Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest

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Recent decisions have expanded public rights in waterways to include rights in secondary lakes and rivers once thought to be private. Federal courts have broadened these rights by more liberal interpretation of the "navigability" test traditionally used to determine the scope of the public interest in waterways. California courts have expanded public rights on a different theory, based on the public trust doctrine and the public right of recreational boating. This article concludes that these federal and state decisions are not inconsistent, but provide alternative avenues for protection of the public interest in waterways, including protection of allied ecological and recreational values.

[A]ll the navigable waters within the said State shall be common highways, and forever free . . . . — Act for the Admission of California into the Union.[1]

INTRODUCTION

America's inland lakes and rivers have played a vital role in the nation's exploration, settlement, and continuing prosperity. In the eighteenth and nineteenth centuries, they served as arteries that made possible the country's westward migration. Waterways provided both transportation and sustenance to explorers and trappers, the first arrivals on the American frontier. Later they served as a principal means of establishing permanent settlements, obtaining necessary commodities

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

from eastern cities, and transporting crops and other products to market.

Under these circumstances, our legal system quickly bestowed special status upon this precious natural resource. A society which from its inception cherished the concept of private property rights nevertheless embraced the view that the country's major waterways are open to all and incapable of private ownership, control, or alienation.

This principle is ingrained in American jurisprudence. The original Massachusetts Declaration of Fundamental Liberties of 1641, for example, declared open public access to and use of the great ponds of Massachusetts.[2] The 1787 Northwest Ordinance, which provided for admission of most of the midwestern states and which was the basis for California's Act of Admission, provided that "navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free . . . ."[3] Early appellate decisions reflected this view[4] as courts vigorously defended the public's right of access to navigable waters. For example, in an 1862 decision, the Pennsylvania Supreme Court observed: "There is no natural right of the citizen, except the personal rights of life and liberty, which is paramount to his right to navigate freely the navigable streams of the country he inhabits."[5]

California's extensive system of inland waterways facilitated the Gold Rush and determined the subsequent settlement patterns in the nineteenth century. It is therefore not surprising that the same concern for public rights of navigation quickly became rooted in California's Constitution,[6] statutes,[7] and common law.[8]

In recent years, America's lakes and rivers have assumed a somewhat different but no less vital role. Particularly in the west, the importance of many of these waterways for commercial purposes has diminished as modern technology has created new and more efficient means of transporting people and goods. At the same time, population growth, accelerating urbanization, diminishing open space, and concomitant pres-

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[2] *See* Inhabitants of W. Roxbury v. Stoddard, 89 Mass. 158, 166-67, 171 (1863).

[3] Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52.

[4] *See, e.g.*, Wright v. Seymour, 69 Cal. 122, 10 P. 323 (1886); Moore v. Sanborne, 7 Mich. 422 (1853); Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139 (1893); Olson v. Merrill, 42 Wis. 203 (1877).

[5] Flanagan v. City of Philadelphia, 42 Pa. 219, 228 (1862).

[6] CAL. CONST. art. X, § 4 (formerly CAL. CONST. art. XV, § 2).

[7] *See, e.g.*, CAL. CIV. CODE § 3749 (West 1970); CAL. HARB. & NAV. CODE § 131 (West 1978); CAL. PENAL CODE § 370 (West 1970).

[8] *See, e.g.*, People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884).

sures for expanded recreational opportunities have all combined to create new demands upon waterways. The capacity of these resources to serve as recreational and ecological havens has been recognized by both the legal[9] and scientific[10] communities. As a result, the pressures on our legal system to preserve longstanding public rights to navigable waters continue unabated.

The threshold problem in this controversy is determining which waterways are significant enough to warrant this special legal status. Traditionally stated, which lakes and rivers are "navigable" and therefore open to public access? Until recently, answers to these questions were found by reference to a few court decisions. In the past few years, however, numerous cases have built upon these earlier precedents and broadened traditional notions of "navigability."[11] As a result, the number and type of waterways subject to preeminent public rights of navigation are expanding dramatically. This expansion establishes the public's right of access to waterways once thought to be private and challenges longstanding concepts of private property rights.

These recent developments are taking place concurrently in both the federal and state courts. The analytical means adopted by each judicial system to achieve that end, however, differ substantially.[12]

This article will review these parallel developments in the law of navigability. Section I briefly summarizes the traditional rules of navigability that have evolved over the past century. Section II analyzes recent federal decisions amplifying upon and liberalizing the federal law of navigability. Section III discusses two lines of state court cases, one focusing on the public trust doctrine and the other on public rights

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[9] *See, e.g.*, Marks v. Whitney, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380-81, 98 Cal. Rptr. 790, 796-97 (1970); People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1045, 1050, 97 Cal. Rptr. 448, 451, 454 (3d Dist. 1971); GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, *Legal Aspects of Instream Use* (1978).

[10] Perhaps one of the most definitive and widely publicized works documenting the environmental values of wetlands is *Our Nation's Wetlands*, published in 1978 by the President's Council on Environmental Quality. Lake Tahoe is a prominent example of an inland waterway with inestimable recreational and ecological values that faces clear and present environmental dangers. Both the resources of Lake Tahoe and the causes of their decline have been extensively documented. *See, e.g.*, TAHOE REGIONAL PLANNING AGENCY, TOWARD A SHORE-ZONE PLAN FOR LAKE TAHOE (1972); U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE AND TAHOE REGIONAL PLANNING AGENCY, FISHERIES OF LAKE TAHOE AND ITS TRIBUTARY WATERS: A GUIDE FOR PLANNING (1971); CALIFORNIA TAHOE REGIONAL PLANNING AGENCY, REGIONAL PLAN (1980).

[11] *See* sections II-IV *infra*.

[12] *See* sections II-III *infra*.

of navigation to minor waterways, and how they are coalescing to create a California rule that may be greater than the sum of its parts. Finally, Section IV contrasts federal and state approaches and offers some suggestions regarding their future utility and viability.

I. RULES OF THE GAME: THE SCHIZOID NATURE OF THE LAW OF NAVIGABILITY

> The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances at all times.[13]

Any discussion of the law of navigability necessarily begins with the recognition that the concept is a slippery one, capable of multiple interpretations and definitions. To appreciate this schizoid nature of the law of navigability, one need venture no further than the decisions of the United States Supreme Court.[14] Even a cursory examination of these cases shows that they address such wide ranging subjects as title to the beds of waterways,[15] the scope of federal power under the commerce clause of the United States Constitution,[16] riparian water rights,[17] and

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[13] United States v. Appalachian Elec. Power Co., 311 U.S. 377, 404 (1940).

[14] Utah v. United States, 403 U.S. 9 (1971) (title to bed of lake); United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) (applicability of Federal Power Act of 1920 and commerce clause); United States v. Oregon, 295 U.S. 1 (1935) (title to bed of lake); United States v. Utah, 283 U.S. 64 (1931) (title to beds of several streams); United States v. Holt State Bank, 270 U.S. 49 (1926) (title to bed of lake); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922) (title to bed of river); Oklahoma v. Texas, 258 U.S. 574 (1922) (title to bed of river); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921) (applicability of Rivers and Harbors Act of 1899); United States v. Cress, 243 U.S. 316 (1917) (compensability of property rights taken under navigation servitude); Donnelly v. United States, 228 U.S. 243 (1913), *modified at* 228 U.S. 708 (1913) (navigability for purposes of determining appropriate jurisdiction for criminal prosecution); Leovy v. United States, 177 U.S. 621 (1900) (applicability of 1890 act of Congress dealing with obstructions in navigable waters); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) (applicability of 1890 act of Congress dealing with obstructions in navigable waters); St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349 (1897) (riparian rights under Minnesota law); Egan v. Hart, 165 U.S. 188 (1897) (power of state to construct dam across allegedly navigable stream); Packer v. Bird, 137 U.S. 661 (1891) (title to bed of stream); The Montello, 87 U.S. (20 Wall.) 430 (1874) (admiralty jurisdiction); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870) (admiralty jurisdiction).

[15] *See* section I(A) *infra.*

[16] *See* section I(B) *infra.*

[17] St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U.S. 349 (1897).

admiralty law.[18]

For purposes of this article, navigability is significant in three principal contexts.[19] The first is the standard by which title to the beds of lakes and rivers is established (the federal title test). The second is the standard of navigability used to establish federal regulatory jurisdiction under the commerce clause. Finally, navigability is a term embraced by various state court systems to define the scope of, for example, public rights of passage and recreational use. These distinct principles of navigability are briefly discussed below.

A. Federal Title Test

The ownership of land under navigable waters is a fundamental incident of state sovereignty.[20] Prior to the admission of the several states, the federal government held these lands in trust for the benefit of those states and their citizens. The beds of these navigable waterways automatically vested in the respective states as they entered the Union and assumed sovereignty on an "equal footing" with the original thirteen states.[21] Once a state enters the Union, its power over the beds of navigable waters is subject to a single limitation: the paramount authority of the United States to ensure that such waters remain free to interstate and foreign commerce.[22] Determining which waterways are "naviga-

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[18] The Montello, 87 U.S. (20 Wall.) 430 (1874).

[19] A comprehensive survey of all facets and legal interpretations of navigability is beyond the scope of this article. *See generally* Johnson & Austin, *Recreational Rights and Title to Beds of Western Lakes and Streams*, 7 NAT. RESOURCES J. 1 (1967); MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U.L. REV. 511 (1975).

[20] Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). In *Martin*, a colonial grant of New Jersey tidelands was construed as being for the benefit of the citizenry at large:

> For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

Id. at 410.

[21] Montana v. United States, 450 U.S. 544, 551-52 (1981), *reh'g denied*, 452 U.S. 911 (1981); Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 375-81 (1977). Under the equal footing doctrine, the new states "have the same rights, sovereignty and jurisdiction . . . as the original states possess within their respective borders." Mumford v. Wardell, 73 U.S. (6 Wall.) 423, 436 (1867). These rights include ownership of the lands underlying the navigable waters within the state's boundaries. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 229 (1845).

[22] Montana v. United States, 450 U.S. 544, 551 (1981); United States v. Oregon,

ble" for purposes of this title test is indisputably a matter of federal rather than state law.[23] Nonetheless, state courts have concurrent jurisdiction to apply the federal test in disputes over title to navigable waters.[24]

The criteria embodied in the federal title test were originally articulated by the Supreme Court over a century ago 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 are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[25]

Over a century later, that statement remains the most oft-quoted articulation of the rule. Ironically, *The Daniel Ball* did not involve the issue of title to the bed of inland waterways; it concerned the parameters of admiralty jurisdiction. Yet the seven subsequent Supreme Court cases that dealt directly with "navigability for title" adopted the *Daniel Ball* definition as the basic federal test for identifying submerged beds to which the state holds title.[26]

The Supreme Court expanded upon the *Daniel Ball* rule in *United States* v. *Holt State Bank*,[27] stating that "navigability does not depend on the particular mode in which such use is or may be had . . . nor on an absence of occasional difficulties in navigation, but on the fact, . . . that the stream in its natural and ordinary condition affords a channel for useful commerce."[28]

The federal test of navigability for title purposes can be distilled into

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295 U.S. 1, 14 (1935).

[23] United States v. Utah, 283 U.S. 64, 75 (1931); United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926). Significantly, this was not considered the rule in the 19th century. Early decisions took the view that the question of title to the beds and shores of navigable waters was one purely of state law. *See, e.g.*, Railroad Co. v. Schurmeir, 74 U.S. (7 Wall.) 272 (1868).

[24] State *ex rel.* Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954); State v. Bunkowski, 88 Nev. 623, 632, 503 P.2d 1231, 1236 (1972). In California, the Attorney General has occasionally been called upon to give advisory opinions on the matter. *See, e.g.*, 55 Op. Cal. Att'y Gen. 293 (1972) (Tuolumne River); 36 Op. Cal. Att'y Gen. 20 (1960) (Salton Sea).

[25] 77 U.S. (10 Wall.) 557, 563 (1870).

[26] Utah v. United States, 403 U.S. 9 (1971); United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922); Oklahoma v. Texas, 258 U.S. 574 (1922); and, arguably, Packer v. Bird, 137 U.S. 661 (1891).

[27] 270 U.S. 49 (1926).

[28] *Id.* at 56.

seven distinct elements:

1. Navigability Is a Question of Fact

Navigability is to be determined by reviewing the applicable facts in each case.[29] Accordingly, analogies to other waterways or a legislative declaration regarding navigability are neither controlling nor particularly helpful.[30]

2. Susceptibility for Navigation

Although actual use of a river or lake is relevant to the determination of whether a particular waterway is navigable, such evidence is not essential.[31] The rationale underlying this principle is obvious: many waterways are located in regions, particularly the American West, which were sparsely populated at the time of statehood. Navigabililty depends on the waterway's natural features, not on actual historical use, which is often determined by population trends.[32]

3. The Waterway Must be Susceptible to Navigation as a Highway

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[29] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

[30] United States v. Utah, 283 U.S. 64, 75 (1931) (Utah statute declaring rivers navigable not determinative in federal litigation over title to beds of waterways); Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 399, 60 P.2d 825, 828 (1936) (fact that Newport Bay not declared navigable by Legislature until 1909 does not mean that it was not navigable in fact before that date).

[31] The Montello, 87 U.S. (20 Wall.) 430, 441 (1874); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

[32] The Supreme Court stressed this point in United States v. Utah, 283 U.S. 64 (1931), when it rejected the argument posed by the federal government that evidence of actual past use is required:

> In view of past conditions, the Government urges that the consideration of future commerce is too speculative to be entertained. Rather it is true that, as the title of a State depends upon the issue, the possibilities for growth and future profitable use are not to be ignored. *Utah*, with its equality of right as a State of the Union, *is not to be denied title* to the beds of such of its rivers as were navigable in fact at the time of the admission of the State either *because the location* of the rivers and the circumstances of the exploration and settlement of the country through which they flowed *had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the developments of natural resources.* And *this capacity may be shown by physical characteristics and experimentation* as well as by the uses to which the streams have been put.

for Public Passage

Several early cases held that a waterway must be susceptible to navigation for commerce.[33] Recent decisions have simply required a waterway's use as a highway for transporting people or goods.[34] The fact that the body of water is wholly within one state or is geographically isolated does not adversely affect navigability for title purposes. Moreover, actual private, recreational, or experimental use can demonstrate susceptibility as a highway for public passage or even for commerce.[35]

4. A Waterway Must be Navigable in its "Natural and Ordinary Condition"

In determining navigability for title purposes, the court must determine a waterway's capacity for navigation in its natural and ordinary condition.[36] Thus, artificial changes such as dams and fills should be ignored.[37]

5. Navigability is Established at the Time of Statehood

Navigability for title purposes is determined as of the date the particular state was admitted to the Union.[38] Thus, substantial historical investigation is often necessary. However, post-statehood history is relevant to the inquiry if the waterway retains its natural or near natural condition.[39] Conversely, intervening events that render a waterway non-navigable do not make it non-navigable in law if it was susceptible of trade and travel in its original condition.[40]

6. Navigability Need Not be Continuous

A particular waterway may be navigable for title purposes despite occasional impediments such as sand or gravel bars, riffles, or occasional log jams.[41] Nor is it determinative that a lake or river is not

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Id. at 83 (emphasis added). *See also* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405-10 (1940); The Montello, 87 U.S. (20 Wall.) 430, 441 (1874).

