

NOTES & COMMENTS

THE PUBLIC TRUST DOCTRINE AND LAKE ABERT:
SAVING OREGON’S ONLY SALT LAKE

by
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The public trust doctrine creates a relationship between states and their citizens under which the states are entrusted with protecting natural resources for public use. Though Oregon recognizes the public trust doctrine, recent decisions from Oregon’s Supreme Court have displaced and fractured this doctrine, leaving the current legal landscape surrounding the public trust doctrine in disarray. This Note focuses on Lake Abert, Oregon’s only saline lake, which in recent years, due to mismanagement and neglect, has undergone dramatic ecological shifts. By looking at arguments rooted in Oregon’s Constitution, as well as judicial approaches taken in neighboring states, this Note examines possible avenues to advocate for Lake Abert under the public trust doctrine.

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INTRODUCTION

Just north of Oregon's borders with California and Nevada, on the western edge of the Great Basin, sits Lake Abert. Though not a household name like Oregon's Crater Lake 100 miles to the west, Lake Abert is one of the most interesting waterbodies in the state. At 64 square miles in size, Lake Abert is the state's sixth-largest lake and its only saline lake¹—with Utah's Great Salt Lake being the only saltier body of water in the United States.² Although Lake Abert's maximum surface area is three times the size of Crater Lake's,³ its average depth is less than ten feet.⁴ Lake Abert is unsuitable for swimming due to its high salinity levels,⁵ which dampens its potential as a tourist attraction. However, Lake Abert is a pivotal migration stop for birds along the Pacific Flyway who take advantage of the lake's brine shrimp and alkali fly population to refuel during their spring and fall migrations.⁶ Because of its popularity among migratory birds, birdwatchers may witness hundreds of thousands of birds in a single day on the lake.⁷ Despite the unique qualities that undoubtedly make Lake Abert into a location worth preserving and protecting, it is in a crisis. Lake Abert is presently on life support—if it is not already dead.

Due to its remoteness, there is not as rich a history surrounding Lake Abert as one might expect for such an exceptional body of water. The first record of Lake Abert from 1832 refers to the lake as "Salt Lake" and is only identifiable as Lake Abert because there are no other saline lakes in the region.⁸ Lake Abert received its official name over a decade later in 1843 when the explorer John Frémont discovered it.⁹ Reading Frémont's description of the lake is an unsettling portent of

¹ See *Lake Abert*, OR. NAT'L DESERT ASSOC., <https://onda.org/regions/hart-sheldon-region/lake-abert/> (last visited Jan. 5, 2025).

² W.R. HASSIBE & W.G. KECK, U.S. DEPT. OF THE INTERIOR, *THE GREAT SALT LAKE* 7 (1991), <https://pubs.usgs.gov/gip/70039229/report.pdf>.

³ Compare Douglas W. Larson & Ron Larson, *Lake Abert*, OR. LAKELINE, Winter 2011, at 47, 49, with *Interesting Briefs of Crater Lake National Park*, NAT'L PARK SERV., https://www.nps.gov/parkhistory/online_books/brochures/1942/crla/info9.htm (last visited Jan. 5, 2025).

⁴ *Lake Abert*, *supra* note 1.

⁵ Caitlin Bell, *Lake Abert Watershed* (USGS #17120006), OR. EXPLORER, <https://oregonexplorer.info/content/lake-abert-watershed-usgs-17120006?topic=56&ptopic=98> (last visited Jan. 5, 2025).

⁶ Rob Davis, *Oregon's Lake Abert Is 'in Deep Trouble.'* *The State Shut Down Its Efforts to Figure Out Why*, OREGONIAN [hereinafter Davis, *Oregon's Lake Abert is 'in Deep Trouble'*], <https://www.oregonlive.com/environment/2022/01/oregons-lake-abert-is-in-deep-trouble-the-state-shut-down-its-effort-to-figure-out-why.html> (Jan. 28, 2023).

⁷ *Id.*

⁸ LEWIS A. MCARTHUR & LEWIS L. MCARTHUR, OREGON GEOGRAPHIC NAMES 552 (7th ed., 2003).

⁹ JOHN CHARLES FRÉMONT, *THE EXPEDITIONS OF JOHN CHARLES FRÉMONT* 426, 594–95

Lake Abert's future. At first impressed by its size and beauty from a distance, Frémont quickly calls it "one of those fetid salt lakes which are common in this region" and expresses his frustration at the lake's inability to provide water or sustenance to his expedition party.¹⁰

There is little historical record about Lake Abert in the decades following its discovery. Sporadic mentions appear in newspapers in the late-19th and early-20th centuries, but these appearances simply act as distinguishing landmarks for events such as a diseased rabbit population¹¹ or a military battle with local Indian tribes.¹² The first substantial news about the lake occurred in the 1910s when individuals and corporations vied for mineral rights around both Lake Abert and nearby Summer Lake.¹³ According to these parties, the areas possessed upwards of 1.6 billion dollars in sodium bicarbonate and other salts.¹⁴ After this brief uptick in notoriety, Lake Abert faded from headlines for nearly 80 years.

In addition to the sodium bicarbonate drawing public attention in the 1910s, Lake Abert's reputation as a birdwatching destination has attracted the public for over a century.¹⁵ By providing a habitat uniquely suitable for brine shrimp, hundreds of thousands of birds would stop at the lake each year on their migration routes.¹⁶ These brine shrimp allowed multiple fisheries to operate on Lake Abert with the first fishery opening in 1979.¹⁷ Unfortunately, falling water levels have caused the brine shrimp population in Lake Abert to collapse in recent years and devastated the fishing industry on the lake.¹⁸

(Donald Jackson & Mary Lee Spence eds., 1970). It is worth noting Frémont was far from the first person to encounter Lake Abert. The Northern Paiute tribe lived in this region of Oregon long before Frémont's expeditions and archaeological findings discovered nearby Lake Abert make it apparent Frémont only discovered what was already known. See Larson & Larson, *supra* note 3, at 47.

¹⁰ FRÉMONT, *supra* note 9, at 594–95.

¹¹ Lakeview Examiner, *Rabbits Dying Over in Northern Lake County*, TIMES HERALD, Aug. 22, 1914, at 1.

¹² *Surprise Valley*, WEEKLY BUTTE REC., Oct. 12, 1867, at 2.

¹³ *Oregon News Notes of General Interest*, WESTON LEADER, Apr. 19, 1918, at 1. Eventually the state leased the lands to an entrepreneur to develop a salt processing plant. By the end of the decade, nothing had come to fruition and coverage faded away entirely.

¹⁴ *Governor's Warning is Repeated Again*, DAILY E. OREGONIAN, Nov. 16, 1914, at 8.

