86-133

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants

v.

CALIFORNIA COASTAL COMMISSION,

Appellee

On Appeal from the Court of Appeal,
Second Appellate District,
State of California

AMICUS CURIAE BRIEF
of the COASTAL STATES ORGANIZATION
Joined by the
SOUTH CAROLINA COASTAL COUNCIL
In support of Affirmance

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STATEMENT OF INTEREST OF AMICI CURIAE IN THE OUTCOME OF THIS CASE

The Coastal States Organization (CSO) and the South Carolina Coastal Council, as Amici Curiae, submit this brief in support of Appellee, California Coastal Commission, in seeking affirmation of the ruling of the Court of Appeal of the State of California, Second Appellate District. We base our brief on the Public Trust Doctrine.

The purpose of the Coastal States Organization is to provide the Governors of the several coastal States with a means to participate in the resolution of nationally significant coastal issues. The Organization took a leading role in the legislative effort to enact the federal Coastal Zone Management Act (CZMA). California's coastal zone management program,

administered by Appellee, was federally approved in accordance with the CZMA. The CZMA[1], the Constitution of the State of California[2], and the California coastal zone management program[3] require that the public have access to the coasts for recreational purposes.[4]

There is a profound human connection with the sea.[5] The public's right to enjoy the beaches of the nation is so intrinsically important that its unavailability, even in very limited circumstances, is a loss that can be measured in both economic and psychological terms. The desire to enjoy the

1. See CZMA, 16 U.S.C. 1454(b)(7)
2. Article X, Section 4.
3. California Coastal Act, section 30001:5(c).
4. See Public Access, Joint Appendix, 351.
5. "I must down to the seas again, for the call of the running tide is a wild call and a clear call that may not be denied." -John Masefield

coasts has brought millions of people to live along the shores. Since 1972, permission has been granted to construct more than 42,000 building units along California's coasts. Approximately 85 percent of California's population lives within 30 miles of the coastline. Over 50 percent of the U.S. population lives within the nation's coastal zone, with projections of an increase to 80 percent by the year 2000. Coastal States Organization, America's Coasts, Progress & Promise (1985). Private property accounts for about 70 percent of the U.S. shoreline, not including Alaska. General Accounting Office, National Efforts to Preserve the Nation's Beaches and Shorelines - A Continuing Problem 1 (1975). Much of this private ownership extends out to the sandy beach, some-

times to the mean high tide line,[6] sometimes to the mean low tide line.[7]

Private ownership of beach lands, if allowed to exclude people other than the owners and their guests, can foreclose any meaningful recreational use of beach areas by the public, turning public beaches, piece by piece, into de facto private beaches. Whereas the public has always enjoyed the use of the beaches, the people's need for recreation continues to grow with the rapidly expanding urbanization of the shore. The beach, however, is a finite resource. Without a solution, the conflict between public beach use and the

6. Appellants' property extends seaward to the mean high tide level.
7. Massachusetts recognizes private property grants to the "low-water mark" which has been interpreted to mean the "mean low water mark." See Opinion of the Justices, 365 Mass., 685 (1974).

rights of private landowners will continue to worsen. The resolution of this growing conflict should provide for development of the nation's coastal area in a manner that increases its value, while allowing for continued public recreational use. The Public Trust Doctrine provides such a resolution, allowing for development while offering the public and private coastal land owners access to the beaches. In addition, it lends certainty to private owners' expectations concerning the reasonable use and enjoyment of these beach areas.

In the course of the recent evolution of the Public Trust Doctrine in the United States, varying state court interpretations of the doctrine, in addition to the differing definitions of "public interest" and "public pur-

pose" offered in these state decisions, has created confusion. Shoreland titles and public rights are in a state of uncertainty. See San Francisco Bay Conservation & Development Commission, San Francisco Bay Plan Supplement 434-443 (January, 1969). As a result, the application of the Public Trust Doctrine, a principal, and sometimes only, means for protection of unrecorded property interests held by the public since the time of Statehood, remains uncertain. If the Public Trust Doctrine were to become a casualty of growth and development, future generations may find it increasingly difficult, if not impossible, to enjoy the ocean's shorelands.

Amici curiae urge this Court to consider the Public Trust Doctrine in resolving this case at bar. Although

this doctrine was not raised in the lower proceedings, this Court may take judicial notice of the public trust burdens on the portion of Appellants' property in question. See Marks v. Whitney, 491 P.2d 374,378 (1971). In fact, to render a decision in this case without recognizing and protecting the public's interests and rights would severely impair the public's rights to full use and enjoyment of the ocean shorelands, rights held in trust for the people by the State, as well as ignore vital judicially recognizable facts. The public's rights must be considered in order to properly decide the issues at hand. Application of the Public Trust Doctrine should lead to the affirmation of the Appellate Court of California specifically, while generally clarifying the rights of the

public and private landowners to the reasonable use and enjoyment of the nation's beaches and coastal lands.

