

Editors Note: *Common Highways, and Forever Free: The Public Right of Navigation*” was written several years ago by Jan Stevens, now retired, from the Office of the Attorney General. Although the article is dated, it does provide a roadmap of the public’s right to use navigable waterways in California. For editorial purposes, we have added at the top of the document the title “Public Trust Doctrine.”

## **Public Trust Doctrine**

### **Appendix E**

#### **"COMMON HIGHWAYS, AND FOREVER FREE:" THE PUBLIC RIGHT OF NAVIGATION**

"Navigation has been characterized as an old bottle into which new wine has been poured by our environmentally aroused generation. It is a historic concept and one which marks, as few concepts do, the development in judicial decisions of a law which reflects the changing needs of our time.

What is navigability and why is it important? To understand the problem fully, it is necessary to go back in history. Under the common law:

**"Both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the crown of England, are in the King. Such waters and the lands which they cover either at all times or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the King's subjects. Therefore, the title... in such lands ... belongs to the King as the sovereign; and the dominion thereof ... is vested in him as a representative of the nation and for the public benefit." Shively v. Bowlby, 152 U. S. 1, 11 (1894). See Corker, "Thou Shalt Not Fill Public Waters Without Public Permission-- Washington's Lake Chelan Decision," 45 Washington Law Review 65, 76 (1970).**

When the thirteen colonies became independent, they assumed the title and rights of the King of England to navigable waters and the soil under them. States which were later admitted to the Union (such as California), were admitted on an equal footing with all of the other states, including the original thirteen. The Northwest Ordinance, which provided for admission of most of the central western states, stated that "navigable waters leading to the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free..." U. S.C.A. Constitution, article IV, section 14.

Under the Spanish/Mexican law applicable to California before the State Constitution was adopted, every man had a right to use the rivers for commerce and fisheries, to tie up to the banks, and to land cargo and fish on them. Scott (ed.), *Los Siete Partidas* 821.

It is only natural that this concept should continue in California law. Accordingly, the act of admission for the State of California expressly declared that "all the navigable waters within the said state shall be common highways, and forever free... to the inhabitants of said state as to the citizens of the United States, without any tax, impost or duty therefor."

The test of navigability for ownership of a navigable lake or stream, however, is a different one from a test which is subsequently developed for determining the public right of passage. The California courts have pointed out that there are essentially three definitions of navigability, all applicable for different purposes.

1. Navigability for commerce cause purposes. For these purposes, i.e., regulation of the waters of the state by Congress, rivers have been held to be navigable in law which are "in fact, used or susceptible to being used in their natural condition 'or with reasonable improvements' for purposes of trade and commerce." U.S. v. Appalachian Power Co., 311 U. S. 377, 406-409.
2. Navigability for the purposes of determining the respective rights of the states to title of a stream bed. Here the test has been characterized as the basic commerce clause test with two exceptions: it is applied to the stream in its natural condition, and is determined as of the time of admission of the state to the United States.
3. Navigability for all other purposes (e.g., the public's right to navigate the river). "In all other respects," it has been held, "the states are free to prescribe their own definitions of navigability," and when in conflict with federal dominion "the exclusive control of waters is vested in the state, whether the waters are deemed navigable in the federal sense or in any other sense." Hitchings v. Del Rio Woods Recreation and Parks District, 55 Cal. App. 3d 560, 567 (1976).

How did these rules develop? We have already seen the historic policy that the public waters of the state are in effect public highways. The same rule appears in California's Constitution in expanded form in article X, section U (formerly article XV, section 2), as follows:

"No individual, partnership, or corporation, claiming or in possession of the frontage or title lands of a harbor, bay, inlet, estuary or other navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or destruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this state shall be always obtainable for the people thereof."

Similarly, in article I, California's "Bill of Rights," Article 1, section 25 provides:

"The people shall have the right to fish upon and from the public lands

of the state and in the waters thereof, excepting upon lands set aside for fish and hatcheries, and no land owned by the state shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this state for purpose of fishing in any water containing fish that have been planted therein by the state..."

In 1897, the California Supreme Court stated: "To the extent that waters are the common passageway for fish, although flowing over lands entirely subject to private ownership, they are deemed; for such purposes, public waters..." People v. Truckee Lumber Co., 116 Cal. 397, 401 (1897). -

This policy appears in many statutes as well. To obstruct navigation on any navigable lake, river, bay, stream, canal or basin is a public nuisance and made unlawful by Civil Code section 3479, Penal Code section 370, and Harbors and Navigation Code section 131.

