THE EROSION OF PRIVATE LITTORAL PROPERTY RIGHTS: *CITY OF LOS ANGELES v. VENICE PENINSULA PROPERTIES*

For over a hundred years, the California judiciary has closely scrutinized the state legislature's disposition of public tidelands.[1] California's tideland trust doctrine,[2] which protects the public's rights[3] to shoreland between low- and high-tide marks,[4] is the primary basis

1. In 1855, the California Legislature made its first disposition of state lands. *See* Sax, *The Public Trust Doctrine*, 68 MICH. L. REV. 473, 524 (1969). This sale, which included marshlands, swampland, and upland, arose out of lands granted California by the federal government. *See* Act of Sept. 28, 1850, ch. 84, § 4, 9 Stat. 519, 520.

For a general history of California's acquisition and disposition of tidelands, see Sax, *supra*, at 524-27; Comment, *San Francisco Bay: Regional Regulation for its Protection and Development*, 55 CALIF. L. REV. 728 (1967).

The California Legislature has periodically alienated tidelands for a variety of uses. Act of July 15, 1961, ch. 1763, 1961 Cal. Stat. 3767 (general statewide interest grant including provisions for snack bars and motels); Act of July 11, 1935, ch. 437, 1935 Cal. Stat. 1484 (grant to City of San Francisco for recreation, park, aquatic, and boulevard purposes); Act of March 28, 1868, ch. 415, §§ 28-29, 1867 Cal. Stat. 514 (sale of salt marshland tidelands to settlers for one dollar per acre).

2. The tideland trust doctrine is a subset of the common law public trust doctrine. Generally, the public trust doctrine may be characterized as "an area of law that gives substantial protection to public rights and to public property." Dyer, *California Beach Access: The Mexican Law and the Public Trust*, 2 ECOLOGY L.Q. 571, 582 (1972). Highways, easements, waterways, and tidelands are included in a broad definition of the "public trust." Historically, however, the scope of public trust law in the United States has been narrower. The laws cover "that aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence." Sax, *supra* note 1, at 556. California's tideland trust doctrine addresses tidewater susceptible to navigation. Eikel, *The Public Trust Doctrine and the California Coastline*, 6 URB. LAW. 519, 523 (1974).

3. Traditional public rights to the tidelands include those of fishing, navigation, and commerce. *See* Dyer, *supra* note 2, at 583. Modern additions to this list include rights of general access and recreation. *Id.* at 581-82.

4. Water law distinguishes between tideland, or littoral land seaward of high tide, and upland, or littoral property not inundated by tides. The high-tide mark is not the only line dividing tideland and upland. Some American decisions delineate the two by use of a mean high tide or extraordinary high-tide mark. Borax Consol. v. Los Angeles, 296 U.S. 10, 22-26 (1935).

for this scrutiny. Although the tideland trust doctrine has traditionally governed only lands within the public domain,[5] the California Supreme Court in *City of Los Angeles v. Venice Peninsula Properties*[6] expanded the doctrine to include semi-navigable, private tideland never owned by the government.

In *Venice Peninsula*, the City of Los Angeles sought to enlarge a privately-owned lagoon[7] without exercising its power of eminent domain.[8] The city argued in its quiet title suit that the lagoon was susceptible to tides and thus was subject to the rights of the public.[9] A lower court traced the lagoon owner's title and concluded that the lagoon was never part of the public domain.[10] The court ruled that such property was outside the public trust and dismissed the city's

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5. *See* Sax, *supra* note 1, at 556.

6. 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982).

7. *Id.* at 292-93, 644 P.2d at 794, 182 Cal. Rptr. at 601. Ballona Lagoon was a shallow body of water isolated from the Pacific Ocean by a thin strand of beach sand. At mean high tide, shallow-draft vessels were able to sail upon the lagoon. "Mean high tide" is a rough average of a month's high tides. For two weeks out of each month, the lagoon was totally unnavigable, and for the remaining weeks the lagoon was navigable for only part of the day. *Id.*

In 1839, when California was a part of Mexico, the governor of California granted Rancho Ballona to the present owner's predecessors-in-title. Under the Treaty of Guadalupe Hidalgo, the Mexican grantees received a patent to the lagoon and surrounding land. This property ultimately came into the possession of Venice Peninsula Properties, a real estate developer. *Id.* at 294, 644 P.2d at 795, 182 Cal. Rptr. at 602.

8. *Id.* at 292, 644 P.2d at 794, 182 Cal. Rptr. at 601.

9. *Id.* at 293-94, 644 P.2d at 794-95, 182 Cal. Rptr. at 601-02. The uses the city envisioned for the properties included service as a flood barrier and as a recreational facility. *Id.*

10. City of Los Angeles v. Venice Peninsula Prop., 117 Cal. App. 3d 335, 342, 172 Cal. Rptr. 619, 626 (1981).

The lower court held that the Treaty of Guadalupe Hidalgo separated the lagoon from public domain lands. *Id.* Under the terms of the treaty, the United States assumed possession of all property held by the Mexican government. The treaty also guaranteed the protection of Mexican citizens' private property:

> In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as of the same belonging to citizens of the United States.

