



April 25, 2025

Representative Ken Helm, Co-Chair
Representative Mark Owens, Co-Chair
Representative Sarah Finger McDonald, Vice-Chair
House Committee on Agriculture, Land Use, Natural Resources, and Water

Re: **Trout Unlimited Supports More Flexibility in the Navigability Determination Process
(Senate Bill 74)**

Dear Co-Chairs Helm and Owens, Vice-Chair Finger McDonald, and Members of the Committee,

Trout Unlimited (TU) is a non-profit dedicated to conserving cold-water fish (such as trout, salmon, and steelhead) and their habitats. The organization has more than 350,000 members and supporters nationwide, including many members in Oregon. TU and its members are committed to caring for Oregon rivers and streams so future generations can experience the joy of wild and native trout and salmon. Access to rivers and fisheries is an important component of that enjoyment.

Trout Unlimited supports DSL’s efforts to create an additional and less burdensome pathway for *asserting* state ownership to “title-navigable” rivers in Oregon, as proposed in SB 74.

The topic of navigability is extraordinarily complex, and understandably, sensitive for landowners. It is also extremely important for the public’s enjoyment of Oregon’s wonderful rivers, let alone the State’s authority to collect revenues for certain uses of state-owned waterways.

LEGAL BACKGROUND

This topic requires a fair bit of legal history. In short, under the “equal footing doctrine,” states acquired ownership of tidally-influenced *and title-navigable waterways* from the federal government, upon statehood. The determination of what waterways are title-navigable is controlled by the U.S. Supreme Court’s decision in *The Daniel Ball* case. 77 US 557 (1870). If a waterway is title-navigable, then the “public trust doctrine” applies to it, and the State must protect the public’s use of the waterway for recreation, navigation, and other uses. *Illinois Central Railroad v. Illinois*. 146 US 387 (1892).

If a waterway is title-navigable, then the State has owned the submerged lands since statehood, with few exceptions.¹ Declaring navigability is a matter of *asserting* the State’s ownership of the submerged lands; it is not a matter of “taking” property or bringing lands out of private ownership and into the State’s ownership. Clearly, this can be confusing and surprising to landowners. That is a consequence of Oregon—like many other states—leaving these important questions unsettled. There are undoubtedly rivers around Oregon that meet the test for title-navigability described in *The Daniel Ball*; in those places, the State owns and has owned the submerged land since statehood, regardless of landowner expectations or understanding.

¹ For additional background on the law of navigability, see the Attorney General opinion attached to Trout Unlimited’s testimony dated March 14, 2025, available at:

<https://olis.oregonlegislature.gov/liz/2025R1/Downloads/PublicTestimonyDocument/152925>

CONTEXT

Ownership of submerged lands (including areas below the ordinary high water mark (OHWM)) is an arcane issue, and it may seem unimportant at first glance. However, this issue affects outdoor recreation on a daily basis. As an example only, if a waterway is title-navigable, then boaters have a legally-enforceable right to anchor upon its riverbed to fish, and anglers may wade upon the bottom or areas below OHWM without citation. Around the state, anglers and other recreational users are hassled and threatened with trespass on a daily basis because the State has never addressed the topic of title-navigability in many places. Landowners, recreational users, and the State alike are unsure of ownership boundaries for many rivers in Oregon, and 166 years post-statehood, it's time to make further progress in addressing this uncertainty.

SCENARIOS OF CHANNEL MOVEMENT

There are 3 main scenarios of waterway channel movement, and they have different results for property ownership under the law. Assume for each of these that the waterway in question meets the controlling test of navigability:²

In scenario 1, where a stream channel has not moved between statehood and today, a navigability determination regards submerged areas only, with the result that the area below the OHWM has been owned by the State since 1859.

In scenario 2, where a channel moved slowly (called accretion), the area of state ownership shifts with the submerged area over time. Like scenario 1, the result is that the navigability determination regards only the areas that are currently submerged. The location of the channel at statehood is not state-owned. Instead, the area below the OHWM today is state-owned.

Scenario 3 is the most complicated example, where a channel moved quickly (called avulsion). In that instance, the area of state ownership remains in the location prior to the avulsive event. For example, imagine that a river channel was located in one area between statehood and 1940, and in 1940, engineers moved the channel several hundred yards eastward. The result is that the State owns the original channel location today, even though it may be built over with homes, roads, or agricultural fields. Moreover, in this scenario, the State does not own the land underlying the existing channel. In this case, an exchange of deeds by affected property owners and the State establishes unequivocally that private landowners own the former channel location, which no longer has a waterway on it. This process can address questions of title by confirming that the State does not own uplands now covered with farms, roads, and houses – but instead, only owns the current channel location.

HOW DOES SB 74 HELP?

This bill creates an additional, new pathway for Oregon to declare the current riverbed and bank below OHWM as the area of state ownership, if property owners agree. It leaves the other existing legal pathways for navigability determinations on the table. In the instance of channel movements since statehood due to avulsive events (with the possible result that the State currently owns dry upland areas now developed with agriculture, residences, or other improvements), SB 74 would establish a helpful option for the State and landowners to confirm that the State does not currently own dry upland areas, and instead owns the submerged areas.

Thank you for this opportunity to provide comments on this legislation, and please let me know if you have any questions.

Sincerely,

James Fraser, Oregon Policy Director, Trout Unlimited, james.fraser@tu.org

² See accompanying diagrams in Trout Unlimited's testimony dated April 1, 2025, available at: <https://olis.oregonlegislature.gov/liz/2025R1/Downloads/PublicTestimonyDocument/187809>