

# CALIFORNIA'S CONSTITUTIONAL RIGHT TO FISH

BY

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*Many states recognize public rights to use public and private property for recreation, hunting, fishing, and navigation, challenging contemporary views of the right to exclude. These public use rights are enshrined in state constitutions, statutes, or the common law. Public use rights are similar to public trust rights, but use rights are generally broader and are not constrained by the public trust's weaknesses. Analysis of public use rights often conflates these rights with public trust rights, resulting in confusion and reduced protection for public use rights. Recognizing public use rights as something apart from the public trust doctrine is key to protecting them, but little scholarship addresses the issue. This Article demonstrates that California's constitutional right to fish is a public use right distinct from the public trust doctrine, and mistaking California's constitutional right to fish for a traditional public trust fishing protection has weakened the fishing right. This work has broad ramifications for efforts to vindicate public use rights.*

*In 1910, California voters amended the state constitution to create a robust constitutional right to fish. The fishing rights amendment protects the people's right to fish on the public lands of the state and prohibits sales of state-owned lands unless the state reserves in the people the absolute right to fish on the former state-owned lands. The amendment grew out of the burgeoning populist conservation movement, coupled with broad concerns about a loss of access to nature at the end of the 18th century. The amendment is an aggressive response to such concerns; on its face, it opens the vast majority of public land in California to public fishing and eliminates the state's ability to sell its lands unencumbered.*

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*The amendment has resulted in nearly all patents for sales of some kinds of state-owned lands since 1912 containing an express reservation of fishing rights, and it likely imposed an implied public fishing access right in all other land sales. Nevertheless, the constitutional fishing amendment has not solved the problem that the voters hoped it would address. Fishing access is now limited in many regions in California. The California Attorney General and state agencies responsible for protecting fishing access and reserving fishing rights have consistently downplayed the fishing right and sought to restrict the lands to which it applies. Courts have done better, enforcing the right in most circumstances, but some courts too have under enforced the constitutional provision. Very few lawsuits have even been brought to protect the right. In spite of its auspicious beginning, the promise of the constitutional right to fish has largely gone unfulfilled.*

*This Article reviews the history of California's constitutional right to fish, from its passage through the present, and concludes that the right's conflation with the public trust has clouded efforts to protect the public use right to fish. The Article illustrates how this confusion has circumscribed the constitutional fishing right and suggests methods of protecting the right to fish, largely focused on lawsuits by private attorneys general.*

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## I. INTRODUCTION

On November 8, 1910, the people of the State of California added section 25 of article I to the California constitution:

The people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries, and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon; and no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State; provided, that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.<sup>1</sup>

This right, added over 100 years ago, remains of interest for two primary reasons. First, it creates a public right to fish on a huge expanse of land, much of which is now privately owned. Conflicting law and piecemeal recordkeeping make it difficult to determine precisely how much private land is at issue here, but our estimate puts it at 1,134,636 acres of privately owned land, roughly 2.27% of private land in California.<sup>2</sup> Including additional state-owned lands currently closed to fishing and closed lands owned by municipal or other sub-state entities raises the total even higher, likely into the millions of acres.<sup>3</sup> Absent

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<sup>1</sup> CAL. CONST. art. I, § 25 (1910).

<sup>2</sup> See *infra* text accompanying note 326 (calculating the private land subject to the fishing right).

<sup>3</sup> See *infra* text accompanying note 327 (highlighting additional lands that should be open to fishing). For example, private aquaculture facilities on state-owned ocean beds are hard to square with the constitutional amendment. See CAL. FISH & GAME CODE § 15400 (2007) (“[T]he commission may lease state water bottoms or the water column to any person for aquaculture, including, but not limited to, marine finfish aquaculture.”).

precise mapping, it is impossible to know how much of the land matters for fishing, in the sense that fishing access is only important if there is water to fish, but the point is clear: this right covers a lot of land. Broader recognition of this right would increase fishing opportunities, with attendant health, justice, and environmental benefits.

Second, understanding how California institutions have protected or failed to protect this right offers insight into state public use rights. Although unappreciated in the literature, many states recognize public rights to use both public and private land.<sup>4</sup> Use rights are often lumped in with state public trust doctrines, but considering them in that light weakens public use rights. This confusion, coupled with other challenges to public rights, allowed California institutions to dramatically weaken the constitutional right to fish, stymying the broad access promised by the amendment. This introduction briefly explains these two aspects of the fishing rights analysis before laying out the structure of the Article.

Fishing is important in California, and access to fishing locations can be a challenge. In any given year, 2.23 million Californians fish,<sup>5</sup> roughly 6% of the state's population.<sup>6</sup> These anglers spend a total of almost 24 million days fishing per year,<sup>7</sup> pumping roughly \$2.3 billion into the state's economy.<sup>8</sup> Fishing is the thirteenth most popular outdoor activity in California.<sup>9</sup> California even recognizes the importance of fishing in its Children's Outdoor Bill of Rights, which includes the right to catch a fish.<sup>10</sup> Sportfishing holds special cultural significance in many of California's immigrant communities,<sup>11</sup> and non-commercial fishing provides an important source of food for many Californians. Most of the data on fish consumption comes from studies of women's health; just under 20% of women in the state eat non-commercially caught fish, and the percentage among poor women is much higher.<sup>12</sup> A study of women who received services at a Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) clinic in Stockton, California, found that 32% of women reported eating non-commercially caught fish, and

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<sup>4</sup> Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENV'T L. REV. 1, 15–17 (2007).

<sup>5</sup> Around 1.7 million people over the age of fifteen fish, and, based on demographic models, California has another 553,000 anglers six to fifteen years old, for a total of 2.23 million anglers. U.S. FISH & WILDLIFE SERV., 2011 NATIONAL SURVEY OF FISHING, HUNTING, AND WILDLIFE-ASSOCIATED RECREATION: CALIFORNIA 5 (2011) [hereinafter NATIONAL SURVEY].

<sup>6</sup> *QuickFacts California*, U.S. CENSUS BUREAU, <https://perma.cc/HT5V-DABN> (last visited Oct. 10, 2021).

<sup>7</sup> NATIONAL SURVEY, *supra* note 5, at 13.

<sup>8</sup> *Id.* at 8, 13.

<sup>9</sup> CAL. STATE PARKS, CALIFORNIA OUTDOOR RECREATION PLAN 2008, at 16 (2009) [hereinafter CAL. OUTDOOR RECREATION PLAN]. Over 20% of the state's population describe themselves as anglers. *Id.*

<sup>10</sup> *Id.* at 10.

<sup>11</sup> Elana Silver et al., *Fish Consumption and Advisory Awareness Among Low-Income Women in California's Sacramento–San Joaquin Delta*, 104 ENV'T RSCH. 410, 411 (2007).

<sup>12</sup> *Id.* at 414.

16% reported eating it in the prior thirty days.<sup>13</sup> Asian and African-American women had the highest consumption of sport fish, although the small sample size made it difficult to achieve statistical significance.<sup>14</sup> It is clear, then, that fishing is a big deal. But is access to fishing in California really a problem?

At first glance, access to the outdoors, generally, and to fishing locations, in particular, seems like a non-issue in California. Almost 48 million acres of California open space land are open to the public,<sup>15</sup> roughly 46% of the state.<sup>16</sup> But this open land is concentrated in the Sierra Nevada, the Coast Range mountains, and the deserts, leaving large portions of the state with relatively little legal access to open spaces.<sup>17</sup> The Central Valley, home to a large and increasing percentage of the state's population,<sup>18</sup> is particularly underserved.<sup>19</sup> More than half of Californians live in areas with little public open space,<sup>20</sup> and this same pattern carries over to fishing access. The California Department of Fish and Wildlife (CDFW) publishes a map of fish stocking and fishing locations based on historical fishing access, but most identified fishing locations are in the Sierra, the foothills, or along the coast, with far fewer opportunities in the Central Valley.<sup>21</sup> Large portions of the more accessible rivers in the valley, like the Sacramento and the San Joaquin, are off-limits to shore anglers, leaving broad swaths of the state with limited access to fishing opportunities.<sup>22</sup>

California state agencies also recognize the challenge of access to outdoor recreation areas. The state's official Outdoor Recreation Plan places a high priority on ensuring adequate access near populated areas, especially in underserved communities, but many Californians still face limited access.<sup>23</sup> The plan identifies "Lack of Access to Public Park and

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<sup>13</sup> *Id.* at 412.

<sup>14</sup> *Id.* at 414.

<sup>15</sup> CAL. PROTECTED AREAS DATABASE, CPAD DATABASE MANUAL 7 (2021).

<sup>16</sup> See Neil Morgan, *California*, BRITANNICA, <https://perma.cc/THZ9-AEJX> (last updated Sept. 30, 2021) (California has a total area of 163,695 square miles).

<sup>17</sup> CPAD Version 2021a, CAL. PROTECTED AREAS DATABASE, <https://perma.cc/CCL8-J9CR>.

<sup>18</sup> CAL. OUTDOOR RECREATION PLAN, *supra* note 9, at 12.

<sup>19</sup> The Central Valley, an underserved region for parks and recreation facilities, "makes up 19% of California's land but only contains 4% of the state's protected public lands." *Id.*

<sup>20</sup> More than half of Californians "live in areas with less than 3 acres of parks or open space per 1,000 residents." *Parks for All Californians, Local Park Access Planning and Grants*, CAL. DEPT PARKS & RECREATION, <https://perma.cc/L2N6-FV9C> (last visited Sept. 18, 2021).

<sup>21</sup> See *Fishing Guide*, CAL. DEPT OF FISH & WILDLIFE, <https://perma.cc/D9UP-FXXN> (last visited Oct. 10, 2021) (visual map showing sparse fishing locations in the Central Valley compared to the concentration of fishing locations in the Sierras and along the coast).

<sup>22</sup> See CPAD Version 2021a, *supra* note 17 (CPAD GIS data shows open access, restricted access, and no access areas overlaid with marked watershed boundaries illustrating the restricted and no access zones along the Sacramento and San Joaquin Rivers).

<sup>23</sup> CAL. OUTDOOR RECREATION PLAN, *supra* note 9, at 10, 56–57. Many state agencies work to provide better access. See S.F. BAY CONSERVATION & DEV. COMM'N, TOWARD EQUITABLE SHORELINES: ENVIRONMENTAL JUSTICE AND SOCIAL EQUITY AT THE SAN

Recreation Resources” as a major barrier to outdoor activities<sup>24</sup> and prioritizes “acquisition opportunities to provide open space and public access to water features such as the ocean, lakes, rivers, streams and creeks,”<sup>25</sup> particularly in the Central Valley.<sup>26</sup> In spite of these challenges, California agencies have not used the state’s public-use right to fish to increase the public’s access to the state’s aquatic resources.

The lack of accessible shore fishing areas in the Central Valley is particularly troubling given the Central Valley’s demographics, which tend toward lower per capita income and higher unemployment and poverty rates than the rest of the state.<sup>27</sup> The Central Valley is also home to many historically marginalized communities, including three of the nation’s top ten most ethnically diverse cities.<sup>28</sup> That marginalized communities face outsized pollution risks is well documented, but less attention has been given to the fact that such communities have restricted access to nature.<sup>29</sup> Anglers from historically marginalized communities may be less able to travel to fishing locations<sup>30</sup> and are more likely to require shore access, as opposed to access from a boat.<sup>31</sup> Anglers in communities like this need accessible shore-fishing, particularly given the importance of subsistence fishing in poorer communities. Moreover, fishing opportunities offer physical and psychological benefits to disadvantaged communities, not just access to fish as food.<sup>32</sup>

Increased angling opportunities can also have broad environmental impacts, leading to a populace that is “better informed, more ethical, more conservation-oriented and, therefore, more likely to respect and wisely

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FRANCISCO BAY, BACKGROUND REPORT IN SUPPORT OF BAY PLAN AMENDMENT NO. 2-17, at 22 (2019) (Recreation Policy 1, added in 2006, recognizes the need to better include underserved communities in the planning of recreational projects); CAL. COASTAL COMM’N, CALIFORNIA COASTAL COMMISSION ENVIRONMENTAL JUSTICE POLICY 7 (2019).

<sup>24</sup> CAL. OUTDOOR RECREATION PLAN, *supra* note 9, at 64.

<sup>25</sup> *Id.* at 66.

<sup>26</sup> *Id.* at 9.

<sup>27</sup> CTR. FOR THE CONTINUING STUDY OF THE CAL. ECON., CENTRAL VALLEY ECONOMIC AND DEMOGRAPHIC TRENDS 1 (2019), <https://perma.cc/N6PV-FVVK>.

<sup>28</sup> See *Fresno Among Most Diverse US Cities, Though its Diversity is Falling*, BUS. J. (Jan. 23, 2020), <https://perma.cc/3JET-L5UJ> (Stockton, Sacramento, and Fresno are located in the Central Valley).

<sup>29</sup> *Draft CalEnviroScreen 4.0*, CAL. OFF. OF ENV’T HEALTH HAZARD ASSESSMENT (June 11, 2021), <https://perma.cc/WN9B-DZ39> (displaying interactive maps of California communities scored by pollution burden and population demographics); Amy Vanderwarker, *Water and Environmental Justice*, in A TWENTY-FIRST CENTURY U.S. WATER POLICY 52, 67 (2012).

<sup>30</sup> Harold L. Schramm, Jr. & Gary B. Edwards, *The Perspectives on Urban Fisheries Management: Results of a Workshop*, FISHERIES, Oct. 1994, at 9, 10 (“[M]ost recreational fishing opportunities are located outside the boundaries of large (population > 50,000) towns and cities.”).

<sup>31</sup> See, e.g., Charlotte Stevenson et al., *Engaging Los Angeles County Subsistence Anglers in the California Marine Protected Area Planning Process*, 36 MARINE POL’Y 559, 560–61 (2012) (finding that pier anglers in Los Angeles County are demographically distinct from boat anglers). The surveyed anglers are less white than the general Los Angeles population with nearly 85% identifying as non-White, and a majority spoke English as a second language. *Id.* at 561.

<sup>32</sup> Vanderwarker, *supra* note 29, at 67.

use finite fisheries resources.”<sup>33</sup> Assuming that increased access leads to an increase in the number of people who fish, there is some evidence that those people will come to care more about environmental protection; increasing knowledge about fishing and fishery resources is tied to increasing concern about environmental protection.<sup>34</sup> In sum then, for many reasons, in many places across the state, California needs increased fishing opportunities. By providing a history of the development and interpretation of California’s constitutional right to fish, this Article aims to improve the implementation of this right.

Turning to the second point, the analysis of the amendment also serves a broader purpose by demonstrating the challenges in constitutional protection of a public use right. Although federal courts treat fishing as merely a privilege and not a constitutional right,<sup>35</sup> many states beyond California have constitutional protection for hunting and fishing.<sup>36</sup> More broadly, many states protect public use rights for fishing, navigation, and recreation, through constitutional, statutory, and common law means.<sup>37</sup> In many cases, these laws explicitly concern access

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<sup>33</sup> Schramm & Edwards, *supra* note 30, at 14.

<sup>34</sup> See J. Marcus Drymon & Steven B. Scyphers, *Attitudes and Perceptions Influence Recreational Angler Support for Shark Conservation and Fisheries Sustainability*, 81 MARINE POL’Y, at 153, 153–54 (2017) (finding that, based on a survey of Floridian saltwater anglers, increased knowledge of sharks leads to increased concern about their protection); Mark E. Eiswerth et al., *Factors Determining Awareness and Knowledge of Aquatic Invasive Species*, 70 ECOLOGICAL ECON. 1672, 1672 (2011) (noting that boat owners with understanding of aquatic invasive species are more likely to take precautions to prevent their spread); Ramesh Paudyal et al., *A Value Orientation Approach to Assess and Compare Climate Change Risk Perception Among Trout Anglers in Georgia, USA*, 11 J. OUTDOOR RECREATION & TOURISM 22, 24, 28 (2015) (finding that more experienced subgroup of trout anglers was more likely to show concern for fish habitat and about climate change); Jennifer Heibult Sawchuk et al., *Using Stakeholder Engagement to Inform Endangered Species Management and Improve Conservation*, 54 MARINE POL’Y 98, 98–99, 102 (2015) (explaining survey of Puget Sound rockfish anglers which found personal fishing experience was positively correlated to willingness to engage in numerous conservation actions).

<sup>35</sup> Jeffrey Omar Usman, *The Game Is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 70–71 (2009).

<sup>36</sup> Many states added constitutional protections for fishing and hunting in the late 1990s through the early 2000s, primarily as a reaction against successful animal rights campaigns to limit hunting and trapping. *Id.* at 77–84. The literature is generally unanimous in viewing these recent additions with suspicion. *Id.* at 82–83. Some of the constitutional protections *explicitly protect* private property rights from any possible infringement based on the constitutional right to fish or hunt. *Id.* at 79. Another body of law is sometimes seen to confer a right to hunt: laws that bar interference with lawful hunting and fishing activities. See, e.g., CAL. FISH & GAME CODE § 2009 (2010) (“A person shall not willfully interfere with the participation of any individual in the lawful activity of shooting, hunting, fishing, falconry, hunting dog field trials, hunting dog training, or trapping at the location where that activity is taking place.”). This Article is not addressing those laws.

<sup>37</sup> See Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 56, 78–79, 129, 140, 148–50, 196–97 (2010) [hereinafter *Western States’ Public Trust Doctrines*] (finding that western states generally provide for public use rights in their public trust doctrines, and discussing protections of public use rights in individual states including New Mexico, Wyoming, Idaho, and Montana); Robin Kundis Craig,

to and use of waterways on private land. Few states, however, have constitutional language addressing access for fishing; only four state constitutions protect fishing access: California, under article I, section 25;<sup>38</sup> Hawaii;<sup>39</sup> Rhode Island;<sup>40</sup> and Vermont.<sup>41</sup> Many states also provide some access to public trust lands, which tends to be narrower than the protections at issue here.<sup>42</sup>

The constitutional public use rights have received little attention, and the evidence suggests they merit more consideration. Even in those states without access protection, constitutionalizing fishing rights has had repercussions. For example, a Minnesota Court of Appeals weighed the state's constitutional right to fish in deciding that a commercial fishing license was a property right protected by due process.<sup>43</sup> Constitutional protections for hunting and fishing could also increase the level of scrutiny courts apply to laws regulating those rights,<sup>44</sup> although

*A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENV'T L. REV. 1, 4, 14 (2007) (finding that eastern states provide for public use rights, even in non-state-owned waters); Leighton L. Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391, 421 (1970) (noting that public use of navigable waters is often protected by states under a public easement theory).

<sup>38</sup> The language of the amendment seems to create an access right self-evidently: "The people shall have the right to fish *upon and from the public lands of the State* and in the waters thereof . . . and no land owned by the State shall ever be sold or transferred without reserving in the people *the absolute right to fish thereupon.*" CAL. CONST. art. I, § 25 (1910) (emphasis added); see Richard S. Ekimoto & Jean E. Rice, *Constitutional Right to Fish: A New Theory of Access to the Waterfront*, 16 U.C. DAVIS L. REV. 661, 665 (1983) (discussing the value of California's right-to-fish amendment as a means to protect waterfront access).

<sup>39</sup> HAW. CONST. art. XI, § 6 (2009) ("All fisheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation shall be free to the public, subject to vested rights and the right of the State to regulate the same.")

<sup>40</sup> R.I. CONST. art. I, § 17 (2021) ("The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore.")

<sup>41</sup> See VT. CONST. ch. II, § 67 (2010) ("The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not enclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly."); Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND, RES., & ENV'T. L. 73, 266 (2002) (noting California, Hawaii, and Vermont); see also R.I. CONST. art. I, § 17 (2021) (protecting right to fish from shore). Pennsylvania's original 1776 constitution included protection for fishing, and the amended Pennsylvania constitution, adopted in 1790, removed the right "as unnecessary constitutional clutter." Usman, *supra* note 35, at 77. Charters or other formal guarantees protected fishing access in four of the original thirteen colonies, and Pennsylvania proposed a fishing rights addition to the Bill of Rights. *Id.* at 69–70, 72–73. Alaska offers some protection for subsistence hunting and fishing as well. ALASKA CONST. art. VIII, § 3 ("Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.")

<sup>42</sup> See discussion *infra* Part II (explaining this distinction).

<sup>43</sup> *Mertins v. Comm'r Nat. Res.*, 755 N.W.2d 329, 336–37 (Minn. Ct. App. 2008).

<sup>44</sup> Ann M. Lousin, *Justice Brennan's Call to Arms—What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387, 395 (2016) (asking whether the constitutional protections "require a strict scrutiny analysis of any regulation of that right").



perhaps these laws should already face greater scrutiny when they impact the public's use of public trust resources.<sup>45</sup> Other impacts may extend to protection of fish and game; the North Dakota attorney general opined that “[t]he State Engineer must consider the provision when deciding whether to grant water permits and when carrying out planning responsibilities.”<sup>46</sup> Impacts could affect state statutes with potential impacts on fishing rights through the constitutional conflict avoidance doctrine, encouraging courts to read potentially conflicting statutes to avoid impinging on constitutional protections.<sup>47</sup>

In California, the constitutional right to fish has been underenforced, with both administrative agencies and the courts failing to protect the full extent of the right as laid out in the Constitution. Agencies have failed to apply the right to many lands that should be covered by the amendment, and California Attorney General opinions have tried to further limit application of the right.<sup>48</sup> A close reading of California attorney general opinions and court cases addressing this right suggests that the right's overlap within the public trust doctrine has led these decisionmakers astray.<sup>49</sup> Many of the opinions and decisions purport to address the constitutional right, but their analysis instead turns on traditional public trust notions, not on principles of constitutional law. Indeed, one judge suggested that the constitutional right to fish was unimportant, presenting it with scare quotes around the words “constitutional” and “right.”<sup>50</sup> At least with regard to this amendment, the constitutionalizing of a public use right has not had the desired effect.

As this Article demonstrates, this is at least in part due to (understandable) confusion between the constitutional right to fish and the public trust right to fish. For example, the legislature has attempted to extinguish fishing rights on some private lands.<sup>51</sup> A state law may be able to extinguish public trust rights in some unique circumstances, but it is hard to imagine that a legislative act can cut off a constitutional right

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<sup>45</sup> See generally Richard M. Frank, *Public Trust Doctrine*, in CALIFORNIA ENVIRONMENTAL LAW & LAND USE PRACTICE §§ 2.01–2.13 (Bender ed., 2021) (discussing the public trust doctrine and strict judicial scrutiny).

<sup>46</sup> Wayne Stenehjem, N.D. Att’y Gen., Opinion Letter 2006-L-23 (Aug. 16, 2006).

<sup>47</sup> Usman, *supra* note 35, at 92–93.

<sup>48</sup> See discussion *infra* Part V.A.1. (discussing the ways the attorney general opinions and agencies constrain fishing access rights not allowed by the amendment).

<sup>49</sup> See discussion *infra* Part V (explaining how the CSLC’s treatment of the public trust constitutional right ignores amendment protections); see also *Friends of Martin’s Beach v. Martin’s Beach 1*, 201 Cal. Rptr. 3d 516, 532 (Ct. App. 2016) (concluding that another constitutionally protected public use, California Constitution “Article X, section 4 *is*, at least in part, a codification of the public trust doctrine”).

<sup>50</sup> *Serrano v. Priest*, 569 P.2d 1303, 1319 (Cal. 1977) (Richardson, J. dissenting) (“[O]ur state Constitution discloses in article I alone, numerous ‘rights’ of varying degrees of importance, ranging from the inalienable right to life, liberty and property (§ 1) to the right to fish in public waters (§ 25). Each of them presumably is a ‘constitutional’ right.”).

