IN THE COURT OF APPEALS OF THE STATE OF OREGON

MARK KRAMER and **TODD PRAGER**,

Plaintiffs-Appellants,

v.

CITY OF LAKE OSWEGO; and the **STATE OF OREGON**, by and through the State Lands Board and the Department of State Lands, in their official capacities,

Defendants-Respondents,

and

LAKE OSWEGO CORP.,

Intervenor-Defendant.

Court of Appeals No. A156284

Clackamas County Circuit Court No. CV12100913

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF INTERVENOR-DEFENDANT

BRIAN T. HODGES, OSB #092040
Pacific Legal Foundation
10940 NE 33rd Place
Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-Mail: bth@pacificlegal.org

Attorney for Amicus Curiae
Pacific Legal Foundation

November 2014

Additional counsel listed on next page

Counsel for Appellants
Kramer/Prager
THANE W. TIENSON
ttienson@lbblawyers.com
Landye Bennett Blumstein LLP
1300 SW Fifth Avenue, Suite 3500
Portland, OR 97201
Telephone: (503) 224-4100
Facsimile: (503) 224-4133

GREGORY M. ADAMS
greg@richardsonadams.com
Richardson Adams, PLLC
515 N orth 27th Street
Boise, ID 83702
Telephone: (208) 938-2236
Facsimile: (208) 938-7904

Counsel for Defendant-Respondent
State of Oregon
ANNA MARIE JOYCE
anna.joyce@doj.state.or.us
Oregon Department of Justice
Appellate Division
1162 Court Street NE
Salem, OR 97301
Telephone: (503) 378-4402
Facsimile: (503) 378-6306

Counsel for Defendant-Respondent
City of Lake Oswego
PAUL W. CONABLE
paul.conable@tonkon.com
ROBYN RIDLER AOYAGI
robyn.aoyagi@tonkon.com
Tonkon Torp LLP
888 Southwest 5th Avenue, Suite 1600
Portland, OR 97204
Telephone: (503) 221-1440
Facsimile: (503) 274-8779

Counsel for Intervenor-Defendant
BRAD S. DANIELS
bsdaniels@stoel.com
DANIEL C. OCCIPINTI
dcocchipinti@stoel.com
Stoel Rives LLP
900 Southwest 5th Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 224-3380
Facsimile: (503) 220-2480

Counsel for Amici Curiae Law
Professor/Willamette Riverkeeper
KENNETH KAUFMANN
kaufmann@lklaw.com
Lovinger Kaufmann LLP
825 Northeast Multnomah, Suite 925
Portland, OR 92723
Telephone: (503) 230-7715

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

Miscellaneous

IDENTITY AND INTEREST OF AMICUS CURIAE

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have participated as lead counsel or amicus curiae in several cases before the U.S. Supreme Court in defense of the right of individuals to make reasonable use of their property. *See*, *e.g.*, *Koontz v. St. Johns River Water Management District*, 133 S Ct 2586 (2013); *Arkansas Game & Fish Comm'n v. United States*, 133 S Ct 511 (2012); *Palazzolo v. Rhode Island*, 533 US 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 US 725 (1997); *Nollan v. California Coastal Comm'n*, 483 US 825 (1987). PLF has also participated in several cases raising similar questions regarding the public trust doctrine to those presented in this case. *See*, *e.g.*, *State ex rel Merrill v. Ohio Dep't of Natural Res.*, 955 NE2d 935 (Ohio 2011); *Severance v. Patterson*, 566 F3d 490 (5th Cir 2009) (addressing a legislative expansion of public beach access effecting a taking of private property); *Envtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot.*, 187 P3d 888, 897 (Cal 2008) (addressing a proposed expansion of the public trust doctrine over all wildlife). Moreover, PLF attorneys have contributed to the body of scholarly literature on the public trust doctrine and the background principles of property law. *See, e.g.*, David L. Callies & J. David Breemer,

Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations, 36 Val U L Rev 339 (2002); James S. Burling, *Private Property Rights and the Environment After* Palazzolo, 30 BC Envtl Aff L Rev 1 (2002).

PLF and its supporters believe that this case is of significant importance to Oregon's landowners and has far-reaching implications for their traditional rights in property. PLF believes that its public policy perspective and litigation experience will provide an additional and useful viewpoint in this case.

