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

Reply Brief of Plaintiff, State of California, ex rel. State Lands Commission

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about federalism. The issue is what law—State or federal—governs the location of the boundary between federal upland and tidelands to which California gained title under the Equal-Footing Doctrine upon its admission to the Union. Even the United States concedes that, after statehood, this issue is governed by state law when the boundary between federal upland and state tidelands in "inland waters" is concerned. Brief for the United States (Jan. 1982) ("U.S. Br.") at 15. The concession is dispositive of this case, for no different rule applies to such boundary questions along the open coast. Indeed, the United States agrees that, under California law, California has title to the subject land, which was filled in and covered up as the direct result of the United States' jetty installation over forty years after California's admission to the Union.[1]

Seeking to avoid the effect of these concessions, the United States spends the great bulk of its brief constructing a brittle diversionary argument. Basically, the United States asserts that the deposition caused by its jetty construction occurred on federally-"owned" submerged lands, whose landward boundary, the ordinary low-water mark, was fixed in location by such activity. U.S. Br. at 5, 6, 11, 20. As a result the United States contends that the deposition caused by the United States filled in and elevated the submerged lands above the Pacific Ocean. With respect

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[1]The subject land remained barren, unused and unoccupied for the next eighty years until the United States, in late 1977, sought California's permission to construct a watchtower. California's Opening Brief, etc. (Jan. 1982) ("Cal. Br.") at 5-6.

to the "small strip of tideland," the United States argues, in contrast, that the high-water boundary moves and that "accretions" inuring to federal upland filled in and covered up these tidelands. Id. at 6, 11, 20, 23-24. By this pincers movement, the argument concludes, federal upland ownership met federal submerged lands "ownership" and wiped out any vestige of California's tidelands ownership. This argument is without merit.

First, the United States ignores the plain holding of *United States v. California,* 381 U.S. 139, 176-177 (1965), that the landward boundary of submerged lands, the low-water mark, moves according to changing physical reality, no matter the cause of the change. Here, at the same time the jetty-caused deposition occurred along the high-water line, a continuous seaward movement of the low-water mark also resulted. Necessarily, no deposition could or did take place on submerged lands. All depositions occurred on tidelands owned by California under the Equal-Footing Doctrine and waterward of the high-water mark that had been, under California law, fixed in location by jetty construction. Second, the argument is internally inconsistent. The United States asserts that the same deposition that filled its submerged lands at the same time also attached to and became part of its upland by "accretion." U.S. Br. at 6, 11, 20, 23-24. Even the Solicitor General has recognized that, with true "accretion", there is only one effect of this deposition process: the deposition expands the upland parcel rather than raising "submerged lands" above water. 42 Op.Att'yGen. 241, 261 (1963). Thus, if the United

States claims by virtue of "accretion" it cannot also claim that its "submerged lands" were elevated above the water by the same process. Third, as an independent argument, the Submerged Lands Act confirmed California's title to the subject land as "made" land. Finally, adoption of the United States' argument would unsettle countless shoreline titles and create land management chaos. This unnecessary consequence should be avoided.

Compounding the misconceptions in its lead argument, the United States makes an even more startling contention when it asserts, contrary to the decisions of this Court, that there is a "federal constitutional rule" of shoreline changes that governs changes in the high-water boundary of California's tidelands. U.S. Br. at 11, 22. The United States alleges that this "rule" was confirmed in 1953 by the Submerged Lands Act, which was enacted before *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (*"Corvallis"*), "changed" the "rule" some 25 years later and held that state, not federal, law governed post-statehood boundary disputes. U.S. Br. at 11, 22. No authority is cited for this contention. There is none; post-statehood boundaries of state sovereign lands are and have been determined pursuant to state law.

This brief will first reaffirm the source of California's title to the lands upon which the deposition occurred. In so doing, California will dispose of the United States' "submerged lands" argument. Second, California's alternate source of title under the Submerged Lands Act will be discussed. Finally, the abbreviated arguments of the United States concerning the choice-of-law issue will be addressed.

I

THE DEPOSITION CAUSED BY THE UNITED STATES OCCURRED ON TIDELANDS OWNED BY CALIFORNIA PURSUANT TO THE EQUAL-FOOTING DOCTRINE; IT DID NOT AND COULD NOT OCCUR ON SUBMERGED LANDS.