Treaty of Guadalupe Hidalgo, Feb. 2, 1848, United States-Mexico, art. VIII, para. 3, 9 Stat. 922, 929-30, — T.S. No. —. A subsequent act provided for the creation of a board of commissioners who possess the power to issue patents to Mexican grantees. This act also stipulated that "all lands the claims to which shall not have been presented to the said commissioners within two years . . . shall be deemed, held, and

suit.[11] On appeal, the California Supreme Court rejected this narrow reading of the public trust doctrine.[12] The salient issue for the supreme court was not whether the lagoon was ever part of the public domain, but whether it was subject to a right of access[13] under the laws of Mexico or the United States.[14]

Public trust law in early England recognized public rights of fishing and navigation in tidelands, or waters which "ebbed and flowed."[15] Although the English sovereign held title to these tidelands,[16] he had no authority to alienate them.[17] Parliament, how-

considered as part of the public domain. . . ." Act of March 3, 1851, ch. 41, § 13, 9 Stat. 631, 633.

The forfeiture provision of the Act of March 3, 1851, received strong criticism in both federal and California courts. *See, e.g.*, Beard v. Federy, 70 U.S. 478 (1865) (patent to Mexican grants is unnecessary for preservation of title); Minturn v. Browden, 24 Cal. 644 (1864) (good Mexican title retains validity in spite of the Act).

11. 117 Cal. App. 3d at 342, 172 Cal. Rptr. at 626.

12. 31 Cal. 3d at 298-300, 644 P.2d at 797-98, 182 Cal. Rptr. at 604-06.

13. The grant to Venice Peninsula Properties' predecessors-in-title provided that the grantees "may enclose [Ballona Lagoon] without prejudice to the traversing roads and servitudes." *Id.* at 297-98, 644 P.2d at 797, 182 Cal. Rptr. at 604. This provision preserved the rights of the public, and so the "title of defendants' predecessors was subject to the interests of the public in the tidelands included in the grant." *Id.* at 297, 644 P.2d at 797-98, 182 Cal. Rptr. at 605.

14. *Id.* at 298, 644 P.2d at 797-98, 182 Cal. Rptr. at 605. A right of access would pass to the United States as part of the sovereign interest transferred by the Treaty of Guadalupe Hidalgo. *See supra* note 10. Those interests could then pass to the new state of California in two ways: through a transfer of the public lands the United States held in trust for the people of California territory, and through separate legislation. The most significant example of the latter transfer is found in an 1850 federal grant of swamplands. *See* Act of Sept. 28, 1850, ch. 84, § 4, 9 Stat. 519, 520.

15. *See generally* R. HALL, ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM (2d ed. 1875). For a general history of the Roman law underlying early English common property law, see W. BUCKLAND, A TEXTBOOK OF ROMAN LAW (2d ed. 1950).

16. Stevens, *The Public Trust*, 14 U.C.D. L. REV. 195, 197-98, 206 (1972). Feudal property law abhorred unowned property, so it was customary for the Crown to assume possession of all public lands. The public had a general right to use such lands for travel and commerce. Thus, public land of early England had the paradoxical characteristics of divine, sovereign ownership and public use. *Id.* at 206.

17. *Id.* at 198. This inalienability of Crown lands reconciled the divine ownership and public use of tidelands. Public use of tidelands, however extensive and for whatever length of time, left the Crown's interests in those lands undiminished. The explanation for this preservation was that "all things which relate peculiarly to the public good cannot be given over or transferred . . . to another person, or separated from the Crown." 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 17 (S. Thorne trans. 1968).

ever, was free to dispose of tidelands for legitimate public purposes.[18]

Although the English recognition of the public trust[19] guided American decisions in the nineteenth century,[20] the combined pressures of geographic expansion and legislative abuses[21] necessitated the development of a new public trust doctrine. The seminal case in the early evolution of this doctrine was *Illinois Central Railroad v.*

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18. *See* Sax, *supra* note 1, at 475-76. Parliament, as the representative of the English body politic, directed the utilization of public lands:

> The ownership of the shore, as between the public and the King, has been settled in favor of the King; but, as before observed, this ownership is . . . liable to certain general rights of egress and regress, for fishing, trading, and other uses . . . of his subjects. These rights are variously modified, promoted, or restrained by the common law, and by numerous acts of parliament, relating to the fisheries, the revenues and the public safety. . . .

R. HALL, *supra* note 15, at 108.

19. English law vested title to all tidal waters in the sovereign. Riparian owners held title to lake and riverbeds free of the public trust. Only tidal waterways were considered navigable for purposes of the public trust in England. State v. Superior Ct. of Lake County, 29 Cal. 3d 210, 218, 625 P.2d 239, 243, 172 Cal. Rptr. 696, 700 (1981). *See generally* R. CLARK, WATERS AND WATER RIGHTS, § 305.1 (2d ed. 1970) (early history of common law public trust doctrine).

