OFFICE OF THE ATTORNEY GENERAL

Department of Justice

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IT 75 - 246

Telephone No. SC 74/1 IL

October 15, 1975

Honorable H. Ted Hansen
District Attorney
County of Sutter
Courthouse Annex
Yuba City, California 95991

Re: Opinion No. SO 74/1 IL
Request for Opinion Concerning the
Navigability of Floodwaters in the
"Butte Sink" Region

Dear Mr. Hansen:

By your letter dated September 11, 1974, you requested an opinion from this office on the following question:

> Do the floodwaters in the region known as the "Butte Sink" constitute navigable waters for the purpose of determining whether they are subject to an easement in the public for navigation and the incidents of navigation, including boating, hunting, fishing, and other recreational uses?

The conclusion is:

> The "Butte Sink" floodwaters are navigable waters subject to an easement in the public for navigation, including boating, hunting, fishing and other recreational uses.

In your letter, you related the circumstances and reasons which motivated your opinion request:

> "The question arises out of the following situation: In the northwest corner of Sutter County, there are lands located in what is

referred to as the 'Butte Sink' that are used as a private duck club. It is my understanding that annually the 'Butte Sink' is flooded by the overflow of the Sacramento River. This overflow comes primarily from the Shasta Dam and the Corps of Engineers has purposely designed this area to receive the overflow to take pressure off of the levees further down the Sacramento River. When the overflow occurs, duck hunters in this area will row boats into the 'Butte Sink' and duck hunt on what was a private duck club prior to the overflow.

"Last year conflicts between the club hunters and those hunters rowing in from the Sacramento River or from the Sutter By-Pass virged [sic] on being very serious. With the upcoming duck season, it is my desire to have a legal determination as to whether a trespass is being committed by those rowing into the private club area or whether they have a right to be there."

ANALYSIS

An easement in the public for navigation and the incidents of navigation, which include boating, bathing, fishing, hunting, swimming, and other recreational activities, attaches to and burdens those waters in California that are navigable, irrespective of whether title to the underlying land is held by private or public entities. Bohn v. Albertson, 107 Cal. App. 2d 738, 749 (1951); People ex rel. Baker v. Mack, 19 Cal. App. 3d 1040, 1045, 1050 (1971). In order for a body of water to be deemed navigable in law, it must be navigable in fact, and conversely, if it is not navigable in fact, it cannot be navigable in law. Bohn, supra at 742; Mack, supra at 1045. Various tests for determining navigability in fact for purposes of the public navigacional easement have been developed by the courts of this country.1/ The rule

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1. Navigability in fact is also the touchstone for establishing whether or not title to the underlying beds of waterways is vested in the state. If a waterway was navigable at the time the state was admitted to the Union, the state has title to the underlying bed, but if it was not then navigable, title to the bed remained in the United States. Utah v. United States, 403 U.S. 9, 10 (1971); United States v. Utah, 283 U.S. 64, 75-76 (1931); Bohn, supra at 742. For purposes of the public easement for navigation, however, current navigability is the criterion. Bohn, supra at 742-43.

established in the federal courts looks to the utility of the waterway as a "highway for commerce," i.e., its capability of transporting products of the country for trade or commercial purposes. The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); Utah v. United States, supra, 403 U.S. 9, 10-11 (1971). Although this was once the California rule, Wright v. Seymour, 69 Cal. 122, 124-25 (1886), the modern courts of this state have rejected that narrow, commerce-oriented definition of navigability in favor of a broader, more liberal test which focuses upon the utility of the waters for purely recreational purposes. Mack, supra at 1045, 1047, 1048, 1050; Bohn, supra at 747-48. A waterway need not be continuously navigable in fact throughout the year in order to constitute a navigable body of water, but the seasons of navigability must be regular and predictable so that they may be depended upon to support the public uses desired under the navigational easement. 1 H. Farnham, The Law of Waters and Water Rights § 23, at 102 (1904); 2 American Law of Property § 9.48, at 477 (A. J. Casner ed. 1952); 3 H. Tiffany, The Law of Real Property § 937, at 627-28 (3d ed. B. Jones 1939); 65 Corpus Juris Secundum "Navigable Waters" § 6, at 76-77 (1966).

Before discussing the question presented, a caveat to our analysis should be noted. In an opinion concerning the navigability of floodwaters of the Yolo Bypass, this office concluded in Indexed Letter 71-25 that such waters were not navigable for purposes of the public navigational easement. The factual situation there was somewhat similar to the present one, involving the sport of duck hunting from small boats in waters which had overflowed the Sacramento River onto the privately owned lands of the Yolo Bypass. However, we believe that the determination of non-navigability in that prior opinion is in no way inconsistent with the conclusion reached herein inasmuch as the irregular, unpredictable seasons of navigability therein together with the specialized and dominant use of the Bypass for agricultural purposes to the exclusion of recreational user completely distinguish the facts and result in this opinion. Significantly, the Yolo Bypass opinion was issued (January 7, 1971) before publication of People ex rel. Baker v. Mack, supra (September 15, 1971), an extremely important ruling which clarified the law in this state regarding navigable waters and expressly adopted the modern test of purely recreational-use navigability, emphasizing that California's standard for navigability in fact is much more liberal than

the federal and old California rule.[2] In any event, we have enclosed as an Appendix hereto a copy of Indexed Letter 71-25 for your further information.

