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2
3 IN THE CIRCUIT COURT FOR THE STATE OF OREGON
4 FOR THE COUNTY OF CLACKAMAS

5 **MARK KRAMER and TODD PRAGER,**

6 Plaintiffs,

7 v.

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

10 Defendants,

11 and

12 **LAKE OSWEGO CORPORATION,**

13 Intervenor-Defendant.
14

Case No. CV12100913

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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1 **INTRODUCTION**

2 Plaintiffs’ Motion for Partial Summary Judgment requests a declaration that, under their
3 First Claim for Relief, pursuant to Oregon’s Public Floatation Easement or Public Use Doctrine,
4 Oswego Lake (the “Lake”) is subject to use by the entire public, including plaintiffs, for
5 recreational swimming and paddling, and defendants State of Oregon (“State”) and City of Lake
6 Oswego (“City”) should be enjoined to enforce those public uses by ensuring a right of access to
7 the Lake for the recreating public. As explained below, there is no material disputed issue of
8 fact, and, regardless of title navigability and ownership of the bed of Oswego Lake, the Lake is
9 navigable-in-fact under Oregon law and Oswego Lake’s waters are therefore held in trust for use
10 and enjoyment by the entire public. The Court should accordingly enter summary judgment in
11 favor of the plaintiffs and enjoin the defendants to protect and preserve the public’s right of
12 reasonable access to, and use of, the Lake.

13 **FACTUAL BACKGROUND**

14 Plaintiffs Todd Prager and Mark Kramer are citizens who have historically used Oswego
15 Lake for open-water swimming and paddling, but who are now prevented from doing so because
16 of the defendant City’s passage of Resolution 12-12 (*see* Declaration of Todd Prager in Support
17 of Plaintiffs’ Motion for Partial Summary Judgment (“Prager Dec.”), ¶¶ 3, 5, 18, 58, 59, 64-66;
18 Affidavit of Mark Kramer in Support of Plaintiffs’ Motion for Partial Summary Judgment
19 (“Kramer Aff.”), ¶¶ 9-16). While much of the 415 acres of Oswego Lake is abutted by private
20 property, the City owns or operates several properties and parks that abut the Lake that are
21 suitable for providing public access to the Lake’s waters to engage in recreational pursuits.
22 Indeed, the City-owned Millenium Park Plaza was constructed with steps leading from the Plaza
23 to the Lake to facilitate public access, and plaintiffs and others, including children, have all
24 engaged in their desired recreational pursuits on the Lake in the recent past and lawfully used
25 City property to access the Lake’s waters. Prager Dec., ¶¶ 5, 17-19; Kramer Aff., ¶¶ 5-6.

26 //

1 The City has long acknowledged this public right of access to the Lake for recreational
2 purposes. Thus, when the City sought permits to construct City parks along the Lake, the City
3 asserted in joint permit applications to U.S. Army Corps of Engineers and the Oregon
4 Department of State Lands that the City's plans for Millenium Plaza Park would provide
5 "**shoreline access**" [to the Lake]. Prager Dec., ¶ 13, Ex. "B". In October 2009, in another such
6 permit application, the City represented to the federal and state authorities that, "[S]tarting in
7 *1988, the City began acquiring properties and easements along this section of the Lake to*
8 *ensure public access.*" Tienson Dec., ¶ 10, Ex. "1", p. 2. According to the City's permit
9 application, "Lakefront Park is scheduled to be open in June 2010 to mark the centennial
10 celebration of Lake Oswego and to show the *City's commitment to the original goal of*
11 *providing access to and along the lake* in the downtown area." *Id.*, p. 3. The Oregon State
12 Department of Lands' authorization of the City's parks stated that the agency "approve[d] the
13 project's design and materials, as set forth in the permit application, as satisfying the resource
14 protection, scenic, safety, recreation, and *public access requirements of ORS Chapters 196, 390*
15 *and related administrative rules.*" Tienson Dec., ¶ 10, Ex. "1"; Prager Dec., ¶ 13, Ex. "B".

16 In addition, in the Easement for Submerged and Submersible Pipeline granted by the
17 defendant State of Oregon, Department of State Lands, to the defendant City for the location of a
18 sanitary sewer line across Oswego Lake, the City obligated itself to ensure that the easement area
19 shall remain open to the public for recreational and other non-proprietary uses unless restricted
20 or closed to public entry by the State Land Board or Grantor [Department of State Lands] (*see*
21 Tienson Dec., ¶ 9, Ex. "6"). This Easement, which is currently in effect, was entered into in
22 2008 and constitutes an express acknowledgment by the defendant of the State ownership of the
23 meandered portion of the Lake (*see* Exhibit "A" to Easement) and acknowledgment of the right
24 of public access to the Lake for recreational purposes unless the State acted to restrict it. Yet, in
25 violation of the agreement, the City has now acted to prohibit such public areas.

