

## OREGON'S PUBLIC TRUST DOCTRINE: PUBLIC RIGHTS IN WATERS, WILDLIFE, AND BEACHES

BY

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*Oregon's public trust doctrine has been misunderstood. The doctrine has not been judicially interpreted in over thirty years but was the subject of an Oregon Attorney General's opinion in 2005. That opinion interpreted the scope of the doctrine to be limited to the beds of tidelands and navigable-for-title waters, and erected a separate "public use" doctrine protecting public rights in other waters, including recreational waters. However, since Oregon courts have never limited public rights in the state's waters to those with publicly owned bedlands, the opinion should have recognized that the public trust doctrine provides broad public recreational rights in all waters. Indeed, since early statehood, Oregon courts and the legislature have recognized that water is publicly owned, and the Oregon Supreme Court has ruled consistently in favor of public rights in waterways, based on language in the Statehood Act that declared navigable waters to be public highways that would remain "forever free," not monopolized by private owners. Moreover, in the early twentieth century, the court explicitly ruled that the scope of public rights in publicly owned waters could and should evolve over time.*

*This Article maintains that Oregon's public trust doctrine is grounded on public ownership of natural resources held in trust by the state in sovereign ownership. The state has always claimed ownership of water and wildlife within the state, so the courts should recognize both as public trust resources. Although the state can authorize private rights in those resources, all private rights are subject to the state's sovereign ownership—a public easement—requiring the state to maintain these resources as trustee for the public. Like the Statehood*

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*Act's declaration of public ownership of waterways, courts should interpret the public trust doctrine to be implicit in other statutory declarations of public ownership of natural resources. Similarly, use rights in ocean beaches, claimed by the public under the doctrine of custom, are public trust resources, necessary to enable public use of the adjacent publicly owned tidelands. This Article suggests that public ancillary rights exist in other uplands where necessary to provide public access to, or preservation of, public trust water and wildlife resources.*

*Oregon's public trust doctrine is not of mere academic interest. The doctrine imposes duties on the state as sovereign owner of water, wildlife, and ancillary uplands. In an era of widespread skepticism of government management, the venerable public trust doctrine seems an especially appropriate mechanism to give citizens an opportunity to gain review of government action and inaction threatening unsustainable development of natural resources that are central to the state's identity, culture, and economy.*

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## I. INTRODUCTION

The public trust doctrine (PTD) in Oregon has a long and venerable history, dating to numerous nineteenth and early twentieth century court decisions that consistently recognized public rights in navigable waters.<sup>1</sup> Shortly after statehood in 1859, Oregon courts acknowledged paramount public rights of navigation, fishing, and commerce in navigable-in-fact waterways, regardless of bed ownership.<sup>2</sup> Since 1918, the Oregon Supreme

<sup>1</sup> See *infra* note 7; see also *infra* notes 59–61, 69–119, 126 and accompanying text.

<sup>2</sup> See, e.g., *Weise v. Smith*, 3 Or. 445, 450 (1869) (stating that navigable waterways are “public highways” that each person has “an undoubted right to use . . . for all legitimate purposes of trade and transportation”); *Hinman v. Warren*, 6 Or. 408, 411–12 (1877) (commenting that as “owner of the tide lands, [the state] had the power . . . to sell the same. It has, however, no authority to dispose of its tide-lands in such a manner as may interfere with the free and untrammelled navigation of its rivers, bays, inlets, and the like”); *Wilson v. Welch*, 7

Court has recognized public rights to use all navigable-in-fact waters for recreational purposes, within the scope of commerce protected by the public navigation easement.<sup>3</sup> Oregon courts have consistently acknowledged broad public rights in state-owned natural resources, explaining that, like other common law doctrines, the PTD evolves as public uses change over time.<sup>4</sup>

Although the early Oregon Supreme Court did not employ the phrase “public trust doctrine”—the term was not widely used before Professor Joseph Sax published his influential article in 1970<sup>5</sup>—many other states have recognized that public recreational uses are protected navigation rights under the PTD over the last forty years.<sup>6</sup> But there is little modern case law on the Oregon PTD,<sup>7</sup> giving rise to substantial questions about the extent of

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P. 341, 344 (Or. 1885) (observing that the state owns the “navigable river[s] within its boundaries, and the shore of its bays, harbors, and inlets between high and low water, but its ownership is a trust for the public. . . . It cannot sell [the lands] so as to deprive the public of their enjoyment”); *Parker v. W. Coast Packing Co.*, 21 P. 822, 824 (Or. 1889) (recognizing that a riparian landowner “may apply such [water] frontage to any use not inconsistent with the rights of the public”); *Bowlby v. Shively*, 30 P. 154, 156 (Or. 1892) (holding that title to tidelands acquired from the state continues to be burdened by the *jus publicum* and “subject only to the paramount right of navigation”), *aff’d*, 152 U.S. 1, 52–54 (1894).

<sup>3</sup> See *Hume v. Rogue River Packing Co.*, 92 P. 1065, 1073 (Or. 1907) (explaining that the public has the right to fish in waters over privately owned beds); *Guilliams v. Beaver Lake Club*, 175 P. 437, 442 (Or. 1918) (holding that all waters in the state capable of navigation by small craft can be used for recreational purposes); *Luscher v. Reynolds*, 56 P.2d 1158, 1162 (Or. 1936) (explaining that the public had the right to use privately owned lakes 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 transportation for pleasure).

<sup>4</sup> *Guilliams*, 175 P. at 442 (ruling that protected public navigational uses of waters include “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” (quoting *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893))); see also *infra* Part III.A (discussing the evolution of public navigation, fishing, and recreational water uses protected by the Oregon PTD).

<sup>5</sup> See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–89 (1970) (tracing the PTD to English and Roman law and describing its development in early American cases, including *Shively*, 30 P. 154, and *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892)).

<sup>6</sup> See, e.g., *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170–71 (Mont. 1984) (recognizing public rights to use all waters for recreational purposes without regard to bed ownership under the state constitution and PTD); *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 123–24 (N.J. 2005) (holding that a private beach club must provide public access but could charge a reasonable management fee); Harrison C. Dunning, *Sources of the Public Right*, in 2 WATERS AND WATER RIGHTS § 30.04 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2011) (describing the public ownership of water concept in Idaho, Montana, New Mexico, South Dakota, and Wyoming).

<sup>7</sup> Since the late 1800s, Oregon courts have repeatedly announced broad public rights in all waters in the state, sometimes discussing the right to use adjacent uplands. See, e.g., *Weise*, 3 Or. at 450–51; *Hinman*, 6 Or. at 411–12; *Wilson*, 7 P. at 344; *Guilliams*, 175 P. at 442. Yet Oregon courts have not addressed the PTD since the 1979 decision of *Morse v. Or. Div. of State Lands*, 590 P.2d 709, 713–14 (Or. 1979) (en banc) (explaining that the Director of the Department of State Lands may authorize dredging or filling of trust lands if the administrative record contained a record finding that the “public need” for a project outweighed the damage to resources). See *infra* notes 167–70 and accompanying text. The Oregon Supreme Court applied

the doctrine and its effects on public and private rights in Oregon's natural resources.<sup>8</sup>

In 2005, after receiving a request from the state treasurer, the Attorney General (AG) issued an opinion on the scope of the Oregon PTD.<sup>9</sup> The lack of recent case law made it impossible for the AG to resolve definitively several questions about the relationship between public use rights and riparian landowner rights.<sup>10</sup> For example, the AG was unable to offer guidance as to whether the public may use the beds of all navigable-in-fact waters to the ordinary high water mark for recreational purposes ancillary to public navigation rights, or whether the public may cross private uplands when necessary to access navigable waters.<sup>11</sup> The AG did not limit public recreational rights to use state-owned submerged lands under navigable-for-title waters<sup>12</sup>—but he provided little clarification on the scope of public rights to use beds that may be privately owned when navigating, fishing, and recreating on waterways in the state.<sup>13</sup>

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the related doctrine of customary rights to Oregon ocean beaches in *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673, 677–78 & n.6 (Or. 1969), a principle that was affirmed in *Stevens v. City of Cannon Beach*, 854 P.2d 449, 454–57, 460 (Or. 1993) (en banc) (rejecting assertions that the State's denial of a permit to construct a seawall was an unconstitutional taking), *cert. denied*, 510 U.S. 1207 (1994), and *McDonald v. Halvorson*, 780 P.2d 714, 724 (Or. 1989) (en banc) (declining to extend public use rights to a large upland tidepool because the area was physically separated from the shoreline and was not customarily used by the public), a case that was misinterpreted by Justice Scalia. See *infra* note 241 and accompanying text.

<sup>8</sup> Janet C. Neuman, *Oregon*, in 4 WATERS AND WATER RIGHTS, § II (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2011) (discussing the controversy over Oregon's declaration of navigable-for-title waters that led to the attorney general's opinion on public use rights in Oregon waters in 2005).

<sup>9</sup> State Land Board, 8281 Op. Or. Att'y Gen. 24 (2005) (recognizing public rights to recreate in navigable-for-title waters under the PTD as well as public rights to recreate in waters capable of recreational use under the "public use" doctrine), available at [http://www.oregon.gov/DSL/NAV/docs/ag\\_op-8281\\_navigability.pdf?ga=t](http://www.oregon.gov/DSL/NAV/docs/ag_op-8281_navigability.pdf?ga=t) [hereinafter 2005 AG Opinion]. See generally Matthew Preusch, *Decision Opens John Day River*, OREGONIAN, June 15, 2005, at B1, B4 (describing the political controversy surrounding public rights to use Oregon waterways in 2005).

<sup>10</sup> 2005 AG Opinion, *supra* note 9, at 24 (explaining that the "owner may not prevent the public from floating down a waterway," but not elaborating on other landowner rights that are "not inconsistent with public use [and] remain with the riparian landowner") (citing *Shaw v. Oswego Iron Co.*, 10 Or. 371, 381–83 (1882)); see also Matthew Preusch, *Who Owns Oregon's Rivers?*, OREGONIAN, Mar. 9, 2008, at C4; Matthew Preusch, *Oregon Land Board Says State Owns 89-Mile Stretch of Rogue*, OREGONIAN, June 10, 2008, [http://www.oregonlive.com/environment/index.ssf/2008/06/oregon\\_land\\_board\\_says\\_state\\_o.html](http://www.oregonlive.com/environment/index.ssf/2008/06/oregon_land_board_says_state_o.html) (last visited Feb. 18, 2012); Matthew Preusch, *Oregon River Rights Still in Question as Montana Governor Signs Stream Access Bill*, OREGONIAN, Apr. 15, 2009, [http://www.oregonlive.com/environment/index.ssf/2009/04/oregon\\_river\\_rights\\_still\\_in\\_q.html](http://www.oregonlive.com/environment/index.ssf/2009/04/oregon_river_rights_still_in_q.html) (last visited Feb. 18, 2012).

<sup>11</sup> 2005 AG Opinion, *supra* note 9, at 24–27.

<sup>12</sup> See *Pollard v. Hagen*, 44 U.S. (3 How.) 212, 224 (1845) (holding states received title to lands underlying navigable-for-title waterways when admitted to the Union under the equal footing doctrine).

<sup>13</sup> 2005 AG Opinion, *supra* note 9, at 16–24 (describing what the AG Opinion considered the "public use doctrine," a seemingly more limited class of public rights to use navigable-in-fact waters with privately owned beds). For waterways in which the beds have not been declared to be state-owned, the AG simply stated that an individual may "decide for himself" what his rights

The 2005 AG opinion assumed that the PTD applies only to navigable-for-title waters with state-owned beds.<sup>14</sup> The opinion also attempted to explain how a so-called “public use” doctrine, or floatage easement, applies to privately owned waters that are navigable-in-fact but not navigable-for-title, that is, those with privately owned beds.<sup>15</sup> This analysis was flawed because it failed to recognize that waters historically susceptible of floatation by small craft or even seasonal log floats satisfy the federal test of title navigability.<sup>16</sup> Further, by limiting public rights in waters over private beds, the opinion adopted an unnecessarily constrained view of the PTD because the Oregon Supreme Court has repeatedly recognized a public easement in all navigable-in-fact waters for navigation, fishing, commerce, and recreation, and has also articulated limited ancillary rights to use uplands.<sup>17</sup>

The 2005 AG opinion recognized that case law does not limit public use rights to navigable-for-title waters in Oregon.<sup>18</sup> Indeed, since 1869, the Oregon Supreme Court has consistently recognized broad public rights in all navigable-in-fact waters, regardless of ownership of the underlying land.<sup>19</sup> By restricting the PTD to navigable-for-title waters, the AG confused the scope of public rights because the courts have never limited public use rights to these waters, and the PTD protects public uses like recreational boating and floating in all lawfully accessed state waters.<sup>20</sup>

The courts and the State Land Board have not ascertained ownership of the beds of most state waters,<sup>21</sup> which has created substantial confusion

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to use the waterway are as a member of the public, “tak[ing] the risk that his use will be a trespass if he is mistaken.” *Id.* at 27–28.

<sup>14</sup> *See id.* at 1–2.

<sup>15</sup> *Id.* at 16–19, 23–24.

<sup>16</sup> *See Utah v. United States*, 403 U.S. 9, 10–11 (1971) (citing *Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

<sup>17</sup> *Compare infra* Part II (discussing the AG opinion), *with Weise*, 3 Or. 445, 450–51 (1869) (recognizing that regardless of bed ownership, “a stream . . . generally useful for floating boats, rafts, or logs, for any useful purpose of agriculture or trade, though it be private property, and not strictly navigable, is subject to the public use as a passage-way”); *Felger v. Robinson*, 3 Or. 455, 458 (1869) (reiterating that loggers had the right to raft logs on waters overlying privately owned beds because “any stream . . . is navigable on whose waters logs or timbers can be floated to market, and [] they are public highway for that purpose,” and explaining that “it is not necessary that they be navigable the whole year to constitute them such”); *Shaw v. Oswego Iron Co.*, 10 Or. 371, 382–83 (1882) (affirming the trial court’s order enjoining a landowner from diverting water to a mill in a manner that interfered with public use of the water for floating logs); *Guilliams v. Beaver Lake Club*, 175 P. 437, 442–43 (Or. 1918) (affirming the trial court’s ruling a landowner could not build a dam for flood control that would interfere with public use of a nearby lagoon and stream for fishing and recreation during high water).

<sup>18</sup> *Compare* 2005 AG Opinion, *supra* note 9, at 15 (“Where the state has acquired ownership of a waterway as an incident of statehood, its management and disposition of those rights is subject to the public trust doctrine . . .”), *with id.* at 15–24 (discussing many early cases recognizing public commercial and recreation use rights in Oregon waters without regard to bed ownership).

<sup>19</sup> *See supra* notes 7, 17 and accompanying text; *infra* Part III.

<sup>20</sup> *Weise*, 3 Or. at 451.

<sup>21</sup> The state has established ownership of just 12 river segments and fewer than 100 of the state’s thousands of lakes. Or. Dep’t of State Lands, *Waterway Authorizations, Waterway*

about bed ownership.<sup>22</sup> Therefore, by limiting ancillary public rights to use bedlands and adjacent uplands to waterways with state-owned beds, the 2005 opinion failed to appreciate the scope of public navigation rights recognized since the 1800s.<sup>23</sup> Neither early nor modern cases on public water use rights turned on bed ownership. And the PTD is not based exclusively on bed ownership, but instead is based largely on public navigation rights from the “common highways” language in the Statehood Act of 1859 (reflecting the language of the Northwest Ordinance of 1787<sup>24</sup>) as well as the states’ long recognition of public ownership of water.<sup>25</sup>

The wealth of early Oregon case law protecting broad public rights in navigable waters, including ancillary rights, also suggests that the PTD has become a background principle of state property law. The United States Supreme Court has explained that a state does not owe constitutional compensation under the Takings Clause of the Fifth Amendment when it regulates private property consistent with background principles of state property law.<sup>26</sup> Justice Scalia once questioned whether customary public rights to use Oregon’s ocean beaches are actually a background principle of

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*Navigability*, [http://www.oregon.gov/DSL/NAV/waterway\\_navigability\\_index.shtml](http://www.oregon.gov/DSL/NAV/waterway_navigability_index.shtml) (last visited Feb. 18, 2012) (providing links to lists of rivers, creeks, sloughs, and lakes that the state has determined are publicly owned).

