THE PUBLIC TRUST DOCTRINE AND THE SUBMERGED AND SUBMERSIBLE LANDS OF OREGON

by

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THE PUBLIC TRUST DOCTRINE AND THE SUBMERGED AND SUBMERSIBLE LANDS OF OREGON[1]

ABSTRACT: Public Trust Doctrine is a legal theory substantive enough for private citizens to utilize as a comprehensive legal approach to resource management problems. The doctrine is ultimately derived from the notion of governmental responsibility to hold lands in trust for beneficial use by the public.

The governmental title to lands is twofold, with an element of private property rights called the "jus privatum" and a superimposed public trusteeship called the "jus publicum."

This paper surveys the scope of Public Trust Doctrine and investigates expansions from traditional common law usages of navigation and fishing.

In Oregon, judicial and legislative ambiguities inhibit extension of trust doctrine from submerged and submersible lands to concerns of administrative land reclassification and private land holdings. Legislative clarification of acceptable public uses and delineation of state responsibilities will facilitate future development of Public Trust Doctrine into a viable avenue for citizen action concerned with the preservation of public benefits from natural resources.

WHY LEGAL CONTROL OF THE ENVIRONMENT

". . . The law, always behind the times, requires deliberate stitching and fitting to adapt it to this newly perceived aspect of the commons . . ."[2]

Legal control of the environment is a relatively modern idea, arising from necessity as the quality of our air, water and land resources were threatened.

An effective way to control these resource problems is through decisive legal action. Until 1969, there was essentially only a few laws dealing specifically with environmental questions. Early litigants suing to abate industrial polluters were discouraged by the "balancing

of the equities" tests employed then by the courts.[3] This test usually construed the economic worth of the polluting industry to outweigh the loss to an individual. Later, those seeking legal protection of the environment were forced to employ interpretations of the 1899 Rivers and Harbors Act, or extrapolations of common law tort, as their only weapons.[4] Successful applications of the 1899 law were limited, as some jurisdictions were reluctant to extend the terms of the law to anything unrelated to direct impedence of navigation or to waters of nonnavigible rivers.

A stronger environmental law tactic was to argue that undesirable land uses or pollution were nuisances.[5] With the changing environmental awareness of the judiciary, the range of definition of tort was broadened.[6]

Since the enactment of the 1969 National Environmental Policy Act, various federal and state statutes have been adopted which specifically control various environmental degradations.[7] Now land use decisions, both on public and private lands are under scrutiny. Effective legal mechanisms for controlling unwise private development have yet to be found.[8] However, public lands by their nature, are under the control of the administrative and legislative representatives of the general public. Consequently, a member of the general public may challenge uses of public lands which seem inconsistent with the consensus of the public interest. This is the basic thrust of Public Trust Doctrine.

STATEMENT OF PURPOSE

This paper explores the feasibilities of Public Trust Doctrine as

a mechanism for controlling use of the public lands, particularly the submerged and submersible lands of Oregon. The nature and extent of trust theory will be discussed and historical background information which demonstrates the development of the doctrine will be presented. Then, the Oregon situation will be examined in detail and recommendations for future use of this philosophy will be suggested.

LITERATURE REVIEW

An exhaustive study of the implications of Public Trust Doctrine has been undertaken by Joseph Sax.[9] Providing a historical guide as well as an analysis of important conceptual material, Sax reviews the significant judicial decisions in the jurisdictions of Wisconsin, California, and Massachusetts. In addition, he suggests some tentative extensions of the doctrine which are theoretically valid.

Berlin and Kessler supplied notes on the English common law history of the public trust as well as comments on widely applicable trust concepts.[10] They also propose a trust imposition upon privately owned lands. Cohen's study discusses Public Trust in the context of constitutional issues.[11] Montgomery is primarily concerned with extending the doctrine to apply to agency reclassification of public lands.[12] One article deals specifically with the Public Trust Doctrine in tidal areas.[13]

Several authors deal solely with Oregon Public Trust questions. Brown's comment deals with the particular problem of asserting state control of gravel deposits, and Larsen provides an overview of the

Oregon trust situation.[14] Speck's article ideals extensively with obstacles to implementation of old and new public trust circumstances in Oregon.[15]

A common deficiency in these works is their procedural rather than substantive orientation. Only Sax attempts an integration of legal principle with the nature of the resources under discussion.

GENERAL PUBLIC TRUST THEORY

Public Trust issues arise at the interface between public and private property rights, or when a governmental agency decision is questionable. Intrinsic to these issues is a delineation of the rights of public and private landowners. In the United States, the sense of private property rights is strong, dating back to the pioneer era. The concept of private property rights and public rights is explicit in English common law.[16]

The idea that the public as a whole has rights is incorporated in the common law as the Public Trust Doctrine. The Doctrine asserts that diffuse public interests need protection against private forces with clearcut goals. The trust may subject to judicial review cases that summarily pass under agency discretion.

Public Trust Doctrine meets the criteria necessary for any type of litigation involving land use. First, there is some notion that the public as a whole has enforcable rights. Next, Public Trust Doctrine can be employed against the government in situations where sovereign immunity might be a defense. Finally, the doctrine is capable of adaptation to modern environmental needs.[17]

Central to trust theory is the responsibility of the government to hold certain lands as a trusteeship for the benefit of the entire public. There are three underlying reasons for this imposed responsibility. First, resources are the "bounty of nature" and all should be able to partake. Next, there is the notion that some resource benefits are so precious that they should be reserved for the use of everyone. Examples of these benefits include clean air and water and the public right of navigation. The last premise is that the nature of government is public, and it should not serve to redistribute resources from broad public to restrictive uses.[18] Thus, the trust imposed on public lands alters their character. They cannot be considered subject to traditional private property rights, as there is a public easement forever attached to the land.[19]

The nature of the government property title is two-fold. There is an element of private property rights called the jus privatum and the public trusteeship called the jus publicum.[20]

Jus privatum is the law which regulates the rights and conduct of the individual property owners. Jus publicum is the law relating to the constitution and functions of government as a public landowner.

In English common law, the jures were used to describe the responsibility of the king and parliament for submerged and submersible lands, particularly land the banks of navigable waterways and tidelands. The king was said to own these lands in fee simple but this ownership was subject to the paramount public interests of navigation and fishing. The consensus of the often inconsistent common law is that the sovereign controls all lands below high water on navigable streams and tidal zones.[21]

Private property rights extend from the uplands to the high water mark, and riparian rights to nonnavigable streams extend to the middle-of-the-road.[22]

There is substantial disagreement concerning the power of the government to separate the jus privatum from the jus publicum. Although there is no specific prohibition against government conveyance of public land in the common law, the majority of cases specify that only the jus privatum is granted and that the property is still subject to the jus publicum. Legal authors would maintain that all private property is subject to public rights, since all title originated with the government.[23] Such patents include the Homestead Act lands, Donation Land Claims, and Swamp and Overflowed Lands. To date, no court has ever chosen to settle this issue.

