# A LEGAL GUIDE TO THE PUBLIC'S RIGHTS TO ACCESS AND USE CALIFORNIA'S NAVIGABLE WATERS

*09/13/2017*

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# I. PURPOSE OF THIS GUIDE

California's spectacular cliff-lined beaches, colorful tide pools, bustling ports, emerald lakes, and meandering rivers are cherished on the west coast and around the world. Along the waters of the Pacific Coast, from the Klamath River in the north to the Tijuana Estuary in the south, and Lake Tahoe and the Colorado River on the east, the state's navigable waters have excited and inspired Native Americans, Spanish, English, Russian, and American sailors and explorers, as well as curious children, adventurous boaters, innovative entrepreneurs, commercial and recreational fishers, probing scientists, and water sports enthusiasts. These waters facilitate commerce, navigation, fisheries, and recreation and provide aquatic habitats for some of the state's most extraordinary flora and fauna.

In California, members of the public have rights to access and use navigable waters for many beneficial uses, including, but not limited to, navigation, fishing, and recreation.[1] These public rights are expressed in federal law, California's Act of Admission, the California Constitution, court opinions, and state statutes. However, the public's rights to access and use the state's navigable waters are sometimes misunderstood.

California public officials are periodically called on to address disputes about the public's rights to access and use the state's navigable waters. These disputes may arise between recreational water users, such as boaters, fishermen, hunters, shoreline and beach users, and adjacent private property owners. In this guide, the California State Lands Commission seeks to inform and clarify, for the public, government officials, and private property owners, the public's rights to access and use the state's navigable waters by summarizing the relevant legal principles.

[1] *See* Marks v. Whitney, 6 Cal. 3d 251, 259-60 (1971); People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1045, 1050 (1971).

To that end, this guide provides an overview of California law governing the public's access and use rights, with an emphasis on the principles applicable to inland waters. The guide is intended to provide the reader with information that may assist in determining public access and use rights. It does not address fact-specific issues, apply the law to any particular dispute, or provide an independent basis for the regulation of any activity.[2]

## A. Overview of Public Rights to Access and Use California's Navigable Waters

California's enacted laws and judicial decisions establish public rights to access and use the state's navigable waters. Under these laws, the public is entitled to access and enjoy all state waters "capable of being navigated by oar or motor-propelled small craft."[3] Owners of lands underlying or adjacent to navigable waters are prohibited from interfering with the public's right to use such waters.[4]

While several states and European countries recognize custom or common usage as authorizing passage across certain privately owned property, including to access navigable waters,[5] the legal system in California has not recognized such a general right.

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[2] The Guide is not intended to be a regulation as set forth in CAL. GOVT. CODE § 11342.600.
[3] *Mack*, 19 Cal. App. 3d at 1050.
[4] *See infra* Part III; CAL. CONST. art. X, § 4.
[5] For example, several European countries protect the public's "right to roam" through private property. *See Freedom to Roam* (February 17, 2016), https://en.wikipedia.org/wiki/Freedom_to_roam. *See also The Right to Roam*, GUARDIAN (Jan. 2, 2015), http://www.theguardian.com/environment/2015/jan/02/country-diary-right-roam (last visited May 24, 2017). In the United States, the New Jersey Supreme Court held that privately owned "upland sands must be available for use by the general public under the public trust doctrine." Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40, 59 (2005). The Oregon Supreme Court held that the state's custom of allowing public use of dry-sand areas and beaches for recreational purpose was a legitimate source of law. *See* State *ex rel.* Thornton v. Hay, 254 Or. 584, 598-99 (1969). Furthermore, the Oregon Beach Bill (Chapter 601, Oregon Laws 1967) gave the public the right to free and uninterrupted use of beaches along Oregon's coast. *See Ocean Shores*, OREGON.GOV, http://www.oregon.gov/oprd/RULES/pages/oceanshores.aspx; *see also Oregon's Beaches: A Birthright Preserved*, OR. STATE PARKS & RECREATION BRANCH (1977), http://www.oregonstateparks.org/index.cfm?do=main.loadFile&load=_siteFiles/publications/oregon_s-beaches-birthright-preserved113001.pdf. "In Texas, public access to Gulf Coast beaches is not just the law, it is a constitutional right. Walking along the beach in Texas has been a right since Texas was a Republic, and the Texas Land Commissioner protects this public right for all Texans by enforcing the Texas Open Beaches Act. Under the Texas Open Beaches Act the public has the free and unrestricted right to access Texas beaches, which are located on

Therefore, the public's rights in California do not include an across-the-board right to cross privately-owned lands to access navigable waters.[6] The government may also limit the public rights to access and use navigable waters through reasonable time, place, and manner restrictions.[7]

## B. The California State Lands Commission's Role in Protecting Public Access Rights

When California became a state, it acquired title to the beds of navigable waterways and tide and submerged lands within its borders, pursuant to the Equal Footing Doctrine.[8] These lands are held in trust for the people of California. Since the California Constitution of 1879 was adopted, the state government has been mandated to maintain and promote access to California's navigable waterways.[9] The California State Lands Commission was established in 1938 to manage these trust lands of approximately 4 million acres of ungranted tidelands, submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits, as well as all the state's remaining jurisdiction and authority in lands that have been granted by the state.[10] These lands, often referred to as "sovereign lands" or "public trust lands," stretch from the state's northern border with Oregon to the southern border with Mexico and include the tide and submerged lands on the Pacific Coast as well as world-famous waters, such as Lake Tahoe, Mono Lake, and the Colorado River. The Commission also monitors sovereign lands granted in



what is commonly referred to as the "wet beach," from the water to the line of mean high tide. The dry sandy area that extends from the "wet beach" to the natural line of vegetation is usually privately owned but may be subject to the public beach easement. The line of vegetation may shift due to wind, and wave and tidal actions caused by storms and hurricanes." http://www.glo.texas.gov/coast/coastal-management/open-beaches/index.html

[6] *See infra* Part III.C.6 ("Trespass"); *but see* People v. Wilkinson, 248 Cal. App. 2d Supp. 906 (1967).

[7] *See infra* Part III.C.3 ("Reasonable Time, Place, and Manner Restrictions").

[8] Pollard's Lessee v. Hagan, 44 U.S. 212, 228-229 (1845); *Marks*, 6 Cal. 3d at 258 n.5; Submerged Lands Act of May 22, 1953, 43 U.S.C. sec. 1311 (a).

[9] Cal. Const. art. X, § 4; Cal. Const. art. I, § 26.

[10] *See* CAL. PUB. RES. CODE §§ 6216, 6301.

trust to over seventy local jurisdictions and administers state-owned mineral rights, including lands under the jurisdiction of other state agencies.[11]

The Commission works to protect and enhance these lands and natural resources and may, where appropriate, issue leases for use or development,[12] resolve boundaries between public and private lands,[13] promote public access,[14] remove hazards and unauthorized structures from waterways, [15] and implement regulatory programs to shield state waters from oil spills[16] and marine invasive species introductions.[17] The Commission seeks to secure and safeguard the public's access rights to waterways and the coastline and to preserve irreplaceable natural habitats for wildlife, vegetation, and biological communities. In addition to promoting public access to and use of state owned waterways, the Commission has participated in litigation to protect the public's access and use rights on privately owned recreational navigable waters as well, *e.g.* on the South Fork of the American River.[18]

## II. PUBLIC ACCESS LAWS

The public right to access and use navigable waters is based on relevant legal precedents. The concept was an important feature of ancient Roman law and early English common law. Those rights were incorporated into American common law and have been upheld by the U.S. Supreme Court.[19] California, like most other states admitted by Congress, is required to ensure its navigable waterways remain "forever free" as part of its Act of Admission to the United

[11] *See* CAL. PUB. RES. CODE § 6301.
[12] *See* e.g. CAL. PUB. RES. CODE §§ 6321, 6501 et seq.
[13] *See* e.g. CAL. PUB. RES. CODE §§ 6307, 6357.
[14] *See* e.g. CAL. PUB. RES. CODE §§ 6210.9, 6213.5, 8613, 8625.
[15] *See* e.g. CAL. PUB. RES. CODE §§ 6216.1, 6224.1, 6302, 6302.1, 6303.1.
[16] *See* CAL. PUB. RES. CODE §§ 8750, *et seq*.
[17] *See* CAL. PUB. RES. CODE §§ 71200, *et seq*.
[18] People ex rel. Younger v. County of El Dorado, 96 Cal. App. 3d 403 (1979).
[19] *See infra* Parts II.A–B.

States. In fact, the California Constitution contains several public access and use provisions. To further those constitutional provisions, the state legislature has enacted statutes that foster those access and use rights. This part gives a brief overview of those sources of law.

## A. Ancient Origins

The concept that the public has rights in navigable waters is deeply rooted in western civilization's legal history. In fact, the public right to access and use navigable waters is at least as old as the Roman Empire.[20] The Institutes of Justinian, a 6th century text of Roman law, states: "[b]y the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea."[21] In ancient Rome, all rivers and ports were public, and the right of fishing was common to all. Although riverbanks were subject to private ownership, all people had a right to anchor boats and unload cargo on the shore.[22]

The principle that the public has a right to use navigable waters for fishing, commerce, and navigation eventually took root in French, Spanish, and Mexican law.[23] The English common law incorporated the principle as well,[24] but added a slight twist — the concept of sovereign ownership.[25] Simply put, the English Crown held ownership of the beds of navigable waters for the public good.[26] Eventually, the principle was incorporated into American law with the states taking ownership of most navigable waters, and the legal principle came to be known

[20] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV 471, 475 (1969-70); Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 UC DAVIS L. REV. 195, 195 (1980-81).
[21] J. INST. 2.1.1 (T. Cooper trans. & ed., 1841); *see also* 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 39-40 (S. Thorne trans., 1968); Stevens, *supra* note 12, at 197.
[22] J. INST., *supra* note 13, at 2.1.4; *see also* Stevens, *supra* note 12, at 196-98.
[23] *See* Stevens, *supra* note 12, at 196-98.
[24] Sax, *supra* note 12, at 476-77; Stevens, *supra* note 12, at 197-98.
[25] Stevens, *supra* note 12, at 197-98.
[26] *Id.*

as the public trust doctrine.

