ESTABLISHING A LEGAL GUARDIAN TO PROTECT THE PUBLIC'S RIGHTS IN OREGON'S NATURAL RESOURCES AFTER *KRAMER* AND *CHERNAIK*

BY

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Until recently, Oregon's public trust doctrine included both traditionally navigable-in-title as well as navigable-in-fact waters. However, in 2005, the Oregon Office of the Attorney General issued an opinion that drastically limited the public trust doctrine to include only navigable-in-title waters, reducing the state's fiduciary trust obligations through the creation of the so-called "public use" doctrine. In the wake of that opinion, the state denied state trust protection to a 400-acre navigable lake and to the atmosphere in two high-profile cases. Oregon has consistently denied any fiduciary obligations for the only trust resources the state acknowledges—navigable-in-title waters and the underlying submerged lands. The attorney general's 2005 opinion, denying public trust protection to waterbodies underlying private submerged lands, has created what is now among the narrowest public trust obligations in the United States, and one entirely out of step with public trust developments abroad.

The role of the attorney general in denying public trust obligations that are widely recognized elsewhere stems from an inherent conflict between two of the attorney general's duties: defending state agencies in cases alleging breach of trust responsibilities and representing the public's interest in trust resources. Over a decade ago, the Oregon State Bar offered a potential solution to this conflict, when the Sustainable Future Section proposed the creation of the Office of the Legal Guardian to act as a custodian and advisor for the state's public trust resources. Building on that 2012 proposal, as well as the experiences of New Jersey's comparable former Department of the Public Advocate, this Article offers suggestions for establishing a Legal Guardian in Oregon today. This proposal would not only eliminate the attorney general's ongoing

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conflict of interest, but would give the Oregon public an unbiased advocate to protect important resources to which the state has denied trust protection.

I. INTRODUCTION

The public trust doctrine is a property principle originating in a centuries-old Roman notion, expressed in the Justinian code, that "the air, running water, the sea, and consequently the shores of the sea" are natural resources "common to all."[1] Under the doctrine, the government has sovereign obligations over public trust resources, including fiduciary trustee duties to ensure public access and protect against "substantial impairment" of the resources.[2] Following the American Revolution, state governments became the trustee of the public trust.[3]

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[1] THE INSTITUTES OF JUSTINIAN 158 (Thomas Collett Sandars trans., Callaghan & Co. 5th ed. 1876). The Justinian code was a sixth-century codification of Roman law commissioned by Emperor Justinian, although its principles were evident in Roman law centuries earlier. *See* J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. 117, 129–31 (2020) (discussing the Justinian code and its role as a foundation of the public trust doctrine).

[2] Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452–53 (1892).

[3] Arnold v. Mundy, 6 N.J.L. 1, 12–13 (1821) ("[W]hen Charles II took possession of this country, by his right of discovery, he took possession of it in his sovereign capacity . . . [and] this right consisted in granting the soil to private persons [via royalties] . . . for the benefit of the colonists . . . ; that those royalties, therefore, of which those rivers, ports, bays, and coasts were part, by the grant of king Charles, passed to the duke of York, as the governor of the province, . . . for the public benefit . . . . [U]pon the Revolution, all those royal rights vested in the people of New Jersey, as the sovereign of the country, and are now in their

When Congress admitted Oregon to the Union in 1859 via the Oregon Admission Act,[4] the federal government implicitly conveyed to the new state the beds of all navigable waters within Oregon's boundaries.[5] Implied in this federal grant was a fiduciary duty to ensure that the overlying waters were not monopolized, but rather open to all.[6] Central to this duty is the prohibition against the state alienating these lands and waters.[7] Oregon has vigorously resisted any expansion of the state's trustee duties beyond this baseline restriction, implementing a 2005 Attorney General's Opinion that narrowly interpreted the state's trust duties.[8] The state now recognizes no duties for navigable-in-fact public waterways in which the underlying submerged lands are privately owned.[9]

Before the 2005 opinion, the Oregon Supreme Court had recognized public rights in navigable-in-fact waters and other non-navigable-in-title

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hands . . . ."); Pollard v. Hagan, 44 U.S. 212, 222–23 (1845) ("[W]e must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal . . . to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. . . . When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects . . . ."); *see also* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, 444–45 (1989) (summarizing that "the western states were entitled to own title to lands under navigable watercourses as a matter of equal footing: since the original states retained those lands . . . so too must the western states in order to achieve equality").

[4] Oregon Admission Act, ch. 33, § 1, 11 Stat. 383 (1859); *Oregon History: Chronology—1852 to 1900*, OR. SEC'Y OF STATE, https://perma.cc/25JD-X3FH (last visited Nov. 14, 2023).

[5] §§ 1–2, 11 Stat. at 383; *see Pollard*, 44 U.S. at 222–23 (concluding that Alabama entered the Union on equal footing with the original states including "all the rights of sovereignty, jurisdiction, and eminent domain").

[6] § 2, 11 Stat. at 383 ("[T]he Columbia and all other rivers and waters bordering . . . Oregon . . . 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.").

[7] HARDY MYERS, OR. DEP'T OF JUST., OFF. OF THE ATT'Y GEN., OP-8281 1 (2005) [hereinafter 2005 AG OPINION] ("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."); *id.* at 16 ("[W]e 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.").

[8] *Id.* at 15–16 (discussing the "public trust" as "the duty to protect the public interest in state-owned waterways"). The Oregon Supreme Court has recognized three categories of waters: 1) waters in which the tide ebbs and flows, which are deemed navigable; 2) streams that are navigable-in-fact, which are considered public highways; and 3) streams that are "so small or shallow as not to be navigable for any purpose," which are considered altogether private property. Shaw v. Oswego Iron Co., 10 Or. 371, 375–76 (1882). Moreover, the court has implicitly recognized the state's duties in the first two categories. *Id.* The 2005 AG Opinion, however, decided that only state-owned, navigable-in-title waters constitute public resources triggering state duties. 2005 AG OPINION, *supra* note 7, at 15–16.

[9] 2005 AG OPINION, *supra* note 7, at 15–16.

waters twice in the early 20th century,[10] and those rights might reasonably have been thought to be public trust rights. However, the 2005 opinion denied those public rights the benefit of state protection under the public trust doctrine.[11] The opinion manufactured a so-called "public use" doctrine, in which the public has use rights, but the state has no trust duties.[12]

Since the 2005 opinion, the state attorney general has not only consistently claimed to have no fiduciary obligations for navigable-in-fact waterbodies, but has also denied public trust duties in a separate wildlife trust and the public's right to use ocean beaches.[13] The state's position is

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[10] *See* Guilliams v. Beaver Lake Club, 175 P. 437, 442 (Or. 1918) (protecting public recreational uses of trust waters); *see also* Luscher v. Reynolds, 56 P.2d 1158, 1162 (Or. 1936) (holding that the public has a "paramount right" to transportation and commerce uses of waters regardless of the ownership of the waters and/or submerged beds).

[11] *See* 2005 AG OPINION, *supra* note 7, at 27–28 (concluding that the state's management of state-owned waterways may not "substantially impair the public rights of navigation commerce, fisheries and recreation," but failing to recognize any such protections for waterways whose beds are privately owned).

[12] *See id.* at 16–24 (citing *Shaw*, 10 Or. 371; *Guilliams*, 175 P. 437; *Luscher*, 56 P.2d 1158) (coining the term and describing the "public use" doctrine while drawing from recognized public trust doctrine case law); *see also* cases cited *supra* notes 8, 10 (describing the cases underlying the public trust doctrine in Oregon).

[13] State of Oregon's Memorandum in Support of Motion for Summary Judgment and Response to Plaintiffs' Motion for Partial Summary Judgment at 8, Kramer v. City of Lake Oswego, No. CV12100913, 2014 WL 8817709 (Cir. Ct. Or. Jan. 24, 2014), 2013 WL 10730635 (Sept. 13, 2013) ("[The public use] doctrine is separate and distinct from the public trust doctrine. But like the public trust doctrine, Oregon courts have never invoked the public use doctrine to impose an affirmative duty on the State. . . . The State does not have affirmative duties under the public trust doctrine."); *id.* at 10 ("[T]he public trust doctrine in Oregon is a common-law doctrine that recognizes the legislature's regulatory authority over waterways and fish and wildlife and prohibits the state from alienating such public trust assets in a way that would substantially impair the public interest in those assets. But, Oregon courts have not imposed an affirmative duty on the state to take certain action in its capacity as trustee that is enforceable against the State by private parties."); Defendant-Respondent City of Lake Oswego's Answering Brief and Supplemental Excerpt of Record at 22–23, Kramer v. City of Lake Oswego, 395 P.3d 592 (Or. App. 2017) (No. A156284), 2014 WL 9865510, at *22–23 (Nov. 18, 2014) ("[I]n Oregon, beach access is governed by the custom doctrine rather than the public trust doctrine . . . ."); State v. Dickerson, 345 P.3d 447, 455 (Or. 2015) ("Although the trust metaphor is an imperfect one (for example, there is no trust instrument that delineates the terms of the trust), the state's powers and duties with respect to wildlife have many of the traditional attributes of a trustee's duties. Acting as a trustee, the state has the authority to manage and preserve wildlife resources and may seek compensation for damages to the trust corpus."); Brief on the Merits of Respondents on Review, Kate Brown and State of Oregon at 15, Chernaik v. Brown, 475 P.3d 68 (Or. 2020) (No. SC S066564), 2019 WL 5295267, at *15 (Oct. 2, 2019) ("The public's rights and the state's duties with regard to other resources—other waters, fish and wildlife, and the atmosphere—are distinct and do not originate in the public trust doctrine . . . ."); *id.* at 18 ("[E]ven if this court concluded that fish and wildlife were part of an overarching trust doctrine, that doctrine does not impose affirmative, fiduciary duties on the state."); *Chernaik*, 475 P.3d at 74 ("The state's primary contentions were that the public trust doctrine does not extend to the atmosphere, or all waters of the state and fish and wildlife, and that the public trust doctrine does not impose fiduciary duties upon the state like those associated with traditional private

that the public rights to wildlife and beaches enjoy no state trust protection.[14] Moreover, the state has successfully persuaded Oregon courts that the attorney general's narrow interpretation of the public trust doctrine is reasonable.[15] Consequently, Oregon's public trust doctrine today is merely an "obligat[ion] [of] the state to protect the public's ability to use [traditionally] navigable waters for identifiable uses,"[16] restricting the state "from disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources."[17] Beyond traditionally navigable waters, the state denies any duty to protect public rights.[18]

Thus, Oregon's public trust doctrine has shrunk in scope to include only the waters and their underlying lands that "meet the federal test for navigability"[19] and is "separate and distinct" from any other resource or trust in the state's jurisdiction.[20] The only obligations Oregon acknowledges are those of nonalienation and refraining from substantial impairment.[21] Under the guardianship of the state attorney general, the Oregon public trust doctrine has become among the narrowest in the country.[22] The Oregon public might fairly question whether this

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trusts."); *id.* at 77 ("The [wildlife and public trust] doctrines are currently separate and distinct doctrines.").

[14] Defendant-Respondent City of Lake Oswego's Answering Brief and Supplemental Excerpt of Record at 22–23, *Kramer*, 395 P.3d 592 (No. A156284), 2014 WL 9865510, at *22–23 (Nov. 18, 2014); Brief on the Merits of Respondents on Review, Kate Brown and State of Oregon at 15, 18, *Chernaik*, 475 P.3d 68 (No. SC S066564), 2019 WL 5295267, at *15, *18 (Oct. 2, 2019).

[15] *See Chernaik*, 475 P.3d at 76 (describing the trust's ability to be expanded but refusing to do so or recognize any prior expansions); *see also* Kramer v. City of Lake Oswego, 446 P.3d 1, 10 (Or. 2019) (reiterating the distinction and differences between the public trust and "public use" doctrine).

[16] *Chernaik*, 475 P.3d at 79.

[17] *Id.* at 75 (quoting Chernaik v. Brown, 436 P.3d 26, 35 (Or. Ct. App. 2019), *aff'd* 475 P.3d 68 (2020)).

[18] *See* 2005 AG OPINION, *supra* note 7, at 15–16 (recognizing trust protections for only state-owned waterways).

[19] *Chernaik*, 475 P.3d at 77.

[20] *Id.* at 77–78 ("Although [the Oregon courts] have 'long used the metaphor of a trust to describe the state's sovereign interest in wildlife,' and some similarities exist between the 'wildlife trust' and the public trust doctrine, plaintiffs erroneously conflate the use of the trust metaphor with a conclusion that fish and wildlife are natural resources that are protected by the public trust doctrine. The two doctrines are currently separate and distinct doctrines. In contrast to the public trust doctrine, which provides that the general public has a right to use navigable waters for certain purposes . . . the wildlife trust doctrine describes the state's broad [hunting management] authority over wild fish and animals in Oregon." (citation omitted) (quoting *Dickerson*, 345 P.3d 447, 455 (Or. 2015))).

[21] 2005 AG OPINION, *supra* note 7, at 1, 28; *see* Michael C. Blumm & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENV'T L. 375, 383–84 (2012) (explaining the attorney general's 2005 opinion).

[22] *Compare* Jack Potash, Comment, *The Public Trust Doctrine and Beach Access: Comparing New Jersey to Nearby States*, 46 SETON HALL L. REV. 661, 673–87 (2016) (comparing the scope of state public trust doctrines for several states in New England, all of which seem to be more encompassing than Oregon's public trust doctrine) *with* Erica A. Doot, *The Public Trust Doctrine in Oregon*, *in* THE PUBLIC TRUST DOCTRINE IN 45 STATES 669, 682 (Michael

consistent hostility to the doctrine has served the best interest of the Attorney General's public beneficiaries.

In 2012, the Oregon State Bar's Sustainable Future Section drafted a proposal that would have established the Office of Legal Guardian for Future Generations (the Guardian) and provided a counterweight to this evident hostility.[23] The Guardian would be a single, independent office to protect and act in the favor of the Oregon trust.[24] The governor would appoint the Guardian, whose tasks would include 1) identifying trust resources and their respective threats, 2) evaluating and potentially participating in legal challenges to government actions affecting trust resources, and 3) organizing public education efforts about trust resources.[25] Although the proposal did not expressly authorize the Guardian to file suit as a party against the state for violations of the public trust, the Sustainable Future Section envisioned the Guardian acting upon the request of judges or the parties as a mediator, arbitrator, or a representative of the trust in state cases and agency hearings.[26] Perhaps because the proposal challenged the attorney general's role as trustee, the Guardian was a political non-starter, and remains unenacted.[27]

The establishment of the Guardian's office would have been a significant development in American public trust doctrine law, but the idea is not entirely novel. New Jersey twice had a Department of the Public Advocate (the Advocate), from 1974 to 1994 and from 2005 to 2010, with similar functions for protecting the state's environmental resources.[28] The Advocate acted as an independent enforcement entity and filed legal actions against the state and local governments to enforce the public trust.[29] Although no longer active, the experience of the

C. Blumm ed., 2014) (claiming that Oregon's public trust doctrine extends to navigable-in-fact waters).

[23] *See* Or. State Bar Sustainable Futures Section, Proposed Rule or Order, Office of Legal Guardian for Future Generations (June 26, 2012) [hereinafter 2012 Proposed Office of Legal Guardian], *in* MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 551 (3d. ed 2021) (reprinting the draft Legal Guardian proposal). The Guardian proposal is also reprinted as an appendix to this Article. *See infra* Appendix: Legal Guardian Proposal; *see also* Ann McQuesten, *Guardian for Future Generations—Safeguarding Opportunity for the Future: Interview of Steve Higgs on the Sustainability Future Section Guardian Study Group*, LONG VIEW (Or. State Bar Sustainable Future Section, Tigard, Or.), Spring 2016, at 7.

