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All Dried Up: Summer Holiday Prohibition on the Lower American River

Isaac T. Bacher

Code Section Affected

Business and Professions Code § 25608.5 (new).

AB 951 (Jones); 2007 STAT. Ch. 19 (*Effective June 28, 2007*).

I. INTRODUCTION

Brian Haight was nineteen years old, an only child, and preparing for his sophomore year at the University of California, Berkeley.¹ Kendall Lui was eighteen years old, an economics major at the University of California, San Diego, and “a disciplined dancer.”² After a day of floating down the American River on the Fourth of July, 2006, the two college students and two other friends got into a car with their designated driver Michael Dimitras.³ Speeding down Folsom Boulevard at approximately seventy miles per hour, Dimitras, whose blood alcohol level was above the 0.08 legal limit, lost control of the car and crashed into a utility pole, killing Brian and Kendall.⁴ Dimitras, “charged with two counts of vehicular manslaughter without gross negligence, and with driving under the influence causing great bodily injury,” faces up to eight years and four months in state prison.⁵

During that tragic weekend, Brian, Kendall, and Dimitras were among a record-setting 10,000 people who floated down the stretch of the American River between the Hazel Avenue and Watt Avenue bridges.⁶ It is estimated that “roughly 5,000-6,000 people rafted down [the] 13-mile river stretch [during the] Memorial and Labor Day holidays” in 2006.⁷ Although nobody has drowned during one of these busy weekends, many believe that the river has become an increasingly dangerous place.⁸ As one supporter of Chapter 19 explained, “[n]ot only are many too drunk to stand, let alone walk or drive, many of those who are able to still function resort to attacks on other—often innocent—rafters, fight

1. Mark Hedlund, *Victims' Parents Question Long Delay in Charges Against Teen*, NEWS10 ABC, Feb. 13, 2007, <http://www.news10.net/printfullstory.aspx?storyid=24400> (on file with the *McGeorge Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Letter from Don Nottoli et al., Chairman, Sacramento County Bd. of Supervisors, to Arnold Schwarzenegger, Cal. State Governor (June 18, 2007) [hereinafter Nottoli Letter] (on file with the *McGeorge Law Review*).

7. *Id.*

8. Ed Fletcher, *American River Going 'Dry': Schwarzenegger Signs Bill Banning Holiday Boozing on the Water*, SACRAMENTO BEE, June 29, 2007, at B1, available at <http://www.sacbee.com/101/v-print/story/248103.html>.

among themselves, remove their clothing, and defecate and urinate on the river banks.”⁹ Beginning as a fun holiday celebration, floating down the American River can quickly devolve into a dangerous, alcohol-fueled melee; one that has claimed the lives of two bright young college students.¹⁰

II. LEGAL BACKGROUND

In 1933, the era of Prohibition came to an end with the enactment of the Twenty-First Amendment to the U.S. Constitution.¹¹ After the repeal of prohibition, states retained the power to create laws to regulate the sale and distribution of alcoholic beverages.¹² In California, the Legislature established the Department of Alcoholic Beverage Control¹³ (ABC) and entrusted it with the responsibility of enforcing the provisions of the ABC Act.¹⁴

The ABC Act makes it illegal to “operate any vessel¹⁵ or manipulate water skis, an aquaplane, or a similar device while under the influence of an alcoholic beverage.”¹⁶ For recreational vessels,¹⁷ this means a blood alcohol concentration¹⁸ (BAC) of 0.08 percent or greater.¹⁹ For non-recreational vessels, under the influence means a BAC of 0.04 percent or greater.²⁰ A violation of either provision carries a first-offense penalty of up to a \$1000 fine, six months in county jail, or both.²¹ For the second violation within seven years, the penalty

9. Letter from Warren V. Truitt, President, Save the Am. River Ass’n, Inc. (SARA), to Assembly Member Dave Jones, Cal. State Assembly (Mar. 1, 2007) (on file with the *McGeorge Law Review*); see Bill Lindelof, *First-Aid Skill Put to the Test: Effie Yeaw Nature Workers Help Rafters Hurt in July 4 Rock-Throwing Fight*, SACRAMENTO BEE, July 13, 2006, at G1 (telling the story of a violent rock-throwing fight where ten people were hit in the head with rocks).

