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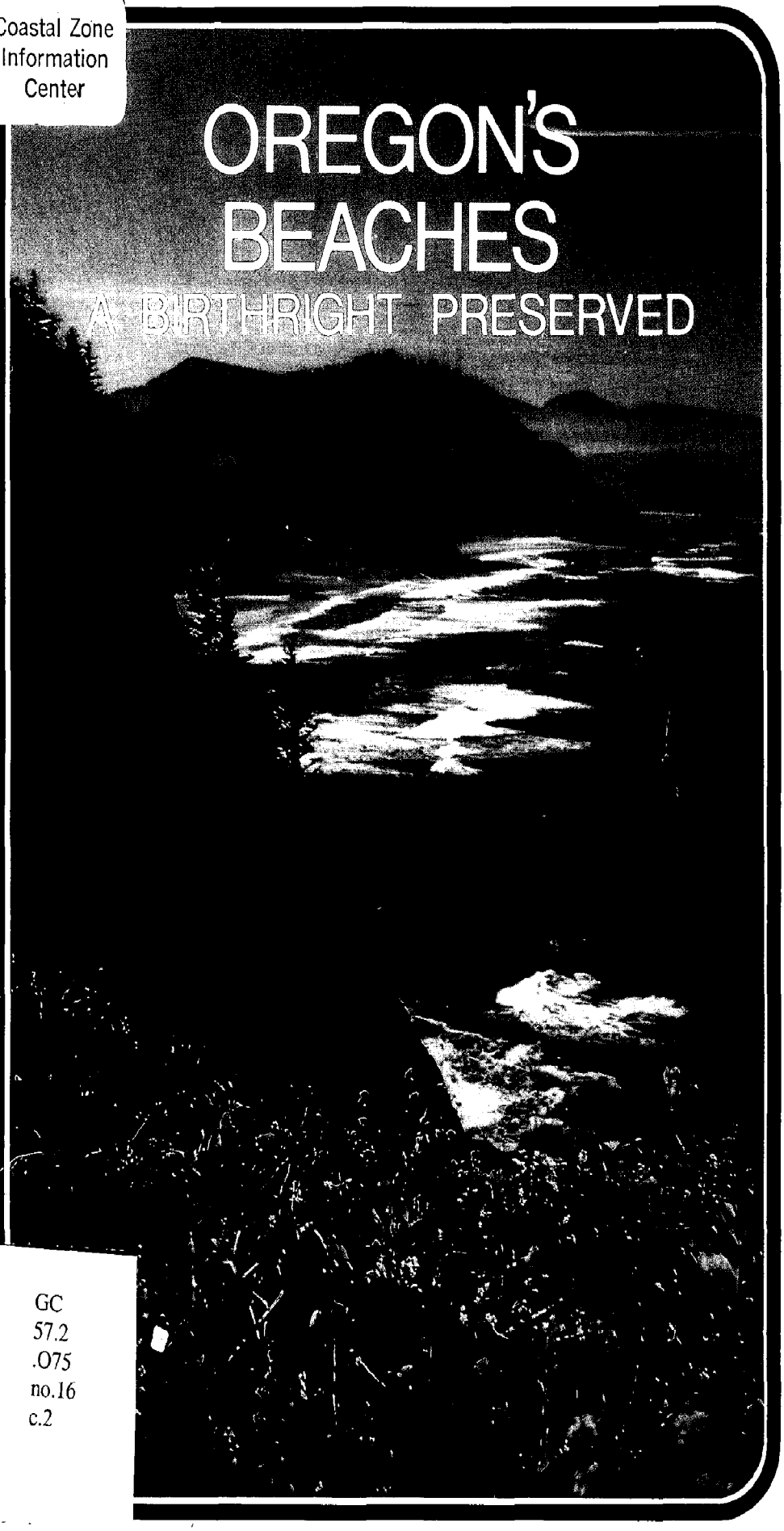
OREGON'S BEACHES

A BIRTHRIGHT PRESERVED



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OREGON'S BEACHES

A BIRTHRIGHT PRESERVED

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FOREWORD

Oregon's majestic ocean beaches are among the state's most popular scenic and recreational attractions. And, they are now and forever will be preserved for free and uninterrupted public use. **Oregon's Beaches, A Birthright Preserved** is a most appropriate title for a book that reminds Oregonians that the public's long-established right to have access to and enjoy this exceptional resource was in grave doubt just a decade ago.

How that doubt was resolved — in favor of the public interest — is what this book is all about. Here is a vivid account of what *almost happened* to Oregon's beaches... and how an extraordinary piece of legislation called "The Beach Bill" eventually established, once and for all time, that the public has acquired recreational rights by custom to the dry sands along Oregon's 362-mile coastline.

My personal involvement in the battle to preserve our beaches, not only for my generation but for generations to come, was an experience I shall never forget. To me, and thousands of other Oregonians, the prospect of "Private Beach - No Trespassing!" signs was not just unacceptable. It was *unthinkable.*

The Beach Bill is more than landmark legislation. It is a tribute to Oregonians' commitment to a vigilant stewardship of a truly wonderous natural environment.

Bob Straub
Governor of Oregon

In the administration of this God-given trust, a broad protective policy should be declared and maintained. No local selfish interest should be permitted, through politics or otherwise, to destroy or even impair this great birthright of our people.

Oswald West, 1949
Former Oregon Governor
1911-1915

THE BIRTHRIGHT

Oregon's Pacific coastline lies like a giant sculpture on the state's western boundary. The coastal headlands, backbone of the shoreline, rise hundreds of feet above the ocean shore. Massive landforms project like fingers into the ocean, and surf lashes continually at their lava-rock base. Yet, it seems they never move, but stand defiant against the sea and sky. Between the headlands the land is low, and soft, with miles of fine, cream-colored beach sand. On a clear and calm day, the ocean's endless rolling against the shore is gentle. On a stormy day, the wind and rain drive against the shoreline in dark and magnificent fury.

Where land meets sea, the sand is wet and dark, and glistens. Sandpipers run quickly and together, darting along the water's edge amid broken shells, seaweed and jellyfish stranded by the retreating tide until the water catches them again and moves them on to some other niche. On these enchanted beaches there is room and time to walk, or run, in freedom like the sandpiper; to think, in solitude; to be close to the earth and in touch with her beauty.

These are the beaches that Oregonians strive to preserve and protect for themselves and future generations. Oregonians are acutely aware of the probable result otherwise. In Maine, approximately 3% of the 4000 miles of coastline are public property. In Massachussetts, only 10 miles of the 1,300 mile coastline are in public ownership. The public frequently pays to go to beaches in New Jersey. Much of Florida's coast has been claimed by hotels and exclusive beach clubs. Along the Gulf Coast, 90% of the beaches are in private ownership.

In California, less than one-fifth of the 1,200 mile coastline is open to the public.

In contrast, along Oregon's 362 miles of shoreline, there are 262 miles of beaches and 64 miles of headlands accessible to the public and set aside for public use. Yet, just ten years ago, there loomed a threat that many of the beaches might be lost for public enjoyment. That might have been the case, had that threat not been averted by the 1967 Oregon Beach Bill which legally established public recreational easements to all the beaches seaward of the vegetation line.

This extraordinary law, however, evolved through time and need and politics. The Beach Bill grew from the public's traditionally free use of the beaches, which, in the collective conscience, should remain free and undisturbed. The law was a response from a gradually developing political conscience which places value on aesthetics as well as economics, preservation as well as progress, conservation as well as development.

The Oregon experience is unique as was the canny foresight of Oswald West. As the "Father of the Oregon Beaches," the former governor gave Oregonians options from which they could make a reasoned choice for the future of their beaches. And, Oregon has chosen.

This history illuminates the events which led to and followed the passage of the Oregon Beach Bill. Those events reflect the independent minds and pioneering spirits which have shaped the conscience of Oregon. They reflect an ecological awareness and an ethical regard for the land. They reflect a sense of historic roots and visions for the future. The preservation of Oregon's beaches is a history of her people.

ROOTS OF CUSTOM

On January 6, 1806, Captain William Clark of the Lewis and Clark Expedition, 12 men and the Indian woman Sacajawea journeyed southward from Camp Clatsop to Cannon Beach. They were in quest of a whale which, according to some Clatsop Indians, had washed up on the beach. Clark hoped to purchase some of the whale blubber from the Tillamook Indians. Sacagawea wanted to see the ocean and the "monstrous fish."

The party made its way south along the beach on the "round Slipery Stones" toward Tillamook Head, and, as William Clark noted: "After walking for 2½ miles on the Stones, my guide made a Sudin halt, pointed to the top of the mountain . . . and made signs that we could not proceed any further on the rocks, but must pass over that mountain."[1]

The party, using a well worn Indian trail, laboriously climbed and descended Tillamook Head and then travelled on the sand of Cannon Beach until it came to a creek, a small Indian village and the place where the whale had perished. Only the skeleton of the whale remained, which was a disappointment to Clark. But, he purchased from the Tillamooks a small portion of the blubber and some oil. Wrote Clark:

> Small as this stock is I prise it highly; and thank providence for directing the whale to us; and think him much more kind to us than he was to jonah, having Sent

[1]Bernard de Voto, (ed.) *Journals of Lewis and Clark* (Boston: Houghton Mifflin Co., Sentry Edition, 1953), p. 304-305.

this Monster to be *Swallowed by us* in sted of *Swallowing of us* as jonah's did.[2]

Clark's wry description of the quest for the whale is the first written account of the use of Oregon's beaches as a "highway," and is a significant event in that aspect of Oregon's recorded history. But, long before the arrival of Spanish, Russian, British and American explorers, the beaches were used for thousands of years by American Indians.

The Indian culture reflected Oregon's bountiful coastal environment. Unlike nomadic Pacific Northwest Indian cultures, the coastal Indians did not range far from home. Easily obtainable foods were abundant, as well as other resources necessary to their survival. Seafood, the staple of the Indian diet, included fish, crabs, clams and mussels from the ocean and intertidal beach and rocky "splash zone." Deer, elk, game birds, wapato and camas roots, and varieties of wild berries supplemented their diet. Fresh water was always plentiful, as was cedar for plank houses and canoes.[3]

Coastal Indian peoples changed village sites with the seasons and the food supply. They did not travel more than a few miles, however, since each group generally stayed within certain geographical boundaries. But from north to south, the Chinook, middlemen in the coastal and inland trade, the Clatsop and Tillamook, the Alsea, Siuslaw, Coos and Umpqua of the central coast, and the Tolowa-Tutuni of the southern coast traded goods, sometimes feuded and infrequently engaged in short-lived wars.[4]

When ocean travel was necessary the Indians sailed canoes from one point of coast to another, always keeping land in sight. Indian trails followed the beaches wherever possible because travel was far easier than through

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[2] *Ibid.*, p. 306.

[3] Philip Drucker, *Indians of the Northwest Coast* (New York: The Natural History Press, American Museum Science Books, 1955), p. 1-9.

[4] *Ibid.*, p. 18-20.

dense inland forests. The dry sand beaches were used constantly as resting, cooking and eating places.

By the 1830s other explorers, trappers, fur traders and missionaries had followed Lewis and Clark into the vast Oregon country. In 1841 the first emigrant wagon train left Independence, Missouri on the long and dangerous trek to Oregon.

The first white settlers on the Oregon coast, taking up claims in the 1840s on the Clatsop Plains, lived in primitive isolation. Since the communities were reached only by ship or by utilizing the beaches, the shoreline was quickly adapted as a ready-made roadway. Communications between settlements were frequently carried by horseback riders using the beaches. Although by the 1880s wagon roads extended westward from the Umpqua and Willamette Valleys to Coos Bay, Elk City, Garibaldi and Astoria, there were few north-south coastal wagon roads south of Seaside.[5] Thus, Oregonians continued to rely upon the beaches for a transportation route.

