MEMBERS PRESENT

Chairman Dini
Mr. Marvel
Mr. Fitzpatrick
Mr. Harmon
Dr. Robinson
Mr. Craddock
Mr. Jeffrey
Mr. Getto
Mr. Bedrosian
Mr. Bergevin

GUESTS PRESENT

See Guest List attached

* * * *

Chairman Dini called the meeting to order at 8:00 A.M.

ACR 8 - ALLOCATES PARK BOND PROCEEDS FOR PARK PURPOSES AND FOR ACQUISITION OF SAN RAFAEL RANCH

ACR 9 - ALLOCATES REMAINDER OF PROCEEDS FROM 1976 PARK BOND ISSUE TO WASHOE CO. FOR ACQUISITION OF SAN RAFAEL RANCH

AB 347 AMENDS 1977 SPECIAL LAW AUTHORIZING CITIES OF RENO AND SPARKS AND WASHOE CO. TO ISSUE GENERAL OBLIGATION BONDS FOR PURCHASE OF SAN RAFAEL RANCH TO BE DEVOTED TO PARK PURPOSES

ASSEMBLYMAN TOD BEDROSIAN, A.D. 24, Northwest Reno

Mr. Bedrosian stated ACR 8 and 9 are Bills which deal with Rancho San Rafael, a 415 acre parcel, located in Northwest Reno adjacent to the University of Nevada. Mr. Bedrosian advised the Committee that during last year's political campaign Rancho San Rafael became an issue due to the fact citizens groups had accumulated signatures asking the city or county buy the land for the purpose of a regional park. He advised that Assemblyman Mello had come forth with a suggestion that the Retirement System of Nevada should buy the parcel as an investment and hold it in trust to give local entities an opportunity to put together a formula or bond issue to buy the parcel.

Mr. Bedrosian stated last year the Nevada Public Employees Retirement Board voted to buy the parcel for seven and a half million dollars from the owner, and the primary stipulation being that the property be appraised at the purchase price, which it was, and that at aleast one of the local entities would try a bond issue to buy the park. He advised the Committee that yesterday, February 20th, the Washoe County Commissioners voted unanimously to put Rancho San Rafael on the ballot for June 5, 1979, and the question will be put to the people whether or not they want a bond to purchase the park. He also advised the Committee one of the stipulations with the Retirement Board was that an annual 15% increase in the price of the park would be assessed. Mr. Bedrosian stated that ACR 8 and 9 essentially ask for state participation in the project, and the monies asked for derive from the 1975 legislation approving $10,000,000 in state park bonds; in 1977 the legislature approved $5,000,000 of the bonds for projects throughout the State of Nevada, the state being divided into recreation regions, each region getting a proportionate amount of the park bond monies; and there is language in the Bill which specifically authorizes the use for acquisition by cities and counties, and Mr. Bedrosian stated that it is under that language he is asking that the money be authorized to help the county purchase Rancho San Rafael. Mr. Bedrosian also suggested to the Committee that ACR 9 be given no further consideration because that $136,000 has been earmarked for Sparks and ACR 8 should be amended; specifically, the $1,000,000 figure for northwestern Nevada so that $200,000 of that figure can go to Sparks.

Chairman Dini inquired if they intend to keep the whole block of land a park or sell part off to developers. Mr. Bedrosian stated he did not know and could not guarantee how the land would be developed. Chairman Dini asked if the City of Reno was in agreement and Mr. Bedrosian responded that they were. Dr. Robinson wanted to know if it would be a state park and Mr. Bedrosian responded it would not.

RON PLAYER, City Councilman, City of Sparks

Mr. Player stated that they were in favor of ACR 8 and Mr. Bedrosian's recommendation that he withdraw ACR 9.

In answer to Mr. Getto's inquiry concerning the $200,000 earmarked for Sparks, Mr. Player advised the money would be used for an area-wide sports complex; 12 ball fields used by

residents of Washoe County, City of Reno, and proposed to go on BLM ground on Pyramid Road on the outskirts of the City of Sparks.

VERNON BENNETT, Executive Officer, Public Employees Retirement System

Mr. Bennett stated they had only one minor technical point to bring out to the Committee and that was in AB 347, page 2, line 12, it refers to the fact that Rancho San Rafael is owned by the Retirement Board. He stated the Board is the governing body of the system and the property is actually owned by the retirement system. He stated if the legislation is acted upon favorably they would suggest an amendment to delete the word "Board" and insert the word "System".

Mr. Dini asked how much money the Retirement System would make and Mr. Bennett responded if it is purchased within the first year, the system paid $7,500,000 for the property, having been appraised at $8,100,000, the 15% interest is paid whether it is purchased during the first day or at any time during the year so the system will receive $1,125,000 in interest, the taxes will be $2,457.04, the total purchase price would be $8,627,457.04.

HENRY ETCHEMENDY, City Manager, City of Reno

Mr. Etchemendy stated that the City of Reno has been entirely supportive of the acquisition of San Rafael, or at least getting it before the voters, and then entering into an agreement with Washoe County later on for the development of the facility and operation. He stated they were entirely supportive of the Bills presented, both the ACR's and AB 347, and with respect to the reallocation of the $1,000,000 as reflected in ACR 8 of $800,000 to the acquisition of San Rafael and $200,000 for Sparks that they would have no concern with that.

JOHN MEDER, State Parks Director

Mr. Meder stated that the funds being requested are monies that were made available as a result of the 1976 recreation bond election and there is 3.5 million left

for local governments, $1,000,000 of which for assistance of acquisition is at the option of the Legislature if the decision is made in favor of the acquisition. He stated if the million dollars is made available for San Rafael, a decision should be made how the rest of the 2.5 million should be divided. Mr. Meder stated the money is available, it is for recreation purposes, and if the decision is made to go with it, it is well within the intent of the law.

RUSSELL McDONALD, Nevada Assn. of Counties

Mr. McDonald stated that the Commissioners of Washoe County endorse ACR 8 and 9. Mr. McDonald stated the main thrust of AB 347 is that it does not bind Sparks or give Sparks any authority. Mr. McDonald stated that he urged amendment of the Bill to reflect Mr. Bennett's suggestion and Do Pass and let it go over to the Senate. Mr. McDonald elaborated more or less in a recap of the prior testimony and discussed the background of the ranch. In response to questions by the Commitee he went into the mechanics of the bond issue and the options.

Chairman Dini asked Mr. Meder what would happen if the Committee killed ACR 9. Mr. Meder responded that money remains in the pot for district 1 and would be distributed.

ROGER STEEL, Homeowner, Incline Village

He stated he would be concerned about the impact of another nine million dollar bond on the Incline Village, Crystal Bay area. Mr. Steel stated the purchase of the park would mean that the Tahoe area would incur an obligation to pay off about 10% or some $900,000 for a park and ballfield that is no benefit to those in the Basin portion of Washoe County. Mr. Steel stated if they are to be stuck with paying off additional bonds for facilities that do them no good he, on behalf of the taxpaying property owners, would urge the Committee to turn down the purchase of San Rafael Ranch as being unfair to the taxpayers in the Incline Village, Crystal Bay area.

MRS. VIRGINIA KURZIG, Reno

Mrs. Kurzig delivered a letter to be made part of the record, and same is attached hereto, on behalf of the Board of Regents of UNR in support of the Bills. She

stated she was a private citizen working on the San Rafael project for over two years and that there was no decrease in the importance to the citizens of Washoe County concerning the project, and the concept would be beneficial to everyone.

JIM RICHARDS, Washoe Democratic Party

Mr. Richards stated that the idea of purchasing the rancho was one of the most enthusiastically supported ideas in their county convention last year. He stated they did have a plank in their platform to see to it that everything could be done to keep the resource for the people of the area and that he was personally very supportive of the Bill.

Chairman Dini stated the testimony was concluded on the San Rafael package and he would entertain a motion for action by the Committee.

COMMITTEE ACTION:

AB 347 - Dr. Robinson moved to amend AB 347 to change the wording on page 2, line 12, from "Employees Retirement Board" to "Employees Retirement System", and adopt DO PASS as amended, seconded by Mr. Getto, and unanimously carried.

Chairman Dini stated that they ought to hold ACR 8 until the data on the formula is received from Mr. Meder, and ACR 9 should be left viable.

AB 286 - INCREASES LIMIT ON AMOUNT OF LOCAL PURCHASES WHICH MAY BE AUTHORIZED UNDER STATE PURCHASING ACT

MRS. RINK, Nevada State Purchasing Division

Mrs. Rink stated AB 286 would amend NRS 333.398 to increase the dollar amount for local purchases that may be authorized by the Purchasing Administrator. She stated the direct purchase authorizations are for specific reasons for an exact amount given only at the request by the agency's head and approval by the Administrator. She advised they are very restrictive, being granted on an individual basis, and for a period not to exceed one year; also, they are rescinded in part or in their entirety at

the discretion of the Administrator. She stated they are not issued for bidable items, items stocked in the warehouses or on open term contract. She stated the majority are for perishables that are not feasible to bid due to the time element involved, the price fluctuations, and the nature of merchandise. Mrs. Rink cited other examples. She stated the request for the amendment has been based on the growth of the agencies involved and the continued increase in the inflation rate.

Committee members discussed Mrs. Rink's presentation and it was the consensus that $5,000 would even be a small amount in this day and age's inflationary situation.

AB 287 - REQUIRES ANNUAL COMPUTATION OF LONGEVITY PAY FOR COUNTY OFFICERS

HAL DUNN, Sheriff, Carson City

TED B. THORNTON, Clerk, Treasurer, Carson City

Sheriff Dunn stated they were in support of the Bill but would request one change on the third line of the advance sheet where it mentions "service in office for more than four years" to "in office for more than one year". He said they were speaking of a 1% increase for elected officials in every four year time frame. Sheriff Dunn stated there is no saving clause for the official in his first time or first full elected term. He cited some examples where it would take some officials almost six years to receive any benefit from the Bill.

AB 234 - ESTABLISHES BOUNDARY BETWEEN LAKE TAHOE AND ADJOINING LANDS

ASSEMBLYMAN BOB WEISE

The Assemblyman stated the purpose of the Bill is to establish by statute a definite elevation of state ownership for Lake Tahoe. Mr. Weise stated one of the things he wasn't aware of was the establishment of the 6229.1 elevation of Lake Tahoe. He stated the administration would probably give testimony that they would like to delete item 2(b) which is a schedule of annual rents for piers. He stated it was his understanding the Dept. of Conservation spends more money in collecting the fees than the fees amount to and provide no logical revenue. Mr.

Weise stated there was some question as to whether 6223 or 6221 elevation is appropriate. He stated the elevation they were trying to get to was the natural elevation of Lake Tahoe prior to the construction of the Dam at Tahoe City. Mr. Weise advised that when the Dam was built it created an artificial level of the Lake and people who owned the property, which was beachfront property prior to that, for the most part haven't been compensated. Mr. Weise stated it was his personal feeling that 6629 is arbitrary and the high level was taken after the Dam was constructed and he didn't believe that was proper. He stated he turned over all of his material to Mr. Bergevin, co-sponsor of the Bill, and he would defer to him.

ASSEMBLYMAN BERGEVIN

Mr. Bergevin stated that the Bill, when properly amended, would do the following: It would eliminate the requirement for rental of any structure on the Lake; it would establish an elevation of 6221 or 6223 feet above sea level or the low water mark of the waters of Lake Tahoe (history will show the real low water mark of the Lake is somewhere between 6212 and 6217); a federal reservoir exists on top of Lake Tahoe at the elevation of 6223 to 6229.1; the 6229.1 alluded to in paragraph 2 of NRS 445.080 is not a permanent highwater mark but that elevation to which the Bureau of Reclamation can legally store water on the eixsting Lake which was the level when Nevada became a state. Mr. Bergevin stated the Bill would either establish 6221 or 6223 as the highwater mark of the Lake or for the purposes of the Bill the actual low-water mark, and all of the lands below this elevation would be in the ownership of the State of Nevada and all lands above the mark would be in the private ownership or applicable. He stated that the State of California, Civil Code Section 830, recognizes the natural low-water mark of the Lake as the private ownership. Mr. Bergevin requested introduction into the record of the Pacific Law Journal analysis of the question and same is attached hereto and made a part hereof.

Mr. Bedrosian stated he felt it was a matter for the Courts to decide and Assemblyman Weise responded that if the Legislature hadn't adopted an arbitrary elevation to begin with there would be no problem and he felt it properly rested with the Legislature.

Mr. Bergevin stated it was interesting to note the Attorney General's opinion does state the State owns the water to the highwater mark but he will not make a determination as to what the elevation is.

Assemblyman Weise stated it was also a question of equity where a government entity has constructed an artificial barrier that has imposed water storage on private land.

Mr. Bergevin suggested that on page 2, secton 3, that whole section be amended out inasmuch as it is something of the past and there are no septic systems at Lake Tahoe; all the sewerage is exported. Assemblyman Weise stated it does provide for installation of septic systems and if it were deleted they couldn't be had.

Dr. Robinson inquired how the Lake got below the natural rim and Mr. Bergevin responded just from draught, evaporation and pumping.

Mr. Bergevin stated they were asking for a level which would indicate the highwater mark of the original natural Lake. Mr. Craddock asked if the water's edge would be the most practical approach and Mr. Bergevin stated in his opinion it would be.

ROLAND WESTERGARD, Dir. of Dept. of Conservation & Natural Resources

Mr. Westergard stated they supported the Bill. He stated they felt it was time the Legislature acted to establish the Lake level for the purposes as set forth in the Bill. He stated it would be his position that the figure of 6223, because it is the natural rim of the Lake, would be a reasonable figure to set.

Chairman Dini wanted to know if there would be interference with the storage rights and Mr. Westergard responded he didn't see how it possibly could. He said the storage rights were covered by Federal Court Decree. Chairman Dini also inquired of Mr. Westergard whether the septic system provision should be taken out and Mr. Westergard stated he didn't think there would be any serious objections to it from the water quality control standpoint, and if there was any inference that it places limitations on the authority to impose necessary water quality controls Mr. Westergard said he thought it should be deleted.

Mr. Westergard stated it might be meritorious to delete lines 11 and 12, page 1, which provides for a Schedule of Rents.

