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Public Access to Lands Annually Flooded: A Constitutional Analysis of Section 2016 of the California Fish and Game Code

*Things common to mankind by the law of nature, are...the seas, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the seashore...*¹

*All that tract of land, over which the greatest winter flood extends itself, is the seashore.*²

Nearly every winter in northern California, water from swollen rivers flows or is diverted onto private land, creating prime habitat for thousands of waterfowl.³ Waterfowl hunters have navigated these floodwaters since the turn of the century, usually without permission from the owner of the flooded land.⁴ Entries of this nature bring two fundamental rights into conflict. The right to protect property from trespass is an inalienable right secured by the California Constitution.⁵ On the other hand, the right of the public to have access to navigable waters also is protected by the California Constitution.⁶

The conflict between the rights of persons who own land annually flooded and the right of the public to traverse navigable waters was considered recently by the California Legislature. Prior to 1982, section 2016 of the California Fish and Game Code⁷ forbade unauthorized entry onto private property to hunt. The law spoke only of entry onto land, however, leaving open the issue whether unauthorized entry onto private lands covered with floodwater was unlawful. To settle this point, section 2016 was amended in 1982 to require landowner consent for entry onto private land that is "temporarily inundated"

1. T. COOPER, THE INSTITUTES OF JUSTINIAN 67-8 (3rd. ed. 1852).

2. *Id.*

3. San Francisco Sunday Examiner and Chronicle, Jan. 22, 1984, at C10, col. 2 [hereinafter cited as Chronicle Article] (on file at the *Pacific Law Journal*).

4. *Id.*

5. CAL. CONST. art. I, §1.

6. CAL. CONST. art. X, §4.

7. All section references are to CAL. FISH & GAME CODE unless otherwise specified.

by water.⁸ This action was taken at the behest of landowners in the northern Sacramento Valley angered by property damage, free use of hunting facilities, and possible civil liability for injuries occurring on their land associated with those who enter flooded lands without permission to hunt waterfowl⁹

By amending section 2016 in 1982, the legislature, while protecting private property rights, placed control over access to navigate floodwaters in private hands. The amount of acreage open to hunters who neither own waterfowl habitat nor belong to a hunting club is thereby greatly reduced.¹⁰ This author will show that this restriction placed on public access to floodwaters is unconstitutional because the law interferes with the constitutional right of navigation in a manner beyond the power of the legislature.

To reach this conclusion, this author initially will discuss the legislative history of section 2016.¹¹ Next, the author will discuss article X section 4 of the California Constitution. This provision will be shown to create a public trust easement on lands beneath navigable water and a constitutional right to use navigable waters.¹² With the public trust easement and constitutional right of navigation established, the author will show that floodwaters of the type used by public waterfowl hunters are navigable waters under the current test for navigability employed by California courts.¹³ The author then will show that this conclusion is not militated against by statutes and cases that limit the ability of certain floodwaters to be legally navigable.¹⁴ Next, this author will address the argument made by proponents of section 2016 that the law impinges only upon the right to hunt and not upon the constitutional right of navigation and is thus not unconstitutional. The author will refute this argument by discussing cases and the opinion of the California Attorney General that hold the right of navigation to include the right to hunt.¹⁵

Having firmly established the constitutional right to navigate floodwaters for the purpose of hunting, the exercise of this right will be shown not to interfere with the inalienable right to protect property

8. See *infra* note 31 and accompanying text for partial text of CAL. FISH & GAME CODE §2016 as amended by 1982 Cal. Stats. c.1607, §1 at 6429.

9. See Chronicle Article, *supra* note 3 at cols. 2-3.

10. *Id.*

11. See *infra* notes 19-34 and accompanying text.

12. See *infra* notes 55-60 and accompanying text.

13. See *infra* notes 81-104 and accompanying text.

14. See *infra* notes 105-29 and accompanying text.

15. See *infra* notes 130-45 and accompanying text.

from trespass.¹⁶ The author then will discuss the limits on the power of the legislature to restrict access to navigable waters as mandated by Article X section 4 of the California Constitution. Using this standard, section 2016 will be shown to be an unconstitutional act because the law impinges on the constitutional right of navigation and places control over access to navigable waters in private hands.¹⁷ Finally, the author will offer suggestions on how the problems faced by landowners can be remedied in a constitutional manner. These problems are discussed in connection with the legislative history of section 2016.¹⁸

THE HISTORY OF SECTION 2016 OF THE CALIFORNIA FISH AND GAME CODE

In England, the king owned the wild creatures of the realm and had power to preserve and protect game reserves for the common good.¹⁹ This concept was adopted in America, with the individual states replacing the sovereign as owner and manager of wild animals.²⁰ In California, the notion of public ownership of game was made clear in *People v. Truckee Lumber Company*.²¹ In *Truckee Lumber*, the state successfully enjoined lumber mill operators from dumping sawdust and other refuse into the Truckee River. The California Supreme Court found this pollution, which killed fish in the river, to be injurious to public property rights in the wild fish.²²

The ability of the government to manage game was made clear in *Ex Parte Maier*.²³ In *Maier*, the California Supreme Court upheld a statute prohibiting the sale of venison to be a proper exercise of the police power.²⁴

With public ownership rights in game and the authority of the state to manage game established, various laws were developed to conserve wildlife and habitat. One of these laws, section 627 of the Penal Code, was enacted in 1895.²⁵ This law was the ancestor legislation of later parts of the Fish and Game Code, including section 2016. As adopted from the Penal Code in 1967, section 2016 made unlawful any

16. See *infra* notes 147-56 and accompanying text.

17. See *infra* notes 157-65 and accompanying text.

18. See *infra* notes 166-67 and accompanying text.

19. II W. BLACKSTONE, COMMENTARIES 417-419.

20. *Ex Parte Maier*, 103 Cal. 476, 37 P. 402 (1894).

21. 116 Cal. 397, 48 P. 374 (1897).

22. *Id.* at 399, 48 P. at 374.

23. 103 Cal. 476, 37 P. 402 (1894).

24. *Id.*

25. Enacted by 1895 Cal. Stats., c. 202, §1, at 258.

unauthorized entry onto the land of another for the purpose of hunting.²⁶

Subsequent to the enactment of this law in 1895, flooded private lands became popular hunting areas. Over the years, landowners experienced property damage caused by persons who had entered private property via floodwaters without consent.²⁷ Further, much private land that had been improved at great expense by duck clubs to attract waterfowl was used by the public without consent and without charge.²⁸

Section 2016, prior to being amended, could have been read to prevent unconsented entry of this type. Under the maxim *cujus est solum, ejus est usque ad coelum*,²⁹ a landowner owns the space above the soil. Thus, a hunter who enters private land by boat has entered, in a physical sense, onto the land of another as much as a hunter on foot. The question whether entry by water was precluded by section 2016, however, was not resolved by a California appellate court.

