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JOHN K. VAN DE KAMP
Attorney General

OPINION

of

JOHN K. VAN DE KAMP
Attorney General

RODNEY O. LILYQUIST
Deputy Attorney General

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THE HONORABLE BYRON D. SHER, Member, California Assembly, has requested an opinion on the following question:

Is the "overflow waters" provision of Fish and Game Code section 2016 constitutional in light of section 4 of article X of the Constitution?

CONCLUSION

The "overflow waters" provision of Fish and Game Code section 2016 is unconstitutional in its application to navigable waters of the state due to conflict with section 4 of article X of the Constitution. Section 2016 is, however, constitutional as applied to "non-navigable waters" which are those not useable by small craft or in which the state holds no sovereign fee or public trust interest.

ANALYSIS

During the winter and spring each year, the rivers flowing into the Sacramento and San Joaquin Valleys swell with rain and snow runoff, spilling over their banks onto adjacent lands. The overflows are diverted and spread over large areas of private property as a flood control measure. A sheet of water may be seen in the valleys where, during the rest of the year, dry land and well-defined waterways are found.

The flooded lands attract migrating waterfowl which in turn attract waterfowl hunters. It is possible to travel by boat for miles on these temporary lakes in search

of game. Not all property owners, however, are tolerant of hunters boating over their lands without their permission.

In 1982 the Legislature amended Fish and Game Code section 20161/ to protect the interests of the landowners:

> "It is unlawful to enter any lands under cultivation or enclosed by a fence, belonging to, or occupied by, another, or to enter any uncultivated or unenclosed lands, including lands temporarily inundated by waters flowing outside the established banks of a river, stream, slough, or other waterway, where signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering such lands, for the purpose of discharging any firearm or taking or destroying any mammal or bird, including any waterfowl, on such lands without having first obtained written permission from the owner of such lands, or his agent, or the person in lawful possesion thereof. Such signs may be of any size and wording, other than the wording required for signs under Section 2017, which will fairly advise persons about to enter the land that the use of such land is so restricted." (Emphases added.)

The Legislature added the italized words as an urgency measure "[i]n order that the provisions of this act take effect prior to the opening of the hunting season and thereby provide needed protection to privately owned lands." (Stats. 1982, ch. 1607, § 2.)

The question presented for analysis is whether this language is constitutional in light of section 4 of article X of the Constitution:

> "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

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1. All references hereafter to the Fish and Game Code are by section number only.

of this State shall be always attainable for the people thereof." (Emphases added.)

We conclude that section 2016, as amended, violates this constitutional provision in its application to navigable waters of the state but is constitutional as applied to non-navigable waters.

Recently in Pacific Gas & Electric Co. v. Superior Court (1983) 145 Cal.App.3d 253, 257-258, the Court of Appeal gave an overview of the public's right of navigation under the Constitution:

> "All navigable waterways are held in trust by the state for the benefit of the public [citation], and the public may use such waters for recreational purposes. [Citations.] Generally, sovereign ownership of navigable waterways extends to the underlying land. [Citation.] Where underlying lands are in private ownership, however, they remain subject to public trust restraints and may not be alienated or used in a manner harmful to trust purposes. [Citations.]
>
> "The public right of access to navigable waters is of constitutional origin. [Citations.]
> . . . .
>
> "Case law applying the constitutional provision confirms the public right of passage, in a lawful manner, over waters usable only for small-craft recreational boating, irrespective of the ownership of the water bed. [Citation.]
> . . . .
>
> "The Constitution and the decisions applying it make it abundantly clear that [a private party's] ownership interest in the land underlying . . . Bailey Cove could not encompass any interest in the waters themselves which would interfere with the public trust. [Citation.] In particular, [the private property owner] does not possess any right to exclude members of the public from entering on and using the waters of Lake Shasta for recreational purposes. [Citation.] On the contrary, plaintiff as a member of the public has a constitutional right to navigate the lake in his boat." [Fns. omitted.]2/

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2. The constitutional right of navigation has merited considerable study and analysis. (See, e.g., Note, Public

1. Navigability of Waters

The first issue to be resolved is whether "waters flowing outside the established banks of a river, stream, slough, or other waterway" so as to temporarily inundate adjacent lands (§ 2016) constitute "navigable waters" as specified in the Constitution.

