10-1983

Summa Corporation v. California ex rel. State Lands Commission

Lewis F. Powell, Jr.

Views of SG

An important case for Calif. & a difficult one.

SG urges grant. I'm still inclined to deny

Still Deny

PRELIMINARY MEMORANDUM

January 14, 1983 Conference
List 1, Sheet 2

No. 82-708

ok / SUMMA CORP., Cert to Calif. S. Ct. (Mosk, Bird, Newman, Broussard; Richardson, Kaus dissenting)

v.

ok / CALIFORNIA, etc., et al. L.A. State/Civil Timely (with ext.)

1. SUMMARY: Did the California S. Ct err in imposing a "public trust" on property derived from a federally-patented Mexican land grant?

2. FACTS & DECISION BELOW: In 1839, while California was still part of Mexico, the local governor of the province granted

CVSG - because this "public trust" doctrine will affect some federal tidelands, the ~~Fed.~~ SG's views may be helpful. This case,

a seaside property known as Rancho Ballona to the Machados and the Talamantes. Rancho Ballona, known today as the Ballona Lagoon, is an arm of the Pacific Ocean in the Marina del Rey area of Los Angeles. It is currently tidelands; at high tide it is covered by from one to six feet of water. At low tide it is virtually dry. Petr owns a parcel of land in what formerly was Rancho Ballona.

In 1848 California was ceded to the United States. The Guadalupe Hidalgo Treaty of that year provided that the rights of Mexican citizens in their property were to be "inviolably respected." In order to fufill this treaty obligation, Congress enacted in 1851 "An Act to ascertain and settle the private Land Claims in the State of California", 9 Stat. 631 (The Act of 1851). This act established a Board of Land Commissioners to hear claims to property by Mexican citizens and issue federal patents for valid claims.

The Machados and Talamantes -- who had received Rancho Ballona from the Mexican government -- petitioned the Board of Land Commissioners for a patent confirming their title to the property. Although the Board confirmed the claim and a federal DC upheld the confirmation, difficulties developed during the subsequent survey to fix the precise boundaries of the property. Among other things, it appears that it was claimed that the Ranchos Ballona consisted in part of tidelands, and that such property was not patentable. This issue was referred to the General Land Office Commissioner, who decided, on the basis of three affidavits, that the land in question was not tidelands. A

patent was issued for the entire claim. At an unidentified time afterwards a portion of the claim was conveyed to petr in fee.

In the early 1970's the city of Los Angeles determined to dredge the Ballona Lagoon. In order to avoid the expense of a condemnation proceeding, it filed an action in state court to quiet title against owners of property in the area, including petr, claiming that it possessed various types of easements to the property that permitted such dredging. (The city eventually changed its mind about dredging, and instead determined that the property should remain undeveloped and open to the public -- which petr apparently resisted.) The state of California, named as a defendant, claimed that it had acquired an interest in the property upon admission to the Union, that this interest permitted it to put the property to public use without payment of compensation, and that it had given this interest to the city. It relied on a line of California cases establishing the "public trust" doctrine which provides that the state holds an interest in tidelands that allows it to use the properties "for purposes such as commerce, navigation, and fishing, as well as for environmental and recreational purposes." Petn App. at A1.

Cal's claim

This leaves title to private owners.

The TC agreed with the state, holding that the city could dredge the lagoon without exercising its powers of eminent domain. The California Court of Appeal reversed, and the city appealed to the California S. Ct, which upheld the TC's decision on the grounds that the state retained a "public trust" interest in the lands.

The S. Ct first held that the land in question constituted tidelands, relying upon apparently uncontroverted testimony of "[e]xperts in the field of geology and geomorphology." This finding was critical to the determination that the "public trust" doctrine was applicable to petr's property, since California law extends the doctrine only to tidelands. Next, the court found that the Guadalupe Hidalgo Treaty, the Act of 1851, and the federal land patent did not destroy California's "public trust" interest in the lands.

The court reasoned that the first owners of the property in question -- the Machados and Talamantes -- had taken title subject to the Mexican government's "public trust" rights. The S. Ct relied on the testimony of experts in 19th century Mexican law for this conclusion. Next, the court decided that when the United States annexed California it acquired Mexico's public trust interest. Recognizing that there "is little authority regarding this issue," the court determined that since the Act of 1851 gave the US fee interests in unpatented land, there was no reason it should not also give lesser interests, such as a "public trust" interest.

Finally, the California S. Ct decided that the issuance of the federal land patent for Rancho Ballona in fee did not affect the state's "public trust" interest. The court recognized that numerous decisions by this Court established that a federal land patent conclusively determined that the grantee possesses title to the land described within and that this interest prevailed over later claims of ownership by private parties or

the government, citing Knight v. US Land Ass'n, 142 US 161, 184 (1891); San Francisco v. LeRoy, 138 US 656, 670-71 (1891); US v. Coronado Beach Co., 255 US 472, 487-88 (1921). These cases were distinguished by the California court on the ground that they involved only claims to title and ownership, not to "public trust" interests in property owned by others.

The court distinguished US v. Title Insurance Co., 265 US 472 (1924), where the Court held that Indians who retained a perpetual right to occupy certain lands under Mexican law did not retain that right in lands patented by private parties under the Act of 1851, because the right had not been asserted in the proceedings under the Act. The California court said: "We do not find this case to be convincing authority. The right to occupy land is normal incident of title, and we have no quarrel with the proposition that private persons who failed to assert their right to occupancy in the patent proceedings may not thereafter claim that right. But the right to exclude the public from tidelands is not a normal incident of title. To the contrary, as we have seen, conveyance of such lands by the government does not ordinarily free them from the burden of the public trust even though no reservation is made in the deed for the preservation of the people's interest." Petn App., at A15. In summary, the California court held that petr's predecessors had taken title from Mexico subject to a "public trust," that California succeeded to this interest when it entered the Union, and that the state's failure to claim this interest in patent proceedings under the Act of 1851 did not affect the interest.

3. CONTENTIONS: Petr. (1) The California S. Ct correctly recognized that ownership of tidelands that were granted by the Mexican government to private citizens did not pass to California upon its admission to the Union. See US v. Coronado Beach Co., 255 US 472, 487-88 (1921). The lower court, however, engaged in a semantic sleight of hand by creating a "public trust" interest retained by the state. Under California law a "public trust" interest leaves the owner of property with only "naked title to the soil," People v. California Fish Co., 166 Cal. 576, 598 (1913), and permits the state to make virtually any use it chooses of the land. For example, it may construct a YMCA, People v. City of Long Beach, 51 Cal.2d 875 (1959), or drill for oil, Boone v. Kingsbury, 206 Cal. 148 (1928).

California's failure to present its claim in the patent proceedings under the Act of 1851 precludes assertion of a "public trust" interest now. In Barker v. Harvey, 181 US 481 (1901), Indians who possessed a right of occupancy under Mexican law, sought to assert that right in federal court. This Court held that the right was abandoned when not asserted in federal patent proceedings under the 1851 Act: "Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him burdened by an Indian right of permanent occupancy." Id., at 491-92. In US v. Title Insurance Co., 265 US 472 (1924), the Court adhered to Barker, saying that the "purpose of the Act of 1851 was to give repose to titles as well as to fulfill treaty obligations, and

that it not only permitted but required all claims to be presented to the commission, and barred all from future assertion which were not presented within the two years." Id., at 483. Since the "public trust" interest claimed by California is at least as broad as that asserted by the Indians in Barker and Title Insurance Co., the lower court's attempt to distinguish the cases fails.