<sup>51</sup> See *infra* text accompanying notes 378 (noting legislative grants that do not reserve the fishing right and legislative approvals for state agencies to make such grants).

to fish.<sup>52</sup> Similarly, in some opinions, the state attorney general has suggested state agencies may be able to extinguish public fishing rights by lumping them in with public trust rights, and this also fails the constitutional eyeball test.<sup>53</sup>

To advance this analysis, Part II of this Article lays out the differences between fishing rights protected by the California constitution and those covered by the public trust doctrine. Part III examines the origin of the public use right through analysis of the social conditions and legislative history leading to the adoption of the constitutional fishing right, demonstrating that it does not come from the public trust doctrine. Part IV details the implementation of the fishing right, generally relying on court decisions and California Attorney General opinions. Part V begins by demonstrating how this history has undercut the right to fish, based in part on the right's historical roots in the public trust doctrine, denying the public their constitutional right to fish. Part V then analyzes the ways anglers may be able to vindicate public fishing rights and suggests that these approaches, coupled with improved state support for the right, may reinvigorate the right to fish. Part VI briefly concludes.

## II. PUBLIC TRUST FISHING RIGHTS

The public use right to fish offers broader protection than that afforded by the public trust doctrine: protections founded firmly on the state constitution. We begin here by laying out the public trust protections as the first step in this analysis and then proceed to the history of the constitutional right to fish. Three aspects of the public trust are germane here: the trust's geographic scope, the interests protected, and the rights of access to public trust lands.

The precise geographic scope of the public trust in California is a little murky, but it appears to include both the traditional public trust waters, defined by the "federal test for state title,"<sup>54</sup> and additional waters meeting the "public right of navigation" test, a state-derived test.<sup>55</sup> The traditional public trust waters are tidelands and lands under navigable waterways, which were transferred to state ownership as an incident of

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<sup>52</sup> See *infra* text accompanying note 423 (The California Attorney General Webb opinion expressed the same position in the fishing right context, finding the "provision of the constitution must be read into every patent which is issued while it is in force and effect.").

<sup>53</sup> See *infra* text accompanying note 424.

<sup>54</sup> The definitional test is a matter of federal law, although that has not always been the case. *United States v. Utah*, 283 U.S. 64, 66 (1931); Sean Morrison, *Public Trust or Equal Footing: A Historical Look at Public Use Rights in American Waters*, 21 HASTINGS W.-NW. J. ENV'T L. & POL'Y 69, 85 (2015). The states take title to lands underlying federally navigable rivers, those rivers which were "susceptible of being used, in [its] ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water" at the time the state joined the union, based on the natural condition of the water. *Daniel Ball*, 77 U.S. 557, 557 (1870).

<sup>55</sup> *People ex rel. Baker v. Mack*, 97 Cal. Rptr. 448, 450, 454 (Ct. App. 1971).

sovereignty whenever a state joined the United States.<sup>56</sup> These lands, often termed sovereign lands, are defined by the federal test for state title and *belong* to the state.<sup>57</sup> These waters are protected by the public trust in California and most other states.<sup>58</sup>

Like many states,<sup>59</sup> California also extends public trust protection to a broader class of waters, those meeting the public right of navigation test, even where those waters flow over private land.<sup>60</sup> Although framed and initially developed in a public use context, the Supreme Court of California clarified that the test also demarcates the extent of public trust interests.<sup>61</sup> Under the California public right of navigation test, a water body is navigable if it is “capable of being navigated by oar or motor propelled small craft [sic].”<sup>62</sup> In California, then, the public trust extends beyond the waters that pass the federal test for state title to also include water bodies passing the state public right of navigation test.

Turning to the interests protected by the California public trust doctrine, the outer limits of the public trust right to use lands is unclear, but it certainly includes activities related to “commerce, navigation, fishing, recreation, or for the purpose of preserving the property in its natural state.”<sup>63</sup> California law thus explicitly recognizes significant

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<sup>56</sup> *Public Trust Doctrine*, S.F. BAY CONSERVATION & DEV. COMM'N, <https://perma.cc/23MK-SBWP> (last visited Oct. 8, 2021).

<sup>57</sup> Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENV'T L. REV. 339, 405–06 (2015); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, 454 (1989).

<sup>58</sup> Roderick E. Walston, *The Public Trust Doctrine in the Water Rights Context*, 29 NAT. RES. J. 585, 585 (1989).

<sup>59</sup> In 2012, a unanimous Supreme Court approved this approach. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603–04 (2012) (“Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law . . . . States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.”).

<sup>60</sup> *Baker*, 97 Cal. Rptr. at 454.

<sup>61</sup> The Supreme Court of California affirmed that “[a] waterway usable only for pleasure boating is nevertheless a navigable waterway and protected by the public trust.” *Nat'l Audubon Society v. Super. Ct. of Alpine Cty.*, 658 P.2d 709, 720 n.17 (Cal. 1983) (citing *Baker*, 97 Cal. Rptr. at 450, which applied the public right of navigation in a public use context).

<sup>62</sup> *Baker*, 97 Cal. Rptr. at 454. Streams need not be navigable year-round to be navigable under this test, and areas that were dry land above the ordinary high water mark can, when flooded, become navigable and thus subject to the public use right of navigation under some circumstances. *Bess v. Cty. of Humboldt*, 5 Cal. Rptr. 2d 399, 401–02 (Ct. App. 1992); *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 127 Cal. Rptr. 830, 833, 835 (Ct. App. 1976). *But see City & Cty. of S.F. v. Main*, 137 P. 281, 281 (Cal. Ct. App. 1913) (noting that navigability should be determined during the ordinary states of the water body). Unlike the federal test for state title, this is not limited by a water's condition at entry to the union. Jeffrey S. Silvyn, *Protecting Public Trust Values in California's Waters: The Constitutional Alternative*, 10 UCLA J. ENV'T L. & POL'Y 355, 357 (1992).

<sup>63</sup> *State of Cal. v. Super. Ct. of Lake Cty. (Lyon)*, 625 P.2d 239, 248 (Cal. 1981).

fishing access rights under its public trust doctrine.<sup>64</sup> The California States Lands Commission (CSLC) presents a long (but not exclusive) list of public trust interests, including “boating, fishing, hunting, swimming, bathing, standing, wading along the waterfront, anchoring, picnicking, bird watching, and nature study.”<sup>65</sup> Under California law, private individuals may sue to protect these public trust rights.<sup>66</sup>

Finally, turning to the question of physical access to public trust lands, the California public trust protects the use of the trust lands themselves, those lands below the high water mark of any water meeting either of the two tests discussed *supra*.<sup>67</sup> Much is made of whether access extends to the land below the high water mark or just to whatever waters cover that land, but the Supreme Court has clearly answered that question, holding that the public may use the land itself.<sup>68</sup> Private owners who have purchased trust lands from the state get possession of the land but, outside of a few cases where the trust interest is removed,<sup>69</sup> the private owner takes the trust lands subservient to the trust.<sup>70</sup> Conversely, at this time, the California public trust doctrine does not allow for access to public trust lands *across* privately owned lands,<sup>71</sup> although other states allow such access.<sup>72</sup>

Finally, the California legislature has provided some explicit protections for physical access to state-owned lands via statutes. The Public Resources Code (PRC) explicitly bars the state from selling, leasing, or renting lands fronting on navigable waters without reserving an easement across the lands if there is no other convenient access to the

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<sup>64</sup> Richard M. Frank, *Forever Free: Navigability, Inland Waterways, and the Expanding Public Interest*, 16 U.C. DAVIS L. REV. 579, 606–07 (1983).

<sup>65</sup> CAL. STATE LANDS COMM’N, A LEGAL GUIDE TO THE PUBLIC’S RIGHTS TO ACCESS AND USE CALIFORNIA’S NAVIGABLE WATERS 45 (2017), <https://perma.cc/UYH6-5T2E> [hereinafter CSLC LEGAL GUIDE].

<sup>66</sup> *Marks v. Whitney*, 491 P.2d 374, 379 (Cal. 1971).

<sup>67</sup> *Lyon*, 625 P.2d at 251–52; *Baker*, 97 Cal. Rptr. at 450–51. *Baker* dealt with access in a public use setting and did not address public trust rights, so the exact basis of access to areas meeting the state test is unclear. Regardless, public access to lands below the high water mark of waters meeting either test is protected in California.

<sup>68</sup> *Lyon*, 625 P.2d at 251 (“[T]he public’s interest is not confined to the water, but extends also to the bed of the water.”); *Baker*, 97 Cal. Rptr. at 454 (the public may exercise the incidents of navigation “at any point below [the] high water mark”).

<sup>69</sup> See *infra* text accompanying note 359 (noting that state law permits lands or interest in lands to be freed of the public trust through an exchange agreement).

<sup>70</sup> *Forestier v. Johnson*, 127 P. 156, 160 (Cal. 1912) (noting that a private purchaser of trust lands “takes subject thereto, and he has no right to enjoin or prevent any citizen from exercising the public rights incident thereto”).

<sup>71</sup> *Bolsa Land Co. v. Burdick*, 90 P. 532, 534–35 (Cal. 1907); *Heist v. Cty. of Colusa*, 213 Cal. Rptr. 278, 285 (Ct. App. 1984). California law provides additional protections for access to navigable waterways. CSLC LEGAL GUIDE, *supra* note 65, at 22.

<sup>72</sup> New Jersey, for example, allows the public to cross private land to access trust beaches. *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 113, 127 (N.J. 2005).

water.<sup>73</sup> A similar provision protects access to state-owned lands that lack navigable waters.<sup>74</sup> These provisions are not explicitly tied to fishing rights, but the first certainly provides some protection. It's not clear whether these statutes implement the public trust or protect public use; probably both.

With this foundation, we return to the fishing rights protected by California's public trust doctrine. Under the trust, the public may fish any waters in the state "capable of being navigated by oar or motor propelled small craft," regardless of the ownership of the underlying lands.<sup>75</sup> To do so, the public may use the underlying lands up to the high water mark,<sup>76</sup> even if those lands are dry and privately owned.<sup>77</sup> The public trust does not otherwise empower the public to cross private land to fish on trust lands. This right is limited in important ways: limiting access to paths below the high water mark, leaving no dry access when the water is full to the high water mark; omitting waters that cannot be navigated by small craft; and leaving some aspects of the trust right to fish subject to legislative and judicial whim, as with any public trust interest. In our historical context, it bears mention that California courts had not yet developed the full contours of the public trust right to fish in California when voters added the right to fish to the Constitution.<sup>78</sup> Nevertheless, the constitutional fishing right addresses many of these shortcomings of the current public trust doctrine, as addressed more fully below.

### III. HISTORY OF THE FISHING RIGHT AMENDMENT

This fishing rights amendment was a juggernaut. It moved from legislative proposal to adoption in just over two months, with only two votes against it in either chamber of the legislature.<sup>79</sup> In the subsequent public vote, the voters of California adopted the amendment by an overwhelming margin.<sup>80</sup> But the amendment is not a minor thing, and its

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<sup>73</sup> CAL. PUB. RES. CODE § 6210.4 (1949) ("No lands owned by the State which lands front upon or are near to any lake, navigable stream or other body of navigable water, convenient access to which is not provided by public road or roads, or otherwise, shall ever be sold, leased or rented, without reserving to the people of the State an easement across the lands for convenient access to such waters.")

<sup>74</sup> CAL. PUB. RES. CODE § 6210.5 (1949) ("No lands owned by the State, which lands provide the only convenient means of access to other lands owned by the State, shall ever be sold, leased or rented without reserving therefrom to the State and its successors in interest in the other lands, an easement for convenient access to the other lands.")

<sup>75</sup> *Baker*, 97 Cal. Rptr. 448, 454 (Ct. App. 1971). Any waters meeting the federal title test would also meet this test, so it is the operative limit.

<sup>76</sup> See Frank, *supra* note 45, at § 2.10 (discussing measurement of the high water mark).

<sup>77</sup> *Lyon*, 625 P.2d 239, 251–52 (Cal. 1981).

<sup>78</sup> See *infra* text accompanying notes 172–177 (describing U.S. Supreme Court cases establishing the contours of the public trust doctrine).

<sup>79</sup> *In re Quinn*, 110 Cal. Rptr. 881, 888 n.4 (Ct. App. 1973).

<sup>80</sup> STATEMENT OF THE VOTE OF CALIFORNIA AT THE GENERAL ELECTION, HELD NOVEMBER 8, 1910, at 25 (1910), <https://perma.cc/T6RZ-ZZY2> [hereinafter STATEMENT OF THE VOTE]; see *California Right to Fish, Amendment 14 (1910)*, BALLOTPEDIA, <https://>

adoption is remarkable. On its face, it opens the vast majority of state public land in California to public fishing and eliminates the state's ability to sell any of its lands unencumbered by the right to fish.<sup>81</sup> It is a declaration that fishing is important and that access to places to fish is of paramount concern. This is a dramatic reduction in the state's own property rights, reducing the value of transferred lands and reducing the state's control over the lands it retains. And it is a part of the California constitution; the legislature cannot merely change its mind and roll the law back. The amendment's swift acceptance, despite its weighty nature, demonstrates its broad support. The state constitution already protected a right-of-way to the navigable waters of the state for any public purpose.<sup>82</sup> What led California to so rapidly and overwhelmingly adopt a new constitutional right?

### A. *Why a Right to Fish?*

The question is not merely academic; California courts, in construing constitutional amendments, "take judicial cognizance of the existence of the evil which the Legislature in framing such amendment, and the people ratifying it, endeavored to correct."<sup>83</sup> Courts resolve ambiguities in constitutional amendments based on "the object to be accomplished or the mischief to be remedied or guarded against."<sup>84</sup> Understanding the setting that birthed this amendment is key to applying the amendment itself. Moreover, understanding the setting helps to define the fishing right as a public use right, not merely a codification of the public trust, and can inform efforts to develop more robust implementation of the right to fish as a constitutional right.

A confluence of three factors came together in the 1890s to set the stage for the fishing rights amendment: a desire to protect traditional public fishing and hunting in America for the common person; the Progressive Era, with its anti-monopoly and anti-capitalist bent; and the Supreme Court's endorsement of the state-ownership-of-wildlife doctrine.<sup>85</sup> The *Sacramento Bee* published a lengthy second-page article in 1890 that exposed these foundations.<sup>86</sup> The article decried the creation

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perma.cc/NAA3-855Z (last visited Oct. 10, 2021) (showing the amendment was approved with 85.89% of voters choosing yes, granting people the right to fish on state-owned lands).

<sup>81</sup> *Forestier*, 127 P. 156, 160 (Cal. 1912).

<sup>82</sup> CAL. CONST. art. X, § 4 (1976); CAL. CONST. art. XV, § 2 (1879).

<sup>83</sup> *Quinn*, 110 Cal. Rptr. at 888.

<sup>84</sup> *Turlock Irrigation Dist. v. White*, 186 Cal. 183, 188 (1921).

<sup>85</sup> See generally MARK DAMIAN DUDA ET AL., *THE SPORTSMAN'S VOICE: HUNTING AND FISHING IN AMERICA* 2–4, 11–12 (2010) (discussing American public wildlife ideals, American Progressive Era ideology, and the American Supreme Court promoting governmental management of wildlife).

<sup>86</sup> See *Whither Are We Drifting*, SACRAMENTO BEE, July 7, 1890, at 2 (protesting fish being stocked in a private pond only accessible to a millionaire).

of a private fish and game preserve by “rich Bay sportsmen” who would be “the lords of all they survey.”<sup>87</sup> The article reads:

[I]n the name of the people of the State, we protest against the Fish Commissioners stocking private ponds owned by dog-in-the-manger millionaires. . . . The spawn belong to the people, and to the free streams must they go. . . . In what land are we living? Are we going back to the old Parks of England[?] . . . [W]here will the poor man get his fish and game?<sup>88</sup>

The *Sacramento Bee* called on the legislature to “once and forever put[] a stop to such feudalistic practices . . . to check these would-be lords of the earth, the air, the sea, and the sky—not to give them free scope within which to reenact here the poaching laws of England.”<sup>89</sup> It is all there—Protect public fishing! Stop the robber barons! The fish belong to the people!<sup>90</sup>

### 1. Protect Traditional American Public Access

Public pursuit of game on open lands was “one of the freedoms that defined America,”<sup>91</sup> set in stark contrast to the “truly draconian” restrictions on non-landowners (and even some landowners) who wanted to hunt or fish in England.<sup>92</sup> English law kept all but a privileged few from hunting or fishing, and transgressors faced “castration, banishment, and even death.”<sup>93</sup> The restrictions mirrored the situation throughout Europe.<sup>94</sup> The lack of access to natural resources motivated many European immigrants to immigrate to North America,<sup>95</sup> and early European immigrants rejected the European restrictions and embraced a nearly universal right to hunt and fish, believing these rights bestowed by a kind of natural law.<sup>96</sup> The rights included hunting and fishing on one’s own private land, on public lands, and, in many cases, on private land belonging to other people.<sup>97</sup> State legislatures undertook long

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> ERIC T. FREYFOGLE, *THE ENCLOSURE OF AMERICA* 18 (2007), <https://perma.cc/4UZ8-QM9J>.

<sup>92</sup> DUDA ET AL., *supra* note 85, at 1; see Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENV'T L. 673, 683 (2005) (discussing how English statutory requirements, like money and land, effectively barred some people from hunting on their own land).

<sup>93</sup> Blumm & Ritchie, *supra* note 92, at 680.

<sup>94</sup> DUDA ET AL., *supra* note 85, at 1.

<sup>95</sup> *Id.*

<sup>96</sup> See Blumm & Ritchie, *supra* note 92, at 687 (explaining that a policy restricting hunting to a limited time or group went against the obvious American recognition that everyone had a free right to hunt and take game).

<sup>97</sup> See Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703, 712 (1976) (discussing how, over time, American lawmakers passed statutes that opened undeveloped private lands to any wildlife taker).

campaigns to protect these public rights, doing away with laws barring trespass by hunters or anglers over undeveloped private lands and creating the “presumption that owners who had not posted notices of their opposition welcomed wanderers to hunt on their wild lands.”<sup>98</sup> These impulses led to the aforementioned early constitutional protections for public use hunting and fishing rights.<sup>99</sup> Courts did their part as well; some found ways to undercut pre-revolution sovereign grants of exclusive hunting and fishing rights, and others decried the British approach as “contrary to the spirit of our institutions’ and as an ‘anomaly’ in the otherwise admirable British jurisprudence.”<sup>100</sup> Professor Freyfogle describes hunting and fishing access rights, across public and private land, as part of a broad public affirmative use right in most lands in early America, which trumped a landowner’s desire to exclude.<sup>101</sup> An 1840 treatise on the law of watercourses similarly described public access to waters over private lands.<sup>102</sup> But public use rights began to decline by the late 19th century, driven by the growing right to exclude.<sup>103</sup>

The *Sacramento Bee*’s callouts to “the old Parks of England[,] . . . feudalistic practices[,] . . . these would-be lords of the earth, the air, the sea, and the sky[,] . . . [and] the poaching laws of England” would have reverberated with fears that deep-seated American values were about to disappear.<sup>104</sup> This was a consistent refrain from the early 1880s through the mid-1910s,<sup>105</sup> as newspapers across California rang with accusations of British-style class warfare over fishing and hunting rights.<sup>106</sup>

The *San Francisco Chronicle*, for example, reported favorably on an 1889 speech by former district attorney J.D. Sullivan, who argued that game preserves were “an institution which he conceived to be foreign not only to the principles of the American Government, but to the long-established ethics of true sportsmanship.”<sup>107</sup> In a 1910 editorial recommending a yes vote on the fishing rights amendment, the *San Francisco Call* argued “[t]he purpose of this amendment is to limit the monopoly of fishing rights in the streams of the state, which promises, if

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<sup>98</sup> *Id.* at 712–13.

<sup>99</sup> See *infra* text accompanying notes 172–177 (citing federal cases that protected public hunting and fishing rights).

<sup>100</sup> Lund, *supra* note 97, at 714–15; see Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549, 552–54 (2004) (describing the impact of English Law on Colonial America).

<sup>101</sup> See generally FREYFOGLE, *supra* note 91, at 16–17, 21.

<sup>102</sup> JOSEPH K. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES 204 (3d. ed. 1840).

<sup>103</sup> See text accompanying notes 104–107 (explaining how newspapers denounced changes to hunting and fishing rights).

<sup>104</sup> *Whither Are We Drifting*, *supra* note 86.

<sup>105</sup> See, e.g., *Sportsman’s Niche: Growing Restlessness Under the Game-Preserve System*, S.F. CHRON., Oct 28, 1882, at 4 (decrying the loss of public lands for hunting and noting private hunting clubs had been formed within the last five years); Editorial, *The State’s Fish and the Rights of the People*, SACRAMENTO BEE, Sept. 17, 1912, at 4.

<sup>106</sup> *Whither Are We Drifting*, *supra* note 86; *Sportsman’s Niche: Growing Restlessness Under the Game-Preserve System*, *supra* note 105.

<sup>107</sup> *State Sportsmen: Discussion of the Game Preserve System*, S.F. CHRON., Nov. 6, 1889.



permitted, to exclude the general public from the enjoyment of this form of sport. This exclusive monopoly is a reversion to the feudal type.”<sup>108</sup> In a similar editorial, the *Sacramento Bee* argued

[t]here is, in any free country, a natural right to fishing and shooting which should be reserved to The People for all time. But California is fast being made into a system of fish and game preserves for the benefit of well-to-do sportsmen, and to the exclusion of the common people from their birthright.<sup>109</sup>

A 1910 *San Francisco Chronicle* article argued that fishing was a natural right.<sup>110</sup> A 1912 article in the *Weekly Calistogan* referred to “the Lords of Shasta and the Dukes of the McCloud [who] have fenced in the public from access to that stream and have hogged to themselves all right to fish.”<sup>111</sup> The *Sacramento Bee* often portrayed laws restricting fishing as a form of class warfare.<sup>112</sup> For example, arguing against a proposed fishing license requirement, the *Sacramento Bee* suggested “[i]t is special legislation in the interest of the rich and leisure class, to whom the cost of a license is a mere bagatelle and who favor anything that tends to make better fishing for themselves by virtually excluding the general public from the fishing grounds.”<sup>113</sup>

As evidence of the passions involved, consider the 1906 dispute over Bolsa Bay.<sup>114</sup> The Bolsa Land Company and the Bolsa Chica Gun Club bought land surrounding Bolsa Bay and nearby tidelands, fencing off the land and attempting to exclude the public.<sup>115</sup> Residents of the town of Bolsa Bay were so incensed that they descended en masse on the property on Thanksgiving Day, “all carrying guns, all discharging them freely and shooting game.”<sup>116</sup> The resulting case made it to the Supreme Court of California, which enjoined the trespassers from crossing private lands to get to the public waters.<sup>117</sup> An 1895 Supreme Court of California case similarly upheld a state legislative grant that eliminated public salmon

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<sup>108</sup> Editorial, *The Constitutional Amendments and Bond Issues*, S.F. CALL, Nov. 3, 1910, at 6.

<sup>109</sup> Editorial, *An Amendment that Is Better Late than Never*, SACRAMENTO BEE, Nov. 2, 1910, at 4.

<sup>110</sup> J.X. De Witt, *Pescadero Likely to Yield Good Sport*, S.F. CHRON., Jan. 23, 1910, at 45.