The question presented is whether the floodwaters covering privately owned lands in the "Butte Sink" are navigable in fact for the purpose of determining whether they are subject to the public navigational easement and the incidents of navigation, including among others waterfowl hunting. Based upon the limited facts that we were able to obtain from you and other sources, we have concluded that to the extent that our factual search is accurate and complete, the "Butte Sink" floodwaters are navigable and subject to an easement in the public for navigation and the incidents thereof, including hunting for waterfowl. We must strongly emphasize that the determination of navigability or non-navigability depends upon the completeness and accuracy of the factual background bearing upon each of the legal issues concerned herein. Indeed, navigability in California "is largely a question of fact, to be determined from the character of the stream . . . and the other surrounding circumstances affecting the question." (Bohn, supra at 742.) Our conclusions in this opinion involve the resolution of highly complicated factual and legal questions which ordinarily are more appropriate for decision after a detailed factual investigation. Unfortunately, we were unable to accomplish that thorough, comprehensive fact-gathering task which would normally be essential to and dispositive of any judicial ruling on a waterway's navigability. Given further and different factual information, we could very likely come to a conclusion opposite to that in the present opinion.

With the foregoing qualifications in mind, the following facts relevant to the question of navigability are those we were able to secure:

It is our understanding that the Northern California region commonly known as the "Butte Sink" is

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2. The Yolo Bypass opinion relies heavily upon the California landmark case of Bohn v. Albertson, supra. It should be noted that the utilization of the waters in Bohn for purposes of both recreational and commercial uses renders the Bohn court's application of the modern test for navigability not altogether free from dispute. See discussion in note 10, infra.

situated primarily in the northwest corner of Sutter County, occupying portions of Colusa and Butte Counties as well, and is bounded generally by Butte Creek on the west and the Sutter Buttes on the east. The "Butte Sink" is an imprecisely defined, brushy marshland area, often nearly dry in the summer months and usually covered by water in the winter months, when its marshy character becomes an attractive environment for wildlife and waterfowl. We are advised by the State Lands Division of the State Lands Commission that all of the land located in the "Butte Sink" is in the private ownership of both individuals and exclusive hunting and recreation clubs, through State patents of swamp and overflowed lands issued in the late 1800's, so that the State owns no property there in fee title.3/

We have been informed by the Flood Control Development Branch of the State Department of Water Resources that the "Butte Sink" is the recipient of floodwaters4/ from the

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3. Mr. Gary Horn, of the State Lands Division, told us that eighty to ninety percent of the patents were granted during the 1870's, and that less than ten percent were granted after 1879, the year of the adoption of Article XV of the California Constitution guaranteeing public access to navigable waters. By the turn of the century, over ninety-nine percent of the patents had been issued by the State, and only one patent was dated after 1910, a parcel of fifteen acres in 1917 which included a reservation of the absolute right to fish, pursuant to Article I, section 25, of the Constitution (added in 1910).

4. The term "floodwaters" is used in this opinion in a very general and popular sense to refer to those waters which were at one time part of an established waterway but which have overflowed the natural channel and escaped onto the adjacent territory. As such, the term encompasses not only extraordinary, unexpected floods but also ordinary, usual recurring flooding "which can be counted on as certain to occur annually, and to continue for months." Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 432 (1888). Technically, however, "floodwaters" are defined by the courts to include only extraordinary overflows that "escape from the usual channels under conditions which do not ordinarily occur" (Everett v. Davis, 18 Cal. 2d 389, 393 (1941)), and thus do not include ordinary, seasonal flooding. Implicit in the

Sacramento River which overflow at the Colusa and Moulton Weirs and the Chico Landing Weir Site of the River's levee system during the winter season, when the water elevation in the River exceeds flood levels as a result of the normal runoff from winter snows and seasonally heavy rains. The Sacramento River accounts for nearly all of the contribution to the "Butte Sink" floodwaters, although runoff waters from the Butte Creek comprise about one percent thereof. At certain water level elevations corresponding to particular rates of flow,[5] each of the unregulated weirs named above in turn allows the flood-stage water within the levees to overflow onto the adjacent lowland property (known as the "Butte Basin"), eventually collecting and inundating the "Butte Sink".

The depth, extent, and duration of the floodwaters coverage of the "Butte Sink" change from one location to another therein and vary throughout the days and months of any one year as well as from year to year, depending upon the strength and frequency of the seasonal snowfalls and rainfalls (which directly affect the incidence of overflows of the Sacramento River). For example, the depth of water ranges from as high as 20-25 feet during the "wet" season (winter months) to nothing at all in the "dry" season (summer months) although the average flood-season depth is 5-15 feet, depending upon the geographical location, and several large pools exist continuously during the entire year. The extent of coverage varies from as little as a few hundred acres to as much as tens of thousands of acres, inundating the entire

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(Footnote 4 continued)
notion of floodwaters is the concept of a natural channel with established banks, which are defined as the boundaries containing the waterway's highest flow of water (Ventura Land & Power Co. v. Meiners, 136 Cal. 284, 290 (1902)), but nothing in this opinion is intended to imply a determination of either the existence or the extent of any established banks of the "Butte Sink" floodwaters.

