



## DEPARTMENT OF JUSTICE

April 21, 2005

**No. 8281**

### QUESTIONS PRESENTED

The State Land Board (Board) has asked three questions about the ownership and use of waterways in this state.

Upon becoming a state, the State of Oregon acquired ownership (or “title”) of all waterways within its boundaries that satisfy certain criteria. The Board first asks us to describe the criteria that determine state ownership and advise whether there are limitations on the state’s authority to dispose of, or constrain the public rights to use, waterways acquired at statehood.

Second, the Board asks us to advise whether the public has any right to use a waterway if its bed is privately owned and, if so, to describe the extent of that right and the types of waterways for which the right exists.

Finally, under current state law, the means to determine whether a particular waterway is state-owned are limited. The Board asks us what activities by members of the public are lawful in the absence of a determination concerning ownership.

### ANSWERS GIVEN

1. The United States Supreme Court’s articulation of the criteria for determining state ownership of waterways has been clarified over time. At statehood, the state acquired (with few exceptions) all waterways that were tidally-influenced or that satisfied the federal test of title-navigability. Federal and state law limit the discretion of the state to alienate its ownership, to the extent that doing so would interfere with the public use of the waterway for navigation, commerce, recreation or fisheries.

2. Even if the bed of a waterway is privately owned, the waterway may be used by the public for certain purposes if it meets the state test of navigable-for-public-use (the “public use doctrine.”) A waterway is navigable-for-public-use if it has the capacity, in terms of length,

width and depth, to enable boats to make successful progress through its waters. If a privately owned waterway meets this test, the lawful public uses generally include navigation, commerce or recreation. Recreation in this case includes use of small boats for pleasure and fishing, as well as swimming. The public may use the land adjacent to a waterway that is navigable-for-public-use as long as the use of the adjacent land is “necessary” to the lawful use of the waterway.

3. Generally speaking, the public may use state-owned waterways for any use not otherwise unlawful. However, unless state ownership has been confirmed by a judicial decree or the Board under ORS 274.400 *et seq.*, persons who use a waterway believing it to be state-owned incur the risk that it will be held to be privately owned and that their use will constitute a trespass – unless their use is authorized by the public use doctrine.<sup>1/</sup>

## DISCUSSION

### I. Introduction

The following definitions are used for purposes of this opinion.

“Waterway” means a body or course of water as well as the land underneath the water. A waterway may be tidal or non-tidal in nature, and includes rivers, streams and lakes.

“Bed” means the land underlying a waterway that is below ordinary high water.

“Tidal waters” or “tidally-influenced waters” mean waters that were subject to the ebb and flow of the tide in their natural state at the time of statehood.

“Navigable-for-title” or “title-navigable” means that ownership of the waterway, including its bed, was passed from the federal government to the state at statehood. If a waterway is navigable-for-title, then it also is generally open to public use for navigation, commerce, recreation, and fisheries.

“Navigable-in-fact” or “navigable-for-public-use” means that the waterway is open to public use under Oregon law, even if the bed is privately-owned.

“Bank” means the land above ordinary high water bordering a waterway. Such lands are also described as “fast lands” or “uplands” in some contexts.

“Public rights to use” means the public’s use of a waterway for navigation, commerce, recreation or fisheries. We do not address rights to use waterways that may arise from federal laws (except as expressly discussed below) including the federal navigational servitude or rights that were reserved by the federal government prior to statehood. Public rights to use a waterway may arise either from state ownership or from the public use doctrine.

### II. State Ownership and the Public Rights Associated with State Ownership

Today, Oregon statutes acknowledge that the state continues to own all waterways that it received in 1859 by virtue of its sovereignty as a state. ORS 274.005(7) and (8); ORS 274.025.

The legal tests for determining what waterways the state owns by virtue of its statehood is established by federal law. As a fundamental aspect of sovereignty, at statehood Oregon acquired (with few exceptions) title to all waterways or portions of waterways that were tidally-influenced or that were non-tidal but that satisfied the federal test of title-navigability. A non-tidal waterway is title-navigable under the federal test if, at the time of statehood, it was used or was susceptible of use, in its ordinary condition, as a highway of commerce over which trade and travel was or could have been conducted in the customary modes of trade and travel on water.

Waterways owned by the state generally are open for all lawful uses by the public. Furthermore, as a condition of federal law, the state has a duty to keep those waterways open to the public for navigation, commerce, recreation and fisheries. Thus, for example, there are limitations on the extent to which the state may block (or allow another person to block) all passage by the public along a state-owned waterway on a permanent basis. If state ownership of a specific waterway or portion of a waterway has been confirmed by a court or by the Board through a statutorily-established study process, the Board may expressly authorize a variety of private and public uses of the waterway.

In section A below, we discuss the historic roots of state ownership of waterways, and trace the development of the federal test for state ownership. This history is important for two reasons. First, it helps explain the federal tests for state ownership. Second, it provides context for understanding the origin of the public use doctrine, which applies to certain waterways that are not state-owned (this doctrine is described in Part III of this opinion). In section B we describe the current federal tests for state ownership.

## **A. The Historical Development of the Federal Test for State Ownership**

### **1. State Ownership of Tidal Waterways**

Before achieving independence, the colonies were governed by the common law of England. By royal charter, the Duke of York was granted both propriety and dominion of the water of, and soils underlying, “navigable” waterways in the 13 colonies. *Martin v Waddell*, 41 US 367, 412-14, and 418, 10 L Ed 997, 16 Peters 367 (1842); *see also Shively v. Bowlby*, 152 US 1, 11 and 14, 14 S Ct 548, 38 L Ed 331 (1894). The duke held the proprietary interest – the *jus privatum* – as a fee simple title, but held dominion over the resource – the *jus publicum* – as a trustee for the benefit of the people. *Shively*, 152 US at 11; *Martin*, 41 US at 412-14, and 418. The primary common use of such waterways was “for highways of navigation and commerce.” *Shively*, 152 US at 11.

Until 1842, the United States Supreme Court had no occasion to address state ownership of waterways. That year, in resolving a dispute over the oyster fishery in the tidal rivers and bays of East New Jersey, the Court held that the people of the original 13 states received the absolute right to the “navigable” waterways within their borders for their own common use, subject only to the rights surrendered by the Constitution to the federal government. *Martin*, 41 US at 410. The Court based its decision on an analysis of the English common law regarding waterways and the Duke of York’s royal charter. *Id.* at 410-413. Notably, the court did not define or provide a test for the term “navigable,” and it held that the states received both the water and the land underlying the water.

Three years later, the Court extended the holding of *Martin* to all of the states. The Court determined that when the State of Alabama was admitted into the Union, it acquired title to the tidally-influenced waterways within its borders. *Pollard's Lessee v. Hagan*, 44 US 212, 230, 11 L Ed 565, 3 How 212 (1845). The Court held that all new states enter the Union on an equal basis with the original 13 states, meaning that a new state has the same “rights, sovereignty, and jurisdiction” over “[t]he shores of navigable waters, and the soils under them,” as well as the navigable waters themselves resting within its borders. *Id.* at 239-30. *Martin* and *Pollard's Lessee* establish that the states own waterways subject to the ebb and flow of the tide.<sup>2/</sup> These early cases remain good law. *Montana v. United States*, 450 US 544, 551-52, 101 S Ct 1245, 67 L Ed2d 493, *rehearing denied*, 452 US 911, 101 S Ct 3042, 69 L Ed2d 414 (1981). However, the early cases did not address whether the states owned other waterways, beyond tidal waters.

## 2. The Initial Treatment of Non-Tidal Waterways

Under English common law, which served as the initial basis for state ownership in the early U.S. Supreme Court cases discussed above, the sovereign's ownership of “navigable” waterways was limited to waters influenced by the ebb and flow of the tide. In a series of cases after *Pollard's Lessee*, however, the Court was called upon to determine the meaning of “navigable” for purposes other than state ownership and whether that meaning was limited to tidal waters.

The Court first addressed non-tidal waterways in a case concerning the geographic reach of federal admiralty jurisdiction. In *The Propeller Genesee Chief v. Fitzhugh et al.*, 53 US 443, 455-56, 13 L Ed 1058, 12 How 443 (1852), the Court had to decide whether federal admiralty jurisdiction extended to a non-tidal waterway (Lake Ontario). The Court rejected the English common law rule as wholly inadequate for the United States:

It is evident that a definition [of admiralty jurisdiction] that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade.

*Id.* at 457.

In 1869, the United States Supreme Court construed the term “navigable” as used in a federal statute that authorized the sale of federal lands in the territories and provided for a different boundary to the lands conveyed, depending on whether the land abutted a navigable or non-navigable waterway. *Railroad Company v. Schurmeir*, 74 US 272, 285-89, 19 L Ed 74, 7 Wall 272 (1869); *see also Shively v. Bowlby*, 152 US at 47 (summarizing the rule of *Schurmeir*). The Court again rejected the term's common law meaning in favor of a more expansive meaning. It stated:

Rivers were not regarded as navigable in the common law sense, unless the waters were affected by the ebb and flow of the tide, but it is quite clear that Congress did not employ the words navigable, and not navigable, in that sense, as usually

understood in legal decisions. On the contrary, it is obvious that the words were employed without respect to the ebb and flow of the tide, as they were applied to territory situated far above tide-waters, and in which there were no salt-water streams.

*Id.* at 288. The court went on to hold that “title to lands bordering on navigable streams should stop at the stream \* \* \* [and] all such streams should be deemed to be, and remain public highways.” *Id.* at 289.<sup>3/</sup>

In 1870, the Court decided *The Daniel Ball*, 77 US 557, 19 L Ed 999, 10 Wall 557 (1870). The dispute concerned whether a steamboat carrying goods and passengers on the Grand River between two Michigan cities was subject to inspection and licensure as required by federal statutes governing “the bays, lakes, rivers, or other navigable waters of the United States” and enacted under Congress’ Commerce Clause authority. 77 US at 557. One question was whether the Grand River was a “navigable water of the United States.” *Id.*

In concluding that the Grand River was “navigable,” the Court expanded on its earlier opinion in *The Propeller Genesee Chief*, flatly declaring that “[t]he doctrine of the common law [of England] as to the navigability of waters has no application in this country.” *Id.* at 563. Instead, a waterway’s “navigability” was to be determined by its “navigable capacity”:

[R]ivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

*Id.* Although the Court was construing “navigable” as used in a federal statute, this statement has become the source of the modern-day test of title-navigability. See *Utah v. United States*, 403 US 9, 10, 91 S Ct 1775, 29 L Ed2d 279 (1971). The Court went on to say that waterways are “navigable waters of the United States” (for purposes of determining the extent of the federal government’s regulatory authority) if “they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.” *Id.*, at 563.<sup>4/</sup>

The Court applied the test established in *The Daniel Ball* in determining the applicability of federal regulatory statutes to the steamship *Montello*, which transported cargo and passengers on the Fox River in Wisconsin. *The Montello*, 87 US 430, 22 L Ed 391, 20 Wall 430 (1874) (*The Montello II*). In concluding that the river was title-navigable, the Court elaborated on the first part of the test, *i.e.*, whether a river is “susceptible of being used, in [its] ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”

First, the Court noted that, while vast improvements had been made to the Fox River to enable the use of sizeable steamships, the river had been used as an avenue for exploration and commerce dating back to at least the late 1600s, with some of that use being made with Durham

boats moved by “animal power.” *The Montello II*, 87 US at 440-441. The Court said that whether the river could be navigated by steam vessels was not the relevant question to determining title-navigability. Instead, the pertinent question was whether the river was “capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, [If it is,] it is navigable in fact, and becomes in law a public river or highway.” *Id.* at 441-442. However, the Court also made clear that susceptibility of navigation, by itself, was not sufficient. The waterway “must be generally and commonly useful to some purpose of trade or agriculture,” thereby excluding the possibility of “every small creek in which a fishing skiff or gunning canoe can be made to float at high water” being deemed navigable. *Id.* at 442.