How have these policies been applied by the court?

1. Fly's Bay. Fly's Bay is a bay or side channel of the Napa River.

It contains a channel deep enough for navigation at mean tide, and is entirely navigable by small boats at high tide, though at low tide the land is nearly bare. Although title to the underlying lands was passed to a private owner, the Supreme Court held that the owner could not exclude the public. Forestier v. Johnson, 164 Cal. 24 (1912).

2. Frank's Tract. Frank's Tract was patented as swamp and overflowed lands: in 1873, and reclaimed for agricultural purposes. In 1938, a break in the levee resulted in flooding of the entire tract by the San Joaquin River. Since then, until 1947, the general public used the tract for fishing in rowboats and similar craft. When, in 1947, the land was leased to recreational developers the court held that there was no right to exclude the public. "Plaintiffs, until the land is reclaimed, have the right to prevent the public from fishing on, or navigating these waters, provided the public can do so without trespassing on plaintiffs' land." Bohn v. Albertson, 107 Cal. 2d 738, 757 (1951) (Hearing denied).

3. The Fall River. In the next case, People ex rel. Baker v. Mack, the shoe was on the other foot. As previously noted, obstruction of navigation is a public nuisance. In the Mack case, the District Attorney of Shasta County filed an action to abate a public nuisance against land owners on the Fall River who were attempting to prevent persons from boating, fishing and hunting on portions of the river adjacent to the lands. Of course, as the court stated, the main issue was whether or not the Fall River in that particular area involved was a navigable stream. "If it is navigable, then a public right of navigation exists and any obstruction of a navigable stream is a public nuisance." Civil Code section 3479. On the other hand, if it is not navigable, the owners of riparian properties have the right to obstruct the use of the river as they own the streams, banks and bed." 19 Cal. App. 3d at 1044 (1971):

The court immediately rejected the defendant's efforts to apply the old commerce cause test and held the river to be navigable for public easement purposes. "With our ever-increasing leisure time (witness the four and five day weekend), and the ever-increasing need for recreational areas (witness the hundreds of camper vehicles carrying people to areas where boating, fishing, swimming and other water sports are available), it is extremely important that the public not be denied use of recreational water by applying the narrow and outmoded interpretation of 'navigability'."

"It hardly needs citation of authority that the rule is that a navigable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes." Id. at 1045.

The court held the Fall River to be navigable for purposes of public passage, based on evidence that the river was capable of use for boating by pleasure and so used. It is useful to note that court and counsel had observed the river both from the air and in a 14-foot aluminum flat-bottom boat with a five horsepower motor. Measurements offered in evidence showed that the river varied in width from 107 feet to 292 feet and its depth varied from 2.7 feet to 17 feet.

In holding the river to be navigable, the court approvingly cited a landmark decision from Minnesota pointing out that "there are innumerable waters--lakes and streams--which will never be used for commercial purposes, but which have been, or are capable of being used, 'for sailing, rowing, fishing, fowling, bathing, skating' and other public purposes, and that it would be a great wrong upon the public for all time to deprive the public of these uses merely because the waters are either not used or not adaptable for commercial purposes." Lamprev v. State, 52 Minn. 181, 53 N.S. 1139, 1143 (1893).

Among other decisions cited approvingly by the court were Diana Shooting Club v. Husting, 145 N.W. 816, 818 (1914), where the court held navigable the widening of Rock River in Wisconsin, which varied seasonably from 8 inches to 2 feet in depth, and which sometimes had no water in it. There the court pointed out that the availability for rowboats made the stream navigable. Another authority relied on was Willow River Club v. Wade, 76 N.W. 273 (1898), a Wisconsin case in which a small stream was held navigable, although, except at times of high tide, it was impossible to get up the stream as far as the main falls in a rowboat without dragging or pushing it on the bottom of the river in numerous shallow places.

In Mack, the court made clear that a number of contentions ordinarily advanced against navigability were not applicable.