GARY SHEERIN, individually, and representing Harvey's Wagon Wheel

He stated he represented himself and Harvey's Wagon Wheel in regard to the Bill. He stated he felt the Legislature should properly make a determination where the ownership lies and that he agreed with the figure of 6223 which is the natural highwater mark. He stated it represents a good balance between public and private interests in the Lake. He stated in his mind 6229 was an artificial, man-made situation, and should not control on the issue of ownership. He stated that in AB 234 NRS 321.595 and 445.080 is being used as a vehicle to define ownership and he stated he felt the Legislature had the wrong vehicle. He said the question of ownership is being limited just where the piers are. He said he thought there should be a section in Chapter 321 that is a statute and should simply state the ownership of the state lands at Lake Tahoe is at the height of 6223. He stated he felt that 321.595 should be repealed and get back in the beginning position. He said it was a section that snuck into the law and 445.080 should be also taken out. He stated that AB 234 be completely amended so that a brand new section is established to take care of the ownership of state lands only and use the figure of 6223.

ELEANOR SAVAGE, Private Citizen

Mrs. Savage had a prepared statement which she requested be made part of the record and the same is attached hereto. She stated that she is opposed to the Bill and that her position is the Bill is a needless and ill-advised giveaway of State property for the financial benefit of a very few lakefront property owners.

ROGER STEELE, Chairman, Nevada North Shore Property Owners Assn.

Mr. Steele had a prepared statement which he requested be made part of the record and the same is attached hereto. He stated the property owners oppose any State claim to ownership above elevation of 6223 feet.

JACK ROSS, Property Owner, Marla Bay, Lake Tahoe
Chairman, Marla Bay Homeowners Assn.

Mr. Ross stated he was in support of the remarks made by Senator Sheerin. He stated Senator Sheerin was excellently prepared and eminently qualified to speak for his group and they supported his testimony one hundred percent.

Chairman Dini was then advised that the witnesses who had come to testify on AB 1 had a plane to catch and it was requested of him if he could hear them right away.

Chairman Dini then stated because the witnesses on AB 1 had to leave, he would temporarily suspend the testimony on AB 234 and requested those persons present who wished to testify on AB 234 to return the next day (February 22, 1979) and that their testimony would be the first order of business.

AB 1 - LIMITS LEGAL TENDER TO MONEY

Mr. Glover stated the Bill was a result of some of his constituents feeling inflation was a major problem in our country and the government's abundant use of their printing presses is one of the major reasons why we are having inflation.

ANDRE LEVIE, Rancho Santa Fe, California

Mr. Levy stated he was testifying in behalf of the Bill in the spirit of it rather than the practicality. He stated credit was good in terms of numbers but very bad in terms of value. He stated that people who had faith in the government did not have their faith returned. He advised the Committee they could render a national service by putting savings in silver and gold and if the Bill were passed, it would give the citizens a chance to concentrate their savings without having to worry about interest payments.

ED CLARK, San Marino, Calif., Attorney

Mr. Clark stated the cause of inflation is the fact that the Federal Government is continually running a deficit. He stated a way to fight the battle of inflation is that people should not be forced to take money that is worth much less than they took in. He said going back to

the system of establishing hard money is another complimentary step in the same direction. Mr. Clark stated he urged the Committee and the Legislature to adopt a measure that begins to establish the principle that people cannot be paid in money that is greatly depreciated in value.

BRIAN W. FIRTH, Carson City, Nevada

Mr. Firth stated he was present in support of the Bill. He submitted a copy of a letter addressed to the Committee which stated his position and asked that it be made a part of the record and it is attached hereto.

Chairman Dini then announced the testimony was concluded on AB 1.

There being no further business to come before the meeting, the same was adjourned.

Respectfully submitted,

Sandra Katzman
Assembly Attache

JOE DINI, JR.
ASSEMBLYMAN
104 N. MOUNTAIN VIEW
YERINGTON, NEVADA 89447

COMMITTEES
CHAIRMAN
GOVERNMENT AFFAIRS
MEMBER
AGRICULTURE
ENVIRONMENT AND PUBLIC RESOURCES
TAXATION
LEGISLATIVE COMMISSION

Nevada Legislature

SIXTIETH SESSION

February 22, 1979

M E M O R A N D U M

TO: Assembly Committee on Covernment Affairs

FROM: Joseph E. Dini, Jr., Chairman

RE: A.B. 234

Two separate and distinct subjects are being discussed in testimony relative to A.B. 234. These two subjects are:

1. Property ownership, and

2. Permitting or property management.

A.B. 234 does not directly address property ownership. The concepts within this bill specifically deal with permitting and property management. If ownership of the property is to be the subject of legislation, it probably should be discussed in a different bill. Only one ownership question is relevant to this bill--does specifying an elevation for management and permitting purposes have the secondary effect of establishing or influencing land ownership? I have requested that the legislative counsel comment on this question. If the answer to this question is "no," the committee need not hear any more testimony relative to land ownership while we are discussing A.B. 234.

If the intent of the committee is to address property management, such as pier permits, rental fees, dredging, and shoreline alteration, additional testimony should be restricted to these subjects and the ways that the 6,223 foot elevation affects these subjects.

EXHIBIT

If these land management issues are discussed, it should be understood that the 6,223 foot elevation represents the natural rim of Lake Tahoe. Since construction of the dam at the Lake's outlet, the actual water level is most often above the 6,223 foot elevation. I have also asked the legislative counsel, regrettably on very short notice, to be prepared to discuss the language relative to the 6,223 foot elevation and how this language would affect the permitting program.

JED:jd

EXHIBIT 197

University of Nevada System Board of Regents

OFFICE OF THE SECRETARY
405 MARSH AVENUE RENO, NEVADA 89509
(702) 784-4958

Bonnie M. Smotony
Secretary

Barbara J. Summers
Assistant Secretary

February 20, 1979

The Honorable Joseph E. Dini, Jr., Chairman
Government Affairs Committee
Nevada State Assembly

Dear Mr. Dini:

It is my understanding that the Assembly Government Affairs Committee will hold a hearing on Wednesday, February 21, 1979, concerning the proposed acquisition of Rancho San Rafael for park and recreation and other community purposes. To that end, I have been asked to inform the Committee of the action taken by the Board of Regents of the University of Nevada on June 17, 1977, at which time the Board unanimously "endorsed the efforts underway for the acquisition by appropriate city and county entities of Rancho San Rafael for park and recreation purposes and for community and university uses."

I believe that I can accurately represent to you that the position of the Board of Regents remains the same in regard to the possible acquisition of Rancho San Rafael for public purposes, and I have been asked by Chairman Robert Cashell to so inform you.

Very truly yours,

Bonnie M. Smotony

Bonnie M. Smotony
Secretary to the Board

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EXHIBIT 198

McGEORGE SCHOOL OF LAW
UNIVERSITY OF THE PACIFIC

PACIFIC LAW JOURNAL

Volume 9 Number 2 July 1978

199

EXHIBIT

California Civil Code Section 830: A Rule of Property Needed for the Protection of the Private Landowner

California Civil Code Section 830 states that if a waterway is tidal, ownership of the upland extends to the high water mark; if the waterway is nontidal but navigable, ownership of the upland extends to the low water mark; and, if the waterway is neither tidal nor navigable, upland ownership extends to the middle of the waterway.[1] For over one hundred years it has been assumed that Section 830 stated the California property law on water boundaries.[2]

That assumption has recently come under attack. In 1971, the state maintained, and a superior court found that the state had title to the *high* water mark of *all* navigable waters, and that Civil Code Section 830 did not operate to divest the state of its title to the land between the high and low water marks of nontidal navigable waterways.[3] Further, the Attorney General has asserted a claim of sovereign ownership to the land between the high and low water marks on nontidal navigable waterways in an unpublished opinion,[4] and in a published notice.[5] The effect of the lower court decision and the new position taken by the state, if they were to be adopted by the California Supreme Court, would be to nullify the boundary distinction between tidal and nontidal navigable waters that is made in Section 830.[6] The position of the state questions the fee ownership of land between the high water and low water mark on 807 miles of shoreline around navigable lakes, and 3,046 miles of shoreline along nontidal navigable rivers.[7] The

1. These rules of upland ownership apply unless the grant under which the owner holds title indicate a contrary intent. CAL. CIV. CODE §830.

2. This assumption has been made in court opinions, attorney general opinions and textual materials. *See, e.g.*, Crews v. Johnson, 202 Cal. App. 2d 256, 258, 21 Cal. Rptr. 37, 39 (1962); City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 466-67, 52 P.2d 585, 588 (1935); 43 OP. ATT'Y GEN. 291, 292 (1964); 30 OP. ATT'Y GEN. 262, 269 (1957); 23 OP. ATT'Y GEN. 97, 98 (1954); 1 A. BOWMAN, OGDEN'S REVISED CALIFORNIA REAL PROPERTY LAW 632-33 (1974).

3. State v. Shasta Pipe and Supply Co., State v. Feather River Inv. Co., Civil No's 37390 and 37786 (Butte Co.), Memorandum of decision at 6-7.

4. Opinion letter from Evelle J. Younger, Attorney General of California to William F. Northrop, State Lands Commission (March 8, 1977) (copy on file at *Pacific Law Journal*).

5. 60 OP. ATT'Y GEN. 93 (1977).

6. The boundary distinction is as follows:

> The owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark.

CAL. CIV. CODE §830.

7. STATE LANDS DIVISION, SUMMARY, SHORELINE MILEAGES FOR STATE-OWNED TIDE

controversy has been brought to a head in two new actions in which private landowners are seeking declaratory relief from the claim of sovereign ownership to this land.[8] These cases squarely raise for the first time in California legal history the question of fee ownership of land between the high water mark and the low water mark of nontidal navigable waterways.

This comment will begin with a discussion of the development of the available fee ownership rules for nontidal navigable waterway ownership as a background to the examination of California law. It will be shown that the nontidal navigable waterway boundary question is an open one in California, and that the state may legislatively or judicially adopt any of the available boundary rules after it has squarely faced the question.[9] The comment will show that any examination of the nontidal navigable water boundary question should involve a determination of exactly what *public and private property rights* are at stake, and a consideration of which of those rights a decision will impact upon.[10] The determination of the rights actually at stake will be shown through a discussion of the use rights the public currently enjoys in all navigable waters, and those which it may acquire in the future. Further, it will be shown that the new position of the state does not completely determine fee ownership, in view of the landowner's right to raise issues of estoppel and adverse possession. Finally, the comment will show that the low water rule of Section 830 strikes an equitable balance between the interests of the public and those of the private landowner.

There is one legal theory raised by this boundary controversy that could be used to give Section 830 effect as a boundary agreement between the state and the upland owner. That theory is the doctrine of acquiescence,[11] which will not be discussed because the doctrine depends on a series of factual determinations. With this limitation on the scope of the comment, the first question to be addressed is the actual fee ownership of the land between the high water mark and the low water mark of nontidal navigable waterways.

AND SUBMERGED LANDS 1 (May 1972). Mileage figures alone, however, do not give an accurate picture of the land involved. There are some 548,420 acres of land in dispute. *Id.* A straight mathematical division of the acreage by shoreline mileage would suggest that the controversy involves a mere strip of land less than two feet wide. This is not the case. The actual area lying between the high water mark and the low water mark of a given parcel depends upon the slope of the shore. *See* McKnight, *Title to Lands in the Coastal Zone: Their Complexities and Impact on Real Estate Transactions*, 47 CAL. S.B.J. 409, 462-63 (1972). Thus the high water/low water area of a parcel with a virtually flat shoreline could be over 100 feet deep. Since that area is exposed for the longest part of the year, this is a substantial parcel of land. See text accompanying note 46 *infra*.

8. Brandenburger v. State, No. 21847 (Nevada County Sup. Court 1977), Fogerty v. State, No. 48281 (Placer County Sup. Court 1977).

9. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 395 (1892).

10. *See id.*

11. The doctrine of acquiescence requires a finding that the owners of adjoining property are uncertain of the true boundary between their lands, and that they have agreed upon and marked its location on the ground. Then, after the period of the statute of limitations, that agreed boundary will constitute the actual property boundary. Muchenberger v. Santa Monica, 206 Cal. 635, 642-43, 275 P. 803, 806 (1929).

FEE OWNERSHIP OF THE HIGH WATER/LOW WATER AREA

The determination of fee ownership of the beds of navigable waterways, which includes the high water/low water area,[12] is a function of both federal and state law. Federal and state definitions of "navigable" differ, and each definition serves a different function. The first test of navigability comes under federal law, and it determines whether a state acquires any fee ownership at all in the bed of a particular waterway.[13] Then, navigability under state law determines the extent of that fee ownership.[14] In addition, a different state definition of navigability, which is discussed below in connection with the common law navigational easement,[15] determines the right of the public to make use of the waters and their beds regardless of underlying fee ownership.[16]

Under the "equal footing doctrine,"[17] the State of California became vested with title to the waters and beds of all of its *navigable* waterways upon admission to the Union on September 9, 1850.[18] This doctrine applies, and the state acquires bed ownership, only if the waterway is navigable under federal law.[19] If it is not navigable under federal law, title to the bed remains in the owner of the upland.[20] Under federal law, a waterway is navigable for title purposes if it is capable of carrying the commerce of the nation, or if it is navigable in fact.[21] This federal test is to be applied to the waterway in its natural condition at the time the state was admitted to the Union.[22] The remainder of this comment deals with the extent of fee ownership under California state law, which is applicable only after a finding that a given waterway is navigable under federal law.

A. Navigability under State Law

Once the waterway has been found navigable under federal law, the extent of state ownership remains to be determined as a question of the law of each state.[23] There are three possible state law rules for determining the

12. The expression "high water/low water area" will be used throughout this comment as a shorthand expression for the land lying between the high water mark and the low water mark of nontidal navigable waterways.
13. *See* Utah v. United States, 403 U.S. 9, 10-11 (1971).
14. Hardin v. Jordan, 140 U.S. 371, 382 (1891).
15. See text accompanying notes 126-150 *infra*.
16. Hitchings v. Del Rio Woods Rec. & Park Dist., 55 Cal. App. 3d 560, 571, 127 Cal. Rptr. 830, 837 (1976).
17. This doctrine states that since the original thirteen states did not grant their navigable waters or the soils beneath them to the United States, but instead retained them, all new states are held to be absolutely vested in the lands underlying their navigable waterways. The waters themselves are subject to control of the United States for commerce. *See* Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845).
18. 9 Stat. c.50 at 452 (1850).
19. *See* Utah v. United States, 403 U.S. 9, 10-11 (1971).
20. *See id.*
21. *Id.*
22. *Id.*
23. Barney v. Keokuk, 94 U.S. 324, 338 (1876).

extent of upland ownership in nontidal navigable waterways. The development of these different rules is largely a product of the confusion created by the application of the English common law rule in the United States.