[33] *See, e.g.*, Packer v. Bird, 137 U.S. 661, 667 (1891); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

[34] Utah v. United States, 403 U.S. 9, 11 (1971).

[35] *Id.*; United States v. Utah, 283 U.S. 64, 83 (1931).

[36] United States v. Holt State Bank, 270 U.S. 49, 56 (1926).

[37] *Id.*; United States v. Utah, 283 U.S. 64, 75-79 (1931).

[38] Utah v. United States, 403 U.S. 9, 9-10 (1971). California, for example, became a state on Sept. 9, 1850.

[39] *Id.*; United States v. Utah, 283 U.S. 64, 82 (1931).

[40] *Cf.* Economy Light & Power Co. v. United States, 256 U.S. 113 (1921).

[41] United States v. Utah, 283 U.S. 64, 86-87 (1931). *See also* The Montello, 87 U.S.

navigable year round.[42]

7. Navigability May be Based on Capacity to Support Relatively Small Craft

The requisite navigation may be by any "customary method of trade or travel."[43] Early cases quickly found that navigability should not depend solely upon evidence of large watercraft such as steamers or sailing ships. Over a century ago, the Supreme Court observed that "[i]t would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway."[44] Over the years, a variety of moderately sized craft have passed legal muster as adequate proof of navigability.[45]

B. Federal Commerce Clause Test

A second relevant standard of navigability arises under the United States Constitution,[46] most importantly the commerce clause.[47] In the landmark case of *Gibbons* v. *Ogden*,[48] the Supreme Court first held that navigation was an implicit concern of the commerce clause. The Court subsequently held that the power to regulate navigation necessarily carried with it control over navigable waters.[49] Federal regulatory jurisdiction over navigable waterways has manifested itself in several congressional enactments.[50]

As in questions of title to waterways, commerce clause jurisdiction over navigable waters raises the issue of determining navigability. Congress and various administrative agencies have struggled to fashion defi-

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(20 Wall.) 430, 441-42 (1874).

[42] United States v. Utah, 283 U.S. 64, 87 (1931); Economy Light & Power Co. v. United States, 256 U.S. 113, 122 (1921).

[43] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). *See also* United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405-06 (1940).

[44] The Montello, 87 U.S. (20 Wall.) 430, 441 (1874).

[45] *See, e.g.*, Utah v. United States, 403 U.S. 9 (1971) (livestock barges and tourist excursion craft); United States v. Holt State Bank, 270 U.S. 49 (1926) (variety of small craft and flatboats).

[46] *See, e.g.*, U.S. CONST. art. I, § 8 (war powers clause); U.S. CONST. art. IV, § 3 (public property clause).

[47] U.S. CONST. art. I, § 8, cl. 3: "[Congress shall have the power] to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[48] 22 U.S. (9 Wheat.) 1 (1824).

[49] *See, e.g.*, Gilman v. City of Philadelphia, 70 U.S. (3 Wall.) 713 (1865).

[50] *See, e.g.*, Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-406 (1976); Federal Power Act, 16 U.S.C. §§ 791a-828c (1976 & Supp. V 1981).

nitions of navigability,[51] but the question ultimately remains a matter for judicial resolution.

The principal case defining navigability for commerce clause purposes is *United States* v. *Appalachian Electric Power Company*.[52] Under *Appalachian Power* and its progeny,[53] the commerce clause test of navigability closely tracks the federal title test. Indeed, they are identical, with three notable exceptions. First, navigability for commerce clause purposes can arise after statehood.[54] Second, unlike the title test, reasonable improvements in enhancing navigation may be considered in determining a waterway's navigability under the commerce clause. Stated another way, the "natural and ordinary condition" prong of the title test is inapplicable.[55] These two variations might lead one to conclude that the commerce clause test of navigability is more liberal than the title test. However, this conclusion is substantially tempered by the third distinction between the two standards. To be navigable for commerce clause purposes, a waterway must serve as a link in interstate or foreign commerce. The title test contains no such requirement.[56]

Although this article does not focus on federal regulatory control over lakes and rivers, many cases arising under the commerce clause address public rights to navigable waterways.[57] This is particularly true concerning sovereign title questions. Many commerce clause decisions contain a searching inquiry of aspects of the two coextensive standards.[58] To the extent that the commerce clause cases analyze such navigability

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[51] *See, e.g.*, 16 U.S.C. § 796(8) (1976), defining "navigable waters" under the Federal Power Act; and 33 C.F.R., § 329 (1981), defining navigable waters for purposes of United States Army Corps of Engineers' jurisdiction under the Rivers and Harbors Act of 1899.

[52] 311 U.S. 377 (1940) (finding New River a navigable waterway for purposes of Federal Power Commission jurisdiction, thereby requiring FPC license prior to construction of hydroelectric dams on river).

[53] *See, e.g.*, Miami Valley Conservancy Dist. v. Alexander, 692 F.2d 447 (6th Cir. 1982); Puget Sound Power & Light Co. v. Federal Energy Regulatory Comm'n, 644 F.2d 785 (9th Cir. 1981); Connecticut Light & Power Co. v. Federal Power Comm'n, 557 F.2d 349 (2d Cir. 1977).

[54] United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408 (1940).

[55] *Id.*

[56] Utah v. United States, 403 U.S. 9, 10 (1971); Oregon v. Riverfront Protective Ass'n, 672 F.2d 792, 794 n.1 (9th Cir. 1982); Sierra Pacific Power Co. v. Federal Energy Regulatory Comm'n, 681 F.2d 1134, 1137-39 (9th Cir. 1982). *See also* notes 30-34, 36-38 and accompanying text *supra*.

[57] *See, e.g.*, United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); Puget Sound Power & Light Co. v. Federal Energy Regulatory Comm'n, 644 F.2d 785 (9th Cir. 1981); Loving v. Alexander, 548 F. Supp. 1079 (W.D. Va. 1982).

[58] *See* note 57 *supra*.

concepts, they are directly applicable to title test concerns.[59]

C. State Tests of Navigability

Individual states are free to establish their own rules of navigability for purposes other than determining title and defining the limits of federal regulatory power.[60] Many states have formulated their own stan-

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[59] In recent years, certain cases purporting to define navigability in the commerce clause context have extended the notion of navigability far beyond the bounds of either federal title test or traditional commerce clause precedents. Among the most notable is N.R.D.C. v. Callaway, 392 F. Supp. 685 (D.D.C. 1975). In *Callaway*, the district court interpreted "navigable waters" as that term is found in Section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1976 & Supp. V 1981). Section 404 prohibits the discharge of dredged or fill materials into "navigable waters" without a federal permit. The court found that in Section 404 Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability." 392 F. Supp. at 686. The *Callaway* decision forced the United States Army Corps of Engineers to expand broadly its permit authority over dredging and filling activities, and provoked a controversy that continues to this day. *See, e.g.*, 40 Fed. Reg. 31,322-43 (1975); 47 Fed. Reg. 31,793 (1982).

This expansive view of navigability has triggered new legal questions. In Kaiser Aetna v. United States, 444 U.S. 164 (1979), for example, the Supreme Court focused on the Corps of Engineers' assertion of jurisdiction over a shallow lagoon in Hawaii. The Court found that the claim of jurisdiction, based on the Rivers and Harbors Act, constituted a taking of property in violation of the fifth amendment to the United States Constitution under the rather unique facts of the case.

One significant way in which such cases differ from the traditional line of title and commerce clause navigability decisions lies in the governmental objective sought to be enforced. In the latter type of cases, the focus is on the waterway's susceptibility for navigation. Jurisdiction in both *Callaway* and *Kaiser Aetna* was predicated on quite different concerns: protection against deleterious water quality in *Callaway*, and promotion of public land and water access to what originally had clearly been private property in *Kaiser Aetna*. For this reason, the line of decisions represented by these two cases may well constitute a distinct and separate set of principles rather than a substantive modification to more traditional notions of navigabiity and navigable waters. *See* Oregon v. Riverfront Protective Ass'n, 672 F.2d 792, 795 n.2 (9th Cir. 1982); Loving v. Alexander, 548 F. Supp. 1079, 1090-91 (W.D. Va. 1982).

[60] This principle was cogently summarized in a recent California decision, Hitchings v. Del Rio Recreation & Park Dist., 55 Cal. App. 3d 560, 567, 127 Cal. Rptr. 830, 834 (1st Dist. 1976):

> These federal definitions [for title test and commerce clause purposes] are controlling when applicable to the context of the problem at hand, and the federal government retains paramount control over waters navigable under the commerce clause definition. However, in all other respects, the states are free to prescribe their own definitions of navigability, and, when not in conflict with federal dominion, "the exclusive control of waters is vested in

dards to establish a right of public passage along lakes and rivers[61] and to promote expanded recreational opportunities to these inland waterways.[62] State rules of navigability for these purposes have tended to be far more liberal than traditional formulations of either of the federal tests.[63] The result has been to make available for public use lakes and rivers considered too modest to constitute state sovereign lands under the federal title test or to subject them to federal regulatory power under the commerce clause, at least under early federal decisions.

California has been at the forefront of this trend, providing that the public may use for boating and related recreational purposes any body of water that may be navigated using a small oar or motor propelled craft.[64] This standard has been characterized as "a recreational boating

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> the state, whether the waters are deemed navigable in the Federal sense or in any other sense."

(Citations omitted.) The power of the states to establish their own rules of navigability has been expressly recognized by the United States Supreme Court. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 89 (1922); Donnelly v. United States, 228 U.S. 243, 262 (1913).

[61] *See, e.g.*, Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912); Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); Luscher v. Reynolds, 153 Or. 625, 56 P.2d 1158 (1936).

[62] *See, e.g.*, People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3d Dist. 1971); Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

[63] By using criteria far less imposing than those applied under the federal tests summarized above, these state standards of navigability embrace a broader scope of waterways, including minor lakes and streams as well as artificially created waterways. *See, e.g.*, Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 568, 127 Cal. Rptr. 830, 834 (1st Dist. 1976); Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1st Dist. 1951); Wilbour v. Gallagher, 462 P.2d 232 (Wash. 1969). *See also* Johnson & Austin, *Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1 (1967); Annot., 6 A.L.R. 4th 1030 (1981).

[64] The California test of navigability was articulated in People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1050, 97 Cal. Rptr. 448, 454 (3d Dist. 1971):

> The modern determinations of the California courts, as well as those of several of the states, as to the test of the 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.

Numerous other states have fashioned their own standards of navigability and concomitant public rights to inland lakes and rivers. *See, e.g.*, Muench v. Public Service Comm'n, 261 Wis. 492, 53 N.W.2d 514 (1952); Day v. Armstrong, 362 P.2d 187 (Wyo. 1961). *Cf.* People v. Emmert, 597 P.2d 1025 (Colo. 1979). For a comprehensive review of these sometimes disparate state approaches, see Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 568-70, 127 Cal. Rptr. 830, 834-37

test of navigability."[65] The rights conferred upon the public to navigable waterways are in the nature of a public recreational easement, existing irrespective of private ownership claims to the river or lake bed.[66]

II. EXPANDING STATE SOVEREIGN INTERESTS IN WATERWAYS: THE FEDERAL TITLE TEST OF NAVIGABILITY RECEIVES A LIBERAL APPLICATION

> [N]avigable waters, in contrast with non-navigable waters, is but one way of expressing the idea of public waters, in contrast with private waters.[67]

The standards of navigability under both federal and California law have been the subject of considerable judicial scrutiny in recent years. Building upon precedents, the courts have broadly construed the definition of navigable waterways.

This trend is seen most clearly in the context of the federal test of navigability for title purposes. Until recently, the federal title test was considered settled, due largely to the infrequent appellate decisions addressing the question of navigability and sovereign title.

The federal title test was traditionally considered the most "stringent" iteration of navigability in the legal system.[68] Early decisions of

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(1st Dist. 1976); People *ex rel.* Baker v. Mack, 19 Cal. App. 3d at 1045-48, 97 Cal. Rptr. at 450-53; Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1 (1967); Annot., 6 A.L.R. 4th 1030 (1981).

[65] Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 568, 127 Cal. Rptr. 830, 835 (1st Dist. 1976).

[66] *Id.* at 571, 127 Cal. Rptr. at 837. While these public rights of navigation find strong support in California common law, they are also embodied in the state Constitution and statutes. *See, e.g.*, CAL. CONST. art. XV, § 4:

> No individual, partnership or corporation claiming or possessing the frontage of title lands in a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right-of-way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

See also CAL. CIV. CODE § 3479 (West 1980) (unlawful obstruction to free public use of navigable waterways constitutes a nuisance); CAL. HARB. & NAV. CODE § 131 (West 1978) (obstruction of navigable waterways a misdemeanor); CAL. PENAL CODE § 370 (West 1970) (same).

[67] Nekoosa Edwards Paper Co. v. Railroad Comm'n, 201 Wis. 40, 47, 228 N.W. 144, 147 (1929).

[68] This perception is actually somewhat misguided, as explained in notes 54-56 and accompanying text *supra*. *See also* United States v. Oregon, 295 U.S. 1, 14 (1935); United States v. Utah, 283 U.S. 64, 75 (1931).

the Supreme Court, lower federal courts, and state tribunals reflected a relatively strict reading of the federal test of navigability.[69]

However, recent federal court opinions, and certain federal administrative decisions signal a broader formulation of the concept of navigability. Virtually without exception, these decisions reflect a more liberal view of the federal title test. In part, this trend can be attributed to the recent increase in litigation over title to the beds of inland waterways. The courts have resolved these cases by broadly reading the earlier precedents. The decisions have embraced the smallest watercraft imaginable, along with mere timber products, as proper evidence of historic use under the federal standard. Additionally, the decisions have found insignificant the fact that the waterways in question are often seasonal in nature or possess formidable obstructions to navigation. Finally, the *degree* of proof required to support a finding of navigability appears to be far less substantial than it once was.

The result of these developments is twofold. First, there is an increase in state sovereign claims to inland lakes and rivers once thought to be owned by the federal government or private parties. Second, much new litigation testing the limits of this suddenly dynamic area of the law has arisen. Several of the most important new decisions are summarized below.