<sup>111</sup> *The State's Fish and Rights of the People*, WEEKLY CALISTOGIAN, Sept. 20, 1912; *The State's Fish and the Rights of the People*, *supra* note 105.

<sup>112</sup> See SACRAMENTO BEE, Feb. 12, 1909, at 4 (A constitutional amendment “would be a much needed rebuke to those law-makers who have favored class legislation, in the form of fish and game laws, for the benefit of a few sportsmen and in disregard of the rights of the public”).

<sup>113</sup> Editorial, *Special Legislation to Favor Sportsmen*, SACRAMENTO BEE, Feb. 6, 1909, at 13.

<sup>114</sup> *Bolsa Land Co.*, 90 P. 532, 532 (Cal. 1907).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 533.

<sup>117</sup> *Id.* at 534–35.

fishing rights on the Eel River.<sup>118</sup> The public feared that California's 8,000 natural lakes, 189,454 miles of rivers, and untold miles of streams were soon to be locked away in vast estates, beyond the reach of the common angler.<sup>119</sup> This would end the American experiment in public hunting and fishing rights and seemed inimical to American ideals.

## 2. Progressive Era Influences

The *Sacramento Bee's* 1890 article attacking the "private ponds owned by dog-in-the-manger millionaires" also reflects a merger of concerns about reenacting European fishing restrictions with accusations of class warfare.<sup>120</sup> This fits hand-in-glove with the burgeoning Progressive Era. Populist Progressive Era politics are hard to sum up, but progressives generally focused on eliminating "the problems created by industrialization and its corrupting influx of money [including] uncontrolled capitalism, . . . monopolies and trusts, political machines and their bosses, and the control of government by wealthy capitalists."<sup>121</sup> Progressive reformers sought to take power and resources back from "moneyed interests" through government reform.<sup>122</sup>

To a great extent, the progressive movement was a conservation movement,<sup>123</sup> and the movement made environmental issues front-page political news for the first time.<sup>124</sup> For example, President Theodore Roosevelt spent more than twelve percent of his first State of the Union Address speaking on environmental issues, primarily addressing the wise use of forests and irrigation.<sup>125</sup> Progressive Era environmentalism focused on "protect[ing] natural resources from the wasteful, destructive

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<sup>118</sup> Heckman v. Swett, 40 P. 420, 420 (Cal. 1895) ("The state, by virtue of its sovereignty, has authority to regulate fisheries within its borders, and may prescribe the places as well as the times in which fish may be taken, and may make exclusive grants of fisheries in designated waters, so far as the same do not impair private rights already vested.").

<sup>119</sup> William J. Billick, III, *Public Recreation and Subdivisions on Lakes and Reservoirs in California*, 23 STAN. L. REV. 811, 813–14 (1971) (citing E. SALITORE, CALIFORNIA INFORMATION ALMANAC 427 (1969)).

<sup>120</sup> *Whither Are We Drifting*, supra note 86.

<sup>121</sup> Donald McInnis, *Money & Politics Citizens' Initiative: Who Shall Govern*, 59 SANTA CLARA L. REV. 69, 76 (2019).

<sup>122</sup> Charles Wilkinson, "The Greatest Good of the Greatest Number in the Long Run": *TR, Pinchot, and the Origins of Sustainability in America*, 26 COLO. NAT. RES., ENERGY & ENV'T L. REV. 69, 70 (2015).

<sup>123</sup> See, e.g., SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920, at 2–3, 5, 261 (1999) (stating that "[c]onservation . . . was a scientific movement" with political implications" while "[t]he modern American conservation movement grew out of the firsthand experience of federal administrators and political leaders with problems of Western economic growth, and . . . Western water development").

<sup>124</sup> CONSERVATION IN THE PROGRESSIVE ERA: CLASSIC TEXTS 3 (David Stradling ed., 2004).

<sup>125</sup> President Theodore Roosevelt, State of the Union Address (Dec. 3, 1901).

practices of nineteenth-century business,”<sup>126</sup> pushing rational, scientific use of natural resources to provide for “the greatest good of the greatest number for the longest time.”<sup>127</sup> Conservationists laid emerging environmental problems at the feet of the Progressive Era villains: uncontrolled capitalism and capitalists, “immigration, crime, . . . monopolies and trusts, political machines and their bosses, and the control of government by wealthy capitalists.”<sup>128</sup> California was a progressive bastion, electing a progressive governor and legislative majority in November 1910.<sup>129</sup>

The progressive conservation themes echo through the contemporary discussions of the right to fish. As early as 1881, the *Morning Union* observed that, even on the river, “[m]onopoly is the order of the day,” recounting a fisherman who gave an encroacher on the Truckee River “a severe beating.”<sup>130</sup> In 1899, the *San Francisco Chronicle* reported that “rich clubs . . . have taken up the various shooting and fishing grounds as preserves. Every good piece of ground accessible to San Francisco is in the hands of some club, and the men outside the wealthy organizations are shut out from the pursuit of legitimate field sport.”<sup>131</sup> A 1909 *Marin Journal* article argued “[t]he fish and game hogs act as though they imagine the Lord God Almighty had placed fish and game on this earth solely for their sport and greed.”<sup>132</sup> In 1910, the *Madera Mercury* noted the “[p]opular sentiment of late years . . . against the growing monopoly of fishing and gunning privileges and against the laws passed by the Legislature in the interest of the so called sportsmen and to the disadvantage of the public. It is high time for a change.”<sup>133</sup> A 1911 *Truckee Republican* editorial complained about the “trout stream monopoly secured by the rich.”<sup>134</sup> Less than a year earlier, the paper reported that:

Private monopoly of bank lands along the best stocked trout river in the state of California is awakening considerable interest in all parts of the state especially among the thousands of people who come and go annually to fish

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<sup>126</sup> WILLIAM D. ROWLEY, *THE BUREAU OF RECLAMATION: ORIGINS AND GROWTH TO 1945*, at 74 (2006), <https://perma.cc/R7EM-4XJV>.

<sup>127</sup> GIFFORD PINCHOT, *BREAKING NEW GROUND* 326 (1947).

<sup>128</sup> McInnis, *supra* note 121; see *Can Fish in Ocean or Tubs: Stuckenbruck is Witty and Assembly Opens Waters for Sport*, SACRAMENTO BEE, Feb. 11, 1909, at 5 (arguing for the abolishment of all fish and game laws, particularly those laws restricting public fishing on private lands).

<sup>129</sup> Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1187 (1998). In his 1911 inaugural address, newly-elected Gov. Hiram Johnson argued for “preserving, so far as we may, for all of the people, those things which naturally belong to all.” Governor Hiram Johnson, *First Inaugural Address* (Jan. 3, 1911).

<sup>130</sup> *Local Intelligence*, GRASS VALLEY DAILY UNION (Cal.), Apr. 24, 1881, at 3.

<sup>131</sup> *A Sportsmen's Fight: Trying to Break Up the Game Preserve System*, S.F. CHRON., July 10, 1889, at 5.

<sup>132</sup> MARIN J., Feb. 18, 1909, at 4.

<sup>133</sup> *Should Not Be Permitted*, MADERA MERCURY, May 14, 1910, at 2.

<sup>134</sup> *Rutherford May Have Bitter Fight*, TRUCKEE REPUBLICAN (Cal.), Jan. 25, 1911, at 1.

in the mountain streams that are kept stocked at the expense of the state for the benefit of its populace.<sup>135</sup>

A 1913 *Sacramento Bee* editorial objected to the “private monopoly on the trout streams and lakes of California,” observing the “[m]any miles of river, streams and lake-shore . . . fenced in by private owners of land on such water frontage, who allow no fishing save by special permit from themselves.”<sup>136</sup> In 1916, the *Sacramento Union* reported on efforts to “compel . . . capitalists to allow fishing for trout in that stream. Capitalists who have built splendid mansions in the McCloud river section have prohibited anglers from fishing in the river, claiming it is not open for public use.”<sup>137</sup> Note the rhetoric here: evil capitalists pigs who create monopolies at the expense of the public. Progressive Era politics in a nutshell.

Public sentiment fell on the side of the trespassing public. For instance, in a criminal trial, a man stood charged with disturbing the peace by fishing on the Lagunitas Creek, which was controlled by a private estate.<sup>138</sup> In spite of the evidence, the jury returned a nullification verdict in only thirty minutes.<sup>139</sup> Tensions were high in the case; the estate’s keeper had “placed a pistol at the fisherman’s breast and said he would pull the trigger if he did not get off [the place].”<sup>140</sup>

The California Fish and Game Commission itself reported on the problem, noting that only a few Californians owned land, and the rest of the public wanted to be able to pursue fish and game throughout the state.<sup>141</sup>

But . . . the minority owns the farms and the streams and lake beds and borders, and quite naturally objects to trespassing and keeps or puts the invaders out . . . . [T]he game and fish belongs to the general public, and the general public knows it and curses a system of laws that keeps it away from them and in the practical possession of the landholder.<sup>142</sup>

In masterful understatement, the report noted this understandably “irritate[d] the local public.”<sup>143</sup>

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<sup>135</sup> *Does Truckee Lumber Co. Own Truckee River?*, TRUCKEE REPUBLICAN, May 11, 1910, at 4.

<sup>136</sup> Editorial, *Let the People Have Free Access to the Trout Streams*, SACRAMENTO BEE, Aug. 9, 1913, at 26.

<sup>137</sup> *To Open McCloud River to Anglers*, SACRAMENTO UNION, Jan. 6, 1916, at 7.

<sup>138</sup> *Fisherman Is Not Guilty*, MARIN J., Apr. 28, 1910, at 3.

<sup>139</sup> *Id.*

<sup>140</sup> *Fisherman Arrested*, MARIN J., Apr. 14, 1910, at 8

<sup>141</sup> STATE OF CAL. FISH & GAME COMM’N, TWENTY-THIRD BIENNIAL REPORT 1912-1914, at 47-48 (1914).

<sup>142</sup> *Id.* at 48

<sup>143</sup> *Id.*

### 3. State Ownership of Wildlife

The Fish and Game Report's emphasis that "the game and fish belongs to the general public" leads into the third factor supporting the amendment: the state ownership of wildlife doctrine.<sup>144</sup> Again, the 1890 *Sacramento Bee* article argued "[t]he spawn [eggs and young fish] belong to the people, and to the free streams must they go."<sup>145</sup> At the end of the 19th century, California state and federal fish hatcheries were hatching over 100 million trout and salmon eggs per year to replenish the state's rivers and streams.<sup>146</sup> Stocking these fish, produced at no small expense,<sup>147</sup> where the public could not fish for them seemed "a rank injustice."<sup>148</sup>

Legal luminaries like Sir William Blackstone and his editor Edward Christian fought long-running battles over the law of fish and game ownership,<sup>149</sup> and first-year law students still wrestle with the issues in *Pierson v. Post*,<sup>150</sup> the fox hunt case laying out the capture doctrine.<sup>151</sup> Early American wildlife law stressed the capture doctrine, with some limitations, but this began to shift as the need for state regulation of hunting and fishing became apparent. By 1855, the Supreme Court in *Smith v. Maryland*<sup>152</sup> found authority for regulation of wildlife based on the state's proprietary interests in its natural resources.<sup>153</sup> This approach spread to other state and federal courts,<sup>154</sup> culminating in the 1896 Supreme Court decision *Geer v. Connecticut*.<sup>155</sup>

In *Geer*, Justice White explained that the fish and game of a state were held in common by the people of the state, and the state itself represented the people in their ownership of the game.<sup>156</sup> The Court

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<sup>144</sup> *Id.*

<sup>145</sup> *Whither Are We Drifting*, *supra* note 86.

<sup>146</sup> *See generally* W.W. VAN ARSDALE ET AL., NINETEENTH BIENNIAL REPORT OF THE STATE BOARD OF FISH COMMISSIONERS OF THE STATE OF CALIFORNIA, FOR THE YEARS 1905-1906, at 27 (1907) (describing successful hatchery seasons in 1903, 1904, and 1905).

<sup>147</sup> *See id.* at 14-15 (describing disbursements totaling \$53,913.21 for the fiscal year ending on June 30, 1906).

<sup>148</sup> *Foresees New State Fish Law*, SACRAMENTO UNION, June 29, 1910, at 8; *see Next Legislature May Enact New Fish Law*, TRUCKEE REPUBLICAN (Cal.), July 9, 1910, at 1 (noting possible legislation that would make it "impossible for private interests [to fish] in waters running through private lands").

<sup>149</sup> *See* Lund, *supra* note 97, at 706-09 (analyzing the debate between Blackstone, who advocated for taking rights belonging to all citizens, and Christian, who advocated for taking rights belonging to landowners); *see also* Blumm & Ritchie, *supra* note 92, at 687-88 (evaluating the evolution of taking law during Western expansion).

<sup>150</sup> Daniel R. Ernst, *Pierson v. Post: The New Learning*, 13 GREEN BAG 31, 31 (2009).

<sup>151</sup> *Pierson v. Post*, 3 Cai. R. 175, 177-78 (N.Y. Sup. Ct. 1805).

<sup>152</sup> 59 U.S. 71 (1855).

<sup>153</sup> *Id.* at 75.

<sup>154</sup> *See* Blumm & Ritchie, *supra* note 92, at 693-701 (evaluating the spread of state control over taking laws, as well as the development of supreme court jurisprudence on the same topic).

<sup>155</sup> 161 U.S. 519 (1896).

<sup>156</sup> *Id.* at 529-30.

recognized “the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government as a trust for the benefit of the people.”<sup>157</sup> The Court approvingly cited *Ex parte Maier*,<sup>158</sup> a Supreme Court of California case holding, “[t]he wild game within a State belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so.”<sup>159</sup> The hunting and fishing interests in California wasted no time in integrating these decisions into their arguments for expanded access to fish and game. In 1902, Fish and Game Commissioner Vogelsang issued an opinion that all navigable California streams up to the high water mark were open to the public for fishing, relying in part on an unnamed U.S. Supreme Court case (probably *Geer*)<sup>160</sup> that held the game belongs to all the people of the state.<sup>161</sup> A 1906 *San Francisco Chronicle* editorial lamented the “gradual closure of the fishing waters of the State is going on despite the fact that the Federal and State governments have been for thirty or forty years stocking the streams and the bays with game fishes, at public expense, for the benefit of the public at large.”<sup>162</sup> In 1908, State Senator Curtin of Tuolumne County wrote an article, reprinted in at least four papers, arguing for opening all private lands to hunting and fishing,<sup>163</sup> based in part on *Geer* and on the 1897 Supreme Court of California case *People v. Truckee Lumber Co.*,<sup>164</sup> another case relying on the state ownership doctrine.<sup>165</sup> The state ownership doctrine offered a legal justification for Californians’ belief in a moral right to pursue the fish and game that belonged to them, wherever it might be found.<sup>166</sup>

#### 4. *Summing up the Setting*

For the right to fish amendment, “the evil which the Legislature in framing such amendment, and the people [in] ratifying it, endeavored to

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<sup>157</sup> *Id.* at 529.

<sup>158</sup> 37 P. 402 (Cal. 1894).

<sup>159</sup> *Id.* at 404.

<sup>160</sup> *Geer*, 161 U.S. at 529–30.

<sup>161</sup> *May Fish There*, TRUCKEE REPUBLICAN (Cal.), Aug. 16, 1902, at 7.

<sup>162</sup> *Closing Trout Streams: Angling Clubs Trying to Establish Exclusive Rights*, S.F. CHRON., Feb. 27, 1906, at 6 [hereinafter *Closing Trout Streams*].

<sup>163</sup> *Death Blow to Gun Clubs*, OCEANSIDE BLADE, Aug. 1, 1908, at 3; see *The Game Laws*, MADERA MERCURY, July 18, 1908, at 3 (quoting State Senator Curtin of Tuolumne County as supporting a law that “grant[s] to everyone the right to fish and hunt on any land”).

<sup>164</sup> 48 P. 374 (Cal. 1897).

<sup>165</sup> *Id.* at 375.

<sup>166</sup> Even after the amendment passed, in early 1912, F.M. Newbert, President of the California Fish and Game Commission, promised not to stock fish in private waters. *Fish Are for the People*; *Newbert*, SACRAMENTO BEE, Jan. 29, 1912, at 8; see *For People Only, New Rule*, SACRAMENTO UNION, Jan. 30, 1912, at 10 (announcing the state’s new rule that “no fish would be furnished . . . for any stream or lake where the public is barred or prohibited from catching fish”).

correct,”<sup>167</sup> “the mischief to be remedied or guarded against,”<sup>168</sup> is abundantly clear. Californians were losing public fishing access as private holdings blocked off rivers like the Truckee and the McCloud,<sup>169</sup> already renowned fishing destinations. Californians worried that if the trend continued, the waters of the state would “become closed fishing grounds for an exclusive set.”<sup>170</sup> These fears resonated with a deep-set belief in a natural right to fish as part of the American way of life, with progressive-era concerns about losing this natural right to rich capitalists and their fishing monopolies, and with righteous anger over losing access to fish that belonged to the people of the states. Something had to be done.

Relevant here, nothing in this history connects the public use right to fish to the public trust doctrine. The U.S. Supreme Court had already articulated a robust public trust doctrine by 1900 in three separate cases. In *Martin v. Waddell*,<sup>171</sup> in 1842, the Supreme Court declined to enforce a private claim to an oyster fishery and embraced a view of fisheries in navigable waters as a public trust resource, not amenable to easy divestiture by the legislature.<sup>172</sup> In *Shively v. Bowlby*,<sup>173</sup> in 1894, the Court again recognized a public right to fish.<sup>174</sup> And most famously, in *Illinois Central Railroad Co. v. Illinois*,<sup>175</sup> in 1892, the Court held that lands under Lake Michigan were “held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”<sup>176</sup> These cases provide all the pieces for a public trust right to fish, but California instead built the constitutional right to fish upon a conceptual foundation of natural rights, public use, and state ownership of wildlife.<sup>177</sup>

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<sup>167</sup> *Quinn*, 110 Cal. Rptr. 881, 888 (Ct. App. 1973).

<sup>168</sup> *Turlock Irrigation Dist.*, 186 Cal. 183, 188 (1921).

<sup>169</sup> See Eric Palmer, *A Stretch of River East of Town: The San Francisco Fly Casters Story* 4–5 (Oct. 2015), <https://perma.cc/AX4Z-QQQF> (detailing the history of The San Francisco Fly Casting Club which purchased lands along the Truckee River for exclusive use by the club members); see also Dick Galland, *Fly Fishing California's Magical McCloud River* (Sept. 27, 2021), <https://perma.cc/VD3L-XLBR> (describing that “[s]ince the early 1900s the McCloud [River] has been protected by miles of private ownership” including by “wealthy San Francisco sportsmen [who] created private fishing clubs on the middle and lower river”)

<sup>170</sup> *Closing Trout Streams*, *supra* note 162.

<sup>171</sup> 41 U.S. 367 (1842).

<sup>172</sup> *Id.* at 432–33.

<sup>173</sup> 152 U.S. 1 (1894).

<sup>174</sup> *Id.* at 11–12.

<sup>175</sup> 146 U.S. 387 (1892).

<sup>176</sup> *Id.* 452.

<sup>177</sup> See *People v. Truckee Lumber Co.*, 48 P. 374, 375 (Cal. 1897) (stating that California may protect fish in a private waterway if it is a “common passageway” to and from public fishing grounds). The court based its decision on public ownership of wildlife and never used the word “trust.” *Id.* at 374–75.

*B. Creating the Constitutional Right to Fish**1. Writing the Amendment*

California Assemblyman W. J. Costar, chairman of the Assembly Committee on Fish and Game,<sup>178</sup> introduced Assembly Constitutional Amendment 14 on January 15, 1909.<sup>179</sup> Once a proposed constitutional amendment passes the legislature, the people can vote it into the constitution in the next election. As introduced, the amendment was broad and aggressive, opening private lands throughout the state to public fishing. It proclaimed: “[t]he people shall have the right to fish along the shores of the ocean, bays, lakes, lagoons, estuaries and from the banks of all rivers, creeks, streams and other waters, stocked with fish by the State, or which contain fish that are indigenous to such waters.”<sup>180</sup> It also constrained the Legislature, requiring that “no law restricting such right shall ever be passed . . . *provided* that the Legislature may by statute provide for the season when the different species of fish may be taken.”<sup>181</sup>

The proposed amendment made the front page in the *Sacramento Bee* (below the fold) when it passed.<sup>182</sup> Nevertheless, this first version raised serious constitutional takings concerns and concerns about the loss of state authority to regulate most aspects of fishing. Assemblyman Costar amended the proposal on February 1, 1909, eliminating the provision for fishing in waters containing *indigenous* fish and instead focusing solely on those fish stocked by the state, likely a nod to *Geer and Truckee Lumber*.<sup>183</sup> The proposal also added a clearer authorization for state regulation of the manner of taking fish.<sup>184</sup> During the debate, in a widely reported speech, Assemblyman Stuckenbruck asked if the members of the Assembly opposing the bill “wished to deprive schoolboys of the inalienable right to go fishing; to climb over a barbed-wire fence, and to tear a two-dollar pair of pants for five cents worth of bullheads.”<sup>185</sup> Opposing legislators worried about impacts to private land—trampling of crops, scaring livestock, cutting levees, fires—but to no avail.<sup>186</sup> The Assembly adopted the bill on February 11, 1909, and sent it to the Senate.<sup>187</sup>

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<sup>178</sup> CAL. ASSEMBLY JOURNAL, 1909 Leg., 38th Sess., at 946 (1909).

<sup>179</sup> *Id.* at 155; Cal. Assembly Const. Amend. No. 14, 1909 Leg., 38th Sess., at 1343 (1909).

<sup>180</sup> CAL. S. JOURNAL, 1909 Leg., 38th Sess., at 1351 (1909).

<sup>181</sup> *Id.*

<sup>182</sup> *Free Fishing Bill Approved*, SACRAMENTO BEE, Jan. 26, 1909, at 1.

<sup>183</sup> CAL. S. JOURNAL, 1909 Leg., 38th Sess., at 1612.

<sup>184</sup> *Id.*

<sup>185</sup> *Can Fish in Ocean or Tubs*, *supra* note 128.

<sup>186</sup> *House Passes Law to Give Wider Limits to Fishing*, L.A. HERALD, Feb. 12, 1909, at 2; *Fishing Rights Granted*, S.F. CALL, Feb. 12, 1909, at 3.

<sup>187</sup> CAL. LEG., FINAL CALENDAR, 38th Sess., at 635 (1909); see *The Assembly Acts on the Fishing Bill: Fish Belong to the People*, RED BLUFF NEWS, Feb. 3, 1911, at 6 (stating that the bill sponsor “launched the bill declaring that the fish belong to the people”). The bill passed the assembly 63-6. CAL. ASSEMBLY JOURNAL, 1909 Leg., 38th Sess., at 529 (1909).



