Constitutional Right to Fish: A New Theory of Access to the Waterfront

This comment discusses the potential impact of the rarely invoked right to fish conferred by article I, section 25 of the California Constitution. That section provides that the state may not sell or grant lands to private parties without reserving in the people the right to fish upon those lands. The comment suggests that land patents executed under this provision have reserved a right of access to the waterfront as well as a right to fish. If implied access accompanies the express right to fish, a new and potentially powerful tool for providing public access to waterfront recreation would be available.

INTRODUCTION

Recently, the California Supreme Court has sought to advance a state policy of facilitating public access to the waterfront[1] for general recreational purposes.[2] The state has applied many legal theories to ex-

[1] The term "waterfront" in this comment refers to property abutting either salt or fresh water bodies. BLACK'S LAW DICTIONARY 1427 (5th ed. 1979).

[2] County of Los Angeles v. Berk, 26 Cal. 3d 201, 222, 605 P.2d 381, 395, 161 Cal. Rptr. 742, 756 (1980) (estoppel does not defeat an implied dedication because of public policy favoring waterfront access), *cert. denied*, 449 U.S. 836 (1980); Gion v. City of Santa Cruz, 2 Cal. 3d 29, 42-43, 465 P.2d 50, 58-59, 84 Cal. Rptr. 162, 170-71 (1970) (implied dedication applied to beaches because of public policy favoring waterfront access); Taper v. City of Long Beach, 129 Cal. App. 3d 590, 608, 181 Cal. Rptr. 169, 179 (modified in unrelated matter after denial of pet. for rehearing, 130 Cal. App. 3d 474b (official advance sheets)) (4th Dist. 1982) (city and state not estopped from asserting public recreational easements when estoppel would defeat public policy supporting beach access); Natural Resource Defense Council, Inc. v. California Coastal Zone Conservation Comm'n, 57 Cal. App. 3d 76, 88, 129 Cal. Rptr. 57, 65 (1st Dist. 1976) (commission's grant of permits to develop coastal area upheld because environmental impact was minimal); Lane v. City of Redondo Beach, 49 Cal. App. 3d 251, 256-57, 122 Cal. Rptr. 189, 193 (2d Dist. 1975) (municipality's power to vacate street does not include power to destroy public access to tidelands); Richmond Ramblers Motorcycle Club v. Western Title Guar. Co., 47 Cal. App. 3d 747, 756-59, 121 Cal. Rptr. 308, 313-15 (1st Dist. 1975) (implied dedication limited to beach access and roads, in part because of policy favoring beach access); CAL. CONST. art. X, § 4 (formerly CAL. CONST. art. XV, § 2) (protects public access to navigable waters); CAL. GOV'T CODE §

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pand public access including: custom,[3] prescription,[4] express[5] or im-

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39933 (West 1968) (implementing CAL. CONST. art. X, § 4 by requiring municipalities to maintain access to navigable waters); *id.* § 54093 (West Supp. 1982) (Department of Parks and Recreation may acquire public beach access from local governments); CAL. PUB. RES. CODE § 6008 (West 1977) (restricts sale of state owned lands in Humboldt Bay to protect public access); *id.* § 6210.4 (West 1977) (prevents sale of state waterfront property without reserving public access); *id.* § 6323 (West 1977) (restricts government from maintaining obstructions on accreations); *id.* § 30001.5(c) (West Supp. 1982) (one goal of Coastal Act is to maximize public beach access); *id.* § 30210 (West Supp. 1982) (maximizes public access to the coast); *id.* § 30211 (West 1977) (prohibits development from interfering with public beach access); *id.* § 30212 (West Supp. 1982) (requires public beach access for new development projects); *id.* § 30252 (West 1977) (new development should not interfere with public beach access).

[3] Custom is the presumption that a legal right of access existed because of ancient use. The major elements of custom are: 1) use exercised for such a time that it preceeds all records and knowledge; and 2) continuous use. Maloney, Fernandez, Parish & Reinders, *Public Beach Access: A Guaranteed Place to Spread Your Towel*, 29 U. FLA. L. REV. 853, 855-56 (1977) (summary of common methods of gaining access to beach) [hereafter Maloney]. Unlike prescription and dedication, *see* notes 4-6 *infra*, custom does not involve a tract by tract litigation, but a finding of public rights for larger areas of land, such as oceanfront property. Only Florida, Hawaii, Idaho, and Oregon appear to have adopted this method of insuring access to the waterfront. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. Sup. Ct. 1974) (public obtained right to use dry sand area of beaches based on custom); County of Hawaii v. Sotomura, 55 Hawaii 176, 181-82, 517 P.2d 57, 61-62 (1973) (beach property owner takes title only to vegetation line based on Hawaiian custom), *cert. denied*, 419 U.S. 372 (1974); *In re* Ashford, 50 Hawaii 314, 315, 440 P.2d 76, 77 (1968) (based on ancient Hawaiian custom, boundary line dividing public beaches and private lands is edge of vegetation); State *ex rel.* Haman v. Fox, 594 P.2d 1093, 1101 (Idaho 1979) (customary rights to waterfront denied because elements of proof not met); State *ex rel.* Thornton v. Hay, 254 Or. 584, 588-89, 462 P.2d 671, 673-74 (1969) (property owners could not build structure on beach because it would obstruct public recreational easement created by custom); Maloney, note 3 *supra*, at 856-57; Comment, *Public Beaches: A Reevaluation*, 15 SAN DIEGO L. REV. 1241, 1259-61 (1978); Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 U.C.L.A. L. REV. 1049, 1056-59 (1981).

