IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

OLIVIA CHERNAIK, a minor and resident of Lane County, Oregon; **LISA CHERNAIK,** guardian of Olivia Chernaik; **KELSEY CASCADIA ROSE JULIANA,** a minor and resident of Lane County, Oregon and **CATHY JULIANA,** guardian of Kelsey Juliana;

Plaintiffs,

v.

KATE BROWN, in her official capacity as Governor of the State of Oregon; and the **STATE OF OREGON,**

Defendants.

Case No. 161109273

PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE'S MOTION FOR SUMMARY JUDGMENT

Hearing scheduled on April 7, 2015 at 2:30 p.m. before the Honorable Karsten H. Rasmussen, Presiding Judge

I. INTRODUCTION

Plaintiffs respectfully oppose the motion for summary judgment filed by Governor Kitzhaber and the State of Oregon (hereinafter, the "State"). These youth Plaintiffs have come before the Court to seek declarations of law as to whether the State has any fiduciary duties under the Public Trust Doctrine to protect Oregon's essential natural resources from the irreversible catastrophic effects of climate change and ocean warming and acidification,[1] which threaten their lives, liberties, and property. As Plaintiffs discussed at length in their Memorandum supporting their Motion for Partial Summary Judgment ("Pl. Mem."), the facts of climate change and the threats posed to Oregon's unique natural resources are not in dispute, which has only been further confirmed by the State's own motion. The State cannot dispute that Oregon is facing the imminent threat of irreversible damage to the State's natural

[1] Plaintiffs hereinafter refer to "climate change" broadly to cover the full scope of irreversible harm caused by human carbon emissions to the atmosphere, which includes ocean warming and acidification.

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resources. Nor does the State argue that it has faithfully fulfilled its duties as sovereign trustee of Oregon's essential natural resources by limiting emissions of carbon dioxide within the control of the State. Nor does the State put forth evidence that it will meet the goals set by the legislature for emissions reductions.

The State has instead taken an extremely narrow view of the scope and substance of the Public Trust Doctrine, and its arguments represent a radical departure from Oregon's common law, precedent by the United States Supreme Court, and persuasive authority from judiciaries of many other States around the country. The State's arguments are fundamentally undemocratic, would result in too much power being placed in the political branches of government, and deny young citizen beneficiaries fundamental rights. Most egregiously, the State's argument that it has no affirmative obligation to help stop the *irreversible* harm to Oregon's public resources caused by carbon emissions, which if left unabated will cause death, disease, massive species extinction, water and food shortages, coastal and marine devastation, and a vastly altered environment for these young people and our posterity. The magnitude of what is at risk in this case can in no way be compared to a single permit to treat oyster beds with pesticides or a permit to remove gravel from specific submerged lands. It is true that this Court will not find an Oregon Public Trust Doctrine case of this significance because one does not exist. However, there is abundant public trust precedent from this and other jurisdictions to guide this Court's critical response to an issue of massive injustice for the young beneficiaries of this State.

The State's ultimate contention that these youth should use the "democratic process" to "achieve their policy goals" exemplifies the State's fundamental misconstruction of democracy and of this case. This Court is instrumental in our democratic system of checks and balances. The State would have the Court not perform its function as a check on the other branches and give complete power to the political branches to decide whether or not they will act in time to protect the very resources that sustain our lives and our liberties. The State is of course wrong,

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because nothing in our Constitutional system requires young people, who cannot vote, to raise the funds necessary for a voter initiative, or to lobby their legislature, in order to uphold their fundamental rights (*not "policy goals"*) as citizen beneficiaries of the public trust. Expecting these young citizens to go to the very branches of government that are violating their rights for redress would be like the courts of the civil rights era telling young African American children to lobby their legislatures or initiate voter referenda to secure their rights. This is precisely why we have a third branch of government, and why this Court's decision is so important, particularly as here where irreversible consequences are at stake.

The State first argues that the scope of the Public Trust encompasses only real property – submerged and submersible lands. The State then argues that the substance of the doctrine amounts to no more than a restraint on alienation of that real property, referring to the "trust" relationship as a "legal fiction" that is not accompanied by the same fiduciary responsibility that defines the very essence of every other trust known in our legal system. The State cannot produce one single case from Oregon in which a court has imposed either of these limitations on the Public Trust Doctrine, and in fact both propositions conflict directly with numerous appellate cases. The State thus invites the Court to walk out onto a very thin branch to issue broad declarations of law that conflict with more than a hundred years of Oregon common law, which could have serious ramifications far beyond this one case.

The Public Trust Doctrine, however, is an inherent component of the State's sovereignty and is not subject to the type of *ad hoc* attacks leveled by the State. The State as a sovereign entity has a duty to preserve the corpus of the trust and to protect those assets from substantial impairment so that future beneficiaries may continue to use and enjoy those essential natural resources. The Public Trust Doctrine thus sets a floor and imposes minimum duties upon the State to prevent waste of the resource and secure its enduring function for future generations. In this case, faced with a difficult and undeniable crisis, the State attempts to rewrite and to eviscerate the heart of the Public Trust Doctrine rather than acknowledging

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and faithfully executing its duties as trustee. But if there is one unifying thread tying together all of the Public Trust cases from *Illinois Central Railroad*, through the Oregon cases, up through the recent cases from the U.S. Supreme Court and Pennsylvania Supreme Court, it is this – the State cannot abdicate its responsibilities under the Public Trust Doctrine. And yet, by asking this Court to rewrite the doctrine in the context of this one case, the State attempts to do just this.

For those reasons and the reasons to be set forth in more detail below, Plaintiffs respectfully request that the Court deny the State's motion as to the first three legal rulings requested by the State, which relate to the scope and applicability of the Public Trust Doctrine. Consistent with Plaintiffs' motion for partial summary judgment, the youth Plaintiffs respectfully request that the Court issue the following three declarations of law as alternatives to the State's requested declarations, which are fully consistent with and complement the declarations requested in Plaintiffs' motion for partial summary judgment:

1) The atmosphere is a public trust resource.

2) The Public Trust Doctrine imposes fiduciary duties on the State to prevent substantial impairment of public trust resources.

3) It is appropriate for the Court to declare whether the State has upheld those fiduciary duties as it relates to the impacts of climate change on Oregon's essential natural resources.

The remaining issues in this case relating to declaratory relief can be resolved in the Court's ruling on Plaintiffs' motion for partial summary judgment.

The other three declarations requested by the State relate to injunctive relief. Under the Declaratory Judgments Act, questions relating to injunctive relief are to be resolved after entry of judgment declaring the law in the context of a petition for supplemental relief. ORS 28.080 ("The application thereof shall be by petition to a court having jurisdiction to grant the relief."); *see also* Pl. Mem. at 1 n 1. Moreover, the Court of Appeals instructed that questions

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relating to injunctive relief "cannot be answered until a court declares the scope of the public trust doctrine and defendants' obligations, if any, under it." *Chernaik v. Kitzhaber*, 263 Or App 463, 480, 328 P3d 799, 808 (2014). The State did not seek any further review of the Court of Appeals' decision and yet it now suggests on remand that this Court should once again rule on issues of separation of powers and political questions before the Court has declared the law. Because the parties disagree as to both the scope and the substance of the Public Trust Doctrine, it is particularly important in this case for the Court first to issue declaration of law before considering argument from the parties on injunctive relief.

II. THE ATMOSPHERE IS A PUBLIC TRUST RESOURCE.

Plaintiffs address this issue in their memorandum and rely in principle on the argument set forth therein. Pl. Mem. at 11-14. Plaintiffs provide additional argument in response to the State's motion below.

A. The Scope of the Public Trust Doctrine is Not Limited to Submerged and Submersible Lands.

In its Memorandum In Support of Its Motion for Summary Judgment ("State Mem."), the State's request for declaratory relief is premised principally upon its argument that the scope of the doctrine encompasses only submerged and submersible lands. State Mem. at 11-12. The State cannot cite to a single Oregon case that has limited the scope of the doctrine in this manner and none exists. While the State relies on cases that apply the doctrine to real property, *see, e.g.*, *Kalmiopsis Audubon Soc. v. Div. of State Lands*, 66 Or App 810, 676 P2d 885 (1984), it ignores other Oregon cases and statutes that recognize explicitly that numerous additional natural resources also fall within the scope of the Public Trust Doctrine. Plaintiffs detail many of those authorities in their memorandum. Pl. Mem. at 9-11 (citing ORS 537.334(2) (recognizing the "public trust" inherent in the "waters of the state"); *State v. Hume*, 52 Or 1, 95 P 808 (1908) (wildlife)). While many prior Oregon cases under the Public Trust

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Doctrine have addressed submerged and submersible lands, the State clearly misstates the law in arguing that the scope of the doctrine encompasses only those resources. No court in Oregon has ever declared that to be the law and such a holding would be inconsistent with U.S. Supreme Court precedent.

More than a century ago, in what has become the seminal public trust case, the U.S. Supreme Court recognized the Public Trust Doctrine was needed as a bulwark to protect resources too valuable to be disposed of at the whim of the legislature. *See Ill. Cent. R.R. v. Illinois*, 146 US 387, 453, 13 S Ct 110, 118 (1892) ("The 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 and the preservation of the peace."); *see also Geer v. Connecticut*, 161 US 519, 534, 16 S Ct 600, 606 (1896) ("The ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state."), *rev'd on other grounds*, *Hughes v. Oklahoma*, 441 US 322, 99 S Ct 1727 (1979).

Over time, courts have expanded the Public Trust Doctrine beyond original societal concerns of commerce and navigation to other modern concerns such as biodiversity, wildlife, and recreation. *See, e.g.*, *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 33 Cal 3d 419, 658 P2d 709 (1983); *Ctr. for Biological Diversity v. FPL Group, Inc.*, 166 Cal App 4th 1349, 1363, 83 Cal Rptr 3d 588, 599 (2008) (undomesticated birds and wildlife); *Matthews v. Bay Head Improvement Ass'n*, 95 NJ 306, 321-22, 471 A2d 355, 363 (1984) (bathing, swimming, and other shore activities). Indeed, courts have "perceiv[ed] the public trust

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doctrine, not to be 'fixed or static,' but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Id.* at 326, 471 A2d at 365.

Indeed, in the seminal 1894 decision of *Shively v. Bowlby*, 152 US 1, 14 S Ct 548 (1894), the U.S. Supreme Court affirmed an Oregon Supreme Court decision holding that the Public Trust Doctrine encompassed both tidelands and navigable waters. *Id.* at 58, 14 S Ct at 570. In a line of 20th century cases, the Oregon Supreme Court then recognized that the public retained recreational rights, in addition to navigation and commerce, in all navigable-in-fact waters, regardless of whether the state owned the underlying bed. *Luscher v. Reynolds*, 153 Or 625, 635-36, 56 P2d 1158, 1162 (1936) ("title to the bed is in the adjacent owners, subject however to the superior right of the public to use the water for the purposes of commerce and transportation."); *Guilliams v. Beaver Lake Club*, 90 Or 13, 26, 175 P 437, 441 (1918). Thus, from the very earliest cases, the Public Trust Doctrine in Oregon has extended beyond submerged and submersible lands to encompass all navigable-in-fact waters regardless of ownership of the bed. *See also* Michael C. Blumm & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 Envtl L 375, 386-94 (2012).

In 1987, the legislature passed the instream water rights act and recognized explicitly that the Public Trust Doctrine extends to all "waters of this state." ORS 537.334 (stating that instream rights would not diminish "ownership and control of the waters of this state [and] the public trust therein"); *see also* Pl. Mem. at 10. The legislature thus recognized that the State owns all "waters of this state" irrespective of navigability and without reference to the holder of title to the underlying bed and that those waters are held in trust by the sovereign for the benefit of the public. The State's argument conflicts irreconcilably with the legislature's recognition of the Public Trust Doctrine when it passed the In-Stream Water Rights Act.

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Moreover, the Public Trust Doctrine in Oregon plainly encompasses wildlife resources regardless of whether those wildlife resources are located on state-owned lands. In *Hume*, the Supreme Court held that:

> It is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all its citizens.

52 Or at 5 (emphasis added). The Supreme Court thus upheld the State's exercise of authority over the taking of wild animals as an exercise of its duties attendant in a sovereign capacity holding title to this common resource. *See, e.g.*, *State v. Pulos*, 64 Or 92, 95, 129 P 128, 130 (1913). As recently as 2011, the Court of Appeals adhered to *Hume* and similar precedent from *Monroe v. Withycomb*, 84 Or 328, 334-35, 165 P 227, 229 (1917), holding that the State's ownership of wildlife is "not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common." *Simpson v. Dep't of Wildlife*, 242 Or App 287, 300, 255 P3d 565, 571 (2011) (emphasis added). The Supreme Court has similarly held that the State holds title to fish in its sovereign – and not in its proprietary – capacity. *Anthony v. Veatch*, 189 Or 462, 487, 220 P2d 493, 503-04 (1950), *cert dismissed*, 340 US 923, 71 S Ct 499 (1951).[2]

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[2] In a case that did not interpret the Public Trust Doctrine, the Court of Appeals suggested that the state's ownership of wild animals is a "legal fiction." *See State v. Couch*, 196 Or App 665, 676 n 5, 103 P3d 671, 677 n 5 (2004), *aff'd on other grounds*, 341 Or 610, 147 P3d 322 (2006). The Supreme Court affirmed this case on different grounds, finding that the state had statutory authority to regulate "game mammals" whether or not they were wildlife. Another Oregon Appeals case, *State v. Dickerson*, 260 Or App 80, 85 n 5, 317 P3d 902, 904 n 5 (2013), which cites to this alleged "legal fiction," interprets a similar criminal statute, and that case has again been accepted for review by the Supreme Court, 355 Or 567 (2014). Finally, *Simpson v. Dept. of Fish and Wildlife* quotes *Couch* in stating that state ownership is a "legal fiction," but does so in order to explain that the *type* of property interest the state has in wildlife is distinct from the traditional sense of the word "own." 242 Or App 287, 304, 255 P3d 565, 573 (2011) ("[T]he state's *property* interest in wildlife under ORS 498.002(1) is not a proprietary or possessory interest that amounts to ownership, as ownership is commonly understood.") (emphasis added). These cases plainly did not speak to the nature of the Public Trust Doctrine, and no Oregon court has ever held that the doctrine is in any way a "legal fiction." Rather, these cases are consistent with the U.S. Supreme Court's holding that states do not own wildlife in a proprietary sense, but do have obligations and authority in their sovereign capacity

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Thus, the only rationale offered by the State to exclude the atmosphere from the scope of the Public Trust Doctrine flatly conflicts with a host of legal authorities within the State. As the State asserts incorrectly in its brief:

> Unlike submerged and submersible lands, the State was not granted "title" to the atmosphere at statehood under the equal footing doctrine (or at any other time). Unlike submerged and submersible lands, the atmosphere itself is not a type of real property that is susceptible to the sort of dual-component ownership that is applicable to the State's interest in submerged and submersible lands. Nor have the plaintiffs demonstrated how a doctrine that is, in this state, effectively a restraint on alienation of real property, would have relevance to fungible, constantly shifting resource like the atmosphere that it not tied to underlying real property interests in land akin to the State's interests in submerged and submersible lands underlying waterways.

State Mem. at 15. As discussed above, the Public Trust Doctrine in Oregon has never been limited to real property that is tidally influenced (*i.e.*, those subject to the equal footing doctrine) and has always encompassed navigable waters irrespective of the ownership of the underlying bed as well as fish and wildlife. According to the State's argument, the Public Trust Doctrine would have no applicability to many lakes, rivers, or other waters within Oregon, and yet the legislature recognized that the public trust applies equally to "waters of the state." As recently as 2012, the Supreme Court recognized that the scope of the Public Trust Doctrine is distinct from the equal footing doctrine because the contours of the doctrine do not depend on the federal constitution. *See PPL Montana, LLC v. Montana*, ___ US ___, 132 S Ct 1215, 1234-35 (2012). In limiting the Public Trust Doctrine to equal footing lands, the State ignores

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to protect wildlife in trust for future generations. *See Missouri v. Holland*, 252 US 416, 434, 40 S Ct 382, 384 (1920); *Geer*, 161 US at 530. The "legal fiction" of state ownership was originally dispelled by the U.S. Supreme Court to prevent states from unnecessarily discriminating against other states' citizens and interfering with interstate commerce when managing wildlife resources within the state. *Hughes v. Oklahoma*, 441 US 322, 338-39, 99 S Ct 1727, 1737-38 (1979) (upholding states' rights to conserve wildlife in non-discriminatory ways). The "legal fiction" of state ownership rulings had nothing to do with abrogating the public trust obligation of sovereigns.