For an application of these principles in the U.S., see McManus v. Carmichael, 3 Iowa 1 (1856) (Mississippi River boundary case defining common law public trust).

20. *See, e.g.*, Taylor v. Underhill, 40 Cal. 471 (1871) (tidelands patent was inalienable, modifications of foreshore were prohibited); Eldridge v. Cowell, 4 Cal. 80 (1854) (state alone has power to manage tidelands); Arnold v. Mundy, 6 N.J.L. (1821) (riverbeds were Crown property, and thus passed to the U.S. upon British surrender of the colonies).

21. Railroad companies held a particularly strong influence in the nascent California Legislature:

> By the time 152 prominent Californians met in Sacramento on September 28, 1878, to draft a new state constitution . . . people . . . had become aware . . . of a great many abuses growing out of the sale of tidelands . . . the Central Pacific Railroad had bought up all the frontage on the bay so that no other company could erect a wharf without its consent . . . unscrupulous speculators had purchased tide lots and then tried to force owners of the abutting dry lands to pay extortionate prices for mud flats, in order to attain access to the bay.
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> "If there is any one abuse greater than another that I think the people of the State of California has [sic] suffered at the hands of their law-making power, it is the abuse that they have received in the granting out and disposition of the lands belonging to the State," [a delegate] told the constitutional convention. Swamp lands, tidelands, and marsh and overflowed lands had been taken in such vast quantities, he said, that "now the people are hedged off entirely from reaching tide water, navigable water, or salt water."

M. SCOTT, THE FUTURE OF SAN FRANCISCO BAY 9 (Inst. of Gov'tal Studies, Univ. of Cal., Berkeley, Sept. 1963) (quoting debates and proceedings of the Constitution Convention of the State of California, Sacramento, 1881).

Illinois.[22] There the railroad contested the Illinois Legislature's rescission of its extensive gift[23] of tidelands to the railroad.[24] The Supreme Court invalidated the gift and provided guidance on legislative abuse of the public trust:[25] courts must scrutinize any governmental conduct which reallocates public resources to private ownership or limits public use of those resources.[26]

Prior to the *Illinois Central* decision, California courts followed the common law rule banning sales of tidelands.[27] Previous decisions invalidated patents[28] of tidelands used for public navigation and fishing.[29] California courts, however, avoided a total invalidation of alienation statutes by permitting limited sales of unproductive tidelands.[30] This modicum of deference averted at least one early confrontation between the California Legislature and judiciary. In

22 146 U.S. 387 (1892).

23. *Id.* at 412-14. In 1869 the Illinois Legislature granted the Illinois Central Railroad, its successors and assigns, "all the right and title of the state of Illinois, in and to the submerged lands constituting the bed of Lake Michigan, [extending into the lake] for a distance for one mile. . . ." Act of April 16, 1869, § 3, 1869 Ill. Laws 245, 246. Although the railroad had reclaimed a strip of the foreshore, or submerged land between the high- and low-tide marks, from the lake, the Supreme Court held that all the railroad's foreshore property remained subject to public use. 146 U.S. at 460.

24. 146 U.S. at 414-19.

25. The Court's invalidation of the 1869 grant went to the heart of the state's obligation as public trustee:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

Id. at 453.

26. *Id.* at 452-60.

27. *See supra* note 19.

28. The U.S. Constitution grants Congress the power to alienate property of the United States. U.S. CONST. art. IV, § 3, cl. 2. A common means of disposal of property was through a land patent. *See* State of Ala. v. State of Tex., 347 U.S. 272 (1955).

29. *See, e.g.*, Kimball v. MacPherson, 46 Cal. 104 (1873) (grants of bargain-priced tideland under Act of March 28, 1868, partially invalidated); Taylor v. Underhill, 40 Cal. 471 (1871) (patent of tidelands held voidable if transfer obstructed navigation); People v. Morrill, 26 Cal. 346 (1861) (sale of tidelands is an aberration of common law tradition).

Early California courts occasionally bypassed invalidation of disposal statutes by simply holding grants voidable. *See* Taylor v. Underhill, 40 Cal. 471 (1871).

30. *See, e.g.*, Ward v. Mulford, 32 Cal. 365 (1867) (court found that the intent of a

Kimball v. MacPherson,[31] the California Supreme Court discussed this deference to the legislature's power to alienate select public lands.[32] The *Kimball* court concluded that the state legislature was well aware of its duty as public trustee and thus intended to alienate only tidelands lacking public utility.[33]

California courts had difficulty applying the *Kimball* analysis of public trusts to title disputes involving the property of Mexican grantees.[34] The problem first arose prior to *Kimball* in the early mineral rights case of *Moore v. Smaw*.[35] In *Moore*, the California Supreme Court discerned a lack of congruity between Mexican and American public trust law.[36] The differences prompted the *Moore* court to pro-

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disposal statute was the reclamation of swampland, thus within scope of the public trust).

31. 46 Cal. 104 (1873).