The test for "navigable waters" with respect to "a river, stream, slough, or other waterway" is whether they "are capable of being navigated by oar or motor-propelled small craft." (People ex rel. Baker v. Mack (1970) 19 Cal.App.3d 1048, 1050; see National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 435, fn. 17.)

Navigability may be found despite the fact that the water overlies the land only on a seasonal basis. (See Hitchings v. Del Rio Woods Recreation & Park Dist. (1967) 55 Cal.App.3d 560, 570-571; Bohn v. Albertson (1951) 107 Cal.App.2d 738, 749-757; see also Chowchilla Farms v. Martin (1933) 219 Cal. 1, 36-38; Collier v. Merced Irr. Dist. (1931) 213 Cal. 554, 558; Miller & Lux v. Madera Canal etc. Co. (1909) 155 Cal. 59, 76; Mammoth Gold Dredging Co. v. Forbes (1940) 39 Cal.App.2d 739, 752.) Accordingly, use of the word "temporarily" by the Legislature in section 2016 does not prevent its application to navigable waters of the state.

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2. (Continued.)

Access to Lands Annually Flooded: A Constitutional Analysis of Section 2016 of the California Fish and Game Code (1984) 16 Pac. L.J. 353; Walston, The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy (1982) 22 Santa Clara L.Rev. 63; Note, The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power (1982) 33 Hastings L.J. 653; Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes The People's Environmental Right (1980) 14 U.C. Davis L.Rev. 195; Dunning, The Significance of California's Public Trust Easement for California Water Rights Law (1980) 14 U.C. Davis L.Rev. 357; Johnson, Public Trust Protection for Stream Flows and Lake Levels (1980) 14 U.C. Davis L.Rev. 233; Robie, The Public Interest in Water Rights Administration (1977) 23 Rocky Mt. Min. L.Inst. 917; Dyer, California Beach Access: The Mexican Law and the Public Trust (1972) 2 Ecology L.Q. 571; Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention (1970) 68 Mich. L.Rev. 471.)

In Harbors and Navigation Code sections 101-106, the Legislature has designated certain waterways as being navigable. Designation of some waters does not, however, preclude other waters from being found to be navigable in law or in fact. (See National Audubon Society v. Superior Court, supra, 33 Cal.3d 419, 425; City of Los Angeles v. Aitkin (1936) 10 Cal.App.2d 460, 466; see also Bohn v. Albertson, supra, 107 Cal.App.2d 738, 742-748.)

Here the Legislature, in amending section 2016, was faced with, among other things, the situation of hunters traveling by boat over large bodies of water for several months on an annually recurring basis. While they are not specifically referred to in the statute, it can be argued that the amendment was intended to be applicable to navigable waters of the state.3/

Any possible conflict between section 2016 and article X of the Constitution may be avoided by restricting the interpretation of the statutory provision to nonnavigable waters. One rule of statutory construction is that the interpretation should eliminate doubt as to the provision's constitutionality. But this rule, as with any other rule of construction, yields to the primary principle of effectuating the Legislature's intent. "[W]e must, in applying the provision, adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." (In re Kay (1970) 1 Cal.3d 930, 942; accord, People v. Davis (1981) 29 Cal.3d 814, 829, emphases added.) "'[T]he primary rule of statutory construction, to which every other rule as to interpretation of particular terms must yield, is that the intention of the legislature must be ascertained if possible, and, when once ascertained, will be given effect, even though it may not be consistent with the strict letter of the statute.'" (Dickey v. Raisin Proration Zone No. 1 (1944) 24 Cal.2d 796, 802; see Marina Village v. California Coastal Zone Conservation Com. (1976) 61 Cal.App.3d 388, 392-393.) "The court should not rewrite legislation to avoid constitutional questions if doing so subverts the legislative intent." (Carroll v. State Bar (1985) 166 Cal.App.3d 1193, 1201.)

We thus proceed to the constitutional issue of whether the Legislature may restrict navigable waters in the manner set forth in section 2016.

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3. Section 2016 is constitutional as applied to non-navigable waters; article X, section 4, is inapplicable to such areas. Non-navigable waters would be waters which are not useable by small craft or in which the state holds no sovereign fee or public trust interest.

2. Legislative Authority

The Constitution forbids private persons from destroying or obstructing the free navigation of navigable waters. It also directs the Legislature to enact laws liberally implementing this prohibition.

