

Dear Madams and Sirs who serve the public interests,

Attached is the document, Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches. Specifically, please refer to section B, provided for your convenience, and its explanation of the public's right to recreate on rivers.

## B. Public Recreational Rights

In 1918, Oregon became one of the first states to recognize recreation as commerce protected under the public navigation easement.<sup>93</sup> Most states now recognize recreation as a public use purpose of the PTD, which burdens all navigable-in-fact waters capable of floatation by small craft.<sup>94</sup> Although the Oregon Supreme Court has not addressed public use rights in navigable waters since the mid-1930s, the principle of broad public rights in all navigable waters regardless of bed ownership was well established long ago in Oregon law. First, in *Guilliams v. Beaver Lake Club*, the 1918 Oregon Supreme Court upheld a trial court ruling that a landowner could not build a flood control dam that would interfere with public use of a nearby lagoon for recreation during high water.<sup>95</sup> The court also affirmed an injunction preventing the landowner from maintaining a wire fence across the stream to prevent the public from fishing and recreating, even though the landowner owned the streambed.<sup>96</sup> Following the Minnesota Supreme Court decision of *Lamprey v. Metcalf*,<sup>97</sup> the *Guilliams* court recognized broad public rights to recreate in navigable-for-public-use waters, even those overlying private beds, not merely navigable-for-title waters acquired by the state upon admission to the Union.<sup>98</sup> <sup>92</sup> See *infra* Part III.B. <sup>93</sup> See *infra* notes 95–113 (discussing the *Guilliams* decision). The Minnesota Supreme Court first recognized public rights to use all waters for recreational purposes, regardless of bed ownership in 1893, in *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893) (“Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. . . . 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.”). <sup>94</sup> See, e.g., generally Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53, 72–75 (2010) (describing public use rights in recreational waters in North Dakota, Oklahoma, California, Oregon, and Alaska); Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classification of States, Property Rights, and State Summaries*, 16 *PENN. ST. ENVTL. L. REV.* 1, 14, 18 & n.99 (2007) (explaining that the PTD includes recreational purposes in Arkansas, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Ohio, New Jersey, North Carolina, and Vermont). <sup>95</sup> 175 P. 437, 443 (Or. 1918). Although the Oregon Supreme Court affirmed the trial court’s order enjoining the landowner from building a dam, the court modified the order to allow landowner to construct the dam if he could avoid interfering with public uses by constructing a channel. *Id.* The trial court

enjoined the landowner from constructing another dam because the first dam he constructed washed out during a storm. *Id.* The facts of the case involved riparians with rowboats, but it was unclear whether they were for private recreational use or for commercial use for tourists. *Id.* at 438. 96 *Id.* at 442–43. 97 53 N.W. 1139 (Minn. 1893); see *supra* note 93. 98 *Guilliams*, 175 P. at 442 (quoting *Lamprey*, 53 N.W. at 1143). TOJCI.BLUMM.DOC 4/3/2012 12:50 PM 2012] OREGON'S PUBLIC TRUST DOCTRINE 391 In *Guilliams*, the court did not consider whether the streambeds at issue were navigable-for-title because the parties “conceded . . . that such title is in the riparian proprietors.”<sup>99</sup> But the court explained that “[w]hatever may be the title to the bed of such streams or bodies of water . . . they do not own the water itself, but only the use of it as it flows past their property.”<sup>100</sup> Even though the riparian landowner owned the streambed, the court ruled that the stream was impressed with a public navigation easement, so the public had a right to recreate in rowboats, engage in commerce with scows,<sup>101</sup> and fish for trout during the summer months.<sup>102</sup> The *Guilliams* court reasoned that recreation was a form of commerce within the scope of the public navigation easement, explaining: Even confining the definition of navigability, as many courts do, to suitability for the purposes of trade and commerce, we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure. The vessel carrying a load of passengers to a picnic is in law just as much engaged in commerce as the one carrying grain or other merchandise.<sup>103</sup> Thus, the Oregon court was a pioneer in recognizing recreation as commerce guaranteed under the public navigation easement, now the rule in the many states that recognize the PTD protects public rights to navigate, fish, and recreate in all navigable waters, regardless of bed ownership.<sup>104</sup> Following the 1889 *Shaw* decision,<sup>105</sup> *Guilliams* upheld public rights to use waters over privately owned beds for recreational purposes, even though not suitable for large-scale commerce, so long as they were capable of floatation by small craft.<sup>106</sup> Relying again on *Lamprey*, the court explained 99 *Id.* at 441. 100 *Id.* 101 *Id.* at 438, 442 (mentioning use of the stream by scows). Scows are flat-bottomed boats with square ends used to haul freight. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 2038 (Philip Babcock Gove ed., 2002). 102 *Guilliams*, 175 P. at 438, 442 (discussing use of the stream for trout fishing during the summer). 103 *Id.* at 441. It was unclear from the court's decision whether the riparian landowners' rowboats mentioned in *Guilliams* were for private use or commercial tourism, although tourism was common near Oregon beaches at that time. See generally STRATON, *supra* note 30 (describing the history of public use of Oregon beaches); Or. Pub. Broad., Oregon Experience, Timeline: The Beach Bill, <http://www.opb.org/programs/oregonexperiencearchive/beachbill/timeline.php> (last visited Feb. 18, 2012) (providing a timeline of the Beach Bill). 104 *Guilliams*, 175 P. at 441; see *Dunning*, *supra* note 6, § 32.03, 32.03(a) (describing how many states first determined the scope of the PTD using a log floatation test, but since the mid-19th century, over 10 states have adopted the so-called “pleasure boat” test, including Arkansas, California, Idaho, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, Wisconsin, and Wyoming). Professor *Dunning* could add Oregon to this list based on *Guilliams*, *Luscher*, and the 2005 AG Opinion. See 2005 AG Opinion, *supra* note 9, at 1–3 (describing public rights to use waters over privately owned beds for recreational purposes under the public use doctrine); *supra* notes 36–37 and accompanying text (describing the AG's recognition of public rights to use waters over privately owned beds for recreational purposes in *Guilliams* and *Luscher*). 105 See *supra* notes 80–83 and