In England, no waters were deemed "navigable" for purposes of sovereign ownership except those that were influenced by the tides.[24] Navigable meant tidal, and the two words were used interchangeably. Under English law, the Crown owned the beds of tidal waterways to the high water mark, while it owned no portion of the beds of nontidal waterways.[25] Thus, the sovereign owned no portion of the beds of nontidal navigable waterways. This English common law definition of navigable became the common law in the United States.[26] It was felt to lead to illogical results[27] because a waterway could be navigable *in fact* under the federal test and title could vest in the state; but if that water was not tidal, and the state had adopted the English rule, the water was therefore not navigable under state law, and the state owned no portion of the bed.

The most common explanation given for the English rule equating "navigable" with "tidal" is that the topography of England is such that only tidal waters can, in fact, be navigated.[28] The underlying rationale for sovereign ownership of waterway beds is that the public authorities should have control of the great passageways of commerce and navigation for the public advantage and convenience.[29] In England, then, equating tidal with navigable was consistent with this underlying rationale, because the waters could not be navigated unless they were tidal.

Although the English rule became the common law in this country, resistance to it appeared, and prevailed, in *Barney v. Keokuk*.[30] The Court reasoned that the application of the English rule to the thousands of miles of nontidal waterways in this country that are navigable in fact was inconsistent with the underlying rationale of the rule that the state should control the passageways of commerce.[31] The Court held that a state could, and Iowa did, adopt a rule of sovereign ownership of the beds of *all* navigable waterways, including inland nontidal navigable waterways, to the high water mark.[32] This will hereinafter be referred to as the "Iowa rule."

The Court called the Iowa rule "the more correct rule,"[33] based on its compelling logic as revealed by an earlier exhaustive examination of the question by the Iowa Supreme Court.[34] The Court emphasized that the rule

24. *Id.* at 336.
25. *Id.*
26. *Id.* at 338.
27. *Id.* at 337-38.
28. *Id.* at 337.
29. *Id.* at 338.
30. 94 U.S. 324, 337-38 (1876).
31. *Id.*
32. *Id.*
33. *Id.* at 338.
34. *Id.* at 338-39.

had been adopted in a case in which the precise point—whether the title of the upland owner extended below high water—was directly before the Iowa court and that the decision had become the settled law of that state.[35] Finally, the Court cautioned that it might not be "safe" for other states to change their existing law.[36]

The importance of announcing a water boundary rule in a case where the precise question is before the court and the effect of change on the settled law of the state became more clear fifteen years later in *Hardin v. Jordan*.[37] The plaintiff claimed that Illinois had changed its law from the English common law rule to the Iowa rule.[38] The Court refused to recognize the earlier attempt to do so by the Illinois court because it felt that the earlier decision had not necessarily rested on the question of how far the upland owner's title extended, and that the Illinois court had attempted to lay down the Iowa rule without being required to do so.[39] Consequently, the Court ruled that the English common law remained the settled law of Illinois.[40] In so ruling, the Court accepted the continued vitality of the English rule in this country.

Finally, in *Massachusetts v. New York*,[41] the Court recognized a third state rule on the sovereign ownership question. Massachusetts argued that a boundary agreement with New York conveyed the high water/ low water area of Lake Ontario to Massachusetts.[42] The Court denied the claim on the basis of the settled New York law, which, like California Civil Code Section 830, stated that the boundary of upland ownership along the shore of a nontidal navigable waterway is the low water mark.[43] This will hereinafter be referred to as the "low water mark rule." The Supreme Court emphasized that a low water mark rule for nontidal navigable waterways was reasonable in light of certain difficulties created by the Iowa rule. The Court felt that the Iowa rule was impractical to administer because the boundary was difficult to locate on the ground, given the lack of natural landmarks defining the shores of nontidal waters.[44] Further, the Iowa rule was thought to contravene public policy because it denied the upland owner access to the water except during irregular and infrequent occasions of flood.[45] The character of the two waters is different: tidal waters inundate the shores daily while nontidal waters do so only seasonally, after spring runoff,[46] and

35. *Id.* at 339.
36. The Court seemed to be concerned with the riparian owners' rights. *See id.* at 338.
37. 140 U.S. 371 (1891).
38. *Id.* at 384.
39. *Id.* at 384-85.
40. *Id.* at 385.
41. 271 U.S. 65 (1926).
42. *Id.* at 91.
43. *Id.* at 93.
44. *Id.* A natural landmark making the high water mark visible on the ground would be something like the visible line of vegetation along Oregon's Pacific coast at the high tide mark. *See* State v. Hay, 254 Or. 584, 586, 462 P.2d 671, 673 (1969).
45. 271 U.S. at 93.
46. *Compare* People v. California Fish Co., 166 Cal. 576, 585, 138 P. 79, 82-83 (1913) (tide

thus the shores of nontidal waters are exposed for a greater period of time. Since there are no public rights in the shores of nontidal waters,[47] the upland owner would have to commit trespass to get to the water.[48]

This background shows that the state law of navigability is varied and confused. There is support for each of the three state rules of nontidal navigable waterway ownership and a state may adopt whichever rule it chooses when squarely faced with the water boundary question. The English rule, that the state takes no title to nontidal beds is followed by many states,[49] but is supported primarily by history and tradition. The Iowa rule, that the state takes to high water on all navigable waters, is logically consistent with the underlying rationale for sovereign ownership. The low-water rule, however, is also logically consistent with the underlying rationale for sovereign ownership, but it does not contravene public policy by denying the private landowner access to the waterway.

It seems that the low water rule is as consistent with the underlying rationale for sovereign ownership as the Iowa rule, because the low water rule retains sovereign control over those waters that are navigable in fact the year around. It has the added advantage of promoting both the public policy of access to navigable waters and, at the same time, private access to those waters. Thus, given the different character of the shores of the tidal and nontidal waters, the low water rule seems to strike an equitable balance between public access and private ownership. Keeping in mind the existence of three possible rules of sovereign ownership, and the reasons for each, this comment now turns to the question of California law.

B. California Nontidal Navigable Water Boundaries

None of the three possible state sovereign ownership rules has been judicially adopted in California.[50] The California courts have never been

waters) *with* Mammoth Gold Dredging Co. v. Forbes, 39 Cal. App. 2d 739, 751-52, 104 P.2d 131, 137 (1940) (nontidal waters).

47. These shores are not subject to the public trust easement, and the right to pass over them is lost when the waters recede. See text accompanying notes 126-150 *infra*.

48. 271 U.S. at 93.

49. *See, e.g.*, Delancy v. Boston, 2 Del. (2 Harr.) 489 (239) (1833) (Delaware); Middleton v. Prichard, 4 Ill. (3 Scam.) 510 (1842) (Illinois); Browne v. Kennedy, 5 H. & J. 195 (1821) (Maryland).

50. When discussing California law, the question of the influence of Mexican control over the lands that became California arises. The effect of Mexican law on the fee ownership question is limited to a factual determination of the priority of title between two claimants to a particular parcel, as opposed to a statewide water boundary rule. Under the Treaty of Guadalupe Hidalgo (1848, United States-Mexico), two kinds of titles acquired from the Mexican government were recognized as valid. The first, Mexican rancho grants to private citizens, has little effect on the high water/low water fee ownership question because the boundary is determined by the description in a U.S. patent confirming the Mexican grant. The U.S. patents generally referred to meander lines and the actual boundary is determined in accordance with state law. See note 86 *infra*. The second type of Mexican title, pueblo lands, did inure to the State of California upon admission to the Union. Pueblo lands were patented directly to the cities, and there are only seven cities with pueblo lands in California. Thus, Mexican law influences fee ownership only to specified parcels. *See* 2 A. BOWMAN, OGDEN'S REVISED CALIFORNIA REAL PROPERTY LAW 1238-41 (1974). *See generally* 1 TITLE INSURANCE TRUST CO., SOURCES OF TITLE TO LAND IN CALIFORNIA (1965).

squarely faced with the nontidal navigable water boundary question, the importance of which the Supreme Court emphasized in *Barney v. Keokuk*,[51] and required in *Hardin v. Jordan*.[52] Similarly, the courts have not addressed the question of whether the legislature adopted the low water mark rule for California by enacting Civil Code Section 830. Although Section 830 was enacted in 1872,[53] and amended to its present form a year later,[54] no California decision squarely interprets it as either a rule of property that states the California law, or a rule of construction that is to be applied only to ambiguous grants. This comment will first make an examination of the California cases which will show that statements can be found to support the position that California has adopted any one of the three rules, before discussing the rule of property/rule of construction arguments.

The early California decision of *Wright v. Seymour*[55] indicates that the English common law rule prevailed in California. The court said,

> a grant from the sovereign of land bordering upon a stream not navigable in the common-law sense—that is, above tide water—would be presumed to extend to the thread[56] of the stream . . . . All waters above tide-water are . . . *prima facie* private.[57]

The quoted language was not central to the holding of the case and is therefore not precedent for the proposition that the common law rule was adopted in California. The land in controversy was an island in a *tidal* portion of the Russian River,[58] making this language dicta. In addition, although Section 830 was mentioned in the opinion,[59] the conflict between the Section 830 low water mark rule and the English rule was neither raised nor discussed, because the waters were tidal.

An additional argument that California adopted the English rule of nontidal navigable water boundaries arises from the fact that in 1850, California adopted the common law of England as the rule of decision in the state.[60] The only rule available at the time[61] was the English common law rule, because the Iowa rule had neither been announced,[62] nor upheld as a valid alternative to the English rule.[63] The low water mark rule had not yet

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51. *See* 94 U.S. 324, 338 (1876).
52. 140 U.S. 371, 385 (1891).
53. CAL. CIV. CODE §830, *as enacted* (1872). *See generally* CAL. CIV. CODE §830, HISTORICAL NOTE (West 1954).
54. CAL. CIV. CODE §830, CAL. STATS. 1874, c. 612, §111, at 220.
55. 69 Cal. 122, 10 P. 323 (1886).
56. The "thread" of a stream is its centerline. Bishel v. Faria, 53 Cal. 2d 254, 259, 347 P.2d 289, 292, 1 Cal. Rptr. 153, 156 (1959).
57. 69 Cal. at 125, 10 P. at 325 (footnote omitted).
58. *Id.* at 122, 10 P. at 323.
59. *Id.* at 126-27, 10 P. at 326.
60. CAL. STATS. 1850, c. 95 at 219.
61. When faced with the problem of ascertaining the common law to be applied, California courts may look to the law of sister states. *See* People v. Mack, 19 Cal. App. 3d 1040, 1046, 97 Cal. Rptr. 448, 451 (1971).
62. The Iowa rule was first announced in *McManus v. Carmichael*, 3 Iowa 1 (1856).
63. The Supreme Court first upheld the Iowa rule in *Barney v. Keokuk*, 94 U.S. 324, 338-39 (1876).

been upheld as an alternative to the English rule.[64] Furthermore, there was no reported California decision addressing the boundary question prior to the enactment of Civil Code Section 830.[65] The logical result, then, is that the English rule would apply in California. The weakness of this argument is that the adoption of English common law was general in nature, not specific as to water boundaries. In addition, the remainder of the California case law discussion will show subsequent judicial statements that indicate that either the Iowa rule or the low water mark rule prevailed. Finally, there is the consideration that Section 830 itself exists as a subsequent declaration of California property law, which at the very least operated to change the English rule over one hundred years ago.

There are four cases that suggest that, as the state currently maintains,[66] California followed the Iowa rule. *Churchill Co. v. Kingsbury*[67] contains the statement that "[t]he lake consists of the body of water contained within the banks as they exist at the stage of ordinary *high* water. . . ."[68] The petitioner states "[t]hat the land is . . . sovereign land of the state, and in this, we think, [h]e is clearly right."[69] That statement did not actually adopt the Iowa rule, however, because the proceeding was in mandamus to compel the state to issue a patent for lands.[70] State ownership therefore was necessary to the plaintiff's cause of action, and state ownership of the high water/low water area was simply not in dispute. Thus the conflict between the Iowa rule and Section 830 did not arise and the case cannot be found determinative of a California rule.

People v. Morrill[71] also suggests that California followed the Iowa rule by stating that "[a] conveyance by the State bounding upon the sea, or upon a bay, or navigable stream, would extend to high water mark."[72] This language was not central to the holding of the case because ownership of nontidal navigable beds was not in dispute: the property in question was *tideland* lying below the high water mark.[73] All three state rules hold that state ownership of tidelands extends to the high water mark.[74] Section 830 contains the same provision.[75] Furthermore, since the case involved tidelands, the court could have meant "tidal stream" when it said "navigable stream," given the English common law equation of the two terms. The

64. The Supreme Court upheld the low water mark rule in *Massachusetts v. New York*, 271 U.S. 65, 93 (1926).
65. See text accompanying notes 67-92 *infra*.
66. See notes 3-5 and accompanying text *supra*.
67. 178 Cal. 554, 174 P. 329 (1918).
68. *Id.* at 559, 174 P. at 331 (emphasis added).
69. *Id.* at 558, 174 P. at 330.
70. *Id.* at 555-56, 174 P. at 329.
71. 26 Cal. 336 (1864).
72. *Id.* at 357.
73. *Id.* at 353.
74. See text accompanying notes 1, 25 & 32 *supra*.
75. CAL. CIV. CODE §830 provides: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark. . . ."

Morrill court made no distinction between the two, as such a distinction was unnecessary. Thus, this case could more appropriately be interpreted as an example of the confused state of the common law than as an adoption of the Iowa rule in California.

There is a case suggesting that the Iowa rule was adopted in which the extent of bed ownership was central to the holding. In *Packer v. Bird*[76] the plaintiff, whose patent description was bounded by the river, claimed ownership of an island in the middle of the Sacramento River at a point where it was navigable in fact.[77] The court held that "the river being navigable in fact, the title *extends* no farther than the edge of the stream."[78] While use of the navigability-in-fact test indicates that the court was not equating navigability with tidal, the opinion fails to raise or decide the critical question of whether the boundary is the high water mark or the low water mark.[79] Apparently the boundary at the edge of the stream was unimportant to the controversy because the island claimed lay within the low water marks, and title went with the bed ownership.[80] Furthermore, Section 830 was not discussed, and the case cannot be found determinative of the high water/low water boundary question.

The Iowa rule itself was proposed in *Yolo Water and Power Co. v. Edmands*.[81] The plaintiff sought to amend its complaint on appeal to condemn and pay for the landowner's property above the high water mark on the theory that the state had title below that point.[82] The amendment was permitted, leaving the impression that the high water mark was the boundary. A close examination of the opinion, however, shows that the issue decided was the permissibility of amendment on appeal, not the water boundary question. The condemnor was permitted to amend his complaint on the basis of a Civil Procedure Code Section allowing amendment at any time,[83] and the Iowa rule was not even discussed as an alternative ground for the decision.[84] This case, therefore, cannot be taken as authority that California has adopted the Iowa rule. Thus, a careful examination of the cases shows that, contrary to the current position of the state, California has never squarely adopted the Iowa rule.

