

**From:** Todd Prager [<mailto:toddeprager@gmail.com>]  
**Sent:** Thursday, September 22, 2011 7:45 PM  
**To:** Sin, Sidaro  
**Cc:** Weigel, Laura; Jim Johnson; Selden, Sarah; Jon Gustafson; [weg@buckley-law.com](mailto:weg@buckley-law.com)  
**Subject:** Re: Public Comment for Comp Plan CAC Re: Oswego Lake

Hi Sid,

I had submitted some comments (below and in an upcoming email) regarding Oswego Lake for the CAC's consideration and didn't see it in the packet materials. I think the comments are timely because they relate to the recreation component of the Community Culture Action Area which will be discussed at the next meeting. Could this be provided to the CAC?

Thanks,

Todd

On Thu, Sep 8, 2011 at 7:59 AM, Sin, Sidaro <[ssin@ci.oswego.or.us](mailto:ssin@ci.oswego.or.us)> wrote:

I will include in the next CAC packet for their September 28 meeting.

Thanks, Sid

**From:** Todd Prager [<mailto:toddeprager@gmail.com>]  
**Sent:** Thursday, September 08, 2011 7:41 AM  
**To:** Sin, Sidaro; Weigel, Laura; Selden, Sarah  
**Cc:** Jim Johnson  
**Subject:** Public Comment for Comp Plan CAC Re: Oswego Lake

Hi all,

I was reviewing the July 27, 2011 Comp Plan CAC meeting summary and wanted to respond to the discussion about public accessibility of Oswego Lake. Could you please pass my comments along to the CAC?

In the meeting summary, one CAC member stated Oswego Lake "should be open to everyone". A City official and several other CAC members responded that "the Lake is a private

corporation" and access is not up to the City. There was acknowledgment that water access came up as a priority during the Parks Master Plan process, but the City is focusing its accessibility efforts on the river instead of the lake.

I have been doing research on Oswego Lake accessibility and found it to be a highly complex issue. At this point, I am not prepared to simply accept the position that because the lake bed is privately owned, the Lake Corporation can control access to the water.

I have sent a summary of my understanding of the issues and some questions to Jeff Kroft, a policy expert on water accessibility with the Oregon Department of State Lands. My hope is that Mr. Kroft can answer some of my questions so I can be more informed during future discussions about Oswego Lake, particularly during the Comprehensive Plan update process.

Some of the issues and questions I raised with Mr. Kroft are:

1. According to the Oregon Attorney General, navigable waterways should be open to the public whether publicly or privately owned.
2. The Department of State Lands and Coast Guard currently consider Oswego Lake and Oswego Canal navigable.
3. The US Congress declared "Lake Oswego" non-navigable in 1976, but the precise water bodies they were referring to is unclear.
4. Which governing body has supremacy in determining navigability?

My email to Mr. Kroft (forwarded below) goes into the issues and questions in more detail and provide links to some of the source materials referenced.

My point in sharing this with the CAC is that before making policy decisions on Oswego Lake accessibility, I think more research and analysis of the issue is needed. Perhaps the City's own legal counsel could provide some assistance.

After the issue of Oswego Lake accessibility is better understood, the CAC could consider the following policy alternatives (which are not exhaustive):

1. Business as usual. Continue no zoning for the lake. Allow the Lake Corporation to continue controlling lake access, building permits on the lake, and water quality issues.

2. Work with the Lake Corporation collaboratively to increase accessibility. The City is likely one of the largest shareholders in the Lake Corporation because it owns a significant share of lake front property. Since citizens are shareholders of the City, the public working through the City could potentially be influential with the Lake Corporation Board.
3. Apply zoning to the lake and outline permitted, conditional, and prohibited uses. For example, continue to allow things like recreation and limited development for things like boat houses, but prohibit more extreme changes such as allowing telecommunications facilities which could impact its scenic features. Acquire "water trail" easements for public access as conditions of development approval just as the City acquires trail easements on upland properties.
4. Pursue a more aggressive agenda of expanding lake accessibility. This could involve actively investigating legal options for increasing access including lobbying Congress through Oregon's representatives for a repeal of the 1976 provision declaring Oswego Lake non-navigable. In the aggressive expansion scenario, perhaps the existing level of permits for motorized watercraft could continue so that water/noise quality and safety are maintained, but low impact recreational activities such as swimming and kayaking could be expanded.