A. The Decisions

1. The Little Missouri River Case

In *North Dakota v. Andrus*,[70] the Eighth Circuit Court of Appeals applied the title test of navigability in a dispute between North Dakota

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[69] *See, e.g.*, United States v. Oregon, 295 U.S. 1 (several lakes in Oregon found non-navigable despite documented use by trappers in variety of small craft); Oklahoma v. Texas, 258 U.S. 574 (1922) (portions of Red River forming common boundary between Texas and Oklahoma determined non-navigable for title purposes); North American Dredging Co. of Nev. v. Mintzer, 245 F. 297, 300 (9th Cir. 1917) (San Pablo Canal near Richmond, California non-navigable despite evidence "that occasionally power boats and scows of light draft have been taken up through San Pablo Creek into the channel involved"); Harrison v. Fite, 148 F. 781 (8th Cir. 1906) (Arkansas waterways susceptible of navigation in some seasons of year by canoes, skiffs, and dugouts, are nonetheless non-navigable for title purposes, since deemed not to be useful highways of commerce); State *ex rel.* Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954) (Minnesota rivers found non-navigable by state court applying federal test of navigability).

[70] North Dakota *ex rel.* Bd. of Univ. & School Lands v. Andrus, 671 F.2d 271 (8th Cir. 1982), *cert. granted on other grounds sub nom.* Block v. North Dakota *ex rel.* Bd. of Univ. & School Lands, 103 S. Ct. 48 (1982) (mem.).

and the federal government over title to the bed of the Little Missouri River. The state argued that the river was navigable under the federal standard and therefore owned by North Dakota in its sovereign capacity. The federal government, on the other hand, claimed that the Little Missouri was non-navigable. Accordingly, it claimed title to its bed as an incident of federal upland ownership.[71] The lawsuit had been precipitated by the federal government's issuance of mineral leases to the bed of the waterway.

North Dakota filed suit in federal district court to stop these leasing efforts and to obtain a declaration of the river's navigability. The state prevailed at the district court level,[72] and the United States appealed.

The court of appeals sustained the district court decision, holding that the river was navigable for title purposes and the riverbed was therefore sovereign land owned by North Dakota in trust for its citizens. The court relied exclusively on evidence of isolated cases of historic use by small craft such as canoes, some brief and unsuccessful efforts to float logs downstream, and current use annually by hundreds of recreational canoes.[73] The court was not dissuaded by the fact that the river was impassable at certain times of the year due to winter freezes, high flood levels during spring runoff periods, and low summer flows. Moreover, the opinion recounts facts showing that the waterway's maximum depth was two and one-half feet.[74]

Although the *North Dakota* court cited and relied on the Supreme Court's decisions in *The Daniel Ball, The Montello*, and especially *Utah v. United States*,[75] it nonetheless recognized that its decision was not based on particularly strong evidence.[76]

The Little Missouri River decision constitutes a major precedent in the law of navigability for title purposes for several reasons. First, the case demonstrates that the capability of a waterway to support only the

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[71] *See, e.g.*, Packer v. Bird, 137 U.S. 661, 672-73 (1891).

[72] North Dakota *ex rel.* Bd. of Univ. & School Lands v. Andrus, 506 F. Supp. 619 (N.D. 1981).

[73] North Dakota *ex rel.* Bd. Of Univ. & School Lands v. Andrus, 671 F.2d 271, 277-78 (8th Cir. 1982).

[74] *Id.*

[75] *Id.* at 277.

[76] The court wrote:

> Although we feel that the evidence in the record concerning navigability is rather thin, we still affirm the district court. The legal standards on navigability are liberal, and we must bear in mind that the issue is one of potential commercial use and hence navigability at the time of statehood, not in the present day.

Id. at 278.

smallest of craft, such as a canoe, is a proper touchstone of title test navigability.[77] Second, the case constitutes perhaps the most liberal application of the principle that a waterway need not be navigable year round.[78] Third, the case suggests that the modest physical characteristics of a waterway are not determinative. The court found the river navigable despite its shallow bottom, substantial rapids, swift moving current, and other obstructions. Fourth, the decision explicitly relies on the modern private recreational use of the water to demonstrate navigability under the federal test, that is, as a highway for public passage, trade, or commerce. Finally, the court found evidence of logging to be a proper indication of navigability for title purposes.[79]

2. The White River Case: Logging and Navigability

Another recent federal court decision also found that logging is an adequate basis for navigability. In *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission,*[80] the Ninth Circuit Court of Appeals considered the navigability of the White River in the State of Washington. The case arose under the commerce clause with the Federal Energy Regulatory Commission (F.E.R.C.) asserting licensing jurisdiction over the river under the Federal Power Act.[81] Rejecting an

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[77] *Cf.* United States v. Oregon, 295 U.S. 1 (1935).

[78] Indeed, from the language of the decision, it appeared that on an annual basis the Little Missouri is more often impassible than not. North Dakota *ex rel.* Bd. of Univ. & School Lands v. Andrus, 671 F.2d 271, 277-78 (8th Cir.), *cert. granted on other grounds sub nom.* Block v. North Dakota *ex rel.* Bd. of Univ. & School Lands, 103 S. Ct. 48 (1982) (mem.).

[79] The Little Missouri River case contains another legal issue unrelated to the present inquiry but nonetheless of substantial proportions. The Eighth Circuit also ruled that the 12 year statute of limitations contained in the federal quiet title statute, 28 U.S.C. § 2409a(f) (1976), does not apply in an action brought by a state to quiet its claim to sovereign lands. This latter issue was appealed to the United States Supreme Court which granted a writ of certiorari. 671 F.2d 271, 273-76 (8th Cir. 1982), *cert. granted sub nom.* Block v. North Dakota *ex rel.* Bd. of Univ. & School Lands, 103 S. Ct. 48 (1982) (mem.). As this article went to press, the case was still pending before the Supreme Court. The federal government chose not to appeal that portion of the Eighth Circuit's decision dealing with the navigability of the Little Missouri River. Accordingly, that portion of the court of appeal's ruling is final. *Cf.* STERN & GROSSMAN, SUPREME COURT PRACTICE 361 (B.N.A. 1978).

[80] 644 F.2d 785 (9th Cir. 1981).

[81] The federal government often finds itself in a somewhat novel position in litigating navigability issues. On the one hand, the federal government owns millions of acres of land in the Western United States, both in a proprietary capacity and as trustee for numerous Indian tribes. Accordingly, in cases involving navigability for title test purposes, the federal government generally is in the position of arguing that various water-

earlier decision of the Washington Supreme Court holding the identical reach of the White River non-navigable,[82] the Ninth Circuit ruled the waterway navigable for commerce clause purposes.

The court premised its finding exclusively on evidence of use by Indian canoes and the flotation of "shingle bolts" downstream,[83] noting however, that "[s]hingle bolts were not driven on the White River without difficulty. Nor was the use of the river extensive, or long and continuous."[84] The upland owners had argued that mere evidence of a commercial timber drive was insufficient to establish navigability. Echoing the Eighth Circuit in *North Dakota*, the court rejected this contention, stating that navigability does not depend upon the size of articles transported in commerce, but upon the stream's usefulness as a transportation mechanism for commerce. The court added that the tests for navigability must consider the wide variations of a waterway's uses.[85]

Puget Sound is particularly significant because it based navigability almost *exclusively* on river transportation of timber supplies. Moreover, the shingle bolts involved were so moderately sized that they could be transported on comparatively small waterways. Thus, *Puget Sound* represents a further liberalization of the navigability standard for commerce clause purposes and, by inference, for title test purposes as

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ways are non-navigable. The result, assuming this contention is correct, is that the federal upland property interests would extend into and include the bed of the waterway in question. On the other hand, the federal government often takes an expansive view of its jurisdiction for commerce clause purposes and thus argues for a broad interpretation of navigability in the commerce clause context. Given the similarities between the two legal standards, the potential for legal inconsistencies in the government's far-flung litigation efforts becomes apparent.

[82] Sumner Lumber & Shingle Co. v. Pacific Coast Power Co., 72 Wash. 631, 131 P. 220 (1913), *discussed in* Puget Sound Power & Light Co. v. Federal Energy Regulatory Comm'n, 644 F.2d 785, 787-88 (9th Cir. 1981).

[83] The decision defines shingle bolts as being "a quartered section of log, normally cedar, and . . . about four feet six inches in length." Puget Sound Power & Light v. Federal Energy Regulatory Comm'n, 644 F.2d 785, 788 n.3 (9th Cir. 1981).

[84] *Id.* at 789.

[85] *Id.*, relying in part on United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405-06 (1940). The *Puget Sound* decision brings the Ninth Circuit into conformance with the views of several other federal courts that have relied upon historic evidence of logging to find inland waterways navigable for commerce clause purposes. *See, e.g., Appalachian Elec. Power Co.*, 311 U.S. at 405, St. Anthony Falls Water Power Co. v. St. Paul Water Comm'n, 168 U.S. 349, 359 (1897); Connecticut Light & Power Co. v. Federal Power Comm'n, 557 F.2d 349, 357 (2d Cir. 1977); Wisconsin v. Federal Power Comm'n, 214 F.2d 334, 336 (7th Cir.), *cert. denied*, 348 U.S. 883 (1954).

well.[86]

3. The McKenzie River Case: Logging and Title Test Navigability

As discussed above, the tests of navigability for title and commerce clause purposes are quite similar.[87] The holding in *Puget Sound*, a commerce clause case, was extended by the Ninth Circuit to a sovereign title case in *State of Oregon v. Riverfront Protective Association.*[88]

In *Riverfront*, the bed of the McKenzie River in Oregon was the subject of a title dispute. The state claimed that the bed of the river constituted state sovereign trust lands. Defendants, riparian landowners claiming title derived from federal upland land grants, asserted that the bed of the McKenzie River was privately owned. The issue was whether the river had been navigable for title purposes upon Oregon's admission to the Union in 1859.

The sole evidence of navigability posited by Oregon was the fact that the McKenzie River had been used for log drives for several years in the late 1800s. The district court held this evidence insufficient as a matter of law to demonstrate navigability for title purposes,[89] and the Ninth Circuit Court of Appeals reversed.

In so doing, the court predictably relied on *Puget Sound.* Recognizing the distinctions between title and commerce clause navigability,[90] the court nonetheless found the earlier case controlling. It did so even in the face of facts arguably less compelling than those in *Puget Sound.* Driving logs on the McKenzie, the court observed, required constant attention to avoid such difficulties as logjams, flooding, and low

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[86] The extent to which this position represents a pronounced change from earlier legal views is illustrated by reference to the California Supreme Court's decision in the early case of American Water Co. v. Amsden, 6 Cal. 443, 446 (1856):

> To . . . attribute navigable properties to a stream which can only float a log, is carrying the doctrine entirely too far, and is turning a rule which was intended to protect the public, into an instrument of serious detriment to individuals, if not of actual private oppression. The important uses to which the waters of non-navigable streams are constantly applied, would have no security or certainty under such a stretch of construction. Dams for the erection of mills, manufactories, canals, for the purpose of irrigation, supplying mines, or even to subserve navigation itself, would have to give way to the mere claim of the right to float a saw-log, and if a log, why not a plank, or a fishing rod? The idea of navigation certainly never contemplated such a definition or such results.

[87] *See* notes 52-56 and accompanying text *supra.*

[88] 672 F.2d 792 (9th Cir. 1982).

[89] The district court opinion is unreported.

[90] 672 F.2d at 794 n.1.

seasonal flows. Still, the river was successfully used to transport logs.[91]

The court noted in *Riverfront* that although log drives regularly occurred on the McKenzie in the late 1800s and early 1900s, they were not a year round activity. It observed that log drives generally occurred over a two and one-half month period in late spring. The court found that the river was never utilized during high water periods from November through March due to unsafe conditions, and that insufficient water levels prevented logging during the low water period from July through October.[92]

Finally, the *Riverfront* court focused on the title test requirement that a river must be navigable in its natural condition for purposes of determining title. It noted the lower court finding that the McKenzie had sometimes been temporarily deepened for logdriving through the construction of "wing dams." The court held that such minor alterations facilitated the log drives but did not "improve" the river significantly.[93]

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[91] The court wrote:

> Like the logs transported down the McKenzie, the shingle bolts in *Puget Sound* "required nearly constant handling by the drivers to break up jams, free those bolts that were lodged on the banks and shallow areas, and direct them down the main channel of the river." . . .
>
> Transportation on the McKenzie may have been somewhat more difficult. In *Puget Sound* drivers found the work "not difficult," 644 F.2d at 788, whereas on the McKenzie it took substantial logging crews an average of from thirty to fifty days to complete a log drive down the 32-mile reach at issue. Unfavorable circumstances could increase this time to over ninety days. Intractable log jams had to be broken up with dynamite. Too much rain caused uncontrollable flooding; too little exposed gravel bars, boulders, and shoals. Crews might spend three or four days moving logs across a single gravel bar. But notwithstanding such difficulties, thousands of logs and millions of board feet of timber were driven down the river. Significantly, the evidence shows that the logs floated on the McKenzie were much larger than shingle bolts floated on the White River in *Puget Sound* and, apparently, the entire volume of traffic also was larger.

Id. at 795 (footnote omitted).

[92] 672 F.2d at 795.

[93] The court observed:

> [T]hese crude dams cannot reasonably be deemed to have altered the natural condition of the river. The same is true of all the other artificial aids to logdriving — log booms, peaveys, "dogs," two-horse teams, and dynamite — with which log drivers on the McKenzie plied their laborious trade. These rough means facilitated the transport of logs on the McKenzie, but they did not improve the river. Certainly they bear little resemblance to the planned civil engineering projects considered to be reasonable improvements in *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377,

Thus, *Riverfront* is important for several reasons. First, it expressly found that evidence of logging activity, standing alone, is adequate to prove navigability for title purposes. Stated another way, navigation solely *downstream* suffices as a matter of law for title test navigability purposes.[94] Second, the case shows that hazards and obstructions in the river that made log drives difficult and required extensive human acts to overcome do not preclude a finding of navigability. Finally, *Riverfront* demonstrates that the capability of a waterway to support navigation for as little as two and one-half months per year constitutes an adequate capacity for navigation under the title test. Each of these principles reflects a major development in the law of navigability.

4. The Kankakee River Decision: Support From The East

Navigability questions usually arise in litigation over waterways located in the western United States.[95] This can be attributed to the following factors that make these lands increasingly valuable: shifting population patterns; increased interest in mineral exploration and development activities; and heightened activism of Native American tribes asserting their property interests.

Occasionally, however, eastern jurisdictions have left their mark in this area of the law. In a recent case, *Illinois v. Corps of Engineers*,[96] the Corps of Engineers determined that a seventy-mile stretch of the Kankakee River in Illinois was non-navigable under the Rivers and Harbors Act of 1899. Illinois challenged the Corps' ruling. The district court held for the state, finding the Kankakee to be navigable. As in the cases discussed above,[97] historical evidence of actual use was sparse.

