

NOTE

Increased Public Trust Protection for California's Tidelands—*City of Berkeley v. Superior Court*

In a recent decision, the California Supreme Court held that the private owners of 15,448 acres of land beneath San Francisco Bay do not hold clear title to their land. Rather, the court declared that they hold title subject to the paramount public trust rights of the people of California. This casenote examines the City of Berkeley decision, the latest development in the continuing evolution of the public trust doctrine.

INTRODUCTION

When California was admitted to the Union in 1850, it succeeded by virtue of its sovereignty to all tidelands,¹ submerged lands² and other lands beneath navigable waters within its boundaries.³ In the same year, the federal government granted to the state all swamp and overflow lands⁴ located within Cali-

¹ Tidelands are defined as "those lands lying between the lines of mean high tide and mean low tide." *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). The *Mansell* case is discussed in Note, *Coastal Zone Management—The Tidelands: Legislative Apathy vs. Judicial Concern*, 8 SAN DIEGO L. REV. 695, 697-706, 719-21 (1971).

² Submerged lands are defined as "[l]ands seaward of the line of mean low tide." *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 473 n.13, 476 P.2d 423, 434 n.13, 91 Cal. Rptr. 23, 34 n.13 (1970). California's sovereign ownership of lands beneath the Pacific Ocean extends to three miles from the line of mean low tide. Submerged Lands Act, 43 U.S.C. § 1301 (1976).

³ *Borax Consol. v. Los Angeles*, 296 U.S. 10, 15-16 (1935); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842).

⁴ Swamp and overflow lands are lands lying above the line of mean high tide

fornia.⁵ Because the state held the swamp and overflow lands in a proprietary capacity, it was free to manage those lands as it wished. In contrast, the state held the sovereign lands—at least those tidelands and submerged lands within the costal zone, which this author will refer to as public trust lands⁶—in trust for the people of the state.⁷ This notion that the state holds certain lands as trustee for the people is the basis of the tidelands trust doctrine, the most comprehensively developed branch of the broader public trust doctrine.⁸

but which are periodically subject to extreme high tides. As used in the context of the public trust doctrine, the term “swamp and overflow lands” refers only to wetlands which are subject to periodic tidal influence, rather than to all wetlands. SAN FRANCISCO BAY CONSERVATION & DEVELOPMENT COMM’N, SAN FRANCISCO BAY PLAN SUPPLEMENT 416 (1969) [hereinafter cited as BCDC Supp.]. *But cf.* note 6 *infra*.

⁵ Swamp and Overflow Lands Grant Act of 1850, 43 U.S.C. §§ 982-984 (1976). The act was part of a federal program which transferred swamp and overflow lands in the federal public domain to certain states. Congress granted to California all such lands within the state’s borders so that the lands could be reclaimed, then used for agriculture.

⁶ In a recently released decision, the California Supreme Court greatly expanded the scope of the public trust doctrine. *State v. Superior Court (Lyon)*, 29 Cal. 3d 210 (1981). *Lyon* involved a dispute over the ownership of land located between the high and low water levels of Clear Lake, but the decision applies to all lands below the high water mark of inland navigable rivers and lakes in California. *Id.* at 216. The court held that the private title to all such lands is impressed with the public trust. *Id.* at 231.

In a companion case, the court held as a matter of law that the state was not equitably estopped to assert public trust rights in the shorezone of inland navigable waters and that the high water boundary was to be determined according to the current condition of each body of water. *State v. Superior Court (Fogerty)*, 29 Cal. 3d 240 (1981).

⁷ The state’s “ownership” of public tidelands and submerged lands (see [Cal.] Civ. Code § 670), which it assumed upon admission to the Union, is not of a proprietary nature. Rather, the state holds such lands in trust for public purposes, which have traditionally been delineated in terms of navigation, commerce, and fisheries.

City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970). *See also* *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892); *People v. California Fish Co.*, 166 Cal. 576, 584, 138 P. 79, 82 (1913).

⁸ For a discussion of the development of the tidelands trust doctrine in California case law, see Parker, *History, Politics and the Law of the California Tidelands Trust*, 4 W. ST. U.L. REV. 149 (1977); Eikel & Williams, *The Public Trust Doctrine and the California Coastline*, 6 URBAN LAW. 519 (1974); Comment, *The Tidelands Trust: Economic Current in a Traditional Legal Doctrine* 21 U.C.L.A. L. REV. 826 (1974); Comment, *Private Fills in Navigable*

The tidelands trust doctrine places a limit on the state's ability to alienate public trust lands. The state may not convey vast areas of such lands to private parties and effectively abandon its role as trustee. The landmark case of *Illinois Central Railroad Co. v. Illinois* holds that such grants are either void from inception or voidable by the legislative grantor.⁹

California courts have adopted the limitation which *Illinois Central* places upon the proper granting of lands by a legislature but have formulated a less drastic remedy. The primary California authority on the public trust doctrine is *People v. California Fish Co.*¹⁰ That case stated the general rule that an improper

Waters: A Common Law Approach, 60 CALIF. L. REV. 225 (1972); Note, *California's Tidelands Trust: Shoring It Up*, 22 HASTINGS L.J. 759 (1971). See also II OGDEN'S REVISED CALIFORNIA REAL PROPERTY LAW 1273-1302 (Cal. Cont. Educ. Bar 1975).

It has been suggested that the public trust doctrine should apply to resources other than tidelands which, because of their unique character of historical significance, deserve special protection. For instance, parklands and wildlife might be deemed to be held by the state in trust for the people. For an argument that the public trust doctrine extends to all public lands, see Wilkinson, *The Public Trust Doctrine in Public Land Law*, this issue at 269. For an overview of the development of the broader applications of the public trust doctrine, see FISH & WILDLIFE SERVICE, U.S. DEP'T OF THE INTERIOR, PUBLIC TRUST RIGHTS (1978) (a comprehensive reference to case law); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); A.W. STONE, *Public Rights in Water Uses & Private Rights in Land Adjacent to Water*, in 1 WATERS & WATER RIGHTS 177 (R. Clark ed. 1967).

For a discussion of the ancient English and Roman roots of the public trust doctrine, see Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, this issue at 195; Note, *State Citizen Rights Respecting Greatwater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571 (1971); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970).

⁹ 146 U.S. 387, 452-54 (1892). In *Illinois Central*, the legislature of Illinois had conveyed to a private company the entire waterfront of the city of Chicago, consisting of 1,000 acres. Four years later, the new legislature revoked the grant. The Supreme Court upheld the revocation, holding that the original grant had been beyond the power of the legislature. *Id.*

¹⁰ 166 Cal. 576, 598-99, 138 P. 79, 88 (1913). In *California Fish*, the court had a choice between declaring improper conveyances of public trust lands to be void or, alternatively, finding that the private grantees held absolute title. Rather than make an election between those extreme options, however, the court formulated a compromise rule: the private owners retained title to the lands, but their ownership interest was subject to a paramount right of use in the people of the state. This was an equitable result. Private owners who had

alienation of public trust lands transfers only the legal title to the land.¹¹ Thus, the court implied a reservation of a public trust interest by the state for the benefit of its people. Under the California version of the public trust doctrine, the state cannot terminate the public's interest in even small areas of public trust lands merely by conveying those lands to private purchasers. Such conveyances will pass only the legal title to the land, subject to the retained public trust easement or servitude.¹² The doctrine does not, however, absolutely prohibit the alienation of public trust lands. The transfer of lands for the purpose of improving navigation terminates the public interest in the lands conveyed, and the private transferees receive absolute title free of the public trust.¹³ This is an important exception to the general rule of *California Fish*.

In the most recent case involving the tidelands trust, *City of Berkeley v. Superior Court*,¹⁴ the California Supreme Court reaffirmed the vitality of the principles expressed in *Illinois Central* and *California Fish*. This note will focus upon the *City of Berkeley* case, deriving from it a model of analysis for future cases concerning California's tidelands trust doctrine.

purchased their lands up to 52 years before the *California Fish* decision were not totally divested of ownership. At the same time, the decision protected the public's interest in the tidal zone, a unique natural resource.

¹¹ The court held: "[The purchasers] own the soil, subject to the easement of the public for the public uses of navigation and commerce . . ." *Id.* at 599, 138 P. at 88.

¹² *Id.*

¹³ *Id.* at 585, 138 P. at 82-83; *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892); *Oakland v. Oakland Waterfront Co.* 118 Cal. 160, 183-84, 50 P. 277, 285-86 (1897); *Ward v. Mulford*, 32 Cal. 365, 372 (1867); *Eldridge v. Cowell*, 4 Cal. 80, 87 (1854). In order to preserve the public's interests in public trust lands, the courts have limited the ability of state legislatures to alienate such lands. The traditionally recognized public interests are navigation, commerce and fishing. In some instances, conveyances of public trust lands to private parties will facilitate the public interests—for example, when the lands conveyed are used to construct wharves to provide access to navigable waterways. Under those circumstances, the courts will hold that the conveyance was proper and that the grantee received title free from the public trust. For a discussion of other judicially formulated exceptions to the general rule of *California Fish*, see note 20 *infra*.