<sup>22</sup> In 1995, the Oregon Legislature established a detailed administrative process under which the State Land Board may assert state ownership of submerged or submersible lands. OR. REV. STAT. §§ 274.402–274.412 (2007); see Or. Dep’t of State Lands, *supra* note 21.

<sup>23</sup> See *infra* Parts III, IV.A.

<sup>24</sup> Ordinance of 1787: The Northwest Territorial Government, 1 U.S.C. LV, LVII (2006) (part of the Organic Laws of the United States of America); see also *Brusco Towboat Co. v. State*, 589 P. 2d 712, 718 (Or. 1978) (en banc); *Port of Portland v. Reeder*, 280 P.2d 324, 334–35, 338 (Or. 1955) (en banc); *Winston Bros. Co. v. State Tax Comm’n*, 62 P.2d 7, 9 (Or. 1936); *Anderson v. Columbia Contract Co.*, 184 P. 240, 243 (Or. 1919); *Corvalis & E. R. Co. v. Benson*, 121 P. 418, 422 (Or. 1912) (“The state, however, cannot abdicate or grant away the other element of its title to tidelands—the jus publicum, or public authority over them. This is the dominion of government or sovereignty in the state, by which it prevents any use of lands bordering on the navigable waters within the state which will materially interfere with navigation and commerce thereon.”); *Johnson v. Jeldness*, 167 P. 798, 799 (Or. 1917) (“Section 2 of the act of Congress approved February 14, 1859, admitting the state of Oregon into the Union, ... [guarantees that on] ‘rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.’ This section is declarative and preservative of the jus publicum including the public right of navigation and fishery.” (quoting Act of Feb. 14, 1859 (Oregon Statehood Act), ch. 33, § 2, 11 Stat. 383)); *Hinman v. Warren*, 6 Or. 408, 412 (1877) (“The grantees of the state took the land subject to every easement growing out of the right of navigation inherent in the public.”); Office of the Attorney General, State of Oregon, Opinion No. 6861, 35 Or. Op. Atty. Gen. 844, 847–48 (Sept. 17, 1971); *Dunning*, *supra* note 6, § 30.04.

<sup>25</sup> See *In re Hood River*, 227 P. 1065, 1087 (Or. 1924) (announcing that “[n]o one has any property in the water itself, but a simple usufruct” and that Oregon law “plainly declares that all waters within the state from all sources of water supply belong to the public”); see also *Dunning*, *supra* note 6, § 30.04.

<sup>26</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (explaining that the state can regulate property consistent with background principles of nuisance and property law without owing constitutional compensation).

Oregon property law.<sup>27</sup> But since 1869, the Oregon Supreme Court recognized paramount public rights in all navigable-in-fact waters, even those with privately owned beds.<sup>28</sup> In 1912, the state supreme court explained that “[t]he right of the state so to regulate the use of tidelands as not materially to impede the public right of navigation is a constant factor in every title relating to such land, but regulation is not confiscation.”<sup>29</sup> The next year, in 1913, Governor Oswald West and the legislature again declared all Oregon tidelands “public highways” based upon their longstanding use for travel along the rugged coast.<sup>30</sup> The modern Oregon Supreme Court declared that customary rights to use Oregon beaches are background principles of state property law burdening private land titles.<sup>31</sup> Consequently, Oregon courts should recognize that public water use rights are also background principles and a defense against compensation claims because the Oregon Supreme Court has consistently upheld these public rights since early statehood.<sup>32</sup>

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<sup>27</sup> *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting) (arguing that “a State may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law”).

<sup>28</sup> See *supra* note 17 and accompanying text; *infra* Part III (discussing Oregon Supreme Court opinions recognizing public rights to navigate, fish, engage in commerce, and recreate on waters overlying privately owned beds).

<sup>29</sup> *Corvallis & E. R. Co.*, 121 P. at 426; *accord* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458–460 (1892) (upholding the state’s conveyance of a tract of tidelands and navigable waters to a railroad but explaining that the state could not abdicate the *jus publicum* or duty to protect public rights of navigation, fishing, and commerce).

<sup>30</sup> Act of Feb. 13, 1913, ch. 47, 1913 Or. Laws 80, 80 (“The shore of the Pacific Ocean, between ordinary high tide and extreme low tide, and from the Columbia River on the north to the Oregon and California State line on the south . . . is hereby declared a public highway and shall forever remain open as such to the public.”); see KATHRYN A. STRATON, OR. STATE PARKS & RECREATION BRANCH, OREGON’S BEACHES: A BIRTHRIGHT PRESERVED 10–11 (1977); Or. State Archives, *Oregon Blue Book: Notable Oregonians: Oswald West—Governor*, <http://bluebook.state.or.us/notable/notwest.htm> (last visited Feb. 18, 2012) (describing how, after recovering 900,000 acres of school trust lands fraudulently acquired by speculators, Governor West lobbied for legislation halting conveyances of tidelands); Or. Pub. Broad., *Oregon Experience: The Beach Bill*, <http://www.opb.org/programs/oregonexperience/archive/beachbill/> (last visited Feb. 18, 2012) (providing links to a documentary and timeline of Oregon’s landmark 1967 Beach Bill, ch. 601, 1967 Or. Laws 1448 codified at OR. REV. STAT § 390.605–390.770 (2011)).

<sup>31</sup> Oregon Statehood Act, ch. 33, § 2, 11 Stat. 383 (1859). The Act incorporated language from the Northwest Ordinance of 1787 declaring that “all the navigable waters . . . shall be common highways and forever free.” *Id.*

<sup>32</sup> See, e.g., *Stevens v. City of Cannon Beach*, 854 P.2d 449, 460 (Or. 1993) (“Because the administrative rules and ordinances here do not deny to dry sand area owners all economically viable use of their land and because ‘the proscribed use interests’ asserted by plaintiffs were not part of plaintiffs’ title to begin with, they withstand plaintiffs’ facial challenge to their validity under the takings clause of the Fifth Amendment.” (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992))); *Dodd v. Hood River Cnty.*, 855 P.2d 608, 614 n.12, 617 (Or. 1993) (en banc) (denying landowner claims of regulatory takings based on a county forest zoning ordinance, explaining that the zoning designation did not deprive landowners of all economically viable uses of their property because the ordinance allowed for “numerous forest and agricultural uses”).

This Article maintains that Oregon case law, statutes, and AG opinions support a comprehensive Oregon PTD that protects public rights to use water, wildlife, ocean beaches, and associated uplands. Part II explains how the 2005 AG opinion unnecessarily confined the PTD to navigable-for-title waters while identifying a new category of public use rights in waters with privately owned beds. Part III shows how since the early 1900s, the Oregon Supreme Court has upheld public rights to use all navigable-in-fact waters for recreational purposes, regardless of bed ownership. Part IV proceeds to describe how the courts, the legislature, and executive officials have consistently recognized broad public rights in Oregon's waters, wildlife, and beaches based on public navigation rights, sovereign ownership of water and wildlife, and custom. The Article concludes that Oregon's courts and the AG should unify these common law concepts under the state PTD to consistently recognize public rights in state-owned natural resources.<sup>33</sup>

## II. THE 2005 ATTORNEY GENERAL OPINION

In 2005, controversy surrounding the determination of state bed ownership along segments of the John Day River, combined with high-profile trespass suits involving fishermen's associations, prompted Oregon's Treasurer to request an AG opinion on the scope of public rights in Oregon's navigable waters.<sup>34</sup> In the ensuing opinion, Oregon AG Hardy Myers acknowledged public rights to recreate on both navigable-for-title waters with state-owned beds, and navigable-in-fact waters with privately owned beds.<sup>35</sup> The AG relied on the Oregon Supreme Court's recognition of public rights to use all navigable-in-fact waterways for recreational purposes regardless of bed ownership in the 1918 decision of *Guilliams v. Beaver Lake Club*<sup>36</sup> and the 1936 decision of *Luscher v. Reynolds*.<sup>37</sup> However, the opinion confined the PTD to navigable-for-title waters, creating confusion by announcing a new category of public rights, apparently separate from the PTD, on navigable-in-fact waters with privately owned beds: the so-called "public use" doctrine.<sup>38</sup>

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<sup>33</sup> See *infra* note 61 and accompanying text (discussing two 1959 AG opinions following 1918 and 1936 Oregon Supreme Court cases, and recognizing broad public rights to use all navigable-in-fact waters for commerce and recreation based on public ownership of water and wildlife); *infra* Part V.

<sup>34</sup> JANET C. NEUMAN, OREGON WATER LAW: A COMPREHENSIVE TREATISE ON THE LAW OF WATER AND WATER RIGHTS IN OREGON § 8.0, at 222–23, 233–35 (2011) (describing recreational navigability in Oregon and the genesis of the 2005 AG Opinion).

<sup>35</sup> 2005 AG Opinion, *supra* note 9, at 15–17, 24 (recognizing public rights to recreate in state waters under the PTD, and in all navigable waters under the "public use" doctrine).

<sup>36</sup> 175 P. 437, 442 (Or. 1918).

<sup>37</sup> 56 P.2d 1158, 1162 (Or. 1936); 2005 AG Opinion, *supra* note 9, at 24.

<sup>38</sup> See 2005 AG Opinion, *supra* note 9, at 24 ("*Guilliams* and *Luscher* are the Oregon Supreme Court's most recent opinions on the public use doctrine in Oregon. The public's common law right to use a waterway independent of state ownership is established by the line of cases culminating in these decisions.>").



The AG's public use doctrine was a consequence of a failure to appreciate the breadth of the PTD, defining "navigable-for-public-use" waterways as those "navigable-in-fact" waters "open to public use under Oregon law, even if the bed is privately-owned."<sup>39</sup> Although Oregon courts had never distinguished public rights based on state or private bed ownership,<sup>40</sup> the AG erected this wholly new "public use" doctrine protecting public rights to use waters for purposes like those protected under the PTD, including commerce, fishing, and recreation. The new doctrine applied to "navigable-for-public-use" waters with privately owned beds.<sup>41</sup> But the opinion failed to distinguish public rights protected under the public use doctrine from those protected by the PTD.<sup>42</sup> The 2005 opinion explained that the public can use navigable-for-public-use waters to hunt, fish, boat, bathe, and "do other things incidental to the public use of water,"<sup>43</sup> suggesting that, like under the PTD, protected public uses can evolve over time.<sup>44</sup> By identifying this new category of public rights protected under the so-called public use doctrine, the opinion created confusion about public rights to navigate, fish, hunt, and recreate on most of Oregon's lakes and small rivers, where bed ownership is often unclear.<sup>45</sup>

On navigable-for-title waters that are clearly subject to the PTD, the AG opinion advised that all activities "not otherwise unlawful" are permissible below the ordinary high water mark on waters, including any use of state-owned beds and banks for recreational purposes.<sup>46</sup> However, for waters overlying privately owned beds, the AG noted that some lawful activities below the ordinary high water mark may be trespasses outside the scope of the public use doctrine if the public "materially injure[s] or interfere[s]" with landowner rights.<sup>47</sup> Without giving any examples, the 2005 opinion advised that proscribed uses were those "unreasonably interfering" with landowner rights, supplying law enforcement little guidance as to the scope of permissible activities when members of the public may lawfully access

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<sup>39</sup> *Id.* at 2. This Article refers to navigable-in-fact waters as navigable-for-public-use waters.

<sup>40</sup> *See id.* (defining "[p]ublic rights to use" arising from either state ownership or the public use doctrine as "navigation, commerce, recreation or fisheries" in one common definition).

<sup>41</sup> *Id.* at 22, 24 (describing how the *Guilliams* court recognized that "public use for 'commerce' includes fishing and pleasure boating" (citing *Guilliams*, 175 P. at 441-42)).

<sup>42</sup> *Compare id.* at 15 (describing the state's requirement to protect public uses under the PTD), *with id.* at 22 (describing the uses protected under the public use doctrine).

<sup>43</sup> *Id.* at 23 (quoting ROBERT Y. THORNTON, 29 BIENNIAL REPORT AND OPINIONS OF THE ATTORNEY GENERAL OF THE STATE OF OREGON 296, 296-97 (1959)); *id.* at 23-24 (citing THORNTON, *supra*, at 311-12) (advising the Oregon Military Department that it could not lease department-owned lands to a private hunting club because the public has the right to hunt and fish on waters that were navigable-in-fact, regardless of ownership of the beds of the waterway).

<sup>44</sup> *See generally* Or. Dep't of State Lands, *supra* note 21 (explaining which waters have been declared navigable-for-title by the Department or the courts in linked pages).

<sup>45</sup> *See supra* notes 21-22, *infra* notes 54-58 and accompanying text.

<sup>46</sup> 2005 AG Opinion, *supra* note 9, at 2.

<sup>47</sup> *See id.* at 25 (quoting *Trullinger v. Howe*, 97 P. 548, 550 (Or. 1908), *modified*, 99 P. 880 (Or. 1909) and explaining that in 1908, the Oregon Supreme Court ruled that "a logger did not have the right to operate dams or reservoirs on a stream above a riparian landowner's property for the purpose of floating logs, if that operation 'materially injure[s] or interfere[s] with the riparian owner's use of the waters for power purposes'").

navigable waters.<sup>48</sup> Uncertain public rights on state waters pose problems because landowners may erroneously exclude members of the public from floatable waterways, and demand for recreational uses of waters is on the rise.<sup>49</sup>

Unlike the 2005 opinion, the Oregon Supreme Court has never articulated narrower public rights to use waters with privately owned beds for navigation or recreation, so the state should not have to determine bed ownership to determine the scope of public rights in waters.<sup>50</sup> Public ownership of water and the public highways language of the Oregon Statehood Act support the consistent protection of public navigation rights in all waters navigable-for-public-use.<sup>51</sup> As explained in Part III, these ideas were the basis of early state common law on the subject, which the Oregon Supreme Court has consistently followed when recognizing public rights to use waters for commerce, navigation, fishing, and recreation, regardless of bed ownership.<sup>52</sup> Consequently, the AG should revise the 2005 opinion to recognize that the PTD burdens all waters in Oregon and protects public rights to use water for trust purposes, subject, of course, to reasonable state regulation.<sup>53</sup>

When ownership of the bed of a waterway is unclear, and the extent of public rights below ordinary high water mark are therefore uncertain, the AG advised members of the public to “(1) file a Petition for Navigability Study that asks the Board to conduct a formal study and issue a final declaration; (2) file an action asking a court to determine whether the particular waterway is state-owned; or (3) decide [whether it is worth] . . .

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<sup>48</sup> *Id.* at 28.

<sup>49</sup> *See, e.g.,* *Nw. Steelheader’s Ass’n v. Simantel*, 112 P.3d 383, 385–86 (Or. Ct. App. 2005) (describing a landowner’s counterclaim for trespass when the public plaintiffs sought a declaration of navigability for recreational fishing on the John Day River); *see also* OregonBusinessPlan.org, *Tourism & Hospitality*, <http://www.oregonbusinessplan.org/Industry-Clusters/About-Oregons-Industry-Clusters/Tourism-Hospitality.aspx> (last visited Feb. 18, 2012) (noting that tourism will continue to play an important role in Oregon’s future and that the industry saw a 20% increase between 2003 and 2009).

<sup>50</sup> *See infra* Part III; *see, e.g., Weise*, 3 Or. 445, 450–51 (1869) (recognizing public rights to float logs on navigable waters, even those over privately owned beds); *Felger v. Robinson*, 3 Or. 455, 458 (1869) (upholding public rights to float logs in streams with privately owned beds that were only seasonally navigable); *Shaw*, 10 Or. 371, 371, 382–83 (1882) (affirming an injunction against a riparian sawmill owner for diverting water in a manner that interfered with log floats on the Tualatin River); *Johnson*, 167 P. 798, 799 (Or. 1917) (rejecting a littoral landowner’s attempt to exclude the public and establish an exclusive fishery because the Oregon Statehood Act, ch. 33, § 2, 11 Stat. 383 (1859), recognized a public fishery); *Guilliams*, 175 P. 437, 441–42 (Or. 1918) (affirming public recreational rights on navigable streams and lagoons with privately owned beds); *Luscher*, 56 P.2d 1158, 1162 (Or. 1936) (ruling that the bed of Blue Lake was privately owned in a breach of warranty decision, but explaining that the public had recreational rights on the lake under *Guilliams*).