26 /////

1 However, on April 3, 2012, the City adopted Resolution 12-12, which purports to
2 prohibit using the City’s shoreline parks to enter Oswego Lake’s waters. Prager Dec., ¶¶ 55-59.
3 The Resolution includes subsections 1.b.19 and 1.b.20 of the Lake Oswego Policies Governing
4 the Use of City Owned Park and Recreation Facilities (“Park Rules”), prohibit “any person”
5 from entering the Lake from Millenium Park Plaza, Sundeleaf Plaza, or Headlee Walkway “by
6 an means or method, “including wading, swimming or using water vessels or other floatation
7 devices, and also prohibit “any person” from leaving the pathway of Headlee Walkway. Park
8 Rule 1.b.6 prohibits fishing, wading, or bathing in the Lake where signs are posted. Violators
9 may be fined by the City. *Id.*, ¶ 58. The practical effect of these Park Rules is to prohibit all
10 public access to the Lake because the three identified entry points to the Lake (Millenium Plaza
11 Park, Sundeleaf Plaza, and Headlee Walkway) were the only means of access to the Lake for the
12 general public.

13 Additionally, despite representing to the state and federal authorities that the City’s
14 shoreline parks would provide public access to and along the Lake, a plaque is currently fastened
15 to the steps that descend into the water at the City’s Millenium Plaza Park that reads, “Private
16 Lake, Please Stay on Steps.” Although anyone may walk to the water’s edge, the City now
17 prohibits entrance to the waters of the “Private Lake.” There are now also boulders and bronze
18 reeds installed at the base of the Millenium Plaza Park’s concrete steps which present a barrier to
19 public access to the Lake. *Id.*, ¶¶ 19-20. Both Sundeleaf Plaza Park and Headlee Walkway also
20 would allow easy Lake access for the public (*id.*, ¶¶ 21-28), as could other access points
21 controlled by the City. *Id.*, ¶¶ 29-32.

22 Furthermore, while the City also operates two swim parks at other locations in Lake
23 Oswego, these swim parks are only operated seasonally and are not open to the general public.
24 The swim parks are limited to areas smaller than an Olympic swimming pool, and the City
25 expressly prohibits access by non-residents of the City, such as plaintiff Kramer. Kramer Aff.,
26 ¶ 12; Prager Dec., ¶¶ 29, 60-61. The swim parks do not allow for paddling or swimming into or

1 out of the designated swim park areas, with a limited exception for members of the Lake Oswego
2 Corporation who enjoy privileged status and may paddle into the Lake Grove Swim Park. Prager
3 Dec., ¶¶ 29-30, 59-63. Neither plaintiff Prager nor plaintiff Kramer is a member of the Lake
4 Oswego Corporation entitled to this paddling right afforded by the City. *Id.*, ¶ 62; Kramer Aff.,
5 ¶ 17.

6 Consequently, plaintiffs fear that if they attempt to again use the Lake for their
7 recreational purposes, the City will fine them, or the City may even arrest them for trespassing.
8 Prager Dec., ¶¶ 58-59, 64-65; Kramer Aff., ¶ 13. Notwithstanding the City’s restrictions on
9 general public access, members of the Lake Oswego Corporation enjoy full use of the entire
10 Lake for a variety of recreational activities, including paddling, swimming, motor boating, water
11 skiing, and stand-up paddle boarding. Prager Dec., ¶¶ 62-63. These select, elite, private
12 individuals enjoy Lake access through easements and private property rights not available to the
13 general public. *Id.* Simply put, the City controls the only potential public access points to the
14 Lake, but the City prohibits public access to the Lake for recreational pursuits from these points
15 in favor of exclusive use of the Lake as a “private lake” by members of the Lake Oswego
16 Corporation, and a limited swimming privilege for City residents. Plaintiffs challenge the
17 prohibition on public access to Oswego Lake in this motion.

18 ARGUMENT

19 A. Standards Governing Summary Judgment.

20 ORCP 47 governs summary judgment, and provides:

21 The court shall grant the motion if the pleadings, depositions, affidavits,
22 declarations, and admissions on file show that there is no genuine issue of
material fact and that the moving party is entitled to prevail as a matter of law.

23 *See Schiele v. Montes*, 231 Or App 43, 47-48, 218 P3d 141, 143-44 (2009).

24 In this way, dilatory tactics resulting from the assertion of unfounded claims or
25 the *interposition of specious denials or sham defenses can be defeated*, parties
may be accorded expeditious justice, and some of the pressure on court dockets
26 may be alleviated.

1 *Seeborg v. General Motors Corp.*, 284 Or 695, 699, 588 P2d 1100, 1102 (1978) (internal
2 quotation omitted) (applying prior version of Oregon’s summary judgment rule, which is
3 consistent with the current version, *see Jones v. General Motors Corp.*, 325 Or 404, 413, 939
4 P2d 608, 613 (1997). “[A]n adverse party may not rest upon the mere allegation or denials of
5 that party’s pleading, but the adverse party’s response, by affidavits, declarations or as otherwise
6 provided ... must set forth specific facts showing that there is a genuine issue as to any material
7 fact for trial.” ORCP 47D.