The California Senate took up the bill and proposed an amendment on March 3, 1909.<sup>188</sup> That amendment would have deleted much of the bill and substituted new language, with several notable elements. The amendment would have blocked public access to state “lands set aside for fish hatcheries, prisons, asylums or other public institutions.”<sup>189</sup> The amendment would have required that any land sold by the state “reserv[e] in the people the absolute right to fish thereupon”; barred the legislature from passing any law “making it a crime for the people to enter upon the private or public lands within this State for the purpose of fishing in any water containing fish that have been planted by the State” (leaving civil trespass remedy in place); empowered the legislature to regulate the taking of fish; and created a mechanism for the legislature to buy or condemn fishing easements where needed.<sup>190</sup> The amendment limited the right to fish to public lands of the state and so eliminated constitutional takings concerns surrounding opening private lands to the public. Nevertheless, the California Senate rejected the proposed amendment on March 12, 1909.<sup>191</sup>

In place of the rejected amendment, the Senate unanimously adopted an amended bill containing much of the language that would eventually be adopted as the right-to-fish amendment.<sup>192</sup> The new bill narrowed the public land fishing exception to just those lands set aside for fish hatcheries, omitting any exception for prisons, asylums, or other public institutions.<sup>193</sup> The record shows no reason for the change, but certainly the Senate considered the broader exceptions and rejected them. The California Senate kept the obligation to reserve fishing rights upon the sale or transfer of land owned by the state and dropped the provisions related to condemnation of easements for access to fishable waters.<sup>194</sup>

The Assembly approved the amended version of the bill on March 18, 1909, with only two votes against,<sup>195</sup> and Governor James Gillet signed the bill on March 27, 1909,<sup>196</sup> paving the way for the amendment’s consideration in the November 1910 general election.<sup>197</sup>

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<sup>188</sup> CAL. LEG., FINAL CALENDAR, 38th Sess., at 635 (1909).

<sup>189</sup> CAL. S. JOURNAL, 1909 Leg., 38th Sess., at 1208 (1909).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1612.

<sup>192</sup> *Id.*; *Quinn*, 110 Cal. Rptr. 881, 885–86 (Ct. App. 1973).

<sup>193</sup> CAL. S. JOURNAL, 1909 Leg., 38th Sess., at 1612 (1909).

<sup>194</sup> *Id.* This same provision became law in 1911. Act of May 1, 1911, 39th Sess., ch. 706, 1911 Cal. Stat. 1389 (codified as CAL. GOV'T CODE § 25660 (1947)).

<sup>195</sup> *Quinn*, 110 Cal. Rptr. at 888, n.4.

<sup>196</sup> 1909 Cal. Stat. 1343.

<sup>197</sup> STATEMENT OF THE VOTE, *supra* note 80; see *California Right to Fish, Amendment 14 (1910)*, *supra* note 80 (showing the amendment was approved with 85.89% of voters choosing yes, granting people the right to fish on state-owned lands).

## 2. Adoption by the Public

When presented to the people, the amendment was accompanied by a ballot argument prepared by its original sponsor, Assemblyman W. J. Costar.<sup>198</sup> This argument serves both to inform the history of the amendment and to guide its interpretation by courts.<sup>199</sup> A copy of the argument for a constitutional amendment was mailed to each voter in the state before the election.<sup>200</sup> Assemblyman Costar's argument was straightforward:

The inland streams and coast waters of the State of California abound in a great variety of fish, and aside from the sport of taking them, they furnish a very large portion of the state's free food supply. That the fish may not be exterminated and this great item of popular food depleted the people of the state are spending large sums annually for its protection and propagation.

For many years the people of California have enjoyed the right to take fish from the waters of the state pretty generally, but since the vigorous development of California's natural resources by individuals and large corporations, many of the streams have been closed to the public and trespass notices warning the public not to fish are displayed to an alarming extent.

The people are paying for the protection and propagation of the fish; for this reason if for no other they should have the right to take them. It is not fair that a few should enjoy the right to take the fish that all the people are paying to protect and propagate.

To reserve the right to fish in a portion of the waters of the state at least, for the people, Assembly Constitutional Amendment No. 14 was introduced and adopted at the last session of the legislature of the State of California, and as an evidence of its popularity it was unanimously adopted by the assembly and by the senate with but two dissenting votes.

If the people of the state vote favorably upon this proposed amendment to the constitution it will give them the right to fish upon and from the public lands of the state and in the waters thereof, and will prevent the state from disposing of any of the lands it now owns or what it may hereafter acquire without reserving in the people the right to fish.<sup>201</sup>

At its heart, this amendment is about property rights. The ballot argument speaks to "the streams . . . closed to the public and [to the]

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<sup>198</sup> *Quinn*, 110 Cal. Rptr. at 888, n.4.

<sup>199</sup> *Id.* at 887–89.

<sup>200</sup> See *Turlock Irrigation Dist.*, 186 Cal. 183, 184 (1921) (stating that a copy of a printed argument in favor of adopting an amendment must be "mailed to each voter in the state as required by law").

<sup>201</sup> *Quinn*, 110 Cal. Rptr. at 888, n.4.

trespass notices” keeping the public away from the stream.<sup>202</sup> The early iteration would have opened all private lands to fishing, and this compromise version opened only the public lands, but it required that they be kept open to fishing in perpetuity.

The public reaction to the proposed amendment was nearly universal acclaim. The few naysayers focused on the portion of the amendment prohibiting land sales without a fishing rights reservation. The *Los Angeles Herald* recommended a no vote, arguing the bill would create a perpetual easement on all land bordering fishable water, which “would be a burden upon the land if the state were to attempt to dispose of it, and would thereby impair its value.”<sup>203</sup> Likewise, the *Marin Journal* featured a review of ballot proposals written by the Associate (later Chief) Justice of the Supreme Court of California, Justice F. M. Angellotti, who doubted “[t]he wisdom of the policy of encumbering public lands of the State to the extent that they cannot be disposed of free of such a burden as is here sought to be imposed.”<sup>204</sup>

Supporters, of course, praised the amendment, although many argued for even broader fishing and hunting access. The *Sacramento Bee* opined:

Assembly Constitutional Amendment No. 14, reserving to The People the right to fish upon State lands, except State hatcheries, and upon lands hereafter sold by the State, is good in principle, and should be approved.

....

.... But something more radical is needed, with relation to both fish and game, and affecting all lands in the State, whether public or private.<sup>205</sup>

The *Santa Cruz Evening News* exhorted its readers, “[w]hatever you do[,] vote for that amendment. The News is only sorry it does not go farther and provide for the opening of all private game preserves to the people.”<sup>206</sup> The *Sacramento Union*,<sup>207</sup> *Santa Cruz Sentinel*,<sup>208</sup> and the *San*

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<sup>202</sup> *Id.*

<sup>203</sup> *The Constitutional Amendments and Bond Propositions*, L.A. HERALD, Nov. 6, 1910, at 6; see *The Great Issues at the Polls Today*, L.A. HERALD, Nov. 8, 1910, at 10 (“Assembly amendment No. 14, relating to the right of people to fish in public water of the state. VOTE NO.”).

<sup>204</sup> *Proposed Constitutional Amendments: Brief Explanation of Them by Supreme Justice F. M. Angellotti*, MARIN J. (Cal.), Oct. 27, 1910, at 1.

<sup>205</sup> Editorial, *An Amendment that is Better Late than Never*, SACRAMENTO BEE, Nov. 2, 1910, at 4.

<sup>206</sup> Editorial, *Be Sure and Vote for This Amendment*, SANTA CRUZ EVENING NEWS, Oct. 26, 1910, at 3.

<sup>207</sup> See Editorial, *Constitutional Amendment*, SACRAMENTO UNION, Oct. 7, 1910, at 4 (“[O]nly thing to be regretted is that it was not adopted years ago. It should go through unanimously.”).

<sup>208</sup> See *The Eight Amendments*, SANTA CRUZ SENTINEL, Nov. 4, 1910, at 2 (“Here the voters should stand together.”).

*Francisco Chronicle*<sup>209</sup> also all supported adoption of the amendment. Interestingly, the public trust doctrine was notably absent from the debates about the amendment and from the newspaper reporting and advocacy. This is surprising given the focus on state ownership from *Greer*, but it is apparent that the origins of the amendment were not in the public trust.

Assembly Constitutional Amendment 14 appeared on the ballot on November 8, 1910,<sup>210</sup> and it won in a landslide, 85.89% to 14.11%.<sup>211</sup> The new constitutional amendment took effect on November 9, 1910.<sup>212</sup>

#### IV. IMPLEMENTATION

In spite of these illustrious beginnings, the official record on the right to fish is fairly quiet after the constitutional amendment took effect. The amendment shows up in some federal and state case law, state attorney general opinions, and state property records, but the thread is tenuous. Here, we first provide a brief overview of the right and then a history of the amendment's implementation through a variety of primary sources. This provides the necessary context for the interactions between the public trust and public use rights, addressed in Part V.

##### *A. Contours of the Right*

The fishing rights amendment has four distinct parts. First, it declares “[t]he people shall have the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries.”<sup>213</sup> When the amendment took effect on November 9, 1910,<sup>214</sup> this language created an immediate right of access for fishing on state public lands, which we call the “fishing access right.” Some of the early cases characterized the right to fish not as a right but rather as a mere privilege, without addressing how a constitutional right could be reduced to a privilege.<sup>215</sup> Eventually, the Supreme Court of

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<sup>209</sup> See *Constitutional Amendments: How to Vote on Them*, S.F. CHRON., Nov. 8, 1910, at 2 (“VOTE YES.”).

<sup>210</sup> STATEMENT OF THE VOTE, *supra* note 80.

<sup>211</sup> *Id.*; *California Right to Fish, Amendment 14 (1910)*, *supra* note 80.

<sup>212</sup> See *California Proposition 71, Effective Date of Ballot Measures Amendment (June 2018)*, BALLOTPEdia,

<https://perma.cc/SXU3-C8F2> [hereinafter *CA Prop 71*] (last visited Oct. 10, 2021) (stating that, prior to 2018, the effective date of voter-approved ballot propositions was the day after the election date). See also CAL. CONST. art. XVIII, § 4 (2018) (demonstrating that the provision was adopted on November 8, 1910).

<sup>213</sup> CAL. CONST. art. I, § 25 (1910).

<sup>214</sup> See sources cited *supra* note 212 (showing that the effective date of the amendment would have been the day after the election date).

<sup>215</sup> *Ex parte Parra*, 141 P. 393, 395 (Cal. Ct. App. 1914) (“That the imposition of a license tax of \$10 per annum for the privilege of fishing in the waters of the state for profit is a reasonable tax we are satisfied.”); *Paladini v. Super. Ct.*, 173 P. 588, 590 (Cal. 1918) (“It is

California clarified that because the fishing rights amendment “expressly authorizes legislative regulation of fishing, the constitutional language creates . . . a qualified right to fish.”<sup>216</sup> Because it is a qualified right, not a fundamental right, restrictions on the right do not face strict scrutiny but instead fall under the rational basis test.<sup>217</sup>

Second, the amendment provides that “no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon,”<sup>218</sup> which we term the “reservation requirement.” Note that this right is absolute, generally meaning it is superior to other private and public rights.<sup>219</sup> There is some question as to whether the reservation applies to land sales pending on the amendment’s effective date, but the weight of California precedent for state land claims favors relating back to the date of issuance of a certificate of purchase by the state surveyor general, only issued after receipt of full or partial payment by the county treasurer.<sup>220</sup> This view limits the reservation to patents where the certificate was issued after November 9, 1910.<sup>221</sup>

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sufficient to say that the license to fish is a privilege granted by the state, and may be taken away in the exercise of its police power.”).

<sup>216</sup> Cal. Gillnetters Ass’n v. Dep’t of Fish & Game, 46 Cal. Rptr. 2d 338, 343 (Cal. Ct. App. 1995) (“[T]he constitutional language creates only a qualified right to fish . . . and was not intended to curtail the traditional Legislative prerogative to regulate fishing.”).

<sup>217</sup> *Id.*

<sup>218</sup> CAL. CONST. art I, § 25 (1910).

<sup>219</sup> Judicial characterization of the power of a tideland’s trustee as “absolute” has caused confusion because that word “can have, and persistently has had, several different meanings in the public trust context.” *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 779 (1970). The adjective “absolute” is most commonly used in tideland cases to single out a particular type of public easement as superior to all others. “Absolute” can also be used to mean that a public trust easement is inextinguishable, or that “[t]he package of all public interests is absolute *vis-à-vis* any and all conflicting private interests.” *Id.* at 780. See *Zack’s, Inc. v. City of Sausalito*, 165 Cal. App. 4th 1163, 1191–94 (Cal. Ct. App. 2008) (explaining that the public trust doctrine creates an absolute right for tideland trustees and while private rights are subject to the burden of public interest, they can exist simultaneously if the private rights do not conflict with the public interests).

<sup>220</sup> See *Stanway v. Rubio*, 51 Cal. 41, 44 (1875) (explaining how the state patent relates back to date of the certificate); *Lux v. Haggin*, 10 P. 674, 776–77 (Cal. 1886) (explaining how the state patent relates back to date of the certificate); *S. Pac. R. Co. v. Jackson Oil Co.*, 129 P. 276, 277 (Cal. 1912) (explaining how the state patent relates back to date of the certificate); *Newcomb v. City of Newport Beach*, 60 P.2d 825, 827–28 (Cal. 1936) (explaining how the state patent relates back to date of the certificate). *But see* *Shenandoah Mining & Milling Co. v. Morgan*, 39 P. 802, 803–04 (Cal. 1895) (holding that the state patent relates to the date of the certificate, issued after payment, but also “title . . . relates back to the date of . . . application to purchase”); *Bernhard v. Wall*, 194 P. 1040, 1043–44 (Cal. 1921) (holding that the state land patent relates back to the date payment offered); *People v. Banning Co.*, 138 P. 101, 102–03 (Cal. 1913) (holding that the state land patent relates back to the date payment offered); *Smith v. Athern*, 34 Cal. 506, 511 (1868) (holding that the state land patent relates back to the date payment offered). For transaction details, see CAL. SURVEYOR GENERAL’S OFFICE, LAWS GOVERNING THE SALE OF SCHOOL LANDS IN THE STATE OF CALIFORNIA: TOGETHER WITH RULES, REGULATIONS AND INFORMATION CONCERNING SAME AND LIST OF THE VACANT SCHOOL LANDS ON SEPTEMBER 1, 1916, at 7, 13 (1916).

<sup>221</sup> See text accompanying *supra* notes 113, 220.

Third, the amendment mandates that “no law shall ever be passed making it a crime for the people to enter upon the public lands within this State for the purpose of fishing in any water containing fish that have been planted therein by the State.”<sup>222</sup> This mandate seems to be a more specialized application of the fishing access right, limited to stocked fish, not wild fish, and everyone, courts and commentators alike, largely ignores this language.

Fourth and finally, the amendment offers a sort of savings clause, “provid[ing] that the legislature may by statute, provide for the season when and the conditions under which the different species of fish may be taken.”<sup>223</sup> Many early decisions addressed whether the amendment prevented the state from regulating fishing or requiring fishing licenses. The Supreme Court of California held that the amendment did not affect the state’s ability to regulate fishing<sup>224</sup> and other California courts have followed this approach.<sup>225</sup>

More broadly, courts have had few occasions to examine article I, section 25.<sup>226</sup> A few cases interpret the amendment itself and these decisions are incorporated in the chronological history of the two major requirements of the amendment.<sup>227</sup> Creative plaintiffs have also tried to

<sup>222</sup> CAL. CONST. art I, § 25 (1910).

<sup>223</sup> *Id.*

<sup>224</sup> *Paladini*, 173 P. 588, 589–90 (Cal. 1918).

<sup>225</sup> See *California Gillnetters Ass’n*, 46 Cal. Rptr. 2d 338, 343 (Ct. App. 1995) (holding that legislative regulation of fishing is expressly authorized by the constitutional language); *Ex parte Marinovich*, 192 P. 156, 159–60 (Cal. Ct. App. 1920) (explaining that the legislature is able to regulate deep-sea fishing and is able to regulate when certain species of fish may be caught); *Cent. Coast Fisheries Conservation Coal., v. Cal. Fish & Game Comm’n*, No. CV030165, 2004 WL 424196, at \*2 (Cal. Ct. App. Mar. 9, 2004) (holding that legislative limits on length of a fishing season were constitutional); *People v. Stafford Packing Co.*, 227 P. 485, 488, 490 (Cal. 1924) (holding that legislatures can enact regulations to prevent excess fish reductions); *Ex parte Parra*, 141 P. 393, 393, 395 (Cal. Ct. App. 1914) (concluding that legislatures can impose a license tax “for the privilege of fishing”); *Ventura Cnty. Com. Fishermen’s Ass’n v. Cal. Fish & Game Comm’n*, No. 215942, 2004 WL 293565, at \*5 (Cal. Ct. App. Feb. 17, 2004) (holding that legislatures can impose “no-take zones” to protect fish and other aquatic resources). See generally Doug Obegi, *Is There a Constitutional Right to Fish in a Marine Protected Area?*, 12 HASTINGS W.-NW. J. ENV’T L. & POL’Y 103, 112–14 (2005) (describing various cases where the Supreme Court of California upheld the power of the state to regulate hunting and fishing).

<sup>226</sup> In addition to the cases cited here, there are undoubtedly some unreported superior court cases. Newspaper accounts from the decade after the amendment’s passage suggest such litigation was not uncommon. See, e.g., *Illegal Fishing Case Dismissed by Judge*, S.F. CALL, May 25, 1912, at 11 (reporting judge dismisses charges against an angler fishing in Lake Tahoe during its closed season based on article I, section 25); *Fishing Licenses*, SAN LUIS OBISPO TRIB., Jan. 16, 1914, at 2 (reporting a test case arguing a fishing license requirement violated the amendment); *River Fisherman Loses in Test Case*, STOCKTON DAILY INDEP., Sept. 14, 1915, at 1 (reporting decision that public did not have right to fish the McCloud River within the boundaries of private property). This case was also reported in the *San Francisco Chronicle*. *The Right to Fish: A Curious Injunction Suit Brought in the United States Court*, S.F. CHRON., Sept. 7, 1915, at 18.

<sup>227</sup> See *Quinn*, 110 Cal. Rptr. 881, 889–90 (Ct. App. 1973) (holding that the amendment does not give people an unrestricted right to fish and does not restrict the state from using

use the amendment to show that a U.S. Forest Service fee demonstration program requiring forest visitors to purchase a pass violated the California constitutional amendment by interfering with access to public lands for fishing<sup>228</sup> or attempts to protect instream flows for fish,<sup>229</sup> but these attempts have come to naught.<sup>230</sup>

For our purposes, then, the fishing right boils down to two parts: the fishing access right and the reservation requirement. We provide some necessary background on California land laws and then address each of these requirements in turn.

### *B. California Land Law*

Some background on California land law is helpful to understand the amendment's requirements. Historically, Spain and eventually Mexico claimed all land in California, and many private holdings trace their titles to grants from either of these two sovereign nations.<sup>231</sup> California joined the U.S. on September 9, 1850, and, as sovereign, immediately took title to lands that qualified under the federal test for state title.<sup>232</sup> California

police power for public safety and welfare concerns); *State of Cal. v. San Luis Obispo Sportsman's Ass'n*, 584 P.2d 1088, 1092 (Cal. 1978) (holding that "public lands" does not include state-owned land being used by the government for purposes incompatible with public fishing); *Adams v. Kraft*, No. 5:10-CV-00602-LHK, 2011 WL 3240598, at \*18 (N.D. Cal. July 29, 2011) (noting that the "right to fish" amendment does not clearly grant an individual "a private right of action for damages").

<sup>228</sup> *See, e.g.*, *Lauran v. U.S. Forest Serv.*, 141 F. App'x 515, 520 (9th Cir. 2005) (rejecting the argument because "public lands" in the constitutional amendment referred to state lands, not the federal lands at issue).

<sup>229</sup> *See, e.g.*, *Fullerton v. Cal. State Water Res. Control Bd.*, 153 Cal. Rptr. 518, 520, 526 (Ct. App. 1979) (rejecting CDFW's effort to secure an instream flow right, in spite of its reliance on the constitutional amendment); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 150 P.3d 709, 732 (Cal. Ct. App. 2007) (noting the petitioners argument that dewatering a river interferes with salmon migration); *see* 51 Cal. Att'y Gen. Op. 92, 94 (1968) (opining that that the amendment does not require maintenance of water quality sufficient for fish because the amendment "was intended solely to provide to the public the right of access to waters and the right to fish in those waters and was not intended to provide standards at which the quality of the waters were or are to be maintained").

<sup>230</sup> Beyond these cases, there are several brewing controversies concerning the right to fish. *S.F. Herring Ass'n v. United States*, No. 13-cv-01750-JST, 2014 WL 12489595, at \*3 (N.D. Cal. Apr. 29, 2014); *Dummer v. S.F. Pub. Util. Comm'n*, No. A160789, 2021 WL 2431248, at \*3 (Cal. Ct. App. June 15, 2021). Courts also often cite the constitutional amendment as evidence for the "legitimacy and importance" of the state's interest in fish and game resources of the state to "the strong public policy in favor of according public access to the coast." *People v. Maikhio*, 253 P.3d 247, 260 (Cal. 2011); *Gion v. City of Santa Cruz*, 465 P.2d 50, 59 (Cal. 1970); *see* *Dietz v. King*, 80 Cal. Rptr. 234, 238 (Ct. App. 1969) (citing the California Constitution in stating "[i]t is the clear public policy of [California] that beach areas owned by the state . . . shall be open to the use of all persons"); *Richmond Ramblers Motorcycle Club v. W. Title Guaranty Co.*, 121 Cal. Rptr. 308, 313-14 (Ct. App. 1975) (determining that the use of land by the motorcycle club and public was permissible).

<sup>231</sup> JOYCE D. PALOMAR, 2 PATTON AND PALOMAR ON LAND TITLES § 307 (3d ed. 2003). A federal land commission eventually confirmed these grants. MELVILLE P. FRASIER, REALTY LAWS OF CALIFORNIA 8 (1916).

<sup>232</sup> FRASIER, *supra* note 231.

estimates it holds roughly 4 million acres of these “sovereign lands.”<sup>233</sup> The public trust doctrine generally bars the sale of these lands free of the public trust, per California statutory, constitutional, and common law, with narrow exceptions.<sup>234</sup> Conversely, the state often grants sovereign land to local municipalities, termed grantees or trustees, for management for the benefit of the people of California.<sup>235</sup> Currently, then, sovereign land is held by the state, a mix of municipalities, and some private entities which took their land subject to the public trust.<sup>236</sup>

The U.S. government maintained ownership of other lands in California.<sup>237</sup> Most federal lands became public domain lands, to be “surveyed and disposed of under laws of the United States.”<sup>238</sup> The U.S. Congress granted the 16th and 36th sections in every township to California for school support; these sections are known as the school lands or school sections.<sup>239</sup> In townships where these sections were already taken by other owners, were thought to have important resources, or were otherwise unavailable, the state received other lands in lieu of the normal school sections, now known as in lieu lands.<sup>240</sup> The federal government also conveyed all swamp lands and overflow lands to the state through the Arkansas Swamp Lands Act, as determined by the government surveyors and the General Land Office;<sup>241</sup> these lands totaled over two million acres in California.<sup>242</sup> All swamp lands and overflow lands have been conveyed to private parties.<sup>243</sup> Finally, the U.S. conveyed other small parcels of land to the state for universities and other purposes,<sup>244</sup> seemingly limited to four grants between 1841 and 1862.<sup>245</sup> These grants totaled just over 700,000 acres.<sup>246</sup> The state refers to the lands it holds

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<sup>233</sup> *Land Types*, CAL. STATE LANDS COMM’N, <https://perma.cc/5ABH-HY9L> (last visited Oct. 10, 2021).

<sup>234</sup> PUBLICLY OWNED LANDS § 3 (52A CAL. JUR. 3D 2021); CAL CONST. art. X, § 3 (1976) (prohibiting most sales of tidelands near “any incorporated city, city and county, or town”).

<sup>235</sup> See *Granted Public Trust Lands*, CAL. STATE LANDS COMM’N, <https://perma.cc/5899-7XXD> (last visited Oct. 10, 2021) (“The Legislature has enacted more than 300 statutes granting sovereign public trust lands to over 80 local municipalities.”).