[4] Elements necessary to show an access easement by prescription are, with the exception of the tax requirement, the same as those required to prove acquisition by adverse possession. Gilardi v. Hallam, 30 Cal. 3d 317, 322-23, 636 P.2d 588, 590, 178 Cal. Rptr. 624, 626 (1981) (when occupiers intend to claim land only if title is determined in their favor, prescriptive easement is not created); Taormino v. Denny, 1 Cal. 3d 679, 686, 463 P.2d 711, 716, 83 Cal. Rptr. 359, 364 (1970) (use of road for statutory period gave defendant easement by prescription). In California, implied dedication has replaced the creation of public rights through prescriptive easements. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 38-40, 465 P.2d 50, 55-57, 84 Cal. Rptr. 162, 167-68 (1970) (implied dedication applied to beaches because of public policy favoring waterfront access).

[5] Dedication is the creation of a property interest in the public by showing that the

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plied[6] dedication, eminent domain,[7] the exchange of development rights,[8] and the public trust doctrine.[9] Despite these theories, increased

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owner intended to offer the land or some interest in the land and public acceptance of the offer. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 38, 465 P.2d 50, 55-56, 84 Cal. Rptr. 162, 167-68 (1970); Union Transp. Co. v. Sacramento County, 42 Cal. 2d 235, 240, 267 P.2d 10, 12-13 (1954) (county is liable for damages caused by a collapsed bridge previously dedicated to public use); People *ex rel.* Howland v. Dreher, 101 Cal. 271, 273, 35 P. 867, 868 (1894) (nuisance not found because street dedication was not accepted). An access easement can be created by express dedication when the owner expressly manifests the intent to dedicate the property interest. Gion v. City of Santa Cruz, 2 Cal. 3d 29, 38, 465 P.2d 50, 55, 84 Cal. Rptr. 162, 167 (1970); Union Transp. Co. v. Sacramento County, 42 Cal. 2d 235, 240-41, 267 P.2d 10, 12-13 (1954); People v. County of Marin, 103 Cal. 223, 227, 37 P. 203, 204 (1894) (owner's written statement that road should remain open to public creates express dedication); City of Anaheim v. Metropolitan Water Dist. of S. Cal., 82 Cal. App. 3d 763, 770, 147 Cal. Rptr. 336, 341 (4th Dist. 1978) (county's acceptance of dedication thirteen years after original offer does not defeat dedication).

[6] An owner's intent to dedicate a property interest can also be implied. In California, the public merely has to use the access way for five years to create a presumption of public dedication. To rebut the presumption, the owner must show the use was either permissive or that the owner made bona fide attempts to prevent the public use. County of Los Angeles v. Berk, 26 Cal. 3d 201, 220, 605 P.2d 381, 393, 161 Cal. Rptr. 742, 754 (1980) (reaffirming *Gion*); Gion v. City of Santa Cruz, 2 Cal. 3d 29, 41, 465 P.2d 50, 57-58, 84 Cal. Rptr. 162, 169 (1970) (implied dedication applied to beaches because of public policy favoring waterfront access); Cushman v. Davis, 80 Cal. App. 3d 731, 737, 145 Cal. Rptr. 791, 794-95 (1st Dist. 1978) (implied dedication of road); City of Long Beach v. Daugherty, 75 Cal. App. 3d 972, 978-79, 142 Cal. Rptr. 593, 596 (2d Dist. 1977) (implied dedication of public recreational easement over beachfront property); Richmond Ramblers Motorcycle Club v. Western Title Guar. Co., 47 Cal. App. 3d 747, 756, 121 Cal. Rptr. 308, 313 (1st Dist. 1975) (implied dedication theory limited to roads and beachfront property). *See also* Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 U.C.L.A. L. REV. 1049, 1054-56 (1981).

[7] The state can exercise its eminent domain powers by condemning and paying for a right of access. CAL. CONST. art. I, § 19 (constitutional grant of power to state to condemn property); CAL. CODE CIV. PROC. § 1240.010 (West 1982) (general provision allowing condemnation for any public use).

[8] The California Coastal Commission often predicates grants for coastal development permits on the dedication of public access to the beach. CAL. PUB. RES. CODE § 30212 (West Supp. 1982) (restricts new development from interfering with public beach access); *id.* § 30600 (requires coastal development permit to develop property on coast); CALIFORNIA COASTAL COMMISSION, STATEWIDE INTERPRETIVE GUIDELINES, 35-53 (1981). Requiring dedication to receive a permit is constitutional. Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 637-45, 484 P.2d 606, 610-15, 94 Cal. Rptr. 630, 634-39 (1971) (requiring dedication of park to receive approval of subdivision maps); Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal. App. 3d 678, 699, 183 Cal. Rptr. 395, 407-08 (1st Dist. 1982) (writ of mandamus challenging beach dedication requirements denied in part); Frisco Land

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& Mining Co. v. State, 74 Cal. App. 3d 736, 753, 141 Cal. Rptr. 820, 830 (1st Dist. 1977) (requiring dedication of public beach access to receive a development permit is constitutional), *cert. denied*, 436 U.S. 918 (1978). However, some courts have limited the Coastal Commission's power to require dedication of public access. The court of appeal in Pacific Legal Found. v. California Coastal Comm'n, 180 Cal. Rptr. 858, 862 (2d Dist. 1982) (officially depublished) held that development must adversely impact access before the commission can require dedication. Subsequently, the California Supreme Court held the controversy not ripe for adjudication. 33 Cal. 3d 158, 169-74, 655 P.2d 306, 313-17, 188 Cal. Rptr. 104, 111-15 (1982).

Local agencies are also prohibited from granting development permits unless public access is dedicated. CAL. GOV'T CODE § 66478.11 (West Supp. 1982) (subdivision along coast); *id.* § 66478.12 (subdivision fronting lakes or reservoirs); *id.* § 66478.13 (parcels over forty acres along coast).