<sup>51</sup> *See* Dunning, *supra* note 6, § 30.04 (describing public ownership of water as a source of the PTD in Montana, Idaho, New Mexico, South Dakota, and Wyoming, and noting similar statutory language in OR. REV. STAT. § 537.110 (2006)).

<sup>52</sup> *See infra* Part III (describing Oregon Supreme Court cases recognizing public rights to use all waters regardless of bed ownership).

<sup>53</sup> *See infra* notes 121–27 and accompanying text.

tak[ing] the risk that [the] use will be a trespass.”<sup>54</sup> This advice is neither practical nor in keeping with the spirit of the Oregon Supreme Court’s consistent and broad protection of public recreational rights in navigable-for-public-use waters, regardless of bed ownership.<sup>55</sup> First, although Oregon has established a process for declaring bed ownership, the procedure is cumbersome, time-consuming, and rarely invoked, meaning that ownership confusion is likely to persist for decades.<sup>56</sup> Second, case law and several earlier AG opinions reveal that the Oregon PTD burdens all state waters, presumes the validity of public uses, and requires landowners to bear the burden of establishing that a waterway is not useful for public boating, bathing, fishing, hunting, or other uses.<sup>57</sup> Consequently, the PTD should not, as the 2005 AG Opinion concluded, require the public to either bear the burden of proving bed ownership or risk trespass liability.<sup>58</sup>

As long ago as 1918, in *Guilliams v. Beaver Lake Club*, the Oregon Supreme Court recognized recreational use as a protected public use of navigable waters, even those with privately owned beds.<sup>59</sup> The court explicitly affirmed the *Guilliams* holding two decades later in 1936, in *Luscher v. Reynolds*.<sup>60</sup> Then, in a 1959 opinion, the AG recognized that irrespective of bed ownership, public rights to fish and hunt in all navigable-for-public-use waters are “free and common to all the citizens of the state” and that, absent statutory authority, the Oregon National Guard could not lease a portion of Slusher Lake to provide a private hunting club with exclusive waterfowl shooting privileges.<sup>61</sup>

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<sup>54</sup> 2005 AG Opinion, *supra* note 9, at 27–28.

<sup>55</sup> See *supra* text accompanying note 40; *infra* Part III.

<sup>56</sup> See *supra* notes 54–55 and accompanying text (describing Oregon’s processes for determining navigability and bed ownership); see also Matthew Preusch, *Oregon River Rights Still in Question as Montana Governor Signs Access Bill*, OREGONIAN, Apr. 15, 2009, [http://www.oregonlive.com/environment/index.ssf/2009/04/oregon\\_river\\_rights\\_still\\_in\\_q.html](http://www.oregonlive.com/environment/index.ssf/2009/04/oregon_river_rights_still_in_q.html) (last visited Feb. 18, 2012) (“Currently the state has a bulky, contentious, river-by-river system for determining whether a river is ‘navigable’ . . .”).

<sup>57</sup> See *infra* Part III.

<sup>58</sup> See *infra* text accompanying notes 110–20 (describing the Oregon Supreme Court’s broad view of the PTD concerning public navigational rights); see also *Mont. Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088, 1091 (Mont. 1984) (rejecting a “pleasure-boat” or “commercial use” test of the scope of the PTD as unduly restrictive because the Montana Constitution declares that “[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people” (quoting MONT. CONST. art. IX, § 3(3) (2011)); *Ark. River Rights Comm. v. Echubby Lake Hunting Club*, 126 S.W.3d 738, 743–44 (Ark. Ct. App. 2003) (ruling that inundated lands with privately owned beds were navigable for recreational use, explaining: “We disagree that the concept of navigability for the purpose of determining the public’s right to use water is that static. Although navigability to fix ownership of a river bed or riparian rights is determined as of the date of the state’s entry into the union, navigability for other purposes may arise later.”).

<sup>59</sup> *Guilliams*, 175 P. 437, 441–42 (Or. 1918) (explaining that “we fail to see why commerce should not be construed to include the use of boats and vessels for the purposes of pleasure”).

<sup>60</sup> *Luscher*, 56 P.2d 1158, 1162 (Or. 1936) (describing *Guilliams* as “well-considered”).

<sup>61</sup> THORNTON, *supra* note 43, at 311–12 (advising that the Oregon Military Department could not lease department-owned lands to a private hunting club because the public has the right to hunt and fish on waters that were navigable in fact, regardless of ownership of the beds of the waterway); see also THORNTON, *supra* note 43, at 296–97 (affirming that the Oregon State Marine

The 1959 opinion explained that state agencies cannot issue leases interfering with public use rights without authorization from the state legislature because doing so would “transform[] a public right into a monopoly.”<sup>62</sup> The AG recognized that the state could regulate hunting, fishing, and other recreational activities in its sovereign capacity but, like private landowners, the state could not exclude the public from using navigable waters for recreational purposes when acting in its proprietary capacity.<sup>63</sup> Consistent with the 1959 opinion and a wealth of Oregon case law discussed in the next Part, the AG should revise the 2005 opinion to recognize that the Oregon PTD protects all reasonable uses of navigable-for-public-use waters. In short, the PTD is not only associated with public land ownership, but also provides public usufructuary rights in all navigable waters.

### III. PUBLIC WATER USE RIGHTS UNDER THE OREGON PTD

Oregon courts should recognize that, as in other states,<sup>64</sup> the state’s traditional PTD protecting public rights to navigate, fish, hunt, and conduct commerce may evolve to protect new public uses, just as the Oregon PTD evolved in the early 1900s to protect recreation in waters floatable only by small craft.<sup>65</sup> The 1859 Oregon Statehood Act required the state to protect public navigation rights, including language from the Northwest Ordinance of 1787 that declared “all the navigable waters . . . shall be common highways and forever free.”<sup>66</sup> After statehood, the Oregon Supreme Court

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Board could promulgate boating regulations governing the use of Oswego Lake, even though the lakebed was privately owned).

Oswego Lake provides a useful case study of the potential effects of the PTD. The lake is nearly surrounded by private landowners, although there are adjacent public lands. *See, e.g.*, Oswego Lake Forum, *Q&A on Oswego Lake Accessibility with the Oregon Department of State Lands*, <http://lakeaccess.wordpress.com/about> (last visited Feb. 18, 2012) (colloquy between Todd Prager, Lake Oswego Planning Commissioner, and Jeff Kroft, Senior Policy Specialist, Oregon Department of State Lands). For years, however, the corporation managing the lake has assumed that there are no public rights to the lake. *See id.* Yet, the public’s ownership of the water in the lake means that the corporation has no right to exclude the public from recreational use of the lake. *Id.*

<sup>62</sup> THORNTON, *supra* note 43, at 312.

<sup>63</sup> *Id.* (“It is our view then that the public easement for the purposes of navigation and commerce includes the right to hunt and that the state cannot grant an exclusive right to hunt on Slusher Lake.”).

<sup>64</sup> *See* Dunning, *supra* note 6, § 31.01–.02 (describing traditional public rights of navigation, commerce, and fishing, as well as modern recognition of public recreational rights).

<sup>65</sup> 2005 AG Opinion, *supra* note 9, at 1 (“Federal and state law limit the discretion of the state to alienate its ownership [of the beds of navigable-for-title waters], to the extent that doing so would interfere with the public use of the waterway for navigation, commerce, recreation or fisheries.”); *see supra* note 61 and accompanying text (describing public rights to hunt in Oregon).

<sup>66</sup> Oregon Statehood Act, ch. 33, § 2, 11 Stat. 383 (1859); *see, e.g., Johnson*, 167 P. 798, 799 (Or. 1917) (rejecting a littoral landowner’s attempt to claim an exclusive fishery because the Oregon Statehood Act established a public right of fishery (citing Oregon Statehood Act, § 2, 11 Stat. 383)); *Anderson v. Columbia Contract Co.* 184 P. 240, 243 (Or. 1919) (“The Columbia river

repeatedly invoked this “public highways” language when recognizing public rights to navigate, fish, and conduct commerce in all navigable waters, even those with privately owned beds.<sup>67</sup> Later, in the early 1900s, the Oregon Supreme Court recognized public rights to recreate in all navigable-in-fact waters, regardless of bed ownership.<sup>68</sup> This Part describes how, building on the Statehood Act, several nineteenth century Oregon Supreme Court decisions laid the groundwork for a broad PTD recognizing public rights to conduct commerce, navigate, fish, and recreate in all Oregon waters capable of supporting these public uses.

### A. Public Rights of Navigation, Fishing, and Commerce

In back-to-back cases in 1869, the Oregon Supreme Court defined public rights to conduct commerce, fish, and navigate in navigable-in-fact waters. First, in *Weise v. Smith*,<sup>69</sup> the court affirmed a trial court ruling that loggers did not trespass by floating logs over privately owned beds of the Tualatin River to sawmills in Oregon City.<sup>70</sup> The court held that a “stream . . . generally useful for floating boats, rafts, or logs, for any useful purpose of agriculture and trade, though it be private property, and not strictly navigable, is subject to public use as a passageway.”<sup>71</sup> The *Weise* decision explained that the public had the right to use waters that were exposed privately owned beds below the high water mark and, when necessary, even associated uplands.<sup>72</sup> The court expressly recognized that the loggers had the

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is a navigable stream, and as such is a common highway ‘and forever free.’ This right is a public one, and it is not only given by the common law, but is preserved by the statute admitting the state of Oregon into the Union.” (citing *Jeldness*, 167 P. at 799).

<sup>67</sup> *Felger v. Robinson*, 3 Or. 455, 455, 458 (1869); *Shaw*, 10 Or. 371, 375 (1882) (“At the common law . . . navigable rivers . . . are denominated public highways, and the public have only an easement therein for the purposes of transportation and commercial intercourse.”).

<sup>68</sup> See *supra* notes 36–37; *infra* Part III.B and accompanying text (discussing the *Guilliams* and *Luscher* decisions).

<sup>69</sup> 3 Or. 445 (1869).

<sup>70</sup> *Id.* at 450–51.

<sup>71</sup> *Id.* at 450. The *Weise* court rejected the tidal test of navigability inherited from English common law in favor of the navigable-in-fact test after describing the navigable-in-fact test as the “settled law of the United States” adapted to its geographical conditions. *Id.* at 448–49. The early Oregon Supreme Court did not seem to recognize log floats as sufficient evidence of commerce to establish navigability for title purposes. See, e.g., *Shaw*, 10 Or. at 375–76 (explaining that streams “navigable in fact for boats, vessels, or lighters” are “public highways” where “the public have an easement for the purposes of navigation and commerce, but the title of the subjacent soil . . . is in the riparian owner, subject to the superior rights of the public to use it for the purposes of transportation and trade”). However, the modern Oregon Supreme Court has recognized that waters capable of supporting log floats are navigable-for-title, meaning that the state acquired ownership of the beds of these waters at statehood. See *Nw. Steelheaders Ass’n v. Simantel*, 112 P.3d 383, 385, 392 (Or. Ct. App. 2005) (affirming that segments of the John Day River were navigable-for-title based on evidence of log floats in early statehood).

<sup>72</sup> *Weise*, 3 Or. at 450–52 (explaining that “[n]o person has a right to permanently obstruct the channel of such stream by a boom across it, though he may do so temporarily, if necessary for the useful navigation of the stream,” and commenting that “[i]f there had been no

right to construct temporary booms on privately owned uplands adjacent to navigable-in-fact waters when necessary to facilitate navigation.<sup>73</sup> In this first case on public rights in navigable waters, the Oregon Supreme Court upheld public rights of navigation and commerce on all floatable waters, regardless of bed ownership.<sup>74</sup>

Second, in the companion case of *Felger v. Robinson*,<sup>75</sup> the court recognized the public's right to float logs to market on waters over privately owned beds that were navigable only during the spring freshet.<sup>76</sup> The supreme court affirmed a lower court decision in favor of the loggers, but emphasized that a jury should decide whether public use of waters was reasonable based on the facts because under state law, despite private bed ownership, the public has superior rights to navigate for purposes of transportation and trade, and "any stream . . . is navigable on whose waters logs or timbers can be floated to market, and that they are public highways for that purpose."<sup>77</sup> The court also stated that "it is not necessary that they be navigable the whole year for that purpose" to constitute navigable streams.<sup>78</sup> Thus, in its earliest rulings on public navigation rights in 1869, the Oregon Supreme Court ratified public rights to use all waterways, even those with privately owned beds that are intermittently suitable for public use.<sup>79</sup>

A little more than a decade later, in its 1882 decision of *Shaw v. Oswego Iron Co.*,<sup>80</sup> the Oregon Supreme Court continued to emphasize this broad protection of public use rights, explicitly affirming *Weise* and *Felger*.<sup>81</sup> In *Shaw*, the court upheld an injunction against an iron smelter for diverting water in a manner that interfered with log floats on the Tualatin River,<sup>82</sup> explaining that even when riparian landowners own to the middle of a stream, their rights are "subordinate to the public easement" and "subject to the superior rights of the public to use [the water] for the purposes of

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necessity for fastening the boom to the plaintiff's land . . . it would have been a trespass" (citations omitted)).

<sup>73</sup> *Id.* at 450–51 (determining that the jury should determine whether public navigational uses are unreasonable, including whether loggers failed to remove booms within a reasonable time).

<sup>74</sup> *Id.* at 450.

<sup>75</sup> 3 Or. 455 (1869).

<sup>76</sup> *Id.* at 457–58 ("We hold the law to be, that any stream in this state is navigable on whose waters logs or timbers can be floated to market, and that they are public highways for that purpose; and that it is not necessary that they be navigable the whole year for that purpose to constitute them such.").

<sup>77</sup> *Id.* at 458; *see also Shaw*, 10 Or. 371, 375–76 (1882) (describing superior public navigation rights on navigable-in-fact waters, even those with privately owned beds).

<sup>78</sup> *Felger*, 3 Or. at 458.

<sup>79</sup> *See Weise*, 3 Or. at 450; *Felger*, 3 Or. at 455, 458.

<sup>80</sup> 10 Or. 371, 382 (1882).

<sup>81</sup> *Id.* at 382 (noting that *Weise* and *Felger* were consistent with developments of the public navigation right in Maine, New York, and Wisconsin and citing *Treat v. Lord*, 42 Me. 552, 560–62, 564 (1855); *Morgan v. King*, 35 N.Y. 454, 459 (1866); *Diedrich v. Nw. Union Ry. Co.*, 42 Wis. 248, 266 (1877)).

<sup>82</sup> *Id.* at 374–75.

transportation and trade.”<sup>83</sup> The Oregon court was hardly unique in recognizing paramount public navigation rights based on this public highways language from the Northwest Ordinance.<sup>84</sup>

Throughout the nineteenth century, the Oregon Supreme Court recognized the broad public navigation rights in waters with state-owned beds, as well as those with private beds.<sup>85</sup> In addition, the court emphasized that when exercising navigation rights, members of the public cannot damage riparian land or privately owned beds.<sup>86</sup> Thus, in early statehood, the court laid the foundation of a broad PTD by establishing public rights to use all navigable waters for purposes of navigation and commerce, regardless of bed ownership, while also recognizing that the public cannot unreasonably interfere with landowner rights.<sup>87</sup>

Then, in its 1893 decision of *Shively v. Bowlby*,<sup>88</sup> the United States Supreme Court affirmed an Oregon Supreme Court decision that the PTD burdened both tidelands and navigable waters, explaining that the state owns these resources 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.”<sup>89</sup> The *Shively* Court ruled that, even if the state conveyed interests in tidelands to private landowners, the title remained “subject [] to the paramount right of navigation.”<sup>90</sup> The Court observed that 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.”<sup>91</sup> In the early twentieth century, the Oregon Supreme Court continued to recognize that the *jus publicum* burdens all navigable waters, even those with privately owned

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<sup>83</sup> *Id.* at 375–76, 382. The court did emphasize that the public does not have a right to damage riparian land. *See id.* at 375–76 (discussing the public right to use navigable streams for navigation and commerce, but title of the subjacent soil belongs to the riparian owner).

<sup>84</sup> *See* Dunning, *supra* note 6, § 30.06 (describing the Northwest Ordinance of 1787 as a basis of the PTD in states like Wisconsin, Missouri, and Mississippi, and noting similar language in the statehood acts of Massachusetts, New Hampshire, and Alaska). Arkansas has also recognized that the PTD is based on the “public highways” language derived from the Northwest Ordinance. *Id.* § 30.06(c).