[24] *See* 2012 Proposed Office of Legal Guardian, *supra* note 23, at 551.

[25] *See id.* at 551–54.

[26] *See id.* at 553.

[27] Although a public Office of the Legal Guardian may still seem unlikely, there are efforts to start a similar private office. *See infra* Part V.

[28] DEP'T OF THE PUB. ADVOC., A VOICE FOR THE PEOPLE: 2008 ANNUAL REPORT (2008), https://perma.cc/9ZNK-LNKS; *Public Advocate,* N.J. STATE LIBR., https://perma.cc/G3MK-USZP (last visited Nov. 12, 2023).

[29] Dep't of the Pub. Advoc., *Mission*, STATE OF N.J., https://perma.cc/E6RK-BRK5 (archived June 13, 2006) (describing the Public Advocate's public trust work as well as work on public interest issues relating to disabilities and mental health, housing, and children and elders).

Advocate may be instructive for the Guardian proposal, providing some insight as to how to successfully and sustainably implement such an office in Oregon. Additionally, several legal guardians exist internationally, providing a variety of models upon which the state might draw.[30]

This Article reconsiders the establishment of the Office of Legal Guardian. Part II briefly explains the evolution of the public trust doctrine's scope in Oregon, emphasizing the doctrine's recent diminishment. Part III then assesses the 2012 Guardian proposal to balance the attorney general's hostility to public trust rights. Part IV evaluates the former New Jersey Department of the Public Advocate as a case study, focusing on the department's creation, restoration, and dissolutions. Part V makes some recommendations to revive the Guardian proposal based on the New Jersey experience and proposes a plan of action to establish the Guardian in Oregon today. The Article concludes that a Guardian would be both more accountable for and more successful in ensuring the trust's protection and sustainable use than the state's attorneys general.

II. OREGON'S PUBLIC TRUST DOCTRINE

From the state's inception, Oregon's public trust doctrine included traditionally navigable tidal and navigable-in-title waters. In the early twentieth century, the courts expanded the doctrine to include navigable-in-fact waters.[31] Recognized public uses of these waters included navigation, transportation, and recreation, and Oregon courts recognized the inherent flexibility of the doctrine in accepting new public uses over time, like "skating . . . and even city purposes . . . [like] cutting ice."[32]

In 2005, Attorney General Hardy Myers issued an opinion that drastically curtailed the state's public trust doctrine.[33] The opinion created a new "public use" doctrine, applicable in navigable-in-fact waters where beds were not state-owned, limiting public rights in those

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[30] *See* Jesse Matsukawa, *Guardian for Future Generations*, LONG VIEW (Or. State Bar Sustainable Future Section, Tigard, Or.), Fall 2014, at 3 (describing Legal Guardians in Hungary, Finland, and Wales).

[31] *See* Blumm & Doot, *supra* note 21, at 386–87, 390, 393–94 (noting the state recognized public navigation rights in the 1859 Oregon Statehood Act, built on the Statehood Act by recognizing recreation as a type of commerce protected under the public navigation easement, and later interpreted to include public rights to recreate in all navigable-in-fact waters in Oregon).

[32] *See id.* at 392 (quoting *Guilliams*, 175 P. 437, 442 (1918)); *see also Guilliams*, 175 P. 437, 442 (1918) ("Many . . . of the meandered lakes of this state . . . will never be used to any great extent for commercial navigation; but they are used—and as population increases . . . will be still more used—by the people for . . . public purposes which cannot now be enumerated or even anticipated." (quoting Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893))).

[33] 2005 AG OPINION, *supra* note 7, at 1–3 (failing to recognize public trust protections in privately owned navigable-in-fact waters); *see* Blumm & Doot, *supra* note 21, at 379 (discussing the implications of the 2005 AG Opinion, and how it is inconsistent with Oregon case law).

waterbodies.[34] The Oregon Supreme Court seemed to accept this interpretation of distinct doctrines and reduced the state's public trust doctrine in *Chernaik v. Brown*,[35] a decision denying the claim of youth plaintiffs that the public trust doctrine extended to atmospheric pollution.[36] The court distinguished between the duties of the state in protecting public trust resources and the fiduciary obligations of private trustees, stating that the former do not impose proactive obligations.[37] The result seemed to sanction the state's constriction of Oregon's public trust doctrine to just those traditionally navigable-in-title waters.[38]

A. A Brief History of the Public Trust Doctrine in Oregon

When admitted to the Union, Oregon received title and "jurisdiction over all navigable water in the state."[39] The Oregon Admission Act of 1859 stated that "all the navigable waters . . . shall be common highways and forever free . . . to the inhabitants of [Oregon] as to all other citizens of the United States, without any tax, duty, impost, or therefor."[40] This language suggests that Congress intended the state to act as the public trustee, to preserve public rights to the waters and their traditional

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[34] 2005 AG OPINION, *supra* note 7, at 16–17.

[35] 475 P.3d 68, 78 & n.6 (Or. 2020) ("The public's easement for navigation and commerce on [streams that are navigable-in-fact] is now referred to as the 'public use doctrine.'").

[36] *Id.* at 76.

[37] *Id.* at 83.

[38] *See* Blumm & Doot, *supra* note 21, at 383 (discussing the distinction the 2005 AG Opinion drew between navigable-for-public-use waters, which the opinion suggested are subject only to the public use doctrine, and navigable-for-title waters, which are protected by the public trust doctrine).

[39] Oregon Admission Act, ch. 33, § 2, 11. Stat. 383, 383 (1859) ("[A]ll the navigable waters of [Oregon] . . . shall be common highways and forever free . . . ."); *see also* KATHRYN A. STRATON, OREGON'S BEACHES: A BIRTHRIGHT PRESERVED 9 (1977) (noting that Congress granted Oregon jurisdiction over all navigable waters in the state and therefore gave these rights to the inhabitants of the state). Public rights in navigable waters were recognized in the Northwest Ordinance. *See* Ordinance of 1787: The Northwest Territorial Government (Northwest Ordinance of 1787) art. IV, *reprinted in* 1 U.S.C. LVII (2018) ("The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor."); Wilkinson, *supra* note 3, at 456 ("[T]he [public] trust is based on congressional preemption, manifested by implication . . . through the statehood acts. Congress' tradition of mandating that navigable watercourses be kept open to the public runs deep, from the Northwest Ordinance's guarantee in 1787 that such rivers and lakes must be 'forever free' . . . ."); *see also* Matthew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 459 (2014) ("The [Northwest] Ordinance reflected a desire to promote free navigation, which also served as an important act establishing the public trust doctrine in the U.S. . . . . [The Northwest Ordinance] established a blueprint for the eventual admission of new states on 'equal footing' . . . .").

[40] § 2, 11 Stat. at 383.

uses.[41] Although the public trust is inherent in sovereignty,[42] the Oregon Admission Act codified Oregon's public trust doctrine.[43]

Trust resources originally protected by the state's public trust doctrine included tidelands and navigable waters.[44] Two 1869 Oregon Supreme Court decisions clarified that Oregon's public trust doctrine extended to waterways even if the bed was privately owned and not used for transportation throughout the entire year. In *Weise v. Smith*,[45] the court determined that a stream on private lands "capable of being commonly and generally useful . . . and consequently 'subject to the public use as a passage way'" was navigable-in-fact regardless of the ownership of the streambed, and that the public thus had "an absolute right . . . to navigate the stream."[46] Then, in *Felger v. Robinson*,[47] the court reaffirmed this wide-encompassing concept of navigability-in-fact, stating that "it is not necessary that [a stream] be navigable the whole year" for it to be navigable for public use.[48]

Thirteen years later, the Oregon Supreme Court, in *Shaw v. Oswego Iron Co.,*[49] articulated the scope of navigability-in-fact in terms of three categories of waterbodies.[50] The first category were navigable-in-title waterways, those traditionally navigable "rivers . . . [and] arms of the sea in which the tide ebbs and flows" owned by "the sovereign," with "all right[s] belong[ing] exclusively to the public."[51] In the second category

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41 *See* STRATON, *supra* note 39, at 9 ("Clearly, Congress intended that Oregon's navigable waters were to be held in public trust for the people."); *see also* Festa, *supra* note 39, at 459 (arguing that the Northwest Ordinance helped establish the public trust doctrine within the United States).

42 *See, e.g.*, *In re* Water Use Permit Applications, 9 P.3d 409, 443–44 (Haw. 2000) ("[H]istory and precedent have established the public trust as an inherent attribute of sovereign authority that the government 'ought not, and ergo, . . . cannot surrender.'" (citing McBryde Sugar Co., Ltd. v. Robinson, 504 P.2d 1330, 1338 (Haw. 1973))).

43 § 2, 11 Stat. at 383; *see also* BLUMM & WOOD, *supra* note 23, at 5 ("Some modern decisions consider the doctrine as inherent in the sovereign structure. . . . The trust has been incorporated into many state constitutions . . . .").

44 DAVID C. SLADE ET AL., COASTAL STATES ORG., INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES 5 (2d ed. 1997). The states held title to these resources due to their "unsuitab[ility] for commercial agriculture" and their nature as an "equivalent of highways." *Id.* (citing Packer v. Bird, 137 U.S. 661, 667 (1891)).

45 3 Or. 445 (1869).

46 *Id.* at 449–50 (citing Brown v. Chadbourne, 31 Me. 21 (1849)) (internal quotation marks omitted).

47 3 Or. 455 (1869).

48 *Id.* at 457–58 ("We hold the law to be, that any stream in this state is navigable, on whose waters logs, or timbers can be floated to market, and that they are public highways for that purpose; and that it is not necessary that they be navigable the whole year for that purpose to constitute them such. 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.").

49 10 Or. 371 (1882).

50 *Id.* at 375–76.

51 *Id.* at 375.

were navigable-in-fact waters: "public highway[]" streams to which the title to the waters and submerged beds are privately owned but "subject to the superior [easement] rights of the public to use . . . for the purposes of transportation and trade."[52] The third category, non-navigable waters, included those streams "so small or shallow as not to be navigable for any purpose," which are considered "altogether private property" and not available for use by the public.[53] By confirming public rights in the first two categories, the court "recognized . . . broad public navigation rights in waters with state-owned beds, as well as those with private beds," seeming to obligate the state to provide some protection to public rights in navigable waters regardless of ownership of the waters or underlying beds.[54]

In 1918, the Oregon Supreme Court again recognized an expansive scope of the public rights in *Guilliams v. Beaver Lake Club*.[55] Following other state courts, the court included recreational uses in the protected public trust uses,[56] suggesting that "[e]ven confining the definition of navigability . . . to suitability for the purposes of trade and commerce" is overly limiting without the inclusion of the "use of boats and vessels for the purposes of pleasure."[57] Some two decades later, in *Luscher v. Reynolds*,[58] the court confirmed that the public had recreational rights in all navigable waters in Oregon.[59]

Oregon courts continued to clarify the state's public trust doctrine throughout the twentieth century. In 1968, in *Corvallis Sand & Gravel Co. v. State Land Board*,[60] the Oregon Supreme Court declared that the state inherently holds inalienable title to navigable-in-title waters.[61] A decade later, in *Morse v. Oregon Division of State Lands*,[62] the Oregon Court of Appeals reaffirmed that the public trust doctrine's "tacit

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[52] *Id.* at 375–76.

[53] *Id.* at 376.

[54] Blumm & Doot, *supra* note 21, at 389.

[55] 175 P. 437, 442 (Or. 1918).

[56] *Id.* ("[S]o 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." (quoting *Lamprey*, 53 N.W. 1139, 1144 (Minn. 1893)); *see also* Michael C. Blumm & Courtney Engel, *Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to* Lamprey *and* Oswego Lake, 43 VT. L. REV. 1, 21 (2018) ("Many other states have also relied on the language of *Lamprey* to recognize the recreational boating test, including California, South Dakota, North Dakota, Arkansas, Ohio, Missouri, Maine, Montana, and Wisconsin." (citations omitted)).

[57] *Guilliams*, 175 P. at 441.

[58] 56 P.2d 1158 (Or. 1936).

[59] *Id.* at 1162 ("A boat used for the transportation of pleasure seeking passengers is . . . as much engaged in commerce as is a vessel transporting a shipment of lumber. . . . 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.").

[60] 439 P.2d 575 (Or. 1968) (en banc).

[61] *Id.* at 583. The court held that the inalienability of this title defeats attempts to establish adverse possession. *Id.*

[62] 581 P.2d 520 (Or. Ct. App. 1978), *aff'd on other grounds*, 590 P.2d 709 (Or. 1979) (en banc).

[underlying] principle . . . is that water resources should be devoted to uses which are consistent with their nature and should be protected from inimical uses."[63] The inference was the state had a duty to protect public uses.

According to the Oregon Supreme Court, a series of state statutes enacted in the 1960s and 1970s "partially codified," or at least recognized, certain aspects of the public trust doctrine.[64] For example, the state legislature passed the Oregon Beach Bill in 1967,[65] which seemed to recognize the public trust doctrine's access guarantee by "establish[ing] a permanent public easement for access and recreation along the ocean shore seaward of the existing line of vegetation, regardless of ownership."[66] Four years later, the Scenic Waterways Act[67] "declared that the highest and best uses of the . . . scenic waterways are recreation, fish and wildlife uses," thereby recognizing the public character and uses of these waters.[68] In addition, the Scenic Waterways Act "provid[ed] an apt statement of the state's duties when managing public trust water resources,"[69] directing the Water Resources Commission and the Department of State Lands to actively safeguard the public uses by managing alterations to the waterways with a permit system.[70] Two statutes—the "jurisdiction over submersible and submerged lands" law of 1967[71] and the "state ownership of meandered lakes" law of 1967[72]—"declar[ed] that the waters of all navigable lakes are 'of public character'

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[63] *Id.* at 525. In *Morse,* the first case to describe the public rights in navigable waters as public trust rights, *id.*, the appellate court enjoined a state rule allowing non-water-related uses of public trust resources adversely affecting public uses of the water. *Id.* at 528. However, the Oregon Supreme Court overruled the appeals court's public trust findings on the ground that the public trust "doctrine does not prohibit other than water-related uses." Morse v. Or. Div. of State Lands, 590 P.2d 709, 711 (Or. 1979) (en banc).

[64] *Chernaik,* 475 P.3d 68, 77 (Or. 2020).

[65] Oregon Beach Bill, OR. REV. STAT. §§ 390.610–390.690 (2021); Oregon Beach Bill, ch. 601, 1967 Or. Laws 1448 (codified as amended at OR. REV. STAT. §§ 390.610–390.690).

[66] Coastal Management Program: Department of Land Conservation and Development, *Public Access to the Coast*, OREGON, https://perma.cc/C4S2-P9UE (last visited Nov. 12, 2023); § 2(1), Oregon Beach Bill, 1967 Or. Laws at 1448; Oregon Beach Bill, OR. REV. STAT. § 390.610(1) ("The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of lands abutting, adjacent and contiguous to the public highways and state recreation areas and recognizes, further, that where such use has been sufficient to create easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreation resources.").

[67] Scenic Waterways Act, OR. REV. STAT. §§ 390.805–390.925 (2021); *see also* Scenic Waterways Act, ch. 1, 1971 Or. Laws 9 (codified as amended at OR. REV. STAT. §§ 390.805–390.925).

[68] Scenic Waterways Act, OR. REV. STAT. § 390.835(1).

[69] Blumm & Doot, *supra* note 21, at 399.

[70] Scenic Waterways Act, OR. REV. STAT. § 390.835(1)–(2) (directing the agencies to "administer and enforce" its provisions).

[71] Act of June 19, 1967, ch. 421, § 100, 1967 Or. Laws 872, 897 (codified as amended at OR. REV. STAT. § 274.025) (relating to public lands).