5. For example, the Colusa Weir flows at approximately 30,000 cubic feet of water per second, the Moulton Weir at 70,000 c.f.s., and the Chico Landing Weir Site at 100,000 c.f.s.

"Butte Sink" region. The duration is also variable, ranging from a few weeks to several months of constant flooding, with 1-2 months as the average duration that the "Butte Sink" is continuously covered by the River's overflows.6/

Despite these fluctuations and variations in the "Butte Sink" floodwaters (which are, of course, to be expected) an unmistakable pattern of seasonal flooding emerges from an analysis of the available hydrographic data. With the possible exception of one or two years, the "Butte Sink" has been inundated perenially by Sacramento River runoff waters for the past 25 years, at some time during the months of December through March. Usually, the flooding begins in December or January, continuously and completely covers the "Butte Sink" for an average of 1-2 months, and ultimately recedes in February or March. In fact, the "Butte Sink" quite often remains flooded throughout the entire December-through-March period, and the floodwaters have been known to start in early October without abating until late April of the next year. The seasonal pattern of inundation by the winter months' overflows and floodwaters is highly regular, predictable, and ordinary.

Moreover, the normal depths of the "Butte Sink" floodwaters during the winter are sufficient to support numerous and different types of recreational pleasurecraft, ranging from small shallow-draft rowboats and canoes to large moderate-draft motorboats. These watercraft are used by both private clubs and members of the public primarily for waterfowl hunting, although a limited amount of fishing and boating is also done.7/ We understand that

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6. The preceding information was extrapolated from data contained in stage hydrographs from the Department of Water Resources which were based upon measurements taken at the gaging station at Butte Slough (Outfall Gates). These were furnished to us by Mr. Seward Andrews of the State Attorney General's Office in Sacramento.

7. The use of the "Butte Sink" for hunting and occasiona fishing is obviously restricted to the winter season when flooding makes such activities feasible. Some forms of farming, such as rice cultivation, take place in the later spring and summer months; however, this is not done to any significant extent in the "Butte Sink."

duck hunting is one of the most popular sporting activities in the Northern California counties which abut upon the Sacramento River, and it commands a large following and enormous interest among the citizenry there. We also understand that the "Butte Sink" is widely known as a great duck-hunting location. Virtually every year, thousands of hunting enthusiasts travel to the "Butte Sink" to pursue their sport, and at any one point in time during the "open season" for hunting migratory waterfowl (generally from October through February), several hundred duck hunters, from the general public as well as from private hunting clubs, may be found in the "Butte Sink" transporting themselves around and across the floodwaters by means of oar-propelled and motor-driven boats.

It is highly significant and noteworthy that this waterfowl-hunting population is composed of members of both the public at large and privately organized clubs. Access to the "Butte Sink" waters for the general public user is provided by small public roads, the Butte Creek, the Butte Slough, the Colusa Bypass, and the Sacramento River itself. During the flooding season, those roads are usually washed out and the waterways normally swollen and overflowed, so that they all afford convenient sites from which the public can directly launch their boats onto the water-covered lowlands.[8] In this fashion public duck hunters can easily and frequently gain entry into the "Butte Sink" in large numbers and over a long timespan. Public use of the "Butte Sink" area for purposes of hunting for waterfowl in the "open season" has recurred and been customary for many, many years, and has become a regular and expected phenomenon concomitant to the seasonal coverage of the "Butte Sink" by floodwaters.[9]

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8. Under these facts, the public has ready access to the "Butte Sink" lowlands without the necessity of entering upon any privately owned property. Consequently, we are not presented with any question of trespass under Penal Code, section 602, nor of unlawful entry under section 2016 of the Fish and Game Code, as they each relate to land-locked navigable waterways. See Bolsa Land Co. v. Burdick, 151 Cal. 254, 260 (1907); 25 Ops. Cal. Atty. Gen. 49, 50-51 (1955); 35 Ops. Cal. Atty. Gen. 24, 24-25 (1960); see generally, 35 Am. Jur. 2d. "Fish and Game" § 9, pp. 653-54 (1967).

9. This information was obtained from various representatives of the Department of Water Resources and the Attorney General's Office.

The leading cases in California on the question of the navigability in fact of waterways for purposes of determining whether the public navigational easement and the recreational incidents thereof, such as boating and hunting, attach to those waters are People ex rel. Baker v. Mack, supra, 19 Cal. App. 3d 1040 (1971), and Bohn v. Albertson, supra, 107 Cal. App. 2d 738 (1951). In Bohn, the court was confronted with the issue of the navigability of "Frank's Tract," an area of swamp and overflowed lands under private ownership which had been unexpectedly inundated and completely flooded by waters from the San Joaquin River escaping through a break in the levee. Large numbers of the public had gained access to the flooded lands in small rowboats and other pleasurecraft for use in recreational activities such as fishing and boating. Additionally, the waters were also shown to have been utilized for the commercial transportation of peat by barges. In holding that these were navigable waters, the court applied the modern liberal test of navigability based upon purely recreational use, citing and relying upon Lamprey v. State, 53 N. W. 1139, 1143-44 (Minn. 1893) for the following:

> "But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation in its ordinary sense, we fail to see why they ought not be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. . . .[S]o long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule [of commercial-use navigability]."
> (Emphasis by the court.)
> 107 Cal. App. 2d at 744.10/

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10. Although Bohn's application of the modern navigability standard was apparently the first California case to do so explicitly, the court did not rest its determination of navigability solely upon recreational use:

> "The evidence [of commercial transportation of peat] conclusively shows that the water in its present 'natural and ordinary condition affords a channel for useful commerce.'" (Citations omitted.) 107 Cal. App. 2d at 747. (Continued)

However, the public's rights pursuant to the navigational easement in the Bohn situation are qualified by the surviving right of the owner of the underlying lands to reclaim his land, but until so reclaimed the waters are burdened by the recreational incidents of the public easement. (Id. at 749.)

