



**DEPARTMENT OF JUSTICE**  
GENERAL COUNSEL DIVISION

May 18, 2005

Tom Byler, Executive Director  
Oregon Watershed Enhancement Board  
775 Summer Street NE, Suite 360  
Salem, OR 97301-1290

Chuck Hibner, Deputy Director  
Oregon Secretary of State, Audits Division  
Public Service Building, Suite 500  
Salem, OR 97301

Re: Opinion Request OP-2005-2

Dear Messrs. Hibner and Byler:

You have asked about the Oregon Watershed Enhancement Board's (OWEB) legal responsibilities as the agency designated to administer moneys expended for natural resource purposes pursuant to Article XV section 4b of the Oregon Constitution. Your questions and our short answers are set out below, followed by our analysis.

1. What legal responsibilities arise from the legislature's designation of OWEB as the "one state agency" required by Article XV section 4b of the Oregon Constitution to administer the portion of net lottery proceeds deposited into a parks and natural resources fund that is "disbursed for the public purpose of financing the restoration and protection of wild salmonid populations, watersheds, fish and wildlife habitats and water quality"?

Net lottery proceeds dedicated to the purposes specified in section 4b must be spent in accordance with criteria stated in the same constitutional provision. OWEB is responsible for overseeing the ultimate expenditure of *all* proceeds covered by section 4b for compliance with its mandatory criteria. In addition, to the extent that the legislature does not directly appropriate or specify OWEB's distribution of proceeds to particular entities, OWEB is responsible for distributing proceeds among public or private entities for expenditure. The legislature may enact laws that further delineate OWEB's responsibilities, so long as those laws do not conflict with the Constitution.

2. If the legislature specifies OWEB's distribution of particular sums of the net lottery proceeds to particular entities or for particular purposes, may the Board delegate the distribution of those proceeds to the OWEB Executive Director?

Yes. Under an express delegation of authority by the Board, executed according to the requirements of ORS 293.330, the OWEB Executive Director may distribute moneys consistent with the terms of legislation addressing the expenditure of the net lottery proceeds for any particular biennium.

3. Could Board members be held personally liable for a distribution of moneys made pursuant to legislative direction, if it results in violation of one or more of the requirements stated in Article XV section 4b of the Constitution?

The Oregon Tort Claims Act would protect Board members and staff from personal liability in the event a distribution made pursuant to the terms of a budget law or some other statutory directive results in a violation of the terms of Article XV section 4b of the Oregon Constitution, unless the action was taken after the Board members or the Executive Director were made aware of the law's constitutional infirmity.

4. Would OWEB be responsible for making up a shortfall that results from distributing moneys in excess of available lottery revenues, if the distribution was mandated by a budget law or some other statutory directive?

In both 2001 and 2003, the legislature directed OWEB to establish a process for executing the allocations it mandated OWEB make to other state agencies. Following that process should prevent OWEB from allocating moneys in amounts greater than available lottery revenues. We recommend that OWEB establish a similar process for distributing the moneys available for grant programs, through the execution of funding agreements with its grantees.

## **Discussion**

### **1. OWEB's Constitutional Duty to "Administer" Moneys Dedicated to Natural Resource Purposes**

Ballot Measure 66 was approved by the people in 1998. It amended the Oregon Constitution, Article XV to require that 15 percent of net lottery proceeds be deposited in a "parks and natural resources fund" and that 50 percent of that fund (the "natural resources moneys") be distributed to finance "restoration and protection of native salmonid populations, watersheds, fish and wildlife habitats and water quality." Or Const Art XV, § 4(10). Article XV, section 4b specifies:

Moneys disbursed for the public purpose of financing the restoration and protection of wild salmonid populations, watersheds, fish and wildlife habitats and water quality from the fund established under Section 4 of this Article *shall be administered by one state agency*. At least 65% of the moneys will be used for capital expenditures. These moneys, including grants, shall be used for all of the following purposes:

- (1) Watershed, fish and wildlife, and riparian and other native species, habitat conservation activities, including but not limited to planning, coordination, assessment, implementation, restoration, inventory, information management and monitoring activities.
- (2) Watershed and riparian education efforts.
- (3) The development and implementation of watershed and water quality enhancement plans.
- (4) Entering into agreements to obtain from willing owners determinate interests in lands and waters that protect watershed resources, including but not limited to fee simple interests in land, leases of land or conservation easements.
- (5) Enforcement of fish and wildlife and habitat protection laws and regulations.

