In the

Supreme Court of the United States

CALIFORNIA EX REL. STATE LANDS COMMISSION, Plaintiff,	:	
v.	:	No. 89 Orig.
UNITED STATES	:	

Washington, D. C.

Monday, March 29, 1982

Pages 1 thru 38

ALDERSON REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -x

CALIFORNIA EX REL. STATE LANDS :

COMMISSION, :

Plaintiff, :

v. : No. 89 Orig.

UNITED STATES :

- - - - - - - - - - - - - - - - - - - -x

Washington, D.C.

Monday, March 29, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock a.m.

APPEARANCES:

BRUCE S. FLUSHMAN, ESQ., Deputy Attorney General of California, San Francisco, California; on behalf of the Plaintiff.

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Defendant.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in California against the United States.

Mr. Flushman, you may proceed whenever you are ready.

ORAL ARGUMENT OF BRUCE S. FLUSHMAN, ESQ.,
ON BEHALF OF THE PLAINTIFF

MR. FLUSHMAN: Chief Justice Burger, and may it please the Court, this choice of law case arises under the original jurisdiction of this Court. California was granted leave to file a complaint seeking to acquire title to certain coastal lands which under undisputed California law belong to the state. The matter is now before the Court on California's motion for summary judgment and the United States cross-motion for a judgment on the pleadings.

At its heart, this case concerns the federal system defining the relationship between the state and national sovereign. The issue is whether the United States can interfere with fundamental state soveriegn attributes long recognized by this Court that state law decides conflicts over state sovereign lands. Here, if the United States were not the upland owner, it would be unquestioned but that California would own the disputed

land. The result should not differ merely because the United States is that owner.

The facts are few and are not contested. Before the late 1880's, the disputed land lay north of the entrance channel to Humboldt Bay, California, and below the ordinary high water mark along the Coast Guard site. In the late 1880's, two rubble mound jetties were built to stabilize this entrance channel by the Army Corps of Engineers. Most particularly concerned is the north jetty, which according to an undisputed government report, formed a barrier to the down-coast drift of sand suspended in the ocean.

As a result, the shoreline along the Coast Guard site moved seaward almost two-thirds of a mile at the jetty. Comparison of maps showing the unjettied entrance with maps after the jetties were built shows the progressive, dramatic boundary changes. California has lodged with the Court a blown-up exhibit of a series of such maps.

That this shoreline change would not have occurred as a result of natural wave and tidal action unaided by the jetty barrier may best be shown by an examination of a 1915 map showing the north jetty destroyed. During that time, the jetty ceased to function as a barrier to the down-coast drift of sand

and the shoreline reverted to its natural configuration. Once the jetty was rebuilt, the artifical deposition process continued, covering up and filling in the land, resulting in the current coastline configuration.

Never considered part of the Coast Guard site, the land remains barren and unused. The Coast Guard even applied to California for use of the land, which the Coast Guard characterized as "artificially accreted land belonging to California." Only belatedly did the United States assert that it owned this artificially accreted land according to federal law applied by virtue of the rule of Hughes versus Washington.

After some peregrinations, this is now the essential position of the United States before this Court.

QUESTION: The state has not been exactly consistent.

MR. FLUSHMAN: We believe our position has been consistent.

QUESTION: Well, you have not abandoned a single part of any of your claims.

MR. FLUSHMAN: I do not believe so, Justice White. Our position is quite simple.

QUESTION: I take it you are not asserting any

estoppel principle against the United States for having applied --

MR. FLUSHMAN: We are not. The United States versus California, 332 U.S., we believe, bars us from doing so.

QUESTION: Would this case be here if that movement on the part of the admiral out there had not taken place?

MR. FLUSHMAN: I think it still would be. We believe that what the admiral did is to show that the manager of the land believed that the land -- the manager of the lands adjacent to the subject lands did not believe that the subject lands were part of the Coast Guard site. We believe that that is an interpretation by a person of some administrative authority which is entitled to some weight by this Court in considering the questions before it, but it does not constitute an estoppel.

QUESTION: Has the watchtower ever been built?

MR. FLUSHMAN: The watchtower was built.

QUESTION: Otherwise, are the subject lands used for any purpose?

MR. FLUSHMAN: They are used by members of the public to traverse that portion of the shoreline. They are not used by the United States in any other fashion.