## B. Common Law Public Access and Use Rights

The public interest in accessing and using navigable waters has been recognized in the English common law in North America since the 1600s.[27] In the 1821 case of *Arnold v. Mundy*, an American court recognized the importance of navigable waters and the public interest in maintaining them for the public at large.[28] To that end, the court found that the rights to the beds of navigable waters, which had been held by the English Crown in trust for public use, passed to the states as sovereign trustees.[28] Furthermore, the court held that the sovereign "cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right."[29]

In the seminal public trust doctrine case *Illinois Central Railroad Co. v. Illinois*, the United States Supreme Court elaborated on the rule. The Court held that individual states are obligated to hold their navigable waters in trust for the people and strictly limited alienability so that the public "may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein, freed from the obstruction or interference of private parties." [30] Furthermore, the Court recognized that "[t]he control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[31] As a result, the Court held that "[lands under navigable waters]

[27] *Id.* at 199.
[28] Stevens, *supra* note 12, at 199.
[29] *Arnold*, 6 N.J.L. at 78.
[30] *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).
[31] *Id.* at 453.

cannot be placed entirely beyond the direction and control of the state."[32] Thus, the Court ruled that the state's grant of the rights and title to 1,000 acres of submerged lands within Chicago's harbor to a private railroad company exceeded the state's power over such lands.[33] Moreover, the Court held that any such grants by a state are revocable and that states may resume the exercise of their trust obligations at any time.[34]

The Court's *Illinois Central* decision describes the trusteeship responsibility that the state has to the public. In 1850, California adopted the common law to serve as the basis for its legal system and, in so doing, adopted common law principles of the public trust doctrine.[35] As a result, California courts have held that the state government is obligated to hold certain natural resources, particularly its sovereign lands, in trust for current and future generations.[36] The public trust doctrine generally precludes the state from alienating its trust resources into private ownership.[37] Furthermore, the trust requires state officials to protect and ensure the long-term preservation of those resources for the public benefit.[38] In most instances, when the state has conveyed away its fee title to tideland or shoreline areas, the state retains authority and responsibility to protect the public's rights in a public trust easement waterward of the high water mark.[39]

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[32] *Id.* at 454.
[33] *Id.* at 454-56.
[34] *Id.* at 455.
[35] CAL. CIV. CODE § 22.2 (originally 1850 Cal. Stat. ch. 95).
[36] Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 UC DAVIS L. REV. 665, 667 (2012) [hereinafter *Public Trust Doctrine*].
[37] *See Ill. Cent. R.R Co.*, 146 U.S. at 452-54; Nat'l Audubon Soc'y v. Super. Ct., 33 Cal. 3d 419, 440-41 (1983); *see also* Frank, *Public Trust Doctrine*, *supra* note 31, at 667; Sax, *supra* note 12, at 475-91; Stevens, *supra* note 12, at 210-14.
[38] *Nat'l Audubon Soc'y*, Cal. 3d at 441 ("Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."); San Francisco Baykeeper, Inc. v. California State Lands Commission, 242 Cal. App. 4th 202 (2015); Frank, *Public Trust Doctrine*, *supra* note 31, at 667.
[39]; *Marks*, 6 Cal. 3d at 261; State v. Super. Ct. (Lyon) 29 Cal. 3d 210, 232 (1981); *Fogerty*, 29 Cal. 3d 240, 249 (1981); People *ex inf.* Webb v. Cal. Fish Co., 166 Cal. 576, 584 (1913); City of Berkeley v. Super. Ct., 26 Cal. 3d

Lastly, the common law doctrines of dedication and prescription have been adapted to recognize public easements to navigable waters.[40] The common law public nuisance doctrine has been used to impose civil and criminal penalties on those who obstruct the navigability of state waters.[41] The common law doctrines of dedication, prescription, and nuisance are discussed in more detail below.

## C. Act of Admission

As a condition of statehood in 1850, Congress required California to maintain its navigable waterways as "common highways, and forever free."[42] Similar requirements were imposed on other newly admitted states. This provision of federal law, based on the Northwest Ordinance of 1787, set the baseline for the future states' obligations regarding public use of navigable waters.[43] This provision has been implemented by subsequent state constitutional provisions, statutes, and judicial decisions aimed at protecting the public's right to access and use navigable waters.[44]



515, 523-24 (1980) (an exception for filled Board of Tide Land Commissioners Lots in San Francisco Bay was found).

[40] *See infra* Part II.F.

[41] People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 147 (1884) ("all unauthorized intrusions upon a water highway for purposes unconnected with the rights of navigation or passage, are nuisances"); *see also* CAL. CIV. CODE § 3479 (unlawful obstruction of free passage or use of navigable waterway is a nuisance); CAL. HARB. & NAV. CODE § 131 (obstruction of navigable waterway is misdemeanor); CAL. PENAL CODE § 370; *see generally* Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in A Pod?* 45 UC Davis L. Rev. 1075, 1078-88 (2012); *infra* Part III.

[42] Act of Sept. 9, 1850, ch. 50, 9 Stat. 452, 453.

[43] Northwest Ordinance of 1787, Art. IV.

[44] Cardwell v. American River Bridge Co., 113 U.S. 205 (1885); CAL. CONST. art X, § 1, § 3, § 4; Richard M. Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 UC Davis L. Rev. 579, 580 (1983).

## D. Equal Footing Doctrine

The United States Supreme Court's adoption of the Equal Footing Doctrine for all states admitted to the United States serves as the basis for state ownership of California's navigable waterways and for the *federal test for state title*.[45][46]

## E. California Constitution

California's promise to protect the public's rights is also set forth in its constitution, statutes, and court decisions. The California Constitution directs the legislature to enact laws that broadly construe the public right to access and use state waters.[47] Since 1879, the state Constitution has provided various additional protections for the public's right to access and use the state's navigable waterways.[48] For example, Article X, section 4 states:

> No individual or 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 always be attainable for the people thereof.[49]

Additionally, Article I, section 25, adopted in 1910, protects the public's right to fish upon and from state public lands and in the waters thereof and restricts the sale of state land without preserving access rights;[50] Article X, section 1 sets forth the state's right of eminent domain to

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[45] References to the three tests for navigability (discussed *infra*) appear in italics.
[46] Pollard's Lessee v. Hagan, 44 U. S. at 221, 228-229; The Daniel Ball, 77 U.S. 557, 563 (1870).
[47] CAL. CONST. art. X, §4.
[48] *See Cnty. of El Dorado*, 96 Cal. App. 3d at 406.
[49] CAL. CONST. art X, § 4.
[50] CAL. CONST. art I, § 25. The right to fish has been held by the courts to constitute a privilege and subject to the state's police powers to regulate (Matter of Application of Parra, 24 Cal. App. 33 (1914) and Paladini v. Superior Court, 178 Cal. 369 (1918)); Public lands sold by the state and subject to Article I, § 25 have a reserved right of access to fish (Attorney General's Opinion No. NS3679, August 5, 1941); The provision that "no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon" was interpreted by the Attorney General as not applying to all state owned lands only public lands (Attorney General's Opinion No. 53-193, October 14, 1953); Atwood v. Hammond, 4 Cal. 2d 31, 39-40 (1935) held that the legislature has, under certain limited circumstance, the power to eliminate not only public fishing rights, but also the public's

provide public access to navigable waters;[51] and Article X, section 3 prohibits the sale of tidelands within two miles of an incorporated city, county, or town.[52]

## F. Statutory Enactments

For over a century, California's legislature has enacted numerous statutes seeking to protect and foster public access to and use of navigable waters. The Subdivision Map Act, the California Coastal Act, provisions of the Streets and Highways Code, and other statutes incorporate the state's broad policy in favor of providing public access to navigable waters.[53] Those laws regulate development, prohibit the sale of certain state owned lands abutting navigable waters, and require state and local agencies to facilitate public access to those waters.[54] A brief overview of these statutory enactments is provided below.

### *1. Prohibitions on the Sale or Elimination of Access*

Since 1910, the state has been prohibited from selling lands below the ordinary high water mark of a navigable waterway.[55] Furthermore, the state cannot sell lands contiguous to navigable waters unless convenient access to the waters is provided from a public road or roads.[56] If a tract of land owned by the state provides the only convenient means of access to a navigable waterway, the state, or its successors in interest, must provide an easement for convenient access to the waterway.[57] Lastly, municipal governments and local agencies must

additional public trust rights of commerce and navigation; State of California v. San Luis Obispo Sportsman's Assn., 22 Cal 3d 440, 446-448 (1978) held that lands acquired by the state after 1910, where fishing was compatible with their use, were also "public lands" and subject to the public's right to fish.

[51] CAL. CONST. art X, § 1.

[52] CAL. CONST. art X, § 3.

[53] *See infra* Parts II.E.2–5.

[54] *See id.*

[55] CAL. PUB. RES. CODE § 7991. This is in addition to the Constitutional prohibition of selling tidelands within two miles of a city or town.

[56] *Id.* § 6210.4.

[57] *Id.* § 6210.5; *see also id.* § 6210.9 (providing California State Lands Commission with authority to "acquire by purchase, lease, gift, exchange, or, if all negotiations fail, by condemnation, a right-of-way or easement . . . across privately owned land or other land that it deems necessary to provide access" to public trust lands).

ensure that all navigable waters within or adjacent to their borders remain open and free to navigation and that waterfronts are accessible from nearby public streets and highways.[58]

### *2. McAteer-Petris Act – San Francisco Bay Conservation and Development Commission*

Although Article X, section 4 of the Constitution prohibits any "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"[59] from restricting the right of way to such water whenever it is required for any public purpose, it took the Legislature 90 years, until 1969, to enact legislation regulating the use of privately owned land for the purpose of securing public access to tidal or navigable waters. First, in 1965, the Legislature enacted the McAteer-Petris Act (MPA), which created the San Francisco Bay Conservation and Development Commission (BCDC), to protect San Francisco Bay from indiscriminate filling and to promote public access.[60] Then in 1969, the Legislature amended the MPA to, among other things, adopt an confer the status of law on a new regional plan prepared by BCDC for the San Francisco Bay region, called the San Francisco Bay Plan (Bay Plan), that was California's, and the nation's, first coastal resource protection plan.[61]

In addition to adopting the Bay Plan, in amending the MPA in 1969, the Legislature made a finding and declaration "that existing public access to the shoreline and waters of the San Francisco Bay is inadequate and that maximum feasible public access, consistent with a proposed project, should be provided."[62] The 1969 Bay Plan implemented this finding by

[58] CAL. GOV'T CODE § 39933; *see also id.* §§ 39901, 54090–54093; Lane v. City of Redondo Beach, 49 Cal. App. 3d 251, 257 (1975).
[59] CAL CONST. art. X, § 4.
[60] CAL. GOV'T CODE § 66600-66663.1.
[61] CAL. GOV'T CODE § 66651 ("This plan and any amendments thereto shall constitute the plan for the [BCDC] to use to establish policies for reviewing and acting on projects until otherwise ordered by the Legislature.").
[62] CAL. GOV'T CODE § 66602.

providing, in Public Access Policy No. 1, that "maximum feasible opportunity for pedestrian access to the waterfront should be included in every new development in the Bay or on the shoreline . . . ."[63] The Bay Plan, as amended through 2011, contains many other policies that have as their purpose increasing public access to the tidal waters in and tributary to San Francisco Bay.[64]

The Bay Plan also contains findings and policies concerning the public trust.[65] Those findings include but are not limited to: (1) virtually all unfilled tidelands and submerged lands within BCDC's jurisdiction are subject to the public trust; (2) title to public trust ownership is vested in the State Lands Commission or legislative grantees; and (3) the MPA and Bay Plan are an exercise of the Legislature's authority over public trust lands and establish policies for meeting public trust needs. The Bay Plan's public trust policies provide, in part, that "[w]hen [BCDC] takes any action affecting lands subject to the public trust, it should assure that the action is consistent with public trust needs for the area."[66]

### *3. Subdivision Map Act*

Certain shoreline development cannot interfere with the public's right to access navigable waterways. In fact, most shoreline developments must facilitate public access to adjacent navigable waterways. Accordingly, state legislation imposes certain conditions on development adjacent to the California coastline and other navigable waterways. The Subdivision Map Act prohibits the approval of new subdivisions fronting upon navigable waters unless reasonable public access from a public highway to and along the bank of the waterway is provided.[67] The

[63] Bay Plan (1969), p. 29.
[64] Bay Plan (2012), pp. 66 – 69, Public Access Policies 1 – 14.
[65] *Id.* at p. 88, Public Trust Findings and Policies.
[66] *Id.*, Public Trust Policies 1.
[67] *See* CAL. GOV'T CODE §§ 66478.1–.14.