Or Const Art XV, § 4b (emphasis added). In short, section 4b requires that at least 65 percent of the natural resources moneys be used for capital expenditures,<sup>1/</sup> and that they be spent on each of the purposes listed in subsections (1) through (5) of Article XV, section 4b and no others. The legislature has designated OWEB to be the one agency to “administer” the “[m]oneys disbursed” from the fund. ORS 541.377(5).

To determine what the people intended by requiring that one state agency administer the natural resources moneys, we follow the rules of construction established by the Oregon courts. In interpreting a constitutional amendment approved through the initiative process, we apply the method of analysis outlined by the court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 612 n 4, 859 P2d 1143 (1993). We first look at the text and context of the provision to determine the intent of the people, giving words of common usage their plain, natural and ordinary meaning. *Id.* at 611. If the people’s intent is clear from the text and context, the search ends there. If the people’s intent is not clear from the text and context, we look to materials that disclose their understanding of the measure, such as information available to them at the time the measure was approved. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559 n 8, 871 P2d 106 (1994).

**a. PGE Analysis of OWEB’s Constitutional Duty**

**(1) Text and Context**

We first look to the plain, natural and ordinary meaning of “administer.” *PGE*, 317 Or at 611; *Gaston v. Parsons*, 318 Or 247, 253, 864 P2d 1319 (1994). Two of the definitions offered in WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993) are potentially applicable. “Administer,” as used in section 4b, could mean: (1) “to direct or superintend the execution, use or conduct of”; or (2) “to mete out: DISPENSE.” WEBSTER’S at 27. To determine the meaning intended by the people in approving Ballot Measure 66, we also consider the context provided by

the remainder of section 4b and the other sections of Article XV that relate to the natural resources moneys.

We note at the outset that the first sentence of section 4b provides for the single agency administrator to perform its responsibilities with respect to “[m]oneys disbursed for [natural resources purposes] from the fund established under Section 4 of this Article.” That phrase covers all natural resources moneys. This suggests that, whatever the administrative duties intended for the agency, they are to be carried out with respect to all of the natural resources moneys. In other words, this much of the term’s context suggests that “one state agency” is to have an “administrative” role with respect to *all* natural resources moneys disbursed from the parks and natural resources fund.

Article XV, section 4(4)(d) requires the State Lottery to turn over net proceeds to a fund from which the legislature “shall make appropriations for the benefit of \* \* \* restoring and protecting Oregon’s parks, beaches, watersheds and critical fish and wildlife habitats.” Article XV, section 4(10) states that “50% [of the moneys deposited in the parks and natural resources fund] shall be distributed for the public purposes of financing the restoration and protection of native salmonid populations, watersheds, fish and wildlife habitats and water quality in Oregon.” Finally, the administering agency’s responsibilities apply to “[m]oneys disbursed” (past tense), which suggests that section 4b does not require that disbursement decisions be made by the agency. Those provisions, read in conjunction with the constitutional prohibition against drawing money from the state treasury except through an appropriation,<sup>2/</sup> tell us that the legislature can disburse natural resources money directly to end users, *i.e.*, to entities other than the single agency administering the money.

On the other hand, the plain language of Article XV, section 4b (“[t]hese moneys, including grants, shall be used for all of the following purposes”) indicates that the people expected that grants would be used to disburse some of the natural resources moneys. “Grants” is not a term normally used to denote legislative appropriations or the passing of state money from one state agency to another, which suggests the people intended to allow for the legislature to delegate at least some distribution decisions and to permit natural resources moneys to be disbursed to private entities and local public entities as well as state agencies.<sup>3/</sup>

On the basis of our analysis of text and context in the manner prescribed by the Supreme Court, it appears the people intended that the administering agency was in some way to administer *all* natural resources moneys disbursed, regardless of what state entity (legislature or other agency) made the disbursement decision or how the moneys reached particular end users. Therefore, in approving Ballot Measure 66, the people intended “administer” to mean “direct or superintend the use of.” Only this interpretation fully accounts for the text and context of the term as it appears in section 4b.

The nature of the “directive” aspect of “administer” is suggested by other elements of section 4b. As noted above, Article XV, section 4b specifies three requirements for the expenditure of natural resources moneys:

- at least 65 percent of the moneys *must* be used for capital expenditures;
- some of the moneys *must* be used for each of the purposes listed in subsections 4(b)(1) through 4(b)(5); and
- the moneys may not be used for any other purpose.