ISSUE ADDRESSED BY AMICUS BRIEF

Whether this Court should extend Oregon's public trust doctrine to create a public right to cross over upland properties in order to gain access to bodies of water for recreational purposes where Oregon's Supreme Court has recognized that the doctrine creates no right of way across property adjacent to water.

INTRODUCTION

This case raises important questions regarding Oregon's common law of shoreline property ownership. Oswego Lake is a private, man-made lake that is owned, maintained, and operated by a private company, Lake Oswego Corp., for the benefit of lakefront property owners.[1] ER 4-5, 7. While most of the land

---

[1] As set out in the parties' briefs, Oswego Lake actually consists of two distinct water bodies, with different histories. Appellants incorrectly assert that the Lake is "navigable" and, therefore, "an Oregon water body." App. Opening Br. at 1. In fact, the trial court never reached the Appellants' challenge to Lake Oswego

(continued...)

surrounding the lake is privately owned, the City of Lake Oswego acquired a lakefront parcel, which it operates as a swim park, providing lake access for city residents.[2] ER 44. The Appellants—two public access activists (one of whom is a resident of the City and freely permitted to swim under the city's swim park rules (ER 43))—argue that the "public trust doctrine" should be broadly interpreted to prohibit the City from adopting rules that restrict the general public from accessing the lake.

Broadly stated, the public trust doctrine is a common law doctrine that recognizes that certain waters must remain open to the public for commerce, navigation, fishing, bathing, and related activities, regardless of who owns the submerged land. *PPL Montana, LLC v. Montana*, 132 S Ct 1215, 1234 (2012). Historically, the public rights established by the doctrine have ended at the water's edge. But the Appellants ask this Court to expand the doctrine beyond that well-settled demarcation line by declaring the existence of easements across dry, upland property so that the public can gain access "to . . . navigable waters throughout the State or Oregon, including the Lake, . . . regardless of ownership." ER 2

---

[1](...continued)
Corps.'s title in the lake bed and never determined whether the lake was subject to the public trust doctrine. ER 45. Instead, the trial court assumed both facts for the purpose of resolving the cross motions for summary judgment and motion to dismiss. ER 45.

[2] The city owns a total of four parcels of lakefront property—three upland parcels and the swim park.

(Complaint). The trial court dismissed the activists' claims for a variety of reasons, including a lack of standing, a lack of state action, the non-justiciability of political questions, and a failure to cite any binding case law supporting the proposed expansion of the public trust doctrine. ER 42-43, 45, 48.

Amicus Curiae PLF believes that the trial court's order of dismissal can be affirmed without reaching the merits of Appellants' public trust claims. Nonetheless, it is necessary to address their arguments because the consequences of their proposed rule would be far-reaching and harmful to Oregon's shoreline property owners, and could expose the State to liability under the U.S. Constitution.[3] *See Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 130 S Ct 2592, 2601, 2614 (2010) (a judicial ruling that redefines established principles of a state's property law will raise federal constitutional problems under the Due Process and Takings Clauses).

[3] This amicus brief will not discuss the public use doctrine, which is separate and distinct from the public trust doctrine and the doctrine of custom.

ARGUMENT

I

THE PUBLIC TRUST DOCTRINE DOES NOT CREATE A PUBLIC RIGHT TO USE PRIVATE PROPERTY TO GAIN ACCESS TO PUBLIC WATER BODIES

Oregon's public trust doctrine is a common law property doctrine under which the State holds certain waters, and the submerged lands, in trust for the benefit of its citizens. *Morse v. Division of State Lands*, 34 Or App 853, 859, 581 P2d 520 (1978), *aff'd*, 285 Or 197, 590 P2d 709 (1979); *see also Brusco Towboat v. State, By and Through Staub*, 30 Or App 509, 517-19, 567 P2d 1037 (1977), *aff'd as modified*, 284 Or 627, 589 P2d 712 (1978). The purpose of the trust is to ensure that the public can use and enjoy those waters for commerce, navigation, fishing, bathing, and related activities. *Id*. This common law tradition passed to the original thirteen states at the time they attained sovereignty over the beds of the sea following the revolution.[4] It then passed on to the later-admitted states, including Oregon, by virtue of the Tenth Amendment, which reserved to the states all powers not delegated to the federal government. *Brusco Towboat*, 30 Or App at 515-16 (citing *Oregon v. Corvallis Sand & Gravel Co.*, 429 US 363 (1977)).