10. See Hedlund, *supra* note 1 (telling the tragic story of the death of Brian Haight and Kendall Lui); Lindelof, *supra* note 9 (telling the story of a violent rock-throwing fight where ten people were hit in the head with rocks).

11. See U.S. CONST. amend. XXI, § 1 (repealing the Eighteenth Amendment to the U.S. Constitution); U.S. CONST. amend. XVIII, § 1 (making the “manufacture, sale or transportation of intoxication liquors” within the U.S. illegal).

12. See U.S. CONST. amend XXI, § 1 (repealing the Eighteenth Amendment, which had been the sweeping ban on all alcoholic beverages known as Prohibition); U.S. CONST. amend. X (reserving to the states or the people all powers “not delegated to the United States by the Constitution, nor prohibited by it to the States”).

13. CAL BUS. & PROF. CODE § 23050 (West 1997 & Supp. 2007).

14. See *id.* § 23049 (West 1997).

15. See CAL. HARB. & NAV. CODE § 651(aa) (West 2001) (defining vessel to “include[] every description of watercraft used or capable of being used as a means of transportation on water”).

16. *Id.* § 655(f).

17. See *id.* § 651(t) (defining recreational vessel to “mean[] a vessel that is being used only for pleasure”).

18. See *id.* § 651(b) (defining alcohol concentration to “mean[] either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath”).

19. *Id.* § 655(c).

20. *Id.* § 655(d).

21. *Id.* § 668(e).

increases to a combination of any of the following: up to a \$1000 fine, one year in jail, or eighteen to thirty months in a state licensed rehabilitation program.²²

The State of California grants cities and counties the power to prohibit the possession of open containers of alcoholic beverages without a license in any city or county owned public place.²³ Sacramento approved one such resolution, making it illegal to possess an open alcoholic beverage along the banks of the American River without a license.²⁴ According to both state and local law, possessing an open container in a public place without a license from the ABC Board is punishable as an infraction.²⁵

Faced with the problem of rowdy river rafters, California is not the first state to ban alcohol from one of its rivers.²⁶ In Idaho, officials “[f]aced with a similar situation” banned alcohol on the Boise River in 2005.²⁷ The city has since issued fewer alcohol citations, and the “[p]olice get fewer calls for fights and public nudity.”²⁸ According to one source, rafting down the Boise River has since “been voted by residents as the city’s ‘Best Family Recreational Destination.’”²⁹ Oregon has not gone so far as to ban alcohol on the water, but it has enacted a temporary ban along the Clackamas River in Barton and Carver parks in response to problems with drunken rafters’ behavior once they have migrated ashore.³⁰ Texas also passed ordinances last year “to clamp down on rowdy tubers[,] . . . limit the size of coolers allowed on the rivers, prohibit alcohol consumption in some riverside parks, and ban Jell-O shots and beer bong on the rivers.”³¹

22. *Id.* § 668(f). The penalty for the second offense within seven years is also triggered if the first offense was vehicular manslaughter, grossly negligent driving, or driving an automobile while under the influence. *Id.*

23. CAL. BUS. & PROF. CODE § 25620(a) (West 1997 & Supp. 2007).

24. SACRAMENTO, CAL., SACRAMENTO COUNTY BD. OF SUPERVISORS, RESOLUTION 2006-0969 (2006).

25. See CAL. GOV'T CODE § 36900(a) (West 1988 & Supp. 2007) (“Violation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction.”); SACRAMENTO, CAL., SACRAMENTO CITY CODE § 9.04.055(E) (“Unless another penalty is specified in state law, any person violating this section shall be guilty of an infraction.”). An infraction is punishable by up to a \$100 fine for the first offense, up to \$200 for the second offense within one year, and up to \$500 for each additional offense within the same year. CAL. GOV'T CODE § 36900(b).

26. See Editorial, *Deter River Drunkfests*, SACRAMENTO BEE, June 20, 2007, at B6 (explaining a similar alcohol ban enacted in Idaho with regard to the Boise River).

27. *Id.*

28. *Id.*

29. *Id.*

30. Jessica Bruder, *Two Clackamas River Parks Get Temporary Alcohol Ban*, THE OREGONIAN, July 18, 2007, http://blog.oregonlive.com/breakingnews/2007/07/two_clackamas_river_parks_get.html (on file with *McGeorge Law Review*).