(2) Under state law, only tidelands are subject to a "public trust" interest. Relying on expert testimony the California courts decided that petr's property constituted tidelands. This was error because in 1873 the General Land Office determined that the property was not tidelands, and because "if there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is ... conclusive, and such questions cannot thereafter be relitigated in the courts." Johnson v. Drew, 171 US 93, 99 (1898). The lower court decided that the General Land Office's determination as to whether Rancho Ballona was tidelands was ambiguous because the Office denominated the lagoon as an "inner bay," which, according to the 1951 edition of Webster's, meant tidelands; this is wrong. The Office decided that the lagoon was "not an arm of the sea" and this plainly resolves the question of whether the lagoon constituted tidelands.

Resp. (1) Under California law title to tidal lands is subject to a "public trust" easement, even when the patent

conveying fee title to the land does not contain an explicit reservation of the interest. The grant of Rancho Ballona from the Mexican government to the Machados and Talamantes provided that "they may enclose it without prejudice to the traversing roads and servitudes ...." This was incorporated by reference into both the Board of Land Commissioner's confirmation decree and a decision of the federal DC upholding the decree. Expert witnesses testified that this phrase reserved a "public trust" interest under Mexican law. See also Apalachicola Land & Development Co. v. McRae, 86 Fla. 393 (1923).

The question of whether the foregoing clause reserved in the Mexican government a "public trust" interest is not a federal question. This Court has established that a dispute as to the nature and extent of property rights gained under patents issued by the United States in confirmation of prior Mexican grants does not present a federal question. Los Angeles Milling Co. v. Los Angeles, 217 US 217; Devine v. Los Angeles, 202 US 313 (1906); Hooker v. Los Angeles, 188 US 314 (1903).

Petr's claim that California abandoned its "public trust" interest by not asserting it in federal patent proceedings is without merit. The Board of Land Commissioners lacked jurisdiction to determine the validity of private land grants made by prior sovereigns. The Board had authority only to determine the validity of fee simple interests. In Fremont v. US, 58 US 541 (1854), this Court held that the Board lacked jurisdiction to determine the validity of claims to mineral rights. Petr's reliance on Barker v. Harvey, 181 US 481 (1901),

is misplaced. That case involved the private claims of Mission Indians and the Act of 1851 was intended to "ascertain and settle private claims." As to public rights, however, there could have been no abandonment, Eldridge v Trezevant, 160 US 452 (1896); New Orleans v. US, 35 US 662 (1836).

(2) Petr's argument that the General Land Office decision that Rancho Ballona was not tidelands does not present a federal question. In addition, as the California S. Ct held, the Office's decision was ambiguous, and thus has no preclusive effect.

Amicus. The California Land Title Association, acting on behalf of a number of title insurance companies, urges the Court to review the decision below. Thousands of policies insuring titles within Mexican land grants patented under the Act of 1851 have been issued. These policies did not take into account the risk that the lands would be declared subject to "public trust" interests. Over 8,500,000 acres of California land derives from federally-patented Mexican grants, which generally included shallow lagoons, sloughs, streams, and ponds -- much of which may be tidelands for purposes of the public trust doctrine. The United States owns a substantial amount of property obtained from private parties, which is subject to a "public trust" interest. The decision below, if allowed to stand, will cloud title to vast amounts of California, and foreclose title insurance for similar areas. Moreover, under the law of Mexico "fountains," "the sandy beaches on the banks of rivers," "the commons and roads traversed

by horses," "mountains," and "pastures" are subject to a public trust, and California could claim rights to such property.

A federally-patented, Mexican land grant is good against both private parties and the government. See Beard v. Federy, 70 US 478, 492 (1866) ("As against the government this record [a federal patent], so long as it remains unvacated, is conclusive."). Amicus also repeats petr's argument that a reexamination of factual question decided by the General Lands Office is improper.

4. DISCUSSION: The decision below appears important because of the considerable amount of property in southern California that derived from federally-patented Mexican land grants and because of the sweeping character of a "public trust" interest. The question of what property interests petr and the state received as a result of the Act of 1851 patent proceedings seems clearly to be a question of federal law. State Land Board v. Corvallis Sand & Gravel Co., 429 US 363, 375 (1977); Knight v. United States Land Association, 142 US 161, 183-84 (1891).

On the merits, the case is difficult. The California S. Ct's treatment of the effect of the failure of the state to assert its "public trust" claim in the Act of 1851 patent proceedings is somewhat inconsistent with this Court's decisions in the area. In US v. Coronado Beach Co., 255 US 472, 487-88 (1921), the Court indicated in dicta that California's title to certain tidal lands was subject to prior Mexican grants that had been federally patented. Similar results were reached in US v. Title Insurance & Trust Co., 265 US 472 (1924), and Barker v.

Heavey, 181 US 481 (1901), in cases where Indians sought to claim rights to occupancy that had been long recognized but not asserted in patent proceedings under the Act of 1851.

The distinctions offered by the lower court and resp are not completely persuasive. The California S. Ct relied on the fact that occupancy is a "normal incident of title" and thus the Indians in Barker and Title Insurance & Trust were required to have claimed this type of right in federal patent proceedings. A "public trust" interest, however, is at least as significant and intrusive an interest as a right to occupancy, and the California court's distinction is thus not particularly strong. Resp also draws a distinction between public and private claims. This seems foreclosed, however, by US v. Coronado Beach Co., 255 US 472, 487-88 (1921), which indicated that California was bound to present its claims to the patent commission under the Act of 1851. See also Beard v. Federy, 70 US 478, 490 (1866). Resp also argues that Townsend v. Greeley, 72 US 326, 335 (1866)(no obligation to assert equitable interests in Act of 1851 patent proceedings), made it unnecessary for the state to assert its public trust interest in the patent proceedings. This decision seems to provide the best basis for distinguishing this case from the Barker, Title Insurance & Trust Co., and Coronado Beach Co., decisions, since the interest asserted by the state seems to be some sort of trust interest. Nonetheless, Townsend did not involve the peculiar "public trust" interest presented here and it is unclear to me whether that decision should apply to this type of interest; Townsend apparently did not apply in the Indian

occupancy cases which involve interests similar to the "public trust" interest. In summary, the governing precedents are unclear, particularly as applied to the novel "public trust" interest. To the extent I understand them, I think these precedents are somewhat inconsistent with the decision below. Because of the widespread economic significance of the case, the Court should give serious consideration to a grant. (The SG's views might also be useful, given the extensive federal land holdings that might be affected.)

I do not recommend reviewing the second question raised by petr. The question turns on a factual determination of what was meant by a particular land grant in 1873 and involves no principles of general significance.

There is a response and one amicus brief.

December 28, 1982 Born Op. in Petn

however, looks wrong simply because the land in question had already been determined not to be "tidelands."

