between the different types of recreational use that may be involved. At one end of the spectrum would be a commercial carrier taking large numbers of people as passengers for purposes of sight-seeing. Steamboats on upper Klamath Lake did this kind of business, although mixed with other commercial purposes. The Rogue River excursion boats presently conduct this type of traffic. At the other extreme would be a single person traversing a river in a short boat, kayak or inflatable raft. Would any or all of these types of use constitute navigation?

The United States courts have not been entirely clear on this issue, particularly as it affects title to the bed of a stream. In US v Utah (283 US 63, 1930) the Special Master, upon whose facts the law in the case was decided, emphasized that "commerce" included the carriage of persons as well as goods and found that "transportation of passengers or tourists for hire is clearly a form of commerce" (Special Master's Report, p. 110). He further argued that navigability of a river at statehood in western states was prospective and that prospective navigation for Utah rivers would be for commercial tourism.

At the other end of the legal spectrum on recreational use, the U. S. Supreme Court in The Montello decision (20 Wall. 442, 1874) declared, "It is not every small creek in which a fishing skiff or gunning

canoe can be made to float at high water which is deemed navigable". In general federal courts have consistently applied this doctrine.

A second source of difficulty is the fact that a certain type of usage may make a river navigable for one type of law, i. e. admiralty, commerce, or ownership, but not for another. Lastly, there has been a recent weakening of the rule on recreational boating.

On Arkansas's White River, the U. S. Eight Circuit Court of Appeals in George v Beavark (402 F. 2d at 979, 1969) found:

Float fishing is nothing more than pleasure fishing and is conducted in much the same manner as game fishing in most any lake or stream, the main difference being that in a stream such as this a guide is necessary to negotiate the shoals, and the use of motorless flat bottomed boats such as described is necessary.... Such pastime, however, standing alone is too fragile a basis to support a holding of legal navigability, absent any evidence of a channel of useful purpose to trade or commerce. [emphasis added]

The case was one in admiralty law and the court felt that a finding of navigability would lead to absurdity in enforcing the federal statute relating to admiralty.

Confusion arises because of the recent Arkansas Supreme Court decision State v McIlroy (268 Ark 277, 1980). It deals with Mulberry River or Creek, a meandered waterway. The stream was used only for recreational purposes by canoeists and fishermen in flatbottomed boats of 18 foot length. The court explicitly expanded Arkansas's former criterion of navigability to encompass this use, thereby determining

that property ownership of the bed was in the state and not in the adjacent riparian owner. Despite the precedent of George v Beavark, the U. S. Supreme Court refused certiorari in McIlroy which was a clear contest between private owners and the state.

The Ninth Circuit Court of Appeals, which has jurisdiction in Oregon, followed George v Beavark and The Montello in its recent decision, Adams v Montana Power Co. (528 F.2d 437, 1975). This was also an admiralty case and they ruled, "Neither non-commercial fishing nor pleasure boating nor water skiing constitutes commerce". They emphasized, however, that their determination resulted from the fact that it was an admiralty not a commerce case. "The definitions of navigability may vary because, as in the present case, the purposes served by the commerce clause and admiralty jurisdiction may vary". Presumably they could also vary if it were an ownership case, as happened with regard to Arkansas rivers.

At the Federal District Court level in Oregon, the McKenzie River was adjudged to be a navigable river in 1931 (Thomson v Dana, 52 F (2d) at 763). This case concerned the right of a river guide and resort owner to carry fishermen for hire on the McKenzie above the mouth of Blue River (RM 57). Presumably this use was what constituted navigation as no other had occurred. The reach was also measured.

Aside from the character and purpose of this tourist traffic, its mere existence is evidence of the susceptibility of a river for commerce. Susceptibility is an important part of the Federal Test following the

Daniel Ball decision. This is especially a matter for consideration in the sparsely populated areas of Oregon where it is arguable that density of settlement was so slight that it precluded the use of a river as a highway for commerce, even though its size and hydrology made it capable of sustaining commercial traffic.

In the absence of clear guidance from the federal courts on this issue, the Division feels that it should make its recommendations on the basis of maximum possible case of state ownership. This is tempered by the Division's previous decision to claim only meandered waterways. Therefore the only rivers that would be determined navigable on the basis of commercial tourism alone would be the meandered portions of the Deschutes. Navigability claims would be extended only on the Clackamas, McKenzie, Rogue and Siletz.

## II. MEANDERED OREGON RIVERS RECOMMENDED FOR NAVIGABLE STATUS

### A. COMMON POINTS OF TESTIMONY

Hearings were held during March 1982 in order to establish the basis of State ownership of riverbeds where that claim rested on evidence other than log driving. In order to avoid the expense of hearings on the Columbia, Willamette and Snake, a decision was made that these, and other rivers on which the U. S. Army Corps of Engineers had made a determination of "historical navigability," would not be subject to rules hearings. In addition to the Columbia, Willamette and Snake, most of the river lengths listed by the Corps were in tidal waters in which there already

was a public assumption of State ownership and obvious evidence of vessel traffic. The Corps met the same standards of evidence required of the State to establish ownership. By these assumptions, the legislature, which could supersede its instructions regarding hearings in ORS 274.031, would have been asked to declare State ownership in river lengths determined navigable by the Corps. Hearings were held, therefore, where the Division had independent evidence of vessel navigation above the reach determined navigable by the Corps.

VESSEL  
NAVIGATION

Dealing with the single criteria of vessel navigation, the results of the March 1982 hearings show that several common objections to the State's position were voiced in nearly all of them: One-way navigation is not true navigation; log driving is not navigation; rivers not presently used for navigation are not navigable rivers as of February 14, 1859, and the virtually unanimous opposition by adjacent owners to State ownership should prevent State ownership. Federal Court decisions, especially Puget Sound and the McKenzie decisions with regard to the first two objections, overrule these arguments.

Much of the testimony in all hearings consisted of complaints about loss of land by erosion. This was not an issue in the proceedings and sprang from confusion about riparian law and the law of property as it relates to riparian ownership. Similarly there was a fairly widespread misunderstanding that State claims of navigability meant that the rivers would be currently maintained in a navigable condition, usually by huge public expenditure. Another general objection of a policy nature was that State ownership

would make various riverbeds into public parks with no supervision to the disadvantage -- often strongly and circumstantially described -- of adjacent owners.

Because the State has not consistently exercised its ownership of various rivers under review since 1859, many persons argued that it has lost title by adverse possession, particularly as persons have paid taxes on lands now claimed by the State. This is erroneous; the rule of adverse possession does not apply against the State ownership of the beds of navigable waters (Gatt v Hurlburt, 131 Or 554, 1930).

Another large group argued that the costs of asserting State ownership of this form of property would never be recouped by any benefits the State might derive from it. This possibly is true on a few rivers, but the State exists forever and there is no telling what values may be derived from this resource in the future. Additionally, the general public will find State ownership of great value to them on many of the river reaches under consideration.

There was a consistent argument that the State had a hidden agenda for making claims to river beds at the present time. The interesting thing is that the alleged ulterior motive varied markedly from basin to basin. Thus, on the upper Nehalem it was to cash in on oil and gas finds, in the Klamath Basin it was to give away their water to California, and on the Clackamas it was to allow the Corps of Engineers to dredge a boat channel to Estacada.

Some adjacent owners may have serious zoning problems if State claims to certain riverbed proper-

ties currently in their deed descriptions are made good. Presently they would have enough land to qualify for certain land uses, but if the State claims are upheld they will be prevented from undertaking these uses. As persons sometimes bought property with specific development plans in mind, they could stand to lose great sums of money because of these proceedings. Claiming only meandered river lengths should remove the problem; if not, the Legislature may wish to consider remedial legislation if the assertion of State riparian claims has serious zoning implications for a number of landowners.

#### LOG DRIVES

Log drives formed the major basis of evidence for State claims to rivers for which hearings were held in 1981. That evidence now is relevant for title determination since the McKenzie decision.

For a number of tributary streams which were listed on the hearing notices for 1981, the public gave persuasive evidence that driving occurred only with extensive artificial improvement, especially the installation of splash dams. A State claim on splash dam streams would be unjustified. Division staff have therefore rigorously omitted such rivers from consideration, even if a few early drives or drives early in the season were accomplished without artificial aids.

#### COMMERCIAL TOURISM

Uniformly riparian owners opposed use of commercial tourism as a basis of State proprietary claims to river beds. These owners also emphasized on nearly all the rivers the difficulty or impossibility of using the rivers for any recreational purpose in summer months or low water periods.

## B. SPECIFIC RIVERS

The meandered navigable rivers are presented in alphabetical order. Those of the Coquille and Klamath Basin appear under "C" and "K" respectively. Both the State's evidence, most of which is as presented in the 1982 notice to adjacent owners, and testimony from both the 1982 and 1981 hearings is grouped under the subject headings of "Vessel Navigation", "Log Driving", and "Commercial Tourism" displayed in the margins. The Division's recommendations conclude each river section.

## ALSEA RIVER

Upon a review of the hearings, The Division recommends a finding of navigability on the Alsea from the mouth of the river upstream to River Mile 28.5, the meandered limit. Its use for barge traffic above head of tide, however, presents important problems for a claim of title to this river bed.

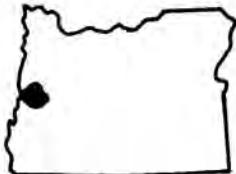
### Summary of State's Evidence

#### VESSEL NAVIGATION

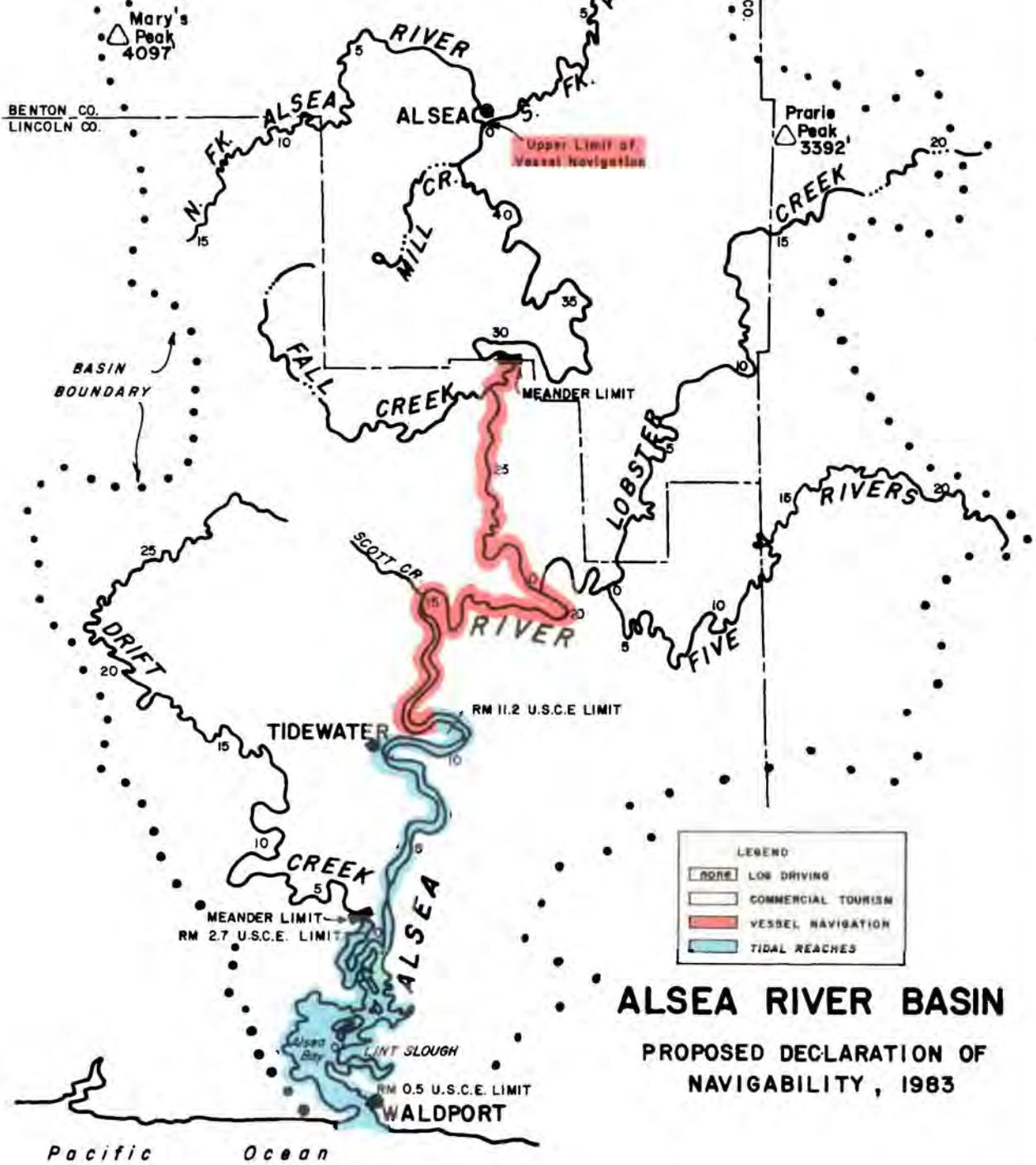
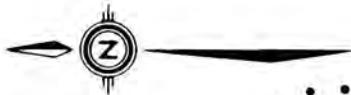
The tidal portions of the Alsea River and Alsea Bay sustained ocean-going commerce and a regular steamer route between Waldport and the town of Tidewater. Presently the U. S. Corps of Engineers recognizes the navigability of the Alsea to River Mile 11 as well as that of the tributaries Drift Creek to RM 2.7 and Lint Slough for one-half mile. The U. S. Coast Guard has determined that the Alsea is navigable to River Mile 14 which is above the head of tide and just below Helion Rapids.

The State of Oregon believes the traffic in rafts and scows from Alsea to Waldport, here described, extends the area of navigability for title purposes on the Alsea River to Mile 43.3. The State, however, would limit its ownership to the meander limit at River Mile 28.5.

In 1871 David Ruble built a sawmill on the North Fork of the Alsea River and in 1875 the lower river basin was opened to white settlement. During the decade of the 1870's, traffic commenced in lumber rafts and scows from the town of Alsea to Waldport and intermediate points. By 1879 David Ruble,



LOCATION MAP



LEGEND

	ROAD	LOS DRIVING
	COMMERCIAL TOURISM	
	VESSEL NAVIGATION	
	TIDAL REACHES	

**ALSEA RIVER BASIN**  
**PROPOSED DECLARATION OF NAVIGABILITY, 1983**

who seems to have inaugurated the traffic, is reported to have completed 67 trips over the route. The original scows had dimensions of five feet in the beam by fifteen to twenty feet in length. Loaded with up to five tons of freight they would draw one foot in the water. After some of the worst rocks and obstructions were blasted with funds from the Corps of Engineers in 1897, larger barges with dimensions of ten by thirty feet used the river. Much of the traffic was from the Thomas E. Chandler sawmill built at the mouth of Mill Creek (RM 42) in 1881.

Two of Chandler's living grandchildren, Bethel Vernon of Alsea and Mrs. Bernice Perin of Lebanon, witnessed the traffic before it came to an end in 1909. Scows continued to use the lower river until 1923. Besides the scows, which made about three trips downriver each spring, local settlers frequently floated their possessions on sections of the river when they moved from one home to another along its course.

The commercial use of the Alsea from the forks at Alsea to tidewater is fully recorded in the accounts of local historians, contemporary newspaper articles, U. S. Corps of Engineers reports, and the testimony of witnesses. Most of this information is in the Division's Lincoln County Rivers Navigability Report. The scow traffic on the Alsea is comparable to that recognized by the U. S. Supreme Court in the Montello case (20 Wall. 430) and Utah v U. S. (403 U. S. 9) and the Land Board on the Rogue below Grave Creek. The commercial reach of the Alsea (to RM 43.3) exceeds the meandered length (RM 28.5).

LOG DRIVES

There was very little log flotation on the Alsea, therefore the State does not base its claim of navigability on this usage.

COMMERCIAL  
TOURISM

Today the section of the Alsea which had early scow traffic is heavily used by drift-boat fishermen, including commercial guides taking passengers over various reaches for profit. As indicated by the Oregon Guides and Packers Association Directory, 10 commercial guides and outfitters currently take parties on all coastal rivers, which would include the Alsea. State Fish and Wildlife personnel indicate that during the year approximately 5,000 boat days of sports fishing use occurs between Mill Creek (RM 42) and tidewater, mostly in the months November through June. The majority of these users, of course, are private parties rather than guides taking passengers or sportsmen for hire.

Summary of Public Hearings

VESSEL  
NAVIGATION

The May 1982 hearings on the Alsea were based exclusively on the downriver barge traffic described above and are described first. During the hearing a state senator presented the strongest arguments of the local residents against the State's claim. These were that the voyages only took place during temporary periods of high water and that this did not meet the Federal test as established in Oklahoma v Texas (258 US 574, 1923). He further argued that commercial use depended on the artificial aid of blasting rocks.

One witness argued that a rule of law in Oregon that on some waterways there is an easement for navigation but title in the adjacent owner (Lusher v Reynolds

152 Or 625, 1935) applies to the Alsea. The Division has concluded that the Alsea is not such a waterway and that the Federal test of ownership would govern regarding the State's claim. This might, of course, be disputed by litigation.

In 1981 there had been emphasis on the argument that the Division had not proven that the river when used was in the same condition that it was on the date of statehood. In 1982, however, one witness (page 75 of the hearing transcript) affirmed that the Alsea, having a bedrock channel, was in substantially the same condition today that it was in 1859.

Another witness noted that much of the property in the bed of Alsea Bay and river had been granted away by the State in order to encourage construction of a railroad to the area. These proceedings are not meant to infringe actual grants to tidelands or navigable river beds specifically issued by the State.

It was further argued that the weights stated as carried in the scows were physically impossible given their dimensions. This may well be true, but as the size of vessels is not important, only the fact of their commercial use, this argument does not weaken the State's case.

Some months after the 1982 hearing, a son of Ezra E. Hammersley, who ran some of the scows downriver, wrote the Division that Ruble's as well as later scows began their trips at Mill Creek, not at the town of Alsea. The Division has also recently found transcripts of Corps of Engineers' hearings on the Alsea held during 1935 and 1937. In one, C. R. Evens stated that he made

70 scow trips on the river. In the other, residents argued that if the Corps improved the mouth of Alsea Bay, sawlogs would be driven down the river to tidewater.

LOG DRIVES

Of interest is the fact that one witness within the past few years tried to use the Alsea to float down a 10 x 10 foot raft of logs below River Mile 20. He stated the trip was not worth the effort, but it was done, and shows that people even today might be tempted to use the river for such a commercial purpose.

COMMERCIAL  
TOURISM

Testimony regarding recreational use emphasized that the river was not suitable for it during more than six months of the year.

RECOMMENDATION

The conclusion supporting the State's claim of navigability of the Alsea takes into account several criteria of varying strengths as applied to the historical research: the public hearings, legal history, legislative direction and court decisions.

It may be difficult to make a determination of navigability on the Alsea above tidewater. Does the admitted fact that the scows operated on short-lived high stages of water prevent the State's claim? Or does the fact that the river was a highway for commerce for nearly 50 years take legal precedence? While the Ninth Circuit Court tends to emphasize the latter criterion, there is no guarantee that they would not place greater emphasis on the former with regard to the Alsea.

The blasting of rocks seems only to have allowed larger scows to operate; therefore it is not a serious objection to the State's case. Such improvement was discounted by the court in the McKenzie case.

Use of the Alsea by commercial guides strengthens the recommended claim of navigability.

As with other rivers it is recommended that only the meandered portion of the river be claimed, excepting, of course, those portions already granted by the State. The Division recommends a finding of navigability on the Alsea from the mouth to River Mile 28.5.

## CLACKAMAS RIVER

The Clackamas River presents some interesting questions with regard to navigability. Still, because of significant evidence of the river's use for vessel navigation and log drives and extensive use for commercial tourism, the Division recommends that it be declared navigable from its mouth to River Mile 20.5.

### Summary of State's Evidence

#### VESSEL NAVIGATION

The earliest use of the Clackamas River for commerce was the flotation of scow loads of rock from a quarry near Carver downstream for use in Portland. This was done in favorable stages of water at various times in the later Nineteenth Century. Toward the end of that century a commercial fishery developed on the river with fishermen putting in at Feldenheimer's Ferry, fishing downstream at several points with set gillnets, and then floating their catch to the mouth where it was generally sold to the Portland Fish Company. The fishery was closed in 1910 though reopened for a year during World War I to aid the food supply.

#### LOG DRIVES

The Clackamas seems to have been used from time to time from the mid Nineteenth Century to float logs, but the first circumstantial evidence of driving came in the 1890's to the Harvey Cross sawmill opposite Gladstone. A boom company proposed in 1896 to improve the river for log transport, especially by placing a boom at its mouth, but that facility would not hold. They and other operators, however, ran logs and ties during various years until at least 1919. Some drives in the latter years were assisted during the summer by releases from the River Mill dam.



COMMERCIAL  
TOURISM

In recent years the river has been used by commercial guides to carry persons for hire for various sporting purposes. A few guides operated on the Clackamas before the 1960's using outboard motors with a special lift to clear bars in the rivers. They mostly operated in favored pools between Carver and Eagle Creek and could go up and downstream until the 1964 flood altered the character of the river's bed. The flood created so many shallows that they switched to water jet engines but still operated in the same reaches. During the 1970's more powerful jet engines which had been developed on the Rogue were introduced in combination with the aluminum sled hull. Since then virtually all of the twenty some guides operating on the river utilize this craft to take their passengers to the best reaches. The new technology which is now customary on water allows guides to operate both up and downstream from River Mill Dam (RM 23) to the mouth.

Summary of Public Hearings

The Clackamas has a large number of adjacent owners who prize it as natural, recreational property. They do not wish commercial-industrial development of the river bed on the one hand and on the other they fear large numbers of insensitive and polluting sports users from the metropolitan population of nearby Portland. They stated that they feared State ownership would contribute to such dredging activities and cited the condition of the lower river currently managed by the State. In this regard the president of the Clackamas River Water Control District in a letter of April 20, 1982, made the interesting suggestion that the State enter into a covenant with the District for mutual administration of the river's bed.

VESSEL  
NAVIGATION

With regard to the sources of proof of navigability in fact, some witnesses cast doubt on the use of the river by rock carrying scows. The 1888 Corps of Engineer's Report substantiates this usage.

Witnesses also argued that gillnet fishing is not commercial navigation. This objection may not stand up in Federal Court as the rationale for State ownership of navigable waters includes protection of common fisheries. Furthermore portions of the fishermen's voyages were taken up in carriage of the catch to market. The fact that all of this usage was one-way no longer weakens its navigable character since the Puget Sound and McKenzie decisions.

Several persons argued that the Clackamas River during the years that it sustained commercial use was not in the same natural condition it had been in 1859, especially because of the 1861 flood. While the Clackamas was subject to considerable change in its channel during the Nineteenth Century, there is no indication that it was any less susceptible of navigation in 1859 than in later years.

Others cited the river's inability to sustain navigation in low stages, but annually recurring low stages which prohibit navigable use do not of themselves detract from the navigable character of a river.

LOG DRIVES

One witness in 1981 argued that some of the drives cited in the report depended on the release of water from River Mill dam. Other witnesses cited the difficulties of the Clarkson & McIrvin Boom Co. at the mouth of the Clackamas mentioned in the Division's report.