Just as lake accessibility has been a top community issue during the Parks Master Plan process, in my experience it is also a top issue for the Comprehensive Plan process. My hope and recommendation is that the CAC more fully explore the issues and questions of Oswego Lake accessibility before recommending goals and policies about Oswego Lake for the updated Comprehensive Plan.

Thanks for your consideration,

Todd Prager

----- Forwarded message -----

From: **Todd Prager** <[toddeprager@gmail.com](mailto:toddeprager@gmail.com)>

Date: Sun, Sep 4, 2011 at 11:47 AM

Subject: Navigability of Oswego Lake

To: [jeff.kroft@dsl.state.or.us](mailto:jeff.kroft@dsl.state.or.us)

Dear Mr. Kroft,

The City of Lake Oswego is in the process of updating its Comprehensive Plan, and there has been a lot of discussion regarding the public accessibility of Oswego Lake. As a member of the City's Planning Commission, I am trying to educate myself on the issue so I can make informed decisions when the issue comes before us.

I have done some background research and found that Oswego Lake was originally a natural lake known as Waluga by Native Americans and then Sucker Lake by European settlers. Later on, as the Oregon Iron and Steel Company flourished, they purchased the town of Oswego including the lake and surrounding uplands in roughly 1865. In 1872 a canal was completed that connected the Tualatin River to the lake which allowed steamships to travel between the two water bodies for commerce. Logs were also floated to a sawmill at the lake's outlet (Sucker Creek now Oswego Creek) at that time. Since the 1860s, dams have been built at Oswego Creek for power and to more precisely control the lake's water level. In 1928, a canal was completed between the lake and a marshy area known as the duck pond (present Lakewood Bay in downtown) for the final expansion to the lake's current size of over 400 acres.

With the demise of the iron industry, Oregon Iron and Steel entered the land development industry, sold off portions of its land for private development and included lake easements as part of the property deeds. Oregon Iron and Steel eventually disbanded but created the Lake Oswego Corporation which claims to own the lake as a private corporation of shareholders which include lakefront property owners and other property owners with deeded lake easements. The shareholders comprise about 10% of City residents.

There are presently a number of public access points including two swim parks owned by the City and School District. However, the swim parks are roped off so that swimmers can't stray far into the lake. The public is also prohibited from launching canoes from the public access points. Although the city is one of the largest lakefront property owners and owns a number of other lakefront properties including public parks, the Lake Corporation prohibits the public from entering the lake from these areas as well.

In the past, residents have challenged the Lake Corporation's exclusion of non-shareholders because the lake is a "navigable" waterway and according the Oregon Attorney General, the public has a right to use its waters for recreational purposes. See the Oregon Attorney General's 2005 confirmation of this opinion.

[http://oregonstatelands.us/DSL/NAV/docs/ag\\_op-8281\\_navigability.pdf](http://oregonstatelands.us/DSL/NAV/docs/ag_op-8281_navigability.pdf)

To counter this fact and exclude the public from using Oswego Lake for recreation, the Water Resources Development Act of 1976 was passed by Congress and included a provision declaring "Lake Oswego" as "non-navigable". (Note: The Act specifically references "Lake Oswego" and not "Oswego Lake". It is unclear to me what exactly is being referenced and whether the intent is that non-navigability applies only to the expanded portions of the lake beyond the original Sucker Creek, the entire Oswego Lake, or all water bodies in Lake Oswego which would include Oswego Canal.)

However, according to the present Oregon Department of State Lands website, there is "sufficient evidence" that Oswego Lake is navigable.

<http://oregonstatelands.us/DSL/NAV/meanderedlakes.shtml>

In addition, a 1983 report on navigable waters of Oregon (after the Water Resources Development Act of 1976), the Department of State Lands also concluded "the State has a claim to the bed of the 1859 lake" (see pages 146-147).

