

ADDING CONFUSION TO THE MUDDY WATERS OF THE OSWEGO LAKE DECISION: A RESPONSE TO DEAN HUFFMAN

By

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Dean Jim Huffman’s recent article in Environmental Law on the Oswego Lake decision claims that the Oregon Supreme Court’s opinion is a “confused treatise on the public trust doctrine.” Objecting to the court’s decision on a number of grounds, Dean Huffman took issue with the court’s recognition of public access rights, its creation of a so-called “public use” doctrine, its use of the law of private trusts, and its recognition of the state’s claim of ownership of water within its jurisdiction. Moreover, and somewhat astonishingly, Huffman claims that the rights of the people cannot be violated by the representatives of the people, seemingly at odds with over a century of case law. Although we agree with a few of Huffman’s criticisms, he overlooks some critical public trust interpretations of the Oswego Lake court, such as its recognition of the trustee status of municipalities. He also confuses other issues, like the state’s distinction between what it calls “navigable-in-fact” waters (those which support recreational watercraft today) and those waterways that are navigable under the federal title test (commercially navigable around the time of statehood). We explain our criticisms in this essay.

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Our friend, former colleague, and dean, Jim Huffman, well known as the Darth Vader of the public trust doctrine,¹ dashed off a comment on the Oswego Lake decision² while an article of ours was in press without our knowledge.³ We use this space to respond to Jim because while we agree with him that Oregon Supreme Court’s decision is problematic, several of his criticisms are

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¹ See Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 597 n.108 (1989) (describing Huffman as the “Darth Vader of the public trust doctrine.”)

² James L. Huffman, *Oregon Supreme Court Muddies the Waters: Kramer v. City of Lake Oswego*, 50 ENVTL. L. 455 (2020). Jim is perhaps the most frequent and longstanding critic of the doctrine, as evident in some of his many writings which his article references. See, e.g., *id.* at 456 nn. 4–19; 460 nn. 33–34; 466 n. 71; 468 n. 89; 473 n. 114. For a review of some of his scholarship, see Michael C. Blumm, *The Water Law Scholarship of Jim Huffman and Janet Neuman: Prologue to the Festschrift*, 41 ENVTL. L. 1, 2–6 (2012).

³ Michael C. Blumm & Ryan J. Roberts, *Oregon’s Amphibious Public Trust Doctrine: The Oswego Lake Decision*, 50 ENVTL. L. no. 4 (forthcoming Dec. 2020) (manuscript at 22–23 nn. 108–115) [hereafter *Oregon’s Amphibious PTD*], <https://ssrn.com/abstract=3592003>.

wide of the mark, the comment has important omissions, and a number of its statements are inaccurate.

First, we agree with Jim that the so-called “public use” doctrine, which the court distinguished from the public trust doctrine, has little to recommend it, as there is no functional difference between the two doctrines in terms of the public’s right to use waterways.⁴ Since Jim’s project has been to argue that the public trust doctrine is merely a public easement for navigation and fishing, he does not see the need for a “public use” doctrine recognized as an easement. While we agree, we do not share his view that the public trust doctrine is simply a public access easement; it also is an inherent limit on sovereignty that imposes a fiduciary obligation to protect trust resources from “substantial impairment.”⁵ This aspect of the public property right is not an access easement but is instead akin to a restrictive servitude. In his effort to narrow the scope of the doctrine, Huffman does not recognize its existence as a limitation on government.

Nor, as Jim suggests, is the public trust doctrine limited to navigation and fishing. For over a century, courts have expanded the scope of trust resources to include recreational uses,⁶ such as those at issue in the Oswego Lake case. Environmental preservation has been a trust purpose for nearly a half-century.⁷ So, Huffman’s objection to the “public use” doctrine is a product of mischaracterizing the scope of the public trust doctrine. Our objection, on the other hand, is based the fact that the “public use” doctrine apparently relieves the state of its fiduciary obligations, contravening the very essence of the trust in holding government officials accountable to the

⁴ Huffman, *supra* note 2, at 463–67. *Cf.* For our criticism of the court’s ratification of the public use doctrine, see *Oregon’s Amphibious Public Trust Doctrine*, *supra* note 3, at 22–23 nn. 108–115).