SUMMARY OF ARGUMENT

The roots of the Public Trust Doctrine reach deep into Roman law. The doctrine, as understood in Roman times, provided that "[b]y the law of nature, three things are common to mankind - the air, running water, the sea and consequently the shores of the sea." Justinian Institutes, 2.1.1 - 2.1.6. See Connors, The Public Trust Doctrine: A Primer for the 1980s (April 1986).

Since these early beginnings, and especially in the last two decades in American jurisprudence, the doctrine has undergone a significant evolution. Whereas traditional public trust uses

included use of the shorelands and navigable waters for commerce, navigation and fishing, the scope of the doctrine has been expanded to include new uses, and indeed, what lands are considered to be in the public trust.

"It is well settled in the United States generally and in California specifically that the Public Trust is not limited to the reach of the tides, but encompasses all navigable lakes and streams." National Audubon Society v. Superior Court, 33 Cal. 3rd 419,435 (1983) and cases cited therein. Further, public trust uses have expanded from the traditional commerce, navigation and fishery. "The object of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways." Id at

434. "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the State is not burdened with an outmoded classification favoring one mode of utilization over another." Id, quoting Marks v. Whitney, 6 Cal. 3rd 251, 259-260. Thus, in the last two decades, swimming, boating and recreational activities have been recognized as added forms of the traditional definition of commerce - tourism. See District of Columbia v. Air Florida, 750 F.2d 1077, 1083 (1984); Matthews v. Bay head Improvement Ass'n, 471 A. 2d 355,363 (N.J. 1984). This is an important aspect of the Public Trust uses, because many of the coastal states consider their beaches, and the revenue (commerce) generated by the tourists

visiting those beaches, as one of their crown jewels.[8]

Appellants raise the question whether Appellees have committed a "taking" of property in violation of the Fifth and Fourteenth amendments of the U.S. Constitution by requiring Appellants to record a deed restriction acknowledging a right of public access to the public beach on their deed in order to receive permission to develop their beachfront property. Appellants' Brief, at i. Amici curiae respond that

8. See North Carolina General Statutes Sec. 113A-134.1, "The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State." See also A Proposed Comprehensive Beach Management Program for the State of Florida, Florida Department of Natural Resources (1986); Ch. 115, Hawaii Rev. Stats., "Public Access to Coastal and Inland Recreational Areas."

there is no "taking" because a property interest cannot be taken from someone who did not possess it in the first place.

This case involves publicly used shorelands, the beach portion of the Appellants' lot. Such lands are held by the State in trust for the benefit of the public.[9] "The control of the State for the purposes of the trust can never be lost, except as such parcels as are used in promoting the interests of the public therein, or can be disposed without any substantial impair-

9. An exception to this general rule in California is when "lands which had previously been granted by Mexico to other parties under the treaty of Guadulupe Hidalgo (9 Stat. 922). Borax Ltd. v. Los Angeles, 296 U.S. 10, 15 (1935). See also San Francisco V. Le Roy, 138 U.S. 656, 671; Knight v. United States Land Ass'n, 142 U.S. 161,

ment of the public interest inthe lands and waters remaining." Illinois Central Railroad v. Illinois, 146 U.S. 387, 453 (1892).

The grant of this public trust land to private hands would not promote the interest of the public. Further, such a grant would substantially impair the public's interest in the remaining public beaches in that access to them would be impaired, if not lost. This would render the remaining public beach a de facto private beach.

This is not to say that a State cannot alienate public trust lands to private holders, as it has done in the

(9. cont.) 183; Shively V. Bowlby, 152 U.S. 1; Summa Corporation v. California ex rel State Lands Commission, 466 U.S. 198 (1984). The shorelands in question in this case do not fall within this exception.

case at bar. A State may so alienate public lands, but it cannot simply grant title to a private holder in fee simple absolute. The State, through its legislature, holds public trust resources in perpetuity, retaining control over their development even after they are granted or sold to private parties. Carlson, J.F., The Public Trust and Urban Waterfront Development in Massachusetts: What is a Public Purpose, 7 Harv. Envt'l L. Rev. 71 (1983). The State holds title to the Public Trust easement on behalf of its citizens, and has subjected this State trust right to regulation under the authority of the California Coastal Act which is administered by Appellee. Holding these public trust resources in perpetuity, the State, regulating its own property rights through Appellee,

cannot be "taking" something from Appellants -- something Appellants never possessed in the first place.

