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CALIFORNIA'S TIDELANDS TRUST FOR MODIFIABLE PUBLIC PURPOSES

California's coastline is a unique natural resource. Competition for its use, already intense, grows constantly greater.¹ Although over 90% of the state's population live within the 8% of the area nearest the seashore,² barely one-quarter of the coastline is open to direct public access.³ Moreover, there is an increased public awareness of this resource's irreplaceability and a growing recognition of the need to consider environmental and ecological factors in determining *what* uses shall be permitted to compete in various segments of the shoreline.⁴ A comprehensive coastal zone management plan is required,⁵ but such plans are regularly frustrated by a lack of adequate funding.⁶

The tidelands,⁷ that portion of the shore covered and uncovered by the daily ebb and flow of the tides, are an important, if not the key, area in the management of land use in the entire coastal zone. Effective control over the use made of the tidelands not only determines the method of their utilization and, to a large degree, that of the immediate littoral⁸ area, but may indirectly influence the use of inland

1. See COMMITTEE ON OCEAN RESOURCES, RESOURCES AGENCY OF CALIFORNIA, CALIFORNIA AND THE OCEAN 81 (1966).

2. CALIFORNIA ASSEMBLY SELECT COMM. ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL BILL OF RIGHTS 36 (1970) [hereinafter cited as ENVIRONMENTAL BILL OF RIGHTS].

3. Only about 275 miles of the entire 1,087-mile California coast are available directly to the public. Los Angeles Times, Feb. 3, 1973, § I, at 1, col. 8, at 23, cols. 3-4.

4. These irreplaceable environmental values are threatened only briefly, for once the planned developments materialize the threat is over. In its stead are irreversible changes. Immediate action must be taken to prevent the destruction of these environmental values. ENVIRONMENTAL BILL OF RIGHTS, *supra* note 2, at 36.

5. The need has been recognized and declared by the California legislature itself. See notes 218-29 *infra* and accompanying text.

6. 3 UNIVERSITY OF MAINE SCHOOL OF LAW, MAINE LAW AFFECTING MARINE RESOURCES, REGULATION OF THE COAST: LAND AND WATER USES 531 (1970) [hereinafter cited as UNIVERSITY OF MAINE].

7. "Tideland" is land which is "covered and uncovered by the daily flux and reflux of the tides." *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 182, 50 P. 277, 285 (1897). The line of high water is that set by the mean neap, or ordinary, tides. See *People v. William Kent Estate Co.*, 242 Cal. App. 2d 156, 159-61, 51 Cal. Rptr. 215, 218 (1966). "Tidelands," when used in reference to the "tidelands trust," also includes submerged lands as well as those described above. *San Pedro, L.A. & S.L.R.R. v. Hamilton*, 161 Cal. 610, 614, 119 P. 1073, 1074 (1911).

8. "Bordering on the shore; pertaining to the shore of the sea." BALLENTINE'S

areas to a significant extent.⁹

California's tidelands are encompassed by the "tidelands trust," a doctrine which originated in Elizabethan England and under which the state, as trustee of a "public trust,"¹⁰ protects public uses¹¹ in the foreshore¹² which are traditionally defined in terms of navigation, commerce, and fishery. The concept in its traditional molding has proven inadequate to protect the public interest;¹³ however, in December, 1971, the California Supreme Court in *Marks v. Whitney*¹⁴ unanimously recognized an additional public use within the trust based solely on environmental, scenic, climactic, and spatial considerations: the preservation of the tidelands in their natural state.¹⁵ Even more important for the public interest was the fact that the court made it clear that there are still *other* public uses within the trust terms, likewise based on environmental and ecological considerations, which have not, as yet, been definitively stated.¹⁶ Further, such heretofore unrecognized public uses of the foreshore could be implemented as part of a comprehensive coastal zone management plan with little or no need for the "taking" of private property, the "just compensation" for which has been the consistent bane of such plans in the past.¹⁷

Admittedly this recognition of environmentally-based public uses in the tidelands was made in an *obiter dictum* having little or nothing to do with the actual controversy between the parties.¹⁸ But such "state-

LAW DICTIONARY 746 (3d ed. 1969), *i.e.*, the property which extends down to the line of mean high tide, at which point the tidelands begin. See note 7 *supra*.

9. This indeterminate effect is discussed in notes 268-75 *infra* and accompanying text.

10. "A charitable trust." BALLENTINE'S LAW DICTIONARY 1025 (3d ed. 1969). See note 44 *infra*.

11. "The use of premises by the public at large, that is, the general, unorganized public, rather than by one person, a limited number of persons, or a restricted group." BALLENTINE'S LAW DICTIONARY 1025 (3d ed. 1969).

12. "The territory lying between the lines of high water and low water, over which the tide ebbs and flows." BALLENTINE'S LAW DICTIONARY 488 (3d ed. 1969). Within this Comment, the term "foreshore" will be used synonymously with "tideland." See note 7 *supra*.

13. "[E]xisting legislation is not adequate to protect the public interest." CALIFORNIA ADVISORY COMM'N ON MARINE & COASTAL RESOURCES, DEFINING THE CALIFORNIA PUBLIC INTEREST IN COASTAL ZONE MANAGEMENT 7 (1970).

14. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

15. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.

16. *Id.* at 260, 491 P.2d at 380, 98 Cal. Rptr. at 796.

17. See notes 258-67 *infra* and accompanying text.

18. The case arose when Marks sued to quiet title to certain tidelands owned by him and to enjoin the neighboring landowner, Whitney, and others from asserting any claim or right in his property. 6 Cal. 3d at 256, 491 P.2d at 377, 98 Cal. Rptr. at 793. Whitney opposed on the grounds that his rights, both as the littoral owner and

ments in passing," although not legally binding, are oftentimes used by courts to express their opinions on questions and issues related to, although not present in, the controversy before them.¹⁹ As will be shown to have been the case in *Marks*, they can also constitute threats to take action unless legislative changes are made.²⁰

After noting that Marks' tidelands were subject to a public trust easement "traditionally defined in terms of navigation, commerce and fisheries,"²¹ the court recognized that:

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.²²

as a member of the general public, would be thereby terminated and requested, by way of cross-complaint, a declaration that Marks' title to the tidelands was burdened with a perpetual public trust easement for fisheries, commerce, and navigation owned by him and the other members of the general public, as well as with certain prescriptive rights claimed personally by Whitney as the littoral owner. The Superior Court of Marin County did find a prescriptive easement in Whitney's favor across Marks' tidelands, 6 Cal. 3d at 256, 491 P.2d at 377-78, 98 Cal. Rptr. at 793-94, but held that Whitney had no standing to raise the public trust issue and refused to make a finding as to whether or not the tidelands were so burdened. *Id.* at 256, 491 P.2d at 377, 98 Cal. Rptr. at 793. The court of appeal affirmed. 90 Cal. Rptr. 220, 222-23 (1970), *vacated*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). Whitney appealed the same "traditional" trust for "fisheries, commerce, and navigation," to the California Supreme Court, apparently because the lower courts had restricted his personal prescriptive rights of navigational ingress and egress over Marks' tidelands to an existing wharf and "seven-foot wide easement area." 6 Cal. 3d at 256, 491 P.2d at 378, 98 Cal. Rptr. at 794. The trust, as he asserted it, would have permitted Whitney access over the almost 350 feet of Marks' tidelands which abutted his littoral property. *Id.* at 257, 491 P.2d at 378, 98 Cal. Rptr. at 794. There was apparently no environmental concern in the motivation of either party. See Taylor, *Patented Tidelands: A Naked Fee?*, 47 CALIF. ST. B.J. 420, 423 (1972).

19. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 543 (1970) [hereinafter cited as Sax].

20. See notes 247-48 *infra* and accompanying text.

21. 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

22. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796 (citation omitted). The case cited in the quotation, *Colberg, Inc. v. State ex rel. Dep't of Pub. Works*, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), recognized that the use to which tide-

But the court then proceeded to point out that Marks' title was burdened solely with the traditional public rights of navigation, commerce, and fishery.²³ Its failure to recognize a *present* right in the general public to the use of preservation, or to recognize any public use other than navigation, commerce, and fishery, was clearly significant. Immediately prior to its recognition of the use of preservation, the court listed various recreational uses of the tidelands by the general public which have been held to be rights encompassed within traditional trust purposes.²⁴ However, it did not similarly link preservation to the traditional trust uses in the sense that preservation is merely to be deemed an acceptable mode of exercising those uses. If it had meant to do so, it would have held that there was a present right in the public to the "use" of preservation. It mentioned no such right.²⁵

lands are put must be that "by which the general welfare is best to be served." *Id.* at 422, 432 P.2d at 12, 62 Cal. Rptr. at 410.

23. A proper judgment for a patentee of tidelands was determined by this court . . . to be that he owns "the soil, subject to the easement of the public for the public uses of navigation and commerce, and to the right of the state, as administrator and controller of these public uses and the public trust thereof, to enter upon and possess the same for the preservation and advancement of the public uses and to make such changes and improvements as may be deemed advisable for these purposes." *Id.* at 261, 491 P.2d at 381, 98 Cal. Rptr. at 797, quoting *People v. California Fish Co.*, 166 Cal. 576, 598-99, 138 P. 79, 88 (1913).

24. 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796. "[Public trust easements] have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreational purposes. . . ." *Id.* This, however, refers to public trust easements in other states as well as in California. The only two California cases cited by the court to support the above contention, *Bohn v. Albertson*, 107 Cal. App. 2d 738, 238 P.2d 128 (1951), and *Forestier v. Johnson*, 164 Cal. 24, 127 P. 156 (1912), held only that various forms of recreational boating were permissibly navigation.

25. 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796. Nor did the court say that the public trust easement in California tidelands has been held to include all the public rights listed in its compilation quoted in note 24 *supra*.

Other states *have* attempted to link preservation of the tidelands to the traditional servitudes, and have done so explicitly. Massachusetts, for example, in *Commissioner of Nat. Resources v. S. Volpe & Co.*, 206 N.E.2d 666 (Mass. 1965), built upon the traditional trust purpose of fishery to hold that adequate conservation was required to protect and extend the viability of the servitude. Specifically, the Massachusetts Supreme Court held that the ecological balance of certain marshlands proposed to be filled would have to be preserved in order to protect the public right of fishery. *Id.* at 669-71. However, *Volpe* fails to give environmental considerations an independent priority in any way comparable to that of the traditional servitudes (*id.* at 671), and it must be noted that the creation of such legal fictions extending the traditional servitudes *have* acted *against*, rather than for, environmental and conservational purposes in California, e.g., *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928), *cert. denied*, 280 U.S. 517 (1929). The California Surveyor-General had refused to issue a permit for oil prospecting in tidelands on the ground that, *inter alia*, subsequent drilling operations would pollute the surrounding ocean "to such an extent as to render the

What the dictum did say was that preservation is "encompassed within the tidelands trust."²⁶ The court cited no authority for this proposition; however, although the public has no present right to the use of preservation, it is clear that such use would be permissible under the state's administration of public uses. The implication is that the public *can* be given the right to preservation of the foreshore.

This concept of public rights to modifiable uses of the foreshore does not square well with the history of the doctrine in California or elsewhere. In California, for example, the uses of the tidelands to which the general public have rights have not varied from navigation, commerce, and fishery in over 120 years and were generally regarded as immutably fixed to those three uses.²⁷ How, then, can they be modifiable?

The answer to that question lies in the very nature of the public trust doctrine. Its history might lead one to conclude that the doctrine is inadequate to meet the current requirements of the public interest in tidelands,²⁸ but one must closely examine that history in order to discover the true nature of the doctrine and to avoid a continuation of its apparent inadequacy.

I. THE HISTORICAL BACKGROUND OF PUBLIC RIGHTS IN THE FORESHORE

The concept of public rights in the foreshore dates from Roman times, if not earlier.²⁹ The common right of the Roman citizenry in the seashore was often expressed in absolute terms. As described by the *Institutes of Justinian*:

The public use of the sea-shore, too, is part of the law of nations, as is that of the sea itself; and therefore any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man³⁰

Some legal commentary has seen this expansive Roman concept as

fish therein unfit for human consumption." *Id.* at 168, 273 P. at 806. The court ordered issuance of the permit, stating "the use of gasoline and oil to be practically indispensable to the needs of rapid, expanding, industry and *commerce*." *Id.* at 182, 273 P. at 812 (emphasis added).

26. 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

27. See notes 209-15 *infra* and accompanying text.

28. See note 13 *supra* and accompanying text.

29. See W. HUNTER, ROMAN LAW 309-11 (4th ed. 1903) [hereinafter cited as HUNTER].

30. INSTITUTES 2.1.5.

being more or less integrally incorporated into Anglo-Saxon common law at its inception and maintained until the present day.³¹ Whether or not the concept was really quite so expansive or was, in fact, incorporated into Anglo-American jurisprudence, however, does not bear on the legal, as opposed to the spiritual, ancestry of any presently existing public rights in the foreshore.

