OREGON SUPREME COURT MUDDIES THE WATERS: *KRAMER V. CITY OF LAKE OSWEGO*

BY

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In Kramer v. City of Lake Oswego*, the Oregon Supreme Court has turned what should have been a simple determination of rights of access to navigable waters from riparian lands into a confused treatise on the public trust doctrine and the unnecessary perpetuation of a public use doctrine. The court confuses the public interest and the associated police power with public rights. It erroneously attributes rights of access to waters from public lands to the navigability of those waters rather than to public ownership of riparian and submerged lands. It mistakenly grounds public rights in the use of navigable waters in state title to submerged and riparian lands, while perpetuating the mistaken concept of public ownership of state waters. It erroneously seeks to explain the public trust doctrine in terms of the law of trusts rather than as an easement or servitude on properties in submerged and riparian lands. Finally, the court embraces the implausible proposition that the rights of the people can be violated by actions taken by the representatives of the people.*

To its credit, the Kramer *court does, at least for now, acknowledge the aquatic boundaries of the common law public trust doctrine. If on remand the trial court determines that Lake Oswego is navigable under the federal definition, the public will have a right of access to that lake. But if the trial court finds the lake non-navigable by the federal definition, the public will have no right of access under the court's public use doctrine, just as it has no right of access to waters "navigable in a qualified or limited sense" to which that peculiar doctrine applies. If the plaintiffs prevail on remand, it will be a slender victory.*

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I. INTRODUCTION

The spirit of Professor Joe Sax lives on in the imaginative and even fantastical public trust doctrine claims being pressed in the academic literature and the courts.[1] In a 1969 article, Sax proposed the public trust doctrine as a vehicle for "effective judicial intervention" in natural resources law and policy.[2] But few American courts have accepted Sax's invitation to break the historical shackles of the common law doctrine.[3] Out of respect for their constitutionally limited role, the vast majority of state courts have kept the doctrine confined to its aquatic roots and to a limited set of public rights in the use of variously defined waters.[4] A recent decision of the Oregon Supreme Court in *Kramer v. City of Lake Oswego*[5] continues this adherence to the historic doctrine,[6] but muddies the public trust waters.

II. KRAMER V. CITY OF LAKE OSWEGO

The City of Lake Oswego is named for the lake at its center.[7] Before the lake was enlarged with dams constructed by the Oregon Iron & Steel Company, it was called Sucker Lake and was surrounded by two Donation Land Claim properties later acquired by Oregon Iron & Steel.[8] In the early twentieth century the company platted and sold lots surrounding the lake.[9] The company reserved the riparian rights and transferred them to the Lake Oswego Corporation, the shareholders of

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[1] Advocates for an expanded public trust doctrine have long proposed its application to wildlife. *See, e.g.*, WILDLIFE SOC'Y, TECHNICAL REVIEW 10-01, THE PUBLIC TRUST DOCTRINE: IMPLICATIONS FOR WILDLIFE MANAGEMENT AND CONSERVATION IN THE UNITED STATES AND CANADA (2010), https://perma.cc/LV38-AMQJ. More fantastical is the theory of an atmospheric trust propounded in *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (2016). *See also* Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to A Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL'Y 633, 648 (2016).

[2] Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

[3] Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

[4] *See* James L. Huffman, *The Public Trust Doctrine: A Brief (and True) History*, 10 GEO. WASH. J. ENERGY & ENVTL. L. 15, 27–28 (2019).

[5] 446 P.3d 1 (Or. 2019).

[6] *Id.* at 6.

[7] *Id.*

[8] *Id.*

[9] *Id.*

which included the waterfront property owners and others.[10] Those shareholders have since paid dues in exchange for access to the lake.[11]

Oregon Iron & Steel also deeded two parcels to the city for use "'by the resident children of Lake Oswego' for the purpose of recreation."[12] Those parcels became a swim park, fenced to prevent access to the open lake.[13] Use of the park is restricted to city residents.[14] The City subsequently acquired properties on which three downtown, waterfront parks are located.[15] Access to the lake from two of the parks is prevented by fencing and from the third by signs announcing that it is a private lake.[16]

The City's denial of access to the lake by non-residents was challenged as a violation of the public trust doctrine and the public use doctrine and of article I, section 20, of the Oregon Constitution.[17] The latter claim was rejected by the trial court and affirmed by both the court of appeals and the Oregon Supreme Court.[18] On the public trust and public use claims, the trial court ruled that even if the plaintiffs have a right to use the lake, neither doctrine gives the public a right to use the city's access.[19] This ruling was also affirmed by the court of appeals and the Oregon Supreme Court with respect to both the public use doctrine and article I, section 20, claims.[20] But the Oregon Supreme Court ruled that "if plaintiffs are correct that the lake is a navigable waterway subject to the public trust doctrine, then genuine issues of material fact preclude a determination on summary judgment that the city is authorized to prohibit the public from entering the water from the public waterfront parks."[21]

The first question that likely occurs to students of the public trust doctrine is: What is the public use doctrine? The public trust doctrine has long been understood to recognize certain public rights of use in particular waters, but the idea of a distinct public use doctrine in the context of lakes and waterways is unusual, if not unique to Oregon.[22] Of

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10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at 6–7.
16 *Id.*
17 *Id.* at 6.
18 *Id.*
19 *Id.* at 7.
20 Kramer v. City of Lake Oswego, 395 P.3d 592, 603–04, 612 (Or. Ct. App. 2017); *Kramer*, 446 P.3d at 6.
21 *Kramer*, 446 P.3d at 8.
22 Courts have referred to a public use doctrine in the context of challenged alienations of submerged lands. "Governments may recognize title in private individuals to trust property pursuant to an international duty, even though the original alienation of submerged lands may conflict with the public use doctrine." W. Indian Co. v. Gov't of Virgin Islands, 643 F. Supp. 869, 876 (D.V.I. 1986), *aff'd*, 812 F.2d 134 (3d Cir. 1987). The only other reference to a public use doctrine in the context of public rights of use in water is in *Jones v. Rose*, No. 00-CV-1795-BR, 2008 WL 552666, at *38 (D. Or. Feb. 28, 2008), *aff'd*,

course the Oregon Supreme Court is free to describe state law as it chooses, but there is already what might be called a public use doctrine in eminent domain law. The 14th Amendment to the United States Constitution and article I, section 18, of the Oregon Constitution both mandate that government takings of private property be justly compensated and for a public use.[23] Oregon has well developed law on what constitutes a public use for eminent domain purposes,[24] making the idea of a parallel public use doctrine confusing,[25] and unnecessarily so as will be demonstrated later in this Article.