There is one California case that indicates the low water mark rule of Section 830 is the California boundary rule. The conflict in *Maginnis v. Hurlbutt*[85] arose between the successor to a patentee of the United States government and a patentee from the state, for lands allegedly lying between

76. 71 Cal. 134, 11 P. 873 (1886).
77. *Id.* at 134, 11 P. at 873.
78. *Id.* at 135, 11 P. at 874 (emphasis added).
79. *Id.* at 135, 11 P. at 874.
80. *See id.*
81. 50 Cal. App. 444, 195 P. 463 (1920).
82. *Id.* at 446-47, 195 P. at 464.
83. *Id.* at 450, 195 P. at 465-66.
84. *Id.*
85. 34 Cal. App. 504, 510, 168 P. 368, 370 (1917).

the United States government survey meander line[86] and the low water mark of Clear Lake, a nontidal navigable waterway.[87] The plaintiff claimed that under Section 830 the United States patents that described lands on both sides of the meander line gave him title to the low water mark.[88] The state patent to the defendant purported to grant lands below the meander line. The plaintiff was unsuccessful in his attempt to void the defendant's patent and quiet title to the property himself because he did not establish the location of the meander line in relation to the low water mark—he failed to show that the property in dispute was in fact located landward of the low water mark.[89] The court felt that the state may have intended to convey title below the low water mark by its patent, and that absent clear and convincing proof of an actual discrepancy between the meander line and the low water mark, it would not be justified in disturbing the title from either patent.[90] The clear implication in the case was that under Section 830, the federal patent would prevail over the state patent, because Section 830 was the controlling property law.[91] The weakness of this case for purposes of proving that Section 830 is the California property rule is that the court never actually addressed that question because of the plaintiff's failure of proof. The court merely assumed that Section 830 was the California rule of property without discussing it.[92]

These cases show that there is support in judicial decisions for an argument that California has followd any one of the three fee ownership rules. The preceding examination of those cases has shown that none of them squarely raised or decided the precise question of nontidal navigable waterway bed ownership of the high water/low water area. The question that remains at this point is whether or not Section 830 is a *legislative* adoption of the low water mark rule of property.

C. *Civil Code Section 830, a Rule of Property*

The question of whether Section 830 is a rule of property or a rule of construction becomes important if the court somehow finds as the state

86. A meander line is an angular straight line that runs along the navigable waters bordering public lands. It is generally landward of the low water mark, and is used to determine the acreage of the parcel conveyed by the government. Use of this straight line makes calculation of acreage more simple than use of the curving physical line of waters themselves. The actual property boundary is not the meander line, but the waterway, at the thread, high water mark or low water mark, depending upon the applicable state law. *See* Hendricks v. Feather River Canal Co., 138 Cal. 423, 426, 71 P. 496, 498 (1903).

87. 34 Cal. App. 504, 510, 168 P. 368, 370 (1917).

88. *Id.*

89. *Id.*

90. *Id.* at 511, 168 P. at 371.

91. The federal patent would prevail because under Section 830, the actual boundary of federal ownership would have been the edge of the lake at the low water mark. Thus, the federal patent would convey the land between the low water mark and the meander line, while the state patent would convey nothing. *See* Hendricks v. Feather River Canal Co., 138 Cal. 423, 426, 71 P. 496, 498 (1903).

92. 34 Cal. App. at 510-11, 168 P. at 370-71.

maintains that California has adopted the Iowa rule. Section 830 could be a legislative adoption of a low water mark rule of property, in effect conveying the high water/low water area to the riparian owners. Alternatively, interpreted as a rule of construction, Section 830 would have little effect on fee ownership because it would be applied only to ambiguous grants. There are arguments supporting both positions.

The argument *against* Section 830 being a rule of property has two bases: (1) Section 830 cannot be granted because it does not contain the operative words of conveyance found in normal grants; and the legislative history shows no donative intent;[93] (2) a state donation of almost 4,000 miles of shoreline is manifestly against reason.[94] The weakness in the first basis of the argument is that the legislature has the power to regulate and change at will the method of transferring property.[95] By analogy, the state itself acquired bed ownership without operative words of conveyance,[96] and there is no reason that operative words would be necessary if the state disposed of the land.

The question of legislative donative intent and whether such a gift totally lacks reason are not easily answered, given the absence of legislative history to early California legislation. This could very well be the grounds on which a final court decision could rest. It must be pointed out, however, that the reasonableness of such a grant is to be measured as of the time Section 830 was enacted, not the present.[97] Presumably, the great public need for the high water/low water area did not exist at that time.[98]

An analysis of case law fails to disclose a single decision in which the question of whether Section 830 was meant to be a rule of property or a rule of construction was actually raised and answered. In only one case involving nontidal navigable waterways does the court actually purport to be applying a rule of property,[99] and there the court merely assumed, but did not decide, that Section 830 was a rule of property.[100] The court has also said that the law of California with respect to land bordering upon waters was "settled" by Section 830, but that case involved nonnavigable waters.[101] These waters are treated the same under the English rule, the Iowa rule, and Section

93. This argument is made by the Attorney General. *See* Opinion letter from Evelle J. Younger, Attorney General of California to William F. Northrop, State Lands Commission at 7-8 (Mar. 8 1977) (copy on file at *Pacific Law Journal*).

94. The state takes this position in *Brandenburger v. State*, No. 21847 (Nevada County Sup. Court 1977), Demurrer to First Amended Complaint, at 13.

95. *See* Roberts v. Wehmayer, 191 Cal. 601, 605, 218 P. 22, 23 (1923).

96. The state simply became vested automatically with its title under the equal footing doctrine. See note 17 *supra*.

97. *See* McLeod v. Reyes, 4 Cal. App. 2d 143, 148, 40 P.2d 839, 841 (1935).

98. This public need is first given strong emphasis in *Bohn v. Albertson*, 107 Cal. App. 2d 738, 753, 238 P.2d 128, 138 (1951). See the discussion of public use rights in the text accompanying notes 126-150 *infra*.

99. Los Angeles v. Aitken, 10 Cal. App. 2d 460, 466-67, 52 P.2d 585, 588 (1935).

100. *Id.*

101. Foss v. Johnstone, 158 Cal. 119, 127-28, 110 P. 294, 298 (1910).

830.[102] Therefore, the case is not conclusive of the nontidal navigable waterway question.

Other cases have called Section 830 a codification of the common law, but once again the courts were dealing either with tidelands,[103] or with nontidal nonnavigable waters;[104] and, as stated above, treatment of these waters is the same under all three rules. The court has applied Section 830 without discussion in other cases, either because the parties stipulated that it controlled,[105] or because the court found that the deed under which title was claimed indicated a contrary intent, thereby removing the case from operation of the rule.[106] None of the cases provide precedent for the decision that Section 830 is a rule of property.

Perhaps the most persuasive argument that the legislature intended Section 830 as a rule of property to settle the nontidal navigable boundary question is furnished by an examination of its language and development. As originally enacted, Section 830 provided that the low water mark was the boundary only for nontidal navigable lakes, with other nontidal navigable waters being divided in the center.[107]

The following year Section 830 was amended to its present form, setting the low water mark as the boundary for all nontidal navigable waterways.[108] The change has led to the belief that either the legislature discovered a mistake, or that it had simply changed its mind.[109] In either case, the change in itself seems to indicate that the legislature was aware that it did have a choice in fixing the nontidal navigable water boundaries, and that it exercised that choice by enacting the Section 830 low water mark rule as the California boundary rule.

This conclusion is also supported by the concurrent enactment of Civil Procedure Code Section 2077(5),[110] which contains the same low water rule as Civil Code Section 830, but is prefaced as a rule "for construing the descriptive part of a conveyance of real property, when the construction is doubtful."[111] Logically, the legislature would not enact the same rule of construction in two code sections at the same time. More probable is the inference that the rule of construction in Civil Procedure Code Section 2077(5) was intended to bring ambiguous grants into conformity with the statewide rule of property contained in Civil Code Sections 670[112] and 830.

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102. See text accompanying notes 1, 25 & 32 *supra*.
103. *See* White v. State, 21 Cal. App. 3d 738, 752, 99 Cal. Rptr. 58, 68 (1971).
104. *See* Drake v. Russian River Land Co., 10 Cal. App. 654, 660, 103 P. 167, 169-70 (1909).
105. Crews v. Johnson, 202 Cal. App. 2d 256, 258, 21 Cal. Rptr. 37, 39 (1962).
106. Hutton v. Yolo Orchard Co. 203 Cal. 724, 729-30, 265 P. 933, 935 (1928).
107. CAL. CIV. CODE §830, *as enacted* (1872). *See generally* CAL. CIV. CODE §830, HISTORICAL NOTE (West 1954).
108. CAL. CIV. CODE §830, CAL STATS. 1874, c. 612 §111, at 220.
109. McKnight, *Title to Lands in the Coastal Zone: Their Complexities and Impact on Real Estate Transactions*, 47 CAL. S.B.J. 409, 462 (1972).
110. CAL. CIV. PROC. CODE §2077(5), CAL. STATS. 1874, c. 383 §244, at 390.
111. CAL. CIV. PROC. CODE §2077(5), CAL. STATS. 1874, c. 383 §244, at 390.
112. California Civil Code Section 670 sets forth the extent of state ownership of lands:

Finally, the requirement of Section 830 that a boundary *other* than those set forth therein can be established only if the conveyance clearly indicates an intent to set a different boundary[113] has been called a codification of the common law of England.[114] The boundaries of tidelands and nontidal nonnavigable waters may be contrary to the English common law, but to be so, the grantor must specifically state his contrary intent.[115] It seems unlikely that the legislature would intend the entire code section to be a rule of construction simply because it inserted a new provision concerning nontidal navigable waters in its codification of the common law. More plausible is the position that the legislature, in recognizing the difference between "tidal" waters and "navigable" waters, chose what it felt was a reasonable rule of property for nontidal navigable waters.[116]

The preceding examination of California case law shows that no court has squarely raised or decided the issue of California law regarding the ownership of the high water/ low water area of nontidal navigable waterways, or decided the effect to be given Civil Code Section 830. There are grounds supporting each of the three rules, ranging from history and tradition that support the English common law, to the logical consistency with the public interest that supports the Iowa rule and the concurrent protection of public passageways and the private landowners' interests that support the low water rule.

In making an examination of the subject, a court should weigh the competing interests of the public and the private landowner.[117] The public interest lies in the need for recreational facilities[118] and the state constitutional right of the citizens guaranteeing them access to the navigable waters of the state.[119] Against this, the individual property owner has a right to enjoy the property he has paid for without unnecessary and unreasonable governmental intervention,[120] and to be able to rely on the law defining

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The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; . . . and of all property of which there is no other owner.

113. "Except where the grant under which the land is held indicates a different intent. . . ." CAL. CIV. CODE §830.

114. White v. State, 21 Cal. App. 3d 738, 752, 99 Cal. Rptr. 58, 68 (1971) (tidelands); Drake v. Russian River Land Co., 10 Cal. App. 654, 660, 103 P. 167, 169-70 (1909) (nontidal, nonnavigable waters).

115. *Id.* This comports with the idea that California Civil Code Sections 670 and 830, when combined with California Civil Procedure Code Section 2077(5) form a comprehensive plan for settling boundary ownerships. California Civil Code Sections 670 and 830 contain the substantive boundary rules, while California Civil Procedure Code Section 2077(5) would conform otherwise ambiguous grants to the substantive rule.

116. This seems to be the interpretation given California Civil Code Section 830 by the title industry. *See* 1 A. BOWMAN, OGDEN'S REVISED CALIFORNIA REAL PROPERTY LAW 632-33 (1974). It is a "rule of title practice" to object to descriptions following the waterline but not expressly stating that it follows the low water mark as to any adverse claim to any portion of the land *lying below* the *low* water mark. *See id.* at 634. (emphasis added).

117. *See* Barney v. Keokuk, 94 U.S. 324, 338 (1876).

118. *See* People v. Mack, 19 Cal. App. 3d 1040, 1045-46, 97 Cal. Rptr. 448, 451 (1971).

119. CAL. CONST. art. X, §4 (originally enacted as art. XV, §2 of the 1879 constitution).

120. *See* Los Angeles v. Aitken, 10 Cal. App. 2d 460, 470, 52 P.2d 585, 590 (1935).

those rights.[121] The rights of the public and those of the landowners are both extremely important rights in need of protection. In determining the California rule on the subject, a court should be mindful of the fact that certain public rights presently coexist with private rights in the use of all navigable waterways. It should also consider that the public may acquire additional use rights through other doctrines.

RIGHTS OF THE PUBLIC REGARDLESS OF UNDERLYING FEE OWNERSHIP

It is important to recognize that adoption of the Iowa rule is not necessary to guarantee public access to navigable waters. Regardless of who owns the underlying fee, the public has certain "use" rights: the common law navigation easement guarantees the right to make use of all navigable waters and incidental use of their beds;[122] the public trust doctrine guarantees similar rights in tidal waters, and there is support for extending it to all other navigable waters;[123] the doctrine of implied dedication may be available to secure additional use rights not only in land within the bed, but in land adjacent to the waterway.[124] Any examination of the question of fee ownership of nontidal navigable waterways must discuss these doctrines,[125] not only because they define actual public use rights as they currently exist, but also because they indicate the rights that will be affected by the choice of a fee ownership rule. Such an examination will show that an equitable balance between public rights and private rights can best be achieved through the adoption of the low water mark rule and the application of these doctrines as they presently exist.

A. The Common Law Navigational Easement

The public has a common law navigational easement or right of passage in *all* waterways that are navigable in fact, regardless of the underlying fee ownership of the bed.[126] "Navigability" for purposes of this easement is defined by state law,[127] and is determined in each case in light of the factual circumstances of the particular waterway.[128] Public use rights under the easement are extensive; and, as an examination of the cases will show, the definition of navigability for navigational easement purposes is expanding, thereby rendering more waterways available for public use.