[http://www.oregon.gov/DSL/NAV/docs/nav\\_waters\\_rpt.pdf](http://www.oregon.gov/DSL/NAV/docs/nav_waters_rpt.pdf)

Finally, according to the Thirteenth Coast Guard District, both Oswego Lake and Oswego Canal are considered navigable. There is however a footnote in the Coast Guard's report acknowledging the existence of the Water Resources Development Act of 1976 for Oswego Lake.

[http://www.uscg.mil/d13/docs/exhibit11\\_k1.pdf](http://www.uscg.mil/d13/docs/exhibit11_k1.pdf)

My questions for you are:

1. Did the Department of State Lands consider the Water Resources Development Act of 1976 before determining there is sufficient evidence that Oswego Lake is navigable? If so, on what basis was the determination made?
2. Does the US Congress have supremacy over states in determining navigability?
3. If Oswego Lake is non-navigable, does that prohibit the general public from swimming and other recreational activities when accessed from public shorelines?

4. Do you know of any maps that define the boundaries of Oswego Canal in relation to Oswego Lake?

5. Would the Department of State Lands be willing to do a navigability study on Oswego Canal and Oswego Lake?

Obviously, Oswego Lake is a central issue for the City of Lake Oswego because it defines the community. In addition to recreational accessibility, the community is interested in discussing water quality issues, lakefront and in-lake development issues, and natural resource issues regarding Oswego Lake. I appreciate any information you can provide that will help inform the discussions that are ongoing in our community.

Sincerely,

Todd Prager

[503-699-6160](tel:503-699-6160)

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PUBLIC RECORDS LAW DISCLOSURE

This e-mail is a public record of the City of Lake Oswego and is subject to public disclosure unless exempt from disclosure under Oregon Public Records Law. This email is subject to the State Retention Schedule.

Hi Sid,

Could you please forward the email string below to the CAC for their next meeting packet? It is from Jeff Kroft with the Department of State Lands in response to my previous questions about Oswego Lake accessibility. In his response, he confirms that according to the Public Use Doctrine, the general public has a right to water dependent uses (things like swimming, canoeing, etc.) on the surface of Oswego Lake.

Thanks,

Todd

On Fri, Sep 9, 2011 at 12:35 PM, KROFT Jeff <[jeff.kroft@state.or.us](mailto:jeff.kroft@state.or.us)> wrote:

Todd,

I'm glad to have been able to help you. If you have any other questions, let me know. I will be retiring on 30 November – so after that time, any questions you may have should be referred to Nancy Pustis or Tami Hubert.

Best regards,

Jeff

**From:** Todd Prager [mailto:[toddeprager@gmail.com](mailto:toddeprager@gmail.com)]

**Sent:** Friday, September 09, 2011 12:34 PM

**To:** KROFT Jeff

**Subject:** Re: Your Questions Concerning Lake Oswego

Thanks Jeff. This does help clarify for me that the Public Use Doctrine applies to the to post dam level lake surface. I have very much appreciated you discussing this issue with me. -Todd

On Fri, Sep 9, 2011 at 11:25 AM, KROFT Jeff <[jeff.kroft@state.or.us](mailto:jeff.kroft@state.or.us)> wrote:

Hi Todd,

You have asked an interesting question. Yes, the Public Use Doctrine applies. However, more importantly, is the fact that the water in a river or lake belongs to the State of Oregon. For this reason, the public can use the surface of a river or lake for any legal purpose once they have gained lawful entry. The limitations on what the public can/cannot do apply to the underlying submerged and submersible land.

Because that part of Lake Oswego which was formed as a result of the dam is an “artificial” feature and was not in existence in 1859 at the time of Oregon’s statehood (as would be a man-made canal or basin along a waterway) a navigability study would not apply.

Does this help?