[72] *Id.* § 132, at 906 (codified at OR. REV. STAT. § 274.430).

and that the title to . . . 'submersible and submerged lands' beneath navigable lakes is vested in the State of Oregon."[73]

These four statutes addressed public use protections and recognized government management authority related to both coastal tidewaters and lands and non-coastal navigable waters. Despite this recognition and the proactive protection duty imposed by the Scenic Waterways Act,[74] the state has invoked these statutes only to justify its inaction in protecting public uses and to assert that judicial protection is unnecessary.[75]

Still, at the turn of the twenty-first century, Oregon's public trust doctrine appeared expansive, protecting public navigation and recreational uses in both navigable-in-title and navigable-in-fact waters.[76] However, in 2005, the attorney general issued an opinion that substantially reduced the reach of Oregon's public trust doctrine.[77] Although such a rollback in the public trust case law did not seem warranted, the Oregon Supreme Court has proved to be surprisingly deferential to the opinion.[78]

B. The Modern Public Trust Doctrine in Oregon

One analysis of the case law prior to 2005 defined Oregon's public trust as "spring[ing] from the common highways provision of the Statehood Act, the public ownership of water, and the state's common law duty to preserve [public resources], to protect public rights to use all navigable-for-public-use waters in the state."[79] However, the 2005 opinion interpreted the scope of the public trust doctrine to be limited to the beds of tidelands and navigable-for-title waters.[80] Instead of seeing the case law as defining both public uses and the state's responsibility to protect those uses and resources as the public trust's trustee, the opinion construed the case law only to "address what constitutes a navigable waterway for the purpose of public use rights . . . [and] the relationship between those rights and the rights of affected riparian landowners."[81] The opinion coined the term "public use" doctrine to describe the state's

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[73] *See Kramer*, 446 P.3d 1, 13 (Or. 2019) (first quoting OR. REV. STAT. § 274.025(1) (2021); and then quoting OR. REV. STAT. § 274.430(1) (2021)).

[74] Scenic Waterways Act, OR. REV. STAT. § 390.835(1)–(2).

[75] *Cf. Chernaik*, 475 P.3d 68, 74 (Or. 2020) ("The state maintains that the [public trust] doctrine has historically been limited in scope and that plaintiffs have not established a basis for the court to expand the resources protected . . . .").

[76] *See* Blumm & Doot, *supra* note 21, at 390 ("Although the Oregon Supreme Court has not addressed public use rights in navigable waters since the mid-1930s, the principle of broad public rights in all navigable waters regardless of bed ownership was well established long ago in Oregon law.").

[77] 2005 AG OPINION, *supra* note 7, at 28 (recognizing trust protections in state-owned navigable-in-fact waters but failing to recognize such protections in privately-owned navigable-in-fact waters).

[78] *See* discussion *infra* Part II.B.

[79] *See* Blumm & Doot, *supra* note 21, at 394 (internal quotation marks omitted).

[80] 2005 AG OPINION, *supra* note 7, at 28.

[81] *Id.* at 17 (internal quotation marks omitted).

new role with regard to navigable-in-fact waters.[82] According to the attorney general, this new doctrine recognized public use rights in waters overlying private lands but imposed no fiduciary duties on the state.[83]

The creation of the so-called "public use" doctrine, which broke from over a century of precedent affirming and expanding the public trust doctrine, now defines the parameters of Oregon's public trust doctrine. For example, in *Kramer v. City of Lake Oswego*,[84] a case involving the right of the public to access a 400-acre lake in metropolitan Portland, the Oregon Supreme Court declared that "for waterways subject to the public trust doctrine, the public has a right to use water because the state owns the underlying land in trust for the public, while for waterways subject to the public use doctrine, the underlying land remains privately owned."[85] This distinction means that navigable waters whose beds are publicly owned remain protected by the public trust doctrine, but the public rights in navigable-in-fact waters whose beds are privately owned now fall outside the state's trust obligation. Members of the public must now defend public rights in navigable-in-fact waters, likely through litigation, without state assistance.[86] The results of this declaration are evident in the Oregon Supreme Court decisions in both *Kramer* and *Chernaik*.

Throughout the proceedings in *Kramer*, defendants, including the state of Oregon, consistently denied the existence of trust rights in Oswego Lake because the addition of dams had expanded the lake over the years.[87] Oregon also refused to recognize the public's right to access the lake from surrounding public uplands, which the local municipality

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[82] Blumm & Doot, *supra* note 21, at 383.

[83] 2005 AG OPINION, *supra* note 7, at 28; *see also* Blumm & Doot, *supra* note 21, at 383–84 (explaining that the new doctrine concerned "navigable-for-public-use" waters flowing over private submerged lands). The Oregon Supreme Court affirmed the limited nature of the state's duties in both *Kramer* and *Chernaik*, where it found the state only has the duty to not impair public trust waters from its own actions, not to proactively protect the waters from any impairment that could affect public use. *Kramer*, 446 P.3d 1, 17, 19 (Or. 2019) (holding that the public trust doctrine "limits the state's authority to interfere with the public's right to use the public waters of the state" but "[n]either the legislature nor [the Oregon Supreme Court] has mandated specific requirements or prohibitions to govern the state's management of the waters that it holds in trust"); *Chernaik*, 475 P.3d 68, 83 (Or. 2020) (concluding that the state does not have a fiduciary obligation under the public trust doctrine that requires it to protect trust resources from the effects of climate change).

[84] 446 P.3d 1.

[85] *Id.* at 10 (internal quotation marks omitted); *see also* Matrin Cizmar, *Meet the Heroes Suing to Free Oswego Lake, the Portland Area's Forbidden Paradise*, WILLAMETTE WEEK (June 13, 2017, 2:14 PM), https://perma.cc/PNX2-DC5G (describing the events that led to the suit brought in *Kramer*). The court made this declaration without deciding whether Oswego Lake was a navigable water under state law. *Kramer*, 446 P.3d at 6.

[86] *See* 2005 AG OPINION, *supra* note 7, at 27–28 (describing the process the public must go through to determine use and access rights for waters in the state).

[87] *Cf.* Kramer v. City of Lake Oswego, 395 P.3d 592, 602 (Or. Ct. App. 2017) (noting that the "[d]efendants [argued] that the public-trust doctrine applies only with respect to 'title-navigable' waterways, that is, water ways to which the state was granted ownership of the underlying land as an incident of sovereignty under the equal-footing doctrine," implying that the lake was not navigable at statehood), *aff'd in part, rev'd in part*, 446 P.3d 1 (Or. 2019).

had banned.[88] The distinction between the "public use" and public trust doctrines drawn in the 2005 opinion gave the state a chance to narrowly interpret the scope of traditionally navigable water so as to relieve itself of trust duties.[89] The lower courts accepted the state's position,[90] but the Oregon Supreme Court reversed on the grounds that 1) the state's claim about the navigability of the lake required trial court's fact-finding on the navigability of the lake and the reasonableness of the municipality's ban, and 2) if the lake was navigable, the local government in fact had a trust obligation to provide access across municipal parklands adjacent to the lake.[91] On remand, in an unpublished opinion attached as an appendix to this Article, the circuit court concluded that the lake was traditionally navigable, but an allegation that the trial judge had had *ex parte* contacts with the plaintiffs before the trial put the decision on hold.[92] Although the public rights to access the lake remain uncertain as of this writing pending a trial on the reasonableness of the city's exclusion, the driving force behind the state's push to narrowly construe its responsibilities to the public was quite evident throughout.

In *Chernaik*, the Oregon Supreme Court affirmed the attorney general's denial of trust responsibilities to the atmosphere, permitting the

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[88] *Kramer*, 446 P.3d at 6–7, 12.

[89] *See* 2005 AG OPINION, *supra* note 7, at 28 (noting that the state may not substantially impair waters protected by the public trust doctrine, but not recognizing such protections for waters protected by the public use doctrine).

[90] *Kramer*, 395 P.3d at 603–04 ("[W]e agree with defendants that, even if the public-trust doctrine applies to all navigable waterways regardless of ownership of the underlying land . . . it does not obligate the state or the city to provide public access."); *id.* at 604 ("In defendants' view, the doctrine operates as a *restraint* on the state's power to alienate or otherwise encumber lands underlying navigable waterways in a manner that might substantially impair the public's interest in the waterway . . . it does not *oblige* the state to take affirmative action to create or ensure that the public has access to those waterways . . . ." (emphasis in original)); *Kramer*, No. CV12100913, 2014 WL 8817709, at *4 (Or. Cir. Ct. Jan. 24, 2014) ("There are important fundamental reasons for the court to stay its hand in imposing on the State a duty to act in this and similar cases . . . . First, there appear to be no precedents that support requiring the State to take action in respect of upland property not owned by it."); *id.* at *5 ("Public Use Doctrine cases . . . have not involved or led to the imposition of duties on the trustee under the Public Trust Doctrine.").

[91] *Kramer*, 446 P.3d at 6.

[92] Judge Ann Lininger, the trial judge, had been elected to the Oregon legislature before being appointed to the bench. Conrad Wilson, *Judge Removed from Oswego Lake Access Case*, OR. PUB. BROAD. (July 21, 2022, 6:18 AM), https://perma.cc/ZA4P-J2W7. In that capacity, she listened to public comments about public access to Oswego Lake, because she represented the area in question. *Id.* She disclosed those contacts in court before the trial on navigability took place and had taken no position on those alleged public rights. *Id.* Although the defendants in the case made no objection before the trial, after they lost on the merits, they pursued an *ex parte* contacts claim after the trial. *Id*. The chief judge of the Multnomah Circuit Court (after the chief judge of the Clackamas County Circuit, where Judge Lininger sits, recused) removed Judge Lininger from the case. Nigel Jaquiss, *Judge Ann Lininger Disqualified from Long-Running Case Over Access to Waters of Oswego Lake*, WILLAMETTE WEEK (July 19, 2022, 4:36 PM), https://perma.cc/KKD5-CTT7. Judge Lininger's unpublished decision was adopted by her successor, Judge Kathy Steele, and appears in an appendix to this Article.

state to eschew regulation of atmospheric pollution, and damaging recognized trust resources through inundation and ocean acidification.[93] Despite agreeing with the state that the atmosphere was not a trust resource, the court noted that the scope of trust resources was not fixed and could adapt to meet the public's needs in the future.[94] Although *Chernaik* gave the state a justification for inaction, the scope of this discretion is not unreviewable, as the *Kramer* decision made clear.[95] But the incentives to do nothing are strong.

C. The Attorney General as Trustee of Public Rights

As evident from the previous Part, the state attorney general as the primary enforcer of the public rights under the public trust doctrine is problematic.[96] The Office of the Attorney General has been primarily responsible for the significant tightening of the doctrine in the years since the 2005 opinion created the duty-free "public use" doctrine.[97]

In *Chernaik*, Oregon continued to narrow the doctrine by arguing that the state's public trust duties were not similar to those of private trustees, instead insisting that the doctrine only restrains the state's alienation of trust resources and imposes no duty to protect against actions that substantially impair trust resources.[98] The court agreed that public and private trustee duties were not identical but did not elaborate on the differences.[99] As a result, whether the court endorsed the state's position—which fused the doctrine's anti-alienation and "substantial impairment" principles, and limited any state duty only to prevent conveyances of trust resources producing substantial impairment—remains unclear.[100]

Along with diminishing the state's trustee duties, the attorney general, defending the state's inaction in *Chernaik*, reduced the scope of

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[93] *Chernaik*, 475 P.3d 68, 82–83 (Or. 2020).

[94] *Id.* at 78 ("[T]he public trust doctrine is not necessarily fixed at its current scope. It is within the purview of this court to examine the appropriate scope of the doctrine and expand or to mold it to meet society's current needs, as we have done in the past.").

[95] *See Kramer*, 446 P.3d at 25–26 (holding that discretion of public entities to cabin public rights in relation to public trust resources is limited by a reasonableness standard).

[96] *See* discussion *supra* Part II.B (discussing the state's abdication of trustee duties).

[97] *See supra* Part II.B.

[98] The Attorney General maintained that the state does not have "the same fiduciary duties that a trustee of a common-law private trust would have, such as a duty to prevent substantial impairment of trust resources." *See Chernaik*, 475 P.3d at 72, 76 (declining to adopt the plaintiffs' view regarding the state's fiduciary duties as a trustee). The appellate court agreed with the state that it was only "restrained from disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources." *Chernaik*, 436 P.3d 26, 35 (Or. Ct. App. 2019). Protective actions are, according to this view, "entrusted to the legislative and executive branches of government." *Chernaik*, 475 P.3d at 74.

[99] *Chernaik*, 475 P.3d at 84.

[100] *See id.* at 79 (recognizing that the state has limited authority to impede the public's right to use public waters but not elaborating further).

trust resources by eliminating navigable-in-fact waters from the trust.[101] Although the attorney general could not eliminate public rights to use these resources, those rights are now enforceable only in private suits or through petitions to the state.[102] Petitions to the state for a navigability determination have no assurance that the state will support their public rights with action.[103]

The sorry performance of Oregon's attorney general in narrowing the state's public trust duties may be surprising, but this diminishment of public rights is the logical consequence of a clear conflict of interest. The state's attorney general represents the public and presumably the public's interest in trust resources.[104] But the attorney general also represents state agencies.[105] Thus, if a violation of the trust is due to the action or inaction of a state agency or a local government, the attorney general faces a conflict of interests between its role as the representative of the state and its role as trustee of the public, the beneficiaries of the trust.[106] The following Part proposes a way to overcome the conflict through the creation of a separate entity—the Office of the Legal Guardian for Future Generations—to protect the public rights in public trust resources.

III. THE OFFICE OF LEGAL GUARDIAN FOR FUTURE GENERATIONS PROPOSAL

In 2012, a study group of the Oregon State Bar's (OSB) Sustainable Future Section (SFS) drafted a proposal calling for the establishment of an Office of the Legal Guardian for the state.[107] The group envisioned the Guardian as playing a role in amassing data on trust uses and analyzing proposed legislation, aiming to protect a healthy environment to benefit the interest of future generations.[108] The proposal failed to gain approval then, but with some modifications may still have a future today.

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101 *Id.* at 76 (recognizing public trust protections for only navigable-in-title waters).

102 *Cf. id.* at 82–83 (concluding that there is no affirmative duty of the state to protect public trust resources); *see also* 2005 AG OPINION, *supra* note 7, at 27–28 (describing the process for "ascertain[ing] whether there is a public right to use a particular waterway").

103 2005 AG OPINION, *supra* note 7, at 27–28. Persons wanting to enjoy Oregon's waterways must "ask the Department of State Lands whether . . . the waterway is state-owned." *Id.* at 27. If a formal determination has not already been made, the person may either "(1) file a Petition for Navigability Study that asks the [Department] to . . . issue a final declaration; (2) file an action asking a court to [make a determination;] . . . or (3) decide for [themselves]." *Id.* at 27–28.

104 *See About the Oregon Department of Justice*, OR. DEP'T OF JUST., https://perma.cc/NMK2-67ZR (last visited Nov. 17, 2023) (describing the duties of the Department of Justice, which includes the office of the Attorney General, including its role "[e]nforcing environmental protections").

105 *Id.*

106 *See id.* (describing the Department of Justice's role "serv[ing] as general counsel for all legal proceedings affecting the state).

107 *See* McQuesten, *supra* note 23, at 7; 2012 Proposed Office of Legal Guardian, *supra* note 23, at 551.

108 2012 Proposed Office of Legal Guardian, *supra* note 23, at 551–55.