The Legislature has in part carried out its constitutional duties by enacting such laws as Harbors and Navigation Code section 131 ["Every person who unlawfully obstructs the navigation of any navigable waters is guilty of a misdemeanor"], Penal Code section 370 ["Anything which . . . unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin . . . is a public nuisance"], and Civil Code section 3479 ["Anything which . . . unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin . . . is a nuisance"].

In general the Legislature may not "divest the people of the State of their rights in navigable waters of the state . . . ." (People v. Gold Run D. & M. Co. (1884) 66 Cal. 138, 151; see People v. California Fish Co. (1913) 166 Cal. 575, 584.)

Under limited circumstances the public's constitutional right of navigation may be impaired by the Legislature, such as in an effort to promote the public's use overall of navigable waters (see City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 523-524, 531; Eldridge v. Cowell (1854) 4 Cal. 80, 87) and where the property is being used for a governmental purpose incompatible with use by the public (see State of California v. San Luis Obispo Sportsman's Assn. (1978) 22 Cal.3d 440, 447; 64 Ops.Cal.Atty.Gen. 463, 466-467 (1981)).

None of limited conditions for legislative control are applicable here. In particular the Legislature has not made express findings that the uses of navigable waters by the public would be enhanced by its amendment of section 2016. (See National Audubon Society v. Superior Court, supra, 33 Cal.3d 419, 438-441; City of Berkeley v. Superior Court, supra, 26 Cal.3d 515, 529; Atwood v. Hammond (1935) 4 Cal.2d 31, 41-42; Taylor v. Underhill (1871) 40 Cal. 471, 473.) On the contrary, the stated purpose of the amendment was to exclude the public so as to "provide needed protection to privately owned lands." (Stats. 1982, ch. 1607, § 2.) Such a purpose is outside the scope of the Legislature's powers and responsibilities to protect and manage navigable waters. (See Marks v. Whitney (1971) 6 Cal.3d 251, 260; City of Long Beach v. Mansell, supra, 3 Cal.3d 462, 482, fn. 17; Colberg Inc. v. State of California

ex rel. Dept. Pub. Wks. (1967) 67 Cal.2d 408, 416-419; Mallon v. City of Long Beach (1955) 44 Cal.2d 199, 206-207; Forestier v. Johnson (1912) 164 Cal. 24, 30-31; Oakland v. Oakland Water Front Co. (1887) 118 Cal. 160, 210-213; People ex rel. Younger v. County of El Dorado (1979) 96 Cal.App.3d 403, 406-407; Hitchings v. Del Rio Woods Recreation & Park Dist., supra, 55 Cal.App.3d 560, 572; 45 Ops.Cal.Atty.Gen. 122, 127 (1965).)

It may nonetheless be argued that the constitutional right of navigation is unaffected by section 2016 inasmuch as the statute is directed solely at hunting. Anyone may travel by boat over the lands in question without violating the statute; the right of access and travel is unimpaired by its terms.

Hunting, however, constitutes an integral part of the constitutional right of navigation. In Forestier v. Johnson, supra, 164 Cal. 24, 40, the Supreme Court stated:

> ". . . the hunting of wild game . . . is a privilege which is incidental to the public right of navigation. There is no private property right in wild game. The wild animal or bird, not in captivity nor tamed, becomes the property of him who takes or kills it. Any person has the right to take and kill such wild birds or other game in any place where he may find them. He has no lawful right to trespass on the premises of another for that purpose. But wherever he may lawfully go, he may take and kill such game as he may find there, subject, of course, to the restrictions of the game laws. The defendants, therefore, having the right of navigation over these waters, may exercise that right at will as a public right, and if, in doing so, they find game birds thereon, they may, during lawful season, shoot and take them. The plaintiff, of course, has an equal right to the same privilege. If the judgment were to be construed as excluding the plaintiff from this privilege or as giving defendants the exclusive privilege of hunting thereon, it would be to that extent erroneous. But it is clear that it was not so intended and should not be given such effect. It is to be understood as a declaration that the defendants, in common with the plaintiff and all other persons, have the privilege of hunting on these waters while exercising the public right of navigation over them." (Emphases added.)

In People ex rel. Baker v. Mack, supra, 19 Cal.App. 3d 1040, 1048, the court interpreted Forestier as recognizing "that members of the public had an absolute

right to navigate and hunt in small boats" on navigable waters. (See also National Audubon Society v. Superior Court, supra, 33 Cal.3d 419, 434; City of Berkeley v. Superior Court, supra, 26 Cal.3d 515, 521; Marks v. Whitney, supra, 6 Cal.3d 251, 259; People v. Sweetser (1977) 72 Cal.App.3d 278, 283; Bohn v. Albertson, supra, 107 Cal.App.2d 738, 749.)