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over a hundred years of jurisprudence from within Oregon in arguing that the doctrine is "tied to underlying real property interests" and cannot apply to "constantly shifting resource[s]." *See* State Mem. at 15. The State's argument that the doctrine amounts to no more than a "restraint on alienation of real property," is plainly wrong, because the doctrine applies to a number of other types of natural resources and has since its earliest roots in Oregon's common law.

Thus, the restraint against alienation is *one* of the sovereign trustee's restrictions. However, the underlying purpose of the restraint on alienation is to avoid the substantial impairment of the public's right to use the trust resource, as the State concedes in its brief. State Mem. at 11 ("public trust doctrine . . . operates as restraint on the State's authority to either alienate or divest itself . . . where such alienation or divestment would substantially impair the public's right to use the [trust resource] . . . for . . . [trust purposes]." (Emphasis added). Thus, the foremost duty of the trustee is to protect the public's rights and not allow substantial impairment.

B. Cases From Other Jurisdictions Weigh Strongly In Favor of Plaintiffs' Request That the Court Declare the Atmosphere To Be a Public Trust Resource.

Plaintiffs acknowledge that no prior Oregon court has been asked to declare the atmosphere to be a public trust resource; there was no need for such a declaration in our State's history. However, now that the need and the question have arisen, the Court of Appeals directed the Court to decide this important question. This is an issue of first impression, but the Court can look to guidance from other jurisdictions around the country as well as the fundamental principles that underlie the doctrine. The "very essence of the common law is flexibility and adaptability . . . ." *In re Hood River*, 114 Or 112, 180, 227 P 1065, 1086 (1924). "The public trust by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances." *In re Water Use Permit Applications,* 94 Haw 97, 135, 9

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P3d 409, 447 (2000). Indeed, as discussed above, Oregon courts earlier expanded the doctrine to protect public rights in recreation as well as navigation and commerce. *See Luscher*, 153 Or at 635-36; *Guillams*, 90 Or at 28-29.

As Plaintiffs set forth in their motion for partial summary judgment, courts around the country have routinely addressed the question of whether the scope of the doctrine includes natural resources that were not previously declared to be public trust assets. Pl. Mem. at 11-12. A 2008 case from the California Court of Appeals declared that the scope of the doctrine in that state includes wildlife:

> Defendants' first line of defense is that the public trust doctrine applies only to tidelands and navigable waters, and has no application to wildlife. While the public trust doctrine has evolved primarily around the rights of the public with respect to tidelands and navigable waters, the doctrine is not so limited. '[T]he public trust doctrine is not just a set of rules about tidelands, a restraint on alienation by the government or an historical inquiry into the circumstances of long-forgotten grants.' (Sax, Liberating the Public Trust Doctrine from its Historical Shackles (1980) 14 U.C. Davis L.Rev. 186, 186.)

Ctr. for Biological Diversity, Inc., 166 Cal App 4th at 1359-60, 83 Cal Rptr 3d at 595-96 (emphasis added). Having rejected the very theories posited by the State here, the California Court of Appeals then held that the doctrine encompasses birds and wildlife because they "are natural resources of inestimable value to the community as a whole" and their "protection and preservation is a public interest that is now recognized in numerous state and federal statutory provisions." *Id.* at 1363, 83 Cal Rptr 3d at 599.

The sovereign government has had, since the early times of Roman Law, an inalienable obligation as sovereign over the air, just as with land and water. William Blackstone, 2 *Commentaries on the Laws of England* 14 (1766); *Institutes of Justinian*, 2.1 (J. Moyle trans, 3d ed 1896) ("The following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore."). And the U.S. Supreme Court has also referred to the state's interest as sovereign in the atmosphere:

> This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its

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> citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.

State of Ga. v. Tennessee Copper Co., 206 US 230, 237, 27 S Ct 618, 619 (1907).

The State relies disproportionally on recent cases in other jurisdictions where other plaintiffs sought declarations that the atmosphere is a public trust resource. State Mem. at 15-18. As the State itself acknowledges in a footnote, however, a great majority of those cases were dismissed on jurisdictional grounds. *Id.* at 16 n 3. Here, in contrast, the Court of Appeals held that this Court does have jurisdiction to declare the law. *Chernaik*, 263 Or App at 479. The State, therefore, not only lacks any basis to rely on jurisdictional rulings from other courts, its undue reliance on those cases in the face of the Oregon Court of Appeal's decision in this case inappropriately attempts to undermine the authority of that Court by circumventing the law of the case.

In cases that have been resolved on the merits, at least one court has ruled that the atmosphere is a public trust resource. *See Bonser-Lain v. Tex. Comm'n on Envtl. Quality*, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex Dist, Aug 2, 2012), *rev'd on jurisdictional grounds*, 438 SW3d 887 (Tex App 2014). The State's effort to distinguish that holding on the basis of Texas' constitutional provisions is unavailing, State Mem. at 17, because the Texas District Court held the duty applied at common law as well. Further, the Public Trust Doctrine in Oregon does not derive solely from our State's constitution. The Oregon Constitution, Or Const, Art VIII, § 5(2), creates the State Lands Board and then delegates the public trust obligations with respect to state lands to that entity. Thus, it is an "expression of" the public trust obligation – not the source of or the full extent of those obligations. *Brusco Towboat v. Oregon*, 30 Or App 509, 519, 567 P2d 1037, 1044 (1977), *aff'd in part on other grounds, Brusco Towboat Co. v. State*, 284 Or 627, 589 P2d 712 (1978). As the earliest Oregon cases demonstrate, the Public Trust Doctrine derives from the State's holder of title in essential shared natural resources and not solely from the State constitution. As stated in the April 21,

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2005 Oregon Attorney General Opinion (attached as Appendix hereto): "Where the state has acquired ownership of a waterway as an incident of statehood, its management and disposition of those rights is subject to the public trust doctrine, which derives from federal and state law and generally requires the state to protect the public's use of these waterways for navigation, recreation, commerce and fisheries." *Id.*, at 15, *citing Shively*, 152 US at 40, 47, 56; *Corvallis & Eastern*, 61 Or 359, 369-74; 121 P 418 (1912), *Bowlby*, 22 Or at 427; App-15.

The case from New Mexico, *Sanders-Reed v. Martinez*, No. D-101-CV-2011-01514 (NM Dist Ct) is on appeal and was argued on January 27, 2015 and thus the transcript of the proceeding before the trial court is of little use. Notably, however, that court too found that if the Public Trust Doctrine applied, it would include the atmosphere.

The Colorado case does not support the State's arguments because the district court dismissed on the basis that "the Public Trust Doctrine has never been recognized by the Colorado courts" and the decision was not reviewed by an appellate court. *Xiuhtezcatl Martinez v. State of Colorado*, No. 11CV4377, slip op at 4 (District Court, City and County of Denver, Colorado, November 7, 2011). In contrast, the doctrine is deeply rooted in Oregon's common law dating back to statehood. Pl. Mem. at 5-11.

In *Filippone v. Iowa Dep't of Natural Resources*, No. 2-1005 / 12-0444, 829 NW2d 589, 2013 Iowa App. LEXIS 279 (March 13, 2013) (unpublished table decision), the court declined to declare the atmosphere as a trust resource because the Iowa Supreme Court had explicitly cautioned lower courts that the "public trust doctrine in Iowa has a narrow scope." *Id.* at *6 (citing *Fencl. v. City of Harpers Ferry*, 620 NW 2d 808, 813 (Iowa 2000)) (emphasis added). The concurring opinion explained that it would thus be up to the Iowa Supreme Court to extend the scope of the doctrine but made a point of noting that there was a "sound public policy basis" for including the atmosphere as a trust resource. *Id.* at *9 (Doyle, J., concurring).

In the Minnesota case, the Court of Appeals issued an unpublished opinion resting on binding precedent from earlier cases that the doctrine in Minnesota encompassed only

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"navigable waters and the lands under them..." that would require Supreme Court expansion. *Aronow v. State*, No. A12-0585, 2012 Minn App Unpub LEXIS 961, at *4 (Oct 1, 2012). Moreover, unlike this case, the plaintiff had not alleged that any public trust rights in navigable waters or submerged lands were being impacted by climate change. *Id.* at *5-6.

While Plaintiffs acknowledge this is an issue of first impression, there is no principled distinction between traditional trust assets in Oregon – surface water, wildlife, fisheries, and submerged and submersible lands – and the atmosphere. Indeed, every day as the climate crisis worsens, it becomes more evident that the integrity of these traditional trust assets is dependent upon the atmosphere, because each and every one of these essential natural resources will suffer irreversible damage as a result of climate change. It would be highly incongruous for the State to have certain responsibilities and duties over these trust assets without concomitant duties and responsibilities over the atmosphere.

III. UNDER THE PUBLIC TRUST DOCTRINE, THE SOVEREIGN HAS A DUTY TO PRESERVE ESSENTIAL NATURAL RESOURCES AND TO PREVENT SUBSTANTIAL IMPAIRMENT OF THE CORPUS OF THE TRUST.

As the Court of Appeals recognized, the ultimate disposition of this case does not rise or fall wholly on the question of whether the atmosphere is a trust resource: "plaintiffs are entitled to a judicial declaration of whether the atmosphere . . . the State of Oregon, as a trustee, has a fiduciary obligation to protect . . . from the impacts of climate change," ***and*** whether the other natural resources identified in plaintiffs' complaint also "are trust resources" that the state has a fiduciary obligation to protect." *Chernaik*, 263 Or App at 481. (Emphasis added). As Plaintiffs state in their motion for partial summary judgment following remand, they seek affirmation that submerged and submersible lands, waters of the state, fisheries, beaches and shorelands and wildlife are also public trust resources that are threatened with irreversible and catastrophic damage as a result of climate change, which include sea level rise, coastal erosion, flooding and inundation of tidally influenced wetlands essential for many public uses. Pl. Mem. at 9-11.

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Significantly, the State has ***not*** moved for summary judgment on the question of whether any of these other natural resources fall within the scope of the Public Trust Doctrine. State Mem. at 1. The ***only*** resource addressed in its motion and in its requested declarations of law is the atmosphere. Thus, with those traditionally acknowledged trust resources, the State has nothing to argue except that the substance of the Public Trust Doctrine "does not impose particular actions associated with traditional legal trusts (*i.e.*, fiduciary obligations or duties)." State Mem. at 2. Faced with the overwhelming evidence from its own state-commissioned bodies, *i.e.*, Oregon Climate Change Research Institute and the Oregon Global Warming Commission, and Plaintiffs' expert declarations, that climate change threatens all of these other trust resources, the State can seek only to rewrite the Public Trust Doctrine with a broad brush stroke – to argue that the trust is merely a "legal fiction." In doing so, the State tries to absolve itself of any fiduciary responsibility to act to stop the crisis to befall Plaintiffs and future generations. This argument is utterly without legal precedent and is antithetical to the basic principle of the Public Trust Doctrine. If the government can simply wash its hands of a fiduciary responsibility that has been articulated by courts over hundreds of years of jurisprudence, if the people cannot turn to the judiciary when all other branches of government have failed to address a crisis that threatens the very livability of our planet, then power is no longer "inherent in the people." Or. Const., Art. 1, § 1.

While the State suggests that Plaintiffs should simply fall back on the legislature, that branch of government has obviously failed the people, both in Oregon and at the federal level, under constant and unwavering influence from the fossil fuel industry. Here in Oregon, the legislative process has resulted in non-binding targets or inadequate standards for greenhouse gas emissions that are largely unsupported by science, and the State readily admits that it is already falling well behind in its attempt to meet those targets. Pl. Mem. at 26-28. Time is quickly running out before our climate is pushed beyond the point of irreversible and catastrophic harm to our State's natural resources and economy. *See* Declarations of Dr. James

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Hansen, Dr. Philip Mote, and Ernest Niemi attached to Plaintiff's Motion for Partial Summary Judgment. Plaintiffs and the public have already turned to the State's policy-making body, and it has failed to uphold the sovereign's obligations to preserve Oregon's essential natural resources in trust for the benefit of the people. Accordingly, Plaintiffs must rely on the judiciary to declare the State's fiduciary responsibilities and uphold the citizens' beneficiary rights to the conservation of their state public trust resources.

A. The Foundation Of a Legal Trust Is a Fiduciary Obligation Owed By a Trustee To a Beneficiary Of the Trust.

The State faces a formidable task in attempting to convince a court of law that the Public Trust Doctrine – or any legal trust – is not accompanied by fiduciary responsibilities. As the Supreme Court has noted in the context of statutory interpretation, "when a term is a legal one, we look to 'its established legal meaning' as revealed by, for starters at least, legal dictionaries." *Comcast Corp. v. Dep't of Revenue*, 356 Or 282, 296, 337 P3d 768, 776 (2014). The Court's evaluation of the State's argument in this case should start with the well-accepted definition of this legal term of art.

A trust is defined as a "fiduciary relationship regarding property and charging the person with title to the property with equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligations towards the property and the beneficiary." Trust, *Black's Law Dictionary* 1740 (10th ed 2014). Indeed, when Oregon courts were first delineating the scope of the Public Trust Doctrine in the late 1800s and early 1900s, the common law in Oregon defined a trust in much the same way:

> A trust is an equitable obligations, either express or implied, resting upon a person by reason of a confidence reposed in him to apply or deal with property for the benefit of some other person, or for the benefit of himself and another or others, according to such confidence . . . .

Templeton v. Bockler, 73 Or 494, 506, 144 P 405, 409 (1914).

In 1892, in *Shively*, the U.S. Supreme Court, in affirming the opinion from the Oregon Supreme Court, described the State's sovereign interest in the navigable waters and the soils

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underneath them as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, as well for shellfish as floating fish . . . ." 152 US at 16. In 1896, in *Geer v. Connecticut*, 161 US 519, 16 S Ct 600 (1896) *overruled on other grounds by Hughes v. Oklahoma*, 441 US 322, 99 S Ct 1727 (1979), the Supreme Court stated that:

> The ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state.

161 US at 534. (Emphasis added). In 1908, the Oregon Supreme Court held in *Hume* that title in wildlife is "held by the state, in its sovereign capacity in trust for all its citizens." *Hume*, 52 Or at 5. In 1983, the Court of Appeals reaffirmed this same understanding of the Public Trust Doctrine. "The state, as trustee for the people, bears the responsibility of preserving and protecting the right of the public to the use of the waters for those purposes." *Or. Shores Conservation Coal. v. Or. Fish and Wildlife Comm'n*, 62 Or App 481, 493, 662 P2d 356, 364 (1983). These rights of the public include the rights of both present as well as future generations.

This precedent, drawing upon a legal term of art that has always been defined with respect to an enforceable fiduciary obligation, stands in stark contrast to the arguments of the State in its legal memorandum. The State brushes aside decades of case law while casually referring to the use of this long-accepted legal term of art "as shorthand" for the State's police power authority "to regulate and manage certain assets in the public interest . . . ." State Mem. at 7. Not surprisingly, the State provides no legal citation in support of that absurd statement, because none exists. Indeed, these courts were not using the term "trust" as any sort of shorthand. Very much to the contrary – the courts also referred to the State as a "trustee," *Or. Shores Conservation Coal.*, 62 Or App at 493, and found that this trust obligation imposed a "duty" on the legislature to "enact such laws as will best preserve the subject of the trust . . . ." *Geer*, 161 US at 534. It is clear that courts have intentionally and with purpose imposed on the

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State a trust obligation specifically because it is associated with a duty to act as a fiduciary for the public.

Furthermore, Courts have always treated the Public Trust Doctrine as distinct from the State's police power authority. *See, e.g.*, *Ill. Cent. R.R.*, 146 US at 453 ("The 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 and the preservation of the peace . . . ."); *Geer*, 161 US at 534. In other words, the United States Supreme Court held that the police power is a distinct source of regulatory power. Thus, the State embarks down the wrong path from the very beginning of its memorandum of law by improperly elevating its police power at the expense of the Public Trust Doctrine. State Mem. at 5-8. The police power supports the State's regulatory authority; the Public Trust Doctrine provides the regulatory authority *and* the inherent duty to exercise that authority. Consequently, the authority of the State to exercise its police power to protect the public interest is not at issue in this case; rather, the issue is the affirmative obligation of the state trustee to protect the trust *res* for present and future generations of Oregonians.