¹⁵ See, e.g., William L. Finley, *Hunting Birds with a Camera. A Record of Twenty Years of Adventure in Obtaining Photographs of Feathered Wild Life in America*, NAT. GEOGRAPHIC MAG., Aug. 1923, at 161, 193.

¹⁶ See Larson & Larson, *supra* note 3, at 54.

¹⁷ See Proposed Final Order, In the Matter of the Application for an Extension of Time for Permit S-51164, Water Rights Application S-70921 in the name of Wayne Clark, No. 9415802, at 24–26 (Or. Water Res. Dep't Feb. 12, 2019) [hereinafter Proposed Final Order, Permit S-51164]; Larson & Larson, *supra* note 3, at 56.

¹⁸ Ron Larson, Joseph Eilers, Keith Kreuz, Wolf Pecher, Shiladitya DasSarma & Steve

Recent drops in water level elevation are not a first-time occurrence for the lake. For a period of six years in the late 1920s to the early 1930s, the lake reached its lowest elevation and was either dry or nearly dry.¹⁹ It was not until 1947, almost 20 years after the Dust Bowl, that Lake Abert recovered.²⁰ This status quo at Lake Abert ended in 2014. For the first time in 80 years, Lake Abert ran dry.²¹ As a result of drops in water levels, Lake Abert's salinity levels have increased.²² Due to the higher saline content, the shrimp's primary food source dwindled, causing the brine shrimp population to die off, and leading to the fishery ceasing operations in 2014 after 35 years of business.²³ In 2021, the lake again ran dry and has still not recovered to date.²⁴

Lake Abert is unable to advocate for itself as the lake has no "legal right to exist."²⁵ The lake's survival is not just dependent on environmental conditions but on management by state agencies like Oregon's Water Resources Department (OWRD) and Department of Environmental Quality (ODEQ).²⁶ Unfortunately, in 2015, politics proved too powerful to allow the state to take any sort of meaningful action to prevent the crisis at Lake Abert from escalating. In 2014, then-Governor Kitzhaber expressed concern about Lake Abert's condition. Unfortunately

Dougill, *Recent Desiccation-Related Ecosystem Changes at Lake Abert, Oregon: A Terminal Alkaline Salt Lake*, 76 W. N. AM. NATURALIST 389, 395, 401 (2016); Davis, *Oregon's Lake Abert is 'in Deep Trouble'*, *supra* note 6.

¹⁹ Douglas W. Larson & Joe Eilers, *Lake Abert, OR: A Terminal Lake Under Extreme Water Stress*, LAKELINE, Fall 2014, at 30, 30.

²⁰ See RON LARSON & TAMARA WOOD, OR. LAKES ASSOC., WHAT IS THE STATUS AND FUTURE OF LAKE ABERT? RESPONSES TO PRIMARY QUESTIONS MOTIVATING THE WORKSHOP ON SOUTHCENTRAL OREGON SALINE LAKES 12 (2023), <https://www.oregonlakes.org/resources/Documents/Projects/OLA%20Lake%20Abert%20Status%20Future%20Jan2023.pdf>.

²¹ Anne White, *Lake Abert at Risk*, OR. NAT'L DESERT ASSOC. (Feb. 2, 2022), <https://onda.org/lake-abert-at-risk/>; Rob Davis, *Oregon's Only Saltwater Lake Is Disappearing, and Scientists Don't Know Why*, OREGONLIVE (July 3, 2014) [hereinafter Davis, *Oregon's Only Saltwater Lake*], <https://www.oregonlive.com/projects/lake-abert/>.

²² See Karla Lant, *Salinity and Water Levels Changing the Face of Lake Abert Salinity and Water Levels Changing the Face of Lake Abert Wildlife*, ENV'T MONITOR (May 10, 2018), <https://www.fondriest.com/news/salinity-water-levels-changing-face-lake-abert-wildlife.htm>; Larson & Eilers, *supra* note 19, at 31.

²³ See Lant, *supra* note 22; Proposed Final Order, Permit S-51164, *supra* note 17, at 24–25; Keith Kreuz & Lynn Kreuz, Letter to the Editor, *Readers Respond: Lake Abert Needs Lawmakers' Help*, OREGONIAN (Feb. 2, 2022, 6:00 AM), <https://www.oregonlive.com/opinion/2022/02/readers-respond-lake-abert-needs-lawmakers-help.html>.

²⁴ Rob Davis, *In Turnaround, Oregon Agencies Say They're Ready to Work Together for Lake Abert Solution*, OREGONIAN [hereinafter Davis, *Oregon Agencies Say They're Ready to Work Together*], <https://www.oregonlive.com/environment/2022/02/in-turnaround-oregon-agencies-say-theyre-ready-to-work-together-for-lake-abert-solution.html> (Apr. 5, 2022, 6:44 PM).

²⁵ Davis, *Oregon's Lake Abert is 'in Deep Trouble'*, *supra* note 6.

²⁶ *Id.*

for the lake, just a few months after it ran dry, Governor Kitzhaber resigned and his successor, Kate Brown, shifted responsibility to state agencies.²⁷

Despite the governor's office placing the burden on these agencies, this strategy proved ineffective and allowed political motivations to thwart any meaningful action to protect the lake. Though the ODEQ investigated how diversions up the Chewaucan River affect Lake Abert, these investigations ended when agency heads determined the findings led to "uncomfortable conclusions."²⁸ After Lake Abert ran dry again in 2021, the ODEQ, OWRD, and Oregon Department of Fish and Wildlife (ODFW) walked back their stance on being unwilling to help the lake but have yet to implement any changes in policy to benefit the lake to date.²⁹

This Note explores two different lines of arguments potential litigants can bring in defense of Lake Abert using the public trust doctrine: an argument rooted in Oregon's Constitution and a statutory argument. Part I discusses the causes of the current crisis at Lake Abert and explores mishandling of water right dispensation by the OWRD. Part II provides a brief overview of the public trust doctrine in Oregon and examines two recent Oregon Supreme Court decisions that have reshaped the landscape of the public trust doctrine in the state. Part III focuses on constitutional arguments for the public trust doctrine in Oregon. Part IV discusses a statutory basis for the public trust doctrine rooted in the Oregon water code and looks at how courts in other states have found the public trust doctrine encompasses similar bodies of water. This Note concludes by arguing the public should pressure the state by filing suit to obtain relief for Lake Abert and clarify the current status of the public trust doctrine in Oregon.

I. THE CURRENT CRISIS AT LAKE ABERT

Lake Abert's modern-day crisis has two interrelated causes: climate change and over-appropriation of water.³⁰ For more than twenty years, Lake County, where Lake Abert is located, has experienced either abnormally dry conditions or actual droughts nearly every year.³¹ Comparing satellite imagery from 2002 and 2022 shows the lake is just a shadow of what it used to be.³² What was once the sixth-largest lake in Oregon now appears as little more than a small, murky pond.³³ Due to extended drought causing a lower-than-average snowpack, the Chewaucan River,

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Davis, *Oregon Agencies Say They're Ready to Work Together*, *supra* note 24.