Those criteria indicate that the people intended the one administering agency to oversee the expenditure of moneys with regard to fulfillment of the constitutional criteria. For the reasons discussed above, this oversight function would apply to *all* natural resources moneys, including those the legislature may appropriate to other agencies, those it may direct OWEB to distribute to other agencies or entities, and those it may designate as available for OWEB or other agencies to distribute to grantees, whether private or public. While the Secretary of State is directed to audit individual agencies that receive Measure 66 moneys (Article XV, section 4c), that office is not responsible for *prospective* oversight of how the moneys are spent.<sup>4/</sup> By requiring in the same section of Article XV that one state agency administer the natural resources moneys and that specific criteria be met in the use of those moneys, it appears that the people intended for the one administering agency to oversee, on a continual basis, compliance with the standards set in section 4b.

Although the conclusions we draw are based on the text and context of Measure 66, to the extent those conclusions derive from inference, we also consider the history of Measure 66.<sup>5/</sup>

## (2) History

The history of Measure 66 includes materials that were widely available to the people, including the 1998 Voters' Pamphlet. *Shilo Inn v. Multnomah County*, 333 Or 101, 129-130, 36 P3d 954 (2001). The Voters' Pamphlet contains information relevant to determining what the people intended by requiring that one state agency administer natural resources moneys. The explanatory statement for Ballot Measure 66 includes the following description of what was intended:

The money for state parks and other natural recreation areas may be allocated and spent by a variety of state and local agencies. However, the measure requires that the money for restoring and protecting native salmon runs, watersheds, water quality and fish and wildlife habitat *must be administered by a single state agency*. That state agency must spend at least 65 percent of the money available to the agency for capital expenditures.

Voters' Pamphlet, at 136 (emphasis added). The explanatory statement draws a distinction between the parks' half of the parks and natural resources fund (the first sentence), and the natural resources moneys comprising the other half of the fund (the second sentence). The first sentence reflects Article XV, section 4a, which provides express that a variety of agencies may spend the parks moneys. In contrast, the second and third sentences state that one state agency must administer the natural resources moneys, and must "spend" at least 65 percent for capital

expenditures. Taken by itself, this history suggests that the people intended the one agency that administers the natural resources moneys to be the only state entity that *spends* those moneys; or, to put it another way, that only OWEB may use the natural resources moneys directly or through non-state grantees for the constitutional purposes specified under Article XV, section 4b.

Other materials in the Voters' Pamphlet and in media sources indicate that the people intended that the natural resources moneys be spent by other public and private entities. For instance, a number of arguments in the Voters' Pamphlet state that the moneys will be used by the Oregon State Police, Fish and Wildlife Division, to enforce fish and wildlife laws.<sup>6/</sup> One argument in the Voters' Pamphlet specifically states that the natural resources moneys will be distributed via grants to non-state entities.<sup>7/</sup> Finally, according to at least one newspaper article describing Ballot Measure 66:

A single state agency, most likely the Governor's Watershed Enhancement Board [which the 1999 Oregon Legislature transformed into what is now OWEB], would dole out money to restore and protect watersheds and fish habitat. Watershed councils, individuals and public agencies could compete for funds.

Geoff Pampush, executive director of Oregon Trout, listed these possible project ideas:

- Provide landowners money to fence streams, then plant and maintain trees, creating a floodplain forest for fish and water quality.
- Provide money to a forest-land owner to replace a culvert blocking fish migration upstream.
- Buy key fish spawning areas on private land.
- Buy unused water rights and let them go unused, keeping more water in streams for fish.

STATESMAN JOURNAL, Oct. 13, 1998, at 1A to 2A.

In sum, the arguments in the Voters' Pamphlet supporting Measure 66, as well as at least one media report, anticipate that the "one state agency" will distribute natural resources moneys for expenditure by both private and public entities. The arguments are generally consistent with the interpretation gleaned from text and context. The newspaper article suggests that the single agency would make the disbursement decisions, but that is inconsistent with the meaning of "administer" called for by text and context, as well as the legislature's appropriation authority. The explanatory statement anticipates that not only must the natural resources moneys be *administered* by a single agency, they must also be *spent* by a single agency (or its non-state grantees). Nothing in text or context supports that reading.<sup>8/</sup>

### (3) Summary

While Article XV, section 4b does not create or identify an administering state agency, its text, context and history indicate that the people intended the legislature to designate a single state agency to serve this role. The legislature designated OWEB for this purpose. ORS 541.377(5). The people intended that OWEB, as the designated agency, oversee the use of *all* natural resources moneys disbursed from the parks and natural resources fund, whether expended by public or private entities, for fulfillment of the mandatory criteria established by section 4b.

