

Oregon Cases

■ Treating Water: Oregon Supreme Court Remands the Fate of Public Access to Oswego Lake

In a long and meandering case that began in 2012, the Oregon Supreme Court in *Kramer v. City of Lake Oswego* decidedly did not decide whether the public can access Oswego Lake for recreational pursuits. In an August 1, 2019, opinion, the court issued a remand to determine whether Oswego Lake was “navigable for title,” which will govern what rights, if any, the public has to access the Lake.

Oswego Lake has three “public” areas that potentially allow public access to the Lake. Other than these areas, the Lake is surrounded by private property, and those property owners pay dues to access the Lake. In 2012, the City of Lake Oswego passed a resolution that prohibited general public access to Oswego Lake from the three public areas abutting the Lake.

Plaintiffs challenged the City’s resolution on two primary grounds. First, plaintiffs argued that non-residents should be able to use the Lake because it is owned by the State of Oregon, which holds it in trust for the public. Due to this ownership, plaintiffs alleged that either the Public Use Doctrine or Public Trust Doctrine entitled the public to access the Lake. Plaintiffs also argued that a City resolution barring general public access to Oswego Lake violated Article 1, Section 20 of the Oregon Constitution, the “Privileges and Immunities Clause.” (In a related claim, plaintiffs also challenged under Article 1, Section 20 another City rule that limits the use of a fenced-in swim park to Lake Oswego residents.)

The *Kramer* case teed up hotly disputed questions about what rights, if any, the general public has to access and use waterways and waterbodies in Oregon. On summary judgment, the trial court assumed that the public had a right to use the Lake, but also held that neither the City nor the State had a duty to ensure the public had access to the Lake, even from the public access points.

The court of appeals agreed with the trial court. But the supreme court found that the lack of a factual record on whether Oswego Lake was a “navigable waterway” warranted a remand, at least with respect to the Public Trust claim. A waterbody that is deemed “navigable” imbues the public with certain use rights – including the right to use the waterway for recreation – that are not available on waterways not deemed navigable. Reaching as far back as the Roman Emperor Justinian as authority, the supreme court noted that the public’s right to use “navigable” waterways is a bedrock legal principle under federal law. And under Oregon’s common law, the public’s right to use waterways for commerce (and by extension, transportation and recreation) has similarly been recognized in Oregon’s jurisprudence for 150 years.

Therefore, while the right of the public to use a navigable waterway is incontrovertible, whether the public also has a right of access to such waterways is less certain. The original cases over who could use waterways in Oregon often arose out of logs runs down Oregon’s rivers. More recently, such fights revolve around recreation and fishing. Central to many of these disputes are what rights upland owners have to deny access to waterways. These competing interests frame the main question in the *Kramer* case: does the general public have a right to access a waterbody that is navigable and available for public use?

The court analyzed plaintiffs' claims under the Public Use Doctrine and the Public Trust Doctrine separately. It rejected the claim that public access is available to Oswego Lake under the Public Use Doctrine because under the common law, the use of private property adjacent to a navigable waterway is limited to instances of "necessity." Because the plaintiffs did not seek access rights solely for instances of "necessity," the court affirmed the dismissal of that claim.

As for the question whether the Public Trust Doctrine mandates access rights to a navigable waterway, the court noted that the public's use rights under that Doctrine are broader than those rights granted under the Public Use Doctrine. Lands (or waters) held in trust for the public carry with them a heightened right for use by the public, and in turn, a heightened right to access those lands (or waters) held in trust. Unlike the "necessity" test under the Public Use Doctrine for the right of access over private land, the supreme court found that restricting the public's access to navigable water was only allowable if the restriction was "objectively 'reasonable'" in light of the purpose of the land held in trust.

After finding that any restriction imposed by the City of Lake Oswego (as a municipality) would be subject to the "objectively reasonable" test, the court remanded the case to determine if Oswego Lake was, in fact, navigable (a determination that had been assumed but never proved throughout the history of the case) and if so, whether the City's resolution violated the public's rights of access under the Public Trust Doctrine. The question of navigability on remand will turn on whether Oswego Lake was susceptible for use for commerce in 1859 when Oregon was admitted as a state to the Union.

Having cast back upriver the main question whether Oswego Lake is a navigable waterway, the court then turned to the final question raised on appeal: whether the City's resolution barring general public access to Oswego Lake violated the Privileges and Immunities Clause of the Oregon Constitution. Plaintiffs' main contention was that the City's resolution had the effect of unlawfully granting the privilege of using the Lake to residents, to the exclusion of non-residents. But the court found that the City's resolutions barred *everyone* from entering the Lake from public access points, and therefore did not impermissibly create disparate classes of persons subject to an Article 1, Section 20 analysis. (The court also found that the small swim park used only by Lake Oswego residents was "rational" because of the City's interest in ensuring the swim park remains available for residents given its limited size.)

Although *Kramer* clarified a few questions under Oregon law regarding access rights to navigable waterways, many legal eddies remain. Private landowners will continue to have concerns about privacy and the removal of sticks from their bundles. Policy wonks will debate tragedies to the commons against benefits of broad public use and access. And recreationalists, anglers, and others will continue to seek opportunities to enjoy Oregon's beautiful waterways. Answers to these questions may also implicate other lands and resources held in "trust" by the State, such as forestlands. But given the pace of the *Kramer* litigation to date, scorekeepers at home may need to wait many more years before knowing whether Oswego Lake residents will need to welcome non-residents on the Lake.

Kramer v. City of Lake Oswego, 365 Or. 422 (2019).

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