There are two poles of interpretation as to the role of the government in administering the trust. Either the trust puts lands beyond the routine police power of the state or the weaker state authority must be exercised consistent with police powers.[24] The first choice is too strong for it would bar wise development in the future.

Sax suggests three restrictions that the trust imposes on government.[25] First, the property must be held available for use by the general public. Next the property may not be sold outright in fee simple. Third, the land uses must be related to the use as a resource. This last stipulation allows for availability of the resource for traditional uses or those related to the particular nature of the resource.

It is possible to suggest parameters for state control of resources. Basically, a government cannot relinquish land to the degree of having no authority to control the uses. Yet the grant is not rendered illegal because it diminishes some of the trust interests. Beyond these tenuous offerings, common and statute law have not been developed sufficiently to spell out the limits of state power.

In recent years, with governmental agency projects subject to increased scrutiny in public hearings, the secret nature of the decision making process has been somewhat unveiled. But there are every day decisions that fall under the umbrella of agency discretion which may go unnoticed unless challenged through judicial review. The courts are not willing to proceed with extensive agency review because of court budget limitations and also to preserve a sense of separation of powers. The courts agree that agencies should not be overly scrutinized lest it interfere with the exercise of their discretionary authority. Ordinarily there must be some gross abuse or misinterpretation of authority before the courts will seriously question agency decisions. Public Trust Doctrine provides an avenue for seeking judicial review of these decisions, because it argues that the whole of the public interest was not considered in arriving at the decision.[26]

A Public Trust crisis situation arises when an agency transfers land from one public use to another. The classic example being the filling of a wetland for a highway. Invoking the Public Trust Doctrine could force a balancing of the equities test. Unfortunately, the criteria for the balancing in this case are not clear-cut.

The philosophy behind Public Trust Doctrine is intriguing and there is nothing implicit in it to prevent future dynamic expansion. The obstacles to implementation are found elsewhere.

TRULY PUBLIC

Much mention has been made of "public rights" or "the public interest," but there is no consensus on their meanings.

The political theorist Lippmann, would espouse a "public philosophy" based on natural law.[27] He maintains that institutions can only be effectively used by people who believe in the philosophy. Lippmann cites as a principle of natural law, the duties as well as rights inherent in property ownership.

Wengert points out the difficulties of determining the public interest, as the public consists of nodes of varying interests.[28] An exact determination of the consensus of public interest is not often possible since the public interest is in flux, and therefore is not easily identifiable.

Beyond the public interest question is a consideration of what rights are truly public, and what benefits from natural resources accrue to a member of the "general public."

Idealistically, it is the right of each individual to determine what "truly public" is. But this determination is only for a point in time and may not be valid for the future.

There is a variety of existing public rights associated with navigable waters and the submerged and submersible lands, as expressed in common law.

Navigation

This is the oldest public right and is considered to be superior to the others. Included in the navigational servitude is the corollary right to anchorage, but excluded is the right to tow boats from river banks.

Ports

The right to port facilities is a derivative of the navigation priviliges. The public is entitled to unhampered approach to the shore for the purposes of loading or unloading goods. Public nuisances historically cited at ports are siltation, rubbish, weir building, and extension of the port into navigation areas.

Passage

In general, citizens have the right to move over the shore when this passage is necessary to exercise some other public rights. Some states have specific statutes granting a public access over private, unimproved beach areas.

Commerce

Commercial rights are an outgrowth of the navigation right. A specific commercial right can not be preferentially treated. In essence, this is an extension of navigation privileges to the commercial sector.

Fishing

The right of citizens to harvest fish is inferior to the navigation servitude when they conflict in use. Fishing is also subject to private interest through prescription and grant. There is some confusion in theory because fishing could be construed to be either an easement or a specific right connected with ownership of beds in navigable waters.

Sand, Gravel and Shellfish Collection

Private and public property rights assign items attached to the soil to whomever has title to that soil. Thus these resources are public if found in navigable waters or tidelands but private if located in nonnavigable streams.

Recreation (Swimming)

Although originally swimming was an inherent right in English common law, later courts refused to recognize this as a paramount public right. Instead, it became a public convention. Modern case law reflects the importance of water based recreation. The judicial trend currently is to allow public access across private property to reach public recreational areas.

Conservation and Aesthetics

These are considered to be citizens' rights for the future. Conservation can be substantiated as a public right because it is a

necessary protection of all other public rights. Aesthetics as a public right is less well defined.[29]

This discussion is not meant to imply that any agency project is acceptable if it is in any way public. Nor does it mean that resources should always be put to a prescribed use forever. It should be clear, however, that any alteration in a resource should produce a greater public benefit. All benefits should not necessarily be measured in pecuniary terms, and specific long range benefits of another use should not be ignored.

THE ROOTS OF PUBLIC TRUST DOCTRINE

Roman Common Law

The Romans inherited their legal system from the Greeks. The Romans believed that an intrinsic "natural law," rendered air, water, the sea and seashore common to all.[30] The Roman government's sovereignity extended to the sea but the use and enjoyment of it belonged to all in the empire for unlimited exercise of fishing, navigation and water consumption. As these priviliges were unalienable, they could not be subject to individual exclusive appropriation. The Roman's considered all uses of rivers, harbors and seashore as public; anyone was free to construct houses there but the structure may not belong as private property to an individual.[31] This philosophy is the wellspring of Public Trust Doctrine.

Early English Law

The Middle Ages, marked by a decline in commerce and public government, produced an increase in feudal ownership of property that had once been public. In England, the jurisdictional claims to tidal areas exerted by the king became confused with the notion of private property rights. The king claimed as his private property the tidal and riverbed soils and anything on them, as well as the right to the exclusive possession of the fish. The king alienated part of his property title to the jurisdiction of local princes, thus a formidable section of ocean foreshore became vested in private holdings. Since the king's right to the fish was transferred with these grants, both the king and the lords netted an excessive number of fish. This was the antithesis of the old Roman ideal.