> 418-18 (1940) (improvements for keelboat and steamboat use). Thus, the McKenzie was used in its ordinary condition as a highway for useful commerce.

Id. at 796 (footnotes and citations omitted).

[94] The decision follows an earlier Nevada decision taking the same position in a case involving logging and sovereign title questions. State v. Bunkowski, 88 Nev. 623, 503 P.2d 1231 (1972).

[95] All of the seven previously cited title test navigability cases decided by the Supreme Court, for example, involve waterways located west of the Mississippi. *See* note 26 *supra*. Virtually all of the recent decisions analyzed in this article also concern lakes and rivers in the western states.

[96] 17 Env't Rep. Cas. (BNA) 2214 (Jan. 9, 1981).

[97] Oregon v. Riverfront Protective Ass'n, 672 F.2d 792 (9th Cir. 1982); North Dakota *ex rel.* Bd. of Univ. & School Lands v. Andrus, 671 F.2d 271 (9th Cir. 1982), *cert. granted on other grounds sub nom.* Block v. North Dakota *ex rel.* Bd. of Univ. & School Lands, 103 S. Ct. 48 (1982) (mem.); Puget Sound Power & Light Co. v. Federal Energy Regulatory Comm'n, 644 F.2d 785 (9th Cir. 1981).

The court recounted random trips in small craft by explorers, trappers, fur traders, and Indians in the eighteenth and nineteenth centuries. It was unimpressed with the federal government's argument that the river was shallow, long and sinuous, and passed through a large swamp area. The court noted that even a single trip by a supply boat could raise an inference of navigability. Past use, even though sporadic, was held sufficient for a finding of navigability.[98]

Illinois arises under the commerce clause,[99] but nonetheless bears on the general question of title test navigability because the pertinent distinctions between the two tests are inapplicable.[100] Like the *North Dakota* case,[101] *Illinois* illustrates the increased tendency of the federal courts to premise a finding of navigability on sporadic evidence of small craft similar to recreational boats.[102]

5. The Truckee River Opinion: Sierra Whitewater

The most recent statement by the Ninth Circuit Court of Appeals on

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[98] The court stated that:

> This evidence is clearly sufficient to establish navigability even if the defendants' contentions were accurate. Acknowledging that "use of a stream long abandoned by water commerce is difficult to prove by abundant evidence," 311 U.S. at 416, the Supreme Court in *Appalachian Electric* noted that an inference of navigability could arise even by a single trip of a government supply boat despite the need of the crew to get out and push or even through testimony of "sporadic" use.
>
> The most the federal defendants could hope to establish at trial would be the fact that transportation on the River was difficult and sporadic. Yet the conclusions of the District Counsel regarding these supposed difficulties are legally irrelevant since, given the undisputed documentary evidence of *some* past use, neither the frequency of such use nor its cause are necessary conditions for establishing navigability and the lack thereof does not negate navigability.

Illinois v. Corps of Engineers, 17 Env't Rep. Cas. (BNA) 2214, 2216 (N.D. Ill. 1981) (emphasis in original).

[99] Due to the cryptic nature of the opinion, the context in which the court considered navigability in *Illinois* is unclear. Communications with trial counsel, however, reveal that the case involved regulatory jurisdiction under the Rivers and Harbors Act (telephone conversation with Judith S. Goodie, Asst. Attorney General, State of Illinois, counsel for plaintiff, Dec. 9, 1982).

[100] *See* notes 53-56 and accompanying text *supra*.

[101] North Dakota *ex rel.* Bd. of Univ. & School Lands v. Andrus, 671 F.2d 271 (8th Cir. 1982), *cert. granted on other grounds sub nom.* Block v. North Dakota *ex rel.* Bd. of Univ. & School Lands, 103 S. Ct. 48 (1982) (mem.).

[102] Other recent cases from the eastern United States involving commerce clause jurisdiction similarly illustrate a liberal application of navigability principles. *See, e.g.*, Miami Valley Conservancy Dist. v. Alexander, 692 F.2d 447 (6th Cir. 1982) (portions

the law of navigability involved a dispute over the Truckee River. The Truckee begins at the northwest shore of Lake Tahoe, California, and flows northeasterly down the eastern slope of the Sierra Nevada, terminating 100 miles away at Pyramid Lake, Nevada. The F.E.R.C. claimed that the river was navigable, and that it therefore had jurisdiction to license hydroelectric power operations under the Federal Power Act. The Sierra Pacific Power Company, which operates several such projects on the Truckee, protested the government's assertion of jurisdiction. In a lengthy administrative decision, the F.E.R.C. found the Truckee navigable for commerce clause purposes, and therefore under the Federal Power Act.[103] Sierra Pacific appealed the ruling to the Ninth Circuit, which reversed in *Sierra Pacific Power Company v. Federal Energy Regulatory Commission.*[104]

The opinion recounts in considerable detail the physical characteristics of the Truckee. Of particular significance are the court's observations that the gradient (rate of vertical fall) of the Truckee ranges from negligible levels to 100 feet per mile. Most of the river has a gradient of twenty-five to forty feet per mile.[105] The only evidence of historical navigation cited by the court was the use of segments of the river for logging.[106]

No clear evidence was presented to show that the portion of the river straddling the California/Nevada border had ever been used for logging or had the physical capacity for such use. Because there was no effective interstate link, the Truckee was held to be non-navigable for commerce clause purposes.[107]

Although *Sierra Pacific* held the Truckee River to be non-navigable, it is nonetheless instructive to analyze the decision for title test purposes. In dicta, the court appeared to find major stretches of the river in both California and Nevada navigable for intrastate title purposes.

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of Great Miami River navigable under Rivers & Harbors Act and therefore subject to federal regulatory jurisdiction; upriver portion and certain tributaries of Great Miami River non-navigable); Loving v. Alexander, 548 F. Supp. 1079 (W.D. Va. 1982) (Jackson River is a navigable water of the United States based on minimal evidence, but not subject to United States Army Corps of Engineers' jurisdiction under Rivers & Harbors Act because waterway located entirely within Virginia).

[103] Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Co., Env't Rep. Cas. (BNA) 61 (Aug. 10, 1979).

[104] 681 F.2d 1134 (9th Cir. 1982).

[105] *Id.* at 1136.

[106] *Id.* at 1136-39.

[107] It was this portion of the river that contained a gradient of 100 feet per mile and a "possibly significant obstruction to navigation" consisting of "two long boulder-filled drops." *Id.* at 1138-39.

These "findings" appeared to be based on prior state determinations and the fact that those intrastate portions of the Truckee were shown by documented historic logging operations to be more susceptible to navigation than the segment transsecting the state border.[108]

Sierra Pacific is also significant because it reaffirms the Ninth Circuit's previously stated view in *Puget Sound* and *Riverfront* that logging represents a sufficient form of navigation for title and commerce clause navigation. Moreover, the gradients of those portions of the Truckee wholly within California and Nevada that the court appeared to find navigable for intrastate purposes are far more pronounced than those of other rivers previously considered navigable for title purposes by the federal appellate courts.[109]

6. The Alaskan Experience: Special Circumstances and Expanding Principles

Since Alaska was admitted to the Union in 1959, considerable controversy has existed over property rights to its waterways. Administrative decisions of the federal government have embraced the expansive view of navigability typified in the judicial decision of the Alaska Native Claims Appeal Board (Board) in *Appeal of Doyon, Ltd.*[110]

The Board, a part of the United States Department of the Interior, was established to administer the Alaska Native Claims Settlement Act.[111] Title to the Kandik and Nation Rivers, which are tributaries to the Yukon, was contested. The issue was whether these rivers were navigable. If so, they passed as sovereign lands to Alaska upon its admission to the Union. If non-navigable, the beds of these rivers would remain available for federal conveyance to Native tribes or private interests.

In a unanimous decision, the Board reversed the prior decision of the Bureau of Land Management, another branch of the Department of the Interior. The Board held that the Kandik and Nation Rivers in Alaska are navigable for title purposes and therefore held in trust by the state. The Board prefaced its lengthy opinion by asking whether use of a river by trappers employing such small craft as pole, tunnel,

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[108] *Id.* at 1137 n.4, 1138-39.

[109] *Cf.* discussion of river gradients contained in United States v. Utah, 283 U.S. 64, 77-81 (1931) (finding navigable portions of several rivers in Utah containing gradients ranging from 1 to 11 feet per mile).

[110] 86 Interior Dec. 692 (1979).

[111] 43 U.S.C. §§ 1601-1628 (1976 & Supp. IV 1980) as implemented in 43 C.F.R. §§ 2650.0-.8 (1981), and 43 C.F.R. §§ 4.900-.913 (1981).

and river boats is sufficient evidence to sustain a finding of navigability.[112]

The Board based its findings of navigability solely on the fact that the rivers historically had been used in connection with trapping, trading, and the transport of supplies and furs by trappers.[113] The administrative decision went on to find that small craft such as pole boats, tunnel boats, and outboard river boats constituted the customary modes of trade on those waterways, thus supporting a finding of state sovereign ownership.[114] The Board also based its ruling on the presently widespread recreational use of the rivers.[115] Relying on recent judicial decisions on navigability,[116] the Board rejected the Bureau of Land Management's arguments that the rivers should be declared non-navigable because of their sparse use, physical impediments in the waterways, and frozen consistency for approximately seven months each year.[117]

In *Doyon*, an administrative agency of the federal government adopted the broad view of navigability recently espoused by the federal courts. Like *North Dakota* and *Illinois*, *Doyon* relies exclusively on evidence of navigation by very small craft. In *Doyon*, sparse level of historic use was not significant; instead, physical susceptibility of the rivers for navigation was the key. The administrative decision also shows that a waterway may be navigable despite significant physical obstructions and the fact that, on the average, they are passable for only five months of the year. In this regard, the Board's ruling mirrors the decisions in *Riverfront* and *North Dakota*. Finally, *Doyon* lends fur-

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[112] Appeal of Doyon, Ltd., 86 Interior Dec. 692, 694 (1979).

[113] *Id.* at 703.

[114] *Id.* at 705.

[115] The Board observed:

> In the present case, historical use by trappers was within the living memory of some of the witnesses, and use of the rivers continues, although the purpose is increasingly for recreation rather than trapping . . . [R]ecreation [sic] use of itself, may not suffice the susceptibility test for purposes of navigation for title. Present use of recreation [sic] purposes may be properly considered as a corroborating factor in determining susceptibility for uses of highway of commerce. The Board notes that if the type of watercraft used for recreation is capable of carrying a commercial load, and is commonly used to do so, then use of such watercraft offers some indication that the waterway is capable of being used for the purpose of useful commerce.

Id. at 706. *Cf.* United States v. Utah, 283 U.S. 64, 82 (1931).

[116] Utah v. United States, 403 U.S. 9 (1971); United States v. Holt State Bank, 270 U.S. 49 (1926).

[117] Appeal of Doyon, Ltd., 86 Interior Dec. 692, 697-98 (1979).

ther credence to recreational use as valid evidence of historic navigability. The federal government's decision in *Doyon* thus represents an administrative counterpart to a long line of judicial decisions enunciating a liberal test of navigability for title purposes.

B. The Evolving Federal Law of Navigability: New and Liberal Application of the Doctrine

Together, the decisions analyzed above demonstrate the broadening of the federal title test of navigability. These developments affect property rights to many western lakes and rivers. Cases have arisen in both federal courts and administrative tribunals, and involve disputes arising directly under the title test and under the closely related commerce clause standard.

This change has altered several of the elements comprising the federal title test.[118] First, several decisions attach little significance to the documented use of the contested waterway. The mere *susceptibility* of a lake or river for use is increasingly stressed. Second, recent decisions deemphasize commercial navigation of these waterways, relying instead on isolated instances of navigation, experimental efforts, and even purely recreational use. Subtly modifying the venerable *Daniel Ball* standard, the cases find navigability based on public passage alone without sustained commercial utility. Third, the decisions evince a liberalized view toward obstructions to navigation. The fact that waterways are shallow, frozen, or otherwise impassable for most of the year, or subject to pronounced gradients, does not compel the conclusion that they are non-navigable, and may even support a finding of navigability. Finally, the smallest type of craft or object such as canoes, skiffs, logs, and even pieces of timber may constitute the "customary method of trade or travel."

These cases suggest a clear trend favoring a finding of navigability. As a result, increasing numbers of lakes and rivers are viewed as being navigable under federal law. Assuming that claims are vigorously pursued, the beds of these waterways — together with their important recreational, ecological, and economic values — are likely to be found sovereign assets of the several states rather than incidental appendages of private upland ownership or, alternatively, part of the vast federal domain.

Neither these developments nor the consequences have been lost on the states. Currently pending are many cases in which states seek to

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[118] *See* notes 29-45 and accompanying text *supra*.

quiet title to the beds of inland lakes and rivers. Virtually all of these cases deal with waterways in the Western United States, and most involve litigation between individual states and the federal government.[119] The decisions summarized above will bear heavily in the resolution of those pending sovereign claims. Not since 1971 has the United States Supreme Court dealt with the issue of navigability for purposes of establishing state sovereign title.[120] Given the plethora of pending and anticipated litigation on the subject, the Supreme Court may soon have occasion to speak again. At least until it decides to do so, however, liberal application of the title test of navigability will continue.

III. THE CALIFORNIA ALTERNATIVE: THE PUBLIC TRUST DOCTRINE

> In the courts of the Western States, there is much conflict of opinion . . . .[121]

Although federal courts have promoted public rights to waterways by broadly interpreting the established federal title test of navigability, the

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[119] A partial listing of these cases includes the following: Alaska v. United States, No. A81-265CIV (D. Alaska) (state quiet title action to bed of Slopbucket Lake); Alaska v. United States, No. A80-359CIV (D. Alaska) (quiet title action concerning navigability of Gulkana River); Alaska v. United States, No. A81-483CIV (D. Alaska) (state ownership of submerged lands in Alaska being litigated in connection with Alaska Native Claims Settlement Act of 1971); Alaska v. Warner, No. A-78-69 (D. Alaska) (quiet title action to bed of Colville River, involving boundary dispute between State of Alaska and United States Navy involving former Naval Petroleum Reserve No. 4); State v. Yuba Goldfields, Inc., et al., No. S-79-733-RAR (E.D. Cal.) (quiet title action brought by California against federal government and private mining corporation concerning title to bed of Yuba River); Nevada v. United States, et al., No. R-78-015 (D. Nev.) (state title claim to bed of Ruby Lake, contained within Ruby Lake National Wildlife Refuge); 101 Ranch v. United States, No. CIV 82k-81-89 (D. N.D.) (quiet title action brought against federal government to determine ownership to portion of Devil's Lake; state has intervened); Utah v. United States, No. 79-0302 (C.D. Utah) (quiet title action brought by Utah against United States to quiet state's title to bed of Utah Lake); Brandenberger v. State of California, Nevada County Superior Court, No. 21947 (quiet title action brought by private upland owners against California concerning title to Donner Lake).