The original state definition of navigability for navigational easement

121. *Id.*
122. See text accompanying notes 126-150 *infra*.
123. See text accompanying notes 151-174 *infra*.
124. See text accompanying notes 175-205 *infra*.
125. *See* Barney v. Keokuk, 94 U.S. 324, 338 (1876).
126. *See* Wright v. Seymour, 69 Cal. 122, 125, 10 P. 323, 325 (1886).
127. *See* People v. Mack, 19 Cal. App. 3d 1040, 1046, 97 Cal. Rptr. 448, 451 (1971). For a discussion of the law applicable to navigability for these purposes, see the text accompanying notes 126-149 *infra*.
128. Bohn v. Albertson, 107 Cal. App. 2d 738, 742, 238 P.2d 128, 131 (1951).

purposes was one of commercial use,[129] but it has been expanded to a recreational boating test.[130] The facts of the *Bohn v. Albertson*[131] case are instructive in showing this expansion. In February of 1938, the levee bordering the plaintiff's ranch broke and waters from a tidal portion of the Sacramento River flooded a part of his land.[132] The lands remained flooded, and from 1938 to 1947 members of the public traversed his land in great numbers, and fished the waters from rowboats, skiffs and pleasure boats.[133] The court found that this temporary flooding resulted in "navigable waters," and held that the public had rights of navigation and fishing.[134] The case reached two significant points on "navigability" for public easement purposes: first, waters that could accommodate pleasure craft are "navigable;"[135] and second, this type of navigability, unlike navigability for title purposes,[136] can arise at any time.[137] No longer was the commercial use definition exclusive.[138] The public could navigate and fish the waters for pleasure.

Twenty years later the pleasure craft or "recreational boating" test of navigability as it was called in *People v. Mack*,[139] was used to force a private landowner to remove wires and cables he had placed across the river on the grounds that they interfered with the public navigational easement.[140] The *Mack* court emphasized that the reason behind expanding the definition of navigability in *Bohn* had been the ever-increasing need for recreational areas; and it felt that it was extremely important that the public not be denied use of recreational waters by applying what it called a narrow and outmoded interpretation of commercial navigability.[141] The *Mack* court continued the development of the common law navigation easement by expanding the incidental uses to which recreationally navigable waters could be put. Waters navigable under the recreational boating test may be used *for any recreation* including sailing, rowing, fowling, bathing, skating and other public purposes.[142] The public already had the right to make incidental use of the land within the bed while the waters overflowed them.[143] After *Mack*, the primary use right still denied the public is the use of the privately owned high water/low water area while the waters are receded.[144]

129. *See* Wright v. Seymour, 69 Cal. 122, 125, 10 P. 323, 324 (1886).
130. 107 Cal. App. 2d at 746, 238 P. at 134.
131. 107 Cal. App. 2d 738, 238 P.2d 128 (1951).
132. *Id.* at 746, 238 P.2d at 134.
133. *Id.*
134. *Id.* at 754, 238 P.2d at 138-39.
135. *Id.* at 746, 238 P.2d at 134.
136. Navigability for title purposes is discussed in the text accompanying notes 12-49 *supra*.
137. 107 Cal. App. 2d at 742-43, 238 P.2d at 131-32.
138. *See* People v. Mack, 19 Cal. App. 3d 1040, 1045, 97 Cal. Rptr. 448, 451 (1971).
139. 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971).
140. *Id.* at 1043, 97 Cal. Rptr. at 449-50. California Civil Code Section 3479 deems any obstruction of a navigable stream a public nuisance.
141. 19 Cal. App. 3d at 1045, 97 Cal. Rptr. at 451.
142. *See id.* at 1046, 97 Cal. Rptr. at 451.
143. *See* Bohn v. Albertson, 107 Cal. App. 2d 738, 749, 238 P.2d 128, 136 (1951).
144. *See* Massachusetts v. New York, 271 U.S. 65, 93 (1926).

The latest expansion of the public recreational easement occurred in *Hitchings v. Del Rio Woods*,[145] where the court held that a waterway need not be navigable for the entire year to meet the *Bohn/Mack* test of navigability, given the state policy of promoting unimpeded public use of navigable waters that is expressed in the constitution and statutes.[146] The duration of recreational navigability required to vest use rights in the public was said to depend on the characteristics of the stream and the circumstances of its suitability for public use.[147] In *Hitchings*, nine months of recreational navigability was sufficient to vest public use rights.[148] Also instructive is the statement of the court that the policy of unimpeded public use would be important in answering the open question of whether recreational navigability had to be tested only by the natural condition of the stream, or if it could be applied to waters behind artificial improvements.[149] While the statement is dicta, it strongly implies that the court is willing to extend the definition of "navigability" to fit the public need.

It has been shown that public use rights in nontidal navigable waters are extensive and that they have greatly increased under an expanding definition or recreational navigability. The primary use right that does not exist under the common law navigation easement is the right to use the high water/ low water area while the waters have receded.[150] That particular right does exist, however, under the public trust doctrine. The public trust doctrine is normally applied only to tidal waters, and since there is support for the argument that the additional right should be acquired through an extension of the public trust doctrine to nontidal navigable waters, it is necessary to examine the public trust doctrine and the argument for its extension.

B. The Public Trust Doctrine

The public trust doctrine provides that certain lands are held in trust for the public and must be used by the state to promote and guarantee public rights of navigation, commerce and fishery.[151] The trust results in the imposition of a public easement or servitude similar to the common law navigational easement on lands originally held by the state in its sovereign capacity.[152] Traditionally, these were lands lying between the lines of ordinary high tide and ordinary low tide, together with those lands located within a bay or harbor that are permanently covered by its waters.[153] The emphasis of the doctrine was the protection of navigation and fishery for

145. 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976).
146. *Id.* at 569, 127 Cal. Rptr. at 835-36.
147. *Id.* at 570, 127 Cal. Rptr. at 836.
148. *Id.* at 571, 127 Cal. Rptr. at 837.
149. *See id.* at 569, 127 Cal. Rptr. at 835-36.
150. *See* Massachusetts v. New York, 271 U.S. 65, 93 (1926).
151. People v. California Fish Co., 166 Cal. 576, 584, 138 P. 79, 82 (1913).
152. *Id.*
153. *Id.*

commerce.[154] There is California constitutional support for extending the public trust doctrine to nontidal navigable waters;[155] but, as will be seen below, such an extension would be anomalous and unnecessary.

The use rights granted under the public trust doctrine are extensive. They include the right: to fish, hunt, bathe, and swim; to use the waters for boating and general recreational purposes; and to use the bottom for anchoring, standing or other incidental purposes.[156] A most significant element of the trust is that these uses are guaranteed even when the tide has receded and the land is exposed.[157] The fee title owner can do nothing to interfere with public access to the sea or other trust uses, and is therefore prohibited from attempting to prevent the tide from inundating his land.[158] This right to use the land after the waters have receded is the primary difference between the public trust doctrine and the common law navigational easement.

The rights secured by the public trust are considered extremely important. The state is without power to remove the trust, except where removal is deemed to serve the best interests of the public, and is held not to substantially impair the public right of navigation and fishery in the lands remaining subject to the trust.[159] Although the legislature is empowered to make a determination that specific lands are no longer useful for trust purposes and thereafter to convey them into private ownership free of the trust, the requisite intent to sever land from the trust will not be found "if any other inference is reasonably possible."[160] The extensive nature of these public rights is further illustrated by California constitutional guarantees that are more protective than those of the common law. One provision of the California constitution absolutely prohibits the alienation of trust lands lying within two miles of an incorporated city, city and county, or town.[161] Another provides that no one may prohibit public access to navigable water or obstruct its free navigation.[162]

It is the constitutional provision protecting access to *all* navigable waters[163] that gives impetus to the argument that the public trust should be extended to nontidal navigable waters. The argument begins with the recognition that despite the great public need for recreational areas, there is no public right under the common law navigational easement to use the shores of nontidal navigable waterways when the water has receded. Such a right would exist under the public trust; and, since the constitution does protect access to all navigable waters, the public trust doctrine should be applied to

154. *See id.*
155. The constitution guarantees access to *all* navigable waters. CAL. CONST. art X, §4.
156. Marks v. Whitney, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).
157. Forestier v. Johnson, 164 Cal. 24, 40, 127 P. 156, 162-63 (1912).
158. *Id.*
159. People v. California Fish Co., 166 Cal. 576, 585, 138 P. 79, 82-83 (1913).
160. *Id.* at 597, 138 P. at 87-88.
161. CAL. CONST. art. X, §3 (originally art. XV, §3 of the 1879 constitution).
162. CAL. CONST. art X, §4.
163. CAL. CONST. art. X, §4.

nontidal navigable waters. The argument has some merit because the United States Supreme Court imposed the public trust on nontidal navigable waters in *Illinois Central Railroad v. Illinois*.[164] The arguments against such an extension are strong, however.

First, there is the obvious historical distinction between tide waters and nontide waters, which the Supreme Court has held is supported by reason.[165] *Illinois Central* was not inconsistent with that distinction. The reason that the Court imposed the public trust on those nontidal navigable waters was their peculiar nature—the waters were the Great Lakes.[166] The Court called them "inland seas" supporting extended commerce with foreign nations.[167] It imposed the public trust for the protection of commerce.[168] It seems then, that this commerce rationale should be found applicable to the inland lakes and nontidal navigable rivers of California before the public trust doctrine can be extended.

Beyond this, California courts have referred to the public trust as applicable to tidelands,[169] and have not extended the doctrine to nonsovereign lands despite their apparent opportunity to do so.[170] In each case that has expended the common law recreational easement the courts spoke only of the navigational easement, not even mentioning the possibility of extending the public trust.[171] This very lack of discussion of the public trust in *Bohn v. Albertson*[172] is instructive when viewed in light of the concern of the court for the rights of the landowner. Despite facts that could arguably have supported the finding of a prescriptive easement,[173] the court preserved the landowner's right to reclaim his land and extinguish the rights of the public.[174] Further, despite the emphasis on the great interest of the public, it seems the court simply did not consider the idea of totally depriving the landowner of the use of his property through any indestructible public trust easement.

Finally, viewing the extension from the landowner's point of view, it should be noted that he has very few rights left in the high water/low water area as against the public. The easement use rights of the public have greatly expanded from a commerce basis to a recreation basis, and the landowner may not obstruct the use of that easement. Thus, it seems that the primary

164. 146 U.S. 387, 460 (1892).
165. *See* Massachusetts v. New York, 271 U.S. 65, 93 (1926).
166. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 460 (1892).
167. *Id.* at 435.
168. *Id.*
169. *See* Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437-38, 91 Cal. Rptr. 23, 37-38 (1970).
170. *See generally* Hitchings v. Del Rio Woods Rec. & Park Dist., 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976); People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951).
171. *Id.*
172. 107 Cal. App. 2d 738, 238 P.2d 128 (1951).
173. See the text accompanying notes 126-127 *supra*, where it is seen that the public use in *Bohn* continued from 1938 to 1947. In this connection, also see the text on implied dedication, which accompanies notes 175-205 *infra*.
174. 107 Cal. App. 2d at 757, 238 P.2d at 141.

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167. *Id.* at 435.
168. *Id.*
169. *See* Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437-38, 91 Cal. Rptr. 23, 37-38 (1970).
170. *See generally* Hitchings v. Del Rio Woods Rec. & Park Dist., 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976); People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (1951).
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174. 107 Cal. App. 2d at 757, 238 P.2d at 141.

right remaining to him is his right to exclude the public from the high water/low water portion of his land only during the time the water has receded. It seems inequitable to attempt to deprive him of that remaining right through an anomalous extension of the public trust doctrine, especially when that right may be acquired through the doctrine of implied dedication.

C. *Implied Dedication*

To this point it has been seen that regardless of who the court determines owns the underlying fee interest in the high water/low water area, the public enjoys extensive use rights in the beds of all tidal and nontidal navigable waterways; and, the primary difference between public rights in the two waterways is the right to use the exposed portion of the bed. It has also been shown that while this final right could be acquired through an extension of the public trust doctrine, such an extension has not been attempted, and would be anomalous. The theory of implied dedication, contained in both statutory[175] and case law,[176] might be used to acquire that additional right without distorting public trust law. The statutory requirements are preferable to those of the case law, because they reflect the concern of the legislature for both public and private interests, and embody an attempt to strike a balance between the two. For purposes of this discussion, the high water /low water area, during the period the water has receded and it is exposed, will be referred to as "the dry land area."

Implied dedication under Civil Code Section 1009 is available if the public has used the dry land area for five years and a governmental entity has expended public funds on visible improvements or maintenance thereon in connection with that use.[177] There are additional requirements imposed for the protection of the rights of the landowner. The public use and the expenditure of public funds must be of such a nature that the owner knew or should have known of the public use.[178] Finally, no dedication will be implied if the landowner has given express permission for continuing the use or has taken reasonable steps to enjoin, remove or prohibit it.[179]

The legislature has reached what appears to be an equitable result through Civil Code Section 1009. The public cannot acquire vested use rights unless it shows that it has actually used the private property and expended its money and the landowner does not lose his right to exclude the public unless his gross inaction makes it appear that he must have intended the dedication. The public, in effect, has acquired an equitable interest in the property through its continued use and the expenditure of public funds, which, given

175. CAL. CIV. CODE §1009.
176. Gion v. Santa Cruz, Dietz v. King, 2 Cal. 3d 29, 265 P.2d 50, 84 Cal. Rptr. 162 (1970).
177. CAL. CIV. CODE § 1009(d).
178. CAL. CIV. CODE § 1009(d).
179. CAL. CIV. CODE § 1009(d).

the owner's silence,[180] lead to the belief and expectation that the property is public property.[181] It seems completely reasonable to presume that any landowner who, with knowledge of these circumstances, has not given notice of his right to prohibit the use through unobtrusive methods,[182] or has not tried to stop the use, must have intended to dedicate his land to that public use.[183]

It is also possible to find implied dedication of the dry land area through the *Gion v. City of Santa Cruz-Dietz v. King*[184] doctrine. Under *Gion-Dietz* if a five-year use period was completed prior to January 1, 1972, the dry land area may have been dedicated to public use.[185] The critical difference between *Gion-Dietz* and Section 1009 is the much heavier burden *Gion-Dietz* imposes on the landowner. Under Section 1009, the state must show actual use, expenditure of funds and circumstances tantamount to actual knowledge;[186] under *Gion-Dietz*, once the state proves only the public use for the five-year period, the burden shifts to the landowner to prove affirmatively that he granted the public a license or made a bona fide attempt to prevent the public use.[187]

What constitutes a bona fide attempt depends upon the character of the property involved and the extent of the public use;[188] but, under *Gion-Dietz*, as *a matter of law*, the landowner *cannot* prevent the dedication by: posting "no trespassing" or other signs,[189] temporarily blocking access to the beach,[190] granting permission to a few but not to all users,[191] or by making a "half-hearted attempt" to collect tolls.[192] Unlike Section 1009, there is no need to show the expenditure of government funds, although it is given great weight.[193] Thus, under *Gion-Dietz* the burden is on the landowner, whereas under Section 1009 it is primarily on the state.