The State is also incorrect in arguing that Courts have "repeatedly explained that describing the State as owning or holding wild game in trust is just a 'legal fiction . . . expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate . . . .'" *Id.* (quoting *Dickerson*, 260 Or App at 85 n 5)). As discussed earlier, *Dickerson* had nothing to do with the Public Trust Doctrine, the case has been accepted for review by the Supreme Court, and the statement in *Couch*, 196 Or App at 665, is no longer good law, 341 Or at 610. Indeed, the State is talking out of both sides of its mouth, because in one breath it asserts that the Public Trust Doctrine extends only to submerged and submersible lands, State Mem. at 11, and in the next it asks this Court to rewrite the entire doctrine based on a case dealing with the interpretation of a criminal misdemeanor statute regarding wildlife,

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State Mem. at 7-8. The State cannot have it both ways. It is the possessive ownership theory which is the legal fiction, not the sovereign property, or the trust itself.

Indeed, it is apparent from the State's brief, that its objective here is to wipe the Public Trust Doctrine from the face of Oregon's common law, subsuming those obligations wholly within the State's police power and freeing the State of any fiduciary obligations owed to its citizens. The fundamental flaw in the State's position is that Public Trust Doctrine, while flexible to respond to new threats to public resources, cannot be abrogated as long as the sovereign exists. *See Ill. Cent. R.R. v. Illinois*, 146 US at 453. It would be one thing for the State to acknowledge that it is seeking a change in the common law, a reversal of course, based upon some reason grounded in public policy or moral foundation. But here, the State simply embarks unannounced down a new road, untethered from the confines of legal precedent, seemingly unaware it is asking for a radical departure from more than a hundred years of carefully crafted Oregon jurisprudence and a fundamental right of all generations of citizens. As a "trustee" holding title to natural resources "in trust" for the "benefit of the people," the State of Oregon has a fiduciary obligation with respect to those resources. That fiduciary obligation is the very reason why the judiciary has imposed on the other branches of government this trust responsibility.

B. The Cases Relied Upon By the State In Fact Defeat Its Argument.

The State attempts to rely on a line of Oregon cases from the 1970s and 1980s in support of its argument that the substance of the trust amounts to no more than a restraint on the alienation of real property. State Mem. at 12-15. Those cases, however, undermine the State's position.

In *Morse*, plaintiffs challenged a permit that was granted for the fill of state waters in Coos Bay for the construction of a municipal airport. *Morse v. Or. Div. of State Lands*, 285 Or 197, 199-200, 590 P2d 709, 710-11 (1979). The plaintiffs argued that pursuant to the Public Trust Doctrine, all fills must be limited to a water-dependent use. 285 Or at 200. The Supreme

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Court held that the fill permit did not violate the Public Trust Doctrine, because there was "no claim in the present case that the fill for the airport covers a part of the bed of the bay over which the waters are used for other than very casual navigation of the recreational kind." *Id.* at 201.

If, however, the Supreme Court in *Morse* had adopted the view espoused by the State here – that the Public Trust Doctrine is only a restraint on the alienation of real property – it would simply have said so and cut off its analysis quite early in its decision, noting that the case involved only a permit for a fill activity and not a conveyance of title to real property. Instead, the Court engaged in an analysis of the Doctrine to determine the boundaries of the "[l]imitation upon the power of the state to permit alienation of the use of its waters . . . ." *Id.* at 200-01 (emphasis added). Thus, the crux of the Court's analysis was whether the activities authorized by the State interfered with the public uses of the State's waters protected by the doctrine – navigation, recreation, commerce and fisheries. Based on this decision, in the April 21, 2005 Opinion, the Oregon Attorney General gave the following description of the public trust doctrine: "In sum, we believe that the public trust doctrine prevents the state from alienating ***or otherwise encumbering the public's rights*** to use state-owned waterways so as to materially affect or impede those public rights." App-16; *see also* 25 Op Atty Gen 274 (1951) (summarizing Oregon case law describing the limited circumstances under which the state may alienate or encumber state-owned waterways); Letter of Advice to Janet Neuman, Assistant Director, Oregon Division of State Lands, January 24, 1990 (OP-6358) (analyzing the public rights to use a navigable lake, and the extent to which those rights could be regulated by the Division and limited by a lessee of the Division); 36 Op Atty Gen 638 (1973) (same).

Here, the State is allowing for the use of the trust *res* in a manner that is perpetuating the substantial impairment of the public's interest in the atmosphere as a climate stabilizer regulating rain and snowfall, as well as protector of Oregon coastal zone temperatures and marine acidity. While the irreversible threat here is vastly more catastrophic than the more

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limited harm to a particular area of submerged land in *Morse,* the court's substantial impairment standard, as further reinforced and articulated by the Attorney General, applies here.

Similarly, in *Brusco Towboat Co. v. State*, 284 Or 627, 635, 589 P2d 712, 718 (1978), the Supreme Court addressed a challenge to regulations governing the State's leasing of submerged and submersible lands. Once again, the Supreme Court did not adopt the State's argument that the doctrine prohibits only the alienation of real property. That would certainly have been a simple and straightforward way to dispose of a challenge to rules governing the leasing of state-owned lands. Instead, the Supreme Court held that the State "does not purport to divest the legislature or the Board of the state's power to protect the rights of the public in the state's navigable waters . . . ." 284 Or at 635.

In addition, both *Or. Shores Conservation Coal.*, 62 Or App at 481, and *Kalmiopsis Audubon Soc'y*, 66 Or App at 810, involved challenges to permits granted by the State. And once again, neither decision reflects the State's argument here that the Public Trust Doctrine is nothing more than a restraint on the alienation of real property.

What is apparent from this line of cases is that the State government during this period of time acknowledged and faithfully implemented its public trust obligation to protect public uses of navigable waters. Those cases are fully consistent with Plaintiffs' argument here that by failing to address the irreversible impacts to waters of the state caused by climate change that the State is failing in its obligation to protect the public uses of those waters. There is not one case in the history of Oregon's common law that restricts the Public Trust Doctrine to nothing more than a restraint on the alienation of submerged real property.

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C. The Court is Free to Rely on the General Principles of Trust Law in Evaluating Whether the State Has Carried Out Its Fiduciary Duties.

Presuming its argument on alienation to be correct, the State then suggests that it would not be "appropriate" for the Court to draw on traditional principles of trust law in evaluating whether the State has upheld its fiduciary obligations to the Plaintiffs. State Mem. at 24-25. Adoption of the State's argument that general trust principles do not apply to the Public Trust Doctrine would eviscerate the doctrine and leave the judiciary with no check over the impairment and alienation of trust resources. This would also leave the beneficiaries of the trust, the public, with no recourse to ensure that trust resources are not impaired or alienated.

The State relies upon *State v. Oregon Health & Sci. Univ.*, 205 Or App 64, 82, 132 P3d 1061, 1071 (2006) to support its claim that an agreement, transfer, or statutory provision explicitly placing a state agency in a fiduciary role is required to create a trust with the State as trustee. But *OHSU* does not contain such a broad holding. In *OHSU*, the Court of Appeals limited its review of the potential fiduciary obligations imposed on the Public Employees Benefits Board to its enabling legislation because the Board was created by statute. *Id.* The Court determined that the legislature did not place the Board in a fiduciary capacity because there was no statutory provision placing it in such a position. *Id.* Importantly, however, the Board was a creature of statute, and therefore its authority and obligations were limited to those outlined in its enabling legislation. 205 Or App at 83.

In contrast, the Public Trust Doctrine was not created by the legislature, and is instead an inherent and essential attribute of sovereignty that has evolved at common law. Apart from this inapposite one case, the State has no other authority for the proposition that general principles of trust law should not be used by a Court when applying the Public Trust Doctrine. Indeed, the State's position conflicts with the Attorney General's April 21, 2015 Opinion that quotes the Oregon Supreme Court's decision in *Lewis v. City of Portland*, 25 Or 133, (1893) "[t]he state's duty to protect the public interest in state-owned waterways ***is in the nature of a trust***." *Id.*, 159; App-15. (Emphasis added).

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Likewise, courts around the country have consistently turned to general trust principles to guide their application of the Public Trust Doctrine when faced with particular factual settings. *See Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist.*, 112 Idaho 512, 517, 733 P2d 733, 738 (1987) ("[T]he administration of land subject to the public trust is governed by the same principles applicable to the administration of trusts in general."); *Ariz. Ctr. For Law in the Pub. Interest v. Hassell*, 172 Ariz 356, 367, 837 P2d 158, 169 (Ariz Ct App 1991) ("Just as private trustees are judicially accountable to their beneficiaries for their disposition of the res, so the legislative and executive branches are judicially accountable for their disposition of the public trust. The beneficiaries of the public trust are not just present generations, but those to come."); *Robinson Twp., Washington Cty. v. Commonwealth of Penn.*, 83 A3d 901, 957 (Penn 2013) ("As a fiduciary, the Commonwealth has a duty to act toward the corpus of the trust–the public natural resources–with prudence, loyalty, and impartiality."); *Baxley v. State of Alaska*, 958 P2d 422, 434 (Alaska 1998) ("The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, 'and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.' We apply basic principles of trust law to public land trusts." (citations omitted)); *Ctr. for Biological Diversity*, 166 Cal App 4th at 1367, 83 Cal Rptr 3d at 602 (applying "traditional trust concepts" to public trust claim and finding that a plaintiff must bring a public trust claim "against the appropriate representative of the state as the trustee of the public trust"); *State of Washington, Dept. of Fisheries v. Gillette*, 27 Wash App 815, 820, 621 P2d 764, 767 (1980) (finding Department of Fisheries to be trustee with regards to salmon: "In addition, the State, through the Department, has the fiduciary obligation of any trustee to seek damages for injury to the object of its trust"); *District of Columbia v. Air Fla.*, 750 F2d 1077, 1083 (DC Cir 1984) ("[The public trust doctrine] has evolved from a primarily negative restraint on states' ability to alienate trust lands into a source of positive state duties.").

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General principles of trust law are uniform in that the trustee bears a fundamental obligation to protect the corpus of the trust and to prevent waste. George T. Bogert, *Trusts*, § 99, 358 (6th ed 1987) ("The trustee has a duty to take whatever steps are necessary . . . to protect and preserve the trust property from loss or damage."); *Protection of Estate*, 76 Am Jur 2d § 404 ("[T]he trustee must make the trust property productive, and must not suffer the estate to waste or diminish, or fall out of repair."); *United States v. White Mountain Apache Tribe*, 537 US 465, 475, 123 S Ct 1126, 1133 (2003) (fundamental common law duty of a trustee is to maintain trust assets); *Lytle v. Payette-Oregon Slope Irr. Dist.*, 175 Or 276, 288, 152 P2d 934, 939 (1944) (waste is a "spoil or destruction in . . . corporeal hereditaments, to the [detriment of the one who has a] remainder or reversion").

Finally, the State relies heavily on its argument that the trust is not set forth in "any statute or other writing" and without a "written conveyance designative the atmosphere as a trust asset and the State as trustee, there is no basis to infer any obligation beyond those expressly stated in the duly enacted laws and Constitution." State Mem. at 25. his argument is just one more variation on the State's attempt to wipe the Public Trust Doctrine from the annals of Oregon's common law. There is, of course, no written instrument setting forth the State's trust obligation with respect to any of the other natural resources protected by the doctrine, including waters of the state and wildlife. And yet, at no point in the history of Oregon's common law has one single court ever raised this issue as an impediment to its recognition and enforcement of the Public Trust Doctrine.

The Supreme Court addressed an analogous fiduciary duty question when it recognized the distinctive obligation of trust incumbent upon the Government in its dealings with the dependent and sometimes exploited Native American tribes. *Seminole Nation v. United States*, 316 US 286 (1942). The Supreme Court found that while the tribal treaties by themselves did not create a written trust *per se*, the government evolved into a trustee role in its dealings with

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the Indian tribes. The Court held the Government to exacting fiduciary standards in carrying out its treaty obligations with those tribes:

> Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Id. The Court's reference to Chief Judge Cardoz in *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 is further instructive as to the essential nature of the fiduciary's role:

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

The State's role in protecting the natural resources that its citizens rely on for water, food, navigation, recreation, and wildlife is subject to this same unbending fiduciary obligation. Any arguments by the State seeking to abdicate its essential function must be denied by this Court.

D. The State Has Failed to Uphold Its Fiduciary Obligations to Protect Oregon's Atmosphere and Its Essential Natural Resources From the Catastrophic and Irreversible Effects of Climate Change.

As a final matter, the factual information presented by the State, the declaration of Ms. Hoffman that outlines certain steps the State has taken to address climate change, does not in any way establish that the State has met its fiduciary obligation to the people. First, as discussed above, the State denies that it bears any fiduciary obligation under the Public Trust Doctrine, and thus it is entirely unclear why, as a legal mater, the State would, at the same time, present factual information to the Court detailing how it has attempted to address the

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issue. The State suggests that it has taken these steps as an exercise of its police power authority over the atmosphere, but that is not the issue presented in this case.

More importantly, what the State fails to present is any discussion of whether and to what extent these actions have succeeded in achieving measurable reductions in emissions of carbon dioxide in or within the control of the State of Oregon. The laundry list of efforts, while perhaps well intended, is frankly meaningless without hard numbers on emissions of greenhouse gases. Good intentions are no longer enough. In order to conserve the public's interest in Oregon's essential natural resources, the State must exercise its authority to do more than apply window dressing to impending catastrophe. This is precisely the reason that Oregon's Global Warming Commission tracks actual emissions over time, and the State is clearly not even close to meeting even those outdated targets. Pl. Mem. at 26-29. Only by significantly reducing actual emissions can the State protect the public's fundamental interests.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court deny the State's motion for summary judgment, issuing the three declarations of law set forth in this response brief. Plaintiffs further request that the Court deny the State's request that it rule on the issue of injunctive relief at this stage of the proceedings.

DATED this 12th day of March 2015.

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DEPARTMENT OF JUSTICE

April 21, 2005

No. 8281

QUESTIONS PRESENTED

The State Land Board (Board) has asked three questions about the ownership and use of waterways in this state.

Upon becoming a state, the State of Oregon acquired ownership (or "title") of all waterways within its boundaries that satisfy certain criteria. The Board first asks us to describe the criteria that determine state ownership and advise whether there are limitations on the state's authority to dispose of, or constrain the public rights to use, waterways acquired at statehood.

Second, the Board asks us to advise whether the public has any right to use a waterway if its bed is privately owned and, if so, to describe the extent of that right and the types of waterways for which the right exists.

Finally, under current state law, the means to determine whether a particular waterway is state-owned are limited. The Board asks us what activities by members of the public are lawful in the absence of a determination concerning ownership.

ANSWERS GIVEN

1. The United States Supreme Court's articulation of the criteria for determining state ownership of waterways has been clarified over time. At statehood, the state acquired (with few exceptions) all waterways that were tidally-influenced or that satisfied the federal test of title-navigability. Federal and state law limit the discretion of the state to alienate its ownership, to the extent that doing so would interfere with the public use of the waterway for navigation, commerce, recreation or fisheries.

2. Even if the bed of a waterway is privately owned, the waterway may be used by the public for certain purposes if it meets the state test of navigable-for-public-use (the "public use doctrine.") A waterway is navigable-for-public-use if it has the capacity, in terms of length,

width and depth, to enable boats to make successful progress through its waters. If a privately owned waterway meets this test, the lawful public uses generally include navigation, commerce or recreation. Recreation in this case includes use of small boats for pleasure and fishing, as well as swimming. The public may use the land adjacent to a waterway that is navigable-for-public-use as long as the use of the adjacent land is "necessary" to the lawful use of the waterway.

3. Generally speaking, the public may use state-owned waterways for any use not otherwise unlawful. However, unless 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.[1/]

DISCUSSION

I. Introduction

The following definitions are used for purposes of this opinion.

"Waterway" means a body or course of water as well as the land underneath the water. A waterway may be tidal or non-tidal in nature, and includes rivers, streams and lakes.

"Bed" means the land underlying a waterway that is below ordinary high water.

"Tidal waters" or "tidally-influenced waters" mean waters that were subject to the ebb and flow of the tide in their natural state at the time of statehood.