Jeff

**From:** Todd Prager [mailto:[toddeprager@gmail.com](mailto:toddeprager@gmail.com)]  
**Sent:** Friday, September 09, 2011 8:43 AM  
**To:** KROFT Jeff

**Subject:** Re: Your Questions Concerning Lake Oswego

Thanks Jeff. Sorry to keep coming back with additional questions, but I am interested in teasing out what the public can and cannot do on the post dam level lake surface. Based on the Public Use Doctrine, your email, and my reading of the brochure, I am assuming water dependent uses and uses incidental to a water dependent uses only are allowed because although it is floatable, there has not been a navigability determination on the post dam level. Of course all of this is contingent on legal access to the lake surface. Am I correct in my understanding?

Thanks,

Todd

On Fri, Sep 9, 2011 at 8:11 AM, KROFT Jeff <[jeff.kroft@state.or.us](mailto:jeff.kroft@state.or.us)> wrote:

Good morning, Todd,

You have raised a good question, and one for which the answer as it concerns Lake Oswego is not a simple “yes” or “no”.

I don't know if you have had a chance to read the brochure on our website that summarizes the public's rights. If so, you noted that the extent of those rights is contingent on whether the waterway has been determined to be navigable for title purposes.

On navigable waterways, the public has what I term “the full bundle of rights” – that is, the rights to fish, recreate, navigate and conduct commerce up to the line of ordinary high water. However, on waterways for which there has not been a determination of navigability, the public's rights are more limited –that is, to water dependent uses and uses incidental to a water dependent use only. To illustrate this difference - on a waterway that has been determined to be navigable for title purposes, the public could play a game of touch football on the land below the line of ordinary high water. However, on a waterway for which no such determination of ownership has been made (but for which the person wanting to use it has determined that it is floatable under the Public Use Doctrine), no such game would be allowed since touch football is neither a water dependent use or use incidental to a water dependent use.

The factor that complicates what the public can/cannot do on Lake Oswego relates to the dam: the line of ordinary high water as it existed prior to the construction of the dam is below the current water surface. This results in the state-owned submerged and submersible land being below the current water surface. Consequently, although the public has the right to recreate on the surface of the water, it does not have the right to use what is now the post-dam submersible land around the land – which is above the pre-dam line of ordinary high water – as it would if the lake had not been dammed unless such land is publicly-owned. Does this make sense to you?

In any event, to use the surface of the lake, the public has to gain legal entry through either publicly-owned land or with the permission of an adjacent landowner. And once on the surface of the land, the public cannot use the submerged or submersible land that exists above the pre-dam level of the lake.

Please let me know if you have any other questions. And I do thank you for contacting us.

Regards,

Jeff

**From:** Todd Prager [mailto:[toddeprager@gmail.com](mailto:toddeprager@gmail.com)]  
**Sent:** Thursday, September 08, 2011 9:30 PM  
**To:** KROFT Jeff

**Subject:** Re: Your Questions Concerning Lake Oswego

Thank you for taking the time to provide me a detailed response, Dr. Kroft. This has been very informative in helping me sort out this complex issue. Just to clarify, from your email it seems like the issue of navigability is irrelevant in answering the question of whether or not the general public has a right to recreate on the lake. The fact that Oswego Lake is "floatable" gives the public a right to use it (from points of public access) regardless of any navigability determination. Correct?

Thanks again for your time.

-Todd

On Thu, Sep 8, 2011 at 3:48 PM, KROFT Jeff <[jeff.kroft@state.or.us](mailto:jeff.kroft@state.or.us)> wrote:

Good afternoon, Mr. Prager,

Let me first apologize for my delay in getting back to you with regard to your questions about the title navigability of Lake Oswego. I have been out of my office for much of this week attending meetings and am only now catching up with my e-mail. Before answering your questions, I must say that I am impressed with the work you have done to try to understand the history of Lake Oswego and the topics of title navigability and public trust rights – all of which are complex.

You have asked me:

**Q. Did the Department of State Lands consider the Water Resources Development Act of 1976 before determining there is sufficient evidence that Oswego Lake is navigable?**

**A.** No, the Department of State Lands (DSL) did not consider the Water Resources Development Act of 1976 (codified as USC Title 33, Chapter I, Subchapter II).