As early as 1851 whites established settlements on the lower Umpqua River and at Port Orford in Curry County. The discovery of gold in 1853 in the black sands on the south coast, and of abundant coal veins on Coos Bay, brought a rapid influx of settlers and created an initial economy based on mining. By 1855, however, these new coastal residents were building sawmills and cutting the south coast forests to export lumber to booming California. Lumber from Astoria, Gardiner, Coos Bay and Port Orford—carried increasingly after 1856 upon schooners and brigantines built in the shipyards of the Oregon Coast—was a major adjunct to a growing, and equally important, agricultural economy.[6]

The commercial fishing industry began in 1867 with

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[5]R. N. Preston, *Historical Early Oregon* (Corvallis, OR: Western Guide Publishers, 1972).

[6]Stephen Dow Beckham, *Coos Bay: The Pioneer Period, 1851-1890* (Coos Bay, OR: Arago Books, 1973).

a salmon cannery which opened near Astoria on the Columbia River. As the industry prospered, it increased the growth of coastal lumbering, mining and farming communities. By the turn of the century, the Columbia and Rogue estuaries were major centers of commercial canning. This industry was dependent upon the free and uninterrupted use of the ocean and ocean shore for transportation and economic survival.[7]

Tourism developed also in the late 1800s as newly established railroad lines from population centers promoted beach traffic. Train brochures advertised the "majestic grandeur" of the Pacific coastline, and beach trains became popular with citizens from the Willamette Valley. Often they carried tourists to within a block of the beach, where nearby hotels and tent cities accommodated the visitors.

In 1885 the Oregon Pacific Railroad rolled into Yaquina City from Corvallis loaded with beach tourists. Thereafter on weekends, as many as eight trains were sometimes needed to deliver beach bound crowds.[8] By 1898 the popular "Daddy Train," which carried on Friday evenings many fathers enroute to meet wives and children already at the coast, was steaming between Portland and Seaside via Astoria and the beautiful Clatsop County beach.[9] In 1911 the Pacific Railway and Navigation Company offered regular rail service between Portland and Tillamook.[10] In 1916 the Southern Pacific line extended west from Eugene to Florence, and south through Reedsport to Coos Bay.[11]

The Oregon beaches had become a recreational playground for fishermen, sunbathers, swimmers, campers, hikers, beachcombers and occasionally bicyclists. As

[7]Dorothy O. Johansen, *Empire of the Columbia* (New York: Harper and Row Publishers, 1967), p. 405-414.

[8]Edwin D. Culp, *Stations West: The Story of the Oregon Railway* (Caldwell, ID: Caxton Printers, Ltd., 1972), p. 82.

[9]*Ibid.*, p. 118.

[10]*Ibid.*, p. 108.

[11]*Ibid.*, p. 136.

Oregonians entered the automobile age, they used the beaches as a highway. This use continued even as late as 1932 until the last segment of Highway 101 was completed.

Although the beach was no longer needed as a highway, old habits were hard to break. More and more people were using the beaches in cars, on horses, and occasionally in airplanes. Suddenly, by the early 1940s, state and local governments were faced with problems resulting from conflicting recreational uses of the ocean shore. Automobiles cluttered the beaches as tourists searched for a likely picnic spot and then parked there. Some coastal cities, concerned about safety, posted speed limit signs on their beaches.

The Highway Commission subsequently responded to a number of beach use problems.[12] In 1947 the commission designated sections of the beach where automobiles were permitted. But, as the years progressed and the tourists increased, it became evident that the many automobiles on the beaches were both a nuisance and a hazard. In 1961 the commission received complaints about the automobile problem on the northern beaches, especially Cannon Beach. An estimated 3,000 automobiles were using the beaches daily during the summer. The commission, wanting to control rather than prohibit autos, designated two sections of beach where cars would be permitted with a 15-mile per hour speed limit.[13]

The influx of vacationers and travelers was an economic boon to the coastal towns. Tourism was flourishing, and with it a new industry for Oregon. New tourist attractions, gift and souvenir shops, motels and restaurants seemed to spring up every day. Competing pressures on the coastal land base grew intense as corporate developers sought sites for power plants and factories.

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[12]Minutes of State Highway Commission, 1940-1967, Highway Division Files, Oregon Department of Transportation.

[13]*Ibid.,* January 27, 1961.

When Lincoln City touted its "Twenty Miracle Miles," others glumly called it the "Twenty Miserable Miles."* It was too commercial and too concentrated. In many cases a hodge-podge of unplanned and unattractive developments crept closer and closer to the beaches. The character of Oregon's coast was being destroyed by a burgeoning population's abuse and misuse.

*A popular term attributed to former Oregon Governor Mark O. Hatfield.

THE POLITICAL CONSCIENCE

From a political point of view, the Oregon Beach Bill evolved from a variety of legislative and natural resource preservation activities during the 108 years between the state's admission to the Union in 1859 and passage of the Beach Bill in 1967.[1]

The first spark of that long, evolutionary process can be traced to the Admissions Act itself.[2] Congress granted Oregon jurisdiction over all navigable waters in the state. The act provided that those waters ". . . shall be common highways and forever free . . . to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll."

Clearly, Congress intended that Oregon's navigable waters were to be held in public trust for the people. That trust included public rights of navigation, commercial fishing and recreation. More importantly, there was little doubt that, through the act, and English Common

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[1]This discussion will concern legislation and preservation activity that most directly pertains to the public's use of beaches, and the development of the State Parks System. For further reference see generally:

(a) Janet McLennan, "Public Patrimony: An Appraisal of Legislation and Common Law Protecting Recreational Values on Oregon's State Owned Lands and Waters," *Environmental Law,* vol. 4, no. 3, Spring, 1973.

(b) Chester H. Armstrong, *History of the Oregon State Parks,* July 1, 1965.

(c) Thomas R. Cox, "The Crusade to Save Oregon's Scenery," *Pacific Historical Review,* May, 1968.

(d) Thomas R. Cox, "Conservation by Subterfuge," *Pacific Northwest Quarterly,* January, 1973.

[2]General Laws of Oregon, 1859, Chapter 33.

Law, the state owned the tidelands along the ocean shore and estuaries.[3]

The Oregon legislature in the late 1800s apparently believed that what the state owned the state could sell. In 1872 the legislature authorized private citizens ". . . to purchase from the state all tide land belonging to the state . . ." under auspices of the State Land Board comprising the governor, secretary of state and state treasurer. The board began selling tide lands in 1874 and by 1901 had sold approximately 23 miles of tidal shore to private owners.[4]

But, doubts arose about these activities, and the beaches were increasingly important as a north-south coastal transportation route. Consequently, the 1899 legislature declared the 30 miles of ocean beach from the Columbia River to the south line of Clatsop County, between ordinary high tide and extreme low tide, a public highway and ". . . forever open as such to the public."[5]

In 1911, 37-year-old Oswald West became Oregon's 14th governor. His outstanding record as state land agent and railroad commissioner helped West win the office, and he quickly became an outspoken and colorful politician. West had strong opinions about preserving Oregon's natural environment and he rarely hesitated in speaking out. West's determined advocacy of a preservation ethic did not win him many friends among the land barons of the early 1900s. But West soon became a national figure and he was widely admired as a protector of natural resources. President Theodore Roosevelt vis-

[3]Interview with Janet McLennan, February 6, 1976; and McLennan, "Public Patrimony," p. 328-329.

[4]The deeds for these 23 miles of tidal shore (which are still in private ownership) show ownership to the low tide line. Thus, prior to the 1967 Beach Bill which superseded all previous legislation, the state had sold its rights to those areas. The 1947 Legislature finally repealed the 1872 law. See J. M. Devers, "The Shores of the Ocean," November 28, 1949, in Armstrong, *Oregon State Parks,* p. 49-53.

[5]Laws of Oregon, 1899, Section 4817 B and C. See also McLennan, "Public Patrimony," p. 321-322, and 346.

ited Oregon in 1911 and, after meeting Governor West, wrote:

> I found a man more intelligently alive to the beauty of nature . . . and more keenly appreciative of how much this natural beauty should mean to civilized mankind, than almost any other man I have ever met holding high political position . . .[6]

West's leadership spurred preservation of Oregon's beaches and set the stage for the development of the Oregon State Parks System. He was adamantly opposed to the sale of tidelands. But West wanted to avoid opposition from owners of beach frontage with legislation specifically prohibiting further sales. He ". . . came up with a bright idea" instead. In 1913 he told the legislature that all Oregon beaches should be designated as a public highway because there was no other route along the coast.[7] The legislature agreed and amended the 1899 legislation to include the entire tideland on the ocean shore as a public highway from the Columbia River to the California line. The new legislation kept the low and ordinary high tide boundaries and declared the highway forever open to the public, excepting those portions which had already been sold by the state.[8]

West's clever and benevolent strategy worked. Years later, in 1949, he recalled with obvious satisfaction: "I pointed out that thus we would come into miles and miles of highway without cost to the taxpayer. The Legislature and the public took the bait—hook, line and sinker."[9]

In 1913 the legislature also created the State Highway Commission. By 1916, the Columbia River Scenic Highway was completed, extending from Portland east to

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[6]Cox, "The Crusade to Save Oregon's Scenery," p. 187.

[7]Oswald West, "Seashore Conservation," (Editorial) *Oregon Daily Journal,* August 8, 1949.

[8]General Laws of Oregon, 1913, Chapter 47. Since the state had sold its title to the 23 miles of tideland, it had to except those portions from the law.

[9]West, "Seashore Conservation;" Harold Hughes, "Crafty Os West Hoodwinked Legislature to get Beaches for State," *The Oregonian,* May 14, 1967, p. 24; and Nancie Fadeley, "The Wizardry of Os," *Eugene Register-Guard,* November 26, 1967.

Hood River and west to Astoria.[10] As Oregonians took to the automobile, they became increasingly supportive of the state's newly developing highway system. At the same time, more leisure time and opportunities for recreational travel heightened citizen interest in preserving the state's natural and scenic areas. Within the Highway Department, there were concerns about the need to obtain property other than highway rights-of-way for conservation purposes.[11]

In 1919 Stephen T. Mather, director of the National Park Service, and Madison Grant, a prominent naturalist from New York City, visited Oregon on an evangelical mission for the preservation cause. Disturbed ". . . by the rapid disappearance of the country's scenery, they were directing a major portion of their efforts toward encouraging scenic preservation movements on state and local levels."[12]

In Oregon, Mather and Grant were shocked to see roadside logging near Bend, Portland and Hood River. Said Mather:

> You Oregonians are so accustomed to it that you do not realize the charm of your beautiful trees to visitors from less favored regions. The trees along your highways are a scenic asset of almost incalculable value. If you permit these trees to be cut away and your highways to traverse bare and desolate regions, you will destroy what is, in fact, your greatest tourist asset.[13]

The two men campaigned through Oregon, mustering local support for the preservation movement.

Os West had left the governor's office in 1915 and was succeeded by James Withycombe. Ben Olcott was elected governor in 1919 and although he was West's protege, Olcott's political style was more moderate than his mentor's. Mather and Grant found Olcott less sym-

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[10] C. Lester Horn, "Oregon's Columbia River Highway," *Oregon Historical Quarterly,* vol. 66, no. 3, September, 1965.

[11] Armstrong, *Oregon State Parks,* p. 2.

[12] Cox, "The Crusade to Save Oregon's Scenery," p. 180.

[13] *Ibid.,* p. 182.

pathetic of the preservation movement than West might have been. Olcott was an avid outdoorsman and generally appreciative of Oregon's natural scenery. Although he agreed with Mather and Grant in principle, Olcott seemed reluctant to take direct action to help the preservationists until a single incident moved him.