A. The Oregon State Bar's Sustainable Future Solution

In 2009, the state bar's board of governors established the SFS amid growing interest in environmental sustainability and the role of the legal profession in promoting state sustainability efforts.[109] Three years later, in 2012, a study group of the SFS formed to consider options for "protecting the rights of future generations" to a healthy environment.[110] Drawing on international models,[111] the study group drafted a proposal directed at the state executive branch for either an administrative rule or executive order to establish the Office of Legal Guardian for Future Generations.[112] Neither the governor nor any state agency implemented the proposal, but the years since the proposal have demonstrated the need for such an office, especially in light of the narrowed geographic scope of the public trust following the 2005 Attorney General's Opinion and the attorney general's position in *Chernaik*.[113] The Guardian would provide a more effective and enthusiastic protection of trust resources and perhaps restore Oregon's role as a leader on environmental issues.[114]

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[109] *About*, OR. STATE BAR SUSTAINABLE FUTURE SECTION, https://perma.cc/HS5V-78NB (last visited Nov. 14, 2023). The SFS hosts events allowing for "constructive dialogues" related to sustainability, publishes an informational newsletter four times per year, and distributes OSB Sustainability Leadership Awards. *Id.* The SFS also oversees the OSB Partners in Sustainability Program, which recognizes law offices in Oregon that have implemented sustainable practices addressing energy and waste reduction within the program's criteria. OR. STATE BAR TASK FORCE ON SUSTAINABILITY, REPORT OF THE OREGON STATE BAR TASK FORCE ON SUSTAINABILITY 46–48 (2009), https://perma.cc/7TK2-6H6C.

[110] OR. STATE BAR SUSTAINABLE FUTURE SECTION, https://perma.cc/5G6S-DZUY (last visited Nov. 14, 2023); *see also 2013 Activities and Accomplishments*, LONG VIEW (Or. State Bar Sustainable Future Section, Tigard, Or.), Winter 2013, at 4, 5 (noting that several of Sustainable Future Section's study groups from 2012 continued into 2013, one of which "stud[ied] the feasibility and effect of creating a state office of legal guardian to analyze how proposed legislation and administrative rules might impact the environmental interests of future generations").

[111] Matsukawa, *supra* note 30, at 3. The study group looked at the Hungarian, Finnish, and Welsh Guardians for Future Generations offices as models. *Id.* In Hungary, the Guardian prepares analyses akin to environmental impact statements for proposed agency regulations but also examines the "needs of future generations, especially in relation to sustainability and combatting climate change." *Id.* In Finland, the Guardian monitors and develops plans consistent with the government's sustainability goals. *Id.* The Guardian program in Wales, still being established when the SFS study group examined its model, was a hybrid between the Hungarian and Finnish programs. *Id.*

[112] *See* 2012 Proposed Office of Legal Guardian, *supra* note 23, at 551.

[113] *Cf.* discussion *supra* Part II.B–C (explaining how, in both the 2005 opinion and *Chernaik*, the state attorney general argued to limit the state's trust responsibilities and has said nothing of the conflict of interest in having to both defend the state and act in the interest of the beneficiaries of the trust).

[114] *See, e.g.*, Alyson March-Young, *The Art of Collaboration: Working Together for Conservation*, OR. ENV'T COUNCIL: BLOG (July 13, 2018), https://perma.cc/LAJ4-GKKW (describing how Oregon led the nation with groundbreaking bipartisan land use planning approaches and policies enacted by the state government in the 1970s).

B. The Legal Guardian Proposal

The 2012 proposal had four sections: 1) creating the office and describing the qualifications of the Guardian; 2) establishing the purpose of the office; 3) defining and explaining the functions of the Guardian; and 4) prescribing a Future Generations Impact Statement (FGIS) to assess state actions affecting trust resources.[115] The proposal claimed that the Guardian would "ensur[e] that the environmental concerns of the public are heard" and hold the "government[] . . . accountable to the public and to future generations" by "providing concrete metrics by which to judge progress toward sustainability."[116] In each of the office's functions, the Guardian would strive for intergenerational justice.[117]

The governor would appoint the Guardian, whose mission would be to "fulfill the responsibility of the State to serve as a trustee of the environment to ensure that a clean, healthful, ecologically balanced, and sustainable environment is passed on to future generations."[118] The office would be part of the Department of Administrative Services, funded by the state budget, and would work closely with state agencies and the state legislature.[119] At bottom, the Guardian would represent the interests of the future and work to preserve the environment in a way to allow for those interests to come to fruition.[120]

The proposal named the Guardian as the trustee of the "environment," defined as the "totality . . . of physical substances, conditions and processes[,] . . . including all living organisms[,] . . . that affect the ability of all life forms to grow, survive and reproduce."[121] The "totality" is expansive, "includ[ing] both natural and human-created substances, conditions and processes," so long as there is an effect on a life form's basic survival functions.[122] This definition of environment would extend the Guardian's responsibility to resources that the attorney

115 *See* 2012 Proposed Office of Legal Guardian, *supra* note 23, at 551–55 (setting out the 2012 proposal).

116 Matsukawa, *supra* note 30, at 4.

117 McQuesten, *supra* note 23, at 7.

118 *See infra* Appendix: Legal Guardian Proposal § 2. Note the mission statement clearly asserted that the state is a trustee of the environment for the benefit of the public. *See id.* (recognizing the state's "responsibility . . . to serve as a trustee of the environment"). The criteria for appointment of a legal guardian *ad litem* for minors or the incapacitated in Oregon may be instructive, although they are quite vague. The appointee must: 1) be a licensed health professional or an attorney; 2) be familiar with the relevant law; 3) have experience in representing minors or incapacitated parties in court; and 4) not be related to a party. OR. REV. STAT. § 419B.231; Application Packet, Or. Judicial Dept., Applying for a Guardian Ad Litem (Feb. 22, 2023), https://perma.cc/NB2W-HB6T.

119 *See infra* Appendix: Legal Guardian Proposal. §§ 1.1, 4.2 (explaining the Legal Guardian's proposed collaboration with state agencies and the state legislature).

120 *See id.* § 1.2 (documenting the qualifications the Guardian would possess to represent these interests adequately: the Guardian would have a background in ecological sustainability, economics, and public policy, as well as be knowledgeable about Oregon governance and politics and the precautionary principle).

121 *Id.* § 3.1(b).

122 *Id.*

general has denied a duty to protect, and therefore would be broader than Oregon's public trust doctrine, as interpreted by the attorney general.[123]

The proposal envisioned the Guardian undertaking a variety of duties. Reporting and analysis making up the lion's share of the office's obligations.[124] At least once every five years, the Guardian would prepare an "Inventory of Significant State Resources . . . that identifies all resources of significant ecological or cultural importance located in the State," as well as "any change in the status or condition of previously identified resources."[125] The proposal did not explain whether the Guardian would submit the inventory to a particular department or the legislature, stating only that the office would "[m]aintain a website for the purposes of educating the public," and that this website would include access to the inventory and other documents prepared by the Guardian.[126] Guided by the inventory, the Guardian could act as an advisor, "[p]ropos[ing] goals and actions that can be taken by the State . . . [to] best protect and improve . . . the environment."[127] Between the inventory, analysis, and planning duties, as well as the FGIS described below, the Guardian could influence state policy at a variety of stages of the policymaking process.

The Guardian's most comprehensive duty, and most substantial task, would be to "identify and assess all material threats . . . to the ecological health and sustainability of the environment" present in the rules, decisions, and actions levied by Oregon's agencies and legislature.[128] This review would require the Guardian to issue a "Future Generations Impact Statement" (FGIS) when the office identified a threat in a proposed state action.[129] Such a statement would explain "how the legislative measure or proposed administrative rule poses a material threat to the . . . environment . . . and . . . identify those alternatives that provide the least threat [to] . . . and improve the ecological health and sustainability of the environment."[130] After receiving a FGIS, the relevant

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123 *See, e.g.*, *Chernaik*, 475 P.3d 68, 74 (Or. 2019). The attorney general argued that the public trust doctrine does not extend to the atmosphere and does not impose affirmative, fiduciary-like duties upon the state. *Id.* The court seemed to agree, although it did recognize that the doctrine's scope could be expanded in the future. *Id.* at 80, 82–83. On the other hand, the Guardian's proposed environmental scope would exceed traditionally navigable waters and submerged lands by encompassing every aspect of an environment which affects life, including the atmosphere. *See infra* Appendix: Legal Guardian Proposal § 3.1(b).

124 *See infra* Appendix: Legal Guardian Proposal §§ 3–4 (outlining the powers and duties of the Legal Guardian).

125 *Id.* § 3.2(a).

126 *See id.* § 3 (discussing the Legal Guardian's function to prepare the inventory with no indication stating to whom the inventory would be submitted).

127 *Id.* § 3.2(d).

128 *See id.* §§ 3.2(d)–(j) (discussing the general function of the Guardian to identify and assess all material threats, including supporting related functions with regards to the review of proposed legislation and administrative rules).

129 *Id.* § 3.2(g). Unlike the other West Coast states, Oregon has no state environmental impact statement requirement.

130 *Id.* § 4.1.

legislative committee or agency would have at least ten days to issue a "Response to Impact Findings" (RIF) to "accept or deny [the Guardian's] findings and . . . provide a written explanation of the denial of any such finding."[131] After the response, the Guardian would have the option of issuing a "Legal Guardian Response" (LGR) to "each finding . . . that the committee or agency has denied."[132] If the legislative committee or agency proceeded with the disputed rule, decision, or action, the entity must "provide a written explanation" for the inconsistency between the action and the Guardian's findings, and include that explanation, the FGIS, the RIF, and any LGRs in the official legislative record or in any copies of the administrative rule.[133]

The proposal focused primarily on the Guardian's role in policymaking but did not preclude the office from participating in legal actions. This involvement would be limited, as the proposal did not authorize the Guardian to file a claim or act as a party itself. If an environmental dispute arose, the Guardian could act "in the capacity of a mediator or arbitrator[,] . . . but only if all necessary parties to the resolution of such dispute request in writing that the Legal Guardian act."[134] The Guardian could "[t]estify in legislative, administrative, judicial, or other hearings," but could only "[s]erve in pending litigation . . . at the request of a state or federal judge in Oregon."[135] Even if requested by a judge, the proposal limited the Guardian to acting as a "special master, expert witness, or settlement judge."[136] Like other state agencies, if the Guardian desired, the office could receive "appropriate legal relief to enforce [its] power and authority" by seeking the attorney general's services.[137]

Although the proposed Office of the Legal Guardian for Future Generations would be a groundbreaking development in the protection of Oregon's public trust and other environmental resources, the office would not be the first of its kind in the United States. With a similarly constrained public trust doctrine,[138] New Jersey's former Department of

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131 *Id.* § 4.2.

132 *Id.* § 4.3.

133 *Id.* §§ 4.4–.5.

134 *Id.* § 3.2(j). As the attorney general would still be the legal actor representing the public trust, relevant environmental cases would necessarily involve the attorney general as a party. Requiring parties to request the Guardian thus gives the attorney general veto authority on the Guardian's involvement.

135 *Id.* § 3.2(l)–(m).

136 *Id.* § 3.2(m).

137 *See id.* § 3.2(p) (allowing the Guardian to "[s]eek appropriate legal relief to enforce [its] power and authority"). This seeking of the attorney general's services would ironically implicate the conflict of interests the Office of the Legal Guardian would ideally avoid.

138 *See* Leonard R. Jaffee, *The Public Trust Doctrine is Alive and Kicking in New Jersey Tidalwaters:* Neptune City v. Avon-by-the-Sea*—A Case of Happy Atavism?*, 14 NAT. RES. J. 309, 334 (1974) ("No public trust having been recognized in the rest of the New Jersey environment [outside the beach context], the state's citizens can claim no inalienable, indefeasible property-like equities in any but tidalwater interests.").

the Public Advocate provides some insight as to how the Office of the Legal Guardian could function in Oregon.

IV. LESSONS FROM NEW JERSEY

New Jersey defines and manages the state's public trust doctrine in a similar manner to Oregon, including coastal and tidal navigable-in-title waters and dry sand beaches as covered water resources and navigation, transportation, and recreation as recognized public uses.[139] In 1974 and again in 2005, the New Jersey legislature created the Department of the Public Advocate, which advocated for "the voiceless," including the New Jersey environment and public trust resources.[140] The Advocate was the lead plaintiff in several of New Jersey's cornerstone public trust doctrine cases, and the legacy of those court decisions shaped the state's current public trust doctrine.[141] Although no longer active, the Department of the Public Advocate's strengths and weaknesses offer guidance for reviving the proposed Office of the Legal Guardian.

A. New Jersey's Public Trust Doctrine

Since the state's founding, the public trust doctrine has been the subject of frequent legal actions in New Jersey.[142] New Jersey courts recognize the public trust doctrine as an inherent, but flexible, right of the public, including the ability to expand and change over time.[143] The state holds the title to traditionally navigable and tidal waters to the high water line in fee simple; New Jersey may convey the *jus privatum* interest in these in these land, but even if it did, the state does not convey the public's *jus publicum* trust interest.[144] In recent years, New Jersey courts

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139 *Id.* at 310, 334.

140 *See* Dep't of the Pub. Advoc., *supra* note 29 (highlighting the Department of the Public Advocate's responsibility to provide advocacy on a range of issues through six divisions, including the Division of Public Interest Advocacy); *Public Advocate*, NEW JERSEY STATE LIBRARY, https://dspace.njstatelib.org/xmlui/handle/10929/19052 (last visited Nov. 13, 2023) (discussing the history of the department of the Public Advocate).

141 *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 358 (N.J. 1984) ("Stanley Van Ness, as Public Advocate, joined as plaintiff-intervenor . . . [and after movant dropped], the Public Advocate became the primary moving party."); Van Ness v. Borough of Deal, 393 A.2d 571, 571 (N.J. 1978) ("The underlying suit was brought by Stanley C. Van Ness, Public Advocate of the State of New Jersey . . . ."); *see also* discussion *infra* Part IV.B (discussing cornerstone cases in New Jersey public trust doctrine jurisprudence).

142 *See*, *e.g.*, *Arnold*, 6 N.J.L. 1, 12–13 (N.J. 1821) (creating the foundation for New Jersey's public trust doctrine law by recognizing rights of the people to navigable waters).

143 *See, e.g.*, *Van Ness*, 393 A.2d at 574 (applying the public trust doctrine to dry sand beaches); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972) ("The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.").

144 *See* David Allen, *The Public Trust Doctrine in New Jersey*, *in* THE PUBLIC TRUST DOCTRINE IN 45 STATES, *supra* note 22, at 549, 557.

have expanded the doctrine to include "dry sand areas located between the water and the nearest public road."[145] Although expansive along tidewater beaches and extended to adjacent beaches, New Jersey has not recognized the doctrine beyond the traditionally navigable, tidal water, and ocean beach contexts.[146] So New Jersey's public trust doctrine includes resources within the traditional scope of the public trust doctrine, including tidal and navigable-in-title waters, as well as the non-traditional upland ocean beaches, for public navigation, transportation, and recreation uses.[147]

New Jersey's public trust doctrine calls for the state to protect trust resources from "economic[,] . . . nonphysical[, and] . . . physical . . . impairments."[148] The state formally recognizes the Commissioner of the New Jersey Department of Environmental Protection (NJDEP) as the trustee of all natural resources.[149] New Jersey also acknowledges its shared responsibility of protecting the trust resources with the federal government with the Secretary of the U.S. Department of the Interior, Secretary of the U.S. Department of Commerce, and Secretaries of the U.S. Departments of Defense and Energy as co-trustees.[150] The New Jersey legislature and the NJDEP are the primary protectors of the trust through regulatory authority.[151] The attorney general represents the state in environmental and public trust-related litigation, acting as the trustee enforcing public rights.[152] Although the current attorney general now litigates more aggressively in environmental cases, a "decade in which no such cases were brought" indicates a lack of consistent focus on acting as the state's public trustee.[153]

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145 Arielle O. Harris & Christian L. Marsh, *The Expansion of the Public Trust Doctrine in an Era of Resource Scarcity: Have We Reached the Tipping Point?,* 31 NAT. RES. & ENV'T, Summer 2016, at 43, 43 (citing *Matthews*, 471 A.2d 355); *Matthews*, 471 A.2d at 365–66.

