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Comments

Wherever the Water Flows: Lyon Applies the Public Trust to Non-Tidal Water

Bart Seldon*

In *State of California v. Superior Court (Lyon)*, the California Supreme Court applied California's public trust doctrine to the shores of navigable, nontidal water (the shorezone) and to some swamp and overflowed lands. The court held that the owner of marshland bordering on a navigable lake holds his land subject to the public trust, which prohibits land use "incompatible with the public's interest in the property."

The decision affects a large amount of land. Four thousand miles of shoreline along 24 navigable lakes and 31 navigable rivers in the state are involved. Shorezone is extremely important to the people of California for economic, recreational and ecological reasons. This Comment argues that, in view of the shorezone's value, the court was correct in applying the public trust to shorezones and to some swamp and overflowed lands. Yet in reaching the correct result, the court seriously compromised the opinion's future effect by misusing and ignor-

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2. The land between the high and low watermarks on the shores of navigable, nontidal water will hereinafter be referred to as the "shorezone." *Id.* at 233, 625 P.2d at 253, 172 Cal. Rptr. at 710 (Clark, J., dissenting). Shorezone may be distinguished from "tide lands," defined as lands between high and low tide that border on tidal waters. City of Long Beach v. Mansell, 3 Cal. 3d 462, 478 n.13, 476 P.2d 423, 434 n.13, 91 Cal. Rptr. 23, 34 n.13 (1970).
3. Swamp and overflowed lands are "unfit for cultivation by reason of their swampy character and require[ ] drainage or reclamation to render them available for beneficial use." BLACK'S LAW DICTIONARY 1298 (5th ed. 1979).
5. *Id.* at 232, 625 P.2d at 252, 172 Cal. Rptr. at 709.
6. *Id.* at 216, 625 P.2d at 242, 172 Cal. Rptr. at 699. "[A]t Clear Lake alone there is a difference of 5,000 acres in the surface area of the lake between high and low water." *Id.*
7. These functions are detailed in the amici curiae briefs of the Sierra Club and the California Department of Water Resources. See text accompanying *infra* notes 130-131.
ing existing California authority. The court also failed to articulate a principle for dealing with existing improvements in the shorezone and in swamp and overflowed lands where such improvements conflict with trust purposes.

Part I of this note discusses the Lyon opinion. Part II briefly reviews the history of the public trust doctrine from its establishment in ancient Rome to its original manifestation in California. Part III analyzes the concept of the public trust as adopted in California and argues that the shorezone and certain swamp and overflowed lands are subject to the public trust as a matter of California common and constitutional law. Part IV suggests a manner for dealing with existing uses which conflict with trust purposes. Lastly, Part V suggests that regional planning could make administration of the trust more beneficial to the public and more equitable for landowners subject to the public trust.

I

THE CASE

A. Facts

Raymond and Margaret Lyon own property on the shore of Clear Lake, several hundred acres of which are marshland. Lyon's predecessors in interest purchased the land from the State of California as swamp and overflowed land, and received patents from the state for the property. The patents did not specify a waterward boundary.

The controversy began when Lyon decided to reclaim a portion of the marsh. The California Department of Fish and Game claimed that the state owned the marsh to the high water mark and therefore refused to issue him a permit for levee repair. Lyon filed a quiet title action against the state seeking title to the low watermark; the state cross-complained to quiet title in the state between the high and low watermark land to seek a declaration of public trust over the land in question.

10. Lyon, 29 Cal. 3d at 215, 625 P.2d at 241, 172 Cal. Rptr. at 698.
11. Id.
12. Id. The complaint named the California Department of Fish and Game. Lyon also named the California State Lands Commission, which has jurisdiction over the beds of navigable waters owned by the state or in which the state claims an interest. Id. at n.1, 625 P.2d at 241 n.1, 172 Cal. Rptr. at 698 n.1.
13. Id. at 215, 625 P.2d at 242, 172 Cal. Rptr. at 699. The County of Lake, grantee in trust of the state's interest in the land under Clear Lake, intervened in support of Lyon's claim to ownership of the marsh to low water. Id.
The trial court granted Lyon's motion for partial summary judgment, finding that no portion of the marsh above the low watermark was state owned or subject to the public trust. It also found that the waters of Clear Lake were impressed with a public servitude for navigation so that as the water level rose, the public could navigate up to the ordinary high watermark. The state brought the case to the California Supreme Court seeking a writ of mandate.

B. Majority Opinion

The California Supreme Court looked first at Lyon's claim that the state had title only to the low watermark. Lyon argued that California, by adopting English common law as the rule of decision when it was admitted to the Union in 1850, accepted the English common law view that nontidal waters were owned by private landowners rather than by the state. Therefore, the rule should still apply except as modified by section 830 of the California Civil Code, which sets the boundary between state and private land along navigable, nontidal waters at the low watermark.

The court rejected Lyon's argument, asserting that California had not adopted the portions of English common law that were inapplicable to local conditions. The English common law rule was developed in a country where all navigable rivers are tidal rivers, but California and much of the United States contain navigable rivers and lakes that are nontidal. Given the physical dissimilarities between the United States and England, the United States Supreme Court long ago ruled that states were free to claim ownership of navigable, nontidal waters up to the high watermark. The California Supreme Court ruled that California had done so, noting the adoption of section 830 as support

14. The County of Lake joined in Lyon's motion for partial summary judgment as to the determination that the state never owned the land above the low watermark. Id.
15. Id. at 215-16, 625 P.2d at 242, 172 Cal. Rptr. at 699.
16. Id. at 216, 625 P.2d at 242, 172 Cal. Rptr. at 699.
17. Id.
18. Id. at 217, 625 P.2d at 242-43, 172 Cal. Rptr. at 699-700.
19. Id.
20. Id. at 220, 625 P.2d at 244, 172 Cal. Rptr. at 701-02.
21. Id. at 218-19, 625 P.2d at 243-44, 172 Cal. Rptr. at 700-01.
22. Id. at 219, 625 P.2d at 244, 172 Cal. Rptr. at 701 (citing Barney v. Keokuk, 94 U.S. 324, 338 (1876)).
23. Id. at 222, 625 P.2d at 246, 172 Cal. Rptr. 703. Lyon argued that the U.S. Supreme Court cases rejecting the English common law should not be considered in deciding whether California adopted the rule because they were all decided after California had entered the Union. The California Supreme Court rejected this argument by concluding that the cases showed the inapplicability of the English rule to the situation in California. Since the English rule was inappropriate at the time California entered the Union, it did not become the law of the state. Id. at 220 n.7, 625 P.2d at 245 n.7, 172 Cal. Rptr. at 702 n.7. The court also noted that a number of states had rejected the English rule prior to California's admission.
for its conclusion. If, as Lyon would have it, California had recognized in 1850 that all navigable, nontidal waterways were owned privately, then the adoption of section 830 in 1872 would have deprived those riparian owners of their property rights between the low watermark and the center of the river.

The majority concluded that the legislature intended to grant the land between high and low watermarks to the riparian landowners. Thus, the court rejected the State of California's argument that section 830 is a rule of construction to be used only in situations where the land grant did not specify a waterward boundary, and instead interpreted the law as a grant of property.

