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OREGON'S AMPHIBIOUS PUBLIC TRUST DOCTRINE:‡ THE OSWEGO LAKE DECISION

BY

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In late 2019, the Oregon Supreme Court decided the Oswego Lake case, concerning public access rights to the State's only allegedly "private" lake, located in suburban Portland. The court's unanimous decision was pathbreaking for it interpreted the State's public trust doctrine, for the first time, to apply to uplands adjacent to navigable waters necessary for accessing those waters. The court also clarified that the doctrine applies to fish and wildlife, and to local governments as well as the State, and invoked private trust principles in articulating public trust duties. The plaintiffs achieved all these results over the objections of the State, which has long sought a narrow judicial interpretation of the doctrine's public rights. However, the court did not give the public immediate rights to access Oswego Lake, limiting upland access rights to waterbodies that meet the federal test for title: they must have been suitable for commercial trade or transport at statehood in 1859. Although this test may be a boon to historians versed in the settlement conditions of the mid-nineteenth century, it lacks any perceptible policy justification a century and a half post-statehood. The court made no attempt to explain why it restricted public access from public lands to public waters to such an arcane and archaic test.

This Article discusses the Oswego Lake decision, explaining the history of the lake and the persistent efforts of the Lake Oswego Corporation to monopolize access to it. These efforts have proved to be surprisingly successful, even though for over 100 years Oregon State law has recognized public rights to use all waterbodies capable of supporting recreational watercraft, which far outnumber the few waterways that passed the federal test in 1859. The court's decision

‡Responding to the question posed many years ago by Scott Reed, *Is the Public Trust Doctrine Amphibious?,* 1 J. ENV'T L. & LITIG. 107 (1986).

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means monopoly use of the lake will continue until the courts determine evidence from the lake's history satisfies the federal test, likely a long and expensive process. This Article examines how the Oswego Lake case reflected the political dynamics of local government captured by wealthy landowners as well as the State's antipathy for carrying out public trust duties. Appendix A responds to a recent comment by Dean Huffman. Appendix B sets forth an initiative proposed by an Oregon bar section that would establish a "legal guardian for future generations" to protect public trust rights the State apparently cannot.

I. INTRODUCTION

Oswego Lake, a shimmering emerald perched above the Willamette River, is once again the focus of decades of contention between public access and privatization. This tension between private and public interests stems from the lake's popularity for water-borne recreation, boasting a surface area of 395 acres and nearly 11 miles of shoreline.[1] Private ownership of most of the shoreline restricts public access to three municipal waterfront parks and a swim park, all owned by the City of Lake Oswego.[2] The most recent conflict centers around the City of Lake Oswego's rules prohibiting access to the lake from four city-owned waterfront parklands.[3] In combination with private ownership over the rest of the lakeshore, these restrictions effectively established a monopoly for members of the Lake Oswego Corporation (Lake Corp), who enjoy exclusive access to recreate on the lake.[4]

In 2012, two members of the public who wished to swim and kayak on the lake filed suit against the City, the State of Oregon, and Lake Corp.[5] They challenged the City's rules on the grounds the rules support Lake Corp's private monopoly in violation of the State's public trust doctrine and the Equal Privileges and Immunities Clause of the Oregon Constitution.[6] The public trust claim asserted sovereign governments like the State of Oregon and the City of Lake Oswego must hold publicly

[1] DANIEL JOHNSON ET AL., ATLAS OF OREGON LAKES 114 (1985), https://perma.cc/Q2DH-QP7T (last visited Oct. 17, 2020).

[2] Conrad Wilson, *Oregon Supreme Court Considers Lake Oswego's Lake Access Rules*, OR. PUB. BROADCAST (May 3, 2018), https://perma.cc/8BR5-AKLB ("Despite the water being public, the city prohibits access to the lake from adjoining public parks. Put another way: the city's rules don't allow people to get into the lake from public parks that touch the lake.").

[3] Kramer v. City of Lake Oswego (*Kramer II*), 446 P.3d 1, 5–7 (Or. 2019); On the history of conflicts over the lake, *see infra* notes 37–48 and accompanying text. *See also* Everton Bailey, Jr., *Locals, Critics Spar Over Access to Oregon Lake*, OREGONIAN (Mar. 1, 2012), https://perma.cc/B6GB-A4XG (quoting Doug Thomas, president of the Lake Oswego Corporation's board of directors) ("Every 10 years or so, someone makes a challenge as to why everyone and anyone can't come into the lake.").

[4] *See Kramer II*, 446 P.3d at 6–7 (citing CITY COUNCIL, CITY OF LAKE OSWEGO, RULES AND REGULATIONS (KNOWN AS PARK RULES) GOVERNING THE USE OF CITY OWNED PARK AND RECREATION PROPERTY, AMENITIES AND FACILITIES, Res. 12-12 § 1(19) (Or. 2012) *amended by* Res. 16-24 § 3(27) (Or. 2016)) (barring "any person to enter Oswego Lake from Millennium Plaza Park, Sundeleaf Plaza or the Headlee Walkway by any means or method"), https://perma.cc/ET32-9LQW (last visited March 26, 2020); *id.* at 6 (citing CLACKAMAS COUNTY, OR., DEED BOOK 223: 268−71 (1934) (restricting recreational use to the "resident children of Lake Oswego"); *see infra* notes 93−94, 302 and accompanying text.

[5] *Kramer II*, 446 P.3d at 5; Kramer v. City of Lake Oswego, No. 3:12–00927-HA, at *1 (D. Or. Oct. 11. 2012) (explaining that the lawsuit was a challenge to a city resolution passed on April 3, 2012).

[6] *Kramer II*, 446 P.3d at 19–20; OR. CONST. art. I, § 20.

owned resources in trust, including navigable lakes like Oswego Lake.[7] As trustees of these resources, the City and the State have a fiduciary duty to protect them for the benefit of present and future generations of the public—not the adjacent landowners.[8] The plaintiffs also claimed the doctrine imposed affirmative obligations on those sovereigns to provide public access to, and prevent substantial impairment of, the lake.[9] Their constitutional claim asserted the rules created an impermissible monopoly under the Oregon Constitution.[10]

The City defended its exclusionary rules on the ground it was within its police powers to protect public health and safety.[11] The State argued the public trust doctrine does not apply to uplands like the City's parks because it extends only to submersible and submerged lands and, in any event, imposes no affirmative obligations on the State.[12] The lower courts rejected virtually the entirety of the plaintiffs' claims.[13] But the Oregon Supreme Court, in a unanimous, lengthy, and confounding opinion, gave the plaintiffs much of what they sought—although not immediate access

[7] *See Kramer II*, 446 P.3d at 5 (explaining the swim park, part of Lake Oswego, should be protected by the common law public trust doctrine, which would require sovereign governments such as the State of Oregon and the City of Lake Oswego to hold the lake in trust).

[8] *Id.* at 17–18, 18 n.22 (agreeing both the State and the City have trust obligations, importing the trustee's fiduciary duty from private trust law to reinforce public trust limitations on the State and its municipalities). *But see* Chernaik v. Brown, 367 Or. 143, 168 (Or. 2020) (rejecting the notion that "all" private trust principles apply to the public trust doctrine because those principles could overburden the public trust doctrine, although not rejecting their selective application).

[9] *Kramer II*, 446 P.3d at 12; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970) (explaining that the public trust doctrine provides a judicial remedy enabling the public to challenge a government's actions or inactions that deny public access to or which threaten significant impairment of trust resources).

[10] OR. CONST. art. I, § 20. *See infra* notes 93–94 and accompanying text.

[11] *Kramer II*, 446 P.3d at 20 (affirming that an outright ban on public access to Oswego Lake was not a violation of the Equal Privileges and Immunities Clause because the court thought it did not grant a privilege to a select class of persons).

[12] *See* Brief on the Merits of Respondent on Review, State of Oregon at 3–4, *Kramer II*, 446 P.3d 1 (Or. 2019) (No. S065014), 2018 WL 1240191 [hereinafter State's Brief] (maintaining that the public trust doctrine only imposed limits on the State's ability to convey submersible and submerged lands).

[13] *See* Kramer v. City of Lake Oswego (*Kramer I*), 395 P.3d 592, 595, 597, 612 (Or. Ct. App. 2017) (stating that the City deemed an absolute ban necessary to forward its goals of improving public safety and the ecological health of the lake), *aff'd in part, rev'd in part*, 446 P.3d 1 (Or. 2019), *and opinion adhered to as modified on reconsideration*, 455 P.3d 922 (Or. 2019). The Oregon Court of Appeals did remand to the trial court, directing it to respond to the plaintiffs' request for declaratory relief. *Id.* at 612.

to the lake.[14] Instead, plaintiffs must await a trial to determine whether the lake is a navigable water under the federal test for title.[15]

The Supreme Court's opinion broke significant new Oregon public trust ground by rejecting several narrow interpretations of the doctrine propounded by the State and the City.[16] With one significant exception, the State lost on all the public trust doctrine interpretations it advanced.[17] For example, over the State's objections, the court expanded the scope of the public trust doctrine to a waterway's adjacent public uplands,[18] included fish and wildlife within the trust,[19] and invoked private trust principles in articulating the State's affirmative duties, which the State had denied.[20] The court also rejected the City's claim it

[14] *Kramer II*, 446 P.3d at 6. The Oregon Supreme Court reversed the lower courts on the public trust doctrine claim because they failed to adequately analyze the relationship between the State and its municipalities under the limits the doctrine imposes. *Id.* at 18–19. The court construed the doctrine to afford the public a right of access to public waterways from public uplands if the waterways are title-navigable. *Id.* at 25–26.

[15] *See* discussion *infra* Part IV.A; *infra* notes 107–108 and accompanying text.

[16] *Kramer II*, 446 P.3d at 17–18, 25–26.

[17] *Id.* at 11 (explaining that the plaintiffs' argument that the public use doctrine compels abutting land owners to allow incidental uses of the banks of waterways was overbroad because Oregon case law recognized only a narrow exception to the "general rule that those engaged in use of the water highways are prohibited from interfering with the land at all" which occurs when "first, the burden on the landowner [i]s incidental and temporary; and second, without imposing that incidental burden on the landowner, the navigator c[an] not continue [using the water highway]").

[18] *Id.* at 16–17 (reviewing the public trust doctrine's application to public uplands in three other states: Iowa, Montana, and New Jersey); *see* discussion *infra* Part IV.A; *infra* note 109 and accompanying text.

[19] The State argued to the court of appeals that the public trust doctrine applies only to title-navigable waters. *Kramer I*, 395 P.3d 592, 602 (Or. Ct. App. 2017) (footnote omitted). The State reasserted this position in its brief to the Oregon Supreme Court, stating that no Oregon court has applied the public trust beyond 1) limiting the State from alienating beds of title-navigable waterways, and 2) establishing the contours of the State's authority to regulate activities in such waterways. State's Brief, *supra* note 12, at 9–10. These assertions are inconsistent with the State's position in a contemporaneous suit against Monsanto Company et al., where the State asserted public trust ownership over "all natural resources within its borders, which it holds and protects for the benefit of all Oregonians." Complaint ¶ 9, State of Oregon v. Monsanto Co., et al., Multnomah County Circuit Court, No. 18CV00540 (Jan. 4, 2018) [hereinafter Monsanto Complaint]. *See also infra* note 82, and accompanying text. In *Kramer II*, the Oregon Supreme Court not only rejected the State's interpretation, but also recognized that the scope of the public trust doctrine extends to fish and wildlife. *Kramer II*, 446 P.3d at 12 n.12 ("Water is not the only resources that the State holds in trust." (citations omitted)). *See also* State v. Dickerson, 345 P.3d 447, 454–55 (Or. 2015) (en banc) (explaining that wildlife is a trust resource); Portland Fish Co. v. Benson, 108 P. 122, 124 (Or. 1910) (stressing the State holds fish in trust prior to capture); *see infra* note 82 and accompanying text. *But see Chernaik*, 367 Or. 143, 164 (Or. 2020) (distinguishing other resources under other trust doctrines, which may not impose affirmative obligations on the State).

[20] *Kramer II*, 446 P.3d at 15–16 (discussing two prior decisions related to the rights of private owners as "suggest[ing] that the rights flowing from ownership of submersible lands includes a right to pass from the upland border of that land to the adjacent water"). Like the lower courts, the Oregon Supreme Court also rejected plaintiffs' constitutional claim

had no public trust obligations.[21] But the court restricted the scope of the public trust doctrine to waterways meeting the federal title test, under reasoning that is hard to understand.[22] The result, while disappointing to the plaintiffs[23]—who must endure more delays and marshal century-and-a-half-old evidence which may not exist[24]—promises to invigorate the State's venerable public trust doctrine in the future.

This Article examines the Oregon Supreme Court's *Kramer v. City of Lake Oswego*[25] decision and its ramifications for the public trust doctrine in Oregon. Part I explains the monopoly of lake access the City endorsed in its rules that prompted the suit. Part II briefly discusses the lower court decisions, where the Oregon circuit court summarily rejected the plaintiff's claims, and the Oregon Court of Appeals affirmation. Part III examines the Oregon Supreme Court's Oswego Lake decision, where the plaintiffs succeeded in many of their arguments: applying the public trust doctrine to uplands, fish, and wildlife and confirming the State's affirmative trust obligations and the City's duty to implement those obligations.[26] Part IV turns to issues the circuit court must address on remand, beginning with an explanation of the chain of title to some of the properties surrounding Oswego Lake. The title chains appear to show the State, not Lake Corp, owns the lakebed of Oswego Lake. Part V then explores the specific issues the plaintiffs must address to show the public trust doctrine applies to Oswego Lake under the Supreme Court's new test. If they succeed, the public will have a right to access Oswego Lake from the surrounding public parklands, as the plaintiffs have asserted for years.

We maintain that, although the Oswego Lake opinion gives the public a path forward for lake access, it relied on an unsatisfactory, antiquated test for determining title-navigability to control public access from public lands to waterways in the state. Why public access from

under the Equal Privileges and Immunities Clause of the Oregon Constitution. *Id.* at 20–21, 25; *see infra* notes 93–94 and accompanying text.

[21] *Kramer II*, 446 P.3d at 17–18 (requiring the State and its localities to determine whether the use of their police powers over public trust resources is "objectively 'reasonable' in light of the 'purpose of the trust and the circumstances of each case.'" (quoting Rowe v. Rowe, 347 P.2d 968, 971 (Or. 1959)). *See infra* notes 278–285 and accompanying text.

[22] *Kramer II*, 446 P.3d at 14 (apparently approving a dichotomy between the public trust doctrine and a so-called "public use doctrine," seeming to limit the scope of the former to waterbodies that were commercially navigable at statehood and restricting the parkland access rights the court recognized to those waterbodies). *See infra* notes 138–140 and accompanying text (explaining the federal title test for navigability and its application to *Kramer*).

[23] The Oregon Supreme Court also rejected the plaintiffs' constitutional claim under the Equal Privileges and Immunities Clause of the Oregon Constitution. *Kramer II*, 446 P.3d at 20–26. *See infra* notes 93–94 (discussing the Court's rejection of the plaintiff's constitutional claim at length).

[24] *Kramer II*, 446 P.3d at 19.

[25] *Id.* at 1.

[26] *Id.* at 12 n.12, 17–19.

public lands to public waters should depend upon how a waterway was used in 1859 lacks any appreciable policy justification, especially in light of century-old precedent that recognizes the public's right to recreate on all waterways suitable for recreational watercraft.[27] Moreover, the opinion undermines the State by infusing a federal navigability test into century-old state property law.[28] It is far from clear why public access to Oregon's public waters should depend on a federal navigability test the State rejected as unnecessary for public access a century ago. Despite these jurisprudential shortcomings, there is no question the public gained significant public trust rights in the Oswego Lake case.

II. THE LAKE AND THE MONOPOLY

Monopoly control of Oswego Lake began about eighty years ago.[29] Until roughly around 1960, the public could access the lake.[30] By then, Lake Corp, acting in concert with the City of Lake Oswego on many

[27] *See infra* notes 102, 128 and accompanying text (summarizing the test for title-navigability and the Oregon Attorney General's recognition of the public's use of waterways for recreation).

[28] *Kramer II*, 446 P.3d at 12–13.

[29] STEPHEN DOW BECKHAM, OSWEGO LAKE, OREGON: A HISTORY OF ITS DEVELOPMENT AND USE 69–70 (2014).

[30] Developers, who were eager to rebrand Oswego Lake after the fall of the steel industry in the late 19th century and prior to the incorporation of Lake Corp, heralded the lake as a pristine respite from industrial Portland. *See id.* at 41 (providing examples of recreational activities and promotion efforts to attract visitors to Oswego Lake). Depression-era federal stimulus projects enhanced the recreational allure of the lake. *See* ANN FULTON, IRON, WOOD & WATER: AN ILLUSTRATED HISTORY OF LAKE OSWEGO 94 (George Bergeron et al. eds., 2002) (mentioning the City's request for WPA funds and how federal funds supported public improvements). One such project created the Oswego Municipal Swim Park in 1934, now known simply as the swim park, a donation from the Ladd Estate Company, developer for the Oregon Iron & Steel Company. *Id.* This park came burdened with covenants restricting access to the children of Oswego only, to mitigate local fears that Portlanders would abuse the park's amenities to the detriment of the Oswego residents. *Id.* City residents voted to impose theses restrictive covenants excluding non-residents, over concerns of littering and exaggerated fears of property damage. *Id.* However, the mayor at the time, William Ewing, explained that the Ladd Estate Company intended to keep open the five acres at the east end of the park "and never intended to eliminate lake access completely." *Id.* Interestingly, the owner of the Oregon Iron & Steel Company, Paul Murphy—who would later attempt to monopolize the lake—echoed the mayor's proclamation during a private settlement in which he struck a deal with the Game Commission to allow public fishermen the right to access the lake and in exchange, the Game Commission continued to stock the lake with publicly owned fish. MINUTES OF MEETING OF THE OREGON STATE GAME COMMISSION 1353−54 (Sept. 11–12, 1936). From the 1940s to the 1960s, Oswego Lake was a highly valued training area for the Portland-based Multnomah Athletic Club, which produced Olympic swimmers during the 1940s. FULTON, *supra*, at 106–07. The incorporation of Lake Corp ended this era of goodwill, quickly asserting its claim to the riparian boundary and lakebed to the exclusion of all non-members. *Id.* at 103. *See, e.g.*, *Swim Area Will Close*, SUNDAY OREGONIAN, July 8, 1962, at 35 (discussing the long history of the Lake Oswego Swimming Resort, which was open to all fee-payers); BECKHAM, *supra* note 29, at 50−51 (noting multiple outings to Oswego Lake by non-residents throughout the 1910−1920s).

occasions, had nearly accomplished its goal of restricting access to neighboring residents who were dues-paying members of the corporation.[31] The corporation's authority to restrict access has never been apparent,[32] resulting in considerable conflicts over the years.[33] These conflicts commonly arose when Lake Corp asserted regulatory authority to control use of, and access to, the lake, maintaining neither the State nor the federal government had regulatory roles due to the uniquely private nature of Oswego Lake.[34]

Lake Corp's actions were not without support. U.S. Congressmen, Senators, influential attorneys, historians, and businessmen have all endorsed Lake Corp's goal to privatize the lake.[35] Their skill, clout, and perseverance were essential in rewriting the history of Oswego Lake, helping legitimize Lake Corp's ownership claim.[36]

In 1959, Lake Corp and the state government had one of their more notable clashes when the State rejected Lake Corp's claim to control the use of recreational watercraft.[37] Lake Corp's defeat came at the hands of the state attorney general, who concluded in a formal opinion the State Marine Board had regulatory jurisdiction over all public use of boats on Oswego Lake.[38] The attorney general cited the Oregon Supreme Court's

[31] The Paul F. Murphy Company, a land development company responsible for part of the city of Lake Oswego's expansion, no longer wished to maintain cleaning, patrolling, and insuring the lake. So, to avoid governmental control (and potentially higher taxes) and public access, 4,000 lakefront and lake access easement holders created the Lake Oswego Corporation to fill the developer's void. *See* FULTON, *supra* note 30, at 102–04.

[32] *Id.* at 104 (quoting Ward Smith, a member of the Lake Oswego Corporation's first board of directors, who observed, "[a]s far as we have been able to find out, there is no other residential lake setup like this in the United States.").

[33] *See supra* note 30 and accompanying text; *infra* notes 319–320 and accompanying text.

[34] *See* FULTON, *supra* note 30, at 104.

[35] Notable among Oswego Lake's privatization leaders: Paul C. Murphy, president of the Oregon Iron & Steel Company; Paul F. Murphy, owner of the Paul F. Murphy Company, successor to the Ladd Estate Company; Mark O. Hatfield, former U.S. Senator and Oregon Governor (R-Or.); Senator and former U.S. Congressman Ron Wyden (D-Or.); Les AuCoin and Robert Duncan, former U.S. Congressmen (D-Or.); Lamar Newkirk, former editor of the Oregon Journal; and Jack Kennedy, president of the Oregon State Bar Association . *See* FULTON, *supra* note 30, at 102. *See also A Bill to Exempt the Lake Oswego, Oregon, Hydroelectric Plant from Part I of the Federal Power Act and Section 408 of the Renewable Energy Resources Act of 1980, and for Other Purposes: Hearing on H.R. 6657 Before the Subcomm. On Energy Conservation of the H. Comm. Energy and Commerce and Power*, 97th Cong. 3–4 (1982) (statement of Robert Duncan, Jack Kennedy, Counsel, and Lamar Newkirk, past president, Lake Oswego Corp.) [hereinafter House Hearing].

[36] *See* FULTON, *supra* note 30, at 4 (Senator Hatfield's foreword proclaiming Fulton's retelling of the history of Oswego Lake to be a "great gift" as for the Oswego community to rediscover its roots); House Hearing, *supra* note 35, at 6 (citing Lamar Newkirk's oral testimony minimizing the original Sucker Lake name to "Sucker Swamp" before the committee to emphasize the purported non-navigable nature of the lake).

[37] 1958–1960 OR. ATT'Y. GEN. BIENNIAL REP. & OPS 296, 296–97.

[38] *Id.* (answering the director of the State Marine Board's question as to the board's regulatory authority).

decision in *Guilliams v. Beaver Lake Club*[39] in deciding the public had a navigational easement to use the lake since it was (at least) navigable-in-fact.[40] Consequently, the public had a navigational easement over the lake, regardless of who owned title to the lakebed.[41]

That same year, Circuit Court Judge Ralph Holman enjoined filling of the lake adjacent to a landowner's property in the Lakewood Bay area by a construction company.[42] Judge Holman initially declared the lakebed was state-owned, thus open to the public.[43] He later withdrew the decree to allow a so-called future "test case" to determine public access to the lake.[44] That case would not emerge until plaintiffs filed suit over a half-century later.

Twenty years after the run-in with the State Marine Board and Judge Holman's opinion, Lake Corp again made news attempting to evade federal licensing for its small 500-kilowatt hydroelectric generator.[45] In a 1982 oversight hearing of the House Energy Subcommittee, Senator Hatfield claimed the Federal Energy Regulatory Commission's (FERC) assertion of jurisdiction over the hydropower project on Oswego Lake was an unwarranted attempt to expand federal

[39] Guilliams v. Beaver Lake Club, 175 P. 437, 439 (Or. 1918).

[40] 1958–1960 OR. ATT'Y. GEN. BIENNIAL REP. & OPS. 296, 296–97 (citing *Guilliams*, 175 P. at 439).

[41] *Id.* at 297 (in short, where the public has access rights, the State has regulatory authority).

[42] *See Lake Oswego Title 'Open,'* OREGONIAN, Sept. 15, 1959, at 8 (describing the 1959 suit filed by Carl Coad and his wife against Kuckenberg Construction for filling the lakebed adjacent to their land on Lakewood Bay in Oswego Lake).

