No. 89, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA, ex rel.
STATE LANDS COMMISSION,
Plaintiff,

VS.

UNITED STATES OF AMERICA,
Defendant.

On Bill of Complaint

Plaintiff, State of California, ex rel. State Lands Commission's Opening Brief In Support of Its Motion For Summary Judgment and In Opposition to the United States' Motion for Judgment on the Pleadings

GEORGE DEUKMEJIAN
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
BRUCE S. FLUSHMAN
(Counsel of Record)
Deputy Attorneys General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-1152
Attorneys for Plaintiff

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Can California be defeased of its absolute title to its sovereign land, in violation of the plain mandate of *State Land Board v. Corvallis Sand & Gravel Company*, 429 U.S. 363 (1977), by the unilateral action of the United States?

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JURISDICTIONAL STATEMENT AND PROCEDURAL STATUS OF CASE

By Motion for Leave to File Complaint in Original Action, filed July 7, 1981, Plaintiff, State of California, ex rel. State Lands Commission ("California") brought this original action against the United States under authority of Article III, Section 2 of the Constitution and 28 U.S.C. section 1251(b). On October 5, 1981, an order issued granting California's motion for leave to file complaint and requiring the United States to answer within 60 days. In November, 1981, the United States answered and, as well,

filed a motion for judgment on the pleadings. Thereafter, in November, 1981, California filed its motion for summary judgment and memorandum in opposition to the United States' motion for judgment on the pleadings. In their memoranda both parties requested leave to file briefs in support of their respective positions. By orders of November 30, 1981, and December 5, 1981, the Court set the cross motions for oral argument in due course and invited the parties to file simultaneous opening briefs in support of their respective positions 45 days after November 30, 1981. This opening brief is responsive to such orders.

STATEMENT OF THE CASE

On September 9, 1850, the date of California's admission into the Union, the land that is the subject of this dispute ("subject land") was land under the navigable, tidal waters of the Pacific Ocean lying along the ordinary high-water mark immediately north and west of the entrance to Humboldt Bay, California.[1] California, as an incident of its sovereignty, was the owner of these sovereign lands. E.g., *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1844); *Weber v. Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *Shively v. Bowlby*, 152 U.S. 1, 26-27 (1894); *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935); *State Land Board v. Corvallis Sand and Gravel Co.* ("Corvallis") 429 U.S. 363, 370-374 (1977). California

[1]Exhibit B to California's complaint depicts, for illustrative purposes, the geographic location of the subject land and its relation to adjacent United States public lands. For the Court's convenience, a copy of that Exhibit is attached hereto.

acquired such lands on an "equal-footing" with the Original States. *Ibid.* The United States has no claim of title to such lands. E.g., *Shively, supra,* 152 U.S. at 57; *United States v. California,* 332 U.S. 19, 38-39 (1947) ("the 1947 California Decision"); *United States v. California* (Decree), 332 U.S. 804, 805 (1947); *United States v. Texas,* 339 U.S. 707, 719, 723 (Reed, J., dissenting), 724 (separate views of Frankfurter, J.) (1950); *United States v. California* (Supplemental Decree), 382 U.S. 448, 452-453 (1966). And Congress confirmed California's title to such sovereign lands in the Submerged Lands Act, Act of May 22, 1953, Title II, § 3, 67 Stat. 30, 43 U.S.C. § 1311; *United States v. California,* 436 U.S. 32, 37 (1978). Thus, at the time of California's admission to the Union, California's title to these sovereign lands vis-a-vis the United States was ". . . absolute so far as any federal principle of land titles [was] concerned . . .", *Corvallis, supra,* 429 U.S. at 374 and ". . . complete . . . [,] no power of disposition remain[ing] with the United States . . .", *Borax, Ltd., supra,* 296 U.S. at 19.

Township plats prepared by the United States showing the extent and location of the public lands in the townships in which the subject land is located[2] establish that, in 1854, the subject land lay seaward of the ordinary high-water mark, being the seaward boundary of the public lands of the United States and the landward boundary of the sover-

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[2]Certified copies of these plats were lodged, on July 7, 1981, with the Court as Exhibit A to the "Exhibits in Support of California's Motion for Leave to File Complaint; Matters of Which Judicial Notice is Requested" (hereinafter "Supporting Exhibits"). California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit A as containing facts not subject to reasonable dispute.

eign lands of California. *Packer v. Bird,* 137 U.S. 661, 666, 671-672 (1891); *Borax, Ltd., supra,* 296 U.S. at 22, 26. The United States has admitted as much.[3]

In 1859 and 1871 the United States withdrew from disposition the public lands immediately adjacent to the subject lands.[4] These withdrawn public lands are referred to collectively herein as the Coast Guard site.

The ordinary high-water mark boundary between the Coast Guard site and the sovereign lands of California was, under natural conditions, an ambulatory boundary which followed the waterline through all of its gradual, natural changes. *Miramar Co. v. City of Santa Barbara,* 23 Cal.2d 170, 175, 143 P.2d 1, 3 (1943). However, after construction of jetties at the entrance to Humboldt Bay, beginning in 1891, the configuration of the Pacific Ocean shoreline of the Coast Guard site was completely altered. The dramatic and swift nature of this change is best seen by a review of the "Humboldt Bay, California, Comparison of Periodic Surveys of Bar and Entrance."[5] Even a casual review of these

[3]Memorandum for the United States (August, 1981), p. 1; Memorandum for the United States in Support of Its Motion for Judgment on the Pleadings (November, 1981), p. 1.

