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WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

Oregon Ex Rel. State Land Board,)	
Petitioner,)	
v.)	
Corvallis Sand And Gravel Company,)	
Respondent.)	
Corvallis Sand And Gravel Company,)	No. 75-567
Petitioner,)	
v.)	
Oregon Ex Rel. State Land Board,)	No. 75-577
Respondent.)	

Washington, D. C.
October 4, 1976

Pages 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

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OREGON EX REL. STATE LAND BOARD, :
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Petitioner, :
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v. : No. 75-567
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CORVALLIS SAND AND GRAVEL COMPANY, :
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Respondent. :
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CORVALLIS SAND AND GRAVEL COMPANY, :
:
Petitioner, :
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v. : No. 75-577
:
OREGON EX REL. STATE LAND BOARD, :
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Respondent. :
:
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Washington, D. C.,

Monday, October 4, 1976.

The above-entitled matter came on for argument at
1:05 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT MIX, ESQ., 745 N.W. Van Buren, Corvallis,
Oregon 97330; on behalf of Respondent Corvallis
Sand and Gravel Company.

RUSSELL IUNGERICH, ESQ., Deputy Attorney General
of California, Los Angeles, California; as
amicus curiae, supporting Oregon.

PETER S. HERMAN, ESQ., 100 State Office Building,
Salem, Oregon 97310; on behalf of Petitioner
State of Oregon.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-567 and No. 75-577, Oregon v. Corvallis Sand and Gravel.

Mr. Mix, you may proceed.

ORAL ARGUMENT OF ROBERT MIX, ESQ.,

ON BEHALF OF CORVALLIS SAND AND GRAVEL CO.

MR. MIX: Mr. Chief Justice, and may it please the Court, and gentlemen:

I am Robert Mix, appearing here on behalf of Corvallis Sand and Gravel Company. The issues in the case are essentially the following: Those made by the state are was the change in channel of the Willamette River from a loop approximately three miles in length to a basically straight channel across the neck of the loop avulsive. In that connection, it should be pointed out that the land involved in this case is not only the changed channel but a portion of the river as it had historically flowed in its natural bed.

The other issue made by the state is whether or not the change of channel transferred private dry land to the state in fee simple by virtue of the presence of the water which had submerged private land.

The issues made by Corvallis Sand and Gravel are the following: Does the state have sufficient title to maintain ejectment to recover the bed of the river when its title is

based on sovereignty, and when there is no issue in the case as to interference with the public right of navigation and fishery by Corvallis Sand.

In this connection, the sand and gravel materials that were removed from the river were removed under permits issued by the Corps of Engineers.

The second issue made by Corvallis Sand, does the state, by virtue of its sovereignty have sufficient title to recover money damages for removal by Corvallis Sand of sand and gravel materials from the bed of the stream, again, there being no issue as to interference with navigation or fishery by Corvallis Sand.

In support of its position --

QUESTION: Mr. Mix, isn't one of the underlying issues in the case, at least if you take some of the amicus briefs, the question of what law governs on this issue of title, whether it is Oregon law or federal common law?

MR. MIX: Yes, Your Honor. It is my understanding of the Bonelli decision that we are now in an area to be controlled by federal common law, and that decision is at the core of the Court's receiving this case, and the Court is to spell out as a matter of common law the extent of the state's title.

QUESTION: Well, of course, Bonelli is distinguishable on its facts, isn't it? There you are dealing with what had

been an interstate boundary, and the Court, in its original jurisdiction cases, it always treated that as a matter of federal common law. But the Willamette River at Corvallis has never been an interstate boundary.

MR. MIX: That is correct, Your Honor. As to the Willamette River, it is my understanding of Bonelli that the Court said that first the state's title to the bed is a limited title, that the state's interest in the bed must be related to navigation; third, that that title is determinable if the navigable aspect of the use of the bed ceases; fourthly, that the state's interest in the bed is "as a bed" and in that connection the Court cited the case of State v. Gill, of Alabama, in which the Alabama court held that the state holds title to the bed as a bed and not to the individual grains of sand or lumps of mud.

The first basis on which Corvallis Sand claims that the state cannot maintain ejectment is that the common law concept of the ownership of the beds of navigable fresh water streams controls in this situation. That doctrine was announced by this Court in the case of Jones v. Soulard, decided in 1860.

Oregon was admitted to the Union in 1859, and it is submitted that as of the time Oregon became a state, the common law controlled the ownership of the beds of navigable streams, and under the common law the state's interest did not

extend above tidewater.

QUESTION: What was the basis of federal court jurisdiction in Jones v. Soulard? Do you remember?

MR. MIX: Your Honor, it is not very clear in the decision. As to jurisdiction, we take the position there is jurisdiction here. All the property that is involved in this case originally was patented out by the federal government.

Secondly, on the basis of the equal footing doctrine, which was a basis for jurisdiction also, as I understand it, in the Bonelli case, also on the basis on the fact that the Willamette River is navigable -- and I will get to talk about that later -- at least until the Bonelli decision; also on the basis that the Oregon court's ruling which in effect said that the state has a fee simple title to the bed, is contrary to Bonelli.

QUESTION: If your first basis for jurisdiction were federal jurisdiction, the idea that the land was originally patented by the federal government, were adequate to sustain it, any real property dispute that arise west of the Appalachian Mountains you could bring into federal court, could you not?