8 **B. Oregon Recognizes a Right of Public Access to Navigable Waterways.**

9 Plaintiffs’ claims and this motion turn on the public’s right to use water bodies within the
10 State of Oregon under Oregon’s Public Floation Easement or Public Use Doctrine, which is a
11 component of the Public Trust Doctrine. The Public Trust Doctrine and the related Equal
12 Footing Doctrine evolved from the English common law. *See Land Bd. v. Corvallis Sand &*
13 *Gravel Co.*, 283 Or 147, 151, 582 P2d 1352 (1978). Under the Equal Footing Doctrine, “[l]ands
14 lying below the ordinary high water mark for navigable rivers are, thus, generally owned by the
15 state and are considered to have been so held since the admission of that state to the Union.”
16 *Northwest Steelheaders Ass’n., Inc. v. Simantel*, 199 Or App 471, 481, 112 P2d 383, 380 (2005).
17 That title-navigability “test is applied to the conditions of the river at the time of statehood.” *Id.*,
18 199 Or App at 481. The State holds such lands in trust for the public. *Id.*

19 Unlike the equal-footing doctrine, however, which is the constitutional foundation
20 for the navigability rule of riverbed title, the public trust doctrine remains a matter
of state law....

21 *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S.Ct. 1215, 1234 (2012).

22 The States retain residual power to determine the scope of the public trust over
23 waters within their borders, while federal law determines riverbed title under the
equal-footing doctrine.

24 *Id.*, 132 S.Ct. at 1234. As set forth below, Oregon courts have long recognized the State’s
25 authority over its waterways and articulated a public right for access for waterways that are
26 deemed navigable-in-fact, even if they are not title-navigable. Oregon courts have consistently

1 held that there exists a public right of access and use of such navigable-in-fact waterways,
2 including use for recreational purposes. It is undisputed that Oswego Lake is navigable-in-fact.
3 Plaintiffs therefore submit there is a public right to access and use the Lake for recreational
4 purposes.

5 **C. Oswego Lake is Subject to the Public Floatation Easement or Public Use**
6 **Doctrine.**

7 The Public Floatation Easement or Public Use Doctrine provides the public with a right
8 to access and use all navigable waterways in Oregon for recreational purposes. Because the
9 Lake is navigable-in-fact today, the general public, including the plaintiffs, therefore possess a
10 public right to access and swim and paddle on the Lake. Neither the defendant City nor the
11 defendant-intervenor Lake Oswego Corporation can rely upon artificial improvements to the
12 Lake as a basis to exclude the public from reasonable access and recreational use of the Lake.
13 Under the Oregon Supreme Court’s holding in *Luscher v. Reynolds*, 153 Or 625 (1936), even if
14 some portion of the beds of the Lake is privately owned, the public still has a right to use the lake
15 and a right to incidental use of any private bed and banks if necessary to exercise its right.

16 **1. Oswego Lake is a Public Lake Subject to Public Floatage Rights**
17 **because it is Navigable-in-Fact in its Current Condition.**

18 Oregon has long recognized public navigation rights in the State’s waters. The 1859
19 Statehood Act promised that all navigable waters in Oregon would remain “forever free.” Act of
20 Feb. 14, 1859, ch. 33, § 2, 11 Stat. 383. Ten years after the Act’s recognition of the waters as
21 “common highways,” the Oregon Supreme Court, in *Weise v. Smith*, 3 Or 445, 450 (1869), held
22 that navigable waterways are “public highways” that each person has “an undoubted right to use
23 ... for all legitimate purposes of trade and transportation.” The *Weise* court ruled that the public
24 had the right to conduct log drives to transport logs downstream on the Tualatin River over
25 privately owned riverbeds, and even to use private uplands where necessary to facilitate the log
26 drives. *Id.* The Court explained that “[w]hen a stream is inherently and in its nature capable of

1 being used for the purpose of commerce, for the floating of vessels, boats, rafts or logs, the
2 public easement exists.” *Id.* at 449.

3 The Oregon Supreme Court has also expressly held that the public possesses the right to
4 recreate in all of the State’s navigable-in-fact waters. In *Guilliams v. Beaver Lake Club*, 90 Or
5 19 (1918), the Court recognized the public’s right to use waterways that are floatable by vessels,
6 including recreational watercraft. The Court divided the water bodies of the State into four
7 categories:

8 (1) Those in which the tide ebbs and flows, which are technically
9 denominated navigable, in which class the sovereign is the owner of the soil
10 constituting the bed of the stream, and all right to it belongs exclusively to the
11 public.