III. THE PUBLIC INTEREST

At the very outset of its opinion, the court introduces another confusion by stating that all three of the plaintiffs' claims for relief "depend to some extent on their premise that the assumed public interest in Oswego Lake includes a right of access to the water from the abutting upland."[26] There is an important distinction between the public interest and public rights. The public has an interest in all private property, for example, but that interest establishes no public rights. Rather the public interest in private property is protected and promoted by the exercise of the police and eminent domain powers that all states

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495 F. App'x 788 (9th Cir. 2012). There, the court noted that the Water Resources Development Act, 33 U.S.C. § 2211 (2012), "does not specifically address issues of public access to beaches . . . because such access invokes rights under the Public Use Doctrine, which are matters reserved to the State of Oregon." *Jones*, 2008 WL 552666, at *38.

23 Eminent domain law is also said, at least by a few courts, to have a "prior public use doctrine" that precludes the eminent domain taking of property previously taken for a different or prior public use. "The general rule is that property already devoted to public use can only be condemned by special legislative authority clearly expressed or necessarily implied." Atl. States Legal Found. v. Onondaga Cty. Dep't of Drainage & Sanitation, 233 F. Supp. 2d 335, 342 (N.D.N.Y. 2001).

24 *See* Foeller v. Hous. Auth. of Portland, 256 P.2d 752, 766 (Or. 1953).

25 Other public use doctrines could lead to more confusion. Under the "public use doctrine," a lessor of land is not liable to a lessee for physical harm caused by a dangerous condition arising after the lessee takes possession except where the lessor knows that the premises will be for a public use. Shoy v. Venator Grp. Specialty, Inc., No. CIV. 458/2000, 2002 WL 561063, at *1 (Terr. V.I. Mar. 26, 2002). The America Invents Act of 2011, 35 U.S.C. § 102(b) (2012), includes a public use doctrine under which a person is not entitled to a patent if the invention was in public use more than one year prior to the date of the application for patent. *See also* Kearns v. Wood Motors, Inc, 773 F. Supp. 979, 980 (E.D. Mich. 1990); DTA Corp. v. J & J Enters., 715 F. Supp. 290, 292 (C.D. Cal. 1988). Prescriptive and adverse possession claims of title have been rejected pursuant to a public use doctrine, which examines whether "'the people of the state at large . . . have a general interest in the property at issue' such that 'the property is for the general benefit of the people of the state.'" Wilmot Mountain, Inc. v. Lake Cty. Forest Pres. Dist., 859 F. Supp. 2d 932, 940 (N.D. Ill. 2012) (quoting Miller v. Metro. Water Reclamation Dist. of Greater Chi., 870 N.E.2d 1040, 1042 (N.D. Ill. 2007)). Finally, the federal circuit court of appeals has referred to a "shifting public use doctrine" in the context of changed uses of public use easements. Hash v. United States, No. CV-99-324-S-MHW, 2008 WL 818347, at *16 (D. Idaho Mar. 24, 2008).

26 *Kramer*, 446 P.3d at 8.

have by virtue of their sovereignty,[27] and that cities exercise by delegation from the state. While the public interest justifies exercise of the police power to regulate land use, for example, or exercise of the eminent domain power to acquire land for a highway, it neither establishes rights in members of the public with respect to the regulated or taken lands nor standing as members of the public to enforce the state's regulations. The public's interest in Oswego Lake would justify prohibitions of polluting runoff from lakeside properties, regulation of boating safety, limits on time and manner of uses that disturb the peace and quiet of the community, or enforcement of state and local criminal laws. But the public's interest in the lake establishes no public rights. If public rights could be declared to exist wherever there is a public interest, private property would be meaningless.

This conflating of the public interest with public rights, in the sense of rights shared by all members of the public, is not peculiar to the Oregon Supreme Court. As long ago as the seminal public trust case of *Illinois Central Railroad v. Illinois*,[28] the U.S. Supreme Court stated that legislation concerning "[t]he soil under navigable waters being held by the people of the State in trust for the common use . . . any act of legislation concerning their use affects the public welfare. It is therefore, appropriately within the exercise of the police power of the State."[29] But, neither then nor now is the exercise of the police power with respect to navigable waters or submerged lands contingent on the state's holding title, whether in trust or not, in the submerged lands. Where submerged lands are privately held the public welfare is affected and the lands are equally subject to police power regulation. The public's interest in the use of submerged lands, not the public's title to those lands or rights of use in the overlying waters, allows for the exercise of the police power. If plaintiffs' public rights claims derive from the public's interest in Oswego Lake, the imagination runs wild with other interests to be pursued in the courts as public rights claims, rather than lobbied for in the legislature as competing visions of the public interest.

IV. THE PUBLIC TRUST DOCTRINE

From this general and potentially wide-ranging linkage of public rights to the public interest, the *Kramer* court turns its attention to the actual common law doctrine that plaintiffs cite as the source of the public rights they claim. Because the court makes the not uncommon mistake of founding the public trust doctrine in state title to submerged lands, it delineates two parallel doctrines—public trust and public use.

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[27] "It belongs to [the legislative branch] to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." Mugler v. Kansas, 123 U.S. 623, 661 (1887) (J. Harlan, majority opinion).

[28] 146 U.S. 387 (1892).

[29] *Id.* at 459.

The public trust doctrine, says the court, "applies to bodies of water that are considered navigable as a matter of federal law."[30] The public use doctrine "recognizes a public right to use other waterways, even if title to the underlying land is privately held, as long as the water is 'navigable in a qualified or limited sense.'"[31] Because the land under navigable waters as defined by federal law is the property of the states under the equal footing doctrine,[32] the court asserts that the public trust doctrine arises from state ownership of submerged lands and not from the fact that the waters are navigable. But this is not consistent with the common law on which the court purports to rely.

What became the public trust doctrine in the United States was, in English law, a public right of commercial navigation in navigable waters.[33] Navigable waters constituted those affected by the tides. These public rights existed without regard to ownership of the submerged lands. Although the prima facie rule was that the Crown owned all lands affected by the tides, the Crown could and did alienate those lands.[34] The public right to navigate was unaffected by the Crown's alienation of submerged lands to private parties.[35] Thus, the public rights did not derive from Crown title, but rather from the fact that the waters were navigable. Indeed, the public right of navigation served to limit the proprietary claims of the Crown to exclusive navigational rights.[36] In effect, the public rights were an easement on the proprietary rights of whomever owned the submerged lands.

Prior to the American Revolution, English laws applied in the American colonies. With independence, the individual states assumed the sovereignty previously claimed by the Crown and "received" the common law, including what would become known as the public trust doctrine, as their own subject to future modifications.[37] The one major modification generally accepted by the American states was the redefinition of navigable waters as navigable-in-fact rather than tidal

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30 *Kramer*, 446 P.3d at 8.

31 *Id.* (citing Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936)).

32 As explained by Justice McKinley in *Pollard v. Hagan*, 44 U.S. 212, 224 (1845), "the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever." Because the original states had succeeded to the Crown's title to submerged lands under navigable waters, it was therefore required that the new states would hold title to submerged lands beneath navigable water within their boundaries.

