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APR 19 2022

IN THE CIRCUIT COURT IN THE STATE OF OREGON

IN THE COUNTY OF CLACKAMAS

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 CONLUSIONS 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.

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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.

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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

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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

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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.

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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.)

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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 sternwheelers, 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 sternwheelers on Sucker Lake, the *Minnehaha* and the *Henrietta*, from 1866-1873 (Ex 208.) Trullinger used these sternwheelers 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

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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. (Annear 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

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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 sternwheelers 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).

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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

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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).

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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 Cliff Fishing 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 dams 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.

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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 Plaintiff's 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

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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 laches"). Defendants' laches 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.[1]

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.

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

Verified Correct Copy of Original 4/20/2022.

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. Linnger
Circuit Court Judge