local agency (city or county) shall not approve a proposed subdivision adjacent to a navigable waterway unless a reasonable public access route to and along the waterway is expressly designated on the tentative or final map.[68] Furthermore, the route must provide access along the "'portion of the bank of the river or stream bordering or lying within the proposed subdivision,' not simply access to the river itself, or to some other part of the riverbank."[69]

#### *4. California Coastal Act*

One of the goals of the California Coastal Act is to "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone."[70] Furthermore, "[i]n carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."[71] The Coastal Act provides that "development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation."[72] Subject to the finding of a rational nexus between the proposed development and permit conditions implementing public policy[73] and the degree of private exaction being roughly proportional to the public benefit,[74] new coastal development projects must allow for public access from the nearest public roadway to the shoreline unless (1) it is inconsistent with public

[68] *Id.* §§ 66478.5–.6.
[69] Kern River Pub. Access Comm. v. City of Bakersfield, 170 Cal. App. 3d 1205, 1217 (1985) (quoting CAL. GOV'T CODE § 66478.4).
[70] CAL. PUB. RES. CODE § 30001.5.
[71] *Id.* § 30210.
[72] *Id.* § 30211; *see also id.* §§ 30210–30214.
[73] Nollan v. California Coastal Commission, 483 U.S. 825, 836-37 (1987).
[74] Dolan v. City of Tigard, 512 U.S. 374, 390-92 (1994).

safety, military security needs, or protection of fragile coastal resources, (2) adequate access already exists nearby, (3) agriculture would be harmed, or (4) the new development project is otherwise exempted under the Coastal Act.[75] However, under this provision, public access will not be required until a public agency or private association agrees to accept responsibility for maintenance and liability of the access way.[76]

The California Coastal Commission works in partnership with coastal cities and counties to plan and regulate land and water use in the state's coastal zone.[77] The Coastal Commission works with 15 counties and 61 cities in the state's coastal zone to develop and implement their Local Coastal Programs (LCPs),[78] which guide coastal planning, land use, and zoning in their municipalities.[79] Each LCP must "contain a specific public access component to assure that maximum public access to the coast and public recreation areas is provided."[80] Also, no coastal development project may begin until a permit is issued by the Coastal Commission or a local government with a certified LCP.[81] Given the unique features of California's numerous coastal communities, the specific access provisions of each LCP may vary based on the features of each community. Interested parties should contact their local government for more information about their LCP's specific access requirements.

### *5. Bridges – Streets and Highways Code*

Oftentimes, the most logical location for access to a waterway is where a bridge crosses it. Kayakers, rafters, and others may legally utilize the public access easements around bridges to

[75] CAL. PUB. RES. CODE § 30212.
[76] *Id.*
[77] *What We Do*, CAL. COASTAL COMM'N, http://www.coastal.ca.gov/whoweare.html (last visited May 24, 2017).
[78] *Local Coastal Programs*, CAL. COASTAL COMM'N, http://www.coastal.ca.gov/lcps.html (last visited May 24, 2017).
[79] CAL. PUB. RES. CODE §§ 30500–30504.
[80] *Id.* § 30500.
[81] *What We Do*, *supra* note 59.

enter and exit navigable waterways.[82] With those factors in mind, the legislature adopted three code sections in 1974 to facilitate increased public access around bridges.[83] All state or county highway projects and all city street projects that propose construction of a new bridge over a navigable waterway must consider, and report on, the feasibility of providing public access for recreational purposes to the waterway before the bridge is constructed.[84] These code provisions apply to state agencies and city and county governments that approve bridge construction projects.[85]

### *6. Other Statutory Enactments and Public Agencies that Protect and Promote Public Access*

The legislature's efforts to implement the state's constitutional public access principles also include, but are not limited to:

- Delta Protection Act – **Delta Protection Commission**[86]

  The Delta Protection Act requires the resource management plan for the "primary zone" of the Sacramento-San Joaquin Delta to provide for reasonable public access to public lands and waterways.[87]

- San Joaquin River Conservancy Act – **San Joaquin River Conservancy**[88]

  Created in 1992 to serve as the managing entity for the proposed San Joaquin River Parkway, the Conservancy's mission includes acquiring land from willing sellers on both sides of the San Joaquin River between Friant Dam and Highway 99 and managing these

[82] People v. Sweetser, 72 Cal. App. 3d 278, 284 (1977).
[83] CAL. STS. & HIGH. CODE §§ 84.5, 991, 1809.
[84] *Id.* §§ 84.5, 991, 1809.
[85] *See id*.
[86] *Delta Prot. Comm'n*, CA.GOV, http://www.delta.ca.gov (last visited May 24, 2017).
[87] CAL. PUB. RES. CODE §§ 29760–29767.
[88] *San Joaquin River Conservancy*, CA.GOV, http://www.sjrc.ca.gov (last visited May 24, 2017).

lands for public access and recreation, as well as protecting, enhancing, and restoring riparian and floodplain habitat.[89]

- **Coastal Conservancy**[90]

  The Coastal Conservancy was created in 1976 to help facilitate publicly beneficial projects in and around San Francisco Bay and along the California Coast and, today, includes many watersheds flowing to the Pacific Ocean.[91]

- **California Tahoe Conservancy**[92]

  The California Tahoe Conservancy may acquire real property interests on behalf of the state to protect the natural environment of Lake Tahoe, provide public access or recreational facilities, preserve wildlife habitats, and provide access to or management of state lands.[93]

- **Mountains Recreation and Conservation Authority**[94]

  The Mountains Recreation and Conservation Authority promotes public access and use of the Los Angeles River and also holds and manages numerous public access easements to and along the ocean shoreline in the vicinity of the Santa Monica Mountains.[95]

- **Department of Parks and Recreation**[96]

  The Department of Parks and Recreation promotes outdoor recreation and preserves and protects natural resources through management of the statewide park system. Many navigable waterways are located within or adjacent to state parks.[97]

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[89] CAL. PUB. RES. CODE § 32501, et seq.
[90] *California Coastal Conservancy*, http://www.scc.ca.gov (last visited May 24, 2017).
[91] CAL. PUB. RES. CODE § 31000, et seq.
[92] *Cal. Tahoe Conservancy*, http://tahoe.ca.gov (last visited May 24, 2017).
[93] CAL. GOV'T CODE §§ 66905–66908.3.
[94] MOUNTAINS RECREATION & CONSERVATION AUTH., http://www.mrca.ca.gov (last visited May 24, 2017).
[95] *Id.*
[96] *Department of Parks and Recreation*, CA.GOV, http://www.parks.ca.gov (last visited May 24, 2017).
[97] CAL. PUB. RES. CODE § 500, et seq.; CAL. GOV'T CODE § 54093.

- **The Department of Fish and Wildlife**[98]

  The Department of Fish and Wildlife "has jurisdiction over the conservation, protection, and management of fish, wildlife, and native plants, and the habitat necessary for biologically sustainable populations of those species."[99] Many fish and aquatic wildlife and plant species are public trust resources that rely on navigable waterways and associated habitats subject to public use and access rights. Segments of some navigable waterways are under the ownership of the Department of Fish and Wildlife.

## G. OTHER PUBLIC ACCESS LAWS

Public rights to access navigable waters may arise in a variety of ways. A right of way may be expressly dedicated to public use, impliedly dedicated through a long period of public use with the owner's knowledge, or it may arise by prescriptive use. If an offer of dedication is accepted by express act or implication, public rights are established.

### *1. Express Dedication*

An express dedication for public access occurs when a landowner intentionally offers to dedicate his or her land to a public purpose and the offer is accepted by the public.[100] A city or county, or both, may expressly accept the offer,[101] or the offer may be accepted by public use over a reasonable period of time for the purpose to which it was dedicated.[102] The dedication may take the form of a gift, purchase, or condition of entitlement.[103]

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[98] *Department of Fish and Wildlife*, https://www.wildlife.ca.gov/ (last visited May 24, 2017).
[99] CAL. FISH & GAME CODE § 1802.
[100] Hanshaw v. Long Valley Rd. Ass'n, 116 Cal. App. 4th 471, 477-83 (2004); McKinney v. Ruderman, 203 Cal. App. 2d 109, 115 (1962).
[101] *See, e.g.*, CAL. GOV'T CODE § 7050.
[102] *Hanshaw*, 116 Cal. App. 4th at 477-83; *McKinney*, 203 Cal. App. 2d at 116; Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615, 623 (1924).
[103] *See* 6 CAL. REAL EST. §§ 15:43, 26:3–:25 (4th ed. 2015).

An expressly dedicated easement provided public access to a navigable waterway in *People v. Sweetser*.[104] There, John Sweetser, a kayaker, accessed the Kern River via a county easement held for public highway purposes.[105] Although there was a fence with "no trespassing" signs around the easement, Sweetser climbed over it to launch his kayak.[106] He was cited by a deputy sheriff, charged in a criminal complaint with trespassing, and convicted in the Municipal Court.[107] However, the Fifth District Court of Appeal reversed his conviction because Sweetser "was walking within the perimeters of a county easement conveyed for 'public highway purposes' and . . . was acting within the scope of the easement."[108] Since launching a small craft into the navigable waterway was a permissible use of the easement and there was no evidence that the county had restricted the easement, Sweetser's conviction was reversed.[109] Thus, the public, unless restricted by reasonable government action, may use expressly dedicated road and highway easements to access navigable waters.[110]

### *2. Implied Dedication*

Under the doctrine of implied dedication, continued public use of private land for more than five years with full knowledge of the owner, without asking or receiving permission, and without objection, gives rise to an easement to navigable waters.[111] The California Supreme Court found that an informal or implied dedication of land may occur by "simply setting it apart or devoting it to that use."[112] Furthermore, "[t]o constitute a dedication at common law no

[104] Sweetser, 72 Cal. App. 3d 278
[105] *Id.* at 282.
[106] *Id.*
[107] *Id.* at 282-83
[108] *Id.* at 283, 286.
[109] *Id.* at 283.
[110] *Id.* at 283-84. *See infra* Part III. C. 3 ("Reasonable Time, Place, and Manner Restrictions").
[111] Gion v. City of Santa Cruz, 2 Cal. 3d 29, 38 (1970).
[112] Smith v. City of San Luis Obispo, 95 Cal. 463, 466 (1892).

particular formality of either word or act is required."[113] Thus, the California Supreme Court in 1982 ruled that the use of a street by the public for a "reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient, without any specific action by the municipal authorities, either by resolution or by repairs or improvements."[114]

Subsequent decisions held that in dedication by acquiescence of the owner, for a less than five year period, actual intent of the owner must be shown. [115] However, for periods in excess of five years, if the public has engaged in "long-continued adverse use," the question of intent shifts from the owner to that of the public.[116] Parties seeking to establish that a tract of land has been impliedly dedicated must show that "persons used the property believing the public had a right to such use."[117] The public use need not be "adverse" to the interest of the owner in the same way as the word is used in adverse possession cases.[118] In fact, the landowner's intention is not necessarily relevant as to whether there has been an implied dedication.[119] Litigants need to show only that the land was used as if it were public land.[120]

If a court finds that the public has used land without objection or interference for more than five years, it does not need to make a separate finding of "adversity" to find implied dedication.[121] If the land is a beach or shoreline area, litigants should show that the land was used as if it were a public recreation area.[122] Similarly, if a road is involved, the litigant must show that it was used as if it were a public road.[123] Once a tract of land has been impliedly dedicated