A. California Received Sovereign Title To Its Tidelands By Virtue Of The Equal-Footing Doctrine.

For at least one hundred and forty years, it has been recognized that the States received title to tidelands under the Equal-Footing Doctrine. 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); *United States v. California* (Supplemental Decree) 382 U.S. 448, 452-453 (1966); *Corvallis,* 429 U.S. at 370-374.

Even in connection with the 1947 California decision both the Supreme Court and the United States recognized California's undisputed title to its tidelands. *United States v. California,* 332 U.S. 19, 22, 30 (1947). And although the ownership of tidelands by the States was not contested, the State's title to tidelands was "confirmed" in the Submerged Lands Act. 43 U.S.C. §§ 1301(a), 1311.[2]

[2]The legislative history makes clear that insofar as tidelands were concerned the Submerged Lands Act was merely an affirmation of already vested State title. E.g., H.R.Rep. No. 2078, 81st Cong., 2nd Sess. 52, 54 (1950); H.R.Rep. No. 215, 83d Cong., 1st Sess. 104 (1953) (veto message of President Truman, S. Doc. No. 139, 82d Cong., 2d Sess. 2 (1952), reprinted in 1952 U.S. Code Cong. & Admin. News 908); S. Rep. No. 133, 83d Cong., 1st Sess. (minority views) 10, 15-18, reprinted in 1953 U.S. Code Cong. & Admin. News 1543, 1549-1551; 99 Cong. Rec. 2862-2863 (1953) (remarks of Senator Douglas); *Corvallis,* 429 U.S. at 371, n. 4. And the Submerged Lands Act did not alter state property law concerning shoreline ownership. *Corvallis,* 429 U.S. at 371, n. 4.

It is the boundaries of these tidelands that are disputed by the United States. The landward boundary of tidelands is the ordinary high-water mark. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 22, 26 (1935). The seaward boundary of tidelands is the ordinary low-water mark. *United States v. California*, 332 U.S. at 30; *United States v. California*, (Decree) 332 U.S. 804, 805 (1947). Importantly, the location of the ordinary low-water mark has already been settled by this Court.

B. Along the Open Coast the Seaward Boundary of California's Tidelands and the Landward Boundary of the Submerged Lands, the Ordinary Low-Water Mark, Follows Physical Changes Irrespective of Cause; Thus, No Deposition Could Occur on Submerged Lands.

The United States' argument that the low-water boundary between tidelands and submerged lands was fixed and the deposition occurred on submerged lands is contrary to the plain holding of *United States v. California*, 381 U.S. 139. In that case the Court defined the low-water mark as the lower low-water line as it actually existed, no matter how it came to be there, whether by natural or artificial causes. *Id.* at 175-177. The Court determined that this line followed physical realities regardless of what process, either natural or artificial, caused movement of the lower low-water line. Ibid.; *United States v. California* (Supplemental Decree), 382 U.S. at 449.

Thus, the seaward boundary of California's tidelands along the open coast (which is also the landward boundary of submerged lands) is the actual line of low-water, regardless of how that line changed over time, whether by natural causes or by the works of man. In this case, begin-

ning in 1891 with the construction of the jetties, that low-water line was continually and progressively pushed farther and farther seaward as the artificial depositions also pushed out the high-water line. The depositions started along the high-water line and continued to be made along this line over the years as its physical, geographical location moved seaward. At no point in time could the deposition caused by the jetty form on the submerged lands, which always lay seaward of the artificially changing low-water line. *Ibid.* Indeed, such depositions occurred entirely on State tidelands.

C. All Depositions Occurred Landward of the Submerged Lands on California's Tidelands, Whose High-Water Boundary Was, Under Settled California Law, Fixed In Location By Jetty Construction.

Although the low-water boundary of tidelands always remains ambulatory, the same is not always true of the high-water line. Post-statehood changes in that line are subject to the laws of the State. *Corvallis,* 429 U.S. at 376. This is true even though the original boundary is defined by federal law. *Ibid.; Borax,* 296 U.S. at 22, 26. ". . . [T]hat determination is solely for the purpose of fixing the boundaries of the [tidelands] acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended and the land is subject to the laws of the State." *Corvallis,* 429 U.S. at 376; *accord, Pollard,* 44 U.S. (3 How.) at 229-230; *Joy v. St. Louis,* 201 U.S. 332, 340, 343 (1906); *Arkansas v. Tennessee,* 246 U.S. 158, 175-176 (1918); *Montana v. United States,* 450 U.S. 544, 551 (1981).