"Navigable-for-title" or "title-navigable" means that ownership of the waterway, including its bed, was passed from the federal government to the state at statehood. If a waterway is navigable-for-title, then it also is generally open to public use for navigation, commerce, recreation, and fisheries.

"Navigable-in-fact" or "navigable-for-public-use" means that the waterway is open to public use under Oregon law, even if the bed is privately-owned.

"Bank" means the land above ordinary high water bordering a waterway. Such lands are also described as "fast lands" or "uplands" in some contexts.

"Public rights to use" means the public's use of a waterway for navigation, commerce, recreation or fisheries. We do not address rights to use waterways that may arise from federal laws (except as expressly discussed below) including the federal navigational servitude or rights that were reserved by the federal government prior to statehood. Public rights to use a waterway may arise either from state ownership or from the public use doctrine.

II. State Ownership and the Public Rights Associated with State Ownership

Today, Oregon statutes acknowledge that the state continues to own all waterways that it received in 1859 by virtue of its sovereignty as a state. ORS 274.005(7) and (8); ORS 274.025.

The legal tests for determining what waterways the state owns by virtue of its statehood is established by federal law. As a fundamental aspect of sovereignty, at statehood Oregon acquired (with few exceptions) title to all waterways or portions of waterways that were tidally-influenced or that were non-tidal but that satisfied the federal test of title-navigability. A non-tidal waterway is title-navigable under the federal test if, at the time of statehood, it was used or was susceptible of use, in its ordinary condition, as a highway of commerce over which trade and travel was or could have been conducted in the customary modes of trade and travel on water.

Waterways owned by the state generally are open for all lawful uses by the public. Furthermore, as a condition of federal law, the state has a duty to keep those waterways open to the public for navigation, commerce, recreation and fisheries. Thus, for example, there are limitations on the extent to which the state may block (or allow another person to block) all passage by the public along a state-owned waterway on a permanent basis. If state ownership of a specific waterway or portion of a waterway has been confirmed by a court or by the Board through a statutorily-established study process, the Board may expressly authorize a variety of private and public uses of the waterway.

In section A below, we discuss the historic roots of state ownership of waterways, and trace the development of the federal test for state ownership. This history is important for two reasons. First, it helps explain the federal tests for state ownership. Second, it provides context for understanding the origin of the public use doctrine, which applies to certain waterways that are not state-owned (this doctrine is described in Part III of this opinion). In section B we describe the current federal tests for state ownership.

A. The Historical Development of the Federal Test for State Ownership

1. State Ownership of Tidal Waterways

Before achieving independence, the colonies were governed by the common law of England. By royal charter, the Duke of York was granted both propriety and dominion of the water of, and soils underlying, "navigable" waterways in the 13 colonies. ***Martin v Waddell***, 41 US 367, 412-14, and 418, 10 L Ed 997, 16 Peters 367 (1842); *see also* ***Shively v. Bowlby***, 152 US 1, 11 and 14, 14 S Ct 548, 38 L Ed 331 (1894). The duke held the proprietary interest – the *jus privatum* – as a fee simple title, but held dominion over the resource – the *jus publicum* – as a trustee for the benefit of the people. ***Shively***, 152 US at 11; ***Martin***, 41 US at 412-14, and 418. The primary common use of such waterways was "for highways of navigation and commerce." ***Shively***, 152 US at 11.

Until 1842, the United States Supreme Court had no occasion to address state ownership of waterways. That year, in resolving a dispute over the oyster fishery in the tidal rivers and bays of East New Jersey, the Court held that the people of the original 13 states received the absolute right to the "navigable" waterways within their borders for their own common use, subject only to the rights surrendered by the Constitution to the federal government. ***Martin***, 41 US at 410. The Court based its decision on an analysis of the English common law regarding waterways and the Duke of York's royal charter. *Id.* at 410-413. Notably, the court did not define or provide a test for the term "navigable," and it held that the states received both the water and the land underlying the water.

Three years later, the Court extended the holding of ***Martin*** to all of the states. The Court determined that when the State of Alabama was admitted into the Union, it acquired title to the tidally-influenced waterways within its borders. ***Pollard's Lessee v. Hagan***, 44 US 212, 230, 11 L Ed 565, 3 How 212 (1845). The Court held that all new states enter the Union on an equal basis with the original 13 states, meaning that a new state has the same "rights, sovereignty, and jurisdiction" over "[t]he shores of navigable waters, and the soils under them," as well as the navigable waters themselves resting within its borders. *Id.* at 239-30. ***Martin*** and ***Pollard's Lessee*** establish that the states own waterways subject to the ebb and flow of the tide.[2/] These early cases remain good law. ***Montana v. United States***, 450 US 544, 551-52, 101 S Ct 1245, 67 L Ed2d 493, *rehearing denied*, 452 US 911, 101 S Ct 3042, 69 L Ed2d 414 (1981). However, the early cases did not address whether the states owned other waterways, beyond tidal waters.

2. The Initial Treatment of Non-Tidal Waterways

Under English common law, which served as the initial basis for state ownership in the early U.S. Supreme Court cases discussed above, the sovereign's ownership of "navigable" waterways was limited to waters influenced by the ebb and flow of the tide. In a series of cases after ***Pollard's Lessee***, however, the Court was called upon to determine the meaning of "navigable" for purposes other than state ownership and whether that meaning was limited to tidal waters.

The Court first addressed non-tidal waterways in a case concerning the geographic reach of federal admiralty jurisdiction. In ***The Propeller Genesee Chief v. Fitzhugh et al.***, 53 US 443, 455-56, 13 L Ed 1058, 12 How 443 (1852), the Court had to decide whether federal admiralty jurisdiction extended to a non-tidal waterway (Lake Ontario). The Court rejected the English common law rule as wholly inadequate for the United States:

> It is evident that a definition [of admiralty jurisdiction] that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade.

Id. at 457.

In 1869, the United States Supreme Court construed the term "navigable" as used in a federal statute that authorized the sale of federal lands in the territories and provided for a different boundary to the lands conveyed, depending on whether the land abutted a navigable or non-navigable waterway. ***Railroad Company v. Schurmeir***, 74 US 272, 285-89, 19 L Ed 74, 7 Wall 272 (1869); *see also* ***Shively v. Bowlby***, 152 US at 47 (summarizing the rule of ***Schurmeir***). The Court again rejected the term's common law meaning in favor of a more expansive meaning. It stated:

> Rivers were not regarded as navigable in the common law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that Congress did not employ the words navigable, and not navigable, in that sense, as usually

> understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide-waters, and in which there were no salt-water streams.

Id. at 288. The court went on to hold that "title to lands bordering on navigable streams should stop at the stream * * * [and] all such streams should be deemed to be, and remain public highways." *Id.* at 289.[3/]

In 1870, the Court decided ***The Daniel Ball***, 77 US 557, 19 L Ed 999, 10 Wall 557 (1870). The dispute concerned whether a steamboat carrying goods and passengers on the Grand River between two Michigan cities was subject to inspection and licensure as required by federal statutes governing "the bays, lakes, rivers, or other navigable waters of the United States" and enacted under Congress' Commerce Clause authority. 77 US at 557. One question was whether the Grand River was a "navigable water of the United States." *Id.*

In concluding that the Grand River was "navigable," the Court expanded on its earlier opinion in ***The Propeller Genesee Chief***, flatly declaring that "[t]he doctrine of the common law [of England] as to the navigability of waters has no application in this country." *Id.* at 563. Instead, a waterway's "navigability" was to be determined by its "navigable capacity":

> [R]ivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. Although the Court was construing "navigable" as used in a federal statute, this statement has become the source of the modern-day test of title-navigability. *See* ***Utah v. United States***, 403 US 9, 10, 91 S Ct 1775, 29 L Ed2d 279 (1971). The Court went on to say that waterways are "navigable waters of the United States" (for purposes of determining the extent of the federal government's regulatory authority) if "they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Id.*, at 563.[4/]

The Court applied the test established in ***The Daniel Ball*** in determining the applicability of federal regulatory statutes to the steamship Montello, which transported cargo and passengers on the Fox River in Wisconsin. ***The Montello***, 87 US 430, 22 L Ed 391, 20 Wall 430 (1874) (***The Montello II***). In concluding that the river was title-navigable, the Court elaborated on the first part of the test, *i.e.*, whether a river is "susceptible of being used, in [its] 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."

First, the Court noted that, while vast improvements had been made to the Fox River to enable the use of sizeable steamships, the river had been used as an avenue for exploration and commerce dating back to at least the late 1600s, with some of that use being made with Durham

boats moved by "animal power." ***The Montello II***, 87 US at 440-441. The Court said that whether the river could be navigated by steam vessels was not the relevant question to determining title-navigability. Instead, the pertinent question was whether the river was "capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, [If it is,] it is navigable in fact, and becomes in law a public river or highway." *Id.* at 441-442. However, the Court also made clear that susceptibility of navigation, by itself, was not sufficient. The waterway "must be generally and commonly useful to some purpose of trade or agriculture," thereby excluding the possibility of "every small creek in which a fishing skiff or gunning canoe can be made to float at high water" being deemed navigable. *Id.* at 442.

Second, the Court stated that limitations on the types of vessels that may use a waterway, and obstructions that may make passage difficult, do not necessarily foreclose a finding of title-navigability. The court emphasized that "[v]essels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river." *Id.* at 442. Even serious obstructions do not necessarily preclude a waterway from being title-navigable. *Id.* at 442. An obstruction preventing "the use of the best instrumentalities for carrying on commerce" will not render a waterway non-navigable. *Id.* at 443. "[T]he vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce," and a waterway may be title-navigable even though "its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars."[5/] *Id.*

3. State Ownership of Certain Non-Tidal Waterways Confirmed

In 1877, the Court addressed and confirmed state ownership of a non-tidal waterway. The decision involved a dispute about the rights of a riparian land owner and those of the city of Keokuk, Iowa in land adjoining the Mississippi River. ***Barney v. Keokuk***, 94 US 324, 24 L Ed 224, 4 Otto 324 (1876). In upholding the city's right to make improvements to the land in question, the Court confirmed that the "proprietorship of the beds and shores" of certain non-tidal waters "belongs to the States by their inherent sovereignty," declaring that "the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience." *Id.* at 338.

In 1892, the Court reaffirmed state ownership of certain non-tidal waterways in deciding a dispute between the State of Illinois and the Illinois Central Railroad concerning the latter's wharves, which conflicted with public use of much of the Lake Michigan waterfront in Chicago. ***Illinois Central Railroad v. Illinois***, 146 US 387, 435-37, 465, 474, 13 S Ct 110, 36 L Ed 1018 (1892); ***Shively***, 152 US at 47. The Court stated:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so

far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. ***Pollard's Lessee v. Hagan***, 3 How. 212; ***Weber v. Harbor Commissioners***, 18 Wall. 57.

The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas * * * and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.

* * * * *

The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

Id., at 436-437.

4. Twentieth Century Cases Adhere to the Test of Title-Navigability Stated in *The Daniel Ball* and Clarify that Federal Law Determines State Ownership at Statehood

Between 1922 and 1935, the U.S. Supreme Court decided five cases involving the ownership of lands underlying various waterways. ***Brewer-Elliott Oil & Gas Co. v. United States***, 260 US 77, 86, 43 S Ct 60, 67 L Ed 140 (1922); ***Oklahoma v. Texas***, 258 US 574, 42 S Ct 406, 66 L Ed 771, *appeal denied* 260 US 711, 43 S Ct 251, 67 L Ed 476 (1922); ***United States v. Holt***, 270 US 49, 46 S Ct 197, 70 L Ed 465 (1926); ***United States v. Utah***, 283 US 64, 51 S Ct 438, 75 L Ed 844 (1931); and ***United States v. Oregon***, 295 US 1, 55 S Ct 610, 79 L Ed 1267 (1935). In each of the cases, the pivotal issue was whether the United States, an Indian tribe for which the federal government had reserved land prior to statehood, or the subsequently formed state, owned the bed of a particular waterway. To resolve the issue in each case, the Court had to determine whether the waterway was title-navigable. As the Court explained in ***United States v. Utah***:

> The controversy is with respect to certain facts, and the sufficiency of the basis of fact for a finding of navigability, rather than in relation to the general principles of law that are applicable. In accordance with the constitutional principle of the equality of States, the title to the beds of rivers within Utah passed to that State

> when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States.

283 US at 75. The existence or the extent of state ownership in each case was determined by applying the first part of ***The Daniel Ball*** test to the specific facts of each case.[6] Thus, in ***United States v. Utah***, the Court determined that portions of the Colorado, Green and Grand rivers were title-navigable based on specific findings concerning each river's width, depth and flow, *Id.*, at 77-82, and the extent to which permanent natural features of the waterways would preclude their use for commerce absent exceptional circumstances. *Id.*, at 84.[7] And, in ***United States v. Holt***, the Court held that a lake was title-navigable where the evidence showed that it was three to six feet deep in its natural state, and there was evidence of actual use at statehood by small boats. 270 US at 56-58.

In contrast, in ***United States v. Oregon***, the Court determined that five lakes in Oregon were not title-navigable, based on evidence and findings that boats were seldom used for anything other than trapping, and that the trappers had to pull their boats by wading because there was not a continuous channel capable of navigation. 295 US, at 15-24.[8] And, in ***Oklahoma v. Texas***, the Court determined that the Red River in Oklahoma was not title-navigable based on evidence that small boats could use long stretches of the river only with great effort and difficulty. 258 US at 586-592.

These five cases demonstrate that by 1935 ***The Daniel Ball*** test of title-navigability was firmly established and that states acquired ownership not only of tidal waters and the "great" lakes and rivers, but of all waterways susceptible of use for navigation and commerce in their ordinary natural condition. *See also* ***Utah v. United States***, 403 US 9, 91 S Ct 1775, 29 L Ed2d 279 (1971).

Several of these cases also clarify that, for purposes of determining state ownership of the soil underlying a waterway at statehood, navigability is determined under *federal* not state law. In ***United States v. Oregon***, the Court explained:

> Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty * * *. Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts, even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce.

U.S. v. Oregon, 295 US at 14 (citations omitted).

Two recent decisions by the U.S. Ninth Circuit Court of Appeals further illustrate how the federal test for title-navigability is applied. Although these decisions are not binding precedent for Oregon courts, they are strong indications of how the courts are likely to apply the federal test today. In the first decision, ***State of Oregon v. Riverfront Protection Association,*** 672 F2d 792 (1982), the Court of Appeals held that mile 0 to 37 of Oregon's McKenzie River was title-navigable. Notably, the court did not look only at evidence of the extent to which the river was susceptible of use by boats. Instead, to determine the river's potential use for commerce, the court considered evidence of the transporting of logs on the river. The court found that:

> [O]n the McKenzie it took substantial logging crews an average of from thirty to fifty days to complete a log drive down the 32-mile reach at issue. Unfavorable circumstances could increase this time to over ninety days. Intractable logjams had to be broken up with dynamite. Too much rain caused uncontrollable flooding; too little exposed gravel bars, boulders, and shoals. Crews might spend three or four days moving logs across a single gravel bar. But notwithstanding such difficulties, thousands of logs and millions of board feet of timber were driven down the river.

Riverfront, 672 F2d at 795. In addition, the court stated that "use of the river need not be without difficulty, extensive, or long and continuous." *Id.*; *see also* ***Puget Sound Power and Light Co. v. FERC***, 644 F2d 785, 788-89 (9th Cir), *cert den* 454 US 1053, 102 S Ct 596, 70 L Ed2d 588 (1981) (the need for constant tending to ensure that logs will float does not mean the river is not navigable). The court further held that the seasonal nature of the log drives on the McKenzie did not destroy its navigability. ***Riverfront***, 672 F2d at 795. Even though the record showed that use of the river for commerce was difficult and limited to certain seasons, the court held that the McKenzie was title-navigable. *Id.*

In ***State of Alaska v. Ahtna, Inc.***, 891 F2d 1401 (9th Cir. 1989), *cert den* 495 US 919, 109 L Ed2d 312, 110 S Ct 1949 (1990), the Court of Appeals held that the lower Gulkana river in Alaska was title-navigable. The river is "normally a foot and a half deep, diminishing to a foot during low-flow season [at its shallowest point]. On average however, the River * * * is 125-150 feet wide and 3 feet deep." *Id.* at 1402. The parties agreed that the river was used, or was susceptible to use, by aluminum or fiberglass powerboats, inflatable rafts, motorized freight canoes, and double-ended paddle canoes, and that in the years immediately prior to statehood (from the 1940s to 1959) hunters and fishermen traveled the river in aluminum and fiberglass watercraft with a load capacity of approximately 1,000 lbs. *Id.* at 1402-03. Since the 1970s, the recreation industry offered guided fishing and sightseeing river trips in 20 to 24-foot long aluminum powerboats and 12 to 15.5-foot long inflatable rafts, which usually carry five passengers and one guide, providing for loads often in excess of 1,000 lbs. *Id.* at 1403. The average fare is $150. *Id.* The industry employs 400 people. *Id.*

The court concluded that the river's present use was commercial and provided "conclusive evidence" of its susceptibility for commercial use at statehood, given that the river's characteristics remained unchanged since statehood and the watercraft customary at statehood could, with minor modifications, have supported the type of commercial activity carried on today. *Id.* at 1405.