accompanying text (discussing Shaw). 106 Guilliams, 175 P. at 439–42. TOJCI.BLUMM.DOC 4/3/2012 12:50 PM 392 ENVIRONMENTAL LAW [Vol. 42:375 that if waters “are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule.”<sup>107</sup> The court emphasized that a riparian owner’s land title is “subject to the superior right of the public to use the water for the purposes of transportation and trade,”<sup>108</sup> stating that “courts should not lightly consign [public highways] to unrestricted private ownership.”<sup>109</sup> Consequently, by 1918, the Oregon Supreme Court recognized paramount public recreational rights in all waters floatable by small craft. The Guilliams court explained that the public navigation easement is broad, and that protected public uses of waterways may change over time.<sup>110</sup> The court again quoted the Minnesota Lamprey decision for the proposition that public navigation easement protects an expansive range of navigational and commercial uses, including “sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated.”<sup>111</sup> Landowners “do not own the water itself, but only the use of it as it flows past their property.”<sup>112</sup> As a consequence of public water ownership and public navigation rights, the court followed Lamprey, agreeing that landowners cannot interfere with public use of waters for protected purposes, including navigation, fishing, commerce, and recreation.<sup>113</sup>

Oregon is well known for its great beauty and it attracts many people here to recreate in the beautiful summer weather.

I own a home on the upper Willamette River, in the "zone". I have a nice dock, with pilings and a gangway just downriver from Champoeg Park. My boat does **not** have a wake enhancing device. I have many people come and enjoy the river from my dock and home. When they come we also visit wine country, we walk and bike in Champoeg Park, and we relax and enjoy the sunsets sitting in our boat or on our dock without any concern for safety of boats and people recreating just in front of our dock with the usual required distance of 100 feet.

Lastly, while I do not know if wakes affect my dock I do not believe it matters even if they did. It is my family's responsibility to maintain our dock. In fact, I have to have a permit to even put my dock in the water because it is a public waterway.

Based on the Preliminary SMS for bill 4099 prepared by Patrick Brennan, LPRO analyst, the "EFFECT OF AMENDMENT: -1 replaces the original measure and creates the Task Force on

Motorboat Water sport and Recreational Activities, consisting of 10 members and staffed by the Oregon State Marine Board. Directs Task Force to study conflicts between motorboat users, shoreline property owners and other river recreators. Sunsets Task Force on December 31, 2019. Takes effect on 91st day following adjournment sine die."

My husband provided a great deal of his time serving on the most recent Marine Board Advisory Panel in 2017 consisting of 10 members with the same inclusion of member types noted in the SMS above. The stated goal was to find common ground and find a compromise that all sides of the issue could support. The committee met over a four-month period and held four meetings, all facilitated by the Oregon Marine board, also noted above in the SMS. I submit to you and it should be public record that **9 of the 10** members supported a proposal that would remove the current ordinance and implement already present rules of stewardship of the river and add additional stewardship rules that would allow both sides have their needs met while allowing all motor boats to continue to recreate on our public waterway.

A letter following the final panel recommendation was submitted to the OSMB by Representative Kennemer and responded to by Rachel Graham, Interim Director of Oregon State Marine Board. This letter failed to recognize the fair and thoughtful process that the Marine Board Advisory Panel applied the process of representing the public. I believe Bill Kennemer did not seek a finding that served all of the constituent just those he believed held the same sentiments noted in his letter.