[113] *Id.*
[114] *Id.* at 470; *see also* Brumbaugh v. Cnty. of Imperial, 134 Cal. App. 3d 556, 563 (1982).
[115] Union Transp. Co. v. Sacramento Cnty., 42 Cal. 2d 235, 240-241(1954),
[116] *Gion*, 2 Cal. 3d. at 38.
[117] *Gion*, 2 Cal.3d. at 39.
[118] *Id.*
[119] Bess v. Cnty. of Humboldt, 3 Cal. App. 4th 1544, 1551 (1992).
[120] *Gion*, 2 Cal. 3d at 39.
[121] *Id.*
[122] *Id.*
[123] *Id.*

for public purposes, the fee owner is precluded from reasserting an exclusive right over the parcel.[124]

Evidence that the users looked to a government agency for maintenance of the land is significant in establishing an implied dedication to the public.[125] For instance, in *Gion v. City of Santa Cruz*, the California Supreme Court held that a parking lot maintained by the city and used by the public for many years had been impliedly dedicated to public use.[126] The evidence in *Gion* was that the public had used the lot for parking for 60 years.[127] Furthermore, the city had paved the level area, maintained trash receptacles on the land, and cleaned it after weekends of heavy use.[128]

In the companion case of *Dietz v. King*, the court considered whether a road leading to the beach had been impliedly dedicated.[129] The public had used the road for many years for camping, picnicking, collecting and cutting driftwood, and fishing.[130] Large groups of Native Americans had used the beach in summer months, camping there for weeks at a time.[131] The owners of the land, for the most part, did not object to public use of it.[132] Therefore, the court held it had been impliedly dedicated to public use.[133]

### *3. Implied Dedication in Coastal Areas*

The doctrine of implied dedication has been most effective in coastal areas. In its 1970 *Gion* decision, the state Supreme Court cited numerous cases, the California Constitution

[124] Friends of the Trails v. Blasius, 78 Cal. App. 4th 810, 820 (2000).
[125] *Gion*, 2 Cal. 3d at 39.
[126] *See id.* at 34-36.
[127] *Id.*
[128] *Id.*
[129] *Id.* at 36.
[130] *Id.* at 36-37.
[131] *Id.*
[132] *Id.* at 37.
[133] *Id.* at 43.

(Article X, sec. 4), and statutes that indicate the state's "strong policy . . . of encouraging public use of shoreline recreational areas."[134] Consequently, the court reasoned that the "intensification of land use combined with the clear public policy in favor of encouraging and expanding public access to and use of shoreline areas" required it to hold that the shoreline area at issue in *Gion* had been impliedly dedicated to public use.[135] Despite the state's strong policy promoting public access and use of coastal waterways, costly legal disputes between coastal property owners and public access advocates still arise.

#### *4. Restrictions on Implied Dedication*

In 1972, the Legislature limited the implied dedication doctrine in several ways. It amended Civil Code section 813 to permit landowners to record a notice of consent for public use for a described purpose.[136] Such a notice is conclusive evidence that later uses of the land are permissive, thus precluding the creation of non-revocable public use rights through implied dedication.[137]

Also in 1972, the Legislature enacted Civil Code section 1009, which states that public use of private property after the section's effective date (March 4, 1972) shall never ripen to confer vested rights under the implied dedication doctrine unless either (1) a government entity expended public funds to improve or maintain the land for public use for at least five years or (2) the land is within 1000 yards of coastal waters.[138] Even then, implied dedication will not be found if the owner posts signs granting the public permission to pass under Civil Code section

[134] *Id.* at 42.
[135] *Id.* at 42-43.
[136] *See* CAL. CIV. CODE § 813.
[137] *See id.*
[138] *Id.* § 1009.

1008, records a notice under section 813, or enters into a written agreement with a federal, state, or local agency providing for public use of the land.[139]

Those provisions severely restrict implied dedications for public access to waterways based on public use occurring after March 4, 1972 —section 1009's effective date. Consequently, implied dedication will not be found unless a government entity improved or maintained the alleged public access, and public access to the waterway can be demonstrated by evidence of public use and other acts occurring before March 4, 1972. Such evidence may include testimony from members of the public who used the land, from owners during the pertinent period, and perhaps documentary evidence. [140]

### *5. Prescriptive Use*

A prescriptive easement, which is a right to use someone else's private property, can be acquired by using another's property for a prescribed period of time.[141] In order to establish an easement based on prescriptive use, the use must be "consistent and constant . . . for the prescriptive period without material or substantial deviation in the location."[142] The party seeking to establish an easement by prescription must show continuous, uninterrupted use of the easement for at least five years and that the use has been open, notorious, hostile, and adverse to the owner.[143] A prescriptive right cannot be established on property owned by a federal, state, or local government.[144] While the prescription doctrine most commonly applies to individuals

[139] *Id*.; the California Supreme Court on June 15, 2017 held that Civil Code section 1009 also restricts non-coastal access implied dedication claims for non-recreational road access *(Sher v. Burke,* No. S230104).
[140] *Gion*, 2 Cal. 3d at 34-35.
[141] 6 CAL. REAL EST. § 16:1 (4th ed. 2015).
[142] *Id.* § 15:53.
[143] Fogerty v. State, 187 Cal. App. 3d 224, 238 (1986) ("Fogerty II"); Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal. 3d 564, 570 (1984); *see also* CAL. CIV. PROC. CODE § 321; 6 CAL. REAL EST. § 15:29 (4th ed. 2015).
[144] 6 CAL. REAL EST. § 15:29 (4th ed. 2015).

seeking easement rights, it was used in *Fogerty II* to determine the ordinary high water mark of Lake Tahoe.[145]

### *6. Private Fee Title Owners May Not Prevent Public Access and Use on Lands and Waters Subject to a Public Trust Easement.*

In the last half of the 19th Century, the state conveyed its fee title in certain sovereign public trust tidal and non-tidal shore lands lying between the ordinary high and low water marks to private parties, subject to the public trust easement.[146] Owners of such lands may not prevent the public from using portions of their property that are subject to the public trust easement.[147] Furthermore, the state retains the right to enter upon, possess, and control how those lands are used to ensure the preservation of public trust uses.[148] The state may exercise the easement and take lawful possession of such property,[149] subject to the fee title owner's right to just compensation for lawful improvements taken by the state. [150]

Fee owners of these tidal and non-tidal shore lands who have lawfully constructed docks, piers, and other structures on their property in areas where the public trust easement exists may continue to use those amenities unless the state determines that their use is inconsistent with the

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[145] *Fogerty II*, 187 Cal. App. 3d at 238-42.
[146] *See Land Classifications*, CAL. STATE LANDS COMM'N, http://www.slc.ca.gov/Info/Land_Class.html (last visited May 24, 2017).
[147] Forestier v. Johnson, 164 Cal. 24, 34 (1912) ("Whenever a navigable channel or navigable water may extend over any tideland granted by the state under these statutes the public right of navigation therein is not destroyed, the purchaser takes subject thereto, and he has no right to enjoin or prevent any citizen from exercising the public rights incident thereto.").
[148] Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198, 205 (1984) ("Through this easement, the State has an overriding power to enter upon the property and possess it, to make physical changes in the property, and to control how the property is used."); *Marks*, 6 Cal. 3d at 259-260; *Cal. Fish Co.*, 166 Cal. at 598 (". . . the patents under which the several defendants claim tidelands are subject to the constitutional restriction, and do not deprive the state of its power as sovereign trustee to adapt and improve these lands for navigation as it may see fit.").
[149] *See Cal. Fish Co.*, 166 Cal. at 599; *see also* Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 403 (1936); *Fogerty*, 29 Cal. 3d at 249 (1981
[150] CAL. PUB. RES. CODE § 6312 ("Neither the state, nor any political subdivision thereof, shall take possession of lawful improvements on validly granted or patented tidelands or submerged lands without the tender of a fair and just compensation for such lawful improvements as may have been made in good faith by the grantee or patentee or his successors in interest pursuant to any express or implied license contained in the grant or patent.").

public trust.[151] The state may make changes and improvements necessary to fulfill public trust purposes even if those actions cause harm to the property.[152] However, the state must compensate property owners if it removes any lawfully constructed structures or retakes absolute title to the land.[153] In sum, owners of such lands may not impede the public's access or use rights and must yield to the state's efforts to advance public trust purposes and values.[154] The filling of or artificial accretion to these lands does not dispossess the state or public of its property interests.[155] Finally, the state may also use its eminent domain power to acquire access to navigable waters.[156]

## III. NAVIGABLE WATERS

Under California law, the public has a general legal right to access and enjoy California's navigable waterways at any point below the high water mark.[157] While there are several navigability tests under state and federal laws, a waterway is "navigable" for purposes of the *California public right of navigation* if it is "capable of being navigated by oar or motor-propelled small craft."[158]

Tidelands, whether or not they can support small craft, and submerged lands, collectively sometimes referred to as sovereign or public trust lands, are also regarded as navigable.[159]

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[151] *Fogerty*, 29 Cal. 3d at 249; Coburn v. Ames, 52 Cal. 385, 397 (1877).
[152] *Fogerty*, 29 Cal. 3d at 249; Colberg, Inc. v. State *ex rel.* Dep't of Pub. Works, 67 Cal. 2d 408, 420 (1967); *Cal. Fish Co.*, 166 Cal. at 599.
[153] *Fogerty*, 29 Cal. 3d at 249; *Cal. Fish Co.*, 166 Cal. at 612-13; CAL. PUB. RES. CODE § 6312.
[154] State v. Super. Ct. (Lyon), 29 Cal. 3d 210, 232 (1981).
[155] State *ex rel.* State Lands Comm'n. v. Superior Court (Lovelace), 11 Cal. 4th 50, 66-80 (1995); California ex rel. State Lands Comm'n. v. U.S., 457 U.S. 273, 277 (1982); But see Board of Tide Land Commissioners Lots in San Francisco Bay filled prior to February 22, 1980 - City of Berkeley v. Super. Ct., 26 Cal. 3d 515, 534. (1980).
[156] CAL. CONST. art. X, § 1; CAL. PUB. RES. CODE § 6210.9.
[157] *Mack*, 19 Cal. App. 3d at 1050.
[158] *Ibid.*
[159] *Cal. Fish Co.*, 166 Cal. at 596; *see also Marks*, 6 Cal. 3d at 259; Phillips Petroleum v. Mississippi, 484 U.S.469 (1988) CAL. PUB. RES. CODE § 6301 and *infra* Part III. C. 1.