MR. MIX: Yes, Your Honor, and the Court has stated this as a basis for jurisdiction.

QUESTION: In Hughes v. Washington, that was the basis --

MR. MIX: In Hughes v. Washington and also in Borax Limited.

QUESTION: Well --

MR. MIX: Also in -- well, not in Bonelli, the federal aspect. Well, the federal patent aspect is mentioned in Bonelli. Now, Your Honor, my recollection may be in error, and apparently it is. It was not my understanding that Bonelli involved a boundary between two states.

Another basis for jurisdiction is the problem of due process, and this again I hope to discuss later, but it is on the basis that the riparians became investors with certain rights that they were granted under the common law, and that those rights have been divested, and particularly in this situation. And it should be pointed out that the states at least have not questioned jurisdiction in previous cases.

Continuing with the basis of Corvallis -- of the common law being contributing here, under the common law the state had no interest in the beds of navigable fresh water streams. And along came a state in 1859, and the common law was controlling in my view until at least 1876 when the Court gave the opinion in Barney v. Keokuk. The plats involved in this case are dated approximately 1853, 1859, 1865, and one small government lot is dated 1882. However, that was a homestead and not a donation land claim, and the entryman who had made his entry in his filing in 1875, we took the position in

the Oregon courts that his riparian rights related back to 1875, which would be before Barney v. Keokuk. The Oregon court rejected that position.

The Oregon court did not, to the best of my knowledge, until 1808, in the case of Hume v. Rogue River Packing Company, make a ruling that the beds of navigable fresh water streams belong to the state, and by that time all of these rights had been vested.

The Oregon Legislature did not until 1967 pass a statute claiming that the state owned the beds of navigable fresh water rivers.

Now, the second opinion for ownership by Corvallis Sand is as follows: Except in the line of decisions of the Court which began in Barney v. Keokuk in 1876, the state owns the beds of navigable fresh water streams, but that the state has the right to grant to the riparian whatever portion of that title it wishes. And applying that line of opinions, it is our position that in 1859, when Oregon became a state, by constitutional provision, it adopted the common law, and this was accomplished by continuing in force the statutes of the territory, and one of those statutes made the common law controlling in all of them.

Now, it is our position that in 1859 Oregon, even though it owned the beds of the navigable fresh water streams, made an election to apply the common law, and that the

riparian received his traditional rights and that it is a denial of due process to now try to take those rights away from him.

QUESTION: Would you analogize that situation to a case where Oregon had received lands from the federal government at the time of statehood which were unrestricted and it had in turn turned around and conveyed them to private individuals?

MR. MIX: Yes, Your Honor. In that situation, you are talking about new lands, and in that situation the State of Oregon would be in the position of a private landowner. When it gave land to the riparian, and did not reserve any rights from the deed, the entire title would pass, including the traditional common law riparian rights.

The third ground, the position that the state cannot maintain ejectment is based on Bonelli, which approaches in many ways, at least in my view, the common law, and again Bonelli held that the state's title is limited, that it must be related to navigation, it is determinable, the state's interest in the bed is as a bed in my interpretation of water that is part of the navigation servitude. The public would have the right to anchor on the bed, as part of the fishing servitude, for example, and would have the right to wade on the bed, to use the bed for spotting salmon and so on, but that it is not proprietary.

On the basis of --

QUESTION: As I understand it, you say that at no time has the sand and gravel company ever interfered or conducted activities that would interfere with these various rights?

MR. MIX: Yes, Your Honor, and my big point of that is this: The Corps of Engineers, under the Commerce Clause, issued permits removal of sand and gravel materials, and it is our position that those permits would not be issued if --

MR. CHIEF JUSTICE BURGER: Counsel, you need not be quite so close to the microphone.

MR. MIX: -- that the Corps would not issue those permits if navigation were being interfered with. And the second basis is that the state at no time pleaded or offered any evidence that there was any interference with navigation or fishery, throughout the case we've maintained there was no interference, and to the best of my knowledge the state has never said there was any interference.

The fourth ground relates solely to the judgment for money damages recovered by the state, and the state recovered ad judgment based on the number of cubic yards of material removed from the river.

At common law, the riparian had the right to remove sand and gravel so long as he did not interfere with the public rights. Bonelli holds again that the state owns the bed as a

bed, citing State v. Gill, and in Gill the Alabama court said that title to the state does not extend to the individual grains of sand or lumps of mud, and on that basis we submit that the proprietary right of removing sand and gravel is not owned by the state but belongs to the riparian, and the state cannot recover damages.

QUESTION: Your view is, your argument is that the bed is still the bed, even if some of the surface material is taken off of it?

MR. MIX: Yes, Your Honor. And as a matter of river hydraulics, the river normally replaces the sand and gravel you remove. In the next spring or the next high water, it washes more material down.

There is a related matter that is not an issue directly, but it is important, and that is the definition of navigable or navigability. There is no question but that in 1971, when this case was tried, that the definition of navigable applied to any stream which had historically been navigated, irrespective of subsequent events.

The Willamette River was used in the early days as the main artery of commerce, the Willamette River. And again, I am referring to the area above Corvallis, which is the disputed part. With the advent of --

QUESTION: When you say above, do you mean upstream from or downstream from?

MR. MIX: Upstream from Corvallis, Your Honor.