The Mack case, supra, 19 Cal. App. 3d 1040 (1971), involved the navigability of the Fall River whose bed was owned by private individuals, but whose waters were used and capable of use by the public for fishing, boating, hunting, and other recreational pursuits. Evidence gathered at trial demonstrated that the river was negotiable by small, motor-powered boats, and that public access thereto was available via an express right of way and public waterways. The Third Appellate District Court of Appeal affirmed the lower court's finding that the river was navigable, and explicitly adopted the modern test of recreational-use navigability as the law in California. The court applied the following version of the modern rule, at page 1050:

> "The streams of California are a vital recreational resource of the state. The modern determination of the California courts, as well as those of several of the states, as to the test of navigability can well be restated as follows: members of

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(Footnote 10 continued)

Thus, the question as to whether the Lamprey rule was fully incorporated into California law in the Bohn case is not entirely clear.

the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark [11] on waters of this state which are capable of being navigated by oar or motor propelled small craft." (Emphasis and footnote added.)

Parenthetically, it should be noted that the public easement for navigation extends to the high-water mark of all navigable bodies of water, so that public uses of navigable, nontidal waters for hunting, fishing, boating, bathing, and the other recreational incidents of the navigational easement, may be made at any point up to the line of high water associated with those waters. 1 Waters and Water Rights § 36.4, at 198-99 (R. Clark ed. 1967); 3 American Law of Property, supra, § 12.33, at 271; 3 Tiffany, supra, at 626-27; Illinois Central Railroad v. Illinois, 146 U.S. 387, 445-47, 450 (1892); Wilbour v. Gallagher, 462 P.2d 232, 238 (Wash. 1969); Diana Shooting Club v. Husting, 145 N.W. 816, 820 (Wis. 1914); Lamprey v. State (Metcalf), supra at 1143 (Minn. 1893). Cf. People v. California Fish Co., 166 Cal. 576, 584-89, 596-99 (1913).

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11. The exact definition of and method of measuring the "high-water mark" for navigable, nontidal inland bodies of water (i.e., lakes, rivers, streams, etc.) have never been settled by the courts of California. In fact, such high-water mark is presently the subject of another opinion being prepared by our office but which has not yet been released, as of this writing. However, for purposes of this opinion, the "high-water mark" (or equivalently, "ordinary high-water mark") may be defined as the level of water attained by such waterway at its ordinary, usual maximum accumulation of water during the annual wet season (which is characterized by times of heavy rainfalls and melting snows). Thus, this definition includes the normal overflow and flooding that occur each year, but excludes those water elevations resulting from extraordinary, unexpected floods. See Mammoth Gold Dredging Co. v. Forbes, 39 Cal. App. 2d 739, 752 (1940); People v. Ward Redwood Co., 225 Cal. App. 2d 385, 390 (1964); cf. 43 Ops. Cal. Atty. Gen. 292, 296 (1964).

The Mack court points out that the rule in California at one time defined navigability in the strict common-law language of usefulness for commerce, as employed in federal courts, but that "this is no longer the rule in this state." (Id. at 1045.) Indicating that "the basic question of navigability is simply the suitability of the particular water for public use. . . .," the opinion states at page 1045 the basic rationale for adopting the liberal standard:

> "With our ever-increasing population, its ever-increasing leisure time (witness the four and five day week), 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.'"

Finally, Mack emphasizes that the modern tendency among many state jurisdictions is toward applying the recreational-use test of navigability while rejecting the anachronistic federal doctrine of commercial utility. (Id. at 1046.) The court cites numerous cases from other states which have applied or adopted a definition of navigability based upon capability of use for purely recreational purposes. Among those are the following: Diana Shooting Club v. Husting, supra; Rushton ex rel. Hoffmaster v. Taggart, 11 N.W.2d 193 (Mich. 1943); Nekoosa-Edwards Paper Co. v. Railroad Commission, 228 N.W. 144 (Wis. 1929); Wilbour v. Gallagher, supra; St. Lawrence Shores, Inc. v. State, 302 N.Y.S. 2d 606 (Ct. Cl. 1969); and the often quoted case of Lamprey v. State (Metcalf), supra, which is relied upon to a large extent by the courts both in Mack and in Bohn, supra. Mack notes that the California cases of Forestier v. Johnson, 164 Cal. 24 (1912), and Bohn, supra, had in effect already applied the modern navigability rule, and in concluding, holds that "[t]he federal test of [commercial-use] navigation does not preclude a more liberal state test establishing a right of public passage whenever a stream is physically navigable by small craft." (Id. at 1051.)