JOB

Treaty

SG's views:

The SG recommends a grant. He argues that the federal law questions are properly presented. The Cal. S. Ct. [illegible] first found that the title of petr's predecessors, received from Mexico in 1839, was subject to the rights of the public [illegible] claimed by the State and City and that the U.S. acquired these rights upon annexation of Cal. in 1848. It also concluded, however, that these rights were not relinquished by the U.S. to the Mexican grantees by issuance of the patents of 1873. It then concluded that, when Cal. was admitted to the Union, it succeeded to these rights. The first issue involves the law of Mexico; the second the Treaty of Guadalupe Hidalgo; the third by a congressional act; and the fourth requires application of the equal footing doctrine. State law plays no role until it is determined that the property rights in issue inured to Cal.

The SG argues that Cal. court erred. The lands were never in State ownership — because alienated before statehood — and it cannot now claim an interest in them. The logan conveyed to the Mexican grantees was not burdened with a pervasive public easement that effectively recaptures for the State the estate it would have enjoyed if no prior grant had been made. Such a holding otherwise would violate the patent and the Treaty of Guadalupe Hidalgo.

Finally, the SG contends that the federal questions are of substantial importance. He is uncertain how much "mischief" the decision will cause, but argues that they will be significant. If left undisturbed, other States may be tempted to assert a like interest in submerged lands alienated by prior sovereigns — Mexico, Spain, France or Great Britain. The SG is also concerned about federal lands, although it does not concede that federal lands would be subject to the same restrictions as private landowners.

— I am inclined to doubt the importance of this case outside of Cal., and am inclined to deny. If the Court decides to grant cert, however, cert should be limited to Q 1.

January 14, 1983

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 82-708

Submitted ....., 19... *Announced* ....., 19...

SUMMA CORP.

vs.

CALIFORNIA EX REL. T. LANDS COMMN.

SG urges Grant — important Q
But I'm still inclined to Deny
2/24

Still included to Deny; not entirely clear there is a federal Q, & case may be less important than Pet argues.
3/17

Hold for SG's views

SG's views received. - See back
JOB

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		SG	G	views									
Brennan, J.		~~G~~	Grant on Q1										
White, J.		SG	G	views									
Marshall, J.			"	"									
Blackmun, J.			✓										
Powell, J.		SG	G	"									
Rehnquist, J.		✓											
Stevens, J.		SG	G										
O'Connor, J.		✓	in Q1										

dac 02/26/84

Reviewed 2/27

Fine memo. concluding that although case is close, affirmance is indicated. David's reasoning is persuasive & I ~~may~~ may well agree — but there are strong arguments to contrary. I'm not at sent.

BENCH MEMORANDUM

Summa Corp. v. California

No. 82-708

David A. Charny February 26, 1984

Question Presented

Whether a United States patent, issued to confirm title to land granted to private owners by the Mexican government, reserved to California a "public trust" interest in tidelands included within the patent.

Outline page

I. Background

Under the California "public trust" doctrine, the state holds a trust interest on behalf of the public in tidelands. Private persons hold these lands subject to the public's right to use the lands for commerce, navigation and recreation.

The present suit involves the applicability of the doctrine to the Ballona Lagoon, now an arm of the Pacific Ocean. The lagoon lies within a tract of land granted by the Mexican government to private individuals in 1839. After the United States acquired California, the owners of the land filed their claim to it with the Board of Land Commissioners. Congress had created the Board to confirm the claims of Mexican citizens to California land, as the United States had agreed in the treaty of Guadalupe Hidalgo to respect Mexican property rights in the territories acquired from Mexico.

The Board approved the claim, and the District Court affirmed. A survey of the confirmed claim was then approved by the Surveyor General and submitted to the General Land Office, that was responsible for issuing patents. The Office in 1873 issued a patent that included the lagoon within the bounds of the property, although the parties now dispute whether the patent unambiguously includes a determination of the character of the Lagoon -- whether it was an "arm of the sea" or merely a non-tidal, inland pond.

The present suit arose when resp Los Angeles invoked the doctrine to make various "improvements" in the lagoon. The City filed a quiet title action against petr, and other owners of the

lagoon, alleging that it owned a "public trust" easement in the lagoon. The State, a necessary party under California and a resp here, supported the City's claim. The TC determined that the City did have an easement and that, in any case, the defendants had dedicated the property to public use.

The California S.Ct. affirmed, reaching only the TC's holding on the public trust doctrine. Accepting that the patent was a final determination of rights to the property, the state court found the patent ambiguous as to whether the lagoon was tidelands. It found that other evidence admitted before the TC demonstrated that the "lagoon was tidelands". The state court then found, citing the testimony at trial of an expert on Mexican law, that petr's predecessors in interest had been granted the property subject to the public's rights in the tidelands. The reserved interest was acquired by the United States when it annexed the territory, and then passed to California when it became a state.

II. Discussion

A. Jurisdiction and Mexican Law Questions

Resps' contention that the Court lacks subject matter jurisdiction is without merit. The cited cases involved property rights conceded to have been incorporated from Mexican law into the federal patents. E.g., Los Angeles Milling Co. v. Los Angeles, 217 U.S. 217, 226 (1910). The Court held the scope of these rights was a question of state law. In contrast, the present case requires the Court to consider whether the federal patents incorporate the "public trust" easement that arguably would obtain under Mexican law.

The SG further urges the Court to reach the issue whether Mexican law would have recognized the "public trust" easement, arguing that the line of cases culminating in Los Angeles Milling Co. was overruled by United States v. Pink, 315 U.S. 203, 217-218 (1942). The Pink case reviewed, although with some degree of deference, a New York court's determination of Russian property law that governed the scope of the Litvinov Agreement, under which the United States acquired various extraterritorial properties that had been expropriated by the Soviet government. This case is slender authority for overruling Los Angeles Milling Co. Pink posed foreign law issues of importance to the property and foreign relations interests of the United States; no state policy was at stake. In Los Angeles Milling Co. -- a case that, like the present one, involved the water rights of Los Angeles -- the state interests in the foreign law issue were great, as the Mexican law would become the state common law of property for much of California and would determine the rights of a state intrumentality; and no federal interest was directly implicated. The SG's position would give the federal courts jurisdiction over a number of ordinary property disputes.

Although the Court undoubtedly has the power to determine that the California courts' determination of Mexican law is so erroneous as to threaten the integrity of the patent rights confirmed by the United States, neither the record nor the SG's brief seems to support this determination.

B. Reservation of the Public Trust

Although it is a close question, it does not appear that the failure of California to assert its public trust claim forfeited that claim. The governing principle appears to be that the government reserves such rights to lands granted by it "as may appear on the face of the grant, or the law under which it was made, or be declared by a general statute in force at the time the interest of grantee was acquired." United States v. Rindge, 208 F. 611 (1913). Although the reservation of the public trust is not explicit in the grant, the law under which the grant was made by Mexico and confirmed by the United States appears to have contemplated such a reservation. The "public trust" in tidelands is not, under Mexican law, a right that would attach only to lands as a consequence of the terms of a deed by the government. Rather, the record indicates that the public trust attaches to all tidelands simply as a consequence of their geological condition. See JA, at 221-222. As the state under Mexican law could not grant these lands to private individuals, a grant of lands whose boundaries included tidelands need not contain an explicit reservation of the public trust in order to preserve that right. For this reasons, the claim does not appear to be the type that Congress intended to have asserted in these proceedings. Congress's primary concern appears to have been to resolve claims to property that rested upon particular grants or reservations of title by the Mexican government.