The majority then concluded that land transferred to riparian landowners under section 830 remains subject to the public trust. The majority relied upon a United States Supreme Court case, *Illinois Central R.R. Co. v. Illinois*, rather than on a provision of the California Constitution guaranteeing the right to navigation. In *Illinois Central*, the Supreme Court held that the public trust applies to waterways that are navigable in fact. As Clear Lake is navigable, the California Supreme Court held that the state originally held title to the shorezone in trust for the people of California and any grant made by the state was subject to the public trust unless specifically made to promote trust purposes. Thus, Lyon's land might still be found free of the public trust if the court interpreted section 830 to convey the shorezone for public trust purposes. Using the standard that "a statute authorizing

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24. *Id.* at 219, 625 P.2d at 244, 172 Cal. Rptr. at 701 (citing Carson v. Blazer, 2 Binn. 475, 484-86 (Pa. 1810); Cates v. Wadlington, 12 S.C.L. (1 McCord) 580, 582 (1822).

25. *Id.* at 221, 625 P.2d at 245, 172 Cal. Rptr. at 702.

26. *Id.* at 226, 625 P.2d at 248, 172 Cal. Rptr. at 705. Prior to Lyon, courts were divided on the question of whether § 830 was intended to be a grant of property. Until 1970, the Attorney General took the position that § 830 meant the state owned only to the low watermark. In 1970, this position was reversed, and the Attorney General asserted that the state owns the land to the high watermark. *Id.* This reversal in the Attorney General's position was not communicated to the California State Lands Commission until 1977. 

27. *Id.* at 229, 625 P.2d at 248, 172 Cal. Rptr. at 705. It also noted that both Montana and North Dakota enacted statutes similar to § 830, and both interpret their statutes to convey shorezone title to riparian landowners.

28. 146 U.S. 387 (1892).

29. *Lyon*, 29 Cal. 3d at 227, 625 P.2d at 249, 172 Cal. Rptr. at 706. The State of California argued that CAL. CONST., art. X, § 4, mandated that Lyon's property be subject to the public trust. For a discussion of this provision's effects on the public trust, see text accompanying *infra* notes 103-107.

30. 146 U.S. at 436-37.

31. *Id.* at 226, 625 P.2d at 248, 172 Cal. Rptr. at 705.
the conveyance of tidelands will not be interpreted to abandon the public trust unless no other interpretation is reasonably possible," the majority concluded that section 830 was not intended to grant the shorezone to riparian landowners free of the public trust.

In confirming that the shores of all navigable waters, whether tidal or nontidal, are subject to the public trust, the court adopted the wide range of trust purposes it had set forth in Marks v. Whitney. These rights "are not confined to commerce, navigation and fishing, but include recreational uses and the right to preserve the tidelands in their natural state." The Lyon court stated, "[w]e discern no valid reason why the scope of the public's right in nontidal waters should not be equally broad." Lastly, the majority held their decision did not constitute a "taking" because Lyon remained free to use his land "in any manner not incompatible with the public's interest in the property."

C. The Dissent

In a separate opinion, Justice Clark agreed with the majority that Lyon held title to his property to the low watermark, but dissented from the holding that Lyon's property is subject to the public trust. Clark argued that the holding in Illinois Central did not apply to the situation in Lyon since it extended the public trust only to lands submerged under non-tidal navigable waters. The majority opinion was therefore, in Clark's view, a major extension of the Illinois Central doctrine, rather than a simple confirmation of a public trust in all nontidal waters.

The major point of Clark's dissent was that California's longstanding policy of promoting reclamation, particularly for agricultural and residential use, conflicted with the public trust idea. Clark noted that "[r]eclamation of tidelands does not in and of itself terminate the public trust." The consequence of extending the trust at this late date, he warned, was a cloud "on thousands if not millions of land titles and

32. Id. at 231, 625 P.2d at 251, 172 Cal. Rptr. at 708.
33. Id.
34. 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).
35. Lyon, 29 Cal. 3d at 230, 625 P.2d at 251, 172 Cal. Rptr. at 708.
36. Id. The court went on to state, "Lyon's assertions in this regard imply the resurrection of the common law distinction between tidal and nontidal waters—a distinction which has been thoroughly discredited in this country. As was said in Illinois Central, when the United States rejected the English rule that admiralty jurisdiction was confined to tidewaters because it was inapplicable to the conditions in this country, 'the limitation and all its incidents were discarded.'" Id. at 230-31, 625 P.2d at 251, 172 Cal. Rptr. at 708 (quoting Illinois Central, 146 U.S. at 436).
37. Id. at 232, 625 P.2d at 252, 172 Cal. Rptr. at 709.
38. Id. at 233, 625 P.2d at 253, 172 Cal. Rptr. at 710.
39. Id. at 238, 625 P.2d at 256, 172 Cal. Rptr. at 713.
40. Id. at 235, 625 P.2d at 24, 172 Cal. Rptr. at 711.
II

LEGAL BACKGROUND OF THE PUBLIC TRUST

The concept of the public trust dates back to at least Roman times. Under Roman law, the public possessed extensive rights in rivers and seas. The public owned rivers, the sea, the land under the sea, and the seashore up to the level of the year's highest tide. It possessed a virtually unrestricted right to use the seashore and a similar right to use riverbanks limited only by the ownership interest of the property owner of the land adjacent to the riverbank. This Roman law rule was modified when introduced into Britain. The king, rather than the public, owned the sea and the "tide rivers, as far as the reach of the tide." He had the right to alienate the royal interest, or "jus privatum," in the tidelands, but his ownership was liable to the "jus publicum": "the general rights of egress and regress for fishing, trading and other uses claimed and used by his subjects." He could not convey title free from these public rights. Thus a grantee of the king held title to the tidelands subject to the public rights to naviga-

41. *Id.* at 233, 625 P.2d at 253, 172 Cal. Rptr. at 710.
43. T. COOPER, *THE INSTITUTES OF JUSTINIAN* 67-68 (3d ed. 1852). The Institutes provide:

§1 Things common to mankind by the law of nature, are . . . the seas, and consequently the shores of the sea; no man therefore is prohibited from approaching any part of the sea-shore . . . .

§2 Rivers and ports are public . . . .

§3 All that tract of land, over which the greatest winter flood extends itself, is the sea-shore.

§5 The use of the sea-shore, as well as of the sea, is also public by the law of nations; . . . for the shores are not understood to be property in any man, but are compared to the sea itself, and to the sand or ground which is under the sea.

44. *Id.* at 67-68.

§4 By the law of nations the use of the banks is as public as the rivers; therefore, all persons are at equal liberty to land their vessels, unload them, and to fasten ropes to trees upon the banks, as to navigate upon the river itself; still, the banks of a river are the property of those who possess the land adjoining . . . .

§5 The use of the sea-shore . . . . is also public . . . . and therefore any person may erect a cottage upon it, to which he may resort to dry his nets, and haul them from the water . . . .