QUESTION: And they do not in any wise interfere with the operation of the Coast Guard site?

MR. FLUSHMAN: I do not believe so. The entrance to the Pacific Ocean is on the other side of the spit. The Coast Guard site is on a very open and rough shoreline. It would be impossible, at least, I believe it to be impossible for boats to enter the Pacific Ocean from the shoreward side of the Coast Guard site.

QUESTION: And do we know whether the United States has any plans for its use?

MR. FLUSHMAN: I -- my belief is that the entire Coast Guard base has been declared surplus, and will be transferred to either a state or public agency or to private parties.

QUESTION: Mr. Flushman, as I understand it, the Coast Guard reservation was acquired by the federal government after California had become a state.

MR. FLUSHMAN: Justice O'Connor, the land that comprises the Coast Guard site was ceded to the United States in the Treaty of Guadaloupe Hidalgo, and is part of the public lands of the United States. At the time that California became a state in 1850, all of the tide and submerged lands that were in California -- excuse me, all of the tidelands in California and the submerged

lands by virtue of the Submerged Lands Act came to California as the result of its sovereignty and the Submerged Lands Act. The uplands remained in the United States for whatever disposition the United States desired to take.

QUESTION: And the formal withdrawal by the United States of the parcel for the purposes of building a lighthouse originally?

MR. FLUSHMAN: Yes.

QUESTION: Were there any terms or provisions in the withdrawal that would affect any rights that the United States would have reserved for the tidelands?

MR. FLUSHMAN: The reservation orders are contained in the exhibits, and they refer to lots and sections of particular townships.

QUESTION: Right. That is why it's hard to interpret them.

MR. FLUSHMAN: Those lots and sections are described also in one of the exhibits which is the township plat that was prepared by the United States. The shoreward boundary of those -- or the seaward boundary of those lots is the boundary of the public lands of the United States. That is all the United States could reserve. California owned the lands that were below the ordinary high water mark. That is what

the term of the reservation is. The United States reserved the lands above the ordinary high water mark; California owned the lands below the ordinary high water mark.

QUESTION: Down to the low water mark?

MR. FLUSHMAN: Until United States versus California, United States versus California 381 U.S., said that --

QUESTION: You are suggesting that California owned the lands and the seabed before California?

MR. FLUSHMAN: I am suggesting that --

QUESTION: That isn't what California held.

MR. FLUSHMAN: -- that 381 U.S., United States versus California, determined the ownership of lands, the decree as a result of that case determined the ownership of lands below the low water mark in California.

QUESTION: What the ownership had always been.

MR. FLUSHMAN: I'm sorry?

QUESTION: Determined what the ownership had always been.

MR. FLUSHMAN: It determined what the Submerged Lands Act conveyed to California. Our contention is that that ownership as a matter of equity and justice related back to the time that California

became a state.

QUESTION: Well, that may be the result of what some court should hold, but that is not what either the Act or the case required.

MR. FLUSHMAN: The Act was designed according to our contention to restore these states --

QUESTION: Restore?

MR. FLUSHMAN: -- to its pre 19 --

QUESTION: Restore, or to cede? What language did it use?

MR. FLUSHMAN: It used a variety of language. It used --

QUESTION: But it didn't use restore.

MR. FLUSHMAN: It used language such as follows. "Recognized, confirmed, established, and vested in and assigned to the respective states." This is the granting clause, Section 3 of the Submerged Lands Act. So it either recognized, it confirmed, it established, or it vested. Now, to recognize, there had to have been some title there for it to do so. This is the basis in statutory language.

QUESTION: Well, you really aren't suggesting, are you, that the California case said that the United States was taking property that did not belong to it?

MR. FLUSHMAN: The first California case held

that the national sovereign as a result of its paramount authority and for external sovereignty reasons has -- excuse me, paramount authority over the submerged lands that lie seaward of the ordinary low water mark. Ownership of those lands, we contend, was not decided in those cases.

Alabama versus Texas, which is the case which upheld the Submerged Lands Act, says that --

QUESTION: Well, what if you are wrong? That really isn't your basic claim in this case, I don't think.

MR. FLUSHMAN: It is not.

