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 Land Board and the Department of State Lands,

Defendants-Respondents,

and

LAKE OSWEGO CORPORATION,

Intervenor-Defendant.

Clackamas County Circuit Court
No. CV12100913

CA A156284

BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND WILLAMETTE RIVERKEEPER IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Kramer & Prager v. Lake Oswego

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Treatises

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SUMMARY OF THE ARGUMENT

This case concerns the wrongful exclusion of the public from public waters by an Oregon municipality and an allied corporation, which mistakenly believe the waters of Oswego Lake are privately owned. The case also involves the State's unwillingness to take action to vindicate public rights in public resources. Both the City of Lake Oswego's exclusionary ordinance and the State's inaction violate the state's public trust doctrine, as codified in section 2 of the Oregon Statehood Act. The lower court's affirmation of the City's exclusion and the State's inaction are inconsistent with anti-monopolization principles of Oregon law.

Public rights in navigable waters have a long history of judicial protection in Oregon courts, dating back to within a decade of statehood. The Oregon Supreme Court has repeatedly ruled that public rights exist in all waterways capable of supporting recreational watercraft, which Oswego Lake clearly does, regardless of whether the lakebed is privately or publicly owned.

The City claims to be exempt from public trust doctrine duties, but there is no support for this position in Oregon law, and numerous other jurisdictions have applied public trust duties to municipalities which, after all, are mere creatures of the state. The State's position that it may ignore its public trust obligations is grounded on a flawed 2005 Attorney General's opinion which invented a so-called

"public use" doctrine—existing in no other jurisdiction—in an apparent attempt to relieve itself of its sovereign duties to protect public rights in public waterways.

The lower court ruled that the public trust doctrine did not apply to uplands, which is inconsistent with state law, as public rights clearly apply to private uplands like beaches, parklands, and portages, where necessary to access publicly owned resources. But there is no need to burden private uplands in this case, since reasonable access to Oswego Lake is available from adjacent municipally owned lands.

If the lower court decision in this case is affirmed, Oregon municipalities may decide which members of the public may access public resources. Influential members of localities will be able to lobby for access for the specially privileged and to exclude others through discriminatory ordinances like the Lake Oswego ordinance at issue in this case, a result that the public trust doctrine forbids. Nor are discriminatory covenants or servitudes enforceable against the public; over seventy years ago the Oregon Supreme Court ruled they violated public policy. They are no more judicially enforceable than the racially restrictive covenants to which they were often attached.

We urge the Court of Appeals to recognize that the Oregon Statehood Act's recognition of the State's public trust duties forbids the City from adopting ordinances enforcing monopoly use of public resources for the specially privileged,

and forbids the State from opting to selectively enforce its trust duties, thereby denying the public access to public resources that the sovereign is bound to protect.

ARGUMENT

I. The Evolution of Oregon's Public Trust Doctrine

We begin by tracing the evolution of the state's public trust doctrine and explaining its early judicial interpretation. By the turn of the 20th century, public rights in Oregon's navigable waters were firmly established. These rights were clearly paramount to private landowner rights.

A. Origins and 19th Century Interpretations

The Oregon public trust doctrine originated in statehood, if not before. Section 2 of the Oregon Statehood Act incorporated language from the Confederation Congress's 1787 Northwest Ordinance declaring that "all the navigable waters . . . shall be common highways and forever free," 11 Stat 383 (1859).[1] The Oregon Supreme Court has interpreted this language to preserve public

[1] The Statehood Act (sometimes referred to as the Enabling Act) is federal law binding on the state under the Supremacy Clause of the U.S. Constitution, Article VI, cl 2. In *Economy Light & Power Co. v. United States*, 256 US 113, 122 (1921), the Supreme Court ruled that the Northwest Ordinance's "forever free" language "established public rights of highway in navigable waters" and was no more capable of repeal by one of the states than any other regulation enacted by the Congress." *See also* 33 USC § 10 (providing that all navigable rivers within the Louisiana Purchase "shall be and forever remain public highways"). In 1899, the Oregon legislature used the language to that in the Statehood Act when it declared tidelands to be a "public highway, and shall forever remain open as such to the public." Oregon Laws, title XXX, ch XXI, § 4702 (1899).

rights to fish first recognized by the common law. *Anderson v. Columbia Contract Co*., 94 Or 171, 182, 184 P 240, 243 (1919), citing *Johnson v. Jeldness*, 85 Or 657, 661, 167 P 798, 799 (1917). The U.S. Supreme Court determined in *Martin v. Waddell's Lessee,* 41 US (16 Pet) 367, 414 (1842), that public rights in navigable waters antedated the Northwest Ordinance declaration; the Court cited Lord Matthew Hale's treatise, De Jure Maris (1670), for the proposition that "the public common of piscary" belonged to the "common people of England" since the Magna Charta.

The Pennsylvania Supreme Court recently recognized that that state's constitution merely codified fundamental, inalienable public rights. The court stated that "prior to the adoption of [an amendment to the state constitution, the state] possessed the inherent sovereign power to protect and preserve for its citizens the natural and historic resources now enumerated in Section 27" of the state's constitution. *Robinson Township v. Commonwealth of Pennsylvania*, 83 A3d 901, 947 n 35 (Pa 2013). The court described these rights as "inherent and indefeasible rights," *id.* at 948, that were "preserved rather than created by the Pennsylvania Constitution," *id.*, rights that the state had a duty to manage for the benefit of the public. *Id.* at 980.

The Pennsylvania Supreme Court clearly recognized public trust rights as fundamental elements of the social contract. *Id.* at 947–48. Similarly, we believe

those rights were recognized by (not created by) section 2 of Oregon Statehood Act. As the New Mexico Supreme Court has understood, statehood act promises, which are much more difficult to change than state constitutional provisions, are a paramount source of a state's sovereignty. *State ex rel. King v. Lyons,* 248 P3d 878, 882 (NM 2011) (describing the Enabling Act as "fundamental law to the same extent as if it had been directly incorporated into the Constitution," enforcing its provisions to restrict the Commissioner of Public Lands' authority to exchange public lands with private parties); *see also Ryals v. Pigott,* 580 So 2d 1140, 1149 (Miss 1990), enforcing a statehood act's "forever free" language, stating that waterways are open as matter of federal law and "may not—by legislative enactment or judicial decree—be withdrawn from public use").

The Morrison Bridge case, *Willamette Iron Bridge Co. v. Hatch*, 125 US 1 (1888), is not to the contrary. There, the Court reversed an injunction blocking construction of the bridge's blocking access to a landowner's dock, ruling that section 2 of the Statehood Act did not establish "the police power of the United States over the rivers of Oregon," and denied federal court jurisdiction over the dispute. *Id.* at 12. Recent Supreme Court decisions have interpreted the Morrison Bridge decision to mean that there was no federal common law of navigation prohibiting obstructions or nuisances in navigable waters. *California v. Sierra Club,* 451 US 287, 295 (1981); *United States v. Republic Steel Corp.*, 362 US 482, 486

(1960). According to Justice Stevens' concurrence in *California*, the Morrison Bridge case "did not question the right of the private parties to seek relief in a federal court; rather, the Court held that no federal rule of law prohibited the obstruction of the navigable waterway." *California*, 451 US at 298.[2] Stevens explained that the Morrison Bridge decision rejected the argument that under the Statehood Act congressional approval was required for individual projects like the Morrison Bridge. *Id.* at 299 n 1. The case does not therefore stand for the proposition that Statehood Act promises are not enforceable in Oregon as they are elsewhere.