The proliferating private ownership of land by wealthy lords, added to the public burdens that eventually produced the Magna Carta.[32]

The relevant provisions of this document specifically prohibit private fishing weirs from permanently blocking waterways.[33] Later English common law confused this issue by allowing public fishing rights in tidal areas but none in nontidal areas, some of which are navigable.[34]

Modern English Law

With the growth of England's commerce, both common and statute law served to augment public rights in water. The new view was that the king's rights of fishing and navigation are in the character of a protection of public rights. The king had no authority to grant exclusive

rights to submerged and submersible lands, and even though he could convey title to the soil of "any arm of the sea," these grants are subservient to public rights.[35] In this period, Public Trust Doctrine was slow to develop, probably because there was not intensive demand for the resources, and lack of accessibility to high level decision makers. The most common approach was to limit the whims of private landowners by reserving particular rights for the public, in a type of easement.[36]

One author believes that the historical interaction of the public trust and laissez-faire liberals heightened the tendency for English trust models to be a set of public easements superimposed on a private ownership pattern.[37] The minimum necessary easement technique was furthered by the fact that the principal owners of private property were the king and his grantees and it might have proved difficult for the court to take these lands outright.[38]

Easements are defined by way of activities not by particular parcels of land, and they had applicability to public navigation rights. Eminent Domain had no meaning in this period since the idea of a "collective public" was not prevalent. These easements later crystallized into a principle that assumed them to be intrinsic to the crown's responsibility in government. It is not certain if this principle allowed the public to enforce its right against the government for laxness in protecting these rights.[39]

Struggles between the parliament and crown resulted in restricting the king from alienating public lands. However, the restriction was on the king's actions and not on the government as a body, as parliament could increase or decrease public lands for some suitable public purpose.

A survey of related thought reveals that all streams which showed tidal influences were prima facie navigable and thus the crown owned the beds. All nontidal streams were classified nonnavigable and landowners owned to the center of the stream or lake.[40]

AMERICAN TRUST HISTORY

When the United States became an independent nation, it inherited English common law and sovereign powers. The application of Public Trust Doctrine in England had varied with the growth of the government. The United States, has experienced one type of government structure, but has also experienced a trust doctrine development which is contradictory. Perhaps, this curiosity can be attributed to the independent actions of our state and federal courts and legislatures. Naturally, judicial and legislative sentiments and awareness change with the times, but there is no linear extension of the Public Trust Doctrine with time in the United States. When formulating precedent, judges operate under the peculiarities of their own state law, or the uniqueness of the specific issue at hand. In any decision, the admittance of evidence and points of law depend on the tendency of a judge to be a strict or broad constructionist.

The term "public trust" was first explicitly used in Martin v. Waddel, and the phrase was expressed in the context of rights to land under navigable waters, transferred to New Jersey.[41] The transfer established "a public trust" for the benefit of the whole community to be freely used by all for navigation and fishing and not as "private property to be parceled out and sold by the duke for his individual enrichment."[42]

The ruling in Pollard's Lessee v. Hagen was that the states upon admission to the union acquired title to the lands below high tide.[43]

Perhaps the most significant of the early public trust cases was Illinois Central R.R. v. State of Illinois,[44] because the adjudication expressed some specific roles of the government in respect to public lands. The Illinois congress had granted the railroad a fee simple title to lands below the high water mark on Lake Michigan in Chicago. Later the congress rescinded that grant and the railroad brought suit. The judge asserted that the title to the disputed submerged lands came to Illinois upon statehood, and that the state had no authority to give public land because it should remain in trust for the use of all. Although the state may allow the public to be benefited by wharves or piers for which the state can grant small parcels of land to private individuals, it is not their prerogative to convey substantial submerged lands, because this is not consistent with the purpose of a trusteeship.

A departure from the sentiment expressed above occurred in Appleby v. City of New York.[45] The plaintiffs sought to enjoin the city from dredging parcels of land beneath navigable waters which had allegedly been deeded to them. The court maintained that the legislature could convey both the jus privatum and publicum, and that the city by conveying the deed showed intent to abandon its public proprietorship. The court's opinion was that the city must obtain the disputed property outright by condemnation.[46]

Another important ruling, Gould v. Greylock Reservation Commission, dealt with challenging agency discretion.[47] The issue was centered on the leasing of state park property by the Greylock Reservation Commission,

to a private recreation developer. The lease was based on a statute which allowed the commission to enter into agreements with the Greylock Park Authority about leases. The judge concluded that the private development would be in excess of statutory authority, and held in favor of Gould, suing as a member of the public alienated by the agency action. The court reasoned that it is not the function of a state or its agencies to convey public lands into private hands.[48]

A fairly recent court decision shows how the California courts handle the question of public use of beach recreational areas. In the combined cases of Gion v. Santa Cruz and Dietz v. King, the right of the public to cross private property to reach public lands was upheld. Gion initiated a quiet title suit for his waterfront property prior to beginning development. The city had maintained the property for many years with people continuously using the access route, thus acquiring a prescriptive easement.[49] In the Dietz suit, the landowners sought to enjoin the public from crossing their property. The court maintained that the long standing custom of using the property as a beach access had given the public the right to use the property for access in the future.[50] This thinking is based on the same presumption as adverse possession: that property ownership is a set of duties as well as rights, which must be actively maintained.[51] Those who are passive in their responsibilities, may lose the rights by default. The significance of this will become more apparent when discussing the Public Trust in Oregon.

As manifested in this analysis, there is no pattern of consensus of the nature of Public Trust responsibilities of the sovereign.

Figure 1 describes the historical aspects of Public Trust doctrinal trends. Although the courts will probably not embrace the Roman concept of absolute public ownership in the future, there is a definite tendency toward expansion of public rights in natural resource issues.