¹⁴ 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980). The court of appeal decision is reported at 147 Cal. Rptr. 113 (1st Dist. 1978).

I. LEGISLATIVE DISPOSITION PROGRAMS

A review of early legislative acts which sought to dispose of the state's interest in its public trust lands is helpful in understanding current tidelands trust law. The statutes granting or authorizing the sale of waterfront lands in California fit into two broad categories: the "general" disposition statutes (general acts) and the "special" disposition statutes (special acts). The general acts were primarily designed to promote agricultural reclamation and to raise revenue for the state through the sale of swamp and overflow lands given to the state by the federal government.¹⁵ The acts were statewide in scope, except for certain areas excluded from sale,¹⁶ and they made no reference to the public interests in the lands conveyed. The general act program was characterized by corruption and abuse. County surveyors, charged with administering the sales program, routinely classified lands as swamp and overflow when the lands being sold were obviously either tidelands or submerged lands.¹⁷ State offi-

¹⁵ The early general acts authorized the sale of swamp and overflow lands given to California by the federal government under the Swamp and Overflow Lands Grant Act of 1850, 43 U.S.C. §§ 982-984 (1976); see ch. 151, 1855 Cal. Stats. 189; ch. 235, 1858 Cal. Stats. 198; ch. 314, 1859 Cal. Stats. 340. Through these acts, the legislature sought to facilitate private reclamation and agricultural use of the lands conveyed. See notes 4-5 and accompanying text *supra*.

Later general acts included tidelands within their scope. See, e.g., ch. 352, 1861 Cal. Stats. 355; ch 356, 1861 Cal. Stats. 363; ch. 397, 1863 Cal. Stats. 591; ch. 415, 1867-68 Cal. Stats. 507 (1868); ch. 573, 1869-70 Cal. Stats. 875 (1870); ch. 425, 1871-72 Cal. Stats. 622 (1872). Both the early and the later general acts were codified in CAL. POL. CODE §§ 3440-3493½ (Deering 1899) (current version in scattered sections of CAL. WATER CODE).

¹⁶ The early general acts excluded from sale, among other areas, all lands within ten miles of San Francisco. The later general acts excluded only lands within five miles of San Francisco.

¹⁷ Several commentators have summarized the abuses which took place in classifying lands to be sold under the general acts: "[T]he county surveyors of San Mateo and Alameda counties, in particular, unblushingly certified as lands 'above low tide' thousands of acres that lay six to eighteen feet below the waters of San Francisco Bay." M. SCOTT, *THE FUTURE OF SAN FRANCISCO BAY* 4 (1963) (U. of Cal., Berkeley, Inst. of Gov'tal Studies). "[T]he states were being more than liberal in their selection of lands as swamp or overflowed; indeed they were including lands that by no stretch of the imagination could be so regarded." PUBLIC LAND L. REV. COMM'N, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 326 (1968). "If there is any one abuse greater than another that I think the people of the State of California has [sic] suffered at the hands of their lawmaking power, it is the abuse that they have received in the granting out

cials obtained favorable deals on the purchase of state land for themselves and their associates.¹⁸ As a result of these and other improper practices, ownership of most lands sold became consolidated in the hands of a few large landholders to the exclusion of the general public.¹⁹ Constitutional and statutory provisions were later adopted to prevent further sales of public trust lands by the state.²⁰

and disposition of the lands belonging to the State." DEBATES AND PROCEEDINGS, CAL. CONST. CONVENTION 1038-39, 1478-81 (1878-79) (remarks of Mr. Wyatt) (reprinted as an appendix to *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 504-06, 476 P.2d 423, 454-57, 91 Cal. Rptr. 23, 54-57 (1970)).

The improper practices connected with the sales under the general act program have caused intractable title problems for successors to such lands. For example, early cases voided conveyances of tidelands and submerged lands which had been misclassified as swamp and overflow lands and sold under the general acts. See *Kimball v. MacPherson*, 46 Cal. 103 (1873); *Taylor v. Underhill*, 40 Cal. 471 (1871); *People v. Morrill*, 26 Cal. 336 (1864). The misclassification problem is an issue in current litigation concerning certain lands in the Sacramento River Delta area. *State v. Southern Pac. Trans. Co.*, No. 277-312 (Cal. Super. Ct., Sacramento County, filed Nov. 1, 1978).

A related issue arises when it is unclear whether certain lands were public trust lands or swamp and overflow lands at the date of California statehood. See *Newcomb v. City of Newport Beach*, 7 Cal. 2d 393, 60 P.2d 825 (1936); *Perry v. State*, 139 Cal. App. 2d 379, 293 P.2d 480 (3rd Dist. 1956).

¹⁸ The legacy of corruption by state officials has been described as follows: "Not only was the state administration [of the swamp and overflow lands granted to California] woefully inefficient but its record was constantly marred by corruption. State officials soon became large holders of state lands by using the inside information their office made available to them." HISTORY OF PUBLIC LAND LAW DEVELOPMENT, *supra* note 17, at 338.

¹⁹ For the most part the states quickly disposed of their swampland grants without accomplishing the purpose for which the land had been granted. If we may judge by the records of the disposal of swamplands in . . . California the greater part of the lands went to parties who were already large investors in land which they might or might not be developing. The concentration of ownership in [California] was largely accentuated by the Swamp Land Acts. *Id.* at 181.

²⁰ At the constitutional convention of 1879, the delegates adopted two protective provisions relating to tidelands. The first, CAL. CONST. art. 10, § 3 (formerly CAL. CONST. art. 15, § 3), withholds from sale all tidelands "within two miles of any incorporated city, city and county, or town in this State." A similar limit contained in a statute had been totally ineffective to halt the sale of tidelands. See ch. 573, § 8, 1869-70 Cal. Stats. 875, 878 (1870) (amending ch. 415, § 70, 1867-68 Cal. Stats. 507, 528 (1868)). In 1909, a provision was enacted to prevent the sale of *any* state-owned tidelands in California. See CAL. PUB. RES. CODE § 7991 (West 1977) (originally enacted in ch. 444, 1909 Cal. Stats.

The special acts,³¹ on the other hand, were ostensibly designed

774). Article 10, § 3 does not prohibit the transfer of leasehold interests in the lands within its scope. See authorities cited in note 75 *infra*.

The constitutional limit of article 10, section 3 has been described as "a padlock on a treasury already plundered of its most valuable stores. More than 50,000 acres of San Francisco Bay, many of them in areas destined to be included in the corporate limits of new cities, had already passed from the state into private ownership." M. SCOTT, *supra* note 18, at 11.

Although article 10, § 3 appears to place an absolute prohibition on sales of lands within its scope, courts have recognized four exceptions to the ban on sales:

1. The state may alienate lands if:
 - (a) the legislature declares the lands to be "valueless for trust purposes";
 - (b) the lands "have been or are to be reclaimed pursuant to and in the course of a highly beneficial public program of harbor development"; and
 - (c) the lands "constitute a relatively small parcel of the total acreage involved" in the program.

City of Long Beach v. Mansell, 3 Cal. 3d 462, 486, 476 P.2d 423, 440, 91 Cal. Rptr. 23, 40 (1970); *Atwood v. Hammond*, 4 Cal. 2d 31, 48 P.2d 20 (1935). See also *County of Orange v. Heim*, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (4th Dist. 1973) (not all elements of the exception were present). This first exception is analogous to the improvement of navigation exception to the judicial limits on alienation of public trust lands. See note 13 and accompanying text *supra*.

2. The state may grant lands to local governmental entities, subject to an express trust in favor of the public. *Atwood*, 4 Cal. 2d at 38, 48 P.2d at 23. The California Legislature has made numerous grants in trust to municipalities. For example, 22% of the land under San Francisco Bay is held in trust by cities and counties in the bay area. For an inventory of all state legislative grants in trust to 1965, see JOINT LEG. COMM. ON TIDELANDS REPORT TO THE LEGISLATURE (1965). For a chronological listing of some major grants in trust, see M. SCOTT, *supra* note 17, at 117-25.

3. The state may formally transfer land pursuant to a boundary settlement agreement, where the agreement represents a "bona fide effort to establish the true boundary," for example, between state and private lands. *Mansell*, 3 Cal. 3d at 481, 476 P.2d at 437, 91 Cal. Rptr. at 37.

The State Lands Commission is authorized to administer the public trust lands still owned by the state of California, as well as the public's interest in privately owned lands which are held subject to the public trust. CAL. PUB. RES. CODE § 6301 (West 1977). The commission is also empowered to enter into land exchange agreements whereby state-owned public trust lands are exchanged for private lands of equal value. CAL. PUB. RES. CODE § 6307 (West 1977). For an argument that the termination of the public trust rights in lands exchanged pursuant to § 6307 violates sections three and four of article 10 of the California Constitution, see Martyn & Bohner, *The Loss of Public Tidelands to Private Parties Through Unconstitutional Land Trades*, 13 U.S.F. L.

to promote the private development of harbor facilities.²² Raising revenue and disposing of lands considered by the legislature to be unsuited for navigation or commerce or fisheries were incidental objectives of the special acts. These acts were narrower in geographic scope than the general acts, referring only to designated waterfront areas near seaport towns in California and authorizing the sale of areas landward of a waterfront line established by the legislature. At least with respect to the special acts relating to San Francisco, the legislature amply provided for the protection of free public access to the navigable waters of San Francisco Bay.²³ Thus, the special acts were intended to and did result in the construction of waterfront improvements benefiting the people of the state as a whole.