In summary, a waterway in Oregon is title-navigable under federal law if it was used or was susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade and travel on water at statehood. ***The Daniel Ball***, 77 US at 563; ***Utah v. United States***, 403 US at 10. That a waterway must have been navigable in its natural and ordinary condition means that, at the time of statehood, the river must have been susceptible of being used as a highway for commerce. ***Ahtna***, 891 F2d at 1404. Navigability does not depend on the particular mode of commerce or the type of vessels that is used or that could be used, or on actual use. ***United States v. Utah***, 283 US at 76. The use of the waterway need not be without difficulty, extensive, or long and continuous; and seasonal use of the river is sufficient to establish navigability. ***Riverfront***, 672 F2d at 795. Evidence of actual use, or potential use, are both acceptable. ***Utah v. United States***, 403 US at 10; ***Ahtna***, 891 F2d at 1404. If navigability is based on use by boats, the waterway must have allowed a "customary" boat of 1859 to float in areas or reaches that are continuous enough to make navigation practicable. ***Oregon***, 295 US at 12. For log drives, the drives may be done with difficulty but the river should lend itself to more than occasional use for that purpose. ***Riverfront***, 672 F2d at 795.

B. The Current Federal Tests for State Ownership of Waterways

1. Tidally-Influenced Waterways

Under federal law, a waterway is "title-navigable" if it is tidally-influenced or if it is navigable-in-fact, or both. ***Phillips Petroleum Co. v. Mississippi***, 484 US 469, 476, 108 S Ct 791, 98 L Ed2d 877 (1988); ***United States v. Holt***, 270 US at 56; 45 Op Atty Gen 1 (1985). A waterway is tidally-influenced if it is affected by the ebb and flow of the tide. In that event, the waterway is state-owned even if it is not used or not susceptible of use for commerce. ***Phillips***, 484 US at 478-81.

2. Non-Tidal Waterways

The cases discussed above reflect that in order for a waterway to be title-navigable under federal law, at the time of statehood the waterway must:

(a) have been used or have been susceptible of use;
(b) in its natural and ordinary condition;
(c) for trade and travel;
(d) by a mode of transportation that was customary in 1859;
(e) as a highway of commerce.

To assist the Board in understanding the likely extent of state ownership of waterways, we illustrate how each of these factors is applied to specific fact situations in the following subsections.

a. Actual Use or Susceptibility of Use

Actual use of a waterway prior to, at, or following statehood is relevant to a determination of title-navigability.[9/] However, evidence of actual use is not necessary in order for a court to find that a waterway is title-navigable.

> The extent of existing commerce is not the test. The evidence of actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.

United States v. Utah, 283 US at 82. The fact that actual use is or was lacking may be explained by current or historical limitations on the number of people in the area or by the remoteness of the area and the difficulty of reaching it. ***U.S. v. Holt State Bank***, 270 US 49, 56-57, 46 S Ct 107, 70 L Ed 465 (1926) (actual use of a lake was limited, but this was because trade and travel in that vicinity were limited).

In addition, where actual use is the basis for an assertion of title-navigability, its *extent* or *amount* may be limited. In ***Utah v. United States***, the Court rejected the contention that use by only a small number of small boats to shuttle supplies to a few ranching operations on a few islands in the Great Salt Lake was too limited to constitute "commerce" under the federal test:

> It is suggested that the carriage was also limited in the sense of serving only the few people who performed ranching operations along the shores of the lake. But that again 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.

Utah v. United States, 403 US at 11-12.

b. Natural and Ordinary Condition at the Time of Statehood

Where the use of a waterway for commerce is made effectively impossible as a result of natural and ordinary conditions of flow or depth of water, those conditions will preclude a determination of title-navigability under federal law. For example, in ***United States v. Rio Grande Dam & Irrigation Co.***, 174 US 690, 19 S Ct 770, 43 L Ed 1136 (1898),[10/] the Court described the portion of the Rio Grande River in the State of New Mexico as having an ordinary flow of water that was insufficient, because it allowed use for transportation "only in times of temporary high water." *Id.*, at 669.

Another fact situation illustrating how the U.S. Supreme Court has applied the test for ordinary condition and natural obstacles is ***Oklahoma v. Texas***, 258 US 574; 42 S Ct 406; 66 L Ed 771 (1921) involving the Red River. The Court found the western half of the river clearly non-navigable for title based on the following:

> [T]he river in the western half of the State does not have a continuous or dependable volume of water. It has a fall of three feet or more per mile and for long intervals the greater part of its extensive bed is dry sand interspersed with irregular ribbons of shallow water and occasional deeper pools. Only for short intervals, when the rainfall is running off, are the volume and depth of the water such that even very small boats could be operated therein. During these rises the water is swift and turbulent and in rare instances overflows the adjacent land. The rises usually last from one to seven days and in the aggregate seldom cover as much as forty days in a year.

Id., at 587. Based on these facts, the Court "regard[ed] it as obvious that in the western half of the State the river is not susceptible of being used in its natural and ordinary condition as a highway for commerce." *Id.* at 588. As for the eastern half of the Red River, the Court found that for several years light craft carried merchandise on the river, but only in periods of high water, and then with difficulty. Congress had appropriated funds for the improvement of the river, but the project was abandoned because "the characteristics of the river rendered it impracticable to secure a useful channel except by canalization, the cost of which would be prohibitive * * *." *Id.*, at 590. The Court concluded that "[i]ts characteristics are such that its use for transportation has been and must be exceptional, and confined to irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability." *Id.*, at 591.

It is useful to compare the facts in ***Oklahoma v. Texas*** to those in ***The Montello II***. In the latter, the river presented many difficulties such as rapids and falls, which required the boats used for trade to be pushed through shallows by people wading, and (in some places) portages. Nevertheless, based on evidence of actual use, the Court held that the river was navigable (for purposes of federal authority to regulate commerce). ***The Montello II***, 87 US at 443. Thus, the fact that it is necessary for people to wade, or even stand on the shore of a waterway in order for the trade and travel to occur, does not preclude a determination of title-navigability.

The foregoing cases show that a waterway must be susceptible of use in its natural and ordinary condition. This does not foreclose title-navigability where use is possible only on a seasonal basis or where floatage is occasionally interrupted because of rapids or other obstacles. Nor does the fact that artificial aids are necessary to make a waterway more useful mean that it is not title-navigable in its ordinary condition. The McKenzie River was held to be title-navigable to river mile 37 based on actual use for log drives, even though the drives were generally possible only during three months of the year and wing dams and dynamite were used to move the logs downstream. ***Riverfront***, 672 F2d at 793, n 1; and 795-96.

Finally, the "natural and ordinary" condition that is relevant is the condition that existed at statehood, not the condition that exists today (although it is permissible to use evidence of current conditions as a basis for determining what conditions existed at statehood). ***United States v. Holt State Bank*** concerned a shallow lake that over time became overgrown with vegetation (particularly late in the growing season), and eventually was drained entirely for reclamation as farm land. The Court found that:

> In its natural and ordinary condition the lake was from three to six feet deep. [At statehood,] it was an open body of clear water. * * * In seasons of great drought there was difficulty in getting boats * * * through the lake, but this was exceptional * * *. Sand bars in some parts of the lake prevented boats from moving readily all over it, but the bars could be avoided * * *. Some years after the lake was meandered, vegetation * * * got a footing in the lake and gradually came to impede the movement of boats at the end of each growing season.

U.S. v. Holt State Bank, 270 US at 56-57. As a result, the Court held that the lake was title-navigable based on the ordinary condition of the lake at statehood.

c. For Trade and Travel

Title-navigability may be established by a variety of uses. Trade is not restricted to the use of boats for moving goods in commerce. Log drives are a type of trade, for example, that may be the basis for title-navigability. ***United States v. Utah***, 283 US at 79 (lumber rafts); ***Riverfront,*** 672 F2d at 794-795 (log drives during three months of the year); *accord*, 37 Op Atty Gen 1342 (1976) (log drives). However, if log drives are to be the basis for title-navigability, the use must be substantial and not occasional or exceptional. 37 Op Atty Gen at 1355. In addition, a river's susceptibility to use by the recreation industry has been held to support a determination of navigability, ***Ahtna***, 891 F2d at 1405.

d. By a Mode of Transportation That Was Customary in 1859

Title-navigability does not require any particular mode of transportation as long as it was "customary" in 1859. A waterway's suitability for "steamboats, sailing vessels or flatboats" would be sufficient. ***Holt***, 270 US at 56. ***United States v. Utah*** took account of "boats of various sorts, including row-boats, flat-boats, steam-boats, motor-boats, a barge and scows, some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying and mining operations." *Id.*, 283 US at 82. Use of a waterway by Native Americans for canoe travel may also establish title-navigability. ***Alaska v. United States,*** 662 F Supp 455, 467 (1987) *aff'd* by ***Ahtna*** (1987). *See also* ***Puget Sound Power & Light Co. v. Federal Energy Regulatory Com.***, 644 F2d 785, 788 (1981) (evidence of navigation by Native Americans in canoes is relevant to title navigability.

In addition, a court may consider evidence of *current* use as relevant to what modes of transportation were possible at statehood. ***Ahtna***, 981 F2d at 1405. Current use by, for example, drift boats, rafts, canoes, or kayaks may be evidence of susceptibility of use at statehood if it is demonstrated that vessels of that era required similar depths of water, or that similar modes of transportation were customary at that time.

e. As a Highway of Commerce

The final characteristic of the federal test, use or susceptibility of use as "a highway of commerce," is closely related to whether the waterway is used or susceptible of being used for "trade and travel." The distinctive characteristic of this component of the test is the requirement

that a waterway "afford a channel useful for commerce." ***United States v. Utah***, 283 US at 76. If the waterway does not provide a path during at least some regular part of the year that a person may use as a practical matter for trade and travel, the waterway is not title-navigable. ***United States v. Oregon***, 295 US at 23 (a relatively few acres of disconnected ponds not sufficient).

In sum, title-navigability is determined under federal law. All waterways that were tidally-influenced in their natural condition were acquired by the State of Oregon at statehood. Non-tidal waterways that were susceptible in their natural and ordinary condition of being used as a highway of commerce for trade and travel by a mode of transportation that was customary at statehood also were acquired by the state at statehood. This second test for title-navigability is satisfied if a waterway is physically capable of any one of a variety of uses, including log drives or trade and travel by small boats.

C. The Boundary of State-Owned Waterways

Federal law establishes that the ordinary high water mark is the initial boundary line between a waterway acquired by a state at statehood and adjoining private land. ***Oregon v. Corvallis Sand & Gravel***, 429 US 363, 376-77, 97 S Ct 582, 50 L Ed2d 550 (1977). State law generally governs boundary changes subsequent to statehood.. *Id.*

The ordinary high water mark as defined under federal law is the line that the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation. ***Alabama v. Georgia***, 64 US 505, 16 L Ed 556, 23 How 505 (1859). The area in state ownership includes:

> [A]ll of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys which have the characteristics of relatively fast lands, and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood.

Oklahoma v. Texas, 260 US 606, 632, 43 S Ct 221, 67 L Ed 428 (1923).

ORS 274.005 defines the "ordinary high water mark" as a line on the bank or shore to which high water ordinarily rises each year and is the waterward limit of upland vegetation and soil. The Oregon courts have defined the ordinary high water mark as "the point below which the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil a character distinct from that of the banks with respect to vegetation as well as with respect to the soil itself." ***Sun Dial Ranch v. May Land Co.***, 61 Or 205, 119 P 758 (1912). There appears to be little, if any, practical difference between the state and federal definitions.

D. State Management of State-owned Waterways

If the state acquires title to a waterway at statehood, it has the authority to manage and dispose of its title, but that authority is constrained. ***Bowlby v. Shively***, 22 Or 410, 427, 30 P 154 (1892), *aff'd* 152 US 1, 14 S Ct 548, 38 L Ed 331 (1894). In ***Bowlby***, the Oregon Supreme Court

held that the state had the right to dispose of tidelands along the Columbia River, "subject only to the paramount right of navigation and commerce." *Id.* In ***Lewis v. City of Portland***, 25 Or 133, 159, 35 P 256 (1893), the Oregon Supreme Court applied this principle to all title-navigable waterways. In this section, we address the two main constraints on state management of waterways acquired at statehood: the federal navigational servitude and the public trust doctrine.[11/]

1. The Federal Navigational Servitude

The navigational servitude is the interest that the United States retains when it transfers ownership of certain title-navigable waterways to a state at statehood or to another entity. ***United States v. Cherokee Nation of Oklahoma***, 480 US 700, 707, 107 S Ct 1487; 94 L Ed2d 704 (1987); *see also* ***Montana v. United States***, 450 US 544, 551, 555, 101 S Ct 1245, 67 L Ed2d 493 (1981); ***Martin v. Waddell***, 41 US 367, 410 (1842). The federal navigational servitude is dominant to any other interest in a title-navigable waterway no matter how that interest is acquired. *See* 480 US at 704 n 3, and 706-07. It includes the right of the United States to use the waterway for every purpose which is in aid of navigation. 480 US at 705. As the navigational servitude is paramount to state ownership, a state may not act in a way contrary to the federal interest. A detailed discussion of the geographic extent of the navigational servitude and the scope of the retained powers is beyond the scope of this opinion,[12/] but as a general matter the servitude preserves the power of the federal government to promote navigation on waterways that are or may be used in commerce with other countries or between the states.

2. The Public Trust Doctrine

Where the state has acquired ownership of a waterway as an incident of statehood, its management and disposition of those rights is subject to the public trust doctrine, which derives from federal and state law and generally requires the state to protect the public's use of these waterways for navigation, recreation, commerce and fisheries. ***Shively***, 152 US at 40, 47, 56; ***Corvallis & Eastern***, 61 Or 359, 369-74; 121 P 418 (1912), ***Bowlby***, 22 Or at 427; ***Morse v. Oregon Division of State Lands (Morse I)***, 34 Or App 853, 859-60, 581 P2d 520 (1978) *aff'd as modified* 285 Or 197, 200; 590 P2d 709 (1979) (public interest includes recreation).

Each state has the right to use or dispose of any portion of its waterways so long as it does not substantially impair the interest of the public in such waters. ***Illinois Central Railroad v. Illinois***, 146 US 387, 435-37, 465, 474 (1892); ***Shively***, 152 US at 47. The Oregon Supreme Court has held that the State of Oregon has the right to use or dispose of the land underlying state-owned waterways if the use or disposition will not impair or damage the public's interest in fishing, navigation, recreation and commerce. ***Lewis v. City of Portland***, 25 Or 133, 159 (1893); *see also* ***Morse v. Oregon Division of State Lands (Morse II)***, 285 Or 197, 200-02, 590 P2d 709 (1979) (filling Coos Bay for airport extension allowed because it did not materially interfere with public use of waterway); ***Corvallis & Eastern***, 61 Or at 369-74 (state may alienate rights in tidelands to private parties, but retains authority to prevent any use that will materially interfere with navigation or commerce). The state's duty to protect the public interest in state-owned waterways is in the nature of a trust. ***Lewis***, at 159. That duty also may derive from the terms of the Oregon Admissions Act. ***Johnson v. Jeldness***, 85 Or 657, 661, 167 P 798 (1917).[13/]

Federal and state courts have protected the public interests in state-owned waterways by voiding specific conveyances or legislation that substantially impaired or damaged fishing, navigation, recreation or commerce. *See, e.g.*, ***Illinois Central Railroad v. Illinois***, 146 US 387 (state may revoke statutory conveyance of lake bed); ***Cook v. Dabney***, 70 Or 529, 532-34, 139 P 721 (1914) (state conveyance of portion of bed of Willamette River used for navigation voided); ***Morse I***.[14/]

The "bellweather" case for what has become known as the public trust doctrine is ***Illinois Central Railroad***, 146 US 387. ***Morse II***, 285 Or at 201; ***Morse I***, 34 Or App at 860. The United States Supreme Court upheld Illinois' legislative repeal of a statute that had purportedly granted a substantial part of the portion of the bed of Lake Michigan that could be used as a harbor for the City of Chicago to a private railroad. ***Illinois Central Railroad***, 146 US at 447-52, 454, 460, 463-64; ***Morse II***, 285 Or at 201 (explaining ***Illinois Central Railroad***). Because of the public interest – the *jus publicum* – in the use of the waters, the Court held that the legislature did not have the power to grant a large area of the lake bed to the railroad which would have allowed the railroad to impede navigation if it so desired. ***Illinois Central Railroad***, 146 US at 451, 452-53, 458, 463-64; ***Morse II***, 285 Or at 201.