The Oregon Supreme Court upheld public trust rights not long after statehood. In *Weise v. Smith*, 3 Or 445, 450–51 (1869), the Court affirmed a trial court's conclusion that log floats on the Tualatin River did not amount to a trespass, though the riverbed was privately owned, since the river was "subject to the public use as a passage way." The *Weise* Court even ruled that the loggers had the right to use uplands adjacent to navigable waters when necessary for the log booms. *Id.* The same year, the Court decided that streams that were navigable only during the spring freshet were subject to public navigation rights, *Felger v. Robinson*, 3 Or 455, 457–58 (1869).

[2] Congress responded by enacting the Rivers and Harbors Act in 1890. *See California*, 451 US at 299.

In another 19th century decision involving log floats on the Tualatin River, the Oregon Supreme Court expanded its recognition of public rights, upholding an injunction against an iron smelter that halted the diversion of water interfering with the log floats. In *Shaw v. Oswego Iron Co.* 10 Or 371, 375–76, 382 (1882),[3] the Court explained that even where riparian landowners own the riverbed, their riparian rights are "subordinate to the public easement" and "subject to the superior rights of the public to use [the water] for the purposes of transportation and trade."

A decade after the *Shaw* decision, in *Bowlby v. Shively*, 22 Or 410, 30 P 154 (1892), the Oregon Supreme Court applied public navigation rights to tidal waters near Astoria, holding that title to tidelands purchased from the state continues to be subject to the paramount right of public navigation. The U.S. Supreme Court affirmed, explaining that the state owned tidelands in its sovereign capacity in "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery." *Shively v. Bowlby*, 152 US 1, 16 (1894) (quoting from Lord Hale's treatise). Even after the state conveyed the lands to private owners, title remained "subject [] to the paramount right of navigation." *Id.* at 52–54. This was so because private title, "or *jus privatum*, whether in the king or in a subject, is held subject to the public right, *jus publicum*, of navigation and fishing." *Id.* at 13–14,

[3] The Oswego Iron Company was the predecessor-in-interest of the current Lake Corp.

16, 25 (citing Lord Hale, English common law decisions, and a Virginia attorney general's opinion).

Thus, within a quarter-century of statehood, the Oregon Supreme Court applied the Statehood Act's promise of public rights in navigable waters to ensure public access over privately owned streambeds, recognized public access rights over private uplands adjacent to navigable waters, enjoined private water diversions adversely affecting public rights, and ruled that state conveyances to private landowners could not defeat public trust rights. The latter decision received a ringing affirmation from the U.S. Supreme Court in *Shively*.

B. Expanding Public Trust Rights in the 20th Century

In the early 20th century, the Oregon Supreme Court proceeded to expand the scope of public trust rights from navigation and fishery to include recreation.[4] In *Guilliams v. Beaver Lake Club*, 90 Or 13, 30–31, 175 P 437, 443 (1918), the Court upheld a trial court decision that a landowner could not build a dam that would interfere with public use of a nearby lagoon for recreation during high water. The Court also affirmed the lower court's injunction against a wire fence that the

[4] *See* Michael C. Blumm & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 Envtl L 375, 390 (2012) (explaining that Oregon was one of the first states to recognize recreation as part of the public trust doctrine, which most states now acknowledge). The first state to recognize public recreation rights within the scope of the public trust doctrine was Minnesota, in *Lamprey v. Metcalf*, 53 NW 1139, 1143 (Minn 1893).

landowner erected on his privately owned riverbed to prevent public fishing and recreating. *Id.* at 27–30. The Court explained that "[w]hatever may be the title to the bed of such streams or bodies of water, [private riparian landowners] do not own the water itself, but only the use of it as it flows past their property." *Id.* at 26. Moreover, the public's navigation easement was broad enough to support a right to recreate in rowboats and to fish for trout. *Id.* at 14–15, 27–28. Among the other public uses the court recognized were "sailing, rowing, fishing, fowling, bathing, skating, . . . and other public uses which cannot now be enumerated or even anticipated." *Id.* at 29 (quoting *Lamprey v. Metcalf*, 53 NW 1139, 1143 (Minn 1893)).

Further, a stream was subject to public trust rights even if not suitable for large-scale commerce, so long as it was capable of floatation by small craft. *Id.* at 18–29. According to the Court, streams are navigable for purposes of public rights if they "are capable of use for boating, even for pleasure." *Id.* at 29 (quoting *Metcalf*, 53 N.W. at 1144). This "pleasure-boat test" for navigable waters is now well-established and is the dominant test for navigable waters under state law. *See* Harrison C. Dunning, *Waters Subject to the Public Right*, 2 Waters and Water Rights § 32.03 (Amy L. Kelley, ed, 3rd ed 2014).

Nearly two decades after *Guilliams*, the Supreme Court again revisited the public trust doctrine in a case involving Blue Lake, a small popular, man-made lake

near Portland with privately owned lakebeds. Affirming the lower court, the Supreme Court ruled, in *Luscher v. Reynolds*, 153 Or 625, 631–33, 56 P2d 1158, 1161 (1936), that a seller did not breach a title warranty when conveying part of the lakebed because the landowner—not the state—owned the lakebed. Even though the lakebed of Blue Lake was privately owned, the lake was open for public recreation because "[r]egardless of the ownership of the bed, the public has the paramount right to the use of the waters . . . for the purpose of transportation and commerce," including recreational boating. *Id.* at 635–36. The *Luscher* Court explained its reasoning in memorable terms:

> '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. . . . '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.'

Id. at 635 (quoting *Guilliams*, 175 P at 442).

By mid-20th century then, the Oregon Supreme Court had firmly embraced recreation as among the uses protected by the state's public trust doctrine.[5] In doing

[5] References to the "public trust doctrine" were not widespread until Professor Sax published his seminal article in 1970. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law*, 68 Mich L Rev 471 (1970) (describing the public's rights in

so, it also expanded the waterbodies subject to the doctrine by defining as navigable all waters that were suitable for use by recreational watercraft. Its expanding scope was in fact characteristic of the public trust doctrine throughout the 20th century.[6]

C. Expanding Public Uses Upland: The Role of Custom

In *Weise*, 3 Or. at 450, as discussed above, the Oregon Supreme Court recognized that public rights to use navigable waters extended to uplands where necessary to float logs. A century later, the Court expanded the public's right to use

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navigable waters as the public trust doctrine and explaining that these rights imposed duties on the state). According to Google Scholar, the article has been cited over 1,836 times over the last 44 years (last visited June 12, 2014).

