MINUTE ITEM 3/31/77
RH

36. APPROVAL OF FINAL MAPS OF DONNER LAKE - W 8670.

The attached Calendar Item 36 was withdrawn prior to the meeting.

Attachment: Calendar Item 36 (15 pages)

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CALENDAR ITEM

3/77
W 8670
RH

36.

APPROVAL OF FINAL MAPS OF DONNER LAKE

In 1973, property owners on Donner Lake complained to the Commission that Dart Industries was constructing a pipe, piers, and other projects encroaching into State-owned submerged lands. After investigation the Commission brought suit against Dart, and a boundary line settlement was reached. The boundary between State-owned submerged lands and privately-owned uplands was set at the ordinary high water mark of the lake. A survey of the entire perimeter of Donner Lake was then undertaken to complete the determination of State-private boundaries. Consistent with the Dart agreement, and the position taken by the Attorney General's office in litigation on behalf of the Commission (see Exhibit "C", attached and by reference made a part hereof), the staff was instructed to set the proposed boundary at the ordinary high water mark.

At its regular meeting on May 27, 1975, the Commission approved an 18-sheet set of preliminary maps titled "Boundary of State Ownership in the Bed of Donner Lake, Nevada County, California, June 1974". Notice of the Commission's preliminary findings was published in newspapers of general circulation in Truckee, Sacramento and San Francisco and mailed to all persons with piers on the lake. The staff then met with interested persons at public sessions for a total of 12 hours in the Donner Lake area. Approximately 100 persons attended the session. These meetings were followed by a number of on-site inspections of particular sites and review of materials submitted by interested persons.

The maps have been revised as necessary to reflect certain objections, and they are now in final form and ready for recording. After recording the maps will be used in the land management program of the State Lands Division.

The boundary of State ownership as set forth on the maps is the ordinary high water mark of Donner Lake. This boundary determination is consistent with the Commission's general position as to the landward extent of the State's sovereign title interest along all such nontidal inland navigable waters.

EXHIBITS: A. Location Map.

B. 18-Sheet set of final maps entitled "Boundary of State Ownership in the Bed of Donner Lake, Nevada County, California, June 1974"

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S 1

C. Letter, Attorney General Evelle J. Younger to Executive Officer, March 8, 1977.

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND THAT THE ORDINARY HIGH WATER MARK OF DONNER LAKE CONSTITUTES THE BOUNDARY OF STATE OWNERSHIP IN THE BED OF DONNER LAKE.

2. FIND THAT A PUBLIC TRUST EASEMENT EXISTS IN FAVOR OF THE PUBLIC BETWEEN THE LINES OF ORDINARY HIGH AND ORDINARY LOW WATER AND ALL OTHER PORTIONS OF DONNER LAKE LOCATED BELOW SAID LOW WATER LINE IN ADDITION TO OTHER PUBLIC RIGHTS THAT MAY EXIST.

3. APPROVE THE 18-SHEET SET OF FINAL MAPS SHOWING THE HIGH WATER LINE TO BE THE BOUNDARY, ENTITLED "BOUNDARY OF STATE OWNERSHIP IN THE BED OF DONNER LAKE, NEVADA COUNTY, CALIFORNIA, JUNE 1974".

4. AUTHORIZE THE EXECUTIVE OFFICER TO SIGN AND RECORD THE MAPS.

5. AUTHORIZE THE STATE LANDS COMMISSION STAFF AND OFFICE OF THE ATTORNEY GENERAL TO TAKE ALL ACTION NECESSARY AND PROPER TO IMPLEMENT THE COMMISSION'S DETERMINATIONS, INCLUDING BUT NOT LIMITED TO LITIGATION.

EVELLE J. YOUNGER
ATTORNEY GENERAL

STATE OF CALIFORNIA

EXHIBIT "C"

OFFICE OF THE ATTORNEY GENERAL
Department of Justice
STATE BUILDING, SAN FRANCISCO 94102

(415) 557-2544

March 8, 1977

Honorable Wm. F. Northrop
Executive Officer
State Lands Commission
1807 13th Street
Sacramento, California 95814

Re: Legal Boundaries of, and Public Rights in, Navigable Lakes and Nontidal, Navigable Rivers

Dear Mr. Northrop:

This is in response to your request that this office provide you with a written discussion of the position that we are taking on behalf of the State Lands Commission in litigation involving the legal boundaries of, and public rights in, navigable lakes and nontidal, navigable rivers.