[9] The public trust doctrine requires the state to hold navigable waters for the people and to protect certain uses of these waters. National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 437-41, 658 P.2d 709, 721-24, 189 Cal. Rptr. 346, 358-61 (1983) (non-navigable tributaries to a navigable lake); City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 291, 644 P.2d 792, 793-94, 182 Cal. Rptr. 599, 600-01 (1982) (tidelands that are never owned by government); State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 214, 625 P.2d 239, 241, 172 Cal. Rptr. 696, 698 (1981) (non-tidal navigable waters), *cert. denied*, 454 U.S. 865 (1981); State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 243-44, 625 P.2d 256, 257-58, 172 Cal. Rptr. 713, 714-15 (1981) (state not estopped from asserting public trust rights), *cert. denied*, 454 U.S. 865 (1981); City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 521, 606 P.2d 362, 364-65, 162 Cal. Rptr. 327, 329-30 (1980) (reaffirming public trust principles), *cert. denied*, 449 U.S. 840 (1980); City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970) (government is estopped from raising public trust rights under art. XV, § 3); Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest, this issue supra*, at 579; Sax, *The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 *passim* (1970); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 195 n.3 (1980); Comment, *The Public Trust After* Lyon *and* Fogerty — *Private Interests and Public Expectations: A New Balance, this issue supra*, at 631. The New Jersey Supreme Court implied in dicta that the public trust doctrine might be extended to insure public access to the tidelands. Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 301-02, 294 A.2d 47, 51 (1972). The New Jersey Supreme Court has stated that the Public Trust Doctrine applies to the dry sand area of beaches. Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 228, 430 A.2d 881, 886, Annot., 18 A.L.R. 4th 558, 565 (1981) (ordinance that partially prohibits recreational use of oceanfront property is valid pursuant to New Jersey's public trust doctrine); Van Ness v. Borough of Deal, 78 N.J. 174, 179, 393 A.2d 571, 573 (1978) (municipally owned beach must be opened to nonresidents on same basis as residents based on public trust doctrine); Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 308, 294 A.2d 47, 54 (1972). However, New Jersey has limited this holding to beaches presently owned by the state or municipality in resident discrimination cases. Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 228, 430 A.2d 881, 886 (1981); Van Ness v. Borough of Deal, 78 N.J. 174, 179, 393 A.2d 571, 573 (1978). No other state ap-

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waterfront development has decreased publicly accessible property.[10]

An additional legal tool to increase public access to the waterfront has gone almost unnoticed. A provision of the California Constitution protects the right to fish upon or from waterfront property owned or patented by the state since 1910.[11] If this constitutional right to fish includes a right of access to the waterfront property over adjoining private parcels, a new inventory of public accessways to waterfront areas would be available for exploitation.

This comment argues that the constitutionally guaranteed right to fish would be meaningless without a related right of access over adjoining lands. Constitutional history,[12] traditional concepts of property law[13] and the strong policy in favor of access[14] all compel this conclusion.

After a brief discussion in Section I of fishing access over state-owned lands, this comment focuses on access over private lands previously owned by the state. Section II discusses whether rights of access accompany the right to fish, considers the effect of a grant defect on fishing rights and assesses possible methods of extinguishing fishing rights. Section III suggests a strategy by which state agencies may advance this little known and seldom used right.

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pears to have applied the public trust doctrine to access rights. In contrast, art. I, § 25 grants a right of public access. *See* notes 21-37 and accompanying text *infra.*

[10] Pacific Legal Found. v. California Coastal Comm'n, 33 Cal. 3d 158, 165, 655 P.2d 306, 307-08, 188 Cal. Rptr. 104, 105-06 (1982) (declining to adjudicate Coastal Commission's access guidelines in absence of a ripe controversy); State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 245, 625 P.2d 256, 259, 172 Cal. Rptr. 713, 716 (1981); CALIFORNIA DEP'T OF PARKS AND RECREATION, CALIFORNIA COASTLINE PRESERVATION AND RECREATION PLAN 11-12 (1971); Ballot argument in favor of art. I, § 25, *reprinted in* note 25 *infra.*

[11] CAL. CONST. art. I, § 25 states:

> The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the Legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.

[12] Ballot argument in favor of art. I, § 25, *reprinted in* note 25 *infra. See* notes 21-25 and accompanying text *infra.*

[13] *See* notes 26-34 and accompanying text *infra.*

[14] *See* notes 35-37 and accompanying text *infra.*

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I. Access Over State Owned Lands

On November 8, 1910, California amended its constitution to include article I, section 25. This provision gives the public a constitutional right to fish in all state waters and a corresponding right of access over state lands to get to the water.[15] This corresponding right of access does not apply to property used for a special purpose that is incompatible with its use by the public, such as lands used for prisons or mental institutions.[16] The California Supreme Court, however, has narrowly construed these special purposes.[17] In *State v. San Luis Obispo Sportsman's Association*,[18] access to fish on state owned reservoir land was allowed although public access created some risk to domestic water quality.[19] In fact, the court required the state to implement a fishing program to meet its dual duties of insuring water quality and protecting fishing rights.[20] In sum, there is little controversy concerning public access to fish on state owned lands because such access is clearly provided for in the language of the constitutional provision.

II. Access Over Private Property

A. *Constitutional Provision: Article I, Section 25*

In addition to guaranteeing fishing rights on public lands, article I, section 25 provides that "no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish

[15] State v. San Luis Obispo Sportsman's Ass'n, 22 Cal. 3d 440, 452-53, 582 P.2d 1088, 1097, 149 Cal. Rptr. 482, 489 (1978) (when state's duty to provide for public fishing conflicts with its duty to protect water supply, state must institute fishing program); Paladini v. Superior Ct., 178 Cal. 369, 372, 173 P. 588, 589 (1918) (state may require production of fishing licenses pursuant to art. I, § 25); *In re* Quinn, 35 Cal. App. 3d 473, 485, 110 Cal. Rptr. 881, 889 (5th Dist. 1973) (article I, § 25 does not invalidate ordinance prohibiting bridge fishing); *In re* Marincovich, 48 Cal. App. 474, 482, 192 P. 156, 159 (2d Dist. 1920) (state may prohibit fishing with net more than six feet in breadth pursuant to art. I, § 25); *In re* Parra, 24 Cal. App. 339, 342, 141 P. 393, 395 (3d Dist. 1914) (dictum) (state may require fishing licenses pursuant to art. I, § 25). *See* CAL. CONST. art. I, § 25, *reprinted in* note 11 *supra*; 36 Op. Cal. Att'y Gen. 20, 26 (1960) (advising commission on provisions to be included in grant of school lands); Ballot argument in favor of art. I, § 25, *reprinted in* note 25 *infra*.