[6] Expanding the scope of the public trust doctrine was anticipated in the U.S. Supreme Court's decision in *Illinois Central Railroad v. Illinois*, 146 US 387 (1892), in which the Court voided a conveyance of the inner Chicago Harbor to the railroad. The Court ruled that the public's *jus publicum* rights were largely inalienable, as the trust doctrine barred abdication of the public's rights:

> Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. . . The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

Id. at 453. Although the case involved submerged lands in Chicago Harbor, the Court indicated that the trust imposed on the state was due to the fact that these submerged lands were "a subject of public concern," *id.* at 455, implying that other natural resources of public concern could become part of the trust *res.*

of uplands to include recreational use of ocean beaches. In *State ex rel. Thornton v. Hay*, 254 Or 584, 593–97, 462 P2d 671, 676–77 (1969), the Court used the doctrine of custom—due to the public's long, uninterrupted, and peaceable use of ocean beaches as highways of commerce—to expand public recreational rights to uplands. The Court reaffirmed this reasoning a quarter-century later in *Stevens v. City of Cannon Beach*, 317 Or 131, 142–43, 854 P2d 449, 456 (1993), *cert den*, 510 US 1207 (1994) (applying the doctrine of custom to a landowner who purchased before the *Thornton v. Hay* decision).

The public trust doctrine is a complementary, if not better justification for public recreational rights in ocean beaches. In a concurring opinion in the *Hay* case, Justice Denecke explained the state's long history of distinguishing between *jus publicum* and *jus privatum* in public trust cases like *Guilliams* and *Luscher* made the public trust doctrine a superior rationale for a public easement in ocean beaches, analogizing ocean beaches to navigable waters. 254 Or at 600–01.[7] Like the *Weise* Court's recognition of public rights to uplands adjacent to navigable waters where necessary for log floats, 3 Or at 450–51, the public's easement to use Oregon's ocean beaches is best understood as a right ancillary to the public's ownership of adjacent tidelands. The New Jersey courts have expressly recognized that the source of the

[7] *See* Blumm & Doot, *supra* note 4, at 407–11. The distinction between *jus publicum* and *jus privatum* was adopted by the Supreme Court in *Shively v. Bowlby*, 152 US at 11.

public's right to beach access is the public trust doctrine. *Matthews v. Bay Head Improvement Ass'n*, 471 A2d 355 (NJ 1984) (establishing criteria for determining when public access was warranted in "quasi-public" beaches); *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*, 879 A2d 112 (NJ 2005) (applying the *Matthews* criteria to a privately owned beach).

The public's right to recreate on ocean beaches is clearly a public right to use private uplands, one that evolved from the public's right to float and recreate on privately-owned submerged lands. Similarly, the public's right to use private uplands where necessary to access navigable waters, first recognized 145 years ago in the *Weise* decision, is part of the public's rights under the public trust doctrine. Thus, if it were necessary to imply an easement over private lands for the public to access navigable waters, there is authority to do so. But since there is ample publicly-owned land adjacent to the publicly-owned Oswego Lake, there is no need to imply a public easement over private uplands in this case.

The City and Lake Corp argue—and the lower court ruled—that the public trust doctrine does not apply to the City's uplands adjacent to Oswego Lake, in part based on *Lebanon Lumber v. Leonard*, 68 Or 147, 136 P 891 (1913), where the Oregon Supreme Court indicated that the public lacked a right to use uplands along McDowell Creek to facilitate a log drive. But the *Lebanon Lumber* Court ruled that McDowell Creek was *not* a navigable water, so of course the public would not only

lack rights to access the water from uplands, it had no right to use the creek for a log drive. 68 Or at 149–50.[8] By contrast, Oswego Lake, a meandered lake that supported substantial waterborne commerce at statehood, Appellants' Opening Brief, at 5–6, is clearly a navigable water.[9]

Moreover, a declaration that the public trust doctrine applies broadly to uplands is unnecessary for Appellants to prevail in this case. The public already has access to the public parklands surrounding Oswego Lake. What the public lacks is access to the navigable lake from those public parklands. The case law discussed in this section demonstrates that the public trust doctrine applies to certain uplands, but for the public to access Oswego Lake all that is necessary is for this Court to declare that the City's restrictions on public parkland conflict with the public's rights to access a public waterway in violation of the public trust promises in the Statehood Act.

D. The Statutory Public Trust and Broad Public Standing

Apart from *Stevens v. City of Cannon Beach* in 1993, the Oregon Supreme Court's most recent interpretation of the public trust doctrine was thirty-five years

[8] *Lebanon Lumber* was decided five years before the Oregon Supreme Court adopted the "pleasure-boat test" for navigability in its 1918 *Guilliams* decision. It is likely that McDowell Creek would satisfy the pleasure-boat test's suitability for use by recreational watercraft.

[9] See ORS § 274.430(1) (declaring the waters of meandered lakes to be "of public character").

ago in *Morse v. Div. of State Lands* (*Morse II*), 285 Or 197, 590 P2d 709 (1979), in which the Court affirmed a Court of Appeals decision to reverse a state fill permit for the expansion of the North Bend airport. The Court of Appeals had ruled that the state's fill and removal statute aimed "to codify the [*j*]*us publicum* and to provide procedures for its orderly administration" because "[t]he legislative history [of the statute] reflects [the fact] that the legislature was aware of the historical public trust, was motivated by the same concerns that underlie the public trust, and chose language which would best perpetuate it," *Morse v. Div. of State Lands* (*Morse I*), 34 Or App 853, 862, 581 P2d 520, 525 (1978). The Supreme Court did not disturb these determinations, although it decided that the public trust reflected in the statute did not require rejection of all fill permits for non-water-dependent uses. *Morse II*, 285 Or at 200, 203. The Supreme Court also assumed broad standing of numerous individuals and environmental groups to enforce the public trust doctrine,[10] which the lower court in this case failed to recognize.

In fact, although the lower court did not rule the Plaintiffs in this case lacked standing, the lower court incorrectly suggested that public trust standing should be restricted to only plaintiffs with an interest "in some special sense that goes beyond the injury the plaintiffs would expect as [] member[s] of the general public." *Kramer*

[10] *Morse II* involved thirty-seven individuals and four environmental groups who had standing to challenge the State's issuance of a fill permit.

v. City of Lake Oswego, No CV12100913, at *2 (Cir Ct of Or, 5th Jud Dist Jan 8, 2014). This restrictive view of standing seems to import the "special injury" rule of public nuisance law to public trust standing, the purpose of which is to protect prosecutorial discretion of local officials. Jesse Dukeminier, et al., Property 803 (8th ed 2014).[11] Such an importation is not only inconsistent with the Supreme Court's broad acceptance of public standing in the *Morse II* decision, it assumes that the public trust doctrine is a common law doctrine analogous to nuisance law. But unlike nuisance—a common law tort—the public trust doctrine is inherent in sovereignty—a limit on governmental discretion to allow monopolization of public resources. The trust doctrine, reflected (but not created) by the Statehood Act, is not concerned with protecting prosecutorial discretion; in fact, the public trust enables the public to enforce the anti-monopolization promise reflected in the Statehood Act. To say that the public trust doctrine requires "special injury" of a plaintiff as a prerequisite for enforcement effectively means that the public cannot enforce the public trust doctrine. That amounts to an oxymoron.