<sup>85</sup> *Weise*, 3 Or. 445, 450 (1869) (recognizing public rights to float logs on navigable-in-fact waters with privately owned beds); *Felger*, 3 Or. 455, 458 (1869) (recognizing public rights to float logs in seasonally navigable streams with privately owned beds); *Shaw*, 10 Or. 371, 372, 383 (1882) (enjoining a riparian sawmill owner from diverting water in a way that interfered with log floats); *Johnson*, 167 P. 798, 799 (Or. 1917) (rejecting a littoral landowner’s attempt to exclude the public to establish an exclusive fishery).

<sup>86</sup> *Weise*, 3 Or. at 451 (“If he has a right to meddle with the bank, it is only an incidental one. Although the riparian owner has an absolute right to enjoy his land, . . . the [public] has an absolute right . . . to navigate the stream. Neither one can justly deprive the other of his rights.”).

<sup>87</sup> *Id.* at 450–51 (noting that “[i]f there had been no necessity for fastening the boom to the plaintiff’s land . . . it would have been a trespass”).

<sup>88</sup> 152 U.S. 1, 54–55, 58 (1893), *aff’d sub nom.* *Bowlby v. Shively*, 30 P. 154 (Or. 1892) (holding that title to tidelands purchased from the state continues to be subject to paramount public navigation rights).

<sup>89</sup> *Shively*, 152 U.S. at 16 (quoting passages of Lord Hale’s treatise).

<sup>90</sup> *Id.* at 52–54.

<sup>91</sup> *Id.* at 13–14, 16, 25 (citing Lord Hale, English common law decisions, and a Virginia attorney general opinion).

beds, and soon ruled that it protects recreation within the scope of public navigation rights.<sup>92</sup>

### *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>

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<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.

<sup>96</sup> *Id.* at 442–43.

<sup>97</sup> 53 N.W. 1139 (Minn. 1893); see *supra* note 93.

<sup>98</sup> *Guilliams*, 175 P. at 442 (quoting *Lamprey*, 53 N.W. at 1143).



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

<sup>99</sup> *Id.* at 441.

<sup>100</sup> *Id.*

<sup>101</sup> *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).

<sup>102</sup> *Guilliams*, 175 P. at 438, 442 (discussing use of the stream for trout fishing during the summer).

<sup>103</sup> *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).

<sup>104</sup> *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*).

<sup>105</sup> See *supra* notes 80–83 and accompanying text (discussing *Shaw*).

<sup>106</sup> *Guilliams*, 175 P. at 439–42.

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>

In its next decision on public recreational rights, the 1936 decision of *Luscher v. Reynolds*, the Oregon Supreme Court continued to emphasize the breadth of public rights in waters overlying privately owned beds.<sup>114</sup> The case centered on the extent of public rights to use Blue Lake, a small and popular lake near Portland with privately owned beds.<sup>115</sup> Affirming the lower court, the court held that a seller did not breach his title warranty by conveying the bed of Blue Lake because in fact he, and not the state, owned the lakebed.<sup>116</sup>

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<sup>107</sup> *Id.* at 442 (quoting *Lamprey*, 53 N.W. 1139, 1144 (Minn. 1893)).

<sup>108</sup> *Id.* at 439.

<sup>109</sup> *Id.* at 441. Interpreting language from the Statehood Act and Northwest Ordinance, the court explained that in navigable waters, “the public has an easement for the purposes of navigation and commerce, they being deemed public highways for such purposes.” *Id.* at 439–40.

<sup>110</sup> *Id.* at 442 (quoting *Lamprey*, 53 N.W. 1139, 1143–44 (Minn. 1893)).

<sup>111</sup> *Id.* (quoting *Lamprey*, 53 N.W. 1139, 1143 (Minn. 1893)).

<sup>112</sup> *Id.* at 441.

<sup>113</sup> *See id.* at 442 (quoting *Lamprey*, 53 N.W. 1139, 1143 (Minn. 1893)). The court explained that “where actual navigability of the water exists, courts should not lightly consign them to unrestricted private ownership. Whatever may be the title to the bed . . . [riparian landowners] do not own the water itself, but only the use of it as it flows past their property.” *Id.* at 441.

<sup>114</sup> 56 P.2d 1158, 1162 (Or. 1936) (recognizing public recreational rights in navigable-in-fact waters, not only navigable-for-title waters, because “[t]here 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 acceptance of such terms”).

<sup>115</sup> *Id.* at 1159, 1162 (determining that for Blue Lake, the “title to the bed is in the adjacent owners, subject however to the superior right of the public to use the water for the purposes of commerce and transportation”).

<sup>116</sup> The buyer alleged that the seller failed to disclose that the state held title to the portion of the bed of Blue Lake at issue, but the Oregon Supreme Court affirmed that the seller validly conveyed private title to the lakebed. *Id.* at 1161.

The court explained that even though the lakebed was privately owned, the lake was open for public recreational use because recreation is a form of commerce within the scope of the public navigation easement.<sup>117</sup> Describing *Guilliams* as “well-considered,” the *Luscher* court explained that “[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.<sup>118</sup> The court reiterated the breadth of public recreational rights in all navigable-in-fact waters:

“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.”<sup>119</sup>

Thus, in both *Guilliams* and *Luscher*, the Oregon Supreme Court recognized public rights to recreate in all navigable-in-fact waters in Oregon and anticipated that public uses of waterways would evolve over time.<sup>120</sup>

The term “public trust doctrine” was not widespread until Professor Sax published his seminal article in 1970.<sup>121</sup> Yet over thirty years before his article, the Oregon Supreme Court recognized public recreational rights in navigable-in-fact waters in its decisions of *Guilliams* and *Luscher*.<sup>122</sup> As the AG pointed out in his 2005 opinion, “[n]o cases decided since *Guilliams* and *Luscher* contradict or erode their holdings.”<sup>123</sup> In both decisions, the Oregon Supreme Court recognized public rights in navigable-for-public-use waters capable of recreation by small craft as public highways, invoking language from the Oregon Statehood Act that was adopted from the Northwest Ordinance of 1787.<sup>124</sup> The Statehood Act stipulates that “[a]ll the navigable waters . . . shall be common highways and forever free,”<sup>125</sup> and the Oregon Supreme Court recognized broad public rights on waters with private beds

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<sup>117</sup> *Id.* at 1162.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (quoting *Guilliams*, 175 P. at 442).

<sup>120</sup> For examples of other cases adopting the recreation-use test for navigability, see *State v. McIlroy*, 595 S.W.2d 659, 664–65 (Ark. 1980) (adopting a recreational use test of navigability under the PTD); *Kelley ex rel. MacMullan v. Hallden*, 214 N.W.2d 856, 862 & n.11, 863 (Mich. Ct. App. 1974); *J.J.N.P. Co. v. State*, 655 P.2d 1133, 1137 & n.4 (Utah 1982).

<sup>121</sup> See *supra* note 5 and accompanying text (discussing Professor Sax’s article).

<sup>122</sup> *Luscher*, 56 P.2d at 1162 (quoting *Guilliams*, 175 P. at 442).

<sup>123</sup> 2005 AG Opinion, *supra* note 9, at 24.

<sup>124</sup> See *Luscher*, 56 P.2d at 1162 (quoting *Guilliams*, 175 P. at 439) (describing navigable in fact waters as “public highways”).

<sup>125</sup> Oregon Statehood Act, ch. 33, § 2, 11 Stat. 383 (1859).

in *Weise, Felger, Shaw, Gulliams, and Luscher*.<sup>126</sup> These decisions demonstrate that the Oregon PTD is not restricted to publicly owned lands underlying navigable-for-title waters as the AG contended, but instead springs from the “common highways” provision of the Statehood Act, the public ownership of water, and the state’s common law duty to preserve the *jus publicum*, to protect public rights to use all navigable-for-public-use waters in the state.<sup>127</sup>

#### IV. PUBLIC RIGHTS IN WATER, WILDLIFE, BEACHES, AND UPLANDS UNDER THE OREGON PTD

As explained above, considerable Oregon Supreme Court precedent supports a broad PTD protecting public rights to use all navigable-in-fact waters for navigation, commerce, fishing, and recreation, regardless of bed ownership.<sup>128</sup> In recent years, courts in other western states have applied the PTD to the allocation of water rights.<sup>129</sup> In addition, states like Montana, New Jersey, and California have recognized that these public rights in natural resources impose certain duties on the state, such as providing public access, obtaining full market value for private use of public resources, and maintaining PTD resources for future generations.<sup>130</sup> Oregon courts should

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<sup>126</sup> See *supra* Part III.A; see also *Johnson*, 167 P. 798, 799 (Or. 1917) (rejecting a littoral landowner’s attempt to claim an exclusive fishery because the Oregon Statehood Act established a public right of fishery (citing Oregon Statehood Act, § 2, 11 Stat. 383 (1859))).

<sup>127</sup> The AG did not address the effect of the language in the Oregon Statehood Act but noted in his discussion of the PTD that the state’s duty to protect the public interest in waterways “may derive from the terms of the Oregon Admissions Act,” although he again assumed that this duty would apply only to state-owned waters. 2005 AG Opinion, *supra* note 9, at 15 & n.13.

<sup>128</sup> See *supra* notes 50, 67–83, 92–94, 103, 105–08, 110–20 and accompanying text (discussing judicial recognition of evolving public rights including navigation, fishing, commerce, and recreation in all navigable-in-fact waters in Oregon).

<sup>129</sup> Like the California Supreme Court in its *Mono Lake* decision, the Oregon Supreme Court should recognize that the both the PTD and state water code impose a duty on the state to “continuously supervise” water rights to protect public trust resources. Nat’l Audubon Soc’y v. Super. Ct. of Alpine Cnty. (*Mono Lake*), 658 P.2d 709, 721 (Cal. 1983) (en banc), cert. denied sub nom. L.A. Dep’t of Water & Power v. Nat’l Audubon Soc’y, 464 U.S. 977 (1983); see also *In re Water Use Permit Applications*, 9 P.3d 409, 448 (Haw. 2000) (recognizing that the PTD burdens water rights to protect public navigation, commerce, fishing, and recreation, including bathing, swimming, boating, and scenic viewing and incorporates the precautionary principle); *United Plainsmen Ass’n v. N.D. State Water Conservation Comm’n*, 247 N.W.2d 457, 462 (N.D. 1976) (stating that “the Public Trust Doctrine requires, at a minimum, a determination of the potential effect of the allocation of water on the present water supply and future water needs of this State” to ensure that water rights are allocated and regulated “without detriment to the public interest in the lands and waters remaining”). This principle also applies to wildlife. See *infra* notes 209–14 and accompanying text (discussing *Ctr. for Biological Diversity v. FPL Group*, 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008)).

<sup>130</sup> Montana recognizes that its citizens have a fundamental right to a healthful environment, and that the public can use all waters capable of recreational use for recreational purposes. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1092 (Mont. 2007) (recognizing “[t]he right to a clean and healthful environment constitutes a fundamental right” of all Montanans) (citing MONT. CONST. art. IX, § 3; *Mont. Envtl. Info. Ctr. v. Dep’t of Envtl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999)); *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170–71 (Mont.

similarly recognize that as sovereign owner of the state's water and wildlife, the state has a trust duty to protect public uses of navigable waters and wildlife by regulating water rights to maintain water flows, water quality, and habitat.<sup>131</sup> Further, Oregon courts should view the public's rights to use ocean beaches, which the Oregon Supreme Court upheld under the doctrine of custom, as part of the state's PTD.<sup>132</sup>

### A. Water Rights

Oregon courts have yet to consider whether the PTD burdens existing water rights,<sup>133</sup> but they should acknowledge that the PTD requires the state to manage water rights as public trustee based on the state's longstanding recognition of public ownership of water and the paramount public rights in navigable-for-public-use waters. For decades, both the legislature and state officials have recognized that public instream uses can impose limits on the amount of water available for appropriation, but this recognition has not slowed water consumption, and Oregon surface and groundwater levels remain insufficient to support fish habitat and recreation during summer months.<sup>134</sup> In 2009, the legislature took note that surface water in the state was almost completely appropriated in the summer and that groundwater supplies have declined precipitously in some parts of the state.<sup>135</sup> Because

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1984) (recognizing that under the codification of public ownership of water in Article 9, Section 3 of the 1972 Constitution, "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes"); *Galt v. State Dep't of Fish, Wildlife, and Parks*, 731 P.2d 912, 915 (Mont. 1987) (explaining that "the public's right to use the waters includes the right of use of the bed and banks up to the high water mark even though the fee title in the land resides with the adjoining landowners" (citing *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984); *Mont. Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088 (Mont. 1984)). In New Jersey, the PTD provides public access to privately owned beaches. *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 124 (N.J. 2005) (holding that a private beach club in an area with no public beaches "must be available for use by the general public under the public trust doctrine," though it could charge a reasonable management fee); *Mono Lake*, 658 P.2d at 721 (explaining that the PTD imposes a duty on the state of "continued supervision over the trust" to maintain water and wildlife resources).

<sup>131</sup> See *infra* Part IV.A–B (discussing sovereign water and wildlife ownership, as well as common law and statutory efforts to protect these resources).

<sup>132</sup> See *infra* Part IV.C (discussing public rights to use Oregon beaches as public highways).

<sup>133</sup> See *WaterWatch of Or., Inc. v. Water Res. Comm'n*, 112 P.3d 443, 446, 453 (Or. Ct. App. 2005) (declining to consider whether the Water Resources Commission violated its public trust duty by allowing groundwater withdrawals to deplete surface water flows, after concluding that the Commission violated a statutory directive to maintain stream flows in quantities that it had established as necessary for fish, wildlife, and recreation).

<sup>134</sup> See generally Robert David Pilz, Comment, *At the Confluence: Oregon's Instream Water Rights Law in Theory and Practice*, 36 ENVTL. L. 1383, 1395 (2006) (describing practical limitations on Oregon's instream water rights, including lack of enforcement resources, local opposition, administrative obstacles, and challenges to instream transfers).

<sup>135</sup> Act of Aug. 4, 2009, ch. 907, 2009 Or. Laws 3237, 3237 ("Whereas surface water is almost completely allocated across Oregon during summer months, ground water levels have declined precipitously in several areas and the hydrological connection between surface water and ground water levels is significant; and [w]hereas Oregon needs to develop an integrated

the prior appropriation system of water rights is based on the state's ownership of water,<sup>136</sup> Oregon courts should acknowledge that the PTD burdens all appropriated water rights, imposing an affirmative duty on the state to maintain streamflows and water quality.<sup>137</sup>

Other western states like Idaho, New Mexico, South Dakota, and Wyoming have acknowledged that the PTD is based on both public ownership of water and public navigation rights guaranteed under the Northwest Ordinance of 1787,<sup>138</sup> not sovereign ownership of beds or banks, as the 2005 AG opinion assumed.<sup>139</sup> Since 1909, Oregon's water code has declared: "All water within the State from all sources of water supply belong to the public."<sup>140</sup> Three-and-a-half decades later, in 1955, the legislature

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statewide water management plan . . ."). By mid-century, some Oregon waters had appropriated rights of more than double their flow. Janet Neuman et al., *Sometimes A Great Notion: Oregon's Instream Flow Experiments*, 36 ENVTL. L. 1125, 1133 (2006). In 1954, Governor Patterson denounced the "promiscuous, unlimited filing of water rights" that was destroying water resources. *Id.* at 1137 & n.65, 1145 & n.118. Although the legislature overhauled the state water code in response in 1955, its instream flow provisions did little to remedy depleted streamflows and water quality. *Id.* at 1148 (concluding that "[t]he 1955 Water Code overhaul, though revolutionary for its time, did not fulfill its promise to Oregon's rivers"). In 1987, the legislature amended the water code again to authorize instream water rights, allowing private parties and specified government agencies to purchase water rights with senior priority dates. OR. REV. STAT. § 537.336 (1987). *See generally* Janet C. Neuman, *The Good, the Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 NEB. L. REV. 432 (2004) (concluding that "water markets are indeed useful tools that can allow water to move to legitimate demands voluntarily").

<sup>136</sup> The 1909 Oregon Water Code declared that "[a]ll water within the State from all sources of water supply belong to the public." Act of Feb. 24, 1909, ch. 221, 1909 Or. Laws 370, 370 (codified as amended at OR. REV. STAT. §§ 536–558 (2011)).