With the advent of the railroad and the truck, commerce disappeared. Today, the stream is used by fishermen floating down or people floating down canoes and innertubes and such. The historical definitions of navigable are derived from two sources: First, in the *Genesee Chief*, in 1851, the Court, for purposes of admiralty jurisdiction, held that admiralty jurisdiction does extend to navigable fresh water. In 1870, in the case of the *Daniel Ball*, the Court held that for purpose of the Commerce Clause, navigable is to be defined as far as fresh water is concerned as those streams or bodies which are capably being used commercially for trade and travel.

Now, the law has been undisputed until *Bonelli*, that if a stream was historically navigable, the state's ownership continued. It is submitted that definitions of navigability for purposes of the Commerce Clause and for purposes of admiralty jurisdiction should be broad for protection of the public. However, when we come to define navigable for the purpose of taking from the riparian his rights and giving those to the states, the definition should be restrictive. And a suggested definition is that a stream will be considered navigable for purposes of the state's interest in the stream so long as it continues to be usable for commercial purposes of trade and travel, and the Willamette at this time, in my judgment at least, is not suitable for that purpose.

Now, Bonelli --

QUESTION: Isn't that kind of a new definition of navigability?

MR. MIX: The idea of the continuing navigability is new, Your Honor, that's correct.

QUESTION: In the finding here, do we not to the contrary, at least on a different -- maybe you would say a different kind of a definition?

MR. MIX: Let me make it very clear. The last thing Corvallis Sand wants to do is try to defeat the jurisdiction of the Court. The stream is navigable, the court found it was navigable, the trial court, and I stipulated it was navigable, and it was navigable.

My concern is this: The states have liberalized this definition of navigable for the purpose of claiming ownership to additional land, and Bonelli at least implies that the state's interest ceases if the land ceases to be necessary for purposes of navigation.

QUESTION: Even if we were to adopt your restrictive definition of navigability so that Bonelli would not apply, the Supreme Court of Oregon could still develop its own body of law, could it not, as to whether or not you, your client or the state owned this particular land?

MR. MIX: That's not my understanding, Your Honor. The definition of navigability or navigable is for the federal

courts, and there is a long line of decisions holding this. Secondly, again, I can only state my understanding of Bonelli -- my understanding of Bonelli is that it said that this area of the law in the future is to be the subject of federal common law. Bonelli, the situation there was a very limited situation involving some dry land which had been artificially created. Again, it is my understanding that here we are seeking to explore what law should be applicable on a broader scale in terms of the --

QUESTION: But you are trying to avoid the application of Bonelli, as I understand your argument, by limiting the definition of navigability, is that correct?

MR. MIX: No, Your Honor, that is not my position.

QUESTION: Well, what is your reason then for wanting a narrow definition of navigability?

MR. MIX: For this reason, Your Honor, that again the states have taken upon themselves to liberalize the definition to take on more property. And again, if my understanding of Bonelli is correct, the implication at least is that the state's interest only continues so long as the water is usable for purposes of navigation.

QUESTION: So doesn't that prove what I just asked you, that you want to narrow the definition of navigability so that Bonelli will have less application?

MR. MIX: Well, it would limit, shall we say, the

land area underwater in that sense, yes, Your Honor.

QUESTION: Okay. Then, suppose we were to conclude for one reason or another that Bonelli didn't govern this case, then wouldn't it be up to the Supreme Court of Oregon to decide by Oregon law who got the property that is in conflict here?

MR. MIX: Not if my understanding is correct, Your Honor, that we also have a problem of due process here in the sense that these rights became vested --

QUESTION: Well, subject to constitutional limitations --

MR. MIX: Yes.

QUESTION: -- but what body of real property law would you look if Bonelli were not applicable to this case?

MR. MIX: Well, Your Honor, prior to Bonelli, the states had free rein to decide what they chose.

Excuse me, I request to reserve ten minutes, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Mix.

Mr. Iungerich.

ORAL ARGUMENT OF RUSSELL IUNGERICH, ESQ.,

AS AMICUS CURIAE, SUPPORTING CALIFORNIA, ETC.

MR. IUNGERICH: Mr. Chief Justice, and may it please the Court:

I want to begin by thanking the State of Oregon for

permitting the State of California and the 21 other states which join it in advancing the position expressed in our amicus briefs in this case, an opportunity to present our position to the Court in oral argument.

Our position is that neither this case nor the earlier decision of *Bonelli Cattle Co. v. Arizona* was ever a federal question arising under federal common law. And I submit that this is a very critical question to the states. Until *Bonelli*, the nature and extent of the rights of each state and its lands beneath the navigable waters within each state's boundaries were questions of state law exclusively confined to state courts, and we --

QUESTION: How about *Hughes v. Washington*?

MR. IUNGERICH: *Hughes v. Washington*, Your Honor, I submit, relied upon the construction of a federal patent and is a question there -- it involved a federal patent and the boundary that we are talking about, we are talking about actually defining one of the boundaries of a federal patent, where you have a federal patent and the construction of that patent and the scope and giving it force and effect, such as in *Hughes* or in *Borax*, which is in question, we concede that there is a federal question.

However, the normal rule is under *Joy v. City of St. Louis*, which is mentioned in one of the amicus briefs, is that the mere fact that a federal patent was the source of title

does not confer jurisdiction on any court. There has to be an issue about construction. In this case, there was no issue of construction of the patent. The issue here is the effect of a change brought about by a flood on the Willamette River. We submit that that is a question purely and simply of state law, what the effect of that change was.

