

Submitter: Justin Kidd
On Behalf Of: Self
Committee: Senate Committee On Judiciary
Measure: SB1576

This committee should advance the bill and this committee should further expand the bill to include the terms "Swimming, surfing, wading, and similar activities". Further the legislature should clarify that recreational immunity extends to the ocean shore and the ocean, even given the background of the public trust doctrine.

I urge the committee to take this position based on experience I had as an Assistant Attorney General, though I am testifying in my own personal capacity and I no longer work as an AAG. About ten years ago, I defended the Oregon State Parks system against a case in Tillamook County. There, at Cape Kiwanda, a surfer decided to surf where the dory boats generally entered the ocean. There was a collision, and regrettably, the surfer lost an arm. The surfer sued the state for inadequate warnings because he said he did not know it was a bad idea to go surfing where motor boats also enter and exit the ocean. The state asserted recreational immunity, and that matter went up to the Court of Appeals.

The case is *Ortega v State*. <https://caselaw.findlaw.com/court/or-court-of-appeals/1946191.html> The court of appeals held that recreational immunity does not apply to the ocean shore because the public has an inherent right to be on the shore under the public trust doctrine. Because the public already had the right to be there, the state is not "permitting" people to be there, so there is no quid-pro-quo for recreational immunity. Accordingly, the court of appeals reasoned that the legislature really did not intend the state to have recreational immunity at the sea shore.

The case went back to the trial court level, and the state had to pay a multi-million dollar verdict. Incidentally, the tillamook jury found that the dory boat driver was not liable for running over the surfer, so the state ended up paying all the damages, even though its involvement in the case was only because the state is the titular landowner to the sea bed.

I think the Court of Appeals got this one wrong. It would be a weird choice indeed for the legislature to give immunity to all landowners for recreation, except for recreation where most people recreate -- the sea shore! But that was their conclusion. This legislature should correct this oversight by specifically stating that recreational immunity applies even at the sea shore. And it applies while people are swimming, wading, surfing and engaging in similar activities.