The California courts have drawn a distinction between the title to public trust lands conveyed under the special acts and the title to such lands conveyed under the general acts. Beginning with *Eldridge v. Cowell*,²⁴ the cases have held that private grantees under the San Francisco special acts received absolute

REV. 39 (1978).

4. The state may, under certain circumstances, be equitably estopped to challenge the validity of a transfer of public trust lands. See *Mansell*, 3 Cal. 3d at 487-501, 476 P.2d at 441-451, 91 Cal. Rptr. at 41-51. But see *State v. Superior Court (Fogerty)*, 29 Cal. 3d 240 (1981), discussed in note 6 *supra*.

These four exceptions to the prohibition of article 10, § 3 should *a fortiori* apply to sales of public trust lands prior to the enactment of article 10, § 3.

The delegates adopted a second protective provision, which provides that "[n]o individual . . . claiming or possessing the frontage or tidal lands of a . . . 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 . . .". CAL. CONST. art. X, § 4 (formerly CAL. CONST. art. XV, § 2). Two cases have suggested that article 10, § 4 constitutionalizes the body of common law relating to the public trust. See *County of Orange*, 30 Cal. App. 3d at 707, 709 n.14, 717, 106 Cal. Rptr. at 836, 839 n.14, 843; *Atwood*, 4 Cal. 2d at 42, 48 P.2d at 25.

²¹ Ch. 41, 1851 Cal. Stats. 307; ch. 160, 1853 Cal. Stats. 219; ch. 181, 1855 Cal. Stats. 226; ch. 66, 1858 Cal. Stats. 52. These acts authorized the sale of lands within the present boundaries of San Francisco.

²² See statutes cited in note 21 *supra*.

²³ See statutes cited in note 21 *supra*.

²⁴ 4 Cal. 80 (1954). A line of cases following *Eldridge v. Cowell* was approved in *People v. California Fish Co.*, 166 Cal. 576, 586, 138 P. 79, 83 (1913). See also cases cited in note 13 *supra*; *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 524, 606 P.2d 362, 366, 162 Cal. Rptr. 327, 331-32, cert. denied, 101 S. Ct. 119 (1980).

title, free from the public trust. Those special acts were interpreted to fall within the "improvement of navigation" exception to the general rule that legislative transfers of public trust lands pass only title subject to the public's rights.

The judicial treatment of general acts stands in sharp contrast to the treatment accorded the special acts. In *California Fish*, the supreme court determined that general acts were not enacted for the improvement of navigation.²⁵ Therefore, the court reasoned, private grantees under general acts took title subject to the public trust.²⁶

Two years later, in *Knudson v. Kearney*,²⁷ the court faced the issue of the nature of ownership of lands sold by the state under two state statutes. The first of these statutes, the 1868 act,²⁸ created a Board of Tideland Commissioners. The act empowered the board to establish a waterfront line for the city of San Francisco and to sell at public auction all lands within that waterfront line. The act contained detailed provisions for the reservation from sale of areas for streets, docks and other uses "necessary for the public convenience and the purposes of commerce." It also specified procedures to be followed by the board in the execution of the duties assigned to it.²⁹ On the whole, the purpose, terms and subsequent implementation of the act closely resembled those of the acts determined to convey absolute title by *Eldridge v. Cowell* and related cases.³⁰

The second statute, the 1870 act,³¹ which purported merely to supplement the 1868 act, differed from the earlier act in several important respects. The later act did authorize the Board of Tideland Commissioners to reserve from sale canals and basins "whenever they deem them necessary for the purposes of drainage, navigation, and the wants of commerce,"³² but the scope of the 1870 act was much broader than that of the 1868 act. It en-

²⁵ *People v. California Fish Co.*, 166 Cal. 576, 590, 597-98, 138 P. 79, 85, 88. (1913).

²⁶ *Id.* at 599, 138 P. at 88.

²⁷ 171 Cal. 250, 152 P. 541 (1915).

²⁸ Ch. 543, 1867-68 Cal. Stats. 716 (1869). This statute was necessary because the previous disposition statutes had withheld from sale all lands within five miles of the city of San Francisco. See notes 15-16 *supra*.

²⁹ Ch. 543, 1867-68 Cal. Stats. 716, 716-22 (1868).

³⁰ See note 24 and accompanying text *supra*.

³¹ Ch. 388, 1869-70 Cal. Stats. 541 (1870).

³² *Id.* § 2.

compassed all tidelands and submerged lands lying within five miles of San Francisco out to a point where the bay waters were nine feet deep at low tide.³³ Since the other provisions of the act contained few specific substantive or procedural standards, the board operated with wide discretion. The board sold many acres of tidelands into private ownership, but few of those acres were promptly reclaimed or otherwise developed by the construction of harbor improvements. In fact, most of the lands sold consisted of small, contiguous lots suitable only for residential use, with few areas actually reserved from sale for public use.³⁴ The legislature nevertheless renewed the sales program in 1874, impliedly ratifying the methods of implementation chosen by the board.³⁵

The *Knudson v. Kearney* court held that the private purchasers under both acts received absolute title, free from the public trust:

It is obvious from the provisions of the aforesaid acts of 1868 and 1870 that they were enacted in aid of navigation and for the purpose of providing for the improvement of San Francisco Bay, so as to make it more suitable for navigation. . . . Deeds made under the authority of these and similar acts do not come within the scope of the decision in . . . California Fish Co³⁶

In this one-paragraph analysis, the court applied the improvement of navigation exception to a statute very different in its terms and effect from the other special acts.³⁷ The San Francisco

³³ *Id.* § 1. The 1870 act increased the area within the jurisdiction of the Board of Tideland Commissioners to approximately 60,000 acres (93.8 square miles), many times greater than the area within the scope of the 1868 act. For a map designating the areas of San Francisco Bay sold by the board, see BCDC Supp., *supra* note 4, at 432.

³⁴ M. SCOTT, *supra* note 17, at 6.

³⁵ Ch. 611, 1874 Cal. Stats. 858. This 1874 act did not enlarge the scope of the acts of 1868 and 1870 but merely created a different agency to complete the sales program previously administered by the Board of Tideland Commissioners. See M. SCOTT, *supra* note 17, at 7.

³⁶ 171 Cal. 250, 253, 152 P. 541, 542 (1915). This holding was followed, without independent analysis, in *Alameda Conservation Ass'n v. City of Alameda*, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264 (1st Dist. 1968), which stated: "[c]onveyance of like lands [subject to the public trust] under the acts of 1868 and 1870 does in fact so terminate the trust and pass unrestricted title to the grantee [citing *Knudson v. Kearney*]." *Id.* at 287, 70 Cal. Rptr. at 265.

³⁷ The result in *Knudson v. Kearney*, 171 Cal. 250, 152 P. 541 (1915), has been much criticized:

[T]he statutes in *Knudson* reveal little if any public purpose be-

special acts³⁸ were unlike the 1870 act; they formulated a comprehensive plan for the construction of harbor facilities, and they contained relatively little area within their scope. Plainly, the main purpose of those statutes *was* the furtherance of navigation and commerce in the San Francisco Bay. Moreover, the program was carried out by the construction of the San Francisco waterfront. It was not until *City of Berkeley*—sixty-five years after *Knudson*—that the California Supreme Court analyzed the 1868 and 1870 acts in detail to determine the nature of the title which passed to private purchasers under those acts.

II. CITY OF BERKELEY V. SUPERIOR COURT

A. Facts

The Santa Fe Land Improvement Company (Santa Fe) acquired over 600 acres (approximately one square mile) of land within the boundaries of the city of Berkeley through a series of purchases between 1930 and 1951.³⁹ Title to the land was traceable to grants made by the Board of Tideland Commissioners in the 1870's pursuant to the 1870 act. The dispute centered on a seventy-nine-acre parcel which had been almost entirely reclaimed from the waters of San Francisco Bay.⁴⁰

The trial court granted Santa Fe's motion for partial summary judgment on the issue of ownership of the parcel in question,

yond raising revenue for the state. While the original act [the 1868 act] does provide for establishment [sic] of a harbor line in the city of San Francisco, allowing deeper draft vessels to use the port, its subsequent extension to lands within five miles of the city [the 1870 act] was a disposal of public land that preserved only minimal navigation access.

60 CALIF L. REV., *supra* note 8, at 251-52 (1972) (footnotes omitted). See also Comment, *San Francisco Bay: Regional Regulation for its Protection and Development*, 55 CALIF L. REV. 728, 775-77 (1967).

³⁸ See note 21 and accompanying text *supra*.