12 (2) Those which are navigable in fact for boats, vessels, or lighters. In these,
13 the public has an easement for the purposes of navigation and commerce, they
14 being deemed public highways for such purposes, although the title of the soil
15 constituting the bed remains in the adjacent owner, subject to the superior right of
16 the public to use the water for the purposes of transportation and trade.

17 (3) The streams which are so small and shallow that they are not navigable for
18 any purpose, the public has no right to whatever.

19 (4) To this list may be added our larger rivers susceptible to a greater volume
20 of commerce where the title to the bed of the stream remains in the state for the
21 benefit of the public.

22 90 Or at 19.

23 For those water bodies in the second category, the Court determined the public use rights
24 in those waterways included recreational activities, stating “[w]e do not see why boating or
25 sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary
26 profit.” *Id.* The Court further held that this right applied to inland lakes, and reasoned that to
hand Oregon’s small inland lakes over to private ownership “... would be a great wrong upon the
public for all time....” *Id.*, 90 Or at 29 (*quoting with approval* from the Minnesota Supreme
Court’s decision in *Lamprey v. State*, 52 Minn. 181, 200 (1893)).

Two decades later, in *Luscher v. Reynolds, supra*, the Court affirmed the *Guilliams*
holding and its recognition of a public easement for navigable-in-fact waterways. In *Luscher*,

1 the Oregon Supreme Court determined that Blue Lake in Multnomah County, which is
2 one-quarter the size of Oswego Lake, was navigable-in-fact for recreational boats, even though
3 its lakebed was privately owned. 153 Or at 633-34. The Court also noted that, as with Oswego
4 Lake, Blue Lake’s natural water level was artificially altered by drainage and a dam, and the
5 Court was “unable to reconcile or comprehend the findings of the trial court relative to the issue
6 of whether there has been substantial recession of the water due to artificial drainage.” *Id.* at
7 628. The “findings as to whether the lake is navigable or non-navigable [we]re likewise
8 indefinite and uncertain.” *Id.* at 629. The Court nevertheless ruled that there was a public right
9 of access to Blue Lake for recreational use because it was navigable-in-fact in its artificially
10 altered state.

11 While we have held that Blue Lake is not a navigable body of water in the sense
12 that title to the bed thereof would pass to the state upon admission to the Union, it
is navigable in a qualified or limited sense.

13 *Id.* at 634. That is:

14 ...title to the bed is in the adjacent owners subject however to the superior right of
15 the public to use the water for the purposes of commerce and transportation.
16 “Commerce” has a broad and comprehensive meaning. It is not limited to
17 navigation for pecuniary profit. A boat used for the transportation of
18 pleasure-seeking passengers is, in a legal sense, as much engaged in commerce as
is a vessel transporting a shipment of lumber. There are hundreds of similar
beautiful, small inland lakes in this state well-adapted for recreational purposes,
but which will never be used as highways of commerce in the ordinary
acceptation of such terms.

19 As stated in *Lamprey v. State*, 52 Minn. 181, 53 N.W. 1139, 38 Am. St. Rep. 541, 18

20 LRA 670, *quoted with approval* in *Guilliams v. Beaver Lake Club*, *supra*:

21 To hand over all these lakes to private ownership, under any old or narrow test of
22 navigability, would be a great wrong upon the public for all time, the extent of
23 which cannot, perhaps be anticipated. Regardless of the ownership of the bed, the
public has the paramount right to the use of the waters of the lake for the purpose
of transportation and commerce.

24 153 Or at 635-36.

25 These cases, while dated, remain good law and clearly establish that Oregon’s public
26 trust doctrine relative to the public’s right of access and use of the State’s waterways, falls

1 among the category of states where the Public Trust Doctrine extends to any water body, whether
2 artificial or manmade; and that such waterways are subject to public access for recreational use if
3 they are susceptible to such use by being navigable-in-fact. This is, in fact, by far the majority
4 rule throughout the United States. See Annot., *Public Rights of Recreational Boating, Fishery,*
5 *Wading and the Like in Inland Streams, the Bed of Which is Privately Owned*, 6 A.L.R. 4th 1030
6 (1981). Accord *Fish House, Inc. v. Clarke*, 693 S.E.2d 208, 212 (N.C. App. 2010) (“any
7 waterway, whether manmade or artificial, which is capable of navigation by watercraft
8 constitutes ‘navigable water’ under the public trust doctrine of this state”). As one court
9 explained under similar circumstances,

10 When the owner of the land raised the lake level so as to cover it, such land
11 immediately became subject to use by the public as a part of the natural lake bed,
12 not by permission of the owner of the paper title, but by the same right that the
13 public used any other part of the lake.

13 *Village of Pewaukee v. Savoy*, 79 N.W. 436, 438 (Wis. 1899). “The creation of the condition,
14 knowing that the public will have a right to enjoy it, necessarily carries with it a presumed
15 intention that they shall enjoy it.” *Id.* See also *Adirondack League Club, Inc. v. Sierra Club*, 92
16 N.Y.S.2d 591, 706 N.E.2d 1192 (1998).