32. *Id.* at 107-08. In light of the sometimes egregious conduct of the California Legislature, judicial brinksmanship required both fluency in rhetoric and a capacity for irony. *See supra* note 21. The opinion in *Kimball* is emblematic of such brinksmanship. The supreme court quoted from the district court judge's conclusions of law:

> [T]he [navigable tideland] sought to be purchased, in my opinion, is not of the character that the Legislature intended to sell. Either the Legislature has established a most pernicious system, or a good, wholesome one has been provided, and this application, as well as many others, develops an attempt to apply it to a purpose never intended by the Legislature.

46 Cal. at 104.

33. 46 Cal. at 107.

34. California courts were in general agreement over the trust interest held by the State in public domain tidelands. *See, e.g.*, Ward v. Mulford, 32 Cal. 365 (1867) (exercise of sovereignty over tidelands was a public trust function, not a proprietary action); Moore v. Smaw, 17 Cal. 199 (1861) (consonance between Mexican and United States law required in transfers of sovereign interests). Some courts applied the general rule of trust interests attaching to tidelands regardless of the origin of title. Other courts observed the special legislative treatment given Mexican tidelands patents and made an exception to the general rule of the state's trusteeship. *See* Minturn v. Brower, 24 Cal. 644 (1864).

35. 17 Cal. 199 (1861).

36. *Id.* at 218-19. In *Moore*, the primary issue was whether a patent issue under the directives of the Treaty of Guadalupe Hidalgo, *supra* note 10, conveyed mineral rights with the soil. Mexican law reserved for the sovereign all subsurface rights in private property. From these rights the Mexican sovereign derived a major portion of his fiscal revenue. The dilemma before the California Supreme Court in *Moore* was that the property owner stood to gain if mineral rights were transferred by patent, but the State of California would violate the owner's constitutional rights if the mineral rights were withheld. The court held that, notwithstanding the property owner's fortuitous windfall, the withholding of mineral rights was inimical to the spirit of United States law. 17 Cal. at 226.

pose a test for applying the public trust doctrine to the property of Mexican grantees. The test required the existence of a trust interest previously held by the Mexican sovereign,[37] affirmation of a rough congruence between prior Mexican public trust law and controlling California law,[38] and the preservation of all the grantees' property interests.[39]

A later California Supreme Court decision, *F.A. Hihn Co. v. City of Santa Cruz*,[40] abbreviated the *Moore* test[41] by excising the requirement of parallel sovereign interests.[42] The *Hihn* court concluded that Mexican property law had only marginal utility in the California tideland trust doctrine.[43] Several courts subsequently criticized the *Hihn* court's conclusions.[44]

Apart from the difficulties with Mexican property interests, the California courts faced additional problems in analyzing legislation

37 17 Cal. at 213.

38. *Id.* at 225-26.

39. *Id.* at 212. The court concluded that a separation of mineral rights from a fee estate was repugnant to the "spirit of our race and genius of our institutions." If separation was effected by the patent, the court reasoned, the patent would have expressly indicated so. *Id.* at 206.

40. 170 Cal. 436, 150 P. 62 (1915).

41. *See supra* text accompanying notes 37-39.

42. 170 Cal. at 443-45, 150 P. at 66. *Hihn* held that tidelands within the perimeter of a pueblo founded under Mexican law were not governed by the *ayuntamiento* or local governing body, but by the sovereign. The rights of public use passed, as did rights attached to the public domain, to the United States upon Mexico's cession of the Californias in 1848. *Id.* at 444-45, 150 P. at 66-67. While the *Hihn* court examined pertinent Mexican law in some detail, it avoided basing its decision upon the public trust interest held by the city as successor to its pueblo ancestor. *Id.* at 445, 150 P. at 66. Although the *Hihn* court concluded that a sovereign trust interest did pass to the State of California, it implied that those interests came directly from the sovereign, not through the *ayuntamiento*. *Id.* at 445, 150 P. at 66-67. Thus, the *Hihn* court used Mexican law to define a public trust interest existing before California's cession, but it refused to interpret that interest in light of applicable restrictions arising from the same corpus of Mexican law.

43. *Id.* at 444, 150 P. at 66. The private tidelands involved in early tideland trust cases were almost exclusively the property of Mexican grantees. *See supra* note 10 and accompanying text.

44 *See, e.g.*, Borax Consol. v. Los Angeles, 296 U.S. 10 (1935) (duty of U.S., under Treaty of Guadalupe Hidalgo, to protect all rights of property emanating from the Mexican government prior to cession); Pike Rapids Power Co. v. Minneapolis, St. P. & M. Ry. Co., 99 F.2d 902 (8th Cir. 1938) (responsibility of state to abide by provisions of grant of public lands).

that modified the public uses of tidelands.[45] Until the decision of *People v. California Fish Co.*,[46] the tidelands trust doctrine lacked a standard for determining valid public use of tidelands.[47] In *California Fish*, the California Supreme Court held that tidelands were freely alienable subject to the public trust.[48] Although the supreme court adopted elements of the rigorous scrutiny test applied in *Illinois Central*,[49] it also made a significant innovation. The court ruled that legislation proposing new uses for tidelands is valid if those uses promote the aims of the public trust.[50]