[4]Certified copies of the Secretarial Orders withdrawing such lands were lodged as Exhibit C to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit C as containing facts not subject to reasonable dispute.

[5]Supporting Exhibits, Exhibit D, figure 5. A certified copy of *U.S. Army Corps of Engineers, San Francisco District, Survey Report on Humboldt Bay, California,* Appendix I, "Shoreline Changes" (February 19, 1950) containing said figure 5 was lodged with the Court as Exhibit D to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit D as containing facts not subject to reasonable dispute.

surveys establishes that after jetty construction there was a pronounced seaward shift of the shoreline adjacent to the Coast Guard site. The jetties had interrupted the natural littoral sand transport system, impounding the sand and causing the build up of manmade land along the Pacific Ocean boundary of the Coast Guard site.[6] No controversy exists between the United States and California concerning this fact.[7] As shown on Exhibit B to the Complaint, approximately 184 acres of the former bed of the Pacific Ocean have been covered up and filled in through the deposition of sand caused by the United States unilateral jetty construction. The subject land lies landward of the low-water mark as it presently exists on the coast, but below the high-water mark as it existed immediately prior to the construction of the jetties. To protect California's interest in its sovereign lands, lands that are held in trust for the public, California law provides that the State, not the littoral owner, gains title to such artificially-created land. *Carpenter v. City of Santa Monica,* 63 Cal.App.2d 772, 794, 147 P.2d 964, 975 (1944).

Indeed the United States, as late as December, 1977, recognized California's ownership of the subject land. In December, 1977, the United States Coast Guard applied for

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[6]Supporting Exhibits, Exhibit D, paras. 8-16, p. 3-6; para. 21, p. 8; para. 25, p. 9-10.

[7]Complaint, para. 9; Memorandum for the United States (August, 1981), p. 1-2; Answer (November, 1981), para. 9, p. 2; Memorandum for the United States in Support of Its Motion for Judgment on the Pleadings (November, 1981), pp. 1-2.

California's permission to use the subject land to construct a watchtower.[8] California, honoring the United States' request for an expedited permit,[9] transmitted a permit to the United States for execution.[10] Only thereafter was California first advised that the United States would dispute the location of the boundary between the public lands of the United States and the sovereign lands of California.[11] Although California continued to attempt to resolve this dispute amicably,[12] she was rebuffed by the United States.[13] California was advised by the United States Bureau of Land Management that the United States would dispute California's ownership of the subject land based on the "rule" of *Hughes v. Washington,* 389 U.S. 290 (1967) that

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[8]A certified copy of a communication containing said matters was lodged with the Court as Exhibit E to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit E as containing facts not subject to reasonable dispute.

[9]*Ibid.*

[10]A certified copy of a communication containing such matters was lodged with the Court as Exhibit F to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit F as containing facts not subject to reasonable dispute.

[11]A certified copy of a communication containing such matters was lodged with the Court as Exhibit G to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit G as containing facts not subject to reasonable dispute.

[12]*Ibid.*

[13]A certified copy of a communication containing such matters was lodged with the Court as Exhibit H to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit H as containing facts not subject to reasonable dispute.

federal law determines title and boundary questions when the United States is a contending party.[14] Thus, the United States determined to ignore the Supreme Court's mandate in *Corvallis* that state, *not* federal, law determined such questions. *Corvallis, supra,* 429 U.S. at 371.

SUMMARY OF ARGUMENT

California brought this original action to defeat the United States' attempt to defease California of two fundamental attributes of its sovereignty: California's sovereign land title and California's right to apply her own laws to determine disputes over the boundaries of her sovereign land. The subject land was vested and confirmed in California as sovereign land by virtue of the Equal-Footing Doctrine and the Submerged Lands Act. Although this sovereign land was formerly beneath ocean waters, jetty construction by the United States caused deposition and some 184 acres of sovereign land were covered and filled.

As the Constitution and rulings of this Court have long recognized, the title to and boundaries of such land is determined according to state law. To use federal law to decide disputes over such lands would conflict with these principles holding that the title of the State to sovereign lands is absolute and cannot be defeased by any doctrine of federal law.

Any remains of *Hughes v. Washington, supra,* 389 U.S. 290, which held to the contrary, should be explicitly overturned. *Hughes* has been completely discredited by *Corvallis, supra,* 429 U.S. 363. *Corvallis* reaffirmed adherence to

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[14]Ibid.

the choice-of-law rule that, since 1845, has applied state law to decide property boundary questions.

Neither does *Wilson v. Omaha Indian Tribe,* 442 U.S. 653 (1979), require any different result. There is no principle of federal law requiring application of federal law to decide a dispute over the boundary between state sovereign lands and littoral fast lands owned by the United States. Indeed the intention of Congress, as set forth in the Submerged Lands Act, is that state, not federal law, should govern these disputes.

But even assuming that federal law controls the decision in this case, state law should provide the rule of decision. There is no need to create a nationwide, uniform federal rule, especially because the title to and boundaries of state sovereign land and the right to decide disputes over such land according to state law are fundamentally related to the constitutional sovereignty of the States. The results would be chaotic if two discrete systems of property law were to govern property boundary disputes with the result depending on the vagaries of who were the parties.

There is no doubt that if state law were applied to the undisputed facts here California would be held the owner of the subject land. The United States agrees. Nor can there be any doubt that the Submerged Lands Act confirmed California's title to lands formed by artificial deposition as "made" lands. And under a settled rule of property, when deposition occurs through the action of littoral owner, the owner of land on which the deposition is deposited, not the littoral owner, retains the land covered up and filled in.