17 The Oregon Attorney General, too, has consistently interpreted the law to conclude that
18 the public rights to fish in all navigable-in-public use waters are “free and common to all the
19 citizens of the State,” irrespective of whether the bed is publicly or privately owned. 29 Or. Op.
20 Att’y. Gen. 296, 311-12 (1959). In fact, the 1959 Opinion specifically addressed Oswego Lake
21 and declared that the Lake had “a qualified navigability in that it is used for boating and is,
22 therefore, navigable in fact.” As such, the Opinion classified Oswego Lake in the same second
23 category as the Supreme Court placed Blue Lake in *Luscher*. 29 Or. Opp. Att’y. Gen. 296, 297
24 (1959) (*citing Williams*, 175 P at 439). Significantly, the Opinion also recognized that as a lake
25 whose waters were “navigable in fact:”

26 It appears clear that the public has a paramount interest in the waters of Lake
 Oswego for purposes of transportation and commerce.

1 *Id.* Accordingly:

2 ... *public rights in such bodies of water, held by it in trust for the public*, extend
3 further than the use of the same as a highway for commerce, or for navigation, in
4 the technical legal sense, and include navigation and commerce to include the
right to fish, boat, bathe, and do other things incidental to the public use of such
water.”

5 *Id.* at 297.

6 In short, the State recognized that Oregon’s Public Trust Doctrine extended to include all
7 navigable-in-fact waterways, including Oswego lake, and that, as such, the State had an
8 affirmative responsibility as public trustee to enforce the public’s right of access and recreational
9 use of the Lake.

10 In 2005, the AG revisited the issue and again concluded, “[E]ven if the bed of a waterway
11 is privately owned, the waterway may be used by the public for certain purposes if it meets the
12 state test of navigable-for-public use (the ‘Public Use Doctrine’). 50 Or. Op. Att’y. Gen. 8281,
13 at 2, 16-24 (2005). All that plaintiffs must prove to enjoy this right is that the Lake “has the
14 capacity, in terms of length, width, and depth, to enable boats to make the successful progress
15 through its waters.” *Id.* at 2. “If a privately owned waterway meets this test, the lawful public
16 uses generally include navigation, commerce or recreation,” including “use of small boats for
17 pleasure and fishing, as well as swimming.” *Id.*

18 There is no dispute that Oswego Lake is navigable-in-fact. Boats can and do progress
19 through the Lake’s waters on a regular basis. Plaintiffs have themselves traveled on the Lake by
20 kayak and by swimming. Kramer Aff., ¶ 7; Prager Dec., ¶ 3. The Oregon Marine Board has
21 adopted comprehensive rules for public recreational use, including boat operations and
22 waterskiing on the Lake. OAR 250-020-0031. The Lake Oswego Corporation even operates a
23 marine patrol on the Lake. *See* Lake Oswego Corporation Answer, ¶ 27. Therefore, the general
24 public should and does possess the right to use the Lake for navigation, commerce and
25 recreation, including use of canoes or kayaks, and swimming. To exclude these uses by the

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1 general public would, in the words of the Oregon Supreme Court, work “a great wrong for all
2 time.”

3 **2. Oswego Lake is Subject to the Public Use Doctrine Regardless of**
4 **Artificial Improvements.**

5 The Lake Oswego Corporation contends in its Answer that Oswego Lake is not open to
6 the public because artificial improvements have expanded the size of the Lake. See Lake
7 Oswego Corporation Answer, ¶¶ 3, 6, and 9. This argument is contrary to Oregon law. As
8 explained above, Oregon decisions firmly establish that the Lake is subject to public use because
9 it has the present capacity to enable boats to pass through its waters, regardless of whether
10 artificial improvements have changed the Lake’s natural state. See *Luscher*, 56 P2d at 1160,
11 1162; 50 Or. Op. Att’y. Gen. 8281 (2005), at 2, 16-24. Additional alterations to the Lake’s level
12 cannot work to exclude the public. See *Luscher, supra.*¹

13 Sucker Lake (the former name for Oswego Lake) was meandered in 1851, prior to the
14 time of statehood, and the State further acknowledges the Lake as navigable and that its waters
15 are owned by the public. See State of Oregon Answer, ¶¶ 6-10, 15; State of Oregon Response to
16 _____