It is generally recognized that a body of water may be considered a navigable waterway even though it is neither constantly, continuously, nor permanently navigable in fact throughout the entire year. As long as its seasons of navigability in fact, established under some test of

navigability, are of a regular, predictable recurrence and of sufficiently continuous duration during each year such that the public may depend upon them for the various public navigational uses, that body of water will be deemed navigable in law despite its perennial fluctuations in actual navigability. 1 Farnham, supra; 2 American Law of Property, supra, § 9.48, at 477; 3 Tiffany, supra; Willow River Club v. Wade, 76 N.W. 273, 276 (Wis. 1898), cited by Mack, supra at 1045; People ex rel. Erie R. Co. v. State Tax Commission, 43 N.Y.S.2d 189, 191-92 (App. Div. 1943), aff'd 60 N.E.2d 31 (N.Y. 1944); Kemp v. Normand, 91 P. 448, 449-50 (Or. 1907); Kemp v. Putnam, 283 P.2d 837, 840 (Wash. 1955); Monroe v. State, 175 P.2d 759, 761 (Utah 1946); United States v. Ladley, 4 F.Supp. 580, 582 (D. Idaho 1933); Bingenheimer v. Diamond Iron Mining Co., 54 N.W.2d 912, 920-23 (Minn. 1952); Taylor Fishing Club v. Hammett, 88 S.W.2d 127, 130 (Tex. Civ. App. 1935); McGahhey v. McCollum, 179 S.W.2d 561, 663-64 (Ark. 1944); American Red Cross v. Hinson, 122 S.W.2d 433, 435 (Tenn. 1938); cf. People v. Elk River M. & L. Co., 107 Cal. 221, 224 (1895). As is stated in 1 Farnham, supra, at pages 102 (§ 23) and 123 (§ 25):

> "The fact that the water is not continuously navigable does not destroy its character [as a navigable waterway], but the times of navigability must be incident to the natural condition of the stream and be of such regular occurrence and duration that persons wishing to use the stream may place dependence on them. It is not sufficient that after a sudden shower or unusual storm sufficient water rushes down the stream to carry floatable material with it." (Emphasis added.)

1 Farnham at 102.

> "Most streams fluctuate in capacity, containing considerable water during the season of melting snow and the frequent fall of rains, and in periods of drought becoming in some instances almost dry. The fact that in the dry season the stream is not capable of use will not prevent its being used at other times when it is capable of it. But the period of capacity must be sufficiently regular and continued to make the stream of commercial [or in California, recreational] importance. The stream may be used whenever its capacity is sufficient for that purpose."

1 Farnham at 123.

Our research has disclosed no case in California which has considered the navigability status of the waters of a marshland area whose lands are periodically inundated by the overflow floodwaters of an adjacent watercourse but are otherwise virtually dry. The California cases we found, however, provide helpful and persuasive comparisons. In Forestier v. Johnson, supra, 164 Cal. 24 (1912), a case cited and relied upon by both Bohn v. Albertson, supra, and People ex rel. Baker v. Mack, supra, the court was concerned with the navigability of Fly's Bay, a side channel of the Napa River, whose underlying lands were privately owned patented tidelands from the state. (164 Cal. at 27-28.) The court ruled that the bay was navigable and therefore subject to the rights of the public to use the waters for hunting, fishing, and navigation, despite the fact that the only evidence of navigational use was public boating for the purpose of hunting at high tide, the bay being almost dry at low tide. (Id. at 28-29.) Churchill Co. v. Kingsbury, 178 Cal. 554 (1918), cited by the Mack case, involved the question of whether Little Klamath Lake was a navigable waterway (for purposes there of determining title to the lake's bed). The court decided in favor of navigability, finding that the seasonal variation in the water coverage (3 feet during high water for most of the year to bare land at low water for the remaining few months) was ordinary and regular. (Id. at 556, 558.)

In Bolsa Land Co. v. Burdick, supra, 151 Cal. 254 (1907), which was noted in the Bohn opinion, the court held non-navigable an artificially created drainage ditch known as the "Freeman River" based upon facts completely different from those herein. Evidence at trial disclosed that water in the ditch was often less than two feet deep, that dense vegetation usually filled and congested the passageway preventing access through it, and that it was impossible at any time to row small skiffs down the channel. (Id. at 259-60.) Lastly, the federal court in North American Dredging Co. of Nevada v. Mintzer, 245 F. 297 (9th Cir. 1917), a diversity jurisdiction lawsuit originating in the Northern District of California, affirmed the trial court's determination that a tidal slough or channel which ran through a marshy tideland area did not constitute a navigable waterway, even though the channel was used for boating, fishing, and duck hunting at high tide. However, although both the trial and appellate courts purportedly applied California law regarding navigable waters, it is essential to note that the navigability test utilized by Mintzer was the strict standard of commercial use discarded by Bohn and Mack. (Id. at 300.)

Among those cases arising in other jurisdictions, the factual situation in Diana Shooting Club v. Husting, supra, 145 N.W. 816 (Wis. 1914), cited and approved by Mack and Bohn, closely resembles the facts presented in this opinion. At issue in the Husting case was the navigability of Malzahn's Bay, a marshland area in private ownership adjoining the Rock River, whose lands had been subjected for many years to regular, seasonal coverage during the "wet" or high water months of March through June, achieving depths of 1-2 feet, while becoming extremely shallow, nearly bare, during the "dry" months of low water. (Id. at 817-18.) The court affirmed findings that members of the public had used the bay for the past 35 years for the purpose of hunting waterfowl from small skiffs and rowboats during the high-water season, and held that the waters were navigable in fact because of the regularly recurrent nature of the annual periods of recreational-use navigability. (Id. at 819-20.)