California law holds that deposition artificially caused by works of man, such as the jetties built by the United States here, is owned by the State and not the upland owner to whose property such deposition physically attached. *Carpenter v. City of Santa Monica,* 63 Cal.App.2d 772, 794, 147 P.2d 964, 975 (1944); *People v. Hecker,* 179 Cal.App.2d 823, 837, 4 Cal.Rptr. 334, 343 (1960). The effect of this rule is to fix in geographic location the high-water boundary of tidelands at the time the artificial influence was first introduced. This rule is similar to the rule concerning avulsion, which results in the fixing of the boundary of the watercourse at a former location. E.g., *St. Louis v. Rutz,* 138 U.S. 226, 245 (1891). Thus, in this case, the United States' jetty construction fixed in location the high-water boundary between federal upland and the tidelands of California.

Consequently, the deposition caused by the jetty formed on California's tidelands. No deposition occurred on the "submerged lands" because, as discussed above, the landward boundary of submerged lands was pushed farther and farther seaward as the depositions pushed the low-water mark seaward. Under settled California law, conceded by the United States, such artificial deposition is owned by California as part of its tidelands.

Thus, California's title to the subject land is derived from the Equal-Footing Doctrine and can stand solely on that basis, without reliance on the Submerged Lands Act.

II

CALIFORNIA'S TITLE TO THE SUBJECT LAND HAS BEEN CONFIRMED AND RATIFIED BY THE SUBMERGED LANDS ACT.

Quite independently of the Equal-Footing Doctrine and contrary to the position of the United States, the Submerged Lands Act provides California an alternate source of title to the subject land.

A. The Subject Land is "Made" Land Confirmed In California by the Submerged Lands Act.

The lands confirmed or ratified in State ownership in 1953 by the Submerged Lands Act were not limited to lands then covered by navigable waters. "Lands beneath navigable waters," were expressly defined to include lands that had been "filled in, made or reclaimed." 43 U.S.C. § 1301(a)(3). The Submerged Lands Act confirmed and ratified California's title to such "made" land. 43 U.S.C. § 1311.

The subject land is "made" land. Although the United States quibbles that the deposition occurred as a result of "natural wave and tidal action," "albeit 'fairly' rapid," U.S. Br. at 3, the United States has conceded that the deposition process which created the subject land was the direct result of jetty construction that disturbed the pre-existing natural shoreline regime. Id. at 3, 6, 15, 24.[3] The Submerged

[3]Significantly, the United States admitted in its permit application: "The watch tower site is located on an area of accreted land formed subsequent to the initial construction of the North Jetty in 1889 . . . This new land was formed as result of the North Jetty acting as a barrier to downcoast littoral sand movement . . ." Supporting Exhibits, Exhibit E, "Environmental Assessment, etc.,"

Lands Act confirmed and ratified title in the States to this very type of land.

In testimony in support of S.J. Res. 13, 83d Cong., 1st Sess., which was ultimately enacted as the Submerged Lands Act, Robert Moses, the famed New York planner, described the need to confirm the State's title in the exact situation in this case. Moses referred to lands that had grown up as the result of jetty construction as "filled in artificially or by the action of the tide . . ." And Senator Daniel termed such land as "made" land, title to which should be confirmed by Congress. Hearings Before the Sen. Comm. on Int. and Insular Affairs on S.J. Res. 13, etc., 83d Cong., 1st Sess. 158, 193-194 (1953) (remarks of Mr. Moses and Sen. Daniel).

The "made" lands provision was meant to do equity by applying ". . . to areas that are now above water, but which were under navigable waters at some time in past." 99 Cong. Rec. 2633 (1953) (remarks of Sen. Cordon.). There was no indication that Congress meant to distinguish between lands that were intentionally "made" and lands that were not deliberately "made" but were "made" as the direct result of man's works.[4] Indeed, both supporters and oppo-

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at 2 ("Environmental Assessment"). The process described by the United States in its application and brief comports exactly with the process described by California cases which hold that such artificially made lands are owned by the State. *Carpenter*, 63 Cal.App. 2d at 777, 147 P.2d at 966.