We next consider in further detail the relationship between OWEB's constitutional responsibilities and the legislature's authority to implement Ballot Measure 66.

#### **b. OWEB's Duty Where the Legislature Has Directed How Measure 66 Moneys Are to be Spent**

Because Ballot Measure 66 does not identify an existing agency, or create a new one, to act as the one administering agency, we do not believe that the people intended for the provisions regarding expenditure of the natural resources moneys to be self-executing.<sup>9/</sup> The legislature may direct OWEB in its administration of those moneys so long as the laws it enacts do not contravene the terms of Ballot Measure 66. *See* 44 Op Atty Gen 431, 436-439 (1985) (discussing legislature's authority to direct work of state lottery). For example, while the legislature is prohibited from limiting expenditures from this fund (Article XV, section 4(10)) there is no similar constitutional prohibition on the legislature's appropriating natural resources moneys to particular agencies or on legislative appropriations directing OWEB to allocate funds to particular state agencies. To date, the legislature has enacted numerous statutes pertaining to OWEB's constitutional responsibilities, including statutes governing the distribution of moneys.

The legislature created the Parks and Natural Resources Fund, into which the net lottery proceeds specified by Measure 66 are deposited. ORS 541.377(1). The moneys in this fund are continuously appropriated for the purposes identified in Measure 66. ORS 541.377(1). Pursuant to Article XV, section 4, the legislature also established two subaccounts, the Parks Subaccount and the Restoration and Protection Subaccount; each subaccount receives half of the moneys deposited into the Parks and Natural Resources Fund. ORS 541.377(2), (4). The Restoration and Protection Subaccount holds the entirety of the natural resources moneys. ORS 541.377(4). OWEB is charged with administering this subaccount. ORS 541.377(5). It must deposit 65 percent of the moneys in the subaccount into the Watershed Improvement Grant Fund and the remaining 35 percent into the Watershed Improvement Operating Fund; OWEB is responsible for administering both funds.<sup>10/</sup> ORS 541.377(6).

For the biennium beginning July 1, 2001, the 2001 Legislature directed that OWEB allocate specified sums from the Watershed Improvement Operating Fund (through ORS 541.377(6)(b) (for operating expenses)) to other state agencies.<sup>11/</sup> Or Laws 2001, ch 814 (Enrolled HB 5043). Similarly, the legislature directed that OWEB allocate specified sums from the Watershed Improvement Grant Fund (through ORS 541.377(6)(a)(for capital expenditures)) to other state agencies. *Id.* Examples of those allocations include:

Of the moneys deposited into the Watershed Improvement Operating Fund \* \* \* the Oregon Watershed Enhancement Board shall allocate \$3,952,074 to the Department of State Police for fish and wildlife activities to implement section 4(5), Article XV of the Oregon Constitution.

\* \* \* \* \*

Of the moneys deposited into the Watershed Improvement Grant Fund established under ORS 541.397, the Oregon Watershed Enhancement Board shall allocate \$1,233,105 to the State Department of Agriculture for activities and projects to implement section 4(5), Article XV of the Oregon Constitution.

Or Laws 2001, ch 814, §§ 1 and 7 (Enrolled HB 5043). Similarly, for the biennium beginning July 1, 2003, the 2003 Legislature again directed OWEB to allocate specified amounts from the Watershed Improvement Operating and Grant Funds to specified state agencies. Or Laws 2003, ch 702 (Enrolled SB 5547). In each biennium, then, the legislature has directed that OWEB allocate certain amounts from each of the two funds to particular state agencies.

To carry out those budget laws, OWEB transfers moneys from the Watershed Improvement Grant and Operating Funds to other state agencies. Moneys that flow into the two funds, over and above those amounts that the legislature has directed be allocated to particular state agencies, are available to OWEB for distribution to grantees through a grant process, separately established by statute and rule.<sup>12/</sup> OWEB's duty to oversee the ultimate use of natural resources moneys extends to all such moneys, whether distributed pursuant to legislative direction or OWEB's discretion.

