

## **The Kaweah River Is Irrefutably Navigable Under State Law**

It would not be within the domain of the county to forbid boating or other public access to on any part of the Kaweah River. Right to navigate the rivers and streams of California is guaranteed to the citizens by the State Constitution (Article 10, §4):

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

The state retains ownership of navigable rivers and streams, and retains the power to regulate boating activities.

## **Counties Do Not Have Authority To Ban Public Use of Navigable Rivers**

The state gives limited power to local entities such as counties, under the Harbors and Navigation Code §660, to impose special use areas. However, this power does not extend so far as to impose an outright ban on boating on any stretch of river or waterway.

There are clear legal precedents.

On August 10, 1976, El Dorado County passed an ordinance making it unlawful "to float, swim, or travel in said waterway by any artificial means" on the twenty miles of the South Fork of the American River between Chili Bar Dam and Salmon Falls. In *People v. County of El Dorado* (96 Cal. App. 3d at 403; 157 Cal. Rptr. at 815), the California Court of Appeal ruled that the ordinance was invalid because it denied the constitutional right of the public to use of and access to a navigable stream. The court stated:

However laudable its purpose, the exercise of police power may not extend to total prohibition of activity not otherwise unlawful.

Reasonable regulation is in order, use prohibition is not. The problems of pollution and sanitation in our increasingly crowded state are difficult and complex, calling for imaginative and sophisticated solutions. But total prohibition of access is an impermissible solution. The ordinance is invalid because it denies the constitutional right of the public to use of and access to a navigable stream.

## **The Simple Ability to Float a Canoe Defines the Limits of Navigability**

In *People v. Mack*, Cal. App. 3d. at 1050; 97 Cal. Rptr. at 454, the Court held that:

Members of the public have the right to navigate and to exercise the incidence to navigation in a lawful manner at any point below high water

mark on waters of this State which are capable of being navigated by oar or motor-propelled small craft.

This ruling and others underscore the legality of portaging obstructions to navigation by carrying boats along the shoreline below the ordinary high water mark.

### **The Public Trust Supports Strong Public Recreation Rights on Navigable Rivers**

In *Bess v. County of Humboldt* (3 Cal. App. 4th at 1544; 5 Cal. Rptr. 2d. at 399), the court found:

It is well settled that the state has fee title to such portion of any navigational river within its boundaries as lies beneath the low water mark. It is equally well established that although abutting landowners own the land between the high- and low-water marks, their ownership is subject to a public trust for purposes such as navigation, fishing, and recreation," and "The public, therefore, has the right to use the river, and the river bed up to the high water mark, for navigational, fishing, recreational, and other permitted purposes.

### **State Navigability Law Conveys a Public Right-of-way**

In August of 1994, the Superior Court of the State of California in and for the County of Nevada passed summary judgment in the case -*Troutwine Family Trust v. County of Nevada et al.* The Troutwine family had brought suit to prevent kayaking and canoeing on the South Fork of the Yuba River where it crossed their land. The court ruled:

The court agrees with the State of California's position that navigability in this case is defined by California law which has evolved over the years to encompass changing public needs. Because there is no conflict with the federal dominion, the federal test of commercial navigability does not apply.

If the South Yuba River between Highway 49 and Bridgeport is now navigable in fact by small recreational crafts during some part of the year, then the State holds a navigational easement in law on behalf of the public. The river may be used up to the high water mark for various recreational purposes and environmental values of the river may be protected. Recreational purposes include but are not limited to fishing, hunting, bathing, swimming, boating, (which includes portage, scouting, brief rests, anchoring, and standing on the bottom), scenic enjoyment, and general recreational purposes. This list is not exhaustive.

### **Obstructions to Navigational Rights Violate State Nuisance Law**

Landowners could be in violation of the law if they interfere with the rights of the public to use the river. The California Health and Safety Code §370 reads:

Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere

with the comfortable enjoyment of life or property by an entire community of neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street or highway, is a public nuisance.

On the same point, §131 of the Harbors and Navigation code reads:

Every person who unlawfully obstructs the navigation of any navigable waters, is guilty of a misdemeanor.

### **State Law Encourages the Expansion of Public Access to the Outdoors**

The State of California has stated its interest in protecting the public rights of access to public waterways and other natural resources. §66478.2 of the California Government Code states:

The Legislature finds and declares that the public natural resources of this state are limited in quantity and that the population of this state has grown at a rapid rate and will continue to do so, thus increasing the need for utilization of public natural resources. The increase in population has also increased demand for private property adjacent to public natural resources through real estate subdivision developments which resulted in diminishing public access to public natural resources.

Additionally, the code states in §66478.3 that:

The Legislature further finds and declares that it is essential to the health and well-being of all the citizens of this state that public access to public natural resources be increased. It is the intent of the Legislature to increase public access to public natural resources.

### **State Recreational Use Statutes Are Designed to Promote Access**

Section 846 of the California Real or Immovable Property Code severely restricts liability of landowners who permit the general public to use their land for recreation. This law was passed in order to encourage landowners to allow members of the general public to use their land for recreational purposes. It reads in part:

An owner of any estate or other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use of others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as described in this section.

An owner of any estate or other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty or care is owed, or (c)

assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.