146 *See* Timothy M. Mulvaney & Brian Weeks, *"Waterlocked": Public Access to New Jersey's Coastline*, 34 ECOLOGY L.Q. 579, 585 (2007) ("In New Jersey, the public trust doctrine recognizes public rights to a variety of natural resources, including access to and use of the ocean and other tidal waterways and shores."); Jaffee, *supra* note 138, at 334 ("[New Jersey's] citizens can claim no inalienable, indefeasible property-like equities in any but tidal water interests.").

147 Jaffee, *supra* note 138, at 310, 316.

148 *Id.* at 316.

149 Off. of Nat. Res. Restoration, N.J. Dep't of Env't Prot., *Public Trust Doctrine*, STATE OF N.J., https://perma.cc/W7NT-DU4K (July 17, 2020).

150 *Id.*

151 COASTAL MGMT. OFF., N.J. DEP'T OF ENV'T PROT., PUBLIC ACCESS IN NEW JERSEY: THE PUBLIC TRUST DOCTRINE AND PRACTICAL STEPS TO ENHANCE PUBLIC ACCESS 22 (2006), https://perma.cc/6Z5W-LZZN.

152 *See Environmental Justice*, OFF. OF THE ATT'Y GEN., https://perma.cc/9M66-LNLL (last visited Nov. 18, 2023) (describing the attorney general office's environmental enforcement program); *Protecting New Jersey in Court*, OFF. OF THE ATT'Y GEN., https://perma.cc/M3P4-25QM (last visited Nov. 18, 2023) (describing the attorney general office's responsibilities, including "[s]afeguarding the Garden State's environmental resources").

153 *Environmental Justice*, *supra* note 152. The last major case involving the public trust and the New Jersey Attorney General was *City of Long Branch v. Jui Yung Liu*, 4 A.3d 542,

In an effort to increase government accountability related to the protection of environmental resources and the public trust doctrine, the New Jersey legislature twice established a Department of the Public Advocate.[154] Unfortunately, the Advocate became a partisan issue, and the legislature dismantled the department twice.[155]

B. The Department of the Public Advocate

The New Jersey legislature enacted the Department of the Public Advocate Act of 1974, establishing the first Advocate.[156] An executive appointed by the governor, the Advocate could promulgate regulations, initiate legal actions, and delegate work to sub-departments, which included entities like the Public Defender.[157] The Advocate was not solely focused on upholding the public trust doctrine—the department's mission was to "provide a voice to the voiceless on a range of issues" affecting New Jersey citizens.[158]

The Advocate collaborated with the Department of Health; the Department of Agriculture; the Department of Commerce, Energy, and Economic Development; and the Board of Public Utilities to address environmental issues.[159] The Advocate shared the responsibilities involved in protecting trust resources with the NJDEP and the Attorney General's Office.[160] Together, the three offices could engage in "litigation, amend[ing] regulations, regulatory oversight, investigation, and propos[ing] legislation" relating to trust resources and their use by the public.[161]

With support from the NJDEP and the Attorney General's Office, the Advocate was heavily involved in what became two of the cornerstone cases in New Jersey's public trust doctrine case law. In *Van Ness v.*

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547 (N.J. 2010), in 2010, the same year the second Department of the Public Advocate was abolished, An Act of June 29, 2010, ch. 34, 2010 N.J. Laws 308. Since 2018, the attorney general has initiated over ten environmental—though not public trust—cases, suggesting that environmental enforcement is now being taken more seriously but is still widely dependent on the goals of the sitting attorney general. *Environmental Justice*, *supra* note 152. Despite this increased action, trust in the attorney general's abilities is currently in question. *See* Joe Atmonavage, *N.J. Needs a Public Advocate in Light of Attack at Women's Prison, Deaths at Veterans Homes, Lawmakers Say*, NJ.COM (Feb. 31, 2021, 12:12 AM), https://perma.cc/R4TS-72P4 (explaining that after allegations of abuse at a women's prison, several state law makers introduced legislation that would create an independent public advocate office).

154 *Public Advocate*, *supra* note 140.

155 *See* discussion *infra* Part IV.B.

156 Department of the Public Advocate Act of 1974, ch. 27, 1974 N.J. Laws 67.

157 § 3, 1974 N.J. Laws 67–69.

158 Dep't of the Pub. Advoc., *supra* note 29 (internal quotation marks omitted).

159 *See* Barry G. Rabe, *Environmental Regulation in New Jersey: Innovations and Limitations*, 21 PUBLIUS, Winter 1991, at 83, 96 (1991) (describing New Jersey agencies responsible for environmental management).

160 Mulvaney & Weeks, *supra* note 146, at 613.

161 *Id.*

Borough of Deal,[162] the Advocate challenged the partitioning of dry sand areas of a beach for the exclusive use of members and guests of a municipally-owned membership-based casino.[163] The court confirmed the inherent nature of the public trust, stating that the public's right to use the municipality-owned dry sand area of the beach existed regardless of any dedication of the beach for public use by the landowner.[164]

Later, in *Matthews v. Bay Head Improvement Association*,[165] the Advocate intervened before taking over as the "primary moving party" in a class action suit challenging the Bay Head Improvement Association's allegedly discriminatory fee and membership system for restricting public access to the public beach.[166] The court did not endorse the Advocate's argument that all beach property must be publicly open and accessible,[167] but it agreed that, since the beaches in question were "quasi-public,"[168] the public had a right to access them through equal membership opportunities.[169]

The Advocate was active for twenty years until the Public Advocate Restructuring Act of 1994 dissolved the department.[170] Although the 1994 act did not divulge the reasoning behind the abolition of the Advocate, reduced "federal funding for environmental programs may [have] put increasing pressure on the state" to reconsider its overall budget.[171]

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162 393 A.2d 571 (N.J. 1978).

163 *Id.* at 572–73.

164 *Id.* at 573 ("The Public Trust Doctrine has always been recognized in New Jersey. It is deeply engrained in our common law . . . ."); *id.* at 573–74 ("The fact that Deal has never dedicated the Casino beach to the use of the general public is immaterial. . . . If the area, which is under municipal ownership and dedication, is subject to the Public Trust Doctrine, and we hold that it is, all have the right to use and enjoy it.").

165 471 A.2d 355 (N.J. 1984).

166 *Id.* at 358–59.

167 *See id.* at 369 ("The Public Advocate has urged that all the privately-owned beachfront property likewise must be opened to the public. Nothing has been developed on this record to justify that conclusion.").

168 *Id.* at 367 ("[A] nonprofit association that is authorized and endeavors to carry out a purpose serving the general welfare of the community and is a quasi-public institution holds in trust its powers of exclusive control in the areas of vital public concern."); *id.* at 368 ("When viewed in its totality—its purposes, relationship with the municipality, communal characteristic, activities, and virtual monopoly over the Bay Head beachfront—the quasi-public nature of the Association is apparent. The Association makes available to the Bay Head public access to the common tidal property for swimming and bathing and to the upland dry sand area for use incidental thereto . . . .").

169 *Id.* at 369. The *Matthews* court established what have become known at the "*Matthews* factors" to determine whether privately owned beaches are subject to public trust rights: 1) the location of the beach; 2) the extent and availability of nearby public beaches; 3) the nature and extent of public demand; and 4) the previous use of the beach by the upland owner. *Id.* at 365; *see also* Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112 (N.J. 2005) (applying the *Matthews* factors to a privately-owned beach).

170 Ch. 365, 1994 N.J. Laws 365. The 1994 Act promoted the subdepartment of the Public Defender to the principal executive Office of the Public Defender and reallocated the Advocate's responsibilities and powers to this new office and other state departments. *Id.* §§ 6–8, at 366–67.

171 Rabe, *supra* note 159, at 101.

After a decade, the New Jersey legislature declared in 2005 that "[t]he abolition of the Public Advocate . . . resulted in diffuse, ineffective representation of the rights of those unable to effectively advocate for themselves."[172] The legislature expressed discontent with the results of reassigning the former Advocate's duties to various other departments, declaring that "a single Department of the Public Advocate [would] produce cost savings and more effective protection of the public interest."[173] The legislature consequently reestablished the Department of the Public Advocate in the Public Advocate Restoration Act of 2005.[174] The Restoration Act authorized the Advocate to engage in the same responsibilities and actions as the 1974 statute, with an added provision requiring the Advocate to compile and submit reports about the department's activities to the governor and legislature.[175] Despite the department's expansive range of duties and the legislature's apparent support, the Advocate was one of the smallest departments in New Jersey's state government and operated on a correspondingly small budget.[176]

The second iteration of the Advocate was effective, albeit not as aggressive as the first, as the department "seemed less inclined to sue other state agencies."[177] This change may be attributed to the provision requiring the Advocate to report to the Governor on the department's decisions and activities, limiting the independence previously enjoyed by the first Advocate.[178] The restored Advocate did not initiate any public trust related cases, but it did submit an amicus brief in *City of Long Branch v. Jui Yung Liu*,[179] which involved a municipal beach renourishment project.[180]

In *City of Long Branch*, landowners claimed that, because the renourishment project added dry sand area to the beach, their land titles should be amended to include greater beach area.[181] The Advocate's brief, describing the history and scope of New Jersey's public trust doctrine,

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172 Public Advocate Restoration Act of 2005, ch. 155, § 2(c), 2005 N.J. Laws 1086, 1087.

173 *Id.* § 2(b).

174 *Id.* § 3, at 1086.

175 *Compare* Department of the Public Advocate Act of 1974, ch. 154, §§4–6, 1974 N.J. Laws 67, 68–69 (detailing the powers and duties of the Advocate as set out in the 1974 act) *with* § 5, 2005 N.J. Laws 1088–90 (establishing similar powers and duties and adding that the Public Advocate must annually report matters the Advocate deems as public interest and details what must be in this report).

176 *See* § 5, 2005 N.J. Laws 1088–90 (detailing the powers and duties of the Advocate); Dep't of the Pub. Advoc., *FAQs*, STATE OF N.J., https://perma.cc/4VW9-5DH8 (archived June 16, 2006) (describing the Department of the Public Advocate's 2007 budget).

177 Tom Johnson, *Public Advocate Office Quietly Headed for Elimination*, N.J. SPOTLIGHT NEWS (May 10, 2010), https://perma.cc/V33K-E45N/.

178 § 5(h), 2005 N.J. Laws 1088–89; *see* Atmonavage, *supra* note 153 ("Under the proposed legislation [to reestablish the public advocate], the office of the public advocate would not report to the governor, unlike in the past . . . .").

179 4 A.3d 542 (N.J. 2010).

180 *Id.* at 545.

181 *Id.* at 547.

helped persuade the court to reaffirm the state's and the municipality's inherent ownership of the dry sand along the ocean shore, even after a beach renourishment project.[182] Guided by the Advocate's brief, the court also rejected the state's attempt to convey away its trust resources to a private owner as a violation of New Jersey's public trust obligations, concluding that the state had granted the landowner only an easement to the dry sand beach in question that did not preclude public access.[183]

After only five years, the legislature, in 2012, again abolished the department.[184] New Jersey faced debt and budget issues, and proponents of the Advocate conceded that delegating the department's activities and responsibilities to other state departments would trim the budget.[185] The Office of the Public Defender and other state departments again absorbed the Advocate's responsibilities and powers.[186] New Jersey has not restored the Advocate, but following several local scandals, there have been increasing efforts to reestablish the department in recent years.[187]

V. A REVIVED LEGAL GUARDIAN

The design of New Jersey's Department of the Public Advocate is distinguishable from Oregon's proposed Office of the Legal Guardian for Future Generations. However, the Advocate functioned as a protector of New Jersey's public trust, a purpose the Guardian would also fulfill, so the successes and shortcomings of the Advocate should be instructive.

The Advocate's ability to initiate legal action was critical to the department's role as an effective trustee.[188] In contrast, the Oregon proposal would not authorize the Guardian to initiate legal action or to act as a party in public trust cases.[189] Granting the Guardian the power to act fully on behalf of the public trust through the authority to initiate and represent the trust as a party in litigation would require legislative authorization, which the 2012 proposal did not seek. If legislatively

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[182] *Id.* at 548, 560; *see generally* Letter-Brief for Department of the Public Advocate, as Amicus Curiae at 5–6, *City of Long Branch*, 4 A.3d 542, No. A-9-09, 2010 WL 11252531, at *5–6 (Jan. 25, 2010) (providing a historical context of New Jersey's public trust doctrine).

[183] *See City of Long Branch*, 4 A.3d at 548, 554–55 (stating that the disputed land constitutes an avulsion and always belonged to the state, but that the public including the property owners may enjoy the dry sand for recreation and bathing); *see* Letter-Brief for Department of the Public Advocate, *supra* note 182, at 16, *16.

[184] An Act of June 29, 2010, ch. 34, 2010 N.J. Laws 308.

[185] Johnson, *supra* note 177.

[186] §§ 1(j), 2–(3), 2010 N.J. Laws 309–10.

[187] *See* Atmonavage, *supra* note 153 (describing how alleged abuses at a women's prison and mismanagement of nursing homes during the COVID pandemic led to three New Jersey senators introducing proposed legislation in February 2021 to establish a Department of the Public Advocate more akin to the first department).

[188] *See* Mulvaney & Weeks, *supra* note 146, at 613 (noting that the Pubic Advocate was "taking action to uphold the state's obligation to protect [public trust] resources and ensure public access to and use of them").

[189] *See infra* Appendix: Legal Guardian Proposal § 3.2 (detailing the functions of the proposed Guardian, which does not include initiating legal actions).

authorized, the Guardian would not have to rely on the attorney general for legal services, ensuring that the office would be independent of the attorney general. The New Jersey Advocate was most effective when challenging other New Jersey state departments,[190] and the Guardian should have similar authority to object to the actions and inactions of Oregon state departments. The office's independent status would avoid the attorney general's existing conflict of interest.[191] Such a power would elevate the office from one of analysis to one of action, making the Guardian an enforcer and protector of Oregon's public trust.

Despite some limited funding from federal and private grants, the New Jersey Advocate's primary shortcoming was the department's vulnerability to state budget cuts.[192] The Guardian would also be subject to cuts in legislative funding but could find additional funding through public and foundation grants.[193] Alternatively, the office could protect itself against fiscal vulnerability via the authority to obtain attorney's fees in victorious cases. Such an authorization would provide an additional incentive for the Guardian to actively monitor public trust resources and act in response to violations.

Some lawmakers voiced concerns that the duty of the Advocate to report and receive approval for the department's actions to the New Jersey legislature and governor weakened the Advocate's independence,[194] but these concerns do not negate the benefits of transparency and public accountability. Since the duties of the Guardian would include educating the public on its rights to trust resources, the reporting requirements would provide critical information for the public.[195] The Guardian could foster this educational duty by extending

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190 *See* Johnson, *supra* note 177 (noting that the original incarnation of New Jersey's public advocate frequently sued other state agencies, "much to the annoyance of the sitting governor").

191 *See* discussion *supra* Part II.C.

192 Department of the Public Advocate Act of 1974, ch. 27, § 4(m)–(n), 1974 N.J. Laws 67, 68–69 (allowing the Public Advocate to "[s]olicit and accept grants of funds from the Federal Government and from private foundations"); Johnson, *supra* note 177 (noting that the second iteration of the Public Advocate was disestablished in large part due to budget restraints).

193 *Cf. infra* Appendix: Legal Guardian Proposal §§ 3.3–.5 (noting sections of the proposed act, removed from the printed excerpt, provided for funding mechanisms for the Department of the Legal Guardian).

194 *See, e.g.*, Atmonavage, *supra* note 153 ("The senators said they are working with the non-partisan Office of Legislative Services to make sure the office remains [politically] independent . . . . 'One thing we've learned from past experience is that the public advocate cannot report to the governor or another Cabinet official,' Sen. Weinberg said. 'The new agency must be truly independent to be effective—and to survive.' The [proposed] bill would [instead] require the establishment of community advisory boards to provide oversight. . . .").