[43] *Id.*

[44] *Id.* It is likely that the reason for withdrawing the statement that the lake was open to the public, was in response to a request by the City and Lake Corp, who had not participated in the suit. However, we have not been able to verify that request. *See also* BECKHAM, *supra* note 29, at 58.

[45] The Federal Power Act requires the Federal Energy Commission (FERC) to license hydroelectric projects affecting interstate commerce. Federal Power Act, 16 U.S.C. § 817(1) (2018). In 1976, when determining whether it had jurisdiction over the project, FERC asked Lake Corp whether the electricity produced by its Oswego Lake project entered interstate commerce. House Hearing, *supra* note 35, at 44. In 1977, Lake Corp petitioned FERC for a declaration that Oswego Lake's 500-kilowatt hydroelectric project was outside the scope of the Commission's licensing jurisdiction, referencing Congress' earlier declaration in the Water Resources Development Act of 1976 that Oswego Lake was non-navigable for the purposes of the Rivers and Harbors Act of 1899. *See id.* at 65 (referencing Order Denying Reconsideration at 1, Lake Oswego Corp., 15 FERC P61,042 (1982)) (No. E–9601) (recording the history of conflict between FERC and Lake Corp over the hydroelectric dam on Oswego Lake). *See also Hearing on S. 1573 Before the Subcomm. on Water and Power of the S. Comm. on Energy and Natural Resources*, 97th Cong. 51–52, 57, 59–60 (1982) (citing the Water Resources Development Act of 1976, 33 U.S.C. § 59m (2018)) [hereinafter Senate Hearing]. FERC, however, determined Oswego Lake has "long been part of a network of general and commercial transportation" and issued an order requiring the project to obtain a federal license because it met the definition of a navigable water on the Federal Power Act. *See id.* at 62 (citing Order Finding Licensing Required, Lake Oswego Corp., 7 FERC P61,122 (1979)).

regulation.[46] But FERC maintained it had no choice but to require licensing because Oswego Lake affected interstate commerce, which triggered FERC's regulatory duties under the Federal Power Act.[47] To shield the Oswego Lake project from federal licensing, Senator Hatfield, Congressmen Ron Wyden, and Les AuCoin convinced Congress to statutorily exempt the hydroelectric project from the Federal Power Act and the Energy Security Act in 1982.[48] Lake Corp's effort to maintain control without federal oversight succeeded spectacularly.

The City's Resolution 12-12, its third and most recent monopolization effort, effectively bans public access from city-owned properties, a result of Lake Corp's distortion of Oswego Lake's history and the City's willingness to accept it in order to maintain the status quo.[49] The resolution put the City's police power behind Lake Corp's monopolization

[46] House Hearing, *supra* note 35, at 32.

[47] *Id.* at 79. The navigational test for waters subject to Federal Power Act authority, 16 U.S.C. § 796(8) (2018), no longer links federal regulation to a waterbody's historic navigability. *See* Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1643, 1674–75 (2013) (explaining United States v. Appalachian Elec. Power Co., 311 U.S. 337, 426 (1940), where the Court decided that Congress did not have to rely on navigation when it regulated hydroelectric power production under the Federal Power Act). Consequently, FERC believed it could regulate the hydroelectric generator on Oswego Lake regardless of whether the lake was navigable under the title-navigability test. *See* House Hearing, *supra* note 35, at 79. Lake Corp attempted to disprove Oswego's navigability, citing the historical record to show that passage of a steamship up Oswego Canal was impossible due to the narrow physical dimensions of the canal as compared to the beam width of the steamboat. *Id.* at 75 (referencing Order Denying Reconsideration, Lake Oswego Corp., 1–5, 3 FERC P95,462 (1981)). FERC, however, determined the implausible steamboat use was not dispositive proof of non-navigability, given other verified forms of transportation existed on Oswego Lake that demonstrated its navigability. *Id.* at 75–76.

[48] The statute, which amended 16 U.S.C. §§ 791a–830 (2018) and 16 U.S.C. §§ 2701–708 (2018), was never codified in the United States Code but remains good law today: An Act to Exempt the Lake Oswego, Oregon, Hydroelectric Facility from the Licensing Requirement of the Federal Power Act, Pub. L. No. 97-345, S. 1573, 97th Cong. (1982), 96 Stat. 1646 (1982). It is likely that the Office of the Law Revision Council did not codify this amendment because the amendment was not general enough to warrant codification. *See About Classification of Laws to the United States Code*, U.S. HOUSE OF REPRESENTATIVES, https://perma.cc/LU44-DP56 (last visited Nov. 9, 2020) (explaining that "[b]ecause the United States Code contains only the general and permanent laws of the United States, not every provision contained in those public laws goes into the Code"); House Hearing, *supra* note 35, at 81–82. Note that Oswego Lake is considered non-navigable for purposes of the Rivers and Harbor Act, 33 U.S.C. § 401 (2018) after it was amended by 33 U.S.C. § 59m (2018) in 1976. This designation does not affect a federal title-navigability inquiry deciding the applicability of Oregon's public trust to title-navigable lakes with publicly owned beds. Instead, it merely permits riparian owners to wharf out, dam, or bridge Oswego Lake without prior approval from Congress.

[49] CITY OF LAKE OSWEGO, CITY COUNCIL REGULAR MEETING MINUTES 6 (Apr. 3, 2012) ("The Council report notes the Council ha[d] . . . an informal process relating to the public debate about public use or rights on the lake, that it prefers the status quo, that the Lake is private.").

goal.[50] This resolution prevents the public from reaching the water from the City's surrounding parklands, allegedly on public safety grounds.[51] The plaintiffs in *Kramer v. City of Lake Oswego* disputed the validity of the resolution.[52]

III. CHALLENGING THE CITY RULES

Following the city council's unanimous adoption of Resolution 12-12 on April 3, 2012, plaintiffs Mark Kramer—a kayaker—and Todd Prager—an open-water swimmer—filed suit in Clackamas County Circuit Court against the City, claiming the resolution effectively eliminated their right to access the Lake.[53] The plaintiffs alleged three violations of their rights: 1) the State owned the water in the lake in trust for the use and enjoyment of the public, 2) the State owned the lakebed in trust for the public because the lake was navigable under both the State's navigable-in-fact test and the federal title-navigable test, and 3) the City's rules violated the Equal Privileges and Immunities Clause of the Oregon Constitution by privatizing the lake for the benefit of a specific class of persons.[54] The plaintiffs argued the first two claims triggered the public trust doctrine, claiming the doctrine preempted the City's legislative authority to modify the public's access rights.[55] The plaintiffs also sued the State for not protecting their public trust rights and neglecting its public trust duties, and sued Lake Corp for erroneously maintaining it owned the lake and claiming the right to control access to it.[56]

A. The Trial Court's Rejection of the Plaintiffs' Claims

At trial, the plaintiffs argued the public trust doctrine warranted a judicial injunction to force the City and the State to fulfill their trust duties and to provide public access to the lake. The City defended Resolution 12-12 and its swim park rule, claiming the public exclusion was a valid exercise of its "home-rule" jurisdiction and was rationally related to the purposes for which the City enacted it: to assure compliance with deed restrictions imposed by Lake Corp and its predecessors, to

[50] *Kramer II*, 446 P.3d 1, 6 (Or. 2019) (observing private parties own most of the property around the lake, but the City has four public parks abutting the lake).

[51] CITY OF LAKE OSWEGO, at 7.

[52] *Kramer II*, 446 P.3d at 5.

[53] *Id.* at 7.

[54] *See id.* at 7. The Equal Privileges and Immunities Clause, in article I, section 20 of the state constitution, forbids laws from granting special privileges to classes of persons or individuals. *See infra* notes 93–94 and accompanying text.

[55] *See Kramer II*, 446 P.3d at 7 (alleging the resolution and swim park rule are preempted by the public trust doctrine because the State of Oregon owns the waters of the lake).

[56] *See Kramer I*, 395 P.3d 592, 597 (Or. App. Ct. 2017) (contending that Resolution 12-12 infringed upon public rights, contrary to state law).

protect public health and safety, and to preserve a limited city resource for its residents.[57] The City also explained it was not subject to public trust responsibilities because the trust doctrine applied only to the State, not to municipalities.[58] Thus, if an affirmative trust duty existed, it was the State's.[59]

The State, on the other hand, asserted that it owned the bed of the original Sucker Lake because surveyors meandered[60] it in 1852. But the State claimed the public trust doctrine applied only to submersible and submerged lands, not to uplands, and in any event, imposed no affirmative obligations on the State.[61] Since it allegedly had no affirmative duty to act against the City, the State felt no obligation to determine whether the whole of current Oswego Lake was navigable.[62] Lake Corp maintained it, not the State, owned both the lakebed adjacent to the municipal parks and the riparian rights to adjacent lands; therefore, the corporation controlled lake access.[63]

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[57] *Id. See* State v. Uroza-Zuniga, 439 P.3d 973, 974 (Or. 2019) (deciding that home rule authority allows localities to regulate to the outer limits of their charters).

[58] *Kramer I*, 395 P.3d at 597 (owning parklands adjacent to a public trust waterway did not impose a duty on the City to provide access to the lake).

[59] *Id.* at 597, 603.

[60] *See infra* note 254 and accompanying text. A meandered lake is one where a federal surveyor depicted its shoreline in a survey to facilitate federal land sales. In Oregon, the State claims ownership of all meandered lakes. OR. REV. STAT. § 274.430(1) (2019) ("All meandered lakes are declared to be navigable and public waters. . . . The title to the submersible and submerged lands of such meandered lakes, which are not included in the valid terms of a grant or conveyance from the State of Oregon, is vested in the State of Oregon."). At trial, the State claimed to own the lakebed of Oswego Lake:

> Because Sucker Lake was meandered, the State asserts ownership to the submerged and submersible lands underlying the original Sucker Lake. In addition, the State believes that the original Sucker Lake meets the definition of navigable for title purposes based on historical information that it was used or susceptible to use for navigation at the time of statehood.

Defendant State of Oregon's Memorandum in Support of Motion for Summary Judgment and Response to Plaintiff's Motion for Partial Summary Judgment at 3, *Kramer II*, 446 P.3d 1 (Or. 2019) (No. CV12100913), 2013 WL 10730653 [hereinafter State's Trial Court Memorandum]. *See also id.* at 7 ("[T]he State claims to own Sucker Lake as a meandered lake and as title-navigable.").

[61] *Kramer I*, 395 P.3d at 597 n.8 (noting that even though the state asserted ownership over the bed of Oswego Lake as a meandered lake under OR. REV. STAT. § 274.430(1) (2019)—and therefore presumptively a navigable water under the federal title test—the State claimed that the public trust doctrine did not apply to uplands). *See also* State's Brief, *supra* note 12, at 3–4 (arguing that the State is not compelled by the public trust doctrine to provide access to state-owned waterways through uplands).

[62] *See Kramer I*, 395 P.3d at 610 (declaring that the public trust doctrine did not apply to uplands like the parklands adjacent to the lake regardless of whether the State owned the lakebed).

[63] Lake Corp claimed that it owns the lakebed of Oswego Lake and Lakewood Bay, which it maintains is a separate waterbody from Oswego Lake. *See Formation of the Lake Oswego Corporation, Info*, LAKE OSWEGO CORP., https://perma.cc/BGP4-FQGU (last visited Oct. 6, 2020) ("The Corporation owns and operates the Lake."). However, at trial the State asserted

The trial judge, Henry C. Breithaupt, a tax court judge sitting by designation, agreed with the State that the public trust did not burden adjacent uplands and neither the State nor the City had any affirmative obligations to provide public access to the lake.[64] The court also concluded that the resolution and swim park rules were valid exercises of the City's authority and did not violate article I, section 20 because the City rules were not facially discriminatory.[65] The State, the City, and Lake Corp scored a thoroughgoing, if cursory, victory.

B. The Affirmance of the Court of Appeals

The plaintiffs appealed the trial court's decision, arguing that the lake is a public trust resource because, as a lake supporting recreational watercraft, it is navigable under Oregon law and therefore subject to public trust obligations.[66] A unanimous court of appeals, in a decision by Presiding Judge Rex Armstrong, was unpersuaded.[67] The court agreed with the trial court and the State that the public trust doctrine did not extend to uplands.[68] The appeals court also concurred that, regardless of the lake's status, there was no affirmative duty to provide access to a navigable waterway from the adjacent public parklands.[69]

it owned the bed of the original lake, as meandered in 1852, pursuant to OR. REV. STAT. § 274.430 (2019) (claiming state ownership of all meandered lakes). State's Trial Court Memorandum, *supra* note 60, at 3. Consequently, Lake Corp refined its ownership position, acknowledging the State's ownership claim but maintaining it owns the remaining bed of Oswego Lake and the bed of Lakewood Bay, allegedly there was a separate waterbody created by dams raising the level of the lake. Answer & Affirmative Defense of Intervenor-Defendant Lake Oswego Corp. at 6–7, *Kramer II*, 446 P.3d 1 (Or. 2019) (No. CV12100913) ("LOC now holds record title to the Property, including most of the bed and the banks of the Bay and the Lake. LOC also holds reserved rights, including riparian rights, and the right to enforce the Real Property Restrictions on littoral parcels owned by others, including the City."). Lake Corp claims title to lands inundated by artificial modifications in the lake created by a still-operational concrete dam erected in 1921 and a channel, dug in 1928, connecting Oswego Lake to Lakewood Bay. *Id.* at 6. *See also* FULTON, *supra* note 30, at 71, 91 (depicting the enlargement of Oswego Lake after completion of the channel and dam); BECKHAM, *supra* note 29, at 55 (on the modifications).

64 *Kramer I*, 395 P.3d at 603–04 (presuming, without deciding, that the State owned the bed of the lake because it was title-navigable under the federal test).

65 *Id.* at 610.

66 *Id.* at 597 n.7; Respondent's Answering Brief at 2, *Kramer I*, 395 P.3d 592 (Or. Ct. App. 2017) (No. CV12100913), 2014 WL 9865598, at *2. The State agreed with the plaintiffs that 1) the State owned a portion of the lakebed, 2) there was a need to determine ownership of the entire lakebed, and 3) the public has a right to use the lake for recreational purposes. But the State denied it had any enforceable duty to provide public access to the lake over land it did not own. *Id.* at 4.

67 *Kramer I*, 395 P.3d at 601–10.

68 *Id.* at 610.

69 *Id.* at 598–601.

The court also rejected the plaintiffs' Equal Privileges and Immunities claim,[70] deciding that the city's resolution did not violate the constitution since the restrictions applied to any person using the parks without singling out any group.[71] And the court upheld the swim park rule because the City was allegedly complying with deed restrictions, and the rule "preserv[ed] a limited city resource,"[72] affirming the City's express discrimination against non-residents as a rational classification not worthy of heightened scrutiny.[73]

Neither the trial court nor the court of appeals resolved the status of Oswego Lake.[74] But as discussed below, after the Oregon Supreme Court's decision, ownership over the lakebed and the scope of the severed riparian rights are the primary factors that will determine whether the

[70] OR. CONST. art. I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."). *See infra* notes 93–94 and accompanying text.

[71] The court explained that an article 1, section 20 violation requires a regulatory action to "grant privileges or immunities to one citizen or class of citizens" at the expense of others that would be similarly situated but for the preferential treatment. *Kramer I*, 395 P.3d at 610 (quoting State v. Savastano, 309 P.3d 1083, 1089 (Or. 2013)). Viewing the City's exclusionary park rules against this constitutional floor, the court determined that the rules applied uniformly to all people thus complying with the constitution because the rules did not confer a benefit to a specific class of person. *Id.* The court also opined that the fact that Lake Corp reserves riparian rights to the private lakefront property and grants lake access easements does not make the City's exclusionary rules discriminatory. *Id.*

[72] *Id.* at 611–12 (stating the classification of resident versus non-resident and the banning of non-resident use of the swim park satisfied a rational basis analysis applicable when classifications between people are based on characteristics that are not immutable because the City's deed restrictions required the bifurcation, and the discrimination was justified to preserve a finite City resource). These deed restrictions, while written to simply prevent the general public from overtaxing finite lake resources, were born out of earlier racial covenants established for the sole purpose of excluding people of color from Oswego Lake and the surrounding community. *Compare* CLACKAMAS COUNTY, OR., DEED BOOK 132:166 (1913) ("no structure other than single detached dwelling houses . . . shall be erected on the premises . . . in any manner used or occupied by Chinese, Japanese or Negroes, except that persons of said races may be employed as servants by residents."), *with* CLACKAMAS COUNTY, OR., DEED BOOK 358: 676 (1945) ("Grantor agrees that it was the intent and purpose of the original grants of lake rights to . . . . exclude the general public from using Lake Oswego for any purposes whatsoever, and the Grantor agrees therefore that it has always construed and will construe any and all documents affecting use of said lake in such manner as to accomplish those purposes, and protect said residents of Lake Oswego district against public intrusion."). *See supra* note 11, 63 and accompanying text; *see also infra* notes 191, 193, and 204 and accompanying text.

[73] *Kramer I*, 395 P.3d at 611–12. The Oregon Supreme Court affirmed on this issue, *see infra* notes 93–94, 280 and accompanying text, which seems to invite other forms of municipal discrimination against non-residents. *See infra* note 283 and accompanying text.

[74] *Kramer II*, 446 P.3d 1, 8 (Or. 2019) (the trial court and the court of appeals assumed, for the sake of argument, that Oswego Lake was title-navigable, and therefore owned by the State).

City's exclusionary rules override the public's paramount rights of public access to public waters.[75]

IV. THE SUPREME COURT'S OPINION

Despite these resounding losses, the undeterred plaintiffs successfully petitioned the Oregon Supreme Court to review the case. They asked the court to recognize 1) state ownership over the bed of the lake, 2) the applicability of the public trust doctrine to public uplands, and 3) a state constitutional violation of the Equal Privileges and Immunities Clause due to the City's grant of monopolistic privileges to a small group of its citizens.[76] The court rejected the constitutional claim, applying an extremely deferential standard of review.[77] Otherwise, the State's interpretation of its public trust obligations was largely, and somewhat surprisingly, rejected by the Oregon Supreme Court.[78]

The State's position on its public trust obligations before the Oswego Lake decision reflected a decidedly minimalist approach: it considered the public trust to be restricted to submersible and submerged lands and to impose no duties on the State other than restricting alienation of those lands.[79] A unanimous Supreme Court refused to endorse this narrow state interpretation of the doctrine's scope.[80] The court rejected the State's position that its public trust obligations did not extend to uplands,[81] clarified that fish and wildlife are trust resources,[82] and determined that the doctrine imposed duties on the State to protect and

[75] *Id.* at 10 ("We have emphasized, however, that for either category of waterway, 'the public has the paramount right to the use of the waters.'" (quoting Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936))). *See infra* note 87 and accompanying text.

[76] *Kramer II*, 446 P.3d at 5–6.

[77] *Id.* at 8 n.4 (declining to resolve the status of the lake, remanding this fact-finding investigation because the plaintiffs did not seek summary judgment to resolve the lake's status); *see infra* notes 93–94 and accompanying text.

[78] *Kramer II*, 446 P.3d at 10–19.

[79] State Brief, *supra* note 12, at 7 (acknowledging that "the people's right to use that land and the overlying waters—which includes all waters located in state owned waterways—for specified public uses, including navigation, fishing, commerce, and recreation." (citing Morse v. Or. Div. of State Lands, 590 P.2d 709, 711–12 (Or. 1979))).

[80] *Kramer II*, 446 P.3d at 25–26.

[81] *Id.* at 17. *See infra* note 105 and accompanying text.

[82] *Id.* at 12 n.12 ("Water is not the only resource that the state holds in trust."). *See Dickerson*, 345 P.3d 447, 455 (Or. 2014) (explaining that "Oregon courts have long used the metaphor of a trust to describe the state's interest in wildlife," and the State holds title to wildlife in trust for the benefit of the public). *See also* Portland Fish Co. v. Benson, 108 P. 122, 124 (Or. 1910) (emphasizing that "title to the fish, before they are captured is in the state in its sovereign capacity, in trust for all citizens."). *See supra* note 19 and accompanying text. *But see Chernaik*, 367 Or. 143, 157–58 (Or. 2020) (explaining that while the wildlife trust provides the state government the authority to "manage and preserve wildlife resources," it imposes no affirmative obligations on the State (quoting State v. Pulos, 64 129 P. 128, 130 (1913)).

manage the trust property for the benefit of the public.[83] The court also rejected the City's claim that it had no public trust duties.[84] These were all significant advances in judicial recognition of the scope of the State's public trust doctrine.

The State's errors in the Oswego Lake litigation were substantial and should cause the attorney general to rethink her narrow interpretation of the scope of the public trust doctrine. We elaborate in the conclusion, for we think this case reveals the State, given its apparent aversion to public trust litigation and its trustee responsibilities, may be institutionally incapable of effectively implementing the public trust doctrine going forward.[85]

The most puzzling aspect of the court's decision was its view that, only if the lakebed were state-owned, the public would have a right of access from public uplands.[86] Recognition of this access right lifted the Oregon public trust doctrine out of waterways, although it does not usually burden private uplands.[87] Nor would the right exist if the lakebed was private property, the consequence of the court's apparent adoption of a so-called "public use" doctrine.[88] Since neither the Oregon Supreme Court nor the lower courts resolved the ownership of Oswego Lake,[89] the Supreme Court sent the case back to the circuit court to make that determination.[90] Until then, the private monopoly over the lake will continue. Despite applying the public trust's protections to fish and wildlife[91] and extending the doctrine's obligations to localities,[92] the court affirmed the lower court's ruling that the City's rules did not violate the

[83] *Kramer II*, 446 P.3d at 17. *See infra* note 116 and accompanying text.

[84] *Kramer II*, 446 P.3d at 19. *See infra* note 122 and accompanying text.

[85] *See infra* notes 310–311 and accompanying text (discussing a proposed "legal guardian for future generations").

[86] *Kramer II*, 446 P.3d at 17, 19.

[87] According to the court, public rights did not burden private lands, except where temporary and necessary to maintain access under the public use doctrine. *Id.* at 11 (citing Weise v. Smith, 3 Or. 445, 450 (Or. 1869) (explaining the public use doctrine affords the public the right to access private uplands only where "the burden on the landowner was incidental and temporary . . . without imposing that incidental burden on the landowner, the navigator could not continue" navigating the waterbody)). *See also id.* at 17 n.20 (explaining that Oregon joins "other states . . . reject[ing] the" right to cross private uplands "with respect to private lands but have not considered the question of access rights from public land.").

[88] *Id.* at 9.

[89] *Id.* at 8.

[90] *Id.* at 25–26 (explaining there are genuine issues of material fact precluding a determination as to whether the City's park rules are a "'reasonable' restriction on the public's right of access.").

[91] *Id.* at 12 n.12. *See supra* notes 19, 82 and accompanying text. *But see Chernaik*, 367 Or. 143, 158 (Or. 2020) (seeming to assert that the public trust doctrine is a wholly separate legal doctrine from the wildlife trust).

[92] *Kramer II*, 446 P.3d at 18–19.

Oregon Constitution's Equal Privileges and Immunities Clause.[93] The court believed the city rules were a "reasonable" exercise of the City's authority.[94] We discuss the court's public trust reasoning below.