[4]As early as 1949, then Solicitor General Perlman represented the consistent view of the United States that equities which had risen based on construction of artificial structures along the open coast and the rights of the States and individuals in connection with such works should be confirmed. Submerged Lands:

nents[5] of the legislation agreed that tidelands that became filled in over time belonged to the States. *Ibid*; 99 Cong. Rec. 2968-2972 (remarks of Sens. Lehman and Holland), 3000-3003 (remarks of Sen. Douglas); 42 Op.Att'yGen. at 247-250. A reading of this history can only lead one to conclude that Congress, in enacting this section, did not intend to interfere with public and private rights or equities that had grown up over the years in these "made" lands. "Congress was not in a niggardly mood, holding out every bit of land that it could find an excuse to retain." 42 Op.Att'yGen. at 254. As recognized in *United States v. California,* 381 U.S. at 176-177, Congress confirmed California's title to land such as the subject land as "made" land.

B. The Relation Back Principle Independently Supports the Conclusion that the Subject Land Was Confirmed In California As "Made" Land by the Submerged Lands Act.

Putting aside the particular legislative history concerning the "made" lands provision of the Submerged Lands Act, the purpose of Congress in enacting the Submerged Lands Act supports the conclusion that it confirmed Cali-

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Hearings Before the Sen. Comm. on Int. and Insular Affairs on S.155, etc., 81st Cong., 1st Sess. 25, 485 (1949) (statement of Solicitor General Philip B. Perlman).

[5]The opponents of the Submerged Lands Act in the Eighty-Third Congress introduced a competing bill, S. 107, 83d Cong., 1st Sess., which, as one of its provisions, also confirmed State title to filled in, made, or reclaimed land. Its sponsor conceded that if S.J.Res. 13 passed there was no need for S. 107. Hearings in Executive Session, Sen. Comm. on Int. and Insular Affairs on S.J. Res. 13, etc., 83d Cong., 1st Sess. 1333 (1953) (remarks of Sen. Anderson).

fornia's title to the subject land as "made" land. The whole purpose of the Submerged Lands Act was to ". . . undo the effect of [the 1947 California decision] and to 'restore' to the States . . . 'what they supposed that they already owned.'" prior to that decision. 42 Op.Att'yGen. at 253; *accord, United States v. Louisiana,* 363 U.S. 1, 28 (1960); *United States v. California,* 436 U.S. 32, 37 (1978).

Under long-settled California law and according to California cases decided both prior to 1947 as well as after 1953, artificial addition to the shoreline, such as the deposition formed as the direct result of the jetty construction by the United States, does not inure to the upland owner. *Carpenter,* 63 Cal.App.2d at 794, 147 P.2d at 975; *Hecker,* 179 Cal.App.2d at 837, 4 Cal.Rptr. at 343. The artificially-created land remained tidelands in State ownership. *Ibid.* As the intent of Congress was to recognize the public and private expectancies concerning tidelands ownership that had arisen prior to 1947 and to put the States back where they were prior to 1947, that is, to confirm title in line with state law as it existed prior to the 1947 California decision, ". . . the title so conferred [by the Submerged Lands Act] related back so as to confirm and maintain possession and title of the state as good from the beginning." *Hecker,* 179 Cal.App.2d at 836, 4 Cal.Rptr. at 342-343; *accord, Superior Oil Company v. Fontenot,* 213 F.2d 565, 569 (5th Cir. 1954), cert. den., 348 U.S. 837 (1954); Cal.Br. at 18-19, n. 18. Indeed, 43 U.S.C. section 1311(a) provides that title to land beneath navigable waters (including "made" land) is confirmed to the States and those persons *entitled thereto under state law.*

To hold otherwise would create title uncertainties regarding countless acres of California shoreline. A particular example is the shore of Santa Monica Bay, formed by artificial deposition and held by California law to be State owned. *Carpenter,* 63 Cal.App.2d at 776-779, 794, 147 P.2d at 966-967, 975. Further, the resulting Sacher torte[6] scheme of multi-layered ownerships, Cal. Br. at 30-31, would create a land management nightmare.[7]

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[6]California's appetite for metaphor exceeded its gastronomic knowledge. With apologies to Court and counsel, the torte referred to in Plaintiff's Opening Brief at 31 should be a Sacher torte, not a Linzer torte.