Now, effectively what we are arguing for is with regard -- we submit that, first, under the equal footing doctrine, the equal footing doctrine is properly interpreted, leaves to the state courts the right to determine under their own rules of property and in their own form all questions with regard to the beds of navigable rivers and all questions with regard to the changes in those beds that occur later. Simply stated, that means that all these questions are state law questions, as we see them.

An alternative view, we believe essentially that that construction is the proper one. An alternative and perhaps equally acceptable construction to the states that argue as amicus is that if the equal footing doctrine does confer jurisdiction under the federal Constitution on this Court, it confers it to define what the incidence of sovereignty are and no more. It does not confer a basis for determining questions under federal common law, and to explain that point and what I mean by that is this:

The Court could say that, as of the date of admission

to the Union, the states involved under the equal footing doctrine were vested with fee simple title in the beds of all navigable rivers as to wherever those beds might move in the future. However, the line on the analysis of Bonelli, the effect of that decision would be that it would acquire title to the beds of navigable rivers in all states in the state in full proprietary and all other sovereign aspects and would do so as a matter of constitutional law, no longer bringing cases like this before this Court, because any effect of where the river happened to be flowing, changed by a flood, would leave those cases out of court.

However, if Bonelli is applied under those circumstances, it would mean that the state cannot rely upon the equal footing doctrine as a source of title for relictbeds or re-emerged land. But we submit that still does not present a federal question. What it creates is a title vacuum, and that is really what the issue was in Bonelli.

In other words, the courts, as we see it, should have gone no further than to decide in Bonelli that equal footing did not confer title on the state. It should not then have gone and created a federal common law rule which disposed of the relictbed of the river and granted it to Bonelli Cattle Company, because the question there presented is really a question of state law, as the cases of this Court indicate. The effects of accretion, the effects of avulsion, the effects

of reliction, all of those questions have always been held by this Court to be questions for the state courts, not questions for the federal courts to determine.

And we submit that the basis for this second alternative is essentially that, when you decide the equal footing determines that there was no claim in Bonelli, that equal footing could be a basis for the state's title. Really, it should be up to the state court to decide the disposition of the property in question at that point, because the third section of the Bonelli opinion begins by stating "the question that remains is as to who owns the subject land under the applicable federal common law." I submit, however, that the parties in Bonelli -- and having read the briefs, I submit this -- indicated that there was no difference between state and federal law in this case. And they did not bring out any source of federal jurisdiction for creating a federal common law principle.

We are told in *Erie Railroad v. Tompkins* that there is no longer any general federal common law, so we must look to one of the several sources of specialized common law. None of them, which our brief points out, are applicable in the case of the federal common law rules created in the Bonelli decision. And I think that --

QUESTION: Well, what about interstate boundaries?

MR. IUNGERICH: Well, the court did not rely on the

interstate boundary in Bonelli. And I would point out that we were only talking about land that was wholly within Arizona in Bonelli. In other words, we were talking about Arizona owned from the middle of the river to the new high water mark. The remaining --

QUESTION: The river had been at one time the interstate boundary, had it not?

MR. IUNGERICH: It had at one time -- well, it still is the interstate boundary.

QUESTION: The channel of it.

MR. IUNGERICH: The channel of the river. I don't know exactly the effect of the compact between Arizona and California on that point at this precise location, which, of course, affects that. But the interstate boundary was not the critical question. If it were, we would not be here, because I would submit, if there is an interstate boundary and you are talking about a conflict between two states over an interstate boundary, that is one of the areas where specialized federal common law does apply. And we would agree under those circumstances, but it was land wholly within Arizona, it was land between the new high water mark and the old high water mark, and there was a question purely and simply of state law that should have been applied.

QUESTION: Do you think state law has force enough on your approach to the case to give the state title to the

land under a river which has changed -- a navigable river which has changed its course noticeably by an avulsion rather than accretion?

MR. IUNGERICH: I think a state could so hold, yes.

QUESTION: At the time of statehood the river is in a certain place; under the equal footing doctrine, the state gets the title to the riverbed as it then is, and then the river changes course markedly by, say, a quarter of a mile and the person over whose land the river now flows loses title to the riverbed.

MR. IUNGERICH: That's right.

QUESTION: You think the state could have that sort of a rule?

MR. IUNGERICH: Yes, I do.

QUESTION: Without any reliance on any equal footing doctrine?

MR. IUNGERICH: Yes, I do, Your Honor. I think the reason for that is --

QUESTION: I suppose you have to take that position?

MR. IUNGERICH: Yes, Your Honor, because the whole purpose of protecting the public's rights to commerce, navigation and fisheries depends, as the cases of this Court teach us, upon the ownership of the bed. The two are related. And so the state holds that bed in trust to protect those public purposes, and it really makes no sense to talk about

the state not owning the bed of a major artery such as the Willamette River, a major navigable river, which is so important to commerce and to a state and to its public. So that you have some portions that are held in private ownership and other portions that are held in public ownership.

QUESTION: Would you deny that the Oregon courts could conclude as a matter of Oregon law that the State of Oregon didn't have title to this river, to the bed of the river?