The robust history of judicial interpretations of the public trust doctrine has not been matched by this state's executive branch. In particular, a 2005 Opinion of

[11] "Moreover, some commentators make the dubious assertion 'that any harm or interference shared by the public at large will normally be, if not entirely theoretical or potential, at least minor, petty, and trivial so far as the individual is concerned.'" Dukeminier, *supra*, at 803–04, quoting the Restatement (Second) of Torts § 821C, cmt. a (1979).

the Attorney General proposed a crabbed interpretation of the public trust doctrine, misinterpreting several court decisions and making errors in the distinction between sovereign and proprietary authority. Fortunately, no Oregon court has adopted the Attorney General's unprecedented attempt to narrow the scope of the state's public trust doctrine.

II. The Attorney General's 2005 Creation of the So-Called "Public Use" Doctrine

In 2005, the Attorney General issued Opinion No. 8281 in response to questions from the State Land Board and others about the ownership and use of waterways in the state.[12] The opinion recognized the long history of judicial recognition of the public trust doctrine in Oregon, acknowledging public rights to recreate on both navigable-for-title waters (with state-owned beds) and navigable-in-fact waters (with privately-owned beds). State Op Att'y Gen 8281, at 15–17, 24 (2005). The opinion also recognized the foundation cases of *Guilliams* and *Luscher*, but suggested that the public rights recognized in those cases were the product of what the Attorney General described as a "public use doctrine," a doctrine

[12] Controversy over ownership of the John Day riverbed and several high-profile trespass suits involving fishermen's associations prompted the Oregon Treasurer to request an opinion of the Attorney General concerning the scope of public rights in the state's navigable waters. *See* Janet C. Neuman, Oregon Water Law: A Comprehensive Treatise on the Law of Water and Water Rights in Oregon 222–23, 233–35 (2011).

recognized by no courts in this or in any other state as independent of the public trust doctrine.[13]

The Attorney General limited his invented "public use" doctrine to privately-owned riverbeds, like Beaver Creek in *Guilliams* and Blue Lake in *Luscher*, without explaining why the public trust doctrine was not sufficient to protect public rights in such waters. Nor did the Attorney General make an effort to clearly distinguish the "public use" from the public trust doctrine. But upon examination, the apparent reason for the unprecedented erection of the "public use" doctrine was to disclaim any state duties or responsibilities for ensuring the public's rights to these waterbodies. This abdication of the state's role in ensuring public rights to trust resources—which the U.S. Supreme Court explicitly disallowed in its *Illinois Central* decision[14]—cannot withstand scrutiny.

The Attorney General's creation of his "public use" doctrine rested on a flawed understanding of the scope of the public trust doctrine. The Attorney General equated the scope of the public trust with state sovereign ownership of submerged lands, a limit that no Oregon court has suggested since the Oregon Supreme Court adopted the pleasure-boat test in 1918 in its *Guilliams* decision. In fact, as decisions

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[13] *See, e.g.*, Michael C. Blumm (ed), The Public Trust Doctrine in 45 States (2014 ed.), *available at* http://ssrn.com/abstract=2235329 (no evidence of the public use doctrine in 45 states).

[14] *See* quote from *Illinois Central* in note 6 above (a state cannot abdicate its public trust responsibilities).

like *Guilliams* and *Luscher* reflect, the public trust doctrine is not dependent on state ownership of the beds of the water body; it coexists with private ownership of submerged lands, imposing a public easement without displacing private ownership. Public trust rights are usufructuary in nature, arising out of the public's ownership of water and the Statehood Act's promise of access to public waters. Landowners' private titles are subject to these public rights in the same way that owners of ocean beaches are subject to the prior and paramount public rights to access public ocean waters and tidelands.

The Attorney General's attempt to limit the public trust doctrine to lands owned by the state reflects a fundamental misunderstanding of the distinction between proprietary ownership and sovereign ownership. The 2005 opinion claimed that proprietary ownership was necessary for the public trust to apply. But the trust doctrine is a sovereign obligation, imposing an inherent limit on sovereign authority. Public proprietary ownership is not necessary to trigger trust obligations, as the Attorney General erroneously assumed. The Court of Appeals recently recognized the distinction between sovereign and proprietary ownership in the context of the state's sovereign ownership of wildlife, explaining that the state's duty to regulate wildlife is grounded on its sovereign ownership, not proprietary ownership. *Simpson v. Dep't of Fish and Wildlife*, 242 Or App 287, 299–304, 255 P3d 565, 571–73

(2011). So also is the public trust doctrine a sovereignty concept; proprietary ownership is not determinative of the scope of the public trust doctrine.

There was simply no reason for the Attorney General to attempt to create a novel "public use" doctrine—independent of the public trust doctrine—out of whole cloth, at least in terms of protecting either public rights or private ownership. The apparent reason behind the incipient public use doctrine is, however, revealed in this case. The state has suggested that unlike its obligations under its artificially narrow view public trust doctrine, it has no duty to protect public rights under the so-called "public use" doctrine: according to the state, these rights are enforceable only by the public, and the state may—as it has done in this case—sit idle with no effort to protect public rights. We maintain that the state may not, through inventing new categories of public rights, reduce its public trust duties in this fashion—any more than Illinois could convey away its trust obligations over Chicago Harbor in the *Illinois Central Railroad* case. The Supreme Court stated that the public trust makes it "hardly conceivable that the legislature can divest the state of the control and management of this harbor, and vest it absolutely in a private corporation." 146 US at 454–55. Yet for years the State of Oregon has allowed the control and management of Oswego Lake to vest in the hands of the Lake Corp.

III. The Applicability of the Public Trust Doctrine to Uplands

The lower court decided that the public trust doctrine did not apply to this case because its scope did not extend to uplands. That assumption is not borne out by experience.

A. *The Beach Cases*

The Oregon doctrine of public beach access, premised on custom, is best conceptualized as a subset of the public trust doctrine. In the landmark decision of *Thornton v. Hay*, 254 Or 584, 462 P2d 671 (1969), the Oregon Supreme Court emphasized a pattern of longstanding, peaceable public use of ocean beaches in fashioning a public recreational easement over privately-owned beaches that was a kind of ancillary right to the public's ownership of ocean tidelands.[15] In short, recognizing a public easement on the dry-sand beaches was necessary to fulfill public use of the publicly owned tidelands. This access right is similar to a public trust right, as Justice Denecke's concurrence indicated, 254 Or at 599–602, and that might have been a less controversial justification for public rights, given the long history of judicial recognition of public trust rights in this state.[16]

[15] The trial court found the recreational easement for the dry-sand beach to be appurtenant to the publicly-owned tidelands. *Hay*, 254 Or at 587 (discussing the trial court's determination).

[16] Justice Scalia was critical of the lack of historical grounding of the doctrine of custom in his dissent from denial of certiorari in *Stevens v. City of Cannon Beach*, 510 US 1207 (1994).