The Division argues that the boom company had trouble booming logs, not floating them on the river. Other operators and the sawmill company that used an assist from River Mill dam had successful drives on the Clackamas on ordinary flows. Specific drives were documented in all months of the year and contained up to half a million board feet in some drives.

COMMERCIAL  
TOURISM

Use of the river by commercial guides, especially using recently invented jet sleds, was strongly objected to as a basis for navigability and State claim of title.

LEGAL  
QUESTIONS

Stanley and Hazel Stevens said that they won a court case against the Land Board which gave them title to the bed of the Clackamas. Division staff researched this case with staff from the Attorney General's Office. They concluded that the State of Oregon did not dispute the Stevens' title because it dealt only with an upland parcel, not the bed of the stream. The Stevens were so advised by letter on February 4, 1982.

One witness stated the Oregon Supreme Court in 1966 had declared the Clackamas nonnavigable. There was no such delcaration in Hazen v Herbst (244 Or 494). It was further argued that the Clackamas County Circuit Court decision in Smith v Meyer (Decree No. 25643, 1932) prevented the State from declaring the Clackamas to be navigable. The Attorney General advises that that case does not prevent such a declaration.

## RECOMMENDATION

Log drives on the Clackamas, although less extensive than on the McKenzie, satisfy the criteria of navigability set forth in the Puget Sound and McKenzie decisions. Taken together with evidence of vessel navigation below River Mile 19 and the volume of commercial tourism below River Mile 23, the Division believes it has grounds for a declaration of navigability on the Clackamas.

Because the Clackamas was only meandered to River Mile 20.5, the Division recommends that it be declared navigable from its mouth to that point.

## COLUMBIA RIVER

Its entire length in Oregon is meandered and recognized as navigable by the Corps of Engineers.

### Summary of State's Evidence

From early fur traders' bateaux and Indian canoes, pioneer rafts, steam boats and wind driven lumber scows to modern diesel powered barges, the Columbia above the Cascades as well as in its tidal reaches has been a vital highway of commerce. Construction of railroads and super highways on either side of its channel has not erased its commercial importance. Many accounts of the history of its navigation exist of which the following may be named: Fred Lockley, History of the Columbia River Valley (Chicago, 1928), Vol. I; Randal V. Mills, Sternwheelers Up Columbia (Palo Alto: Pacific Books, 1947), and Stewart Holbrook, The Columbia (NY: Rinehart, 1956).

No Navigability Hearing was held on this River.

### RECOMMENDATION

The Division recommends that the entire length of the Columbia River in Oregon be declared navigable. The State also claims the tidal reaches as tideland.

## COQUILLE RIVER BASIN

### Summary of State's Evidence

The State's claim of navigability to rivers in this basin is based either on historical and contemporary evidence of navigability or on evidence of log drives or both. The exception is the Middle Fork where it is evident that no commercial navigation is possible under ordinary conditions.

Hearings were held on April 21, 1981, and again on March 17, 1982. Important points about log drives were received in 1981 that were not brought up in the 1982 hearings. Summaries of the two hearings are presented separately while the Division's recommendation resulting from the two hearings are combined and presented stream by stream at the end of this report on the Coquille.

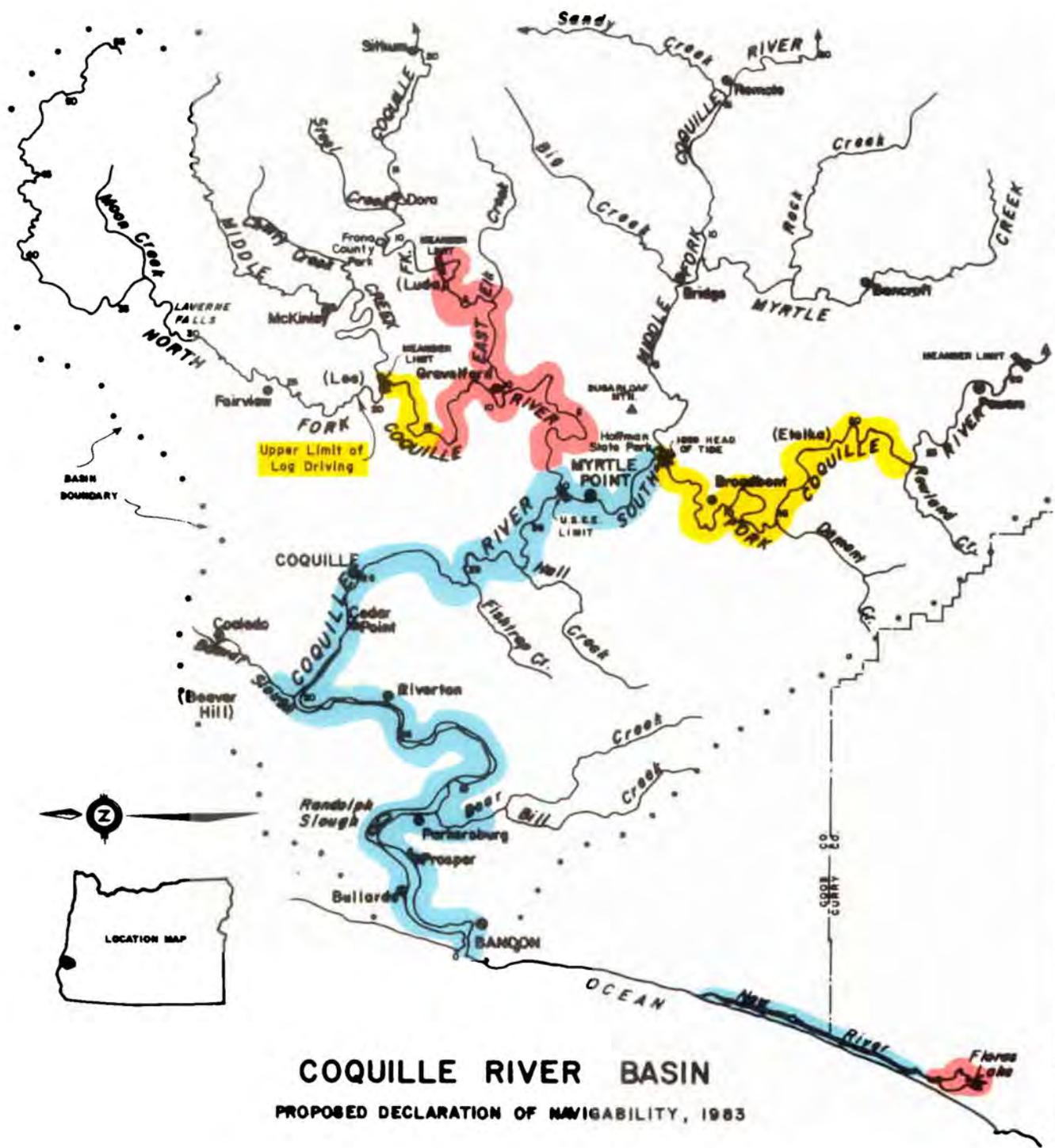
#### VESSEL NAVI- GATION AND LOG DRIVES

The U. S. Corps of Engineers recognizes the navigability of the main stem of the Coquille River to the mouth of the North Fork, River Mile 36.3. Several tributaries of the river have had substantial vessel navigation, however, and the State of Oregon therefore has a claim to their beds.

This vessel navigation largely followed the establishment of the Port of Coquille River in 1911 which was to maintain the tributary to navigable standards.

Beaver Slough. The tributary that had most intensive early navigation was Beaver Slough. Since the time of the Indians it had served as a major connector between

LEGEND	
	LOG DRIVING
	COMMERCIAL TOURISM
	VESSEL NAVIGATION
	TIDAL REACHES



**COQUILLE RIVER BASIN**  
 PROPOSED DECLARATION OF NAVIGABILITY, 1983

the Coquille Valley and Coos Bay. The Indians even had pole skids to help in the portage of their canoes from Isthmus Slough to Beaver Slough. In 1859 it was the regular route of pioneers from the Coquille area to their source of supplies in Empire City. Capt. Dunham ran the 23 foot steamer Mud Hen on the Beaver Slough route during the 1880's, and in 1886 used six barges to carry freight on its waters. By 1897 this water route was replaced by road and railroad and not used. Extinction of the beaver has lowered the water table and rendered the route unservicable. Beaver Slough was not meandered. If only meandered navigable and tidal reaches on waterways are claimed by the State, then on Beaver Slough the claim would be to the natural head of tide. This is presently obstructed by an artificial tidegate at the Slough's mouth.

North Fork Coquille River. Well before 1898 the pioneer boatman James W. Bright began to navigate the North Fork, and owing to the absence of roads, did a good business. Bright regularly ran his boats from Myrtle Point to Gravelford on winter stages of water until about 1912. The Corps of Engineers regulated log driving on the North Fork at Gravelford in order to facilitate the passage of vessels in 1904. After the Port of Coquille River began snagging and clearing the North Fork to Fox Bridge in 1914, they could report in January 1916 that farmers could use the river to go to the creamery during seven to eight months of the year. The steamboat Myrtle, length 57.4 feet, reached Fox Bridge (RM 14.3) in February 1918. Since 1966 Ernest Bryant has cleared the North Fork up to the gorge above the Hollis Mast ranch (to RM 21.6). This is the Port of Coquille River's limit to which they have kept the river "up to navigational standards."

Detailed history of log driving on the North Fork commenced in 1898. Immediately large quantities were taken down the river. Many came from as far up as River Miles 36 and 40. From these reaches the logs jammed, however, without the use of splash dams. Splash dams were also needed to take logs out from the Fairview area (near RM 26). Below River Mile 21, however, the logs floated on ordinary winter levels. They came down in such large numbers that the Corps of Engineers had to regulate their passage at Gravelford in 1904. Heavy traffic in logs persisted on this fork until after 1928.

One of this fork's tributaries, Middle Creek, was also the scene of large scale drives from as high as River Mile 15 during the years 1902 to the mid 20's. All these drives required splash dam assistance.

East Fork Coquille River. There was a similar development of vessel navigation on the East Fork. Early explorers ascended this tributary in canoes as far as the rapids near Dora. From 1914 there was a regular boat service to Dora during winter stages of water. There is some question whether "Dora" was then at the mouth of Steel Creek or two miles further downstream at the present Frona Park or at some other point on the river. In December 1915 lumber was rafted downstream from the Minard sawmill. As with the North Fork, the Port of Coquille River, which had cleared the lower eight miles of the river, asserted in 1916 that farmers could use that reach of the East Fork to take their boats to the creamery during the greater part of the year. The Myrtle was able to take a load of hay to the I. P. Weekly farm (RM 1.5) in February 1918. George Hermann, M. M. Minard, and later the L. B. & L. Logging Co. used gasoline powered boats in this reach in order to aid their log dri-

ving operations. In 1929 the Port of Coquille River ordered that a dam at River Mile 12 (Frona State Park) be repaired in order "to render navigation reasonably free, easy and unobstructed."\* Since 1966 the Port has maintained the East Fork to Minard Riffle (RM 8).

As early as 1885-86 there was a log drive from Dora on the East Fork to the lower river. Almost every year from the late 1890's until about 1950 there were extensive drives on this fork; one company brought out 23 million board feet during the winter of 1941-42. This was the LB & L Logging Company. The initials L stand for Ivan and Kenneth Laird who both supplied information to the Division on their and other logging operations on the East Fork. Above Minard Riffle various artificial aids seem to have been needed for the drives.

Middle Fork Coquille River. Log driving on the Middle Fork began about the turn of the century. Both on the main stem and its tributaries there is much evidence that the drives were unsuccessful without splash dams. The leading logger on Myrtle Creek, Frank Fish, left testimony of this fact in an oral history tape. When for economic reasons the practice of log driving on the Middle Fork was revived in 1923 it was undertaken only with the use of three large splash dams.

Bear Creek. This tributary which enters the main stem near its mouth was regularly the scene of log drives from at least 1884 to 1910 and perhaps again during the

\*The early navigation on the East Fork occurred before this dam was built and did not depend upon it.

1920's. A splash dam was used on its tributary Bill Creek, but the extent to which this device was used, if at all, on Bear Creek during any of these years is not known.

South Fork Coquille River. At the time of statehood the tide ran to the mouth of the Middle Fork on the South Fork Coquille River. The clearing of forest and farming allowed much soil to enter the river and by the end of the Nineteenth Century the head of tide had moved downstream to its present location just above Myrtle Point. The early pioneers, however, were able to take their supplies in boats upriver to the present Hoffman State Park. On one occasion they hired an Indian to carry some of their heavier equipment up the South Fork at least to Dement Creek (RM 14.5). During a later period, around 1912, creamery boats operated on the South Fork to Broadbent at River Mile 10 and the Myrtle took off a load of cheeses from there in December 1912. The Port of Coquille's efforts on the South Fork were early confined to large expenditures to maintain the channel to Myrtle Point. Since 1974, however, they have maintained the channel up to Rowland Creek (RM 24) and some commercial guides take parties for hire down the river from this point.

The South Fork sustained log, cordwood, and railroad tie drives from at least 1900 to 1918. The head of this form of river traffic was Rowland Creek.

\* \* \* \* \*

Question has been raised about the impact of the rule hearing upon the grant by the State of overflow lands of the Coquille River to adjacent owners in 1876. The State Land Board recognizes the validity of those

grants and does not intend that the present claim should in any way interfere with such titles. The problem is, how high did the Coquille River extend in 1876 and therefore what was the upper limit of that grant? The Attorney General of the State of Oregon ruled on May 28, 1952, with specific reference to the Millicoma, that the grant should be strictly construed and did not extend to any tributary of the rivers specified in the statute. It is the position of the Division of State Lands that the Coquille River ends at the mouth of the North Fork, River Mile 36.3.

Evidence for this is in the fact that from the time of statehood in 1859 the vicinity of the mouth of the North Fork of the Coquille River was called "The Forks" and in the Pioneer History of Coos and Curry Counties 1898) various pioneers identified that portion as the terminus of the South Fork of the Coquille:

The next day the mouth of the South Fork was reached where John Dulley had located at [The Forks]. During the latter part of the summer of 1859 Capt. Rackliff and son, William, came to the river with their schooner Twin Sister, 40 tons register, with a cargo of general merchandise, which they sold from the deck of the vessel, moored to the bank at the junction of the North and South Forks.

The editor of the History, Orvil Dodge, wrote or quoted:

The steamer Cordelia was built at the junction of the north and south forks of the Coquille River in 1874, by Capt. Wm. Rackleff.

[John S.] Dulley came to Oregon in 1850, and finally settled at the junction of the North and South Forks of the Coquille River, where W. E. Rackleff's mill now stands, in 1854.

The U. S. Geological Survey map of Coos Bay Quadrangle, 30 minute series, 1895, indicates that the South Fork and North Fork join to form Coquille River below Myrtle Point. Water rights surveys of the Department of Water Resources going back to 1904 indicated that the South Fork Coquille River reached to the mouth of the North Fork. Finally, in its early proceedings the Port of Coquille River referred to the reach between Myrtle Point and the North Fork as the South Fork.

There is contrary evidence that the river fronting Myrtle Point has been called "Coquille River" on private maps dating to 1900 and most weightily on the General Land Office survey plat of 1858. The Division believes, however, that the preponderance of evidence indicates that the upper limit of Coquille River in 1876 was the mouth of the North Fork.

#### Summary of Public Hearings

Public Hearings on the Coquille River Basin were held on April 21, 1981, dealing largely with log drives within the basin, points that were not raised in 1982; the 1982 hearings were held on March 17 of that year and focused on navigation. Summary of testimony from both hearings is here presented river by river under the headings Vessel Navigation and Log Drives.

#### VESSEL NAVIGATION

Beaver Slough. While the best evidence of navigation in the basin is for Beaver Slough, the Coaledo Drainage District is very anxious about the implications of State ownership. This is because the Fish and Wildlife Commission is presently trying to have their tide gate removed in order to extend fish spawning grounds.

While State ownership of the Slough might aid the Fish and Wildlife Commission's efforts, in fact the permit process and other aspects of the State and Federal Government's police powers are what will govern this dispute.

The Drainage District did point out some other problems with State ownership and the basis of the State's claim. In the first place, they emphasized the fact that the natural condition of the waterway in 1859 which allowed navigation depended on the existence of beaver dams which elevated the water table. They testified that the beaver are now gone and the water table consequently lowered.

Furthermore the Drainage District after 1922 completely altered the course of Beaver Slough so that the original channel is part of farmers' fields. The Division feels that this matter could, however, be amicably settled by exchanges of title in the same manner as has been done under similar circumstances on other rivers.

North Fork. Although no witnesses at the hearing itself commented upon the State's claim on the North Fork, a letter from Hollis Mast dated March 17, 1982 shed considerable light on the reach of the North Fork actually used. The Mast family has held property there since the year 1873. In the first place, Mr. Mast states that the meander lines ended downstream from the point cited by the Division. Reference to the BLM's original survey notes indicates that the North Fork was in fact only meandered to its confluence with Middle Creek at RM 18.8. Hollis Mast further states, with circumstantial evidence, that the head of boat navigation was Fox Bridge (RM 14.3).

Only one boat made an extraordinary trip higher than that. On the other hand, Mr. Mast did give positive evidence regarding log drives.

East Fork. Some riparian owners denied that the East Fork was navigable by vessels in any reach. One witness said it was only navigable to the mouth of Weekly Creek (RM 1.5). Forest Easton, at this hearing and in 1981, and Ivan Laird after the 1981 hearing, both gave considerable evidence that the head of vessel traffic was at Minard Riffle (near RM 8). This was the point to which the East Fork was meandered. The Division agrees that the head of navigation was at Minard Riffle. Even log driving above that point depended on artificial aids.

The problem that remains with regard to vessel navigation to Minard Riffle is whether it occurred when the river was in its ordinary condition. In the first place, boats went from Myrtle Point to Dora or Minard Riffle only during the season of winter high water. Secondly, regular boat use occurred after the Port of Coquille River stated that it had improved the river. This improvement consisted for the most part in removing log jams and willows and other overhanging trees from the bank which obstructed passage. It is the Division's understanding, especially from the Puget Sound and McKenzie decisions, that this type of navigational improvement does not alter the "ordinary condition" of the river. The question remains whether the fact that the river was used by vessels (and for log drives) only during the winter rainy season prohibits a State claim of navigability.

South Fork. As to the question as to where the South Fork began, one adjacent owner presented a patent to lands opposite the town of Myrtle Point in this reach. It stated that it ran to the bank of the Coquille River, not the South Fork. Notes of the first government survey for this reach were introduced; they also referred to it as Coquille River. Early government surveyors did not place the name "South Fork" on their maps until above the present town of Powers.

With regard to the South Fork understood to begin at the mouth of the North Fork, some witnesses held that the head of tide and navigation was either the town of Myrtle Point or Reeds Ford (RM 3).

A number of witnesses objected to citation of a single freighting of goods on an Indian canoe as evidence of navigability and similarly objected that one trip by the sternwheeler Myrtle to Broadbent did not show navigability in the river's ordinary condition. While there is evidence of the owner of the cheese factory at Broadbent using a gasoline launch to go to and from his business, this, too, may have been an extraordinary occurrence. Several octogenarians born on the South Fork testified that they had never seen themselves or heard from their parents of boat use on that river. Therefore, the Division is left with no evidence that there was vessel navigation on the South Fork in the river's ordinary condition above the mouth of the Middle Fork. The Division agrees that Ernie Bryant's occasional trips upstream in his aluminum boat do not constitute commerce.

Photographs were submitted which purported to show that the South Fork Coquille was nonnavigable.

An extremely rocky reach is labelled River Mile 22½. Visual inspection of this reach during the study period convinced the Division's researcher that it could not have served as a highway for commerce even for log drives. This reach is not however, at River Mile 22½ according to the Water Resources map of the basin, which is used for locating distances in all the Division's studies. Instead, the depicted reach is the Cascades at River Mile 26½ between Rowland Creek and the town of Powers. It is above the section which the Division argues served as a highway for commerce.

One witness objected that a Division of State Lands Supervisor had written in 1972, upon referral of the matter to him by the Attorney General's Office, that the South Fork was not a navigable river. Davenport Concrete further complained that it had purchased property and undertaken its gravel removal business on the South Fork on the strength of a Division of State Lands letter of 1972 that the South Fork in that reach was a nonnavigable river.

Although much valuable testimony in 1981 was repeated during the 1982 hearing, there were important points raised in 1981 alone about log driving streams.

#### LOG DRIVES

North Fork. A number of persons testified that all log drives above Laverne Falls required splash dam aid. Others stated that drives from the Fairview area required similar assistance. Drives through the canyon at the present Rock Prairie County Park regularly jammed and had to be blasted with dynamite. The Division concurs that driving above River Mile 21 required so much artificial aid that the State does not have sufficient grounds to claim the bed in those reaches. Driving from the

Hollis Mast ranch downstream did not seem to require that type of aid. In that reach it did have to be cleared of drifts and undergrowth, and driving only occurred on winter stages of water. According to Hollis Mast's testimony, his family drove logs over this reach from 1907 to the 1930's.

Middle Creek. The Division concluded that splash dams had been so frequently used to drive logs on this tributary that the State was precluded from a claim to its bed.

East Fork. The Lairds and other witnesses described the artificial aids needed to drive logs on the East Fork and its tributaries above Minard Riffle, though describing the long period of log traffic on ordinary winter flows below that natural obstruction.

Middle Fork. All driving on this fork after the early attempts was done with splash dams. Likewise driving of its tributaries required splash dam aid. Testimony on this point was particularly strong with regard to Myrtle Creek.

South Fork. As for log driving on the South Fork, Verlin K. Hermann, great grandson of the pioneer settler in the region, stated that some logs were put in from Neal Mountain just south of Broadbent but could only be driven in the highest stages of water. Other witnesses acknowledged that splash dams were never used on this fork.

#### RECOMMENDATIONS

Beaver Slough: This waterway had acknowledged navigation in 1859 and later, but is not meandered. With-

out the present tidegate, it is subject to the ebb and flow of tide. The Division recommends that Beaver Slough be claimed as tideland to the natural head of tide. Objections raised by adjacent owners to the State's claim to Beaver Slough are not so serious that they cannot be overcome, if necessary by amicable land exchanges.

North Fork: The Division recommends that the head of log driving at River Mile 21 (below which splash damming was not needed) be taken as the basis of the State's claim of navigability. Only the meandered portion of that reach which extends from the mouth to the confluence with Middle Creek at River Mile 18.8 should be claimed. The question still remains whether winter high water usage is sufficient basis to establish State title.

East Fork: The Division concludes that the East Fork was a highway for commerce below Minard Riffle and recommends that it be declared navigable from its mouth to that obstruction near River Mile 8.

Middle Fork and Middle Creek: The Division concludes that these waterways were not navigable because log flotation on them depended on artificial means.

Bear Creek: The Division recommends that State ownership of the bed of this waterway extend only to the head of tide because the remainder of the portion that sustained log drives was not meandered.

South Fork: As to the extent of the South Fork, there is obviously ambiguity in early nomenclature about this stretch of river. Following that rule that grants are strictly construed to the advantage of the State,

the Division adheres to the position that the South Fork of the Coquille begins at the forks where it meets the North Fork, not at the confluence with the Middle Fork.

The State owns the bed of the South Fork from its confluence with the North Fork Coquille to its confluence with the South Fork Coquille on the basis of its tidal character in 1859. The Division recommends that the South Fork be declared navigable on the basis of log drives from the mouth of the Middle Fork Coquille to the mouth of Rowland Creek near River Mile 24.1.