QUESTION: Well, so it isn't critical to your --

MR. FLUSHMAN: It is not. As admitted by the United States in its answer, the depositions that were caused by the jetty were deposited below the ordinary high water mark on California's sovereign tidelands. This conclusion is found in the decisions of this Court. Although in United States versus California, as I have mentioned, the state's title to tidelands, lands that lie landward of the low water mark but seaward of the high water mark, was not questioned. The Court explicitly recognized California's title to tidelands. This title was also confirmed in the Submerged Lands Act.

In United States versus California, 381 U.S., this Court set the seaward boundary of the state's open coast tidelands at the low water mark as that mark actually exists. Thus, the low water mark boundary of tidelands follows physical reality, no matter the cause of the change in its physical location, whether natural or gradual, sudden -- whether natural or artificial, sudden or gradual.

In this case, as the jetty-caused depositions occurred along the Coast Guard site, the low water mark was pushed further and further seaward. On the other hand, under California law, the high water boundary of tidelands does not remain ambulatory in these conditions. Under undisputed California law, when the depositions are caused by the works of man, as here, they are treated as artificial accretions owned by the state.

The effect of this rule is to fix the high water mark boundary in its location immediately prior to the effect of the artificial works. This is similar to the rule concerning an evulsion, which also results in the fixing of a boundary at a former location. Thus, as all depositions occurred seaward of the high water mark fixed in location immediately prior to the jetty construction, but landward of the low water mark, such

depositions occurred on California's tidelands in which California, as admitted by the United States, has absolute title.

QUESTION: Why wouldn't you submit the same rule would apply to accretions on your tidelands if they didn't occur artificially?

MR. FLUSHMAN: That is a decision which California submits each state makes for itself.

QUESTION: So -- all right. In this case, if it were decided that these were natural rather than artificially caused accretions, what would the California law be?

MR. FLUSHMAN: California law would be that those accretions go to the upland owner. The upland owner's boundary would move out as the accretions occurred.

QUESTION: So a critical factor in this case is whether these are natural or artificial?

MR. FLUSHMAN: Yes, Justice White. Under --

QUESTION: I mean, even -- under your submission, even that.

MR. FLUSHMAN: The critical fact in this -- as to this part of the case is that these were artificially caused --

QUESTION: Yes.

MR. FLUSHMAN: -- and under California law there is no question but that they were artifically caused. California's conclusion, I will frankly admit, depends on the application of state law to decide the boundary contest between the upland owner, the United States, and California, the owner of the tidelands, over the effect of the movement of their mutual boundary, the high water mark.

California submits that the rule of American jurisprudence since California -- since Pollard's Lessee versus Hagan was decided in 1845, has been that the effect on land title of after statehood changes in the high water boundary of sovereign lands such as tidelands is decided under state law. Long established precedents of this Court have held that state law applies to determine the right of littoral owners in sovereign lands.

Thus, the United States had no expectation to the land formed by jetty construction based on application of federal law. This rule is founded in the constitutional doctrines which preserve the basic powers and sovereign attributes, sovereign inherent attributes of the states. The rule has been recognized by this Court, which holds that state sovereign title is absolute so far as any federal principle of land titles

was concerned, and cannot be defeased by application of federal common law.

In fact, the United States admits in Paragraph 5 of its answer that the state's title to tidelands lying landward of the coastline as these lands do is absolute.

Although the United States recognizes this rule, it seeks to restrict its application solely to sovereign lands underlying inland waters, but other than an offhand reference to Hughes, there is no reason given that would distinguish tidelands along inland waters from tidelands along the open coast. Presumably, the United States argues, based on Hughes, that there are international relations implications in the determination of the high water boundary along the open coast that require creation of federal common law.

Our opening brief, at Pages 13 to 18, disposes of this contention, and none of the three briefs filed by the United States elaborates on this point or responds to those arguments. Hughes, if it has any remaining viability, should be overruled.

QUESTION: If it isn't, is it controlling here?

MR. FLUSHMAN: Hughes would be controlling in this case. This case is an analogue to Hughes. It involves open coast lands.

QUESTION: Yes.

MR. FLUSHMAN: We think Hughes is wrongly decided, however, for the reasons that we have stated in our briefs.

