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NAVIGABILITY

Current law: “Under the Equal Footing Doctrine, federal courts have held that states entering the Union have the same rights as did the original thirteen states. When the original thirteen states took sovereignty of their land from the British, those states became owners of the land underlying what are termed “navigable” waterways and tidal waters within its borders as a part of its sovereignty”¹.

On February 14, 1859, Oregon became a state. Thus, all waterways that were **navigable** in 1859 are subject to state claims that “the people of Oregon own the bed and banks of all navigable streams, rivers, and lakes up to the ordinary high water line.” In addition, “the courts have determined that the use or potential for use by almost any type of watercraft is sufficient to determine navigability. Further, they have found that the use did NOT have to occur in 1859; it is enough that it could have occurred...”. The **ordinary high water line** “is a line on the bank or shore to which the water ordinarily rises each year. This line is not established based on the level to which the water rises during major floods.”²

If a waterbody is declared navigable, citizens may use the bed and banks of the waterway up to the ordinary high water mark for recreational purposes and, with a lease, commercial purposes. Use of the bed and banks on navigable stream segments are subject to state laws, regulations, and local ordinances. Violations include, but are not limited to, littering in or within 100 yards of state waters, trespass onto private land, interference with property, damaging property, damaging livestock, and reckless burning.

Most Recent Legislative Changes: The 1995 Oregon Legislature passed HB 2697 which provided the following primary direction:

- Grants the State Land Board exclusive jurisdiction to assert title to submerged or submersible lands (an assertion of navigability) and to specify the extent of the state’s interest in the navigable portion.
- Requires the board to establish rules to make such a determination.
- Provides for extensive public notice and input.
- Allows for judicial review of the board’s finding of navigability (A court determination will override a decision by the State Land Board.)

¹ Who Owns the Waterways? Division of State Lands

² Ibid.

Navigability Study Criteria: Under administrative rule, adopted June 11, 1996 by the State Land Board, a navigability study may be triggered by either criteria defined below. Any person may request the Division of State Lands to make a determination of navigability, however, that application must show evidence of one of the two compelling reasons to initiate a study of navigability on any waterbody. Briefly, if there is a conflict on the stream that can not be resolved in any other way, or if the state can collect revenue from activities occurring on the bed and bank of a waterway that is shown to have been navigable in 1859, only then will the state pursue a determination of navigability.

1. **“Broad And Substantial Public Interest”** exists when the Land Board , after considering the public’s right to the use of a waterway segment and the authority of the state and local government, determines that an administrative determination of navigability is required to: (a) Help resolve conflicts between property owners, between users (including recreational users), or between users and affected property owners of a waterway segment; (b) Facilitate management or protection of a waterway segment (for example, its environmental components or scenic, historic and cultural values), and/or (c) Facilitate and promote commerce.³
2. **“Sufficient Economic Justification”** exists when the Land Board decides that a determination of navigability will result in revenue accruing to the Common School Fund from a leasable use of the water segment or underlying land (for example, the placement of marinas or log rafts, or the extraction of aggregate).⁴

PLEASE NOTE: The issue of navigability is separate from the **“floatage easement”** granted by the Oregon Supreme Court which states that “(T)he public has the right to float waterways even where the bed is privately owned, and to make reasonable, incidental use of the bed and banks.” That is, if you can practically float the waterbody, then you may legally do so. Confusion arises since “reasonable, incidental use” was never defined and it has never been tested in court. The Division of State Lands is holding stakeholder meetings with an outside facilitator to formulate an equitable definition of public rights associated with the floatage easement.

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³ OAR 141-121-010(2)

⁴ OAR 141-121-010(10)