The most recent extensive treatment of the public trust doctrine by the Oregon Supreme Court is ***Morse II***, 285 Or 197 (1979). In ***Morse II***, the Court recognized the authority of the Division to permit the fill of approximately 32 acres in Coos Bay for the expansion of a public airport, although it remanded the decision for additional findings by the agency. ***Morse II*** indicates that the Oregon courts will allow the state to authorize non-water-related public uses of waterways where the use does not materially interfere with the public rights of navigation, recreation, commerce and fisheries. ***Morse II***, at 201.[15/]

In sum, we believe that the public trust doctrine prevents the state from alienating or otherwise encumbering the public's rights to use state-owned waterways so as to materially affect or impede those public rights. *See also* 25 Op Atty Gen 274 (1951) (summarizing Oregon case law describing the circumstances under which the state may alienate or encumber state-owned waterways); Letter of Advice to Janet Neuman, Assistant Director, Oregon Division of State Lands, January 24, 1990 (OP-6358) (analyzing the public rights to use a navigable lake, and the extent to which those rights could be regulated by the Division and limited by a lessee of the Division); 36 Op Atty Gen 638 (1973) (same). This does not prevent the state from regulating the public's use of a waterway if necessary to protect navigation, commerce, recreation, or fisheries. But it probably does mean that the State of Oregon cannot grant rights to use waterways in a manner that materially interferes with the public rights. In our view and as discussed above, the Oregon appellate courts will require that the State of Oregon protect the trust uses of navigation, commerce, recreation, and fisheries, from any substantial impairment.

III. Public Rights Independent of State Ownership of a Waterway

The second main source of public rights to use waterways in Oregon derives from state common law, and is independent of state ownership. It is the "floatage" or "public use" doctrine (hereinafter the "public use" doctrine.) Although no Oregon appellate court has relied on this body of law for some time, we believe it remains a valid basis for public use of certain

waterways that meet the public use test developed in a series of Oregon Supreme Court decisions.

The Oregon Supreme Court has characterized the public's right to use waterways where the bed is privately owned as a "highway," a "public easement," and a "public servitude." ***Weise v. Smith***, 3 Or 445, 449-50, 8 Am Rep 621 (1869); ***Shaw v. Oswego Iron Co.***, 10 Or 371, 375, 381-83, 45 Am Rep 146 (1882); ***Luscher v. Reynolds***, 153 Or 625, 635, 56 P2d 1158 (1936). In a line of cases decided between 1869 and 1936,[16] the court identified and developed a state common law right for the public to make certain uses of "navigable"[17] waterways. Those cases address what constitutes a "navigable" waterway for purposes of public use rights, the scope of those rights, the relationship between those rights and the rights of affected riparian landowners, and the extent to which those rights carry with them a public right to use privately owned adjoining uplands. The eleven cases preceding ***Guilliams v. Beaver Lake Club***, 90 Or 13, 175 P 437 (1918) are concerned almost exclusively with public rights to use waterways to float logs. The dispute in ***Guilliams*** required the court to consider the right of the public to use a waterway for other purposes. In doing so, the court established the test for identifying public use rights: "The test of navigability of a stream * * * is the capacity to afford the length, width and depth to enable boats and vessels to make successful progress through its waters * * *. *Id.* at 26.

Subsection A of this section of the opinion discusses the development of the doctrine of public use in cases preceding ***Guilliams***, while subsection B discusses the application of the doctrine to other uses in ***Guilliams*** and ***Luscher***, and the current court's likely reliance on these precedents in deciding public use issues today. Subsection C describes the relationship between public rights and the rights of the riparian landowner. Finally, subsection D discusses the extent to which the public right to use a waterway creates a concomitant right to use the adjoining uplands.

A. Development of Public Use Rights in Timber Cases

1. *Weise* through *Hallock* (1869 – 1900)

In *Weise*, 3 Or 445, the Oregon Supreme Court opined that "navigable" waterways are "public highways" which every person has "an undoubted right to use * * * for all legitimate purposes of trade and transportation." *Id.* at 450. At issue in the case was whether the public had the right to float saw-logs down the Tualatin River, and to use a boom temporarily placed on private land to facilitate that use. The plaintiff owned the small island on which the defendant had placed the boom, and he alleged that the boom caused damage to his property and interfered with his use of the river. The plaintiff conceded that the portion of the Tualatin River at issue was "to some extent, or for some purposes" navigable as a factual matter. He nevertheless argued that it was not "navigable" in the legal sense because it was not tidally-influenced, and defendant therefore had no right to use it. *Id.* at 448.

The court's analysis begins by stating that the English common law rules limiting "navigability" to tidally-influenced waterways had given way in the United States to a determination of *actual* navigability, *i.e.*, navigability-in-fact. *Id.* at 448. Thus, the court articulated the relevant question for determining public use rights:

> [I]f a stream is in fact capable, in its natural condition, of being profitably used for any kind of navigation, its use is to that extent subjected to the general rules of law relating to navigation applicable to the circumstances of the case.

Id. at 449. The court observed that the entire stretch of the Tualatin River at issue was in fact navigable as a conveyance for saw-logs, even though at least a portion of it was not navigable for boats. *Id.* at 448. Because the Tualatin River was capable of floating saw logs, the public had a right to reasonable use of the river as a passage way for that purpose.[18/] *Id.* at 449-50 *citing, e.g.*, ***Brown v. Chadbourne***, 31 Me 9; 50 Am Rep 641 (1849). With regard to placement of the boom, the court stated that a person exercising ordinary care in using the waterway for "legitimate purposes of trade or transportation" may temporarily "impede or obstruct another" if doing so is necessary and unavoidable to that person's use.[19/] *Id.* at 450.

The right to use the Tualatin River was again at issue in ***Shaw***, 10 Or 371 (1882). One riparian landowner claimed that he was being harmed by another's permanent diversion of water from the river's natural channel at a point about five miles above the complaining landowner's property. *Id.* at 371-372. The defendant claimed that it had a right to divert the water because the portion of the river at issue "is and always has been a public navigable stream." *Id.* at 373.

Referring back to ***Weise***, the court stated that the river was navigable "during certain periodical seasons of high water" for the purpose of floating logs or timber, and perhaps some portions were also navigable for small boats. *Id.* at 375. The court then asked whether "such a floatage [capability] place[s] the Tualatin upon a footing with public navigable waters, so as to confine the riparian ownership to the margin of the river?" *Id.* at 375. In other words, the court was examining navigability for the purpose of determining whether the state, rather than the adjacent riparian owner, owned the river bed.[20/]

The court indicated that the state did not own the bed for two reasons. First, the Tualatin River was not tidally-influenced so as to be deemed navigable under the English common law. ***Shaw***, 10 Or at 376. Second, the Tualatin was not within the class of great fresh water rivers that had been recognized as title-navigable by the U.S. Supreme Court and others. *Id.* at 380.

The court referenced ***Weise*** as recognizing the Tualatin to be "subject to the public easement for rafting logs to market," and explained that the right of a riparian owner to use the water flowing over the bed, which he owned "to the middle of the stream," was subject only to this easement.[21/] *Id.* at 382-383. Without explicitly tying its holding to this analysis, the court enjoined the defendant's diversion of water from the natural river bed. *Id.* at 383. It appears that the court enjoined the diversion because such a use of the river was outside of the recognized public easement, which was essentially limited to "rafting logs to market." *Id.* at 382-383.

In 1888, the Oregon Supreme Court considered the public's right to use a relatively small creek, Anthony Creek, to float logs.[22/] ***Haines v. Hall***, 17 Or 165, 20 P 831 (1888). The court framed the question as whether a privately-owned creek had sufficient capacity to float logs so as to "render it capable of serving an important public use as a channel of commerce" and thereby subject to public use rights. *Id.* at 168. The appellant had attempted to float logs since 1883 but only one million four hundred thousand feet of saw-logs out of over three million put into the waterway in the spring of 1886 and 1887 reached their intended destination. *Id.* at 170. To

accomplish this, appellant had positioned 25 to 35 men along two miles of the bank for 27 days "to prevent the logs from lodging, to roll them back into the stream, drag them over gravel-bars, turn them around bends in the creek, break jams, etc." *Id.* The logs caused water to "constantly overflow" the banks of the creek, and, in 1886 and 1887, the overflow washed out both a fence and private bridge on the respondent's property. *Id.* at 171.

The appellant's right to use the portion of the creek crossing the respondent's property for floating logs depended on whether the creek was navigable for that purpose. *Id.* at 172. The case produced three opinions from the then-existing three justice court; one for the majority, one concurring opinion, and a dissenting opinion. The court stated that the creek's navigability "depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public," and not just "a few persons." *Id.* Focusing on the "means and appliances" needed to move the logs, the court held that Anthony Creek was not navigable for that purpose:

> We are * * * committed to the doctrine that a stream of water which is of sufficient extent and capacity to float logs and timber from mountainous regions to market, and can be utilized thereby for the benefit and advantage of the community at large, notwithstanding it is included with the land owned by private individuals, is, nevertheless, a public navigable stream for such purposes; and we must accept that doctrine as the law. But I am not willing to extend it so as to include every little rivulet or brook which runs across a man's farm, although its waters may be so swollen for a short time every year * * * as to enable logs and timber in limited quantities to float down it, and, by the adoption of extraordinary means for that purpose, convenience one or two neighbors in so using it.

Id. at 173.

The Oregon Supreme Court next examined whether the portion of a slough that ran from the appellant's land through the respondent's to points beyond was navigable so as to bar the respondent from obstructing the waterway. ***Nutter v. Gallagher***, 19 Or 375, 24 P 250 (1890). With permission from prior owners, the appellant had made improvements to the channel of the slough[23/] that enabled him to use it for floating logs during winter freshets and for floating wood, hay and supplies on high tides. *Id.* at 381. Citing to the passage in ***Haines*** quoted above, the court concluded that the waterway "had no capacity for general purposes of navigation" as appellant was the only person who could use it and his use was restricted to only a few days a year. *Id* at 382.

In 1900, the court decided a dispute between two riparian landowners as to the use of a stream running through both of their properties. ***Hallock v. Suitor***, 37 Or 9, 60 P 384 (1900). The upper riparian landowner had a sawmill which was powered by a dam built on the portion of the stream (La Creole Creek) that ran through her property. The lower riparian landowner also had a sawmill and built three dams on the stream for the purpose of floating logs from its headwaters to his mill; one was on a portion of the creek in the upper riparian's land. *Id.* at 10.

The upper landowner sought to enjoin the lower landowner from operating a dam on her property and from interfering with the power supplied by the stream to her mill. *Id.* Quoting the tests for navigability established by ***Weise***, 3 Or 445, and ***Felger***, 3 Or 455, the court concluded that there was a "common right" to use the stream to float logs through the upper riparian landowner's property because it was "navigable" for that purpose. *Id.* at 11-12, *also citing* ***Shaw***, 10 Or 371, ***Hall***, 17 Or 165, and ***Nutter***, 19 Or 375. Facts supporting this finding included that the stream could float logs in its natural stage during winter freshets. *Id.* at 10. The court also was concerned to protect the upper landowner's use of the stream to power her sawmill. *Id.* at 12. Nevertheless, the court perpetually enjoined the lower landowner from operating the dam he had built on the upper landowner's property. *Id.* Stating that the stream was navigable only for the purpose of floating logs, the court held that the upper landowner, as owner of the banks, had "the exclusive right to dam the stream upon her premises, provided the floating of logs by others [was] not obstructed thereby." *Id.* at 12-13 (citations omitted).

2. Reconsideration of the Public Use Rights Test in *Kamm* and *Lebanon Lumber* (1907 – 1913)

In 1907, the court decided a dispute in which the plaintiff, who owned upland along the North Fork of Klaskanie Creek, sought to enjoin defendants from using the stream to float saw logs, alleging that it was not navigable for that purpose. ***Kamm v. Normand***, 50 Or 9, 91 P 448 (1907). The court used the occasion to review its analysis of navigability in prior cases, *e.g.*, ***Weise***, 3 Or 445, and ***Hall***, 17 Or 165, and that of other state courts. ***Kamm***, 50 Or at 11-13. In doing so, the court articulated the test for identifying public use rights in a waterway as follows:

> The doctrine, then, which we derive from the authorities, is that a stream, to be a public highway for floatage, must be capable, in its natural condition and at the ordinary winter stages of water, of valuable public use, and, if not, it is private property.[24/]

Id. at 14. The waterway was not floatable except during winter freshets and the freshets "ordinarily" occurred no more than three or four times a year and endured for only a few hours at a time. *Id.* at 18. From these facts, the court concluded that the stream, where it flowed through the plaintiff's land, "is not, in its natural condition, floatable for logs, because it is not capable of serving any important public use."[25/] *Id.* at 25. The ***Kamm*** test requires that a waterway be of "valuable public use," which it equates with "use of commercial value" before it is navigable for public use. *Id.* at 14 ("A stream * * * that is capable of floating logs, unaided by artificial means, during freshets or stages of water occurring with reasonable frequency and continuing long enough to make its use of commercial value, is a public highway for that purpose").

In 1913, the court revisited the test for determining whether the public had the right to use a waterway and also addressed its right to use the banks. ***Lebanon Lumber Co. v. Leonard***, 68 Or 147, 136 P 891 (1913). The case was another dispute between a riparian landowner and a logger using the waterway to float logs downstream.[26/] The court did not directly address ownership of the stream, assuming that it was privately owned. *Id.* at 148-149. Thus, the question was whether the logger had a right to use the stream to float logs, and a right to have workers along the banks of the stream to facilitate that movement. The court concluded that the logger did not, because it found the stream not to be navigable. *Id.* at 151. It stated:

> The true test * * * is whether a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs. It is sufficient if it has that character at different periods, recurring with reasonable certainty, and continuing for a sufficient length of time to make it commercially profitable and beneficial to the general public. * * * It must at least be navigable or floatable in its natural state, at ordinary recurring winter freshets long enough to make it useful for some purposes of trade or agriculture.

Id. at 149-150. The public did not have the right to use the stream at issue for floating logs because, among other reasons, the high water was not "of sufficient regularity or duration to be of practical public utility" and the stream had been so jammed with plaintiff's logs from January until the time of trial in May that no one else could have used the stream to float logs during that time.[27/] *Id.* at 151. In announcing its "true test" for public use rights in a waterway, the court distinguished between "large" and "small" streams without providing identifying characteristics of either:

> Large streams are considered nature's highways without the aid of legislation. This is especially recognized as true where they have been reserved from private ownership by the national government or by the state. In the admission of Oregon as a state Congress provided that all navigable waters therein should be common highways and forever free to the inhabitants of the state, and later this right in the public was recognized by the courts as extending to small streams the beds and banks of which are claimed by riparian owners. * * * [A]s said in *Kamm v. Normand*, 50 Or 9, streams which are not of sufficient size and capacity to be profitably so used are wholly and absolutely private.

Id. at 149.

B. Applying the Public Use Doctrine to Uses Other Than Floating Logs (1918 – To Date)

1. *Guilliams*

In 1918, the Supreme Court examined public use rights in a case not dealing with floating logs.[28/] ***Guilliams***, 90 Or 13. Plaintiffs sought to enjoin the defendant from maintaining a dam on his property near the mouth of Beaver Creek and from maintaining a wire fence across the creek above the dam, on the grounds that the dam had backed up water over their lands and that the dam and wire fence impeded the passage of small boats on the lagoon at the mouth of the creek.[29/] The court held that Beaver Creek was navigable down to and across the defendant's property to the dam; that the plaintiffs could not use the creek below defendant's dam without trespassing because below the dam the creek was not navigable; and that the defendant did not have a right to maintain a dam unless he also built a channel to the beach to sufficiently prevent water from the lagoon from backing up and damaging the plaintiffs' land. *Id.* at 30.