[120] Utah v. United States, 403 U.S. 9 (1971). In *Utah*, the Court held the Great Salt Lake to be navigable. Accordingly, the Court found its bed to be owned in trust by Utah. The Court relied on limited evidence of navigation on the Lake in connection with riparian agricultural operations and a short lived excursion craft. In many ways, *Utah* is the most liberal of the Supreme Court's seven rulings on navigability for title purposes. Accordingly, it perhaps can be viewed as the case precipitating the current development in federal title test navigability.

[121] Packer v. Bird, 137 U.S. 661, 669 (1891) (discussing law of navigability).

individual states have followed a somewhat different course. California appears to rely upon the public trust doctrine to expand public access to its system of lakes and waterways. In so doing, the California courts, already known for their broad interpretation of the public trust doctrine, are extending the limits of trust principles into previously uncharted areas. To fully understand this development, a brief discussion is necessary of California's development of the public trust doctrine and its rules establishing public access to and passage upon lakes and rivers.

A. The Public Trust Doctrine in California

The public trust doctrine has recently been the subject of renewed interest in California law. It has evolved into a basic element of modern environmental law.

Although the public trust concept was developed under the English common law, it actually dates back to Roman civil law.[122] Simply stated, the doctrine provides that certain resources are held by the sovereign in special status. Government may not alienate these resources; nor may it permit their injury or destruction by private parties. Instead, governmental officials have an affirmative duty to safeguard the long term preservation of these resources for the general public.[123]

The public trust doctrine first achieved prominence in American jurisprudence in the United States Supreme Court's decision, *Illinois Central Railroad v. Illinois*.[124] In *Illinois*, the Court invalidated the Illinois Legislature's earlier grant of Chicago's waterfront because it impermissibly alienated a public resource that was incapable of private ownership.

California law early embraced the public trust doctrine[125] and the California Supreme Court incorporated the *Illinois Central* doctrine into California law in *Oakland v. Oakland Water Front Co.*[126] The

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[122] For a discussion of the historic underpinnings of the public trust doctrine, see Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-84 (1970).

[123] For a detailed analysis of the public trust doctrine, see Althaus, PUBLIC TRUST RIGHTS (U.S. Fish & Wildlife Service 1978); Dunning, *The Significance of California's Public Trust Easement for California's Water Rights Law*, 14 U.C. DAVIS L. REV. 357, 367-78 (1980); Sax, note 122 *supra*; Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980).

[124] 146 U.S. 387 (1892).

[125] *See, e.g.*, People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 P. 1152 (1884); Ward v. Mulford, 32 Cal. 365 (1867).

[126] 118 Cal. 160, 50 P. 277 (1897).

court held that land between the lines of ordinary high and low tide along the Oakland waterfront was subject to the trust and therefore incapable of private sale.

The public trust doctrine achieved full flower in California in *People v. California Fish Company*.[127] Some seventy years later, *California Fish* remains perhaps the most important explication of the doctrine in California law. In *California Fish*, the supreme court reviewed the validity of state tideland and swamp and overflowed lands patents for lands on the Southern California coast. Rather than adopt the somewhat harsh sanction authorized by *Illinois Central* and wholly invalidate the patents, the court adopted a more moderate course. It held that implicit in any grant encompassing tidelands or other sovereign lands were two kinds of property interests. The first was a proprietary interest. Assuming that the other necessary conditions of sale were met, this proprietary interest was susceptible of private ownership. However, the court also ruled that the public trust interest, also a public trust easement, is incapable of private ownership. Thus the court held that any conveyance of sovereign lands remains subject to the trust easement, retained by the state in perpetuity for benefit of its citizens.[128] These principles, along with related concepts articulated in the *California Fish* decision,[129] remain a vital element of California public trust law to this day.

Three major developments in public trust doctrine in recent years affect the present analysis. The first involves the spectrum of trust uses; the second, express application of the trust doctrine to California's lakes and rivers; and, finally, application of public trust principles to natural resources other than the beds of waterways.

Traditionally, public trust purposes were denominated as commerce, navigation, and fishing.[130] These trusts uses were at one time deemed

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[127] 166 Cal. 576, 138 P. 79 (1913).

[128] *Id.* at 584-85, 598-99, 138 P. at 82-83, 88-89. California law provides that the public trust easement can be extinguished under very limited circumstances not applicable here. *See, e.g.*, 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), *discussed in* notes 147-49, 199-201 and accompanying text *infra*. City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 521-25, 606 P.2d 362, 364-67, 162 Cal. Rptr. 327, 329-32, *cert. denied*, 449 U.S. 840 (1980); City of Long Beach v. Mansell, 3 Cal. 3d 462, 481-86, 476 P.2d 423, 436-41, 91 Cal. Rptr. 23, 36-41 (1970); People v. California Fish Co., 166 Cal. at 585-87, 138 P. at 82-84.

[129] 166 Cal. at 596-99, 138 P. at 87-88.

[130] *See, e.g., California Fish Co.*, 166 Cal. at 584-85, 138 P. at 82-83; Oakland v. Oakland Water Front Co., 118 Cal. at 183-84, 50 P. at 285-86. The California Supreme Court recently characterized these as "the traditional triad of uses." National

exclusive. Indeed, courts often viewed other potential functions of trust lands, such as recreational use, to be valid only to the extent that they did not conflict with commerce, navigation, and fishing.[131]

This traditional formulation of the trust was broadened and rearticulated in the California Supreme Court's landmark decision, *Marks v. Whitney*.[132] The court first held that the public trust easement necessarily encompasses recreational uses and environmental protection in addition to the traditional uses. The court also held that, like many venerable common law doctrines, the public trust is a constantly evolving legal tool capable of expanding to meet changing public needs.[133]

The second development is equally noteworthy. Until recently, most of the reported California decisions analyzing the public trust doctrine involved tidally influenced waters along California's coast.[134] This is

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Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 434, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356 (1983).

[131] *See, e.g.*, People *ex rel.* State Lands Comm'n v. City of Long Beach, 200 Cal. App. 2d 609, 617, 19 Cal. Rptr. 585, 590 (2d Dist. 1962) (recreational conditions imposed by municipality on trust lands were valid so long as they did not interfere or conflict with public trust uses for commerce, navigation, and fishing); Los Angeles Athletic Club v. Long Beach, 128 Cal. App. 427, 429-30, 17 P.2d 1061, 1063 (1st Dist. 1952) (characterizing navigation and fisheries as "paramount" trust uses, and allowing recreational use of such lands only because that use was deemed consistent with traditional trust purposes under facts involved).

[132] 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

[133] The court observed that:

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another . . . . There is 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. It is not necessary to here define precisely all the public uses which encumber tidelands.

6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

[134] City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980) (Berkeley waterfront, San Francisco Bay); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (Tomales Bay); City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970) (Alamitos Bay); Mallon v. City of Long Beach, 44 Cal. 2d 199, 282 P.2d 481 (1955) (Long Beach tidelands); Boone v. Kingsbury, 208 Cal. 148, 273 P. 797, *appeal dismissed, cert. denied*, 280 U.S. 517 (1929) (Ventura County tidelands); People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) (San Pedro Bay).

understandable given historic settlement patterns which have resulted in the urbanization of California's coast. This history, however, triggered the misconception that the trust doctrine applied only to tide and submerged lands.[135] The notion was forcefully rejected by the California Supreme Court in two recent cases. In *State v. Superior Court (Lyon)*[136] and *State v. Superior Court (Fogerty)*,[137] the court ruled that *all* lands under navigable waters are held in trust, without distinguishing between tidal and nontidal waterbodies.[138]

A third facet of the public trust doctrine currently undergoing judi-

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[135] *See, e.g.*, Littman, *Tidelands: Trusts, Easements, Custom and Implied Dedication*, 10 NAT. RESOURCES LAW. 279 (1977). This misperception may in turn be based on the ill-conceived notion that navigable waters are limited to those influenced by the ebb and flow of the tides. Such a rule arguably applied under the English common law. *See, e.g.*, Le Case del Royall Piscarie de le Banne, 1 Davies Rep. 55 (1674) (Le Reports des Cases & Matters en Ley, Resolver & Adjudes en les Courts del Roy en Ireland); M. HALE, DE JURE MARIS 3, *reprinted in* S. MOORE, HISTORY OF THE FORESHORE 378 (1888), but this "rule" was quickly discarded in this country as unsuitable for conditions in the United States. *See, e.g.*, Barney v. Keokuk, 94 U.S. 324, 339-40 (1876); Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Comment, *California's Tideland Trust: Shoring It Up*, 22 HASTINGS L.J. 759 (1971); Comment, *California's Tidelands Trust for Modificable Public Purposes*, 6 LOY. L.A.L. REV. 485 (1973).

[136] 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, *cert. denied*, 454 U.S. 865 (1981).

[137] 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 865 (1981).

[138] In *Lyon* and *Fogerty*, the state asserted public trust rights to the beds and shorelines of Clear Lake and Lake Tahoe, respectively. The private upland owners contended that the trust doctrine was inapplicable to inland lakes and rivers in California. The court responded in *Lyon*:

> The application of the trust doctrine to tidal waters is not confined to those bodies which are huge in size and important for purposes of commerce; we can see no reason why such a test should not be applied to nontidal waters . . . .[T]he public's rights in tidelands are not confined to commerce, navigation and fishing, but include recreational uses and the right to preserve the tidelands in their natural state. We discern no valid reason why the scope of the public's right in nontidal waters should not be equally broad. Lyon's assertions in this regard imply the resurrection of the common law distinction between tidal and nontidal waters — a distinction which has been thoroughly discredited in this country . . . . We hold that the same incidents of the trust applicable to tidelands also apply to nontidal navigable waters and that the public's interest is not confined to the water, but extends also to the bed of the water.

Lyon, 29 Cal. 3d at 228, 230-31, 625 P.2d at 250-51, 172 Cal. Rptr. at 707-08. *See generally* Comment, *The Public Trust After Lyon and Fogerty: Private Interests and Public Expectations — A New Balance, this issue infra*, at 634.

cial scrutiny concerns sovereign ownership questions. The cases have analyzed title claims to tidelands and, in some instances, the beds of major inland waters, that California received as an incident of sovereignty upon its admission to the Union.[139] These questions of sovereignty in turn were triggered by a finding that the waterway in question was navigable under the federal title test.[140]

Nevertheless, state courts have found that certain natural resources other than sovereign lands are imbued with the public trust and that "ownership" considerations are not particularly relevant. In *People v. Truckee Lumber Company*,[141] for example, the California Supreme Court recognized that the fish inhabiting the state's waterways — both navigable and non-navigable — are incapable of private "ownership" in the conventional sense; instead, they constitute trust resources for the public.[142] The *Truckee Lumber* decision represents a judicial separation of public trust considerations from traditional notions of riverbed ownership. The decision gives the trust a legitimacy separate from land title questions.[143]

Courts of other states have gone even further. In *Just v. Marinette County*,[144] the Wisconsin Supreme Court upheld governmental restrictions that barred private parties from filling wetlands. Basing its ruling on the environmental sensitivity of the wetlands, the court held that the property was subject to the public trust doctrine.[145] Most importantly,

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[139] *See, e.g.*, State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, 625, *cert. denied*, 454 U.S. 865 (1981); State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, *cert. denied*, 454 U.S. 865 (1981); City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980); People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913).

[140] *See* notes 20-118 and accompanying text *supra*.

[141] 116 Cal. 397, 48 P. 374 (1897).

[142] *Id.* at 399, 401, 48 P. at 374-75. *See also* People v. Glenn-Colusa Irrigation Dist., 127 Cal. App. 30, 30, 36, 15 P.2d 549, 549, 552 (3d Dist. 1932) (injunction barring diversion of water from Sacramento River sustained on grounds that diversions would have deleterious effect on wildlife. "The title to and property in the fish within the waters of the state are vested in the State of California and held by it in trust for the people of the state").

[143] For a general discussion of public trust principles applicable to California's fish and wildlife, see 53 Op. Cal. Att'y Gen. 332, 338-44 (1970).

[144] 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

[145] The court noted the environmental values of the wetlands involved, together with government's responsibility to maintain the area's pristine condition:

> We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present

the court did so in full recognition that the lands at issue were *privately* owned and not subject to a public property interest.[146]

By completely disassociating public trust considerations from questions of ownership, *Just* represents an extension of the *Truckee Lumber Company* philosophy. Under *Just*, the public trust is a fully independent legal force: the court relied solely on the trust to justify upholding stringent police power measures.

The separation of the public trust doctrine from its traditional real property law underpinnings is also manifested in the area of water rights. The public trust may serve as a limitation on the water rights systems administered by the various states.

This issue was recently addressed by the California Supreme Court in the landmark decision, *National Audubon Society v. Superior Court*.[147] In that case, the Audubon Society challenged the authority of

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> pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or securing of a benefit by the maintaining of the natural *status quo* of the environment. What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.

Just v. Marinette County, 56 Wis. 2d 7, 16-17, 201 N.W.2d 761, 768 (1972).

[146] The court held that private ownership of wetlands does not equate with the power to destroy them:

> Is the ownership of a parcel of land so absolute that man can change its nature to suit any of his purposes? . . . An owner of land has no absolute and unlimited right to change the natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.

Id. at 17, 201 N.W.2d at 768.

[147] 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983). North Dakota has embraced the public trust doctrine in the water rights context in a manner similar to California's. United Plainsman v. North Dakota State Water Comm'n, 247 N.W.2d 457 (N.D. 1976) (public trust doctrine requires state officials charged with allocating water supplies to gauge effect of permit upon existing and future state requirements, and to devise water conversation plan).

the City of Los Angeles to divert water for domestic, municipal, and industrial uses that would otherwise flow into and replenish Mono Lake. Alleging that the city's diversions were causing pronounced adverse effects on the Mono Lake environment, Audubon argued that the public trust doctrine constitutes a legal restraint on the city's ability to exercise its water rights. It contended that those rights may not be exercised in such a way as to unreasonably damage the ecology of the lake.