It is settled that the absolute ownership of all lands in the English realm was vested in the crown by the time of the Norman Conquest of 1066, if not earlier.³² All early English private titles derived originally from crown grants, which often lacked precision, particularly in the case of coastal grants which regularly omitted a description of the seaward boundary.³³ Such coastal grantees came to consider their property as extending down into the sea, and originally were not opposed in that belief by the crown.³⁴

The idea that the foreshore had been omitted from the scope of royal coastal grants was first advanced in the 1560's,³⁵ although it was not judicially accepted until 1632 during the reign of Charles I.³⁶ The concept of such retained royal title to the foreshore was later adopted by Sir Matthew Hale in his treatise *De Jure Maris et Brachiorum Ejusdem*,³⁷ which first appeared in 1670,³⁸ further strengthening the

31. See, e.g., Note, *California's Tideland Trust: Shoring It Up*, 22 HAST. L.J. 759 (1971); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970). Evidence is lacking that such "public rights" could be asserted successfully against a recalcitrant government. See HUNTER, *supra* note 29, at 311; 79 YALE L.J. at 764-65.

32. 3 AMERICAN LAW OF PROPERTY § 12.1 (A.J. Casner ed. 1952); S. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 24, 27 (3d ed. 1888) [hereinafter cited as MOORE].

33. MOORE, *supra* note 32, at 1, 2.

34. *Id.* at XXX, 51. It is not certain whether the lack of royal opposition was due to acquiescence, oversight, or the press of more urgent matters. 1 WATERS AND WATER RIGHTS § 36.3(A) (R. Clark ed. 1967) [hereinafter cited as WATERS].

35. WATERS, *supra* note 34, at § 36.3(A); MOORE, *supra* note 32, at 185-211 wherein the original treatise of Thomas Digges is reprinted. Descriptions of Digges range from "mathematician, engineer, astronomer, and lawyer," WATERS § 36.3(A), to "an impetuous courtier [bent on procuring the royal favor]," Comment, *Waters and Watercourses—Right of Public Passage Along Great Lakes Beaches*, 31 MICH. L. REV. 1134, 1136 n.4 (1933). It would be ironic if public rights in the foreshore stem from an individual's attempt to achieve personal gain some four centuries ago.

36. Attorney General v. Philpott, 8 Chan. 1 (1632), reprinted in MOORE, *supra* note 32, app. I at 895. This doctrine was obviously regarded in certain interested circles as both relatively successful and extremely novel. One of the specifications later levelled at Charles I in depriving him of his crown was "the taking away of men's rights under colour of the King's title to land between high and low water mark." MOORE, at 310; WATERS, *supra* note 34, at § 36.3(A).

37. Reprinted in MOORE, *supra* note 32, at 370-413 and in R. HALL, ESSAY ON THE

legal status of the doctrine.³⁹ This retained royal title was the *jus privatum*,⁴⁰ or personal right, of the king and originally encompassed the complete legal and equitable ownership of the foreshore.⁴¹

But subsequent to and because of the early judicial acceptance of its prima facie title to the foreshore, political pressure had forced the crown to stipulate that its title was held for the public purposes of navigation and fishery,⁴² thereby transforming that portion of the royal personal title into the *jus publicum*,⁴³ or public right. The *jus publicum* continued to be held by the sovereign personally, although in a representative capacity. The property interest represented by the *jus publicum* was, in effect, the trust res of a declared charitable trust.⁴⁴ Through Parliamentary limitation, subsequent crown grants of the foreshore to individuals conveyed only the royal personal title (*jus privatum*), and it thus became established that such crown grantees took subject to the public rights of navigation and fishery, as represented by the *jus publicum* which had remained behind in the crown;⁴⁵ however, the

RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM, app. (2d ed. 1875) [hereinafter cited as R. HALL].

38. WATERS, *supra* note 34, at § 36.3(A) n.54. The treatise was not first published, however, until 1787. *Id.*

39. "The impact of this treatise was such that the burden of proof was placed upon the subject to show that his land extended to the low-water mark. In the absence of proof of a specific grant of the tidelands, placement of the burden of proof could be decisive." WATERS, *supra* note 34, § 36.3(A), quoting Attorney General v. Burridge, 147 Eng. Rep. 335, 342 (Ex., 1822) ("It is a doctrine of ancient establishment, that the shore between the high- and low-water marks belongs prima facie to the King."); Attorney General v. Parmeter, 147 Eng. Rep. 345 (Ex., 1811), *aff'd. sub nom.* Parmeter v. Gibbs, 147 Eng. Rep. 356 (Ex., 1813); Attorney General v. Richards, 145 Eng. Rep. 980 (Ex., 1795).

40. "A private right. Any right held by the king of England in his individual capacity was known as *jus privatum*. Any right which he held in a representative capacity was known as *jus publicum*, a public right." BALLENTINE'S LAW DICTIONARY 695 (3d ed. 1969). See note 43 *infra*.

41. See text accompanying note 32, *supra*.

42. Comment, *Public and Private Rights in the Foreshore*, 22 COLUM. L. REV. 706-08 (1922); cf. 36 HARV. L. REV. 763 (1923); 33 HARV. L. REV. 458 (1920).

43. "A public right; a right held by the king in a representative capacity." BALLENTINE'S LAW DICTIONARY 695 (3d ed. 1969). See note 40 *supra*. "[T]he property, indeed, . . . is vested in the sovereign but . . . not for his own use. . . ." Arnold v. Mundy, 6 N.J.L. 1, 77 (1821).

44. "A trust for the benefit of an indefinite class of persons constituting some portion or class of the public or, more broadly defined, a trust limiting property to some public use . . ." BALLENTINE'S LAW DICTIONARY 194 (3d ed. 1969). The trust, however, is discretionary in that any public rights granted thereunder are taken subject to defeasance by further parliamentary limitation to which the royal assent is given, which assent acts as a declaration of trust. See note 47 *infra*.

remainder of the equitable interest, the right to all other possible uses of the foreshore, passed to the grantee along with the legal title.⁴⁶

In cases where the royal *jus privatum* had not been granted to private parties, it was and still is possible that additional uses included within that private right might be declared *jus publicum* and thereby be transferred into the public right.⁴⁷ As yet, however, there has been no such enlargement of the scope of public rights under the English trust.⁴⁸ Consequently, the rights of the British public have been strictly limited to navigation and fishery, as well as those other rights incidental to and strictly necessary for the exercise of the two primary rights.⁴⁹ The independent existence of public bathing and other recreational rights has been specifically rejected, and those attempting to assert such rights have been treated as trespassers, whether the tidelands in question were still crown property or had passed to private grantees.⁵⁰ Although criticized by English legal commentators virtually since its inception, this restriction of public rights to navigation and fishery endures.⁵¹

45. M. HALE, *DE JURE MARIS ET BRACHIORUM EJUSDEM*, reprinted in MOORE, *supra* note 32, at 404-05; Comment, *Public and Private Rights in the Foreshore*, *supra* note 42, at 708. See also *Blundell v. Catterall*, 106 Eng. Rep. 1190 (K.B., 1821), which contained the first definitive statement on the alleged existence of public rights to use the foreshore for purposes other than navigation and fishery. It was held that a private owner did not hold subject to any public right of bathing. *Id.* at 1190. See also *Llandudno Urban Dist. Council v. Woods*, [1899] 2 Ch. 705, 708-09 (public on privately-owned tidelands but not engaged in navigation or fishery deemed trespassers). But see dissent of Best, J., in *Blundell v. Catterall*, 106 Eng. Rep. at 1193-97, summarized in WATERS, *supra* note 34, at § 36.3(A) n.56.

46. See note 45 *supra*. Apparently, the crown can no longer alienate even its *jus privatum* without specific Parliamentary authorization. R. HALL, *supra* note 37, at 106 n.10.

47. "These [public] rights are variously modified, promoted, or restrained by the common law, and by numerous acts of parliament. . . ." R. HALL, *supra* note 37, at 108.

48. WATERS, *supra* note 34, at § 36.4(B); Comment, *Waters and Watercourses—Right of Public Passage Along Great Lake Beaches*, *supra* note 35, at 1137. See also 39 HALSBURY, *THE LAWS OF ENGLAND* 562-72 (3d ed. 1962).

49. *Brinckman v. Matley*, [1904] 2 Ch. 313, 317 (public right recognized to pass over tidelands to exercise established public rights of navigation and fishery); WATERS, *supra* note 34, at § 36.4(B).

50. "The public have no common right to use the foreshore to pass or repass thereon for the purpose of bathing in the sea, whether the foreshore is the property of the Crown or of a private owner." *Brinckman v. Matley*, [1904] 2 Ch. at 313 (sylabus).

51. WATERS, *supra* note 34, § 36.4(B). See Comment, *Waters and Watercourses—Right of Public Passage Along Great Lake Beaches*, *supra* note 35, at 1137.

II. THE SCOPE AND NATURE OF PUBLIC RIGHTS IN AMERICA

Upon the success of the American Revolution, the people of each state became in themselves sovereign and succeeded to the ownership not only of the king's *jus publicum* (under which, as British subjects, they had possessed the rights of navigation and fishery), but also of the royal *jus privatum*,⁵² which gave them the "absolute right . . . for their own common use."⁵³ However, this succession of "the people" to the ownership of those two royal rights was metaphorical and has been the source of much confusion concerning public rights in the fore-shore. Strictly speaking, it was the organism of the state *as sovereign* which succeeded to the ownership of *both* royal rights.⁵⁴ "[T]he State represents its people, and *the ownership is that of the people in their united sovereignty*."⁵⁵ The original states, therefore, in cases where there had been no prior alienation of the *jus privatum*,⁵⁶ succeeded to the complete legal and equitable ownership of their tidelands.⁵⁷

In the subsequent formation of the federal government, these states

52. "[U]pon the Revolution, all these royal rights became vested in the people of New Jersey, as the sovereign of the country" *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1821); *Shively v. Bowlby*, 152 U.S. 1, 15 (1894); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). In *Martin*, the Court described the holding in *Arnold* as being "entitled to great weight" and virtually incorporated that opinion as its own. *Id.* at 418.

53. *Id.* at 410.

54. "[T]he several states hold and own the lands covered by navigable waters within their respective boundaries in their sovereign capacity They have in them a double right, a *jus publicum* and a *jus privatum*." *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 183, 50 P. 277, 285 (1897). "And upon the American Revolution, *all the rights of the Crown* and of Parliament *vested in the several states* . . ." *Shively v. Bowlby*, 152 U.S. 1, 14-15 (1894) (emphasis added). See *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1876); *Koyer v. Miner*, 172 Cal. 448, 453, 156 P. 1023, 1025 (1916); *Bolsa Land Co. v. Burdick*, 151 Cal. 254, 261, 90 P. 532, 535 (1907).

55. *Shively v. Bowlby*, 152 U.S. 1, 24 (1894) (emphasis added); *accord*, *McCready v. Virginia*, 94 U.S. 391, 394 (1876); see *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

56. The king had possessed the same dual title in English possessions in the Americas. "[W]hen [the king] took possession of this country, by his right of discovery, he took possession of it in his sovereign capacity; . . . he had the same right in it, and the same power over it, as he had in and over his other dominions and no more . . ." *Arnold v. Mundy*, 6 N.J.L. at 77. See also *Shively v. Bowlby*, 152 U.S. 1, 14 (1894).

57. "[U]nder] the British constitution all vacant lands are vested in the crown as representing the nation . . ." *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). Since the states succeeded to the king's ownership (*supra* note 54, which was complete legal and equitable title absent an alienation of the *jus privatum* (*supra* notes 32, 41, 43, 56)), they took the same complete legal and equitable ownership.

conveyed to it the power to control all navigable waters for the purpose of regulating and improving navigation through the federal commerce power.⁵⁸ Not having passed their ownership of the foreshore, however, they retained it in themselves, subject only to the paramount servitude over navigation which they had created in the general government.⁵⁹ Consequently, although the congressional commerce power "comprehends navigation within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states';"⁶⁰ rights in tidelands and in lands under navigable waters within state boundaries are governed and controlled by state rather than federal law.⁶¹

As territorial possessions were acquired by the United States, the tidelands and navigable waters therein were held by the federal government and conveyed to the states upon their admission into the Union.⁶² Since new states enter the Union on an equal footing with the original thirteen members,⁶³ they also took complete legal and equitable ownership of their tidelands as an attribute of their sovereignty upon their respective admissions, except, of course, for the retained federal navigational servitude.⁶⁴

58. *Gibson v. United States*, 166 U.S. 269, 271-72 (1897); *Eldridge v. Trezevant*, 160 U.S. 452, 466-68 (1896); *South Carolina v. Georgia*, 93 U.S. 4, 12 (1876).

59. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

60. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

61. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845).

62. *Borax Consol., Ltd. v. City of Los Angeles*, 296 U.S. 10, 15 (1935); *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Port of Seattle v. Oregon & W.R.R.*, 255 U.S. 56, 63 (1921); *United States v. Mission Rock Co.*, 189 U.S. 391, 404 (1903); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Knight v. United States Land Ass'n*, 142 U.S. 161, 183 (1891); *Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65 (1873); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845).

63. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). See, e.g., 9 Stat. 452 where California is declared "admitted into the Union on an equal footing with the original States in all respects whatever." See generally Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519 (1951).

64. Although the federal servitude will not be dealt with in this paper, which will deal solely with public rights under state law, its inherent power and potential scope should not be discounted nor forgotten. See, e.g., *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). In that case, the Corps of Engineers District Engineer had refused to grant the permit requisite for dredging and filling of navigable waters under the Rivers and Harbors Act of 1899 although there would, admittedly, have been no adverse effect on navigation, 430 F.2d at 202, 207. The refusal was based solely on ecological considerations. *Id.* at 202. The Court of Appeals upheld the denial (*id.* at 214), since the Fish and Wildlife Coordination Act required consideration of conservation of wildlife resources prior to issuance of a per-

In past commentary on the tidelands, the concept of enforceable rights in the general public is usually supported by an assertion of the equitable ownership of the tidelands by the public's individual members,⁶⁵ but the public had no such ownership rights under the prior English trust⁶⁶ and, upon independence, the complete legal and equitable ownership, previously held by the king, became the property of the state as an independent entity.⁶⁷ State grants of part or all of its ownership are most conspicuous by their absence.⁶⁸ Without such a grant, individuals have no ownership rights in the foreshore.⁶⁹ Equitable ownership of the tidelands by the individual members of the

mit to dredge and fill (*id.* at 209), and a negative determination had been made. *Id.* at 202. But see Note, *Coastal Zone Management—The Tidelands: Legislative Apathy vs. Judicial Concern*, 8 SAN DIEGO L. REV. 695, 728-32 (1971) as regards the doubtful wisdom in placing such authority in the Corps of Engineers and the possibility of federal preemption in the area of coastal zone management.

65. *E.g.*, Comment, *Public and Private Rights in the Foreshore*, *supra* note 42; Comment, *Waters and Watercourses—Right of Public Passage Along Great Lake Beaches*, *supra* note 35; Note, *California's Tidelands Trust: Shoring It Up*, *supra* note 31.

66. See notes 42 and 43 *supra*.

67. There are cases which have said exactly the opposite, although, apparently, not in California. An example is *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927) wherein the court said that "[t]he equitable title to these submerged lands vests in the public at large, while the legal title vests in the state . . ." *Id.* at 830. Such a statement could hardly be any more explicit, but it at least admits that any rights of property ownership held by the general public would not be continuations of identical rights held under the previous English Trust. Were they, the title would be already vested prior to the vesting of the state's interest. But if, then, the entire ownership is derived from the king, it seems quite incomprehensible that part of it should vest in the unitary organism of the state, while the remainder vests in the public at large, especially in proportions so radically different from the prior apparent "apportionment" between sovereign and subject.

In any event, dicta such as this have not appeared in recent cases, and that is just as well. Although a romantic concept, public equitable ownership of trust lands would effectively prohibit any reallocation of the resource after its initial allocation. See notes 68-75 *infra* and accompanying text. Further, in the absence of some "mechanism" or "system" to make the class of equitable owners subject to open to admit new members, which cases such as this have never even considered, the equitable ownership would be strictly limited to those individuals who were part of that "public at large" when the state achieved its sovereignty, and their direct lineal descendants. People moving to the jurisdiction after sovereignty, and their descendants, would have no ownership rights in trust lands. Even the present-day descendants of the original "equitable owners" would have unequal rights due to the variable number and extent of division of his ancestor's title as determined by individual lineage. Although intended to "democratize" the trust lands by making each citizen an equal owner thereof, the concept of public equitable ownership of the foreshore fails when confronted by legal practicalities.

68. See *Sax*, *supra* note 19, at 478 n.28.

69. See notes 65-68 *supra* and accompanying text.

general public would effectively prohibit any modification of the original use of such lands. This static situation would arise since such a reallocation of the resource would constitute a taking of private property for public use within the meaning of the constitutional prohibitions.⁷⁰ It has been maintained that:

It is difficult to understand why the government should be prevented from taking property which is owned by the public as a whole. Whether or not the people and the government should theoretically be recognized as distinct, it is clear that the concept underlying the constitutional protection against taking [that the public should bear the cost for property taken for public use] does not accommodate itself very easily to situations in which the public as a whole claims to be a property owner.⁷¹

However, the theoretical distinction between people and government is of critical importance. If the "public" owning the property is viewed as a single entity, then it is the state, "the people in their united sovereignty," which is owner, and the individual citizen has no property interest which can be the subject of a taking. Conversely, if the "public" equitably owning the property is viewed as the mass of individuals, then each of them owns a private undivided interest in that equitable ownership. Any diminution of the manner in which the individual can permissibly exercise his interest consequently "takes" a portion of his ownership right.⁷² Or, as the above-quoted opinion concludes:

To accept such claims of [individual] property rights would be to prohibit the government from ever accommodating new public needs by reallocating resources.⁷³

In all likelihood, initial governmental allocations of natural resources would be irreversible. Such a move could possibly be enjoined by parties who preferred maintenance of their rights to the receipt of compensation.⁷⁴ In any event, the burden of paying "just compensation" for the rights taken would be insurmountable as a practical matter.⁷⁵

Nor can public rights to use the American foreshore be merely continuations of those non-ownership rights which the public *had* previ-

70. U.S. CONST. amend. V; amend. XIV, § 1. CAL. CONST. art. I, § 14.

71. SAX, *supra* note 19, at 479-80.

72. This, perhaps, can best be shown by analogy. When the owner of an undivided equitable ownership interest is subsequently prohibited from making a certain, previously permissible, use of the property, a portion of his interest has been taken.

73. SAX, *supra* note 19, at 482.

74. *Id.* at 482 n.35.

75. See note 70 *supra*. As to the additional strictness of the California provision, see notes 260-67 *infra* and accompanying text.

ously held as British subjects.⁷⁶ Previous restrictions on the royal ownership created those rights in the public but are unenforceable against the independent American states. In the first place, such restrictions had been placed solely on the king personally but not on the power of the government generally.⁷⁷ Secondly, even if the restrictions had applied to the English government as a whole, their continued applicability to a successor obtaining ownership by right of conquest⁷⁸ could only be imposed either by the latter's acquiescence or by fundamental functional limitations imposed upon that successor by its inherent character.⁷⁹

The mass of individual citizens, therefore, do not own the equitable title to the foreshore and there is no continuation of the rights which they possessed under the English trust. Public rights under the American trust doctrine were shaped anew in the same way that they had been under the English trust. The very existence, as well as the content and scope, of any public rights to use the foreshore of American states is dependent upon the manner in which the state deals with its property and the restrictions placed upon its freedom of choice in so doing.⁸⁰ For example, if a state determines that public bathing is to be permitted in certain of its tidelands, the public have a right to bathe. If, however, the state later determines that boating is to henceforth have a higher priority than bathing in the same tidelands, the latter use, although still permissible, is severely constricted. Further, if the particular tract is subsequently allocated to serve as a wildlife sanctuary, with public bathing prohibited, the public right to bathe is destroyed. No property interest⁸¹ has been taken; no compensation is required. A right has, of course, been either diminished or destroyed, but such regulation occurs daily without any requirement of com-

76. See notes 42-44 *supra* and accompanying text.

77. See text accompanying notes 32-51 *supra*.

78. *Shively v. Bowlby*, 152 U.S. 1 (1894); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

79. "That all laws theretofore in force which are in conflict with the political character, constitution or institutions of the substituted sovereign lose their force, is also plain." *Vilas v. City of Manila*, 220 U.S. 345, 357 (1911); *accord*, *Alvarez y Sanchez v. United States*, 216 U.S. 167, 175-76 (1910). See generally 16 C.J.S. *Constitutional Law* § 15 (1956). As to the existence of such a functional limitation imposed by the character of the independent American states, at least of a conditional nature, see notes 85, 96-97, and 106-10 *infra* and accompanying text.

80. See generally *Sax*, *supra* note 19, at 482-83.

81. Although this may be characterized as a type of property interest (see notes 178-89 *infra* and accompanying text), it is not one within the meaning of the constitutional protections against taking.

pensatory relief.⁸²

III. LIMITATIONS ON STATE FREEDOM OF CHOICE IN TIDELAND ALLOCATION

If unrestricted the state could theoretically allot the foreshore to any use. But what in fact are the limitations placed on a state's dealings with its tidelands? Such limitations determine the state's freedom of choice in allocating or reallocating tidelands to any one or more uses, and it is these allocations which either create, modify, or destroy public rights in the foreshore as well as determine the content, scope, and potential viability of those rights.⁸³ For purposes of analysis, these limitations on state freedom of action can be classified as either "absolute" or "conditional." A limitation is "absolute" if it is one which the state can neither modify nor abolish.⁸⁴ "Conditional" limitations are those which can be established, modified, or abrogated by the state itself, but while in force they unconditionally restrict the scope of permissible state action.⁸⁵

A. Absolute Limitations

The only absolute limitation on state control and use of its tidelands is that "[t]he state exists . . . to promote the welfare of its citizens. . . ."⁸⁶ The very purpose for state governmental existence imposes on

82. Of course, due process, equal protection, and other constitutional limitations must be complied with.

83. See notes 80-82 *supra* and accompanying text.

84. Of course, *no* limitation on government is theoretically absolute. However, government as it is known in this country could not exist without the absolute limitation described in notes 86-95 *infra* and accompanying text.

85. There are, of course, federal conditional limitations on state action in the foreshore. See notes 58-64 *supra* and accompanying text. Whereas these are not "conditional" in the sense that they can be modified or abrogated by the states, they are not truly "absolute" since they *can* be modified or revoked by the national government. Since this paper deals with public rights in tidelands under state law, these federal limitations will not be dealt with herein. However, see note 64 *supra*.

86. *Allbritton v. City of Winona*, 178 So. 799, 803 (Miss. 1938), *appeal dismissed*, 303 U.S. 627 (1938). "[I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation . . ." *Mayor v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837). "[T]he welfare of the state, and the 'protection, security, and benefit of the people,' for which government is instituted, and which has been by the people confided to it." *In re Madera Irrigation Dist.*, 92 Cal. 296, 316, 28 P. 272, 276 (1891). CAL. CONST. art. I § 2 provides:

Sec. 2. All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it.

all state action "the duty . . . to protect its citizens and to provide for the safety and good order of society."⁸⁷ It is from this duty that the state police power stems, which power exists "to promote the public health, safety, morals, . . . or general welfare of the people"⁸⁸ Securing the general welfare, therefore, is the real object of the police power.⁸⁹

Although its purpose must be to promote the general welfare in its dealings with all property, public or private, the tidelands were originally owned by the state. The basic concept of a "public trust"⁹⁰ therefore arose from the common incidence of two factors: a state ownership interest in the land and the all-inclusive requirement that state action be designed to promote the general welfare. State ownership increases the *quantum* of its police power ability to promote that welfare to a level far above that it possesses over private property.⁹¹ The state, therefore, may be characterized as "trustee" of a charitable trust of its land for the purpose of promoting the general welfare.⁹² It is not a true express trust⁹³ since the state neither accepted its ownership on a *special* condition that it hold for the general welfare,⁹⁴ nor did it declare that a previously unrestricted state ownership would thereafter be so held. Although having the same basic effects as an

Although this duty to promote the general welfare is usually expressed in constitutional provisions, which are conditional limitations, see note 101 *supra*, such expression of them is merely a recognition of their existence. Whether so expressed or not, state governments are so bound. See generally 81 C.J.S. *States* § 1 (1953).

87. *Galyon v. Municipal Court*, 229 Cal. App. 2d 667, 669, 40 Cal. Rptr. 446, 448 (1964).

88. *Miller v. Board of Pub. Works*, 195 Cal. 477, 484, 234 P. 381, 383 (1925) (citations omitted).

89. *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232 (1945). See generally 16 C.J.S. *Constitutional Law* § 182 (1958).

90. See notes 11 and 44 *supra* and accompanying text.

91. Over private property, the police power is limited to reasonable regulation, whereas, over state-owned property, the police power determines the use to which the land is put. See generally Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

92. It is rather like a private charitable trust where the trustee has discretion "to apply the trust property to any charitable [*i.e.*, public] purpose which he may select . . ." RESTATEMENT (SECOND) OF TRUSTS, § 396 (1959).

93. "A trust which arises out of a direct or positive declaration of trust. A trust that comes into existence by the execution of an intention to create it by the person having legal and equitable dominion over the property made subject to it." BALLENTINE'S LAW DICTIONARY 442 (3d ed. 1969).

94. Act of Sept. 9, 1850, 9 Stat. 453, § 3: "[A]ll the navigable waters within the said State shall be common highways, and forever free, as well to inhabitants of said State as to citizens of the United States, without any tax, impost or duty therefor." California courts have never found the proviso to be a particular source of restraint on state action in tidelands. See SAX, *supra* note 19, at 538-39.

express charitable trust for the promotion of the general welfare, this situation simply arose by operation of law upon the state's succession to the ownership of the property. The state's inherent character imposed on it the absolute limitation that, *inter alia*, it utilize its property for the general welfare. All state land is held in the same manner. State "proprietary"⁹⁵ land is similarly restricted as to the general purpose which the state may seek to serve in using it.