As already explained in section 1, after distributing natural resources moneys to an end user, OWEB's ongoing obligation is to oversee or "administer" the expenditure of those moneys for fulfillment of the requirements of section 4b. For example, if an enacted budget bill directs OWEB to allocate a specified amount of natural resources moneys to another state agency for capital expenditures to achieve a purpose listed in Article XV, section 4b(1) to (5), OWEB has two continuing oversight obligations after allocating the moneys to that agency. First, OWEB is responsible for overseeing that the agency's expenditure of the moneys is within the limits set by section 4b, *i.e.*, that it is for one or more of section 4b's stated purposes. Second, OWEB must also coordinate that agency's expenditures with all other expenditures of natural resources moneys to meet the overall requirements of section 4b for any given biennium. To review, those requirements are that at least some of the natural resources moneys be expended for each of the five purposes stated in section 4b (and for no other purpose) and at least 65 percent of those moneys be spent on capital expenditures.

Next, we consider steps OWEB may take to execute its responsibility to oversee expenditures of natural resources moneys.



**c. Oversight through Interagency and Grant Agreements**

For OWEB to carry out the oversight aspect of its “administering” responsibilities, we strongly recommend that it distribute all natural resources moneys, whether or not the distribution is pursuant to direction contained in a budget law, in association with an agreement between OWEB and the recipient entity.<sup>13/</sup> Such agreements should provide OWEB with the means to oversee the use of the distributed moneys in relation to the criteria for expenditure established in Article XV, section 4b of the Oregon Constitution. For example, an agreement may provide that the entity receiving moneys will submit a quarterly written report to OWEB about the entity’s expenditures to date and how those expenditures further the purposes identified in section 4b for which the moneys were distributed.

If, through such a report or otherwise, OWEB learns that a recipient entity was not spending the moneys as agreed, OWEB would need to take steps reasonably necessary and appropriate to correct the deficiency. This could include holding back future distributions, requiring the return of moneys or reporting the misexpenditure to the Secretary of State Audits Division. Possible consequences should be stated in the agreement. Also, while OWEB may rely on reports and other information provided by public and private entities receiving moneys, it may have a duty to further inquire if it has a reason to believe that moneys are not being used as agreed.

**2. Delegation of Distribution Authority to the OWEB Executive Director**

You ask whether the OWEB Executive Director needs a formal delegation of authority from the Board to distribute natural resources moneys for which the legislature has specified distribution to a particular entity or for a particular use.

The Board is created under ORS 541.360. The position of the OWEB Executive Director is created under ORS 541.362. The Executive Director is given specific authority to enter into interagency agreements on behalf of the Board to carry out the agency’s duties and responsibilities, ORS 541.363, but the statutes are otherwise largely silent as to the executive director’s authority beyond the authority to hire the agency’s employees. Rather, it is the Board that is given a lengthy list of express powers and duties with regard to carrying out the state’s program to enhance watersheds.

ORS 293.330 generally authorizes state boards and commissions to delegate the approval of disbursements to representatives or deputies under certain conditions. The two conditions for delegation are that the person be under bond to the state, and that the board chair file with the Department of Administrative Services (DAS) a statement designating the delegatee, together with a sample of the delegatee’s signature. We see nothing in the statutes governing OWEB, ORS 541.351 to 541.415, that contradicts or otherwise supercedes the general authority of state boards and commissions to delegate this type of decision. Therefore, we conclude that the Board may delegate to OWEB’s Executive Director the authority and responsibility for distributing natural resources moneys to entities pursuant to legislative direction. As required under ORS 293.330, any delegation should be through a written delegation approved by the Board and filed

with DAS, along with a copy of the executive director's signature. The delegation document should specify the scope of the delegation and any limitations thereon.

### 3. Potential Liability for Unconstitutional Disbursements

You also ask whether a Board member could incur personal liability if, acting pursuant to delegated authority and in accord with a budget law, the OWEB Executive Director makes distributions that result in a violation of one or more of the requirements stated in Article XV, section 4b.

The Oregon Tort Claims Act (OTCA) states:

(3) Every public body and its officers, employees and agents acting within the scope of their employment or duties \* \* \* are immune from liability for:

\* \* \* \* \*

(f) Any claim arising out of an act done or omitted under apparent authority of a law, resolution, rule or regulation which is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice.