46. R. HALL, *supra* note 45, at 121.
tion and fishing.\textsuperscript{47} Non-tidal rivers and lakes were privately owned; the public trust did not apply.\textsuperscript{48}

Early in the history of American law, courts incorporated the public trust doctrine. In \textit{Martin v. Waddell},\textsuperscript{49} the United States Supreme Court held that the citizens of each state took title to both the jus privatum and the jus publicum.\textsuperscript{50} The courts were troubled, however, by the English rule limiting the public trust to tidal waters. The English common law, in seeking to protect navigable waters, had defined the public trust in terms of tidal waters because virtually all navigable waters in England were tidal.\textsuperscript{51} The United States Supreme Court, in \textit{The Propeller Genessee Chief v. Fitzhugh},\textsuperscript{52} recognized that such an equation did not make sense in the American context. The Court noted that by 1851 "a great and growing commerce"\textsuperscript{53} was taking place on nontidal waters in the United States. The navigability of these inland lakes and rivers could not be disputed.\textsuperscript{54}

Forty years later the Supreme Court accepted the implications of \textit{The Propeller Genessee Chief} in \textit{Illinois Central R.R. Co. v. Illinois}\textsuperscript{55}; it extended the public trust to nontidal waters and required the state government to act as trustee.\textsuperscript{56} The case arose when the Illinois state legislature attempted to revoke a huge grant of submerged land in the port of Chicago made to the Illinois Central Railroad Company.\textsuperscript{57} The


\textsuperscript{48} Lyon, 29 Cal. 3d at 218, 625 P.2d at 243, 172 Cal. Rptr. at 700.

\textsuperscript{49} 41 U.S. 234, 16 Pet. 367 (1842).

\textsuperscript{50} Id. at 263, 16 Pet. at 410. \textit{See Shively,} 152 U.S. at 48-49.

\textsuperscript{51} Lyon, 29 Cal. 3d at 218, 625 P.2d at 243, 172 Cal. Rptr. at 700. There is some dispute as to whether this was actually the English rule at the time of the American Revolution, but early American courts assumed that it was. \textit{See Comment, The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right,} 14 U.C.D. L. Rev. 195, 201-02 (1980).

\textsuperscript{52} 53 U.S. (12 How.) 443 (1851).

\textsuperscript{53} Id. at 453.

\textsuperscript{54} Id. at 457.

\textsuperscript{55} 146 U.S. 387 (1892).


\textsuperscript{57} The grant "placed under the control of the railroad company nearly the whole of the submerged lands of the harbor . . .\" \textit{Illinois Central,} 146 U.S. at 450-51. This amounted to "more than three times the area of the outer harbor . . . It is as large as that embraced by all the merchandise docks along the Thames at London . . . and nearly if not quite equal to the pier area along the water front of the city of New York." \textit{Id.} at 454. California, like Illinois, had its own problems with excessive grants of trust lands. These abuses are detailed in Public Land Law Revision Commission, \textit{History of Public Land Law Development} (1968). At the California Constitutional Convention in 1879, one delegate stated: "If there is any one abuse greater than another that I think the people of the State of California have suf-
Supreme Court held the state legislature exceeded its powers in granting the land, finding that Illinois' title to the land under the navigable, non-tidal water of Lake Michigan is "a title held in trust for the people of the State," and that the grant in question was "not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public."

California courts have reached the same conclusions concerning the state's duties as trustee of the public trust, and have held that purchasers of lands susceptible to the public trust take title subject to its exercise. Unlike the U.S. Supreme Court in Illinois Central, however, California courts have not allowed a grant to be revoked.

III
ANALYSIS

The majority opinion is flawed because it fails to properly substantiate its holding that the public trust extends to the shorezone and, specifically, to certain swamp and overflowed land. Despite California's rich common law and Constitutional history regarding the public trust over these lands, the court cited only Illinois Central and out-of-state authority to support its holding. Furthermore, in its unnecessary discussion of section 830, the court complicated both the holding and future applications of Lyon.

Section A of this analysis argues that, as a matter of California common law and constitutional history, the public trust applies to the land between high and low watermarks along the shores of all water, tidal and nontidal, that is navigable by California standards. Section B argues that the public trust applies to some swamp and overflowed land.

A. The Application of the Public Trust Doctrine to Shorezone

1. California Common Law

California common law does not specifically address the question of whether the public trust applies to the shorezone of navigable, nontidal water. The applicability of the public trust can, however, be inferred 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 Debates and Proceedings of the Constitutional Convention of the State of California 1038 (1880). In 1909 the legislature passed a statute, codified as PUB. RES. CODE § 7991, prohibiting further sale of tidelands.

59. Id. at 452.
60. Id. at 453.
61. See infra text accompanying notes 63-65.
62. Lyon, 29 Cal. 3d at 227-8, 625 P.2d at 249-50, 172 Cal. Rptr. at 706-07.
ferred from the case law holdings addressing both the physical extent of trust property and the purposes of the public trust.

a. Trust property

The seminal case in California on the public trust is *People v. California Fish Co.* In *California Fish*, the California Supreme Court ruled that plaintiffs who had bought tidelands (land between high and low tide) took such land subject to the public trust. Though the case concerned tidelands, the court in its discussion quotes cases which emphasize the importance of navigation to the applicability of the public trust. The case did not discuss the English rule that the public trust is limited to tidelands, so some doubt as to the applicability of the public trust to nontidal waters remained.

*Bohn v. Albertson*, another case dealing with tidelands, helped clarify the situation. The appellate court in *Bohn* was asked to decide the applicability of the public trust to a lake created by a breach in a levee. The waters of the lake were affected by the tide, but the court did not resolve the case by simply saying that the waters were tidal and therefore the public trust applied; it decided the case based on the navigability of the water. Along the way it noted the existence of the English rule equating tidal and navigable waters, but held that the tidal character of the water, while significant, was not determinative.

Any doubt that the *Bohn* court's analysis was limited to tidal waters was eliminated by *People ex rel. Baker v. Mack.* The appellate court in *Mack* held that the public had the right "to navigate and to exercise the incidents of navigation" in Fall River, a navigable, nontidal river. In reaching its decision the court noted that the *Bohn* decision was based on the navigability of the water at issue rather than its

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63. 166 Cal. 576, 138 P. 79 (1913).
64. Id. at 597, 138 P. at 84.
65. See id. at 584, 138 P. at 82 (quoting Illinois Central, 146 U.S. at 452); id. at 593, 138 P. at 86 (quoting Oakland v. Oakland Water Front Co., 118 Cal. 118, 50 P. 285 (1897)).
67. Id. at 746, 238 P.2d at 134.
68. Id. at 747-48, 238 P.2d at 135.
69. Id. at 743-45, 238 P.2d at 132-33. Contrast this case with a pre-*California Fish* case, in which the plaintiff had claimed title to an island in the Russian River, arguing that because the stream was not navigable, the English common law rule that a landowner owned all land to the middle of a nonnavigable river should apply. *Wright v. Seymour*, 69 Cal. 122, 123, 10 P. 323 (1886). The court rejected this argument, saying that the water was tidal and therefore the plaintiff did not own anything beyond the highwater mark. Id. at 127, 10 P. at 326. Given the *Bohn* court's refusal to apply the *Wright* court's analysis to a public trust situation, it would appear that the English public trust rule did not survive *California Fish*.
70. 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971).
71. Id. at 1050, 97 Cal. Rptr. at 454.
tidal character.  

This was not the first time, however, that the California courts had dealt with the public's rights in navigable, nontidal bodies of water. The California Supreme Court was asked to consider such rights in People v. Gold Run D. & M. Co., a case predating California Fish. In Gold Run, the court enjoined defendant from dumping mining tailings into the nonnavigable American River because such tailings had been carried down that river into the navigable Sacramento River, raising the bed of the Sacramento River in places, and consequently interfering with navigation. The court held that the mining company's activities violated the public's right to use navigable waters that the state had a duty to protect as trustee for the public.