³⁹ Santa Fe owns 608 acres of the 854 acres sold by the Board of Tideland Commissioners in Berkeley. The 854 acres constitute 71% of the 2.5 mile waterfront of Berkeley. Of these 854 acres, 525 are still under water or subject to the tidal action of the bay. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 526, 606 P.2d 362, 368, 162 Cal. Rptr. 327, 333, *cert. denied*, 101 S. Ct. 119 (1980).

⁴⁰ All but a "fraction of an acre" of the parcel has been filled in. *City of Berkeley v. Superior Court*, 147 Cal. Rptr. 113, 117 (1st Dist. Ct. App. 1978), *vacated*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980).

relying upon the holding of *Knudson*.⁴¹ After a thorough examination of the facts of *Knudson*, the court of appeal reversed, concluding that the relevant language in that opinion was mere dictum and therefore not binding.⁴² The court interpreted the collective legislative purpose of the acts to be revenue-raising, rather than the promotion of any valid tidelands trust purpose.⁴³ Therefore, the court held that private grantees under *both* the 1870 act and the 1868 act took title subject to the public trust.⁴⁴

B. *The Analysis of the Supreme Court*

Utilizing its power as the highest court in the state, the California Supreme Court was able to overrule *Knudson*.⁴⁵ The court analyzed the 1870 act as if its interpretation were a matter of first impression.

The issue was whether or not the sale of the land by the California Legislature had terminated the public trust in the lands conveyed so that the recipients of the land received title free of the public trust.⁴⁶ The court focused on whether the 1868 and

⁴¹ The superior court issued its opinion in the form of a Memorandum of Decision under the title of *Murphy v. City of Berkeley*, No. 422942 (Cal. Super. Ct., Alameda County, Apr. 29, 1977). In granting Santa Fe's motion, the court stated:

Case authority in California squarely holds that conveyances pursuant to the 1868 and 1870 legislative acts of tide and submerged lands in the San Francisco Bay area terminated the public trust for commerce, navigation and fisheries, to which such lands had previously been subject, with the consequence that private grantees received unencumbered fee title thereto as of the date the conveyances were made. [citing *Knudson v. Kearney* and *Alameda Conservation Ass'n v. Alameda*]

Id. at 2. The court of appeal opinion contains a summary of the above Memorandum of Decision. *City of Berkeley v. Superior Court*, 147 Cal. Rptr. 113, 117-18 (1st Dist. Ct. App. 1978), *vacated*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980).

⁴² *City of Berkeley v. Superior Court*, 147 Cal. Rptr. 113, 122-23 (1st Dist. Ct. App. 1978); *vacated*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980).

⁴³ *Id.* at 124.

⁴⁴ *Id.*

⁴⁵ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 532, 606 P.2d 362, 372, 162 Cal. Rptr. 327, 337, *cert. denied*, 101 S. Ct. 119 (1980). The court also disapproved of *Alameda Conservation Ass'n v. City of Alameda*, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264 (1st Dist. 1968); *see note 36 supra*.

⁴⁶ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 519, 606 P.2d 362, 363,

1870 acts should be treated as general or as special acts. If they were treated as general acts, they would convey only title subject to the public trust; if treated as special acts, they would convey unrestricted title to the private grantees as of the date of purchase from the state. The court began by inquiring into the legislative intent behind the 1870 act. The court reasoned that, for the improvement of navigation exception to apply, the legislature must have intended to terminate the public trust through a plan of disposition designed to promote navigation.

The 1870 act did contain some provisions for the establishment of canals for the purposes of navigation and commerce. But it also authorized the sale of lands within an area encompassing the entire waterfront of many shoreline communities along San Francisco Bay and did not adequately provide for the reservation of areas from sale to assure public access to the bay. The available legislative history is ambiguous. There is some indication that the act was passed for the dual purposes of revenue raising and prevention of fraud in the sale of bay lands.⁴⁷

162 Cal. Rptr. 327, 328, *cert. denied* 101 S. Ct. 119 (1980).

⁴⁷ The majority relied primarily upon two items of legislative history pertaining to the 1868 and 1870 acts. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 529-31, 606 P.2d 362, 370-71, 162 Cal. Rptr. 327, 335-36, *cert. denied*, 101 S. Ct. 119 (1980). First, the court examined a letter from the Attorney General to the legislature, which was attached to a committee report recommending passage of the 1868 act. The letter stated, in pertinent part:

The State, in making this disposition of those lands, passes the title with the same disability which obtains with the State. Her purchaser can acquire from the State no such title as will enable the owner or holder of [the lands] to use them to the detriment or prejudice of commerce or navigation. For such uses the public have an easement, and the Government retains and has the authority to enforce the right.

ASSEM. SPECIAL COMM. REP. ON SAN FRANCISCO TIDELANDS 6 (Jan. 25, 1868), 2 App. to Sen. & Assem. J. (1867-68 Reg. Sess.). The court viewed this statement as an indication that the legislature intended to pass title subject to the public trust and not absolute title. However, the unambiguous terms of the 1868 act contradict that interpretation. Section 7 of the act states: "Upon a sale, the Commissioners shall sign and execute a deed of grant and release to the purchaser. *Such deed shall convey all the right, title and interest of the State of California in the premises . . .*" Ch. 543, § 7, 1867-68 Cal. Stats. 716, 720 (1868) (emphasis added). Even if the legislature had intended to sell the lands subject to the public trust, that intent would not be determinative. The important issue is whether or not the legislature intended to sell the lands for the purpose of improving navigation or furthering other public trust interests. See note 46 and accompanying text *supra*.

Since the act did not expressly terminate the public trust as to the lands conveyed thereunder, the court was unwilling to infer such an intent. The court followed a canon of strict construction:

[S]tatutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied; and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation.⁴⁸

Second, the court relied upon statements contained in the above committee report indicating that the legislature passed the 1868 act for the purpose of raising revenue. *See ASSEM. SPECIAL COMM. REP. ON SAN FRANCISCO TIDELANDS, supra* this note, at 3-4, 10. The court also cited statements made by the Governor and by the Attorney General subsequent to the passage and the implementation of the 1868 act. "[T]he results have been quite satisfactory. . . . The benefits of the measure have been very great, in removing from legislation a subject of contention and corruption, and in securing to the state, from this source, funds urgently needed for the University and other purposes." GOVERNOR'S MESSAGE, Assem. J. 49 (1869-70 Reg. Sess.), Sen. J. 51 (1869-70 Reg. Sess.). *See also* 1868-69 ATT'Y GEN. ANN. REP. 6, 1 App. to Sen. & Assem. J. (1869-70 Reg. Sess.). Although the Governor and the legislature were clearly pleased with the revenue from dispositions conducted pursuant to the 1868 act, the legislature had other goals in addition to revenue-raising when it enacted the 1868 act. The legislature, for example, was also concerned with preventing corruption in sales of land in San Francisco Bay. An early report of the Attorney General makes that point clear:

I believe there exists a bold and systematic scheme and a comprehensive conspiracy, entered into by large numbers, and engineered by capital and unscrupulous ingenuity, for the purpose of plundering the State of all its valuable lands lying along the city front and within five miles of San Francisco, which had heretofore been thought reserved from sale.

1865 ATT'Y GEN. ANN. REP. 9, 1 Appen. to Sen. & Assem. J. (1866 Reg. Sess.). *See also* ASSEM. SPECIAL COMM. REP. ON SAN FRANCISCO BAY TIDELANDS, *supra* this note, at 10. *See generally* notes 17-19 and accompanying text *supra*.

The committee report on the 1868 act reveals a further purpose of the act—promoting commercial development in San Francisco. "The further consideration, that the wants of the great commercial interests of the City of San Francisco are now demanding that opportunity should be presented in this direction for expansion would urge action for the disposition of these lands at an early day." ASSEM. SPECIAL COMM. REP. ON SAN FRANCISCO TIDELANDS, *supra*, at 4. *See also* 1866-67 ATT'Y GEN. ANN. REP. 5, 1 Appen. to Sen. & Assem. J. (1867-68 Reg. Sess.).

The majority chose not to base its conclusions solely on the available legislative history. Rather, it found alternate grounds for its holding that the legislature did not transfer clear title to grantees under the 1870 act. *See* text accompanying notes 49-53 *infra*.

⁴⁸ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 528, 606 P. 2d 362, 369,

Therefore, the court presumed that the legislature intended neither to facilitate navigation in the bay nor to terminate the public trust.

The majority provided other grounds to support its holding that the public trust survived the transfer of the subject lands into private ownership. The court declared that, even if the legislative purpose behind the 1870 act had been to further navigation, the act would not have terminated the public trust as to the lands conveyed.⁴⁹ The majority reasoned that there must be some outer limit on the power of the legislature to make wholesale dispositions of public trust lands. The grant of such a vast area of tideland as authorized by the 1870 act constituted "an improper abdication by the state of its role as trustee on behalf of the people."⁵⁰ Furthermore, such a wholesale abandonment of the legislature's duties as trustee would have substantially impaired the ability of future legislatures to manage the state's remaining public trust lands.⁵¹

An additional basis for the majority's decision was the notion that a grant of public trust lands pursuant to a legislatively formulated plan for the promotion of navigation transfers no more than conditional title.⁵² Under this newly introduced theory, absolute title does not vest in the private grantee until the legislative program is actually implemented—for example, by the reclamation of the lands and construction of harbor

162 Cal. Rptr. 327, 334, *cert. denied*, 101 S. Ct. 119 (1980).

⁴⁹ The court stated that "*Knudson* was incorrectly decided even if the court had been justified in concluding that the purpose of the 1870 act was to promote navigation." *Id.* at 531, 606 P.2d at 371, 162 Cal. Rptr. at 336.