The *California Fish* test added a new flexibility to California's tideland trust doctrine, but it failed to delineate the range of permissible uses.[51] Later courts adopted the "water-related" doctrine[52] to define

45. The chief concern of the court was the privitization of lands within the public domain. *See, e.g.*, City of Oakland v. Oakland Waterfront Co., 118 Cal. 160, 50 P. 277 (1897) (grant for the expansion of city boundaries upheld); Shirley v. City of Benicia, 118 Cal. 344, 50 P. 404 (1897) (wharf built by city interfered with plaintiff's access to properties, upheld as property use of trustlands); Ward v. Mulford, 32 Cal. 365 (1867) (any public use of tidelands not interfering with rights of navigation upheld). California courts generally ignored legislative modifications of public uses of tidelands. *See generally* Sax, *supra* note 1, at 524-30.

46. 166 Cal. 576, 138 P. 79 (1913).

47. Early tideland trust cases did differentiate between public works grants and grants to politically influential but non-civic-minded individuals. The latter were generally invalidated. *See supra* note 29. The former, however, were accepted by courts because the grants specifically aspired to some valid public interest, often drainage and filling of tidelands and marshlands. *See* Sax, *supra* note 1, at 528. The absence of a judicial use standard stemmed more from the court's preoccupation with fraudulent legislative conveyances of tidelands than from a lack of ripeness of the issue.

48. 166 Cal. at 586, 594-97, 138 P. at 83, 86-88. In *California Fish*, the State of California brought suit to quiet title to several parcels of tideland. The defendant corporation held title to one parcel under a 1887 patent. The state's main argument was that the common law prohibited alienation of any tideland, and so the defendant's patent was void. While the California Supreme Court in *California Fish* accepted the state's argument in regard to alienation of useful tidelands, it pointed to the judicial acceptance of sales of unproductive swampland and tideland. *Id.* at 585, 138 P. at 82-83. Proper management of the public trust, the court concluded, involved a judicial and legislative flexibility, not a doctrinaire adherence to common law rules. *Id.* at 597, 138 P. at 80.

49. *See supra* notes 22-26 and accompanying text.

50. People v. California Fish Co., 166 Cal. at 596, 138 P. at 87. It is worth noting, however, the court's language on proprietary tidelands and swamplands: "When [filling] has been done in the regular administration of the trust, the land thus excluded from use for navigation may be alienated irrevocably . . . for private use by private individuals." *Id.*

51. Part of the test's flexibility, of course, lay in its ambiguity. The *California Fish*

these uses.[53] In *Mallon v. City of Long Beach*,[54] the California Supreme Court defined a "water-related" use as one that at least indirectly serves navigation or water recreation.[55] *Mallon* applied the "water-related" doctrine to a municipality's distribution of off-shore oil revenues.[56] It found a valid distribution of tideland revenues was one that equitably contributed to "water-related" uses.[57] The court in *Mallon* stipulated that a use must serve a broad, as opposed to a narrow, public interest.[58] Recent decisions have criticized *Mallon's* lib-

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court did, however, provide some guidance in rephrasing the traditional public use of navigation:

> As the state has the powers necessary to the execution and administration of the trust, it follows that it may dispose of [trustlands] . . . as the interests of navigation may require. One of the duties of the trust is to adapt the land to the use for navigation in the best manner. If, in so adapting the tide lands for this use, it is found necessary or advisable, in aid of the use, to cut off portions of it from access to navigable water . . . the state has the power to exclude such portions from public use. . . .

Id. at 597, 138 P. at 87-88.

52. *See generally* Sax, *supra* note 1, at 532-38.

53. The *California Fish* court's language on the "interests of navigation" was an articulation of the "water-related" doctrine. *See supra* note 51. For an example of the ingenuity of courts in fleshing out the "water-related" doctrine, see Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928) (prospecting on public tidelands held to be a valid use under the public trust doctrine). *But see* City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595, 212 P.2d 894 (1949) (construction of a sewer was a municipal affair outside the water-related uses of public trustlands).

54. 44 Cal. 2d 199, 282 P.2d 481 (1955).

55. *Id.* at 206-08, 282 P.2d at 485-86.

56. *Id.* at 209-10, 282 P.2d at 487.

57. *Id.* at 205-08, 282 P.2d at 485-87. *See also* California *ex rel.* State Lands Comm'n v. County of Orange, 134 Cal. App. 3d 20, 184 Cal. Rptr. 423 (1982) (revenues from tidelands granted in trust to a county are not free of public trust, must serve state interests); City of Long Beach v. Morse, 31 Cal. 2d 254, 188 P.2d 17 (1947) (city is trustee of tidelands; income as well as corpus is subject to the trust).