The New Jersey Supreme Court has invoked the public trust doctrine in recognizing public recreational rights to private beaches in that state. Over forty years ago, that court ruled that an oceanside municipality could not discriminate against non-residents through charging differential fees for beach use permits. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A2d 47 (NJ 1972). Unlike the lower court in this case—which sanctioned continuation of a landowner monopoly—the New Jersey court had no trouble applying the public trust doctrine to the municipally-owned beach and also expanded the scope of the doctrine to include recreational use:

> We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend . . . to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.

Id. at 54.

The same court subsequently explained the relationship between the beach uplands and the publicly owned tidelands, stating that "[e]xercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless." *Matthews*, 471 A2d at 364. Consequently,

the court extended the public right to recreate on upland beaches beyond municipally-owned beaches to a beach owned by a quasi-public body. *Id.* at 369.[17]

The New Jersey Supreme Court proceeded to expand the scope of public rights to include privately-owned beaches on the basis of a four-factor test established in its *Matthews* decision. *Raleigh Avenue Beach Ass'n*, 879 A2d at 112.[18] Most recently, in a decision of some relevance to the state's position in this case—in which the state denies any obligation to safeguard public rights in municipally-owned lands—a New Jersey appellate court struck down agreements between the state and private beach clubs limiting public access to replenished beaches, considering such agreements to be "void as against public policy." *Chiesa*

[17] The *Matthews* court also recognized that "[t]he [public]'s right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge." 471 A2d at 365 (citing Justice Denecke's concurrence in *Hay*, 254 Or at 599–602).

[18] The four "*Matthews* factors" are: 1) the location of the dry sand area in relation to the foreshore; 2) the extent and availability of publicly-owned upland sand areas; 3) the nature and extent of public demand; and 4) usage of the upland sand by the landowner. *Matthews*, 471 A2d at 365. Thus, in New Jersey the applicability of the public trust doctrine to privately-owned beaches is a function of case-by-case determination, something that the Oregon Supreme Court in *Hay* consciously avoided. As the *Hay* decision stated, "Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly." *Hay*, 254 Or at 595.

v. D. Lobi Enterprises, No A-6070-09T3, 2012 WL 4464382, at *7 (NJ Super Ct App Div Sept 28, 2012). Enforcing covenants between the City and the Lake Corp which exclude the public from accessing navigable waters from municipally-owned lands should similarly be void as against public policy.[19]

B. The Wildlife Trust

Like navigable waters, such as Oswego Lake, wildlife in the State of Oregon is owned by the state in trust for the public. This is true regardless of whether the wildlife occurs on navigable waters, state-owned land, municipally-owned land, or private land.

For over a century, Oregon courts have recognized state ownership of wildlife imposes a duty on the part of the state to take action to protect the public's interest in hunting and fishing.[20] Typical was the Oregon Supreme Court's decision in *State v. Hume*, 52 Or 1, 5, 95 P 808, 810 (1908), in which the court recognized the state's duty to prevent expiration of salmon species, explaining that migratory fish, as *ferae naturae*, are owned by the state "in its sovereign capacity in trust for all its citizens . . . ." Recently, the Court of Appeals explained that since 1921, Oregon Statutes have recognized sovereign ownership without substantial change, rejecting a claim

[19] See discussion of *Darling v. Christensen* (voiding restrictions as against public policy) in § V, *infra*.
[20] See cases collected in Blumm & Doot, *supra* note 4, at 402–03, 413.

that game farm animals were not wildlife, regulated by the state's wildlife code. The court ruled against the claimed private ownership of these fenced mammals immunized them from state regulation, deciding that "the state's property interest in wildlife is sovereign, not proprietary." *Simpson*, 242 Or App at 302. Like navigable waters, wildlife is a publicly-owned trust resource, and the state's sovereign duty to manage for the common benefit is not defeated by claims of private ownership.

C. The Public Trust Doctrine's Applicability to Uplands in Other States

The lower court decided that the public trust doctrine did not apply to uplands, even publicly owned by the City. As shown above, the court overlooked the substantial public rights that exist in Oregon beaches and Oregon wildlife, including beaches and wildlife that are privately owned. Courts in other states have recognized the applicability of the public trust doctrine to uplands, particularly parklands, such as those surrounding Oswego Lake.

A good example of the application of the public trust doctrine to uplands is *State v. Sorensen*, 436 NW2d 358 (Iowa 1989), where the Iowa Supreme Court ruled that 150 acres of uplands along the Missouri River were public trust lands if the state could establish that they were accreted lands.[21] After noting that fishing and navigation were public rights, the court stated that such rights "require means of

[21] Accreted lands are lands gradually added to adjacent uplands from the bed of a watercourse. *See* Joseph W. Dellapenna, *Introduction to Riparian Rights*, 1 Waters and Water Rights § 6.03(b)(2) (Amy L. Kelley, ed, 3rd ed 2014).

public access to the river. This means that state-owned land adjacent to the river, as well as the land actually covered by the river, must be part of the public trust." *Id.* at 363.

Pennsylvania courts have consistently upheld public trust restrictions on parklands in that state. For example, the Pennsylvania Supreme Court upheld an injunction against the sale of a public square to a development on public trust grounds in *Hoffman v. City of Pittsburgh*, 75 A2d 649 (Pa 1950). And a lower court enjoined an attempted transfer of parklands for construction of an elementary school in *In re Conveyance of 1.2 Acres of Bangor Mem'l Park to Bangor Area School Dist*., 567 A2d 750 (Pa Commw Ct 1989).

New York courts have a long history of applying the public trust doctrine to parklands. *See, e.g.*, *Brooklyn Park Comm'rs v. Armstrong*, 45 NY 234, 243 (1871) (disallowing a sale of parkland due to the city's trust obligations); *Williams v. Gallatin*, 128 NE 121 (NY 1920) (invalidating a ten-year lease of part of Central Park for a museum for impermissibly diverting park resources without the state legislature's approval); *Ackerman v. Steisel*, 480 NYS2d 556 (NY App Div 1984) (ordering removal of city sanitation equipment from a park); and *Ellington Construction v. Zoning Bd. of Appeals*, 549 NYS2d 405 (NY App Div 1989) (prohibiting the re-conveyance of parkland for redevelopment).

Illinois and Wisconsin courts do allow some conveyances of public trust parklands, but only where the conveyance meets a five-part test designed to protect public rights in the parkland.[22] Thus, for example, the Illinois Supreme Court allowed the conveyance of two percent of Washington Park for a middle school and recreational facilities leased to the Chicago Park District. *Paepcke v. Public Building Comm'n of Chicago*, 263 NE2d 11, 19 (Ill 1970). And the same court allowed the renovation of Soldier Field in Burnham Park for benefit of the Chicago Bears because the project improved public access to both public facilities and the lakefront. *Friends of Parks v. Chicago Park Dist*., 786 NE2d 161, 170 (Ill 2003).