- a. It is not necessary that a stream or river be included in a statutory list of navigable streams such as that set forth in Harbors and Navigation Code section 131. In fact, "all waters are deemed navigable which are really so." Churchill Co. v. Kingsbury, 178 Cal. 544 (1918).
- b. A water may be navigable even though it is periodically bare or nearly bare. Forestier v. Johnson, 164 Cal. 24 (1912).
- c. Boating for pleasure is a sufficient test of navigability. Bohn v. Albertson, supra.
- d. The question of title of the bed of the river was expressly held irrelevant... The fact that the county and the State Board of Equalization taxes the bed of a river is of no significance for the question of navigability. 19 Cal. App. 3d at 1049: "The real question here is not of title but whether the public has the right of fishing and navigation." Id at 1050.

The court concluded as follows:

"The modern determinations of the California courts, as well as those of several other states, as to the test of navigability, can well be restated as follows: Members of the public have the right to navigate and to exercise the incidence of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft." Id at 1050.

4. The Russian River: governmental power enters the scene. The next case involved the efforts of riparian land owners with governmental police powers; in this case a recreation and park district, to close a river to canoeists ostensibly on the grounds of health and safety. In Hitchings

v. Del Rio Woods Recreation and Parks District, 55 C.A. 3d 560 (1976), the court reaffirmed the logic developed in Forestier, Albertson, and Baker v. Mack. In Hitchings the Court of Appeals held that the Russian River was navigable, and that the public's right was subject to reasonable police power regulations.

5. Other Navigable Waters. Apart from judicial holdings, a number of Attorney General's Opinions have discussed the question of navigability. The Tuolumne River between La Grange and Dickinson's Ferry was held to be subject to the public easement for navigation and its incidence, based on the test laid out in Bohn and Mack. 55 Ops. Cal. Atty. Gen. 293 (1972).

It was concluded in an informal letter that the "Butte Sink," a region in northwest Sutter County annually flooded by the Sacramento River, was subject to the public easement and could be used by duck hunters in rowboats. (Letter, Attorney General Evelle J. Younger to Ted Hansen, District Attorney of Sutter County, October 15, 1975.-) This letter distinguishes an earlier informal opinion holding the Yolo Bypass to be non-navigable for public easement purposes on the basis of the irregularity of navigability and the "specialized and dominant use of the bypass for agricultural purposes." Id, p. 3, discussing Letter, Deputy Attorney General Raymond H. Williamson to L.H. Cloyd, Deputy Director, Department of Fish and Game, I.L. 71-25 (Jan. 7; 1971).

In addition, opinions of county counsels have concluded the Mokelumne and Cosumnes Rivers to be navigable under the public easement test.

6. The future lies ahead: Police power v. navigability. Presently under litigation as to navigability are the Kern (held to be navigable by the appellate department of the Kern County Superior Court) and the South Fork of the American.

1. Cf. Harbors and Navigation Code section 100, excluding from the statutory definition of navigability floodwaters temporarily flowing above the normal high-water mark.

The next chapter represents a logical development of population pressures on public waterways. It involves the effort of general purpose-government to close a navigable waterway in the exercise of its police power to regulate for public health and safety. This case is still before the Court of Appeals of the Third Appellate District, the same court that decided Baker v. Mack, and the answer is not yet forthcoming. Based on the complaints of riparian land owners on the south fork of the American River, the El Dorado County Board of Supervisors passed an ordinance prohibiting the use of the river by craft of any type whatever. This office and attorneys for an association of river touring organizations petitioned the Court of Appeals to stay the enforcement of the ordinance and to reaffirm the Baker v. Mack rule. A stay order was issued prohibiting enforcement of the ordinance until further order of the Court of Appeals, and the matter is now before that court.

### CONCLUSION

The tests, then, are becoming steadily clearer:

- (1) "Members of the public have the right to navigate and to exercise the incidence to navigation in a lawful manner at any point below high water mark on waters of this State which are capable of being navigated by oar or motor-propelled small craft." (People v. Mack, supra, at 19 Cal. App. 3d at 1050; 97 Cal. Rptr. at 454.) (Emphasis supplied).
- (2) "the test of navigability is met if the stream is capable of boating for pleasure." People v. Mack, supra, at 19 Cal. App. 3d at 1044, 97 Cal. Rptr. at 450) (Emphasis supplied).
- (3) The effect of this conclusion is clear; "It hardly needs citation of authorities that the rule is that a navigable stream may be used by the public for boating, swimming, fishing, hunting, and all recreational purposes." Hitchings v. Del Rio Woods Recreation and Park District, 55 Cal. App. 3d 560, 571, 127 Cal. Rptr. 30, 837 (1976) quoting People v. Mack, supra, 19 Cal. App. 3d at 1045, 97 Cal. Rptr. at 451.) (Emphasis supplied.)
- (4) " .. it is extremely important that the public not be denied use of recreational water." (People v. Mack, supra, 19 Cal. App. 3d at 1045, 97 Cal. Rptr. at 451 (1971)). (Emphasis supplied.)