## DESCHUTES RIVER

The Division recommends that the Deschutes be declared navigable in its meandered reaches between its mouth and River Mile 12 and between River Miles 54 and 102.

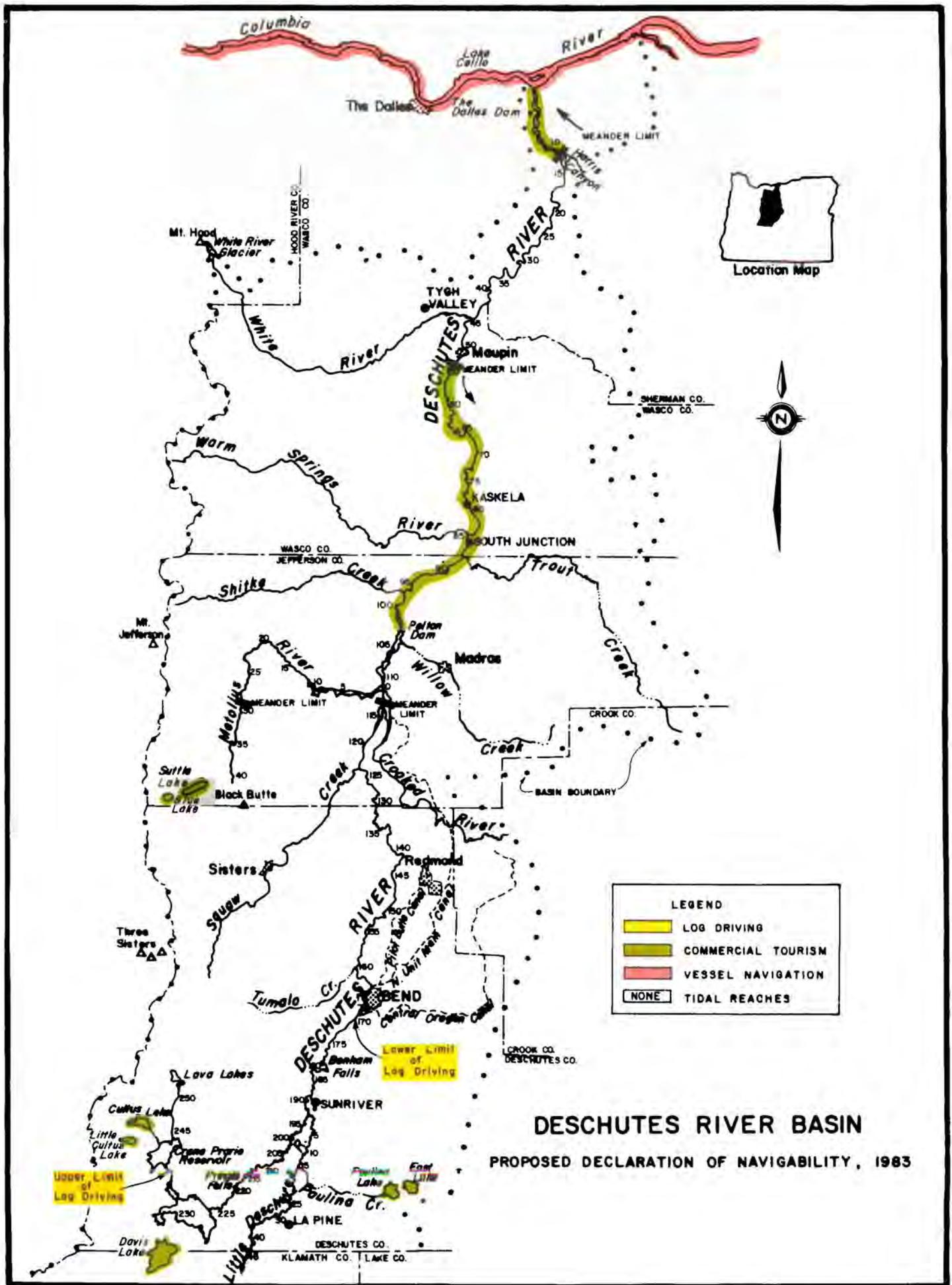
### Summary of State's Evidence

#### LOG DRIVES

The only successful series of log drives on the Deschutes occurred on the main stem above Bend. These were launched from a few miles above Bend in the years 1911-1914. Additionally an enormous drive was mounted for one year only by the Shevlin-Hixon Company from Wickiup Reservoir, River Mile 237, to Bend in the summer of 1939. This may be too abbreviated a period of time to establish a claim of navigability. None of these upper reaches were meandered.

#### COMMERCIAL TOURISM

This is one of the two premier recreation rivers in Oregon. It sustains so much use by private parties and commercial guides that the Governor appointed a Task Force to study problems of use and over-use in 1980. Figures from the Bureau of Land Management indicate that 34 guides registered with them to use their lands in 1977 and by 1979 the number had risen to 71. Other guides not using BLM lands also operated on the Deschutes during those years. The 71 guides accounted for 10,276 service days on the river in 1979. Most of this was in the lower 25 miles of the river during fall steelhead season. Other guides take persons from Pelton Dam (RM 102.5) or other downstream points over various reaches of the lower Deschutes, mostly in the months April-September. There is little commercial guide use of the Deschutes above Bend at the present time.



No Navigability Hearing has been held on this river.

RECOMMENDATION

Surely the Deschutes would meet the standard of commercial transport set in U. S. v Utah. The usage occurs on portions of the river that were meandered (RMs 0-12 and 54-114.5). There would presumably be widespread public support for a declaration of navigability by the State, though the standard objections by riparian owners would also be heard. The Division recommends that the Deschutes be declared navigable in its meandered reaches between its mouth and River Mile 12 and between River Miles 54 and 102.

## KLAMATH BASIN

### Summary of State's Evidence

VESSEL  
NAVIGATION  
AND LOG  
DRIVES

Evidence for commercial vessel navigation on the rivers of Klamath Basin has been thoroughly documented in Harry J. Drew, Early Transportation on Klamath Waterways (Klamath Falls: Klamath County Museum, 1974) and articles by Devere Helfrich in Klamath Echoes. This data has been summarized in the Division of State Lands' "Klamath Basin Rivers Navigability Report".

The State has evidence for a claim to the following rivers:

Klamath River, Keno Bridge (RM 233) to Power Station on Link River including Lake Ewauna. This river was navigated by steamboats from 1888-1909. During that period and since, log rafts have been towed on its waters. It was meandered; when surveyed it was called Link River (linking Lower and Upper Klamath Lakes) while the present Link River was called Klamath River (hence Klamath Falls). The present Klamath River was recognized as a navigable river by the Oregon Supreme Court in Oliver v Klamath Lake Navigation Co. (54 Or 95).

Klamath Strait from Klamath River to the S. P. Railway Levee. Rafts and some of the steamboats which used the Klamath River also used this strait to get to Lower Klamath Lake. The State of Oregon surrendered its claim to the bed of the strait in 1905, contingent upon drainage, but in the remaining section of open water the State would still retain a claim to the bed.

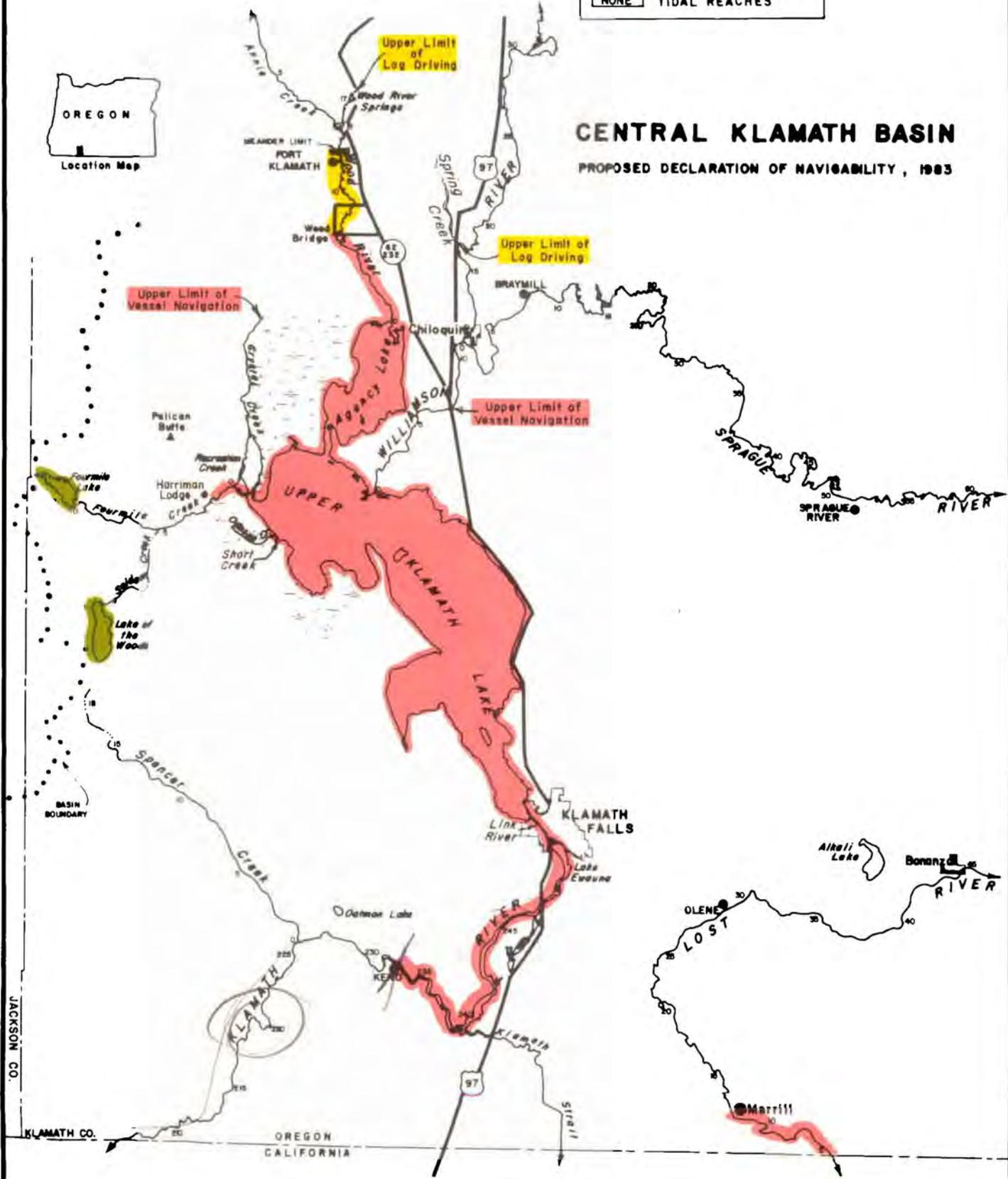
Lost River, California State Line (RM 4.5) to Merrill

LEGEND	
	LOG DRIVING
	COMMERCIAL TOURISM
	VESSEL NAVIGATION
	NONE TIDAL REACHES



# CENTRAL KLAMATH BASIN

PROPOSED DECLARATION OF NAVIGABILITY, 1983



Bridge (RM 11). This is an intermittent river which at unpredictable times ceases to flow, hence its name. It was in a low stage in the 1840's and easily crossed on an elevated rock reef by the Applegate expedition. The basin's waterways were generally recharged with water during the 1850's. The August 1858 U. S. Government Survey map shows that Lost River was sufficiently large to be meandered the year before statehood. In fact the surveyor wrote on July 13, 1858 for T41S R10E that "Lost River runs through the east end of this township which affords abundance of good water and is navigable for small crafts".

One or more settlers along Tule Lake used this portion of Lost River to obtain supplies by boat from Merrill. The Shag also pushed barges over this reach from 1912 to about 1916.

Wood River, mouth to Weed Bridge (RM 5.9). Beginning in 1904 steamboats and gasoline launches operated to Weed Bridge. The traffic ended either in 1918 or the early 1920's. It included carriage of passengers destined to Crater Lake, freight, and the pulling of scows loaded with hay. Log drives also occurred during that period from as far up as its source springs out to Agency Lake.

Crystal Creek, mouth to source. Next to Klamath River this small waterway has the longest history of commercial use of any stream in Klamath County. Beginning in the 1890's the Brown family took barges loaded with lumber from their sawmill at the upper end of the creek to Upper Klamath Lake and Klamath Falls. The Browns and other loggers continued to take barges of lumber, rafts of logs and logs out of the creek until 1962. Steamboats carrying passengers to Crater Lake also operated on its entire length in 1905, 1909 and other years.

Williamson River, mouth to Agency Highway Bridge (RM 4.8). Barges of sand and rafts of logs were taken out on this portion of the river from at least 1909 to 1919. Some other log drives occurred above Chiloquin. At the present time this reach is frequently used by recreational power boats operating up from Klamath Lake. There were also log drives below Spring Creek.

Although commercial use of some of these rivers has been obsolete for many years, "When once found to be navigable, a waterway remains so .... Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense." (United States v Appalachian Power Co., 311 U. S. 408-410, 1940).

#### Summary of Public Hearings

Public hearings on the Central Klamath Basin were held on April 29, 1981, and on March 31, 1982. The 1981 hearing produced most of the evidence with regard to log drives specifically on the Sprague and Williamson Rivers and the 1982 hearing dealt largely with the use of the rivers for vessel navigation. The summary of the latter hearing is first presented river by river, then the log driving testimony. The Division's recommendations on the combined material are presented at the end.

#### VESSEL NAVIGATION

The 1982 hearing took up several waterways in the vicinity of Klamath Lake which were historically navigable. There was general concern that a State determination of navigability would affect the Federal government's authority over water rights in the basin. Other testimony is best reviewed with respect to each of the rivers.

Klamath River. Many persons objected to the State making this claim 123 years after statehood. The argument is hardly justified. The river was meandered, regularly navigated, and adjudicated navigable in 1909.

It had been objected in 1981 that the present level of the river is artificially controlled by a power company dam constructed in 1916. In a supplementary letter to riparian owners sent before the 1982 hearing, the Division set forth that its claim was to the bed of the original river; leasing would be done on a water column rising from it. This area of State ownership should therefore not affect the dikes and lands of adjacent upland owners. The Division is currently clarifying the limited area of the river's original channel it claims in leasing arrangements with local lumber mills which store logs on the river.

Link River. At the 1982 hearing it was noted that there had been two power company sites, the landmark by which the Division had defined the head of navigation on this waterway in its public notice. The Division here states that the head of navigation was the lowest rapids on Link River. Measuring from the river's mouth in Lake Ewauna to the southwest corner of those rapids, the length is 0.3 miles.

Klamath Strait. The Division's representatives were informed during the 1982 hearing that the Bureau of Reclamation has recently built dams west of the Southern Pacific railway levee and is filling the strait with sediment discharge. Such filling is consistent with the 1905 Oregon statute. Communication with the Bureau of Reclamation indicated, however, that this portion of Klamath Strait is still open water. Therefore the State's claim

to the bed would still remain in force. The waterway was not, however, meandered.

Lost River. A witness argued that navigation at the end of the 19th and in the early 20th centuries described in the Division's report was dependent on unusually high water stages from Tule Lake. In fact during the period of navigation a natural outlet formed in the bottom of Tule Lake (which is also aperiodically intermittent) and settlers thought the lake would completely drain. Given the surveyor's notes from 1858, the Division concludes the river when navigated was in approximately the same natural condition as at the time of statehood.

Other witnesses emphasized that the river is now almost completely manipulated by man, largely as a result of the work of the U. S. Bureau of Reclamation. This includes some relocation of the channel itself.

Wood River. There was objection that navigation on Wood River occurred when it was not in its natural state. There was sand removal at the river's mouth in the period before boats used the river. The action of the paddle wheels themselves kept the channel in a deeper condition than would natural hydraulics. One witness in 1981 noted the many unsuccessful efforts to get small boats up to Fort Klamath, particularly to reach the creamery at that town.

Crystal Creek. Daniel G. Brown's granddaughter stated that Crystal Creek's banks are now wider than in the 1890's due to avulsive changes of man and nature. Presumably they were also narrower in 1859, and this would have to be taken into account if the State continued to maintain that it has title to the bed of this creek.

The other watercourses on which there was considerable testimony in 1981 were the small tributaries of Pelican Bay. One witness asked why Harriman and Recreation Creeks were not included in the State's claim along with Crystal Creek. The Division believes that only the mouth of Harriman Creek was used and would be included in the claim to Klamath Lake. Another witness clarified that Recreation Creek is an artificial waterway.

#### LOG DRIVES

At these sessions in 1981 there was also strong concern about implications of State ownership of waterway beds and the issue of water rights. Most of the specific testimony about river traffic centered on the use of the Sprague and Williamson to float logs.

Floyd Heffcock, an oldtimer from the region with Indian relatives, gave much circumstantial information about the use of these two rivers. He stated that rafting logs on the Sprague was unsuccessful with ordinary flows. A splash dam was built to help flush the logs, but all it did was flood the adjacent lands and allow the logs to float out in the bayous formed. This testimony was compared with the records available to the Division at the time its navigability report was written. They give a consistent picture of a river which was used but a short time and then abandoned because of lack of success.

Heffcock and other witnesses cast doubt on use of the Williamson above Spring Creek. He did note that one trapper at the present time works the river. He also asked what effect Indian rights would have on the question of State ownership of the Williamson.

## RECOMMENDATIONS

Klamath River: The Division recommends that the Klamath River be declared navigable from Klamath Falls to Keno Bridge (RM 233). It is understood that this State ownership is limited to the 1859 bed of the Klamath River.

Klamath Strait: Because this short reach is subject to being filled and was not meandered, the Division recommends that the State not claim ownership to any portion of Klamath Strait.

Link River: The Division recommends that the Link River be declared navigable from its mouth in Lake Ewauna to the lower rapid at River Mile 0.3.

Lost River: The Division believes the State's claim to the bed of Lost River is valid, and that amicable exchanges of title can solve the problem of these avulsive changes. These have been negotiated on other rivers with similar problems. The Division recommends that Lost River be declared navigable from the California Border to Merrill Bridge, River Mile 11.

Sprague River: The Division believes that testimony regarding the Sprague River indicated that there was not sufficient use to sustain a claim of navigability.

Williamson River & Crystal Creek: Williamson River and Crystal Creek were not meandered. The Division recommends that neither be declared navigable.

Wood River: As there was important log driving as well as vessel navigation on Wood River, the Division recommends that Wood River be declared navigable from its mouth to River Mile 15 near Fort Klamath to which it was meandered.

## MCKENZIE RIVER

In 1975 the State Land Board declared the McKenzie to be navigable from its mouth to Dutch Henry Rock near River Mile 37.5.

### LOG DRIVES

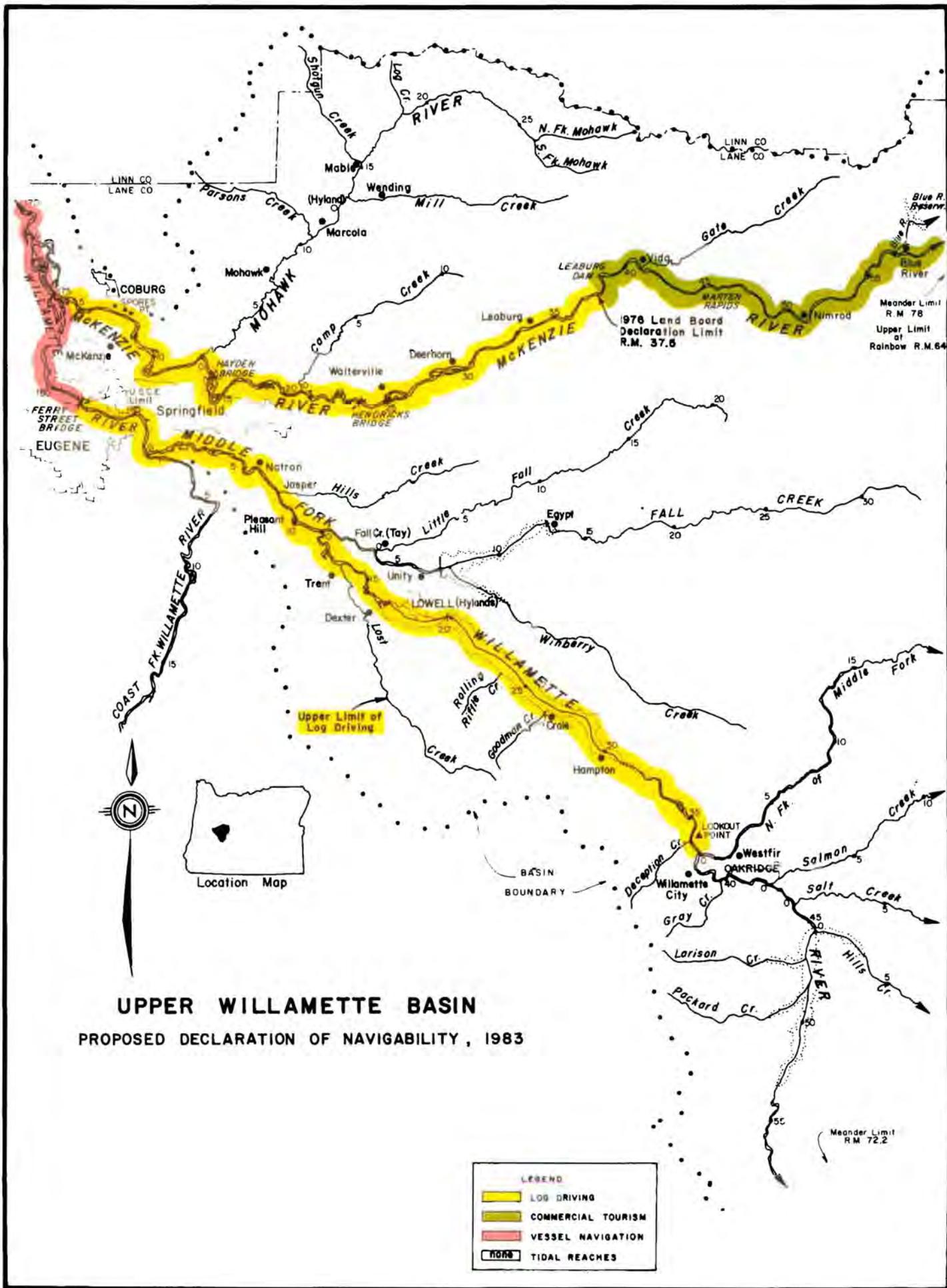
The declaration was made on the basis of the massive log drives which had taken place on that segment of the river from the late Nineteenth Century to 1912. Although this declaration which implied State ownership of the bed of the river was contested by the riparian owners, the State's claim was upheld in March 1982 by the Ninth Circuit Court of Appeals. Subject to review by State courts for possible earlier divestiture of ownership of the bed by the State, Oregon is now the presumed owner of the McKenzie's bed from its mouth to River Mile 37.5.

### Summary of State's Evidence and Additional Recommendation

### COMMERCIAL TOURISM

This was probably the original commercial guide river in Oregon on which the famous McKenzie River Boat was developed. When the State contested ownership of this river in Federal Court, it purposely omitted guide sponsored boat use as a basis of claim in order to limit the issue to log driving.