Compared to the Wisconsin or Massachusetts public trust doctrine, the *Mallon* standard of equitable distribution of tideland benefits allows municipalities more flexibility to alter the character of the seabed and foreshore of public waters. *Compare* Bach v. Sarich, 74 Wash. 2d 575, 445 P.2d 648 (1968) (roadway beyond power of state legislature as public trustee) *and* Sacco v. Department of Pub. Works, 352 Mass. 670, 227 N.E.2d 478 (1967) (widening of highways at expense of tideland not envisioned by state legislature) *and* State v. Public Serv. Comm'n, 275 Wis. 112, 81 N.W.2d 71 (1957) (state held powerless to destroy character of lake, even for public purposes) *with* Martin v. Smith, 184 Cal. App. 2d 571, 7 Cal. Rptr. 725 (1960) (transformation of tidelands for construction of a restaurant, swimming pool, and other commercial appurtenances was consistent with public trust aims).

58. *Mallon* distinguished between a "regional" public interest (e.g., sewers, municipal buildings) serving a small group of state residents, and a "state-wide" or gen-

eral definition of public tideland uses.[59]

Expanding California municipalities have urged courts to apply the tideland trust doctrine to private property.[60] In the recent case of *City of Berkeley v. Superior Court of Alameda County*,[61] the California Supreme Court held that property reclaimed from the ocean was subject to public use.[62] This decision, however, differed from previous reclamation decisions in that it considered the tideland owner's expense in reclaiming the property.[63] *City of Berkeley* carried forward the *California Fish* scrutiny of reallocation of public resources and limitations on uses by adding a means of balancing the benefits to both tideland owners and the public use.[64]

This balancing test had only an ephemeral influence on California's tideland trust doctrine. Two years after *City of Berkeley*, the California Supreme Court abandoned the test in *City of Los Angeles v. Venice Peninsula Properties*.[65] Applying the *California Fish* scrutiny, the court ruled that a patent of tideland failed to destroy a public trust interest in such land.[66] The property in dispute was primarily reclaimed tideland, as was that involved in *City of Berkeley*. The court, however, did not balance private and public benefits.[67] Instead, the court rested its decision upon an analysis of the chain of title to the lagoon.[68]

The *Venice Peninsula* court conducted its analysis along the guide-

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eral interest which may potentially serve a broader spectrum of residents. Examples of the latter include fisheries, harbors, and public parks. 44 Cal. 2d at 205-06, 282 P.2d at 486-87.

59. *See, e.g.*, State v. Superior Ct. of Lake County, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981) (preservation of public right of access involves preservation of tideland itself); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (overdevelopment of tidelands breaches public trust duty to posterity).

60. *See* Dyer, *supra* note 2, at 572-75.

61. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

62. *Id.* at 534-35, 606 P.2d at 373-74, 162 Cal. Rptr. at 338.

63. *Id.* at 536, 606 P.2d at 374, 162 Cal. Rptr. at 339. *City of Berkeley* held that tideland developed by a grantee was subject to public use, and no compensation is required if "the economic use to the grantees [of such tideland] is speculative at best and is clearly outweighed by the interests of the public." *Id.*

64. *Id.* at 536, 606 P.2d at 373, 162 Cal. Rptr. at 338.

65. 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982).

66. *Id.* at 299, 644 P.2d at 798, 182 Cal. Rptr. at 605.

67. *See supra* note 63.

68. City of Los Angeles v. Venice Peninsula Prop., 31 Cal. 3d at 294-98, 644 P.2d at 795-97, 182 Cal. Rptr. at 602-04.

lines specified in the *Hihn* opinion.[69] The court concluded that Mexico once held a public trust interest in the disputed lagoon.[70] *Venice Peninsula*, like *Hihn*, avoided the issue of congruence in Mexican and United States public trust interests.[71] For the *Venice Peninsula* court, pre-cession Mexican property law[72] was of limited utility in California's tideland trust doctrine.[73]

Once the *Venice Peninsula* court determined that Mexico had held a public trust interest in the lagoon,[74] application of the tideland trust doctrine became simple. When the United States assumed this interest,[75] the court reasoned, the lagoon became part of the common law public trust.[76] For the *Venice Peninsula* court, it was the transfer of this trust interest, not transfer of title to the property, which made the lagoon trustland.[77]

Venice Peninsula marks the demise of the prerequisite of navigabil-

69. *Id.* For an analysis of the *Hihn* opinion, see *supra* notes 40-43 and accompanying text.

70. 31 Cal. 3d at 298, 644 P.2d at 797-98, 182 Cal. Rptr. at 604-05. The court cited Moore v. Smaw, 17 Cal. 199 (1861), in making the analogy between established, transferable sovereign interests and the Mexican trust interest in the lagoon. 31 Cal. 3d at 298, 644 P.2d at 798, 182 Cal. Rptr. at 603.

71. 31 Cal. 3d at 310-12, 644 P.2d at 805-06, 182 Cal. Rptr. at 612-13 (Richardson, J., dissenting).

72. *See supra* note 42.

73. 31 Cal. 3d at 303-04, 644 P.2d at 800-01, 182 Cal. Rptr. at 607-08.

74. *Id.* at 301-03, 644 P.2d at 799-800, 182 Cal. Rptr. at 606-07.

75 *See supra* note 10.

76. *See supra* notes 13-14.

77 31 Cal. 3d at 288, 644 P.2d at 796, 182 Cal. Rptr. at 603.