In a lengthy decision, the California Supreme Court generally upheld the contentions of the Audubon Society. It rejected Los Angeles' position that the public trust doctrine has been "subsumed" into the established system of appropriative water rights and therefore had no independent legal significance. Instead, it ruled that the public trust doctrine serves an essential role in the integrated system of California water law by preserving the continuing sovereign power of the state to protect public trust uses. The court found this power to preclude any water user from acquiring a vested right to harm the public trust, and that it imposes a continuing duty on state officials to consider such uses when allocating water resources. The court concluded that the Audubon Society could rely on the public trust doctrine to seek reconsideration of the allocation of the waters of Mono Lake.[148]

Even before the Supreme Court issued its decision, the *National Audubon* litigation had provoked substantial public controversy and commentary from legal scholars.[149] This debate can be expected to continue,

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[148] *Id.* at 452, 658 P.2d at 732, 189 Cal. Rptr. at 369. *National Audubon* makes four essential points in bridging the gap between the public trust doctrine and California's system of water rights law. First, the general principle that the state retains the continuing sovereign power to guard and control its sovereign trust resources prevents any party from appropriating water in a manner harmful to public trust interests. Second, the state nevertheless has the power to grant appropriative water rights to promote the efficient use of California's water resources, even when to do so might harm trust resources. Third, the state has the affirmative duty of balancing these competing uses in order to avoid "unnecessary and unjustified harm to trust interests." Finally, the state may reweigh these interests over time to meet "current needs"; stated another way, it retains continuing jurisdiction over water rights permits held by private interests to address new or altered public trust concerns that may arise in the future. *Id.* at 445-48, 658 P.2d at 726-29, 189 Cal. Rptr. at 363-66.

[149] Both the substantive issues and the procedural history of the Mono Lake litigation have been discussed extensively by various commentators with a wide spectrum of viewpoints. *See, e.g.*, Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law*, 14 U.C. DAVIS L. REV. 357 (1980); Hoff, *The Legal Battle Over Mono Lake*, CAL. LAW., Jan. 1982, at 28; Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy*, 22 SANTA CLARA L. REV. 63 (1982); Comment, *The Public Trust Doctrine and California Water Law:* National Audubon Society v. Department of Water and Power, 33

given the important ramifications of the *National Audubon* opinion.

The possible application of the public trust doctrine in the context of water rights law further demonstrates its potential utility and viability independent of the sovereign lands context.[150] In recent years, various other state and federal courts have applied the public trust doctrine in other than the traditional sovereign lands context. These include public park acquisition and development,[151] marshlands,[152] wildlife,[153] and dissipation of natural resources in general.[154] Thus, recent public trust doctrine cases demonstrate an enhanced vitality of the doctrine, reflecting the willingness of the common law to recognize changed circumstances and adapt accordingly.

HASTINGS L.J. 653 (1982).

[150] One principle of existing California water rights law that facilitates incorporation of the public trust doctrine is that running water is incapable of private ownership. Private parties obtain a right to use the water, but ownership always remains with the public. Schaezlein v. Cabaniss, 135 Cal. 466, 470, 67 P. 755, 757 (1902); Big Rock Mut. Water Co. v. Valyermo Ranch Co., 78 Cal. App. 266, 274, 276, 248 P. 264, 267 (1st Dist. 1926). For a general discussion of these principles, see 53 Op. Cal. Att'y Gen. 332, 345-48 (1970).

[151] Gould v. Greylock Reservation Comm'n, 359 Mass. 410, 215 N.E.2d 114 (1966) (proposed lease of rural parklands for ski resort beyond power of state legislature); State v. Public Service Comm'n, 275 Wis. 112, 81 N.W.2d 71 (1957) (filling of lake bed within city park does not violate trust doctrine).

[152] Freeborn v. Bryson, 297 Minn. 218, 210 N.W.2d 290 (1973) (Minnesota marshlands may not be filled in connection with county highway construction unless no feasible alternative exists).

[153] State Dep't of Envtl. Protection v. Jersey Cent. Power & Light Co., 133 N.J. Super. 375, 336 A.2d 750 (1975), *rev'd on other grounds*, 69 N.J. 102, 351 A.2d 337 (1976) (discharge of nuclear powerplant wastewaters into creek limited by trust doctrine); State v. City of Bolling Green, 38 Ohio St. 2d 281, 313 N.E.2d 409 (1974).

[154] Sierra Club v. Department of Interior, 376 F. Supp. 90 (N.D. Cal 1974), *further proceedings*, 398 F. Supp. 284 (N.D. Cal. 1975). *See also*, Payne v. Kassab, 11 Pa. Commw. 14, 28, 312 A.2d 86, 93 (1973):

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

(Citing PA. CONST. art. I, § 27). *But cf.* San Diego County Archeological Soc'y Inc. v. Compadres, 81 Cal. App. 3d 923, 146 Cal. Rptr. 786 (4th Dist. 1978) (archeological artifacts located on private property do not constitute resources subject to public trust doctrine).

B. Public Rights of Navigation and Access to Navigable Waters in California

Simultaneously with the evolution of the public trust doctrine in California, a separate line of cases developed that firmly establishes the public's right of access to and use of California's navigable inland waterways.[155] These decisions made it clear that this public right was distinct from the issue of who owned the bed of the waterway. Nor have the recent cases enunciating this public right of navigation equated it with or even relied on the public trust doctrine. This public right of recreational boating is simpler and more straight forward than the public trust doctrine in California.[156] For example, the test of navigability for purposes of determining the existence of these public water rights involves simply the capacity of a given lake or river to support small recreational craft.[157] In order to fully understand the relationship of this right of recreational navigation to the public trust doctrine, however, it is necessary to briefly discuss the cases that have yielded the former rule.

The law of public access to and use of California navigable waterways was originally applied by the courts to resolve disputes between competing and often irreconcilable commercial uses. For example, at the height of the Gold Rush era, the state's rivers were the main focus of gold mining activities. By the 1860s, hydraulic mining had superceded the previously relied upon system of placer mining. Hydraulic mining greatly damaged the environment of the Mother Lode region and the Sacramento Valley. A torrent of hydraulic debris filled and choked California's rivers, flooding vast areas of land and causing massive damage to agricultural and ranching operations. In two landmark decisions — one federal and one state — the courts enjoined hydraulic mining as an impermissible intrusion upon farmers' and ranchers' ability to use California's rivers and surrounding areas.[158]

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[155] For a discussion of a promising constitutional theory of access to waterways, see Comment, *The Constitutional Right to Fish: A New Theory for Access to the Waterfront, this issue infra*, at 661.

[156] *See* notes 60-66 and accompanying text *supra*.

[157] People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 1050, 97 Cal. Rptr. 448, 454 (3d Dist. 1970).

[158] Woodruff v. North Bloomfield Mining Co., 18 F. 753 (9th Cir. 1884); People v. Gold Run Ditching & Mining Co., 66 Cal. 138, 4 P. 1152 (1884). The California Supreme Court recently recounted this history in citing *Gold Run* as "one of the epochal decisions of California history . . . ." National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 436, 658 P.2d 709, 720, 189 Cal. Rptr. 346, 357 (1983). For an excellent historical analysis of the debate over hydraulic mining, see R. KELLEY, GOLD

Other nineteenth-century California decisions similarly analyzed public rights of access to navigable waterways in the context of competing commerical pursuits.[159]

In *Forestier v. Johnson*,[160] the California Supreme Court first addressed recreational users' right of access to navigable waterways. The landowner in *Forestier* claimed that the land was private property, and that as an incident of ownership he had a right to exclude the public. The court ruled in favor of public access upon three interrelated points. First, relying on the earlier precedents of *Illinois Central*[161] and *Oakland Water Front*,[162] it held that the landowner's interest was subject to a public trust easement, and extended the public's trust rights to *recreational* navigation.[163] Second, the Supreme Court relied on Article XV, section 2 of the California Constitution[164] to support the public's access to Fly's Bay. The court observed that the statute which authorized the sale of the subject tidelands could not override the constitutional guarantee of free navigation.[165] Finally, the court appeared to rely on common law precedents favoring unfettered public access to navigable waterways. It found that recreational boating, fishing, or hunting should

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V. GRAIN (1959).

[159] *See, e.g.*, American Water Co. v. Amsden, 6 Cal. 443 (1856).

[160] 164 Cal. 24, 127 P. 156 (1912). *Forestier* involved a tidally influenced waterway known as Fly's Bay, which is a side channel emanating from the Napa River. The plaintiff claimed he owned the bed of the waterway — a contention that the defendant did not dispute. It was further agreed that while the channel was nearly dry at low tide, it was navigable at high tide by a variety of small boats used by plaintiff and other members of the public for fishing, hunting, and other recreational purposes. 164 Cal. at 28-31, 127 P. at 157-59.

[161] *Id.* at 30, 127 P. at 159. *See* notes 124-29 and accompanying text *supra*.

[162] *Id. See* notes 126-29 and accompanying text *supra*.

[163] The court relied on three theories for extending the public trust doctrine. Forestier v. Johnson, 164 Cal. 24, 29-30, 127 P. 156, 160 (1912).

[164] CAL. CONST. art. XV, § 2 has since become art. X, § 4, *quoted in* note 66 *supra*. The text of the provision has remained unchanged.

[165] The court held that:

> The power of the legislature is limited by the provisions of the constitution, which are mandatory and prohibitory. Therefore, if it can dispose of, or authorize the disposition of, the underlying soil to private ownership, it cannot thereby authorize the alienee to obstruct the free navigation of such water . . . . We think it is plain that the provisions for the sale of swamp and overflowed, salt marsh, and tide lands as set forth in the Political Code were not intended to affect or extinguish the public rights in navigable waters. The result is that the grantee of such lands may claim the portions of the land so purchased which are not capable of navigation, but that he must leave the navigable waters open for public use.

Forestier v. Johnson, 164 Cal. 24, 34-35, 127 P. 156, 160 (1912).

be afforded the same protected status as commercial navigation, because such rights are "incidental" to navigation.[166]

Forestier combines the public trust doctrine with the right of public access to navigable waterways. Although later cases bifurcated these concepts, *Forestier* was a precursor of the California Supreme Court's current thinking on the issue.

The next decision confronting the issue of public access to waterways was *Bohn v. Albertson*,[167] involving Frank's Tract, an island in the Sacramento-San Joaquin Delta which had been reclaimed and farmed for several decades until a levee break flooded the parcel in 1938. As in *Forestier*, the private landowner sued to exclude members of the public who were boating and fishing on the waters covering Frank's Tract. The parcel in *Bohn* was also subject to the ebb and flow of the tides and had been sold by the state to private parties.[168]

Bohn departed from the *Forestier* analysis, however, in finding that the lands had been sold as swamp and overflowed lands rather than tidelands. This distinction is significant because swamp and overflowed lands, unlike sovereign tide and submerged lands, are proprietary lands subject to absolute alienation.[169] Under conventional legal thinking, Frank's Tract was not impressed with the public trust because it was not sovereign land.

However, after noting that the property was now navigable in fact,[170] the court ruled that the public had a valid right to navigate and fish in the area. Although the water was not used for commercial purposes, the court noted it was being used by pleasure and fishing boats.[171]

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[166] According to the court:

> [H]unting . . . is a privilege which is incidental to the public right of navigation. There is no private property right in wild game . . . . The defendants . . . having the right of navigation over these waters, may exercise that right at will as a public right, and if, in doing so, they find game birds thereon, they may, during the lawful season, shoot and take them.

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

[167] 107 Cal. App. 2d 738, 238 P.2d 128 (1st Dist. 1951).

[168] *Id.* at 740-41, 238 P.2d at 130-31.

[169] *See, e.g.*, Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 400, 60 P.2d 825, 828 (1936); People v. California Fish Co., 166 Cal. 576, 596-99, 138 P. 79, 87-88 (1913).

[170] The decision contains a detailed discussion of the law of navigability under both federal and state law. 107 Cal. App. 2d 738, 742-45, 238 P.2d 128, 131-33 (1st Dist. 1951).

[171] Ironically, the court relied on an earlier United States Supreme Court decision involving title test navigability in arriving at its conclusion:

Characterizing the flooding of Frank's Tract as an avulsive change, the court ruled that the plaintiff had a right to reclaim the island, at which time the public's navigational rights would cease.[172]

Two interpretations of *Bohn* are possible. The first is that the court completely severed the question of the public's recreational boating rights from public trust considerations, ignored the former, and based its ruling exclusively on a common law navigational easement theory. This interpretation seems to be the one ascribed to the case by subsequent court of appeals decisions and is the principle articulated by later cases.[173]

A second reading of *Bohn* is that the court recognized and incorporated public trust principles in its determination. Under this view, the case found the public trust applicable despite the proprietary origins of the land title involved and, like *Forestier*, construed trust purposes to include boating and related recreational activities. Indeed, *Bohn* cited *Forestier* and *California Fish* without explicitly embracing the trust doctrine.[174] Unfortunately, the operative language of *Bohn* is vague enough to preclude a definitive answer to this question.[175]

> [T]he evidence conclusively shows that the water in its present "natural and ordinary condition affords a channel for useful commerce." (United States v. Utah . . . .) While not as yet available for heavy commercial traffic, it is being used by innumberable pleasure and fishing boats, and for the transportation of peat.

Bohn v. Albertson, 107 Cal. App. 2d 738, 747, 238 P.2d 128, 135 (1st Dist. 1951).

[172] The court neatly summarized its lengthy opinion as follows:

> [T]he waters of Frank's Tract are navigable until reclamation is made. The title is subject to the right in the public of navigation and fishing, because, by the sudden flooding of the tract by the San Joaquin River the rights of the public in the river are transferred to the waters of the tract. The title to the lands underlying the waters is not lost, and the owners have the right to reclaim. Plaintiffs, until the land is reclaimed, have no right to prevent the public from fishing on, or navigating these waters, provided the public can do so without trespassing on plaintiffs' land.

Id. at 757, 238 P.2d at 140-41.

The right to reclaim is not without limits, however. The *Bohn* decision notes that such efforts must be commenced "within a reasonable time." *Id.* at 749, 238 P.2d at 136. *See also* Mark Sand & Materials Co. v. Palmer, 51 N.J. 51, 237 A.2d 619 (1968) (landowner's failure to exercise right of reclamation for over 50 years terminates private interest and vests tideflowed lands permanently in state).

[173] Hitching v. Del Rio Woods Recreation Park Dist., 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1st Dist. 1976); People *ex rel.* Baker v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3d Dist. 1971). Both cases are described in greater detail in notes 176-87 and accompanying text *infra*.

[174] 107 Cal. App. 2d 738, 741, 238 P.2d 128, 131 (1st Dist. 1951).