³⁰ See Larson & Larson, *supra* note 3, at 57.

³¹ *Drought Conditions for Lake County*, NAT'L INTEGRATED DROUGHT INFO. SYS., <https://www.drought.gov/states/oregon/county/Lake> (last visited Jan. 5, 2025).

³² See Davis, *Oregon's Lake Abert is 'in Deep Trouble'*, *supra* note 6.

³³ See Adam Voiland, *Shrinking Lake Abert*, NASA EARTH OBSERVATORY (Jan. 23, 2023), <https://earthobservatory.nasa.gov/images/150891/shrinking-lake-abert>.

the only river feeding into Lake Abert, received less water than normal from snowmelt which led to the lake receiving less water.³⁴ Besides small amounts of precipitation, Lake Abert is wholly dependent on the water it receives from the Chewaucan River, with the health of the lake being directly tied to the water from the river.³⁵

Though droughts constantly afflicted the region at the start of this century, they cannot fully account for the shrinking of Lake Abert.³⁶ In 2014, the lake shrunk 90% while the snowpack was only 8% below average.³⁷ The reason the lake has fallen disproportionately relative to the amount of precipitation feeding into the Chewaucan River is because of water diversions upriver.³⁸ Oregon's water rights system, like most western states, is one of appropriation, where the first to have a right to water gains priority over subsequent parties who have a water right in the same source.³⁹ Lake Abert does not have a water right in the river, so all of the "marginal agricultural land" up the Chewaucan River have superior water rights to Lake Abert's non-existent water rights.⁴⁰

Of all the diversions off the Chewaucan River, the one that has drawn the most ire in recent years, and is having the biggest effect on Lake Abert, is the River's End Ranch reservoir. Situated less than a half mile from where the Chewaucan River feeds into Lake Abert, the OWRD initially approved construction of the reservoir in 1991.⁴¹ Almost immediately the project proved disastrous.⁴² Shortly after work began on the dam, workers disturbed Northern Paiute burial sites and artifacts, with human bones visibly jutting out from the side of the dam itself.⁴³ In an ideal world, construction would have ceased at this point, but the world is far from ideal and construction continued.

The reservoir started as a collaborative project between the property owner, United States Fish and Wildlife Service (USFWS), and the ODFW with the aim to restore destroyed marsh habitats.⁴⁴ Per a lease agreement with the USFWS, the reservoir's diversions were originally contingent upon the elevation of Lake Abert, and if the lake was too low, then the property owner could not divert any water for

³⁴ See Davis, *Oregon's Only Saltwater Lake*, *supra* note 21.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Larson & Eilers, *supra* note 19, at 21.

³⁹ See, e.g., *WaterWatch of Or. v. Water Res. Dep't*, 501 P.3d 507, 510 (Or. 2021).

⁴⁰ See Larson & Larson, *supra* note 3, at 57.

⁴¹ *Id.*

⁴² See Davis, *Oregon's Lake Abert is 'in Deep Trouble'*, *supra* note 6.

⁴³ *Id.*

⁴⁴ See Proposed Final Order, Permit S-51164, *supra* note 17, at 5.

the reservoir.⁴⁵ Unfortunately, the lease agreement terminated in 1995 and the provisions on diversion focusing on lake level disappeared.⁴⁶

In the years since, the OWRD has had the opportunity to intervene and cease the diversion but has failed to do so, allowing the near destruction of Lake Abert and violating the public trust doctrine.⁴⁷ In 2015, the year after Lake Abert ran dry for the first time in nearly a century, the property owner applied for a permit extension on their diversion.⁴⁸ Eight years later, the OWRD has neither approved nor denied the permit extension; instead, a proposed final order issued over four years ago is still in place, leaving the permit extension request in a state of limbo.⁴⁹

In response to River's End's extension application, public comments were largely in opposition, with nearly every comment pointing to the impact the reservoir has on Lake Abert.⁵⁰ Even federal agencies expressed concern about the reservoir through comments. The Bureau of Land Management, the agency managing most of the land surrounding Lake Abert, pointed to the lake's designation as an Area of Critical Environmental Concern as a reason to deny the permit extension.⁵¹ Similarly, the USFWS expressed concern as to the effects the reservoir has on migratory birds who depend on Lake Abert while travelling on the Pacific Flyway;⁵² particularly of note about this comment is that the USFWS was involved in the initial construction of the reservoir in the early 1990s.⁵³

The exact effect of the reservoir on lake water levels is contentious.⁵⁴ The ODFW claims the diversion is not large enough relative to the size of Lake Abert to account for the decrease.⁵⁵ In the agency's opinion, finding one diversion to be the problem facing Lake Abert is not "realistic" considering all of the other diversions on the Chewaucan River.⁵⁶ On the other side some argue the reservoir's repeated

⁴⁵ *Id.*

⁴⁶ *Id.* at 6.

⁴⁷ *See id.* at 6–9.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 9–10, 34.

⁵¹ Letter from Todd Forbes, Field Manager, Bureau of Land Mgmt., to Michelle Bamberger, Or. Water Res. Dep't (Sept. 15, 2015), https://apps.wrd.state.or.us/apps/misc/vault/vault.aspx?Type=WRFolder&folder_image_id=62861.

⁵² Letter from Nanette Seto, Chief, Migratory Birds and Habitat Program, United States Fish and Wildlife Serv., to Michelle Bamberger, Or. Water Res. Dep't (n.d.) https://apps.wrd.state.or.us/apps/misc/vault/vault.aspx?Type=WRFolder&folder_image_id=63506; *see Pacific Flyway*, WATER ED. FOUND., <https://www.watereducation.org/aquapedia/pacific-flyway> (last visited Jan. 5, 2025).

⁵³ Letter from Nanette Seto, *supra* note 52; *see* Proposed Final Order, Permit S-51164, *supra* note 17, at 5.

⁵⁴ Davis, *Oregon's Lake Abert is 'in Deep Trouble'*, *supra* note 6.