The commercial tourist portion of use of the McKenzie is directly above the portion now owned by the State of Oregon, i. e. from Leaburg up to the fishing deadline at Rainbow (RMs 37.5-64). Therefore use of this test of navigability would involve a further claim to the McKenzie River's bed. Commercial tourism and the navigability of this reach was recognized by the Federal District Court in Thomson v Dana



**UPPER WILLAMETTE BASIN**  
**PROPOSED DECLARATION OF NAVIGABILITY, 1983**

LEGEND	
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<span style="background-color: lightgreen; border: 1px solid black; display: inline-block; width: 15px; height: 10px;"></span>	COMMERCIAL TOURISM
<span style="background-color: lightcoral; border: 1px solid black; display: inline-block; width: 15px; height: 10px;"></span>	VESSEL NAVIGATION
<span style="border: 1px solid black; display: inline-block; width: 15px; height: 10px;"></span>	TIDAL REACHES

(52 Fed 2d 759, 1931). The McKenzie was meandered to River Mile 78.

By the terms of the Attorney General's Opinion No. 7311, July 1, 1976, it may not be possible for the Division itself to make this extension of the declaration of navigability on the McKenzie River. It is possible for the Legislature itself to extend such a declaration, however, or further empower the Division to make the extension.

No Navigability Hearing was held on the reach of the McKenzie between River Miles 37.5 and 64 during 1981 and 1982.

#### RECOMMENDATION

The Division recommends that a further declaration of navigability be made on the McKenzie River from River Mile 37.5 to River Mile 64 on the basis of the Thomson v Dana decision and commercial tourism.

## NEHALEM RIVER

As a result of evidence presented in the 1981 and 1982 hearings on this river and the decision in the McKenzie case, the Division recommends that the Nehalem River be declared navigable from its mouth to River Mile 52, the upper meander limit. The Division does not recommend a claim of navigability on the North Fork above head of tide.

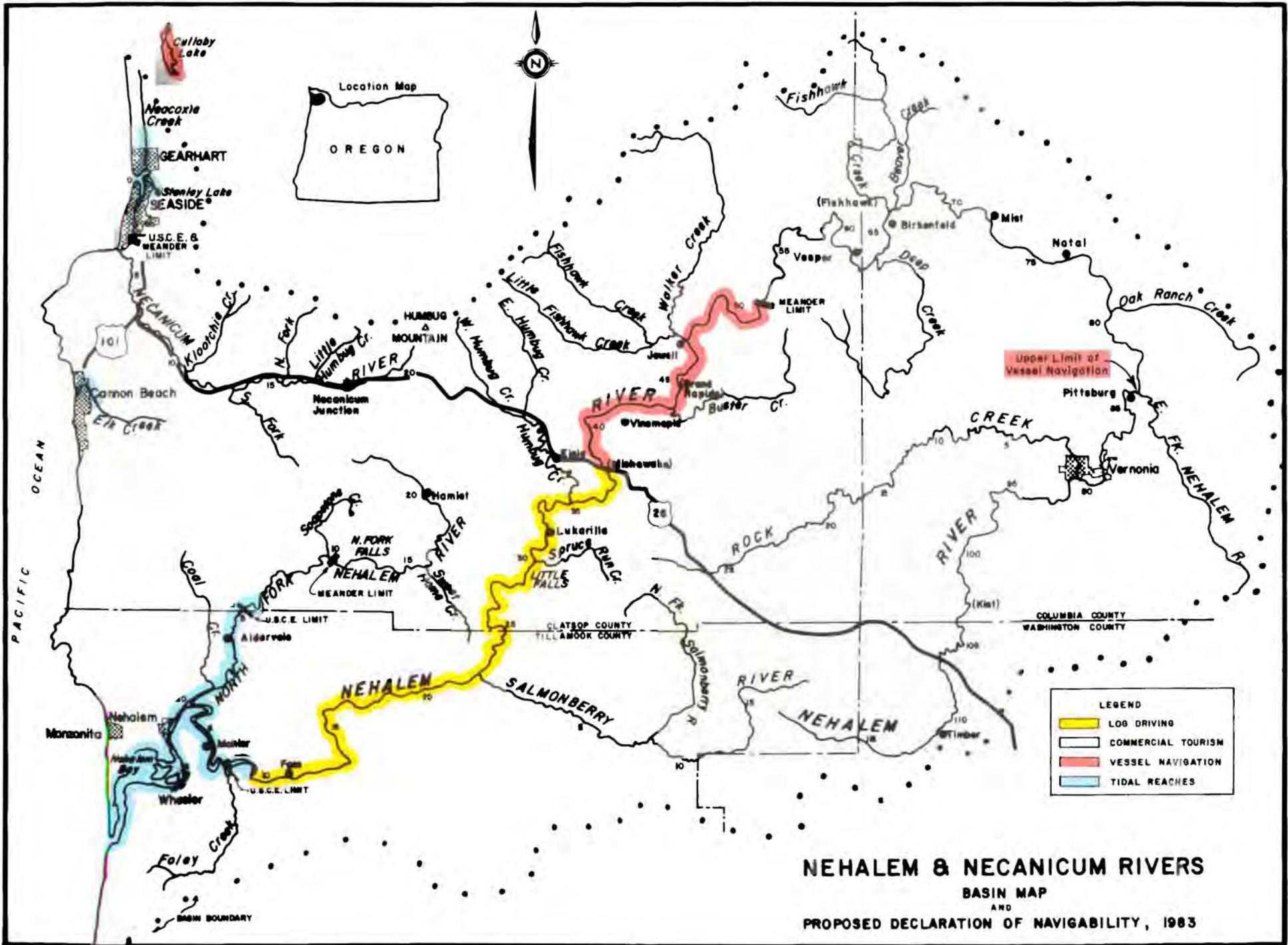
### Summary of State's Evidence

The Nehalem River receives a considerable amount of commercial navigation by three means which the Division considers important to a determination of navigability: vessel navigation, log drives and commercial tourism.

#### VESSEL NAVIGATION

As recounted in the Division's Navigability report for this river (January 1981) early settlers in the upper Nehalem Valley, beginning with Hans Anderson who settled near River Mile 40 in 1866, used the river as one of their means of transport. After William Van established a gristmill at the mouth of Deep Creek in 1882, settlers were reported to have taken their wheat in small boats upriver to the mill in order to trade it for flour. They would pole their boats upstream and then float back to their homes or vice versa.

From the sawmill established at the mouth of the East Fork by Peter Brouse and Isaiah Detrick in 1877-78, the manufactured lumber was floated downriver in crib-built rafts to Mist for land transport to the Columbia or rafted further downstream as far as Mishawaka. By 1891-2 the mill was rafting from November into May.



**NEHALEM & NECANICUM RIVERS**  
 BASIN MAP  
 AND  
 PROPOSED DECLARATION OF NAVIGABILITY, 1983

The mill sent down rafts and scows until at least 1903-4. The Lane Bros. sawmill established at Mist in 1891 also sold lumber downstream in rafts as did the Bond family's sawmill at Vesper established in the first decade of this century. The rafting did not require great skill as customers regularly helped take them downriver and no fatality was ever recorded.

Boats on the Nehalem were also a regular means of passenger transport as is illustrated by the fact that 75 persons taking part in the 4th of July celebrations at Jewell in 1892 travelled three and a half miles downstream by boat to extend their festivities to the new town of Grand Rapids. Although an extraordinary event, it shows, along with other evidence, that there were ample private boats available and used on the river.

These uses of the river as a highway for commerce would seem to meet the standards of navigability for title purposes set by the U. S. Supreme Court in the Montello case (20 Wall. 430) and Utah v U. S. (403 US 9, 1971).

#### LOG DRIVES

In addition to the above vessel traffic, log and shingle bolt drives occurred over all portions of the river during various years well into this century from Pittsburg to the river's mouth, including the portion here claimed by the State.

#### COMMERCIAL TOURISM

There is considerable sport fishing on the Nehalem and among the users are commercial guides. Most of them operate on the river below Mishawaka Bridge over various reaches during the winter steelhead season. Certain guides favor specific portions of this lower segment of the river.

## Summary of Public Hearing

VESSEL  
NAVIGATION

The spokesman for the river owners objected in the 1982 hearing that use by the Division of the January 1981 Nehalem, Necanicum, Nestucca Navigability Studies pamphlet as background information was misleading, because it included log driving data and usage on other portions of the river besides that from Mishawaka to Pittsburg. The Division's report contained material on two other rivers, and contained data besides that on the upper Nehalem. Data on the upper Nehalem had been carefully set forth in the official hearing notice sent to all property owners. That summary was without log driving or other extraneous material. Therefore we do not consider this to be a very serious objection. The availability of the pamphlet was only to allow interested parties to check specific source references to the usages cited in the written notice. Since the McKenzie decision, all material in the pamphlet bearing on the Nehalem is again germane to a navigability determination.

Much of the material presented at the hearing consisted of historical references to the existence of roads along the Nehalem between Mishawaka and Pittsburg. The Division does not deny the existence of roads, it only argues that the Nehalem was a highway for commerce. The written record of Delmar Bond, The Valley I Knew (1968), stated that his father used the river to transport lumber rafts in the winter because the roads were not able to take such heavy loads during the rainy season. The existence of roads does not detract from the navigable status of the Nehalem in that period any more than does the existence of two super highways and two railroads along the Columbia render it a nonnavigable river today.

Lillian Jones appeared as a researcher for Columbia County. She had discovered the Pittsburg Mill Accounts for 1889-91 at the Vernonia County Museum. These are very valuable sources for the navigability of the Nehalem, but Ms. Jones misunderstood their meaning. She emphasized that they used a splash dam to raft and stopped rafting in 1893. Unfortunately for her arguments these conclusions are incorrect. Though the accounts in 1889 and 1891 note several problems with rafts hanging up, none of these stopped delivery or discouraged further rafting. The Ninth Circuit Court in both Puget Sound and the McKenzie case ruled that difficulties - even very serious difficulties - are not a bar to the navigability of a river.

By 1891-2, Pittsburg Mill was rafting from November into May, half the span of the year. It is true that their rafts hung up in low water during late May 1892, and they used the mill dam's splash boards to try to release it. That expedient failed, however, and it was the only time they tried to splash a raft. Rafting in no way depended on such artificial aid. Far from stopping their rafting in 1893, the accounts tell of rafting during succeeding years up to March 1899. Such notices cease then only because the records were very sketchily maintained. Newspaper accounts tell of rafting in the same river reach to the winter of 1903-4, and the Bond family rafted until the end of the decade. Therefore rafting occurred for 20 years. The time period of use on the McKenzie and White Rivers accepted by the Ninth Circuit Court of Appeals was 17 years in each case.

Lillian Jones says the accounts do not tell of settlers bringing grain to the mill to be ground. This is

true. On the other hand on March 11, 1890, coal was brought upriver by boat to the mill. The accounts also tell of the construction and sale of several boats. The 4th of July episode of boating at Grand Rapids - objected to by several witnesses - was admittedly an exceptional event. What it tells about navigability is the fact that there were enough boats available in the vicinity to take the crowd downriver.

Another amateur historian, Mrs. Vivian Reynolds, labelled the account of J. L. Barnard of his trip down the Nehalem in 1884 for the Corps of Engineers as the "Big Lie". Most of her criticism is not germane and is decidedly captious. Her argument that there was no spruce or cedar along the river is disproved by surveyors' notes of 1872 for T5N R7W, for example, which are available at BLM's Portland office. Furthermore much of Barnard's trip was below Mishawaka and not relevant to the reach considered at the 1982 hearing.

Shalmon Libel stated that his ancestor Casper Libel did not own a gristmill at Deep Creek as the Division's report states on page 7. This is true. It was owned by William Van Sr. and Sons as the State's researcher read into the hearing record (page 22 of the transcript). Mr. Libel did uphold the standing of John Banzer as a witness. Mr. Libel's assertion that the Nehalem was not used commercially must be weighed against the evidence of such usage which has been brought forward. Other witnesses who had knowledge of the river before 1930 have no standing, because the commercial usage cited by the Division occurred before that date.

On page 41 of the hearing a witness says Delmar Bond's narrative proved that rafting of the river was

unsuccessful. This is hardly true. The family's first raft did not reach its destination. Profiting from their difficulties on that attempt they made numerous trips thereafter.

Photographs of Grand Rapids were introduced to prove the river could not be navigated. The obstructions to the channel pictured are obviously manmade piers for a bridge and tell nothing of the condition of the river in 1859. Difficulty of use is not a bar to navigability. The Division has photographs from the late Nineteenth Century of much worse rapids being run in Wisconsin with rafts of the type used on the Nehalem with one man steering the train of rafts. This objection has no force.

#### LOG DRIVES

Much of the testimony on this river during 1981 emphasized the problem of police control of the public if they could freely use the bed of this river. Specifically on the point of navigation, two elder residents of the area stated that log driving could only occur when the river level was above the vegetation line, i. e. above mean high water and the level to which any State claim would extend. Other witnesses referred to the fact that in summer they could not operate their small pleasure boats on the river because it was too shallow.

Some testimony and much of the correspondence in 1981 was concerned with the North Fork of the Nehalem. The witnesses and correspondents all insisted that use of that fork above head of tide had been possible only with the aid of splash dams. Therefore, they said, the State would not have a valid claim to its reaches above tide.

## RECOMMENDATION

The testimony in 1982, especially by introducing the Pittsburg Mill accounts, strengthens the claim of navigability on the Nehalem between Pittsburg and Mishawaka. That claim is further substantiated by the log drives from the Vinemaple area to Wheeler on the river's estuary which took place from the teens into the thirties of this century. Coupled with present commercial guide use of the river from Mishawaka to tidewater, the State has sufficient claim of navigability on the Nehalem from Pittsburg to its mouth. The Division recommends that the Nehalem be declared navigable from its mouth to River Mile 52, the upper meander limit on the river.

Because of artificial aids placed on the North Fork to drive logs, the Division does not recommend that the State claim navigability on the North Fork above head of tide.

## ROGUE RIVER

Except for a portion of the river between River Mile 102 and 132, that was declared non-navigable by a decision of the U. S. Supreme Court, the Division recommends that the Rogue be declared navigable from its mouth to River Mile 102 at Caveman Bridge, Grants Pass, and from Tou Velle State Park, River Mile 132 to the meander limit at River Mile 150. Extensive use by commercial guides and vessel navigation supports this claim.

### Summary of State's Evidence

#### VESSEL NAVI- GATION AND COMMERCIAL FISHERY

Effective on October 11, 1975 the State Land Board declared the Rogue to be a navigable river of the State of Oregon from Grave Creek (River Mile 68.4) to Gold Beach, Oregon (River Mile 0.0) OAR ch. 141, Div 81). The facts of navigation on which this declaration was made were reviewed in the Division of State Lands' "Rogue River Navigability Study" of July, 1979. It appears that the commercial use of the Rogue from Grave Creek to Blossom Bar (RM 45.5) consisted of large boats which freighted machinery and supplies for the mines in Rogue River Canyon. These boats began operation in 1906 and commenced their downriver journey from Grants Pass. Therefore commercial use of the Rogue below Grave Creek implies a claim to the reach from Grants Pass to Grave Creek as well. This downriver freighting activity occurred on this reach until the early 1940's.

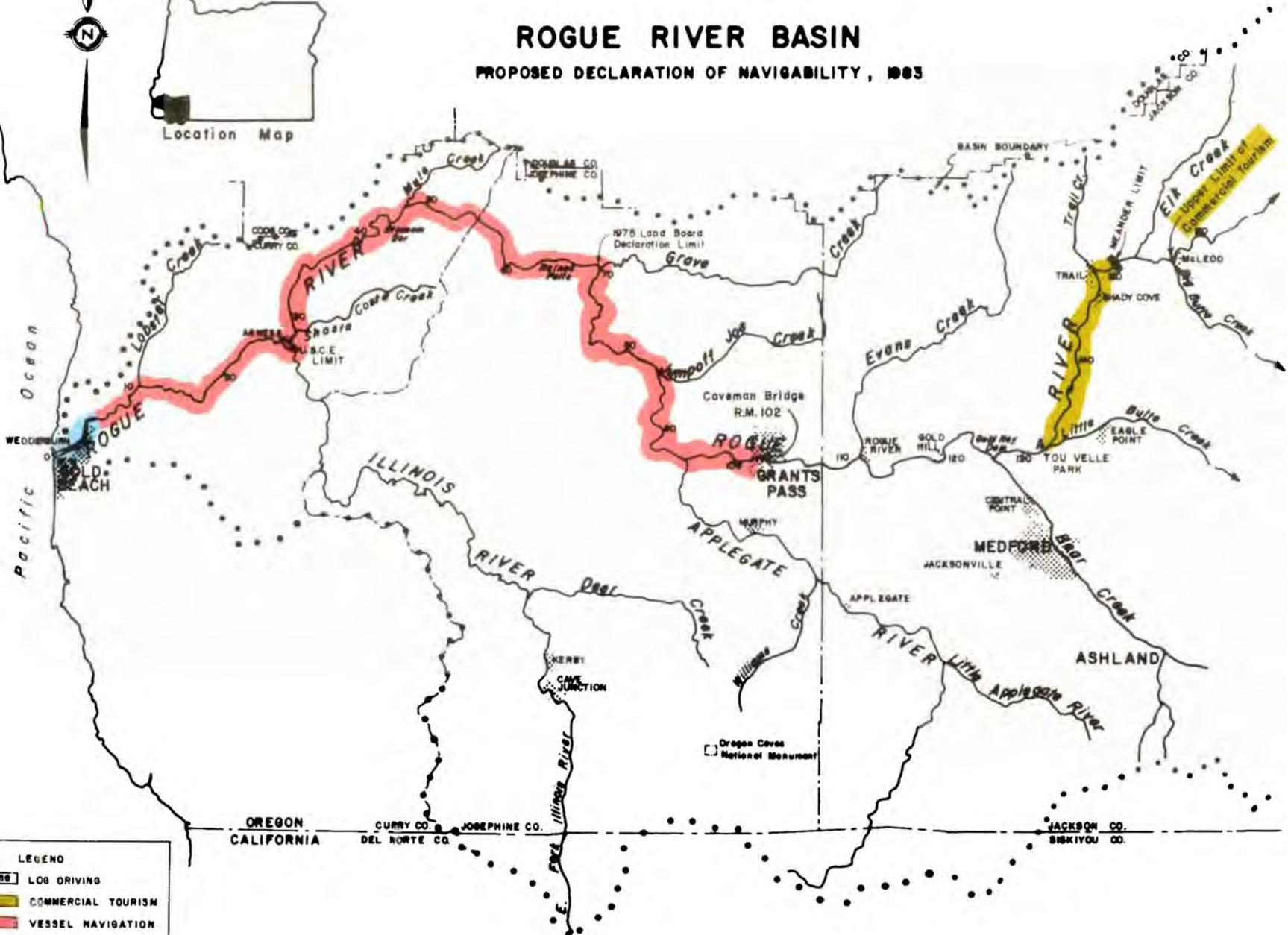
From before 1900 to the permanent closure of the Rogue to commercial fishing in 1935, there was a commercial fishery based on drift boat gill netting on the Rogue from above Grants Pass downriver to a limit

# ROGUE RIVER BASIN

PROPOSED DECLARATION OF NAVIGABILITY, 1983



Location Map



LEGEND	
	LOG DRIVING
	COMMERCIAL TOURISM
	VESSEL NAVIGATION
	TIDAL REACHES

at Hellgate Canyon. Twenty-five boats followed the trade in 1913.

The upper limit of navigation fixed by the Division on this portion of the Rogue is at the present site of Caveman Bridge. The ferry existed in 1853 before Oregon became a State. It is 8/10ths of a mile further upstream than the head of navigation on the Rogue which has been recognized by the U. S. Coast Guard.

#### COMMERCIAL TOURISM

Following the closure of the upper river to commercial fishing, many of the former fishermen, such as Claude Bardon and the Pyle brothers, turned to commercial guiding from Grants Pass downriver as far as Blossom Bar or below. A new dimension was given to this traffic after Glen Wooldridge began upriver navigation of the river in 1947, ultimately using shallow draft aluminum boats powered by water jet engines. This new technology became one of the ordinary modes of travel on water in the mid-twentieth century.

Now the Rogue is the premier commercial guide river in the State. The jet powered aluminum sleds used in the traffic carry 24 or more passengers each. They operate upriver from Gold Beach, sometimes as high as Blossom Bar, and downstream from Grants Pass to Hellgate Canyon. Ten thousand paying passengers were carried over this latter reach in 1971. From Gold Beach, several operators take trips each day during the tourist season from late spring to early fall, the low water season on the Rogue. Additionally guides take smaller groups from below Hellgate through the Rogue River Canyon to Agness for fishing and sightseeing.

Another segment of the Rogue from McLeod to Tou Velle State Park (RM 157-132) is also heavily used by commercial guides using conventional drift boats, especially during the spring Chinook season from mid-May to mid-July.

The Rogue was meandered to River Mile 150 in the middle of this upper reach.

### Summary of Public Hearing

The 1982 hearing took up the claim of the State to the portion of the Rogue River from Caveman Bridge in Grants Pass downstream to the mouth of Grave Creek. The Land Board had already gone through the rule making process with their public hearings before making their claim of navigability on the Rogue from the mouth of Grave Creek to the Pacific.

#### VESSEL NAVIGATION

In 1982 the strongest arguments against the State's claim to this reach of the Rogue River's bed were put forward by Walter Cauble, a Grants Pass attorney representing the Rogue River Riparians Association. Mr. Cauble argued that dynamiting of the river meant that navigation did not occur in the river's natural condition of 1859. Cauble referred to blasting done as far down as Blossom Bar, thus questioning the earlier decision of the Land Board below Grave Creek. Cauble's argument was later supported by a veteran river guide, Ernest Pruitt. Pruitt stated that present jet boat use of the reach under consideration in 1982 depended on blasting by Glen Wooldridge.

The Division replies to this objection in three ways. First, most of the downriver freighting did not

depend on these efforts to redirect the river's flow. Aubrey used the river before Wooldridge did his blasting. Secondly, the Ninth Circuit Court of Appeals found in the McKenzie case that the blasting on the McKenzie and installation of wing dams to aid log drives did not make the river an artificial waterway; large scale engineering works such as dams and locks would have been required to impair its natural state. Thirdly, river freighters on the Rogue often portaged their goods, a perfectly respectable procedure on a navigable river according to The Montello decision.

Cauble next argued that the State had not proved the usefulness of the Rogue as a highway for commerce, in particular that there had not been extensive enough or valuable enough usage to prove this point. In answer, the Ninth Circuit Court in the Puget Sound decision met similar objections with reference to White River shingle bolt drives. The court held that the dollar value of the traffic was not important, what was essential was that the waterway was used as a commercial highway. The State of Oregon believes that it has shown that the Rogue in the reach under consideration met that test.

For his third argument Cauble said that recreational use in and of itself was not grounds for declaring a river navigable. The Division did not make such an argument. Part of the usage of the river was a commercial fishery, not a recreational fishery. Current recreational use includes large scale trips for hire on jet boats from Caveman Bridge down through Hellgate Canyon and return. There is also valuable commercial guide traffic on the river that has been in existence since the 1930's. All of this usage is not advanced alone but in conjunction with commercial freighting on the river for the portion below Grants Pass.

Fourthly Cauble argued that Weise v Smith (3 Or 445, 1869) states that the riparian owner owned the bed of a floatable river (Tualatin) in Oregon and that rule should govern on the Rogue. The Division understands the court to have said in Weise that on a navigable river the riparian owner has title to the upland. Those using the river may use the bank to install booms which are an incidental necessity of navigation. The case does not address the issue of bed ownership.