This uncertainty, coupled with constituent owners of flooded land prompted Senator Ray Johnson of Chico to amend section 2016 to restrict the ability of the public to traverse floodwaters over private land.³⁰ Section 2016, as amended in 1982 reads in part:

26. CAL. FISH & GAME CODE §2016 prior to being amended by 1982 Cal. Stats., c. 1607 §1 read in part:

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 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 on such lands without having first obtained written permission from the owner of such lands, or his agent, or the person in lawful possession thereof.

27. See Chronicle Article, *supra* note 2.

28. *Id.*

29. Whose is the soil, his it is up to the sky. BLACK'S LAW DICTIONARY 341 (rev. 5th ed. 1979).

30. See Chronicle Article, *supra* note 2. The first bill introduced by Senator Johnson was designed to close a loophole in the law which the then Assemblyman Johnson authored in 1972 to remedy the trespass problem faced by many of his constituents. In 1972 the legislature amended section 100 of the Harbors and Navigation Code, CAL. HARB. & NAV. CODE amended by 1972 Cal. Stats., c. 1072, §1 which declares all navigable waters in the state to be public ways. The amendment specifically excluded floodwaters from those waters capable of being navigable. *Id.* Thus, floodwaters could not be public ways to which a public right of navigation right would attach. The amendment, however, restricted the definition of floodwaters to those waters on land due to *extraordinary* flooding. *Id.* Thus, annual floodwaters, the type used by navigable waterfowl hunters could still be navigable waters under the statute.

In 1982 Senator Johnson introduced legislation that would have amended Harbors and Navigation Code section 100 to remedy this anomaly in the statute. This 1982 bill redefined the term "floodwaters" expressly to include annual floodwaters resulting from flood control diversions. S.B. 1920, 1981-82 Reg. Sess. (amended in Senate April 22, 1982, amended in Assembly June 25, 1982)(copies on file with *Pacific Law Journal*). This bill was amended in committee to remove entirely the definition of the term "floodwaters" from the statute. *Id.* See SENATE FINAL HISTORY, 1981-82 Reg. Sess. 1117 (1982). Both versions of the bill would have precluded floodwaters from being navigable and hence could not be "public ways" under Harbors and

It is unlawful to enter any lands under cultivation or enclosed by a fence, or 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....³¹ (emphasis supplied to show new language).

The effect of the amendment to section 2016 is clear. Many thousands of acres of flooded lands, which are prime waterfowl habitat and thus excellent hunting grounds, are no longer accessible to the public.³² Further, hunters who have hunted on floodwaters for many years are now subject to criminal liability.³³ Although section 2016 addresses valid landowner concerns, the law is unconstitutional if it impinges on a constitutional right in a manner beyond the power of the legislature.³⁴ A discussion of the constitutional right of navigation is thus necessary to an analysis of the constitutionality of section 2016.

THE CONSTITUTIONAL RIGHT OF NAVIGATION

The constitutional right of navigation, with which section 2016 conflicts, is expressly protected by article X section 4 of the California Constitution.³⁵ In addition to establishing a constitutional right of navigation, article X section 4 has been held to embody the public trust doctrine.³⁶ These two concepts have been held by California courts to protect and describe similar rights. The public trust doctrine generally has been applied by courts in deciding whether a particular piece of property is burdened by an easement for access and naviga-

Navigation Code 100. The proposed legislation would have thus abolished statutory authority for the public to use navigable floodwaters on private land. Although the amendment to Harbors and Navigation Code section 100 was passed by the California Senate, the proposed law stalled in the Assembly. *Id.* Senator Johnson, joined by Assemblyman Herger, then rewrote the bill to amend Fish and Game Code section 2016. *Id.*

31. CAL. FISH & GAME CODE §2016.

32. See Chronicle Article *supra* note 3 (the author of this article stated that over 100,000 acres of land used by public hunters would be affected by the new legislation).

33. *Id.*

34. *Forestier v. Johnson*, 164 Cal. 24, 127 P. 156 (1912); *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913).

35. CAL. CONST. art. X, §4. See *infra* notes 37-41 for full text of this provision.

36. *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); *P.G.&E. v. Superior Court*, 145 Cal. App. 3d 253, 193 Cal. Rptr. 336 (1983).

tion in favor of the public.³⁷ The constitutional right of navigation, however, has been used by courts in deciding disputes over the right of the public to navigate a waterway.³⁸ Using either theory, California courts are steadfast in recognizing a constitutionally protected public right of navigation.

A. The Constitutional Provision Guarantying the Navigation Right

The provision in the California Constitution that California courts have interpreted to protect the public right of navigation was included in the 1879 Constitution to assure that public access to the waterfront and navigable waters would not be impeded.³⁹ This enactment was desired by the authors of the 1879 constitution because prior legislatures, shortly after statehood in 1850, had sold large tracts of tidelands to private individuals.⁴⁰ Fearing a monopolization of all frontage to navigable water in the state by private persons, the legislature adopted article XV sections 2 and 3 (later renumbered article X section 4 and 3, respectively).⁴¹ Section 3, as renumbered, prohibits the sale to private persons of tidelands within two miles of an incorporated city.⁴² Section 4, as renumbered, protects the navigation right and reads as follows:

No individual, partnership or corporation claiming or possessing the frontage of title lands in 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.⁴³

37. See *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983); *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *State v. Superior Court (Lyon)*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied* 454 U.S. 865 (1981); *State v. Superior Court (Fogerty)*, 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied* 454 U.S. 865 (1981).

38. *People ex rel. Younger v. El Dorado County*, 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (3d Dist. 1979).

39. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 522-23, 606 P.2d 363, 366-67, 162 Cal. Rptr. 327, 330-31 (1980). See also *Debates and Proceedings of the California Constitutional Convention 1878-79 at 1478-81* (text of legislative debates over the wisdom of article X §4 and related provisions dealing with the waterfront).