<sup>236</sup> *Id.*

<sup>237</sup> FRASIER, *supra* note 231.

<sup>238</sup> PUBLIC LAND COMM’N, THE PUBLIC DOMAIN: ITS HISTORY, WITH STATISTICS, 46th Cong., 3rd Sess., at 443 (1881).

<sup>239</sup> FRASIER, *supra* note 231, at 9.

<sup>240</sup> *School Lands*, CAL. STATE LANDS COMM’N (Oct. 19, 2018), <https://perma.cc/NW6N-7KKH> (“School Lands were granted to the State of California on March 3, 1853 by an Act of Congress (Ch. 145, 10 Stat. 244) for the purpose of supporting public schools. . . . A supplementary act in 1927 expanded the grant to include minerals (Ch. 57, 44 Stat. 1026).”).

<sup>241</sup> FRASIER, *supra* note 231, at 9.

<sup>242</sup> *Swamp & Overflow Lands*, CAL. STATE LANDS COMM’N (Oct. 19, 2018), <https://perma.cc/ZN67-EEDV>.

<sup>243</sup> FRASIER, *supra* note 231, at 9.

<sup>244</sup> *Id.*

<sup>245</sup> *Land Types*, *supra* note 233.

<sup>246</sup> *Id.*



that are not sovereign lands collectively as its proprietary lands because it took them as proprietor, not as a sovereign.<sup>247</sup>

Other portions of the federal lands remained open to claims from the public, although some became national forests, national parks, monuments, tribal lands, and other federal reservations.<sup>248</sup> Lands claimed by the public under the various land acts were conveyed directly from the federal government and did not pass through state ownership.<sup>249</sup>

When the amendment became law, California's lands included its sovereign lands (tidelands, land under navigable water bodies) and its proprietary lands (school lands and in lieu lands, swamp and overflow lands, and other small parcels conveyed to the state by the federal government).<sup>250</sup> The state also owned as proprietor lands it acquired through purchase, through condemnation, through tax sales or foreclosures, and through escheat of estates or forfeiture of land owned by aliens.<sup>251</sup> The state acquired and disposed of land regularly, and there is no accurate and complete accounting of the state-owned lands.

With this background, we turn to the implementation of the amendment itself, addressing first the fishing access right and then the reservation requirement.<sup>252</sup>

### 1. *The Fishing Access Right*

California does not appear to have made any cohesive effort to open state lands to fishing access based on the constitutional right to fish. Our research found no information about changes to state lands after the passage of the amendment, and neither the annual reports of the surveyor general nor biennial reports of the California Fish and Game Commission provide any information on fishing access to the state lands. However, disputes over access to state lands do crop up in many California Attorney General opinions and three court cases, which provide some insight.

In California, attorney general opinions provide answers to legal questions from state agencies or officials. The opinions do not bind the courts, but they are entitled to serious consideration where no clear case authority exists.<sup>253</sup> The first relevant opinion for the fishing access right, in 1911, found no right to fish on land used for a state psychiatric hospital, but the opinion addressed only fish and game laws and inexplicably fails

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<sup>247</sup> PUBLICLY OWNED LANDS § 3 (52A CAL. JUR. 3D 2021).

<sup>248</sup> See, e.g., Desert Land Act, ch. 107, 19 Stat. 377 (1877) (opening up arid desert lands in California and other states to settlement); Act of Oct. 1, 1890, ch. 1263, 26 Stat. 650–51 (1890) (declaring certain federal lands in California reserved forest lands).

<sup>249</sup> RICHARD F. SELCER, CIVIL WAR AMERICA 1850 TO 1875, at 467 (2006).

<sup>250</sup> *Land Types*, *supra* note 233.

<sup>251</sup> FRASIER, *supra* note 231, at 9, 22.

<sup>252</sup> CAL. CONST. art. I, § 25 (1910).

<sup>253</sup> *Quinn*, 110 Cal. Rptr. 881, 886–87 (Ct. App. 1973).

to mention the constitutional amendment.<sup>254</sup> The opinion, delivered to the hospital director, concludes, "I am unable to make any direct reservation on the part of the legislature to the people of the state to take fish or game in the grounds of the state hospitals."<sup>255</sup>

The next opinion focused on the fishing access right, from 1941, considers whether the words "public lands of the state" include "those lands held by the State in proprietary ownership as well as those held by the State by virtue of its sovereignty."<sup>256</sup> The opinion noted "[t]he term 'public lands' is used generally to designate such lands as are subject to sale or other disposal under the general laws of the state, and are not held back or reserved for any special or governmental purpose" and ultimately concluded that the amendment refers to all California public lands, whether held in a sovereign or proprietary capacity.<sup>257</sup> The opinion at least seems to suggest that lands held back for any special or governmental purpose might not be subject to the right to fish, but the opinion is unclear in this regard.<sup>258</sup>

In a 1946 opinion, Deputy Attorney General Ralph W. Scott opined that prison directors may lawfully prohibit fishing in the American River where it ran through Folsom Prison grounds,<sup>259</sup> although again, as in the 1911 opinion, this opinion does not discuss or even cite the constitutional right to fish.

In 1953, in an opinion addressing the state's obligation to reserve fishing rights, the attorney general incidentally interpreted "public lands of the state" as used in the fishing access right context to exclude both lands purchased by the state from private parties for the state's use and lands received from the federal government and set aside by the state for the state's use.<sup>260</sup> In effect, the opinion advised that the right to fish applied only to lands received by the state from the federal government generally for sale and not to land set aside by the state for governmental

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<sup>254</sup> Cal. Att'y Gen. Op. No. 2076, at 2-3 (Apr. 8, 1911). This is particularly odd given that a contemporaneous news account points to the constitutional amendment as the impetus for the dispute. *See Anglers May Fish in Hospital Reservoir*, S.F. CALL, Apr. 24, 1911, at 7 ("[The Attorney General] has been asked to decide a conflict between the anglers and directors of the Napa state hospital involving the right to fish in the reservoir at the rear of state institutions.").

<sup>255</sup> Cal. Att'y Gen. Op. No. 2076, at 3 (Apr. 8, 1911).

<sup>256</sup> Cal. Att'y Gen. Op. No. NS-3679, at 1 (Aug. 5, 1941). Other portions of the opinion deal with the potential for trespass on former state-owned lands and are addressed below. *See infra* text accompanying note 328 (explaining that people may fish without becoming liable for trespass on private lands sold by CSLC).

<sup>257</sup> Cal. Att'y Gen. Op. No. NS-3679, at 3 (Aug. 5, 1941).

<sup>258</sup> *Id.* at 2.

<sup>259</sup> 8 Cal. Att'y Gen. Op. No. 46-275, at 332 (Dec. 23, 1946).

<sup>260</sup> 22 Cal. Att'y Gen. Op. No. 53-193, at 135 (Oct. 14, 1953).

use, a drastic reduction in coverage.<sup>261</sup> This opinion is addressed more fully in the fishing rights reservation discussion below.<sup>262</sup>

Two minor opinions followed. A 1955 attorney general opinion noted that the amendment did not apply to federal public lands, only state lands.<sup>263</sup> A 1959 attorney general opinion highlighted a 1949 state water code amendment that denoted coastal waters as part of the waters of the state within the meaning of the amendment.<sup>264</sup> Two more significant disputes over the fishing access right developed in the 1970s, both of which spawned litigation.

*a. In re Quinn*

The California Court of Appeals decided *In re Quinn*<sup>265</sup> in 1973.<sup>266</sup> Anglers convicted of fishing from a bridge over the California aqueduct, in violation of a county ordinance, sought to use the constitutional fishing right to overturn their convictions in a habeas proceeding.<sup>267</sup> A second group jumped a fence along the aqueduct and were cited for trespass while fishing the canal from its banks and sought the same habeas relief.<sup>268</sup> The canal offered the best (and only) local fishing; “the California Aqueduct . . . abounds with fish, including crappie, perch, catfish, striped bass, carp, and large and small-mouthed bass. . . . [T]he nearest fishing streams are 40 miles from the area where petitioners were arrested.”<sup>269</sup> Unfortunately, the canal is also a dangerous place, where users sometimes drown.<sup>270</sup> The state of California has title to the California Aqueduct and the adjacent fenced spaces in that area.<sup>271</sup>

The court first upheld the convictions of the bridge anglers.<sup>272</sup> The court assumed, without analysis, that the county-owned bridge was not part of the “public lands of the state” as used in the constitutional amendment, so it did not apply.<sup>273</sup> Likewise, the court did not consider whether a fishing rights reservation applied to the property, nor did it

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<sup>261</sup> See *id.* (explaining that public lands do not encompass lands that are “held back or reserved for any specific governmental or public purpose”).

<sup>262</sup> See *infra* text accompanying notes 329–344 (discussing the A.G. opinion at length and its effect on fishing rights).

<sup>263</sup> 25 Cal. Att’y Gen. Op. No. 54-202, at 51 (Jan. 10, 1955).

<sup>264</sup> 34 Cal. Op. Att’y Gen. No. 59-129, at 261–62, 264 (1959) (declaring that the Dickey Water Pollution Act, enacted in 1949, regulating waters of the state of California, applied to the coastal waters delineated by sections 171–173 of the then-current California Government Code).

<sup>265</sup> 110 Cal. Rptr. 881 (Ct. App. 1973).

<sup>266</sup> *Id.* at 881.

<sup>267</sup> *Id.* at 883.

<sup>268</sup> *Id.* at 884.

<sup>269</sup> *Id.* at 885.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 884.

<sup>272</sup> *Id.* at 891.

<sup>273</sup> *Id.*

address the question of whether state-owned lands do include county owned lands, so the decision did not address the bulk of the protections that should have been available to the bridge anglers under the amendment.<sup>274</sup>

The trespass convictions for the four anglers on state lands abutting the canal were a much closer question. Prosecutors relied in part on the 1953 attorney general opinion which opined that “public lands” in the constitutional amendment “exclude[d] land acquired for special governmental purposes, such as the aqueduct,”<sup>275</sup> but the court found that opinion unpersuasive because it “fail[ed] to take into consideration certain well settled rules of interpretation of constitutional provisions.”<sup>276</sup>

The court focused on the term “public lands” as used in the amendment, to determine if the state could close off the canal lands.<sup>277</sup> The court sought to determine what the words “were intended to mean by the framers of the amendment and the electors who adopted it in 1910,”<sup>278</sup> concluding that “the words ‘public lands’ as used in article I, section 25, were intended by the framers and voters in 1910 to mean public lands which provided access to fish in the inland streams and coastal waters of the state.”<sup>279</sup> The court went on to exclude from public lands those “state-owned lands used or acquired for special state purposes . . . . Examples of such state-owned lands are lands such as those used for prisons, mental institutions, military and police installations and other special state uses.”<sup>280</sup> Because “[t]he framers and electors did not contemplate in 1910, nor did they intend, that ‘public lands’ as used in article I, section 25, include property acquired or used by the state for special governmental purposes, such as the California Aqueduct,” and because the fishing access right “does not purport to restrict the state from the reasonable exercise of its police power in the interest of the public safety and welfare,” the court declined to overturn the convictions.<sup>281</sup>

*b. California v. San Luis Obispo Sportsman’s Association (SLOSA)*

The next access-requirement lawsuit reached the Supreme Court of California, which overturned significant portions of *In re Quinn*.<sup>282</sup> The state, in cooperation with the City of San Luis Obispo, began construction

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<sup>274</sup> *Id.* at 886. County lands are likely state lands for purposes of the fishing right analysis. See *infra* text accompanying notes 410–412.

<sup>275</sup> *Id.* (citing 22 Cal. Att’y Gen. Op. No. 53-193, at 136 (Oct. 14, 1953)).

<sup>276</sup> *Id.* at 887.

<sup>277</sup> *Id.* at 888.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 889.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 889–90.

<sup>282</sup> *State of California v. San Luis Obispo Sportsman’s Ass’n (SLOSA)*, 584 P.2d 1088, 1092 (Cal. 1978).

of Whale Rock Reservoir in 1957 for domestic water supply purposes.<sup>283</sup> Trophy trout swimming in the reservoir caught the attention of the SLOSA, which sought fishing access at the reservoir.<sup>284</sup>

In 1969, the state and city sought to enjoin any trespassing or fishing at Whale Rock Reservoir to prevent contamination of the domestic water supply, and SLOSA countersued, claiming a constitutional right to fish in the reservoir.<sup>285</sup>

In a March 1970 opinion, the California Attorney General concluded that reasonable regulations designed to protect public health and safety could restrict fishing in the reservoir.<sup>286</sup> The attorney general opined that the government properly exercised its powers when limiting the fishing right as to avoid “a substantial hazard to the health, safety and welfare of other persons.”<sup>287</sup> The opinion emphasized that any regulations must be “grounded upon the necessity of protecting either the ability of others to exercise the same right or to preserve some other conflicting public right.”<sup>288</sup> Most importantly, the opinion does not appear to allow restrictions that would regulate the right out of existence.<sup>289</sup> In spite of this guidance, the lawsuit continued, with the state and city seeking to cut off any fishing access at the reservoir.<sup>290</sup>

The district court found a public right to fish the reservoir, based in part on the constitutional right to fish, and further held “the public right to fish at the reservoir requires the city and the state . . . to fund such a program.”<sup>291</sup> Plaintiff-appellants sought review by the Supreme Court of California.<sup>292</sup>

Appellants argued the reservoir was not “public lands” within the meaning of the constitutional amendment because it was being used for the special governmental purpose of domestic water supply.<sup>293</sup> The court rejected this argument, holding that land acquired for a particular government purpose was not automatically excused from the constitutional requirement.<sup>294</sup> Looking to the intent of the voters in adopting the amendment, the court concluded “public lands” means “state-owned land the use of which by the state is also compatible with use by the public for purposes of fishing.”<sup>295</sup> The Supreme Court of California read “compatible” very broadly, holding that use of the

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<sup>283</sup> *Id.* at 1089–90.

<sup>284</sup> *About Us*, SAN LUIS OBISPO SPORTSMEN'S ASS'N, <https://perma.cc/9ZSR-PNA8> (last visited Oct. 10, 2021); *SLOSA*, 584 P.2d at 1090.

<sup>285</sup> *SLOSA*, 584 P.2d at 1090.

<sup>286</sup> 53 Cal. Att'y Gen. Op. No. 70-22, at 89 (Mar. 6, 1970).

<sup>287</sup> *Id.* at 92.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 93.

<sup>290</sup> *SLOSA*, 584 P.2d at 1090.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 1088.

<sup>293</sup> *Id.* at 1090–91.

<sup>294</sup> *Id.* at 1091–92.

<sup>295</sup> *Id.* at 1092. The court suggests fishing may be incompatible with use of land for prisons or mental institutions. *Id.*

reservoir for domestic water supply was not incompatible with public fishing.<sup>296</sup> To harmonize the uses, the Supreme Court of California required the appellants to fund a fishing program for the reservoir, including both sanitary facilities and surveillance as necessary to meet health and safety standards.<sup>297</sup>

Finally, the decision explicitly overturned the narrower interpretation from *In re Quinn*,<sup>298</sup> which had held that “public lands” in the constitutional amendment “exclude[d] land acquired for special governmental purposes, such as the aqueduct.”<sup>299</sup> It also rejected the similar 1953 attorney general opinion, which had tried to limit the term “public lands” by excluding lands “held back or reserved for any specific governmental or public purpose.”<sup>300</sup> After *California v. SLOSA*,<sup>301</sup> public lands in the right to fish context means any state-owned lands whose use is compatible with public fishing.<sup>302</sup>

### *c. Post-California v. SLOSA Conflicts*

The most recent opinion addressing the fishing rights amendment, from 1981, allowed the California National Guard to prohibit recreational use of the Salinas River in Camp Roberts, an area under the concurrent legislative jurisdiction of the state and federal governments.<sup>303</sup> Various military units used the camp for live fire exercises, generally over portions of a river in the camp.<sup>304</sup> Relying on *California v. SLOSA*, the attorney general concluded “the California National Guard [had] the authority to prohibit recreational uses of that portion of the Salinas River which flows through Camp Roberts whenever such use would be incompatible with its use of Camp Roberts for military purposes.”<sup>305</sup>

In 2011, an angler with a history of mutually aggravating interactions with the police brought a 42 U.S.C. Section 1983 claim alleging deprivation of his California Constitution Article I, Section 25 right to fish in retaliation for an earlier exercise of his U.S. First

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<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 1095.

<sup>298</sup> *Id.* at 1092 n.6 (“To the extent that language in *Quinn* suggests a more restrictive interpretation of the words ‘public lands’ than that given here, we disapprove it.”).

<sup>299</sup> *Quinn*, 110 Cal. Rptr. 881, 886 (Ct. App. 1973).

<sup>300</sup> 22 Op. No. 53-193, *supra* note 260.

<sup>301</sup> 584 P.2d 1088 (Cal. 1978).

<sup>302</sup> *Id.* at 1092. *But see id.* (“[T]he right to fish under article I, section 25 is not an unqualified one. . . . [I]t must yield in appropriate factual situations to the reasonable exercise of the state’s inherent police power to protect public safety and welfare.”); *see Obegi, supra* note 225, at 114–15 (explaining that article I, section 25 “requires opening public lands to fishing unless the primary purpose of the area is incompatible with fishing.”).

<sup>303</sup> 64 Cal. Att’y Gen. Op. No. 80-815 (June 9, 1981), 1981 WL 126770, at \*2.

<sup>304</sup> *Id.* at \*6.

<sup>305</sup> *Id.* at \*5.

Amendment Rights.<sup>306</sup> The court expressed some skepticism that the right to fish provides a private right of action for damages<sup>307</sup> and ultimately concluded the angler's allegations did not establish a deprivation of the right to fish.<sup>308</sup> The angler alleged he was ejected from his preferred fishing location for a single day, and the court concluded "[o]ne individual's ejection from a single location does not strike the Court as the proper occasion to create a private right of action for damages for an individual right to fish, and certainly not as 'adverse action by the defendant that would chill [Plaintiff] . . . from continuing to engage in' his First Amendment rights."<sup>309</sup>

This history of the constitutional right to fish California's public lands points to several conclusions. Most notably, California has made minimal efforts to protect the constitutional right to fish.<sup>310</sup> The attorney general opinions consistently interpret the right very narrowly, more narrowly than the broad language of the amendment.<sup>311</sup> In lawsuits over the right to fish, the state has never argued in support of the right.<sup>312</sup> Protection of the right has come only through private attorneys general who sought to protect the public right to fish.<sup>313</sup> The state's reticence stands in contrast to state efforts to protect coastal access or even access for other recreational purposes. These issues are addressed more fully in Part V.

## 2. The Reservation Requirement

The reservation requirement differs from the access requirement in that agencies would ideally take active steps to add the reservation to any lands conveyed by the state. The case law occasionally offers a glimpse of how this aspect of the right to fish has been implemented for particular plots of land,<sup>314</sup> but these glimpses are rare, and it is difficult to draw

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<sup>306</sup> *Adams v. Kraft*, No. 5:10-CV-00602-LHK, 2011 WL 3240598, at \*17 (N.D. Cal. July 29, 2011).

<sup>307</sup> *See id.* at \*18 ("[I]t is not clear that the 'right to fish' provides an individual with a private right of action *for damages*." (emphasis added)); *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339, 343 (Cal. 2002) (noting many constitutional provisions support private actions for declaratory or injunctive relief).

<sup>308</sup> *Adams*, 2011 WL 3240598, at \*18.

<sup>309</sup> *Id.* at \*10.

<sup>310</sup> *See supra* Part IV.B.1.b.

<sup>311</sup> *See, e.g.*, 53 Op. No. 70-22, *supra* note 286 (holding the right to fish should yield to the proper exercise of State power); 22 Op. No. 53-193, *supra* note 260 (concluding that the California Constitution's reservation of public fishing rights does not extend to the sale or transfer of state-owned real estate acquired from private owners for governmental purposes).

<sup>312</sup> *See, e.g., SLOSA*, 584 P.2d, at 1090-91 (California sought to enjoin trespassing and fishing at Whale Rock Reservoir, arguing that the surrounding property is not public lands).

<sup>313</sup> *See supra* text associated with notes 282-302.

<sup>314</sup> *See, e.g., Ward v. Pearsall*, 3 F.2d 365, 369 (9th Cir. 1925) (involving reservation of the right to fish in a title to California timberland from 1918 or 1919); *United States v. 160,000 Acres of Land*, No. EDCV 16-1957-GW(KKx), 2017 WL 5310713, at \*1 (S.D. Cal. Nov. 9, 2017) (involving federal action condemning land subject to fishing right reservation).

broad conclusions about the state's implementation of the fishing right from the case law. Other sources provide some insight, although a full accounting would require a title-by-title review of the millions of acres of lands held and conveyed by the state of California from 1910 up to the present. In lieu of this prohibitive undertaking, we review other information sources to piece together the history of the various kinds of land owned and sold by the state. We begin with documentation from the surveyor general and the CSLC, and then review relevant California Attorney General opinions; no published decisions address the fishing rights reservation issue.

*a. Early Reservations and the CSLC*

Over California's history, several different entities have had the administrative power to dispose of state lands, beginning with the Office of the California Surveyor General.<sup>315</sup> The state rolled the surveyor general's responsibilities into the California Department of Finance's Division of State Lands in 1929.<sup>316</sup> In 1938, California created the CSLC, which took over land disposal responsibilities.<sup>317</sup> The CSLC currently oversees the state-owned lands, seeking to "provide[] the people of California with effective stewardship of the lands, waterways, and resources entrusted to its care through preservation, restoration, enhancement, responsible economic development, and the promotion of public access."<sup>318</sup>

In 1915, the California Anglers' Association petitioned Surveyor General William Kingsbury to remind him about the fishing rights amendment and his continuing obligation to include the required reservations on any state lands he sold.<sup>319</sup> Surveyor General Kingsbury requested the California Attorney General's opinion as to whether the constitutional right to fish made it "necessary to insert in every patent issued by the State a clause reserving in the people of the State the absolute right to fish upon the lands included within the patent."<sup>320</sup> California Attorney General Webb opined that, "the section is sufficiently clear to require you to insert such a reservation in the patents which are issued."<sup>321</sup> He also opined that, regardless of whether a reservation was *explicitly* added, "this provision of the Constitution must be read into

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<sup>315</sup> See, e.g., ANNUAL REPORT OF THE SURVEYOR-GENERAL DECEMBER 15, 1852, at 16 (1852) (citing an act passed by the California legislature that granted the surveyor general the power to "provide for the disposal of the 500,000 acres of land granted to this state by the act of Congress").

<sup>316</sup> *About the California State Lands Commission*, CAL. STATE LANDS COMM'N, <https://perma.cc/H75Y-TTRY> (last visited Oct. 10, 2021).

<sup>317</sup> State Lands Act of 1938, ch. 5, art. 2, § 11–18, 1938 Cal. Stat. 23.

<sup>318</sup> CAL. STATE LANDS COMM'N, STRATEGIC PLAN 2016-2020, at 3 (2015).

<sup>319</sup> *Fishing Rights on State Land Reserved*, S.F. CHRON., July 1, 1915, at 8.

<sup>320</sup> Cal. Op. Att'y Gen. (July 23, 1915), at 1.