As you know, we are representing the Commission in various cases in which these boundaries and rights are at issue. In general, since 1970, the State of California has been asserting sovereign ownership of the beds of such lakes and rivers landward to the ordinary high-water mark. 1/

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1. See, e.g., retrial of The People of the State of California v. Shasta Pipe and Supply Company, Butte Co. Sup. Ct. No. 37390, following People ex rel. Dept. Pub. Wks. v. Shasta Pipe etc. Co., 264 Cal. App. 2d 520 (1968); Sacramento v. Commons Development Co., et al., Sacto. Co. Sup. Ct. No. 213340; United States of America v. Martin G. Rock, et al., U.S.D.C.C.D. Cal. No. 71-262-HW Civil; State of California v. Dart Industries, Inc., Nevada Co. Sup. Ct. No. 18595; HKM Investments v. City of South Lake Tahoe, et al., El Dorado Co. Sup. Ct. No. 24285; Jean Dufau v. Charles H. Moseley, et al., Placer Co. Sup. Ct. No. 43857; and Raymond R. Lyon, et al. v. State of California, et al., Lake Co. Sup. Ct. No. 13925. In one instance in 1971, however, the State stipulated to a low-water boundary along a short stretch of the Sacramento River. Leon St. Vrain, etc. v. State of California, et al., Shasta Co. Sup. Ct, No. 35714.

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It is understood that for approximately seven years, the Commission has been acting consistently with this position in matters involving the State's title to the lands beneath inland navigable waters. 2/

In light of pending litigation concerning the legal boundaries of, and public rights in, Clear Lake, Donner Lake, Lake Tahoe and the Colorado River, it would be inappropriate to publish a detailed opinion now. 3/ However, due to the widespread public interest in this subject, this letter is written to explain the rationale for the position being asserted by the State in such cases.

The question of whether the ordinary high-water mark or the ordinary low-water mark constitutes the legal boundary between the publicly owned beds of California's inland navigable waters and the adjoining uplands is a difficult and controversial issue. This question has become more significant recently because of the expanding public recreational use of such waters 4/ and private developments of the adjoining uplands.

Attorneys for private parties and members of the Commission's staff and this office who have intensively researched this question agree that there has been no reported California appellate court decision in a case where the State was a party and the boundary issue was squarely presented and determined. Resolution of this question is vital for certainty of both public and private land titles. Such a resolution can be obtained only through judicial proceedings.

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2. As used herein, the phrase "inland navigable waters" denotes all navigable lakes and nontidal, navigable rivers.

3. This office does intend to publish a notice in the Opinions of the Attorney General of California concerning the position being asserted in such litigation.

4. See, e.g., People ex rel. Baker v. Mack, 19 Cal. App. 3d 1040, 1045 (1971):

> ". . . With our ever-increasing population, its ever-increasing leisure time (witness the four and five day week), and the ever-increasing need for recreational areas (witness the hundreds of camper vehicles carrying people to areas where boating, fishing, swimming and other water sports are available), it is extremely important that the public not be denied use of recreational waters . . . ."

The aforementioned pending litigation is an appropriate means for the State to obtain the necessary determination of what line constitutes the boundary. Such cases also afford an opportunity for the courts to clarify public rights in inland navigable waters regardless of whether the boundary is the ordinary high-water mark or the ordinary low-water mark.

In light of our conclusion that a serious question exists as to which line is the boundary, the Commission has recently reaffirmed its authorization that this office continue to take the following position in litigation:

1. In general, the State of California's sovereign ownership of the lands underlying navigable lakes and nontidal, navigable rivers extends landward to the ordinary high-water mark.

2. Irrespective of whether the State's title to such lands extends landward to that line or merely to the ordinary low-water mark, the strip of lands between the two lines is subject to the common-law public trust for commerce, navigation and fisheries.

3. Independently of the common-law public trust, members of the public have the right to use inland navigable waters lying waterward of the ordinary high-water mark if such waters are capable of being navigated by small boats for fishing and other recreational purposes regardless of the ownership of the underlying lands.