Appellee's permit condition recognizes a property right of the State that always has existed; the right of the public to pass and repass. The condition does not create a new public right. Thus, this Court should recognize and use the Public Trust Doctrine to protect the general public's rights to pass and repass over the area seaward of Appellants' seawall, and should find that the Appellee's requirement to record a deed restriction for this Public Trust right is not a "taking" in violation of the U.S. Constitution.

ARGUMENT

I. APPELLEE'S CONDITIONING OF THE ISSUANCE OF APPELLANTS' DEVELOPMENT PERMIT ON APPELLANTS RECORDING ON THEIR DEED A PUBLIC PROPERTY INTEREST OF LATERAL PUBLIC ACCESS ACROSS THEIR BEACH FRONT PROPERTY IS NOT A "TAKING" IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION BECAUSE APPELLANTS NEVER POSSESSED THIS PROPERTY INTEREST IN THE FIRST PLACE. THIS PROPERTY INTEREST HAS FOREVER BEEN HELD BY THE PUBLIC. A PROPERTY INTEREST NOT HELD CANNOT BE TAKEN.

The Public Trust doctrine stands for the proposition that certain resources such as running water, shorelands and the sea are the common property of all. The doctrine originates from the Justinian code, a codification of the law by a commission appointed by the Roman Emperor Justinian around 527 A.D. This code provided, inter alia, that by the law of nature several things were common to all mankind:

> "[T]he public use of the seashore, as of the sea itself, is part of the law of nations; con-

sequently everyone is free to build a cottage upon it for pur- poses of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to anyone as pri- vate property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it." Institutes of Justinian, 2.1.1.

The Justinian code remained the definitive Roman law long past the death of Emperor Justinian. It endured not only the fall of the Roman Empire, but the invasion of Europe by the Germanic conquerors in the Middle Ages. The Justinian code found its way into French law, and from French law to Louisiana where its principles remain codified to this day. The code also found its way into Spanish law, which was brought to the western American continent, eventually becoming part of Mexican law, and finally embodied in the law of what was then known as "Alta

California." At the same time these principles advanced by way of England to the American colonies, and finally to the original 13 States. Under the English colonial law, both the title and dominion of the sea and the shores where the tides ebb and flow within the jurisdiction of the Crown of England vested in the King, as the representative of the nation and for the public benefit. It was understood at that time that the shorelands "where the tides ebb and flow" were those lands below the "high water mark."[9]

"In this country the Public Trust Doctrine has developed almost exclusively as a matter of state law. Tra-

9. For a thorough review of the origins and evolution of the Public Trust Doctrine, See National Audubon

ditionally, the doctrine has functioned as a constraint on states' ability to alienate public trust lands and as a limitation on uses that interfere with trust purposes." District of Columbia v. Air Florida, 750 F.2d 1077, 1082 - 1083 (1984). When California entered the Union, its legislature adopted a statute which provided that unless inconsistent with federal or State law, the "common law of England shall be the rule of decision in all the Courts of this State." Cal. Stats. 1850, Ch. 95, p. 215. See State v. Superior Court of Lake City, 625 P.2d 239, 242 (Cal.

(9 cont.) Society v. Superior Court, 33 Cal. 3rd 419, cert. denied sub nom Los Angeles Department of Water v. National Audubon Society, 104 S. Ct. 413 (1983). See also, Stevens, The Public Trust: A Sovereigns Ancient Prerogative Becomes the Peoples Environmental Right, 14 U.C.D.L.Rev. 195 (1980).

1981).[10]

The meaning of the words "high water mark," in terms of those shorelands held by the State in trust for the public's full use and enjoyment, has long been understood as applying to both the wet sand area (between the mean low and mean high tide lines) and the dry sand area (above the mean high tide line). As noted in State of Oregon ex rel Thornton v. Hay, 462 P.2d 671 (1969), "The public's assumption that the dry sand as well as the foreshore was "public property" has been reinforced by early judicial decisions. See Shively v. Bowlby, 152 U.S. 1, which affirmed Bowlby v. Shively, 22 Or. 410 (1892)." Id. at 674. (Other

10. This is so, despite law review articles to the contrary. See National Audubon Society v. Superior Court, 33 Cal. 3rd 419, 434, note 15.

citations omitted). In the Bowlby case, the controversy concerned the use of the foreshore, i.e. the dry sand beach. The State's title to the tidelands was confirmed to the "high water mark," which was, in the words of the Thornton court, "for all practical purposes, the vegetation line." Thornton, supra, at 674, note 3.