In 1920, on a highway inspection trip, Olcott toured the new Cannon Beach-Seaside highway. He was appalled at Crown Willamette Paper Company's logging operations along the highway route. The once-magnificent forest had become an ugly, scarred and barren landscape.[14]

That incident made Olcott a believer. He joined the preservationists ranks and became the Oregon movement's foremost leader. He introduced important scenic preservation bills as part of his legislative program in 1921. One outlawed destruction of trees along state highways. A second bill authorized the State Highway Commission to purchase land for scenic or cultural purposes, and in effect, was the origin of the State Parks System.[15] The press applauded Olcott's efforts to "... keep our state the most livable in the Union."[16] The public was enthusiastic and supportive of his legislative proposals. Both bills passed the 1921 legislature.

Although there had been a well-organized public crusade for preservation during Olcott's four-year term, it foundered when he was defeated in 1922. The new Governor, Walter M. Pierce, had based his campaign on tax relief and programs to help Oregon farmers. Preserving Oregon's natural beauty was not among the new governor's highest priorities.

Nevertheless, dedicated preservationists continued their efforts, working quietly within established agencies. Behind the scenes, preservationist members of the State Highway Commission and their colleagues in the

[14] *Ibid.*, p. 185.

[15] *Ibid.*, p. 194.

[16] *Ibid.*, p. 193.

Highway Department eventually made important headway in developing programs to preserve Oregon's natural resources.

Between 1922 and 1927 the Highway Commission acquired nearly 2,000 acres for parks. The 1925 legislature had granted condemnation authority to the commission. Twenty parks or waysides, including six ocean beach parks, were situated in 14 different counties.[17] But no employees were specifically assigned to the parks program, and administration was difficult at best.

The late 1920s saw a groundswell of public support for parks system expansion, and preservation of exceptional scenic areas including the beaches. In 1927 and 1928 several important events within the Highway Department influenced the future of the parks system.

Robert Sawyer, who had been editor of the *Bend Bulletin* during the 1919-22 preservation movement, had long been a supporter of parks philosophy in Oregon. He was appointed to the Highway Commission in July, 1927, and immediately and successfully lobbied other commissioners for a parks expansion program. During Sawyer's first six months on the commission, the state acquired more than twice as many sites for parks and scenic protection than in the six preceding years.[18]

Shortly after Sawyer's appointment, Charles G. Sauers, nationally known for his leadership in the state parks movement in Indiana, visited Oregon in the fall of 1927. Sauers urged the state to put the parks system in a new department of conservation. Although local politicians were in favor of the idea, his proposal met with instant opposition from the Highway Commission. The commission supported a parks system, and had already begun to acquire new park sites, but members disagreed on how the system should be organized. Despite the opposition to Sauers' proposal, his timely visit encour-

[17] State Parks and Recreation Branch Files, Oregon Department of Transportation. Hereafter cited as State Parks Files.

[18] *Ibid.*

aged the commissioners to take definite steps toward expanding and improving the parks system.[19]

Commissioner Sawyer's influence on the Highway Commission was an important factor in establishing a state parks agency and policies that would influence the future direction of the program. Sawyer believed the dedicated Highway Fund was a better source of park financing than the legislature for park appropriations. Also Sawyer argued, biennial funding requests to purchase and manage park lands would be less subject to political pressures if the process was administered by the Highway Commission. He had little trouble winning his point when his fellow commissioners realized that a better parks system would generate more tourism and travel. Tourists would buy more gasoline and that meant more tax revenues for the Highway Fund.[20]

Stirring new interest in state parks was not enough for Commissioner Sawyer. He argued that a good parks system needed a capable administrator, and by July, 1929 Sawyer had convinced the Highway Commission to hire a superintendent. The other commissioners, Henry B. Van Duzer and Charles E. Gates, along with Roy A. Klein, state highway engineer and commission secretary, assumed the appointment would be temporary and the superintendent's duties limited.

The commission chose Samuel H. Boardman, a lifelong, devoted conservationist. At the time of his appointment, Boardman had been a Highway Department engineering employee for ten years. He had also coordinated a tree planting program along portions of the Columbia River Highway and the Old Oregon Trail. The commission knew of Boardman's personal interest in preservation and development of Oregon's scenic resources. He was the best candidate for the "temporary" position.

Boardman was an excellent choice. As the first state

[19]Cox, "Conservation by Subterfuge," p. 22.

[20]*Ibid.*, p. 22-24.

parks superintendent, he would hold the position for 21 years and pioneer a statewide park system that would eventually gain national recognition and acclaim.

Boardman followed a commission directive to ". . . secure timber lands alongside the highway . . . particularly in places where logging operations are in progress."[21] Boardman soon devoted more of his attention to acquiring sites solely for their scenic and recreational values. Three months after Boardman's appointment, Commission Chairman Van Duzer wrote to Sawyer: "I don't know how it appeals to you but it seems to me that he was a particularly fortunate suggestion."[22] Fortunate it was indeed because within a year after Boardman's appointment, he was left to carry on the parks crusade alone. By June of 1930, Sawyer had been removed from the commission after a disagreement with Governor A. W. Norblad over road building priorities.

Boardman's policy was to acquire as much unspoiled and inexpensive scenic land as possible and develop the sites as funds became available. One of his techniques was to persuade owners to donate desirable recreational land to the state for parks. He also convinced other property owners to sell their land to the state at prices below market value. When Boardman became parks superintendent there were 28 state parks comprising about 5,000 acres of land. When he retired in 1950, Oregon boasted 142 parks, and acreage had increased tenfold. Along the coast, Boardman increased the state's beach parks to 36, almost one quarter of the total state park acreage.[23]

Concurrent with Boardman's acquisition program, the Highway Commission attempted to develop a public use management plan for the ocean shore. An effective plan faltered, however, because the commission had little legislative authority to make such policies.

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[21] *Ibid.*, p. 27; and Roy Klein to Mark H. Astrup (a highway engineer), August 9, 1929, Samuel Boardman Correspondence, State Parks Files.

[22] Cox, "Conservation by Subterfuge," p. 28.

[23] State Parks Files.

Finally, in 1947, the legislature responded. The 1913 Os West Act was repealed, rewritten and re-enacted to clarify public rights and user activities along the shore. The law declared ownership of beaches "vested" in the state. It authorized the State Highway Commission to designate sections of the beach where automobiles and airplanes were permitted. The law also required a permit for the removal of sand or rock, excepting agates, souvenirs, fish and wildlife. It prohibited all state agencies from selling any portion of the ocean shore. The designation of the beaches as a public highway remained intact.[24]

Former Governor Os West, a practicing lawyer in Portland and freelance political writer, had always kept abreast of Oregon politics and continued to make his opinions known. He was furious with the legislature's action. He did not oppose the re-enactment itself, but no one had asked his opinion. In a letter to J. M. Devers, highway legal counsel, West fumed:

> What made me so damn mad in this matter was the Commission's failure to give me an opportunity to be heard before monkeying with the legislation of which I had secured the adoption, when the members were chasing pennies and not giving a damn whether or not the public owned one foot of beach.[25]

Following World War II, there was a nationwide surge in outdoor recreation and family camping, and increased public demand for developed recreational areas. Thus, Oregon's park program emphasis changed from land acquisition to development and management. There was considerable public interest in developing a parks department separate from the Highway Department to facilitate such management, so in 1955 Governor Paul Patterson appointed a special committee to evaluate Oregon's park system. The committee, under the able guidance of William Tugman, a prominent

[24]Oregon Laws 1947, Chapter 493. Just what the Legislature meant by "vested" is unclear. See McLennan, "Public Patrimony," p. 347.

[25]Oswald West to J. M. Devers, March 19, 1948. Oregon State Archives.

journalist and former editor of the Eugene *Register-Guard,* recommended that jurisdiction of state parks remain with the Highway Commission, so long as the parks program was to be financed by highway revenue. However, the committee recommended formation of a Parks Advisory Committee, which was officially established in 1957.[26]

Also in 1957 came the opening shot of a crucial battle. House Joint Resolution 24 sought a constitutional amendment that all portions of the ocean shore, between low and high tide, ". . . be retained by the State of Oregon in perpetuity for the free use, pleasure and enjoyment of the public." The bill died quietly in committee.[27]

By the early 1960s it was evident to the Highway Commission, the Parks and Recreation Division* and the Parks Advisory Committee that the future development of the Oregon coast would be the key to maintaining and building a quality statewide park system. In 1962, the Parks Division published its first outdoor recreation study, and identified as a high priority a beach access program. The study concluded that ". . . the need for public access . . . is growing because of the rapid growth of private developments along the coast. Many beaches are not conveniently available and lack parking sites and sanitary facilities." The study recommended that ". . . areas in danger of undesirable development should be given priority in any program of acquisition."[28]

As a result of this study, and at the urging of the Highway Commission and the Parks Advisory Committee, the Parks Division began the beach access program in 1964. It acquired access sites adjoining beaches at approximately three-mile intervals. In addition to pro-

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[26] Armstrong, *Oregon State Parks,* p. 36-38.

[27] Oregon Senate and House Journal, 1957; and Minutes of Senate Committee on State and Federal Affairs, April 8, 1957.

*In a Department of Transportation reorganization effective July, 1973, the Parks and Recreation Division became the Parks and Recreation Branch.

[28] Parks and Recreation Division, *Oregon Outdoor Recreation,* June, 1962, p. 117.

viding user facilities, the program's intent was to encourage public use of beaches, and prevent private owners from barring beach access.

At the same time the state was successful at legally fortifying its interest in the beaches as a recreation area. The 1965 legislature passed a bill which amended the 1947 beach law by changing the designation of beaches from a highway to a state recreation area. It also qualified the clause prohibiting ocean shore sales, by adding ". . . except as provided by *special* law."[29]

The 1965 legislature also passed the Oregon Outdoor Recreation Policy, which affirmed the state's belief that ". . . all Oregonians of present and future generations and visitors . . . be assured adequate outdoor recreation resources." Also, it identified the need for ". . . protection of existing and needed open spaces for appreciation, use and enjoyment of Oregon's scenic landscape."[30]

Despite these varied actions to establish statewide outdoor recreation policies, and specifically to retain the ocean beaches for public use, by 1965 there was growing alarm within the Highway Commission and the Parks Division that the state's prime recreational area was in danger of exploitation by private interests. There were isolated incidents of private builders constructing fills onto the dry sand seaward of the vegetation line. Others hauled sand from the wet beach area to the dry sand area.

An examination of the state's legal position on beach jurisdiction revealed that the state's authority was not as sound as had been assumed. With the exception of beaches already in state ownership, or under the jurisdiction of other government agencies, the state had no claim landward of the ordinary high tide line.

David Talbot, state parks superintendent, reported to the Parks Advisory Committee in August, 1965, that the beach situation was serious. He said that although the

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[29]Oregon Laws, 1965, Chapter 368. A similar effort failed in 1963.

[30]Oregon Laws, 1965, Chapter 310.

people believed the dry sand beaches were public, some were in fact privately owned. He said that unless immediate steps were taken to secure certain dry sand areas, that in the future the public might have beach access only during periods of low tide.[31]

Thus far Oregon had been spared the widespread exploitation of her magnificent ocean shore. But inevitably the jutting headlands, the long sandy beaches, the breathtaking vistas of the Pacific Ocean pounding upon pristine shores had finally attracted private interests willing to scar such beauty for economic gain. Those citizens who were aware that Oregon's coastline was threatened, must have had uneasy feelings that a political battle to save the beaches was imminent. They were sure the time would come—and, they were right.

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[31] Minutes of State Parks and Recreation Advisory Committee, August, 1965, State Park Files. Hereafter cited as Parks Advisory Committee Minutes.