17 ¹ Decisions from the U.S. Supreme Court and other jurisdictions also make it clear
18 that artificial improvements to navigable-in-fact waters can serve to subject a waterway to public
19 use under the Public Trust Doctrine. See *State ex rel. Medlock v. S.C. Coastal Council*, 289 S.C.
20 445, 448, 356 S.E.2d 716, 718 (1986) (holding canals and ditches, dug by rice planters for the
21 purpose of water control “have become the functional equivalent of natural streams” and are thus
22 open to the public under the State’s Public Trust Doctrine); *State v. Columbia Water Power Co.*,
23 63 S.E. 884, 887 (S.C. 1909) (holding that a canal constructed to improve the navigability of two
24 navigable rivers becomes “a part of those rivers, and therefore navigable just as any other portion
25 of them is navigable”); *Weatherby v. Meiklejohn*, 13 N.W. 697, 699 (Wis. 1882) (addressing use
26 of artificially improved waterway, and holding “the defendants are not entitled to recover from
the plaintiff for its use any more than they could for the use of the stream had no such channel
been cut.”); *The Robert W. Parson*, 191 U.S. 17, 27, 24 S.Ct. 8, 11 (1903) (holding that the
artificially created Erie Canal was navigable and explaining, “[I]ndeed, most of the harbors upon
the lakes and Atlantic coast are made accessible by canals wholly artificial, or by an artificial
channel broadening and deepening their natural approaches”); *In Re Boyer*, 109 U.S. 629, 3 S.Ct.
434 (1884) (holding Michigan and Illinois canal to be navigable). The “authorities leave no
doubt that a canal constructed to improve ... navigation is navigable water.” *Columbia Water
Power Co.*, 63 S.E. at 887.

1 Admissions, ¶¶ 3-6. ORS 274.430 provides that all meandered lakes are declared to be
2 “navigable and public waters.” Thus, regardless of artificial improvements extending its volume
3 depth and breadth, Oswego Lake, as it existed at statehood, is open to the public by statute. The
4 fact that the Lake’s boundaries have expanded because of artificial improvements does not alter
5 the right of public access to the *current* boundaries of the Lake, however.

6 The language used by the Texas Supreme Court in *Diversion Lake Club v. Heath*, 86
7 S.W.2d 441 (Tex. 1935), is instructive. That case involved the issue of whether the public had
8 the right to fish on a lake created by an irrigation dam across a navigable river. When the lake
9 was created, it flooded former dry bank land which had not been a part of the stream bed. Dry
10 bank land owners tried to stop fishermen from fishing the lake above the former dry land area.
11 The Court held that the land and bed owners’ position was “untenable” because the water in the
12 lake was “public water.” The Court said at 446:

13 It [the water] is part of the flood water of the Medina River which the irrigation
14 company has the right to impound and divert for irrigation. The permit acquired
15 by the irrigation company carried with it the incidental right to construct and
16 maintain the dam and the lake. ***It gave no title to the water***, but only the right to
17 divert and use so much of the water appropriated as might be necessarily required
when beneficially used for the purpose for which it was appropriated.... This
artificial change in the river and in the bend did not affect the public nature of the
water of the waters and did not take away the right of the public to use them for
fishing [citing cases from Wisconsin and Michigan].

18 (Emphasis added).

19 The Texas court cited an Oregon decision, *Hume v. Rogue River Packing Co.*, 51 Or 237
20 (1917), among other cases, for the general rule that the right of hunting and fishing by all
21 members of the public is not confined to tidal waters but has been extended to all the public
22 waters of the country which “are those waters that are navigable in fact.” 86 S.W.2d at 444.

23 In our neighboring state of Washington, in the case of *Wilbour v. Gallagher*, 77 Wash.2d
24 306, 462 P2d 232 (1969), the Court considered the situation of Lake Chelan, some 19.55 miles
25 long and one to two miles in width and concededly, a navigable body of water, in which there
26 was flooding of some town plats and lots when the lake was artificially raised and lowered. The

1 Court held that where the level of a navigable body of water fluctuates due to natural causes, so
2 that a riparian owner's property is submerged part of the year, the public had the right to use all
3 the waters of the navigable lake or stream, whether it be at the high water line or the low water
4 line. The Court said that the public rights to use the water increase as the water of the Lake rises
5 naturally and the rights of the landowner decrease since they cannot use their property rights in
6 such a manner to interfere with expanded public rights. The Court then extended that rule to
7 include the situation where the waters of a navigable body are raised and lowered by artificial
8 means. 462 P2d at 238. In so ruling, the Washington Supreme Court cited an earlier ruling of
9 the Wisconsin Supreme Court in *Mendota Club v. Anderson*, 101 Wis. 479, 493, 78 N.W. 185,
10 190 (1899):

11 Certainly, persons navigating the lake cannot be required or expected to carry
12 with them a chart and compass and measuring lines, to determine whether they
13 are at all times within what were the limits of the lake prior to the construction of
14 the dam.