Next Cauble cited AG Opinions, 1944-46, pp. 409-412 that the Rogue below Grants Pass was not a navigable river. On p. 411 the Opinion reads: "Applying that test to the facts submitted by you, it is my opinion that Rogue River is not a navigable stream at the points involved". The facts presented were that fishermen floated the river, it was meandered, and it had a mean flow of 2820 cfs. As the Division is advancing more and different facts from these, it believes that its expanded range of evidence shows that the Rogue was navigable in a sense that would meet the Federal Test. This AG Opinion does not estop the State from making a declaration of navigability on the Rogue River from Grants Pass to Grave Creek.

Finally Cauble cited California Oregon Power v Portland Cement Co. (295 US 142) that the Rogue River near Gold Hill was not a navigable river. The Division is not making a claim in the vicinity of Gold Hill but from Grants Pass downstream and Tou Velle upstream. The United States Supreme Court has been clear that rivers may be navigable in noncontiguous reaches.

In summation, the Division does not believe that Cauble's arguments for the Rogue River Riparians Assoc-

iation impair its claim to the bed of the Rogue except perhaps with regard to the claim above Tou Velle Park which is based solely on commercial tourism.

Other witnesses cited the existence of trails in Rogue Canyon. The Division acknowledges that most travel and freighting along the lower Rogue was done on trails, but does not believe this detracts from the fact that the Rogue was a highway for commerce.

COMMERCIAL  
TOURISM

A last argument used by some witnesses was that jet boat technology came after 1859, therefore jet boats cannot be used as evidence of the Rogue's navigable capacity. The Division believes that both the Montello and US v Utah (283 US 64, 1931) recognize that river use is prospective at the time of statehood and that technology for such future use would be progressive. In US v Utah gasoline powered boats, which had not been in existence at the time of Utah's statehood, were cited with approval in evidence of navigability on the rivers there in question.

Most of the 1981 hearing's criticism of the State's claim was concerned with the Rogue from Grants Pass upriver to McLeod Park. The upper portion of this reach is currently heavily used by sports fishermen and commercial guides. The Division in its report conceded that log driving had proved a failure in this portion of the Rogue, so commercial guide use is the only successful commercial use of this segment of the Rogue. Riparian owners strongly opposed use of this evidence for establishing navigability. On the other hand this was the only river for which there was an equal input in favor of a declaration of navigability at the time of the 1981 hearing.

One witness from a title insurance company informed the meeting that because Rogue River is meandered, title insurance companies do not insure their property interest below the high water line.

#### RECOMMENDATION

The Division does not believe that testimony taken in 1982 weakens its claim to navigability below Caveman Bridge nor does it upset the Land Board's earlier determination of navigability. Less strong is the case of navigability from McLeod to Tou Velle Park which is wholly commercial guide traffic. It has taken the decision of the U. S. Supreme Court in California Oregon Power v Portland Cement Co. (295 US 142) to prohibit a claim of navigability from River Mile 102 to 132.

The Division recommends that the State declare additional reaches of the Rogue navigable from Caveman Bridge, Grants Pass (RM 102) to its confluence with Grave Creek (RM 68.4) and from Tou Velle Park (RM 132) to the meander limit at River Mile 150.

## SANDY RIVER

(see map page 31)

The Sandy is one of several rivers on which commerce was primarily log driving. Hearings were held only in 1981. The Sandy was meandered above the head of tide to River Mile 4. The Division recommends that it be declared navigable to River Mile 4.

### State's Evidence

#### LOG DRIVES

There are three bases for the Division's claim that the Sandy is a navigable river. The most extensive is the log and railroad tie drives which occurred on the river from 1895 to 1926 from as high as Messinger Bottom below the mouth of the Salmon River, RM 37.5. The circumstances of these drives are very similar to the shingle bolt drives on the White River in Washington State, especially as to the flow and gradient of the river and the time of year of the drives. These formed the basis of a finding of navigability on that river by the Ninth Circuit Court of Appeals in the Puget Sound decision. On the Sandy, the number of driving years was about twice as long as on the White River.

#### COMMERCIAL FISHING

The second basis of a claim of navigability is the use of the lower river to River Mile 3 as a commercial smelt fishery by motorized boats. This has been taking place throughout this century to the present.

#### COMMERCIAL TOURISM

Because of its proximity to Portland and the relatively unspoiled natural condition of its canyon, the Sandy is a popular recreational river and commercial guides take customers down it. The highest frequency of guide use is between Dodge Park and Oxbow Park (RMs

18.5 and 13). This is the third reason for declaring the river navigable.

### Summary of Public Hearings

#### LOG DRIVES

One local historian stated that the highest point from which tie drives occurred was the Nelson sawmill located not at Brightwood, but Sleepy Hollow at River Mile 35.5. The researcher accepts this correction.

#### COMMERCIAL FISHING

Several persons argued that the use of the river by smelt fishermen during the short two-three week smelt season was insufficient to warrant a declaration of navigability.

#### COMMERCIAL TOURISM

At the public hearings there were strong objections to the taking of private property by the State. Many persons felt that State ownership would allow greater ecological damage of the river and opposed a State declaration of navigability for that reason. There were also a number of guides and fishermen who favored State ownership, because they felt it would increase their access to the river.

### RECOMMENDATION

The Division recommends that the State declare the Sandy navigable from its 1859 mouth to River Mile 4. This is the length to which the Sandy was meandered, and by only claiming it, opposition to State title may be reduced. Most persons testifying were willing to accept the Corps limit at River Mile 2. Some parcels of even this lower portion may not be claimed because of prestatehood grants of the river bottom and the fact that the present mouth was avulsively formed: the original mouth flowed east into the Columbia and was diked off in 1931-32 by the Oregon Fish Commission.

## SANTIAM RIVER

The Division recommends that the following portions of the Santiam River system be declared navigable: the main stem from its mouth to the forks; the North Santiam from its mouth to River Mile 27 near Mehama; and the South Santiam from its mouth to near River Mile 26.5 above Waterloo.

### Summary of State's Evidence

#### VESSEL NAVIGATION

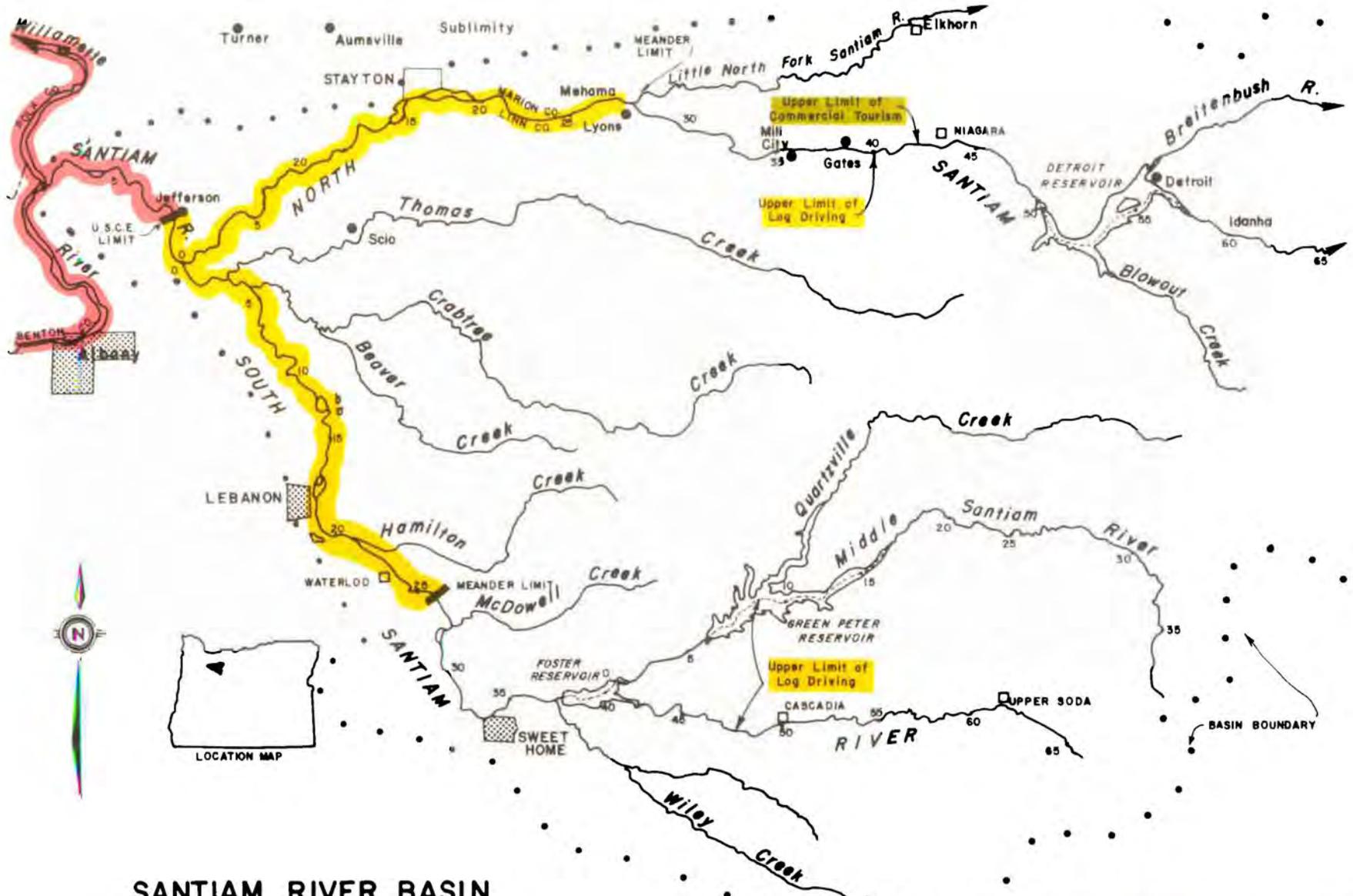
The evidence upon which the Division bases its claim that the Santiam is a navigable river is of three types: vessel, log driving and commercial touring usages. Between 1850 and 1876 steamboats ascended the Santiam to Santiam City and Jefferson on high stages of water to take off stored wheat. Between 1916 and 1950 tugs also used the Santiam to take out rafts of logs when the water was at the 11 foot stage or higher. The Corps of Engineers holds that the Santiam is historically navigable to Jefferson at River Mile 9.6.

#### LOG DRIVES

Log drives occurred on the North Santiam during the period 1879-1916. From 1900 C. K. Spaulding took them from River Mile 40 at Gates to the Willamette and thence to points downstream. The South Fork sustained cordwood drives to the paper mill at Lebanon and log drives during the years 1903 to 1913-14. This was from as high as River Mile 48 and Quartzville Creek on the Middle Santiam. During other years there was also evidence of log drives on McDowell, Hamilton, Crabtree and Thomas Creek.

#### COMMERCIAL TOURISM

Commercial guides operate on the main forks of the Santiam during all months of the year. Mehama to the Forks on the North Fork and Foster to Sweet Home on the



# SANTIAM RIVER BASIN

PROPOSED DECLARATION OF NAVIGABILITY, 1983

LEGEND	
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<span style="display:inline-block; width:15px; height:10px; background-color:lightgreen; border:1px solid black;"></span>	COMMERCIAL TOURISM
<span style="display:inline-block; width:15px; height:10px; background-color:lightcoral; border:1px solid black;"></span>	VESSEL NAVIGATION
<span style="display:inline-block; width:15px; height:10px; border:1px dashed black;"></span>	TIDAL REACHES

South Fork are the reaches most frequented by guides. These trips are to take advantage of steelhead and chinook salmon runs. Additionally there are a number of guides who take whitewater excursions on the North Santiam, especially from Packsaddle Park to Mehama, which is also a popular run during the Spring trout season.

### Summary of Public Hearings

These hearings were well attended and produced a great deal of testimony. Most of it dealt with complaints about the State asserting title to property which was explicitly deeded to the testifiers - particularly on tributary streams - or asserting title after such a long period of time. Related to this complaint was past payment of taxes on the submerged river beds by adjacent owners. The next most frequent complaint was that public ownership would result in abusive use, littering, etc. by the general public. Some witnesses were concerned about irrigation rights or dam rights.

#### VESSEL NAVIGATION

There was substantial criticism of the State's claim of vessel navigability to Jefferson. On the one hand it was argued that there was insufficient evidence of this usage; on the other that it did not occur during the river's ordinary condition but only on extraordinary high water stages.

#### LOG DRIVES

Relying on Magistrate Hogan's District Court opinion in the McKenzie case a number of arguments were advanced against the legal validity of using log driving as evidence of navigability on the North and South Santiam. All of these arguments have since been overridden by the Ninth Circuit Court's decisions. This is particularly so because drives on the Santiam occurred

during the same season as on the McKenzie, that is during the late spring and early summer snowmelt.

Residents along South Santiam tributaries claimed that Thomas and Crabtree Creeks had not been used for log drives. Those from McDowell and Hamilton Creeks stated that drives on those streams had all required splash dam assistance. One witness, opposed to State ownership, allowed that he had observed log drives on the North Santiam.

One witness supplied convincing evidence that McCartney Slough at the mouth of the Santiam, which the Division claimed as navigable, was an artificial channel dug in 1854.

#### COMMERCIAL TOURISM

During the 1981 public hearings commercial tourist usage was opposed as a basis of navigability by riparian owners, but one sportsman desired to know what were his legal rights to use of the Santiam.

One witness noted that title insurance did not guarantee to private owners the South Santiam's bed at Lebanon against the State.

#### RECOMMENDATIONS

There may be some question whether the vessels ascending the Santiam to Jefferson used the river in its ordinary condition, but as the main stem sustained log drives in a manner similar to those which took place on the McKenzie, the State believes that it has a justifiable claim of navigability on the Santiam River in its entire length, the North Fork to River Mile 40, and South Fork to River Mile 48.

The Division accepts the objection of witnesses to the unsuccessful or artificially aided use of the South Santiam tributaries; additional photographs from Lebanon Paper Company archives now in the Horner Museum, Oregon State University, Corvallis, substantiate this. It will not make claim to the beds of these waterways. The Division also accepts the artificiality of McCartney Slough and the State will not claim its bed.

If the State were to claim only the meandered lengths of the North and South Forks, the objection of State taking would also be met. Therefore the Division recommends that the following portions of the Santiam River system be declared navigable: the main stem from its mouth to the forks; the North Santiam from its mouth to River Mile 27 near Mehama; and the South Santiam from its mouth to near River Mile 26.5 above Waterloo.

## SILETZ RIVER

The Division recommends that the Siletz River be declared navigable from its mouth in Siletz Bay to River Mile 34.5.

### Summary of State's Evidence

#### VESSEL NAVI- GATION AND LOG DRIVES

In preparation for the 1982 hearings, the Division's assertion of navigability on Siletz River was based on information that tugs had taken small rafts of logs from Euchre Creek to tidewater during the 1950's. In addition one entrepreneur had a motor-driven boat route to collect fish on the Siletz up to River Miles 27 and 31 during the 1920's. Logs had also been floated freely to tidewater from a rollway at Euchre Creek.

#### COMMERCIAL TOURISM

The most important commercial traffic on the Siletz has probably been its present usage by commercial guides. Guides operate from Moonshine Park (RM 53) in various reaches downstream, but especially below the town of Siletz, in almost all months of the year except March-May. The river was meandered to River Mile 34.5 two miles below the town of Siletz; this includes the most popular winter steelhead run.

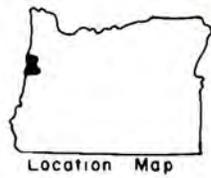
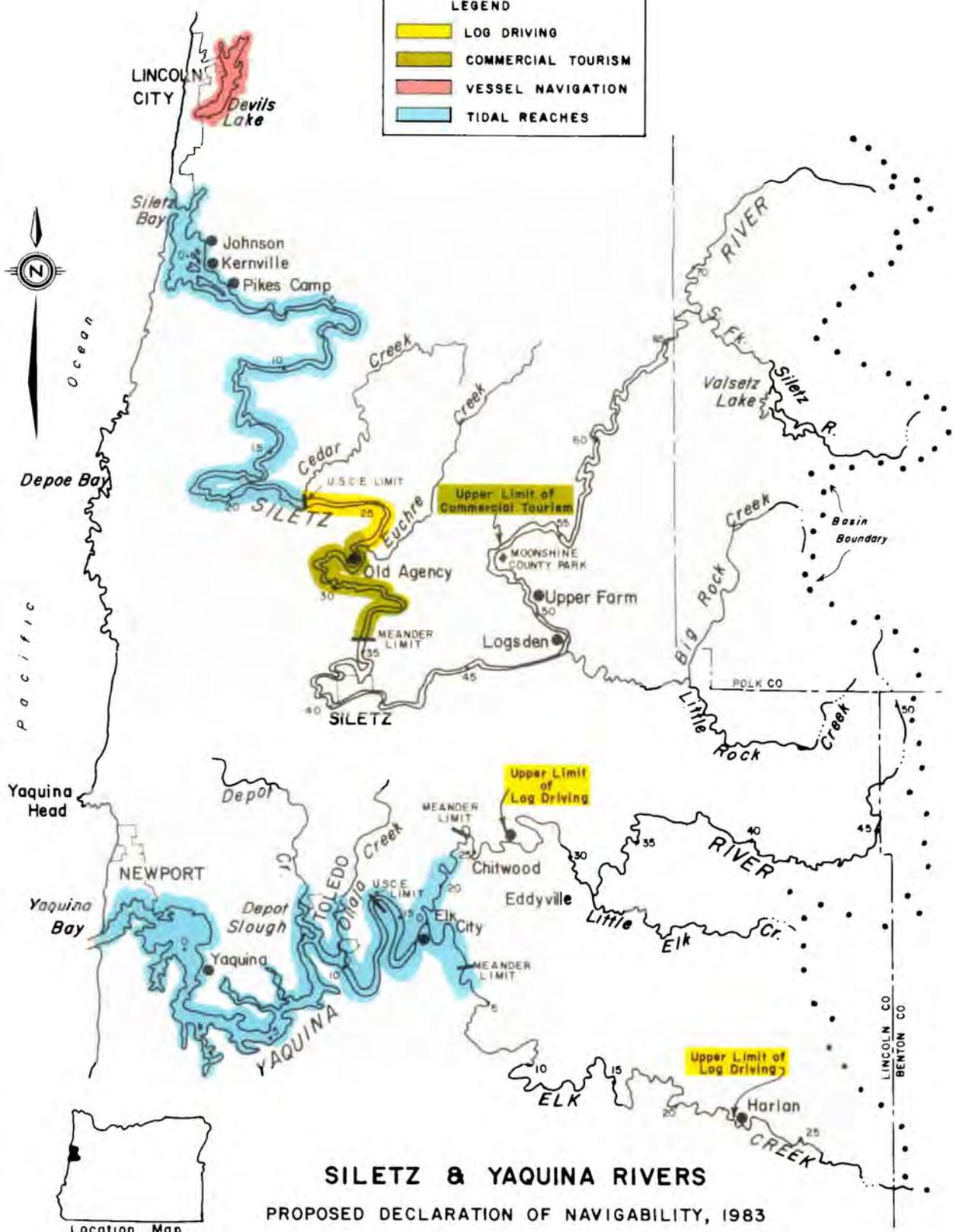
### Summary of Public Hearings

#### VESSEL NAVI- GATION AND LOG DRIVES

Local residents denied that tugs and rafts had ever operated or been taken from Euchre Creek (or any point above head of tide). Some did indicate that there had been a rollway for loose floating of logs at Euchre Creek. 200 owners protested against a claim to the Siletz based on log flotation and small boat use. During a November 1981 informational meeting,



LEGEND	
	LOG DRIVING
	COMMERCIAL TOURISM
	VESSEL NAVIGATION
	TIDAL REACHES



**SILETZ & YAQUINA RIVERS**  
 PROPOSED DECLARATION OF NAVIGABILITY, 1983

Wilfred Gerttula, son of the man who operated the fish boat on the Siletz, stated that his father had made a few trips during the winter of one year, ruined the bottom of his boat in the process, and did not repeat the effort. This would indicate the Siletz was not navigable for vessels larger than driftboats.

COMMERCIAL  
TOURISM

During 1981 hearings, riparian owners argued that commercial guides only operated on winter stages of water.

RECOMMENDATION

Because the Division could not use free floating logs as evidence of navigability in their 1982 hearings, and there was effective challenge of the researcher's evidence of vessel use, the Division cancelled the intended March 1982 hearing on Siletz River. The McKenzie decision changes this situation. The log driving evidence is now important, and the river is heavily used by commercial guides. Therefore a claim of navigability on the Siletz above the head of tide is now called for.

The Division recommends that the Siletz River be declared navigable from its mouth in Siletz Bay to River Mile 34.5.

## SILVIES RIVER

### Summary of State's Evidence

#### LOG DRIVES

From 1888 to 1900 Silvies River sustained log drives from Emigrant Creek to the Sayers sawmill in Burns. The drives occurred on the spring rise from March through June. It is uncertain if significant artificial aids were employed in the drives. The Silvies was meandered throughout the indicated reach.

No Public Hearing was held on this River.

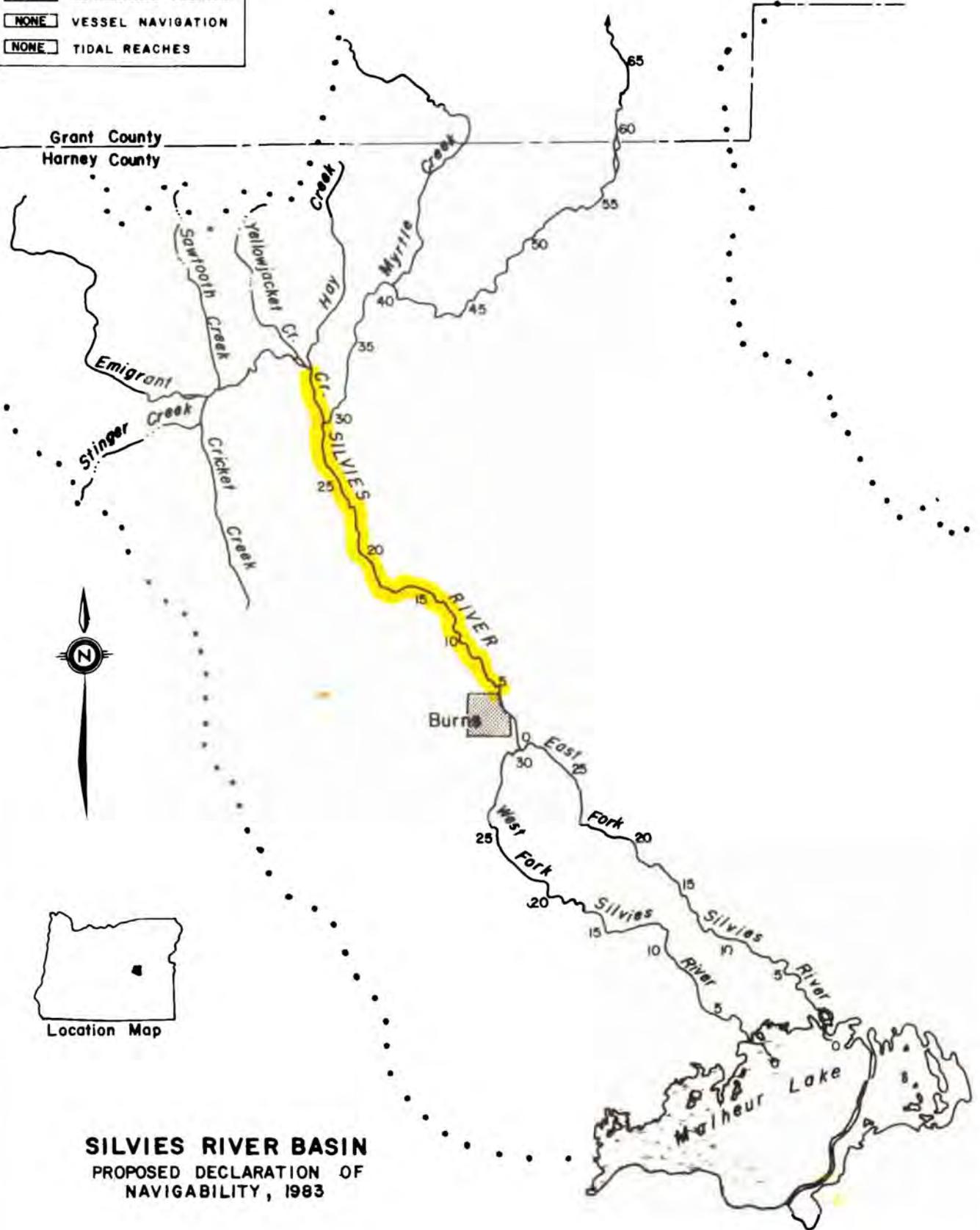
### RECOMMENDATION

Whether this period of driving to one sawmill would qualify Silvies River from River Mile 3-30 as a navigable river is open to question. The Division recommends a declaration of navigability on Silvies River from Burns to its confluence with Emigrant Creek.

