



Undermining Oregon's public trust doctrine: Guest opinion

oswegolake.JPG

-A sign indicates restricted access to Oswego Lake in Lake Oswego. (*Randy Rasmussen/The Oregonian*)

Guest Columnist By **Guest Columnist**

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By Michael C. Blumm and Mary Christina Wood

An important duty of the state attorney general (AG) is to vindicate public property rights in state trust resources. But AG Ellen Rosenblum's recent position in a couple of pending high-profile cases completely undermines the state's 150-year-old trust obligation owed to its citizens.

The public trust doctrine (PTD) imposes limits on governments to ensure public access to and protection of important natural resources. The PTD has been a fundamental part of Oregon law since statehood. The 1859 Statehood Act pledged that as a condition of its sovereignty Oregon would ensure that the state's navigable waters would remain available for public use and "forever free."

Over the years, Oregon courts have applied the public trust doctrine to include not just navigable waters at the time of statehood, but all waters susceptible to use by recreational watercraft and even uplands like Oregon's ocean beaches. Expansion of the Oregon PTD is perfectly consistent with an 1892 U.S. Supreme Court opinion that declared that the doctrine applied to all natural resources of "public concern." One of the most obvious resources of contemporary public concern in the 21st century is the atmosphere upon which all life depends. Two millennia ago, the Roman law origins of the PTD expressly included air as well as water.

We think that the public which elected AG Rosenblum would be distressed to learn how little she apparently values the public's right to a healthy atmosphere and its right to access public waters, both of which we believe to be part of the state's PTD. One of AG Rosenblum's predecessors declared in 2005 that the PTD was "a fundamental aspect of sovereignty." Thus, all sovereign governments — the state as well as cities, counties as well as their permittees and licensees — are bound by the PTD.

In a case that will be argued before the Oregon Court of Appeals on Jan. 16, the state maintains that the PTD applies only to those waters that the state owns, not to the atmosphere, the pollution of which threatens the very existence of the planet through greenhouse gas emissions (GHGs). According to the AG, the inapplicability of the PTD gives the state unbridled discretion to endanger public health and welfare by leaving GHG emissions essentially unregulated. If the state prevails, the result will risk — perhaps recklessly — the climate on which we all depend.

In another case, argued before the Clackamas County Circuit Court on Nov. 21, the state's position was quite similar: It claimed that even though the public had rights to use to the admittedly public waters of Oswego Lake,

the state had no duty to supply access to those rights. The AG contended that she could choose to sit idle while the city of Lake Oswego and a private corporation maintain a monopoly of access to the lake. She takes the position, recognized in no other state — and in fact recognized by no Oregon court — that protecting public rights in navigable waters like Oswego Lake is optional.

Oregon historically has been a leader in protecting public rights. In 1969, the Oregon Supreme Court resoundingly upheld public beach access over private lands (the court used customary rights language, similar to the public rights ensured by the PTD). But now, the state wants to convince the courts that protection of the public's trust resources is completely at the will of the state bureaucracy. Just as a private trustee lacks authority to ignore its trust responsibility to its beneficiaries, the state's fiduciary responsibility to protect citizens' inalienable rights to trust resources is not discretionary.

We think that the AG's position in these cases fundamentally conflicts with her duty to defend public trust resources. We urge the public to insist that she stop supporting the privatization of and damage to public resources in these cases. We hope AG Rosenblum will listen to citizens imploring her to defend, rather than disclaim, these public rights owned by all Oregonians.

Michael C. Blumm is Jeffrey Bain Scholar & Professor of Law at Lewis and Clark Law School; Mary Christina Wood is Philip Knight Professor at the University of Oregon Law School. They coauthored the first public trust doctrine casebook in American law.

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