In this respect, the public trust in tidelands would differ from those public rights in particular easements, such as

roadways, that the state may have preserved by general saving language in a deed. Easements usually arise not from the geological features of the land itself but from a particular claim of right; further, the state had the power to extinguish the easement or grant it to private persons. Such easements, like fee claims to land by the state, could only be proven against contrary private claims by particular deeds, and would have to have been substantiated before the Board of Land Commissioners. THe public trust in tidelands is clearly different.

Although no case directly establishes this point, this appears most consistent with the pattern of decision in analogous property cases. The Court has recognized that decisions of the Board of Land Commissioners finally disposed of sovereign claims with respect to fee interests to particular properties, e.g. United States v. Coronado Beach Co., 255 U.S. 472 (1921), and lesser rights, including easements and mineral rights, asserted as to particular lands or on the basis of particular grants, either by private parties, e.g., Barker v. Harvey, 181 U.S. 481 (1901); United States v. Castillero, 67 U.S. 17, 166 (1862). In contrast, rights such as easements of access to navigable waters attach without express reservation by the patent. E.g. New Orleans v. United States, 35 U.S. 662 (1836); Eldridge v. Trezevant, 160 U.S. 452 (1896).

Perhaps the most disturbing aspect of the resps' position is the sweeping possessory interest that the state would acquire over the land under the public trust doctrine. It appears that under the public trust doctrine the owner of tidelands

exercises his possessory interest only at the pleasure of the state. But that is true as well of other navigational servitude or easements, within the scope of the easement, and so does not distinguish the present case. Nor does petr argue that California has extended the public trust doctrine beyond what would reasonably have been reserved by Mexico at the time of the original grant, and there is no evidence in the record to support that argument.

C. Equal Footing Doctrine

Although the SG correctly argues that the Court has never held that a public trust easement passed to states under the Equal Footing Doctrine, a contrary holding would be inconsistent with the principles underlying the Doctrine. There is no reason to distinguish the "public trust" easement from other property rights, including both ownership in fee and lesser proerty interests, Illinois Central Railroad v. Illinois, 146 U.S. 387, 453 (1892), that pass to the states under the Doctrine. As the SG acknowledges, the navigational servitude did not pass to the state under the Doctrine because it is an attribute of the police power rather than a proprietary right.

D. Estoppel Effect of the Board's Determination

Although the federal patent conclusively resolves any question of title, it appears that the federal patent at issue here does not consider the question whether the lagoon was tideland. The General Land Office was concerned whether the outer boundary of the patented land was the shore of the lagoon or the ocean. The Office noted that on the "diseno" that was part of

the Mexican grant, no bay was indicated; it reasoned that it was unlikely that the grant would be silent as to so prominent feature of the land and so returned the survey for confirmation of the survey. JA, at 33.

The ex parte affidavits filed with the Land Office upon subsequent proceedings indicate that the lagoon was not tidal. This conclusion was adopted by the Surveyor-General in his report to the Secretary of the Interior. JA, at 92-93. And the map attached to the patent deleted an earlier reference to an "inlet." Nonetheless, petr's reliance upon the patent as conclusive evidence that there is no public trust impressed upon its property is not without difficulty. The decision of the Secretary finds the weight of the evidence cited by the Surveyor-General "establishes the correctness of the survey ... in its location of the northern (or northwestern) line of the Ballona [property] according to the decree of confirmation [that] establishes the boundary in question ...." JA, at 100. The Secretary apparently did not consider the question of the character of the lagoon, that was irrelevant to the location of the northern boundary. As the Surveyor-General and the Secretary determined around this time not to permit proof by ex parte affidavits, it seems questionable whether the finding that the lagoon was not an inlet, if necessary to the decision, would have been affirmed. Further, the patent itself incorporates the field notes of the original survey, that petr concedes to have considered the lagoon to be an arm of the sea. JA, at 103. The terms of the patent itself contain nothing that would contradict these notes.

It thus does not appear that the patent definitively resolves the question whether the lagoon is an arm of the sea. The patent itself supports contradictory inferences; and the only other reference to the question in the proceedings that led to the issuance of the patent is a report of testimony upon which the Department itself would not have relied in issuing a patent. And resolution of the tidelands issue was not necessary to any of the points contested by the rival claimants or questioned by the Land Office in requesting a second survey. To the contrary, the roughly contemporaneous U.S. Coast Survey refers to the lagoon as an "estuary," and the evidence in the record unequivocally indicates that the lagoon was tidal.

III. Conclusion

With some hesitation, I conclude that the state court's decision should be affirmed. It appears that the public trust is best understood as attaching to "tidelands" even in the absence of an express reservation by the grant of title; and that in issuing the patent to the property in question here, the government made no determination that the lagoon was not tidelands. Although California's extension of the public trust doctrine may raise constitutional questions, those questions are not before the Court in this case. ?

2/28/84 Powell

82-708 Summa Corp v. Calif

Tidelands in question: "Ballona lagoon", formerly known as "Rancho Ballona, is an arm of Pacific Ocean in the Marina del Rey area of Los Angeles. At high tide, covered by one to sex ft. of water. At low tide-dry.

Chronology:

1848 U.S. acquired Calif - ceded by Mex.

1848 Treaty of Guadalupe-Hidalgo Treaty provided rights of Mex. citizens in their prop. were to be "respected".

1851. Pursuant to the Treaty, Congress established a Bd of Land Commissioners to hear claims to prop. by Mex. citizens & to issue "patents" for valid claims.

Two families, who had received Rancho Ballona from Mex Govt, sought a patent. The Commissioners confirmed their title, & a DC upheld this decision.

Altho a question later arose as to boundaries (especially on a claim that part of prop. was tidelands), the Land Commissioner - on basis of these affidavits - held land was not tideland & issued a patent for all of it.

Patent issued for all of it

Land in quest. was later conveyed to Pett.

Pett. acquired a facially valid title

1970: Los Angeles sued to quiet title, claiming it held easements over tidelands. St. of Calif., named a party, claimed it had acquired title on a "public trust" theory, & had given this to City.

Powell

82-708 Summa Corp

Holdings of Calif S/Ct:

1. This land is "tideland" — according to uncontroverted test. of geologists. This finding is critical to Calif's "public trust" doctrine.

2. Neither the Guadalupe Hidalgo Treaty nor the Fed. land patent affect Calif's "public trust" interest.

3. Calif. S/Ct reasoned that the Mex. owners had taken title from Mex. Govt. subject to Mex.'s "public trust" interests. Thus, when U.S. acquired Calif., it acquired Mexico's "public trust" interest.

