

In the

**Supreme Court of the United States**

CALIFORNIA EX REL. STATE LANDS

COMMISSION,

Plaintiff,

v.

UNITED STATES

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No. 89 Orig.

Washington, D. C.

Monday, March 29, 1982

Pages 1 thru 38

**ALDERSON  REPORTING**

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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10   Monday, March 29, 1982

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

14 APPEARANCES:

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16 California, San Francisco, California; on behalf of  
17 the Plaintiff.

18 LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor  
19 General, Department of Justice, Washington, D.C.;

20 on behalf of the Defendant.

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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 sovereign 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

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

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

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

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

1 and the shoreline reverted to its natural  
2 configuration. Once the jetty was rebuilt, the  
3 artificial deposition process continued, covering up and  
4 filling in the land, resulting in the current coastline  
5 configuration.

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

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

17           QUESTION: The state has not been exactly  
18 consistent.

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

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

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

25           QUESTION: I take it you are not asserting any

1 estoppel principle against the United States for having  
2 applied --

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

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

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

19 QUESTION: Has the watchtower ever been built?

20 MR. FLUSHMAN: The watchtower was built.

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

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

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

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

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

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

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

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



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

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

9           MR. FLUSHMAN: Yes.

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

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

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

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

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

5 QUESTION: Down to the low water mark?

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

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

11 MR. FLUSHMAN: I am suggesting that --

12 QUESTION: That isn't what California held.

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

18 QUESTION: What the ownership had always been.

19 MR. FLUSHMAN: I'm sorry?

20 QUESTION: Determined what the ownership had  
21 always been.

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

1 became a state.

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

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

7           QUESTION: Restore?

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

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

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

13          QUESTION: But it didn't use restore.

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

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

25          MR. FLUSHMAN: The first California case held

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

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

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

12           MR. FLUSHMAN: It is not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 QUESTION: Yes.

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

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

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

1 was concerned, and cannot be defeated by application of  
2 federal common law.

3           In fact, the United States admits in Paragraph  
4 5 of its answer that the state's title to tidelands  
5 lying landward of the coastline as these lands do is  
6 absolute.

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

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

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

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



1 QUESTION: Yes.

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

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

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

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

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

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

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

25           For example, in Jones versus Johnstone, 59

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

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

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

25           If there was any doubt that Congress intended

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

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

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

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

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

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

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

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

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

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

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

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

1 granted.

2 Thank you.

3 CHIEF JUSTICE BURGER: Mr. Claiborne.

4 ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

5 ON BEHALF OF THE DEFENDANT

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

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



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

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

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

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

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

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

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

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

8 QUESTION: That is because of the Hughes case.

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

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

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

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

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

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

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

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

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

8           Now, this, we suggest, something --

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

13          MR. CLAIBORNE: Mr. Justice White --

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

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

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

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

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

5 QUESTION: I thought he did, too.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

15           MR. CLAIBORNE: But as the Court pointed out  
16 in Corvallis, even in the period of Erie, state property  
17 law rules were generally thought to be an exception to  
18 the federal common law, but the Court seemed to be  
19 understanding that the right to naturally formed  
20 accretions is a property right, which no state can take  
21 without compensation. Hence, that universal rule, which  
22 was indeed English law, American law, federal common  
23 law, and the common law of all the states at the time  
24 went unquestioned, and to change that rule in the  
25 1940's, the 1950's, the 1960's, does present a

1 constitutional problem --

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

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

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

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

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

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

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

24           ORAL ARGUMENT OF BRUCE S. FLUSHMAN, ESQ.,

25           ON BEHALF OF THE PLAINTIFF - REBUTTAL

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

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

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

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

1 laws were used to determine the rights to property.

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

4 MR. FLUSHMAN: Yes, it was.

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

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

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

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

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

23 MR. FLUSHMAN: It does not.

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

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

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

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

25           We rely on that submission as part -- because

1 as part of the first clause of Section 5 state law is  
2 referred to. In Section 3 of the Submerged Lands Act as  
3 well the lands that are granted or are restored or  
4 confirmed under the Act are to be administered under  
5 state law, and also under Section 3, Section 3 looks to  
6 those persons who were entitled to those lands in June,  
7 1950, under state law, so state law is -- references to  
8 state law are replete throughout the Act.

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

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

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

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

23

24

25

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.

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BY *Diane Hammond*



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