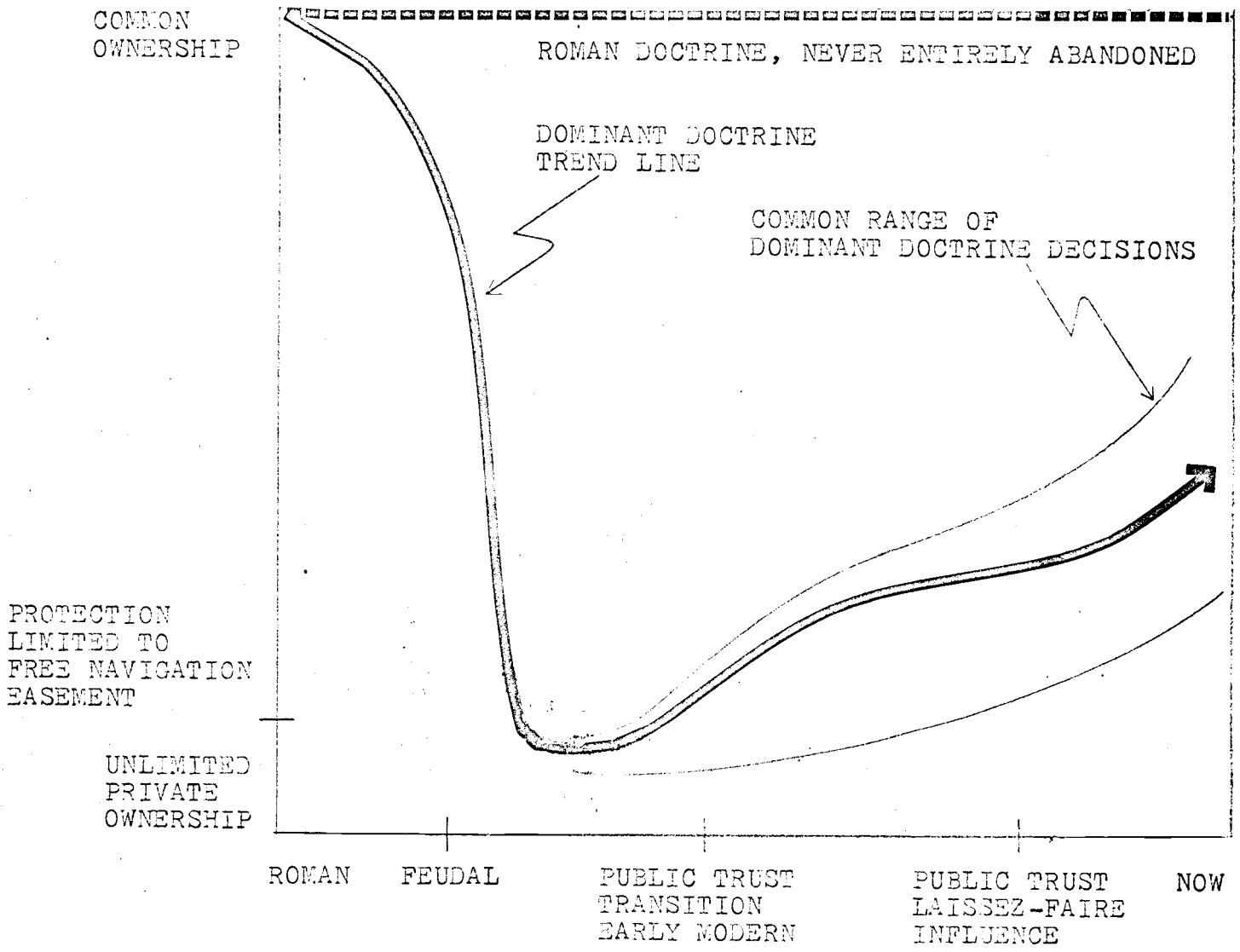
THE PUBLIC TRUST DOCTRINE IN OREGON

The contradictory nature of American trust development is echoed in the Oregon decisions.

Shively v. Bowlby presents an important precedent.[52] The controversy centered on whether the United States was able to patent tidelands to private owners while Oregon was still a territory. It was decided that the United States, knowing that a territory will someday become a state, cannot alienate any rights that would ordinarily come to a state upon statehood. Such conveyances would make Oregon on less equal footing than the other states.[53] This did not say that the state could not dispose of lands it holds in trust, but instead, that the federal government should not upsurp state jurisdiction. The description of the private and public character of state title to tidelands was in the context of their beneficial use to the public.

The court in Winston Brothers v. State Tax Commission, maintained that the state's rights to lands under navigable water were only in a trusteeship form because the government is the direct representation of the people.[54] The judge then differentiated tidelands from the beds of navigable rivers. Tidelands can be conveyed but not the riverbeds because the latter are basic to the public right to navigation. Also,

Figure 1



HISTORY OF PUBLIC TRUST DEVELOPMENT
Source: "The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine," The Yale Law Journal, Vol. 79: 762, 1970, p 773.

he reminded the participants that state lands under navigable waters are ultimately subject to federal regulation of commerce.[55] This is one of the first times that a difference between types of submerged lands was acknowledged.

Lewis v. City of Portland considers the ownership of the banks of navigable waters which generally are above high water.[56] The decision was that by custom, private owners have rights to the high water mark as long as the use does not interfere with navigation and commerce. The judge wrote at length that even if legislative action granting away all public rights exercised by the state occurred, subsequent lawmakers could revoke this statute. All property rights enjoyed by private property owners is subject to state regulation of uses.[57]

In Corvallis and Eastern R. R. Company v. Benson, the railroad claimed that it had title in mesne from the Willamette Valley and Coast Railroad to tidelands mentioned in the act creating the Willamette Railroad.[58] The original law granted certain tidelands at Yaquina Bay to the Willamette Railroad for them to mortgage to provide funds for track construction. The judge cites Shively v. Bowlby, but goes on to make a distinction between rights of the state in the jus privatum and publicum. The jus privatum may be conveyed but the jus publicum should not be divested. Therefore, tidelands can be transferred to private corporations as long as the grant is subject to the public rights of navigation and commerce.[59]

Gatt v. Hurlburt reaffirms that the state has sovereign control over submerged areas below the high-water mark on navigable rivers.[60] The state could grant away the riverbed, subject to the public rights, and that building on these areas by the grantee does not constitute

adverse possession against the state.[61] It seems unlikely that the state would attach a fee simple connotation to its grants, even though building would insue.

A recent case, Corvallis Sand and Gravel v. the State Land Board, demonstrates that there is still uncertainty about the public-private boundaries in submerged lands.[62] The Corvallis corporation had conducted gravel excavation on allegedly state owned submerged lands, for a period of time before the state took action. In the majority opinion, the judges concluded that since the government holds land in a proprietory sense, the statute of limitations against state assertion of ownership, is not valid.[63] The dissenting opinion points out that there has been established no specific test to separate public from proprietory state rights, in all but the most obvious cases.