The purpose of this legislation (Senate Bill 2315) was to define which United States waterways were to be subject to U.S. Army Corps of Engineers regulation and U.S. Coast Guard oversight. The original the purpose of this legislation (more commonly known as the “River and Harbor Act of 1894”) was to “...*prescribe rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation owned, operated, or maintained by the United States, and for the posting of such regulations and the punishment of violations thereof.*”

Although the terms “*navigable*” and “*non-navigable*” were not explicitly defined in the act, it is clear that the use of these terms was not premised on the ownership of the underlying submerged and submersible land. Evidence of this is contained in testimony given by Senator Mark Hatfield on August 4, 1976 that I found in our files concerning Senate Bill 2315. The purpose of this bill was to, among other things, “*declare the privately built and maintained reservoir known as Lake Oswego, Oregon, a non-navigable water of the United States.*” In his testimony, Senator Hatfield stated:

*“In 1972 the Corps of Engineers – without field studies, without prior notice to the Corporation [the homeowners association] or to the public in general, and without, apparently, much justification – abruptly designated the reservoir a “navigable water”. Aside from the impropriety of the Corps’ procedures in this case, there is no substantial reason today to support this action, which injects the police powers of the Corps into the operation of the reservoir. First, the reservoir is closely controlled by the Corporation at standards which exceed every applicable federal guideline, from boating safety to pollution control to dock construction. Second, operation of the reservoir and all attendant facilities, and purchase of water from the Bureau of Reclamation’s Tualatin Project, is a very costly proposition, and the homeowners assess themselves an annual charge to cover it. Any federal action to dilute the homeowners’ control carries with it the threat of their losing the value of their continuing to take over the operation of these facilities. Finally, a Congressional declaration that Lake Oswego is not a navigable waterway for the purposes of the federal government will not affect any future*

*determination by the State of Oregon as to its ownership interest, if any, in the bed of the old Sucker Creek, from ownership transfers that occurred when Oregon became a state in 1859.”*

This testimony is also presented in the September 10, 1975 volume of the Congressional Record - Senate (pages 15633 – 15634).

Interestingly, there is also a carbon copy of a letter in our file sent to Senator Hatfield on July 23, 1976 by William Cox (the Department’s director at that time) stating:

*“Our reason for this concern [regarding the proposed legislation] has nothing to do with the nonnavigability for federal purposes, but rather that this particular wording may have an effect on prejudging a State decision as to whether or not Lake Oswego fits within “navigability” as would indicated that the bed of Lake Oswego (old Sucker Lake) was navigable and hence State-owned.”*

Another letter in our file from Representative Les AuCoin dated July 13, 1976 to a homeowner on Lake Oswego states:

*“The intent of this legislation is solely to cancel the Corps’ claim of jurisdiction. It is not the intention to affect the State of Oregon’s claim to jurisdiction over the Lake in any way.”*

This, of course, leads to the question of how the Department determined that Lake Oswego is navigable for title (ownership) purposes. In 1921, the Oregon Legislative Assembly enacted a law (ORS 274.430) stating that all lakes that were meandered by the federal government are “*declared to be navigable and public waters*” and vested the title to the submerged and submersible lands of such makes in the State of Oregon. Pursuant to that law, and based on:

- A General Land Office Cadastral Survey Map dated June 30, 1852 on which the lake was meandered by federal surveyors, and
- Historical records indicating that logs were floated as early as 1850 and a steamboat may have traveled on the lake from 1865 to 1873,

the State of Oregon claimed the ownership to the submerged and submersible land below the line of ordinary high water prior to dam construction. This claim was articulated in a Land Board Agenda Item dated July 18, 1984.

**Q. Does the United States Congress have supremacy over states in determining navigability?**

**A.** I am not sure I understand the question you have asked. However, if you are asking me this question in the context of the 1975 legislation enacted by Congress concerning the navigability of Lake Oswego, then, as I have indicated in my answer to your first question, what Congress did had no bearing on the title navigability (ownership) of the submerged and submersible land underlying lake as it existed in its pre-dam condition.

**Q. If Oswego Lake is non-navigable, does that prohibit the general public from swimming and other recreational activities when accessed from public shorelines?**

Regardless of whether a waterway has been/not been determined to be navigable for title purposes, the public has certain rights to use it. These rights, generally called Public Trust Rights, are discussed in a document we have prepared that you can access via the following hotlink.