California courts have also applied the public trust doctrine to uplands. The California Court of Appeal has explained that "a public trust is created when property is held by a public entity for the benefit of the general public." *County of Solano v. Handlery*, 66 Cal Rptr 3d 201, 209 (2007). Employing this definition of the scope of the public trust doctrine, California courts have upheld a state agency's rejection of a right-of-way permit to cross a public park to access private land. *Big*

[22] The factors of this test are: 1) public bodies would continue to control the conveyed land; 2) the area would be devoted to the public and open to public use; 3) the diminution of park use would be small compared to the entire park; 4) park uses would not be destroyed or greatly impaired; and 5) the disappointment of those wanting to use the area for park uses would be negligible compared to new public educational and recreational uses. *Paepcke v. Public Building Comm'n of Chicago*, 263 NE2d 11, 19 (Ill 1970), adopting the test from *City of Madison v. Wisconsin*, 83 NW2d 674 (Wis 1957); and *Wisconsin v. Public Service Comm'n*, 81 NW2d 71 (Wis 1957).

Sur Properties v. Mott, 62 Cal App 3d 99, 103 (1976), and invoked the public trust doctrine to forbid the conversion of a public library to improve public access to nearby commercial areas. *Save the Welwood Murray Mem'l Library Comm. v. City Council*, 215 Cal App 3d 1003 (1989).

In a recent decision involving facts quite similar to those in this case, the Montana Supreme Court decided that the public had a right to use private uplands to access a waterway whose bed was privately owned. The private uplands were located between a public highway and the Ruby River, a river with privately owned beds. The court stated that "[t]he public has a broad use right to surface waters and private landowners may not place obstacles that impede the public's exercise of its right." *Public Lands Access Ass'n v. Bd. of County Comm'rs of Madison County*, 321 P3d 38, 52 (Mont 2014). In rejecting the landowner's claim for constitutional compensation for a taking of his property right to exclude, the court ruled that the landowner "never owned a property right that allowed him to exclude the public from using its water resource." *Id.* at 53. The public's right was not a compensable property right, but instead was "recognition of the physical reality that in order for the public to recreationally use its water resource, some 'minimal' contact with the banks and beds of rivers is generally necessary." *Id.* at 52. The only significant difference between the Ruby River case and public access to Oswego Lake is that ownership of the bed of Oswego Lake is currently disputed and may ultimately rest

in the State, and no party claims the public needs an access right to cross private lands to reach the public waters of Oswego Lake. Access across publicly-owned municipal lands will suffice.

Thus, as this case law reveals, the public trust doctrine is applicable to public uplands; the lower court's assumption that it does not is erroneous. To the extent that the State of Oregon has encouraged an interpretation of the scope of the public trust doctrine that does not include uplands, the state is urging a result inconsistent with the above-cited case law from other states as well as Oregon Supreme Court precedent going back to *Weise v. Smith* in 1869, the sovereign ownership of wildlife in the state, and public recreational use rights to Oregon beaches. The public trust doctrine clearly applies to publicly-owned municipal lands adjacent to a navigable waterway like Oswego Lake where necessary for the public to access that publicly-owned waterway. The idea that the public trust doctrine applies only to uplands when the public is already on waterways—an argument advanced by the City and apparently endorsed by the lower court—is fundamentally inconsistent with the public access purpose of the public trust doctrine, as codified in the Statehood Act.

IV. The Applicability of the Public Trust Doctrine to Municipalities

The lower court decided that since the public trust doctrine was a duty of the State's, the City had no duty to act consistently with the public's right to access navigable waters. Combined with the State's inaction, the effect is to deny public

rights through delegation. This view of the public trust doctrine has no support in other jurisdictions.

The New Jersey courts have repeatedly ruled that municipalities in that state have no authority to discriminate against non-residents by denying access to the ocean over municipally-owned beaches. *See, e.g., Borough of Neptune City,* 294 A2d at 47 (striking down discriminatory fees charged at a municipally-owned beach); *Van Ness v. Borough of Deal*, 393 A2d 571 (NJ 1978) (striking down a restriction limiting membership to a municipally-owned beach and casino to residents).

The Vermont Supreme Court recently applied the public trust doctrine to a municipality in *City of Montpelier v. Barnett*, 49 A3d 120 (Vt 2012) (city could not prohibit swimming, boating, and fishing on Berlin Pond, the source of the city's water). California courts have routinely applied the public trust to municipalities and counties. *See, e.g., Center For Biological Diversity v. FPL Group,* 166 Cal App 4th 1349 (2008) (applying the public trust doctrine to a county); *Save the Welwood Murray Mem'l Library Comm.*, 215 Cal App 3d at 1003 (discussed in the following section, applying the doctrine to a city). Similarly, Pennsylvania courts have applied the trust doctrine to both local school districts and cities. *In re Conveyance of 1.2 Acres of Bangor Mem'l Park to Bangor Area School Dist.*, 567 A2d 750 (Pa Commw Ct 1989); *Bernstein v. City of Pittsburgh*, 77 A2d 452 (Pa 1951). Illinois courts are

to the same effect. *See, e.g.*, *Friends of Parks*, 786 NE2d at 161. And the New York cases, cited in section III of this brief (p. 27), have regularly applied the public trust doctrine to municipalities.

There is, in short, no support in other jurisdictions for the proposition that municipalities are exempt from public trust obligations.

V. The Ability of Private Servitudes to Defeat Public Rights

If there were any real question about the applicability of the public trust doctrine to assure public access to the navigable Oswego Lake, the Oregon Supreme Court's decision in *Darling v. Christensen*, 166 Or 17, 109 P2d 585 (1941), resolves the issue in favor of public access. This is evident from the result of that case, and the relationship of the alleged restrictive covenants burdening the municipal lands bordering Oswego Lake to the unenforceable racially restrictive covenants that accompanied them.

A. Public Dedication of Private Lands

The public trust doctrine applies to private conveyances dedicated to public purposes like parklands. Illustrative cases include *Big Sur Properties*, 62 Cal App 3d at 99, where the California Court of Appeal upheld a denial of a right-of-way to cross parkland donated by a private owner on public trust grounds; *Save the Welwood Murray Mem'l Library Comm.,* 215 Cal App 3d at 1003, in which the court used the public trust doctrine to enjoin the City of Palm Springs from allowing a

developer from using a part of property dedicated for public library use to improve public access to nearby commercial areas; and *In re Conveyance of 1.2 Acres of Bangor Mem'l Park to Bangor Area School Dist.,* 567 A2d 750 (Pa Commw Ct 1989), where the court rejected an attempted transfer of dedicated parkland for an elementary school on public trust grounds. On the other hand, the Illinois Supreme Court allowed the renovation of Soldier Field on Chicago parklands on public trust grounds because the area would remain open to the public, which would benefit from an improved stadium. *Friends of Parks*, 786 NE2d at 161.

These cases indicate that the dedication of parkland by a private party implicates the public trust doctrine. The public parklands surrounding Oswego Lake are clearly dedicated parklands. The Oregon Supreme Court indicated long ago that it subscribes to the proposition that once dedicated to the public, public access cannot be denied.