Finally, no decision of this Court has ever questioned California's sovereign title landward of the ordinary low-water mark and seaward of the ordinary high-water mark, even along the open coast. Because the subject land was made as deposition occurred above the ordinary low-water mark and below the ordinary high-water mark on California's sovereign land, California's title is unquestionable.

California's motion for summary judgment should be granted and the United States' motion for judgment on the pleadings should be denied. This will assure that the relationship between the two sovereigns can remain as the Constitution envisioned, with each supreme in their separate spheres of responsibility.

ARGUMENT

I

AS AN ESSENTIAL SOVEREIGN ATTRIBUTE CALIFORNIA HAS THE CONSTITUTIONALLY FOUNDED, COURT-MANDATED RIGHT TO APPLY ITS OWN LAW TO DECIDE BOUNDARY DISPUTES REGARDING ITS SOVEREIGN LAND

Decision in this case will affect two of the basic hallmarks of California's sovereignty—title to its sovereign land and the right to apply state law to determine disputes regarding the title to and boundaries of such land. The Court must consider whether to overturn the recognized, constitutionally founded choice-of-law rule regarding application of state law in property boundary disputes, particularly those concerning state sovereign lands. Plainly, chaos in land title matters would result should the

Court ignore this long adhered to precedent by creating a separate, competing system of federal rules applicable only when the United States is a property owner. Rightly, cases such as this have long been considered to be of "signal importance." *Corvallis, supra,* 429 U.S. at 373; *Pollard's Lessee, supra,* 44 U.S. (3 How.) at 235 (Catron, J., dissenting).

A. As An Incident Of Its Sovereignty, California Received Sovereign Title To All Lands Under Navigable Or Tidal Waters Lying Below The Ordinary High-Water Mark

By virtue of the Equal-Footing Doctrine, States admitted after the Original States hold the same rights and sovereignty as the Original States possessed. E.g., *Pollard's Lessee, supra,* 44 U.S. (3 How.) at 229; *Shively, supra,* 152 U.S. at 26, 30. As the Original States had succeeded to the title of England to lands underlying navigable or tidal waters below the ordinary high-water mark, such as the subject land, the Equal-Footing Doctrine insured that the later admitted States would hold the same title in and exercise the same sovereignty over such lands as did the Original States. Ibid.; *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 332-33 (1973) (Stewart, J., dissenting). And Congress confirmed this already conferred title in the Submerged Lands Act, 43 U.S.C. § 1311, as did this Court, *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 452. Thus California has title to the subject land. *Supra,* p. 2-4.

B. California's Right To Apply Its Own Laws To Determine Boundary Disputes Regarding Its Sovereign Land Is A Sovereign Attribute That Is Founded In The Constitution And Has Been Confirmed By Congress And By This Court

As stated by the Court just last year in *Montana v. United States,* 101 S.Ct. 1225, 1251 (1981): "After a State enters the Union, title to [its sovereign] land is governed by state law." *Montana* is only the last in a long line of cases which hold that only the initial boundary between State and federal land is determined by federal law but that once that determination is made, conflicts over the title to and boundaries of all lands within the State, especially state sovereign lands, are determined by state law. E.g., *Shively, supra,* 152 U.S. at 57-58; *Wilcox v. Jackson,* 38 U.S. (13 Pet.) 498, 517 (1839); *Joy v. St. Louis,* 201 U.S. 332, 343 (1906); *Borax, Ltd., supra,* 296 U.S. at 22; *Wallis v. Pan American Pet. Corp.,* 384 U.S. 63, 68-71 (1966); *Corvallis, supra,* 429 U.S. at 372-378.

This rule is constitutionally based in both the Equal-Footing Doctrine and the Tenth Amendment to the Constitution. The Equal-Footing Doctrine provided that as part of the sovereignty acquired by the States admitted subsequent to the Original States, such States received not only sovereign land title, but the sovereign power to determine conflicting claims to that property in accordance with rules of state law. *Bonelli, supra,* 414 U.S. at 332-333 (Stewart, J., dissenting); *Corvallis, supra,* 429 U.S. at 378. The Tenth Amendment also preserved the sovereign power of the States to decide questions regarding the title to and boundaries of real property within

their borders. The classic expression of this facet of the Tenth Amendment is found in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). Justice Brandeis wrote for the Court:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts . . . . [I]n applying the doctrine [of *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842)] *this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States'.*" Id. at 78-80. (Emphasis added.)

Indeed, the only congressional expression in this area holds that state law is to be used to ". . . manage, administer, lease, develop, and use the [lands beneath navigable waters confirmed in the States by the Submerged Lands Act]. . . ." 43 U.S.C. § 1311(a).

And this Court has decreed that California's title to such lands includes ". . . the right and power to manage, administer, lease, develop and use the such lands . . . *all in accordance with applicable state law.*" *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 452-453 (Emphasis added).

Thus, the principle that state law controls sovereign land title and boundary conflicts is a rule that is constitutionally founded, congressionally confirmed and Court decreed.

C. Corvallis Definitively Ruled That State Law Controls Property Boundary Questions, Ending The Short-Lived Regime Of Hughes And Bonelli

Corvallis reaffirmed, after a studied analysis of the case law, that state law controls real property title and boundary questions. *Corvallis, supra,* 429 U.S. at 378. *Corvallis* emphasized that the case of *Pollard's Lessee v. Hagan, supra,* held the States received absolute title to lands underlying navigable waters and that such title was not derived from any grant[15] by Congress, but from the Constitution itself. Id. at 372-374. *Corvallis* recognized the *Pollard* rule ". . . has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned." *Id.* at 374. The Court concluded that if the land at issue passed under the Equal-Footing Doctrine, as did the subject land here, the State's sovereign title ". . . is not subject to defeasance and State law governs subsequent dispositions." *Id.* at 378.