MR. IUNGERICH: I think the State of Oregon could so decide and, under those circumstances, many states, such as I believe Wisconsin and Illinois, have taken the position that the riparian landowner owns to the thread of the stream. And if a state decides to do that, I submit that that is within the state's prerogative. But the problem here is whether or not a federal common law should compel that result, that the state give up title to the bed of the river, and that is I think the critical issue of state sovereignty that is presented in this case.

QUESTION: Of course, the state got part of this land, didn't they, in the bed of the new river in this case?

MR. IUNGERICH: They got part of the land, yes. The question is the remainder.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Herman.

ORAL ARGUMENT OF PETER S. HERMAN, ESQ.,

ON BEHALF OF THE STATE OF OREGON, ETC.

MR. HERMAN: Mr. Chief Justice, and may it please the Court:

My name is Peter Herman, and I represent the Attorney General's Office of the State of Oregon, and am here on behalf of the State Land Board.

I feel some clarifying statements here are in order in terms of stating the case. I would like to call the Court's attention to pages 40 and 41 of the joint appendix, the brown document. The chart on the left shows the river as it was in 1890, and the Court will note two points, A and B. This is the neck of the peninsula and the overflow channel that was discovered on that date. The chart on the right, page 41, shows an enlarged overflow channel and a smaller channel going around the oxbow. That was the river as it existed in 1911, after the change took place.

Now, the holding of the Bonelli Cattle Company, as we interpret the decision, was that public title follows the river and its changes to guarantee full public use and enjoyment, that when the river recedes from riparian property, the exposed land is no longer needed by the state for public purpose and therefore title goes to the riparian owner. And whether the change is sudden or artificial, perceptible or not, makes no difference.

We submit that the rationale should be applied in this case to the facts involving Fisher Cut. And in any event, even if traditional avulsion doctrine is to be applied, we submit, as a matter of law, that no avulsion did in fact occur. And in effect what the Court is being called upon to do here is to review the legal conclusions the Oregon courts drew in an essentially agreed upon factual setting.

Now, what happened here was --

QUESTION: Precisely what are the issues that the state raised in its petition for certiorari? I take it you got title to three of these parcels.

MR. HERMAN: Well, as far as this --

QUESTION: And beyond those parcels, what issues are you -- you aren't raising any issues to those parcels, are you?

MR. HERMAN: We are not raising any issues as to parcels that the state was awarded title.

QUESTION: All right. Now, what are the issues?

MR. HERMAN: The issues we are talking about are essentially parcels 2A, 2B and a portion of parcel 3, which are called Fisher Cut. That is the overflow channel that the Court sees on page 40, and the enlarged channel that the Court sees on page 41, with the word "Fisher" in it.

Over a twenty-year period, there was much flooding, there were recurrent storms, some major storms. In 1890, this

channel carried water at an intermediate stage of five feet. By 1906, one-fourth of the river was flowing through this channel at the four-foot stage, which is again an intermediate stage. There were some more major storms. And by November, sometime after November 25, 1909, the main flow of the river was found coursing through this overflow channel.

Now, the trial court held that this constituted an avulsion, that the change was sudden and violent. The Oregon Court of Appeals and the Supreme Court essentially agreed and ruled that the state had no title to the bed in this portion of the river. Now, this section of the river is approximately 2,500 feet long, but the court sent the case back to the trial court to determine the precise limits of the avulsion.

Now, the issue we have raised in our petition is whether, under these facts, it was proper for the court to conclude that an avulsion did occur and that the public did not have title to this bed.

Stated another way, we are contending that this was not an avulsion, that the public's title to the river followed the river as it enlarged over the years, this overflow channel.

Essentially what you had here was a river flowing around an island at an intermediate stage and --

QUESTION: Mr. Herman, if it is an avulsion, do you concede that the state does not have title to the bed of Fisher's Cut?

MR. HERMAN: Well, if avulsion doctrine applies, Your Honor, that would have to be the concession, yes. Our position on that is several points.

First, as a matter of law, there was no avulsion here. There was no sudden change of channel. You had in existence two channels.

QUESTION: Yes, but let's assume it is. I want to be sure about this. If it were an avulsion, then, you are content to have a situation where the State of Oregon does not own that portion of the bed of the river?

MR. HERMAN: If avulsion -- if this Court is to continue holding that avulsion doctrine applies, then that ends the case. We submit that --

QUESTION: Well, I thought the Supreme Court, your State Supreme Court awarded you three tracts of land here, 2A, 2B and 2C.

MR. HERMAN: Those are the tracts that are in issue.

QUESTION: All right. Now, what did they award you?

MR. HERMAN: They awarded us tracts 1, 5, 6, 4 --

QUESTION: I see.

QUESTION: And are they under the old channel?

MR. HERMAN: Well, actually you have got a combination here of old channel and new channel. The river followed an oxbow prior to 1890, and part of the property in dispute here is that same river. What happened was, there was an

overflow channel across the neck of the oxbow, and that is the area of the river that is in issue here in this Court today, because we are saying that the state has title to the bed under that former overflow channel, which is now the main bed of the river.

There is no contention from us concerning the parcels at the --

QUESTION: Now, I take it that -- I don't see any claim in your brief -- perhaps it is there -- that is asking us to overrule Bonelli.

MR. HERMAN: No, we are not asking the Court to overrule Bonelli, providing that the Court applies what we think is the logical rationale.