None of these cases arose in a context where the shorezone was specifically at issue, but the public trust doctrine developed in the cases logically extends to the shorezone. At English common law the public trust applied to the sea and to the surrounding tidelands. Thus when the California courts chose to apply the public trust concept to all navigable waters, it seems logical that such an application would parallel the common law and therefore include the surrounding shorezone.

This view was attacked by the Lyon plaintiffs and has been criticized by publicists. Such critical views are based on two propositions: First, prior to Lyon, public trust rights generally existed only in land to which the state had title; and Second, that the cases prior to Lyon only support a public trust right in the submerged beds of navigable waters, that is, land under water even at the low watermark.

72. "The fact that at Frank's Tract [the disputed land in Bohn] the tide ebbed and flowed was not applied by the court as a test of navigability." Id. at 1048, 97 Cal. Rptr. at 453.

73. 66 Cal. 138, 4 P. 1152 (1884).

74. Id. at 144-45, 151-52, 4 P. at 1154, 1159.

75. The Gold Run court stated:

The State holds the absolute right to all navigable waters and the soils under them . . . . [t]he soil she holds as trustee of a public trust for the benefit of the people; and she may, by her legislature, grant it to an individual; but she cannot grant the rights of the people to the use of the navigable waters flowing over it; these are inalienable. Any grant of the soil, therefore, would be subject to the paramount rights of the people to the use of the highway. And such was the doctrine of the common law. "The jus privatum," says Lord Hale, in De Jure Maris, p. 22, "must not prejudice the jus publicum, wherewith public rivers and arms of the sea are affected to public use." Id. at 151-52, 4 P. at 1159.

It is interesting to note that the court quotes language from a section of Lord Hale's treatise dealing with "[t]he right which a subject may have in the creeks or arms of the sea . . . ." i.e., the tidelands. Hale, Cap. V. Thus the court chose to apply the English definition of the public trust (aside from the tidelands limitation) to waters that the trust did not apply to at English common law.


77. Id. at 1145-47.

78. Id. at 1147-48.
In support of the first proposition, it has been argued that California Civil Code section 830, which grants landowners title to the high watermark on land bordering tidewaters and title to the low watermark on land bordering nontidal waters, "creates a presumption that trust interests and ownership interests are coextensive..."79 The initial problem with this argument is that during the nineteenth century, California sold some of its tidelands to private landowners. In California Fish and in Forestier v. Johnson,80 the California Supreme Court ruled that although the landowners took title to the tideland the state had sold them, the public trust still applied to those tidelands.81 The criticism addresses the implications of this line of cases by noting that the state has treated the sale of tide lands and the sale of shorezones differently, asserting public rights in the former even after sale, but making no similar claim as to the latter.82 The cases, however, do not support this argument. The opposite presumption is adopted; that is, that a state does not give up any sovereign power unless a statute clearly so indicates.83 Thus, in both Forestier and California Fish, the court held that the public trust applied to privately held tide lands even though, in the statute authorizing the sale, the state had failed to mention that it was retaining any navigation rights.84

Such an approach has been followed as well in cases dealing with navigable, nontidal waters. In Hitchings v. Del Rio Woods Recreation & Park Dist.,85 defendants sought to focus the appellate court's attention on their claim that they held title to the bed of the Russian River. The court refused to consider defendants' argument, stating that it was irrelevant because the "ownership of the bed is not determinative of public navigational rights."86

The second proposition, that prior California case law extended the public trust only to the submerged beds of navigable nontidal water, fares no better. In Baker, the appellate court ruled that the people of the state had the right to navigate on Fall River and all other

79. Id. at 1146.
80. 164 Cal. 24, 127 P. 156 (1912).
81. Id. at 31-32, 127 P. at 159; California Fish, 166 Cal. at 589, 138 P. at 84.
82. Note, supra note 76, at 1146-47.
83. California Fish, 166 Cal. at 592, 138 P. at 84.
84. Id. at 589-592, 138 P. at 84-86; Forestier, 164 Cal. at 33-35, 127 P. at 160. The author also suggests that the 1909 ban on the sale of tidelands strengthens the argument, apparently because the state, by not selling any tideland since 1909, has acted in accordance with the theory that public trust and state ownership are coextensive. Note, supra note 76, at 1146-47. The author does not, however, make clear why the state's policy choice not to sell certain trust land should affect the legal rule relating to the trust land the state actually has chosen to sell.
86. Id. at 571, 127 Cal. Rptr. at 837.
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navigable waters of the state up to the high water mark. The shorezone is necessarily included within this right because by definition it is the land between the high and the low water mark.

Baker dealt with public trust rights in both the submerged bed of a navigable river and its shorezone, but if there was any doubt that the rule enumerated in Baker applied to shorezones, it was resolved by Hitchings. The subject of that litigation, the Russian River, was naturally almost dry for three months of the year, but navigable in fact for the remainder. The appellate court ruled that this period was sufficient for the River to be considered navigable at law, and that public trust rights therefore applied. As the River is dry in its natural state for a portion of the year, the entire River falls within the technical definition of shorezones. Thus the Hitchings court applied the public trust doctrine to a case involving only shorezone.

88. See Hitchings, 55 Cal. App. 3d at 564-66, 571, 127 Cal. Rptr. at 832-33, 837.
89. Id. at 570-72, 127 Cal. Rptr. at 836-38.
90. The Hitchings case is complicated by the fact that beginning in the 1920's a portion of the Eel River was diverted into the Russian River so that water now flows in the Russian River year-round. Id. at 564, 127 Cal. Rptr. at 832. Having decided that the river was navigable in its natural state, the court did not reach any question of navigability of the River in its current state. Id. at 571, 127 Cal. Rptr. at 837. Because the court addressed the public's rights in the river in its natural state, when it was all technically shorezone, the conclusion that the case clearly establishes public trust rights in the shorezone is a fair one. The casenote also claims that Hitchings demonstrates that the public right to the shorezone is limited by arguing that the public was granted the right to use a Russian River beach in that case only because the beach was owned by a Park District. Note, supra note 76, at 1147 n.63 (citing Hitchings, 55 Cal. App. 3d at 572, 172 Cal. Rptr. at 838). This conclusion, however, confuses the public's right of access from the water with the public's right of access from the land.

The right of access associated with the public trust is a right to cross from one navigable body of water to another. The public is not permitted to trespass across the private land of another in order to get to any area it has public trust rights in, be it sea, river, tideland, or shorezone. See Forestier, 164 Cal. at 39-40, 127 P. at 162. The modern right of access to beaches from the landward side is based on implied dedication, not public trust. E.g., Gion v. City of Santa Cruz, 2 Cal. 3d 29, 43-44, 465 P.2d 50, 59-60, 84 Cal. Rptr. 162, 171-72 (1970).

The author cites two more cases, Gold Run and Bohn, to defend the proposition that the public trust had previously only been applied to submerged beds. Because the tailings from defendant's mining operation raised only the submerged bed of the river in Gold Run, it is argued that the doctrine there applied extends only to submerged beds. Note, supra note 76, at 1147. Yet the discussion in the case concerning the public's right to navigation suggests that the public has rights wherever the water flows, including up to the high watermark, and that any buildup of tailings either on the submerged bed or on the shorezone that interfered with the navigability of the river would violate the public's right. Gold Run, 66 Cal. at 144-46, 151-52, 4 P. at 1153-55, 1159.