[16] State v. San Luis Obispo Sportsman's Ass'n, 22 Cal. 3d 440, 447, 584 P.2d 1088, 1094, 149 Cal. Rptr. 482, 486 (1978).

[17] *See* notes 18-20 and accompanying text *infra*.

[18] 22 Cal. 3d 440, 548 P.2d 1088, 149 Cal. Rptr. 482 (1978).

[19] *Id.* at 452, 584 P.2d at 1097, 149 Cal. Rptr. at 489.

[20] *Id.* at 452-53, 584 P.2d at 1097, 149 Cal. Rptr. at 489.

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thereupon . . . ."[21] Pursuant to this language, since 1910 grants by the state to private owners have included a reservation of the public right to fish.[22] Unfortunately, the constitutional amendment does not require the state patents to reserve a right of access to the waterfront to perfect the reserved fishing rights.[23] Although the right to fish is expressly reserved by the amendment and grant deeds, the right of access to the waterfront should be implied.

A right of access can be implied three ways. First, the ballot argument in favor of the constitutional amendment supports an implied right of access.[24] The amendment was added to counter the effects of private development which blocked access to the waterfront.[25] A reser-

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[21] CAL. CONST. art. I, § 25, *reprinted in* note 11 *supra.*

[22] The California State Lands Commission has made grants followed by a reservation "in the people the absolute right to fish thereupon, provided by Section 25 of Article I of the Constitution of the State of California." Deed from State of California to N. Imbertson (June 19, 1928) (copy on file at U.C. Davis Law Review office). The legislature had made grants in the same manner except that it reserves "in the people of the State of California the absolute right to fish in the waters . . . with the right of convenient access to said waters over said lands for said purposes." 1910 Cal. Stat. 676.

[23] CAL. CONST. art. I, § 25, *reprinted in* note 11 *supra.*

[24] Ballot argument in favor of art. I, § 25, *reprinted in* note 25 *infra.*

[25] Ballot argument in favor of CAL. CONST. art. I, § 25, *reprinted in In re* Quinn, 35 Cal. App. 3d 473, 484 n.4, 110 Cal. Rptr. 881, 888 n.4 (5th Dist. 1973) states:

> Reasons Why Assembly Constitutional Amendment No. 14 Should Be Favorably Voted Upon by the People of California.
>
> The inland streams and coast waters of the State of California abound in a great variety of fish, and aside from the sport of taking them, they furnish a very large portion of the state's free food supply. That the fish may not be exterminated and this great item of popular food depleted the people of the state are spending large sums annually for its protection and propagation.
>
> For many years the people of California have enjoyed the right to take fish from the waters of the state pretty generally, but since the vigorous development of California's natural resources by individuals and large corporations, many of the streams have been closed to the public and trespass notices warning the public not to fish are displayed to an alarming extent.
>
> The people are paying for the protection and propagation of the fish; for this reason if for no other they should have the right to take them. It is not fair that a few should enjoy the right to take the fish that all the people are paying to protect and propagate.
>
> To reserve the right to fish in a portion of the waters of the state at least, for the people, Assembly Constitutional Amendment No. 14 was introduced and adopted at the last session of the legislature of the State of California, and as an evidence of its popularity it was unanimously adopted by the assembly and by the senate with but two dissenting votes.
>
> If the people of the state vote favorably upon this proposed amendment

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vation of the right to fish, without access over private lands enclosing the waterfront, is an ineffective way of protecting the new right from the perceived threat.

Second, traditional property law supports an implied right of access. Through the doctrine of *profit a prendre*,[26] courts have provided access to property when necessary to perfect another property right. This doctrine[27] allows the owner of rights to profits such as sand,[28] minerals,[29] or crops,[30] to have the necessary access to take those profits. Fishing

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> to the constitution it will give them the right to fish upon and from the public lands of the state and in the waters thereof, and will prevent the state from disposing of any of the lands it now owns or what it may hereafter acquire without reserving in the people the right to fish.

[26] Callahan v. Martin, 3 Cal. 2d 110, 122, 43 P.2d 788, 794, Annot., 101 A.L.R. 871, 880 (1935) (*profit a prendre* carries with it the right of possession as is necessary and convenient for exercise of profit); Costa Mesa Union School Dist. v. Security First Nat'l Bank, 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113, 118 (4th Dist. 1967) (value of land without gas and mineral rights is not nominal, as matter of law); Costa v. Fawcett, 202 Cal. App. 2d 695, 700, 21 Cal. Rptr. 143, 146 (5th Dist. 1962) (*profit a prendre* to harvest nuts carries with it reasonable right of access to enter to get crops); Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 434, 297 P. 73, 75 (1st Dist. 1931) (oil and gas rights as *profit a prendre* carries with it right of entry and right to remove and take profit from land); Alexander Dawson, Inc. v. Fling, 155 Col. 599, 603, 396 P.2d 599, 601 (1964) (grant of easement for swimming and boating does not imply *profit a prendre* for fishing); Evans v. Halloway Sand & Gravel, Inc., 106 Mich. App. 70, 78, 308 N.W.2d 440, 443 (1981) (grant creating right to remove sand and gravel created a *profit a prendre*); Bland Lake Fishing & Hunting Club v. Fisher, 311 S.W.2d 710, 715-17 (Tex. Civ. App. 1958) (grant of fishing rights carries with it right of doing whatever is reasonably necessary for full enjoyment of *profit a prendre*).