[175] *Id.* The court held, in pertinent part:

In the decades after *Bohn*, a series of cases involving public navigational rights were handed down in quick succession. In *People ex rel. Baker v. Mack*,[176] Shasta County brought a successful action to restrain private landowners from maintaining physical obstructions across the Fall River which impeded public recreational use of the waterway. Unlike Fly's Bay and Frank's Tract, the Fall River is not tidally influenced. Although *Mack* refined and articulated the liberal state standard of navigability,[177] it rested on a common law theory of a recreational boating easement. Under *Mack*, the easement is triggered simply by the waterway's physical capacity to support small craft.[178] The court did not mention the public trust doctrine or state constitutional guarantees of public access.[179]

Hitchings v. Del Rio Woods Recreation & Park District[180] closely follows *Mack*. In *Hitchings*, pleasure boaters brought suit against a park district that had attempted to bar public access to the Russian River. As in *Mack*, the court framed the issue as the navigability of the river, applied the liberal state standard of navigability outlined above, and ultimately found the Russian River open to public use.[181] The court expressly disclaimed any interest in addressing title questions,[182] and avoided any reference to the California Constitution or the public trust doctrine.[183]

> Plaintiffs assume that because there was no express right of navigation and fishing in the patents of their lessors' predecessors, such right was not reserved to the state. Such assumption, however, is erroneous if there were navigable waters on the land at the time of the patents. That such right was reserved, although not expressed in the Constitution or in conveyances of swamp and overflowed lands, has been definitely decided in this state.

Id. See People v. California Fish Co., 166 Cal. 576, 138 P. 179 (1913); Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912); People *ex rel.* Robarts v. Russ, 132 Cal. 102, 64 P. 111 (1901).

[176] 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (3d Dist. 1971).

[177] *See* notes 64-66 and accompanying text *supra*.

[178] 19 Cal. App. 3d 1040, 1044, 1050, 97 Cal. Rptr. 448, 450, 454 (3d Dist. 1971).

[179] *See* CAL. CONST. art. X, § 4. For a distinct constitutionally based theory of public access to waterways, see Comment, *The Constitutional Right to Fish: A New Theory of Access to the Waterfront, this issue infra*, at 661.

[180] 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1st Dist. 1976).

[181] *Id.* at 568-71, 127 Cal. Rptr. at 834-37.

[182] *Id.* at 571, 127 Cal. Rptr. at 837.

[183] A related case is People v. Sweeter, 72 Cal. App. 3d 278, 140 Cal. Rptr. 82 (5th Dist. 1977). The defendant in that criminal trespass prosecution had attempted to kayak on the Kern River. The court of appeal reversed the trial court conviction, finding simply that the Kern was boated year round by small pleasure craft and therefore available for public use under the *Mack/Hitchings* standard.

The most recent California decision involving public rights to navigable waterways represents a closer link to the *Forestier* philosophy. In *People ex rel. Younger v. County of El Dorado*,[184] the state sought to invalidate a county ordinance banning all public navigation on the South Fork of the American River. Unlike in *Mack* and *Hitchings*, there was no dispute in *El Dorado* that the river was navigable. Instead, the county justified the ordinance as a safety and antilittering measure.

The court of appeal struck down the ordinance, relying on the state constitutional guarantee of public access to navigable waters rather than on the navigational easement theory espoused in *Mack, Hitchings,* and arguably *Bohn*. The court cited Article X, section 4 for the proposition that "the public's right of access to navigable streams is a constitutional right,"[185] and noted that the ordinance denied that right.[186] However, the court in *El Dorado*, like its immediate predecessors, did not refer to the public trust doctrine.

The recreational boating easement appears to be separate from the public trust "easement." The former is transitory in nature, arguably tied to the existence and location of the waters themselves and, within limits, subject to unilateral extinguishment through acts of the landowner.[187] In each of these respects the "navigational easement" affords substantially less protection to the natural resources and the public's right to enjoy them.

C. Merger of the Public Trust and Navigational Access Rights — The California Alternative to Navigability

Recently, the California Supreme Court has moved toward a merger of the public trust doctrine and the principles relating to public rights of access to waters for recreational purposes. Viewed from a slightly

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[184] 96 Cal. App. 3d 403, 157 Cal. Rptr. 815 (3d Dist. 1979).

[185] *Id.* at 406, 157 Cal. Rptr. at 817.

[186] *Id.* at 407, 157 Cal. Rptr. at 817; *see also* Lane v. City of Redondo Beach, 49 Cal. App. 3d 251, 122 Cal. Rptr. 189 (2d Dist. 1975) (city closure of public road abutting coastal beach invalidated as an unconstitutional interference with public access to navigable waters protected by art. XV, § 2 (now art. X, § 4)).

[187] *But see* Wilbour v. Gallagher, 77 Wash. 2d 306, 315-16, 462 P.2d 232, 237 (1969), *cert. denied*, 400 U.S. 868 (1970) (if level of lake raised artificially and maintained at that level for prescriptive period, artificially submerged lands permanently subject to public rights of navigation and private filling barred). The public trust is extinguishable only by specific and narrow means; *see* Comment, *The Public Trust After Lyon and Fogerty: Private Interests and Public Expectations — A New Balance, this issue infra*, at 633 n.12.

different perspective, the court has reaffirmed *Forestier v. Johnson* and seems prepared to apply its principles to California's inland waterways. These recent cases have held that the public's right of navigation is predicated in large part on the public trust doctrine, that the two are inseparable, and that they apply to nontidal lakes and rivers. Each of the cases relies heavily upon the navigational easement decisions by the lower courts,[188] which had previously received a more narrow interpretation.[189]

In *Marks v. Whitney*,[190] for example, the court cited *Bohn v. Albertson* and similar decisions from other states for the proposition that navigation, one of the oldest recognized trust purposes, encompasses numerous uses which many observers had considered only incidental to the public's pleasure boating rights. These uses 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."[191] Additionally, *Marks* relied on both *Bohn* and *Forestier* in stating that members of the public have standing to assert public trust rights of recreational boating and associated pursuits.[192]

The California Supreme Court expanded this theme in its 1981 *Lyon* decision.[193] The court rejected the private landowner's contention that the public trust was inapplicable to inland, nontidal waterways. The landowner in *Lyon* had maintained that inland waters were subject instead to the more limited navigational/recreational easement discussed in *Mack* and *Hitchings*. The court noted that the public trust encompassed purely recreational concerns, and that the trust cannot be confined to waters alone.[194]

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[188] *See* notes 176-86 and accompanying text *supra*.

[189] *See* notes 176-86 and accompanying text *supra*.

[190] 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971), discussed in notes 132-33 and accompanying text *supra*.

[191] *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

[192] *Id.* at 262, 491 P.2d at 381, 98 Cal. Rptr. at 797:

> They have been allowed to assert the public trust easement for hunting, fishing and navigation in privately owned tidelands *as a defense* in an action to enjoin such use (Forestier v. Johnson . . .) and to navigate on shallow navigable waters in small boats (Bohn v. Albertson . . .).

(Emphasis in original, citations omitted.)

[193] *See* notes 136-39 and accompanying text *supra*.

[194] The court framed and then disposed of the argument as follows:

> Our conclusion that the public trust is applicable to nontidal waters is also pertinent to the consideration of Lyon's argument, apparently accepted by the trial court, that as to the area between high and low water

The landowner in *Lyon* had relied in principal part on *Hitchings* and *Bohn*. In a footnote, the court merely observed that those decisions expanded the California rule of navigability to encompass recreational use. It declined to characterize the earlier cases as representing a rule of public rights of navigation separate from the public trust doctrine.[195] Thus, *Lyon* impliedly casts considerable doubt upon the theory that the public's right of access to and use of navigable waters for recreational purposes is a limited doctrine existing independently of the public trust.

The California Supreme Court repeated this theme, albeit cryptically, in its most recent ruling on the public trust doctrine and its application to sovereign lands. In *City of Los Angeles v. Venice Peninsula Properties*,[196] the state and the City of Los Angeles claimed title to tidelands at Ballona Lagoon. In a four to three decision, authored by Justice Mosk,[197] the court held that although these lands had been ac-

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> the public has an interest only in the water itself, so that it may use the water for boating and fishing, but when a lake or stream is at low water, the public has no right to use the bed to the high water mark. In *Marks v. Whitney* . . . we held that, although early cases had expressed the scope of the public's right in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state.
>
> We see no justification in reason or authority for the proposition advanced by Lyon. In *People ex rel. Baker v. Mack* . . . the court made the following statement, upon which Lyon relies: "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."
>
> *We fail to see how Lyon can find comfort in this statement. It does not mean that the public's rights are confined to the waters as such, but merely attempts to distinguish between waters capable of commercial use — which were there claimed to be the test of navigability — and those capable of recreational use.* Other cases cited by Lyon also fail to support his position.

29 Cal. 3d 210, 229-30, 625 P.2d 239, 250-51, 172 Cal. Rptr. 696, 707-08 (1981) (citations omitted, emphasis added). *See generally* Comment, *The Public Trust After Lyon and Fogerty: Private Interests and Public Expectations — A New Balance, this issue infra*, at 634.

[195] State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 230 n.18, 625 P.2d 239, 251 n.18, 172 Cal. Rptr. 696, 708 n.18 (1981).

[196] 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982), *cert. granted sub nom.* Summa Corp. v. California *ex rel.* Lands Comm'n, 51 U.S.L.W. 3684 (U.S. March 22, 1983) (No. 82-708).

[197] *Id.* Justice Mosk has authored a number of the California Supreme Court's landmark public trust decisions. In addition to *Lyon* and *Venice Properties*, see, e.g.,

quired from private parties before California was ceded by Mexico to the United States, nonetheless they were subject to the public trust.

As in *Lyon*, the landowner advanced the argument that any public rights to the tidelands were limited to the *Mack/Hitchings* recreational easement. At the end of its lengthy opinion, however, the court responded in dicta that the tidelands were subject to public trust protections.[198]

The significance of this holding is twofold. First, it relied on the portion of the *Marks* case which adopted the theory that the public trust and the public right of navigation are inextricably intertwined. Second, *Venice Properties* held that to the extent public rights of access and recreational use of waterways can ever be viewed distinct from the public trust, the trust is broad enough to include all facets of the latter.

The California Supreme Court's latest word on the public trust doctrine and navigational access is *National Audubon Society v. Superior Court.*[199] While that decision was concerned with the integration of the California water rights system and the public trust doctrine, it also bears on the present analysis. First, the court observed that the public trust doctrine applies not only to demonstrably navigable waters such as Mono Lake, but also to their tributaries.[200] *National Audubon* is also significant in its reaffirmation of the *Lyon* discussion of the interrelationship of public trust principles and recreational boating rights. In support of the established proposition that the public trust encompasses navigable lakes and streams as well as tidelands, the supreme court in *National Audubon* cited *Hitchings.* The court made the point

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State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981); City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

[198] The opinion's resolution of this important issue is all too brief:

> In view of our conclusion, we need not discuss the trial court's finding that the public holds an easement in the property of defendants for the passage of fresh water to the Venice Canals and for water recreation, and that defendants' predecessors had dedicated the property for use as public streets or waterways. All these uses are included within the public trust.

Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 303, 644 P.2d 792, 801, 182 Cal. Rptr. 599, 608 (1982), *cert. granted sub nom.* Summa Corp. v. California *ex rel.* Lands Comm'n, 51 U.S.L.W. 3684 (U.S. March 22, 1983) (No. 82-708).

[199] National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, (1983); *see* notes 147-49 and accompanying text *supra.*

[200] *Id.* at 425, P.2d at 712, 189 Cal. Rptr. at 349. Later in its decision the court appeared to defer consideration of whether the trust applied to such nonnavigable tributaries independent of their effect on navigable waterbodies. *Id.* at 437 n.19, P.2d at 721 n.19, 189 Cal. Rptr. at 358 n.19.

even more explicit by adding a footnote that waterways navigable only under the *Mack/Hitchings* recreational boating standard are nevertheless encumbered by the public trust.[201]

The supreme court's statements in *Marks, Lyon, Venice Properties* and *National Audubon* may constitute dicta. To date, only *Forestier* explicitly and directly has viewed the public trust and the public navigational easement as two sides of the same coin. Nonetheless, there is strong support for the conclusion that the recreational easement is not a separate and more limited principle than the public trust.

Other states have also found a direct relationship between the public trust and the citizen's right of access to navigable inland waters. In *Nekoosa-Edwards Paper Company v. Railroad Commission*,[202] for example, the Wisconsin Supreme Court held that a stream was navigable in fact by logs and small boats and, therefore, open to public recreational use as a public highway.[203] The court declared such rights protected under the public trust doctrine irrespective of the private ownership of the underlying lands.[204]

The public policy considerations in *Nekoosa-Edwards Paper* are similar to those articulated by California courts. The Wisconsin court noted:

> Many of the meandered lakes and streams of this state, navigable in law, have ceased to be navigable for pecuniary gain. They are still navigable in law, that is, subject to the use of the public for all the incidents of navigable waters. As population increases, these waters are used by the people for sailing, rowing, canoeing, bathing, fishing, hunting, skating, and other public purposes. While the public right may have originated in the older

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[201] *Id.* at 435 n.17, P.2d at 720 n.17, 189 Cal. Rptr. at 357 n.17. The court stated: "A waterway usable only for pleasure boating is nevertheless a navigable waterway and protected by the public trust." (Citing *County of El Dorado* and *Mack.*)

[202] 201 Wis. 40, 228 N.W. 144 (1930).

[203] *Id.* at 46, 228 N.W. at 147.

[204] The court stated:

> The appellant makes the further contention that, as it owns all the land on both sides of Four Mile creek at the point where it proposed to build its dam, . . . by reason of such ownership and its riparian rights incident to such ownership of the land, it has the right to build and maintain such dam without legislative sanction. Such contention is clearly untenable. It is incompatible with the fact that the stream is navigable and public. On such a stream or body of water the riparian owner may not obstruct navigation or the public use of the waters against the consent of the state. The federal government, by its patents, granted to patentees title to the lands subject to the public use. *The state holds in trust for the public all such rights incident to such public use.*

Id. at 47-48, 228 N.W. at 147 (emphasis added).