In the process, the court set out the general test for when a waterway is subject to Oregon's public use doctrine:

> The test of navigability of a stream in the summing up, is the capacity to afford the length, width and depth to enable boats and vessels to make successful progress through its waters, rather than circumstances involving the present right of approach to its banks. The latter are changeable and subject to the will of man, the former is a physical condition dependent upon nature. 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.

Id. at 26-27. Applying this standard to Beaver Creek, the court concluded that it had a well-defined channel and banks, as well as "a fairly constant depth of water" sufficient to enable at least "skiffs and small boats of average size, and scows capable of conveying cattle, hay and other products" to cross it "at all seasons," thereby rendering the creek navigable up to defendant's dam.[30/] *Id.* at 27-28.

Guilliams is significant for several reasons. First, in determining what waterways are subject to the public use doctrine, the Court made clear that it will look not to a waterway's actual use, but to its *capacity for use*, namely, its "capacity to afford the length, width and depth to enable boats and vessels to make successful progress through its waters." *Id* at 26-27. Second, the court declared that the public use for "commerce" includes fishing and pleasure boating. *Id.* at 25-27. The court quoted with approval from a Minnesota case, ***Lamprey v. State***, 53 NW 1139, 52 Minn 181, (1893):

> [I]f, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used – and as population increases, and towns and cities are built up in their vicinity, will be still more used – by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. 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. * * * [W]e are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule.

Id. at 28-29 *quoting* ***Lamprey***, 53 NW at 1143. According to the Oregon Supreme Court, the ***Lamprey*** decision "coincides with the case at bar and the general conditions * * * existing in this state." *Id.* at 24.

Finally, it is noteworthy that ***Guilliams*** cites the prior logging cases for the proposition that a waterway "capable in its natural state of floating sawlogs to market successfully, is navigable *for that purpose*." *Id.* at 22. (Emphasis added.) That sentence suggests, in light of the general test, that a waterway capable of floating sawlogs but not "boats and vessels" is subject to public use only for the former, although we are hesitant to treat a single sentence as conclusive on that point.

2. *Luscher*

Eighteen years after ***Guilliams***, the Supreme Court issued the last appellate court opinion in Oregon to expressly address the public's right to use waterways independent of state-ownership. ***Luscher v. Reynolds***, 153 Or 625, 56 P2d 1158 (1936). The dispute was over ownership of land that had formerly been part of a lake bed but had become uncovered, apparently as a result of the water receding. *Id.* at 629. The court was required to determine the relationship of the strip of land to acreage that had been disposed of by the federal government via patent, after Oregon became a state. Because the lake (Blue Lake in Multnomah County) was "not a navigable body of water in the sense that title to the bed thereof would pass to the state upon admission to the Union," the court held that the land in question was privately owned. *Id.* at 634.

The court went on to declare, seemingly in *dicta*, that the lake was "navigable in fact" and therefore subject to the public use doctrine. *Id.* at 635. The court also reaffirmed ***Guilliams***' exposition of the scope of that doctrine, stating that waterways that are navigable-in-fact are

> subject however to the superior right of the public to use the water for the purposes of commerce and transportation. Commerce has a broad and comprehensive meaning. It is not limited to navigation for pecuniary profit. 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. There are hundreds of similar beautiful, small inland lakes in this state well adapted for recreational purposes, but which will never be used as highways of commerce in the ordinary acceptation of such terms. As stated in ***Lamprey v. State***, 52 Minn. 181 (53 NW 1139, 38 Am St Rep 541, 18 LRA 670), quoted with approval in ***Guilliams v. Beaver Lake Club***, *supra*, "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." 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.

Id. at 635.

Since ***Luscher*** was decided in 1936, this office has been called upon to advise public officials about the scope of uses that are allowed under the public use doctrine. In 1959, we advised the State Marine Board that public use "include[s] the right to fish, boat, bathe and to do other things incidental to the public use of water." 29 Op Atty Gen 296, 296-297 (1959). Later that same year, we advised the Oregon Military Department that the public use doctrine extended

to hunting and fishing on waters that were navigable in fact regardless of ownership of the bed of the waterway. 29 Op Atty Gen 311, 312 (1959).

3. Summary of the Common Law Doctrine of Public Use of Waterways

Guilliams and ***Luscher*** are the Oregon Supreme Court's most recent opinions on the public use doctrine in Oregon. The public's common law right to use a waterway independent of state ownership is established by the line of cases culminating in these decisions. Whether a waterway is "navigable" so as to be subject to those rights depends on its *capacity*, in its natural state, "to afford the length, width and depth to enable boats and vessels to make successful progress through its waters." ***Gulliams***, 90 Or at 26. ***Guilliams*** and ***Luscher*** make clear that a waterway's suitability for recreational boating is sufficient to render it navigable. If a waterway is navigable, ***Guilliams*** and ***Luscher*** suggest that the permitted public uses include a broad range of activities involving the use of the waters.

No cases decided since ***Guilliams*** and ***Luscher*** contradict or erode their holdings. As a result, we expect that an Oregon appellate court would follow ***Guilliams*** if called on to decide the public's right to use a waterway in which the bed is privately owned.

Recognizing the public's right to use a waterway where the bed is privately owned raises two issues that have been adjudicated by the Oregon Supreme Court. The first is the question of how to reconcile the rights of the public and the rights of riparian landowners. The second, actually a subset of the first, is the question of the extent to which a right to use a waterway gives the public a right to access the privately owned uplands adjoining that waterway. Subsections C and D address these issues.

C. Public Use Rights in Relationship to Those of Riparian Owners

In addressing the issues raised by the co-existence of public and private rights in the same waterway, the Oregon Supreme Court has sought to balance the two while recognizing that preserving public use rights necessarily sets limits on actions taken by riparian landowners that could restrict the public's use of the waterway. For example, while all private property rights not inconsistent with public use remain with the riparian owner, ***Shaw***, 10 Or at 381-83, that owner may not prevent the public from floating down a waterway. This includes, for instance, constructing a fence blocking travel along a waterway. ***Guilliams***, 90 Or at 27. In the court's initial decision on public use rights, ***Weise***, 3 Or 445, part of the riparian landowner's claim was that he was damaged by a logger's placement of a boom on his property for the purpose of moving logs down the stream, since the boom interfered with his passage by skiff. In affirming the verdict in favor of the logger, the court explained that one user may temporarily impede or obstruct another if he or she exercises ordinary care and the impediment or obstruction is necessary or unavoidable to use of the stream. *Id.* at 450. The court specified that a riparian owner "takes his title subject to this right [to navigate the stream] vested in the public." *Id.* at 451.

In 1901, the court overturned an earlier case in which it had held that a person exercising public use rights to float logs was strictly liable for any damage to the adjoining upland. ***Hunter v. Grande Ronde Lumber Co.***, 39 Or 448, 65 P 598 (1901), *overruling* ***Haines v. Welch***, 14 Or

319, 12 P 502 (1886). In ***Hunter***, the plaintiff owned upland along the Grande Ronde River, and the defendant released logs into the waterway, floating them through plaintiff's property. Alleging that the defendant's actions caused damage to her property, the plaintiff sought money damages. The court held that one who exercises the right of the public to float logs in a stream that is navigable for public use is only liable to a landowner for injuries to the land caused by the user's negligence. *Id.* at 450-51. The public is entitled to "reasonable enjoyment" of the right to run logs in a stream that is navigable for public use and the riparian landowners to "reasonable enjoyment" of their rights, each "without unnecessary interference from the other." *Id.* at 451. The court expounded on what it meant by each party's "reasonable enjoyment" of rights, and distinguished that concept from a negligent exercise of one's rights:

> A reasonable enjoyment signifies such an exercise of the right as common prudence would dictate, so as not to affect correlative or concurrent rights injuriously. This requires care and circumspection in its exercise, and, if injury should be the proximate result of the want of care, liability would logically attach. But the exercise thereof with proper care and without negligence can entail no liability. If it were otherwise, any person using a stream for the purpose of floating logs would become an insurer or guarantor, and be bound at all hazards to guard the riparian owner against loss by reason of the presence of the logs in the stream, and their rights would at once cease to be concurrent; the right of the log owner would subsist in subordination to and by permission of the riparian owner.

Id. at 451.

Later cases further illuminate the relationship between public use rights and those of riparian landowners. In 1908, the court held that a logger did not have the right to operate dams or reservoirs on a stream above a riparian landowner's property for the purpose of floating logs, if that operation "materially injure[s] or interfere[s] with the riparian owner's use of the waters for power purposes." ***Trullinger v. Howe***, 53 Or 219, 223, 97 P 548 (1908) *modified on rehearing* ***Trullinger v. Howe***, 53 Or 219, 228, 99 P 880 (1909). The Trullingers used the water of the North Yamhill River running through their property to generate power for a gristmill and light-plant. Howe had a sawmill downstream of plaintiffs' property and owned timber at the headwaters of the stream above the Trullingers' property, which supplied logs to his mill. Both parties operated dams on the stream. The court held that Howe did not have a right to operate splash dams to help float logs to his mill, since that operation materially injured and interfered with the Trullingers' use of the stream.[31/] However, the court did allow the Trullingers to continue to operate their dam, evidently because it did not "materially affect" Howe's floatage of logs down to his (lower) mill:

> If the stream is navigable or floatable,[32/] it is so only during the winter months, and the plaintiffs, as riparian proprietors, have a right to maintain a dam across it for their use, provided it does not materially affect or abridge the use of the stream as a highway at such times as in its natural condition it may be so used.

Id. at 222 (citations omitted).

In balancing the rights of riparian landowners and public users of a waterway, the court stated that the public right of passage is "to some extent, necessarily the dominant right, because it is the right to move on or by." *Id* at 223. However, the public may not exercise the right to use a waterway in a way that is "usurping, excessive, or unreasonable." *Id.* Instead, the public right "must be exercised without unnecessarily interfering with the riparian proprietor, and as modified by his right to make a reasonable use of the stream for his own purposes."[33/] *Id.* (citations omitted).

D. Public Right to Use Adjoining Uplands

In ***Weise***, 3 Or 445, the court stated that when a waterway is "navigable" for purposes of the public use doctrine, the authority for a member of the public to "meddle with or touch upon" an adjacent private "upland" is "founded upon necessity." *Id.* at 450. The court's reasoning was based upon the principle that those who lawfully use a waterway that is subject to public use rights "can invoke in their favor all general rules of navigation that are in the nature of things applicable to the particular circumstances and kind of navigation." *Id.* at 450. If the public could not come to land when necessary to navigate a waterway subject to public use rights, a riparian owner could effectively prevent use of the waterway. *Id.* at 450. However, coming onto an upland when it is not necessary would be a trespass, for which nominal damages should be assessed. *Id.* at 451.

Applying these principles to the facts of the case, the court held that the public user had a right to attach a boom onto the riparian owner's land in order to keep logs being floated down the Tualatin River from going over the Willamette Falls en route because that act was "necessary in order to enable * * * [a member of the public] to exercise a right of navigation." *Id.* The court explained:

> If the riparian proprietor could deny the navigator the right to come to land, in a case where the business of navigating could not be performed, without the privilege of landing, he could deny all use of the stream.

Id. at 450.

In two later cases, ***Haines v. Hall***, 17 Or 165, 20 P 831 (1888), and ***Lebanon Lumber***, 68 Or 147, 136 P 891 (1913), loggers had attempted to float logs by placing workers along the uplands to facilitate passage. In both cases, the court concluded that the waterways were not subject to a public right of floatage, but discussed in *dicta* whether there would be a right to use the uplands if the waterway had been subject to public use. In ***Haines***, the court stated that if a waterway were navigable for floatage, a public user "had no right to station his men along its banks to float the logs, or allow the logs to go onto the respondent's land or injure the banks of the creek, or turn the stream out of its banks onto the land." ***Haines***, 17 Or at 172. In ***Lebanon Lumber Co***, the court stated that "the navigability of the stream does not give to the navigator a right of way on the land," noting one exception based on necessity:

> [T]he navigator may find it necessary at times to enter upon the land of a riparian owner by reason of danger, or to reclaim stranded property which was washed

ashore without the fault of the owner, but he must pay all damages occasioned thereby; otherwise he is limited to the stream.

Lebanon Lumber Co., 68 Or at 150. The facts presented in the case were outside of the exception noted in ***Lebanon Lumber Co.***

Neither ***Haines*** nor ***Lebanon Lumber Co.*** comment on the holding in ***Weise***, but the limitations they draw for using the uplands to facilitate navigation of a waterway raise questions about the finding of "necessity" for the placement of a boom in the earlier case. The significant factor for the court in ***Weise*** seems to be that, while the river was generally navigable for floating logs independent of use of the boom, the public would have no practical right to exercise that use without a boom, which required temporary access and caused no "appreciable damages" to the riparian owner's land. ***Weise***, 3 Or at 451. The "necessity" exception described in ***Lebanon Lumber Co.*** appears limited to danger and unexpected events. However, neither that case nor ***Haines*** addresses the possibility of a riparian proprietor being able to render the public's right to use a navigable waterway essentially meaningless by blocking use of the upland.

Without subsequent treatment of a public user's right to access privately owned uplands, it is unclear how Oregon appellate courts, if called upon to decide whether a public user's accessing the uplands was "necessary," will take into account the essential nullification of the right to use a navigable waterway worked by an inability to access the uplands.

IV. Public Use Rights in the Absence of an Ownership Determination

The Legislative Assembly has established a mandatory procedure for the state to determine or assert ownership of a navigable waterway.[34/] ORS 274.402 provides that the Board has exclusive jurisdiction to assert title to submerged or submersible lands in navigable waterways on behalf of the State of Oregon. The Board may do so only after state ownership has been confirmed through litigation or by a final declaration by the Board after the statutory study process set forth in ORS 274.404 through 274.412 has been completed. Read together with ORS 274.025 and ORS 274.005, ORS 274.402 means that the Board is the only state entity that may speak for the state when state ownership of a non-tidal waterway is at issue.[35/] No comparable mechanism has been established to determine whether a waterway is subject to the public use doctrine.

The public's right to use a waterway that is state-owned or subject to the public use doctrine is not dependant on the outcome of any determination process, however. If the characteristics of a particular waterway render it title-navigable or subject to the public use doctrine, members of the public need not await a formal declaration to that effect before they may lawfully exercise their concomitant public use rights. The difficulty is that, among smaller waterways, it is difficult to be certain whether a particular waterway is state-owned or subject to the public use doctrine.

There are several ways a person can attempt to ascertain whether there is a public right to use a particular waterway. A person may ask the Department of State Lands whether the Board has determined that the waterway is state-owned. If the Board has not determined ownership, a person may (1) file a Petition for Navigability Study that asks the Board to conduct a formal

study and issue a final declaration; (2) file an action asking a court to determine whether the particular waterway is state-owned; or (3) decide for himself whether the waterway is state-owned or the public use doctrine applies. A person who chooses this last option takes the risk that his use will be a trespass if he is mistaken. For that reason, definite determinations of title-navigability and of the applicability of the public use doctrine serve to inform members of the public who may wish to use a particular waterway, adjacent landowners, state agencies and law enforcement of their respective rights.

Conclusions

Pursuant to federal law, at statehood the State of Oregon acquired, and generally continues to own, all waterways that were tidally influenced or title-navigable. The federal test for title-navigability was first set out in ***The Daniel Ball***, and is fundamentally a practical one, namely, whether at the time of statehood a particular waterway in its natural and ordinary condition was capable of being used as a highway for trade and travel by a customary mode of water transportation. The courts have applied those criteria to various types of waterways and various fact patterns in terms of use and susceptibility for particular uses.

In addition, the Oregon Supreme Court has established a state public use doctrine that gives the public the right to make certain uses of a waterway whose bed is privately owned if the waterway has the capacity, in terms of length, width and depth, to enable boats to make successful progress through its waters.