Bohn, as mentioned previously, addressed a situation where a lake was created by a break in a levee. See supra text accompanying notes 66-69. In speaking of this case, the casenote asserts that "[t]he public rights in the shorezone, however, existed only while it was flooded. The owner could at any time drain the flooded shorezone lands and assert his private rights to use and occupation." Note, supra note 76, at 1148. While it is true that the owner could drain the land at any time, the court makes clear that the rule applies only in

The plaintiffs chose not to deny that the public had some rights in the shorezone; rather they sought to limit those rights to the period when the shorezone is covered with water. When the shorezone is bare, the public had no right to use it. Therefore, riparian land owners are free to reclaim the shorezone. Yet, even if the plaintiff's argument that the public has no right to use bare shorezone is correct, it does not follow that landowners have the right to reclaim the shorezone. Prior caselaw indicates that landowners have no right to obstruct waters in which the public has a right to navigate. To reclaim the land would obstruct the public's interest in the navigability of the shorezone. This argument is particularly compelling in light of currently recognized trust purposes, which include recreational boating and preservation.

91. Lyon, 29 Cal. 3d at 226-27, 625 P.2d at 249, 172 Cal. Rptr. at 706.
92. The plaintiffs' position is supported by the author of a comment in the Pacific Law Journal. This author contends that in California the public possesses a common law navigation easement in navigable, nontidal waters and public trust rights in tidal waters. The principal distinction he sees between the two public rights is the retention by riparian landowners of the right to exclude the public from dry shorezone. See Comment, California Civil Code Section 830: A Rule of Property Needed for the Protection of the Private Landowner, 9 Pac. L.J. 1011, 1024-29 (1978). The author is, however, unable to cite a California case for the proposition that the public has no right to use dry shorezone. See id. at 1025-26, n.144 & n.150. He cites Forestier for the proposition that the public has a right to use dry tidal land but the page he cites makes no specific mention of any specific public right in dry tidal land. Id. at 1027 & n.157. Rather, the court at that point declares that the public has a right to hunt on navigable waters or tide land, incident to its right to navigation. The term public trust is not mentioned. Forestier, 164 Cal. at 40, 127 P. at 162-63. Still, I would agree that Forestier establishes public rights in dry tidelands because the case does state that the landowner cannot obstruct the public's access to the tidelands. This point will be discussed later in greater detail. See text accompanying notes 86-87.

Thus, the case the author cites to prove an application of the public trust to tidelands speaks of navigational rights rather than public trust rights. In fact, the two major cases in California on the public's rights in tidelands and navigable nontidal waters use both public trust and navigational rights language. California Fish, 166 Cal. at 584, 587, 138 P. at 82, 83-84 (tidelands); Gold Run, 66 Cal. at 146, 151-52, 4 P. at 1155, 1159 (navigable, nontidal waters). If the courts had really thought that the two concepts were different, one would not expect such a commingling. The author of the comment himself has trouble telling the two apart. He includes Bohn in his discussion of navigational easements, although the case deals with tidelands. Comment, supra n.101b, at 1025, 1028. (The author of the casenote in the California Law Review makes a similar error about Bohn by citing the case as having dealt with shorezone when in fact it dealt with tideland. See supra note 90.)


94. Even where a landowner has a right to reclaim land he cannot do so if the reclamation obstructs navigation. People ex rel Roberts v. Russ, 132 Cal. 102, 106, 64 P. 111, 112-13 (1901).
b. Trust purposes

The earliest statement of the purposes of the public trust in California is contained in *Gold Run*, which stated that the public trust is "for the purposes of transportation and commercial intercourse." Any suggestion that the public trust only protected commercial waterways, however, was ended by *Forestier* which protected the public's right to hunt and fish in a shallow bay off the Napa River used solely for those purposes. In *Baker*, the appellate court further extended trust purposes to include all recreational activity. The court justified this extension by citing the increased leisure time of our society and the increased demand for recreational areas.

The latest extension of public trust purposes occurred in *Marks v. Whitney*, which recognized preservation as a trust purpose. In *Marks*, an action to quiet title to tideland, the trial court settled the boundary line between the parties, but refused to include a declaration that the tideland property was subject to the public trust in its decree. After holding such a declaration should have been included in the decree, the California Supreme Court went on to describe the public trust in its current state. The court held "[t]he 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." In addition to the public rights of navigation, commerce and fishing, public trust purposes include "the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes . . . and to use the bottom of the navigable waters for anchoring, standing or other purposes."

The court also found that preserving the lands in their natural state is a public trust purpose.

Broadening the trust purposes strengthens the rationale for hold-

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95. *Gold Run*, 66 Cal. at 146, 4 P. at 1155.
99. *Id.*
100. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.
101. *Id.*
102. 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. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.
ing land subject to the public trust. Certain lands (Lyon's, arguably) have little value for commerce or navigation. If these were the only trust purposes, there would be little reason to hold such land subject to the public trust. These same lands, however, (Lyon's, perhaps) may have great recreational or ecological value. Once recreation and ecological preservation have been recognized as public trust purposes, there is a contemporary rationale for holding the land subject to the public trust. The rationale is no longer solely based on the historical manner in which a sovereign body holds title to these lands; the rationale finds a new basis in current public policy. It is from this foundation of California's public trust doctrine that the Lyon court could have reached its decision.

2. California Constitution: Article 10, Section 4

In addition to California's public trust doctrine, the California Supreme Court could have applied the California Constitution, Article X, section 4, which provides:

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, 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 always be attainable for the people thereof.103

This provision on its face covers both tidal and nontidal waters, securing public rights for "any public purpose."104

In People v. California Fish Co.,105 the California Supreme Court considered the effects of both the common law public trust and the California Constitution. Under both lines of reasoning the court held conveyances of tideland from the state granted under acts authorizing the sale of swamp and overflowed, salt-marsh and tidelands remain subject to the public trust for navigation and fishing.106 The court reached this conclusion even though the various California statutes authorizing the

103. Cal. Const. art. X, § 4 (formerly art. XV, § 2). This section was ratified by the delegates to the 1879 Constitutional Convention. The delegates also ratified article XV, section 3, now article X, section 3, which provides in part:

Sec. 3. All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations.

104. California Fish, 166 Cal. at 587, 138 P. at 83-84; Forestier, 164 Cal. at 34, 127 P. at 160.

105. 166 Cal. 576, 138 P. 79 (1913).

106. 166 Cal. at 589-90, 138 P. at 84. The actual patent which the court considered on appeal was void, because it violated statutory and Constitutional restrictions regarding proximity to incorporated cities. The court, however, specifically stated that its conclusions were
sale of swamp and overflowed, salt-marsh and tidelands made no mention of and apparently were not concerned with promoting public trust purposes.\textsuperscript{107}

In deciding the case, the court set forth rules of construction for statutes purporting to abandon the public trust.\textsuperscript{108} These rules have been followed in subsequent California decisions\textsuperscript{109} and may be stated as follows:

1. Statutes purporting to abandon the public trust will be carefully scrutinized to ascertain the legislative intent.

2. An intent to abandon the public trust must be “clearly expressed or necessarily implied.”

3. Such an intent “will not be implied if any other inference is reasonably possible.”

4. If an interpretation is reasonably possible which would not abandon the public trust, the court will follow such an interpretation.\textsuperscript{110}

Had the Lyon court applied these rules of construction to §830, it would necessarily have concluded that the section, regardless of whether it conveyed any land at all, did so subject to the public trust, because no intent to abandon the public trust appears in §830.