Corvallis rectified the aberrant cases of *Hughes v. Washington, supra,* 389 U.S. 290, and *Bonelli Cattle Company v. Arizona, supra,* 414 U.S. 313, by reaffirming adherence to the system that had applied state law to resolve property boundary disputes since 1845. *Corvallis, supra,* 429 U.S. at 382.

Both *Bonelli* and *Hughes,* which applied federal law to decide littoral or riparian boundary questions, were found to be based on a too expansive reading of *Borax, Ltd. v.*

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[15]The Submerged Lands Act only confirmed the States' title to such lands. *Corvallis, supra,* 429 U.S. at 371, n. 4.

Los Angeles, supra. Corvallis, supra, 429 U.S. at 377, 382. *Hughes* characterized *Borax* as holding that federal law applied to *all* disputes over land with the United States. *Hughes, supra,* 389 U.S. at 292-293. *Hughes* felt *Borax* was correctly decided as the ". . . rule deals with waters that lap both the lands of the state, and the boundaries of the international sea . . . ." *Hughes, supra,* 389 U.S. at 293.

Bonelli, which neither relied on nor cited *Hughes,* reasoned that as the issue there to be decided was the nature and extent of a federal "grant" of the bed of a navigable river under the Equal-Footing Doctrine and the Submerged Lands Act, *Borax* required the issue to be decided under federal law. *Bonelli, supra,* 414 U.S. at 319-321.

Corvallis brought a swift, but well-deserved, end to this incipient line of authority. According to *Corvallis, Borax* required that *only* the determination of initial boundary between state sovereign land acquired under the Equal-Footing Doctrine and federal littoral public lands be decided as a matter of federal law. *Id.* at 376. Once that determination was made the role of the Equal-Footing Doctrine and federal law was ended and the lands were subject to state law. *Ibid. Corvallis* overruled *Bonelli* because *Bonelli's* expanded reading of *Borax,* in effect, mistakenly overruled, *sub silentio,* the line of cases following *Pollard. Id.* at 382. *Corvallis* reaffirmed *Pollard. Id.* at 374. *Corvallis* recognized that the *Pollard* rule "has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned." *Ibid.*

Corvallis gave *Hughes* only casual consideration, recognizing that *Hughes*, as *Bonelli*, had given *Borax* the same mistaken reading that was contrary to *Pollard*. *Id.* at 377, n. 16. The dissent makes explicit, however, that *Hughes* has been effectively overruled. *Id.* at 383, n. 1 (Marshall, J., dissenting). The majority failed to explicitly overrule *Hughes*, because *Hughes* dealt with "ocean-front property" and there were supposed international relations implications. *Id.* at 377, n. 6. *Hughes* should now be explicitly overruled. As the dissent noted, there are no such international relations implications. *Id.* at 383, n. 1 (Marshall, J., dissenting).

The determination of how a change in the location of the high-water line affects the real property boundary between littoral public lands and the sovereign lands of the state, the ordinary high-water mark, and whether that decision is made under state or federal law has no bearing whatsoever on federal control of and responsibility over international relations or national defense.

The 1947 California decision disposes of the United States' argument. It held that the United States has "paramount rights in, and full dominion and power over" the lands of the Pacific Ocean seaward of the ordinary low-water mark, not because it "owned" the lands[16] but because of the necessity for federal power and control over such

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[16]It is evident from the repeated, careful distinctions in the opinion between "ownership" of the submerged lands and their resources versus paramount federal "rights", "control", "dominion", and "power" over them, from Justice Frankfurter's dissent, *United States v. California, supra,* 332 U.S. at 43 (Frankfurter, J., dissenting), from the Court's striking of the word "proprietary" from the decree proposed by the United States, see *United States v. Texas,*

lands and their resources given the federal responsibility for the foreign affairs and national defense of the nation. *United States v. California, supra,* 332 U.S. at 29, 35. But the limit of these responsibilities of the federal government sufficient to require "paramount rights in and full dominion and power over" the submerged lands and their resources was never claimed by the United States and *was not held by the Court to extend landward of the low-water along the open coast. Id.* at 22, 34-35. Indeed, the landward geographical limit of any such remaining paramount rights of the United States based on external sovereignty considerations has been determined, in the case of California, to be the actual ordinary low-water mark regardless of influences—artificial or natural—that may have affected its physical location. *United States v. California,* 381 U.S. 139, 175-176 (1965); *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 449. Thus, there are no international relations implications from a decision in this case since the subject land is landward of this low-water mark. Supra, p. 5.

Further, since the effective date of the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, U.S. T. 1606, T.I.A.S. No. 5369, in 1964, there can be no further argument as to any possible effect of domestic land title disputes on the international boundary. The United States, as a signatory to that treaty, has now

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supra, 339 U.S. at 719, 723 (Rud, J., dissenting) 724 (separate views of Frankfurter, J.), and from subsequent characterizations of the holding, *id.,* at p. 704; *United States v. California,* 436 U.S. 32, 42 (White, J., dissenting), that the 1947 California decision was not based on any determination that the United States had acquired title to, or "owned" the submerged lands or their resources.

agreed to the applicable principles of law for international boundary purposes. *United States v. California, supra,* 381 U.S. at 163-165.[17] Consequently, such feared effects of domestic litigation upon international relations do not exist.