4. Finally, it held that the issuance of the land patent in fee did not affect the "public trust" interest. — even though Calif Ct acknowledged that decisions of this Court have upheld the validity of fee patents of land

Powell

82-708 Summa Corp

Pet's arguments:

1. Calif law - nature of "public trust" interest:
Leaves owner with only a "naked title to soil".
People v. City of Long Beach ('59) -
the State (city) may do what it pleases,
ark → including constructing a YMCA.
Recreational
Boone v. Kingsbury ('28) - drill for oil.

2. Calif precluded from asserting an interest.
Failed to present its claim in the patent proceeding under the Act of 1951 - a proceeding to clear title to lands of Mexican citizens.
or
Cited Barker v Harvey 181 U.S. 481, and U.S. v. Title Ins Co 265 U.S. 472 (purpose of Act was to "give repose to titles".)

Resp's principal argument

The grant from Mex. of Rancho Ballona provided that grantee "may enclose [the prop.] w/out prejudice to traversing roads & servitudes". This was incorporated by reference into both Land Commission's decree of a patent & the DC approval.

Is this correct.

The ~~question~~ Whether the foregoing creates a public trust claim is not a fed. question. State law controls.

Bd of Commissioners had no authority to determine validity of grants by Mexico.

82-708 Summa Corp

Calif. S/Ct decision - Cloud on titles

Amicus Br. of Calif. Land Title Ass'n.

Thousands of titles based on patents under 1951 Act will be clouded.

Title policies have not taken into account any possibility that these titles all are subject to some reserved - but unrecorded - public interest.

Over 8,500,000 acres of Calif land patented under the Act may include shallow lagoons, ponds & streams - much of it tidelands - that may be subjected to "public trust"

Under law of Mexico "fountains" "sandy beaches or banks of rivers", "mountains" & "pastures" are subject to public trusts

X X X X

Writer of pool Cert. memo last Term said decisions of this Court do not clearly answer the ~~great~~ questions raised - but language in some cases is inconsistent with decision of Calif S/Ct.

David

82-708 SUMMA CORP. v. CALIFORNIA Argued 2/29/84

"Under what appears to be
Calif. law, a "public trust"
interest in land leave little
of value to the record holder of
the "fee".
State may do what ever it pleases
if deemed to serve a public purpose:
Eg: construct a ~~YMCA~~ YMCA
drill ~~for~~ for oil

* Under Mex law - "public trust"
land includes "sandy ~~beaches~~
2. beaches or banks of rivers,
mountains, pastures

(1) What are limits of "public trust" land?
(2) Apart tidal land? (3) Can we limit to tidelands
(4) Recreation, commerce, navigation, oil, ??
(5) Title policies?

Chronology (for Petr)

Unqualified ~~[illegible]~~ patent to title.

"Public trust" interest
is permanent - regardless of
any continuing public need
or what the private owner may
have put on land.

Title to 1851 Act - To settle titles

~~Cate O'Donnell~~
Cater O'Donnell & its progeny.

Purpose of Act was to quiet
title.

If a right to public domain
existed under Mex Law, Congress
had power to ~~do~~ resolve all
title Qs & did so w/ '51 Act

Ballona Lagoon

Claiborne (SG)

(I did not follow much of his argument

Mr Saggese (Deputy AG Calif)

Four possible bases of Fed juris. Mex. Treaty, ~~1851~~ 1851 Act. Equal Footing Doctrine. But does not concede fed. juris.

W H R asked about land acquired from France (La. Purchase) & Spain (Fla). Mr. Saggese said cases in the affected states agree with Calif?

Owner can make no improvements w/o prior approval of State.

Christopher (Reply)

Improvements may be made only at owner risk w/o approval of State - & approval may be extensive proceedings

82-708 Summa Corp 2/29/84
Revenue

Public trust doctrine
Leaves owner with
base title (forget to ask
~~who~~ who pays taxes)
Can't encroach w/o
prior permission
Extends to inland
streams & lakes - now
tidal.

Act of 1851 controls
Whatever law of
Mex. may have been.
Congress - after
statehood - had power
to construe Mex. laws
as necessary to clear
titles - purpose to
quiet title.
Can't have uncertainty
for centuries & half.

82-708 Summa Corp #2

Petr. best argument -
The Bd. of Land Commissioners
- pursuant to 1851 Act -
determined that Petr's predecessors
had patented prop. in fee.

The required survey that
established the boundary
that came to be the sea
coast was ~~objected~~
approved by Bd of Commissioners,
the General Land Office
& the Secretary of Interior.

Rev. 6-7

No. 82-708, Summa Corp. v. California Conf. 3/2/84

The Chief Justice Reverse

We should not consider Mex law,

~~last~~

It is ~~to~~ late to go back beyond the 1851 Act's determination

Justice Brennan Affirm

Public trust argument turns on whether Mex. reserved such an interest.

Not persuaded that 1851 Act ~~stopped~~ intended to ignore Mex law.

Mex law is a stale Q (every stale ?!)

Justice White Reverse

Makes no sense to unsettle titles at this late date

Agree that 1851 was intended to settle titles

Justice Marshall

Aut.

Justice Blackmun Aff-in

Whether Mex ~~Gov't~~ law reserved
their ½ interest in matter of
state law, & Calif has decided
this.

The 1851 Act was not concerned
with this type of interest

Justice Powell Reverse

See my note

Justice Rehnquist *Reverse*

May not be a fed. Q ~~and~~ whenever a patent from gov't. is at issue.

Concede this was tide-land & that Mex law is relevant

Relied on ~~Cor~~ Coronado case (?)

(I don't understand WHR reasoning)

Justice Stevens *Reverse*

We do have right to examine Mex law.

Calif's concept of the trust doctrine is so extreme, can't believe Mex law went this far.

Also cited Coronado Beach (Holmes

Can't say a patent creates an inalienable right

[Margin note:] Coronado Beach held that the patent relates back to date of Treaty; this given greater weight to the Act of 51 & the Commissions

Justice O'Connor *Reverse*

~~Whether~~

Base our holding on 1851 Act & proceedings were fed. law & it controls.

job 03/17/83

Inclined to Deny? - See my notes on docket sheet

To: Mr. Justice Powell

From: Jim

Re: Summa Corp. v. California, No. 82-708

The State has filed a brief in opposition to the memorandum for the U.S. It argues that the SG admits that the lands in question were and are "tidelands" and that, under the laws of Mexico in effect at the time of the Mexican conveyance to petr's predecessors in interest, tidelands were subject to a "public trust easement." Indeed, the original Mexican grant contains a specific, express reservation of such public rights, and this reservation was incorporated by reference into the U.S.'s Decree of Confirmation. Even if there were no such reservation, the Court in Fremont v. United States, 58 U.S. 541 (1854), decided that "trust" interests are not affected by proceedings to confirm private titles conveyed by prior sovereigns upon cession to the U.S. Cal. recognizes the underlying fee title of petr, but claims only "one incident" of ownership. Indeed, the federal government itself recognized that the public trust servitude exists over tidelands within ranchos. See United States v. Coronado Beach Co., 255 U.S. 472, 482 (1921) (SG's arguments). The incidents stemming from private ownership of property have traditionally been defined according to state law and this Court has consistently held that no federal question is presented as to such matters. Finally, no interest of the U.S. is*

?

?