The majority opinion discusses §830 and its purported effects extensively, eventually concluding that §830 \textit{granted} the shorezone to riparian landowners.\textsuperscript{111} The court could have treated §830 as a rule of construction, however, using it only to specify a low watermark boundary for Lyon’s ambiguous patents. Had the court employed §830 in this manner, as a rule of construction, it still would have found that Lyon’s predecessors took title to the low watermark under the patents from the state, and the public trust would still apply to the shorezone.

\textsuperscript{107} \textit{Id.} at 589-90, 138 P. at 84-85. The court reviewed:

Act of April 28, 1855, Stats. 1855, p. 189; Act of April 21, 1858, Stats. 1858, p. 198; amending Act of 1859, Stats. 1859, p. 340; amending and confirming Act of May 14, 1861, Stats. 1861, p. 363; Act of May 13, 1861, the first provision for reclamation districts, Stats. 1861, p. 355; Act of April 27, 1863, providing a general scheme for the sale of all state lands, including the swamp and overflowed and all other proprietary lands and also the tidelands, Stats. 1863, p. 591; Act for the reclamation of salt-marsh and tidelands, April 27, 1863, Stats. 1863, p. 684; revising Act of March 28, 1868, embracing all other classes of land belonging to the state and repealing all other laws on the subject, Stats. 1867-68, p. 507; Act of March 27, 1872, legalizing sales and patents of swamp and overflowed, salt-marsh and tidelands where mistake had been made in designating the class of land, Stats. 1871-72, p. 622.

\textsuperscript{108} \textit{Id.} at 597, 138 P. at 88.

\textsuperscript{109} \textit{See, e.g.}, City of Berkeley v. Superior Court, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980).

\textsuperscript{110} \textit{California Fish}, 166 Cal. at 597, 138 P. at 88.

\textsuperscript{111} Lyon, 29 Cal. 3d at 222-25, 625 P.2d at 246-48, 172 Cal. Rptr. at 703-05.
Technically, therefore, the discussion of § 830 as a grant of property is dicta.

Unfortunately, this extensive discussion of the effects of § 830 may severely limit the influence of the Lyon opinion. Future courts may well limit Lyon to holding the public trust applicable only to portions of the shorezone granted by § 830, in other words, those lands conveyed by patents which do not specify a high or low watermark boundary. Such an interpretation would allow decisions holding that patents to the shorezone which specify the low watermark as the waterward boundary conveyed the land free of the public trust. This potential limit on Lyon is the result of the court's unnecessary discussion of § 830.

B. The Application of the Public Trust Doctrine to Swamp and Overflowed Lands

Lyon's predecessors took title to the property as swamp and overflowed land under patents from the State of California. When the court confirmed that Lyon's land was subject to the public trust, it necessarily held that land patented as swamp and overflowed can, at least in some instances, remain subject to the public trust. The Lyon court did not, however, distinguish the swamp and overflowed lands from the other lands under navigable water that California succeeded to upon admission to the Union.

In 1850 California acquired swamp and overflowed lands under provisions of the Arkansas Act, in addition to the beds of navigable water that California succeeded to upon admission to the Union.

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112. Id. at 215, 625 P.2d at 241, 172 Cal. Rptr. at 698.
113. 9 Stat. 519 (1850). The statute provides:

[i]to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

Sec. 2 [i]t shall be the duty of the Secretary of the Interior . . . to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor, and on that patent the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: Provided, however, That the proceeds of said lands . . . shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

Sec. 3 [i]n making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is “wet and unfit for cultivation,” shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

Sec. 4 [t]he provisions of this act [shall] be extended to, and their benefit is be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

According to a General Land Office Circular dated March 17, 1896, reprinted in 43 C.F.R. § 2625.0-3(a), the Commissioner of the General Land Office sent a circular to the governors of the states to which the Arkansas Act applied. The March 17, 1896 circular describes the earlier document as:
waters, which the State acquired upon admission. By federal standards, the water over this land was not navigable because it could not be used for commercial purposes. California’s public trust applies to at least some of these lands, however, because they are navigable by state standards.\textsuperscript{114}

\textsuperscript{114} Allowing the States to elect which of two methods they would adopt for the purpose of designating the swamp lands, viz:

1. The field notes of Government survey could be taken as the basis for selections, and all lands shown by them to be swamp or overflowed, within the meaning of the act, which were otherwise vacant and unappropriated September 28, 1850, would pass to the States.

2. The States could select the lands by their own agents and report the same to the United States surveyor general with proof as to the character of the same.

The authorities of California did not adopt either method, and the passage of the Act of July 23, 1866, rendered such action on their part unnecessary.

43 C.F.R. § 2625.0-3(a). The Act of July 23, 1866 confirmed claims to swamp and overflowed land in California and directed how California should segregate such land. 14 Stat. 219 (1866).

In California, the judicial test for determining whether a certain piece of property could properly have been patented as swamp and overflowed is that “[i]f it is unfit for cultivation in grain or other staple productions by reason of the overflow, it is regarded as swamp and overflowed land.” Keeran v. Griffith, 31 Cal. 461, 465 (1866); see also Keeran v. Allen, 33 Cal. 542, 547 (1867) and Thompson v. Thornton, 50 Cal. 142, 144 (1875), affirming the test used in Griffith. This test derives from the General Land Office circular dated February 11, 1856, which instructed local registers and receivers to take testimony regarding disputes over whether land was actually swamp and overflowed. The circular directed that certain interrogatories be propounded to the witness. After stating his personal knowledge of the property, the witness was asked:

- Is or is not said land susceptible of cultivation in grain or any other staple production, by reason of a swampy and wet character?
- Is or is not said land susceptible of cultivation in grain or any other staple production, by reason of periodic and regular overflow?

W. LESTER, DECISIONS OF THE INTERIOR DEPARTMENT IN PUBLIC LAND CASES, AND LAND LAWS, 547 (1860).

114. When California was admitted to the Union in 1850, 9 Stat. 452 (1850), the State acquired title to the beds of all navigable water within its boundaries to the high watermark as a matter of equal footing with the original states. Oregon ex. rel. State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363, 374-75 (1977). The federal standard of navigability is used to determine whether California took title to the bed of a particular body of water upon admission. United States v. Holt Bank, 270 U.S. 49, 55-6 (1925). This test is applied as of the date of admission. Utah v. United States, 403 U.S. 9, 10 (1971); United States v. Oregon, 295 U.S. 1, 14-15 (1935); United States v. Utah, 283 U.S. 64, 75 (1931); Hitchings v. Del Rio Woods Recreation and Park District, 55 Cal. App. 3d at 567, 127 Cal. Rptr. at 834. “Navigability,” by the federal standard, is based on usefulness for commercial navigation. Id. at 56. According to the definition given by the United States Supreme Court in The Daniel Ball, 77 U.S. (10 Wall) 557 (1870), navigable bodies of water are those which are “used, or are susceptible of being used, in their ordinary condition, as highways for commerce.” Id. at 563; see also Holt Bank, 270 U.S. at 56, expounding on the definition of navigable bodies of water.