<sup>137</sup> *See, e.g.*, *United Plainsmen Ass'n v. N.D. State Water Conservation Comm'n*, 247 N.W.2d 457, 462 (N.D. 1976) (interpreting the public interest language of the state water code to adopt the PTD and explaining that "the Public Trust Doctrine requires, at a minimum, a determination of the potential effect of the allocation of water on the present water supply and future water needs of this State" to ensure that water rights are allocated and regulated "without detriment to the public interest in the lands and waters remaining"); *Mono Lake*, 658 P.2d 709, 732 (Cal. 1983) (en banc) (ruling that "public trust doctrine and the appropriative water rights system are parts of an integrated system of water law"), *cert. denied sub nom. L.A. Dep't of Water & Power v. Nat'l Audubon Soc'y*, 464 U.S. 977 (1983); *In re Water Use Permit Applications*, 9 P.3d 409, 448 (Haw. 2000) (explaining that the PTD burdens water rights to protect public uses for navigation, commerce, fishing, and recreation).

<sup>138</sup> *See* Dunning, *supra* note 6, § 30.04 (describing the evolution of the public ownership of water in Idaho, Montana, New Mexico, South Dakota, and Wyoming).

<sup>139</sup> 2005 AG Opinion, *supra* note 9, at 15 (connecting the PTD to state submerged land ownership).

<sup>140</sup> Act of Feb. 24, 1909, ch. 221, § 1, 1909 Or. Laws 319, 370. A 1932 initiative amending the state constitution allowed for hydroelectric development, while recognizing that the public's ownership of water and lands under water power sites in perpetuity. *See* OR. CONST. art. XI-D, § 1 ("The rights, title and interest in and to all water for the development of water power and to water power sites, which the state of Oregon now owns or may hereafter acquire, shall be held by it in perpetuity."). In 2010, the Montana Supreme Court relied on a similar statutory provision from the same era to uphold the state's ability to charge rent for the use of beds underlying dams on all navigable-in-fact waters to compensate for damages to trust resources, explaining that the state had a duty to seek this compensation that was not extinguished by the state's failure to meet its duty for over a century. *PPL Mont., L.L.C. v. State*, 229 P.3d 421, 430, 461

reiterated in the state groundwater code the same public ownership language from the water code.<sup>141</sup> The legislature recognized public ownership of water as recently as 2009.<sup>142</sup>

Public ownership of water provides additional support for the Oregon Supreme Court's consistent recognition of broad public commercial and recreational rights in the state's navigable-in-fact waters.<sup>143</sup> Indeed, in the 1918 *Guilliams* decision, the Oregon Supreme Court suggested that public rights are a consequence of both public water ownership and the public navigation easement.<sup>144</sup> The court observed that the public had the right to float logs on streams with private beds because landowners "do not own the water itself, but only the use of it as it flows past their property."<sup>145</sup> Public ownership of water is therefore a basis of the state's PTD, meaning that, as trustee, the state has a duty to manage water resources for the benefit of present and future generations, including an obligation to remedy overappropriation of waterways.<sup>146</sup>

Both the courts and the legislature have recognized that the PTD's preferences for public water uses places limitations on water

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(Mont. 2010). On February 22, 2012, the United States Supreme Court reversed on the ground that the state court improperly failed to apply the Court's "segment-by-segment" approach to determining which riverbeds were navigable at statehood under the equal footing doctrine, which Justice Kennedy's opinion described as having federal constitutional significance. *PPL Mont., LLC v. State*, No. 10-218, 2012 WL 555205, at \*12, \*14-19, (U.S. Feb. 22, 2012) (also ruling that the state court erred in deciding that the necessity of making portages around river obstructions was insufficient to defeat navigability). The Court distinguished the federal equal footing doctrine from a state's public trust doctrine, "the contours of [which] do not depend on the Constitution" and which the states "retain residual power to determine the scope of the public trust." *Id.* at \*18.

<sup>141</sup> OR. REV. STAT. § 537.525 (2011) ("The Legislative Assembly recognizes, declares and finds that the right to reasonable control of all water within this state from all sources of water supply belongs to the public, and that in order to insure the preservation of the public welfare, safety and health . . .").

<sup>142</sup> Act of July 1, 2009, ch. 907, 2009 Or. Laws 3237, 3238 (declaring that "all water within Oregon belongs to the public pursuant to law," authorizing the Water Resources Department to make loans or grants for the construction of water development projects in the Columbia River Basin).

<sup>143</sup> *See* Dunning, *supra* note 6, § 30.04 (describing how the PTD in some states is grounded in public ownership of water); *see also supra* notes 51, 67-85, 94-120 and accompanying text. Based on public ownership of water, the Montana Supreme Court has repeatedly explained that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes." *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170-71 (Mont. 1984); *see also* *Mont. Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088, 1091 (Mont. 1984); *Galt v. State Dep't of Fish, Wildlife, and Parks*, 731 P.2d 912, 913 (Mont. 1987); *In re Adjudication of Existing Rights to the Use of All the Water*, 55 P.3d 396, 404 (Mont. 2002) (discussing *Curran* and explaining that "[u]nder the Constitution and the public trust doctrine, the public has an instream, non-diversionary right to the recreational use of the State's navigable surface waters").

<sup>144</sup> *Guilliams*, 175 P. 437, 441 (Or. 1918) (concluding that "[w]hatever may be the title to the bed of such streams or bodies of water . . . [riparian landowners] do not own the water itself, but only the use of it as it flows past their property").

<sup>145</sup> *Id.*; *see supra* notes 100-03 and accompanying text.

<sup>146</sup> *See generally supra* notes 137, 143, and accompanying text (describing public water ownership as a basis of the PTD in North Dakota and Montana).

appropriations.<sup>147</sup> Beginning in the late 1800s, the legislature withdrew waterways from appropriation on an ad hoc basis in order to protect public water uses like municipal water supplies.<sup>148</sup> Then, in 1915, the legislature withdrew streams and waterfalls in the Columbia River Gorge from appropriation to “preserve the[ir] scenic beauty” and promote tourism.<sup>149</sup> In 1939, the Oregon Supreme Court explained that water rights holders could not pollute waterways in a manner that interfered with commercial fishing practices.<sup>150</sup> Later, in the 1950s, the legislature added minimum streamflow provisions to the water code in order to preserve water for public uses.<sup>151</sup> Thus, the legislature has long attempted to reign in consumptive water uses that adversely affect public trust waters, but without significant success.<sup>152</sup>

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<sup>147</sup> See *infra* notes 152–75 and accompanying text.

<sup>148</sup> See generally Portland Water Bureau, *The Bull Run Watershed*, <http://www.portlandonline.com/water/index.cfm?c=29748> (last visited Feb. 18, 2012) (describing how Bull Run water was piped to Portland beginning in 1895). The 1909 Water Code reserved Bull Run Creek from appropriation to provide drinking water for the City of Portland. Act of Feb. 24, 1909, ch. 216, § 71, 1909 Or. Laws 319, 342 (codified as amended at OR. REV. STAT. §§ 536–558 (2011)).

<sup>149</sup> Act of Feb. 9, 1915, ch. 36, 1915 Or. Laws 49, 49 (codified as amended at OR. REV. STAT. § 538.200 (2011)); see Bowen Blair, Jr., *The Columbia River Gorge National Scenic Area: The Act, Its Genesis and Legislative History*, 17 ENVTL. L. 863, 870–71, 878 (1987).

<sup>150</sup> In *Columbia River Fishermen’s Protective Union v. City of St. Helens*, 87 P.2d 195 (Or. 1939), the Oregon Supreme Court ruled that licensed commercial fishermen had standing to sue the City of St. Helens and pulp and paper mills that discharged sewage, chemicals, and waste into the Columbia River destroying fish populations and fishermen’s nets. *Id.* at 196–97 (recognizing plaintiff’s standing because in addition to depleting fish populations, “the pollution of said waters . . . rott[ed] and destroy[ed] their nets and lines . . . in the sum of \$3,000”).

<sup>151</sup> In 1955, the legislature substantially revised the state water code, authorizing certain government agencies to obtain instream water rights. Act of May 26, 1955, ch. 707, §§ 12–14, 1955 Or. Laws 924, 930–31. But this revision proved unsuccessful because of administrative problems and because instream rights did not affect prior existing appropriated water rights. See Neuman et al., *supra* note 135, at 1135, 1146 (describing problems with the instream flow provisions of the 1955 Water Code, and providing background on the events precipitating the enactment of the 1955 Water Code, including the Federal Power Commission’s approval of a federal project on the Deschutes River despite the state’s objection because of interference with public use of the water for fisheries, recreation, and scenic purposes); *id.* at 1131 (explaining that “[t]he code required the state engineer to approve a permit for beneficial use of water unless the proposed use conflicted with determined rights ‘or [was] a menace to the safety and welfare of the public’; in such a case, the application was to be referred to the Board of Control for decision and denial if ‘the public interest demands’” (quoting Act of Feb. 24, 1909, ch. 216, 1909 Or. Laws 319)).

<sup>152</sup> Although the 1909 Water Code allowed the State Engineer to deny permits for beneficial use of water if “the public interest demanded” because the proposed use conflicted with existing rights or was “a menace to the safety and welfare of the public,” Professor Neuman has explained that the state never established instream rights or denied permits based on that provision. Neuman et al., *supra* note 135, at 1131 (discussing Act of Feb. 24, 1909, ch. 216, 1909 Or. Laws 319); see also Neuman, *supra* note 135, at 438 (explaining that “[t]he problem with instream rights created by conversion of minimum streamflows or by new state agency applications is that those two categories of instream rights have fairly junior priority dates,” but instream rights purchased under the 1987 amendments retain senior priority dates). However, because most instream flow rights have relatively junior priority dates, “Oregon’s flowing streams are still in jeopardy.” Neuman et al., *supra* note 135, at 1148; accord Joseph Q.



In 1987, the Oregon Legislature amended the water code to authorize instream rights to protect public trust water uses.<sup>153</sup> The Act enabled state agencies to acquire instream flow rights to protect public water uses including 1) recreation; 2) conservation, maintenance and enhancement of aquatic life, fish, wildlife, habitat, and “any other ecological values”; 3) pollution abatement; and 4) navigation.<sup>154</sup> Recognizing the paramount importance of public ownership of water, the legislature included findings that the grant of an instream water right “shall not diminish the public’s rights in the ownership and control of the waters of this state or the public trust therein.”<sup>155</sup> Under the Act, private parties can also purchase instream rights, which then must be conveyed to and “held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain water in-stream for public use.”<sup>156</sup> Although the legislature declared that the state’s water resources have been impaired by “single-purpose power or influence over the water resources” and ordered implementation of a coordinated water policy that would serve both instream and out-of-stream needs,<sup>157</sup> overappropriation continues to be a problem, and the courts have a role in ensuring that the state fulfills its trustee duties by mediating disputes between consumptive and instream uses to protect public water use rights.<sup>158</sup>

Statutes can help the courts define the bounds of the state’s duty to manage water rights under the PTD for the benefit of the public—the beneficiaries of the trust.<sup>159</sup> The product of a citizen initiative, the Scenic Waterways Act of 1970<sup>160</sup> provides an apt statement of the state’s duties when managing public trust water resources in Oregon.<sup>161</sup> Consistent with paramount public navigation rights first recognized by the Oregon Supreme Court in its 1869 *Weise* decision,<sup>162</sup> the Scenic Waterways Act recognized that

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Kaufman, *An Analysis of Developing Instream Water Rights in Oregon*, 28 WILLAMETTE L. REV. 285, 303–05 (1992).

<sup>153</sup> OR. REV. STAT. § 537.334(1) (2011) (recognizing that “[p]ublic uses are beneficial uses”).

<sup>154</sup> *Id.* § 537.332(5).

<sup>155</sup> *Id.* § 537.334(2).

<sup>156</sup> *Id.* § 537.332(3); see Jack Sterne, *Instream Rights & Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 213 (1997) (“The department’s position is that any person who leases, purchases, or receives as a gift a water right and converts it to instream flow must transfer the right to the department to hold in trust for the people of Oregon.”).

<sup>157</sup> OR. REV. STAT. § 536.220(1)(c), (2)(a), (3)(a) (2011).

<sup>158</sup> See *supra* notes 133–36 and accompanying text.

<sup>159</sup> See Dunning, *supra* note 6, § 31.03 (describing how the PTD has developed to include judicial supervision of administrative action to guarantee environmental preservation); see also *WaterWatch of Or., Inc. v. Water Res. Comm’n*, 112 P.3d 443, 444–45 (Or. Ct. App. 2005) (recognizing that a flyfisherman has standing to challenge rules for groundwater appropriations that could adversely affect his use of a river for fishing and recreation).

<sup>160</sup> OR. REV. STAT. §§ 390.805–390.925 (2011).

<sup>161</sup> *Id.*; see generally Charles C. Reynolds, *Protecting Oregon’s Free-Flowing Water*, 19 ENVTL. L. 841, 842, 848–51 (1989) (describing events precipitating the passage of the voter’s initiative that enacted the Scenic Waterways Act of 1970, which protected 496 river miles for recreational and scenic purposes).

<sup>162</sup> See *supra* notes 69–74 and accompanying text.

the “highest and best uses of the waters within scenic waterways are recreation, fish and wildlife uses” and specified that “[t]he free-flowing character of these waters shall be maintained in quantities necessary for recreation, fish and wildlife uses.”<sup>163</sup> The statute applies to designated scenic waters and related adjacent land, prohibiting new groundwater appropriations that would adversely affect public fishing, navigation, and recreation rights in scenic waterways.<sup>164</sup> The Water Resources Commission must deny permits for groundwater appropriations that reduce flows of scenic waterways, unless the applicant mitigates damage to public uses under a “no-diminishment standard.”<sup>165</sup>

The state has a duty under the PTD to protect public water resources for public uses consistent with “no-diminishment” trust principles, and statutes may help define when the state has failed to meet its duty and owes compensation to the trust.<sup>166</sup> In its 1979 decision of *Morse v. Oregon Division of State Lands*,<sup>167</sup> the most recent case involving an interpretation of the Oregon PTD, the Oregon Court of Appeals reversed a Division of State Lands’s decision that rejected a private landowner’s application for a wetlands fill project permit under the fill and removal statute.<sup>168</sup> The court explained that the legislature enacted the wetlands fill and removal permit program “to codify the *jus publicum* and to provide procedures for its orderly administration” because “[t]he legislative history [of the fill and removal statute] reflects that the legislature was aware of the historical

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<sup>163</sup> OR. REV. STAT. § 390.835(1) (2011). The 1970 initiative acknowledged broad and evolving public rights in water and wildlife resources by declaring that designated scenic lakes and rivers “possess outstanding scenic, fish, wildlife, geological, botanical, historic, archaeologic, and outdoor recreation values of present and future benefit to the public.” *Id.* § 390.815.

<sup>164</sup> *Id.* § 390.805 (defining “scenic waterway” as Waldo Lake and designated waterways, and “related adjacent land” as “all land within one-fourth of one mile of the bank on the side . . . except land that, in the [State Parks and Recreation Department’s] judgment, does not affect the view from the waters within a scenic waterway”).

<sup>165</sup> *WaterWatch of Or., Inc. v. Water Res. Comm’n*, 112 P.3d 443, 447, 449 & n.3 (Or. Ct. App. 2005) (explaining that the Act requires the Commission to deny a permit for groundwater use if it determines that “the use of ground water will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish, and wildlife” unless the applicant explains how it will mitigate adverse impacts (quoting OR. REV. STAT. § 390.835(9)(a) (2011))).

<sup>166</sup> *Marshall v. Frazier*, 81 P.2d 132, 134 (Or. 1938) (explaining that “[t]he question of what is a reasonable compensation for trustees depends largely on the circumstances of each particular case, and can not be properly determined by any inflexible rule” (citation omitted)); 76 AM. JUR. 2D *Trusts* § 276 (2005) (“Where the trustee makes an unauthorized conversion, transfer, or encumbrance of trust property or funds, the beneficiary of the trust may elect to hold the trustee personally liable and accountable for this breach of trust.”); *id.* § 345 (“Misapplication of the trust estate renders the trustee immediately liable for the proceeds or the value of the property misapplied, at the option of the beneficiary.”).

<sup>167</sup> 581 P.2d 520 (Or. Ct. App. 1978), *aff’d*, 590 P.2d 709 (Or. 1979) (en banc).