Second, the Court stated that limitations on the types of vessels that may use a waterway, and obstructions that may make passage difficult, do not necessarily foreclose a finding of title-navigability. The court emphasized that “[v]essels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river.” *Id.* at 442. Even serious obstructions do not necessarily preclude a waterway from being title-navigable. *Id.* at 442. An obstruction preventing “the use of the best instrumentalities for carrying on commerce” will not render a waterway non-navigable. *Id.* at 443. “[T]he vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce,” and a waterway may be title-navigable even though “its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand-bars.”<sup>5/</sup> *Id.*

### 3. State Ownership of Certain Non-Tidal Waterways Confirmed

In 1877, the Court addressed and confirmed state ownership of a non-tidal waterway. The decision involved a dispute about the rights of a riparian land owner and those of the city of Keokuk, Iowa in land adjoining the Mississippi River. *Barney v. Keokuk*, 94 US 324, 24 L Ed 224, 4 Otto 324 (1876). In upholding the city’s right to make improvements to the land in question, the Court confirmed that the “proprietaryship of the beds and shores” of certain non-tidal waters “belongs to the States by their inherent sovereignty,” declaring that “the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience.” *Id.* at 338.

In 1892, the Court reaffirmed state ownership of certain non-tidal waterways in deciding a dispute between the State of Illinois and the Illinois Central Railroad concerning the latter’s wharves, which conflicted with public use of much of the Lake Michigan waterfront in Chicago. *Illinois Central Railroad v. Illinois*, 146 US 387, 435-37, 465, 474, 13 S Ct 110, 36 L Ed 1018 (1892); *Shively*, 152 US at 47. The Court stated:

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so

far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee v. Hagan*, 3 How. 212; *Weber v. Harbor Commissioners*, 18 Wall. 57.

The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas \* \* \* and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes.

\* \* \* \* \*

The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

*Id.*, at 436-437.

#### **4. Twentieth Century Cases Adhere to the Test of Title-Navigability Stated in *The Daniel Ball* and Clarify that Federal Law Determines State Ownership at Statehood**

Between 1922 and 1935, the U.S. Supreme Court decided five cases involving the ownership of lands underlying various waterways. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 US 77, 86, 43 S Ct 60, 67 L Ed 140 (1922); *Oklahoma v. Texas*, 258 US 574, 42 S Ct 406, 66 L Ed 771, *appeal denied* 260 US 711, 43 S Ct 251, 67 L Ed 476 (1922); *United States v. Holt*, 270 US 49, 46 S Ct 197, 70 L Ed 465 (1926); *United States v. Utah*, 283 US 64, 51 S Ct 438, 75 L Ed 844 (1931); and *United States v. Oregon*, 295 US 1, 55 S Ct 610, 79 L Ed 1267 (1935). In each of the cases, the pivotal issue was whether the United States, an Indian tribe for which the federal government had reserved land prior to statehood, or the subsequently formed state, owned the bed of a particular waterway. To resolve the issue in each case, the Court had to determine whether the waterway was title-navigable. As the Court explained in *United States v. Utah*:

The controversy is with respect to certain facts, and the sufficiency of the basis of fact for a finding of navigability, rather than in relation to the general principles of law that are applicable. In accordance with the constitutional principle of the equality of States, the title to the beds of rivers within Utah passed to that State

when it was admitted to the Union, if the rivers were then navigable; and, if they were not then navigable, the title to the river beds remained in the United States.

283 US at 75. The existence or the extent of state ownership in each case was determined by applying the first part of *The Daniel Ball* test to the specific facts of each case.<sup>6/</sup> Thus, in *United States v. Utah*, the Court determined that portions of the Colorado, Green and Grand rivers were title-navigable based on specific findings concerning each river's width, depth and flow, *Id.*, at 77-82, and the extent to which permanent natural features of the waterways would preclude their use for commerce absent exceptional circumstances. *Id.*, at 84.<sup>7/</sup> And, in *United States v. Holt*, the Court held that a lake was title-navigable where the evidence showed that it was three to six feet deep in its natural state, and there was evidence of actual use at statehood by small boats. 270 US at 56-58.

In contrast, in *United States v. Oregon*, the Court determined that five lakes in Oregon were not title-navigable, based on evidence and findings that boats were seldom used for anything other than trapping, and that the trappers had to pull their boats by wading because there was not a continuous channel capable of navigation. 295 US, at 15-24.<sup>8/</sup> And, in *Oklahoma v. Texas*, the Court determined that the Red River in Oklahoma was not title-navigable based on evidence that small boats could use long stretches of the river only with great effort and difficulty. 258 US at 586-592.

These five cases demonstrate that by 1935 *The Daniel Ball* test of title-navigability was firmly established and that states acquired ownership not only of tidal waters and the "great" lakes and rivers, but of all waterways susceptible of use for navigation and commerce in their ordinary natural condition. See also *Utah v. United States*, 403 US 9, 91 S Ct 1775, 29 L Ed2d 279 (1971).

Several of these cases also clarify that, for purposes of determining state ownership of the soil underlying a waterway at statehood, navigability is determined under *federal* not state law. In *United States v. Oregon*, the Court explained:

Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty \* \* \*. Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal, not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts, even though, as in the present case, the waters are not capable of use for navigation in interstate or foreign commerce.

*U.S. v. Oregon*, 295 US at 14 (citations omitted).



Two recent decisions by the U.S. Ninth Circuit Court of Appeals further illustrate how the federal test for title-navigability is applied. Although these decisions are not binding precedent for Oregon courts, they are strong indications of how the courts are likely to apply the federal test today. In the first decision, *State of Oregon v. Riverfront Protection Association*, 672 F2d 792 (1982), the Court of Appeals held that mile 0 to 37 of Oregon's McKenzie River was title-navigable. Notably, the court did not look only at evidence of the extent to which the river was susceptible of use by boats. Instead, to determine the river's potential use for commerce, the court considered evidence of the transporting of logs on the river. The court found that:

[O]n the McKenzie it took substantial logging crews an average of from thirty to fifty days to complete a log drive down the 32-mile reach at issue. Unfavorable circumstances could increase this time to over ninety days. Intractable logjams had to be broken up with dynamite. Too much rain caused uncontrollable flooding; too little exposed gravel bars, boulders, and shoals. Crews might spend three or four days moving logs across a single gravel bar. But notwithstanding such difficulties, thousands of logs and millions of board feet of timber were driven down the river.

*Riverfront*, 672 F2d at 795. In addition, the court stated that "use of the river need not be without difficulty, extensive, or long and continuous." *Id.*; see also *Puget Sound Power and Light Co. v. FERC*, 644 F2d 785, 788-89 (9<sup>th</sup> Cir), *cert den* 454 US 1053, 102 S Ct 596, 70 L Ed2d 588 (1981) (the need for constant tending to ensure that logs will float does not mean the river is not navigable). The court further held that the seasonal nature of the log drives on the McKenzie did not destroy its navigability. *Riverfront*, 672 F2d at 795. Even though the record showed that use of the river for commerce was difficult and limited to certain seasons, the court held that the McKenzie was title-navigable. *Id.*

In *State of Alaska v. Ahtna, Inc.*, 891 F2d 1401 (9<sup>th</sup> Cir. 1989), *cert den* 495 US 919, 109 L Ed2d 312, 110 S Ct 1949 (1990), the Court of Appeals held that the lower Gulkana river in Alaska was title-navigable. The river is "normally a foot and a half deep, diminishing to a foot during low-flow season [at its shallowest point]. On average however, the River \* \* \* is 125-150 feet wide and 3 feet deep." *Id.* at 1402. The parties agreed that the river was used, or was susceptible to use, by aluminum or fiberglass powerboats, inflatable rafts, motorized freight canoes, and double-ended paddle canoes, and that in the years immediately prior to statehood (from the 1940s to 1959) hunters and fishermen traveled the river in aluminum and fiberglass watercraft with a load capacity of approximately 1,000 lbs. *Id.* at 1402-03. Since the 1970s, the recreation industry offered guided fishing and sightseeing river trips in 20 to 24-foot long aluminum powerboats and 12 to 15.5-foot long inflatable rafts, which usually carry five passengers and one guide, providing for loads often in excess of 1,000 lbs. *Id.* at 1403. The average fare is \$150. *Id.* The industry employs 400 people. *Id.*

The court concluded that the river's present use was commercial and provided "conclusive evidence" of its susceptibility for commercial use at statehood, given that the river's characteristics remained unchanged since statehood and the watercraft customary at statehood could, with minor modifications, have supported the type of commercial activity carried on today. *Id.* at 1405.

In summary, a waterway in Oregon is title-navigable under federal law if it was used or was susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel was or may have been conducted in the customary modes of trade and travel on water at statehood. *The Daniel Ball*, 77 US at 563; *Utah v. United States*, 403 US at 10. That a waterway must have been navigable in its natural and ordinary condition means that, at the time of statehood, the river must have been susceptible of being used as a highway for commerce. *Ahtna*, 891 F2d at 1404. Navigability does not depend on the particular mode of commerce or the type of vessels that is used or that could be used, or on actual use. *United States v. Utah*, 283 US at 76. The use of the waterway need not be without difficulty, extensive, or long and continuous; and seasonal use of the river is sufficient to establish navigability. *Riverfront*, 672 F2d at 795. Evidence of actual use, or potential use, are both acceptable. *Utah v. United States*, 403 US at 10; *Ahtna*, 891 F2d at 1404. If navigability is based on use by boats, the waterway must have allowed a “customary” boat of 1859 to float in areas or reaches that are continuous enough to make navigation practicable. *Oregon*, 295 US at 12. For log drives, the drives may be done with difficulty but the river should lend itself to more than occasional use for that purpose. *Riverfront*, 672 F2d at 795.