[7]The United States argues that should California prevail, the Court would be burdened with endless and intractable litigation; indeed the Court would have to "redraw the Louisiana coast." U.S. Br. at 19. This argument is a "red herring." With respect to the "Louisiana coast" argument, the United States mixes apples and oranges by equating boundary determinations concerning the "coastline" under the Submerged Lands Act with determinations concerning the landward boundary between tidelands and upland. The principles for determining the "coastline" from which the three-mile boundary between State and Federal submerged lands is calculated have been established, e.g., *United States v. California,* 381 U.S. 139, and will not be affected by this case. Thus, neither the California nor, for that matter, the Louisiana coastline will have to be redrawn as the *"coastline" is not concerned in this case.* What is concerned is the landward boundary of tidelands, the high-water mark. With respect to boundary disputes over the location of the high-water mark, the majority of such cases do not affect the United States, as they have arisen and will arise between private persons and the State in state courts, which courts have applied and will continue to apply settled state law to resolve the issues. Indeed, it is the United States' argument that would cause endless and intractable litigation, as it would unsettle established state law regarding upland boundaries. And rather than arising in state courts, such boundary litigation would occur in federal courts, *infra,* p. 20, adding yet additional litigation to their already crowded calendars.

The relation back principle applies here. Resorted to when justice requires, *United States v. Detroit Lumber Company,* 200 U.S. 321, 334 (1906), the relation back principle also honors the Congressional purpose of putting the States back where they thought they were prior to the 1947 California decision. The subject land has always been thought, under California law, to be State-owned. Congress confirmed and ratified that belief in Submerged Lands Act. 43 U.S.C. §§ 1301(a)(3), 1311.

C. The Exceptions to the Submerged Lands Act Do Not Encompass The Circumstances of This Case.

With support neither in fact, the words of the statute, nor the intent of the Submerged Lands Act, the United States appears to be arguing that the subject land is excepted from the Submerged Lands Act by 43 U.S.C. section 1313(a) ("Section 1313"). U.S. Br. at 16-17. Close examination of this contention exposes its lack of substance.

Because the subject land is barren and unoccupied, Supporting Exhibits, Exhibit E, "Environmental Assessment," at 2-3, and because the United States came to California for permission to use the subject land, *id.,* Exhibit E, it is difficult to take seriously the United States' claim, under section 1313, that this land was "filled in, built up or otherwise reclaimed by the United States for its own use . . ." U.S. Br. at 16. In its brief, the United States pointedly states that the land was not created "by an artificial land fill, drainage or other deliberate human activity" but by "natural wave and tidal action." *Id.* at 3. These are unequivocal admissions that the United States did not fill in, build up or otherwise reclaim these lands for its own

use and that this clause of section 1313 does not cover the subject land.

Additionally, the United States contends that the subject land was formed as "accretion" to upland ceded to or retained by the United States and was therefore excepted by another clause of section 1313 from the Submerged Lands Act. U.S. Br. at 16. This argument is supported neither by the words of the statute nor the intent of the Submerged Lands Act.

First, it is clear from the words of section 1313, from its legislative history and from other provisions of the Act that the validity of the United States' claims under section 1313 are to be decided in accordance with applicable state law. For example, one clause of section 1313 excepts "all . . . land, together with all accretions thereto, title to which has been lawfully . . . acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State . . . ." This clause contemplates that state law will decide whether the United States lawfully acquired land, as well as whether any additions to the shoreline constitute "accretions" thereto. Under California law, the United States would not acquire such additions to the shoreline if they were directly caused, as here, by the works of man. Supra, p. 7. Indeed, the Solicitor General has opined that the high-water mark boundary of tidelands is determined ". . . in accordance with established real estate law." See 42 Op.Att'yGen. at 261 (1963). This "established real estate law" is state law and was not

affected by the enactment of the Submerged Lands Act. *Corvallis,* 429 U.S. at 371, n. 4.