The English law viewed these shorelands as incapable of private ownership because they were useless for private cultivation and improvement, and that their natural and primary uses, navigation, commerce and fishing, were public in nature. Similarly, the shorelands are recognized today as special lands, and that such lands held in private ownership are not held to the same "absoluteness" as are uplands, i.e.

land above the vegetation line. The special character of the beachlands, including the wet and dry sand areas, has been noted in U.S. Supreme Court and several State Supreme Court decisions. For example, the Supreme Court recognized that tidelands are "unfit for cultivation, the growth of grasses, or other uses to which up-land is applied." San Francisco v. Le Roy, 138 U.S. 656, 672 (1890). In Matthews v. Bay Head Improvement Ass'n., 471 A 2d. 355 (N.J. 1984), the court notes that "Beaches are a unique resource and are irreplaceable." Id. at 364. "Ocean-front property is uniquely suitable for bathing and other recreational activities. Because it is unique and highly in demand, there is growing concern about the reduced 'availability to the public of its priceless beach areas.'"

Lusardi v. Curtis Point Property Owners Ass'n., 86 N.J. 217, 227-228 (1981), quoting from Van Ness v. Borough of Deal, 78 N.J. 174, 180 (1978). Thus, the public has special, recognized expectations in being able to use these shorelands, that are adapted not for uses associated with upland areas, but those long held as proper public uses of the shores.

1. The Sandy Beach Portion Of Appellants' Property Is Subject To The Public Trust.

The Common Law of England placed importance on whether the shorelands were above or below the "high water mark," (See CA. Civil Code Sec. 830 (1872)) though no exact definition of this term was formulated. As a result, the meaning of these words remains somewhat unclear. What must be avoided, however, is interpreting these

words in a manner that would impair the public right of full use and enjoyment of their public trust property.

Although these words have been interpreted to mean the foreshore and dry sand areas, Thornton, infra, Mathews v. Bay Head Improvement Ass'n, 471 A.2d 355, 369 (N.J. 1984) ("Private land...is not immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming") it has been argued in a law journal note that only the wet-sand area, i.e. the area between mean low tide and mean high tide, are directly impressed with the Public Trust. Note, Public Beach Access: A Guaranteed Place To Spread Your Towel, 39 U. Fl. L. Rev. 853, 855 (1977). This view, however, does not accurately reflect California Law and

the State's Constitution, the Coastal Zone Management Act, various judicial opinions on the subject, or common sense in view of the nature of the property and its historical, and reasonable, expected use.

These sources attach no such importance to the "mean high tide level," and in fact, suggest that the shorelands that are required in order to allow the public to fully use and enjoy its property interests in these lands form the public trust property. Although arguably, the beach area up to the vegetation line should be included as public trust shorelands in order for the public to fully enjoy their public trust rights, in terms of this case, the Court need only determine that the beachlands up to Appellant's seawall are subject to the Public Trust.

a) California Constitution and Statutory Law

Although in general, public trust rights are unrecorded property rights, in California one public trust right has been given constitutional protection. Article X, section 4 of the California constitution provides:

> No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purpose ... and the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof. (Emphasis added).

This section expressly preserves a right of way to the public for access to the State's ocean shorelands. It is important to note that this section includes ownership

of either "the frontage or tidal lands." Clearly, combining "frontage" with "tidal lands" suggests no indication that the mean high tide level is the landward boundary of where the public has this right of way. Further, recreational purposes are among the "public purposes" mentioned by this constitutional provision. Gion v. City of Santa Cruz, 2 Cal. 3rd 29, 42 (1970) and cases cited therein. In analyzing this section, the California Supreme Court stated "Although Article [X, section 4] [10] may be limited to some extent by the United States Constitution it clearly indicates that we should encourage pub

10. Note that the numbers of the Articles in California's Constitution have been changed since this 1970 decision. See City of Berkley v. Superior Court, 26 Cal. 3rd 515, 523 (1980).

lic use of shoreline areas whenever that can be done consistently with the federal Constitution." Id. at 43.

Another article of the California Constitution suggests that public lands are those above the mean high tide level on the beach. Article 1, section 25 provides:

> "The people shall have the right to fish upon and from the public lands of the State and in the waters thereof ..."

Although undefined, the term "public lands" surely must include those portions of the ocean shore above the mean high tide level. Otherwise a surf fisherman could be precluded from exercising this constitutionally protected right simply because the water is above the mean high tide level.

b) Coastal Zone Management Act

A federal law, the CZMA must also be

considered. The CZMA authorizes the Secretary of Commerce to make grants to any coastal State with a federally approved coastal zone management plan. Although the CZMA does not expressly give effect to any public trust rights, this federal law is a national expression of the public's desire to restore and enhance "the resources of the nation's coastal zone for this and succeeding generations." 16 USC Sec. 1452(1). A central purpose of the CZMA is "to encourage and assist the states to exercise effectively their responsibilities in the coastal zone." Id. at (2). One such responsibility is protecting the public's trust rights to the full use and enjoyment of the beach trust lands. To this point, the CZMA requires that, inter alia,

federally approved programs "should at least provide for - ...(D) Public access to the coasts for recreation purposes." Id.