## **B. The Current Federal Tests for State Ownership of Waterways**

### **1. Tidally-Influenced Waterways**

Under federal law, a waterway is “title-navigable” if it is tidally-influenced or if it is navigable-in-fact, or both. *Phillips Petroleum Co. v. Mississippi*, 484 US 469, 476, 108 S Ct 791, 98 L Ed2d 877 (1988); *United States v. Holt*, 270 US at 56; 45 Op Atty Gen 1 (1985). A waterway is tidally-influenced if it is affected by the ebb and flow of the tide. In that event, the waterway is state-owned even if it is not used or not susceptible of use for commerce. *Phillips*, 484 US at 478-81.

### **2. Non-Tidal Waterways**

The cases discussed above reflect that in order for a waterway to be title-navigable under federal law, at the time of statehood the waterway must:

- (a) have been used or have been susceptible of use;
- (b) in its natural and ordinary condition;
- (c) for trade and travel;
- (d) by a mode of transportation that was customary in 1859;
- (e) as a highway of commerce.

To assist the Board in understanding the likely extent of state ownership of waterways, we illustrate how each of these factors is applied to specific fact situations in the following subsections.

**a. Actual Use or Susceptibility of Use**

Actual use of a waterway prior to, at, or following statehood is relevant to a determination of title-navigability.<sup>9/</sup> However, evidence of actual use is not necessary in order for a court to find that a waterway is title-navigable.

The extent of existing commerce is not the test. The evidence of actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved.

*United States v. Utah*, 283 US at 82. The fact that actual use is or was lacking may be explained by current or historical limitations on the number of people in the area or by the remoteness of the area and the difficulty of reaching it. *U.S. v. Holt State Bank*, 270 US 49, 56-57, 46 S Ct 107, 70 L Ed 465 (1926) (actual use of a lake was limited, but this was because trade and travel in that vicinity were limited).

In addition, where actual use is the basis for an assertion of title-navigability, its *extent* or *amount* may be limited. In *Utah v. United States*, the Court rejected the contention that use by only a small number of small boats to shuttle supplies to a few ranching operations on a few islands in the Great Salt Lake was too limited to constitute “commerce” under the federal test:

It is suggested that the carriage was also limited in the sense of serving only the few people who performed ranching operations along the shores of the lake. But that again does not detract from the basic finding that the lake served as a highway and it is that feature that distinguishes between navigability and non-navigability.

*Utah v. United States*, 403 US at 11-12.

**b. Natural and Ordinary Condition at the Time of Statehood**

Where the use of a waterway for commerce is made effectively impossible as a result of natural and ordinary conditions of flow or depth of water, those conditions will preclude a determination of title-navigability under federal law. For example, in *United States v. Rio Grande Dam & Irrigation Co.*, 174 US 690, 19 S Ct 770, 43 L Ed 1136 (1898),<sup>10/</sup> the Court described the portion of the Rio Grande River in the State of New Mexico as having an ordinary flow of water that was insufficient, because it allowed use for transportation “only in times of temporary high water.” *Id.*, at 669.

Another fact situation illustrating how the U.S. Supreme Court has applied the test for ordinary condition and natural obstacles is *Oklahoma v. Texas*, 258 US 574; 42 S Ct 406; 66 L Ed 771 (1921) involving the Red River. The Court found the western half of the river clearly non-navigable for title based on the following:

[T]he river in the western half of the State does not have a continuous or dependable volume of water. It has a fall of three feet or more per mile and for long intervals the greater part of its extensive bed is dry sand interspersed with irregular ribbons of shallow water and occasional deeper pools. Only for short intervals, when the rainfall is running off, are the volume and depth of the water such that even very small boats could be operated therein. During these rises the water is swift and turbulent and in rare instances overflows the adjacent land. The rises usually last from one to seven days and in the aggregate seldom cover as much as forty days in a year.

*Id.*, at 587. Based on these facts, the Court “regard[ed] it as obvious that in the western half of the State the river is not susceptible of being used in its natural and ordinary condition as a highway for commerce.” *Id.* at 588. As for the eastern half of the Red River, the Court found that for several years light craft carried merchandise on the river, but only in periods of high water, and then with difficulty. Congress had appropriated funds for the improvement of the river, but the project was abandoned because “the characteristics of the river rendered it impracticable to secure a useful channel except by canalization, the cost of which would be prohibitive \* \* \*.” *Id.*, at 590. The Court concluded that “[i]ts characteristics are such that its use for transportation has been and must be exceptional, and confined to irregular and short periods of temporary high water. A greater capacity for practical and beneficial use in commerce is essential to establish navigability.” *Id.*, at 591.

It is useful to compare the facts in *Oklahoma v. Texas* to those in *The Montello II*. In the latter, the river presented many difficulties such as rapids and falls, which required the boats used for trade to be pushed through shallows by people wading, and (in some places) portages. Nevertheless, based on evidence of actual use, the Court held that the river was navigable (for purposes of federal authority to regulate commerce). *The Montello II*, 87 US at 443. Thus, the fact that it is necessary for people to wade, or even stand on the shore of a waterway in order for the trade and travel to occur, does not preclude a determination of title-navigability.

The foregoing cases show that a waterway must be susceptible of use in its natural and ordinary condition. This does not foreclose title-navigability where use is possible only on a seasonal basis or where floatage is occasionally interrupted because of rapids or other obstacles. Nor does the fact that artificial aids are necessary to make a waterway more useful mean that it is not title-navigable in its ordinary condition. The McKenzie River was held to be title-navigable to river mile 37 based on actual use for log drives, even though the drives were generally possible only during three months of the year and wing dams and dynamite were used to move the logs downstream. *Riverfront*, 672 F2d at 793, n 1; and 795-96.

Finally, the “natural and ordinary” condition that is relevant is the condition that existed at statehood, not the condition that exists today (although it is permissible to use evidence of current conditions as a basis for determining what conditions existed at statehood). *United States v. Holt State Bank* concerned a shallow lake that over time became overgrown with vegetation (particularly late in the growing season), and eventually was drained entirely for reclamation as farm land. The Court found that:

In its natural and ordinary condition the lake was from three to six feet deep. [At statehood,] it was an open body of clear water. \* \* \* In seasons of great drought there was difficulty in getting boats \* \* \* through the lake, but this was exceptional \* \* \*. Sand bars in some parts of the lake prevented boats from moving readily all over it, but the bars could be avoided \* \* \*. Some years after the lake was meandered, vegetation \* \* \* got a footing in the lake and gradually came to impede the movement of boats at the end of each growing season.

*U.S. v. Holt State Bank*, 270 US at 56-57. As a result, the Court held that the lake was title-navigable based on the ordinary condition of the lake at statehood.

**c. For Trade and Travel**

Title-navigability may be established by a variety of uses. Trade is not restricted to the use of boats for moving goods in commerce. Log drives are a type of trade, for example, that may be the basis for title-navigability. *United States v. Utah*, 283 US at 79 (lumber rafts); *Riverfront*, 672 F2d at 794-795 (log drives during three months of the year); *accord*, 37 Op Atty Gen 1342 (1976) (log drives). However, if log drives are to be the basis for title-navigability, the use must be substantial and not occasional or exceptional. 37 Op Atty Gen at 1355. In addition, a river's susceptibility to use by the recreation industry has been held to support a determination of navigability, *Ahtna*, 891 F2d at 1405.

**d. By a Mode of Transportation That Was Customary in 1859**

Title-navigability does not require any particular mode of transportation as long as it was "customary" in 1859. A waterway's suitability for "steamboats, sailing vessels or flatboats" would be sufficient. *Holt*, 270 US at 56. *United States v. Utah* took account of "boats of various sorts, including row-boats, flat-boats, steam-boats, motor-boats, a barge and scows, some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying and mining operations." *Id.*, 283 US at 82. Use of a waterway by Native Americans for canoe travel may also establish title-navigability. *Alaska v. United States*, 662 F Supp 455, 467 (1987) *aff'd* by *Ahtna* (1987). *See also Puget Sound Power & Light Co. v. Federal Energy Regulatory Com.*, 644 F2d 785, 788 (1981) (evidence of navigation by Native Americans in canoes is relevant to title navigability).

In addition, a court may consider evidence of *current* use as relevant to what modes of transportation were possible at statehood. *Ahtna*, 981 F2d at 1405. Current use by, for example, drift boats, rafts, canoes, or kayaks may be evidence of susceptibility of use at statehood if it is demonstrated that vessels of that era required similar depths of water, or that similar modes of transportation were customary at that time.

**e. As a Highway of Commerce**

The final characteristic of the federal test, use or susceptibility of use as "a highway of commerce," is closely related to whether the waterway is used or susceptible of being used for "trade and travel." The distinctive characteristic of this component of the test is the requirement

that a waterway “afford a channel useful for commerce.” *United States v. Utah*, 283 US at 76. If the waterway does not provide a path during at least some regular part of the year that a person may use as a practical matter for trade and travel, the waterway is not title-navigable. *United States v. Oregon*, 295 US at 23 (a relatively few acres of disconnected ponds not sufficient).

In sum, title-navigability is determined under federal law. All waterways that were tidally-influenced in their natural condition were acquired by the State of Oregon at statehood. Non-tidal waterways that were susceptible in their natural and ordinary condition of being used as a highway of commerce for trade and travel by a mode of transportation that was customary at statehood also were acquired by the state at statehood. This second test for title-navigability is satisfied if a waterway is physically capable of any one of a variety of uses, including log drives or trade and travel by small boats.

### C. The Boundary of State-Owned Waterways

Federal law establishes that the ordinary high water mark is the initial boundary line between a waterway acquired by a state at statehood and adjoining private land. *Oregon v. Corvallis Sand & Gravel*, 429 US 363, 376-77, 97 S Ct 582, 50 L Ed2d 550 (1977). State law generally governs boundary changes subsequent to statehood.. *Id.*

The ordinary high water mark as defined under federal law is the line that the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation. *Alabama v. Georgia*, 64 US 505, 16 L Ed 556, 23 How 505 (1859). The area in state ownership includes:

[A]ll of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time; and we exclude the lateral valleys which have the characteristics of relatively fast lands, and usually are covered by upland grasses and vegetation, although temporarily overflowed in exceptional instances when the river is at flood.

*Oklahoma v. Texas*, 260 US 606, 632, 43 S Ct 221, 67 L Ed 428 (1923).