⁵ *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435 (1892). *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911, 931–932 (Pa. 2017). *See infra* note 29.

⁶ The seminal case is *Lamprey v. Metcalf*, 53 N.W. 1139 (Wisc. 1893), whose reasoning was adopted by the Oregon Supreme Court in *Guilliams v. Beaver Lake Club*, 175 P. 437 (Or. 1918).

⁷ The pathbreaking case was *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971).

citizenry.⁸ In fact, in the Oswego Lake case, the state denied any obligation to protect public access at all.⁹

Second, we also agree with Huffman’s claim that the public trust doctrine is not limited to waterbodies whose beds are owned by the state.¹⁰ The interaction of private ownership of submerged (and/or submersible) lands and public trust property rights held by citizens over such lands should have been made clear as long ago as the 1918 *Guilliams* decision, which upheld public’s right to use waterways overlying privately owned streambeds.¹¹ Huffman criticized the Oswego Lake court for creating this unnecessary linkage, but it was actually not a creation of that court. Instead, it was the product of the 2005 Attorney General’s opinion that invented the “public use” doctrine, although the court never acknowledged that it was merely affirming the Attorney General’s misguided opinion.¹² So, we agree with Huffman’s criticism but think he should have recognized the origin of what Jim views as a problem.¹³

⁸ See *Oregon’s Amphibious PTD*, *supra* note 4, at text accompanying notes nn. 116–120.

⁹ See *id.* at text accompanying nn. 9, 51.

¹⁰ Huffman, *supra* note 2, at 460 (disagreeing with the Oswego Lake court that the source of the public trust doctrine is derivative of state ownership of submerged lands); *id.* at 462 (comparing the public trust doctrine to an easement in which a transfer of ownership of the servient estate does not extinguish the easement and also asserting that “sovereign title to submerged lands beneath navigable waters was a product of the preexisting right of public use in those waters” which serves as a prima facie rule of original title but not necessary for the continued existence of public rights).

¹¹ *Guilliams*, 175 P. at 442, reinforced by *Luscher v. Reynolds*, 56 P.2d 1158 (Or. 1936).

¹² Or. Op. Att’y Gen. 8281 (2005), 2005 WL 1079391 (Or. A.G.) [hereinafter 2005 AG Opinion]. The 2005 opinion is examined in some detail in Michael C. Blumm & Erica A. Doot, *Oregon’s Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 375, 382–86 (2012). The state’s interest in creating an entirely novel doctrine was an effort to eliminate its fiduciary obligations for waterways whose beds were privately owned. See *supra* notes 8–9; *Oregon’s Amphibious PTD*, *supra* note 4, at text accompanying nn. 108–115.

¹³ Also confusing is Jim’s statement that in the wake of the Supreme Court’s opinion, the public will have a right of access to Oswego Lake if the lake is “navigable in fact at the time of statehood.” Huffman, *supra* note 2, at 472. This assertion conflates the term “navigable in fact” with the test for navigability under the federal rule for title, a distinction central to the Oregon Supreme Court’s decision. See *Oregon’s Amphibious PTD*, *supra* note 4, at text accompanying n.110. Oswego Lake is clearly “navigable in fact” under state law, giving the public a right to swim and boat on the lake if there is public access to the lake under *Guilliams* and similar cases, as explained in the 2005 Attorney General’s opinion. See 2005 AG Opinion, *supra* note 12, at 24 (explaining that “navigable in fact” waters are those suitable for recreational

Our criticisms of Huffman’s comment begin with his failure to mention a groundbreaking decision of the Oswego Lake opinion. He overlooked the court’s ruling that municipalities as well as the state are trustees, subject to trust obligations.¹⁴ Moreover, he mischaracterized another groundbreaking ruling that interpreted the trust to apply to public uplands adjacent to navigable waters as a misinterpretation of standard riparian rights law.¹⁵ In fact, the court later clarified that its decision was not intended to interpret riparian rights law.¹⁶