California's coastal zone management plan, that implements the State's Coastal Act, was federally approved in accordance with the CZMA. In order for a State plan to be federally approved, the CZMA requires that the plan include a "planning process for ... access to public beaches and other public coastal areas of ... recreational, historical, ... or cultural value." 16 U.S.C. 1454 (b)(7). The CZMA does not mention the mean high tide level. The terms "beaches" or "coastal areas," given their plain meaning, clearly include all of the sandy beaches in addition to nonsandy

(e.g. rocky) coastal areas. This is supported when considering this CZMA requirement in conjunction with California Constitution Article X, section 4.

c) Judicial Opinions

In an often cited case on the public's rights in the shorelands, Shively v. Bowlby, 152 U.S. 1 (1894), decided by the Supreme Court in 1894, Mr. Justice Gray wrote:

> "... the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; ... being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes ..." (Emphasis added).

In the Shively case, the controversy concerned the construction of a wharf over the tidal shores of the Col-

umbia River. The litigants were not then particularly interested in "dry" versus "wet" sand, because a wharf must necessarily cross both in order to reach deep water to receive ships. Nonetheless, it was recognized that these lands below the uplands are valuable "for the public purposes of commerce, navigation and fishery." As such, they should remain available for these public uses.

Although the California Supreme Court has not addressed the question of the public trust rights in privately owned dry sand beaches, for the question has not previously arisen, the New Jersey Supreme Court has. It is instructive to consider its findings in terms of the case at bar, because both California and New Jersey acquired the same English common law upon entering

the Union. In an extensive review of the "Public Rights in Privately-Owned Dry Sand Beaches," the Supreme Court of New Jersey found that "Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless." Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J. 1984). Further, "The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed." Id. at 365. Finally, "private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The

public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand." Id. at 366.

It is important to note that this case recognizes the distinction between the line used to demarcate private from public propery, and the line used to demarcate the upward bounds of the public trust rights in the beach. There are many cases discussing where property ends or begins, or what the borders are, or what land was granted, where courts, including the Supreme Court, have held that the mean high tide level is the seaward boundary for many upland grants. But these decisions are in terms of property boundaries, not what lands are or are not subject to the Public Trust. See Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10

(1935). The fact that the State does not own a portion of beach does not mean that such beachlands are not subject to the Public Trust. Use of the mean high tide level for property demarcation and conveyance purposes should not be confused with delimiting public trust shorelands. All shorelands, whether publicly or privately held, are potentially subject to Public Trust rights.

Assuming that the portion of Appellants' property of interest in this case, their sandy beachfront, is above the mean high tide level, and this is by no means stipulated, this should not be decisive.[11] The mean high tide

11. There is substantial evidence that the portion of Appellants' property pertinent to this case is actually below the mean high tide level, and thus would clearly be in the public domain. See J.A., at 61. In a study performed by the Senior Lands Agent, in

level, although handy as a reference line for property boundaries, is wholly inappropriate as a metes and bounds for application of the Public Trust Doctrine. "The Public Trust Doctrine should not be bound by a mindless formalism because the generalizations that result from an overly formalistic application of the doctrine would eventually destroy its usefulness." Sax, Liberating the Public Trust Doctrine from its Historical Shackles, 14 U.C.D. L Rev. 185 (1980). Pinning

(11. cont.) the Office of the Attorney General for the State of California, of the beach area "immediately seaward of the revetments built to protect the Faria Beach community including the area seaward of the revetment protecting the property located at 3822 West Pacific Coast Highway, Faria Beach [the Nollans property]" the agent stated that:

"... based on my observations, presently, most, if not all of Faria Beach waterward of the existing seawalls lays below the Mean High Tide Level..." [Joint Appendix, 85].

the landward boundary of the shorelands subject to the Public Trust at the mean high tide level is just such "mindless formalism."

d) Common Sense, Reasonableness, and the Nature of the Shoreland

Fishing, bathing, landing boats, resting cargo, drying nets, or just gathering around a beach fire on a group outing, have long been recognized as proper uses of public shorelands, uses protected by the Public Trust Doctrine. When the tide is above the mean high tide, must a fisherman stand in breaking surf to fish?[12] Is a bather

(11. cont.) In addition, the Appellants and Appellee both acknowledge that "At times the wet sandy beach extends up to both the [Appellants'] and other resi- dents existing seawalls, preventing pedestrian passage when the tide is in." (J.A., 68. See Also photos, J.A., 261-276.)