40. *Id.*

41. *Id.*

42. CAL. CONST. art. X, §3.

43. CAL. CONST. art. X, §4. Other states have similar constitutional provisions. See *e.g.*

B. California Case Law Describing the Navigation Right

A leading case interpreting article X section 4 of the California Constitution as creating a public navigation right is *Forestier v. Johnson*.⁴⁴ In *Forestier*, the California Supreme Court was asked to enjoin alleged trespassers from navigating on Fly's Bay, a tidally influenced side channel of the Napa River. The court refused to issue an injunction, finding a public trust easement for navigation, as mandated by article X section 4, to be implicit in the grant of Fly's Bay from the state to private persons.⁴⁵ Further, the Court held that the defendants were exercising the right of navigation secured to the public by this constitutional provision.⁴⁶ Since Fly's Bay was tidally influenced, *Forestier* applied the public navigation right only to navigable tidal waters. Subsequent cases, however, extended both the constitutional right of navigation and the public trust easement found in *Forestier* to nontidal navigable waters.⁴⁷

One case that extended the constitutional right of navigation to inland navigable waters is *People ex rel. Younger v. El Dorado County*.⁴⁸ *Younger* involved a county ordinance designed to ban all navigation on the South Fork of the American River, a popular whitewater rafting area. The purpose of the ordinance was to protect owners of property adjacent to the river from the pollution, noise, trespass, and fire danger that accompanied the rafters.⁴⁹ In reversing the finding of the trial court that the ordinance was a valid exercise of the police power of the local government, the California Court of Appeal stated definitively: "The public's right of access to navigable streams is a constitutional right."⁵⁰ The court then struck down the ordinance

ALASKA CONST. art. VIII §14 (free access to navigable or public waters not to be denied any United States or state resident); ALABAMA CONST. art. I §24 (navigable waters to remain public highways free to citizens of United States and of state without tax, toll, or impost); TENNESSEE CONST. art. I §29 (equal participation in free navigation of the Mississippi River is an inherent right of citizens of Tennessee; it cannot, therefore, be conceded to any prince, potentate, power, person or persons whatever) SOUTH CAROLINA CONST. art. XIV §4 (all navigable water shall remain free to citizens of the state and the United States without tax, impost or toll imposed); MINNESOTA CONST. art. II §2 (all boundary navigable waters and all such waters leading into them, shall be common highways and free to citizens of state and of United States without tax, duty or impost or toll); WISCONSIN CONST. art. IX § (Mississippi River and all navigable waters leading into it and Saint Lawrence River are free to inhabitants of state and to citizens of United States without tax, impost or duty therefor).

44. 164 Cal. 24, 127 P. 156 (1912).

45. *Id.* at 35, 127 P. at 160.

46. *Id.* at 38, 127 P. at 162. The court stated "the public right of navigation [is] secured by the said constitutional provision" (referring to article XV section 2, later changed to article X section 4).

47. See *infra* notes 46-58 and accompanying text.

48. 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (3d Dist. 1979).

49. *Id.*

50. *Id.* at 406, 157 Cal. Rptr. at 817.

because the rafting ban "denies the constitutional right of the public the use of and access to a navigable stream."⁵¹ *Younger* thus extends the constitutional right of navigation to inland navigable waters.

C. The Public Trust Easement for Navigation

The public trust easement for navigation found in *Forestier* to be protected by article X section 4 of the state constitution has ancient origins. Founded in Roman law, the public trust concept evolved in England, where the sovereign held all the navigable waters and the land beneath them in trust for public navigation, commerce, and fishery.⁵² This doctrine was adopted in the United States, where the states succeeded to the trusteeship of navigable waters and underlying land upon admission to the union.⁵³ As exemplified by the decision in *Forestier*, many California public trust cases involved public use of tidal waters near the coast.⁵⁴ The public trust easement for navigation was extended to nontidal, navigable waters, however, in *State of California v. Superior Court (Lyon)*⁵⁵ and *State of California v. Superior Court (Fogerty)*.⁵⁶

In *Lyon* and *Fogerty* the supreme court held that private land on the shore of Clear Lake and Lake Tahoe, respectively, was burdened by the public trust up to the high water mark.⁵⁷ The court held that because the state succeeded to the ownership of lands beneath nontidal navigable waters up to the high water mark upon admission to the union, subsequent grants of these lands to private persons included a public trust easement up to the high water mark.⁵⁸ The public thus was found to have a right to use these lands and the waters on them for navigation, commerce, fishing, and recreation.⁵⁹ Further, the court in *Fogerty* stated that the *modern* seasonal high water mark, even as increased by manmade structures, rather than the level the water would reach under natural conditions, defines the boundary of the

51. *Id.* at 407, 157 Cal. Rptr. at 817.

52. See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* 68 MICH. L. REV. 471 (1970)(history of the public trust doctrine).

53. *Id.*

54. See *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

55. 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, cert. denied 454 U.S. 865 (1981).

56. 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, cert. denied 454 U.S. 865 (1981).

57. *Lyon*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, cert. denied 454 U.S. 865 (1981); *Fogerty*, 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, cert. denied 454 U.S. 865 (1981).

58. *Id.*

59. *Id.*

trust on nontidal navigable waters.⁶⁰ Thus, under *Lyon* and *Fogerty*, the constitutionally based public trust easement for navigation has been extended to the current high water mark of nontidal, navigable waterways in California.

D. The Relationship Between the Public Trust Easement and the Constitutional Right of Navigation

Although *Forestier* made clear that the constitutional right of navigation and the public trust easement are protected by Article X section 4 of the California Constitution, few cases since have discussed the distinctions or overlap between the two doctrines. Two California Court of Appeal decisions, however, provide an analysis of the relationship between the two rights.

In *P.G.&E. v. Superior Court*,⁶¹ an electric utility, P.G.&E., sought immunity from liability under Civil Code section 846,⁶² for injuries sustained by a person on land owned by the utility. Under Civil Code section 846, a landowner is relieved of the duty to keep the premises safe for use by the public for recreational purposes. In this case, the plaintiff had come into contact with a P.G.&E. power line while he was in a catamaran on Lake Shasta.⁶³ P.G.&E. claimed that since it owned the land over which the power line ran, the plaintiff was on P.G.&E. "premises" entitling the utility to immunity under Civil Code section 846. The court rejected this argument, stating that the constitutionally derived public trust easement attached to all navigable waters in the state and to the lands beneath them, including the navigable lake in issue.⁶⁴ The finding that the lake bed was burdened with the public trust meant that the plaintiff, as a member of the public, had a constitutional right to navigate the waters of the lake.⁶⁵ The court concluded that the plaintiff, being where he had a constitutional right to be when he was injured, had not entered onto any lands of P.G.&E. and that the utility company was therefore not shielded from liability.⁶⁶

60. *Fogerty*, 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, cert. denied 454 U.S. 865 (1981).

61. 145 Cal. App. 3d 253, 193 Cal. Rptr. 336 (1983).

62. CALIF. CIV. CODE §846. At the time of the injury suffered by the plaintiff, the law provided that "an owner of an estate in real property...owes no duty of care to keep the premises safe for entry or use by others" for designated "recreational purpose(s)" including "water sports." The purpose of the statute is to encourage landowners to let the public use their land for recreational purposes by relieving the owner of possible tort liability for injury incurred by a member of the public using the land. *Id.*

63. *P.G.&E.*, 145 Cal. App. 3d at 255-56, 193 Cal. Rptr. at 337.

64. *Id.* at 258, 193 Cal. Rptr. at 338.

65. *Id.* at 258, 193 Cal. Rptr. at 339.