To preserve the public's rights, the doctrine places limits on the sovereign's

---

[4] *Martin v. Lessee of Waddell*, 41 US (16 Pet) 367 (1842) (United States Supreme Court held that the crown's interest in tidelands passed to New Jersey upon the American Revolution).

authority to transfer its interest in submerged or submersible lands into exclusive private ownership.[5] *Illinois Central Railroad Co. v. Illinois*, 146 US 387 (1892); *see also* Jose L. Fernandez, *Untwisting the Common Law: Public Trust and the Massachusetts Colonial Ordinance*, 62 Alb L Rev 623, 628 (1998) (under English common law, the land beneath the seabed was held by the sovereign in trust for public navigation and fishing). The doctrine operates by dividing state ownership of submerged or submersible lands into two categories.[6] *Brusco Towboat*, 30 Or App at 516-17; *see also Shively v. Bowlby*, 152 US 1, 11 (1894); David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law:*

---

[5] The public trust was limited to the land beneath the waters since the doctrine was first set forth in Roman law out of recognition that the land beneath the sea was unsuitable for private use. David C. Slade, *Putting the Public Trust Doctrine to Work* xvii (National Public Trust Study, 1990); *see also* George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 BC Envtl Aff L Rev. 307, 310 (2006) (In 530 A.D. the Institutes of Justinian pronounced that watercourses should be protected from private acquisition.).

[6] The undisputed source of the modern public trust doctrine is *Illinois Central Railroad Co. v. Illinois*, 146 US 387 (1892). In that case, a railroad company claimed title to 1,000 acres of submerged lands under Lake Michigan, stretching for nearly a mile along Chicago's shoreline, which it proposed to fill and develop. The railroad obtained title under a specific fee simple grant from the Illinois legislature. Finding that navigable waters, and lands under them, were held by the state in trust for the public, the U. S. Supreme Court concluded that the state could not convey or otherwise alienate them in fee simple, free of the public trust. The state could, however, sell small parcels of public trust land, the use of which would promote the public interest (e.g., docks, piers, and wharves), so long as this could be done without impairing the public's right to make use of the remaining submerged land and water. *Id.* at 450-64.

Background Principles, Custom and Public Trust "Exceptions" and the (Mis) Use of Investment-Backed Expectations, 36 Val U L Rev 339, 355-61 (2002). On the one hand, the doctrine establishes a public right to use and enjoy the water—the res of the trust—for certain purposes. *Brusco Towboat*, 30 Or App at 516-17 (citing *Shively v. Bowlby*, 152 US at 11). This is the so-called jus publicum. *Id*. On the other hand, the doctrine recognizes that traditional private property rights also exist in many such lands and waters. *Id*. This is called the jus privatum. *Id*. The doctrine balances those public and private rights by holding that the state can only alienate the jus privatum—it must reserve the jus publicum in trust for its citizens. *Id*. Thus, properly understood, the doctrine operates *first* as a "limitation on legislative power to give away resources held by the state in trust for its people . . ."[7] and *second* as an obligation to supervise and administer the res of the trust. *Id*. at 518.

---

[7] *San Carlos Apache Tribe v. Superior Court*, 972 P2d 179, 199 (Ariz 1999); *see also Bowlby v. Shively*, 22 Or 410, 427, 30 P 154 (1892), *aff'd*, 152 US 1 (1894) (the state may dispose of the lands beneath navigable waterways as it sees fit, "subject only to the paramount right of navigation and commerce"); *Morse v. Division of State Lands*, 285 Or 197, 203, 590 P2d 709 (1979) (public trust doctrine did not prohibit issuance of an estuarian fill permit, because "there is no grant here to a private party which results in such substantial impairment of the public's interest as would be beyond the power of the legislature to authorize"); *Oregon Shores Conservation Coalition v. Oregon Fish and Wildlife Comm'n.*, 62 Or App 481, 492, 662 P2d 356 (1983) (recognizing the existence of the public trust doctrine, but holding that it was "unnecessary" to apply it because "the legislature has specifically addressed the rights to lands designated as oyster lands"); *Cook v. Dabney*, 70 Or 529, 534, 139 P 721 (1914) (state "had no right to convey" the bed of a navigable waterway "and so abdicate its trust designed to protect navigation").