15 Plaintiffs have found no cases supporting the defendants' position that somehow "public
16 water" magically becomes the "private water" of the Lake Oswego Corporation after a dam was
17 constructed that resulted in an artificial increase in the volume, depth, and breadth of the Lake.
18 Indeed, the State of Oregon, both in its Constitution and statutes, has declared all the waters of
19 this state to be owned by the State, in its sovereign capacity, in trust for the "public" and not
20 private. Or. Const., art. I, § 18; Act of Feb. 24, 1909, ch. 221, § 1, 1909 Or. Laws 319, 370; *see*
21 *also* Act of July 1, 2009, ch. 907, 2009 Or. Laws 3237, 3238; ORS 537.110 (declaring that "all
22 water in Oregon belongs to the public pursuant to law."). Oregon's sovereign ownership of the
23 State's water applies to the waters of Oswego Lake.

24 **3. Regardless of Bed Ownership, the Public Has a Floatage Right and a
25 Right to Access because it is a Necessary Incidental Use.**

26 Even if some of the lakebed beneath Oswego Lake is privately owned, such private bed
ownership provides no justification for excluding public use of the Lake or incidental use of the
bed and banks to obtain public access in order to exercise that floatage easement.

1 In *Weise, supra*, the Oregon Supreme Court upheld the public’s right to navigate over
2 privately owned riverbeds and use of private uplands incident to that navigation. 3 Or at 449-51.
3 When a stream is “capable of being commonly and generally useful for floating boats, rafts or
4 logs, for any useful purpose of agriculture or trade, though it be private property, and not strictly
5 navigable, is subject to the public use as a passage way.” *Weise*, 3 Or at 449. The *Weise* court
6 concluded that it was permissible for Smith to float saw-logs down the Tualatin River and
7 temporarily place a boom on the adjacent private land because use of the boom was “necessary
8 in order to enable the plaintiff to exercise a right of navigation.” *Id.* at 451. *Weise*, the riparian
9 landowner (much like the City and the Lake Oswego Corporation here), took his title to the land
10 subject to the public’s right of navigation. *Id.*

11 The Oregon Supreme Court also explicitly recognized public rights to waters over private
12 beds in *Luscher*, explaining that “[r]egardless of the ownership of the bed, the public has the
13 paramount right to the use of the waters of the lake for the purpose of transportation and
14 commerce.” 56 P2d at 635.

15 The floatage easement is thus a creature of legal and practical necessity. Through that
16 legal doctrine, the boating public has traditionally enjoyed priority over the riparian (and littoral)
17 landowners to the extent that the boaters’ incidental activities on those riparian lands are
18 reasonably necessary to the convenient use of the waterway for travel. Basically, those
19 customary uses of the boating public which are reasonably necessary to the convenient use of the
20 river as a waterway are permitted, and only those uses which are not necessary to convenient
21 travel on the river are not permitted. *See Weise v. Smith*, 3 Or 445 (1869); 50 Or. Op. Att’y.
22 Gen. 8281, *supra* at 2.

23 Oregon, therefore, falls among the states that recognize the public’s right to use uplands
24 necessary to use navigable water bodies. *See, e.g., State v. Town of Linn*, 556 N.W.2d 394, 402
25 (Wis. 1996) (“we conclude that it is appropriate to extend the public trust doctrine to include

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1 navigable waters and the shore appurtenant in order to ensure the public’s continued access and
2 free use of the waters.”).

3 Permitted uses therefore would include activities necessarily incidental to the public’s
4 recreational use, such as anchoring, mooring, poling, wading, and beaching for periods of rest,
5 regardless of whether the bed of the waterway is touched. While the public floatage easement
6 would not allow activities *on the private uplands* regardless of whether those activities were
7 connected with the use of the waterway by boating, it is clear that there is a necessary implied
8 right of public access, reasonable in scope, to allow it to exercise its right of public recreational
9 use of the Lake.

10 In short, the public has the right to float any Oregon waterway that can be, in fact,
11 floated, regardless of ownership. Hence, the term “public floatation easement,” as the Court
12 referred to it in *Northwest Steelheaders, supra*, 99 Or App at 476, n. 4. The scope of the public
13 easement certainly includes swimming and paddling, and those activities necessarily incidental
14 to such use, including access to the Lake.²

15 **D. The City is in Violation of art. I, § 20, of the Oregon Constitution because it**
16 **has Privatized and Excluded the General Public from Accessing Oswego**
17 **Lake.**

17 The right of fishing on a navigable stream in Oregon is free and common to all of
18 the citizens of the state.

19 *Eagle Cliff Fishing Co. v. McGowan*, 70 Or 1, 137 P 766 (1914).

20 The legislature cannot grant to one person an exclusive right to catch salmon in a
21 navigable stream because when that which belongs equally to all of the citizens of
22 this state is taken from all invested in only one citizen, it is equivalent to
transforming a public right into a monopoly, exercisable by only one citizen, and
it is therefore in violation of art. I, § 20, Oregon Const., which commands:

24 ² This floatage easement right to the public in waters of sufficient size to support
25 boating for pleasure or profit was also suggested as the more appropriate basis for deciding the
26 public’s right to access to Oregon’s beaches in the concurring opinion in *State ex rel Thornton v. Hay*, 254 Or 585, 600, 462 P2d 671, 679 (1969) (Denecke, J. specially concurring).

