

American Whitewater

California Navigability Report

Summary

In California, if a stream can be floated for most of the year, then the public has the right to use the stream. The public may use the stream for recreational boating, fishing, swimming, hunting, etc. up to the high water mark.¹⁾

State Test of Navigability

California courts have adopted a state test for determining which streams are subject to a public right of navigation. The waters subject to this right or “easement” include those waters that are navigable in fact at the present time by any watercraft, including small recreational or pleasure craft propelled by motor or by oar, such as canoes, rafts or kayaks. A number of cases have applied this test.²⁾ California has rejected the common law rule that navigability is determined by whether the tide ebbs and flows.³⁾

To be considered navigable, the stream must be suitable for public use, which is determined on a case-by-case basis.⁴⁾ The stream need not be navigable in fact for the entire year. A stream navigable in fact for most of the year should suffice.⁵⁾

Extent of Public Rights in Navigable and Non-Navigable Rivers

The state acquired title to the navigable waters in its territory upon its admission to the union and the navigable waters and lands lying beneath them are held in trust for the benefit of the people.⁶⁾ This includes all waters navigable in fact.⁷⁾

California's constitution allows the public to use all navigable waters in the state, and further directs the legislature to give the provision the most liberal construction.⁸⁾ Regardless of whether the streambed of a river which is navigable in fact is public or privately owned, there is an easement for public navigation and the incidents of navigation; *i.e.* boating, fishing, swimming, hunting and other recreational uses.⁹⁾ The easement exists up to the high water mark.¹⁰⁾ This right includes the use of the bottom of navigable waters for anchoring, standing, or other purposes.¹¹⁾ The public easement, however, does not include the right to use a private pier in navigable water, unless there is an emergency.¹²⁾

Whether portaging and scouting above the high water mark is permissible has not been definitively ruled upon. In other contexts, however, courts have suggested that an action which would otherwise constitute a trespass may be justified if prompted by the motive of preserving life or property, and if reasonably related to that purpose.¹³⁾

Courts are especially sensitive to infringements upon the public's constitutional rights under the guise of police power.¹⁴⁾ The Attorney General found such an infringement when the state sought to prohibit the right to use navigable waters that flowed over inundated privately-owned land adjacent to the navigable waterway.¹⁵⁾ In a landmark case, the same constitutional provision defeated a county ordinance that forbade rafting on a river because of the litter, pollution, and noise generated by the rafters. Although reasonable regulation was in order, use prohibition was not.¹⁶⁾ The California Attorney General, however, has opined that government may close navigable waterways to recreational boaters during an emergency, such as flood conditions, when such emergency rules and regulations are required to protect the safety of persons and property.¹⁷⁾

There is no right to trespass across private property to access navigable waters.¹⁸⁾ Where a public road or bridge easement across private property intersects a waterway, however, lawful access to the waterway may be provided. For example, a kayaker was found innocent of trespass where the kayaker was carrying his boat from a county road across private land within the perimeter of the road easement to gain access to a navigable waterway.¹⁹⁾ In that case, the improved roadway narrowed where a bridge crossed the waterway; nevertheless, the kayaker's use of the entire road easement to access the waterway was reasonable. The County could have

imposed or allowed reasonable restrictions on the use of the easement by the public but had not done so.²⁰⁾

Miscellaneous

Article I, section 25 of the California Constitution forbids the state from alienating land without reserving fishing rights in the public.

The state's subdivision map act (Government Code sections 66478.4 and 66478.5) requires that any subdivision development fronting on public waterways provide both (1) reasonable public access from a public highway to the bank of the waterway, and (2) dedication of a public easement along a portion of the waterway bordering on or lying within the subdivision. These rights are in addition to the existing public right to use a river below the high water line.²¹⁾

See [American Whitewater's letter](#) regarding the Pit 4 Reservoir Closure for an example of how we have dealt with navigability issues on a project in California.

1) Also see the article on California's Public Right to Float by Ronald W. Rogers available at <http://www.americanwhitewater.org/archive/article/966>.

2) Bohn v. Albertson, 107 Cal. App. 2d 738 (1951); People ex rel. Baker v. Mack, 19 Cal. App. 3d 1040, 1045-1051 (1971); Hitchings v. Del Rio Woods Recreation and Park District, 55 Cal. App. 3d 560 (1976); Younger v. County of El Dorado, 96 Cal. App. 3d 403, 406 (1979); Kern River Public Access Committee v. City of Bakersfield, 170 Cal. App. 3d 1205 (1985). Additional cases, California Attorney General opinions, and related law reviews are listed in a letter from the Cal. Att'y Gen. to AWA, dated June 16, 1997 (on file with AWA).

- 3) Mack, 19 Cal. App. 3d at 1048.
- 4) Hitchings, 55 Cal. App. 3d at 570.
- 5) Id. at 571.
- 6) Colberg Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal. 2d 408, 416 (1967).
- 7) 80 Ops. Cal. Atty. Gen. 311 (November 12, 1997)
- 8) Cal. Const. Article X, section 4.
- 9) Mack, 19 Cal. App. 3d at 1045-1051.
- 10) Id. at 1050.
- 11) Bohn, 107 Cal. App. 2d at 749.
- 12) Op. Cal. Att'y Gen. SO 77-42 (February 1, 1978).
- 13) People v. Roberts, 47 Cal. 2d 374, 377 (1956).
- 14) Younger, 96 Cal. App. 3d at 406.
- 15) Op. Cal. Att'y Gen. 85-602 (October 10, 1985).
- 16) Younger, 96 Cal. App. 3d at 406-407.

- 17) 80 Ops. Cal. Atty. Gen. 311 (November 12, 1997).
- 18) Charpentier v. Von Geldern, 191 Cal. App. 3d 101, 110 (1987).
- 19) People v. Sweetser, 72 Cal. App. 3d 278 (1977).
- 20) *Id.*
- 21) Kern River Public Access Committee, 170 Cal. App. 3d at 1215.