<sup>168</sup> *Id.* at 528; *Morse*, 590 P.2d at 715 (remanding the issuance of a permit for a fill of wetlands because the director of the Division of State Lands failed to make findings required under the dredge and fill statute); see also Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 473–74 (1989) (discussing *Morse* as exemplary of water resource disputes likely to arise in the future, and the *Mono Lake* decision’s interpretation of the PTD as a foundation for resolving these disputes).

public trust, was motivated by the same concerns that underlie the public trust, and chose language which would best perpetuate it.”<sup>169</sup>

The Oregon Supreme Court upheld the court of appeals’s reversal of the permit because the director failed to make a finding that the public need for the project “outweigh[ed] the detriment to the use of the waters in question for navigation, fishing and recreational purposes.”<sup>170</sup> As the instream water rights statute and the *Morse* decisions demonstrate, Oregon statutory law can incorporate the PTD and favor nonconsumptive uses, providing support for determinations that maintain public uses of flowing waters.<sup>171</sup>

Oregon courts therefore should supervise the administration of water rights to ensure that overappropriation neither unreasonably interferes with public uses nor impairs ecological conditions.<sup>172</sup> Based on the cases and legislation discussed in this section, it seems evident that the Oregon PTD has both a common law and statutory basis.<sup>173</sup> Because the legislature has recognized that all water is owned by the public,<sup>174</sup> and the paramount nature of public navigation rights,<sup>175</sup> Oregon courts should recognize that public water use rights burden appropriated water rights,<sup>176</sup> requiring the state to continuously supervise water use in the state to ensure no damage to trust resources.<sup>177</sup>

### B. Wildlife

Sovereign ownership of wildlife originated in Roman law (*ferae naturae*), migrated to English common law, and exists now in virtually every state, as wildlife is managed as a trust resource for the benefit of the

<sup>169</sup> *Morse*, 581 P.2d at 525.

<sup>170</sup> *Morse*, 590 P.2d at 714. The court did not disturb the court of appeals’ ruling that the fill and removal statute enacted the PTD, but it did rule, 4 to 3, that neither the PTD nor the statute banned non-water-dependent uses. *Id.* at 712.

<sup>171</sup> See *supra* notes 159–69 and accompanying text.

<sup>172</sup> See Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 662–63 (2010) (explaining that conveyances of trust resources are defeasible); *id.* at 666 (arguing that the PTD requires the state to balance public and private interests in trust resources, and explaining that “[t]his accommodation meant that there would be a balancing of public and private rights in fulfilling the trust responsibility, which is hardly an evisceration of private property, unless private property means a kind of private sovereignty immune from state control” (footnote omitted)).

<sup>173</sup> The California courts recognize both a common law and statutory basis of the state’s PTD. See *Envtl. Prot. & Info. Ctr. v. Cal. Dep’t of Forestry & Fire Prot.*, 187 P.3d 888, 926 (Cal. 2008).

<sup>174</sup> See *supra* notes 136, 140–42 and accompanying text.

<sup>175</sup> See *supra* notes 2, 90, 119 and accompanying text.

<sup>176</sup> See *supra* notes 129, 137 and accompanying text.

<sup>177</sup> See *Mono Lake*, 658 P.2d 709, 732 (Cal. 1983) (stating the “public trust doctrine and the appropriative water rights system are parts of an integrated system of water law”), *cert. denied sub nom.* L.A. Dep’t of Water & Power v. Nat’l Audubon Soc’y, 464 U.S. 977 (1983); Blumm, *supra* note 172, at 666 (“By imposing on the state a continuous supervisory duty to attempt to preserve trust assets *Mono Lake* ruled that 1) there were no vested private rights that limited the trust, 2) private grantees use rights were limited by the trust responsibility, and 3) the state was not confined to erroneous past decisions.” (footnotes omitted)).

public.<sup>178</sup> Since the 1880s, the Oregon Supreme Court has repeatedly recognized that the state owns fish and wildlife within its borders in this sovereign capacity, and is able to regulate wildlife harvests to maintain populations.<sup>179</sup> As recently as 2011, in *Simpson v. Department of Fish and Wildlife*,<sup>180</sup> the Oregon Court of Appeals affirmed that the state owns wildlife within its borders in a constructive, sovereign capacity.<sup>181</sup>

Oregon law has long recognized that public ownership of wildlife means the state has a duty to manage wildlife resources as sovereign trustee for the public.<sup>182</sup> In 1893, the Oregon Supreme Court upheld state authority to regulate fish harvests so that fish “may have an opportunity to propagate their species, and be preserved from extermination.”<sup>183</sup> Fifteen years later, the court reiterated the state’s duty to prevent species extinction, explaining in its 1908 decision of *State v. Hume* that:

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<sup>178</sup> See generally Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 675–81, 706 (2005) (tracing the origins of the wildlife trust doctrine and observing that “the state ownership doctrine lives on . . . in virtually all states, affording states ample authority to regulate the taking of wildlife and to protect their habitat”); THOMAS A. LUND, AMERICAN WILDLIFE LAW 57–100 (1980) (discussing the history of state and federal wildlife law); DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 381–409 (2d ed. 2010) (discussing the evolving role of states holding wildlife in trust for the people).

<sup>179</sup> See, e.g., *State v. Pulos*, 129 P. 128, 130 (Or. 1913) (upholding the defendant’s conviction for possessing a wild duck out of season because the statute did not except ducks captured during open season, and explaining that “title to wild game is in the state, and . . . the taking of them is not a right, but is a privilege, which may be restricted, prohibited, or conditioned, as the lawmaking power may see fit”); *State v. Fisher*, 98 P. 713, 714–15 (Or. 1908) (explaining that the defendant could be convicted for possessing deer out of season, but had a right to present evidence that he killed the deer during open season to avoid liability, based on an exception in the statute); *State v. Hume*, 95 P. 808, 810–11 (Or. 1908) (affirming the defendant’s conviction for carrying canned salmon without a license as a valid exercise of the police power); *State v. Schuman*, 58 P. 661, 662–63 (Or. 1899) (upholding the defendant’s conviction for possessing trout imported from Washington under an Oregon law declaring “[i]t shall be unlawful to sell, offer for sale, or have in possession for sale, any species of trout at any time”); *State v. McGuire*, 33 P. 666, 667, 671 (Or. 1893) (describing the state’s authority to regulate fish and wildlife harvests and holding that the defendant’s possession of salmon in closed season was not unlawful because the salmon had been caught during the open season).

<sup>180</sup> 255 P.3d 565 (Or. Ct. App. 2011).

<sup>181</sup> See *id.* at 569–73 (discussing case law supporting the legislature’s assertion of sovereign ownership of wildlife from 1921 to the present).

<sup>182</sup> *Monroe v. Withycome*, 165 P. 227, 229 (Or. 1917) (“Fish are classified as feræ naturæ, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common.”); *Pulos*, 129 P. at 129–30; see also *infra* notes 189–90 and accompanying text; Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605, 608–12 (2004) (describing the wildlife trust as “clearly enunciated by the United States Supreme Court in *Geer v. Connecticut*” (citing *Geer v. Connecticut*, 161 U.S. 519 (1896))). See generally Dale D. Goble, *Three Cases/Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 ENVTL. L. 807, 846–47 (2005) (describing the evolution of the wildlife trust as interconnected with the development of the state’s police power, and the idea that private property rights are not absolute).

<sup>183</sup> *McGuire*, 33 P. at 668.

It is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all its citizens; and as an incident of the assumed ownership, the legislative assembly may enact such laws as tend to protect the species from injury by human means and from extinction by exhaustive methods of capture.<sup>184</sup>

In the early 1900s, the legislature carried out its sovereign trust duty by enacting several statutes regulating or prohibiting wildlife harvests, including the hunting, taking, or possession of species like salmon and beavers.<sup>185</sup>

By 1920, on at least five occasions, the Oregon Supreme Court had affirmed that the state was sovereign owner of wildlife as trustee for the public, with concomitant power to regulate wildlife harvests.<sup>186</sup> In 1921, the legislature codified Oregon's sovereign ownership of wildlife and power to regulate harvests, declaring that "[n]o person shall at any time or in any manner acquire any property in . . . any of the wild game animals, fur-bearing animals, game birds, nongame birds or game fish, or any part thereof, of the state of Oregon, but they shall always and under all circumstances be and remain the property of the state, except . . . [when harvested as allowed by law]."<sup>187</sup> Thus, early in the twentieth century the Oregon Supreme Court and the legislature had firmly established the state's power to regulate wildlife based on its principle of sovereign wildlife ownership.<sup>188</sup>

In a 2011 decision, the court of appeals explained that Oregon statutes have acknowledged sovereign wildlife ownership since 1921 without substantial substantive change.<sup>189</sup> The court rejected a contention that game farm animals were not wildlife under the Oregon Wildlife Code, explaining that "the state's property interest in wildlife is sovereign, not proprietary."<sup>190</sup> Both case law and statutes therefore recognize that the state's authority to regulate wildlife harvests is grounded not only on its police power, but also on its sovereign ownership of wildlife.<sup>191</sup>

<sup>184</sup> 95 P. at 810.

<sup>185</sup> *See, e.g.*, Act of Feb 16, 1891, 1891 Or. Laws 33 (entitled an "Act to Protect Salmon and Other Food Fishes in the State of Oregon," *as amended by* 1893 Or. Laws 145 (1893) (establishing salmon fishing seasons)); 1931 Or. Laws 693 (providing that it is unlawful to trap beavers outside of open season).

<sup>186</sup> *See supra* notes 179, 182 and accompanying text.

<sup>187</sup> Act of Feb. 21, 1921, ch. 153, 1921 Or. Laws 267, 267.

<sup>188</sup> *See supra* notes 179, 182–85 and accompanying text. *See generally* Blumm & Ritchie, *supra* note 178, at 706 (identifying both the police power and sovereign ownership as the bases of the wildlife trust, and arguing that "the state ownership doctrine lives on . . . in virtually all states, affording states ample authority to regulate the taking of wildlife and to protect their habitat").

<sup>189</sup> *Simpson v. Dep't of Fish & Wildlife*, 255 P.3d 565, 571–73 (Or. Ct. App. 2011) (explaining that changes to the wildlife code in the 1970s were motivated by an attempt to "simplify the language and consolidate the duplicative," but not to change the substance of the laws).

<sup>190</sup> *Id.* at 572. *See generally* *Hughes v. Oklahoma*, 441 U.S. 322, 331–35 (1979) (describing the state's constructive ownership of wildlife as an incident of state sovereign power).

<sup>191</sup> *See supra* notes 182–90 and accompanying text.

Unlike the police power, however, which vests the state with the authority to regulate in the public interest, sovereign ownership of wildlife in trust imposes an affirmative duty on the state to maintain wildlife for the benefit of present and future generations.<sup>192</sup> Early American case law established that public rights in wildlife are a component of citizenship, and the sovereign ownership doctrine prohibits discrimination among classes of citizens with respect to wildlife harvest rights.<sup>193</sup> The Oregon legislature has enacted many statutes to restore declining wildlife populations, acknowledging the state's duty to protect habitat and water resources in order to maintain wildlife populations for the public benefit.<sup>194</sup>

Because public rights in wildlife are a component of citizenship, members of the public should have standing to enforce the state's trust duty to maintain wildlife resources,<sup>195</sup> particularly when statutory remedies are unavailable.<sup>196</sup> The Oregon Supreme Court's 1939 case of *Columbia River*

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<sup>192</sup> See Wood, *supra* note 182, at 612 (arguing that "where there has been damage to trust assets, the trustees have an affirmative duty to recoup damages and restore the corpus"); *supra* note 166 and accompanying text (discussing the obligations of trustees).

<sup>193</sup> See, e.g., *Hughes*, 441 U.S. at 332–35 (describing how many courts have struck down laws regulating fish and wildlife harvests that discriminated among classes of citizens under the privileges and immunities clause, but affirming the state's power to regulate harvests, including by prohibiting particular harvest methods).

<sup>194</sup> For example, the policy of the Watershed Management and Enhancement Act of 1999 is to "[a]ssess[] the conditions in each watershed to determine the quality of the existing environment, to identify the causes for declines in habitat, fish and wildlife populations and water quality, and to assist with the development of locally integrated action plans for watersheds that will achieve agreed-upon protection and restoration objectives." OR. REV. STAT. § 541.895 (2011). See generally OR. DEP'T OF FISH & WILDLIFE, OREGON WILDLIFE AND COMMERCIAL FISHING CODES 55–72 (2002) (including the text of miscellaneous wildlife protection statutes).

<sup>195</sup> Oregonians have broad standing to bring suit under the state's Uniform Declaratory Judgment Act, which states that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." OR. REV. STAT. § 28.010 (2011) (providing that "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a judgment"). In 2006, the Oregon Supreme Court explained that the legislature can grant "any person" standing rights to challenge an agency rule or determination because the Oregon constitution does not include a cases and controversies requirement like the federal constitution. *Kellas v. Dep't of Corr.*, 145 P.3d 139, 142 (Or. 2006). In 2010, the court clarified that the state Administrative Procedures Act requires a person be "adversely affected or aggrieved" within the meaning of the statute. *Pete's Mtn. Homeowners Ass'n v. Or. Water Res. Dep't*, 238 P.3d 395, 401 (Or. Ct. App. 2010).

<sup>196</sup> See Blumm & Ritchie, *supra* note 178, at 714–15 (explaining that the state has a duty to prevent substantial impairment of trust resources following *Geer v. Connecticut*, 161 U.S. 519 (1896); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); and *Mono Lake*, 658 P.2d 709 (Cal. 1983), *cert. denied sub nom.*, L.A. Dep't of Water & Power v. Nat'l Audubon Soc'y, 464 U.S. 977 (1983)); see also *Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588, 601 (Cal. Ct. App. 2008) (recognizing that the public has standing to challenge agency decisions because they do not always strike an appropriate balance between protecting trust resources and accommodating other legitimate public interests); *In re Water Use Permit Applications*, 93 P.3d 643, 658 (Haw. 2004) (vacating the state water commission's decision regarding allocation of water resources because the state failed to weigh competing public and private water uses on a case-by-case basis in light of trust values); *In re Water Use Permit Applications*, 9 P.3d 409,

*Fishermen's Protective Union v. City of St. Helens*<sup>197</sup> provides a helpful case example. The court affirmed a lower court injunction preventing further pollution damage to lower Columbia River salmon populations, deciding that commercial salmon fishermen had a cause of action against industrial and municipal polluters.<sup>198</sup> Rejecting the assertion that the fishermen suffered no special injury necessary to bring a nuisance suit,<sup>199</sup> the court explained that the injury to the fishermen's livelihoods was distinct from the injury suffered by the general public.<sup>200</sup> Thus, eighty years ago, the Oregon Supreme Court ruled that citizens may maintain suits to prevent unreasonable damage to wildlife populations when the state does not meet its duty to maintain wildlife populations sufficient for public uses.<sup>201</sup> This duty should include providing a suitable habitat to support sustainable populations, and the courts should recognize that the public, as beneficiary of the PTD, has standing to bring suit against public and private entities when resource uses threaten to interfere with public rights.

The PTD provides a useful framework to unify public rights to navigate and to use water and wildlife. In 1959, the AG acknowledged that public water and wildlife use rights were intertwined.<sup>202</sup> Considering whether the Oregon National Guard could lease land with exclusive waterfowl shooting privileges on Slusher Lake,<sup>203</sup> the AG explained that regardless of bed ownership, both sovereign ownership of wildlife and the public's navigation easement guarantee public rights to fish and hunt on all navigable waters in Oregon.<sup>204</sup> The AG acknowledged "a conflict on whether the public has a right to hunt where the bed of a lake is privately owned," but after reviewing *Guilliams* and *Luscher*,<sup>205</sup> explained that "the right of hunting and fishing on water navigable-in-fact exists regardless of title to the bed as an incident of navigation."<sup>206</sup> Consequently, the AG opined that the Oregon National Guard could not grant exclusive hunting rights on the lake because hunting and fishing rights are free and common to all citizens in the state.<sup>207</sup> This

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452, 454 (Haw. 2000) (citing *Mono Lake* as instructive while positing that Hawaii's public trust doctrine may require more protection than California's because of geographical difference, but nevertheless recognizing a preference for accommodating both instream and offstream uses where feasible).

<sup>197</sup> 87 P.2d 195 (Or. 1939).