Although the federal standard of commercial navigability determines which lands a state takes title to on admission, the state standard of navigability determines the extent or riparian landowners’ titles, even under patents from the federal government. Hardin v. Jordon, 140 U.S. 371, 380 (1891); Packer v. Bird, 137 U.S. 661, 669 (1891); St. Louis v. Myers, 113 U.S. 566, 567 (1885). Under Corvallis Sand & Gravel Co., 429 U.S. at 372, 376 federal common law applies only to the “determination of the initial boundary between a
The additional land which California received from the federal government as swamp and overflowed land can be divided into three categories. First, some of the land lies under water which was or is navigable by California standards, although it was not navigable by federal standards in 1850. Second, other portions of the land lie under water which is not navigable by either standard, but the land is part of the shorezone surrounding navigable water. Third, some land lies under water that is neither navigable nor part of the shorezone. These areas are "true" swamp and overflowed land.

Lyon's property fell into one of the first two categories, but the court failed to specify which category was applicable. Furthermore, the court made no attempt to distinguish this property from "true" swamp and overflowed land. The mere fact that Lyon's land was patented as swamp and overflowed does not necessarily mean that the State determined it was "true" swamp and overflowed land. The court's failure to make this distinction leaves unresolved the question
of whether “true” swamp and overflowed land is held subject to the public trust. California authority reveals that the public trust, at a minimum, applies to land under water navigable by state standards and to land which is part of the shorezone.\textsuperscript{116}

California law should determine the extent of the public trust for swamps and overflowed land, as well as for tidelands and shorezones.\textsuperscript{117} Although the Arkansas Act’s statement that the proceeds from the sales of such land shall be given “exclusively, as far as necessary, to the purpose of reclaiming said land,”\textsuperscript{118} may seem to limit a State’s ability to apply its law to such land, this view was rejected in \textit{United States v. Louisiana}.\textsuperscript{119} There the U.S. Supreme Court held that swamp and overflowed lands were conveyed as an absolute gift, and the states therefore has full power of disposition over such lands.\textsuperscript{120} The Court interpreted the “as far as necessary” clause to mean that the states were given substantial discretion in the use of the granted land, to the extent that only Congress could challenge the State’s use of the funds.\textsuperscript{121} Thus, state law governs any questions dealing with land originally acquired under the Arkansas Act.

Since the extent of the public trust is determined by California law and the State holds complete control over the swamp and overflowed land once granted by the federal government, any questions regarding rights received by the landowner under patents from the State are a matter of State law. Both \textit{Forestier} and \textit{California Fish} concerned the interpretation of the statutes and code sections authorizing the sale of swamp and overflowed lands, as well as the sale of tidelands.\textsuperscript{122} In fact, the legislature originally passed the statutes to provide for the sale of swamp and overflowed land.\textsuperscript{123} \textit{Forestier} and \textit{California Fish} held

\begin{footnotes}
\footnote{116. See supra text accompanying notes 63-75.}
\footnote{117. See supra note 114.}
\footnote{118. See supra note 113 for text of Arkansas Act.}
\footnote{119. 127 U.S. 182 (1888).}
\footnote{120. \textit{Id.} at 191.}
\footnote{121. Alleged misuse of proceeds is not a justiciable matter in federal court. \textit{Id.} at 192.}
\footnote{122. \textit{Forestier}, 164 Cal. at 32-33, 127 P. at 159-60. \textit{California Fish}, 166 Cal. at 589-90, 138 P. at 84-85.}
\footnote{123. The first statutes, those of 1855 and 1858, with the amendment of 1859, provided only for the sale of swamp lands. These embraced large areas in the interior of the state, situated in the San Joaquin and Sacramento valleys, and extending down to tide water in the bay of San Francisco. There the tide flats in many places merged into them imperceptibly, making it difficult to distinguish between them. The act of May 13, 1861, was the first law providing for reclamation districts. Section 27 of this act declared that it should apply equally to tide lands and swamp lands. No law at that time authorized the sale of tide lands. The next day, by the act of May 14, 1861, all sales of tide lands made under the swamp land sale acts were ratified and confirmed, and it was also provided that thereafter any unsold tide land could be purchased under the laws for the sale of swamp and overflowed lands, referring to said acts of 1858 and 1859. The inclusion of tide lands in the laws authorizing the sale of swamp lands, thus appears to have been originally due to the fact that some of that class of land had been inadvertently sold by the officers.}
\end{footnotes}
these statutes conveyed title subject to the public trust.

These are the same statutes under which patents were issued to Lyon's predecessors. 124 Given the statutory interpretation reached in California Fish and Forestier, it is unlikely that any California court could find that the sale of marshland to Lyon's predecessors constituted a use in promotion of the public trust. Therefore, Lyon's property is subject to the public trust.

On the other hand, because "true" swamp and overflowed lands lie neither beneath navigable water, nor adjacent to it, the public trust may not appear to apply. 125 Some of the arguments made by amici curiae in Lyon, regarding modern rationales for the public trust's application to the shorezone could logically apply to "true" swamp and overflowed land. The argument against extending the public trust to swamp and overflowed land would be that such land can be reclaimed and used for agriculture or other profitable purposes. 126 The argument in favor of such an extension would be that wetlands in general per-
form an important function in maintaining fish and wildlife habitats, providing recreational, educational and scientific opportunities, and in preventing flooding.\textsuperscript{127} Furthermore, Executive Order 11990 makes the preservation of wetlands a federal policy.\textsuperscript{128} This Executive Order may show that federal intent has changed since 1850, when Congress granted the swamp and overflowed lands to the state for reclamation. None of the arguments made by \textit{amici} in Lyon regarding shorezones are decisive when applied to "true" swamp and overflowed land, but the Lyon court could have eliminated some of the uncertainty its opinion created by addressing the question of whether "true" swamp and overflowed land is subject to the public trust.

VI
WHAT ARE THE LANDOWNER'S RIGHTS?

According to the majority opinion in Lyon, the landowner retains the right to use his land in "any manner not incompatible with the public's interest in the property."\textsuperscript{129} Given the broadened nature of the purposes of the public trust, the landowner's right is presently narrowing.\textsuperscript{130} In \textit{State of California v. Superior Court (Fogerty)},\textsuperscript{131} a case decided the same day as Lyon, the California Supreme Court held that landowners who had built piers and docks to low water on Lake Tahoe could continue to use the improvements "unless the state determines, in accordance with applicable law, that their continued existence is incompatible with reasonable needs of the trust."\textsuperscript{132} This notion of "compatibility" gives little definition to the landowner's rights.