This case is different from a typical public trust case because it doesn't involve any State action or State-owned property. Instead, it involves a challenge to a city ordinance regulating the use of "upland property not owned by the State" (ER 46) and, thus, property that was never subject to the reservation of a public interest that establishes the res of the public trust. The Appellants and their amicus supporters fail to address the unique facts of this case—let alone argue whether the public trust doctrine should even apply to dry land that was never owned by the State. Regardless, the Appellants and their amicus supporters raise several arguments, seeking to extend the limitations that the doctrine places on submerged lands to dry, upland property, all of which lack merit.

A. Over a Century of Case Law Holds That the Public Has No Right To Gain Access to Public Waters by Crossing Private Property

The public trust doctrine does not establish any public rights to use property upland of the high-water mark. Instead, because the doctrine concerns the ownership and management of certain submerged lands and the waters above them, all rights and obligations relating thereto end "at the water's edge." *Lebanon Lumber Co. v. Leonard*, 68 Or 147, 150, 136 P 891 (1913). Thus, over a century ago, Oregon's Supreme Court recognized that the doctrine provides no right to cross over upland property:

> Where the bed and banks of the stream are owned by the riparian proprietor, the navigability of the stream does not give to the navigator a right of way on the land. That can be acquired only by

> the exercise of the right of eminent domain. In case of the navigation of such a stream, the 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 has washed ashore without the fault of the owner, but he must pay all damages occasioned thereby; otherwise he is limited to the stream. . . . The right of navigation ceases at the water's edge. The public have, therefore, as against the riparian owners, and as incident to the right of navigation, no common-law right to use the land adjoining a river above high-water mark.

Lebanon Lumber, 68 Or at 150 (citations omitted); *see also Haines v. Hall*, 17 Or 165, 172, 20 P 831 (1889) (A public user "had no right" to station workers on privately owned river banks while floating logs to a mill.).

Lebanon Lumber is in accord with a long line of public trust precedents which recognize that, even though the doctrine establishes a public right to use the water, it does not alter the common law of property, which "prevents the crossing of private property to reach water for the purpose of fishing, or for boating or cutting ice, or for any other purpose." Henry P. Farnham, *Law of Water and Water Rights*, vol 1 at 654 (Lawyers' Co-operative Pub. Co. 1904) (The public "has no right to cross private property to reach the water."); *see also Gaither v. Albemarle Hosp.*, 70 SE2d 680, 691 (NC 1952) ("[T]he right of access to navigable waters over adjacent lands held under private ownership is vested exclusively in the owner of such lands, and can be exercised by another only by virtue of a grant or license by such owner."); *Bolsa Land Co. v. Burdick*, 90 P 532, 534-35 (Cal 1907) (The public has "no right to invade private property to gain access [to public waters]."); *New England Trout & Salmon Club v. Mather*, 35 A 323, 327 (Vt 1896)

(Even where a body of water is open to the public, an individual will be liable for trespass if he crosses over private property to access the water.); *Brastow v. Rockport Ice Co.*, 77 Me 100, 104 (1885) (The use of a public pond is "free to all[] who can reach it without trespassing upon the lands of others."); *Inhabitants of W. Roxbury v. Stoddard*, 89 Mass 158, 158 (1863) (All persons may use public waters, so long as they "can obtain access to them without trespass."); *The Magnolia v. Marshall*, 39 Miss 109, 131 (Miss Err & App 1860) (A riparian owner "may reasonably refuse permission to any person to go over it to approach the river, and demand any sum he thinks fit for the permission, unless there be a public way over it."); *Coolidge v. Williams*, 4 Mass 140, 144 (1880) (A member of the public may fish in public waters so long as "he does not trespass upon the land of others.").

Appellants and their amicus supporters fail to acknowledge this well-settled limitation on the public trust doctrine. Instead, they simply assert, without argument, that the rule stated in *Lebanon Lumber* only applies to *private* upland property—suggesting that the same rule should not apply to *municipally owned* property. App. Opening Br. at 21; Prof. Amicus Br. at 13-14. But there is no support for drawing such a distinction. In *Illinois Central*, the U.S. Supreme Court characterized the City of Chicago as a riparian owner, subject to the same doctrinal restrictions as any other private owner. 146 US at 463 ("[T]he city of Chicago, as riparian owner of [lakefront property] has the power to construct and keep in repair . . . public landing places, wharves, docks, and levees, subject . . . to the authority

of the state to prescribe the lines beyond which [city structures] may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise."). Thus, there is no basis for limiting *Lebanon Lumber*. The rule stated in that case (and *Haines*) has been part of Oregon's common law of property for over a century and establishes the rights and expectations of shoreline property owners.