Civil Code Section 1009 was enacted in reaction to and in an effort to change the *Gion-Dietz* law of implied dedication.[194] While it may not have

180. CAL. CIV. CODE § 1009(d).
181. *See* Gion v. Santa Cruz, Dietz v. King, 2 Cal. 3d 29, 39, 265 P.2d 50, 56, 84 Cal. Rptr. 162, 168 (1970).
182. California Civil Code Section 813 provides that the owner can prevent the public use from ripening into an easement by prescription by recording a notice in the county recorder's office of the county in which the property is situate that the right to use the property is by permission and subject to control of the owner. California Civil Code Section 1008 allows the owner to prevent the prescription by posting signs at the entrance to the property, or at specified intervals along the boundary.
183. 2 Cal. 3d at 44, 265 P.2d at 60, 84 Cal. Rptr. at 172.
184. 2 Cal. 3d 29, 265 P.2d 50, 84 Cal. Rptr. 162 (1970).
185. *See* CAL. CIV. CODE §1009(b). This section provides that no use by the public after the effective date of that section shall ripen into a vested right to continue the use permanently. *Enacted by* CAL. STATS. 1971, c. 941, §2, at 1846.
186. *See* CAL. CIV. CODE §1009(d). See text accompanying notes 177-178 *supra*.
187. 2 Cal. 3d at 40, 265 P.2d at 57, 84 Cal. Rptr. at 169.
188. *Id.* at 41, 265 P.2d at 57-58, 84 Cal. Rptr. at 169-70.
189. *See id.*
190. *Id.* at 37-38, 265 P.2d at 55, 84 Cal. Rptr. at 167.
191. *Id.* at 44, 265 P.2d at 59-60, 84 Cal. Rptr. at 171-72.
192. *Id.*
193. *See id.* at 39, 265 P.2d at 56, 84 Cal. Rptr. at 168.
194. *See* 3 PAC. L. J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 384 (1972).

rendered implied dedication under *Gion-Dietz* completely unavailable, Section 1009 should be the only theory given effect. It states that the policy of California is to encourage the private landowner to allow public use of *his* property, and not to have to risk loss of that property because of his generosity.[195] Further, as above, the legislature has set the terms on which it feels loss of completely private use of the dry land area is justified. Its balance of the private and public equities should be given effect.

It should be noted that there are some difficulties in applying implied dedication to the dry land area, but they are minimal. Some critics have questioned the constitutionality of the *Gion-Dietz* decision on the grounds that it constitutes a taking of private property for a public purpose without just compensation.[196] They also object to the theory of implied dedication in general because it is a total disregard of private rights.[197] While the question of the constitutionality of implied dedication of the dry land area has never been squarely decided, it must be remembered that a dedication is not a taking.[198] It is a voluntary gift by the landowner.[199] Given that conceptualization, constitutional challenge should fail.

The objection that implied dedication ignores the rights of the landowner arose under the *Gion-Dietz* decision,[200] and, given the legislative reaction, it seems to have been well taken. But the circumstances necessary to find implied dedication under Section 1009 do not ignore, but actually balance the equities. As seen above, Section 1009 puts the burden on the state, thereby giving protection to the landowner. The objection that the theory of implied dedication is totally inequitable should not be valid under Section 1009, because the landowner cannot be unfairly deprived of his land under the circumstances required for dedication, but it seems that the public would be unfairly deprived if dedication were not found.[201]

A final obstacle to the use of implied dedication in the nontidal navigable waterway situation arises from the fact that the theory has never been used outside the tideland or highway setting, and that it is, therefore, somehow inappropriate for extension. This objection fails to take into account that extension is implicit from the very structure of Section 1009. It contains separate provisions for tidelands and other lands,[202] and contains no language limiting those other lands to highways.[203] Further, the California Supreme Court had to extend implied dedication from highways to tidelands

195. *See* CAL. CIV. CODE §1009(a).
196. *See* Berger, *Gion v. City of Santa Cruz: A License to Steal?*, 49 CAL. S.B.J. 24, 27 (1974).
197. *Id.*
198. *See* Union Transp. Co. v. Sacramento County, 42 Cal. 2d 235, 240, 267 P.2d 10, 12-13 (1954).
199. *Id.*
200. Berger, *Gion v. City of Santa Cruz: A License to Steal?*, 49 CAL. S.B.J. 24, 27 (1974).
201. See text accompanying notes 177-183 *supra*.
202. *Compare* CAL. CIV. CODE §1009(b), (d) *with* CAL. CIV. CODE §1009(e), (f).
203. *See* CAL. CIV. CODE §1009(d).

in *Gion-Dietz*.[204] In doing so, the court stated that it would be receptive to finding implied dedication because of the public need for recreational facilities.[205] It would seem then that implied dedication is available to acquire the right to use the dry land area.

It has been shown that the public should be able to acquire the right to use the dry land area through the doctrine of implied dedication, and that this doctrine is considerably more protective of the private landowners' rights than the public trust doctrine. It is also evident that the legislature places great importance on the rights of the landowner and that it has attempted to strike an equitable balance between those rights and the needs of the public. In view of these considerations, it seems most equitable to require the state to show actual use of the dry land area before it takes that right from the landowner. Since implied dedication requires actual use and the public trust doctrine does not; and, since implied dedication can be used in its present form, while the public trust would need to undergo an anomalous extension to acquire that right, it seems that the method most consonant with public policy as enunciated by the legislature would be implied dedication. It is the method that should be used.

The Landowner May Have Acquired Fee Title Even if the Court Adopts the Iowa Rule

It has been seen that California has yet to squarely confront the high water/low water area boundary question; and, that regardless of the rule adopted as to fee ownership, the public currently enjoys extensive use rights in all navigable waters under the expanding common law navigational easement. Likewise, the public may acquire use of the dry land area through the doctrine of implied dedication. Just as a fee ownership decision was not conclusive as to public rights, similarly it will not be conclusive as to private rights. In order to reach a final decision on the extent of both public and private rights in the dry land area, the examination by a court must include a discussion of the other means by which the landowner may have acquired title to the dry land area. These means include equitable estoppel and adverse possession.

A. Estoppel Against the State

Should the court determine that the Iowa rule is the rule in California, the state could be estopped from asserting its claim of superior title to the high water/low water area of nontidal navigable waterways. The government may be bound by an equitable estoppel *in the same manner as a private party* so long as the requisite elements are present, and in the considered view of a court of equity, the injustice that would result is of sufficient

204. 2 Cal. 3d at 42-43, 465 P.2d at 58-59, 84 Cal. Rptr. at 170-71.
205. *Id.*

dimension to justify any effect the estoppel would have on the public interest.[206] *City of Long Beach v. Mansell*[207] is a key case in which the government was actually estopped to assert superior title.[208] The case involved title to tidelands lying below the high water mark, and the estoppel was raised despite the impact on the public trust.[209] *Mansell* sets forth the obstacles to raising an estoppel, including the necessary elements required, and the ultimate issue: the impact on public policy.

The first element of estoppel under *Mansell* is that of knowledge: the party to be estopped must have actual or imputed knowledge of the true state of his own title.[210] Knowledge will be imputed to the goverment if it has made affirmative representations, as opposed to merely being silent, because it should have had actual knowledge before making the representation.[211] In *Mansell*, the court imputed knowledge to both the city of Long Beach and the State of California.[212] It felt that where both had conducted themselves as if the land were wholly private manifest injustice would result if the governmental entities whose conduct had induced the reliance were permitted to assert a successful claim of paramount title.[213] The affirmative conduct the court cited was: a request by the city council to the city attorney to investigate titles in the area and a dismissal of the investigation shortly thereafter because of the adverse reaction from the homeowners; the city allowed the area to be filled and issued numerous building permits; and finally, once it had been apprised of the situation, the state enacted enabling legislation permitting the city to remove the public trust.[214]

There is similar affirmative conduct in the high water/low water area situation. The State Attorney General was requested to investigate the question of sovereign ownership on nontidal navigable lakes and rivers in 1964 and, after noting the confusion of "navigable" with "tidal" in state law, he concluded that California law was well settled that private ownership extended to the *low* water mark.[215] That same position has been taken in other attorney general opinions,[216] and in certain judicial opinions.[217] Building permits for piers and homes have been issued on these lands.[218] Finally, the legislature enacted Civil Code Section 830 which states that the

206. City of Long Beach v. Mansell, 3 Cal. 3d 462, 496-97, 476 P.2d 423, 448, 91 Cal. Rptr. 23, 48 (1970).
207. 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).
208. *Id.* at 501, 476 P.2d at 451, 91 Cal. Rptr. at 51.
209. *Id.*
210. *Id.* at 489-90, 476 P.2d at 442-43, 91 Cal. Rptr. at 42-43.
211. *See id.* at 492, 476 P.2d at 445, 91 Cal. Rptr. at 45.
212. *Id.* at 491-92, 476 P.2d at 445, 91 Cal. Rptr. at 45.
213. *Id.* at 499, 476 P.2d at 450, 91 Cal. Rptr. at 50.
214. *Id.* at 472-74, 476 P.2d at 430-31, 91 Cal. Rptr. at 30-31.
215. 43 OP. ATT'Y GEN. 291, 292-95 (1964).
216. 30 OP. ATT'Y GEN. 262, 269 (1957); 23 OP. ATT'Y GEN. 97, 98 (1954).
217. *See, e.g.*, Crews v. Johnson, 202 Cal. App. 2d 256, 258, 21 Cal. Rptr. 37, 39 (1962); City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 467, 52 P.2d 585, 588 (1935).
218. *See* Opinion letter from Evelle J. Younger, Attorney General of California, to William F. Northrop, State Lands Commission, 3-4 (Mar. 8, 1977) (copy on file at *Pacific Law Journal*).

low water mark is the boundary, and that is affirmative action regardless of whether it is called a rule of property or a rule of construction. It seems, then, that given these parallel factors, the first element of *Mansell* has been satisfied: the state has conducted itself for over one hundred years as if this were private land.

The second *Mansell* element, intent to induce reliance, should also be easily satisfied. The party must have made its representations with either the express intention to deceive, or with such carelessness and culpable negligence as to amount to a constructive fraud.[219] In *Mansell*, the collective conduct of the governmental entities, including their early awareness of the title problem and the failure to correct it were held to constitute the requisite constructive fraud.[220] Since the conduct of the government in the high water/low water mark controversy closely parallels that of *Mansell*, including the early awareness of the title problem and the failure to correct it,[221] there should be little difficulty in satisfying this second element.

The state can hardly be found to have attempted to resolve the problem through the superior court case of *People v. Shasta Pipe and Supply Co.*[222] That case involved only one parcel, which has a *de minimis* length of shoreline, and has not been appealed. The state has admitted that the decision is insufficient to determine a statewide rule of property for over 4,000 miles of nontidal navigable waterways.[223]

The third and fourth elements of the estoppel, lack of knowledge of the true state of affairs and reasonable reliance by the landowner appear to require no formal proof by the landowner. The *Mansell* court simply stated without discussion that there was no difficulty in concluding that the owner was without *any convenient or ready means of ascertaining* the knowledge that the circumstances required be imputed to the state, and that therefore, the reliance on the conduct of the public entities was reasonable.[224] Once again, the high water/ low water area situation is very similar to that in *Mansell*. Given the conflicting statements in California law as to the actual boundary line,[225] it would seem that nontidal navigable waterway landowners could not have any convenient or ready means for ascertaining the knowledge that the circumstances require be imputed to the state. Thus, as in *Mansell*, absent a showing of actual knowledge of the true state of the title, the landowners should be presumed to have reasonably relied on the governmental conduct. There appears to be no logical basis for requiring greater proof of these two elements here than in *Mansell*.

219. 3 Cal. 3d at 490, 476 P.2d at 443, 91 Cal. Rptr. at 43.
220. *Id.* at 492, 476 P.2d at 445, 91 Cal. Rptr. at 45.
221. See text accompanying notes 215-218 *supra*.
222. Civ. No. 37390 (Butte County Sup. Court Mar. 25, 1971).
223. *See* Opinion letter from Evelle J. Younger, Attorney General of California, to William F. Northrop, State Lands Commission, 2-3 (Mar 8, 1977) (copy on file at *Pacific Law Journal*).
224. 3 Cal. 3d at 492, 476 P.2d at 445, 91 Cal. Rptr. at 45.
225. See text accompanying notes 55-92 *supra*.

The real hurdle in raising an estoppel against the state is the potential impact on public policy. The *Mansell* Court laid down what it felt would be an extremely narrow precedent for application in the future,[226] and stated that an estoppel will not be raised if it will effectively nullify a strong rule of *policy* adopted for the benefit of the public.[227] The policy impacted upon in *Mansell* was the public trust doctrine, and the landowners' interests outweighed the impact on it because of the court's finding that the impressive array of public facilities for navigation and recreation available on other portions of the same bay prevented the estoppel from withdrawing the entire area from the public.[228]

Exactly what the court meant by a withdrawal of the area is not clear. It could have been emphasizing either the public's right to use the area, including its right of access, or it could have meant actual structural facilities.[229] If the court meant to emphasize access to the waters, the examination of the common law navigational easement and the rights it provides suggests that an estoppel would withdraw only the dry land use right from the public.[230] This impact would appear to be slight when compared to the uses available under the easement and the possibility of acquiring the dry land use right through implied dedication. Further, assuming that the state had fee ownership to begin with, it is possible that it lost the fee through adverse possession,[231] in which case the estoppel would have no impact at all.

If, on the other hand, actual structural facilities like boat slips, bath houses, marinas and the like are meant, then the court may require a statistical examination of the entire lake or a lesser specified portion of a river to determine the actual facilities available to the public in that area before it permits the estoppel. As stated above, the emphasis is not clear, but it would seem that given the constitutional protection of *access*,[232] which has been interpreted to mean *use rights*,[233] the court probably meant use rights. The estoppel could therefore be raised in the high water/low water area situation.

Finally, there are two other related considerations in raising an estoppel argument. The first is whether the state is to be estopped from asserting its superior title in the bed of every parcel along all nontidal navigable water-

226. 3 Cal. 3d at 500, 476 P.2d at 451, 91 Cal. Rptr. at 51.
227. *Id.* at 493, 476 P.2d at 445, 91 Cal. Rptr. at 45.
228. *Id.* at 500, 476 P.2d at 451, 91 Cal. Rptr. at 51.
229. *See id.* at 500 n.34, 476 P.2d at 451 n.34, 91 Cal. Rptr. at 51 n.34.
230. See text accompanying notes 126-144 *supra*.
231. Most jurisdictions prohibit adverse possession against the state. R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY at 1099-1100 (abr. ed. 1968). Adverse possession against the State of California is legally possible, but will probably not be available as to the high water/low water area. See text accompanying notes 236-251 *infra*.
232. *See* CAL. CONST. art. X, §4.
233. *See* Hitchings v. Del Rio Woods Rec. & Park Dist., 55 Cal. App. 3d 560, 569, 127 Cal. Rptr. 830, 835-36 (1976).