In another Wisconsin case, Attorney-General v. Bay Boom Wild Rice & Fur Farm, 178 N.W. 569 (Wis. 1920), the facts involved therein are also quite similar to those in the present question. The area in controversy was a marshland region which was covered by the high-water runoff of an adjacent river during the "wet" months of spring, sufficient to support many boating activities using small skiffs and large pleasurecraft, but which could not support any recreational use during the droughts of summer or freezing weather of winter. The seasonal waters were found to be navigable inasmuch as the periodic inundation recurred in a regular, predictable fasion. (Id. at 573.)

The three remaining cases are factually dissimilar to the situation herein, but only insofar as they involve the navigability of rivers rather than marshlands. At any rate, they offer useful analogies for resolving the issues in this opinion. The Little South Branch of the Pere Marquette River was determined to be navigable in Rushton ex rel. Hoffmaster v. Taggart, supra, 11 N.W.2d 193 (Mich. 1943), a case relied upon by Mack, where the only times of navigability occurred in the spring months of high water as a result of regular, seasonal rains that elevated the water level from less than 1 foot to over 3 feet for at least short periods of time. (Id. at 196-197.) Public usage of the river during these periodic occasions was confined to fishing and floating logs. (Id. at 194-96.) In another case from Mack, St. Lawrence Shores, Inc. v. State, supra, 302 N.Y.S.2d 606 (Ct. Cl. 1969), the sole evidence of navigability upon Crooked Creek was

boating for pleasure and sport fishing during the ice-free seasons of the year, but the court nevertheless ruled that the creek was a navigable waterway. (Id. at 612.) Finally, noted in Bohn and Mack, held navigable in fact the Willow River upon which the public had pursued various recreational activities by small rowboats, canoes, and rafts for many years, even though those activities were restricted to periods of high water because at other times traversal over the waters was impossible without dragging or pushing the pleasurecraft over exposed areas of the river's bottom. (Id. at 273-76.) The court stated that the capacity for recreational use need not be continuous throughout the year, but that periods of navigability "ordinarily recurring from year to year, and continuing long enough to make [the river] useful . . ." for that activity were sufficient. (Id. at 276.)

Willow River Club v. Wade, supra, 76 N.W. 273 (Wis. 1898),

Therefore, based upon an application of the foregoing legal principles to the facts presented, we conclude that the floodwaters of the "Butte Sink" region constitute navigable waters. Accordingly, they are subject to an easement in the public for navigation and the incidents of navigation, including boating, hunting, fishing,[12] swimming and other recreational uses.

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12. With regard to public fishing rights per se, independent of and as distinguished from those associated with the navigational incidents, the public has the absolute right to fish upon waters covering private lands which were originally patented by the State to private individuals after 1910. Section 25 of Article I of the California Constitution, added in 1910, states inter alia that "no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon." Thus, those floodwaters which cover "Butte Sink" parcels described in post-1910 patents (see note 2, supra) are encumbered by the absolute public right of fishing, whether or not the waters are deemed navigable. People v. Truckee Lumber Co., 116 Cal. 397, 400 (1897). Moreover, since there are strong indications that Article I, section 25, is merely declarative of pre-existing law respecting public rights (Paladini v. Superior Court, 178 Cal. 369, 372 (1918); 22 Ops. Cal. Atty. Gen. 134, 137 (1953)), and since the right of fishing is in the nature of an easement in gross (Civ. Code §802(1);

The conclusion that we have reached in this opinion is in no way invalidated by nor inconsistent with section 100 of the Harbors and Navigation Code, which provides the following:

"Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and of such transportation. However, the floodwaters of any navigable river, stream, slough or other watercourse while temporarily flowing above the normal high-water mark over public or private lands outside any established banks of such river, stream, slough, or other watercourse are not navigable waters and nothing in this section shall be construed as permitting trespass on any such lands. For the purposes of this section, 'floodwaters' refers to that elevation of water which occurs at extraordinary times of flood and does not mean the water elevation of ordinary annual or recurring high waters resulting from normal runoff." (Emphasis added.)13/

(Footnote 12 continued)

3 Witkin, Summary of California Law "Real Property" §§ 341, 342, at 2041-42 (8th ed. 1973)) which survives upon subsequent conveyances of the burdened estate to transferees having constructive knowledge thereof (3 Tiffany, supra, § 828, at 397-99; Pollard v. Rebman, 162 Cal. 633, 634-35 (1912)), it may be argued that certain of the pre-1910 State patented lands are likewise subject to the public right of fishing.

13. Section 100 was amended in 1972 (Stats. 1972, ch. 1072, p. 2008, § 1) to add the provisions referring to the floodwaters exception, i.e., all that portion of the section which follows the first sentence. It has been stated that this amendment was intended to protect private landowners, whose properties were subjected to artificial and natural flooding, from damage to those properties occasioned by public recreational uses of the floodwaters. 4 Pacific Law Journal 577, 577-78 (1972).