[27] *Profits a prendre* were recognized as early as the fourteenth century in France. J. BAKER, MANUAL OF LAW FRENCH 167 (1979). In England they were used in the sixteenth century. H. FINCH, A SUMMARY OF THE COMMON LAW OF ENGLAND at Table 8 (London 1654 & reprint 1979).

[28] Evans v. Halloway Sand & Gravel, Inc., 106 Mich. App. 70, 78, 308 N.W.2d 440, 443 (1981) (grant creating right to remove sand and gravel created *profit a prendre*).

[29] Callahan v. Martin, 3 Cal. 2d 110, 122, 43 P.2d 788, 794, Annot., 101 A.L.R. 871, 880 (1935) (oil and gas rights are *profits a prendre*); Costa Mesa Union School Dist. v. Security First Nat'l Bank, 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113, 118 (4th Dist. 1967) (value of land without gas and mineral rights is not nominal, as matter of law); Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 434, 297 P. 73, 75 (1st Dist. 1931) (oil and gas rights as *profit a prendre* carry right of entry and right to remove and take profit from the land).

[30] Costa v. Fawcett, 202 Cal. App. 2d 695, 700, 21 Cal. Rptr. 143, 146 (5th Dist. 1962) (*profit a prendre* to harvest nuts carries with it reasonable right of access to enter to get crops).

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rights have been interpreted as *profits a prendre*,[31] carrying with them the reasonable access rights necessary and convenient to fish.[32] California courts recognize *profits a prendre*[33] and will likely apply this theory to the constitutional right to fish. The alternative is to undermine the right itself.[34]

Third, public policy also supports the implied right of access. In recent years, a growing number of cases emphasized the increasing importance of public access to recreational opportunities.[35] The public appetite for recreation in natural surroundings has increased with California's urbanization.[36] California has responded to this increased need for public access.[37] Access to fishing can be considered no less important than other waterfront recreation favored by the court. Thus, for

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[31] Upper Greenwood Lake Property Owners Ass'n v. Grozing, 6 N.J. Super. 538, 542, 69 A.2d 896, 898 (Ch. Div. 1949) (grant of fishing rights is *profit a prendre* while right to bathe and boat are pure easements); Mitchell v. D'Olier, 68 N.J.L. 375, 379, 53 A. 467, 468, Annot., 59 L.R.A. 949, 951 (1902) (grant of fishing rights is *profit a prendre* because products of land are taken); Bland Lake Fishing & Hunting Club v. Fisher, 311 S.W.2d 710, 715 (Tex. Civ. App. 1958) (grant of fishing rights carries with it right of doing whatever is reasonably necessary for full enjoyment of *profit a prendre*); Alexander Dawson, Inc. v. Fling, 155 Col. 599, 603, 396 P.2d 599, 601 (1964) (grant of easement for swimming and boating does not imply *profit a prendre* for fishing); Callahan v. Martin, 3 Cal. 2d 110, 120, 43 P.2d 788, 793, Annot., 101 A.L.R. 871, 879 (1935) (dictum) (oil and gas rights are *profits a prendre*); Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 434, 297 P. 73, 75 (1st Dist. 1931) (dictum) (oil and gas rights are *profits a prendre*); Mountain Springs Ass'n of New Jersey, Inc. v. Wilson, 81 N.J. Super. 564, 572, 196 A.2d 270, 275 (Ch. Div. 1963) (dictum) (covenant restricting alienation of land is void because of unreasonable duration of restriction).

[32] *See* note 26 and accompanying text *supra*.

[33] Callahan v. Martin, 3 Cal. 2d 110, 122, 43 P.2d 788, 794, Annot., 101 A.L.R. 871, 880 (1935) (*profit a prendre* carries with it right of possession as is necessary and convenient for exercise of profit); Costa Mesa Union School Dist. v. Security First Nat'l Bank, 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113, 118 (4th Dist. 1967) (value of land without gas and mineral rights is not nominal, as matter of law); Costa v. Fawcett, 202 Cal. App. 2d 695, 700, 21 Cal. Rptr. 143, 146 (5th Dist. 1962) (*profit a prendre* to harvest nuts carries with it reasonable right of access to enter to get crops); Richfield Oil Co. v. Hercules Gasoline Co., 112 Cal. App. 431, 434, 297 P. 73, 75 (1st Dist. 1931) (oil and gas rights as *profit a prendre* carry right of entry and right to remove and take profit from land).

[34] *See generally* Note, *Public Recreation and Subdivisions on Lakes and Reservoirs in California*, 23 STAN. L. REV. 811, 816-17 (1971) (summary of methods of gaining public recreation and access rights to private property along California lakes and reservoirs).

[35] *See* note 2 and accompanying text *supra*.

[36] *See* note 10 *supra*.

[37] *See* notes 4-9 *supra*.

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policy reasons, the court may find an implied right of access to perfect the constitutional right to fish.

B. Possible Grant Defect

A simple deed reservation of article I, section 25 fishing rights is arguably sufficient to create an implied right of access. The form of a deed reservation pursuant to that provision, however, raises a possible grant defect: the reservation of the property right to a "stranger to the deed," in this case, the public.