195 *See infra* Appendix: Legal Guardian Proposal § 3.2 (detailing the Advocates reporting requirements).

the office's outreach beyond a proposed website,[196] perhaps including publications, webinars, or exhibits at trust resource sites.

New Jersey established the Department of the Public Advocate through acts of the legislature.[197] The Oregon legislature could authorize the Office of the Legal Guardian for Future Generations, but because of the likely opposition of the attorney general, the citizen initiative process may offer the proposal's best course of action to create a Guardian independent of gubernatorial control.[198] A citizen initiative in Oregon requires a chief petitioner to collect signatures in support of their proposal's placement on the ballot of the next election.[199] The foundation of a new state office would be most resilient if grounded in the state constitution, and a constitutional initiative to establish the Office of the Legal Guardian would require the signatures of eight percent of the voters from the prior election.[200] Even if the initiative fell short of that signature requirement, it may still call important public attention to the proposal.[201] A citizen initiative to create the Office of the Legal Guardian would suggest to the state government that the public desires stronger protections for Oregon's public trust resources.

Alternatively, there have been efforts to shift from the SFS study group's proposal for a state Office of the Legal Guardian to a non-profit private Guardian.[202] A private Guardian could still play a major role in policymaking by "analyz[ing] policy decisions from the point of view of the future" to issue guidance reports and plans, but would be "a non-profit corporation composed of a panel of three advocates . . . funded by a private endowment."[203] This private model could avoid the fiscal vulnerability problem of the Advocate and proposed Guardian and would be able to operate without going through an initiative or legislative establishment procedure.[204] The private Guardian could not act as the trustee of

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196 *See id.* § 3.2(q) (requiring the Advocate to "[m]aintain a website for the purposes of educating the public regarding [its] responsibilities and actions").

197 1974 N.J. Laws 67; Public Advocate Restoration Act of 2005, 2005 N.J. Laws 1086.

198 *See generally* LEAGUE OF OR. CITIES, FAQ: INITIATIVES AND REFERENDUMS IN OREGON 2–6 (2019), https://perma.cc/DXV8-CY5A (providing information on the referendum and initiative process in Oregon).

199 LEGIS. COMM. SERVS., BACKGROUND BRIEF ON INITIATIVE AND REFERENDUM PROCESS 1 (2010), https://perma.cc/J4XY-RUQK.

200 *Id.* In 2022, 1,953,039 votes were cast in the gubernatorial election. *Election Results*, OR. LIVE, https://gov.oregonlive.com/election/ (last visited Nov. 18, 2023). This would mean that roughly 156,244 signatures would be required for a citizen constitutional initiative for the Office of the Legal Guardian to be placed on the next election cycle's ballot.

201 *See, e.g.*, STRATON, *supra* note 39, at 56–58 (describing how the Beaches Forever and Citizens to Save Oregon Beaches initiatives called for "clarif[ication] [of] public rights on Oregon beaches" and "identification and maintenance of public beach areas," and how these initiatives contributed to public awareness around these issues (emphasis omitted)).

202 *See* McQuesten, *supra* note 23, at 7.

203 *See. id.*

204 *See id.* (describing Steve Higgs's proposal for a private foundation-funded Guardian panel); *cf.* Department of the Public Advocate Act of 1974, ch. 27, § 4(g), (m), 1974 N.J. Laws 67, 68–69 (describing the Public Advocate's reporting requirements and obligation to seek funding); Johnson, *supra* note 177 (describing political challenges of the New Jersey public

Oregon's public trust doctrine and thus would not supplant the problems posed by the attorney general's role as trustee,[205] but it may be able to respond to the attorney general's inaction by bringing legal actions on behalf of trust resources as a beneficiary.[206]

VI. CONCLUSION

Not long ago—before the attorney general's unfortunate 2005 opinion—Oregon's public trust doctrine included both traditionally navigable-in-title and navigable-in-fact waters.[207] The Oregon Supreme Court has since endorsed the 2005 opinion's limited scope of the state's public trust to include only tidal and navigable-in-title waters, as well as recognizing the attorney general's creation of the "public use" doctrine.[208] Although *Chernaik* left open the door to expanding the scope of the doctrine in the future, the court's "not just yet" approach significantly reduced the resources protected by the state public trust doctrine in the immediate future.[209] Moreover, the court has upheld the state's denial of any fiduciary obligations imposed by the trust.[210]

The creation of the Office of the Legal Guardian of Future Generations, proposed by the OSB's SFS in 2012,[211] along with applicable revisions in light of the experiences of the former New Jersey Department of the Public Advocate, would allow for stronger enforcement of the public trust than exists today under the attorney general. The Guardian would be a dedicated assessment and educational entity involved in state decisions related to public trust resources and could, with legislative approval, defend the public trust in court. Oregon's public trust requires protection, especially given the climate challenges ahead. The Guardian would provide increased public trust protection, overcome the conflict of interest of the attorney general, and safeguard the state's resources for future generations. A revived Office of Legal Guardian deserves serious consideration by the state, its legislature, and the public.

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advocate); 2012 Proposed Office of Legal Guardian, *supra* note 23, at 554 (funding, staffing, and reporting mechanisms).

205 *See* discussion *supra* Part II.C.

206 *See* Doot, *supra* note 22, at 690–93 (discussing the public's standing to bring suits seeking to enforce the public trust doctrine in Oregon).

207 *See* 2005 AG OPINION, *supra* note 7, at 27–28 (recognizing trust protection for only navigable-in-title waters); discussion *supra* Part II.A (describing Oregon's historic application of the public trust doctrine).

208 *See Kramer*, 446 P.3d 1, 10 (Or. 2019) ("[T]he theory of the 'public use' doctrine is explained as an 'easement' to use the water 'highways' of the state."); *see also* 2005 AG OPINION, *supra* note 7, at 27–28.

209 *Chernaik*, 475 P.3d 68, 79, 82 (Or. 2020).

210 *Id.* at 72.

211 *See* 2012 Proposed Office of Legal Guardian, *supra* note 23, at 551–55.

APPENDIX I: LEGAL GUARDIAN PROPOSAL

Office of the Legal Guardian for Future Generations
[Draft 6-26-12,[212] to be created by Administrative Rule or Executive Order]

1. Creation of Office of Legal Guardian

1.1 Office. There is created an Office of Legal Guardian for Future Generations (the "Office") within the Department of Administrative Services.

1.2 Legal Guardian. The Office shall be comprised of a Legal Guardian (the "Legal Guardian") appointed by the Governor. The Legal Guardian shall have the following qualifications:

(a) A background in ecology and of the dependence of living beings on healthy, functioning ecological systems, an understanding of sustainability, and familiarity with the precautionary principle and decision-making in the face of scientific uncertainty;

(b) A background in financial and budgetary matters and role of economics in public policy;

(c) An understanding of the State's governmental structure, political system and finances;

(d) An understanding of the needs and interests of future generations and how governmental action and public policy can impact such needs and interests; and

(e) The general absence of any ownership interest or membership in any business, industry or occupation or any personal relationship that would be reasonably likely to (i) affect or create the appearance of affecting the exercise of independent judgment relating to actions or decisions in an official capacity, (ii) influence or create the appearance of influencing the outcome of actions or decisions in an official capacity or (iii) generate a private pecuniary benefit or detriment for the Legal Guardian or his or her relative arising from actions or decisions in an official capacity.

2. Purpose. The Office is created to fulfill the responsibility of the State to serve as a trustee of the environment to ensure that a clean, healthful, ecologically balanced, and sustainable environment is passed on to future generations.

3. Powers and Duties of Legal Guardian

3.1 Definitions. The following definitions shall apply to Sections 1 to 4:

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[212] As printed in 2012 Proposed Office of Legal Guardian, *supra* note 23, at 551–55.

(a) "Ecological health and sustainability of the environment" is the capacity for self-renewal and self-maintenance of the soils, water, air[,] people, plants, animals and other species that collectively comprise the environment.

(b) The "environment" is the totality within the State of physical substances, conditions and processes (including all living organisms in the biotic community, air, water, land, natural resources and climate) that affect the ability of all life forms to grow, survive and reproduce. The "environment" includes both natural and human-created substances, conditions and processes.

(c) "Future generations" means all people descended from the current generation.

(d) "Future Generations Impact Statement" has the meaning set forth in Section 4.1.

(e) "Inventory of Significant State Resources" has the meaning set forth in Section 3.2(a).

(f) "Legal Guardian Response" has the meaning set forth in Section 4.3.

(g) "Ombudsperson" means a person appointed by an agency of the State to protect the interests of future generations with respect to actions or decisions of such agency.

(h) "Response to Impact Findings" has the meaning set forth in Section 4.2.

(i) "State" means the State of Oregon.

3.2 Functions. The Legal Guardian shall:

(a) Prepare an inventory (the "Inventory of Significant State Resources") that identifies all resources of significant ecological or cultural importance located in the State, whether owned by the State, the Federal government, Native American tribes, private parties or otherwise, within one year of the date of this [Administrative Rule or Executive Order] and thereafter update the Inventory of Significant State Resources not less frequently than every five years, identifying additional resources and any change in the status or condition of previously identified resources;

(b) Identify and assess all material threats presented by decisions and actions of the State, including all executive agencies, to the ecological health and sustainability of the environment for future generations, including, without limitation, material threats to the resources on the Inventory of Significant State Resources;

(c) Evaluate alternatives to all governmental decisions and actions of the State, including all executive agencies, that may present a material threat to the ecological health and sustainability of the environment for future generations and identify those that provide the least threat and those that

improve the ecological health and sustainability of the environment for future generations;

(d) Propose goals and actions that can be taken by the State, including all executive agencies, that to the extent allowed by law will best protect and improve the ecological health and sustainability of the environment for future generations;

(e) Review, in the exercise of the Legal Guardian's discretion or at the request of a legislator, proposed legislation in the State to identify and assess all material threats to the ecological health and sustainability of the environment for future generations;

(f) Review, in the exercise of the Legal Guardian's discretion, proposed administrative rules in the State to identify and assess all material threats to the ecological health and sustainability of the environment for future generations;

(g) Issue a Future Generations Impact Statement for any proposed legislation or proposed administrative rule in the State that the Legal Guardian reviews and believes may or could pose a material threat to the ecological health and sustainability of the environment for future generations in accordance with Section 4.1;

(h) Whether or not a Future Generations Impact Statement is issued, evaluate alternatives to proposed legislation and proposed administrative rules that may present a material threat to the ecological health and sustainability of the environment for future generations and identify those alternatives that provide the least threat and those alternatives that improve the ecological health and sustainability of the environment for future generations and disclose such matters to the Legislative Assembly (or committees or members thereof) or to agencies, as the Legal Guardian determines is appropriate;

(i) Issue a Legal Guardian Response, as the Legal Guardian determines is appropriate, in accordance with Section 4.3;

(j) Act, in the Legal Guardian's discretion and upon such terms and conditions as the Legal Guardian deems appropriate, in the capacity of a mediator or arbitrator in any dispute that involves a material threat to the ecological health and sustainability of the environment for future generations, but only if all necessary parties to the resolution of such dispute request in writing that the Legal Guardian act in the capacity of a mediator or arbitrator;

(k) Consult with the State, the Legislative Assembly (or committees or members thereof), agencies, Ombudspersons or any other person on any matters relating to the Legal Guardian's functions and furnish such assistance in the performance of the Legal Guardian's functions as may be reasonably requested;

(l) Testify in legislative, administrative, judicial, or other hearings that relate to the Legal Guardian's functions, as the Legal Guardian determines is appropriate, or intervene in any judicial proceeding that relates to the Legal Guardian's functions, as the Legal Guardian determines is appropriate;

(m) Serve in pending litigation, at the request of a state or federal judge in Oregon, as: a special master, expert witness, or settlement judge.

(n) Ensure, together with Ombudsperson, that to the extent allowed by law, the State, including all executive agencies, carries out the proposed actions and achieves the proposed goals identified by the Legal Guardian for best protecting and improving the ecological health and sustainability of the environment for future generations;

(o) Enter into contracts to carry out the functions of the Legal Guardian;

(p) Seek appropriate legal relief to enforce the power and authority of the Legal Guardian; and

(q) Maintain a website for the purposes of educating the public regarding the Legal Guardian's responsibilities and actions, and publishing the Inventory of Significant State Resources, the Annual Report and all Future Generations Impact Statement.

[Sections 3.3, 3.4, and 3.5 provide for professional staff, funding, and annual reporting.]

3.6 No Private Right of Action. The creation of Office of Legal Guardian, and the Legal Guardian's powers and duties are not intended to create any private right of action, and nothing herein shall be interpreted to imply any private right of action.

4. Future Generations Impact Statement

4.1 Preparation of Future Generations Impact Statement. In the exercise of the Legal Guardian's discretion or at the request of a legislator, the Legal Guardian shall prepare a Future Generations Impact Statement, containing such information as the Legal Guardian deems advisable consistent with this Section 4.1, on a legislative measure reported out of a committee of the Legislative Assembly if the Legal Guardian determines that the legislative measure poses a material threat to the ecological health and sustainability of the environment for future generations. In the exercise of the Legal Guardian's discretion, the Legal Guardian shall prepare a Future Generations Impact Statement, containing such information as the Legal Guardian deems advisable consistent with this Section 4.1, on a proposed administrative rule, whether permanent or temporary, for which a notice of rulemaking procedure is noticed if the Legal Guardian determines that the proposed administrative rule may or could pose a material threat to the ecological health and sustainability of the environment for future generations. The Future Generations Impact Statement shall provide a written explanation of how the legislative

measure or proposed administrative rule poses a material threat to the ecological health and sustainability of the environment for future generations and, if appropriate, identify those alternatives that provide the least threat and those alternatives that improve the ecological health and sustainability of the environment for future generations. The Legal Guardian shall review or withdraw the Future Generations Impact Statement, as the Legal Guardian determines is appropriate, if the legislative measure or proposed administrative rule is amended.

4.2 Response to Issuance of Future Generations Impact Statement. If the Legal Guardian issues a Future Generations Impact Statement with respect to a legislative measure, the committee of the Legislative Assembly out of which the legislative measure was reported, within ten days (or such longer period to which the Legal Guardian agrees) after the Future Generations Impact Statement was issued, shall prepare a written response (a "Response to Impact Findings") to each finding in the Future Generations Impact Statement, which response shall accept or deny such finding and shall provide a written explanation of the denial of any such finding, as the committee determines is appropriate. If the Legal Guardian issues a Future Generations Impact Statement with respect to a proposed administrative rule, the agency which proposed the administrative rule, within ten days (or such longer period to which the Legal Guardian agrees) after the Future Generations Impact Statement was issued, shall prepare a written response (a "Response to Impact Findings") to each finding in the Future Generations Impact Statement, which response shall accept or deny such finding and shall provide a written explanation of the denial of any such finding, as the agency determines is appropriate. The Legal Guardian may extend the time period for the preparation of the Response to Impact Findings as the Legal Guardian determines is reasonably appropriate.

4.3 Response by Legal Guardian. Within ten days after a Response to Impact Findings is issued by a committee of the Legislative Assembly or an agency pursuant to Section 4.2, the Legal Guardian may prepare a written response (a "Legal Guardian Response") with respect to each finding in the Future Generations Impact Statement that the committee or agency has denied. The Legal Guardian Response shall provide such written explanation as the Legal Guardian determines is appropriate.