As explained above the panel sought to find a compromise to serve all. The purpose of the panel was not and should not have been unilaterally "to move forward with regulating wake boats on the Willamette River." I would like to point out that Bill Kennemer was not seeking to serve my interest as he claims. Of this, I am certain, based on the letter below. He states his "disappointment... comes as one who lives along the river. " I believe that this letter represents Bill Kennemer, himself, who is abusing his elected position in the Oregon House of Representative to impose his will on others who have a differing perspective as evidenced by his closing sentences, "And if you continue not to manage the Willamette River better, I and others will feel compelled to weigh in with Legislative and other actions that I believe are now within your authority and purview and are also your responsibility. I look forward to your feedback and response. "

His letter condescends, and for all intents, threatens, the people who worked diligently for months to serve their neighbors with the best intent. Below is the full content of the letter. I look forward to the completion of his term the completion of Bill Kennemer's elected term.

*Dear Members of the Oregon Marine Board and Interim Director Graham:*

*I am writing to express my profound disappointment with your failure in your October meeting to move forward with regulating wake boats on the Willamette River. My disappointment comes as (1) a state representative who represents my constituents and, indeed, the residents of our entire great state; (2) it comes as one whose district has many constituents who live and/or play on the Willamette; and (3) it comes as one who lives along the river and witnesses daily the damage and failure to assure responsible and safe usage of the fabulous resource of our Willamette River!*

*From my perspective, your failure to act continues to have a gigantic adverse impact on the river and its users of all varieties which include ultimately virtually all our citizens. I call on you to proceed with your charge to protect the resource and all of its many users. Something must be done to rein in the severe and inappropriate damage these wake boats are doing. Herewith some examples:*

- 1. Extensive erosion along the Willamette's banks*
- 2. Harm to wildlife habitat areas along the river*
- 3. Endangering other river users including fishers, boaters, swimmers, kayakers/paddle boarders, folks using docks that are unsafe because of the wakes, folks seeking a serene and safe place*
- 4. Scaring potential users from going into and enjoying the river*
- 5. Damaging, often very significantly, permitted docks, ramps, parks, and other facilities along the river and lowering the quality of life along the river for many, many folks*
- 6. Greatly increasing noise, congestion, and safety concerns*
- 7. Allowing one group of users to adversely impact and potentially endanger a large range of other users*
  
- 8. And while enforcement is essential, the focus should be principally on education and safety, making punitive approaches a last resort*

*An analogy comes to mind. Our state's Transportation Board regulates truck weights. Sure, manufacturers could build larger capability trucks and larger loads likely could reduce consumer costs. BUT such unregulated use would damage our transportation infrastructure. This is why the Marine Board needs to step forward and regulate wake boats. Remember, "The good of the many outweighs the good of the few".*

*And if you continue not to manage the Willamette River better, I and others will feel compelled to weigh in with Legislative and other actions that I believe are now within your authority and purview and are also your responsibility. I look forward to your feedback and response.*

*Sincerely,*

*Bill Kennemer, State Representative*

I am opposed to both bill 4099 and 4138. I believe the document attached pontificates on the establishment of the rivers, including the Willamette River, as a public trust not to be regulated based on the interest of land owners. The examples in the above letter echo complaints by some land owners in regard to their personal property damage. I am a land owner, again I return to the understanding that I am privileged to have a dock in the water, but this in no way gives me or anyone else the right to impose my will on other people recreating on the river. It is their river as much as mine.

I attended the Wilsonville City Council meeting held on 2/5/2018 at which Representative Vial also attended and spoke. He noted that correspondence directly to him and of the speakers at the meeting the citizens who opposed the bill outweighed the proponents of the bill by 2/3 or maybe 3/4 in number. The meeting was recorded and I strongly recommend you attain it for your review. I would have provided it for you had I been able to attain in time for this hearing of testimony. I am sure you will appreciate the large turnout with opponents to the bill who in essence had only a couple of days' notice at most.

Please take the time to consider the precedence of law preserving my right and my neighbors right to use the river to recreate.

Additionally, in regard to related bill 4138, I respectfully request you also **not** promote or pass any legislation that would prevent the voice of the greater public from being able to assist in informing your concern or activities regarding these bills or any other bills.

In thanks to you, who diligently and with integrity serve the public, I submit my testimony for your solemn consideration of mine and others right to use the beautiful Willamette River to recreate with motorboats and wake enhancing devices. Thank you for receiving our phone calls with true interest and concern.

*Blessings to you,*

*Julie Anne Harris*

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