⁵⁰ *Id.*

⁵¹ California courts have repeatedly declared that the legislature may make no disposition of public trust lands if the disposition would impair the ability of future legislatures to manage the public trust. *See, e.g., City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 522, 531, 606 P.2d 362, 365, 371, 162 Cal. Rptr. 327, 330, 336; *cert. denied*, 101 S. Ct. 119 (1980); *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 207, 282 P.2d 481, 486 (1955); *People v. California Fish Co.*, 166 Cal. 576, 593, 138 P. 79, 86 (1913); *Oakland v. Oakland Waterfront Co.*, 118 Cal. 160, 183-85, 50 P. 277, 285-86 (1897). The *Mallon* case is discussed in Note, *Trusts: Nature of Trust in Tidelands—A City's Right to Profits From Oil Extracted From Lands Held in Trust*, 7 HASTINGS L.J. 115 (1955). It is questionable, however, whether this rule of law does more than to establish general outer limits on the discretion of the legislature as the trustee of the public trust.

⁵² *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 532, 606 P.2d 362, 372, 162 Cal. Rptr. 327, 337, *cert. denied*, 101 S. Ct. 119 (1980).

improvements.⁵³ With respect to the lands sold under the 1870 act, since no overall plan had been carried out, the private owners never perfected title to their lands.

Notwithstanding these three rationales for its holding that the lands in question passed into private hands subject to the public trust, the court declined to give its decision full retroactive effect. Instead, it constructed a balancing test to ascertain the present status of title to particular parcels:

We choose . . . to balance the interests of the public in tidelands conveyed pursuant to the 1870 act against those of the landowners who hold property under these conveyances. . . . [T]he interests of the public are paramount in property that is still physically adaptable for public trust uses, whereas the interest of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes.

. . . [W]e hold that submerged lands as well as lands subject to tidal action that were conveyed by board deeds under the 1870 act are subject to the public trust. Properties that have been filled,⁵⁴ whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action.⁵⁵

⁵³ The court noted that "a grant of tidelands, even if made for the improvement of navigation, does not vest absolute title in a private party until the improvements are actually made." *Id.*; accord, *City of Berkeley v. Superior Court*, 147 Cal. Rptr. 113, 121 n.11 (1st Dist. Ct. App. 1978), *vacated* 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980). This holding settles the much-discussed issue of whether legislative intent or actual physical use is the appropriate test for termination of the public trust as to lands conveyed pursuant to a plan for the furtherance of a public trust purpose. See, e.g., 21 U.C.L.A. L. REV., *supra* note 8, at 844-45 n.90; 60 CALIF. L. REV., *supra* note 8, at 249-50; 55 CALIF. L. REV. *supra* note 37, at 774-77.

⁵⁴ Prior to modification of the opinion (26 Cal. 3d at 847a), the quoted portion read as follows: "Properties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action, *provided that the fill and improvements were made in accordance with applicable land use regulations.*" *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 534, 606 P.2d 362, 373, 162 Cal. Rptr. 327, 338, *cert. denied*, 101 S. Ct. 119 (1980) (emphasis added).

By so modifying its opinion, the court eliminated any implication that the good faith—*i.e.*, compliance with land use regulations—of the property owners was a prerequisite to the termination of the public trust under the balancing test. The court thus simplified the factual issues which must be litigated in future cases concerning title to lands conveyed under the 1870 act.

⁵⁵ *Id.* at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338. This holding appears to undermine the court's earlier reaffirmance of the principles of *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). *City of Berke-*

C. The Dissent

The dissent characterized the acts of 1868 and 1870 as special acts, analogous to the statutes which authorized the sale of the lands underneath what is now the San Francisco waterfront.⁵⁶ The dissent argued that the property owners should have received clear title to all lands sold under the acts in question as of the date of conveyance from the state.⁵⁷ Further, the dissenting justices rejected the canon of strict construction adopted by the majority. They argued instead for judicial deference to the implied legislative determination to free the lands conveyed under the 1868 and 1870 acts from the public trust.⁵⁸ They reasoned that the reliance interests of the private owners should be protected and that the program of disposition, which had furthered public trust interests by the development of the waterfront in the bay area, should not be disturbed at such a late date by the courts.⁵⁹

ley v. Superior Court, 26 Cal. 3d 515, 521, 606 P.2d 362, 365, 162 Cal. Rptr. 327, 330, *cert. denied*, 101 S. Ct. 119 (1980). For a discussion of *Marks v. Whitney*, see notes 79-80 & 82 *infra*. The court characterized filled lands as "substantially valueless for [public trust] purposes." *City of Berkeley*, 26 Cal. 3d at 534, 606 P.2d at 373, 162 Cal. Rptr. at 338. But filled lands, especially those which are unimproved and adjacent to the San Francisco Bay, are often highly suitable for use as recreational areas. While the court recognized this fact, it chose to formulate a clearcut general rule, thereby avoiding the factual disputes certain to occur if the court had required lower courts to individually determine the suitability of particular parcels of land for public trust purposes. *Id.* at 535-36, 606 P.2d at 374, 162 Cal. Rptr. at 339. As applied by the court, therefore, the test is not whether a particular parcel has *any* public trust usefulness, but whether the parcel remains useful for a significantly wide range of public trust uses. *Accord*, *County of Orange v. Heim*, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (4th Dist. 1973), in which the court stated: "Given the expanded and expanding concept of permissible trust uses [citing *Marks v. Whitney*], it would be virtually impossible ever to find land contiguous to navigable water useless for trust purposes in an absolute sense." *Id.* at 720, 106 Cal. Rptr. at 847.

⁵⁶ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 539, 606 P.2d 362, 376, 162 Cal. Rptr. 327, 341, *cert. denied*, 101 S. Ct. 119 (1980). See also note 21 and accompanying text *supra*.

⁵⁷ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 546, 606 P.2d 362, 381, 162 Cal. Rptr. 327, 345-46, *cert. denied*, 101 S. Ct. 119 (1980).

⁵⁸ *Id.* at 542, 606 P.2d at 378, 162 Cal. Rptr. at 343.

⁵⁹ *Id.* at 537, 606 P.2d at 375, 162 Cal. Rptr. at 340.

D. Direct Effect of City of Berkeley

Although *City of Berkeley* applies directly only to lands conveyed under the 1870 act, the decision has far-reaching application since most of the 23,300 acres (36.4 square miles) sold by the Board of Tideland Commissioners were sold under the authority of the 1870 act. Of those lands, 15,448 acres (24.1 square miles) are still beneath the waters of San Francisco Bay or subject to the bay's tidal action. The remaining 7,852 acres (12.3 square miles) have been improved. Of the filled lands, 3,666 acres (5.7 square miles) have not.⁶⁰

City of Berkeley declared that all of the above lands passed into private hands subject to the public trust because the legislatively authorized conveyances did not terminate the trust. The court said, however, that not all of the lands sold under the 1870 act are presently burdened with a public trust easement. The case-by-case balancing test of *City of Berkeley* controls, either retroactively impressing those lands with the public trust or finding that the public trust was terminated by events occurring after the initial sale of such lands. Courts must weigh the interests of the public against the interests of the private landowners. Weighing in favor of the public are various public trust uses, including access to the bay, fishing, navigation, commerce, recreation and preservation of the land in its natural state.⁶¹ Weighing in favor of the landowners are any improvements which have been constructed on the land in reliance on prior judicial declarations of absolute title.

The result under the balancing test is clear when the test is applied to filled bay lands. The public interest in filled lands is not great, since such lands are unlikely to be presently useful for public trust purposes.⁶² On the other hand, the landowners' in-

⁶⁰ These statistics have been derived from the following sources: BCDC Supp. *supra* note 4, at 411-47; SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMM'N, SAN FRANCISCO BAY PLAN 1-39 (as amended July 1979) [hereinafter cited as SAN FRANCISCO BAY PLAN]; *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 526, 606 P.2d 362, 368, 162 Cal. Rptr. 327, 333, *cert. denied*, 101 S. Ct. 119 (1980). In some particulars, these statistics are at variance with those cited in *City of Berkeley*.

⁶¹ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 534-35, 606 P.2d 362, 373-74, 162 Cal. Rptr. 327, 338-39, *cert. denied*, 101 S. Ct. 119 (1980); see notes 79-80 *infra*.

⁶² Although the range of public trust uses for which filled lands are suited is narrow, such lands are potentially suitable for open space, recreation, and pub-

terests in lands which have been reclaimed are substantial. In addition to the out-of-pocket cost of the reclamation itself, owners of filled lands have another interest—the reasonable expectation that they will be able to develop their lands for an economically productive use.⁶³ Hence, all reclaimed lands are free of the public trust.