66. *Id.*

P.G.&E. clarifies the relationship between the public trust doctrine and the constitutional right of navigation. The court stated that Article X section 4 creates *both* doctrines, with the public trust easement attaching to land and water and the navigation right attaching to people.⁶⁷ Once the public trust easement is found to burden a body of water, the public has a constitutional right to navigate the water.

Although *P.G.&E.*, like *Forestier*, holds the public trust easement and the constitutional right of navigation to be interwoven, one California Court of Appeal case has held that the public has a right to use navigable waters on land that is not within the public trust. In *Bohn v. Albertson*,⁶⁸ a reclaimed island in the Sacramento-San Joaquin Delta became flooded because of a levee break. Following the inundation of the island, members of the public fished and boated on the waters.⁶⁹ Several years after the levee break, the private landowner sought to enjoin these alleged trespasses.⁷⁰ Although the lands involved were not within the public trust since the navigable water on the land was not present when the grant of the land from the state was made, the court found that the public still had a right to use the waterway.⁷¹ The court said: "As the waters are navigable, then, although the title to the lands thereunder still remains in the owners and they have the right to reclaim, the public, until the land is reclaimed, has the right of navigation and fishery."⁷² *Bohn* thus holds that land and navigable waters outside the public trust are nonetheless objects of the constitutional right of navigation.

In summary, the California constitution has been held to burden land beneath nontidal, navigable waters with a public trust easement for navigation. The constitutional provision protecting the public trust also creates the constitutional right in the public to use the navigable waters over lands held in the public trust. Further, the navigation right attaches to navigable waters over land that, due to avulsive flooding, are not within the public trust. Under either doctrine, the

67. *Id.* at 258-59, 193 Cal. Rptr. at 339.

68. 107 Cal. App. 2d 738, 238 P.2d 128 (1st Dist. 1951).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 749, 238 P.2d at 135. This holding is significant in light of the recent United States Supreme Court decision *Summa Corp. v. California ex rel. State Lands Commission and City of Los Angeles*, ____ U.S. ____, 80 L. Ed. 2d 237, 104 S.Ct. 1752 (1984). The Court held in *Summa* that interests in land which had become part of the United States pursuant to the Treaty of Guadalupe Hidalgo in 1848, which had been confirmed in federal patent proceedings, were not burdened by the public trust because California did not assert the trust easement in the patent proceedings. *Id.* Thus, according to *Bohn*, although *lands* of the type involved in *Summa* are not burdened with a public trust easement, any navigable *waters* on the land are still subject to use by the public.

public has a right to use navigable waters. Thus the essential determinant in resolving whether the public has a constitutional right to use floodwaters is whether floodwaters are navigable waters.

THE TEST FOR NAVIGABILITY

The determination of the navigability of waterways first became important in the United States in resolving questions of federal jurisdiction under the commerce clause of the United States Constitution.⁷³ In *Gibbons v. Ogden*,⁷⁴ the United States Supreme Court held that federal power over interstate commerce included the power to regulate commerce on navigable waters.⁷⁵ Thus, the determination of the navigability of water became an issue to be resolved in describing the scope of federal jurisdiction under the commerce clause. Although *Gibbons* did not provide a test for navigability, subsequent jurisdictional questions involving the navigability of water prompted the Court to do so. One test, developed in resolving the scope of federal admiralty jurisdiction, was enunciated by the Supreme Court in *The Daniel Ball*:⁷⁶

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.⁷⁷

Although this test was used to resolve an admiralty jurisdiction issue, subsequent courts used the test to determine whether a state newly admitted to the union obtained title to the bed of navigable streams within the state.⁷⁸ For commerce clause issues, the *Daniel Ball* standard was followed generally, though modified to require that a waterway serve as a link to interstate commerce before federal jurisdiction could be invoked.⁷⁹ These rigid federal tests have been relaxed, and federal courts today appear more willing than in the past to declare a waterway to be navigable.⁸⁰

73. U.S. CONST. art. I, §8, cl.3.

74. 22 U.S. (9 Wheat.) 1 (1824).

75. *Id.*

76. 77 U.S. (10 Wall.) 557 (1870).

77. *Id.*

78. See *Utah v. United States*, 403 U.S. 9 (1971); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Utah*, 283 U.S. 64 (1931).

79. *United States v. Appalachian Electric Power Company*, 311 U.S. 377 (1940).

80. See *N.R.D.C. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

A. California Tests for Navigability

Congruent with federal law, the California test for determining the navigability of a waterway has evolved from a rigid test to a more liberal standard. In *Wright v. Seymour*,⁸¹ a test similar to that used in the *Daniel Ball* was employed to ascertain the navigability of a body of water. In *Wright*, the test used for navigability required a stream to be susceptible to the usual commercial purposes of carrying the products of the country.⁸² This test rapidly gave way to a more liberal standard. In *Forestier*,⁸³ for example, the California Supreme Court held that Fly's Bay, a body of water that the court described as capable of being navigated by small boats at high tide, was navigable. The test was not without bounds, however, as was apparent in *Bolsa Land Co. v. Burdick*.⁸⁴ In *Bolsa*, the California Supreme Court stated that an irrigation ditch, twelve to fifteen feet wide and in some places less than two feet deep, which the defendants in the case had successfully navigated to reach an estuary on private land, was not navigable.⁸⁵ The court stated: "It should be unnecessary to add that the contention that such a ditch constitutes a part of the navigable waters of the state, or of the nation, is a sham as shallow as the ditch itself."⁸⁶

As is evident from *Forestier* and *Bolsa*, the facts of each case determined the issue of navigability. This analysis was followed by the California Court of Appeal in *Bohn v. Albertson*.⁸⁷ In *Bohn* the court had to decide whether the floodwaters that had inundated a tract of land were navigable. In a summary of varying tests used by federal and state courts to determine navigability, the court in *Bohn* stated an elusive test, allowing the facts of each case to determine navigability.⁸⁸

The court found the waters navigable even though the water was three and a half feet deep at low tide and contained obstructions.⁸⁹ The countervailing evidence in favor of finding the waters navigable was the presence of many small fishing and pleasure boats on the water.⁹⁰ While *Bohn* did not state a definitive test for determining the navigability of a stream or lake, the decision is important because

81. 69 Cal. 122, 10 P. 323 (1886).

82. *Id.*

83. 164 Cal. 24, 127 P. 156 (1912).

84. 151 Cal. 254, 90 P. 532 (1907).

85. *Id.* at 259, 90 P. at 534.

86. *Id.* at 260, 90 P. at 534.

87. 107 Cal. App. 2d 738, 238 P.2d 128 (1st Dist. 1951).

88. *Id.* at 742-48, 238 P.2d at 132-135.

89. *Id.* at 747, 238 P.2d at 134.