4.4 Disclosure. If the Legal Guardian issues a Future Generations Impact Statement with respect to a legislative measure, the Speaker of the House of Representatives and the President of the Senate shall cause the Future Generations Impact Statement, the Response to Impact Findings (when issued), and the Legal Guardian Response (if and when issued) to be set forth on any print or electronic version of the legislative measure to which it relates. If the Legal Guardian issues a Future Generations Impact Statement with respect to a proposed administrative rule, the agency proposing the administrative rule shall cause the Future Generations Impact Statement, the Response to Impact Findings (when issued), and the Legal Guardian Response (if and when issued) to be set forth on any print or electronic version of the proposed administrative rule to which it relates.

4.5 Consideration of Legal Guardian's Conclusions. If the Legal Guardian issues a Future Generations Impact Statement with respect to a legislative measure, the Legislative Assembly shall consider the Future Generations Impact Statement and the Legal Guardian Response (if and when issued) in acting on the legislative measure to which if relates. The Legislative Assembly shall provide a written explanation with respect to any legislative measure that is passed by the Legislative Assembly that is inconsistent with the Future Generations Impact Statement or the Legal Guardian Response (if and when issued) before the legislative measure is submitted to the Governor for action, which explanation shall be set forth on any print or electronic version of the legislative measure to which it relates. If the Legal Guardian issues a Future Generations Impact Statement with respect to a proposed administrative rule, the agency shall consider the Future Generations Impact Statement and the Legal Guardian Response (if and when issued) in acting on the proposed administrative rule to which it relates. The agency shall provide a written explanation with respect to any administrative rule that is promulgated that is inconsistent with the Future Generations Impact Statement or the Legal Guardian Response (if and when issued) before the administrative rule becomes effective, which explanation shall be set forth on any print or electronic version of the administrative rule to which it relates.

APPENDIX II—JUDGE LININGER'S DECISION ON NAVIGABILITY

MARK KRAMER and TODD PRAGER, Plaintiffs

vs.

CITY OF LAKE OSWEGO; and the STATE OF OREGON, by and through the State Land Board and the Department of State Lands, Defendants

and

LAKE OSWEGO CORPORATION, Intervenor-Defendant

No. CV12100913

PHASE-ONE TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case is about public access to Oswego Lake, in Lake Oswego, Oregon. Plaintiffs contend that the state holds title to the lake, public trust doctrine applies to it, and the public has a right to enter the lake from waterfront public parks. The state partially agrees, asserting title to the land beneath former Sucker Lake and arguing that public trust doctrine applies to that area. The Lake Oswego Corporation disputes state ownership, application of public trust doctrine, and a public right of access to the lake from waterfront public parks. The City joins the Lake Corporation in seeking denial and dismissal of plaintiffs' claims.

I. INTRODUCTION

We hear this case on remand from the Oregon Supreme Court in *Kramer v. City of Lake Oswego*, 365 Or 422, 446 P3d 1 (2019), *opinion adh'd to as modified on recons*, 365 Or 691, 455 P3d 922 (2019). The *Kramer* court directed us to consider these issues on remand:

> [T]he preliminary question of whether the lake is subject to the public trust doctrine and, if the lake is subject to that trust, * * * whether the city's restriction on entering the lake from the waterfront parks unreasonably interferes with the public's right to enter the lake from the abutting waterfront parks.

Id. at 426.

Plaintiffs Mark Kramer and Todd Prager ("Plaintiffs") are represented by counsel Nadia Dahab and David Sugerman of Sugerman Dahab and Gregory Adams of Richardson Adams PLLC. The City of Lake Oswego ("City") is represented by counsel Paul Conable and Stephanie Grant of Tonkon Torp LLP. The State of Oregon ("State") is represented by counsel Nina Englander and Shaunee Morgan of the Oregon

Department of Justice. The Lake Oswego Corporation ("Lake Corporation") is represented by counsel Brad Daniels and Crystal Chase of Stoel Rives LLP and Jennie Bricker of Land Shore Water Legal Services, LLC.

This is a two-phase trial. In phase one, we determine whether any part of Oswego Lake is title-navigable under federal law and/or subject to public trust doctrine. We provide these findings of fact and conclusions of law following trial on these issues from March 8, 2022, to March 15, 2022.

This opinion refers to two components of Oswego Lake. "Sucker Lake" is the portion that existed at Oregon's statehood in 1859. The "Expanded Lake" is the portion created post statehood by damming and canal construction.

We conclude that Sucker Lake was title-navigable at statehood. The State owns the lakebed up to Sucker Lake's ordinary high-water mark in 1859, and Sucker Lake's land and waters are subject to public trust doctrine. The State does not own the Expanded Lake under theories of title-navigability or prescription. All of the Expanded Lake's waters are subject to public trust doctrine. Oswego Lake's partial title-navigability, public trust status, and the specific circumstances here create a public right of access to the lake from public waterfront parks. The State and City may restrict the public's right of access only to an extent objectively reasonable in light of the purpose of public trust doctrine and the circumstances here. We will determine in phase two if the City's Resolution 12-12 and related policies unreasonably interfere with the public's trust rights.

II. THE PARTIES' POSITIONS

This complex case has been pending for almost a decade: In the interest of clarity, we begin by summarizing the parties' basic arguments.

A. Plaintiffs' Positions

Plaintiffs contend that all of Oswego Lake is title-navigable, subject to public trust doctrine, and the State owns the land beneath the lake up to its ordinary high-water mark. In the alternative, Plaintiffs contend Sucker Lake is title-navigable, the State owns it, and public trust doctrine applies to all of Oswego Lake's water. Plaintiffs argue that the lake's partial title navigability and public trust status create a public right to access the lake from the City's waterfront public parks. Plaintiffs seek to enjoin the City from enforcing Resolution 12-12 and related policies that prohibit public use of Oswego Lake. They further seek to enjoin the City and State to remove obstructions blocking that use and to protect and preserve the public's access to Oswego Lake.

B. State's Positions

The State asserts that Sucker Lake was title-navigable at statehood, and the State holds title to it in trust for the public. It disputes title to the Expanded Lake. It contends public trust status does not apply to the

Expanded Lake, and the general public has no right to enter it from the City's waterfront public parks. The State further contends that because it has not affirmatively restricted public access to Oswego Lake, the court should dismiss Plaintiffs' claims against it.

C. Lake Corporation's Position

The Lake Corporation argues that none of Oswego Lake is title-navigable and public trust doctrine does not apply to it. It further contends there is no public right of access to Oswego Lake from the waterfront parks. The Lake Corporation urges denial and dismissal of Plaintiffs' claims with prejudice.

D. City of Lake Oswego's Position

The City joins the Lake Corporation's position to the extent it seeks denial and dismissal of Plaintiffs' claims.

III. FINDINGS OF FACT

A. Credibility Determinations

1. We find the expert testimony of Drs. Jennifer Stevens, Stephen Beckham, Matthew Brunengo, and Robert Annear highly credible. Due to their training and experience, these witnesses possess specialized knowledge, including historical, scientific, and technical expertise, that has helped the Court understand the evidence and determine factual issues. Dr. Stevens, a professional researcher and public historian, has worked on navigability issues and conducted tribal research for decades. (Ex 1.) Dr. Beckham, an ethno-historian and classroom professor for 43 years, has studied and presented expert testimony concerning the history and tribal affairs of 21 tribes in 30 court cases. (Ex 200.) Dr. Brunengo, an engineering geologist with expertise in the fields of geology, geomorphology, and hydrology, has specialized skill developing geologic histories. (Ex 209.) Dr. Annear, a civil and environmental engineer, has worked for over 20 years in the field of hydrodynamics and possesses expertise regarding the creation and size of Oswego Lake. (Ex 532.)

2. Drs. Stevens and Beckham provided credible testimony concerning the history and activities of Tualatin Kalapuyan and Clackamas Chinookan people at and near Sucker Lake. Dr. Brunengo testified credibly concerning the formation and geologic history of the area. Dr. Annear provided credible testimony regarding Oswego Lake's dimensions and the geological and hydrological history.

3. Lake Corporation witness David Ellis provided testimony regarding the presence of indigenous people at and near Sucker Lake that was less credible. This witness lacked relevant training and has not been qualified as an expert to testify on a cultural resource matter. He was also notably reluctant to draw inferences from evidence of indigenous people's presence at and near Sucker Lake for thousands of years.

B. Oswego Lake

4. Oswego Lake is a large waterbody in the City of Lake Oswego, Oregon.

5. In its current condition, the lake is approximately 2.9 miles long and has an area of roughly 385 acres in its main basin. (Annear Testimony.)

6. The lake received its current name in around 1913. Historically, indigenous people referred to it as "Wapato Lake" because wapato root grew there in abundance. Settlers called it "Sucker Lake" because of the sucker fish and lamprey present there. (Beckham Testimony.)

7. Sucker Lake was created roughly 15,000-20,000 years ago by Missoula flood water that repeatedly flowed through Oswego Gap. Over thousands of years, those flood waters carved out Sucker Lake. (Brunengo Testimony.)

8. When Oregon became a state in 1859, Sucker Lake was approximately 230 acres in area (61% of its current size), 1.5 miles long, .14 miles wide at the narrowest point, and had a maximum depth of around 34 feet deep. (Annear Testimony.) The Tualatin River episodically flooded into it. (Brunengo, Annear Testimony.)

9. Lakewood Bay is a fully integrated part of Oswego Lake. A canal connected this area to the main lake in 1928. The waters of Lakewood Bay intermix with other waters of Oswego Lake. At normal operating capacity, Lakewood Bay's water level is consistent with that in the rest of Oswego Lake. (Annear Testimony.)

10. Prior to 1928, Lakewood Bay was known as the "Duck Pond." The Duck Pond froze and served as an ice rink in the winter. In other parts of the year, it was inundated with water, including water from Sucker Lake. (Beckham Testimony.) Evidence indicates that a dike was installed on the west side of the Duck Pond prior to 1928 to keep water from flooding into it from the main lake. (Annear Testimony, Ex 64.)

11. The general public had access to and actively used Oswego Lake as a place to recreate for decades following statehood. A state agency stocked the lake with trout, bass, and salmon, and there was extensive recreational fishing there in the 19th century. It was the site of the Lake Oswego Regatta, a boys' sailing competition, and in 1934, 20,000 people attended the Lake Oswego Free Carnival there. (Beckham Testimony.)

12. The City currently operates three waterfront public parks that adjoin Lakewood Bay. These include Millennium Park Plaza, Sundeleaf Plaza, and Headlee Walkway. (Annear Testimony.) The general public is prohibited from entering Oswego Lake from these parks.

13. On April 3, 2012, the Lake Oswego City Council enacted Resolution 12-12, providing in pertinent part: "It is prohibited for any person to enter Oswego Lake from Millennium Park Plaza, Sundeleaf Plaza or Headlee Walkway by any means or method, including, without limitation, by wading or swimming, or by using water vessels or other

floatation devices." The City has posted signs and installed barriers to prevent the public from accessing the lake from these parks.

C. Title Navigability

a. Sucker Lake's Use and Susceptibility to Use as a Highway for Commerce, Including Trade and Travel

i. Use by Indigenous People

14. Tualatin Kalapuyan and Clackamas and Multnomah Chinookan people were present in the area near Sucker Lake long before statehood and into the 1840s. (Stevens and Beckham Testimony, Ex 22.) Archeologists have recovered artifacts from three nearby locations - the George Rogers Park site, Burnett site, and Lakeshore site - indicating that indigenous people used the area near Sucker Lake for thousands of years before Euro-American settlers arrived. Archeologists have recovered over 6,000 artifacts at the Burnett site showing people lived there as far back as 9,000 years ago. (Ex 28.) At the Lakeshore and George Rogers Park sites, researchers have recovered net weights used for fishing (Ex 202) and projectile points used to spear fish. At the Lakeshore site, they recovered a sharp tool used to butcher a turtle. (Stevens and Beckham Testimony, Exs 28, 201.)

15. Sucker Lake was a source of food, and we infer from contextual clues that indigenous people gathered food there. Wapato root and fish were present in the lake, and camas root grew nearby. Historical documents indicate that Kalapuyan people preserved camas and used it and wapato root for trading. (Stevens and Beckham Testimony, Exs 22-23, 203-04.)

16. It is highly likely that indigenous people used canoes when gathering food and other resources at Sucker Lake. It was common for people in the region to use canoes, and they were a customary mode of travel. (Stevens and Beckham Testimony, Exs 24-27.) Some canoes were light-weight and could have been portaged with relative ease between the Willamette River and Sucker Lake. Some were specially designed for spearfishing, and we infer that people used them at Sucker Lake for fishing and to set fishing nets. (Stevens and Beckham Testimony, Ex 25.)

17. We also infer from contextual clues that indigenous people used canoes to transport food they gathered to locations around the lake for consumption and processing. They likely transported people by canoe as well. (Stevens Testimony.) Kalapuyan people did not use horses before contact with explorers, and canoes would aid in their transportation. (Annear Testimony, Ex 23.)

18. It is highly likely indigenous people who lived near the lake used canoes to carry trade goods and people across it toward trade destinations such as Willamette Falls. Kalapuyan people traded camas and wapato for salmon at Willamette Falls and harvested lamprey there. (Stevens, and Beckham Testimony.)

19. Sucker Lake was part of a multi-faceted transportation route in the area that included the Willamette River, Tualatin River, Sucker Lake, and Sucker Creek. (Stevens and Beckham Testimony, Exs 23, 28, 29, 33.)

20. Malaria and smallpox killed many Kalapuyan and Chinookan people in the period before 1859. The United States removed others to distant reservations. Although there was little presence of indigenous people at Sucker Lake at statehood, we know they used the area for thousands of years. (Stevens and Beckham Testimony.)

ii. Use of Sucker Lake by Settlers

21. Albert Durham, John Trullinger, and others used Sucker Lake for commerce, including travel and trade, around the time of statehood. They transported logs, other goods, and passengers across the lake using stemwheelers, a steam vessel, and other methods.

22. In 1850, Durham obtained land near Sucker Lake through the Oregon Land Donation Act. (Ex 39.) He built a sawmill and crude dam at the east side of the lake and used water from Sucker Lake to power the sawmill. Durham milled logs from neighboring property owners and from his own timberland, some of which was located on the west side of the lake. (stevens and Beckham Testimony.)

23. Durham used Sucker Lake to store and move logs across the lake for processing. He processed hundreds of thousands of board feet of timber at his mill and shipped his finished product to buyers in Portland and around Oregon. He advertised his products as far away as California and Hawaii. (Stevens and Beckham Testimony.)

24. Durham eventually sold his business to John Trullinger, who continued to operate the mill. Trullinger also operated two stemwheelers on Sucker Lake, the *Minnehaha* and the *Henrietta*, from 1866-1873 (Ex 208.) Trullinger used these stemwheelers to transport passengers, logs, and other goods across the lake. (Stevens and Beckham Testimony, Ex 53.)

25. In 1856, the Oregon Territorial Legislature created the Tualatin River Transportation and Navigation Company ("TRTNC"). Its mission was to develop a water route connecting the Tualatin River to the Willamette River. One of two routes under consideration involved travel from the Tualatin River through a canal to Sucker Lake, across the lake, and then to the Willamette River. (Stevens and Beckham Testimony, Ex. 44.)

26. In 1872, builders completed the canal connecting the Tualatin River to Sucker Lake. In 1873, a steam vessel known as the *Onward* traveled through the canal to Sucker Lake carrying agricultural products from farms in the Tualatin Valley. (Stevens and Beckham Testimony, Ex 44.) Sternwheelers and steam vessels were customary modes of travel around the time of statehood.

27. Oregon Iron and Steel Company, incorporated in 1865, used Sucker Lake to store and transport logs to fire its blast furnace. (Exs 50-52.)

28. The Oswego Log and Boom Company sought a franchise in the early 1920s to use the lake for "log booming," a method of transporting logs for processing. Proponents of this effort saw the lake as susceptible to use for commerce. (Beckham Testimony.)