33 James Huffman, *The Limits of the Public Trust Doctrine*, 38 PERC REPS., Summer 2019, at 40, 40–41, https://perma.cc/9NJY-JFQ4.

34 James Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. POL'Y F. 1, 20 (2008).

35 *Id.*

36 Not until 1768 did an English court rule that the Crown could not grant exclusive fisheries to private parties. Carter v. Murcot (1768) 98 Eng. Rep. 127, 128; 4 Burr. 2162, 2163–64.

37 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 94–96 (1973).

waters.[38] The navigable rivers and lakes of the vast North American continent made the modification necessary if the doctrine was to serve the purposes it had in England where navigable waters are almost always tidal waters.

Because the received English law also assigned original title to lands beneath navigable water to the Crown, and because the states had succeeded to the crown's sovereignty, the lands beneath navigable-in-fact waters as well as tidal waters, unless previously granted by the Crown or the Crown's sovereign predecessors, vested in the states and became subject to each state's determination of title.[39] That navigability established state title to submerged lands and delineated the scope of public rights of navigation and fishing did not mean that the public rights derived from state title, as evidenced by the persistence of public rights in navigable waters over alienated, private lands.

The *Kramer* court cites *PPL Montana v. Montana*[40] for the proposition that the public trust doctrine "originates with the British claim to ownership of the land that became the United States . . . [and the common law rule that] the crown was considered to hold title to the beds of 'waters subject to the ebb and flow of the tide[.]'"[41] But this is simply incorrect. *PPL Montana* involved a dispute over title to submerged lands beneath the Missouri River, not public rights in the use of the overlying waters. [42] The *PPL Montana* court stated that while

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> The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. . . . A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers 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.

The Daniel Ball, 77 U.S. 557, 563 (1870). "[I]n England, no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so . . . ." Barney v. City of Keokuk, 94 U.S. 324, 336 (1876); *see also* Weise v. Smith, 3 Or. 445, 448–49 (1869).

39 What constitutes navigable-in-fact non-tidal waters is a question to be determined by the individual states.

> Whether, as rules of property, it would now be safe to change . . . [English common law rules of title to submerged lands] is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

Barney, 94 U.S. at 338.

40 565 U.S. 576 (2012).

41 *Kramer*, 446 P.3d 1, 8 (Or. 2019) (quoting PPL Montana v. Montana, 565 U.S. at 589 (2012)).

42 *PPL Montana*, 565 U.S. at 576. The State of Montana claimed title to and sought rent for submerged lands that had been understood to be in private ownership for a century.

"the Crown was presumed to hold title to the riverbed and soil, . . . the public *retained* the right of passage and the right to fish in the stream."[43] The court's point was not that the public right derived from Crown title as the *Kramer* court suggests, but rather that the public right exists independent from Crown (now state) title. The public retained that right of use when title to the submerged lands transferred from the Crown to the state for the same reason an easement is retained by its owner when the servient estate is transferred—the easement is not dependent on who holds title to the servient estate.[44] In *PPL Montana* the Supreme Court mentions the public trust doctrine only to distinguish it from the law relating to title to submerged lands: "[T]he State of Montana['s] suggest[ion] that denying the State title to the riverbeds here in dispute will undermine the public trust doctrine . . . underscores the State's misapprehension of the equal footing and public trust doctrines."[45]

The *Kramer* court also cites *Illinois Central* in support of its conclusion that the public trust doctrine arises from Crown (and later state) ownership of submerged lands.[46] But *Illinois Central* suggests the reverse. Sovereign ownership, stated the U.S. Supreme Court in language quoted by the Oregon court, "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment."[47] In other words, sovereign title to submerged lands beneath navigable waters was a product of the preexisting right of public use in those waters. Ongoing sovereign title was not necessary to the existence of public rights, but it was an efficient default (prima facie in the terms of English law)[48] rule of original title.

> It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.

Id. (quoting *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922)).

43 *PPL Montana*, 565 U.S. at 589 (emphasis added).

44 "A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.1 (AM. LAW INST. 2000); *see* Ploplys v. Bryson, 69 P.3d 1257, 1262 (Or. Ct. App. 2003).

45 *PPL Montana*, 565 U.S. at 603.

46 *Kramer*, 446 P.3d at 9.

47 *Id.*

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> [T]he prima facie rule pursuant to which title to submerged lands is presumed to be in the Crown absent a showing to the contrary—was a sixteenth century fabrication that did not take hold in England until late in the nineteenth century, well after American law had developed on its own. Ironically, the invented prima facie rule served to feather the nest of the Crown [by asserting title in submerged lands where private title could not be proven], not to protect the rights of the public.

Huffman, *supra* note 34, at 2.

V. THE PUBLIC USE DOCTRINE?

What the Oregon courts calls the public use doctrine is what every other state, including those that have extended the geographic reach of public rights beyond navigable waters as defined by federal law, calls the public trust doctrine. A public use doctrine is, thus, unfamiliar to those schooled in the common law public trust doctrine.[49]

The *Kramer* court appears to have come up with a public use doctrine as a way of explaining its recognition of public use rights in waters to which the public trust doctrine did not traditionally apply.[50] Other states have followed a different path. The story of how the public trust doctrine has, in a few states, reached beyond tidal and navigable-in-fact waters has been told elsewhere.[51] In a nutshell, or perhaps better a seashell, it was suggested by Professor Sax, in his 1969 article, that the then mostly unknown public trust doctrine might prove a vehicle for judicial intervention in a wide array of natural resource and environmental policies.[52] Sax's vision was that courts would use the public trust doctrine's concept of public rights in the use of navigable waters as precedent for declaring other public rights in non-navigable waters and other natural resources.[53] Because the idea gained little traction over the succeeding decade, Sax wrote a second article suggesting that the challenge was to liberate the doctrine from its "historical shackles."[54] It seemed that judges trained in stare decisis and the rule of law found the expansions suggested by Sax, and subsequently others, unsupported by the common law and therefore beyond the authority of the courts.

But a few state courts did take up the challenge of extending the doctrine to waters that did not meet the federal test for navigability. In 1971, the California Supreme Court extended the public trust doctrine rights beyond navigation, commerce and fishing to the "preservation of

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[49] Earlier Oregon cases had referred to a right of public use in the context of the categorization of the state's waters. *See* discussion *infra* note 50.

[50] In *Shaw v. Oswego Iron Co.*, 10 Or. 371, 375–76 (1882), the Oregon Supreme Court identified four categories of state waters: tidal, navigable-in-fact, "such streams as are so small or shallow as not to be navigable for any purpose" and large rivers with the "capability of navigation beyond anything known to the common law." How a water was classified had consequences for ownership of submerged lands, but the right of public use for navigation and fishing was identical in all but those waters not navigable for any purpose.

[51] Huffman, *supra* note 4, at 26–31.