90. *Id.*

it advanced the premise that recreational navigation of a waterway can support a finding that the waterway is legally navigable.

A more concrete test for navigability of waters in California was finally stated in *People ex rel. Baker v. Mack*.⁹¹ In *Mack*, the court of appeal was asked to abate an alleged public nuisance,⁹² consisting of wires and cables placed across the Fall River. The obstructions were strung across the river to prevent the public from navigating the river.⁹³ Before the court could determine whether the cables constituted a public nuisance, the court had to conclude whether the Fall River was navigable. The court found that the river was navigable, holding that under the modern test in California, navigable waters are those waters "below the high water mark...which are capable of being navigated by oar or motor-propelled small craft."⁹⁴

This language has been cited with approval by the California Supreme Court. In *National Audubon v. Superior Court*,⁹⁵ the case that made the public trust a factor to be considered in state water allocation, the court stated in a footnote that the *Mack* test is proper in determining navigability for public trust purposes.⁹⁶

B. Applying the Mack Standard to Annual Floodwaters

Under the *Mack* standard, if annual floodwaters are below the high water mark and capable of being traversed by a person using a small boat, the waters are navigable. If this conclusion is reached, the constitutionally protected right of navigation vests in the public to navigate these waters. Applying the *Mack* standard to any particular body of floodwater is beyond the scope of this comment. An assumption can be made, however, that since frequent and recurrent entries onto and navigation of annual floodwaters by public hunters have occurred,⁹⁷ much annual floodwater is "capable of being navigated by oar or motor-propelled small craft."⁹⁸

Further, floodwaters of the type used by public hunters are below the high water mark as required under the *Mack* test. In *Mammoth*

91. 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3rd Dist. 1971).

92. Under CAL. CIV. CODE §3479, obstructions in navigable waters are public nuisances.

93. *Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3rd Dist. 1971).

94. *Id.* at 1050, 97 Cal. Rptr. at 454.

95. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

96. *Id.* at 435 n.17, 658 P.2d at 720 n.17, 189 Cal. Rptr. at 356 n.17. The court stated: "A waterway usable only for pleasure boating is nevertheless a navigable waterway and protected by the public trust...(citing *Younger* 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 and *Mack* 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448)."

97. See Chronicle Article, *supra* note 2.

98. *Mack* 19 Cal. App. 3d 1040, 1050, 97 Cal. Rptr. 448, 454.

Gold Dredging Co. v. Forbes,⁹⁹ the California Court of Appeal stated that the high water mark of a river is established by the average level attained by the water during the annual wet season.¹⁰⁰ Also, under *Fogerty*¹⁰¹ the public trust easement extends to the current high water mark of a lake or stream, even as affected by manmade structures.¹⁰² Since the floodwaters used by hunters are the result of annual seasonal flow¹⁰³ and much of the water is diverted onto the land by manmade structures,¹⁰⁴ these waters create the high water mark as described in *Mammoth Gold* and *Fogerty*, and hence are below that level. Thus, because most of the floodwater that annually inundates private land in the Sacramento and San Joaquin Valleys meets both criteria of the *Mack* test and are capable of being legally navigable, a constitutional right of access over these waters is vested in the public.

C. California Case Law Discussing the Navigability of Floodwaters

Although no appellate court in California has decided the issue directly, the decisions that discuss whether floodwaters can be navigable do not militate against the conclusion that annual floodwaters used by waterfowl hunters are navigable. In *Bohn*,¹⁰⁵ the waters present on the private land were found navigable.¹⁰⁶ These waters were originally the result of flooding.¹⁰⁷ Thus, under *Bohn*, floodwaters possess no characteristics that render them incapable of being navigable waters. This conclusion must be tempered, however, by a realization that the waters in *Bohn* had been present on the land for several years, taking on the attributes of an estuary.¹⁰⁸

In *Hitchings v. Del Rio Woods Recreation and Park District*,¹⁰⁹ the California Court of Appeal was asked to decide whether a stretch of the Russian River was navigable, and if so, what public rights

99. 39 Cal. App. 2d 739, 104 P.2d 131 (1940).

100. *Id.* at 752, 104 P.2d at 138.

101. 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, cert. denied 454 U.S. 865 (1981).

102. *Id.*

103. See *infra* notes 116-21 and accompanying text.

104. See Chronicle Article, *supra* note 2. See also California Attorney General Indexed Letter IL-75-246 at 4-9 (this letter to the District Attorney of Sutter County concerning the characteristics and navigability of the Butte Sink, a piece of land in the northern Sacramento Valley that is privately owned and annually flooded. The Attorney General discusses the mechanics of water diversions onto private land and the rights that attach thereto)(on file at the *Pacific Law Journal*).

105. 107 Cal. App. 2d 738, 238 P.2d 128 (1st Dist. 1951).

106. *Id.*

107. *Id.*

108. *Id.*

109. 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1st Dist.)

would accrue. This request was made by a member of the public after a park district had sought to restrict access to the river.¹¹⁰ Applying the *Mack* test, the court found the waters navigable and held the public to have a right to use the river.¹¹¹ Regarding floodwaters, the park district argued that a finding that the river was navigable would mean that "every freshet of water in any defined water course throughout the State of California during winter seasons at flood stage"¹¹² would be navigable, entitling the public to have access to them.¹¹³ The court allayed this concern, stating that, although waters temporarily on land could be legally navigable, navigability in law should not be based on navigability in fact during "infrequent or brief" periods of flood.¹¹⁴ Thus, the dicta in *Hitchings* only restricts water on land due to sporadic or unusual flooding from being navigable. This notion coincides with statutory definitions of navigable water and, as will be seen, does not prevent annual floodwaters of the type used by public hunters, from being navigable.

D. Statutory Definitions of Navigable Waters

Harbors and Navigation Code section 100, as originally enacted, stated that navigable waters are public ways for navigation and transportation.¹¹⁵ Subsequent to the enactment of this law, the liberal *Mack* recreational-boating test for navigability was announced.¹¹⁶ Thus, following *Mack*, all waters, including floodwaters, capable of supporting navigation by a small boat were navigable and hence public ways under Harbors and Navigation Code section 100. The California Legislature, cognizant of this ramification of *Mack*, amended Harbors and Navigation Code section 100 to exclude floodwaters from those waters capable of being navigable and hence precluded floodwaters from being public ways.¹¹⁷ This amendment did not effective-

110. *Id.*

111. *Id.*

112. *Id.* at 570 n.5, 127 Cal. Rptr. at 836-37 n.5.

113. *See id.*

114. *Id.* at 570, 127 Cal. Rptr. at 836.

115. CAL. HARB. & NAV. CODE §100 (as amended by 1972 Cal. Stats. c. 1072, §1, at 6429).

116. *Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3rd Dist. 1971). *See supra* notes 90-95 and accompanying text for discussion of the *Mack* test for navigability of water.