But see SG's Brief

affected by this case in that it holds a similar title interest in the subject tidelands which is paramount to that of Calif.

The City of L.A. has also submitted a brief in opposition to the petn for cert.

I think this is a very complicated case, and I am somewhat unsure of my grasp of all the issues. I am inclined, however, to believe that there is a substantial issue whether there is a federal question presented by the case. The importance of this case even in Cal. is doubtful, because it only effects tidelands and a non-title interest at that. At this time do not think it is an appropriate case for this Court's review.

March 18, 1983

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 82-708

SUMMA CORP.

vs.

CALIFORNIA, EX. REL. STATE LANDS COMMN,.

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.		✓											
Brennan, J.		✓											
White, J.		✓	✓										
Marshall, J.													
Blackmun, J.			✓										
Powell, J.			✓		tentative								
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

David

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: MAR 30 1984

Recirculated: _____

Reviewed 4/1 Jour

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–708

SUMMA CORPORATION, PETITIONER *v.* CALIFORNIA EX REL. STATE LANDS COMMISSION AND CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

[April ——, 1984]

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner owns the fee title to property known as the Ballona Lagoon, a narrow body of water connected to Marina del Rey, a man-made harbor located in a part of the City of Los Angeles called Venice. Venice is located on the Pacific Ocean between the Los Angeles International Airport and the City of Santa Monica. The present case arises from a lawsuit brought by respondent City of Los Angeles against petitioner Summa Corp. in state court, in which the City alleged that it held an easement in the Ballona Lagoon for commerce, navigation, and fishing, for the passage of fresh waters to the Venice Canals, and for water recreation. The State of California, joined as a defendant as required by state law, filed a cross-complaint alleging that it had acquired an interest in the lagoon for commerce, navigation, and fishing upon its admission to the Union, that it held this interest in trust for the public, and that it had granted this interest to the City of Los Angeles. The City's complaint indicated that it wanted to dredge the lagoon and make other improvements without having to exercise its power of eminent domain over petitioner's property. The trial court ruled in favor of respondents, finding that the lagoon was subject to the public trust easement claimed by the City and the State, who had the right to construct improvements in the lagoon without

exercising the power of eminent domain or compensating the landowners. The Supreme Court of California affirmed the ruling of the trial court. *City of Los Angeles* v. *Venice Peninsula Properties*, 31 Cal. 3d 288 (1982).

In the Supreme Court of California, petitioner asserted that the Ballona Lagoon had never been tideland, that even if it had been tideland, Mexican law imposed no servitude on the fee interest by reason of that fact, and that even if it were tideland and subject to a servitude under Mexican law, such a servitude was forfeited by the failure of the State to assert it in the federal patent proceedings. The Supreme Court of California ruled against petitioner on all three of these grounds. We now reverse that judgment, holding that even if it is assumed that the Ballona Lagoon was part of tidelands subject by Mexican law to the servitude described by the Supreme Court of California, the State's claim to such a servitude must have been presented in the federal patent proceeding in order to survive the issue of a fee patent.[1]

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[1] Respondents argue that the decision below presents simply a question concerning an incident of title, which even though relating to a patent issued under a federal statute raises only a question of state law. They rely on cases such as *Hooker* v. *Los Angeles*, 188 U. S. 314 (1903), *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217 (1910), and *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339 (1909). These cases all held, quite properly in our view, that questions of riparian water rights under patents issued under the 1851 Act did not raise a substantial federal question merely because the conflicting claims were based upon such patents. But the controversy in the present case, unlike those cases, turns on the proper construction of the Act of March 3, 1851. Were the rule otherwise, this Court's decision in *Barker* v. *Harvey*, 181 U. S. 481 (1901), would have been to dismiss the appeal, which was the course taken in *Hooker*, rather than to decide the case on the merits. See also *Beard* v. *Federy*, 3 Wall. 478 (1866). The opinion below clearly recognized as much, for the California Supreme Court wrote, "under the Act of 1851, the federal government succeeded to Mexico's right in the tidelands granted to the defendants' predecessors upon annexation of California," 31 Cal. 3d at 298, an interest that "was acquired by California upon its admission to statehood," *id.*, at 302. Thus, our jurisdiction is based on the need to determine whether the

Petitioner's title to the lagoon, like all the land in Marina del Ray, dates back to 1839, when the Mexican Governor of California granted to Augustin and Ignacio Machado and Felipe and Tomas Talamantes a property known as the Rancho Ballona.[2] The land comprising the Rancho Ballona be-

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provisions of the 1851 Act operate to preclude California from now asserting its public trust easement.

The 1839 grant to the Machados and Talamantes contained a reservation that the grantees may enclose the property "without prejudice to the traversing roads and servitudes [*servidumbres*]." App. 5. According to expert testimony at trial, under Las Siete Partidas, the law in effect at the time of the Mexican grant, this reservation in the Machados' and Talamantes' grant was intended to preserve the rights of the public in the tidelands enclosed by the boundaries of the Rancho Ballona. The California Supreme Court reasoned that this interest was similar to the common law public trust imposed on tidelands. Petitioner and amicus United States argue, however, that this reservation was never intended to create a public trust easement of the magnitude now asserted by California. At most this reservation was inserted in the Mexican grant simply to preserve existing roads and paths for use by the public. See *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 485–486 (1921); *Barker* v. *Harvey*, 181 U. S. 472 (1901); cf. *Jover* v. *Insular Government*, 221 U. S. 623 (1911). While it is beyond cavil that we may take a fresh look at what Mexican law may have been in 1839, see *United States* v. *Perot*, 98 U. S. 428, 430 (1878); *Fremont* v. *United States*, 17 How. 541, 556 (1854), we find it unnecessary to determine whether Mexican law imposed such an expansive easement on grants of private property.

[2]The Rancho Ballona occupied an area of approximately 14,000 acres and included a tidelands area of about 2,000 acres within its boundaries. The present-day Ballona Lagoon is virtually all that remains of the former tidelands, with filling and development or natural conditions transforming most of much larger lagoon area into dry land. Although Respondent Los Angeles claims that the present controversy involves only what remains of the old lagoon, a fair reading of California law suggests that the State's claimed public trust servitude can be extended over land no longer subject to the tides if the land was tidelands when California became a state. See *City of Long Beach* v. *Mansell*, 3 Cal. 3d 462 (1970).

The Mexican grantees acquired title through a formal process that began with a petition to the Mexican Governor of California. Their petition was forwarded to the City Council of Los Angeles, whose committee on vacant lands approved the request. Formal vesting of title took place after the

came part of the United States following the war between the United States and Mexico, which was formally ended by the Treaty of Guadalupe Hidalgo in 1848. 9 Stat. 922. Under the terms of the Treaty of Guadalupe Hidalgo the United States undertook to protect the property rights of Mexican landowners, Treaty of Guadalupe Hidalgo, Art. VIII, 9 Stat. 929, at the same time settlers were moving into California in large numbers to exploit the mineral wealth and other resources of the new territory. Mexican grants encompassed well over 10,000,000 acres in California and included some of the best land suitable for development. H. R. Rep. No. 1, 33d Cong., 2d Sess., 4–5 (1854). As we wrote long ago:

> "The country was new, and rich in mineral wealth, and attracted settlers, whose industry and enterprise produced an unparalleled state of prosperity. The enhanced value given to the whole surface of the country by the discovery of gold, made it necessary to ascertain and settle all private land claims, so that the real estate belonging to individuals could be separated from the public domain." *Peralta* v. *United States*, 3 Wall. 434, 439 (1865); see also *Botiller* v. *Dominguez*, 130 U. S. 238, 244 (1889).