[52] Sax, *supra* note 2, at 556–57.

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> [T]he delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required.

Sax, *supra* note 2, at 556–57.

[54] Sax, *supra* note 3, at 185.

[tidelands] in their natural state."[55] "In administering the trust," declared the court, "the state is not burdened with an outmoded classification favoring one mode of utilization over another."[56] Twelve years later, the California Supreme Court extended the geographical reach of the doctrine beyond navigable-in-fact waters to tributaries to those waters.[57] In 1972, the Wisconsin Supreme Court concluded that the state's restrictions on the use of privately owned wetlands did not result in an unconstitutional taking because "under the trust doctrine [the state] has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters," thus extending the geographic reach of the doctrine to tributary wetlands and the public use rights to pollution prevention.[58] In 1984, the Montana Supreme Court declared a new "suitable-for-recreation" test for navigability, thus extending the geographic reach of the doctrine to most waters in the state.[59]

Despite these not insignificant extensions of the common law doctrine, it remained firmly linked with water and uses of water, notwithstanding a constant barrage of claims from the legal academy that the doctrine should be applied to other resources. One common refrain has been that the doctrine applies to wildlife, a view endorsed in 2008 in dicta by the California Court of Appeals.[60] Although a central premise of the North American wildlife management model has long been that public wildlife managers have a public trust responsibility,[61] it is a premise founded on the mistaken notion that the states own wildlife. This idea of state ownership of wildlife gained support from the U.S. Supreme Court's 1896 opinion in *Geer v. Connecticut*,[62] but a half century later in *Toomer v. Witsell*[63] the Court described "[t]he whole ownership theory . . . as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[64] In 1979, the *Geer* holding was expressly overruled in *Hughes v. Oklahoma*,[65] finally putting to rest the claim of state ownership of wildlife. The attribution of

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55 Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

56 *Id.*

57 Nat'l Audubon Soc'y v. Sup. Ct. of Alpine Cty., 658 P.2d 709, 721 (Cal. 1983).

58 Just v. Marinette Cty., 201 N.W.2d 761, 768 (Wis. 1972).

59 Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 171 (Mont. 1984). The Montana Supreme Court looked at several other jurisdictions and adopted a new navigability test.

60 Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 591 (Ct. App. 2008). In upholding the lower court's dismissal of plaintiff's lawsuit, the court of appeals proclaimed that "[w]ildlife, including birds, is considered to be a public trust resource of all the people of the state, and private parties have the right to bring an action to enforce the public trust." *Id.*

61 *See* Shane Mahoney, *The North American Model of Wildlife Conservation: What Does it Really Mean?*, PERC REPS., Summer 2019, at 12, https://perma.cc/3A9A-DCX3.

62 161 U.S. 519, 529 (1896).

63 334 U.S. 385 (1948).

64 *Id.* at 402.

65 441 U.S. 322, 335–36 (1979).

a public right to use wildlife to the mistaken claim of public ownership of wildlife parallels, though not exactly, the mistaken understanding that public rights of use in navigable waters arise from public ownership of the submerged lands. It is a direct parallel with another mistaken, but widespread, assertion that public rights in the use of water arise from public ownership of water.[66] Although the *Kramer* court frequently refers to "publicly-owned water" for "convenience," it avoids this latter mistake by acknowledging in a footnote that "technically the state holds title to the land underlying the water."[67] Given the widespread confusion about the ownership of water, the state's responsibilities with respect to water resources, and the public's rights of use in water, it is unfortunate that the Oregon court is not more precise in distinguishing the state's proprietary ownership of resources from the state's authority to regulate natural resources under its police powers.

Creation of a public use doctrine, where other states have chosen to extend the public trust doctrine, is consistent with the court's much earlier recognition of another obscure doctrine where the public trust doctrine would have served. The same year that Sax wrote his first article on the then-little-known public trust doctrine, the Oregon Supreme Court unearthed the even more obscure doctrine of custom. In *State of Oregon ex rel. Thornton v. Hay*[68] the Oregon Supreme Court ruled that, based on "ancient" use of Oregon's beaches by the public, coastal property owners holding legal title to the dry sand beaches could not preclude public access to those beaches.[69] Thus, under the doctrine of custom, the public holds an easement over the dry sand beaches, just as it holds an easement in the same properties under the public trust doctrine. A concurring Justice Deneke agreed that the public has a right of access to the dry sand beaches as among the "rights of the public in tidelands and in the beds of navigable streams [that] have been called 'jus publicum' . . . ."[70] He did not mention the public trust doctrine, but that is what he was referring to.

As suggested above, the *Kramer* court's reliance on a public use doctrine might be explained by the difficulties inherent in justifying extensions of the historic public trust doctrine in ways that effectively take previously settled private property rights.[71] As Justice Scalia

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[66] See, for example, Michael C. Blumm & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 375, 395 (2012), in which the authors attribute public rights under the public trust doctrine to "the state's longstanding recognition of public ownership of water." The *Kramer* court acknowledges that the state does not own the state's waters. *Kramer*, 446 P.3d 1, 15–16 (Or. 2019).

[67] *Kramer*, 446 P.3d at 12 n.11.

[68] 462 P.2d 671 (Or. 1969)

[69] *See id.* at 677–78 (finding a common law custom of historic use of dry sand beaches by the public).

[70] *Id.* at 679 (Denecke, J., concurring).

[71] An appeal of the public trust doctrine for some (and presumably of the public use doctrine) is that the public rights, by definition, predate any private rights. This means that enforcement of the public rights, even if only just recognized, cannot result in an unconstitutional taking of private property. The state cannot take what the property owner

stated in dissenting from the Supreme Court's denial of certiorari in *Stevens v. City of Cannon Beach*[72] (in which plaintiff landowners claimed that custom did not establish a public right of access to their coastal property), "just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law."[73] However, Oregon law with respect to public rights of use in the waters of the state has been clear for well over a century, so the distinction between the public trust doctrine and the public use doctrine seems to rest on tradition and not substantive differences in terms of public rights.

The *Kramer* court's recognition that the public trust doctrine applies to Oregon's navigable waters as defined by federal law means that the state's proprietary interests in the submerged lands and any private interests in those lands acquired prior or subsequent to statehood are subject to superior public rights of use in the nature of an easement.[74] Under the common law received by Oregon when it became a state, submerged and riparian lands on non-navigable waters were owned by the riparian landowners and not subject to a public use easement. Present day recognition of public rights of use in non-navigable waters would raise the concern expressed by Justice Scalia in *Stevens*. But Oregon law recognizes as navigable some waters overlying privately owned submerged lands.[75] The *Kramer* court refers to these waters as "navigable in a qualified or limited sense."[76] The court cites a 1936 case for this category of waters,[77] but at least as early as 1882 a public right of use in these waters was recognized, notwithstanding that the submerged lands were the property of riparian landowners.[78] The term "public trust doctrine" never occurs in the Oregon cases confirming public rights to navigate and fish in waters of "qualified or limited" navigability, but the public rights are the same as those in tidal waters and "larger rivers susceptible of a great volume of commerce where the title to the bed of the stream remains in the state for the benefit of the public."[79] Thus, the distinction between tidal waters and larger rivers on

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does not possess. *See* James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 173–75, 182 (1987).