Additionally, the Court has recognized that even though the ordinary low-water mark, as it moves by either natural or artificial means, also changes the three-mile boundary of the territorial sea, use of this ambulatory line does not defease California of its title to artificially created lands, such as the subject land, landward of that artificially made line. *United States v. California, supra,* 381 U.S. at 176-177. This also demonstrates the lack of any international relations consequences to determining the title to such lands.

Parenthetically, it should also be noted that, in this case, the seaward limit of the territorial sea is measured from the mean lower low-water line at the seaward of the jetty at the southern boundary of the subject land. *United States v. California* (Second Supplemental Decree), 432 U.S. 40 (1977). Consequently, the determination of the boundaries of the subject land, which lies entirely landward of the seaward end of the jetty, will have no effect on the international boundary.

From the foregoing, it is apparent that there are no international relations implications in coastal property boundary disputes such as in the present case.

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[17]Although the Court adopted the definitions provided in the Convention for the administration of the Submerged Lands Act this was for the internal domestic purposes of the Act. *Id.* at 165.

Corvallis settles, once and for all, that state property law controls decisions over such property boundary disputes. *Hughes,* to the extent it has any remaining viability, should be explicitly overruled.

II

NEITHER WILSON v. OMAHA INDIAN TRIBE NOR HUGHES, PROVIDE AUTHORITY FOR APPLICATION OR CREATION OF A "FEDERAL COMMON LAW" RULE TO DECIDE DISPUTES REGARDING THE TITLE TO OR BOUNDARIES OF CALIFORNIA'S SOVEREIGN LANDS

A. As California Had Sovereign Title To The Subject Land, There Is No "Pre-Existing," Un-terminated Federal Title Interest Supporting Application Of "Federal Common Law"

California has demonstrated that its title to the subject land is derived from the Equal-Footing Doctrine and that under the Constitution, the Submerged Lands Act and case law California law controls boundary and title disputes over such land. *Supra,* pp. 10-17.

Despite this settled rule the *United States* asserts that *Wilson* "settles" that federal law governs controversies in which the United States is claiming land adjacent to navigable waters as the original and present owner. Memorandum for the United States (August, 1981), p. 2.

The United States never had any pre-existing title to this sovereign land. The deposition occurred on sovereign land owned by California. *Supra,* pp. 2-5, 10; *infra,* pp. 24-30.[18]

[18]Even if the theory of the United States is adopted—that the jetty construction fixed as of 1891, the boundary between federally "owned" submerged lands and State tidelands—the Submerged

Thus the first requisite for the application of *Wilson* is not present.

B. There Is No "Principle Of Federal Law" Required To Be Protected By Application Of Federal Law To Control This Boundary Dispute

Even if one assumes that the United States had either a pre-existing interest in the subject land or that ownership of littoral property provides a sufficient interest, *Corvallis* also holds that state law governs issues relating to property, ". . . unless some other principle of federal law requires a different result." *Corvallis, supra,* 429 U.S. at 378.

Lands Act confirmed and established the State's title to such submerged lands because the confirmance related back to the time of California's statehood. *Superior Oil Company v. Fontenot,* 213 F.2d 565, 569 (5th Cir. 1954), cert. den., 348 U.S. 837 (1954); *People v. Hecker,* 179 Cal.App.2d 823, 836, 4 Cal.Rptr. 334, 343, (1960); see *Gibson v. Chouteau,* 80 U.S. (13 Wall) 92, 100-101 (1871); *United States v. Detroit Lumber Company,* 200 U.S. 321, 324 (1906) ("It is true that this doctrine is but a fiction of law, but it is a fiction resorted to whenever justice requires.") This comports with the intention of Congress to establish the States' ownership of the submerged lands and ". . . to confer [on the States] the long-standing equities which the [Submerged Lands Act] was intended to recognize." *United States v. Louisiana,* 363 U.S. 1, 38-39 (1960); *United States v. California, supra,* 381 U.S. at 199 (Black, J., dissenting). Thus any title of the United States has been yielded or terminated.

In fact, the United States' theory is contrary to the holding of *United States v. California, supra,* 381 U.S. 139. Jetty construction did not fix the location of California's low-water sovereign land boundary. Under *United States v. California* that boundary follows the mean lower low-water line, wherever it moves and regardless of cause. Id. at 176-177; *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 449; *infra,* pp. 28-30.

Wilson is merely an example of a case where there was "some other principle of federal law requiring a different result." In *Wilson*, the Court found that the United States "had never yielded title or terminated its interest" in the Indian reservation, that the Indians' right to the property depended on federal law, and that Indian title could only be extinguished with federal consent, a matter exclusively the province of federal law. *Wilson, supra,* 442 U.S. at 670-671. In such cases, federal law was held controlling (even though it did not supply the rule of decision). *Ibid.* Thus, *Wilson* does not require that federal law apply in all cases involving a claim to land title by the United States but *only* in those cases in which the United States "has not yielded title or terminated its interest" (which it has here, *supra*, pp. 18-19) and there is, in addition, a principle of federal law that is required to be protected.

If, as the United States suggests, the Court was required to choose federal law every time the United States made a claim to property or was a riparian or littoral owner, as it is here, *Corvallis* and *Pollard* could be rendered a nullity.

Mere presence of the United States as a contending property owner should not provide an independent basis for invocation of federal law. In fact, *Wilson* recognized there was no reason that the United States' real property interests should not be treated under the same rules of property that are applied, evenhandedly to all persons in the State. *Wilson, supra,* 442 U.S. at 673.

