



Public Trust Doctrine

Managing State-Owned Waterways for the Public

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

Statutes

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

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

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

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

Administrative Rule

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

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

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

Oregon Admission Act and Constitution

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

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

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

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

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

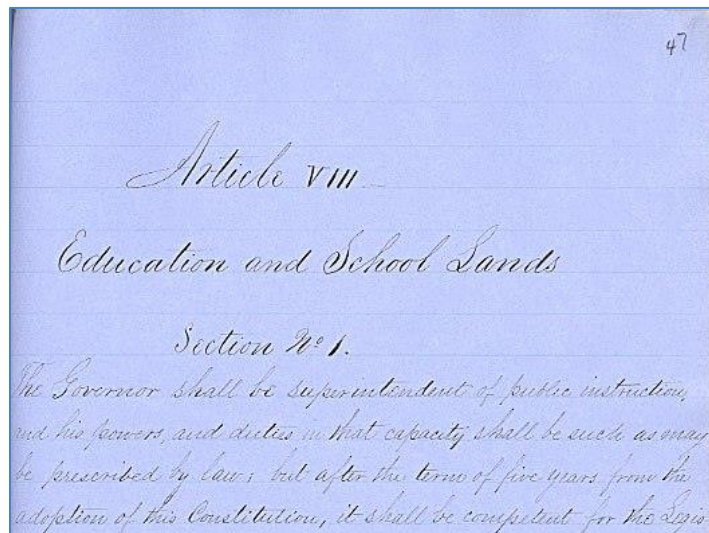
Early court cases later clarified that states acquired the land under navigable waterways subject to the obligation to maintain the public’s right to use the waterway for navigation and fishing; this principle has evolved and expanded over time into the current Public Trust Doctrine. This doctrine prohibits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

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

Admission Act Implications – the Trust Obligation

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

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



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