That state law was intended by Congress to give content to the term "accretions" is also apparent from the legislative history. Hearings in Executive Session, Sen. Comm. on Int. and Insular Aff. on S.J. Res. 13, etc., 83d Cong., 1st Sess. 1420-1421, 1424 (1953).[8] Any other result would cause the primary purpose of the Submerged Lands Act, to restore to the States what they thought they owned prior to 1947, to be defeated by the Act's exceptions. This conclusion is reinforced by 43 U.S.C. section 1311(a), which provides that title is confirmed in persons (including a State, 43 U.S.C. § 1301(h)) who are entitled thereto under State law. Congress did not intend that the confirmations under the Act were to be determined by one rule and the exceptions under another. Nor did Congress intend to create new, uncharted substantive property rights in the United States by section 1313, that could conflict with rules of property that had grown up in the States prior to the 1947 California decision. 99 Cong. Rec. 2619 (1953) (remarks of Sens. Holland and Cordon).

The United States' final contention is that the section 1313 exceptions to the Submerged Lands Act reflect a congressional interpretation of the "disclaimer clause" in

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[8]In discussing what later became section 1313, Senator Kuchel gave an example of certain lands in Long Beach which the United States was occupying either with or without authority. Senator Kuchel stated: ". . . the question of whether there is an occupancy with right or without right is entirely a matter to be determined under the law of the State of California." *Id.* at 1420.

California's Act of Admission[9] as encompassing future accretions to United States "public lands." U.S. Br. at 17. This argument begs the question. Of course, California cannot interfere with the disposal of "public lands." The question is whether the subject land *is* public land.

Even conceding the "submerged lands" argument of the United States, it has been held by the courts and recognized by the United States that submerged lands are *not* "public lands." *Justheim v. McKay,* 229 F.2d 29, 30 (D.C. Cir. 1956), affirming 123 F.Supp. 560, 568 (D. D.C. 1954), *cert. den.,* 351 U.S. 933 (1956); Hearing Before the Sen. Comm. on Int. and Insular Affairs on S.J. Res. 195, 81st Cong., 2d Sess. 6 (testimony of Mastin G. White, Solicitor, Department of Interior); 40 Op.Att'yGen. 540 (1947). And Congress cannot interfere with basic sovereign attributes of the States such as the State's title to its tidelands or its right to apply state law to decide disputes over sovereign land boundaries. See *Withers v. Buckley,* 61 U.S. (20 How.) 84, 92 (1857); *Coyle v. Oklahoma,* 221 U.S. 559, 570-573 (1911); *National League of Cities v. Usery,* 426 U.S. 833, 845 (1976); *California v. United States,* 512 F.Supp. 36, 45 (N.D.Cal. 1981); Cal. Br. at 11-12. This argument also must fail.

Thus, the section 1313 exception does not encompass this case. Under established California law, deposition artificially caused is not "accretion," and inures not to the

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[9]The State ". . . shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned . . ." Act of September 9, 1850, § 3, 9 Stat. 452.

upland owner but to the State. Indeed, in *United States v. California,* 381 U.S. 139, this Court specifically held that such artificially made land belongs to the State despite contrary claims by the United States.[10] *Id.* at 176-177.

III

THE POST-STATEHOOD HIGH-WATER BOUNDARY OF STATE SOVEREIGN LANDS IS, AS A MATTER OF CONSTITUTIONAL PRINCIPLE, SOLELY THE PROVINCE OF STATE LAW; THE UNITED STATES' CONTENTION THAT THERE IS A "FEDERAL CONSTITUTIONAL RULE" GOVERNING SUCH BOUNDARY IS UTTERLY WITHOUT SUPPORT.