A. Moving the Public Trust Doctrine Upland, Amphibiously

The Oswego Lake court's most significant decision was to elevate the public trust doctrine out of navigable waters to uplands like the public parklands, an amphibious evolution of the doctrine.[95] The court presciently recognized, although the trust doctrine was a matter of state law, there was a federal minimum established well over a century ago by the U.S. Supreme Court in *Illinois Central Railroad v. Illinois*,[96] which

[93] *Id.* at 19–20, 25. The Equal Privileges and Immunities Clause of the Oregon Constitution provides "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

[94] *Kramer II*, 446 P.3d at 25. The court decided that neither the functional monopolies recognized by the City's parks nor the swim park rules violated the Equal Privileges and Immunities Clause. *Id.* at 20. The park rules were facially neutral, according to the court, because they applied to "any person" using the parks to enter the lake. Somewhat surprisingly, the court concluded even if there was a monopoly of lake access, the government extended no special privilege but instead upheld the private property rights of the shareholders of Lake Corp. *Id.* The court's willingness to look past the rule's practical effect on the public was startling. The reasoning seemed to be that since no one, including Lake Corp shareholders, could access the lake from the municipal parks, the rules did not create a privileged monopoly; instead, private property did. *Id.* But without the City's rules, the private landowners could not exclude the public from the lake. It was, in fact, the combination of the private lands and the rules that created the monopoly. The court's lapse into formalism to uphold a functional monopoly was remarkable.

As for the swim park exclusion, which the court did recognize as a special privilege granted by the City and based on city residence, the court refused to examine the non-residential exclusion under "strict scrutiny," even though it acknowledged granting of monopolies (like those based on residency) was an "original concern" of the Equal Privileges and Immunities Clause. *Id.* at 23. The court interpreted its prior case law to require only a rational basis for the swim park exclusion and affirmed the court of appeals' determination that the non-residential exclusion was reasonably related to the City's purpose of preserving recreational use by city residents, referring to the swim park as "a city-created recreational facility." *Id.* at 25. The City justified this non-residential discrimination on the basis of municipal costs, such as providing lifeguards. *Id.* The court dismissed the suggestion that those costs could be paid through user fees because the court announced that if the city's management choices are rational, it is immaterial that there exist superior available alternatives. *Id.* This deferential standard of review allowed the court to approve the swim park rules' express exclusion of non-residents, something the New Jersey Supreme Court disallowed nearly a half-century ago. Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54–55 (N.J. 1972) (concluding an ordinance excluding non-residents from a municipally owned beach violated the State's public trust doctrine). Reviewing municipalities exclusion of non-residents on a deferential rational basis test seems designed to countenance future municipal discrimination elsewhere in the State.

[95] *Kramer II*, 446 P.3d at 17 (deciding that the public trust may require a means of public access to an affected waterway, and interference with access may be a substantial impairment of the public's right to use the waterbody for public purposes).

[96] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453–54 (1892).

"set a floor for the management of public trust waters."[97] The court also noted the state legislature codified the public trust doctrine by declaring the State owned all the submersible and submerged lands of navigable waterbodies.[98] The court recognized the distinction between the public trust doctrine and the equal footing doctrine—under which the federal government implicitly conveyed title to the beds of commercially navigable waters at statehood.[99] Nevertheless, the court tied the scope of the State's public trust doctrine to those lands that were conveyed to the State under the equal footing doctrine: submersible and submerged lands under waterbodies that were susceptible to commercial navigation at statehood, or around 1859.[100] The court's reasoning was sparse.

The court seemed to think the scope of the public trust doctrine was a function of state title to lands, which is certainly not true in the vast majority of states.[101] No rationale was apparent in the court's decision to limit the scope of the doctrine in this manner in light of the fact that the public has an undeniable right to recreate on all waterbodies meeting the State's definition of navigable-in-fact waters: those capable of supporting recreational watercraft.[102] More than once, the court described the

[97] *Kramer II*, 446 P.3d at 12 n.13 (citing *Ill. Cent. R.R. Co.*, 146 U.S. at 453). Submersible lands are those between the low- and high-water marks, while submerged lands are those below the low-water mark. *Kramer II*, 446 P.3d at 13.

[98] *Kramer II*, 446 P.3d at 13 n.14 (citing OR. REV. STAT. § 274.025(1) (2019)) (excluding lands with prior vested property rights from state ownership).

[99] *Id.* at 12 (citing PPL Mont., LLC v. Montana, 565 U.S. 576, 603–04 (2012)) ("We pause to emphasize, however, that the doctrine of public ownership of the beds and banks of navigable waters and the so-called public trust doctrine are independent doctrines."); *id.* at 9 (defining equal-footing doctrine).

[100] *Kramer II*, 446 P.3d at 12 n.13 (adopting the federal test for determining a waterbody's navigability for the application of the public trust doctrine to that waterbody). *See PPL Mont., LLC*, 565 U.S. at 577 (indicating the federal test for navigability determines "waterbed title under the equal-footing doctrine," citing The Daniel Ball, 77 U.S. 557, 563 (1870)); *see also* Adler, *supra* note 47, at 1647–50 (noting the varying applications of *The Daniel Ball* test to the 1) federal regulation under the Commerce Clause, 2) federal navigational servitude, 3) admiralty jurisdiction, and 4) navigation of title test). *See infra* notes 131, 139 and accompanying text.

[101] At least the following 39 states do not limit the application of the public trust doctrine to state owned resources: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. *See* Michael C. Blumm, *The Public Trust Doctrine in 45 States* (Lewis & Clark Law Sch., Mar. 2014), https://perma.cc/L9QD-M2AD, [hereinafter 45 States Survey].

[102] Guilliams v. Beaver Lake Club, 175 P. 437, 441 (Or. 1918) ("Even confining the definition of navigability, as many courts do, to suitability for the purposes of trade and commerce, we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure"); *Luscher*, 56 P.2d 1158, 1162 (Or. 1936) ("A boat used for the transportation of pleasure-seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber;"); 2005 Att'y Gen. 8281, at 2 (2005) [hereinafter 2005 AG Opinion] ("Recreation in this case includes use of small boats for pleasure and fishing, as well as swimming.").

public's access right as "paramount."[103] Why the court thought the State's definition of navigable-in-fact waterways should not correspond to the State's public trust doctrine, the opinion never explained. As we elaborate below, we surmise the dichotomy was due to the court's acceptance of a so-called "public use" doctrine propounded over a decade earlier by the state attorney general.[104] However, because the court did not cite the Attorney General's opinion, we cannot be sure.

The court decided that public trust uses could warrant public access because the use may "require means of public access" to the water.[105] According to the decision, denying public access to public waterways "can, itself, be a 'substantial impairment' of the public's right to use the water for public trust purposes."[106] Thus, "the rights incident to public ownership of the submerged and submersible lands beneath navigable waters include a right of access to the public water from abutting public upland."[107] This linking of the public right to access from adjacent public lands to public ownership of adjacent submerged and submersible lands—by no means a self-evident nexus—would lead the court to decide that navigable-in-fact waterbodies had no such rights where the underlying bed is privately owned.

The court maintained its extension of the public trust to uplands was consistent with "the rationale" of judicial decisions in at least three other states: it cited the Iowa Supreme Court's declaration that state-owned public land adjacent to a river was part of that state's public trust doctrine, the Montana Supreme Court's decision that a private riparian landowner could not prevent the public from accessing an adjacent river from a nearby public bridge, and the New Jersey Supreme Court's recognition that the public had a right to cross private beach lands to reach the ocean.[108] A strange aspect of the court's reliance on these cases is that the last case clearly recognized public access across *private* lands to reach public waters, something the Oregon court took pains to avoid.[109]

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103 *Kramer II*, 446 P.3d at 10, 13–14.

104 *See infra* notes 128–136 and accompanying text.

105 *Kramer II*, 446 P.3d at 17 (quoting State v. Sorenson, 436 N.W. 2d 358, 363 (Iowa 1989)) (explaining the public's right to access a public waterbody requires the State to protect this adjacent property under the public trust).

106 *Id.* (citing *Morse*, 590 P.2d 709, 712 (Or. 1979)).

107 *Id.* at 15–17. The court relied on Eagle Cliff Fishing v. McGowan, 137 P. 766, 767, 217–18 (Or. 1914) (involving a lessee of riparian lands who had a right of access over submerged lands against another private party who owned the submersible lands in question and blocked the lessee's access to the Columbia River); and Smith Tug v. Columbia-Pac. Towing, 443 P.2d 205 (Or. 1968) (recognizing a public right of access to tidelands, submersible lands, and submerged lands, even where the State had conveyed a lease to a private party).

108 *Kramer II*, 446 P.3d at 16–17 (citing State v. Sorenson, 436 N.W.2d 358, 363 (Iowa 1989); Public Land Access Ass'n v. Bd. of County Comm'rs of Madison Cty., 321 P.3d 38, 53 (Mont. 2014); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 366 (N. J. 1984)).

109 *See Kramer II*, 446 P.3d. at 11 (interpreting *Weise*, 3 Or 445, 450–51 (Or. 1869)) (allowing a log-float operator to attach log booms to private lands, under a narrow exception

The court's reliance on the New Jersey Supreme Court was also a little curious since it overlooked the fact that the New Jersey public not only has a right to access public waters over private lands, but also to recreate on private beaches under certain circumstances.[110]

Nonetheless, the Oswego Lake decision recognized a public trust right to access public water from public uplands, moving the doctrine amphibiously out of the water and onto the land.[111] But the court's linking of the public's access right to ownership of the submersible and submerged lands, instead of to the State's ownership of the water itself, lacked any rationale and may encourage more municipal discrimination in the future.[112]

B. Articulating Public Trust Duties

A significant question, as yet largely unanswered in public trust law, is the criteria by which to judge government action implementing public trust duties. Perhaps the leading case is from Pennsylvania, endorsing the use of private trust principles of prudence, loyalty, and impartiality.[113] A wise commentator has recently suggested that private trustee duties are less relevant for public trustee responsibilities than the duties of conservation easement trustees.[114]

The Oswego Lake court invoked private trust law authority to declare "a trustee has a duty to protect[] trust property"[115] and to ensure trust property is "managed in a way that will benefit all trust

for temporary uses of private uplands that are necessary for the public use)*; see supra* note 87 and accompanying text.

110 The New Jersey case the court cited, *Matthews v. Bay Head Improvement Ass'n*, ruled the public's right was not limited to passage to the public waters but included reasonable enjoyment of the public tidelands and ocean, as swimming require "intermittent periods of rest and relaxation beyond the water's edge." 471 A.2d 355, 365 (N.J. 1984). The case also established a four-part test for determining whether a privately owned beach was subject to public access: "[1] Location of the dry sand area in relation to the foreshore, [2] extent and availability of publicly-owned upland sand area, [3] nature and extent of the public demand, and [4] usage of the upland sand land by the owner." *Id*. A case that the court did not cite, *Raleigh Beach v. Atlantis Beach Club*, ruled a private beach met the four-part standard, and therefore had to accommodate public access. 879 A.2d 112, 121–25 (N.J. 2005).

111 *Kramer II*, 446 P.3d at 16–17

112 *See supra* notes 93–94; *infra* note 295 and accompanying text.

113 Pa. Env't Def. Found. v. Pennsylvania, 161 A.3d 911, 932–35 (Pa. 2017) (adopting private trust law to protect public trust resources and their proceeds by treating the State as a trustee rather than a proprietor).

114 John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 U. MICH. J.L. REF. (forthcoming 2020) (concluding although all trustees have duties of prudence and loyalty, the duties imposed on conservation trustees are more appropriate analogies to public trust doctrine trustees than those imposed on private trustees).

115 *Kramer II*, 446 P.3d at 17.

beneficiaries."[116] The court relied on the Restatement of Trusts to construe the trust duties imposed on the State.[117] This reliance led the court to narrow the discretion that the State would otherwise employ under its police powers and require the imposition of a standard of "objective reasonableness" in a public trust doctrine case,[118] which may prove to be a significant restriction on state discretion, presumably requiring the State to document with some specificity any decisions to deny public access which the court considered to be a significant impairment of trust resources.[119]

C. Applying the Public Trust to Municipalities

The City of Lake Oswego contended, fruitlessly as it turned out, it was not subject to the same public trust obligations the State had.[120] The court had little difficulty in deciding the public trust doctrine's obligations apply to the City just as they do to the State.[121] Thus, assuming the public trust doctrine applies to the lake, the City could not substantially and unreasonably interfere with the public's paramount right to access the lake.[122]

At trial, the City argued the public trust doctrine did not apply to the municipalities because the State is the trustee for all public trust doctrine waters, and assigning trust duties to municipalities would interfere with the State's responsibilities.[123] This argument proved unpersuasive to the Supreme Court, which ruled that the City is always an agent of the State

116 *Id.*

117 *Id.* (citing White v. Pub. Emps. Ret. Bd., 268 P.3d 600, 615 (Or. 2011)); RESTATEMENT (THIRD) OF TRUSTS §§ 76–79 (AM. L. INST. 2005) imposes the duty to administer the trust in accordance with the trust's terms and applicable law, the duty of prudence, the duty of loyalty, and the duty of impartiality on the trustee. In administering the trust, the trustee must do so "diligently and in good faith, in accordance with the terms of the trust and applicable law." *Id.* at § 76(1). Second, the trustee must also "exercise reasonable care, skill, and caution as a prudent person would, given the purpose of the trust and if the trustee possesses greater skill than that of a prudent person, the trustee has a duty to use that skill." *Id.* § 77(1)– (3). Third, the trustee must administer the trust "solely in the interest of the beneficiaries." *Id.* § 78(1). Fourth, the trustee must be impartial with respect to the individual beneficiaries. *Id.* § 79(1).

118 *Kramer II*, 446 P.3d at 17 (citing *White*, 268 P.3d at 615) (concluding that the trustee did not breach its fiduciary duty to protect trust assets when entering into a settlement agreement, because it acted reasonably to ensure the long-term vitality and stability of the trust property).

119 *See supra* note 105.

120 *Kramer II*, 446 P.3d at 18.

121 *Id.* (observing if the public trust doctrine precluded an action by the State, the City would be unable to take the same action).

122 *Id.* (explaining the City took affirmative action to enact the park rules to restrict access to Oswego Lake). *See supra* notes 21, 93–94 and accompanying text; *infra* notes 210, 275, 293 and accompanying text.

123 *See Kramer II*, 446 P.3d at 18 (disagreeing with the City's argument that assigning trust duties to the City would encroach on the State's role as trustee for public resources).

under the public trust and, therefore, may have violated its trust duties by excluding the public from the lake.[124] The court explained that although home-rule authority provides municipalities in Oregon the power to regulate to the fullest extent of their charters, no local regulation can contravene either state or federal law.[125] As an agent of the State, the City was subject to the public trust doctrine and may have violated its trust duties by creating the park rules to exclude the public from accessing an alleged public trust resource.[126] The decision was a complete endorsement of the applicability of public trust law to municipalities, consistent with several other jurisdictions.[127] Thus, citizens may hold municipalities to account for public trust violations, without the need for the State to join the suit, which may encourage localities to be more careful when considering ordinances excluding non-residents from public trust resources or undertaking actions significantly impairing them.

[124] *Id.* at 19 (explaining the Oregon Constitution delegates state authority to municipalities including any limitation or obligations that constrain state action).

[125] *Id.* at 18 (citing to OR. CONST. art. IV, § 1(5), art. XI, § 2) (confirming the home rule provisions directly grant municipalities the authority to exercise some of the State's police powers). But that delegation of authority did not alter the obligation of municipalities because they function as agents of the State. *Id.* (relying on Kinney v. Astoria et al., 217 P. 840, 845 (1923)) (articulating cities conveniently administer local law on behalf of the state as its agent).

[126] *Kramer II*, 446 P.3d at 19, 25 (concluding if the lakebed is state-owned, the City cannot ban the public from accessing the trust resource from the city-owned public uplands without an "objectively reasonable" basis in light of the public's "paramount" access rights).

[127] *See, e.g.*, Williams v. Gallatin, 128 N.E. 121, 122 (N.Y. 1920) (establishing the rule that the parks are protected by the public trust doctrine and any use of a park by the City other than for encouraging public recreation requires direct legislative sanction); Raritan Baykeeper, Inc. v. City of New York, 984 N.Y.S.2d 634 (N.Y. 2013) (determining the City's solid waste management facility was not a traditional or legitimate park use because it deprived the public of recreational access, at odds with the purpose of the public trust doctrine); Bd. of Trustees of Phila. Museum v. Trustees of the Univ. of Penn., 96 A. 123, 126 (Pa. 1915) (prohibiting the conveyance of public city park lands for private purposes); Paepcke v. Pub. Bldg. Comm'n of Chicago, 263 N.E.2d 11, 19 (Ill. 1970) (citing City of Madison v. Wisconsin, 83 N.W.2d 674 (Wis. 1957)) (allowing the Chicago Park District to convey a small portion of a public park to the school district to build a school by adopting the five-factor test from Wisconsin courts: "1) that public bodies would control the use of the area in question, 2) that the area would be devoted to public purposes and open to the public, 3) the diminution of the area of original use would be small compared with the entire area, 4) that none of the public uses of the original area would be destroyed or greatly impaired, and 5) that the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded those members of the public using the new facility."). *See generally* Mackenzie S. Keith, *Judicial Protection for Beaches and Parks: The Public Trust Doctrine Above the High Water Mark*, 16 HASTINGS WEST NORTHWEST J. ENV'T L. & POL'Y 165, 166 (2010) (addressing the amphibious nature of the public trust and the limitations it imposes on municipalities' use of parklands).

D. Distinguishing Between the Public Trust and Public Use Doctrines

The most puzzling aspect of the Oswego Lake opinion was its refusal to recognize public rights to all public waters from public lands. This result was due to the court's apparent endorsement of an Oregon Attorney General's opinion it never cited. Some explanation is necessary.

In 2005, the Oregon Attorney General issued a comprehensive opinion on the scope of the State's ownership and use of waterways in the State.[128] The opinion narrowly interpreted two Oregon Supreme Court opinions, denying they were public trust decisions at all.[129] In the first case, *Guilliams v. Beaver Lake Club,* the court decided a riparian landowner could not exclude the public from a stream that lacked title-navigability, meaning the streambed was privately owned.[130] The court reasoned that although the State lacked ownership in the riverbed, the public had the right to use it for boating without the permission of the owner of the underlying bed.[131] The court quoted from a Minnesota

[128] 2005 AG Opinion, *supra* note 102. The opinion responded to a request from the State Land Board that the Attorney General explain 1) the criteria determining the ownership interest the State acquired to waterways at statehood and whether there are limits on the ability of the State to dispose of its ownership or restrict public use of these waterways; 2) the rights of the public to use waterways whose beds are privately owned; and 3) the extent of those rights and the types of waterways subject to them. The 33-page opinion concluded the State acquired (with a few exceptions) all waterways subject to tides or which satisfied the federal test of title-navigability at statehood. For those waterways, both federal and state law limit the State's ability to alienate its ownership if doing so would interfere with the public's use of the waterway for navigation, commerce, recreation, or fisheries. The 33-page opinion also recognized that the public has the right to use waterways even where the bed is privately owned if the waterbody has the capacity to enable boats to make successful progress for navigation, commerce, or recreation (the so-called "public use doctrine" that the attorney general constructed for these "navigable-in-fact waters"). "Recreation" includes small boats for pleasure and fishing as well as swimming, and the public may use the land adjacent to these waters if the use is "necessary" to lawful use of the waterway:

> [U]nless state ownership has been confirmed by a judicial decree or the Board under ORS 274.400 *et seq*., persons who use a waterway believing it to be state-owned incur the risk that it will be held to be privately owned and that their use will constitute a trespass – unless their use is authorized by the public use doctrine.

Id. at 1–2. *See also* Michael C. Blumm & Erica Doot, *Oregon's Public Trust Doctrine: Public Rights in Water, Wildlife, and Beaches*, 42 ENV'T L. 375, 383–84 (2012) (discussing the 2005 AG opinion).

[129] 2005 AG Opinion, *supra* note 102, at 16–17.

[130] 175 P. 437, 441–42 (Or. 1918).

[131] *Id.* at 439 (citing Shaw v. Oswego Iron Co., 10 Or. 371, 375–76 (1882)) (highlighting the four distinct classes of waterbody: "(1) Those in which the tide ebbs and flows, which are technically denominated navigable, in which class the sovereign is the owner of the soil constituting the bed of the stream, and all right to it belongs exclusively to the public. (2) Those which are navigable in fact for boats, vessels, or lighters. In these the public has an easement for the purposes of navigation and commerce, they being deemed public highways for such purposes, although the title to the soil constituting their bed remains in the adjacent owner, subject to the superior right of the public to use the water for the purposes of transportation and trade. (3) The streams which are so small and shallow that they are not

Supreme Court opinion which stated that allowing private landowners to exclude the public from these waterways was to create an unacceptable monopoly because "[t]o hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated."[132]

The court reinforced those public rights a couple of decades later, in *Luscher v. Reynolds*,[133] concerning Blue Lake, an artificially enlarged lake which allegedly was privately owned.[134] Repeating the above quote from the Minnesota court about the dangers of monopolizing waterways, the Oregon Supreme Court described the public's right as a public easement or servitude.[135] These public rights seemed to be an expansion of the State's public trust doctrine. But the Attorney General would later use the easement or servitude language to diminish the scope of the Oregon public trust doctrine, although without explicitly saying so.

The vehicle for diminishing the trust doctrine's scope was the invention of a newly named public right, the so-called "public use doctrine." According to the Attorney General, *Guilliams* and *Luscher* were not actually public trust cases because the opinion assumed, without citation of authority, the doctrine extended only to public lands that the State owned.[136] The Attorney General never acknowledged the existence of the overwhelming number of jurisdictions recognizing the scope of the public trust to be unrelated to public land ownership;[137] but, limiting the scope of the public trust doctrine to waters where the State owned the beds would substantially reduce state duties and potential liabilities. The creation of this "public use doctrine" did both. It limited the public trust to state-owned lands and reduced the State's obligations in the process; convenient for the State, but not for the Oregon public, which lost enforcement authority by the clever invention of a doctrine imposing no duties on the State.

navigable for any purpose, the public has no right to whatever. (4) To this list may be added our larger rivers susceptible of a great volume of commerce where the title to the bed of the stream remains in the state for the benefit of the public."). The Oregon Supreme Court in *Kramer* focused on the second classification to support adopting the public use doctrine it derived from the 2005 AG Opinion. *Kramer II*, 446 P.3d at 9; 2005 AG Opinion, *supra* note 102, at 17.

132 *Guilliams*, 175 P. at 442 (citing Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893)).

133 56 P.2d 1158 (Or. 1936).

134 *Id.* at 1162.

135 *Id.* (applying the four-category classification for waterbodies, *see supra* note 131, and quoting *Guilliams*, 175 P. at 439). *See supra* note 128 (discussing the 2005 AG opinion).

136 2005 AG Opinion, *supra* note 102, at 16–17.

137 *See* 45 States Survey, *supra* note 101 (summarizing widespread acceptance that the public trust doctrine applies to waters (and sometimes lands) where the state has no ownership interest; these states include at least California, Florida, Maine, Massachusetts, New Jersey, North Carolina, Utah, South Carolina, and South Dakota. The Nevada Supreme Court recently declared that all waters in the state are subject to the public trust doctrine. Mineral County v. Lyon County, 473 P.3d 418 (Nev. 2020)).

Removing waterways whose beds are privately owned from the scope of the public trust doctrine considerably diminished the reach of the public trust doctrine in the State: only those waters susceptible to commercial navigation in their natural or ordinary condition at the time of statehood in 1859 qualify.[138] The beds of these waterways are state-owned under what is known as the federal test for title.[139] There are far fewer of these waterbodies than those capable of supporting recreational watercraft, which is the state test for a so-called "navigable-in-fact" waterway and has been for over a century.[140] In fact, the State considers only fifteen river segments and seventy-four lakes to be title navigable, and therefore public waters under a patchwork of legislative, judicial, and administrative proceedings.[141] Thus, the Attorney General's public use doctrine would substantially reduce the State's trust responsibilities (and potential litigation exposure) if affirmed by the courts. There was some irony, however, in mapping the boundaries of the State's public trust doctrine with the federal title test rather than the State's own navigable-in-fact test,[142] since it is unusual for a state to decide to circumscribe its

[138] 2005 AG Opinion, *supra* note 102, at 3 (adopting the federal test for navigability as the threshold analysis when applying the public trust to waterbodies).