In both Fogerty and \textit{City of Berkeley}, the court emphasized that the landowner must be compensated by the state for any improvements which are appropriated by the state.\textsuperscript{133} This, however, does not resolve the question of what rights the landowner will be permitted to exercise. In order to determine what private uses may be allowed, the landowner must keep in mind the evolution of public trust purpose in California in order to avoid "incompatible" improvements.\textsuperscript{134}

The expanding concept of the public trust presents problems for a

\textsuperscript{127} Cf., Amicus Curiae Brief of Sierra Club and Natural Resources Defense Council in Support of the Petition for Writ of Mandate at 15-19; Amicus Curiae Brief of the California Department of Water Resources in Support of the Petition for Writ of Mandate at 56-114.
\textsuperscript{128} Amicus Curiae Brief of Sierra Club and Natural Resources Defense Council in Support of the Petition for Writ of Mandate at 15.
\textsuperscript{129} Lyon, 29 Cal. 3d at 232, 625 P.2d at 252, 172 Cal. Rptr. at 709.
\textsuperscript{130} In some situations, development of docks, wharves and similar improvements, motels, restaurants, shopping complexes and parking areas have been held to be within trust purposes. Martin v. Smith, 184 Cal. App. 2d 571, 7 Cal. Rptr. 725 (1960).
\textsuperscript{131} 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981).
\textsuperscript{132} Id. at 249, 625 P.2d at 261, 172 Cal. Rptr. at 718-19.
\textsuperscript{133} Id.; \textit{City of Berkeley}, 26 Cal. 3d at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338.
\textsuperscript{134} For a general discussion of the development of trust purposes in a number of juris-
private landowner attempting to comply with the law. The California Supreme Court has yet to specify what uses an owner can make of his property without running afoul of the “compatibility” standard of *Lyon* and *Fogerty*. Even more importantly, the *Lyon* court failed to indicate criteria for judging the legality of existing improvements and fills in the shorezone.

This omission by the court in *Lyon* is surprising in light of the same majority’s opinion in *City of Berkeley*.135 The case involved a quiet title action over property acquired by patents from the State under an 1870 statute authorizing the sale of lands around the San Francisco Bay.136 In cases decided in 1915 and 1968, the California Supreme Court had held that this statute conveyed tidelands to promote public trust purposes and, therefore, conveyed lands free from the public trust.137 The *City of Berkeley* court reviewed the authorizing act again and concluded this time that it was not intended to convey tidelands free from the public trust.138 The court recognized the difficult position it was in and chose to “balance the interests of the public in tidelands conveyed pursuant to the 1870 act against those of the landowners to hold property under these conveysances.”139 This balancing test is to be applied on a case-by-case basis. The public interest is greatest in property that remains appropriate for trust purposes; a landowner’s interest is greatest in property that is valueless for trust purposes because of improvements.140

The *Lyon* court failed to mandate a balancing test for the shorezone and swamp and overflowed property.141 Without any direction from the court, it is unclear what shorezone improvements will be allowed to remain and what future ones may be undertaken. The *Lyon* opinion leaves the State Lands Commission without any guidance for ruling on land use questions.142 It also fails to assist those courts re-

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135. Justice Mosk wrote the *City of Berkeley* opinion, in which Chief Justice Bird and Justices Tobriner and Newman concurred. Justice Clark dissented in an opinion in which Justices Manuel and Richardson concurred. Justice Mosk also wrote the *Lyon* opinion, with the same justices concurring as in *City of Berkeley*. Justice Clark dissented with Justice Richardson concurring in the dissent.

137. Id.
138. *Id*. at 525-34, 606 P.2d at 367-73, 162 Cal. Rptr. at 332-38.
139. *Id*. at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338. The court refused to declare all grants made under the 1870 act subject to the public trust and also declined to make its decision prospective only. *Id*.
141. This may have been because the owners of these lands cannot claim to have relied on earlier court decisions, as did landowners in *City of Berkeley*. The *Lyon* court did not make this clear, however.
142. The California State Lands Commission has “exclusive jurisdiction” over the
sponsible for reviewing decision made by the Commission.

A balancing test designed along the lines of the one used in *City of Berkeley* could properly be applied to the shorezone. It should seek to identify lands which are most useful to the public for trust purposes. Such a test, applied on a case-by-case basis, would free some of the shorezone from the public trust. This would partially dispel the cloud on titles and would similarly ease any concerns about reclaimed land.143

V

REGIONAL PLANNING AS AN AID IN ADMINISTERING THE PUBLIC TRUST

Once the public trust is established, the balancing of the public trust and the private ownership becomes an issue. Landowners wish to secure their expectations about land use in the face of an evolving and sometimes ambiguous set of trust purposes. For this reason, regional planning, along the lines provided for at Clear Lake, provide an effective means of administering the trust.

In 1973, the State of California granted “all the right, title and interest of the state held by the state by virtue of its sovereignty in and to the submerged lands in Clear Lake” to the county of Lake.144 The land was conveyed to the county in trust, subject to the condition that the county develop or provide for the development of Clear Lake “for purposes in which there is a general statewide interest.”145 Such regional planning is a sensible way to deal with much of California’s shorezone and tidelands. CAL. PUB. RES. CODE § 6301 (West 1977) grants the Commission “exclusive jurisdiction over all ungranted tidelands and submerged lands owned by the state, and of the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits, including tidelands and submerged lands or any interest therein . . . .”

143. Lyon, 29 Cal. 3d at 226, 625 P.2d at 248, 172 Cal. Rptr. at 705.
145. Id. The lands were granted subject to the following conditions:
   (a) That the lands shall be used by the county . . . for purposes in which there is a general statewide interest as follows:
      (1) For the protection of wildlife habitats, the improvement, protection and conservation of the wildlife and fish resources and the ecology of the area, the providing of open-space areas and areas for recreational use with open access to the public, the enhancement of the aesthetic appearance of the lake and the area, control of dredging or filling of the lake, or both, and prevention of pollution of the lake.
      (2) For the establishment, improvement and conduct of small boat harbors, marinas, aquatic playgrounds and similar recreational facilities, and for . . . snackbars, cafes, restaurants, motels, launching ramps and hoists . . .
      (3) For the construction . . . of public buildings . . . convention centers, parks, playgrounds . . . recreation and fishing piers . . .
   (b) The county . . . shall not at any time grant, convey, give or alienate such lands . . . for any purposes whatever; . . . the county . . . may grant franchises thereon for limited periods, not exceeding 66 years . . . and may lease the land . . . for limited periods, not exceeding 66 years, for purposes consistent with the trusts upon which the lands are held by the state, and with the requirements of
remaining shorezone. By creating a regional planning authority, or devolving the responsibility for regional planning onto an existing authority, the state can allay some portion of the landowners' fears concerning the impact of the public trust on land use.

Regional planners can allay these fears by assigning uses suited to the areas. For example, areas of the shorezone currently suited for beaches could be set aside for this use. If that were done, a landowner could be more confident that the state would not dredge his shallow, sloping beach as an aid to navigation. Similarly, a landowner wishing to build a pier can undertake the improvement with the knowledge that the regional plan, calling for piers in his shorezone area, will be respected by the State.

By clarifying the expected patterns of future use, regional planning will help secure expectations. Regional planning will not make actual exercise of the public trust rights any less harsh on the landowners, but it will give them an indication of permissible uses and improvements.

CONCLUSION

Lands between high and low watermarks along the shores of all navigable water in California are subject to the public trust. Some of this land is subject to the public trust even though it was patented as swamp and overflowed land.

Many of the lands subject to the trust have been filled or improved despite their trust status. The more equitable way to deal with these lands is to balance the interests of the public and the landowner on a case-by-case basis, as the California Supreme Court directed with tidelands in City of Berkeley.

The uncertain nature of trust purposes and their tendency to conflict with each other lead to uncertain expectations among landowners affected by the public trust. Some of this uncertainty could be dispelled by regional planning, which would give each landowner an indication of what uses he may make of his property without being found in conflict with a trust purpose.