Under the common law, a grantor could not reserve an easement to a person not a party to the conveyance.[38] In *Willard v. First Church of Christ, Scientist, Pacifica*,[39] the California Supreme Court rejected this rule, stating that the common law rule was based on the obsolete historical notion of seisin.[40] The court instead looked to the parties' intentions to determine if a reservation to a third party was valid.[41] If *Willard* were applied to all article I, section 25 reservations, these reservations would be valid because the constitutional provision clearly intends to reserve fishing rights in the people.[42]

The *Willard* "intent" rule applies retroactively only when the grantee does not rely upon the common law rule.[43] Even when a grantee relies on the common law, however, the state may still argue that the people are not truly "strangers to the deed." Because the state

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[38] Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, 476, 498 P.2d 987, 989, 102 Cal. Rptr. 739, 741 (1972) (reservation to third party upheld when court rejects rule prohibiting such reservations); Boyer v. Murphy, 202 Cal. 23, 34, 259 P. 38, 42 (1927) (clause reserving life estate in husband of grantor construed as exception to effectuate grantor's intent); Mott v. Nardo, 73 Cal. App. 2d 159, 162, 166 P.2d 37, 39 (2d Dist. 1946) (bank is not estopped from asserting that grant was made to stranger to deed); Comment, *Real Property Easements: Creation by Reservation or Exception*, 36 CALIF. L. REV. 470 (1948) (common law rule regarding reservation of easements).

[39] 7 Cal. 3d 473, 498 P.2d 987, 102 Cal. Rptr. 739 (1972), *noted in* 13 SANTA CLARA L. REV. 344 (1972).

[40] Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 476, 478-79, 498 P.2d 987, 989, 102 Cal. Rptr. 739, 741 (1972).

[41] *Id.* at 479, 498 P.2d at 991, 102 Cal. Rptr. at 743; Cushman v. Davis, 80 Cal. App. 3d 731, 735, 145 Cal. Rptr. 791, 793 (1st Dist. 1978) (dictum) (reservation of easement is not in gross unless presumption of appurtenance is overcome).

[42] Ballot argument in favor of art. I, § 25, *reprinted in* note 25 *supra.*

[43] Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, 479, 498 P.2d 987, 991, 102 Cal. Rptr. 739, 743 (1972) (reservation to third party upheld when court rejects rule prohibiting such reservation).

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is the agent of the people,[44] the common law rule should not apply to these defective reservations. Additionally, because article I, section 25 requires the state to reserve to the people the right to fish, and impliedly, the right of access,[45] the constitution alters the common law rule.

Finally, even if this deed provision is defective, the grantee may still not be the owner of unburdened property. The "reservation" of the fishing rights could be construed as an exception or a reservation: the term used in the grant is not controlling.[46] In an exception, the grantor never parts with the property rights.[47] A reservation, on the other hand, involves the grantor transferring all of the interest in the property and recreating a portion of that interest in the grantor.[48] If the courts characterize the grant as containing a defective exception, the *profit a prendre* would revert to the original grantor,[49] in this case, California. The grantee will take the property unburdened by the reservation only if the grant is characterized as containing a defective reservation.[50]

Article I, section 25 grants should be characterized as exceptions rather than reservations because the constitutional provision prohibits the state from transferring the right to fish.[51] Courts will not construe a clause as a reservation if to do so would defeat the grantor's intent.[52] Therefore, the access right should remain with the state regardless of a defective reservation.

A state owned *profit a prendre* created by a defective reservation may still be subject to the article I, section 25 right to fish if the *profit a prendre* is a public land within the meaning of the constitution. Of

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[44] CAL. CONST. art. II, § 1 (formerly CAL. CONST. art. I, § 2) states, "[a]ll political power is inherent in the people. Government is instituted for the protection, security and benefit of the people . . . ."

[45] *See* notes 31-34 and accompanying text *supra*.

[46] Boyer v. Murphy, 202 Cal. 23, 31-35, 259 P. 38, 40-42 (1927) (clause reserving life estate in husband of grantor construed as an exception to effectuate grantor's intent). *See* Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, 477, 498 P.2d 987, 989, 102 Cal. Rptr. 739, 742 (1972).

[47] Boyer v. Murphy, 202 Cal. 23, 31-35, 259 P. 38, 40-42 (1927).

[48] *Id.*

[49] *Id.*; 23 AM. JUR. 2D *Deeds* § 279 (1965).

[50] Boyer v. Murphy, 202 Cal. 23, 31-35, 259 P. 38, 40-42 (1927); 23 AM. JUR. 2D *Deeds* § 280 (1965).

[51] CAL. CONST. art. I, § 25, *reprinted in* note 11 *supra*. *See* notes 15-20 and accompanying text *supra*.

[52] Boyer v. Murphy, 202 Cal. 23, 31-35, 259 P. 38, 40-42 (1927). *See* Willard v. First Church of Christ, Scientist, Pacifica, 7 Cal. 3d 473, 477, 498, P.2d 987, 989, 102 Cal. Rptr. 739, 742 (1972).

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course, a constitutional provision will be interpreted to give effect to the voters' intent in adopting the amendment.[53] The courts have previously looked to ballot arguments to determine the purpose of a constitutional provision.[54] Inferring that the purpose of article I, section 25 is to insure both access to the waterfront, as well as a right to fish,[55] public lands of the state should be construed to include the *profit a prendre*.[56] Therefore, the state would have a potent argument in favor of public fishing rights and for access to the waterfront even if there was an initial defect in the reservation.

C. *Extinguishing Public Access: Defenses to the* Profit a Prendre

Once the right of access is established by the *profit a prendre* theory, plaintiffs seeking access to the waterfront may still have their right extinguished. Defendant landowners may argue that the *profit a prendre* has been extinguished by adverse use,[57] abandonment,[58] elimination of the public purpose,[59] or equitable estoppel.[60]

1. Adverse Use

Profits a prendre, like easements,[61] may be extinguished by adverse

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[53] State v. San Luis Obispo Sportsman's Ass'n, 22 Cal. 3d 440, 446-47, 584 P.2d 1088, 1091, 149 Cal. Rptr. 482, 485 (1978) ("public lands" in art. I, § 25 construed based on the purpose of amendment); Kaiser v. Hopkins, 6 Cal. 2d 537, 538, 58 P.2d 1278, 1279 (1936) (statute exempting property from taxation construed to give effect to intent of voters).