B. A Right to Temporarily Touch a Privately Owned River Bank as a Necessary Incident of River Navigation Does Not Create a Public Right of Way Over All Shoreline Properties

In *Weise v. Smith*, Oregon's Supreme Court recognized an exception to the general rule that bars public users from trespassing on upland property. 3 Or 445, 448-51 (1869). In that case, loggers had placed a boom across a portion of a navigable river while floating their logs to the mill. The riparian owner complained that the loggers had trespassed by securing the boom to the shoreline. Thus, the Court needed to determine "[h]ow far . . . [one may] . . . meddle with or touch upon the bank of the stream, which is private property[.]" *Id.* at 450. The Court acknowledged that the riparian owner "has an absolute right to enjoy his land." *Id.* But, "[i]f 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.* This would effectively "deny to the public the right of navigation." *Id.* at 450-51. Therefore, the Court concluded that the loggers could "temporarily" fasten a boom

to the shore because "the act was necessary in order to enable the plaintiff to exercise a right of navigation." *Id.* at 450-51. The Court clarified, however, that "[i]f there had been no necessity for fastening the boom to the plaintiff's land, the act of fastening it would have been a trespass[.]" *Id*. at 451; *see also Lebanon Lumber*, 68 Or at 150 (recognizing the necessity exception).

Appellants ask this Court to extend the necessity exception to create an "absolute right" in the public to cross over upland property in order to gain access to public waters, regardless of ownership. App. Opening Br. at 21; ER 2; Prof. Amicus Br. at 11-12. Nothing in Oregon's case law supports such a radical extension of the public trust doctrine. Indeed, *Weise*, *Lebanon Lumber*, and *Haines* can be readily harmonized by looking at their unique facts. In *Lebanon Lumber*, the Court recited the common law rule prohibiting non-necessary use of "land adjoining a river above high-water mark." 68 Or at 150. In *Weise* the Court determined that it was necessary for the public user to temporarily fasten a boom to the river bank in order to navigate logs down the river; thus, the exception to the general rule applied. 3 Or at 450-51. And in *Haines*, the Court reiterated the general prohibition against a non-necessary trespass by noting that, even if the stream in question had been navigable, the public user would have been liable for trespass when he stationed workers along the privately owned river bank, allowed logs to go onto the land, and redirected the stream to inundate dry lands. 17 Or at 172. All three cases operate together to establish Oregon's common law of

shoreline property ownership, which holds that, absent a showing that the use of upland property is temporary, minimally invasive, and necessary for the water-based use, the public has "no common-law right to use the land adjoining a river above high-water mark." *Lebanon Lumber*, 68 Or at 150; *Weise*, 3 Or at 450-51.

C. New Jersey Case Law Is Inapplicable and Does Not Support Appellants' Argument for a Right To Access a Private, Man-Made Lake

Recognizing that Oregon case law may not provide the relief that Appellants seek, their amicus supporters ask this Court to adopt the holdings from New Jersey cases without providing this Court with any meaningful analysis of that state's public trust doctrine. Prof. Amicus Br. at 12-13. Notably, New Jersey is the only state in the Union to hold that, under the public trust doctrine, the public's right to recreate in ocean waters also creates a right of access over the dry sand area of certain privately owned beaches. *See, e.g., Matthews v. Bay Head Improvement Ass'n*, 471 A2d 355, 364 (NJ 1984).

That foreign case law, however, does not advance Appellants' argument for public access to Oswego Lake for three reasons. First, *Matthews* concerned oceanfront property with dry beach areas. *Id.* Second, the New Jersey Supreme Court expressly limited the right of access to the dry sand area of oceanfront properties, cautioning that its ruling "does not mean the public has an unrestricted right to cross at will over any and all property bordering on the [dry sand]." *Id*. And third, as part of the state's public trust doctrine, New Jersey courts have long

held that the public has no recreational rights in private lakes, like Oswego Lake.[8] *See Baker v. Normanoch Ass'n, Inc.*, 136 A2d 645, 650 (NJ 1957) ("The rule in this jurisdiction is that the general public have no rights to the recreational use of a private lake, such rights being exclusive in the owner of the bed.") (citing *Cobb v. Davenport*, 32 NJL 369 (1867); *Albright v. Cortright*, 45 A 634 (NJ 1900); *Kanouse v. Slockbower*, 21 A 197 (NJ 1891), *reversed on other grounds*, 26 A 333 (NJ 1892)); *see also Baker* at 652 ("the general public have [sic] no rights to the recreational use of a private lake"). Thus, adopting New Jersey's public trust doctrine would preclude the relief sought in this case.