12. The Mathews Court recognizes the rights of fishermen, noting "Some historical support for this propo-

to stay in the water until the tide goes out again? It is the uncommon beach-goer that drops his or her towel on the wet sand rather than the dry. Is a recreational boater to have no place to land during these times of high water? Should a group build a fire, when this is a proper public use, where it is wet?

Pinning the landward boundary of the public trust shorelands to the mean high tide level would render the public's right to recreational use of the shorelands a perforated right. That is, the public would have such a right only when the water level was

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(12. cont.) sition may be found ... where fishermen, in exercising the right of public fishery in tidal waters, were permitted to draw nets on the beach above the ordinary high water mark in the act of fishing. S. Moore and H. Moore, The History and Law of Fisheries 96 (1908)." Mathews, supra, at 365, Note 7.

below the mean high tide line, and would lose the right whenever the tide was above this line. See Fig. 1.

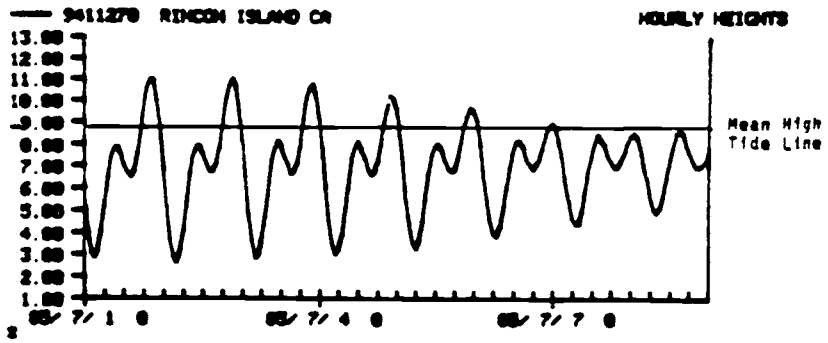

Fig. 1.

It can be seen from this tidal graph, taken from a federal tide gauge approximately three miles from Appellants' property, that the public's rights

would be perforated when the tide is higher than the mean high tide line (MHTL). See Lodging accompanying this brief for a random sample of tidal plots taken at this location.

But how can the public enjoy the right of fishing, bathing and other traditional uses of the coast if their public rights are temporarily vanquished whenever a tide is above the mean high tide level? See Mathews v. Bay Head Improvement, 471 A.2d 355 (1984); Illinois Central v. Illinois, 146 U.S. 387, 452 - 454 (1892). The Public Trust Doctrine characterizes a given right either as being fully protected or as not being protected at all; never is a Public Trust right characterized as perforated. See Note, The Public Trust In Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L.

J. 762 (1970). It is asserted here that public rights protected by the Public Trust Doctrine are continuous in nature, not subject to interruption by the goings and comings of the tide.

e) Summary

The determining factor of what is, or is not, public trust ocean shorelands should not be whether the land lies above or below the technically surveyed mean high tide level. The mean high tide level may be a handy reference for property boundaries, but is wholly inappropriate as a metes and bounds for application of the Public Trust Doctrine. In terms of shorelands subject to the Public Trust, the California Constitution attaches no significance to the mean high tide level, nor does the CZMA, Supreme Court decisions or common sense. The Supreme Court has

stated that lands "within or above the ebb and flow of the tide" are held in trust by the State for the benefit of the public. Traditional uses of the ocean shorelands must allow for use of the beach above the mean high tide level, otherwise the fisherman's landed boat would wash away, his drying nets would get soaked, and the beach going tourist would have one very wet towel.

As noted in National Audubon, shorelands that are required for use in order to allow the public to fully and reasonably use and enjoy its full property interests in these lands, without interruption, form the public trust property. Appellants' beach front property whether above or below the mean high tide line, is clearly within the ebb and flow of the tide, and is necessary for the public to use in times of

high water in order to fish, swim, or just simply stroll along the beach. The only clear and logical conclusion is that the subject area, Appellants' beach front property below the seawall, is subject to the Public Trust.

2. Appellants As Owners of Shore-front Property Held It Subject to Different Legal Rules From Those Applicable To Inland Property.

There is no bar to a State selling, granting or otherwise conveying lands subject to the Public Trust to private ownership, but this power of alienation is not absolute. A State may alienate Public Trust lands, but "it is grants of land ... that do not substantially impair the public interest in the lands and waters remaing ... that are chiefly ... sustained as a valid exercise of this legislative power." Illinois

Central, supra, at 452. The nature of the State's control is specific: public trust resources must be developed and maintained for a "public purpose." A public interest in a certain public use can only be modified upon express legislative approval, and a finding that the property's new use will continue to serve a public purpose, albeit different from the original public use.

a) Appellants possess this shoreland property subject to the Public Trust.