[http://www.oregonstatelands.us/DSL/NAV/docs/recreational\\_use\\_waterways.pdf](http://www.oregonstatelands.us/DSL/NAV/docs/recreational_use_waterways.pdf)

I should point out, as you indicate, that any rights of the public to use Lake Oswego or any other waterway are contingent on the ability of the public to gain legal access to the waterbody. A person may not cross privately-owned property without the owner's permission to get to the waterway. Doing so constitutes a trespass.

**Q. Do I know of any maps that define the boundaries of Oswego Canal in relation to Oswego Lake?**

**A.** No, I do not know of any such maps. Perhaps (if you have not already done so) you could find such maps in the map collections of the Oregon Historical Society, the University of Washington or the University of Oregon. Each of these institutions has a very good map library containing numerous historical maps of the Pacific Northwest.

**Q.** **Would DSL be willing to do a navigability study on Oswego Canal and Oswego Lake?**

**A.** The short answer to your question is “Unlikely”. I say this for several reasons. The first is that it is the position of the State of Oregon that Lake Oswego is navigable for title purposes as I have discussed above. The second relates to the number of study requests which have been received to date. Generally, the Land Board has been authorizing the Department to undertake studies in the order they were received. Given that there are a number of studies pending authorization, and that each study takes on the order of 1.5 years to complete (largely as the result of the number of opportunities provided to the public for participation in the study process), it would be quite a few years for a new request to come before the Land Board for its consideration.

For your information, I have provided the following hotlinks that will take you to the process for requesting and conducting a navigability study provided in both statute and administrative rule. Additionally, I have provided a hotlink to the list of study requests pending authorization by the Land Board.

<http://www.leg.state.or.us/ors/274.html> (ORS 274.400 to 274.412)

[http://arcweb.sos.state.or.us/pages/rules/oars\\_100/oar\\_141/141\\_121.html](http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_141/141_121.html) (OAR 141-121-0000 through 141-121-0040)

<http://oregonstatelands.us/DSL/NAV/studyrequests.shtml>

I hope this information answers your questions. Please let me know if you have any other questions or need clarification to my answers.

Thank you for contacting us.

David J. "Jeff" Kroft, Ph.D.

Senior Policy Specialist

Land Management Division

Oregon Department of State Lands

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**Staff Note:** This string of email has some overlap with the prior string of email, but in attempt to include all comments this email is included as well.

**From:** Todd Prager [<mailto:toddeprager@gmail.com>]  
**Sent:** Thursday, September 22, 2011 7:48 PM  
**To:** Sin, Sidaro  
**Cc:** Weigel, Laura; Jim Johnson; Selden, Sarah; Jon Gustafson; [weg@buckley-law.com](mailto:weg@buckley-law.com)  
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Best regards,

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Because that part of Lake Oswego which was formed as a result of the dam is an “artificial” feature and was not in existence in 1859 at the time of Oregon’s statehood (as would be a man-made canal or basin along a waterway) a navigability study would not apply.

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**Subject:** Re: Your Questions Concerning Lake Oswego

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On navigable waterways, the public has what I term “the full bundle of rights” – that is, the rights to fish, recreate, navigate and conduct commerce up to the line of ordinary high water. However, on waterways for which there has not been a determination of navigability, the public's rights are more limited –that is, to water dependent uses and uses incidental to a water dependent use only. To illustrate this difference - - on a waterway that has been determined to be navigable for title purposes, the public could play a game of touch football on the land below the line of ordinary high water. However, on a waterway for which no such determination of ownership has been made (but for which the person wanting to use it has determined that it is floatable under the Public Use Doctrine), no such game would be allowed since touch football is neither a water dependent use or use incidental to a water dependent use.

The factor that complicates what the public can/cannot do on Lake Oswego relates to the dam: the line of ordinary high water as it existed prior to the construction of the dam is below the current water surface. This results in the state-owned submerged and submersible land being below the current water surface. Consequently, although the public has the right to recreate on the surface of the water, it does not have the

right to use what is now the post-dam submersible land around the land – which is above the pre-dam line of ordinary high water – as it would if the lake had not been dammed unless such land is publicly-owned. Does this make sense to you?