ORS 30.265. We previously have advised that the OTCA immunizes employees and officials of the state who are acting under a legislative command, even if that legislation is later determined to be unconstitutional. 45 Op Atty Gen 160, 172 (1987), citing to *Burke v. Children's Services Division*, 288 Or 533, 546-47, 607 P2d 141 (1980) and 42 Op Atty Gen 277, 290-91 n 7 (1982) (boundary commission immune under ORS 30.265(3)(f) from tort claim based on levy of taxes under invalid authority).

We have also cautioned, however, that the protection provided by the OTCA "does not extend to an 'official' action taken by [a public body or one of its employees] after they have been made aware of the invalidity of their source of statutory authority." 45 Op Atty Gen at 173. For example, if the legislature were to direct OWEB to distribute natural resources moneys in a way that seemed inconsistent with section 4b, in distributing the moneys OWEB would have to try to harmonize the legislative action with constitutional requirements. If this were not possible, OWEB would lack authority to distribute the moneys for the purposes directed by the legislature. The Oregon Supreme Court has affirmed that, "[a]lthough it is an authority to be exercised infrequently, and always with care, Oregon administrative agencies have the power to declare statutes \* \* \* unconstitutional." *Nutbrown v. Munn*, 311 Or 328, 346, 811 P2d 131 (1991) (citations omitted).

OWEB should be very cautious about failing to act pursuant to an enacted budget bill or other law without seeking legal advice about the status of the act in question. Legislative enactments always are accorded a presumption of constitutional validity. *Wright v. Blue Mt.*

*Hospital Dist.*, 214 Or 141, 144, 328 P2d 314 (1958). If the Board or Executive Director has concerns about whether a law conflicts with the requirements of Article XV, section 4b, OWEB should seek legal advice prior to taking any action to implement it. *Employment Div. v. Rogue Valley Youth for Christ*, 307 Or 490, 495, 770 P2d 588 (1989) (“If a statute tells an agency to do something that a constitution forbids, the agency should not do it”). So long as the Board and the Executive Director follow this general approach, both Board members and the Executive Director should be immune pursuant to ORS 30.265(3)(f).<sup>14/</sup> 45 Op Atty Gen at 172.

#### **4. Protecting Against Shortfalls**

Finally, you ask whether OWEB would be responsible for a shortfall if net lottery proceeds deposited in the Parks and Natural Resources Fund, and therefore the amounts eventually transferred to the Watershed Improvement Grant and Operating Funds, are less than projected and insufficient to cover the amounts distributed by OWEB pursuant to the terms of the budget bill enacted for that biennium. Generally speaking, as constitutionally dedicated funds, moneys in the Watershed Improvement Grant and Operating Funds are not subject to allotment by DAS. ORS 291.236(2) and 291.238. Therefore, the answer to your question initially depends on the terms of the budget law directing allocations and other expenditures of the natural resources moneys.

In both 2001 and 2003, the legislature enacted budget laws governing OWEB’s disbursement of the natural resources moneys. Or Laws 2001, ch 814 and Or Laws 2003, ch 702. In each instance, the legislature directed OWEB to allocate specific amounts of money to specific state agencies from the Watershed Improvement Grant and Operating Funds. However, in neither year did the legislature direct OWEB to allocate or otherwise distribute natural resources moneys to any other particular entity. With respect to the state agency allocations, for both the 2001 and 2003 biennia, the legislature directed OWEB to take steps sufficient to guard against a shortfall:

(1) The Oregon Watershed Enhancement Board shall establish by rule a process for allocating available moneys in the Restoration and Protection Subaccount of the Parks and Natural Resources Fund on a quarterly basis to fulfill the biennial allocations made in this 2003 Act. Except as provided in subsection (2) of this section, all quarterly allocations shall be set at one-eighth of the biennial allocations.

(2) If, in any quarter, the moneys transferred from the State Lottery Fund to the Parks and Natural Resources Fund are insufficient to pay for the quarterly allocations established under subsection (1) of this section, these allocations shall be reduced proportionately by amounts sufficient to accommodate the revenue shortfall.