The Legislature, of course, may regulate hunting and boating. It may ban all hunting upon specified navigable waters in certain situations. (See § 1580; Harb. & Nav. Code, §§ 268, 660.) The flaw in section 2016 is that it places in the hands of private property owners the authority to determine who should and should not hunt on navigable waters in an attempt to protect the property interests of the landowners. (See Forestier v. Johnson, supra, 164 Cal. 24, 40; People v. P. & B.Y.R.R. (1885) 67 Cal. 166, 168; Bohn v. Albertson, supra, 107 Cal.App.2d 738, 753-757.)

It must be recognized that the protection of private property rights is a legitimate concern which the Legislature may address. In section 2004 the Legislature has already provided:

> "It is unlawful for any person, while taking any bird, mammal, fish, reptile, or amphibian, to cause damage, or assist in causing damage, to real or personal property, or to leave gates or bars open, or to break down, destroy, or damage fences, or to tear or scatter piles of rails, posts, stone, wood, or, through carelessness or negligence, to injure livestock of any kind."

The owners of lands under navigable waters, however, do not have an interest in the waters that would be protectable by the Legislature as contemplated in section 2016. (See Pacific Gas & Electric Co. v. Superior Court, supra, 145 Cal.App.3d 253, 257-258.)

In People ex rel. Younger v. County of El Dorado, supra, 96 Cal.App.3d 403, the Court of Appeal examined the relationship between the competing concerns of protecting private property rights and the public's use of navigable waters. Certain property owners along the American River complained of noise, litter, pollution and unsanitary conditions caused by persons rafting on the river. This caused the county to adopt an ordinance which banned rafting but not other uses of the river. (Id., at p. 405.) The Court of Appeal found that rafting was virtually the sole public use of that portion of the river and although "problems of pollution and sanitation in our increasingly crowded state are difficult and complex," the public's use

of the river could not be effectively prohibited as a solution. (Id., at p. 407.) The basis of the El Dorado decision may be found in the following language:

> "However laudable its purpose, the exercise of police power may not extend to total prohibition of activity not otherwise unlawful. (Frost v. City of Los Angeles (1919) 181 Cal. 22 (ban on supplying water less pure than purest available); San Diego T. Assn. v. East San Diego (1921) 186 Cal. 252 (ban on operation of hospitals treating infectious or contagious diseases within city limits).) Courts are especially sensitive to infringements upon constitutional rights under the guise of exercise of police power. (See Scrutton v. County of Sacramento (1969) 275 Cal.App.2d 412, 421.) The public's right of access to navigable streams is a constitutional right. (Cal. Const., art. X, § 4; Marks v. Whitney (1971) 6 Cal.3d 251.)" (Id., at p. 406.)

In a similar vein the Arkansas Supreme Court in State v. McIlroy (Ark. 1980) 595 S.W.2d 659, 665, analyzed the situation thusly:

> "McIlroy and others testified that the reason they brought the lawsuit was because their privacy was being interrupted by the people who trespassed on their property, littered the stream and generally destroyed their property. We are equally disturbed with that small percentage of the public that abuses public privileges and has no respect for the property of others. Their conduct is a shame on us all. It is not disputed that riparian landowners on a navigable stream have a right to prohibit the public from crossing their property to reach such a stream. The McIlroy's rights in this regard are not affected by our decision. While there are laws prohibiting such misconduct, every branch of Arkansas' government should be more aware of its duty to keep Arkansas, which is a beautiful state, a good place to live. No doubt the state alone cannot solve such a problem, it requires the individual efforts of the people. Nonetheless, we can no more close a public waterway because some of those who use it annoy nearby property owners, than we could close a public highway for similar reasons." (Emphasis added.)

The amendment of section 2016 was to serve the same purpose as the ordinance in the El Dorado case. It was not to prefer one type of public use (such as scenic or habitat preservation) of certain navigable waters over another, but

rather to prevent all practical public use. This can hardly be said to carry out the Legislature's mandate under the Constitution.

In answer to the question presented, therefore, we conclude that the overflow waters provision of Fish and Game Code section 2016 is void in its application to navigable waters because it conflicts with section 4 of article X of the Constitution. Section 2016 is, however, constitutional as it is applied to non-navigable waters.

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