

# OWNERSHIP AND PUBLIC USE OF WATERWAYS<sup>1</sup>

## A Summary of an Oregon Attorney General's Opinion Issued April 21, 2005<sup>2</sup>

### A. State Ownership

The State of Oregon has owned, and generally continues to own, the land underlying all of the waterways that it received at statehood in 1859<sup>3</sup>. Federal law governs which waterways were acquired by the state at statehood. These include all waterways that were tidally-influenced at statehood, as well as waterways that were title-navigable at statehood. The federal test of title-navigability is fundamentally a practical test, and is comprised of several overlapping factors that are applied to the waterway as it existed at statehood. Those factors are:

- The waterway must have been used or have been susceptible of use. Actual use is not required if the waterway was susceptible of use. Whether the waterway was susceptible for use will be particularly important in those regions where a lack of exploration and settlement explains the infrequency or limited nature of the use or a lack of evidence of actual historical use prior to statehood. A waterway was susceptible of use if it had the physical capacity for use.
- The physical capacity of the waterway is analyzed in its “natural and ordinary” condition. A waterway may be title-navigable in its ordinary condition even if it has the physical capacity to be used only during certain periods of the year. A waterway may not be made title-navigable through improvements, but the fact that artificial aids are necessary to make a waterway more useful does not mean that it is not title-navigable in its ordinary condition. It may be necessary to wade or portage parts of the waterway. The use of the waterway need not be long, uninterrupted, extensive, or without difficulty. Evidence regarding the current physical characteristics of the waterway also may be examined, when the current characteristics are compared to, or used to draw conclusions about, the physical characteristics of the waterway at the time of statehood.
- It must be useful for trade and travel. A variety of uses will be either trade or travel, or both. For instance, log drives and use by the recreation industry are evidence that a waterway was title-navigable.
- The mode of transportation must have been customary in the region at the time of statehood. Many types of transportation have been used to determine title navigability,

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<sup>1</sup> This summary primarily is taken verbatim from a summary of the AG Opinion prepared by the Oregon Department of State Land, and is supplemented with some additional points from the AG Opinion itself..

<sup>2</sup> Referred to herein as the “AG Opinion”.

<sup>3</sup> The exceptions to this general rule are largely beyond the scope of this opinion. They depend on federal actions before statehood or state actions or natural events after statehood, and most must be addressed by examining the specific history of particular properties.

including steamboats, flatboats, rowboats, barges, scows, Native American canoes, drift boats, and floating logs. Evidence regarding current modes of transportation also may be used, when their physical characteristics are comparable to modes of transportation at statehood.

- The waterway must have been useful as a highway of commerce. The distinctive feature of this factor is that the waterway must provide a path useful for commerce during at least some regular part of the year.

State-owned waterways – whether because they are tidally-influenced or because they are title-navigable – are generally open to public use. State ownership of waterways carries with it certain trust responsibilities. The state may manage waterways, and may convey rights to others, so long as in doing so it does not substantially impair the public rights of navigation, commerce, fisheries, and recreation.

## **B. Doctrine of Public Use**

The Oregon Supreme Court identified and developed the Public Use Doctrine between 1869 and 1936. The AG Opinion concludes that this common law doctrine continues to authorize public use of waterways that are navigable-for-public-use. The Public Use Doctrine provides that the public holds a right to use all waterways that are navigable-for-public-use, independent of whether the soil underlying the waterway is in private ownership. The overarching consideration for persons using a waterway subject to the doctrine or owning adjacent land is that both have the right to reasonable enjoyment of their rights without unnecessary interference from the other. Landowners, however, may not interfere with the public's right to use these waterways. For example, even if the landowner owns the bed and banks of the river (in other words, it does not meet the federal test for navigability and therefore the State of Oregon did not acquire ownership of it at statehood) the landowner may not erect a fence or string barbed wire across the river, or take any other action that would impair the public's right to use the river. 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. DSL's best judgment is that the test:

- Is applied to a waterway or a waterway segment.
- Examines the capacity of use rather than the actual use of the waterway.
- Is applied at the time of use.
- Is applied to the waterway in its natural condition.
- May be satisfied if the boat is small and used only for pleasure.
- Does not include a "highway of commerce" component.

Under the Public Use Doctrine, the public may use a waterway below the line of ordinary high water to boat or fish from a boat for pleasure or for profit, and to drive saw logs to market. The AG Opinion concludes that Oregon's appellate courts would also hold that the doctrine authorizes other water-dependent uses below the line of ordinary high water. Such uses include bathing, swimming, fishing on foot, hunting from a boat, and other

similar uses requiring the use of the water. The AG Opinion also states that Oregon's appellate courts would hold that the doctrine authorizes uses below the ordinary high water line that are incidental to water-dependent uses. Such uses include camping when traveling the waterway for a long distance, walking around obstacles, waiting on a gravel bar for other members of a group to arrive, collecting a duck killed by a hunter from a boat, repairing a hole in an inflatable raft, and other uses that are secondary to a water dependent use. In addition, the opinion concludes that the public may use the upland (the area above the line of ordinary high water) along the waterway as long as the use is incidental to the lawful use of the waterway, and is necessary as compared to merely convenient. In this context, DSL believes that "necessary" does not mean that there must be a medical emergency. To illustrate, boaters may move cargo, people, and a boat over upland to go around a set of falls, but they must return to the area below the line of ordinary high water as soon as reasonably possible. They cannot use upland to sit in the sun and enjoy lunch. An angler walking along the bed of a waterway may move over upland to go around a deep pool surrounded by sheer cliffs. In contrast, it will rarely be necessary to camp on upland. The public may not use privately owned uplands to access or leave a waterway, except possibly when there is a severe medical emergency. There is one additional limit on all of these uses. The public must use reasonable and prudent care. This is both a limit on the types of uses that may occur on a specific portion of a waterway, and notice to users that they will have to pay for the damage they cause to the land or personal property of the riparian landowner if they act negligently.

### **C. Public Uses in the Absence of a Determination Concerning Ownership**

Under current statutes, the State Land Board is the only state entity that may take a position on behalf of the state when ownership of a non-tidal waterway is at issue. The Board may assert or determine the ownership of a specific non-tidal waterway only after litigation or by a final declaration after a formal navigability study. This restricts the state's ability to manage its non-tidal waterways, but it does not alter the fundamental general principle that the state has always owned, and continues to own, both tidally influenced and title-navigable waterways. The current law, however, does not restrict individual members of the public. A person may use a state-owned waterway that has not yet been determined to be state owned. In addition, a person may use waterways that are subject to the Public Use Doctrine. But that person risks incurring liability for trespass in the event that the waterway turns out to not be state-owned and not subject to the Public Use Doctrine.