LEGEND

- LOG DRIVING
- NONE COMMERCIAL TOURISM
- NONE VESSEL NAVIGATION
- NONE TIDAL REACHES

Grant County  
Harney County



**SILVIES RIVER BASIN**  
PROPOSED DECLARATION OF  
NAVIGABILITY, 1983

## SIUSLAW RIVER

On the Siuslaw river system, the Division recommends that a declaration of navigability be confined to the meandered portions from the mouth to River Mile 34.5 of the main stem and from the mouth to River Mile 3.5 of Lake Creek. On the North Fork the Division recommends a claim to the bed in the tidal portions to River Mile 10.5.

### Summary of State's Evidence

#### VESSEL NAVIGATION

The State claim to the main stem and its tributaries rests on the basis of vessel transportation, principally in its tidal portion, and log drives above tide and in several tributaries. The head of vessel navigation was Seaton at River Mile 22 of the main stem, a mile and a half above Mapleton, and at Portage, River Mile 7 on the North Fork. Additionally there was some canoe freighting in pioneer days up to River Mile 38 of the main stem.

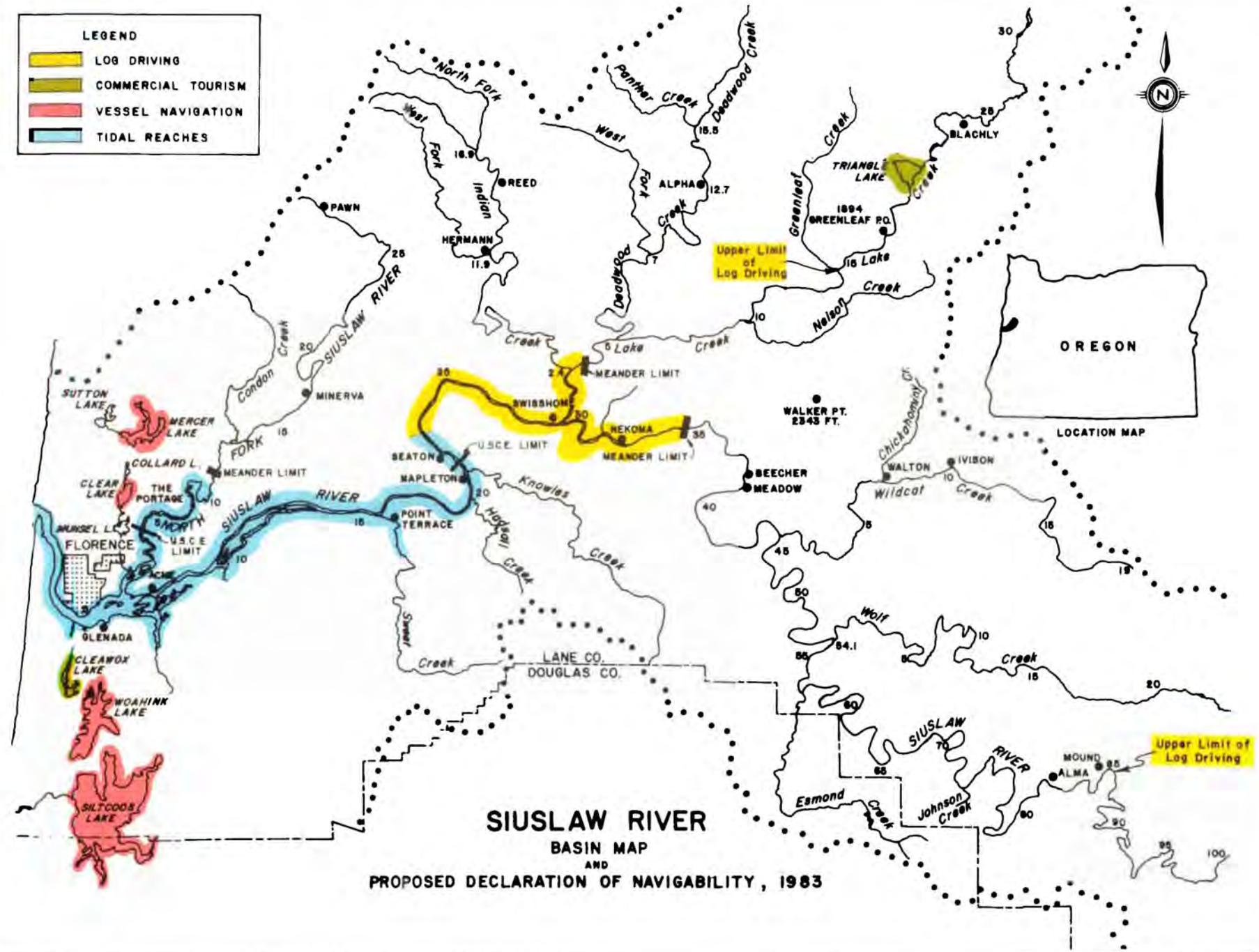
The State has a claim to the bed of the North Fork Siuslaw on the basis of its tidal character to River Mile 10.5 and early vessel navigation, including a regular mail boat run, to Portage, River Mile 7.

#### LOG DRIVES

Log drives occurred in the basin from 1889 to the early 1920's during high waters from November through April. On the main stem logs were driven from Mound, River Mile 85; on Wildcat Creek for seven and a half miles; and on the following tributaries for approximately 15.5 miles: Indian, Deadwood and Lake Creeks. More log drivers registered their brands on this system than any other in Oregon.

**LEGEND**

- LOG DRIVING
- COMMERCIAL TOURISM
- VESSEL NAVIGATION
- TIDAL REACHES



**SIUSLAW RIVER  
BASIN MAP  
AND  
PROPOSED DECLARATION OF NAVIGABILITY, 1983**

## SMITH RIVER

### Summary of State's Evidence

The head of vessel navigation on this river is Sulphur Springs near River Mile 21.2 which is within tidewater. Above that point to River Mile 44, Smith River had a long history of log drives beginning in the 1870's or 80's and ending only in 1916 or later. Splash dams were never used on this river. The river was only meandered, however, a short distance above tidewater to River Mile 23.5.

No Navigability Hearings were Held on this River.

### RECOMMENDATION

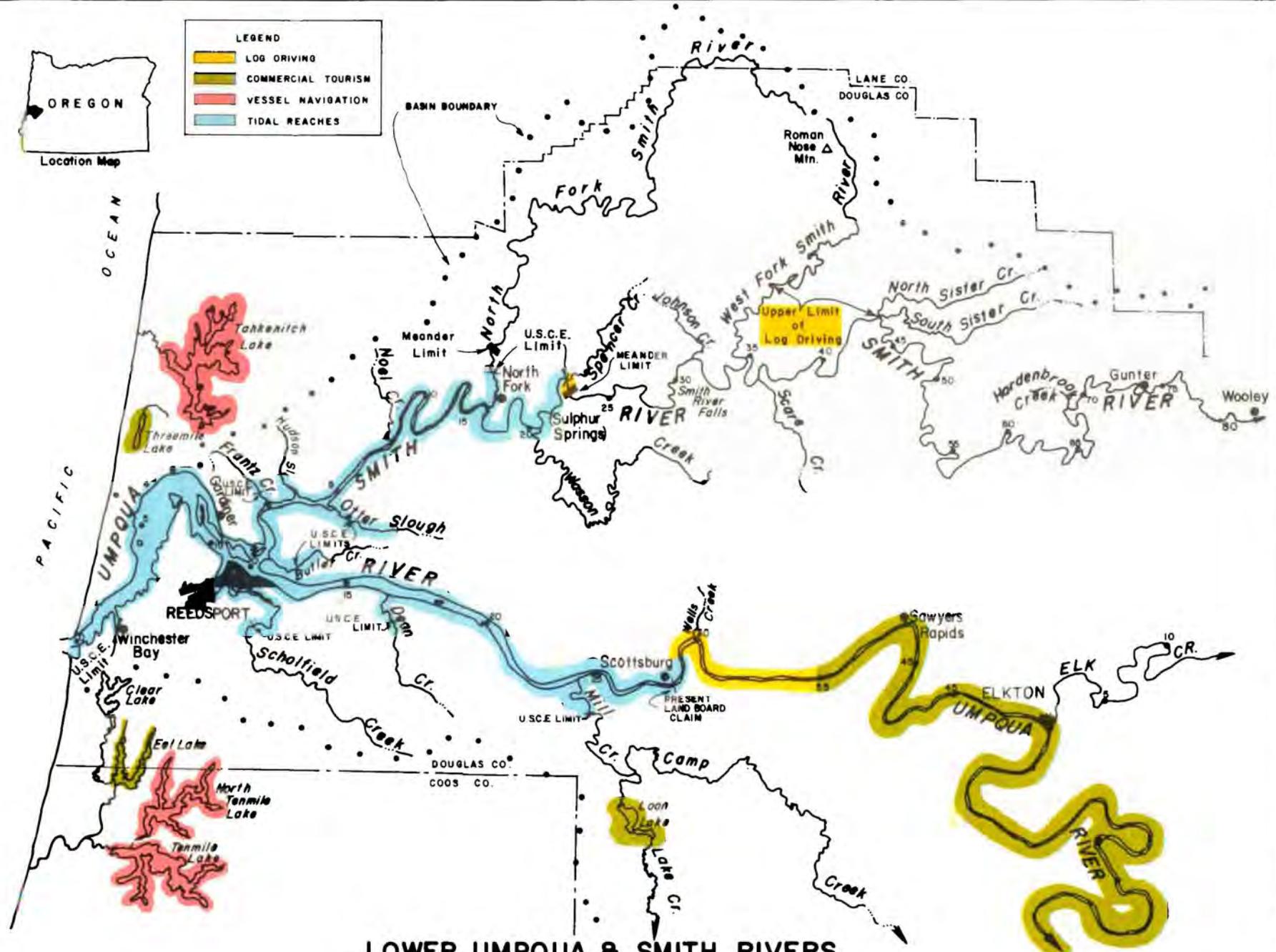
The Division recommends that the State declare Smith River navigable to River Mile 23.5.

115-117



**LEGEND**

	LOG DRIVING
	COMMERCIAL TOURISM
	VESSEL NAVIGATION
	TIDAL REACHES



**LOWER UMPQUA & SMITH RIVERS**  
 PROPOSED DECLARATION OF NAVIGABILITY, 1983

## SNAKE RIVER

### Summary of State's Evidence

The entire Snake River adjacent to and within Oregon is recognized as navigable by the Corps and is meandered.

#### VESSEL NAVIGATION

Commerce in the rugged terrain of the Snake bordering Oregon has never matched that on the Columbia or Willamette, but it has been important. Beginning with mining discoveries in 1862, the upper portion of the Snake within Oregon and on the Idaho border was used to supply mines as far downriver as the Red Lodge Mine (RM 247.5) in the later Nineteenth Century. Two of the larger steamboats built for this traffic proved uneconomical on that reach; they were run through Hells Canyon to the Columbia with damage to their paddles and hulls.

This section of the Snake was recognized to be a navigable river by the U. S. Supreme Court in Scott v Lattig (227 US 220, 1913).

On the lower Snake there was steady effort from prestatehood for trading days to take sail and human powered boats upriver. After mineral discoveries the effort continued into the twentieth century until steamboats reached upriver from Lewiston. Gasoline and diesel powered boats followed, so that since 1914 regular use of the river has proved practicable to take in supplies and take off loads of wool as far upstream as Granite Falls Rapids (RM 239).

COMMERCIAL  
TOURISM

There was a small section from River Mile 239 to 247.5 that was not navigable by commercial boats, though this reach proved very popular for commercial guides in the twentieth century.

No Navigability Hearings were Held on this River

RECOMMENDATION

The Division recommends that the entire length of the Snake River within Oregon from near River Mile 176 to near River Mile 409 be declared navigable.

## TILLAMOOK RIVER

### Summary of State's Evidence

#### LOG DRIVES

Log Drives occurred on the lower Tillamook River between 1887 and 1915. Most of this traffic was of logs which issued from Bewley Creek, a stream that itself required splash dams for most of its drives.

### Summary of Public Hearings

#### LOG DRIVES

During the 1981 hearings there was strong objection to the taking of lands which had deed descriptions to the center of rivers. Many witnesses denied that any rivers in the Tillamook basin were navigable. On Bewley Creek several persons stated that it had only been used with artificial aid and therefore was not navigable.

### RECOMMENDATION

Tillamook River from the mouth of Bewley Creek to tidewater, a distance of about one mile, was regularly used to float logs. This reach was meandered and the Division recommends that the State declare Tillamook River navigable from its mouth to its confluence with Bewley Creek near River Mile 6.7.

With regard to one of the Bay's tidal waterways, the researcher noted while studying its main rivers that Hoquarten Slough's upper reach was artificially created. Therefore the claim to the bed of this Slough would be to its 1859 configuration, not its artificially created dimensions.

## UMPQUA RIVER

(see second map page 115)

The Division recommends that the Legislature determine all of the Umpqua River to be navigable. It also recommends a declaration of navigability on the North Umpqua from its mouth to the meander limit near River Mile 29 below the forks at Glide.

### Summary of State's Evidence

In December 1976 the Land Board confined its declaration of navigability on the Umpqua to its tidal portion from the mouth to River Mile 28 near Scottsburg. It decided that the river was not navigable above that point. An Attorney General's Opinion No. 7311, July 1, 1976, indicates that because the Land Board considered the entire length of the river in making its decision it would be estopped from a further declaration of navigability. The Legislature, however, would not be barred itself from extending the range of the declaration or instructing the Land Board and the Division to make a redetermination. On that basis the factual basis of navigability on the Umpqua is here presented with a recommendation to the legislature.

All of the Umpqua and North Umpqua from its mouth to River Mile 29 just below Glide have been meandered.

#### LOG DRIVES

From 1891 to 1914 there were log and piling drives on the Umpqua from points as high as Long Prairie (RM 35) to tidewater on the lower Umpqua. On the North Umpqua log drives occurred from about 1876 to 1909 during various years. They were on different reaches



from as high as Rock Creek near River Mile 35.5 to Winchester at River Mile 7. The large drives after 1900 were successful but the mill company could never build a boom strong enough to hold the logs during winter high waters.

Of the other streams in this basin, Elk Creek had the most log drives, but virtually all seem to have required splash dam assistance and this creek was not meandered. The same holds true for Mill Creek which enters into the Umpqua's estuary.

COMMERCIAL  
TOURISM

Sports fishing takes place on the Umpqua and its main forks during virtually all months of the year. The most popular runs are the five miles above Scottsburg on the main stem with lesser but significant use of the main river throughout its entire length. Commercial guides use the lower 35 miles of the North Umpqua, the same reach that sustained log drives.

In 1926 the Oregon Attorney General issued the opinion that the North Umpqua was not a navigable river (OAG 12, pp. 489-90). Their office presently advises that their earlier decision, in the light of the McKenzie decision, does not prevent the State from declaring the North Umpqua to be navigable.

The Oregon Supreme Court in Micelli v Andrus (61 Or 78, 1912) determined that the South Fork of the Umpqua was not a navigable river. This decision conforms to the weak evidence of navigable use on this river found by the Division staff.

No Navigability Hearings were Held on this River

## RECOMMENDATION

The Division recommends that the Legislature determine all of the Umpqua River to be navigable. It also recommends a declaration of navigability on the North Umpqua from its mouth to the meander limit near River Mile 29 below the forks at Glide.

## WILLAMETTE RIVER AND ITS MIDDLE FORK

The Willamette River is one of the three rivers which continue and are widely known to be navigable above head of tide. Its Middle Fork is included because of the State's claim of navigability resulting from log drives on that fork in the reach below the mouth of the North Fork.

The Division recommends that the entire length of the main stem of the Willamette River and its Middle Fork to the mouth of the North Fork near River Mile 37.5 be declared navigable.

### Summary of State's Evidence

#### VESSEL NAVIGATION

The Willamette is widely known to be a navigable river. It provided a major commercial artery for its prosperous agricultural valley during the first half century of white settlement. Depending on the year or the season, Corvallis or even Salem were often heads of navigation. Use of the upper river depended on winter stages and considerable snagging, blasting and some dredging. The Willamette remained an important commercial highway until World War I. During most of its history it was also a major carrier of both free floating and rafted logs over its entire length. The most detailed history of its vessel navigability are H. W. Corning, Willamette Landings, 2d ed. (Portland: Oregon Historical Soc. Press, 1947) and Mills, Sternwheelers Up Columbia.

The Willamette is recognized as navigable by the Corps of Engineers to Ferry Street Bridge, Eugene, and is meandered in its entire length. The U. S. Supreme

Court in State Land Board v Corvallis Sand & Gravel Co. recognizes the navigability of the Willamette.

LOG DRIVES

Log driving is the principal use upon which the Division bases its claim to the Middle Fork although commercial guides have also used the river. The log driving history of the Middle Fork is virtually identical to that of the McKenzie. Upon that basis the State was awarded title to the latter river's bed by the Ninth Circuit Court of Appeals. Drives occurred on both rivers during the same period (1873-1911) and in equally large volumes. On both it was done without significant structural aids.

The tributaries that were specified for 1981 hearings were Fall, Larison and Winberry Creeks, and the North Fork which all had log drives. Lost Creek, which was not specified in the hearing notice, also was an important log driving stream in the basin.

The Middle Fork was meandered to River Mile 72.2. None of the log driving tributaries were meandered.

Summary of Public Hearings

LOG DRIVES

The 1981 hearings were fully attended, but the testimony can be summarized under two points: (1) that procedurally there was insufficient time of notification and that a great many riparian owners did not receive mailed notice; (2) that Fall Creek and Little Fall Creek were only driven with the aid of splash dams. The researcher also received a phone call from a Winberry Creek resident who consulted Jap Hill's granddaughter. She testified that all Winberry Creek drives were conducted with splash dams.

Subsequent to the hearings the Division's present researcher (who did not write the original report) did further study and concluded that all of the tributaries but one, Lost Creek, required splash dams for log drives. On the latter tributary drives apparently occurred for a number of years without such assistance, only during the last drives in its upper watershed were splash dams employed.

There was virtually no dispute about the drives on the main stem, although some witnesses emphasized the difficulties of conducting them - a legal objection rejected by the court in both the Puget Sound and McKenzie decisions. Two witnesses stated that they had claims to the bed of the Middle Fork based on Military Road grants by the State and Federal Governments to B. J. Pengra. If such State grants conveyed parcels of streambed property to private owners, they would not be challenged in these proceedings.

No Navigability Hearing was held on the Willamette River main stem.

#### RECOMMENDATIONS

The Division recommends that the Legislature declare the entire length of the main stem of the Willamette River as a navigable river in Oregon. Log drives extend the claim of the State to the main Willamette above the traditional head of vessel navigation at Ferry Street Bridge, Eugene, to include its entire length.

With respect to the Middle Fork, the Division recommends that River Mile 37.5 be declared as the upper limit of its navigability. There were a few piling drives above

the town of Oakland after the main period of driving the Middle Fork, but the head of most log driving was the mouth of the North Fork.

Although Lost Creek had successful unaided log drives in its lower 10 miles, the Division does not recommend that any portion of its bed be claimed because it was not meandered.

## YAMHILL RIVER

While even vessel navigation occurred beyond the meander limit at Lafayette, the Division recommends that the Yamhill be declared navigable only from its mouth to near River Mile 8.3 at that town.

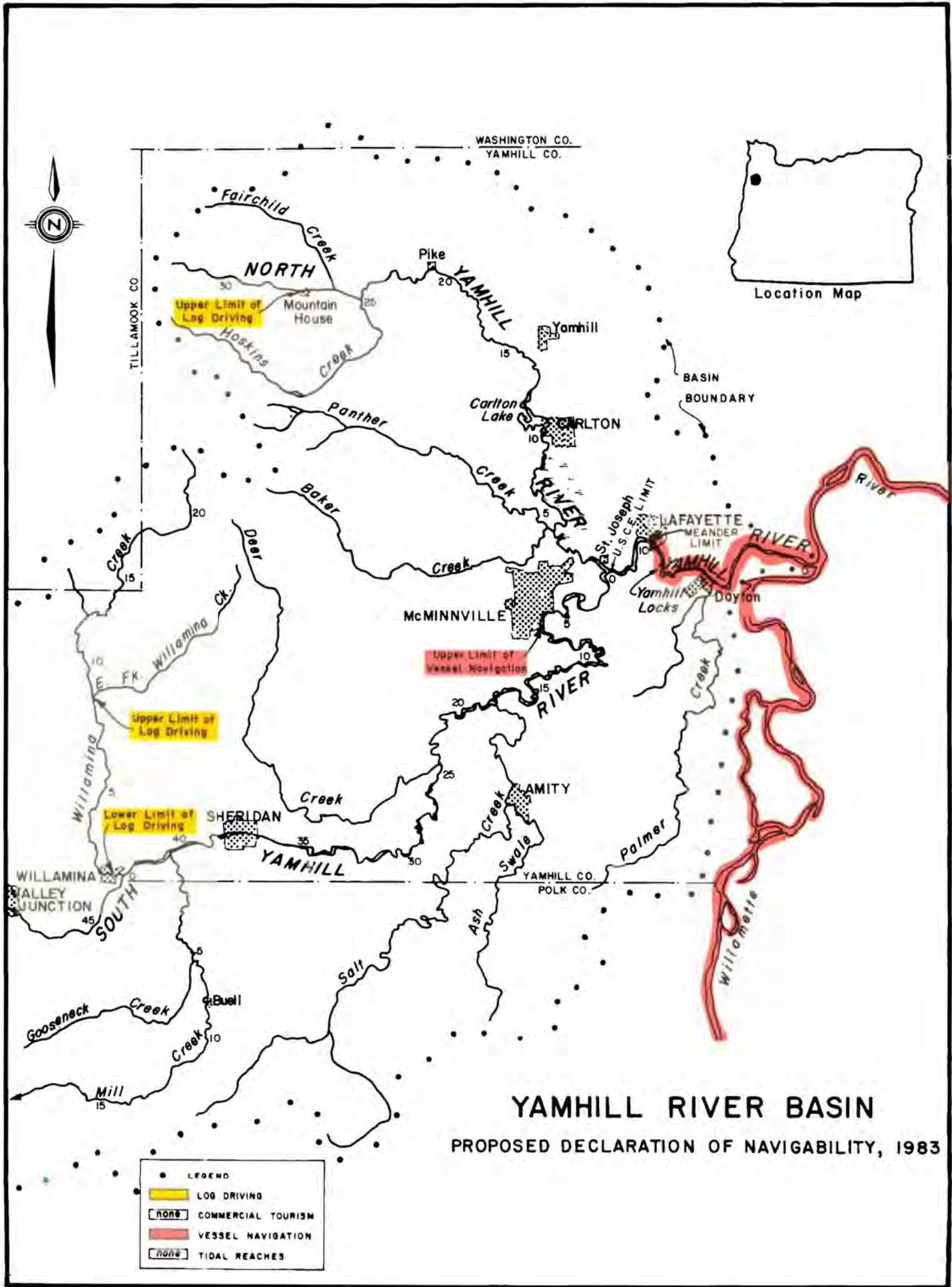
### Summary of State's Evidence

#### VESSEL NAVIGATION

This river commenced its history as a highway for commerce in 1850 when flatboats ascended as high as Lafayette in order to take out loads of wheat. The next year these vessels were succeeded by steamboats. By 1858 they went to McMinnville on winter stages of water. The Corps of Engineers did not undertake snagging on the Yamhill until the 1890's, and locks were not built until 1900. Ironically this expensive "improvement to navigation" so dammed the river in winter that it greatly inhibited the steamboat traffic to McMinnville after 1903. There was some revival of steamboat traffic in the late teens, but thereafter the locks and the lower river were mostly used to transport log rafts until the early 1960's. Some excursion boats from Portland operated on the Yamhill in the 1930's. There is extensive photographic documentation of steamboat traffic on the Yamhill.