ORS 274.005 defines the “ordinary high water mark” as a line on the bank or shore to which high water ordinarily rises each year and is the waterward limit of upland vegetation and soil. The Oregon courts have defined the ordinary high water mark as “the point below which the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil a character distinct from that of the banks with respect to vegetation as well as with respect to the soil itself.” *Sun Dial Ranch v. May Land Co.*, 61 Or 205, 119 P 758 (1912). There appears to be little, if any, practical difference between the state and federal definitions.

### D. State Management of State-owned Waterways

If the state acquires title to a waterway at statehood, it has the authority to manage and dispose of its title, but that authority is constrained. *Bowlby v. Shively*, 22 Or 410, 427, 30 P 154 (1892), *aff'd* 152 US 1, 14 S Ct 548, 38 L Ed 331 (1894). In *Bowlby*, the Oregon Supreme Court

held that the state had the right to dispose of tidelands along the Columbia River, “subject only to the paramount right of navigation and commerce.” *Id.* In *Lewis v. City of Portland*, 25 Or 133, 159, 35 P 256 (1893), the Oregon Supreme Court applied this principle to all title-navigable waterways. In this section, we address the two main constraints on state management of waterways acquired at statehood: the federal navigational servitude and the public trust doctrine.<sup>11/</sup>

## 1. The Federal Navigational Servitude

The navigational servitude is the interest that the United States retains when it transfers ownership of certain title-navigable waterways to a state at statehood or to another entity. *United States v. Cherokee Nation of Oklahoma*, 480 US 700, 707, 107 S Ct 1487; 94 L Ed2d 704 (1987); *see also Montana v. United States*, 450 US 544, 551, 555, 101 S Ct 1245, 67 L Ed2d 493 (1981); *Martin v. Waddell*, 41 US 367, 410 (1842). The federal navigational servitude is dominant to any other interest in a title-navigable waterway no matter how that interest is acquired. *See* 480 US at 704 n 3, and 706-07. It includes the right of the United States to use the waterway for every purpose which is in aid of navigation. 480 US at 705. As the navigational servitude is paramount to state ownership, a state may not act in a way contrary to the federal interest. A detailed discussion of the geographic extent of the navigational servitude and the scope of the retained powers is beyond the scope of this opinion,<sup>12/</sup> but as a general matter the servitude preserves the power of the federal government to promote navigation on waterways that are or may be used in commerce with other countries or between the states.

## 2. The Public Trust Doctrine

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, which derives from federal and state law and generally requires the state to protect the public’s use of these waterways for navigation, recreation, commerce and fisheries. *Shively*, 152 US at 40, 47, 56; *Corvallis & Eastern*, 61 Or 359, 369-74; 121 P 418 (1912), *Bowlby*, 22 Or at 427; *Morse v. Oregon Division of State Lands (Morse I)*, 34 Or App 853, 859-60, 581 P2d 520 (1978) *aff’d as modified* 285 Or 197, 200; 590 P2d 709 (1979) (public interest includes recreation).

Each state has the right to use or dispose of any portion of its waterways so long as it does not substantially impair the interest of the public in such waters. *Illinois Central Railroad v. Illinois*, 146 US 387, 435-37, 465, 474 (1892); *Shively*, 152 US at 47. The Oregon Supreme Court has held that the State of Oregon has the right to use or dispose of the land underlying state-owned waterways if the use or disposition will not impair or damage the public’s interest in fishing, navigation, recreation and commerce. *Lewis v. City of Portland*, 25 Or 133, 159 (1893); *see also Morse v. Oregon Division of State Lands (Morse II)*, 285 Or 197, 200-02, 590 P2d 709 (1979) (filling Coos Bay for airport extension allowed because it did not materially interfere with public use of waterway); *Corvallis & Eastern*, 61 Or at 369-74 (state may alienate rights in tidelands to private parties, but retains authority to prevent any use that will materially interfere with navigation or commerce). The state’s duty to protect the public interest in state-owned waterways is in the nature of a trust. *Lewis*, at 159. That duty also may derive from the terms of the Oregon Admissions Act. *Johnson v. Jeldness*, 85 Or 657, 661, 167 P 798 (1917).<sup>13/</sup>

Federal and state courts have protected the public interests in state-owned waterways by voiding specific conveyances or legislation that substantially impaired or damaged fishing, navigation, recreation or commerce. *See, e.g., Illinois Central Railroad v. Illinois*, 146 US 387 (state may revoke statutory conveyance of lake bed); *Cook v. Dabney*, 70 Or 529, 532-34, 139 P 721 (1914) (state conveyance of portion of bed of Willamette River used for navigation voided); *Morse I*.<sup>14/</sup>

The “bellweather” case for what has become known as the public trust doctrine is *Illinois Central Railroad*, 146 US 387. *Morse II*, 285 Or at 201; *Morse I*, 34 Or App at 860. The United States Supreme Court upheld Illinois’ legislative repeal of a statute that had purportedly granted a substantial part of the portion of the bed of Lake Michigan that could be used as a harbor for the City of Chicago to a private railroad. *Illinois Central Railroad*, 146 US at 447-52, 454, 460, 463-64; *Morse II*, 285 Or at 201 (explaining *Illinois Central Railroad*). Because of the public interest – the *jus publicum* – in the use of the waters, the Court held that the legislature did not have the power to grant a large area of the lake bed to the railroad which would have allowed the railroad to impede navigation if it so desired. *Illinois Central Railroad*, 146 US at 451, 452-53, 458, 463-64; *Morse II*, 285 Or at 201.

The most recent extensive treatment of the public trust doctrine by the Oregon Supreme Court is *Morse II*, 285 Or 197 (1979). In *Morse II*, the Court recognized the authority of the Division to permit the fill of approximately 32 acres in Coos Bay for the expansion of a public airport, although it remanded the decision for additional findings by the agency. *Morse II* indicates that the Oregon courts will allow the state to authorize non-water-related public uses of waterways where the use does not materially interfere with the public rights of navigation, recreation, commerce and fisheries. *Morse II*, at 201.<sup>15/</sup>

In sum, we believe that the public trust doctrine prevents the state from alienating or otherwise encumbering the public’s rights to use state-owned waterways so as to materially affect or impede those public rights. *See also* 25 Op Atty Gen 274 (1951) (summarizing Oregon case law describing the circumstances under which the state may alienate or encumber state-owned waterways); Letter of Advice to Janet Neuman, Assistant Director, Oregon Division of State Lands, January 24, 1990 (OP-6358) (analyzing the public rights to use a navigable lake, and the extent to which those rights could be regulated by the Division and limited by a lessee of the Division); 36 Op Atty Gen 638 (1973) (same). This does not prevent the state from regulating the public’s use of a waterway if necessary to protect navigation, commerce, recreation, or fisheries. But it probably does mean that the State of Oregon cannot grant rights to use waterways in a manner that materially interferes with the public rights. In our view and as discussed above, the Oregon appellate courts will require that the State of Oregon protect the trust uses of navigation, commerce, recreation, and fisheries, from any substantial impairment.

### **III. Public Rights Independent of State Ownership of a Waterway**

The second main source of public rights to use waterways in Oregon derives from state common law, and is independent of state ownership. It is the “floatage” or “public use” doctrine (hereinafter the “public use” doctrine.) Although no Oregon appellate court has relied on this body of law for some time, we believe it remains a valid basis for public use of certain



waterways that meet the public use test developed in a series of Oregon Supreme Court decisions.

The Oregon Supreme Court has characterized the public’s right to use waterways where the bed is privately owned as a “highway,” a “public easement,” and a “public servitude.” *Weise v. Smith*, 3 Or 445, 449-50, 8 Am Rep 621 (1869); *Shaw v. Oswego Iron Co.*, 10 Or 371, 375, 381-83, 45 Am Rep 146 (1882); *Luscher v. Reynolds*, 153 Or 625, 635, 56 P2d 1158 (1936). In a line of cases decided between 1869 and 1936,<sup>16/</sup> the court identified and developed a state common law right for the public to make certain uses of “navigable”<sup>17/</sup> waterways. Those cases address what constitutes a “navigable” waterway for purposes of public use rights, the scope of those rights, the relationship between those rights and the rights of affected riparian landowners, and the extent to which those rights carry with them a public right to use privately owned adjoining uplands. The eleven cases preceding *Guilliams v. Beaver Lake Club*, 90 Or 13, 175 P 437 (1918) are concerned almost exclusively with public rights to use waterways to float logs. The dispute in *Guilliams* required the court to consider the right of the public to use a waterway for other purposes. In doing so, the court established the test for identifying public use rights: “The test of navigability of a stream \* \* \* is the capacity to afford the length, width and depth to enable boats and vessels to make successful progress through its waters \* \* \*. *Id.* at 26.

Subsection A of this section of the opinion discusses the development of the doctrine of public use in cases preceding *Guilliams*, while subsection B discusses the application of the doctrine to other uses in *Guilliams* and *Luscher*, and the current court’s likely reliance on these precedents in deciding public use issues today. Subsection C describes the relationship between public rights and the rights of the riparian landowner. Finally, subsection D discusses the extent to which the public right to use a waterway creates a concomitant right to use the adjoining uplands.

## **A. Development of Public Use Rights in Timber Cases**

### **1. *Weise* through *Hallock* (1869 – 1900)**

In *Weise*, 3 Or 445, the Oregon Supreme Court opined that “navigable” waterways are “public highways” which every person has “an undoubted right to use \* \* \* for all legitimate purposes of trade and transportation.” *Id.* at 450. At issue in the case was whether the public had the right to float saw-logs down the Tualatin River, and to use a boom temporarily placed on private land to facilitate that use. The plaintiff owned the small island on which the defendant had placed the boom, and he alleged that the boom caused damage to his property and interfered with his use of the river. The plaintiff conceded that the portion of the Tualatin River at issue was “to some extent, or for some purposes” navigable as a factual matter. He nevertheless argued that it was not “navigable” in the legal sense because it was not tidally-influenced, and defendant therefore had no right to use it. *Id.* at 448.

The court’s analysis begins by stating that the English common law rules limiting “navigability” to tidally-influenced waterways had given way in the United States to a determination of *actual* navigability, *i.e.*, navigability-in-fact. *Id.* at 448. Thus, the court articulated the relevant question for determining public use rights:

[I]f a stream is in fact capable, in its natural condition, of being profitably used for any kind of navigation, its use is to that extent subjected to the general rules of law relating to navigation applicable to the circumstances of the case.

*Id.* at 449. The court observed that the entire stretch of the Tualatin River at issue was in fact navigable as a conveyance for saw-logs, even though at least a portion of it was not navigable for boats. *Id.* at 448. Because the Tualatin River was capable of floating saw logs, the public had a right to reasonable use of the river as a passage way for that purpose.<sup>18/</sup> *Id.* at 449-50 citing, e.g., ***Brown v. Chadbourne***, 31 Me 9; 50 Am Rep 641 (1849). With regard to placement of the boom, the court stated that a person exercising ordinary care in using the waterway for “legitimate purposes of trade or transportation” may temporarily “impede or obstruct another” if doing so is necessary and unavoidable to that person’s use.<sup>19/</sup> *Id.* at 450.