⁵⁵ *Id.*

⁵⁶ *Id.*

diversion year after year has an additive influence on Lake Abert's health, and the billions of gallons of water the reservoir diverted in the past is the cause of Lake Abert's diminishment.⁵⁷ In a sad irony, a reservoir originally intended as a collaborative project between the property owner, federal, and state agencies to preserve wetlands and wildlife, has since marketed itself as a hunting and fishing destination, while simultaneously contributing to the collapse of the fragile neighboring ecosystem.⁵⁸

II. OREGON'S PUBLIC TRUST DOCTRINE

At its core, the public trust doctrine recognizes a trust relationship between the sovereign as trustee and the public as beneficiaries with the corpus of the trust consisting of natural resources held for public use.⁵⁹ The earliest known recodation of the doctrine comes from Byzantine Emperor Justinian's *Institutes*, which declared, "the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access"⁶⁰ Ownership of these resources was fundamentally impossible because the laws of nature dictated they were common property available to the public.⁶¹ The doctrine made its way into English common law through the Magna Carta,⁶² and the English brought it to North America in the 17th century, when King Charles II granted his brother, the future King James II, land in the original colonies.⁶³ Under this grant, James II brought the laws of England to North America, including its common law and the public trust doctrine.⁶⁴

When the United States gained independence, this sovereign authority passed to the original colonies.⁶⁵ As the nation admitted more states, the new states had the same rights under the Equal Footing Clause of the Constitution as the original states because these new states were admitted with the same sovereignty and power over

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See John C. Dernbach, *The Role of Trust Law Principles in Defining Public Trust Duties for Natural Resources*, 54 UNIV. MICH. J. L. REFORM 77, 82 (2020).

⁶⁰ J. INST. 2.1.1 (J.B. Moyle trans. 1913).

⁶¹ *Id.*

⁶² The Magna Carta imposed obligations on the crown to keep waterways clear for the public for purposes of navigation and commerce—two considerations which still play a substantial role in public trust decisions to this day. Magna Carta 1297, 25 Edw. 1, cl. 23 (Eng.).

⁶³ *Arnold v. Mundy*, 6 N.J.L. 1, 14–15 (1821) (holding a private claim for a tidal riverbed for oyster harvesting was impermissible as the bed of the river was common property of the people).

⁶⁴ *Id.* at 15.

⁶⁵ *Id.* at 15–16.

their land as the colonies received from independence.⁶⁶ As a byproduct of the public trust doctrine passing to the states individually, every state, including Oregon, has its own varied interpretation of the doctrine with some states embracing a broader public trust doctrine and others refusing to acknowledge the public trust doctrine outright.⁶⁷

Quite early in American public trust jurisprudence, the public trust doctrine began to evolve away from its European roots to accommodate the landscape of North America.⁶⁸ In England, the waters contained within the scope of the trust were only navigable waters, with navigability being determined by tidal influence on the waters themselves.⁶⁹ This undoubtedly made sense there because England is surrounded by the Atlantic Ocean and many of its largest rivers are tidal; in the United States, this interpretation would leave major waterbodies such as the Great Lakes and Mississippi River outside of the scope of the trust. The public trust doctrine evolves to accommodate the needs of society, so navigability determinations in the United States shifted from determinations based on tidal influence and instead began to focus on whether the waters themselves were navigable-in-fact.⁷⁰ Determining navigability under this test looks at whether a body of water in its natural state could act as a “highway for commerce.”⁷¹

In the “lodestar” case of the doctrine,⁷² the United States Supreme Court shined a spotlight on the public trust in *Illinois Central Railroad Co. v. Illinois*, in which the Court addressed a dispute between the State of Illinois and a private railroad where the state granted the railroad land underlying Lake Michigan and then subsequently revoked the grant.⁷³ In determining the initial grant was not proper, the Supreme Court announced limits on the trustee’s management of trust resources. First, the Court noted the trust is not something the state can relinquish and even a limited delegation by a state of a trust resource is revocable.⁷⁴ Second, the Court noted two exceptions to the inability of the state as sovereign to abdicate its responsibilities as trustee. The first exception allows a state to renounce control

⁶⁶ Pollard v. Hagan, 44 U.S. 212, 219–30 (1845) (holding the United States and Congress lacked the authority to grant lands in Mobile Bay because control of navigable waters rested with the state rather than the federal government).

⁶⁷ For a survey of how most states treat the doctrine, see THE PUBLIC TRUST DOCTRINE IN FORTY-FIVE STATES (Michael C. Blumm ed., 2015).

⁶⁸ See *The Daniel Ball*, 77 U.S. 557 (1870).

⁶⁹ *Id.* at 563.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970).

⁷³ Ill. Cent. R.R. Co. v. Ill., 146 U.S. 387, 439–49 (1892).

⁷⁴ *Id.* at 453–54.

of a trust resource if doing so would promote public interests.⁷⁵ The second exception permits disposal of a trust resource by the state as trustee so long as there is no substantial impairment on the public interest.⁷⁶

Oregon courts first acknowledged the public trust doctrine shortly after the state's founding in 1859, with the earliest decisions focusing on the public's rights to navigable streams for commercial purposes⁷⁷ and whether lands between the high and low watermarks were trust resources held by the state.⁷⁸ In 1894, the U.S. Supreme Court, in *Shively v. Bowlby*, addressed two conflicting grants to tidelands in the city of Astoria.⁷⁹ The Court emphasized the public trust doctrine burdened both tidelands and other navigable waters in Oregon: The state could choose to alienate trust lands but such alienation would still be subject to the public's rights to use water for purposes of navigation and commerce.⁸⁰

Like many jurisdictions, Oregon's public trust doctrine is not rigid and evolves as needed to accommodate changes in society.⁸¹ In 1918, following a trend originating in Minnesota,⁸² Oregon's definition of navigable waters grew to include use of streams for recreational purposes in addition to the traditional navigation and commerce scope of the trust.⁸³ Just a few years later, the Oregon Supreme Court went further in *Luscher v. Reynolds* by allowing lakes to also be considered trust resources that the public could use for recreation.⁸⁴

Looking at Lake Abert considering the public trust doctrine's development in Oregon, the lake should fall under the scope of the public trust because it is—or at least was, prior to 2014—usable for recreation and capable of supporting commerce.⁸⁵ Unfortunately, the status of the public trust doctrine has recently been shaken up by two Oregon Supreme Court decisions. The first of these decisions fractured judicial precedent of the public trust in Oregon by acknowledging a new, highly related doctrine for water access rights: the public use doctrine.⁸⁶ The second decision has severely curtailed the obligations on the state as trustee and is a clear

⁷⁵ *Id.* at 453.

⁷⁶ *Id.*

⁷⁷ *Felger v. Robinson*, 3 Or. 455, 457–58 (1869) (confirming any streams capable of floating timber are navigable and highways for public use).

⁷⁸ *Wilson v. Welch*, 12 Or. 353, 358 (1885) (clarifying the state owns the land between the high and low watermarks on navigable rivers, but this holding is in trust for the public).

⁷⁹ *Shively v. Bowlby*, 152 U.S. 1, 9 (1894).

⁸⁰ *Id.* at 57–58.

⁸¹ *Chernaik v. Brown*, 475 P.3d 68, 79 (Or. 2020).

⁸² *Lamprey v. State*, 52 Minn. 181, 199 (1893).

⁸³ *Guilliams v. Beaver Lake Club*, 90 Or. 13, 28–30 (1918).

⁸⁴ *Luscher v. Reynolds*, 153 Or. 625, 635–36 (1936).