72 854 P.2d 449 (Or. 1993).

73 *Id.*, *cert. denied*, 510 U.S. 1207, 1207–08, 1211 (1994) (Scalia, J., dissenting).

74 The court does not apply the easement concept to these waters, but the trust concept it does apply says nothing about the relationship between the public rights and the rights of riparian property owners. *Kramer*, 446 P.3d 1, 17–18 (Or. 2019). From the perspective of the property owner, it is an easement.

75 Chernaik v. Brown, 436 P.3d 26, 32 (Or. Ct. App. 2019).

76 *Id.* at 8 (quoting *Luscher*, 56 P.2d 1158, 1162 (Or. 1936)).

77 *Luscher*, 56 P.2d at 1162.

78 *Oswego Iron Co.*, 10 Or. 371, 381 (1882).

79 *Luscher*, 56 P.2d at 1162. The *Luscher* court added the larger-rivers category to the three categories first explicated in *Oswego Iron Co.*:

the one hand and waters of qualified or limited navigability on the other hand is relevant to title to submerged lands but not to public rights of use. Nevertheless, the *Kramer* court chose to attribute public rights in the former to the public trust doctrine and public rights in the latter to the public use doctrine. It is a distinction without a difference in terms of public rights in the use of waters.

VI. PUBLIC RIGHT OF ACCESS

But the Oregon court says there is a difference with respect to the central issue in the case, namely, public rights of access to waters subject to the public trust, on the one hand, and public use, on the other. The public has a right to use waters of qualified or limited navigability—"a public easement to use the waterway."[80] But the public does not have "a different and additional public easement to use the abutting upland to reach the water in the first place."[81] The court acknowledged a narrow exception to this rule where the occupation of private land is "incidental and temporary," but ruled that the plaintiffs' claim that "the owner of abutting upland must allow the public to use the land to enter the lake in the first instance" was neither incidental nor temporary.[82] But, as the court said, "the scope of the public's rights with respect to the navigable waterways subject to the public trust doctrine includes a right of access from public land . . . ."[83] Because the plaintiffs were seeking access from lands owned by the City of Lake Oswego, the court did not address whether there is also a right of public access from private land, although the court expressed its agreement with the rationale of a New Jersey case upholding a public right of access to ocean beaches from private land.[84]

The court's explanation for a public trust doctrine right of access from public lands to navigable waters is convoluted and ultimately unsatisfying, particularly in light of the court's "pause to emphasize . . .

> First, Such rivers, or arms of the sea in which the tide ebbs and flows; and in these, which are technically called navigable, the sovereign is the owner of the subjacent soil, and all right in it belongs exclusively to the public. Second, Such streams as are navigable in fact for boats, vessels, or lighters; and in these, which are termed public highways, the public have an easement for the purposes of navigation and commerce, but the title of the subjacent soil to the middle of the stream, and the right to the use of the water flowing over it is in the riparian owner, subject to the superior rights of the public to use it for the purposes of transportation and trade. Third, Such streams as are so small or shallow as not to be navigable for any purpose; and in these the public have no rights of highway or otherwise, and they are altogether private property.

Oswego Iron Co., 10 Or. at 375–76.

80 *Kramer*, 46 P.3d at 10.

81 *Id.*

82 *Id.* at 11.

83 *Id.* at 12.

84 *Id.* at 16–17 (citing Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355, 364 (N.J. 1984)).

that the doctrine of public ownership of the beds and banks of navigable waters and the so-called 'public trust' doctrine are independent doctrines . . . ."[85] The court is correct that state title to submerged lands and public rights to use the overlying waters derive from distinct doctrines (although it had earlier attributed the public right of use in navigable waters to the state's ownership of the submerged lands),[86] so it is puzzling how the court reaches the conclusion "that the rights incident to public ownership of the lands beneath navigable waters include a right of access to the public water from abutting public upland."[87]

The court's reasoning goes like this. First, the court distinguishes the nature of public rights in navigable waters overlying submerged lands owned by the state (public trust doctrine rights) from the public rights in waters of qualified or limited navigability (public use doctrine rights). The former, says the court, is in the nature of "the beneficial interest of one for whom land is held in 'trust,'" and the latter is in the nature of an easement.[88] As I have demonstrated elsewhere, the public trust doctrine cannot be understood under the law of trusts because, among other difficulties, "[u]nder the law of trusts, a single person or association of persons cannot be both trustee and beneficiary of a trust."[89] The beneficiary of the public trust is said to be the public and the trustee is said to be the state, which in a government founded on popular sovereignty is the self-same public. The idea that a court can find that the people acting through their representatives have violated the rights of the people runs counter to the core premise of popular sovereignty and democratic government. The trust language of public trust law is better understood as an expression of the confidence necessarily placed in democratic governance. We trust that representative government will serve the public interest, though we are often disappointed that special interests (rent seekers in economic terms) have prevailed. The easement theory that the *Kramer* court says applies to waters of qualified or limited navigability better describes, as well, the public rights in navigable waters under the public trust doctrine. In both cases, the members of the public hold in common a judicially enforceable property right in the form of an easement on

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85 *Id.* at 12.

86 *Id.* at 8.

87 *Id.* at 17.

88 *Id.* at 12–13.

89 James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 543 (1989). Another difficulty with the trust theory is that a trust has a beneficiary, a trustee, and a creator (settlor). RESTATEMENT (THIRD) OF TRUSTS § 3 (AM. LAW INST. 2003). Identifying the creator is essential to knowing the purpose of the trust. A few courts have advanced suggestions of who the creator might be (e.g., the federal government, the Crown, parliament, natural law) but none are satisfactory where sovereignty is in the people. The creator might be the people, but then we would have a trust in which the beneficiary, trustee, and creator are all the same.

properties in submerged lands, whether the proprietor is public or private.[90]

Having established two categories of public rights, the court then defines two subcategories within the main category of public trust rights—those affected by the tides and those not affected by the tides. With respect to the former, says the court, the state is "'absolute owner' of the tidelands, with the right to disposes of those lands 'subject only to the paramount right of navigation inherent in the public' . . . ."[91] But,

> the state's ownership rights with respect to lands covered by the nontidal navigable waters of the state are "merely those of a trustee for the public" . . . [with the result that] "the state can make no sale or disposal of the soil underlying navigable waters so as to prevent the use by the public of such waters for the purposes of navigation and fishing . . . ."[92]

This is another distinction without a difference, at least with respect to public rights. Perhaps there are subtle differences, not made apparent in the court's opinion, in the alienability of submerged lands under tidal versus non-tidal waters, but there is no difference between public rights limits on alienation in the two cases. The state is as much a trustee, in the political sense, over state owned submerged tidelands as it is a trustee over submerged non-tidal lands.