THE BEACH BILL

Most Oregonians had always believed that all of the beaches seaward of the vegetation line were public. It was a widespread misconception, however, perpetuated by the public's historical and continuous free recreational use of the dry sand. Because use of the wet sand strip is dictated by the ebb and flow of the tide, the dry beaches have been the principal recreational playground. Many citizens believed the public had acquired a "claim of right" to all the beaches.

The 1913 Os West legislation had further contributed to the misconception. West has always been popularly lauded for saving the beaches. Few persons were aware that his legislation, and subsequent amendments, applied only to the beach seaward of the ordinary high tide line. Most recreationists did not realize that on some beaches they actually were using private land.

Consequently, prior to the 1967 Beach Bill, Oregonians were secure in their belief. In actuality, however, the state's legal jurisdiction over beaches was unclear because of ambiguities and technicalities in existing laws that confused and complicated the issue.

For one thing, some property deeds for beach front land showed ownership to the ordinary high tide line. Those private owners legally held some dry sand areas. Federal court cases involving shore lands disputes had used the ordinary or mean high tide as the landward boundary of state ownership. Some jurisdictions had defined "ordinary high tide" as the average of all high tides over a specific span of years. Others had defined it as the vegetation line. Although Oregon had been given

ownership of "tidelands" when admitted to the Union, specifically what area that encompassed had not been defined. Regardless of legislative intent, Oregon had not clearly determined the landward limit of the public beach, and indications were that the private owners might be in a better legal position than the state.[1]

Further, the Highway Commission had identified two problems specific to the 1965 beach legislation.[2] Although the commission recognized public rights between the vegetation and ordinary high tide lines, through dedication, prescription or grant, the 1965 legislation limited the "state recreation area" to *below* the line of ordinary high tide.

Secondly, the legislation had amended the 1947 beach law to read, ". . . no portion of such shore shall be alienated by any of the agencies of the state, *except as provided by law.*" Interpretations varied, but clearly the amendment implied that the legislature could sell part or all of the beach.

In July and August of 1966, citizens complained to Tom McCall, then secretary of state, and Glenn Jackson, chairman of the State Highway Commission, concerning the denial of public access to beach property at the Surfsand Motel at Cannon Beach.[3] William Hay, owner of the motel, had built a low barricade of logs around a dry sand area adjacent to the motel, for the exclusive use of his guests. Hay put cabanas in the enclosure and posted signs that warned: "Surfsand Guests Only Please." William Nokes, investigator for the Highway

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[1]Forrest Cooper, State Highway Engineer, to Governor Tom McCall, September 2, 1966, Highway Division General Files, Oregon Department of Transportation.

[2]David Talbot, "State Highway Department Statement in Support of HB 1601," cited in Minutes of House Committee on Highways, May 7, 1967, Oregon Legislative Assembly, 1967 Regular Session. Hereafter cited as House Highway Committee Minutes.

[3]Richard Byrne to Glenn Jackson, July 14, 1966; William G. Nokes to Files, August 15, 1966; and Laurence F. Bitte to Tom McCall, August 25, 1966, cited in House Highway Committee Minutes, March 23, 1967.

Department, visited the motel in early August, 1966, and confirmed the situation.[4]

The questions raised by the Surfsand Motel incident were: 1) Does private ownership of beach property legally extend seaward to the ordinary high tide line? 2) Does the private owner of beach property have the right to build seaward of the vegetation line onto the sandy beach, and who issues such building permits? 3) What legally constitutes a beach and can disparate definitions be applied to the term? 4) Is it legal to close a portion of the sandy beach which has been used by the general public for more than 50 years?

The State Parks and Recreation Advisory Committee, under the chairmanship of Loran L. "Stub" Stewart,* met in late July, 1966 and discussed the Surfsand Motel incident.[5] The committee was particularly concerned about the state's uncertain legal position. The calamitous potential of the issue was illustrated by a Parks Division study which showed that 112 of Oregon's 262 miles of sandy beach were in private ownership which extended to the ordinary high tide line.[6] The committee knew the state might have to spend millions to purchase the private land.

The Parks Advisory Committee recommended to the State Highway Commission that a legislative remedy be explored immediately to clarify the state's legal position and avoid another Surfsand Motel incident. George Rohde, then chief counsel for the Highway Commission, his assistant Frank McKinney* and Jim Kuhn, title attorney, took on the task.

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[4] *Ibid.*

*Other State Parks Advisory Committee members were Eric W. Allen, Jr. (Medford), Alfred D. Collier (Klamath Falls), E. R. Fatland (Condon), Donald G. McGregor (Grants Pass), George D. Ruby (Portland), Lestle J. Sparks (Salem), and P. M. Stephenson (Salem). Warren A. McMinimee (Tillamook) was appointed to the committee April, 1967.

[5] Parks Advisory Committee Minutes, July 29, 1966.

[6] State Parks and Recreation Division, *Oregon's Coastal Beaches,* June, 1966.

*McKinney was also the lead trial counsel in the subseqeunt Fultz and Hay beach property litigations.

Highway legal counsel concluded that a law or laws could be adopted to preserve public beach rights. Counsel was well aware of the "fee title" problem. Any law establishing public rights on the dry sand beaches would be tested in court. Private owners were likely to charge that their land was being confiscated, or claim compensation for its public use. But, counsel was sure Oregon could legally establish public recreational easement rights on dry sands in private ownership without having to purchase or condemn property.[7]

In part, counsel based the conclusion on a precedent-setting Texas court case. In 1964 the Texas Supreme Court upheld the 1959 Texas Open Beaches Act on the theory of implied dedication, a common law acceptable in Oregon.[8] Since Oregon's beach use had been similarly open and widely known, counsel believed the theory of implied dedication was sound. It could be proven that private owners, excepting Hay, had never tried to disrupt public use of the beaches.[9]

The first beach legislation was written by the three lawyers at the recommendation of the Parks Advisory Committee. HB 1601 was modeled after the Texas Open Beaches Act, and became popularly known as the "Beach Bill."* The Beach Bill was brief. It recognized public rights to easements on the beach through prescription, dedication and grant, between the vegetation and ordinary high tide lines. It authorized the Highway Commission to protect, administer and supervise such public rights. It amended the wording of the 1965 beach legislation to read that ". . . no portion of such shore or rights in land along such shore shall be alienated by any of the agencies of the state except as provided by *special*

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[7]Interview with Frank McKinney, July 3, 1975.

[8]Seaway Co. vs. Atty's Gen., 375 S.W. 2d 923 (Tex. Civ. App. 1964).

[9]McKinney Interview.

*A companion bill, HB 1600, stated that all future seaward accretions on the beach would belong to the state rather than upland owners. Since the beach controversy was over HB 1601, this discussion will concern the latter only.

law." This would protect the beaches from future sale. The bill maintained the status quo by allowing citizens to continue to use dry sand beaches for recreational purposes. It did not deprive private owners of their property or their rights since they could still use their property, subject only to the public's recreational easement.

The Beach Bill was presented to the Parks Advisory Committee for final review and approval on February 16, 1967. The committee formally chose to support HB 1601 because ". . . it reaffirms, delineates and makes more specific, Oregon's historic attitude toward public rights on the ocean beaches."[10]

Glenn Jackson and the Highway Commission* also endorsed the measure. It was introduced in the legislative session on February 22, 1967, by Representatives Sidney Bazett (R-Grants Pass) and Stanley Ouderkirk (R-Newport), and Senator Anthony Yturri (R-Ontario) at the request of the State Highway Commission. The bill was sent to Representative Bazett's House Committee on Highways** and the first hearings on the Beach Bill were held March 7 and March 23.

Among the Beach Bill's chief supporters, at first, were the Highway Commission, the Parks Division and Parks Advisory Committee. David Talbot, State Parks superintendent, testified on March 7. He emphasized that both the Highway Commission and the Parks Advisory Committee had given long and detailed attention to the beach problem, and that ". . . the assumption of . . . expanded responsibilities will by no means be easy or inexpensive." Further, Talbot said:

The Highway Commission has managed the coastal

[10]Parks Advisory Committee Minutes, February 16, 1967.

*Other Commissioners were Kenneth N. Fridley (Wasco) and David B. Simpson (Portland). Fridley was replaced by Fred W. Hill (Helix/Pendleton) in April, 1967.

**Hereafter referred to as House Highway Committee. Other committee members were Representatives Howard (D-Portland), Anunsen (R-Salem), Elder (R-Eugene), Hanneman (R-Cloverdale), McKenzie (R-Sixes), Meek (R-Portland), Holmstrom (D-Gearhart), Smith (R-Burns), Turner (D-St. Helens), and Leiken (D-Roseburg).

> beaches for many years and has always sought to carry out the intent of the beach laws enacted by the various legislative assemblies which gave limited jurisdiction to the Highway Commission. We believe that HB 1601 is necessary at this time to enable the Highway Commission to adequately protect and manage the beaches for permanent public enjoyment . . .[11]

Chairman Stewart and the Parks Advisory Committee deserve much of the credit that the beach legislation was ever introduced. The committee, determined to pursue the legislation, gave continual support to the Beach Bill during the entire legislative process. Chairman Stewart testified before the House Highway Committee on March 23. He affirmed the Highway Commission's legislative responsibility to provide outdoor recreation opportunities for Oregonians and visitors. Stewart added:

> The Parks and Recreation Advisory Committee was given the question of what to do about the beach problem and what policy should be taken by the Commission. The bill before you gentlemen is their answer . . . House Bill 1601 is not a land grab. We have the finest beach recreation areas in the nation; and the Highway Commission, through this bill, wants to keep it that way for the public.[12]

Even in early 1967 few Oregonians were aware they might lose free access to and use of Oregon's beaches. Nor were they aware of the proposed legislation to prevent that loss. Throughout March and April the House Highway Committee received testimony from coastal real estate firms, private property owners and others who opposed the Beach Bill.

The opposition initially focused on a technicality in the first draft of the Beach Bill. The line of vegetation was not specifically defined other than to say it existed. The Highway counsel believed that in beach areas where

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[11]Talbot, "Highway Department Statement," p. 3.

[12]Loran L. Stewart, "Testimony of HB 1601," cited in House Highway Committee Minutes, March 23, 1967, pp. 3, 5.

there was no vegetation, a line could be established by connecting adjacent vegetated areas.[13] This technical point was soon overshadowed by a larger controversy involving whether the vegetation line should be used at all.

There was other opposition to the bill. Private builders believed the Beach Bill was inadequate unless it provided for certain kinds of non-adverse building seaward from the vegetation line, such as buried sewers, cable lines and stairways from private land down to the beach. The advocacy role of the State Highway Commission in protecting public rights was questioned. Some opponents believed the bill would threaten all private property rights on the coast. Others said the real issue was a proposed prescriptive right and that beach front owners should be compensated if the state were to establish public easements to dry sand areas. Opponents claimed the Beach Bill violated both the Fifth and Fourteenth amendments to the U.S. Constitution with regard to private property rights.

Others claimed the bill was inadequate in protecting Oregon's beaches because under existing law the state could acquire land only through purchase, grant or condemnation. Still others said public rights to easements and prescriptions were a matter to be determined in a court of law, not by the legislature.

Neither Beach Bill supporters nor the opposition, it seemed, were making much headway with the House Highway Committee. The Beach Bill was foundering amid heated committee debate on a proper course of action. On April 6 the committee amended the Beach Bill so that it became a statement of policy, which recognized public rights on the beaches and gave the Highway Commission authority to protect those rights.[14] On April 18 a motion to table the bill and put it into a post legislative interim study committee failed, as did

[13]McKinney Interview.