From our previous discussion,[14] it is prima facie evident that the "Butte Sink" waters come within the literal exclusion to section 100's definition of the type of "floodwaters" intended to be encompassed by that section, and therefore, to be deemed non-navigable. Manifestly, then, Harbors and Navigation Code, section 100, is not applicable to the factual situation described hereinabove, so that the floodwaters provisions of that sectio. do not govern the present question of navigability. Indeed, the wording of the "floodwaters" definition in section 100 in fact supports our ultimate conclusion herein.

Our determination that section 100 is inapplicable herein is further strengthened by a consideration of its statutory intent, ascertained from an interpretation of the language of that statute in light of the legal doctrines discussed earlier. One of the cardinal rules of statutory construction is that a statute should be interpreted so as to sustain its constitutionality and render it valid and operative, rather than making it invalid, unconstitutional and without effect. Fahey v. City Council, 208 Cal. App. 2d 667, 673 (1962); Charles S. v. Board of Education, 20 Cal. App. 3d 83, 94 (1971). "In construing a legislative enactment, courts will presume that the Legislature did not intend an application of the statute which would violate the Constitution, and will not give it such a construction as to make it contrary to the Constitution unless the wording of the statute compels such construction." Baldwin v. City of San Diego, 195 Cal. App. 2d 236, 240 (1961).

A second well-settled principle of legislative interpretation is that laws in derogation of the sovereign's rights are strictly read in favor of the state or public interest concerned. Eden Memorial Park Assn. v. Superior Court, 189 Cal. App. 2d 421, 423 (1961). "A statute will not be construed to impair or limit the sovereign power of the state to act in its governmental capacity and perform its governmental functions in behalf of the public in general, unless such intent clearly appears." People v. California Fish Co., supra at 592. It is also firmly established that statutes are not presumed to alter the rules and doctrines of common law except as expressly provided, so that any statute "purporting to embody such doctrine or rule will be construed in the light of common-law decisions

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14. See especially note 3, note 11 and pages four through eight, supra.

on the same subject." Morris v. Oney, 217 Cal. App. 2d 864, 870 (1963). Finally, "where the enacting clause is general in its language and objects, and a proviso is afterward introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms." People ex rel. S. F. Bay etc. Com. v. Town of Emeryville, 69 Cal. 2d 533, 543 (1968). The floodwaters provisions added to section 100 in 1972 are, in our opinion, in the nature of a proviso to the first (and original) sentence of that section, and hence come within this rule.

Applying the preceding maxims of statutory interpretation to section 100, it is our belief that in enacting the floodwaters provisions therein, the Legislature intended simply to codify existing common law and court-made doctrines regarding navigable waters as expressed by the courts of this and other states. Its specification of floodwaters was not meant to abrogate any established decisional law prescribing the well-accepted standards for navigability in fact relating to any waterways, but rather is declarative of those legal principles, consistent with the judicial guidelines governing the topic of navigability which we have outlined previously. In addition, both literal and strict readings of the floodwaters provisions lead us to conclude, similarly, that floodwaters which are in fact navigable under accepted judicial tests of navigability do not fall "fairly" within these subsequently enacted provisions, but instead come under the general language of the first sentence, which constitutes the original "enacting clause."

We seriously doubt, moreover, that the legislative intention in section 100 was to deny to the public the exercise of their public rights of recreation upon waters which are actually navigable. Such a denial would be clearly violative of the Constitutional mandate expressing the overriding public policy of encouraging public access to California's navigable waters, which is declared in Article XV, section 2, of the California Constitution of 1879:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal 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 obstruct 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 attainable for the people thereof."

Furthermore, it is our opinion that, in the absence of any express opposite intention, the Legislature did not intend to impair or terminate the sovereign prerogatives and powers of the State over navigable waters as trustee of the public navigational easement trust for the benefit of public usage by all of the people.[15] This conclusion is further impelled by the following particular rule of statutory interpretation applicable to legislation which apparently extinguishes the public navigational uses:

> "[S]tatutes purporting to authorize an abandonment of such public use will be carefully scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation." People v. California Fish Co., supra at 597.

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15. "The State of California holds all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust [for the purposes of commerce, navigation and fisheries] for the benefit of the people.' [Citations omitted.] Its power to control, regulate and utilize such waters within the terms of the trust is absolute except as limited by the paramount supervisory power of the federal government over navigable waters [supporting interstate commerce]." (Citations omitted.) Colberg, Inc. v. State of California ex rel. Dep't Pub. Works, 67 Cal. 2d 408, 416-17 (1967).

