

Public Trust Doctrine

Managing State-Owned Waterways for the Public

The mandate to protect public rights of fishing, navigation and commerce is commonly referred to as the Public Trust Doctrine.

Statutes

The following statutes address this obligation and how it relates to the Department of State Lands (DSL):

ORS 274.040(4) DSL may grant easements or permissions to use submerged and submersible lands for Oregon Water Resource Department-permitted projects, but only if the project ensures the preservation of *economic, scenic and recreational values*.

ORS 274.043(8) DSL is authorized to allow use of submerged lands without charge if the use is minimally intrusive to the *public rights of navigation, fishery and recreation*.

ORS 274.760 DSL shall consider whether potential easements or leases over tidal lands will *interfere with recreational areas, substantially endanger marine life, or substantially interfere with commerce or navigation*.

Administrative Rule

Each statute is relatively narrow in scope and applies to specific conditions. The administrative rules provide a broader statement; the rule that is most applicable is:

OAR 141-082-0260 (3) & (6) DSL must manage submerged and submersible lands to

ensure the collective rights of the public, including riparian owners, to fully use and enjoy this resource for *commerce, navigation, fishing, recreation and other public trust values*. These rights are collectively referred to as “public trust rights.” The Department of State Lands shall not authorize a proposed use if it would result in an unreasonable interference with the public trust rights of commerce, navigation, fishing and recreation.

Oregon Admission Act and Constitution

Even though the administrative rule provides a much more comprehensive statement, the stronger legal support for the Public Trust Doctrine is based on the underlying, historical authority – the 1859 Admission Act and two separate implications from that Act.

First, in the Admission Act, the federal government explicitly granted certain land (sections 16 and 36 of every township) to the state to be used “for the schools.” This creates a binding obligation to manage or sell the lands to maximize benefit for common – or public – schools (often referred to as a “trust” obligation).

The constitution directs that the Land Board is responsible for managing these lands. (Oregon Constitution Article VIII, Section 5).

Second, in the Admission Act, the federal government implicitly (by the Equal Footing Doctrine) vested ownership of all submerged

and submersible lands under navigable waterways to the state to manage so that they remained "common highways and forever free".

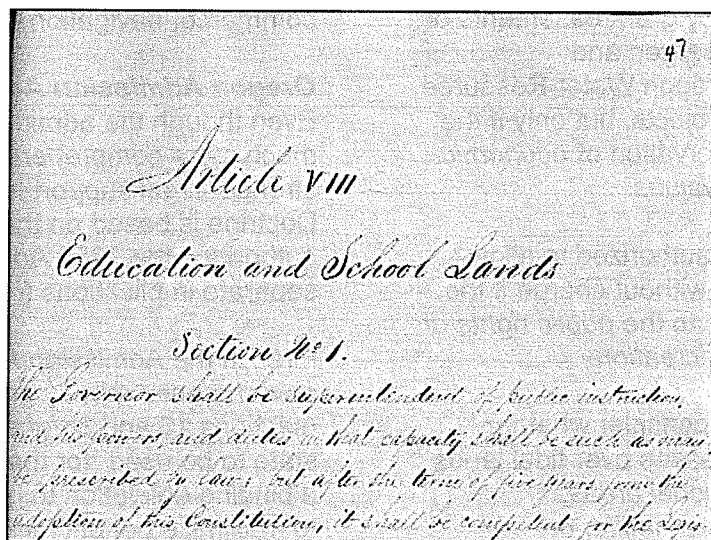
Early court cases later clarified that states acquired the land under navigable waterways subject to the obligation to maintain the public's right to use the waterway for navigation and fishing; this principle has evolved and expanded over time into the current Public Trust Doctrine. This doctrine prohibits the state from taking action that would materially impede or substantially impair the public rights to use the waters for navigation, fishing, commerce and recreation.

The Oregon Legislature directs that the Department of State Lands is responsible for managing these submerged and submersible lands (**ORS 274.040**).

Admission Act Implications – the Trust Obligation

The two separate impacts from the Admission Act form the basis for the separate management strategies that exist today. Common School Fund lands must be managed with a primary focus on maximizing the benefit to K-12 public schools, while the submerged and submersible lands of navigable waterways must be managed in a manner that does not substantially impair the public rights to use the waters for navigation, fishing, commerce, and recreation.

Both areas have been described by courts as creating a "trust" obligation, and provide a sense of the heightened duty under which DSL operates.



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Aquatic Resource Management



The Public's Rights to Use Oregon's Waterways for Recreation

The public has rights to use an Oregon waterway for recreation if the waterway is navigable for title purposes, if the waterway is floatable for purposes of the Public Use Doctrine, or if it is both.

A segment of a waterway is navigable for title purposes if that segment is tidally influenced *or* if that segment is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

A segment of a waterway is floatable for purposes of the Public Use Doctrine if the segment currently has sufficient capacity in terms of length, width and depth to enable watercraft such as canoes, kayaks or drift boats to make successful progress.

The public rights to use Oregon's waterways for recreation are not unlimited. Unauthorized use is a trespass and may violate criminal law. Please use care in identifying waterways that are navigable for title purposes or floatable for purposes of the Doctrine of Public Use.