[139] A waterway meets the federal test for title if there is proof of its use as a highway for commerce at the time of statehood, or susceptibility to such use in its natural and ordinary condition for trade and travel by a mode of transportation customary in that era. *Kramer II*, 446 P.3d 1, 9 n.8 (Or. 2019) (citing *PPL Mont., LLC*, 565 U.S. 576, 592 (2012)). The test originated in The Daniel Ball, 77 U.S. 557, 563 (1870). *See also* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370 (1977) (quoting Mumford v. Wardwell, 6 Wall. 423, 436 (1867) (on the basis of the equal-footing doctrine, the state reserves a sovereign interest in the shores and submerged lands of all navigable waters within a state because each state has "the same rights, sovereignty, and jurisdiction . . . as the original States" in submerged lands underlying navigable waters).

[140] *Kramer II*, 446 P.3d at 9–10 (stating Oregon protects public easements to navigate waters that do not meet the federal test for navigability yet are still navigable-in-fact). Waterways susceptible to use by recreational watercraft have been considered to be navigable-in-fact since *Guilliams*, 175 P. at 442. *See* 2005 AG opinion, *supra* note 102, at 17; *supra* notes 128, *infra* notes 143, 155 and accompanying text.

[141] *See, e.g.*, Act of Feb. 14, 1859, ch. 33 § 2, 11 Stat. 383 (1859) (granting the titles of the Columbia and Snake Rivers to the State); OR. REV. STAT. § 273.900 (2019) (confirming title to the tidal influenced portions of the Coos, Coquille, and Willamette rivers); OR. ADMIN. R. 141-081-0050 (1976) (declaring segments of the Rogue, McKenzie, and Umpqua rivers to be title-navigable waterways); *Corvallis Sand & Gravel*, 429 U.S. 363 (1977), *remanded* to 582 P.2d 1352, 1364 (1977) (declaring the non-tidal influenced portion of the Willamette river to river mile 187 to be a state-owned, title-navigable river). *See also State-Owned Waterways: Rivers*, STATE OF OREGON (Aug. 3, 2016) https://perma.cc/4P3Z-FRCK (listing state-owned rivers along with authority declaring state ownership); *see also Use of State-Owned Waterways: Lakes*, STATE OF OREGON (Aug. 30, 2017) [hereinafter Navigable Lake List] https://perma.cc/6WPK-QGTU (listing state-owned lakes, along with authority declaring date ownership) (last visited Nov. 19, 2020).

[142] 2005 AG opinion, *supra* note 102, at 30 n.17 ("While a waterway's 'navigability' is determinative under both the federal test for state ownership of non-tidal waterways and the state test for public use rights, the term's meaning is not precisely the same for both contexts . . . . For that reason, it is possible that a given stretch of waterway might not be

authority in deference to a federal test that was not meant to trump state jurisdiction.[143]

The Oswego Lake decision was the court's first examination of the State's public trust doctrine in forty years.[144] In it, the court appeared to ratify the Attorney General's public use doctrine—a doctrine which exists in no other state—without citing the 2005 opinion,[145] which no court had previously affirmed. Interpreting both *Guilliams* and *Luscher,* the court agreed with the Attorney General that waterbodies subject to the public use doctrine have a public easement over privately owned beds because they are "public highways for purposes of navigation and commerce."[146] The 1859 Oregon Statehood Act declared all navigable waters to be "common highways and forever free,"[147] an antimonopoly sentiment that ought to inform the courts of the fundamental purpose of the State's public trust doctrine. Just ten years after statehood, the Oregon Supreme Court, in *Weise v. Smith*,[148] ruled a log-float operator could fasten log booms on private uplands, characterizing the public's rights to use rivers like the Tualatin as a "public easement" or "public servitude."[149]

The Oswego Lake court took pains to emphasize the use of private property recognized in *Weise* was a narrow, incidental exception based on

title-navigable and therefore not state-owned, but nevertheless navigable-in-fact for purposes of the Oregon public use doctrine.").

143 Since Shively v. Bowlby, 152 U.S. 1, 57–58 (1894), the Supreme Court has indicated that the scope of the public trust doctrine is a matter of state law. *See PPL Mont., LLC*, 565 U.S. at 604 ("Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.").

144 Before the Oswego Lake case, the court had not investigated the scope of public trust doctrine since *Morse*, 590 P.2d 709, 711–12 (Or. 1979), although it has interpreted the applicability of the federal title test under equal footing in, for example, Oregon v. Riverfront Prot. Ass'n, 672 F.2d 792, 794–96 (9th Cir. 1982) (reversing the district court to declare a portion of the McKenzie River title-navigable under the federal test). *See also* Nw. Steelheaders Ass'n v. Simantel, 112 P.3d 383, 387, 390, 395 (Or. Ct. App. 2005) (determining whether segments of the John Day River were title-navigable and therefore subject to the public trust); Hardy v. State Land Bd., 360 P.3d 647, 654 (Or. Ct. App. 2015) (determining whether segments of the Rogue River were title-navigable and therefore subject to the public trust).

145 *See Kramer II*, 446 P.3d at 9–10; 2005 AG Opinion, *supra* note 102, at 16–17 (explaining the application of the public use doctrine to Oregon's waterways).

146 *Kramer II*, 446 P.3d at 10 (agreeing with the 2005 AG Opinion, *supra* note 102, at 17). *See also* Shaw v. Oswego Iron Co., 10 Or. 371, 375 (1882) (asserting that navigable-in-fact waters did not meet the federal test to title-navigability). Courts long ago broadened this test to recognize transportation for pleasure. *See, e.g.*, *Luscher*, 56 P.2d 1158, 1162 (Or. 1936) (citing *Guilliams*, 175 P. 437, 442 (Or. 1918)).

147 The court cited the Oregon Statehood Act for the proposition that title to lands beneath navigable waters were granted to the State upon admission into the Union. *Kramer II*, 446 P.3d at 8 n.5 (quoting the Act of Feb. 14, 1859, ch. 33, § 2, 11 Stat. 383) ("All navigable waters of said State, shall be common highways and forever free, as well as to the inhabitants of said State . . . .").

148 3 Or 445 (Or. 1869).

149 *Id.* at 449, 451; *Shaw*, 10 Or. 371, 382–83.

temporary necessity and it did not recognize a general right-of-way to cross private land to reach navigable-in-fact waters.[150] The plaintiffs never asked for such a right. Hence, the court's concern regarding an easement over private uplands was based on hypothetical facts not at issue in the case, which was actually about access from public parklands.[151]

Perhaps the court's misplaced concern over perceived threats to private property rights led it to decide so-called "public use doctrine waterways" lacked access rights from uplands possessed by public trust doctrine waterways. The court decided the easement language used in previous cases to describe public rights in waterways whose beds were privately owned "does not give [to one using a navigable-in-fact waterbody] a right of way on the land."[152] This statement seemed to lose sight of the fact the public already had a right to occupy the public parklands at issue in the case.[153] The real issue was whether the City could stop its public invitees from entering public waters from public lands. The court never gave a reason for failing to recognize such a right, other than saying it had not recognized one before, overlooking the public nature of the uplands involved in the case.[154]

The unsatisfactory result of the decision is private ownership of a waterway's bed could defeat the public's paramount right to navigate and recreate on a public waterbody, even from public lands, if the private owners effectively control the local government. The decision never indicated the court was aware of this potential monopoly power, supplying no reasoning for why the private nature of the bed should curtail the public's ability to recreate on navigable-in-fact waters—a right the court has recognized for over a century[155]—from public uplands. The result will require the plaintiffs to show at trial Oswego Lake is navigable under the federal test, a time-consuming and expensive proposition. The following sections explore the issues that the remand must resolve.

150 *Kramer II*, 446 P.3d at 11.

151 The court noted that the plaintiffs sought "a declaration the owner of abutting land must allow the public to use that land . . . ." *Id.* at 11 (suggesting that their claim could impose an access easement burdening private riparian landowners). But the plaintiffs actually requested access only from adjacent public lands. *Id.* at 15. The court's concern over private rights to exclude the public was untethered to any facts in evidence.

152 *Id.* at 11 (quoting Lebanon Lumber Co. v. Leonard, 136 P. 891, 892–93 (Or. 1913)).

153 *Id.* at 15.

154 The court declared without mentioning the public uplands at issue, "[b]ut this court has not applied the principle of a public easement to use the waterway to create a different and additional public easement to use the abutting upland to reach the water in the first place." *Kramer II*, 446 P.3d at 10.

155 The public has had the right to use waterbodies suitable for recreational watercraft since the *Guilliams* decision in 1918. 175 P. 437, 441–42 (Or. 1918); *see supra* note 146 and accompanying text.

V. THE HISTORY OF PROPERTY TRANSACTIONS AFFECTING OSWEGO LAKE

On remand, the trial court must determine the navigability under the federal navigability test. The title-navigability determination will require an examination of the use of the lake and surrounding lands at the time of Oregon statehood in 1859. Moreover, the court will have to address Lake Corp's claim that it owns both the bed of Oswego Lake and severed the riparian rights from the upland public parks surrounding the lake. This assessment will require a historical accounting of the chain of title to the lakefront properties from 1859 to the present. An examination reveals the dubious nature of Lake Corp's assertions.

A. Anglo-American Settlement: Introducing Property Rights to Waluga

The lake was originally an abandoned channel of the Tualatin River, created 13,000 to 15,000 years ago during the Missoula Floods.[156] The original inhabitants of the area, the Clackamas people, who resided along the lower Willamette, and the Kalapuya-speaking Tualatins whose territory covered the Tualatin Plains, likely used the lake for harvesting Wapato bulbs.[157] These Native American tribes gave the lake its first of three names—Waluga, meaning wild swan—after the birds that lived there.[158]

Shortly before 1850, white settlers arrived and renamed the waterbody Sucker Lake because of the abundance of suckerfish present in its waters.[159] Under the federal Donation Land Act of 1850, each settler could claim up to 320 acres of land in the Oregon Territory, and some of them established the first recorded titles in the area.[160] Homesteads soon

156 *Explore the Watershed*, OSWEGO LAKE WATERSHED COUNCIL, https://perma.cc/6QRB-2NCM (last visited Oct. 4, 2020) [hereinafter *Explore the Watershed*].

157 *See* BECKHAM, *supra* note 29, at 6 (discussing the high probability of canoe use on the lake for the gathering of Wapato (*Sagittaria latifolia*), a plant found in shallow waters). The Wapato plant produces edible tubers, a staple of the local tribes' diets. Archeologists have not found evidence of Native American settlements in the Oswego area, but projectile points have been documented in several locations around the lake. FULTON, *supra* note 30, at 9.

158 *Explore the Watershed*, *supra* note 156. The pedigree of the name Waluga is in some doubt. *See* Henry Zenk, *Notes on Native American Place-names of the Willamette Valley Region*, 109 OR. HIST. Q. 6, 29 (2008) (stating that the author could not find the source of the name, Waluga, but the Tualatin Kalapuyan tribe's name for Oswego Creek "translates as 'sucker-place-creek'" which makes it more likely that the white settlers simply adopted the Kalapuyan name for the creek and lake); Susanna Kuo, *1870s*, OR. IRON CHRONICLES, https://perma.cc/45HE-WG9E (last visited Dec. 7, 2020) (highlighting an 1881 map by Borthwick Batty & Co. that identified Sucker Lake as "Tualatin Lake").

159 FULTON, *supra* note 30, at 15 ("The pioneers named the creek [and lake] 'Sucker' because there were so many suckers there that they seined them to use for fertilizer.").

160 *See generally How the Donation Land Act Created the State of Oregon and Influenced its History*, OR. HIST. SOC'Y, https://perma.cc/V4H4-NCVL (last visited Oct. 16, 2020) (discussing the qualifications of settlers who were qualified to claim the free land and the federal policies that transformed a U.S. territory into a state). Most claims before 1850 were 640 acres because a husband and wife could each claim adjacent parcels and combine them.

encompassed the lake, creating the foundation for private ownership around present-day Oswego Lake.[161]

Albert Durham, a migrant from Ohio, was one of the first settlers near the eastern end of Sucker Lake.[162] He built a sawmill and dam in 1850 on the outlet of Sucker Lake on his Donation Land Act claim.[163] Durham's homestead wholly encompassed what is present-day downtown of the City of Lake Oswego and three of the public parks at issue in *Kramer*.[164] In 1852, a surveyor, Butler Ives from the General Land Office, surveyed Sucker Lake.[165] His survey recorded baseline information about the lake, including its location, circumference, and various widths,[166] meandering Sucker Lake as a navigable waterbody two years after Durham raised the level of the lake with his dam.[167] The meander survey had lasting effects on subsequent land surveys, and ensuing conveyances of the Donation Land Act claims.[168] For example, because the original borders of Durham's claim contained a portion of submerged land subsequently inundated by the raised level of Sucker Lake,[169] the surveyor, Israel Mitchel, following a year after the first surveyor, Butler Ives, subtracted the submerged land from Durham's property, on the assumption a person could not hold title to submerged lands under navigable waters unless the United States had explicitly conveyed such rights.[170]

Oregon Donation Land Act, OR. ENCYCLOPEDIA (Aug. 13, 2020), https://perma.cc/SJD7-T93E.

161 *Plat Image Original Survey*, BUREAU OF LAND MGMT. GEN. LANDS OFF. RECS., https://perma.cc/W9N9-6CXL (last visited Oct. 20, 2020) [hereinafter 1862 Survey].

162 REV. H. K. HINES D. D., AN ILLUSTRATED HISTORY OF THE STATE OF OREGON 489–90 (1893), https://perma.cc/9X24-LQ2P (last visited Oct. 28, 2019). According to the historian Ann Fulton, Durham was native to Ohio who lived in Illinois for a brief time before emigrating to Oregon. FULTON, *supra* note 30, at 15.

163 *Id.* at 490.

164 *See Plat Image Original Survey*, *supra* note 161. *See also* FULTON, *supra* note 30, at 15, 91.

165 *See* BECKHAM, *supra* note 29, at 12.

166 *Id.* at 8 (explaining that the General Land Office contracted with Ives to assist in the subdivision of Township 2 South, Range 1 East, Willamette Meridian by surveying and meandering all navigable waterways within the township). Ives apparently believed Sucker Lake to be navigable and meandered it in 1852, observing that the dam raised the lake level approximately six feet above its "natural level" yet preceded to find the "natural width" of the lake based on the raised level of the lake. *Id.* at 2.

167 *Id.* at 12.

168 *Id.* at 61 (explaining that the General Land Office required surveys of Donation Land Act claims surrounding Sucker Lake in 1853 to enforce the conditions of the statute and provide more accurate legal descriptions of the parcels).

169 *Id.* (reproducing Mitchel's field notes).

170 *Id.* ("The submerged lands were thus excluded from the Durham claim and remained in title to the United States per the Oregon Treaty of June 15, 1846."). Both the Oregon Supreme Court and the U.S. Supreme Court largely ratified the surveyor's assumption that federal grants to private landowners did not usually include lands submerged beneath navigable waters. *See* Bowlby v. Shively, 30 P. 154, 159 (Or. 1892) (declaring a state's absolute ownership over tidelands comes from its sovereign authority; therefore, the State's title was

A decade later, Durham sold his land in a series of conveyances between 1863 and 1864 and purchased fifteen acres of timberland on the west end of Sucker Lake to supply his sawmill.[171] Much like the land surveys a decade before, the language in these conveyances and others like it did not expressly convey ownership of the lakebed.[172] The lack of any private claim to the lakebed suggested its ownership remained with the State.[173]

B. The Commercialization of Sucker Lake

After the discovery of iron ore deposits in the hills north and south of Sucker Lake in 1861, commercial development expanded rapidly.[174] The increased activity led to many land transfers.[175] Henry D. Green, one of the founders of the Oregon Iron Company,[176] purchased four acres of Durham's land at the mouth of Sucker Creek as well as Durham's water rights in anticipation of an impending iron rush.[177] The Oregon Iron Company quickly went to work purchasing and developing the tracts of land and the water rights in the eastern end of the lake for "mining, smelting, and manufacturing" pig iron.[178] However, the company was forced into foreculosure in 1876 after protracted legal disputes and

not affected by previous federal land grants), *aff'd sub. nom.* Shively v. Bowlby, 152 U.S. 1, 58 (1894) (construing a federal Oregon Land Donation Act claim to not include submerged lands and establishing a presumption against pre-statehood grants, like those authorized by the Oregon Act, unless the grant was to respond to a "public exigency" or to fulfill an international treaty obligation).

171 *See* BECKHAM, *supra* note 29, at 14.

172 *Id.* at 65 (observing the deed language in the other land claims surrounding Sucker Lake did not assign ownership of the lakebed).

173 *Id.* at 76 (questioning the validity of Oregon Iron & Steel's conveyance of the bed of Oswego Lake to Lake Corp because the previous conveyances to Oregon Iron & Steel did not include the lakebed).

174 *Oswego Iron Mines,* OREGONIAN, Apr. 26, 1961, at 3 (heralding the discovery of iron deposits around Oswego township). *See also* Fulton, *supra* note 30, at 29 (explaining that the southern ore deposit, the Patton beds, were strip mined, while the workers extracted the northern deposits at the Prosser mine, a shaft mine).

175 *See* BECKHAM, *supra* note 29, at 70 ("None of the eight, original landowners with property abutting the lake received nor conveyed any right, title, or interest in the lake excepting the water right established in 1850 by Albert A. Durham for the operation of his sawmill and grist mill on Sucker Creek.").

176 Henry D. Green, who owned Portland Water Company with John Green and Herman C. Leonard, began a lengthy and convoluted history of property consolidation of the eight original donation land act claims by establishing the Oregon Iron Company in 1865. *See* BECKHAM, *supra* note 29, at 16.

177 *See* BECKHAM, *supra* note 29, at 15–16.

178 *Id.* at 16. See Susanna C. Kuo & Rick Minor, *The Oswego Furnace: Industrial Archaeology at the First Iron Works on the Pacific Coast*, 42 J. SOC'Y FOR INDUS. ARCHEOLOGY 37, 40 (2016) (explaining that the facility principally produced pig iron).

capitalization issues—likely a result of the national depression of 1873[179]—doomed the operation.[180]

A successor company, Oregon Iron & Steel, incorporated in 1882, successfully produced pig iron for a number of years; processing 12,305 tons at its peak in 1890.[181] At the same time, Oregon Iron & Steel consolidated the remaining real estate around Sucker Lake to become the single, largest landholder in the area.[182] Still, none of the conveyances contained language describing an ownership interest in the bed of Sucker Lake by any party, reinforcing the presumption that the State owned the lakebed since statehood in 1859.[183]

C. The Decline of Industry and the Rise of Modern Oswego Lake

In 1889, a narrow-gauge railroad began operating along the Willamette River from Portland to Sucker Lake, increasing the number of visitors to the area.[184] But, the national economic Panic of 1893 stunted the growth of the Oswego area when it forced Oregon Iron & Steel to shut down its mining and smelting operations in early 1894.[185] When it became apparent that they could not financially restart the operation, the company's owners began exploring the possibility of converting their land holdings into marketable real estate.[186] They began promoting recreational visits to Sucker Lake to attract home buyers for residential development.[187] In 1913, Sucker Lake was renamed a final time to Oswego Lake, a more appealing name in the real estate market.[188] The

179 Companies, both large and small plunged into bankruptcy. Even the Oregon & California Railroad, with its vast land holdings, collapsed during the economic depression. BECKHAM, *supra* note 29, at 27–28.

180 *See* Kuo, *supra* note 178, at 40, 42 (stating that the furnace lay dormant from 1869 to 1874 following a "dispute over water rights with the owner of Sucker Lake dam" but resumed operations in 1874 under new management).

181 *Oswego Iron Furnace*, OR. ENCYCLOPEDIA (May 16, 2019), https://perma.cc/4PDH-362F. Despite the successful production of pig iron, Oregon Iron & Steel quickly ran into capitalization problems and internal power struggle issues that hampered its productivity. FULTON, supra note 30, at 38–39.

182 BECKHAM, *supra* note 29, at 30. See *supra* note 176 and accompanying text.

183 *Id.* at 67–68 ("The chain of title from Caleb Barnes [1851 donation land claim] and Henry and Mary Prosser [1866 donation land claim] to the plat of Lake View Villas in 1912 by Oregon Iron & Steel Company nowhere identified ownership of any part of Sucker Lake. The properties in the Lake View Villas subdivision reached to the margin of the lake and no farther.").

184 *Id.* at 41.

185 Kuo, *supra* note 178, at 43. The Panic of 1893 ended iron production in Oswego, transforming Reed's dream of becoming a titan of the steel industry akin to Andrew Carnegie. *See* FULTON, *supra* note 30, at 44–45.

186 FULTON, *supra* note 30, at 71–72. *See* BECKHAM, *supra* note 29, at 41 (explaining that by 1912, Oregon Iron & Steel's owners had surveyed and platted "Lake View Villas.").

187 *See* FULTON, *supra* note 30, at 73 (incorporating tour-boat excursions to market its land holdings).

188 BECKHAM, *supra* note 29, at 41.

various deeds and subdivision declarations from Oregon Iron & Steel confirmed its land ownership and those of its successors ended at the meandered, artificially elevated shoreline.[189]

In a 1917 subdivision declaration of Lake View Villas, Oregon Iron & Steel asserted, evidently for the first time, the right to control the use of watercraft on the lake under the easement it claimed to possess as the successor to the Durham water right.[190] The watercraft restriction was accompanied by a complimentary reservation of riparian rights to prevent public access to or use of the lake.[191] However, the language of the 1917 declaration, in keeping with all prior conveyances since 1850, omitted any ownership claim to the lakebed.[192]

In 1941, lakefront landowners sought to acquire control of the lake from the Oregon Iron & Steel Company.[193] The lakefront owners incorporated Lake Corp to assume control of access to the lake from the Oregon Iron & Steel Company.[194] On July 15, 1942, the company transferred the lake's so-called "rim," a kind of riparian boundary, as well as the lakebed itself to the Lake Corp,[195] which claimed for itself the "exclusive right and benefit . . . to use the waters and bed of the Lake Oswego and all branches thereof, and inlets thereto, as a reservoir and a conduit for power purposes."[196] Three years later, Oregon Iron & Steel transferred its "right, title, and interest in and to the bed of Lake

189 *Id.* at 68 (reporting that the "Oregon Iron & Steel Company affirmed its riparian rights to the meandered shore, as established by Butler Ives in 1852, or to the 'artificially created' shore by construction of various dams at the eastern end of the lake" in the Lake View Villas subdivision).

190 *Id.*

191 *See id.* (citing CLACKAMAS COUNTY, OR., DEED BOOK 148: 88 (1917)) ("The grantor hereby expressly reserves unto itself, its successors and assigns forever, all and singular the riparian rights and privileges appertaining to that body of water known as Oswego Lake as meandered or artificially created which are now vested in the said grantor and (or) which may hereafter arise or become appurtenant in or to said body of water.").

192 *See supra* note 176.

193 *See* FULTON, *supra* note 30, at 102–03 (observing that the residents had grown accustomed to the lake maintenance services provided by Oregon Iron & Steel's property management company and opposed the possibility of government control)*; supra* note 31 and accompanying text.