Generally, the public has a legal right to access and use such waters for commerce, navigation, fishing, and water-related uses including recreation.[160]

The public's right to access and use California's navigable waters is not, in general, affected by who owns the waterway's bed and banks, be it a government entity or a private party.[161] California's *public right of navigation* applies to waterways where the underlying land is currently or was formerly state-owned and also to waterways where the underlying land is privately owned and has never been state owned.[162] In fact, private landowners may not interfere with the public use of recreationally navigable waters on their property.[163] The unlawful obstruction of a navigable waterway is a public nuisance that may be enjoined by a court.[164]

## A. Navigable Waters: What Is a Navigable Waterway?

The word "navigable" is a legal term of art with multiple definitions under federal and state law, including the federal test for state title, federal regulatory authority, and California public right of navigation definitions.[165] Courts apply these three definitions of "navigability" in different contexts: (1) courts use the *federal test for state title* definition of navigability to determine whether California or other states gained title to certain lands at statehood; (2) courts use the *federal regulatory authority* definition to determine whether the federal government can

[160] *Marks*, 6 Cal. 3d at 259; *see also Mack*, 19 Cal. App. 3d at 1050.
[161] *See* Bohn v. Albertson, 107 Cal. App. 2d 738 (1951); *Mack*, 19 Cal. App. 3d at 1050 (the question of title to the riverbed is not relevant); *see also Hitchings*, 55 Cal. App. 3d at 571 ("The ownership of the bed is not determinative of public navigational rights, nor vice-versa."); Forestier v. Johnson, 164 Cal. 24, 34 (1912) ("Whenever a navigable channel or navigable water may extend over any tideland granted by the state under these statutes the public right of navigation therein is not destroyed, the purchaser takes subject thereto, and he has no right to enjoin or prevent any citizen from exercising the public rights incident thereto.").
[162] *See Id.*
[163] *See Hitchings*, 55 Cal. App. 3d at 568 ("In California, if a stream is navigable under the state definition, 'a public right of navigation exists and any obstruction of a navigable stream is a public nuisance,'" citing CAL. CIV. CODE § 3479).
[164] CAL. CONST. art. X, § 4; *see also* CAL. CIV. CODE § 3479 (unlawful obstruction of a navigable waterway is a nuisance); CAL. PENAL CODE § 370; CAL. HARB. & NAV. CODE § 131 (unlawful obstruction of navigable waterway is a misdemeanor).
[165] Richard M. Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 UC DAVIS L. REV. 579, 583-90 (1983) [hereinafter *Forever Free*].

exercise its Commerce Clause powers[166] to regulate waters of the United States; and (3) courts use the *California public right of navigation* definition to determine, as a matter of state law, whether the public has a right to access and use a state waterway for water-related and water-dependent activities.[167] While the public has a broad right to access and use any waterway that meets the *California public right of navigation* definition of navigability, the public has more extensive rights and interests on waterways that also meet the *federal test for state title* definition of navigability since the lands involved are subject to a state-owned property interest.[168]

Overall, the *California public right of navigation* definition of navigability is broader in its area of impact, although not broader in the public rights it protects, than the federal definitions; a waterway that is non-navigable under either of the federal definitions can nevertheless be navigable under the California definition.[169] By using criteria less restrictive than those applied under the federal tests, the California definition of navigability embraces a broader scope of waterways, including minor lakes and streams as well as artificially created waterways.[170] Under the California definition, a waterway is navigable if it is "capable of being navigated by oar or motor-propelled small craft."[171]

Courts and attorneys have, at times, conflated the *federal test for state title*, *federal regulatory authority,* and *California public right of navigation* definitions of navigability. Although this guide deals primarily with the *California public right of navigation* definition, it provides a brief discussion of the three definitions of navigability to explain the differences between each one.

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[166] U.S. CONST. art. I, Sec. 8, clause 3.
[167] *See* Frank, *Forever Free*, *supra* at 589-590
[168] *See Marks*, 6 Cal. 3d at 259-61; *see also Mack*, 19 Cal. App. 3d at 1050; *Cal. Fish Co*., 166 Cal. at 588; *Summa,* 466 U.S. at 204-05.
[169] *See Mack,* 19 Cal. App. 3d at 1045; *see also* Shively v. Bowlby, 152 U.S. 1, 26 (1894).
[170] *See* Frank, *Forever Free*, *supra* at 589-590.
[171] *Mack*, 19 Cal. App. 3d at 1050; See *infra* comparison of different legal tests of navigability below.

### *1. The Federal Test for State Title Definition of Navigability*

Under the *federal test for state title* definition of navigability, a waterway is navigable if it was susceptible to commercial navigation when California became a state.[172]

Upon admission to the Union in 1850, California gained the same rights, sovereignty, and jurisdiction as the original thirteen states pursuant to the Equal Footing Doctrine.[173] These rights included ownership of the bed and banks of its tidal and "navigable" waters.[174] The U.S. Supreme Court first articulated the *federal title* definition in *The Daniel Ball*:

> 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 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.[175]

Under the *federal test for state title* definition, navigability depends on susceptibility for use, not on actual historical use.[176] The susceptibility for use did not need to be year-round or continuous,

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[172] *Id.*

[173] *See* Montana v. United States, 450 U.S. 544, 551 (1981) ("As a general principle, the Federal Government holds [land under navigable water] in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States."); *see also* Utah v. United States, 403 U.S. 9, 10 (1971) ("The operation of the 'equal footing' principle has accorded newly admitted State the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown."); Mumford v. Wardwell, 73 U.S. 423, 436 (1867) (Under the Equal Footing Doctrine "the new states since admitted have the same rights, sovereignty and jurisdiction...as the original states possess within their respective borders").

[174] *See Cal. Fish Co.*, 166 Cal. at 584 ("'When the revolution took place, the people of each state became themselves sovereign, and . . . hold the absolute right to all their navigable waters . . . for their common use.'"); *see also* Pollard v. Hagan, 44 U.S. 212, 229 (1845) ("Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.").

[175] The Daniel Ball, 77 U.S. 557, 563 (1870). *see also* PPL Mont., LLC v. Montana, 132 S.Ct. 1215, 1228 (2012) ("The *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds.").

[176] *See* United States v. Utah, 283 U.S. 64, 82, 86-87 (1931) ("The question of that susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question."); *see also* United States v. Holt State Bank, 270 U.S. 49, 56 (1926) (". . . navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."); The Montello, 87 U.S. 430, 441 (1874) ("The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use."); *The Daniel Ball*, 77 U.S. at 563.

as seasonal impediments occur in many state-owned navigable waterways.[177] As a result, substantial historical investigation of the waterway is often helpful to determine whether it was susceptible to commercial navigation at statehood.[178]

As noted above, the public, as beneficial holder of a property interest, has additional rights and protections on waterways and over lands that meet the *federal test for state title* definitions of navigability than on waterways that are in private ownership and meet only the *California public right of navigation* test.[179] Since California holds title or reserved property rights to waterways that were susceptible to commercial navigation at statehood, the state government has more power to control those waterways and lands.[180] In *Marks v. Whitney*, the California Supreme Court noted that the state holds the power to possess and improve waterways that were commercially navigable when California joined the Union in 1850, whether or not title has since passed to a private party.[181] According to the court, the state may possess and improve these waters for the "preservation and advancement of public uses."[182]

### *2. The Federal Regulatory Authority (Commerce Clause) Definition of Navigability*

Courts use the *federal regulatory authority* definition of navigability to determine whether the federal government has authority under the Commerce Clause of the United States

[177] *Utah*, 283 U.S. at 84-87 A particular waterway may be navigable for title purposes despite occasional impediments such as sand or gravel bars, riffles, or occasional log jams. *But see* PPL Mont., LLC v. Montana, 132 S. Ct. 1215 (2012), where the Great Falls and other falls were a substantial impediment to navigation and therefore those segments of the rivers being litigated were not navigable for state title purposes.
[178] *See* Utah v. United States, 403 U.S. 9, 11 (1971) ("There were, for example, nine boats used from time to time to haul cattle and sheep from the mainland to one of the islands . . . . The lake was used as a highway and that is the gist of the federal test."); *see also Utah*, 283 U.S. at 82.
[179] *See Marks*, 6 Cal. 3d at 259-61; *see also Mack*, 19 Cal. App. 3d at 1050; *Cal. Fish Co*., 166 Cal. at 588.
[180] *See Marks*, 6 Cal. 3d at 259-60; *see also Mack*, 19 Cal. App. 3d at 1050; *Cal. Fish Co.*, 166 Cal. at 588.
[181] *See Marks*, 6 Cal. 3d at 260-61 ("The power of the state to control, regulate, and utilize its navigable waterways and the lands lying beneath them, when acting within the terms of the trust, is absolute."); *see also Cal. Fish Co.*, 166 Cal. 588 ("The state has power to enter upon waterways that were commercially navigable at statehood "and make such erections thereon, or changes therein, as it may find necessary or advisable to adapt the premises for use in navigation, and provide access thereto for that purpose, or in furtherance thereof.")
[182] *Marks*, 6 Cal. 3d at 261.

Constitution to regulate the commercial use of a California waterway.[183] California courts do not use the *federal regulatory authority* definition of navigability to determine whether the public has a right to access and use a California waterway for recreation.[184]

The *federal regulatory authority* definition of navigability is similar to the *federal test for state title* definition of navigability, with three exceptions. First, navigability for regulatory purposes can arise after statehood.[185] Second, reasonable improvements to enhance navigation in the waterway may be considered in determining navigability.[186] Third, the waterway must serve as a link in interstate or foreign commerce to be navigable.[187] The Rivers and Harbors Act of 1899 is an example of the federal government exercising this authority.[188]

### *3. The California Public Right of Navigation Definition of Navigability*

A waterway is "navigable" for purposes of the *California public right of navigation* test if it is "capable of being navigated by oar or motor-propelled small craft."[189] The California Court of Appeal explained this test in *People ex rel. Baker v. Mack*:

> The streams of California are a vital recreational resource of the state. The modern determinations 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 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 on waters of this state which are capable of being navigated by oar or motor-propelled small craft.[190]

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[183] *See* Frank, *Forever Free*, *supra* note 90, at 587-88; *see also* U.S. CONST. art. I, § 8, cl. 3 (Congress shall have power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").
[184] *See* Frank, *Forever Free*, *supra* note 90, at 591.
[185] *See* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407 (1940) (overruled on other grounds by *Rapanos v. U.S.*, 547 U.S. 715 (2006)); *see also* Frank, *Forever Free*, *supra* note 90, at 587-88.
[186] *Appalachian Elec. Power Co.*, 311 U.S. at 407.
[187] *Id.* at 404, 407-09.
[188] Act of March 3, 1899, ch. 425, § 9, 30 Stat. 1151; *see also* 33 U.S.C. § 407 (2012).
[189] *Mack*, 19 Cal. App. 3d at 1050.
[190] *Id.*

California waters suitable for navigation by small craft can include rivers, streams, sloughs, lakes, and artificial waterways.[191]

In 1971, the state's Third District Court of Appeal reaffirmed in *Baker v. Mack* that the public has a specific right to use California waterways that meet the *California public right of navigation* definition even if those waterways do not meet the *federal test for state title* definition of navigability.[192] For example, the public has a legal right to access and use a currently flooded tract of land that is capable of supporting small craft today, even if that land was not flooded and not commercially navigable at statehood.[193]

Under the *California public right of navigation* definition, navigability is a context-specific question of fact.[194] The duration of navigability *in fact* required to make a waterway navigable *in law* cannot be stated with precision.[195] Waters need not be navigable year-round to be navigable for public use or access purposes.[196] For instance, in *Hitchings v. Del Rio Woods Recreation & Park District*, a stretch of the Russian River that was navigable in fact for nine months of the year was deemed navigable in law.[197] The court's rationale was to uphold any period sufficient to make the river "suitable, useful, and valuable as a public recreational