You will also need to understand what uses are generally allowed. Any use may be restricted in some circumstances so check with the Department of State Lands and other state agencies for information that may help you decide where and how to enjoy Oregon's waterways.

If a waterway is navigable for title purposes:¹

Except as noted below, a person generally may:

Use the **submerged and submersible land up to the Line of Ordinary High Water** for:

- Any activity allowed on other public lands, including for instance **hiking, camping, picnics, football, hunting, collecting agates, skipping stones, bird watching, kayaking, canoeing, water skiing, swimming, ATVing, and photographing wildlife.**
- The "*jus publicum*" rights (pursuant to the Public Trust Doctrine) of **fishing, navigation, recreation and commerce** including for instance **anchoring, fly-fishing, water-skiing, swimming, camping when traveling a long distance, walking while fishing, and waiting on a gravel bar for others to arrive.**

¹ This includes all portions of a waterway that are subject to tidal action and those portions of waterways that are not subject to tidal action but have been determined title navigable, through a declaration of ownership by the Land Board at the conclusion of a navigability study, or through a court opinion, or through both. It also includes waterways that are title navigable, even if they have not yet been determined title navigable.

- *“Water dependent”* uses (pursuant to the Public Use Doctrine) such as **swimming, boating, fishing, and some forms of hunting.**
- *“Uses incidental to a water dependent use”* (pursuant to the Public Use Doctrine) such as **camping when traveling a long distance, walking while fishing, waiting on a gravel bar for others to arrive, repairing a boat damaged on a trip, and recovering supplies dumped in a rapid.**

Go above the Line of Ordinary High Water *if absolutely necessary, not merely for convenience or ease of use of the waterway.* For instance, a person likely could **carry a seriously injured boater to a nearby road, portage a boat and its contents around a waterfall, or walk around a cliff and waterfall when angling.**

Exceptions:

- Use of some locations is restricted by state or federal agencies in order to protect the resource. For instance, the Land Board restricts uses in specific locations that have been subject to overuse or frequent misuse.
- Some activities require a license or other authorization from a state or federal agency in order to protect the resource. For instance, fly-fishing requires a license from the Oregon Department of Fish and Wildlife, and camping for more than 14 days requires an authorization from the Department of State Lands.
- If the submersible land has been sold or granted by the state to another person, the public’s rights to use the submersible land are limited to the *jus publicum* rights, water-dependent uses, and uses that are incidental to a water dependent use. Each user and the landowner must exercise their

rights to use the submersible land in recognition of each other rights.

- Uses are not allowed that directly conflict with the rights of a person that is using the submerged and submersible land for a purpose that is stated in an authorization issued by the Department of State Lands. For instance, a person may not fish from a house-boat moorage that is authorized by a lease from the Department of State Lands, but a person may fish from a boat in the water near the moorage.
- Every user must exercise care and not unnecessarily interfere with other users or landowners. For instance, a person may not light a fire in a log jam or block the only point of access for 2 hours while they swim.

If a waterway is currently floatable for public use under the Public Use Doctrine:²

Except as noted below, a person generally may: Use the **submerged and submersible land up to the line of Ordinary High Water** for:

- *“Water dependent”* uses such as **swimming, boating, fishing, and some forms of hunting.**
- *“Uses incidental to a water dependent use”* such as **camping when travelling a long distance, walking while fishing, waiting on a gravel bar for others to arrive, repairing a boat damaged on a trip, and recovering supplies dumped in a rapid.**

² This includes all waterways that are floatable for purposes of the Public Use Doctrine. Under current law, no state agency declares whether a waterway is floatable.

Go above the Line of Ordinary High Water *if absolutely necessary, not merely for convenience or ease of use of the waterway.* For instance, a person likely could carry a **seriously injured boater** across uplands to a nearby road, **portage a boat and its contents around a waterfall, or walk around a cliff and waterfall when angling.**

Exceptions:

- Some activities require a license or other authorization from a state or federal agency in order to protect or manage the resource. For instance, fly-fishing requires a license from the Oregon Department of Fish and Wildlife.
- Use of some locations is restricted by state or federal agencies in order to protect the resource. For instance, the Oregon Department of Fish and Wildlife issues fishing regulations for several zones within the state.
- Every user must exercise care and not unnecessarily interfere with other users or landowners. For instance, a person may not light a fire in a log jam or block the only point of access for 2 hours while they swim.

If the waterway is not navigable for title and is not floatable under the Public Use Doctrine:

A person does not have a right to use the waterway or the underlying submerged and submersible land.

Additional considerations:

- Uses may not violate any law. For instance, a person may not commit offensive littering, harassment, menacing, disorderly conduct II, minor in possession of alcohol, reckless burning, criminal mischief, or deposit trash within 100 yards of water.
- Any person wanting to use **submerged or submersible land** in a proprietary way must obtain prior written authorization from the owner. For instance, if the state owns the submersible land, the person must obtain an authorization from the Department of State Lands to place a dock, drive a piling, build a boat ramp, or remove 100 cubic feet of sand or gravel.