II

THE DOCTRINE OF CUSTOM DOES NOT CREATE A RIGHT OF RECREATIONAL ACCESS TO LAKES

The Professor Amici argue that this Court could create a public access easement on lakefront properties by adopting the holding from a case decided under the wholly-unrelated doctrine of custom. Prof. Amicus Br. at 11-12 (citing *State ex rel Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969)). There is a good reason why this argument was neither raised in the complaint nor argued below.

---

[8] New Jersey is not alone in limiting the doctrine's reach onto private lakes. *See, e.g., Bott v. Comm'n of Natural Resources*, 327 NW2d 838 (Mich 1982) (the public trust doctrine does not apply to private lakes and ponds owned by the abutting property owners); *Osceola County v. Triple E Dev. Co.*, 90 So2d 600, 602 (Fla 1956) (ownership of the land on which a non-navigable water body sits entitles the landowner to exclude the public from recreational activities there, including fishing) (en banc).

See Finney v. Bransom, 326 Or 472, 481 n 8, 953 P2d 377 (1998) (declining to consider argument that amicus advanced where it was not presented to the court below). The decision that Amici rely upon is both legally and factually inapplicable to this case.

The "doctrine of custom" was described by Sir William Blackstone's *Commentaries on the Laws of England* as being among the "unwritten laws of England" intended to express the custom of the country and its people.[9] Relying heavily on Blackstone's *Commentaries*, the Oregon Supreme Court defined a customary right as one that is established by "such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates." *Thornton*, 254 Or at 595 (quoting 1 Bouv Law Dict, Rawle's Third Revision, p. 742). Thus, to establish a customary right, the moving party must show that the use satisfies the following seven factors:

> (1) the land has been used in this manner so long 'that the memory of man runneth not to the contrary;' (2) without interruption; (3) peaceably; (4) the public use has been appropriate to the land and the usages of the community; (5) the boundary is certain; (6) the custom is obligatory, *i.e.*, it is not left up to individual landowners as to whether they will recognize the public's right to access; and (7) the custom is not repugnant or inconsistent with other customs or laws.

Stevens v. City of Cannon Beach, 317 Or 131, 139-40, 854 P2d 449 (1993)

---

[9] William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765* (1979); *see also* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum L Rev 1375, 1382 (1996); Lew E. Delo, Comment, *The English Doctrine of Custom in Oregon Property Law:* State ex rel. Thornton v. Hay, 4 Envtl L 383 (1974).

(paraphrasing *Thornton*, 254 Or at 595-97 (paraphrasing Blackstone's *Commentaries*)); *see also* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 Envtl L Rep 10003, 10004-10015 (2000).

In *Thornton*, the Oregon Supreme Court applied the custom doctrine's multi-factor test to conclude that the public had an easement to cross over the dry sand portion of privately owned beachfront property. 254 Or at 593 (customary use created a public right to cross over dry sands where the public used the disputed land "running back in time as long as the land has been inhabited"); *but see McDonald v. Halvorson*, 308 Or 340, 359-60, 780 P2d 714 (1989) (doctrine of custom does not apply where there is no factual predicate establishing the public's historic use of beachfront property). The Professor Amici, however, fail to discuss any of the factors necessary to establish a customary use of upland property to gain access to Oswego Lake. That is because none of the factors are present in this case.

Moreover, the Professor Amici fail to address two important limitations that Oregon courts have placed on the doctrine. First, the Oregon's Supreme Court concluded that the customary use found in *Thornton* only applies to classic dry sand areas abutting the ocean, such as Cannon Beach, but not to inland, freshwater shorelines with no history of customary use by the public. *McDonald*, 308 Or at 359-60. Second, this Court has held that the right of use established by *Thornton* does not extend landward of the vegetation line. *State Highway Comm'n v.*

Bauman, 16 Or App 275, 283, 517 P2d 1202 (1974). The doctrine of custom has no application to this case.