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ways, or only from challenging Section 830 as a rule of property. The second is the number of landowners that should benefit from the estoppel that is raised. In response to the first question, since the reliance on which the estoppel is based involves affirmative conduct only in connection with Section 830, the estoppel should be raised only to prevent the state from denying that Section 830 is the California water boundary property law. To estop the state from asserting superior title where Section 830 clearly does not apply, is to ignore the basis for the estoppel.[234] Furthermore, the state should be estopped as to any landowner who falls within the terms of Section 830, because this will prevent the inefficient and unnecessary massive litigation involved in a case by case adjudication of the same title question. Such was the result in *Mansell*, and such should be the result here.[235]

The question that remains at this point is whether, if the court finds that the state owns title to the high water mark of nontidal navigable beds, and refuses to raise an estoppel thereby giving Section 830 effect, it is possible that the landowner in a particular situation can still claim fee ownership. The answer to that question depends on the availability of adverse possession against the state.

B. Adverse Possession Against the State

Perhaps one of the first arguments that springs to mind when a landowner has been in possession of property for a long period of time, and it appears that he may have color of title through either a statute like Civil Code Section 830, or through the description in his deed, and a court will not estop other parties from asserting their claims of superior title is that the landowner must have acquired title through adverse possession.[236] The claim of adverse possession is one of the rights that may be impacted upon by a decision settling the nontidal navigable waterway question. For that reason it should be included in an examination of the water boundary issue. It will be seen that, while adverse possession against the state does exist, it is available only if the land claimed has not been dedicated to a public use. It is highly probable that the waters and lands subject to the common law navigational easement will be found to be dedicated per se to a public use.

234. All of the state action relied on involved the application, interpretation or enactment of California Civil Code Section 830. See notes 215-225 and accompanying text *supra*.

235. The *Mansell* court felt the nature of the title problem and the massive numbers of potential litigants negatived the idea of case-by-case adjudication. *See* 3 Cal. 3d at 487-88, 476 P.2d at 441, 91 Cal. Rptr. at 41.

236. Most jurisdictions prohibit adverse possession against the state. R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY at 1099-1100 (abr. ed. 1968). The elements of adverse possession are: (1) possession by actual occupation under such circumstances as to constitute reasonable notice to the owner; (2) possession hostile to the owner's title; (3) a claim to the property as one's own, under either color of title or claim of right; (4) continuous and uninterrupted possession of the property for the period of the statute of limitations; (5) the payment of all taxes levied and assessed against the property during the period. *See* Laubisch v. Roberdo, 43 Cal. 2d 702, 706, 277 P.2d 9, 12 (1954).

Finally, it will be seen that even if adverse possession is available to an individual landowner, it is an uneconomical, inequitable means of settling the boundary question.

An individual can adversely possess land owned by the State of California because of a ten-year statute of limitations barring actions for the recovery of government property.[237] It is possible for him to bring a quiet title action against the state.[238] The statute of limitations has actually barred a city from asserting ownership to land it held in trust for municipal purposes,[239] and to other land it owned in fee.[240] The ten-year period has been held applicable to an action by the state to void a patent on the grounds of fraud,[241] but in that case the time period had not yet run,[242] and the statement is not as meaningful as it would have been had the claim of the state actually been barred.

The difficulty in adversely possessing the high water/low water area is that the ten-year *statute of limitations will not bar a claim by the state if the property involved has been put to a public use*.[243] The cases show that it is the availability for or dedication to public use, as opposed to actual public use that is important. Thus, there is no adverse possession of land that was dedicated for street purposes but never used for streets, only private purposes.[244] Property conveyed for a park,[245] and property simply conveyed to the trustees of an agricultural association[246] cannot be adversely possessed. Perhaps most instructive is the holding that lands subject to the public trust doctrine are per se dedicated to a public use simply because the bay is open to navigation only at the actual shore line.[247]

It has been seen that the difference in the character of tidal and nontidal waters and lands permits the two to be treated differently.[248] The argument can therefore be made that because of the difference, nontidal navigable waters should not be found to be per se dedicated to a public use. The argument will probably not succeed. The need of the public to get to the actual line of the water to exercise their use rights in the water justified the holding that public trust beds were per se dedicated to a public use.[249] That need would appear to be the same in the nontidal navigable waterway

237. CAL. CIV. PROC. CODE §315.
238. CAL. CIV. CODE §1007.
239. Ames v. City of San Diego, 101 Cal. 390, 395, 35 P. 1005, 1007 (1894).
240. City of San Diego v. Linda Vista Irrig. Dist., 108 Cal. 189, 196, 41 P. 291, 293 (1895).
241. People v. Kings County Dev. Co., 177 Cal. 529, 536, 171 P. 102, 105 (1918).
242. *Id.*
243. This is currently so provided in California Civil Code Section 1007. It has been so held in the California decisions since at least *Hoadler v. City of San Francisco*, 50 Cal. 265, 274-75 (1875).
244. *See, e.g.*, Mills v. City of Los Angeles, 90 Cal. 522, 531, 27 P. 354, 356 (1891); People v. Pope, 53 Cal. 437, 451 (1879).
245. People v. Chambers, 37 Cal. 2d 552, 557, 233 P.2d 557, 560 (1951).
246. Sixth Dist. Agric. Ass'n v. Wright, 154 Cal. 119, 130, 97 P. 144, 149 (1908).
247. People v. Kerber, 152 Cal. 731, 733, 93 P. 878, 879 (1908).
248. See text accompanying notes 44-48, 144 & 157-78 *supra*.
249. *See* People v. Kerber, 152 Cal. 731, 733, 93 P. 878, 879 (1908).

situation. The public must get to the actual line of the water in order to use it.

Furthermore, a court could easily find that the high water/low water area was in fact *put* to a public use either through the seasonal use of the bottom while the waters overflowed it, or at the very least, through the recreational use of the waters themselves. The burden would then be on the landowner to show that he adversely prevented the public from making its customary use of the property.[250] In any event, it appears unreasonable to expect that any court that would find fee ownership in the state, after realizing that the state will gain only the use of the dry land area, and refusing to raise an estoppel after 100 years of state action treating the land as private, would hold that the high water/low water area had *not* been put or dedicated to a public use. Such findings would be inconsistent.

Finally, even if adverse possession were allowed, it is not the preferable means of resolving the high water/low water fee ownership question. It would involve a time consuming case-by-case adjudication of the ownership question of thousands of miles of waterway. This is not a preferred means of resolving massive title questions.[251] Furthermore, it seems inequitable to put the burden of proof on a landowner who made the unfortunate mistake of relying on his government. The more equitable balance of public and private rights will be achieved through a finding that either California adopted the low water mark rule, or that the state is to be estopped from questioning the effectiveness of Section 830 as a rule of property.

Conclusion

It has been shown that California law on the question of fee ownership of the land lying between the high water mark and the low water mark of nontidal navigable waterways is both conflicting and undecided. Civil Code Section 830 was probably intended as a rule of property, a part of a comprehensive scheme of California water boundary law containing rules of private ownership, state ownership and rules of construction. The Section 830 low water mark rule is supported by logic and its balance between public and private rights. Finally, although Section 830 appears to place the high water/low water area in private ownership, it is evident that the public enjoys extensive rights of navigation, fishing and recreation under an expanding common law navigation easement.

It has also been shown that the only right that the public might be denied is the right to use the dry land area, and that such a right may be acquired through implied dedication. The fee ownership question, then, is definitely

250. The person claiming title by adverse possession must prove all of the necessary elements, including adverse use. Phelan v. Drescher, 92 Cal. App. 393, 399, 268 P. 465, 468 (1928).

251. *See* note 235 *supra*.

not one of "all or nothing" for the public, but may very well be one of "something or nothing" for the private landowner.

It has been the purpose of this comment to urge that all of the above use rights and legal doctrines be considered by any court reviewing this subject to directly decide the question in the manner required by the Supreme Court. It must strike a balance between the competing interests of the increasing public need for recreational facilities and the right of the private landowner to enjoy his own property. No court may totally ignore the interest of the landowner. The California Supreme Court has said that where the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over a citizen's property.[252] The California Court of Appeal gave that principle meaning for the high water/low water controversy when it emphasized that governments are intended primarily to protect the rights of their individual citizens, and the state may not interfere with navigable streams and lakes except to regulate, protect and preserve the easement of the public therein unless such acts are exercised under the doctrine of eminent domain or pursuant to the police power.[253] A balance of the public interest and the individual's rights can best be achieved by giving effect to Civil Code Section 830 as a rule of property, and by applying implied dedication where the circumstances warrant it. The net result of this recommendation is that both the public and the landowner will continue to enjoy the rights that they have reasonably come to expect.

Jeffry Richard Jones

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252. House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 391, 153 P.2d 950, 953 (1944).

253. City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 470, 52 P.2d 585, 590 (1935).

REPORT TO THE GOVERNMENT AFFAIRS COMMITTEE HEARING ON A.B. 234

This is a statement in regard to A.B. 234, which was introduced by Mr. Weise, Mr. Glover and Mr. Bergevin. I am very much opposed to this measure. I speak as a private citizen, who is not a member of any environmental or tax group. I have no motive other than the protection of the rights of the vast number of non-lakeshore property owners and all the residents of the State of Nevada. My position is that this is a needless and ill-advised giveaway of State property - for the financial benefit of a very few lakefront property owners.

I have been spending vacation time at Lake Tahoe since 1932 and my sister and I owned a non-beachfront home on the California side of the Lake for some twenty years. Our friends and our children and their friends have been enjoying Lake Tahoe for many years. I am very familiar with the problem of finding a place to get to the beach without crossing private property. California recognizes 6229.1' as the high water line and property line. In addition, they have seen to it that there are clearly marked easements to allow public access to the beaches. Nevada has been derelict in its duty to preserve Lake Tahoe for its citizens, and this Bill would simply compound that dereliction.

The Attorney Generals of both Nevada and California have issued opinions that recognize 6229.1' as the high water mark and no court challenge of this decision has met with success. I feel sure that all legal precedents were carefully considered in issuing these opinions.

If we consider what A.B. 234 does, we see that by changing property lines to 6223', it will give some very choice beachfront property to the present owners of the land adjacent to the present 6229.1' high water line. It will also extend the present legislative controls to the new areas (below 6223'). The objectives are to limit access to lakefront property, to give title to private owners and to clear up title questions.

The reasons advanced for the proposed changes are; first of all, it is a "housekeeping" measure to clear up claims of ownership as set forth in old deeds (some of which give ownership down into the water). This is a legal matter which is already clarified by the 6229.1' high water and property line. Any challenge of ownership is a matter for the courts.

SUMMARY: THE ATTORNEY GENERALS OPINION OF 6229.1' AS THE HIGH WATER MARK AND PROPERTY LINE HAS ALREADY ACCOMPLISHED THIS.

The second reason advanced is that it is difficult to administer this strip of land in regard to littering, general policing and may lead to tresspassing on private property, as well as littering of private property.

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I realize that there are problems in policing public property at Lake Tahoe, just as there are problems on the banks of the Truckee River, the desert areas, the mountains or any other public property. If the goal of this Bill is to protect the private property owners from having other people using the beaches in front of their homes, then there are some alternatives:

The proper Nevada agency can post the beaches in front of private property as " Not open for public use" and provide additional policing if needed.
Or - Lease this extra property to the private owners with the stipulation that at such time as the State of Nevada or the County requires that portion for use as a part of the development of a public beach area, it would be theirs. The public should not have to pay, at some future date, to regain these parcels as a part of an overall project.

SUMMARY: THIS BILL IS NOT NEEDED TO SOLVE THESE PROBLEMS, AS WE NOW HAVE STATE AGENCIES EMPOWERED TO CONTROL THEM.

The third reason advanced is that this land is of no value to the State of Nevada and title should be transferred to the lakefront property owners. It should be acknowledged, while these areas are presently of so-called limited value to the general public, due to their limited access, at some future time these areas, particularly the broader beaches, will be provided with suitable public access and will become important additions to the enjoyment of Lake Tahoe by all of Nevada's people and visitors.

SUMMARY: THIS PROPOSED LEGISLATIVE ACTION FINANCIALLY BENEFITS A FEW LAKE TAHOE BEACH FRONT PROPERTY OWNERS AND IS NOT IN THE BEST IMMEDIATE OR LONGTERM INTERESTS OF THE RESIDENTS OF NEVADA.

Eleanor Savage

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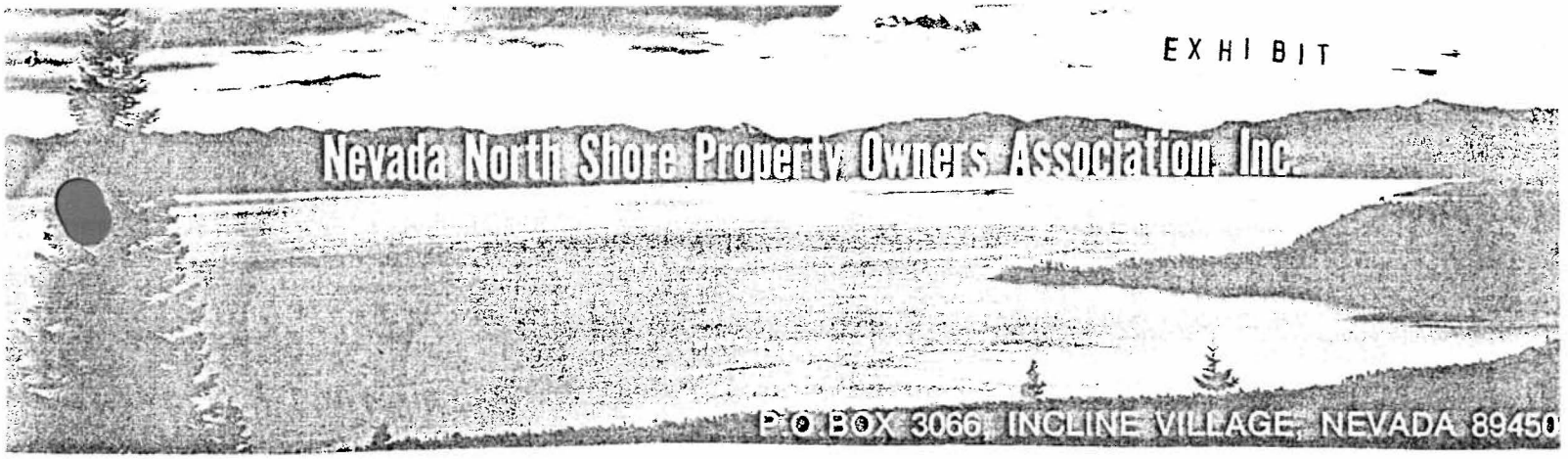
EXHIBIT



EXHIBIT

Hearing, Feb. 21, 1979, AB 234

Committee on Government Affairs

Testimony re Assembly Bill No 234 and the need to limit State ownership at Lake Tahoe to elevation 6223 feet.