In *Darling*, 166 Or. 17, the Oregon Supreme Court ruled that private land dedicated by a developer to a park and streets adjoining a navigable lake could not be restricted for use by seventy-five property owners instead of the general public. The Court determined that such an attempted reservation, however clear on its face, was "ineffective and void" as against the purposes of the dedication because it would

deprive the public of its littoral rights[23] of access to Siltcoos Lake. *Id.* at 32. A New Jersey court recently agreed with the Oregon Supreme Court's approach, *Chiesa v. D. Lobi Enterprises*, 2012 WL 4464382 at *7 (refusing to enforce covenants forbidding public access as against public policy). The Restatement of Property approves, stating that a covenant is invalid at inception if it violates public policy. Restatement (Third) of Property § 3.1 (2000). We maintain that any claimed restrictions on the grants of parklands bordering Oswego Lake are similarly void for depriving the public of its littoral rights of access from municipally-owned land to a publicly-owned waterbody.

B. The Relationship to the Oswego Lake Racial Covenants

In *Shelley v. Kraemer*, 334 US 1 (1948), the U.S. Supreme Court ruled that racially restrictive covenants in private land titles that forbade non-white occupation of burdened houses were not judicially enforceable. Although the Court noted that as private land use agreements, these servitudes were not subject to the 14th Amendment's equal protection clause, which applies only to governmental action, a unanimous Court determined that judicial enforcement of such restrictions *was* governmental action, and thus triggered the equal protection clause. The racial covenants therefore were not enforceable in court.

[23] The *Darling* court explained that littoral rights are the rights of landowners abutting a lake, while riparian rights are rights of landowners abutting a river. 166 Or at 34–35.

At least some of the deed restrictions that the Lake Corp argues forbid public access to Oswego Lake were accompanied by the kind of racial covenants the Court refused to enforce in *Shelley.* Although the Oswego Lake racial restrictions expired by their terms some time ago, the public restrictions to access the lake have not. We contend, however, that like the racial covenants, the covenants forbidding public access to a public waterbody from municipally-owned land are similarly unenforceable. A court enforcing them would violate the Oregon Statehood Act's promise that public waters will not be monopolized, just as a court enforcing a racial covenant would violate equal protection of the law.

VI. The Role of Courts in Public Trust Cases

Perhaps the largest error of the lower court in this case was the assertion that "the State is not subject to being 'judged' in a court." *Kramer v. City of Lake Oswego*, No CV12100913, at *5 (Cir Ct Or, 5th Jud Dist Jan 8, 2014). This erroneous interpretation of the public trust doctrine relieves the State of any duties to protect public resources. The lower court thought that any duties to act must come from state statutes, *id.*, ignoring the Statehood Act's codification of the public trust doctrine,[24] and is flatly inconsistent with this Court's recent decision in *Chernaik v.*

[24] As discussed above on page 4, the Statehood Act is not an unenforceable bromide but instead a paramount source of state authority. The anti-monopolization promise to Oregon citizens implicit in section 2 of the Statehood Act is not merely a hortatory admonition but an obligatory trust duty.

Kitzhaber, 263 Or App ___, ___ P3d ___ (June 11, 2014), ruling that declaratory relief is not limited to statutory or constitutional provisions but includes other sources like the common law. *Id.* at ___ (slip op at 11). The lower court apparently equated the public trust doctrine with the discretion the state possesses in exercising its police powers, a fundamental error that ignores that the public trust doctrine imposes duties on the state as well as authorizing action. As the California Supreme Court has stated, "the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." *Nat'l Audubon Soc'y v. Superior Court*, 658 P2d 709, 724 (Cal 1983) (*Mono Lake* decision).

The trust thus imposes a duty on the state to exercise ongoing supervision over trust resources to ensure that trust values are continuously considered and trust values are not needlessly destroyed. *Id.* at 728. In the recent *Chernaik* decision, this Court stated that "it must be assumed that the state will act in accordance with a judicially issued declaration regarding the scope of any duties that the state may have under the public trust doctrine" and refused to dismiss claims that the state was violating its trust obligation on separation-of-powers or political-question grounds. *Chernaik*, 263 Or App at ___ (slip op at 17, 19). Similarly, the Pennsylvania

Supreme Court recently rejected claims that pollution statutes left no rule for the courts to play in protecting trust resources, stating: "Courts are equipped and obliged to weigh parties' competing evidence and arguments, and to issue reasoned decisions . . . ." *Robinson Township*, 83 A3d at 953.[25]

The state's affirmative obligation to protect the public's interest in trust resources has been widely adopted by other courts. For example, the Nevada Supreme Court cited the *Mono Lake* decision in concluding that the state had an ongoing duty to protect "the people's common heritage" in trust resources. *Lawrence v. Clark County*, 254 P3d 606, 611 (Nev 2011). The state's duty to protect trust resources has also been recognized in Washington, *Citizens for Responsible Wildlife Mgmt. v. State*, 103 P3d 203 (Wash Ct App 2004); Arizona, *Defenders of Wildlife v. Hull*, 18 P3d 722 (Ariz Ct App 2001); Michigan, *People v. Broedell*, 112 NW2d 517 (Mich 1961); New York, *People of Town of Smithtown v. Poveromo*, 336 NYS2d 764 (Dist Ct 1972); Wisconsin, *Wisconsin's Environmental Decade v. Dep't of Natural Resources*, 271 NW2d 69 (Wis 1978); Virginia, *Virginia Marine Resources Comm'n v. Chincoteague Inn*, 757 SE2d 1 (Va 2014); among other states.

[25] The Pennsylvania court made clear that the state's trust obligation did not merely extend to state-owned resources: "the concept of public natural resources includes not only state-owned lands, waterways, and mineral reserves, but also resources that implicate the public interest, such as ambient air, surface and ground water, wild flora, and fauna (including fish) that are outside the scope of purely private property." *Robinson Township*, 83 A3d at 955.

The State's position that it has the discretion to decline to exercise its trust obligations to ensure public access to a public waterbody over publicly owned lands because title to those lands is held by one of its municipalities is flatly inconsistent with its duty to exercise continuous jurisdiction over trust resources and to ensure that they are not needlessly destroyed.[26] The lower court's ratification of this position is completely out of step with public trust law in most jurisdictions.

VII. Conclusion

The public trust doctrine in Oregon is inherent in the state's sovereignty, imposing limits on the discretion of the state to allow the monopolization of public resources, as has happened in the case of Oswego Lake. Although the Statehood Act did not create the public trust doctrine,[27] it recognized and affirmed the doctrine,

[26] The State's position in this case is also inconsistent with its approval of the City's permit applications to remove and fill materials in the lake when constructing the lakefront parks, in which the City claimed that the parks were for public access to the Lake. Appellants' Opening Brief, at 8–9, and 8 n. 1. The City now disingenuously claims it meant only "visual access." Also inconsistent with its position in this case is the State's approval of an easement for construction of a buoyant sewer pipeline in the lake, in which the City accepted the State's condition that the easement area would remain open for public recreation. Tienson Dec., OJIN No. 44, at Ex. 6 at 3 ("3. The easement area shall remain open to the public for recreational and other non-proprietary uses unless restricted or closed to public entry by the State Land Board or GRANTOR.").