Public trust lands, such as ocean shorelands, are of such great value to the public for the purposes of commerce, navigation and recreation that "[t]heir improvement by individuals, when permitted, is incidental or subordinate to the public use and right." Shively v. Bowlby, 152 U.S. 1 (1894). The Shively Court elucidated

why the public trust responsibilities vest with the State:

> The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, ... shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State ... Id. at 49-50.

This Shively opinion does not stand for the proposition, however, that public trust properties cannot be conveyed

to private ownership, but only that such properties must be "ultimately administered and dealt with for the public benefit by the State." In Illinois Central, an opinion contemporary with Shively, the Supreme Court directed it's attention to when public trust property may be conveyed to private ownership, and to what extent the grantee takes the property:

> "The trust devolving on the State for the public, and which can only be discharged by the managment and control of the property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. The State can no more abdicate its trust to property in which the whole people are interested ... than it can abdicate its police powers in the administration of

government and the preservation of the peace." Illinois Central, supra, 453 (emphasis added).

Thus, there are only two situations where a conveyance to private ownership could extinguish the Public Trust responsibilities: where the conveyance would promote the interest of the public therein, or where there would be no substantial impairment of the public interest in the lands and waters remaining.

Because shorelands are of a special character, as noted supra, Courts have taken this into account when determining the degree of ownership ("absoluteness") of a landowner's title. The Massachusetts Supreme Court has held that a landowner's title to trust lands is not absolute but is subject to the condition that

it be used for the public purpose for which it was granted. See Boston Waterfront Development Corp. v. Commonwealth, 393 N.E. 2d 356 (Mass. 1979).

It is clear that a conveyance of these shorelands to Appellants with the result of the public losing its rights to pass and repass over this land would not promote "the interest of the public therein." Id. Further, without the right to use this beachfront land as it always has been used, access by the public to the remaining public beaches would be substantially impaired. Although "the [Appellants'] project has not created the need for access ... it is a small project among many others which together limit public access to the tidelands and beaches of the

State and, therefore, collectively create a need for public access." Nollan v. California Coastal Commission, 177 Cal. App. 3rd 719 (1986). See also Grupe v. California, 212 Cal. Rptr. 578, 589 (Respondent's beach front home is one more brick in the wall separating the People of California from the State's beaches). Thus the Shively Court's admonition that Public Trust lands "shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the ... public benefit by the State ..." has been heeded by Appellee. Shively, Supra, at 50.

Further, returning to the California Constitution, Article 1 section 25, which preserves a right to the people to "fish upon and from the

public lands of the State" goes on to provide that:

> " ... no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon ..."

Clearly, under this section, Appellants' are not vested with the right of sole enjoyment of their beach property for fishing, one of the primary traditional public uses of these beachlands. When viewed in conjunction with Article X, section 4, it follows that if the public reserved its rights of access for fishing, it also reserved its other public trust rights.

b) If there was an attempt to grant or sell this property interest to Appellants' predecessor-in-title free of the Public Trust responsibilities the attempt was an improvident grant.

Legislative efforts to terminate public trust interests through convey-

ances to private individuals should be regarded with great "judicial skepticism" to assure that there has been adequate consideration and protection of the interest of the public. Sax, supra, 490 - 491. As early as 1821 the Supreme Court of New Jersey held in Arnold v. Munday, 6 N.J.L. 1 (Sup. Ct. 1821), that the sovereign power itself cannot, consistent with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters and associated shorelands of the State, divesting all of the citizens of their common right. "This would be a grievance which could never be long born by a free people."

It has been held that any general legislative effort to dispose of public trust property free of the public trust

and its uses remains, regardless of the terms of the grant, subject to the trust. "The interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially unusable for those purposes." City of Berkley v. Superior Court of Alameda, 162 Cal. Rptr 327, cert. denied, 101 S. Ct. 372 (1980). In 1894, the Supreme Court held "such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public." Illinois Central, at 453. This logic applies also for the State responsibility to preserve all Public Trust lands "for the use of the public."

Any such grant of lands subject to the Public Trust into private ownership free from any trust responsibilities would be especially suspect in the State of California. As noted, the Constitution of the State of California provides that no claimant of frontage or tidal lands can exclude the public from these lands if access is desired for any public purpose. To the point here, the Constitution continues to provide that:

> ... the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof.

Any such grant to private ownership of beachlands like Appellants' would do violence to this provision of the State Constitution. Such a grant would clearly be an improvident grant of this property interest.