Another error of the Huffman comment is its singular focus on the court’s opinion, obscuring the role that other branches of state government have played in recognizing public rights. For example, he not only failed to recognize that the 2005 Attorney General opinion was the origin of the “public use” doctrine, he seemed to suggest that the state’s claim of ownership of water is questionable.¹⁷ This assertion ignored the longstanding declaration by the state, dating to the 1909 Water Code, that the state owned “[a]ll water within the State from all sources of water belongs to the public.”¹⁸ Public ownership of resources evokes public rights. The Oswego Lake court recognized that the public ownership of water, no less than the state’s ownership of wildlife, implicated the public trust doctrine.¹⁹ Even the state has acknowledged that public ownership of

watercraft). According to the Oswego Lake court, the public trust right of access across public uplands is a function of whether Oswego Lake was navigable under the federal title test at or around the time of statehood. *Kramer v. City of Lake Oswego*, 446 P.3d 1, 12 (Or. 2019).

¹⁴ *Kramer*, 446 P.3d at 19.

¹⁵ Huffman, *supra* note 2, at 475–76.

¹⁶ *Kramer v. City of Lake Oswego*, 455 P.3d 922, 924 (Or. 2019) (“Because ownership of the riparian rights remains a circumstance in dispute, it would be premature for us to resolve whether that circumstance has relevance to plaintiffs’ claim for relief.”)

¹⁷ Huffman, *supra* note 2, at 465, 474.

¹⁸ The 1909 Water Code, Act of Feb. 24, 1909, Or. L. ch. 221, p. 370 §1 (1909), *codified in*, OR. REV. STAT. §537.110 (2020).

¹⁹ *Kramer*, 446 P.3d at 12 n.12. Jim suggests that the public trust in wildlife, recognized by the Supreme Court in *Geer v. Connecticut*, 161 U.S. 519 (1896), was reversed in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). While *Hughes* did reverse *Geer* on whether state ownership of wildlife could insulate a state from the scrutiny under the Commerce Clause (or other federal prerogatives), the decision has not prevented at least 48 states from claiming the existence of a wildlife trust under state law. See Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437 (2013). As Justice Brennan wrote

water is in trust.²⁰ Huffman’s questioning of public ownership of water is clearly inconsistent with state law.

Perhaps our chief criticism of Huffman’s comment is his unwillingness to acknowledge that the law can and should evolve. His commitment to judicial activism in the name of the Takings Clause may explain his deep skepticism of doctrines which could threaten a vitalization of compensation requirements due to regulations.²¹ Still, Huffman does not object to the evolution of the public trust doctrine from tidal waters to inland waters in the 19th century.²² Nevertheless, he finds the evolution of the public trust to recreation and ecological protection objectionable. In discussing Sax’s articles, he even suggested that any judicial influence the articles had would be inconsistent with stare decisis, “unsupported by the common law and therefore beyond the authority of the courts.”²³ Why the evolution of public rights in the 19th century was satisfactory but not its evolution in the 20th century, Jim never explains. He does not even seem to recognize that the common law values both stability and evolution, not just the former.²⁴ As the Oregon Supreme Court once declared:

in his opinion for the Court in *Hughes*, “the whole [state] ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power . . . so as not to discriminate without reason against citizens of other States.” *Hughes*, 441 U.S. at 334.

²⁰ The State acknowledged in *Chernaik v. Brown* that “title navigable” waterways themselves—not just riverbeds and lakebeds—are trust resources, although the Court of Appeals refused to address the legal grounds for this concession. 436 P.3d 26, 32 (Or. 2019).

²¹ The public trust doctrine is perhaps the quintessential background principle of property law that insulates regulations from compensation requirements. See Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1183-1204 (2019) (reviewing recent background principles decisions including those based on the public trust doctrine).

²² Huffman, *supra* note 2, at 461 (“The navigable rivers and lakes of the vast North American continent made the modification [the extension of public rights to inland navigable waters] necessary if the doctrine was to serve the purposes it had in England where navigable waters are almost always tidal waters.”)

²³ *Id.* at 463.