To fulfill its obligations under the Treaty of Guadalupe Hidalgo and to provide for an orderly settlement of Mexican land claims, Congress passed the Act of March 3, 1851, setting up a comprehensive claims settlement procedure. Under the terms of the Act, a Board of Land Commissioners was established with the power to decide the rights of "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government. . . ." Act of March 3, 1851, § 8, ch. 41, 9 Stat. 631, 632. The Board was to decide the validity of any claim according

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Rancho had been inspected, a Mexican judge had completed "walking the boundaries," App. 213, and the conveyance duly registered. See generally App. 1–13; *United States* v. *Pico*, 5 Wall. 536, 539 (1866).

to "the laws, usages, and customs" of Mexico, *id.*, at § 11, while parties before the Board had the right to appeal to the District Court for a *de novo* determination of their rights, *id.*, at § 9; *Grisar* v. *McDowell*, 6 Wall. 363, 375 (1867), and to appeal to this Court, *id.*, at § 10. Claimants were required to present their claims within two years, however, or have their claims barred. *Id.*, at § 13, see *Botiller* v. *Dominguez*, 130 U. S. 238 (1889). The final decree of the Board, or any patent issued under the Act, was also a conclusive adjudication of the rights of the claimant as against the United States, but not against the interests of third parties with superior titles. Act of March 3, 1851, § 15.

In 1852 the Machados and the Talamantes petitioned the Board for confirmation of their title under the Act. Following a hearing, the petition was granted by the Board, App. 21, and affirmed by the United States District Court on appeal, App. 22–23. Before a patent could issue, however, a survey of the property had to be approved by the Surveyor General of California. The survey for this purpose was completed in 1858, and although it was approved by the Surveyor General of California, it was rejected upon submission to the General Land Office of the Department of Interior. App. 32–34.

In the confirmation proceedings that followed, the proposed survey was readvertised and interested parties informed of their right to participate in the proceedings.[3] The

[3] It is undisputed that the State had the right to participate in the patent proceedings leading to confirmation of the Machados' and Talamantes' grant. The State asserts that as a "practice" it did not participate in confirmation proceedings under the 1851 Act. Brief of Respondent California 16, n. 17. In point of fact, however, the State participated in just such a proceeding involving a rancho near the Rancho Ballona. See National Archives, RG 49, California Land Claims, Docket 414. Moreover, before the Mexican grant was confirmed, Congress passed a statute specially conferring a right on all parties claiming an interest in any tract embraced by a published survey to file objections to the survey. Act of July 1, 1864, § 1, ch. 194, 13 Stat. 332.

property owners immediately north of the Rancho Ballona protested the proposed survey of Rancho Ballona; the Machados and Talamantes, the original grantees, filed affidavits in support of their claim. As a result of these submissions, as well as a consideration of the surveyor's field notes and underlying Mexican documents, the General Land Office withdrew its objection to the proposed ocean boundary. The Secretary of the Interior subsequently approved the survey and in 1873 a patent was issued confirming title in the Rancho Ballona to the original Mexican grantees. App. 101–109. Significantly, the federal patent issued to the Machados and Talamantes made no mention of any public trust interest such as the one asserted by California in the present proceedings.

The public trust easement claimed by California in this lawsuit has been interpreted to apply to all lands which were tidelands at the time California became a state, irrespective of the present character of the land. See *City of Long Beach* v. *Mansell*, 3 Cal. 3d 462, 486–487 (1970). Through this easement, the State has an overriding power to enter upon the property and possess it, to make physical changes in the property, and to control how the property is used. See *Marks* v. *Whitney*, 6 Cal. 3d 251, 259–260 (1971); *People* v. *California Fish Co.*, 166 Cal. 576, 596–599 (1913). Although the landowner retains legal title to the property, he controls little more than the naked fee, for any proposed private use remains subject to the right of the State or any member of the public to assert the State's public trust easement. See *Marks* v. *Whitney*, *supra*.

The question we face is whether a property interest so substantially in derogation of the fee interest patented to petitioner's predecessors can survive the patent proceedings conducted pursuant to the statute implementing the Treaty of Guadalupe Hidalgo. We think it cannot. The federal government, of course, cannot dispose of a right possessed by the State under the equal footing doctrine of the United States Constitution. *Pollard's Lessee* v. *Hagan*, 3 How. 212

(1845). Thus, an ordinary federal patent purporting to convey tidelands located within a state to a private individual is invalid, since the United States holds such tidelands only in trust for the state. *Borax Co.* v. *Los Angeles*, 296 U. S. 10, 15–16 (1935). But the Court in *Borax* recognized that a different result would follow if the private lands had been patented under the 1851 Act. *Id.*, at 19. Patents confirmed under the authority of the 1851 Act were issued "pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tidelands, had not passed to the State." *Id.*, at 21. See also *State Land Board* v. *Corvalis Sand & Gravel Co.*, 429 U. S. 363, 375 (1977); *Knight* v. *United States Land Assn.*, 142 U. S. 161 (1891).

This fundamental distinction reflects an important aspect of the 1851 Act enacted by Congress. While the 1851 Act was intended to implement this country's obligations under the Treaty of Guadalupe Hidalgo, the 1851 Act also served an overriding purpose of providing repose to land titles that originated with Mexican grants. As the Court noted in *Peralta* v. *United States*, 3 Wall. 434 (1865), the territory in California was undergoing a period of rapid development and exploitation, primarily as a result of the finding of gold at Sutter's Mill in 1848. See generally J. Caughey, California 238–255 (1953). It was essential to determine which lands were private property and which lands were in the public domain in order that interested parties could determine what land was available from the government. The 1851 Act was intended "to place the titles to land in California upon a stable foundation, and to give the parties who possess them an opportunity of placing them on the records of this country, in a manner and form that will prevent future controversy." *Fremont* v. *United States*, 17 How. 542, 553–554 (1854); accord, *Thompson* v. *Los Angeles Farming Co.*, 180 U. S. 72, 77 (1901).

California argues that since its public trust servitude is a sovereign right, the interest did not have to be reserved expressly on the federal patent to survive the confirmation proceedings.[4] Patents issued pursuant to the 1851 Act were, of course, confirmatory patents that did not expand the title of

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[4] In support of this argument the State cites to *Montana* v. *United States*, 450 U. S. 544 (1981), and *Illinois Central R.* v. *Illinois*, 146 U. S. 387 (1892), in support of its proposition that its public trust servitude survived the 1851 Act confirmation proceedings. While *Montana* v. *United States* and *Illinois Central R.* v. *Illinois* support the proposition that alienation of the beds of navigable waters will not be lightly inferred, property underlying navigable waters can be conveyed in recognition of an "international duty." *Montana* v. *United States*, *supra*, 450 U. S. at 552. Whether the Ballona Lagoon was navigable under federal law in 1850 is open to speculation. The trial court found only that the present-day lagoon was navigable, App. to Pet. for Cert. A–52, while respondent Los Angeles concedes that the lagoon was not navigable in 1850, Brief of Respondent Los Angeles 29. The obligation of the United States to respect the property rights of Mexican citizens was, of course, just such an international obligation, made express by the Treaty of Guadalupe Hidalgo and inherent in the law of nations, see *United States* v. *Moreno*, 1 Wall. 400, 404 (1863); *United States* v. *Fossatt*, 21 How. 445, 448 (1858).