Finding no such clear indication of legislative intent to abandon the public easement for navigation, we conclude that the Legislature did not intend to eliminate any recreational user in the public upon actually navigable waters which would otherwise exist.[16]

A final word should be added regarding the Harbors and Navigation Code. Sections 101-106, inclusive, list numerous bodies of water which have been declared navigable and public ways by the Legislature. The "Butte Sink" is not included among those enumerated. However, its noninclusion in that listing does not preclude a judicial finding that its floodwaters are navigable for purposes

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16. Even if arguendo this conclusion were inaccurate, i.e., that the Legislature indeed meant in section 100 to terminate the public's recreational rights in navigable floodwaters, our ultimate conclusion reached earlier would remain nevertheless unaffected and unchanged, since such a statutory construction would necessarily render that code invalid. "The state cannot abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the case of parcels used in promoting the interest of the public therein, or when parcels can be disposed of without impairment of the public interest in what remains." (Emphasis added.) Boone v. Kingsbury, 206 Cal. 148, 189 (1928); Illinois Central Railroad v. Illinois, supra at 453; People v. California Fish Co., supra at 584, 597-98. There appearing to be neither a promotion nor a nonimpairment of the public interest under this arguable interpretation of section 100, its invalidity and unconstitutionality would follow accordingly. Further, express legislative findings that the public interest will be aided or unimpaired seem to be an indispensable prerequisite to upholding an attempt by the Legislature to extinguish the public easement for navigation. Atwood v. Hammond, 4 Cal. 2d 31, 41, 42 (1935); see also, Taylor v. Underhill, 40 Cal. 471, 473 (1871); 4 Ops. Cal. Atty. Gen. 298, 300 (1944). None were made concerning section 100.

of the public easement.[17] There are several reasons for this:

Fundamentally, as we noted at the outset of this opinion, the determination of navigability is primarily a factual question (Bohn v. Albertson, supra at 742), so that legislative expressions of navigability or non-navigability, whether explicit by declaration or implicit by exclusion, without more are not conclusive upon a court faced with that question. Addressing itself to this very point, the court in People ex rel. Baker v. Mack, supra at 1048-49, in finding a part of the Fall River to be navigable in fact, held that "[t]he failure of the Legislature to designate Fall River in the list of navigable waters in Harbors and Navigation Code, sections 101-106, is of no consequence." Similarly, in Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 399 (1936), the court ruled that the failure to include Newport Bay in that statutory listing did not mean that the bay was not navigable in fact, nor did it foreclose a determination by the court of actual navigability. In like fashion, Mono Lake was found to be navigable despite its absence from the Harbors and Navigation Code, in City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 466 (1935), and Bohn v. Albertson, supra at 747, held navigable Frank's Tract even though it was not so declared in the Code's enumeration.

More importantly, it is doubtful that the Legislature may properly establish the non-navigability of a body of water which is in fact navigable, merely by implication from the fact that that waterway is not listed among those legislatively declared to be navigable in the Harbors and Navigation Code. The reasons for these doubts are essentially twofold and founded upon earlier discussion. First, in accordance with the compelling Constitutional dictate of providing and enhancing public access to navigable waterways which is stated in Article XV, section 2, of the California Constitution (1879), supra, the Legislature basically is powerless to sever the public's navigational rights from waters actually navigable by impliedly (or expressly) asserting the non-navigability thereof. Secondly, unless the public interest would be promoted or remain unimpaired, any purported abandonment of the public easement

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17. See generally, 65 C.J.S., supra, § 7, at 79.

for navigation through such legislative implication of non-navigability is invalid and of no operative effect, especially where legislative findings of non-impairment or benefit are non-existent.[18]

To summarize, then, our conclusions may be briefly reiterated as follows:

1. In spite of the fluctuating seasons of navigability, the "Butte Sink" floodwaters are navigable in fact due to the regularly recurrent and predictable character of the perennial flooding which is appropriate for potential and actual public recreational use; therefore, they are burdened by the public easement for navigation and its incidents, including boating, hunting, fishing and other recreational activities.

2. Section 100 of the Harbors and Navigation Code is neither inconsistent with nor a qualification upon our finding of navigability, based on a literal scrutiny of its wording as well as an assessment of its legislative intent in light of well-accepted principles of statutory interpretation.

3. The Legislature's failure to include the "Butte Sink" in the Harbors and Navigation Code's listing of public and navigable waterways does not establish by implication its non-navigability, nor is its absence therefrom conclusive and binding upon the courts; that fact alone does not preclude a judicial decision that the floodwaters of the "Butte Sink" are navigable in fact.

In closing, we might suggest another approach which may be investigated for its potential in establishing public rights of boating, hunting or fishing. It is possible that

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18. See note 16, supra, and the cases cited therein; see also, 55 Ops. Cal. Atty. Gen. 293, 298-99 (1972).

there has been an implied dedication to the public for the purposes of public boating, hunting, fishing, etc., by the owners of private lands in the "Butte Sink". Such an implied dedication results from sufficient public usage without effective interference, and it depends upon many factors, such as the nature and character of the public uses (its diversity, history, length, extent, frequency, intensity, continuity, and recurrence), the substantiality of the owners' acts to prevent or interfere with those public activities, and any intervention by governmental agencies (federal, state or local).[19] If the criteria for invoking the doctrine have been satisfied, members of the general public may validly boat, fish and hunt for waterfowl upon the floodwaters in accordance with their impliedly dedicated rights and privileges. Should you care to pursue this alternative in greater detail, we would be happy to discuss and elaborate upon this topic with you.

We hope that the foregoing has been sufficient for your purposes. Please contact us in the event our office can be of any further service and assistance.

Very truly yours,

EVELLE J. YOUNGER
Attorney General

Richard P. Yang

RICHARD P. YANG
Deputy Attorney General

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19. See Gion v. City of Santa Cruz, 2 Cal. 3d 29, 39-42 (1970).