194 FULTON, *supra* note 30, at 102.

195 *See* BECKHAM, *supra* note 29, at 59, 68–69 (citing CLACKAMAS COUNTY, OR., DEED BOOK 296: 244 (1942)) (describing the "property *within* the boundaries of Lake Oswego, as artificially created or otherwise, to be conveyed to Lake Oswego Corporation") (emphasis added). Although the deed language demarcated the boundary at the "rim" of the lake, a more accurate description of the boundary is the "ordinary high water mark," meaning the line on the shore that the water typically reaches during normal inflow and precipitation years. Iowa v. Sorenson, 271 N.W. 234, 236 (1937). The Oregon Department of State Lands interprets this definition as the line at which vegetation ceases to grow along the shoreline. STATE OF OREGON, DIV. OF STATE LANDS, REPORT AND RECOMMENDATION ON THE NAVIGABLE WATERS OF OREGON 154–55 (1983).

196 C*ompare* BECKHAM, *supra* note 29, at 69 *with supra* notes 63, 191 (showing markedly different language from the deed in the transfer of Block 107 of the Lake View Villas, as the deed now reserves an easement over the bed and waters of the lake).

Oswego," as well as a strip of land lying between the "ordinary high water and the platted areas bordering on the lake" to Lake Corp, aiming to exclude the general public from using the lake.[197]

Because of the 1942 and 1945 conveyances, Lake Corp now claims to own both the riparian rights to, and the lakebed of, Oswego Lake, maintaining that Oregon Iron & Steel severed riparian rights from all lakeshore uplands.[198] But Lake Corp's ownership claim to the lakebed has no basis in the company's chain of title because, according to historian Stephen Beckham, none of the original eight donation land claim owners "received nor conveyed right, title, or interest in the lake" from the State.[199] And since there are no lakebed conveyances from the State to any private landowner,[200] the basis of Oregon Iron & Steel's claim of ownership seems to be made out of whole cloth.

The 1942 and 1945 corporate conveyances, in which the State never joined, could not extinguish the State's ownership. Although Lake Corp also claims ownership of all riparian rights to access the lake due to the conveyances, and private conveyances may reallocate riparian rights among private parties, whether private parties may extinguish sovereign rights held by the State in trust for the public to access public waters from public lands is far from clear. The Oregon Supreme Court has declared these public rights to be "paramount."[201]

D. The City's Efforts to Monopolize Oswego Lake

The City acquired property interests in three of the upland parks at issue in the case from private owners who were successors of Oregon Iron & Steel.[202] It purchased Sundeleaf Plaza from private owners; Southern Pacific Railroad still owns Headlee Walkway, having granted the City a public easement; and the City acquired Millennium Park by eminent

197 BECKHAM, *supra* note 29, at 69–70 (citing CLACKAMAS COUNTY, OR., DEED BOOK 358: 675 (1945)) (clarifying and defining the "scope of the original [1942] grants to use the waters of Lake Oswego" to "be advised as to the nature and extent of its obligations under said deed").

198 *Id.* at 61.

199 *See id.* at 69–70 (casting doubt on the validity of Oregon Iron & Steel's riparian claims to the inundated areas of Oswego Lake and concluding that it is fairly certain the company did not have any viable ownership claim to the lakebed before the 1942 and 1945 conveyances to the Lake Corp). *See supra* note 63 and accompanying text. *Cf.* OR. REV. STAT. § 274.040(2)(b) (2019) (requiring all sales of submersible lands owned by the State to be approved by the State Land Board).

200 *See supra* note 175 and accompanying text.

201 *Kramer II*, 446 P.3d 1, 10, 13–14 (Or. 2019); *see supra* notes 63, 87 and accompanying text. *See also infra* notes 271–272 (on the *jus publicum*).

202 *See* Petition for Reconsideration of Respondent Lake Oswego Corporation at 910, *Kramer II*, 446 P.3d 1 (Or. 2019) [hereinafter Lake Corp's Petition for Reconsideration] (maintaining the City acquired an interest in the three properties decades after Oregon Iron & Steel developed and sold the lots).

domain in 1990.[203] Lake Corp maintains the three parks were subject to a 1925 subdivision declaration of Oregon Iron & Steel in which it reserved all riparian rights, similar to the 1917 deed to Lake View Villas.[204]

Even if Oregon Iron & Steel had the authority to sever riparian rights from the lands it sold, it is hardly clear it had ownership of all riparian rights to the lake when it conveyed the "rim" and the bed of the lake to Lake Corp.[205] Nonetheless, Lake Corp has maintained that even if the City's exclusionary resolution and swim park rules violate its public trust duties, the City lacked rights of access to the lake in the first place because of Lake Corp's riparian rights.[206] This argument erroneously assumes that private property arrangements can destroy the State's sovereign rights.[207]

VI. A PATH TOWARD LAKE ACCESS ON REMAND

In challenging the validity of the City's Resolution 12-12 on remand, the plaintiffs must first show that Oswego Lake satisfies the traditional federal title-navigability test.[208] According to the Oregon Supreme Court,

[203] *Id.*

[204] *Id.* at 10. *See supra* notes 191, 195, 197 and accompanying text.

[205] *See* BECKHAM, *supra* note 29, at 70 ("Nowhere in the conveyances did Oregon Iron & Steel Company claim to have secured 100% of the riparian lands surrounding Oswego Lake."). Lake Corp acknowledged in a brief to the trial court that Oregon Iron & Steel no longer owned the upland parcels that later became Millennium Plaza and Headlee Walkway at the time those parcels became riparian in the 1920s or at the time they were allegedly conveyed to Lake Corp in the 1940s. *See* Declaration of Jeff Ward in Support of Lake Oswego Corporation's Memorandum in Support of its Motion to Dismiss and Cross-Motion for Summary Judgment, and in Opposition to Plaintiff's Motion for Partial Summary Judgment at 9–11, Kramer & Prager v. City of Lake Oswego et al., No. CV12100913 (Clackamas County Cir. Ct. 2012) (stating that the Oregon Iron & Steel Company conveyed the property that comprises Millennium Park to private commercial owners in 1914, 1919, and 1924, as well as what is now Headlee Walkway to the Southern Pacific Railroad before creating Lakewood Bay). *See also* Declaration of Colin H. Hunter in Support of Lake Oswego Corporation's Motion to Dismiss and Cross-Motion for Summary Judgment, and in Opposition to Plaintiff's Motion for Partial Summary Judgment at 3, Kramer & Prager v. City of Lake Oswego et al., No. CV12100913 (Clackamas County Cir. Ct. 2012) (describing the easement conveyance from the Southern Pacific Transportation company to the City of Lake Oswego creating Headlee Walkway in 1990); *Lake View Villas Brochure*, CITY OF LAKE OSWEGO, https://perma.cc/4Y3A-GDJB (last visited Nov. 19, 2020) (depicting Southern Pacific's railway property as a separate estate from the Lake View Villas of Oregon Iron & Steel as early as 1913).

[206] *See* Lake Corp's Petition for Reconsideration, *supra* note 202, at 10 ("[T]he city cannot give plaintiffs or anyone else a right—to water access—that the city does not hold.").

[207] *See infra* notes 272–277 and accompanying text.

[208] Kramer *II*, 446 P.3d 1, 12 (Or. 2019) (narrowing public trust protections to waters that are title-navigable under the federal test). *See supra* notes 100, 122, 126 and accompanying text. Interestingly, the 2005 Oregon Attorney General opinion splits the analysis into five factors by separating "have been used or have been susceptible of use . . . as a highway of commerce" into distinct categories: a novel interpretation. *Cf.* AG Opinion 2005 *supra* note 128, at 10 *with PPL Mont., LLC*, 565 U.S. 576, 600–01 (2012). For the purposes of applying

the lake is a trust resource if it is title-navigable.[209] If the plaintiffs establish Oswego Lake is a trust resource, they can assert their access rights to the public lake from the adjacent public parklands unless the State can demonstrate an "objectively reasonable" justification for the City's resolution, which imposes a substantial burden on the public's paramount right to access the lake.[210]

To prevail on remand, the plaintiffs must show Oswego Lake is title-navigable under the federal test and public access rights expanded with the dam-induced expansion of the lake. And they must convince the courts that private conveyances of riparian rights did not extinguish the public's access rights. This section discusses each of these issues in turn.

A. Is Oswego Lake a Traditionally Navigable Water?

Establishing Oswego Lake as a title-navigable waterway under the federal test would not appear to be difficult. The task will require a showing that, in 1859 or thereabouts, the lake supported or could have supported commercial use.[211] Although ascertaining the lake's condition 160 years ago may prove taxing, it should not be a challenge borne by the plaintiffs alone: The State should finally fulfill its trustee responsibility by arguing for the public's rights to access the public waterway of Oswego Lake. Inaction by the State would neglect its fiduciary responsibilities to the public.

In showing the lake was used, or was susceptible to use, as a highway for commerce around the time of statehood,[212] the plaintiffs and the State can point to a wide variety of water-borne activities with varying degrees of frequency as constituting actual use.[213] Moreover, a waterbody is not

the federal test to Sucker Lake, we think that Oregon courts should follow the Supreme Court's interpretation of the test because title-navigability is not a question of state law.

209 *Kramer II*, 446 P.3d at 12–13 (declaring that if a waterbody is title-navigable, the public trust doctrine applies). *See supra* notes 100, 126 and accompanying text.

210 *See Kramer II*, 446 P.3d at 1718; *supra* note 126 and accompanying text.

211 The Daniel Ball, 77 U.S. 557, 563 (1870) (establishing the rule that waterbodies are considered navigable in fact if at statehood, "they are used, or are *susceptible of being used*, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.") (emphasis added); *PPL Mont., LLC*, 565 U.S. at 601 (explaining for a waterbody to be proven susceptible to commercial use at the time of statehood, trade or travel must have been conducted on the waterbody in its natural and ordinary condition in a manner customary to the era); *see supra* notes 99, 131, 139 and accompanying text.

212 *See* 2005 AG Opinion, *supra* note 102, at 10–11, 13–14. A lack of evidence demonstrating actual commercial use around the time of statehood does not bar a waterbody from satisfying the *Daniel Ball* test for navigability because the test requires only that the waterway be "susceptible" to commercial use, including waters used by personal watercraft. 2 WATERS AND WATER RIGHTS, 3d ed. § 35.02(b) (Amy Kelly ed., LexisNexis/Bender 2020) (citing United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407 (1940) (approving the use of "simpler types of commercial navigation")).

213 Judicial determination of a waterway's susceptibility for use in commerce is a fact-intensive inquiry, determined on a case-by-case basis. *See, e.g.*, Alaska v. Ahtna, Inc., 891

required to have a record of commercial use if it was capable of supporting commercial activity.[214] This definition focuses attention on the physical characteristics of the waterbody to determine if it was capable of being a commercial highway,[215] of "afford[ing] a channel useful for commerce."[216]

Courts have not closely scrutinized the frequency of use at statehood; a well-documented account of a single person infrequently using the lake for personal or commercial transport could satisfy the susceptibility criterion under the federal test.[217] Under the relatively relaxed requirements of this factor, courts have accepted an array of evidence and invoked temporal flexibility when considering actual commercial use, or susceptibility to commercial use, creating a relatively low bar for demonstrating a waterbody's historical suitability as a commercial highway.[218]

F2d 1401, 1405 (9th Cir. 1989) (deciding present commercial use provided conclusive evidence of the lower Gulkana River's susceptibility to title-navigation because the river had remained relatively unchanged since statehood); United States v. Holt State Bank, 270 U.S. 49, 56–57 (1926) (determining Mud Lake was susceptible to use as a highway for commerce because early visitors and settlers, in small watercraft of the era, used the lake as a route for travel and trade, despite its swampy features and limited economic activity around the lake); Utah v. United States, 403 U.S. 9, 11 (1971) (explaining that limited use of the Great Salt Lake by the few ranchers along its shores does not detract from the "basic finding that the lake served as a highway and it is that feature that distinguishes between navigability and non-navigability . . . . The lake was used as a highway and that is the gist of the federal test."); United States v. Utah, 283 U.S. 64, 82 (1931) (determining that personal or private use by boats demonstrates the availability of the Green, Colorado, and San Juan rivers for the simpler types of commercial navigation); AG Opinion 2005, *supra* note 102, at 11 (noting that limited use does note negate a finding of navigability).

214 AG Opinion 2005 *supra* note 102, at 11 (citing United States v. Utah, 283 U.S. 64, 82 (1931) (deciding that proof of actual use was not necessary if title-navigability could be proved under the susceptibility factor because historically the Green, Colorado, and San Juan Rivers had limited contact with commerce due to the few people able to reach the rivers)).

215 United States v. Utah, 283 U.S. at 82 ("[E]xtensive and continued [historical] use for commercial purposes[] may be [the] most persuasive" form of evidence, but the "crucial question" is the potential for such use at the time of statehood, not "the mere manner or extent of actual use."); *PPL Mont., LLC*, 565 U.S. at 601 (allowing present day uses to inform a historical navigability determination if the waterbody has not changed substantially since statehood); *see supra* note 211.

216 *See* United States v. Utah, 283 U.S. at 76; AG Opinion 2005, *supra* note 102, at 11 (maintaining that the test does not require evidence of actual use as long as the evidence proves the waterbody was capable of being a highway for commerce).

217 Utah v. United States, 403 U.S. 9, 11–12 (1971) (verifying that the Great Salt Lake was not a part of any navigable interstate or international commercial highway did not foreclose the possibility that the lake could be susceptible to some form of trade or travel).

218 *Id.* at 11 ("That is to say, the business of the boats was ranching and not carrying water-borne freight. We think that is an irrelevant detail. The lake was used as a highway and that is the gist of the federal test."). *See also* United States v. Utah, 283 U.S. at 82 (confirming that the remoteness or lack of human settlement will not affect the waterbody's susceptibility to use as a highway for commerce, because that inquiry is determined on the physical features of the waterbody); *PPL Mont., LLC*, 565 U.S. at 600–01 (citing United States v. Utah, 283 U.S. at 82–83) (reinforcing the broad reading of the susceptibility of commercial use factor by defining the standard to be the potential for the waterbody to

As for Oswego Lake's navigability, a court could conclude that people actually used Sucker Lake commercially around the time of statehood, or it was susceptible to use as a highway for commerce in 1859 or roughly thereafter.[219] Well before 1859, Native Americans frequented the area, using dugout canoes for fishing on the Willamette River, and they harvested Wapato bulbs in nearby lakes like Wapato Lake in the Tualatin Valley.[220] The historical record may be limited, but archeological sites have confirmed indigenous tribes frequented the shores of what became Oswego Lake.[221] Documentation of canoe use on nearby waters by Native Americans implies the use of similar canoes on Oswego Lake.[222] In fact, canoes used by the visitors to the eastern end of the lake suggests commercial activity existed before white settlement.[223] Similar canoe use by Native Americans in the upper John Day River was sufficient to convince the Oregon Court of Appeals of the title-navigability of that river

support commercial traffic); United States v. Oregon, 295 U.S. 1, 20–23 (1934) (explaining evidence of use of watercraft, which normally satisfies this factor of the federal test, can be undermined by the degree of difficulty that the physical conditions of the waterbody impose on such an activity, thus reducing its potential to support commercial activity.); *Riverfront Prot. Ass'n*, 672 F.2d 792, 794–95 (9th Cir. 1982) (recognizing seasonal log floats on the McKenzie River as adequate to establish commercial use under the federal test, since the use does not have to be continuous, extensive, or relatively easy); *Hardy*, 360 P.3d 647, 659 (Or. Ct. App. 2015) (allowing post-statehood, and even present-day uses as evidence, including 1) log floats, 2) recreational boating, and 3) use of ferries); 2005 AG Opinion, *supra* note 102, at 10 (concluding that susceptibility for commercial use does not require actual use).

219 *Hardy*, 360 P.3d at 659 (citing *PPL Mont., LLC*, 565 U.S. at 600–01) (relying on post-statehood uses to demonstrate susceptibility to what would have been a realistic use at the time of statehood).

220 *See* BECKHAM, *supra* note 29, at 1 (explaining the two types of cedar dugout canoes used by local Native Americans: large cargo canoes and shallow-draft canoes used in harvesting Wapato bulbs).

221 *Id.* at 6. *See also* FULTON, *supra* note 30, at 9 ("Allan Morris, proprietor of Lake Oswego swimming pool, found strong evidence of a large Indian campground last week [1939] in the lakebed of Lake Oswego. The evidence consisted of a large number of Indian arrowheads of different shapes and sizes and a 10-inch stone pestle" (quoting OREGON JOURNAL, Mar. 27, 1939 at 2)). The Oregon Supreme Court in *State ex rel. Thornton v. Hay* observed Native American use of ocean beaches long before the "beginning of the state's political history" could "satisfy" the requirement of antiquity necessary to establish a valid customary use of ocean beaches. State *ex rel.* Thornton v. Hay, 462 P.2d 671, 673, 677–78 (Or. 1969).

222 FULTON, *supra* note 30, at 9–10 ("Rella McAllister noted that the Indians used the lake for transportation: 'Legend has it that the Indians often made use of this lake during their travels from north to south as there was but a short portage to the Tualatin River.'"). *See* BECKHAM, *supra* note 29, at 75 (asserting that Native Americans navigated Sucker Lake for Wapato bulb harvesting and fishing).

223 The Oregon Attorney General, in 2005, advised that pre-statehood Native American use is relevant evidence of commercial use but not itself determinative. 2005 AG opinion, *supra* note 102, at 13 (citing Puget Sound Power & Light Co. v. Federal Energy Regulatory Comm'n, 644 F.2d 785, 788 (9th Cir.1981)) (determining the White River to be navigable from evidence of Native American canoe use and the transportation of shingle bolts). The Oregon Supreme Court invoked pre-statehood Native American use, *sua sponte*, in justifying the public's customary right to use ocean beaches. *See supra* note 221.

reach.[224] The Oregon Supreme Court suggested pre-statehood Native American use was probative evidence in the past.[225]

Records of Anglo-American settlement and commercial activity around Oswego Lake also suggest the lake was either used or susceptible to use for commerce both before and after statehood.[226] For example, Albert Durham stored logs on the lake for his lumber mill in the 1850s.[227] These logs were cut at convenient locations along the lake and floated to the storage area pending milling.[228]

Oregon courts have approved log-float transport as a satisfactory method of establishing use or susceptibility for commercial use.[229] Moreover, many recent cases have used recreational activities to qualify as trade or travel,[230] reflecting the growing economic value that recreational water activities provide to local economies.[231] Under the

[224] Nw. Steelheaders Ass'n v. Simantel, 112 P.3d 383, 392 (Or. App. 2005) (stating that only six to eight inches of water in the river was necessary to demonstrate navigability, since that was all that indigenous fishing boats in the upper John Day required).

[225] *See supra* note 221, 223–224 and accompanying text.

[226] FULTON, *supra* note 30, at 18 (explaining that Durham ushered Oswego into the industrial revolution by damming "Sucker Creek, near the foot of the lake, built his mill below the dam, and used the lake as a log pond" in the years before and after statehood).

[227] *Id. See also* BECKHAM, *supra* note 29, at 12.

[228] BECKHAM, *supra* note 29, at 14 (observing that Durham's land purchases in 1863 necessitated lake travel from his timber lands on the west end of the lake to the sawmill on the east end of the lake).

[229] *See Riverfront Prot. Ass'n*, 672 F.2d 792, 794–95 (9th Cir. 1982) (commenting that the use of boats to navigate waterbodies was not the only way to determine the title-navigability of the McKenzie River to river mile 37). *See* also *Hardy*, 360 P.3d 647, 660 (Or. Ct. App. 2015) (affirming that the State's reliance on log drives to show the Rogue River was susceptible for use in commerce below river mile 100). The Attorney General interpreted commercial use to mean that waterbodies must provide a practical path for trade or travel during some part of the year. AG Opinion 2005 *supra* note 102, at 13–14. Since Oswego Lake has always retained water throughout the year, it is not subject to the water shortages that affect ephemeral streams, which can cause them to fail the requirement that a waterbody supply a predictable path for commerce or travel for a significant portion of the year. *Id.* at 12.

[230] *See, e.g.*, United States v. Utah, 283 U.S. 64, 82–83 (1931) (creating the possibility that recreational uses could be determinative factors by incorporating a broad list of watercraft that could be considered in a navigability determination); *PPL Mont., LLC*, 565 U.S. 576, 601 (2012) (alluding to the growing importance of recreation as a determinative factor, however, the court confined recreational evidence to support navigation only if the use was similar to historical uses and could be submitted as evidence only if the waterbody had not materially changed since statehood); *Ahtna, Inc.*, 891 F.2d 1401, 1405 (9th Cir. 1989) (citing Alaska v. United States, 754 F.2d 851, 854 (9th Cir. 1985)) (concluding that a recreational business can be determinative of the existence of "trade" because "[n]avigability is a flexible concept and 'each application of the [*Daniel Ball* test] . . . is apt to uncover variations and refinements which require further elaboration.'"); *Hardy*, 360 P.3d at 662 ("[W]e understand the board to have found that the flow requirements for current recreational boats all along the study segment . . . are similar to those for the dugout-type canoes that were customarily used by Native Americans in the area for trade and travel in 1859.").

[231] Recognition of the commercial importance of recreational activities and industries is the modern equivalent of courts extending commercial value to log floats because of its effect on local Oregon economies. *Hardy*, 360 P.3d at 652–53 (citing OR. REV. STAT. § 274.404(2)(a)

federal test, the Supreme Court, Ninth Circuit, and Oregon courts have all ruled that log floats or recreational activities can satisfy the requirement of navigability "for trade or travel."[232] The Oregon Attorney General has recognized "[t]itle-navigability may be established by a variety of uses," and "[t]rade is not restricted to the use of boats for moving goods in commerce."[233]

Moreover, commercial transport clearly occurred shortly after statehood. The *Minnehaha*, a seventy-foot, flat-bottomed steamer, navigated Sucker Lake hauling cargo and towing logs in 1866, just seven years after statehood.[234] This sort of transport is a quintessential example of the kind courts look for in making navigability determinations being a widely accepted method of transportation of the era, which carried goods of a commercial nature, within the stream of commerce, affecting both national and international commerce.[235] The cargo and log transport, if not the prior Native American use, would likely prove determinative to a reviewing court.

(2015), for the principle that the Oregon State Land Board may employ economic or public interest justifications in making navigability determinations).

> "Sufficient economic justification" exists when the Land Board decides that a determination of navigability will result in revenue accruing to the Common School Fund from a leasable use (as defined by Division administrative rules) of the waterway segment or underlying land (for example, the placement of marinas or log rafts, or the extraction of aggregate).

OR. ADMIN R. 141-121-0010 (1996).

232 *See, e.g.*, *PPL Mont., LLC*, 565 U.S. 576, 601 (2012) (allowing recreational activities to support the probability of historical use on waterways substantially unchanged since statehood); *Ahtna, Inc.*, 891 F2d at 1405 (stating that a recreational business can be a determinative of the existence of "trade"); *Riverfront Prot. Ass'n*, 672 F.2d at 794–95 (allowing log floats to satisfy the trade or travel requirement of the federal navigability test, despite unfavorable seasonal flows and significant obstacles to free-floating log travel); *Hardy*, 360 P.3d at 659–60 (accepting evidence of timber transport from 1889 to demonstrate a type of commercial trade that supported the Rogue River's navigability at the time of statehood); 37 OR. ATT'Y GEN. 1342, 1355 (1976) (maintaining that if historic log floats are used to determine whether a waterbody is title-navigable, the floats must have been substantial, not occasional or exceptional)*; see also supra* notes 221, 229 and accompanying text.

233 *See* 2005 AG Opinion, *supra* note 102, at 13.

234 *See* BECKHAM, *supra* note 29, at 17 (explaining that the *Minnehaha* towed logs and transported cargo across the lake as part of the Oswego timber industry's supply chain); FULTON *supra* note 30, at 18−19 (noting that Durham exported lumber as far as the Hawaiian Islands).