QUESTION: Now, let's assume for the moment that state law would apply in this case, that Oregon law would apply, the avulsion and accretion law, I take it you would come out about the same way under this Supreme Court --

MR. HERMAN: No, we would not come out the same way, Your Honor, because I assume if the state court applied the avulsion doctrine, they would hold that we did not have title to the bed in this overflow channel, which is now the main channel of the river.

QUESTION: Well, they held that you didn't have title to 2A --

MR. HERMAN: Correct, but they held it on the basis

of Bonelli. They applied --

QUESTION: I understand. But under state law, you would come out about the same way, at least as to these three tracts, if there was an avulsion.

MR. HERMAN: Come out the same way as federal law, is that --

QUESTION: No, as the court -- the result here, you would have the same result as to ownership with respect to --

MR. HERMAN: That's correct.

QUESTION: Yes.

MR. HERMAN: If state law was applied -- well, I am going to have to recede from that. I don't think there has been another case in the State of Oregon in which the principle of avulsion has been applied against the sovereign. It has been applied in boundary disputes between riparian owners, where a river was a monument or a boundary between two riparian owners. It has not, to my knowledge, been applied to say the state does not have title in the case of an avulsion, and that, of course, is our principal contention here, that avulsion doctrine has no place in a case such as this.

QUESTION: This is why you surprise me in your concession about avulsion.

MR. HERMAN: Well, maybe I misunderstood the Court's -- I caught myself, because if the Court -- of course, the

Oregon court applied the avulsion doctrine, relying on Bonelli, I assume that it would apply the same doctrine even if Bonelli was not relied upon. However, we would argue in the court, if it were remanded back, that avulsion is not appropriately applied to the situation like this, because avulsion is a boundary concept to mark the boundaries between riparian owners. It is inappropriately applied in a situation where the sovereign title is at issue. And if you are going to have an avulsion doctrine, you are always going to have uncertainty as to ownership of the riverbed, because you are always in the situation of trying to evaluate changes of the river, and there have been hundreds of changes of the Willamette River since 1859, and you might just as well say that the public does not have title, there is no public use and enjoyment, because you are in the position of always having to litigate was this or was this not an avulsion.

We are at the Bonelli rationale, which says that the public's title follows the river. There was some language in the opinion that indicates that it only follows the river as to gradual changes. We think this word "gradual" raises the same problem again. The court was relying upon boundary cases, where the issue is where the line is between two states when the river changes, and those cases where there is a sudden change, you can observe where the river was and the former channel of the river remains the boundary, but that rationale

is inappropriately applied to a case like this.

QUESTION: Well, according to the findings of the Supreme Court of Oregon, you could certainly tell the day that Fisher's Cut began to carry the majority of the stream.

MR. HERMAN: Well, I don't know whether you could or not, Your Honor, nobody was there to see it, the witnesses --

QUESTION: Well, nobody has been there in the case where most things have been found avulsion. It is all a bunch of early settlers or Indians testifying about boats going up and down the river and that sort of thing, isn't it?

MR. HERMAN: Yes. Well, Your Honor, I would answer your question this way: You have an avulsion, if you are going to apply the traditional doctrine, where there is a channel change, but I submit there is no channel change when you have got both channels there, and it is just a question of the water in one channel changing from the major flow to that channel to the major flow of the other channel. And even if it is sudden, it is not really --

QUESTION: Well, but those are contrary to your position, as in the various state courts which have treated questions of state law.

MR. HERMAN: Well --

QUESTION: They are Eighth Circuit cases.

MR. HERMAN: Well, I am not sure which case the Court is referring to. There are actually very few cases that

have dealt with this issue. It is mostly boundary disputes. The Commissioners case was the closet case I know of, and that involved a non-navigable stream and a boundary dispute between two riparian owners. The Court relied on that to come up the result it did in this case.

I would like to make one comment about the business of the rights of riparian owners under Oregon law. Oregon law grants the riparian owner no rights below high water unless by affirmative statute or deed. It has been the common law of our state that the riparian owner owns only to high water, and that what rights he has is by grant of the state, and that has been settled law in our state, going back at least as far as *Bowlby v. Shively* in 1892, which was in this Court on appeal.

Our suggestion to this Court is that if federal law is to be applied, and we do agree with amicus California to this extent, that the states should have title and the state court should have the right to decide title in all cases of river changes, and that the fact there has been a so-called avulsion change does not deprive the public of title, and the state can decide whether the public is to have title in that case or the riparian owner.

QUESTION: Then you are asking for a change in the Bonelli doctrine, aren't you?

MR. HERMAN: You mean change as to what court is to decide the issue?

QUESTION: Yes.

MR. HERMAN: We haven't asked for that, no, because we got what we considered to be an unsatisfactory result in the Oregon court, and we were happy to petition this Court to have that result protected. It would help the state if the Court agrees with our contention and rules that it has jurisdiction.

It would also help the state if this Court rules that it is up to the state to decide under these circumstances whether the riparian or the state has title.

QUESTION: But we can't do that and leave Bonelli completely intact, can we?

MR. HERMAN: The Court would have to modify Bonelli, I presume, as to the comments of federal common law, yes.

QUESTION: But don't you sense some dissatisfaction up here with Bonelli among these questions?

MR. HERMAN: I sense dissatisfaction nationwide with Bonelli, Your Honor.

QUESTION: I wonder why you don't hit it head-on.