<sup>198</sup> See *id.* at 198.

<sup>199</sup> *Id.* at 199 (noting that the fishermen could seek an injunction as an equitable remedy, but had no remedy at law).

<sup>200</sup> *Id.* at 196–97 (recognizing plaintiff's standing based on injury to their livelihood because, in addition to depleting fish populations, "the pollution of said waters . . . rott[ed] and destroy[ed] their nets and lines . . . in the sum of \$3,000").

<sup>201</sup> See *supra* notes 197–200 and accompanying text.

<sup>202</sup> THORNTON, *supra* note 43, at 311–12.

<sup>203</sup> *Id.* at 311.

<sup>204</sup> *Id.* at 312.

<sup>205</sup> *Id.* at 312; see *supra* notes 99–113 and accompanying text (discussing the *Guilliams* decision's recognition of public navigation rights independent of bed ownership); *supra* notes 114–20 and accompanying text (discussing the *Luscher* decision's recognition of the same distinction).

<sup>206</sup> THORNTON, *supra* note 43, at 312.

<sup>207</sup> *Id.* (explaining that doing so would transform public rights into a monopoly).

reasoning suggests that Oregon courts should recognize that wildlife resources are protected under the PTD because of paramount public hunting, fishing, and recreational rights, including birdwatching and wildlife viewing.<sup>208</sup>

In 2008, California expressly recognized that wildlife is part of the PTD. In *Center for Biological Diversity, Inc. v. FPL Group*,<sup>209</sup> the court of appeals ruled that “[t]he public trust doctrine applies to wildlife, including raptors and other birds.”<sup>210</sup> The court noted that “[b]ecause wildlife are generally transient and not easily confined, through the centuries and across societies they have been held to belong to no one and therefore to belong to everyone in common.”<sup>211</sup> Citing United States Supreme Court authority, the court concluded the state must exercise its authority over the common property in game animals as a trust, “represent[ing the] people . . . in their united sovereignty.”<sup>212</sup> As a result, even though wildlife is regulated under the state’s “police power and explicit statutory authorization . . . the public retains the right to bring actions to enforce the trust when the public agencies fail to discharge their duties.”<sup>213</sup> Thus, the public had a right to sue state and local agencies for permitting more than 5000 wind generators in Altamont Pass, whose operations unnecessarily killed tens of thousands of birds, including thousands of raptors.<sup>214</sup>

Similarly, Oregon has long recognized that the state owns wildlife in a sovereign capacity, as trustee for the public.<sup>215</sup> By protecting public rights, including hunting and fishing on all navigable-for-public-use waters, the Oregon Supreme Court and AG have recognized that wildlife and waters are publicly owned trust resources that must be managed for the benefit of the

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<sup>208</sup> See, e.g., *Doty v. Coos Cnty.*, 59 P.3d 50, 51 n.1 (Or. Ct. App. 2002) (recognizing that a birdwatcher had standing to challenge an order of the Oregon Land Use Board of Appeals), *aff’d and clarified on reh’g*, 64 P.3d 1150 (Or. 2003); *WaterWatch of Or., Inc. v. Water Res. Comm’n*, 112 P.3d 443, 444–45 (Or. Ct. App. 2005) (recognizing that a flyfisherman had standing to challenge rules for groundwater appropriations that could adversely affect his use of a river).

<sup>209</sup> 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008).

<sup>210</sup> *Id.* at 595 (rejecting a contention that “the public trust doctrine applies only to tidelands and navigable waters, and has no application to wildlife”).

<sup>211</sup> *Id.* at 597 (quoting James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL’Y F. 1, 86 (2007)).

<sup>212</sup> *Id.* at 598 (citing, for example, *Geer v. Connecticut*, 161 U.S. 519, 529 (1896)).

<sup>213</sup> *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 601 (explaining that “[m]any of the cases establishing the public trust doctrine in this country and in California have been brought by private parties to prevent agencies of government from abandoning or neglecting the rights of the public with respect to resources subject to the public trust”) (citing *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *City of Berkeley v. Super. Ct. of Alameda Cnty.*, 606 P.2d 362 (Cal. 1980)).

<sup>214</sup> *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 592, 601. However, the court held that the public trust claim must be brought against public agencies as trustees of the wildlife, not the wind generators, *id.* at 602–06, a result seemingly inconsistent with the California Supreme Court’s decision in *Marks v. Whitney*, 491 P.2d 374, 378, 381 (Cal. 1971) (en banc), which recognized the standing of a landowner to sue a neighbor who attempted to fill PTD-protected tidelands. *Id.*

<sup>215</sup> See *supra* notes 178–94 and accompanying text.



public, not private interests.<sup>216</sup> A number of statutes, cases, and AG opinions suggest that Oregon courts should expressly recognize the state's trustee duty to preserve wildlife resources for the benefit of present and future generations.<sup>217</sup>

### C. Beaches and Uplands

Oregon's PTD extends to uplands when reasonably necessary to enable public navigation, or to maintain public water and wildlife trust resources.<sup>218</sup> In the Oregon Supreme Court's first decision on public navigation rights in 1869, *Weise v. Smith*, the court recognized public use rights in uplands when necessary for log floats.<sup>219</sup> The court explained that loggers could construct temporary booms on private property when necessary to enable navigation for commercial purposes.<sup>220</sup>

A century later, in the 1969 case of *State ex rel. Thornton v. Hay*,<sup>221</sup> the Oregon Supreme Court endorsed custom as a basis for recognizing public rights to recreate on Oregon ocean beaches.<sup>222</sup> The *Hay* court explained that public had customary rights to use ocean beaches as highways of commerce, rights which existed prior to statehood and which were burdened private

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<sup>216</sup> See *supra* notes 197–207 and accompanying text; see also *supra* Part III.A (describing public rights of navigation, fishing, commerce, and recreation in all Oregon waters regardless of underlying bed ownership).

<sup>217</sup> See generally Dunning, *supra* note 6, § 30.04 (explaining that when the PTD stems from public water and wildlife ownership, it protects these resources but “obviates the need for a finding as to bed ownership”); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91, 95–98 (2009) (describing the state's fiduciary duty to maintain public trust resources, including wildlife).

<sup>218</sup> See *infra* notes 219–20 and accompanying text (explaining how the *Weise* decision recognized that the PTD applies to uplands when necessary to enable navigation); *supra* note 164 and accompanying text (describing how the Scenic Waterways Act applies to adjacent lands that affect scenic waters).

<sup>219</sup> *Weise*, 3 Or. 445, 450 (1869) (explaining that the public had limited rights to use uplands when necessary to enable navigation, including the right to construct booms on private property for a reasonable time to enable log floats). As explained above, the public navigation easement originated in the public highways language in the Northwest Ordinance of 1787, which was incorporated in the Oregon Statehood Act. See *supra* Part III.A (discussing public navigation rights).

<sup>220</sup> *Weise*, 3 Or. at 451–52 (“If there had been no necessity for fastening the boom to the plaintiff's land, the act of fastening it would have been a trespass, for which the plaintiff ought to recover nominal damages at least; but if the act was necessary in order to enable the plaintiff to exercise a right of navigation, no cause of action would lie for a bare intrusion which worked no appreciable damages.”); see Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1092 (2011) (noting that courts have excused trespasses supported by significant public interests by both assessing nominal damages and creating “context-specific exceptions”).

<sup>221</sup> 462 P.2d 671 (Or. 1969).

<sup>222</sup> *Id.* at 676. See generally STRATON, *supra* note 30 (describing how the Beach Bill established a public right to access the beaches for recreation); Or. Pub. Broad., *supra* note 30 (listing *Thornton v. Hay* on its timeline of public beach access in Oregon and dubbing the case a “landmark” decision). In the 1967 Beach Bill, the Oregon Legislature declared that the public had the right to use ocean beaches in the state. *Id.*

titles due to the public's long, uninterrupted, peaceable, and lawful use of ocean beaches.<sup>223</sup> But the public's right to use ocean beaches is also a public trust right and ought to be understood as part of the state's PTD.<sup>224</sup>

Although the majority in *Hay* adopted the doctrine of custom,<sup>225</sup> the PTD is a complementary, if not better justification for the public's easement.<sup>226</sup> In his concurring opinion, Justice Denecke examined the state's long recognition of the PTD, including the *Guilliams, Luscher*, and other decisions, and suggested that sovereign ownership, or the *jus publicum*, was a more suitable vehicle for protecting public recreational beach use.<sup>227</sup> He explained that "[t]hese rights of the public in tidelands and in the beds of navigable streams have been called 'jus publicum' and we have consistently and recently reaffirmed their existence."<sup>228</sup> Analogizing beaches to waters, and relying on *Guilliams* and *Luscher*, Justice Denecke recognized that the

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<sup>223</sup> *Hay*, 462 P.2d at 677 (explaining that "[t]he custom of the people of Oregon to use the dry-sand area of the beaches for public recreational purposes meets every one of Blackstone's requisites").

<sup>224</sup> In New Jersey, the PTD protects the public's right to use beaches. See *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 363–64 (N.J. 1984) (recognizing that public rights to use the dry sand area of private beaches takes two forms: access and use rights. "First, the public may have a right to cross privately owned dry sand beaches in order to gain access to the foreshore. Second, this interest may be of the sort enjoyed by the public . . . , namely, the right to sunbathe and generally enjoy recreational activities."); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 113 (N.J. 2005) (applying the PTD to privately owned beaches and noting "the public trust doctrine requires the Atlantis [upland sand beach] property to be open to the general public").

<sup>225</sup> *Hay*, 462 P.2d at 676. The Oregon Supreme Court affirmed Attorney General Robert Thornton's order directing a motel owner to remove a fence from his beachfront property, ratifying the beach bill's recognition of the public right to recreate on ocean beaches based on the doctrine of custom. *Id.* at 673 (explaining that public recreational use of beaches was an established custom since not only "the beginning of the state's political history" but also "the time of earliest settlement").

<sup>226</sup> See Carl D. Ething, *Who Owns the Wildlife?*, 3 ENVTL. L. 23, 24–26 (1973) (explaining the history of state constructive ownership of wildlife in the United States and Oregon); DePoorter, *supra* note 220, at 1092–94, 1110 (explaining that exceptions to trespass theories should be refined from a patchwork of doctrines into a unified theory of fair trespass, and that, particularly in the context of beaches, custom, and the "public trust doctrine reserves public access rights to private property" (citing *Hay*, 462 P.2d 671, 678 (Or. 1969); *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (en banc)); see also *Matcha v. Mattox*, 711 S.W.2d 95, 97, 101 (Tex. Ct. App. 1986) (affirming the district court's finding of a public easement to the beach through, *inter alia*, the doctrine of custom).

<sup>227</sup> *Hay*, 462 P.2d at 679 (Denecke, J., concurring) (citing *Luscher*, 56 P.2d 1158 (Or. 1936); *Corvallis Sand & Gravel Co. v. State Land Bd.*, 439 P.2d 575 (Or. 1968) (en banc)). In citing *Luscher*, Justice Denecke's concurrence recognized that the public trust doctrine burdened all navigable-for-public-use waters, not merely navigable-for-title waters. See *supra* Part III (discussing Oregon Supreme Court cases recognizing public rights to fish, recreate, navigate, and engage in commerce including log floats on all navigable-in-fact waters irrespective of bed ownership).

<sup>228</sup> *Hay*, 462 P.2d at 679 (Denecke, J., concurring) (citing *Corvallis Sand & Gravel*, 439 P.2d 575 (Or. 1968); *Smith Tug & Barge Co. v. Columbia-Pac. Towing Corp.*, 443 P.2d 205 (Or. 1968) (en banc)).

public's right to use extends to dry sand beaches.<sup>229</sup> Actually, the Oregon Supreme Court's first decision on the scope of public navigation rights in its 1869 *Weise* decision anticipated *Hay* by allowing public use of private uplands when necessary to enable public navigation.<sup>230</sup> As explained above,<sup>231</sup> the *Weise* court recognized public rights to use private property when necessary for log floats.<sup>232</sup> Public access to ocean beaches is a similar ancillary right, necessary to allow for effective public use of publicly owned tidelands.<sup>233</sup>

Historically, public navigation occurred on both the shoreline and the waters in tidal areas, because beaches provided a convenient travel route along the state's rugged coast.<sup>234</sup> In its 1885 decision of *Wilson v. Welch*,<sup>235</sup> the Oregon Supreme Court reiterated that public rights could burden private property rights in tidelands despite state sales of the *jus privatum* in such lands, relying on the three classes of rights in shorelands: “[f]irst, the *jus privatum*, or right of property or franchise; second, the *jus publicum*, or public right of passage and navigation; and, third, the *jus regium*, or governmental right.”<sup>236</sup> After Governor Oswald West declared Oregon tidelands to be public highways in 1913,<sup>237</sup> the legislature repealed statutes authorizing sales of tidelands and upheld the public easement for tideland use.<sup>238</sup> Thus, long before Oregon voters flooded the legislature with letters in

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<sup>229</sup> *Id.*; see also Erin Pitts, Comment, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Use of Oregon Beaches*, 22 ENVTL. L. 731, 733 (1992) (maintaining that Justice Denecke's concurrence gives Oregon courts the option of recognizing the PTD as an independent basis for protecting public rights to recreate on Oregon beaches).

<sup>230</sup> See *supra* notes 69–74 and accompanying text; *Stevens*, 854 P.2d at 453, 456–57 (rejecting assertions that the state's denial of a permit to construct a seawall was an unconstitutional taking, and commenting that “[p]laintiffs [did] not ask this court to overrule *Thornton*, and they [did] not argue that any portion of the Beach Bill is unconstitutional”).

<sup>231</sup> See *supra* notes 219–20, Part III.A (discussing the *Weise* opinion).

<sup>232</sup> *Weise*, 3 Or. 445, 451 (1869) (“[I]f the act [of constructing temporary log booms] was necessary in order to enable the plaintiff to exercise a right of navigation, no cause of action would lie for a bare intrusion which worked no appreciable damages.”).

<sup>233</sup> See *infra* notes 234–38 and accompanying text.

<sup>234</sup> See generally Or. Pub. Broad., *supra* note 30 (describing the fight to preserve public access to beaches, including the right to use them “as a public highway”); Or. Pub. Broad., *Oregon Experience: The Beach Bill, Oregon Beaches Gallery*, <http://www.opb.org/programs/oregonexperiencearchive/beachbill/gallery.php> (last visited Feb. 18, 2012) (providing photos of Oregonians enjoying the wet and dry sand areas and stating that “[i]n 1913 Governor Oswald West declared the tidelands a public highway forever protecting them from private development”).

<sup>235</sup> 7 P. 341 (Or. 1885).

<sup>236</sup> *Id.* at 345.

<sup>237</sup> See Or. State Archives, *supra* note 30 (describing how beaches were protected for public use during West's governorship, which followed his tenure as State Land Agent, during which he recovered 900,000 acres of school trust lands fraudulently acquired by speculators).

<sup>238</sup> See Act of Feb 13, 1913, ch. 47, 1913 Or. Laws 80, 80 (“The shore of the Pacific Ocean, between ordinary high tide and extreme low tide, and from the Columbia River on the north to the Oregon and California State line on the south . . . is hereby declared a public highway and shall forever remain open as such to the public.”); Or. State Archives, *supra* note 30. See generally Or. Pub. Broad., *supra* note 30 (explaining that the fight over public access “erupted

support of the 1967 beach bill,<sup>239</sup> Oregon already had well-established law protecting public rights to use tidelands as highways of commerce. In light of the *Weise* court's century-old recognition of ancillary public rights to use uplands when necessary to enable public navigation,<sup>240</sup> the *Hay* decision was hardly the unexpected sea change that Justice Scalia once suggested.<sup>241</sup>

Modern Oregon courts should recognize that both custom and the PTD support public rights to use beaches and tidelands.<sup>242</sup> Based on a century of case law from 1869 to 1969, the Oregon PTD protects public rights to use uplands when necessary to enable water use for public purposes recognized under the public navigation easement and protected by the PTD, including boating, fishing, swimming, and other recreational activities.<sup>243</sup>

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into the hottest issue of the 1967 legislative session and created the greatest public response to any issue in Oregon's legislative history").

<sup>239</sup> See Or. Pub. Broad., *supra* note 30; STRATON, *supra* note 30, at 26–29.

<sup>240</sup> See *supra* notes 73, 219–20, 232 and accompanying text.

