



April 3, 2025

Senator Jeff Golden, Chair
Senator Todd Nash, Vice-Chair
Senate Committee on Natural Resources and Wildfire

Re: **Trout Unlimited Supports Improvements to Navigability Determination Process
(Senate Bill 74 with “-3”)**

Dear Chair Golden, Vice-Chair Nash, and Members of the Committee,

Trout Unlimited (TU) is a non-profit dedicated to the conservation of cold-water fish (such as trout, salmon, and steelhead) and their habitats. Our organization has more than 350,000 members and supporters nationwide, including many members in Oregon.

Trout Unlimited supports Senate Bill 74 and the “-3” amendment because our mission is to ensure that future generations can experience the joy of trout and salmon. A key element of that enjoyment is access to rivers and their fisheries.

TU submitted written comments after the Committee’s first public hearing on this bill, in effort to answer some of the legal questions raised by Committee members.¹ That letter includes an Attorney General Opinion from 2005 that provides all relevant background on the law about navigability determinations in Oregon.

We’re providing further testimony on this bill for three reasons, and would refer the Committee to a slide deck that TU uploaded to OLIS to accompany this input:²

- 1. TU seeks to clarify for interested parties exactly what “navigability” is about in the context of SB 74, and what it is not about. Navigability is about State ownership of real property underlying title-navigable waterways.**

If a waterway is title-navigable (meaning it was used or susceptible of use in commerce at statehood), then the State has owned the submerged lands since statehood, with few exceptions. Declaring navigability is a matter of asserting the State’s ownership of the submerged lands.

Navigability is not about water rights. It is not about the Waters of the US Rule (which relates to determining which areas are subject to federal water quality jurisdiction under the Clean Water Act). And it is not about “taking” private property without just compensation, as further demonstrated in the scenarios and examples below.

- 2. Navigability is one of the few areas of law where diagrams and drawings are extraordinarily helpful to understanding the concepts. TU refers the Committee to our slides in OLIS because we have diagrams to accompany a few examples.**

There are 3 main scenarios of waterway channel movement, and they have different results for property ownership under the law. Assume for each of these that the waterway in question meets the controlling test of navigability:

¹ Available at: <https://olis.oregonlegislature.gov/liz/2025R1/Downloads/PublicTestimonyDocument/152925>

² Available at: <https://olis.oregonlegislature.gov/liz/2025R1/Downloads/PublicTestimonyDocument/187809>

In scenario 1, where a stream channel has not moved between statehood and today, a navigability determination regards submerged areas only, with the result that the area below the ordinary high water mark (OHWM) has been owned by the State since 1859.

In scenario 2, where a channel moved slowly (called accretion), the area of state ownership shifts with the submerged area over time. Like scenario 1, the result is that the navigability determination regards only the areas that are currently submerged. The location of the channel at statehood is not state-owned. Instead, the area below the ordinary high water mark today is state-owned.

Scenario 3 is the most complicated example, where a channel moved quickly (called avulsion). In that instance, the area of state ownership remains in the location prior to the avulsive event. For example, imagine that a river channel was located in one area between statehood and 1940, and in 1940, engineers moved the channel several hundred yards eastward. The result is that the state owns the original channel location today, even though it may be built over with homes, roads, or agricultural fields. Moreover, in this scenario, the state does not own the land underlying the existing channel. In this case, an exchange of deeds by affected property owners and the state establishes unequivocally that private landowners own the former channel location, which no longer has a waterway on it. This process can address questions of title by confirming that the state does not own uplands now covered with farms, roads, and houses – but instead, only owns the current channel location.

3. We understand that there is a forthcoming amendment—after the “-4”—which would revise Section 2(2) of the bill to clarify when the new process of SB 74 would apply. TU notes for the record that the intent of that amendment is to leave all other DSL options for determining navigability on the table.

DSL has posted proposed language on a forthcoming amendment to OLIS.³ We expect the Committee to consider similar text in next week’s work session. The forthcoming amendment is intended to clarify that the new SB 74 process is only an option where DSL and affected landowners agree to pursue it. Generally speaking, that is acceptable to Trout Unlimited.

However, we wish to flag that the language provided thus far—which refers only to “common law principles”—could be more clear that DSL retains its other options (including statutory processes) to pursue a navigability determination if DSL and landowners cannot agree to pursue the SB 74 process. We have discussed this with DSL. The Department has assured us that the purpose of the new sentence at the end of Section 2(2)⁴ is to allow DSL to exercise its other navigability determination processes and options under the law if DSL and landowners cannot agree to pursue the new SB 74 process. TU simply wishes to make that clear for the record.

Thank you for this opportunity to provide comments on this bill, and please let me know if you have any questions.

Sincerely,

James Fraser
Oregon Policy Advisor
Trout Unlimited
james.fraser@tu.org

³ Available at: <https://olis.oregonlegislature.gov/liz/2025R1/Downloads/PublicTestimonyDocument/190673>

⁴ Proposed text for Section 2, subsection (2) is as follows, with additions in forthcoming amendment underlined: “Notwithstanding common law principles of accretion and avulsion, if an agreement with the immediately impacted landowner is reached, as provided in subsection (4), then the Department of State Lands may include in a report under ORS 274.404 a finding that the state’s interest in a waterway should extend to the current submerged and submersible lands within the waterway. If an agreement with the immediately impacted landowner is not reached, then the Department shall follow the common law principles of accretion and avulsion in determining state ownership.”