

SB 74 Public Hearing

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Written Testimony:

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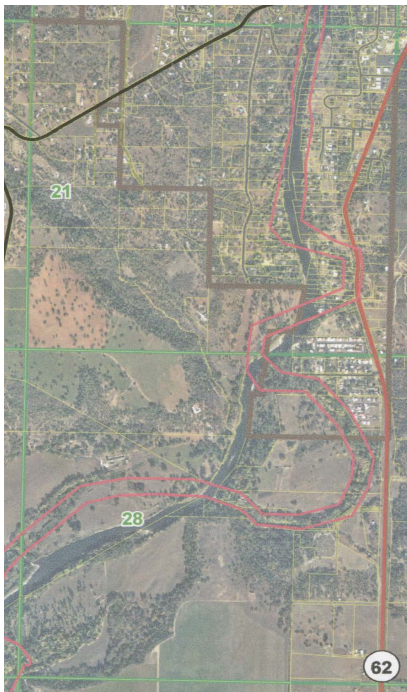
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I represented the petitioners in *Hardy v. State Land Board*, which challenged the state's declaration of navigability on the Rogue River, from river mile 68.5 to 157.5. The case began in 2008 and ended with an opinion from the Oregon Court of Appeals in 2015.

The court of appeals agreed with the state that the 89 river miles were navigable for title. However, the court agreed with the petitioners that the state's declaration of ownership did not meet the requirements in ORS 274.408(1)(a), which specifies that the state must describe what it is claiming so that the land can be identified "in a manner intelligible to the layperson."

On the Rogue River, the state couldn't meet that standard because the river channel in 1859 looked very different, in places, than it looks today.



On this aerial, the Rogue River channel around the time of statehood is shown in red, while the present river channel is visible and now cuts across what used to be river bends, or oxbows. Two of our petitioners owned property, including a house, inside the historic river channel.

To be clear, if the state's declaration had been valid, petitioner Kathryn Hardy's house would be located on state-owned land.

As I understand it, the goal of SB 74 is to make the “intelligible to the layperson” standard more lenient. I want to raise two concerns and also propose some revisions to the bill.

First, I don’t think the new, more lenient standard should apply to the 89-mile Rogue River segment. That’s a matter of fairness—the rules shouldn’t change in the middle of the game. The petitioners, and other landowners along the 89 river miles, have been open to negotiations with the state, and remain open. But these landowners have already been through the administrative process and through the courts. Let’s not make them do it again.

Second, if the state concludes that a waterway is navigable under ORS 274.400, and if part of the state’s claim does include dry land—a former river channel—the state should be required to talk to those property owners. Direct notice and meaningful engagement should not be optional.

Following are some proposed language additions, deletions, and revisions to Section 1 and Section 2. By way of explanation, the revisions to Section 1 are intended to clarify the intent of this legislation, as I understand it. The revisions to subsections (1) and (2) of Section 2 are there to avoid creating confusion. Current law provides that property boundaries along waterways shift with accretive changes to the shoreline. Thus there is no need to say that they remain ambulatory—that’s how the law operates today (except on lakes, pursuant to ORS 274.440). The ambiguity, and the potential for state ownership of dry land, is created by avulsive changes, which do not shift legal ownership boundaries.

“SECTION 1. Section 2 of this 2025 Act is added to and made a part of ORS 274.400 to 274.412. Nothing in this 2025 Act is intended to apply to the boundaries, waters, submerged lands, or submersible lands of lakes or to alter ORS 274.430 to 274.520.

“SECTION 2. (1) Notwithstanding common law principles of accretion and avulsion, the ~~The~~ Department of State Lands may include in a report under ORS 274.404 a finding that the state’s interest in a waterway should extend only to the existing submerged and submersible lands within the waterway.

“(2) ~~Upon the adoption of a report described in subsection (1) of this section, the State Land Board may find in a declaration under ORS 274.406 that the boundary of the waterway should remain ambulatory and change with future accretion. If the study segment of the waterway includes areas of significant channel migration or channel changes that are or may be avulsive, the report shall identify such areas and describe the locations and extent of upland property that could be claimed by the state as part of the historic 1859 navigable channel.~~

“(3) ~~If the State Land Board adopts a navigability report, before making a declaration under ORS 274.406, the board, through the department, shall notify the record owners of the affected upland property identified in subsection (2) of this~~

section and shall initiate negotiations to exchange of deeds with any property owner affected by a ~~such~~ declaration described in subsection (2) of this section. In any negotiation with an affected property owner, the department shall prioritize the goal of state ownership of the existing waterway and need not seek an equal exchange of property values. The board may make a declaration under ORS 274.406 when negotiations have successfully concluded with an exchange of deeds with all affected owners, or 90 days from the date of notice to the last-notified property owner, whichever first occurs.