<sup>241</sup> See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211–12 (1994) (Scalia, J., dissenting) (implying that Oregon denied private property rights protected under the Takings Clause “by invoking nonexistent rules of state substantive law” and referring to the doctrine of custom as “a landgrab”). Justice Scalia also seemed to think that the Oregon Supreme Court inconsistently applied the doctrine of custom laid down in *Hay* and reiterated in *Stevens*. *Id.* at 1211 n.3. He pointed out that in *McDonald v. Halvorson*, 780 P.2d 714, 724 (Or. 1989) (en banc), the Oregon Supreme Court refused to apply public customary rights to a beach that was not adjacent to the ocean and which the public had not historically used. *Stevens*, 510 U.S. at 1212 n.5. But if public beach rights are ancillary rights that spring from the public's ownership of adjacent tidelands, the result in *Halvorsen* is explainable by the lack of adjacent tidelands as well as the lack of customary use.

<sup>242</sup> See *supra* notes 222–33 and accompanying text; *infra* notes 243–44 and accompanying text.

<sup>243</sup> *Guilliams*, 175 P. 437, 442 (Or. 1918) (ruling that the PTD encompasses “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” (quoting *Lamprey*, 52 N.W. 1139 (Wis. 1893))); see also Wood, *supra* note 182, at 612 (arguing that the state has an affirmative duty to remedy damages to trust resources for the public benefit). Oregon courts have not addressed whether the public has a right to cross uplands out of necessity to access public trust water resources. However, as in other states, the public likely has the right to access navigable-for-public-use waters from public bridges or roads, even those not maintained by the state. See generally *Webb v. Clodfelter*, 132 P.3d 50, 51–52, 54 (Or. Ct. App. 2006) (upholding hunters' rights to use a road of unknown origin, and explaining that “the use of an existing road of unknown origin over the servient owner's property in a way that does not interfere with the servient owner's use will defeat a presumption of adverseness”); *Trewin v. Hunter*, 531 P.2d 899, 901 (Or. 1975) (en banc) (stating that when there is no evidence of who constructed a commonly used road, “it should be presumed that the servient owner constructed it for his own use,” thereby establishing that a neighbor's longstanding use is permissive, not adverse); *Boyer v. Abston*, 544 P.2d 1031, 1031–32 (Or. 1976) (en banc) (following the explanation that a landowner's predecessor had always allowed miners, hunters, and neighbors to use a road, the court held that the claimant failed to establish adverse possession of an easement because his use of the road was permissive).

The Oregon legislature established a policy in favor of public rights to access and use uplands without unreasonably burdening landowners in the 1995 Public Use of Lands Act, OR. REV. STAT. §§ 105.672–105.696 (2011). That statute encouraged landowners to open land for recreational use by providing immunity from suits “in contract or tort for any personal injury, death or property damage that arises out of the use of the land for recreational purposes, gardening, woodcutting or the harvest of special forest products.” OR. REV. STAT. § 105.682(1)

The Oregon PTD may also include rights to cross uplands or portage when reasonably necessary to access public water resources.<sup>244</sup> In *Weise*, the 1869 Oregon Supreme Court recognized that the public had privileged, non-trespassory rights to use uplands when necessary to enable useful public navigation.<sup>245</sup> The court explained that, under the *jus publicum*, the public navigation easement includes the right “founded upon necessity . . . to meddle with the bank, [but] it is only an incidental [right].”<sup>246</sup> A century later, in *Hay* and *Stevens v. City of Cannon Beach*,<sup>247</sup> the modern Oregon Supreme Court recognized public rights to use all Oregon beaches under the doctrine of custom, a proposition supported by the *Weise* precedent.<sup>248</sup> Based on these cases and the legislature’s consistent policy of favoring public access to recreational waters,<sup>249</sup> the Oregon PTD should include ancillary public rights to reasonable use of uplands, when necessary to access waters.<sup>250</sup>

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(2011). Recreational uses included in the statute are “outdoor activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, nature study, outdoor educational activities, waterskiing, winter sports, viewing or enjoying historical, archaeological, scenic or scientific sites or volunteering for any public purpose project.” *Id.* § 105.672(5). A landowner receives immunity only if she does not charge a fee for the use of her land, although there are some exceptions for parking fees and other costs associated with providing public access. *Id.* § 105.688. When faced with difficult situations questioning the balance between public and private rights, the courts should affirm paramount public navigation rights without imposing unreasonable burdens on landowners.

<sup>244</sup> See *supra* notes 73, 219–20, 232 and accompanying text. In *Herrin v. Sutherland*, the 1925 Montana Supreme Court explained that a member of the public may have the right to cross private land to access public property out of necessity. 241 P. 328, 333 (Mont. 1925). In *Curran*, the Montana Supreme Court upheld a statute allowing the public to portage around barriers on navigable waters in a reasonable fashion as a pre-existing right under the state PTD, probably based on the doctrine of necessity. 682 P.2d 163, 172 (Mont. 1984); MONT. CODE ANN. § 23-2-311(1) (2011) (“A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner’s land and violation of the landowner’s rights.”). The court severed a provision requiring landowners to construct public portage routes as an unconstitutional taking of private property. See *Galt v. State Dep’t of Fish, Wildlife & Parks*, 731 P.2d 912, 914, 916 (Mont. 1987) (severing subsection (3)(e) from MONT. CODE ANN. § 23-2-311 because “although the recreational user has a right to portage around obstructions . . . there can be no responsibility on behalf of the landowner to pay for such portage right”).

<sup>245</sup> *Weise*, 3 Or. 445, 451 (Or. 1869); see *Pitts*, *supra* note 229, at 733 (suggesting that based on Justice Denecke’s comment in *Hay*, the court could recognize the PTD as an independent basis for protecting public rights to recreate on Oregon beaches).

<sup>246</sup> *Weise*, 3 Or. at 451; see *supra* notes 219–20, 232 and accompanying text. In *Lebanon Lumber Co. v. Leonard*, 136 P. 891 (Or. 1913), the Oregon Supreme Court, without referencing the *Weise* decision, stated that public navigation rights did not include a use right on private lands adjacent to a stream unless necessary “to reclaim stranded property which has washed ashore without the fault of the owner.” *Id.* at 893. The court’s mention of necessity justifying noninjurious trespass makes it possible to reconcile this result with *Weise*. At any rate, the statement in *Lebanon Lumber* is *dicta*, as the court concluded that McDowell Creek was not navigable under the log-float test three years before the *Guilliams* decision expanded the definition of navigable waters to include all Oregon waters capable of recreational boating. See *supra* notes 103–09 and accompanying text.

<sup>247</sup> 854 P.2d 449 (Or. 1993) (en banc).

<sup>248</sup> See *supra* notes 222–33 and accompanying text.

<sup>249</sup> See *supra* notes 30, 222, 238 and accompanying text; *supra* note 243.

<sup>250</sup> See *supra* notes 73, 219–20, 232 and accompanying text.

## V. CONCLUSION

The Oregon PTD is more robust than generally recognized to date.<sup>251</sup> The doctrine is a background principle of state property law, reflecting the pre-statehood principle that as sovereign trustee, the state must manage public water and wildlife resources for the benefit of present and future generations.<sup>252</sup> The PTD is actually shorthand for a collection of Oregon doctrines protecting public usufructuary rights in natural resources, including public rights to navigate on public highways like beaches and waterways, public ownership of water, and sovereign ownership of wildlife.<sup>253</sup> The PTD unifies common law doctrines that recognize public rights to use trust resources, including customary rights to use Oregon beaches recognized in *Hay*.<sup>254</sup> Although the origins of Oregon's PTD lie in longstanding public ownership of waters and wildlife, and the public highways language from the Northwest Ordinance in the Statehood Act,<sup>255</sup> the PTD is quite vibrant, reflected in both historic and modern statutes, as well as modern case law concerning state ownership of wildlife and public rights to use waters and ocean beaches.<sup>256</sup>

The 2005 AG opinion recognized the long history of the Oregon PTD, but mischaracterized it as a doctrine solely related to state land ownership, when in fact public navigation rights are usufructuary in nature, arising out of public ownership of water and wildlife, as well as the public navigation easement in waters and beaches.<sup>257</sup> This confusion encouraged the AG to erect a separate "public use" doctrine that the opinion ought to have recognized as part of the PTD, stemming from public navigation rights and public water ownership.<sup>258</sup> The AG's failure to recognize the proper scope of

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<sup>251</sup> As in the 2005 AG Opinion, some scholars have examined the scope of the state PTD concerning ownership of submerged lands without discussing public rights stemming from public ownership of water, seeming to assume the basis of PTD is ownership of submerged land. See, e.g., Michael B. Huston & Beverly Jane Ard, *The Public Trust Doctrine in Oregon*, 19 ENVTL. L. 623, 625, 629 (1989); Scott B. Yates, *A Case for the Extension of the Public Trust Doctrine in Oregon*, 27 ENVTL. L. 663, 667 (1997). Another commentator assumed that the PTD has protected public recreational uses only since 1978. See Danielle Spiegel, *Can the Public Trust Doctrine Save Western Groundwater?*, 18 N.Y.U. ENVTL. L.J. 412, 442–43 (2010). But see *supra* notes 59–60, 93–120 (discussing the Oregon Supreme Court's recognition of public recreational rights within the scope of the navigation easement in the 1918 *Guilliams* decision and the 1936 *Luscher* decision).

<sup>252</sup> See Sax, *supra* note 5, at 482 (commenting that "it hardly seems sensible to ask for a freezing of any future specific configuration of policy judgments, for that result would seriously hamper the government's attempts to cope with the problems caused by changes in the needs and desires of the citizenry").

<sup>253</sup> See *supra* notes 128–32 and accompanying text; see also Wood, *supra* note 182, at 612 (describing state trust obligations and the remedies available to the public when the state fails to fulfill its duties).

<sup>254</sup> *Hay*, 62 P.2d 671, 676–77 (Or. 1969) (describing how "the dry-sand area along the Pacific shore . . . has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited").

<sup>255</sup> See, e.g., *supra* notes 30, 66, 84, 124–25, 136, 185 and accompanying text.

<sup>256</sup> See *supra* Parts III, IV.

<sup>257</sup> See, e.g., *supra* notes 30, 66, 84, 124–25, 136, 185 and accompanying text.

<sup>258</sup> See *supra* notes 38–49 and accompanying text.

the PTD is no mere conceptual difference between public proprietary ownership and public use rights: the interpretation was grounded on a confusion of proprietary ownership with sovereign ownership.<sup>259</sup> In the recent *Simpson* decision, the Oregon Court of Appeals accurately distinguished sovereign ownership obligations from state proprietary rights, explaining that these sovereign duties have always burdened proprietary rights.<sup>260</sup>

The misguided proprietary ownership model of the PTD in the 2005 AG Opinion also obscures the central role of the PTD concerning public ownership of water and wildlife and public access to ocean beaches. As sovereign trustee, the state has owned water and wildlife in trust for the public since statehood.<sup>261</sup> Sovereign ownership means that the state not only has police power authority to protect and allocate these resources, but has a duty to preserve them for present and future generations—as well as the ability to seek damages for private misuse.<sup>262</sup> Although both water and wildlife are the subject of considerable statutory attention,<sup>263</sup> judicial interpretation of how the state implements these statutes should reflect the fact that sovereign ownership of trust resources preceded the statutes and exists independently of them.<sup>264</sup>

Sovereign ownership and the public navigation easement also justify Oregon's customary rights approach to providing public rights to use all

<sup>259</sup> See *supra* notes 39–45, 190, *infra* notes 260–65 and accompanying text.

<sup>260</sup> See *Simpson*, 255 P.3d 565, 571 (Or. Ct. App. 2011) (“The view that property rights in wild animals lie in the sovereign was adopted in America, including by the Oregon Supreme Court.” (citing *State v. Hume*, 95 P. 808, 810 (Or. 1908))); see also *State v. McGuire*, 33 P. 666, 669 (Or. 1893) (affirming the state's sovereign power to regulate wildlife harvests); *State v. Schuman*, 58 P. 661, 663 (Or. 1899); *State v. Fisher*, 98 P. 713, 715 (Or. 1908); *State v. Pulos*, 129 P. 128, 130 (Or. 1913) (upholding the defendant's conviction for possessing a wild duck out of season because the statute did not except ducks captured during open season, and explaining that “title to wild game is in the state, and . . . the taking of them is not a right, but is a privilege, which may be restricted, prohibited, or conditioned, as the lawmaking power may see fit”).

<sup>261</sup> See *supra* notes 136, 140–145 and accompanying text (water); *supra* notes 182–191 and accompanying text (wildlife).

<sup>262</sup> See Blumm & Ritchie, *supra* note 178, at 708; Wood, *supra* note 182, at 612.

<sup>263</sup> See, e.g., Act of Feb. 24, 1909, ch. 221, 1909 Or. Laws 370, 370 (codified as amended at OR. REV. STAT. §§ 536–558 (2011)) (“All water within the State from all sources of water supply belong to the public.”); OR. REV. STAT. § 537.110 (2011); OR. REV. STAT. § 498.002(1) (2011) (“Wildlife is the property of the state. No person shall angle for, take, hunt, trap or possess, or assist another in angling for, taking, hunting, trapping or possessing any wildlife in violation of the wildlife laws or of any rule promulgated pursuant thereto.”).

<sup>264</sup> See *Simpson*, 255 P.3d at 571 (“It is a generally recognized principle that migratory fish in the navigable waters of a state, like game within its borders, are classed as animals *ferae naturae*, the title to which, so far as that claim is capable of being asserted before possession is obtained, is held by the state, in its sovereign capacity in trust for all its citizens.” (quoting *State v. Hume*, 95 P. 808, 810 (Or. 1908)); *Ctr. for Biodiversity, Inc. v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588, 597 (Cal. Ct. App. 2008) (“The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good.” (quoting *Ex parte Maier*, 37 P. 402, 404 (Cal. 1894)); see also *supra* notes 209–14 and accompanying text (discussing *Ctr. for Biological Diversity*).

ocean beaches.<sup>265</sup> The Oregon Supreme Court has declared that customary beach access rights are “background principles” of state law,<sup>266</sup> insulating the exercise of those rights from private claims landowners for constitutional compensation,<sup>267</sup> because those rights have existed since at least statehood.<sup>268</sup> Indeed, so have public rights to navigate and fish based on state ownership of water and wildlife.<sup>269</sup> Thus, no less than customary public rights to access ocean beaches, public navigation, and wildlife harvest rights are background principles of state property law. Linking public rights in water, wildlife, and beaches under the PTD will help state courts resolve some outstanding issues, like whether and to what extent private uplands may be subject to a public easement when necessary to enable public access to trust waters.

The Oregon PTD has been underappreciated. The 2005 AG Opinion mistakenly connected the PTD with bed land ownership, instead of grounding its origins in public navigation rights and public water ownership. Recognizing its usufructuary nature would correct the narrow interpretation given to the doctrine in the 2005 AG opinion. Understanding the distinction between the sovereign ownership of the PTD and ordinary proprietary ownership should allow courts and the AG to see that the PTD unifies public ownership of water and wildlife and customary rights to ocean beaches. Unifying public trust and sovereign ownership doctrines would make clear that the state holds natural resources like water, wildlife, and beaches in trust for all its citizens, and that trust burdens the state with protective duties as well as allocation authority. The PTD, a collection of constitutional, statutory, and common law principles providing public use rights in waters, beaches, and wildlife since statehood in 1859, offers Oregon an important vehicle for sustainably managing state-owned resources in the twenty-first century.

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<sup>265</sup> See *supra* notes 218–41 and accompanying text.

<sup>266</sup> *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (en banc), *cert. denied*, 510 U.S. 1207 (1994) (“Applying the *Lucas* analysis to this case, we conclude that the common-law doctrine of custom . . . ‘inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already placed upon land ownership.’” (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (2003))).

<sup>267</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (2003) (explaining that the state can regulate property consistent with background principles of nuisance and property law without owing constitutional compensation).

<sup>268</sup> *Hay*, 462 P.2d 671, 673 (Or. 1969) (observing that public rights to use Oregon beaches have burdened sovereign and private title since “the beginning of the state’s political history”).

<sup>269</sup> See *supra* notes 136, 140–43 (discussing public ownership of water), 182–91 (discussing public ownership of wildlife) and accompanying text.