⁸⁵ See Davis, *Oregon's Only Saltwater Lake*, *supra* note 21.

⁸⁶ *Kramer v. City of Lake Oswego (Kramer II)*, 446 P.3d 1 (Or. 2019).

sign from the court that it is unwilling at this time to broadly interpret what natural resources encompass the trust.⁸⁷

In *Kramer v. City of Lake Oswego* (*Kramer II*), a swimmer and a kayaker filed suit against an Oregon city which owned public, lakefront parks but refused to allow public access to the water through these parks.⁸⁸ This essentially privatized the waters of the lake and made it so if someone did not have lakefront or nearby property, they could not swim or boat on the lake.⁸⁹ The Oregon Court of Appeals affirmed the lower court's dismissal of plaintiffs' claims and found there was no obligation on the city itself to provide access to the lake.⁹⁰ In their complaint, the plaintiffs alleged the city had violated either the public trust doctrine or the public use doctrine by refusing access to a navigable water to the public through these lakefront parks.⁹¹

One of the most relevant takeaways for Lake Abert from the Supreme Court's decision in *Kramer II* is the judicial acknowledgement of a new doctrine in Oregon: the public use doctrine. In 2005, the Oregon Attorney General issued an opinion that is the first clear mention of the public use doctrine in the state.⁹² In this opinion, the Attorney General made it clear the public use doctrine allows public access to waters over privately owned, submerged land.⁹³ Because these lands are not owned by the state, Oregon no longer has responsibility to manage them as trustee. Functionally, acceptance of this doctrine withdraws a huge swath of waterbodies that were traditionally public trust resources from the scope of the trust.⁹⁴ In developing this new doctrine, the Attorney General, through legal wizardry, traces the origin of the public use doctrine back to the 1800s, pointing to cases like *Felger*, *Luscher*, and *Guilliams* as examples of public use cases despite their longstanding history of being public trust cases.⁹⁵ In the *Kramer II* decision, the court endorses this new dichotomy using the same logic as the Attorney General's opinion, with seemingly little issue taking these longstanding precedents and reshaping them into a wholly new judicial doctrine.⁹⁶

In determining whether a body of water falls under the purview of the public trust doctrine or the public use doctrine, the court uses two separate tests both of

⁸⁷ *Chernaik v. Brown*, 475 P.3d 68 (Or. 2020).

⁸⁸ *Kramer II*, 446 P.3d at 7.

⁸⁹ See Michael C. Blumm & Ryan J. Roberts, *Oregon's Amphibious Public Trust Doctrine: The Oswego Lake Decision*, 50 ENV'T L. 1227, 1234 (2020).

⁹⁰ *Kramer v. City of Lake Oswego* (*Kramer I*), 395 P.3d 592, 612 (Or. App. 2017).

⁹¹ *Kramer II*, 446 P.3d at 5–6.

⁹² Op. Or. Att'y Gen. 8281, 2005 WL 1079391 (Apr. 21, 2005) [hereinafter Att'y Gen. Op.].

⁹³ *Id.* at *28.

⁹⁴ See Blumm & Roberts, *supra* note 89, at 1250.

⁹⁵ Att'y Gen. Op., *supra* note 92, at *19–23.

⁹⁶ See *Kramer II*, 446 P.3d at 9–10.

which are based on navigability. For the public trust doctrine, instead of relying on the navigable-in-fact test used in earlier public trust cases, the navigability test after *Kramer II* is based on federal navigability looking at whether the water was used or was capable of being used for transportation and commerce upon statehood.⁹⁷ In contrast, the public use doctrine, subsumed the navigable-in-fact standard of cases like *Luscher*.⁹⁸

In addition to endorsing the public trust and public use dichotomy, the other important takeaway from *Kramer II* pertained to the obligations imposed by the public trust doctrine on the state as trustee. The court admitted that neither the legislature nor the judiciary in Oregon impose strict obligations in management of trust resources, but still acknowledged one limitation on trustees under the state's public trust doctrine.⁹⁹ In management of a trust resource, there is a general reasonableness requirement that the trustee must satisfy even if the trustee has discretion in how they are managing the resource.¹⁰⁰ The court ultimately remanded the case to the lower courts to determine whether the lake was navigable, and if it was navigable, whether the restriction on public access met the general reasonableness standard the city had as trustee.¹⁰¹

The second major decision in recent years coming from the Oregon Supreme Court was *Chernaik v. Brown*. In this case, two youth plaintiffs sued the state alleging breach of trust obligations in its failure to protect natural resources from substantial impairment caused by climate change.¹⁰² Plaintiffs sought declarations from the court clarifying both the scope of the trust, with hopes of obtaining a judicial acknowledgement of the atmosphere and water as a trust resource, and a clarification of the duties imposed on Oregon as trustee under the public trust doctrine.¹⁰³ Though the court in *Chernaik* admitted the trust is capable of evolving and changing as needed, with Oregon's public trust having done so multiple times in the past,¹⁰⁴ the court refused to accept the plaintiffs' expansion of the trust to include the atmosphere.¹⁰⁵

For Lake Abert, the major problem created by the Oregon Supreme Court in

⁹⁷ *Id.* at 12.

⁹⁸ *Id.* at 9–10.

⁹⁹ *Id.* at 17.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 19.

¹⁰² *Chernaik v. Brown*, 475 P.3d 68, 71 (Or. 2020).

¹⁰³ *Id.* at 71–74.

¹⁰⁴ *Id.* at 76. Notably, in the court's discussion of how the public trust doctrine evolved in Oregon, it consistently cited to the judicial opinions used just one year earlier in *Kramer II* in its justification of the newfound adoption of the public use doctrine, making the already blurry line between the two doctrines even less clear.

¹⁰⁵ *Id.*

Chernaik is the abandonment of traditional concepts of trust obligations by the state in management of trust resources.¹⁰⁶ Responding to the plaintiffs' request for a substantial impairment standard, a longstanding metric for public trust duties dating back to the *Illinois Central* decision, the court declined any substantial impairment standard on the public trust.¹⁰⁷ The court leaves intact the general reasonableness standard from *Kramer II* and acknowledges there is some duty on the state to protect trust resources for the "benefit of the public's use of navigable waterways for navigation, recreation, commerce, and fisheries."¹⁰⁸ Though the court does not state what exactly the duty is to protect waterways for these uses, they make it clear there is no obligation to protect trust resources from the effects of climate change.¹⁰⁹

After *Kramer II* and *Chernaik*, the public trust doctrine is on uncertain grounds in Oregon. The Supreme Court has left little responsibility on the state as trustee to manage resources besides a general reasonableness standard. While removing burdens on the state as to its duties, the court has simultaneously splintered the doctrine through its acceptance of the public use doctrine.¹¹⁰ Because of this uncertainty, litigation defending Lake Abert would not only act to protect the lake, but it would also be a useful tool in determining the exact contours of the public trust doctrine in Oregon.