B. Conditional Limitations

Conditional limitations on state action in tidelands, those restrictions which can be created, modified, or abrogated by the state itself,⁹⁶ are simply determinations by the state of what allocation of its land to a particular use or set of uses best promotes the general welfare. These determinations necessarily vary from state to state since each deals with its tidelands "according to its own views of justice and policy."⁹⁷ They differ both in method of creation and in comparative dignity and include: administrative determinations,⁹⁸ statutes,⁹⁹ initiative measures,¹⁰⁰ and state constitutional provisions.¹⁰¹ Conditional limitations may be expansive, relating to all tidelands, or specific, applying to only a particular parcel; nevertheless, they create no policy determinations which are truly irreversible. No allocation of tidelands to a specific use is necessarily final. Although some conditional limitations are more difficult to create, modify, or abrogate than others, each can be eliminated by a subsequent and contrary pronouncement

95. "In the capacity of an owner. Being a proprietor." *BALLENTINE'S LAW DICTIONARY* 1011 (3d ed. 1969). A state may hold property in two distinct capacities, the one a proprietary capacity, as individuals generally hold property, and the other a governmental, or sovereign capacity, *i.e.*, for public use. 81 C.J.S. *States* § 104 (1958). Whether or not land is held for public use is determined by conditional limitations. See notes 96-102 *infra* and accompanying text.

96. See note 85 *supra* and accompanying text.

97. *Boone v. Kingsbury*, 206 Cal. 148, at 180, 273 P. 797, 811 (1928), *cert. denied*, 280 U.S. 517 (1929), *quoting* *Shively v. Bowlby*, 152 U.S. 1, 26 (1893).

98. The California legislature has delegated its powers of administration to the State Lands Commission for the day-to-day management of the trust. CAL. PUB. RES. CODE ANN. § 6301 (West 1956).

99. Direct legislative determinations of the requirements of the general welfare. The administration of the trust is vested in the legislature. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482 n.17, 476 P.2d 423, 437 n.17, 91 Cal. Rptr. 23, 37 n.17 (1970).

100. CAL. CONST. art. IV, § 1 (West Supp. 1972).

101. CAL. CONST. art. XVIII, § 1 (West Supp. 1972). "[T]he highest and most solemn expression of the people of the state in behalf of the general welfare." *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 701, 22 P.2d 5, 16 (1933).

of equal or superior dignity.¹⁰²

IV. THE STATE OWNERSHIP INTEREST REQUIRED BY PUBLIC USES

Although the police power applies to both public and private property with the same *raison d'être*, it can only make land available primarily for public uses when an ownership interest is retained by the state. When private property is involved, the constitutional protection against taking limits state police power to reasonable regulation.¹⁰³ Consequently, land which the state alienates into absolute private ownership can no longer be made available primarily for public uses by state fiat. A return to state ownership through an exercise of eminent domain would be required to *guarantee* that the primary use of the land would be by the public at large. Activity on land absolutely owned by private individuals will almost always be primarily private in character.¹⁰⁴ Obviously, then, if a state's conditional limitations ordain one or more uses of the tidelands by the public at large to be most conducive to the general welfare, retained possession of an ownership interest by the state is required.

As noted previously, when the states succeeded to the ownership of their tidelands, they were not constrained to hold their title on the same conditions which had been personally applied to the king.¹⁰⁵ The sole absolute limitation on their ownership was, and is, that they utilize the tidelands to promote the general welfare as such might be determined by their local law.¹⁰⁶ Since public use for purposes of navigation, commerce,¹⁰⁷ and fishery was held to be most conducive to the

102. The order in which the various principal types of conditional limitations are listed in the text accompanying notes 115-18 *supra* is of ascending dignity. See also *Sax*, *supra* note 19, at 482-83.

103. See note 91 *supra*.

104. Although the private owner may, of course, utilize his property for use by the public at large by his own choice, state police power cannot *guarantee* that any such use will continue absent a finding of implied dedication to such public use. See *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970). See note 91 *supra* and accompanying text.

105. See notes 77-79 *supra* and accompanying text.

106. See notes 86, 96-101 *supra* and accompanying text.

107. Exactly when "commerce" entered the American definition of the trust purposes is unclear, but this writer has found no use of it prior to the time of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which held that the federal commerce power granted a paramount servitude over navigable waters to the national government. *Id.* at 197; see notes 58-61 *supra* and accompanying text. "Commerce" may therefore have entered the American definition of the trust terms by a reverse process. Since, due to the inheritance of the English common law, the American states were held to hold their tidelands for the *same* public uses for which the king had previously held,

general welfare under the common law inherited by the states from England,¹⁰⁸ these same public uses were immediately and *de novo* "conditionally limited" into the American trust to the same extent they had previously existed under the English.¹⁰⁹ Thus, in America as well, state ownership of the tidelands came to be characterized as a public trust for the purposes of navigation, commerce, and fishery. Since the general welfare required public uses of the foreshore, it also necessitated state retention of an ownership interest.

A. *The Basic Requisite State Ownership Interest*

The scope of the state ownership interest necessary when the general welfare is deemed to require public use of the foreshore was given its first basic delineation in *Illinois Central R.R. v. Illinois*.¹¹⁰ At issue in that case was the validity of an 1873 repeal by the Illinois legislature of its prior 1869 grant to a railway company of an immense tract of submerged land on the Chicago lake shore, amounting to "something more than a thousand acres."¹¹¹ Since the repeal would have been ineffective against a valid conveyance into absolute private ownership,¹¹² it was necessary for the United States Supreme Court to determine the extent to which such trust lands were alienable by the states in conformance with the absolute limitation on their authority.¹¹³

The Court noted the "public character of the property,"¹¹⁴ recognizing that the land had previously been available to the public at large for purposes of navigation, commerce, and fishery.¹¹⁵ The general welfare clearly required "preserving to the public the use of [the] navigable waters [free] from private interruption and encroachment

"navigation, commerce, and fishery" was originally considered equivalent to the English "navigation and fisheries," although, perhaps more amply stated à la Gibbons. *But see* *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928), *cert. denied*, 280 U.S. 517 (1929).

108. *See generally* notes 42-46 *supra* and accompanying text.

109. The prior English conditional limitations determining such public uses to be required by the general welfare (*see* notes 42-46, 108 *supra* and accompanying text), were only binding on the independent American states due to their inheritance by consent of the English common law (*see, e.g.*, 15A C.J.S. *Common Law* § 3 (1967); CAL. CIV. CODE §§ 5, 22.3 (West 1970)) and *were* modifiable at will by the states. *See* notes 78-79 *supra* and accompanying text. *See also* CAL. CIV. CODE § 4 (West 1970).

110. 146 U.S. 387 (1892).

111. *Id.* at 454.

112. *Id.* at 450-51.

113. *Id.* at 452. *See* notes 86-89 *supra* and accompanying text.

114. 146 U.S. at 456.

115. *Id.* at 452.

. . . .”¹¹⁶ Consequently, “any act of legislation concerning their use affect[ed] the public welfare.”¹¹⁷ Although the Court stressed the immensity of the parcel purportedly conveyed, the fact that it constituted virtually the entire harbor of a major city was clearly the determinative factor.¹¹⁸ Within that harbor area, the state had the responsibility to protect and promote its use by the public for purposes of navigation, commerce, and fishery. Since state police power could only guarantee that the land would be available for such public use when an ownership interest was retained by the state, an absolute alienation of the state’s ownership of the entire harbor area would be contrary to the general welfare;¹¹⁹ consequently, the original grant was held to have created no property interest in the company.¹²⁰

The Court did observe, however, that the state could completely alienate its ownership interest as to “such parcels as are used in promoting the interests of the public [in the area as a whole].”¹²¹ Also, such state control could be alienated as to lands which could “be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”¹²²

Illinois Central, therefore, established the basic premise that the state could not alienate its ownership of substantial portions of the lands in which it was required to maintain and promote public uses.¹²³

116. *Id.* at 436. In other words, they were “held by the people of the State in their character as sovereign in trust for public uses for which they are adapted.” *Id.* at 457-58.

117. *Id.* at 459.

118. *Id.* at 453-54.

119. *Id.* at 459.

120. *Id.* at 460. The grant was therefore held by the Court to have been a revocable delegation of the state’s police power, creating a license in the company, which the 1873 repeal had been effective to terminate. *Id.* at 461. The Court admitted that it could cite no precedent for holding such a grant invalid (*id.* at 455), but this case involved a purported absolute alienation of the state’s interest in the entire harbor area. *Id.* at 453. A license, of course, is the “privilege conferred by a public body on a person for the doing of something which otherwise he would not have the right to do.” *BALLENTINE’S LAW DICTIONARY* 736 (3d ed. 1969). In this case, the license was also a legal right since it was “founded on a statute which confer[red] a privilege.” *Tennessee Elec. Power Co. v. T.V.A.*, 306 U.S. 118, 137-38 (1939).

121. 146 U.S. at 453.

122. *Id.*

123. *Id.* at 454. This has continued down to the present day where the general welfare requirement is defined in terms of the traditional public uses. *See, e.g.*, *County of Orange v. Heim*, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973), wherein the court invalidated an attempted exchange of tidelands between the county and the Irvine Company. Of the 644 acres in public control, 157 were to go to the company in

Any diminution of its police power authority over such lands would be repealable except as to those lands whose alienation would not impair its ability to promote the public uses in the area as a whole and those relatively small parcels of land which, although suitable for the required public uses, would better serve those uses if alienated.¹²⁴

B. *The Required State Ownership Interest in California*

California had acquired ownership of her tide and submerged lands by virtue of her sovereignty upon admission to the Union in 1850.¹²⁵ The absolute limitation that state tidelands be utilized to promote the general welfare as traditionally defined, as well as the consequential requirement that state ownership of the lands be maintained, was recognized in California long before its definitive exposition in *Illinois Central*,¹²⁶ but the development of the state was seen as necessarily requiring favorable treatment for special, private interests which were deemed most capable of aiding the state's economic growth.¹²⁷ Hence, it is not surprising that the state's *de facto* policy was that the favoritism of such special interests was promotive of the general welfare.¹²⁸

In the area of the foreshore, literally thousands of acres of tidelands were purportedly conveyed into absolute private ownership under various patenting statutes¹²⁹ within the first twenty years after California's

exchange for 147 acres in the bay in question and 120 additional acres further up the bay area. However, since the exchange would have left only one-third of the *immediate* bay area in state control, the transaction was nullified under the same rationale as in *Illinois Central*. *Id.* at 722-23, 728.

124. See notes 120-22 *supra* and accompanying text.

125. See notes 63-64 *supra* and accompanying text. However, by the Treaty of Guadalupe Hidalgo, lands previously conveyed by the prior Spanish and Mexican sovereignties did not pass to the United States in 1848. Treaty with the Republic of Mexico, (Feb. 2, 1848), 9 Stat. 922, T.S. No. 207. Therefore, any such previously alienated tidelands were not conveyed to the state upon its admission to the Union in 1850. Act for the Admission of the State of California into the Union, ch. 50, 9 Stat. 452 (1850); *Ward v. Mulford*, 32 Cal. 365, 372 (1867).

126. See, e.g., *Taylor v. Underhill*, 40 Cal. 471 (1871); *Ward v. Mulford*, 32 Cal. 365 (1867); *Eldridge v. Cowell*, 4 Cal. 80 (1854).

127. "Since man's main concern from the beginnings of California's development has been the exploitation of resources to develop the economy, the bulk of the law and the weight of judicial precedent has [*sic*] tended to favor special interests." ENVIRONMENTAL BILL OF RIGHTS 18 (1970).

128. G. NASH, STATE GOVERNMENT AND ECONOMIC DEVELOPMENT, 124-36, 207-12, 339-58 (1964). See also *Boone v. Kingsbury*, 206 Cal. at 182, 273 P. at 812, wherein it was stated that "the development of the mineral resources . . . is the settled policy of state and nation, and the courts should not hamper this manifest policy except upon the existence of most practical and substantial grounds."