The only other suggestion of a "principle of federal law" required to be protected by application of federal, not state, law to resolve this dispute is an oblique reference to

Hughes. But the United States' shorthanded reference to the asserted international relations rationale of *Hughes* cannot supply such a "principle of federal law" as previously demonstrated. *Supra,* pp. 15-17. Thus, federal law does not control this case.

C. Should Federal Law Control This Case, Non-Discriminatory State Law Should Be Adopted As The Federal Rule Of Decision Because There Is No "Federal Common Law" Rule Established

Assuming, *arguendo,* that under *Wilson* federal law would control this case, the Court must still determine two matters: (1) whether there exists a uniform "federal common law" rule applicable to the circumstances of this case; and (2) if not, whether there is a need to create a uniform, nationwide federal rule or to, instead, adopt state law as the federal rule of decision. *Wilson, supra,* 442 U.S. at 671-672. Since *Wilson* determined that there was no "federal common law" of accretion and avulsion, *id.* at 672,[19] the inquiry in this case is whether there is need to create such a rule.

The United States appears to urge that the only remaining relevance of *Hughes* is to answer just this question. Indeed the United States does not suggest any basis, other than its shortland reference to *Hughes,* that requires creation of a uniform, nationwide federal rule in lieu of adopting state law as the federal rule of decision in cases such as this.

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[19]Significantly, *Corvallis* also points out the "misapprehension" that there is a "federal common law" concerning littoral or riparian boundary questions. *Corvallis, supra,* 429 U.S. at 381. n. 8.

The United States' reference to the sole relevance of *Hughes* is oblique. California supposes the United States will rely on the rationale of *Hughes* that the claimed international relations implications of the determination of the location of the high-water boundary require the development of a "federal common law." But California has already established that there are no international relations implications in deciding the location of the ordinary high-water mark property boundary. *Supra,* pp. 15-17. *Hughes,* therefore, does not supply authority requiring the creation of a nationwide, uniform federal rule for determination of the effect of physical changes on the location of the boundary between the sovereign lands of California and federally-owned littoral uplands.

Finally, because this is an area that is integrally related to the constitutional sovereignty of the States, *Corvallis, supra,* 429 U.S. at 381, there is a powerful countervailing reason not to create a uniform, nationwide federal rule and instead to leave determinations of real property boundary conflicts, such as this case, to state law. Even in *Wilson,* a case where the need to create a uniform, nationwide federal rule was arguably much more compelling because of the special responsibilities of the United States to Indians, it was determined that state law would be adopted as the content of federal law. *Wilson, supra,* 442 U.S. at 676. In fact, in reaching that holding the Court specially noted that application of state law to determine real property conflicts was of special concern to the States. *Id.* at 674. Borrowing state law will avoid answering property boundary questions one way when the United States is on one side and another way for adjacent land when the United States

is not a disputing property owner. *Ibid.* This assures uniform rules of property will apply to all land in the State.

Thus, although *Corvallis* settles that the choice-of-law in property disputes is state law, the result would not differ even if the United States were correct in its claim that federal law controls this case. Even assuming this result, state law would supply the rule of decision to determine the effect of the United States' unilateral action which caused California's sovereign land to be covered up and filled in.

III

UNDER CALIFORNIA LAW, THE UNITED STATES CONCEDES THAT CALIFORNIA OWNS THE SUBJECT LAND

Since 1876, the Supreme Court has recognized:

> "It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means . . . is a question which each State decides for itself. *By the common law,* as before remarked, *such additions to land on navigable waters belong to the crown* . . . . Whether as rules of property, it would now be safe to change these doctrines where they have been applied . . . is for the several States themselves to determine . . . ." *Barney v. Keokuk,* 94 U.S. 324, 337-338 (1876) (emphasis supplied).

California follows this common law rule. The United States recognizes that under California law artificial additions to land beneath navigable waters belong to the State. Memorandum for the United States (August, 1981), page 2.

California courts have stated this rule as follows:

> "[I]t must be accepted as settled in this state that accretions formed gradually and imperceptibly, but caused entirely by artificial means . . . belong to the state, or its grantee, and do not belong to the upland owner." *Carpenter, supra,* 63 Cal.App.2d at 794, 147 P.2d at 975; *People v. Hecker,* 179 Cal.App.2d 823, 837, 4 Cal.Rptr. 334, 343 (1960).

Further, the United States does not question that if this rule is applied in this case, California is owner of the subject land. Memorandum for the United States (August, 1981), p. 2.

Thus, under California law, the application which was specifically contemplated by Congress, see *Corvallis, supra,* 429 U.S. at 371, n. 4, California owns the subject land created as deposition caused by the jetty built by the United States covered up and filled in its sovereign land below the high-water mark in front of the Coast Guard site.

IV

UNDER THE SUBMERGED LANDS ACT TITLE TO "MADE" LANDS, LANDS FORMERLY BENEATH NAVIGABLE WATERS, WAS CONFIRMED IN THE STATES; THE SUBJECT LAND IS "MADE" LAND TITLE TO WHICH HAS BEEN CONFIRMED IN CALIFORNIA

The Submerged Lands Act confirmed the States' title to "lands beneath navigable waters." 43 U.S.C. § 1311. "Lands beneath navigable waters" are defined in the Act to include "all filled in, made, or reclaimed lands which

formerly were lands beneath navigable waters." 43 U.S.C. § 1301(a)(3).

In its Complaint California alleged and the United States in its Answer admitted:

> "The construction of the jetty interfered with the natural regime of littoral sand transport along the western boundary of the Coast Guard Site. As [a] consequence, alluvion has been and is being deposited along said western boundary of the Coast Guard Site below the ordinary high-water mark, resulting in the formation of the subject land." Complaint (July, 1981), para. 9; Answer (November, 1981), para. 9.