III

EXPANDING PUBLIC TRUST BEYOND ITS HISTORIC APPLICATION WOULD ABROGATE PRIVATE PROPERTY RIGHTS

The question of where the public trust ends and where unencumbered private property begins must be resolved in a manner consistent with the Fifth Amendment of the United States Constitution, which provides that government may not take private property without just compensation.[10] Over a century ago, Oregon's Supreme Court recognized that creating a public access right over upland property would effect a taking. *Lebanon Lumber*, 68 Or at 150; *see also Webb's Fabulous Pharms., Inc. v. Beckwith*, 449 US 155, 164 (1980) (state, "by ipse dixit, may not transform private property into public property without compensation"). There is no reason to retreat from that conclusion in this case.

The right to exclude others from entering upon one's land is universally held to be one of the most fundamental rights associated with the ownership of private property. *See Nollan v. California Coastal Comm'n*, 483 US 825, 831 (1987) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 433 (1982)

---

[10] *PPL Montana*, 132 S Ct at 1235 ("the public trust doctrine remains a matter of state law"); *see also Phillips Petroleum Co. v. Mississippi*, 484 US 469, 475 (1988) (All fifty states "have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.") (citing *Shively v. Bowlby*, 152 US 1, 26 (1894)).

(quoting *Kaiser Aetna v. United States*, 444 US 164, 176 (1979))); *see also Lingle v. Chevron U.S.A. Inc.*, 544 US 528, 539 (2005) (A physical invasion of private property will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using his or her property which is "perhaps the most fundamental of all property interests."). Indeed, the right to exclude is so essential to private property that the United States Supreme Court has held that, to the extent that the government authorizes the public to cross over an individual's land, the government destroys all of the essential rights thereto and constitutes a categorical taking. *Loretto*, 458 US at 435.

It is unsurprising, therefore, that several courts faced with the same arguments as those advanced by the Appellants have concluded that creating an easement over private property to gain access to public waters would effect a taking. In *Bell v. Town of Wells*, 557 A2d 168 (Me 1989), for example, the Maine Supreme Judicial Court held that an attempt to expand the state's public trust doctrine to allow the public to traverse private lands to reach public land for recreational purposes resulted in a taking of private property. Similarly, in *Opinion of the Justices*, the Massachusetts Supreme Judicial Court refused to expand statutory declarations of public trust to grant access across private land to reach intertidal lands, explaining that:

> The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the

> Constitution of the Commonwealth and of the United States. . . . The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest inreal property has any meaning at all it must include the general right to exclude others.

313 NE2d 561, 568 (Mass 1974) (citation omitted).

Several opinions of the New Hampshire Supreme Court exhibit similar skepticism toward expansions of the public trust that intrude on private property. In *Opinion of the Justices (Public Use of Coastal Beaches)*, the court responded to a new statute that provided for access to a public trust shoreline across abutting private land:

> When the government unilaterally authorized a permanent, public easement across private lands, this constitutes a taking requiring just compensation. . . . Because the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitutions against the taking of private property for public use without just compensation. Although the State has the power to permit a comprehensive beach access and use program by using its eminent domain power and compensating private property owners, it may not take property rights without compensation through legislative decree.

649 A2d 604, 611 (NH 1994) (citations omitted). The court drove home the same points in *Purdie v. Attorney General*, 732 A2d 442 (NH 1999). There, forty beachfront property owners sued the state, alleging a taking of their property when the state established a statutory boundary line defining public trust lands further inland from the mean high-water mark. The language of the court is instructive:

> Having determined that New Hampshire common law limits public

> ownership of the shorelands to the mean high water mark, we conclude that the legislature went beyond these common law limits by extending public trust rights to the highest water mark. . . . [P]roperty rights created by the common law may not be taken away legislatively without due process of law. Because [the state statute] unilaterally authorizes the taking of private shoreland for public use and provides no compensation for landowners whose property has been appropriated, it violates . . . the Fifth Amendment of the Federal Constitution against the taking of property for public use without just compensation. . . . Although it may be desirable for the State to expand public beaches to cope with increasing crowds, the State may not do so without compensating the affected landowners.

Id. at 447 (citations omitted) (citing *Opinion of the Justices*, 649 A2d 604).