We are aware that the State's current position with respect to inland navigable water boundaries is inconsistent with that taken by this office and the Commission before 1970. We also acknowledge that statements, or assumptions, in our prior opinions may have contributed to the uncertainty as to this complex subject. 5/

In view of this situation, we recommend the following course of action:

1. Pending a definitive appellate court resolution of the water boundary question, the Commission (a) should refrain from requesting private parties to enter into new leases for

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5. See, e.g., 43 Ops. Cal. Atty. Gen. 291, 292, 295, 296 (1964); 30 Ops. Cal. Atty. Gen. 262, 269 (1957) (Lake Tahoe); 23 Ops. Cal. Atty. Gen. 306, 307, 309 (1954) (Lake Tahoe); 23 Ops. Cal. Atty Gen. 97, 98 (1954) (Lake Tahoe); and Ops. Cal. Atty. Gen. No. 3100, pp. 5-6 (1916) (Clear Lake).

existing improvements landward of the ordinary low-water mark, and (b) should excuse any payments otherwise due under present leases of lands between the ordinary high-water and ordinary low-water marks of inland navigable waters.

2. Notice should be given to presently or potentially affected private upland owners and members of the general public with respect to the State's position in pending litigation.

Although the State is generally asserting sovereign ownership of the beds of inland navigable waters landward to the ordinary high-water mark, the Commission must consider and evaluate all relevant factual circumstances with respect to any specific boundary problem before claiming title up to the ordinary high-water mark. The Commission and its staff must realize that various legal and equitable defenses potentially may be raised in opposition to such an assertion by the State in certain situations.

## ANALYSIS

A full discussion of all authorities supporting the position being asserted by this office in pending lake and river cases on behalf of the Commission is beyond the scope of this letter. The following briefly summarizes the rationale for our assertions.

### 1. State Ownership Between 1850 and 1871

In 1850, upon its admission to the Union, the State of California obtained sovereign title to all lands underlying inland navigable waters within its boundaries, except for such lands included within prior Spanish and Mexican rancho grants. See Act of Admission of the State of California, 9 U.S. Stat. 452 (1850); Oregon v. Corvallis Sand & Gravel Co., 97 S.Ct. 582, 586-89 (Jan. 12, 1977); Knight v. U.S. Land Association, 142 U.S. 161, 183-84 (1891); and Hardin v. Jordan, 140 U.S. 371, 382 (1891).

The California Legislature, in anticipation of statehood, adopted the common law as the "rule of decision." Stats. 1850, ch. 95, p. 219. The California Supreme Court, in interpreting this statute, held that the reasoning of American courts "down to the present time" should be considered, rejecting the argument that the new State was required to follow the English "common law as it was administered prior to July 4, 1776." Lux v. Haggin, 69 Cal. 255, 379-86 (1886). (Emphasis by court.)

In general, under the common law as applied in the United States, the initial landward extent of the sovereign states' title to the beds of inland navigable waters is the ordinary high-water mark. Many states discarded the English common-law rule that only the beds of tidal rivers are owned by the Crown, and treated their nontidal, navigable waters in the same manner as tidal rivers for title purposes. See, e.g., Oregon v. Corvallis Sand & Gravel Co., supra, 97 S.Ct. 582, 591, and Hardin v. Jordan, supra, 140 U.S. 371, 382-84.

As of 1850, the ordinary high-water mark delimited the boundary between the State of California's sovereign lands underlying inland navigable waters and the adjoining federal public domain lands. See Barney v. Keokuk, 94 U.S. 324, 336, 338 (1877). Absent a "declaration" by a state, federal public land grants of such uplands to private parties do not extend waterward of the ordinary high-water mark. See Hardin v. Shedd, 190 U.S. 508, 519 (1903). Since our research has disclosed no California statute or appellate court decision between 1850 and 1871 stating, or even suggesting, that a line other than the ordinary high-water mark constitutes the boundary of the State's fee title to the beds of inland navigable waters, it is our opinion that the State had made no such "declaration" before 1872.

2. Enactment of Statutes in 1872

In 1872, the Legislature adopted a statutory scheme with respect to the State's ownership of lands underlying navigable waters and the rules for interpreting ambiguous descriptions in conveyances of property bounded by such waters. These statutes, which became effective on January 1, 1873, were amended during the 1873-74 legislative session. Civil Code section 670, as thus amended, states:

> "The State is the owner of all land . . . below the water of a navigable lake or stream; . . ."

Section 830 of the Civil Code, as thus amended, provides:

> "Except where the grant under which the land is held indicates a different intent, . . . when it borders upon a navigable lake or stream, where there is no tide, the owner [of the upland] takes to the edge of the lake or stream, at low-water mark; . . ."