[14]House Highway Committee Minutes, April 6, 1967.

another to send the amended bill to the floor with a "do pass" recommendation.[15] The House Highway Committee was stalemated.

On May 1 Chairman Bazett, a staunch ally of the Beach Bill, warned that without strong public support the bill would die in his committee. At the same time, Matt Kramer of the Associated Press launched a series of newspaper articles which clearly described the beach issue to the public. He warned of the possible loss of the public's right to use the beaches should the bill fail. Subsequently, aroused citizens flooded the House Highway Committee with letters and telegrams. Within a few days the committee had heard from more than 10,000 persons, most of whom supported the bill.*

Daily television coverage and newspaper headlines trumpeted the controversy: "Battle Lines Drawn Over Beach Issue," "Dry Sands Bill Survives Raid by Opposition," "Another New Ploy in the Beach Battle," "This Sand is Your Sand, This Sand is My Sand." The Beach Bill had suddenly become the most explosive issue of the 1967 session.

In early May there was constant pressure and hectic efforts to get the Beach Bill out of committee. Governor McCall and State Treasurer Robert Straub, strong supporters of the bill, called for legislative action. On May 5 McCall, with Straub's endorsement, wrote Chairman Bazett: "We cannot afford to ignore our responsibilities

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[15] *Ibid.,* April 18, 1967.

*One of Kramer's final articles on the Beach Bill was in recognition of Sidney Bazett's efforts to keep the bill alive. He stated that "... the only thing that prevented a quiet burial (of the Beach Bill) was the fact that a genial ... legislator turned uncommonly stubborn about it. In fact, there would be no Beach Bill but for Representative Sidney Bazett." (Grants Pass *Courier,* July 6, 1967). The public support for the Beach Bill generated by Matt Kramer's news stories was another important factor in its passage by the legislature. He gained national recognition for contributing to greater public understanding and awareness of natural resource issues. After his death in 1970, the Oregon State Highway Commission erected a memorial plaque in his honor at Oswald West State Park.

public had acquired through its historic use of the beach. Passage, he said, would prevent a take-over by private interests and give Oregonians time to fortify their legal claim to the beaches.[21]

From the beginning Governor McCall urged the legislature to pass a substantive bill protecting public rights to dry sand areas. Since much of the controversy was over an acceptable boundary line, McCall asked nine experts at Oregon State University, including engineers, oceanographers, biologists and geologists to develop a boundary formula. On May 11 McCall issued a statement announcing that he would personally visit the Oregon beaches to test the scientific formula for beach definition.[22]

The day before McCall's beach visit, the House Highway Committee met without Chairman Bazett, despite the chairman's refusal to call a meeting. He feared members would pass a bill out of committee to embarrass the governor, and before McCall had a chance to add technical language to the bill. But, the committee agreed only to draft more compromise amendments, and asked Representatives Redden and Johnson, House Speaker Montgomery and highway legal counsel Rohde to cooperate in the task.[23]

On May 13 Governor McCall walked along five beaches between Salishan and Neskowin, accompanied by his team of experts, Representative Bazett, and a throng of aides, press and observers. The governor and his team subsequently offered a single rule of elevation to help solve the Beach Bill controversy. Their recommendation was a beach line at 16 feet above the sea level markers already established by the U.S. Coast and Geodetic Survey.

The 16-foot elevation was written into the compro-

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[21] House Highway Committee Minutes, May 11, 1967.

[22] "Recommendation by Governor McCall for Preservation of Oregon's Beaches," Office of the Governor, State Capitol, May 11, 1967.

[23] House Highway Committee Minutes, May 12, 1967.

to the public of this state for protecting the dry sands from the encroachment of crass commercialism."[16]

On May 8 House Democrats tried unsuccessfully to remove the Beach Bill from the House Highway Committee. Their motion failed on a roll call vote.[17] House Speaker F. F. Montgomery (R-Eugene), Representatives James Redden (D-Medford), Lee Johnson (R-Portland) and Paul Hanneman (R-Cloverdale), and highway legal counsel George Rohde all worked feverishly, drafting amendments to the bill. One news report stated: "Amendments to the Beach Bill littered the legislature like drift wood." Chairman Bazett added: "We've got amendments coming out of our ears."[18]

The furor continued. A pro-Beach Bill group, *Citizens to Save Oregon Beaches,* headed by Laurence Bitte of Portland, threatened to begin an initiative petition if the legislature failed to approve the bill.

House Speaker Montgomery on May 11 offered Beach Bill amendments (which were essentially a substitute bill).[19] Montgomery's amendments recognized property rights of both public *and* private citizens and established as a boundary line 200 feet landward from the ordinary high tide line. His proposals drew fire from both political parties and enmeshed committee members in a new dispute. Chairman Bazett charged Montgomery had watered down an already weakened bill. Straub called it "... the most scandalous giveaway of public rights in this country."[20]

In testimony before the committee Straub said the original bill emphasized prescriptive rights which the

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[16]Harold Hughes, "McCall Slaps GOP's Tabling of Beach Bill," *The Oregonian,* May 5, 1967, p. 1.

[17]Oregon Senate and House Journal, 1967.

[18]*The Oregonian,* "Legislative Rebellion Explodes Over Beach Issue," May 13, 1967, p. 1.

[19]House Highway Committee Minutes, May 11, 1967.

[20]Harold Hughes, "Uproar Spurs Public Hearing Over Beaches," *The Oregonian,* May 11, 1967, p. 1.

mise amendments and presented to the House Highway Committee on May 16. But the committee balked at McCall's proposal. They said the elevation was too high, and first adopted a 12-foot elevation line instead.[24]

Members argued that in some cases the 16-foot elevation line did not include the entire beach. In other cases, especially around estuaries, it extended beyond the beach area. After more lengthy debate, on May 18 the committee finally agreed on the 16-foot elevation above sea level and a 5.7-foot elevation plus 300 feet at estuaries.[25] The compromise gained the support of Governor McCall, State Treasurer Straub, House Speaker Montgomery and Representatives Redden and Johnson. The House Highway Committee recommended that the State Highway Commission survey the entire coast to establish a permanent zone line for approval by the next legislative session in 1969.[26]

Representative Fred Meek moved to send the Beach Bill to the House floor with a "do pass" recommendation. His motion carried by a vote of 8 to 2. Representatives Paul Hanneman and Rod McKenzie voted against the motion. After ten hearings and thousands of words of testimony, the amended Beach Bill reached the floor of the House of Representatives on May 23, 1967.

It passed the House 57 to 3. The bill was then referred to the Senate Judiciary Committee.* A number of amendments were adopted, including a re-statement of the policy declarations to clarify legislative intent regarding the public's recreational right on the beaches. The Beach Bill passed the committee unanimously and was approved by the Senate 27 to 0 on June 6. The House

[24] *Ibid.*, May 16, 1967.

[25] *Ibid.*, May 18, 1967.

[26] House Highway Committee Minutes, "Statement Concerning HB 1601," May 18, 1967.

*Committee members were Senators Mahoney, chairman (D-Portland), Yturri, vice chairman (R-Ontario), Boivin (D-Klamath Falls), Burns (D-Portland), Cook (D-Gresham), Eivers (R-Milwaukie), Fadeley (D-Eugene), Husband (R-Eugene), Lent (D-Portland), McKay (R-Bend) and Willner (D-Portland).

of Representatives, despite substantive Senate amendments, passed the bill 36 to 20 on June 7.

With this victory the legislature declared a new policy in preserving and maintaining the state's jurisdiction over ocean beaches. The bill codified into law already existing public rights to dry sand beaches. It gave the State Highway Commission the authority to police, protect and maintain the property. The law included the stipulation that any improvements or alterations to the ocean shore seaward from the 16-foot elevation line (construction and fill or removal) required a permit from the state highway engineer. The bill provided for hearing procedures, and an appeal process for private property owners or developers.

The essence of the Beach Bill, enacted as Chapter 601, Oregon Laws 1967, stated that the legislature:

> . . . recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore . . . sufficient to create easements in the public through dedication, prescription, grant or other use . . . the Legislative Assembly hereby declares that all public rights . . . are vested exclusively in the State of Oregon.

Governor McCall signed the bill into law on July 6, 1967, stating that ". . . it is one of the most far reaching measures of its kind enacted by any legislative body in the nation."[27]

Immediately after the Beach Bill became law the State Highway Commission, as requested by the 1967 legislature, began a survey of the entire coastline to establish a permanent landward beach zone line. The

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[27] *The Oregonian,* "McCall Hails Beach Bill," July 7, 1967, p. 13.

Ironically, within two weeks the Highway Commission publicized plans to re-route a section of the Highway 101 along the Nestucca sandspit (through two parcels of BLM land). The proposed route, supported by Governor McCall, was landward of the 16-foot line. Nevertheless, the plan was opposed by State Treasurer Straub and many citizens who believed the route would desecrate the beach. In late August, 1967, Secretary of the Interior Stewart L. Udall ordered the Bureau of Land Management to disapprove the Highway Commission's plan. The issue was re-opened in September, however, by Governor McCall, and more controversy ensued until late November when a final decision was made to abandon the sandspit route.

commission used survey points keyed to the Oregon Coordinate System* and connected the adjacent points with a straight line. The resulting survey line, which approximates the actual vegetation line, has proved to be more practical than either the vegetation line or the 16-foot elevation line.

The survey points were introduced to the 1969 legislature in HB 1045. The bill also included an amendment that all beach lands subject to public recreational easement would be exempt from taxation. It was approved without conflict and was signed by Governor McCall on August 22, 1969.[28]

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*Assistant Highway Engineer Lloyd Shaw developed the survey method based on the Oregon Coordinate System, which is part of a nationwide grid system of latitudes and longitudes. The survey points or coordinates are keyed to the grid. When using this survey method, the result is a *horizontal* control rather than *vertical* elevations above sea level. In the case of the beach boundary, this method of survey was preferable because the resulting zone line is unaffected by natural changes in the beach terrain.

[28]Oregon Laws, 1969, Chapter 601.

ILLUSTRATIONS

Barview Beach, Tillamook County, in the 1890s when the ocean shore was used as a highway. (Oregon State Library).

Clam digging at Gearhart, Clatsop County. (Oregon Historical Society).