The right to use the Tualatin River was again at issue in ***Shaw***, 10 Or 371 (1882). One riparian landowner claimed that he was being harmed by another’s permanent diversion of water from the river’s natural channel at a point about five miles above the complaining landowner’s property. *Id.* at 371-372. The defendant claimed that it had a right to divert the water because the portion of the river at issue “is and always has been a public navigable stream.” *Id.* at 373.

Referring back to ***Weise***, the court stated that the river was navigable “during certain periodical seasons of high water” for the purpose of floating logs or timber, and perhaps some portions were also navigable for small boats. *Id.* at 375. The court then asked whether “such a floatage [capability] place[s] the Tualatin upon a footing with public navigable waters, so as to confine the riparian ownership to the margin of the river?” *Id.* at 375. In other words, the court was examining navigability for the purpose of determining whether the state, rather than the adjacent riparian owner, owned the river bed.<sup>20/</sup>

The court indicated that the state did not own the bed for two reasons. First, the Tualatin River was not tidally-influenced so as to be deemed navigable under the English common law. ***Shaw***, 10 Or at 376. Second, the Tualatin was not within the class of great fresh water rivers that had been recognized as title-navigable by the U.S. Supreme Court and others. *Id.* at 380.

The court referenced ***Weise*** as recognizing the Tualatin to be “subject to the public easement for rafting logs to market,” and explained that the right of a riparian owner to use the water flowing over the bed, which he owned “to the middle of the stream,” was subject only to this easement.<sup>21/</sup> *Id.* at 382-383. Without explicitly tying its holding to this analysis, the court enjoined the defendant’s diversion of water from the natural river bed. *Id.* at 383. It appears that the court enjoined the diversion because such a use of the river was outside of the recognized public easement, which was essentially limited to “rafting logs to market.” *Id.* at 382-383.

In 1888, the Oregon Supreme Court considered the public’s right to use a relatively small creek, Anthony Creek, to float logs.<sup>22/</sup> ***Haines v. Hall***, 17 Or 165, 20 P 831 (1888). The court framed the question as whether a privately-owned creek had sufficient capacity to float logs so as to “render it capable of serving an important public use as a channel of commerce” and thereby subject to public use rights. *Id.* at 168. The appellant had attempted to float logs since 1883 but only one million four hundred thousand feet of saw-logs out of over three million put into the waterway in the spring of 1886 and 1887 reached their intended destination. *Id.* at 170. To

accomplish this, appellant had positioned 25 to 35 men along two miles of the bank for 27 days “to prevent the logs from lodging, to roll them back into the stream, drag them over gravel-bars, turn them around bends in the creek, break jams, etc.” *Id.* The logs caused water to “constantly overflow” the banks of the creek, and, in 1886 and 1887, the overflow washed out both a fence and private bridge on the respondent’s property. *Id.* at 171.

The appellant’s right to use the portion of the creek crossing the respondent’s property for floating logs depended on whether the creek was navigable for that purpose. *Id.* at 172. The case produced three opinions from the then-existing three justice court; one for the majority, one concurring opinion, and a dissenting opinion. The court stated that the creek’s navigability “depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public,” and not just “a few persons.” *Id.* Focusing on the “means and appliances” needed to move the logs, the court held that Anthony Creek was not navigable for that purpose:

We are \* \* \* committed to the doctrine that a stream of water which is of sufficient extent and capacity to float logs and timber from mountainous regions to market, and can be utilized thereby for the benefit and advantage of the community at large, notwithstanding it is included with the land owned by private individuals, is, nevertheless, a public navigable stream for such purposes; and we must accept that doctrine as the law. But I am not willing to extend it so as to include every little rivulet or brook which runs across a man’s farm, although its waters may be so swollen for a short time every year \* \* \* as to enable logs and timber in limited quantities to float down it, and, by the adoption of extraordinary means for that purpose, convenience one or two neighbors in so using it.

*Id.* at 173.

The Oregon Supreme Court next examined whether the portion of a slough that ran from the appellant’s land through the respondent’s to points beyond was navigable so as to bar the respondent from obstructing the waterway. *Nutter v. Gallagher*, 19 Or 375, 24 P 250 (1890). With permission from prior owners, the appellant had made improvements to the channel of the slough<sup>23/</sup> that enabled him to use it for floating logs during winter freshets and for floating wood, hay and supplies on high tides. *Id.* at 381. Citing to the passage in *Haines* quoted above, the court concluded that the waterway “had no capacity for general purposes of navigation” as appellant was the only person who could use it and his use was restricted to only a few days a year. *Id.* at 382.

In 1900, the court decided a dispute between two riparian landowners as to the use of a stream running through both of their properties. *Hallock v. Suitor*, 37 Or 9, 60 P 384 (1900). The upper riparian landowner had a sawmill which was powered by a dam built on the portion of the stream (La Creole Creek) that ran through her property. The lower riparian landowner also had a sawmill and built three dams on the stream for the purpose of floating logs from its headwaters to his mill; one was on a portion of the creek in the upper riparian’s land. *Id.* at 10.

The upper landowner sought to enjoin the lower landowner from operating a dam on her property and from interfering with the power supplied by the stream to her mill. *Id.* Quoting the tests for navigability established by *Weise*, 3 Or 445, and *Felger*, 3 Or 455, the court concluded that there was a “common right” to use the stream to float logs through the upper riparian landowner’s property because it was “navigable” for that purpose. *Id.* at 11-12, *also citing Shaw*, 10 Or 371, *Hall*, 17 Or 165, and *Nutter*, 19 Or 375. Facts supporting this finding included that the stream could float logs in its natural stage during winter freshets. *Id.* at 10. The court also was concerned to protect the upper landowner’s use of the stream to power her sawmill. *Id.* at 12. Nevertheless, the court perpetually enjoined the lower landowner from operating the dam he had built on the upper landowner’s property. *Id.* Stating that the stream was navigable only for the purpose of floating logs, the court held that the upper landowner, as owner of the banks, had “the exclusive right to dam the stream upon her premises, provided the floating of logs by others [was] not obstructed thereby.” *Id.* at 12-13 (citations omitted).

## 2. Reconsideration of the Public Use Rights Test in *Kamm and Lebanon Lumber* (1907 – 1913)

In 1907, the court decided a dispute in which the plaintiff, who owned upland along the North Fork of Klaskanie Creek, sought to enjoin defendants from using the stream to float saw logs, alleging that it was not navigable for that purpose. *Kamm v. Normand*, 50 Or 9, 91 P 448 (1907). The court used the occasion to review its analysis of navigability in prior cases, *e.g.*, *Weise*, 3 Or 445, and *Hall*, 17 Or 165, and that of other state courts. *Kamm*, 50 Or at 11-13. In doing so, the court articulated the test for identifying public use rights in a waterway as follows:

The doctrine, then, which we derive from the authorities, is that a stream, to be a public highway for floatage, must be capable, in its natural condition and at the ordinary winter stages of water, of valuable public use, and, if not, it is private property.<sup>24/</sup>

*Id.* at 14. The waterway was not floatable except during winter freshets and the freshets “ordinarily” occurred no more than three or four times a year and endured for only a few hours at a time. *Id.* at 18. From these facts, the court concluded that the stream, where it flowed through the plaintiff’s land, “is not, in its natural condition, floatable for logs, because it is not capable of serving any important public use.”<sup>25/</sup> *Id.* at 25. The *Kamm* test requires that a waterway be of “valuable public use,” which it equates with “use of commercial value” before it is navigable for public use. *Id.* at 14 (“A stream \* \* \* that is capable of floating logs, unaided by artificial means, during freshets or stages of water occurring with reasonable frequency and continuing long enough to make its use of commercial value, is a public highway for that purpose”).

In 1913, the court revisited the test for determining whether the public had the right to use a waterway and also addressed its right to use the banks. *Lebanon Lumber Co. v. Leonard*, 68 Or 147, 136 P 891 (1913). The case was another dispute between a riparian landowner and a logger using the waterway to float logs downstream.<sup>26/</sup> The court did not directly address ownership of the stream, assuming that it was privately owned. *Id.* at 148-149. Thus, the question was whether the logger had a right to use the stream to float logs, and a right to have workers along the banks of the stream to facilitate that movement. The court concluded that the logger did not, because it found the stream not to be navigable. *Id.* at 151. It stated:

The true test \* \* \* is whether a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs. It is sufficient if it has that character at different periods, recurring with reasonable certainty, and continuing for a sufficient length of time to make it commercially profitable and beneficial to the general public. \* \* \* It must at least be navigable or floatable in its natural state, at ordinary recurring winter freshets long enough to make it useful for some purposes of trade or agriculture.

*Id.* at 149-150. The public did not have the right to use the stream at issue for floating logs because, among other reasons, the high water was not “of sufficient regularity or duration to be of practical public utility” and the stream had been so jammed with plaintiff’s logs from January until the time of trial in May that no one else could have used the stream to float logs during that time.<sup>27/</sup> *Id.* at 151. In announcing its “true test” for public use rights in a waterway, the court distinguished between “large” and “small” streams without providing identifying characteristics of either:

Large streams are considered nature’s highways without the aid of legislation. This is especially recognized as true where they have been reserved from private ownership by the national government or by the state. In the admission of Oregon as a state Congress provided that all navigable waters therein should be common highways and forever free to the inhabitants of the state, and later this right in the public was recognized by the courts as extending to small streams the beds and banks of which are claimed by riparian owners. \* \* \* [A]s said in *Kamm v. Normand*, 50 Or 9, streams which are not of sufficient size and capacity to be profitably so used are wholly and absolutely private.

*Id.* at 149.

## **B. Applying the Public Use Doctrine to Uses Other Than Floating Logs (1918 – To Date)**

### **1. *Guilliams***

In 1918, the Supreme Court examined public use rights in a case not dealing with floating logs.<sup>28/</sup> *Guilliams*, 90 Or 13. Plaintiffs sought to enjoin the defendant from maintaining a dam on his property near the mouth of Beaver Creek and from maintaining a wire fence across the creek above the dam, on the grounds that the dam had backed up water over their lands and that the dam and wire fence impeded the passage of small boats on the lagoon at the mouth of the creek.<sup>29/</sup> The court held that Beaver Creek was navigable down to and across the defendant’s property to the dam; that the plaintiffs could not use the creek below defendant’s dam without trespassing because below the dam the creek was not navigable; and that the defendant did not have a right to maintain a dam unless he also built a channel to the beach to sufficiently prevent water from the lagoon from backing up and damaging the plaintiffs’ land. *Id.* at 30.