MR. HERMAN: Well, I like the result of Bonelli, or we like the result of Bonelli. If the Court had stopped at the point of saying that Arizona has no title under the equal footing doctrine to this bare land, and the rest of the opinion stood, the implication would be very clear that the state would still have title, no matter how the river changed.

QUESTION: Are you suggesting that we modify or re-examine at least merely the dicta in Bonelli?

MR. HERMAN: Yes, although I think the federal common law is more than dicta, because the Court relied on that to say that Arizona didn't have title to the bare land, although the Court could have say it didn't have title to the bare land just based on the equal footing doctrine.

I think it is appropriate here to sum up what our position is. If the Bonelli case is to apply, we submit that it should apply in this case and the Oregon courts would have to be reversed because the rationale of Bonelli is that title follows the river and the character of the change is immaterial, both as to the riparian and as to the public. We feel that the same rationale should apply to both sides.

If the Court is to modify Bonelli, it seems to us that that part of the opinion that in effect rules the state has title under the Constitution or under the equal footing doctrine as to the river, wherever it lies, would require remand of the case back to the Oregon courts to deal with the fact that their decision is inconsistent with the way this Court would interpret Bonelli under those circumstances, and leave to the Oregon courts and the legislature to decide how the title should be apportioned between the riparian owner and the state.

QUESTION: Do you understand your state courts to

have held that there was an avulsion in this case?

MR. HERMAN: They held there was an avulsion in this case, yes.

QUESTION: And now you think that if federal law applies, we should not necessarily accept their finding as to avulsion?

MR. HERMAN: They should not accept it, because we submit both as a matter of law, whether you are looking at traditional avulsion doctrine or looking at the equal footing doctrine under Bonelli, this was not an avulsion. And it was not an avulsion because it was a twenty-year process. In fact, one-fourth of the river was going through this channel in 1906 and it didn't change until November of 1909, so I submit that this is a matter of classical avulsion. That is not an avulsion.

QUESTION: You would suspect -- if you accept the finding of avulsion, you would, I take it from what you said before, would anticipate the same result under Oregon law as under federal law, if this was an avulsion?

MR. HERMAN: Well, if it is and the Court rules that it is still up to the state to decide --

QUESTION: Yes. Let's assume that we decided that federal law governs -- federal law does not govern, but that state law does, would you think that the Oregon courts would come out with the same result?

MR. HERMAN: I think I would rather not predict that, because I would want to argue the point that this really is not an appropriate doctrine to apply when the state is the sovereign and the owner of the bed, and the issue is whether the state has title to where the river now flows. I would want to argue that -- we would want to argue that point again and get the Court to re-examine its thinking, particularly since this is the first case where the state was involved in this matter that has come up in the State of Oregon that I am aware of.

QUESTION: Let's -- the Oregon court here got around to saying that they didn't think the state really needed ownership of these tracts under this navigable stream, but the state's total sovereign interest could be served in other ways.

MR. HERMAN: The state was answering our contention or it interpreted our argument to mean that we should get title because we needed it, even though it was avulsion, and our argument, of course, was that we needed title and it was not an avulsion and that our argument had substance to it, it wasn't just a technical contention that we should have title because it was nice to have title.

QUESTION: Under Oregon law, Mr. Herman, is the determination of an avulsive change a mixed question of law and fact?

MR. HERMAN: I think that states it perfectly, Mr.

Justice Burger, because the facts in this case really are not in dispute. It is the conclusions that the court drew from those facts that we are arguing about.

QUESTION: Do you think we have any authority to draw different inferences and conclusions from --

MR. HERMAN: I submit you do, Your Honor, in an agreed upon setting of facts, you are not really making a different finding of fact because what the Oregon courts did was draw a legal conclusion that from these facts we hold that an avulsion occurred. It really was more of a legal conclusion, because the facts are essentially in agreement.

QUESTION: But does this Court ordinarily re-examine the highest court of a state on a determination of state law?

MR. HERMAN: Well, this was not a determination of state law.

QUESTION: Well, I am just taking it one step at a time now. On state law, we don't re-examine, do we?

MR. HERMAN: If there is a federal question involved, the Court will re-examine the inferences or conclusions that are drawn from the agreed upon facts.

QUESTION: That is what you are suggesting now, is that because the federal question is at least hovering here --

MR. HERMAN: Yes.

QUESTION: -- if not in, then we can say that this was not an avulsive change because it took at least three

years for it to occur.

MR. HERMAN: Actually it took about twenty.

QUESTION: Yes, but at least three.

MR. HERMAN: Yes. The federal question aspect of it is critical, of course. If there is no federal question here, if the state is not asserting the right under federal law, then we have no basis to ask this Court --

QUESTION: Then we aren't here at all.

MR. HERMAN: Right.

QUESTION: Mr. Herman, you say this was not a classical avulsion. It certainly wasn't a classical accretion either, was it?

MR. HERMAN: It falls almost precisely within the case of Commissioners v. United States, Your Honor, which is cited in the brief. It is classified as an exception to the accretion doctrine, because what the river did was crawl around and create a new channel, and how long that took we don't know, but we know it took twenty years after the channel was discovered before it became the main channel of the river.

QUESTION: But we also know there was a precise point in time at which one channel ceased to bear the main part of the current and the other one did, from the findings of the court, do we not?

MR. HERMAN: That's correct, Your Honor, sometime after November 25, 1909.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Herman.

Mr. Mix, you have about nine minutes left.