After stacking one distinction without a difference atop another distinction without a difference, the *Kramer* court says it does not really matter "whether the state could dispose of the lands underlying Oswego Lake, [because] the state has not disposed of its interest in those lands."[93] But there is no indication that the state has ever claimed to own the lands underlying Oswego Lake, so it is not surprising that the state has not disposed of them. Whether the state does own those lands was not addressed by the trial court and was therefore not an issue before the Oregon Supreme Court, leaving the court to "determine the extent of the public's right to use the public water in the event of continuing public ownership of the underlying land."[94]

Directly relevant to the question of the state's title to the lands beneath Oswego Lake is the U.S. Supreme Court's ruling in *PPL*

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> When viewed as a rule of property law, the public trust doctrine has a sufficiently determinable meaning to guide its application in future cases. It simply describes one of the sticks in the proverbial bundle of rights that constitutes property. Some of those rights are held privately, some are held by the state in its proprietary capacity, and some, including the rights of navigation and fishing on navigable waters, are held in common by the public.

Huffman, *supra* note 89, at 564.

91 *Kramer*, 446 P.3d at 14 (quoting Winston Bros. Co. v. State Tax Comm'n, 62 P.2d 7 (Or. 1936)).

92 *Id.* (quoting *Winston Bros.*, 62 P.2d at 510–11).

93 *Id.*

94 *Id.*

Montana, a case frequently cited by the *Kramer* court. In *PPL Montana*, the state claimed title to submerged lands that, for a century, had been presumed by all, including the state, to be private.[95] A unanimous Supreme Court observed that "the reliance by PPL and its predecessors in title upon the State's long failure to assert title is some evidence to support the conclusion that the river segments were non-navigable for purposes of the equal-footing doctrine."[96] The court went on to declare that

> [i]t is not for a State by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which . . . would enlarge what actually passed to the State, at the time of her admission, under the constitutional rule of equality here invoked.[97]

It should not go without notice that the state is a defendant in *Kramer* and that there is no indication the state had ever claimed title to the bed of Oswego Lake.

In addressing "the extent of the public's right to use the public water in the event of continuing public ownership of the underlying land," the *Kramer* court discusses three of its prior decisions. Citing *Darling v. Christensen*,[98] the court held that

> the owners of property abutting the high water mark held a littoral "right of access to the water of this navigable body of water," and that the owner of the land below that high-water mark had "no right or authority to interfere with, interrupt or prevent the exercise of said right of access to the lake."[99]

Plaintiffs had honed in on language in the *Darling* opinion with regard to public rights of access to the shore from "public streets that had their 'termini' at the high-water border of the plaintiffs' land,"[100] but the *Kramer* court correctly observed that both the private and public claims of access arose from their riparian properties and not from the public's right of use in the navigable waters.[101]

The court then suggested that "the littoral or riparian rights of an owner of upland property to use the abutting water . . . bear some similarity to the rights that the owner of submerged and submersible

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95 *PLL Montana*, 565 U.S. 576, 580–81 (2012).

96 *Id.* at 604.

97 *Id.* at 604–05 (alteration in original) (quoting Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 88 (1922)).

98 109 P.2d 585 (1941).

99 *Kramer*, 446 P.3d at 15 (quoting *Darling*, 109 P.2d at 591–92).

100 *Id.* (quoting *Darling*, 109 P.2d at 591).

101 *Id.* ("[T]he court's statement about the public's right of access to the public water is based on its conclusion regarding the nature of rights possessed by the holder of littoral or riparian rights generally.").

lands has to use the water covering that land."[102] By way of illustration, the court cites *Eagle Cliff Fishing Co. v. McGowan*,[103] in which the court held that the lessee of land between the high- and low-water mark "had a right of access 'to and from' the river '[a]s an incident to the lawful occupation of lands, one border of which is the low-water line of the Columbia river.'"[104] Acknowledging that *Eagle Cliff*, like *Darling*, involved private rights of access, the court went on to cite dicta from *Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp.*,[105] explaining that the "public retains 'certain rights in the tidelands, the submersible lands, and the land below the low-water mark[,]' even if the state has conveyed some ownership interest to private parties."[106]

After reviewing several of its earlier opinions, the *Smith Tug* court found it "apparent that we have not been as precise as we might have been."[107] Unfortunately the *Kramer* court's statement that when lands have been conveyed to private owners the public "retains 'certain rights in the tidelands, submersible lands, and the land below the low-water mark'" is also imprecise.[108] In fact, it is incorrect. In support of the statement, the court quoted from *Waters and Water Rights*, but the rights recognized in that treatise, as stated in the language quoted by the court, are "to navigate, to fish, and to pass over the tidelands and submerged coastal lands," not rights in the land itself.[109] These are the rights of the public trust doctrine—rights that derive not from the state's proprietary interest in submerged and submersible lands but rather from the fact that the overlying waters are navigable. They are rights that exist independent of ownership of submerged, submersible, and riparian lands and, therefore, are not "retained" upon conveyance of those lands. Thus, the similarity between the rights of littoral or riparian owners and owners of submerged and submersible lands to use the abutting or overlying waters bears no relation to the public's right of use in those waters. The public's rights exist independent of both public and private title to submerged, submersible, and riparian lands.

The private rights of access to navigable waters recognized in *Eagle Cliff* and *Smith Tug* are inherent in the ownership of lands adjacent to and underlying navigable waters. They are easements on adjoining properties, including those held by the state (or city) in its proprietary capacity. Similarly, the public rights of use recognized in *Smith Tug* and the Clark treatise are easements on the rights of those owning submerged, submersible and riparian lands. That the public may have a right of use in Oswego Lake is unrelated to any public ownership of riparian or submerged lands. On remand, the trial court will determine

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102 *Id.*
103 137 P. 766 (1914).
104 *Kramer*, 446 P.3d at 15–16 (quoting *Eagle Cliff*, 137 P. at 767).
105 443 P.2d 205 (Or. 1968).
106 *Kramer*, 446 P.3d at 16 (alteration in original) (quoting *Smith Tug*, 443 P.2d at 218).
107 *Smith Tug*, 443 P.2d at 217.
108 *Kramer*, 446 P.3d at 16 (quoting *Smith Tug*, 443 P.2d at 218).
109 *Id.* (quoting, 1 WATERS AND WATER RIGHTS 247 (Robert Clark ed., 1967)).

whether the lake was navigable at the time of Oregon statehood. If it was, the public has a right to navigate and fish in the lake. If it was not, there are no such public rights. Public ownership of riparian or submerged lands is not relevant to the trial court's determination on navigability. The public right exists if the lake was navigable-in-fact at the time of statehood. It does not exist if the lake was not navigable-in-fact at that date. Public ownership of submerged, submersible, or riparian lands is irrelevant.