Code of Civil Procedure section 2077, as amended, contains rules for construing ambiguous descriptions in conveyances of real property, and states that ". . . [w]hen a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark are included in the conveyance."

Clearly, Civil Code section 670 sets forth rules of property and Code of Civil Procedure section 2077 contains rules of construction of ambiguous descriptions in property conveyances, and neither statute constitutes a present or future mass grant of the strip of sovereign lands beneath California's inland navigable waters between the ordinary high-water and ordinary low-water marks. On the other hand, Civil Code section 830, which relates to boundaries, arguably might be deemed to enunciate either a rule of property or a rule of construction.

For several decades before 1970, this office, the Commission and other officials appear to have assumed that section 830 6/ states a rule of property. See, e.g., 43 Ops. Cal. Atty. Gen. 291 and other opinions cited in footnote 5, supra. The State's thorough reexamination of the effect to be given section 830 began with two consolidated eminent domain actions involving the Feather River, and has continued to date in connection with the other previously mentioned lake and river litigation and the Commission staff's preparation of maps depicting State claim lines with respect to legislatively mandated Area Project Studies.

On November 6, 1970, the State asserted that the ordinary high-water mark, as opposed to the ordinary low-water mark, constitutes the subject boundary in a memorandum of points and authorities filed during the retrial of the Feather River condemnation actions, The People of the State of California v. Shasta Pipe and Supply Co., supra, Butte Co. Sup. Ct. No. 37390, and its companion case. On March 24, 1971, the trial court held that, with respect to a navigable, nontidal stretch of that river, the ordinary high-water mark is the boundary. The court expressly rejected the contrary view stated in this office's 1964 opinion. The retrial was held in accordance with the instructions of the Court of Appeal in People ex rel. Dept. Pub. Wks. v. Shasta Pipe etc. Co., supra, 264 Cal. App. 2d 520, 531-36. The judgment upon retrial was not appealed.

Since the Shasta Pipe decision upon retrial, three title insurance company spokesmen have publicly speculated about the impact of that decision and the effect to be given section 830. 7/ Meanwhile, the State has consistently asserted

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6. All section references hereinafter are to the Civil Code unless otherwise specified.

7. See Leerskov, Meander Lines, "Title Tips," The California Surveyor, No. 43, p. 18 (Fall 1976); text of speech by R. H. Morton, president, Western Title Insurance Company, to the annual convention of the California Land Title Association, San Diego, May 7, 1976; McKnight, Title to Lands in the Coastal Zone: Their Complexities and Impact on Real Estate Transactions, 47 Cal. St. B.J. 408, 464-75 (1972).

its sovereign title landward to the ordinary high-water mark in a number of other lawsuits. For example, our position was articulated in a document filed October 29, 1975, in a case involving Lake Tahoe, HKM Investments v. City of South Lake Tahoe, et al., supra, El Dorado Co. Sup. Ct. No. 24285. While asserting the high-water boundary in such litigation, this office and the Commission's staff continued the State's meticulous reexamination of the water boundary question, particularly during the past two to three years. Our research and analysis included an intensive review of voluminous materials furnished to us by title industry spokesmen and attorneys representing private littoral and riparian owners.

As discussed more fully below, our conclusion, following this lengthy and exhaustive reexamination, is that section 830 does not set forth a rule of property, and that, in general, the State is the sovereign owner of lands beneath inland navigable waters landward to the ordinary high-water mark. Although we recognize that this position is inconsistent with statements, or assumptions, in our 1964 opinion and earlier opinions, 8/ and that others have different views on the subject, we believe that it is indisputable that the current uncertainty in the law should be resolved promptly to clarify the respective rights, title and interests of both the public and the private littoral and riparian property owners.

3. Bases for State's High-Water Boundary Claim

The premise underlying the State's current position is that the enactment of section 830 in 1872 and its amendment during the 1873-74 legislative session did not constitute either a present or future general conveyance to the federal government or to private parties of the strip of sovereign lands beneath inland navigable waters between the ordinary high-water and ordinary low-water marks.

It is this office's opinion, based upon our reexamination of the water boundary issue, that although there is a serious question as to the effect to be given section 830, the State has sound legal bases for asserting a claim of ownership landward to the ordinary high-water mark.