The concessions by the United States that state law governs sovereign land boundary conflicts and inland waters at Page 15 of its opening brief and in its answer at Paragraph 5, where it admits that California has absolute title to lands that are landward of the coastline, are dispositive of this question. The rule cannot be otherwise, as the state's title to such tidelands, whether along the open coast or along inland waters is constitutionally founded.

Thus, the application of state law to decided contests over such lands cannot be limited solely to lands under inland water. Such state laws apportion changes between competing landowners in accordance with the customs and usages that have grown up in the state after long experience. This is a workable regime, consisting of a defined body of rules relied on by all property-owners in the state in the management of their holdings, and it makes no difference that the United States is the upland owner.

Wilson versus Omaha Indian Tribe recognizes that the mere presence of the United States as the

littoral owner does not provide an independent basis for application of federal law. Further, federal interests are not implicated as long as the state rules of property are not applied discriminatorily. Surely, the United States cannot complain that California's rule, which fixes the upland boundary at a former location, affects the sovereign interest of the United States, any more than the rule of supposed federal law where an evulsive change would also fix that upland boundary without affecting federal interests.

Other than an oblique reference to Hughes, the United States supplies no reason to create a federal rule. As this is an area that is integrally related to the constitutional sovereignty of the states, and as in Wilson, it requires the adoption of state law as the rule of decision.

Independently of the last argument, California submits that the Submerged Lands Act confirms California's title to the subject lands as "made" lands under the Submerged Lands Act. These lands are in fact "made" lands. The jetty was the sole and direct cause of two-thirds of a mile of deposition. This Court has long referred to such lands formed by such artificial depositions as "made" lands.

For example, in Jones versus Johnstone, 59

U.S. at 157, and in County of St. Clair versus Lovingston at 90 U.S. at Page 50, in the Senate hearings on the Act, land formed along jetties by tidal action, such as the lands here, was termed by Senator Price Daniel "made" lands. What makes this statement of great significance, more than the offhand remark, as claimed by the United States, is the fact that it was made by Senator Daniel. Senator Daniel argued both United States versus California and United States versus Texas before this Court. Senator Daniel was also one of the Senate's, if not the Senate's leading expert on the need for the enactment of the Submerged Lands Act.

Further, the remarks of Senator Cordon quoted in California's reply brief at Page 9 show that Congress contemplated the exact situation here. Lands that were once water-covered but through artificial activity no longer are are confirmed to the state. Indeed, it is a settled rule of property that the owner of once water-covered land made upland by the littoral owner retains title to those lands.

Here, Congress recognized this rule of property and confirmed California's title to the submerged lands which were made upland by the act of the littoral owner.

If there was any doubt that Congress intended

to confirm California's title to the lands formed by artificial deposition, it is dispelled by a consideraion of the purpose of the Submerged Lands Act. That great purpose was to restore the states to their pre-1947 position. Under settled California law, California was the owner of those lands prior to 1947. As a matter of equity and justice, Congress confirmed to the states the title that the states thought they had prior to 1947.

Now that the United States has retreated from its submerged lands argument, it is clear that this boundary dispute between the owner of tidelands and the adjoining upland owner, as California has repeatedly argued, is wholly extraneous to matters concerned in the determination of the coastline and the offshore boundary under the Submerged Lands Act.

The United States urges upon this Court the astounding proposition that there is a constitutional rule of ambulatory navigable water boundaries which all states accepted as part of their equal footing grant, and which has been confirmed in the Submerged Lands Act, particularly in Section 5 thereof. Based on this assertion, the United States claims that Section 5 creates in the United States the right to retain accretions to reserved uplands, state law to the contrary notwithstanding.

Such a contention directly conflicts with the basic purpose of the Submerged Lands Act. Indeed, it places California in a worse position than if the Submerged Lands Act had never been enacted. Even under the 1947 California decision, California's title to lands lying landward of the low water mark was unquestioned. As the Submerged Lands Act was meant to restore the states to their pre-1947 position, it should not be interpreted to deprive California of land lying landward of the low water mark that even under the 1947 California decision California owned.

Aside from the argument that the plain words of the statute do not except from the confirmation accretions to retained federal uplands, certainly this case does not fall within the class of federal interests that were designed to be protected by Section 5. Section 5 was designed to protect the interests of the United States with respect to any property which it actually occupied or is using. Especially in this case, where the United States had no expectation at the time the jetty was rebuilt that it would own the land created, where the United States has neither occupied nor used the land, and where the manager of the Coast Guard site considered this land not part of this installation but as belonging to California, Section 5

does not except the subject land from operation of the Submerged Lands Act.