The present status of title to the remaining 15,448 acres of unfilled lands is less certain. The *City of Berkeley* court noted that the landowners have a minimal interest in unfilled lands, because present regulations make it unlikely that any of those lands will ever be filled.⁶⁴ In contrast, there is a significant public interest in unfilled lands since they are useful for a wide range of public trust uses. Therefore, unfilled lands will, for the most part, remain subject to the public trust.

The result under the balancing test is, however, unclear for lands which have been improved—for example, by the construction of docks—but which remain subject to the tidal action of the bay. The court recognized that it might be unfair to find such lands to be subject to the public trust when the owners may have innocently constructed harbor improvements in reliance upon *Knudson*.⁶⁵ In such situations, courts must apply the balancing test case by case, considering such factors as whether the particular lands remain useful for public trust purposes and whether the owner actually relied upon *Knudson* in constructing the improvements. A similar situation is presented by lands which have been severed from the waters of the bay but remain unfilled, such as lands which have been diked off.

Although some lands have been freed from the public trust by *City of Berkeley*, serious obstacles remain for owners seeking

lic access to the bay. See SAN FRANCISCO BAY PLAN, *supra* note 60, *passim*.

⁶³ Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, this issue at 186-87.

⁶⁴ When it created the San Francisco Bay Conservation and Development Commission, the California Legislature declared a strong policy against further filling of lands under the waters of the bay. CAL. GOV'T CODE §§ 66601, 66605 (West Supp. 1980). See also SAN FRANCISCO BAY PLAN, *supra* note 60, at 34-38. In *Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n*, 11 Cal. App. 3d 557, 570-73, 89 Cal. Rptr. 897, 905-06 (1st Dist. 1970), discussed in 8 SAN DIEGO L. REV., *supra* note 1, at 706-12, 722-28, the court upheld the denial of a fill permit by the BCDC as a valid exercise of the police power.

⁶⁵ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 536, 606 P.2d 362, 374, 162 Cal. Rptr. 327, 339, *cert. denied*, 101 S. Ct. 119 (1980).

clear title to their land. The pragmatic test for clear title is whether title companies will issue a title insurance policy for particular parcels without exceptions relating to the public trust. In the past, title companies have been reluctant to strike such exceptions because of the uncertain legal status of title to all lands which may have at any time been subject to the public trust.⁶⁶ Owners desiring to remove the public trust exception from their policies may have to institute a quiet title action.

III. AMBIGUITIES IN THE PUBLIC TRUST DOCTRINE REMAINING AFTER CITY OF BERKELEY

Although the *City of Berkeley* decision presents a model for analysis of the ownership of lands which were sold under the 1870 act, it leaves unanswered many related public trust questions. A close examination of the language of the decision may, however, provide some indication of how those issues will be resolved.

One question unanswered by *City of Berkeley* is the ownership of lands conveyed under the 1868 act.⁶⁷ The 1868 act authorized the sale of an area much smaller than the approximately 60,000 acres (93.8 square miles) within the scope of the

⁶⁶ For example, a title insurance policy for one of the parcels within the 79 acres at issue in *City of Berkeley* contained the following exception: "5. RIGHTS AND EASEMENTS for commerce, navigation and fishery in favor of the public, or the federal, state, county or municipal government and a right of way in favor of the public to said waters adjacent thereto over said land as provided in the Constitution of the State of California." Replication to Answer to Petition for Writ of Mandamus at 9 (filed in the California Court of Appeal in *City of Berkeley*; copy on file at U.S. Davis Law Review office).

For discussions of the effect of the public trust doctrine on the title to lands in the tidal regions of California, see Eikel & Williams, *supra* note 8; McKnight, *Title to Lands in the Coastal Zone: Their Complexities and Impact on Real Estate Transactions*, 47 CAL. ST. B. J. 409 (1972). See generally Comment, *Fluctuating Shorelines and Tidal Boundaries: An Unresolved Problem*, 6 SAN DIEGO L. REV. 447 (1969).

⁶⁷ None of the lands involved in *City of Berkeley* had been sold under the 1868 act. The court, therefore, expressly declined to address the issue of ownership of lands conveyed under the 1868 act: "[T]here can be no doubt that the promotion of harbor development may be more readily inferred from the language of the [1868 act]. We are directly concerned in the present case only with the meaning of the 1870 act, and our holding applies only to it." *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 531 n.16, 606 P.2d 362, 371 n.16, 162 Cal. Rptr. 327, 336 n.16, *cert. denied*, 101 S. Ct. 119 (1980). For a detailed discussion of the 1868 act, see text accompanying notes 28-30 *supra*.

1870 act. In addition, it contained detailed terms designed to regulate sales and protect the traditional public trust interests. It is therefore logical that the 1868 act be grouped with the San Francisco special acts rather than with the general acts.⁶⁸ On the other hand, the court relied upon the legislative history of the 1868 act in concluding that the 1870 act was not intended to terminate the public trust in the lands conveyed thereunder.⁶⁹ But determining that the legislative intent behind the 1868 act was other than that required to bring the act within the improvement of navigation exception does not conclude the inquiry. Even if that act did not pass clear title to the private grantees as of the date of conveyance, the balancing test of *City of Berkeley* will declare the trust terminated at least as to all lands subsequently filled.

Another issue left unresolved by *City of Berkeley* concerns the limits which the public trust doctrine places on the powers of the state legislature, as trustee, to convey and otherwise to manage public trust lands.⁷⁰ The *City of Berkeley* court adopted a

⁶⁸ For a discussion of the general and special acts, see notes 17-26 and accompanying text *supra*.

⁶⁹ See note 47 *supra*.

⁷⁰ There is a separation of powers problem with the public trust doctrine. The cases expounding on the doctrine have implied that there exists a judicially formulated but non-constitutionally based limit on the powers of the legislative branch relating to the management of public trust lands. In doing so, they have failed to address this apparent interference with the legitimate law-making function of the legislative branch. Some recent case in other states have gone so far as to declare attempted conveyances by state legislatures to be invalid. See *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 360 N.E. 2d 773 (1977) (the terms of the conveyances expressly stated that the public trust would not be impaired.); *International Paper Co. v. State Highway Dep't*, 271 So. 2d 395 (Miss. 1972), *cert. denied*, 414 U.S. 827 (1973), *discussed in Note, Conveyance of Tideland to Private Owner for Private Purpose Invalid: State Not Estopped from Asserting Title*, 44 Miss. L.J. 322 (1973). The dissent in *International Paper*, in a cogent argument, recognized the lack of a supportable basis for the majority's holding:

[N]o common law rule, . . . not embodied in a constitutional provision, can survive or withstand a legislative enactment specifically dealing with the subject matter and providing a contrary rule.

. . . In the enactment of law [the state legislature], at least theoretically, [is] limited only by the provisions of the Federal and State Constitutions.

. . . It is incredible, . . . that in Mississippi in modern times a common law rule has been declared to be controlling and to nullify an express statute enacted by the Legislature.

stringent test for a valid termination of the public trust on lands conveyed to private parties prior to 1879. According to the court, the public trust is terminated under the improvement of navigation exception if the following elements are present: (1) a bona fide legislative plan for the furtherance of one or more public trust purposes;⁷¹ (2) filling or other improvement of the lands

271 So. 2d at 400-01.

If the California courts accept the holdings of the above cases, the validity of the many statutes expressly terminating the public trust will be called into question. *See, e.g.*, statutes cited in Taylor, *Patented Tidelands: A Naked Fee? Marks v. Whitney and the Public Trust Easement*, 47 CAL. ST. B. J. 421, 487 n.50 (1972). Moreover, California courts will be directly faced with the separation of powers issue which their previous decisions have not addressed. Article 10, § 4 of the California Constitution will provide a constitutional basis for the public trust doctrine if it is held to constitutionalize the common law body of public trust law. *See note 20 supra*. It may even apply retroactively to impress the trust upon lands conveyed prior to its adoption in 1879. *See City of Berkeley v. Superior Court*, 147 Cal. App. 3d 113, 122 n.12 (1st Dist. Ct. App. 1978), *vacated* 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 101 S. Ct. 119 (1980) (court recognizing but declining to address the issue of the possible retroactive application of article 10, § 4). *See also* Cohen, *The Constitution, The Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388 (suggesting that the Ninth Amendment of the U.S. Constitution provides a basis for the public trust doctrine).

California cases have thus far avoided invalidating express legislative enactments solely on the basis of the public trust doctrine. For example, in *Oakland v. Oakland Waterfront Co.*, 118 Cal. 160, 182-86, 50 P. 277, 285-87 (1897), the legislature had granted certain lands to the city of Oakland. The city had then conveyed its entire waterfront to a private individual. Rather than invalidating the legislative grant, the majority construed the act's terms as prohibiting the subsequent grant by the city to the private party. *See text accompanying notes 89-94 infra*. Also, in *County of Orange v. Heim*, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (4th Dist. 1973), the court invalidated, under CAL. CONST. art. X, § 3, a legislatively approved land exchange agreement whereby a city would have relinquished into private hands two thirds of its shoreline. *See note 20 supra*. Finally, in *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482-87, 476 P.2d 423, 437-41, 91 Cal. Rptr. 23, 37-41 (1970), the court held that a legislative act purporting to terminate the public trust in certain lands by way of a boundary line agreement was not effective to do so. The holding was based upon CAL. CONST. art. X, § 3. The doctrine of equitable estoppel, however, prevented the city from successfully challenging the validity of the legislative act. *Id.* at 487-501, 476 P.2d at 441-51, 91 Cal. Rptr. at 41-51; *see note 20 supra*.