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8. It is noteworthy that the Attorney General of the State of Nevada recently disapproved two of his earlier written opinions on the boundaries of inland navigable waters. In Nevada Attorney General Opinion No. 204 issued April 20, 1976, it was stated: "It is the present opinion of this office that the title to lands beneath navigable waters in Nevada is bounded by the ordinary and permanent high-water mark and prior opinions to the contrary are hereby superseded."

Section 830 contains no express language granting such lands, thus differing sharply from statutes authorizing the alienation of sovereign tidelands or State-owned proprietary lands. Unlike such statutes as the contemporaneously enacted sections 3440 to 3493 1/2 of the Political Code, relating to the management and sale of State lands by the Surveyor General, section 830 does not provide for the payment of any compensation to the State by private parties or for the issuance of a patent describing the lands.

Indeed, section 830 has been treated as stating a rule of construction rather than a rule of property in a number of cases. See, e.g., Freeman v. Bellegarde, 108 Cal. 179, 185 (1895); Hess v. Merrell, 78 Cal. App. 2d 896, 899-900 (1947); Lynch v. Kupfer, 134 Cal. App. 652, 656 (1933); and Drake v. Russian River Land Co., 10 Cal. App. 654, 660-61 (1909).

Our assertion that the ordinary high-water mark constitutes the subject boundary is strongly supported by language in the California Supreme Court's opinion in Churchill Co. v. Kingsbury, 178 Cal. 554 (1918). The decision expressly states that Little Klamath Lake, a navigable lake, "consists of the body of water contained within the banks as they exist at the stage of ordinary high water. . . ." Id. at 558. (Emphasis added.) Although section 830 was not cited, the court presumably was cognizant of the provisions thereof. Cf. Bishop v. City of San Jose, 1 Cal. 3d 56, 65 (1969) (in interpreting statutes, it is presumed that the Legislature was aware of existing judicial decisions). Moreover, when an issue has been litigated and determined, "all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto." Price v. Sixth District Agricultural Assn., 201 Cal. 502, 511 (1927). The relevant language in the Churchill decision has never been overruled, qualified or even questioned by the Supreme Court. 9/

In this office's 1964 opinion, the Churchill language is discounted as authority for the high-water rule. See 43 Ops. Cal. Atty. Gen. 291, 295. That opinion relates to "the criteria to be used for locating [the ordinary] low water mark

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9. The State Surveyor General, predecessor of the State Lands Commission, was a party defendant to the Churchill case and in subsequent related litigation. See Franklin v. Churchill Co., 187 Cal. 555, 556 (1921); Reynolds v. Churchill Co., 187 Cal. 543, 545-46, 548-52 (1921); Franklin v. Churchill Co., 73 Cal. App. 304, 307-09 (1925); and Montgomery v. Neilon, 41 Cal. App. 184, 188, 191 (1919). See also 7 Ops. Cal. Atty. Gen. 182 (1946) and Op. No. NS4490 (1942).

on non-tidal navigable streams, the beds of which are owned by the State of California in its sovereign capacity." Id. at 291. Although the specific questions asked in the opinion requested by the then Executive Officer of the Commission merely assumed that private ownership of uplands adjoining inland navigable waters extends waterward to the ordinary low-water mark, it must be conceded that the opinion does not question the propriety of using that line instead of the ordinary high-water mark. Id. at 292-95.

Upon reanalysis of Churchill Co. v. Kingsbury, supra, 178 Cal. 554, we have concluded that the Supreme Court's language to the effect that the State's ownership of the subject lake bed extends landward to the ordinary high-water mark was vital to that decision, and is not dictum. The pivotal issue was whether petitioner had any right to a patent to certain lands. Id. at 555-56. In dismissing petitioner's proceeding in mandamus, the court unqualifiedly stated:

> ". . . it [petitioner] does, however, take the stand that the land is, in fact, sovereign land of the state, and in this, we think, it is clearly right." Id. at 558. (Emphasis added).

The court stated that "[t]he lands [in dispute] are still covered by the waters of the lake during the greater part of each year." Id. at 560. Clearly, the court reasoned that the disputed lands were still waterward of the ordinary high-water mark and hence sovereign lands.