In the process, the court set out the general test for when a waterway is subject to Oregon's public use doctrine:

The test of navigability of a stream in the summing up, is the capacity to afford the length, width and depth to enable boats and vessels to make successful progress through its waters, rather than circumstances involving the present right of approach to its banks. The latter are changeable and subject to the will of man, the former is a physical condition dependent upon nature. 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.

*Id.* at 26-27. Applying this standard to Beaver Creek, the court concluded that it had a well-defined channel and banks, as well as “a fairly constant depth of water” sufficient to enable at least “skiffs and small boats of average size, and scows capable of conveying cattle, hay and other products” to cross it “at all seasons,” thereby rendering the creek navigable up to defendant's dam.<sup>30/</sup> *Id.* at 27-28.

*Guilliams* is significant for several reasons. First, in determining what waterways are subject to the public use doctrine, the Court made clear that it will look not to a waterway's actual use, but to its *capacity for use*, namely, its “capacity to afford the length, width and depth to enable boats and vessels to make successful progress through its waters.” *Id.* at 26-27. Second, the court declared that the public use for “commerce” includes fishing and pleasure boating. *Id.* at 25-27. The court quoted with approval from a Minnesota case, *Lamprey v. State*, 53 NW 1139, 52 Minn 181, (1893):

[I]f, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used – and as population increases, and towns and cities are built up in their vicinity, will be still more used – by the people for 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. 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. \* \* \* [W]e are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule.

*Id.* at 28-29 quoting *Lamprey*, 53 NW at 1143. According to the Oregon Supreme Court, the *Lamprey* decision “coincides with the case at bar and the general conditions \* \* \* existing in this state.” *Id.* at 24.

Finally, it is noteworthy that *Guilliams* cites the prior logging cases for the proposition that a waterway “capable in its natural state of floating sawlogs to market successfully, is navigable *for that purpose*.” *Id.* at 22. (Emphasis added.) That sentence suggests, in light of the general test, that a waterway capable of floating sawlogs but not “boats and vessels” is subject to public use only for the former, although we are hesitant to treat a single sentence as conclusive on that point.

## 2. *Luscher*

Eighteen years after *Guilliams*, the Supreme Court issued the last appellate court opinion in Oregon to expressly address the public’s right to use waterways independent of state-ownership. *Luscher v. Reynolds*, 153 Or 625, 56 P2d 1158 (1936). The dispute was over ownership of land that had formerly been part of a lake bed but had become uncovered, apparently as a result of the water receding. *Id.* at 629. The court was required to determine the relationship of the strip of land to acreage that had been disposed of by the federal government via patent, after Oregon became a state. Because the lake (Blue Lake in Multnomah County) was “not a navigable body of water in the sense that title to the bed thereof would pass to the state upon admission to the Union,” the court held that the land in question was privately owned. *Id.* at 634.

The court went on to declare, seemingly in *dicta*, that the lake was “navigable in fact” and therefore subject to the public use doctrine. *Id.* at 635. The court also reaffirmed *Guilliams*’ exposition of the scope of that doctrine, stating that waterways that are navigable-in-fact are

subject however to the superior right of the public to use the water for the purposes of commerce and transportation. 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 acceptance of such terms. As stated in *Lamprey v. State*, 52 Minn. 181 (53 NW 1139, 38 Am St Rep 541, 18 LRA 670), quoted with approval in *Guilliams v. Beaver Lake Club*, *supra*, “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.” Regardless of the ownership of the bed, the public has the paramount right to the use of the waters of the lake for the purpose of transportation and commerce.

*Id.* at 635.

Since *Luscher* was decided in 1936, this office has been called upon to advise public officials about the scope of uses that are allowed under the public use doctrine. In 1959, we advised the State Marine Board that public use “include[s] the right to fish, boat, bathe and to do other things incidental to the public use of water.” 29 Op Atty Gen 296, 296-297 (1959). Later that same year, we advised the Oregon Military Department that the public use doctrine extended

to hunting and fishing on waters that were navigable in fact regardless of ownership of the bed of the waterway. 29 Op Atty Gen 311, 312 (1959).

### 3. Summary of the Common Law Doctrine of Public Use of Waterways

*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. Whether a waterway is "navigable" so as to be subject to those rights depends on its *capacity*, in its natural state, "to afford the length, width and depth to enable boats and vessels to make successful progress through its waters." *Gulliams*, 90 Or at 26. *Guilliams* and *Luscher* make clear that a waterway's suitability for recreational boating is sufficient to render it navigable. If a waterway is navigable, *Guilliams* and *Luscher* suggest that the permitted public uses include a broad range of activities involving the use of the waters.

No cases decided since *Guilliams* and *Luscher* contradict or erode their holdings. As a result, we expect that an Oregon appellate court would follow *Guilliams* if called on to decide the public's right to use a waterway in which the bed is privately owned.

Recognizing the public's right to use a waterway where the bed is privately owned raises two issues that have been adjudicated by the Oregon Supreme Court. The first is the question of how to reconcile the rights of the public and the rights of riparian landowners. The second, actually a subset of the first, is the question of the extent to which a right to use a waterway gives the public a right to access the privately owned uplands adjoining that waterway. Subsections C and D address these issues.

#### C. Public Use Rights in Relationship to Those of Riparian Owners

In addressing the issues raised by the co-existence of public and private rights in the same waterway, the Oregon Supreme Court has sought to balance the two while recognizing that preserving public use rights necessarily sets limits on actions taken by riparian landowners that could restrict the public's use of the waterway. For example, while all private property rights not inconsistent with public use remain with the riparian owner, *Shaw*, 10 Or at 381-83, that owner may not prevent the public from floating down a waterway. This includes, for instance, constructing a fence blocking travel along a waterway. *Guilliams*, 90 Or at 27. In the court's initial decision on public use rights, *Weise*, 3 Or 445, part of the riparian landowner's claim was that he was damaged by a logger's placement of a boom on his property for the purpose of moving logs down the stream, since the boom interfered with his passage by skiff. In affirming the verdict in favor of the logger, the court explained that one user may temporarily impede or obstruct another if he or she exercises ordinary care and the impediment or obstruction is necessary or unavoidable to use of the stream. *Id.* at 450. The court specified that a riparian owner "takes his title subject to this right [to navigate the stream] vested in the public." *Id.* at 451.

In 1901, the court overturned an earlier case in which it had held that a person exercising public use rights to float logs was strictly liable for any damage to the adjoining upland. *Hunter v. Grande Ronde Lumber Co.*, 39 Or 448, 65 P 598 (1901), *overruling Haines v. Welch*, 14 Or



319, 12 P 502 (1886). In *Hunter*, the plaintiff owned upland along the Grande Ronde River, and the defendant released logs into the waterway, floating them through plaintiff's property. Alleging that the defendant's actions caused damage to her property, the plaintiff sought money damages. The court held that one who exercises the right of the public to float logs in a stream that is navigable for public use is only liable to a landowner for injuries to the land caused by the user's negligence. *Id.* at 450-51. The public is entitled to "reasonable enjoyment" of the right to run logs in a stream that is navigable for public use and the riparian landowners to "reasonable enjoyment" of their rights, each "without unnecessary interference from the other." *Id.* at 451. The court expounded on what it meant by each party's "reasonable enjoyment" of rights, and distinguished that concept from a negligent exercise of one's rights:

A reasonable enjoyment signifies such an exercise of the right as common prudence would dictate, so as not to affect correlative or concurrent rights injuriously. This requires care and circumspection in its exercise, and, if injury should be the proximate result of the want of care, liability would logically attach. But the exercise thereof with proper care and without negligence can entail no liability. If it were otherwise, any person using a stream for the purpose of floating logs would become an insurer or guarantor, and be bound at all hazards to guard the riparian owner against loss by reason of the presence of the logs in the stream, and their rights would at once cease to be concurrent; the right of the log owner would subsist in subordination to and by permission of the riparian owner.

*Id.* at 451.

Later cases further illuminate the relationship between public use rights and those of riparian landowners. In 1908, the court held 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." *Trullinger v. Howe*, 53 Or 219, 223, 97 P 548 (1908) *modified on rehearing* *Trullinger v. Howe*, 53 Or 219, 228, 99 P 880 (1909). The Trullingers used the water of the North Yamhill River running through their property to generate power for a gristmill and light-plant. Howe had a sawmill downstream of plaintiffs' property and owned timber at the headwaters of the stream above the Trullingers' property, which supplied logs to his mill. Both parties operated dams on the stream. The court held that Howe did not have a right to operate splash dams to help float logs to his mill, since that operation materially injured and interfered with the Trullingers' use of the stream.<sup>31/</sup> However, the court did allow the Trullingers to continue to operate their dam, evidently because it did not "materially affect" Howe's floatage of logs down to his (lower) mill:

If the stream is navigable or floatable,<sup>32/</sup> it is so only during the winter months, and the plaintiffs, as riparian proprietors, have a right to maintain a dam across it for their use, provided it does not materially affect or abridge the use of the stream as a highway at such times as in its natural condition it may be so used.

*Id.* at 222 (citations omitted).

In balancing the rights of riparian landowners and public users of a waterway, the court stated that the public right of passage is “to some extent, necessarily the dominant right, because it is the right to move on or by.” *Id.* at 223. However, the public may not exercise the right to use a waterway in a way that is “usurping, excessive, or unreasonable.” *Id.* Instead, the public right “must be exercised without unnecessarily interfering with the riparian proprietor, and as modified by his right to make a reasonable use of the stream for his own purposes.”<sup>33/</sup> *Id.* (citations omitted).

#### **D. Public Right to Use Adjoining Uplands**

In *Weise*, 3 Or 445, the court stated that when a waterway is “navigable” for purposes of the public use doctrine, the authority for a member of the public to “meddle with or touch upon” an adjacent private “upland” is “founded upon necessity.” *Id.* at 450. The court’s reasoning was based upon the principle that those who lawfully use a waterway that is subject to public use rights “can invoke in their favor all general rules of navigation that are in the nature of things applicable to the particular circumstances and kind of navigation.” *Id.* at 450. If the public could not come to land when necessary to navigate a waterway subject to public use rights, a riparian owner could effectively prevent use of the waterway. *Id.* at 450. However, coming onto an upland when it is not necessary would be a trespass, for which nominal damages should be assessed. *Id.* at 451.

Applying these principles to the facts of the case, the court held that the public user had a right to attach a boom onto the riparian owner’s land in order to keep logs being floated down the Tualatin River from going over the Willamette Falls en route because that act was “necessary in order to enable \* \* \* [a member of the public] to exercise a right of navigation.” *Id.* The court explained:

If the riparian proprietor could deny the navigator the right to come to land, in a case where the business of navigating could not be performed, without the privilege of landing, he could deny all use of the stream.