Finally, so far as the lands here, the lands along the open coast that lie landward of the low water mark, as well as lands underlying inland waters, it is California's position that Section 5 of the Act and those exceptions cannot give the United States any more title to such lands than the United States can establish under state law. Such lands were already in state ownership by virtue of the equal footing doctrine. The Submerged Lands Act cannot restrict or defease California of its absolute title to such lands. The Section 5 exceptions could only condition those lands that were seaward of the low water mark along the open coast which the states lost in the tidelands cases but later received by virtue of the Submerged Lands Act.

Using state law to determine the rights of the United States as an upland owner would place no more additional burden on the United States than on any corporation that does business in more than one state. The United States would be required to research each state's property laws, hardly a burdensome or an impossible task. In fact, the Court recently held that such a requirement does not interfere with the program of the Small Business Administration. Indeed, the Court

has also held that federal water rights are subject to the various water laws of the states.

Nor would the United States be deprived of access to the sea if it really needed such access. The United States would merely need to condemn whatever access it needs, although, as in most such cases, agreement is the more likely avenue of resolution.

What the United States seeks to do here is to unilaterally deprive the state of land which the state owns under settled state law by applying, indeed, creating a federal common law. This is a clear violation of the mandate not only of Corvallis but of Erie versus Tompkins. Under the federal system, the states have certain fundamental and immutable sovereign attributes, long recognized by this Court, and concerned directly in this case, the sovereign land title and the right to apply state law to decide disputes over such lands.

Acceptance of the United States' assertion would alter the balance between the states and the nation envisioned in the Constitution by its Framers and set out in the decisions of this Court. Talismanic incantation of national sovereignty cannot cause the state to forfeit their retained sovereign rights. California's motion for summary judgment should be

granted.

Thank you.

CHIEF JUSTICE BURGER: Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE DEFENDANT

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court, it may be appropriate to begin by parsing California's arguments and the strange and odd premise on which it is constructed, and the odd results to which it leads. California would have you hold that the equal footing doctrine on which it places its entire reliance save only for the "made" land provision of the Submerged Lands Act, does not vest indefeasible title in the tidelands along the open shore as against erosion by the sea, but that it does vest indefeasible state title with respect to uplands extended by accretion. California would have you hold that the seaward boundary of the tidelands is governed by federal law, whereas the landward boundary of those same tidelands is governed by state law.

California would have you hold that the seaward boundary is ambulatory, regardless of any state law rule to the contrary, but that the landward boundary is frozen if the state so chooses, and here California has gone halfway. Washington, as the Court knows from

Hughes versus Washington, has gone the whole way. That is, any accretions, natural or otherwise, have no effect in giving accretions to the upland owner.

But even those contradictions are not the end of it. The landward boundary itself, according to California, is not frozen when erosion occurs. That part of the upland which was shoreward of the tidelands when it is lost to the sea does not remain with the upland owner.

Now, the rationale of this submission by California is self-contradictory. California successfully argued in this Court some years ago that the federal title to the submerged lands before the Submerged Lands Act has to be logically restricted to that area actually submerged, because the paramount rights of the United States were related to navigation --

QUESTION: Well, Mr. Claiborne, it nevertheless is the California rule, isn't it? However contradictory it may be, it is the rule. It may be that you are going to argue that there is a federal rule that supervenes, I suppose, but it is the California rule.

MR. CLAIBORNE: It is the California rule, though interestingly the California courts do not apply this rule to federal lands, or even to lands derived

from federal grants, but it is the California law and --

QUESTION: Well, but it isn't the California rule applicable in these circumstances? Is that it?

MR. CLAIBORNE: Well, it is the general California law. The California courts have not to date, but if they were free to do so, perhaps would apply it to federal uplands.

QUESTION: That is because of the Hughes case.

MR. CLAIBORNE: We don't know what the California courts --

QUESTION: Isn't that because of the Hughes case?

MR. CLAIBORNE: That may be because of the Hughes case. It may be because of the Bonelli case, but at all events, I take it that it is fair to say that the California rule, if it were free to apply it, would apply it even to federal uplands.