The United States admits that jetty construction by the United States caused "fairly rapid accretion" so that "former submerged lands and tidelands [the subject land] became uplands" and that "[b]ut for the construction, improvement and maintenance of the jetties, the [subject land] would have remained submerged or tidelands . . . ." Memorandum for the United States (August, 1981), pp. 1-2; Memorandum for the United States in Support of its Motion for Judgment on the Pleadings (November, 1981), pp. 1-2.

Given the above, and the affirmance of this principle in *United States v. California, supra,* 381 U.S. at 176-177, there can be no doubt that the subject land is "made" land, title to which was confirmed in California by the Submerged Lands Act. 43 U.S.C. §§ 1301(a)(3), 1311.

V

IT IS A SETTLED RULE OF PROPERTY, CONFIRMED IN THE SUBMERGED LANDS ACT, THAT THE UNITED STATES DOES NOT RECEIVE THE BENEFIT OF DEPOSITION WHICH IT CAUSES

Even if a uniform, nationwide federal rule were to be created for situations like this, it would not, given the settled rule of property, yield a different result.

It has long been the rule that when an upland owner causes deposition, the person whose land is covered up and filled in, not the upland owner, retains the land so effected. See *Marine Ry. Co. v. United States,* 257 U.S. 47, 65 (1921); *Burns v. Forbes,* 412 F.2d 995, 997 (3rd Cir. 1969); *Bonelli, supra,* 414 U.S. at 322-323, rev'd on other grounds, 429 U.S. 363 (1977); 134 A.L.R. 467, 472. The United States has also recognized this rule of property in litigation with California. *United States v. California, supra,* 381 U.S. at 176.

The rule is based on sound equitable considerations. It hardly seems right that one, who by unilateral action causes the land of another to be covered up and filled in, should receive the benefit of such action.

The Submerged Lands Act, by including within the definition of the lands beneath navigable waters, title to which was confirmed in the States, "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters . . . ," 43 U.S.C. § 1301(a)(3), recog-

nized and confirmed this rule of property.[21] There is no doubt that the subject land is "made" land. *Supra,* pp. 24-25.

Thus, under the settled rule of property, recognized and confirmed in the Submerged Lands Act, California should be held the owner of the subject land.

VI

THERE IS NO SUPPORT FOR THE CONTENTION BY THE UNITED STATES THAT JETTY CONSTRUCTION FIXED THE LOW-WATER MARK ADJACENT TO THE COAST GUARD SITE; THE 1947 CALIFORNIA DECISION AND SUBSEQUENT DECISIONS OF THE COURT CONFIRMED CALIFORNIA'S TITLE TO ITS SOVEREIGN LANDS LYING ABOVE THE LOW-WATER MARK AS SUCH MARK WAS MODIFIED BY EITHER NATURAL OR ARTIFICIAL PHENOMENA AND THEREBY UPHOLD CALIFORNIA'S TITLE TO THE SUBJECT LAND

The United States asserts that the subject land is not sovereign tidelands, but federal property because a portion was once submerged. The United States argues that by the process of deposition caused by the United States, this submerged portion was covered up and filled in and thereby became upland. This assertion by the United States

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[21]An equally plausible interpretation is that by confirming title to lands beneath navigable waters in the States and those persons who were on June 5, 1950, entitled thereto under *state law* in 43 U.S.C. § 1311(a) Congress also recognized that some States, such as California, followed this rule of property and specifically avoided interference with such expectations.

depends fundamentally on the conclusion that when jetty construction by the United States interfered with the natural littoral sand transport along the Pacific Ocean shoreline of the Coast Guard site, not only was the upland boundary fixed in location, but so was the boundary between the lands over which the United States asserted paramount rights and the sovereign lands of California, the ordinary low-water mark.

The United States argues that when deposition occurred below the "fixed" boundary between the lands over which it asserted paramount rights and California's sovereign lands, it occurred on lands "owned" by the United States.[22] Since such once-submerged lands eventually became covered up and filled in, lie above the high-water mark, and were no longer lands beneath navigable waters on March 22, 1953, such lands, so the argument goes, were not conveyed to California by virtue of the Submerged Lands Act. Memorandum for the United States (August, 1981), p. 7.

This position is contradicted by the holding and decree of this Court that the ordinary low-water mark along California's coast was an ambulatory line, modified by either natural or artificial phenomena. *United States v. California, supra,* 381 U.S. at 176-177; *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 449.

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[22]The United States' title in such submerged lands has never been quieted, *United States v. California, supra,* 332 U.S. at 38, 44 (Frankfurter, J., dissenting); *United States v. Texas, supra,* 339 U.S. at 724 (separate views of Frankfurter, J.), only its "paramount rights" were upheld, *United States v. California, supra,* 332 U.S. at 38.

Thus, as the deposition occurred, it was deposited below the high-water mark on California's land and pushed the low-water mark farther and farther seaward. No deposition occurred on lands "owned" by the United States, all of which would lie seaward of this ambulatory low-water mark.

Further the very claim made here by the United States was disposed of in *United States v. California, supra,* 381 U.S. 139.

> "When this case was before the Special Master the United States contended that it owned all mineral rights to lands outside inland waters which were submerged at the date California entered the Union, even though since . . . reclaimed by means of artificial structures. The Special Master ruled that lands so enclosed or filled belonged to California because such artificial changes were clearly recognized by international law to change the coastline. . . .
>
> "[And the United States has since admitted] the Submerged Lands Act recognized and confirmed state title within all artificial as well as natural modifications to the shoreline prior to the passage of the Act. . . ." *Id.* at 176.