235 United States v. Utah, 283 U.S. 64, 76, 83 (1931) (citing The Montello, 87 U.S. 430, 441–42 (1874)) (recognizing that traditional commercial use is the engagement in transportation for hire, barter, or sale but reinforcing that title-navigability requires only proof that the waterbody could sustain such activity, not that it actually occurred). *See supra* notes 215, 233 and accompanying text.

B. Public Rights on an Enlarged Waterbody

The title-navigability test also requires the use of the lake in its natural and ordinary state. This issue may be the most contested factor on remand because dams have raised the lake level, beginning with Durham's dam in 1850.[236] This dam is not a disqualifying factor if it merely enhanced the lake's navigability, rather than creating it, which focuses attention on the condition of the pre-1850 lake.[237] Durham used the lake for log transport contemporaneously with the construction of the first dam on Sucker Lake in 1850.[238] Moreover, Native American use of the lake before Anglo-American settlement may be determinative, since the Oregon Supreme Court has suggested, in ocean beach access cases, that such use could establish antiquity necessary to prove customary use.[239] The dugout canoes used by the Native Americans had small, flat drafts, allowing for maneuverability in marshy, shallow waters for food harvesting.[240] Evidence of Native American tools, their Wapato bulb harvesting practices, and the physical similarities of Oswego Lake and nearby Wapato Lake all support the conclusion the lake was susceptible to commercial use in its "natural and ordinary condition" before Anglo-American settlement in the late 1840s and at statehood in 1859.[241] Sucker Lake clearly possessed a depth suitable for Native American canoe use before the construction of Durham's dam in 1850.[242]

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[236] The first recorded instance of artificial modifications of Sucker Lake was in 1850, when Albert Durham dammed Sucker Lake to stabilize its water level, providing more consistent waterpower to drive his sawmill. *See* BECKHAM, *supra* note 29, at 55; Senate Hearing, *supra* note 45, at 53. Subsequent dam operators rebuilt the original dam four more times resulting in the current concrete structure which replaced the older, washout-prone wooden dams in 1921. FULTON, *supra* note 30, at 79. *See supra* notes 163, 167, 210, 215 and accompanying text.

[237] Although there is no Oregon case law on point, the Washington Supreme Court in *Wilbour v. Gallagher* stated public rights associated with navigable waterways that were subsequently dammed extended to the new elevation and reach of the enhanced waterway. 462 P.2d 232, 238 (Wash. 1969) (en banc). The court recited the principle that if the level of a navigable waterway is raised and maintained for the prescriptive period, the new level will be considered the natural level of the waterway and all submerged lands are "converted into part of the lake bed and to state ownership." *Id.* at 237 (citing State v. Malmquist, 40 A.2d 534, 538 (Vt. 1944) and Village of Pewaukee v. Savoy, 79 N.W. 436, 437 (Wisc. 1899)).

[238] Beckham, *supra* note 29, at 33 (citing MARY GOODALL, OREGON'S IRON DREAM: A STORY OF OLD OSWEGO AND THE PROPOSED IRON EMPIRE OF THE WEST 17 (1958) (confirming that Durham's lumber milling business began in 1850, using the water running through Sucker Creek to power his prosperous venture)).

[239] *See supra* note 221 and accompanying text.

[240] *See* BECKHAM, *supra* note 29, at 6–7.

[241] Wapato Lake is located 28 miles west of Oswego Lake and shares similar ecological characteristics to Oswego Lake. Wapato Lake is now part of the Wapato National Wildlife Refuge. *Wapato Lake*, *About the Refuge*, U.S. FISH & WILDLIFE SERV., https://perma.cc/WR86-XWMZ (last updated Mar. 29, 2017).

[242] BECKHAM, *supra* note 29, at 1, 55 (noting that Durham's dam raised the level of Sucker Lake by six feet).

Subsequent dams on the lake will not disqualify it as a navigable waterbody.[243] For example, a dam on Lake Chelan in north-central Washington did not affect the navigable status of the lake and, in fact, expanded the scope of public rights, according to the Washington Supreme Court.[244] The Oregon Attorney General agreed. In a case involving Bonneville Dam's inundation of Columbia River riparian lands, the attorney general concluded that the newly submerged lands were state-owned and subject to public rights, in effect treating the inundation as equivalent to a natural change to the river.[245] Thus, the dams on Oswego Lake should not affect the lake's title-navigability if it was actually used in a stream of commerce or susceptible to such use around the time of statehood.

C. The Presumption of Title-Navigability for Meandered Waterways

In addition to the title-navigable inquiry described above, another means of establishing public trust protections for Oswego Lake is through the State's declaration it owns all navigable waterbodies in existence in 1859, under a statutory presumption all meandered lakes are title-navigable and therefore state-owned.[246] The Oregon Supreme Court

243 In its supreme court brief, the State limited its ownership claim to the original meandered border of Sucker Lake. State's Brief, *supra* note 12, at 20.

244 *Wilbour*, 462 P.2d at 238–39 (concluding the artificial increase in water levels of Lake Chelan due to the dam extended the public's rights to the new ordinary high-water mark because the public's navigation rights ebbs and flows with the farthest reaches of a navigable waterbody).

245 The Attorney General explained there is a presumption in case law of treating any permanent artificial change to a navigable waterbody as if the change were "caused by natural conditions." 24 OR. OP. ATT'Y GEN. 323, 328 (1949), 1949 WL 40861 [hereinafter cited as 1949 AG Opinion]. Citing considerable precedents from both Oregon and other states, the 1949 opinion asserted that the State gained ownership in the newly submerged lands behind Bonneville Dam, presumably also extending the public's access rights in the water overlying these lands. *Id.* at 326–28. The Attorney General reinforced the State's ownership rights recognized in the Bonneville Dam question 23 years later in an opinion involving Fish Hawk Lake, created by damming Fish Hawk Creek, explaining:

> In short, if Fishhawk Creek was navigable in fact and the public had the right to navigate along its length at the location of the lake before any lake existed, the public still has that same right in Fishhawk Lake. *We do not see how that right could be restricted to the portion of the lake immediately above the submerged thread of the stream, and presume without deciding that it would extend to the entire navigable extent of the lake.*

35 OR. OP. ATT'Y GEN. 1202, 1206–07 (1972), 1972 WL 137705 (emphasis added).

246 OR. REV. STAT. § 274.025(1) (2019) ("The title to the submersible and submerged lands of all navigable streams and lakes in this state now existing or which may have been in existence in 1859 when the state was admitted to the Union, or at any time since admission, and which has not become vested in any person, is vested in the State of Oregon. The State of Oregon is the owner of the submersible and submerged lands of such streams and lakes and may use and dispose of the same as provided by law"); OR. REV. STAT. § 274.430(1) (2019) ("All meandered lakes are declared to be navigable and public waters. The waters

mentioned these provisions as partly codifying the State's public trust doctrine[247] but decided the cases interpreting them were of limited relevance because they restricted the ability of the State to dispose of trust lands and did not decide if the public had a right to access them.[248] The court's unwillingness to consider the effect of the statutory presumption that meandered lakes are navigable was confusing since the court decided navigable waters at statehood had a public access right from adjacent public lands: "We conclude that the rights incident to public ownership of the submerged and submersible lands beneath navigable waters include a right of access to the public water from abutting public upland."[249] For the defendants to prevail on remand, they must rebut the statutory presumption that a meander survey designates Oswego Lake as navigable waterbody.

Oregon statutes make clear all submersible and submerged lands of all navigable streams and lakes now in existence, or which may have been existence in 1859, are state-owned unless "vested in any person," presumably through an express conveyance from the State.[250] Oswego Lake (then Sucker Lake) was meandered in 1852, two years after Durham built his dam raising the level of the lake.[251] With no evidence in the historical record of any state conveyance of the bed of Oswego Lake or even any claim of private ownership before statehood,[252] the statutory presumption of state ownership should prevail on remand.[253]

There is an argument the statutes recognize only the title-navigability of the original perimeter of Sucker Lake as meandered in 1852.[254] The current lake encompasses roughly twice the size of the

thereof are declared to be of public character. The title to the submersible and submerged lands of such meandered lakes, which are not included in the valid terms of a grant or conveyance from the State of Oregon, is vested in the State of Oregon."); OR. REV. STAT. § 274.430(3) (2019) (the State's ownership of the submerged lands does not impair "the title of any upland or riparian owner.").

247 *Kramer II*, 446 P.3d 1, 13 nn.14–15 (Or. 2019).

248 *Id.* at 13–14 (citing, *e.g.*, Hinman v. Warren, 6 Or. 408, 412 (1877); *Bowlby*, 30 P. 154, 160 (Or. 1892); Corvallis & E. R. Co. v. Benson, 121 P. 418, 422 (Or. 1912)).

249 *Kramer II*, 446 P.3d at 17.

250 OR. REV. STAT. § 274.025(1) (2019).

251 *See supra* notes 166–167 and accompanying text.

252 *See supra* note 172 and accompanying text.

253 State's Brief, *supra* note 12, at 20. *See also* State v. McIlroy, 595 S.W.2d 659, 663 (Ark. 1980) ("'Mulberry Creek' was 'meandered' by the surveyors. Meander lines are those representing the border line of a stream and such lines are considered prima facie evidence of navigability.").

254 The State asserts ownership of the original Sucker Lake under OR. REV. STAT. § 274.430 (2019) (declaring all meandered lakes to be "navigable and public waters") but seemed to maintain that its ownership of submerged land did not expand with a permanent increase in the size of a navigable water because damming a non-navigable stream does not create public rights. State's Brief, *supra* note 12, at 19–20 (citing 35 Op Atty Gen 1202, 1207 (1972)). But of course, that reasoning does not apply to Oswego Lake, a navigable waterbody. Moreover, it completely overlooked the State's claim of ownership to the lands submerged by Bonneville Dam. 1949 AG Opinion, discussed *supra* note 245 and accompanying text.

original meandered lake.[255] But there is nothing in Oregon's public trust statutes nor Oregon case law suggesting a lake meandered as navigable could be bifurcated into navigable and non-navigable portions, let alone a lake that was meandered after it was dam-enlarged. Practically, such line drawing would be infeasible. Moreover, according to both the Oregon Attorney General and the Washington Supreme Court, public rights expand when artificial or natural changes enlarge a navigable waterway.[256] The enlargement of Oswego Lake post-meandering should similarly expand the public's rights under the State's public trust doctrine.

D. Lake Corp's Claim of Riparian Rights

Although not discussed in detail in the Oregon Supreme Court's decision, Lake Corp claims ownership of all riparian rights on lands surrounding the lake, based on the 1945 conveyance from Oregon Iron & Steel.[257] There are significant questions as to the validity of this allegation.[258] Oregon Iron & Steel owned the land that eventually became three of the city parks at issue, and Lake Corp maintains the company severed riparian rights from these uplands before selling them to successors.[259] The argument is that, without riparian rights, the public parklands adjacent to the lake lack public access rights. But the City of Lake Oswego believes the company's reservation of riparian rights did not include all the land adjacent to Oswego Lake and maintains that riparian reservation applicable to one of the parks explicitly recognizes the City's right to use the lake "for swimming, bathing, and/or boating."[260] Since Lake Corp successfully petitioned the Supreme Court to clarify its

255 STATE OF OREGON, DIV. OF STATE LANDS, MAP OF LAKE OSWEGO (SUCKER LAKE) (1984) (mapping the contrast in size of the 1984 lake to the original meandered lake bed). Note that among the listed state-owned lakes is Wallowa Lake, meandered in 1880, a lake later raised by a dam in 1905. *See* KENNETH MACKENZIE CRAIG, CONFLICTS IN THE MULTIPLE USE OF WALLOWA LAKE 13 (1967); Navigable Lake List, *supra* note 141. The State makes no claim that only the original Wallowa Lake is navigable.

256 *See supra* notes 237, 244–245 and accompanying text (discussing the inundation of riparian lands by Bonneville Dam and the *Wilbour* decision). Other states agree that public rights expand with rising waters. Parks v. Cooper, 676 N.W.2d. 823, 841 (S.D. 2004) (deciding that the public trust resides in the water itself, therefore depressions in the land that fill with water can be converted to public use); McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119–20 (S.C. 2003) (applying the public trust to artificially created wetlands).

257 *See supra* note 197 and accompanying text.

258 *See* BECKHAM, *supra* note 29, at 70–71 (observing that Oregon Iron & Steel never claimed to own 100% of the riparian rights around the lake).

259 *See* Lake Corp's Petition for Reconsideration, *supra* note 202, at 9–10.

260 Letter of J.W. Ring et al., Legal Counsel to the City of Lake Oswego to Anita Huffman, Oregon Dep't of State Lands, at 5 (Aug. 5, 2011) [hereinafter Letter to the Dep't of State Lands] (concerning a dispute between Lake Corp and the City over a fill permit necessary to erect a wave abatement structure; the City contended that the 1925 reservation of riparian rights did not apply to the northern half of Sundaleaf Plaza which expressly recognized the City's access rights to the lake).

Kramer opinion did not decide this issue,[261] the riparian rights question will be before the circuit court on remand. However, Lake Corp's argument is contrary to the weight of authority.

The Iowa Supreme Court decided three decades ago public uplands adjacent to the Missouri River were public trust lands just like adjacent submerged lands.[262] Thus, as sovereign lands held in trust, they were not subject to the statute of limitations applicable to private property.[263] Similarly, the Montana Supreme Court dismissed an attempt by a riparian rights owner to deny public access from a public highway to adjacent public waters.[264] And the Wisconsin Supreme Court, after carefully examining the relationship between public trust access and riparian rights, concluded that a landowner with no riparian rights (due to prior conveyances) nevertheless could invoke public trust rights to access the adjacent waterway.[265] These cases make clear that conveyances of private riparian rights do not affect sovereign public trust rights.

Although the Oregon Supreme Court declined to address the question of whether private riparian rights could impair sovereign rights,[266] several of its decisions suggest a longstanding willingness to recognize public rights to access public waters. For example, the court refused to allow the owner of submerged lands to block access to Siltcoos Lake of owners of land adjacent to the lake from public streets.[267] Similarly, it twice ruled a lessee of submersible lands along the Columbia River could not be denied access to the river by another private party,[268]

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261 Kramer v. City of Lake Oswego *(Kramer III)*, 455 P.3d 922, 924 (Or. 2019) (clarifying that the court made no decision on the dispute over the effect of riparian rights on public access to the lake from the city-owned parks).

262 State v. Sorenson, 436 N.W.2d 358, 363 (Iowa 1989) (taking judicial notice of the rising importance of recreational activities and the need for access to waterbodies to facilitate such activities, and remanding the case to allow the State to prove that it had a right to acquire public trust assets created by accretion).

263 *Id.*, cited in *Kramer II*, 446 P.3d 1, 16 (Or. 2019) (noting the court in *State v. Sorenson* ruled that a statute of limitations defense could not prevent a state from asserting title to land held in the public trust).

264 *Kramer II*, 446 P.3d at 16 (quoting Pub. Lands Access Ass'n v. Bd. of Cty. Comm'rs, 321 P.3d 38, 53 (Mont. 2014)) (noting that the public right to access a river from a public right-of-way did not amount to an unconstitutional taking of private riparian rights because the landowner never held a right "to exclude the public from using its water resource, including the riverbed and banks up to the high-water mark").

265 Movrich v. Lobermeier, 905 N.W.2d 807, 815–20, 822 (Wis. 2018) (noting that although the private landowner could use public trust access rights, he could not install a dock).

266 *See supra* note 261 and accompanying text.

267 Darling v. Christenson, 109 P.2d 585, 591 (Or. 1941), discussed in *Kramer II*, 446 P.3d. at 15 (noting that the *Darling* decision recognizing access from public streets "bear[s] some similarity" to the issue of public access from public parklands).

268 Eagle Cliff Fishing Co. v. McGowan, 137 P. 766, 771 (Or. 1914); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 443 P.2d 205, 218 (Or. 1968), discussed in *Kramer II*, 446 P.3d at 15–16.

even suggesting this result was due to reserved public rights (although not defining those rights with specificity).[269] The Oswego Lake court recognized these decisions suggest ownership of submersible land includes a right to access adjacent waters, "lend[ing] support" to the notion public ownership of uplands designated for public use includes a right of waterway access.[270] The court, however, declined to be definitive.

Lake Corp's riparian rights argument overlooks one of the core elements of the public trust doctrine—the *jus publicum*—which encumbers all trust land, whether it is private or public.[271] A private entity may try to sever all access rights to navigable water from the estate restricting private successors, but the *jus publicum* is inalienable by private conveyances.[272] Oregon courts have recognized the distinction between the *jus publicum* and the *jus privatum* since the *Bowlby v. Shively*[273] decision well over a century ago.[274]

269 *Smith Tug,* 443 P.2d at 218.

270 *Kramer II*, 446 P.3d at 16.

271 *See, e.g.*, Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002) (citing Washington case law that explains the *jus publicum*); Marks v. Whitney, 491 P.2d 374, 380–81 (Cal. 1971) (describing the State's absolute *jus publicum* power over navigable water and land within the trust, unless expressly relinquished or altered); Parks v. Cooper, 676 N.W.2d. 823, 838 (S.D. 2004) (affirming the State's right to use, control, and develop public waters as an "asset in trust for the public"); McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003). *See* Michael C. Blumm, *The Public Trust Doctrine and Private Property Rights: The Accommodation Principle*, 27 PACE ENV'T L. REV. 649, 658 (2010) (explaining the public trust doctrine, like private trusts, bifurcates trust resources into two legal titles: the *jus privatum*, controlled by the private owner, and the *jus publicum* controlled by the sovereign; these uses coexist on the same property in balance with one another so as not to eviscerate either the public or the private property right).

272 *See, e.g.*, *Esplanade*, 307 F.3d at 985 (quoting Weden v. San Juan Cty., 958 P.2d 273, 283 (Wash. 1998)) ("The 'doctrine reserves a public property interest, the *jus publicum*, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership." (emphasis added)).

273 30 P. 154 (Or. 1892).

274 *Id.* at 155–56. For a discussion of Oregon court decisions that have recognized the distinction between the *jus publicum* and the *jus privatum*, see, e.g., *Morse*, 590 P.2d 709, 711 (Or. 1979) (affirming the viability of the *jus publicum*, as prescribed by *Illinois Central*, in Oregon when asserting the state's interest in preserving water-related uses over the expansion of an airport); Brusco Towboat Co. v. State, 589 P.2d 712, 718 (Or. 1978) (recognizing the state's sovereign, *jus publicum*, interest in regulating the leasing of submerged lands under navigable waters); State *ex rel.* Thornton v. Hay, 462 P.2d 671, 679 (Or. 1969) (reaffirming that the *jus publicum* encumbers public property when title is conveyed to private ownership, preventing the private owners from infringing the public's customary right to use the dry sand area of the beach); Corvallis Sand & Gravel Co. v. State, 439 P.2d 575, 582 (Or. 1968) (determining that private uses, like gravel dredging, may continue so long as they do not interfere with public rights found in the *jus publicum*); Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp., 443 P.2d 205, 217–18 (Or. 1968) (acknowledging that the *jus publicum* sets a floor protecting the public's right in navigable waterways, but above that floor, private entities may conduct business consistent with statutes and regulations); Anthony v. Veatch, 220 P.2d 493, 504 (Or. 1950) (deciding that the *jus publicum* creates public rights in fisheries from which the State may regulate their harvest); Johnson v. Jeldness, 167 P. 798, 799 (Or. 1917) (ruling that a private defendant could not subvert the public

The conveyances of Lake Corp's predecessor consequently could have severed private riparian rights, the *jus privatum*, from the lands it sold to its purchasers. Still, those conveyances could not destroy the State's *jus publicum* rights under the public trust doctrine. Thus, even if Lake Corp and its predecessors severed riparian rights from the lands surrounding the lake, Lake Corp would retain riparian rights to use the water, obtain accretions, and wharf out into the lake—rights the landowners surrounding the lake lack. But those private arrangements could neither frustrate public access rights under the public trust nor authorize substantial diminishment of trust resources any more than the riparian right to construct wharves or docks can interfere with the public's navigation right.[275] Public trust rights are sovereign rights, recognized by the Oregon Supreme Court as paramount rights,[276] and cannot be disposed of through proprietary arrangements of private parties conveying or severing ownership of riparian rights.[277]

E. Is the City's Public Access Prohibition "Objectively Reasonable"?

If, as seems likely, the bed of Oswego Lake is owned by the State and the lake itself is title-navigable—and therefore the public trust doctrine applies—the public has a right to access the lake from the surrounding public parklands unless the City's ban on public access is, in the words of the Oregon Supreme Court, "objectively reasonable."[278] Invoking private trust principles to ascertain the appropriateness of sovereign actions involving public trust assets, the court ruled the State, as trustee, "has a duty to 'to protect trust property' and to ensure . . . that [trust property] is managed in a way that will benefit all trust beneficiaries."[279] This private trust standard led the court to conclude that the public trust doctrine, if applicable, would require the City, as trustee, to demonstrate its ban on public access was objectively reasonable in light of the purposes of the trust.[280] The court emphasized the paramount purpose of the trust

right in fisheries by claiming to act for the benefit of the public, since the *jus publicum* vests sovereign authority exclusively in the State); Pac. Milling & Elevator Co. v. Portland, 133 P. 72, 75, 81 (Or. 1913) (concluding that a private riparian owner's *jus privatum* because the *jus publicum* impresses the paramount right of navigation over submerged lands under navigable waters subjecting the property to reasonable state regulation); *Bowlby*, 30 P. 154, 155–56 (Or. 1892) (upholding the state's title, both *jus privatum* and *jus publicum* to tidelands conveyed by the federal government to state at statehood).

[275] *See Kramer II*, 446 P.3d 1, 17 (Or. 2019) (recognizing that the denial of the public's right of access could amount to an impermissible "substantial impairment" of trust resources).

[276] *Id.* at 10, 13–14.

[277] As the U.S. Supreme Court has said, public trust rights are as inalienable as the state's police power. *Ill. Cent. R.R. Co.*, 146 U.S. 387, 459 (1892).

[278] *Kramer II*, 446 P.3d at 17–18.

[279] *Id.* at 17 (citing *White*, 268 P.3d 600, 615 (Or. 2011)). *See supra* note 117 and accompanying text.

[280] *Kramer II*, 446 P.3d. at 17–18.

under the circumstances was to provide public access to trust resources.[281] How this paramount purpose may be achieved by a complete ban on non-residents is hard to imagine.

If the City's justification for restricting access to the lake is based on conserving the limited resources of Oswego Lake from overuse, an alleged conservation ban needs to overcome the fact that even the City has acknowledged little or no boat use of the lake "for 75% of the year."[282] Moreover, similar attempts to impose all the burdens of conservation on non-residents have failed elsewhere. For example, the New Jersey Supreme Court long ago decided a shoreside city could not limit beach access to its residents because discriminating between residents and non-residents violated the public trust doctrine.[283] The plaintiffs in the Oswego Lake litigation never objected to reasonable non-resident fees, or to reasonable time, place, and manner regulations.[284] On remand, the City must bear the burden of explaining why such regulations are insufficient and why a non-resident ban amounts to an objectively reasonable restriction in light of all the beneficiaries of the public trust whose paramount purpose is to provide public access to trust resources.[285] Meeting that burden would seem to be a tall order.

VII. CONCLUSION

The Oswego Lake decision significantly expanded the Oregon public trust doctrine by enlarging its scope to uplands,[286] reinforcing earlier decisions about the public trust's application to fish and wildlife,[287] and clarifying that municipalities serve as trustees.[288] Before the decision, the State held none of these positions. Just as importantly, the court rejected the State's position the public trust doctrine imposed no affirmative

[281] *Id.* at 13–14, 17, 25–26.