[191] *Pacific Gas & Electric Co. v. Superior Court, 145 Cal. App. 3d 253 (1983)*; 68 Op. Cal. Att'y. Gen. 268 (1985); *see also infra* Part III.A.6 (discussing artificial waters).
[192] *Mack*, 19 Cal. App. 3d at 1045, 1051.
[193] *See Bohn*, 107 Cal. App. 2d at 749 (In California, the public can legally use navigable floodwaters on private lands unless and until the flooded land is reclaimed by the landowner, provided the public can access the floodwaters without trespassing on private property).
[194] Hitchings, 55 Cal. App. 3d at 565 ("Navigability is essentially a question of fact, and must in each case be determined on the factual circumstances of the particular waterway.").
[195] *Id*. at 570 ("The duration of navigability in fact required to make a stream navigable in law cannot be stated with precision; the characteristics of the stream and circumstances of its suitability for public use will vary from case to case, and remain a factual question,"); *see also* 68 Op. Cal. Att'y Gen. 268 (1985).
[196] *Hitchings*, 55 Cal. App. 3d at 571; *see also* Bess v. Cnty. of Humboldt, 3 Cal. App. 4th 1544, 1549 n2 (1992) (explaining that the fact that river is only navigable during certain seasons does not make it non-navigable); *Bohn*, 107 Cal. App. 2d at 749 (floodwaters can be legally navigable); *see also* Chowchilla Farms v. Martin, 219 Cal. 1, 36-38 (1933); Miller & Lux v. Madera Canal and Irrigation Co., 155 Cal. 59, 76 (1909); Mammoth Gold Dredging Co. v. Forbes, 39 Cal. App. 2d 739, 752 (1940).
[197] *Hitchings*, 55 Cal. App. 3d at 570-71.

highway."[198] The duration of navigability required to make a waterway suitable, useful, and valuable as a public recreational highway depends on the unique circumstances of each case.[199]

Waterways containing natural and artificial obstructions may be navigable under the *California public right of navigation* definition of navigability.[200] In *Bohn v. Albertson,* the court held that a waterway was navigable despite the fact that it contained obstructions such as tree trunks, farm machinery, and shallow areas.[201]

### *4. Legislative Findings Not Conclusive on State Title or Public Right of Navigation*

In 1894, Congress adopted provisions that regulated the use of drawbridges over navigable waters.[202] Prior to that Congressional action, numerous rail lines were built across California's waterways in the 1860s and 1870s. However, sailboat and steamboat traffic required bridges that would not obstruct navigation.[203] In its first set of codified laws enacted in 1872, California established the "head of navigation" on numerous waterways to identify locations where drawbridges would be required and to allow fixed structures above certain described

[198] *Id*.
[199] *Id*. at 570; *see also California Whitewater Guide to Rafting and Kayaking*, CALIFORNIAWHITEWATER.COM, http://www.californiawhitewater.com/rivers/ (last visited May 24, 2017) (providing seasonal flow information for California rivers).
[200] *Bohn*, 107 Cal. App. 2d at 746-47 ("It is clear that in spite of obstructions such as tree trunks, farm machinery and low spots, the waters are navigable.")
[201] *Id*.
[202] 33 U.S.C. § 499 (2012).
[203] 1872 CAL. POLITICAL CODE §§ 2872, 2875, 2877; *see also* Cardwell v. American River Bridge Co., 113 U.S. 205 (1885) and Cardwell v. Sacramento Cnty., 79 Cal. 347, 348-49 (1889) ("[S]ection 2875 of the Political Code expressly prohibits the construction of bridges across navigable streams without draws, or so as to obstruct navigation, and section 3479 of the Civil Code provides that anything which obstructs the free passage or use in the customary manner of any navigable river or stream is a nuisance. . . .") The United States Supreme Court decision stated the American River was navigable by small steamers to the city of Folsom, but the Act of Admission did not prevent the State from determining where fixed bridges were authorized; the subsequent California Supreme Court case held that the river was not listed by the Legislature as navigable and therefore bridges without draws could be constructed.

locations.[204] Those laws have been amended from time to time and are now found in the California Harbors and Navigation Code.[205]

However, the legislature need not designate a waterway as navigable for the waterway to be legally "navigable" under the *federal test for state title, federal regulatory authority* test, or *California public right of navigation* test.[206] The test for public recreational navigability in California is not whether a waterway is *designated* as navigable but whether the waterway is *navigable in fact* by small craft.[207] The *Baker* court held that "the 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."[208] As the Indiana Supreme Court recognized, "nature is competent . . . to make a navigable river without the help of the legislature."[209]

### *5. Floodwaters*

In California, the public can legally use navigable floodwaters on private lands until the flooded land is reclaimed by the landowner, provided the public accesses the floodwaters without trespassing.[210] While flooded land is navigable, the public has a right to fish and navigate over it.[211] Landowners who wish to reclaim flooded land on their property must abide by pertinent federal, state, and local regulations.

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[204] 1872 Cal. Political Code §§ 2872, 2875, 2877.
[205] *See* CAL. HARB. & NAV. CODE § 101.
[206] *See Mack*, 19 Cal. App. 3d at 1048-49; *see also* Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 399 (1936) (Newport Bay was a navigable waterway even though it was not so designated in the code); People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 151 (1884) (state legislature may not divest the people of their rights in the state's navigable waters); 68 Op. Cal. Att'y Gen. 268 (1985) ("In Harbors and Navigation Code sections 101–106, the Legislature has designated certain waterways as being navigable . . . [this] does not, however, preclude other waters from being found to be navigable in law or in fact.").
[207] *Mack*, 19 Cal. App. 3d at 1048-49.
[208] *Id.* at 1048-49.
[209] Martin v. Bliss, 5 Blackf. 35, 35 (1838).
[210] *Bohn*, 107 Cal. App. 2d at 749 (1951); *see also* CAL. CIVIL CODE § 1015.
[211] *Id*.

### *6. Artificial Waters*

The public has a right to use artificially created waters that can support a small craft and be accessed legally.[212] In *Golden Feather Community Association v. Thermalito Irrigation District*, the court noted that artificial waters can be navigable under California's small craft test because "a waterway need only be usable for pleasure boating to be considered navigable" for purposes of public access.[213] Dredged lands may also be subject to the public right of navigation.[214]

## B. Physical Reach of Public Access and Use Rights: Where Can the Public Go on a Waterway?

Generally, the state holds in trust "all land below tide water, and below [the] ordinary high-water mark" on tidal lands.[215] On non-tidal waters that meet the *federal test for state title*, private parties who own land abutting a navigable waterway hold title to the ordinary low water mark, and the state holds title to the beds and banks below the low water mark.[216] However, the state retains a public trust easement over the lands lying between the ordinary high and low water marks on waterways that satisfy the *title* test, and riparian owners may not utilize those lands in any manner that is "incompatible with the public's interest in the property."[217] The State Lands

[212] *See Pacific Gas & Electric*, 145 Cal. App. 3d 253 at 258 ("The public right of access to navigable streams is of constitutional origin.")
[213] Golden Feather Comty. Ass'n v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276, 1281 n.2 (1989) ("In their letters to the court following publication of our original opinion, the Attorney General's Office and the State Water Resources Control Board point out that a waterway need only be usable for pleasure boating to be considered navigable for purposes of the public trust doctrine, and they assert that it is highly unlikely that the reservoir behind Concow Dam is not navigable in this sense. Nevertheless, the question of navigability is a factual question. The parties to this litigation agreed that the case does not involve a navigable waterway. Naturally, such a concession binds only the parties to this litigation and those in privity with them. But in resolving the dispute between the parties we are not free to disregard their concessions.")
[214] CAL. PUB. RES. CODE § 7552.5.
[215] *See* CAL. CIV. CODE § 670.
[216] *See id.* § 830.
[217] *See* State v. Super. Ct. (Lyon), 29 Cal. 3d 210, 226, 232 (1981); *Fogerty*, 29 Cal. 3d at 249 (1981); *Marks*, 6 Cal. 3d at 259.

Commission is authorized to establish the ordinary high and low water marks of any swamp, overflowed, marsh, tide, or submerged lands of this State by agreement or action to quiet title.[218]

Boundary determination is complex, due to the changing dynamics of the water-land interface, the supporting issues of fact necessary to establish a boundary, and whether that boundary will continue to change. The consequence is that few boundaries have been legally established and fixed along the state's navigable waterways. Given the value of California's waterfront property, legal disputes occasionally arise over boundary locations.[219] The following sections outline how certain boundaries are determined and the rules that riparian owners must adhere to if a public access easement runs through a portion of their property. Some of the ways in which easements may be established are set forth in Section E 5.

### *1. Ordinary High Water Mark Determination*

In 1935, the U.S. Supreme Court, in a case involving the boundary of an island in Los Angeles Harbor, adopted a method for determining the ordinary high water mark of tidal waters by averaging all of the two daily high tides occurring over an 18.6-year cycle, which are influenced primarily by the gravitational effects of the sun and the moon.[220] However, courts have not developed a universal test for determining the ordinary high water marks of non-tidal navigable waterways. Non-tidal waters, and waters impounded behind a dam, are not influenced by the same tidal rhythm.[221] Water stored in reservoirs fluctuates with the weather, and its levels can be artificially manipulated.[222] Additionally, the unique features of each non-tidal navigable waterway raise questions about the practicality of a universal test to determine the ordinary high

[218] CAL. PUB. RES. CODE § 6357; *Marks*, 6 Cal. 3d at 264.
[219] *See, e.g.*, Borax Consol., Ltd. v. City of Los Angeles, 296 U.S. 10 (1935); Lechuza Villas W. v. Cal. Coastal Comm'n, 60 Cal. App. 4th 218 (1997); *Fogerty II*, 187 Cal. App. 3d 224.
[220] *Borax Consolidated, Ltd.*, 296 U.S. at 26-27; *see also Fogerty II*, 187 Cal. App. 3d at 241 n.12.
[221] *Fogerty II*, 187 Cal. App. 3d at 241 n.12.
[222] *Id.*

water mark. Thus, courts must engage in a fact-specific inquiry when attempting to determine the ordinary high water mark of a non-tidal navigable waterway.[223]

The challenges associated with determining the boundaries of non-tidal shore zones, have resulted in courts using a variety of tests to resolve ordinary high water mark disputes. Any one of these tests may be employed, subject to its relevance and practicability. There is no one standard adopted by the courts to determine this natural monument.[224] In a 1906 case from Arkansas, the U.S. Court of Appeals for the Eighth Circuit held that the ordinary high water mark is the highest point where the water's flows have prevented the growth of vegetation.[225] However, California's Third District Court of Appeal rejected the "vegetation" test for Lake Tahoe in *Fogerty v. State of California* (*Fogerty II*) because it was considered inaccurate.[226] The *Fogerty II* court also rejected a "mathematical averaging test," adopted by a federal district court in Virginia in 1943, for similar reasons.[227] Ultimately, the *Fogerty II* court based its ordinary high water mark determination on a prescriptive five-year period, where the lowest annual high level reached during the highest five-year period established the high water boundary.[228] The *Fogerty II* court used prescription to establish the Lake Tahoe's high water mark because it reflected the continuous "actual incursion of dam waters upon the shore," rather than a "paper" mark that did not reflect the "ordinary" lake level.[229] This level is actually lower than that used