Even the 1947 California decision did not question the State's title to tidelands, lands lying above the ordinary low-water mark but below the ordinary high-water mark. The complaint filed by the United States alleged, in pertinent part, that the United States was the " '. . . owner in fee simple of, or possessed of paramount rights in and powers over, the lands . . . lying seaward of the ordinary low-water mark on the coast of California . . .' " *United States v. California, supra,* 332 U.S. at 22. The Court

also specially noted that "[t]he Government does not deny that under the *Pollard* rule . . . California has a qualified ownership of . . . tidelands down to the low-water mark." *Id.* at 30. Thus, under the 1947 California decision, as reinforced by subsequent decisions, the State's title to its sovereign lands lying above the ambulatory low-water mark, but below the ordinary high-water mark has never been in question.

Further, the effect of the United States' argument, if granted any credence,[23] would be to create a strip of federally "owned" beach front property landward of the coastline, as defined in the Submerged Lands Act and subsequent cases construing the Act, along some of the most valuable, popular beach areas in California.

For example, it is well known that many acres of land have artificially accreted along and formed the beaches in Santa Monica Bay. *Carpenter, supra,* 63 Cal.App.2d at 776-779, 142 P.2d at 906-907; *Hecker, supra,* 179 Cal.App. 2d at 826, 832-833, 4 Cal.Rptr. at 340-341; *Muchenberger v. City of Santa Monica,* 206 Cal. 635, 638-639, 275 P. 803, 804-805 (1929). These artificially accreted lands have been the subject of California appellate court decisions which affirmed the rule that artifically accreted lands belong to the State and not to the upland owner. *Carpenter, supra,* 63 Cal.App.2d at 794, 147 P.2d at 975; *Hecker, supra,* 179 Cal.App.2d at 834-835, 4 Cal.Rptr. at 340-341. Adoption of the argument of the United States would negate these

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[23]But see fn. 18, supra, p. 19. This argument also ignores the fact that the Submerged Lands Act confirmed California's title to the subject land as "made lands." Supra, pp. 24-25; 43 U.S.C. sections 1301(a)(3), 1311.

holdings and public and private expectations based thereon and create a multi-layered ownership of beach-front lands. Thus, the upland owner would own to the ordinary high-water mark in its last natural position; the State would own land between such ordinary high-water mark and the ordinary low-water mark in its last natural position; the United States would own the land between such ordinary low-water mark and the present ordinary low-water mark; and the State would own all lands seaward of such low-water mark out to three miles. Such a Linzer torte scheme of ownership flies in the face of common sense and sound land management practices.

Finally, adoption of this argument would conflict with the Submerged Lands Act. That Act not only confirmed the States' title to lands beneath navigable waters (defined generally as lands covered by tidal waters up to the line of mean high tide, 43 U.S.C. § 1301(a)(2)), but also the title of persons, who, on June 5, 1950 were entitled to such lands " . . . under the law of the respective States in which the land is located . . ." 43 U.S.C. 1311(a). Since under California law the State or its grantees were entitled to such artificially accreted lands, *Carpenter, supra,* 63 Cal. App.2d at 794, 147 P.2d at 975, *Hecker, supra,* 179 Cal. App.2d at 834-835, 4 Cal.Rptr. at 340-341, the position of the United States in this case would conflict with the plain expression of Congress in 43 U.S.C. section 1311(a).

Thus, although the boundary between the fast lands owned by the United States and California's sovereign land was fixed by the activities of the United States, the boundary between California's sovereign lands and the

land over which the United States asserted paramount rights and which have since been confirmed in California continued to move as deposition occurred on the State's sovereign lands below the high-water mark. This process created a band of lands that, although now physically above the high-water mark, are in legal character tidelands. And under the 1947 California decision and *United States v. California, supra*, 381 U.S. at 176-177, such lands are recognized to be the sovereign lands of California in which California holds absolute title free of any federal principle of land titles.

CONCLUSION

There is no factual dispute. Artificial deposition on the sovereign land of California unilaterally caused by the United States and the United States' assertion that federal common law should be created to control the decision concerning the effect of this deposition on the boundary of California's sovereign land should not be allowed to defease California of its essential rights, its sovereign land and its right to apply California law to determine ownership and boundary questions regarding such land. California's title to such land is absolute and cannot be defeased by application of "federal common law." Thus, the United States' motion for judgment on the pleadings should be denied and summary judgment as requested by California should be granted because under California law, there is no question that California is the owner of the subject lands.

Such a judgment will preserve the fine balance struck in the Constitution between the powers of the state government and the powers of the federal government, a balance

which assures that each government, federal and state, is supreme within its own sphere. Here, one government, the United States, seeks to invade what has always been held the province of the other, ownership of state sovereign land and the right to apply state law to determine boundary and title disputes concerning such land. To honor that constitutionally-mandated balance, it should be affirmed that California law governs the sovereign land boundary question presented in this case.

Dated: January 13, 1982.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
BRUCE S. FLUSHMAN
Deputy Attorneys General

DENNIS M. EAGAN

BRUCE S. FLUSHMAN
Counsel for Plaintiff, State of California, ex rel. State Lands Commission

EXHIBIT B

PORTIONS OF U.S.G.S. 7 1/2 MIN. SERIES "FIELDS LANDING 1959" AND "EUREKA 1958"; BOTH PHOTO REVISED 1972