The rights of the public to beach access were challenged in Thornton v. Hay.[64] The Oregon Supreme Court opinion stated that the state controls the tidelands for the public good, but also held that the public has rights in the dry sand beach area. An adjoining landowner may not prevent the public from reaching its tidelands. Instead of relying on the prescriptive easement tool, the court employed "customary use." In addition, the area of the beach was defined to be between high tide and the visible vegetation line.[65]

Figure 2, summarizes the pattern of decisions concerning Public Trust Doctrine in Oregon. Generally, a distinction between the public and private nature of sovereign land tenure is made when the question of allowing a private use of the public lands appears. The early trust cases were concerned primarily with settling disputes arising from the

Figure 2

RANGE OF PUBLIC TRUST DECISIONS IN OREGON

OREGON CASES

DECISIONS	Shively v. Bowlby (1893)	Lewis v. City of Portland (1893)	Corvallis & Eastern RR v. Benson (1912)	Gatt v. Hurlburt (1930)	Winston Bros. v. State Tax Comm. (1937)	Corvallis Sand & Gravel v. State Land Board (1968)	Thornton v. Hay (1970)
Public lands are trusts for Government	o	o	o	o	o	o	o
Nature of Sovereign ownership is both public and private	o	o	o	o	o	o	o
Nature of Sovereign ownership is separated between public and private			o		o	o	o
Navigable rivers to State below high water	o	o		o	o	o	
Tidelands to State			o		o		o
Government can transfer jus privatum to private ownership			o	o	o		
Separation of title of the beds and banks of river possible			o	o	o		
No possible separation of the beds and banks of rivers possible	o	o				o	
All areas below high water mark to State				o	o		
High water mark and vegetation line equal							o
Governments can dispose of public lands for public benefit						o	o
Beach is public							o
State can not lose Public Rights						o	

o Judicial Consensus

Donation Land Claim Act of 1850. These cases dealt primarily with the immediate issues of establishing state jurisdiction over the disputed lands, as opposed to the later opinions on the separation of river beds from banks, and separating the jus publicum and privatum.

FEDERAL AND STATE CONFLICTS

At the heart of many of the Public Trust cases is the jurisdictional conflict between the federal and state governments. Traditionally, the federal government has jurisdiction over inland interstate navigation and commerce. But federal control over coastal areas has been in joint control with the states, with the latter supervising their adjacent tideland areas.

In 1931, the Federal Supreme Court held that the ownership by the state of a particular stream bed was for federal determination.

A source of federal-state conflict is land grants patented by the federal government. Quite often the deed descriptions gave the ocean as a boundary, and the private owners believed they owned the tideland areas that would pass to the state upon statehood.

There are a variety of opinions on the boundary between state controlled tidelands and federal waters. States have judged the boundary to be at neap tide, or daily low tide or even mean high tide. Problems arise in accurately determining any of these and applying uniform federal tests to the various coasts.[66]

Likewise, a source of discrepancy is the overlap of jurisdiction prevalent with many small inland navigable lakes. Most inland lakes would not meet Federal navigation tests even though they are in fact capable of navigation.

Historically, federal water laws have often been incompatible with state water laws, and when employed the federal laws can seriously abrogate established property rights. These questions are particularly pertinent to Oregon, which has approximately half of its land in federal ownership. (Figure 3)

Proper implementation of the public trust rests upon the definitive delineation of governmental jurisdictions. Continued federal and state conflicts only serve to delay Public Trust development.

OREGON LAW AND THE PUBLIC TRUST DOCTRINE

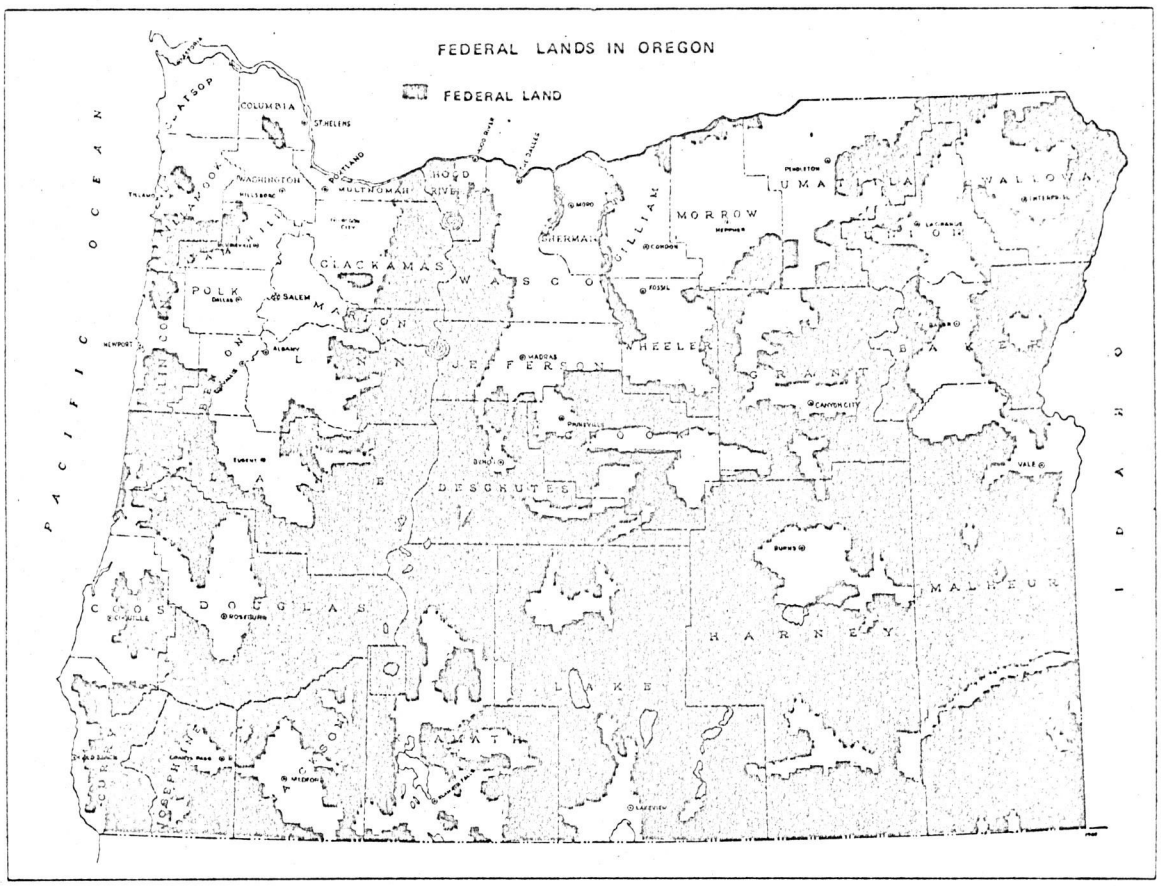
To fully understand the implications of Public Trust Doctrine for Oregon's submerged and submersible lands, we must consider these in the context the pecularities of Oregon statute and common law.

Interaction of Public Trust Doctrine With Oregon Statute Law

Unique to Oregon were the lands obtained under the Donation Land Claim Act of 1850, enacted to encourage permanent settlement in the Oregon territory.[67] The patents to these lands were issued by the Federal government. As the United States Public Survey had not reached the Oregon territory at the time of the claims, all of the deeds were written with metes and bounds descriptions.[68] Quite often the imprecise descriptions used natural monuments as boundaries, creating a false imprecision that title was being given to all lands under high water. As previously discussed in Shively v. Bowlby, Oregon became a state in 1859, and received the lands below high water from the federal jurisdiction.