²⁴ Jim cites Justice Scalia’s dissent from denial of certiorari in *Stevens v. City of Cannon Beach* 510 U.S. 1207 (1994), as if it were law. Huffman, *supra* note 2, at 465–66.

The very essence of the common law is flexibility and adaptability. It does not consist of fixed rules but it is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life If the common law should become so crystallized . . . it would cease to be the common law of history, and would be an inelastic and arbitrary Code [O]ne of the established principles of the common law [is] that precedents must yield to the reason of different or modified conditions.²⁵

Jim also objects to the use of private trust law principles to influence public trust interpretation, because he thinks the fact that the public is both the settlor of the trust and the class beneficiary makes private trust law inapposite in the public trust world.²⁶ Why public trust jurisprudence cannot draw upon private trust law without mirroring it precisely, he does not explain.²⁷ Instead, he posits that “[t]he trust language of public trust law is better understood as an expression of the confidence necessarily placed in democratic governance,” and that “there are no judicial remedies for breach of this public trust,” suggesting without citation to authority that the only remedies lie in “lobbying, recall, or the next election.”²⁸ This rather astonishing conclusion is precisely the opposite function that the public trust doctrine serves, which is to question and cabin democratic decision making in much the same way as the Bill of Rights functions. As the Pennsylvania Supreme Court expressed, the public trust—implicit in that state’s constitution’s declaration of rights—limits, not reinforces police powers by affirming that the public’s “inherent and infeasible rights” predate the constitution itself and are embedded in the

²⁵ *In re Hood River*, 227 P. 1065, 1086–1087 (1924).

²⁶ Huffman, *supra* note 2, at 468.

²⁷ Courts regularly look to private trust standards in judging public fiduciary performance. See, e.g. *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d at 932 (Pa. 2017) (citing Restatement (Second) of Trusts section 174 in defining the state’s duties as trustee of the people’s environmental trust to include the duty of care, skill, prudence, loyalty, and impartiality). John Dernbach has suggested that public trust jurisprudence should look to conservation trust law as well as private trust law. John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 U. MICH. J.L. REF. (forthcoming 2020), <https://ssrn.com/abstract=3569906>.

²⁸ Huffman, *supra* note 2, at 468, 475. See also *id.* at 474 (“The reference to a trust responsibility must be read in that political context.”); *id.* at 475 (“ . . . the concept of trust is political, not legal.”)

social compact between the citizens and their government.²⁹ In short, public trust rights are inherent in the social contract; legislative acts cannot rescind these rights.³⁰

There are some other errors in the Huffman comment. He twice claims that the state has never claimed ownership of the submerged lands of Oswego Lake.³¹ In truth, as a meandered lake, the state asserts ownership of at least the lake as meandered in 1852.³² He also alleges that the public retains no rights in submerged lands once conveyed to private parties.³³ His assertion ignored the rights recognized in cases like *Gulliams*, which include the public right to engage in “sailing, rowing, fowling, bathing, skating, taking water for domestic, agricultural, and even city use and other purposes which cannot now be enumerated or even anticipated.”³⁴ Surely

²⁹ *Pennsylvania Environmental Defense Foundation*, 161 A.3d at 930–31 (quoting PA. CONST. art. I, § 1) (adopting analysis of *Robinson Township v. Pennsylvania*, 83 A.3d 901, 948 (2013)); *see also id.* at 948 (describing such rights as “of such ‘general, great and essential’ quality as to be enconced as ‘inviolable.’” (quoting PA CONST. art. I, § 25)). Although the Pennsylvania Constitution contains a specific public trust provision (PA CONST. art. I, § 27), the *Robinson Township* and subsequent *Pennsylvania Environmental Defense Foundation* opinions make clear that Article 27 created no new rights, but instead enumerated pre-existing rights that the people had reserved to themselves in creating government. *See id.* at 931. Notably, Article I, section I of the Oregon Constitution secures the same reserved rights of citizens, through its reservation of “natural rights inherent in people.” OR. CONST. art. I, § 1 provides: “*Natural rights inherent in people.* (emphasis added) We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority” The constitutional force of the public trust doctrine was articulated in the landmark *Illinois Central* opinion which declared, “[t]he state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government” *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 453 (1892). As one federal district court observed, “[t]he trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign.” *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981). For commentary on the constitutional underpinnings and force of the public trust principle, see Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 WAKE FOREST J. L. POL’Y 281 (2014).