117. CAL. HARB. & NAV. CODE §100, which reads in part:

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 water course 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 lands. For the purposes of this section, "floodwaters" refers to that elevation of water which occurs at extraordinary times of flood and

ly prevent *all* floodwaters from being navigable, however, because the statute defined "floodwaters" as waters on land due to *extraordinary* flooding.¹¹⁸ Thus, both *Hitchings* and Harbors and Navigation Code section 100 only preclude waters on land due to infrequent or extraordinary flooding from being navigable waters. Waters on land due to *normal, ordinary runoff*, therefore, remain capable of being navigable waters under California case and statutory law. *Normal, ordinary runoff* has been described by California courts as including water that has temporarily escaped the banks of rivers swollen with water from seasonal runoff.¹¹⁹

In *Miller and Lux v. Madera Canal and Irrigation Co.*,¹²⁰ a case involving riparian water rights, the California Supreme Court held that waters that had escaped the banks of the Fresno River and flooded adjacent land were still part of the river, and were not extraordinary floodwaters.¹²¹ In a statement germane to the circumstances surrounding the waters used by public waterfowl hunters, the court said:

Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrences is usual and ordinary. It appears that they occur practically every year and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur; they are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno River has its source are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary — when a season of drouth prevails.¹²²

The geographic and hydrologic conditions involved in the *Miller* case are typical of the circumstances that produce much of the water on private land used by public hunters.¹²³ Thus, under *Miller* annual floodwaters of the type used by hunters are ordinary high waters resulting from normal runoff and hence are capable of being navigable waters

does not mean the water elevation of ordinary annual or recurring high waters resulting from normal runoff.

See also note 29 for a discussion of attempts made by Senator Ray Johnson to amend this statute. See also *Review of Selected 1972 California Legislation*, 4 PAC. L.J. 577 (1973).

118. See *id.*

119. See *Miller and Lux v. Madera Canal and Irrigation Co.* 155 Cal. 59, 99 P. 502 (1909).

120. 155 Cal. 59, 99 P. 502 (1909).

121. *Id.*

122. *Id.* at 76, 99 P. at 508.

123. See California Water Atlas at page 5, 8, 72 (graphs and maps showing hydrologic patterns in California).

under *Hitchings* and Harbors and Navigation Code section 100.

In addition to Harbors and Navigation Code section 100, sections 101¹²⁴ through 106¹²⁵ of that code designate certain waters as being legally navigable. An argument might be proffered that because this list of navigable waters does not contain any bodies of water that are the result of flooding, floodwaters may not legally be navigable. This argument is easily refuted by reference to *Bohn*.¹²⁶ In *Bohn*, as has been shown, the waters on private land due to a levee break were held to be navigable, the absence of the floodwaters from the list of statutorily recognized navigable waters notwithstanding.¹²⁷ Further, in *City of Los Angeles v. Aitken*,¹²⁸ judicial notice was taken of the navigability of Mono Lake. This finding of navigability was made despite the absence of Mono Lake from the list of navigable waterways given in the Harbors and Navigation Code.¹²⁹ Thus, the annual floodwaters used by waterfowl hunters do not have to be designated as navigable in the Harbors and Navigation Code to be recognized as legally navigable by California courts.

This author has shown that under the current test for navigability used by California courts, annual floodwaters can be navigable. The validity of this conclusion is not affected by statutes or case law that restrict the types of water than can be navigable. The author has also shown that a constitutional right of public access to navigable waters, whether based on the public trust or the right of navigation, exists in the people of California. Thus, the people have the right to navigate floodwaters on private land.

THE NAVIGATION RIGHT PROTECTS INCIDENTAL RECREATION RIGHTS

Since landowner consent is required under section 2016 when a member of the public wishes to hunt on flooded lands and is not required when that person wishes only to navigate across the floodwaters, the law impedes only the right to hunt, and the navigation right is unscathed by the statute.¹³⁰ Thus, even if proponents of section 2016 concede the existence of a constitutional right to navigate floodwaters, the argument could still be made on their behalf that the statute is constitutional because it does not affect the right of

124. CAL. HARB. & NAV. CODE §§101-106.

125. *Id.*

126. 107 Cal. App. 2d 738, 238 P.2d 128 (1st. Dist. 1951).

127. *Id.*

128. 10 Cal. App. 2d 460, 52 P.2d 585 (1936).

129. See CAL. HARB. & NAV. CODE §§101-106.

130. See *supra* notes 28-29 and accompanying text of the amended version of CAL. FISH & GAME CODE §2016.

navigation *per se*, rather, the law impinges only on the right to hunt, a right not protected by the constitution. This conclusion is erroneous, however, because it does not comport with California case law,¹³¹ and an opinion of the California Attorney General.¹³² Both of these authorities hold the navigation right to embrace incidental recreational activities.

A. California Case Law Interpreting Article X Section 4 Holds Recreation Rights to be Protected by the Navigation Right

In *Forestier v. Johnson*,¹³³ the California Supreme Court found the constitutional right of navigation to include the right to hunt. In *Forestier*, the activity that the landowner sought to enjoin was navigation across Fly's Bay by persons hunting waterfowl.¹³⁴ After concluding that article X section 4 protected the defendant's right to navigate the bay, the court turned to the issue whether the right of navigation encompassed the right to hunt. The court found affirmatively that:

[H]unting...is a privilege which is incidental to the public right of navigation....The defendants,...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 the lawful season, shoot and take them.¹³⁵

This language makes plain the assertion that the privilege to hunt is contained in, or is incidental to, the navigation right.

This conclusion was reached by the California Court of Appeal in *Mack*.¹³⁶ In *Mack*, the court interpreted the *Forestier* holding as creating "an absolute right (in the public) to navigate and hunt in small boats" on navigable waters.¹³⁷ Further, the *Mack* court stated: "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 (emphasis added)."¹³⁸

The constitutionally based public trust easement over navigable water also includes recreational rights under contemporary California law. In *Marks v. Whitney*,¹³⁹ a quiet title action between adjacent landowners, the California Supreme Court stated that in addition to the

131. See *infra* notes 133-40 and accompanying text.

132. See *infra* notes 141-45 and accompanying text.

133. 164 Cal. 24, 127 P. 156 (1912).

134. *Id.*

135. *Id.* at 40, 127 P. at 162-63.

136. *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448. (3rd Dist. 1971).

137. *Id.* at 1048, 97 Cal. Rptr. at 452.

138. *Id.* at 1045, 97 Cal. Rptr. at 451.

139. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

traditional uses protected by the public trust easement, the easement also includes right to "fish, hunt, bathe, swim, to use for boating and general purposes the navigable waters of the state...."¹⁴⁰

B. California Attorney General Considers Recreation Rights to be Included in the Navigation Right

The *Mack* decision was relied on in an opinion by the California Attorney General¹⁴¹ that stated that the right of navigation includes incidental recreation rights, including hunting. The opinion was in response to a query by an assemblyman whether a portion of the Tuolumne River was navigable, and if so, what the ramifications were in terms of title to the bed of the river and public access rights.¹⁴² The opinion stated that regardless of whether the bed is in public or private ownership, the public enjoys an easement over all navigable streams in the state.¹⁴³ This easement, the opinion continued, included the right of the public to exercise the incidents of navigation on the water, namely boating, fishing, swimming, hunting, and other recreational uses.¹⁴⁴ Applying the *Mack* test for the navigability of a waterway, the Attorney General concluded that the part of the river in question was navigable and hence burdened by this public easement.¹⁴⁵

This opinion, together with the cases discussed above, makes clear that the constitutional navigation right, which attaches to all navigable waters in the state and hence to most annual floodwaters, includes the right to hunt. The people of the state, therefore, have a constitutional right to navigate floodwaters on public or private land to hunt. This conclusion, however, appears to be in direct conflict with other provisions of the California Constitution.

Article I section 1¹⁴⁶ of the constitution creates an inalienable right in the people to own land and protect the land from trespass. This provision would seem to disallow unauthorized entry onto private land and the taking of game thereon, acts allowable under article X section 4. As will be shown, however, entry onto navigable waters over private land to hunt does not constitute a trespass in derogation of article I section 1.

140. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

141. 55 OP. ATT'Y. GEN. 293 (1972).

142. *Id.*

143. *Id.* at 294.

144. *Id.*

145. *Id.* at 302.

146. CAL. CONST. art. I, §1.

ENTRIES ON NAVIGABLE WATERS AND THE TAKING OF GAME
THEREON DO NOT CONSTITUTE TRESPASSES

When a person enters onto private land by navigating floodwaters and kills and takes a game bird, two possible trespasses to the landowner may occur: a trespass to the owner's land and a trespass to the owner's waterfowl. Regarding trespass to land, *P.G.&E.*¹⁴⁷ made clear that no entry, and hence no trespass can occur when a member of the public traverses navigable *waters* over private land since this land is burdened by a public easement.¹⁴⁸ The constitutional right of navigation does not create a right in the public to cross private *land* to get to navigable waters, however, and this activity would constitute a trespass.¹⁴⁹ The exercise of the navigation right over annual floodwaters does not involve this type of trespass because most floodwaters are accessible to public hunters from adjacent navigable *waters* and does not involve travel by foot or vehicle over private *land*.¹⁵⁰ Thus, the exercise of the constitutional right of navigation over annual floodwaters does not constitute a trespass to land.

The taking of wild game by a public hunter once on floodwater over private land arguably constitutes a trespass under section 656 of the California Civil Code.¹⁵¹ Under that section, wild animals can be "owned" when the animals are on the land of someone "claiming" them.¹⁵² Under this section, duck hunting clubs that are organized and which purchase land solely for the purpose of hunting game arguably "claim," and hence own, the wildlife on their land. When a member of the public shoots a "claimed" duck without the consent of the landowner, therefore, a trespass to the owner's property rights in the duck appears to occur. Decisions by the California Supreme Court, however, reveal that this is not precisely the case.

In *Kellogg v. King*,¹⁵³ the California Supreme Court was requested to enjoin the trespasses by a large number of persons who were entering onto land owned by a private hunting club.¹⁵⁴ The defendants were proven to have killed several of the waterfowl that frequented the land and to have driven off many more birds. The court ordered

147. *P.G.&E. v. Superior Court*, 145 Cal. App. 3d 253, 193 Cal. Rptr. 336 (1983).

148. *Id.*

149. *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 90 P. 532 (1907). Although this case was decided before the liberal *Mack* test was announced, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971), the *Bolsa* court makes clear that although a right may exist in the public to navigate waters, the public may not lawfully cross private land to get to navigable waters.

150. California Attorney General Indexed Letter IL-75-246 (1975) at page 8.

151. CAL. CIV. CODE §656.

152. *Id.*

153. 114 Cal. 378, 46 P. 166 (1896).

154. *Id.*

the injunction, holding that since the defendants had not been given permission to enter the land to hunt, the landowner had rights in the waterfowl under Civil Code section 656 superior to the rights of the trespassers.¹⁵⁵ Thus, the court in *Kellogg* construed Civil Code section 656 to create private property rights in wild game only as against trespassers. As has been shown, entry onto private land by navigable waters is not a trespass. Thus, under the *Kellogg* rationale, no trespass to waterfowl can occur when a person shoots a duck from navigable floodwaters over private land. This conclusion comports with cases discussed earlier that hold wild game, while alive, to be public property and incapable of private ownership.¹⁵⁶ The right to navigate and hunt on navigable floodwaters, protected by article X section 4, does not conflict with the inalienable property rights secured by article I section 1 of the California constitution since no trespass to property occurs in exercising the right to navigate floodwaters to hunt waterfowl. The finding that no conflict exists between the rights protected under article I and article X section 4 is the final step in showing that a constitutional right to navigate floodwaters to hunt is held by the people of California.

SECTION 2016 IS UNCONSTITUTIONAL AS BEYOND THE POWER OF THE LEGISLATURE

The author has shown that a constitutional right of navigation, whether called the public trust easement or simply the right of navigation, exists in California. This right, which includes the right to hunt, attaches to all navigable waters in the state, whether the waters are on public or private lands. Further, the author has shown that the exercise of this right does not interfere with the property rights secured to landowners by article I of the California Constitution. Furthermore, annual floodwaters of the type used by waterfowl hunters are navigable under the current navigability standard used by California courts. The conclusion must be reached, therefore, that the right of the people to navigate floodwaters over private land to hunt is a right protected by the California Constitution.

Although laws are presumed valid, those that impinge upon a constitutional right in a manner that is beyond the power of the legislature are unconstitutional.¹⁵⁷ Section 2016 clearly impinges on the constitutional right of navigation because thousands of acres of navigable

155. *Id.* at 388-89, 46 P. at 169.

156. *People v. Truckee Lumber Company*, 116 Cal. 397, 48 P. 374 (1897).

157. *Forestier v. Johnson*, 164 Cal. 24, 127 P. 156 (1912); *People v. California Fish Co.* 166 Cal. 576, 138 P. 79 (1913).

waters are no longer freely accessible to a large segment of the public.¹⁵⁸ Laws exist, however, that constitutionally restrict the recreational use by the public of equally vast areas of navigable waters.¹⁵⁹ The proper inquiry in judging the constitutionality of section 2016, therefore, is whether the legislature, in enacting the law, exceeded the constitutional allotment of power to restrict access to navigable waters.