In view of early New Jersey case of Arnold v. Munday, the recent California case of City of Berkley, the 1892 case of Illinois Central, the California Constitution, as well as the judicially developed doctrine of Public Trust, it is clear that there was no authority to transfer this Public Trust land to the Appellants' or to their predecessors-in-title in fee simple absolute. If such an attempt was made, the conveyance should be held "if not absolutely void on its face, as subject to revocation." Illinois Central, supra, at 453.

c) Defining the public trust ocean shorelands as that strip of land between the mean high tide level and the mean low tide level would likewise be an improvident act beyond the power of a State to make.

If Public Trust rights in land subject to the trust cannot be extinguished by conveying such land into private ownership, it likewise cannot be said that the same end could be accomplished by simple definition of "public trust ocean shorelands." If a legislature, or a court, attempted to define public trust ocean shorelands as that strip of land between the mean high tide level and the mean low tide level, the public's right of full use and enjoyment of the shorelands would be impaired much the same as it would by an improvident conveyance. As shown above, such a definition would serve to perforate the public's trust rights. What is beyond the State's authority to extinguish by conveyance should also be beyond its authority to extinguish by definition.

d) Summary

Because Public Trust rights cannot be relinquished by a transfer of the property to private ownership, the bundle of property rights conveyed to Appellants' predecessor-in-title, and hence to Appellants, did not include the property interest of the public to pass and repass over these beach lands. This property interest remained with the people; Appellant never acquired this property interest for it has always been held by the public.

Where the line demarking the Public Trust area should be placed in this particular case is at the seawall on Appellants' property. Above the seawall the Appellants' property is clearly private and unaffected by the Public Trust since the wall is to keep the sea out. Below the wall the sea, and the

public, enjoy the freedom to come and go.

3. Public Trust Rights Are Held In Trust By The State For All Of The People Of The Nation.

As with all trusts, the Public Trust must have a beneficiary. As the name suggests, the beneficiary here is the public. But who is the "public"? In Illinois Central it was said "It is a title held in trust for the People of the State..." Illinois Central, supra, at 452. The Public Trust is also to be administered so as not to conflict with the U.S. Constitution. See State v. Superior Court of Lake City, 625 P.2d 239, 242 (1981). In view of the Commerce Clause, art. I, sec. 8, and the Privileges and Immunities Clause, art. IV, sec. 2, the Constitution would seem to require that the Public Trust be held for the benefit of all U.S. citi-

zens, if not to all persons legally within the United States. It has been stated that the property held in trust is "property in which the whole people are interested." Boone v. Kingsbury, 206 Cal. 148, 189 (1928). "Thus, it has been suggested that the federal government could enforce such trust." Mallon v. City of Long Beach, 44 Cal.2d 199,215. Justice Spence dissenting, refering to Boone v. Kingsbury. In other words, "the jus privatum of each State" in its shorelands "is subject to the jus publicum of the United States, which is free and uninterrupted passage for all citizens of the United States." Note, The Public Trust in Tidal Areas: A Sometime Submerged Doctrine, 79 Yale Law Journal 762, 787 (1970).

It is fairly clear that the proper-

ty rights held in trust by the State are rights of "the whole people," i.e. all the people of the United States. This would make sense in that it is doubtful that any State could lawfully exclude anyone not a resident of that State from its public trust shorelands.

CONCLUSION

This case involves publicly used shorelands, the beach portion of Appellants' lot. As such, this Court must consider the Public Trust burdens on the portion of Appellants' property in question. To fail to recognize the people's interests and rights in these shorelands would severely impair the public's rights to full use and enjoyment of the ocean shorelands, rights held in trust by the State.

The public's trust rights for full

use and enjoyment of the shorelands extends, at least in this case, up to the Appellants'seawall. Use of the mean high tide level for property demarcation and conveyance purposes should not be confused with delimiting public trust shorelands. The deciding factor of whether ocean shorelands are subject to the Public Trust should not be whether the land lies above or below the mean high tide line. The fact that such shorelands have been conveyed from public to private ownership is without import, for the public trust responsibilities held by the State remain vested in the people unless 1) the conveyance promotes the interests of the public, i.e. the public may still use the conveyed property as its always has, or 2) there is no substantial impairment of the public interest in the lands and

waters remaining.

Appellants' beach front property is public trust ocean shoreland. To hold otherwise would be to perforate a public right to pass and repass as they have used them for decades. If an attempt has been made to grant these public trust shorelands free of the trust burdens, it is an improvident grant, void on its face, or at least revocable. The public trust rights remained with the people when the subject land was conveyed to Appellants' predecessor-in-title. Thus, Appellants' never possessed this property interest, and not possessing of it, the interest cannot be "taken" from them.

The California Appellate Court ruling should be affirmed.

Respectfully submitted,

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