State-owned waterways are generally open to public use, and the state's management of the waterway may not substantially impair the public rights of navigation, commerce, fisheries and recreation. Under the public use doctrine, the public's right of passage must be exercised without unreasonably interfering with the riparian owner. The public's right to use a waterway that is state-owned or subject to the public use doctrine does not depend on a formal declaration of the waterway's status.

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[1/] Another potential legal basis for public use of waterways is the doctrine of custom. The doctrine of custom has been applied to Oregon's dry sand ocean beaches but not to waterways. Unlike the public use doctrine, which does not depend on historic practice, the doctrine of custom recognizes and protects those uses, and only those uses, historically exercised by the public. Whether an Oregon court would extend the doctrine of custom to waterways if the question were presented is beyond the scope of this opinion.

[2/] Federal law controls all aspects of ownership and management of navigable waterways until the control is vested in a newly-formed state through the equal footing doctrine. ***Corvallis Sand &***

Gravel, 429 US 363, 371, 374 (1977); ***State Land Board v. Corvallis Sand and Gravel***, 283 Or 147, 149-150 (1978); ***United States v. Holt***, 270 US 49, 55-56 (1926) (transfer of title to states is a federal question); ***United States v. Oregon***, 295 US at 14 (federal law governs until the title is vested in a state). But once control is transferred to a new state, the equal footing doctrine is "spent" and does not operate after that date to affect ownership issues. ***Corvallis Sand & Gravel***, 429 US at 371, 374.

[3/] The statutes reflected Congress' intent that federal patents for land along title-navigable waterways would not convey the lands underlying the waterway, and that the boundary of the lands conveyed by the patent was the edge of the waterway instead of the center of the stream. ***Schurmeir***, 74 US at 285-88.

[4/] The significance of the two tests stated in ***The Daniel Ball*** (susceptibility for commerce for purposes of determining title-navigability, and susceptibility for commerce between the states or with another country for purposes of determining the extent of federal regulatory authority) is clarified in ***The Montello***: where a river is navigable only between different places within the same state (meeting the first part of the test, but not the second) the waterway is "a navigable water of the State" but *not* "a navigable water of the United States." ***The Montello***, 78 US 411, 415-416, 20 L Ed 191, 11 Wall 411 (1870) (***The Montello I***).

[5/] The Court held that the Fox River had both "always been navigable in fact" and met the second part of ***The Daniel Ball*** test in terms of forming "a continued highway for *interstate* commerce. * * *" ***The Montello II***, 87 US at 443 (emphasis added).

[6/] ***Brewer-Elliott*** and the other cited cases apply only the first part of the test introduced in ***The Daniel Ball***, 77 US at 563, as construed by ***The Montello II***, 87 US 430, and do not consider whether the waterways are capable of use for navigation in interstate or foreign commerce. ***Brewer-Elliott***, 260 US at 86.

[7/] The Court in ***United States v. Utah*** further elaborated the test for title-navigability originating in ***The Daniel Ball***. It stated that title-navigability does not depend on the particular mode of travel or type of vessel used, nor is it defeated by occasional difficulties in navigation. 283 US at 76. Instead, the question is whether the river, in its ordinary and natural condition, "affords a channel for useful commerce." 283 US at 76. The court also rejected the notion that a paucity of evidence of actual historical use is dispositive. 283 US at 82-83. Post-statehood evidence of uses of the river was properly relied on to show the susceptibility of the river for use as a highway at the time of statehood. The court stated:

> [S]usceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. * * * "It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them."

283 US 82-83, citing ***Packer v. Bird***, 137 US 661, 11 S Ct 210, 34 L Ed 819 (1891).

[8/] The five lakes were all located in Harney County, Oregon (Malheur, Mud, Harney, The Narrows, and Sand Reef). *Id.* at 5.

[9/] *See, e.g.*, ***Utah v. U.S.***, 403 US 9, 11-12, 91 S Ct 1775, 29 L Ed 2d 279 (1971) (evidence of actual use of the Great Salt Lake in Utah prior to statehood properly relied upon as one basis for finding that the lake was navigable at statehood).

[10/] ***Rio Grande Dam & Irrigation Co.*** concerned ownership of water rights. The title-navigability of the Rio Grande River was relevant to the ownership of water rights but was not directly at issue in the case.

[11/] Another limit on the state's authority is Article IV, Section 2 of the U.S. Constitution, the Property Clause, which provides the federal government with authority to govern uses of federal lands. *See* 39 Op Atty Gen 440 (1978) (discussing the Property Clause as a limitation on the state's authority over title-navigable waterways). It should be noted, however, that this earlier opinion did not address federal authority under the Property Clause over waters of a state. We do not address these matters in this opinion.

[12/] In general, the servitude applies to waterways that in their ordinary condition form by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary mode in which such commerce is conducted by water. *See* ***United States v. Appalachian Electric Power Co.***, 311 US 377, 404, 417-418 (1940); 39 Op Atty Gen 440, n 7 (1978).

[13/] The Court in ***Johnson*** noted that:

> Section 2 of the act of Congress, approved February 14, 1859, admitting the State of Oregon into the Union, reads thus:
>
> > The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state, and other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.
>
> This section [of the Admissions Act] is declarative and preservative of the *jus publicum* including the public right of navigation and fishery.

Id. at 661.

[14/] In ***Cook***, the Land Board issued a deed for lands within the harbor lines of the Willamette River near Swan Island. ***Cook***, 70 Or at 529-32. Watercraft passed over the submerged lands on a nearly daily basis. ***Cook***, at 531. The court found that the conveyance acted as a direct and permanent impediment to navigation. ***Cook***, at 532. The court held that the conveyance violated the trust under which the State of Oregon holds title to lands within waterways, and was an abdication by the state of its trust responsibilities. ***Cook***, at 532-34. The court relied on ***Illinois Central Railroad***, saying that the conveyance by the State of Oregon was analogous to the conveyance condemned by the United States Supreme Court. ***Cook***, at 533. This case indicates that a conveyance of even a relatively small area of

land underlying a state-owned waterway may be void if the land is in an area important for one of the public trust resources, such as navigation.

[15/] In 1951, this office concluded that the Land Board was authorized to convey a portion of the Columbia River to the State Highway Commission in order to relocate a railroad, notwithstanding the limitations imposed by the public trust doctrine. 25 Op Atty Gen 274 (1951). However, we also advised that the Board do so only after making findings that the use would not interfere with the public right of navigation and fishing on the Columbia River. *Id.*, at 278.

[16/] *See* ***Weise v. Smith***, 3 Or 445 (1869); ***Felger v. Robinson***, 3 Or 455 (1869); ***Shaw v. Oswego Iron Co.***, 10 Or 371 (1882); ***Haines v. Hall***, 17 Or 165, 20 P 831 (1888); ***Nutter v. Gallagher***, 19 Or 375, 24 P 250 (1890); ***Hallock v. Suitor***, 37 Or 9, 60 P 384 (1900); ***Hunter v. Grande Ronde Lumber Co.***, 39 Or 448, 65 P 598 (1901); ***Kamm v. Normand***, 50 Or 9, 91 P 448 (1907); ***Trullinger v. Howe***, 53 Or 219, 97 P 548 (1908); ***Flinn v. Vaughn***, 55 Or 372, 106 P 642 (1910); ***Lebanon Lumber Co. v. Leonard***, 68 Or 147, 136 P 891 (1913); ***Guilliams v. Beaver Lake Club***, 90 Or 13, 175 P 437 (1918); ***Luscher v. Reynolds***, 153 Or 625, 56 P2d 1158 (1936).

[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 (see the glossary above). For that reason, it is possible that a given stretch of waterway might not be title-navigable and therefore not state-owned, but nevertheless navigable-in-fact for purposes of the Oregon public use doctrine.

[18/] In a second 1869 case addressing the public's right to use a stream to float logs, which was affirmed on other grounds, the court stated: "any stream in this state is navigable on whose waters logs or timbers can be floated to market, and * * * they are public highways for that purpose." ***Felger***, 3 Or at 457-458. In a later case, ***Shaw***, 10 Or at 382, the court refers to this statement as part of the "holding" in ***Felger***, but also states that the question of *title*-navigability was not before the court. The court opined that, for a waterway to be subject to public use rights, it is not necessary that it be navigable in fact *for a particular purpose at all times*:

> [I]t is not necessary that they be navigable the whole year for that purpose [of floating logs] to constitute them such [public highways]. If at high water they can be used for floating timber, then they are navigable; and the question of their navigability is a question of fact * * *. Any stream in which logs will go by the force of the water is navigable.

Id. at 458.

[19/] For further discussion of the right of the public to come onto a privately owned upland in relation to exercising public use rights on a waterway, as expounded in ***Weise*** and later cases, *see* subsection D, *infra*.

[20/] But, *see* ***Corvallis Sand & Gravel Co.***, 283 Or 147, 158, 582 P2d 1352 (1978) ("That case did not involve the title to a riverbed, but considered the navigability of the Tualatin River in another context."); ***State v. Salot***, 66 Or App 492, 493, 674 P2d 93 (1984) (***Weise*** and ***Shaw*** do not definitively address title to the beds of the Tualatin River).

[21/] The court also recognized another category of waterways, namely those that are completely private and not subject to any public use rights because they are "so small or shallow as not to be navigable for any purpose," ***Shaw***, 10 Or at 376.

[22/] In 1886, presuming that Anthony Creek was privately owned and subject to public use rights relating to the floating of logs, the court held that a person exercising those rights was liable for damages caused to the riparian landowner's land regardless of whether the rights had been negligently exercised. ***Haines v. Welch***, 14 Or 319, 12 P 502 (1886). This holding was subsequently overturned in ***Hunter***, 39 Or 448.

[23/] A short slough ran from appellant's land across respondent's land and to a navigable waterway. Appellant had opened a short channel through the slough by clearing logs and brush from the gulch, deepening the channel, and cutting a channel or ditch through solid ground. Appellant was the only one other than the respondent who could utilize the slough, and then only at extreme high tides to float logs and for other purposes. ***Nutter***, 19 Or at 380-82.

[24/] The court explained the terminology of its newly stated test:

> Ordinary stages of water or natural conditions * * * has reference to the natural flow of the water, and is applied to the stream in its natural condition, without the application of artificial means, and is used in contradistinction to extraordinary or unusual floods. That which occurs with reasonable certainty, periodically * * * may be properly characterized as ordinary.

Kamm, 50 Or at 14.

[25/] Because the defendants had built a splash dam above plaintiff's land to facilitate the floating of logs the court also considered whether a waterway not floatable for logs in its natural state would be subject to public use rights if made floatable by artificial means. The court clearly stated that a stream "not navigable or floatable in its natural condition cannot be made so by artificial means, nor can the capacity of a navigable stream be increased by such means to the injury of a riparian proprietor without compensation * * *." ***Kamm***, 50 Or at 17. However, a member of the public could use artificial means to increase the usefulness of a waterway that was naturally navigable for a given purpose, as long as the improvements did not injure riparian proprietors along the waterway and did not extend the periods of navigability. *Id.* at 14-15; *see also* ***Flinn***, 55 Or at 374-75 (1910) (upholding injunction against defendants' operation of splash dams to facilitate floating of logs on Coquille River where it flowed through plaintiffs' property). It is beyond the scope of this opinion to analyze the distinction between factors that may improve the natural condition of an already useful waterway and those that would render it useful.

[26/] Plaintiff, a logger, used McDowell Creek to float logs and, in doing so, caused destruction of the banks of the stream and the carrying away of soil. He left a jam of logs in the stream and along the banks, obstructing the stream for several months. Defendant was the riparian owner. ***Lebanon Lumber Co.***, 68 Or at 151-52. McDowell Creek was 1.5 to 3.0 feet deep and 20 to 30 feet wide during ordinary freshets, which occurred three or four times a year but not at regular periods. The stream would not float a large quantity of logs without the use of men on the banks to keep the logs moving. *Id.* at 151.

[27/] *See* subsection D (public use of uplands) for discussion of restrictions on public's right to use uplands to facilitate use of navigable waterway.

[28/] The court noted that its cases to date had "arisen mainly with respect to the floatability of streams for the purpose of conveying sawlogs to market, in which it is held in effect that a stream capable in its natural state of floating sawlogs to market successfully, is navigable for that purpose." ***Guilliams***, 90 Or at 21-22 *citing, e.g.*, ***Weise***, 3 Or 445 and ***Kamm***, 50 Or 9.

[29/] Beaver Creek is described as "a small nontidal stream of insignificant size at a point 3 ½ miles above the ocean, but at its mouth, by reason of the sands thrown up by the sea, it becomes a lagoon or lake * * * of a depth sufficient to float ordinary skiffs and small scows." ***Guilliams***, 90 Or at 14. People had navigated boats on the lagoon for more than 20 years and also fished for trout in the summer. *Id.* at 14-15. Winter storms had diverted the course of the creek so that it was washing away a portion of the defendant's property and threatened continued destruction; defendant built the dam to protect his land from further erosion. *Id.* at 15-16. Because the defendant had failed to make the new channel deep enough to handle the surplus water from the lagoon, water backed up onto plaintiffs' property. *Id.* at 16.

[30/] In ***Guilliams***, 90 Or 13, the court explicitly recognized public ownership of the *water* in navigable waterways, with riparian owners having a right to use the water as it flows by their property. *Id.* at 26.

[31/] Operating Howe's dams to release water downstream raised the water levels from 16 to 24 inches as the stream flowed through plaintiffs' property, thereby interfering with their generation of power. It also eroded the banks and filled plaintiffs' mill race with mud and debris. Plaintiffs had repeated shortages of water while defendant filled its reservoirs. ***Trullinger***, 53 Or at 223-24.

[32/] The court stated that it was not necessary to determine whether the stream was "navigable or floatable" at or above the Trullingers' gristmill. ***Trullinger***, 53 Or at 222.

[33/] The court made similar points in ***Trullinger*** and ***Kamm*** in relation to a logger's alteration of the flow of water through the riparian owner's property: "Dams, dikes, embankments and the like may be constructed in or along floatable streams to facilitate their use, but not to the extent of injuring the riparian proprietors by retarding the flow of the water or sending it down in increased volumes to his injury or at times when the stream would not otherwise be navigable." ***Kamm***, 55 Or at 15. *See also* ***Trullinger***, 53 Or at 222.

[34/] It bears noting, however, that a separate body of law governs state ownership of the waters in a waterway. The ownership of waters in all waterways (regardless of the ownership of the beds) lies with the state. In a previous Attorney General Opinion, this office explained that public ownership of water in Oregon and other Western states is the result of federal statutes providing for the disposal of federal public domain lands in the mid to late 19th century. 49 Op Atty Gen 284, 307 (2001). Under the Desert Land Act of 1877, the federal government made explicit that non-navigable water "shall remain and be held free for the appropriation and use of the public." *Id. citing* 43 USC § 321. In 1935, the U.S. Supreme Court interpreted the Desert Land Act to mean that western states exercise plenary control over previously unappropriated water and may manage and dispose of it under state law. *Id.*, ***California Oregon Power Co. v. Beaver Portland Cement Co., et al.***, 295 US 142, 163-164, 55 S Ct 725, 79 L Ed 1356 (1935). Prior to this, in 1909, the Oregon legislature had recognized that surface waters were owned by the state (more accurately the public, held in trust by the state) in enacting a comprehensive water code providing, in part, "all water within the state from all sources of water supply belong to the public." 49 Op Atty Gen at 307 *quoting* ORS 537.110.

[35/] This opinion does not address the applicability of ORS 274.400 to 274.412 to waterways that are tidally influenced.

CERTIFICATE OF SERVICE

I certify that on March 12, 2015 I served the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE'S MOTION FOR SUMMARY JUDGMENT** on the following attorney of record:

Sarah Weston
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Special Litigation Unit
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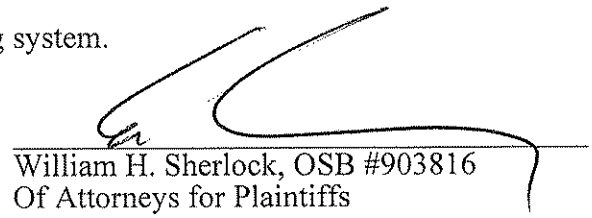
Of Attorneys for Defendants

by causing a true copy thereof, addressed to the attorney's last known address, and served on the attorney(s) of record by the following method.

√ by US Mail, first class postage prepaid, from Eugene, Oregon.
□ by overnight courier.
□ by electronic mail.
□ by hand delivery.
□ electronically by the electronic filing system.



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