Or Laws 2003, ch 702, §13. An almost identical provision is contained in the Oregon Laws 2001, chapter 814, section 17.<sup>15/</sup>

Providing for quarterly allocations and proportionate reductions if needed should greatly reduce, if not eliminate, the risk of OWEB's creating a shortfall by making allocations in excess of revenues. With respect to distributions made through its grant program, we recommend that OWEB establish, through its grant agreements, a process similar to that set out by the legislature for its mandatory allocations, so that grantees also receive eight equal installments over the course of a biennium.

In addition, all grant agreements should include provisions obligating OWEB to make payments only to the extent that natural resources moneys are available, and obligating grantees at OWEB's request to return moneys that have been distributed if necessary to avoid a situation where expenditures for the biennium exceed revenues.

## **Conclusions**

As the single state agency responsible for administering the natural resources moneys, OWEB is responsible for overseeing the expenditure of all natural resources moneys for fulfillment of the requirements of Article XV, section 4b. Those requirements are that some moneys be spent for each of the five specified purposes; that no moneys be spent for any other purpose; and that at least 65 percent of all moneys be spent for capital expenditures. OWEB's oversight responsibility extends to all expenditures of natural resources moneys, regardless of whether an end-user spending the moneys received them directly by legislative appropriation, from OWEB pursuant to statutory direction, or from OWEB as a result of its discretionary decision-making. Section 4b's requirements are such that OWEB must oversee not only discrete expenditures by individual end-users but also the coordinated expenditure of *all* natural resources moneys. We believe that the best way to accomplish this oversight is through the execution of agreements between OWEB and recipient entities. The agreements would govern the ultimate expenditure of moneys and should provide OWEB with the means to oversee the entities' actions.

With respect to internal OWEB activities, the Executive Director needs a formal delegation from the Board to be able to distribute moneys pursuant to statutory direction. The OTCA protects both Board members and the Executive Director from personal liability for unconstitutional distributions made pursuant to legislative allocations, so long as members and the director were not aware of the problem at the time they acted. OWEB should consult with this office regarding any concerns about the constitutionality of implementing legislation. Finally, to avoid potential shortfalls, we recommend that OWEB establish, through rulemaking, the allocation process mandated by the legislature and that it establish a similar process through its grant agreements, so that it distributes natural resources moneys in periodic installments. We also recommend including in its grant agreements provisions obligating OWEB to make

payments only to the extent that moneys are available and obligating grantees to return grant funds in the event of a shortfall in lottery revenues.

Sincerely,

Donald C. Arnold  
Chief Counsel  
General Counsel Division

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<sup>1/</sup> We addressed the meaning of the constitutional requirement that at least 65 percent of the natural resources moneys be used for capital expenditures in a letter of advice to Catherine Pollino, Director, Audits Division, dated May 28, 2002. OP-2002-4.

<sup>2/</sup> See Or Const, Art IX, § 4 (“No money shall be drawn from the treasury, but in pursuance of appropriations made by law”).

<sup>3/</sup> With the requisite statutory authority, OWEB could itself expend the natural resources moneys for the purposes designated in Article XV, section 4b.

<sup>4/</sup> The audit required under section 4c measures the financial integrity, effectiveness and performance of the agency receiving moneys from the parks and natural resources fund, including natural resources moneys. And each agency that receives such moneys must submit the audit to the legislature as part of a biennial report. Because of the Secretary of State’s other constitutional and statutory audit functions, additional entities receiving natural resources moneys, including private sector entities, may also be subject to audit.

<sup>5/</sup> If the intent of the people remains susceptible of more than one meaning after reviewing the pertinent text and context, it is appropriate to consider the history of the enactment. ***Robinson v. Lamb’s Wilsonville Thriftway***, 332 Or 453, 458, 31 P3d 421 (2001). The history of an initiated constitutional provision includes information available to the people at the time the measure was approved, such as the ballot title, explanatory statement and arguments for and against the measure included in the Voters’ Pamphlet, as well as contemporaneous news reports and editorials on the measure. ***Ecumenical Ministries v. Oregon State Lottery Commission***, 318 Or 551, 560 n 8, 871 P2d 106 (1994).