<sup>321</sup> *Id.*



every patent which is issued while it is in force and effect.”<sup>322</sup> It is unclear whether the surveyor general included the fishing rights reservation in lands sold between 1910 and the issuance of the Webb opinion.<sup>323</sup>

The surveyor general periodically issued publications laying out the available public lands for sale and the laws concerning those lands. The earliest available publication, from 1915, included the requirement that patents must reserve the people’s “absolute right to fish thereupon,”<sup>324</sup> so it is clear the surveyor general was at least attempting to reserve these rights as of 1915. The surveyor general included this language in subsequent publications on the same topic.<sup>325</sup>

Based on these early reports, it is possible to estimate the number of acres of private land that should carry the fishing rights reservation: approximately 1,134,636 acres.<sup>326</sup> Other affected lands include those

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<sup>322</sup> *Id.*

<sup>323</sup> California suspended sales of many federal lands granted to California from 1912 to September 1, 1915. Act of May 1, 1911, ch. 720, § 2, 1911 Cal. Stat. 1408; Act of Apr. 21, 1913, ch. 46, § 1, 1913 Cal. Stat. 47–49.

<sup>324</sup> CAL. SURVEYOR GEN.’S OFF., LAWS GOVERNING THE SALE OF SCHOOL LANDS IN THE STATE OF CALIFORNIA 6 (1915).

<sup>325</sup> *E.g.*, CAL. SURVEYOR GEN.’S OFF., LAWS GOVERNING THE SALE OF SCHOOL LANDS IN THE STATE OF CALIFORNIA 5 (1921); CAL. SURVEYOR GEN.’S OFF., LAWS GOVERNING THE SALE OF SCHOOL LANDS IN THE STATE OF CALIFORNIA 10 (1919); CAL. SURVEYOR GEN.’S OFF., LAWS GOVERNING THE SALE OF SCHOOL LANDS IN THE STATE OF CALIFORNIA 18 (1926).

<sup>326</sup> We arrived at this estimate through a variety of sources. Since 1921, California has been required to reserve the mineral rights on lands it sells, Act of May 25, 1921, ch. 303, § 1, 1921 Cal. Stat. 404, and all of these lands should also carry the fishing right reservation. The state tracks the mineral reservations and reports that 790,000 acres have been sold with the mineral rights reservation since 1921. CAL. STATE LANDS COMM’N, ANNUAL STAFF REPORT ON THE MANAGEMENT OF STATE SCHOOL LANDS, FISCAL YEAR 2018–2019, at 1 [hereinafter CSLC ANNUAL STAFF REPORT 2018–19]. The mineral reservation law has some exceptions that do not apply to the fishing right reservation, so this number is likely low, although we cannot determine how low. Act of May 25, 1921, ch. 303, § 1, 1921 Cal. Stat. 404. Between the passage of the act in November 1910 and when the state started applying the mineral reservation (it does not appear to have applied it prior to 1922), BIENNIAL REPORT OF THE SURVEYOR-GENERAL OF THE STATE OF CALIFORNIA FOR THE TERM ENDING AUGUST 1, 1922, at 6, the state-issued certificates of purchase on 344,636.43 acres of land. *See, e.g.*, 1910–1912 Cal. Surveyor Gen. Rep; 1912–1914 Cal. Surveyor Gen. Rep., <https://perma.cc/TE5F-77Y9> (providing counts for certificates of purchase issued). When patented, these lands would not have the mineral rights reservation but would have the fishing rights reservation. Not all of these lands would ultimately be patented; some portion would return to the state based on the buyer’s failure to pay for the property, so this number is likely a bit high, but how high is unknown. Adding the 1910 to 1922 acreage to the acres with the mineral reservation gives a total of 1,134,636.43 acres sold by the state that should have the fishing rights reservation applies. This does not include lands acquired by the state from private owners and later sold by the state, although these lands also carry the fishing rights reservation. *See* Public Land Ownership by State, NAT. RES. COUNCIL OF ME. <https://perma.cc/PYF4-6XES> (last visited Dec. 18, 2021) (showing the total area of California is 99.8 million acres); Scott, Public and Private Land Percentages by US States, SUMMITPOST, <https://perma.cc/XD8U-LXHL> (showing that California has 47.9% private land). Doing that math, that means at least 2.37% of private lands may be subject to the fishing right reservation. Although it is unclear how many of these lands offer fishing opportunities, they should all carry the reservation. Under current interpretations, angling in California includes angling for “a wild fish, mollusk, crustacean, invertebrate, amphibian,

currently held by the state or substate entities that are illegally closed to fishing.<sup>327</sup>

Moving on from the early surveyor general and the CSLC information, a 1941 attorney general opinion concluded that anyone exercising the right to fish upon private lands sold by the CSLC, with the right to fish reserved in the deed, would have the right to enter the land to fish without becoming liable for trespass.<sup>328</sup> The opinion did not address lands where the reservation was omitted from the deed but explicitly concluded that the reservation was required for “all public lands of the State whether held in its *sovereign* or *proprietary* capacity.”<sup>329</sup>

*b. “Public Land” or “Land Owned by the State?”*

The most significant attorney general opinion came in 1953. The controversy addressed prison land.<sup>330</sup> Private parties first patented the land from the federal government, and then the state acquired the land from the private parties for the prison.<sup>331</sup> The federal government sought to buy the land back from the state for construction of the Folsom Dam project but wanted the land free of the fishing reservation.<sup>332</sup> The opinion addressed whether “[i]n selling land acquired from a private owner for governmental purposes, is the State required by Article I, section 25, of the California constitution to reserve public fishing rights?”<sup>333</sup>

The opinion, a marked departure from earlier attorney general interpretations,<sup>334</sup> explicitly concluded that the amendment does not require a reservation on lands acquired from private parties for government use.<sup>335</sup> The attorney general’s reasoning would also suggest a belief that the reservation requirement did not apply to land acquired from the federal government and set aside for government use. The opinion turned on the meaning of the term “public lands” and as used in the fishing rights amendment.

The attorney general opinion began with the rights reservation language, attempting to define “land owned by the state” in that

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or part, spawn, or ovum of any of those animals.” CA Fish and Game Code Sections 15, 45. Although more research is needed, this suggests that the right to fish may include the right to take snakes, toads, frogs, and other creatures that frequent dry land, not just more traditional fishing waters.

<sup>327</sup> CSLC ANNUAL STAFF REPORT 2018–19, *supra* note 326. For example, as of 2019, the state still holds 458,843 acres of school and in lieu lands, all subject to the access right. It is unclear to what extent fishing has traditionally been allowed on these lands. *Id.*

<sup>328</sup> 22 Cal. Att’y Gen. Op. No. 53-193, *supra* note 260.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.* at 134.

<sup>334</sup> *See supra* text accompanying note 258.

<sup>335</sup> 22 Cal. Att’y Gen. Op. No. 53-193, *supra* note 260.

context.<sup>336</sup> The opinion considered the reservation requirement as subsidiary to the fishing access right and likewise considered the meaning of public land in that context.<sup>337</sup> The opinion noted that the term “public lands” is generally used to refer to lands subject to disposal under the general land laws, excluding lands acquired from private parties or held back for a specific government purpose, although the opinion noted that “[t]he meaning of the term may vary with its context.”<sup>338</sup> The opinion then turned to the meaning of “land owned by the state” and interpreted that language to refer only to the opinion’s narrow definition of public lands.<sup>339</sup> On this reading, the attorney general concluded that “Article I, section 25 does not require the State to reserve public fishing rights in the sale or transfer of state-owned real property outside the category of public lands.”<sup>340</sup> The state tried to rely on this opinion in the 1973 case *In re Quinn*, discussed above,<sup>341</sup> but the court found the opinion unpersuasive because it “fail[ed] to take into consideration certain well settled rules of interpretation of constitutional provisions.”<sup>342</sup> More importantly, the Supreme Court of California explicitly defined public lands in the context of the amendment in the 1978 case *California v. SLOSA*:

[W]e interpret the words ‘public lands’ in article I, section 25 as meaning state-owned land the use of which by the state is also compatible with use by the public for purposes of fishing. Only property which is being used for a special purpose that is incompatible with its use by the public—for example, lands used for prisons or mental institutions—does not fall within the scope of this constitutional provision.<sup>343</sup>

Thus, the Court read the broader “state-owned land” language to require a broader definition of public lands, which is well supported by contemporaneous uses of the term. California attorney general’s opinions are entitled to serious consideration where no clear case authority exists, but where, as here, they conflict with later Supreme Court of California decisions, they provide no authority, persuasive or otherwise.<sup>344</sup> It is unclear whether the attorney general has issued a correction to this opinion; no published correction is available, but the attorney general may have provided updated internal guidance to its client agencies.

Two last opinions relevant to the fishing right reservation came in the 1960s. First, a 1960 attorney general’s opinion noted that any patents

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<sup>336</sup> *Id.* at 135–36.

<sup>337</sup> *Id.* at 137.

<sup>338</sup> *Id.* at 136.

<sup>339</sup> *Id.* at 137.

<sup>340</sup> *Id.*

<sup>341</sup> See *supra* text accompanying notes 266–281.

<sup>342</sup> *Quinn*, 110 Cal. Rptr. 881, 887 (Ct. App. 1973).

<sup>343</sup> *SLOSA*, 584 P.2d 1088, 1092 (Cal. 1978).

<sup>344</sup> *Quinn*, 110 Cal. Rptr. at 886–87; *Wenke v. Hitchcock*, 493 P.2d 1154, 1158 (Cal. 1972); *People v. Vallerga*, 136 Cal. Rptr. 429, 441 (Ct. App. 1977).

of school lands underlying the Salton Sea from the state to a private party should contain a reservation of the fishing right.<sup>345</sup> More significantly, in November 1962, the attorney general issued an informal opinion addressing the reservation of fishing rights in a dispute over lands belonging to the Leslie Salt Company.<sup>346</sup>

*c. The Leslie Salt Opinion*

That opinion, the Leslie Salt Opinion, is a bit involved in part because it covers two separate disputes.<sup>347</sup> First, Leslie Salt applied to the U.S. Army Corps of Engineers for permission to dredge parts of two waterways connecting to the southern San Francisco Bay.<sup>348</sup> This application revealed significant confusion over the ownership of the waterways in the area, and Leslie Salt and CSLC negotiators sought to determine who owned what.<sup>349</sup> Leslie Salt held title to much of the land, based on grants prior to the 1910 passage of the fishing rights amendment, although poor records, shifting shoreline, and a lack of platting made exact ownership “unknown and unknowable.”<sup>350</sup> The negotiators agreed to a new ownership map and sought to memorialize it through a series of quitclaim deeds, an apparently common solution to the muddy state of tideland and submerged land ownership.<sup>351</sup> The California legislature empowered the CSLC to enact the map through a 1959 statute,<sup>352</sup> which also authorized the removal of the public trust rights from any lands transferred to Leslie Salt.<sup>353</sup>

The opinion characterizes the quitclaim deeds as mechanisms to memorialize the boundary agreement, for the most part, rather than true transfers of state-owned land, relying in part on *Muchenberger v. City of Santa Monica*.<sup>354</sup> Following this line of reasoning, the opinion determined that the quitclaims generally were “not a ‘sale’ or ‘transfer’ [of land] within the meaning of Article I, section 25 of the State Constitution and

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<sup>345</sup> 36 Cal. Att’y Gen. Op. No. 60-15, at 20–21, 26 (July 14, 1960).

<sup>346</sup> Cal. Att’y Gen, Opinion Letter on Proposed Exchange of Lands Between Leslie Salt Company and State of California Pursuant to Chapter 1885, Statutes of 1959, at 1–2 (Nov. 13, 1962) [hereinafter *Leslie Salt Opinion*].

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 2.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 6, 22.

<sup>351</sup> *See id.* at 2, 22, 23 (discussing the need for clarity of title over the channels that took runoff to the ocean); *see generally* *Muchenberger v. City of Santa Monica*, 275 P. 803, 805 (Cal. 1929) (describing the execution of a joint quitclaim deed between the city and the Santa Monica Land Company).

<sup>352</sup> Act of July 16, 1959, ch. 1885, § 1, 1959 Cal. Stat. 4446, 4446–47.

<sup>353</sup> *Leslie Salt Opinion*, *supra* note 346, at 22.

<sup>354</sup> *Muchenberger*, 275 P. at 807. This is hard to square with *Atwood v. Hammond*, 48 P.2d 20, 23–24 (Cal. 1935), a Supreme Court case that suggests legislative statements about the nature of a transaction are generally conclusive.

hence [did] not require a reservation of fishing rights,”<sup>355</sup> based on authorization from the legislature.<sup>356</sup>

During the same period, the CSLC authorized the exchange of other lands in the area between the state and Leslie Salt for flood control purposes, under California PRC Section 6307.<sup>357</sup> The CSLC exchanged the old Alameda Creek bed with other lands to allow the construction of a new Alameda County Flood Control Channel.<sup>358</sup> At that time, PRC Section 6307 did not allow the CSLC to remove the public trust protections from property transferred under the statute (although it now does),<sup>359</sup> and so “the title companies would not insure title acquired by Leslie Salt.”<sup>360</sup> The legislature authorized the exchange, complete with the removal of the public trust.<sup>361</sup> The new lands acquired in exchange by the state would then come under the public trust mantle, and indeed, the public got fishing rights along the new Alameda County Flood Control Channel.<sup>362</sup> As with the lands in the boundary dispute, the opinion argues that, for most of the land, there was no transfer of lands within the meaning of the fishing rights amendment.<sup>363</sup>

In this opinion, it is difficult to separate the wheat from the chaff. Ultimately, the opinion characterizes most of the property transactions as either boundary determinations or terminations of the public trust on lands already owned by Leslie Salt, and in either case, the opinion determines the transactions are not transfers within the meaning of the amendment.<sup>364</sup> But for both the boundary transactions and the flood channel realignment, the opinion notes that the Commission is, in fact,

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<sup>355</sup> Leslie Salt Opinion, *supra* note 346, at 17.

<sup>356</sup> *Id.* at 2.

<sup>357</sup> CAL. PUB. RES. CODE § 6307 (2005). The uncodified introduction to § 6307 explicitly mentions the constitutional fishing amendment.

<sup>358</sup> Leslie Salt Opinion, *supra* note 346, at 3.

<sup>359</sup> Compare Act of May 27, 1949, ch. 433, § 2, 1949 Cal. Stat. 778, with Act of Aug. 14, 1968, ch. 1354, § 1, 1968 Cal. Stat. 2587, 2587–88, and CAL. PUB. RES. CODE § 6307; Act of Oct. 6, 2005, ch. 585, § 2, 2005 Cal. Stat. 4404, 4405. The 2005 version reads simply: “Pursuant to an exchange agreement, the commission may free the lands or interest in lands given in exchange from the public trust and shall impose the public trust on the lands or interests in lands received in exchange.” CAL. PUB. RES. CODE § 6307; Act of Oct. 6, 2005, ch. 585, § 2, 2005 Cal. Stat. 4404, 4405. These exchanges are fairly well documented and often lead to litigation. See, e.g., John Bourdeau, *Exchanges for State Lands, Generally*, 52A CAL. JUR. 3D PUBLICLY OWNED LANDS § 84 (last updated Aug. 2021) (commission is allowed to exchange public trust lands). Washington and Utah allow similar exchanges. See *Western States’ Public Trust Doctrines*, *supra* note 37, at 184, 190 (quoting the Utah Code that repeals the commissions ability to exchange land in the public trust). In spite of the importance and relative novelty of public trust manipulation via land exchanges, the environmental law literature generally does not address them.

<sup>360</sup> Leslie Salt Opinion, *supra* note 346, at 3.

<sup>361</sup> Act of May 4, 1955, ch. 353, § 3, 1955 Cal. Stat. 809, 810; Act of July 16, 1959, ch. 1885, § 5, 1959 Cal. Stat. 4446, 4447.

<sup>362</sup> Leslie Salt Opinion, *supra* note 346, at 21.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.* at 23.

transferring at least some lands from the state to Leslie Salt.<sup>365</sup> And the legislation empowering the Commission to pursue these transactions characterizes them as a grant or conveyance.<sup>366</sup> Nevertheless, the opinion concludes that where “the legislature has expressly lifted the public trust . . . , it can further authorize the *absolute* conveyance of them,” without the fishing rights reservation.<sup>367</sup>

Explicitly relying on the opinion, the CSLC went on to authorize its executive officer to delete the constitutional fishing rights reservation from the patent.<sup>368</sup> There is some evidence that the attorney general and the CSLC interpret the Leslie Salt Opinion narrowly and thus generally still reserve the fishing right in most land transfers, based on several settlement agreements from CSLC meeting minutes, although the extent of its use of this authority is unclear.<sup>369</sup> The legislature itself has attempted to extinguish the fishing right in statutory land grants on several occasions, particularly in its grants to municipalities.<sup>370</sup>

#### *d. Grants to Municipalities*

Beyond the land sales, the California legislature also conveyed some sovereign lands directly to municipalities of its own accord;<sup>371</sup> these grants should inherently reserve the fishing right.<sup>372</sup> The CSLC notes that “over 300 statutes grant[] sovereign public trust lands to over 80 local municipalities” and suggests that “[a]ll grants [of sovereign land to municipalities] reserve to the people the right to fish in the waters over the lands and the right to convenient access to those waters for that purpose.”<sup>373</sup> This is not explicit in many of the grants, however, and some of the grants even seek to remove the lands from the public trust.<sup>374</sup>

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<sup>365</sup> For the boundary dispute, these are the submerged lands which could not be patented. *Id.* at 2. For the channel realignment, these lands are the unpatented parcel of the old creek bed and the submerged lands along the creek. *Id.* at 21.

<sup>366</sup> *Id.* at 3 (citing Act of May 4, 1955, ch. 353, § 3, 1955 Cal. Stat. 809, 810); see Act of July 16, 1959, ch. 1885, § 1, 1959 Cal. Stat. 4446, 4446 (allowing for the Commission to exchange land if it is in the interests of the public).

<sup>367</sup> Leslie Salt Opinion, *supra* note 346, at 2 (emphasis added).

<sup>368</sup> Cal. State Lands Comm’n, Meeting Summary 8515–16 (Dec. 20, 1962).

<sup>369</sup> See *infra* text accompanying note 429. Beyond the attorney general opinions and a few mentions in the Cal. State Lands Comm’n minutes, very few available records address the reservation requirement. No reported cases address this right. The only other publicly available records addressing the right come from legislation conveying state lands to municipalities for their use.

<sup>370</sup> See *infra* text accompanying note 425.

<sup>371</sup> *Granted Public Trust Lands*, *supra* note 235.

<sup>372</sup> See, e.g., 51 Cal. Att’y Gen. Op. No. 67-272, at 92, 93 (May 7, 1968) (restricting the application of reserving rights in lands).

<sup>373</sup> *Granted Public Trust Lands*, *supra* note 235.

<sup>374</sup> This is based on a review of the statutes linked for each granted land area on the SLC website. See *Granted Public Trust Lands, Grantee Information*, CAL. STATE LANDS COMM’N, <https://perma.cc/VD9F-BS88> (under “Grantee Information” and “Cities” sections) (last visited Sept. 2, 2021) (showing the amount of cities that had land with restrictions on the use).

Almost none of the grants prior to 1911 reserve any fishing rights,<sup>375</sup> but beginning in 1911, most grants include reservations for fishing, which suggests attention to the constitutional requirement.<sup>376</sup> Nevertheless, the legislature occasionally tries to convey lands without the fishing rights reservation through statutes that explicitly declare the land conveyed is free of any reservations, as in the Leslie Salt case.<sup>377</sup> To bring us full circle, we note that most of the reservations seem to focus on the public trust right to fish rather than the constitutional right to fish.<sup>378</sup>

## V. PROTECTING THE PUBLIC USE RIGHT TO FISH

The fishing right has failed to deliver the public land access and fishing right reservations that its framers intended. This results, at least, in part, from the way that public trust rights have tended to subsume public use rights, particularly in the fishing context. We first explain how the right has been underprotected and then draw some lessons from those failures. We conclude this Part by examining ways to reinvigorate the public right to fish.

### *A. The Right that Got Away: Diminution of the Right to Fish*

#### *1. Exclusion of Many Public Lands from Right of Access*

The attorney general opinions tend to constrain the fishing access right in ways not allowed by the constitutional amendment and contrary to basic principles of constitutional interpretation. On its face, the amendment protects “the right to fish upon and from the public lands of the State and in the waters thereof, excepting upon lands set aside for fish hatcheries.”<sup>379</sup> The legislature considered expressly exempting land around prisons, asylums, or other public institutions from the amendment’s requirements but ultimately chose to exempt only fish

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<sup>375</sup> See, e.g., Act of May 3, 1855, ch. 187, § 1, 1855 Cal. Stat. 239, 239 (failing to reserve fishing rights).

<sup>376</sup> See, e.g., Act of May 1, 1911, ch. 654, § 1, 1911 Cal. Stat. 1254, 1256 (“There is hereby reserved in the people of the State of California the right to fish in the waters on which said lands may front with the right of convenient access to said waters over said lands for said purpose.”). But see Act of June 11, 1913, ch. 317, §§ 2, 7, 1913 Cal. Stat. 605, 606–07 (failing to reserve a fishing right).

<sup>377</sup> See, e.g., Act of June 20, 1953, ch. 1263, § 1, 1953 Cal. Stat. 2820 (creating a land conveyance that does not give the right to fish from land exchanged out of the public trust); Act of July 8, 1957, ch. 2044, § 1, 1957 Cal. Stat. 3613, 3613–14; Act of Apr. 3, 1958, ch. 2, 1958 Cal. Stat. 181.

<sup>378</sup> See, e.g., S.B. 792, ch. 203, § 10, 2009 Cal. Stat. 1067, 1067 (“There is reserved in the people of the state the right to hunt and fish in and over the waters on the trust lands, together with the right of convenient access to the waters over the trust lands for those purposes.”); A.B. 1759, ch. 250, § 4(k), 2018 Cal. Stat. 2581, 2587 (“There is hereby reserved in the people of the State of California the right to fish in the waters on and from the trust lands with the right of convenient access to those waters for fishing purposes.”).

<sup>379</sup> CAL. CONST. art. I, § 25 (1910).

hatcheries.<sup>380</sup> This strongly suggests the legislature did not intend to exempt prison lands, “[u]nder the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.”<sup>381</sup> “The *expressio unius* inference arises only when there is some reason to conclude an omission is the product of intentional design,” which is the case here, given the Senate’s consideration and *rejection* of the other exemptions.<sup>382</sup> “Generally[,] the Legislature’s rejection of a specific provision which appeared in the original [proposed] version of an act supports the conclusion that the act should not be construed to include the omitted provision.”<sup>383</sup> The text and history of the amendment, then, suggest a very broad right of access with only one explicit exception.

Nevertheless, the series of attorney general opinions seeks to create many exceptions to the access requirement. First, the 1911 attorney general opinion noted that state mental hospital grounds should be excluded from the requirement,<sup>384</sup> even though the legislature considered and rejected the amendment that would have allowed exclusion of the state hospitals from the amendment. The 1941 attorney general opinion suggested (without expressly concluding) that lands held back by the state for any special or governmental purpose might not be subject to the right to fish.<sup>385</sup> The 1946 attorney general opinion, concluding that there is no public right to fish on the prison lands, again failed to address the text and legislative history of the amendment.<sup>386</sup>

Finally, the 1953 attorney general opinion sought to radically constrain the fishing right through a new interpretation. That opinion tried to redefine the terms “public lands” and “land owned by the state” as used in the fishing rights amendment, limiting the right to “those lands of the [f]ederal [g]overnment or the [s]tate which are subject to sale or disposal under general [land] laws and are not held back or reserved for any specific governmental or public purpose.”<sup>387</sup> These “public lands” would be a much smaller set of lands than public lands in a generic sense.<sup>388</sup>

Sometimes the term “public lands” is used in this technical sense to refer to the public domain, defined as those lands offered by the federal

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<sup>380</sup> See *supra* text accompanying notes 190–191.