In addition to the limits the public trust doctrine places upon the disposition by California of public trust lands, there are statutory and constitutional limits on such disposition. *See note 20 supra*.

⁷¹ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 525, 606 P.2d 362, 367, 162 Cal. Rptr. 327, 332, *cert. denied*, 101 S. Ct. 119 (1980).

conveyed, pursuant to the plan, so that the lands are physically cut off from public trust usefulness;⁷² (3) sale of the lands to private parties; and (4) a clearly expressed legislative intent to terminate the public trust as to the lands conveyed.⁷³ Transfers of state-owned public trust lands after 1879 are subject to the additional limits of sections three and four of article ten of the California Constitution, under which a different and more strict test for termination applies.⁷⁴

The *City of Berkeley* test adequately protects the rights of the public where the state has purported to convey public trust lands into private ownership. Aside from such conveyances, however, the legislature and administrative agencies charged with managing public trust lands might take other actions which would be equally effective in making the public trust lands inaccessible to the people of the state for public trust uses.⁷⁵ If the public trust doctrine is to continue evolving, the courts must recognize and attempt to effectuate the basic goal underlying the doctrine. That goal is to achieve optimum land use in terms of the various public trust interests without seriously infringing upon traditional incidents of private property ownership. A rational first step in this proposed direction would be to expand the strict construction principle of *City of Berkeley* into a rule of strict substantive review of legislative and administrative land management decisions affecting public trust lands.

⁷² See note 53 *supra*.

⁷³ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 525, 528-29, 606 P.2d 362, 367, 369, 162 Cal. Rptr. 327, 332, 334-35, *cert. denied*, 101 S. Ct. 119 (1980).

⁷⁴ See note 20 *supra*.

⁷⁵ The more recent grants-in-trust have contained terms which specify a broad range of permissible uses by the municipal grantees. For example, certain grants-in-trust have authorized such uses as "convention, exhibition, and banquet halls for the use of trade, shipping, and commercial organizations; restaurants, snack bars, small shops, motels, boatels, and service stations . . .; stadiums for football, baseball, basketball, and other sports; and even 'commercial and industrial buildings, plants and facilities.'" M. SCOTT, *supra* note 17, at 18.

CAL. CONST. article X, § 3 prohibits sales of the lands within its scope, but this prohibition does not apply to leases. *Besig v. Friend*, 463 F. Supp. 1053 (D.D.C. 1979); *City of Long Beach v. Vickers*, 55 Cal. 2d 153, 160-61, 358 P.2d 687, 692, 10 Cal. Rptr. 359, 364 (1961). Thus, municipal grantees who desire to circumvent article 10, § 3 might lease out the lands to private parties for a lengthy term of years.

Additionally, the *City of Berkeley* decision does not decide whether or not purely private actions may effect a termination of the public trust. Prior cases held that mere reclamation of privately owned public trust lands is not sufficient to terminate the public's rights in the lands filled.⁷⁶ *City of Berkeley* nonetheless holds that a private owner may free his lands of the public trust by filling them or otherwise cutting them off from public trust usefulness in reliance on a prior judicial holding that such lands were free of the public trust. Broadly read, *City of Berkeley* supports the termination of the public trust even in situations where the reliance element is not present. For example, owners who have filled and made substantial improvements on their lands in ignorance of the existence of the public trust might argue that their lands should be free of the public trust. Their interest in innocently made improvements might indeed outweigh the minimal public trust usefulness of their lands. However, prior cases have held that purely private actions could not terminate the public trust.⁷⁷ The *City of Berkeley* court distinguished those cases, noting that they did not involve the element of reliance on a prior judicial holding of clear title.⁷⁸ So reliance is an essential prerequisite to termination of the public trust by private action. Therefore, any attempts to argue for such an expansive reading of *City of Berkeley* should fail.

A final issue left open by *City of Berkeley* concerns the extent to which the California Supreme Court will continue expanding the public trust doctrine in a manner designed to implement the broad statement of public trust interests enunciated in *Marks v. Whitney*.⁷⁹ The majority opinion reaffirms the landmark holding of *Marks v. Whitney*; public trust interests include "preservation of . . . lands in their natural state," "general recreational purposes," and the traditional navigation, commerce and fisheries.⁸⁰ However, had the *City of Berkeley* court desired to

⁷⁶ See e.g., *Marks v. Whitney*, 6 Cal. 3d 251, 261, 491 P.2d 374, 381, 98 Cal. Rptr. 790, 797 (1971); *Atwood v. Hammond*, 4 Cal. 2d 31, 40-41, 48 P.2d 20, 24-25 (1935).

⁷⁷ See cases cited in note 76 *supra*.

⁷⁸ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 535 n.19, 606 P.2d 362, 374 n.19, 162 Cal. Rptr. 327, 339 n.19, cert. denied, 101 S. Ct. 119 (1980).

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

⁸⁰ *Marks v. Whitney* is often cited for its expansive definition of the scope of permissible public trust purposes:

Public trust easements are traditionally defined in terms of navi-

build upon the holding of *Marks v. Whitney*, it would have given greater weight to the non-traditional public trust interests when applying its balancing test. Instead, the majority concluded that filling of public trust lands renders those lands "substantially valueless" for public trust purposes.⁶¹ Therefore, the court did not apply the protections of the public trust doctrine to filled lands. Yet even filled lands remain useful for recreation, open space and access to navigable waters.⁶²

After *City of Berkeley*, the major significance of *Marks v. Whitney* may be limited to its expansion of the range of uses to which a public trustee may permissibly allocate the public trust lands of California.⁶³ That is, *Marks v. Whitney* may broaden

gation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state . . .

The public uses to which tidelands are subject are sufficiently felxible to encompass changing public needs. . . . [O]ne 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; accord, *Neptune City v. Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972), discussed in Jaffee, *The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwaters: Neptune City v. Avon-By-The-Sea—A Case of Happy Atavism?*, 14 NAT. RESOURCES J. 309 (1974).

For a discussion of *Marks v. Whitney*, see Taylor, *supra* note 70; Note, *Environmental Law—Expanding the Definition of Public Trust Uses*, 51 N.C.L. REV. 316 (1972); Comment, *California's Tidelands Trust for Modifiable Public Purposes*, 6 LOY. L.A. L. REV. 485 (1973); 21 U.C.L.A. L. REV. *supra* note 8, at 866-70.

⁶¹ *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 534-5, 606 P.2d 362, 373, 162 Cal. Rptr. 326, 338, cert. denied, 101 S. Ct. 119 (1980); see note 62 and accompanying text *supra*.

⁶² See note 55 *supra*. The three dissenting justices gave even less weight to the holding of *Marks v. Whitney*. They stated: "Principal trust purposes are promotion of commerce, navigation, and fishing, and not maintenance and protection of tidelands as some would have us believe." *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 536, 606 P.2d 362, 374, 162 Cal. Rptr. 327, 339, cert. denied, 101 S. Ct. 119 (1980).

⁶³ A secondary holding of *Marks v. Whitney* is that private parties have standing, as members of the general public, to enjoin infringements on the rights of the public in privately held lands which are subject to the public

the improvement of navigation exception. If so, conveyances of state-owned public trust lands would be valid whenever the purpose of the transfer was to further one or more of the trust purposes listed in *Marks v. Whitney*.

IV. IMPACT OF CITY OF BERKELEY ON OTHER DISPOSITIVE ACTS

Several of the statutes which authorized disposition of state-owned public trust lands in the mid-1800's do not fit neatly into either the special act or the general act category. Given the apparent willingness of the California Supreme Court to apply public trust protection to more lands, litigation may arise concerning the title to lands conveyed under these legislative enactments. If, after examining these dispositive acts, the courts were to find that any of them had authorized the improper termination of the public trust upon the lands transferred, the analysis of *City of Berkeley* would be useful to ascertain the present state of title to such lands.

Five acts lie within the immediate scope of the *City of Berkeley* decision. The first of these, the 1868 act, has been analyzed above. Under the second of these dispositive acts, the Martinez act,⁸⁴ the town of Martinez received title to the lands beneath the Carquinez Straits and abutting the town's waterfront. The town was authorized to sell the lands "for the improvement of said town, and for the benefit of commerce."⁸⁵ The Martinez act is less extensive in scope than the 1870 act; the entire waterfront of the town at that time was only one-half mile long. In addition, the Martinez act contains somewhat clearer evidence of legislative intent to further commerce, a well recognized public trust purpose. Thus, the Martinez act resembles the San Francisco special acts which were held to be in furtherance of public trust purposes.⁸⁶

To determine whether or not sales under the act conveyed absolute title, a court would have to first examine the legislative

trust. 6 Cal. 3d 251, 261-62, 491 P.2d 374, 381-82, 98 Cal. Rptr. 790, 797-98 (1971). This holding has little meaning, however, with regard to non-traditional public trust purposes. For example, it is difficult to imagine any use of private lands which does not in some way infringe upon the "preservation of lands in their natural state."