31. *New Braunfels Businesses Sue over River Alcohol Rules*, NEWS 8 AUSTIN, Apr. 11, 2007, http://www.news8austin.com/content/top_stories/default.asp?ArID=182304 (on file with the *McGeorge Law Review*).

III. CHAPTER 19

Chapter 19 is an urgency³² measure designed to ban alcohol “[o]n the portion of the Lower American River . . . from the Hazel Avenue Bridge to the Watt Avenue Bridge.”³³ Chapter 19 makes it an infraction³⁴ to possess an open or closed container³⁵ of alcohol while floating down the specified part of the river in a nonmotorized vessel.³⁶ The alcohol ban is enforceable only “during the summer holiday periods that the Sacramento County Board of Supervisors prohibits the consumption or possession of an open alcoholic beverage container on the land portions along the river.”³⁷

IV. ANALYSIS

Essentially, Chapter 19 increases the power of the Sacramento County Board of Supervisors by extending the alcohol ban from the land out into the water.³⁸ In doing so, Chapter 19 creates a new infraction within the meaning of section 17556 of the Government Code.³⁹ Without the new measure, the power of the Sacramento County Board of Supervisors to ban alcohol ended at the American River’s shoreline⁴⁰ because “[t]he state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters.”⁴¹ Chapter 19 was designed specifically to “close this loophole.”⁴²

32. 2007 Cal. Stat. ch. 19, § 4 (“[D]ue to the problem of consumption of alcohol during certain summer holiday periods[,] . . . it is necessary for this act to take effect immediately.”).

33. CAL. BUS. & PROF. CODE § 25608.5(a) (enacted by Chapter 19).

34. See CAL. GOV’T CODE § 25132(b) (West 2003 & Supp. 2007) (defining the potential penalties for an infraction).

35. CAL. BUS. & PROF. CODE § 25608.5(b) (enacted by Chapter 19) (defining container to mean a “bottle, can, or other receptacle”).

36. *Id.* § 25608.5(a), (c) (enacted by Chapter 19).

37. *Id.* § 25608.5(a) (enacted by Chapter 19).

38. See *id.* (creating an alcohol ban on the water, an area over which the state has exclusive jurisdiction).

39. 2007 Cal. Stat. ch. 19, § 3; see also CAL. GOV’T CODE § 17556(g) (West 1995 & Supp. 2007) (explaining that the state shall not pay mandated costs when enacting a law that creates a new crime or infraction).

40. See SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 951, at 3 (May 22, 2007) (“[T]he County resolution does not prevent an individual from carrying an alcoholic beverage to the river in a closed container and then consuming that beverage in a non-motorized vessel on the river.”).

41. *Nat’l Audubon Soc’y v. Super. Ct.*, 33 Cal. 3d 419, 445, 658 P.2d 709, 727 (1983); see also SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 951, at 3 (May 22, 2007).

In response to [past violent behavior that has occurred during the three holiday weekends], last summer the County adopted a resolution banning open containers of alcohol, or its consumption, along portions of the American River Parkway “shoreline” where rafting occurs between the Hazel Avenue Bridge and the Watt Avenue Bridge during the three summer holidays.

However, the state has jurisdiction over alcohol on the waterway itself.

Id.

42. SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 951, at 3 (May 22, 2007).

Chapter 19 was passed as an urgency measure because supporters adamantly wanted to ban alcohol on the American River in time to prevent another Fourth of July tragedy.⁴³ While they were successful in banning alcohol in time for the Fourth of July, the language used by Chapter 19 may not be specific enough to include Memorial Day weekend.

By grouping together Memorial Day, Labor Day, and the Fourth of July under the label “summer holiday periods,”⁴⁴ Chapter 19 may have no effect on Memorial Day weekend because it is a holiday that does not fall in the summer season.⁴⁵ Summer generally consists of “the period between the summer solstice (year’s longest day), June 21 or 22, and the autumnal equinox ([when the] day and night [are] equal in length), September 22 or 23” in the Northern Hemisphere.⁴⁶ Since Memorial Day always falls on the last Monday of May,⁴⁷ one could argue that it is not a “summer holiday” within the meaning of Chapter 19.⁴⁸ However, the Senate Committee on Governmental Organization indicated Memorial Day is to be included in the term “summer holiday.”⁴⁹ Still, Memorial Day is technically more than two weeks before the first day of the summer season.⁵⁰ Moreover, the rule of lenity, a rule of statutory construction, generally requires that ambiguities in criminal statutes be resolved in favor of the defendant.⁵¹

While multiple states have faced similar problems, California’s approach seems to have had at least some success in reducing the chaos this past Fourth of July.⁵² Although some alcohol was confiscated by the police, “[m]ost offenders

43. See Nottoli Letter, *supra* note 6 (“The bill contains an urgency clause in hopes that the bill can become law by the upcoming 4th of July weekend.”).