[223] *Id.*
[224] Bruce S. Flushman, *Water Boundaries: Demystifying Land Boundaries Adjacent to Tidal or Navigable Water*, §7.3 – 7.12 .12.3 (pp.246-281), John Wiley & Sons Inc. (2002).
[225] Harrison v. Fite, 148 F. 781, 783 (8th Cir. 1906); *see also* Howard v. Ingersoll, 54 U.S. 381, 427 (1851).
[226] *Fogerty II*, 187 Cal. App. 3d at 240 n.12.
[227] *Id.*
[228] *Id.* The ordinary high water mark level established by *Fogerty II* is 6,228.75' above sea level.
[229] *Id.* at 238-42.

by the Tahoe Regional Planning Agency and the United States Army Corps of Engineers for regulatory purposes.[230]

Given the difficulty associated with determining the ordinary high water mark of a non-tidal navigable waterway, some legal disputes over the boundary have been resolved through settlements between the state and adjacent owner. Since it is often unclear where the ordinary high and low water marks lie, owners and local governments may ask the State Lands Commission to help determine the boundaries along their navigable waterways.[231] Furthermore, owners and local governments can help prevent accidental trespass on private property by informing the public about the locations of public access easements to and around navigable waterways. By taking proactive steps, owners can accurately determine the portions of their riparian property that are "impressed with the public trust" easement, prevent trespassing on their land, and avoid potentially costly litigation in the future. [232]

### *2. Accretion, Erosion, Submergence, Reliction, and Avulsion – Reach of Access Rights is Subject to Change*

It is a geological phenomenon that water erodes land and that land (rock, sand, or soil) is deposited elsewhere by water or wind. The result is that the intersection of water and shorelines of all waterways move and change over time. The upland shore can grow by accretion, the gradual and imperceptible accumulation of land[233] or reliction, the slow and imperceptible and

[230] *Id*. at 231. The high water level for the lake was established at 6229.1' above sea level by the Truckee River Agreement in 1935 and adopted by a final decree in the United States v. Orr Water Ditch Co. in 1944.
[231] *Water Boundaries*, CAL. STATE LANDS COMM'N, http://www.slc.ca.gov/Info/Water_Boundaries.html (last visited May 24, 2017).
[232] State v. Super. Ct. (Lyon), 29 Cal. 3d 210, 231 (1981).
[233] 3 CAL. REAL EST. § 8:69 (4th ed. 2015).

permanent lowering of a body of water.[234] It can also be lost to submergence, the gradual and imperceptible rise of the body of water[235] or by erosion, the wearing away of the land.[236]

When land adjacent to a waterway grows "from natural causes," upland owners can gain title to the new shore land.[237] However, Civil Code section 1014 provides that even when an upland owner gains title to new land by natural accretion, the land remains subject to any existing right of way over the bank.[238] When a waterway's shore grows, or is filled, by artificial means, the state retains title to the land.[239] Accretion is artificial if directly caused by human activities, such as filling, local dredging, or construction of wing dams and levees in the vicinity of the accreted land.[240] Accretion is not artificial merely because human activities far away and long ago contributed to it.[241] Lastly, the physical shore, but not necessarily the boundary, can change by avulsion—a sudden and perceptible change in the location of a body of water.[242] If a riparian owner's land is lost by avulsion and becomes attached to the opposite bank, "the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof."[243]

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[234] For a boundary case involving the term "slow and imperceptible," see State *ex rel.* State Lands Comm'n. v. U. S., 805 F. 2d 857 (1986). In that case, the court held that the 37 foot change in elevation of the lake over a 34 year period, moving the boundary 110 feet per year and exposing approximately 12,000 acres of land was slow and imperceptible.

[235] Bruce S. Flushman, *Water Boundaries: Demystifying Land Boundaries Adjacent to Tidal or Navigable Water*, §3.12.3 (p.97), John Wiley & Sons Inc. (2002); United States v. Milner, 583 F.3d 1174, 1187-88 (9th Cir. 2009).

[236] *Id.*

[237] CAL. CIV. CODE § 1014; State *ex rel.* State Lands Comm'n v. Super. Ct., 11 Cal. 4th 50, 64-65 (1995).

[238] CAL. CIV. CODE § 1014 ("Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank."); *see also id.* § 1017 ("An island, or an accumulation of land, formed in a stream which is not navigable, belongs to the owner of the shore on that side where the island or accumulation is formed; or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river."); *id.* § 1016 ("Islands and accumulations of land, formed in the beds of streams which are navigable, belong to the State, if there is no title or prescription to the contrary.").

[239] *State ex rel. State Lands Comm'n*, 11 Cal. 4th at 56; City of Long Beach v. Mansell, 3 Cal. 3d 462, 469 (1970).

[240] *Id.*

[241] *Id.*

[242] 3 CAL. REAL EST. § 8:70 (4th ed. 2015).

[243] CAL. CIV. CODE § 1015.

### *3. Trespass*

The public does not have a right to enter private property where no right of access exists and where signs forbidding trespass are displayed, without the license of the owner or legal occupant.[244] Trespassers may be subject to civil penalties or criminal sanctions for entering private property without the owner's consent.[245] However, courts have held that the doctrine of necessity generally protects people, like boaters, who are forced to go onto private property in an emergency.[246] The doctrine has also been held to protect boaters whose way is obstructed by a sudden and temporary cause.[247] If an alleged trespasser can establish beyond a reasonable doubt the necessity to enter private property, a court may find the offense justified.[248] However, the defendant must show that he or she faced imminent harm and had no alternative routes available.[249] Additionally, members of the public who exercise the privilege of necessity are responsible for any damage they cause.[250]

## C. Permissible Uses of California's Navigable Waters: What Can the Public Do on These Waterways?

### *1. Waterways that Meet the Federal Title Definition*

The public has a broad right to access, use, and enjoy waterways that meet the *federal title* definition of navigability. Traditionally, the scope of the public's right to use such waters extended to commerce, navigation, and fishing.[251] In 1913, for instance, the California Supreme

[244] *See* CAL. PENAL CODE §§ 552–555, 602–607; *see also* Bolsa Land Co. v. Burdick, 151 Cal. 254, 260 (1907); *but see* People v. Wilkinson, 248 Cal. App. 2d Supp. 906 (1967) where the Court of Appeal found that it was not a violation of Pen. Code § 602, subd. (*l*) by holding that transient overnight camping by four individuals on a large ranch did not constitute occupation.
[245] CAL. PENAL CODE §§ 555.3, 602.5; *see also* CAL. FISH & GAME CODE § 2016.
[246] RESTATEMENT (SECOND) OF TORTS § 195 (1965).
[247] *Id.*
[248] *See* The Diana, 74 U.S. 354, 360-61 (1868).
[249] *See id.* at 361.
[250] RESTATEMENT (SECOND) OF TORTS § 195 (1965).
[251] *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) ("It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.").

Court wrote that "lands lying between the lines of ordinary high and low tide . . . are held in trust for the public purposes of navigation and fishery."[252]

However, by 1971, courts had expanded the scope of the public use rights on such waters to include environmental preservation and water-related recreational activities.[253] The California Supreme Court described this expansion in *Marks v. Whitney*:

> Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. [Citations.] The public has the same rights in and to tidelands.[254]

The California courts' expression in 1971 of these common law public rights in waterways in both the *Marks* decision dealing with the California's public trust easement property right and the *Mack* decision dealing with *California's public right of navigation* may be attributed at least in part to California's need to address both the recreational needs of a rapidly growing population and the environmental consequences of this rapid population growth.[255]

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[252] *Cal. Fish Co.*, 166 Cal. at 584.

[253] *See Marks*, 6 Cal. 3d at 259-60; *Mack*, 19 Cal. App. 3d at 1045-46.

[254] *See Marks*, 6 Cal. 3d at 259; *see also Cal. Fish Co.*, 166 Cal. at 596; *Bohn*, 107 Cal. App. 2d at 749; Forestier v. Johnson, 164 Cal. 24, 39 (1912); *see also* Munninghoff v. Wis. Conservation Comm'n, 255 Wis. 252, 259 (1949); Jackvony v. Powel, 21 A.2d 554, 556 (1941) ("Among the common-law rights of the public in the shore, which have been frequently claimed by the public or have been described by authors who have discussed the law pertaining to rights in the shore, are rights of fishing from the shore, taking seaweed and drift-stuff therefrom, going therefrom into the sea for bathing, and also, as necessary for the enjoyment of any of these rights, and perhaps as a separate and independent right, that of passing along the shore"); Nelson v. De Long, 213 Minn. 425, 431 (1942) ("Public use comprehends not only navigation by watercraft for commercial purposes, but the use also for the ordinary purposes of life such as boating, fowling, skating, bathing, taking water for domestic or agricultural purposes, and cutting ice.").

[255] *See Mack*, 19 Cal. App. 3d at 1045 ("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.'"); *see also Marks*, 6 Cal. 3d at 257 ("This matter is of great public importance, particularly in view of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property.").

With respect to public trust lands, California courts have held that the list of permissible uses can expand to encompass changing public needs.[256] Under the *Marks v. Whitney* decision, the state is not burdened with an outmoded classification favoring one mode of utilization over another.[257] The court identified environmental preservation as a legitimate "public use" of tidelands in response to a "growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."[258]

### *2. Waterways that Satisfy the California Public Right of Navigation Test*

With respect to waterways that meet the *California public right of navigation* definition of navigability, the public may use them for recreational activities such as boating, fishing, hunting, swimming, bathing, standing, wading along the waterfront, anchoring, picnicking, bird watching, and nature study, citing court decisions from California and many other states. [259]

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[256] *Marks*, 6 Cal. 3d at 259-60; Colberg, Inc. v. State *ex rel.* Dep't Pub. Work, 67 Cal. 2d 408, 421-422 (1967) ("The limitation of the servitude to cases involving a strict navigational purpose stems from a time when the sole use of navigable waterways for purposes of commerce was that of surface water transport. That time is no longer with us.") (Internal citation omitted).

[257] *See Marks*, 6 Cal. 3d at 259-60.

[258] *Id.* at 259-60.

[259] *See Mack*, 19 Cal. App. 3d at 1045; *see also* Munninghoff v. Wis. Conservation Comm'n, 255 Wis. 252, 259 (1949); *Jackvony*, 21 A.2d. at 556; Lamprey v. Metcalf, 52 Minn. 181, 199-200 (1893) ("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 to 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. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.").