⁸⁴ Ch. 37, 1851 Cal. Stats. 305.

⁸⁵ *Id.* at 306.

⁸⁶ See notes 21-24 and accompanying text *supra*.

history, terms and subsequent implementation of the act. If this inquiry revealed a clear legislative intent to free the lands conveyed from the public trust and to further commerce, then the grantees would have received conditional title at the time of purchase. The grantees' title could be perfected by reclamation or development of their lands pursuant to the legislative plan for harbor development.⁸⁷

No case has analyzed or interpreted the Martinez act. Since the necessary element of reliance on a prior judicial determination is absent, the *City of Berkeley* balancing test for termination of the public trust as to lands conveyed under the authority of that act does not apply. Therefore, a judicial determination that the act conveyed no more than title subject to the public trust would be given full retroactive application.⁸⁸

The third of the dispositive acts is the Oakland act.⁸⁹ Under this act, the state granted thirteen-and-one-half miles of waterfront property (containing 7,870 acres) to the town of Oakland, along with the authority to sell those lands "to facilitate the construction of wharves and other improvements."⁹⁰ The California Supreme Court looked with considerable skepticism upon the Oakland act when analyzing it in *Oakland v. Oakland Waterfront Co.*⁹¹ The act is extensive in scope and gives substantial discretion to the grantee as to how to dispose of the land. The town conveyed all 7,870 acres to a private individual.⁹² The court could justifiably have held that the act was void or voidable since the facts were analogous to those of the *Illinois Central* case.⁹³ Instead, the court upheld the act, choosing to strictly construe the terms of the power of sale delegated to the town of Oakland. Reasoning that the legislature could not have intended to allow unfettered private control over public access to the San Francisco Bay through Oakland, the court declared that the town had exceeded the authority delegated to it by the act. The deed to the Oakland Waterfront Company was therefore void.⁹⁴

⁸⁷ See note 53 and accompanying text *supra*.

⁸⁸ See notes 76-77 and accompanying text *supra*.

⁸⁹ Ch. 107, 1852 Cal. Stats. 180.

⁹⁰ *Id.* at 181.

⁹¹ 118 Cal. 160, 50 P. 277 (1897); see note 70 *supra*.

⁹² *Id.* at 187, 50 P. at 287.

⁹³ 146 U.S. 387 (1892); see note 9 *supra*.

⁹⁴ *Oakland v. Oakland Waterfront Co.*, 118 Cal. 160, 182-94, 50 P. 277, 285-90 (1897).

In this manner, the court avoided invalidating the act by using a process of statutory interpretation to read into the act a limit on the town's discretion to sell the lands granted to it by the California Legislature.

In a fourth act, the Benicia act,⁹⁵ the legislature granted to the city of Benicia "the entire waterfront of said city" out to a certain depth of water.⁹⁶ The legislature further empowered the city to sell the lands according to the town's best interests.⁹⁷ Since the act contains no language from which to infer an intent to further the public interests of the people of California, any lands conveyed thereunder would convey only title to the soil subject to the public trust. The *City of Berkeley* balancing test for terminating the rights of the public does apply, because an 1897 case held that those lands were free of the public trust.⁹⁸

The final dispositive act, the Eureka act,⁹⁹ granted to the town of Eureka "the entire waterfront of said town."¹⁰⁰ The town was authorized to offer the lands for sale first to the present occupants, then to the general public. No provision was made for construction of wharves or other harbor facilities. Despite its limited geographic scope, the Eureka act resembles the general acts discussed in *California Fish* because it makes no reference to public trust purposes. The act would thus convey title subject to the public trust, and the *City of Berkeley* test for termination would not apply.

⁹⁵ Ch. 187, 1855 Cal. Stats. 239.

⁹⁶ *Id.* at 239.

⁹⁷ The Benicia act provides that such lands "may be sold from time to time by the authorities of said city, in such maner as will be most to the interest of the same". *Id.*

⁹⁸ *Shirley v. City of Benicia*, 118 Cal. 344, 50 P. 404 (1897). The *Shirley* court interpreted the Benicia act and two other statutes. Ch. 292, 1859 Cal. Stats. 314; ch. 216, 1868 Cal. Stats. 206. These three statutes laid out a waterfront line to the city and authorized the city to sell the lands to private parties. At the time, the lands were located beneath the Carquinez Straits.

The court, in dictum, stated that the establishment of a waterfront line by the state and sale of those areas landward of the line is sufficient to terminate the public interest in the lands sold to private parties. *Shirley v. City of Benicia*, 118 Cal. at 346, 50 P. at 405.

⁹⁹ Ch. 82, 1857 Cal. Stats. 76. In a pending suit, the issue of title to lands sold under the Eureka act is being litigated. *Tom Lazio Fish Co. v. City of Eureka*, No. 47780 (Cal. Super. Ct., Humboldt County; filed Oct. 30, 1968).

¹⁰⁰ Ch. 82, § 1, 1857 Cal. Stats. 76.

V. MODEL FOR ANALYSIS OF STATUTORY ENACTMENTS
DISPOSING OF PUBLIC TRUST LANDS

Several analytical factors can be synthesized from the way courts have treated these various dispositive statutes. These factors should be used to determine whether particular dispositive acts are interpreted either to convey only title subject to the public trust or to convey absolute title free of the public trust. The factors are as follows:

1. Geographic scope of the act. Statutes which authorize the sale of large areas of land which are imprecisely described are more likely to receive close judicial scrutiny.

2. Evidence of legislative purpose. Any language in the act that the grants are "for purposes of commerce," or similar language in legislative history documents, would support an argument that the grants were made in furtherance of public trust purposes.

3. Implementation of the legislative plan. Under the conditional title notion of *City of Berkeley*, private grantees do not have absolute title until their lands are actually reclaimed or otherwise developed—for example, through the construction of wharves in accordance with a legislative plan for harbor development. Furthermore, such subsequent development, or the lack thereof, is persuasive evidence of the previous legislative purpose.

4. Improprieties in the implementation of the legislative plan of disposition. The California Supreme Court has closely examined early legislative disposition programs in three instances. There were improper practices in the implementation of each program. All the lands granted by the Oakland act were sold to one private individual, thus creating a monopoly over access to harbor and commercial facilities in Oakland.¹⁰¹ The abuses associated with the general act program interpreted in *California Fish* were numerous.¹⁰² In administering sales pursuant to the 1870 act, the Board of Tideland Commissioners did not reserve from sale areas adequate to preserve the public's interest.¹⁰³ In each of these cases, the court placed limits on the nature of title received by the private grantees.

¹⁰¹ See note 92 and accompanying text *supra*.

¹⁰² See notes 17-19 and accompanying text *supra*.

¹⁰³ See note 34 and accompanying text *supra*.

A court will first analyze the above factors and determine whether to treat the act in question as of the general or special act variety. If the court finds that the act has authorized the improper termination of the public trust upon the lands transferred, then the lands would be subject to the public trust from the time of conveyance by the state.

The next analytical step is to see whether or not the act has been the subject of prior judicial interpretation. If so, the possibility of reliance by landowners on a prior ruling of clear title will cause the court to test for termination of the public trust by the balancing test of *City of Berkeley*. Any judicial imposition of the public trust would apply retroactively only as to those lands not freed from the public trust by subsequent improvement of the lands.

CONCLUSION

Within the limited factual context of the legislative disposition programs during California's early years of statehood, the California Supreme Court has managed to give some concrete content to the tidelands trust branch of the ancient public trust doctrine. In doing so, the court has overcome difficult obstacles: the vagueness of the public trust concept, a lack of legislative guidance as to which of the public trust uses should receive higher priority, and the inherent limitations of the judiciary as a law-making institution.

Overruling prior cases to the contrary, the court held that the 1870 act did not terminate the public trust when San Francisco Bay lands were sold into private ownership under the act's authority. Rather, all private purchasers received title subject to the continuing rights of the public in their land. To mitigate the unfair effect of overturning an established rule of law, the court formulated a balancing test for retroactive application of its holding. Under this balancing test, all reclaimed lands were declared to be presently held in absolute private ownership. Unfilled lands, on the other hand, remained for the most part subject to the public trust.

Although the test established by the court is oriented toward the facts of a particular 19th-century legislative program for the sale of lands in San Francisco Bay, it has potential applicability to other statutory programs for the disposition of California's public trust lands. Moreover, the *City of Berkeley* opinion pro-

vides some clues as to how the California courts will resolve future disputes over the scope and content of the public trust doctrine. In the absence of any sudden change in the state of public trust law, it may be expected that future cases will follow generally in the mold of *City of Berkeley*. That is, courts will continue to formulate rational, pragmatic compromises designed to best protect the legitimate interests of the parties to each dispute.

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