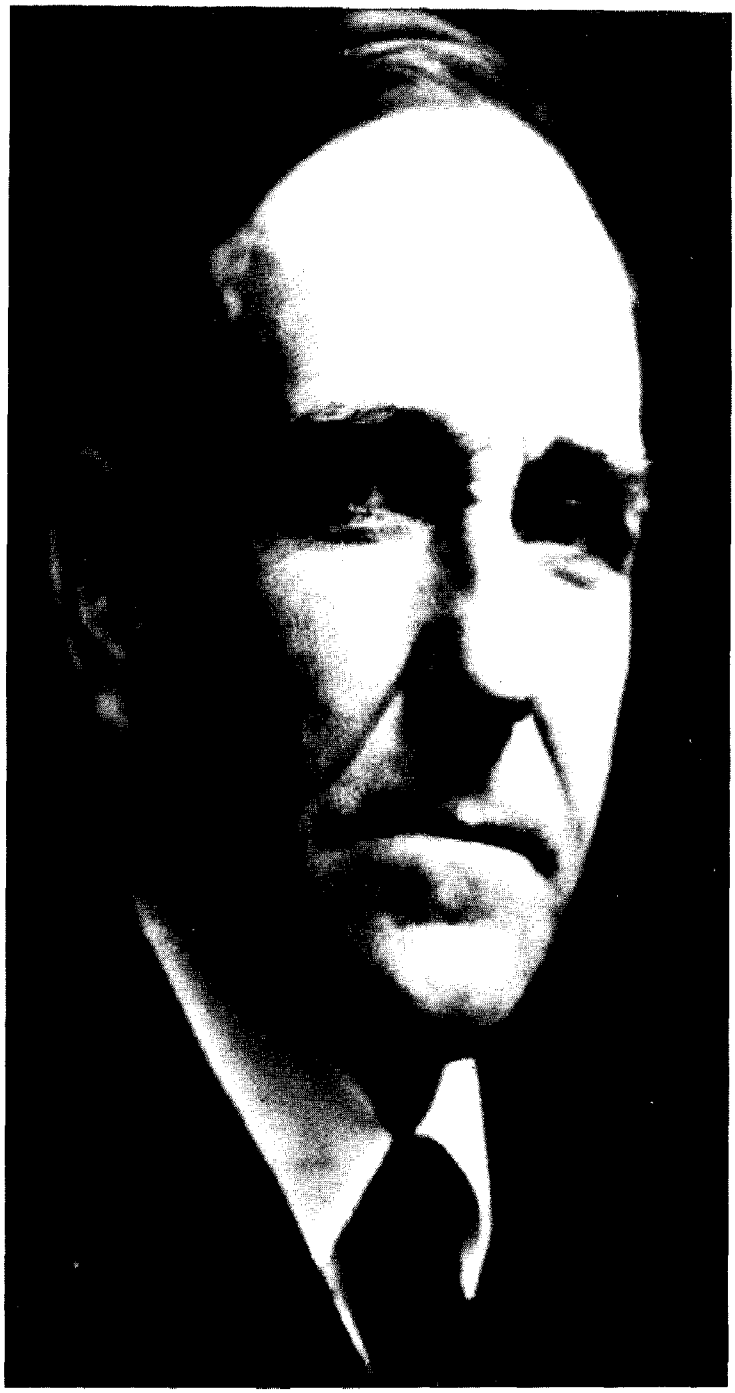
Bathing beauties at Rockaway Beach, Tillamook County, in the early 1900s. (Oregon Historical Society.)

A Clatsop County beach, 1870s. (Oregon Historical Society).

A family outing on Oregon's northern coast. (Oregon Historical Society).

Nye Beach at Newport, Lincoln County, early 1900s. (Oregon Department of Transportation).

Cannon Beach, Clatsop County, 1920s. (Oregon Department of Transportation).



Oswald O. West, former Oregon governor from 1911 to 1915, and "The Father of the Oregon Beaches." (Oregon State Library).

Samuel H. Boardman, first State Parks superintendent, 1929-1950. (Oregon Department of Transportation).

On May 13, 1967, former Governor McCall surveyed the log barricade in front of the Surfsand Motel at Cannon Beach. (The Oregonian Newspaper).

The controversial beach road at Neskowin triggered the state's first court test of the Beach Law. (Oregon Department of Transportation).

In a ceremonial signing of the Beach Bill, Tom McCall was joined by: (left to right) State Parks Advisory Committee members Leslie J. Sparks and Loran L. Stewart, and former Representative Norm Howard, vice-chairman of the House Committee on Highways. (Statesman-Journal Newspapers, Inc.).

McCall signed the Beach Bill on July 7, 1967 and gave special recognition to former Representative Sidney Bazett, Chairman of the House Committee on Highways, for his outstanding efforts in helping to pass the Beach Bill. (Sidney Bazett).

THE CIRCUIT COURT CASES

Despite the legislative success of the Beach Bill it was both inevitable and essential that the new law be tested in court. Anticipating that test, the assistant attorneys general for the Highway Commission, in the fall of 1966, began gathering evidence to document a case for public rights.[1] Since legal precedent for Oregon's Beach Law was obscure, the lawyers were investigating similar cases in Texas, California, Washington and elsewhere, trying to anticipate the outcome of Oregon's potential cases. Most legal observers predicted the courts would find that beach ownership resided with the deed holder and that ownership would extend seaward to the line of ordinary high tide.[2]

A potential case had developed in the winter of 1967 when William Hay built a second and much more substantial barricade of pilings and steel cable at his Surfsand Motel. The barrier enclosed a dry sand area historically used by the public. Hay's barricade was built while the legislature was in session considering the Beach Bill and all legal efforts were geared toward filing a case against him as soon as the bill passed.[3]

But soon, lawyers had more to contend with than Hay's barricade. On May 22, 1967, Lester Fultz, a property owner at South Beach at Neskowin, started work on a private road which extended seaward past the vegetation line. Fultz made a cut in the Cascade Head

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[1]George Rohde, chief legal counsel; Frank McKinney, assistant; Jim Kuhn, title attorney.

[2]McLennan Interview.

[3]McKinney Interview.

cliff, approximately 60 feet above the beach, and then pushed dirt, gravel and rock from his property over the cliff and onto the dry sands until there was enough cut and fill to build his road onto the beach. It extended in a U-shape approximately 200 feet beyond the vegetation line. Fultz' intention was to make accessible his "view property" on Cascade Head situated to the south and east of the road, and to provide a good beach access from the property for vehicles and pedestrians.[4]

The Highway Commission received many letters in opposition to the Fultz construction from local residents. Although nothing could be done to stop the Fultz project until the Beach Bill became effective, the commission immediately began building a case for future legal action.

Fultz halted work when the Beach Bill passed the Senate on June 7. Fultz, believing the bill to be law, requested a beach permit application. He was informed by the state highway engineer that the governor had not signed the bill into law, so Fultz—for a few weeks—resumed his work. This time he began extending a second road northward from the original fill and parallel to the ocean for about 200 feet.

Governor McCall signed the Beach Bill into law on July 6. Fultz, on July 13, filed for a permit as required by the law to complete his road and to build a revetment. Following a public hearing on September 14, the state highway engineer denied Fultz' request on November 8.

Five days later Fultz resumed construction of the road without a permit. He relied on the advice of his legal counsel that his fee title to the beach was superior to the provisions in the Beach Law.

If Fultz was inviting a law suit he did not have long to wait. Within twenty-four hours Attorney General Robert Y. Thornton filed suit to stop Fultz' project.[5] Fultz

[4]Lester E. Fultz to Lloyd P. Shaw, June 20, 1967, Highway Division General Files.

[5]State vs. Fultz and LEW Engineering. 261 OR 289; 491 P2d 1171 (Tillamook, OR Cir. Ct., 1968).

counter sued and appealed denial of his construction permit.[6] He also asked the court to declare the Beach Law unconstitutional, based on his contention that the law violated the Fifth and Fourteenth Amendments of the U.S. Constitution by confiscating private property.

The Fultz Cases

Through the state's preparation for its cases, it had acquired more than 70 affidavits from citizens prepared to testify that they had used the Fultz beach property for many years for recreational purposes. In addition, Attorney General Thornton issued a public appeal for citizens' photographs (more than ten years old) which would further attest to public use of the beaches. The response was overwhelming.*

Both the state's suit and Fultz' countersuit were consolidated for trial in Tillamook County Circuit Court before Judge J. S. Bohannon. Trial began on May 7, 1968. Fultz argued that he had not been given "due process" because he was not granted a judicial type hearing.** The state engineer, Fultz claimed, based his decision on an incomplete transcript of the hearing and arbitrarily denied the permit.

Fultz claimed the state had failed to prove any public rights through prescription or implied dedication. He maintained that public use of open, uninclosed, wild and vacant land is presumed to be permissive, not adverse. The disputed property, according to Fultz, had been

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[6]LEW Engineering vs. Cooper and State. 261 OR 289; 491 P2d 1171 (Tillamook, OR Cir. Ct., 1968).

*Thornton planned to use the evidence in other potential beach litigations as well as the Fultz case.

**Bohannon stated it was his opinion ". . . that Fultz was entitled to a judicial type hearing before the representative of the state engineer . . . but that the requirement of the law had been met by Chapter 601 in that the Act provided for a judicial review in equity of the Engineer's ruling . . . This . . . means a trial de novo. The trial de novo afforded by this law meets the due process requirement." (Opinion, August 26, 1968).

lawfully and sufficiently fenced by natural barriers, without a safe public access. Previous absentee owners, he claimed, had no knowledge of any substantial use of the property. Fultz testified that when he bought the property in 1961, he told various individuals that he owned the beach down to ordinary high tide, and he gave permission for them to use his land. He said that prescriptive easements in his case were inapplicable and that he rightfully was entitled to build on his own property.

Fultz also maintained that the Beach Law was unconstitutional because it ". . . attempts to work a sudden change in established law and attempts to avoid eminent domain principles under which property is normally secured for public use."

The trial lasted five weeks. The state was prepared to call its more than 70 witnesses. After hearing testimony from 27 witnesses, Judge Bohannon directed that statements of 11 others be read into the record.

To make an important point in its case regarding the long recreational use of the beach, the state had taken an aerial photograph of the Neskowin beach area. On clear overlays, each witness showed the court how he or she found access to the beach, and also indicated on the overlay the kinds of activities in which they engaged on the beach.[7]

Judge Bohannon handed down his opinion on both cases on August 26, 1968.[8] He affirmed denial of the permit on the basis that the road and proposed revetment was not in the public interest. He also ruled that although Fultz held fee title seaward to the ordinary high tide line, the public nevertheless had acquired an easement based on implied dedication and long recreational use of the beach.

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[7]McKinney Interview.

[8]Judge J. S. Bohannon, *Opinion,* State vs. Fultz and LEW Engineering; LEW Engineering vs. Cooper and State (previously cited).

Also, Judge Bohannon said, the Beach Law ". . . does not change or attempt to change the substantive law of real property." Rather, he said, the Beach Law is an enabling act which empowers the state to enforce already existing public rights with respect to beach use. The law, Judge Bohannon declared, was valid.

Additionally, Bohannon said, in his view ". . . the legislature had no intent to attempt regulation by the State above the lines spelled out in the statute." And further, that ". . . as to such areas of the beach lying above these lines and between the vegetation line . . . the State has no right in this case to interfere."

The Hay Case

While the state was preparing for the Fultz litigation, the state highway engineer had written William Hay on March 21, 1968 requesting that Hay remove his barricade at the Surfsand Motel. Hay countered with a request to set the barricade back farther. His request was denied. This interplay resulted in two lawsuits. Hay sued the state,[9] asking that a three-judge federal court tribunal declare the Beach Law unconstitutional under the Fifth and Fourteenth Amendments to the U.S. Constitution. He also sought to enjoin the state from bringing a suit against him to require removal of the barrier. That case, filed in U.S. District Court in Portland, was held in abeyance (at state's request) until 1972.

Following the federal court's decision to hold Hay's suit in abeyance, the state subsequently sued Hay in the Clatsop County Circuit Court because he refused to remove his barricade.[10] That case was tried in December, 1968, and decided on January 3, 1969, again before Judge Bohannon. At issue in the case was the validity of

[9]Hay vs. Bruno, 344 F. Supp 286 (June 6, 1972).

[10]State ex rel Thornton vs. Hay. 254 OR 584; 462 P2d 671. (Clatsop, OR Cir. Ct., 1969).

the Beach Law. The state contended that the fence was erected in violation of the law and sought an order directing its removal.

Hay's defense was that the Beach Law was unconstitutional and that implied dedication did not apply to his property. Or, in the alternative, Hay contended that the law did not apply because the fence was erected prior to the Beach Law and therefore constituted a pre-existing use. Also, he said he had a right to maintain the fence since he legally owned the beach to the ordinary high tide line.

In his opinion of January 3, 1969,[11] Judge Bohannon said that public use of the beach area in question had extended for more than sixty years, and that the public had acquired rights to use the beach under the common law doctrine of implied dedication. The Judge also rejected Hay's argument that the fence constituted a pre-existing use. The Beach Law was not, Judge Bohannon said, a zoning law to which the "grandfather" theory could be applied. He said the public had acquired recreational rights prior to enactment of the Beach Law and that the law codified the already existing public rights. The Beach Law, Bohannon said, was valid and constitutional.