[282] Letter to the Dep't of State Lands, *supra* note 260, at 8.

[283] Borough of Neptune City v. Borough of Avon-By-the-Sea, 294 A.2d 47, 55 (N.J. 1972). The court later determined that a municipality could charge non-residents higher fees to compensate residents for the local property taxes they paid, but not charge discriminatory rates to nonresidents unrelated to the cost of maintaining beaches. Hyland v. Borough of Allenhurst, 393 A.2d 579, 581 (N.J. 1978); Slocum v. Borough of Belmar, 569 A.2d 312 (N.J. Sup. Ct. Law Div. 1989) (concluding that a municipality violated its public trust duty of loyalty by charging a discriminatory beach admission fee to non-residents).

[284] *Kramer II*, 446 P.3d at 6 (noting that the plaintiffs wish to invalidate the portions of Resolution 12-12 and the Swim Park Rules that prevent public access to the lake). *See also* Complaint at 7, Kramer v. City of Lake Oswego et al., No. CV12100913, letter op. (Clackamas County Cir. Ct. 2012) (seeking only reasonable access to and use of the lake).

[285] *Kramer II*, 446 P.3d at 6, 10. The ban is technically a non-Lake Corp ban because it excludes non-member residents.

[286] *See supra* notes 84, 95, 105, 280, 264, 270, 275 and accompanying text, discussing *Kramer II*, 446 P.3d at 16–17.

[287] *See supra* notes 19, 26, 82, 91 discussing *Kramer II*, 446 P.3d at 12.

[288] *See supra* notes 120–127 and accompanying text, discussing *Kramer II*, 446 P.3d at 18, 25–26.

obligations on the State. Instead, the court invoked private trust principles to articulate the State's trust duties.[289] Although it did not—as other courts have[290]—expressly recognize the State's trustee duties of prudence, loyalty, and impartiality, the court's invocation of private trust law[291] suggests it could do so in the future.[292]

The Oswego Lake court's extension of the public trust to uplands gave it an amphibious character, its most notable result. Although the court's reasoning on this issue was thin,[293] its emphasis on the ownership of the lakebed seemed to suggest the trust doctrine's extension to uplands was ancillary to ownership of submersible and submerged lands in the same way the New Jersey Supreme Court defined the scope of public rights to use private beaches: that use is necessary for the public to enjoy publicly owned tidelands and ocean waters.[294] Since Oregon's tidal waters are title-navigable, the public should enjoy access rights to all of them under the Oswego Lake decision. But the court drew a bright line between title-navigable waters and navigable-in-fact waters that was unnecessarily confusing and leaves the vast majority of Oregon waterways without access rights, even from public parklands. The result may encourage municipalities to reserve public access to their residents. The Oswego Lake court never even acknowledged preventing municipalities from discriminating against non-resident was a concern, eschewing such policy considerations.[295] In doing so, the court was able to decide lakebed ownership was determinative of public access to public

289 *See supra* notes 117–118 and accompanying text.

290 *Pa. Env't Def. Found.*, 161 A.3d 911, 932–35 (Pa. 2017). *See supra* note 113.

291 *See supra* note 114 and accompanying text.

292 In *Chernaik*, 367 Or. 143, 168 (Or. 2020), the Oregon Supreme Court rejected interjecting "all" private trustee obligations on public trustees in wholesale fashion as too disruptive but expressly decided that the public trust doctrine is "not necessarily fixed at its current scope" but is capable of expanding "to meet society's current needs," as it has done in the past. *Id.* at 158.

293 *Kramer II*, 446 P.3d at 16–17 (agreeing with the amphibious nature of the public trust in Iowa, Montana, and New Jersey but failing to explain the reach of public trust rights on uplands beyond adjacent public lands).

294 *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984) (recognizing the public trust affords more than an access right on private beaches it also protects the public's right to use the beaches for rest and recreation.). *See also* Raleigh Beach v. Atlantis Beach Club, 879 A.2d 112, 121–25 (N.J. 2005) (relying on *Matthews*, reaffirming the right to rest and relaxation accompanies the right to access beaches).

295 *See Kramer II*, 446 P.3d at 20. The court's cursory dismissal of the plaintiffs' Equal Privileges and Immunities claim, *supra* notes 93–94, may warrant revisiting, as municipal discrimination is no theoretical threat. *See* Andrew W. Kahrl, *Who Will Get to Swim This Summer?*, N.Y. TIMES (June 28, 2020), https://perma.cc/CL9X-KZEJ (addressing the social phenomena of financially advantaged taxpayers withdrawing support for public spaces during periods of racial tension; removing access to recreational spaces like beaches for those not as financially or socially advantaged). The State, as trustee of these public spaces, plays an essential role ensuring that all residents may share in the State's public trust resources regardless of financial, social, or racial background.

waters from public lands without any attempt to explain why this should be so.

By ignoring the underlying anti-monopolistic purpose of the public trust in favor of looking backward at previous court interpretations of the doctrine, the court ratified (without citing) the 2005 Attorney General's opinion that substantially diminished the scope of the doctrine by creating the so-called "public use doctrine."[296] This administrative invention was the product of an extremely narrow reading of case law by the Attorney General, invoked to relieve the State from protecting public rights to a substantial majority of the State's waterways, and which the court seemed to accept without careful examination of the consequences.[297] Instead of scrutinizing the many public parkland cases from other states, the court focused on Oregon cases involving private uplands,[298] and seemingly lost sight of the context of the case, which did not affect private property rights at all.[299] Worse, the court never thought it necessary to explain why lakebed ownership—as opposed to state ownership of the overlying water[300]—should be the litmus test for public access to public waters.

The court's evasion of these central issues is not costless. The plaintiffs, represented by pro bono lawyers, must now marshal considerable historical evidence about what sort of activity was taking place on Oswego Lake in 1859 or around that time, as well as track a byzantine array of private conveyances aimed at excluding the public over most of a century. The court imposed these costs with no explanatory reasoning for its unprecedented decision that ownership of submerged lands is a prerequisite to public access rights from the public lands surrounding the lake to public waters in the lake. Perhaps that holding was the price for a unanimous decision. If so, the result is no less disturbing.

The Oswego Lake case also calls into question the political dynamics operative in the City of Lake Oswego, which have led the City to approve a use monopoly for less than one-tenth of the constituents of its namesake

296 *See supra* notes 128–154 and accompanying text, discussing *Kramer II*, 446 P.3d at 17–18. *See generally* Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 779 (1986) (discussing the importance of public access to public property as an educating and socializing function, providing "social glue" to a society).

297 *Kramer II*, 446 P.3d at 9–10 (Or. 2019) (seeming to adopt the public use doctrine for waterbodies that are "navigable-in-fact"). *Cf.* 2005 AG Opinion, *supra* note 102, at 16 (inventing the public use doctrine without any clear indication that Oregon courts meant to relieve the State of its trustee obligations for navigable-in-fact waterways). *But see 45 States Survey*, *supra* note 101 (demonstrating that the majority of states protect the same navigable-in-fact waters under the public trust doctrine).

298 *See supra* notes 107, 109, 146, 149, 152 and accompanying text.

299 *See supra* notes 151, 154 and accompanying text.

300 *See supra* note 154 and accompanying text.

resource while excluding the remaining city residents.[301] This apparently undemocratic result was supported unanimously by the Lake Oswego City Council.[302] The apparent incongruity is perhaps explainable by the fact the minority interest in the democratic process protected an organized group representing the wealthiest people of a wealthy municipality. The result would be unsurprising to the founders of the Public Choice political theory who predicted that organized, persistent interest groups representing a minority could dominate the democratic process.[303] Lake Oswego politics may represent a paradigmatic example of Public Choice political theory.

The State's position in the Oswego Lake case also is worth examining. The State denied fish and wildlife were part of the public trust doctrine, that the doctrine extended to uplands, and that it imposed any affirmative obligations on the State.[304] The Oregon Supreme Court rejected all these positions.[305] But the court did adopt the Attorney General's diminishment of the scope of the public trust doctrine by ratifying the distinction between title-navigable and navigable-in-fact waterways. The latter—now described as subject to the novel "public use doctrine"— apparently have no state obligations to preserve the public's right to access them, which constitute the vast majority of the State's

[301] *See Easement Overview*, LAKE OSWEGO CORP., https://perma.cc/Y8ER-VW7Q (last visited Nov. 19, 2020) (stating that approximately 3,000 homes have deeded lake access within the City of Lake Oswego limits); *Lake Oswego City, Oregon, Quick Facts*, U.S. CENSUS BUREAU https://perma.cc/8TP4-RBK7 (last visited Nov. 19, 2020) (estimating that there are 39,822 residents of the City of Lake Oswego); *supra* note 31 and accompanying text.

[302] Meeting Minutes, Lake Oswego City Council City of Lake Oswego, Regular Meeting 7 (Apr. 3, 2012); *see supra* notes 93–94 and accompanying text.

[303] *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 27, 94–95 (1957) (stating that interest groups try to simultaneously create real public opinion supporting their views and convince government that such public opinion exists); Daniel A. Farber, *Public Choice Theory and Legal Institutions* 4–5 (Univ. Cal. Berkeley Pub. L. Rsch. Paper No. 2396056, 2014) https://perma.cc/2AJX-JGF5; PHILIP P. FRICKEY & DANIEL A. FARBER, PUBLIC CHOICE THEORY: A CRITICAL INTRODUCTION 23, 36–37 (1991) (explaining that small interest groups are more likely to assert political influence because coordination is easier in concentrated groups); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 283–86 (1962) (providing a comprehensive review of the often decisive decision-making role that small interest groups have on legislatures); KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 48–51 (Wiley, 2d ed. 1963) (explaining the different outcomes that prevail when there are two individuals and three alternatives); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 126–28 (1965) (claiming small, well-organized interest groups are successful because of their commitments to causes); WILLIAM RIKER, THE THEORY OF POLITICAL COALITIONS 12 (Yale University Press 1st ed. 1962) (examining the process of forming a subgroup within a larger group that can decide for the whole).

[304] *See supra* notes 12, 19, 26 and accompanying text. The State also denied that fish and wildlife were trust resources in the Oswego Lake case, although not in the *Monsanto* case concerning the cleanup of Portland Harbor. *See supra* note 19 and accompanying text.

[305] *See supra* notes 81–83 and accompanying text.

waterways whose beds are not state-owned.[306] Evidently, enforcement of these public rights is left to the public, without state assistance.

Absent a change in policy from the State, its evident hostility to the public trust doctrine leaves public rights in a perilous position, as the State appears more interested in reducing its obligations than vindicating public rights.[307] One solution would be to establish a public enforcement office without the conflict of interest that burdens the State. New Jersey had a so-called Public Advocate that played an essential role in the development of the public trust doctrine's applicability to ocean beaches.[308] Although the Public Advocate did not survive New Jersey politics,[309] it served as a model for a proposed Office of Legal Guardian for Future Generations drafted by an Oregon State Bar section in 2012.[310] This guardian would fulfill the responsibility the State's Attorney General cannot: "to ensure that a clean, healthful, ecologically balanced, and sustainable environment is passed on to future generations."[311] The state legislature, largely reflecting the same interests opposed to public

306 *See supra* notes 128, 138–140 and accompanying text.

307 Even worse, in an ensuing decision, the Oregon Supreme Court apparently ratified the State's position in *Kramer II*, with respect to public resources not involving the State's waters or submerged or submersible lands, although the state had a trust *authority* to protect them but no trust *duty* to do so. *Chernaik*, 367 Or. 143, 164 (Or. 2020) (approving the State's position in the Portland Harbor Superfund site case, in which the State claimed it was "trustee for all the natural resources in the state," including fish and wildlife, water, wildlife habitat, and "the bed and banks of every river within the state"). This position is flatly inconsistent with the State's position in the Oswego Lake case. *Kramer II*, 446 P.3d 1, 12 n.12 (Or. 2019); *see supra* notes 19, 82 and accompanying text. The *Chernaik* court ratified an optional trust doctrine by upholding the State's incongruous position: The State may act as a trustee when it chooses, but it may choose not to act to protect trust resources when inconvenient. Judicial acceptance of this capricious position makes one doubt the existence of viable separation of powers. The court's approval of such rank inconsistency undermines the public's respect for the rule of law.

308 *See, e.g.*, *Matthews*, 471 A.2d 355, 369 (N.J. 1984) (noting that the Public Advocate argued for opening all privately owned beaches to the public). The New Jersey Public Advocate was a department in the executive branch of state government that acted as a voice for the public, attempting to make the government more accountable through legal advocacy, policy research, and legislative outreach. *See, e.g.*, STATE OF NEW JERSEY, DEPT. OF THE PUBLIC ADVOCATE, A VOICE FOR THE PEOPLE: 2008 ANNUAL REPORT (2009), https://perma.cc/DGK3-QXYR.

309 The Public Advocate, created in 1974, abolished in 1994, revived in 2005, and again abolished in 2010 is not currently slated for yet another revival. *See Editorial: Bring Back the Public Advocate*, ASBURY PARK PRESS. (Oct. 29, 2017), https://perma.cc/G9L7-FYWB.

310 Oregon State Bar, Section on Sustainable Futures, *Office of Legal Guardian for Future Generations* (June 26, 2012), *reprinted in* MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 440–44 (2d ed. 2015), and in the appendix to this Article.

311 *Id.* (citing Oregon State Bar, Section on Sustainable Futures, *Office of Legal Guardian for Future Generations* § 2 (June 26, 2012)).

rights as the Attorney General,[312] is unlikely to authorize the guardian. But Oregon voters, via initiative, might.[313]

On remand, the circuit court will decide the future of public access to Oswego Lake as a function of the lake's title-navigability determination. To ascertain whether the public has a present right to access the lake from public parklands, the circuit court must determine if the lake was suitable for commerce in 1859 or roughly thereafter;[314] however, strange such a test might be. Even if the plaintiffs succeed in showing the bed of Oswego Lake is state-owned, as seems likely, the City's ban could still stand if the City can convince the courts it is "objectively reasonable."[315] This standard would seem to require the City to shoulder the burden of showing it cannot preserve the public's paramount trust rights to access Oswego Lake without preserving the lake itself. The fact the City finds it necessary to exclude the vast majority of its own residents to preserve its eponymous lake contradicts previous statements there are no boats—and therefore, no human degradation—on the lake for three-quarters of the year[316] and imposes a substantial burden for the City on remand.

The case, filed in 2012, remains decidedly undecided after the court left the central issue of access to Oswego Lake untouched, pending a title-navigability determination. Not only is justice slow, it is expensive. The plaintiffs' attorneys, working *pro bono*, were not awarded attorney fees,[317] even though the case contributed significantly to the State's public trust doctrine by elevating the doctrine out of the water, applying it to municipalities, clarifying that fish and wildlife are trust resources, and subjecting the State trustee to private trust principles.[318] The case would not have happened without their donated time. The State's public trust doctrine should not have to depend on the charity of private lawyers. Adopting the Legal Guardian for Future Generations would make the charitable impulse less determinative of public rights.

Ultimately, the Oregon Supreme Court's Oswego Lake decision was unsatisfactory because, despite seven years of legal proceedings, public access to the lake remains unresolved. Justice should not be so slow. In the case of Oswego Lake, a resolution is not likely to be forthcoming any time soon. The ponderous pace of the legal proceedings benefits the monopolists controlling access to the lake. But going forward, it is worth

312 *See, e.g.*, Rob Davis, *Polluted by Money: How Corporate Cash Corrupted One of the Greenest States in America*, OREGONIAN (Feb. 22, 2019), https://perma.cc/4NPA-3MSS.

313 *See infra* Appendix B for a possible initiative.

314 *See supra* note 208 and accompanying text.

315 *Kramer II*, 446 P.3d 1, 19 (Or. 2019). *See supra* note 278 and accompanying text.

316 *See supra* notes 282, 301 and accompanying text.

317 Order Den. Att'y Fees and Allowing Costs at 1, *Kramer II*, 446 P.3d 1 (Or. 2019) (noting that the court denied the fees without prejudice to request fees after the forthcoming trial).

318 *See supra* notes 81–83, 116, 127, 278 and accompanying text. *But see Chernaik*, 367 Or. 143, 158 (Or. 2020) (refusing to apply "all" private trust principles to public trust cases); *see supra* notes 8, 292 and accompanying text.

noting the Oregon Supreme Court described public access to be a "paramount right" more than once.[319] Perhaps on remand, the lower courts will take that admonition seriously and recognize the State's sovereign duty to protect public rights to the lake cannot be subjected to termination through private arrangements by Lake Corp and its predecessor.[320] If so, the plaintiffs, who have contributed considerably to the development of Oregon public trust law, may finally be rewarded by actually being able to swim in, and boat on, the public waters of Oswego Lake.

VIII. APPENDICES

Appendix A—Response to Dean Huffman's "Muddy Waters" Comment[*]

Our friend, former colleague and dean, Jim Huffman, well known as the Darth Vader of the public trust doctrine,[321] dashed off a comment on the Oswego Lake decision[322] while this Article was in production without our knowledge. We use this addendum to this Article to respond to Dean Huffman because while we agree with him that the Oregon Supreme Court's decision is problematic, several of his criticisms were well wide of the mark, the comment contained important omissions, and a number of its statements were inaccurate.

First, we agree with Dean Huffman that the so-called "public use" doctrine, which the court distinguished from the public trust doctrine, has little to recommend it, as there is no functional difference between the two doctrines in terms of the public's right to use waterways.[323] Since the dean's project has been to argue the public trust doctrine is merely a public easement for navigation and fishing, he does not see the need for a "public use" doctrine recognized as an easement.[324] While we agree, we do not share his view that the public trust doctrine is merely a public access

319 *Kramer II*, 446 P.3d at 10, 13–14.

320 *See supra* notes 197, 277 and accompanying text.

[*] Thanks to Mary Wood, Greg Adams, Todd Prager, and Kathleen Blumm for comments on this Addendum.

321 *See* Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENV'T L. 573, 597 n.108 (1989) (describing Dean Huffman as the "Darth Vader of the public trust").

322 James L. Huffman, *Oregon Supreme Court Muddies the Waters:* Kramer v. City of Lake Oswego, 50 ENV'T L. 455 (2020). Jim is perhaps the most frequent and longstanding critic of the doctrine, as evident in some of his many writings which his article references. *See, e.g.*, *id.* at 456 nn. 4–19; 460 nn.33–34; 466 n.71; 468 n.89; 473 n.114. For a review of some of his scholarship, see Michael C. Blumm, *The Water Law Scholarship of Jim Huffman and Janet Neuman: Prologue to the Festschrift*, 41 ENV'T L. 1, 2–6 (2012).

323 Huffman, *supra* note 322, at 463–67. For our criticism of the court's ratification of the public use doctrine, *see supra* notes 128–137 and accompanying text.

324 Huffman, *supra* note 322, at 1 ("It erroneously seeks to explain the public trust doctrine in terms of the law of trusts rather than as an easement or servitude on properties in submerged and riparian lands.").

easement; it also is an inherent limit on sovereignty that imposes a fiduciary obligation to protect trust resources from "substantial impairment."[325] This aspect of the public property right is not an access easement but is instead akin to a restrictive servitude. In his effort to narrow the scope of the doctrine, Dean Huffman does not recognize its existence as a limitation on government.

Nor, as Dean Huffman suggested, is the public trust doctrine limited to navigation and fishing. For over a century, courts have expanded the scope of trust resources to include recreational uses,[326] such as those at issue in the Oswego Lake case. Environmental preservation has been a trust purpose for nearly a half-century.[327] So, Dean Huffman's objection to the "public use" doctrine is a product of mischaracterizing the scope of the public trust doctrine. Our objection, on the other hand, is based on the fact the "public use" doctrine apparently relieves the State of its fiduciary obligations, contravening the very essence of the trust in holding government officials accountable to the citizenry.[328] In fact, in the Oswego Lake case, the State denied any obligation to protect public access at all.[329]

Second, we also agree with the dean's claim the public trust doctrine is not limited to waterbodies whose beds are owned by the State.[330] The interaction of private ownership of submerged (and/or submersible) lands and public trust property rights held by citizens over such lands should have been made clear as long ago as the 1918 *Guilliams* decision, which upheld the public's right to use waterways overlying privately owned streambeds.[331] Dean Huffman criticized the Oswego Lake court for creating this unnecessary linkage,[332] but it was actually not a creation of that court. Instead, it was the product of the 2005 Attorney General's opinion that invented the "public use" doctrine, although the court never acknowledged it was merely affirming the Attorney General's misguided

325 *Ill. Cent. R.R. Co.*, 146 U.S. 387, 435 (1892). *Pa. Env't Def. Found.*, 161 A.3d 911, 931–32 (Pa. 2017). *See infra* note 352 and accompanying text.

326 The seminal case is *Lamprey*, 53 N.W. 1139, 1143 (Minn. 1893), the reading of which was adopted by the Oregon Supreme Court in *Guilliams*, 175 P. 437, 442 (Or. 1918).

327 The pathbreaking case was *Marks*, 491 P.2d 374, 380 (Cal. 1971).

328 *See supra* notes 138–143 and accompanying text.

329 *See supra* notes 12, 66 and accompanying text.

330 Huffman, *supra* note 322, at 460 (disagreeing with the Oswego Lake court that the source of the public trust doctrine is derivative of state ownership of submerged lands); *id.* at 462 (comparing the public trust doctrine to an easement in which a transfer of ownership of the servient estate does not extinguish the easement and also asserting that "sovereign title to submerged lands beneath navigable waters was a product of the preexisting right of public use in those waters," which serves as a prima facie rule of original title but not necessary for the continued existence of public rights).

331 *Guilliams*, 175 P. at 442, reinforced by *Luscher*, 56 P.2d 1158, 1162 (Or. 1936).

332 Huffman, *supra* note 322, at 459, 463 (discussing the conflation of public interests with public rights and the creation of a "public use" doctrine).

opinion.[333] So, we agree with Dean Huffman's criticism, but think he should have recognized the origin of what he viewed as a problem.[334]

Our criticisms of Dean Huffman's comment begin with his failure to mention a groundbreaking decision of the Oswego Lake opinion. He overlooked the court's ruling that municipalities as well as the State, are trustees, subject to trust obligations.[335] Moreover, he mischaracterized another groundbreaking ruling that interpreted the trust to apply to public uplands adjacent to navigable waters as a misinterpretation of standard riparian rights law.[336] In fact, the court later clarified its decision was not intended to interpret riparian rights law.[337]

Another error of the dean's comment was its singular focus on the court's opinion, obscuring the role other branches of state government have played in recognizing public rights. For example, he not only failed to recognize the 2005 Attorney General opinion was the origin of the "public use" doctrine, he seemed to suggest the State's claim of ownership of water is questionable.[338] This assertion ignored the longstanding declaration by the State, dating to the 1909 Water Code, that "[a]ll water within the state from all sources of water supply belongs to the public."[339] Public ownership of resources evokes public rights. The Oswego Lake court recognized the public ownership of water, no less than the State's ownership of wildlife, implicated the public trust doctrine.[340] Even the

[333] 2005 AG Opinion, *supra* note 102, at 16–28. The 2005 opinion is examined in some detail in Michael C. Blumm & Erica A. Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENV'T L. 375, 382–86 (2012). The State's interest in creating an entirely novel doctrine was an effort to eliminate its fiduciary obligations for waterways whose beds were privately owned. *See supra* notes 328–329. *See also supra* notes 128–36 and accompanying text.