Lake Abert's public trust claims can overcome both threshold issues left by *Kramer II* and *Chernaik*. The state owns Lake Abert,¹¹¹ so the public use doctrine is inapplicable to it since the public use doctrine applies to waters over privately owned land.¹¹² Litigants can argue the state has a fiduciary obligation to protect the lake under a general reasonableness standard, rather than a substantial impairment standard, which the state failed in performing by allowing over-appropriation from the Chewaucan River.

III. SUPPORT FOR OREGON'S PUBLIC TRUST DOCTRINE IN THE STATE CONSTITUTION

Throughout the Oregon Constitution, there are indications of public trust concepts which provide support for litigants looking to strengthen the doctrine through state courts. At the very beginning of the State Constitution, the preamble

¹⁰⁶ *Id.* at 83.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.* at 81; *Kramer II*, 446 P.3d 1, 5–6 (Or. 2019).

¹¹¹ *Oregon-Owned Waterways List*, OR.: DEP'T STATE LANDS (June 6, 2024) [hereinafter *Oregon-Owned Waterways*], <https://www.oregon.gov/dsl/waterways/Documents/OregonOwnedWaterwaysListWebsite.pdf>.

¹¹² *See Att'y Gen. Op.*, *supra* note 92, at *28.

of Article 1, Section 1 begins by acknowledging there are “[n]atural rights inherent in people.”¹¹³ These five words starting the State’s Bill of Rights are reminiscent of the very foundation the public trust rests on dating back to Justinian’s *Institutes*. Some things, like water and air, are incapable of private ownership and instead, by natural law, are commonly shared by all people as a common right.¹¹⁴ This seemingly innocuous phrase opens the door for the constitutional basis for the public trust doctrine in Oregon, with other states finding similar language to be indicative of the public trust in their constitutions.

In Pennsylvania’s Constitution, Article 1, Section 1 states, “All men are born equally free and independent, and have certain *inherent and indefeasible rights*”¹¹⁵ In *Robinson Township v. Commonwealth*, the plurality opinion of the Pennsylvania Supreme Court interpreted all of the rights contained in Article 1 as “inherent and indefeasible rights” of the people, not just those contained in Article 1, Section 1.¹¹⁶ These rights are not rights granted by the State’s Constitution but instead are inherent rights of the people which are merely preserved by the Constitution.¹¹⁷ This interpretation then allowed the court to give force to a public trust doctrine argument rooted in Article 1, Section 27, an environmental protection amendment which prior to this decision had largely sat dormant in the state’s Constitution.¹¹⁸

The text of Article 1, Section 27 of Pennsylvania’s Constitution contains three separate clauses all of which the court gave meaning to in finding a constitutional basis for the public trust. The first sentence guarantees the public rights to “clean air, pure water, and to the preservation of the . . . environment.”¹¹⁹ The second clause puts these natural resources into shared public ownership.¹²⁰ The final clause of Section 27 expressly says the state is the trustee of these resources.¹²¹ In its interpretation of these provisions, the Court found both affirmative obligations on the state to enforce the rights of the public and negative rights which precluded certain state actions that would violate the public trust.¹²²

Unfortunately, Oregon does not presently have an environmental protection amendment in its Constitution, but this does not mean there are not public trust concepts contained therein. Article 1, Section 18 states, “use of all roads, ways and

¹¹³ OR. CONST. art. I, § I.

¹¹⁴ See J. INST. 2.1.1 (J.B. Moyle trans. 1913).

¹¹⁵ PA. CONST. art. 1, § 1 (emphasis added).

¹¹⁶ *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 948 (2013).

¹¹⁷ *Id.* at 947–48.

¹¹⁸ *Id.* at 963–64, 969.

¹¹⁹ PA. CONST. art. 1, § 27.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Robinson Twp.*, 83 A.3d at 955–56.

waterways necessary to promote the *transportation* of the raw products . . . for beneficial use or drainage is necessary to the development and welfare of the state and is declared a public use.”¹²³ Because this language is within the Oregon Bill of Rights, which acknowledges rights are inherent in people rather than granted by the state, using the logic employed by the Pennsylvania court in *Robinson Township*, this is an inherent public right to waterways for transportation of resources for the welfare of the state.¹²⁴ This guarantee of access to waterways is a public trust concept. Since Justinian and the Magna Carta, one of the main purposes of the public trust is to provide access to water for transportation and commerce, the very thing Article 1, Section 18 of the Oregon Constitution does.¹²⁵

An inherent right to waterways for transportation and commerce in the Constitution itself provides a strong basis for Lake Abert’s defense. Litigants can argue this creates an inherent right to waterways which the state has a duty to protect, and in failing to maintain Lake Abert at a healthy level, the state has failed in preserving this constitutional guarantee. This argument finds additional support in the Oregon Supreme Court’s recent *Kramer II* decision where considerations as to what waterways are trust resources is dependent on the very focus of Article 1, Section 18: the ability of the public to access waterways for transportation and commerce.¹²⁶

In addition to the inherent rights established in Article 1, there is further support for the constitutional public trust doctrine in Oregon in Article 15, Section 4 which governs state lottery proceeds. Section 4a establishes the various uses proceeds from the state lottery go towards including “public parks, natural areas or outdoor recreational areas to meet the needs of current and future residents of the State of Oregon” and “[protection of] natural, cultural, historic and outdoor recreational resources of state or regional significance.”¹²⁷ This amendment was adopted through a statutory ballot measure in 2010 wherein the Oregon public decided by a two-to-one margin how the state should use lottery proceeds.¹²⁸ The way the ballot measure presented itself to voters shows further considerations of the public trust doctrine in Oregon because the preamble of the measure indicated lottery proceeds were to be used to maintain a healthy environment for present and

¹²³ OR. CONST. art. I, § XVIII (emphasis added).

¹²⁴ *Robinson Twp.*, 83 A.3d at 940.

¹²⁵ Carolyn Kelly, *Where the Water Meets the Sky: How an Unbroken Line of Precedent From Justinian to Juliana Supports the Possibility of a Federal Atmospheric Public Trust Doctrine*, 27 N.Y.U. ENV’T L. J. 183, 187–88 (2019).

¹²⁶ *Kramer II*, 446 P.3d 1, 19 (Or. 2019).

¹²⁷ OR. CONST. art. XV, § 4a(a)–(b).

¹²⁸ *Or. Election Results 2010*, N.Y. TIMES: ARCHIVE (2010), <https://archive.nytimes.com/www.nytimes.com/elections/2010/results/oregon.html>.

future citizens of the state.¹²⁹

The reference to future generations frequently appears as a signal of public trust considerations.¹³⁰ The reason why future generations are so frequently considered in public trust jurisprudence is because the beneficiary of the trust does not temporally limit its beneficiaries to the present and includes future generations as well.¹³¹ The clear indication of public trust considerations in maintaining natural resources not just for use of present generations but also future generations provides additional support for the constitutional basis of Oregon's public trust doctrine.