In any event, to use the surface of the lake, the public has to gain legal entry through either publicly-owned land or with the permission of an adjacent landowner. And once on the surface of the land, the public cannot use the submerged or submersible land that exists above the pre-dam level of the lake.

Please let me know if you have any other questions. And I do thank you for contacting us.

Regards,

Jeff

**From:** Todd Prager [mailto:[toddeprager@gmail.com](mailto:toddeprager@gmail.com)]

**Sent:** Thursday, September 08, 2011 9:30 PM

**To:** KROFT Jeff

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Thanks again for your time.

-Todd

On Thu, Sep 8, 2011 at 3:48 PM, KROFT Jeff <[jeff.kroft@state.or.us](mailto:jeff.kroft@state.or.us)> wrote:

Good afternoon, Mr. Prager,

Let me first apologize for my delay in getting back to you with regard to your questions about the title navigability of Lake Oswego. I have been out of my office for much of this week attending meetings and am only now catching up with my e-mail. Before answering your questions, I must say that I am impressed with the work you have done to try to understand the history of Lake Oswego and the topics of title navigability and public trust rights – all of which are complex.

You have asked me:

**Q. Did the Department of State Lands consider the Water Resources Development Act of 1976 before determining there is sufficient evidence that Oswego Lake is navigable?**

**A.** No, the Department of State Lands (DSL) did not consider the Water Resources Development Act of 1976 (codified as USC Title 33, Chapter I, Subchapter II).

The purpose of this legislation (Senate Bill 2315) was to define which United States waterways were to be subject to U.S. Army Corps of Engineers regulation and U.S. Coast Guard oversight. The original the purpose of this legislation (more commonly known as the “River and Harbor Act of 1894”) was to “...*prescribe rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation owned, operated, or maintained by the United States, and for the posting of such regulations and the punishment of violations thereof.*”

Although the terms “*navigable*” and “*non-navigable*” were not explicitly defined in the act, it is clear that the use of these terms was not premised on the ownership of the underlying submerged and submersible land. Evidence of this is contained in testimony given by Senator Mark Hatfield on August 4, 1976 that I found in our files concerning Senate Bill 2315. The purpose of this bill was to, among other things, “*declare the privately built and maintained reservoir known as Lake*

*Oswego, Oregon, a non-navigable water of the United States.*” In his testimony, Senator Hatfield stated:

*“In 1972 the Corps of Engineers – without field studies, without prior notice to the Corporation [the homeowners association] or to the public in general, and without, apparently, much justification – abruptly designated the reservoir a “navigable water”. Aside from the impropriety of the Corps’ procedures in this case, there is no substantial reason today to support this action, which injects the police powers of the Corps into the operation of the reservoir. First, the reservoir is closely controlled by the Corporation at standards which exceed every applicable federal guideline, from boating safety to pollution control to dock construction. Second, operation of the reservoir and all attendant facilities, and purchase of water from the Bureau of Reclamation’s Tualatin Project, is a very costly proposition, and the homeowners assess themselves an annual charge to cover it. Any federal action to dilute the homeowners’ control carries with it the threat of their losing the value of their continuing to take over the operation of these facilities. Finally, a Congressional declaration that Lake Oswego is not a navigable waterway for the purposes of the federal government will not affect any future determination by the State of Oregon as to its ownership interest, if any, in the bed of the old Sucker Creek, from ownership transfers that occurred when Oregon became a state in 1859.”*

This testimony is also presented in the September 10, 1975 volume of the Congressional Record - Senate (pages 15633 – 15634).