These cases recognize that, although, as a general matter, property rights are determined by state law, the background principles of property law cannot be changed in such a way as to negate previously recognized rights without the state incurring liability for a constitutional taking. *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1032 n 18 (1992) ("We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."). The U.S. Supreme Court recently underscored that point in *Stop the Beach Renourishment*, 130 S Ct at 2601, 2614.

Writing for a plurality of the Court, Justice Scalia concluded that "[t]he Takings Clause is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor." *Id.*

(Scalia, J., plurality opinion). Thus, when a court "declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.* at 2602. To hold otherwise would render the constitutional prohibition against takings without meaning. *Id.* ("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.").

Justice Kennedy's concurring opinion echoed the same concerns, but suggested that the Due Process Clause is the proper method for setting aside a "judicial decision" that "eliminates an established property right." *Id*. at 2614 (Kennedy, J., concurring) ("The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause."). At a minimum, Justice Kennedy opined that due process must accompany the redefinition of settled property rights. *See id.* at 2614 ("It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights."). Whether the Takings Clause or the Due Process Clause governs, a majority of the U.S. Supreme Court agreed that a court's power does not include the ability "to eliminate or change established property rights." *Id.*

Over a century ago, Oregon's Supreme Court established the rights and expectations that the State's shorelines property owners have vis-a-vis the public trust doctrine. The establishment of easements across dry, upland property so that the public can gain access "to . . . navigable waters throughout the State or Oregon, including the Lake, . . . regardless of ownership" (ER 2) would effectively rewrite those background principles of property law by eviscerating the very rights recognized in *Lebanon Lumber* and *Haines*. And doing so would expose the State to liability under *Stop the Beach Renourishment*, 130 S Ct at 2601, 2614.

CONCLUSION

The public interest in certain waters afforded by the public trust doctrine does not override an owner's well-settled interest in his or her land. The common law relies on a predicable and well-understood system for characterizing the various types of interests in property. Landowners rely on those definitions to establish ownership of property. The arguments advanced by Appellants run contrary to established law and would radically rewrite the State's common law system of property ownership, depriving Oregon's shoreline property owners of well-settled rights and expectations and exposing the State to liability. For those reasons, Amicus Curiae PLF respectfully requests that this Court reject Appellants' public trust arguments.

DATED: November 25, 2014.

Respectfully submitted,

s/ Brian T. Hodges

BRIAN T. HODGES, OSB #092040

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 6,819 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

s/ Brian T. Hodges
BRIAN T. HODGES, OSB #092040

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF FILING AND SERVICE

I certify that on November 25, 2014, I filed the original of this AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF INTERVENOR-DEFENDANT with the State Court Administrator by the eFiling system.

I further certify that on November 25, 2014, I served a copy of the AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF INTERVENOR-DEFENDANT on the following parties by electronic service via the eFiling system, if applicable, and by the United States Postal Service, first-class mail, at the following addresses:

Counsel for Appellants Kramer/Prager
THANE W. TIENSON
ttienson@lbblawyers.com
Landye Bennett Blumstein LLP
1300 SW Fifth Avenue, Suite 3500
Portland, OR 97201
GREGORY M. ADAMS
greg@richardsonadams.com
Richardson Adams, PLLC
515 North 27th Street
Boise, ID 83702

Counsel for Defendant-Respondent State of Oregon
ANNA MARIE JOYCE
anna.joyce@doj.state.or.us
Oregon Department of Justice
Appellate Division
1162 Court Street NE
Salem, OR 97301

Counsel for Defendant-Respondent City of Lake Oswego
PAUL W. CONABLE
paul.conable@tonkon.com
ROBYN RIDLER AOYAGI
robyn.aoyagi@tonkon.com
Tonkon Torp LLP
888 Southwest 5th Avenue, Suite 1600
Portland OR 97204

Counsel for Intervenor-Defendant
BRAD S. DANIELS
bsdaniels@stoel.com
DANIEL C. OCCIPINTI
dcocchipinti@stoel.com
Stoel Rives LLP
900 Southwest 5th Avenue, Suite 2600
Portland, OR 97204

Counsel for Amici Curiae
KENNETH KAUFMANN
kaufmann@lklaw.com
Lovinger Kaufmann LLP
825 Northeast Multnomah, Suite 925
Portland, OR 92723

s/ Brian T. Hodges
BRIAN T. HODGES, OSB #092040

Attorney for Amicus Curiae
Pacific Legal Foundation