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[11]Judge J. S. Bohannon, *Opinion,* State ex rel Thornton vs. Hay (previously cited).

THE INITIATIVE PETITIONS

Although the Beach Bill had received broad political and public support, some Oregonians had lingering doubts that the law had really established public rights to the dry sand areas. By early 1968 the State Highway Commission was facing the court cases involving the Hay and Fultz beach properties at Cannon Beach and Neskowin. The suits challenged the claim that public rights to those particular dry sand beaches had been established. Further, plaintiffs challenged the constitutionality of the new Beach Law.

Other activities were causing public alarm and doubt about the Beach Law's effectiveness. The controversy sparked by the Highway Commission's proposal to reroute a section of Highway 101 along the Nestucca sandspit (near Pacific City) dominated the news from July to December, 1967. That issue was followed in early January, 1968, when many citizens were outraged that private developers at Neskowin and Seaside appeared to be violating the spirit of the Beach Law. Both companies were scooping sand (not prohibited in the law) from below the 16-foot line and hauling it to their respective development sites above the 16-foot line for foundation fill.

Amid the continuing confusion and anger, and the generous amount of publicity given the beach rights issue by the news media, there emerged in early 1968 some citizens who were concerned with the apparent ambiguities and inadequacies in the Beach Law itself. They launched two separate initiative campaigns to put a bond issue to finance state purchase of ocean beaches on the November, 1968 general election ballot.

One group, *Beaches Forever Inc.*, was sponsored by then State Treasurer (later Governor) Bob Straub. The group's executive director, Janet McLennan (later Governor Straub's assistant for natural resources), recalled almost 10 years later: "The *Beaches* initiative grew out of concerns that the courts would not uphold the right of the legislature to regulate use of the beaches, or if they did that regulation would be limited and would not guarantee the public's right to use the beaches freely."[1]

According to *Beaches Forever,* the Beach Law had two major flaws.[2] It was, the group said, primarily a zoning measure that established the landward boundary of the beach. The law did not clarify the issue of public vs. private rights on all dry sand areas. In some beach areas, and around estuaries, the 16-foot and 5.7-foot elevations left the beach unzoned between the elevation lines and the vegetation line. *Beaches Forever* believed public rights to some areas historically used by the public remained in question. Also, the new law had not provided for funds to acquire ownership or interests in beach lands.*

The *Beaches Forever* initiative sought a constitutional amendment to clarify public rights on Oregon beaches. That amendment would define the landward beach boundary at the vegetation line instead of the 16 and 5.7-foot lines. It would authorize state acquisition of privately owned beaches, and beach accesses, financed by $30 million in general obligation bonds—$20 million to

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[1]Interview with Janet McLennan, February 1967. *Beaches Forever* counted among its supporters the Izaak Walton League, Oregon Wildlife Federation, the Sierra Club, the Mazamas, the Federation of Western Outdoor Clubs and other conservation organizations.

[2]Janet McLennan, "Ballot Measure #6—The Beach Bill," *Beaches Forever Inc.,* 1968, pp. 2-3.

*The omission of such a provision had been deliberate. The Highway legal counsel in late 1966 had originally contended that the state could legally establish public rights on all beaches without purchasing them, and therefore such a provision was unnecessary. Presumably the legislators involved in amending the bill agreed because the subject of purchase was never included in any of the proposed amendments.

acquire ownership or rights to beaches, $10 million to acquire beach accesses.

The bonds were to be paid off by revenue from a one-cent per gallon tax on fuel for private passenger motor vehicles, imposed for three years, from January 1, 1969 through December 31, 1972. The initiative sought to prohibit highway construction on beaches or publicly owned sand spits, and it directed the State Highway Commission to police the beaches up to the vegetation line.[3]

The second group, *Citizens to Save Oregon Beaches (CSOB),* had been organized during the 1967 legislative session. It was headed by Dr. Robert Bacon, professor of anatomy at the University of Oregon Medical School; Laurence Bitte, a University of Oregon graduate student; and Jefferson Gonor, an Oregon State University professor of oceanography. They were joined by Representative Norman Howard (D-Portland), who had begun an initiative drive with similar goals.

As did *Beaches Forever, CSOB* believed that the 1967 Beach Law was flawed. The state, they said, had not clearly identified what areas of the beach it owned or which areas were forever held in public trust for public use.[4]

However, *CSOB* maintained that Oregonians already had established public use rights to all the dry sand areas through prescription. *CSOB* believed the state's legal position was sound and *establishment* of prescriptive rights was not necessary. What was needed, *CSOB* said, was *identification and maintenance* of public beach areas. *CSOB's* initiative sought to require that within one year private property owners legally verify claims to private beach land. Also, *CSOB* stated that the vegeta-

[3]McLennan, "Ballot Measure No. 6," pp. 3-4; and *Portland City Club Bulletin,* "Report on Bond Issue to Acquire Ocean Beaches," October, 1968, p. 217.

[4]Robert L. Bacon, Laurence Bitte, Jefferson Gonor, "Concerning Public and Private Rights on Oregon Beaches," *Citizens to Save Oregon Beaches,* (no date) pp. 1-8.

tion line should not be used as a boundary between public and private use areas. Instead, *CSOB* said, the law should be amended so that public rights could be adjusted to natural changes in beach terrain.[5]

The *CSOB* measure lacked some of the provisions of the *Beaches Forever* initiative. For one thing, *CSOB* made no reference to acquisition of beach accesses. Although *CSOB* sought a bond issue to acquire private beach property, it did not identify a source of revenue to retire the bonds. The *CSOB* measure mentioned nothing about prohibiting highway construction on beaches or sand spits, and did not provide for enforcement of beach regulations.[6]

There was controversy and competition between the two groups during the separate drives to obtain the 48,000 signatures needed to place initiatives on the ballot.* Both measures sought to preserve and conserve the beaches for public recreational use and enjoyment. The differences lay in strategies to achieve that goal. There were suggestions that *Beaches Forever* and *CSOB* join forces. One editorial stated:

> With so many wise people holding such diverse opinions, it may be guessed the final word on the subject probably must be from the Oregon Supreme Court. But, pending that, would it not be better for the two rival groups to try to compose their differences and get together behind a single proposal? Otherwise, it may be predicted, we will end up after the November election just where we are now. Wherever that is.[7]

That may have been wise counsel. But the point was soon rendered moot. *Beaches Forever* easily acquired the necessary signatures by early June, and in fact collected nearly 90,000 signatures by the July 4 deadline. The

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[5] *Ibid.*

[6] *Oregon Journal,* "Beaches Forever Better Plan," May 31, 1968.

*An initiative petition for a constitutional measure requires signatures from 8% of the number of people who voted for all candidates for governor in the most recent gubernatorial election. Oregon Constitution, Art. 4, Sec. 1.

[7] *The Oregonian,* "Beachland Rights," April 9, 1968.

CSOB signature drive failed. The *Beaches Forever* initiative would go to the voters as Ballot Measure Number Six.

The *CSOB* supporters did not necessarily transfer their support to *Beaches Forever* and Measure Six. Many citizens believed the motor fuel tax was premature, unfair and unrealistic. They argued that the tax was discriminatory.* Gasoline revenues historically were dedicated to the Highway Fund, and there were strong objections to allocating any part of the fund to non-highway uses, though since 1942 they had been used for park and recreational purposes under the constitutional dedication.[8]

Another argument against Measure Six was that the measure implied the public did not already own the dry sand beaches. In fact, opponents said, the 1913 legislation had been interpreted to mean that they were public beaches. There was confusion as to the distinction between recognition of a public easement, as in the 1967 Beach Law, and ownership. Opponents said that purchase of some private beach land would be a dangerous precedent whereby all of the beaches might have to be purchased. A third argument held that the vegetation line as a boundary was inadequate because it did not allow for irregularities in the shoreline, where the vegetation was far inland. A final argument held that regulation of the beaches was not properly a constitutional matter.[9]

After Measure Six had qualified for the ballot, on August 26, 1968, Judge Bohannon issued his first opinion on the Beach Law, involving the Fultz property at Neskowin. He ruled that the public had indeed acquired recreational easement rights based upon implied

*The tax would apply to passenger cars, but not motorcycles, buses, emergency cars, antique cars, farm vehicles, government automobiles or commercial vehicles.

[8]Oregon Constitution, Art. 9, Sec. 3.

[9]*League of Women Voters,* "Ballot Measure No. 6," August, 1968.

dedication and long recreational use of the beach. The Beach Law had weathered its first serious legal challenge.[10]

Judge Bohannon's decision was a victory for the public interest, but it did not resolve the larger issue of the public's rights to *all* beaches, as *Beaches Forever* spokespersons quickly pointed out. Bohannon's jurisdiction comprised only Clatsop, Columbia and Tillamook Counties. Courts in other counties might not agree with his ruling. Very likely, the state would be involved in tract-by-tract litigation to determine whether public rights by implied dedication or prescription did exist. Also, the decision did not clarify public rights above the 16-foot and 5.7-foot elevation lines.[11]

As the November election approached it appeared that Measure Six would pass by an overwhelming margin. Preliminary polls taken five weeks before the election indicated that public sentiment was 85% in favor of the measure. Supporters of Measure Six may have been lulled. Understandably, they did not expect the opposition to overcome what appeared to be a commanding lead.

But in late September, without much warning, a massive campaign against Measure Six was launched by a new organization called the *Family Highway Protection Council.* The campaign was directed by Ken Rinke, a seasoned and successful Portland lobbyist.[12] Other organized interest groups opposing the ballot measure included the Oregon Highway Users Conference, Oregon State Motor Association, some associations of automobile dealers and some insurance companies. They all viewed the increased gas tax as unnecessary and discriminatory, and an open door for future "raids" on the dedicated highway funds.

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[10] Judge J. S. Bohannon, *Opinion,* LEW Engineering vs. Cooper and State; State vs. Fultz and LEW Engineering (previously cited).

[11] McLennan, "Ballot Measure No. 6," p. 4.

[12] *The Oregonian,* "Beach Vote Foes Form," September 9, 1968.

Straub labeled Rinke's organization a "hoax," charging that it was a front to conceal the identities of those ". . . special interests and land developers who are really trying to kill the beach measure."[13] There were rumors about "outside funds" to defeat the measure financed by a "hidden opposition." Over the next month a media blitz bombarded Oregonians with advertisements on television, radio and in the newspapers, and 100,000 brochures that warned: "Beware of Tricks in Number Six!"

Governor McCall had opposed Measure Six believing that Oregonians should know what land had to be purchased before approving the money. He had favored legislative solutions (rather than a plebicite on a constitutional amendment) to resolve the beach issue. But the governor changed his mind when the opposition's campaign went into high gear. Just 12 days before the election, McCall said he would support Measure Six. "The picture has changed dramatically because of the emergence of campaign arguments that really threaten the future of our beaches." Further, McCall said:

> This entire issue has now come to be identified in this way: whether or not the people of Oregon are in favor of public beaches and whether or not they are willing to pay for the permanent acquisition of those beaches. In short: a vote "no" says you don't . . . a vote "yes" says you do. This is the time. The people of Oregon must join their voices in a loud and united call; yes, we want our beaches and we want them forever.[14]

The measure's supporters did not know who, beyond the obvious organizers, was behind the campaign. *Beaches Forever* demanded to know the opposition's source of money. On October 31 Multnomah County Circuit Court Judge William M. Dale ordered the *Oregon Highway Users Conference* to open its financial records. Portland lawyer Keith Burns, counsel for *Beaches Forever,* discovered that $83,930 had been contributed by

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[13] *Oregon Journal,* "Straub Charges Hoax," October 2, 1968.