Interestingly, there is also a carbon copy of a letter in our file sent to Senator Hatfield on July 23, 1976 by William Cox (the Department’s director at that time) stating:

*“Our reason for this concern [regarding the proposed legislation] has nothing to do with the nonnavigability for federal purposes, but rather that this particular wording may have an effect on prejudging a State decision as to whether or not Lake Oswego fits within “navigability” as would indicated that the bed of Lake Oswego (old Sucker Lake) was navigable and hence State-owned.”*

Another letter in our file from Representative Les AuCoin dated July 13, 1976 to a homeowner on Lake Oswego states:

*“The intent of this legislation is solely to cancel the Corps’ claim of jurisdiction. It is not the intention to affect the State of Oregon’s claim to jurisdiction over the Lake in any way.”*

This, of course, leads to the question of how the Department determined that Lake Oswego is navigable for title (ownership) purposes. In 1921, the Oregon Legislative Assembly enacted a law (ORS 274.430) stating that all lakes that were meandered by the federal government are “*declared to be navigable and public waters*” and vested the title to the submerged and submersible lands of such makes in the State of Oregon. Pursuant to that law, and based on:

- A General Land Office Cadastral Survey Map dated June 30, 1852 on which the lake was meandered by federal surveyors, and
- Historical records indicating that logs were floated as early as 1850 and a steamboat may have traveled on the lake from 1865 to 1873,

the State of Oregon claimed the ownership to the submerged and submersible land below the line of ordinary high water prior to dam construction. This claim was articulated in a Land Board Agenda Item dated July 18, 1984.

**Q. Does the United States Congress have supremacy over states in determining navigability?**

**A.** I am not sure I understand the question you have asked. However, if you are asking me this question in the context of the 1975 legislation enacted by Congress concerning the navigability of Lake Oswego, then, as I have indicated in my answer to your first question, what Congress did had no bearing on the title navigability (ownership) of the submerged and submersible land underlying lake as it existed in its pre-dam condition.

**Q. If Oswego Lake is non-navigable, does that prohibit the general public from swimming and other recreational activities when accessed from public shorelines?**

Regardless of whether a waterway has been/not been determined to be navigable for title purposes, the public has certain rights to use it. These rights, generally called Public Trust Rights, are discussed in a document we have prepared that you can access via the following hotlink.

[http://www.oregonstatelands.us/DSL/NAV/docs/recreational\\_use\\_waterways.pdf](http://www.oregonstatelands.us/DSL/NAV/docs/recreational_use_waterways.pdf)

I should point out, as you indicate, that any rights of the public to use Lake Oswego or any other waterway are contingent on the ability of the public to gain legal access to the waterbody. A person may not cross privately-owned property without the owner's permission to get to the waterway. Doing so constitutes a trespass.

**Q. Do I know of any maps that define the boundaries of Oswego Canal in relation to Oswego Lake?**

**A.** No, I do not know of any such maps. Perhaps (if you have not already done so) you could find such maps in the map collections of the Oregon Historical Society, the University of Washington or the University of Oregon. Each of these institutions has a very good map library containing numerous historical maps of the Pacific Northwest.

**Q. Would DSL be willing to do a navigability study on Oswego Canal and Oswego Lake?**

**A.** The short answer to your question is "Unlikely". I say this for several reasons. The first is that it is the position of the State of Oregon that Lake Oswego is navigable for title purposes as I have discussed above. The second relates to the number of study requests which have been received to date. Generally, the Land Board has been authorizing the Department to undertake studies in the order they were received. Given that there are a number of studies pending authorization, and that each study takes on the order of 1.5 years to complete (largely as the result of the number of opportunities provided to the public for participation in the study process), it would be quite a few years for a new request to come before the Land Board for its consideration.

For your information, I have provided the following hotlinks that will take you to the process for requesting and conducting a navigability study provided in both statute and administrative rule. Additionally, I have provided a hotlink to the list of study requests pending authorization by the Land Board.

<http://www.leg.state.or.us/ors/274.html> (ORS 274.400 to 274.412)

[http://arcweb.sos.state.or.us/pages/rules/oars\\_100/oar\\_141/141\\_121.html](http://arcweb.sos.state.or.us/pages/rules/oars_100/oar_141/141_121.html) (OAR 141-121-0000 through 141-121-0040)

<http://oregonstatelands.us/DSL/NAV/studyrequests.shtml>

I hope this information answers your questions. Please let me know if you have any other questions or need clarification to my answers.

Thank you for contacting us.

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