

MINUTE ITEM

10/30/81
W 503.849
Horn
Hadly

48. LYON - FOGERTY - GENERAL POLICY REGARDING MANAGEMENT
OF INLAND NONTIDAL NAVIGABLE WATERS.

Calendar Item 48 attached was pulled from the agenda prior
to the meeting.

Attachment: Calendar Item 48.

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LYON - FOGERTY - GENERAL POLICY
REGARDING THE MANAGEMENT OF
INLAND NONTIDAL NAVIGABLE WATERS

1. Summary of the cases:

The California Supreme Court in State of California v. Superior Court (Lyon) (1981) 29 CAL. 3d 210 and State of California v. Superior Court (Fogerty) 29 Cal. 3d 240 has held:

- a. Private upland owners, on non-tidal navigable waters hold fee title to the low water mark unless their deeds provide otherwise.
- b. The area lying between the high and low water marks of the bed of such waters is subject to the public trust for commerce, navigation, fishing, recreation and preservation.
- c. Private upland owners may utilize lands between low and high water in any manner not incompatible with public trust needs in the property.
- d. Private upland owners who have previously constructed docks, piers and other structures in the shorezone between high and low water may continue to use those facilities unless the state determines, in accordance with applicable law, that their continued existence is inconsistent with the reasonable trust needs of the public.
- e. If the State chooses to exercise the public's trust interest and take possession of lawfully constructed improvements in the shorezone it must compensate the owners for such improvements.

The United States Supreme Court has denied certiorari and these decision's are therefore final expressions of California law.

2. Need for notice and compliance:

Legal descriptions and policy statements used by staff since 1977 in leases, permits, notices and correspondence are in accordance with policy adopted by the

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Commission in March of 1977 at the inception of Lyon and Fogerty, when sovereign title was claimed to high water. That policy is now outdated, is in part inconsistent with the Lyon and Fogerty decisions, and also of course, does not inform the public of the holdings in those cases. The proposed Lyon and Fogerty Notice Statement set forth in Exhibit "A" would inform lease or permit applicants, public agencies etc. of the holdings in Lyon and Fogerty and related laws and Commission policies as they affect private upland owners.

3. Policy proposals for complying with Lyon and Fogerty:

Commission staff and the Office of the Attorney General recommend that the Commission adopt the following general policies regarding the private upland owners whose deed descriptions call to the edge of a non-tidal navigable lake or stream: (1) Specific guidelines for particular lakes, rivers and streams may be recommended for Commission action where circumstances require.

a. For the area waterward of the low water mark:

- (1) Require leases or permits for uses or improvements on such areas, and
- (2) Issue the Lyon and Fogerty Notice Statement set forth in Exhibit "A".

Such a policy would be consistent with Lyon and Fogerty in that those cases affirmed the State's sovereign fee ownership interest below low water. (The Commission has since 1977 issued permits and leases to high water although rent was only charged for uses below low water).

b. For existing uses or improvements within the area between the high and low water marks:

- (1) Do not require a lease or permit, but
- (2) Issue the Lyon and Fogerty Notice Statement set forth in Exhibit "A".

Private owners of existing structures within the high/low area should be informed of the nature and extent of the public's interest in that area as well as their own rights. Such notice is provided in the proposed Notice Statement set forth in Exhibit "A". The State may of course at any time seek to have unlawful public nuisances or illegal

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obstructions within the high/low shoreline area removed at their owner's expense. Assuming lawfully constructed and maintained uses or improvements the State could also secure possession by exercising the trust over the area on which such improvements were located. That option, however, would require compensating the owner for such improvements.

- c. For proposed uses or improvements within the area between the high and ordinary low water marks:
- (1) Do not require a lease or permit, but
 - (2) issue the Lyon and Fogerty Notice Statement set forth in Exhibit "A" and
 - (3) When requested by private parties, staff is directed to bring proposed uses to the Commission for findings of consistency or inconsistency with public trust needs.

The purpose of such a notice would be to provide upland owners proposing a particular use with certainty regarding their right to compensation in the event of a subsequent exercise of the trust by the State.

EXHIBITS: A. Notice and Policy Statement.