#### LOG DRIVES

The North Yamhill below River Mile 27 sustained many log drives after the year 1873. Splash dams were used above that point as well as on that river's tributaries in order to take out logs. Not until 1905-1907 were splash dams used to flush logs down the main stem, and the nuisance they caused led to closure of the river for drives. Logs, particularly in the Spaulding operation of 1897-1905, went from River Mile 27



**YAMHILL RIVER BASIN**  
 PROPOSED DECLARATION OF NAVIGABILITY, 1983

to the river's mouth on ordinary high winter stages of water.

The only other waterway in the Yamhill basin which had log drives on winter stages without splash dam assistance was Willamina Creek from its confluence with East Creek to its mouth. These took place from at least 1880 to 1914. During later years most of the drives were of railroad ties. It was not meandered.

No Navigability Hearing was held on this River.

#### RECOMMENDATION

The Division recommends that the Yamhill be declared navigable from its mouth to River Mile 8.3 at Lafayette. This is only the meandered portion of this river system and does not even include the whole of the main stem which is recognized as navigable by the Corps of Engineers. No claim is recommended on Willamina Creek because it was not meandered.

C. RIVERS THAT WERE NOT MEANDERED BUT HAD NAVIGABLE USE

Only the rivers that had navigable use and were also meandered have been presented above with recommendations for navigability determination. It is possible that the Legislature may wish to exercise its full right to declare rivers navigable under the Federal Test and not be limited to meandered reaches of waterways. If that is the case, the following additional rivers or river reaches show evidence of navigability in fact under various criteria established by the Federal courts. Some rivers appear more than once under different criteria.

VESSEL  
NAVIGATION

Alsea, additional River Miles 28.5 to 42.

Beaver Slough (Coos County), natural head of tide to Coaledo.

Crystal Creek, (Klamath County), mouth to source springs.

Fiddle Creek, mouth in Siltcoos Lake to River Mile 5.

Nehalem, additional River Miles 52 to 84 (Pittsburg).

Tualatin, mouth to River Mile 56.5 near Forest Grove (recognized by Corps of Engineers)

Dairy Creek, mouth to River Mile 2 (River Mile 8.3 recognized by the Corps of Engineers).

Williamson, mouth to River Mile 4.8.

Yamhill, additional River Miles 8.5 to forks (recognized by the Corps of Engineers).

South Yamhill, mouth to McMinnville, River Mile 6.

LOG DRIVES

Calapooia, Crawfordsville to Holley, River Miles 33 to 45.

Coquille North Fork, additional River Miles 18.8 to 21.

Bear Creek, head of tide to confluence with Bill Creek, approximate River Miles 1.6 to 2.6.

Crystal Creek, mouth to source springs.

Deschutes, RM 168 Bend to RM 173.

Lewis & Clark, head of tide (River Mile 8.5) to River Mile 17.

Long Tom, Elmira to Noti, River Miles 31 to 38.

Lost Creek (Middle Fork Willamette), mouth to near River Mile 6.

Luckiamute, mouth to confluence with Little Luckiamute near River Mile 18.

Marys, mouth to Wren near River Mile 22.

Molalla, mouth to confluence with North Fork near River Mile 26.5.

Nestucca, head of tide to confluence with Beaver Creek near River Mile 15.2.

Sandy, Troutdale to Messinger Bottom, River Miles 2 to 37.5.

Santiam, North Fork, additional River Miles 27 to 40, Mehama to Gates.

South Fork, additional River Miles 26.5 to 48.

Siuslaw, additional River Miles 34.8 to 85, Mound.

Lake Creek, additional River Miles 3.5 to confluence with Greenleaf Creek, River Mile 14.5.

Trask, head of tide to River Mile 10.

Tualatin, mouth to River Mile 72, Cherry Grove.

Gales Creek, mouth to River Mile 19, near Glenwood.

Williamson, mouth to confluence with Spring Creek, near River Mile 17.

Wilson, head of tide to confluence with Ryan Creek near River Mile 22.5.

Wood, additional River Miles 13 to source springs near River Mile 17.

Yamhill, North Fork, mouth to River Mile 27.

Willamina Creek, mouth to confluence with East Creek near River Mile 8.8.

COMMERCIAL  
TOURISM

Chetco, head of tide to Upper Summer Bridge near  
River Mile 18.8.

Clackamas, additional River Miles 20.5 to 23 below  
River Mill Dam.

Elk (Curry County), River Miles 3.4 to 14.

Nestucca, head of tide to River Mile 20.

Sandy, additional River Miles 4 to 18.5.

Santiam, South, additional River Miles 33 to 37.5,  
Sweet Home to Foster.

Siletz, additional River Miles 34 to 53.

Sixes, River Miles 5.5 to 10.

SUSCEPTIBLE  
OF NAVI-  
GATION

Deschutes, additional River Miles 12 to 54.

Grande Ronde, Washington border to confluence with  
Wallowa River, approximate River Miles 38 to 38.5  
and 39 to 82.

John Day, mouth to forks at Kimberley. 2m 184.7

Owyhee, Lake Owyhee to Rome, River Miles 124 to 167.

Rogue, additional River Miles 150 to 155.5.

Wallowa, mouth to confluence with the Minam, near  
River Mile 10.

D. CRITERIA FOR CLAIMING LENGTHS OF VARIOUS OREGON NONTIDAL RIVERS TO BE NAVIGABLE

The primary criteria is underlined. Actual use supporting the meandered length indicated with broken underlining.

RIVER	<u>Meandered</u>	<u>Vessel</u>	<u>Commercial Usage</u>	<u>Guides</u>	<u>Federal</u>	<u>Recommend</u>
			<u>Log Drives</u>			
Alesea	<u>0-28.5</u>	<u>0-43.3</u>		0-42	0-11.2 CE 0-13 CG	0-28.5
Clackamas	<u>0-20.4</u>	<u>0-19</u>	<u>0-19</u>	<u>0-23</u>	0-0.4 CE	0-.20.4
Columbia	Border	<u>Entire Border</u>			0-290.5 CE 0-290.5 CG	Entire length
Coquille, East Fork	<u>0-8</u>	<u>0-8</u>	0-13.2			0-8
North Fork	<u>0-18.9</u>	0-14.3	<u>0-21</u>		0-0.2 CG	0-18.9
South Fork	0-30.5	0-10	<u>0-24</u>	0-24		0-24
140 Deschutes	<u>0-12</u>		169-237	<u>0-102</u>		0-12
	<u>54-114.5</u>			<u>174.5-178</u>		54-102
				<u>187-227</u>		
Klamath River	Yes	<u>KF-233</u>	KF-233			KF-233
Link River	All	<u>0-0.3</u>				0-0.3
Lost River	0-13+	<u>4.5-11</u>				4.5-11
McKenzie	0-78		<u>0-37.5</u>	<u>37.5-64</u>	0-40 CG	0-64
Nehalem	<u>0-52</u>	0-9 Tide <u>37.8-84</u>	<u>0-84</u>	0-37.8	0-7.3 CE Yes CG	0-52
Rogue	0-150	<u>0-102</u>	0-27	0-102 132-155.5	0-27.1 CE 0-101.2 CG	0-102 131-150
Sandy	<u>0-4</u>	0-3	<u>0-35.5</u>	12-18.5	0-2 CE	1859 mouth - 4

<u>RIVER</u>	<u>Meandered</u>	<u>Vessel</u>	<u>Commercial Usage Log Drives</u>	<u>Guides</u>	<u>Federal</u>	<u>Recommend</u>
Santiam	<u>A11</u>	0-9.6	A11		0-9.6 CE 0-9 CG	A11
North Santiam	<u>0-27</u>		<u>0-40</u>	Yes		0-27 (Mehama)
South Santiam	<u>0-26.5</u>		<u>0-48</u>			0-26.5
Silvies	Yes		<u>4-30</u>			4-30
Siletz	<u>0-34.5</u>	0-22.6(Tide)	<u>0-26.3</u>	<u>0-52.5</u>	0-22.6 CE Yes CG	0.34.5
Siuslaw	<u>0-34.8</u>	0-38 (canoe) 0-22.5(Tide)	<u>0-85</u>	Yes	0-21.5 CE 0-19 CG	0-34.8
Lake Creek	<u>0-3.5</u>		<u>0-17.5</u>	Yes		0-3.5
Smith	<u>0-24</u>	0-21 0-23(Tide)	<u>0-44</u>		0-23.1 CE Yes CG	0-24
Snake	A11	<u>176-239</u> <u>247.5-409</u>		<u>176-247.5</u>	176-409 CE	176-409
Tillamook	0-6.8	0-6(Tide)	<u>0-6.5</u>		0-5 CE	0-6.5
Umpqua	0-111.5	0-28 (Ld Bd) 0-29.2(Tide)	0-35	<u>A11</u>	0-122.2 CE Yes CG	0-111.5
North Fork	0-29		<u>7-35</u>	<u>0-35</u>		0-29
Willamette	<u>A11</u>	0-185	<u>A11</u>		0-183.2 CE 0-183.2 CG	A11
Middle Fork	<u>0-75</u>		<u>0-37.5</u>			0-37.5 (Nth Fk)
Wood	<u>0-15</u>	0-5.9	A11 (0-17)			0-15 (Fort Klamath)
Yamhill	<u>0-8.5</u>	<u>A11 (0-11.2)</u>	A11		0-11.2 CE	0-8.5
South Fork		0-6				None

### III. NAVIGABLE LAKES

While Oregon Revised Statutes claim the beds of all meandered lakes in the State, the faulty legal basis of this assertion since U. S. v Oregon has already been discussed. In this section the evidence of navigability in fact for Oregon lakes is examined. Virtually all Oregon navigable lakes are meandered; the reason for any exceptions will be taken up in discussion of the specific lake involved.

There are a number of residual lakes in the Willamette basin which were in fact the bed of the Willamette in 1859 and to which the State may have title because of avulsive changes of that river. These lakes virtually never had any independent use as highways of commerce and are not discussed here. Ownership determination in them is part of the Division's ongoing task of ownership determination in the Willamette River.

There are also a number of forest lakes in the Oregon Cascades and desert lakes in Eastern Oregon for which there has never been any evidence of commercial navigability or the reasoned likelihood, given their physical situation, that any ever took place or would likely take place. Many Eastern Oregon lakes are periodically intermittent like the Malheur lakes ruled non-navigable by the U. S. Supreme Court. Neither type lake would be subject to State claims of ownership.

On the other hand the State presently owns portions of the beds of Anderson, Bluejoint, Crump and Hart lakes not as meandered lakes but as swampland.

The following two groups are the Oregon lakes that the Division recommends be declared navigable.

Clear Lake, Lane County. This lake has 148 acres and is located 4 miles north of Florence. Like other sizeable lakes in the environs of Florence it was used as a highway of commerce by early settlers and at the present time for recreational boats.

Crater Lake, Klamath County. This 13,186 acre lake became part of the National Park in 1902 and was therefore not subject to survey or meandering. The first boat put on this lake was in 1869. The first Park vessels were put in service in 1907. The main use of the lake's surface is for 60 foot excursion launches each with a capacity to hold 60 passengers which for a fee carry them for educational and sightseeing trips on the lake. In 1956, 2500 persons used the service. Boats have also been used for scientific and maintenance service on Crater Lake.

Cullaby Lake, Clatsop County. Covering 220 acres three miles north of Gearhart, the lake was used for log raft transport intermittently during the first quarter of this century. Tug boats were from time to time used to pull the log rafts from the cutting ground to off-loading points on the lake's shore. Presently it is a popular lake for recreational boats.

Devils Lake, Lincoln County. This 629 acre lake east of Lincoln City was meandered after white settlement in 1901. At that time settlers used the lake to travel from point to point on its circumference especially during winter when the surrounding land was waterlogged. Some settlers crossed the lake on a regular basis in order to obtain mail and supplies.

In recent years pile drivers and other maintenance vessels have operated on its surface and myriad recreational vessels also travel on it (see OAG 31, pp. 387-88, 1964).

In 1973 all owners riparian to the lake were advised of the State's claim of ownership under provision of Senate Joint Resolution 3. They were invited to respond to the State's claim and many of them did so. They argued that the use of service pile drivers was not true navigation and that the lake was not a navigable lake.

Ewauna, Klamath County. This 386 acre lake on the southern edge of Klamath Falls has had both steamboat traffic and tugboat towing of log rafts on its surface. The latter activity occurs to the present. With Klamath River, it was meandered and adjudged navigable in Oliver v Klamath Lake Navigation Co. (54 Or 95, 1909). The lake was subject to a navigability hearing with Klamath River in 1982; there was no demurrer to its navigability in fact.

Floras Lake, Curry County. This lake was to be the site of Lakeport in 1908. A real estate boom mushroomed for a couple of years and was to include an excursion vessel on the lake. Whether it ever operated is not known. During the 1940's Owen Smith operated a 21 foot gasoline inboard motor on the lake with which he towed logs and carried sightseers at \$5 a ride. Presently the lake is used by recreational vessels. It was meandered in 1857.

Goose Lake, Lake County. Approximately 30,210 acres of this large shallow lake lies in Oregon. It is periodically intermittent, but at the date of statehood historical records indicate that it was approximately 25 to 30 miles long and 10 miles wide. This was somewhat smaller

than its extent when meandered in 1872: at that date it was 12 miles wide. Boats carrying passengers and freight operated on the lake between at least 1882 and the mid-teens of this century. The high point of usage was 1909-1914 during the Oregon Valley Land Company promotion when the company operated the 65 foot ferry Lakeview between California and the north end of the lake. During this period the lake's dimensions were approximately those of 1859.

In 1905 the State acted as owner when it agreed to transfer title to the bed upon its drainage to the U. S. Reclamation Service. It was not drained, and the Land Board reasserted title in 1941 confirmed by Public Law 588, 77th Congress, Chapter 348 - 2d Session (5 June 1942).

Upper Klamath and Agency Lakes, Klamath County. This 67,777 acre lake system has a well attested history of navigation both by early steamships and tugs towing log rafts, a traffic which continues to the present day. (See Harry J. Drew, Early Transportation on Klamath Waterways (Klamath County Museum [1974]) and Devere Helfrich in Klamath Echoes, 1:2 (1965)). Recreational boating has always marked the history of use of this lake's surface. The lake is held to include the mouths of Harri-man, Short, Odessa and other creeks as part of its navigable area. There is presently a low dam at the outlet to Link River; the State owns the bed to its natural or 1859 High Water Line.

Lost Lake, Hood River County. At the turn of the century this lake was used for log flotation and presently is a popular recreational lake.

Mercer Lake, Lane County. This 340 acre lake 6 miles

north of Florence was used by early settlers for a highway and also served for log flotation to sawmills on the lake's north bank. This lake also has extensive recreational vessel use.

Odell Lake, Klamath County. This 3,420 acre Cascade Mountain lake was not meandered because its surrounding townships have not been surveyed by the U. S. Government. It has a history of navigation in fact from before 1923 to after 1928 in connection with the building of the Southern Pacific Railroad's Natron cutoff. During the 1920's a regular system of freight boats operated on the lake with other vessels operating for specific purposes, often the carriage of horses. Presently it has extensive recreational use.

Sucker Lake (Oswego), Clackamas County. The State's claim to the bed of this highly exclusive suburban lake is not to its present artificially raised and expanded surface but to the original bed of Sucker Lake which was meandered in 1851. Sucker Lake sustained regular steamboat traffic as part of a transportation route from Portland and Oregon City to the steamboats which ran on the Tualatin between 1865 and 1873. Logs were also floated to Trullinger's sawmill located on Sucker Creek, the outlet stream, from a railroad connecting the lake to the Tualatin after 1865. A local resident said her father had told her the practice had begun as early as 1850. Later, cordwood was floated on the surface of the lake from the Tualatin canal dug in 1871 to the Oregon Iron and Steel Company plant. The wood provided charcoal during the years when the furnace operated, apparently from 1877 to 1894. A picture exists of a sternwheel steamboat towing cordwood rafts on the lake during the latter period of operation.

J. C. Trullinger built a dam at his sawmill which elevated the level of the lake by 8 feet in 1864. Therefore most if not all of the commercial use took place on this artificially raised surface. The elevation was for power purposes and was not essential to the waterborne traffic. As the lake was meandered, and was of navigable depth in its natural state, the State has a claim to the bed of the 1859 lake.

Siltcoos or Tsiltcoos Lake, Lane and Douglas Counties. This 2,979 acre lake south of Florence was meandered in 1857. It was recognized as a navigable lake by the Oregon Supreme Court in Darling v Christensen (166 Or 17, 1941) which also decided that the Land Board sold a parcel of submersible land in the lake.

Siltcoos Lake was regularly used as a highway by early settlers in the lower Siuslaw basin. Later a freight and passenger boat offered service on the lake and a milk boat also operated on it and on Fiddle Creek. That creek, too, was a navigable body of water in its lower 5 miles by virtue of that usage and log flotation. Log rafts were towed on the surface of the lake at various times. Currently the lake is an important recreational body of water.

The State has acted as owner from time to time on the lake's bed and adjacent owners were notified of the State's claim in 1973. In addition to usual objections to State ownership, riparian owners argued that the lake is not now commercially navigable though admitting to earlier commercial transport on the lake. They also pointed out that the lake was artificially raised 6 feet by a dam built at the lake's outlet in 1964.

The State's claim is therefore to the natural (1859) Ordinary High Water Line. The best approximation of this would be the 1857 meander line.

Tahkenitch or Fivemile, Douglas County. This 1,523 acre lake is located 5 miles south of Siltcoos Lake and north of Reedsport. It was meandered in 1857. When Willamette Pacific built their railroad across the lake in 1914 they were required by the Corps of Engineers to leave sufficient openings in the pilings to allow right-of-way because it was a navigable lake. Vessels operated on the lake in aid of railroad building and pilings were floated to construction sites.

The major evidence of commercial navigation on Tahkenitch was for the flotation of logs and log rafts after 1945. Tugs operated on the lake to pull the logs and rafts during this period. In 1947 Coos Bay Pulp Co. had 125 men logging on the lake; they took 40 million feet out on the lake from a total cut of 100 million feet in the late '40's. Crown Zellerbach had 55 loggers working on the lake that year taking 25 million feet out on the lake from a total cut of 100 million feet. Three other companies in 1947 took out respectively 17 million, 7 million, and a portion of a 300 million foot cut on the waters of the lake. Crown Zellerbach operated a tug on the lake from time to time to tow log rafts until 1973. In addition to commercial log flotation, marinas and numerous pleasure craft have long operated on the lake.

Adjacent owners were notified of the State's claim of ownership to the bed of Tahkenitch in 1946 and 1973. Since 1949 an earth and log fill dam has maintained the summer height of the lake at 12 feet, though 19 foot lake heights during winter were natural before that date. In

1960 the State Engineer allowed a concrete gate type dam to be constructed to regulate the summer level at 15 feet. The State's claim is to the natural Ordinary High Water line of the lake which may not have been increased by construction of the outlet dams. The main period of navigation was before the first dam was constructed.

Tenmile and North Tenmile Lakes, Coos and Douglas Counties. These lakes have areas of 1,187 and 858 acres respectively and were not meandered because of a fraudulent survey conducted by the contracting government surveyor. Its meanderable character was noted on re-survey in 1922. The lakes were manifestly navigable bodies of water at the time of the first survey and served as highways of commerce from the time of earliest settlement.

Since statehood there has been a commercial fishery on the lake; creamery, school and mail boat routes; and tugboat towing of log rafts. The largest vessel operating on the lake was a commercial excursion boat, the 60 foot sternwheeler Ten Mile Queen between 1964 and 1967. Large vessels continue to operate on the lakes for recreational purposes.

Riparian owners were notified of the State's claim of ownership to the bed in 1948 and the State has since acted as owner. In 1978 lakebed property was removed from the Lane County Assessors rolls because it was State owned.

Wallowa Lake, Wallowa County. This lake located 6 miles south of Enterprise currently covers 1,950 acres. It is 283 feet deep and was meandered in 1881. A concrete dam presently elevates the lake when full to 23

feet above its natural level. Dams were not, however, built at the outlet until 1905 and later. This was after the period of most extensive vessel use.

Commercial navigation consisted of a series of launches operating from the late 1880's from Joseph to the lake's head. They transported persons and goods to a resort located there. No road existed on the steep morainal sides of the lake. Vessel transport was required to take off cannery products, and logs were from time to time floated on the lake's surface to sawmills. There is presently a marina on the lake and extensive use of its surface by recreational vessels.

Adjacent owners were notified of the State's claim in 1973. Many owners protested, usually on policy grounds, but there were some questions raised concerning the State's evidence of facts. The researcher believes that these objections were not well based. The State's claim to the bed would be to the natural Ordinary High Water line. In the absence of a scientific survey, the best approximation of this is the 1881 meander line.

Woahink, Lane County. This 726 acre lake is located 3 miles south of Florence and was meandered in 1857. During the pioneer period of the late nineteenth and early twentieth century, the lake was used for the movement of lumber and other heavy items of freight and of persons to their home sites. With other lakes to the south it served as a highway for commerce. Presently it is used by recreational boats and is a seaplane landing area.

Woahink Lake was recognized as a navigable lake in a 1972 Marion County Circuit Court case brought by the Land Board (Oregon v Hall et al, Case No. 71-4313).

Adjacent owners were advised of the State's claim in 1973. Some persons claimed the pioneer usage had been minimal. Others admitted its early commercial navigability but argued that this was outdated and should not be used as a basis of State claim. Other owners argued that there were sandbars and fallen timbers that made boating difficult. None of these arguments are sufficient to legally defeat the State's claim of navigability.