[14] "Statement by Governor McCall on Ballot Measure No. 6," Office of the Governor, State Capitol, October 24, 1968.

national oil companies to finance opposition to Measure Six. The companies had donated shares based on gross business revenues in Oregon. And, the money had been transferred to the *Family Highway Protection Council* bank accounts for the fight against Measure Six. There were no Oregon contributors to that organization.[15]

The companies contended that they favored the preservation of beaches for public use and that the beaches should belong to the public. Their only reason for opposing Measure Six was because the one cent per gallon tax increase would be diverted to non-highway uses.[16]

The intensive, heavily financed eleventh hour opposition effort worked. On November 5, 1968, Oregonians defeated Measure Six by almost 150,000 votes.[17] Just five weeks earlier Measure Six was "passing" by a margin of more than 8 to 2. The turnabout ranks among the most remarkable political phenomenons in Oregon history. In restrospect, Janet McLennan remarked:

> In innocence, we thought we had to be responsible, and that if we wanted $30 million dollars then we must somehow provide the means of raising that money . . . Politically, I think that was a mistake . . . it would have been adequate to tell the legislature to find some money, and just pass the measure . . . [18]

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[15]The oil companies involved were: Standard Oil, $21,360; Humble Oil, $5,000; Richfield Oil, $12,840; Signal Oil, $5,000; Shell Oil, $15,320; Mobil Oil, $6,000; Phillips Oil, $5,910; Union Oil, $10,500; and Gulf Oil, $2,000. Oregon Secretary of State's Office, Elections Division, January, 1977.

[16]Phillips Petroleum Co., November 26, 1968; Standard Oil Co. of California, November 8, 1968; and Shell Oil Co., November 20, 1968. Personal files of Jack Remington, Portland, OR.

[17]Oregon Secretary of State's Office, Elections Division, January, 1977. 464, 140 against; 315, 175 in favor.

[18]McLennan Interview.

THE COURT APPEALS

With the failure of Measure Six, the Hay and Fultz case appeals to the Oregon Supreme Court took on crucial importance. Judge Bohannon's decisions had established legal precedent, but that precedent might be limited to his three county jurisdiction. Additionally, the state had wasted no time in challenging other violators of the Beach Law. Thus, by 1969, the efficiency of Attorney General Robert Thornton and the assistant attorneys general to insure enforcement of the law had resulted in other potential court cases in Clatsop and Tillamook Counties. Supporters of the Beach Law anticipated that the state could face tract-by-tract litigation in the other five coastal counties.

Hay's circuit court case was appealed first. The Oregon Supreme Court upheld the trial court in a December 19, 1969 opinion written by Justice Alfred T. Goodwin.[1] The Beach Law, the Supreme Court said, was an exercise of the state's right to protect the public's use and enjoyment of beaches, since neither the state nor the private landowner fully "owned" the disputed dry sand areas. But, while the theory of implied dedication was a proper and recognized legal theory, until 1967 property owners did not think they had anything to dedicate, the opinion said. A more appropriate legal theory could be applied to Oregon beaches.

In an unusual and precedent-setting decision, the Supreme Court concluded that a better legal basis was

[1]Justice Alfred T. Goodwin, *Opinion,* State ex rel Thornton vs. Hay (previously cited).

the English doctrine of Custom.* It would allow for uniform treatment of all Oregon beaches "... as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited." It would also avoid tract-by-tract litigation in the future.

The Supreme Court said that arguments had been made against the election of custom on the basis that "ancientness" (one legal element of custom) was inapplicable because of Oregon's brief existence. The court dismissed that argument, however, saying that "... if antiquity were the sole test of validity of a custom, Oregonians would satisfy that requirement by recalling that the European settlers were not the first people to use the dry-sand area as public land." The court said that "... because so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society." The decision confirms "... public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his."

Fultz also appealed his circuit court case to the Oregon Supreme Court.[2] In a December 22, 1971 opinion by Justice Edward Howell, the Supreme Court affirmed the lower court's decision, again on the basis of custom rather than implied dedication.

Hay, following the Supreme Court decision, reactivated his first suit which had been in abeyance in the U.S. District Court for the District of Oregon.[3] Hay challenged the constitutionality of the Beach Law. He argued that the Oregon Supreme Court created an unpredictable change in state property law by declaring

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*The Supreme Court defined custom according to Blackstone's Commentaries as being (1) ancient, (2) exercised without interruption, (3) peaceable and free from dispute, (4) reasonable, (5) certain, (6) obligatory on the landowner, (7) not repugnant or inconsistent with other customs or law.

[2]Justice E. Howell, *Opinion,* LEW Engineering vs. Cooper and State; State vs. Fultz and LEW Engineering (previously cited).

[3]Hay vs. Bruno (previously cited).

a public recreational easement under the doctrine of custom and that it was ". . . constitutionally impermissible for the Oregon Supreme Court . . . to dredge up an inapplicable, ancient English doctrine that has been universally rejected in modern America."

The federal court dismissed Hay's case without discussing the doctrine of custom. Judge Gus Solomon, in a June 6, 1972 opinion, said there was no unpredictable change in property law because the state had claimed an interest in the wet and dry sands for at least 80 years. The Oregon Supreme Court decision followed legal precedent by which the state could claim a public use interest in beach lands. The Oregon Beach Law, the federal court declared, was constitutional.[4]

The Beach Law generated several other actual and potential lawsuits, but all were dropped after the Supreme Court decisions in the Hay and Fultz cases. The courts had upheld public rights on the dry sand beaches, and the long battle had been won.

The Oregon Supreme Court's unusual election of custom as a basis for public rights effectively precluded tract-by-tract litigation in the future because the decision applied uniformly to all Oregon beaches. Equally momentous was the decision by the federal tribunal that upheld the constitutionality of the Beach Law. With the exception of the Texas Open Beaches Act, Oregon's Beach Law is essentially unique.[5]

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[4] *Ibid.*

[5] The provisions in the Texas act assure public access only to beach areas that are owned by the state, or have become public by long use and enjoyment. The act does however function to preserve public access to a larger area of the state's beaches. In Hawaii, the beaches have been established by law and courts to be in public ownership up to the vegetation line. Hawaii's problems stem from lack of sufficient access to the beaches, and as a result that state recently passed a law appropriating funds specifically for acquisition of accesses. A New Hampshire legal decision has determined that easements can be established by custom. See Lew E. Delo, "The English Doctrine of Custom in Oregon Property Law: State ex rel Thornton vs. Hay," *Environmental Law,* vol. 4, no. 3, Spring, 1973, p. 387.

Frank McKinney later said that the assistant attorneys general had anticipated and were prepared for tract-by-tract litigation. Highway right-of-way agents* had documented public use for every area of usable beach from the Columbia River to the California line. But, legal counsel hoped that when the state had won several cases, private owners of beach front property would no longer contest the rights of the public to use the beach.[6]

Although the Oregon Supreme Court decisions were clearly a victory for the public, the state has always recognized and respected the private owner's fee title extending to the ordinary high tide line. At no time during the entire episode did the state ever say or imply that the public has the right to trespass on private property to get to the beach. Supporters of the Beach Bill always denied that it confiscated private property because the state sought to establish easements, not ownerships.

Some private owners have been apprehensive that the state would attempt to encroach upon their dry sand areas above the vegetation line. In 1971 and 1974, however, private interests were upheld. The cases involved a proposed condominium at Cannon Beach to be built well landward of the zone line. Attorney General Lee Johnson tested the issue of "uniform treatment" by trying to establish public easement rights in the area of the proposed condominium. The Clatsop County Circuit Court, and subsequently the Oregon Court of Appeals, ruled that the state *had not* established recreational rights to the contested area on the basis of prescription, implied dedication or custom. That was an important victory for private interests.[7]

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*Robert Gormsen and Rayburn Wilson.

[6]McKinney Interview.

[7]State ex rel Johnson vs. Bauman. 7 OR APP 489; 492 P2d 284 (1971). State Highway Commission vs. Bauman. 16 OR APP 275; 517 P2d 1202 (1974).

IN RETROSPECT

Oregon was ready for the Beach Law. And, the process from which the law evolved has been as significant as the Beach Law itself.

The events thrust a relatively young and environmentally vulnerable state through an emotionally and politically wrenching experience. Yet, Oregonians emerged more mature and more confident of the worth of democratic processes. The Beach Law reinforced faith in the means by which people may be heard and by which laws may be created, contested or changed.

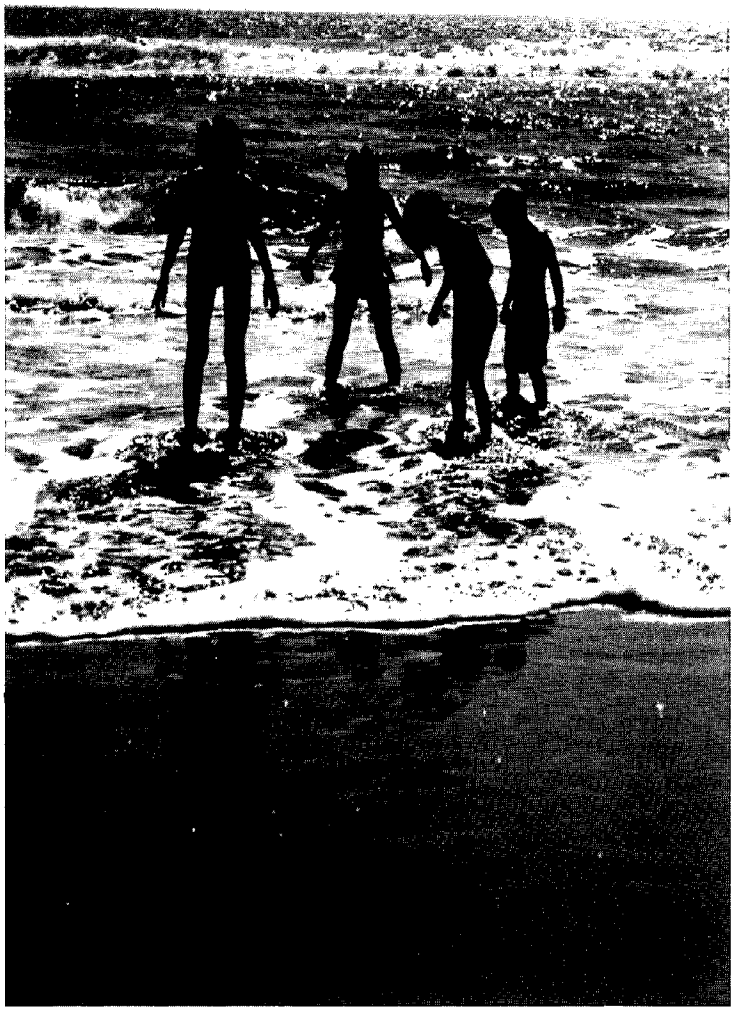
The state emerged from the experience with its first, truly significant landmark environmental legislation. The process untangled confusions, challenged and for the first time clarified private and public expectations and rights, and established new directions for Oregon's future. The stage was set for other extraordinary environmental legislation, and today Oregon has an elaborate and expansive body of environmental law acknowledged as among the most progressive in the nation.

The Beach Law focused public attention on the vincibility not only of Oregon's beaches, but of her other resources—historic, agricultural, forests, rivers and air. And, it broadened areas of concern. Oregonians have aggressively addressed other elements of livability—housing, transportation, employment, public facilities and services, urban growth, energy needs, sound economic expansion, recreation and open space.

The experience intensified the need for compatible balances between conservation and development, for

long range resource planning and for citizen involvement in all planning and decision-making processes.

Oregonians have vigorously, forthrightly and uniquely met their challenges. Oregon's pioneering spirit continues to prevail.



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