Additional decisions stating, or clearly implying, that the ordinary high-water mark constitutes the boundary include Heckman v. Swett, 99 Cal. 303, 307-08, 309-10 (1893), aff'd, 107 Cal. 276, 280 (1895) (Eel River; dictum as to nontidal watercourses); Packer v. Bird, 71 Cal. 134, 135 (1886), aff'd, 137 U.S. 661, 673 (1891) (nontidal, navigable portion of Sacramento River); and People v. Morrill, 26 Cal. 336, 356 (1864) (tidelands; dictum as to nontidal watercourses).

Some secondary authorities also indicate that the ordinary high-water mark is the boundary. See, e.g., 4 American and English Encyclopedia of Law 824-25 (2d ed. 1897), and 2 Nichols, The Law of Eminent Domain, § 5.791[1], p. 5-314 n.12 and accompanying text (rev. 3d ed. 1976).

On the other hand, several Court of Appeal decisions suggest, or assume, that the subject boundary is the ordinary low-water mark. This office's 1964 opinion cites Crews v. Johnson, 202 Cal. App. 2d 256, 258 (1962) (Clear Lake), and

City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 467 (1935) (Mono Lake), as authority for this proposition. A careful re-examination of these cases demonstrates that they did not squarely adjudicate the water boundary question.

In Crews, the two private parties agreed that private ownership extends to the ordinary low-water mark, and the question of whether that line or the ordinary high-water mark is the landward boundary of the publicly owned bed of Clear Lake was not at issue.

In Aitken, the Court of Appeal merely assumed that section 830 is a rule of property and stated that the only issue presented on appeal was whether a municipal condemnor had to pay substantial damages for affecting littoral rights of adjacent private land owners to have the natural level of a navigable lake maintained.

Since this office's 1964 opinion, the federal courts have handed down decisions containing dicta suggesting that the ordinary low-water mark is the landward boundary. See United States v. Gossett and United States v. Williams, 277 F. Supp. 11, 13 (C.D. Cal. 1967), aff'd, 416 F. 2d 565, 569 (9th Cir. 1969), cert. denied, 397 U.S. 961 (1970). However, the Ninth Circuit Court of Appeals' decision must be strictly limited to the specific factual and legal situations involved. Significantly, the State of California disclaimed any interest in the lands in dispute. Moreover, a federal court's construction of a State statute is not binding on California courts. See City of Oakland v. Buteau, 180 Cal. 83, 89 (1919), and Strand Improvement Co. v. Long Beach, 173 Cal. 765, 772-73 (1916).

Three additional grounds supporting our present position should be mentioned briefly.

First, various principles of statutory construction buttress our conclusion that section 830 merely states a rule for interpreting ambiguous descriptions in conveyances. It is a fundamental precept that laws in derogation of sovereignty are construed strictly in favor of the State and are not permitted to divest it or its government of any prerogatives, unless intention to effect that object is clearly expressed. People v. Centr-O-Mart, 34 Cal. 2d 702, 703 (1950). See also People v. California Fish Co., 166 Cal. 576, 592-93 (1913), and Eden Memorial Park Assn. v. Superior Court, 189 Cal. App. 2d 421, 423-24 (1961). Moreover, grants from the State are to be strictly construed in its favor. Civ. Code § 1069; Los Angeles v. San Pedro etc. R.R. Co., 182 Cal. 652, 655 (1920); and White v. State of California, 21 Cal. App. 3d 738, 766-67 (1971).

Secondly, if the enactment of section 830 had been intended as a present grant, or to empower some unnamed public officials to make a future conveyance of the strip of sovereign lands between the ordinary high-water and ordinary low-water marks along all inland navigable waters, 10/ it is possible the courts would invalidate the statute on the ground that such an act was beyond the power of the Legislature. See Illinois Central Railroad v. Illinois, 146 U.S. 387, 460 (1892); cf. Oakland v. Oakland Water Front Co., 118 Cal. 160, 183 (1897).

Third, California's well-settled public policy favoring public access to and use of navigable waters furnishes a firm foundation for our position. Such policy considerations are reflected in numerous constitutional and statutory provisions and in various appellate court decisions, including the following: Act of Admission of California, 9 U.S. Stat. 452 (1850); former Article XV, section 2 of the 1879 California Constitution (renumbered Article X, section 4); Article I, section 25 of the 1879 California Constitution; Gov. Code §66900 et seq. and §67000 et seq., relating to the protection and preservation of Lake Tahoe; Gion v. City of Santa Cruz, 2 Cal. 3d 29, 42-43 (1970); Lux v. Haggin, supra, 69 Cal. 255, 321; Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal. App. 3d 560, 566-71 (1976). See also 55 Ops. Cal. Atty. Gen. 293, 294, 296-99 (1972).