*Id.* at 450.

In two later cases, *Haines v. Hall*, 17 Or 165, 20 P 831 (1888), and *Lebanon Lumber*, 68 Or 147, 136 P 891 (1913), loggers had attempted to float logs by placing workers along the uplands to facilitate passage. In both cases, the court concluded that the waterways were not subject to a public right of floatage, but discussed in *dicta* whether there would be a right to use the uplands if the waterway had been subject to public use. In *Haines*, the court stated that if a waterway were navigable for floatage, a public user “had no right to station his men along its banks to float the logs, or allow the logs to go onto the respondent’s land or injure the banks of the creek, or turn the stream out of its banks onto the land.” *Haines*, 17 Or at 172. In *Lebanon Lumber Co*, the court stated that “the navigability of the stream does not give to the navigator a right of way on the land,” noting one exception based on necessity:

[T]he navigator may find it necessary at times to enter upon the land of a riparian owner by reason of danger, or to reclaim stranded property which was washed

ashore without the fault of the owner, but he must pay all damages occasioned thereby; otherwise he is limited to the stream.

*Lebanon Lumber Co.*, 68 Or at 150. The facts presented in the case were outside of the exception noted in *Lebanon Lumber Co.*

Neither *Haines* nor *Lebanon Lumber Co.* comment on the holding in *Weise*, but the limitations they draw for using the uplands to facilitate navigation of a waterway raise questions about the finding of “necessity” for the placement of a boom in the earlier case. The significant factor for the court in *Weise* seems to be that, while the river was generally navigable for floating logs independent of use of the boom, the public would have no practical right to exercise that use without a boom, which required temporary access and caused no “appreciable damages” to the riparian owner’s land. *Weise*, 3 Or at 451. The “necessity” exception described in *Lebanon Lumber Co.* appears limited to danger and unexpected events. However, neither that case nor *Haines* addresses the possibility of a riparian proprietor being able to render the public’s right to use a navigable waterway essentially meaningless by blocking use of the upland.

Without subsequent treatment of a public user’s right to access privately owned uplands, it is unclear how Oregon appellate courts, if called upon to decide whether a public user’s accessing the uplands was “necessary,” will take into account the essential nullification of the right to use a navigable waterway worked by an inability to access the uplands.

#### **IV. Public Use Rights in the Absence of an Ownership Determination**

The Legislative Assembly has established a mandatory procedure for the state to determine or assert ownership of a navigable waterway.<sup>34/</sup> ORS 274.402 provides that the Board has exclusive jurisdiction to assert title to submerged or submersible lands in navigable waterways on behalf of the State of Oregon. The Board may do so only after state ownership has been confirmed through litigation or by a final declaration by the Board after the statutory study process set forth in ORS 274.404 through 274.412 has been completed. Read together with ORS 274.025 and ORS 274.005, ORS 274.402 means that the Board is the only state entity that may speak for the state when state ownership of a non-tidal waterway is at issue.<sup>35/</sup> No comparable mechanism has been established to determine whether a waterway is subject to the public use doctrine.

The public’s right to use a waterway that is state-owned or subject to the public use doctrine is not dependant on the outcome of any determination process, however. If the characteristics of a particular waterway render it title-navigable or subject to the public use doctrine, members of the public need not await a formal declaration to that effect before they may lawfully exercise their concomitant public use rights. The difficulty is that, among smaller waterways, it is difficult to be certain whether a particular waterway is state-owned or subject to the public use doctrine.

There are several ways a person can attempt to ascertain whether there is a public right to use a particular waterway. A person may ask the Department of State Lands whether the Board has determined that the waterway is state-owned. If the Board has not determined ownership, a person may (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 for himself whether the waterway is state-owned or the public use doctrine applies. A person who chooses this last option takes the risk that his use will be a trespass if he is mistaken. For that reason, definite determinations of title-navigability and of the applicability of the public use doctrine serve to inform members of the public who may wish to use a particular waterway, adjacent landowners, state agencies and law enforcement of their respective rights.

## Conclusions

Pursuant to federal law, at statehood the State of Oregon acquired, and generally continues to own, all waterways that were tidally influenced or title-navigable. The federal test for title-navigability was first set out in *The Daniel Ball*, and is fundamentally a practical one, namely, whether at the time of statehood a particular waterway in its natural and ordinary condition was capable of being used as a highway for trade and travel by a customary mode of water transportation. The courts have applied those criteria to various types of waterways and various fact patterns in terms of use and susceptibility for particular uses.

In addition, the Oregon Supreme Court has established a state public use doctrine that gives the public the right to make certain uses of a waterway whose bed is privately owned if the waterway has the capacity, in terms of length, width and depth, to enable boats to make successful progress through its waters.

State-owned waterways are generally open to public use, and the state's management of the waterway may not substantially impair the public rights of navigation, commerce, fisheries and recreation. Under the public use doctrine, the public's right of passage must be exercised without unreasonably interfering with the riparian owner. The public's right to use a waterway that is state-owned or subject to the public use doctrine does not depend on a formal declaration of the waterway's status.



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<sup>1/</sup> Another potential legal basis for public use of waterways is the doctrine of custom. The doctrine of custom has been applied to Oregon's dry sand ocean beaches but not to waterways. Unlike the public use doctrine, which does not depend on historic practice, the doctrine of custom recognizes and protects those uses, and only those uses, historically exercised by the public. Whether an Oregon court would extend the doctrine of custom to waterways if the question were presented is beyond the scope of this opinion.

<sup>2/</sup> Federal law controls all aspects of ownership and management of navigable waterways until the control is vested in a newly-formed state through the equal footing doctrine. *Corvallis Sand &*

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*Gravel*, 429 US 363, 371, 374 (1977); *State Land Board v. Corvallis Sand and Gravel*, 283 Or 147, 149-150 (1978); *United States v. Holt*, 270 US 49, 55-56 (1926) (transfer of title to states is a federal question); *United States v. Oregon*, 295 US at 14 (federal law governs until the title is vested in a state). But once control is transferred to a new state, the equal footing doctrine is “spent” and does not operate after that date to affect ownership issues. *Corvallis Sand & Gravel*, 429 US at 371, 374.

<sup>3/</sup> The statutes reflected Congress’ intent that federal patents for land along title-navigable waterways would not convey the lands underlying the waterway, and that the boundary of the lands conveyed by the patent was the edge of the waterway instead of the center of the stream. *Schurmeir*, 74 US at 285-88.

<sup>4/</sup> The significance of the two tests stated in *The Daniel Ball* (susceptibility for commerce for purposes of determining title-navigability, and susceptibility for commerce between the states or with another country for purposes of determining the extent of federal regulatory authority) is clarified in *The Montello*: where a river is navigable only between different places within the same state (meeting the first part of the test, but not the second) the waterway is “a navigable water of the State” but *not* “a navigable water of the United States.” *The Montello*, 78 US 411, 415-416, 20 L Ed 191, 11 Wall 411 (1870) (*The Montello I*).

<sup>5/</sup> The Court held that the Fox River had both “always been navigable in fact” and met the second part of *The Daniel Ball* test in terms of forming “a continued highway for interstate commerce. \* \* \*” *The Montello II*, 87 US at 443 (emphasis added).

<sup>6/</sup> *Brewer-Elliott* and the other cited cases apply only the first part of the test introduced in *The Daniel Ball*, 77 US at 563, as construed by *The Montello II*, 87 US 430, and do not consider whether the waterways are capable of use for navigation in interstate or foreign commerce. *Brewer-Elliott*, 260 US at 86.

<sup>7/</sup> The Court in *United States v. Utah* further elaborated the test for title-navigability originating in *The Daniel Ball*. It stated that title-navigability does not depend on the particular mode of travel or type of vessel used, nor is it defeated by occasional difficulties in navigation. 283 US at 76. Instead, the question is whether the river, in its ordinary and natural condition, “affords a channel for useful commerce.” 283 US at 76. The court also rejected the notion that a paucity of evidence of actual historical use is dispositive. 283 US at 82-83. Post-statehood evidence of uses of the river was properly relied on to show the susceptibility of the river for use as a highway at the time of statehood. The court stated:

[S]usceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question. The Government insists that the uses of the rivers have been more of a private nature than of a public, commercial sort. But, assuming this to be the fact, it cannot be regarded as controlling when the rivers are shown to be capable of commercial use. The extent of existing commerce is not the test. The evidence of the actual use of streams, and especially of extensive and continued use for commercial purposes may be most persuasive, but where conditions of exploration and settlement explain the infrequency or limited nature of such use, the susceptibility to use as a highway of commerce may still be satisfactorily proved. \* \* \* “It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them.”

283 US 82-83, citing *Packer v. Bird*, 137 US 661, 11 S Ct 210, 34 L Ed 819 (1891).

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<sup>8/</sup> The five lakes were all located in Harney County, Oregon (Malheur, Mud, Harney, The Narrows, and Sand Reef). *Id.* at 5.

<sup>9/</sup> *See, e.g., Utah v. U.S.*, 403 US 9, 11-12, 91 S Ct 1775, 29 L Ed 2d 279 (1971) (evidence of actual use of the Great Salt Lake in Utah prior to statehood properly relied upon as one basis for finding that the lake was navigable at statehood).

<sup>10/</sup> *Rio Grande Dam & Irrigation Co.* concerned ownership of water rights. The title-navigability of the Rio Grande River was relevant to the ownership of water rights but was not directly at issue in the case.

<sup>11/</sup> Another limit on the state's authority is Article IV, Section 2 of the U.S. Constitution, the Property Clause, which provides the federal government with authority to govern uses of federal lands. *See* 39 Op Atty Gen 440 (1978) (discussing the Property Clause as a limitation on the state's authority over title-navigable waterways). It should be noted, however, that this earlier opinion did not address federal authority under the Property Clause over waters of a state. We do not address these matters in this opinion.

<sup>12/</sup> In general, the servitude applies to waterways that in their ordinary condition form by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary mode in which such commerce is conducted by water. *See United States v. Appalachian Electric Power Co.*, 311 US 377, 404, 417-418 (1940); 39 Op Atty Gen 440, n 7 (1978).

<sup>13/</sup> The Court in *Johnson* noted that:

Section 2 of the act of Congress, approved February 14, 1859, admitting the State of Oregon into the Union, reads thus:

The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon, so far as the same shall form a common boundary to said state, and other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and all the navigable waters of said state, shall be common highways and forever free, as well as to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor.

This section [of the Admissions Act] is declarative and preservative of the *jus publicum* including the public right of navigation and fishery.

*Id.* at 661.