IV. STATUTORY ARGUMENTS FOR OREGON'S PUBLIC TRUST IN WATER

The basis of Oregon's modern water law, the 1909 water code, starts with two key concepts. The first is all waters in the state are publicly owned.¹³² The second is the State adopting an appropriation system with beneficial use being a requisite for any water right.¹³³ Both of these concepts indicate the State's water laws already consider the public trust doctrine, and the state must consider trust resources when providing water rights.

Though Oregon water law does not provide an express definition of what is and is not a beneficial use of water, the state's ODEQ provides standards throughout Oregon. In the Goose and Summer Lakes Basin, beneficial uses of freshwater streams encompass a wide range of purposes including domestic, agricultural, recreational, and even aesthetic quality.¹³⁴ Similarly, saline waters like Lake Abert have beneficial uses including recreational and aesthetic purposes.¹³⁵ The biggest question the River's End Ranch reservoir and other diversions pose for Lake Abert is how the state water board's grants of water rights should be allowed to affect trust resources and whether water rights in non-navigable sources can be put to beneficial

¹²⁹ OR. CONST. art. XV, pmbl.

¹³⁰ See, e.g., *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 164, 170 (Ariz. 1991); *Mineral Cnty. v. Lyon Cnty.*, 473 P.3d 418, 428 (Nev. 2020); *Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 659 (2004); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 940 (2013); *Sagoonick v. State*, 503 P.3d 777, 787 (Ala. 2022); see also Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV'T L. 43, 45, 67–68, 88 (2009).

¹³¹ *Robinson Twp.*, 83 A.3d at 959.

¹³² OR. REV. STAT. § 537.110 (2021).

¹³³ *Id.* § 537.120.

¹³⁴ OR. DEP'T OF ENV'T QUALITY, DESIGNATED BENEFICIAL USES GOOSE AND SUMMER LAKES BASIN (2003) [hereinafter DESIGNATED BENEFICIAL USES], <https://www.oregon.gov/deq/FilterRulemakingDocs/table140a.pdf>.

¹³⁵ *Id.*

uses when said uses harm trust resources.

Other states have tackled these same issues and interpreted similar state water codes as requiring consideration of the public trust doctrine in determining appropriations. The groundbreaking case in this realm of public trust jurisprudence is *National Audubon Society v. Superior Court (Mono Lake)*. In that case, the California Supreme Court faced a problem eerily like the one facing Lake Abert today. Mono Lake, a large saline lake near Yosemite National Park, was in an environmental crisis caused by excessive diversion of water from streams feeding into the lake by the City of Los Angeles.¹³⁶ California's water code requires considerations of whether specific appropriations are for beneficial uses in the public interest, and the California Supreme Court read this as requiring an affirmative duty on the State's water board as trustee of the public trust.¹³⁷ This duty was not temporally limited to when the water rights were granted, but was a continuous affirmative duty of supervision on the water board.¹³⁸ The court adopted an affectation test where the effects of water rights, even in non-navigable waters, on trust resources warranted consideration and evaluation in allotting water rights.¹³⁹ Because the duty of supervision was a persistent duty, previously granted water rights could be terminated or reconsidered if the water board determined these water rights negatively affected a public trust resource like Mono Lake.¹⁴⁰

The Oregon water law system operates in a similar manner to California's where the grant of a water right is contingent upon putting said right to beneficial use,¹⁴¹ but this beneficial use requirement should still require consideration of how the water right affects trust resources. By the ODEQ's definitions of beneficial use, the River's End Ranch reservoir likely does qualify as a beneficial use since it is for wildlife and hunting, two permitted uses in the basin.¹⁴² At the same time, because something is a beneficial use in a vacuum should not preclude consideration of its effects on public trust resources. In bringing a *Mono Lake* argument to the Oregon court that the River's End Ranch diversion is a violation of the public trust doctrine because of its effects on a trust resource, the beneficial use criteria is still subject to a general reasonableness standard of discretion. Per both *Chernaik* and *Kramer II*, if there is any obligation on the state as trustee, it is to exercise reasonableness in

¹³⁶ Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 711 (Cal. 1983).

¹³⁷ *Id.* at 727–28.

¹³⁸ *Id.* at 728–29.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ DESIGNATED BENEFICIAL USES, *supra* note 134; *California State Water Resources Control Board*, CAL. WATER BDS.: STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/waterrights/board_info/water_rights_process.html (Aug. 20, 2020).

¹⁴² *See* DESIGNATED BENEFICIAL USES, *supra* note 134.

discretionary management of trust resources.¹⁴³ By allowing the reservoir to divert substantial amounts of water from Lake Abert year after year, the OWRD failed in exercising reasonable discretion as trustee. Because of this failure by the OWRD, litigants should seek an injunction against the department as it pertains to the proposed final order for the water permit extension.

As an alternative to a *Mono Lake* argument, another potential route litigants could take is adopting a similar statutory argument as the Nevada Supreme Court recently adopted in *Mineral County v. Lyon County (Walker Lake)*. In a fact pattern which is all too familiar at this point, Walker Lake faced imminent collapse and environmental destruction due to over-appropriation from the river feeding into the lake.¹⁴⁴ The court examined the state water code that required beneficial use for water rights with all water in the state being publicly owned, like in Oregon.¹⁴⁵ Because of this requirement for beneficial use of a publicly shared resource, the state is limited in how it manages water, and the state is limited in how it uses water to only those uses which are in the public interest.¹⁴⁶ The court concluded all waters in the state are trust resources, making no distinction between navigable and non-navigable waters.¹⁴⁷ In turn, this meant all waters in the state, regardless of navigability determinations, are public trust resources because the water code statutes in Nevada put all water under public ownership.¹⁴⁸

The Oregon statutory language, much like the Nevada language, places no limitation on what waters the public owns when it says, “All water within the state from all sources of water supply belongs to the public.”¹⁴⁹ Though the Chewaucan River is likely not navigable under the federal test of navigability since there is no indication of its use in commerce or for transportation historically, by bringing a *Walker-Lake*-style argument to the courts in Oregon, this would no longer matter. All waters in Oregon would be public trust resources, and dispensation of water rights would require the OWRD to go beyond the effects test from *Mono Lake* and instead only grant water rights if it is generally reasonable to do so under the public trust. For Lake Abert, this would limit the ability of the OWRD to grant water rights in the Chewaucan River because it must consider not just whether the water right is a beneficial use in a literal sense but whether the right aligns with the public interests in water in Oregon.