On such waters, California boaters have a legal right to exercise the incidents of navigation, such as anchoring, landing and portage—to carry their boats overland around obstacles like rapids, provided they remain below the high water mark. The only California case to sanction portage above the high water mark involved passage over land owned by a park district.[260] At this time, neither California courts nor the California legislature has addressed whether boaters may portage across private property above the high water mark. Nonetheless, California courts may find that portage across private property is reasonable in an emergency.[261] The two states that have expressly addressed this issue both concluded that portage above high water mark is a legal incident of navigation, provided boaters act reasonably.[262]

### *3. Reasonable Time, Place, and Manner Restrictions*

The public right to access and use California's navigable waters is not absolute; the state can limit the public's ability to access and use its navigable waters by imposing reasonable time, place, and manner restrictions.[263] In *In re Quinn*, for example, the court upheld a county ordinance that restricted the public's ability to fish from a bridge over a portion of the California Aqueduct and also upheld a trespass conviction for other individuals who entered a fenced and posted area along the aqueduct.[264] The court concluded that the ordinance—which was intended

[260] *Hitchings*, 55 Cal. App. 3d at 572.
[261] *See* RESTATEMENT (SECOND) OF TORTS § 193 (1965) ("the privilege of navigation carries with it the ancillary privilege to enter on riparian land to the extent that this is necessary for the accomplishment of the purpose of the principal privilege"); *see also* RESTATEMENT, *supra*, § 195 (privilege for deviation from public highway).
[262] *See* MONT. CODE ANN. § 23-2-311; IDAHO CODE ANN. § 36-1601; *see also* Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 172 (1984); *cf. Use of Stream Bank to Scout and Portage Hazards*, TEX. PARKS & WILDLIFE, https://tpwd.texas.gov/publications/nonpwdpubs/water_issues/rivers/navigation/riddell/scoutandportage.phtml (last visited May 24, 2017) (explaining that Texas grants boaters a limited privilege to portage across private land).
[263] See *e.g.* CAL. PUB. RES. CODE § 30214; ("The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case. . . ."); CAL. HARB. & NAV. CODE § 660; *Cnty. of El Dorado*, 96 Cal. App. 3d 403.
[264] *In re* Quinn, 35 Cal. App. 3d 473, 481 (1973) ("We conclude that the fencing and posting of the area adjacent to the California Aqueduct is a reasonable and proper use of the police power under the particular facts before us in this case to protect the lives, safety and welfare of the citizens of the state, to protect the state from possible liability

to protect life, safety, welfare, and public property—was a reasonable and proper exercise of police power and did not conflict with the California Constitution's right to fish from public lands.[265] Also, in *People v. Deacon*, the court held that a county ordinance which prohibited riding motorcycles on an open easement within Catalina Island did not unreasonably deprive the public of access to tidelands because the public could access the tidelands by alternate means: hiking, horseback riding, official tour buses, authorized motor vehicles, and boating.[266]

However, courts may invalidate restrictions that effectively prohibit public use of navigable waterways.[267] No matter how laudable its purpose, the exercise of state or local police power may not extend to total prohibition of an activity that is not otherwise unlawful.[268] In *People ex rel. Younger v. County of El Dorado*, the appellate court held that a county ordinance, which prohibited traveling, floating, or swimming by artificial means along a 20-mile stretch over privately owned land underlying the South Fork of the American River, was unconstitutional.[269] The court held that the county could enact reasonable regulations to address pollution and sanitation problems caused by river users but could not absolutely prohibit public use of the river.[270]

#### *4. Property Owners May Not Restrict Public Use of Navigable Waters*

The courts have described the reach of the *California public right of navigation* as "the right to navigate and to exercise the incidents of navigation in a lawful manner at any point

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and to protect its property from possible damage") (Holding limited by *State of California v. San Luis Obispo Sportsman's Assn.*, 22 Cal. 3d 440, 447 (1978).)

[265] *Id.*; *see also* CAL. CONST. art. I, § 25.

[266] People v. Deacon, 87 Cal. App. 3d Supp. 29, 34 (1978).

[267] *Cnty. of El Dorado*, 96 Cal. App. 3d at 407. *But see* 64 Op. Cal. Att'y Gen. 463 (1981) ("[T]he California National Guard [has] authority to prohibit recreational uses of that portion of the Salinas River which flows through Camp Roberts whenever such use would be incompatible with its use of Camp Roberts for military purposes."

[268] *Cnty. of El Dorado*, 96 Cal. App. 3d at 406.

[269] *Id*.

[270] *Id*.

below high water mark" on waters that satisfy California's small craft test.[271] Thus, property owners cannot interfere with the public's right to navigate or use shoreline areas below the ordinary high water mark for incidents of navigation.[272] In fact, unauthorized obstruction of the public's right to access and use a navigable waterway constitutes a public nuisance.[273]

In *People ex rel. Baker v. Mack*, the court held that the erection and maintenance of booms, fences, and low bridges across a navigable river was a public nuisance, even though the landowner owned title to the riverbed.[274] In *People ex rel. Robarts v. Russ*, the court held that no legal difference existed between obstructing navigation by damming a navigable stream and its non-navigable tributary.[275] However, not all encroachments on navigable waters are necessarily public nuisances.[276] If a waterway is not navigable and not subject to the public trust easement or the *public right of navigation*, landowners and riparian owners have the right to obstruct the bed and banks, subject to state or local regulation.[277] Nonetheless, landowners and riparian owners should be aware that a waterway does not need to be navigable in fact year-round to be found navigable in law.[278]

### *5. Spanish and Mexican Land Grants*

When the state joined the Union in 1850, previously granted Spanish and Mexican rancho and pueblo lands encompassed over 10 million acres of California.[279] Under the Act of March 3,

[271] *Mack*, 19 Cal. App. 3d at 1050.
[272] *Id.*
[273] *Mack*, 19 Cal. App. 3d at 1044, citing CAL. CIV. CODE § 3479; *see also* People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 147 (1884) (all unauthorized intrusions upon a water highway for purposes unconnected with the rights of navigation or passage are nuisances).
[274] *Mack*, 19 Cal. App. 3d 1040.
[275] People *ex rel.* Robarts v. Russ, 132 Cal. 102, 105 (1901) (". . . if a tributary of a navigable stream be necessary to its navigability, then the owner of the land upon which this tributary is situated has no right to dam it. . . .").
[276] Coburn v. Ames, 52 Cal. 385, 397 (1877).
[277] *Mack*, 19 Cal. App. 3d at 1044.
[278] *See Hitchings*, 55 Cal. App. 3d at 565-57; *see also* CAL. FISH & GAME CODE § 1602.
[279] *Summa Corp*., 466 U.S. at 202 (1984).

1851, pursuant to the Treaty of Guadalupe Hidalgo with Mexico, the federal government established a claims settlement procedure to adjudicate the claims of Mexican landowners.[280]

The City of Los Angeles, as trustee for the state, and the State of California claimed a retained public trust easement over navigable waters within a Mexican rancho grant.[281] However, when that claim was challenged in *Summa Corp. v. California ex rel. State Lands Commission*, the U.S. Supreme Court held that California had failed to assert the easement during the federal government's confirmation process involving property claimed as Mexican rancho lands.[282] Thus, according to the court, the state did not preserve its sovereign property right to possess, improve, and control the use of navigable waters within the boundaries of patented rancho lands.[283]

*Summa* addressed only state *ownership of a property interest obtained pursuant to the Equal Footing Doctrine at statehood* in rancho lands and did not address other laws establishing rights of the public to access and use navigable waters within those lands.[284] Some major harbors, rivers, and coastal lagoons, all providing recreational and even commercial navigation, are located within the boundaries of Mexican land grants.[285] Furthermore, *Summa* did not discuss the federal Act of Admission or California's Constitution.[286] No state or federal reported decision has held that a property owner may exclude the public from a navigable waterway based on *Summa*.

[280] *Id.* at 203.
[281] *Id.* at 203-05.
[282] *Summa Corp.*, 466 U.S. at 209.
[283] *Id*.
[284] *See generally Summa Corp.*, 466 U.S. 198.
[285] *See Ranchos*, CAL. STATE LANDS COMM'N, http://www.slc.ca.gov/Info/Ranchos.html (last visited May 24, 2017).
[286] *See generally Summa Corp.*, 466 U.S. 198.

# IV. LANDOWNER IMMUNITY AND LIABILITY

## A. Private Property

California Civil Code section 846 was enacted to promote public access and use of private property by relieving landowners of the duty to keep their premises safe for public recreational use.[287] Similarly, landowners generally have no legal duty to warn recreational users of hazardous conditions, uses of structures, or activities on their property or on adjacent navigable waters.[288] In *Charpentier v. Von Geldern*, a landowner whose property bordered a navigable river was held immune from liability when a member of the public was injured on the river and the landowner had done nothing to obstruct the river's use.[289]

However, section 846 does not shield landowners from liability when they obstruct or impede public use of navigable waters.[290] In *Pacific Gas & Electric Co. v. Superior Court of Shasta County*, the plaintiff was injured when his sailboat mast came into contact with the utility's power lines, which were overhanging an artificial waterway that satisfied the state's *small craft* test.[291] The utility asserted that it was immune from liability for the plaintiff's injuries under section 846.[292] The court, however, rejected that argument and held that property owners holding "an interest in real property underlying or adjacent to navigable waters [are] not entitled to the protection of section 846 as against persons injured while using those waters."[293]

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[287] CAL. CIV. CODE § 846 ("An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose, except as provided in this section. . ."). See section for details.
[288] *Id.*
[289] Charpentier v. Von Geldern, 191 Cal. App. 3d 101, 105 (1987).
[290] *Pac. Gas & Elec..*, 145 Cal. App. 3d 253, 259 (Holding limited by Hubbard v. Brown, 50 Cal. 3d 189, 196-97 (1990); *see also* CAL. CIV. CODE § 3479 (unlawful obstruction of free passage or use of navigable waterway is a nuisance).
[291] *Id.* at 255-56.
[292] *Id.* at 256.
[293] *Id.* at 259.

## B. Public Property and Private Land Trusts

California Government Code sections 831.2–831.7 discuss various immunities provided to government and non-government organizations, such as private land trusts, for public use of property they manage.[294] Similar to the immunity for private property owners discussed above, Government Code sections 831.2-831.7 were enacted to promote public access and encourage public agencies to keep public lands open for recreation.[295] Public entities have absolute immunity for injuries caused by unimproved land in a natural condition, including tide and submerged lands and navigable waters, and injuries on unpaved roads or trails used for recreation.[296] Additionally, the legislature deemed public beaches to be in a natural condition and unimproved as a matter of law to encourage public use of beaches.[297]

In order to encourage nonprofit land trusts to preserve open space and provide public access, the legislature created a mechanism to extend governmental immunities to nonprofit land trusts in addition to the immunity provided by Civil Code section 846.[298] Nonprofit land trusts can enter into an agreement with certain government agencies to enjoy immunity from liability from injuries caused by a natural condition of unimproved property, injuries from unpaved roads and trails for recreation and injuries from voluntary participation in hazardous recreational activities.[299]

[294] CAL. GOV'T CODE §§ 831.2–.7.
[295] *Id.*
[296] CAL. GOV'T CODE §§ 831.2, 831.4, 831.6; Armenio v. County of San Mateo, 28 Cal. App. 4th 413, 416 (1994).
[297] CAL. GOV'T CODE §§ 831.21; Schooler v. State of California, 85 Cal. App. 4th 1004, 1011 (2000).
[298] CAL. GOV'T CODE § 831.5;
[299] CAL. GOV'T CODE §§ 831.2, 821.4, 831.5, 831.7;

# CONCLUSION

Since statehood, California laws have safeguarded the public rights to access and use its navigable waters. Provisions of the California Constitution and various state statutes have been enacted to protect and promote those public rights.[300] Neither the government nor owners of land underlying navigable waters may unlawfully interfere with the public's access and navigation rights.[301] In general, so long as members of the public do not trespass on private property, they may lawfully use and enjoy the state's navigable waters below the high water mark subject to reasonable time, place, and manner restrictions.[302]



[300] CAL. CONST. art. X, § 4; *Cnty. of El Dorado*, 96 Cal. App. 3d at 406*; Pac. Gas & Elec*., 145 Cal. App. 3d 253 at 258; Kern River Pub. Access Comm. v. City of Bakersfield, 170 Cal. App. 3d 1205, 1217 (1985) (quoting CAL. GOV'T CODE § 66478.4).
[301] *Cnty. of El Dorado*, 96 Cal. App. 3d at 406.
[302] *See Marks*, 6 Cal. 3d 251; *Mack*, 19 Cal. App. 3d 1040.