It is right, Mr. Justice White, that this is the California law. The question is whether that California law producing these inconsistent results ought to be deemed the applicable rule with respect to tidelands. It is a very greedy rule, because it seeks to get the best of both worlds.

On the one hand, it invokes Corvallis for the proposition that title to tidelands is frozen as of

statehood, but not content with that, because in this case that would win California only a very narrow strip of the parcel involved, since most of this land was submerged at statehood, California then invokes Bonelli for the proposition that the equal footing doctrine grants continually as time progresses, long after statehood, any lands which acquire the character of tidelands.

No case in this Court has remotely suggested that this acquisitive doctrine, which works in only one direction, ought to be condoned.

Now, as applied to lands of the United States, the California submission produces this strange result, which is that although the United States expressly reserves for purposes connected with its maritime access lands along the coast defined in the reservation as lots which in turn are defined as bounded by the high water mark, as California itself describes those lots, they meandered, and they are meant to move, so one would suppose from the fact that the seaward boundary is -- the United States having reserved this area for a maritime purpose, it can, through imposition of a California state rule, which doesn't happen to be as greedy as Washington's state rule, but the principle is the same, can be deprived of its access to the sea.

That may or may not matter in this particular case, because there happens to be access on the other side in Humboldt Bay, but the principle the Court is deciding would be the same even if the only access to what might be a Naval base were on the coast of California and a state law rule deprived it of the accretions that formed in front of it.

Now, this, we suggest, something --

QUESTION: So you suggest then that you aren't necessarily deciding what the result would be here if the United States had patented the land to a private party?

MR. CLAIBORNE: Mr. Justice White --

QUESTION: That would be Hughes, I suppose, would it?

MR. CLAIBORNE: That would be Hughes. Now, we suggest that these anomalies, these odd results can be avoided in one of three different ways. The first, and simplest, is for this Court to adhere to its Hughes decision, which applies not only to land still held by the United States but to lands granted by the United States, in other words, not to apply the Corvallis rule to the open coast, as Corvallis itself hesitated to do.

QUESTION: I don't know that I caught your response to my brother White, Mr. Claiborne. Did you

say that you think Hughes disposes of this case unless it is overruled?

MR. CLAIBORNE: If Hughes were adhered to, it disposes of this case, as I think my opponents conceded.

QUESTION: I thought he did, too.

MR. CLAIBORNE: That is one way in which the Court can most simply avoid the incongruities which I have outlined. The second, if there is a logical inconsistency between the survival of Hughes and the survival of the Corvallis doctrine, I would invite the Court to question whether the right of accretions as added to uplands which have been universally recognized from Roman times through English law through all American law until very recently in some few states as appertaining to the upland-lowland, is not one of those property rights, right of private property, which no state can defease without violating the just compensation clause. That is assuming that state law applies.

QUESTION: Do you mean that a state would not be free upon its admission to the union to adopt a different rule than that?

MR. CLAIBORNE: Perhaps upon its admission to the union, but there is no indication that California or any other state has ever adopted such a rule that far

back. Indeed, here, I invoke the concurring opinion of Justice Stewart in the Hughes case. Washington changed its law in 1966, and Justice Stewart said to allow that to destroy property vested at statehood in the predecessor of Mrs. Hughes would violate the just compensation clause, and accordingly, they had a judgment.

QUESTION: Would there be room to distinguish between private uplands and public uplands?

MR. CLAIBORNE: Well, that would be the third way in which the Court can avoid these anomalies, that is, to follow the rule of Wilson, which was simply an application of the general rule that federal law controls the boundaries of federal land. Whether to borrow state land is therefore the only question if one takes this approach, now, in Wilson the Court found it appropriate to do so. Here, I would invite the Court to turn to the Submerged Lands Act as the federal rule of decision. Section 5 of the Submerged Lands Act very explicitly and plainly says that when the United States reserves lands, it reserves it together with the accretions thereto. Therefore, we don't have to confect a common law rule for this purpose. We turn to the rule which Congress itself has enacted, and very appropriately, in this very context. We apply that

federl law enacted by Congress as the rule of decision, and do not borrow state law.