The *Kramer* court suggests that the right, confirmed in *Eagle Cliff* and *Smith Tug*,

> to pass from the upland border of submersible lands to the adjacent water . . . lends support to plaintiffs' proposal that public ownership of the submerged and submersible land underlying a navigable waterway provides a public right to enter that water from abutting upland that is designated for public use.[110]

But like any proprietor of riparian land, the City of Lake Oswego has a right of access to adjacent navigable waters independent from ownership of the submerged lands. That right is an incident of property in riparian and submersible lands and exists whether or not the City (or state) owns the adjacent submerged lands.

VII. A MISTAKEN RELIANCE ON THE LAW OF TRUSTS

The *Kramer* court concludes its analysis of the public trust rights issue with a discussion of trust law.[111] As indicated above, the law of trusts does not provide a satisfactory framework for analysis of the public trust doctrine.[112] The public right to navigate and fish in navigable waters is best understood as an easement held in common by all members of the public. It operates as a limit on the property rights of the owners of submerged, submersible, and riparian lands underlying or adjacent to navigable waters—a stick in the bundle of rights never possessed by landowners or by owners of water rights.[113] Alternative theories of the public trust doctrine have been proffered by scholars and

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110 *Kramer*, 446 P.3d at 16.

111 *Id.* at 17–18.

112 *See* Huffman, *supra* note 89 and accompanying text.

113 A confirmation of this understanding is that judicial, legislative, or administrative enforcement of public trust rights do not constitute takings of private property. The public trust doctrine is thus a "background principle" of property law, to borrow Justice Scalia's language from *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). "The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit." *Id.* In other words, the state cannot take that which the property owner does not own. Ownership of submerged, submersible, and riparian lands underlying or adjacent to navigable waters does not include a right to exclude the public from navigation and fishing in those waters.

others,[114] but none of those theories is consistent with the common law doctrine and thus undermine the reasonable expectations of affected property owners.

Nevertheless, the *Kramer* court attempts to explain the public trust doctrine in trust law terms. The court cites *Anthony v. Veatch*[115] (in which it was held "that the state 'in its sovereign capacity in trust for its people' may regulate and even prohibit the public's right to fish in navigable waters")[116] as "consistent with a principle that we have described as a basic principle of trust law: 'that a trustee has a duty to 'protect[ ] trust property' and to ensure . . . that [trust property is] managed in a way that will benefit all trust beneficiaries.'"[117] But *Anthony* is a police power, not a trust, case. In *Anthony*, the court stated that

> [t]he right of the state, either in the exercise of its police power, or in its sovereign capacity in trust for its people, to regulate and even to prohibit the capture of fish in navigable waters within its borders, has been asserted by this court, and is sustained by the weight of authority.[118]

Anthony relied on *Monroe v. Withycombe*,[119] in which the court stated:

> Fish are classified as feræ naturæ, and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common.[120]

"In the exercise of its police power," said the *Monroe* court, "and for the welfare of all its citizens the state can regulate or even prohibit the catching of fish."[121]

The *Monroe* court distinction between the proprietary and sovereign capacities of the state is important. As Blackstone wrote two and a half centuries ago: "By the sovereign power . . . is meant the making of laws . . . . In a democracy . . . the right of making laws resides in the people at large . . . ."[122] This is the police power, or in Blackstone's terms, "public police and economy [by which] I mean the due regulation and domestic order of the kingdom."[123] Although the *Anthony* court was, thus, redundant in stating that "[t]he right of the state [to regulate

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114 *See, e.g.*, James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 ENVTL. L. 337 (2015).

115 220 P.2d 493 (Or. 1950).

116 *Kramer*, 446 P.3d at 17 (quoting *Anthony*, 220 P.2d at 498).

117 *Id.* (quoting White v. Pub. Emp. Ret. Bd., 268 P.3d 600, 615 (Or. 2011)).

118 *Anthony*, 220 P.2d at 498.

119 165 P. 227 (Or. 1917).

120 *Id.* at 229.

121 *Id.*

122 WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 38 (19th ed. 1867).

123 *Id.* at 162.

fishing is], either in the exercise of its police power, or in its sovereign capacity," in both *Anthony* and *Monroe* the court correctly grounded the state's authority in its sovereign police power.[124] The reference to a trust responsibility must be read in that political context.

After referencing the wildlife cases in support of its trust theory, the *Kramer* court refers to "the state's management of the waters that it holds in trust for the public as a whole."[125] Although the court had earlier acknowledged that the state does not own the state's waters,[126] it refers to those waters as "trust property."[127] In describing fish as "*ferœ naturæ*," owned by the state "not as a proprietor, but in its sovereign capacity," the *Monroe* court drew a distinction that also describes the state's "ownership" of water.[128] State laws have long asserted state ownership of both wildlife and water, and state managers of those resources have described themselves as trustees of a public trust. But the claimed ownership, as the *Monroe* court explained, is not proprietary and therefore not an appropriate subject of a common law trust.[129] Three decades later, as noted above, the U.S. Supreme Court confirmed the *Monroe* court's view in *Toomer*: "The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."[130] After another three decades, the Supreme Court explained that "[u]nder modern analysis, the question is simply whether the State has exercised its police power [exercised its sovereignty] in conformity with the federal laws and Constitution."[131] Citing *Toomer*, the Supreme Court in *Sporhase v. Nebraska*[132] overturned the state's limits on the export of groundwater as "based on the legal fiction of state ownership."[133] What the state does have is the sovereign police power to regulate the use of the state's waters—a power that the public trusts will be exercised in the public interest. It is a power that can be employed to enforce the public rights of use in navigable water but cannot be used in contravention of the public's navigation and fishing easement over submerged and submersible lands.

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124 *Anthony*, 220 P.2d. at 498.

125 *Kramer*, 446 P.3d 1, 17 (Or. 2019).

126 *Id.* at 15–16.

127 *Id.* at 17.

128 *Monroe*, 165 P. 227, 229 (Or. 1917).

129 *Id.*

130 *Toomer*, 334 U.S. 385, 402 (1948). In a footnote, the court stated that "[t]he fiction apparently gained currency partly as a result of confusion between the Roman term *imperium* or governmental power to regulate, and *dominium*, or ownership. Power over fish and game was, in origin, *imperium*." *Id.* at 402 n.37 (citing POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW, 197–202 (1922)).

131 Douglas v. Seacoast Prods., 431 U.S. 265, 284–85 (1977).

132 458 U.S. 941 (1982).

133 *Id.* at 951.