(5) It is immaterial that the underlying bed is privately owned and taxed.

(6) The land may have been once dry in its original state.

(7) Water need not cover the area all year.

The story is far from over. Basically still open for decision are crucial questions of regulation of the river:

1. To what extent may the public's right of navigation be restricted for health and safety purposes? Clearly, there is no absolute right to use a river to the detriment of others any more than there is such an absolute right to use a highway. Littering, unsanitary conditions and trespass will and must be prohibited.

What can a county do in this respect? Article XI, section 7 of the California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary and other ordinance and regulations not in conflict with general laws." A local ordinance therefore must meet several tests: (1) It must not be in conflict with general law; (2) It must be constitutional in all other respects. In other words, it must not violate basic rights of travel and navigation, and general laws with which there may be a conflict. Harbors and Navigation Code sections 650 and 660 outline the area in which counties may operate. First, section 650 states: "It is the policy of this state to promote safety of persons and property in connection with the operation and equipment of vessels and to promote uniform laws relating thereto." Section 660 provides in part that the provisions of the Harbors and Navigations Code regulate the operation of motor boats and vessels on the waters of this state but that nothing in that law shall be construed to prevent the adoption of any ordinance, regulation or rule relating to vessels by any entity otherwise authorized to adopt such measures; "provided, however, that such measures relating to undocumented vessels shall pertain only to time of day restrictions, speed zones, special use areas, and sanitation and pollution control, the provisions of which are not in conflict with the provisions of this chapter or other regulations adopted by the department."

This office has taken the position that counties, as well as other general purpose agencies, are restricted to regulations concerning "time of day restrictions, speed zones, special use areas, and sanitation and pollution control" with respect to the operation and equipment of vessels, and that furthermore, these provisions must not be in conflict with the provisions of the Harbors and Navigations Code or the regulations adopted by the department.

2. What is the effect of artificial changes in water levels? Although the Russian River was clearly subject to such changes, the court in Hitchings expressly side-stepped the issue. It would appear, however, that the artificiality of flows can have little effect on the right of navigation, since the more restrictive federal test applies even if a water is merely susceptible of being made navigable. U.S. v. Appalachian Power Co., 311 U. S. 377 (1940).
3. What are the purposes incident to navigation that accompany the navigational easement? Clearly, they include boating, fishing, swimming, hunting and other recreational uses. Hitchings, supra, at 571. 55 Ops. Cal. Atty. Gen. at 298. They include the right to stand on the bottom while fishing or bathing, to anchor a boat, and to pole a boat. Bohn, supra, at 749-750. They include the right of portage around navigational

obstructions (Restatement of Torts, Comment (d) to section 193.). They also include launching and landing below the high-water mark.

4. To what extent may general-purpose governments restrict access to navigable waters? Article 10, section 4 of the California Constitution, as previously stated, establishes a constitutional right of access. At the same time, however, it does not confer the right to trespass over private lands.

In a case now on appeal, defendant Sweetser carried his kayak from a county bridge over an unused, fenced and posted county right-of-way into the Kern River. He was arrested and convicted of trespass. The appellate department of the Kern County Superior Court reversed, holding (1) the Kern River is navigable; thus, no trespass could occur there; (2) a county could not exclude persons from its right-of-way. This case is now before the Court of Appeals.

Public recreational pressures are steadily rising. Like roads once little travelled, our streams and waterways are suffering the strains of population growth. In the absence of concerted state or federal planning, landowners, public districts and counties are struggling with the problems of crowding, sanitation and trespass.

The solution cannot be to close these common highways. It must be to plan and regulate intelligently, on a statewide basis, to ensure that the freedom of navigation is not destroyed by its abuse.

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\*The views are those of the author and do not necessarily reflect those of the Attorney General.