[54] State v. San Luis Obispo Sportsman's Ass'n, 22 Cal. 3d 440, 446-47, 584 P.2d 1088, 1091, 149 Cal. Rptr. 482, 485 (1978) (purpose of amendment determined by reviewing ballot argument in favor of amendment); White v. Davis, 13 Cal. 3d 757, 775 n.11, 533 P.2d 222, 234 n.11, 120 Cal. Rptr. 94, 106 n.11 (1975) (purpose of constitutional right to privacy determined by reviewing ballot argument); Carter v. Commission on Qualifications of Judicial Appointments, 14 Cal. 2d 179, 185, 93 P.2d 140, 144 (1939) (ambiguities in constitutional amendment resolved through analysis of ballot argument).

[55] Ballot argument in favor of art. I, § 25, *reprinted in* note 25 *supra*.

[56] *See* notes 21-34 and accompanying text *supra*.

[57] *See* notes 61-64 and accompanying text *infra*.

[58] *See* notes 65-68 and accompanying text *infra*.

[59] *See* notes 69-70 and accompanying text *infra*.

[60] *See* notes 71-79 and accompanying text *infra*.

[61] Gerhard v. Stephens, 68 Cal. 2d 864, 880, 442 P.2d 692, 706, 69 Cal. Rptr. 612, 626 (1968) (right to drill for oil and gas is *profit a prendre* and subject to same rules for easement); Evans v. Halloway Sand & Gravel, Inc., 106 Mich. App. 70, 78, 308 N.W.2d 440, 443 (1981) (grant that created right to remove sand and gravel created *profit a prendre*).

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use for the statutory period of five years.[62] The owner of the land burdened with an easement or a *profit a prendre* can generally extinguish the servitude by erecting and maintaining a permanent structure that obstructs and prevents the use of the servitude for the statutory period.[63] Because much California waterfront property is fenced, this would appear to effectively extinguish the servitude. By statute, however, the state prevents the acquisition of prescriptive rights against property dedicated to a public use.[64] Therefore, the absolute right of the public to fish on given property could not be extinguished by adverse use.

2. Abandonment

Profits a prendre can also be extinguished by abandonment.[65] However, nonuse alone is insufficient to show abandonment;[66] the holder of the *profit a prendre* must intend to abandon the right.[67] The intent to abandon state held rights must be shown by official acts of the government.[68] Under article I, section 25 the state is prohibited from transfer-

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[62] Glatts v. Henson, 31 Cal. 2d 368, 370-71, 188 P.2d 745, 746-47 (1948) (easement obstructed by building is extinguished by adverse possession); Zimmer v. Dykstra, 39 Cal. App. 3d 422, 435, 114 Cal. Rptr. 380, 388-89 (2d Dist. 1974) (easement not extinguished by adverse possession because fences and parked cars were not present for five years); Ross v. Lawrence, 219 Cal. App. 2d 229, 232, 33 Cal. Rptr. 135, 137 (4th Dist. 1963) (easement obstructed by parking spaces extinguished by adverse possession).

[63] *See* note 62 *supra*.

[64] City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 270-77, 537 P.2d 1250, 1301-06, 123 Cal. Rptr. 1, 52-58 (1975) (California Civil Code § 1007 bars prescription of water rights of city); Mathews v. Ferrea, 45 Cal. 51, 52-53 (1872) (adverse possession of water rights is not effective against federal government); Ross v. Lawrence, 219 Cal. App. 2d 229, 232, 33 Cal. Rptr. 135, 137 (4th Dist. 1963) (easement obstructed by parking spaces extinguished by adverse possession); CAL. CIV. CODE § 1007 (West 1982).

[65] *See* note 61 *supra*.

[66] Gerhard v. Stephens, 68 Cal. 2d 864, 890, 442 P.2d 692, 713, 69 Cal. Rptr. 612, 633 (1968) (right to drill for oil and gas is *profit a prendre* and subject to same rules as easements); Faus v. City of Los Angeles, 67 Cal. 2d 350, 363, 431 P.2d 849, 858, 62 Cal. Rptr. 193, 202 (1967) (removal of railroad tracks is not sufficient to show abandonment of railroad easement); Zimmer v. Dykstra, 39 Cal. App. 3d 422, 435, 114 Cal. Rptr. 380, 388-89 (2d Dist. 1974) (easement was not extinguished by adverse possession because fences and parked cars were not present for five years).

[67] Gerhard v. Stephens, 68 Cal. 2d 864, 889-91, 442 P.2d 692, 712-14, 69 Cal. Rptr. 612, 632-34 (1968); Faus v. City of Los Angeles, 67 Cal. 2d 350, 363, 431 P.2d 849, 858, 62 Cal. Rptr. 193, 202 (1967).

[68] City of Stockton v. Miles & Sons, Inc., 165 F. Supp. 554, 560 (N.D. Cal. 1958) (official action shown by city's appropriation of funds to fill water channel); Humboldt

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ring the right to fish and therefore is impliedly prohibited from taking official action to abandon this right.

3. Elimination of the Public Purpose

When an easement is for a public purpose and this public purpose no longer exists, the easement is extinguished.[69] In the same way, a *profit a prendre* may be extinguished when its public purpose has been eliminated.[70] As noted above, the public purpose of article I, section 25 can be inferred to provide public access to the waterfront as a necessary corollary to the constitutional right to fish. This purpose may be eliminated when neither water nor fish exist on the property in question.