The *Kramer* court also cites *Morse v. Oregon*[134] as consistent with the principles of trust law.[135] Although *Morse* did involve the permitted uses of submerged tidal lands owned by the state, the claim was not that the state's trust responsibilities with respect to those lands were violated by the issuance of a fill permit, but rather that the fill would interfere with the public's rights of navigation and fishing in the overlying waters.[136] In ruling that the public trust doctrine does not limit fills in navigable waters to water-related uses, the *Morse* court cited *Illinois Central* and *Shively v. Bowlby*,[137] and quoted Professor Sax's conclusion that:

> [t]hese traditional cases suggest the extremes of the legal constraints upon the states: no grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses.[138]

Although there was no grant in *Morse*, the court's reliance on Sax makes clear that the issue was the scope of the police power (the "authority to govern") and not any trust limits on the use of the state's property in submerged lands.

As used in the several opinions cited by the *Kramer* court as trust law cases, the concept of trust is political, not legal. It has reference to the trust the sovereign people place in their representatives that government will exercise the police, eminent domain, and taxing powers for the people's benefit. Absent unconstitutional actions, there are no judicial remedies for breach of this public trust. The remedies lie with lobbying, recall, or the next election.

The *Kramer* court's erroneous analyses of *Anthony*, *Monroe*, and *Morse* lead to its ruling that "the rights incident to public ownership of the submerged and submersible lands beneath the navigable waters include a right of access to the public water from abutting public upland."[139] As explained above, the rights to navigate and fish in navigable waters are not incident to public ownership of the submerged lands. Those rights exist independent from state ownership, including in circumstances where the state never held title to submerged lands. But even if the public trust rights to navigate and fish in navigable waters were incident to state ownership of the submerged lands, there is nothing in the public trust doctrine to explain a right of access from publicly owned uplands. If there is a right of access to Oswego Lake from riparian lands owned by the City, then it derives from the City's title to those uplands, not from public ownership of the submerged

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134 590 P.2d 709 (Or. 1979).
135 *Kramer*, 446 P.3d 1, 17 (Or. 2019) (quoting *Morse*, 590 P.2d at 709).
136 *Morse*, 590 P.2d at 711.
137 152 U.S. 1 (1894).
138 *Morse*, 590 P.2d at 712 (quoting Sax, *supra* note 2, at 488–89).
139 *Kramer*, 446 P.3d at 17.

lands. Like every proprietor of lands riparian to Oswego Lake, the City has a right of access to the lake's waters if those waters are determined to have been navigable-in-fact at the time of Oregon statehood.

If the City holds riparian lands in trust, meaning it has legal but not equitable title (as appears to be the case for the swim park), it is responsible (as the trustee) to allow and limit access in accordance with the rights of those holding equitable title (namely the children of the City of Lake Oswego who are the beneficiaries of the trust). If the City holds title as a proprietor, like any other riparian landowner on the lake, it has discretion, consistent with its authority as delegated by the state and with the rights of other riparians, to regulate access to the lake. The coincidence of public title to the submerged lands (if the lake is found to be navigable) and public title to riparian lands is just that—a coincidence. The rights incident to ownership of riparian lands do not vary with title to the adjacent submerged lands. Whether or not there is a right of access to navigable waters cannot depend on the presence or absence of publicly owned riparian lands. Either there is a public right of access or there is not.

VIII. CONCLUSION

In the wake of the *Kramer* opinion float several doctrinal challenges for future courts to struggle with. The court's blurring of the distinction between the state's police powers and public rights, and its suggestion that a public interest can translate into public rights will invite even more political factions to pursue their interests in the courts. The court's recurrent linking of public rights of use in navigable waters to the state's ownership of submerged lands contradicts the reality of public rights in navigable waters overlying private lands. Repeated references to public ownership of the state's waters, notwithstanding the court's disclaimer in a footnote, perpetuates a legal myth that encourages political factions to seek judicial remedies.[140] The court's distinction between rights of public use in waters of qualified or limited navigability and public trust rights of use in waters navigable as a matter of federal law has no basis in the common law and adds nothing to an understanding of these two seemingly identical rights. Although commonplace, the court's insistence that public trust rights are rooted in trust law does not bear even cursory analysis under the law of trusts. Even if it could somehow be explained how the trustee, beneficiary, and creator are not one in the same, there is no basis for the court's conclusion that the state is a proprietary owner of submerged tidal lands and a trustee of submerged non-tidal lands. Title to both is founded on the equal footing doctrine. The court does get it right in stating that public use rights, which are indistinguishable from public trust rights, are easements on the rights of owners of submerged, submersible, and riparian lands. Reliance on trust law principles leads

[140] *Id.* at 12 n.11.

to the implausible conclusion that it is possible for the sovereign people, acting through their representatives, to violate the rights of the self-same sovereign people.

The claim made by the plaintiffs in *Kramer* could have been resolved with a straightforward analysis of the rights incidental to ownership of lands riparian to a navigable body of water and the responsibilities of a city when it is such an owner. While it is possible that the plaintiffs seek nothing more than access to Oswego Lake, their reliance on the public trust doctrine suggests that they have bigger fish to fry. Certainly, their amici supporters have larger ambitions.[141] A public right of access to Oswego Lake will be precedent for pursuit of similar claims in other state waters previously understood to be privately held.

The trial court and the court of appeals declined to take the bait, but the Oregon Supreme Court nibbled enough to muddy the waters of Oregon law governing public use of and public access to the state's waters. Under the Oregon Supreme Court ruling in *Kramer*, the plaintiffs will gain access to Oswego Lake from the City's riparian properties if the lake is found to have been navigable at the time of Oregon statehood. If, in a future case, the Oregon Supreme Court finds a similar right of access from private riparian lands, *Kramer* will prove to have been an important step to a big win for the plaintiffs' supporters and a huge loss for private property rights. But not without costs to public access advocates. In a major victory for owners of riparian properties, the *Kramer* court has already resolved that there is no public right of access to what the court calls waters of qualified or limited navigability, notwithstanding that the public right of use in such waters is identical to the public right of use in waters to which the public trust doctrine applies. If it is determined on remand to the trial court that Oswego Lake is not navigable under the federal definition, it will turn out to be a water of qualified or limited navigability to which the public has no right of access. An outcome the plaintiffs might have contemplated before pressing their broadside claim in the courts.

Rather than accepting the plaintiffs' invitation to base its ruling on the common law public trust doctrine, leading to the judicial gymnastics described above, the court would have done far better to look to the common law of property rights in riparian land in resolving the plaintiffs' right of access claim.

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141 Amici brief of law professors, Columbia Riverkeeper, Human Access Project, Rogue Riverkeeper and Willamette Riverkeeper wrote: "It is past time for the Court to look seriously at the state's public trust doctrine and its role protecting public rights in natural resources in the 21st century." Their brief went on to reference, by way of illustration, the expansive federal district court public trust ruling in *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016). Brief for Law Professors et al. as Amici Curiae Supporting Petitioners at 3, Kramer v. City of Lake Oswego, 2017 WL 6605508 (2017) (No. S065014).