1 “No law shall be passed granting to any citizen or class of citizens any
2 privileges or immunities which, upon the same terms, shall not equally
3 belong to all citizens.”

3 29 Or. Op. Att’y. Gen. 311-12 (1959).

4 As a creature of the State, the City of Lake Oswego, in adopting Resolution 12-12,
5 effectively transformed a public right of access to Oswego Lake into a monopoly exercisable
6 only by one small class of citizens. The Resolution, as applied, is therefore in violation of art. I,
7 § 20, of the Oregon Constitution.

8 When a state holds a resource which is available for the free use of the general
9 public, a court will look with considerable skepticism upon **any governmental**
10 **conduct** which is calculated either to relocate that resource to more restricted uses
11 or **to subject public uses to the self-interest of private parties.**

11 *In Re Sanders Beach*, 143 Idaho 443, 453, 147 P3d 75, 85 (2006) (quoting J. Sax, *The Public*
12 *Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich.L.Rev. 473,
13 490 (1970) (internal quotation omitted; emphasis added).

14 The City of Lake Oswego is a governmental authority of the State and therefore
15 possesses duties above and beyond those of a mere private riparian landowner. Here, the Court
16 should “look with considerable skepticism upon” and invalidate the City’s “governmental
17 conduct which is calculated ... **to subject public uses to the self-interest of private parties.**”

18 The City’s parks, Millennium Plaza, Sundeleaf, and Headlee Walkway, and its swim
19 parks, would not only provide suitable facilities for accessing the Lake, but in fact, are the **only**
20 public access points on the Lake. The City’s denial of public access at its three waterfront parks
21 is inconsistent with statements that the City made to state and federal authorities to obtain
22 permits to construct the parks to provide public access to and along the Lake. Instead of making
23 these facilities available, however, the City has affirmatively prohibited and obstructed public
24 access, and itself declared the Lake to be a “private lake” with no right of public access –
25 effectively denying access to everyone but members of the Lake Oswego Corporation.

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1 Furthermore, Oregon law delegates uniform regulation of use of boats on public
2 waterways to the State Marine Board – not to a private marine patrol of the corporation. 29 Op.
3 Att’y. Gen. 296 (1959). ORS 830.040 (“no political subdivision of this state may enact or
4 enforce any law contrary to the provisions of this chapter.”). Indeed, the Marine Board has
5 adopted regulations governing boat operations and water skiing on Oswego Lake. See
6 OAR 250-020-0031. But in this case, the City has expressly determined to do exactly that and to
7 prohibit public access to the Lake apparently on the ground that the Lake Oswego Corporation
8 has “done a good job” of regulating the Lake’s use. Prager Dec., ¶ 56, Ex. “U” (Minutes). The
9 City’s delegation of such private regulation of the Lake and its designation of the Lake as a
10 “private lake” violates the Oregon Constitution, art. I, § 20, and state laws. See *Johnson v. Hoy*,
11 151 Or 196 (1935):

12 It is well-settled law in this jurisdiction that the Legislature cannot grant to one
13 person or corporation an exclusive right to catch salmon in the navigable waters
14 of this state. The right of fisheries is common to all citizens of this state. To
15 deprive citizens of such right would be in violation of the state Constitution (art. I,
§ 20) which commands that “no law shall be passed granting to any citizen or
class of citizens, privileges or immunities which, upon the same terms, shall not
equally belong to all citizens.

16 151 Or at 197. See also *Voth v. Fisher*, 241 Or 590 (1965); *Monroe v. Withycombe*, 84 Or 328
17 (1917); *Kliks v. Dalles City*, 216 Or 160 (1959); 40 Op. Att’y. Gen. 111 (1979); 32 Or. Op.
18 Att’y. Gen. 383 (1966); 29 Or. Op. Att’y. Gen. 311 (1959).

19 CONCLUSION

20 The Court should find that there is no material disputed issue of fact that, regardless of
21 title navigability and ownership of the beds of the Lake, the Lake is navigable-in-fact under
22 Oregon law and the public therefore has a right of recreational use of the Lake’s waters and a
23 right of public access as a necessary incident of that right. Therefore, plaintiffs are entitled to a
24 declaration that the Lake’s waters are held in trust for use and enjoyment by the entire public,
25 and that Resolution 12-12, to the extent it forecloses all public access to the waters of the Lake,
26 is contrary to state law. The Court should accordingly enter summary judgment in favor of the

1 plaintiffs and enjoin the defendants to enforce, protect, and preserve the public's right of
2 reasonable access to, and use of the Lake.

3 DATED this 24th day of June, 2013.

4 LANDYE BENNETT BLUMSTEIN LLP
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