129. Act of April 28, 1855, ch. 151, §§ 1-19, [1855] Cal. Stat. 189; Act of April 21, 1858, ch. 235, §§ 1-16, [1858] Cal. Stat. 198, as amended Act of April 18, 1859, ch. 314,

admission to the Union.¹³⁰ Abuse of the public interest seems to have been the rule with those early grants.¹³¹ Although the executive and legislative departments of the state government assisted private interests obtain state tide and other lands to virtually the full extent of which they were capable,¹³² the California judiciary was confronted by previously recognized public rights in the foreshore which "theoretically, at least, [were inalienable]."¹³³ Consequently, grants of tidelands to private parties under the patenting statutes were at first held by the California courts to have conveyed either no title¹³⁴ or a voidable title.¹³⁵ Such holdings were generally based upon some technical defect in the grant,¹³⁶ but the virtual unanimity of the decisions clearly signaled some deeper, more pervasive concern with the very legality of the attempted alienation of the state's ownership interest under the patenting system.¹³⁷

The question of the validity of the patenting statutes and the titles purportedly conveyed under them was resolved in the 1913 case of *People v. California Fish Co.*¹³⁸ The case dealt with a conveyance to a patentee and his payment to the state of the required purchase price, both of which were effectuated after the ratification of the California Constitution of 1879, but both the patenting statute under which the grant had been made and the filing of the patentee's application with the State Surveyor General were effectuated before ratification.¹³⁹ The court held that article XV, section 2 of the constitution, which

§§ 1-6, [1859] Cal. Stat. 340, *as amended* Act of May 14, 1861, ch. 356, §§ 1-2, [1861] Cal. Stat. 363; Act of May 13, 1861, ch. 352, §§ 1-29, [1861] Cal. Stat. 355; Act of April 27, 1863, ch. 397, §§ 1-31, [1863] Cal. Stat. 591; Act of April 27, 1863, ch. 420, §§ 1-13, [1863] Cal. Stat. 684; Act of March 28, 1868, ch. 415, §§ 1-72, [1867-68] Cal. Stat. 507; Act of March 27, 1872, ch. 425, §§ 1-4, [1871-72] Cal. Stat. 622.

130. M. SCOTT, *THE FUTURE OF SAN FRANCISCO BAY* 3 (1963).

131. *Id.* at 9. At the California state constitutional convention of 1878, delegate N.G. Wyatt declared that:

If there is any one abuse greater than another that I think the people of the State of California have suffered at the hands of their lawmaking power, it is the abuse that they have received in the granting out and disposition of the lands belonging to the State. . . . 2 E. WILLIS & P. STOCKTON, *DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA* 1038 (1882).

132. See notes 128-29 *supra* and accompanying text.

133. *Ward v. Mulford*, 32 Cal. 365, 372 (1867). See also note 126 *supra* and accompanying text.

134. *E.g.*, *Kimball v. MacPherson*, 46 Cal. 103 (1873); *People ex rel. Pierce v. Morrill*, 26 Cal. 336 (1864).

135. *E.g.*, *Taylor v. Underhill*, 40 Cal. 471 (1871).

136. See cases noted in notes 134-35 *supra*.

137. SAX, *supra* note 19, at 524-28.

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

139. *Id.* at 588, 138 P. at 84.

guarantees public access to and free navigability of all navigable waters within the state,¹⁴⁰ had been incorporated into the terms of the sale, and that the mere filing of the application had not operated to create any vested property right in the applicant.¹⁴¹ Thus, access to the tidelands in question, and any others patented after 1879, was guaranteed "for any public purpose."¹⁴²

Alternatively, and of extreme importance in the case of tidelands patented prior to the 1879 constitutional limitation, the court reached the "same conclusion" solely on the basis of an examination of the statutes under which the conveyances of tidelands had been authorized.¹⁴³ The court reiterated the *Illinois Central* prohibition of large-scale alienation of the state's ownership interest in tidelands where maintenance of public uses was required by the general welfare,¹⁴⁴ and found it apparent that the statutes authorized alienation of the state's interest without *any* consideration of those special uses:¹⁴⁵

140. Section 2 provides:

People Shall Always Have Access to Navigable Waters

Sec. 2. 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, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof. CAL. CONST. art. XV, § 2 (West 1954).

141. 166 Cal. at 587-88, 138 P. at 83-84.

142. *Id.* at 588, 138 P. at 84.

143. *Id.* at 589-90, 138 P. at 84-85. The court also reached the same conclusion by a third route, utilizing the rule of statutory construction that "[a] statute will not be construed to impair or limit the sovereign power of the state to act in its governmental capacity and perform its governmental functions in behalf of the public in general, unless such intent clearly appears." *Id.* at 592, 138 P. at 86.

144. *Id.* at 584-85, 138 P. at 82-83. The statutes in question purported to authorize the absolute alienation of the state's interest in virtually the entire coastline (*id.* at 591, 138 P. at 85), an area where the state had a responsibility to protect public uses, a situation parallel to that in *Illinois Central R.R. v. Illinois*, although infinitely more egregious.

145. *Id.* at 590, 138 P. at 85. The purpose of the statutes was found to be to secure the reclamation of land suitable for agriculture and to make it productive. *Id.* at 591, 138 P. at 85. In fact, the original statutes had authorized such alienation only of swamp lands conveyed to the state by the federal government (Act of Sept. 28, 1850, ch. 84, 9 Stat. 519), expressly for that purpose. 166 Cal. at 591, 138 P. at 85. The inclusion of tidelands into subsequent statutes had apparently been due to the inadvertent sale of tidelands by state officials as swamp lands under the previous statutes. *Id.* at 591-92, 138 P. at 85. Thus, both swamp lands and tidelands were to be sold by the same procedure and for the identical purpose of reclamation and drainage to make them fit for agriculture. *Id.* at 592, 138 P. at 86. However, no provision had been made for segregating those tidelands never covered by water and fit only for such reclamation and agriculture from those tidelands on the shores of navigable bays, rivers,

This apparent neglect and failure even to mention the paramount interests of navigation shows that there was no intention to deal with that subject or to affect the public easement for that purpose.¹⁴⁶

Since the navigable tidelands patented under the statutes had not been legislatively determined to be freed from the trust for either of the two reasons permissible under *Illinois Central*,¹⁴⁷ the patents were consequently held to be invalid to convey the entirety of the state's interest.¹⁴⁸

Although *Illinois Central* and prior California cases furnished adequate precedent for holding the conveyances to have been absolutely invalid,¹⁴⁹ the court refused to follow those prior holdings¹⁵⁰ and made an interesting and highly sophisticated, albeit questionable and perhaps unfortunate, refinement of the *Illinois Central* requirement.

In order that "the private right of the purchaser [should] be given as full effect as the public interests [would] permit,"¹⁵¹ the court held that the patentee of navigable tidelands had received:

title to the soil, the *jus privatum*, subject to the public right . . . , and in subordination to the right of the state to take possession and use and improve it . . . , as it may deem necessary.¹⁵²

It is necessary to recall here what was said earlier in a slightly different context. A state, by its very nature, cannot hold property as a monarch may, for private or personal purposes.¹⁵³ Each state therefore succeeded to the ownership of both the personal and representative portions of the royal title in the only way it could, in a representative capacity.¹⁵⁴ Holding the entirety of the previously apportioned

and beaches. *Id.* Nor was any discretion placed in any state officer or agency to determine whether any such tidelands for which application might be made were necessary for purposes of navigation or what effect upon navigation their reclamation by a private owner might have. *Id.* at 590, 138 P. at 85.

146. *Id.* at 592, 138 P. at 86.

147. *Id.* at 592-94, 138 P. at 85-86. See text accompanying notes 121-22 *supra*.

148. *Id.* at 593-94, 138 P. at 86.

149. *Id.* at 594-96, 138 P. at 86-87.

150. *Id.* at 596, 138 P. at 87.

151. *Id.*

152. *Id.* This was simply the final, perhaps inevitable, step. The court determined the previous year in *Forestier v. Johnson*, 164 Cal. 24, 32-34, 127 P. 156, 159-60 (1912) that such lands not legislatively freed of the trust would remain subject to it, irrespective of whatever title, if any, the patentee had received. It must have seemed a simple matter to hold that title *had* passed. In *Forestier*, the defendants stipulated to the patent's validity to convey title and the question of whether or not title had in fact passed was not before the court. *Id.* at 30-31, 127 P. at 159.

153. See notes 86-95 *supra* and accompanying text.

154. This was due to their inheritance of the English common law which decreed that the sovereign power held such lands for public uses. See notes 106-09 *supra*

legal and equitable titles in the same representative manner and on the same condition that its property be used to promote the general welfare, the entire ownership, legal title as well as *all* possible uses, became *jus publicum*.¹⁵⁵

This view of the entirety of the state's interest as *jus publicum* may seem contrary to *California Fish Co.*'s direct holding of the existence of a completely alienable *jus privatum* under the California trust; however, it must be recognized that (1) ownership by the sovereign power began at opposite ends of the personal-representative continuum under the English and American trusts, and (2) although the sum total of interest represented by the *jus privatum* and the *jus publicum* is fixed, their respective contents may vary.

Under the English trust, the king began with complete legal and equitable ownership as a personal right (*jus privatum*).¹⁵⁶ A portion of his private right was later shifted to the *jus publicum* as a right held by him in a representative capacity, whose alienation into private ownership was deemed inimical to the general welfare.¹⁵⁷ Further shifting from one aspect of the dual royal title to the other, in either direction, remains within the scope of the Parliamentary equivalent of the police power.¹⁵⁸ Conversely, the independent American states began with complete legal and equitable ownership held as a representative right (*jus publicum*).¹⁵⁹ Those portions of that complete ownership for which representative ownership is determined to be unnecessary, i.e., alienation of which would not impair the requirements of the general welfare, are transferred to the *jus privatum* as state rights which are proprietary and freely alienable.¹⁶⁰ *Illinois Central* had recognized that

and accompanying text. Therefore, upon succession to the royal interest, they did so in a representative capacity.

155. See note 43 *supra*.

156. See notes 40-41 *supra* and accompanying text.

157. See notes 42-46, 106, *supra* and accompanying text.

158. See note 47 *supra* and accompanying text.

159. See notes 153-55 *supra* and accompanying text.

160. Such determinations are made, of course, by conditional limitations, but the fact that the original conditional limitations inherited from England limited public rights only to the uses of navigation and fishery did not shift the remainder of the complete ownership into the *jus privatum* where it had lain under the English trust. See note 46 *supra* and accompanying text. All elements of the complete ownership, began as *jus publicum* under the American trust. See notes 153-55 *supra* and accompanying text. But such elements are not transformed into *jus privatum* by a simple determination that the public does not presently require an enforceable right to them. Their maintenance as *jus publicum* without attached public rights may be deemed necessary to protect those elements to which the public *does* have rights. See note 174 *infra*.

the *entire* state interest could be transferred to the *jus privatum* and alienated consistently with the absolute general welfare limitation in certain special circumstances.¹⁶¹ *California Fish Co.* recognized the permissibility of a partial shift.

The patenting statutes under examination in *California Fish Co.* purported to transfer the entire state interest into the *jus privatum*.¹⁶² The court held that the statutes' failure to expressly disavow the prior general welfare requirements prevented such a shift of the entirety of the state's interest into the *jus privatum*.¹⁶³ Such a failure required the maintenance of state control over the uses made of the lands, but the court reasoned that the promotion of the general welfare by such retained state control over uses required no more than the retention of the equitable ownership. Since the statutes had also purportedly shifted the legal title into the *jus privatum*, and since its retention was viewed as non-essential to the maintenance of such state control, the legislative decision to transfer the legal title was upheld.¹⁶⁴ The patentee, as grantee of the *jus privatum*, received "naked title to the soil,"¹⁶⁵ but nothing more. In California, therefore, only the bare legal title has been transformed into *jus privatum* as regards tidelands generally. Even if that title has been alienated, the entire equitable interest remains *jus publicum*.¹⁶⁶

The unfortunate portion of the decision was that the court also held the legal owner (patentee) has a license¹⁶⁷ to use the tidelands as he sees fit,¹⁶⁸ until the state revokes the license by exercising its retained interest.¹⁶⁹ Consequently, unless the state so acts, either to "take possession and use and improve" or to merely "abate any nuisance or

161. See notes 121-24 *supra* and accompanying text.

162. 166 Cal. at 595-96, 138 P. at 87.

163. *Id.* See generally notes 143-48 *supra* and accompanying text.

164. 166 Cal. at 596, 138 P. at 87. See the latter part of note 160, *supra*.

165. 166 Cal. at 598, 138 P. at 88.

166. Nor has the bare legal title remained *jus privatum* in California tidelands. See note 174 *infra* and accompanying text.

167. See note 120 *supra*.

168. 166 Cal. at 599, 138 P. at 88.

169. *Id.* Note the similarity between this method of state retrieval of its control over the tidelands and that of *Illinois Central R.R. v. Illinois*, where the grant was held ineffective to convey more than a revocable license. See note 120 *supra* and accompanying text. Further, it must be noted that reclamation of such patented tidelands, with or without governmental approval, does not terminate the public trust easement absent a specific legislative determination that the particular lands in question are freed from the trust. *Marks v. Whitney*, 6 Cal. 3d at 261, 491 P.2d at 381, 98 Cal. Rptr. at 797. See *Newcomb v. City of Newport Beach*, 7 Cal. 2d 393, 60 P.2d 825 (1936); *Atwood v. Hammond*, 4 Cal. 2d 31, 48 P.2d 20 (1935).

purpresture"¹⁷⁰ created on patented tidelands, the reduction in the state's ability to promote the public interest is effectively reduced to the same low point where it would have been had the statutes validly authorized absolute alienation.¹⁷¹

Nevertheless, the California public was, in a sense, very fortunate. The attempted legislative determination of inutility of the lands for the trust purposes contained in the patenting statutes might well have been considered valid in its entirety. All that was lacking was an ostensible specific consideration of the unique uses which previously constituted the general welfare requirements. If such a legislative intent to change those requirements is clear, it is conclusive on the courts.¹⁷² A court that would go as far to promote and protect a private interest as the court did in *California Fish Co.* would hardly have attempted to question the validity of such a legislative determination had such been clearly stated.