[27] As the Oregon Supreme Court has noted, the public's right to use privately owned beaches in the state existed "so long as there has been an institutionalized system of land tenure," if not before, given the fact that "European settlers were not the first people to use the dry-sand area as public land." *Hay*, 254 Or. 584, 596, 598.

promising that public waterways would remain "forever free." Oregon Statehood Act, ch 33, § 2, 11 Stat 383 (1859). The State's position that the doctrine applies only to state-owned lands is belied by a long line of case authority cited in this brief, including the Oregon Supreme Court decisions in *Guilliams* and *Luscher*, discussed above in section I. Nor does the State have the discretion to shirk its public trust duties, as it has done with respect to Oswego Lake.

If the lower court's interpretation of the public trust doctrine is allowed to stand, local governments will be able to monopolize waterways for their local residents (or subsets of local residents) by passing local ordinances barring public access from publicly-owned uplands. For example, local governments may be able to make rules about who can access beaches from public property, such as from local streets, parks, and other publicly-owned lands. As the population of Oregon continues to grow and demand increases for public use of waterways, there is a very real threat of local governments excluding outsiders in ways that the public trust doctrine in other states in the case law discussed in this brief has foreclosed.[28]

The State of Oregon has an affirmative duty to ensure that there exists reasonable public access over publicly-owned lands for the exercise of public trust uses, such as swimming, fishing, and non-motorized recreational watercraft. Its

[28] See cases discussed above in §§ III-VI.

failure to carry out this duty is a clear violation of the state's public trust doctrine as reflected in the Oregon Statehood Act.

DATED this 8th day of July, 2014.

Respectfully submitted,

/s Kenneth Kaufmann

_____

Kenneth Kaufmann, OSB No. 982672

Counsel for Applicants,
Amici Curiae Law Professors and
Willamette Riverkeeper

and deemed to be, for all purposes affecting the jurisdiction of the United States, or of any department of the government thereof, the true line of boundary between said Commonwealth of Massachusetts and the State of Rhode Island and Providence Plantations.

APPROVED, February 9, 1859.

CHAP. XXXIII.—*An Act for the Admission of Oregon into the Union.* Feb. 14, 1859.

Whereas the people of Oregon have framed, ratified, and adopted a constitution of State government which is republican in form, and in conformity with the Constitution of the United States, and have applied for admission into the Union on an equal footing with the other States: Therefore— Preamble.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Oregon be, and she is hereby, received into the Union on an equal footing with the other States in all respects whatever, with the following boundaries: In order that the boundaries of the State may be known and established, it is hereby ordained and declared that the State of Oregon shall be bounded as follows, to wit: Beginning one marine league at sea due west from the point where the forty-second parallel of north latitude intersects the same; thence northerly, at the same distance from the line of the coast, lying west and opposite the State, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship channel of the Columbia River; thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla-Walla, where the forty-sixth parallel of north latitude crosses said river; thence east, on said parallel, to the middle of the main channel of the Shoshones or Snake River; thence up the middle of the main channel of said river, to the mouth of the Owyhee River; thence due south, to the parallel of latitude forty-two degrees north; thence west, along said parallel, to the place of beginning, including jurisdiction in civil and criminal cases upon the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State. Oregon admitted. Boundaries.

SEC. 2. *And be it further enacted*, That 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 any 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. Concurrent jurisdiction on the Columbia and other rivers and waters forming a common boundary, &c. Navigable rivers, &c., to be common highways.

SEC. 3. *And be it further enacted*, That, until the next census and apportionment of representatives, the State of Oregon shall be entitled to one representative in the Congress of the United States. Entitled to one representative in Congress.

SEC. 4. *And be it further enacted*, That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. Second, That seventy-two sections of land shall be set apart and reserved for the use and support of a State university, to be selected by the governor of said State, subject to the approval of the Commissioner of the General Land-Office, and to be appropriated and applied in such Proposition to be submitted to popular vote. School lands. State university lands.

manner as the legislature of said State may prescribe for the purpose aforesaid, but for no other purpose. Third. That ten entire sections of land, to be selected by the governor of said State, in legal subdivisions,

Lands for public buildings.

shall be granted to said State for the purpose of completing the public buildings, or for the erection of others at the seat of government, under

Salt springs and contiguous lands.

the direction of the legislature thereof. Fourth. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use, the same to be selected by the governor thereof within one year after the admission of said State, and when so selected, to be used or disposed of on such terms, conditions, and regulations as the

Proviso.

legislature shall direct: *Provided*, That no salt spring or land, the right whereof is now vested in any individual or individuals, or which may be hereafter confirmed or adjudged to any individual or individuals, shall by this article be granted to said State. Fifth. That five per centum of the

Percentage on land sales.

net proceeds of sales of all public lands lying within said State which shall be sold by Congress after the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to said State, for the purpose of making public roads and internal improvements,

Proviso. Conditions on which propositions are offered.

as the legislature shall direct: *Provided*, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that in no case shall non-resident proprietors be

United States property to be free from taxation.

taxed higher than residents. Sixth. And that the said State shall never tax the lands or the property of the United States in said State: *Provided, however*, That in case any of the lands herein granted to the State

Proviso.

of Oregon have heretofore been confirmed to the Territory of Oregon for the purposes specified in this act, the amount so confirmed shall be deducted from the quantity specified in this act.

Residue to belong to the Territory of Washington.

SEC. 5. *And be it further enacted*, That, until Congress shall otherwise direct, the residue of the Territory of Oregon shall be, and is hereby, incorporated into, and made a part of the Territory of Washington.

APPROVED, February 14, 1859.

Feb. 18, 1859.

CHAP. XXXV.—*An Act for the Relief of the Mobile and Ohio Railroad Company.*

Preamble.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whereas the State of Mississippi, by its act approved on the twenty-eighth of January, eighteen hundred and fifty-two, and the State of Alabama, by its act approved on the first of December, eighteen hundred and fifty-one, did transfer to the Mobile and Ohio Railroad Company the lands which were granted to said

1850, ch. 61, § 7. vol. ix. p. 467.

States under the provisions of the act of Congress approved the twentieth September, eighteen hundred and fifty, to aid in the construction of a rail-

Transfers by the States of Alabama and Mississippi confirmed.

road from Mobile to the mouth of the Ohio River, the said transfers of said lands so made by said States, respectively, to said company, are hereby recognized, ratified, and confirmed, and the title to all bona fide purchasers of said company are also hereby confirmed; and that the time

Time for completing the road extended to Sept. 20, 1865.

limited by said original act of Congress for the completion of said railroad is hereby extended, and the said company is allowed further time till the twentieth of September, in the year eighteen hundred and sixty-five, to complete the same, anything in said act to the contrary notwithstanding:

Proviso.

Provided, nevertheless, That the said Mobile and Ohio Railroad Company be subjected to, and shall comply with all the conditions, restrictions, and limitations contained in the act of Congress above referred to, approved

Proviso.

the twentieth September, eighteen hundred and fifty; *And provided*, That

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 9,971 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).

DATED this 8th day of July, 2014.

Respectfully submitted,

/s Kenneth Kaufmann

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 8, 2014, I filed BRIEF OF *AMICI CURIAE* LAW PROFESSORS AND WILLAMETTE RIVERKEEPER IN SUPPORT OF PLAINTIFFS-APPELLANTS with the Appellate Court Administrator via the eFiling system, which will serve this motion by eFile on:

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