<sup>381</sup> *Wildlife Alive v. Chickering*, 553 P.2d 537, 539 (Cal. 1976).

<sup>382</sup> *Howard Jarvis Taxpayers Ass’n v. Padilla*, 363 P.3d 628, 645 (Cal. 2016).

<sup>383</sup> *Hess v. Ford Motor Co.*, 41 P.3d 46, 57 (Cal. 2002) (citing *People v. Goodloe*, 44 Cal. Rptr. 2d 15, 19 (Ct. App. 1995)).

<sup>384</sup> Cal. Att’y Gen. Op. No. 3076, at 3, 9–10 (Apr. 8, 1911).

<sup>385</sup> Cal. Att’y Gen. Op. No. NS-3679, at 2 (Aug. 5, 1941).

<sup>386</sup> 8 Cal. Att’y Gen. Op. No. 46-275, *supra* note 259, at 332–33.

<sup>387</sup> 22 Cal. Att’y Gen. Op. No. 53-193, *supra* note 260, at 135, 137.

<sup>388</sup> See, e.g., *Bank of Lemoore v. Fulgham*, 90 P. 936, 938 (Cal. 1907) (“[L]ands which originally have been part of the public domain, and have become subsequently private property, on reverting to the state or other sovereignty by escheat, forfeiture, or otherwise, are not within the purview of the general land laws relating to the disposal of public lands.”).



or state government for entry under the general land laws.<sup>389</sup> But “public lands” can also be used in a general sense to mean any land not under private ownership. “The words used in a constitution ‘must be taken in the ordinary and common acceptance, because they are presumed to have been so understood by the framers and by the people who adopted it.’”<sup>390</sup> Thus, a constitutional amendment should be construed in accordance with the natural and ordinary meaning of the words as generally understood at the time of its enactment, and “where it does not appear that the words were used in a technical sense,” the voters must be deemed to have construed the amendment “by the meaning apparent on its face according to the general use of the words employed.”<sup>391</sup>

The opinion argues that “[b]efore the adoption of Article I, section 25, the phrase ‘public lands’ had been thoroughly defined so as to exclude real property acquired by the government for special governmental purposes,” but that statement is not supported by any evidence of contemporaneous use.<sup>392</sup> Again, under California law, “[c]ontemporaneous exposition is in general the best.”<sup>393</sup> Looking to the use of the term at the time of the amendment, it is clear that many contemporaneous writings by both the courts and the legislature generally did not limit their use of “public lands” to the technical sense, instead using it, for example, to denote land belonging to a city.<sup>394</sup> In California legal writings of that era, the term is often used to refer to any publicly owned land, whether part of the public domain or reserved for particular governmental uses.<sup>395</sup> The ambiguity

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<sup>389</sup> See *Land*, BLACK'S LAW DICTIONARY (2d. ed. 1910) (defining “[p]ublic lands[:] [t]he general public domain; unappropriated lands; lands belonging to the United States and which are subject to sale or other disposal under general laws, and not reserved or held back for any special governmental or public purpose”); *People by McCullough v. Shearer*, 30 Cal. 645, 658 (1866) (“[T]he public lands of a State are frequently termed the public domain, or domain of the State.”).

<sup>390</sup> *Keller v. Chowchilla Water Dist.*, 96 Cal. Rptr. 2d 246, 250 (Ct. App. 2000) (quoting *Miller v. Dunn*, 76 Cal. 462 (1887)).

<sup>391</sup> *Id.*

<sup>392</sup> 22 Cal. Att’y Gen. Op. No. 53-193, *supra* note 260, at 137.

<sup>393</sup> California Civil Code § 3535 (2019).

<sup>394</sup> *People v. Banning Co.*, 140 P. 587, 589 (Cal. 1914) (“[T]he city could not be deprived of this *public land* by adverse possession or by the statute of limitations.” (emphasis added)); Act of Feb. 1, 1909, ch. 5, § 32, 1909 Cal. Stat. 1137, 1147 (describing the pueblo lands of San Diego as public lands); Act of Mar. 23, 1911, ch. 264, 1911 Cal. Stat. 442, 443 (using public lands as a catch all term describing land belonging to the city); *Mills v. City of Los Angeles*, 27 P. 354, 355 (Cal. 1891) (describing as public lands those city “lands which had been assigned for the use of the public”).

<sup>395</sup> See, e.g., Act of Mar. 20, 1909, ch. 352, § 1, 1909 Cal. Stat. 581, 581–82 (qualifying public lands to exclude public lands “otherwise disposed of or in use” from the remaining public domain); Act of Dec. 24, 1911, ch. 23, 1911 Cal. Stat. 428 (using the term “public domain” to describe public lands subject to public entry); Act of Feb. 9, 1911, ch. 14, 1911 Cal. Stat. 1547 (describing lands withdrawn from entry as public lands); 59<sup>TH</sup> ANNUAL REPORT OF THE CALIFORNIA STATE BOARD OF AGRICULTURE FOR THE YEAR 1912, at 2 (1913) (differentiating forest reserves from public domain lands, all within the heading of public lands); *Alberger v. Kingsbury*, 91 P. 674, 675–76 (Cal. Ct. App. 1907) (using the term “public domain” to distinguish public lands that are available for disposition under the general land

flowed both ways; in California's laws of that era, state public domain lands were not always described as "public lands," but rather in a wide variety ways.<sup>396</sup> In other words, "public lands" did not consistently refer to the public domain, and the state public domain was not consistently referred to as "public lands." Thus, the use of the term in the statute, based on contemporary evidence, does not suggest it should be read in a technical sense.

The amendment itself also shows that a technical interpretation of "public lands" is wrong. If the term were interpreted as the attorney general argued, the language excluding land set aside for hatcheries would be unnecessary surplusage, because land set aside for a hatchery is not state land subject to disposal under the general land laws.<sup>397</sup> "It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided."<sup>398</sup> Moreover, the second part of the amendment requires a reservation of an absolute right to fish on all "land owned by the State," which is free of any possible limitation to public domain lands.<sup>399</sup> As the attorney general opinion noted, interpreting the "public lands" reference to mean lands in the public domain creates "internal inconsistency," resulting in a "restriction on alienation [that] is literally broader than the guarantee which precedes it."<sup>400</sup> The attorney general would fix this inconsistency by reading "land owned by the State" to match the narrow definition of public lands, but this reading does not comport with the rules for interpreting California constitutional provisions.<sup>401</sup>

"Constitutional provisions must be construed to give full force and effect to every portion thereof."<sup>402</sup> Ambiguities in constitutional

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laws from those public lands reserved by the federal government for various purposes, including forest reservations and military bases); *McLemore v. Express Oil Co.*, 112 P. 59, 62 (Cal. 1910) (Native American reservations same, with reference to public lands withdrawn from the public domain but still available for mineral claims); *Town of Red Bluff v. Walbridge*, 116 P. 77, 82 (Cal. Ct. App. 1911) (using "public land" to mean any "land to which no private rights had attached"); *Truckee Lumber*, 48 P. 374, 375 (Cal. 1897) (using "public lands" to denote public domain lands and lands already reserved for specific uses).

<sup>396</sup> See, e.g., Act of Apr. 27, 1911, ch. 612, 1911 Cal. Stat. 1154 (describing state public domain lands as "state lands"); Act of May 1, 1911, ch. 721, 1911 Cal. Stat. 1409; see Act of Feb. 13, 1911, ch. 26, §1, 1911 Cal. Stat. 47 (discussing "state school lands").

<sup>397</sup> A review of other hatcheries in operation when the public adopted the constitutional amendment suggests most were on state land acquired specifically for that purchase, although some were on land belonging to private entities. This review found no evidence of hatcheries established on state public domain lands. EARL LEITRITZ, STATE OF CALIFORNIA, THE RESOURCES AGENCY DEPARTMENT OF FISH AND GAME FISH BULLETIN 150, A HISTORY OF CALIFORNIA'S FISH HATCHERIES 1870-1960, at 15-45, 55 (1970), <https://perma.cc/U5J8-4Y7R> (providing an overview of fish hatcheries established in California between 1870 and 1960).

<sup>398</sup> *People v. Woodhead*, 741 P.2d 154, 157 (Cal. 1987).

<sup>399</sup> CAL. CONST. art. I, § 25 (1910).

<sup>400</sup> 22 Cal. Att'y Gen. Op. No. 53-193, *supra* note 260, at 136.

<sup>401</sup> *Quinn*, 110 Cal. Rptr. 881, 886-87 (Ct. App. 1973).

<sup>402</sup> *Id.* at 887.

amendments should be resolved in “contemplation of the object to be accomplished or the mischief to be remedied or guarded against.”<sup>403</sup> Thus, “[t]he words ‘public lands’ must be interpreted to give effect to the intent of the voters in adopting this constitutional amendment. Evidence of this intent may be found in the argument submitted to the voters in support of the amendment.”<sup>404</sup> Finally, “[n]ew provisions of the Constitution must be considered with reference to the situation intended to be remedied or provided for,” and courts “have the power to take judicial cognizance of the existence of the evil which the Legislature in framing such amendment, and the people ratifying it, endeavored to correct.”<sup>405</sup> Here, the underlying “evil” is clear—the loss of fishing access. The voters sought to remedy that by providing broad protection.<sup>406</sup> Thus, the broader and clearer restraint on alienation should inform the reading of “public land,” suggesting it was meant to include all state-owned land.

Fortunately, the 1953 attorney general opinion’s narrow reading of public lands was short-lived. The restriction to public domain lands had not played a significant role in earlier opinions, and, in any case, twenty years later, *In re Quinn* explicitly rejected the attorney general’s narrow reading.<sup>407</sup> Instead, the *In re Quinn* court defined “public lands” as “public lands which provided access to fish in the inland streams and coastal waters of the state,” excluding “lands used or acquired for special state purposes.”<sup>408</sup>

The *In re Quinn* court itself misstepped, however, when it concluded the amendment’s “public lands” do *not* include county-owned lands.<sup>409</sup> California courts generally treat county-owned lands as state-owned lands since the state constitution defines counties as subdivisions of the state.<sup>410</sup> As a general rule, “property entrusted to a county’s governmental management is public property, the proprietary interest in which belongs to the public. Legal title held by a county is held in trust for the whole

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<sup>403</sup> *Turlock Irrigation Dist.*, 186 Cal. 183, 188 (1921).

<sup>404</sup> *SLOSA*, 584 P.2d 1088, 1091 (Cal. 1978).

<sup>405</sup> *Quinn*, 110 Cal. Rptr. at 887–88.

<sup>406</sup> *Id.* at 888.

<sup>407</sup> *Id.* at 886–87.

<sup>408</sup> *Id.* at 889.

<sup>409</sup> *Id.* at 886, 889.

<sup>410</sup> CAL. CONST. art. XI, § 1 (1970) (“The State is divided into counties which are legal subdivisions of the State.”); see *Baldwin v. Cty. of Tehama*, 36 Cal. Rptr. 2d 886, 891 (Ct. App. 1994) (“[R]eferences to ‘the State,’ . . . may include counties.”); *Cty. of San Mateo v. Coburn*, 130 Cal. 631, 636 (1900) (“A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government.”); *Env’t L. Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr. 3d 393, 409–10 (Ct. App. 2018) (review denied Nov. 28, 2018) (counties are subdivisions of the state and share in the state’s “responsibility for administering the public trust”).

public.”<sup>411</sup> This was true when the amendment was added to the constitution, and it remains true today.<sup>412</sup>

The *In re Quinn* definition stood for only five years until the Supreme Court of California explicitly overruled it as too narrow in *California v. SLOSA*.<sup>413</sup> There, the court defined “public lands” as any state-owned lands whose use is compatible with public fishing, dropping *In re Quinn*’s exclusion,<sup>414</sup> and stating, “To the extent that language in *Quinn* suggests a more restrictive interpretation of the words ‘public lands’ than that given here, we disapprove it.”<sup>415</sup> The court interpreted “compatible” in a broad sense to include lands where public access may be regulated to make it compatible with other land uses like drinking water protection. Even this level of restriction is difficult to square with the legislature’s rejection of nearly all land use-based restrictions on the right to fishing access, but perhaps this reflects the court’s efforts to balance the constitutional right to fish with the state’s inherent police and other powers.<sup>416</sup> Notably, *California v. SLOSA* did not explicitly address the county lands issue, but its rejection of *In re Quinn* appears broad enough to encompass that court’s county-land exclusion.<sup>417</sup>

In sum, the history of the fishing access right reveals that attorney general opinions have ignored the constitutional protection for fishing rights or attempted to construe the protection narrowly, well short of the broad protections envisioned by the voters who approved it. Such opinions have not been corrected by the attorney general. The Supreme Court of California has stayed truer to the amendment’s text and purpose, but with so few cases on point, it is difficult to accurately gauge judicial reactions to the fishing access right.

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<sup>411</sup> *Vagim v. Bd. of Supervisors of Cty. of Fresno*, 40 Cal. Rptr. 760, 762 (Ct. App. 1964); see also *Cty. of Marin v. Superior Court of Marin Cty.*, 349 P.2d 526, 529–30 (Cal. 1960) (“all property under the care and control of a county is merely held in trust by the county for the people of the entire state”); *San Miguel Consol. Fire Dist. v. Davis*, 30 Cal. Rptr. 2d 343, 347 (Ct. App. 1994) (referencing the aforementioned quote from *County of Marin v. Superior Court of Marin County*).

<sup>412</sup> See *Cty. of San Mateo v. Coburn*, 130 Cal. 631, 636 (1900) (“A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government.”).

<sup>413</sup> *SLOSA*, 584 P.2d 1088, 1092 n.6 (Cal. 1978) (“To the extent that language in *Quinn* suggests a more restrictive interpretation of the words ‘public lands’ than that given here, we disapprove it.”). Notably, the 1970 A.G. Op. dealing with the same conflict did not rely on the “public land” argument from the vitiated 1953 A.G. Op.

<sup>414</sup> *Id.* at 1092.

<sup>415</sup> *Id.* at 1092 n.6.

<sup>416</sup> *Id.* at 1092 (“Respondents do not dispute that it must yield in appropriate factual situations to the reasonable exercise of the state’s inherent police power to protect public safety and welfare.”).

<sup>417</sup> *Id.*

## 2. Exclusion of Many State Lands from Reservation Requirement

The attorney general opinions, some CSLC and other agency decisions, and legislative actions have also fallen short of providing the robust protection created by the amendment's reservation requirement.<sup>418</sup>

As discussed, the 1953 attorney general opinion sought to construe the rights reservation requirement narrowly. The opinion remains uncorrected.<sup>419</sup> The other significant attorney general opinion addressing the reservation requirement, the 1979 Leslie Salt opinion, analyzed several land transfers and concluded that the legislature had disclaimed any public trust rights in the properties and established that the CSLC thus had the power to transfer the property free of the public trust right to fish.<sup>420</sup> But the opinion then extends this same reasoning to the constitutional right to fish, ignoring the significant differences in legislative power over the public trust versus a constitutional right. Under California law, the legislature cannot abrogate constitutional rights through legislation; such changes require a constitutional amendment.<sup>421</sup> Any "limitations or restrictions contained in the Constitution are to be construed strictly and are not to be extended to include matters not covered by the language used."<sup>422</sup> In the end, however, "[t]he power of the Legislature is limited by the provisions of the Constitution, which are mandatory and prohibitory," and any law clearly attempting to contravene the constitution is void.<sup>423</sup> The attorney general's conclusion that the legislature "can further authorize the *absolute* conveyance of [the properties]"<sup>424</sup> has no discernable basis in the law, and the CSLC's subsequent transfer of the property after deleting

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<sup>418</sup> Very few reported decisions address this part of the fishing right amendment. *In re Quinn*, for example, neglected to consider whether the fishing rights reservation could have protected the anglers whose arrests were at issue in that case. *Quinn*, 110 Cal. Rptr. 881, 885 (Ct. App. 1973).

<sup>419</sup> 22 Cal. Att'y Gen. Op. No. 53-193, *supra* note 260, at 135. Several private parties patented the land from the federal government, and then the state acquired the land back from the private parties, making the lands part of California's proprietary lands. The opinion concluded that "Article I, section 25, of the California Constitution does not require a reservation of public fishing rights upon the sale or transfer of state-owned real estate which has been acquired from private owners for governmental purposes and which does not constitute state public land." *Id.*

<sup>420</sup> Leslie Salt Opinion, *supra* note 346, at 21.

<sup>421</sup> *City & Cty. of S.F. v. Regents Univ. Cal.*, 442 P.3d 671, 684 (Cal. 2019) ("[I]f there is a conflict between the California Constitution and a law adopted by the [California] Legislature, the California Constitution prevails . . . [because it] is the paramount authority to which even sovereignty of the state and its agencies must yield.").

<sup>422</sup> *Quinn*, 110 Cal. Rptr. at 890.

<sup>423</sup> *Forestier*, 127 P. 156, 160 (Cal. 1912).

<sup>424</sup> Leslie Salt Opinion, *supra* note 346, at 2 (emphasis added).

the constitutional fishing rights reservation from the patent is unlawful.<sup>425</sup>

The remedy here is straightforward. The constitutional amendment creates explicit requirements for state contracts, and the Supreme Court of California has consistently held that such requirements are to be read into the contracts at issue, even when the state neglects to include them: “The words of the Constitution are to be considered as incorporated in the grant or patent the same as if inserted therein. They become a part of it and qualify[] it so that the estate granted is limited to the permitted uses.”<sup>426</sup> The California Attorney General Webb opinion expressed the same position in the fishing right context, finding the “provision of the constitution must be read into every patent which is issued while it is in force and effect.”<sup>427</sup> This applies to lands beyond the few parcels at issue in Leslie Salt, covering any land the state has conveyed since November 9, 1910. The only judicially approved alternative which would achieve the protections required by the amendment seems to be voiding the contracts entirely, which would lead to a royal mess.<sup>428</sup>

The CSLC’s current understanding of the fishing right reservation requirement is unclear. The CSLC appears to generally reserve the fishing right in most land transfers, but its statements in other contexts suggest a narrow interpretation.<sup>429</sup> For example, in 1976, the CSLC appeared to suggest that it had the power to transfer properties with the

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<sup>425</sup> See CAL. STATE LANDS COMM’N, MEETING MINUTES, at 8515 (Dec. 20, 1962) (authorizing the Commission’s executive officer to delete fishing rights from patents previously granted to Leslie Salt Co.).

<sup>426</sup> *Forestier*, 127 P. at 160; see also *Boone v. Kingsbury*, 273 P. 797, 813 (Cal. 1928) (quoting *Forestier*: “The words of the Constitution are to be considered as incorporated in the grant or patent the same as if inserted therein”); *Bohn v. Albertson*, 238 P.2d 128, 130 (Cal. Ct. App. 1951) (collecting cases); *People v. Carbajal*, 899 P.2d 67, 76 n.2 (Cal. 1995) (noting that although a constitutional amendment does not abrogate the court’s caselaw, the amendment is instructive and should be taken into account). California public contracting law generally provides that a contract which fails to conform to a law protecting a substantial public right is void—a court will not supply a required term. *Contra Amelco Electric v. City of Thousand Oaks*, 38 P.3d 1120 (Cal. 2002) (suggesting a different outcome in a constitutional setting).

<sup>427</sup> Francis E. Coats, Letter to the California State Land Commission Re: Disclosure of School Lands and Former School Lands Subject to the Public Right to Fish (June 20, 2020), <https://perma.cc/G39T-SP58>.

<sup>428</sup> *Banning*, 140 P. 587, 588 (Cal. 1914) (holding the contract void because it violated the state constitution).

<sup>429</sup> See CAL. STATE LANDS COMM’N, MEETING SUMMARY, APRIL 28, 1960, at 5926–27 (1960) (approving a settlement protecting the public fishing access rights in lawsuits which sought to eliminate the constitutional fishing rights reservation); CAL. STATE LANDS COMM’N, MEETING SUMMARY, MARCH 31, 1975, at 269 (1975) (authorizing a sale of school lands to Eugene J. Joergenson subject to the constitutional fishing rights reservation); CAL. STATE LANDS COMM’N, MEETING SUMMARY, APRIL 25, 1985, at 124 (1960) (approving a settlement protecting the public fishing access rights in a lawsuit seeking to eliminate the constitutional fishing rights reservation). E-mail from Randy Collins, Public Lands Management Specialist, to author (July 2, 2020) (on file with author) (stating that “the commission reserves fishing rights when school lands are sold.”).

reservation more broadly.<sup>430</sup> The CSLC suggested that the relevant “provisions of the State Constitution . . . operate as restraints upon grants to private parties rather than as a constraint upon legislative policy.”<sup>431</sup> It also argued that “[t]he administration and execution of *this trust* is committed by the Constitution to the legislative department, subject to certain expressed reservation and restrictions.”<sup>432</sup> The CSLC also suggested that “the determination of the State Lands Commission pertaining to administration of the trust pursuant to an express delegation of authority from the Legislature must be classified as quasi-legislative in character.”<sup>433</sup> Taken together, these statements suggest that the CSLC believed it could act in a quasi-legislative capacity to make trust determinations, which, in the publication, it explicitly extended to the constitutional right to fish. The CSLC’s treatment of the constitutional right as a part of the public trust ignores the greater protections afforded by the constitution.

The CSLC published a comprehensive overview of the public’s right to access waters in California in 2017, designed as an informational guide for the public, but this overview again undersold the constitutional right to fish.<sup>434</sup> It cites the 1953 attorney general opinion overturned in *In re Quinn* and *California v. SLOSA* to suggest that the reservation does “not applying to all state owned lands[,] only public lands,” even though California Attorney General opinions that conflict with later Supreme Court of California decisions provide no authority, persuasive or otherwise.<sup>435</sup> Citing the 1953 attorney general opinion without disclaiming it suggests some lingering uncertainty where none exists. The overview also cites a 1935 Supreme Court of California case, *Atwood v. Hammond*,<sup>436</sup> for the proposition “that the legislature has, under certain limited circumstance, the power to eliminate not only public fishing rights, but also the public’s additional public trust rights of commerce and navigation.”<sup>437</sup> But, like other instances where this power exists, *Atwood* addressed only the public trust right to fish and does not discuss or even cite the constitutional right to fish, which would not be subject to legislative abrogation.<sup>438</sup> Citing the case in this context confuses at best and misleads at worst. The CSLC also suggests the reservation

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<sup>430</sup> CAL. STATE LANDS COMM’N, A REPORT ON THE USE, DEVELOPMENT, AND ADMINISTRATION OF GRANTED TIDELANDS AND SUBMERGED LANDS 10 (1976), <https://perma.cc/8SE2-5FBA>.

<sup>431</sup> *Id.* at 7.

<sup>432</sup> *Id.* at 7–8 (citing *People v. Cal. Fish Co.*, 138 P. 79, 87 (1913)) (emphasis added).

<sup>433</sup> *Id.* at 8 (citing *Cnty. of Orange v. Heim*, 106 Cal. Rptr. 825, 845 (Ct. App. 1973)).

<sup>434</sup> CAL. STATE LANDS COMM’N, A LEGAL GUIDE TO THE PUBLIC’S RIGHTS TO ACCESS AND USE CALIFORNIA’S NAVIGABLE WATERS 13–14 (2017), <https://perma.cc/UH7S-5DPR>.

