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To: Oswego Lake Workgroup, Comprehensive Plan Citizen Advisory Committee
Lake Oswego Planning Commission

From: Michael C. Blumm

Re: Oswego Lake Public Access

Date: January 3, 2012

I am Jeffrey Bain Faculty Scholar and Professor of Law at Lewis and Clark Law School, where I have taught natural resources and property law courses for the past thirty-three years. I have published over one-hundred articles on natural resources and property law over the years, which are available from my law school website: http://law.lclark.edu/faculty/michael_blumm/publications. I was also past Chair (2005-07) of the American Association of Law Schools' Natural Resources Law Section Committee. Recently, I completed a study of the Oregon public trust doctrine, which will be published in the law journal, Environmental Law, a draft of which is available at http://ssrn.com/abstract=1925112.

Based on that study, which included an analysis of Oregon case law from 1869 to the present, I am quite convinced that the public has a right to access Oswego Lake for recreational purposes, regardless of whether there is private ownership of the bed of the lake, and regardless of whether there is federal regulatory jurisdiction over the lake. In fact, if the City of Lake Oswego were to deny the public access to the lake from municipally owned lands, I believe that denial would violate the state's public trust doctrine.

The public trust doctrine has been part of Oregon case law almost since statehood, although Oregon courts have not always referred to it by that name. In early cases, the courts labeled the doctrine the public's rights to navigation. But since 1913, those public rights have included all waters on which the public can recreate, and in recent years Oregon courts have referred to the doctrine as the public trust doctrine, a doctrine recognized by the U.S. Supreme Court as long ago as 1892 and as recently as 1989. In brief, the doctrine prevents private monopolization of important public resources, particularly water and related resources. That is precisely what has been going on concerning Oswego Lake, as the Lake Corporation has erroneously concluded that it may deny the public access to the lake, which is clearly a publicly-owned resource. The city should not engage in this continued monopolization.

The water in Oswego Lake is publicly owned, as is all the water in the state. The state claimed ownership of the waters for over a century (see 1909 Or. Laws at 319). It is irrelevant that the Lake Corporation or its private members may own the lakebed. The Oregon Supreme Court has made clear many times that private lakebed or riverbed ownership cannot deny public access to public waters. (See, e.g., Guilliams v. Beaver Lake Club, 174 P. 437 (Or. 1918); Luscher v. Reynolds, 56 P.2d 1158 (Or. 1936). Moreover, the fact that the Lake Corporation was able to get Senator Hatfield to convince Congress that Oswego Lake was non-navigable for purposes of federal regulation under the Clean Water Act is also irrelevant. The scope of federal water quality regulation is not determinative of public access rights under state law.

State law recognizes public access rights to all waters that are floatable by recreational boats, (see Guilliams v. Beaver Lake Club 174 P. at 438, 442, recognizing the public's right to recreate in rowboats and to fish for trout), which certainly includes Oswego Lake. Those rights exist independently of rights to access Oswego Lake itself. Moreover, long ago, In *Weise* v. Smith, 3 Or. 445 (1869), the Oregon Supreme Court upheld the public's right to conduct log drives by using private uplands to construct booms necessary to transport logs downstream. That right to use private uplands to facilitate public rights on the state's waters seems applicable to monopolization that currently exists on Oswego Lake today. Thus, I believe that there is a right to cross private uplands to access Oswego Lake.

But even if the 1869 case is not precedent for public access over private lands to reach the publicly-owned Oswego Lake, as I believe it is, the city has no right to exclude the public from accessing the lake from publicly-owned lands. The fact that the public may not have the right to enter all publicly-owned property, like the city manager's office, is no reason to deny the public access public trust resources like Oswego Lake. Some public ownership is proprietary in nature, similar to private ownership; other public ownership is sovereign in nature—meaning it is held in a trust for the public—like Oswego Lake. Denial of the public's right to access Oswego Lake is clearly in the latter category. Forbidding the public to access this public trust resource from public lands adjacent to the lake is not only bad public policy, it is a violation of the state's venerable public trust doctrine.

Local comprehensive plans are required to comply with state law and statewide planning goals. The planning commission should take this opportunity to recommend city council adopt a policy allowing public access to Oswego Lake in order to comply with state law as well as statewide planning goal 8 as part of its comprehensive plan update. Otherwise, the city will risk lengthy and expensive litigation.

Sincerely yours,

Michael C. Blumm
Jeffrey Bain Faculty Scholar & Professor of Law