> use or capacity of the waters for navigation, such public right having once accrued, it is not lost by the failure of pecuniary profitable navigation, but resort may be had thereto for any other public purpose.[205]

The consequences of an explicit merger of the public trust doctrine and rights of navigation to inland waterways in California would be twofold. First, it would constitute a recognition that the trust does not arise only as part of the state's original fee ownership of the beds of the waterways. Rather, the public trust exists as an incident of the sovereign's larger responsibility to manage and protect its vital natural resources for the long-term public interest. This development is consistent with the overall expansion of the trust concept.[206]

Second, a reaffirmation of the *Forestier* rule in the context of nontidal, inland waterways would bring California's extensive system of "secondary" lakes and rivers within the ambit of resources protected by the public trust. These would include the myriad alpine lakes and various smaller tributaries to California's major river systems which might not qualify as navigable for title purposes even under the liberalized federal test. Given the breadth of the government's role and obligations as trustee, the result would be to increase sorely needed recreational opportunities for the public and provide additional legal resources to ensure against degradation of the waterways.[207]

Although the California Supreme Court's signals on this important legal question are not wholly clear,[208] and although the issue is not free

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[205] *Id.* at 47, 228 N.W. at 147; *see also* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); notes 144-47 and accompanying text *supra.*

[206] *See* notes 139-54 and accompanying text *supra.*

[207] *See, e.g.*, Illinois Cent. Ry. v. Illinois, 146 U.S. 387 (1892); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); Colberg, Inc. v. State, 67 Cal. 2d 408, 62 Cal. Rptr. 401 (1967); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

[208] An alternative reading of the California Supreme Court's views is that they simply recast the federal title test of navigability to parallel completely the state recreational boating test articulated in *Mack.* In *Lyon*, for example, Justice Mosk observed that the *Mack* standard "attempts to distinguish between waters capable of commercial use — which were there *claimed* to be the test of navigability — and those capable of recreational use." State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 230, 625 P.2d 239, 251, 172 Cal. Rptr. 696, 708 (1981) (emphasis added). Similar discomfort with the criteria of title test of navigability as enunciated by the federal courts is found in the *Mack* case itself, 19 Cal. App. 3d 1040, 1044 n.3, 97 Cal. Rptr. 448, 450 n.3 (3d Dist. 1971), and in the *Hitchings* decision, 55 Cal. App. 3d 560, 569 n.4, 127 Cal. Rptr. 830, 836 n.4 (1st Dist. 1976).

Any state court attempt to reconstruct the federal title test of navigability in this way is fraught with some peril, however. In Lamprey v. State of Minnesota, 52 Minn. 181, 53 N.W. 1139 (1893), the Minnesota Supreme Court held that title to the beds of

from doubt,[209] the available signs point toward a consolidation of the public trust and public access/navigation doctrines.

IV. CONTRASTING THE FEDERAL AND STATE COURT APPROACHES: IMPLICATIONS FOR THE FUTURE

L'embarras des richesses.[210]

The modern federal and California approaches to navigability are distinct but yield a similar result: a heightened public role in the management and preservation of inland lakes and rivers. This section examines the potential problems and ultimate viability of the two

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inland waterways should be established by reference to a liberalized pleasure boat test of navigability. This ruling provoked considerable debate. In the face of subsequent federal decisions indicating that the matter was one of federal law, the Minnesota Supreme Court later recanted and adopted the federal test for title purposes. State v. Adams, 251 Minn. 521, 89 N.W.2d 66 (1958); State *ex rel.* Burnquist v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954). The California Supreme Court has itself experienced a similar rebuff in a closely related legal context. In Ivanhoe Irrigation Dist. v. All Parties, 47 Cal. 2d 597, 306 P.2d 824 (1957), the court invalidated the 160-acre "excess land" requirements of the federal Reclamation Act, 43 U.S.C. § 431. In so doing, the court ruled that the state held such waters in trust for its citizens. 47 Cal. 2d at 620, 627, 306 P.2d at 837, 841. After the United States Supreme Court reversed California's invalidation of the statute, Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958), the California Supreme Court on remand explained that its earlier statement of public trust principles had been "sheer dicta" and "should not be construed as a statement of the law of California." Ivanhoe Irrigation Dist. v. All Parties, 53 Cal. 2d 692, 716, 350 P.2d 69, 83, 3 Cal. Rptr. 317, 331 (1960).

[209] *See, e.g.*, Oklahoma v. Texas, 258 U.S. 574, 585 (1922), in which the United States Supreme Court appeared to distinguish between the federal title test of navigability and a simpler, state enforced public right of navigation; *see also* 1982 Cal. Legis. Serv. ch. 123 § 1 (West), adding § 7552.5 to the Cal. Pub. Res. Code. That statute, involving title to lands sold under swamp and overflowed patents, provides in pertinent part as follows:

> Where a private owner, deriving title by virtue of such a conveyance of swamp and overflowed lands, dredges or has dredged such lands pursuant to then existing law, and such dredging results or has resulted in the navigable waters of the state flowing over such lands, such acts shall not operate to create or impose the common law public trust for commerce, navigation, and fisheries with respect to such lands. Such acts shall operate to create a navigational easement, in favor of the public, upon the waters which flow over the affected real property. The navigational easement so created may be extinguished only upon the lawful removal of the navigable waters from the real property.

[210] "The More Alternatives, The More Difficult The Choice," Abbe D'Allainval (title to comedy, 1726).

approaches.

The federal doctrine has several virtues. First, it is a far more direct means to the presumed objective of expanded public access. The numerous recent decisions interpreting the federal title test of navigability constitute a reformulation of longstanding concepts of property law. The federal approach is also more analytically straightforward than its California counterpart. Accordingly, liberal application of the title test of navigability is less likely to be perceived as a radical change in property law and is less likely to result in increased governmental liability.[211] In *Riverfront*,[212] for example, the Ninth Circuit Court of Appeals rejected the contention that to premise navigability for title purposes solely on evidence of logging would effect a taking under the fifth and fourteenth amendments.[213] A second benefit of the federal application of the law of navigability is the uniformity that federal law can provide.

The federal approach is not without its disadvantages, however. Recent developments in the federal law of navigability for title test purposes have triggered a spate of new litigation.[214] In most cases, the federal government opposes the sovereign claims of western states. The cases involve complicated factual and engineering issues and often re-

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[211] *See, e.g.*, Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

[212] Oregon v. Riverfront Protective Ass'n, 672 F.2d 792 (9th Cir. 1982).

[213] The court in *Riverfront* was confronted with the argument that, under principles established in Kaiser Aetna v. United States, 444 U.S. 164 (1979) (discussed in note 59, *supra*), a finding of navigability resulted in an unconstitutional taking. The court found *Kaiser Aetna* to be distinguishable:

> While *Kaiser Aetna* suggests that any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of navigability was invoked in the particular case, . . . it does not overrule the existing body of Supreme Court precedent on navigability. Since the instant case concerns navigabilty for title, we look to the Supreme Court's navigability for title cases to discover the applicable standard. Those cases uniformly adopt the test of *The Daniel Ball*, . . . [which is] essentially the same test elaborated in *Puget Sound*.

Oregon v. Riverfront Protective Ass'n, 672 F.2d 792, 795 n.2 (9th Cir. 1982). Contrasting the facts of the *Kaiser Aetna* decision, the court held:

> Here the issue concerns whether title to the riverbed passed to the State of Oregon at statehood in 1859. The Supreme Court's analysis of the navigation servitude and the takings issue in *Kaiser Aetna* is simply not relevant here, where neither the navigation servitude nor a taking is at issue.

Id. at 795 n.2. *See also* Loving v. Alexander, 548 F. Supp. 1079, 1090-91 (W.D. Va. 1982) (same result as in *Riverfront* regarding successful assertion of commerce clause jurisdiction over Jackson River).

[214] *See* note 119 *supra*.

quire lengthy trial and pretrial proceedings. Liberal application of the law of federal title test navigability is therefore likely to strain an already overburdened federal judiciary.

The California approach to navigability issues takes advantage of the freedom of individual states to adopt principles of navigability and jurisdiction over navigable waters that are consistent with their own needs and desires. In addition to the obvious philosophical appeal to devotees of traditional notions of federalism, this state latitude has been approved by the federal courts.[215]

The California decisions suggest a somewhat more complex approach to both public trust rights and navigable waters. It may be viewed as a more sudden departure from established legal doctrines.[216] In the past, other rulings of the California judiciary deemed innovative by some have met with a storm of criticism.[217]

An attempt to apply the public trust doctrine to the many waterways navigable only under the "pleasure boat" standard is also more likely to promote litigation against governmental entities by affected party owners. Challenges could be brought against the state by property owners alleging a taking of property rights protected under the fifth and fourteenth amendments. Such arguments have met with mixed success in the past.[218] Another possible vehicle for challenging an extension of

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[215] The Supreme Court has held that public rights are determined in each state by the applicable state test of navigable waters, Donnelly v. United States, 228 U.S. 243, 262 (1913), *modified at* 228 U.S. 708 (1913); that each state is responsible for protecting the navigation related rights of its citizens, Illinois Cent. Ry. v. Illinois, 146 U.S. 387, 452-54 (1892); and that, at least regarding questions of navigability other than for title purposes, there is no federal common law governing navigable waters, Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888).

[216] As explained in section III(C) *supra*, however, this perception would be incorrect. The trend is simply toward a reaffirmation of principles originally espoused decades ago in Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912).

[217] *See, e.g.*, Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970), articulating the doctrine of implied dedication applicable to lands bordering California's coastal inland waterways. *Gion* sparked much critical legal commentary, prolonged legislative debate and, of course, collateral litigation. These developments are reviewed in Briscoe & Stevens, *Gion After Seven Years: Revolution or Evolution?*, 53 L.A. BAR J. 207 (1977).

[218] *Cf.* Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977) (state water rights ruling constituted an unconstitutional taking). A detailed discussion of *Robinson* and its ramifications is presented in Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?*, 2 U. HAWAII L. REV. 57 (1979). *See also* Loving v. Alexander, 548 F. Supp. 1079, 1090-91 (W.D. Va. 1982) (no taking in commerce clause jurisdiction case); State v. Superior Ct. (Lyon), 29 Cal. 3d 210, 231-32, 625 P.2d 239, 251-52, 172 Cal. Rptr. 696, 708-09 (1981) (no taking as result of state assertion of trust rights to

the public trust doctrine to small, inland waterways is the Federal Civil Rights Act, section 1983.[219] The Civil Rights Act is available to aggrieved landowners seeking damages from the government as a result of a deprivation of their property rights.[220] An important shield against potential liability under the Act, however, is the immunity from suit conferred upon states and state officials by the eleventh amendment.[221] That immunity has been successfully raised to bar a suit for damages arising out of an alleged deprivation of property rights.[222] Finally, California's effort to tie liberalized navigability standards to the public trust doctrine may be susceptible to a challenge that it provokes conflicts with the federal government over their respective public trust responsibilities.[223]

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lake shore); Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981); *cf.* Kaiser Aetna v. United States, 444 U.S. 164 (1979), *discussed in* note 59 *supra*.

[219] The Civil Rights Act, 42 U.S.C. § 1983 (1976 & Supp. IV 1980), provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

The exposure of state and local governments under § 1983 has mushroomed in recent years in response to a number of precedent setting United States Supreme Court decisions. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622 (1980) ("good faith" immunity not available to governmental entity otherwise liable under § 1983); Monell v. New York City Dept. of Social Services, 436 U.S. 659 (1978) (municipalities constitute "persons" within meaning of § 1983). An exhaustive treatment of governmental liability under § 1983 can be found in Note, *Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism*, 53 S. CAL. L. REV. 945 (1980).

[220] Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). For a thorough discussion of the Civil Rights Act's application in a property law context, see Bley, *Use of the Civil Rights Act to Recover Money Damages for the Overregulation of Land*, 14 URB. LAW. 223 (1982).

In State v. Superior Ct. (Fogerty), 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981), the property owner claimed that the state's assertion of a trust interest in the Clear Lake parcel he held in fee constituted a violation of § 1983. *Id.* at 243, 625 P.2d at 258, 172 Cal. Rptr. at 715. The California Supreme Court summarily disposed of the contention without any serious discussion. *Id.* at 249, 625 P.2d at 261-62, 172 Cal. Rptr. at 718-19.

[221] Quern v. Jordan, 440 U.S. 332 (1979); Edelman v. Jordan, 415 U.S. 651 (1974).

[222] Windward Partners v. Ariyoshi, 693 F.2d 928 (9th Cir. 1982).

[223] Such conflicts have precipitated litigation between the states and the federal government in the past. *See, e.g.*, United States v. 1.58 Acres of Land, 523 F. Supp. 120 (D. Mass. 1981) (Commonwealth of Massachusetts successfully sued federal govern-

If one envisions the federal and California approaches as different means to the same end, and further takes a mechanistic view of the advantages and disadvantages of each, the federal option may seem preferable. The straightforwardness of its logic and the relative immunity to collateral judicial attack commend its continued use. However, the comparison is ultimately inappropriate because the federal and state approaches are not mutually exclusive. They have evolved from independent wells of jurisprudential thought, and there is no reason to think that the two cannot coexist. Such legal diversity is the essence of federalism.

Most important, both approaches promote the public interest. The state and federal cases together stand for the principles that states and their citizens should not be dispossessed of their vital interests to inland waterways through unduly restrictive interpretations of navigability. As one California decision emphasized:

> Many, if not most, of the meandered lakes of this state, are not adapted to, and probably never will 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.*[224]

CONCLUSION

It is axiomatic that such major waterways as the Mississippi, Columbia, and Sacramento Rivers, the Great Lakes and Lake Tahoe are public resources incapable of private ownership. Controversies over these waterways were resolved long ago. In recent years, however, the courts have taken a renewed and expansive interest in public rights to other waterways. There is a growing recognition that smaller lakes and rivers also have important ecological and recreational value. The law has responded accordingly.

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ment to prevent latter from selling lands underlying Boston Harbor, on grounds that to do so would violate Commonwealth's trust responsibilities).

[224] Bohn v. Albertson, 107 Cal. App. 2d 738, 744, 238 P.2d 128, 132-33, (1st Dist. 1951), *quoting with approval from* Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893) (emphasis added). As stated in note 208 *supra*, the *Lamprey* decision currently has limited precedential value under Minnesota law. Having been incorporated into the California law of navigability, however, it has re-emerged, Lazurus like, to confound its critics.

Several recent federal decisions have liberally applied the title test of navigability created by the United States Supreme Court over a century ago. These decisions have found a variety of western waterways to be navigable and, therefore, owned by the respective states. Rejecting earlier suggestions to the contrary, the federal courts have determined that navigability is not precluded by a waterway's isolated location, limited seasonal utility, or capacity to support only the most modern forms of craft or timber.

California courts have adopted a different course. Rather than start from the premise that the public interest and navigability are irrevocably tied to ownership, they have focused on two principles. The first involves the public trust doctrine, recently the subject of renewed interest in California law. The second, sparked in large part by an expanding population's need for recreational opportunities, revolves around the long standing but essentially limited rule that the public has a right of recreational navigation irrespective of questions of ownership.

California courts appear to be merging these two concepts and finding that state waterways which are usable for only limited purposes are imbued with the public trust, together with all the public rights and responsibilities the trust implies.

Only time will tell whether the incremental federal approach or the more ambitious and sweeping California theory — or both — will achieve its full potential. Yet two predictions can be safely ventured. First, substantial additional litigation over title and public rights to our lakes and rivers lies ahead. Second, these developments signal enhanced opportunities for environmental preservation, expanded recreational resources for the general public, new challenges to rights of private property owners claiming title to these inland waterways, and heightened responsibilities for governmental officials charged with maintaining the delicate balance among these diverse interests.