The court overruled dictum in San Diego County Archaeological Soc'y, Inc. v. Compadres, 81 Cal. App. 3d 923, 146 Cal. Rptr. 786 (1978), indicating that a public trust interest is an incident of sovereign ownership. *Id.* at 928, 146 Cal. Rptr. at 788. The *Compadres* case involved the impending destruction of some Indian artifacts found on privately owned upland. *Compadres* rejected the Archaeological Society's argument applying the public trust doctrine to uplands, stating that "the doctrine has been restricted to tidelands, navigable waters, and situations where the government or public in general own the property." *Id.* The *Compadres* court failed to discuss its reasons for this restricted scope. The court in *Venice Peninsula*, however, felt that such scope would lead to judicial chaos and prognosticated:

> [There would develop] a California Mason-Dixon coastline dramatically divided between the north, in which the public trust doctrine is respected, and the south, where it is unrecognized. A dual system of rights would be created. Grantees whose title derives from Mexican grants would enjoy title free of the public trust, whereas those whose title did not originate with Mexico would hold their land subject to the trust.

ity in the application of the tideland trust doctrine.[78] The *Venice Peninsula* court reduced this requirement to a mere formality.[79] Once the definitive test of a tideland trust interest,[80] navigability has become a bootstrap for applying the doctrine to areas of "water-related" public interest.[81] The public interest involved in *Venice Peninsula* was not navigability per se but potential navigability. Since the lagoon was only periodically navigable by a small class of vessels,[82] it was subject to a limited easement of public access. Physical alteration of tidelands, such as the proposed dredging of the lagoon,[83] can facilitate year-round navigation and thus expand the public's right of access.[84] Thus, potential navigability adds a new di-

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City of Los Angeles v. Venice Peninsula Prop., 31 Cal. 3d at 304, 644 P.2d at 801, 182 Cal. Rptr. at 608.

The *Venice Peninsula* court's criticism of *Compadres* was made on the general level of the public trust. *See id.* at 299-300, 644 P.2d at 798, 182 Cal. Rptr. at 605. Since the tideland trust doctrine must comply with general public trust law, the *Venice Peninsula* court's rejection of the *Compadres* sovereign ownership theory affects all property under the aegis of the California public trust doctrine.

78. *See generally* Stevens, *supra* note 16.

79. In light of the lagoon's shallowness, the court in *Venice Peninsula* strains the traditional definition of nagigable waters. *See supra* note 7.

80. *See generally* M. Scott, *supra* note 21.

81. *See* City of Los Angeles v. Venice Peninsula Prop., 31 Cal. 3d at 304-06, 644 P.2d at 801-02, 182 Cal. Rptr. at 608-09 (Richardson, J., dissenting).

In the recent case of National Audubon Soc'y v. Superior Ct. of Alpine County, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), the California Supreme Court extended the public trust doctrine to nonnavigable tributaries of navigable waterways. The question of the applicability of the public trust doctrine to such tributaries arose in the context of a growing problem in California water law—the competing interests of the public trust doctrine and the appropriative water rights system. Whereas *Venice Peninsula* expanded the concept of navigability by adding a temporal parameter (*i.e.*, the potential for *future* navigability), *National Audubon Soc'y* uses a special parameter (*i.e.*, proximate physical connection with a waterway) in applying the public trust doctrine to non-navigable waterways. *See* National Audubon Soc'y v. Superior Ct. of Alpine County, 33 Cal. 3d at 429, 658 P.2d at 720-21, 189 Cal. Rptr. at 356-57.

82. *See supra* note 7.

83. The city wanted to dredge Ballona Lagoon, construct sea walls, and make minor changes in the foreshore. Dredging would permit larger vessels to use the lagoon, and sea walls would stop tidal flooding of upland properties. City of Los Angeles v. Venice Peninsula Prop., 31 Cal. 3d at 293, 644 P.2d at 794, 182 Cal. Rptr. at 601.

84. The expansion of public's right of access to tidelands necessarily involves the issue of just compensation for the corresponding reduction of the littoral property owners' exclusionary powers. In *Venice Peninsula*, the California court did not consider exclusionary powers as coming within the protection of the fifth amendment. In a similar case, however, the Supreme Court held that the federal government must pay private owners just compensation before converting a privately owned pond into

mension to the flexibility of use advocated in *California Fish*.[85] Municipalities may not only modify the present uses of tidelands, but they may also modify the tideland itself to better serve the public interest.[86]

The *Venice Peninsula* court's allusions to Mexican property law of pre-cession California belie the court's reluctance to embrace Mexican law as an alternative foundation of the public trust doctrine.[87] California courts in growing numbers refer to public use easements under Mexican law.[88] Reference to such residual easements in modern public trust analysis serves to comport public appropriation of tidelands with fifth amendment due process guarantees.[89] Although Mexican law in public trust cases is presently limited to access disputes in private littoral property,[90] that body of law may help clarify California's constitutional guarantees of public access rights.[91]

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a public marina opening onto the Pacific Ocean. Kaiser Aetna v. United States, 444 U.S 164, 179-80 (1979).