QUESTION: Do you think that Congress could pass a general law somewhat like the Submerged Lands Act except applicable to all 50 states saying, in effect, that we reserve such and such lands when they are connected to land owned by the United States?

MR. CLAIBORNE: Justice Rehnquist, I think Congress has done precisely that in Section 5 of the Submerged Lands Act.

QUESTION: Well, what authority does it have to do that?

MR. CLAIBORNE: Well, it has that authority only if no constitutional rule barred the way, and here, with respect to tidelands, there was no constitutional rule announced by this Courtt to the effect that accretions which occur along the open coast belong to the states, and therefore Congress was free to make disposition accordingly.

QUESTION: Do you think Congress could overrule the decision in Corvallis by simply passing a statute that said state rules of decision along inland waters shall not divest the federal government of property which it owns along those waters except on conditions that Congress lays down?

MR. CLAIBORNE: No, Justice Rehnquist, I do not suppose that Congress can overrule Corvallis. Corvallis, as I appreciate it, has two parts. Insofar as it rests on the equal footing doctrine, it does not for the most part aid California here, because Corvallis holds that the equal footing doctrine is fully spent at statehood, and most of these lands did not become tidelands, much less uplands, until long after statehood. Most of them were submerged, and therefore not sovereign lands of California, therefore not vested under the equal footing doctrine, but California reads the equal footing doctrine notwithstanding Corvallis as granting more, as continual grant, as indeed it is fair to say it appears Congress read the equal footing doctrine in 1953, because it very plainly made an ambulatory grant.

The courts up to that time, most read it, including members of this Court, as late as 1973, read the equal footing doctrine as merely an ambulatory grant, which was of some advantage to the states, in that it vested title to newly formed navigable water bottoms, whereas under the Court's holding in Corvallis, that is not true, and yet Corvallis did hold in favor of Oregon with respect to a newly formed bed, but not under the equal footing doctrine.

Now, if that aspect of Corvallis, we suggest, ought not be made applicable to the coast, and indeed Corvallis itself, and no single decision of this Court has ever doubted that accretions as opposed to the effect of evulsions, that accretions did not innure to the upland owner. Indeed, the decisions quoted in Corvallis pointed out that this is the universal rule. The only question in those cases was with respect to title to manmade land or what happens in the case of unusual evulsions.

QUESTION: Most of those decisions, though, were in the pre-Erie days, were they not, when the Court was simply laying down -- following its own notion of common law?

MR. CLAIBORNE: But as the Court pointed out in Corvallis, even in the period of Erie, state property law rules were generally thought to be an exception to the federal common law, but the Court seemed to be understanding that the right to naturally formed accretions is a property right, which no state can take without compensation. Hence, that universal rule, which was indeed English law, American law, federal common law, and the common law of all the states at the time went unquestioned, and to change that rule in the 1940's, the 1950's, the 1960's, does present a

constitutional problem --

QUESTION: Well, had California in its decision or law had a different rule prior to the Carpenter case, so that in effect there was a change of decisional law?

MR. CLAIBORNE: I am not expert in California law, but it appears that in the briefs filed by California in the 1950's in connection with Number 5 and Number 6 Original, in the briefs filed in this case, no decision before 1944 is cited as upholding this unusual rule that what would in federal law be viewed as naturally formed accretions will not in the case of California be so viewed, alter the interest of -- as California put it in 1951 -- the exceptional situation of beaches formed along the California coast.

We rest on our written submission with respect to the arguments made under the Submerged Lands Act. Let me simply make this point about the Submerged Lands Act argument. It seems clear to us that these lands are not made, filled in, or reclaimed lands within the meaning of the provision invoked by California, but -- and we have recited the legislative history to demonstrate that no such indirectly formed natural accretions were aimed at by that provision of the Act -- the general rule of the Submerged Lands Act is one

granting an ambulatory boundary of dealing only with lands at any given time submerged or washed by the tide, not uplands, not accreted lands, and indeed, the very definition says, as heretofore or hereafter modified by accretion, reliction, and erosion, very clearly an ambulatory grant, as everyone understood water boundaries generally were at the time.