[334] Also confusing was Dean Huffman's statement that in the wake of the Supreme Court's opinion, the public will have a right of access to Oswego Lake if the lake is "navigable-in-fact at the time of statehood." Huffman, *supra* note 322, at 472. This assertion conflated the term "navigable-in-fact" with the test for navigability under the federal rule for title, a distinction central to the Oregon Supreme Court's decision. *See supra* note 131 and accompanying text. Oswego Lake is clearly "navigable-in-fact" under state law, giving the public a right to swim and boat on the lake if there is public access to the lake under *Guilliams* and similar cases, as explained in the 2005 Attorney General's opinion. *See* 2005 AG Opinion, *supra* note 102, at 24 (explaining that "navigable-in-fact" waters are those suitable for recreational watercraft). According to the Oswego Lake court, the public trust right of access across public uplands is a function of whether Oswego Lake was navigable under the federal title test at or around the time of statehood. *Kramer II*, 446 P.3d 1, 12 (Or. 2019).

[335] *Kramer II*, 446 P.3d at 19.

[336] Huffman, *supra* note 322, at 475–76.

[337] *Kramer III*, 455 P.3d 922, 924 (Or. 2019) ("Because ownership of the riparian rights remains a circumstance in dispute, it would be premature for us to resolve whether that circumstance has relevance to plaintiffs' claim for relief.").

[338] Huffman, *supra* note 322, at 474.

[339] The 1909 Water Code, Act of Feb. 24, 1909, Or. L. ch. 221, p. 370 § 1 (1909), *codified in*, OR. REV. STAT. § 537.110 (2019).

[340] *Kramer II*, 446 P.3d at 12 n.12. Dean Huffman suggested the public trust in wildlife, recognized by the Supreme Court in *Geer v. Connecticut*, 161 U.S. 519 (1896), was reversed in *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). Huffman, *supra* note 322, at 464. While

State has acknowledged public ownership of water is in trust.[341] Dean Huffman's questioning of public ownership of water was clearly inconsistent with state law.

Perhaps our chief criticism of Huffman's comment is his unwillingness to acknowledge the law can and should evolve. His commitment to judicial activism in the name of the Takings Clause may explain his deep skepticism of doctrines which could threaten a vitalization of compensation requirements due to regulations.[342] Still, Dean Huffman did not object to the evolution of the public trust doctrine from tidal waters to inland waters in the nineteenth century.[343] Nevertheless, he found the evolution of the public trust to protect recreation and ecological uses objectionable. In discussing Sax's articles, he even suggested any judicial influence the articles had would be inconsistent with stare decisis, "unsupported by the common law and therefore beyond the authority of the courts."[344] Dean Huffman never explained why the evolution of public rights in the nineteenth century comports with his view of the public trust but not its evolution in the twentieth century. He did not even seem to recognize that the common

Hughes did reverse *Geer* on whether state ownership of wildlife could insulate a state from the scrutiny under the Commerce Clause (or other federal prerogatives), the decision has not prevented at least 48 states from claiming the existence of a wildlife trust under state law. *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, UTAH L. REV. 1437, 1462–65 n.204 (2013). As Justice Brennan wrote in his opinion for the Court in *Hughes*:

> The whole [state] ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power . . . so as not to discriminate without reason against citizens of other States.

Hughes, 441 U.S. at 334.

341 The State acknowledged in Chernaik v. Brown, 436 P.3d 26, 32 (Or. Ct. App. 2019) that "title navigable" waterways themselves—not just riverbeds and lakebeds—are trust resources, although the Court of Appeals refused to address the legal grounds for this concession.

342 The public trust doctrine is perhaps the quintessential background principle of property law that insulates regulations from compensation requirements. *See* Michael C. Blumm & Rachel Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1183–1204 (2019) (reviewing recent background principles decisions including those based on the public trust doctrine).

343 Huffman, *supra* note 322, at 461 ("The navigable rivers and lakes of the vast North American continent made the modification [the extension of public rights to inland navigable waters] necessary if the doctrine was to serve the purposes it had in England where navigable waters are almost always tidal waters.").

344 *Id.* at 463.

law values both stability and evolution, not just the former.[345] As the Oregon Supreme Court once declared:

> The very essence of the common law is flexibility and adaptability. It does not consist of fixed rules but it is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life. . . . If the common law should become so crystallized . . . it would cease to be the common law of history, and would be an inelastic and arbitrary code. . . . [O]ne of the established principles of the common law . . . [is] that precedents must yield to the reason of different or modified conditions.[346]

Dean Huffman also objected to the use of private trust law principles to influence public trust interpretation because he thinks the fact the public is both the settlor of the trust and the class beneficiary makes private trust law inapposite in the public trust world.[347] Why public trust jurisprudence cannot draw upon private trust law without mirroring it precisely, he never explained.[348] Instead, he posited that "[t]he trust language of public trust law is better understood as an expression of the confidence necessarily placed in democratic governance," and "there are no judicial remedies for breach of this public trust," suggesting without citation to authority the only remedies lie in "lobbying, recall, or the next election."[349] This rather astonishing conclusion is precisely the opposite function the public trust doctrine serves, which is to question and cabin democratic decision-making in much the same way as the Bill of Rights functions. As the Pennsylvania Supreme Court expressed, the public trust—implicit in that state's constitution's declaration of rights—limits, not reinforces, police powers by affirming the public's "inherent and indefeasible rights" predate the constitution itself and are embedded in the social compact between the citizens and their government.[350] In short,

345 Dean Huffman cited Justice Scalia's dissent from denial of certiorari in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994), as if it were law. Huffman, *supra* note 322, at 465–66.

346 *In re* Hood River, 227 P. 1065, 1086–87 (Or. 1924).

347 Huffman, *supra* note 322, at 468.

348 Courts regularly look to private trust standards in judging public fiduciary performance. *See, e.g.*, *Pa. Env't Def. Found.*, 161 A.3d 911, 932 (Pa. 2017) (citing Restatement (Second) of Trusts § 174 in defining the state's duties as trustee of the people's environmental trust to include the duty of care, skill, prudence, loyalty, and impartiality). John Dernbach suggested that public trust jurisprudence should look to conservation trust law as well as private trust law. John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 U. MICH. J.L. REF. (forthcoming 2020) (manuscript at 16–17), https://perma.cc/2QZL-4WMS.

349 Huffman, *supra* note 322, at 468, 475. *See also id.* at 474 ("The reference to a trust responsibility must be read in that political context."); *id.* at 475 ("[T]he concept of trust is political, not legal.").

350 *Pa. Env't Def. Found.*, 161 A.3d at 930–31 (quoting PA. CONST. art. I, § 1) (adopting analysis of Robinson Township v. Pennsylvania, 83 A.3d 901, 948 (2013)). *See also id.* at 931 (describing such rights as "of such 'general, great and essential' quality as to be ensconced as 'inviolate.'" (quoting PA CONST. art. I, § 25)). Although the Pennsylvania Constitution

public trust rights are inherent in the social contract; legislative acts cannot rescind these rights.[351]

There are some other errors in Dean Huffman's comment. He twice claimed the State has never claimed ownership of the submerged lands of Oswego Lake.[352] In truth, the State asserts ownership of at least the lake as meandered in 1852.[353] He also alleged the public retains no rights in submerged lands once conveyed to private parties.[354] His assertion ignored the rights recognized in cases like *Gulliams,* which include the public right to engage in "sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes . . . and other public purposes which cannot now be enumerated or even anticipated."[355] Surely *Guilliams* and its progeny intended to include some rights to use the privately owned subsurface without trespass.[356] It

contains a specific public trust provision (PA CONST. art. I, § 27), the *Robinson Township* and subsequent *Pennsylvania Environmental Defense Foundation* opinions make clear that article 27 created no new rights, but instead enumerated pre-existing rights that the people had reserved to themselves in creating the state government. *See id.* Notably, article I, section I of the Oregon Constitution secures the same reserved rights of citizens, through its reservation of "natural rights inherent in people." OR. CONST. art. I, § 1. OR. CONST. art. I, § 1 provides: "*Natural rights inherent in people*. We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority . . . ." (emphasis added). The landmark *Illinois Central* opinion articulated the constitutional force of the public trust doctrine declaring, "[t]he state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government." *Ill. Cent. R.R. Co.*, 146 U.S. 387, 453 (1892). As one federal district court observed, "The trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign." United States v. 1.58 Acres of Land, 523 F. Supp. 120, 124 (D. Mass. 1981). For commentary on the constitutional underpinnings and force of the public trust principle, *see* Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. POL'Y 281, 285 (2014).

351 *See* Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs, 742 F. Supp. 441, 446 (N.D. Ill. 1990) ("The very purpose of the public trust doctrine is to police the legislature's disposition of public lands. If courts were to rubber stamp legislative decisions, as Loyola advocates, the doctrine would have no teeth.") Reserved public property rights to crucial resources remain fundamental to the democratic understandings that underly all government authority. *Id.* at 444. As the U.S. Supreme Court said in *Illinois Central*, private monopolization of essential resources "would be a grievance which never could be long borne by a free people." 146 U.S. at 454, 456.

352 Huffman, *supra* note 322, at 469–70.

353 *Kramer II*, 446 P.3d 1, 14 (Or. 2019) ("[R]egardless of whether the state could dispose of the lands underlying Oswego Lake, the state has not disposed of its interest in those lands."). *See also* Kramer v. City of Lake Oswego, No. 3:12-cv-00927-HA, 2012 WL 4863214, at *1, *4 (D. Or. Oct. 11, 2012) (dismissing the federal suit because the State's interest in the bed of Oswego Lake made it a required party under the Federal Rules of Civil Procedure, Rule 19(a)); *supra* note 60 and accompanying text (citing OR. REV. STAT. § 274.430(1) (2019)).

354 Huffman, *supra* note 322, at 471.

355 *Guilliams*, 175 P. 437, 442 (Or. 1918).

356 *Id.* ("To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated."). *See also Luscher*, 56 P.2d 1158, 1162 (Or. 1936)

is surprising that Dean Huffman would fail to recognize public rights beyond navigation and fishing, since his home state of Montana recognizes both rights of access from uplands and portage rights on private uplands.[357]

Dean Huffman's comment concluded with his assertion that the Oswego Lake decision blurred "the distinction between the state's police power and public rights," encouraging "even more political factions to pursue their interests in the courts."[358] We do not quite know what he meant, but he did claim the plaintiffs' motivations were larger than public access to the lake, which, if recognized, "will be precedent for pursuit of similar claims in other state waters previously understood to be privately held."[359] What those private waters are, and who recognized them, are left unsaid. The dean also raised the specter of future cases finding a right of public access over private lands.[360] In truth, there is precedent for public access rights in private lands, although the Oswego Lake decision cautioned such rights must be narrowly interpreted.[361] But the Oswego Lake case was about *public* access rights to a *publicly owned* lake over *publicly owned* parklands. Imagining the case was about facts not in evidence does not serve to clarify the muddy waters Dean Huffman claimed the Oswego Lake decision created.

("Regardless of the ownership of the bed, the public has the paramount right to the use of the waters of the lake for the purpose of transportation and commerce."). Commerce should be construed broadly to include pleasure-seeking passenger crafts—recreational watercraft— because Oregon courts consider recreational vessels to be engaged in commerce. *Id.*

357 Pub. Land Access Ass'n v. Bd. of Cty. Comm'rs of Madison Cty., 321 P.3d 38, 50 (Mont. 2014) (denying a private landowner the right to impede the public from accessing a privately owned riverbed); Galt v. State, 731 P.2d 912, 915–16 (Mont. 1987) (noting, however, that public portage rights must be narrowly construed).

358 Huffman, *supra* note 322, at 476.

359 *Id.* at 477.

360 *Id.* (claiming that such a result would be "a big win for the plaintiffs' supporters and huge loss for private property rights"; also maintaining that the plaintiffs' reliance on the public trust doctrine for access "suggests they have bigger fish to fry" than just access). Dean Huffman suggested that issue of public access to Oswego Lake could have been resolved in a more straightforward manner under riparian rights law, which will in fact be an issue on remand. *Id. See also Kramer II*, 446 P.3d 1, 6 (Or. 2019). How straightforward that inquiry will be is hardly clear, however, involving questions about the extent and effectiveness of alleged reservations of private riparian rights in the adjacent public parklands and whether such private proprietary conveyances can eliminate sovereign rights held in trust for the public.

361 *Id.* at 10–11 (interpreting *Weise*, 3 Or. 445, 446–47, 450–51 (1869) (recognizing the right of a log driver to attach a boom to a privately owned land on an island in the Tualatin River to facilitate the log drive)).

Appendix B—A Proposal for an Office of Legal Guardian for Future Generations

In 2012, a study group of the Oregon State Bar's Sustainable Futures Section proposed the following as an administrative rule or an executive order. Neither the bar nor the state has taken any action on the proposal.

Office of Legal Guardian for Future Generations
[DRAFT 6-26-12, to be created by Administrative Rule or Executive Order]

1. CREATION OF OFFICE OF LEGAL GUARDIAN

1.1 OFFICE. There is created an Office of Legal Guardian for Future Generations (the "Office") within the Department of Administrative Services.

1.2 LEGAL GUARDIAN. The Office shall be comprised of a Legal Guardian (the "Legal Guardian") appointed by the Governor. The Legal Guardian shall have the following qualifications:

(a) A background in ecology and of the dependence of living beings on healthy, functioning ecological systems, an understanding of sustainability, and familiarity with the precautionary principle and decision-making in the face of scientific uncertainty;

(b) A background in financial and budgetary matters and role of economics in public policy;

(c) An understanding of the State's governmental structure, political system and finances;

(d) An understanding of the needs and interests of future generations and how governmental action and public policy can impact such needs and interests; and

(e) The general absence of any ownership interest or membership in any business, industry or occupation or any personal relationship that would be reasonably likely to (i) affect or create the appearance of affecting the exercise of independent judgment relating to actions or decisions in an official capacity, (ii) influence or create the appearance of influencing the outcome of actions or decisions in an official capacity or (iii) generate a private pecuniary benefit or detriment for the Legal Guardian or his or her relative arising from actions or decisions in an official capacity.

2. PURPOSE

The Office is created to fulfill the responsibility of the State to serve as a trustee of the environment to ensure that a clean, healthful, ecologically balanced, and sustainable environment is passed on to future generations.

3. POWERS AND DUTIES OF LEGAL GUARDIAN

3.1 DEFINITIONS. The following definitions shall apply to Sections 1 to 4:

(a) "Ecological health and sustainability of the environment" is the capacity for self-renewal and self-maintenance of the soils, water, air[,] people, plants, animals and other species that collectively comprise the environment.

(b) The "environment" is the totality within the State of physical substances, conditions and processes (including all living organisms in the biotic community, air, water, land, natural resources and climate) that affect the ability of all life forms to grow, survive and reproduce. The "environment" includes both natural and human-created substances, conditions and processes.

(c) "Future generations" means all people descended from the current generation.

(d) "Future Generations Impact Statement" has the meaning set forth in Section 4.1.

(e) "Inventory of Significant State Resources" has the meaning set forth in Section 3.2(a).

(f) "Legal Guardian Response" has the meaning set forth in Section 4.3.

(g) "Ombudsperson" means a person appointed by an agency of the State to protect the interests of future generations with respect to actions or decisions of such agency.

(h) "Response to Impact Findings" has the meaning set forth in Section 4.2.

(i) "State" means the State of Oregon.

3.2 FUNCTIONS. The Legal Guardian shall:

(a) Prepare an inventory (the "**Inventory of Significant State Resources**") that identifies all resources of significant ecological or cultural importance located in the State, whether owned by the State, the Federal government, Native American tribes, private parties or otherwise, within one year of the date of this [Administrative Rule or Executive Order] and thereafter update the Inventory of Significant State Resources not less frequently than every five years, identifying additional resources and any change in the status or condition of previously identified resources;

(b) Identify and assess all material threats presented by decisions and actions of the State, including all executive agencies, to the ecological health and sustainability of the environment for future generations, including, without limitation, material threats to the resources on the Inventory of Significant State Resources;

(c) Evaluate alternatives to all governmental decisions and actions of the State, including all executive agencies, that may present a material threat to the ecological health and sustainability of the environment for future generations and identify those that provide the least threat and those that improve the ecological health and sustainability of the environment for future generations;

(d) Propose goals and actions that can be taken by the State, including all executive agencies, that to the extent allowed by law will best protect and improve the ecological health and sustainability of the environment for future generations;

(e) Review, in the exercise of the Legal Guardian's discretion or at the request of a legislator, proposed legislation in the State to identify and assess all material threats to the ecological health and sustainability of the environment for future generations;

(f) Review, in the exercise of the Legal Guardian's discretion, proposed administrative rules in the State to identify and assess all material threats to the ecological health and sustainability of the environment for future generations;

(g) Issue a Future Generations Impact Statement for any proposed legislation or proposed administrative rule in the State that the Legal Guardian reviews and believes may or could pose a material threat to the ecological health and sustainability of the environment for future generations in accordance with Section 4.1;

(h) Whether or not a Future Generations Impact Statement is issued, evaluate alternatives to proposed legislation and proposed administrative rules that may present a material threat to the ecological health and sustainability of the environment for future generations and identify those alternatives that provide the least threat and those alternatives that improve the ecological health and sustainability of the environment for future generations and disclose such matters to the Legislative Assembly (or committees or members thereof) or to agencies, as the Legal Guardian determines is appropriate;

(i) Issue a Legal Guardian Response, as the Legal Guardian determines is appropriate, in accordance with Section 4.3;

(j) Act, in the Legal Guardian's discretion and upon such terms and conditions as the Legal Guardian deems appropriate, in the capacity of a mediator or arbitrator in any dispute that involves a material threat to the ecological health and sustainability of the environment for future generations, but only if all necessary parties to the resolution of such dispute request in writing that the Legal Guardian act in the capacity of a mediator or arbitrator.

(k) Consult with the State, the Legislative Assembly (or committees or members thereof), agencies, Ombudspersons or any other person on any matters relating to the Legal Guardian's functions and furnish such assistance in the performance of the Legal Guardian's functions as may be reasonably requested;

(l) Testify in legislative, administrative, judicial, or other hearings that relate to the Legal Guardian's functions, as the Legal Guardian determines is appropriate, or intervene in any judicial proceeding that relates to the Legal Guardian's functions, as the Legal Guardian determines is appropriate;

(m) Serve in pending litigation, at the request of a state or federal judge in Oregon, as: a special master, expert witness, or settlement judge.

(n) Ensure, together with Ombudspersons, that to the extent allowed by law, the State, including all executive agencies, carries out the proposed actions and achieves the proposed goals identified by the Legal Guardian for best protecting and improving the ecological health and sustainability of the environment for future generations;

(o) Enter into contracts to carry out the functions of the Legal Guardian;

(p) Seek appropriate legal relief to enforce the power and authority of the Legal Guardian; and

(q) Maintain a website for the purposes of educating the public regarding the Legal Guardian's responsibilities and actions, and publishing the Inventory of Significant State Resources, the Annual Report and all Future Generations Impact Statements.

[Sections 3.3, 3.4, and 3.5 provide for professional staff, funding, and annual reporting.]

3.6 NO PRIVATE RIGHT OF ACTION. The creation of Office of Legal Guardian, and the Legal Guardian's powers and duties are not intended to create any private right of action, and nothing herein shall be interpreted to imply any private right of action.

4. FUTURE GENERATIONS IMPACT STATEMENT

4.1 PREPARATION OF FUTURE GENERATIONS IMPACT STATEMENT. In the exercise of the Legal Guardian's discretion or at the request of a legislator, the Legal Guardian shall prepare a Future Generations Impact Statement, containing such information as the Legal Guardian deems advisable consistent with this Section 4.1, on a legislative measure reported out of a committee of the Legislative Assembly if the Legal Guardian determines that the legislative measure poses a material threat to the ecological health and sustainability of the environment for future generations. In the exercise of the Legal Guardian's discretion, the Legal Guardian shall prepare a Future Generations Impact Statement, containing such information as the Legal Guardian deems advisable consistent with this Section 4.1, on a proposed administrative rule, whether permanent or temporary, for which a notice of rulemaking procedure is noticed if the Legal Guardian determines that the proposed administrative rule may or could pose a material threat to the ecological health and sustainability of the environment for future generations. The Future Generations Impact Statement shall provide a written explanation of how the legislative measure or proposed administrative rule poses a material threat to the ecological health and sustainability of the environment for future generations and, if appropriate, identify those alternatives that provide the least threat and those alternatives that improve the ecological health and sustainability of the environment for future generations. The Legal Guardian shall review or withdraw the

Future Generations Impact Statement, as the Legal Guardian determines is appropriate, if the legislative measure or proposed administrative rule is amended.

4.2 RESPONSE TO ISSUANCE OF FUTURE GENERATIONS IMPACT STATEMENT. If the Legal Guardian issues a Future Generations Impact Statement with respect to a legislative measure, the committee of the Legislative Assembly out of which the legislative measure was reported, within ten days (or such longer period to which the Legal Guardian agrees) after the Future Generations Impact Statement was issued, shall prepare a written response (a "Response to Impact Findings") to each finding in the Future Generations Impact Statement, which response shall accept or deny such finding and shall provide a written explanation of the denial of any such finding, as the committee determines is appropriate. If the Legal Guardian issues a Future Generations Impact Statement with respect to a proposed administrative rule, the agency which proposed the administrative rule, within ten days (or such longer period to which the Legal Guardian agrees) after the Future Generations Impact Statement was issued, shall prepare a written response (a "Response to Impact Findings") to each finding in the Future Generations Impact Statement, which response shall accept or deny such finding and shall provide a written explanation of the denial of any such finding, as the agency determines is appropriate. The Legal Guardian may extend the time period for the preparation of the Response to Impact Findings as the Legal Guardian determines is reasonably appropriate.

4.3 RESPONSE BY LEGAL GUARDIAN. Within ten days after a Response to Impact Findings is issued by a committee of the Legislative Assembly or an agency pursuant to Section 4.2, the Legal Guardian may prepare a written response (a "Legal Guardian Response") with respect to each finding in the Future Generations Impact Statement that the committee or agency has denied. The Legal Guardian Response shall provide such written explanation as the Legal Guardian determines is appropriate.

4.4 DISCLOSURE. If the Legal Guardian issues a Future Generations Impact Statement with respect to a legislative measure, the Speaker of the House of Representatives and the President of the Senate shall cause the Future Generations Impact Statement, the Response to Impact Findings (when issued), and the Legal Guardian Response (if and when issued) to be set forth on any print or electronic version of the legislative measure to which it relates. If the Legal Guardian issues a Future Generations Impact Statement with respect to a proposed administrative rule, the agency proposing the administrative rule shall cause the Future Generations Impact Statement, the Response to Impact Findings (when issued), and the Legal Guardian Response (if and when issued) to be set forth on any print or electronic version of the proposed administrative rule to which it relates.

4.5 CONSIDERATION OF LEGAL GUARDIAN'S CONCLUSIONS. If the Legal Guardian issues a Future Generations Impact Statement with respect to a legislative measure, the Legislative Assembly shall consider the Future Generations Impact Statement and the Legal Guardian Response (if and when issued) in acting on the legislative measure to which it relates. The Legislative Assembly shall provide a written explanation with respect to any legislative measure that is passed by the Legislative Assembly that is inconsistent with the Future Generations Impact Statement or the Legal Guardian Response (if and when issued) before the legislative measure is submitted to the Governor for action, which explanation shall be set forth on any print or electronic version of the legislative measure to which it relates. If the Legal Guardian issues a Future Generations Impact Statement with respect to a proposed administrative rule, the agency shall consider the Future Generations Impact Statement and the Legal Guardian Response (if and when issued) in acting on the proposed administrative rule to which it relates. The agency shall provide a written explanation with respect to any administrative rule that is promulgated that is inconsistent with the Future Generations Impact Statement or the Legal Guardian Response (if and when issued) before the administrative rule becomes effective, which explanation shall be set forth on any print or electronic version of the administrative rule to which it relates.