The potential for such abuse has apparently been corrected by conditional limitations. As aforementioned, the 1879 Constitution protects the equitable title by requiring any navigable waters alienated by the state after that date to remain accessible for "any public pur-

170. 166 Cal. at 599, 138 P. at 88. A public nuisance is "[a]n unauthorized invasion of the rights of the public to navigate the water flowing over the soil" *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 146, 4 P. 1152, 1155 (1884). A purpresture is "[a]n inclosure by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large. It is not necessarily a public nuisance. A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever." BLACK'S LAW DICTIONARY 1401 (4th ed. 1951). If not a nuisance or purpresture, an improvement on tidelands cannot be removed without payment of just compensation. *People v. California Fish Co.*, 166 Cal. at 599, 138 P. at 88; *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 183, 50 P. 277, 285 (1897).

171. See notes 91, 104 *supra* and accompanying text.

172. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482 n.17, 476 P.2d 423, 437 n.17, 91 Cal. Rptr. 23, 37 n.17 (1970); *People v. California Fish Co.*, 166 Cal. at 597, 138 P. at 88. Further, in *California Fish Co.*, the court stated that "[i]f lands on the sea beach alone were to be considered as excluded, there would be no difficulty" *Id.* at 596, 138 P. at 87. The legislators' attempted shift of the entirety of the state's interest into the *jus privatum* was rejected solely because it also included tidelands on San Francisco and other large, populated bays, and "would produce the utmost confusion and uncertainty." *Id.* But, in present times, an exercise of the police power, to be upheld, must "not [be] arbitrary, unreasonable, or discriminatory." *Lees v. Bay Area Air Pollution Control Dist.*, 238 Cal. App. 2d 850, 857, 48 Cal. Rptr. 295, 299 (1965) (emphasis added). But no case has mentioned the applicability of this standard of review to legislative determinations concerning tidelands. See generally 11 CAL. JUR. 2d *Constitutional Law* § 178 *et seq.* (judicial review of propriety of exercises of police power).

pose."¹⁷³ A 1909 statute protects the state's legal title by banning further sales.¹⁷⁴

One cannot escape feeling, however, that such protections are tenuous if not definitely ephemeral. In truth, without constant public vigilance, they are. If, for example the statutory conditional limitation was abrogated,¹⁷⁵ *California Fish Co.* clearly shows the harm which might be done to the public interest by the alienation of "naked title to the soil" and subsequent permissive use by the private legal owner.¹⁷⁶

C. *Adequacy of the California State Ownership Interest*

The court closely restricted the patentee's vested interest to legal title. On the other hand, it failed to characterize the state's retained interest as the complete equitable ownership, although admitting the right of the state to take possession for the purpose of promoting public uses.¹⁷⁷ This omission probably resulted from a confusion of the retained state interest with the interest of the general public.

As has been shown, the public does not equitably own the foreshore,¹⁷⁸ but the original conditional limitations inherited from the common law of England decreed that the state's general welfare duty required it to permit public use of its tidelands for purposes of navigation, commerce,¹⁷⁹ and fishery. The public thus received an enforceable right to use the foreshore for those purposes.¹⁸⁰ Such a specifically enforceable power over the state's property generated the idea of a property right "in equity," and the public's permissive right to use the tidelands came to be characterized as a "public easement" for those purposes.¹⁸¹

173. See note 140 *supra*.

174. CAL. PUB. RES. CODE ANN. § 7991 (West 1968) (formerly POL. CODE § 3443a, added ch. 444, § 1, [1909] Cal. Stat. 774). However, grants-in-trust and leases are still permissible. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482 n.18, 476 P.2d 423, 437 n.18, 91 Cal. Rptr. 23, 37 n.18 (1970).

175. See note 174 *supra* and accompanying text.

176. See notes 168-71 *supra* and accompanying text.

177. 166 Cal. at 596-98, 138 P. at 87-88. In part, this may have been due to the court's obvious desire to uphold the conveyance of an interest to the patentee as best it could. The statutes purported to authorize a transfer of the entire ownership. To admit in so many words that the entire beneficial interest had been withheld by the state might have amounted to a legal failure of consideration. However, the going price was only one dollar an acre (*id.* at 591, 138 P. at 85) and a "sufficient" consideration for whatever the patentee received.

178. See notes 67-68 *supra* and accompanying text.

179. See note 107 *supra*.

180. See notes 106-09 *supra* and accompanying text.

181. In a sense, the individual's right is an easement in gross in that it is "not

Since the public "easement" was a license granted to the public by the state to utilize its property, maintenance of such public uses required retention of a state ownership interest.¹⁸² However, at that time the state's police power had developed to the point where its equitable interest (even if complete) could support only such public uses as navigation, commerce, and fishery.¹⁸³ Its interest was characterized as including no more than the administration and control of such uses.¹⁸⁴ Today the state's capability to promote the general welfare has developed to include additional modes of exercising its equitable ownership,¹⁸⁵ and is not limited by the prior "public easement" for navigation, commerce, and fishery.

This public "easement" is discretionary with the state.¹⁸⁶ Should the state's duty to promote the general welfare later require other (or no) use of the tidelands, public use for the traditional purposes could be materially altered or destroyed.¹⁸⁷ The public's license was taken subject to future defeasance should the absolute limitation require modification or abrogation of the conditional one which created it.¹⁸⁸ Consequently, although considered a "right" to use the state's interest in the tidelands, impairment or destruction of the public's license would not constitute a taking of private property within the meaning of the constitutional protections.¹⁸⁹

appurtenant to any estate in land (or not belonging to any person by virtue of his ownership of an estate in land) but a mere . . . right to use the land of another." BLACK'S LAW DICTIONARY 600 (4th ed. 1951). Thus, terming the public's right a "public easement" would, itself, seem to discount any ideas of equitable ownership by the public. But, if it is an easement, it is subject to defeasance. See note 186 *infra* and accompanying text.

182. See notes 103-09 *supra* and accompanying text.

183. On the development of the police power's permissible scope, see notes 197-99 *infra* and accompanying text. This was tacitly recognized by the court in *California Fish Co.*, when, having held tidelands patented after 1879 to be subject to "access for any public purpose," they mentioned no other possibly permissible uses than navigation, commerce, and fishery. See notes 158-61 *supra* and accompanying text.

184. 166 Cal. at 597, 138 P. at 87.

185. See notes 197-99 *infra* and accompanying text.

186. Although this is not an "express trust," (note 93 *supra*) see generally A. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS § 128.3 (Discretionary Trusts). Applying the terminology of that section to the tidelands problem: When the state uses its land for the benefit of the citizenry, an individual is entitled only to that which the state in its discretion decides to give him. Since, "[a] person has no property, no vested interest, in any rule of the common law," *Munn v. Illinois*, 94 U.S. 113, 134 (1877), the state is not prevented from changing what an individual receives, if necessary to carry out its duty to promote the general welfare.

187. See text accompanying notes 81-82 *supra*.

188. See text accompanying notes 96-97, 105-10 *supra*.

189. See notes 260-68 *infra* and accompanying text.

Therefore, the duty to promote the general welfare remains the sole absolute limitation on state use of its interest in tidelands. Fortunately, perhaps fortuitously, that state ownership interest has remained adequate in the greater part of California's tidelands¹⁹⁰ to meet today's general welfare requirements, if only those requirements be clearly shown.

V. REDEFINING THE REQUIREMENTS OF THE GENERAL WELFARE

A. *The Permissible Scope of a Redefinition*

The state interest in tidelands which are either still in absolute state ownership or in the legal ownership of a patentee contains a *jus publicum* which, at a minimum, includes the entire equitable interest.¹⁹¹ Since the only absolute restriction on the state as to how it utilizes its interest is that it promote the general welfare, one is naturally led to wonder why the original trilogy of navigation, commerce, and fishery, as the only uses of tidelands to which public rights were required by the general welfare, has not been changed in over 120 years.

Of course, many have believed that the public rights are immutably fixed to those three uses and no others,¹⁹² but these are lands "the government of which, from the very nature of things, must vary with varying circumstances,"¹⁹³ and police power determinations as to their mode of utilization must "meet the reasonable current requirements of time and place and period in history."¹⁹⁴

Early in California history, the motivation to effectuate any change in public rights was probably lacking. The population was sufficiently small that competition for the use of the tidelands was weak and the threat of their irretrievable destruction by the forces of man was neither great, widespread, nor apparent. It may well have seemed rational then to believe that navigation, commerce, and fishery were the only uses of the foreshore to which the public required enforceable rights. The additional belief that the general welfare necessarily required the economic development of the state also militated against the granting of any new public rights in the foreshore which could have retarded that development.¹⁹⁵ But the lack of *incentive* in those earlier

190. See note 268 *infra*.

191. See note 166 *supra* and accompanying text.

192. This belief is still held by some. See note 236 *infra*.

193. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 460 (1892).

194. Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 522, 370 P.2d 342, 346, 20 Cal. Rptr. 638, 642 (1962).

195. See notes 127-28, 130-32 *supra* and accompanying text.

days to add more humanistic public rights to the working terms of the tidelands trust only partially explains why until recently there was no *attempt* to add such additional rights. In truth, until recently the paramount reason why purely environmental considerations had never been implemented into enforceable public trust uses was that the scope of the police power was not adequate to do so.¹⁹⁶

Although securing the general welfare is the real object of the police power,¹⁹⁷ "[i]n its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for 'the general welfare.'"¹⁹⁸ It was believed that only through the promotion of those four objectives could the general welfare be subserved.¹⁹⁹ With the advancement of society, however, the interpretation of the law has changed and the general welfare of the people is now one of the legitimate, *independent* objectives of the police power.²⁰⁰ It has long been settled that the concept of the general welfare extends to regulations to promote the economic welfare,^x public convenience, and general prosperity of the community.²⁰¹

Although the traditional view had been that the police power could not be exercised for purely aesthetic objects, regulations having an incidental aesthetic effect were often sustained on other grounds.²⁰² The requirement that there be an adequate and independent non-aesthetic purpose for such regulations to be sustained was severely limited by the United States Supreme Court's decision in *Berman v. Parker*:²⁰³

[T]he concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.²⁰⁴

196. See notes 197-99 *infra* and accompanying text.

197. *East New York Sav. Bank v. Hahn*, 326 U.S. 230, 232 (1945).

198. *Miller v. Board of Pub. Works*, 195 Cal. 477, 485, 234 P. 381, 383 (1925).

199. *Id.*

200. *In re Kazas*, 22 Cal. App. 2d 161, 166, 70 P.2d 962, 964-65 (1937).

201. *Miller v. Board of Pub. Works*, 195 Cal. at 485, 234 P. at 383; *accord*, *Chicago, B. & O. Ry. v. Illinois ex rel. Drainage Comm'rs*, 200 U.S. 561, 592 (1906).

202. See generally Rodda, *The Accomplishment of Aesthetic Purposes Under the Police Power*, 27 S. CAL. L. REV. 149 (1954) and the cases discussed therein. See also 26 CALIF. L. REV. 155 (1937).

203. 348 U.S. 26 (1954).

204. *Id.* at 33 (citation omitted).

Thus, as society "develops politically, economically, and socially, the police power likewise develops . . . to meet the changed and changing conditions."²⁰⁵ But as the California Supreme Court had pointed out even prior to *Berman*:

This apparent extension of the police power is in fact no extension at all. The police power has not expanded. Its proper exercise has always been and still is confined to regulations in the public welfare However, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to regulation in order that the general welfare may be adequately protected. *The proper application of the power cannot be measured by past precedents—the test is, of course, present day conditions.*²⁰⁶

Therefore, California's police power has developed to maintain its *ability* to promote and protect the general welfare as required by *present* circumstances. Although, under California law, "aesthetic considerations alone cannot sustain a statute or ordinance which impinges substantially upon private property rights,"²⁰⁷ in state-owned tidelands, there are no private property rights. An exercise of state police power in patented tidelands, even to achieve purely aesthetic objectives, would in no substantial way encroach upon the property rights of the patentee. His legal title continues unaffected while the state is exercising its retained trust powers.²⁰⁸ The potential scope of permissible uses under the California tidelands trust is therefore limited solely by the scope of present perceptions of the general welfare.²⁰⁹ Since the means are adequate to achieve the end, the apparent limitation is no limitation at all.

B. *Prior Ad Hoc Redefinitions*

It seems appropriate to ask, therefore, not only why the legislature

205. *Miller v. Board of Pub. Works*, 195 Cal. at 484, 234 P. at 383.