The limits on the legislative power to restrict access to, and use of, navigable waters arises from article X section 4 of the state constitution.¹⁶⁰ This provision states that 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."¹⁶¹ This provision is a clear mandate that the legislature, in taking action affecting the use of navigable waters, may enact only those laws that ensure control over access to and use of navigable waters is not placed in private hands. This provision has been so interpreted by the California Supreme Court. In *People v. California Fish Co.*,¹⁶² the court ruled on the validity of patents of coastline from the state to private individuals.¹⁶³ The court ruled that although the patents were valid, "section 2 of article XV of the state constitution deprives the legislature of power to dispose of tidelands fronting upon navigable water so as to entitle the grantee to destroy or interfere with the public easement for navigation."¹⁶⁴ Hence implicit in the grants was a navigational easement. Since the public trust has been extended to nontidal navigable waters,¹⁶⁵ this language is applicable to laws dealing with those waters. Thus, under article X section 4 the legislature is powerless to place control over navigable nontidal waters, including annual floodwaters, in private hands. Section 2016, therefore, which places control over the exercise of the constitutional right of navigation in private hands is beyond the power of the legislature and is unconstitutional.

158. See Chronicle Article *supra* note 2.

159. CAL. FISH & GAME CODE §1580, for instance, allows the Department of Fish and Game to create wildlife refuges containing navigable waters where hunting is banned. The distinction between these laws and section 2016 is that under section 2016, access to navigable waters is controlled by private persons whereas in section 1580, control over navigable waters remains in a public agency.

160. See *supra* note 43 and accompanying text for the text of CAL. CONST. art. X §4.

161. *Id.*

162. 166 Cal. 576, 138 P. 79 (1913).

163. *Id.*

164. *Id.* at 598, 138 P. at 88.

165. See *supra* notes 52-60 and accompanying text.

POSSIBLE SOLUTIONS

Although section 2016 is unconstitutional, the problems sought to be remedied by the enactment of the law are real.¹⁶⁶ This author offers two solutions to the problems faced by owners of private land annually flooded. One solution is the education of public waterfowl hunters of the problems that are associated with free use of privately owned flooded lands. This could be accomplished by dispersal of information by the Department of Fish and Game and hunting organizations. If the majority of public hunters realize that they are navigating across private land, they will invariably be more respectful of the landowners property. Further, informed hunters will aid in discouraging and apprehending the few public hunters that will cause damage to private property. Second, the Department of Fish and Game and other authorities should increase law enforcement activities on privately owned flooded lands during the waterfowl hunting season. The effective enforcement of *existing* fish and game laws¹⁶⁷ can accomplish the desired effect of section 2016 in a constitutional manner.

CONCLUSION

Nearly every winter in California, the rivers that flow into the Sacramento and San Joaquin Valleys swell with rain, frequently spilling over their banks onto adjacent land.¹⁶⁸ These excess waters are also diverted onto nearby land as a flood control measure.¹⁶⁹ These floodwaters, oblivious to property lines, inundate many acres of privately owned land. The flooded lands attract a major portion of the waterfowl that migrate through California.¹⁷⁰ These waterfowl, in turn, attract waterfowl hunters who navigate the privately owned flooded lands in pursuit of the birds.¹⁷¹ Over the years, landowners experienced prop-

166. See *supra* notes 28-29 and accompanying text; see also Chronicle Article *supra* note 2 and California Attorney General Indexed Letter IL-75-246 (1975)(On file at the *Pacific Law Journal*).

167. For example, CAL. FISH & GAME CODE §2004 reads:

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.

Id.

168. See Chronicle Article *supra* note 2.

169. *Id.*

170. *Id.*

171. *Id.*

erty damage caused by hunters who had not received permission to hunt on the private land.¹⁷²

Seeking to stop this damage, the California Legislature amended section 2016 of the Fish and Game Code.¹⁷³ Section 2016, as amended in 1982, requires the hunter to obtain landowner consent before entry can lawfully be made onto privately owned flooded lands.¹⁷⁴ The result of this legislation has been to place control over access to thousands of acres of prime hunting waters in the hands of private individuals and corporations. This action effectively closes these waters, some of which have been used for many years, to the public.¹⁷⁵ This appears equitable because private landowners should not have to suffer the damage caused by unauthorized entry onto privately owned flooded lands.¹⁷⁶

In California, however, a strong public policy founded in the state constitution, allows access to, and use of, navigable waters.¹⁷⁷ This right is protected by the constitution expressly,¹⁷⁸ and by the constitutionally based public trust doctrine.¹⁷⁹ This navigation right extends to all navigable waters of the state, including floodwaters,¹⁸⁰ and embraces the recreational incidents of navigation,¹⁸¹ including hunting.¹⁸²

Although the amendment to section 2016 has a laudable purpose, the statute is unconstitutional because the law places control over access to navigable waters in private hands.¹⁸³ The statute thus manifests the very evil sought to be eradicated by article X section 4 of the California Constitution.¹⁸⁴ A statement by one of the proponents of this constitutional provision, made in 1879 is relevant today in describing the action taken by the legislature when section 2016 was amended: "The higher interest of the public has been disregarded, and the lesser interest of individuals and corporations has had full sway."¹⁸⁵

172. *Id.*

173. *See supra* notes 18-32 for history and text of this statute.

174. *Id.*

175. *See* Chronicle Article, *supra* note 2, at col. 1.

176. *Id.*

177. CAL. CONST. art. X, §4. *See supra* note 41 and accompanying text for the text of this provision.

178. *Id.*; *see supra* notes 44-51 and accompanying text.

179. *See supra* notes 52-61 and accompanying text.

180. *See supra* notes 62-129 and accompanying text.

181. *See supra* notes 130-45 and accompanying text.

182. *Id.*

183. *See supra* notes 156-65 and accompanying text.

184. *Id.*

185. Debates and Proceedings of the California Constitutional Convention 1878-79, at 1481. This statement was made by a Mr. Ayers. *Id.*

Possible solutions exist to the dilemma faced by landowners over whose land floodwaters flow and hunters hunt. Education of public waterfowl hunters, designed to impress upon them the nature of the problems encountered by landowners invariably would reduce the harm suffered by landowners. Also, effective enforcement of existing Fish and Game laws would reduce the amount of property damage occurring on privately owned flooded lands.¹⁸⁶ In any event, the lands and waters affected by section 2016 should not be closed to the public because, as the California Supreme Court said in *Lyon*:¹⁸⁷ "Lands of this type...constitute a resource which is fast disappearing in California; they are of great importance for the . . .recreational needs of the residents of the state."¹⁸⁸

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186. See *supra* notes 166-67 and accompanying text.

187. State v. Superior Court (*Lyon*), 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, cert. denied 454 U.S. 865 (1981).

188. *Id.* at 216, 625 P.2d at 252, 172 Cal. Rptr. at 699.