But even if we should be wrong, that made land arguably does cover our case, in the particular situation of the United States's upland, Section 5 of the Submerged Lands Act makes clear that such lands will not innure to the state, are not confirmed in the state, but on the contrary, when made by the United States, as in the case of this land allegedly, appertain to the upland United States reservation, and it also makes clear in a provision which we think governs here, that accretions to reserved lands of the United States are included in the reservation, and in that respect, the Submerged Lands Act document in our view fails.

Unless there are questions from the Court, I am done.

CHIEF JUSTICE BURGER: Mr. Flushman, you have seven minutes remaining.

ORAL ARGUMENT OF BRUCE S. FLUSHMAN, ESQ.,
ON BEHALF OF THE PLAINTIFF - REBUTTAL

MR. FLUSHMAN: Thank you, Mr. Chief Justice.

In response to one question from the Court, I would like to advise the Court as to what the state of California law is concerning artificial accretions. It has been the rule in the state since 1866. The cases that are cited in the Carpenter case, which is cited in our brief, and in the People versus Hecker case, also cited in our brief, go back to 1866 and form a continuum of cases that stem from that date. So, the Carpenter case and the Hecker case after the Submerged Lands Act worked no change in the law that was adverted to by Justice Stewart in the Carpenter case. There was no defeasance of the right of a littoral owner to accretions.

With respect to accretions to upland, this Court held in 1876 that each state decides for itself who gets title to those accretions. This was in Barney versus Keokuk, which is cited in our brief. Two years later, the Court decided County of St. Clair versus Lovingston, which is the main case concerning accretions on which the United States relies.

That case was a state law case. The authority that is relied on in County of St. Clair is a New York case, and it was done, as is pointed out, during the rule of Swift versus Tyson, when local real property

laws were used to determine the rights to property.

QUESTION: Well, wasn't Lovingston against St. Clair something in the Mississippi River?

MR. FLUSHMAN: Yes, it was.

QUESTION: Well, why did they use a New York case?

MR. FLUSHMAN: It was a common law case, the common law of Illinois, which looked to New York.

The reference that California courts might not apply the Carpenter rule to federally owned upland is based on a statement in Carpenter where an exception appears to have been made for federally owned upland. That court was relying on the Borax decision, which had been decided some eight years earlier, and was using the same expansive reading of Borax that this Court has said in Corvallis was erroneous.

With respect to Hughes versus Washington, if it has not been overruled by Corvallis, which we contend it is, my concession is limited to that submission.

QUESTION: May I ask you on the -- I take it that does not cover your argument on the Submerged Land Act.

MR. FLUSHMAN: It does not.

QUESTION: Now, on that statute, what is your response -- I just may not recall it -- to the argument

about Section 5 of the Submerged Land Act, that in any event there is an exception for accretion to -- United States lands including accretions thereto?

MR. FLUSHMAN: The exception under the Submerged Lands Act in Section 5 is termed in clauses. There are four or five different clauses. The first clause, which pertains to all accretions to uplands that are acquired by the United States. The second clause pertains to lands that were either ceded to or reserved by the United States. There is no accretions clause attaching to that. Now, the United States makes a jump of logic to -- or a jump of statutory interpretation to also attach the accretions clause in the first clause of Section 5 to the second clause of Section 5, but that is not our main argument.

Our main argument is that with respect to tidelands, lands that lay above the low water mark, the Court in United States versus California in 1947 did not dispute the state's title. These lands lie above the low water mark. The Congress in 1953 could not defease the state of its title to those lands. So, we contend that the term "accretion", assuming it is attached to the second clause of Section 5, is given content as a matter of state law.

We rely on that submission as part -- because

as part of the first clause of Section 5 state law is referred to. In Section 3 of the Submerged Lands Act as well the lands that are granted or are restored or confirmed under the Act are to be administered under state law, and also under Section 3, Section 3 looks to those persons who were entitled to those lands in June, 1950, under state law, so state law is -- references to state law are replete throughout the Act.

We contend that this is an express intent of Congress, that federal common law, a new common law rule under Federal law should not be created, but that the rules of state law should be looked to to interpret the Submerged Lands Act. Under that contention, California's rule would apply. The United States would not receive artificially accreted lands that attached to its upland holdings.

Unless the Court has any further questions, I have nothing.

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

(Whereupon, at 10:50 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

California Ex Rel. State Lands Commission, Plaintiff, V. United States -- No. 89 Orig.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Diane Hammond