During the late 1930's the lake's level was slightly raised by a concrete dam at its outlet. The present level is therefore somewhat higher than in 1859. The State's claim would be to Ordinary High Water in 1859, the best approximation for which would be the 1857 meander line.

With the exception of parcels previously granted by the State, the following lakes near Columbia River in Multnomah counties together with the sloughs connecting them to Multnomah Channel are meandered and claimed by virtue of tidal ebb and flow:

Cunningham Lake  
McNary Lake  
Sturgeon Lake

Others Susceptible of Navigation by Virtue of Recreational Use.

The following meandered lakes presently have extensive recreational use, often with commercial marinas, which indicate their susceptibility to navigation.

<u>Lake</u>	<u>County</u>	<u>Surface Area in Acres</u>
Big	Linn	226
Blue	Jefferson	56
Charlton	Deschutes	130
Clear	Linn	152
Crescent	Klamath	3640
Cultus	Deschutes	1140
Little Cultus	Deschutes	170
Davis	Deschutes & Klamath	3005
Diamond	Douglas	3012
East	Deschutes	1010
Eel	Coos and Douglas	349
Fish	Jackson	443
Garrison	Curry	117
Lake of the Woods	Klamath	1213
Loon	Douglas	145
Lytle	Tillamook	57
Paulina	Deschutes	1400
Summit	Klamath	690
Suttle	Jefferson	276
Threemile	Douglas	71
Triangle	Lane	276
Waldo	Lane	6142

Lake of the Woods was determined nonnavigable for admiralty jurisdiction in Federal District Court decision Johnson v Wurthman (227 F Supp. 135, 1964). The decision emphasized that Lake of the Woods did not connect with other navigable waters so that it could be a contiguous part of interstate or international commerce; therefore it did not come under the Admiralty Act. Such a requirement is not necessary in determining navigability for title purposes.

## Appendix A.

### GLOSSARY OF TECHNICAL TERMS USED IN THIS REPORT\*

CITATIONS OF COURT CASES: Court cases are referred to by names of the parties underlined followed by the volume number, abbreviation of the State, page number and year of the decision in parenthesis. For Federal Courts, US indicates United States Supreme Court decisions; Fed. indicates reports of Circuit and District Court opinions.

ACCRETION: A process of gradual and imperceptible addition to riparian land caused by the action of water bordering the land. One of the valuable rights in most states that inure to the riparian owners is the right to preserve contact with the water by appropriating the accretions. At common law, boundaries and ownership generally follow the changes in the channel if caused by accretion, reliction, erosion or a combination of these factors.

RELICTION: (Dereliction) While this is being placed out of alphabetical sequence, the term is used in conjunction with accretion and it applies to land that has been covered by water but which has become uncovered by the recession of the water from the land such as the gradual and imperceptible change of a stream channel -- the case of a drying-up of a lake bed or a lowering of sea level. The law applying to accretions relating to ownership generally applies to relictions.

ALIENATE: In the sense used in this report the term means to convey or transfer title. (Black's Legal Dictionary)

AVULSION: Avulsion relates to loss of lands by sudden or violent action of the water often combined with flooding and storms. The land loss is perceptible while in progress. If the stream suddenly leaves its old bed and forms a new one, the process is avulsion. The resulting change of channel usually causes no change of boundary or land ownership. The boundary remains in the old channel even though no water may be flowing in it.

BED OF A RIVER: The United States Supreme Court has held that the bed of a river is "that portion of its soil which is alternately covered and left bare..." The Division holds that it extends from Ordinary High Water Mark on one bank to Ordinary High Water Mark on the other.

\*Principally derived from Aaron L. Shalowitz, Shore & Sea Boundaries (GPO, 1962).

EROSION: (Submergence) The general rule which operates in favor of a riparian owner, increasing his land holdings as a result of accretion or reliction, also operates against him when the water by slow process encroaches on his land. Such a process is known as erosion. Erosion has been defined judicially as the gradual eating away of the soil of a riparian or littoral owner by action of currents or tides. Usually if there is erosion on one bank there would be reliction on the opposite bank.

ESTUARY: An arm of the sea where fresh water from lakes or rivers meets and mixes with the water of the sea. Most authorities consider the submersible land and the banks as well as the submerged lands as being part of the estuary.

JUS PUBLICUM: Relates to a public right -- in the sense used in this report, the term relates to public or state ownership. It is contrasted with Jus Privatum which relates to the law governing the rights, conduct and affairs of individuals; it also denotes private ownership or right of a private owner.

MEANDER LINES: Meander lines refer to those run in surveying portions of the public lands which border on navigable rivers. Meander lines usually define the sinuosities of the banks of a waterway. The primary purpose was to prepare an official plat to ascertain the quantity of land in the fraction that would be subject to sale and which was to be paid to the government by the purchaser of the public land. It is to be noted that only waterways thought to be navigable were meandered. Thus, the meandering of certain lakes in Oregon could be considered as persuasive evidence that the lakes were considered to be navigable at the time of the original survey. Otherwise, they would not have been meandered and the original titles or patents simply would have extended into the lake bottom.

ORDINARY HIGH WATER MARK: (A non technical term) "The line to which high water ordinarily reaches" and not the line reached by the water in unusual floods. (Iowa v. Sorenson, 271 N.W. 234, 236 (1937)). "Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes... Nor yet does it mean meadowland adjacent to the river, which when the water leaves it, is adapted to and can be used for grazing or pasturing purposes". (Welch v. Browning, 87 N.W. 430 (1901)). The term bank, while synonymous in Oregon with high-water mark, has been defined as the continuous margin

along a river where all vegetation ceases. (Geodetic Survey 9, Special Publication No. 242 (1948)). The mark along the river where vegetation ceases to appear to be the most prevalent reference line for the high-water mark.

ORDINARY LOW WATER MARK: A non technical term generally considered to be the usual or ordinary stage of a river when the volume of water is not increased by rains or freshets occasioned by melting snow or diminished below such usual stage or volume by long continued drought to extreme low-water mark. (Goodall v. T. L. Herbert & Sons, 8 Tenn. App. 265 (1938)).

RIGHT BANK AND LEFT BANK: The right and left bank of the river is determined as one looks downstream.

RIPARIAN RIGHTS: The rights of the owners of lands on the banks of water courses -- relate to access to the water, certain privileges regarding its uses, the benefits of accretions and relictions. If navigable, the banks and bed are public property. If not navigable, the bed and banks are usually privately owned. It is to be noted that rights are governed by statutes and related court decisions. In Oregon, a riparian owner on a navigable waterway has the right to access to the water including right to build a wharf out to the line of navigation (harbor line) providing the property is within the boundaries of an incorporated city or within a port district.

RIVER MILE (RM): The measured point on a river measured along the channel from the mouth upstream.

SUBMERSIBLE LAND: When used in this report the term relates to land on navigable waters that is periodically covered by tides or lies between the mean high and mean low water marks on non tidal waters.

TIDELANDS: The land that is covered and uncovered by the daily rise and fall of the tide.

In a more limited usage, it is the zone between the mean high-water line and the mean low-water line along a coast, and is commonly known as the "shore" or "beach". Referred to in legal decisions as between ordinary high-water mark and ordinary low-water mark. Tidelands presuppose a high-water line as the upper boundary.

# Act of Congress Admitting the State of Oregon into the Union

## PREAMBLE

Whereas the people of Oregon have framed, ratified, and adopted a constitution of state government which is republican in form, and in conformity with the Constitution of the United States and have applied for admission into the Union on an equal footing with the other states; therefore—

## 1. ADMISSION OF STATE — BOUNDARIES

That Oregon be, and she is hereby, received into the Union on an equal footing with the other states in all respects whatever, with the following boundaries: In order that the boundaries of the state may be known and established, it is hereby ordained and declared that the State of Oregon shall be bounded as follows, to wit: Beginning one marine league at sea, due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast lying west and opposite the state, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship channel of the Columbia River; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle and widest channel thereof, to a point near Fort Walla Walla, where the forty-sixth parallel of north latitude crosses said river; thence east, on said parallel, to the middle of the main channel of the Shoshone or Snake River; thence up the middle of the main channel of said river, to the mouth of the Owyhee River; thence due south, to the parallel of latitude forty-two degrees north; thence west, along said parallel, to the place of beginning, including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with states and territories of which those rivers form a boundary in common with this state.

## 2. CONCURRENT JURISDICTION ON COLUMBIA AND OTHER RIVERS — NAVIGABLE WATERS TO BE COMMON HIGHWAYS

The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty & impost, or toll thereof.

## 3. REPRESENTATION IN CONGRESS

Until the next census and apportionment of representatives, the State of Oregon shall be entitled to one representative in the Congress of the United States.

## 4. PROPOSITIONS SUBMITTED TO PEOPLE OF STATE

The following propositions be and the same are hereby offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit:

### School Lands

First, that sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools.

### University Lands

Second, the seventy-two sections of land shall be set apart and reserved for the use and support of a state university, to be selected by the Governor of said state, subject to the approval of the Commissioner of the General Land Office, and to be appropriated and applied in such manner as the legislature of said state may prescribe for the purpose aforesaid, but for no other purpose.

### Lands for Public Buildings

Third, that ten entire sections of land, to be selected by the Governor of said state, in legal subdivisions, shall be granted to said state for the purpose of completing the public buildings, or for the erection of others at the seat of government, under the direction of the legislature thereof.

### Salt Springs and Contiguous Lands

Fourth, that all salt springs within said state, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said state for its use, the same to be selected by the Governor thereof within one year after the admission of said state, and when so selected, to be used or disposed of on such terms, conditions and regulations as the legislature shall direct; provided, that no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said state.

### Percentage on Land Sales

Fifth, that 5 per centum of the net proceeds of sales of all public lands lying within said state which shall be sold by Congress after the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to said state, for the purpose of making public roads and internal improvements, as the legislature shall direct; provided, that the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be taxed higher than residents.

### Conditions on Which Propositions are Offered

Sixth, and that the state shall never tax the lands or the property of the United States in said state; provided, however, that in case any of the lands herein granted to the State of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act.

## 5. RESIDUE OF TERRITORY

Until Congress shall otherwise direct, the residue of the Territory of Oregon shall be and is hereby incorporated into and made a part of the Territory of Washington.

APPROVED FEBRUARY 14, 1859.

PROPOSITION OF CONGRESS ACCEPTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF OREGON ON JUNE 3, 1859.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

STATE OF OREGON, by and through the  
 Division of State Lands,  
 Plaintiff-Appellant,  
 vs.  
 RIVERFRONT PROTECTION ASSOCIATION, an  
 unincorporated association; HENRY  
 SALOT, SARAH G. SALOT, CARL WILSON,  
 ROSE WILSON, JOHN E. JAQUA and  
 ROSEMUND R. JAQUA,  
 Defendants-Appellees.

No. 81-3035  
 DC# 79-40

O P I N I O N

Appeal from the United States District Court  
 for the District of Oregon  
 Michael R. Hogan, United States Magistrate, Presiding  
 Argued and Submitted February 3, 1982

Before: SNEED, ANDERSON, and REINHARDT, Circuit Judges

SNEED, Circuit Judge:

This appeal poses the question whether the McKenzie River between river mile 37 and its confluence with the Willamette River was navigable under federal law on February 14, 1859 when the State of Oregon was admitted to the Union. If it was so navigable title to the riverbed vested at that time in the State of Oregon. The district court held that it was not so navigable. We hold that the McKenzie River between river mile 37 and its confluence with the Willamette River was navigable and reverse.

I.

BACKGROUND

To determine ownership of the riverbed underlying the reach of the McKenzie now in dispute, the appellant, State of Oregon, sought a declaratory judgment that when the State of Oregon was admitted to the Union, the disputed reach of the McKenzie River was navigable. The appellee, Riverfront Protective Association, is an unincorporated association composed primarily of persons owning real property riparian to the McKenzie River. Many of these landowners hold title derived from federal land patents. They threaten to engage in acts that would interfere with plaintiff's ownership of the land. The parties stipulated to a magistrate's trial with the case to be submitted on the pretrial order and briefs. On December 5, 1980, the magistrate issued his findings of fact and conclusions of law as those of the district court. See 28 U.S.C.A. § 636 (c) (1981). Thus, the court determined that the McKenzie River was not navigable in 1859, nor was it commercially usable in its ordinary condition. Clerk's Record 28, p. 19. Thereafter, the court entered judgment ordering that plaintiff take nothing and dismissing plaintiff's action on the merits; Clerk's Record 29.

The facts are not in dispute. On questions of law, our review is not limited by a duty to defer to the decision of the district court. East Oakland-Fruitvale Planning

Council v. Rumsfeld, 471 F. 2d 524, 529 (9th Cir. 1972).  
Jurisdiction in the district court was based on 28 U.S.C.A.  
§ 1331 (1981).

## II.

### ANALYSIS

#### A. Title of the Riverbed

Upon the admission of a state to the Union, title to lands underlying navigable waters within the state passes from the United States to the state as incident to the transfer to the state of local sovereignty. Therefore, title to the submerged and submersible lands within the state vests in the state subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. United States v. Oregon, 295 U.S. 1, 14 (1935). This is so even though the waters in question are wholly within the borders of the state and are not part of a navigable interstate or international waterway. *Id.*; Utah v. United States, 403 U.S. 9, 10 (1971). If the waters are not navigable the title of the United States to land underlying them remains unaffected by the creation of a new state. *See United States v. Utah*, 283 U.S. 64, 75 (1931); Oklahoma v. Texas, 258 U.S. 574, 583 (1922). As pointed out above, at least some of the defendants-appellees in this case hold titles descended from federal title.

Thus, ownership of the riverbed on February 14, 1859 substantially affects its present ownership. Whether the waters within the state are navigable or non-navigable is a federal question. United States v. Oregon, 295 U.S. 1, 14 (1935); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922).

B. Navigability

A river is navigable under federal law when it is used or susceptible of use in its ordinary condition as a highway 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 U.S. (10 Wall.) 557, 563 (1870). The Daniel Ball sounded in admiralty, but the Supreme Court has adopted the same definition in "navigability for title" cases. See, e.g., Utah v. United States, 403 U.S. 9 (1971); United States v. Oregon, 295 U.S. 1 (1935).

In a case decided five weeks after the magistrate's opinion here, we held evidence of transportation of logs by river sufficient, when joined with the other facts of the case, to support a finding of navigability for purposes of federal regulatory jurisdiction under 16 U.S.C. § 796 (8) (1976). 1/ Puget Sound Power & Light Co. v. FERC, 644 F. 2d 785, 788-89 (9th Cir.), cert. denied, 102 S. Ct. 596 (1981) (shingle bolts).

We recognized in that case that use of the river need not be without difficulty, extensive, or long and continuous. Id. Like the logs transported down the McKenzie, the shingle bolts in Puget Sound "required nearly constant handling by the drivers to break up jams, free those bolts that were lodged on the banks and shallow areas, and direct them down the main channel of the river". Id. Transportation on the McKenzie may have been somewhat more difficult. In Puget Sound drivers found the work "got difficult", 644 F. 2d at 788, whereas on the McKenzie it took substantial logging crews an average of from thirty to fifty days to complete a log drive down the 32-mile reach at issue. Unfavorable circumstances could increase this time to over ninety days. Intractable log jams had to be broken up with dynamite. Too much rain caused uncontrollable flooding; too little exposed gravel bars, boulders, and shoals. Crews might spend three or four days moving logs across a single gravel bar. But notwithstanding such difficulties, thousands of logs and millions of board feet of timber were driven down the river. Significantly, the evidence shows that the logs floated on the McKenzie were much larger than the shingle bolts floated on the White River in Puget Sound and, apparently, the entire volume of traffic also was larger.

Nor does the seasonal nature of log drives on the McKenzie destroy its navigable character. While it is true

that the Supreme Court has observed that "The mere fact that logs .... are floated down a stream occasionally and in times of high water does not make it a navigable river", United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 698 (1899) (*italics added*), navigation on the McKenzie did not depend on high water. In fact, the river was never used during high water. Cf. 644 F. 2d at 788 (White River) (same). During the high-water period of November through March, the river was too swift, deep, and dangerous for logdriving. During the low-water period from July through October, bars, rapids, boulders, and shoals usually prevented log drives. Furthermore, the log drives were not "occasional". Most drives on the McKenzie were held in April, May, and early June over a period of seventeen years. Thousands of logs and millions of board feet of timber were driven down the river. Such use of the McKenzie was not "occasional".

Because the parties stipulated that evidence from the late 1800's and early 1900's would be deemed evidence of the river's natural condition on February 14, 1859, only the question of whether the river was navigable in its ordinary, unimproved condition is at issue. The magistrate's findings of fact show that the McKenzie was sometimes temporarily deepened for logdriving by construction of "wing dams". However, these crude dams cannot reasonably be deemed to have altered the natural condition of the river. The same

is true of all the other artificial aids to logdriving - log booms, peaveys, 2/ "dogs",3/ two-horse teams, and dynamite - with which log drivers on the McKenzie plied their laborious trade. These rough means facilitated the transport of logs on the McKenzie, but they did not improve the river. Certainly they bear little resemblance to the planned civil engineering projects considered to be reasonable improvements in United States v. Appalachian Electric Power Co., 322 U.S. 377, 417-18 (1940) (improvements for keelboat and steamboat use). Thus, the McKenzie was used in its ordinary condition as a highway for useful commerce.

C. Oregon law

Appellees also assert that, even assuming title vested in the State of Oregon on February 14, 1859, subsequent disposition of title to the riverbed is a question of state law and under that law title to the McKenzie riverbed vests in them as riparians. Due process, they insist, requires that they be compensated if divested of title.

We need not address these issues. Although appellees' due process claim was argued in the trial briefs, the trial court did not address the issue. It is outside the scope of the issues as defined in the pretrial order, which was not amended, and we decline to reach it here. Although the previously unsettled question of riparian title

to beds of navigable rivers under Oregon law appears to have been authoritatively decided in favor of the state, see State Land Board v. Corvallis Sand & Gravel Co., 283 Or. 147, 159, 582 P.2d 1352, 1360 (1978), this is an issue that initially should be addressed by the district court which has a better position than do we for interpreting Oregon law. See, e.g., Power v. Union Pacific Railroad Co., 655 F.2d 1380 (9th Cir. 1981); Major v. Arizona State Prison, 642 F.2d 311 (9th Cir. 1981), United States v. County of Humboldt, 628 F.2d 549, 551 (9th Cir. 1980). Therefore we remand to the district court to permit the determination in the way it judges most practicable of how Oregon law affects a riparian's title to the riverbed involved in this case.

The judgment of the district court is reversed.

REVERSED AND REMANDED.

Filed: March 26, 1982, Phillip B. Winberry, Clerk,  
U. S. Court of Appeals

## FOOTNOTES

1/ Navigability for title to riverbeds differs in three important respects from navigability for federal regulatory jurisdiction over power plants under the Commerce Clause. The former must exist at the time the State is admitted into the Union. Also it must exist in the river's ordinary condition, see United States v. Utah, 283 U.S. 64, 75-76 (1931); it cannot occur as a result of reasonable improvements. This is not the case in federal power plant licensing. See United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940). Finally, to support federal regulatory jurisdiction over power plants the river must by statute be, or have been, "suitable for use for the transportation of persons or property in interstate or foreign commerce". 16 U.S.C. § 796(8) (1976). No such "in interstate or foreign commerce" requirement exists when the issue is navigability for title.

2/ A "peavey" is a long-handled tool with a stout, sharp spike and hook at one end.

3/ A "dog" is a bent spike for driving into logs that have become wedged between boulders or stranded on gravel bars. The dog holds firm under pressure, but releases when struck a quick blow. By using dogs, stranded logs could be pulled free by two-horse teams and released into the current at the critical moment.

**Enrolled**

**Senate Bill 930**

Sponsored by Senators POWELL, BULLOCK, DAY, HANLON, ISHAM, JERNSTEDT, KITZHABER, KULONGOSKI, McFARLAND, RIPPER, SIMMONS, SMITH, THORNE, TROW, Representatives ANDERSON, BRADBURY, BROGOITTI, BUGAS, CAMPBELL, DeBOER, FORD, GRANNELL, HAMBY, HANNEMAN, HARPER, JOHNSON, JONES, KENNEDY, MAGRUDER, MARKHAM, PARKINSON, SCHOON, TRAHERN, VanLEEUEWEN, YIH, JOLIN, VAN VLIET

CHAPTER..... 219 .....

AN ACT

Relating to stream navigability; amending ORS 274.029 and 274.031; and declaring an emergency.

**Be It Enacted by the People of the State of Oregon:**

Section 1. ORS 274.029 is amended to read:  
274.029. As used in ORS 274.029 to 274.032:

(1) "Division" means the Division of State Lands.

(2) "Issue of navigability" means, for the purposes of the division's performance of its lawful functions, whether a stream was navigable in fact on February 14, 1859. A stream was navigable in fact on that date if it was susceptible of being used in its ordinary condition as a highway for commerce, trade and travel in the customary modes of trade and travel on water. **Unless a court of competent jurisdiction rules otherwise, the periodic use of a stream solely for the floating of logs during high water does not make it a navigable stream for the purpose of defining navigability.**

(3) "Board" means the State Land Board.

Section 2. ORS 274.031 is amended to read:

274.031. **Notwithstanding any hearing conducted by it before July 1, 1981**, the division shall investigate the issue of navigability of a stream or any portion thereof and, in accordance with ORS 183.310 to 183.500, shall determine, *[prior to] before July 1, [1981] 1985*, the issue of navigability for *[such] the* stream or portion upon its own motion or upon the request of any person or state agency affected by the division's performance of its lawful functions. In conducting an investigation of the navigability of a stream or portion thereof under this section, the division shall mail written notice of each hearing to be held during *[such] the* investigation, not later than *[20] 90* days *[prior to] before* the date of *[such] the* hearing. The notice shall be addressed to each owner of record of any land adjacent or contiguous to *[such] the* stream or portion at *[his] the* place of business of **the owner or the residence of the owner**. Any determination of navigability made by the division under this section shall not be binding upon any person[,] but *[such determination]* shall be binding upon the division in the performance of its lawful duties.

**SECTION 3.** This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act takes effect on its passage.

Approved by the Governor June 22, 1981.  
Filed in the office of Secretary of State June 22, 1981.

Appendix E. List of Division Navigability Studies

Port of Astoria

Big Creek  
John Day  
Klaskanine  
Lewis & Clark  
Skipanon  
Walluski  
Youngs

Calapooia

Clackamas

Clatskanie

Beaver Creek  
Milton Creek  
Tide Creek

Coos & Coquille

Millicoma

Curry County

Chetco  
Elk  
Pistol  
Sixes

East Central Oregon

Chewaucan  
Deschutes  
John Day  
Malheur  
Owyhee  
Powder  
Silvies

Grande Ronde

Klamath Basin

Crystal Creek  
Klamath  
Lost  
Sprague  
Williamson  
Wood

Lincoln County

Alsea  
Siletz  
Yaquina

Long Tom & Coast Fork

Luckiamute

McKenzie

Marys & Rickreall Creek

Mohawk

Molalla & Pudding

Nehalem, Necanicum, Nestucca

Rogue

Applegate  
Illinois

Sandy & Hood

Santiam

Siuslaw

Smith

Tillamook Bay

Bewley Creek  
Kilchis  
Miami  
Tillamook  
Trask  
Wilson

Umpqua

Willamette, Middle Fork

Yamhill