<sup>14/</sup> In *Cook*, the Land Board issued a deed for lands within the harbor lines of the Willamette River near Swan Island. *Cook*, 70 Or at 529-32. Watercraft passed over the submerged lands on a nearly daily basis. *Cook*, at 531. The court found that the conveyance acted as a direct and permanent impediment to navigation. *Cook*, at 532. The court held that the conveyance violated the trust under which the State of Oregon holds title to lands within waterways, and was an abdication by the state of its trust responsibilities. *Cook*, at 532-34. The court relied on *Illinois Central Railroad*, saying that the conveyance by the State of Oregon was analogous to the conveyance condemned by the United States Supreme Court. *Cook*, at 533. This case indicates that a conveyance of even a relatively small area of

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land underlying a state-owned waterway may be void if the land is in an area important for one of the public trust resources, such as navigation.

<sup>15/</sup> In 1951, this office concluded that the Land Board was authorized to convey a portion of the Columbia River to the State Highway Commission in order to relocate a railroad, notwithstanding the limitations imposed by the public trust doctrine. 25 Op Atty Gen 274 (1951). However, we also advised that the Board do so only after making findings that the use would not interfere with the public right of navigation and fishing on the Columbia River. *Id.*, at 278.

<sup>16/</sup> See *Weise v. Smith*, 3 Or 445 (1869); *Felger v. Robinson*, 3 Or 455 (1869); *Shaw v. Oswego Iron Co.*, 10 Or 371 (1882); *Haines v. Hall*, 17 Or 165, 20 P 831 (1888); *Nutter v. Gallagher*, 19 Or 375, 24 P 250 (1890); *Hallock v. Suitor*, 37 Or 9, 60 P 384 (1900); *Hunter v. Grande Ronde Lumber Co.*, 39 Or 448, 65 P 598 (1901); *Kamm v. Normand*, 50 Or 9, 91 P 448 (1907); *Trullinger v. Howe*, 53 Or 219, 97 P 548 (1908); *Flinn v. Vaughn*, 55 Or 372, 106 P 642 (1910); *Lebanon Lumber Co. v. Leonard*, 68 Or 147, 136 P 891 (1913); *Guilliams v. Beaver Lake Club*, 90 Or 13, 175 P 437 (1918); *Luscher v. Reynolds*, 153 Or 625, 56 P2d 1158 (1936).

<sup>17/</sup> While a waterway’s “navigability” is determinative under both the federal test for state ownership of non-tidal waterways and the state test for public use rights, the term’s meaning is not precisely the same for both contexts (see the glossary above). For that reason, it is possible that a given stretch of waterway might not be title-navigable and therefore not state-owned, but nevertheless navigable-in-fact for purposes of the Oregon public use doctrine.

<sup>18/</sup> In a second 1869 case addressing the public’s right to use a stream to float logs, which was affirmed on other grounds, the court stated: “any stream in this state is navigable on whose waters logs or timbers can be floated to market, and \* \* \* they are public highways for that purpose.” *Felger*, 3 Or at 457-458. In a later case, *Shaw*, 10 Or at 382, the court refers to this statement as part of the “holding” in *Felger*, but also states that the question of *title*-navigability was not before the court. The court opined that, for a waterway to be subject to public use rights, it is not necessary that it be navigable in fact *for a particular purpose at all times*:

[I]t is not necessary that they be navigable the whole year for that purpose [of floating logs] to constitute them such [public highways]. If at high water they can be used for floating timber, then they are navigable; and the question of their navigability is a question of fact \* \* \*. Any stream in which logs will go by the force of the water is navigable.

*Id.* at 458.

<sup>19/</sup> For further discussion of the right of the public to come onto a privately owned upland in relation to exercising public use rights on a waterway, as expounded in *Weise* and later cases, see subsection D, *infra*.

<sup>20/</sup> But, see *Corvallis Sand & Gravel Co.*, 283 Or 147, 158, 582 P2d 1352 (1978) (“That case did not involve the title to a riverbed, but considered the navigability of the Tualatin River in another context.”); *State v. Salot*, 66 Or App 492, 493, 674 P2d 93 (1984) (*Weise* and *Shaw* do not definitively address title to the beds of the Tualatin River).

<sup>21/</sup> The court also recognized another category of waterways, namely those that are completely private and not subject to any public use rights because they are “so small or shallow as not to be navigable for any purpose,” *Shaw*, 10 Or at 376.

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<sup>22/</sup> In 1886, presuming that Anthony Creek was privately owned and subject to public use rights relating to the floating of logs, the court held that a person exercising those rights was liable for damages caused to the riparian landowner's land regardless of whether the rights had been negligently exercised. *Haines v. Welch*, 14 Or 319, 12 P 502 (1886). This holding was subsequently overturned in *Hunter*, 39 Or 448.

<sup>23/</sup> A short slough ran from appellant's land across respondent's land and to a navigable waterway. Appellant had opened a short channel through the slough by clearing logs and brush from the gulch, deepening the channel, and cutting a channel or ditch through solid ground. Appellant was the only one other than the respondent who could utilize the slough, and then only at extreme high tides to float logs and for other purposes. *Nutter*, 19 Or at 380-82.

<sup>24/</sup> The court explained the terminology of its newly stated test:

Ordinary stages of water or natural conditions \* \* \* has reference to the natural flow of the water, and is applied to the stream in its natural condition, without the application of artificial means, and is used in contradistinction to extraordinary or unusual floods. That which occurs with reasonable certainty, periodically \* \* \* may be properly characterized as ordinary.

*Kamm*, 50 Or at 14.

<sup>25/</sup> Because the defendants had built a splash dam above plaintiff's land to facilitate the floating of logs the court also considered whether a waterway not floatable for logs in its natural state would be subject to public use rights if made floatable by artificial means. The court clearly stated that a stream "not navigable or floatable in its natural condition cannot be made so by artificial means, nor can the capacity of a navigable stream be increased by such means to the injury of a riparian proprietor without compensation \* \* \*." *Kamm*, 50 Or at 17. However, a member of the public could use artificial means to increase the usefulness of a waterway that was naturally navigable for a given purpose, as long as the improvements did not injure riparian proprietors along the waterway and did not extend the periods of navigability. *Id.* at 14-15; *see also Flinn*, 55 Or at 374-75 (1910) (upholding injunction against defendants' operation of splash dams to facilitate floating of logs on Coquille River where it flowed through plaintiffs' property). It is beyond the scope of this opinion to analyze the distinction between factors that may improve the natural condition of an already useful waterway and those that would render it useful.

<sup>26/</sup> Plaintiff, a logger, used McDowell Creek to float logs and, in doing so, caused destruction of the banks of the stream and the carrying away of soil. He left a jam of logs in the stream and along the banks, obstructing the stream for several months. Defendant was the riparian owner. *Lebanon Lumber Co.*, 68 Or at 151-52. McDowell Creek was 1.5 to 3.0 feet deep and 20 to 30 feet wide during ordinary freshets, which occurred three or four times a year but not at regular periods. The stream would not float a large quantity of logs without the use of men on the banks to keep the logs moving. *Id.* at 151.

<sup>27/</sup> *See* subsection D (public use of uplands) for discussion of restrictions on public's right to use uplands to facilitate use of navigable waterway.

<sup>28/</sup> The court noted that its cases to date had "arisen mainly with respect to the floatability of streams for the purpose of conveying sawlogs to market, in which it is held in effect that a stream capable in its natural state of floating sawlogs to market successfully, is navigable for that purpose." *Guilliams*, 90 Or at 21-22 *citing, e.g., Weise*, 3 Or 445 and *Kamm*, 50 Or 9.



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<sup>29/</sup> Beaver Creek is described as “a small nontidal stream of insignificant size at a point 3 ½ miles above the ocean, but at its mouth, by reason of the sands thrown up by the sea, it becomes a lagoon or lake \* \* \* of a depth sufficient to float ordinary skiffs and small scows.” *Guilliams*, 90 Or at 14. People had navigated boats on the lagoon for more than 20 years and also fished for trout in the summer. *Id.* at 14-15. Winter storms had diverted the course of the creek so that it was washing away a portion of the defendant’s property and threatened continued destruction; defendant built the dam to protect his land from further erosion. *Id.* at 15-16. Because the defendant had failed to make the new channel deep enough to handle the surplus water from the lagoon, water backed up onto plaintiffs’ property. *Id.* at 16.

<sup>30/</sup> In *Guilliams*, 90 Or 13, the court explicitly recognized public ownership of the *water* in navigable waterways, with riparian owners having a right to use the water as it flows by their property. *Id.* at 26.

<sup>31/</sup> Operating Howe’s dams to release water downstream raised the water levels from 16 to 24 inches as the stream flowed through plaintiffs’ property, thereby interfering with their generation of power. It also eroded the banks and filled plaintiffs’ mill race with mud and debris. Plaintiffs had repeated shortages of water while defendant filled its reservoirs. *Trullinger*, 53 Or at 223-24.

<sup>32/</sup> The court stated that it was not necessary to determine whether the stream was “navigable or floatable” at or above the Trullingers’ gristmill. *Trullinger*, 53 Or at 222.

<sup>33/</sup> The court made similar points in *Trullinger* and *Kamm* in relation to a logger’s alteration of the flow of water through the riparian owner’s property: “Dams, dikes, embankments and the like may be constructed in or along floatable streams to facilitate their use, but not to the extent of injuring the riparian proprietors by retarding the flow of the water or sending it down in increased volumes to his injury or at times when the stream would not otherwise be navigable.” *Kamm*, 55 Or at 15. *See also Trullinger*, 53 Or at 222.

<sup>34/</sup> It bears noting, however, that a separate body of law governs state ownership of the waters in a waterway. The ownership of waters in all waterways (regardless of the ownership of the beds) lies with the state. In a previous Attorney General Opinion, this office explained that public ownership of water in Oregon and other Western states is the result of federal statutes providing for the disposal of federal public domain lands in the mid to late 19<sup>th</sup> century. 49 Op Atty Gen 284, 307 (2001). Under the Desert Land Act of 1877, the federal government made explicit that non-navigable water “shall remain and be held free for the appropriation and use of the public.” *Id. citing* 43 USC § 321. In 1935, the U.S. Supreme Court interpreted the Desert Land Act to mean that western states exercise plenary control over previously unappropriated water and may manage and dispose of it under state law. *Id., California Oregon Power Co. v. Beaver Portland Cement Co., et al.*, 295 US 142, 163-164, 55 S Ct 725, 79 L Ed 1356 (1935). Prior to this, in 1909, the Oregon legislature had recognized that surface waters were owned by the state (more accurately the public, held in trust by the state) in enacting a comprehensive water code providing, in part, “all water within the state from all sources of water supply belong to the public.” 49 Op Atty Gen at 307 *quoting* ORS 537.110.

<sup>35/</sup> This opinion does not address the applicability of ORS 274.400 to 274.412 to waterways that are tidally influenced.