Figure 3

LOCATION OF FEDERAL LANDS
IN OREGON



(from Oregon State University
Extension Service pub. 328)

The Oregon Admissions Act of 1859, section 2, specifically transfers both the jus publicum and privatum to the State of Oregon with the following words:[69]

> " . . . The state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the state of Oregon . . . and said rivers and waters and all navigable waters of said state, shall be common highways and forever free . . . "

Section 5 of the Oregon Constitution provides for the formation of the State Land Board for the purpose of:[70]

> " . . . managing and disposing of all lands granted to Oregon by the federal government for educational purposes, and all other lands owned by the state or under their jurisdiction . . . with the object of obtaining the greatest benefit for the people of this state consistent with the conservation of this resource under sound techniques of land management."

Thus, the State Land Board can not routinely put public lands out of public control. It is uncertain whether the intent was to construe "disposition" in the private property sense of fee simple, especially since section 2 provides for the conservation of the resource. This unclear language contributes to the diversity of opinion as to the extent of the public trust.

In 1872 and 1874, Oregon statutes were enacted which allowed upland owners to have preferential rights to buy adjacent tidal areas, with wharfage rights, subject to the public easement. This early statute reflects a strong sense of private property rights.

Prior to the enactment of the 1909 water code, riparian rights to all streams were common. The code allowed all substantiated riparian rights prior to 1909 to stand.[71]

The Act of 1872 was superseded by Oregon Revised Statutes 274.060, which allowed for legislative regulation of wharves, and natural oyster beds so as to protect specific public rights.

ORS 274.915 allows the Director of State Lands to sell old and new submerged and submersible lands. Although there is no mention of public rights in these resources, a court would probably allow that the jus publicum cannot be sold. Judge Lusk in Corvallis Sand and Gravel v. the State Land Board states, " . . . We express no opinion as to the validity of this statute . . ."[72] Subsequent Attorney Generals' opinions would impose the jus publicum in all sales of land under high water.[73]

ORS 541.615 gives the Director of State Lands the power to grant permits for filling. These permits are subject to the stipulations that the fill does not unreasonably interfere with public rights of navigation, fishing and public recreation. The filling project must be consistent with state conservation policies on public health and safety as well as harmonious with present uses and land use plans. This is an example of the encorporation of Public Trust philosophy into statute law.

Under ORS 541.625, reasonable doubt in issuing permits should be resolved in favor of the public. The Director of State Lands should consider if public benefits would be augmented by the filling operations or if "unreasonable" interference with the public will occur. There are no specific guidelines for determining "unreasonable."

Although Oregon statute law has attempted to consider public rights in public lands, ambiguities and inconsistencies still exist. Provisions of the earliest statutes can only serve to confuse the

boundaries between public and private property, making the application of the public trust difficult. New and progressive state laws such as SB 100, which seek to control unwise private development, serve to promote public rights.

THE PUBLIC TRUST DOCTRINE AND OREGON COMMON LAW

Traditionally, riparian owners on nonnavigable Oregon waters owned to the thread of the stream at low flow.[74] The U. S. Army Corps of Engineers has the power to reclassify the status of the inland waterways of the U. S.[75] It is entirely possible that most of Oregon's rivers would be declared navigable upon review. Thus, the land under high water would become vested in the state and not the private landowner, and as state land, it would be subject to the public trust.

A prevailing principle in English and American common law is to preclude a private property owner from obtaining adverse possession rights against the sovereign, because of the public nature of it's holdings. In Oregon, the doctrine of equitable estoppel has precedent.[76] This principle of law brings about a similar effect as adverse possession by barring a government from misleading a private owner into making improvements on public property which the owner thought had been abandoned. Although this principle is not favored by the courts, it is occasionally employed successfully. The net effect of such a provision inhibits the employment of Public Trust Doctrine.

In Corvallis Sand and Gravel v. State Land Board, the doctrine of laches was applied to challenge the state's property rights.[77]

The corporation alleged that the state had been delinquent in asserting ownership, and therefore should forfeit the disputed gravel deposits. The court did not allow the forfeiture, but the opinion was not decisive, and it is a significant precedent for private encroachment onto public lands. The Public Trust Doctrine can serve to reinforce the state's title, as well as protecting public rights.

A provision of common and statute law dedication is that once a parcel of land is dedicated to a specific public purpose, it cannot later be put to another use.[78] Thus a preclusion that one agency cannot condemn another's land is created. Transfers of land among agencies for purposes of reclassification is not rededication. This is a crucial area for employment of Public Trust Doctrine to prevent agency misuse of public lands, accomplished through reclassification of land to a less desirable public use.

One of the main judicial shortcomings in Oregon has been the treatment of submerged and submersible lands as separate entities. A perusal of Oregon case law shows that tidelands, land between high and low mark, and beds of navigable rivers are all considered independently, even though they are all below high water. This fragmentation is an obstacle to comprehensive application of the Public Trust Doctrine for resource management. Riparian property owners are entitled to gains to their property by accretion and must bear losses from erosion not associated with flooding. However, frequently changing river channels such as the Willamette's, create ownership problems. Complicating the situation is the lack of an authoratative survey of the channels made before statehood. Ultimately, this results in the state administering

and disposing of land that belongs in fee simple to a private owner, and overlooks lands that are due to it. Any such uncertainty of ownership, frustrates the implementation of the Public Trust Doctrine.

Another situation which has not been adequately settled in common law is the navigability status of Oregon's lakes. Shively v. Bowlby said that the state owned all lands below high water on inland natural lakes. The consensus of legal opinion would extend state title only to the submerged and submersible lands of navigable lakes. No single set of guidelines has been established for lake navigability. Most of Oregon's natural lakes would not be declared navigable if the federal test of commerce were applied, because many do not connect with large rivers. For nonnavigable lakes, title rests with the adjoining owners, extends to the middle of the road, but is subject to the public easements.

The land necessary for reservoirs built by the Corps of Engineers is obtained by condemnation with an area reserved around the lake perimeter which is often enough for public recreation, and to serve as a bar from the establishment of new riparian rights by adjoining property owners.

Customary rights, as advanced in Thornton v. Hay, allows the public, by long standing custom, to cross the dry sand areas of the beach to reach public recreational areas in the tidelands.[79] In this manner, the judge avoided legal problems created by the traditional easement approach. Although the term easement has a legal meaning apart from that used in property law, it may be misconstrued to be indicating a specific spot on the ground rather than a bundle of rights. Beach use

by the public would not be adaptable to such a narrow employment of "easement." "Customary rights" is the Public Trust Doctrine expression of prescription and implied dedication. Using "customary rights" eliminates litigation which would necessarily result when "easements" are extended. The whole beach as an access is implied by "customary rights."