85. *See supra* notes 46-51 and accompanying text. *Venice Peninsula* also arguments the decision of Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). The court in *Marks* stated that "the public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust, the State is not burdened with an outmoded classification favoring one mode of utilization over another." *Id.* at 216, 491 P.2d at 380, 98 Cal. Rptr. at 796.

86. *Venice Peninsula* represents a quantitative enlargement of the California tideland trust doctrine. Considering the large amount of privately owned California littoral property and the number of patents granted for such land during California's early statehood, *Venice Peninsula* may have serious implications for hundreds of littoral property owners.

87. For a discussion of the efficacy of Mexican common property law in public trust cases, see Dyer, *supra* note 2, at 608-11. For an examination of the *Venice Peninsula* court's construction of Mexican law, see *supra* note 70 and accompanying text.

88. *See, e.g.*, State v. Superior Ct. of Lake County, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981) (title to land between low and high tides voided through inference of public use easement existing prior to cession); City of Berkeley v. Superior Ct. of Alameda County, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980) (Mexican easement of access inferred); Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (foreshore easement extended to land seaward of very high tide).

89. *See* Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). *See supra* note 84.

90. *See* Dyer, *supra* note 2, at 611.

91. *See* Gion v. City of Santa Cruz, 2 Cal. 3d at 42, 465 P.2d at 62, 84 Cal. Rptr. at 174. *Gion* involved the rights of littoral owners whose property lay in the path of public ingress and egress to tidelands. Under the California Constitution, "No individual . . . claiming or possessing frontage . . . of a navigable water in this state, shall be permitted to exclude the right of way to such water whenever it is required

Venice Peninsula's impact on the California shoreline depends upon the tideland trust doctrine's ability to reconcile both due process challenges of tideland appropriations and criticism—both judicial and legislative—of major alterations of the shoreline. The efficacy of *Venice Peninsula* for purposes of recreational development lies in the potential transformation of unused tidelands into fruitful property. Future use of the *Venice Peninsula* precedent, however, demands a delicate balancing of competing public interests: the recreational rights of a present generation and the rights of future generations to an uncompromised shoreline.*

Kevin P. Cronin

*EPILOGUE

In April, 1984, the United States Supreme Court reversed the California Supreme Court's decision on narrow grounds in Summa Corp. v. California *ex rel.* State Lands Comm'n, 104 S. Ct. 1751 (1984). Justice Rehnquist, who authored the Court's 8-0 decision, focused on whether California's public trust easement, if it existed, survived the patent proceedings instituted by petitioner's predecessors-in-interest. The proceedings were conducted pursuant to the 1851 Act that Congress had enacted to implement the Treaty of Guadalupe Hidalgo. *Id.* at 1755-56. The Court barred California from imposing the easement on the petitioner's tidelands, rejecting California's claim that it was not required to expressly reserve its easement in the confirmation proceedings because the easement was a "sovereign" property interest. *Id.* at 1756, 1758.

The Court reasoned that the 1851 Act's purpose was to stabilize land titles in California, and to provide "parties who possess [land titles] an opportunity of placing them on the records . . . in a manner and form that will prevent future controversy." *Id.* (citation omitted). *See Venice Peninsula*, 31 Cal. 3d 288, 315, 644 P.2d 792, 808, 182 Cal. Rptr. 599, 615 (Richardson, J., dissenting) (asserting that

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for any public purpose. . . ." CAL. CONST. art. XV, § 2. Although the court in *Gion* held that an implied easement existed in appellant's property, it based its decision on the appellant's lack of response to the adverse possession by city residents. The court acknowledged possible conflicts between art. XV, § 2 of the California Constitution and the just compensation and due process clauses of the fifth amendment of the United States Constitution. Gion v. City of Santa Cruz, 2 Cal. 3d at 44, 465 P.2d at 58-59, 84 Cal. Rptr. at 170-71.

procedures under the 1851 Act were a "forthright, direct and common sense" method to resolve title providing California "ample opportunity" to assert a public trust interest). In light of the procedures to confirm title under the Act, and because a public trust easement would be "substantially in derogation of the fee interest patented to petitioner's predecessors," 104 S. Ct. at 1755, the Court looked to other cases involving similar claims made subsequent to patent proceedings. Justice Rehnquist cited United States v. Coronado Beach Co., 255 U.S. 472 (1921), and Barker v. Harvey, 181 U.S. 981 (1901), for the proposition that a state may not collaterally attack a patent proceeding. 104 S. Ct. at 1757.

The Supreme Court left untouched the California Supreme Court's conclusion that the state's easement derived from the tideland's potential navigability. Furthermore, Justice Rehnquist did not alter the California Supreme Court's finding that California received the easement through transfer of Mexico's property interest. *See supra* note 77 and accompanying text. *Summa Corp.'s* significance lies in its subordination of a state's sovereign property interest to an interest confirmed by a federal patent proceeding. The Court's statement of the conclusiveness of those proceedings, in effect, affords a substantial protection only to private property owners whose interests exist under an uncontested federal patent entered pursuant to the 1851 Act.