³⁰ *See Lake Michigan Federation v. U.S. Army Corps of Engineers*, 742 F. Supp. 441, 446 (N.D. Ill. 1990) (“The very purpose of the public trust doctrine is to police the legislature’s disposition of public lands. If courts were to rubber stamp legislative decisions, as Loyola advocates, the doctrine would have no teeth.”) Reserved public property rights to crucial resources remain fundamental to the democratic understandings underlying all government authority. As the U.S. Supreme Court said in *Illinois Central*, private monopolization of essential resources “would be a grievance which never could be long borne by a free people.” 146 U.S. at 456.

³¹ Huffman, *supra* note 2, at 469–70.

³² *See Oregon’s Amphibious PTD*, *supra* note 4, at 11 (citing OR. REV. STAT. § 274.430(1) (2020)).

³³ Huffman, *supra* note 2, at 471.

³⁴ *Guilliams*, 175 P. at 442.

Guilliams and its progeny intended to include some rights to use the privately owned subsurface without trespass.³⁵ It is surprising that Jim would fail to recognize public rights beyond navigation and fishing since his home state of Montana recognizes both rights of access from uplands and portage rights on private uplands.³⁶

The Huffman comment concludes with the assertion that the Oswego Lake decision blurred “the distinction between the state’s police power and public rights,” encouraging “even more political factions to pursue their interests in the courts.”³⁷ We do not quite know what he means, but he does claim that the plaintiffs’ motivations were larger than public access to the lake, which, if recognized, “will be precedent for pursuit of similar claims in other state waters previously understood to be privately held.”³⁸ What those private waters are, and who recognized them, are left unsaid. Huffman raises the specter of future cases finding a right of public access over private lands.³⁹ In truth, there is precedent for public access rights in private lands, but the Oswego Lake

³⁵ *Id.* (“To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.”); *See also* *Luscher v. Reynolds*, 56 P.2d 1158 (Or. 1936) (“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.”) Commerce should be construed broadly to include pleasure-seeking passenger crafts—recreational watercraft—because Oregon courts consider recreational vessels to be engaged in commerce. *Id.*

³⁶ *Public Land Access Ass’n v. Bd. of County Comm’rs of Madison County*, 321 P.3d 38 (Mont. 2014) (denying a private landowner the right to impede the public from accessing a privately owned riverbed); *Galt v. State*, 713 P.2d 912, 915–16 (Mont. 1987) (noting, however, that public portage rights must be narrowly construed).

³⁷ *Huffman*, *supra* note 2, at 476.

³⁸ *Id.* at 477.

³⁹ *Id.* (claiming that such a result would be “a big win for the plaintiffs’ supporters and huge loss for private property rights;” also claiming that the plaintiffs’ reliance on the public trust doctrine for access “suggests they have bigger fish to fry” than just access). Huffman suggests that issue of public access to Oswego Lake could have been resolved in a more straightforward manner under riparian rights law, which will in fact be an issue on remand. How straightforward that inquiry will be is hardly clear. however, involving questions about extent of alleged reservations of private riparian rights in the adjacent public parklands, and whether private proprietary conveyances can eliminate sovereign rights held in trust for the public.

decision cautioned that such rights must be narrowly interpreted.⁴⁰ But the Oswego Lake case was about *public* access rights to a *publicly owned* lake over *publicly owned* parklands. Imagining that the case was about facts not in evidence does not serve to clarify the muddy waters that Huffman claims the Oswego Lake decision created.

⁴⁰ *Kramer*, 446 P.3d at 10–12 (interpreting *Weise v. Smith*, 3 Or. 445, 447, 450–51 (1869)) (recognizing the right of a log driver to attach a boom to a privately-owned land on an island in the Tualatin River to facilitate the log drive).