ORAL ARGUMENT OF ROBERT MIX, ESQ.,

ON BEHALF OF CORVALLIS SAND AND GRAVEL CO. -- REBUTTAL

MR. MIX: Thank you, Your Honor.

Clearing up one basic fact matter, the land in dispute can be divided into two types. A comparably small portion of it was under the channel that is being disputed as to whether or not it was avulsive. The balance of it upstream was in the original bed of the river, and I submit this creates two different problems.

My concern here is the right of the riparian. Being very candid, if the Court had not, starting with *Barney v. Keokuk*, handed down a line of decisions on federal authority, taking the ownership of the bed from the riparian and giving it to the state, we wouldn't be here today, because all states except Louisiana adopted the common law, and there was no question as to what the common law meant. It was only when the Court said the states own the beds, that they may decide what disposition they are going to make of them, that we found ourselves in the situation we are in today.

On that basis, *Bonelli* becomes very important because it points the way to a return to what was the law of the land. And it should be pointed out that in 1876, when *Barney*

was decided, 38 states had already been admitted to the Union, and in the territories not yet granted statehood it is safe to assume that the principal riparian land had been occupied.

QUESTION: Did the Court in Barney say what its authority was for deciding the matter as a federal question?

MR. MIX: It did not, Your Honor.

QUESTION: Was it a diversity case?

MR. MIX: It was not, is my understanding. It could have been. It was a railroad case, and the railroad might not have been a resident, but the case doesn't say that.

QUESTION: It conceivably could have been a Swift v. Tyson case, couldn't it?

MR. MIX: I am not familiar with the case, Your Honor. Again, by 1876, most of the important riparian land in this country was occupied by riparians. And then Barney v. Keokuk was handed down and the riparian started to have his rights taken away from him. Again, emphasizing the due process aspect, there is even more than that. There is the problem of the court taking jurisdiction a hundred years ago, and if it is now going to be declared that the court doesn't have jurisdiction, the riparian is left at the mercy of the states. And there is a very practical aspect of this.

Stating this hypothetically -- but it is very real -- we take a riparian in State A, and State A's supreme court has decided, as Oregon has and as Mr. Herman said, that the

riparian has no rights below high water. Immediately across this navigable river is State B, and State B has ruled that the riparian owns to the middle of the stream. They are both under the common law, they are both under the applicable constitutions. How in that situation do we explain to A that the state can actually come in and take the portion of the bed in front of your property, sell it off so long as it doesn't interfere with navigation -- and let's take between high and low water, for example -- someone can fill it in, build a building and you, A, have no rights left.

Now, while Bonelli is in dispute here, there is certainly one thing said in Bonelli that should not in my judgment be in dispute, and that is that riparianness is important. And there is no reason under our jurisprudence for saying to a riparian, you do not occupy the same status as other property owners in this country. There is no reason to discriminate against the riparian when the courts are dedicated to protecting the property rights in other types of situations.

The common law, as it applied at least until 1865, would resolve all of these problems. We wouldn't have to argue --

QUESTION: Mr. Mix, could you help me a little bit on the federal question issue. You argue that a uniform rule is desirable, but your theory of federal jurisdiction, as I understand it, is that there are patents involved and the equal

footing doctrine and the fact that the river is navigable. Those are your three bases for federal jurisdiction. Would you explain to me what is the relevance of the fact there is patented land involved?

MR. MIX: Referring to at least two decisions of this Court, the Borax Ltd. case and the Hughes case --

QUESTION: In Hughes, they were construing the patent of the prior owner, I believe, were they not?

MR. MIX: Yes, Your Honor.

QUESTION: But you are not arguing any basis of construction on a prior owner of this Fisher Cut, are you?

MR. MIX: Well, we are contending, Your Honor, yes. We are the owners by means of conveyances of the property which was originally patented out by the federal government, and it is our position that when that property was received from the federal government, as part of it the riparian rights passed and that we have succeeded to those rights by the mean conveyances, and that this is a matter of federal law, in interpreting that patent, that the state can't come along and say, now, even though you have a federal patent, you've got nothing beyond the high water mark.

QUESTION: Thank you.

MR. MIX: Again, very briefly, the common law, it is applied, we will not have these problems of avulsion, what is navigable. It is a very simple matter to determine the head

of tidewater.

Turning briefly to the matters the state has raised, the law goes back to the Romans, that if a river changes its channel and flows over private property, the private landowner does not lose his title. We are not talking about riparian rights, we are talking about the law of submergence. And the riparian continues to maintain title subject to the public navigational servitude. And disagreeing with California's position, the state doesn't need fee title to the bed to protect the public, and we know this is true because in approximately twenty states in this country, the state has declared or has adopted the common law and the riparian owns the bed, and there is no record to my knowledge of the riparian successfully interfering with the public rights. It is --

QUESTION: And the Oregon courts decided likewise in this case with respect to the three tracts of land?

MR. MIX: Yes, to the avulsive challenge, yes, Your Honor, that is correct. And this is an illustration of the lack of need of fee title in the state. And what we are disputing here really is its proprietary right of the riparian on the one hand versus the right of the public to use the water on the other, and there is no real conflict except that one is created hypothetically by saying, well, we hold it in trust. But I submit that is a misapplication of the trust doctrine.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:07 o'clock p.m., the case in the above-entitled matter was submitted.]

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