29. Between 1859 and 1928, private parties built multiple dams on Oswego Lake, as well as the canal connecting Lakewood Bay to the lake's main basin. Gradually, over this period of roughly seventy years, the lake expanded to its current size. (Stevens and Beckham Testimony.)

iii. Sucker Lake was susceptible to use for commerce in its ordinary and natural condition.

30. Sucker Lake was large, both before and after Oregon joined the Union. At statehood in 1859, Sucker Lake was around 230 acres in area, 61% of its current size, 1.5 miles long, and had a maximum depth of 34 feet. Prior to 1850, the lake was around 200 acres in area, 51% of its current size, 1.4 miles long, and had a maximum depth of around 28 feet. The dam Albert Durham built in 1850 increased the lake's overall water level by about six feet. (Anneai · Testimony.)

31. The United States General Land Office completed a survey of Sucker Lake in 1852. The surveyor map depicted Sucker Lake with a meandered boundary. (Ex 43.) Designation of a lake with a meandered boundary indicates the surveyor's conclusion that it is navigable, deep, and/or over 25 acres in size. (Stevens Testimony, Ex 41.) Butler Ives, who conducted the 1852 survey, described Sucker Lake in his field notes as a "deep lake." (Ex 42).

32. When the United States approved settlers' Donation Land Claims in Oregon, it did not include waterways with meandered boundaries in those conveyances. It retained title to those waterways to transfer to the State on statehood day. (Stevens Testimony.) The 1851 instruction manual for surveyors provides that "[t]he courses and distances on meandered, navigable streams, govern the calculations wherefrom are ascertained the true areas of the tracts of land (sections, quarter sections, []) known to the law as fractional, and binding on such streams." (Ex 41.) The 1853 Butler Ives survey of Durham's land claim indicates redaction of language regarding meandered Sucker Lake. This indicates the State owned Sucker Lake's bed and banks. (Stevens Testimony, Ex 39.)

IV. CONCLUSIONS OF LAW

1. Sucker Lake was navigable-for-title when Oregon became a state in 1859. It was used or susceptible to use in its ordinary and natural condition as a highway for commerce, over which trade or travel were or could have been conducted, using modes of trade and travel on water. *See*

Utah v. United States, 403 US 9, 10,91 S Ct 1775 (1971) (citing *The Daniel Ball*, 77 US 557, 563, 19 L Ed 999 (1870)).

2. Indigenous people used canoes at Sucker Lake for fishing, harvesting wapato, transporting people and goods,and crossing the lake en route to Willamette Falls, a regional trading destination.

3. Early settlers used Sucker Lake for commerce. Albert Durham used it to power his mill and to store and move logs. John Trullinger operated stemwheelers on it to transport people, logs, and other goods. The Oregon Territorial Legislature and TRTNC pursued creation of a regional transportation route from the Tualatin River across Sucker Lake to the Willamette River. In 1873, the Onward traveled through the canal carrying produce from the Tualatin River Valley. Oregon Iron and Steel Company used Sucker Lake to hold logs used to fire its blast furnace. Others sought to create a log-booming franchise there.

4. To satisfy the "qualifying use" component of the federal test for title-navigability, a use need not have been widespread or commercially profitable. *See Nw. Steelheaders Ass 'n, Inc. v. Simantel*, 199 Or App 471,482, 112 P3d 383 (2005). It need not have been easy and extensive, or long and continuous. *Oregon v. Riverfront Protection Ass 'n*, 672 F2d 792,795 (9th Cir 1982). Evidence regarding use of a waterbody after statehood can establish a qualifying use. *PPL Montana, LLC v. Montana*, 565 US 576, 601, 132 S Ct 1215 (2012); *Hardy v. State Land Bd.*, 274 Or App 262,285,360 P3d 647 (2015).

5. The lake was usable for commerce in its ordinary and natural condition both before and at statehood. *The Daniel Ball*, 77 US at 563. Durham's dam did not change the fundamental, natural condition of the lake. *See Riverfront Protection Ass 'n*, 672 F2d at 795-96 (concluding that artificial aids to assist log driving on the McKenzie River did not improve the river and could not "reasonably be deemed to have altered the natural condition of the river"). Sucker Lake was large and deep both before and after statehood. *State ex rel. Winkleman v. Ariz. Navigable Stream Adjudication Comm'n*, 224 Ariz 230, 241, 229 P3d 242 (2010) (noting the court evaluates a waterbody's condition at statehood in light of dams and other diversions).

6. Sucker Lake's representation with a meandered boundary on the 1852 General Land Office survey supports the conclusion it was title-navigable at statehood but is not dispositive. *United States v. Oregon*, 295 US 1, 14, 55 S Ct 610 (1935). Meander lines indicate the surveyor's conclusion that the lake was navigable, deep, and/or bigger than 25 acres. (Exhibit 41.) Oregon law provides that "all meandered lakes are declared to be navigable and public waters. The waters thereof are declared to be of public character." ORS 274.430.

7. The State holds title to the lakebed of Sucker Lake. Under equal-footing doctrine, Oregon took title to the land beneath title-navigable waters when it joined the Union. *Chernaik v. Brown*, 367 Or 134, 159, 475 P3d 68 (2020); *PPL Montana*, 565 US at 591. The State owns all land

within Sucker Lake's ordinary high-water mark at statehood. *Micelli v. Andres*, 61 Or 78, 84, 120 P 737 (1912).

8. Public trust doctrine applies to Sucker Lake's waters and lakebed to its ordinary high water mark. *Chernaik*, 367 Or at 156; *Kramer*, 365 Or at 438. We disagree with the Lake Corporation's suggestion that public trust doctrine and ORS 537.110 are interchangeable. (Lake Oswego Corp's Trial Memo (Phase 1 - Navigability) at 52-53.) "[T]he core purpose of public trust doctrine [is] to obligate the state to protect the public's ability to use navigable waters for identifiable purposes," *Chernaik*, 367 Or at 161, which it recognized to be "navigation, recreation, commerce, and fishing." Id. at 168. Public trust status is distinct from the public's ownership of all water in the state pursuant to ORS 537.110, see *Chernaik*, 367 Or at 154-55 (declining to extend public trust doctrine to all waters in Oregon).

9. Public trust doctrine applies to all waters of the Expanded Lake. The Oregon Supreme Court has identified public trust doctrine as flexible, forward-looking, and subject to expansion "in response to different circumstances and society's changing needs." *Id*. at 159. The facts here merit application of public trust doctrine to the Expanded Lake's waters. Oswego Lake consists primarily of title-navigable waters. Despite that, the lake has been functionally privatized. After statehood, private parties artificially raised the lake level for private benefit. This has created a barrier between the City's public waterfront parks and Oswego Lake's predominantly title navigable waters. Lake Corporation shareholders routinely use these waters for boating, paddling, swimming, and other recreation (public trust uses), even as the public is denied access. There is no meaningful way to segregate the public trust water from the other water in the lake: it intermixes and flows together. Water that is at one point within the footprint of Sucker Lake disperses to all parts of Oswego Lake over time. To lightly hand over this precious public asset to private control at a time when fresh water is increasingly scarce and valuable "would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated." *See Guilliams v. Beaver Lake Club*, 90 Or 13, 29, 175 P 437 (1918).

10. The expansion of Oswego Lake beyond its core of title-navigable waters expanded the public's right of access to it. "[T]he public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands." *Wilbour v. Gallagher*, 77 Wash 2d 306,315-16, 462 P2d 232 (1969) (finding a public right to navigate, fish, and recreate on the artificially expanded waters of Lake Chelan, including water covering privately owned land); *Diversion Lake Club v. Heath*, 126 Tex 129, 138-40, 86 SW2d 441 (1935) (affirming public access to a reservoir created by damming a state-owned river); *Movrich v. Lobermeier*, 379 Wis 2d 269, 301, 905 NW2d 807 (Wis 2018) (identifying a public trust right for plaintiffs to access a publicly owned stream by crossing private land submerged by an artificially expanded "flowage"). In 1973,the Oregon Attorney General recognized that "the public must be

permitted to go where the water is," including over expanded lakebeds leased to a private party. *See* 36 Or Op Atty Gen 638,641-46 (1973).

11. Legal scholars recognize that when the boundaries of a navigable waterbody expand, that generally expands the public's right to use the water body under public trust doctrine. John M. Gould, *A Treatise on the Law of Waters*, ¶¶ 111, 213, 352 (1883). Conduct that "rais[ses] the level of a lake for the private benefit of the riparian owner will extend the public right of boating to the limits established by the higher level of the water." *See* Henry P. Farnham, *The Law of Waters & Water Rights,* ¶¶ 430, at 1495-96 (1904).

12. The fact Oswego Lake is predominantly title-navigable and public trust doctrine applies to all of its waters, together with the specific facts here, creates a right of public access from the City's public waterfront parks. The Oregon Supreme Court has recognized 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." *Kramer*, 365 Or at 446. For public trust protections to be meaningful, the public must be able to reach their water. *Matthews v. Bay Head Imp. Ass'n*, 95 NJ 306, 323-24, 471 A2d 355 (1984) (recognizing that public trust doctrine carries a right of access across private land to reach the ocean beachfront); *Public Lands Access Ass 'n, Inc. v. Bd. of Cty. Comm 'rs*, 373 Mont 277, 321 P3d 38 (2014) (holding that public may access water over private land because the water is subject to public trust). "The public's ability to use the water for purposes expressly protected under the public trust doctrine may 'require means of public access' to that water." *Kramer*, 365 Or at 445 (citing *Iowa v. Sorensen*, 436 NW2d 358, 363 (1989)); *see also Smith Tug & Barge Co. v. Columbia-Pacific Towing Co.*, 250 Or 612, 638, 443 P2d 205 (1968) (finding a public right to pass over "tidelands and submerged coastal lands" leased to a private party as incident to the right of navigation); *Darling v. Christensen*, 166 Or 17, 31-35, 109 P2d 585 (1941) (holding that the private owner of upland property abutting the high-water mark of navigable waters may cross private land below it to enter the water); *Eagle CliffFishing Co. v. McGowan*, 70 Or 1, 11, 15, 137 P 766 (1914) (finding that lawful rights to lands carries a right of access to and from the river).

13. The theory of avulsion does not foreclose our conclusion that the general public has a right of access to Oswego Lake from the City's public waterfront parks. There is no conveyance of title here. We are aware of no Oregon case that invokes avulsion doctrine to deny public access to an artificially expanded, predominantly title-navigable, lake full of public trust water. The facts of *State Land Bd. v. Corvallis Sand & Gravel Co.*, 283 Or 147, 151, 582 P2d 1352 (1978), and *State Land Bd. v. Sause*, 217 Or 52, 99-103, 342 P2d 803 (1959), are distinguishable from the facts here. Those cases involve the movement of river and the ocean water. Rivers and the ocean move with force that can be unpredictable and violent. The water of Oswego Lake is relatively calm and predictable. The

private parties who chose to build darns and a canal on Oswego Lake anticipated and wanted the expansion that resulted. It is fair that the foreseeable results of those decisions would expand the public's right of access.

14. We do not read *Kramer* as foreclosing our conclusion that the public has a right of access from waterfront parks into Oswego Lake's predominantly title-navigable water, public trust water. We understand *Kramer* as rejecting existence of a public use right to enter a lake that is privately owned "to the middle of the stream" from abutting public upland. *Kramer*, 365 Or at 434 (quoting *Shaw v. Oswego Iron Co*., 10 Or 371, 375, 1882 WL 1457 (1882)). Title navigability was absent from that scenario. The *Kramer* court expressly reserved the title navigability question for the trial court, noting that if the waters were title-navigable, that could change the analysis. *Kramer*, 365 Or at 429. Since then, we have conducted a trial and concluded that the majority of Oswego Lake is title-navigable, and public trust doctrine applies to its waters. In addition, the Oregon Supreme Court has since released its decision in *Chernaik v. Brown*, further defining the scope and nature of public trust doctrine. *Chernaik*, 367 Or at 161- 62. Based on these distinctions, we believe our conclusion is consistent with the Kramer court's decision.

15. The *Chernaik* court recognized that public trust doctrine imposes some duties on the State, though not duties identical to those of a private trustee. *Chernaik*, 367 Or at 170. It noted the State has a duty "to protect public trust resources for the benefit of the public's use of navigable waterways for navigation, recreation, commerce, and fisheries." *Id.* at 168-69. The State must also prevent "private interruption and encroachment" on the public's use of its trust resources, *Ill. Cen. R.R. Co. v. Ill.*, 146 US 387, 436, 13 S Ct 387 (1892), and avoid selling or disposing of public trust resources in a way that would interfere with the public's right of use. *Corvallis Sand & Gravel v. State Land Bd*., 250 Or 319, 334, 439 P2d 575 (1968); *Chernaik*, 367 Or at 161-62. While the State may interfere with the public's right to use the public waters, such restrictions must be "objectively reasonable in light of the purpose of the trust and the circumstances of the case." *Kramer*, 365 Or at 449-50.

16. The State has taken some action consistent with its public trust duties in this case. In February 2013, after Plaintiffs filed their October 2012 complaint, the State joined Plaintiffs effort to obtain legal recognition that Sucker Lake is title-navigable and subject to public trust doctrine. At trial, the State litigated actively in support of that position. In phase two we will determine if Plaintiffs' additional requests for relief against the State have merit.

17. We will also consider Plaintiffs' claims against the City. The *Kramer*, while declining to "fully decide whether the city shares fully in the state's duties a trustee for the publicly-owned waterways," *Kramer*, 365 Or at 448, did acknowledge the City's affirmative prevention of public access to Oswego Lake. *Id.*

18. We reject the Lake Corporation's assertion that the doctrine of laches bars Plaintiffs and the State from claiming public ownership of, public trust protection for, and/or a public right of access to Oswego Lake. The defense of "laches do[es] not run against the public right, [e]ven when the action is brought by a private person for particular harm." *Smejkal v. Empire Lite-Rock, Inc.*, 274 Or 571, 576, 547 P2d 1363 (1976). It does not bar a private party from seeking to vindicate a public right, as Plaintiffs do here. *See, e.g., Carnegie Inst. of Med. Lab. Technique, Inc. v. Approving Auth. for Sch. for Training Med. Lab. Technologists*, 350 Mass 26, 30, 213 NE2d 225 (1965) ("Laches does not run against public rights."); *O'Reilly v. Town of Glocester*, 621 A2d 697, 703 (RI 1993)("when public rights are at stake, courts should disfavor the defense of]aches"). Defendants' !aches theory fails against the State as well. The doctrine of laches does not bar the State from protecting the public interest or asserting a public right. *See City of Mosier v. Hood River Sand, Gravel & Ready-Mix, Inc.*, 206 Or App 292, 319-20, 136 P3d 1160 (2006).

V. CONCLUSION

1. Sucker Lake was title-navigable at statehood, and the State holds title to its lakebed up to its ordinary high-water mark in 1859.[213]

2. Public trust doctrine applies to all of the land and water within Sucker Lake's high water mark in 1859.

3. Plaintiffs have not established, under title-navigability or prescription theory, that the State owns the land beneath the Expanded Lake.

4. All waters of the Expanded Lake are subject to public trust doctrine.

5. Oswego Lake's partial title-navigability, the public trust status of its waters, and the specific circumstances here create a public right of access to the lake from the City's public waterfront parks.

6. The Lake Corporation's affirmative defense of laches fails.

7. Any State or City interference with the public's right of access to Oswego Lake must be objectively reasonable given the purpose of public trust doctrine and the specific circumstances.

8. In phase two we will determine if the City's Resolution 12-12 and related policies prohibiting public access to Oswego Lake from public parks unreasonably interfere with the people's right of access. We will also address any remaining issues.

DATED: April 19, 2022
Honorable Ann. M. Lininger
Circuit Court Judge

213 This finding encompasses all water within the Sucker Lake footprint to the current surface of Oswego Lake.