<sup>6/</sup> “The measure sets aside 15% of lottery proceeds to: \* \* \* [r]educe illegal hunting, fishing and poaching by restoring cuts to Oregon State Police Fish and Wildlife officers.” Argument in Favor, by Brian Booth, State Parks Commissioner, Former Chair, L.L. “Stub” Stewart, Parks Commissioner, and Geoff Pampush, Oregon Trout, Director. 1998 Voters’ Pamphlet, at 138. “If passed, the measure will: \* \* \* [r]educe illegal hunting, fishing and poaching by restoring cuts to Oregon State Police Fish and Wildlife Officers.” 1998 Voters’ Pamphlet, at 138. “[T]here have been devastating cuts to the Fish and Wildlife Officers responsible [for enforcing the wildlife laws]. \* \* \* Measure 66 will provide desperately needed funding to restore our ability to enforce the law and stop poachers, polluters and others who destroy or steal our precious natural resources. Without the passage of Measure 66, the cuts will continue, and likely even get worse.” 1998 Voters’ Pamphlet, at 147. See also, STATESMAN JOURNAL, Oct. 8, 1998, Editorials section at 8C (“Measure 66 would expand those efforts to improve habitat

management, add state police fish and game officers to prevent poaching, protect water quality and provide watershed education programs”). We caution, however, that the courts may discount the probative value of arguments for and against a measure. *See, e.g., Northwest Natural Gas Co. v. Frank*, 293 Or 374, 383, 648 P3d 1284 (1982) (“While the voter’s pamphlet is a source which we can consider in construing legislative enactments, we are aware of the need for caution in relying on the statements of advocates contained in the pamphlet”).

<sup>7/</sup> How will the money be distributed?

- Half the money (the part dedicated to parks) will be distributed and overseen by the Oregon Parks Commission.
- Half the money (the part dedicated to fish, wildlife and water quality) will be distributed through grants to non-profit organizations, watershed councils, local governments, local park providers, soil and water conservation districts, and others involved in fish and wildlife habitat protection.

1998 Voters’ Pamphlet, at 138.

<sup>8/</sup> That the text of Article XV, section 4b contradicts the explanatory statement on this point is the most salient element contributing to our conclusion. Courts have stated that they may discount the probative value of arguments for and against a measure. *See, e.g., Northwest Natural Gas Co.*, 293 Or 374 (note 6 *infra*).

<sup>9/</sup> In relation to ballot measures approved by the people in 1984 to create a state lottery, 44 Op Atty Gen 431, 433-434 (1985) addresses self-executing constitutional amendments.

<sup>10/</sup> ORS 541.377(6). Natural resources moneys in the Watershed Improvement Operating Fund may be used for a number of purposes including (but not limited to) the operational expenses of OWEB, activities of other state and local agencies related to the purposes of Measure 66, and research. ORS 541.377(6)(b); ORS 541.379(1) and (2). Natural resources moneys in the Watershed Improvement Grant Fund may be used only for capital expenditure projects that also fall within one or more of the public purposes listed in Article XV, section 4b. ORS 541.377(6)(a).

<sup>11/</sup> As used in budget laws such as Oregon Laws 2001, chapter 814, “allocate” means “**1:** to apportion for a specific purpose or to particular persons or things \* \* \* as **a:** to give (a share of money, land, or responsibility) to a person **b:** to distribute or to divide and distribute according to relative contribution to an objective whether on an equal, proportional, or judiciously calculated basis \* \* \*.” WEBSTER’S at 57.

<sup>12/</sup> In other instances, the legislature has suggested that funds be distributed for specific purposes through budget notes. While OWEB has no legal duty to comply with legislative budget notes, to date, we understand that OWEB has complied with the legislature’s wishes by distributing these funds through interagency or grant agreements. *See* 40 Op Atty Gen 56 (1979), 38 Op Atty Gen 1731 (1978); 38 Op Atty Gen 1328 (1977) (addressing whether budget notes are legally binding on state agencies).

<sup>13/</sup> In those instances where OWEB is distributing moneys at its discretion, we recommend that the distribution be contingent on the recipient entity executing such an agreement.

<sup>14/</sup> For discussion of an agency’s responsibility subsequent to a judicial determination that its distribution of moneys pursuant to legislative mandate violated the Oregon Constitution *see* 47 Op Atty

Gen 214 (1994) (advice to Lottery following the Oregon Supreme Court's decision in *Ecumenical Ministries*, 318 Or 551, holding the Lottery's distribution of moneys to counties pursuant to statute unconstitutional).

<sup>15/</sup> The 2001 legislature also chose to make the provisions of Oregon Laws 2001, chapter 814 subject to DAS' allotment and related authority. Or Laws 2001, ch 814, § 18. However, a similar provision was not included in the 2003 budget bill.