4. Common-Law Public Trust

Even if the courts determine that section 830 operated to convey fee title to the strip of lands underlying inland navigable waters between the ordinary high-water and ordinary low-water marks, another significant issue in the State's pending lake and river litigation is whether that strip is impressed with the common-law public trust for commerce, navigation and fisheries. Our 1964 opinion and earlier opinions did not address this subject.

The landmark United States Supreme Court case articulating the common-law public trust doctrine involves the Chicago waterfront in Lake Michigan. Illinois Central Railroad v. Illinois, supra, 146 U.S. 387, 452. California appellate courts, relying upon Illinois Central, have consistently held that tidelands are subject to the common-law public trust. See, e.g., Marks v. Whitney, supra, 6 Cal. 3d 251, 259-60, and People v. California Fish Co. supra, 166 Cal. 576, 597. Since the State obtained title to previously ungranted beds of inland navigable waters upon admission to the Union in the same manner as it became the owner of previously ungranted tidelands, we

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10. A summary of California shoreline mileages prepared in May 1972 by the Commission's staff indicates there were then 807 miles of shoreline around navigable lakes and 3,046 miles of shoreline along nontidal, navigable rivers in the State.

believe that it is clear that the public trust doctrine is equally applicable to the lands underlying such nontidal but navigable waters.

Moreover, it is our opinion that the enactment of section 830 could not have operated to terminate the common-law public trust in inland navigable waters because that statute does not "clearly express or necessarily imply" a legislative intent to lift the trust. Cf. People v. California Fish Co., supra, 166 Cal. 576, 585, 597; County of Orange v. Heim, 30 Cal. App. 3d 694, 719-20, 722-23 (1973).

5. Bohn/Mack Recreational Easement

In addition to asserting that inland navigable waters are impressed with the common-law public trust, this office is taking the position in pending litigation that, irrespective of title, there is a recreational easement enabling members of the public to use such waters lying waterward of the ordinary high-water mark for fishing and other recreational purposes under the Bohn/Mack rule.

This judicially created doctrine, which is distinct from the common-law public trust, was set forth in Bohn v. Albertson, 107 Cal. App. 2d 738, 749 (1951). Later, the rule was amplified in People ex rel. Baker v. Mack, supra, 19 Cal. App. 3d 1040, 1046, in which it was held that the public can use any stream capable of being used for recreational purposes. The court stated that ". . . members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor-propelled small craft." Id. at 1050. (Emphasis added.) See also Hitchings v. Del Rio Woods Recreation & Park Dist., supra, 55 Cal. App. 3d 560, 566-71.

Although Mack involved the Fall River, its rationale is equally applicable to navigable lakes; the court cited with approval and relied upon cases from other jurisdictions relating to lakes. People ex rel. Baker v. Mack, supra, 19 Cal. App. 3d 1040, 1046-47.

6. Authority of the State Lands Commission

We believe that, in light of the legal situation discussed above, the State Lands Commission, which has "exclusive jurisdiction . . . of the beds of navigable rivers, streams, [and] lakes, . . ." (Pub. Resources Code § 6301), and is the trustee of the common-law public trust in such lands, has the authority to assert California's sovereign ownership of such lands landward to the ordinary high-water mark in pending or potential litigation relating to the subject boundary question.

The Commission also is authorized to take whatever legal action as may be necessary to "eject from any . . . beds of navigable channels, streams, rivers, creeks, [and] lakes, . . . under its jurisdiction, any person, firm or corporation, trespassing upon any such lands, through appropriate action in the courts of this State." Pub. Resources Code § 6302. See also Pub. Resources Code §§ 6215(a), 6307, 6327, 6461, 6462, 6501 et seq., 7601 et seq., 7992; cf. Pub. Resources Code §§ 6210.4, 6225, 6371 et seq.

## CONCLUSION

We share the State Lands Commission's concern that an appellate court determination of the effect to be given Civil Code section 830 be obtained at the earliest possible time so that there may be certainty as to the respective rights, title and interests of the State and private upland owners in and to California's valuable inland navigable waters.

Very truly yours,

EVELLE J. YOUNGER
Attorney General