4. Equitable Estoppel

The state may not be estopped from enforcing rights under article I, section 25 if estoppel would nullify an important rule of public policy.[71] In *City of Long Beach v. Mansell*[72] and *State v. Superior Court (Fogerty),*[73] estoppel was asserted in cases in which the state attempted to enforce its public trust duties.[74] In both instances, the California Supreme Court focused on the effect of the holdings.[75] The *Mansell* court, which upheld estoppel against the government, noted that its holding

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County v. Van Duzer, 48 Cal. App. 640, 645, 192 P. 192, 195 (1st Dist. 1920) (county's operation of ferry along different route is simply evidence of non-use, not of intent to abandon).

[69] People v. Ocean Shore R.R., Inc., 32 Cal. 2d 406, 417, 196 P.2d 570, 578 (1948) (public use of railroad easement abandoned when company sold its equipment and said that it would liquidate); Slater v. Shell Oil Co., 39 Cal. App. 2d 535, 549-50, 103 P.2d 1043, 1051 (1st Dist. 1940) (conveyance of easement to non-public entity showed abandonment of public purpose).

[70] *See* note 61 *supra.*

[71] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 244, 625 P.2d 256, 259, 172 Cal. Rptr. 713, 716 (1981) (state was not estopped from asserting public trust rights), *cert. denied,* 454 U.S. 865 (1981); City of Long Beach v. Mansell, 3 Cal. 3d 462, 493, 476 P.2d 423, 445, 91 Cal. Rptr. 23, 45 (1970) (government was estopped from raising public trust rights under art. XV, § 3). *See* Comment, *The Public Trust After* Lyon *and* Fogerty: *Private Interests and Public Expectations — A New Balance, this issue supra*, at 631.

[72] 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).

[73] 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981).

[74] *Id.* at 244, 625 P.2d at 259, 172 Cal. Rptr. at 716 (1981); City of Long Beach v. Mansell, 3 Cal. 3d 462, 493, 476 P.2d 423, 445, 91 Cal. Rptr. 23, 45 (1970).

[75] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 247, 625 P.2d 256, 260, 172 Cal. Rptr. 713, 717 (1981); City of Long Beach v. Mansell, 3 Cal. 3d 462, 500, 476 P.2d 423, 450, 91 Cal. Rptr. 23, 50 (1970).

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was narrow and therefore only minimally affected public policy.[76] However, the *Fogerty* court noted that its holding would apply to all four thousand miles of California's waterways.[77] In *Fogerty*, therefore, the state was not estopped because estoppel would have frustrated the important policy of preserving public trust lands.[78]

The *Fogerty* approach may prevent estoppel from being applied to article I, section 25 rights. The state should not be estopped from enforcing public access to exercise fishing rights. To do so would frustrate the express and implied intent of the provision to grant access over public and private land to exercise the right to fish. Also, in contrast to *Mansell*, in which the court's holding affected only a limited property interest, the application of estoppel to article I, section 25 rights would involve potentially hundreds of miles of California's waterfront.[79]

III. PROPOSED FISHING ACCESS GUIDE

In 1979, legislation was enacted directing the California Coastal Commission to prepare an access guide identifying areas on the coast that are open to the public, and explaining the public's rights and responsibilities regarding the use of coastal resources.[80]

No such access guide exists for lands subject to article I, section 25. It is impossible for the public to know which lands are subject to that provision without individual title searches. Considering the significance of fishing as a waterfront recreational activity,[81] and as a traditional food source,[82] the state should begin cataloguing land it has conveyed or

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[76] City of Long Beach v. Mansell, 3 Cal. 3d 462, 500, 476 P.2d 423, 450, 91 Cal. Rptr. 23, 50 (1970).

[77] State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 247, 625 P.2d 256, 260, 172 Cal. Rptr. 713, 717 (1981).

[78] *Id.* at 246, 625 P.2d at 260, 172 Cal. Rptr. at 717.

[79] The amount of waterfront property subject to article I, § 25 is uncertain. Figures for total waterfront property owned by state are unreported. Although other state agencies own waterfront land, only the California Department of Parks and Recreation reports ownership amounts. The Department owns 873 miles of waterfront property in California. CALIFORNIA DEP'T OF PARKS AND RECREATION, CALIFORNIA STATE PARK SYSTEM PLAN, 1980 at 12 (1980). A further complication in determining the scope of art. I, § 25 is that the amount of waterfront land conveyed by the state has never been compiled.

[80] CALIFORNIA COASTAL COMM'N, CALIFORNIA COASTAL ACCESS GUIDE (1981).

[81] Ballot argument in favor of art. I, § 25, *reprinted in* note 25 *supra*.

[82] Visitors to the State Parks System were surveyed in 1965. The results showed the following percentages of visitors planning to fish: 7% in southern California parks, 26% in northern California parks and 30% in central California parks. CALIFORNIA DEP'T OF PARKS AND RECREATION, CALIFORNIA COASTLINE PRESERVATION AND RECREATION

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transferred since 1910. The state has both the records and the personnel to make and publish such a survey — as it did with the *Coastal Access Guide*. Research and publication of a guide is an inexpensive approach to providing necessary information to facilitate public access to recreational opportunities.

CONCLUSION

The public's demand for recreational land in California has exceeded its supply. In response, the state may increase access to the waterfront through eminent domain, dedication and the exchange of development rights.

An additional theory for gaining access to the waterfront involves the application of article I, section 25 of the California Constitution. This provision created the right to fish on any property owned or patented by the state since 1910. This comment asserts that a right of access over public or private property exists as a necessary and intended corollary of this right to fish. Because fishing represents a significant portion of waterfront recreation and is a traditional source of food, this seldom used theory of access to the waterfront should be cultivated. A major obstacle to the use of article I, section 25 is the lack of information on properties subject to this right of access. The state should undertake a survey of all private lands burdened by the right to fish and be willing to support public use of these accessways through litigation of appropriate cases.

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PLAN 56 (1971). During 1979-80, 2,384,741 angling licenses were purchased. STATE OF CALIFORNIA, CALIFORNIA STATISTICAL ABSTRACT 108 (1980).

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