Ignoring over 135 years of case law just recently reaffirmed, Cal. Br. at 11-18, the United States argues as if *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), had not been overruled by *Corvallis.* The United States contends that *Pollard* established a "federal constitutional rule" of navigable water boundaries that, after statehood,

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[10]In *United States v. California,* 381 U.S. at 177, the Court noted and specifically rejected the United States' argument, U.S. Br. at 18, that California would "have its cake and eat it too" by gaining title to both the artificially made depositions and any consequent "bulge" produced in the three-mile boundary between the United State's submerged lands and those of California. In response to the Court's recognition that the United States could protect itself against such "inequity" through its power over navigable waters, *United States v. California,* 381 U.S. at 177, the United States issued a specific regulation concerning just such situations. 33 C.F.R. § 320.4(f). Indeed, the United States has required California to waive its claim to a "bulge" resulting from an artificial extension of the coastline. See Cal. Stats. 1969, Ch., 1044, p. 2028. In this particular case, no bulge will be produced. The three-mile boundary is calculated from a point further seaward of the subject land. Cal. Br. at 17.

governs the boundaries of sovereign land received under the Equal-Footing Doctrine. U.S. Br. at 11-12, 16, 22. The United States also argues that this rule was affirmed by the Submerged Lands Act and that *Corvallis* was a *change* in the law which the Submerged Lands Act, enacted prior to *Corvallis,* could not contemplate. *Ibid.*

To reiterate, federal law determines *only* the original boundary between sovereign land which inured to the State pursuant to the Equal-Footing Doctrine and the abutting upland. After statehood, conflicts over the title to and boundaries of State sovereign land are decided by state law. Cal. Br. at 11-12. This right is constitutionally founded, court ratified and congressionally confirmed. *Ibid.*

The breathtaking contention of the United States stands the law on its head. There is no credible authority for the novel proposition that *Pollard* established a "federal constitutional rule" of ambulatory water boundaries for Equal-Footing Doctrine lands. None is cited. In fact, the authorities are exactly the other way.

The effect of post-statehood physical movement of the high-water line on land title has consistently been held a matter of state law. E.g., *Pollard,* 44 U.S. (3 How.) at 229-230; *Barney v. Keokuk,* 94 U.S. 324, 337-38 (1876); *Joy,* 201 US. at 340, 343; *Arkansas v. Tennessee,* 246 U.S. at 175-176 (reciting the ". . . familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to navigable waters within their borders and the riparian lands adjacent to them.") And, although the very contention made here by the United States was erroneously adopted in *Bonelli,* 414 U.S. at 318, it was shortly thereafter expressly re-

jected by *Corvallis,* 429 U.S. at 372-378, 381-382. *Corvallis* specifically noted that the application of state law to decide property boundary disputes had been adhered to "from 1845 until 1973 [Bonelli]." *Id.* at 381.

In fact, not only has state law always decided such boundary disputes, but there is no "federal constitutional rule" regarding "accretion" or any other aspect of shoreline movement in other than interstate boundary cases. E.g., *id.* at 380-381; *Texas Industries, Inc. v. Radcliffe Materials,* 101 S.Ct. 1784, 1790 (1981).

There is no reason that State law should not govern the decision as to the location of the high-water mark upland boundary in this case. The United States has conceded that state law governs the high-water mark boundary in "inland waters". And there is no reason articulated by the United States that makes open coast tidelands any different.

Given the evenhanded application of state law, the mere fact that the United States is an adjoining land owner is not a sufficient reason to cause application of federal law to decide boundary disputes. *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 673 (1979). A rule such as California's, which holds that gradual, but artificial, additions to upland fix the boundary, does not affect the sovereign interests of the United States any more than does the doctrine of avulsion, which also fixes the boundary. And the United States concedes that, even under its chimerical "federal constitutional rule," avulsive changes fix the boundary of federal upland. U.S. Br. at 11.

Finally, in coastal boundary cases such as this there are no international relations implications in establishing the high-water mark. Cal. Br. at 15-17. Thus, there is no basis on which to apply or create federal law.

A holding that there is a post-statehood "federal constitutional rule" regarding "accretion" and other aspects of shoreline movement would bring into the federal courts a whole body of litigation that until now has been pursued in the state courts. Surely federal courts are not now to be burdened with private boundary and title disputes.

Thus, the Court should heed the admonition in *Corvallis* that a State's title to its sovereign land ". . . vests absolutely as of the time of its admission and is not subject later defeasance by operation of any doctrine of federal common law." *Corvallis,* 429 U.S. at 371. Creation of a federal common law rule to decide the effect of events that occurred forty years after statehood would manifestly violate that admonition.

CONCLUSION

California urges this Court to grant its motion for summary judgment and deny the United States motion for judgment on the pleadings.

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Respectfully submitted,

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