The immaturity of the Public Trust Doctrine in Oregon common law can partially be blamed on the above considerations as well as the judicial and legislative ambiguities previously described.

RECOMMENDATIONS AND OBSERVATIONS

To promote effective citizen action via the Public Trust Doctrine, the following suggestions and observations are offered:

1. There is no account in the common law that prescribes a penalty for failure to protect the Public Trust. Traditionally a writ of mandamus is usefull in instances when an agency has failed to perform its duty, but not when the suit seeks to challenge agency action. An injunction could be sought, but this may only serve to forestall the event. The most damaging penalty would be the adverse media publicity which would at least focus attention on the workings of the agency.

2. In view of the historical inconsistencies, Public Trust Doctrine might be most effective in some cases if it were couched in a framework of common law tort which is well established. Particularly useful is public and private nuisance tort.

Nuisance applications have been narrow in the past, but there in no theoretical hindrance to extension in a manner similar to to Martin v. Reynolds Aluminum.[80] A citizen could perhaps establish that a particular resource use is a public nuisance because it is incongruous with the public trust.

3. Another mechanism to direct attention to disposal of public lands would require the legislature to pass specific legislation for each conveyance of public lands to private persons or corporations. If this method is employed, the proposed use of the conveyed land may undergo public scrutiny.

4. In Milwaukee v. the State, the Wisconsin courts came close to providing rules to establish if new resource uses are consistent with public aims:

   a. Public bodies will control the use of the area.
   b. The area will be devoted to public purposes and open to the public.
   c. Dimunition of the resource area will be small when compared with the whole.
   d. None of the public uses of a resource as a resource will be destroyed or greatly impaired, i.e. a lake will be used as a lake.
   e. The disappointment of the public who desire to exercise public rights in the old use will be negligible when compared with the greater convenience afforded by the new use.[81]

5. The tests used in the Wisconsin court need to be refined into workable criteria, capable of being recognized in all jurisdictions. This would facilitate establishment of the citizens suit as well as shift some of the burden of proof to the offender.

6. The various submerged and submersible lands should not be treated separately but as a continuous resource. Legislative amendments to current statutes could accomplish this purpose, without interfering with the judicial role of considering each case in the context of the particular circumstances.

7. The Public Trust Doctrine philosophy should be embodied in a bill, perhaps similar to the Michigan Environmental Protection Act.[82] Basically this law guarantees any private citizen the right to seek judicial relief for the protection of air, water and other natural resources of the state of Michigan. Inherent in some of this bill's language, is the failure of administrative agencies to wisely manage natural resources. It reflects a lack of confidence in the normal administrative decision making procedure.

8. A basic source of judicial confusion in some cases would be alleviated if the legislature would take positive action and delineate a range of desirable public uses and acceptable public rights. Included should be a listing of specific unacceptable private uses which would conflict with acceptable public uses. If the law is definitive, litigation can be minimized.

9. Private property owners will undoubtedly take up the cry that limitation of their property uses is "taking" without compensation. It can be argued that the government cannot "take" that which it already owns, i.e. the jus publicum is still attached to the private property.

10. The State Land Board and the Division of State Lands, which are intrusted with leasing gravel rights in state waters, should not consider the title to state lands a light matter. An accurate updated inventory of the precise state holdings in navigable waters is necessary to avoid title challenges in the future.

11. An effort to ensure that lessees of public lands are charged a fair market value should be made by the lease granting agencies. Leases should be renegotiated and renewed periodically.

12. The Public Trust Doctrine in Oregon is not sufficiently developed for extension to private property or to agency reclassification of land. Public Trust Doctrine in this state could more easily be expanded into water related areas such as enforcement of water quality standards.

13. Some definition of the ownership of natural lakes must be determined to eliminate the title questions.

14. The permanent resolvement of federal-state conflicts may not be forthcoming in the near future. Knowledgable observers have suggested that the distress could be relieved by legislative

action. Appeal procedures under such a plan are cumbersome for the great number of decisions that have to be made. Long standing conflicts are not easily resolved by simply passing a law, for among other things, all laws are subject to judicial interpretation.

15. With the current impetus on developing new energy sources, the subject of geothermal leasing on public lands may test the strength of the Public Trust Doctrine in the future.

16. The courts should settle the extent that the "jus privatum" can be divested from the "jus publicum." Are they always separable?

17. The courts should consider the specific limitations that the legislature and agencies have on disposal of lands. Current language in the Oregon Revised Statutes is vague.

18. There should be monitoring on interagency transfers of land.

19. The courts need to provide agencies with guidelines for preservation of public rights that can be incorporated into decision making.

20. The Public Trust Doctrine can be employed effectively as a stop-gap mechanism to deal with matters not yet treated by statute law or where questionable legislation exists.

21. Washington has a state law which forbids the sale of the beds of navigable streams. Perhaps a law like this for Oregon would

be more consistent with public aims. Leasing, not selling, facilitates regulation.

CONCLUSION

The Public Trust Doctrine can be an effective tool for citizen action to protect the public interest in resource management. Historical anomalies in common law have prevented trust development to its full potential. Both judicial and legislative ambiguities have compounded problems of interpreting the limitations of the trust. Some states have specific state laws or common law doctrine which facilitate using the trust in instances unrelated to submerged and submersible lands. Oregon Public Trust cases have, for the most part, been limited to determination of property boundaries. Basic questions concerning the ownership of natural lakes, and a reconciliation of current state statutes with public trust ideas must occur in Oregon before the Public Trust Doctrine can be directed to other purposes.

FOOTNOTES

[1] Oregon Revised Statute 274.005 defines:
submerged lands to be lands lying below the line of ordinary low water of all navigable waters.
submersible lands are those lying between the line of ordinary high and low water of all navigable water.

line of ordinary high water is the line on the bank or shore to which the high water ordinarily rises annually in season.
line of ordinary low water is the line on the bank or shore to which the low water ordinarily recedes annually in season.

[2] Garrett Hardin, "Tragedy of the Commons" reprinted in the Environmental Handbook from Science, Vol. 162, p. 1243-1248, December 13, 1968.

[3] "Balancing of the equities" - the concept of complete fairness is implicit in equity. Court balancing tests weigh the economic loss from one consequence against the loss from another.

[4] Environmental litigation has extended the law to bar putting any foreign material into navigable rivers without a permit. Common Law Tort - see Glossary.

[5] Glossary.