<sup>435</sup> *Id.* at 13 n.50; *Quinn*, 110 Cal. Rptr. 881, 886–87 (Ct. App. 1973).

<sup>436</sup> 48 P.2d 20 (Cal. 1935).

<sup>437</sup> CAL. STATE LANDS COMM’N, *supra* note 434, at 13 n.50.

<sup>438</sup> *Atwood*, 48 P.2d at 22; see also Omar Jadwat, *No, Mr. President. You Can’t Change the Constitution by Executive Order*, ACLU (Oct. 30, 2018), <https://perma.cc/3V25-N37L> (stating that constitutional guarantees cannot be overturned by legislation).

requirement may be limited to “lands acquired by the state after 1910,” but again, this has no basis in the history or text of the amendment.<sup>439</sup> Other decisions by the CSLC, including their refusal to publicize a useful map of lands with the reservation (or of school lands that should have the reservation), suggest some reticence on their part toward public use of the fishing reservations that should burden many otherwise private properties in the state.<sup>440</sup> Other agencies, including Caltrans<sup>441</sup> and the Central Valley Flood Protection Board,<sup>442</sup> do not appear to reserve rights of way in their land transactions.

Finally, as noted, the legislature occasionally tries to convey lands without the fishing rights reservation through statutes that explicitly declare the land conveyed to be free of any reservations, as in the Leslie Salt case, although these actions generally focus on the public trust right to fish, rather than the constitutional right to fish.<sup>443</sup>

Taken together, these actions show that California has preferred to downplay the fishing rights reservation, perhaps in an effort to accommodate the interests of landowners, achieve free market goals by relieving the land of the burden of the reservation, or to facilitate certain transactions such as the conveyance of land to the federal government for the Folsom Dam project or land exchanges under section 6307 of the Public Resources Code.<sup>444</sup> Regardless of the motivation, these decisions undercut the public’s constitutionally protected right to fish on formerly state-owned lands.

### *B. Lessons from the Right to Fish*

#### *1. Public Trust or Public Use? Confusion Leads to Reduced Protections*

Environmental law commentators have a running debate about whether public use rights are a part of the broader public trust doctrine

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<sup>439</sup> CAL. STATE LANDS COMM’N, *supra* note 434, at 13 n.50.

<sup>440</sup> See *California State Lands Commission Map Collection*, FRESNO STATE HENRY MADDEN LIBRARY, <https://perma.cc/DY9W-DLSV> (last visited Sept. 26, 2021) (lacking a visual depiction of lands that are, or should be, subject to the fishing reservation); CAL. STATE LANDS COMM’N, *supra* note 434, at 29–30 (emphasizing that the public has a right to access navigable waters for fishing purposes even if the underlying land, bed, or bank is owned by a private party, and that private landowner must refrain from interfering with the public’s right to fish).

<sup>441</sup> CAL. DEPT. OF TRANSP., RIGHT OF WAY MANUAL (2021), <https://perma.cc/RT6X-VT52> (A public records act request to Caltrans/Department of Transportation inquiring as to any manual or policy statement on the application of the fishing right easement requirement or CA PRC sections 6210.4 or 6210.5 garnered only a link to the CalTrans right of way manual. An electronic search of the manual using the terms “fish,” “land,” “6210.4” or “6210.5” did not disclose any information on such reservations).

<sup>442</sup> Interview with Kanwarjit (Jit) Dua, counsel for the Central Valley Flood Protection Board (expressing the view that the reservation requirement does not apply to lands purchased from private parties for government use).

<sup>443</sup> Leslie Salt Opinion, *supra* note 346, at 23.

<sup>444</sup> 22 Cal. Att’y Gen. Op. No. 134.



or whether they stand on their own, as a separate set of rights with a different provenance.<sup>445</sup> While this might seem like an esoteric debate, the right to fish example suggests that the way we think about public use rights has real-world impacts on how well those rights are protected. Recognizing them as distinct from the public trust aids in their vindication by offering more enduring protection and by creating a separate avenue for protecting public resources. Both benefits are discussed below.

The confusion between public trust and public use rights explains some of the errors in both the 1953 opinion, which would have limited the right to a narrow interpretation of public lands, and the Leslie Salt opinion, which approved the legislature and the CSLC selling public lands free of the fishing right reservation. Both opinions rely on inartful language in the early Supreme Court of California decision *Paladini v. Superior Court*,<sup>446</sup> where the court suggested the amendment “gave no right to the people which they did not already have.”<sup>447</sup> The 1953 opinion relied on this language to suggest that “[p]rior to the 1910 adoption of this provision, the people had the same rights of fishery in the waters of the State as they had afterward. The clause guaranteeing the right to fish in state waters is simply declaratory of pre-existing public privileges.”<sup>448</sup> The 1953 Leslie Salt opinion quoted this same language.<sup>449</sup> The attorney general spends most of the opinion explaining the legislature’s power to free land from the public trust right to fish and then slips the question of releasing the fishing rights reservation into that same analytical framework.<sup>450</sup> But treating a clause guaranteeing a right as “simply declar[ing] [a] pre-existing privilege” sells the amendment short.<sup>451</sup> Once added to the constitution, the right took away the flexibilities allowed by the public trust doctrine, and the legislature could no longer extinguish the right, the Leslie Salt opinion’s errant conclusion notwithstanding. Many of the attorney general opinions seem to use the *Paladini* language to downplay the significance of the right, rendering it a codification of a prior public trust right.<sup>452</sup> But constitutionalizing a right has consequences. It takes power away from the state in order to protect a right dedicated to the public. It also means that the right to fish is no longer dependent on mutable court interpretations of the public trust nor subject to the standard complaints about the public trust doctrine. Treating the amendment as a restatement of common law public trust rights ignores these consequences.

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<sup>445</sup> Silvyn, *supra* note 62, at 356–57.

<sup>446</sup> 173 P. 588 (Cal. 1918).

<sup>447</sup> *Id.* at 589.

<sup>448</sup> 22 Cal. Att’y Gen. Op. No. 53–193, *supra* note 260, at 137.

<sup>449</sup> Leslie Salt Opinion, *supra* note 346, at 9–10.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* at 10.

<sup>452</sup> The 1970 Whale Rock opinion, itself largely unobjectionable, makes the same mistake. See 53 Cal. Att’y Gen Op. No. 70-22, *supra* note 286, at 90 (relying upon the language from *Paladini*, which, in effect, understates the significance of the right to fish).

The amendment also provides broader access than the California public trust. On lands subject to it, the reservation requirement provides physical access to private lands above the high-water mark.<sup>453</sup> It allows anglers to cross private land burdened with the right to access fishing.<sup>454</sup> And it applies to any fishable waters, even if those waters cannot be navigated by a craft of any description or if they do not otherwise qualify for public trust protections.<sup>455</sup> This is a broad and powerful right—California’s public trust does not provide these protections.<sup>456</sup>

## 2. Incentives for Agency Action

Many early California laws sought to protect fish and fisheries, including laws requiring minimum instream flows or laws seeking to abate barriers to fish passage.<sup>457</sup> These laws set meaningful requirements that could have resulted in the long-term protection of California fish populations, but most of these laws have gone largely unenforced. Although the public trust doctrine and its broad standing provisions offer private litigants some ways to enforce these laws, meaningful enforcement by the administrative agencies charged with the protection of California’s resources would be a better approach.

The reasons for the agencies’ failure to enforce these laws are myriad, but absent such enforcement, compliance seems likely to be spotty at best. In the case of the fishing right, after the amendment added protection for the right, the legislature neglected to charge an agency with its implementation. This weakened the impact of the amendment. For example, Surveyor General William Kingsbury only seemed to note the amendment’s requirements when a citizen group petitioned him to remind him of his obligation to include the required reservations.<sup>458</sup>

The fate of the fishing amendment stands in stark contrast to other efforts to increase access in California, undertaken by agencies like the

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<sup>453</sup> Silvyn, *supra* note 62, at 358.

<sup>454</sup> CAL. CONST. art. I, § 25 (1910).

<sup>455</sup> Silvyn, *supra* note 62, at 365–66.

<sup>456</sup> The amendment may augment the public trust doctrine by adding the lands subject to the fishing rights to the lands protected by the public trust, and consequently applying the procedural requirements of the public trust (public agency consideration of the effect of decisions on the public trust interests and so far as feasible avoiding interference with those interests, and providing this consideration in a public process) to public agency decisions that may affect the public’s access to and use of lands subject to the fishing rights reservation. Note this is in addition to the statutory obligation of public agencies to reserve convenient access to other state-owned land when selling leasing or renting state-owned land which provides the only convenient access to the other land. CAL. PUB. RES. CODE § 6210.5 (1949).

<sup>457</sup> See Karrigan Bork, *Targeting Public Trust Suits*, 29 ENV’T L. NEWS 3, 4 (2020) (referencing California laws and regulations that protect fish and waterways, such as the state’s Wild and Scenic Rivers Act and Section 5937 of the Fish and Game Code—which requires dam operators to release sufficient amounts of water to protect downstream fish).

<sup>458</sup> *Fishing Rights on State Land Reserved*, S.F. CHRON., July 1, 1915, at 8 (PROQUEST HISTORICAL NEWSPAPERS).

San Francisco Bay Conservation and Development Commission,<sup>459</sup> the California Coastal Commission,<sup>460</sup> or the California State Parks at legislative insistence.<sup>461</sup> The state Department of Fish and Wildlife currently maintains an online map with some fishing access information and fish stocking information, but the map is not comprehensive and does not make any claims about access to state lands generally.<sup>462</sup> The map omits access points on most California rivers, for example, greatly limiting its coverage. It also does not appear to reflect the fishing access rights attached to state lands; the currently owned school lands, available in GIS format from the State Land Commission, do not show up on the fishing map.<sup>463</sup>

The CSLC, the agency whose mission relates most closely to the fishing right, manages huge amounts of land but has never been directly tasked with implementing this right. It has the historical land sales data and other information necessary to implement a more robust right to fish in California. As noted, this could cover a significant amount of land, roughly 2.26% of private land in California.<sup>464</sup> The legislature could reinvigorate the fishing rights by charging the CSLC or another state agency with its implementation. Coupled with sufficient funding, such an action could significantly expand fishing access in underserved areas in California.

Finally, attention to the reservation requirement also stands in contrast to the state's protection of the mineral rights reservation.<sup>465</sup> Since 1921, California has reserved the mineral rights when selling state lands, and the mineral rights are then leased to generate additional revenue.<sup>466</sup> This requirement puts more money in the California coffers, and, perhaps predictably, the state tracks mineral reservations very closely.<sup>467</sup> Similarly, the CSLC manages retained school lands to generate revenue for the state, and these lands and activities are also closely tracked and publicly reported.<sup>468</sup> With proper incentives, state agencies can accurately track and aggressively enforce public reservations on private lands, and the state legislature should act to realign incentives to produce similar outcomes in the fishing rights context. Such efforts could

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<sup>459</sup> S.F. BAY CONSERVATION & DEV. COMM'N, *supra* note 23, at 20.

<sup>460</sup> CAL. COSTAL COMM'N, *supra* note 23, at 7.

<sup>461</sup> CAL. OUTDOOR RECREATION PLAN, *supra* note 9, at 60.

<sup>462</sup> *Fishing Guide*, CAL. DEPT OF FISH & WILDLIFE, <https://perma.cc/45E4-ALLU> (last visited Oct. 10, 2021).

<sup>463</sup> *GIS Open Data*, CAL. STATE LANDS COMM'N, <https://perma.cc/6MMR-GKKQ> (last visited Oct. 17, 2021).

<sup>464</sup> *See supra* text accompanying note 326.

<sup>465</sup> CAL. PUB. RES. CODE § 6401 (2021).

<sup>466</sup> 1921 Cal. Stat. 404-303.

<sup>467</sup> *See* CSLC ANNUAL STAFF REPORT 2018–19, *supra* note 326, at 1, 4–5, 7, 9–10 (Carrying out their mandate to “enhance[]” and “proactively” manage school lands and attendant interests, California regulates reserved mineral interests on 790,000 acres of land, generating \$798,385.51 in solid mineral royalties.).

<sup>468</sup> *Id.* at 11.

include explicitly assigning an agency the responsibility for implementing the fishing right or tying CSLC budgets to efforts to enforce the right.

### *C. Pursuing the Public Right to Fish*

Advocates seeking to develop a more robust right to fish in California should consider what ought to be included in a robust right to fish. At a minimum, goals should include better information on fishing opportunities on state lands in underserved areas and better information about private lands subject to the fishing reservation, coupled with public access to those lands. Mapping these lands and sharing that map publicly would go a long way toward vindicating the right.

The CSLC should also prospectively and retrospectively fix titles for conveyed land to provide easier use of the reserved fishing right. This reservation is likely to come as a surprise to landowners who did not know that their property is burdened by a public access right, and the state should work with them to ease the impacts of the public use. For example, this right likely takes the form of a floating easement over the private land, and the state could reduce the burden to affected landowners by specifically locating the easement in a fixed location on the land through on-the-ground fact-finding work or could assist with parking arrangements.<sup>469</sup>

It would be nice if the state guarded the fishing right as jealously as it does the mineral rights reservation, but this seems unlikely. Lawsuits may be able to compel state agencies to more vigorously pursue the right, but, fortunately, the public need not wait for state action. Often, public users find themselves asserting a public use right as a defense, most often the right to navigation and its incidents, when an irate landowner brings an action seeking to enjoin ongoing public use after the public has helped itself to the public resource.<sup>470</sup> For example, after a levee along the San Joaquin River broke, the river flooded an island known as Frank's Tract.

[T]he general public in large numbers ha[s] gone on the tract in rowboats, skiffs and pleasure boats and have fished there. . . . [P]laintiffs have attempted to bar the public therefrom, charging a fee or license for the privilege of fishing on the tract. Plaintiffs brought [an] action to quiet their title to the land and the waters thereon. Defendants answered, claiming for themselves and the general public the right of navigation and fishing on and in said waters.<sup>471</sup>

In cases like these, courts have consistently found standing for members of the public to assert constitutional arguments as a defense. “A

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<sup>469</sup> S. Cal. Edison Co. v. Severns, 252 Cal. Rptr. 3d 667, 673–74 (Ct. App. 2019).

<sup>470</sup> See, e.g., *Forestier*, 127 P. 156, 162 (Cal. 1912) (“A person against whom an action is begun to enjoin him from using navigable water, or other public way, may defend by asserting his public right to do so.”).

<sup>471</sup> *Bohn*, 238 P.2d 128, 129–30 (Cal. Ct. App. 1951).

person against whom an action is begun to enjoin him from using navigable water, or other public way, may defend by asserting his public right to do so. He need not, in such a case, show private injury either to person or property.”<sup>472</sup> This route to asserting the constitutional fishing right offers some advantages: successful self-help is cheaper than litigation, it makes a clear statement that the angler believes she has a right to fish the waters in question, it puts the decision as to whether litigation is appropriate in the hands of the property owner, and it forces the property owner to incur the burdens and costs of initiating litigation. Although this approach seems to have been the choice of most prospective litigants, self-help presents some risks beyond the inherent risk of bodily harm due to violent resistance. California has a strong policy against self-help in situations ranging from landlord/tenant disputes to easement issues to boundary fence arguments, although cases imposing this policy have largely been conflicts between two private landowners.<sup>473</sup> California statutory and common law imposes liability for forcible interference with “one in peaceable though wrongful possession of real property . . . even in the absence of injury to his person or goods,”<sup>474</sup> but again, this has only arisen in the context of disputes between private landowners.<sup>475</sup> Advocates who argue that a fishing reservation exists and has created a public easement may also face liability if they are wrong.<sup>476</sup>

The cases critical of self-help in private ownership disagreements conflict with other authority that favors self-help in the public nuisance context. Under California Civil Code Section 3479, “[a]nything which . . . unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.”<sup>477</sup> This would encompass anything barring constitutionally guaranteed access to fishing resources. Civil Code Section 3495 states that “[a]ny person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.”<sup>478</sup> Again, this is hard to square with the line of cases criticizing self-help, especially as Civil Code Section 3502 provides the same self-help remedy for a private

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<sup>472</sup> *Forestier*, 127 P. at 162.

<sup>473</sup> See *Daluiso v. Boone*, 455 P.2d 811, 821 (Cal. 1969) (citing *ROSCOE POUND, JUR.* § 142, at 351–52 (1959)) (“Self help is in conflict with the very idea of social order. It subjects the weaker to risk of the arbitrary will or mistaken belief of the stronger. Hence the law in general forbids it.”).

<sup>474</sup> *Allen v. McMillion*, 147 Cal. Rptr. 77, 80 (Ct. App. 1978). The force required is minor and need not be against a person; removal of a fence or gate might suffice. *Id.* at 79–80.

<sup>475</sup> *But see CAL. FISH & GAME CODE* § 2004 (1974). (“It is unlawful for any person, while taking any bird, mammal, fish, reptile, or amphibian, to cause damage, or assist in causing damage, to real or personal property, or to leave gates or bars open, or to break down, destroy, or damage fences.”).

<sup>476</sup> See *Glass v. Gulf Oil Corp.*, 96 Cal. Rptr. 902, 904–06 (Ct. App. 1970) (explaining liability under the California tort “slander of title”).

<sup>477</sup> CAL. CIV. CODE § 3479 (1996).

<sup>478</sup> CAL. CIV. CODE § 3495 (1872).

nuisance.<sup>479</sup> Note, however, that the self-help approach requires the public nuisance be specially injurious to the one removing the nuisance;<sup>480</sup> what this means remains unclear.<sup>481</sup> Of course, state and local officials can bring public nuisance actions to abate the nuisance and provide fishing access.<sup>482</sup>

Even absent self-help, however, anglers are not without recourse. A member of the public can sue to enjoin an obstruction or an unreasonable interference with her use of fishing rights easement or seek “declaratory and injunctive relief to resolve a dispute regarding the nature and scope of that easement;” this approach is not subject to the “specially injurious” requirement.<sup>483</sup> Advocacy groups have sought court orders to declare and enjoin interference with a public easement in other contexts, and such suits can result in fee awards for “the enforcement of an important right affecting the public interest.”<sup>484</sup> “[T]he right to public ownership of public property, the easement in issue. . . is [just such] an important public right.”<sup>485</sup> These causes of action allow the would-be-angler to file suit to open for public fishing those privately held lands subject to the fishing right reservation.<sup>486</sup> Perhaps more importantly, success in these suits would establish better conditions for negotiations

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<sup>479</sup> CAL. CIV. CODE § 3502 (1872) (“A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing which constitutes the nuisance, without committing a breach of the peace, or doing unnecessary injury.”).

<sup>480</sup> CAL. CIV. CODE § 3493 (1872) (“A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.”).

<sup>481</sup> Koll-Irvine Ctr. Property Owners Ass’n v. Cty. of Orange, 29 Cal. Rptr. 2d 664, 666 (Ct. App. 1994) (“The damage suffered must be different in kind and not merely in degree from that suffered by other members of the public.”); *but see* Zack’s, Inc. v. City of Sausalito, 81 Cal. Rptr. 3d 797, 818 (Ct. App. 2008).

<sup>482</sup> CAL. CIV. PROC. CODE § 731 (2010); *see* CAL. FISH & GAME CODE § 2009 (2009) (making it a misdemeanor to interfere with hunting and fishing by posting signs without authorization).

<sup>483</sup> McBride v. Smith, 227 Cal. Rptr. 3d 390, 403 (Ct. App. 2018); Scruby v. Vintage Grapevine, Inc., 43 Cal. Rptr. 2d 810, 812 (Ct. App. 1995); *see Marks*, 491 P.2d 374, 378 (Cal. 1971) (discussing a private citizen asserting a public use easement in response to a quiet title action); Kern River Pub. Access Comm. v. City of Bakersfield, 217 Cal. Rptr. 125, 136 (Ct. App. 1985) (discussing a non-governmental organization suing to create a public easement for navigation). *See generally* CAL. CIV. PROC. CODE § 731 (2010) (“An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as defined in Section 3479 of the Civil Code.”); CAL. CIV. CODE § 3493 (1872) (“A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.”).

<sup>484</sup> Friends of the Trails v. Blasius, 93 Cal. Rptr. 2d 193, 208 (Ct. App. 2000) (citing CAL. CIV. PROC. § 1021.511); *see Kern River Pub. Access Comm.*, 217 Cal. Rptr. at 138 (discussing that “[w]hen a local agency, like the city. . . fails to enforce this law, private suits . . . are the only practical way to effectuate the policy, so attorney’s fees awards are appropriate.”); Pavan v. Walmer, No. C073012, 2015 WL 4150696, at \*15–16 (Cal. Ct. App. 2015).

<sup>485</sup> *Blasius*, 93 Cal. Rptr. 2d at 208.

<sup>486</sup> Moreover, such lawsuits seem likely to draw the attention of California’s title insurance companies and real estate attorneys, who would be likely to spread word of the fishing rights reservation. *See supra* text accompanying note 484.

over public access with other owners of land burdened with the fishing easement.

Opening new areas to shore fishing is not without cost; new fishing locations open additional areas to some level of degradation due to increased use and will necessitate additional resources to enforce fishing and other state laws.<sup>487</sup> This should not be a barrier to publicizing lands open to fishing; *California v. SLOSA* imposes responsibility on the state for creating programs to facilitate increased fishing access and minimize the impacts of that access.<sup>488</sup> In some states with significant fishing resources on private lands, nonprofit organizations like Trout Unlimited have negotiated the creation of access points to privately held waters, which cabin the use of these waters and concentrate impacts for easier mitigation.<sup>489</sup> Perhaps the CSLC or other entities could work with state and private landowners to implement similar programs in California. Regardless, these concerns were considered when the fishing right was created, and the legislature and voters of the state decided that protecting public fishing access was more important. As a prerequisite for this kind of work, both the reservation and access requirements for the right to fish must be more firmly established and more well known to landowners, which is likely to require litigation and which could be added by legislative action.

## VI. CONCLUSION

Public rights to use private property for recreation, hunting, fishing, and navigation, often enshrined in state constitutions, statutes, or the common law, are often broader than public trust rights and are not constrained by the public trust's limitations. Existing approaches to these public use rights often confuse these rights with the public trust doctrine, which can result in under protection of the public use rights. California's constitutional right to fish is a public use right, distinct from the public trust doctrine, and the conflation of California's constitutional right to fish with traditional public trust fishing protections has weakened the fishing right. Private litigation targeting public agencies who have not enforced the public use right and private landowners who block the constitutionally-required public fishing access could result in a more robust right to fish. More broadly, understanding the origin and history of public use rights is essential to their protection.

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<sup>487</sup> See Amanda C. O'Toole et al., *The Effect of Shoreline Recreational Angling Activities on Aquatic and Riparian Habitat Within an Urban Environment: Implications for Conservation and Management*, 44 ENV'T MGMT. 324, 329, 331–32 (2009) (Degradation can include localized ecological effects and increases in litter); see also *id.* at 330–31 (showing Table 3 and Figure 3 comparisons of angling- and non-angling-related litter).

<sup>488</sup> *SLOSA*, 584 P.2d 1088, 1095 (Cal. 1978); see Usman, *supra* note 35, at 85 (“In fact, some courts have suggested that these amendments impose upon states an affirmative constitutional obligation to enact laws that preserve hunting and fishing.”).

<sup>489</sup> See TROUT UNLIMITED, LAND PROTECTION PROJECT: SUCCESS STORIES AND CASE STUDIES 5–6, 9 (2010), <https://perma.cc/XZ5X-6JLD>.