44. CAL. BUS. & PROF. CODE § 25608.5(a) (enacted by Chapter 19).

45. See Memorial Day History, <http://www.usmemorialday.org/backgrnd.html> (last visited on July 28, 2007) (on file with *McGeorge Law Review*) (stating that Memorial Day is celebrated on the last Monday in May).

46. Encyclopedia Britannica Online, Summer, <http://www.britannica.com/eb/article-9070305/summer> (last visited Feb. 22, 2008) [hereinafter Summer] (on file with the *McGeorge Law Review*).

47. See 36 U.S.C.A. § 116(a) (West 2001) (“The last Monday in May is Memorial Day.”). As an interesting aside, several attempts have been made to restore the traditional day of observance of Memorial Day to May 30th. See, e.g., S. 70, 110th Cong. § 1(a) (2007).

48. See CAL. BUS. & PROF. CODE § 25608.5(a) (enacted by Chapter 19) (prohibiting possession of alcoholic beverages during the “summer holiday periods”).

49. See SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 951, at 3 (May 22, 2007) (“This measure . . . [applies] during the three-day Memorial Day, Fourth of July and Labor Day weekends.”).

50. Compare 36 U.S.C.A. § 116(a) (“The last Monday in May is Memorial Day.”), with Summer, *supra* note 46 (explaining that the summer season begins at the summer solstice on either June 21 or 22).

51. *People v. Canty*, 32 Cal. 4th 1266, 1277, 90 P.3d 1168, 1173 (2004) (“[U]nder the traditional ‘rule of lenity,’ language in a penal statute that truly is susceptible of more than one reasonable construction in meaning or application ordinarily is construed in the manner that is more favorable to the defendant.”).

52. See Mark Hedlund, *River Booze Ban Calms Holiday Waters*, NEWS10 ABC, July 4, 2007, http://www.news10.net/display_story.aspx?storyid=29899 (on file with the *McGeorge Law Review*) (claiming that the river was not as rowdy as usual and that the total number of people was reduced by up to fifty percent).

were simply given a warning and lost their alcohol.”⁵³ This brings into question the assertion by some that the additional cost to enforce this new law would be offset by revenue from fines.⁵⁴ It is possible that the river will continue to be policed during major holiday weekends without generating revenue. However, it is equally plausible that the police went out of their way to be lenient this past Fourth of July because the law was new and the general public may not have been aware of it. Even if offsetting fees are not collected, creating a family friendly environment on the river may be a price taxpayers are happy to pay.⁵⁵

V. CONCLUSION

Although it is unclear whether the language of Chapter 19 applies to Memorial Day weekend, at least the Senate Committee on Governmental Organization clearly supports its inclusion within the term “summer holiday periods.”⁵⁶ Less clear is whether or not fees collected for future infractions will offset the cost to enforce the law. Regardless, the American River is likely to be a safer place during summer holidays for years to come.⁵⁷ Unfortunately for Brian Haight and Kendall Lui, Chapter 19 came one year too late.

53. *Id.*

54. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 951, at 2 (June 18, 2007) (“According to the Assembly Appropriations Committee, potential non-reimbursement costs for enforcement offset by revenue for fines.”).

55. See Hedlund, *supra* note 52 (quoting a comment from one man who brought his kids to the river on the Fourth of July because he heard that the alcohol ban was going to be in enforced).

56. See SENATE COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 951, at 3 (May 22, 2007) (“This measure . . . [applies] during the three-day Memorial Day, Fourth of July and Labor Day weekends.”).

57. See Hedlund, *supra* note 52 (noting that there were half as many people on the American River in 2007 in comparison to 2006 and that those who were there were much less rowdy).