IT IS RECOMMENDED THAT THE COMMISSION:

1. REVOKE ITS EXISTING POLICY CONCERNING GRANTING OF LEASES AND PERMITS BETWEEN THE HIGH WATER AND LOW WATER MARKS ON NONTIDAL NAVIGABLE WATERS, APPROVED IN MARCH OF 1977.
2. ADOPT THE FOLLOWING GENERAL POLICY FOR COMPLYING WITH THE CALIFORNIA SUPREME COURT'S DECISIONS IN STATE OF CALIFORNIA V. SUPERIOR COURT (LYON) 29 CAL. 3d 210 AND STATE OF CALIFORNIA V. SUPERIOR COURT (FOGERTY) 29 CAL. 3d 240 AS THEY RELATE TO THE MANAGEMENT OF NON-TIDAL NAVIGABLE WATERS.
 - a. FOR THE AREA WATERWARD OF PRIVATELY OWNED UPLANDS ON NON-TIDAL NAVIGABLE WATERS:
 - (1) REQUIRE LEASES OR PERMITS FOR USES OR IMPROVEMENTS WATERWARD OF THE LOW WATER MARK.
 - (2) ISSUE THE LYON AND FOGERTY NOTICE STATEMENT SET FORTH IN EXHIBIT "A".

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- b. FOR EXISTING USES OR IMPROVEMENTS WITHIN THE AREA BETWEEN THE HIGH AND LOW WATER MARKS:
- (1) DO NOT REQUIRE A LEASE OR PERMIT, BUT
 - (2) ISSUE THE NOTICE AND POLICY STATEMENT SET FORTH IN EXHIBIT "A".
- c. FOR PROPOSED USES OR IMPROVEMENTS WITHIN THE AREA BETWEEN THE HIGH AND LOW WATER MARKS:
- (1) DO NOT REQUIRE A LEASE OR PERMIT, BUT
 - (2) ISSUE THE NOTICE AND POLICY STATEMENT SET FORTH IN EXHIBIT "A", AND
 - (3) WHEN REQUESTED BY PRIVATE PARTIES STAFF IS DIRECTED TO BRING PROPOSED USES TO THE COMMISSION FOR FINDINGS OF CONSISTENCY OR INCONSISTENCY WITH PUBLIC TRUST NEEDS.
3. AUTHORIZE AND DIRECT THE STAFF OF THE STATE LANDS COMMISSION AND/OR THE ATTORNEY GENERAL TO TAKE ALL NECESSARY OR APPROPRIATE ACTION ON BEHALF OF THE STATE LANDS COMMISSION TO CARRY OUT THE ABOVE POLICY.

EXHIBIT "A"

LYON AND FOGERTY NOTICE STATEMENT

(For use in informing applicants, government agencies or the general public of the holdings in Lyon and Fogerty and related law and Commission policy; to be used in leases, permits, Public Notice responses, applicant correspondence, general inquiries, etc.):

"1. The California Supreme Court in State of California v. Superior Court (Lyon) (1981) 29 Cal. 3d 210 and State of California v. Superior Court (Fogerty) 29 Cal. 3d 240 has held:

- (a) Private upland owners of on non-tidal navigable waters hold fee title to the low water mark unless their deeds provide otherwise.
 - (b) The area lying between the high and low water marks of the beds of such waters is subject to the public trust for commerce, navigation, fishing, recreation and preservation.
 - (c) Private upland owners may utilize lands between low and high water in any manner not incompatible with public trust needs in the property.
 - (d) Private upland owners who have previously constructed docks, piers and other structures in the shoreline between high and low water may continue to use those facilities unless the state determines, in accordance with applicable law, that their continued existence is inconsistent with the reasonable trust needs of the public.
 - (e) If the State chooses to exercise the public's trust interest and take possession of lawfully constructed improvements in the shoreline it must compensate the owners for such improvements.
2. Pursuant to California law, the State may require the removal of any nuisance or illegal obstruction on lands subject to the public trust. It is not required to compensate for such improvements.
 3. The State Lands Commission will require a lease or permit for only those uses or improvements lying waterward of the low water mark.

4. Any private upland owner seeking to construct improvements on the area lying between the high and low water marks, subsequent to the effective date of the Lyon and Fogerty decisions should secure a statement from the State Lands Commission that such proposed use is consistent with public trust needs in order to insure their right of compensation if such improvements are later taken by the State through an exercise of its public trust easement rights."