206. *Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co.*, 11 Cal. 2d 634, 644, 82 P.2d 3, 9 (1938) (emphasis added).

207. *City of Santa Barbara v. Modern Neon Sign Co.*, 189 Cal. App. 2d 188, 197, 11 Cal. Rptr. 57, 62 (1961).

208. *Newcomb v. City of Newport Beach*, 12 Cal. 2d 235, 239, 83 P.2d 21, 23 (1938); *People v. California Fish Co.*, 166 Cal. at 599, 138 P. at 88 (1913).

209. Nor could the state be equitably estopped to assert the continued applicability of the public trust to patented tidelands for purposes other than navigation, commerce, and fishery. Although, in extreme cases, estoppel will be granted, the state must be found guilty of either (1) an express intention to deceive, or (2) a careless and culpable negligence sufficient to amount to constructive fraud. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 489-91, 476 P.2d 423, 442-44, 91 Cal. Rptr. 23, 42-44 (1970). Further, even in the absence of *any* state exercise of its trust powers, such sovereign lands are not, in California, subject to the acquisition of private rights by adverse possession. *United States v. Gossett*, 416 F.2d 565, 569 (9th Cir. 1969).

has failed to extensively modify the original public uses in over 120 years, but also *how* it managed to avoid the necessity of making *any* such modifications.

The principal reason a redefinition of the requirements of the public welfare was so long avoided was the inherent expansiveness of the terms "navigation, commerce, and fishery." In essence, as the requirements of the general welfare changed, and the police power developed in a parallel fashion to maintain its ability to meet those demands, the inclusiveness of the traditional purposes was judicially expanded. Thus, as the general welfare developed a need for a public right to recreation as well as navigation, commerce, and fishery and as the police power developed a capability to meet that need, the judicial definition given "navigation" was expanded to include recreational navigation.²¹⁰ Prior to *Marks*, this expansion of the permissible content of the three traditional public uses had advanced to the point where a particular usage would be upheld if it were (1) for a public purpose, and (2) either incidental, necessary, or merely convenient for the promotion and accommodation of the directly water-related uses.²¹¹ These two requirements were themselves "stretched" in turn to uphold specific usages of the foreshore whose connection with the traditional trust purposes could, at best, be termed fanciful.²¹²

There is no single satisfactory explanation why legislative authorization of prior "deviate" uses were not recognized by the courts to be independently permissible uses. At times, the *specific* usage was not

210. See, e.g., *Forestier v. Johnson*, 164 Cal. 24, 127 P. 156 (1912) (boating for the purpose of hunting water fowl permissibly within "navigation"); *Bohn v. Albertson*, 107 Cal. App. 2d 738, 238 P.2d 128 (1951) (purely recreational boating upheld). The "break" seems to have come in *Miramar Co. v. City of Santa Barbara*, 23 Cal. 2d 170, 175, 143 P.2d 1, 3 (1943) wherein the court first stated that "[t]he right of the public to use navigable waters . . . is not limited to any particular type of craft. Pleasure yachts and fishing boats are used for navigation and the state . . . can provide harborage for them as well as for merchant vessels and steamers."

211. *SAX*, *supra* note 19, at 536-37. Therefore, the particular usage itself did not need to be a "public use," merely a use for a "public purpose." On the importance of this in the light of today's needs in the tidelands, see note 270 *infra* and accompanying text.

212. See, e.g., *People v. City of Long Beach*, 51 Cal. 2d 875, 338 P.2d 177 (1959), wherein it was held that the construction of an armed forces Y.M.C.A. on tidelands was "not only consistent with but in direct aid of the basic trust purpose to establish and maintain a harbor and necessary or convenient related facilities for the 'promotion and accommodation of commerce and navigation'." *Id.* at 880, 338 P.2d at 179. Its purpose was "in direct aid" because the intent was held to be to "promote 'the moral and social welfare of seamen, naval officers and enlisted men, and other persons engaged in and about the harbor . . .'" *Id.*

authorized by the legislature, but rather by a local governmental unit under a state grant-in-trust or lease, in which case the traditional limitations would still have been applicable.²¹³ In those cases where the usage *had* been specifically authorized by the legislature it might have been legally supportable only under the traditional public uses.²¹⁴ The process of expanding the coverage of the traditional public uses may have been self-feeding, and courts may well have wished to avoid, if possible, a direct determination of how the original public purposes could be varied. The judges of those earlier days probably believed the purposes were then fixed to navigation, commerce, and fishery, either because the development of the police power had not then reached the necessary level to independently uphold the particular questioned usage at that time, or because they erroneously felt the purposes were completely immutable.²¹⁵

In any case, the expansion of the coverage of the traditional trust purposes allowed the specific usages made of the foreshore to keep pace with "current requirements of time and place" without a *de jure* addition of new public uses. Today's requirements, however, necessitate public rights to uses whose arguable incidental promotion of the traditional trust purposes would be untenable, even under the distorted reading of "navigation, commerce, and fishery."²¹⁶ New, independently permissible public uses are required. Certainly the non-use approved by the *Marks* dictum²¹⁷ would be beyond the scope of the traditional uses.

C. *The Recognized Need for Redefinition*

The need for such a change in public uses under the trust has been recognized by the California legislature. The Marine Resources Con-

213. See, e.g., *People v. City of Long Beach*, 51 Cal. 2d 875, 338 P.2d 177 (1959); SAX, *supra* note 19, at 536-38 wherein the author contends that such leases or grants-in-trust generally had a proviso requiring general compliance with the traditional trust terms.

214. See, e.g., *Ventura Port Dist. v. Taxpayers*, 53 Cal. 2d 227, 347 P.2d 305, 1 Cal. Rptr. 169 (1959) wherein the proposed small boat harbor may have been inadequate as a public purpose, see note 270 *infra* and accompanying text, unless considered part of a larger harbor project, benefiting a larger class of the public. *Id.* at 230, 347 P.2d at 308, 1 Cal. Rptr. at 172.

215. Frankly, such a stretching of the traditional trust purposes could not have come about unless there was a general feeling that they were immutable, or, at least, an uncertainty as to how they could be modified.

216. The public purpose of preservation as a bird sanctuary recognized by *Marks*, 6 Cal. 3d at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796, could not, in this writer's opinion, be supported by the traditional trust purposes, even in a more extended condition than they have thus far reached.

217. *Id.*

ervation and Development Act of 1967²¹⁸ declares it "to be the policy of the State of California to develop, encourage, and maintain a comprehensive, coordinated state plan for the orderly, long-range conservation and development of marine and coastal resources which will ensure their wise multiple use in the total public interest."²¹⁹ The Act further requires that various environmental and ecological considerations be implemented by that state coastal zone plan,²²⁰ including *inter alia*:

1. The conservation and utilization of the mineral and living resources of the marine environment;²²¹
2. Recreation;²²²
3. Research and education;²²³
4. Weather, climate, and the monitoring of oceanographic conditions;²²⁴ and
5. Social, economic, and legal matters relative to the conservation and utilization of ocean resources.²²⁵

The Act recognized that the general welfare called for the effectuation of environmental and ecological interests balanced against the necessary and beneficial development and use of the coastal zone and its resources.²²⁶ Legislative action, of course, is a discretionary determination of what is needed to promote the general welfare.²²⁷ The general welfare has been legislatively deemed to call for the creation of public rights to whatever uses of tidelands might be found necessary to fulfill the Act's policies.²²⁸ Although not granting public rights to any additional uses, the legislature has pledged itself to establish such

218. CAL. GOV'T CODE ANN. §§ 8800-27 (West Supp. 1972).

219. *Id.* § 8800. On the problems of coastal zone management in California, see Kruger, *Management: The California Experience*, 47 CAL. ST. B.J. 402 (1972).

220. The Plan was to be formulated by the California Advisory Commission on Marine and Coastal Resources, created by the Act (CAL. GOV'T CODE ANN. § 8810 (West Supp. 1972)), which was instructed to implement the considerations listed in the text accompanying notes 221-25 *infra*, by appropriate action. CAL. GOV'T CODE ANN. § 8825 (West Supp. 1972).

221. CAL. GOV'T CODE ANN. § 8825(d) (West Supp. 1972).

222. *Id.* § 8825(e).

223. *Id.* § 8825(j).

224. *Id.* § 8825(k).

225. *Id.* § 8825(l).

226. *Id.* § 8800. See note 227 *infra*.

227. That policy is expressed in its conditional limitations. See notes 96-97 *supra* and accompanying text.

228. See notes 220-25 *supra* and accompanying text.

new public rights as the environmental and ecological policies of the Act may require.²²⁹

D. *The Positive Duty of Redefinition*

That the California Supreme Court considered a change in the enforceable public rights in tidelands imminent after passage of the Act can be seen by noting the subsequent modification of its definition of the trust and its purposes. No longer referring to a trust for "public use for purposes of navigation and fishery,"²³⁰ the court noted in 1970 that it was a "trust for public purposes, which have traditionally been delineated in terms of navigation, commerce, and fisheries."²³¹ By relegating the traditional trust purposes to the position of a postscript the court clearly signaled its belief that the prospective delineation of the public purposes would be more expansive.

It has been noted that the police power has developed to the point where it can regulate tidelands with purely aesthetic objectives,²³² and that the legislature has determined conservation of the tidelands is required by the general welfare to an extent not yet precisely delineated.²³³ Consequently, the *Marks* court was able to recognize "the preservation of those lands in their natural state" as "a use [presently] encompassed within the tidelands trust . . ."²³⁴ The court mentioned scientific study, open space, wildlife habitat, scenic, and cli-

229. CAL. GOV'T CODE ANN. § 8801(a) (West Supp. 1972). Other states have enacted requirements that environmental factors be considered in the use and disposition of their tidelands. Oregon, for example, has declared its entire ocean shore to be a recreational area. ORE. REV. STAT. § 390.615 (1971). All improvements in that area require a permit which is granted subject to the following considerations, *inter alia*:

The public need for healthful, safe, aesthetic surroundings.

The natural, scenic, recreational and other resources in the area. *Id.* § 390.640(1).

The present and prospective need for conservation and development of those resources. *Id.* § 390.655(1).

Florida, on the other hand, requires, biological and ecological surveys to be made prior to any sale of public lands. FLA. STAT. ANN. § 253.12(4)(d) (Supp. 1972). Such a sale can only then be made if the results preclude interference with "fish, marine, and wildlife or other natural resources, including beaches and shores, to such an extent as to be contrary to the public interest." *Id.* However, neither the specific considerations composing that "public interest," nor the relative weights they are to be given, are specified.

230. *People v. California Fish Co.*, 166 Cal. at 596, 138 P. at 87.

231. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970) (emphasis added).

232. See text accompanying notes 207-09 *supra*.

233. CAL. GOV'T CODE ANN. §§ 8800, 8801(a) (West Supp. 1972). See notes 218-19, 227-28 *supra* and accompanying text.

234. 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

mactic considerations²³⁵ as being served by such preservation. By basing non-use on such environmental and ecological factors, the court was clearly recognizing conservation as an independent use within the trust and not merely as a permissible manner in which to exercise the traditional trust purposes.²³⁶ Further, the discussion of preservation as a use was merely meant to be illustrative. The court's mention of "all the public uses" presently encumbering tidelands²³⁷ demonstrates the court's belief that there are other "new" uses besides preservation within the scope of the trust.

The court did not assert that the public presently has a right to preservation of the tidelands in their natural state, in either particular parcels or the tidelands as a whole.²³⁸ The legislature declared preservation and other uses encompassed within the policies of the Marine Resources Conservation and Development Act of 1967 to be in the general welfare, but the legislature failed to specify the priority which particular uses were to be given. Rather, it committed itself to make such determinations later in the form of a comprehensive coastal zone plan.²³⁹ Nevertheless, no substantial progress had been made in meeting that commitment by the time of the *Marks* decision in 1971.²⁴⁰ The legislature's own creation, the California Advisory Commission on Marine and Coastal Resources,²⁴¹ pointed out in 1970 that "existing legislation is not adequate to protect the public interest."²⁴² The California Assembly Select Committee on Environmental Quality acknowledged an increased public awareness that "immediate action must be taken to prevent the destruction of these environmental values."²⁴³

235. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796. Compare the reasons given herein with text accompanying notes 238-42 *infra*.

236. See notes 23-24 *supra* and accompanying text. Some persons close to the *Marks* decision, it must be admitted, still believe the case merely established preservation as an acceptable variant mode of exercising the traditional trust purposes. *E.g.*, interview with J. L. Shavelson, Cal. Ass't Att'y Gen. and member of the state amicus party in *Marks*, in Los Angeles, California, Feb. 9, 1973. However, these parties are unable to explain why the court failed to recognize a public right, even of indeterminate relative weight vis-à-vis the more customary modes of exercising the traditional trust purposes, to the use of preservation. Again, see notes 24-25 *supra* and accompanying text.

237. 6 Cal. 3d at 260, 491 P.2d at 380, 98 Cal. Rptr. at 796.

238. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796. See notes 24-25 *supra* and accompanying text.

239. CAL. GOV'T CODE ANN. §§ 8800, 8801(a) (West Supp. 1972).

240. See note 14 *supra*.

241. See note 220 *supra*.

242. See note 13 *supra*.

243. See notes 218-29 *supra*.

As Professor Sax has indicated, the court would be unwilling to establish guidelines for the implementation and relative priorities of new public uses required by the redefined public interest *if* the decision could be passed back to the more representative forum of the legislature for resolution.²⁴⁴ By the dictum, the *Marks* court was reminding the legislature of its failure to meet its self-imposed commitment. To assure the legislature that it had the power to augment the existent public uses as might be required by the Act's policies, the court noted that:

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another.²⁴⁵

To emphasize the legislature's role as the proper forum for such determinations, the court pointed out that "[i]t is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified . . . and to take the necessary steps"²⁴⁶

The reason for the court's attempt to prod the legislature was its continued failure to enact the conditional limitations required to implement its previously declared policies. This legislative delay was fast approaching the point of harming the public welfare and thus violating the absolute limitation on state authority.²⁴⁷ Behind that warning was the implied threat that the court could not permit the state to violate the absolute limitation on its authority, that there *are* limits which the court would impose and that the situation was very close to demanding a judicial delineation of minimum standards.²⁴⁸

E. Subsequent Progress Toward a Redefinition

On November 7, 1972, the court received what may be, temporarily at least, an adequate response to its call for action from an even more representative forum than the legislature. Acting through the initiative process, the people of California remedied the failure of their legislators to redefine the requirements of their welfare and passed the

244. SAX, *supra* note 19, at 558.

245. 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796 (citations omitted).

246. *Id.* at 260-61, 491 P.2d at 381, 98 Cal. Rptr. at 797 (citation omitted).

247. *I.e.*, harmful to the extent of requiring judicial intervention to prevent the state's conduct from being ultra vires.

248. SAX, *supra* note 19, at 543. The judicially-drawn minimum standards would, of course, be within the general scope delineated by the Act's partial resolution of the political question.

Coastal Zone Conservation Act of 1972.²⁴⁹

The Act establishes a state-wide commission which must prepare, adopt, and submit to the legislature's 1976 regular session a "California Coastal Zone Conservation Plan."²⁵⁰ This plan's objectives are similar to those of the antecedent Marine Resources Conservation and Development Act of 1967.²⁵¹ If implemented, the Plan would grant public rights to new uses of tidelands insofar as it determines the permissible use or uses to be made of the foreshore.²⁵²

In the interim period between February 1, 1973, and the 91st day after adjournment of the legislature's 1976 regular session,²⁵³ virtually any development within a permit area encompassing the tidelands must be authorized by one of six regional commissions created by the Act.²⁵⁴ A permit for the dredging and filling of tidelands requires a two-thirds vote by the appropriate regional commission.²⁵⁵ The commission's approval depends upon its finding "[t]hat the development will not have any substantial adverse environmental or ecological effect."²⁵⁶ Theoretically, at least, virtually all development of the tidelands could be halted under the terms of the Act for approximately four years.²⁵⁷

Such coastal zone management plans as that required by the Act have received a fair amount of legal commentary in recent years.²⁵⁸

249. CAL. PUB. RES. CODE ANN. §§ 27000-27650 (West Supp. 1973).

250. *Id.* § 27312.

251. Compare *id.* § 27302(a)-(d) with CAL. GOV'T CODE ANN. §§ 8825(d)(e), (j)-(l) (West 1964). Initiative measures cannot be legislatively altered unless therein provided. CAL. CONST. art. IV, § 1. The 1972 Act so provides, CAL. PUB. RES. CODE ANN. § 27650.5 [[1972] Cal. Stat. A-188], if "to better achieve the objectives" of the Act.

252. CAL. PUB. RES. CODE ANN. § 27304 (West Supp. 1973). This is, of course, a big "if." Were the legislature to reject the Plan, the situation would revert back to what it was before November, 1972. If such were the case, one might reasonably expect the court to impose its own minimal standards within the limits of the 1969 Act. See notes 247-48 *supra* and accompanying text.

253. It is on the 91st day after adjournment of the regular session that California statutes normally take effect. CAL. CONST. art. IV, § 1.

254. CAL. PUB. RES. CODE ANN. §§ 27400-27405 (West Supp. 1973). Repairs and improvements not over \$7,500 to existing single-family residences are excepted (*Id.* § 27405(a)), as is maintenance dredging of existing navigation channels under permit from the United States Army Corps of Engineers. *Id.* § 27405(b).

255. *Id.* § 27401(a).

256. *Id.* § 27402(a).

257. See notes 254-56 *supra* and accompanying text.

258. *E.g.*, UNIVERSITY OF MAINE, *supra* note 6; Heath, *Estuarine Conservation Legislation in the States*, 5 LAND & WATER L. REV. 351 (1970); Knight, *Proposed Systems of Coastal Zone Management: An Interim Analysis*, 3 NAT. RES. LAW. 599 (1970); Note, *Coastal Zone Management—The Tidelands: The Legislative Apathy vs. Judicial Concern*, 8 SAN DIEGO L. REV. 695 (1971).

It is recognized that these plans almost invariably encounter serious difficulties in implementing their objectives since they are inadequately funded and cannot meet the expense required by large scale exercises of state eminent domain.²⁵⁹

The California Constitution requires compensation to be paid not only for the "taking" of private property for public use, but also for its "damaging."²⁶⁰ The amount of compensation is determined by the diminution in market value of the interest taken or damaged.²⁶¹ Thus, the implementation of new public uses within the tidelands would seem to damage the bare legal title of a patentee.²⁶² But, in fact, the patentee's legal title would not be affected although his license to use²⁶³ the tidelands would be revoked by such state action. Such an exercise by the state of its absolute equitable interest would not be actionable under the doctrine of *damnum absque injuria* if carried out by a private party similarly situated.²⁶⁴ The constitutional provision has not been construed as creating a new right to recovery in the private property owner,²⁶⁵ but simply as ensuring his ability to recover against the state.²⁶⁶ Therefore, no cause of action nor right to compensation would lie against the state for whatever use it chose to make of its retained interest in patented tidelands.²⁶⁷

259. UNIVERSITY OF MAINE, *supra* note 6, at 531.

260. "Private property shall not be taken or damaged for public use without just compensation having first been made . . ." CAL. CONST. art. I, § 14 (West 1954). The Federal Constitution imposes on the states no liability for damage without taking, in spite of an increasingly liberal expansion of the concept of taking. *See generally* Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954). The California provision alone, then, need be dealt with herein.

261. *Rose v. State*, 19 Cal. 2d 713, 739, 123 P.2d 505, 519 (1942).

262. Damage is not compensable if it results from a valid police power regulation of private property. *Eminent Domain—Policy and Concept*, *supra* note 260, at 608. Logically, the implementation of new public uses would not merely be a police power regulation of private property, but a "public improvement" of the state's interest which gives rise to compensation if damaging the patentee's legal title. *Id.* *But see* note 120 *supra* and notes 264-67 and accompanying text *infra*.

263. *See* note 120 *supra*.

264. "[T]he doctrine of *damnum absque injuria* . . . means merely that a person may suffer damages and be without remedy because no legal right or right established by law and possessed by him, has been invaded . . ." *Rose v. State*, 19 Cal. 2d 713, 729, 123 P.2d 505, 515 (1942).

265. *Youngblood v. Los Angeles County Flood Control Dist.*, 56 Cal. 2d 603, 608, 364 P.2d 840, 842, 15 Cal. Rptr. 904, 906 (1961); *Archer v. City of Los Angeles*, 19 Cal. 2d 19, 24, 119 P.2d 1, 4 (1941).

266. *See* cases cited in note 265 *supra*.

267. Of course, however, "[t]he constitutional requirement of due process of law . . . applies in every case at the exertion of governmental power." *Chicago, B. & Q. R.R. v. Illinois*, 200 U.S. 561, 593 (1906).

Since patented and absolutely state-owned tidelands make up the greater part of the state's foreshore,²⁶⁸ the tidelands trust may permit California's Coastal Zone Conservation Plan to be more than adequately effective at a more than acceptable cost.²⁶⁹

As *Marks* has tacitly acknowledged, *any public purpose*, even complete non-use, is within the terms of the tidelands trust and is capable of being made subject to a public right if deemed requisite for the general welfare.²⁷⁰ Since the state's interest in most tidelands is still sufficient to exercise the full range of such uses without the need to pay compensation, the development of every parcel of the foreshore still encompassed by the trust could be halted at its present point indefinitely.²⁷¹ Of course, such a complete ban on development would not necessarily be best for the total public interest.²⁷² However, such restriction as should be made would also have an incidental effect on the development of private property inland, even were it otherwise completely unrestricted.²⁷³ How far inland the effect would carry with

268. The State Lands Commission estimates that there are approximately 125 square miles (80,000 acres) of patented tidelands in California, extending along several hundred miles of the state's coastline. See Taylor, *Patented Tidelands: A Naked Fee?*, 47 CALIF. ST. B.J. 420, 423 (1972). The exact extent of tidelands still in absolute state ownership was unavailable to this writer, but, of the 1,087 miles of "coastline," the state still owns about 408 miles. Los Angeles Times, Feb. 3, 1973, § I, at 1, col. 8. Whether this "coastline" includes tidelands was not therein made clear. However, the only tidelands not either patented or state-owned would be those relatively small parcels which have been legislatively determined to be freed from the trust, or which have been granted in trust to smaller governmental entities. The remainder would still be subject to an adequate state ownership interest.

269. Being able to implement new public uses in what appears, at a minimum, to be the foreshore of three-quarters of the state's coastline (*supra* note 268), without any need to pay compensation (*supra* notes 260-67 and accompanying text), is not all this signifies. See note 275 *infra* and accompanying text.

270. The police power, of course, must be exercised for public purposes only, *Binford v. Boyd*, 178 Cal. 458, 461, 174 P. 56, 58 (1918), and a public purpose is merely one which "has for its objective the promotion of the public health, safety, morals, [or] *general welfare* . . ." BLACK'S LAW DICTIONARY 1394 (4th ed. 1951) (emphasis added). Therefore, the duty of the state in exercising its police power to determine the use made of tidelands does not *require* any public use. Complete non-use, if fitting within the above definition of a public purpose, is also permissible.

271. See notes 182-89 *supra* and accompanying text.

272. See, e.g., the recognition of the need for balancing conservation and necessary development contained in the Marine Resources Conservation and Development Act of 1967, CAL. GOV'T CODE ANN. § 8825(d) (West Supp. 1972). See text accompanying note 221.

273. Since activities on the littoral property almost invariably revolve about some use of the adjoining tidelands whether recreational or commercial, any prohibition of that use in the tidelands in question would seriously hamper, if not effectively eliminate, the inland activity.

significant force is, as yet, undetermined.²⁷⁴ But if such indirect regulation were of any real import, its minimal cost alone would become significant.²⁷⁵

CONCLUSION

The uses to which California's tidelands are put can be modified to accommodate whatever particular usage is deemed necessary to promote the general welfare of the people.²⁷⁶ The need for a redefinition of the requirements of that welfare in light of today's needs has been recognized.²⁷⁷ Moreover, significant action is again being taken to effectuate that reevaluation,²⁷⁸ with the obligation imposed on the state to continue it to completion.²⁷⁹ The implementation of environmentally-based public uses in the tidelands, together with a complementary regulatory, or zoning, plan inland, would provide the best possible protection of the public interest in California's most unique natural resource: its irreplaceable coastal zone.

The ability is present. The need is recognized. But whether or not the general welfare will be adequately served along the shore depends on whether it is *accurately* defined by the legislature both in the immediate and more distant future. Further, the requirements of the public welfare, once accurately set forth, will not remain so untended. It is the people of California who must remain vigilant to ensure that the legal definition of their requirements keeps pace with their actual needs and desires.²⁸⁰

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274. But the inland extent of this effect has not, it seems, been adequately examined to permit definitive statement.

275. Since the initial, direct "restriction" on the tidelands would be possible at little or no cost, virtually any *real* inland effect would be significant. This is not to say, however, that such an effect would necessarily be minimal. The same considerations which apply to the situations described in note 273 *supra* apply as well to land further inland. The question to be resolved is how quickly, or slowly, the effect dissipates as one moves inland. It may well be that the significant effect would be limited to immediate littoral property. The possibility of a more extensive influence cannot as yet be rejected.

276. See text immediately following note 189 *supra*.

277. See notes 218-29 *supra* and accompanying text.

278. See notes 249-57 and accompanying text.

279. Even should the legislature fail to approve the Plan submitted to it under the Coastal Zone Conservation Act, the obligation which it imposed upon itself under the Marine Resources Conservation and Development Act would still be binding. See notes 218-29 *supra* and accompanying text.

280. "For protection against abuses by legislatures the people must resort to the polls, not to the courts." *Munn v. Illinois*, 94 U.S. 113, 134 (1876).