In addition to providing an argument for interpreting how the public trust doctrine interacts with Oregon’s appropriation doctrine, *Walker Lake* also provides

¹⁴³ *Kramer II*, 446 P.3d 1, 17 (Or. 2019); *Chernaik v. Brown*, 475 P.3d 68, 83 (Or. 2020).

¹⁴⁴ *Mineral Cnty. v. Lyon Cnty.*, 473 P.3d 418, 422 (Nev. 2020).

¹⁴⁵ *Id.* at 426.

¹⁴⁶ *Id.* at 425.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*; see also NEV. REV. STAT. § 533.025 (2022).

¹⁴⁹ OR. REV. STAT. § 537.110 (2021).

a cautionary tale to litigants looking to defend Lake Abert. Though the court in *Walker Lake* broadly interpreted the scope of trust resources to include all water in the State of Nevada,¹⁵⁰ its decision provided no immediate relief for Walker Lake. The court concluded the emphasis the state's water code placed on finality in water rights made it impossible for perfected rights to be reallocated.¹⁵¹

Oregon's water code does indicate some desire for finality, but this is just a feature of water appropriation systems in general; these systems create certainty as to who has rights to water in a particular source.¹⁵² A side-by-side comparison of the Oregon and Nevada water statutes shows a great deal of similarities. What Oregon's water code lacks relative to Nevada's is a clear statutory dictate for finality in water rights decisions.¹⁵³ The crux of the court's finding as to the Walker River water rights being unreviewable by the State Engineer comes from NRS 533.210 titled "Finality of decree."¹⁵⁴ This is the section of Nevada's water code that says grants of water rights are unreviewable after three years.¹⁵⁵ Oregon lacks this section in its own water code indicating the certainty gained by using the prior appropriation doctrine in the State does not have the same policy concerns of finality as the Nevada water code.

It is helpful to look at the difference in forfeiture provisions contemplated by each water code. Oregon and Nevada's water codes both require a five-year period where a water right is not put to beneficial use for the forfeiture provision to apply.¹⁵⁶ Even in Nevada, where the court has found such a strong emphasis placed on finality in water dispensation, the water code provides ways to terminate an existing water right.¹⁵⁷ The relevant distinction between the two codes is what types of water rights can be forfeited.

Nevada expressly limits its forfeiture provision to groundwater, and the State does not have similar rules for other types of water rights like in-stream rights.¹⁵⁸ In Oregon, the forfeiture provision is not so narrow. Instead, Oregon's forfeiture provision applies to all water rights not used beneficially.¹⁵⁹ Because there is no limit

¹⁵⁰ *Mineral Cnty.*, 473 P.3d at 421.

¹⁵¹ *Id.*

¹⁵² Michael Toll, *Reimagining Western Water Law: Time-Limited Water Right Permits Based on a Comprehensive Beneficial Use Doctrine*, 82 U. COLO. L. REV. 595, 607–08, 616 ("[P]rior appropriation was never intended to do anything more than maximize water use and create certainty of rights among water users.").

¹⁵³ Compare NEV. REV. STAT. § 534.090 (2022), with OR. REV. STAT. § 540.610 (2021).

¹⁵⁴ *Mineral Cnty.*, 473 P.3d at 420, 429.

¹⁵⁵ NEV. REV. STAT. § 533.210 (2022).

¹⁵⁶ See OR. REV. STAT. § 540.610 (2021); NEV. REV. STAT. § 534.090 (2022).

¹⁵⁷ NEV. REV. STAT. § 534.090 (2022).

¹⁵⁸ *Id.*

¹⁵⁹ *Cancel a Certificate*, OR., <https://www.oregon.gov/owrd/programs/waterrights/cert/pages/cxlcert.aspx> (last visited Jan. 5, 2025).

of forfeiture to just groundwater, this means any appropriations which are no longer beneficial, including the River's End Reservoir, are terminable. Even "perfected and developed water right[s]" once shown to no longer be beneficial uses of water are presumptively forfeited under Oregon law.¹⁶⁰

The River's End Ranch reservoir's permit requires beneficial use per Oregon law.¹⁶¹ By adopting the *Mono Lake* approach to how appropriation law intersects with the public trust doctrine, the OWRD would need to reconsider the effects the diversion is having on Lake Abert. If the agency found the harm caused to a trust resource to not be generally reasonable, then the agency would have to reconsider and reallocate the right. Alternatively, if litigants put forth a *Walker Lake* argument, and the Oregon court agreed with the reasoning of the Nevada court that all water rights are public trust resources per the language in the Oregon water code, then the state agency would need to consider the public trust doctrine and public interests in granting water rights. As the Oregon water code lacks the finality emphasis of the Nevada water code and allows for the forfeiture of any water right found continuously to not be a beneficial use, this would allow the reconsideration of any water right that may unreasonably harm the public trust.

CONCLUSION

Lake Abert is in a crisis that the State could have prevented had it fulfilled its obligations under the public trust doctrine to the people of the State in the 1990s when it approved the River's End Ranch reservoir. Even though state agencies have stated a willingness to figure out some sort of solution,¹⁶² their track record with the lake is clearly dubious. With no precise timetable or metrics in place, it is not clear when, if ever, agencies will finalize a clear path forward.¹⁶³

The health of lakes throughout the Great Basin has become a cause of concern even on the federal level, with Congress passing a bill at the very end of the 2022 term to monitor saline lakes throughout the basin—including Lake Abert and Mono Lake.¹⁶⁴ The results of this monitoring are currently unknown, so it is not clear what impact the legislation may have on the future of Lake Abert. Much like with actions on the state level, there is no certainty the federal government can remedy the plight of Lake Abert.

Today, the futures of both Lake Abert and the public trust doctrine in Oregon are unclear. It is not possible to say whether state intervention will return the lake

¹⁶⁰ OR. REV. STAT. § 540.610 (2021).

¹⁶¹ See *id.* § 537.120.

¹⁶² See Davis, *Oregon Agencies Say They're Ready to Work Together*, *supra* note 24.

¹⁶³ *Id.*

¹⁶⁴ Saline Lake Ecosystems in the Great Basin States Program Act of 2022, Pub. L. No. 117-318, 136 Stat. 4421 (2022).

to its former health and size without additional external pressures. With the help of the public trust doctrine, individuals looking to defend Lake Abert can apply this needed pressure. For the public trust doctrine, after *Chernaik* and *Kramer II*, the exact boundaries of what the State must do as trustee is unclear with no guidance given by the Oregon Supreme Court as to what does and does not satisfy a standard of general reasonableness of discretion. In addition, the recent acknowledgement of the public use doctrine only confuses the public trust doctrine's status further. By bringing litigation to defend Lake Abert, this would not only benefit the lake but would also help clarify the exact contours of the public trust doctrine post-*Chernaik* and what duties the general reasonableness standard requires in state management of trust resources. It is clear something needs to be done to save Lake Abert before it is no longer capable of being saved.