The State also argues that the Court has previously recognized that sovereign interests need not be asserted during proceedings confirming private titles. The State's reliance on *New Orleans* v. *United States*, 10 Pet. 662 (1836), and *Eldridge* v. *Trezevant*, 160 U. S. 452 (1892), in support of its argument is misplaced, however. Neither of these cases involved titles confirmed under the 1851 Act. In *New Orleans* v. *United States*, for example, the board of comissioners in that case could only make recommendations to Congress, in contrast to the binding effect of a decree issued by the Board under the 1851 Act. Thus, we held in that case that the City of New Orleans could assert public rights over riverfront property which were previously rejected by the board of commissioners. *New Orleans* v. *United States*, 10 Pet., at 733–734. The decision in *Eldridge* v. *Trezevant*, *supra*, did not even involve a confirmatory patent, but simply the question whether an outright federal grant was exempt from long-standing local law permitting construction of a levee on private property for public safety purposes. While the Court held that the federal patent did not extinguish the servitude, the interest asserted in that case was not a "right of permanent occupancy," *Barker* v. *Harvey*, 181 U. S. 481, 491 (1901), such as that asserted by the State in this case.

the original Mexican grantee. *Beard* v. *Federy*, 3 Wall. 478 (1865). But our decisions in a line of cases beginning with *Barker* v. *Harvey*, 181 U. S. 481 (1901), effectively dispose of California's claim that it did not have to assert its interest during the confirmation proceedings. In *Barker* the Court was presented with a claim brought on behalf of certain Mission Indians for a permanent right of occupancy on property derived from grants from Mexico. The Indians' claim to a right of occupancy was derived from a reservation placed on the original Mexican grants permitting the grantees to fence in the property without "interfering with the roads, crossroads, and other usages." *Id.*, at 494, 495. The Court rejected the Indians' claim, holding that:

> "If these Indians had any claims founded on the action of the Mexican Government they abandonded them by not presenting them to the Commission for consideration, and they could not, therefore, . . . 'resist successfully any action of the government in disposing of the property.' If it be said that the Indians do not claim the fee, but only the right of occupation, and therefore, they do not come within the provision of § 8 as persons 'claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government,' it may be replied that a claim of a right to a permanent occupancy of land is one of far-reaching effect, and it could not well be said that the lands burdened with a right of permanent occupancy were part of the public domain and subject to the full disposal of the United States. . . . Surely a claimant would have little reason for presenting to the Land Commission his claim to land, and securing a confirmation of that claim, if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy." *Id.* at 491–492 (quoting *Beard* v. *Federy*, 3 Wall. 478, 493 (1865)).

The Court followed its holding in *Barker* in a subsequent case presenting a similar question, in which the Indians

claimed an aboriginal right of occupancy derived from Spanish and Mexican law that could only be extinguished by some affirmative act of the sovereign. *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472 (1924). Although it was suggested to the Court that Mexican law recognized such an aboriginal right, Brief for Appellant in *United States* v. *Title Ins. & Trust Co.*, O. T. 1923, No. 358, p. 14–16, cf. *Chouteau* v. *Molony*, 16 How. 203, 229 (1853), the Court applied its decision in *Barker* to hold that because the Indians failed to assert their interest within the timespan established by the 1851 Act, their claimed right of occupancy was barred. The Court declined an invitation to overrule its decision in *Barker* because of the adverse effect of such a decision on land titles, a result that counseled adherence to a settled interpretation. *Id.*, at 486.

Finally, in *United States* v. *Coronado Beach Co.*, 255 U. S. 472 (1921), the government argued that even if the landowner held title to the tidelands by reason of the Mexican grant, a condemnation award should be reduced to reflect the servitude of the federal and state governments to protect navigation, commerce, and fisheries, an interest that the government asserted was paramount to the company's fee interest. The Court expressly rejected the government's argument, holding that the patent proceedings were conclusive as against the United States in its sovereign capacity, 255 U. S., at 488, and could not be collaterally attacked by the government. The necessary result of the *Coronado Beach* decision is that sovereign claims such as those raised by the United States in *Coronado Beach* on its own behalf or on behalf of the State must likewise be asserted in the condemnation proceedings or be barred.

These decisions control the outcome of this case. We hold that California cannot at this late date assert its public trust easement over petitioner's property, when petitioner's predecessors-in-interest had their interest confirmed without any mention of such an easement in proceedings taken pursu-

Holding

ant to the Act of 1851. The interest claimed by California is one of such substantial magnitude that regardless of the fact that the claim is asserted by the State in its sovereign capacity, this interest, like the Indian claims made in *Barker* and in *United States* v. *Title Insurance Co.*, must have been presented in the patent proceeding or be barred. Accordingly, the judgment of the Supreme Court of California is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 30, 1984

Re: No. 82-708-Summa Corp. v. California

Dear Bill:

Please show me as "not participating" in this one.

Sincerely,

T.M.

Justice Rehnquist

cc: The Conference

April 2, 1984

82-708 Summa Corporation v. California

Dear Bill:

Please join me.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 2, 1984

Re: No. 82-708 Summa Corporation v. California ex rel. State Lands Commissions and City of Los Angeles

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 2, 1984

Re: 82-708 - Summa Corp. v. California

Dear Bill:

Please join me.

Respectfully,

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 3, 1984

Re: 82-708 - Summa Corporation v. California, Ex Rel State Lands Commission

Dear Bill:

I join.

Regards,

WEB

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 5, 1984

No. 82-708

Summa Corporation v. California ex rel. State Lands Commission and City of Los Angeles

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Dear Bill,

You are much too persuasive. I voted the other way but I now join you.

Sincerely,

Bill

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 6, 1984

Re: No. 82-708, Summa Corp. v. California
Ex rel. State Lands Commission

Dear Bill:

I'll give you one of Charlie Whittaker's "graveyard dissents" and go along in this case.

Sincerely,

Harry

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 10, 1984

Re: 82-708 -

Summa Corporation v. California ex rel. State Lands Commission and City of Los Angeles

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Dear Bill,

Please join me.

Sincerely yours,

Byron

Justice Rehnquist

Copies to the Conference

cpm

&82-708 Summa Corp. v. California ex rel. (David)

WHR for the Court 5/3/84

1st draft 3/30/84
2nd draft 4/11/84

TM out 3/30/84
Joined by LFP 4/2/84
SOC 4/2/84
JPS 4/2/84
CJ 4/2/84
WJB 4/5/84
HAB 4/6/84
BRW 4/10/84