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

A My name is Roger Steele and I am the Acting Chairman of the Nevada North Shore Property Owners Association, Incorporated. This taxpayers' Association was formed in 1965 to preserve the value of our individual properties and to protect the natural beauty of the environment. It is open to all property owners in the Washoe County portion of the Lake Tahoe Basin; this is the same geographical area that is now being considered for a future separate county.

B We suggest you consider two basic points, plus a possible technical correction:

1. The State ownership of Lake Tahoe ends at elevation 6223 feet. The lands above 6223 are in Tahoe resevoir, formaed when the dam was built at Thhoe City, long before Nevada became a state and took title to the lake.

2. The number of Agencies and Departments a taxpayer has to apply to for permits should be reduced, not enlarged, to hold down wasted time and traval. There is already the Corps of Engineers in Sacramento, the County in Reno, The Tahoe Regional Planning Agency at South Tahoe; the State should add only one more agency or department at most.

3. I believe the historic terminolgy for Lake Tahoe's elevation does not tie to"feet above mean sea level" but rather to 'Lake Tahoe Datum", or some other specific reference that differs from mean sea level by a foot or two. (The Watermaster, Claud Dukes, could claify this.) 232

one reference calls it U.S.G.S. Lake Datum.
Another reference calls it U.S.D.I. Bureau of Reclamation

 OUR PROPERTY OWNERS OPPOSE ANY STATE CLAIM TO OWNERSHIP ABOVE ELEVATION 6223 FEET

~~THIS LAND THEFT IS MORALLY WRONG AND UNFAIR:~~

The taxpayers bought this land, they have deeds to it, and have been paying taxes on the land all these years. Specific examples of the high property taxes include a tax of $9,667.00 on the home I sold last year, and a tax of $4,171.61 on my present small place on Shoreline Circle in Incline Village.

In the case of our Incline Village General Improvement District Community Beaches, we each paid $50.00 per lot for these beaches when we originally purchased our lot in the early 1960's and we bought the beaches again for 2.1 million dollars in 1968. We are still paying off the bonds for these community beach properties that the State would have us open up to overcrowding and littering by the public when the public hasn't spent a penny for the purchase or maintenance of these two beaches.

THE STATE IS WRONG FROM A PRACTICAL STANDPOINT OF AVOIDING VANDALISM, POLLUTION, AND THEFTS, ASSOCIATED WITH UNPATROLLED PROPERTY:

If the ten to fifty-foot wide strip of land running all the way from Cal-Neva Point to the State Park were to be opened to the public, the results in terms of littering, vandalism, thefts, and pollution would be horrendous. The Sheriff's office is too undermanned to even handle their present responsibilities of the lakefront, as witnessed by a grand larceny and vandalism last month on the beach at 1055 Lakeshore after the new owner failed to retain the private patrol service of the North Shore Patrol. A copy of an affidavit pertaining to this act of vandalism and theft ~~is~~ has been submitted for the record.

It is noteworthy that the Nevada Attorney General, in his July 21, 1978 statement, ~~today~~, agreed that the State could not maintain and police this strip of land even if the State did own it.

Regarding public beaches; the Washoe County Sheriff's Substation at Incline Village would no doubt be pleased to see their task eased by fences or further guard rails to reduce the public access to the State-owned nudie beaches on the east side of the lake.

Perhaps the lakefront should be lined with signs like this red one that reads: ~~"TRESPASSERS WILL BE VIOLATED"~~

> The government already owns large sections of Tahoe lakefront; it is recommended that adequate parking, access, maintenance, and policing of the existing lakefront be instituted, so that the public can make proper use of the many miles of existing government-owned shoreline areas.

~~THIS LAND GRAB IS OBVIOUSLY ILLEGAL IF YOU STUDY THE LAW:~~

The Attorney General's opinion #204 of April 10, 1976, claiming ownership to high lake level, is wrong. It reversed three previous opinions of Nevada Attorneys General, in addition to ignoring court decisions. His next to the last paragraph regarding "No opinion as to the precise location of the present ordinary high-water mark which may be considered permanent for title purposes," refers to U.S. Geological Survey "records of the elevation of the Lake since 1900 and such records, especially those of recent years, are good evidence of the elevations of the permanent high-water mark below which title to that portion of the shore and bed of Lake Tahoe within the State of Nevada inures to the State."

This is now referred to as some sort of disclaimer regarding the nominal high lake level of 6229.1 feet, but if you examine the attached lake level chart, going back to 1901, the "recent years", whether you take

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from 1938 or 1965 (up to the 1976 opinion), the high elevation, if not 6229.1 is over 6228.5 in most years. To say that this isn't true is to say that 2 plus 2 is not equal to four; therefore, this #204 opinion should have been reversed long ago.

I don't pretend to be a lawyer, but to those who have carefully examined the law regarding the ownership of lakefront property, it is obvious that the State's ownership ends at 6223 feet. The littorial property owner owns to the waters of Lake Tahoe. The lands above 6223 feet are in "Tahoe Reservoir", formed when the dam was built at Tahoe City, long after Nevada became a State.

F The document shown at the July 6, 1978 hearing is proof that the Bureau of Reclamation acknowledged that the government never owned above 6223 feet because this agreement offered to pay littorial property owners for a storage easement above 6223 feet. Perhaps the littorial property owners should be charging the government for use of the land above 6223 feet

G The case of King vs. Crystal Bay, right here next to Burnt Cedar Beach in Incline Village confirmed that property owners can fence to the water and keep out trespassers.

H CONCLUSION: Please write the Statute using 6223' as the boundary.

If this hearing does nothing else, it should carry back the word to all levels at Carson City that the State of Nevada should flatly renounce its claim to ownership above 6223 feet, rather than continue to spend taxpayers' money to fight the taxpayers.

The estimated cost of hiring an expert attorney in this field to file a class action against the State of Nevada is $10,000 to $30,000, depending on court time and possible appeal. These funds will have to be committed by the property owners this August unless the State of Nevada firmly renounces by then its erroneous 1976 claim to ownership of Tahoe Lakefront above elevation 6223.

Hopefully, we would like to see the Government serve us rather than harrass us.

Respectfully submitted,

Roger C. Steele

ROGER C. STEELE
~~Acting~~ Chairman
NEVADA NORTH SHORE PROPERTY OWNERS ASSOCIATION, INCORPORATED

Note: ~~Please see Appendix "A" on reverse side~~.
Enclosure: Lake Level Chart back to when the dam was built.
Evidence submitted: A jar of "Navigable Water" to be sipped by those still perpetrating this ridiculous situation.

EXHIBIT 234

206 West Robinson,
Carson City,
Nevada 89701

Government Affa irs Committee,
State Assembly.

NRS 99.030 - Legal money

The prevailing fear of inflation is due to the statute being obscurely worded and thus open to misconstruction.

AB-1 should suffice to end the threat of inflation, but it would introduce yet a fresh danger of the statute being misunderstood: it would appear that there had been a change in the legal money of the State on July 1, 1979.

Therefore, it would be preferable to make no change in the wording other than the final change, i.e. adding the closing words, "before February 15, 1893."

An even more desirable form of words would be to use the date used in 31 USC 459 to refer to the standard silver coin, and make the closing words "on June 9, 1879."

However, if neither of these amendments is acceptable to the Committee, then it is recommended that the statute be amended to legalize the de facto money of the executive branch, i.e. the closing words should be, "from time to time." It would then be open to any citizen to contest the statute before the courts, as repugnant to Art. 1, Sec. 10 of the Constitution of the United States.

Respectfully submitted,

Brian W. Firth

February 21, 1979

EXHIBIT 235

To;
Ed Clark, Esq.,
San Marino.

NRS 99.030 LEGAL MONEY

I - STATUTORY LEGAL MONEY IS INDISPENSABLE

The courts of Oregon (Leitch v. Dept. of Revenue, 16 Or. App. 627, 519 P. 2d. 1045, 1974),Minnesota (Chermack v. Bjornson, 302 Minn. 213, 223 N. W. 2d. 659, 1974), Maine (Rush v. Casco Bank & Trust Co., 348 A. 2d. 237, 1975), Alabama (Radue v. Zanaty, 293 Ala 585, 308 S. 2d. 242, 1975), and Kansas (Allen v. Craig, 564 P. 2d. 552, 1977) have agreed in refusing to evoke Art. I, Sec. 10, legal tender, where the legislature has not established a legal tender in the State.

Nonetheless, it should be remarked that all of these cases were, arguably, decided correctly: the question was whether a tax must be paid, or (Chermack) refunded,in gold or silver coins, and if the liability was assessed in copper dollars or Federal Reserve notes the payment (if not delayed) could unobjectionably be made in the same medium.

See PART III, infra

II - POWER TO MAKE LEGAL MONEY IS FEDERAL

The principal difficulty is in deciding where the Congress makes legal moeny, and where the States make legal money. EVERY CASE ON THE QUESTION HAS CONCERNED THE narrow ISSUE OF PAYMENT OF DEBTS: the distinction between intra-state and inter-state commerce has, apparnetly, been overlooked, and inter-state jurisdiction assumed (very many of the cases concern Federal Reserve Banks.)

IN ONE CASE AND ONE CASE ONLY HAS THE POWER OF THE STATE BEEN LIMITED. Capital Grain and Feed Co.,v. Federal Reserve Bank of Atlanta, D. C. Georgia 1925, 3F. 2d. 614, struck down a state statute allowing a bank to make a payment either in coin or by cheque at its option, on the grounds that the privilege was granted to a class of persons only.

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The federal nature of the power to make legal tender is explicitly affirmed in, for instance, Thayer v. Hedges and Another, 22 Indiana 282, 1864: at 300, "States, then, though they can not coin money, can declare that gold or silver coin, or both, whether coined by the Federal, or the Spanish or the Mexican Government, shall be legal tender." At 306, "It will be observed that while the States are forbidden to make anything but gold and silver a tender, Congress is empowered to coin money, without being limited to the two kinds of coin to which the States are restricted. Hence, Congress has, for small change, coined copper; * * " (Emphasis added.)

Se also Van Husan v. Kanouse, 13 Mich. 303, 1865: "The States are prevented by [Art. 1, Sec. 10] from creating either metal or paper money, and if they establish tender laws, it must be for coin, the value of which is regulated by Congress. * * This clause does not oblige the States to pass tender laws. Nor does it authorize or recognize any authority to pass such laws to govern all cases. There are many commercial matters beyond the control of States. And, with the control over certain classes of contracts and undertakings placed in Congress, it is evident that no tender laws passed by any State could govern in any matter which was not itself governed and sanctioned by State laws."

Cases which deny the power of the State make no pretence of construing Art. 1, Sec. 10. In the Legal Tender Cases of 1870, Know v. Lee and Parker v. Davis, 12 Wall. 457, 20 L. Ed. 287, the attorney-general asserts, at 305, " * * the power to determine what shall be a legal tender being a power function of government which cannot, therefore, be reserved to the people, which is denied to the States, and nowhere expressly prohibited to the National Government * *" (emphasis added.) But denying to the States the power to "make any thing but gold and silver coin a tender" is expressly reserving to the States the power to make gold and silver coin a tender.

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Nevertheless, the attorney-general's position is reiterated, without explanation, in the opinion (at 311); " * * coupled also with a denial to the States of all power over the currency * * "

Similarly, U. S. v. Schmitz, 542 F. 2d. 782 (1976) carries a hednote (2) asserting "Federal Reserve notes constitute legal tender and are taxable dollars. U. S. C. A. Const. Art. 1, Sec. 10." But the decision itself, at 785, makes no citation of the Constitution, nor attempts to construe it.

III - MONEY IS NOT ONLY A MEDIUM OF PAYMENT

Courts have decided many cases where the question at issue was the obligation of a debtor to a creditor. Of great importance, as illuminating the nature of Congressional money, is the dictum of Black, J., in Guaranty Trust v. Henwood, 307 U. S. 247, 83 L. Ed. 1266 (1939): "The Resolution intended that debtors under obligation to pay dollars should not have their debts tied to any fixed value of particular money, but that their entire obligations should be measured by and tied to to the actual number of dollars promised, dollar for dollar." (Emphases added.)

However, money has other and distinct uses. One is particularly relevant here; it is as a reserve or store of purchasing power. The State of Nevada maintains a budget surplus, it is liquid. It is necessary for the State to hold its liquid assets in some form or another; and the State would risk the loss of part of its accumulated purchasing power if it held those assets in the form of money other than "gold and silver coin." The power of the State to determine the manner in which its assets are to be held in its treasury cannot, presumably, be supposed to have been delegated to the Congress.

The decisions, apparently, overlook completely the fact that money is exactly indispensable as a unit of account. Payment can be made in beaver skins or in wampum, and purchasing power can be stored in beaver skins or in wampum. But only a medium of which each and every unit is indistinguishable from every other unit - i.e. money - can be used to draw up accounts and establish profit or loss. It is characteristic of commerce that it proceeds by strking a balance at one time, and striking another balance at a later time, and observing whether or not a loss has been made. But this comparison is invalid unless the unit of account at the later time is fixed in value compared to that at the earlier time; the keeping, and the auditing, of books presupposes a stable unit of value.

Note particularly that if the unit of account depreciates -- if there is inflation -- then the accounts are biassed in the direction of profitability. Thus inflation has the effect of yielding a fictitious profit, which is taxed or divided: but in truth (i.e. compared to the results using gold or silver coin as a unit of account) there has been a lesser profit, or even a loss. The appearance of profitability has been achieved by running the assets of the business into the ground.

Thus only if the unit of account is gold or silver coin are the owners of a business honestly informed of the condition of their business. And, be it noted, the incorporation of companies is indisputably a matter which is "itself governed and sactioned by State laws" -- business are identified as "a Nevada corporation" or "a Delaware corporation."

Thus an unequivocal legal money law is necessary to the citizens even as to the State.

Brian W. Firth,
Carson City, NV

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