[6] Glossary.

[7] PL 91-190.

[8] e.g. zoning, a traditional land regulation tool, is being challenged as taking without compensation.

[9] Sax, "Public Trust Doctrine in Natural Resource Law."

[10] Berlin and Kessler, "Law in Action: The Trust Doctrine."

[11] Bernard Cohen, "The Constitution, the Public Trust Doctrine and the Environment."

[12] Montgomery, "The Public Trust Doctrine in Public Land Law: Its Applications in the Judicial Review of Land Classification Decisions."

[13] "The Public Trust Doctrine in Tidal Areas: A Sometimes Submerged Doctrine."

[14] James Brown, "State Action and the Doctrine of Laches."

[15] Speck, "The Public Trust Doctrine in Oregon."

[16] Sax, supra 9, p. 475.

[17] Sax, supra 9, p. 474.

[18] Sax, supra 9, p. 480.

[19] Easement - The right held by one person to use the land of another for a special purpose not inconsistent with property rights of the owner.
Usufruct - The right of engagement of something owned by another.

[20] Jus privatum - (private law) - The right of exclusive possession and absolute ownership which characterizes private property.
Jus publicum - (public law) - The trusteeship of the government who holds lands for the benefit of the populace.

[21] Supra 13, p. 772.
Navigable - see Glossary

[22] Ibid, p. 772.

[23] Supra 10, p. 172.

[24] Supra 9, p. 520.

[25] Ibid, p. 514.

[26] Supra 12, p. 179.

[27] Bluhm, p. 411.

[28] Wengert, "Resource Development and the Public Interest."

[29] Conservation can be either utilitarian or preservationist. Aesthetics is not necessarily a derivative.

[30] Supra 13, p. 763.

[31] Ibid 3, p. 764.

[32] Ibid 3, p. 764.

[33] Ibid, p. 766

[34] Supra 9, p. 476.

[35] Supra 13, p. 768.

[36] Ibid, p. 770. Easement is meant in the context of rights.

[37] Ibid 13, p. 769.

[38] Ibid 13, p. 768.

[39] Ibid 13, p. 770.

[40] Center of the stream is synonymous with thread of the stream or middle of the road. This point is usually defined as the midpoint at ordinary flow.

[41] Supra 13, p. 768.
See also Shively v. Bowlby, 132 S. Ct. 548.

[42] Ibid, p. 768.

[43] 3 How. 212, 1844.
See also Shively v. Bowlby, p. 551.

[44] Supra 9, p. 489.

[45] 271 U. S. 364 (1928), Supra 15, p. 8.

[46] Ibid.

[47] Supra 9, p. 492.

[48] Ibid.

[49] 84 California Rep. 162 (1970).

[50] Ibid, p. 163. A suit to quiet title seeks to uphold existing boundaries or deed descriptions by court action.

[51] Adverse Possession - Open, notorious, exclusive, continuous and hostile occupancy under color of title for a specified time period which results in ownership to the possessor. Adverse rights are usually not operative against a sovereign.

[52] 14 S. Ct. 548 (1893).

[53] Ibid.

[54] 62 P2d 7 (1937).

[55] Ibid.

[56] 35 P 256 (1893).

[57] Ibid.

[58] 121 P 418 (1912)

[59] Ibid. In Mesne - passing property to successive owners without changes in deed descriptions.

[60] 284 P 172 (1930).

[61] Ibid.

[62] 439 P2d 575 (1968).

[63] Ibid.

[64] 492 P2d 671 (1969).

[65] Ibid.

[66] Teclaff, p. 633-635. The tidal ranges on the Atlantic, Pacific and Gulf coasts are all different, and uniform tests cannot be used.

[67] 320 acres were offered free to each person in the territory by 1851.

[68] Metes and Bounds - courses and distances - Since there was no public survey or coordinate system in the early days, deed descriptions are expressed in measurements with references to natural or artificial monuments.

[69] Oregon Admissions Act, section 2.

[70] Oregon Constitution, section 5.

[71] There was no uniform water code in Oregon until 1909.

[72] Supra 62.

[73] Opinions of the Attorney General of Oregon, #6861, 1971.

[74] Most states specify ordinary flow, not low flow. Ordinary flow is neither in flood nor drought periods.

[75] Ibid.

[76] For some reason, Oregon accepted adverse rights claims against the state until 1931.
Estoppel bars the government from committing fraud by misleading citizens into taking some action, and then later damaging them.

[77] 439 P2d 575. Laches is a procedural term which means a delay in asserting rights or claiming privileges.

[78] Dedication involves: a grantor, a grantee, an identifiable parcel of land, and acceptance either formal or implied of the dedication. Brown and Eldridge, p. 154.

[79] Customary Use - Because the public has been historically allowed to pursue an act, they acquire the right to do it because no one has stopped them in the past.

[80] 221 OR 86, (1959) see footnote 6.

[81] Supra 9, p. 512.

[82] Michigan Comprehensive Laws, 691.1201 (1970), see Thibodeau, p. 580.

APPENDIX - GLOSSARY

The Concept of Common Law Tort

Common law is law that has evolved from legal theories advanced by courts or by public usage. Common law does not rely solely on the interpretation of pre-existing statutes but also makes heavy use of precedents which result from litigation.

The Common Law premise of "sic utere tuo ut alienum non laedas" (use your property in such a manner so as not to injure the property of another) can be considered to be Tort. Violations of Tort philosophy are called torts. Torts fall into the following categories:

Trespass - Unlawful invasion of a possessor's rights in exclusive possession of his property.

Nuisance - Unlawful invasion of a possessor's interest in the use and enjoyment of his land. There are private and public nuisances. N. B. a continuing trespass may become a nuisance.

Negligence per se (as a matter of law) - Damage resulting from violation of a statute or ordinance.

Res ipsa loquitor - (the facts speak for themselves) - Damage would not have resulted unless someone was negligent.

Product Liability - The manufacturer is responsible for the quality of his product. There is always an implied guarantee.

Strict Liability - The manufacturer, wholesaler, distributor and retailer are equally responsible to the consumer for damage through negligence.

Ultrahazardous Conduct - A person is liable for negligence if he engages in activities so ultrahazardous that damage may surely result. Due care must always be exercised in performing activities.

(Definitions from the Environmental Law Handbook)

Other Points of Law

Navigational Servitude - The rights of the public to pass over navigable waters. Includes the corollary rights of anchoring and port access.

Navigable Waters - Waters that are navigable for commerce either naturally or with the addition of structures to aid navigation. (Federal Test)

Waters that are capable of navigation for commerce or recreation. (State Test)

(Clark, Waters and Water Rights)

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